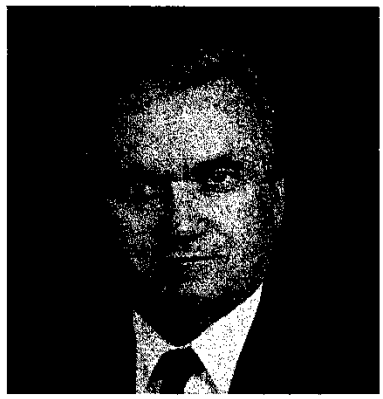
The Advocate

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

VOLUME 22, ISSUE 3 MAY, 2000

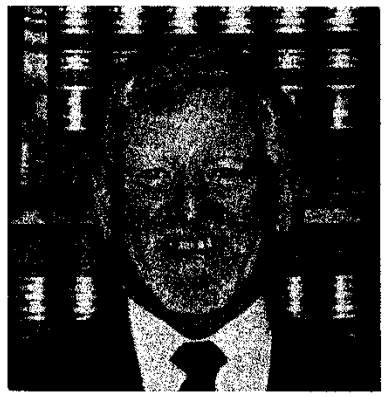
28TH ANNUAL PUBLIC DEFENDER EDUCATION CONFERENCE

Judge Jennifer Coffman
United States District Court

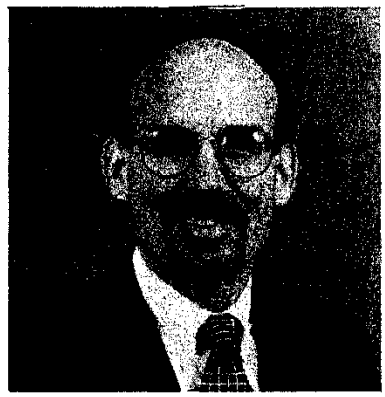


Dean Donald L. Burnett, Jr.
Brandeis School of Law

William Johnson
Johnson, Judy, True & Guarnieri



Jerry Cox
Clontz & Cox



Ernie Lewis
Public Advocate

Advocacy and Professionalism

Remarks by Judge Jennifer Coffman and Dean Donald Burnett
With reflections by William Johnson, Jerry Cox and Ernie Lewis

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Violence as a way of achieving racial justice is both impractical and immoral. It is impractical because it is a descending spiral ending in destruction for all. The old law of an eye for an eye leaves everyone blind. It is immoral because it seeks to humiliate the opponent rather than win his understanding; it seeks to annihilate rather than convert. Violence is immoral because it thrives on hatred rather than love. It destroys community and makes brotherhood impossible. It leaves society in monologue rather than dialogue. Violence ends by defeating itself. It creates bitterness in the survivors and brutality in the destroyers.

Dr. Martin Luther King, Jr.

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During normal business hours (8:30am - 5:00pm) DPA's Central Office telephones are answered by our receptionist, with callers directed to individuals or their voicemail boxes. Outside normal business hours, an automated phone attendant directs calls made to the primary number, (502) 564-8006. For calls answered by the automated attendant, to access the employee directory, callers may press "9." Listed below are extension numbers and names for the major sections of DPA. Make note of the extension number(s) you frequently call – this will aid our receptionist's routing of calls and expedite your process through the automated attendant. Should you have questions about this system or experience problems, please call Ann Harris or the Law Operations Division, ext. 136.

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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.

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From The Editor. . .

DEFENDER FUNDING

The 2000 General Assembly has passed the state's budget for the next two years, and the Public Advocate highlights its affect on defenders.

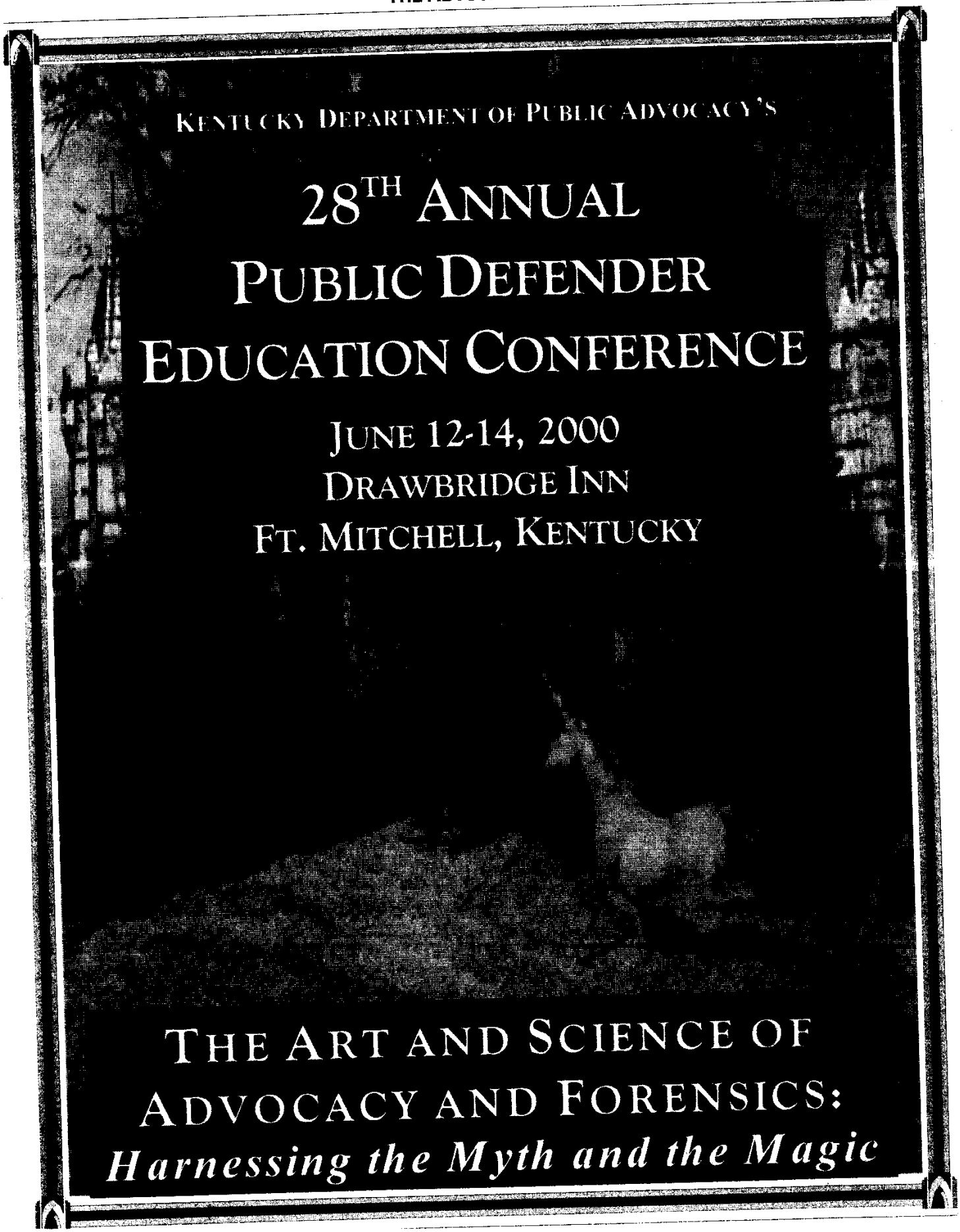
ON OUR COVER: ANNUAL CONFERENCE

DPA conducts its 28th Annual Conference in Covington, Kentucky. This program offers a wide array of information, education and practical workshops. Tony Natale will help us learn how to work with state and defense experts and the art of cross-examining experts. Dr. Bruce Frumkin will teach us new skills in evaluating the voluntariness of waivers. There will be sessions on the new laws passed by the 2000 General Assembly, the latest in juvenile litigation and forensics. Special sessions on capital mitigation from Manette Zeitler, using a community specialist in a capital case by Charles See and forensic mental health in a capital case by Jim Clark will be offered. Bob Walker will conduct a workshop on the methods, skills and art of interviewing. There will be a review of caselaw, ethics sessions and domestic violence. District Judge Marty Sheehan will tell us about the recent DUI changes. Dr. Robert Fay will educate us on the medical aspects of sex abuse cases. There will be special workshops for investigators, appellate attorneys and post-conviction litigators. Larry Komp will conduct workshops on 6th Circuit practice and post-conviction litigation. Ira Mikenberg will educate us on persuasive legal writing and appellate litigation. Court of Appeals clerk, George Geoghegan, III; will provide practical tips for litigating in the Court of Appeals. There will be a featured presentation on the tension between advocacy and professionalism by Judge Coffman and Dean Burnett followed by reflections from 3 criminal defense litigators, Bill Johnson, Jerry Cox and Ernie Lewis.

As one of last year's participants observed, "If you want to become or remain a successful criminal defense attorney, this is the place to come to get the latest tips, news and ideas."

Edward C. Monahan
Editor

Chance favors the prepared mind.
- Louis Pasteur


KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY'S
28TH ANNUAL
PUBLIC DEFENDER
EDUCATION CONFERENCE
JUNE 12-14, 2000
DRAWBRIDGE INN
FT. MITCHELL, KENTUCKY
THE ART AND SCIENCE OF
ADVOCACY AND FORENSICS:
Harnessing the Myth and the Magic

The largest yearly gathering of Kentucky criminal defense advocates.
OPEN ONLY TO CRIMINAL DEFENSE ADVOCATES

CONFERENCE INFORMATION

For more information, contact Patti Heying at Tel: (502) 564-8006 or Email: pheying@mail.pa.state.ky.us

Choose from Over 50 Learning Opportunities

The focus of this summer's conference encompasses the art of balancing the roles of an "Aggressive Warrior" with the studied skills of an "Accomplished Bard" and "Master Strategist." Forensics, the use of experts, cross-examination of experts are areas that will be explored to aid defense advocates in achieving this balance. Participants will have the opportunity to receive specific instruction in forensic sciences. These sessions will be followed by presentations on how to cross-examine the state's forensic experts. There will also be special workshops on post-conviction, appellate, juvenile and capital litigation. Sessions will address changes in the law made by the 2000 General Assembly. Over 350 defense advocates will convene at the largest yearly gathering of criminal defenders in Kentucky which provides a splendid opportunity to meet and associate with others representing clients accused or convicted of a crime. This Conference offers the greatest variety of criminal defense education opportunities of any Kentucky criminal justice CLE program. *There are over 50 diverse presentations from the pragmatic to the cutting edge to choose from based on your individual needs!* Our presenters are prominent Kentucky and distinguished national professionals.

Registration/Meals/Lodging

The deadline for registration is May 8, 2000. There is a late registration fee of $25. Cancellations must be received by June 7, 2000. There is a $25 cancellation charge. On-site registration is Monday from 12:00 noon in the London Lobby area outside of the House of Tudor Room of the *Drawbridge Inn*, Ft. Mitchell, Kentucky. Check-in at the hotel is 2:00 p.m. on Monday. Check-out is 11:00 a.m. on Wednesday. Our program begins at 1:30 p.m. on Monday and ends on Wednesday at 12:00 p.m.

