The Advocate

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KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY

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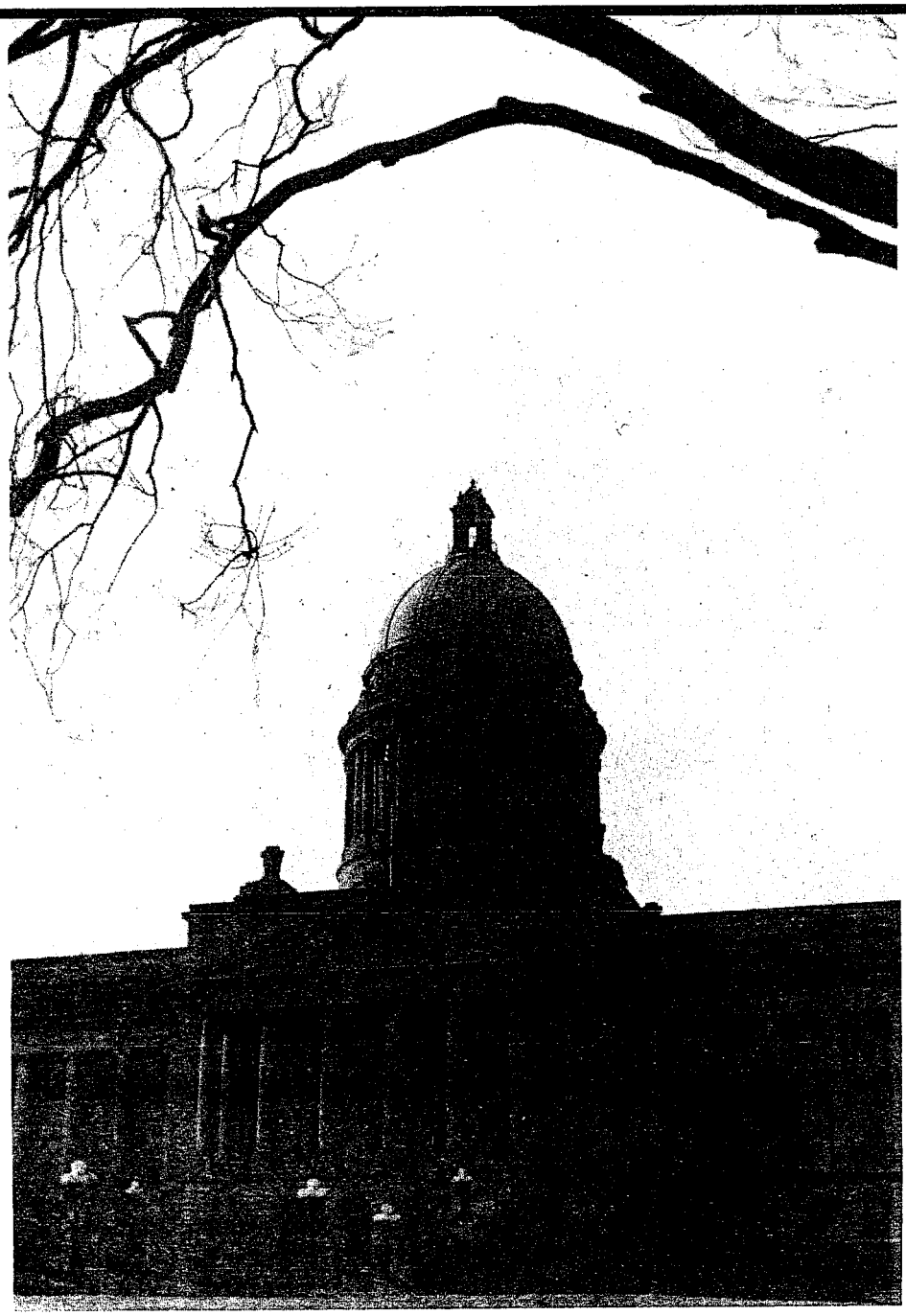
The Work of the 2000 General Assembly

New Criminal Laws

New Defender Funding



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DPA'S PHONE EXTENSIONS

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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. . .

Our Legistature

The work of the 2000 General Assembly is finished. DPA has received substantial new funding and there are many new laws. We report on both in this issue including the testimony before the House Judiciary Committee of Rep. Eleanor Jordan, Debra Miller, Ralph Kelly, Kerby Neill and Ernie Lewis on the bill to eliminate the death penalty for juveniles.

New Authors

In this issue we have new column authors: Shannon Smith for Ky. Caselaw Review (formerly West's Review), Misty Dugger for Practice Corner, and Emily Holt for 6th Circuit Review. We thank them for helping to educate us.

Mentally Ill Clients

We represent many persons who are mentally ill under the penal code and in 202A proceedings. Tom Glover helps us understand our responsibility in 202A cases, and Eric Drogin offers many practical ideas on working with our clients who have mental illness.

RCr11.42

The right to counsel in RCr11.42 proceedings is an area of confusion for some. We offer our interpretation of the various legal authorities and we note some myths.

Law Day

At the request of Chief Justice Joe Lambert, Public Advocate, Ernie Lewis gave this year's Law Day presentation to the new lawyers and assembled dignitaries. His remarks are reprinted in this issue.

Edward C. Monahan
Editor

2000 General Assembly Funds: Significant Part of Blue Ribbon Group Recommendations

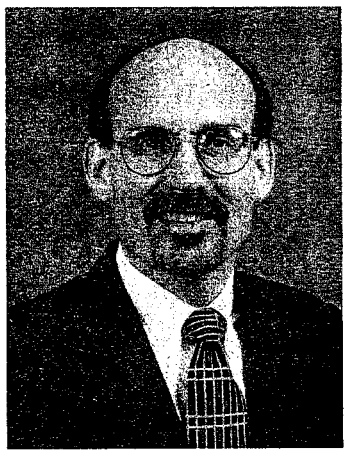
by Ernie Lewis, Public Advocate

The 2000 General Assembly has gone home. What they did for indigent defense, however, was dramatic and will have an impact for many years. The net effect will be a substantial improvement in the quality of the public defender system and the representation rendered to poor people accused of crime in Kentucky.

What has happened during the last four years is familiar to most of our readers but bears repeating. Four years ago, the Kentucky public defender system languished as the worst funded public defender system in the country. This was the case irrespective of the particular benchmark, including cost-per-capita, cost-per-case, and defender salaries. The 1998 General Assembly took a stab at the problem, increasing the General Fund for DPA by $2.3 each year of the biennium. This allowed the Department of Public Advocacy (DPA) to implement Plan 2000. Plan 2000 included as its primary feature the enhancement of juvenile representation through several measures. First, 5 new full-time offices were opened during 1998-2000 in Paintsville, Columbia, Maysville, Owensboro, and Bowling Green. In 1996, 47 counties were covered by a full-time office, while 73 counties were covered by part-time, contract lawyers. By the end of 2000, 82 counties will be covered by full-time offices, while only 38 counties will be covered by part-time, contract lawyers. DPA was thus able to keep pace with Commonwealth's Attorneys, who also continued during the last 4 years to move increasingly toward a full-time prosecutorial system. Juvenile enhancement also included the hiring of a second trainer whose focus has been on improving the quality of juvenile representation. Jeff Sherr was hired to fill this position, and he along with others has spearheaded the *Gault Initiative* which has gone a long way toward improving the quality of justice juveniles are receiving at the hands of Kentucky public defenders.

While much progress was made by the 1998 General Assembly, the systemic underfunding of Kentucky's indigent defense delivery system continued. Shortly after the 1998 General Assembly left town, the Public Advocate and the Public Advocacy Commission began to talk about tackling the fundamental issue of chronic underfunding.

In the spring of 1999, the *Blue Ribbon Group on Improving Indigent Defense in the 21st Century* (BRG) was formed to address this very problem. The membership was impressive, built from a broad spectrum of Kentucky's criminal justice and leadership community. The co-chairs were Mike Bowling, former chair of the House Judiciary Committee, and Robert F. Stephens, at first the Chief Justice of the Kentucky Supreme Court later named the Secretary of the Kentucky Justice Cabinet. They were joined by the new Chief Justice, Joseph Lambert, two Republican and Democratic leaders of the Senate, David Williams and Larry Saunders, several Democratic and Republican Leaders of the House, Harry Moberly, Kathy Stein, and Jeff Hoover, two Bar Leaders, Dick Clay and Don Stepner, the current and former Public Protection and Regulation Cabinet Secretaries, Ron McCloud and Laura Douglas, the Dean of Law Professors, Robert Lawson, and many other prominent Kentuckians including former Congressman Scotty Baesler, former Rep. Jim Lovell, Commonwealth's Attorney Phil Patton, District Judge Denise M. Clayton, Appalachian Research and Defense Fund Executive Director and Bar Leader John Rosenberg, current and former Public Advocacy Commission members Bob Ewald and Bob Carran, and prominent businessman Richard Dawahare. The BRG had at its disposal the top indigent defense consultant in the country, the The Spangenberg Group headed by Bob Spangenberg.



Ernie Lewis, Public Advocate

The *Blue Ribbon Group* met throughout the spring of 1999, and issued its report on June 1, 1999. The basic findings of the BRG were stated in Findings #5-7 as follows: "The Department of Public Advocacy Ranks at, or Near, the Bottom of Public Defender Agencies Nationwide in Indigent Defense Cost-Per-Capita & Cost-Per-Case. The Department of Public Advocacy per Attorney Caseload Far Exceeds National Caseload Standards. The Department of Public Advocacy Ranks At, or Near, the Bottom of Public Defender Salaries Nationwide for Attorneys at All Experience Levels. All Components of the Criminal Justice System Should be Adequately Funded Particularly Public Defense. Overall the Department of Public Advocacy is Under-Funded." The *Blue Ribbon Group* recommended stated in Recommendation #12 that "$11.7 Million Additional Funding for Each of the 2 Years Is Reasonable and Necessary to Meet DPA's Documented Funding Needs as Described in PD 21."

The *Blue Ribbon Group* report was presented to the Kentucky Criminal Justice Council in its June 1999 meeting. The Criminal Justice Council decided for policy reasons not to make a specific finding on the *Blue Ribbon Group*'s budgetary recommendation. However, the Criminal Justice Council voted to support recommendations 1-11, which were the foun-

dation of the $11.7 million budgetary recommendation. Thereafter, the BRG Report was disseminated widely.

In August of 1999, the Public Advocate and several members of the *Blue Ribbon Group* presented the report to Governor Paul Patton, Budget Director Jim Ramseay, the Secretary of the Governor's Executive Cabinet, Crit Luallen, and other members of his staff.

In January 2000, Governor Patton presented his Executive Budget to the 2000 General Assembly. The budget included improving the Kentucky public defender system as one of the Governor's priorities. Included in his recommended budget was $10 million additional General Fund dollars for indigent defense. This budget was based fundamentally on the *Blue Ribbon Group*. This budget represented a commitment to fund the *Blue Ribbon Group* fully over a four-year period of time.

The General Assembly fully adopted the Governor's budget for Kentucky public defenders. Beginning July 1, 2000, DPA will have $4 million to spend on indigent defense during the first year of the biennium, and $6 million during the second year. This $10 million infusion of funds will allow Kentucky to move off the bottom of indigent defense funding into the middle. More importantly, it will enable Kentucky to ensure that poor citizens accused of crime will be given the justice that is their due.

How will justice be improved with this increase in funding?

Salaries Will Be Improved

The 2000 budget includes $1.2 million for the first year and $2.6 million for the second year of the biennium to improve the salaries of public defenders. The original budget request based upon the recommendation of the *Blue Ribbon Group* was for a 30% increase in the salary of each defender. DPA requested 15% increase each year of the biennium. The press widely reported that the General Assembly funded 15% salary raises. Unfortunately that is not the case. DPA is working with The Governor's Office of Policy & Management (GOPM) and the Personnel Cabinet to determine how much the salary raises will be. It is clear that the starting salaries for defenders will be increased from $23,388 to $28,000+ during the first year and $30,000+ during the second year. This will allow DPA to pay more reasonable salaries, and should assist in the recruiting and retention of new lawyers.

Unfortunately, I cannot report that the *Blue Ribbon Group*'s Recommendation #4 that "Salary Parity is the Goal" has been achieved. It is reported that prosecutors in Assistant Commonwealth Attorney's funded by the Unified Prosecutorial System will have starting salaries of been funded at approximately $32,500 for the starting salaries of their new full-time prosecutors. Public Defenders will start Attorneys at $28,000 in 2000-2001 and $30,000 in 2001-2002.

Further, loan forgiveness remains as an unmet need. The *Blue Ribbon Group* recommended in Recommendation #5 that "Loan Forgiveness Programs Should Be Made Available to Prosecutors and Defenders." Defenders and prosecutors worked together on this effort. While a bill was introduced that would have effectuated loan forgiveness for both prosecutors and defenders, we were unable to get the bill to move through the General Assembly. That remains a serious unmet need for both defenders and prosecutors.

The Full-Time System Has Advanced

The *Blue Ribbon Group* Recommendation #3 was that the "Full-Time System Should be Completed." The 2000 General Assembly made great strides in fully funding this recommendation. An additional 26 counties will transition from being covered by part-time contract lawyers to full-time by the end of the biennium.

The primary way the full-time system will grow during the biennium will be through the expansion of existing offices into surrounding counties. This will be accomplished in the following way:

- The Frankfort Office will begin to cover Bourbon County in July of 2000. In January of 2001, Woodford and Owen County will be covered from the Frankfort Trial Office.
- The LaGrange Trial Office will begin to cover Spencer County July 2000.
- The Owensboro Office will cover Hancock and Ohio Counties beginning January 2001.
- The Hopkinsville Office will cover Todd and Logan Counties beginning January 2001.
- The Bowling Green Office will cover Butler, Edmonson, Simpson and Allen Counties beginning January 2001.
- The Elizabethtown Office will cover Meade and Breckenridge Counties January 2001.
- The Stanford Office will move to Danville and cover Boyle and Mercer Counties beginning January 2001.
- The Morehead Office will cover Bath, Menifee, and Greenup Counties beginning January 2001.
- The Maysville Office will cover Lewis County beginning January 2001.

Two new offices are scheduled to open in April 2001. An office will open in Bullitt County in order to cover Bullitt and Nelson Counties. Spencer County will be moved into the Bullitt Office at that time. An office will also be opened in Murray in April of 2001 to cover Marshall, Calloway and Graves County. The four river counties, Fulton, Hickman, Ballard, and Carlisle, will be divided between the Paducah and Murray Offices.

By the end of this next biennium, DPA will have 27 field offices covering 108 counties. These offices will be actively supervised by directing attorneys. Additionally, they will be

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managed by 5 regional managers plus the Louisville Office's Executive Director, Dan Goyette. Private lawyers will have a vital role covering conflicts of interest in the 27 field offices. In addition, 12 counties will continue to be covered by part-time contract lawyers.

Caseloads will be Reduced

Blue Ribbon Group Rrecommendation #6 was that "Full-Time Trial Staff Should Be Increased to Bring Caseloads Per Attorney Closer to the National Standards. The Figure Should Be No More Than 350 in Rural Areas and 450 in Urban Areas." DPA asked for 35 additional lawyers in order to be able to achieve this goal.

The 2000 General Assembly was not able to allot sufficient funding to achieve the goal. Full funding of recommendation Recommendation #6 will have to await 2002. However, I am happy to announce that 10 additional lawyers were funded to tackle the high caseload problem. These lawyers will begin April 2001. They will be assigned to those offices with the highest caseloads as shown by DPA's caseload tracking system.

One Lawyer for Capital Trials

The *Blue Ribbon Group* Recommendation #10 was that it was "imperative that Kentucky Reasonably Fund Indigent Capital Defense both at the Trial and Post-Trial Levels." The DPA budget request was for $1.8 million for both the trial and post-trial levels to improve our representation of persons charged with or convicted of capital crimes. The major part of that plan was to regionalize the representation at the trial level, with teams of 2 lawyers and 1 mitigation specialist being placed in each of the 5 regions.

The 2000 budget will enable DPA to hire 1 additional capital trial lawyer. This lawyer will be placed in the Frankfort Capital Trial Branch.

One Lawyer for the Appeals Branch

When I became Public Advocate, the Appellate Branch consisted of only 8 ½ lawyers. At the same time, the Attorney General's Criminal Appellate Division consisted of 26 lawyers. Today, 16 lawyers are doing appellate work for DPA, including 10 in the Appeals Branch, 4 in the Capital Appeals Branch, and 2 in the Juvenile Post-Dispositional Branch. There are also two appellate attorneys in the Jefferson County Public Defender Office. DPA requested 6 additional appellate lawyers in order to come closer to parity with the Attorney General's Office. This request was in response to the *Blue Ribbon Group*'s Finding #10, "The Appellate Branch is Limited in its Ability to Handle the Workload in the court Court of Appeals and the Supreme Court."

This finding will need to be addressed in the 2002 General Assembly. However, the budget will allow us to get a start by funding one new Appellate Branch lawyer. By October 2000, DPA will have 17 lawyers devoted to appellate work.

$200,000 Additional Dollars will be Devoted to Conflicts of Interest Cases

One of the difficult issues in public defender work where full-time offices are utilized is conflicts of interest. The *Blue Ribbon Group* recognized the problem in Finding #13, which reads "Compensation for Private Bar Members Who are Appointed to Conflict Cases is Among the Lowest in the Country." In the body of the report, the *Blue Ribbon Group* stated that "[t]o assure quality of counsel and sufficient number of conflict counsel, particularly in the rural areas of the state, increased funding for conflict counsel must occur."

The 2000 General Assembly has helped fund the solution to this problem by placing $200,000 in the first year and $100,000 in the second year of the biennium into our conflict budgets. This will allow private lawyers to be paid at a somewhat higher level. Conflicts of interest will remain a problem, however, until the *Blue Ribbon Group* is fully funded.

The Infrastructure of DPA Will Improve

Blue Ribbon Group Finding #12 recognizes that as "DPA Moves Toward a Fully Staffed Statewide Program, the Demands on the Law Operations Division (LOPS) Will Grow Dramatically. Currently, the Number of Staff at LOPS Will Need to be Expanded during the Implementation of PD21."

The 2000 General Assembly funded a significant part of this finding by funding 4 new positions. This will enable DPA to have the staff sufficient to support the accounting, library, technology, and other functions vital to running a statewide system.

Many Exciting Activities will Occur without New Funding

The primary activity of DPA is providing counsel to indigents accused of and convicted of crimes. However, DPA is also charged with doing other things, such as "conducting research into methods of improving the operation of the criminal justice system with regard to indigent defendants and other defendants in criminal cases." KRS 31.030(7).

2000-2002 promises to be an exciting time for DPA as we implement the 2000 budget, and as we make efforts to improve the criminal justice system. Included in our plans are the following:

- Continued juvenile enhancement. DPA will continue to try to raise the level of juvenile representation across the Commonwealth.
- Focus on the unrepresented juvenile. The problem in Kentucky is not just the quality of representation for juve-

niles. Unfortunately, the problem is all too often that juveniles are being adjudicated without counsel. This happens for a variety of reasons, including the inadequate coverage by public defenders in contract counties, the mass waiver of counsel, the intervention of parents, and other reasons. DPA along with the Department of Juvenile Justice have recognized this to be a significant problem in Kentucky's court system. A bill which would have addressed this passed the Senate but failed in the House in 2000. DPA is committed to ensuring during the next two years that all those juveniles eligible for the appointment of counsel have counsel when important decisions about their lives and futures are being decided.

- The Innocence Project. The Post-Conviction Branch has offices in Frankfort, LaGrange, and Eddyville. This branch represents inmates in numerous post-conviction matters, including RCR11.42s, CR 60.02s, and federal habeas. An increasing concern at the national level has been that individuals who can be proven innocent, particularly through new technologies such as DNA, are being held in prisons, including far too many on death row. The Post-Conviction Branch will begin an innocence project inspired by the now famous efforts of Professors Barry Scheck and Peter Neufeld. This will be an effort undertaken to bring new technologies to bear to ensure that innocent prisoners are having their claims of innocence fully adjudicated.
- Revenue Sharing. DPA is beginning an experiment to see whether sharing some portion of the Administrative Fee pursuant to KRS 31.051(2) with the local offices might be a successful way for conflict cases to be funded.
- DPA will host conduct a Defender Leadership Practice Institute in the winter of 2001 to train educate our present and future defender leaders in good management and supervision skills.
- The Post-Trial Division will create a conflict unit for capital post-conviction cases. This unit will be housed in the LaGrange Post-Conviction Office, and will necessitate a relocation of that office.
- DPA will produce a current death penalty manual in time for the Capital Litigation Persuasion Institute to be conducted this fall.
- DPA will engage in an office quality review project, whereby trial division leaders will visit our field offices to ensure that certain benchmarks of a good field office are being followed.
- DPA will continue to implement standards of practice adopted by both the Trial Division and the Post-Trial Division.

There is Much Left to Accomplish in 2002

It will take four years to fund the recommendations of the *Blue Ribbon Group*. The 2000 General Assembly took a giant step toward full funding of those recommendations. It is estimated, however, that it will take an additional $6-7 million each year of the biennium to fund fully all of the BRG recommendations. The most significant needs remaining will be:

- Caseload reduction. A reasonably paid public defender cannot be effective if his/her caseload is too high. Depending upon the number of cases that come in during the next two years, it will take an estimated $2 million to meet our goals of 450 open cases per lawyer per year in urban areas and 350 in rural areas.
- Completion of full-time system. It will cost an estimated $1,100,000 to open offices in Glasgow, Cynthiana, and Boone County and cover the remaining counties.
- Completion of proposal for adequate capital defense funding. This will cost approximately $1.7 million.
- Completion of appellate branch expansion. This will cost approximately $400,000.
- Access to court for juveniles and adult inmates. The indigent post-conviction effort was not funded by the 2000 General Assembly. It is estimated that $600,000 is needed to fund access to court for adult inmates and juveniles in treatment and detention facilities.
- Field Office Support Staff. DPA is support-staff short. We are not able to make use of efficiencies such as paralegals and social workers that other defenders and private lawyers are able to do. One additional support staff per office would cost approximately $1 million each year.
- Salary parity with Kentucky prosecutors.

Conclusion

DPA is very grateful to the Governor Paul Patton, the 2000 General Assembly, the *Blue Ribbon Group*, the Criminal Justice Council, and the many members of the Judiciary, public defenders, Commission and Board members, and others who were supportive of our budget during the 2000 General Assembly. This budget will go far in meeting the recommendations of the *Blue Ribbon Group*, and the promise of *Gideon*.◆

"The rung of a ladder was never meant to rest upon, but only to hold a man's foot long enough to enable him to put the other somewhat higher."

