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KENTUCKY DEPARTMANT OF PUBLIC ADVOCACY

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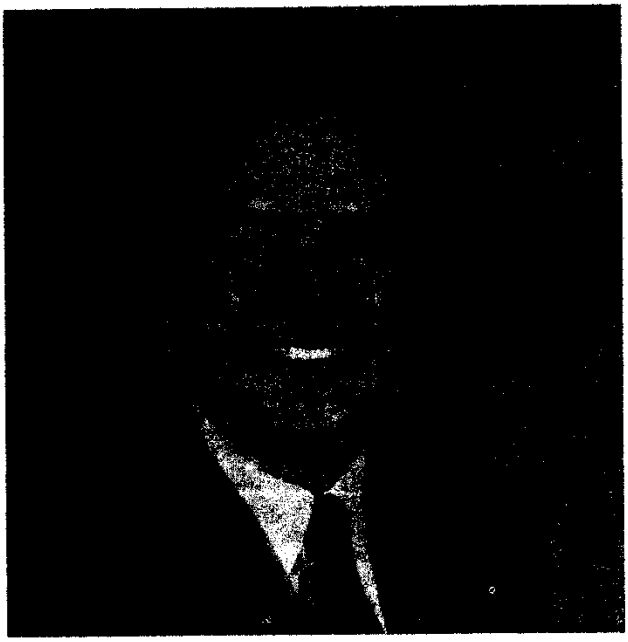
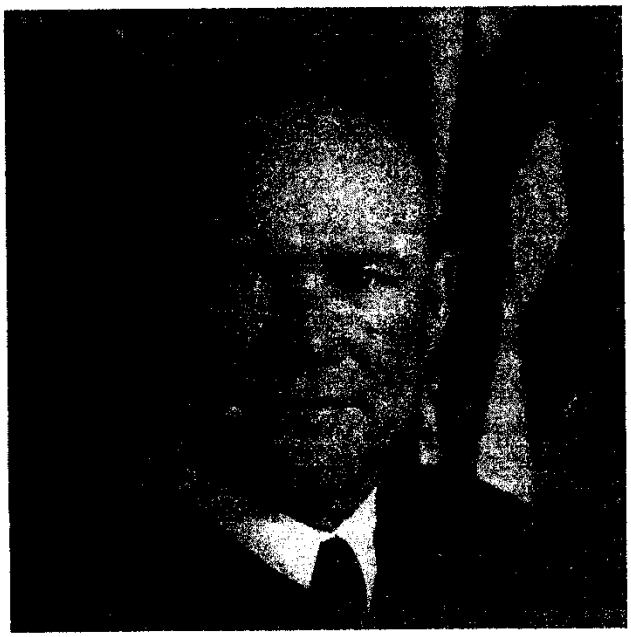


Cabinet Secretary Ronald B. McCloud

Reasonable Funding Level Necessary for Effective Representation

Opening Remarks from the 27th Annual Public Defender Education Conference on June 14, 1999

See page 6



Chief Justice Joseph E. Lambert

Public Trust and Confidence

Remarks given at a special address at the 27th Annual Public Defender Education Conference on June 15, 1999

See page 7

Bill Mizell, Boyd County Public Defender, Retires

TABLE OF CONTENTS

"WAIS" Not, Want Not? 4-5
- Eric Drogan, J.D., Ph.D.

More on Mental Retardation 5-6
- Harwell F. Smith, Ph.D.

27th Annual Public Defender Conference Welcome Remarks 6-7
- Secretary Ronald B. McCloud

27th Annual Public Defender Conference Remarks 7-9
- Chief Justice Joseph E. Lambert

Public Defending for the 21st Century 10-11
- Ernie Lewis

"Not in My Neighborhood": An Overview of Kentucky's Megan's Law 12-15
- Carol Camp

Prerelease Probation: An Update 15-19
- Joe Myers

Practice Tips 19
- Susan Balliet

Plain View / Short View 20-26
- Ernie Lewis

William Mizell Retires 26

Kentucky's RCr 11.42's: A Farce or a Mockery? 27-28
- Susan Jackson Balliet

Defending Against the Dogs 29-31
- Roger Gibbs

Rock Soup 32
- Tim Shull

Protecting Freedom 32-33
- Mark Stanziano

Child Sex Abuse Cases: What All Defenders Should Have Read 34-38
- Mark Stanziano

Capital Case Review 39-43
- Julia Pearson

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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 defender 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.

LETTER TO THE EDITOR. . .

Edward C. Monahan July 23, 1999
The Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

Dear Ed:

Re: Law Day Note, page 31, May 1999 issue

The note above referenced contains an error of history.

The first Law Day was proclaimed by President Dwight D. Eisenhower sometime in the 50's. He continued to iddue an annual proclamation until Law Day was properly memorialized by Congress.

While there is no objection to giving credit where credit is due, there is to giving credit which is not due. President Kennedy may well have issued the proclamation you reference, but it was not the first one. The Madison County Bar Association has, I believe, observed it every year since its institution.

I am always impressed with the quality of *The Advocate* and hope you will not remove me from the mailing list so long as I am breathing breath. Or, as it has been said "until I'm no longer able to sit up and take nourishment." Thanks for a job well done.

Cordially,

Charles R. Coy
Coy, Gilbert & Gilbert
Richmond, Kentucky

Apologies

In the May issue of *The Advocate*, we printed an article and failed to give credit where it was due. The article entitled *Juvenile Court Turns 100, But is the Party Over?* was reprinted with permission from *Youth Today*, a publication of the American Youth Work Center, 1200 17th St., NW, Washington, DC 20036. Annual subscriptions are available for $14.97 prepaid.

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Advocate Article Responses

"WAIS" NOT, WANT NOT?: A JURISPRUDENT THERAPY APPROACH TO INNOVATIONS IN FORENSIC ASSESSMENT OF INTELLECTUAL FUNCTIONING

I have just read with considerable interest the article "Capital Culpability: Daubert Necessitates Re-Evaluation of Condemned Persons with Borderline Intelligence as Measured by the Weschler *[sic]* Adult Intelligence Scale - Revised (WAIS-R)" published in the May 1999 issue of *The Advocate*.

The context in which I would like to offer a response is that of "Jurisprudent Therapy," an extension of the "Therapeutic Jurisprudence" model proposed by Professors David Wexler and Bruce Winick. Whereas the "Therapeutic Jurisprudence" (or TJ) perspective analyzes substantive law, legal procedure, and legal roles to determine whether their effects are therapeutic, neutral, or antitherapeutic, the "Jurisprudent Therapy" (or JT) approach considers the extent to which mental health science, mental health practice, and mental health roles are jurisprudent, neutral, or antijurisprudent.

The essential thesis of the previously published article is a sound one: that WAIS-R IQ scores are likely to be higher than WAIS-III IQ scores, such that any use of the WAIS-R after the publication of the WAIS-III raises significant reliability and validity questions, with dramatically high stakes in the case of "close calls" in evaluations of putatively death-eligible defendants. You will be pleased to note that I have witnessed your attorneys applying this logic to good effect, on a state-wide basis, for well over a year.

I am concerned that some aspects of this article may inadvertently contribute to confusion on the part of counsel. For example, on page 40, one finds:

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.

According to the *Manual*, what one study did find was that for the WAIS-III, the average Verbal IQ score was 1.2 points lower, the average Performance IQ score was 4.8 points lower, and the average Full Scale IQ score was 2.9 points lower, than their WAIS-R counterparts [pp. 78-79]. One would not want attorneys to conclude that any given WAIS-III Full Scale (or other) IQ score would be expected to be lower than a WAIS-R IQ score by an average of 1.2 to 4.8 points.

The *Manual* does note that score ranges are "wider at the upper and lower score levels," with the same study suggesting, perhaps most pertinently, that the "expected" WAIS-III Full Scale IQ score range for a WAIS-R Full Scale IQ score of 70 would be 65 to 69 [pp. 79-80].

It may be difficult to determine just what was meant by the bracketed phrase in the article excerpt provided *supra*; perhaps there was a typographical error in its construction. Later in this article, one does find the assertion that "[t]he 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" [p. 41]. In fact, when it comes to comparing the WISC-R with the WAIS-R, the WAIS-III's *Manual* refers us back to the old *WAIS-R Manual*, which contains the following statement concerning the only study cited in this regard:

The mean IQs on the WAIS-R and WISC-R are remarkably similar, with differences of 0, 2, and 1 points, respectively between the Verbal, Performance, and Full Scale IQs on the two scales. [pp. 48-49]

The *WISC-III Manual* does, however, cite a study suggesting that the "expected" WAIS-R Full Scale IQ score range for a WISC-III Full Scale IQ score of 70 would be 71 to 77 [pp. 199-201].

The authors of the recent *Advocate* article maintain that "the Daubert decision absolutely necessitates that all persons who were evaluated with the WAIS-R, yielding results in the Borderline range (70-80) *[sic]*, must be re-evaluated with the WAIS-III or other testing instrument" [p. 41]. Defense counsel should bear in mind, however, that "re-evaluation" bears its own set of complicating factors. Consider the following hypothetical situations:

Defendant A has just been tested with the WAIS-R. The result was a Full Scale IQ of 71. Defense counsel clamors for immediate re-evaluation. Due to practice effects in light of similarities between the general construction (and some identical items) of the WAIS-R and WAIS-III, the resulting WAIS-III Full Scale IQ score is 74.

Defendant B was originally tested with the WAIS-R. The result was a Full Scale IQ of 69. The Commonwealth moves for a new WAIS-III evaluation because of supposed WAIS-R validity issues ... what have they got to lose? Having benefitted from ongoing medical treatment of chronic mental illness, Defendant B's resulting WAIS-III Full Scale IQ score is 72.

Am I suggesting that defense counsel should make a point of shying away from re-evaluation, or that re-evaluation cannot ultimately be the best thing that ever happened to a capital defendant? Certainly not! Attorneys should realize, however, that in psychology as in law, timing can be everything, and that arguments cutting one way may someday wind up cutting another. It is imperative that ALL of the circumstances surrounding original and follow-up evaluations be weighed carefully, with input from legal and psychological experts where applicable.

One more comment along these lines: a capital defense attorney whose client obtains a WAIS-R Full Scale IQ score of 70 is unlikely to be budged from that score by anything less

(Continued on page 5)

(Continued from page 4)
potent than dynamite, despite any amount of urging that scores from 70-80 "must be re-evaluated."

I was particularly taken with the clever notion that "[b]ecause 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" [p. 41].

It could also be argued, of course, that the statute's reference to "significantly subaverage *general* intellectual functioning" [emphasis supplied] mandates the use of a Full Scale I.Q. score. Either way, defense counsel may wish to tread lightly in this area, given the implications of the frequently voiced prosecutorial assertion that it is the Verbal IQ (reflecting vocabulary, information, comprehension, and the like) rather than the Performance IQ (measured in part with the use of pictures, puzzles, and blocks), or some combination of the two, that is really relevant in the forensic context. Imagine the consternation of defense counsel faced with this argument, whose client has a Full Scale IQ of 70, a Verbal IQ of 77, and a Performance IQ of 67!

Thanks to the editorial staff of *The Advocate* for publishing a most interesting, timely, and heuristic article. The authors clearly have much to say that will contribute considerably to the ongoing development of these issues. I hope the comments provided herein serve to enhance attorney decision-making in this regard. ◆

Eric Y. Drogin, J.D., Ph.D., ABPP is an attorney and board-certified forensic psychologist on the faculty of the University of Louisville School of Medicine. He currently chairs the American Bar Association's Behavioral Science Committee and the Federal Bar Association's Health Law Section, and serves on ABA's Commission on Mental and Physical Disability Law.

Advocate Article Response continues

More on Mental Retardation

Harwell F. Smith, Ph.D.
Clinical Psychology, Lexington, Kentucky

In a recent issue of *The Advocate* (Vol. 21, #3, May 1999), M.A. Taylor and R.S. Spangler raise some valuable points regarding the application of IQ scores obtained from the Wechsler Adult Intelligence Scale - Revised to persons undergoing adjudication since the new Wechsler Adult Intelligence Scale - III was introduced in 1997. The authors note that expert witnesses are required to present reliable evidence and they argue that once the new WAIS-III norms were published, defendants evaluated under the WAIS-R norms had an unreliable measure used to assess whether or not they were mentally retarded. This would be significant, they argue, in that the defendant in a capital case becomes "death ineligible" if the court determines he/she is "seriously mentally retarded." Thus the tendency of persons to score higher on the WAIS-R than the WAIS-III might result in a WAIS-R evaluated defendant being death eligible when he was actually death ineligible under the more accurate WAIS-III norms. While this distinction is an important one, the authors make several errors in the article which call for correction. Further, they do not give the full picture of the definition of mental retardation.

The authors refer to the introduction of the WAIS-III as occurring in October, 1997 when in fact the publication date, according to the publisher, was 7/25/97. In fact, the test was actually available for purchase prior to the July date, though its use was discouraged until the publication date.

The authors note, "the WAIS-III may give a score of 1.2 to 8.9 lower than the WAIS-R." In fact, the WAIS-III technical manual notes, "a comparison of Mean IQ scores shows that WAIS-III FSIQ is 2.9 points less than the WAIS-R FSIQ score and that the WAIS-III VIQ and PIQ are 1.2 points and 4.8 points less than the corresponding WAIS-R scores respectively" (p. 78). FSIQ stands for Full Scale Intelligence Quotient with V and P standing for Verbal and Performance respectively. The defense attorney cannot simply subtract 2.9 points from the obtained FSIQ on the WAIS-R and know what the WAIS-III FSIQ would be. However, if such a simple calculation does change the defendant's IQ classification, then certainly a retest with the WAIS-III is indicated.

Moving to the larger question of defining "mental retardation," the authors observe that 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." In fact, under the regulation cited, 20 C.F.R § 404, Subpart P, Appendix 1, the "other disabling feature" has to be important in itself and must impose "significant work related limitation of function" (12.05C). It is only in the case when the claimant has "a valid verbal, performance or full scale IQ of 59 or less" (12.05B) that the low IQ in and of itself is sufficient to satisfy the "mental retardation" criterion for receiving benefits.

While the Social Security regulations refer to intellectual functioning in the "approximately lowest 2 percent," the American Psychiatric Association's *Diagnostic and Statistical Manual - Fourth Edition* refers to "approximately two standard deviations below the mean" when describing mental retardation. An IQ of 70 would be 2 standard deviations below the mean and would describe "significantly sub-average intellectual functioning" per the DSM-IV. In fact, 2.2 percent of the population falls below 2 standard deviations (FSIQ=70) in the normal curve.

Under the DSM-IV scheme, mental retardation requires three things - (1) "significantly sub-average intellectual functioning" and, (2) "concurrent deficits or impairments in present adaptive functioning in at least 2 of the following areas: communica-

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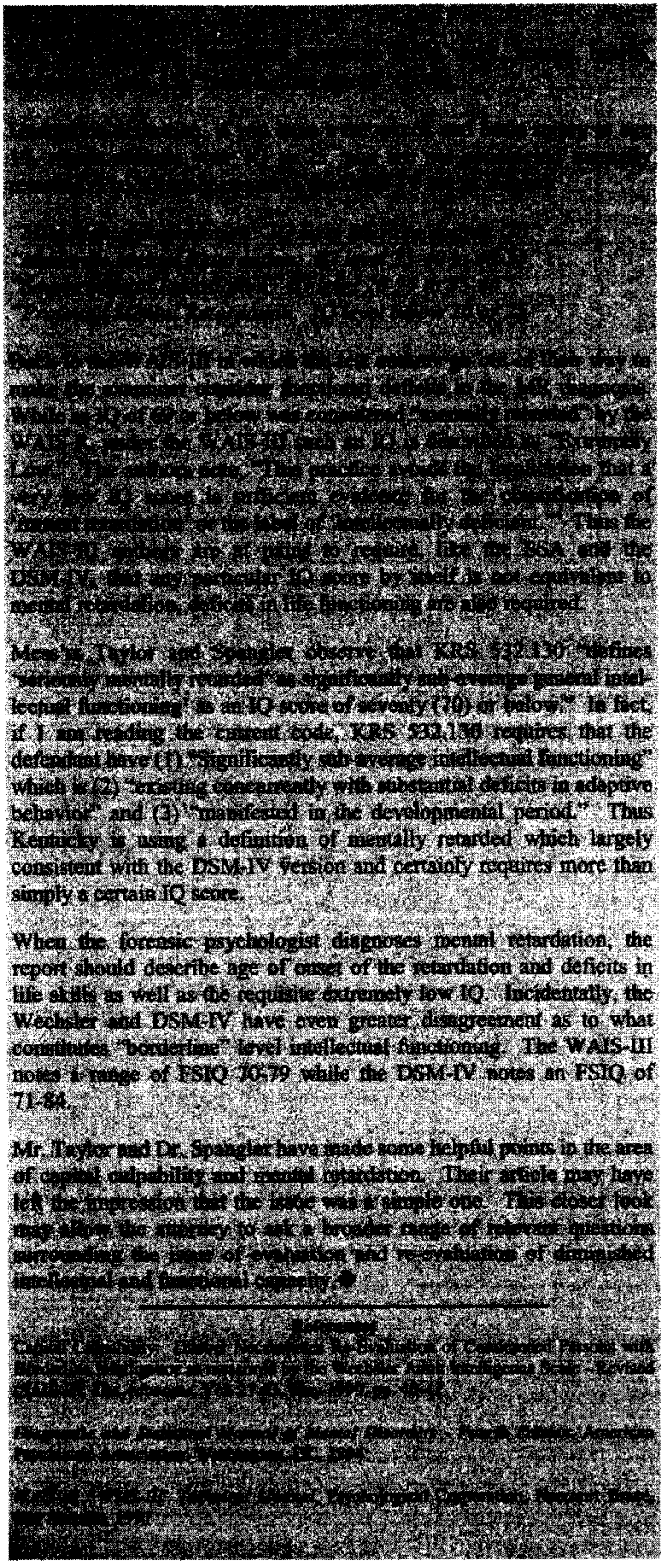

Secretary Ronald B. McCloud

Public Protection and Regulation Cabinet

Welcoming Remarks at the 27th Annual Public Defender Education Conference, June 14, 1999

It's a pleasure to be here tonight to welcome you to the 27th Annual Public Defender Education Conference on behalf of Governor Paul Patton and the Public Protection and Regulation Cabinet.

Governor Patton could not be here tonight, but he asked me to tell you how much he values the work that you do representing some of Kentucky's poorest citizens.

He understands how difficult your jobs are, and he appreciates the effort you put forth every day on behalf of the Commonwealth of Kentucky.

George Washington wrote in a letter to a friend in 1789, "The administration of justice is the firmest pillar of government." More than 200 years later, those words continue to be the hallmark of the Patton Administration, the Cabinet and the Department of Public Advocacy.

Public defenders represent 84% of people in circuit court - and your job is tremendous. Public defenders ensure

- that people who are incarcerated are placed there fairly;
- that verdicts are reliable;
- that the innocent are freed and the guilty have been given due process;
- and that juveniles, persons with mental illness and mental retardation are given a voice.

Probably the most important aspect of your job is to operate as a check on the police and prosecutors to ensure that justice is brought about.

Fortunately, the Governor recognizes the significant role Public Advocacy plays in his administration as well, which is why he's made criminal law reform one of his highest priorities.

In the summer of 1997, the Governor formed the Criminal Justice Response Team, and appointed the Public Advocate and the Jefferson District Public Defender as two of its members.
This Response Team made numerous recommendations, which evolved into House Bill 455, the Governor's Crime Bill.

There were two notable outcomes of the Crime Bill - the creation of the Criminal Justice Council and sentencing reform.

