



The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

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Governor Paul E. Patton

GOVERNOR OPENS MURRAY DPA OFFICE



Steve Bright

Making Good on the Promise of *Gideon v. Wainwright*: The Challenges and Rewards of Defending the Poor

Sixth Circuit Grants Writs in *Gall* and *Skaggs*

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***The Advocate:* Ky DPA's Journal of Criminal Justice Education and Research**

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...



Ed Monahan

Kentuckians were called by **Governor Paul Patton** to understand and appreciate the important role of defenders at the recent opening of the Murray Office. We reprint the Governor's remarks at the ribbon cutting ceremony for the Murray opening.

Steve Bright, a national criminal justice prophet, concluded the June 2000 Annual Public Defender Conference with remarks about the nature and importance of our work as defenders. We set out his remarks in full.

Capital Reversals - Two different panels of the 6th Circuit Court of appeals rendered opinions in the *Gall* and *Skaggs* capital federal habeas cases, granting the Writ in both based on very serious errors that violate the Constitution. Their holdings are summarized in this issue.

Freeing Innocent Citizens - There are innocent people who are wrongly convicted. DNA is helping us to understand that stark reality. The Kentucky Innocence Project (KIP), a major initiative of DPA, has been launched in an effort to insure those innocent persons who are wrongly incarcerated in Kentucky prisons have their liberty returned. Post-Trial Director Rebecca DiLoreto describes the DPA Project for us.

Annual Defender Conference and Awards - It is time to make nominations for DPA's Annual awards to be presented at the 2001 Annual Defender Conference in Lexington, Ky. Mark the date of our conference on your calendar for June 11-13, 2001. Our theme is Actual Innocence.

Ed Monahan
 Deputy Public Advocate
 Editor, *The Advocate*

Governor Paul E. Patton's Remarks at the Grand Opening Ceremony of the Murray Department of Public Advocacy Office

(Murray State University, August 31, 2000) It is certainly a pleasure for me to be here because this is a little bit of a special occasion – a cooperative effort to serve the people of Kentucky from our Department of Public Advocacy and Murray State University. This is one more demonstration of the fact that our universities understand that they have a comprehensive mission to serve Kentucky in a whole lot of different ways and certainly no institution is doing a better job of it than Murray State University and Dr. Alexander and your Board. Thank you all for looking at the big picture and looking at your mission of service to all Kentuckians in a whole lot of different ways and of course the work of the public advocates is very, very important.

One of the great things about this nation is that we believe that we will get justice. We have a great belief in justice for all and in order to try to administer justice as completely and accurately as we can we have a very complex system with lots of safeguards, hopefully for the victims and the accused. But, it does require help in the navigation of that system. It does require the assistance of someone that is trained and has the knowledge to help an individual get through the system – an attorney and of course they have to be paid, they have to make a living. If you happen to be in a situation where you have to go through the court system and you can't afford an attorney, it is vital if our system is going to work, if our system is going to work for all, then all have to have access to competent and adequate representation when they come before the courts of justice. And of course that is what our Department of Public Advocacy does and while most of us hopefully will never come into direct contact with the Department of Public Advocacy we ought to be happy and we ought to be concerned about it being able to do its job. And that was a situation that we faced four years ago, five years ago almost, and we felt like that perhaps a new direction, perhaps a new emphasis, perhaps focusing on all of the various cases not just the high profile cases that they were responsible for was the appropriate way. And at that time, we made a change and we appointed Ernie Lewis to the position as director of that Department and I am pleased to announce that as of yesterday, Mr. Lewis has been reappointed to another four year term. So Ernie, that is an indication of the confidence that we have in the leadership that he and the people that he works with have given to this organization.

There is a lot of progress as Ernie talked about occurring in the Department of Public Advocacy due in large part to the actions of the last two sessions of the General Assembly and I certainly want to emphasize that these as well as the other efforts of our Commonwealth is a joint venture almost always between the Executive Branch - our administration - and the members of the General Assembly. We have Senator Jackson going to speak in a moment and he is going to acknowledge the other members of the General Assembly that are here but let me add my acknowledgment to the very very important role that they played in making sure that these and other programs are brought to the assistance of Kentucky.

It was two years ago when I became aware of the very very severe underfunding of this agency because of the work of a *Blue Ribbon Group on Indigent Defense in the 21st Century* that was chaired by now Secretary of Justice Robert Stephens and former State Representative Mike Bowling. They came to us and talked to us about the Kentucky public defender system and how underfunded that it was and that the Kentucky public defenders were paid the lowest salaries of any defenders in the nation and they had caseloads that were far far excessive. This group persuaded us to commit a higher level of funding to the Department of Public Advocacy that Ernie has talked about. And we did include an additional ten million dollars which was a substantial increase and the General Assembly did approve that.

Today, we celebrate an innovative and unique partnership in which a regional university and a state agency have formed forces to provide services to the people of Calloway and Marshall Counties. Murray State University has graciously offered their facilities to the Department of Public Advocacy and in turn the Department has offered the students at Murray State a unique opportunity to learn about and get hands on experience regarding today's criminal justice system. I am also proud to announce today that public defenders throughout the Commonwealth are receiving a substantial pay raise. I am especially pleased that the public defender starting salary will rise from \$23,388 to \$28,485.00 and a starting salary will increase to almost \$30,000 in the second year of this biennium. Experienced attorneys will also be receiving pay raises of 8% each year of the biennium. These raises are effective August 15, 2000, but retroactive to July 1, 2000.

It is important to pay our public servants adequately. Public defenders serve in every court in the Commonwealth, defending children, the mentally ill, and people charged with crimes who unable to afford their own attorney. This salary increase will help these defenders earn a living wage while at the same time allowing the Department of Public Advocacy the ability to recruit and retain highly qualified public defenders.

So once again, it is a pleasure for me to be here in Calloway County and in the Purchase Area and it is a pleasure for me to stand up with the members of the General Assembly and support one of the vital services of our Commonwealth and to celebrate this unique joining of our university and public defenders to serve the people of Kentucky. Thank you for allowing me to be a part of it. ■

**One of the great things about this nation is
that we believe that we will get justice.**

-- Governor Paul E. Patton

Making Good on the Promise of *Gideon v. Wainwright*: The Challenges and Rewards of Defending the Poor

by Steve Bright

Kentucky's Indigent Defense System

- ◆ **Structure**
- ◆ **Training**
- ◆ **Independence**
- ◆ **Resources**
- ◆ **High Quality Representation**
- ◆ **Focus on Clients**

In the last 25 years, the Department of Public Advocacy and defenders in Kentucky have made great progress. We have stood on the shoulders of others and we have strengthened ourselves, so that others – those who are interns and law clerks this summer – will someday stand on our shoulders. They will carry on in delivering on the promise of *Gideon v. Wainwright*.

The following remarks were made at the conclusion of the 28th Annual Public Defender Conference in Covington, KY.

Thank you for taking on the immensely difficult task of defending poor people accused of crimes. Thank you for doing it proudly and zealously, as the Constitution requires. And thank you for attending this program, where you have learned lessons you will take back to your communities so you can do an even better job of defending your clients.

I remember being instructed and inspired by speakers like Albert Kreiger and Frank Hadad at a training program held by the Department of Public Advocacy in its fledgling days in the early 1970's. I was a student at the University of Kentucky College of Law. When that program was over, I could not wait to get my law degree and become a criminal defense lawyer and do the things that they talked about.

And now, over 25 years later, I find the same excitement and the same electricity at this training program that I experienced then. But I also find that much has changed.

Kentucky now has a *structure* for providing indigent defense – offices where lawyers and investigators and paralegals and others can devote their careers to defending poor people accused of crimes.

There is *training* so that those who defend the poor can learn from the best and the brightest lawyers from all over the country.

There is *independence* so that a lawyer in Kentucky can defend a person zealously without fear that, as in Houston and other places, doing a good job for the client means never getting another appointment.

And, now – thanks to the person at the Kentucky Bar Association, in recognizing as the lawyer of the year, Ernie Lewis, the Public Advocate, and his Blue Ribbon Commission – there are more *resources*, millions more dollars. It is still not enough, but it is a significant increase.

This has been accomplished without allowing the Department of Public Advocacy to become another state bureaucracy where people just sit around waiting to get their pensions. Instead, it is made up of people who are devoted to providing the highest quality representation and committed to thinking creatively about how defenders can best practice their craft and serve the poor.

Continued on page 6

Continued from page 5

It has also been accomplished without losing sight of the reason for the work – the people that you represent. Take, for example, the Gideon Award. The Clarence Earl Gideon Award recognizes a man who was accused of breaking into a pool hall in Panama City, Florida, and, when forced to defend himself at trial, demanded a lawyer. After he was convicted without one, he filed a handwritten petition to the United States Supreme Court. When I teach the right to counsel at the law schools, I have the students read Clarence Earl Gideon's handwritten petition for certiorari, as well as the decision in *Gideon v. Wainwright* that held everyone accused of a felony is entitled to a lawyer. And I have them read the article from the *New York Times* of August 6, 1963, reporting that Clarence Earl Gideon, represented by counsel at his retrial, was acquitted. I want the students to understand that the case is about more than an important legal principal; it is about Clarence Earl Gideon; it is about his liberty.

The William Henry Furman Award recognizes a man sentenced to death in Georgia, whose name appears in the landmark decision, *Furman v. Georgia*, that struck down the death penalty in 1972. That decision saved his life. Today, William Henry Furman, despite mental limitations, works and lives in Macon, Georgia.

This work is about these people; it is about the clients that we represent day in and day out.

You are making good on the constitutional promise of *Gideon v. Wainwright* and the promise of equal justice. Those are promises that are not being kept in many courts, including, I am sure, some here in Kentucky.

In many courts all over the country today, it is better to be rich and guilty than to be poor and innocent. And, of course, that is not equal justice. If the quality of legal representation in criminal cases does not improve in some places, it is going to become necessary to sandblast the words "equal justice under law" off the Supreme Court building and admit that our courts are like the country clubs and the skyboxes at the stadiums, available to those who can afford them, but not the poor.

Resources are important and the most important resources are the human resources. So few people care about our clients. So few people care about upholding the Constitution on behalf of those who are accused of crimes.

It is not easy to be a criminal defense lawyer. It never has been. It wasn't when Clarence Darrow was a criminal defense lawyer.

It wasn't when Thurgood Marshall was trying to prevent executions all across the South.

It wasn't when Wiley Branton, an African-American lawyer

was defending people facing the death penalty in Arkansas in the 1950s and 1960s.

I had the privilege of knowing Wiley Branton when I was associated with Howard Law School in the 1980s. He was the dean at the time. I would visit him in his office periodically and he would tell me about trying those cases. He and his client would be the only two black people who would be down on the main level with the judge and the jury. All the other African-Americans had to sit in the balcony. The juries were made up exclusively of white males in those days. Wiley defended African-Americans all over Arkansas and other southern states before all-white, all-male juries.

It has never been easy to have a case in which someone's freedom or life hangs in the balance. After I had been a public defender for several years in Washington, DC, I filed a civil case on behalf of some young men who had been beaten by the police. As we were coming out of court one day after a pretrial hearing, I realized that no matter what happened in that case, they would not be worse off than they were right then. If we won, they would get some money. If we lost, – unlike the cases I had as a public defender – they would not lose their freedom; they just would not get any money. Lawyers who have not had the responsibility of having people's lives and freedom in their hands have no idea of what kind of burden it is to carry, to have that kind of responsibility.

It is not easy to deal with rejection, which is an inevitable part of being a defense lawyer. We have all felt the powerlessness of our clients, even as we have tried to empower them with our advocacy. It is not easy to represent someone who have been in the free world and have them torn out of the community – sentenced to prison. And nothing is more difficult that to represent someone for eight, 10 or 12 years, and at the end of that process – after you have worked your heart out – to stand there and watch that person give a final statement, be strapped down on a gurney, and, finally, after all that you have done to uphold the humanity and dignity of this person, and see what Justice Goldberg aptly called "the greatest conceivable degradation to the dignity of the human personality."

It is not easy to see the kinds of injustice that we all see every day – our clients treated differently because of their race, their poverty, and their powerlessness, judges who ignore the law due to political or community pressures, misconduct by police and prosecutors swept under the rug.

But never underestimate the day to day importance of what we all do such as explaining, counseling, holding the hands of you clients and their families in their darkest hours, comforting members of a family after a client is executed.

Robert Louis Stevenson once said, "It is the history of our kindness that makes the world tolerable. If it were not for that, for the effect of kind words, kind looks, kind letters. . . .

I should be inclined to think our life a practical jest in the worst possible spirit."

Never underestimate the importance of the kindness that you show in counseling your clients, in helping them and their families understand and travel through the foreign and hostile land which is the criminal justice system; in spending long hours discussing options, none of which are particularly attractive; and absorbing the anger and frustration that many feel when there appears to be no way out.

Never underestimate the importance of your patience in dealing with the mentally impaired people who so often are caught up in the criminal courts even though they do not belong there. Some would call them difficult clients, but we know that they are a people who have come through a hell of a life – afflicted with severe disabilities and limitations through no fault of their own, born into dysfunctional families, reared in debilitating poverty, seared by years of abuse and neglect, abandoned by their families, schools, and other institutions that should have protected them. We know they are struggling against enormous odds to survive in a world they do not fully comprehend. They require a great deal of our patience and our understanding, almost to the point of exhausting us at times.

And never underestimate the importance of giving people a voice and empowering them – people who would be absolutely voiceless if were not for you – even when you are not successful on their behalf.

Do not think for one minute, that you have not performed a great service every time you uphold the dignity of another human being, every time you treat a client with respect, every time you insist that *others* treat your client with respect, every time you stand up to power and empower with your advocacy, every time you bear witness to injustice.

No matter what the outcome, you have served a great and noble purpose.

Dr. Martin Luther King, Jr. once said that all of us, whatever we do, we stand on the shoulders of other people and until we develop the strength that other people can stand on our shoulders.

In the last 25 years, the Department of Public Advocacy and defenders in Kentucky have made great progress. We have stood on the shoulders of others and we have strengthened ourselves, so that others – those who are interns and law clerks this summer – will someday stand on our shoulders. They will carry on in delivering on the promise of *Gideon v. Wainwright*.

It is a burden, but it is one we take on proudly because we realize its importance. The great poet Langston Hughes once wrote:

There's a dream in the land.
With its back against the wall.
By muddled names and strange
Sometimes this dream is called.

There are those who claim
This dream for theirs alone
A sin for which, we know,
They must atone.
Unless shared in common
Like sunlight and like air,
The dream will die for lack
Of substance anywhere.

The dream knows no frontier or tongue,
The dream no class or race,
The dream cannot be kept secure
In any one locked place.

This dream today embattled,
With its back against the wall
To save the dream for one
It must be saved for ALL.

That is what we defenders recognize and do every day.

Thank you for the work that you are doing. I wish you the best in going back to the courts, proudly defending people. Good luck and Godspeed.

Stephen Bright, a native of Kentucky and graduate of the University of Kentucky College of Law, is director of the Southern Center for Human Rights in Atlanta and teaches at Emory, Harvard and Yale law schools. He teaches at DPA Capital Litigation Institute in Faubush, Ky. ■

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Kentucky Innocence Project Established by the Department of Public Advocacy

by Rebecca DiLoreto

The Department of Public Advocacy (DPA) has responded to the public's concern about innocent people behind bars by creating the *Kentucky Innocence Project* (KIP). The *Kentucky Innocence Project* will seek out and assist those in Kentucky's prison population who claim actual innocence and have new evidence to support their claim.

The nation has been shocked in recent months by news reports of innocent men and women being freed from prisons all across the country. The shock comes not from the justified release of innocent people, but from the sheer numbers of actually innocent people found in the nation's prisons.

The recent case of William Gregory, a Jefferson County man convicted and sentenced to 70 years for crimes that new scientific tests proved he did not commit, is concrete proof that, unfortunately, innocent people can be sent to prison in Kentucky. No citizen in Kentucky, no matter their place in life, wants an innocent person to spend a single day incarcerated in a Kentucky prison.

Modeled after successful programs such as the Innocence Project at Cardoza Law School under the direction of Barry Scheck, the Innocence Project Northwest at the University of Washington School of Law and the Center for Wrongful Convictions at Northwestern University, the *Kentucky Innocence Project* will utilize teams of volunteer students from Kentucky universities and law students from Kentucky's law schools. Gordon Rahn of DPA's Eddyville office is spearheading this effort with the assistance and oversight of Post Conviction Branch Manager, Marguerite Thomas.

MODEL

The *Kentucky Innocence Project* is operated within the Post-Conviction Branch of the Department of Public Advocacy. Funding for the project comes from a grant from the Kentucky Bar Association (to cover travel and phone expenses for volunteers) and the already established Post Conviction Branch budget. At the suggestion of members of the Kentucky Criminal Justice Council (KCJC), KIP will be making a presentation to KCJC in January 2001 to enlist the Council's support.

KIP will be utilizing students at all three law schools in Kentucky. Professor Roberta Harding has led the way to establish a for credit course at the University of Kentucky Law School that will begin January 2001. Planning is underway to establish programs to meet the needs of the students and the col-

leges at the University of Louisville Brandeis School of Law and Salmon P. Chase Law School at Northern Kentucky University with an anticipated date of the fall of 2001. In addition, as the caseloads grow, we anticipate involving students in different disciplines such as journalism and social sciences from Kentucky's regional universities. The students from the regional universities will be assigned as part of a team with a law student from the law schools. The rationale behind this idea is to involve as much Kentucky academia as possible as well as have students involved in important issues in their respective communities or areas of the state. These volunteers will also allow KIP to move a case more quickly from beginning to end.

For example, if a case comes into KIP from a county in far Western Kentucky, we would assign that case to a law student and use volunteer students from the journalism or social sciences colleges at Murray State University (MSU), a regional university located in Western Kentucky. The MSU students could help in record collections and witness interviews without asking a law student to travel 500 miles.

IMPLEMENTATION

DPA staff will be responsible for the initial screening of requests for assistance received from men and women incarcerated in Kentucky prisons. Initial questionnaires and a brief description of the program was sent to every warden in the Commonwealth to distribute to the inmate population in our prisons. Criteria for consideration by KIP includes:

- Kentucky conviction and incarceration;
- Minimum 10 year sentence;
- Minimum of 3 years to parole eligibility OR if parole has been deferred, a minimum of 3 years to next appearance before the parole board; and
- New evidence discovered since conviction or that can be developed through investigation.

A panel will assign cases to students based upon recommendations made by DPA staff. The model in place at the University of Kentucky includes professors at the law school providing immediate supervision of the students and two DPA staff members serving as adjunct professors to supervise the entire program. Students will have to submit status reports as well as time and document log sheets to the adjunct supervisors on a regular basis. The adjunct supervisor will meet at least once a month with all law students for case

review and presentations. In addition, the adjuncts will be able to communicate with the students through Westlaw's TWEN program. A staff attorney within DPA's Post-Conviction branch will be assigned to a case once it reaches the level requiring legal pleadings.

Requests for assistance are now being accepted by the *Kentucky Innocence Project* and after review by KIP staff, selected cases will be assigned to the teams for investigation.

The *Kentucky Innocence Project* will soon be assigning the first cases in the Project's efforts to free the actual innocent from Kentucky's prisons. Initiated in June 2000, cases will be assigned to law students for investigation in January 2001.

KIP began accepting letters and requests for assistance from Kentucky inmates in late September after the information packet was sent to the Kentucky institutions. As word has spread of the project, the number of requests has steadily increased.

Through November, the *Kentucky Innocence Project* reports the following:

Letters Received	82
Information Packets Mailed	34
Request for Assistance Received	65
Request for Assistance Reviewed	60
Screening Questionnaires Mailed	33
Screening Questionnaires Reviewed	14
Denials	17
Referrals	6

If an inmate's case satisfies all the four categories of criteria for the program, he or she is sent a detailed, 20-page questionnaire for specific information about the case. The decision to assign a case will, for the most part, be based upon the information provided in the screening questionnaire.

The successes of the DNA testing and challenges of other Innocence Projects such as the Innocence Project at Cardoza Law School, led by Barry Scheck and Peter Neufeld, have opened a window for those who claim actual innocence. DNA has exonerated 77 people in the past few years, yet forensic evidence such as DNA is not available in most convictions. Imagine how many factually innocent people could possibly be incarcerated based upon mistaken identification, coerced confessions and jailhouse snitches. National estimates put the number of innocent people incarcerated in the nation's prisons between 4%-10%, which means almost 1,500 innocent people could be sitting in Kentucky's prisons.

The requests that have been reviewed by KIP include many of the same problems seen across the country as leading factors in the wrongful conviction of innocent people. The *Kentucky Innocence Project* certainly wants to assist as many

as possible, but the Project will have met its mission if one innocent individual, through the efforts of the Project's volunteers and employees, is allowed to walk away from the prison gates that have taken years away from his life.