-Thomas Henry Huxley, Life and Letters of Thomas Huxley

New Laws Of The 2000 General Assembly

by Ernie Lewis, Public Advocate

SEXUAL ASSAULT

SENATE BILL 263. This is the primary bill coming out of the Governor's Sexual Assault Task Force. It continues the trend of creating special laws for sex offenders, increasing penalties, and ensuring treatment. The wide-reaching provisions include the following:

- The date rape drug, gamma hydroxybutyric acid, is included as a Schedule I drug.
- Violent offenders are no longer eligible for shock probation under this amendment to KRS 439.265 or probation under the amendment to KRS 439.3401.
- The definition of deviate sexual intercourse under KRS 510.010 is expanded to include the "penetration of the anus of one person by a foreign object manipulated by another person." All sexual offenses involving anal penetration with foreign objects are moved to the sodomy statute.
- The one-year statute of limitations involving claims of sexual assault by one spouse against another spouse has been eliminated.
- Third and subsequent sexual assault misdemeanors are now Class D felonies. The Commonwealth must indict as a felony if it desires to proceed under this section. In a curious section that will have to be fleshed out, the statute reads that the "jury, or judge if the trial is without a jury, may decline to assess a felony penalty in a case under this section and may convict the defendant of a misdemeanor." This raises questions about lesser-included offense instructions, how the jury is to "decline to assess a felony penalty," and other concerns.
- "Megan's Law" has been altered significantly, mostly to comply with federal statutory requirements under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act [42 U.S.C. 14071 et seq.]. Carol Camp of the DPA has written an extensive analysis of this section of the Bill, and the reader is referred to her work, particularly for questions raised and possible challenges to the statute. The primary shift in the Bill is that information has been placed on a KSP Website rather than disseminated through the media and law enforcement. The Website carries the registrant's photograph, his address, age, race, sex, date of birth, height, weight, hair and eye color, aliases used, brief description of the crime committed, and other information to be required by the Justice Cabinet through the regulatory process. Classifications of high, moderate, and low risk have been abolished. Hearings have been abolished. The previous definition of sex offender has been replaced by a very simple definition: "'Sex offender' means a person who has been convicted of a sex crime as defined in KRS 17.500." There are two classifications of registrants. Registrants must register for life if they have been convicted of kidnapping of a minor, unlawful confinement of a minor, a sex crime with a prior conviction against a minor or a prior sex crime conviction, any person with 2 or more criminal offenses against a minor victim, anyone who has been convicted of rape or sodomy in the first degree, and any sexually violent predator. All other registrants must register for 10 years. The duty to register ends only when his conviction is reversed or he receives a pardon. Persons convicted of sex crimes, criminal offenses against a victim who is a minor, and "sexually violent predators", are required to register prior to their release with the local probation and parole office in the county in which they intend to reside. The definition of "criminal offense against a victim who is a minor" has been expanded under KRS 17.500 to include kidnapping, unlawful confinement, promoting a sexual performance of a minor, promoting prostitution when the "defendant advances or profits from the prostitution of a person under the age of 18, use of a minor in a sexual performance, sexual abuse 2nd and 3rd degrees, and any attempts of the included offenses. Upon the person's release, he must report to a local detention facilitity where he is fingerprinted and photographed. The fingerprints and photographs are sent to the Information Services Center with the Kentucky State Police. When the released person changes his address, he must notify his current probation and parole officer prior to changing his address. He must register with his new probation and parole officer within 5 days of the date of the change of address. If the person fails to register, or to register his change of address, he may be charged with having committed a Class D felony. The Justice Cabinet is required to verify addresses of registrants every 90 days for lifetime registrants, and every year for those required to be registered for 10 years. The role of the Sex Offender Risk Assessment Advisory Board has shifted to include the approval of providers who conduct comprehensive sex offender presentence evaluations. The comprehensive sex offender presentence evaluation is to be done pursuant to a court order at the time of conviction prior to sentencing. The evaluation is to be done by approved providers who look at the issues of the threat posed to public safety, amenability to sex offender treatment, and the nature of the required sex offender treatment. Communications made during the comprehensive sex offender presentence evaluations or treatment are privileged. Registrants are barred from residing within one thousand feet of a high school, middle school, elementary school, preschool, or licensed day care facility. Persons are prohibited from using information obtained from the Website to harass a registrant. Harassment is a Class B misdemeanor.

HOUSE BILL 237. This bill pertains to the creation and role of the "children's advocacy center." These centers are agencies that advocate "on behalf of children alleged to have been abused; that assists in the coordination of the investigation of child abuse by providing a location for forensic interviews and promoting the coordination of services for children alleged to have been abused..." Other provisions of the bill are:

- Children's advocacy center staff are to be on multidisciplinary teams investigating child abuse.
- Interviews with children are to take place in children's advocacy centers "to the extent practicable and when in the best interest of a child."
- The Cabinet for Families and Children are to "participate in all investigations of reported or suspected sexual abuse of a child."

JUVENILE LAW

SENATE BILL 256. This is one of the two major bills pertaining to juvenile justice. Among the changes in this bill are the following:

- A philosophical section is added to KRS 600.010 regarding the public offender section of the juvenile code, KRS Chapter 635, saying that the chapter will be interpreted "to promote the best interests of the child through providing treatment and sanctions to reduce recidivism and assist in making the child a productive citizen by advancing the principles of personal responsibility, accountability, and reformation, while maintaining public safety, and seeking restitution and reparation."
- A philosophical section is added to KRS 600.010 regarding the youthful offender section of the juvenile code, KRS 640, saying that KRS 640 "shall be interpreted to promote public safety and the concept that every child be held accountable for his or her conduct through the use of restitution, reparation, and sanctions, in an effort to rehabilitate delinquent youth."
- Victims are included as interested parties in juvenile court who have a right to "prompt and fair hearings."
- An entity called a youth alternative center is created for use as a place of detention prior to and after adjudication for status, public, and youthful offenders. These are nonsecure facilities. Youth alternative centers may be created by the county applying to DJJ for the construction and operation of the center.
- Children accused of public offenses may be detained for 72 hours in intermittent holding facilities which are approved by DJJ. Jail employees may supervise juveniles as well as adults.
- KRS 610.310 is amended to allow a juvenile court to send a child for mental health examination and evaluation when the "mental or physical" health of the child before the court requires it.
- The mandatory transfer statute for juveniles using firearms during the commission of a felony is amended to allow for prosecution irrespective of whether the firearm is "functional or not."
- Children transferred to circuit court and convicted and placed in a DJJ facility may be sent to an adult prison for 1 escape.
- Some changes have been instituted with supervised placement revocation hearings. A preliminary hearing is to be held with 5 days of the child being taken into custody, exclusive of weekends and holidays, unless the child agrees to a longer period of time. If the child is returned to active custody at the preliminary hearing, a final hearing must be held with 10 days. At the hearing, DJJ has both the power to administer oaths and to issue subpoenas. DJJ is given regulatory power to govern commissioner's warrants, the procedural aspects of the hearing, the burden of proof, the standard of proof, and the appeals process.

HOUSE BILL 296. This is another very extensive bill which changes many provisions of the laws pertaining to detention and status offenders. Among the changes (but by no means exclusive) featured in this bill are the following:

- A definition is given to "beyond the control of school" which is to be "found by the court to have repeatedly violated the lawful regulations for the government of the school..." The status petition must "describe the student's behavior and all intervention strategies attempted by the school."
- A definition is given to "beyond the control of parents" which means a child "who has repeatedly failed to follow the reasonable directives of his or her parents...which behavior results in danger to the child or others..."
- A definition is given to "detention" which means "the safe and temporary custody of a juvenile who is accused of conduct subject to the jurisdiction of the court who requires a restricted environment for his or her own or the community's protection."
- Status offenders are to be detained in a nonsecure facility, a secure juvenile detention facility, or a juvenile holding facility for not longer than 24 hours pending a detention hearing.
- Public offenders may be held for 48 hours in a secure juvenile detention facility or juvenile holding facility pending a detention hearing.
- Status offenders are not to be detained following the detention hearing unless the child is accused of violating a valid court order. Status offenders are to be detained following a detention hearing in a nonsecure setting. If the status offender is charged with violating a valid court order, the child may be detained in secure detention only after the court holds a hearing and finds that there is probable cause to believe the child has violated a valid court order. The child may be detained for 72 hours following his detention hearing, after which a written report must be filed reviewing the behavior of the child and the circumstances involved. The report must address the reasons for the child's behavior, and whether "all dispositions other than secure

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detention have been exhausted or are inappropriate." Within 24 hours of receipt of the report, a violation hearing must be held.

- Children charged with a public offense are to be detained depending upon whether there is in the county a state operated secure detention facility under the statewide detention plan. If there is such a facility, DJJ conducts an assessment and places the child in one of its detention facilities. If there is no such facility, the child may be held in a secure juvenile detention facility, juvenile holding facility, or a nonsecure setting.
- Status offenders are not to be charged with escape "for being absent without leave or failing to comply with the conditions of supervised placement."
- The bill reaffirms "the inherent contempt power of the court..."

HOUSE BILL 10. This very simple bill outlaws the possession or use of tobacco products by someone under 18. If the police see a minor possession tobacco products in plain view the officer may confiscate the tobacco products.

DOMESTIC VIOLENCE

SENATE BILL 116. This bill was one of the pieces of legislation proposed by the Governor's Council on Domestic Violence. There are numerous provisions to the bill, including:

- KRS 196.280 is amended to expand the scope of the VINE notification system. State prisons are part of the VINE system. Jailers and wardens must provide notice to the VINE system before release of the inmate from the facility or institution. The notice is also to be done when someone escapes from a penitentiary, juvenile detention facility, regional jail, or county jail.
- KRS 411 is created to create a civil action against a person who commits the acts of stalking in the first and second degree. The action is not dependent upon a conviction or even a charge of stalking. The statute of limitations for bringing the charge is 2 years within the last act of stalking.
- KRS 431.064 is amended to require the circuit clerk to place the conditions of release into the computer within 24 hours following filing of the conditions. This is entered into LINK. The effect of this provision will be to allow law enforcement officers on a 24-hour basis to verify the existence and validity of pre-trial release conditions.
- KRS 438.250 and KRS 510.320 are amended to allow victims of crime to have the written results of the blood tests required to test for HIV when someone is bitten or otherwise suffers from a puncture wound by an inmate or person charged with a crime.

SENATE BILL 263. This is primarily a bill pertaining to sexual assaults. There are two significant changes pertaining to domestic violence in this bill:

- One section of the bill creates a new section of KRS 237 which requires notice to law enforcement and victims when a person under a domestic violence order attempts to or succeeds at purchasing a firearm. Another section amends KRS 508.130 to define a protective order as including EPOs, DVOs, foreign protective orders, pretrial release for persons accused of assault, sexual offenses, domestic violence cases under KRS 431.064, and any other bond, probation, parole, or diversion order "designed to protect the victim from the offender." KRS 508.140 is amended to allow a prior misdemeanor conviction for stalking to be among those offenses which would cause a subsequent offense to be prosecuted as a felony.
- The statute also creates a felony for the conviction of 3 assaults in the 4th degree against family members as defined in KRS 403.720. This section also has the same curious language that "the jury, or judge if the trial is without a jury, may decline to assess a felony penalty in a case...and may convict the defendant of a misdemeanor."

DUI

HOUSE BILL 366. This bill represents a major shift in DUI law, particularly the change from .10 to .08. Bob Lotz has written extensively on this bill, and the reader is encouraged to seek his handouts for potential challenges to the bill. Some of the changes in this 50 page bill are as follows:

- DUI is partially defined as "[h]aving an alcohol concentration of .08 or more..."
- Both the .08 and the .02 provisions establish the validity of the test taken within 2 hours of "cessation of operation or physical control of a motor vehicle." If the test is done after 2 hours, the results are inadmissible for prosecution under .08 and .02, unless the test is done by the defense following the taking of the requested state tests.
- Declining to take a blood or urine test is a refusal only if the refusal occurs at the test site.
- License suspension is to be done by the court. The DOT's role is to administer "the suspension period under the terms and for the duration enumerated by the court in its order..."
- The .18 sentencing provision is eliminated as a separate provision, and transformed into an aggravating circumstance.
- The presence of certain aggravating circumstances will cause a mandatory and nonprobatable 4 days in jail for a first time offender, 14 days for a 2nd offense, 60 days for a 3rd offense, and 240 days for a 4th offense. Among the aggravating circumstances are speeding 30 miles an hour over the limit, going the wrong direction on a limited access highway, causing an accident resulting in death or serious physical injury, having a blood alcohol level above .18, refusing to submit to a test, and transporting a child under 12.
- License revocation is for 30-120 days for a first offense, 12-18 months for a second offense, 24-36 months for a 3rd offense. 60 months remains the revocation period for a fourth or subsequent offense.
- A person cannot either operate or be in physical control of a motor vehile while his license is revoked or suspended

due to a DUI, unless there is a functioning ignition interlock device. If the person violates this section, it is a Class B misdemeanor, unless he was also driving while intoxicated in which case it is a Class A misdemeanor, for a first offense. For a 2nd offense, it is a Class A misdemeanor and a Class D felony if driving while intoxicated. For a 3rd or subsequent offense, the driving on a suspended license is a Class D felony.

- The breath, blood, and urine tests are to be performed only "after a peace officer has had the person under personal observation at the location of the test for a minimum of twenty (20) minutes."
- Warnings at the time of the test must be that if a person refuses, his mandatory jail time will be doubled and that he will not be allowed to obtain a hardship license, that the tests can be used against him including that if the results are .18 or better his mandatory jail time will be doubled, and that a person can have his own test if he submits first to the state's tests.
- A person has a right to contact an attorney and must be given 10-15 minutes to do this prior to the test being given. An attorney may be present at the testing if she can be there within the time frame established by the statute.
- A refusal will result in license suspension while the case is being prosecuted. If the court determines that a refusal did occur, even if the defendant is not convicted his license is still suspended as if he had been convicted.
- Licenses are suspended by the court pretrial if the court finds after holding a hearing by a preponderance of the evidence that the person was in violation of the statute and that there was an accident resulting in death or serious physical injury.
- The court may require an ignition interlock device before granting a hardship license.
- The crime of possession of an open alcoholic beverage container in a motor vehicle on a public highway is created. Both open containers, or containers with the seal broken, must be in the glove compartment, in the trunk, or in the back hatch in order to avoid prosecution. The penalty is a fine of $35-$100.
- The bill creates an elaborate and complicated law utilizing the installation of functioning ignition interlock devices. A simplistic account of this section is that upon a second conviction, the court must impound the license plates of all vehicles owned by the defendant, unless the court orders installation of an ignition interlock device. At the conclusion of the license revocation period, the court may order that a person must have an ignition interlock device on their car. If a person violates the court order, the court may then order the device to be placed on the car for ever-increasing time period depending upon the number of violations.
- If the police record the stop, they must film the field sobriety tests in their entirety and that portion of the pursuit and stop which were recorded. If a videotape has been made by the officer, that is to be noted on the uniform citation.
- The service fee is raised from $200 to $250.

CRIMINAL GANGS

SENATE BILL 223. This bill makes significant changes to the criminal gang statute. It eliminates KRS 503.130 altogether and amends KRS 506.140 and 150, the criminal gang recruitment and activity statutes. Some of the changes are as follows:

- The enhancement section for committing certain offenses in furtherance of criminal gang activity contained in KRS 503.130 is gone.
- The only gang related crime now remaining is that of criminal gang recruitment, a Class A misdemeanor for the first offense, and a Class D felony for a second or subsequent offense.
- The definition of "criminal gang activity" in KRS 506.130 has been eliminated. In its place is a definition of a "criminal gang" under KRS 506.150. The Commonwealth will be allowed to prove the existence of a criminal gang by proving many of the same factors previously contained in KRS 506.130(3). Added to the list of admissible evidence, however, is proof of insignias, flags, means of recognition, codes, membership, age, or other qualifications, creed of belief, concentration or specialty, or a method of operation or criminal enterprise.
- KRS 506.140(1) requires that the recruitment or enticement be to join a criminal gang rather than any other kind of gang.
- Criminal gang is defined as follows: "[A]ny alliance, network, or conspiracy, in law or in fact, of five (5) or more persons with an established hierarchy that, through its membership or through the action of any member, engages in a continuing pattern of criminal activity." "Fraternal organizations, unions, corporations, associations, or similar entities" are excluded from the definition.
- A "continuing pattern of criminal activity", essential to the definition of criminal gang, means "a conviction by any member or members of a criminal gang for the commission, attempt, or solicitation of two (2) or more felony offenses, the commission of two (2) or more violent misdemeanor offenses, or a combination of at least one (1) of these felony offenses and one(1) of these violent misdemeanor offenses, on separate occasions within a two (2) year period for the purpose of furthering gang activity."
- A "violent misdemeanor", relevant to the definition of "continuing pattern of criminal activity" means 4th degree assault, menacing, 2d degree wanton endangerment, terroristic threatening, 3rd degree criminal abuse, 2nd degree stalking, 2nd degree unlawful imprisonment, and criminal coercion.

THEFT OF IDENTITY

HOUSE BILL 4. This bill creates a new section of KRS Chapter 514 entitled Theft of Identity. Some of the prominent features of this new crime are as follows:

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- The crime of theft of identity is a new Class D felony.
- Theft of identity is the knowing possession or use of identifying information without the other person's consent with the purpose of representing that the defendant is the other person in order to obtain some sort of profit, including obtaining "political" benefit.
- A minor using someone else's identification to buy alcohol or tobacco is not included in the definition.
- Venue lies where the crime is committed or where the victim resides.
- A crime of trafficking in stolen identities is also created. It is a Class C felony, and is defined as the manufacturing, selling, transferring, etc. of personal identities. Possession of 5 or more personal identities is prima facie evidence of the possession of the identities for the purpose of trafficking.
- A civil action for compensatory and punitive damages is also created.
- The Attorney General's Office and the Commonwealth's Attorneys have concurrent jurisdiction over the prosecution of these offenses.

OTHER

SENATE BILL 256. In addition to making significant changes in juvenile law, as described above, this bill also added 3 people to the Criminal Justice Council, the Commissioners of DJJ, Corrections, and the Department of Criminal Justice Training.

SENATE BILL 316. This bill amends KRS 514.040 by allowing the maker of a check to pay a "merchant's posted reasonable bad check handling fee" of up to $25 in order to make good on a bad check. The County Attorney's fee has also been raised to $25 from $10 under the previous version.

SENATE BILL 65. This bill amends KRS 218A.1412 to include methamphetamine in the trafficking in a controlled substance in the first degree section. This apparently cleaned up language from the 1998 bill that was unintended.

SENATE BILL 137. This bill amends KRS 216.793 to include AOC along with the Justice Cabinet as being the entities who create the process and forms for requests for criminal records. The Justice Cabinet is allowed to contract with AOC to conduct criminal records or backgrounds checks.

SENATE BILL 167. This bill amends the expungement statute, KRS 431.076, when the charge relates to the abuse or neglect of a child. In those situations, the court must notify the Office of General Counsel of the Cabinet for Families and Children of any motion and hearing to expunge the criminal charge. Counsel for CFC is required to respond within 20 days of the notice where CFC has records which indicate that "the person charged with the criminal offense has been determined by the cabinet or by a court under KRS Chapter 620 to be a substantiated perpetrator of child abuse or neglect." If CFC does not respond to the notice within the time period, the CFC records are also expunged. If CFC prevails on the motion, the expungement does not apply to CFC's records.

SENATE BILL 263. Victims must be notified by the Commonwealth's Attorneys of hearing dates for shock probation or bail pending appeal and the results of the hearings.

SENATE BILL 218. This bill amends several sections of the KRS, and creates new ones, addressing the issue of child support. Included in the bill are the following provisions:

- KRS 154A.060 is amended to ensure that CFC gets to the Kentucky Lottery Corporation a list of delinquent child support obligors, and that the Lottery Corporation withhold delinquent child support monies from the prizes of lottery winners.
- KRS 205.712 to 205.800 have additions to them. CFC and the Revenue Cabinet are encouraged to work together. CFC is required to "establish a statewide program to help low-income, noncustodial parents find and keep employment...to reduce welfare payments by helping participants become financially responsible for their children...The program shall also encourage noncustodial parents to be actively involved in their children's lives.
- CFC may enforce child support liens by disabling the car of the delinquent parent. This is done by applying for approval to the Circuit Court. Upon approval, a "vehicle boot" may be placed on the car. This may be done upon an arrearage of 6 months without payment, and after subpoenas and warrants relating to child support proceedings have been ignored, resulting in a lien filed in the county where the vehicle is kept. Before the boot is placed on the car, the owner/parent receives a notice of the intent to boot, with a target date for the booting indicated in the notice. Once the vehicle has been booted, CFC and the parent/owner then "shall attempt to reach a payment agreement... including terms for the release of the vehicle."
- It is made clear that the child support arrearage continues after emancipation of the child.
- CFC may compile a list of parents with arrearages in excess of 6 months and give this list to the newspaper for publication.
- The Attorney General's Office receives the list of parents with 6 months' excess child support payments and they are to place the list on an agency internet site. The OAG is also to distribute a list of "most wanted" child support "delinquent obligors."

SENATE BILL 326. This bill increases the amount of court costs that are paid to sheriffs from $5 to $12, and increases the amount of court costs in criminal cases.

HOUSE BILL 156. This bill amends the concealed/carry laws to eliminate the pistol packing preacher provision. However, by so doing, it also eliminates the exemption for churches generally. The end result is confusing, but may mean that a person with a concealed carry license may take weapons into

church.

HOUSE BILL 331. This bill requires that all confiscated or abandoned firearms are to be sent to the KSP for disposition. Unless the KSP transfers the gun pursuant to these statutes, the guns are to be sold to properly licensed gun dealers.

HOUSE BILL 355. Parents who kill their spouse are not to be given visitation rights unless the court determines that the "visitation is in the child's best interest."

HOUSE BILL 433. KRS 525.155, the grave violation statute, is amended to require the court to order the defendant to "restore the cemetery to its pre-damage condition."

HOUSE BILL 439. This bill creates the "Senior Status Program for Special Judges" as a pilot project. Under this provision, judges may elect to become senior status special judges by committing to serving as special judges for 120 work days per year for a term of 5 years without compensation other than increased retirement benefits. If the special judge works more than 120 days per year, he is compensated for that time.

HOUSE BILL 454. This bill adopts the Interstate Compact for Adult Offender Supervision. An Interstate Commission for Adult Offender Supervision is created with broad powers to regulate and manage the system managing the supervision of adult offenders moving between states.

HOUSE BILL 475. This bill creates several changes to laws effecting contact between prison guards and inmates. Throwing body fluids onto a juvenile worker by a public offender is a third degree assault. Sexual contact caused by the prison worker upon an inmate is sexual abuse in the 2nd degree.

HOUSE BILL 533. This bill requires that Class C felons join Class D felons in serving their time in county jails. Sentences must be greater than 5 years, and the person must be classified by DOC as appropriate for community custody. This can only occur if beds are available in the jail and state facilities are at capacity and halfway house beds are being fully utilized. Persons convicted of sex offenses and given 2 years continue to serve their time in a DOC facility. Jails can opt out of this statute. If they choose to house Class C felons, they must offer "programs as recommended by the Jail Standards Commission." Inmates in county jails will be allowed to work at community-service-related projects under a plan written by the jailer and approved by the fiscal court.

HOUSE BILL 678. This bill amends KRS 532.358 to require payment of home incarceration fees for those who serve time under condition of home incarceration.

HOUSE BILL 685. Abuse of a corpse is presently a Class A misdemeanor. Under this bill, it becomes a Class D felony under KRS 525.120 where "the act attempted or committed involved sexual intercourse or deviate sexual intercourse with the corpse." Further, KRS 514.110 is amended to allow for conviction for receiving stolen property when the defendant has in addition to knowledge that the property has been stolen the "reason to believe that it has been stolen."

HOUSE BILL 789. This bill creates the crime of counterfeiting in intellectual property. Under this provision it is a crime to manufacture, use, display, advertise, distribute, offer for sale, sell, or possess with the intent to sell "any item or service that the person knows bears or is identified by a counterfeit mark," which is defined as "any unauthorized reproduction or copy of intellectual property; or intellectual property knowingly affixed to any item without the authority of the owner of the intellectual property." It is to be contained in KRS 365. First offense is a Class A misdemeanor; the second offense is a Class D felony.

HOUSE BILL 830. This bill amends KRS 533.262 to allow the Supreme Court and the Department of Corrections to create drug court diversion programs outside the pretrial diversion programs authorized by KRS 533.250 to 533.260.

HOUSE BILL 919. This bill cleans up numerous provisions of the statutes allowing for offenses to be prepayable only where they are violations. Violations are not prepayable where a deadly weapon or dangerous instrument is seized, where the offense is cited with a nonprepayable offense, or an arrest is made. Misdemeanors are not to be prepayable. Numerous offenses that were formerly classified as misdemeanors have been changed to violations in order to maintain their status as being prepayable.◆

"To laugh often and much; to win the respect of intelligent people and the affection of children; to earn the appreciation of honest critics and endure the betrayal of false friends; to appreciate beauty, to find the best in others; to leave the world a little better; whether by a healthy child, a garden patch or a redeemed social condition; to know even one life has breathed easier because you have lived. This is the meaning of success."

-Ralph Waldo Emerson

CHANGES IN LAWS IMPACTING JUVENILES – AN OVERVIEW

by Gail Robinson, Juvenile Post Disposition Branch (JPDB) Manager & Tim Arnold, Assistant Public Advocate, (JPDB)

The 2000 session of the General Assembly enacted relatively few laws affecting juveniles who may be subject to the jurisdiction of the Juvenile Code. This article supplements Ernie Lewis's "New Laws of the 2000 General Assembly" and contains some background, analysis and practice tips.

HB 296

The most far reaching and potentially beneficial piece of juvenile legislation enacted in this session was House Bill 296. The bill was proposed by the Juvenile Justice Advisory Committee (JJAC) to deal with portions of Kentucky's Juvenile Code which conflicted with provisions of the federal Juvenile Justice and Delinquency Prevention Act (JJDP Act) of 1974. For many years, Kentucky had been out of compliance with the JJDP Act relating to status offenders and thus had failed to receive significant federal funding. The JJAC and the Department of Juvenile Justice have been determined to bring Kentucky into compliance with that Act, and significant progress has been made. Enactment of HB 296 is another substantial step in bringing Kentucky into compliance with the Act. Moreover, it should promote protection of the rights of status offenders and, hopefully, ensure that such children are not inappropriately detained.