The changes in sentencing laws enable nonviolent offend-

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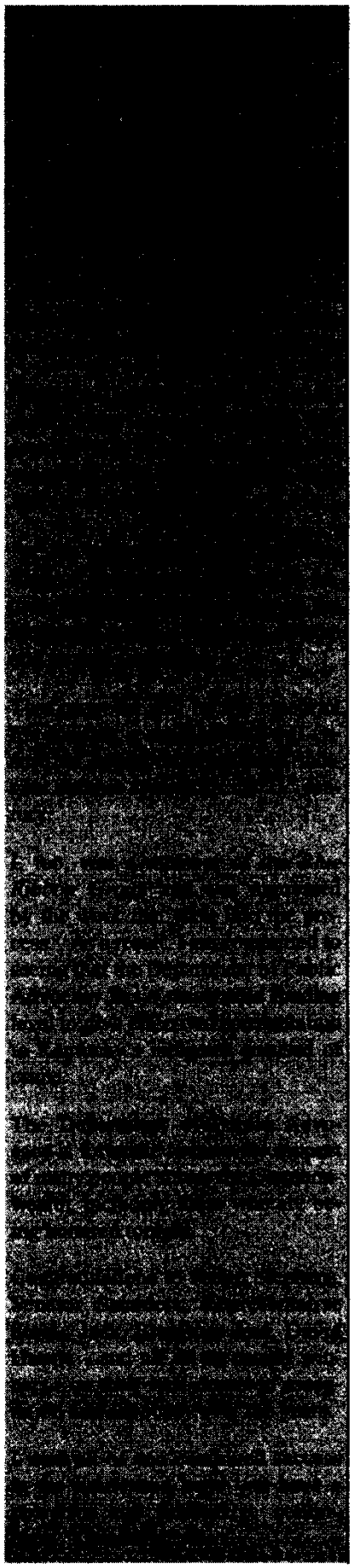

REMARKS OF CHIEF JUSTICE JOSEPH E. LAMBERT

27th Annual Public Defender Education Conference
LOUISVILLE, KENTUCKY JUNE 15, 1999

Last month, I attended an important and thought-provoking national conference in Washington D.C. Also in attendance were most of the other state court chief justices, numerous federal trial and appellate judges, the president and top leadership of American Bar Association, representatives of the League of Women Voters, the academic community, and other public-minded citizens. The keynote speaker was Chief Justice Rehnquist. The concluding speaker was Justice O'Conner. Other speakers included Frank Bennack, president of the Hearst Corporation, Kathryn Crier of Fox News Network, Tony Monro of USA Today, former Governor Mario Cuomo of New York, and of course, the irrepressible Arthur Miller. I mention some of the names of participants to help demonstrate the significance of the topic on which the conference focused.

The general purpose of the conference was to address public attitudes toward the judiciary in America. More specifically, the purpose was to identify areas where public attitudes might be negative and to develop strategies to counteract those negative attitudes. The difficulties inherent in this task were perhaps reflected in the evolution of the conference's name. Originally, the title of the conference was "*Restoring* Public Trust and Confidence in the Judiciary." Implicit in this title was an acknowledgment that public trust and confidence had been completely lost. That title was changed along the way to "*Improving* Public Trust and Confidence in the Judiciary." Implicit in this revised name was the sense that public trust and confidence had not been completely lost, but certainly had weak points that needed to be strengthened. Finally the name evolved into simply, "*On* Public Trust and Confidence in the Judiciary." Perhaps this change of titles might reflect a problem which we all know exists — the crisis of public confidence in our legal institutions — yet which we are reluctant to acknowledge forthrightly and to address in a conscientious and constructive manner.

As I mentioned earlier, the first major objective of the conference was to identify areas where negative attitudes exist. Through the years there have been numerous studies designed to ascertain the state of public opinion with regard to courts and the justice system. The landmark study was the 1977 "Public Image of the Courts" survey by the National Center for State Courts. At one time or another, all of you have heard references to this study, and those references reported negative public attitudes with respect to American courts. Another survey was conducted in 1983 by the Hearst Corporation. This survey found that Americans were largely ignorant about the legal system; that only a small percentage of the population had participated in jury service; and that public opinion about the courts was strongly influenced by the mass media. The most recent survey is brand new, having been conducted by the Hearst Corporation between January 13 and February 15 of this year. The population sample for this latest survey consisted of 1826 people: 12% African-American, 13% Hispanic, 72% white non-Hispanic, and the remainder classified generally as 'other.' The survey covered four broad areas: public access to the courts; timeliness of court decisions; fairness of judicial decision-making; and judicial independence, which was combined with responsiveness of the courts to the public and to changing conditions in society. In general, the conclusion was a mix of high, medium and low marks across the differing categories. Sometimes there was broad consensus and at other times views differed widely according to race, ethnic group, income and other factors. As to access to the courts, the response was generally quite good and there was broad consensus. Fully three-fourths of Americans believed that courts make an effort to see that people have adequate legal representation and that courts treat people with dignity and respect. On the other hand, only 1 in 3 persons believed that taking a case to court was affordable and nearly 9 out of 10 saw the cost of legal representation as the main barrier to access. Thus, on the issue of accessibility, we received high marks, except as to costs.

On the issue of fairness in judicial decision-making, opinions were sharply divided

(Continued on page 8)

(Continued from page 7)

across racial lines. While the consensus was that courts protect constitutional rights and are fair in case decisions, there was also an overwhelming belief among African-American and Hispanic citizens that the court system treats them differently than white citizens. Although I know that the judicial system aims at equal treatment both systematically and on a personal basis, the fact that there remains even the perception of unequal treatment before the law is disconcerting.

With respect to judicial independence, the study revealed that the public does not grasp the concept of separate but equal branches of government and that the concept of judicial independence is not widely acknowledged. Seventy-eight percent believed that elected judges are influenced by campaign fundraising, and 40% believed that judges are influenced by political considerations. These are disturbing results, whether based on ignorance or cynicism. In this area, we suffer along with the political branches from the view that money influences outcomes and the resultant mistrust that accompanies that view.

As to timeliness of judicial decision-making, the view was broadly held that courts were overworked and backlogged to a point where they can't get anything done. Whether courts are responsive to the communities they serve, the numbers are simply and clear and disturbing. Two out of three African-Americans, a majority of Hispanics, and 4 out of 10 whites believe courts are out of touch with their communities.

After the survey results were reviewed, the focus of the conference shifted to identifying problem areas with respect to public trust and confidence for which there were reasonable possibilities of developing strategies for improvement. Foremost among the many issues discussed was the public's lack of basic understanding of the judicial system. The conference participants viewed this problem as the result of a poor flow of information from the courts to the public as well as the lack of school, media and other means to promote understanding of the justice system. Also awarded a very high priority were the high cost of access to the justice system, particularly with respect to attorneys' fees, and unequal treatment in the justice system by virtue of gender, race, ethnicity, and poverty. Other issues of prominence were abuses of the adversary system, poor treatment of jurors, incursions on judicial independence, and lack of enforcement of time standards and sanctions for delay. While this list of issues is far from comprehensive, these were the issues determined to be the most critical in their effect on public trust and confidence as well as those most amenable to a solution or at least improvement.

While no final report of the conference results has yet been issued, the principal strategies developed are just as you might expect. I am confident that you could have provided many of the same strategies without having attended the conference. Nevertheless, just because a particular approach is predictable, it is so precisely because of the probability that it is accurate. With respect to the overarching problem of lack of public understanding, the consensus was that we must improve school curricula about courts and that judges and lawyers must be willing to participate in public education endeavors, and generally break away from our traditional reluctance to share our knowledge and understanding of the law with non-lawyers and youngsters who are in the process of being educated. We must be aware that civics education in this nation has become virtually non-existent. The civics classes you and I took in the eighth and ninth grade are not generally taught in the public schools of America. I am told that education curricula is driven by standardized tests and that subjects that are absent there are absent in the curriculum. More than thirty states, including Kentucky, have no civic education requirement in the public school curriculum.

While you who are leaders of the Bar already take an interest in public outreach, many of our colleagues do not. With that in mind, I have proposed a modest modification of the CLE rule, which would permit lawyers to claim up to two hours of CLE credit per year for speaking, teaching and lecturing to non-lawyer groups and students in an effort to educate our fellow citizens about the court system. We, as officers and representatives of the courts, are the best spokespersons for the courts. We are the ones who are in the best position to disseminate meaningful information and to repair the damage caused by misinformation. We must get directly involved in educational outreach and stop leaving formation of public opinion about the Court of Justice to Judge Wapner, Judge Judy, and Judge Mills Lane.

The news media, while probably well-meaning, is a frequent source of misinformation or superficial information about court processes. I have often had the shocking experience of reading a news account of an opinion I had written and finding myself hardly able to identify the opinion because the reason for the decision had been totally overlooked or misunderstood in the article. What transpires in trial courts is equally appalling. In a complex case lasting several days or perhaps longer, a typical editor may send a junior reporter to the courthouse for an hour or so with instructions to write a meaningful article on the course of the trial. Of course, the result of such inadequate treatment is a poorly written or misleading story. By those who are unfamiliar with the judicial process, verdicts rendered by juries and decisions rendered by appellate courts can be easily distorted and made to appear ridiculous. We should constantly remind the news media that verdicts are rendered by juries that have heard all the evidence and have considered this evidence in light of carefully chosen instructions from a judge, and that appellate decisions are the product of detailed study and comprehensive writing. We should encourage respect for the judicial process and support an appropriate deference to its participants, whether they be judges, juries, lawyers, or appellate tribunals. And the role of constitutional rights in the judicial process should be continually restated and reaffirmed.

Among the most intractable problems in our legal system, but one widely acknowledged and certainly given a high priority at

(Continued on page 9)

(Continued from page 8)
the conference, is the high cost of legal services. Among the admitted imperfect solutions advanced are mandatory mediation, limitations on depositions and discovery according to the amount in controversy, encouragement of pro se litigation, more expeditious handling of cases, with the idea being that shorter periods of time in litigation will inevitably result in less cost and greater use of cost-saving technology in the court process.

Finally, there was considerable discussion of the idea that the role of courts should be expanded to include non-traditional activities. Chief Justice David Brock of New Hampshire has called this time the "era of therapeutic justice." This phrase refers to the expanded role courts have been given that go far beyond mere adjudication into active intervention. Every day, circuit courts and district courts in Kentucky confront complex social problems formerly handled by families, churches, schools and other non-judicial forums. Many, if not all, of you are already actively involved in the administration of "therapeutic justice," handling cases involving domestic, substance, and juvenile problems that in an earlier day and age would have been resolved by communities and not by courts. With regard to expanding the court's role in non-traditional activities, in Kentucky we have already taken a number of steps in this direction. In many venues we now have family courts. In other areas, drug courts have been initiated and the number of drug courts is expanding rapidly. In other places, we have teen courts which serve the dual function of providing an alternative means of adjudication and educating youngsters about the court system.

The final item I want to touch upon is the perception among minority citizens that they are treated less favorably than the majority. While each of us might say that in our courts and in our experience that perception is not factual, the perception is undeniable and we must address it. I recently came across a shocking statistic. Of the 13,000 holders of Kentucky law licenses, fewer than 200 are members of racial minorities. I am confident that the small number of minority lawyers and judges contributes to the perception. To address this problem, I have recently begun an initiative to work with the presidents of our eight public universities designed to identify qualified minority students and recruit them to law school. It is widely believed that many minorities do not regard the law as a profession which welcomes their participation, and therefore follow other career paths. We need to eliminate that view by directly contacting qualified minority students and explaining the opportunities available to them in the law and forcefully explaining that under no circumstances are they intentionally excluded. Dean Donald L. Burnett of Brandeis School of Law graciously agreed to Chair the minority recruitment effort.

I hope I have not spoken too much of the conference on public trust and confidence, but this is a subject I feel strongly about and one which I spoke of in my swearing-in speech eight months ago.

The survey data I mentioned earlier is not what we wish it were, but neither is it cause for despair. Compared with the other branches of government at the state and federal levels, court systems rank comparatively high in public trust and confidence. Clearly, despite what often seems like hopelessly negative public opinion, there is a reservoir of belief in the integrity of our institution. As legal professionals, but also as committed citizens, we should build on that foundation of belief in the integrity of our institutions and repair, to the greatest extent possible, repair any damage which can be repaired.

On other occasions, I have quoted Alexander Hamilton, one of the founders of our Republic, as follows: "the ordinary administration of civil and criminal justice contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence toward the government."

We must never forget that our branch of government, more than any other, defines public altitudes with respect to the whole of state and national government and that our branch is the only branch of government with which most citizens have any direct contact.

This is not a trivial or trifling subject. Nor is it merely a matter of professional integrity. Respect for the law and the institutions that administer law directly protects the freedom of our nation. More than half a century ago, Senator Robert A. Taft of Ohio spoke of freedom under law. He said: "Unless there is law, and unless there is an impartial tribunal to administer that law, no man can be really free. Without them only force can determine controversy. . . and those who have not sufficient force cannot remain free. Without law and an appeal to a just and independent court to interpret that law, every man must be subject to the arbitrary discretion of his ruler or of some subordinate government official."

Although we ourselves may often take our judicial system for granted, and although the public may often be skeptical of the system, we must always remember that each one of us plays an essential role not only in the ordinary, everyday administration of justice, but also in actively preserving the individual freedom that is the philosophical foundation upon which our nation is built. We must always keep in mind that many of the legal institutions that we and the public now take for granted, such as the Public Defender system, are actually quite exceptional. We must keep in mind that many nations of the world do not value individual liberty to such an extent that all criminal defendants, even those without financial resources, are guaranteed representation by counsel. Although there may be many shortcomings in our judicial system, I believe negative public perceptions are most often the result not of these shortcomings but of the positive aspects of our system being overlooked, misunderstood, or neglected. I hope that, through conscientious and concerted efforts, we can ensure that these many positive aspects are not overlooked, and, in doing so, we can improve the public's trust and confidence in the judicial system. ◆

PUBLIC DEFENDING FOR THE 21ST CENTURY

Ernie Lewis, Public Advocate

In many ways, the turning of a calendar into a new century is artificial. In other ways, it offers us the opportunity to think about our past and to envision our future. Turning the page offers us the opportunity to create our future by envisioning it.

This is of Our Own Choosing

What will happen in the future is not something we are powerless to change. Many of the changes that I envision are matters we can either bring about or not. By thinking about our future, and choosing what we want to make of our future, we are making those changes that much more possible.

Much is Dependent upon Funding

The Blue Ribbon Group, as other groups before it, has declared Kentucky's public defender system to be chronically underfunded. Many of the changes discussed below are dependent upon adequate funding. In many ways, chronic underfunding has dominated the first quarter century of public defending in Kentucky. This chronic underfunding has slowed the development of the full-time system, it has caused immense problems with recruiting, it has driven public defenders out of the work, it has left caseloads too high, it has resulted in many people without counsel, especially children, and unfortunately, it has likely cast doubt upon the reliability of many of the verdicts in criminal cases handled by public defenders. It is clear to me that unless the Blue Ribbon Group recommendations are accepted, either in whole or in part, we will not move into a new millenium, but will rather remain mired in the underfunded past.

Having said that, as I look into the 21st Century for public defenders in Kentucky, I see the following:

Public Defenders Must Become Co-Managers of the Criminal Justice System

We have spoken before of interdependence as a value for public defenders. For the defender who values independence above all else, and who perceives the primary relationship to be the individual defender representing the individual client, the notion of interdependence can be off-putting. Some even see the value as threatening to client representation.

I believe we need to perhaps rephrase this value. Mike Judge, Los Angeles Public Defender, asserts that we need to view ourselves as co-managers of the criminal justice system. I believe this is an important way of reflecting on who we need to become. For too long, public defenders have been ignored at "the table." Decisions significant to our client at the state and local levels have been made without the input of public defenders. This has occurred when jails are being constructed, courthouses are being planned, video arraignments are being considered, and new statutes are being discussed. We have much to offer. Our clients will benefit. Let's begin to think of ourselves as co-managers. And if ignored, let's assert our rightful place at the table.

Ernie Lewis

When invited to the table, we must then be responsible. We must be civil in our dealings with other parts of the criminal justice system. We must be prepared to negotiate. We must be smart enough to hold onto our core values while being willing to trade-off other lesser interests.

This must occur at the state and local level. Local directing attorneys need to be involved in family courts, drug courts, juvenile delinquency prevention councils, and the other multi-disciplinary bodies springing up across the Commonwealth.

We must also be involved with Civil Legal Services where possible. There are of course times, particularly in domestic violence cases, where defenders and legal aid attorneys face conflicts of interest. More often, however, we have common interests, that of advocating for the poor people we represent.

This is part of a national trend. In many ways, the 20th Century has closed with the notion that public defenders must be at the table when important decisions are being made. The National Symposium on Indigent Defense, sponsored by the U.S. Department of Justice in March 1999 emphasized that public defenders must collaborate with other parts of the criminal justice system, and that if we do, the entire system, and especially our clients, will benefit.

We Must Build a Culture of Excellence

Charles Ogletree, former public defender and Harvard Law School, has written an article entitled "Essay on the New Public Defender for the 21st Century." Interestingly, in considering this issue he looks backward to what made the Washington, D.C. Public Defender's Office such a model, saying, "The culture of the office encouraged the commitment of each attorney to her clients, thereby improving the quality of representation." That culture is one in which the right to counsel is

(Continued on page 11)

(Continued from page 10)
defined "to mean that the accused poor should have access to competent counsel who have sufficient resources available to enable them to provide effective representation."

We must build a culture which encourages commitment to the client, and which emphasizes competence and indeed excellence. Standards play a major role in developing this culture. It will no longer do to simply put a warm body into a courtroom. Rather, we must define what the benchmarks for competence are, and then we need to go beyond that and reach for excellence. A good start is the NLADA Performance Guidelines, which have been adopted by DPA. The Post-Trial Division is presently working on standards and guidelines for all of the branches in the Post-Trial Division.

Other component parts of the building of this culture are recruiting for excellence, and then constant, repeated training and retooling. A culture of constant improvement will be built only to the extent that we emphasize the need for training.

National Trends will have a significant effect upon public defending in Kentucky

We are obviously a part of a nation, and increasingly criminal justice is responsive as much to national as statewide trends. There are a number of these trends of which we must be aware:

- *The Trend Toward Harsh Treatment of Sex Offenders.* Nationally, sex offenders are being treated more harshly all of the time. Kentucky has adopted Megan's Law, has added a 3 year period of conditional discharge, and has adopted 85% for violent offenders, including some sex offenders. Kentucky is looking at a law which would involuntarily commit "sexually violent predators." We must be willing to speak up for these most lonely and voiceless people, and advocate for their interests.

- *The Trend Toward Reducing the Separate Treatment of Juveniles.* Many argue that juvenile court has lost its way. Congress seeks to federalize juvenile law. Transfers are becoming mandatory in many states for many crimes. We need to continue to advocate for a benign juvenile justice system, a separate juvenile justice system, one that is responsive to the family court and restorative justice movements.

- *The Trend Toward Longer Sentences.* Kentucky has now adopted 85% for violent offenders. In response to this, we defenders must become better sentencing advocates. We must be creative in coming up with alternative sentencing plans, and we must enforce the spirit of HB 455, which is that virtually all nonviolent offenders, including PFOs and those with extensive records, should be either probated or placed on probation with an alternative sentencing plan.

- *The Trend Toward Futuristic Solutions to Crime.* Change is everywhere. Technology solves everything, including drug problems, gang problems, problems with sex offenders. Clockwork Orange is possible. The gap between rich and poor continues to grow in this rich country of ours. Race continues to trouble us. We are beset with gang problems, particularly in our poorest urban areas. We will need to continue to remind decision-makers that what is possible is not desirable, resist futuristic solutions to crime, and continue to advocate for our clients irrespective of what technology makes possible.

We Must Strike a Balance with Technology

Technology is neutral. It can be a tremendous tool for us; or, it can effect our clients in a negative way. We must continue to seek ways to be more efficient. We must continue what is already a trend toward utilizing brainstorming on significant issues through the use of e-mail. We can achieve other efficiencies through telecommuting, the virtual law-firm, instant mentoring. We can explore better client communications, particularly those in remote prisons, through videoconferencing. At the same time, we must be vigilant as technology threatens to take away our clients' rights, whether it be through witnesses appearing in remote courtrooms or worse yet, video trials, or video "presence" in court.

We Must Have a full-time System with significant Private Bar Involvement

I am convinced that the criminal justice system in Kentucky will involve full-time defenders and prosecutors in both circuit and district court in the 21st Century. We now have 79 counties covered by a full-time office. By July 2000, 82 counties will have a full-time defender. Full-time prosecutors will continue to grow as well. At the same time, private lawyers need to be involved in indigent defense, particularly in conflict of interest situations. Those lawyers need to be compensated fairly, far above the existing rates which are barely above a break-even point. The KBA has been a tremendous ally of DPA, particularly in the recent Blue Ribbon Group. DPA must continue to interact with the KBA and the private bar and be in partnership with them as we develop the indigent defense system for the 21st Century.◆

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"Not in My Neighborhood": An Overview of Kentucky's Megan's Law

by Carol Camp, Appellate Branch

A. Introduction

The death of seven year-old Megan Kanka on July 29, 1994 sparked a modern-day crusade. Congress, as well as legislators in every state, have enacted registration and notification provisions for sex offenders that have become universally known as "Megan's law." The prevailing presumption is that knowing the exact whereabouts, identities and physical descriptions of individuals who are deemed to be at risk for recommitting sex crimes will increase public safety. However, no direct nexus has been established between the widespread public dissemination of sex offender information and a safer populace. The Kentucky statute punishes for a second time individuals who have completed their prison sentences by making it virtually impossible for them to resume their lives and by imposing on them, at a minimum, an additional ten-year registration requirement and, in the case of high risk sex offenders, unlimited public notification.