Dinner on Monday; breakfast & lunch on Tuesday; and breakfast Wednesday are included in the registration fee. There will be dinner with the presentation of awards on Monday evening

KBA CLE Credits Including Ethics Credits

Last year, this Conference was approved for 12.5 hours of CLE credits from the KBA CLE Commission, including 5 hours of legal ethics. We are anticipating similar hours to be approved for this year's conference. CLE approval will be sought from any state you indicate on your registration form.

OUR CONFERENCE THEMES AND PROGRAMS

There will be programs focusing on the theme ***The Art and Science of Advocacy and Forensics: Harnessing the Myth and the Magic*** with an emphasis on Forensics and Cross-Examination. Presentations include:

- ✓ Forensics Issues Generally
- ✓ Specific Forensics Sciences
- ✓ Cross-Examination of Experts
- ✓ Funds for Experts
- ✓ False Confessions
- ✓ Consulting Experts
- ✓ New Legislation from the 2000 General Assembly
- ✓ Advanced Interviewing Techniques
- ✓ Advanced Mitigation
- ✓ U.S. Supreme Court Review
- ✓ Appellate Litigation
- ✓ Effective Preservation
- ✓ Ethics
- ✓ Civil Contempt
- ✓ Sex Defenses
- ✓ Litigating Your 1st Capital Case
- ✓ Litigating Juvenile Law Cases
- ✓ Persuasive Demonstrative Evidence
- ✓ Preservation of Rights in Habeas Cases
- ✓ The State of Indigent Defense by the Public Advocate
- ✓ Advocacy & Professionalism by Judge Jennifer B. Coffman and Dean Donald L. Burnett, Jr.

Public Defenders Receive Substantial New Funding

On Friday April 14, 2000, the Kentucky General Assembly approved a budget for 2000-2002. The budget compromise worked out in the Free Conference Committee passed both Houses by a big majority, including a unanimous vote in the Senate.

The work begun 18 months ago with PD21 and the *Blue Ribbon Group on Improving Indigent Defense in the 21st Century* (BRG) has come to fruition. Governor Paul Patton agreed to place $10 million new General Fund dollars in DPA's budget in order to partially fund the BRG recommendations which totaled $11.7 each year of the biennium. He agreed to place $4 million in the first year of the biennium, and $6 million in the second to partially fund the recommendations of the BRG. The recommendations of the *Blue Ribbon Group* proved resilient throughout this 2000 General Assembly. DPA's budget passed without alteration from the time Governor Patton constructed it.

Obtaining this additional funding has been a terrific team effort of many in DPA, many legislators, many judges and many prosecutors who worked for this funding and who expressed support. The Blue Ribbon Group (see next page for members) and its consultant, Bob Spangenberg, Public Advocacy Commission, Criminal Justice Council and media provided major leadership and support. Public Protection and Regulation Secretary Ronald B. McCloud, Justice Secretary Robert Stephens and Mike Bowling, chairs of the BRG, provided much leadership and support. Each deserves our heartiest praise for their dedication to our work and their immense support. This could not have been accomplished without everyone's help.

DPA has begun the 21st Century with a chance to improve significantly Kentucky's indigent defense delivery system, the quality of services we give to our clients and the service we provide the public. Highlights of the defender budget are:

- Balance is restored. DPA had been operating at a deficit by spending more revenue (administrative fee, DUI fee, recoupment) than we were taking in. DPA now has a balanced budget.

- Public defender salaries will be enhanced by $1.2 million the first year and $2.6 the second year of the biennium. DPA will now work with the Personnel Cabinet to devise a system for making this happen. I will be working to ensure a fair and equitable division of this salary enhancement. Salaries in Louisville and Lexington will also be going up with salaries of the attorneys in the merit system.

- The full-time system will continue to move forward. 26 additional counties will be converted during the biennium. 2 new offices in Bullitt County and either Murray or Mayfield will open during the last quarter of the biennium. When I started in October of 1996, 47 counties were full-time, and 73 were part-time. At the end of the biennium, 108 counties will be full-time, and only 12 remaining for the 2002-2004 biennium.

- DPA will be able to reduce caseloads during the last quarter of the biennium. 10 new lawyers will be hired to reduce caseloads in our highest caseload offices. The BRG recommended 35 new lawyers; this is a mostly unmet recommendation, and full funding of this recommendation will be one of our top priorities in the 2002 Kentucky General Assembly.

- An additional capital trial branch lawyer and an additional appellate branch lawyer will be hired. 5 additional support staff people will be hired.

- $200,000 will be available to improve our conflict system throughout our full-time offices which is provided by private attorneys.

- $50,000 will be available to fund a law clerk program which is essential to our hiring top notch attorneys.

This is a turning point for the Kentucky public defender system. I appreciate everything all of us do to defend poor people charged with or convicted of a crime, and to advocate for persons who are mentally ill and mentally retarded. We do good and just work that adds immense public value to our Commonwealth. Governor Patton and the General Assembly and the people of the Commonwealth of Kentucky have just made certain that we will be able to perform our jobs of insuring fair process and reliable results better during the next two years. Let's start now to finish the job in 2002!

Ernie Lewis
Public Advocate

Members of the Blue Ribbon Group

Co-Chairs:

Michael D. Bowling, Esq.
Wilson, Stanley, Bowling & Costanzo

Robert F. Stephens, Secretary
Kentucky Justice Cabinet

Members:

Kim Allen, Executive Director
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Scotty Baesler, Esq.
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Richard F. Dawahare, Esq.
Attorney-at-Law

Laura M. Douglas, VP/General Counsel
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Robert C. Ewald, Esq.
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Kathy W. Stein, Representative
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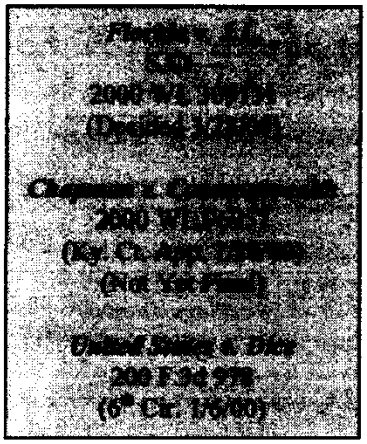
David L. Williams, Senator
President, Kentucky Senate
Kentucky General Assembly

Special thanks to Bob Spangenberg of The Spangenberg Group, BRG national consultant



Florida v. J.L.

S.Ct. --
2000 WL 309131
(Decided 3/28/00)

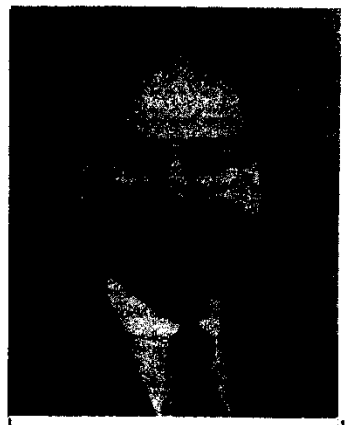
The Supreme Court has made a rare and significant Fourth Amendment decision supportive of the rights of citizens rather than law enforcement. The question being decided was simply stated by the Court: "whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer stop and frisk of that person. We hold that it is not."

The case began in 1995 when the Miami-Dade Police received a completely anonymous phone call saying that a young black male was standing at a particular bus stop, that he was dressed in a plaid shirt, and that he was carrying a gun. The police had no information regarding the credibility of the caller. Carrying a gun in Florida is not a crime; possession of a gun by a minor is illegal. The police went to the bus stop and found three young black males, one of whom matched the description given by the anonymous caller. Nothing occurred at the bus stop to increase the suspicion; they did not flee, they did not behave unusually, they did not display a firearm. JL was frisked and a gun was taken from him. The other two young black males were also searched but nothing was found. JL was charged with carrying a firearm without a license, and with possessing a firearm under the age of 18. The trial court suppressed the gun as the fruit of an illegal search and seizure. The Supreme Court of Florida affirmed the decision of the trial court.

The United States Supreme Court granted *cert* and affirmed the decision of the Supreme Court of Florida. Justice Ginsburg wrote the opinion. She differentiated the tip in this case from the tip in *Adams v. Williams*, 407 U.S. 143 (1972), where the information came from a known informant. In *JL*, the tip came from an unknown informant, whose reputation could not be assessed and who could not be "held responsible if her allegations turn out to be fabricated." The Court also differentiated this situation from an anonymous tip which had been corroborated by the police, such as in *Alabama v. White*, 496 U.S. 325 (1990). In contradistinction to *White*, the "tip in the instant case lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case." The Court also declined to look at the fact that a gun was found on JL once the search occurred. "The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."

The Court rejected Florida's assertion that the anonymous tip in this case was reliable because JL was found at the bus stop and he was dressed as described. "Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."

The Court also rejected Florida's position that there should be a "firearms exception" to the *Terry v. Ohio*, 392 U.S. 1 (1968) decision. "[A]n automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun."


Ernie Lewis, Public Advocate

There are limits to the Court's decision. Without deciding, the Court implied that an uncorroborated anonymous tip that a person is carrying a bomb would be sufficient to conduct a *Terry* frisk. Likewise, the Court stated that searches in airports, or other similar safety issues in public places, might also be legal based upon an anonymous tip.

In sum, the Court held that "an anonymous tip lacking indicia of reliability of the kind contemplated in *Adams* and *White* does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm."

Justice Kennedy wrote a concurring opinion joined by Justice Rehnquist. His concern is that there are other matters that can corroborate an anonymous tip that might be sufficient to justify a *Terry* stop. For example, he gives the hypothetical that a person places an anonymous tip on successive nights, each one of which occurs as predicted. In that instance, the 3rd or 4th tip might be sufficiently reliable to justify a stopping.

With this opinion, the Court has further defined the continued evolution of the Terry decision. In *Illinois v. Wardlow*, 120 S.Ct. 623 (2000), the Court recently held that a *Terry* stop could occur based solely upon flight by a person in a high crime area. That extended the reach of the *Terry* stop. The opinion in *JL* indicates that the Court is not going to give law enforcement a carte blanche. The Court is interested in *Terry* and its reach, and it is interested in giving guidance to the police as they enforce the law on the street.

Chapman v. Commonwealth

2000 WL 96957
(Ky. Ct. App. 1/28/00)
(Not Yet Final)

Chapman and her son arranged a sale of marijuana over the phone. This conversation was tape recorded by Chapman's husband. Neither consented to the taping. He then gave the tape to law enforcement, and she was charged with transfer of a controlled substance to a minor in violation of KRS 218A.1401. Chapman pled guilty conditionally and appealed the denial of her motion to suppress.

The Court of Appeals affirmed the decision by the trial court. In a decision written by Judge Buckingham and joined by Judges Gudgel and Johnson, the Court found that under *Brock v. Commonwealth*, 947 S.W. 2d 24 (Ky., 1997), the search was a search by a private citizen rather than state action and thus not covered by either the Fourth Amendment or Section 10.