The Department of Public Advocacy continues to be a national leader in its mission of representing Kentucky's indigent. DPA is the first and, at the time of this writing, only statewide public defender organization that has put together an Innocence Project with an established volunteer component to assist those innocent victims wrongfully convicted. The momentum is strong across the nation and Kentucky's Department of Public Advocacy is a leader in the effort to free the innocent from Kentucky's prisons. It is an exciting time to be at the forefront of such an important movement.



Rebecca DiLoreto, Post-trial Director

Anyone with information that an innocent person has been wrongfully incarcerated may send a written statement of facts of the case to Gordon Rahn, Project Program Coordinator, Kentucky Innocence Project, Department of Public Advocacy, P.O. Box 555, Eddyville, Kentucky 42038. Those interested in volunteering their time or services to this worthwhile project are urged to contact Rebecca DiLoreto, Post Trial Division Director, Department of Public Advocacy, 100 Fair Oaks Lane, Frankfort, Kentucky 40601. ■

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DPA REVENUE REPORTED FOR FY 2000: LITTLE GROWTH SHOWN

by Ernie Lewis

The 2000 *DPA Revenue Report* is in for the money generated from clients, and it shows that there has been little growth in the revenue collected. The total revenue collected was \$3,066,573 in FY 00. This was up from \$2,947,212 in FY 99, a growth of only 4%.

The 1998 General Assembly had given DPA permission to spend \$3.9 million in revenue to fund necessary programming in FY 99. Revenue partially funded many of the trial offices, including the Elizabethtown, Covington, and Bell County Offices, the Louisville and Lexington Offices, the Capital Post-Conviction Branch and the Capital Trial Branch. DPA, however, did not collect \$3.9 million to meet those expenses, and thus needed additional funds from the 2000 General Assembly to cover the cost overrun. Indeed, until FY 00, DPA had never collected over \$3 million in revenue. Recognizing that fact, the 2000 General Assembly lowered the spending level funded by revenue to \$3 million during the next biennium, and moved the other program funding into the General Fund. The wisdom of that move has been made clear by the FY 00 figures showing that DPA raised a little over \$3 million. So long as the revenue level continues at the present pace, DPA will be able to balance its budget, although any hope of expanding programs to meet needs which arise will hinge on raising additional revenue.

DPA has a budget of \$26,272,500 for FY 01. Of that figure, \$2,971,600 comes from revenue, while \$22,392,500 comes from the General Fund. \$908,400 is allotted from federal sources to fund the Protection and Advocacy Division.

In order to understand the revenue picture for DPA, each fee should be examined.

The Administrative Fee

First, DPA receives \$50.00 of the \$52.50 administrative fee established in KRS 31.051. \$2.50 of the fee goes to the circuit clerk for hiring new clerks and salary adjustments. While this fee is mandatory, it is assessed and collected historically in fewer than 20% of the cases. In FY 00, the fee collected was \$873,526. This does not include the \$2.50, which goes to the circuit clerk. If each of these fees represents a \$50 assessment, that would total 17,470 cases in which fees have been assessed and collected. This was an increase of 7.7% over 1999, when \$810,473 was collected.

This should be DPA's best source of revenue. As envisioned, \$52.50 would be collected in a majority of the 100,000 cases annually. Potentially, this funding source could generate over

\$5 million per year. However, this past year, the best year in the history of the administrative fee, featured a collection in only 17% of DPA's total cases, and 18.3% of the trial level cases (based upon the assumption the \$50 is being collected in each case. It is understood that some of the fees are collected in increments). Both assessment and collection problems have plagued its history, and it has failed to grow into its full potential.

Recoupment

DPA also receives recoupment, or monies from people adjudged by the appointing court to be partially indigent. KRS 31.120(4). Traditionally, this money has been sent by the Finance and Administration Cabinet to local county public defender systems with DPA acting as a pass-through. While recoupment is still used to fund local programming, the amount collected in each county does not necessarily return to fund that particular county program. DPA will have 104 counties covered by a full-time office by January of 2001. As DPA becomes a full-time system, recoupment is being used increasingly to fund the entire public defender system.

In FY 2000, \$1,000,001 in recoupment monies were ordered by the court and paid by partially indigent clients. This represented a decline of 1% from FY 99, when \$1,011,468 was raised. One reason for this decline may be due to private lawyers on contract no longer being the primary deliverer of services throughout Kentucky. As a result, local judges may not have as much of an incentive to review the defendants' status in an effort to discover whether they are fully or only partially indigent. Another reason for the decline may be the increasing number of ancillary fees, including the recently passed jail fee, imposed upon jailed and incarcerated defendants.

The DUI Service Fee

The third fee received by DPA is the 25% of the DUI Service Fee. In FY 2000, \$1,193,044 was raised from the collection of this fee. This represented a slight growth of 1.9% over FY 99, when \$1,169,870 was raised. This fee is expected to rise over the biennium. As of October 15, 2000, the service fee has been increased by \$50, so that DPA's share will rise an additional \$12.50. The 2000 General Assembly saw this as a way

to pay DPA for its share of the new cases generated by the new .08 DUI statute. Because this fee does not depend upon

a specific assessment by the court, and because many of the people who are convicted of DUI are not indigent, this has been and will continue to be a relatively reliable source of revenue for the Kentucky public defender system.

Other Trends

It is apparent from the *DPA Revenue Report* that revenue in Kentucky has stabilized at approximately \$3 million annually. It is also clear that the unfinished business of the *Blue Ribbon Group* will require additional General Fund monies in the FY 2002 budget.

Some counties continue to assess and collect the administrative fee exceptionally well. Boone County raised \$21,143 in the administrative fee, which would be 422 of its 818 cases (51%). Campbell County collected \$22,246, or 444 of its 1389 cases (31%). Christian County collected \$39,203, or 784 of its 2958 cases (26%). Floyd County collected \$24,535, or 490 of its 1036 cases (47%). Graves County collected \$23,203, or 464 of its 1316 cases (35%). Hardin County collected \$37,319, or 746 of its 2768 cases (26%). Fayette County collected \$100,846, or 2016 cases, which amounts to 30% of the cases in which they were involved.

It continues to be difficult to collect the administrative fee in other counties. For example, in Jefferson County, despite numerous efforts on the part of the courts and the clerk's office to improve this situation, only \$24,673 was collected in administrative fees. That would amount to 493 of the 24,495 cases (2%). Jefferson County collected only 5% of the total revenue, adding together all three fees, despite having approximately 25% of the total cases for DPA. On the other hand, Jefferson Fiscal Court contributes \$1,225,000 to the public defender system in Louisville, the most significant contribution in the Commonwealth by a county government.

Other counties demonstrate a similar difficulty. Davies County collected \$21,600, or 432 out of 2917 cases (14%). Henderson County collected \$10,565, or 211 out of 1725 cases (12%). Madison County collected \$10,078, or 201 of 1303 cases (15%). Clark County collected \$3365, or 67 of 683 cases (9%). And Pike County collected \$3714, or 74 out of 1222 cases (6%). There are many other examples.

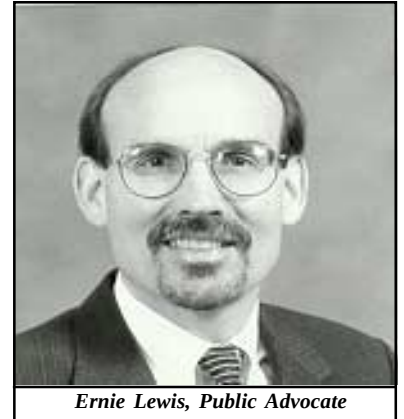
Closing

DPA has made a commitment to collect appropriate levels of revenue as part of its overall budget. The *Blue Ribbon Group* recognized that collecting monies from clients has a place in funding an indigent defense delivery system. Recommendation #7 reads "The Department of Public Advocacy and the Court of Justice must increase their efforts to collect reasonable fees from public defender clients, including considering the use of private collection organizations." DPA has taken the advice of the *Blue Ribbon Group* and is working to continue to collect responsibly these three revenue funds. DPA

has a personal services contract with a Jefferson County law firm in an experiment to see whether revenue can be increased in that county through the use of a private collection firm. DPA also sends out quarterly letters to all judges in the Commonwealth, both Circuit and District, reporting on the revenue picture in their county and all other counties in the Commonwealth, and urging responsible assessment and collection of revenue. DPA is committed to continuing these efforts to maximize contributions from clients consistent with due process and KRS Chapter 31.

Policy makers in Kentucky are gradually realizing that revenue to benefit the Kentucky public defender system plays a necessary but also a limited role. The *Blue Ribbon Group* in Finding #3 states that "The Department of Public Advocacy is effective in indigent defense cost recovery compared to other states." The narrative of the *Blue Ribbon Group Report* goes on to state that "Kentucky is among the most successful of all the states in the collection of alternative sources of revenue. Kentucky collects more revenue from defendants than any other state. Kentucky collects more on the administrative fee than any other state. Unfortunately, the supplemental monies available from the alternative revenue sources have not solved the funding needs of the DPA...It is our strong belief that these revenue funds are virtually tapped out. In fact, there are over 50 legislative requirements for court fees, costs, restitution, fines, etc., having to do with criminal and civil cases."

Policy makers in Kentucky, including DPA, must be realistic about the extent to which revenue can be made to grow. At the same time, DPA and its leaders must continue to work with the Court of Justice to see that revenue continues to be collected in a responsible and appropriate manner. ■



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Defender Revenue: PA Fee, DUI Fee, Recoupment Fee for FY 2000 (7/1/99 - 6/30/00)
The 36 **Bolded & Italicized** counties collect a lower % of revenue than their % of public defender cases

County	PA	DUI	Recoupment	Total Revenue	% Revenue	Caseload	Caseload %
ADAIR	\$1,260.00	\$4,232.50	\$2,075.00	\$7,567.50	0.25%	310	0.33%
ALLEN	\$1,100.00	\$3,530.88	\$3,837.50	\$8,468.38	0.28%	246	0.26%
ANDERSON	\$1,942.50	\$10,176.13	\$1,946.25	\$14,064.88	0.46%	139	0.15%
BALLARD	\$3,034.50	\$4,088.74	\$9,960.50	\$17,083.74	0.56%	107	0.11%
BARREN	\$6,949.00	\$6,919.28	\$30,961.70	\$44,829.98	1.46%	732	0.77%
BATH	\$4,960.00	\$2,454.25	\$1,120.00	\$8,534.25	0.28%	393	0.41%
BELL	\$8,169.00	\$12,828.50	\$6,927.50	\$27,925.00	0.91%	1171	1.23%
BOONE	\$21,143.75	\$26,810.88	\$44,960.70	\$92,915.33	3.03%	818	0.86%
BOURBON	\$3,568.75	\$6,725.38	\$7,134.00	\$17,428.13	0.57%	258	0.27%
BOYD	\$11,056.75	\$15,091.45	\$18,243.35	\$44,391.55	1.45%	694	0.73%
BOYLE	\$4,027.75	\$6,159.00	\$6,034.00	\$16,220.75	0.53%	59	0.06%
BRACKEN	\$2,340.00	\$2,046.75	\$1,425.00	\$5,811.75	0.19%	140	0.15%
BREATHITT	\$10,030.00	\$4,800.00	\$100.00	\$14,930.00	0.49%	570	0.60%
BRECKINRIDGE	\$2,742.25	\$2,983.75	\$2,340.00	\$8,066.00	0.26%	83	0.09%
BULLITT	\$7,745.00	\$20,092.88	\$20,374.00	\$48,211.88	1.57%	602	0.63%
BUTLER	\$2,472.50	\$4,749.75	\$4,300.00	\$11,522.25	0.38%	135	0.14%
CALDWELL	\$3,266.25	\$4,643.38	\$5,074.75	\$12,984.38	0.42%	399	0.42%
CALLOWAY	\$13,908.13	\$7,531.50	\$40,471.51	\$61,911.14	2.02%	367	0.38%
CAMPBELL	\$22,246.37	\$40,252.51	\$36,126.90	\$98,625.78	3.22%	1389	1.46%
CARLISLE	\$1,550.00	\$1,018.75	\$6,605.05	\$9,173.80	0.30%	35	0.04%
CARROLL	\$6,038.00	\$7,297.31	\$22,799.47	\$36,134.78	1.18%	173	0.18%
CARTER	\$7,078.00	\$5,331.00	\$1,350.00	\$13,759.00	0.45%	800	0.84%
CASEY	\$733.00	\$5,957.00	\$350.00	\$7,040.00	0.23%	161	0.17%
CHRISTIAN	\$39,203.89	\$34,332.75	\$39,652.10	\$113,188.74	3.69%	2958	3.10%
CLARK	\$3,365.50	\$13,390.46	\$4,158.50	\$20,914.46	0.68%	683	0.72%
CLAY	\$2,987.50	\$7,726.15	\$282.50	\$10,996.15	0.36%	678	0.71%
CLINTON	\$1,187.50	\$5,080.81	\$0.00	\$6,268.31	0.20%	426	0.45%
CRITTENDEN	\$3,807.25	\$3,945.19	\$11,176.75	\$18,929.19	0.62%	176	0.18%
CUMBERLAND	\$1,350.00	\$3,984.00	\$117.50	\$5,451.50	0.18%	93	0.10%
DAVISS	\$21,600.00	\$21,062.50	\$17,230.00	\$59,892.50	1.95%	2917	3.06%
EDMONSON	\$2,781.25	\$1,094.25	\$2,752.25	\$6,627.75	0.22%	172	0.18%
ELLIOTT	\$1,645.00	\$1,173.50	\$497.50	\$3,316.00	0.11%	123	0.13%
ESTILL	\$1,865.00	\$3,480.59	\$100.00	\$5,445.59	0.18%	347	0.36%
FAYETTE*	\$100,846.55	\$82,705.94	\$131,788.74	\$315,341.23	10.28%	6579	6.90%
FLEMING	\$5,407.00	\$2,703.25	\$1,128.50	\$9,238.75	0.30%	234	0.25%
FLOYD	\$24,535.50	\$12,630.88	\$1,439.34	\$38,605.72	1.26%	1036	1.09%
FRANKLIN	\$5,778.20	\$17,041.13	\$1,360.75	\$24,180.08	0.79%	840	0.88%
FULTON	\$8,615.15	\$4,928.34	\$35,920.70	\$49,464.19	1.61%	326	0.34%
GALLATIN	\$1,041.00	\$4,996.38	\$4,090.00	\$10,127.38	0.33%	84	0.09%
GARRARD	\$5,053.00	\$5,375.00	\$16,297.50	\$26,725.50	0.87%	315	0.33%
GRANT	\$3,066.50	\$8,198.42	\$8,717.99	\$19,982.91	0.65%	101	0.11%
GRAVES	\$23,203.30	\$13,046.25	\$29,400.50	\$65,650.05	2.14%	1316	1.38%
GRAYSON	\$2,194.00	\$6,335.88	\$350.00	\$8,879.88	0.29%	471	0.49%
GREEN	\$1,120.00	\$1,392.00	\$1,260.00	\$3,772.00	0.12%	222	0.23%
GREENUP	\$6,740.25	\$15,048.22	\$8,224.00	\$30,012.47	0.98%	133	0.14%
HANCOCK	\$2,350.75	\$2,160.00	\$1,702.00	\$6,212.75	0.20%	139	0.15%
HARDIN	\$37,319.85	\$27,536.27	\$4,047.50	\$68,903.62	2.25%	2768	2.90%
HARLAN	\$2,187.50	\$6,481.88	\$3,925.00	\$12,594.38	0.41%	325	0.34%
HARRISON	\$10,444.25	\$4,297.31	\$9,969.50	\$24,711.06	0.81%	366	0.38%
HART	\$5,268.00	\$4,679.06	\$10,555.25	\$20,502.31	0.67%	335	0.35%
HENDERSON	\$10,565.50	\$20,000.38	\$8,824.50	\$39,390.38	1.28%	1725	1.81%
HENRY	\$1,880.00	\$5,874.25	\$1,229.95	\$8,984.20	0.29%	147	0.15%
HICKMAN	\$2,545.24	\$1,174.99	\$11,210.88	\$14,931.11	0.49%	94	0.10%
HOPKINS	\$21,354.43	\$16,054.28	\$6,053.35	\$43,462.06	1.42%	1185	1.24%
JACKSON	\$2,536.00	\$3,739.88	\$410.00	\$6,685.88	0.22%	275	0.29%
JEFFERSON*	\$24,673.26	\$108,245.99	\$25,296.50	\$158,215.75	5.16%	24495	25.69%
JESSAMINE	\$7,603.00	\$13,994.84	\$25,700.00	\$47,297.84	1.54%	446	0.47%
JOHNSON	\$4,151.25	\$6,718.63	\$2,005.75	\$12,875.63	0.42%	401	0.42%
KENTON	\$13,717.70	\$57,865.01	\$15,781.85	\$87,364.56	2.85%	3118	3.27%
KNOTT	\$989.00	\$4,146.63	\$252.50	\$5,388.13	0.18%	319	0.33%
KNOX	\$2,714.80	\$9,865.88	\$6,088.25	\$18,668.93	0.61%	499	0.52%
LARUE	\$3,421.85	\$2,123.59	\$5,214.75	\$10,760.19	0.35%	237	0.25%

County	PA	DUI	Recoupment	Total Revenue	% Revenue	Caseload	Caseload %
LAUREL	\$2,325.25	\$22,191.38	\$6,805.25	\$31,321.88	1.02%	742	0.78%
LAWRENCE	\$1,892.00	\$4,842.25	\$1,092.50	\$7,826.75	0.26%	216	0.23%
LEE	\$462.25	\$1,567.58	\$0.00	\$2,029.83	0.07%	157	0.16%
LESLIE	\$1,585.00	\$2,521.50	\$250.00	\$4,356.50	0.14%	259	0.27%
LETCHER	\$7,721.5	\$3,635.00	\$8,508.75	\$19,865.25	0.65%	815	0.85%
LEWIS	\$2,690.75	\$4,309.13	\$2,920.00	\$9,919.88	0.32%	244	0.26%
LINCOLN	\$3,575.00	\$3,167.25	\$10,267.50	\$17,009.75	0.55%	280	0.29%
LIVINGSTON	\$670.00	\$3,799.50	\$1,580.00	\$6,049.50	0.20%	183	0.19%
LOGAN	\$6,360.00	\$8,062.50	\$4,283.12	\$18,705.62	0.61%	71	0.07%
LYON	\$790.00	\$2,911.34	\$840.00	\$4,541.34	0.15%	102	0.11%
MCCRACKEN	\$32,010.00	\$27,587.50	\$23,435.00	\$83,032.50	2.71%	1303	1.37
MCCREARY	\$12,196.92	\$8,162.13	\$5,830.00	\$26,189.05	0.85%	143	0.15%
MCLEAN	\$2,390.00	\$1,665.50	\$895.00	\$4,950.50	0.16%	563	0.59%
MADISON	\$10,078.75	\$30,741.25	\$7,564.75	\$48,384.75	1.58%	400	0.42%
MAGOFFIN	\$385.00	\$4,078.00	\$0.00	\$4,463.00	0.15%	205	0.22%
MARION	\$2,680.25	\$5,850.75	\$1,546.00	\$10,077.00	0.33%	745	0.78%
MARSHALL	\$7,010.00	\$8,418.13	\$27,733.60	\$43,161.73	1.41%	3422	3.59%
MARTIN	\$2,416.00	\$5,032.94	\$1,209.00	\$8,657.94	0.28%	591	0.62%
MASON	\$14,168.15	\$5,764.15	\$1,065.00	\$20,997.30	0.68%	147	0.15%
MEADE	\$1,030.00	\$8,291.63	\$790.00	\$10,111.63	0.33%	161	0.17%
MENIFEE	\$5,578.34	\$1,658.13	\$547.50	\$7,783.97	0.25%	201	0.21%
MERCER	\$2,310.00	\$4,581.50	\$3,004.00	\$9,895.50	0.32%	78	0.08%
METCALFE	\$1,865.00	\$2,422.25	\$3,925.87	\$8,213.12	0.27%	145	0.15%
MONROE	\$2,555.50	\$2,721.94	\$2,078.00	\$7,355.44	0.24%	180	0.19%
MONTGOMERY	\$12,823.25	\$7,481.81	\$1,987.50	\$22,292.56	0.73%	970	1.02%
MORGAN	\$4,924.50	\$4,475.79	\$1,159.00	\$10,559.29	0.34%	241	0.25%
MUHLNBURG	\$2,870.00	\$7,227.50	\$4,037.50	\$14,135.00	0.46%	456	0.48%
NELSON	\$7,135.80	\$10,152.50	\$12,937.00	\$30,225.30	0.99%	437	0.46%
NICHOLAS	\$3,926.00	\$2,580.75	\$5,420.75	\$11,927.50	0.39%	138	0.14%
OHIO	\$6,124.00	\$3,980.50	\$6,955.00	\$17,059.50	0.56%	251	0.26%
OLDHAM	\$2,006.25	\$8,175.54	\$2,320.50	\$12,502.29	0.41%	212	0.22%
OWEN	\$2,837.50	\$1,545.63	\$18,573.50	\$22,956.63	0.75%	42	0.04%
OWSLEY	\$1,677.50	\$876.38	\$0.00	\$2,553.88	0.08%	122	0.13%
PENDLETON	\$3,942.00	\$3,371.13	\$5,943.50	\$13,256.63	0.43%	135	0.14%
PERRY	\$10,339.00	\$10,428.88	\$2,987.00	\$23,754.88	0.77%	2067	2.17%
PIKE	\$3,714.50	\$14,721.94	\$3,473.00	\$21,909.44	0.71%	1222	1.28%
POWELL	\$9,041.00	\$6,159.50	\$225.00	\$15,425.50	0.50%	457	0.48%
PULASKI	\$6,383.00	\$15,472.71	\$5,297.25	\$27,152.96	0.89%	687	0.72%
ROBERTSON	\$663.00	\$450.00	\$1,107.00	\$2,220.00	0.07%	22	0.02%
ROCKCASTLE	\$4,023.50	\$9,334.44	\$4,202.00	\$17,559.94	0.57%	246	0.26%
ROWAN	\$14,579.00	\$8,727.88	\$3,125.00	\$26,431.88	0.86%	705	0.74%
RUSSELL	\$8,045.45	\$5,993.25	\$1,987.50	\$16,026.20	0.52%	404	0.42%
SCOTT	\$4,374.50	\$9,313.69	\$4,182.00	\$17,870.19	0.58%	681	0.71%
SHELBY	\$3,285.00	\$19,537.35	\$2,302.50	\$25,124.85	0.82%	395	0.41%
SIMPSON	\$2,150.00	\$7,374.00	\$8,176.52	\$17,700.52	0.58%	156	0.16%
SPENCER	\$1,050.00	\$2,988.75	\$475.00	\$4,513.75	0.15%	72	0.08%
TAYLOR	\$8,470.00	\$4,757.50	\$1,615.00	\$14,842.50	0.48%	702	0.74%
TODD	\$1,890.00	\$3,325.00	\$1,447.50	\$6,662.50	0.22%	57	0.06%
TRIGG	\$1,640.00	\$3,503.44	\$2,570.00	\$7,713.44	0.25%	124	0.13%
TRIMBLE	\$1,097.50	\$2,324.88	\$245.00	\$3,667.38	0.12%	103	0.11%
UNION	\$7,462.20	\$5,881.50	\$19,669.55	\$33,013.25	1.08%	31	0.03%
WARREN	\$10,011.25	\$34,058.18	\$5,863.75	\$49,933.18	1.63%	412	0.43%
WASHINGTON	\$1,425.00	\$1,856.25	\$920.00	\$4,201.25	0.14%	3353	3.52%
WAYNE	\$8,159.50	\$3,956.91	\$0.00	\$12,116.41	0.40%	259	0.27%
WEBSTER	\$5,483.74	\$3,590.00	\$15,731.28	\$24,805.02	0.81%	393	0.41%
WHITLEY	\$11,884.00	\$10,485.06	\$2,283.50	\$24,652.56	0.80%	291	0.31%
WOLFE	\$3,621.00	\$3,397.56	\$0.00	\$7,018.56	0.23%	882	0.93%
WOODFORD	\$3,244.65	\$11,203.25	\$7,881.53	\$22,329.43	0.73%	199	0.21%
UNIDENTIFIED						185	0.19%
TOTAL:	\$873,526.47	\$1,193,044.84	\$1,000,001.80	\$3,066,573.11	100.00%	95,347	100.00%