Carol Camp, Assistant Public Advocate
Appellate Branch

This article will provide readers with a general overview of Kentucky's Megan's law. Issues that have arisen since the statute's implementation will also be discussed.

B. To whom does Megan's Law apply?

Although a seemingly simple question, the correct answer is more complex than one might initially believe. The fact that the statute has three different effective dates has created considerable confusion. Interestingly enough, even though Megan Kanka was not killed until July 29, 1994, Kentucky's original registration provision, KRS 17.500 to 17.540, applied to individuals who pleaded guilty or who had guilty verdicts returned against them after July 15, 1994.

In 1998, the Kentucky General Assembly amended Kentucky's registration statute and added requirements concerning certified providers, risk assessments and risk assessment hearings and community notification. The amended registration provision, KRS 17.510, as well as the sections concerning definitions [KRS 17.550], certified providers [KRS 17.550 and KRS 17.554 to 17.568] and penalties [KRS 17.990] became effective on July 15, 1998. However, the sections concerning the certification requirement for sexual offender risk assessments [KRS 17.552], court-ordered risk assessments and risk assessment hearings [KRS 17.570] and community notification [KRS 17.572] did not become effective until January 15, 1999.

Advocates should keep these effective dates in mind when reviewing their cases because it could make a difference when determining which, if any, part of the statute applies. Arguably, there are at least four different classifications of individuals to whom the statute may being applied:

1. Persons who were convicted or pleaded guilty before July 15, 1994—these individuals should not be required to register or to undergo risk assessments, participate in risk assessment hearings or be subjected to community notification.

2. Persons who were convicted or pleaded guilty sometime after July 15, 1994 but before July 15, 1998—these individuals should arguably be required to register under Kentucky's original registration statute, but should not be required to undergo risk assessments, participate in risk assessment hearings or be subjected to community notification.

3. Persons who were individually sentenced or incarcerated on or after July 15, 1998 but before January 15, 1999—these individuals should arguably be required to register under the amended registration statute. but should not be required to undergo risk assessments, participate in risk assessment hearing or be subjected to community notification.

4. Persons who were individually sentenced or incarcerated on or after January 15, 1999---these individuals should arguably be required to register under the amended registration statute, and can arguably be required to undergo risk assessments, participate in risk assessment hearings and subjected to community notification. Note, however, that at least one state court has remanded a case when it was uncertain whether the trial judge advised the defendant of the registration requirement when he entered his plea. *See Peterson v.State*, 1999 WL 521696, ---P.2d--- (Alaska Ct. App. July 23, 1999).

Another argument that advocates should vigorously assert is that the General Assembly failed to state its intention that KRS 17.500 *et seq.* be applied retroactively, as KRS 446.080(3) requires. Retroactive application, therefore, violates the *ex post facto* clauses of both the United States and Kentucky Constitutions. U.S. Const., Art. 1, s. 10, cl. 1; Ky. Const. Sec. 19(1). Advocates should also keep in mind that for the

(Continued on page 13)

(Continued from page 12)
purposes of an *ex post facto* analysis, the date that an individual committed his offense, **not** the date of his conviction, controls. *Weaver v. Graham*, 450 U.S. 24, 30-31, 101 S.Ct. 960, 965-966, 67 L.Ed.2d 17 (1981).

C. Risk Assessments: What are they and who does them?

A risk assessment is an "evaluation of the sex offender's characteristics based upon the factors listed in KRS 17.554(2) and three screening devices: the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR); the Minnesota Sex Offender Screening Tool—Revised (MnSOST-R); and the Violence Risk Appraisal Guide (VRAG), which also includes the Hare Psychopathy Checklist Revised: Interview and Information Schedule. 501 KAR 6:190 Sec. 1(10)(a). The factors listed in KRS 17.554(2) include: the individual's criminal history; the nature of his offense; conditions of the person's release and physical conditions that minimize risk; psychological or psychiatric profiles; recent behavior that indicates an increased risk to commit a sex crime; recent threats or gestures against persons or expressions of intent to commit additional offenses; and the victim impact statement. The purpose of a risk assessment is "[t]o reach a recommendation of the [l]evel or risk that an offender will recommit a sex crime; and [t]hreat posed to public safety." 501 KAR Sec. 6:190 Sec. 1(10)(b).

Two groups of individuals may perform risk assessments: certified providers and supervised providers. A certified provider is "a mental health professional certified by the Sex Offender Risk Advisory Board" to conduct risk assessments. KRS 17.550(8). A certified provider must be one of the types of qualified mental health professionals listed in KRS 202A.011(12). 501 KAR 6:190 Sec. 2(1)(d). A supervised provider works under the direction of a certified provider. 501 KAR 6:190 Sec. 1(13). A supervised provider, however, does **not** have to be a qualified mental health professional pursuant to KRS 202A.011(12).

Examples of supervised providers include employees of the Department of Corrections, Division of Mental Health; Department of Juvenile Justice; or Department of Mental Health and Mental Retardation Services, including employees of community mental health centers. 501 KAR 6:190 Sec. 2(2)(c). Supervised providers with master's degrees in psychology, social work, counseling, social gerontology, education or marriage and family therapy must have at least one year of counseling experience; those with bachelor's degrees in these fields must have a minimum of two years' counseling experience. 501 KAR 6:190 Sec. 2(f). Supervised providers must also have applied for certification with the Sex Offender Risk Assessment Advisory Board by March 31, 1999. 501 KAR 6:190 Sec. 2(d). Advocates should familiarize themselves with the credentials of the individuals who conduct the risk assessments in their clients' cases to insure that they possess the requisite professional qualifications.

D. Risk Assessment Hearings

To be eligible for a risk assessment, and thus, a risk assessment hearing, an individual must have committed (or attempted) to commit one of the following offenses: first, second and third degree rape; first, second and third degree sodomy; incest; first degree sexual abuse; first degree unlawful transaction with a minor; use of a minor in a sexual performance; or a similar crime in another jurisdiction. KRS 17.500(4).

KRS 17.570 requires a sentencing court, within 60 days of the discharge, release or parole of an individual convicted of one of the above sex crimes, to order a certified provider to conduct a risk assessment. KRS 17.570(1). The purpose of the risk assessment is to determine whether the person should be classified as high, moderate or low risk; to designate the length of the individual's registration requirement (lifetime unless redesignated after ten years for high risk offenders; ten years for low and moderate risk offenders); and to designate the type of community notification that will be required. KRS 17.570(1)(a)-(c); KRS 17.520; KRS 17.572(2)-(3); KRS 17.578(1).

The sentencing court shall then conduct a risk assessment hearing in accordance with the Kentucky Rules of Criminal Procedure. KRS 17.570(4). The individual has the right to appear and be heard, as well as the right to counsel, including appointed counsel pursuant to KRS 31.070 and KRS 31.110, for indigent defendants. KRS 17.570(4), (5). If a person is indigent, he should not be required to pay for the risk assessment, as KRS 17.570(2) requires.

In determining the person's risk level, the sentencing court is required to "review the recommendations of the risk provider along with any statement by a victim or victims and any materials submitted by the sex offender." KRS 17.570(3). After the hearing, the sentencing court "shall issue findings of fact and conclusions of law and enter an order designating the individual's risk level." KRS 17.570(6). This order may be appealed immediately. KRS 17.570(7). Although the statute fails to define the allocation of the burden of proof in these proceedings, many courts have placed the burden on the state and required proof by clear and convincing evidence.

E. Registration and Notification

Upon release, the sentencing court forwards its "Order of Sex Offender Risk Determination" to the sheriff of the county where the individual will reside. KRS 17.570(8). The individual then has10 days from his release date to register with the probation and parole office located in the county in which he

(Continued on page 14)

(Continued from page 13)
lives. KRS 17.510(2). The local probation and parole office then forwards the person's registry information on to the Information Services Center of the Kentucky State Police for inclusion in the Law Enforcement Network of Kentucky (LINK) and he National Crime Information Computer (NCIC). KRS 17.510(5); 502 KAR 31:020 Sec. 1(4) and (5).

If a person's residence address changes, he must reregister within 10 days of the address change with the probation and parole office located in his new county. KRS 17.510(10). Low and moderate risk sex offenders must update their registry information annually, while high risk offenders must do so on a quarterly basis. 502 KAR 31:020 Sec. 5 (1) and (2). Failure to provide accurate information, as well as failure to register within 10 days of his original release date, subjects a person to prosecution for a Class A misdemeanor, as well as possible probation or parole revocation. KRS 17.510(11)-(13).

The local sheriff's office is responsible for carrying out the community notification provisions of Kentucky's Megan's law, KRS 17.572. Regardless of the level of classification, the following entities always receive a person's sex offender information: the law enforcement agency having jurisdiction, as well as the agency that had jurisdiction at the time of the individual's conviction; victims who have requested notification; and the Information Services Center of the Kentucky State Police. KRS 17.572(1), (4) and (5). If a person is designated moderate or high risk, agencies, organizations or groups serving individuals with characteristics similar to those of the victim must also be notified. These entities must file a request for notification with the local sheriff's department. KRS 17.572(1) and (4). KRS 17.572(1) mandates notification of "[t]he general public, through statewide media outlets and by any other means as technology becomes available" only in the cases of high risk sex offenders.

What types of information about an alleged sex offender can be disseminated? KRS 17.500(3) contains a broad definition of "sex offender information." "Sex offender information" includes basic identification information (name, physical characteristics such as height, weight, hair and eye color); vehicle registration information; residence; Social Security number; a description of the crime(s) committed, "and other information the [Justice] [C]abinet determines, by administrative regulation, may be useful in the identification of sex offenders." KRS 17.500(3). Social Security numbers are not to be disclosed to registered agencies, groups or organizations, victims, or to the general public. KRS 17.572(1), (4) and (5). 502 KAR 31:020 Sec. 2(7) expands the definition contained in KRS 17.500(3) to include: date of release; maximum date of sentence or supervision, whichever is longer; date of registry expiration; name of any person who assists in completing the information form; the releasing entity's office phone number; signatures of the registrant and authorizing witness; the date that the registrant signs the form; and the registrant's fingerprints and photograph. Interestingly enough, 501 KAR 6:210 Sec. 2(6) only authorizes sheriffs to release a registrant's photo or fingerprints to victims, agencies, groups and organizations that have requested notification; release to the general public and the media **is not authorized by regulation or statute**!

F. Technical Difficulties

As advocates and members of law enforcement and the judiciary are undoubtedly aware, the implementation of Kentucky's Megan's law has been haphazard at best. The lack of Kentucky caselaw makes the going all the more difficult for advocates. The following is a checklist of some issues that Kentucky litigators have encountered, as well as applicable caselaw from other jurisdictions that might provide assistance.

Ex post facto—Kentucky's Megan's law is being applied retroactively to offenders whose convictions predate even the original 1994 registration statute. As discussed *supra,* this is additional punishment that violates individual's federal and state constitutional protections against ex post facto legislation U.S. Const. Art. 1, s. 10, cl. 1; Ky. Const. Sec. 19(1); *see Weaver supra; State v. Babin,* 637 So.2d 814 (La. Ct. App.), *writ denied,* 644 So.2d 649 (La. 1994); *State v. Myers,* 923 P.2d 1024 (Kan. 1996), *cert. denied,* 521 U.S. 1118, 117 S.Ct. 2508, 138 L.Ed.2d 1012 (1997); *State v.C.M., C.D.M. and S.D.,* 1999 WL 274903, ---So.2d--- (Ala. Crim. App. 1999)(not yet published); *Rowe v. Burton,* 884 F.Supp. 1372 (D. Alaska 1994), *appeal dism'd by Doe I v. Burton,* 85 F.3d 635 (9th Cir. 1996); *Roe v. Farwell,* 999 F.Supp. 174 (D.Mass. 1998); *Femedeer v. Haun,* 35 F.Supp.2d 852 (D. Utah 1999).

Double jeopardy—A minimum ten-year notification period for all classifications of offenders, plus the possibility of prosecution and/or probation or parole revocation for failure to register subjects an individual to multiple punishments in violation of his federal and state constitutional protections against double jeopardy. U.S. Const. Amend. 5; Ky. Const. Sec. 13; *Femedeer, supra; Roe v. Farwell, supra.*

Due process—Public dissemination of sex offender registry information arguably violates the Kentucky Open Records Act and implicates an individual's liberty and privacy interests under both the federal and state constitutions, thereby entitling him to procedural due process. At a minimum, procedural due process requires the following safeguards to be observed: at least two weeks' advance written notification to an individual describing the risk level assigned and the specific manner proposed for notification; prehearing discovery of all materials used to determine the risk level assigned, and the right to seek a stay of notification pending appeal. U.S. Const. Amends. 9 and 14; Ky. Const. Secs. 1 and 2; *Com. v. Wasson,* 842 S.W.2d 487 (Ky. 1993); KRS 61.878(1)(a); *Zink v. Com., Dep't of Workers' Claims, Labor Cabinet,* 902 S.W.2d 825 (Ky. Ct. App. 1994); *Ky. Bd. Of Examiners of Psychologists and Div. of Occupations and Professions, Dep't for Admin.v. Courier-Journal and Louisville Times Co.,* 826 S.W.2d 324 (Ky. 1992); *Doe v. Poritz,* 142 N.J. 1, 662 A.2d 367 (N.J. 1995); *W.P. v.*

(Continued from page 14)

Poritz, 931 F.Supp. 1199 (D.N.J. 1996); *Roe v. Farwell, supra; Cutshall v. Sundquist*, 980 F.Supp. 928 (M.D. Tenn. 1997); *Doe v. Pataki*, 3 F.Supp.2d 456 (S.D.N.Y. 1998); *Com. v. Williams*, 1999 WL 441873, ---A.2d--- .

Hearsay—Admission of the risk assessment report into evidence without requiring a proper evidentiary foundation violates the hearsay rule, as well as an individual's rights of confrontation and cross-examination. U.S. Const. Amend. 6; Ky. Const. Sec. 11; KRE 803, 804; Bell *v.Comonwealth*, 875 S.W.2d 882 (Ky. 1994). The foundation exemptions outlined in KRE 803(6) and (8) do not apply. Risk assessments are not self-authenticating under KRE 902(1), (2) or (11). A risk assessment hearing is not a miscellaneous proceeding as defined in KRE 1101(d)(5); advocates should argue that the evidentiary rules apply to risk assessment hearings.

Burden of proof—The statute fails to define the burden of proof and to designate which party ultimately bears it. Due process requires the burden of proof, which should be clear and convincing evidence, to be placed upon the state. *E.B. v. Verniero*, 119 F.3d 1077 (3rd Cir. 1997), *cert. denied*, ---U.S.--, 118 S.Ct. 1039, 140 L.Ed.2d 105 (1998).

Use of expert testimony—An individual must have the right to present expert testimony to challenge the state's proposed classification determination and the specific manner proposed for notification. *Doe v. Poritz, supra; Cutshall, supra; In Re G.B.*, 147 N.J. 62, 685 A.2d 1252 (N.J. 1996).

Conclusion

Kentucky's Megan's law is a vague, overly broad statute whose ill-conceived means—unlimited public dissemination of sex offender information—simply do not justify its purported objective of increased public safety. None of us can protect our children from every potentially dangerous encounter. Attempting to do so at the expense of the constitutional rights of individuals ho have paid their debts to society serves no legitimate purpose and erodes the constitutional protections we all enjoy—for the Constitution applies even to those whom we would prefer not to live in our own neighborhoods. ◆

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PRERELEASE PROBATION: AN UPDATE AFTER ONE YEAR

by Joe Myers

This is the fifth in a series of articles in the Department of Public Advocacy's, *The Advocate* and in DPA's Legislative Newsletter, on the subject of Prerelease Probation, a program enacted by the 1998 Kentucky General Assembly under the Governor's Crime Bill. It can be found in KRS 439.575 and in the Department of Corrections (DOC) Policy and Procedures Manual at Section #27-11-02.

Statistical Info:

In response to an open records request, the Department of Corrections, Division of Probation and Parole, in correspondence dated July 29, 1999 reported there have been 953 prerelease probation(PRP)requests processed by the DOC. The number of persons determined ineligible is 466, with 395 being categorized as eligible for PRP. The courts have granted 85 persons PRP with four persons having had their PRP revoked.

The number of inmates obtaining PRP shows that this has become a significant vehicle for inmate release. This is especially noteworthy when factoring in the start-up delay and novelty of the program during the first year. Perhaps even of greater import to the defense advocate and PRP movants is the significantly small number of PRP grantees returned as violators (4.7%). While these numbers will change over time, there is a positive statistical trend at present to show a reviewing court. In essence those inmates with a favorable recommendation following DOC's screening process are highly unlikely to violate their PRP.

PENDING LITIGATION:

The case of *Prater v. Commonwealth*, (Court of Appeals No. 98-CA-2802)presently pending in the Kentucky Court of Appeals will address the constitutionality of the PRP statute. KRS 439.575. While the Commonwealth has conceded in this appeal the statute to be constitutional, it nevertheless maintains the trial court rightfully required the inmate on her own to secure a favorable recommendation for PRP from the DOC before the court could take any action. The problems with this position are both logistical and legal. Legally, the DOC has been given the authority to promulgate regulations for the administration of PRP.(See KRS 439.575(2)) Logistically, DOC,under whose policies and procedures Ms.Prater is subject, requires a referral from the sentencing court before it conducts its screening process for both eligibility and risk assessment. Presently, it is possible only after this process that the inmate can receive a favorable recommendation from DOC to the sentencing court.(SEE CPP 27-11-02, found on pages following this article.) Should the court adopt the Commonwealth's position on this issue, PRP will come to a de facto halt for all inmates unless and until the DOC modifies its procedures eliminating the sentencing court referral. This would

(Continued on page 16)

(Continued from page 15)
necessitate allowing inmates to seek directly from DOC, its favorable recommendation prior to any court involvement. Stay tuned.

ELIMINATION OF PRP ELIGIBILITY FOR ALL FELONY SEX OFFENDERS

Effective June 16, 1999, DOC policies and procedures were modified to exclude specifically any inmate convicted of a "sex crime" as defined in KRS. 17.500(4);(SEE CPP 27-11-02 VI.A.1(b))

That statute in turn defines "sex crime" as a "...felony offense defined in KRS Chapter 510, KRS 530.020(Incest), 530.064(Unlawful transaction with a minor in the first degree), or KRS 531.310(Use of a minor in a sexual performance), a felony attempt to commit a sex crime, or similar offenses in another jurisdiction."

Previous CPP's dealing with PRP in practice eliminated some sex offenders whose offenses or other circumstances prohibited them from being eligible for probation or shock probation. These and other offenders ineligible for probation and shock probation could not receive the necessary, DOC favorable recommendation.

On the other hand, inmates convicted of such offenses as sex abuse, first degree (KRS 510.110) and rape, third degree(KRS 510.060), both class D felonies, which did permit probation and shock probation under certain circumstances, are now no longer eligible for PRP.

The significance of this change in policy has yet to be fully realized. The legal implications of this change likewise remain unclear.

First, while DOC has been granted authority to promulgate regulations as to eligibility requirements for PRP under subsection (2) of the PRP statute, no one can seriously claim this authority is limitless and totally undefined. Kentucky law recognizes that an administrative regulation that exceeds statutory authority or is repugnant to the underlying statutory scheme is an invalid regulation. See for example, *Jewish Hospital,Inc.v. Baptist Health Care System, Inc.*_902 S.W.2d 844 (Ky.App. 1995). The obvious question this amendment poses is, did DOC exceed its statutory authority in eliminating PRP consideration for the inmate, whose sex crime(s) did not preclude his/her eligibility for probation and shock probation. This major DOC policy change now legally renders the affected inmate unsuitable for a form of probation, after the 180 day shock probation period has expired. The basis for denial is solely on the nature of the offense, which has remained unchanged. It is the same offense which the statutory scheme does not automatically deny the same inmate the opportunity for probation and shock probation under certain circumstances that the sentencing court must consider.(See KRS 532.045)

Additionally, this change, besides producing what in some instances can be seen to be an inequitable result, poses practical problems for the trial practitioner. While DOC is required under KRS Chapter 13A to provide notice of its intent to promulgate changes in regulations, the implications are disturbing in that such a change can be made by any agency, where the legislature has set different parameters for probation consideration by courts.