Tim Arnold

"Beyond Control of Parents/ Schools"

As background, a "status offender" is a child who commits an act which, if committed by an adult, would not be a crime. KRS 600.020 (52). Status offenses include habitual truancy, habitual runaway, beyond control of parents and beyond control of school. KRS 630.020. Section 1 of HB 296 amends KRS 600.020 to define "beyond control of parents" and "beyond control of school." Amazingly, these terms were not previously defined, creating numerous legal and factual problems. The "beyond control of school" definition now requires that a student have **repeatedly** violated "lawful regulations for the government of the school" as provided in KRS 158.150 with the petition describing the behaviors "and all intervention strategies attempted by the school." This definition will permit attorneys for juveniles to challenge premature and meritless petitions. Additionally, "beyond control of parents" is now defined to require that a child **repeatedly** fail to follow **reasonable** directives of his parents **with resulting danger to himself or others**. Thus, advocates can file motions to dismiss petitions which do not conform to those requirements and ask for directed verdicts when the proof does not meet the necessary standards. Hopefully, these new definitions will limit petitions filed because a juvenile was disrespectful to a teacher or failed to do his chores. By narrowing the class of eligible status offenders to those juveniles who clearly need the services of the court, the General Assembly has enabled the juvenile courts to spend more time with needy juveniles, wasting less time on kids whose problems can be readily addressed within the community.

"Valid Court Order" Defined

Gail Robinson

HB 296 also includes a definition of "valid court order." This term comes from the JJDP Act. While that Act generally bars secure detention of status offenders, there is an important exception for status offenders who have been found by the court to have violated such an order. Unfortunately, in some juvenile courts in Kentucky, the exception has nearly swallowed the rule. A typical scenario follows. A child is brought before the court on a status offense petition, for example truancy, admits to the truth of the petition, often without counsel, and is ordered to attend school. When the child fails to attend school, he is brought back before the court for contempt, admits to a violation (again, often without counsel) and is ordered to serve time in detention.

KRS 600.020(59) "defines valid court order" as a court order issued by a judge to a child alleged or found to be a status offender:

(a) Who was brought before the court and made subject to the order;
(b) Whose future conduct was regulated by the order;
(c) Who was given written and verbal warning of the consequences of the violation of the order at the time the order was issued and whose attorney or parent or legal guardian was also provided with a written notice of the consequences of violation of the order, which notification is reflected in the record of the court proceedings; and
(d) Who received, before the issuance of the order, the full due process rights guaranteed by the Constitution of the United States.

Certainly there is a very strong claim that an order issued to a child who admitted to a status offense without counsel is not a valid court order since that child did not receive "the full due process rights" guaranteed by the Constitution of the United States. Attorneys who represent juveniles on contempt charges on underlying status offenses should always investigate whether the order in question is a "valid court order."

Protections for Status Offenders

Moreover, KRS 610.265 has been amended to provide significant protections for status offenders accused of violating valid court orders. Prior to ordering such a child securely detained, the court must have a detention hearing where it does the following:

a. affirm the requirements for a valid court order were met at the time the original order was signed.
b. find probable cause the child violated the order

Additionally, the court must:

> within seventy two hours of the initial detention, exclusive of weekends and holidays, receive an oral report in court and on the record delivered by an appropriate public agency other than the court or a law enforcement agency, or receive and review a written report prepared by an appropriate public agency other than the court or a law enforcement agency that reviews the behavior of the child and the circumstances under which the child was brought before the court, determines the reasons for the child's behavior, and determines whether all dispositions other than secure detention have been exhausted or are inappropriate.

Thus, before a court may order a status offender accused of violation of a court order placed in secure detention, it must review what amounts to a PDI recommending such a penalty in light of the child's behavior. Hopefully, this will minimize the number of status offenders placed in secure detention for contempt.

Otherwise, this bill clarifies what "detention" means and defines the various types of detention facilities: intermittent holding facility, juvenile holding facility and secure juvenile detention facility. It bars status offenders, including those facing contempt charges on underlying status charges, from being detained in intermittent holding facilities prior to a detention hearing. Even after a detention hearing, status offenders can only be detained in secure facilities if the valid court order provisions are violated.

SB 256

This was, in general, DJJ's "clean-up bill." It contains the first expansion of the automatic firearms transfer provision of KRS 635.020(4). A child who uses a firearm "whether functional or not" in the commission of a felony is subject to transfer if he is 14 years of age or over at the time of the offense. This amendment is unlikely to widen the automatic transfer net very far.

A positive amendment to KRS 635.055 permits children who are found in contempt to be held in youth alternative centers or DJJ alternative to detention programs. Amendments to KRS 635.100 which deals with revocation of supervised placement permit DJJ to issue subpoenas and require an administrative regulation (which DJJ has already enacted) concerning significant aspects of the hearing such as burden and standard of proof.

MISCELLANEOUS

HB 170 amends KRS 600.020(1) which defines "abused and neglected child" to include children whose parents have failed to make satisfactory progress on a court approved case plan, thereby causing the child to be in foster care 15 of the last 22 months. This is relevant to juvenile court practitioners who must frequently deal with the question of whether a child can return home and, if not, where else he can live.

Various provisions in the juvenile code have been amended to grant the district court power to make permanent custody awards in cases where the child has been neglected or abused by the parent. Notable among these provisions for the defense advocate are (a) KRS 610.125 has been modified to require permanency hearings for children who have been out of the home more than a year; and (b) that the Cabinet no longer is required to make "reasonable efforts" to reunite a parent and child when the parent is going to be in prison for at least a year. ◆

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Sex Offenders on the Net: Kentucky's Sex Offender Registration and Notification Statute Goes High Tech

by Carol R. Camp , Assistant Public Advocate

A. INTRODUCTION

On April 11, 2000, Kentucky Governor Paul Patton signed Senate Bill 263 into law. Senate Bill 263 made several significant changes to the 1998 version of KRS 17.500 et seq. The new law eliminates prerelease risk assessment hearings and low, moderate and high risk classifications, replacing them with presentence risk assessments designed to determine an individual's amenability to treatment and the threat he poses to public safety. The law eliminates an individual's right to appeal negative findings contained in a presentence risk assessment, and to bring a court action against an approved provider or local officials who improperly disseminate information contained in an assessment. The General Assembly has also created an online sex offender registry that the Kentucky State Police will update and maintain.[1] Stricter time limits to notify local probation and parole offices of a change of address have been imposed, as well as harsher penalties for failure to comply with the statute's registration requirements.[2] Additionally, registrants who are subject to any form of supervised release are now prohibited from living within 1,000 feet of a school or licensed day case facility.

This article will provide a brief overview of three of the most significant legislative changes: the use of presentence evaluations and the denial of the right to appeal adverse determinations; the creation of the online registry; and the residency restriction. It is the author's belief that these three provisions are of doubtful constitutional validity.

B. PRESENTENCE EVALUATIONS AND DENIAL OF THE RIGHT TO APPEAL

The 1998 version of KRS 17.570(1) required the trial court to order a sex offender risk assessment within 60 days of an individual's discharge or release. After the risk assessment had been completed, the trial court then held a risk assessment hearing in accordance with the Rules of Criminal Procedure prior to the individual's release. [KRS 17.570(4)].

The 2000 version of the statute significantly changes this procedure. First, KRS 17.570 has been repealed. Second, the information about presentence evaluations has now been placed in the probation and parole and sentencing provisions of the penal code. For example, KRS 439.265(5) has been amended to state that the purpose of presentence evaluations is to "provide to the court a recommendation related to the risk of a repeat offense by the defendant and the defendant's amenability to treatment, and shall be considered by the court in determining whether to suspend the sentence." Similarly, KRS 532.050(4) now provides that the evaluation "shall be considered by the court in determining the appropriate sentence." Upon conviction of a sex crime, the trial court "shall order a comprehensive sex offender presentence evaluation, unless one has been provided within the past six (6) months, in which case the court may order an update of the comprehensive sex offender presentence evaluation." [KRS 439.265(5); KRS 532.050(4)].

Criminal defense attorneys must remember that the individual who undergoes a presentence evaluation will be provided with "a fair opportunity and a reasonable period of time" to controvert the evaluation's findings *only if he requests an opportunity to do so.* [KRS 532.045(8)]. Note that this is significantly different from former KRS 17.570(4), which required the sentencing court to hold a hearing in accordance with the Kentucky Rules of Criminal Procedure.

Perhaps the most significant change is the denial of an individual's right to appeal adverse findings. Under the 1998 version of KRS 17.570(7), an order designating an individual's risk level was subject to appeal. Now, although the court "shall use the comprehensive sex offender presentence evaluation in determining the appropriateness of probation or conditional discharge" [KRS 532.045(3)], the evaluation "shall be filed under seal and shall not be made a part of the court record subject to review in appellate proceedings and shall not be made available to the public." [KRS 532.045(8); KRS 532.050(4)]. Ironically, it appears that although the criteria that will be used to determine whether conditional discharge is applicable in a given case is not subject to appeal, the issue of whether conditional discharge may be imposed is appealable. *Purvis v. Com.*, Ky., ---S.W.3d --- (2000).

Another irony is that persons who move to Kentucky from other states will have the opportunity to administratively appeal a determination that they should be subjected to lifetime registration while living in Kentucky. A person who moves to Kentucky from another state will be required to register for life. However, if this person believes that the offense he committed would only require him to register for ten years if he had committed it in Kentucky, he will be given 60 days from the date he first registers in Kentucky to file a written appeal with the Deputy Commissioner of the Division of Probation and Parole. The appeal must be in writing and include a copy of the foreign judgment; a description of the offense; and a copy of the indictment or other charging instrument describing the conduct constituting the offense. The Deputy Commissioner will review the information provided and render a written decision within 90 days.

The denial of the right to appeal raises serious constitutional concerns. Sentencing decisions are generally subject to appeal. The preferential treatment appears to raise equal protection and due process issues. The denial of the right to appeal

also appears to violate the open courts provision of the Kentucky Constitution, [Section 14], as well as Section 115, which guarantees Kentucky's citizens at least one appeal as a matter of right in all civil and criminal cases.

C. THE KENTUCKY STATE POLICE'S ONLINE SEX OFFENDER REGISTRY

The Kentucky State Police website has been operational since the 2000 version of KRS 17.500 et seq. was signed into law on April 11, 2000. Although the state police claim that the website only includes information provided by individuals who have been released and who have registered since April 11, 2000, the reality is that several high-risk offenders who registered long before April 11, 2000 appeared on the website as soon as it debuted. Eventually, individuals who were required to register before April 11, 2000 [including those who were classified as low and moderate risk under the 1998 version of the statute], will have their photographs and identifying information, including their physical descriptions, offense information, and home addresses, posted on the website.

The unlimited dissemination of personal information such as home addresses, without any showing that such widespread dissemination is necessary to protect public safety, violates an individual's federal and state constitutional interests in reputation and privacy. [U.S. Const. amends. 5, 14; Ky. Const. Secs. 2, 11, 14]. Kentucky's citizens have enjoyed a long tradition of a fundamental right to personal privacy that exceeds the protections granted by the federal constitution. *Com. v. Wasson,* 842 S.W.2d 487, 493-499 (Ky., 1992). The Kentucky Supreme Court has defined this right to privacy as "the right to be let alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters in which the public is not necessarily concerned." *Brents v. Morgan,* 221 Ky. 765, 299 S.W. 967, 970 (Ky., 1927).

The Kentucky Supreme Court has also interpreted the right of privacy guaranteed to all citizens of the Commonwealth (included convicted sex offenders) to mean that "[i]t is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society." *Com. v. Campbell,* 117 S.W. 383, 385 (Ky., 1909). These protections include the right to be free from governmental disclosure of personal information such as home addresses. *Zink v. Com., Dep't. of Workers' Claims, Labor Cabinet,* 902 S.W.2d 825, 829-830 (Ky. App., 1994); KRS 61.878(1)(a); *United Stattes Dep't. of Defense v. Fed, Labor Relations Auth.,* 510 U.S. 487, 501, 114 S.Ct. 1006, 1015, 127 l.Ed.2d 325 (1994).

Although "it might seem that a convicted felon could have little left of his good name, community notification...will inflict a greater stigma than will result from conviction alone." *Doe v. Pryor,* 61 F.Supp.2d 1224, 1231 (M.D. Ala. 1999). Unlimited public notification, without establishing any nexus to increased public safety, invites retribution and punishes convicted sex offenders yet again for their crimes.

D. THE RESIDENCY RESTRICTION

Perhaps the most onerous provision of the 2000 version of KRS 17.500 et seq. Is the residency restriction, which reads as follows:

No registrant, as defined in Section 15 of this Act, who is placed on probation, parole, or any form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility. The measurement shall be taken in a straight line from the nearest wall of the school to the nearest wall of the registrant's place of residence.

Carol R. Camp

This provision raises several significant constitutional issues. First, the terms "supervised release," "high school," "middle school," "elementary school," "preschool," and "licensed day care facility" are not defined, arguably rendering this provision susceptible to a void for vagueness challenge. Do these schools include home schools? Montessori schools? Group homes? Foster homes? Day care facilities for elderly citizens? The answers to these questions will undoubtedly be determined through litigation.

Second, what is a person on supervised release happens to own their home, which happens to be located within one thousand feet of a school or licensed day care facility? If the government is mandating that this person can no longer live in their home, should the government be required to compensate the person for the taking of his private property that has just occurred? And, third, what about an individual's fundamental constitutional rights to establish a home and to live in that home with his family members? Can the government legitimately carve out a statutory exception to these fundamental constitutional rights that applies only to convicted sex offenders?

Finally, the General Assembly apparently forgot to attach a penalty provision to this section of the statute, so individuals who allegedly violate it have no notice as to what potential penalties they will face.

E. CONCLUSION

The 2000 version of KRS 17.500 et seq. is susceptible to constitutional challenge because it denies Kentucky's sex offenders the right to appeal adverse sentencing decisions based on their presentence evaluations, subjects them to unlimited public notification without any showing that such notification is necessary to promote public safety, and severely restricts the areas in which they can live.

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CELEBRATE FREEDOM IN OUR DEMOCRACY BY CELEBRATING DIVERSITY

The 2000 Law Day Address

by Ernie Lewis, Public Advocate

Mr. Chief Justice and members of the Court, distinguished guests, new members of the bar and their families. It is a great honor to be asked by the Chief Justice to deliver the turn of the century address celebrating Law Day. I am especially pleased to deliver the Law Day address on the topic of diversity in our democracy.

In many ways, my being here is evidence of the commitment of the Court of Justice in Kentucky to celebrate diversity. I am a public defender. Public defenders have in many ways been the forgotten members of the bar. Yet I have been selected by the chief justice to deliver the address on this day set aside to recognize the importance of living under law.

Thank you Mr. Chief Justice for your raising up public defenders, for recognizing the importance of diversity, and for your own commitment to diversity.

You are committed to diversity in our profession. You have spoken passionately of the need for more diversity in our justice system. In an address delivered last year before the annual public defender seminar, you noted that a 1997 National Center for State Courts survey had uncovered a sharp dividing line between minority and majority groups in this country in their opinions on our justice system. You stated that, "although I know that the judicial system aims at equal treatment both systematically and on a personal basis, the fact that there remains even the perception of unequal treatment before the law is disconcerting." You announced an initiative to work with the presidents of Kentucky's 8 public universities designed to identify qualified minority students and recruit them to law school. Thank you, Mr. Chief Justice, for your commitment to doing something both to celebrate and create diversity in our profession.

I have been asked to give a few thoughts about the role of citizens in a diverse democracy.

How to "extend the blessings of liberty to diverse people as our democracy under the rule of law changes and matures."

I am especially going to concentrate on the role of lawyers in a diverse democracy.

This discussion is especially appropriate for you on this day, the day that you are being sworn into our profession. On the threshold of your first job as a lawyer.

I have always thought that the first job of a lawyer is the most important, because in many ways it is during the early days of the practice of law that you put flesh to your values and vision.

You will learn what questions to ask. You will be tested by what you see and experience. The decisions you make will shape the lawyer and the person that you will become.

Today we are going to celebrate the diversity of our democracy by looking at several difficult issues and holding up lawyers who have addressed those issues.

Lawyers who saw things as they were and decided to change things. Lawyers who saw things as they could be and asked why not. Lawyers who looked into the eyes of the poor, the oppressed, children, and did what they could to improve things.

Diversity is important for our democracy today

Diversity is an essential part of our democracy.

- It is important because it adds content to the promise of the constitution and the declaration of independence.
- It is important because it adds richness and texture to our

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ENDNOTES

1. The Kentucky State Police's online sex offender registry can be accessed at http://kspsor.state.ky.us, or by using the search term "Kentucky State Police" to access the KSP's home page, which includes a link to the online registry.

2. A registrant who moves to a new address within the same county must now notify his local probation and parole offices of his new address on or before the date he moves. A registrant who moves to a new county must provide his new address to the probation and parole office in his former county of residence on or before the date he moves, and give this information to the probation and parole office in his new county of residence within five days of relocating to the new county. Failure to comply with these requirements is now a Class D felony instead of a Class A misdemeanor.◆

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policy-making.

- It continues to challenge us, helping us to avoid smugness and the concentration of power in the upper class.
- It acts as a fuel for hope for all newcomers and all those who feel left out of our society.
- I will be discussing diversity in the context primarily of race. Diversity also applies to gender, class, physical and mental disabilities.
- While it is important to celebrate diversity, it is also important to acknowledge that ours is a democracy in mid-journey, and that while progress has been made, issues remain that are serious challenges to our vision of America as a land of equal opportunity under the law.
- These issues have been with us, in many instances, since the birth of our nation.
- We began our journey by bringing black Africans to work our soil.
- Unfortunately, we began with 17th century version of racial profiling. Professor Terry Maclin points out at 51 Vanderbilt Law Review that "racial profiling" has an "ancient pedigree. Philadelphia in 1693 gave city officials power to stop and detain any black, free or slave, who was "gadding abroad" without a pass. South Carolina in 1696 required slave patrols to search slave's homes weekly for concealed weapons. By 1738, Virginia authorized mandatory searches of the homes of all blacks.
- In our Declaration of Independence and our Constitution we jointly held out the promise of equality for all peoples while at the same time we were in practice working the men and women of Africa against their will in order to enrich our economy.
- The Dred Scott case dramatically show cased the fracture in our democracy, where the highest court in the land said that the Negro slave was not a person.
- In 1862, Frederick Douglas said in reflecting on the justice system of the time: "justice is often painted with bandaged eyes, she is described in forensic eloquence as utterly blind to wealth and poverty, high or low, white or black, but a mask of iron however thick could never blind American justice when a black man happens to be on trial...it is not so much the business of his enemies to prove him guilty, as it is the business of himself to prove his innocence. The reasonable doubt which is usually interposed to save the life and liberty of a white man charged with crime seldom has any force or effect when a colored man is accused of crime."
- The promise of our democracy continued to grow unevenly, with the problem of race impeding its progress.
- Reconstruction was replaced by Jim Crow.
- Our society attempted to progress separately, holding out the promise to former slaves that they would achieve equality thereby.
- Since the 1950's, we have experienced integration of schools, voting rights legislation, the civil rights movement, affirmative action.
- Truly, our democracy is a work in progress, one which is in need of persistent reinventing and examination.
- Today, there are signs of distress in our democracy, signs that our progress toward diversity has not yet fully succeeded.
- Those signs of distress are apparent in the encounters between the police and citizens, they are apparent in some of our sentencing practices, they are apparent in the application of the death penalty, and they are apparent in our provision of indigent defense services.

Let us turn now to these problems. But at the same time let us celebrate lawyers who are holding up the values of diversity in our democracy.

Police Citizen Encounters

This is not a good time for citizen/police encounters.

Earlier this year in a legislative hearing I heard Chief Larry Walsh of the Lexington Fayette County Police Department state that the last year had been the worst in his memory for police/citizen relations.

- A Lexington Herald Leader headline from April 25, 1999 reads: "Black drivers ticketed more often than whites."

Looking elsewhere, we see far more serious and dramatic problems.

Haitian immigrant Amadou Diallo was gunned down by 4 white police officers as he pulled his wallet from his pants.

- He was said by his uncle to have loved America more than Americans did.
- He was confronted by New York City's elite street crime unit consisting of 400 undercover officers whose motto was, "we own the night."
- In 97 and 98, the S.C.U. stopped and searched 45,000 men, mostly African-Americans and Hispanics.
- Yet officers Sean Carroll, Kenneth Boss, Richard Murphy and Edward McMillan were looking for a rapist but found Diallo at the front door of his apartment building.
- 4 blacks were on the jury that acquitted the four officers.

On March 16, New York police shot another unarmed Haitian immigrant named Patrick Dousmaid, a security guard shot after an officer approached him and asked him to sell him marijuana. This is the same police department where Abner Louima was brutalized with a broom handle in a police station bathroom.

The ramparts scandal in Los Angeles has shaken the criminal justice system to its core.

- The rampart police station was in charge of an 8 square mile area with 30 different street gangs. It featured a unit called CRASH, or Community Resources against Street Hoodlums.
- They were effective. They reduced murders from 170 a year in the 1960s to only 33 in 1999.
- But there was a dark side to this success, a dark side that contradicted the ver rule of law they purported to uphold. Their reign of terror was not broken until officer Rafael Perez revealed that a police anti-gang unit in LA was regularly engaging in framing innocent people by planting drugs and guns, beating up citizens, and perjuring themselves to get convic-

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tions.

- Officer Perez revealed that in 1996 crash had shot a 19 year old gang member named Javier Francisco Ovando, and put a rifle at the crime scene in order to claim self defense. Ovando is now paralyzed.
- He further revealed a shooting of Juan Saldana, who bled to death while the police were comparing notes on the shooting.
- 40 convictions have already been reversed, and an additional 17,000 convictions are now at risk.
- 70 anti-gang officers are being investigated.
- 20 officers have been relieved of their duties.
- The first indictments have recently been returned.

While these are dramatic signs of police/citizen mistrust, there are other less dramatic but equally troubling signs that we cannot ignore.

- We all learned in law school that in the late 60s the supreme court approved of a Fourth Amendment encounter between police and citizen short of probable cause. *Terry v. Ohio.*
- *Terry*... has expanded in scope considerably since that time, further giving to the police the ability to seize citizens, particularly young, minority citizens, and invade their privacy in a variety of settings.
- 20 years later, in *Whren v. United States* the court said that it does not matter whether a stopping is a pretext so long as the stop can be classified as a *Terry* stop, that is so long as there is a reasonable and articulable suspicion of wrongdoing, including a minor traffic infraction.
- In *Illinois v. Wardlow* the court stated that the police may stop someone with no evidence of wrongdoing, in a high crime area who flees from them, so called "running while black."
- I would be remiss if I did not note the most recent word on this subject. The court recently in *Florida v. JL* outlawed the practice of "standing while black," that is they rejected an anonymous tip which was uncorroborated in any significant detail as being sufficient for a stop and frisk.
- A recent note in the Texas Law Review revealed that from 1989-1992, of 1000 motorists stopped by the Volusia county sheriff's department in Florida, 70% were African-American or Hispanic. 80% of those stopped and subsequently searched were also African-American or Hispanic. Yet, only 9 of the 1084 were cited for breaking any traffic law.
- A Vanderbilt Law Review article by Professor Terry Maclin of Boston University recounted a Maryland study on I-95 finding that 93.3% of all drivers are violating the law at any 1 time, that 17% of drivers were black, but that 72% of those stopped were black, and that 80% of the searches were of blacks, Hispanics, or another minority.
- 73% of motorists stopped and searched in New Jersey in 1999 were African-Americans.

Professor Macklin asserts that *Terry v. Ohio* and its progeny is the source of a lot of these problems. In a recent note published in both the Search and Seizure Law Reporter and the St. John's Law Review, he states that: "the *Terry* ruling, while correctly acknowledging the racial harm caused by stop and frisk, ultimately subverts 4th Amendment values. *Terry's* holding was flawed because the court lost sight of the larger picture it confronted: widespread use of a police practice that was causing perilous friction between the police and minority communities and making a mockery of the 4th Amendment rights of minority citizens."

These are occurrences that are undermining citizens' faith in our police.

- A recent survey of Bronx residents revealed only 11% who thought the police treated them fairly.
- A nationwide survey revealed that 44% of African-Americans were less likely to believe the police as a result of recent scandals.

In Kentucky, we are lucky to have a Governor who has decided to do something about racial profiling.

- In executive order 2000-475, on April 21, 2000, Governor Patton ordered 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."

We can ill afford minority distrust in our criminal justice system. Yet in other areas, minorities cannot have faith that our system is working fairly for all citizens. One of those areas of concern is racial disparities and sentencing in the criminal justice system.