* Pursuant to KRS 31.060, Jefferson County provides funds in the amount of \$1,225,000 in FY 1999-2000 for the Louisville-Jefferson County Public Defender Corporation. The Lexington-Fayette Urban County Government contributes \$112,870 to Fayette County Legal Aid, Incorporated.

Public Advocacy Seeks Nominations

We need your nominations for the Department of Public Advocacy Awards which will be presented at this year's 29th Annual Conference in June. An Awards Search Committee recommends two recipients to the Public Advocate for each of the following awards. The Public Advocate then makes the selection. Contact Lisa Blevins at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006 ext. 294; Fax: (502) 564-7890; or Email: lblevins@mail.pa.state.ky.us for a nomination form. **All nominations are to be submitted on this form by April 3, 2001.**

Gideon Award: Trumpeting Counsel for Kentucky's Poor

In celebration of the 30th Anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the *Gideon* Award was established in 1993. It is presented at the Annual Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. Clarence Earl Gideon was denied counsel and was convicted. After his hand-written petition to the U.S. Supreme Court, he was acquitted upon retrial where he was represented by counsel.

- 1993 **J. VINCENT APRILE, II**, DPA acting General Counsel
- 1994 **DAN GOYETTE**, Director of the Jefferson County District Public Defender's Office and the JEFFERSON DISTRICT PUBLIC DEFENDER'S OFFICE
- 1995 **LARRY H. MARSHALL**, Assistant Public Advocate in DPA's Appellate Branch
- 1996 **JIM COX**, Directing Attorney, DPA's Somerset Office
- 1997 **ALLISON CONNELLY**, Assistant Clinical Professor, UK, former Public Advocate
- 1998 **EDWARD C. MONAHAN**, Deputy Public Advocate
- 1999 **GEORGE SORNBERGER**, DPA Trial Division Director
- 2000 **JOHN P. NILAND**, former DPA Central Regional Manager

ROSA PARKS AWARD: FOR ADVOCACY FOR THE POOR

Established in 1995, the *Rosa Parks* Award is presented at the Annual DPA Public Defender Conference to the non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice... And we are not wrong.... If we are wrong justice is a lie. And we are determined...to work and fight until justice runs down like water and righteousness like a mighty stream."

- 1995 **CRIS BROWN**, Paralegal, DPA's Capital Trial Branch
- 1996 **TINA MEADOWS**, Executive Secretary to Deputy, DPA's Education & Development
- 1997 **BILL CURTIS**, Research Analyst, DPA's Law Operations Division
- 1998 **PATRICK D. DELAHANTY**, Chair, Kentucky Coalition Against the Death Penalty

- 1999 **DAVE STEWART**, Department of Public Advocacy Chief Investigator, Frankfort, KY

- 2000 **JERRY L. SMOTHERS, JR.**, Investigator, Jefferson County Public Defender Office, Louisville, KY

NELSON MANDELA LIFETIME ACHIEVEMENT AWARD

Established in 1997 to honor an attorney for a lifetime of dedicated services and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants. Nelson Mandela was the recipient of the 1993 Nobel Peace Prize, President of the African National Congress and head of the Anti-Apartheid movement. His life is an epic of struggle, setback, renewal hope and triumph with a quarter century of it behind bars. His autobiography ended, "I have walked the long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb... I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended."

- 1997 **ROBERT W. CARRAN**, Attorney, Covington, KY, former Kenton County Public Defender Administrator
- 1998 **COL. PAUL G. TOBIN**, former Executive Director of Jefferson District Public Defender's Office
- 1999 **ROBERT EWALD**, Chair, Public Advocacy Commission
- 2000 **JOHN M. ROSENBERG**, A.R.D.F. Director, Public Advocacy Commission Member

IN RE GAULT AWARD: FOR JUVENILE ADVOCACY

This Award honors the person who has advanced the quality of representation for juvenile defenders in Kentucky. It was established in 2000 by Public Advocate, Ernie Lewis and carries the name of the 1967 U.S. Supreme Court case that held a juvenile has the right to notice of charges, counsel, confrontation and cross-examination of witnesses and to the privilege against self-incrimination.

- 1998 **KIM BROOKS**, Director, N. Ky. Children's Law Center, Inc.
- 1999 **PETE SCHULER**, Chief Juvenile Defender, Jefferson District Public Defender Office
- 2000 **REBECCA B. DiLORETO**, Post-Trial Division Director

PROFESSIONALISM & EXCELLENCE AWARD

The *Professionalism & Excellence Award* began in 1999. The President-Elect of the KBA selects the recipient from nominations. The criteria is the person who best emulates Professionalism & Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism & Excellence: *prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. The person celebrates individual talents and skills, and works to insure; high quality representation of clients, and takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence.*

1999 **LEO SMITH**, Deputy, Jefferson Co. Public Defender Office

2000 **TOM GLOVER**, DPA Western Regional Manager

ANTHONY LEWIS MEDIA AWARD: Established in 1999, this Award recognizes in the name of the *New York Times* Pulitzer Prize columnist and author of *Gideon's Trumpet* (1964), the media's informing or editorializing on the crucial role public defenders play in providing counsel to insure there is fair process which provides reliable results that the public can have confidence in. **Anthony Lewis**, himself, has selected two recipients to receive the Award named in his honor in its first year, 1999:

1999 **JACK BRAMMER**, *Lexington Herald Leader*, March 5, 1999 article, "The Case of Skimpy Salaries: Lawyers for poor make little in Ky." AND **DAVID HAWPE**, Editorial Director, and **The Courier Journal** for their history of coverage of counsel for indigent accused and convicted issues from funding to the death penalty.

2000 **ROBERT ASHLEY**, Editor, *The Owensboro Messenger*

FURMAN CAPITAL AWARD

Established in 2000 by Public Advocate Ernie Lewis, it honors the person who has exhibited outstanding achievements on behalf of capital clients either through litigation or other advocacy. William Henry Furman's name appears in the landmark decision, *Furman v. Georgia*, 408 US 346 (1972) which abolished capital punishment in the nation for four years. Furman was a 26 year old African-American who had mental limitations and who finished the 6th grade. Today, Furman lives and works in Macon, Ga.

2000 **STEPHEN B. BRIGHT**, Director for the Southern Center



Ernie Lewis presenting Steve Bright with first DPA Furman Award

**STEVE BRIGHT PRESENTED
WITH FIRST WILLIAM HENRY FURMAN AWARD**

In 2000, Public Advocate Ernie Lewis established the *Furman Award*. The DPA Awards Committee recommended names to the Public Advocate and Steve Bright was chosen by Ernie Lewis as the inaugural winner of this important new award. Public Advocate Lewis presented the award at the June 2000 Annual Public Defender Conference in Covington saying, "Steve will forever define the award." Lewis continued, "This award was established to hold up advocacy on death penalty issues. William Furman was a 26 year old African American who had finished the 6th grade and who was charged with murder. *Furman v. Georgia*, 408 U.S. 346 (1972) abolished capital punishment in this country for 4 years. Steve has lived his life committed to this work. He grew up in Danville, was UK's Student Body President, attended UK Law School, and worked as a public defender at the Public Defender Service in Washington, D.C. In 1982, Steve took over the Southern Prisoners' Defense Committee and renamed it the Southern Center for Human Rights. He has litigated capital cases at trial, appellate, and post-conviction levels across the south ever since. He has brought up a generation of capital litigators. He is a tireless trainer and prolific writer whose words have been literally adopted by the likes of George Will and Gov. Ryan. Steve's a prophet. He's the nation's conscience on judicial independence, the politics of the death penalty, the shocking ineffectiveness of trial counsel in capital cases." Steve Bright has generously assisted Kentucky defenders with his teaching capital litigation skills, especially at DPA's week long Capital Litigation Institutes at Faubush, Ky. Defenders, indeed, all of Kentucky is honored to hold out Steve Bright and his values as those to be modeled by Kentucky defenders who stand up for those accused of capital crimes and the condemned. *Proximity to Death* is a recent book about Steve and his work.

CAPITAL CASE REVIEW SIXTH CIRCUIT COURT OF APPEALS

by Julia K. Pearson

***Gall v. Parker*, C F.3d C (October 30, 2000)**

Majority: Jones (writing), Martin

Minority: Guy (dissenting in part and concurring in part)

The Sixth Circuit reversed the district court's denial of Eugene Gall's petition for a writ of habeas corpus and remanded Gall's case for further mental competency proceedings. The central issue in the trial, and in the habeas appeal, was Gall's mental state at the time of the crime. *Gall v. Parker*, 2000 FED. App. 0379P (6th Cir.) See *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980) (*Gall I*); *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1984) (*Gall II*). The Court found little reason to doubt Gall's guilt in taking a young girl's life in the most cruel and grisly fashion. Still, the Sixth Circuit found serious errors due to Gall's mental state, and also errors in seating the jury, in proving the prosecution's case, and in prosecutorial misconduct.

COMPETENCY TO STAND TRIAL

The court appointed clinical psychologist Dr. Robert Noelker, to assess Gall's competency to stand trial. The prosecution hired psychiatrist Dr. Lee Chutkow for the same reason. Dr. Noelker first saw Mr. Gall on April 13, 1978, about ten days after the crime; he continued observing Mr. Gall throughout the trial. Dr. Chutkow examined Gall about a month after the crime.

At a competency hearing, Dr. Noelker stated that although Gall's verbal intelligence was high, he was a "severely disturbed, emotionally disturbed individual" who had a "schizophrenic paranoid type" of personality disorder. He said that Mr. Gall had no memory of the crime and that such amnesia was rare. However, Gall was competent to stand trial. Dr. Chutkow did not testify, but the prosecution introduced two reports from him stating his opinion that Gall was competent to stand trial. On September 13, 1978, at another pre-trial hearing, Dr. Noelker again found Mr. Gall competent to stand trial. *Gall*, slip op. at 7.

During trial, the question became somewhat more close, when, after several days of voir dire, Mr. Gall told the trial court he wished to become more active in his defense, to the point of questioning and cross-examining witnesses. After an exam by another psychiatrist and more testimony by Dr. Noelker, the court found Gall competent and the trial continued.

The Sixth Circuit agreed that the record fairly supported a conclusion that Gall was competent to stand trial, that is, he had a "sufficient present ability to consult with his lawyer

with a reasonable degree of rational understanding" and had "a rational as well as factual understanding of the proceedings against him." *Godinez v. Moran*, 509 U.S. 389, 396 (1993), quoting *Dusky v. United States*, 362 U.S. 402 (1960), slip op. at 7.

The trial court held a number of hearings regarding Gall's competence. Even after Dr. Noelker became convinced that Gall was incompetent, the trial court questioned Dr. Noelker about his findings and then questioned Mr. Gall regarding his desire to assist in his trial and his resistance to the insanity defense. After ordering the assistance of another mental health professional, the court finally made its finding that Mr. Gall was competent.

The same standard applies to a finding that a defendant is competent to waive his counsel. At the hearing, Mr. Gall told the court he knew he was on trial for murder and faced the death penalty; that his counsel had explained and he understood that taking part in the trial could be detrimental to his insanity defense, that he was doing so against the advice of his attorneys. After trial began, the court held another hearing, and the Sixth Circuit found the record supported the trial court's actions in ensuring Mr. Gall understood what he was doing and why. *Id.*, at 8.

ABSENCE OF EXTREME EMOTIONAL DISTURBANCE

Gall argued the Commonwealth did not establish an element necessary to prove the offense of murder beyond a reasonable doubt, *i.e.*, it had not proved there was an absence of extreme emotional disturbance, and had actually shifted the burden of proof on the EED element.

The Sixth Circuit examined Kentucky case law as it existed in 1978, at the time of Gall's trial, and found that *at that time* the Kentucky Supreme Court had held the absence of EED was an element of murder. The Court then found the Commonwealth's showing as to absence of EED was so lacking that no rational trier of fact could have found the required element beyond a reasonable doubt. Slip op. at 9, citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Kentucky case law at the time of Gall's trial also made it clear that a showing of a severe psychotic disorder was sufficient to establish EED. *Id.* Gall had established through the testimony of Dr. Noelker and Dr. Toppen that he suffered from chronic paranoid schizophrenia. The Commonwealth failed to rebut this testimony. Its witness, Dr. Chutkow, testified only that Gall was competent to stand trial and his entire

testimony was based, as he admitted, on an examination to determine Gall's competency, not whether he suffered from a mental disorder. *Id.*, at 11. The short-term observations of witnesses to Gall's later robbery and of the police who participated in a chase and later apprehension of Gall were not enough to rebut the expert evidence presented by his defense.

In *Gall I*, the Kentucky Supreme Court held that unless the evidence regarding EED is so probative that the defendant would be entitled to a directed verdict of acquittal on the murder charge, the prosecution was not required to prove its absence beyond a reasonable doubt. The Sixth Circuit found this reasoning violated *In re Winship*, 397 U.S. 358 (1970). *Id.*, at 13. The court should have adhered to Kentucky law at the time and addressed heads-on whether the prosecution met its burden. *Id.*, at 14-15.

In dicta, (in response to the dissent) the majority went on to discuss "the evolution of Kentucky EED case law" after the time of Gall's trial. *Id.*, at 15. The Court noted that it was not until *Wellman v. Commonwealth*, Ky., 694 S.W.2d 696 (1985), that Kentucky overruled prior decisions that had stated absence of EED was an element of murder, and for the first time held mental illness alone was not sufficient to show EED. It was also in *Wellman* that Kentucky's highest court established what later came to be called the "triggering event" requirement¹, by holding for the first time that there must be "probative, tangible and independent evidence of initiating circumstances, such as provocation" to establish EED. The Kentucky Supreme Court's official definition of EED which also did not use the phrase "triggering event" but required a "reasonable explanation or excuse" for the EED appeared in *McClellan v. Commonwealth*, Ky., 715 S.W.2d 464, 467 (1986). A rule requiring the prospective application of the new definition came about a year later. *Smith v. Commonwealth*, Ky., 734 S.W.2d 437, 449 (1987). The Sixth Circuit held that none of these later definitions and alterations apply to Gall, whose trial occurred in 1978. The court found that any application other than the one it made would be an *ex post facto* application of law. *Id.*, at 20, citing *Bouie v. Columbia*, 378 U.S. 347 (1964).

RIGHT TO AN IMPARTIAL JURY

During voir dire, prospective juror Barton acknowledged he had read about the Gall case in the newspaper and recited the facts he remembered: Gall's hometown, that Gall had a prior record for similar crimes, that the state police were involved in the case and that Gall was a father. He then stated that notwithstanding that knowledge, he could decide the case fairly and impartially.

The Court analyzed the argument under *Murphy v. Florida*, 421 U.S. 794 (1975) which states that qualified jurors need not have been in a vacuum in order to be seated on a case, the only requirement is that the juror be able to lay aside impressions or opinions and decide the case based squarely on the

facts. In *Murphy*, and in *Haney v. Rose*, 642 F.2d 1055 (6th Cir. 1981) and *Goins v. McKeen*, 605 F.2d 947 (6th Cir. 1979), the Supreme Court and the Sixth Circuit had set forth factors to be considered: the nature of the information, how probative the information was to the defendant's guilt, when and how the juror learned of the information, the juror's estimation as to how relevant the knowledge was to the decision he or she would be making, whether, during voir dire, the juror had said something indicating his or her partiality, the atmosphere of the community and the steps taken by the trial court in order to neutralize the situation. *Id.*, at 22. Although Barton did have special knowledge, there was sufficient support in the record to prove Barton was sufficiently impartial that the decision to seat him as a juror was proper.

Gall also argued that the post-conviction testimony of another juror, Palmer, that he was aware of Gall's parole status from another juror rendered his death sentence unconstitutional. The Court found that post-conviction hearings are permissible as a tool to investigate and remedy juror bias, underscoring the fact that these issues must continue to be raised in post-conviction. The court also found, under Federal Rule of Evidence 606 that most of Palmer's statements were not admissible because his answers involved the internal considerations of the jury, *i.e.*, the effect of knowledge of Gall's parole status on the jury's deliberations. *Id.*, slip op. at 38. See *Tanner v. United States*, 483 U.S. 107 (1987). The "external influences" on the jury, that is, "specific knowledge about or a relationship with either the parties or their witnesses."

PROSECUTORIAL MISCONDUCT

Though Gall's counsel had not objected to the claimed errors at trial, the Sixth Circuit found that because the Kentucky Supreme Court had rejected the claim on the merits, the issue was properly before it. The Court's analysis shows that for pre-AEDPA habeas cases, it will consider a procedural bar only when the state court "clearly and expressly" relies on the bar. The Kentucky Supreme Court's recitation of the issue: "To be mercifully brief, we do not find in this record any conduct by the prosecuting attorney that could be said to have been inconsistent with Gall's right to a fair trial" was not a clear and express reliance on the bar. *Id.*, at 23, citing *Gall I*.

In closing, the prosecutor referred a number of times to his personal beliefs and opinion. He stated that he was "not convinced" Gall was not just a very intelligent criminal; his skepticism of the results of intelligence and psychiatric testing; his beliefs about the credibility of Dr. Noelker. The prosecutor also mischaracterized evidence and testimony pertaining to Gall's evidence regarding EED and insanity. The Court found each instance to be "part of a broader strategy of improperly attacking" the insanity defense presented by criticizing its use. *Id.*, at 25. The Court acknowledged that prosecutors must strike hard blows against the defense presented, but stated that such blows should not turn into foul

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blows. The court's consideration of, and reversal, in part, on this issue, demonstrates the continuing viability of raising prosecutorial misconduct at trial, on appeal and at the post-conviction level.