Inmates who pled guilty or are found guilty and sentenced before this amendment can be expected to seek relief under the ex post facto clauses of the U.S. and Kentucky Constitutions if they are automatically precluded from PRP consideration. Lawyers recognizing the possible challenge to the legality of this amendment can advise their clients of the potential invalidity of the rule in assessing plea bargains, with no absolute guarantee as to the state of the law in the future. Plea bargaining may take the form of amending a sex crime to an offense outside the scope of KRS 17.500(4)in order to escape this change in DOC policy and regulation.

From a public policy perspective, this change can be expected to bring about mixed results. It is true this amendment will keep inmates convicted of sex crimes from returning to society via PRP. In an age of accountability, sensationalism, and avoiding appearing soft on criminals, DOC's policy is understandable. On the other hand, some offenders, especially Class D sex offenders, for a variety of reasons, may not be suitable for the Sex Offender Treatment Program as offered presently by the DOC.(See KRS 197.400-197.440) Those mentally ill, mentally retarded or learning impaired sexual offenders who do not meet the requirements of being an "eligible sexual offender" within the meaning of KRS 197.410(2) are such examples. Others could be ineligible due to the length of their sentence, precluding completion of the program while incarcerated. Likewise the inmate may have accumulated a large amount of jail credit prior to sentencing after failing to make bond, leaving insufficient time on the end of his sentene to complete the program. Whatever the reason, the sentencing court, under this CPP cannot use PRP as a vehicle to place such inmates on probation with quality sex offender treatment outside of the DOC institutional setting.

Perhaps most unsettling, in light of this change, is determining specifically what is the limit on DOC's discretion in setting the criteria for PRP eligibility? Moreover, what role does the overall statutory scheme regarding probation eligibility play in these DOC policy formulations? The answers to these questions may well determine whether a client in prison or a class D facility gets his/her day in court to seek PRP.◆

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KENTUCKY CORRECTIONS Policies and Procedures	Policy Number 27-11-02	Total Pages 3
	Date Issued June 10, 1999	Effective Date June 16, 1999
References KRS 439.470, 439.575	Subject **PRERELEASE PROBATION**	

I. AUTHORITY

This policy is issued in accordance with: KRS 439.575 which institutes a program of prerelease probation; and KRS 439.470 which authorizes the Commissioner of the Department of Corrections (Corrections) to make rules regarding probationers and parolees.

II. PURPOSE

To set forth procedures to govern the administration of prerelease probation.

III. APPLICABILITY

To all employees of Corrections and all offenders.

IV. DEFINITIONS

None

V. POLICY

It is the policy of Corrections that inmates who receive a low score on the risk assessment scale and who are not otherwise excluded by application of this policy shall be given a favorable recommendation for prerelease probation to the sentencing court.

VI. PROCEDURES

A. Criteria

1. The following individuals shall be excluded from consideration. An inmate:

Policy Number	Issue Date	Effective Date	Page
27-11-02	June 10, 1999	June 16, 1999	2

a. who has committed a crime in which a life was taken or the victim suffered serious physical injury;

b. convicted of a sex crime as defined in KRS 17.500(4);

c. with an outstanding felony detainer; or

d. who has committed a major violation within the last twelve (12) months or has any outstanding good time loss.

2. To receive a favorable recommendation to the sentencing court, the inmate:

a. shall be eligible for probation or shock probation;

b. shall have a home placement within the Commonwealth of Kentucky; and

c. shall receive a score in the low category on the risk assessment.

B. Responsibilities of Caseworkers and Probation and Parole Officers (Officer)

1. A file shall not be reviewed prior to the passing of the one hundred eighty (180) day shock probation period.

2. The caseworker shall complete the risk assessment within sixty (60) days of receiving a written request for consideration from the court.

3. The Officer responsible for the Class D program shall complete the risk assessment within sixty (60) days of receiving a written request for consideration from the court.

4. The caseworker or Officer shall forward the completed risk assessment to the Deputy Warden or District Supervisor for review.

5. The inmate shall be informed of his risk assessment score. The score shall not be appealable or grievable.

C. Responsibilities of Deputy Warden or District Supervisor

If the inmate receives a score in the low category, the Deputy Warden or District Supervisor shall review the assessment and the presentence investigation report

Policy Number	Issue Date	Effective Date	Page
27-11-02	June 10, 1999	June 16, 1999	3

for accuracy. A decision and recommendation shall be made within thirty (30) days of receipt of the risk assessment to forward to the sentencing court.

D. Violations of Prerelease Probation

Any violation of court imposed conditions shall be governed by KRS 439.575.

E. The period of supervision shall be governed by KRS 439.575.

PRACTICE TIPS from DPA's Appellate Division

collected by Susan Balliet, Assistant Public Advocate

Protect Sex Offenders Right to Privacy

There are newspapers that think it's O.K. to publish names and information about low and moderate risk sex offenders (arguably in violation of KRS 17.572(4) and (5). To protect our clients' right to privacy, trial counsel should file a motion for an in camera risk assessment hearing, and a motion to seal the risk assessment report and the court's final determination of someone's risk to re-offend.

Carol Camp, Assistant Public Advocate
ccamp@mail.pa.state.ky.us

Look at Clients' Medical Records from the Jail

Especially in death penalty cases, attorneys should make sure they've seen their clients' medical, psychological and disciplinary records *from the jail in which they've been housed* before trial. I've had 2 cases already where we found out the clients were receiving Mellaril while awaiting trial, one of whom was definitely taking it during his final sentencing. Clients don't always know the significance of the drugs they're taking [*Riggins v. Nevada,* 50445127 (1992)] and don't always tell their attorneys everything that's going on in their lives.

Sue Martin, Assistant Public Advocate
smartin@mail.pa.state.ky.us

Watch out for Commonwealth's Questions in Voir Dire

Defense counsel should not permit the Commonwealth to ask questions during voir dire that belong in opening statement or closing argument, especially when the questions may influence the jury's understanding about instructions.

Karen Maurer, Assistant Public Advocate
kmaurer@mail.pa.state.ky.us

Everything you need to know....

1) make sure that everything you do in court is done on the record; if a hearing is worth having, it is worth having on the record, if an argument is worth making, it is worth making on the record. The cheapest part of a court hearing is the videotape (or court reporter);

2) keep an accurate log of all court appearances - the day will come when it will be your responsibility to tell the clerk or the court reporter every date that you have been in court on the case. Do not trust your memory, it will undoubtedly fail you when you need it most. Do not rationalize that the record on appeal is not the appellate attorney's problem to deal with, it is the client's problem - which means it is the problem of everyone who has represented the client.

Per Curiam, Appellate Branch

Don't be afraid!

Don't be afraid to object in the middle of closing argument.

Karen Maurer, Assistant Public Advocate
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[redacted]

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[redacted]

[redacted]

City of Chicago v. Morales
119 S.Ct. 1849
(June 10, 1999)

Mills v. Commonwealth
1999 WL 236404 (Ky.)
(April 22, 1999)
(Not Yet Final)

Commonwealth v. Wood
1999 WL 354494 (Ky.)
(June 4, 1999)
(Not Yet Final)

Cox v. Commonwealth
1998 - CA - 1345 - MR
(June 18, 1999) Not to be published

United States v. Watkins
179 F.3d 489 (6th Cir.)
(June 10, 1999)

Wyoming v. Houghton
119 S.Ct. 1297
(April 5, 1999)

The Supreme Court has decided a significant Fourth Amendment case involving automobiles. The question presented was "whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband."

The case began with a traffic stop for speeding and driving with a faulty brake light. During questioning of the driver, the police noticed a syringe in his pocket. When questioned why he had a syringe, the driver stated that it was for taking drugs. Houghton, a passenger, was told to get out of the car. She gave a false name and stated she had no identification. The police searched the car and found Houghton's purse, in which they found identification, a syringe, drug paraphernalia, and 60 ccs of methamphetamine. She was arrested.

Houghton moved to suppress the evidence seized from her purse. The trial court found that there was probable cause to search any containers in the car. Houghton was convicted at trial. The Wyoming Supreme Court, however, reversed, holding that while a probable cause search of an automobile would justify the search in this case, "if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection." Certiorari was granted, and in a 6-3 decision, the U.S. Supreme Court reversed the Wyoming Supreme Court.

Justice Scalia wrote the majority opinion, joined by Justices Rehnquist, O'Connor, Kennedy, Thomas, and Breyer. As a result of the authorship, the opinion featured a significant new analysis of warrantless Fourth Amendment questions. Justice Scalia announced that in Fourth Amendment cases there is a two-part inquiry. First, the Court inquires "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." Second, "we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."

Under the first question, Justice Scalia concludes that the Framer's would have regarded a probable cause *automobile* search as being reasonable. "We have furthermore read the historical evidence to show that the Framers would have regarded as reasonable...the warrantless search of containers *within* an automobile." Further, the Court relies upon *Carroll v. United States*, 267 U.S. 132 (1925) and *United States v. Ross*, 456 U.S. 798 (1982) to hold that where there is probable cause regarding an automobile, that extends to all containers within the automobile including those the police know belong to passengers.

The Court also found that the balancing test weighed in favor of the State. "Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars." Further, the Court found that the degree of intrusiveness upon personal privacy and personal dignity were less for the passenger of a vehicle than for someone in, for example, a bar. (See *Ybarra v. Illinois*, 444 U.S. 85 (1979). On the other hand, the "governmental interests at stake are substantial. Effective law enforcement would be appreciably impaired without the ability to search a passenger's personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car." Accordingly, under the familiar balancing test, the privacy interests of passengers give way to the needs of law enforcement.

Succinctly stated, the Court's holding is "that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."

While this is a significant case, it is not a surprising case. The Court has in recent years been less and less inclined to enforce privacy rights, particularly when associated with cars, and more and more inclined to both declare bright line rules and to support the needs of the law enforcement community. Not only does this continue the trend toward reducing the expectation of privacy in the automobile, it also continues the emphasis on the reasonableness inquiry and away from an emphasis on the presumptive illegality of warrantless searches.

(Continued on page 21)

(Plain View, Continued from page 20)
One wonders what the effect of this case will be on *Paul v. Commonwealth*, Ky. App., 765 S.W. 2d 24 (1989). There, the Court had held that where the police have probable cause to arrest the driver they do not have probable cause the backseat passenger. While *Paul* is an arrest case rather than a case involving a *Ross* case, whether the courts will extend *Houghton* over into *Paul* is unclear. Justice Breyer's concurrence sheds some light on the question.

In Justice Breyer's concurring opinion, he reaffirmed the importance of bright-line rules in the Fourth Amendment area while at the same time took pains to limit this bright line rule. "Obviously, the rule applies only to automobile searches...it does not extend to the search of a person found in that automobile." Interestingly, Justice Breyer was also concerned that the search in this case involved Houghton's purse, which he viewed as "an intrusion so similar to a search of one's person that the same rule should govern both." Had Houghton been carrying the purse, Justice Breyer would have disallowed the *Ross* rule, and required a warrant prior to a search under these circumstances.

Justice Stevens penned the dissent joined by Justices Souter and Ginsburg. The dissenting Justices condemned the majority for abandoning previous caselaw which had distinguished the drivers from passengers. The dissenters would have required probable cause to believe that the purse contained contraband. Finally, the dissenters expressed confidence in the ability of the police to have understood and applied a rule requiring probable cause as to the passenger or the passenger's container.

Florida v. White
119 S. Ct. 1555
(May 17, 1999)

The Florida police saw White deliver cocaine using his car on three occasions. Later, White was arrested on another charge. The car was seized under a Florida statute allowing vehicles to be seized and forfeited without a warrant if used in violation of the provisions of the statute. Cocaine was found in the inventory search of the car, resulting in a possession charge. White challenged the search of the car based upon the fact that the car had been seized without a warrant. Ultimately, the Florida Supreme Court agreed with him, and held that "the Fourth Amendment requires the police to obtain a warrant prior to seizing property that has been used in violation of" the Florida statute. The United States Supreme Court granted *cert.*

Justice Thomas wrote the 7-2 opinion reversing the Florida Supreme Court. The Court began its analysis in a curious place. They looked, similarly to *Houghton*, to "inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed." They relied upon *Carroll v. United States*, 267 U.S. 132 (1925) to observe that in our nation's earliest days federal officers could conduct warrantless searches of ships and seize goods from them. While the police had no probable cause to believe the car contained contraband, the police did have probable cause to believe that the car itself was contraband under the Florida forfeiture statute.

The Court also relied upon the fact that the seizure occurred in a public place. "[O]ur Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places." "Here, because the police seized respondent's vehicle from a public area—respondent's employer's parking lot—the warrantless seizure also did not involve any invasion of respondent's privacy. Based on the relevant history and our prior precedent, we therefore conclude that the Fourth Amendment did not require a warrant to seize respondent's automobile in these circumstances.

Justice Souter wrote a concurring opinion joined by Justice Breyer. He wrote simply to caution the reader against reading "our holding as a general endorsement of warrantless seizures of anything a State chooses to call 'contraband,' whether or not the property happens to be in public when seized. The Fourth Amendment does not concede any talismanic significance to use of the term 'contraband' whenever a legislature may resort to a novel forfeiture sanction in the interest of law enforcement, as legislatures are evincing increasing ingenuity in doing."

Justice Stevens was joined in his dissent by Justice Ginsburg. The dissenters analyzed the case as a standard warrantless seizure which is illegal absent an except to the warrant requirement. They rejected the probable cause automobile exception because the car was not seized until 2 months after the criminality had been observed. The dissenters were further disturbed by the pecuniary interest that law enforcement had in the automobile. The core of the dissent is that no warrant was obtained. "*Ex parte* warrant applications provide neutral review of police determinations of probable cause, but such procedures are by no means public. And the officers had months to take advantage of them. On this record, one must assume that the officers who seized White's car simply preferred to avoid the hassle of seeking approval from a judicial officer. I would not permit bare convenience to overcome our established preference for the warrant process as a check against arbitrary intrusions by law enforcement agencies 'engaged in the often competitive'—and, here, potentially lucrative—'enterprise of ferreting out crime.'"

Wilson v. Layne
119 S.Ct. 1692
(May 24, 1999)

The United States Supreme Court has held that "media-ride-alongs," whereby the media are invited to accompany the police in the execution of a search warrant, are unconstitutional. This holding was provided in the context of a civil suit.

In April of 1992, a judge in Montgomery County Maryland issued an arrest warrant for Dominic Wilson. Thereafter, state

(Plain View. Continued from page 21)
and federal police officers executed the search warrant. They were accompanied by a reporter and photographer from the Washington Post, despite the fact that the warrant did not authorize the presence of reporters. The police went to Wilson's parents' home at 6:45 a.m. and entered while the older couple was still in bed. An angry father was wrestled to the ground when he complained of 5 armed men in street clothes in his house. When Dominic Wilson was not located, the police, and the media, left.

Thereafter, the Wilsons filed a suit against the police for money damages under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Court of Appeals reversed a lower court decision denying summary judgment based upon qualified immunity. The en banc Court of Appeals decided that qualified immunity was proper because no court had held that the presence of the media was a Fourth Amendment violation. The Supreme Court granted *cert.*

Justice Rehnquist wrote the decision for the Court. He stated that the question was whether "'the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" Stating the question this way provided an opportunity to evaluate the core issue involved, the right to privacy in the home. Justice Rehnquist did just that, emphasizing that the "Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."

Justice Rehnquist acknowledged that the officers here lawfully entered the Wilsons' home because they had a warrant. However, that did not end the analysis. Rather, by bringing along the media, the police raised the question of whether the scope of the warrant was exceeded by its execution. "[T]he Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion." Bringing the media along for a search warrant execution was beyond the scope of the warrant because it was not related to the objective of the warrant. The media were not there to help in the search, to assist in the arrest, to identify stolen property, or any other lawful purpose contemplated by the warrant.

The State argued that inviting the press to witness a search warrant execution serves a legitimate law enforcement purpose. This was rejected by the Court. While media attention may serve a law enforcement aim, that aim must give way to the core of the Fourth Amendment. "But this claim ignores the importance of the right of residential privacy at the core of the Fourth Amendment...Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home. And even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant...We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."

While the Wilsons won on the Fourth Amendment issue, they did not fare as well on the issue of qualified immunity. "We hold that it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful." Accordingly, the police were able to claim qualified immunity, and the lower court was affirmed.

Justice Stevens concurred in part and dissented in part. While he agreed that the actions of the police violated the Fourth Amendment, he also believed that this was clearly established in 1992 and thus the police had no right to claim qualified immunity. "The defense of qualified immunity exists to protect reasonable officers from personal liability for official actions later found to be in violation of constitutional rights that weren't clearly established. The conduct in this case...contravened the Fourth Amendment's core protection of the home. In shielding this conduct as if it implicated only the unsettled margins of our jurisprudence, the Court today authorizes one free violation of the well-established rule it reaffirms."

City of Chicago v. Morales
119 S.Ct. 1849
(June 10, 1999)

The most important thing that can be said of this case is that if it had been decided differently, it would have had immense Fourth Amendment impact. It was decided much more narrowly, with little Fourth Amendment significance. It will be reviewed likewise.

This is the long-awaited gang loitering case out of Chicago. Under review was a Chicago ordinance making it a criminal offense punishable by a $500 fine and 6 months in jail to loiter with no apparent purpose in a public place in the presence of a gang member and to disobey the order of a police officer to disperse. The ordinance was held to violate not only the First and Fourteenth Amendments but also the Fourth Amendment. The Illinois Supreme Court dropped the Fourth Amendment analysis, and the Supreme Court reviewed only under the First and Fourteenth Amendments.

The decision, written in part by Justice Stevens, was highly splintered. The bottom line is that the ordinance as written was unconstitutionally vague. The ordinance failed to give fair notice of what is prohibited, and it failed to give adequate guidance to govern law enforcement. "In this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets."

(Plain View. Continued from page 22)

The decision is important not only for recognizing that there continue to be limits to enforcement mechanisms given to the police for controlling street gangs. It also creates a window into the Court's views on privacy in today's world, of which urban street gangs are a major part. A glimpse of this discussion follows:

Justice Stevens: "[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."

Justice Stevens: "It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she 'shall'—order them to disperse."

Justice Kennedy: "A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a dispersal order based on the officer's own knowledge of the identify or affiliations of other persons with whom the citizen is congregating; nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose."

Justice Breyer: "The city of Chicago may be able validly to apply some *other* law to the defendants in light of their conduct. But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than could it apply an (imaginary) statute that said, 'It is a crime to do wrong,' even to the worst of murderers."

Justice Scalia: "Tony, a member of the Jets criminal street gang, is standing alongside and chatting with fellow gang members while staking out their turf at Promontory Point on the South Side of Chicago; the group is flashing gang signs and displaying their distinctive tattoos to passersby. Officer Krupke, applying the Ordinance at issue here, orders the group to disperse. After some speculative discussion...over whether the Jets are depraved because they are deprived, Tony and the other gang members break off further conversation with the statement...'Gee, Officer Krupke, krup you.' A tense standoff ensues until Officer Krupke arrests the group for failing to obey his dispersal order...I find it hard to believe that the Jets would not have known they had it coming."

Justice Thomas: "Today the Court focuses extensively on the 'rights' of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods...By focusing exclusively on the imagined 'rights' of the two percent, the Court today has denied our most vulnerable citizens the very thing that JUSTICE STEVENS...elevates above all else—the 'freedom of movement.' And that is a shame."

As you can tell, the discussion is impassioned. While no Fourth Amendment precedent resulted, other statutes will be written and reviewed which will effect the privacy rights of all of us.

Mills v. Commonwealth
1999 WL 236404 (Ky.)
(April 22, 1999)
(Not Yet Final)

A Fourth Amendment issue was decided in this capital case. Here, a body was found by a relative and the police were called. The police discovered a trail of blood to the house next door. Blood was present on the walls of Mills' house, as well as the front door and the front porch. The police saw Mills through an open window, told him to remain, went into the house and arrested Mills.

On appeal, Mills challenged the warrantless entry into his home to arrest him. The Court, however, held that there were exigent circumstances eliminating the need for a warrant. The police had reason to believe that Mills was injured, according to the Court, and thus had exigent circumstances to enter into the house without a warrant. The Court further found that following the arrest, Mills consented to the search of the house.

Commonwealth v. Wood
1999 WL 354494 (Ky.)
(June 4, 1999)
(Not Yet Final)

Wood was pulled over for driving on expired vehicle registration plates. A check thereafter revealed that his operator's license had been suspended for driving under the influence. Wood was arrested, and the car was searched, revealing a pipe with marijuana residue in it found in the glove compartment. Wood challenged the search, but lost. The circuit court, however, reversed the decision, holding that under *Clark v. Commonwealth*, Ky. App., 868 S.W. 2d 101 (1994), the evidence had to be suppressed.