Race and Sentencing

In 1972, 196,000 prisoners were incarcerated in America. 130,000 prisoners were in jail. 1 in 625 were incarcerated. By 1997, 196,000 had risen to 1,159,000 in prison. 130,000 had risen to 567,000 in jails. 1 of every 155 citizens is incarcerated.

American prisons hold more of our citizens than all the nations of the world other than Russia.

- This is a more recent phenomenon.
- In 1926, blacks were 21% of prison population.
- Blacks account for fewer than half of arrests for violent crimes, over half of the convictions, and 60% of the prison admissions.
- A 1995 report showed that blacks received prison sentences 10% longer than whites for the same crime in federal court, despite the sentencing guidelines.
- In 1998, 36% of the 3.9 million people who were disenfranchised temporarily or permanently as a result of their being convicted of a crime were African-American.
- 1 in 3 young black males in 1995 were under the control of the criminal justice system.
- 1 in 14 adult black males is locked up on any given day.

These sentencing disparities include children.

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- A recent study by the National Council on Crime and Delinquency revealed that while minorities make up 1/3 of the juvenile population, 2/3rds of the 100,000 detained and committed youth in secure juvenile facilities are minorities.
- Blacks are 15% of the juvenile population from 10-17, but 26% of juveniles arrested, 45% of those detained.
- While 1/3rd of adjudicated cases involve black youths, 40% of juveniles in secure residential placements are black.
- Kentucky is the 5th worst state in the nation in this regard.
- In Kentucky, where minorities are 11% of the juvenile population, minorities are 40% of the children committed to public facilities. Black juveniles in Kentucky have a custody rate 5 times greater than white youth.
- In Kentucky, from 1997-2000, blacks were 56% of juveniles transferred, 5 times their proportion of the general population.

This is complex. Overt racism is not the cause, and the data is mixed.

- 1990 study in New York state showed significant disparities between minorities and whites who commit misdemeanor and property offenses.
- 1990 Rand study concluded that offenders in California received generally comparable sentences when looking at severity of offense and record, with the exception of drug sentencing.
- Many states have implemented structured sentencing, which takes away judicial discretion in order to achieve a rough level of equity in sentencing.
- Many, including policy makers in Kentucky, have rejected that policy position, fearing the solution would outweigh or exacerbate the problem.

One reason for the high % of minorities in our prisons is our policy on drugs.

- Marc Mauer in *Race to Incarcerate* says, "since 1980, no policy has contributed more to the incarceration of African-Americans than the war on drugs. To say this is not to deny the reality of drug use and the toll it has taken on African-Americans and other communities; but as a national policy, the drug war has exacerbated racial disparities in incarceration while failing to have any sustained impact on the drug problem."
- Blacks represent 15% of drug users but 33% of drug possession arrests.
- Blacks represent 18% of cocaine use, but 47% of cocaine possession arrests.
- In 1994, 90% of those convicted of trafficking in cocaine were black. Yet, Africans-Americans are only 12% of the drug users in America, and 35% of the crack users.

These statistics should deeply concern all of us.

- Minorities are victimized by crime more than any other segment of our population.
- We must understand what our system is doing to these communities.
- The effect it is having on their participation in our criminal justice system.
- The effect it is having on their families.
- The effect it is having on their participation in our democracy.

Race and the Death Penalty

The ultimate sentence, the death penalty, also raises serious concerns in its present implementation. Historically, the death penalty was a tawdry and racist practice. 455 persons executed for rape during 1900-1950, 90% were black men. No whites were executed for raping a white woman. 2/3rds of the 288 children executed in this country have been black.
4/6ths of the children executed during Kentucky's history have been black.

All 40 children executed for rape were black.

The remnants of this racist past remain with us, hidden in some troubling statistics.

Death row is holds 42% African-American, while African-Americans constitute 13% of the population.

Prof. David Baldus has published studies in the Cornell Law Review in 1998 revealing that race of victim and defendant continue to be significant factors in New Jersey and Philadelphia, similar to his previous studies in Georgia showing the same thing in the 70s and 80s.

Mcklesky v. Kemp ignored clear evidence of a pattern of race discrimination in the death penalty.

- The study presented in this case showed that a defendant's odds of getting death were 4.3 times higher if the victim was white.
- Justice Powell ruled that statistical evidence of systemic discrimination was insufficient basis for relief absent direct evidence of discrimination by the prosecutor or jury.
- The majority stated that allowing such statistical proof would throw "into serious question the principles that underlie our entire criminal justice system." Justice Brennan in dissent wrote that the majority "seems to suggest a fear of too much justice."

2/3rds of the children presently on death row are black.

Profs. Keil and Vito study of murder trials in Kentucky from 76-91 conducted at the request of the General Assembly found that "blacks accused of killing whites had a higher average probability of being charged with a capital crime (by the prosecutor) and sentenced to die (by the jury) than other homicide offenders.

A 1990 GAO study found "racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision."

Indigent Defense

While not a classic element of diversity, indigent defense is in the same constellation of values.

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- We represent the poor.
- We represent many minorities.
- Our lawyers have historically not been represented in the bar and on the judiciary.

The story of providing lawyers to poor people charged with crimes is a familiar one to you. You have learned:

- How the 6th Amendment promised the right to counsel for citizens in federal courts.
- How states unevenly provided counsel to the poor.
- How it was not until the 1930s that counsel to poor people charged with capital crimes was guaranteed.
- How it was not until the 1960s in *Gideon v. Wainwright* that the right to counsel in all felonies was guaranteed for the indigent accused.
- How in Kentucky there had long been a history of lawyers providing pro bono services to the poor.
- How a group of Kentucky lawyers challenged the system of requiring lawyers to do these services without compensation, how Kentucky court of appeals agreed in *Bradshaw v. Ball*, all leading to the statutory creation of the Department of Public Advocacy.

The creation of the Department of Public Advocacy, however, did not fulfill the promise of *Gideon*.

- The indigent defense function has been historically underfunded, so that by 1998, it was the poorest funded public defender system in the United States.
- The cost per case was only $187 per case.
- The cost per capita was under $4.90 per case.
- The starting salary was $23,388.
- And while some full-time prosecutors suffer from similarly low salaries, the prosecution function receives 3 times the defense function, despite our providing representation in 85% of the cases in circuit court.

The result is a poorly funded indigent defense delivery system.

- Consisting of highly committed but poorly paid public defenders.
- Public defenders with caseloads averaging 475 new cases per year per lawyer in FY 99.
- Creating injustice every day in our court rooms across Kentucky.
- Threatening the reliability of the verdicts that our juries are reaching in over 100,000 cases each year.

These are all problems on Law Day 2000 that mar our celebration. But these problems should in no way diminish this Law Day, or cause us to despair regarding America's journey. These problems are not the last word.

We have much to celebrate.

We have lawyers who have committed themselves to working on these issues. Let us celebrate lawyers who have tackled these problems and by doing so have endorsed diversity.

Let us celebrate the life of **Abraham Lincoln**, a lawyer, as an old model for our profession.

- The dominant moral issue of his time was that of the continued slavery of millions of black Africans.
- He devoted his life as president to rejecting the system of slavery, and led the nation in our greatest moral struggle.
- He then set out to bring reconciliation between north and south, black and white, and gave his life for that.
- Let us celebrate the life of Abraham Lincoln.

Let us celebrate the life of **Nelson Mandela**, not an American, but a lawyer.

- He went to law school as a young man.
- He began to fight against a system of racial apartheid.
- He said in his book "long walk to freedom" that "my career as a lawyer and activist removed the scales from my eyes...I went from having an idealistic view of the law as a sword of justice to a perception of the law as a tool used by the ruling class to shape society in a way favorable to itself. I never expected justice in court, however much I fought for it, and though I sometimes received it."
- He was jailed repeatedly for his activism.
- Eventually he was imprisoned for life.
- Again from his book, he says that "no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones—and South Africa treated its imprisoned African citizens like animals...there were many dark moments when my faith in humanity was sorely tested, but I would not and could not give myself up to despair. That way lay defeat and death...the campaign to improve conditions in prison was part of the apartheid struggle...we fought injustice where we found it, no matter how large, or how small, and we fought injustice to preserve our own humanity."
- He was in prison for 10,000 days until the bonds of oppression could hold no longer.
- His goal when he got out: "To make peace with an enemy one must work with that enemy, and that enemy becomes one's partner."
- He became his nation's president. He led his nation into an extraordinary movement of reconciliation between the oppressed and the oppressor, where the oppressors asked forgiveness from the oppressor.
- Looking back he reflects: "It was this desire for freedom of my people to live their lives with dignity and self respect that animated my life, that transformed a frightened young man into a bold one, that drove a law-abiding attorney to become a criminal...I found that I could not enjoy the poor and limited freedoms I was allowed when I knew my people were not free...the chains on any one of my people were the chains on all of them, the chains on all of my people were the chains on me. It was during those long and lonely years that my hunger for the freedom of my own people became a hunger for the freedom of all people, white and black.
- Let us celebrate the life of Nelson Mandela, a lawyer.

Let us celebrate the life of **Jesse Crenshaw**

- An African-American lawyer from Lexington.

- A teacher at KSU.
- A legislator who guided the Racial Justice Act through the house in 1998.
- A legislator who in the 2000 General Assembly sponsored a bill that would have stream-lined the process of restoration of voting rights for persons released from prison, knowing that this disproportionately disenfranchises Africans-Americans.
- Let us celebrate the life of Jessie Crenshaw, Kentucky lawyer.

Let us celebrate the life of **Gerald Neal**

- An African-American lawyer from Louisville.
- In 1992, 94, 96, and 98, he was the primary sponsor of the racial justice act.
- He successfully guided this bill through the senate to its final passage.
- Kentucky now stands as the only state in the nation to have a law prohibiting racial discrimination in the charging process for capital crimes, and allowing for the use of statistical evidence as proof of racial discrimination.
- Gerald Neal introduced SJR 86 which would have directed DJJ, JJAC, and SEJAY to study disproportionate minority confinement.
- Let us celebrate the life of Senator Gerald Neal.

Let us celebrate the life of **Chief Justice Joe Lambert**, former Chief Justice and present Justice Cabinet Secretary Robert F. Stephens, Mike Bowling, John Rosenberg, Robert Lawson, Rep. Harry Moberly, Sen. David Williams, Rep. Kathy Stein, Rep. Jeff Hoover, Dick Clay, Don Stepner and other members of the Blue Ribbon Group.

- They gathered as a group and looked at the problems with the funding of indigent defense in Kentucky.
- They made an extraordinary recommendation: that Kentucky needed to fund indigent defense at a rate of $11.7 million each year in new general fund dollars.
- They went to Governor Patton to urge him to endorse this recommendation.
- Governor Patton agreed to fund the BRG recommendations over 4 years, and put $10 over the biennium into his budget.
- This was funded by the 2000 General Assembly.
- Let us celebrate the lives of these Kentucky lawyers.

Let us celebrate **Steve Bright**

- Danville native
- UK student body president in the early 80s
- A public defender in Washington, D.C.
- Established the Southern Center for Human Rights.
- Teacher at Yale, Harvard, and Emory law schools.
- Argued *Amada v. Zant* in 1988 before the US Supreme Court.
- Presented with the 1998 Thurgood Marshall award at the ABA Annual Meeting.
- Takes a small salary ($23,000) out of the money raised and recruits the best and brightest to represent death-row inmates in the south.
- From *Proximity to Death*, by William Mcfeely: Steve Bright has made a difference. "but the personal price is high. Although Bright affects an all-in-a-day's work approach, there can be no doubt that experiencing two executions in one week is wrenching. After a final appeal in the Joseph Carl Shaw case in South Carolina, Steve spent the last day with J.C., walking with him to the execution chamber, and was there as Shaw was strapped into the electric chair and killed. Immediately afterward, with almost no sleeping, Bright was on a plane to Florida, after another appeal had failed, to repeat the draining experience of staying with James David Raulerson until his death.

Let us celebrate the life of **Dick Clay**

- Louisville lawyer with Woodward, Hobson, and Fulton.
- KBA president in 1998-1999.
- Member of the Blue Ribbon Group.
- Worked during his term as KBA President to fully fund civil legal services.
- In a speech before DPA's 1998 Annual Seminar he promised to devote his term as KBA President to looking at the issue of racial injustice in the Kentucky Criminal Justice System.
- He said, "we must not ignore the fact that out of 12,500 members of the KBA roughly 150-200 are black. This is a terrible statistic. It is not my fault. It is not yours." It is the result of a nation where education has been undervalued for both black and white children, and where there has not been a long tradition of large numbers of black lawyers...this must change. It will only happen—but it must happen—over time. There must be intensive efforts by the Bar and the Judiciary to identify promising African-American students at the elementary, junior and high school levels and, quite simply, to indoctrinate them with the drive to become great lawyers."

Closing

Ours is a big, raucous, wonderful democracy.

Our profession is one which has played and continues to play a major role in the journey of our democracy.

Lawyers have:

- Kept nations together during civil war.
- Brought reconciliation between races.
- Raised up issues that were being ignored by the majority
- Simply put, they have looked at the problems in our society and tried to solve them.

Flower where you are planted. Look around and solve problems. Change those places where diversity is not valued. And today join with ALL OF US IN CELEBRATING DIVERSITY IN OUR DEMOCRACY.◆

Eliminating the Death Penalty for Juveniles

The following 5 testimonies were presented before the House Judiciary Committee on February 17, 2000

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Representative
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Louisville, KY 40211

Currently in Kentucky we can execute a 17 year old for committing a capital offense. House Bill 311 changes that to age 18 for a youthful offender. We also changed the punishment for youthful offenders to life imprisonment without benefit of parole for 25 years.

The juvenile death penalty is both controversial and emotionally charged. It's impossible to know the pain, the anguish, and the loss a victim's family is faced with each and every day when a loved one has been murdered, unless it has happened to your family. I'd like to use this opportunity to go on record denouncing the Benniton Company marketing strategy by resurrecting that kind of pain and anguish in many families across this nation, and particularly two families in Louisville. However, in Kentucky our criminal justice system continues to practice the very antithesis of what we condemn the most, murder.

Ladies and Gentlemen of this Committee a 17-year-old is still a child. I could not effectively make this argument if we as legislatures and parents have not clearly set limits on the rights and privileges of our youth. We have instructed them through our legislation that they lack the maturity and sound judgment to vote at that age, to buy, possess, and drink alcohol, to buy and possess cigarettes. Children are not allowed to contract until they are eighteen. They cannot drive in this state if they have not graduated from high school or are not currently enrolled in school. They must be 18 before donating bodily organs. And, they must have our consent to marry. As parents, we set curfews, we give them advice, and we instruct them on proper behavior. We correct their English, we forbid them to listen to certain types of music, and see certain types of movies. The list goes on and on.

We guide our children through adolescence and even beyond. That is true at some point that we hold them accountable and we expect sound judgment in their decision making, and a level of maturity to match or exceed our own. But, what about the children who not only do not have the love, the guidance, and the protection that most of us provide? But, the many times those children are even victims at the hands those who are supposed to protect them. The profile of the juvenile homicide offender most often reveals these two common characteristics. They are more likely to be psychologically disturbed, because often they have been victims of horrifying child sexual and physical abuse; and/or, alcoholism, drug abuse, and psychiatric treatment and hospitalization are prevalent in the history of their parents. We are not advocating or excusing a child whom commits a capital offense. The Bill clearly addresses punishment, but with what we now know, what we have learned during the interim what we'll talk about this very session regarding early brain research, and the proper early childhood and what it means to adulthood. It is clear in that in these kinds of cases death is not the punishment.

If any one you were to walk into a child care center today and see a room full of infants, could you tell which one might commit murder one day? Our life experiences teach us how to be adults. What kind of adults we become depends on what those life experiences are. If we continue to permit juveniles to be put to death, then we are in fact giving up on one of those infants. I am asking you to do what is in the best interest of our children, and giving up on them is not.

T. Kerby Neill, Ph.D.
Child Psychologist
3767 Winchester Road
Lexington, Kentucky 40509
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As a psychologist I have worked with children and families in the Commonwealth since 1974 and evaluated a number of youth charged with capital offenses. I served on the legislative Task Force that recommended youth be tried as adults in cases of serious or repeated felonies. The youth I personally evaluated were often wounded and immature. I know more comprehensive research tells us that youth who commit serious crimes often suffer disabilities, disadvantages and victimization which further handicaps their social judgment.

As a parent of teenagers, two fears haunt me. The first, is my memory of foolish decisions that I made or nearly made as a teen? There are few of us who cannot recall a choice they regret making at 16 or 17 that they would not have made at 20. The second, is an awareness that children are growing-up in a dramatically more stressful society than we did. Competition for things and social status can be intense. There is often little family interaction. Violence pours into our homes via the media. Advertising shapes youthful identities around appearance and possessions --*not* the content of their character.

As a society we withhold responsibilities until youth reach certain ages--16 to drive, 18 to enter contracts, 21 to consume liquor. Our wisdom is matched by research on child development. This research indicates that youth under 16 perform a number of thinking tasks differently than adults. At age 16 or 17 most, but not all, youth can solve many thinking tasks like adults. But, we recognize the process of balancing limited life

experience with pressures and emotions in order to make good decisions --the process we call judgment--is more complex than solving research thought problems. The newly acquired thinking skills of youth are not tested under such stress or complexity. We pay a premium for the demonstrated poor judgment of youth when we insure our cars for our teenaged children. While we recognize the limitations of those under 18 in so many ways, we suspend this wisdom when a youth commits a serious offense. That is why we have states which allow the death penalty for youth, but prohibit their getting tattoos.

If we can remember poor judgments we made in our teens, we can also remember that we usually "knew better." We knew enough to be held responsible on more than a young child's level. There are many serious consequences for youth in the adult system short of death. A youth of 17 only has about 12 years of his life within ready access of his memory. Twenty-five years without parole would constitute double of what he knows as a lifetime.

We can all experience such rage that can cause us to wish for the death of another. Such rage allows us to see people narrowly--only in terms of their offense against us. It is in such a stereotyped and detached way that criminals often see the rest of us when they offend. In this sense the revenge of the death penalty diminishes us all, the more so, the younger and more vulnerable the persons upon whom we inflict it.

One message prevalent in our society that facilitates youth violence is simply that violence solves problems. In our decisions regarding the death penalty for juveniles we have the power to say yes or no to that message.

Ralph Kelly
Commissioner
Juvenile Justice

Thank you Mr. Chairman and Ladies and Gentlemen of the Committee. I appreciate the opportunity to testify before you on what I think is a very important piece of proposed legislation:

When we began our 20th Century some one hundred years ago, almost every nation on earth, with the exception of Costa Rico and Venezuela, allowed the execution of convicted murderers, including those under 18. By the end of the century, the list has dramatically changed to the extent that the only regimes that allowed the death penalty for youngsters under the age of 18 was Iran, Pakistan, Nigeria, Saudi Arabia, and, of course, 23 states in our own great country the United States of America.

As we closed the last century, we executed four men who were convicted of murder when they were under the age of 18, three were seventeen and one was sixteen. As we opened the new century in January, we've already executed two who committed murder when they were seventeen and one who committed murder when they were sixteen. So, I guess we could say if you are on whichever side of the coin, the nation is off to a great start.

It's amazing that the Supreme Court and *Thompson v. Oklahoma* held that executions of offenders under 16 was unconstitutional. And then, almost a year later, they came back in *Stanford v. Kentucky* and held that it was a good standard of decency for the state to execute 16 and 17 year olds. It is equally ironic that in January of this year, the President of the United States hailed an important advance in human rights when the United States agreed with the United Nations Convention on the Rights of the Child in raising the standard for the age that a young man or woman can go to war. So, the Convention said that no person under the age of 18 should really be allowed to fight in a war. Yet the same nation, our great nation, continues to allow the execution of 16 and 17 year olds.

Statistics and data clearly prove that the juvenile death penalty is blatantly racist. Over two-thirds of the 357 juveniles executed in this nation have been African-American. And that certainly fits in with the fact that even in Kentucky we have a disproportionate number of minorities in general in the juvenile justice system, just like there is in the adult correctional system. Now, one of the things we pride ourselves on in Kentucky is having a real good juvenile justice system. We came into existence, this Department, on the heels of federal consent decree. We have worked very hard with the support and approval of the legislature and our Governor to change our juvenile justice system. We have imbued in our statutes the fact that we are a treatment and rehabilitated-oriented system. We imbued very clearly the (parent's patree) philosophy, which came out of England for this country in terms of trying to do things in the best interest of the child.

We do some great things here in terms of youngsters under eighteen, unlike many of our sister states. All juveniles in this state go through the juvenile justice system no matter what crime they committed if they are under the age of eighteen. While most of our border states and many other states in the nation transfer juveniles as young as 13 to the adult correctional system where they are housed. We serve all types of kids in the juvenile justice system with the goal being treatment and rehabilitation. Almost all of our other statutes begin to draw a distinction between young people and adults. You can't buy cigarettes unless you are over 18. You can't drink until you are 21 and a host of other kinds of things. It almost seems just unusual that we look at age of adulthood in one fashion and then we look at in another fashion. There is no question that we deal with some very difficult and dangerous young people in our state. And some of our young people are very sophisticated criminals and some have committed some very horrific crimes. But, I'm not sure if it serves any useful purpose if the eleven young people now in the juvenile justice system who committed horrific crimes of murder and otherwise would be under the death penalty. I'm not even sure how we as a Department would be focusing on their rehabilitation

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if they were condemned individuals. How do you rehabilitate somebody, how do you treat somebody in terms of trying to help them focus on making a better life in the future if the state is going to take that life away?

I commend you ladies and gentlemen for all the things that you have done to improve the juvenile justice system in this state. I think the passage of this legislation out of the Committee would take us one step further in making Kentucky a model type juvenile justice program.

Debra Miller
Executive Director
Kentucky Youth Advocates

My name is Debra Miller and I am the Executive Director of Kentucky Youth Advocates. KYA is a child advocacy organization founded in 1975 and dedicated to creating policies and conditions that recognize children's rights and serve their best interests.

We were very involved in the work in the late 70's and early 80's to revise Kentucky's juvenile statutes. Eventually the Kentucky Unified Juvenile Code was completed and passed by the General Assembly. It was hailed nationally as model juvenile law – clearly placing Kentucky in the forefront of states committed to the treatment and rehabilitation of youth. Since that time, we have built on this commitment.

HB 311 gives the General Assembly another chance to be a leader – and do what we believe is the right thing for children – by eliminating the death penalty for juveniles.

Kentucky has executed six persons for crimes committed as juveniles and two more individuals are on death row today.

As we can see from today's meeting, the death penalty is a visceral issue – and even more so when the talk turns to juveniles.

Yes, the crimes behind the sentences may be horrendous. These crimes certainly call into question the general concept of the innocence of youth. Yet we know that those executed for crimes committed as children share some common characteristics:

- They are likely to have mental retardation or mental illness.
- They are likely to have histories of sexual or physical abuse.
- They have been victimized by lives of poverty and poor education.
- And in a further irony of their marginalization, they are often poorly represented in trial.

We can – and we should – hold juveniles responsible for crimes committed. HB 311 would allow life without parole for 25 years and by pass the court review at 18 when juveniles are transferred from Department of Juvenile Justice to adult Corrections custody. We don't need to worry that juveniles will get away with merely having their hands slapped.

We claim to a child-oriented nation – and state – but the juvenile death penalty contradicts this claim.

- Internationally, only five other nations sentence juveniles to death.
- Nationally, a minority of states allow the death penalty for juveniles.

It seems that we would like to believe that the death penalty is the ultimate threat and deterrent to crime – but like almost all parents will admit – kids just don't work that way.

- Children are impulsive and reckless by nature.
- Children seem to have an inherent belief in their own invincibility and immortality – despite any presentation of evidence to the contrary.

KYA is joined by a number of organizations who represent the mental health professions, child advocacy groups, racial justice organizations, and religious organizations in supporting HB 311. There is a complete listing of endorsing groups in the blue pamphlet you have.

We don't condone crime committed by juveniles but we see no useful purpose in the death penalty. Its use is one more time adults say to kids, "do as we say, not as we do." Kentucky Youth Advocates urges you to support House Bill 311.

Ernie Lewis
Public Advocate

I am personally not in favor of capital punishment but if we are going to have the death penalty in Kentucky, I encourage us to have a very carefully drawn statute. The ABA looked at the death penalty in 1997 across America and said there are four major problems: 1) the states allow the execution of the mentally retarded; 2) there are disproportionate numbers of people of color on death row; 3) the death penalty is arbitrary since we are not funding indigent defense, so people do not have a proper representation, and 4) we still allow the death penalty for children in this country.