CONFRONTATION CLAUSE VIOLATION

Dr. Chutkow did not testify in person, and the jury heard his testimony in a videotaped deposition. Based on Gall's presence and active participation in his trial, the Court rejected Gall's argument that he had not procedurally defaulted on the claim (because the error did not become clear until Dr. Chutkow was deposed during habeas proceedings in the district court). Although Gall did not meet the cause and prejudice exception to its consideration of the error, the Court examined the error as a fundamental miscarriage of justice, and found it was "more likely than not that no reasonable juror would have [voted to convict] absent the" error. *Id.*, at 29, quoting *Schlup v. Delo*, 513 U.S. at 327. Dr. Chutkow examined Gall only for competency to stand trial, and the Commonwealth could not rebut Gall's showing of insanity at the time he killed Lisa Jansen. Dr. Chutkow's testimony could have misled the jury into believing that he actually supported the Commonwealth's argument that Gall was legally sane at the time of the crime. But for the fact that Dr. Chutkow testified via videotape, more likely than not, Gall would have been acquitted.

PENALTY PHASE INSTRUCTIONS

Gall argued that portions of his penalty phase instructions prevented the jury from considering and giving weight to his mitigating circumstances. The Commonwealth argued that Gall had defaulted because he had not objected at trial or raised the issue in post-conviction. However, although Gall had not objected at trial, once again, the Kentucky Supreme Court did not clearly and expressly rely on a procedural bar to prevent its consideration of the claim, and reviewed the issue on the merits. *Gall I*, 607 S.W.2d at 112. The Sixth Circuit also acknowledged that because Gall had raised the claim on direct appeal, he could not then raise it in state post-conviction.²

The Commonwealth also argued that Gall could not rely on *Mills v. Maryland*, 486 U.S. 367 (1988), because that case announced a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989).³ *Mills* invalidated instructions that misled a jury to believe no mitigating evidence could be considered unless all twelve jurors were unanimous as to its existence.

The Sixth Circuit held *Teague* did not bar consideration of *Mills*, because *Mills* met both of the two exceptions to *Teague*: 1) it merely extended the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), which states that a juror cannot be precluded from considering any aspect of a defendant's character or record, or any other mitigating circumstances of the offense. And 2) consideration of mitigation in a death penalty case is so necessary to fundamental fairness and accuracy that it is a "watershed rule of criminal procedure." Slip op. at 31.

The Court found no constitutional error in the instruction that

the jury had to find the existence of mitigation by a preponderance of the evidence. Also, the instruction that the jury "may" consider mitigating factors was also not error, because the court was merely describing what the jury could consider as mitigation, not that it was limited to only the four factors listed.

The trial court's Instruction VI informed the jury that its "findings and verdict must be unanimous...." and the verdict form asked five questions the jury had to answer, based upon the instructions given to it. Both violated the dictates of *Lockett*, *Mills*, and *McKoy*. "Just as in *Mills*," a reasonable juror sitting in judgment of Gall would have assumed that because the court had instructed him or her that the findings and verdict must be unanimous, any finding regarding mitigation also had to be unanimous, whether the juror was answering Question Number 2 (EED); Number 3 (whether Gall was legally insane when he committed the offense); Number 4 (age as a mitigating factor); or Number 5 (any other mitigation found). *Id.*, slip op. at 34. As with prosecutorial misconduct, the court's reversal shows that attorneys must continue to raise jury unanimity and other jury instruction issues at trial, on appeal and in post-conviction.

WITHERSPOON EXCLUSION

During voir dire, a venireman, Correll, told the court that he was undecided about the death penalty, but that his mind was not closed. Several times, he said that he possibly felt the death penalty was appropriate in certain factual situations. Thus, he did not meet the *Wainwright v. Witt*, 469 U.S. 412 (1985) standard for exclusion because he was not "so irrevocably opposed to capital punishment" that he could not sit on a capital sentencing-jury. His answers likewise showed a juror who would "conscientiously" apply the law and the facts. *Id.*, slip op. at 37.

JURY CONSIDERATION OF EXTRANEOUS INFORMATION

The Court took Gall's argument that the jury's consideration of his parole status violated his right to an impartial jury, confrontation, and cross-examination, and considered it instead as an issue involving jury consideration of extraneous information. There was no mention in the record that Gall was on parole at the time of the rape and murder of Lisa Jansen. The closest mention was his mother's penalty phase testimony that he had been "released." Thus, the information Jurors Barton and Palmer had was certainly extraneous to the trial.

During the deliberations, the jury asked the judge a question regarding Gall's parole eligibility. At the time, Kentucky law provided that juries could not consider a defendant's parole eligibility, and the trial court answered it would be error to comment regarding parole. The 6th Circuit found that when faced with a question of that sort, the judge's admonition to the jury should have been more forceful that the jury

could not consider parole.

The court granted relief since the prejudicial extraneous parole evidence had substantial and injurious influence in the jurors' determining their sentence verdict as this allowed the "considering on aggravating factor beyond what was presented at trial, and which the lawyers had been forbidden from discussing...." Slip opinion at 108.

CONCLUSION

In its conclusion, the majority found that the overwhelming evidence from the record was that Gall was not sane at the time of the rape and murder of Lisa Jansen; that he is permanently mentally ill, and would be dangerous if released. Taking those factors into consideration, the court conditionally granted Gall's petition for habeas, provided the Commonwealth of Kentucky conducts an involuntary hospitalization proceeding under KRS 504.030 in order to determine whether Gall should be confined until he is no longer a danger to himself or society.

CONCURRING IN PART, DISSENTING IN PART

Judge Guy concurred on the *Witherspoon*, *Mills* and extraneous parole evidence issues. He noted the unusual remedy the majority had fashioned by implicitly finding that double jeopardy would bar a retrial, finding Gall insane, and then ordering an involuntary hospitalization proceeding.

Relying on *Wellman v. Commonwealth*, Ky., 694 S.W.2d 696 (1985), decided some four years after *Gall I*, the dissent believes that Kentucky law requires a showing of some provocation for the EED before that defense to murder becomes viable. *Gall v. Parker*, slip op. at 41.

The jury was not obliged to find Gall insane, because they had a rare opportunity to observe him in action during the trial. The prosecution's theory was that Gall was faking his amnesia surrounding the events of the Jansen murder; and the commonwealth certainly should have been allowed to argue inferences rising from this theory. Although there were no witnesses to the murder, the jury heard witnesses to Gall's robbery of a store and shooting a police officer during the chase, and could consider that Gall remembered events which had been witnessed. Considering that Gall was an active participant in his trial and that Gall was attempting a full acquittal, the prosecutors' attack on the expert testimony was legitimate to keep the jury from confusing Gall's apparent mental illness with the question of his sanity at the time of the events. *Id.*, at 46.

Further, the prosecutor's injection of his personal belief was harmless error. The prosecutor did not vouch for the credibility of a witness; rather, he commented on the expert testimony. Once again, Judge Guy felt the majority did not lend the proper deference to the Kentucky Supreme Court's decision on this issue, which, as he noted, the court "thought so little of. . . that it spent little or no time discussing them." *Id.*, at 47.

The dissent found the issue regarding the error in admitting Dr. Chutkow's deposition rather than his live testimony to be result-oriented, and felt the majority just needed to find a way to keep Gall in custody, after vacating his murder conviction. Gall's case was assisted by Dr. Chutkow's videotaped testimony; had Chutkow testified in person, his testimony would have touched on Gall's sanity, rather than simply on his competency to stand trial.

***Skaggs v. Parker*, __F.3d __ (rendered October 31, 2000)**

Electronic citation: 2000 FED App. 0380P (6th Cir.)

Merritt, Nelson, Cole

David Skaggs received ineffective assistance of counsel at the penalty phase of his capital trial; the district court's denial of his petition for a writ of habeas corpus is therefore reversed.

THE MENTAL HEALTH EXPERT WHO WAS NOT

During Skaggs' trial, Elya Bresler, who claimed to be a licensed clinical and forensic psychologist and who had been hired as a defense psychiatrist testified that Skaggs suffered from a "depressive disorder" and a "paranoid personality disorder," both of which would have affected his ability to appreciate the criminality of his actions and to conform his actions to the requirements of the law. At times during his testimony, Bresler rambled, was confusing and incoherent. By contrast, prosecution psychiatrist Dr. Pran Ravani, testified that although Skaggs had a history of alcohol abuse and displayed a "schizophrenic trend," he was, nevertheless, able to tell right from wrong. After Skaggs was convicted of murder and robbery, because of his poor performance in the guilt phase, defense counsel did not use Bresler at the penalty phase. After the jury could not agree on a sentence, the court set a time four months later for a retrial of the penalty phase. *See Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672 (1985).

At that new penalty phase, defense counsel presented Mr. Skaggs' father, who testified about his son's birth in "an insane asylum" and the circumstances of his childhood and criminal record. Dr. Bresler gave essentially the same poor testimony as he had at trial. In rebuttal, the prosecution used Dr. Ravani, who stated again that Skaggs knew right from wrong.

In state post-conviction, Skaggs discovered that Bresler was a charlatan who had no post-secondary training save two years of college in which he majored in English. In addition, Skaggs offered the evaluation of two psychiatric experts, both of whom stated that Skaggs was mildly mentally retarded, and one of whom stated that Bresler's testimony "was 'so far below the standard of care as to totally misrepresent Mr. Skaggs to the jury.'"

CERTIFICATE OF APPEALABILITY

Skaggs filed his petition in January 1996, about four months before the new federal habeas law (AEDPA) was signed. The

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District Court denied his petition in 1998 and issued a Certificate of Probable Cause to appeal on every issue contained in his habeas petition. *Skaggs v. Parker*, W.D. Ky., 27 F.Supp. 952 (1998). Although pre-AEDPA law governs his entitlement to habeas relief, the certificate of appealability (COA) requirements set forth in the AEDPA⁴ apply to his entitlement to be heard on appeal from denial of that petition. *Skaggs*, slip op. at 4, citing *Slack v. McDaniel*, 120 S.Ct. 1595, 1602 (2000).

The Sixth Circuit did not address whether a COA should have issued for each claim in *Skaggs*' habeas petition. Instead, it said that only one issue would be discussed, penalty phase IAC, which did meet the requirements for a COA.

GUILT PHASE IAC CLAIM

Skaggs claimed that his trial counsel were ineffective for failing to investigate Dr. Bresler's credentials and background before he testified. During the hearing conducted in the district court, one of his trial counsel testified that she and her co-counsel had a difficult time finding anyone to agree to evaluate and testify for Mr. *Skaggs*. She also testified that she had done no background check on Dr. Bresler, but that she had used him in presenting another insanity defense several years before and he had performed well. She also relied on recommendations from two other Department of Public Advocacy attorneys who had used Dr. Bresler. *Skaggs*' other trial counsel testified that he, too, was familiar with Dr. Bresler.

The court found that counsels' initial decision to use Bresler, based upon their familiarity with him and recommendations from other attorneys, was reasonable under *Strickland v. Washington*, 466 U.S. 668 (1984). Both counsel found Bresler in "much the same way many trial attorneys obtain an expert: through recommendations from colleagues and general familiarity within the legal community. . . . counsel could have taken more time and given more thought to their expert witness", but their actions did not fall below the standard of reasonableness set forth in *Strickland*. *Skaggs*, slip op. at 6.

PENALTY PHASE IAC-STRICKLAND CAUSE

However, after having observed Bresler's bizarre and eccentric testimony, counsel had a duty to find a different psychiatric expert for the retrial of the penalty phase. Counsel had a responsibility to present "meaningful mitigating evidence." *Id.*, slip op. at 7. The court found that the failure to present available mitigating evidence was, in his case, an "abdication of advocacy." *Id.*, quoting *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997).

Counsel testified at the hearing that she and her co-counsel had decided not to use Dr. Bresler at the penalty phase because of his poor performance at the guilt phase. However, before the retrial of the penalty phase, they had decided because they had faced difficulties in obtaining the funding for and finding an expert willing to testify for Mr. *Skaggs*, they would attempt to obtain more money for Dr. Bresler to testify

at the new penalty phase. Thus, because they acknowledged that Bresler was not a competent witness and had "made a mockery of the first trial," primarily because they waited so long to find another witness, counsel's decision could not be considered as reasonable.

PENALTY PHASE IAC-STRICKLAND PREJUDICE

The Court reiterated that the standard for proof of a different result is not a preponderance of the evidence, but only a reasonable probability. *Id.*, slip op. at 9, citing *Williams v. Taylor*, 120 S.Ct. 1495, 1515 (2000). The Court also reaffirmed that when examining penalty phase issues, the determination is on a case-by-case basis. *Id.*, citing *Gregg v. Georgia*, 428 U.S. 153 (1976).

The citation to *Gregg* is a sign that at least three members of the Court have heard the argument capital practitioners have made since 1976: that penalty determinations are made based upon the individual characteristics of the defendant. In this case, the court instructed the jury on two mitigating factors: extreme emotional disturbance and mental disease or defect. As support for these factors, counsel presented Dr. Bresler, which, in effect, left the jury with "essentially no mitigating evidence at all," especially on *Skaggs*' mental condition. *Id.*, slip op. at 9.

ENDNOTES

1. The words "triggering event" do not appear in a Kentucky case to describe the requisite "initiating circumstances" until *Foster v. Commonwealth*, Ky., 827 S.W.2d 670, 678 (1991)
2. For post-conviction practitioners, it is important to examine both the direct appeal opinion and briefs to determine whether, and how, an issue has been raised in post-conviction.
3. "New rule" is that which "breaks new ground or imposes a new obligation on the states or federal government." *Teague*, 489 U.S. at 301.
4. COA may issue only upon a "substantial showing of the denial of a constitutional right" and must "indicate which specific issue or issues satisfy the showing required." ■

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6th Circuit Review

by Emily Holt

U.S. v. Smithers

212 F.3d 306 (6th Cir. 5/8/00)

Admissibility of Expert Eyewitness Testimony

In this case the Sixth Circuit held the *Daubert* test, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993), should be applied by trial courts in determining the admissibility of expert eyewitness testimony. *Daubert* requires that trial courts perform a two-step inquiry to “ensure that any and all scientific testimony or evidence is not only relevant, but reliable.” *Id.*, 509 U.S. at 589. Trial courts must first determine the expert’s testimony reflects scientific knowledge. The trial court must then decide if the testimony is relevant and will aid the trier of fact.

The *Smithers* decision includes a veritable bibliography of cases and treatises addressing the reliability of eyewitness testimony. The Sixth Circuit acknowledges that the modern trend is to allow expert testimony on eyewitness identification in certain circumstances: “[t]his jurisprudential trend is not surprising, in light of modern scientific studies which show that, while jurors rely heavily on eyewitness testimony, it can be untrustworthy under certain circumstances.”

Luberda v. Trippett

211 F.3d 1004 (6th Cir. 5/10/00)

Luberda filed his direct appeal to the Michigan Court of Appeals in March 1989. In October 1989, Michigan Court Rule 6.508 was enacted. It provides that the reviewing court on collateral review will not consider errors that could have been raised on direct appeal but were not unless the defendant can demonstrate cause and prejudice. In November 1990, Luberda’s direct appeal was submitted to the Michigan Court of Appeals. It was denied, except for a remand for resentencing, in 1991.

In 1994, Luberda filed a motion for collateral review with Michigan state courts. This motion raised constitutional claims that were not raised on direct appeal. On appellate review after the trial court’s dismissal, the Michigan Court of Appeals affirmed, stating that Luberda failed to demonstrate cause why he failed to raise the arguments on direct appeal.

“Firmly Established” Procedural Rule as “Adequate and Independent State Ground” to Preclude Federal Habeas Review

Generally, federal courts cannot act upon habeas petitions raising claims denied by the state court if the state court relied on an “adequate and independent state” procedural bar in its denial. *Rogers v. Howes*, 144 F.3d 990 (6th Cir. 1998). “Only a ‘firmly established and regularly followed state practice’ may be interposed by a State” to bar federal habeas review. *Ford v. Georgia*, 498 U.S. 411, 423-24, 112 L.Ed.2d 935, 111 S.Ct. 850 (1991) (citations omitted). In determining how “firmly established” the state procedural rule is the reviewing court must determine whether the petitioner could be “deemed to have been apprised of” [the procedural rule’s] existence” at the time of state’s action or inaction *Id.*, 423.

How “firmly established” can a rule be if the petitioner was convicted prior to the procedural rule’s enactment? The Sixth Circuit rejected the petitioner’s “date of conviction” rule and declined to adopt any *per se* approach. Instead the Court held federal courts must make the determination on a case-by-case basis, looking at the facts of the case and the type of procedural rule at issue. The Court determined that M.C.R. 6.508 was a “firmly established” rule in Luberda’s case despite the fact that the procedural rule was not enacted until after he filed his direct appeal: “there is no reason why after the enactment of M.C.R. 6.508 in October 1989, Luberda could not have requested permission to add the constitutional arguments raised in the present petition prior to the submission of his direct appeal in November 1990.” Direct appeal attorneys may want to cite this decision in motions to file supplemental briefs.

Harris v. Stovall

212 F.3d 940 (6th Cir. 5/18/00)

This decision provides guidance as to the application of 28 U.S.C. § 2254(d) in light of *Terry Williams v. Taylor*, 529 U.S. 362, 146 L.Ed.2d 389, 120 S.Ct. 1495 (2000). Harris was convicted in Michigan state court of first-degree felony murder and received a life sentence. He claimed on federal habeas review that he was denied due process of law when not provided with free transcripts from his co-indictees’ trial for impeachment purposes. The district court held preliminary hearing transcripts were an adequate alternative to trial transcripts. The Sixth Circuit found the district court incorrectly applied AEDPA standards but reached the correct substantive result.

“Reasonable Jurist” Standard is Rejected

The “reasonable jurist” standard under 28 U.S.C. 2254(d)(1) adopted by the Sixth Circuit in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir.), *cert. denied*, 527 U.S. 1004, 144 L.Ed.2d 237, 119 S.Ct. 2340 (1999), and *Maurino v. Johnson*, 210 F.3d 638 (6th Cir. 2000), was expressly rejected by the Supreme Court in

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Terry Williams. Federal courts' inquiry as to whether a trial court's decision "involved an unreasonable application" of federal law should be objective not subjective.

Application of § 2254(d) When No State Court Decision to Review

The Court considered how to apply § 2254(d) when there is no state court decision to review. Although Harris did raise the transcript issue on direct appeal, the Michigan Court of Appeals summarily denied relief, and the Michigan Supreme Court denied leave to appeal. Thus, there was no state court decision articulating the reason for the denial. The Sixth Circuit determined that when a state court "has not articulated its reasoning, federal courts are obligated to conduct an independent review of the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented."

Meaning of "Clearly Established Federal Law"

The district court relied on *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971), and various lower federal court decisions to determine that Harris was not entitled to a transcript from his co-indictees' trial. The Sixth Circuit held that the district court misinterpreted the meaning of "clearly established federal law as determined by the Supreme Court of the United States." § 2254(d). First, federal courts can only consider U.S. Supreme Court decisions and should also limit consideration to holdings, not *dicta*, at the time of the state court's decision.

Further, in *Williams*, the U.S. Supreme Court held "whatever would qualify as an 'old rule' under *Teague*" will be "clearly established Federal law." In other words, the relief requested is an old rule if the rule desired by the petitioner was "dictated or compelled by" the case in question. The Court concluded that *Britt* did not compel the state court to provide Harris with a copy of the transcript from his co-indictees' trial.

In Re: Cook

215 F.3d 606 (6th Cir. 6/6/00)

In 1988, Cook was convicted in Tennessee state court of various sexual offenses. In 1996 Cook filed a writ of habeas corpus under 28 U.S.C. § 2254; the district court denied the application. In 1999, Cook filed another § 2254 petition in federal district court. The court, treating it as a motion requesting permission to file a second petition pursuant to 28 U.S.C. § 2244(b)(2), forwarded the petition to the Court of Appeals.

"Second or Successive Habeas Corpus Application" Under § 2254

For the Sixth Circuit to consider granting permission to file a second or successive petition for writ of habeas corpus, it must determine that the application is "a second or successive habeas corpus application under § 2254." 28 U.S.C. § 2244(b)(2). The Sixth Circuit has previously held "a habeas petition filed after a previous petition has been dismissed [for failure to exhaust state remedies] is not a 'second or successive' petition implicating the pre-filing requirement of obtaining an order of authority from the court of appeals." *Carlson v. Pitcher*, 137 F.3d 416 (6th Cir. 1998). The rationale behind this holding is that the denial was not a disposition "on the merits." The petitioner could return to state court, exhaust his claims, and re-file. The petitioner is "making one challenge with multiple stages."

In this case, Cook's initial habeas petition was denied because of unexcused procedural default arising from failure to exhaust state remedies where the statute of limitations had run on the state remedies. The Sixth Circuit held denial on the basis of unexcused procedural default is a disposition on the merits. Because Cook procedurally defaulted on his claims and the district court found no cause or prejudice for the default, Cook has forfeited federal habeas review. The current petition is a completely new challenge to Cook's conviction. Thus, the Court of Appeals must authorize the district court to consider the second application. § 2244(b)(3). It declined to do so.