The Court of Appeals reversed the Warren Circuit Court, holding that *Clark* was distinguishable. The Court, in an opinion written by Judge Emberton and joined by Judges Buckingham and Huddleston, held that the case was controlled by *New York v. Belton*,453 U.S. 454 (1981). *Belton* had held that when a car was lawfully stopped and the defendant arrested, that the defendant and the car could be searched incident to a lawful arrest. *Clark* was distinguishable, according to the Court, because in *Clark* the stopping was for a minor offense, and the search did not take place for a long time after the stopping. The Court noted that the *Clark* Court had "expressed concern that the search was not genuinely incident to the arrest as it occurred some distance from the vehicle and after the elapse of some forty minutes from the time of arrest. These circumstances convinced the *Clark* court that the safety

(Plain View. Continued from page 23)
and evidentiary rationales for the 'incident to arrest' exception had become so attenuated as to make the exception inapplicable.

In contradistinction to *Clark*, in this case the offense, driving on a suspended license suspended for DUI, was one that commonly results in an arrest. Further, the search occurred immediately after the arrest. Thus, the case more resembled *Belton* and the trial court was reversed.

Cox v. Commonwealth
Ct of App., June 18, 1999, No. 1998 0 CA - 1345 - MR
(not to be published)

This case represents a rare reversal of a trial court's order declining to suppress evidence. Here, Cox and two men were sitting in a car at Cox' home in Louisville when officers approached, investigating a report of gunfire in the area. The police asked him to lower the window, and upon smelling marijuana asked him to get out of the car. The officer observed Cox' eyes as bloodshot, his smell as marijuana stained, and his "attitude" being "real mellow." The officer decided to arrest Cox for public intoxication, and searched him, finding a bottle with 3 pieces of crack cocaine. He was charged with possession of crack cocaine, lost a suppression motion, entered a conditional guilty plea and was sentenced to one year. He was never charged with public intoxication.

The Court of Appeals, in an opinion by Miller joined by Judges Gardner and Schroder, reversed the trial court. The Court noted that the trial court had found probable cause to arrest Cox for public intoxication. This was a fatal mistake. The Court observed that the standard is not whether there is probable cause to arrest for a misdemeanor, but rather whether a misdemeanor has been committed in the officer's presence. "Probable cause is an insufficient basis to make a warrantless arrest for a misdemeanor. *Mash v. Commonwealth*, Ky., 769 S.W. 2d 42 (1989)." The Court then went on to find that there had been no public intoxication committed in the officer's presence. Bloodshot eyes, the smell of marijuana, and a mellow attitude do not a misdemeanor make. Accordingly, the arrest was illegal, mandating the suppression of the evidence seized incident thereto.

United States v. Watkins
179 F.3d 489 (6th Cir.)
(June 10, 1999)

The Sixth Circuit has explored the good faith exception in a case where there was neither probable cause nor adequate particularity. In this case, the FBI failed to identify in their affidavit that an unoccupied house could have cocaine in it. Nor was the unoccupied house identified in the warrant itself. When the FBI executed the warrant, cocaine was found in an unoccupied house located behind the house named in the warrant.

The defendant challenged the seizure of the cocaine saying that the search was illegal because the place to be searched had not been named in the warrant. The defendant also challenged the affidavit because it was not supported by probable cause in that the illegal activity noted in the affidavit was not tied to the unoccupied house where the cocaine was found. The Government argued that the seizure was legal because the affidavit used typical boilerplate language of "all outbuildings and appurtenances..." and that the good faith exception should apply. The district court upheld the seizure, ruling that the affidavit, which included a map noting the unoccupied house, had been incorporated into the warrant.

The Sixth Circuit, in an opinion written by Judges Dowd, Boggs, and Moore, affirmed the decision of the district court. The Court found first that there was no reference to the affidavit in the warrant, and thus the warrant did not identify the place to the searched. However, the Court held that because the affidavit described the unoccupied house that "it was reasonable for the officers to believe that the warrant incorporated the affidavit."

The Court rejected the Government's position that an officer could rely upon another officer's telling him that the unoccupied house could be searched. "Allowing executing officers to search a property not described in a warrant and then to claim good faith based on what other officers incorrectly told them could invite officers acting unreasonably or in bad faith to tell 'innocent' officers to wrongly search a property."

However, the Court again found that the good faith exception applied. "[T]here is no evidence that Agent Parrish gave a knowingly false affidavit or otherwise acted in bad faith; the warrant was issued by a proper authority; there is no evidence that the issuing magistrate judge had abandoned his neutral judicial role; and Agent Parrish had probable cause to believe that the defendant had committed a crime." "[A]lthough the affidavit was not properly incorporated into the warrant and did not, at any rate, contain probable cause to search the second house, the evidence seized during the search was nevertheless admissible pursuant to the good-faith exception in *Leon*."◆

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Short View. . .

Ernie Lewis, Public Advocate

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Court held that where information is provided by an informant and the police fail to write down what is said that this will be interpreted against the position of the state. The Court stated that they could think of no reason why the police would fail to memorialize an informant's statement upon which an affidavit in support of a search warrant is based.

3. *United States v. De La Paz*, 43 F.Supp. 370 (S.D.N.Y. 3/24/99). The police arrest a man with a cell phone. Between the arrest and arraignment, the phone rings. Can the police answer the phone and gain information from that? Is there a reasonable expectation of privacy? Is the cell phone more like a typical phone, or a pager? The District Court for the Southern District of New York answered these questions in a recent case. The Court agreed that the cell phone is more like a pager, and thus De La Paz had a reasonable expectation of privacy in the fact that calls were received and the information arrived at by answering the phone. The Court further rejected the Government's call for an exception to the warrant requirement for cell phones. However, this did not benefit De La Paz, because the Court held that it was per se reasonable for the police to answer the cell phone during the time between arrest and arraignment.

4. *State v. Lark*, 726 A.2d 294 (NJ Super. Ct. App. Div. 3/30/99). The police may not search a car after the driver fails to produce a driver's license or other identification, unless the police have another basis for probable cause.

5. [illegible] — So.2d —, 1999 WL [illegible] (Fla. Dist. Ct. App. [illegible]). While a police officer may order a [illegible] during a traffic stop, and [illegible] *Maryland v.* [illegible]

[illegible] search of the [illegible]

8. *United States v. Davis*, 174 F.3d 941 (8[th] Cir. 4/22/99). It violates the Fourth Amendment to delay presenting an accused before a magistrate in order to conduct an investigation, according to the 8[th] Circuit, even when done without the presumptive window of 48 hours created by *Riverside County v. McLaughlin*, 500 U.S. 44 (1991). "Although *Riverside* only explicitly stated that delays in probable cause determinations resulting from police efforts to justify the suspect's original arrest would be unreasonable, later cases have clarified that this principle applies with equal force to situations where the delay is based solely on police efforts to investigate additional crimes in which the suspect might have participated." The Court ordered the suppression of a statement made during the time of the violation.

9. *United States v. Carey*, 172 F.3d 1268 (10th Cir. 4/14/99). The Tenth Circuit has explored issues relating to the execution of warrants and computers. Here, the police obtained a warrant to search a computer for evidence of drug trafficking. During the execution of the warrant, the police discovered computer files marked as image files. The police opened one and discovered child pornography. The police then downloaded the files, and began to open all of the child pornography files. This exceeded the scope of the warrant and thus violated the Fourth Amendment. The Court rejected the Government's arguments [illegible] plain [illegible]

10. [illegible] (Ga. [illegible]) [illegible] search the jail cell of a [illegible] search is to

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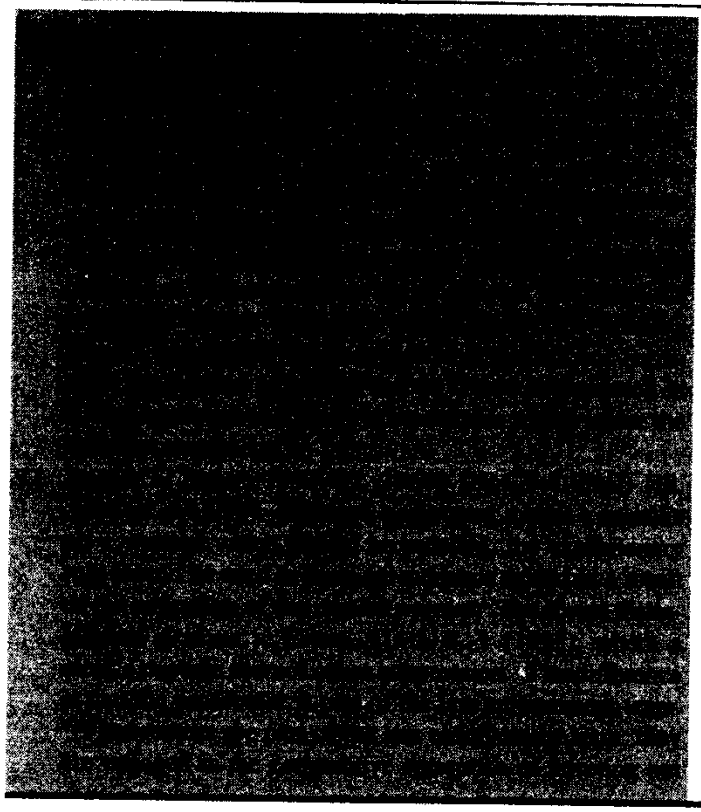

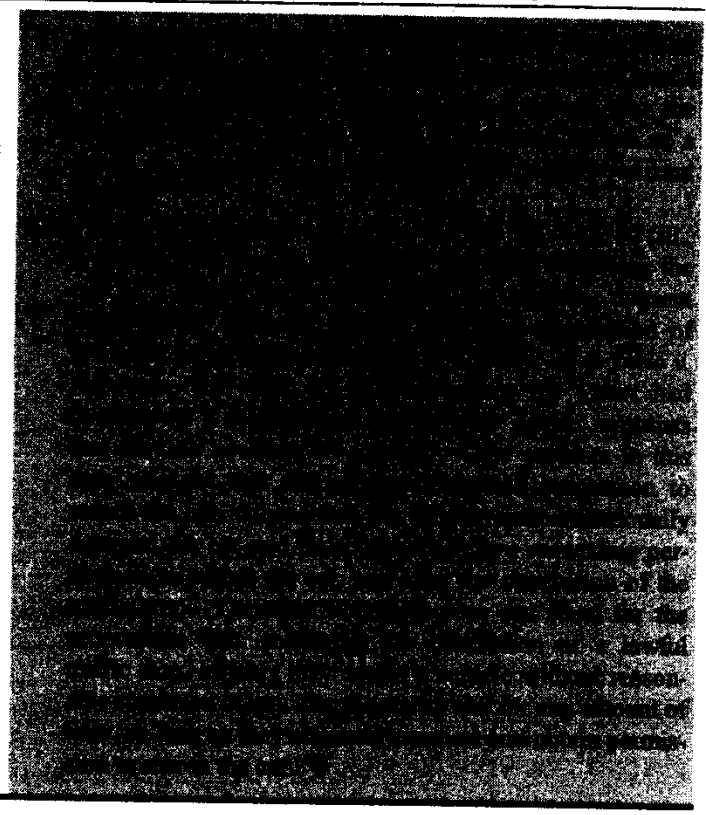

William Mizell, Director of Boyd County Office Retires after 27 Years of Public Defending

It is with mixed emotions that I must inform you of my decision to retire effective July 31, 1999.

I have exceeded 27 years in the retirement system and am leaving behind a career in indigent criminal defense representation that has literally been the entire focal point of my professional existence since law school.

Over the years, I have resisted the advice of many persons who advised me to enter private practice that.. of course, offered the opportunity to earn far more money-I do not regret any career choice however and truly believe that, on the whole, it has been fulfilling and worthwhile.

I will treasure to the end of my life, the experiences I had attempting to protect the rights of the poor and the comradeship working closely with other dedicated professionals like yourself in the never ending fight to serve justice for our clients.

In a sincere effort to provide quality representation to my clients, in Boyd County, with a staff consisting of only 2 lawyers, an investigator and a secretary, I found it necessary to basically forego vacations and any real measurable amount of time off for the past 10 years. I knew that this was unhealthy but our local system demanded constant attention and the confusion created by absences a week or more wasn't acceptable to me. I have to take this step now to ensure that I can at least have some opportunity to relax a little and attempt to rejuvenate myself.

I leave confident that my successor Honorable Brian Hewlett will pick up where I left off and maintain the high standards that I, and all who have worked in this office, have sacrificed for in the past years.

I will always remain dedicated to the principles for which the Department of Public Advocacy and all of the other agencies of the State that perform indigent criminal defense work stand.

Many people, thought the years, have inquired as to "how can you defend those people" or "why don't you go into private practice and make a few bucks." Those type of sophomoric comments didn't affect me when I heard them and they have nothing to do with my decision to retire.

I gave all I had for as long as I could and might have lasted longer with a more level playing field. However, the State and County, both gave generously to my budget and we had everything we needed in my view but manpower.

I wish everyone at DPA the best and will never forget the support and friendship given. It truly has made life worthwhile because this type of system occurs all to seldom in an increasingly cynical world.

Yours truly,

William Mizell

KENTUCKY'S RCR 11.42's: A Farce and Mockery?

Part II: The Inordinate Burden of Proving Ineffective Assistance[1]

by Susan Jackson Balliet, Assistant Public Advocate

Part I of this 3-part series of articles (See May, 1999 issue of *The Advocate*) addressed the first hurdle a defendant must overcome in order to overturn a conviction in an RCr 11.42 proceeding –the obtaining of a hearing. Arguably, under RCr 11.42 a defendant who raises a colorable claim of IAC that is not conclusively refuted by the record should get a hearing. As discussed in Part I, Kentucky courts set the bar for obtaining 11.42 hearings too high, in violation of due process. Part II addresses Kentucky's additional hurdles inside the 11.42 hearing, the burdens of proof.

In 1984 the United States Supreme Court lowered the bar for proving ineffective assistance of counsel (IAC) by announcing that instead of proving counsel rendered the proceedings a farce, henceforth defendants need prove only that counsel failed to render "reasonably effective assistance, considering all the circumstances." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) One might assume that after *Strickland* lower standards of proof would be required in IAC RCr 11.42 hearings. And this is true. Or at least it is half true.

As discussed in this article, there are two separate burdens of proof to overcome in proving IAC, and *Strickland* lowered one of them. Also as discussed, Kentucky –at least initially-- failed to follow *Strickland*. Kentucky's "heavy burden" of proof for IAC, *i.e.*, the requirement in an 11.42 of "clear and convincing evidence" to prove that ineffectiveness occurred is probably still valid under *Strickland*. But Kentucky's other burden, the burden of proving prejudice, is subject to question.

The Burden of Proving Ineffectiveness

Under *Strickland*, to prove IAC a defendant must establish two things, by overcoming two separate burdens of proof. First, a defendant must prove that the attorney was ineffective. Since at least the 1960's, a defendant in Kentucky has been required to present clear and convincing evidence in an RCr 11.42 hearing to overcome the presumption that counsel was effective.[2] "Serious doubt" over whether a defendant has been adequately represented is not enough: a defendant in an RCr 11.42 proceeding has a "heavy burden" and must establish "convincingly" that he has been deprived of "some substantial right which would justify the extraordinary relief afforded by [a] postconviction proceeding." *Commonwealth v. Campbell*, 415 S.W.2d 614, 616 (Ky. 1967); *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968) (where the Court used the word "convincingly" to describe the required manner of proving IAC). As to the first prong, the Court in *Strickland* spoke of a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and stated that defendants must "overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland*, 104 S.Ct. at 2065. Given the dual presumptions affecting IAC proceedings, and given this language, it is doubtful that *Strickland* requires a lesser burden for proving ineffectiveness than the burden of producing clear and convincing evidence.[3]

The Burden of Proving Prejudice.

However, as to the second prong, once a defendant has established that ineffectiveness occurred, the defendant must show only a "reasonable probability" that "absent the error" the verdict would have been different. *Strickland*, 104 S.Ct. at 2068 -2069. And "reasonable probability" is defined in *Strickland* as "a probability sufficient to undermine confidence in the outcome." (Id.) Arguably, this could be as little as a 10% probability. At a bare minimum, *Strickland* states that the burden of proof as to whether attorney ineffectiveness has prejudiced a defendant's case *must be less than a preponderance of the evidence*. Justice O'Connor, writing for the majority, said:

> " ...we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."
>
> ****
>
> The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.
>
> ****
>
> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> *Strickland*, 104 S.Ct. at 2068.

Given the very explicit language in *Strickland*, once a defendant establishes ineffectiveness has occurred, he *cannot* be required to establish prejudice by more than a preponderance of the evidence.

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Unfortunately, when the Kentucky Supreme Court restated the *Strickland* rule in *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1986), it left out the part about "reasonable probability," and recast the burden of proof as to prejudice in a much harsher form, requiring a showing that "but for counsel's 'unprofessional errors,' the result of the proceeding would have been different." *Gall*, 702 S.W.2d at 43. This was a misstatement of *Strickland*. The Court in *Strickland* never used "but for" language. The *Strickland* Court said "absent the error." Under *Strickland*, if there is a mere "reasonable probability" of prejudice, arguably as little as a 10% chance of prejudice, a retrial is mandated. The erroneous language in *Gall* makes it appear that the defense must prove to a 100% certainty that "but for" the error, the result would have been different.

Kentucky trial courts routinely rely on *Gall*, and given the error in *Gall*, Kentucky trial courts are liable to impose the wrong standard in 11.42 hearings and to deny defendants, erroneously, of 11.42 relief. The Kentucky Supreme Court was forced to address such an error only recently, in *Moore v. Commonwealth*, 983 S.W.2d 479, 488 (Ky. 1998), and appeared to concede the erroneous standard, but denied relief on the grounds that "even if we were to conclude the trial judge applied the wrong standard, it is our opinion... that application of the correct standard would have led to the same result." Unfortunately, the Court left *Gall* standing. Unfortunately, like a siren's song, the erroneous language in *Gall* will continue to lure Kentucky trial courts into error.

Due Process/ Equal Protection

Requiring a criminal defendant to meet an improperly high threshold burden in order to get an 11.42 hearing (Part I, May 1999 *The Advocate*) or requiring him to prove prejudice beyond a "reasonable probability" violates the right to due process. *N.S. v. C. and M.S.*, 642 S.W.2d 589, 591 (Ky. 1982) (preponderance of the evidence standard in involuntary termination cases was unconstitutional because it deprives parents of due process of law, remand due to failure of trial court to identify any burden of proof) See also *Santosky v. Kramer*, 455 U.S.745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (statute requiring the state to produce no more than a "fair preponderance of evidence" in order to terminate a parent's right to have custody of her children violated due process) and *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) ("beyond a reasonable doubt" standard was inapplicable, because it might impose a burden the state could not meet due to the inherent uncertainty of psychiatric diagnosis, and "preponderance of the evidence" standard would be too low in a proceeding that might result in damage to reputation or other stigma to the defendant).

The liberty interest of a criminal defendant is substantial, and the stakes can be life or death. The wrong standard for granting an 11.42 hearing or the wrong burden of proof can impose a very high risk of erroneous deprivation. The state has a strong interest in protecting society from criminal behavior. However, the state has an equally strong interest in not locking up or killing innocent citizens. A state's interest in protecting the reputations of criminal defense attorneys could never outweigh a defendant's interest in life or liberty. True, the state has an interest in the cost of spending additional time and state resources (including judicial resources and corrections resources) required in order to grant 11.42 hearings in every case where allegations are not conclusively refuted by the record. But it does not cost a nickel to apply the correct burden of proof in every RCr 11.42 hearing.

The next issue of *The Advocate* will contain Part III on this topic, with practical tips on how to apply Parts I and II at the trial court level.

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[1] Special thanks to Rebecca Diloreto, DPA Post Trial Division Director, and Joe Myers, Post Conviction Branch, for invaluable insight and contribution to this article.

[2] This article addresses only RCr 11.42 ineffective assistance of counsel issues. It should be noted that RCr 11.42 proceedings can also be based on other grounds, including lack of jurisdiction, and voidness of statute. The standard for granting a hearing and burden of proof might vary based on the nature of the grounds that are raised.