Kentucky has gone a long way toward carefully drawing a capital statute. In 1992, you addressed the first question and eliminated the death penalty for the mentally retarded. In 1998, you addressed the problems of race and passed the Racial Justice Act. This year, the problem of indigent defense is being addressed by the Governor's recommendation of $10 million additional funding for indigent defense. Question four remains, we still allow the death penalty for children.

I encourage the General Assembly to carefully craft a narrowly drawn statute and pass HB311.◆

Breaking Through: Communicating And Collaborating with the Mentally Ill Defendant

by Eric Drogin, J.D., Ph.D.

The more elaborate our means of communication, the less we communicate.

-- Joseph Priestley (1733-1804)

INTRODUCTION

Functioning within a system inured to spending hundreds of dollars an hour on specialized mental health expertise, many criminal defense attorneys adopt a deferential, even disingenuous manner when compelled to comment on the behavior of their own clients: "What do I know? I'm not a psychologist!"

For expert witnesses to wish they had a dollar for every time they heard this would be to ignore the fact that, of course, they already do. Many dollars.

As personally and financially gratifying as this approach may be for the forensic psychological community, one inescapable fact makes it less than ideal for attorneys and the persons they attempt to defend:

No matter what firm you join (to say nothing of working in indigent defense systems), there will *never* be enough money to run every mental health aspect of each case by a mental health expert or consultant.

This may never be more evident than during the initial phases of representation in cases where competency and sanity issues are off the table (and therefore, no funded mental health expertise is forthcoming), important deadlines are looming, and quite simply, you and your client are incapable of working together.

What is frequently overlooked in such cases is that the defense team already has considerable expertise at its disposal. Attorneys, investigators, and other staff persons have their own varied life experiences upon which to draw. In addition, in a somewhat different way from their mental health colleagues, they are themselves students (and, in the courtroom, teachers) of human nature, whose stock in trade already consists of identifying, explaining, and normalizing the behavior of persons from every walk of life.

The purpose of this article is not to turn defense team members into diagnosticians or psychotherapists, but rather to enhance their ability to communicate and collaborate with certain types of mentally ill criminal defendants. Common traits and recommended modes of interaction are identified where clients may be affected by symptoms of depression, mental retardation, paranoid personality disorder, bipolar disorder, Schizophrenia, and substance dependence.

Readers will find frequent references to the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*. **[1]** While some (but not all) of the diagnostic criteria are identified for each of the disorders listed *supra* (in considerably abbreviated form), these are not intended for use in "ruling in" or "ruling out" the presence of a specific mental illness. Rather, they provide some very general examples of the sorts of actions, thoughts, or feelings defense team members *may* encounter when dealing with mentally ill clients.

DEPRESSION

According to the *DSM-IV*, persons suffering from a Major Depressive Episode may display:

(1) depressed mood;
(2) diminished interest or pleasure
(3) weight loss;
(4) sleep disturbance;
(5) agitated or slowed movements;
(6) fatigue or loss of energy;
(7) feelings of worthlessness or guilt;
(8) concentration problems or indecisiveness; and
(9) thoughts of death or suicide. **[2]**

During a client interview, depressed defendants may be listless, apathetic, and seemingly disinterested in the details of their representation. Despite the fact that important decisions must be made as soon as possible, they can adopt a frustratingly indifferent attitude about counsel's need for information and advice in the face of rapidly approaching deadlines. Often, the depressed defendant may dissolve into tears, seemingly incapable of taking an active role in his or her own defense.

For these and other reasons, the defense team may wonder whether such persons are actually competent to stand trial. Attorneys sometimes conclude – erroneously – that a client must exhibit psychosis or mental retardation in order to be incompetent. In fact, some severe forms of clinical depression can, in particular, render criminal defendants incapable of participating rationally in their own defense. **[3]**

Once the issue of trial competency has been resolved, the defense team may still be left with a client whose collaborative abilities are minimal at best. Key to establishing a working relationship with such persons is understanding what cognitive behavioral therapists have termed the *cognitive triad*: **[4]**

The cognitive triad consists of three major cognitive patterns that induce the patient to regard himself, his future, and his

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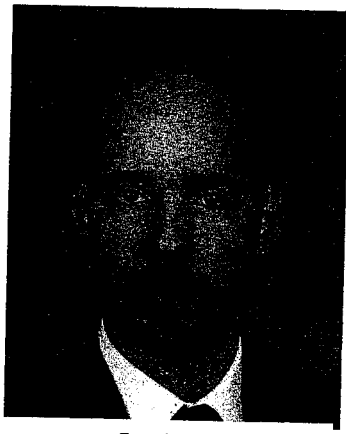
experiences in an idiosyncratic manner ...

The first component of the triad revolves around the patient's negative view of himself. He sees himself as defective, inadequate, diseased, or deprived. He tends to attribute his unpleasant experiences to psychological, moral, or physical defect in himself. In his view, the patient believes that because *of his presumed defects he is undesirable and worthless. He tends to underestimate or criticize himself because of them. Finally, he believes he lacks the attributes he considers essential to attain happiness and contentment.*

The second component of the cognitive triad consists of the depressed person's tendency to interpret his ongoing experiences in a negative way. He sees the world as making exorbitant demands on him and/or presenting insuperable obstacles to reaching his life goals. He misinterprets his interactions with his animate or inanimate environment as representing defeat or deprivation. These negative misinterpretations are evident when one observes how the patient negatively construes situations when more plausible, alternative interpretations are available. The depressed person may realize that his initial negative interpretations are biased if he is persuaded to reflect on these less negative alternative explanations. In this way, he can come to realize that he has tailored the facts to fit his preformed negative conclusions.



Eric Drogin

The third component of the cognitive triad consists of a negative view of the future. As the depressed person makes long-range projections, he anticipates that current difficulties or suffering will continue indefinitely. He expects unremitting hardship, frustration, and deprivation. When he considers undertaking a specific task in the immediate future, he expects to fail. **[5]**

In other words, the depressed criminal defendant is not merely so "sad," "miserable," or "unhappy" that a preoccupation with these emotions is crowding out the desire to assist counsel in developing a viable defense to his or her current charges. Rather, clinical depression is inseparable from an entrenched negative of one's self, situation, and prospects that interferes *logically* with the desire and/or ability to interact effectively.

Cognitive therapists have developed a series of labels to describe these "Common Patterns of Irrational Thinking":

(1) *Emotional reasoning.* A conclusion or inference is based on an emotional state, *i.e.*, "I *feel* this way; therefore, I *am* this way."

(2) *Overgeneralization.* Evidence is drawn from one experience or a small set of experiences to reach an unwarranted conclusion with far-reaching implications.

(3) *Catastrophic thinking.* An extreme example of overgeneralization, in which the impact of a clearly negative event or experience is amplified to extreme proportions, *e.g.*, "If I have a panic attack I will lose *all* control and go crazy (or die)."

(4) *All-or-none (black-or-white; absolutistic) thinking.* An unnecessary division of complex or continuous outcomes into polarized extremes, *e.g.*, "Either I am a success at this, or I'm a total failure."

(5) *Shoulds and musts.* Imperative statements about self that dictate rigid standards or reflect an unrealistic degree of presumed control over external events.

(6) *Negative predictions.* Use of pessimism or earlier experiences of failure to prematurely or inappropriately predict failure in a new situation. Also known as "fortune telling."

(7) *Mind reading.* Negatively toned inferences about the thoughts, intentions, or motives of another person.

(8) *Labeling.* An undesirable characterization of a person or event, *e.g.*, "Because I failed to be selected for ballet, I am a *failure*."

(9) *Personalization.* Interpretation of an event, situation, or behavior as salient or personally indicative of a negative aspect of self.

(10) *Selective negative focus (selective abstraction).* Undesirable or negative events, memories, or implications are focused on at the expense of recalling or identifying other, more neutral or positive information. In fact, positive information may be ignored or disqualified as irrelevant, atypical, or trivial.

(11) *Cognitive avoidance.* Unpleasant thoughts, feelings, or events are misperceived as overwhelming and/or insurmountable and are actively suppressed or avoided.

(12) *Somatic (mis)focus.* The predisposition to interpret internal stimuli (*e.g.*, heart rate, palpitations, shortness of breath, dizziness, or tingling) as *definite* indications of impending catastrophic events (*i.e.*, heart attack, suffocation, collapse, *etc.*). **[6]**

Realizing the source and nature of these irrational patterns of thinking will help the defense team in determining the best ways to impart and obtain critical information in anticipation of pending hearings and motions.

These clients should never be told that they are not feeling what they claim to feel; nor should it simply be asserted that they are "wrong" about their perceptions and predictions concerning the case at hand.

Instead, counsel may elect to:

(1) Acknowledge the client's current feelings.

(2) Point out that counsel has worked with many persons in similar situations, with similar feelings, while owning that this is not, in and of itself, expected to make the client feel better.

(3) Observe that counsel has managed not only to work with, but to help other persons who have felt the same way.

(4) Indicate that counsel sees many aspects of the case a certain way, and understands how and why the client may currently see some aspects differently.
(5) Patiently review some of the issues, not arguing with the client, but gently noting differences of opinion as they arise, suggesting that the client may come to view some perspectives differently upon later reflection.
(6) Reassure the client that counsel will revisit these issues with the client when there has been some time for both parties to consider them at length.

While detailed consideration of additional measures is beyond the scope of this article, it is assumed that counsel will attend to such usual issues as monitoring for suicidality, obtaining clinical assistance where indicated, and documenting prolonged difficulties in communication and collaboration which may indicate that competency concerns have resurfaced.

MENTAL RETARDATION

Persons who have received a diagnosis of mental retardation will typically exhibit:
(1) significantly low intellectual functioning; and
(2) impairments in adaptive behavior. [7]

These difficulties must begin before the person reaches the age of 18. The Intelligence Quotient ("I.Q.") range associated with this condition is typically 70 or below, although certain test-specific and other considerations may result in such persons having I.Q. scores that are several points higher. [8]

Once the presence of mental retardation has been determined, interviewing these criminal defendants takes on a singularly diagnosis-specific aspect. Mitigation experts have maintained that:

People with mental retardation tend to think in concrete and liberal terms. As a result, they may not understand the meaning of such concepts as plea bargain and waiver of rights. One of the safest ways of communicating with people with mental retardation is to use simple words in open-ended questions. Always ask questions that require them to explain their reasoning. If possible, have present a social worker or an individual who is close to the defendant to assist him or her in interpreting what is being said and asked and to ensure that the defendant understands the process. [9]

This perspective has been echoed in recommendations offered by clinicians, as well:

Informal clinical interviews with the client (when possible) and informants who know the client well, such as parents, teachers, and day program supervisors, typically initiate the diagnostic process and precede structured assessment procedures. [10]

Although counsel will attempt to converse at a level most likely to be understood by the defendant with Mental retardation, this should not be taken as advice to speak with such persons as if they are children. According to core training resources in the field of psychiatry:

[T]he interviewer should not be guided by the patient's mental age, which cannot fully characterize the person. A mildly retarded adult with a mental age of 10 is not a 10-year-old child. When addressed as if they were children, some retarded people become justifiably insulted, angry, and uncooperative. Passive and dependent people, alternatively, may assume the child's role that they think is expected of them. In both cases, no valid [information] can be obtained. [11]

The defense team should also remain aware that they are not the only persons interested in obtaining information from the client with mental retardation:

Keep in mind that the defendant may be unfamiliar with the jail setting and will find themselves wanting to talk to anyone. If possible, counsel should obtain a court order to prevent the prosecution from contacting the defendant.

Many prosecutors send police personnel, investigators, or psychologists into the jail to interview the defendant. In most cases, a defendant with mental retardation will talk to these people, and may make false statements and admissions ...

People with mild mental retardation often have significant difficulty coping and adapting. Skills such as communication, socialization, and functional academic abilities usually are quite limited. These skill deficits limit their ability to interact with their lawyer and to fully understand the significance of their Miranda rights.

This is especially problematic because defendants with mental retardation may waive their rights to remain silent or to speak with a lawyer, in favor of talking with interrogators to please them. Given this tendency, characteristics such as acquiescing to those in authority may hinder efforts to learn the truth. [12]

Because of the likely presence of suggestibility, counsel must be careful not to "lead" criminal defendants into misleading statements about past or present behaviors, feelings, and attitudes. The same dynamics that defense attorneys are concerned will impair a client's *Miranda* protections may also burden the defense team with bogus information that will frustrate attempts at competent representation. [13]

PARANOID PERSONALITY DISORDER

A primary concern in working clients with a paranoid personality disorder is that they not be confused with those suffering from a full-blown Delusional Disorder (characterized by "non-bizarre delusions" that nonetheless represent a break from reality). [14]

Persons with the contrastingly non-psychotic, albeit clinically significant paranoid personality disorder may:
(1) suspect that others are exploiting, harming, or deceiving

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them;
(2) doubt the loyalty of their acquaintances;
(3) avoid confiding in others;
(4) perceive harmless behaviors as threatening;
(5) bear a grudge;
(6) misinterpret neutral remarks as character attacks; and
(7) suspect spouses or partners of infidelity. **[15]**

Predictably, building a professional relationship with such clients is fraught with complications. While criminal prosecutions occur in the context of an adversary system, defendants with a Paranoid personality disorder may seem unsure about which side of that system counsel is actually on. Any indication that the defense team is less than fully prepared and supportive is likely to be interpreted as an expression of indifference, a heedless slight, or even an outright declaration of contempt.

Once again, cognitive behavioral therapists have provided the most cogent description of the issues at play in developing a professional understanding with such individuals:

The first issue ... is establishing a working relationship. This obviously is no simple task when working with someone who assumes that others are likely to prove malevolent and deceptive. Direct attempts to convince the client to trust the therapist are likely [to] be perceived by the client as deceptive and therefore are likely to increase the client's suspicions.

The approach that proves most effective is for the therapist to openly accept the client's distrust once it has become apparent, and to gradually demonstrate his or her trustworthiness through action rather than pressing the client to trust him or her immediately. **[16]**

A similar dynamic comes into play when the would-be collaborator is an attorney or investigator instead of a therapist or mental health counselor. Overt attempts at ingratiating oneself are likely to be interpreted quite negatively, while steadily building a track record of responsiveness and reliability is likely to advance the professional relationship significantly.

After all, individuals with a paranoid personality disorder are characterologically *inclined* to be suspicious and distrustful, but this need not be dominant substance or conclusion of every interpersonal contact. This having been said, however, defense team members should remain aware that setbacks are likely to occur from time to time, now matter how assiduously the trust relationship may have been cultivated. **[17]**

Regarding additional details of fostering collaboration and communication with these defendants over time:

It is then incumbent on the therapist to make a point of proving his or her trustworthiness. This includes being careful only to make offers that he or she is willing and able to follow through on, making an effort to be clear and consistent, actively correcting the client's misunderstandings and misperceptions as they occur, and openly acknowledging any lapses that do occur.

It is important for the therapist to remember that it takes time to establish trust with most paranoid individuals and to refrain from pressing the client to talk about sensitive thoughts or feelings until sufficient trust has been gradually been established ...

Collaboration is always important ... in working with paranoid individuals. They are likely to become intensely anxious or angry if they feel coerced, treated unfairly, or placed in a one-down position ...

This stress can be reduced somewhat by focusing initially on the least sensitive topics ... and by discussing issues indirectly (i.e., through the use of analogies or through talking about how "some people" react in such situations), rather than pressing for direct self-disclosure. **[18]**

Patience is not the only virtue taxed by interacting with such clients. Somewhat counterintuitively in comparison to how they at least attempt to deal with many other defendants, members of the defense team must also be prepared to downplay the degree of shared insight, closeness and identification they express with the persons they attempt to assist in these cases:

[O]ver zealous use of interpretation – especially interpretation about deep feelings of dependence, sexual concerns, and wishes for intimacy – significantly increase [these] patients' mistrust ...

At times, patients with paranoid personality disorder behave so threateningly that therapists must control or set limits on their actions. Delusional accusations must be dealt with realistically but gently and without humiliating patients.

Paranoid patients are profoundly frightened when they feel that those trying to help them are weak and helpless; therefore, therapists should never offer to take control unless they are willing and able to do so. **[19]**

SUBSTANCE DEPENDENCE

According to *DSM-IV*, persons who have become dependent on any of a range of substances (including alcohol, cocaine, and others) may share several of the following experiences:
(1) tolerance (needing more to become intoxicated, or not getting as intoxicated with the same amount);
(2) withdrawal symptoms;
(3) consuming more, and for a longer time, than intended;
(4) failed attempts or persistent desire to minimize consumption;
(5) increased time spent in obtaining or recovering from the substance in question;
(6) giving up social, occupational, or recreational activities; and
(7) continuing to consume despite knowledge that there is a problem. **[20]**

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Several inquiries have proven useful in a very basic, general screening for the presence of alcoholism. One of the most simple and straightforward of these is the CAGE questionnaire:

CAGE provides a mnemonic device for the exploration of the following areas: Cut down: "Has a doctor ever recommended that you Cut back or stop the use of alcohol?" Annoyed: "Have you ever felt Annoyed or angry if someone comments on your drinking?" Guilt: "Have there been times when you've felt Guilty about or regretted things that occurred because of drinking?" Eye-opener: "Have you ever used alcohol to help you get started in the morning; to steady your nerves?" **[21]**

Often the substance-dependent defendant is first encountered in the throes of withdrawal from chronic intoxication. The best strategy is to reschedule planned interviews, seeking a continuance on this basis if necessary. Not only will questioning at this juncture provide questionably reliable information and planning; it may also engender considerable resentment on the part of clients who will find it difficult to forget that defense team members chose such an inopportune time to put them through their paces.

"Withdrawal" is likely to be marked by considerable pain and psychological disturbance. **[22]** This is distinct from the longer-term process of "recovery," which involves, among other aspects, the gradual return of the central nervous system to an approximately pre-morbid level of functioning. In the case of long-term alcohol dependence, this component of "recovery" is generally estimated to take between 9 and 15 months. **[23]**

While the incorporation of direct interviewing assistance from family members has been identified as a useful technique in developing a relationship with defendants with, for example, mental retardation, it may become a "two-edged sword" in working with substance-dependent criminal defendants:

Addicts have most likely been hiding their problems from other family members for a long time, perhaps years. They may have been draining family finances to support their habits, often unbeknownst to anyone else. In some cases, this has gone on with the knowledge of other family members, who have chosen to ignore the problem.

When the "truth comes out" in the course of litigation, feelings of guilt and betrayal on both sides add fuel to already simmering resentments. Children reflect on how they have been deprived in the service of someone else's addiction, or identify with a neglected or abused parent. Spouses express additional distress at the thought of how their children's upbringing and educational prospects were impaired as a result of a partner's addictive behavior. **[24]**

Defense team members need to take special care to gain a full understanding of the addicted client's *comprehensive* legal situation. These persons often lead chaotic personal lives, are likely confused, and frequently have difficulty with trust issues, in a fashion seemingly similar to persons with paranoid personality disorder. **[25]** It is a good idea to go down a full list of potential problems with these persons, conveying at all times the understanding that these are situations which might occur with anyone, and that it is standard procedure to make sure that "all the bases are covered." **[26]**

Comprehension difficulties are a significant issue in these cases. **[27]** While deficits are typically not as profound nor as pervasive as those encountered with criminal defendants with mental retardation, they may still provide a substantial barrier to collaboration and communication:

Simply put, the addicted client may not understand what you are saying. He or she may be sleep deprived, hung over, or acutely intoxicated. There may be lingering effects of chronic substance abuse, and even permanent organic impairment. It follows that the addicted client who has been technically sober for some time may still have significant difficulties with memory and logical processing.

These deficits may be difficult to detect at first, as long as the addict can keep interactions at a social level that does not require complex reasoning ...
In order to serve the client better, attorneys can also make a point of cycling back to earlier conversations, revisiting specific comments and information to make sure that clients have been following along. [S]trategic planning should proceed in a logical and stepwise fashion ... **[28]**

The trademark attitude (and primary psychological defense) of the addict is *denial.* **[29]** Defense team members should not be surprised when addicted clients resolutely refuse to acknowledge aspects of their cases which would seem readily apparent to anyone else:

This situation can complicate the attorney-client relationship from its inception. Necessary data gathering is hampered from the beginning. Attorneys are unsure what clients cannot remember, and what they are simply unwilling to recall. What might appear to be evasiveness (or even outright duplicity) on the part of addicts may be explained by their ingrained inability to face certain aspects of their past and present lives.

Patience is the key in dealing with this situation. That is not the same thing as acquiescence; clients need to learn as early as possible that attorneys have duties that they must perform, and information that they must obtain. To the extent possible, attorneys need to schedule sufficient time to draw out the addicted client and work through areas of obvious denial. The assistance of a therapist consultant may be particularly useful at this juncture. **[30]**

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SCHIZOPHRENIA

Criminal defendants who have received a *DSM-IV* diagnosis of schizophrenia will often endure some or all of the following:
(1) delusions;
(2) hallucinations;
(3) disorganized speech;
(4) disorganized or catatonic behavior; and
(5) social or occupational dysfunction. **[31]**

Clearly, an active phase of this disorder will probably render a client incapable of effective collaboration and communication, likely make him or her incompetent to stand trial, **[32]** and perhaps have prevented him or her from possessing the requisite mental status for criminal responsibility. **[33]**

In those cases where psychotic symptoms are currently inactive, and thus at least temporarily in "remission," the defense team may be able to obtain useful information from criminal defendants, in addition to forming at least the basis for a working professional relationship.

Similar to difficulties encountered with persons diagnosed with a paranoid personality disorder, those subject to the vicissitudes of Schizophrenia may be prone to overreact to seemingly innocuous remarks and comments, even as more florid aspects of this illness are not readily apparent. From a classic reference designed for the families of persons with schizophrenia:

Interpretations of this kind may indeed increase the anxiety of the patient and hasten a new psychotic episode ... [h]owever, distance is not desirable either and does not promote rehabilitation ...

A question that comes up quite frequently is the following: Should the recovering patient be told the truth when some terrible event (sudden death or the diagnosis of a serious disease) occurs ...?

Certainly we do not want to lie to patients or anybody else. However, there is a good time and a bad time for telling the truth. State hospital psychiatrists used to insist that no ill effects have ever resulted from the revelation of bad news. They were referring to a group of patients who, in addition to being ill, often lived in a state of alienation aggravated by the environment.

Many of these patients were not able to express their emotions. An apparent insensitivity should not be interpreted as imperviousness. Even a catatonic schizophrenic who seems insensitive and immobile like a statue feels very strongly. A volcano of emotions is often disguised by his petrified appearance.

With the recovering schizophrenic we find ourselves in a completely different situation. He is very sensitive ... and would not forgive relatives for not telling him the truth. And yet knowing the truth may be detrimental to him when he is still unstable and still struggling to recover fully his mental health. The patient has to be prepared gradually and eventually be told the truth when he has already anticipated in his own mind its possibility and the methods of coping with it. **[34]**

Does this sound complicated? Somewhat internally contradictory? More than someone would want to attempt on his or her own, or even with the assistance of a group of professional colleagues? Schizophrenia is a diagnosis apart, involving such high stakes and potentially volatile reactions that extreme caution is warranted when considering any significant interaction.

Guidance materials for psychiatrists further underscore this perspective, while lending some practical tips for working with Schizophrenic clients that generalize to other professional endeavors:

The relationship between clinicians and patients differs from that encountered in the treatment of nonpsychotic patients. Establishing a relationship is often difficult. People with schizophrenia are often desperately lonely, yet defend against closeness and trust; they are likely to become suspicious, anxious, or hostile or to regress when someone attempts to draw close.

Therapists should scrupulously observe a patient's distance and privacy and should demonstrate simple directness, patience, sincerity, and sensitivity to social conventions in preference to premature informality and the condescending use of first names. The patient is likely to perceive exaggerated warmth or professions of friendship as attempts at bribery, manipulation, or exploitation.

In the context of a professional relationship, however, flexibility is essential in establishing a working alliance with the patient. A therapist may have meals with the patient, sit on the floor, go for a walk, eat at a restaurant, accept and give gifts, play table tennis, remember the patient's birthday, or just sit silently with the patient.

The major aim is to convey the idea that the therapist is trustworthy, wants to understand the patient and tries to do so, and has faith in the patient's potential as a human being, no matter how disturbed, hostile, or bizarre the patient may be at the moment. **[35]**

BIPOLAR DISORDER

Although it is, of course, clinically distinct from other forms of mental illness, bipolar disorder calls for an interpersonal approach that mirrors to a considerable extent the adaptive procedures employed by defense team members when encountering clients with other psychiatric conditions.

Persons with bipolar disorder may be prey to dramatic fluctuation between manic episodes of seemingly unrestrained agitation and energy on the one hand, and almost catatonic periods of depression on the other. **[36]**

Similar to overtly psychotic phases of schizophrenia and profoundly debilitating manifestations of major depression, the

criminal defendant with bipolar disorder may present as incompetent to stand trial or lacking in criminal responsibility [37] when experiencing the extreme manifestations of either affective component of this illness.