The Court further considered Chapman's position that the tape should be suppressed because it was an interception of a conversation in violation of the federal wiretapping statute pursuant to 18 U.S.C. 2515. To address the question the Court relied upon *United States v. Murdock*, 63 F. 3d 1391 (6th Cir. 1995), which had held that where the government has "clean hands" that an exception exists to #2515. "'We note that in that regard that government agents are charged with no wrongdoing and that to suppress here would have no impact on the future conduct on law enforcement officials.'"
The Court also relied upon *Pollock v. Pollock*, 154 F. 3d 601 (6th Cir. 1998) to hold that the father could vicariously consent to the interception and thus the father did not violate the federal wiretapping statute. "As he suspected that his son was involved in illegal drug trafficking, it is clear that there was a good faith and objectively-reasonable basis for Chapman's ex-husband to tape the conversations."

United States v. Dice

200 F.3d 978
(6th Cir. 1/6/00)

Judge Jones, the author of this opinion by the Sixth Circuit, expresses the issue in this case succinctly: "This case arises from a battle in the 'war on drugs' that the Government lost because it failed to abide by one of the key rules of engagement."

This case began with a phone call to the police saying that a Pike County, Ohio residence was using a lot of electricity, and that Dice was conducting an indoor marijuana cultivation operation. The police subpoenaed the utility records for Dice's home. Those records showed that Dice was using 10 times the electricity of the average nearby home. The FBI then assisted and made a thermal image tape of Dice's home showing that a large amount of heat was escaping through the roof of the house. The police then applied for and obtained a search warrant. The police went to the house and after a brief period of time knocked down the door. There was no information that Dice was either armed or dangerous. Once inside, the police seized 1900+ marijuana plants, grow lights and other equipment. Whether the police announced their presence prior to knocking down the door was a fact disputed at the suppression hearing.

The district court found that while the officers had announced their presence, they waited only a few seconds prior to knocking down the door. The court further found that the government had proved no exception to the knock and announce law. Accordingly, the court found that the knock and announce rule had been violated, and ordered suppression of the evidence.

Judge Jones wrote the opinion for the Sixth Circuit, joined by Judges Cole and Gilman. The Court founded its decision upon *Wilson v. Arkansas*, 514 U.S. 927 (1995), and affirmed the interests protected by *Wilson*, namely "1) reducing the potential for violence to both the police officers and the occupants of the house into which entry is sought; 2) curbing the needless destruction of private property; and 3) protecting the individual's right to privacy in his or her house...At its heart, the rule exists to protect the occupants of private residences." The Court further recognized 3 exceptions to *Wilson*: "1) the persons within the residence already know of the officers' authority and purpose: 2) the officers have a justified belief that someone within is in imminent peril of bodily harm; or 3) the officers have a justified belief that those within are aware of their presence and are engaged in escape or the destruction of evidence."

Based upon *Wilson*, the Court found that the evidence should be suppressed because the knock and announce rule had been violated by the police knocking down of the door too soon after announcing their presence without waiting for the residents inside to open the door. "[T]he mere knocking by an officer protects no interests whatsoever if they are not given ample time to respond."

The Court rejected the government's position that the evidence was admissible under the independent source doctrine, whereby evidence otherwise suppressible is admissible where "knowledge or possession of evidence is gained from an independent and lawful source." "[T]here is no caselaw to support the Government's theory that the warrant itself serves as an independent source for evidence seized following a single, illegal search. Rather, the search is flatly unconstitutional, and evidence secured pursuant to that search is inadmissible as a direct fruit of the illegal search..."◆

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

***Gideon v. Wainwright*, 372 U.S. 335, 344 (1965)**

Short View. . . Ernie Lewis, Public Advocate

1. *State v. D*[illegible] *775* [illegible]. The Connecticut Supreme Court has expressed concern about the "criminalization of neighborhoods and locations" in this opinion. The fact that drug buyers and johns go to a particular place does not constitute reasonable suspicion. The Court noted that the "present case raises the insidious specter of 'profiling', the criminalizing of locations, neighborhoods or even individuals due to generalized perceptions of supposedly identifying and suspicious characteristics." Because the only facts supportive of suspicion were that the defendant had pulled into a parking lot in an area where drugs were purchased and prostitution occurred, the Court found that the officer could not stop the defendant and investigate further. As a result, the trial court should have thrown out the evidence of drunk driving found as a result of the illegal stop.

2. *Shadler v. State*, 2000 WL 12841 (Fla. 1/6/00). An error by the Florida Division of Driver Licenses in entering a driver's license suspension is a law enforcement error to which the exclusionary rule applies. Such an error is unlike an error made by a court clerk, which according to *Arizona v. Evans*, 514 U. S. 1 (1995) is not one which should result in the exclusion of evidence. The Court noted the deterrent effect of their ruling, saying that "the exclusion of evidence in cases such as the one at bar will surely serve to encourage accurate record-keeping of driver's license information."

3. *State v. Britton*, 604 N.W.2d. 84 (Minn. 1/13/00). The Minnesota Supreme Court has decided that a broken rear window does not without more give the police a reasonable suspicion to believe that the car is stolen. Thus, the evidence gathered following the stop supportive of the driver being intoxicated had to be suppressed.

4. *Commonwealth v. Rodriguez*, 722 N.E. 2d. 429 (Mass. 1/18/00). While a roadblock to check for DUI is constitutional, a similar roadblock to check for drug trafficking is not under the Massachusetts Constitution. The difference is that the first is done not only to press criminal charges but also to ensure public safety; the latter has as its very purpose the discovery of drug traffickers for purposes of prosecution, and thus must have a level of suspicion to justify the stop.

5. *State v. DeBooy*, 2000 WL 126749 (as amended) (Utah 2/4/00). The Utah Supreme Court has similarly declared unconstitutional under both the Fourth Amendment and the Utah Constitution a roadblock that has dual purposes, checking for drunk driving and checking for equipment violations. Such a roadblock was viewed as "less a highway safety measure, and more a pretext to stop all vehicles to search for drugs and all violations of the law that might be apparent." The Court was most troubled by the roadblock to check for equipment violations. "Such unbridled discretion for the officers is inherently unreasonable under the Fourth Amendment and article I, section 14."

6. *Indianapolis v. Edmond*, 120 [illegible]. The U. S. Supreme Court has granted cert. [illegible] "checkpoints at which law enforce[illegible] vehicular traffic, check motorists' [illegible] tions, look for signs of impairment, [illegible] dog around exterior of each stopped [illegible] under Fourth Amendment."

7. *State v. Flowers*, 745 A.2d. 553 (N.J. Super. Ct. App. Div.2/10/00). The New Jersey Superior Court Appellate Division has approved of suspicionless [illegible] at finding stolen vehicles.

8. *State v. Woods*, 524 S.E. 2d. 363 (N.C. Ct. App. [illegible]). The police may not search an area too small to hide a person while investigating a burglary. Thus, when the police came to the scene of a burglary alarm, entered the house when no one answered, and looked into a drawer finding marijuana, that search was illegal. While the initial entry was legal as an exigent circumstance, the opening of drawers was unreasonable and far beyond the exigency.

9. *Sampson v. State*, 744 A.2d. 588 (Md.Ct. Spec. App. 1/19/00). The police may not search a trash bag placed in the curtilage under the Fourth Amendment. While there is no reasonable expectation of privacy in garbage placed at the curb, *California v. Greenwood*, 486 U.S. 35 (1988), there is such an expectation in garbage placed inside the curtilage.

10. *Commonwealth v. Stevenson*, 744 A.2d. 1261 (Pa. 1/20/00). The "plain-feel" exception under *Minnesota v. Dickerson*, 508 U.S. 366 (1993) does not allow the police to seize items upon feeling something which can house illegal substances. "[T]he immediately apparent requirement of the plain feel doctrine is not met when an officer conducting a *Terry* frisk merely feels and recognizes by touch an object that could be used to hold either legal or illegal substances, even when the officer has previously seen others use that object to carry or ingest drugs."

11. *Megel v. Commonwealth*, 524 S.E.2d. 139 (Va. Ct. App. 2/1/00). (Rehearing *en banc* granted, 2000 WL 310254, 3/28/00) An individual who is on home incarceration has no reasonable expectation of privacy in his home, according to the Virginia Court of Appeals. The Court analogized the home to "a person serving time in a jail or prison. The participant's house is the functional equivalent of a jail or prison cell."

12. *Ferguson v. Charleston*, 120 S.Ct. [illegible]. The United States Supreme Court has granted cert. on the question of whether the special needs "exception to Fourth Amendment's warrant and probable cause requirements properly applied to discretionary drug testing program [illegible] patients that was created and implemented with police and prosecutors primarily for law enforcement purposes."

13. *People v. Allen*, 92 Cal. Rep. [illegible]. The California Court of Appeals has applied the [illegible] exception to bicycles whereby the police may [illegible] of a bike without a warrant based upon [illegible] of probable cause. ◆

"Don't Count Your Chickens Before They Hatch!"

Proving "Pecuniary Loss" and "Value" in District Court Cases

by Brian "Scott" West, Assistant Public Defender

I cannot remember when I was first told not to count my chickens before they hatched, but it was not until this January that I learned that there was legal authority for that saying. That was when I came across the case of *McKinney v. Commonwealth*, 171 S.W.2d 244 (Ky. 1943), an old case which interpreted a statute[1] that made stealing chickens valued at $2.00 or more a felony, but a misdemeanor if valued at less than $2.00. The trial judge added the value of a hen ($1.00) and seventeen eggs (10 cents each) to equal $2.70 worth of chicken, and sustained the felony conviction of the defendant. "Thus, it is seen," *McKinney* held in reversing the conviction, "the court in permitting the jury to consider eggs as chickens for the purposes of value did, in truth, count chickens before they hatched."

As amusing and antiquated as the holding in *McKinney* may be, the case still has vitality today, unfortunately, for persons accused of theft: *McKinney* still stands for the proposition that the individual values of multiple items taken during a single theft are added together for the purpose of determining whether a theft is a misdemeanor or a felony.

When and how "value" in a theft case and "pecuniary loss" in a criminal mischief case are calculated is the purpose of this Article. Although not identical, the methods of proving value and pecuniary loss are very similar, and case law applicable to one is generally applicable to the other.

In district court cases, the issue of "value" in a theft case will arise only at a preliminary hearing when there is a question whether the value of goods allegedly stolen is greater than or equal to $300. The issue of "pecuniary loss" due to criminal mischief arises both at preliminary hearings (when damage is alleged to be $1,000 or greater) *and* trials (where there is a question of whether the damage is $500 or greater). This article first discusses "value," then discusses "pecuniary loss," and closes with some remarks about proving either at a preliminary hearing.

I. Proving "Value" in a Theft Case

There are seven offenses in Chapter 514 of the Kentucky Revised Statutes which make theft and related crimes felonies where the value of the stolen item or items is $300 or more, and misdemeanors otherwise: (1) theft by unlawful taking or disposition, (2) theft by deception, (3) theft of property lost, mislaid, or delivered by mistake, (4) theft of services, (5) theft by failure to make required disposition of property, (6) theft by extortion, (7) theft of labor already rendered, (8) receiving stolen property, and (9) obscuring identity of machine or other property. In addition, there are offenses related to the fraudulent use of credit cards in Chapter 434 of the Kentucky Revised Statutes which are also either felonies or misdemeanors, depending upon the value of the items or services procured through fraudulent use of a card, and the period of time during which the items are procured.