[3] Presumptions shift the burden of proof. *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries Mobile*, 114 S.Ct. 2251, 2260, 512 U.S.267 (1994) And there are two presumptions that affect the burden of proof in RCr 11.42 hearings. First, the law presumes counsel to have rendered effective assistance. *United States v. Cronic*, 466 U.S. 648, 658, 80 L.Ed.2d 657, 667, 104 S.Ct. 2039, 2049 (1984) And second, there is a "presumption of regularity" that attaches to final judgments. *Parke v. Raley*, 113 S.Ct. 517, 524, 506 U.S. 20 (U.S.Ky. 1992)

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DEFENDING AGAINST THE DOGS
(Or How to Cross-Examine Fuzzy, The Black Labrador)

By Roger Gibbs, Eastern Regional Manager

More and more often, defense counsel finds that a drug-, arson-, or bomb- sniffing dog is involved in a case. Even small communities like Barbourville have a K-9 unit as part of their police force. With the increasing availability of federal money and the popularity of dogs with jurors, their use will grow. How is the defense attorney to handle this latest development? Using the experiences gained by co-counsel and myself in a tough arson case, I have some suggestions for the defense.

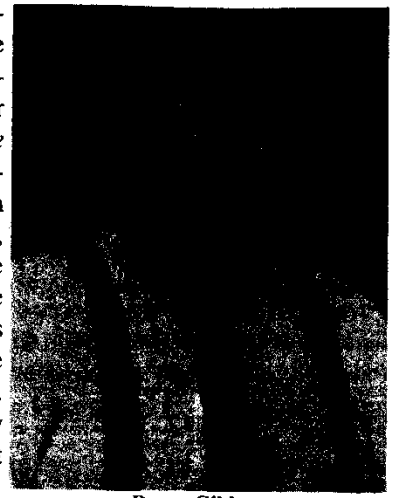
As I begin, the most important advice I offer is to be aware of how your efforts will be received. Our Judge jokingly told us off the record when we were discussing the case, that he owned five dogs. I submit that your jury pool may not be much different.

In dealing with dogs, I suggest that the tried and true formula of making sure the approach fits within the theory of the case, doing the background research, and doing the usual lawyer things, like filing discovery motions, is the best approach. Dogs are really no different than DNA, fingerprints, or any other evidence that will come against your client. They may be better received than other types of evidence, but they are still just that, evidence. An integrated approach to handling the dog is best.

First, the approach to the dog must fit within the theory of the case. For instance, if the claim is that the drugs belonged to the co-defendant and were not your client's, there may be no need to do anything with the dog. If, however, there are issues of search, and the jury appeal is "too much government," the dog may be the central focus of your efforts. Nancy Hollander, a former NACDL President and a teacher of mine at the National Criminal College, proudly speaks of retiring three drug dogs. All three were retired because Nancy showed they sniffed *too well*. Although it is not the usual line of attack to show that evidence is "too good", it has been successful for her. All of the dogs were handled in the context of the cases she had and her theory of the case. How you diminish or reduce the effect of dog evidence is not as important as doing it. I suggest it cannot be done outside the context of theory of the case.

The second step is doing the background research. Just as those of us who diligently avoided college biology classes find ourselves studying biology materials when we have a DNA case, when working on a case involving canine sniffers, we must read background materials on dogs. Fortunately, many law enforcement experts have written books and articles about dogs as a law enforcement tool. Although frequently written from the point of view of how great an addition to law enforcement they are, they also draw pretty high standards for using dogs. This can be a gold mine of cross-examination questions.

For example, in our arson case one of the better books we found was *Sniffing the Ashes, K-9's in the Fire Service*, by William H. Whitstine, Jr. It was published in 1992. It details the development of the dog program in his state. Chapter Five, *The Canine On The Scene*, was a source of wonderful cross-examination questions. For example, the author talks about the importance of having the dog on the scene as soon as possible even while the fire is still being extinguished. He discusses the necessity of protecting the dog's feet from burning while it is still hot to walk on by using pads. He talks of searching the crowd with the dog, and of making sure that the dog is there for the removal of each layer of debris to help avoid the effects of "sinking" and "pooling". In our case, the rest of the "team" had completed their work and the dog was brought in on the fourth day after the fire. All layers had been removed, and obviously there was no crowd to work.



Roger Gibbs
Eastern Regional Manager

Our approach was to say that the dog added nothing because the investigators did not properly use him. This was not the dog or the dog handler's fault: It was the fault of the arson investigation team, the same team responsible for all of the other "problems" in the case. This was our theory of the case, and I believe our approach effectively negated the dog evidence. In closing argument, he was barely mentioned by the prosecutor, who only said that the dog confirmed what the other investigators already had found. Because the dog's evidence essentially conceded what we had proven, the dog added nothing to the case.

Finally, the third step is to do what we do best as defense attorneys: investigate fully and litigate when necessary. Part of the investigation must be an inquiry into the qualifications and certifications of the dog and handler. The defense attorney must view the dog in the context of a team. What the dog and handler have done together is critical and must be documented. Any gaps in the records must be part of the treatment of the dog. It is not the dog's fault that he or she was not certified in a timely manner, but somebody should answer for that. The records may show that a full frontal assault on the dog's qualifications is not the route to go. Only thorough investiga-

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tion will answer that question. This may lead to a *Daubert* hearing.

A sample discovery motion follows this article. It may give you some ideas about things to ask for in dog cases. As with any motion, it is really only a place to start, and should be tailored to the specific case. The answer may lead to other motions for exclusion, further investigation, your own expert, or some changes in the theory of the case. I suggest it start with basic discovery.

In closing, I suggest that dogs are really nothing new for us as criminal defense attorneys. They are just one more tool the government is using to try to secure convictions. Although by their nature, they may be better received by the jury than other evidence put forth by law enforcement, they can still be negated. We just have to settle in and do what we do best: be smart advocates for our clients.◆

In writing this article, I want to thank my co-counsel Jim Norris and Dennis Burke. I also want to thank our interns from Washington and Lee University Patrick McCormack, Jamie Slagle, Lee Dunham, and Mike Pidgeon. Finally, I want to thank Larry, who I had the honor of representing. This article is a summation of the experiences we went though in the case. I hope our experience aids someone else in his or her efforts.

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Commonwealth of Kentucky
Circuit Court
Indictment No. 99-CR-

Commonwealth of Kentucky — Plaintiff

Vs

Joe Houseburner — Defendant

Motion for Discovery on Accellerant Sniffing Dog

Comes now the Defendant, by Counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution, Sections, Seven, Eleven, Sixteen, and Seventeen of the Kentucky Constitution, all applicable statutes, Rules of Criminal Procedure, Rules of Evidence, and all other authority whether cited or not, and hereby moves this Court to enter the attached discovery order. In support of this motion, the defendant states as follows:

1. He stands charged with arson.

2. The Commonwealth has provided partial discovery in this case, which includes references to the use of an accelerant-sniffing dog.

3. In one of the references for arson investigation, *Basic Tools and Resources for Fire Investigation: A Handbook by the Federal Emergency Management Agency and U. S. Fire Administration*, we found the following statement:

> "As a tool, their [the canines'] effectiveness is limited by their training and abilities of the trainer, handler, origin, and cause investigator. law enforcement agency, forensic laboratory, and prosecutor responsible for investigating and prosecuting the case."

4. In order to fully investigate this case, the defendant needs the following records:

   a) Any and all records concerning this particular dog, its handler, and their training as a team, including their training in the function of accelerant detection, their training history, the dog's education, and the dog's medical history;

   b) Copies of any and all records of the dog and handler's training, fire scene experience, and laboratory results of any samples sent in for hits made by the team;

   c) The daily training schedule followed by this dog, and whether or not this dog has met ATF training and certification requirements;

   d) Any and all records indicating a positive reaction by the dog to a sample, which was later ruled to not be an accelerant or cause of the fire;

   e) Any and all records concerning how the dog was made part of this case investigation, including when the dog was first brought into the case. Also identification of any samples sent for testing that were alerted by the dog;

   f) Any and all records or indications concerning whether or not this dog can differentiate between accellerants and vapors from plastics and paints;

   g) The kennel or source of the puppy that was trained in this case, and any information about anyone who may have participated in the training of this dog;

   h) Copies of any and all departmental or organization policies, rules, directives, memos, and documents regarding operation of the dogs, as well as any certifications by any organization for the Department or the dog or handler;

   i) Any and all news articles, recordings, or videotapes about the dog or its training;

   j) Any and all departmental or organizational policies or rules concerning certification and the frequency of certification or testing.

   k) Any and all information about the dog's primary reward.

   l) Any and all documentation about the specific training for this dog including training aids, specifically including the chemical composition, purity, and differentiation of accellerants.

   m) Any and all departmental or organizational policies concerning the minimum standards for training proficiency for arson sniffing dogs.

5. Since the arson team used the dog to reach its conclusions concerning the fire in this case, the defendant is entitled to all information underlying the opinion. Under RCr. 7.24, KRE 702, KRE 703, KRE 705, the state and federal Constitutional guarantees of effective assistance of counsel, cross examination, and a fair trial, the defendant is entitled to all information requested. The dog's opinion is no different than that of any other expert; hence all foundation information is discoverable.

Wherefore comes now the Defendant and moves the Court to enter the attached order.

Respectfully submitted,

_____

Counsel

ROCK SOUP, COLLABORATION AND OTHER CONSIDERATIONS

by Tim Shull, Assistant Public Advocate

In the Juvenile Post Dispositional Branch (JPDB) we often file petitions for writs of habeas corpus for our clients. The other day, while preparing a petition for K.J.M., I remembered the old childhood story of "Rock Soup" (several variations). You may recall that in the story the three soldiers came to town at the end of the war. They were hungry, tired and without any money or food. The townspeople weren't much better. And they were suspicious. The most clever soldier of the bunch (probably a lawyer after he mustered out) convinced the townspeople that he could make a wonderful soup from the three stones he had in his pocket. First he got the towns people to loan him a great big cauldron of water, and he started cooking the rocks. Then, he slowly cajoled other items from the people to "help" the soup. The town's people slowly donated some of the things they had on hand: potatoes from one, onions from another, and so on. Before anyone knew it, they had all made a wonderful, hearty soup. And they had all become friends.

K.J.M. was in a bad spot. Unfortunately, his legal situation repeats itself all too often in the Kentucky Juvenile Courts. Over a period of eight months, K.J.M. appeared in Juvenile Court at least five times. At every appearance, K.J.M. admitted to charges, had a formal disposition, or the court found him in contempt. The only time K.J.M. had a lawyer in court was at his last appearance when the district judge committed him. Members of the JPDB often brief this "no lawyer" issue in petitions for writs of habeas corpus. I borrowed two of these petitions from my colleagues, and began to draft K.J.M.'s petition. More Rock Soup. But there were more problems with K.J.M.'s case.

All those times K.J.M. went to court, the system also forgot to follow several different sections of the Kentucky Juvenile Code. K.J.M. had had two dispositions, and no written dispositional report had ever been ordered or tendered. K.J.M. never waived these written reports, and he never had a lawyer to advise him on it. What to do?

In *Brown v. Commonwealth*, 911 S.W.2d 279 (Ky. App., 1995), the Kentucky Court of Appeals held that, by failing to follow the six day time limit for a preliminary hearing under the Kentucky Mental Inquest Statute (KRS 202A.071), the government violated Section 2 of the Kentucky Constitution by continuing to hold and prosecute petitioner Carl Brown. *Brown* turns out to be a wonderfully broad case supporting Section 2 protections. So, taking all the dispositional problems, and several other problem areas in K.J.M.'s case, I argued that each of the individual problems alone constituted reason to sustain K.J.M.'s petition under the *Brown* Section 2 analysis.

DPA people helped me figure out several of the Section 2 violations in K. J. M.'s case. Appellate Branch Attorney, Richard Hoffman, said, "Sounds like double jeopardy to me. Use Cooper's *Kentucky Instructions to Juries*." More rock soup. Joe Meyer, of the Post Conviction Branch, said "All these problems. Sounds like cumulative error to me. Let me give you some cumulative error research." More rock soup! Some more advice from JPDB colleagues and a final edit from Gail Robinson, and we filed the petition. The circuit court released K.J.M. He's now home with his family. Rock soup, collaboration, and other considerations.

Other Considerations: Everyday, I am thankful that I work for DPA. I think that no one could find any place where people are more willing to give time and advice to their colleagues than in the Kentucky DPA family. All of us at the JPDB are always happy to get telephone calls, facsimile messages, and e-mails from anyone wanting information about juvenile cases. Please let us know if you'd like a copy of the K.J.M. petition for a writ of habeas corpus or any of our other petitions. [Special thanks to law clerk Lisa Hayden who also knows how to make Rock Soup.]◆

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Protecting Freedom

The following article is a speech given by Mark Stanziano at the 27th Annual Public Defender Education Conference held June 1999 in Louisville, Kentucky. Mr. Stanziano was speaking on behalf of the Kentucky Association of Criminal Defense Lawyers.

A couple of years ago, I remember Ronald Goldman's father being in Lexington to pitch his case for a dismantling of the current Bill of Rights, in so far as it afforded due process protections to those in our society whom the government would imprison or kill, in favor of establishing a "Victims' Bill of Rights." At the time, white outrage at the verdict in the criminal half of the O.J. Simpson case sparked another in a long series of debates regarding the legislative evisceration of the rights of a citizen-accused to have a fair trial. Some of the proposals made during these debates sought to limit an accused's right to the effective assistance of counsel by (1) limiting access to counsel and, (2) limiting the extent to which counsel could, thereafter, assist the accused.

In speaking to you tonight about the Kentucky Association of Criminal Defense Lawyers, I'd like to take a brief look at the cornerstone of due process for an accused, the right to counsel. To truly understand what that right is all about, you must first

(Continued from page 32)
come to know the true believers who bring the Bill of Rights alive and make it meaningful for us all.

Most of us, that is to say most criminal defense attorneys, are "drawn" to the practice of criminal law. Many of us have been lured, seduced or enticed into this most noble of specialities by the long and varied history of those who have preceeded us in the law and we are attracted by the personalities of some of the criminal law's giants.

Orators like Cicero, Daniel Webster, and Clarence Darrow; courtroom gladiators such as Earl Rogers, Max Steuer, and Edward Bennett Williams; and, enchanters like Earl Stanley Gardner, John Mortimer, and Gerry Spence continue to fascinate and motivate us.

The true believers are pulled into the swirling waters of this field by the realization that their necessity is born of a society's efforts to make itself, first, free, and then, safe. The existence of the criminal defense attorney is necessary to preserve and protect the freedom of entire societies and, without them, no one in a society can be truly free.

The criminal law has existed from the time of the Sumerian Code of Lipit-Ishtar and has evolved thorough the codes of Hammurabi and Justinian. It has been re-defined in terms of personal liberties within the framework of the Magna Carta and the Constitution of this great land. It has been limited through our Bill of Rights.

During nearly all of recorded history, the most enlightened cultures of the ages have insisted upon the right of the citizen accused to defend himself in one manner or another. The natural outgrowth of this right was the emergence of those individuals who would stand in the stead of the accused in order to argue for her innocence, freedom, or both. Throughout history, criminal defense attorneys--in one form or another--have stood as "protector," "advocate," and "last, best hope" under these laws for those who could not stand for themselves.

The defense attorney has, from the earliest times, become part of humankind's most notable, and sometimes notorious, spectacles. They have fought to protect "witches" in Salem, and, at least one man, Jabez Stone, from the Devil himself. They defended both the great Galileo and Mr. Scopes' monkey from the darkness of the times, and fought for the lives of Germans who fought to take ours when their genocidal and racist atrocities were thrown open to the light of day in Nuremburg.

A criminal defense attorney, John Adams, defended British soldiers after a "massacre" in Boston; just as Gerry Spence defended a modern day American "soldier" after the "massacre', at Ruby Ridge. Defense attorneys were there to try to save Sacco and Vanzetti; Leopold and Loeb, Bundy, Gacy, and Bruno Richard Hauptman though they were reviled in these cases for doing so.

Criminal defense attorneys defended Captain Kidd and Lieutenant Calley. They have stood up for, and before, leaders of state, royalty, emperors, dictators, and even God; as when Cicero argued the innocence of Deiotarus of Galatia, against a charge of trying to assassinate Julius Caesar, before Caesar himself. They have defended those who conspired to assassinate presidents and those who, themselves, killed presidential assassins. They have spoken on behalf of those who would have toppled countries through acts of treason as well as John Peter Zenger who was accused of sedition but was no traitor.

They have faced down ridicule, personal and financial ruin, excommunication, death, and, in some instances, the loss of their very souls in order to defend those whom society and its leaders would have damned without hearing.

True believers are drawn into this profession of service by their belief that those who have gone before have bequeathed a legacy to those who would come after. It is a legacy of courage, of selflessness, and of honor. It is a legacy which, like Excalibur, can only be entrusted to those who dare to defy convention and to do what conventional wisdom says could not, or should not, be done. It is a legacy which demands that its mantle be worn with pride.

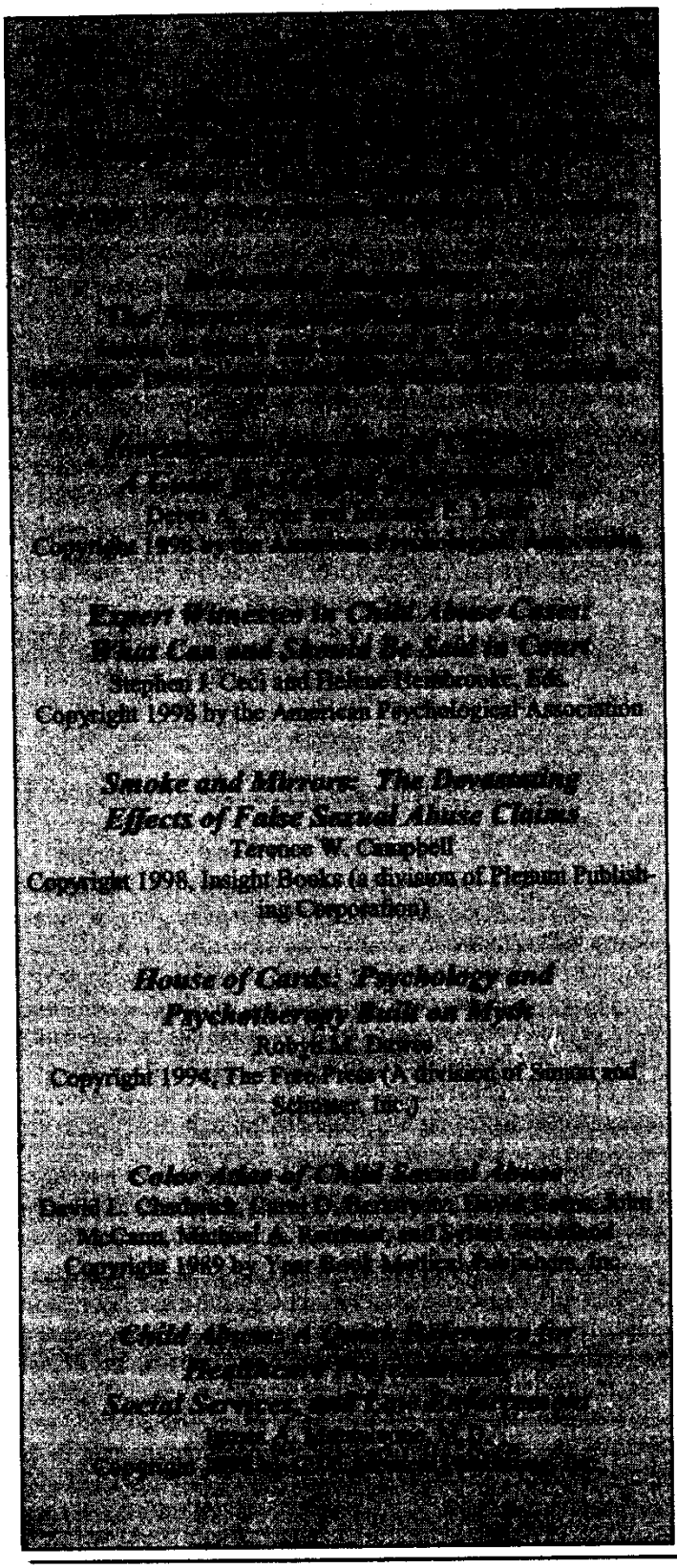
Over the course of time, the civil law, in its quest for economic justice, seems to become more unfair with each new legislative "reform." Defending the citizen-accused remains the last, true practice of law in the classical sense.

And, to Mr. Goldman and those like him--who continue to try to whittle away at the cornerstone of due process--we, who have accepted the challenge of committing our energies to defending the lives, property, and freedom, of the people whom society would deprive of these precious gifts, respond that we will not allow this cornerstone to be destroyed; either in the name of "reform" nor in the name of "victims' rights." Forgetting that no one can be a "crime victim," *unless and until* proof beyond a reasonable doubt that a crime has been committed is found, endangers the freedom of everyone in society. Worse, allowing convictions to be secured in the absence of due process, including a meaningful right to *the effective* assistance of counsel, makes "victims" of us all.