Rockwell v. Yukins

217 F.3d 421 (6th Cir. 6/29/00)

Rockwell was convicted in Michigan state court of conspiracy to commit murder on the basis that she discussed murdering her husband with her sons. Her defense at trial was that her husband had sexually abused their sons and the discussions that she had with her sons about murdering their father were therapy. Rockwell had to prove that her sons were sexually abused. The trial court excluded this evidence, and Rockwell was convicted and sentenced to life in prison.

In March 1997, Rockwell filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. She raised two issues: sufficiency of the evidence and the trial court's ruling excluding evidence of sexual abuse. Both issues had been exhausted in state court. In June 1997 Rockwell filed a motion to amend her petition to include an unexhausted claim involving jury instructions. The state failed to object, and the district court granted the motion to amend the petition.

In 1999, the district court granted Rockwell's habeas petition on the claim that her due process right to a defense was violated by the trial court's exclusion of the sexual abuse evidence. The district court excused the failure to exhaust

the third claim. The state appealed both the due process determination and the failure to dismiss.

“Mixed” Petitions Under AEDPA

A habeas petitioner cannot file a “mixed” petition containing both exhausted and non-exhausted claims. *Rose v. Lundy*, 455 U.S. 509, 518-519, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982). This requirement is not jurisdictional; however, a petition containing unexhausted claims will normally not be considered absent “unusual” or “exceptional” circumstances. *Granberry v. Greer*, 481 U.S. 129, 95 L.Ed.2d 119, 107 S.Ct. 1671 (1987). In *Granberry*, the state waived the non-exhaustion defense. Since *Granberry*, AEDPA has been amended and the state must expressly, through counsel, waive the defense of non-exhaustion. Mere failure to object, as occurred here, is not sufficient.

The Sixth Circuit held that the district court should have denied the motion to amend the petition. Rockwell could have then proceeded in federal district court on her two original exhausted claims or she could have withdrawn her habeas petition, returned to state court and exhausted her remedies. The Sixth Circuit expressly noted the fact that one of the exhausted claims provided meritorious grounds was not sufficient to make this an “exceptional” case under *Granberry*.

Seymour v. Walker

224 F.3d 542 (6th Cir. 8/16/00)

Seymour was convicted in Ohio state court of voluntary manslaughter and firearm specification for the shooting death of her husband. On federal habeas review, the district court denied her petition after considering all 46 claims of error, finding some to be procedurally defaulted and others to be without merit.

Ineffective Assistance of Appellate Counsel as “Cause” for Procedural Default

Failure to obtain consideration of a claim in state court procedurally defaults the claim for federal habeas review. To avoid procedural default, the petitioner must show cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 87, 90-91, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). On appeal of the denial of her habeas petition, Seymour argued the cause for her default was ineffective assistance of appellate counsel: appellate counsel was restricted to thirty-five pages in the brief and had to eliminate some claims; appellate counsel’s motion to correct errors in the transcript was denied; and appellate counsel was unavailable for communication with Seymour during the eight days the appellate brief was being prepared and filed.

The Sixth Circuit held that for ineffective assistance of appellate counsel to serve as cause it must rise to the level of violation of sixth amendment rights. *Murray v. Carrier*, 477 U.S. 478, 488, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986). Thus,

Seymour must satisfy the *Strickland* standard. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). She has not done so. The errors claimed by Seymour do not amount to constitutionally deficient appellate counsel performance. Furthermore, Seymour must have raised the ineffective assistance of appellate counsel claim in state court for it to serve as her “cause” for procedural default. She did not.

U.S. v. Corrado

2000 U.S. App. LEXIS 21401
(6th Cir. filed 8/24/00,
corrected 10/12/00)



Emily Holt

Corrado, Tocco, and Giacalone were convicted of conspiracy under RICO. Two days before closing arguments, Khalid Shabazz approached Corrado and told him he had a friend on the jury and for money Corrado could obtain a favorable verdict. Corrado immediately informed the court and the government. A sting operation occurred and Shabazz was arrested. A newspaper article about the bust was on the front-page of two Detroit newspapers. It falsely reported that Corrado was arrested as well.

Corrado and Tocco moved for a mistrial. The motion was overruled. The trial court asked the jurors in open court if anyone either outside the jury or on the jury had tried to influence them or if there was any reason that each juror could no longer serve as a fair and impartial juror. He gave them a 15-minute recess in which they could individually contact the trial court. No juror responded. The defendants were convicted on all counts. Shabazz plead guilty to obstruction of justice, admitting that he offered juror Edward Kennedy \$25,000, in exchange for a “not guilty” verdict.

Remmer Hearing Required When Credible Allegations of Juror Misconduct

Corrado and Tocco argued that their sixth amendment right to an impartial jury was violated by possible jury misconduct. The Sixth Circuit noted the trial court’s approach to the problem was “an inadequate response to the serious and credible allegations of extraneous influences on the jury.” Pursuant to *United States v. Rigsby*, 45 F.3d 120, 124-25 (6th Cir. 1995), the trial court was under a duty to investigate the allegations of the jury tampering. The court should have also investigated the possibility of improper influence as a result of the misleading newspaper articles. *United States v. Rugiero*, 20 F.3d 1387, 1390-1391 (6th Cir. 1994).

In *Remmer v. United States*, 347 U.S. 227, 230, 98 L.Ed. 654, 74 S.Ct. 450 (1954), the Supreme Court held when jury miscon-

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duct is credibly alleged a hearing is required “to determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.” It was an abuse of discretion for the trial court to fail *sua sponte* to order an evidentiary hearing.

The Sixth Circuit noted that the approached juror has now been identified. The fact that he was an alternate juror is irrelevant. He could have still influenced the jury. Even the fact that the juror would have been trying to sway the jurors to acquit does not excuse the prejudice as jurors could have believed the defendants were behind the scheme.

U.S. v. Rebmann

226 F.3d 521 (6th Cir. 8/28/00)

In this case the Sixth Circuit applied the Supreme Court ruling in *Apprendi v. New Jersey*, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000), to a sentence enhancement under the federal sentencing guidelines. Although this case is not related to Kentucky state law practice, it is noteworthy in that it shows how federal courts will handle *Apprendi*.

Pursuant to a plea agreement, Rebmann plead guilty to heroin distribution. Under the agreement, her maximum term of imprisonment for the distribution was to be 20 years; however, if the district court found that death resulted from the distribution, she would be sentenced 20 years to life. The court, by a preponderance of the evidence, found Rebmann’s ex-husband’s death was caused by heroin distribution and she was sentenced to a term of 24 years and 4 months.

Application of *Apprendi* to Factual Determinations Under Sentencing Guidelines

In *Apprendi*, the Court held “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi*, 120 S.Ct. at 2355, quoting *Jones v. U.S.*, 526 U.S. 227, 243 143 L.Ed.2d 311, 119 S.Ct. 1215 (1999). The Sixth Circuit determined in light of this holding its duty is “to examine whether the sentencing factor in this case was a factual determination, and whether that determination increased the maximum penalty for the crime charged in the indictment.” The Court then held that the determination that death resulted from the heroin distribution was a factual determination and the factual determination significantly increased the maximum penalty. Thus, they were elements of an offense.

Waiver of Jury Trial Not Conclusive

In her plea agreement Rebmann waived her right to a jury trial on the issue of whether the distribution caused death. The

Court determined that she did not, however, waive her right to have a court decide the elements of the offense beyond a reasonable doubt. The Court accordingly reversed petitioner’s sentence and remanded for a determination of whether petitioner’s ex-husband’s death was caused by the distribution of heroin beyond a reasonable doubt.

Wheeler v. Jones

226 F.3d 656 (6th Cir. 9/11/00)

Wheeler was convicted in 1971 of first-degree murder and sentenced to life without the possibility of parole. He did not exercise his right to a direct appeal. In 1977, Wheeler filed an application for delayed appeal. The Michigan Court of Appeals remanded his case to the trial court to determine if Wheeler had been competent to stand trial *nunc pro tunc*. The trial court found him competent to stand trial; that ruling was not appealed.

In 1988 Wheeler filed a second application for delayed appeal, alleging ineffective assistance of counsel and prosecutorial misconduct. The Michigan Court of Appeals denied the application. Wheeler appealed to the Michigan Supreme Court which held that his case warranted further review and remanded it to the Court of Appeals which in turn remanded it to the trial court. The trial court conducted a hearing on the ineffective assistance of counsel claims and found no merit. The Michigan Court of Appeals affirmed and the Michigan Supreme Court denied leave to appeal.

In 1997 Wheeler filed a federal habeas petition raising four claims, including a challenge to jury instructions based on *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979). The district court denied relief on the basis that because Wheeler’s conviction was final in 1971 he could not take advantage of a 1979 rule.

Delayed Appeal Does Not Affect Finality of Conviction for Retroactivity Analysis

The sole issue for the Sixth Circuit’s consideration was whether Wheeler’s conviction was final in 1979 when *Sandstrom* was decided. In *Caspari v. Bohlen*, 510 U.S. 383, 127 L.Ed.2d 236, 114 S.Ct. 948 (1994), the Supreme Court held “a state conviction becomes final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.” The Sixth Circuit held Wheeler’s conviction was final forty-two days after the verdict was returned which is when his time for filing a direct appeal as a matter of right to the Michigan Court of Appeals expired. The fact that he was allowed to file a delayed appeal is irrelevant.

Isham v. Randle

2000 U.S. App. LEXIS 22934 (6th Cir. 9/13/00)

**Time in Which Petitioner Can Petition for
Writ of Certiorari Does Not Toll § 2244(d)(2)
Statute of Limitations**

Isham argues that the time in which he could have petitioned the U.S. Supreme Court for writ of certiorari should toll the statute of limitations under § 2244(d)(2). The Sixth Circuit rejected this argument. § 2244(d)(2) expressly states “state post-conviction or other collateral relief.” A petition for writ of certiorari to the U.S. Supreme Court is not an application for state relief. Furthermore, § 2244(d)(1)(A) includes the period of time during which a petition for writ of certiorari can be filed. If Congress wished for § 2244(d)(2) to include such language it would have written the statute that way. Finally filing a petition for writ of certiorari is not a requirement for federal habeas review.

Vincent v. Seabold226 F.3d 681 (6th Cir. 9/13/00)

On federal habeas review of his Kentucky convictions for murder, robbery and burglary, Vincent asserted his sixth amendment right to confrontation was violated when the trial court allowed KSP Detective Gaddie to testify to post-arrest, custodial hearsay statements made by co-indictee Kinser. Vincent had filed a motion *in limine* to exclude Kinser’s confession but the trial court overruled the motion under *Taylor v. Commonwealth*, Ky., 821 S.W.2d 72 (1991), *cert. denied*, 502 U.S. 1100, 117 L.Ed.2d 428, 112 S.Ct. 1185 (1992), *overruled on other grounds*, *St. Clair v. Roark*, Ky., 10 S.W.3d 482 (1999). Defense counsel argued Kinser’s confession was not a statement against penal interest under KRE 804(b)(3) because Kinser minimized his own participation while inculpating Vincent and Johnson. The trial court held it was sufficiently against Kinser’s penal interest because he indicated he was an active and willing participant in the crime and made no attempt to prevent the injuries to the victim. Gaddie was allowed to testify as to Kinser’s confession.

KRE 804(b)(3): Statement Against Penal Interest

In *Williamson v. U.S.*, 512 U.S. 594, 129 L.Ed.2d 476, 114 S.Ct. 2431 (1994), the U.S. Supreme Court addressed statements against penal interest. As to what a “statement” under Rule 804(b)(3) is “. . . the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it part of a fuller confession, and this is especially true when the statement implicates someone else.” *Williamson*, 512 U.S. at 599, 600-601. Analysis of a statement requires that the court examine the circumstances in which the statements were made. *Id.*, 603-604.

Under *Williamson* and *Lilly v. Virginia*, 527 U.S. 116, 134, 144 L.Ed.2d 117, 119 S.Ct. 1887 (1999), accomplice’s statements are to be considered presumptively unreliable. To rebut the presumption, a reviewing court must examine the “indicia of reliability” associated with each declaration made by the accomplice. In the case at bar, the Sixth Circuit determined it must “bear in mind that it is highly unlikely that Kinser’s post-arrest, custodial statements, which clearly shift the brunt of the blame to defendants Vincent and Johnson, effectively can be rebutted.”

The Sixth Circuit concluded that although Kinser’s confession in its entirety was inculpatory in that it placed him at the crime scene, many statements were exculpatory in that they placed blame on Vincent and Johnson. *Williamson* requires each statement be self-inculpatory.

U.S. v. Hayes

2000 U.S. App. LEXIS 23197 (6th Cir. 9/14/00)

**No “Dangerous Patient” Exception to
Psychotherapist/Patient Privilege**

The Sixth Circuit declined to recognize a “dangerous patient” exception to the psychotherapist/patient privilege. The government argued the U.S. Supreme Court established a “dangerous patient” exception to the privilege in the following footnote in *Jaffee v. Redmond*, 518 U.S. 1, 15, 135 L.Ed.2d 337, 116 S.Ct. 1923 (1996): “We do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or others can be averted only by means of a disclosure by the therapist.” *Id.*, at 18, n. 19.

The Sixth Circuit observed that recognition of a “dangerous patient” exception would have a chilling effect on the psychotherapist/patient relationship. The Court determined that the *Jaffee* footnote is referring to a situation in which a therapist would be testifying in an involuntary hospitalization hearing, not a criminal trial. The Sixth Circuit held “the federal psychotherapist/patient privilege does not impede a psychotherapist’s compliance with his professional and ethical duty to protect innocent third parties, a duty which may require, among other things, disclosure to third parties or testimony at an involuntary hospitalization proceedings. Conversely, compliance with the professional duty to protect does not imply a duty to testify against a patient in criminal proceedings or in civil proceedings other than directly related to the patient’s involuntary hospitalization, and such testimony is privileged and inadmissible if a patient properly asserts the psychotherapist/patient privilege.” *U.S. v. Snellenberger*, 24 F.3d 799 (6th Cir. 1994), is no longer good law to the extent it held that once the state statutory “duty to protect” has attached, the privilege ceases to apply.

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Boggs v. Collins

226 F.3d 728 (6th Cir. 9/18/00)

Boggs was convicted of rape, kidnapping and felonious assault of Elizabeth Berman by an Ohio state court. There was no physical evidence found in Berman's apartment indicating that a rape had occurred. Ms. Berman had a history of mental illness and was a drug abuser.

Boggs wished to introduce evidence, through cross-examination of Ms. Berman and two other witnesses' testimony, about an incident in which Berman had falsely accused a man of rape approximately one month before this rape had allegedly occurred. The trial court prohibited any questioning about the alleged incident.

Confrontation Clause Not Violated When Defendant Barred From Presenting False Accusation Evidence

The Sixth Circuit determined in light of U.S. Supreme Court precedent the Constitution was not violated when Boggs was barred from cross-examining Berman about prior false accusations. A confrontation clause violation is shown when the defendant is foreclosed from cross-examining a witness on "a prototypical form of bias": cross-exam as to bias, motive, or prejudice is constitutionally protected, but cross-exam as to general credibility is not. *Delaware v. Van Arsdall*, 475 U.S. 673, 678-679, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986). An attack on general credibility occurs when a party "intends to afford the jury a basis to infer the witnesses' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." *Davis v. Alaska*, 415 U.S. 308, 316, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974). Boggs' desired cross-examination would only attack Berman's general credibility. To prevail, Boggs must have articulated that the cross-examination would go to bias, motive, or prejudice.

McMeans v. Brigano

2000 U.S. App. LEXIS 24884 (6th Cir. 10/5/00)

Claims Must Be "Fairly Presented" to State Court

This is a case direct appeal attorneys must be familiar with. On federal habeas review, the district court ruled McMeans "failed to present" his confrontation clause claim to Ohio courts. A claim is only "fairly presented" if the petitioner asserted the factual and legal basis for his claim to the state courts. *Franklin v. Rose*, 811 F.2d 322, 325 (6th Cir. 1987). "General allegations of the denial of rights to a 'fair trial' and 'due process' do not 'fairly present' claims that specific constitutional rights were violated." *Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2nd Cir. 1984). The Sixth Circuit determined that petitioner did not "fairly present" his confrontation clause claim because on direct appeal he focused exclusively on Ohio's rape shield law. No federal precedent was cited and he merely alleged the

trial court's limits on cross-exam "denied him a 'fair trial' and 'due process.'" This is not enough to alert a state court that appellant is asserting violation of a specific constitutional right. "[A] few brief references to the confrontation clause in isolated cases is [not] enough to put state courts on notice that such a claim has been asserted."

The fact that the Ohio Court of Appeals mistakenly stated in an opinion that petitioner raised the confrontation clause issue on direct appeal does not change the fact that the claim was not "fairly presented."

McGhee v. Yukins

2000 U.S. App. LEXIS 24937 (10/6/00)

"Unreasonable Application" of Supreme Court Holdings As of the Time of the Relevant State Court Decision

On federal habeas review, the district court determined that error occurred when the trial court allowed statements that were improperly redacted pursuant to *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), to be admitted at trial. Under *Terry Williams v. Taylor*, 120 S.Ct. 1495, 1522-23, 146 L.Ed.2d 389 (2000), the trial court's decision must involve an unreasonable application of Supreme Court holdings as of the time of the relevant state court decision. The relevant state court decision occurred in 1994 when the Michigan Supreme Court reviewed McGhee's case on direct appeal. In 1994 U.S. Supreme Court law did not bar the manner in which McGhee's co-defendants' statements were redacted. ■

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"I am innocent, innocent innocent... Something very wrong is happening here."

Leonel Herrera, May 12, 1992, just prior to his execution by the state of Texas.

Amnesty International, November 1998

KENTUCKY CASELAW REVIEW

by Shelly R. Fears

Price v. Commonwealth, Ky., __ S.W.3d __ (11/22/00)
2000 WL 1735903
(Not Yet Final)
(Affirming in part, reversing in part)

Price was charged with shooting and killing his wife and sexually assaulting his stepdaughter, L.B., in October of 1996. By separate indictment, Price was also charged with seven additional counts of first-degree rape allegedly perpetrated against L.B. After a jury trial, Price was convicted of murder and attempted first-degree rape. He was sentenced to life in prison for the murder and to 20 years for the attempted rape, said sentences to run concurrently. On appeal to the Supreme Court of Kentucky, Price asserted five errors: (1) the rape and murder charges should have been severed for purposes of trial; (2) his tape-recorded confession should have been suppressed because it was involuntary; (3) his invocation of his right to counsel should have been deleted from his confession; (4) L.B. should have been declared incompetent to testify; and (5) he should not have been excluded from the courtroom during L.B.'s testimony.

Severance

On his severance claim, Price argued that the denial of his motion to sever offenses allowed the jury to consider evidence of prior sexual assaults while deliberating his guilt or innocence on the unrelated murder of his wife. The Court held that Price was not "unduly prejudiced" by the trial court's denial of his motion to sever the rape and murder charges. Citing KRE 404(b)(1) and several Kentucky Supreme Court decisions, the Court noted that evidence of prior sexual assaults on L.B. was admissible to prove intent, as well as motive and plan with respect to the first-degree rape charge. The Court stated that while admission of the prior sexual assaults may have prejudiced Price's ability to defend against the murder charge, the real issue was whether he was "unduly prejudiced" (i.e., whether the prejudice was "unnecessary and unreasonable").

After reviewing the evidence introduced at trial, the Court concluded that Price's prior and subsequent sexual assaults were "inextricably connected" to the death of his wife. The Court noted that Price developed an uncontrollable sexual obsession with L.B. and that he admitted sexually assaulting her on several occasions. The child told her mother about these incidents and the entire family sought help for the problem at the Department for Social Services ("DSS"). While in counseling Price was found to be suicidal and was hospitalized for treatment of depression. A DDS worker reported the sexual incidents to law enforcement authorities and Price was

prohibited from returning to his family after his discharge from the hospital. Price's theory of the case was that he was so depressed over his predicament that he was attempting to kill himself when he accidentally shot and killed his wife. However, the Commonwealth claimed that Price was so sexually obsessed with L.B. that he intentionally killed his wife to get rid of her. The Court concluded that either way, under KRE 404(b)(1) and (2), evidence of Price's prior and subsequent sexual abuse of L.B. was so "inextricably connected" with the issues concerning his motive and intent to kill his wife that such evidence would have been admissible even in a separate trial for murder. Since the same evidence would have been admissible at separate trials, Price was not unduly prejudiced by the denial of his motion to sever the rape and murder charges. *Schambon v. Commonwealth, Ky.*, 821 S.W.2d 804, 808-09 (1991).

Confession: Voluntariness

As to his confession, Price argued that the "totality of the circumstances" indicated it was involuntary. As factual support, Price cited his suicidal mental state and the physical pain he endured while being handcuffed. Quoting *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986), the Court stated that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." The Court explained that while a defendant's mental condition is a significant factor to consider in determining voluntariness, it does not, by itself, dispose of the question. Excluding the five minutes consumed by the detectives' efforts to remove his handcuffs and the one-minute consumed by advising Price of his *Miranda* rights, Price's interrogation lasted less than eight minutes. The Court held that absent any indication of coercion by the authorities or complaints of pain during the actual interrogation itself, the trial court's finding that the confession was voluntarily given is conclusive.