At the preliminary hearing, the Commonwealth has the burden of proof to establish probable cause that the value of the items or services was equal to or more than $300. While this burden of proof is below the reasonable doubt standard, it is not miniscule. A preliminary hearing is not the criminal law equivalent of civil law's "motion for summary judgment," where the complaining party need only establish a fact issue to survive dismissal of a charge. A criminal defendant is bound over to the grand jury only upon a finding of "probable cause," and this term has been defined in Kentucky to mean a "reasonable belief" in the facts upon which the claim is based.[2] The preliminary hearing is thus the first and best opportunity to challenge the unreasonableness of a claim that an item or service is worth $300, and force the Commonwealth to take an early position on how it will attempt to prove value. The Commonwealth will not likely be as ready to prove value at a preliminary hearing as it will be in circuit court, and the witness proffered on the issue of value may be wholly unprepared to discuss value. Effective cross-examination may lock the witness into a version of facts from which, after transcription, there will be no escape later. Of course, to be effective, the defense counsel must be as fully aware as possible of the cases construing "value."

A. What is "Value?"

"Value" is not defined in KRS 514.010, nor does the legislative commentary provide any useful information for determining value. The best source for an authoritative definition seems to be a 1912 case interpreting **KRS 433.220**, Kentucky's larceny law (which preceded the enactment of the present theft provisions in the Model Penal Code), and adopting its commentary. *Allen v. Commonwealth* 146 S.W. 762 (Ky. 1912), held:

> The test by which the grade of larceny, either grand or petit, is determined is the value of the article at the time of the larceny which must be arrived at from a consideration of

> all facts in evidence; where an article is in general use and has a standard market value, that is the best evidence of value, and where the article has no standard value, value must be determined by the testimony of witnesses qualified to determine value.

There has not been a theft case since *Allen* that has so eloquently restated this definition of value, or defined it differently. This is the definition which I urge judges to accept when arguing issues of value.

1. Wholesale or Retail Price?

Proving a "standard market value" is not so easily done, however. Arguably, the same item can have different values depending upon the circumstances and from whom it is stolen. For example, suppose a wholesaler offers television sets to merchants for $250 apiece, which in turn are sold at retail for $300. Thief One steals a television set from the wholesaler's loading dock before it is taken into the store. Thief Two steals an identical television set from the back of a truck from a customer who has just purchased it at retail. Both are charged with felony theft by unlawful taking. Is this the correct result?

Looking at value from the perspective of the two victims, each suffered a different loss. The wholesaler has a loss $250. Restitution by the defendant of $250 would make him whole, since that is what he would have been paid for the item by a retailer. Thus, the "standard market value" for the wholesaler is $250, and the thief should be charged with a misdemeanor. The consumer, on the other hand, has no wholesale purchasing ability. The loss to him is $300, the cost it would take for him to replace the item with a brand new one. For him, the "standard market value" would be $300. The thief will likely be charged with a felony. Different result, and yet both stole the same brand new television set.

Does Kentucky's case law allow such seemingly disparate treatment? Seemingly. In *Irvin v. Commonwealth*, 446 S. W.2d 570 (Ky. 1969), Kentucky's highest court reviewed a conviction of theft of dresses from three retail stores. The defense protested the felony convictions on the ground that, although the retail price was above the felony threshold, the wholesale price was in the misdemeanor range. Thus, the convictions should have been misdemeanors. In affirming the judgments, the court held that "the retail price at which an item is offered for sale by a merchant in the ordinary course of business represents an expert's opinion of what it will bring from a willing buyer at that time and place, and a jury is free to accept it as correct." ***Id.*** at 573.

However, the court noted that the record contained testimony by the storeowners that "numerous items of cost went into a retailer's markup," and in any event, "it was a matter of common knowledge that a dress cannot be purchased from a display rack in Elizabethtown for what it would bring as part of a manufacturer's or wholesaler's inventory in New York City." Impliedly, the court accepted that there can be a market value for inventory and a different market value for goods in a retail store.

The Court also noted that both wholesale and retail prices were admitted into evidence, and the trial court instructed on both grand larceny and petit larceny. Thus, the jury was free to decide whether the value of the property should have been based on wholesale or retail prices.

Incorporating this case into practice, it is apparent that there is an opportunity at the preliminary hearing to lock into testimony of value favorable to the defendant when the items are stolen from a retail store. The Commonwealth will likely call the arresting officer, who will testify that the value of the stolen items is $300 or more. His testimony will be based on the sticker price, and he likely will not have any other basis for establishing value. If the storeowner is subpoenaed, along with inventory invoice records or purchase orders showing from whom and from where he got the items which were stolen, there is a chance to establish that the replacement cost to the storeowner is less than $300. The storeowner may not be cognizant of the hidden costs which go into the markup of an item, and at this point, he may not have been educated by the prosecutor to say that the retail price represents his best estimate of the value of item for resale. Moreover, he may also be able to testify as to what portion of the retail price constitutes "profit," which should be subtracted from the "value" of the item. After all, if the value of the item is restored to the storeowner, he can replace the stolen item and still realize his profit. Chances are, if a storeowner prices a television for sale at $300, for which he paid $250 to a wholesaler, he will say on the stand that his profit is $50, his replacement cost is $250, and his loss is therefore only $250.

2. Retail or Sale Price?

Another problem with proving value by retail prices is that other retailers may sell the same item at a lower price. In a shoplifting case I handled in Texas a few years ago, the client was charged with a misdemeanor for allegedly attempting to steal a ceiling fan. (Actually, she had stood in line for a long time waiting to pay for the fan, and went outside to the payphone to call her employer and tell him she would be late returning from lunch. Unfortunately, she forgot to put down the ceiling fan before she stepped outside.) The ceiling fan was "on sale" for $39.99, marked down from its "usual price" of $59.99. In Texas, there is a difference in degree of misdemeanors depending upon whether the value of the item was above or below $50. I argued to the prosecutor that the client should be charged with a lower-degreed misdemeanor because the real value of the ceiling fan was the price of the item "on sale," and not the usual retail price. As evidence, I gave the prosecutor an affidavit from the owner of a ceiling fan store

who was willing to testify that this particular model was sold "everywhere" for $39.99, and anyone who paid $59.99 was getting "ripped off." The charge was reduced, and the defendant pled to the Texas equivalent of pre-trial diversion on the lower charge.

The testimony of the fan dealer should be competent evidence in a Kentucky prosecution also. What is the "standard market value" of an item is a question of fact, and if an item does not sell at its "retail" price, and can only be moved at its "sale" price, a jury, or judge at a preliminary hearing, may be persuaded that the sale price represents the real value of the item.

3. Value of an Item Enhanced by Labor

The value of an item stolen is not the value of the item after figuring in costs of installation or attachment to realty, but rather is the value of the item by itself. Hence, in *Stephens v. Commonwealth*, 199 S.W.2d 719 (Ky. 1947), the value of wire stolen from a fence was not the sum of value of the wire and the added value of labor necessary to install the wire, but rather was the value of the wire as if unattached to realty. This is a departure from the concept of "pecuniary loss" suffered by the property owner, because the true value of the loss to the victim is the value of the wire plus the added cost of restoring the wire to his fenceline. Nevertheless, *Stephens* remains good law, and is there to cite in the event that the Commonwealth or a complaining witness attempts to increase the value of a stolen item by adding in costs of labor or services.

The logical extension of *Stephens* would be to limit the value of an item when it has been taken apart and sold piecemeal to others in excess of $300. Suppose, for instance, suppose a particular junked car which has a fair market value of $250 is stolen from the yard of its owner. The thief strips the car and sells the parts to others, eventually getting $450 for the parts. Although the Commonwealth might contend that the $450 represents the true value of junked car, the fact is that the acts of taking the car apart and finding different purchasers for each part constitute labor that enhanced the value. Assuming that good evidence exists which places a value of $250 on an item sold as a whole, the fact that the thief realized $200 more than that in resale should not increase the misdemeanor to a felony.

4. Multiple Items Taken at One Time v. Multiple Items Taken at Different Times

As already mentioned during the discussion of the "unhatched chickens case," the value of all items taken *during a single theft* are added together to determine whether the theft was a felony or a misdemeanor. Thus, before the values of several items are added together, the court must first determine whether it has a single theft – or multiple thefts – pending before it. The Commonwealth may have charged a single felony theft; but if the facts show that there should have been multiple thefts charged, and each theft taken in isolation would be a misdemeanor, the defense attorney must attack the Commonwealth's characterization of the offenses and move to have each theft considered separately.

In *Fair v. Commonwealth*, 652 S.W.2d 864, 866 (Ky. 1983), the Court analyzed the issue as follows:

> The question presented by this case is whether the theft of the three items constitutes a single offense or multiple offenses. The fountainhead of Kentucky case law on this issue is *Nichols v. Commonwealth*, 78 Ky. 180 (1879). The court in *Nichols* held that where several items of property are stolen at the same time and the same place there is but a single offense, whether the property belonged to one or several persons....
>
> The holding of *Nichols* has been repeatedly reaffirmed by Kentucky's highest court.... [citations omitted].
>
> Thus with case [law] on the issue firmly established, *the only question remaining is whether the items stolen in this case were stolen "at the same time and place"*.... In the case at bar, all three items of property were stolen from the same building on the same night. [Emphasis added.]

Hence, the Court in that case reversed the trial court's decision not to amend the indictment to consolidate three theft charges into one. Had the court answered the above-emphasized question differently, i.e., the three items of property were stolen from different buildings or on different nights, then the proper result would have been to affirm the trial court's decision to keep separate the three charges separate.

If the various thefts are separated into multiple charges, then the values of the items are not accumulated, and each charge is tried as either a misdemeanor or felony depending upon the value of each particular item involved in that charge.

An important departure from the *Fair* rule is that where various articles are taken at one time or *as the result of a single purpose at different times*, their value may be added together to determine the degree of larceny. See *Weaver v. Commonwealth*, 86 S.W.551 (Ky. 1905). What constitutes a "single purpose" is anyone's guess, but the Commonwealth's burden. The only time that I have seen a prosecutor attempt to prove a "single purpose" is when a defendant was alleged to have taken a job as a sales clerk at a store *solely for the purpose* of being able to shoplift with impunity. The prosecutor urged that the several thefts should be aggregated into one theft, because each theft was part of a common scheme to deprive the storeowner of various items over a period of time. (The case was resolved before the court ruled on the motion.)

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Finally, note that in cases involving the fraudulent use of a credit card – either because a credit card was stolen and used, or fraudulent information was used to obtain a credit card – the values of fraudulently obtained items accumulate with each use of the card for a period six months. K.R.S. 434.650 – 690. Thus, the fraudulent purchase of items valued at $75 in February, and $75 in June, will combine for $150 in value, $50 over the misdemeanor / felony demarcation line set by statute.

B. Methods of Proving Value

"Value" can be proven by lay or expert opinion, or, at a preliminary hearing, by documents which can establish value.

1. Lay and Expert Opinion

A person may testify as to his opinion of the value of his own property, and it will be considered "competent and adequate proof." *Young v. Commonwealth*, 286 S.W.2d 893, 894 (Ky. 1955). Hence, a grocer was able to testify to the value of sausage and pork loins,[4] a motorcycle owner could testify as to the value of his motorcycle *Gayton v. Commonwealth*, 287 S.W.2d 429 (Ky. 1956), and an automobile dealer's wife could testify as to the value of a used car. *Crum v. Commonwealth*, 467 S. W.2d 343 (Ky. 1971).