I appear before you to tonight to ask if you are a true believer, descended from a long line of true believers, and to invite. . .no, urge. . .those of you who are, to join more than 350 of your brothers and sisters-in-arms as members of the KACDL. Together, we will continue to make a difference for thousands of Kentuckians who stand accused and who face the imminent loss of their property, their freedom, and their lives. Together, we will earn the right to the richness of our inheritance. Together, we will heard it said of us: They saw wrong, and righted it; they saw suffering and stopped it, they saw injustice and freed us from it.◆

An Express Train[1] for Child Sex Abuse Cases: What All Defenders Should Have, Read and Know[2]

by Mark Stanziano



At the 1999 DPA Annual Public Defender Conference, I spoke on a number of topics related to the defense of the person who is accused, in one form or another, of child sex abuse. During one talk, I referenced various works which, in my opinion, should be read and frequently referenced by attorneys who find themselves embroiled in these awful cases. Following the conference, I was asked to "do a short *Advocate* piece" on the works I discussed. I believe that what follows may be of benefit to both short and tall advocates, alike.

In defending a child sex abuse case (CSA), it is incumbent on the defense attorney to understand certain scientific principles and precepts. For example, the suggestibility of young children, "normalcy" in ano-genital medical examinations, and how people can come to believe things that are not factually accurate, are but three matters upon which much research has been conduced and for which scientific principles have been developed. Also, counsel needs to have more than a passing familiarity with terms such as "confirmatory bias," "inter-rater reliability," "diagnostic sensitivity," "diagnostic specificity," "confabulation," and "recovered memory"[3] or there is simply no way counsel is competent to handle these cases.

Of course, having said that, I will now be bombarded with anecdotal accounts by defense attorneys, both public and private, who will say to me, "Why, I have been defending these cases for years and I've never even heard of that psychological mumbo-jumbo. I do pretty well. Why, I even got an acquittal in the last case I tried. I don't need to learn all of this nonsense to do my job. And, who are you, anyway, to tell me that I'm not competent?" To these folks I can only respond by saying the following three things:

With regard to your last great trial victory: *Even a blind squirrel finds a nut now and then.*

With regard to your unfamiliarity with, and disdain for, social science research: *Why would you **willingly** forego an entire body of research which, on the whole, can make your job easier, result in more victories **and** make you a better lawyer?*

With regard to my credentials: *I have been where you are now; wondering whether I should take the time to study the science in order to be able to separate the myths from the reality in these cases. I decided that these cases had to be fought on a plane that was different than that dictated by the police, the social workers, and the prosecutors. I can tell you that you're not competent because, looking back, I can see that **I** was not competent.*

(Continued from page 34)

I understand that, the truth is, some people just seem to do well in this business without ever learning anything new. Fortune smiles on these people and Luck, companion and protector of children and fools, alike, guides their day-to-day professional efforts. If you are one of these people, your luck is, eventually, going to run out; sooner or later the dice come up craps. When that happens, expect the worst for you and your client. Moreover, on the odds, you are **not** one of these people.

Still, for the rest of us, taking the time to understand the science, the myths and the realities behind the allegations of abuse, as well as investigations into those allegations, will help us be stronger advocates, more powerful persuaders and increasingly ferocious warriors for our clients. For the rest of us, hard work and constant preparation will produce luck just as surely as wood and heated air produce fire. For the rest of us, understanding that learning is a lifelong process and that knowledge is power, ensures that we will never give our opponents our tacit permission to beat us in court. For us, I offer the following assistance.

Child Abuse-Related Case Law[4]

The following cases ought to be read and understood by defense counsel. The principles set out in these cases can be applied in a number of situations.

Idaho v Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Incriminating statements, admissible under the exception to the hearsay rule, are inadmissible under the confrontation clause unless the prosecution produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use and unless the statement bears "adequate indicia of reliability." Reliability requirement can be met where the statement either falls within a firmly rooted hearsay exception or is supported by a showing of particularized guarantees of trustworthiness.

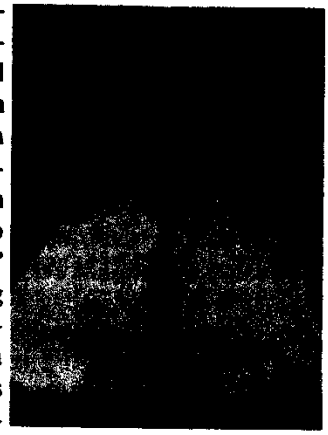
Coy v Iowa, 108 S.Ct. 2798 (1988). Confrontation Clause provides the right to "confront" witnesses face-to-face. The placement of a screen between the defendant and the child witness, therefore, violated the defendant's right to confront his accuser.

Section 11 of the Kentucky Constitution states, "In all criminal prosecutions, the accused has the right ..... to meet the witnesses face to face...."

See, ***Commonwealth v Willis***, 716 S.W.2d 224 (Ky. 1986) and ***George v Commonwealth***, 885 S.W.2d 938 (Ky. 1994).

But, see, ***Maryland v Craig***, 497 U.S. 836, 110 S.Ct. 3157 (1990). Confrontation Clause did not categorically prohibit child witnesses from testifying outside defendant's physical presence by one-way closed circuit television but, the finding of such necessity is to be made on a case-by-case basis.

Daubert v Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Evidence rule 702 places appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. An expert's testimony must pertain to "scientific knowledge." "Scientific" implies a grounding in science's methods and procedures. "Knowledge" connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds.



Mark Stanziano

Daubert has been fully incorporated into the Kentucky law of evidence. ***Mitchell v Commonwealth***, 908 S.W.2d 100 (Ky. 1995), [DNA]; and, ***Stringer v Commonwealth***, 956 S.W.2d 883 (Ky. 1997) [judicially engrafting FRE 704 into Kentucky's Rules of Evidence. An expert **may** give an opinion on the ultimate issue in the case]

Collins v Commonwealth, 951 S.W.2d 569 (Ky. 1997). *Daubert* is applicable only to testimony of a scientific nature. This case will probably be overruled in the near future because of the United States Supreme Court's recent decision in ***Kumho Tire***.

Kumho Tire Company, Ltd. v Carmichael, ____ U.S. ____, 119 S.Ct. 1167 (1999). *Daubert* analysis under Rule 702 does not distinguish between "scientific," "technical," or "other specialized" knowledge. This gives to all expert witnesses a testimonial latitude not accorded to other witnesses. The *Daubert* gatekeeping responsibilities of the judge apply to *all expert testimony* not just to scientists.

State v Michaels, 136 N.J.299, 642 A.2d 1372 (1994). The preeminent case dealing with the concept of "taint hearings." 'Nuff said.[5]

State v Kelly, 456 S.E.2d 861, (N.C. 1995). Discovery violations, and improper lay opinions.[6]

Tome v United States, 513 U.S 150, 115 S.Ct. 696, 130 L.Ed. 2d 574 (1995). A prior consistent statement introduced to rebut a charge of recent fabrication, improper influence, or improper motive is only admissible if the statement was made prior to the time the alleged fabrication, influence or motive came into being and, otherwise, is inadmissible.

(Continued on page 36)

(Continued from page 35)

Fields v Commonwealth, 905 S.W.2d 510 (Ky. App. 1994); and, ***Smith v Commonwealth***, 920 S.W.2d 514 (Ky. 1995). State law counterparts to ***Tome***.

Pennsylvania v Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Defendant's rights under 6th and 14th Amendments can require a trial judge to make an *in camera* inspection of child services records which would otherwise be confidential.

Commonwealth v Lloyd, 567 A.2d 1357 (Pa. 1989). Pennsylvania Supreme Court has ruled that the ***Ritchie*** analysis does not apply under state constitutional law because it is insufficient to protect a defendant's rights under the confrontation and compulsory process clauses. Realizing that the Kentucky Constitution is based upon the Pennsylvania Constitution, this case and its reasoning may be particularly applicable here.

Anderson v Commonwealth, 864 S.W.2d 909 (Ky. 1993). Where trial judge conducts *in camera* inspection and fails to disclose information which defendant had a right to know (discoverable or exculpatory), it is reversible error.

See, also, KRS 620.050(d). Statutory right of an accused to CFC records.

Kyles v Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The most important pretrial discovery case since ***Brady***; imposing on prosecutorial authorities the duties to ferret-out exculpatory information and to provide it to the defense.

United States v Whitted, 11 F.3d 782 (11th Cir. 1993). An examining physician's opinion that findings are "consistent with" history of sexual abuse given by complaining child is admissible. However, vouching for the child's truthfulness or diagnosing "sexual abuse" is not permitted.

McNamara v United States, 867 F. Supp. 369 (E.D. Va. 1994). Failure of trial counsel to conduct an investigation into either the law or the facts can be ineffective assistance of counsel. Counsel must have some way to keep up with changes in the law.[7]

State v Gersin, 76 Ohio St. 3d 491, 668 N.E.2d 486 (1996). A defendant in a child sex abuse case can present expert testimony as to the proper protocol for interviewing child victims regarding their abuse.

However, see, ***Stringer v Commonwealth***, ***supra***, where that issue was decided differently in Kentucky. Given the decision in ***Kumho Tire v Carmichael***, *supra*, this issue may be decided differently now.

Kansas v Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Kansas' Sexually Violent Predator Act is constitutional.

Kentucky does not have such a law yet. However, it is expected that two such bills will be introduced and debated in the 2000 General Assembly.

Books and Other Publications with which to be Familiar

1. Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony

Stephen J. Ceci and Maggie Bruck

This is "the Bible" for lawyers handling CSA cases. All of the relevant social science research (through 1994) is reviewed and conclusions are made; all supportable by the research. The book is neither pro-defense nor pro-prosecution. It takes a scholarly approach to the issues involved in many–if not, most–CSA cases and comes down on the side of truth.

In assessing the relevant research, the authors reference seven case studies: (1) the Salem witch trials; (2) the Little Rascals Day Care case (***State v Kelly***, *supra.*); *(3)* the Kelly Michaels case (***State v Michaels***, *supra*); (4) the Old Cutler Presbyterian case; (5) the Country Walk Babysitting Service case; (6) The rape on Devil's Dyke case; and, (7) the Frederico Martinez Macias case. Against these factual backdrops, the authors evaluate the issues of the prevalence and statistics on child abuse; memory and suggestibility; the dynamics of structured and therapeutic interviews of children; repressed memories; age differences in reliability of children's reports; and proper guidelines for the interviewing of children.[8] The authors wrote the amicus brief which was quoted by the New Jersey Supreme Court in the ***Michaels*** decision, referenced above.

2. Believed in Imaginings: The Narrative Construction of Reality

Joseph de Rivera and Theodore R. Sarbin, Eds.

The subject of this book is quite simply: How we may come to believe in the reality of phenomena that spring from our imaginations and the function of imaginings in our emotional lives. Though, I suspect, we rarely think about it, concepts such as *imagining*, *believing* and *remembering* are definable. The parameters of the definitions of those terms explain how it is that we can believe in something that we have only imagined.

Frequently, we are confronted in a CSA case with the question, *"If the allegation is not true, why is the child saying it?"* The answer, which may be nothing more complicated than,

(Continued from page 36)

"Because the child believes it," may tell us nothing of primary importance and may, ultimately, spell doom for our client with the jury. Perhaps in our efforts to redefine the issue and, hence, shape the trial, the question is better put, *"How can this child have come to believe this story is true in the absence of a basis in fact for the story?"* The various authors in this work provide some answers that we can explore and build on in our own cases to create theories and themes which will resonate as the truth to the jury.

3. *Investigative Interviews of Children: A Guide for Helping Professionals*

Debra A. Poole and Michael E. Lamb
Copyright 1998 by the American Psychological Association.

We are rarely provided with audio or video tapes of investigative interviews with child complainants in a CSA case. However, when we do get them what do we do with them? How do we know if an interview has been done properly? If the interview has been done improperly, what can we make of that in the process of defending against the accusations which came from the poorly-conducted interview? How should we conduct interviews if we have an opportunity to do so?

Poole and Lamb, both developmental psychologists, provide guidelines for interviewers based on the latest social science research. They also present a flexible interview protocol which can be tailored to fit the particularized needs of each case. They also discuss language development and its impact on the interview process. With a knowledge of what *should* be done and–more importantly–*why*, we can better understand the shortcomings of the interviewers in our cases.

4. *Expert Witnesses in Child Abuse Cases: What Can and Should Be Said in Court*

Stephen J. Ceci and Helene Hembrooke, Eds
Copyright 1998 by the American Psychological Association

Given the ***Daubert*** and the ***Kuhmo Tire*** decisions referred to, above, the title of this book says it all. In this work, lawyers, psychologists, and social workers discuss the vexatious aspects of testimony and provide advice on the proper scope of expert testimony. The authors include discussions of the uses of expert testimony, the ethical standards to which psychologists who serve as experts should adhere, the kinds of evidence most offered in CSA cases, the admissibility of such evidence, the effects of this evidence on jurors, and, in the end, the authors provide analysis in an effort to achieve a sort of consensus of what constitutes ethical testimony.

The book is important to us in two respects. First, it helps us to see and understand when the expert against us is not being forthright and ethical. Second, it helps us guide our own presentations so that our experts do fall victim to the same sorts of criticisms.

5. *Smoke and Mirrors: The Devastating Effects of False Sexual Abuse Claims*

Terence W. Campbell
Copyright 1998, Insight Books (a division of Plenum Publishing Corporation)

How do false allegations occur? The usual situation is that a claim originates with a vague, ill-defined statement by a young child. Well-intentioned, but terribly misinformed, adults misinterpret these ambiguous statements and conclude that the child has been sexually abused. In response to the adult's misinterpretations, the child undergoes numerous interviews. The sheer number of the interviews and the biased nature of the interviewer leads the child into describing things which never occurred. The child, then, finds himself in therapy where the therapist further contaminates what he thinks and remembers. The combined effects of this spiral can result in innocent people facing criminal charges and parents losing their children.

Dr. Campbell provides a number of cases detailing the false allegations of CSA and the issues raised in those cases. The DPA employee will enjoy reading Chapter 4 which details a case handled by Carolyn Clark-Cox, now of the Somerset field office.

Dr. Campbell discusses rumors and how false allegations grow in the same way rumors grow; interviewing children properly; the need for videotaping of interviews; fabrications; play therapy; repressed memories, "imagination inflation;" and, many other topics of professional interest to those of us who defend "perps." He provides an excellent basic understanding of how and why children can come to make such allegations as well as a lethal source for cross-examining everyone in the chain of contamination, from the parents of the complaining kids to the therapists.

6. *House of Cards: Psychology and Psychotherapy Built on Myth*

Robyn M. Dawes
Copyright 1994, The Free Press (A division of Simon and Schuster, Inc.)

Dr. Dawes takes on psychology and psychotherapy in a marvelously readable, and thought-provoking book. He explores common beliefs and "understandings" within these fields and reveals that the emperor is wearing no clothes. For example, he shows that Rorschach tests are nonsense; that greater clinical experience has nothing to do with being a better therapist; statistical analysis is a better indicator of a person's future behavior than clinical expertise; and, how fraudulent claims of psychologists in court pose a real threat to the justice system. Simply because of the style in which it is written, it is a worthwhile read.

7. *Color Atlas of Child Sexual Abuse*

David L. Chadwick, Carol D. Berkowitz, David Kerns, John

(Continued from page 37)
McCann, Michael A. Reinhart, and Sylvia Strickland
Copyright 1989 by Year Book Medical Publishers, Inc.

Very simply, if you handle CSA cases and have never seen color pictures of the ano-genital areas of children who have, and have not, been abused, then how would you know what to look for if, in your next case, you received such photographs in discovery? How would you know if the state's expert actually saw something that was indicative of abuse or if she saw something that was common to non-abused children? The fact is, you wouldn't. Therefore, this reference tool should be in every library.

The authors break down their Atlas into four sections. The first is just the techniques of conducting physical examinations of the children. The second section shows normal findings. The third section illustrates positive findings from non-sexual sources. The fourth section depicts findings that commonly result from sexual abuse. The differences are important and can mean the difference between jail and freedom for our clients.

8. *Child Abuse: A Quick Reference for Healthcare Professionals, Social Services, and Law Enforcement*

James A. Monteleone, M.D.
Copyright 1998 by G.W. Medical Publishing, Inc.

This volume is also a quick reference for us in defending allegations of abuse. This work does not limit itself to sexual abuse, but deals pictorially with physical abuse of all kinds, as well. It shows us what the "other side" is looking for when it is looking for signs of abuse. We are well advised to remember that abuse does occur; with some regularity. We need to remember that when abuse does occur it has a face and fingerprints. This book can help us to identify the faces and the prints.

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It is important to remember that the above-described cases and books do not constitute an exhaustive list. This is not a "laundry list" of reading which guarantees that counsel will be effective. We have an obligation to constantly update ourselves in order to provide the highest quality defense we can for our clients. There are many other cases and volumes that I have not dealt with in this article. Perhaps I will be able to update this list in the future. Perhaps, readers will be able to do that themselves after reading some of the works, above, and there will be no need for me to do so. In either case, we can all become better "trial artists" by taking the time to improve ourselves.

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[1] From C.H. Spurgeon, *Gems from Spurgeon*, (1859): "If you want a lie to go round the world, it will fly; it is as light as a feather, and a breath will carry it. But, if you want truth to go round the world, you must hire an express train to pull it."

[2] The author, Mark J. Stanziano, is a private attorney in Somerset, Kentucky, who limits his practice to criminal defense. He is President of the Kentucky Association of Criminal Defense Lawyers, a member of the Kentucky Criminal Justice Council and a long-time friend of the D.P.A.

[3] To name but a few!

[4] With apologies for the, sometimes rather incomplete, citations.

[5] The opinion in the New Jersey Supreme Court case is important. The opinion by the intermediate appellate court is just as important. For that opinion, see, 264 N.J.Super. 579 (1993). Additionally, the brief filed on behalf of an amicus group, the Committee of Concerned Social Scientists, is extraordinary and is **a must read** for anyone defending these cases.

[6] ***Michaels and Kelly*** are two of the most famous–and, in all probability, infamous–child sex abuse cases in the history of the United States. Both involved day care situations where numerous allegations were made against staff/owners of the day cares. Both defendants were convicted, their sentences were set aside and new trials were ordered. Both are free today.

[7] Specifically, this case dealt with counsel's failure to know that a particular issue in his case had been accepted on a petition for *certiorari* by the United States Supreme Court.

[8] The issues listed are not exclusive.

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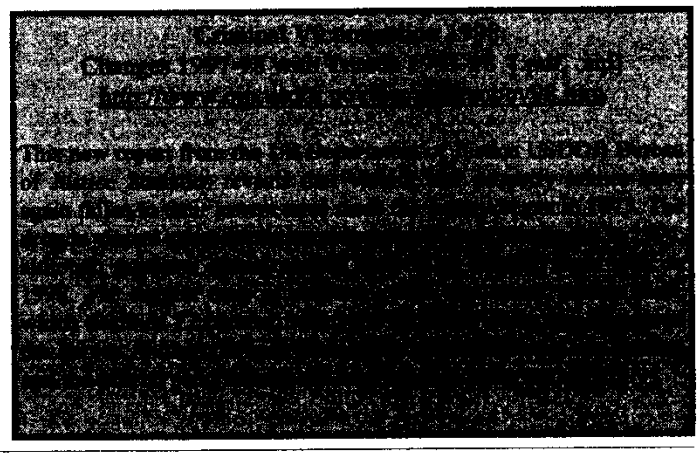

Capital Case Review

Julia K. Pearson, Paralegal/Law Clerk

UNITED STATES SUPREME COURT

***Jones v. United States*, 1999 WL 402258 (decided June 21, 1999)**

Majority: **Thomas (writing), Rehnquist, Scalia, O'Connor, Kennedy**
Minority: **Ginsburg (writing), Stevens, Souter, Breyer (in part)**

The Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 et seq., requires that a jury unanimously determine whether 1) the defendant intentionally engaged in life-threatening activity from which a killing or death resulted; 2) the United States Government proved beyond a reasonable doubt at least one statutory or non-statutory aggravating factor; and 3) whether the aggravation "sufficiently outweighs" mitigation (proven to at least one juror by a preponderance of the evidence) to warrant a death sentence, or whether in the absence of mitigation, the aggravation warrants a death sentence. In its first analysis of that Act, the Supreme Court held that the Eighth Amendment does not require that a jury be instructed as to the effect of a deadlock on sentencing; that there was not a reasonable likelihood that the jury was misinformed that the petitioner would receive a sentence of less than death if it could not be unanimous in a sentencing recommendation, and that submission to the jury of two duplicative, vague and overbroad non-statutory aggravating circumstances was not error.