Confession: Invocation of Right to Counsel

Price also asserted that it was error to inform the jury that he had invoked his right to counsel at the end of his confession. The Court stated that requesting a lawyer is different from asserting the right to remain silent. The Court reasoned that even an innocent person is likely to want to consult with a lawyer if accused of a crime that he did not commit. Therefore, the issue is more susceptible to harmless error analysis than is a comment on silence. The Court found that in Price's case, by the time he had invoked his right to counsel, he had

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already admitted that he shot his wife and sexually assaulted his stepdaughter. Therefore, any inference of guilt which may have arisen from Price's invocation of his right to counsel was harmless beyond a reasonable doubt.

Competency of Witness

With respect to L.B.'s competency to testify, Price argued that inconsistencies in her testimony as to specific details of the sexual assaults proved that she was unable to recollect the facts accurately. Noting that L.B. was 13 years old when she testified and that she was lucid and unemotional on the stand, the Court found no error. The Court stated that the fact that L.B. could not recollect all of the specific facts surrounding the abuse affected only her credibility as a witness, not her competency to testify.

Exclusion of Defendant from the Courtroom

On the final claim of error, the Court agreed with Price's argument that he was improperly excluded from the courtroom during L.B.'s testimony. The Court found three errors in the application of KRS 421.350(2) (which allows the exclusion of a child witness from the courtroom under specified circumstances): (1) Price was excluded from the courtroom whereas the statute provides that the child witness will testify from another room; (2) Price was not in continuous audio contact with his attorney; (3) No hearing was held nor finding made with respect to whether there was a compelling need to employ the statutory procedure in Price's case. Noncompliance with KRS 421.350(2) resulted in the violation of Price's right to confrontation and right to be present at every critical stage of his trial. However, L.B.'s testimony only pertained to the rape charges. Thus, the erroneous exclusion of Price from the courtroom during L.B.'s testimony does not require reversal of Price's murder conviction, but only of his conviction on the rape charges.

Justice Graves (with Chief Justice Lambert and Justice Wintersheimer joining) dissented from the Court's ruling on the application of KRS 421.350. Justice Graves found that the trial court employed a hybrid of KRS 421.350 that was favorable to Price because L.B. had to testify in front of the jury. Also, Price was able to consult freely with his attorney during L.B.'s testimony by writing notes on a legal pad. Finally, the trial court admonished the jury that Price's absence from the courtroom was mandated by statute and that no inference of guilt should be made from such absence. According to Justice Graves, under the totality of the circumstances, there was no abuse of discretion in using a hybrid method that protected Price's constitutional rights.

Gosser v. Commonwealth, Ky., __ S.W.3d __ (11/22/00)
2000 WL 1736870
(Not Yet Final)
(Affirming)

Gosser was convicted of wanton murder and sentenced to 20 years imprisonment. Gosser's conviction stems from a shooting incident in 1996 when Gosser attended a party at a home in Somerset, Kentucky.

Witnesses testified that Gosser went to the party to find Abbott with whom Gosser had a dispute a few days earlier. Shortly after arriving at the party, Gosser and Abbott stepped outside to settle their differences. As they began to argue, a crowd gathered around to watch. A friend of Gosser's, Parmalee, began fighting with Abbott. Gosser briefly entered the fight, then stepped back, pulled a gun and fired it. Witnesses testified that Gosser fired the gun directly at Abbott. However, Gosser maintained that the position of the participants in the fight made it impossible for the gun to be pointed at Abbott and that he fired the gun only to break up the fight. The shot fired by Gosser hit a bystander in the chest causing his death.

On appeal to the Supreme Court of Kentucky, Gosser argued three issues: (1) the trial court erred in admitting into evidence photographs and computer-generated visual models that were prepared by the police; (2) the trial court erred by denying his request for continuance; and (3) the trial court erred in failing to grant a mistrial after the Commonwealth made Parmalee unavailable to testify at trial.

Police Created Photographs and Computer-Generated Visual Models

Two of the photographs at issue (Exhibits #7 and #8) were pictures of the crime scene in which the police had planted colored flags and made spray-painted marks to show the location of the individuals and the evidence at the time of the shooting. Exhibits #9 and #10 were computer-generated diagrams of the crime scene.

With respect to the photographs, the Court noted that while these exhibits were physical photographs, they were actually used by the Commonwealth as diagrams of the crime scene. The Court stated that it was error for the Commonwealth to admit the photographs/diagrams through a detective who was not present at the crime scene at the time of the shooting because his testimony as to the placement of flags and markings was based on hearsay. Rather, the Commonwealth should have authenticated the photographs/diagrams through individual witnesses who were present at the time of the shooting. Such persons would have personal knowledge of the subject matter of both the physical crime scene and the accuracy of the placement of the identifying markers.

As to the computer-generated diagrams, the Court noted that it had not previously addressed any issues concerning computer-generated visual evidence ("CGVE") and referred to a growing body of case law and law review articles concerning these issues. The Court first noted that CGVE is usually divided into two categories: (1) demonstrative (still

images or animation which merely illustrates a witness's testimony); and (2) substantive (computer simulations or recreations prepared by experts based on mathematical models to recreate or reconstruct the event). The Court then stated that the standard of admissibility depends on whether the CGVE is categorized as demonstrative or substantive. The Court cited cases indicating that demonstrative CGVE is admissible if it is a fair and accurate representation of the scene sought to be depicted and substantive CGVE is admissible under FRE 702 and *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). However, the Court suggests that classification of CGVE is not absolutely necessary. While stating that the classification of CGVE might provide "a helpful starting point," the Court found that "the question of admissibility is ultimately determined under the KRE."

Computer-generated diagrams such as those utilized in Gosser's case are analyzed the same as diagrams drawn by hand or photographically created. They must be relevant, KRE 402; are subject to exclusion under KRE 403 (prejudice, confusion or waste of time); are subject to the trial court's discretion over the mode and order of presentation, KRE 611; and must be authenticated by a witness that has personal knowledge of the diagram's subject matter, KRE 901. Where a diagram purports to contain exact measurements or is drawn to scale, testimony as to how the data was obtained and inputted into the computer would be relevant and could be necessary to the admission of the diagram.

Despite the finding of error in the admission of the photographs and computer-generated diagrams through an inappropriate witness, the Court ultimately concluded that such error was harmless and did not warrant reversal. Numerous other witnesses who were present at the time of the shooting referred to the exhibits in question at trial and thus authenticated the exhibits. Also, the Court concluded that there was no substantial possibility that the result would have been any different had the diagrams been introduced through a proper witness.

Continuance

Gosser argued that the trial judge abused his discretion when he denied a continuance when the Commonwealth withheld statements made by Parmalee to the police and to the grand jury until approximately a week before trial. Also, Gosser argued that he did not receive six diagrams that were created during police interviews with witnesses until the first day of trial. Gosser maintained such disclosure violations forced defense counsel to reformulate the case at the last minute. The Court found no error. While the Commonwealth provided the diagrams outside the "48-hour rule" of RCr 7.26, Gosser did not show any prejudice resulted from the violation. As to Parmalee's statements, the Commonwealth violated the spirit, if not the letter, of RCr 5.15(3) (right to grand jury transcript or recording). Although the Court found the Commonwealth's failures to be "indefensible," the Court held

that such actions did not amount to reversible error in light of the fact that the case had been previously continued twice because of scheduling conflicts.

Mistrial

Parmalee was slated to testify pursuant to a deal with the Commonwealth wherein the indictment against him for conspiracy to murder would be dismissed. However, the Commonwealth closed its case without calling Parmalee as a witness. When Gosser indicated his desire to call Parmalee as a witness, the Commonwealth's Attorney stated that he would not dismiss the indictment. Parmalee's attorney advised the trial court that Parmalee would assert his Fifth Amendment privilege if called to the stand by the defense. Gosser moved for a mistrial. Ultimately, the trial court allowed Parmalee's statements to the grand jury to be read to the jury under KRE 804 on the theory that he was unavailable as a witness. Upon review, the Court concluded that Parmalee's statements actually supported Gosser's theory of the case. Therefore, there was no "manifest necessity requiring a mistrial" and the trial court did not abuse its discretion in denying Gosser's motion.

Dissent: Cumulative Error Warranted Reversal

Justice Stumbo dissented stating "[i]n summary, the majority opinion holds that the trial was rife with error, none of it reversible." In Justice Stumbo's view, the case should have been reversed on the basis of cumulative error. "The jury saw exhibits that may not have truly been representative of the crime scene, heard testimony from witnesses that could not be cross-examined and the defendant had a defense counsel who was faced with a change in defense strategy only days before trial." As a result, Gosser was entitled to a new trial.

Hayes v. Commonwealth, Ky., 25 S.W.3d 463 (8/24/00) (Affirming)

Hayes was convicted of first-degree robbery and unlawful imprisonment for his involvement in the robbery of a restaurant. He was sentenced to 20 years in prison. On appeal to the Supreme Court of Kentucky, Hayes argued that his confession was not voluntary because the detective who questioned him did not tell him that he had been indicted for the robbery **before** he signed a waiver of rights form and gave a statement. Hayes further argued that, despite his signing the form, his waiver was not "knowing and intelligent" because he was not made aware of the indictment.

The Court rejected his claim finding the test set forth in *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) to be dispositive of the issue. In short, all that is required is that the accused be fully aware "of both the nature of the right being abandoned and the consequences of the decision to abandon it." The Court noted that although Hayes was not aware of the indictment, he was aware that two other suspects had confessed and implicated him in the

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robbery. In addition, Hayes was advised that any statements he made could be used against him in a criminal proceeding. As stated in *Patterson*, this is the "ultimate adverse consequence" a person can suffer by virtue of a decision to speak to the authorities.

Hayes also argued that the Commonwealth, through its agent the detective, violated SCR 3.130-4.2 – Communication with Person Represented by Counsel. The Court rejected this claim because Hayes made no showing that he was represented by counsel. The Court also found that there was no evidence that the prosecutor had asked the detective to speak with Hayes, so the detective could not be considered an agent of an attorney. Since the detective was not an attorney, he is not subject to SCR 3.130-4.2 or any of the Kentucky Rules of Professional Conduct. Therefore, even if Hayes had been represented by counsel, there could have been no violation of the rule.

Commonwealth v. Davis Ky., 25 S.W.3d 106 (8/24/00)
(Certifying the Law)

A district court suppressed Davis' Intoxilyzer results after a technician testified that the testing component of the unit was in proper working order, but that the calibration component of the unit was not. In its suppression order, the district court cited *Owens v. Commonwealth, Ky., 487 S.W.2d 897 (1972)*, for the proposition that the Commonwealth is required to prove that the machine, including all of its components, was in proper working order at the time of the test. The Commonwealth sought certification of the law in the Supreme Court of Kentucky on the following questions:

- (1) Is an Intoxilyzer result admissible in a prosecution under KRS 189A.010(1)(a) and/or (e), where the subject testing component has been shown to be in proper working order, but the calibration component showed out of tolerance readings on other dates?
- (2) Does the decision in *Owen* require the prosecution to demonstrate that all possible components of the machine are in proper working order on dates other than the date of the arrest as a condition precedent to the admission of the Intoxilyzer results into evidence?

The Court certified the law as follows: An Intoxilyzer test result is admissible in a prosecution pursuant to KRS 189A.010(1)(a) and/or (e) where the calibration unit and the subject testing component have been shown to be in proper working order on the testing date, despite the fact that the calibration component may have been out of tolerance on other dates. *Owen* is clarified to the extent that the Intoxilyzer results may be admitted when the alcohol test component and the calibration unit were in proper working order on the day of the test but the independent calibration unit was out of tolerance on other days. When the Intoxilyzer calibration unit and testing unit are in proper working order on the testing day, any earlier problems should go to the weight of the evidence and not its admissibility.

The Court stated that the technician testified that the calibration unit is independent of the testing unit, and that the testing unit provides an accurate reading even if the calibration unit is turned off. Intoxilyzer results are still relevant under KRE 401 and KRE 402. KRE 702 (scientific evidence) authorizes the use of such tests to assist the trier of fact.

With respect to Davis, the Court reversed the decision of the trial court and ruled the results of Davis' Intoxilyzer test to be admissible.

Justice Cooper (with Chief Justice Lambert and Justice Stumbo) dissented on the grounds that the calibration component was not in proper working order on Davis' test date. Therefore, the district judge properly suppressed the results of this particular Intoxilyzer test. ■

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"It is to be remarked that a good many people are born curiously unfitted for the fate waiting them on this earth."

-Joseph Conrad, *Chance*

PLAIN VIEW DECEMBER 2000

by Ernie Lewis, Public Advocate

Gray v. Commonwealth

28 S.W.3d 316

(Ky. Ct. App., 7/28/00)

The Court of Appeals has explored the inventory exception to the warrant requirement and its relation to an automobile search in this case out of

SUPREME COURT OF THE UNITED STATES

The following recent case will be discussed in greater detail in our next issue.

CITY OF INDIANAPOLIS, et al., PETITIONERS v. JAMES EDMOND et al., 2000 U.S. LEXIS 8084, ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (November 28, 2000) Justice O'Connor delivered the opinion of the Court, in which Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., filed a dissenting opinion, in which Thomas, J., joined, and in which Scalia, J., joined as to Part I. Thomas, J., filed a dissenting opinion.

"In August 1998, the city of Indianapolis began to operate vehicle checkpoints on Indianapolis roads in an effort to interdict unlawful drugs. The city conducted six such roadblocks between August and November that year, stopping 1,161 vehicles and arresting 104 motorists. Fifty-five arrests were for drug-related crimes, while 49 were for offenses unrelated to drugs. *Edmond v. Goldsmith*, 183 F.3d 659, 661 (7th Cir., 1999). The overall "hit rate" of the program was thus approximately nine percent....

"Respondents James Edmond and Joell Palmer were each stopped at a narcotics checkpoint in late September 1998. Respondents then filed a lawsuit on behalf of themselves and the class of all motorists who had been stopped or were subject to being stopped in the future at the Indianapolis drug checkpoints. Respondents claimed that the roadblocks violated the Fourth Amendment of the United States Constitution and the search and seizure provision of the Indiana Constitution. Respondents requested declaratory and injunctive relief for the class, as well as damages and attorney's fees for themselves....

"The primary purpose of the Indianapolis narcotics checkpoints is in the end to advance "the general interest in crime control," *Prouse*, 440 U.S., at 659, n. 18. We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."

The full opinion can be found at <http://supct.law.cornell.edu/supct/html/99-1030.ZS.html>

Fayette County.

Sharon Gray was stopped on March 25, 1999 for driving erratically. She failed three field sobriety tests. Upon arrest, she told the officer she had a weapon in her car. The officer took the weapon out of the car but did not search further. A dog was called, and the dog reacted to the car. A search revealed hashish, hashish oil, and marijuana. The car was moved off the highway to an impoundment lot, where it was searched without a warrant the following day. 50 glass vials were discovered in the vehicle along with 49 packs of rolling papers and plastic bags.

Gray moved to suppress the evidence obtained in the second search. After the trial court overruled the motion, she entered a conditional plea, and appealed the issue to the Court of Appeals.

In an opinion written by Judge Johnson joined by Judges Huddleston and McAnulty, the Court of Appeals affirmed the trial court. The Court characterized the issue as being whether the search was an inventory search or an automobile search. If the search was an inventory search, it was illegal because it was accomplished without the necessary procedures being followed. If the search was an automobile search, then it was legal as being accomplished with the same probable cause as the first search.

The Court held that the search was an automobile search. "We find support in the case law for the trial court's legal conclusion that the same probable cause that supported the first search of the automobile on the highway continued to exist and to support the second search at the impoundment lot. When police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, **even after it has been impounded and is in police custody.**" The Court rejected appellant's position that this question is to be resolved by determining either where (an impoundment lot) or when (the day following the seizure of the car) the search occurred. "It would be illogical and unreasonable to hold that once a car has been removed from the public highway to police custody that the probable cause leading to the original search disappears, leaving officers with no right to search the car further unless they are doing so under another separate warrant."

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Banks v. Commonwealth

2000 Ky. App. LEXIS 66
(Ky. Ct. App., 6/23/00)
(Not Yet Final)

Judge Huddleston, joined by Judges Combs and Schroder, have evaluated a very common, urban encounter between the police and its citizens. In this case, the Court finds that the police encounter went beyond the bounds of the Fourth Amendment.

Leon Banks was walking across the front yard of an apartment building in a high crime area when he was spotted by two Lexington police officers. Nearby was a "no trespassing" sign. When he saw the officers, Banks "appeared startled, quickly placed his hands in his pockets and turned around. Banks took several steps away from the officers and then stopped. He did not flee." He pulled his hands from his pockets at the officers' request. The officers patted him down and found what felt like a crack pipe. Banks consented to a search of the pockets, and a crack pipe was produced. A search incident to arrest revealed rolling papers, a second pipe, and two rocks of crack. After a suppression motion was denied, Banks entered a conditional plea of guilty.

The Court of Appeals reversed the decision of the trial judge. The Court found that this was not a proper *Terry* stop and search. Rather, "Banks's acts, even in a high crime area, do not create a reasonable suspicion that he was involved in criminal activity.... The circumstances in this case lack the sharpness required to fit within *Terry*'s narrow exception. An individual like Banks should be able to turn away from the police and place his hands in his pockets, even in a high crime area, without the fear of being subjected to governmental intervention."

Stewart v. Commonwealth

2000 Ky. App. LEXIS 82
(Ky. Ct. App., 7/28/00)
(Not Yet Final)

The Court of Appeals has also decided a case regarding anonymous tips, and how much corroboration is required to rise to the level of a reasonable and articulable suspicion.

In this case, an anonymous telephone caller told the Cadiz Police Department that Charles Stewart would be arriving in Barbara Grubbs' car from the direction of Hopkinsville at about 10:00 p.m., that he had just purchased cocaine, and that he should have the cocaine in his mouth. At 10:46, Cadiz Officers Moore and Knight saw Grubbs' car drive into Cadiz from the direction of Hopkinsville. The car pulled into a Minit Mart, and Stewart got out and went toward a motel. The officers approached him and asked to search him. Stewart declined. The officer asked Stewart what was in his waistband, and Stewart handed the officer a bottle which later was identified as containing crack cocaine and marijuana. Stewart was

charged with possession of cocaine and misdemeanor offenses. After Stewart's suppression motion was denied, he entered a conditional plea of guilty.

The Court of Appeals affirmed the trial court in an opinion written by Judge Huddleston and joined by Judges Johnson and Knopf. The Court found that the case was close, but that it was more similar to *Alabama v. White*, 496 U.S. 325 (1990) than *Florida v. J.L.*, 120 S. Ct. 1375 (2000). The Court found that much of the information given by the anonymous caller had been verified by the police prior to the stop. "In the case under consideration, a substantial portion of the information supplied by the anonymous telephone caller was verified by the personal observations of the police. This included futuristic or predictive information that Stewart and a female companion would be arriving in Cadiz from the direction of Hopkinsville sometime after 10:00 p.m. The caller also provided information specifically identifying Stewart and his companion, as Barbara Grubbs, and the fact that they would be in her automobile. We agree with the trial court that while *this may be a close question*, there was sufficient corroboration of significant facts to create reasonable suspicion that Stewart was in possession of illegal drugs. The information included several specific details and predictive information that under the totality of the circumstances, the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to satisfy the lesser reasonable suspicion standard to justify an investigatory stop."

Stogner v. Commonwealth

2000 Ky. App. LEXIS 89
(Ky. Ct. App. 8/18/00)
(Not Yet Final)

This case explores the question of whether a police officer may arrest a suspected misdemeanor shoplifter who has not committed the offense in the presence of the officer. The Court of Appeals answers yes in this opinion by Judge Huddleston, joined by Judges Johnson and Knopf.

The Central City Police Department received a call from the local Wal-Mart store saying that a shoplifting had just occurred. Officers went to the Wal-Mart and were told that two people had stolen a Christmas tree and a plastic Santa Claus and had left in a blue Thunderbird traveling toward Central City. One of the officers recognized a description of the driver and her car, so they went to her home. They saw a Christmas tree at the back of the house. When questioned, the defendant and her companion said they "took" the tree from Wal-Mart. They were arrested. At the same time, the officers smelled what they believed to be ether. Having seen starting fluid and antihistamine boxes on the back porch, the officers suspected methamphetamine was being manufactured there. They asked to search the house but were denied. The County Attorney was contacted, and he stated that the defendant's husband had an outstanding arrest warrant for bail jumping. Another resident of the house then gave the police permission to search for the defendant's

husband. While searching for him, the police smelled smoke, and found other items connected to the manufacture of methamphetamine. The officers then obtained a search warrant and found a great deal of other evidence supportive of a charge of manufacturing in methamphetamine. Eventually, following the denial of the motion to suppress, the defendant entered a conditional plea of guilty.