However, a person's lay opinion of value must have some reasonable basis. The same cases which hold an owner's opinion to be competent proof do so only after establishing that the opinion was reasonably grounded in fact. In the case of the grocer, the court reasoned that "it was a simple matter of mathematical calculation," in allowing the grocer to multiply the number of stolen sacks of meat by the number of pounds in each sack, and the price per pound. ***Gayton,*** at 431. In the case of the automobile dealer's wife, the court noted that the witness had worked in the business, was familiar with the amount of money that had been paid for the automobile, and was familiar with the book used by automobile dealers for establishing prices on used cars. ***Crum,*** at 346. The motorcycle owner's testimony was found to reasonable because he testified that the motorcycle was only two-months old, had low mileage, and had never been wrecked, ***Brewer,*** at p. 457, enough information for a jury to infer that the value had not fallen very far from its value when new. Hence, a property owner's bald assertion that an item is worth "X dollars" should be objected to as irrelevant, barring some showing of a reasonable basis on which that opinion of value is made. (One could argue that the testimony of at least two of these victims was not "lay" opinion at all, but constituted "expert" opinion, because of the backgrounds of the witnesses.)

At a trial, defense counsel will usually need an expert opinion to contradict the lay or expert opinion of the victim. Whether to use that expert at a preliminary hearing is, as discussed, a judgment call. Regardless, an "expert" is merely a person who has particularized knowledge which will assist the trier of fact, and should be fairly easy to find on short notice, especially if the items allegedly stolen are generally available and in wide circulation.

2. Documents

A car, boat or motorcycle's value can be fairly estimated by dealer "blue books," generally available at the County Court Clerk's office. While not the final word on any particular vehicle's value, it establishes the usual range for the value of such items, and can contradict a lay opinion at wide variance with that range. Internet search engines, whose brands are nameless here, also offer programs which attempt to place a value on vehicles. These blue books and internet programs are most effective if used during the testimony of an expert who frequently uses them.

If the item stolen was recently awarded in a divorce or probate proceeding, a check of the court files to see if the item was valued in an inventory may be rewarding.

"Green sheets," classified ads, or trade publications which offer similar items for sale may also establish a baseline for value.

A call to the manufacturer may yield an opinion as to an item's value.

There are virtually unlimited ways to prove value, depending upon the item and its history of sale and resale, if it can be determined. While usually there is little opportunity before the preliminary hearing to conduct extensive discovery, getting the item's history from the complaining witness while he or she is on the stand may preclude attempts to embellish the history of the item later.

II. Proving "Pecuniary Loss" in a Criminal Mischief Case

KRS 512.020 "Criminal mischief in the first degree" provides in pertinent part that a person is guilty of the offense when he intentionally or wantonly damages any property causing "pecuniary loss of $1,000 or more." KRS 512.030 "Criminal mischief in the second degree" is completed when the "pecuniary loss" is $500 or more. KRS 512.040 "Criminal mischief in the third degree" is completed when property is damaged – there is no reference to a dollar amount.

In a criminal mischief trial, the Commonwealth must prove "pecuniary loss" by the victim beyond a reasonable doubt. KRS 500.070. At a preliminary hearing, the Commonwealth need only establish probable cause that the victim suffered a "pecuniary loss" in the jurisdictional amount.[5] RCr 3.14.

A. Method of Measuring "Pecuniary Loss" is a Legal Question

At a criminal mischief trial, before a jury can determine the amount of pecuniary loss as a result of property damage, the court should first decide how damages are to be measured in the case, and instruct the jurors accordingly. The proper *measure* of damages upon which a jury will be instructed is a legal issue.[6] At a preliminary hearing, the court should still decide the proper measure of damages, and bind a defendant over to a grand jury only if the prosecutor establishes probable cause under the proper measure of damages. For example, if the prosecution were to state that the pecuniary loss is over $1,000 under one method of determining "pecuniary loss", and the defense were to state that the loss is under $1,000 under a *different* method of determining "pecuniary loss," then the district court must determine which side has presented the proper method of determining "pecuniary loss." Once this legal question is answered, the inquiry then becomes: "what is the amount of "pecuniary loss" under the proper measure of damages?" If the prosecution still presents proof of loss greater than $1,000 under the court's method of determining loss, then probable cause will *probably* be found regardless of the defendant's proof, if any.[7]

Determining "pecuniary loss" under the proper measure of damages is critical when defending clients in criminal mischief cases. Consider the too familiar circumstance where you represent a person who intentionally pounded someone's twelve year old car with a hammer, or threw a brick at it, or simply crashed his own car into it. The car has a value of $500, according to the N.A.D.A. book. At a preliminary hearing, the prosecutor attempts to prove pecuniary loss by introducing into evidence an estimate of repair and repainting costs in the amount of $1,200. This estimate is declared to be *the* proof of pecuniary loss, and an indictment for criminal mischief in the first degree is sought on this basis. Is the cost of repairs the proper measure of pecuniary loss? Or rather, is the diminution in the value of the vehicle after it has been damaged the proper measure of damages? If the repair costs are accepted as the measure of damages, then the $1,200 estimate of the cost to replace a dented hood and repaint the vehicle makes the case a felony. On the other hand, if the vehicle was worth $500 before the damage, but is now worth $400, a measure of damages based on diminution in value would make the crime a misdemeanor. Whether your client is tried on a felony or misdemeanor charge will depend upon your ability first to persuade the judge to choose the proper measure of proving pecuniary loss. To do that, you have to convince the judge of the proper definition of "pecuniary loss" and how it is determined under the law.

B. "Pecuniary Loss" is the Diminution in Value of the Property

Although "pecuniary loss" is not defined in the Kentucky Revised Statutes, nor has any case defined "pecuniary loss" in the context of a criminal case, it is clear that the legislature intended that "pecuniary loss" be proven in the same manner that property damage in a civil case is proven -- by proving the value of the property before it was damaged, and immediately after it was damaged, and calculating the difference.

The Kentucky Crime Commission / LRC 1974 commentary to the statute provides: "Penalties are graded according to the value of the property injured or destroyed and the defendant's state of mind...." West's 1998-99 Criminal Law of Kentucky "Blue book" contains a library reference to Am Jur 2d on "Damages," which is the encyclopedic reference to damages in general. These references imply that the civil measure of damages is to be used when determining the "pecuniary loss" of an alleged victim.

Lawson & Fortune, in their book, *Kentucky Criminal Law*, Sect. 12-5(c), p. 474, agree:

> Although neither defined nor judicially construed, "pecuniary loss" presumably means the difference in fair market value before and after the defendant's act. A showing of damage to property without a showing of the amount of loss would result in a conviction of mischief in the third degree.

Finally, the case of *Parham v. Commonwealth*, 520 S.W.2d 327 (Ky. 1975), supports a civil evaluation of damages in a criminal automobile damage case. (Although an arson case, it is listed in Michie's official annotations under Criminal mischief in the first degree, presumably because the case was decided on law in existence prior to Kentucky's enactment of the Model Penal Code in 1974. Degrees of arson under the old code[8] were dependent upon the value of property burned, unlike the present arson statutes which base degrees of culpability upon the type of building and whether it is inhabited. Hence, the placement of the case under "criminal mischief," which does vary the degrees based on the "value" of the property damaged or destroyed.) In *Parham*, the high court held that the Commonwealth has the duty to establish *value*." [Emphasis supplied.]

A civil damage valuation was done in *Parham*: the auto was completely destroyed, so the only issue was the value of the vehicle before it was destroyed, the value after its destruction being $0. However, where the property is merely damaged, and not destroyed, the value of damages is the difference between reasonable market value immediately before and immediately after the injury. As stated in *Gheens v. Bush*, 80 S.W.2d 581, 258 (Ky. 1935), "[w]here damaged personal property can be repaired, measure of damages is the difference between its reasonable market value immediately before and after injury." Numerous cases are cited in West's Kentucky Digest 2d, Damages Sect. 113, which involve damages to vehicles in particular, and apply this measure of damages.[9]

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C. "Pecuniary Loss" Is Not Equal to "Repair Costs"

As mentioned above, an estimate of the costs of repair are often used as "proof" of pecuniary loss by prosecutors, without further proof of the actual diminution in value of the damaged property, if any. Under the above cited cases, this is not the proper measure of damages. That is not to say that cost of repairs is irrelevant. As held in *Ecklar-Moore Express, Inc. v. Hood,* 256 S.W.2d 33 (Ky. 1953), a civil case involving damage to a trailer truck, the "cost of reasonably necessary repairs....may be considered *in determining diminution in value* of use of property." [Emphasis added.] As explained by the court:

> The appellant indirectly argues that the damages should have been limited to the actual cost of repairs. The argument is untenable. The measure of damages, in this state, for injuries to personal property is the difference between the reasonable market value immediately before and immediately after the injury....[citation omitted]....Evidence as to the cost of repairs is admissible as bearing on the question of difference in value....[citation omitted]....but where there is competent evidence that the difference in value exceeds the cost of repairs, the recovery is not limited to the cost of repairs...[citation omitted]. ***Id.***

In *Ecklar-Moore*, even though the loss in value of the damaged vehicle was more than the cost of repairs, damages were allowed for the loss in value, and were not limited to cost of repair. However, the result is the same where the cost of repairs exceeds the loss in value.

In *Edwards & Webb Construction Co., Inc. v. Duff,* 554 S.W.2d 909, (Ky. App. 1977), a blasting damage case, it was held that the trial court committed reversible error in refusing to give an instruction which would have limited recovery to total fair market value of a building damaged if cost of repair was found to exceed such value.

Hence, regardless of the cost of repair, the Commonwealth must prove *loss in value*: *i.e.*, the Commonwealth must present evidence of the difference between the value of the car immediately before the injury, and the value immediately after.

D. Multiple Items Damaged at One Time

If various items are damaged at one time, by analogy to the theft cases, particularly *Fair v. Commonwealth,* the pecuniary loss of each item is added together to determine the total amount of property damage. No cases have specifically so held, but an 1889 case. ***Evans v. Commonwealth*, 12 S.W. 768 (Ky. 1889).** found an indictment for burning a barn was sufficient even though it did not allege "wheat, corn and other articles" which were usually kept in the barn. By implication, separate indictments are not necessary for separate articles criminally damaged or destroyed in the same event.

Likewise, by analogy to the theft cases, if a client damages someone's car on one day, and returns to damage his truck on another day, there are separate instances of criminal mischief and the total pecuniary loss of each vehicle should not be combined into one criminal mischief charge.

E. Methods of Proving "Pecuniary Loss"

There are no cases particular to criminal mischief which discuss the methods of proving pecuniary loss. However, once a court is satisfied that proving pecuniary loss is equal to proving the diminution in value of the property, the aforementioned cases which discuss the methods of proving value in a theft case become applicable. Lay opinion, expert testimony and documents that relate to the value of an item ought to be competent evidence. As stated, repair bills may have some relevance to the issue of pecuniary loss, but should not be considered the same as pecuniary loss.