Jones kidnaped Private Tracie McBride from Goodfellow Air Force Base in San Angelo, Texas, took her to his home and sexually assaulted her, then drove her to a bridge just outside of San Angelo, where he hit her with a tire iron. She died from the wounds. The United States Attorney charged Jones with kidnaping resulting in death to the victim, and using discretion under 18 U.S.C. §3591 et seq., decided to seek the death penalty.

At the sentencing hearing, the jury found that Jones had intentionally inflicted serious physical injury which resulted in McBride's death, two statutory aggravating factors: that Jones had caused McBride's death during the commission of another crime, and that the offense was committed in an especially heinous, cruel and depraved manner and two non-statutory aggravating factors: one based on victim impact evidence, the other based on McBride's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas." At least one juror found 10 of the 11 mitigators Jones presented. Seven jurors noted on the verdict form that Jones's ex-wife was a mitigating factor. *Jones v. United States*, 1999 WL 401258, at *3.

INSTRUCTION ON CONSEQUENCES OF JURY DEADLOCK

Jones requested that the jury be instructed that if they were unable to unanimously agree to a sentencing decision, that the judge would sentence Jones to "life without possibility of release", and that if they would not agree on life without release, but were unanimous that the sentence should not be less than life without release, that the judge would sentence him to life without release. The trial court refused to give the instruction. Jones argued in the Supreme Court that the Eighth Amendment required such an instruction; alternatively, he requested that the Supreme Court exercise its supervisory power over the federal courts, and require such an instruction.

Julia Pearson

Justice Thomas, writing for the majority, found that no *Romano v. Oklahoma*, 114 S.Ct. 2004 (1994), occurred. The jury was not affirmatively misled regarding its role in the sentencing process, because the requested instruction had no bearing on the jury's role, but rather, dealt with the effects of the jury's inability to agree on what the sentence should be. The Eighth Amendment does not require such an instruction. "The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Jones*, at *5, quoting *Allen v. United States*, 164 U.S. 492 (1896). Furthermore, the requested instruction may well undermine the government's strong interest in the jury expressing the "conscience of the community" about whether a defendant receives life or death. *Id.*, quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988).

SUPREME COURT SUPERVISORY POWER OVER LOWER FEDERAL COURTS

The Supreme Court also refused to exercise its supervisory power over the federal courts and require that such an instruction be given in every federal capital case. The Court reasoned that had Congress desired that such an instruction be given, when it drafted the Federal Death Penalty Act, it would have required such an instruction. The Court once again pointed out the strong government interest in having a jury render a unanimous sentence recommendation. *Id.*, at *6, citing *Justus v. Virginia*, 266 S.E.2d 87, 92-93 (Va. 1980).

JURY MISIMPRESSION

Jones argued that his requested instruction was needed to correct the jury's misimpression that if it could not reach a unanimous recommendation as to sentence, he would receive a sentence of something less than life.

The majority found first that Jones had not raised his objections to either the trial court's instructions or the verdict forms

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given to the jury below, as required by Fed.R.Civ.P. 30. The majority also disallowed Jones's argument that the jury's confusion over sentencing was an arbitrary factor warranting resentencing under §3595(c)(2)(A) of the Federal Death Penalty Act, which provides for mandatory remand if an appellate court finds that the death sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor". That section "does not explicitly announce an exception to plain-error review, and a congressional intent to create such an exception cannot be inferred from the overall scheme." *Id.*, at *9.

Thus, the majority reviewed the instructions for plain error, which is warranted only when there has been a plain error which affects a petitioner's substantial rights. *Id.*, citing *Johnson v. United States*, 520 U.S. 461, 465-466 (1997), and other cases.

Jones argued that in combination with two earlier references to a "lesser sentence" option, a part of the instructions caused the jury to infer that the court would decide the sentence if they were no unanimous in recommending either death or life without release caused the jury to infer that the court would impose a sentence . He also referred to a later instruction which informed the jury that the jury must be unanimous in finding either death or life without release, implied that anything less than those two sentences did not require jury unanimity. He also argued that one of the four verdict forms did not include "unanimity" language.

The court found that when the instructions in their entirety were examined, Jones did not "satisf[y] even the first requirement of the plain-error doctrine. No error occurred, because there was no reasonable likelihood that the jury improperly applied its instructions. The jury was told "in unambiguous language" that any sentencing recommendation must be unanimous. *Id.*, at *10.

NON-STATUTORY AGGRAVATOR DUPLICATIVE

Jones did not assert that victim impact evidence was not admissible. He did object to the introduction of two non-statutory aggravating factors as being duplicative, vague and overbroad. The Fifth Circuit agreed that such duplication (personal characteristics necessarily included young age, slight stature, background and unfamiliarity with San Angelo, Texas identified in second factor) could lead to "double counting" of aggravators in a weighing state, but found the error harmless. *Id.*, at *12.

The Supreme Court disagreed. "[P]ersonal characteristics" did not have to include those identified in the second non-statutory aggravator, but could "refer to those aspects of the victim's character and personality that her family would miss the most." *Id.*, at *14. Moreover, each aggravator was "entirely different": the first "clearly went to victim vulnerability while the latter captured the victim's individual uniqueness and the effect of the crime on her family." *Id.*

NON-STATUTORY AGGRAVATOR OVERBROAD

A non-statutory aggravator is overbroad if the jury could fairly conclude that the aggravator applies to every person eligible for the death penalty. *Id.*, at *15, quoting *Arave v. Creech*, 507 U.S. 463 (1993). Because "every murder will have an impact on the victim's family and friends and victims are often chosen because of their vulnerability", each of the non-statutory aggravators found in *Jones* could be considered to apply to ever person eligible for the death penalty. Such reasoning is incorrect; "if it were, we would not have decided *Payne* [*v. Tennessee*, 501 U.S. 808 (1991) (victim impact evidence relevant to jury's sentencing consideration)] as we did. "[E]vidence of victim vulnerability and victim impact in a particular case is inherently individualized. . . ." *Id.* Thus, because the factors were specific to Jones's victim, they were not unconstitutionally overbroad.

HARMLESS ERROR ANALYSIS

If the trial court erred at all, it erred in "loose[ly] drafting" the non-statutory aggravating factors. Assuming the loose drafting was error, the Court concluded it was harmless.

The Fifth Circuit concluded that the jury would have recommended death even had it not considered the non-statutory aggravators. *Id.*, at *16. Jones argued that the Fifth Circuit's analysis did not meet constitutional muster because the Court had required a detailed analysis from the Mississippi Supreme Court in *Clemons v. Mississippi*, 494 U.S. 738, 753-754 (1990). The majority distinguished that case, noting that although giving an "especially heinous" aggravator had been found harmless error, the only remaining aggravating factor was that the murder had been committed during a robbery for pecuniary gain, and that the Mississippi Supreme Court had expressed its satisfaction beyond a reasonable doubt that the jury would have sentenced Clemons to death even without the invalid aggravator.

In this case, "[h]ad [the invalid aggravators] been precisely defined in writing, the jury surely would have reached the same recommendation as it did. . . .We are satisfied that the jury in this case actually understood what each factor was designed to put before it. . . ." *Id.*, at *17.

DISSENT

Justice Ginsburg, writing in dissent, stated that the "indispensable prerequisite" of accurate sentencing information had not been satisfied. *Id.*, at *18. Moreover, Jones's motion for new trial because of the jury misimpression had been supported by post-trial statements from jurors that they had, indeed, been misinformed. *Id.*, at *19. In that motion, Jones argued that jurors had believed that a deadlock would result in the judge handing down a lesser sentence, and that some jurors who favored a life sentence had changed their vote for the death penalty so that they, not the judge could sentence

(Continued on page 41)

(Continued from page 40)

Jones. The argument was supported by statements from the jurors. *Id.* Citing the juror statements, the dissenters believed there was at least a reasonable likelihood that the instructions tainted the jury's deliberations. *Id.*, at *22, citing *Simmons v. North Carolina*, 512 U.S. 154, 163 (1994) (plurality opinion).

"It should suffice that the potential to confuse, i.e., that the instructions could have tilted the jury toward death. The instructions 'introduce[d] a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case.'" *Id.*, citing *Beck v. Alabama*, 447 U.S. 625 (1980).

Both errors cannot be reconciled with the recognition that the death sentence is different from any other sentence handed down by jury or judge. *Id.*, at *24, citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

KENTUCKY SUPREME COURT

***Slaughter v. Commonwealth*, Not to be published (decided April 22, 1999)**

Majority: Lambert (C.J.), Cooper, Graves, Johnstone, Stephens, Wintersheimer
Minority: Stumbo (writing)

The Kentucky Supreme Court affirmed the Jefferson Circuit Court's denial of James Slaughter's post-conviction motion pursuant to Kentucky Rule of Criminal Procedure 11.42. Slaughter had previously been convicted of murder and first-degree robbery and sentenced to death.

INEFFECTIVE ASSISTANCE OF COUNSEL--PENALTY PHASE

Slaughter was indicted under the alias of James Earl Slaughter. Prior to trial, Slaughter told his trial counsel that his parents were dead, and his only living relative was an aunt in Alabama. Trial counsel spoke with the aunt, but decided that she would not be helpful in the penalty phase because she was elderly and had not seen her nephew in some time. Some time after trial, post-conviction counsel discovered that Slaughter was using an alias, that his name was actually Jeffrey DeVan Leonard, and that his mother and two half-brothers were alive. All three testified at the post-conviction hearing.

Although counsel has a duty to investigate his client's case, *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997), the reasonableness of counsel's actions is measured by the information his client gives him and by the choices the client makes. In this case, the client led his attorney to believe that most of his relatives were dead. Therefore, counsel's decision was reasonable under the circumstances. *Slaughter*, slip op., at 4, citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

INEFFECTIVE ASSISTANCE OF COUNSEL–MENTAL HEALTH EXPERTS

Counsel's decision not to investigate Slaughter's social history was reasonable. The information in the trial expert, Dr. Johnson's, report was "mixed", in that some information was helpful, some was not. Thus, counsel could reasonably have determined, as a matter of trial strategy, that further funding and evaluations would not be useful. The additional mitigation provided by post-conviction evaluations was "equivocal at best". The jury would probably not have decided to sentence Slaughter to something less than death. *Id.*, at 7.

The Court also said that even if Slaughter had proven counsel's actions were unreasonable, he had not met the second *Strickland* prong: prejudice as a result of counsel's actions. The trial court conducted a three day post-conviction hearing. Even after fourteen witnesses testified, the court did not find that the newly presented mitigation would have changed the jury's verdict.

DIRECT APPEAL ISSUES NOT RECONSIDERED

The Court refused to consider several issues because each had been presented on direct appeal and found meritless at that time. These include: failure to request an instruction on criminal facilitation;
failure to request a competency hearing, no attempt to rehabilitate potential jurors excused because of their views on the death penalty; ineffective assistance because counsel should have objected to statements about Slaughter's prior bad acts, objected to a police officer's testimony that he was suspicious of Slaughter and to the introduction of several photographs of the victim, failure to request a jury instruction on non-statutory mitigation. Issues surrounding the trial judge's conduct include denial of a meaningful opportunity to present mitigation because he prepared his report before the sentencing hearing, and because he permitted a juror to question Slaughter during the penalty phase. Instruction issues not considered include; an improper instruction that the jury was required to reach a unanimous verdict on sentencing, and an improper characterization of the word "recommend".

ISSUES WHICH SHOULD HAVE BEEN PRESENTED ON DIRECT APPEAL

The Court refused to address several issues which it said could or should have been presented on direct appeal: ineffective assistance because counsel did not ask voir dire questions regarding race or question five potential jurors who had served on other cases during their term of service, or seek the services of co-counsel, and trial court error in presenting a victim impact statement from the victim's husband.

ISSUES PRESENTED WITHOUT SUFFICIENT PROOF

Slaughter argued that his trial counsel had a conflict of interest as defined under SCR 1.7. However, the Court found the evidence presented by Slaughter was not enough to make the

(Continued on page 42)

(Continued from page 41)
determination. "In seeking post-conviction relief, the movant must set out the facts with sufficient specificity to generate a basis for relief." *Id.*, at 10, citing *Lucas v. Commonwealth*, 465 S.W.2d 267 (Ky. 1971).

The Court found that although Slaughter had pointed out the perjured testimony the prosecution had used in gaining his convictions, he did not show that the Commonwealth was aware of the nature of the testimony.

POLICE DESTRUCTION OF EVIDENCE

Slaughter did not meet the *Arizona v. Youngblood*, 488 U.S. 51 (1988), standard of bad faith in police destruction of a taped statement from the witness who allegedly perjured himself. The record indicated that a police detective testified that the tape was inadvertently erased. *Id.*, at 11.

DISSENT

Justice Stumbo felt the trial court erred in its analysis of the second *Strickland* prong: prejudice as a result of ineffective assistance of counsel because it held Slaughter to a higher standard of proof. As the Supreme Court itself said in *Strickland*, the defendant need not meet a"more likely than not"–preponderance of the evidence standard of proof, but only a "reasonable probability" the result of the proceeding would have been different. *Id.*, at 2-3, citing *Strickland*, 466 U.S. at 693, 694.

***Ernest Arnaze Rogers*, --- S.W.2d --- (decided March 25, 1999)**

Majority: **Stephens (writing), Lambert, Cooper, Johnstone, Stumbo**
Minority: **Graves (writing), Wintersheimer**

Rogers was convicted of murder, first degree robbery, criminal attempt to commit murder, kidnaping and attempted first degree rape. After the jury was unable to reach agreement as to sentence, another jury was impaneled, which sentenced Rogers to death.

ADMISSION OF CO-DEFENDANT'S "REDACTED" STATEMENT

At trial, the prosecution introduced the videotaped statement of Rogers's non-testifying co-defendant, Nakia Dillard, which had been redacted only to exchange the word "blank" in those spots where Dillard referred to Rogers. The Supreme Court found this procedure lacking because it nevertheless directly implicated Rogers. *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny, and *Cosby v. Commonwealth*, 776 S.W.2d 367 (Ky. 1989), require that a statement used in this fashion not refer to the co-defendant in any way. In this case, it was clear the word "blank" referred to Rogers, and no other person, in violation of *Gray v. Maryland*, 523 U.S. 185 (1998). Thus, in the future, when the Commonwealth wishes to use the testimony of a non-testifying co-defendant, it has two choices, separate trials for both co-defendants, or redaction to eliminate both the co-defendant's name and references "'to his or her existence.'" *Rogers*, slip op. at 7, citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

JURY VIEW OF DILLARD'S FINGERNAILS

Dillard's counsel moved that the jury view both his client's and Rogers's fingernails. The pathologist had testified that the victim had abrasions on her body which were consistent with being made by fingernails. No other attempt was made in any way to connect Rogers or Dillard to the "fingernail" marks on the victim's body. The Court found this demonstration was improper and inadmissible.

Rogers's counsel originally withdrew their objection to the presentation of this evidence to the jury; however the Court reviewed the error under its precedent that greater caution is due even unpreserved errors in death penalty cases. *Id.*, at 8, citing *Baze v. Commonwealth*, 965 S.W.2d 817 (Ky. 1997); *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984); and *Cosby v. Commonwealth*, 776 S.W.2d 367 (Ky. 1989).

The evidence was not relevant to the proceedings. Thus, under KRE 401, such evidence would not have made any fact more or less probable, and had such danger of confusing the issue or misleading the jury that it greatly outweighed any value the jury might have found. *Id.*, at 9.

Further, the evidence was not properly authenticated, as required by KRE 901(a). Dillard could not establish the chain of custody to prove that the state of his fingernails when he exhibited them to the jury was the same as that on the night of the crimes.

DISSENT

The dissent felt that weighing the relevancy of the fingernail evidence against the prejudice resulting from it was for the trial court, and found no reversible error.

***Thomas C. Bowling, Jr. v. Commonwealth*, --- S.W.2d --- (Ky. 1998)**

Majority: **Graves (writing), Lambert, Stephens, Johnstone, Wintersheimer, Stumbo, Cooper**

A Fayette County trial judge's denial of Thomas Bowling's capital RCr 11.42 action was upheld. Bowling was convicted of the Early Bird Cleaners murders in Fayette County. His convictions and death sentence were affirmed by the Kentucky Supreme Court on September 30, 1993. *Bowling v. Commonwealth*, 873 S.W.2d 175 (Ky. 1994).

DISMISSAL OF SUPPLEMENTAL 11.42

(Continued on page 43)

(Continued from page 42)

Bowling filed his post-conviction action on January 26, 1996, and received 120 days from that date in which to supplement his pleading. On May 28, 1996, Bowling's attorney filed an unverified amendment; eight days later, the verification was added to the motion. On October 1, 1996, the trial court struck Bowling's unverified supplement from the record, and denied his 11.42 action in toto.

Bowling argued that RCr 11.42 does not require that any pleading other than the original RCr 11.42 be signed and verified, or in the alternative, that if the rule does require verification of a supplemental pleading, RCr 11.42 does not require dismissal of a supplemental pleading because it is not verified.

The Supreme Court felt that the trial court did not abuse its discretion by not permitting Bowling to file his supplemental pleading.

ISSUES RAISED ON DIRECT APPEAL AND NOT RE-EXAMINED

The Court did not re-examine several issues which were raised on direct appeal: ineffective assistance of counsel because counsel spent little time with his client and did not keep him apprized of developments in the case; counsel's failure to object to Commonwealth's conclusions during closing argument that Bowling stalked his victims and waited for them; counsel's failure to object to the Commonwealth's line of questioning that Bowling used his non-existent mental problems to manipulate his family.

INEFFECTIVE ASSISTANCE OF COUNSEL

Bowling argued that he was not given the choice of defending himself based on Extreme Emotional Disturbance. The Court disposed of this issue, noting that the alleged "wealth of evidence" regarding extreme emotional disturbance introduced at the penalty phase was not enough to warrant an instruction at that time, let alone enough to warrant an instruction at the guilt phase on the defense of extreme emotional disturbance.

Bowling's argument that defense counsel failed to investigate persons who had a motive to commit the crime was based upon "vague rumors and unsupported claims." *Bowling*, slip op. at 7. The "mere existence" of these other persons did not do away with the "overwhelming proof" against Mr. Bowling. The Court also found this claim "offensive when Appellant alleges to know the identity of the actual killer yet continues to withhold the information." *Id.*

The record indicated that Bowling's trial counsel "made extraordinary efforts" to locate Norman Pullins, who witnessed the shooting and gave the police a description of the gunman which did not match Bowling's. The Commonwealth also agreed to allow Pullins's taped statement to be played before the jury, even though the Commonwealth could not cross-examine him, and without other danger to Bowling.

In contravention of his issue, Bowling was assisted by the Commonwealth's expert's profile of him more than he was by his own expert's. An expert's unfavorable report does not require counsel to search for a expert willing to give a more favorable report.

Counsel presented a great deal of mitigation information at the penalty phase regarding Mr. Bowling's family history of mental illness. "Counsel presented strong evidence upon which the jury could have reduced Appellant's sentence, had it seen fit to do so". It did not. *Id.*, slip op. at 11.

ISSUES DISPOSED OF BECAUSE NO PROOF WAS PRESENTED

Bowling presented no evidence that the Commonwealth knew the identity of a witness who saw the automobile accident which immediately preceded the shootings. Further, no evidence was presented regarding the effect the accident had on Mr. Bowling.

Post-conviction counsel presented no evidence that trial counsel, who had been indicted, was distracted and had a breakdown.

The Court found "no basis" for Bowling's argument that the Commonwealth struck a secret deal with one of its witnesses, Clay Brackett.

CLAIMS RAISED IN SUPPLEMENTAL RCr 11.42 PLEADING

Bowling argued that the shootings may have been triggered by jealousy because Bowling could have mistaken Eddie Early, one of the victims, for the man who was dating Bowling's wife, and that this evidence could have served as proof of the triggering event which entitled him to an instruction on EED, and have refuted the Commonwealth's assertion that Bowling killed the victims intentionally.

A claim of jealousy does not trigger a defendant's right to an instruction on EED. Furthermore, Bowling's argument during the trial was of actual innocence.

The Commonwealth provided open discovery; thus, no discovery issues exist.

DEFENSE EXPERT'S INCOMPETENT MENTAL HEALTH EVALUATIONS

Bowling argued that the defense psychologist did not follow the five-step process for a competent mental health evaluation. However, counsel cited no authority for his contention that an expert's failure to adhere to such a process renders the evaluation legally deficient, and the expert ineffective. *Id.*, at 13.◆

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