The defense team may be able to obtain important factual material, and forge some degree of cooperative bonding, between more dramatic changes in the client's overall mood and accompanying behavior. In general, this is more likely to occur when a client is less depressed and more energetic, although a counterproductive irritability may characterize the later phase of his or her illness.

Key to the success of such encounters is a recognition that progress will be episodic. Considerable ground is likely to be lost when a fully realized manic episode eventually ensues. Contrastingly, there will likely be periods during which the patient's mood appears to balanced that no mental illness is readily apparent. [38]

If interaction must be sustained during intermittent depressive stages of bipolar disorder, the approach will likely be substantially similar to that described *supra* for a free-standing case of major depression.

CONCLUSION

Attorneys, investigators, and other defense team members will encounter a myriad of mental conditions in their clients. While they are not encouraged to diagnose or treat mental illness, they are frequently compelled to interact with afflicted criminal defendants without the assistance of mental health professionals. When this occurs, there are various approaches to collaboration and communication that are specific to certain pre-identified diagnoses.

While they may not always be in a position to express their appreciation directly, clients will always benefit when legal services are delivered with consideration for (and adaptation to) the individual's unique personal circumstances.

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The Scope of the Right to Counsel in Kentucky Post-Conviction Proceedings

by Ed Monahan and Rebecca DiLoreto

Many areas of criminal law practice are misunderstood. The appointment of counsel in post-conviction proceedings is an area of confusion, misunderstanding and misconceptions for some people. In an attempt to promote greater awareness, this article looks at what the law in Kentucky is on the appointment of counsel in post-conviction proceedings. Statutory law, the rules of the Kentucky Supreme Court, and twenty years of caselaw in Kentucky indicate that the law on appointment is:

- Counsel must be appointed in RCr 11.42 proceedings if the movant is indigent and unambiguously requests appointment of counsel in the body of the motion for purposes of supplementing his grounds to vacate his conviction;
- If the movant fails to ask for counsel in the body of the motion, he is not entitled to appointment;
- If the indigent asks for counsel only for an evidentiary hearing and not to supplement his grounds, the indigent is entitled to counsel if an evidentiary hearing is warranted;
- Even if there is a material issue of fact that can be determined on the face of the record, counsel must be appointed if the indigent clearly requests appointment in the motion in order to file supplemental grounds;
- During the course of representation, counsel and the indigent client can originate the filing of a post-conviction action that is appropriate, and
- If the action is not a proceeding a reasonable person with adequate means would be willing to bring at his own expense then counsel who has been appointed by the court can withdraw from representation after making such a determination with approval of the court.

Constitutional Aspects. There is no federal or state *constitutional* right to counsel in a post-conviction proceeding. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). However, Kentucky has judiciously provided for the right to counsel in certain situations through its court rules and statutes. There are very pragmatic reasons for these provisions - economy, efficiency, and finality.

A Triumvirate of Authority: Statute, Rule, and Caselaw

Statute. Kentucky statutory law, KRS 31.110(2)(c), provides for the appointment of counsel when:

1) the attorney *and* the needy person consider the action appropriate, and
2) a determination is made that the post-conviction action is a proceeding a reasonable person with adequate means would be willing to bring at his own expense.

If counsel is appointed and the post-conviction action is not a proceeding a reasonable person with adequate means would be willing to bring at his own expense then the statute provides that counsel with the approval of the court involved can withdraw from representation. KRS 31.110 states:

1) A needy person who...is being detained under a conviction of a serious crime, is entitled:
   a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled;...
2) A needy person who is entitled to be represented by an attorney under subsection (1) is entitled:
   a) To be represented in any other post-conviction proceedings that the attorney and the needy person considers (*sic*) appropriate. However, if the counsel appointed in such post-conviction remedy, with the court involved, determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.

Rule. The Kentucky Rules of Criminal Procedure provide for the appointment of
counsel when:
1) the movant is financially unable to employ counsel;
2) the movant makes a specific written request, and
3) a material issue of fact is raised and is not able to be determined from the record.

RCr 11.42(5) provides:
Affirmative allegations contained in the answer shall be controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant, appoint counsel to represent the movant in the proceeding, including appeal.

Caselaw. Two decades ago in *Commonwealth v. Ivey*, 599 S. W.2d 456 (Ky. 1980) the indigent petitioner filed a CR 60.02 motion to amend the order in the RCr 11.42 proceeding since the circuit judge refused to appoint counsel that was requested under KRS 31.110. The circuit judge refused to appoint counsel under RCr 11.42(5) since there was no material issue of fact raised. The Kentucky Supreme Court held it was error to deny counsel under KRS 31.110. Looking at both the statute and rule, the Court observed that the "provision for appointment of counsel found in RCr 11.42(5) was intended to set the minimum standard for post-conviction relief proceedings. The legislature could and did provide for a more generous policy of appointing counsel for indigents...." *Id.* at 457.

The Court noted the pragmatic, practical, and equitable reasons for the statutory right to counsel above the minimum required when it observed that the Court's RCr 11.42 rule barred successive RCr 11.42 motions and that without the assistance of counsel "Ivey could be effectively precluded from raising valid grounds by failure to include such grounds at the time of his first motion. This inequity between the needy and the affluent is cured by the statute." *Id.* at 458.

Under this analysis, the Supreme Court's opinion was that "KRS 31.110 and RCr 11.42 are complementary and clearly provide for appointment of counsel in the situation presented here." *Id.* The case was remanded for the circuit judge to appoint counsel for Ivey and "permit him to present for adjudication supplementary grounds for RCr 11.42 relief." *Id.*

Must appointment of counsel be made for investigation purposes prior to the filing of a *pro se* pleading, or are appointments confined to supplementing the defendant's *pro se* pleading with representation following through the evidentiary hearing and on appeal?

KRS 31.110(2)(c) provides for a needy person to be represented in any post-conviction proceeding that the attorney and the needy person consider appropriate. KRS Chapter 31's provision of counsel through the statewide public defender program contemplates situations where in the course of representation counsel will originate a post-conviction motion on behalf of the client when appropriate.

While it is clear that Kentucky's statutory scheme supports the right to counsel in post-conviction proceedings in the course of representation when appropriate, the language of KRS 31.110(2)(c) and facts of *Ivey* support the view that a judicial appointment of counsel should take place after an "action," or pleading alleging improprieties surrounding the conviction has been filed unless during the course of representation counsel and the client originate the filing. The filing of the RCr 11.42 vests the court with jurisdiction to act in the case. *Bowling v. Commonwealth*, 964 S.W.2d 803, 804 (Ky. 1998) determined that judges lose jurisdiction over a case 10 days after the entry of the final judgment and they therefore do not have jurisdiction to authorize funding to conduct an investigation in support of a proposed but unfiled motion to vacate a sentence.

A series of cases beginning with *Ivey* elaborate on when counsel must be appointed. In *Ivey*, the movant filed an RCr 11.42 motion alleging specific reasons his conviction should be vacated. The trial court initially determined that the appointment of counsel was not necessary because the pleadings did not raise a material issue of fact. The Supreme Court remanded the case and ordered counsel be appointed to present supplementary grounds. The appellate court recognized the confines of RCr 11.42, which typically limits defendants to one such action where all known issues must be presented. Counsel plays an important role in supplementing a defendant's *pro se* complaints due to the harsh confines of the rule that prohibits successive petitions.

In *Gilliam v. Commonwealth*, 652 S.W.2d 856 (Ky. 1983) the movant filed a motion to obtain a free copy of the transcript of his trial and guilty plea. Gilliam argued that he needed the transcript to help him prepare a motion for post-conviction relief.

The Kentucky Supreme Court found that the purpose of the request for a transcript was to "enable counsel to search the record for points subject to collateral attack under RCr 11.42, although no RCr 11.42 motion had yet been filed. In essence, [the motion for transcripts] is an independent action to obtain a record *preparatory* to filing an RCr 11.42 motion." *Id.* at 857. *Gilliam* observed that *Ivey* "provides the movant with legal assistance in preparing and presenting grievances. It does not provide a

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mechanism to search for unknown grievances." *Id.* at 858. Since Gilliam was searching for issues, he was not entitled to a transcript for preliminary investigative measures.

A *pro se* RCr 11.42 motion must set forth specific grounds challenging the conviction which give fair notice of the requested relief. The *pro se* litigant must make a "clear and unambiguous" written request for counsel that is "contained in the body of the RCr 11.42 motion." *Beecham v. Commonwealth*, 657 S.W.2d 234, 237 (Ky. 1983). Beecham's signed affidavit of indigency attached to the motion was not sufficient to require the appointment of counsel. The circuit judge is not required to automatically appoint counsel if such appointment is not requested in the body of the motion.

The written request for counsel must also specify the purpose for which counsel is desired. In *Allen v. Commonwealth*, 668 S. W.2d 556, 557 (Ky.Ct. App 1984), the movant asked for appointment of counsel solely for assistance at the evidentiary hearing but did not ask for counsel to supplement his motion to vacate. Since the Court found that no evidentiary hearing was required under the grounds alleged by the movant, the Court held that it was not error to fail to appoint counsel for an unneeded evidentiary hearing.

In *Commonwealth v. Stamps*, 672 S.W.2d 336 (Ky. 1984) the movant asked for counsel and was not provided one in his RCr 11.42 motion. The Kentucky Supreme Court, recognizing its holding in *Ivey*, looked at the merits of the claims and found "an evidentiary hearing is totally unnecessary" and "remanding this case for appointment of counsel to search for supplementary grounds for RCr 11.42 relief is also an exercise in futility" and therefore refused to reverse for failure to appoint counsel. *Id.* At 339. The Court applied a harmless error analysis. It is not easy to understand how harmless error analysis can be utilized to preclude appointment of counsel for purposes of supplementing the record since courts cannot divine what might be uncovered. *Stamps*, which did not state it was overruling or modifying *Ivey*, is at odds with *Ivey*. In effect, *Stamps* invites trial judges to commit harmless error.

In a recent case, *Osborne v. Commonwealth*, 992 S.W.2d 860 (Ky. 1999), the benefit of having counsel was demonstrated. Counsel, who was appointed after a *pro se* RCr 11.42 motion was filed, requested an evidentiary hearing to present proof of the claims raised by the *pro se* defendant. The trial judge denied the evidentiary hearing but the Kentucky Court of Appeals reversed based on the preserved request for a hearing on ineffective assistance on whether to plead guilty or proceed to trial.

In cases where there has been an evidentiary hearing, harmless error analysis has been found inappropriate. In *United States v. Iasiello*, 166 F. 3d 212, 214 (3rd Cir. 1999) the Third Circuit held that the failure to appoint counsel in a post-conviction action under 28 U.S.C. 2255 and Rule 8(c) of the Rules Governing Section 2255 Proceedings where an evidentiary hearing was conducted "is not susceptible to harmless error analysis. Rather, prejudice to the petitioner is presumed." See also, *United States v. Vasquez*, 7 F.3d 81 (5th Cir. 1993). The Kentucky Supreme Court has observed that the 28 U.S.C. Section 2255 procedure "is the federal equivalent of our RCr 11.42." *Gilliam v. Commonwealth*, 652 S.W.2d 856, 859 (Ky. 1983).

In *Hopewell v. Commonwealth*, 687 S.W.2d 153 (Ky. App. 1985) the Court refused to reverse on the grounds that the movant was denied appointment of counsel since a hearing and appointment of counsel are "not necessary when the record in the case refutes the movant's allegations." *Id.* at 154. *Hopewell,* however, cited *Newsome v. Commonwealth*, 456 S.W.2d 686 (Ky. 1970). *Newsome* was decided a decade before *Ivey* and is inconstant with *Ivey. Newsome* was decided before KRS Chapter 31 was enacted into law. *Newsome* relied only on the language of RCr 11.42. *Hopewell* did not mention or distinguish *Ivey,* and did not enlighten practitioners on how to interpret it juxtaposed against *Ivey. Hopewell* did not overrule *Ivey.*


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The right to appointed counsel does not extend to Civil Rule 60.02 proceedings. *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983).

From the holdings in this series of cases, judges have the obligation under *Ivey*, KRS 31.110(2)(c), and RCr 11.42(5) to appoint counsel when it is explicitly requested in writing in the motion for purposes of supplementing the grounds to vacate the conviction. If upon appointment, counsel represents to the court that counsel has determined that the post-conviction action is not a proceeding a reasonable person with adequate means would be willing to bring at his own expense, then the court should allow counsel to withdraw if the court concurs in counsel's determination.

What the Statewide Data Tells Us: Oppressive Numbers Are a Myth. Since July 1, 1998, the Post-Conviction Branch of the Department of Public Advocacy has had the responsibility of providing representation in court-appointed RCr 11.42 cases from all 120 counties in the state. See Diloreto and Thomas, "Redefining the Mission in the Post-Conviction Branch," *The Advocate*, Vol. 20, No. 5 (September 1998) at page 66-67. Prior to 1998, each county's local trial public defender service provider was responsible for either providing representation of these clients or securing conflict counsel. Public Advocate Ernie Lewis shifted responsibility for representing these clients from the local trial attorney to the state post-conviction branch attorneys for three reasons:

1. to provide uniform quality representation to indigent clients in these post-conviction cases by attorneys specifically hired for and experienced in the post-conviction litigation;
2. to allow trial attorneys with huge caseloads to focus on the

representation of trial clients, and

3. to more equitably distribute caseloads within DPA to provide more reasonable caseloads for trial attorneys, to better serve the courts in both trial and post-conviction litigation.

After some initial adjustments, this new plan for delivering counsel to post-conviction clients is up and running. This is the first time in DPA's history that one post-conviction leader has managed all post-conviction appointments.

The perception of many is that there are an endless number of motions to vacate being recklessly filed across the Commonwealth. The Kentucky Administrative Office of the Courts (AOC) data indicates this is a myth. Amongst the hundreds of thousands of cases in the system, the AOC data for four years, FY 1996 - FY 1999, indicates there were but 768 reported motions to vacate or set aside a sentence filed, which is an average of 192 per year. (Report excludes Jefferson County District Court information).

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In the FY 99 (July 1, 1998 - June 30, 1999), the first year of this shift in responsibility for representation, DPA's Post Conviction Branch received 111 appointments, 92 in RCr 11.42 cases and 19 in CR 60.02 cases from over 40 counties. Of those 92 RCr 11.42 appointments in those 40 counties, 24 were from Fayette County with no evidentiary hearings granted, and 14 were from Warren County.

Conclusion: Promoting Economy, Efficiency, and Finality

The right to counsel in post-conviction proceedings is an important right that Kentucky has wisely provided to insure efficient, complete, professional litigation of matters in one post-conviction proceeding. This is of measurable benefit to the courts and the public that seek reliable results in which confidence can be placed. This post-conviction process, assisted by the guiding hand of counsel, insures deliberate consideration of claims that, if true, undermine the reliability of the original conviction. The statute and rule and their application by Kentucky appellate courts through caselaw provide a pragmatic system of insuring the right to counsel in appropriate proceedings that promotes economy of resources and finality of final judgments. As Justice Lukowsky astutely observed two decades ago in *Ivey*, the statutory right to counsel allows for resolution of all legitimate claims in the first motion and provides no inequity between the needy and rich.◆

PUBLIC DEFENDERS & PUBLIC ADVOCATES: AN UNNECESSARY DICHOTOMY

by Thomas C. Glover

In July of 1999, I began to handle the 202A civil commitment cases at Western State Hospital for the Hopkinsville Trial Office. This was a new experience for me and was somewhat disconcerting. I entered a world with a language and culture that was foreign to me. In my criminal practice, I was always the proponent of a diagnosis of mental illness. Mental illness was like a safe harbor into which my client could sail and seek shelter from a raging storm. I had never questioned a diagnosis, which would permit a complete defense or at least mitigate a difficult case. My only questions had been for doctors who found my clients competent and responsible, when it appeared to all that the defendant was gravely ill. I entered every case in which the defendant engaged in bizarre behavior with a presumption, and even hope, that a mental illness was present. Therefore, when I undertook to defend civil commitment cases, I began with the assumption that my clients were likely to be mentally ill and need treatment. No one had ever told me that I would have to completely retool my personal approach to mental illness, to successfully represent my civil commitment clients.

When you first visit a locked ward in a mental hospital, you are overwhelmed with a sense of confusion, sadness, disorder and hopelessness. You see people in a clinical setting and you naturally assume that they need to be in the hospital for their own good. As a criminal attorney, you quickly conclude that your disturbed criminal clients should have been in this mental hospital and not prison. After speaking with your first patient, you believe that the humanitarian thing to do is to ensure treatment for your client. This is the source of the infamous "best interest of the client" standard, which often prevails in 202A hearings. There is no such standard in a civil commitment. Rather four elements must be proven beyond a reasonable doubt by the government as set out in KRS 202A.026. The government must prove:

1. He can reasonably benefit from treatment;
2. The respondent suffers from a mental illness;
3. He presents a danger or threat of danger to self, family or others as a result of the mental illness;
4. And hospitalization is the least restrictive alternative mode of treatment presently available.

Avoiding the "best interest of the client" standard is the greatest hurdle to be cleared by a novice attorney in this field, followed

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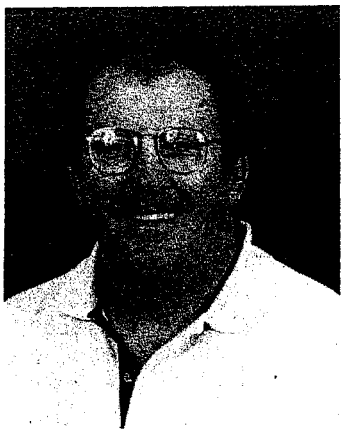
closely by a need to understand the role of Protection and Advocacy.

Protection and Advocacy (P&A) is a special division of the Department of Public Advocacy, which provides advocates to represent the interest of the mentally ill in Kentucky. While P&A has several in-house counsel, they also have advocatorial specialists who are not attorneys. P&A receives its funding primarily from federal grants and although every state has a federally funded P&A, Kentucky is one of only a few states that have placed P&A within the state government.



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Placing P&A with the public defenders appears to be a logical fit on the surface, but it creates a natural tension derived from competing missions. Often a public defender does not want his client to go to prison and finds commitment to a mental hospital a far better alternative. A P&A advocate does not want his client warehoused in a hospital for years, misdiagnosed and drugged into oblivion. The tension arises when an advocate, who can't practice law, must rely on a public defender to attack a diagnosis and hospitalization, and the public defender is programmed to accept any diagnosis of mental illness with relief.

The challenge of retooling the approach of a public defender to handle 202A cases is not insurmountable.

I believe training should be set up for any attorney undertaking 202A representation, regardless of experience in the criminal realm, to sensitize them to the needs of the mentally ill and to educate them as to the differences in criminal and civil commitment practice. An experienced 202A public defender, a P&A attorney and several advocates should invest several days with the new attorney, providing intense training in the following areas:

1. Procedure
2. Substantive Law
3. Medications
4. How To Read A Medical Chart
5. Compassion Fatigue
6. DSM IV
7. Forced Treatment
8. Treatment Team
9. Placement Alternatives
10. Guardianship
11. Jury Trials
12. Making The District Judge Your Ally
13. Timelines
14. Best Interest Trap
15. Social Workers
16. Structure of P&A
17. Mental Retardation At Mental Hospitals
18. Utilization of P&A's Services In Defense of 202A Cases
19. Treatment Plans

This is by no means an exhaustive list, but it covers the majority of problems a new attorney will face. Never again should a DPA attorney be literally thrown into this arena and asked to survive by their wits alone.

This training challenge is not so great as it would appear. There are attorneys in Hopkinsville (Western State Hospital), Hazard (ARH Psychiatric Unit) and Lexington (Eastern State Hospital) who handle 202A cases on a regular basis. They would greatly benefit from the training, but only a handful of attorneys would need this training. The Louisville Public Defender System (Central State Hospital) has been very successful in their approach to civil commitments and could be brought in to aid in the training.

If through retraining, DPA takes an attorney and sensitizes him to the issues involved in 202A cases, we will solve the majority of problems that currently exist. By networking between P&A and the Trial Division, we can create a coalition, which will result in strong and effective representation. By an understanding of the unique perspective of both a criminal attorney and an advocate, the two can be brought together to form an alliance and thereby protect our most vulnerable clients.◆

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"Without a sense of caring, there can be no sense of community."

-Anthony J. D'Angelo

Kentucky Caselaw Review

by Shannon Dupree Smith, Assistant Public Advocate

White v. Commonwealth,
__S.W.3d__(4/28/00 Ky. Ct. App.)
2000 WL 502538
(Not Yet Final)

In 1995, White pled guilty to one count of trafficking in a controlled substance and PFO II. The Commonwealth recommended a five-year sentence on the trafficking offense enhanced to thirteen years based on the PFO II status. At the time White committed the 1995 trafficking offense, he was on shock probation for a 1991 trafficking conviction. The trial court ordered the thirteen-year sentence to run consecutive with the sentence for the 1991 felony conviction.

White filed an RCr 11.42 motion based on the failure of his trial counsel to argue for concurrent sentencing. The Commonwealth responded that KRS 533.060(2) precluded imposition of a concurrent sentence for a felony offense committed while the defendant was on probation. The trial court denied said motion, and the Court of Appeals affirmed the denial.

White filed a CR 60.02 motion asking the court to reconsider its decision ordering the thirteen-year sentence to run consecutively with the sentence for the 1991 conviction. The trial court denied the motion.

On appeal, White argued that the trial court should have held a hearing on his CR 60.02 motion. He sought a retrospective application of KRS 532.110 (which allows for concurrent sentences when multiple sentences of imprisonment are imposed), and argued that KRS 532.110(1) controlled KRS 533.060(2) because the former was recently amended. The Court of Appeals citing *Commonwealth v. Hunt,* 619 S.W.2d 733 (Ky. App.1981), stated that KRS 533.060(2) took precedence over KRS 532.110.

The Court stated that there is a presumption of prospective application and that there was no express language in KRS 532.110 indicating that it should be given retrospective application. The Court also stated that there was long-existing case law establishing the primacy of KRS 533.060 (2) over KRS 532.110. The Court further noted that the particular amendment to KRS 532.110 would not have effected White's situation. The amendment to KRS 532.110 placed a 70-year limitation on the aggregate of consecutive indeterminate sentences.

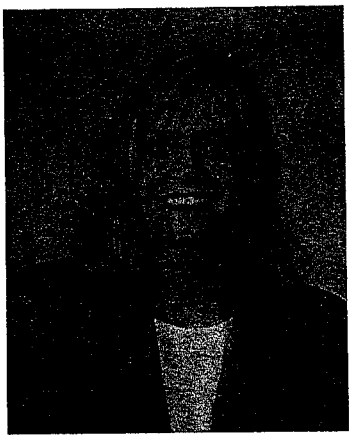
The Court stated that White was not entitled to a hearing on his CR 60.02 motion unless he affirmatively alleged facts which, if true, justified vacating the judgment and further alleged special circumstances that justified CR 60.02 relief.

The Court found that White did not meet this standard, and thus, the trial court did not abuse its discretion in denying his CR 60.02 motion without a hearing.

Aviles v. Commonwealth
___S.W.3d___ (4/14/00, Ky. Ct. App.)
2000 WL 377501
(Not Yet Final)

Aviles pled guilty to one count of trafficking in a controlled substance, second-degree, one count of trafficking in a controlled substance, third-degree and one count of theft by unlawful taking over $300. On appeal, Aviles argued that amendments to KRS 533.010 made imposition of alternatives to incarceration mandatory for certain classes of offenders.

Aviles submitted that the amendments to KRS 533.010 entitled her to probation or probation with alternative sentencing. The Court stated that the statute, as amended, still gave discretionary authority to the trial court to determine on a case-by-case basis the appropriateness of probation or probation with alternative sentencing. The statute states that the court shall grant probation or conditional discharge unless the court "is of the opinion that imprisonment is necessary for the protection of the public" based on one of three factors. The three factors include recidivism, the need for correctional treatment, and whether an alternative disposition would unduly depreciate the seriousness of the crime.



Shannon Dupree Smith

The Court cited *Turner v. Commonwealth,* 914 S.W.2d 343 (Ky.1996) to support the holding that the determination of whether to grant probation is within the discretion of the trial court.

Aviles also argued that if the crime committed was nonviolent, that it could not be the basis for determining that probation would unduly depreciate the seriousness of the offense. The Court stated that the language of the statute did not support Aviles position and that had the legislature intended to change when a court could impose imprisonment to nonviolent offenders, it was required to use clear and plain language that a departure from the prior interpretation was intended.