One additional avenue of proof of pecuniary loss may exist if the owner of the damaged property mitigated his damages by selling the damaged property to another. If a car is reasonably valued at $4,000, and after being damaged is sold for $3,200, the loss in value to the owner would be $800, below the felony threshold for criminal mischief in the first degree. Although it cannot be reasonably argued that a criminal mischief victim has a *duty* to mitigate, there is no case law that would preclude consideration of the salvage value of property in calculating the pecuniary loss to the individual.

III. Preliminary Hearings: Should the Defendant Produce Proof of Value or Pecuniary Loss?

Usually at a preliminary hearing the prosecutor presents at least a police officer that will testify generally as to the offense, including the value of the item stolen or damaged, but sometimes also the owner of the item to testify as to value. The defense attorney then can always cross-examine the complaining witnesses and attempt to elicit admissions which will circumscribe what these witnesses will be able to say about value or pecuniary loss at a later trial.

Then comes a judgment call: If the defense attorney has available expert or lay testimony which credibly refutes (as opposed to merely contradicts) the complaining witnesses' version of value or loss, does the attorney present the witnesses before the prosecution, or wait until the case goes to trial?

In favor of not calling a witness during the defense's case in chief is the concern of telegraphing your defense strategy to the prosecution before it really counts. After all, the most relief that be gained at a preliminary hearing is the dismissal without prejudice of the charge. More likely, the charge will be amended to a misdemeanor if the Commonwealth fails to prove value in excess of the felony jurisdictional limit. Even

then, a prosecutor committed to getting a felony conviction can move to dismiss without prejudice and bring the charges before a grand jury later, after he has had time to consider the defendant's witness testimony and refute it with other experts or lay witnesses without the objections or interference of a defense counsel.

On the other hand, if the evidence of guilt is overwhelming, and value or loss is the defendant's best or only triable issue, the defendant may wish to put forward evidence in the hope of achieving the amendment of the charge to a misdemeanor, whereupon the client can immediately plead guilty in order to bar trial at the circuit level on double jeopardy grounds. (This may be especially true if the defendant has prior felonies and is therefore vulnerable to a Persistent Felony Offender charge. In that event, the Defense has every incentive to try to "win" the preliminary hearing and have the charge amended to the misdemeanor. Once amended, the defendant has an absolute right to plead guilty to the charge and proceed to sentencing. [10]

If, after amendment, the Commonwealth still attempts to dismiss without prejudice, the defense attorney should respond that the dismissal prejudices the defendant by not allowing him to avail himself of the right to plead guilty to a charge, and subjects him to possible greater punishment, even though the court has already ruled that the Commonwealth has not shown probable cause that he should be tried on that higher charge. The judge may still grant a dismissal, but on the other hand may also take the defendant's plea.

Absent a desire by the Defendant to plea to a misdemeanor, this attorney advocates not calling witnesses at the preliminary hearing on behalf of the defendant on a contested issue of value or pecuniary loss. This is a judgment call, though, and any particular situation must be looked at independently.

IV. Conclusion

Knowing how to calculate "value" in a theft case and "pecuniary loss" in a criminal mischief case – and educating the court as to the same – may mean the difference whether your client is tried as a misdemeanant or a felon. Keep hammering that retail is not necessarily value, and repair cost is not necessarily pecuniary loss, and hopefully your client will be facing charges more appropriate to the crime he allegedly committed.

◆

[1]Kentucky Statutes 1201c, revised as KRS 433.250, now repealed.

[2]*Smith v. Smith,* 178 S.W.2d 613, 614 (Ky. 1944). This case involved a claim of malicious prosecution, where the court addressed whether a civil litigant had "probable cause" to initiate his prior civil litigation. Nevertheless, the case defines "probable cause," and there is no reason to belief that "probable cause" means one thing in a civil context and another in a criminal context.

KRS 433.220

[4]*Gayton v. Commonwealth,* 287 S.W.2d 429 (Ky. 1956)

[5]RCr 3.14

[6] (*See, e.g., Kentucky Utilities Co. v. Consolidated Tel. Co.,* 252 S.W.2d 437; failure of court in tort action to give instructions concerning basis by which damages to personal property were to be measured was reversible error.)

[7] This is not an absolute, however. A person's testimony that a ten year old television set was worth over $1,000 when it was broken by a defendant, when its purchase price ten years ago was $1,100.00, brand new, ought not to constitute probable cause even in the absence of any proof by the defendant.

[8]KRS 433.030

[9] *Rudd Construction Equipment Co., Inc. v. Clark Equipment Co.,* 735 F.2d 974 (6th Cir. 1984). *Hayes Freight Lines v. Hamilton,* 257 S.W.2d 60 (Ky. 1953); *McCarty v. Hall,* 697 S.W.2d 955 (Ky. App. 1985); *See, e.g., Howard v. Adams,* 246 S.W.2d 1002 (Ky. 1952).

[10]*Commonwealth v. Corey,* 826 S.W.2d 319, 321 (Ky. 1992) ("Finally, we observe that by virtue of RCr 8.08, and without regard to the wishes of the Commonwealth, a defendant has an absolute right to unconditionally plead guilty to the crime charged in the indictment....") *Corey* referenced *Allen v. Walter,* 534 S.W.2d 453 (Ky. 1976), which held that, without agreement by the Commonwealth, a judge cannot unilaterally amend the charges and allow a defendant to plead to a lesser charge than that upon which he was indicted. However, the rationale of *Allen* was that a judge could so amend only after all evidence had been presented in a jury trial, and the court was able to determine that there was insufficient evidence to support the greater offense. In the case of a preliminary hearing, however, the court would also have grounds because an amendment would only occur upon the Commonwealth's failure to produce evidence of probable cause on the issue of value. Certainly, evidence insufficient to sustain probable cause as to value would also be insufficient to sustain a verdict of guilty beyond reasonable doubt on the issue of value. Hence, using the rationale of *Allen* and *Corey*, the defendant ought to have an "absolute right" to unconditionally plead to the lesser offense.

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THE JUVENILE CASEWORKER'S RECOMMENDATIONS:

Does Kentucky's highly discretionary model lead to arbitrary and capricious application of our laws?

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Assistant Public Advocate

ABSTRACT

JUVENILE ATTORNEYS NEED TO ADVOCATE FOR ALL THEIR YOUTHFUL CLIENTS AT THE DISPOSITIONAL PHASE OF THE JUVENILE PROCEEDINGS. OFTEN, THIS CRITICAL PHASE IS OVERLOOKED, AND JUDGES MERELY RUBBER STAMP THE CASEWORKER'S RECOMMENDATIONS. JUVENILE ATTORNEYS HAVE A POWERFUL TOOL IN THE JUVENILE CODE'S MANDATE THAT THE COURT MAY ONLY IMPOSE THE LEAST RESTRICTIVE ALTERNATIVE. UNLESS THE COURT MAKES FINDINGS THAT LESSER RESTRICTIVE ALTERNATIVES HAVE BEEN CONSIDERED AND ARE NOT FEASIBLE, COMMITTING A JUVENILE TO THE DEPARTMENT OF JUVENILE JUSTICE IS IMPROPER. JUVENILE ATTORNEYS SHOULD PRESENT EVIDENCE CONCERNING "PROTECTIVE FACTORS" (SIMILAR TO MITIGATING FACTORS IN SENTENCING) AS WELL AS REQUIRING THAT THE COURT MAKE FINDINGS ON WHAT ALTERNATIVES ARE OR ARE NOT FEASIBLE AND WHY THE CHILD MUST BE COMMITTED. JUVENILE ATTORNEYS CAN ARGUE THAT UNLESS THE COURT MAKES THESE FINDINGS THE JUVENILE COURT HAS ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER AND THUS COMMITMENT OF THE CHILD VIOLATES SECTION 2 OF THE KENTUCKY CONSTITUTION.

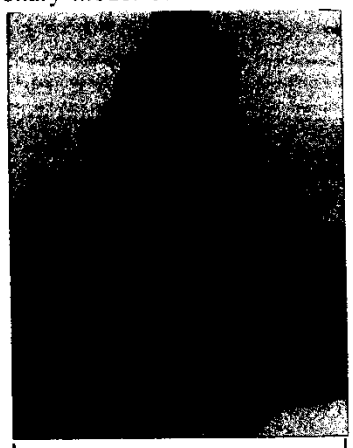
Introduction

Many children are channeled into the juvenile justice system as a result of improper evaluations and improper commitment by the court. Kentucky caseworkers use predisposition reports that are highly discretionary, and do not properly consider empirical factors that would assist courts in properly determining which children should be committed to the Department of Juvenile Justice. Totally discretionary methods utilized by caseworkers and juvenile courts lead to erroneous, inconsistent or inequitable placement and restrictions on the juvenile's liberty. Advocacy has been recognized as having a positive effect in promoting proper policy applications and outcomes, and is an effective tool for properly managing and reducing detention populations.

Studies have shown that approximately one-third of the juvenile population are improperly placed in training schools when they are scored as "low" or "medium" risk. If placement decisions had been made on agreed upon public safety criteria far fewer youths would be held in secure care. Data on the seriousness of offense committed shows that the vast majority of youth in State custody are not violent offenders. "Severity profiles" of youth admitted to correctional institutions shows that:

- Only 14% of the youths admitted into custody in 29 states studied were admitted for what were identified as "serious and violent" offenses.
- Over one half of the youths admitted involved youths that had not committed a serious or violent offense and who were never previously in the State's custody.
- Eight percent of the youths had been admitted for what were considered "minor" offenses.

This data begs the important policy question of whether the states are using their resources in the most efficient manner, and whether many of our treatment centers are overloaded with less serious juvenile offenders. Because the discretionary model of risk assessment has been called into question, the National Center of Child Abuse and Neglect (NCCAN) has endorsed the empirical approach to risk assessment. The NCCAN states that the empirical model is "superior to consensus models in predicting reoccurrence" and that empirical models "lead to more efficient use of available services." Empirical analysis is used in other states to assure that the least restrictive alternative is imposed on juveniles and in order to assure accurate policy application and outcomes. Three examples of such models are presented in Figures 1-3, which follow this article.



Suzanne Hopf

Well designed instruments are able to identify groups of high risk offenders who are four or five times more likely to commit a new offense than the identified low-risk offenders. The following risk predictors have been identified:

1) Age of first referral or adjudication;
2) Number of prior referrals or arrests;
3) Number of out-of-home placements or institutional commitments;
4) School behavior and attendance;
5) Substance abuse;
6) Family stability;
7) Parental control; and
8) Per relationships.

R.F. Catalano has also found that there are 19 factors that place youth at risk for one or more problem behaviors, and that these include, generally: community risk factors, family risk factors, school risk factors, and individual and peer risk factors (a more specific

list of the risk factors is included in the endnotes to this article). However, these risk factors can be offset by countervailing forces, or "protective factors," that can reduce the impact of the risk factors. "Protective factors" include three basic categories:

- Individual characteristics;
- Attachment and commitment to prosocial persons, institutions and values;
- Healthy beliefs and clear standards for behavior in families, schools, and communities.

Well developed community interventions will be designed to strengthen these "protective factors" and will thus mitigate the influence of the high risk factors. Proper interventions should also promote child and adolescent bonding to prosocial persons and institutions, and a good prevention program should address these two factors simultaneously.