The defendant's primary position on appeal was that her initial arrest was illegal as not being in the officer's presence, and thus that all further evidence obtained was a fruit of the initial illegality. The Court of Appeals held that KRS 433.236 trumps KRS 431.005(1)(d), and that a police officer may arrest a misdemeanor shoplifter upon probable cause despite not having witnessed the commission of the misdemeanor. The Court rejected the defendant's position that KRS 433.236 is confined to situations where the merchant has detained the person suspected of shoplifting. Because the initial arrest occurred based upon probable cause, there was no illegal taint for obtaining the other evidence at the house.

Guth v. Commonwealth
2000 Ky. App. LEXIS 101
(Ky. Ct. App., 9/15/00)
(Not Yet Final)

A Manchester Police Officer signed an affidavit for a search warrant to search Guth's Trailer for evidence supportive of trafficking in a controlled substance. The affidavit stated that the affiant had observed "Darian Guth sell an eight ball of cocaine to Jeff Sullivan for \$200. The transaction was made in a controlled environment and observed by Officers Kevin Johnson, Same Davidson, and Randy Rader." The affidavit did not state where the transaction had taken place. The reality is that the transaction had taken place in the parking lot of a motel 5 miles from the place to be searched. Based upon the affidavit, a search warrant was issued. Darian Guth's mother, Carolyn, was at the trailer when the search occurred. As a result of the search, Carolyn was arrested and charged with trafficking in a controlled substance. She filed a suppression motion, which was denied by the trial court.

The Court of Appeals reversed in an opinion written by Judge Buckingham and joined by Judges Johnson and Tackett. The Court found that the affidavit was invalid on its face because it failed to show that the place to be searched had anything to do with the transaction observed by the police officers. "In short, because the affidavit in this case alleged only that the drug transaction upon which it was based occurred in a 'controlled environment,' we believe that the affidavit was insufficient to constitute probable cause to search the residence."

The Court also rejected the trial court's reliance upon the good faith exception to the warrant requirement. The good faith exception did not apply because "[I]f the affidavit contains false or misleading information, the officer's reliance cannot be reasonable," citing *United States v. Leon*, 468 U.S. 897 (1984). In this case, because "the officer supplied

information which misled the judge, the officer cannot be said to have had an objectively reasonable belief in the probable cause determination."

United States v. Pollard
215 F.3d 643
(6th Cir., 6/15/00)

On July 31, 1997, the Memphis Police Department learned that a shipment of drugs was coming to Memphis. On August 4, the police were told by an informant that Pollard had contacted him and told him that drugs were coming to Memphis from Texas and that he should meet him. At 8:00 p.m. on August 4, the informant met Pollard and another person named Rodriguez at Howard's residence. Howard was a friend of Pollard's. Pollard stayed with Howard from time to time. Rodriguez had never been there before. After conversation, the informant left, and told the police that he was to be back at 10:00 p.m. The informant was wired, and purchase money was supplied to the informant. A police officer accompanied the informant back into Howard's home. When the purchase of cocaine was made, a "takedown" signal was given. Officers broke down the door of Howard's residence without a warrant and without knocking, and Pollard and Rodriguez were arrested. Guilty pleas were entered after the motions to suppress were denied, and an appeal to the Sixth Circuit followed.

In an opinion written by Judge Siler, the Sixth Circuit affirmed the trial court. The opinion focused on the standing issue. The Court held that Pollard had standing to challenge the search because of his status as an overnight guest. Relying upon *Minnesota v. Olson*, 495 U.S. 91 (1990), the Court stated that "Pollard has standing to contest the search. He had been friends for approximately seven years with the lessee, Howard, and had been staying at the home earlier in the week." On the other hand, Rodriguez did not have standing to challenge the search. "Rodriguez has no standing to contest the search, because he had never been to the premises before and did not know the renter of the premises." The Court relied upon *Minnesota v. Carter*, 525 U.S. 83 (1998) upon which to base its holding regarding Rodriguez.

Despite the finding that Pollard had standing, this led to no relief for him. The Court held that because the undercover officer had consent to enter Howard's house, the other officers similarly had the same consent. "[A]n undercover officer may gain entrance by misrepresenting his identity and may gather evidence while there." The Court applied the "consent once removed" doctrine established by the 7th Circuit. This doctrine requires the following: "The undercover agent or informant: (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers." "We adopt the doctrine of 'consent once removed' because this entry was lawful under those circumstances."

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Judge Jones dissented from the adoption of the consent once removed doctrine. "I believe this doctrine represents an unjustified extension of our traditional exigent circumstances jurisprudence.... In short, without any specific reason to believe that evidence would be destroyed or that officer safety was in danger, there is no justification for a warrantless intrusion into the sanctity of a private home."

United States v. Bohannon

225 F.3d 615

(6th Cir., 8/9/00)

In November of 1997, a search warrant was executed at the trailer of someone suspected of operating a methamphetamine laboratory. As the search was winding down, two of the officers executing the search left, and saw a car drive up the driveway at a high rate of speed. James Bohannon got out of the passenger side of the car, and his brother Johnny got out of the driver's side. As they walked toward the trailer, the two officers approached them and asked for identification. Johnny showed a state-issued identification. James had a beer in his left hand and his right hand in his pocket. Twice James put his hands in his pockets despite an order otherwise by the police. The officer told James to put his hands into the air and began to frisk him. When James dropped his hands, the officer slapped them, and continued his frisk. He saw a bulge and pulled out two packs of cigarettes and methamphetamine. James told him he had a gun and more drugs in his back pocket. James was arrested, confessed to operating a meth lab. After being charged, he moved to suppress, which was granted by the district court.

The suppression of the search was reversed by the Sixth Circuit in an opinion written by Judge Siler and joined by Judge Kennedy. The Court analyzed the case using *Michigan v. Summers*, 452 U.S. 692 (1981), which held that law enforcement officials may detain occupants of a residence being searched pursuant to a warrant in order to prevent flight, to minimize the risk to the officers, and to facilitate the orderly completion of the search. The Court held that the detention of James Bohannon was justifiable under *Summers* because it was necessary to protect the agents conducting the search and because it would prevent flight.

The Court also held that the frisk following the detention was legal. "James acted very nervous and twice ignored the officer's request that he keep his hands out of his pockets. A reasonable conclusion for an officer to make was that James may have been armed and dangerous. Therefore, it was reasonable and prudent for the agent to 'conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.'"

Judge Batchelder dissented. Judge Batchelder believed that *Summers* was not applicable because Bohannon was not in the trailer at the time of the search. Rather, under *Terry* the officer had no suspicion that Bohannon had done anything wrong, and thus the detention and frisk were both unlawful.

The Short View

1. *Sanders v. United States*, 751 A.2d 952 (D.C. 5/25/00). It is insufficient for an officer to state in an affidavit that he recognized the voice of an anonymous tipster and that he had given previously accurate tips. This was not sufficient to establish probable cause. The magistrate should have evaluated independently the facts underlying the police officer's statements supportive of probable cause. "[I]t is well-established that a court may not simply rely on a police officer's conclusory assertions in deciding whether a search or seizure was justified under the Fourth Amendment, but rather must evaluate the facts underlying those assumptions."
2. *Bryan v. State*, 760 So. 2d 246 (Fla. Dist. Ct. App. 5/31/00). When the police approach a suspect with guns drawn and the suspect takes his hands out of his pockets and throws down a paper bag, he has not abandoned the paper bag, and thus the search of the bag was unreasonable without some exception to the warrant requirement applying. "Under the circumstances of this case, when a group of armed police officers approached an individual, we find that it is perfectly reasonable for the person so approached to throw down a paper bag the person is carrying, lest it be confused with some kind of weapon that could conceivably endanger the officers and thus provoke a dangerous reaction by the police."
3. *State v. Wyman*, 3 P.3d 392 (Ariz. Ct. App. 5/30/00). Police have detained a person for 4th Amendment purposes where they repeatedly yell at a person to stop and talk with them. At some point, that becomes a detention requiring reasonable and articulable suspicion. "This is the rare case in which a person did choose to ignore and walk away from an officer's request for a voluntary interview, perhaps the only course of action under the law remaining to a pedestrian who does not care to talk to the police.... If the *Royer* paradigm is to have any practical meaning, police must allow a person to go about his or her business when it is clear that the person does not wish to voluntarily cooperate."
4. In "The Rise of Warrantless Auto Searches: The Need for a Reasonableness Inquiry", by Professor David Steinberg of the Thomas Jefferson School of Law, the point is made that "police almost never will need a warrant to search an automobile" under recent caselaw, including *Wyoming v. Houghton*, 526 U.S. 295 (1999). This law review article is reprinted in the May 2000 Search and Seizure Law Report. He argues that "the refusal to require warrants in auto search cases is ill-advised, given the frequency of auto searches and the danger inherent in such searches." He advocates that police officers should "conduct a warrantless search of an automobile only under exigent circumstances, which made it impracticable for an officer to obtain a warrant."

- If a case did not involve exigent circumstances, officers would need to obtain a warrant before they searched an auto.” In response to this situation, he urges practitioners to “focus on whether a particular search is reasonable under the circumstances.”
5. *Charity v. State*, 753 A. 2d 556 (Md. Ct. Spec. App. 6/8/00). The virtual immunity given to the police officer’s pretextual reasons for a stopping given by *Whren v. United States*, 517 U.S. 806 (1996) did not provide protection in this case, where the officer failed to pursue diligently the underlying traffic infraction. The Court gave guidance to the determination of the legality of traffic stops by saying that in “determining whether a police officer has exceeded the temporal scope of a lawful traffic stop, the focus will not be on the length of time an average traffic stop should ordinarily take nor will it be exclusively on a determination...of whether a traffic stop was literally ‘completed’ by the return of documents or the issuance of a citation...There is no set formula for measuring in the abstract what should be the reasonable duration of a traffic stop. We must assess the reasonableness of each detention on a case-by-case basis and not by the running of the clock.” It is in the determination of reasonableness that the pretextual reason for the stopping, and the pursuit of the underlying infraction, comes into play.
 6. *Reitinger v. Commonwealth*, 532 S.E.2d 25 (Va. 6/9/00). 3 requests for consent to search a vehicle amounted to a stopping requiring reasonable suspicion or probable cause, according to the Virginia Supreme Court. The Court based their decision on whether a reasonable person would have felt free to go under these circumstances.
 7. *People v. Camacho*, 3 P.3d 878 (Cal., 7/27/00). The California Supreme Court has ruled that the police cannot go to a side yard and peer into a window consistent with the Fourth Amendment. Here, once they saw the defendant packaging drugs, they entered the house through a window, without a warrant, and arrested the defendant. The Court relied upon *Bond v. United States*, 120 S. Ct. 1462 (2000) to hold that the defendant had a reasonable expectation of privacy, and that society was prepared to accord privacy to the side window at 11:00 p.m.
 8. *People v. Reyes*, 98 Cal. Rep. 2d 898 (Cal. Ct. App., 8/15/00). Courts are typically tolerant of police trickery when it comes to search and seizure. In this case, however, the California Court of Appeals ruled that trickery had gone too far. Here, the police went to their target’s door, told him that they had hit his car. When he came outside, three uniformed officers approached him and obtained a consent to search, producing methamphetamine. The Court ruled that the trickery had tainted Reyes’ consent to search.
 9. *People v. Matelski*, 98 Cal. Rep. 2d 543 (Cal. Ct. App., 7/31/00). Two people visiting a probationer may be detained in order to enforce a condition of the probationer’s probation. As a result, once a check of them revealed outstanding warrants, drugs found during the search incident to a lawful arrest could be admitted at their trials. The Court stated that the “intrusion on defendants’ privacy was minimal, the governmental interest...outweighed the brief intrusion on defendants’ privacy, and that the lack of a search or arrest warrant was not dispositive...The officers simply had no other way to enforce the probation term that [the probationer] not associate with known felons unless they could identify his associates and determine whether they were known felons or not.” The dissent pointed out that there was no reasonable suspicion against the two people who were detained, and thus the detention was illegal.
 10. *United States v. Holt*, 229 F.3d 931 (10th Cir. 8/24/00). The police may not question a detained motorist on a subject beyond the scope of the original stop according to this 10th Circuit case. Here, a motorist pulled over at a traffic checkpoint, was asked to pull over due to his being in violation of the state’s seatbelt law, at which time he was asked about whether he had loaded weapons in the car. Thereafter, the defendant consented to a search of his car, with the search resulting in the finding of illegal drugs. The Court found that because the questioning was not “reasonably related in scope to the circumstances which justified the interference in the first place” that the drugs were not admissible in the defendant’s case. The foundation for this holding was that *Terry* must be limited in both scope and duration. The questioning in this case illegally expanded the scope of the detention. The Court further rejected the Government’s attempt to establish a bright-line rule that would have allowed questioning regarding weapons of all detained motorists.
 11. *State v. Cline*, 617 N.W.2d 277 (Iowa, 9/7/00). Iowa has become the 12th state rejecting the good faith exception to the exclusionary rule established in *United States v. Leon*, 468 U.S. 897 (1984). The rule is inconsistent with the state constitutional provision, which reads almost identically to the Fourth Amendment. The Court rejected both justifications for the good faith exception, that the foundation of the exclusionary rule is that it is only to deter the police, and that the rule has no effect on the judiciary or the legislature. “The reasonableness of a police officer’s belief that the illegal search is lawful does not lessen the constitutional violation.” The Court states that suppression of evidence is “clearly the best remedy available,” that the judiciary would otherwise condone the illegality were the exclusionary rule not to apply, and that the exclusionary rule does have a deterrent effect

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- on the judiciary and the legislature. "Thus, the exclusionary rule serves a deterrent function even when the police officers act in good faith."
12. *Ex Parte Warren*, 2000 Ala. LEXIS 378 (Ala. 9/8/00, as amended 10/16/00). Can an officer conducting a lawful frisk who feels what he knows to be a Tic Tac box, which he also knows to have contained drugs in the past, reach for the box and seize it under the "plain feel" exception? Not according to the Alabama Supreme Court. The Court held that under *Minnesota v. Dickerson*, 508 U.S. 366 (1993), that the Tic Tac box could not make the nature of the contraband "immediately apparent." "[I]f the object detected by the officer's touch during a *Terry* search is a hard-shell, closed container, then the incriminating nature of any contents of that container cannot be immediately apparent to the officer until he seizes it and opens it. In such a situation, the officer cannot satisfy the *Dickerson* requirement that the officer have probable cause to believe, before seizing it, that the object is contraband."
 13. The United States Supreme Court has granted *cert* in 5 cases that will explore search and seizure issues. In *Ferguson v. Charleston*, S.C. 120 S.Ct. 1239; 146 L.Ed.2d 98 (mem; 2/28/00), the Court will examine the special needs exception in the context of pregnant women being tested for the presence of drugs with the results being sent to law enforcement. In *Indianapolis v. Edmond*, 120 S.Ct. 1156; 145 L.Ed. 2d 1068 (mem; 2/22/00); decided 2000 U.S. LEXIS 8084 (11/28/00) the Court will examine the legality of vehicle checkpoints for the purpose of discovering illegal drugs. *Illinois v. McArthur* 120 S.Ct. 1830; 146 L.Ed.2d 774 (mem., 5/1/00) addresses the issue of the execution of search warrants and the extent to which occupants can be prohibited from entering the residence to be searched while a warrant is obtained. In *Atwater v. Lago Vista, Tex.*, 120 S.Ct. 2715; 147 L.Ed.2d 981 (mem., 6/26/00) the Court will explore whether arrests can be made for fine-only offenses. *Kyllo v. United States*, 121 S.Ct. 29; 147 L.Ed.2d 1052 (mem., 9/26/00) explores the question of whether the use of a thermal imaging device to detect heat sources within a residence requires a warrant.
 14. *Boykin v. Commonwealth*, 1999-SC-0462-MR. This is an unpublished opinion of the Kentucky Supreme Court, rendered on September 28, 2000. In this opinion, the Court affirms a decision of the trial court overruling suppression motions challenging searches conducted pursuant to two search warrants. The affidavits in the case stated they were reliable because the office through "his continuing investigation of a homicide that occurred in Clinton, Ky., on Jun 21, 1998, has a shoe print case, and shell casings, and bullets, that may have been in possession of, Terrance Boykin on June 21, 1998." The interesting part of this unpublished opinion is that the Court
- relies upon far more than the four corners of the affidavit and warrant. Instead, the Court notes that there was testimony by the police officer at the suppression hearing that the "Tennessee Judge Morris, who issued the warrants, 'grilled him pretty well' before he would agree to issue the warrants. As part of this grilling process, Gibson imparted far more information to Judge Morris than is contained in the warrants... Thus, based on the totality of the circumstances, the trial court did not err in denying the motion to suppress evidence obtained from these searches." While it is difficult to judge from the opinion, this statement appears to be contrary to the long-standing rule in Kentucky that the reviewing court will measure the legality of warrants by the four corners of the affidavit rather than relying upon other information presented orally to the magistrate. See *Rath v. Commonwealth*, 298 S.W. 2d 300 (Ky. 1957).
15. *United States v. Burton*, 228 F.3d 524 (4th Cir. 9/27/00). A police officer may not frisk a citizen during a suspicionless encounter despite having a fear for his safety. While under *Florida v. Bostick*, 501 U.S. 429 (1991), the police may approach a citizen and question him without any level of suspicion, the *Terry* frisk requires a reasonable and articulable suspicion. "In short, an officer may encounter citizens and attempt to question them without implicating the Fourth Amendment. But during such police-citizen encounters, an officer is not entitled, without additional justification, to conduct a protective search. To conduct such a protective search, an officer must first have reasonable suspicion supported by articulable facts that criminal activity may be afoot." The officer's alternative was to "avoid a person he considers dangerous" in the absence of any suspicion.
 16. *Dorsey v. State*, 2000 Del. LEXIS 444 (Del. 10/18/00) (Not Yet Final). Another state has rejected the good faith exception to the exclusionary rule. The Delaware Constitution mandates suppression of illegally seized evidence irrespective of the good faith of the police. "The Delaware Constitution requires actual probable cause for the issuance of a search warrant not 'a good faith belief in probable cause.'" ■

"We are caught in an inescapable network of mutuality, tied in a single garment of destiny."

Dr. Martin Luther King, Jr., Letter from Birmingham City Jail; April 16, 1963.

PRACTICE CORNER

LITIGATION TIPS & COMMENTS COLLECTED BY MISTY DUGGER

Court of Appeals Holds All Megan's Law Cases in Abeyance

On September 26, 2000, the Kentucky Court of Appeals, held all presently pending Megan's Law cases in abeyance pending the dispositions of Motions for Discretionary Review in *Hall v. Commonwealth*, *Hyatt v. Commonwealth*, and *Sims v. Commonwealth*. The Supreme Court granted the motions on November 15, 2000.

What this means for clients presently on appeal is that their appeals will now halt pending the Supreme Court's decision in these cases. The Court of Appeals has indicated that cases currently going through the system based on the 2000 version of Megan's Law will also be held in abeyance.

In order for our clients to reap the benefits of a favorable decision in the Kentucky Supreme Court, these issues must still be raised in the trial court, be preserved for appeal, and have a notice of appeal filed. However, you should inform your clients that the Court of Appeals would not be deciding their cases until after the Supreme Court rules in *Hall*, *Hyatt*, and *Sims*. ~ John Palombi, Appeals Branch

Criminal Defense Lawyers Have a Duty to Prepare and Advise Clients for the Pre-sentence Interview

In *State v. Kerekes*, 673 P.2d 979 (App. 1983), the Arizona Court of Appeals held that a defendant has a constitutional right to refuse to answer questions put to him by a probation officer who was preparing a pre-sentence investigation report. The court also held that a sentencing judge may not consider a defendant's refusal to "cooperate" with the pre-sentence report writer as a factor in sentencing. Likewise, in *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982), the Ninth Circuit Court of Appeals held the privilege against self-incrimination applicable to pre-sentence investigation interviews. The lower federal district court had found trial counsel ineffective for failing to advise the client of his constitutional right against self-incrimination during the PSI and sentencing phase. ~ from For The Defense Newsletter, Vol. 9, Issue 4, April 1999

Remember to Speak Directly into the Microphone to Preserve the Record

Since most counties use only video cameras to record the trial proceedings, it is vital that the attorneys speak directly into the microphone during bench conferences. If the microphone does not pick up your voice, any points or arguments you are making are **not preserved for the record and thus are lost** for appellate purposes.