Finally, Aviles argued that the trial court should have considered home incarceration pursuant to KRS 532.210. This statute provides that any misdemeanant or felon who hasn't been convicted of or pled guilty to a violent felony offense may petition the court for a portion of their sentence in the *county jail* be served under conditions of home incarceration. Aviles was sentenced to the state penitentiary. Thus, she was not included

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in the class of prisoners who could petition for home incarceration.

Lozier v. Commonwealth
___S.W.3d___ (4/7/0 Ky. Ct. App.)
2000 WL 356385
(Not Yet Final)

Lozier pled guilty to third-degree sodomy and was sentenced to a five-year term of imprisonment and a three-year term of conditional discharge. On appeal. Lozier argued that the recently enacted KRS 532.043 (which imposes a three-year period of conditional discharge for sex offenders, subject to revocation and reincarceration upon violation of terms) and KRS 197.045 (4) (which restricts the award of good time for sex offenders) are *ex post facto* laws and thus, unconstitutional as applied to her.

The Court set forth the test for determining whether a law is an *ex post facto* law: (1) it must apply to events occurring before its enactment, and (2) it must disadvantage the offender.

Concerning KRS 532.043, the Court found it met the first prong of the test. KRS 532.043 became effective July 15, 1998 and Lozier's offense occurred prior to that date.
The Court also found that the second prong of the test was met, that is, that the application of KRS 532.043 (5) disadvantaged Lozier. When Lozier committed her offense, she was exposed to the possibility of a maximum five-year sentence. Under KRS 532.043, Lozier was subject to the possibility of serving three additional years beyond the maximum five-year sentence to which she was subject when she committed the crime. The Court held that the application of KRS 532.043 to Lozier's sentence was unconstitutional as an *ex post facto* law.

KRS 197.045 (4) defers the effective date of any good time credit earned until successful completion of the sex offender treatment program. Concerning KRS 197.045 (4), the Court also found that the court had retrospectively applied the statute. However, the Court stated that KRS 197.045 (4) did not impose any additional punishment upon Lozier. The Court reasoned that since Lozier was convicted and sentenced after the effective date of the statute, it did not deprive her of any previosuly earned credits. The Court noted that the statute did not deprive her of the opportunity to earn good time, rather, it merely deferred the effective date of any good time that she could earn till the successful completion of the sex offender treatment program.

The Court held that the application of KRS 197.045(4) to Lozier's sentence was constitutional and not an *ex post facto* law.

Hyatt v. Commonwealth
___S.W.3d___(4/7/00, Ky. Ct. App.)
2000 WL 356384
(Not Yet Final)

Hyatt was charged with one count of first-degree sexual abuse. Hyatt entered into a pretrial diversion agreement, and pursuant to said agreement, the indictment was later dismissed with prejudice. Hyatt moved to segregate his criminal records under the indictment pursuant to KRS 17.142. The trial court denied the motion.

KRS 17.142 (1) directs the court to issue an order to segregate the criminal records if the person who is the subject of those records meets one of the following requirements: (a) is found innocent of the charges, (b) the charges are dismissed, or (c) the charges are withdrawn. The Court held that the language of KRS 17.142 is mandatory in that if application has been made, and (a) (b) or (c) applies to the arrestee, then the court shall issue an order to segregate the criminal records.

The Commonweath argued that KRS 17.142 was not intended to apply to charges which were dismissed as a result of participation in a pretrial diversion agreement, but rather only to cases where indictments were dismissed due to innocence or lack of evidence.

The Court stated that it was clear the legislature intended for a successful pretrial diversion to wipe the slate clean as to those charges, and that in the absence of an express legislative directive to the contrary, a successful pretrial diversion participant is entitled to qualify under KRS 17.142.

Manning v. Commonwealth.
___S.W.3d___(4/20/00, Ky.)
2000 WL 426360
(Not Yet Final)

Manning was convicted of first-degree manslaughter for the death of his step-father. Manning stood to inherit his step-father's farm upon his death. However, his step-father offered to sell the farm to someone else. The next day, the step-father was found dead. Manning confessed to his common law wife, Lunell, that he murdered his step-father. He told her in detail exactly how he killed him. In turn, Lunell told a detective everything Manning had told her.

At trial, Lunell testified that she could not recall what Manning had told her regarding the death of the victim. She stated that she only vaguely remembered speaking with the detective. After the Commonwealth laid a foundation pursuant to KRE 613, the video of her statement to the detective was admitted at trial as a prior inconsistent statement.

The Court stated that the constitutional right of confrontation does not prohibit the introduction of all hearsay evidence and that no person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying they cannot recall certain events. The Court held that the trial court was correct in admitting the video of Lunell's prior inconsistent statement and that the Confrontation Clause was satisfied by the opportunity for cross-examination of Lunell at trial.

Manning also argued on appeal that the trial court erred by

denying admission of a police report which indicated that a white female had approached the officer with details regarding the victim's death as potentially related to another murder committed by someone else. This report was not admissible under KRE 803(6) , the business records exception to the hearsay rule. The Court stated that in order for a police report to be admissible under KRE 803(6), all parts of the report must be admissible under some hearsay exception. If a particular entry in the record would be inadmissible for another reason, it does not become admissible just because it is included in a business record. The Court held that anything in the police report regarding what a white female may have told the officer would be inadmissible, because the statements would not qualify for admission under any other hearsay exception.

Concerning his PFO I conviction, Manning argued that both of the prior felony convictions had to be within five years of the commission of the instant offense. The Court cited *Howard v. Commonwealth*, Ky. App., 608 S.W.2d 62 (1980), stating that the persistent felony statute only requires that completion of service of sentence or discharge from probation or parole on any, not each, of the prior convictions have to have occurred with five years of the commission of the instant offense.

Lastly, Manning argued that the trial court erred in instructing the jury on first-degree manslaughter. He contended that the Commonwealth failed to prove by any non-speculative evidence that he was suffering from extreme emotional disturbance at the time of the victim's death. The Court held that a trial court is required to instruct on every theory of the case reasonably deducible from the evidence. Based on the evidence presented at trial, the Court found that the jury had a solid basis for the finding that Manning was acting under extreme emotional disturbance when he killed the victim.

Dunagan v. Commonwealth,
__S.W.3d__(4/20/00, Ky.)
2000 WL 426224
(Not Yet Final)

Dunagan was ordered to pay $65 per week child support. In 1994, he was indicted for flagrant nonsupport. In 1996, the court found Dunagan in contempt for his failure to pay child support and sentenced him to 90 days in jail, said sentence being conditionally discharged as long as Dunagan paid the child support and $25 per week toward the arrearage. Dunagan again failed to make the payments, and the court ordered him to serve 30 days of the 90-day jail sentence, probating the remaining 60 days on the condition that he comply with the order.

The court dismissed the 1994 indictment for flagrant nonsupport on the ground of double jeopardy. The issue on appeal was whether the principles of double jeopardy prevented prosecuting a defendant for flagrant nonsupport after a civil court had sentenced him to jail for contempt for failing to pay child support.

The Court stated that a person may be sentenced to jail for civil contempt but the party in contempt "carries the keys to jail in his pocket" because he is entitled to immediate release upon obedience to the order of the Court. The purpose of civil contempt is to compel obedience to and respect for an order of the court. However, if the purpose of the court is to punish, such sanction is criminal contempt.

The Court held that Dunagan did not in effect "hold the keys to the jail cell in his hand" because he was conditionally discharged as a criminal defendant. Dunagan was required to serve 30 days of the sentence. The circuit judge did not order Dunagan to be released if he began making weekly payments. The Court noted that even if Dunagan had began making payments on a weekly basis after his imprisonment, he could not have left jail until his 30-day sentence was completed.

The sentence Dunagan received had the effect of compelling obedience to the order of the court but it was actually intended to punish him for failing to abide by the order of the court.

The Court reversed, and ordered that the circuit court order dismissing the indictment be reinstated.

Commonwealth of Kentucky v. Montaque,
__S.W.3d__(4/20/00, Ky.)
2000 WL 426364
(Not Yet Final)

Montaque was convicted of trafficking in a controlled substance first-degree and possession of drug paraphernalia. Additionally, she was found guilty of being in possession of a firearm at the time of the commission of the offenses which subjected her to an enhanced penalty under KRS 218A.992.

Montaque admitted having the drugs and further admitted she had intended to sell it. She denied, however, that the unloaded, semi-automatic handgun found in a trunk of a car owned by her boyfriend's mother and parked in the parking lot played any part in her drug dealing. Montaque said that she was storing the gun for a friend. She also stated that she had recently bought a new car and wasn't even using the car in question any longer.

KRS 218A.992 provides for an enhanced penalty when a defendant is found to be in possession of a firearm at the time of the commission of the offense. On appeal, Montaque argued that KRS 218A.992 contemplates the existence of some nexus between the firearm and the underlying offense, and that she should have received a directed verdict on the issue of whether she was eligible for sentence enhancement under KRS 218A.992. The Commonwealth claimed that KRS 218A.992 did not require proof of a nexus but only proof of firearm possession contemporaneous with the underlying offense.

The Court held that KRS 218A.992 does not require actual possession of a firearm, but that it does require a nexus be-

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tween the crime committed and the possession of the firearm. Mere contemporaneous possession of a firearm is not sufficient to satisfy the nexus requirement. The Court stated that when it cannot be established that the defendant was in actual possession of a firearm or that a firearm was within his or her immediate control upon arrest, the Commonwealth must prove more than mere possession. It must prove some connection between the firearm possession and the crime. The Court noted that this holding limits the reach of *Houston v. Commonwealth*, 975 S.W.2d 925 (Ky. 1998), but does not overrule it.

In a dissenting opinion, Justice Graves opined that the statute does not require proof of a nexus between the firearm possession and the drug offenses. All that is required is possession, which includes constructive possession. Justices Lambert and Wintersheimer joined the dissenting opinion.◆

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6th Circuit Review

by Emily Holt, Assistant Public Advocate

Austin v. Mitchell
200 F.3d 391 (6th Cir. 2/25/00)
AEDPA

This case involves interpretation of 28 U.S.C. § 2244(d)(2), the provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) that allows tolling of the federal habeas statute of limitations by pending state collateral review.

Austin was convicted in an Ohio state court of aggravated murder and received a life sentence. His indictment did not contain the phrase "against the peace and dignity of Ohio," language that must be in all criminal indictments pursuant to the Ohio Constitution. Although this issue was raised at trial, Austin's appellate attorney failed to include the issue on direct appeal.


Emily Holt

On December 1, 1994, Austin filed a petition for state post-conviction relief, the grounds being that failure to include the indictment issue on direct appeal constituted ineffective assistance of appellate counsel and that the indictment was invalid due to the omission of the necessary constitutional language. Summary judgment was granted to Ohio by the trial court. It is clear under Ohio case law that failure to include the language in question is not prejudicial. Further, the trial court held that it had no jurisdiction to consider ineffective assistance of appellate counsel. The Ohio Court of Appeals upheld the trial court's grant of summary judgment and stated in dicta that the ineffective assistance of appellate counsel claim was raised in the wrong court and that, regardless, appellate counsel was not ineffective in failing to raise an issue constituting harmless error.

Under AEDPA, a state prisoner has one year from conclusion of the state appeal to file for federal habeas relief. 28 U.S.C. § 2244(d)(1). If the state appeal concluded prior to the passage of AEDPA, the Sixth Circuit has held that there is a one-year grace period, which expired on April 24, 1997, one year after passage of AEDPA. *Nooks v. Collins*, No. 98-3243, 1999 WL 98355 (6th Cir. 1/29/99) (unpublished opinion). Austin thus had until April 24, 1997, to file his federal habeas petition.

However, "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section." 28 U.S.C. § 2244(d)(2). Austin asserted that his petition, filed January 29, 1998, was timely because the statute of limitations was tolled. The district court disagreed.

The Sixth Circuit first analyzed whether a properly filed state post-conviction petition must raise a federal constitutional issue to toll the AEDPA statute of limitations. The Court determined that it must.

Appellate Ineffective Assistance of Counsel

Austin's post-conviction petition contained a federal constitutional issue: ineffective assistance of appellate. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The problem, the Court observed, was that this claim was filed in the wrong state court.

The Court determined that it was unnecessary to reach the issue of whether a petition filed in the wrong state court is properly filed for the purpose of tolling AEDPA but indicated in dicta that it would follow the Fourth Circuit and hold that such a habeas petition would have to be dismissed as being "time-barred on grounds that 'properly filed' implies notice to the respondent, proper place of filing, and timeliness." *Holloway v. Corcoran*, 980 F.Supp. 160, 161 (D.Md.1997), appeal dismissed by *Holloway v. Corcoran*, 162 F.3d 1155 (4th Cir. 1998)

Austin's federal habeas petition did not contain ineffective assistance of appellate counsel as a ground. Thus, the final issue analyzed by the Sixth Circuit was whether the state post-conviction proceeding must address at least one of the federal habeas grounds to toll AEDPA's statute of limitations. The Court adopted the rule that the state post-conviction review must address one or more of the federal habeas grounds to toll the one-year AEDPA statute of limitation. Thus, in Austin's case, his state claim failed to toll the AEDPA statute of limitations, and his federal habeas petition was properly dismissed.

The question remains as to how a Kentucky defendant can properly preserve an ineffective assistance of appellate counsel claim for federal habeas review. In *Hicks v. Commonwealth*, 825 S.W.2d 280 (Ky.1992), the Kentucky Supreme Court held that it would not consider claims of ineffective assistance of appellate counsel. Where can a defendant raise this issue?

Boyle v. Million
201 F.3d 711 (6th Cir. 3/13/00)

Prosecutorial Misconduct Infected Integrity of Proceeding
This case represents a victory for defendants in the area of prosecutorial misconduct, although it must be noted that appellant is a wealthy physician and the inappropriate comments made by the prosecutor primarily addressed his wealth and social status. However, public defenders could apply the rationale used by the Court to argue for exclusion of comments about indigent defendants' lack of money and status in society.

Boyle, an ophthalmologist in Mayfield, Kentucky, was tried in Graves County, for first-degree assault stemming from an altercation with his office assistant, her husband, and their neighbor. Because of a conflict, the regular prosecuting attorney for Graves County was disqualified, and Thomas Osborne served in his stead. The circuit court judge also recused himself, and a jury from a neighboring county was brought in because of pretrial publicity. What followed at trial was a "mockery of constitutional principles and protections."

During cross-examination of Boyle, Osborne "launched into theatrics" and accused Boyle of lying, threw a deposition in his lap, and told him he needed a psychiatrist. During closing argument Osborne told the jurors that Boyle received special treatment because of his social status, and cited as evidence of this the fact that the prosecutor and judge recused themselves, and the jury came from another county.

Osborne then informed the jury that Boyle's attorneys were expensive. He said that "Medicare payments for surgeries that weren't needed" paid for the defense, and that the doctor who testified for the defense "told the biggest whopper in the world."

Osborne implied that the jurors could be the next victims of assault by Boyle because his victims were selected at "random" (an obvious misstatement of the facts of the case). He stated that Boyle "committed a murder: it's just that Bob [the victim] got saved in that emergency room."

Boyle was convicted of first-degree assault and sentenced to ten years. Boyle failed to prevail on the issue on direct appeal. *Boyle v. Commonwealth*, No. 93-SC-193-D (Ky., 10/22/93) (order denying discretionary review).

Kentucky Supreme Court Reversed by Federal Court
The Sixth Circuit applied analysis from *United States v. Francis*, 170 F.3d 546, 549-50 (6th Cir. 1999), to determine that the statements made by Osborne constituted prosecutorial misconduct: "badgering and interrupting a witness, name-calling, predicting that the defendant will lie on the stand, and stating before the jury that the defendant is in need of psychiatric help are tactics so deplorable as to define the term 'prosecutorial misconduct.' Furthermore, closing arguments that appeal to class prejudices, encourage juror identification with crime victims, or vouch for the defendant's guilt would each be deemed beyond ethical bounds."

United States v. Hall
200 F.3d 962 (6th Cir. 1/19/00)

Actual Conflict of Interest: Representation of Co-Defendants
In this case, the Sixth Circuit examined a claim of ineffective assistance of counsel where an attorney represented two brothers in a jury trial. The Court held that despite the fact that both brothers waived their right to separate counsel, the trial court should have intervened to protect Stanley Hall's sixth amendment rights when an actual conflict developed and prejudice was obvious.

Rex and Stanley Hall were convicted of conspiracy to possess with intent to distribute marijuana and cocaine and possession with intent to distribute marijuana and cocaine in federal district court. Rex and Stanley were caught driving a vehicle with marijuana in it. In a search of Rex's home, the police found marijuana and cocaine.

Before trial, the court, numerous times, informed the Halls of the dangers of dual representation. The day before trial, at the request of the U.S. Attorney's office, the court conducted a hearing on the matter. The attorney representing the Halls advised the court that if not allowed to represent both, he would

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continue with his representation of Rex, a long-time client. Stanley said he wished to remain with the attorney after being advised so by him. The Court endorsed Stanley's decision.

A jury convicted both men of the charges. Rex was sentenced to life imprisonment, and Stanley was sentenced to prison for 10 years and 3 months.

Conflict of interest cases involve a slight departure from normal *Strickland* analysis of ineffective assistance of counsel claims. There must be "specific instances in the record" suggesting conflict, and the defendant must demonstrate the attorney "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to another." *Thomas v. Foltz*, 818 F.2d 476, 481 (6th Cir.), *cert. denied*, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987)

Because the attorney failed to negotiate a plea agreement, the Sixth Circuit held that there was an actual conflict: "foregoing plea negotiations is proof of an actual conflict of interest." Plea agreements were signed, but were withdrawn at the last moment. Rex would have received life so it was clearly in his best interest to proceed to trial. Stanley would have received between three and four years imprisonment as he had no prior record. It was obviously in his best interest to enter a guilty plea.

The Court then considered whether the attorney's performance was "adversely affected by the conflict," *Foltz*, 818 F.2d at 480, and concluded that the jury's confusion (evidenced by a question from the jury involving the lack of evidence linking Stanley to the cocaine found in Rex's home) and the general lack of evidence implicating Stanley "should have indicated to the court not only that an actual conflict existed, but also that the conflict had prejudiced Stanley Hall's defense." In such a case, the trial court had a duty to intervene and sever the case.

White v. Schotten
201 F.3d 743 (6th Cir. 1/26/00)

Defines Cause for Failure to Follow Procedural Rule

White's federal habeas petition alleged ineffective assistance of appellate counsel. The district court dismissed the petition on the ground of state procedural default; the issue was not raised within the time limit set by Ohio App.R. 26(B) and the petitioner could not show cause and prejudice for the procedural default. The Sixth Circuit held that ineffective assistance of appellate counsel in filing an application to reopen a direct appeal (the method by which appellate ineffective assistance of counsel is raised in Ohio) constituted cause and remanded the petition to the district court to determine prejudice.

Ohio App.R. 26(B) provides that an application to reopen a direct appeal must be filed within 90 days "from journalization of the appellate judgment." White's application was filed three years after the statute of limitations had tolled. The Ohio Court of Appeals refused to reopen the appeal, despite the fact that applicant's current attorney, an Ohio public defender, attached an affidavit to the application stating that he received the case in time to file the application but failed to do so due to his office's "overwhelming caseload" and his own "personal heavy caseload."

Overwhelming Public Defender Caseload Can Equal Cause

The Sixth Circuit applied *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), analysis to determine if the federal habeas petition was procedurally defaulted in state court. The Court determined that White established cause for his failure to follow the Ohio procedural rule. White did not comply with the rule because of problems within the Ohio Public Defender's office. "The failure of the Ohio Public Defender to offer such constitutionally-mandated counsel excuses the failure of the petitioner to abide by the timing requirements of applicable procedural rules." The Court concluded that the case must be remanded to federal district court for a determination of whether White can establish prejudice. If so, he would be entitled to federal habeas review of the merits of his claim.

U.S. v. Buchanan
207 F.3d 344 (6th Cir. 2/17/00)

Racial Makeup of Jury: Batson Challenge and "Fair Cross-Section" Requirement

Although this is a federal district court drug conspiracy case, it involves analysis of important constitutional jury issues and evidentiary issues.

Appellants first challenged the racial makeup of the jury and the jury selection process. The government used a peremptory challenge to strike the only African-American selected for the jury. Appellants argued that the challenge must be racially motivated since they are all African-American. The government's alleged basis for challenge was the juror's "general distrust of what she read or saw or heard." It derived this belief from her answer to a written question: "What newspapers, magazines, and kinds of books do you read? Grand Rapids press. . . I read mysteries, romances, and my Bible. I listen to CNN. I really don't trust our newspaper." The district court overruled the Batson objection, finding the government's basis for challenge to be "logical" and race-neutral.

The Sixth Circuit, acknowledging that the government's justification was "not 'particularly persuasive,'" held that this was "at least plausible and a sufficiently neutral justification to overcome the defendant's Batson challenge." This ruling is a further weakening of *Batson* in that it allows an unbelievable justification for a jury strike to overcome a legitimate Batson claim.

The appellants also objected at trial to the racial makeup of the entire jury panel, asserting that it did not represent the population of the Western District of Michigan. The jury clerk testified about the assembling of venires, and the trial court overruled the objection.

The Sixth Circuit noted that the Sixth Amendment requires a

"fair cross-section of the community." *United States v. Allen*, 160 F.3d 1096, 1103 (6th Cir. 1998), quoting *Taylor v. Louisiana*, 419 U.S. 522, 528, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The Court looked at the statistics presented by the jury clerk at trial: African-Americans comprise 4.58% of the population of the area that the jury was pulled from; only 2.49% of the residents who qualified for jury service were African-American; in this case, 2.86% of the venire were African-American. The Court thus concluded that the fair cross-section requirement was not violated.

"Drug-Sniffing Dogs"

Another issue raised on appeal was the admission of evidence regarding drug-sniffing dogs' positive reaction to currency seized from two of the appellants. The Court declined to decide the issue of whether there is a presumption against the admission of such evidence. However, it did indicate that because such a high percentage of money is tainted with the scent or residue of drugs, FRE 403 would support a holding that the probative value of such evidence is outweighed by the danger of unfair prejudice.

In the concurrence, Judge Jones, joined by Judge Moore, expressed his opinion that the drug-sniffing dog evidence should have been excluded and that there should be a presumption against the admissibility of such evidence "unless the government offers other evidence showing a direct nexus between illegal narcotics, the currency in question, and the defendant. Further, when circumstances of the dog-sniff detection in any way cast doubt on the reliability of that evidence. . .we believe courts should find such evidence inadmissible."

The Court also concluded that it was not error for the government to use actual packages of powder cocaine and crack cocaine to aid in testimony since the jury was informed that the drugs exhibited were not actually seized from the defendants in the case.

U.S. v. Moody
206 F.3d 609 (6th Cir. 1/25/00)

No Right to Counsel During Pre-Indictment Plea Negotiations

In *Moody*, the Sixth Circuit dealt a harsh blow to the sixth amendment right to counsel. The Court held that a defendant is not entitled to counsel during pre-indictment plea negotiations.

Moody was a participant in a conspiracy to deal cocaine. Evidence connecting Moody to the conspiracy, including cocaine, was found in a search of his home and business. Mr. Moody approached the FBI and volunteered to cooperate. Over a two-month period, Moody met with agents, without counsel, provided information about the conspiracy, and made numerous self-incriminating statements. In two of the six interviews, an Assistant U.S. Attorney was present.

Mr. Moody was offered a deal, before indictment, in which he would receive 5 years in prison in exchange for pleading guilty to conspiracy, continuing to cooperate, and testifying at trial. Moody expressed some concerns, and the FBI and U.S. Attorney suggested he speak to an attorney. He did, and the attorney, a month later, declined the offer. The attorney never inquired about the substance of the interviews.

Moody was subsequently indicted on conspiracy and other related charges. Several months later, his attorney advised him to enter into a plea agreement. He was sentenced to 120 months imprisonment, five years supervised release, and a special assessment of $50.

On appeal of the district court's determination that the 6th amendment right to counsel attached pre-indictment, the Sixth Circuit acknowledged that "logic, justice, and fundamental fairness favor the district court's position." However, the Court held that a bright-line test for the determination of when the right to counsel attaches was announced in *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972): only "at or after the initiation of judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Sixth Circuit Regrets Having to Follow *Kirby v. Illinois*

The Sixth Circuit, in strong language, expressed disagreement with the prevailing rule. It acknowledged that the dangers that gave rise to the right to counsel--confrontation with the procedural system, the prosecutor, or both--were present in this case and that this was a "triumph of the letter over the spirit of the law." However, it held that in accordance with both Supreme Court and Sixth Circuit precedent [*U.S. v. Sikora*, 635 F.2d 1175 (6th Cir. 1980)], it was bound to hold that Moody was not entitled to counsel during pre-indictment plea negotiations and reversed the district court.