The Least Restrictive Alternative As A Factor in Disposition

At disposition the juvenile attorney should present evidence that supports that the least restrictive alternative should be imposed and if the court commits the child, the juvenile attorney should require that it articulates the reasons why a child should not remain in the community for treatment. State actors (*i.e.* your judge, the caseworker and the county attorney) often assume that youth who have committed serious or violent offenses are more likely to commit subsequent offenses than those who have not. However, risk research shows that serious offenses are not highly correlated to, and in fact often are inversely correlated with a negative outcome. KRS 610.080 requires that a separate hearing is held for the disposition, and that the child is entitled to a formal predisposition investigation unless the child waives this requirement. Kentucky's caseworkers frequently use a totally discretionary analysis in making their recommendations to the juvenile court, and rely on a "gut feeling" that the caseworker has about any given child. Juvenile attorneys should argue that the court consider all relevant "protective factors" listed previously. Attorneys should point out to the court that these factors are valid and reliable and are proper scientific evidence that is relevant and probative on the issue of commitment. Under KRE 702 the courts must consider this evidence, and the recent *Kumho Tire Co. v. Carmichael*, discussed *infra*, supports that the application of the *Daubert* standards (mirroring KRE 702 and requiring additionally that the court conduct pre-trial Daubert hearings) shall apply to all expert testimony.

Not only must the courts consider such evidence under KRE 702, but the Juvenile Code also has an express provision that states that:

> At the disposition, **all information helpful in making a proper disposition**, including oral and written reports, shall be received by the court in compliance with subsection (1) of this section and relied upon to the extent of their probative value, provided that the parties or their counsel shall be afforded an opportunity to examine and controvert the reports.
>
> KRS 610.110 (2) (emphasis not in the original)

Evidence presented at a dispositional hearing need not be limited to the caseworker's testimony and that other evidence relevant to appropriately placing the child should be submitted to the court. Juvenile attorneys can rely on KRS 610.110(2) if the court is reluctant to admit evidence that is probative in determining the least restrictive alternative.

Attorneys should consider having their own expert conduct a proper empirical analysis of risk and may want their own expert to present evidence concerning the "protective factors." The juvenile is entitled to present this evidence to "controvert the reports." Even when the caseworker has declared that he or she recommends commitment, the trial attorney should be considering whether alternative witnesses could sway the court towards a community placement.

Vigorous advocacy requires that counsel questions the caseworker as to the process upon which he or she relied in making the determination that the child should be committed. The attorney may wish to discover the following information:

- Was an empirical risk assessment done? If so what were the determining variables and what weight did each variable carry to determine the final score.
- Are criterion clearly specified in the caseworkers "risk assessment?"
- Did the selection process ensure that the youth was eligible for certain levels of security? Do the least restrictive alternatives exist at these levels and in fact will the child be served at that level?
- Was the child ultimately ranked as a low, moderate or high risk for committing another offense.
- Does the family as a whole require services? In these cases community placement is the most holistic approach to providing proper treatment and services, and may very well be the only way to treat some offenders properly.
- What specifically are the various placement options that are available in the community?
- What was the criterion upon which the youth was determined to not be suitable for community placement?

It is important at the disposition phase not to simply allow the juvenile court to "rubber stamp" the caseworker's recommendation without proper inquiry and at the very least, juvenile counsel should make an affirmative request that the least restrictive alternative be considered by the court. The juvenile's attorney may very well have to suggest what alternatives are available if the caseworker is not a favorable witness. **If the juvenile court insists on committing a low risk offender and will not allow the child to remain in the community, counsel should request that the court articulate the reasons for the commitment.** The Juvenile Code requires that the court utilize the least restrictive alternative, and that it must also consider these alternatives and show that they are not feasible. Not only can counsel cite to this section of the code as a basis for the least restrictive alternative, but juvenile courts should be reminded of the heavy financial burden that improper placement imposes on the state.

(Continued on page 20)

(Continued from page 19)

If the court commits the child to the Department of Juvenile Justice or orders detention without proper inquiry into the community placement alternatives that are available and without making specific findings on WHY the court has determined that the commitment or detention is appropriate, the court violates the intent of the Juvenile Code and Section 2's (Kentucky Constitution) prohibition against arbitrary and capricious application of the law. In order to preserve this issue for appeal juvenile attorneys should request that the court make these findings, and should object to commitment if the court refuses to make this record. Even after the least restrictive alternatives have been considered by the court and these options are rejected, the juvenile attorney can object to detention or commitment if the "protective factors" have been articulated to the court and indicate that commitment or detention is not warranted.

Legal Argument:

IT IS AN ABUSE OF DISCRETION FOR JUVENILE COURTS TO FAIL TO CONSIDER ALL LESSER RESTRICTIVE ALTERNATIVES PRIOR TO COMMITMENT OF A CHILD TO THE DEPARTMENT OF JUVENILE JUSTICE.

Juvenile courts must consider the overriding objectives to KRS Chapter 600 when they determine the disposition of a juvenile. KRS 600.010 requires that the juvenile court utilize dispositions that will promote the integrity of the family and that courts must actually show that the least restrictive alternatives have been attempted or are not feasible. It is an abuse of discretion if the juvenile court does not place a child in the least restrictive alternative environment. Juvenile advocates should present testimony on the services that are available in the community and should make sure that a proper assessment has been done by the child's caseworker as to the feasibility of providing these services. The juvenile court should be required to articulate their reasoning when it does not place the child in the community. To do less than this would be to deny the child Due Process guarantees.

Section Two of the Kentucky Constitution expressly forbids the exercise of absolute and arbitrary power by the state. While the juvenile court does have wide latitude in determining the best interest of the child and the proper disposition for a juvenile offender, this latitude cannot be absolute. No statutory scheme can confer upon the juvenile court a license to engage in arbitrary procedures and thus the juvenile court must be held to a proper standard of review in order to assure that fundamental fairness is guaranteed and that any arbitrary and capricious application of the law is avoided. Allowing the juvenile court to commit a child, absent **ANY** finding by the juvenile court that a lesser restrictive alternative had been attempted and shown to have failed is an express violation of KRS 600.010 (2)(c) as well as the overall intent of the Juvenile Code. The burden of proof that must be met in juvenile proceedings is a high one, and the general standard applied to juvenile proceedings is the well known "beyond a reasonable doubt" standard adopted thirty years ago in *In the Matter of Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 369 (1970).

The Commonwealth must show that lesser restrictive alternatives are not available or have proven to have failed in the past. This requirement is embodied in the mandatory language of 600.010(2)(c) which states **"The court shall show that other least restrictive alternatives have been attempted or are not feasible...."** This proof must rise to the level of either beyond a reasonable doubt or at the very least, to the level of clear and convincing. In many cases there is absolutely NO proof that less restrictive alternatives have been considered or have already failed. In these cases commitment of the child is improper and violates the express provisions KRS 600.010 (2)(c).

According to the United States Supreme Court three essential factors must be considered by the court to determine whether the standard of proof utilized in a given proceeding complies with due process. The court must consider: " the private interests affected by the proceeding; the risk of error created by the State's chosen procedures and the counterveiling government interest supporting use of the challenged procedure." In *Santosky*, the Court emphasized that "when individual liberty interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money" the appropriate standard is "clear and convincing." The clear and convincing standard must be met to provide "a level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or with stigma." Even if juvenile courts refuse to apply the higher burden of proof associated with *Winship* (that of reasonable doubt), they should have AT LEAST meet the burden of clear and convincing.

Summary

Effective juvenile advocacy requires that counsel present reasons at the dispositional phase of the proceedings on why the child should remain in the community. Advocates should present evidence of "protective factors" and require that the court actively consider placement in the least restrictive alternative, and require the courts to articulate reasons why community placement is not a proper disposition. Also, juvenile advocates should consider requesting *Daubert* type hearings on the matter of the caseworker's recommendations in order to assure that the recommendations are accurate, empirically valid and reliable, and comply with the proper standards under KRE 702. ◆

For a copy of a brief and supporting appendices that sets forth the reasoning and citations provided in this article, contact:

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Figure 1

Louisiana Office of Juvenile Services Secure Custody Screening Document

		Score
1. Severity of Present Adjudicated Offense		
Level 0 Felony	10	
Level 1 Felony	7	
Level 2 Felony	5	
Level 3 Felony	3	
Level 4 Felony	1	
All Other	0	
2. If Present Adjudication Involves		
Possession / Use of Firearm	2	
Multiple Felonies	2	
3. Number Prior Adjudication		
Two or More Felony Adjudications	2	
One Felony or Two + Misdemeanors	1	
None	0	
4. Most Serious Prior Adjudication		
Level 0 or Level 1 Felony	5	
Level 2 Felony	3	
Level 3 or below	0	
5. For Offenders With Prior Adjudications		
Age at First Adjudication		
Age 13 or younger	2	
Age 14	1	
Age 15 and older	0	
6. History of Probation / Parole Supervision		
Offender Currently On Probation / Parole	2	
Offender With Probation / Parole Revocation	1	
7. History of In-Home / Nonsecure Residential Intervention		
Three or More Prior Failures	3	
One or Two Prior Failures	1	
None	0	
8. If the Offender Had a Prior Placement in OJS	2	
9. Prior Escapes or Runaways		
From Secure More than Once	3	
From Secure Once or Nonsecure 2+	2	
From Nonsecure Once	0	
Total Score		

Recommended Action

0-6 = consider nonsecure placement
7-8 = consider short-term secure placement
9+ = consider secure placement

Figure 2

NCCD Michigan Delinquency Risk Assessment Scale

		Score
1. Age at First Adjudication		
11 or under	3	
12 – 14	2	
15	1	
16 or over	0	
2. Number of Prior Arrests		
None	0	
One or Two	1	
Three or More	2	
3. Current Offense		
Nonassaultive offense (i.e., property, drug, etc.)	2	
All others	0	
4. Number of Prior Out-of-Home Placements		
One or fewer	0	
Two or more	1	
5. History of Drug Usage		
No known use or experimentation only	0	
Regular use, serious disruption of functioning	1	
6. Current School Status		
Attending Regularly, occasional truancy only, or graduated / GED	0	
Dropped out of school	1	
Expelled / suspended or habitually truant	2	
7. Youth was on Probation at Time of Commitment to DSS		
No	0	
Yes	1	
8. Number of Runaways from Prior Placements		
None	0	
One or more	1	
9. Number of Grades Behind in School		
One or Fewer	0	
Two or three	1	
Four or more	2	
10. Level of Parental / Caretaker Control		
Generally effective	0	
Inconsistent and / or ineffective	1	
Little or no supervision provided	2	
11. Peer Relationships		
Good support and influence; associates with nondelinquent friends	0	
Not peer-oriented or some companions with delinquent orientations	2	
Most companions involved in delinquent behavior or gang involvement / membership	3	
	Total Score	

Risk Assessment

0 – 8 Low Risk
9 – 13 Moderate Risk
14 – 18 High Risk

Figure 3

Wisconsin Delinquency Risk Assessment Scale

		Score
1. Age at First Referral to Juvenile Court Intake		
13 or under	2	
14	1	
15 or over	0	
2. Prior Referrals to Juvenile Court Intake		
None	0	
One or Two	1	
Three or More	2	
3. Prior Assaults (includes use of a weapon)		
Yes	2	
No	0	
4. Prior Out-of-Home Placements		
None or one	0	
Two or more	2	
5. Prior runaways (from home or placement)		
None or one	0	
Two or more	2	
6. School Behavior Problems (includes truancy)		
None or only minor problems	0	
Serious problems noted	2	
7. History of Physical or Sexual Abuse as a Victim		
Yes	1	
No	0	
8. History of Neglect as a Victim		
Yes	2	
No	0	
9. History of Alcohol or Other Drug Abuse		
Yes	2	
No	0	
10. History of serious emotional problems		
Yes	1	
No	0	
11. Peer Relationships		
Good support and influence	0	
Negative influence; some companions involved in delinquent behavior or lack of peer relationships	1	
Strong negative influence; most peers involved in delinquent behavior such as gang involvement	2	
Total Risk Score		

Risk Classification:

0 – 5	Low Risk
6 – 9	Medium Risk
10 – 13	High Risk
14 or Above	Very High Risk

PRACTICE TIPS from DPA's Appellate Division

Collected by Susan Balliet, Capital Post-Conviction Branch Manager

For Federal Habeas: Cite Old U.S. Supreme Court Cases at Trial

Under the AEDPA's § 2254(d) federal habeas relief is available only to correct violations of very old black letter law reflected in U. S. Supreme Court decisions. If there is a U.S.S.Ct. case that covers the objection you are about to make, cite it. If your objection could be characterized as a violation of more than one federal constitutional rule, cite each and every provision that has been violated, and cite a U. S. Supreme Court case to back it up.

Also critical at the federal habeas level is proof that you attempted vigorously to make a record. Any time you are denied the right to introduce evidence, be sure to put it in by avowal.

Mark Olive, NLADA's "Life in the Balance" conference in Washington D.C., March 2000

Use Positive Terms to Describe the Trial Process

Call it the "innocence phase" and (in a death penalty case) the "life" phase.

Mike Tigar, NLADA's "Life in the Balance" conference in Washington D.C., March 2000

To Avoid a Claim of Ineffectiveness

Evidence that a trial started late in the day on repeated occasions can be evidence of attorney ineffectiveness, if the late starts can be attributed to the attorney. So be on time for trial. Inconsistent theories can be evidence of ineffectiveness: don't argue your client was abused and then put on his nice well-behaved mother to testify. An aggressive 11.42 lawyer might subpoena jail and phone records to show you had insufficient contact with your client. Spend adequate time with your client to prepare your case. Attorney trainer Ira Mickenberg in a federal habeas hearing said to appellate counsel (who had neither visited his client nor responded to numerous client letters, "I'd like to introduce you to your client."

Ira Mickenberg, NLADA's "Life in the Balance" conference in Washington D.C., March 2000

Your Client's Rights Under International Law

All your clients, not just those who are U. S. citizens, may have rights under international law. For instance, under the supremacy clause Kentucky must enforce the Vienna Convention, which is a contract between the U. S. and other nations. Any Kentucky statute that violates a provision of the Vienna Convention is per se a violation of the supremacy clause of the U. S. Constitution.

Recently, a Texas Court of Appeals reversed the conviction of a foreign national based on a violation of the Vienna Convention on Consular Relations in *Trujillo v. State*, _____ S.W.2d _____ (Tex.App. - Beaumont, No. 09-97-0528-CR, January 26, 2000). This attack was probably successful only because the trial lawyers cited the Vienna Convention in their attack on the confession in the trial court so that it was preserved for direct appeal. For the text of various treaties, see http://www.unhchr.ch/ or http://wwwl.umn.edu/humanrts/

Sandra L. Babcock, NLADA's "Life in the Balance" conference in Washington, D.C., March 2000

SWINGING ON A STAR: Defender Recruiting

by Tim Shull, Assistant Public Advocate

Would you like to swing on a star?
And carry moon beams home in a jar.
You can be better off than you are. . .
. . . You could be swinging on a star!

American Standard, "Swinging On A Star"
by Burke-Van Heusen.

Great news! Good people want to work for the Department of Public Advocacy. In early February, I helped interview prospective DPA employees and participated in the University of Louisville Law School Career Day. What stands out among so many of these first, second, and third year law student applicants and prospective applicants is that they already appear to be developing commitment to indigent clients as law students. Several of the people I interviewed or spoke with at Career Day emphasized that helping people interested them, not making money.

University of Louisville School of Law Career Day 2000: I participated in this event on Saturday, February 5, 2000. About 30 other lawyers also participated. They represented all types of practices from solo practices to large civil, full-service firms. First year law students hold the Career Day forum. The law school wants Career Day to give first year students a brief glance at practice opportunities as told by practicing lawyers.

After the reception breakfast, everyone gave an opening statement, which summarized what that individual lawyer did for a living, and something about her or his firm. The opening statement gave me a chance to promote the DPA education trilogy: For the beginning lawyer, as well as one with experience, no Kentucky law firm or organization offers anything to compare with the education, mentoring, and opportunity offered by DPA.

After opening statements, participant lawyers conducted two breakout sessions exploring aspects of their practices in meetings with students. I got to work with Laura Early of DPA Protection and Advocacy and with Jefferson District Judge, Denise Clayton, respectively in these sessions.

After the sessions, there was a panel discussion and a reception following that. At the reception, lots of students asked about public service law and especially juvenile representation. Several students showed great interest in juvenile representation.

U. of L. Career Day provides us with an excellent chance to introduce first year law students to indigent defense work.

Lots of these budding lawyers are swinging on a star, and some of the best will make it DPA.

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DPA's Recruitment of Excellent Litigators

DPA is setting up fall interview session at 10 of the area law schools including UK, UofL, Chase, Cincinnati, Tennessee, Dayton, IU Indianapolis, IU Bloomington, Southern Illinois University, and Vanderbilt. DPA will also be attending several job fairs this fall.

Currently, DPA has openings for attorneys who want to be litigators in: Stanton, Stanford, Columbia, Bell County, Hazard, Pikeville, Frankfort – Capital Trial Branch attorney, Juvenile Attorney for Boyd Co., Appellate Branch, and the Post Conviction Branch in Frankfort. If you are interested in any of these positions, or know of someone that may be interested in them, please inform Doug Howard.

Check out DPA's most current openings on the webpage at:
http://dpa.state.ky.us/dpa.htm

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Governor Paul Patton Orders Study to Determine If Racial Profiling Exists

"Stopping or searching individuals on the basis of race is not an effective law enforcement tool nor is it a defensible strategy for public protection," Governor Patton said as he signed an Executive Order on April 20, 2000 to determine if racial profiling is a problem in state law enforcement.

"While an attempt to address this issue in the General Assembly was unsuccessful we believe this is an important policy issue that needs to be addressed. It's my opinion that state government should collect information and statistics regarding law enforcement activities at the state level to ensure the fairness of our law enforcement practices and ensure the protection of the civil rights of our people," the Governor added.

The order calls on all state-level law enforcement agencies and officials to begin collecting data on activities related to citations, drug related stops, and requests for consent to searches and warrant less searches. Over the next three months, the information will be analyzed by the Secretary of the Justice Cabinet and the Kentucky Law Enforcement Council to better define racial profiling and assist them in designing and implementing a model policy to prohibit racial profiling.

Once the state has a model policy in place, the order urges all local law enforcement agencies and sheriff's departments in Kentucky to either adopt the state's policy or come up with one of their own.

Governor Patton said, "I believe that tracking the race, ethnicity, and gender of those who are stopped and searched by law enforcement officials will help us determine whether problems related to racial profiling exist and can act as a guide in the development of solutions."

RELATING TO CIVIL RIGHTS

WHEREAS, the government of the Commonwealth of Kentucky exists in part to secure for all Kentuckians equal protection of the law, security and freedom from discrimination and other forms of unwarranted harassment because of race, color, religion, national origin, disability, sex or age; and

WHEREAS, stopping and/or searching individuals on the basis of race is not an effective law enforcement policy and/or a legitimate and defensible strategy for public protection, and is inconsistent with our democratic ideals, especially our commitment to equal protection under the law for all persons; and

WHEREAS, the systematic collection of statistics and information regarding law enforcement activities can ensure the fairness of our law enforcement practices; and

WHEREAS, tracking the race, ethnicity, and gender of those who are stopped and/or searched by law enforcement officials will help to determine whether problems related to racial profiling exist and act as a guide in the development of solutions:

NOW, THEREFORE, I, Paul E. Patton, Governor of the Commonwealth of Kentucky, by virtue of the authority vested in me by the Constitution of Kentucky and the laws of the Commonwealth, do hereby order and direct the following:

(Continued on page 27)

I. It is hereby ordered and directed that no state law enforcement agency or official shall stop, detain, or search any person when such action is solely motivated by consideration of race, color, or ethnicity, and the action would constitute a violation of the civil rights of the person.

II. All state level law enforcement agencies and officials shall begin to collect data and design a system at all levels of state law enforcement to better define the scope and parameters of the problem of racial profiling. To the extent practicable, agencies and officials shall collect data which is sufficiently detailed to permit an analysis of their actions and law enforcement activities as it relates to race, ethnicity, and gender. Such actions may include, but should not be limited to, activities related to the issuance of citations, drug related stops and requests for consent to searches and warrantless searches.

III. The Secretary of the Justice Cabinet and the Kentucky Law Enforcement Council, in consultation with the Attorney General, the Office of Criminal Justice Training, Secretary of the Transportation Cabinet, Kentucky State Police, Secretary of Natural Resources and Environmental Protection Cabinet, Secretary of the Public Protection and Regulation Cabinet, shall design and implement a model policy to prohibit racial profiling by state law enforcement agencies and officials as well as collect and report statistics relating to race, ethnicity, and gender as it relates to law enforcement activities. The Secretary of the Justice Cabinet, the Criminal Justice Council and the Kentucky Law Enforcement Council shall design and implement the system referenced in paragraph II, above, and model policy within one hundred-twenty (120) days of the issuance of this order.

IV. The Kentucky Law Enforcement Council shall disseminate the established model policy against racial profiling to all sheriffs and local law enforcement officials, including local police departments, city councils and fiscal courts. All local law enforcement agencies and sheriff departments are urged to implement a written policy against racial profiling or adopt the model policy against racial profiling as established by the Secretary of the Justice Cabinet and the Kentucky Law Enforcement Council within six (6) months of dissemination of the model policy. A copy of any implemented or adopted policy against racial profiling shall be filed with the Kentucky Law Enforcement Council and the Kentucky Law Enforcement Foundation Program Fund.

V. The Secretary of the Justice Cabinet and the Kentucky Law Enforcement Council shall submit an initial report to the Governor and the General Assembly concerning implementation of the model policy within one hundred-twenty (120) days of the date of this order. Annual reports shall be submitted thereafter pending further action by the General Assembly.

VI. All state agencies are hereby directed to take the necessary steps to implement the provisions of this Executive Order.

/s/ Paul E. Patton, Governor

/s/ John Y. Brown III, Secretary of State

The Advocate

Department of Public Advocacy
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