Judge Wiseman, in a concurring opinion, echoed the Court's unhappiness with the result in this case. He noted that pre-indictment plea bargains have become increasingly important to defendants since the advent of the Federal Sentencing Guidelines. He argued that the sixth amendment right to counsel should evolve "to meet the challenges presented by a changing legal paradigm" and urged the Supreme Court to reconsider the *Kirby* bright-line test for attachment of the right to counsel.

U.S. v. Marks
209 F.3d 577 (6th Cir. 4/6/00)

Admissibility of Post-Plea Statements

In this case, the Sixth Circuit interpreted FRCP 11(e)(6), which deals with the inadmissibility of pleas, plea negotiations, and related statements, to not extend to statements made post-plea. This is important to Kentucky state court practitioners because under KRE 401(3) "any statement made in the course of formal plea proceedings, under either state procedure or Rule 11 of the Fed.R.Crim.P, regarding either of the foregoing pleas" is inadmissible.

(Continued on page 46)

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On the morning of appellants' first scheduled trial, all three men plead guilty and agreed to cooperate fully in the ongoing investigation. After they entered their plea agreements, a FBI Special Agent spoke to the defendants with defense counsel either present or informed of the interview. Sentencing was set for a future date. Several months later they moved pro se to withdraw their pleas. At the hearing, the government told the defendants that it would use their incriminating post-plea statements against them at trial. The court allowed all defendants to withdraw their pleas. At trial, the statements made post-plea were admitted.

The Sixth Circuit held that since the statements were made to FBI agents post-plea that FRCP 11(e)(6) did not apply. The Court pointed out that Congress expressly amended Rule 11(e)(6) in 1979 to provide that only statements made to prosecutors would be excluded. Furthermore, statements made after the finalization of a plea agreement could not be "made in the course of plea discussions." *U.S. v. Watkins*, 85 F.3d 498, 500 (10th Cir. 1996)

U.S. v. Webber
208 F.3d 545 (6th Cir. 3/31/00)

No *Sua Sponte* Inquiry Required on Waiver of Right to Testify

In this case, the Sixth Circuit declined to hold that waiver of the right to testify must be put on the record by the trial court and instead adopted the majority rule that no *sua sponte* inquiry is required when a defendant fails to testify.

Webber was tried on several drug offenses. Before the close of the prosecution's case, his attorney advised the court that they planned to raise an entrapment defense and that Webber would testify. The trial court then informed the defendant that if he testified and perjured himself, the court would enhance his sentence.

At the close of the prosecution's case, Webber's attorney advised the trial court that they had decided not to present an entrapment defense and that Webber would not testify.

On direct appeal to the Sixth Circuit, Webber argued that his right to testify was waived by his attorney, not him, and that the judge "chilled" his right to testify.

In holding that the trial court had no duty to *sua sponte* inquire of the defendant whether he was waiving his right to testify, the Court noted that such a requirement "might impede on an appropriate defense strategy, might lead the defendant to believe that defense counsel has been insufficient, or might inappropriately influence the defendant to waive the Fifth Amendment right not to testify."

Judge's Perjury Warning to Defendant Not Chilling

As to whether the trial court's discussion with the defendant regarding sentence enhancement for perjury was an unconstitutional "chilling" of his right to testify, the Court quickly dismissed this claim by noting that the "trial court's instruction here was neither excessive nor so egregious that Defendant's ability to knowingly and intentionally waive his right to testify was impaired." Further, the defendant and his attorney had a lunch break to discuss the matter and defendant never notified the court that he wanted to testify. "There is not a scintilla of evidence of judicial intimidation, threat, or overbearance in the record."

Riggs v. U.S.
2000 Fed.App. 0129, 2000 WL365279
(6th Cir. 4/11/00)

Defense Counsel's Employment as Assistant U.S. Attorney Not Actual Conflict

Riggs alleged that he received ineffective assistance of appellate counsel because his attorney (Cox) was an Assistant United States Attorney (AUSA) at the time of Riggs' investigation and indictment; the grand jury transcript cover lists Cox as making an appearance on the U.S.'s behalf during Riggs' testimony; Cox represented a prosecution witness's ex-wife; and Cox shared office space with two other attorneys who represented co-defendants-turned-prosecution-witnesses.

The Sixth Circuit held that because Riggs could not demonstrate an actual conflict of interest that affected Cox's performance at trial, *Thomas v. Foltz*, 818 F.2d 476, 481 (6th Cir.), *cert. denied*, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987), his conviction must stand. In dicta, the Court distinguished this case from the situation where the trial court is informed of a potential conflict of interest and fails to make an inquiry. In such a case, prejudice is presumed and reversal is required.

Further, even if there was an actual conflict, appellant must show a causal connection between any omission on the part of counsel and the conflict.

The Court dismissed the suggestion that mere fact of prior employment as an AUSA automatically constitutes an actual conflict. ◆

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Plain View. . .

Ernie Lewis, Public Advocate

Bond v. United States
120 S.Ct. 1462
4/17/2000

United States v. Allen
6th Cir., 5/4/2000
__F.3d__
2000 WL 547599

Bond v. United States
120 S.Ct. 1462
4/17/2000

The question presented in this case, written by Justice Rehnquist, is "whether a law enforcement officer's physical manipulation of a bus passenger's carryon luggage violated the Fourth Amendment's proscription against unreasonable searches."

The case originated when Bond was on a California bus headed for Arkansas. As the bus went through Texas, Border Patrol Agent Cantu boarded to check the immigration status of the passengers. On his way through the bus, he squeezed the soft luggage in the overhead storage space. One of the pieces of luggage belonged to Bond. Cantu squeezed Bond's luggage and felt a "brick-like" object. Bond agreed to have Cantu open it, and a brick of methamphetamine was discovered. Bond was prosecuted in federal court and moved to suppress. His motion was denied, he was convicted, and appealed. He lost his appeal to the 5th Circuit, and then sought review by the US Supreme Court, which granted certiorari.

The Supreme Court reversed in a 7-2 opinion. The Court rejected the Government's position that no search occurred in this case because Bond had no reasonable expectation of privacy in his publicly displayed luggage. The Court focused on the fact that Agent Cantu had physically manipulated the luggage. ""[P]hysically invasive inspection is simply more intrusive than purely visual inspection." While a reasonable person would expect his luggage to be touched during transport, he would not expect a police officer to manipulate it in a search for drugs.

The Court went on to perform classic Fourth Amendment analysis. First, the Court found Bond to have exhibited an actual expectation of privacy by using an opaque bag in which to place his personal items. Second, the Court analyzed whether Bond's subjective expectation of privacy was one in which the society was prepared to recognize as reasonable. "When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." Thus, the Court held that society was prepared to recognize as reasonable Bond's subjective expectation of privacy.

One interesting facet of this case is the voting pattern. Chief Justice Rehnquist wrote the opinion for the 7-judge majority. Justice Breyer wrote the dissent, joined by the more predictable Justice Scalia. Justice Breyer did not believe that society was prepared to recognize as reasonable Bond's subjective expectation of privacy. Justice Breyer believed the physical manipulation of Bond's luggage to be no more than what a passenger could have expected his luggage to have received from other passengers of the bus. Justice Breyer feared that the Court's decision would "deter law enforcement officers searching for drugs near borders from using even the most non-intrusive touch to help investigate publicly exposed bags."

United States v. Allen
6th Cir., 5/4/2000
__F.3d__
2000 WL 547599

An *en banc* decision of the Sixth Circuit written by Judge Boggs has reversed a panel decision upholding the privacy rights of a defendant. The panel decision had ruled that an affidavit had been insufficient to establish probable cause for the issuance of a warrant. *United States v. Allen*, 168 F. 3d 293 (6th Cir. 1999). In reversing the panel, the Court held that "an affidavit based upon personal observation of criminal activity by a confidential informant who has been named to the magistrate and who, as the affidavit avers, has provided reliable information to the police in the past about criminal activity, though without further specificity as to the type of such activity, can be sufficient for a magistrate to find probable cause to issue a warrant."

The issue in this case is how much corroboration need be demonstrated in an affidavit in support of a search warrant in order to support a finding of probable cause. The majority and the dissent agree that the issue is to be decided by applying *Illinois v. Gates*, 462 U.S. 213 (1983) to the facts of the case. *Gates*, the reader will recall, eliminated the two-part veracity and basis of knowledge test of *Aguilar/Spinelli* and substituted a totality of the circumstances test for the determination of probable cause supportive of the issuance of a search warrant.

The Court rejects the panel decision's finding that the affidavit lacked probable cause under the totality of the circumstances. While the panel had found the affidavit wanting due to the lack of specifity regarding the type or amount of cocaine observed, the informant's lack of familiarity with the appearance of cocaine, the absence of independent police corroboration of the informant's statements, and the boilerplate nature of the affidavit, the *en banc* Court declined to address each of the failures. Rather, the Court found that the affidavit was sufficient under the totality of the circumstances. The Court especially was impressed that the informant in this case was one known to the police, rather than being an anonymous informant. Further, he had been involved with giving information

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to the police over a five-year period of time. "Corroboration is not a necessity in such a case."

The holding of this case is simple: "[W]here a known person, named to the magistrate, to whose reliaibility an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past, a neutral and detached magistrate *may* believe that evidence of a crime will be found."

Judge Gilman concurred, and wrote while he believed there was an absence of probable cause to support the issuance of the warrant, he would have decided the case based upon the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984).

Judge Clay wrote a stinging dissenting opinion, saying that the majority opinion had driven "a stake through the very heart of the Fourth Amendment." He characterized the majority holding as follows: "any tip provided by an informant who has provided reliable information to the police in the past is sufficient to constitute probable cause for the warrant to issue, irrespective of the bare, generalized nature of the information provided and without any corroboration by the police."

According to Judge Clay, the majority misreads *Gates*. *Gates* requires us to consider the totality of the circumstances when considering probable cause; *Gates* was not intended to lower the threshold for probable cause. "The flaw in the majority's holding in the case at hand lies in its failure to comply with *Gates*' command to consider the totality of the circumstances; instead, the majority relaxes the probable cause requirement to a degree unsupported by *Gates*, and allows for a warrant to issue based simply upon the averment that the informant 'has provided reliable information in the past about criminal activity...without the further specificity as to the type of such activity...' In other words, the majority's holding fails to account for the basis of knowledge of the tip."

Short View. . . Ernie Lewis, Public Advocate

1. *Bass v. Commonwealth*, 525 S.E. 2d 921 (Va. 3/3/00). The Virginia Supreme Court has held that taking a particular evasive action at a checkpoint such as turning into a gas station and going the other direction does not constitute reasonable suspicion sufficient to justify a stopping. Thus, the evidence found supportive of DUI in this case should have been suppressed. The Court categorized turning around near a checkpoint as more a "hunch" than reasonable suspicion.

2. *Smith v. State*, 753 So. 2d 713 (Fla. Ct. App. 3/17/00). A general consent to search given during a routine street encounter does not authorize a search of the suspect's mouth according to the Florida Court of Appeals. Here, the Court held that the suspect, by holding his tongue down, was rescinding his consent, which he had a right to do. The officer instructed the suspect to hold his mouth open. Under these circumstances, the consent was not voluntary, and thus the motion to suppress should have been granted. The Court suggested that the Florida Supreme Court adopt a bright line rule "that requires clear verbal consent before the search of any body orifice. The rule, to insure an individual's right to privacy, should impose a duty upon law enforcement to inform a person of the right to refuse consent as well as the concomitant right to withdraw previously given consent."

3. *Query v. State*, 725 N.E. 2d 129 (Ind. Ct. App. 3/15/00). A police officer has a duty to update his search warrant affidavit, particularly where lab tests come back finding that evidence seized during a controlled buy and found to be methamphetamine during a field test was not in fact methamphetamine. By failing to update the affidavit, the officer had given the magistrate less than the full picture. "The result was that the judge had less than full information to assess whether a search warrant should be issued." The Court further found that this did not qualify under the good faith exception to the exclusionary rule.

4. Professor Margaret Raymond of the University of Iowa College of Law has written a law review article that is worth noting. It is called *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 40 Ohio St. L. J. 99 (1999). You will recall the recent case of *Illinois v. Wardlow*, 120 S. Ct. 623 (2000) held that the character of a high crime neighborhood combined with flight from the police is sufficient to establish a reasonable suspicion. Professor Raymond wrote her article prior to *Wardlow*. Her thesis would have likely changed the calculus in *Wardlow*. She argues that considering the nature of a high crime neighborhood has a disparate impact on the poor and racial minorities. "Poor people and people of color disproportionately live and work in less secure and more crime-ridden neighborhoods. People found in 'high-crime areas' or areas 'known for drug trafficking' are, purely as a statistical matter, more likely to be people of color. A standard that considers being situated in a 'high crime area' a substantial justification for a police stop disproportionately burdens residents of those communities, subjecting residents of high crime areas to more stops on less suspicion. Using the character of the neighborhood as a factor in the determination of reasonable suspicion results in the consideration by proxy of the impermissible factors of race and poverty. Professor Raymond suggests an alternative. She would allow the use of the character of the neighborhood in the reasonable suspicion calculus, but only to the extent that the person being observed by the police behaves differently than other law-abiding

citizens in that neighborhood. She states that "[b]ehavior that would typically be observed amongst law-abiding persons could not by itself support a finding of reasonable suspicion, for it would violate the requirement that reasonable suspicion narrow the stop-eligible class of persons. If such behavior is observed in a high-crime neighborhood, the character of the neighborhood for criminality may bootstrap the observations to reasonable suspicion. To avoid this, the standard requires that the behavior have *some* potential to narrow the stop-eligible class before the character of the neighborhood is taken into account. This constraint permits the consideration of relevant contextual information in the totality of the circumstances inquiry, while meaningfully enforcing the requirement of *Brown v. Texas* that stops not be justified purely on the basis of the character of the neighborhood." Significantly, Professor Raymond considers the factors affirmed in *Wardlow*, and finds them wanting. "Consider, for example, cases which address whether flight in a neighborhood known for drug or other criminal activity can support a finding of reasonable suspicion. . . The inconsistent and unpredictable outcomes in these cases may stem from the courts' failure to ask the right question, which is whether flight in the presence of police is sufficiently uncommon among law-abiding persons in the community that it effectively narrows the stop-eligible class. If so, then the character of the neighborhood for criminality may be considered in evaluating whether reasonable suspicion is present; if not, then it may not."

5. Governor Paul Patton has issued Executive Order 2000-475 on April 21, 2000, which will be of interest to the readers of this column. During the 2000 General Assembly, Senator Gerald Neal introduced a bill that would have required the collection of data to look at the issue of racial profiling by the police. While Justice Cabinet Secretary Robert F. Stephens, Attorney General Ben Chandler, and Acting State Police Commissioner John Lile were present to endorse Senator Neal's bill, the bill never got out of the Senate Judiciary Committee. In response, the Governor has now acted by executive order to accomplish the same goal. Through this executive order, the Governor has ordered 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." Further, the order requires that all law enforcement agencies begin to collect data "to better define the scope and parameters of the problem of racial profiling." This was a welcome and courageous act on the Governor's part.

6. *People v. Spence*, 93 Cal. Rep. 2d 607 (Cal. Ct. App. 3/10/00). Where the police rely upon a document prepared by probation and parole officers in order to conduct a probation search, and the document is incomplete intentionally by omitting a search limitation, the good faith exception to the exclusionary rule does not apply. Unlike clerks in *Arizona v. Evans*, 514 US 1 (1995), who are not expected to be deterred by the exclusionary rule, the probation and parole officers would be deterred by invocation of the rule.

7. *US v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 4/11/00). The *en banc* 9th Circuit has decided that having a Hispanic appearance does not create an articulable suspicion for a stopping. The Court stated that demographics have changed significantly since the decision in *US v. Brignoni-Ponce*, 422 US 873 (1975). "Reasonable suspicion requires particularized suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination." The Court went on to hold that having a Hispanic appearance is not an appropriate factor in the reasonable suspicion calculus.

8. *Ex parte Turner*, 2000 WL 356316 (Ala. 4/7/00). Where authorization for anticipatory search warrants is altered by a higher appellate court, the good faith exception to the exclusionary rule will not save a search conducted pursuant to the earlier authorization. The Alabama Supreme Court went on to affirm that the purpose of the exclusionary rule is not only to deter the police, but also to deter the judiciary, a purpose eschewed in *U.S. v. Leon*, 468 U. S. 897 (1984). "The appellate courts, including this one, are duty-bound to preserve the rule of law in the issuance of search warrants. Suppression of evidence seized pursuant to a search warrant issued contrary to the rule of law is necessary to preserve the rule of law itself."

9. *United States v. Wald*, 208 F.3d 902 (10th Cir. 4/10/00). The smell of burnt methamphetamine does not give probable cause to search the trunk of a lawfully stopped vehicle. In this case, a car was stopped for having a cracked windshield. The officer smelled burnt methamphetamine. He found nothing in the passenger compartment search pursuant to consent. He found two pipes when he patted down the defendant. Thereafter, he searched the trunk and found packages of methamphetamine. The 10th Circuit held that the patdown search was illegal because it was unrelated to the safety of the officer. The search of the trunk was not a probable cause search because the smell of methamphetamine was cause to believe the defendant's had been smoking but not trafficking in methamphetamine. "[T] strong odor of burnt methamphetamine, whether or not it can permeate trunks, does not provide probable cause to search a trunk, because it is unreasonable to think someone smoked drugs in the trunk of a car."

10. *Illinois v. McArthur*, ___ S.Ct. ___ (Mem.), 67 Cr. L. 2033. The United States Supreme Court has granted cert. on the question of whether it is constitutionally reasonable "for police officers to secure residence from outside, and prohibit occupant's entry into that residence for short time

while they obtain search warrant based on probable cuase, in light of this court's suggestion in *Segura v. United States*, 468 U.S. 796 (1984), that such conduct is reasonable under Fourth Amendment and findings of other courts that similar behavior is consistent with Fourth Amendment and *Segura*.

11. *Horton v. State*, 2000 WL 372646 (Tex. App. 4/13/00). The Texas Court of Appeals, Third District, has decided that when a person is detained under the community caretaking function of *Cady v. Dombrowski*, 413 U.S. 443 (1973), that the limits on the ability of the police to search the car are the same as under *Terry v. Ohio*, 392 U.S. 1 (1968) and *Michigan v. Long*, 463 U.S. 1032 (1983). Thus, the police had no right to search the car of a person found either unconscious or drunk, where upon further inquiry the police had no reasonable articulable suspicion that criminal activity was afoot or that the person was armed or a danger to the police.

12. *State v. Grant*, 2000 WL 504538 (Iowa Ct. App. 4/28/00). The consent to search given by a renter of an apartment does not extend to allow for a search of a jacket of a guest. The renter could consent only to the search of the apartment, and not to the personal property of guests located in the apartment.

13. *Park v. Commonwealth*, __ S.E. 2d __, 2000 WL 526852 (Va. Ct. App. 5/2/00). Knock and announce rules require more than knocking on the door and entering forcibly at the moment the door opens. Rather, the police must give the person opening the door the opportunity to respond prior to entry, absent some sort of exigent circumstances, which was not shown in this case.

14. There is a fascinating law review article on the Fourth Amendment and its applicability to technology written by Stephan K. Bayens in 48 Drake L. R. 239 (2000). The article analyzes the different components of modern technology and attempts to place those components within the framework of traditional Fourth Amendment analysis. The conclusion drawn is that "it appears as thought the Fourth Amendment has finally met its match in technology... Traditional notions of privacy and possessory interests have become increasingly difficult to apply with the amorphous world of networks and the Internet. Electronic communication in its various forms is a practical necessity despite its inherent dangers. Thus, the judiciary or the legislature must acknowledge this dilemma and formulate appropriate responses." ◆

Peremptory Challenges in Criminal Cases: the Kentucky History and the Federal Rule

The history of allocation of peremptory challenges in Kentucky is interesting in what it reveals. Prior to 1994, the defense had more peremptory challenges for an over 100 year period than the prosecution had:

1877 – 1893			
Felony:	Defense **(20)**	Misdemeanors:	Defense (3)
	Prosecution **(5)**		Prosecution (3)
1893 – 1978			
Felony:	Defense **(15)**	Misdemeanors:	Defense (3)
	Prosecution **(5)**		Prosecution (3)
1978 – 1994			
Felony:	Defense **(8)**	Misdemeanors:	Defense (3)
	Prosecution **(5)**		Prosecution (3)
1994 – PRESENT			
Felony:	Defense **(8)**	Misdemeanors:	Defense (3)
	Prosecution **(8)**		Prosecution (3)

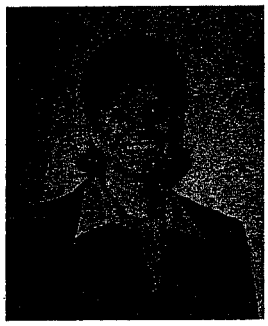
The federal Rule of Criminal Procedure 24(b) provides for 10 peremptories for the defense and 6 for the prosecution in felony cases:

Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

The Kentucky Supreme Court is currently considering changing RCr 9.40 to the numbers in the federal rule.

PRACTICE Corner
Litigation Tips & Comments

Collected by Misty Dugger,
Assistant Public Advocate



Misty Dugger

Get an IFP Order and DPA Appointment

Immediately after the client has been sentenced, trial counsel should obtain an order allowing the client to proceed on appeal *in forma pauperis* (IFP) and apppointing the DPA to represent the client on appeal. Without such an orders, the circuit clerk's office is reluctant to file a timely Certificate of Service or to file the Notice of Appeal in the absence of a filing fee.

The IFP order should specifically refer to KRS Chapter 31 and appoint DPA to handle the appeal. DPA must be appointed to appeal even if DPA represented the client below. *Otherwise, the appellate courts and DPA will consider the appellant to be represented on appeal by trial counsel, or proceeding pro se.*

.~ John Palombi, Appellate Branch Manager

Challenge Conditional Discharge if Offense was Prior to July 15, 1998

In *Purvis v. Commonwealth*, (Ky. S.Ct., Opinion Rendered March 23, 2000), the Kentucky Supreme Court held KRS 532.043 was unconstitutional as applied to offenses committed before the effective date of the act (July 15, 1998) when both elements of the *ex post facto* law test are satisfied

~ Misty Dugger, Assistant Public Advocate

Check Out these Web Sites

http://8cc-www.ca8.uscourts.gov/Oral-Arg/scripts/GetRA.asp

This web page allows you to listen to the oral argument made before the 8th Circuit U.S. Court of Appeals.

http://www.fpdmow.org/re1999.pdf

Reversible Errors, a project of the Office of the Federal Public Defender for the Districts of Northern New York & Vermont, lists cases in which a criminal defendant received relief from a U.S. Court of Appeals or the U.S. Supreme Court.

~ Jeff Sherr, Assistant Public Advocate

Q & A Corner

QUESTION: Can a conviction now under appeal be used to enhance as PFO?

ANSWER: No. *Melson v. Commonwealth*, 772 SW 2d 631 (Ky. 1989) states that a prior conviction cannot be utilized for TRUTH IN SENTENCING or PFO until the case is disposed of by the reviewing court if discretionary review has been granted. It may, however, be utilized if the conviction is being collaterally attacked. A valid interpretation would be that if a motion for discretionary review is pending on the issues (rather than on collateral matters such as an RCT 11.42 & CR 60.02), the prior can't be used. Clearly, if the appeal is a matter of right appeal, the conviction cannot be used.

Thompson v. Commonwealth, 862 SW 2d 871 (Ky.1993) states that a conviction can only be relied upon (for TIS & PFO) if it is a final judgment, meaning termination of the appeal or expiration of the time for taking the appeal. *Kohler v. Commonwealth*, 944 SW 2d 146 (Ky. App. 1997) and *Tabor v. Commonwealth* 948 SW 2d 569 (Ky. App. 1997), also both indicate that convictions on appeal cannot be used in TIS or PFO hearings.

~ Q & A Corner topics are gathered from the DPA list serves.
All sources and contributors are kept confidential to protect the individual's interests.

Practice Corner needs your tips, too!

Trial attorneys, appellate attorneys, and others working to defend the accused, please share your knowledge. If you have a practice tip, courtroom observation, or other comments which would be useful to share with other public defenders, please email it to: mdugger@mail.pa.stat.ky.us.

Litigation tips and comments for The Practice Corner are collected by Misty Dugger, Assistant Public Advocate, Appellate Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, email: mdugger@mail.pa.state.ky.us.

The Advocate

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