~Tom Ransdell, Appeals Branch

Rule Regarding Unpublished Opinions Held Unconstitutional in 8th Circuit

In *Anastoff v. United States*, 223 F.3d 898 (8th Cir. 2000), the Court held that its rule regarding unpublished opinions was unconstitutional under Article III to the extent that it prohibits such opinions from being used as precedent. The opinion provides an excellent discussion of the importance of published opinions, urging that unpublished opinions should not develop into underground body of law that can be ignored by the court and permit inconsistent rulings and opinions on the same questions of law. ~ Misty Dugger, Appeals Branch



Misty Dugger

Accusatory Statements & Comments on Defendant's Veracity Must Be Redacted From Taped Interrogations Played to Jury

Often during an interrogation a police officer will attempt to get a confession by telling a defendant such things as "your story doesn't make sense," "start telling the truth," or something along these lines which suggest that the cop does not believe the defendant. Admitting statements of this kind is very similar in impact to admitting a live witness's or a prosecutor's impermissible personal opinion about a defendant's guilt. Courts hold that the admission of such opinion testimony to be constitutional error on the ground that it may influence the jury and thereby deny the defendant a fair and impartial trial. In *Commonwealth v. Kitchen*, 730 A.2d 513 (Pa. Supr. Ct. 1999), the Court ruled that these types of comments have to be redacted. Attorneys have successfully used *Kitchen* and Kentucky's *Moss v. Commonwealth*, Ky., 949 S.W.2d 579 (1997), to require that videotaped statement be redacted to avoid hearsay and comments on veracity. ~ Richard Hoffman, Appeals Branch

Check Out these Web Sites

Check out <http://www.dockets.kycourts.net/> to access the District and Circuit Court dockets in all 120 counties for the next six days. ~ Bill Burt, Stanton

The U.S. Supreme Court created its own site at <http://supremecourtus.gov/sitemap.html>. This page is extremely helpful for common questions associated with U.S. Supreme Court filings. ~ Joe Meyers, Post Conviction Branch

Practice Corner needs your tips, too.

If you have a practice tip, courtroom observation, or comment to share with other public defenders, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.stat.ky.us. ■

Searching for Mary Jane: Can Testing for Marijuana Establish Impairment? (Part One: Looking On the Roadside)

by Brian Scott West

The second problem is that you don't know an expert who could explain all of this to a judge or jury, and you don't have anything authoritative in writing to show the judge

Maybe it's smelling the telltale odor of "burnt rope" rolling out the car window. Maybe it's finding a joint in the ashtray, a baggie under the seat, or rolling papers over the visor. Maybe it's nothing more than failing to find any alcohol related explanation – like empty beer cans or the smell of alcohol — for why this car crossed the centerline a half-mile back. For whatever reason, the police officer decides to conduct a roadside field sobriety test, and, after concluding that the driver must be intoxicated on marijuana or *something*, takes the driver back to the station for a blood and urine test.

Later in district court you are informed by the prosecutor that your client's lab results have come back. "He tested positive for marijuana in the urine," you're told, "and this is consistent with the officer's statement that he failed the field sobriety tests." So the county is going to prosecute for operating a motor vehicle while under the influence of marijuana.

"But don't worry," the prosecutor reassures you. "If he pleads, we'll give him minimum jail time, probated, and minimum fines. Plus, we'll drop the failure to wear a seatbelt."

Sound familiar? It might be a good deal, especially if on the way to jail your client blurts out a confession, no, a *brag*, about how high he was.

But what if your client is adamantly insistent that he didn't smoke any pot, at least not *that* day, and hadn't for at least a week? Moreover, the police officer confirms that he found nothing in the car – no roach, no dope, not even a rolling paper. The arrest was grounded partly on your client's admission that he did smoke pot at a party last weekend, and partly on his failing the sobriety tests. The only other evidence is the positive lab report.

Your client demands a trial. Now what?

First of all, you don't have much time. The prosecutor is ready; the police officer knows what he is going to say, and the only other witness the county needs to subpoena is the lab tech, to complete the chain of custody of samples and testify as to the results. You, on the other hand, need more time. You're fairly certain that a positive urine test for marijuana cannot prove impairment at the time of operating a vehicle, and you've heard from other colleagues that the "horizontal gaze nystagmus" test, one of the field sobriety tests used by the officer in your case, does not work for marijuana intoxication, but applies only to alcohol and certain other drugs.

that these tests cannot prove impairment at the time your client operated the vehicle. If you had solid information to show the judge you might be able to file a motion for more time, a motion for expert funds, or a motion suppressing the test results altogether. At the very least you more effectively would be able to cross-examine the police officer and lab tech.

Hopefully, this article can help. While the information contained herein was originally researched and collected over time for my personal use in several cases, after sharing and comparing war stories with colleagues, I am persuaded that others might benefit from a written assemblage of authoritative resources that scientifically refute any purported ability of (1) the horizontal gaze nystagmus test (HGN) or (2) a positive urine test to prove that someone was impaired by or under the influence of marijuana at a particular time, e.g., while operating a motor vehicle. Part One of this Article discusses the use of the Horizontal Gaze Nystagmus test, first generally, as a tool to prove intoxication or impairment when alcohol or drug usage is suspected, and then specifically, as a tool to prove impairment by or usage of marijuana. Part Two, to be published in the next issue of *The Advocate*, discusses the use of laboratory analysis of urine to prove impairment or intoxication of marijuana.

In researching this article, I have borrowed heavily from the work of others who have preceded me, and therefore have included an acknowledgement at the end of Part Two of his article.

Also, in appreciation of the difficulty in getting copies of published works to include with a motion or memorandum, where possible I have used internet-available information. I have attempted to apply a *caveat emptor* approach to internet research; because an internet search string will yield an index containing literally hundreds of sites addressing issues involving marijuana and intoxication – including some of dubious origin or suspect credibility – I have mentioned only the articles and resources which I believe others will find to be credible. These mentions are, of course, judgment calls, and you may want to do your own research if you believe this article contains too little research in support of the conclusions it reaches.

I. Looking for Mary Jane on the Road: The Horizontal Gaze Nystagmus Test

After pulling over a motorist suspected of driving under the influence, a police officer will typically administer several

field sobriety tests. Three in particular make up the standardized field sobriety test (SFST), which are referenced in a publication by the National Highway Traffic Safety Administration (NHTSA) called "Horizontal Gaze Nystagmus: The Science & the Law – A Resource Guide for Judges, Prosecutors and Law Enforcement". (Although this publication purports to be a manual intended for prosecutors and law enforcement, there is actually much information contained within favorable to the criminal defense lawyer.)

The three tests which make up the SFST battery are: (1) the "walk-and-turn" test, where the motorist must walk heel to toe on a straight line, usually the white line on the side of the road, turn, and repeat the process; (2) the "one-leg-stand" test, where the motorist lifts one leg and tries to maintain balance; and (3) the horizontal gaze nystagmus. *Id.* at p. 1. The NHTSA claims that "scientific evidence establishes that the horizontal gaze nystagmus test is a reliable roadside measure of a person's impairment due to alcohol or certain other drugs." *Id.* While theoretically (and debatably) the HGN can, when used in conjunction with the other roadside sobriety tests, yield some predictability about the level of alcohol intoxication of a particular motorist, in practice the HGN is not so reliable for reasons discussed below. Moreover, there appears to be no authority that the HGN test is applicable to marijuana intoxication. In fact, the published material on the HGN suggests the contrary. To understand why, one first has to know what the HGN test is, and how it is properly administered.

A. What is the Horizontal Gaze Nystagmus Test and How Is It Administered?

"Nystagmus" refers to an "involuntary jerking or bouncing" of the eye that occurs when there is a "disturbance of inner ear system or the oculomotor control of the eye." "Horizontal Gaze Nystagmus" refers to a lateral or horizontal jerking when the eye gazes to the side. To put this in the context of a field sobriety test, the consumption of alcohol or other central nervous system depressants hinders the ability of the eye to control the eye muscles, resulting in the aforementioned jerk or bounce of the eye, as the person attempts to move his eye from side to side. Supposedly, the greater the degree of impairment, the more pronounced the jerking or bouncing.

To administer the test, the officer must make sure the subject's eyes can be clearly seen, either by administering it in a well lit area or by using a flashlight to illuminate the subject's face. *Id.* at p.5. The subject should not be facing the blinking lights of a police cruiser or passing cars, either of which could cause an involuntary jerking as the eye fixates on a moving object which quickly passes through the field of vision, such as occurs when a driver by utility poles. *Id.*, and n. 37.

The officer then places an object, such as a pen or the tip of a penlight, approximately twelve to fifteen inches from the subject's face and slightly higher than eye level. *Id.* at p.6.

The officer instructs the motorist to follow the object with the eyes and the eyes only, the head remaining still. The officer then conducts the test, looking for six "clues," three in each eye, that indicate impairment. The clues as described verbatim by the NHTSA are:

- **LACK OF SMOOTH PURSUIT** – The officer moves the object slowly but steadily from the center of the subject's face towards the left ear. The left eye should smoothly follow the object, but if the eye exhibits nystagmus, the officer notes the clue. The officer then checks the right eye.
- **DISTINCT NYSTAGMUS AT MAXIMUM DEVIATION** – Starting again from the center of the suspect's face, the officer moves the object toward the left ear, bringing the eye as far over as possible, and holds the object there for four seconds. The officer notes the clue if there is a distinct and sustained nystagmus at this point. The officer holds the object at maximum deviation for at least four seconds to ensure that quick movement of the object did not possibly cause the nystagmus. The officer then checks the right eye. This is also referred to as "endpoint" nystagmus.
- **ANGLE OF ONSET OF NYSTAGMUS PRIOR TO FORTY-FIVE DEGREES** – The officer moves the object at a speed that would take about four seconds for the object to reach the edge of the suspect's left shoulder. The officer notes this clue if the point or angle at which the eye begins to display nystagmus is before the object reaches forty-five degrees from the center of the suspect's face. The officer then moves the object towards the suspect's right shoulder. For safety reasons, law enforcement officers usually use no apparatus to estimate the forty-five degree angle. Generally, forty-five degrees from center is at the point where the object is in front of the tip of the subject's shoulder. *Id.* at p. 7.

Presumably, if all six clues are present, the motorist is presumed to have "failed" the HGN test, and if none of the clues are present, to have "passed" the HGN test. (The NHTSA publication does not specify what happens if fewer than six clues are present, or if even such a result is possible.) After the HGN test is complete, the officer should conduct the walk-and-turn test and the one-leg-standing test, and then make the decision whether to arrest, release or take other action, such as seeking medical assistance for the subject. *Id.*

A. Attacking the Results of a "Failed" HGN Test

From the moment a police officer states that the subject failed the HGN test, several questions arise in the mind of the defense attorney: Does the HGN survive *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588 (1993) scrutiny? Is the police officer trained and qualified to administer the HGN test, and if so, did he properly administer the HGN

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test in *this* instance? Finally, can the HGN test identify marijuana intoxication, even if properly administered? (While it is this last question with which this article is most concerned, the validity of the HGN test in general is discussed below and may be helpful to anyone defending an alcohol intoxication case as well.)

1. Does the HGN Test Survive *Daubert*?

The NHTSA publication makes great effort to state the case that the HGN test is a scientific test “resting upon the scientific principle that there is a relationship between alcohol consumption and HGN rather than it being simply an observation or common knowledge.”² The publication cites cases from twenty-six states and the District of Columbia (Kentucky is not included) to argue that the HGN test is admissible under either the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) or *Daubert* (as clarified by *Kumho Tire*) standards.

In Kentucky, the validity of the HGN test has only been discussed once, in *Commonwealth v. Rhodes*, Ky. App., 949 S.W.2d 621 (1996). In that case the District Court allowed into evidence the results of an HGN test. On appeal, the Circuit Court held that the results of the HGN test should not have been admitted because the test “encompassed attributes of a test scientific in nature,” and that a proper foundation should have been laid upon which the trial court could then make a finding regarding the scientific validity of the test. *Rhodes*, at p.623.³

On further appeal, the Court of Appeals noted that states which have held the HGN test to be *not* scientific in nature had required at least some foundational testimony that the officer was trained and certified, that the test was properly administered, and that proper procedures were employed. *Id.*, at pp. 623-24.⁴ However, the Court of Appeals reversed the Circuit Court on the grounds that no specific objection was made by defense counsel to the lack of qualifications of the police officer, and that only a “hearsay” objection had been made. “Given these circumstances,” the Court held, “we cannot say that the trial court erroneously admitted the HGN testimony.”

We will never know how Kentucky Courts would have ruled upon the issue of whether the HGN test is scientific in nature, since that question has been mooted by the Kentucky Supreme Court’s decision in *Goodyear Tire and Rubber Co. v. Thompson*, Ky., 11 S.W.3d 575 (2000), which clarified that the *Daubert* standard (as adopted by *Mitchell v. Commonwealth*, Ky., 908 S.W.2d 100 (1995) and explained in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)), applies to both scientific and technical and other specialized knowledge:

[W]e adopt the reasoning of *Kumho* and hold that *Daubert* and *Mitchell* apply “not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.

We also conclude that a trial court may consider one or more of the specific factors that *Daubert* [and *Mitchell* mention] when doing so will help determine that testimony’s reliability. But ... the test of reliability is ‘flexible,’ and *Daubert*’s [and *Mitchell*’s] list of specific factors neither necessarily nor exclusively applies to all experts or in every case.” *Goodyear Tire and Rubber Co.*, at p. 577.

The factors set forth in *Daubert*, *Mitchell*, and now *Goodyear* which a trial court may apply in determining the admissibility of an expert’s proffered testimony include (1) whether a theory or technique can be and has been tested, (2) whether same has been subjected to peer review and publication, (3) whether there is a high known rate of error or potential rate of error, (4) whether there are standards in place for controlling the technique’s operation; and (5) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community. *Id.* at 579.

The NHTSA publication, as previously stated, posits the theory that the above factors have been satisfied by a number of courts who have found the HGN test to be scientifically valid and reliable, and offers tips to prosecutors on how to persuade any particular judge accordingly:

To demonstrate that the HGN test meets the scientific standard of the jurisdiction, a prosecutor can ask that the trial court take judicial notice of the validity and reliability of the HGN test as found in case law from other jurisdictions. This allows the prosecution and the defendant to avoid the cost of expert testimony. If required, the prosecutor will present evidence at an evidentiary hearing. There are two types of evidence the prosecution should use: expert testimony and scientific studies. The prosecution should use both types of evidence to show that the HGN test is valid, reliable, and meets the appropriate scientific standard....

Although a minority of courts have been willing to take judicial notice of the HGN test’s reliability, the better and safer practice may be to move for an evidentiary hearing. Do not wait for the defense to file a motion challenging the admissibility of the test results. (Emphasis in original).⁵

The benefit to defense counsel of the above passage is obvious; while most defense counsel would object to the Court’s taking “judicial notice” of the scientific reliability of the HGN test – particularly one which purports to prove intoxication – now there is a prosecution-oriented publication to cite to the judge which shows that most courts do *not* take such judicial notice.

Assuming that there will be an evidentiary hearing, whether requested by the defense or the prosecution, the defense should be ready to challenge the validity and reliability –

scientific or otherwise —of the HGN test, and attack the credentials of any “expert” who will so testify. The NHTSA recounts anecdotally an evidentiary hearing where a research psychologist (nameless here), whose field of study was the effects of alcohol and drugs on behavior and performance, was able to establish the scientific validity of the HGN, its selection as one of the SFST’s, and its reliability. *Id.* at p.16. The NHTSA then says that, “although not essential,” the prosecution’s case can be advanced by testimony of a medical expert, such as an optometrist, ophthalmologist, toxicologist, pharmacologist, neurologist, emergency room physician or an urgent care physician who will be qualified to discuss the effect of alcohol on eye movements. *Id.* In the case of an optometrist, the NHTSA suggests giving him or her a copy of the resolution passed by the American Optometric Association endorsing the HGN test as an effective test for alcohol impairment, *Id.*, stating that it will enhance the credibility of the prosecution’s expert while diminishing the credibility of an optometrist called by the defense.

Resolution or no, it appears to this defense counsel that the NHTSA has overstated the validity and reliability of the HGN, especially given some of the information which appears elsewhere in its publication.

As stated above, one of the factors of the *Daubert-Mitchell-Goodyear* test is whether there is a high known rate of error or rate of potential error. According to the NHTSA publication and the surveys it cites the rate for error appears *extremely* high, given the reasonable doubt standard which governs criminal trials in this country. For example:

Using data from the 1981 [Southern California Research Institute], the NHTSA determined that the HGN test was seventy-seven percent accurate in detecting whether an individual’s [blood alcohol content] was .10 or higher. The [walk-and-turn test] was found to be accurate sixty-eight percent of the time. However, the NHTSA researchers found that when the results of the HGN and [walk-and-turn] test data were combined, the two tests were eighty percent accurate in detecting whether an individual’s [blood alcohol content] was .10 or higher.

Seventy-seven percent (77%) accurate by itself, and eighty percent (80%) accurate when combined with a failed walk-and-turn test! Are you impressed by that? Should a judge or jury be? Shouldn’t a test standing on its own — if “scientifically” valid and reliable — be accurate more than just over three-quarters of the time? If the HGN is a scientifically or medically valid and reliable test, why is there a need to bootstrap the results of other failed field sobriety tests, none of which are scientific or medical, to inflate the success rate of the HGN?

Other tests are more supportive of the NHTSA’s position, but these results also have a margin for error which leaves room for reasonable doubt:

[M]ore recent studies demonstrate that the HGN test is even more accurate when administered by law enforcement officers trained and experienced in the administration of the HGN test. A 1986 study found the HGN test ninety-two percent accurate in detecting impairment. A 1987 study found that experienced law enforcement officers were correct ninety-six percent of the time in determining a .10 [blood alcohol content] or more using the HGN test. *Id.*

Those are clearly better statistics for the NHTSA; but what is meant by “trained and experienced in the administration of the HGN test?” How do you know if you have an “experienced law enforcement officer?” You can bet the Commonwealth will argue that any particular officer is experienced if the officer can testify that he has performed the test “hundreds of times.” Of course, if the officer performed the test hundreds of time wrongly, the officer is actually an expert on how *not* to do the test. How do you find out which one he or she is? You really have to know the answer to know whether the particular roadside HGN test in your case is in the seventy-seven percent accurate category, or the ninety-two to ninety-six percent accurate category.

2. Is the Officer Qualified to Administer the HGN and Report the Results?

In order to persuade a judge at a *Daubert* or suppression hearing that the HGN test in your case is reliable, according to surveys by the NHTSA, only seventy-seven percent of the time, you have to establish the experience level of the officer administering the test. Areas ripe for cross-examination include his or her (1) training in Standard Field Sobriety Tests, (2) knowledge on the stand of the HGN test and how to administer it, and (3) recollections of the conditions under which this particular test was administered.

First of all, ask to see any certifications that evidence his or her training in administering the HGN test. Although there is no requirement that an officer hold a certification card to administer an HGN test (unlike the requirement that an officer administering an alcohol-breath test must be certified to operate the breath machine⁶), there is a training manual for administering the Standard Field Sobriety Test battery, *Id.* at p.5, of which the NHTSA warns that a defense attorney who specializes in impaired driving cases will know “as well as if not better than some law enforcement officers and many prosecutors.” *Id.* at p.8. If you have time for discovery, ask for any confirmation of training he or she may have received regarding the SFTS battery, or for the HGN test in particular, and copies of any materials received during that training.

Next, use the NHTSA guide to quiz the officer about his or her knowledge of HGN. What is vertical nystagmus as opposed to horizontal? What relation does vertical nystagmus have to intoxication? What is nystagmus caused by non-alcohol related disturbance of the vestibular system (caloric

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nystagmus, rotational nystagmus)? What is nystagmus caused by neural activity? What is epileptic nystagmus, natural nystagmus, and physiological nystagmus? These types of nystagmus differ from HGN, but only if you know what to look for. All of these are in the NHTSA publication, and arguably, a truly HGN trained and experienced officer will be able to explain these various types of nystagmus, and offer his opinion to the judge or jury why they could not possibly have been present during the roadside test. (There is always the risk that the officer did not garner this knowledge through training and experience, but rather that he or she crammed in preparation for his testimony. Even so, it is worth testing his or her extent of knowledge on the subject, because otherwise, such knowledge will be presumed by the judge or jury, who has just heard that he has administered the HGN "hundreds of times.")

Question the officer about the known rate of error of the HGN test and ask if his or her own department has a known rate of error or potential error. If there's time, find out from court files or other defense counsel whether he or she has ever noted a failed HGN test on a uniform citation, only to find out later that the subject blew under a .10 on a breathalyzer.

Finally, have the officer demonstrate to the best of his or her recollection how this particular test was conducted at the roadside. Watch for any deviation from the instructions in the NHTSA manual, excerpted above, or in the SFST training manual, if you have one. Check the degrees, the timing, and the positioning of the subject being tested vis-a-vis oncoming traffic. In short, have the officer demonstrate to the best of his ability and memory exactly how he administered the test to your client. (If you have an expert, he can observe the officer during trial, and hopefully be able to critique his performance in a way that benefits your client.)

If the officer cannot substantiate his or her training, or exhibits poor knowledge of the HGN, the SFST battery, the rate of error, or has a poor memory of how this particular test was conducted, argue that a proper foundation has not been laid by the prosecutor and that the results of the test should be excluded from evidence under *Rhodes*. Argue also that the test, scientific or technical, has not been shown by the officer to be valid and reliable, and ought to be excluded on that ground also.

3. Does the HGN Test Even Apply to Marijuana Intoxication?

All of the above applies to attacking the validity of an HGN in general, and may be more helpful in an alcohol DUI case than in a marijuana DUI case. In a marijuana case, defense counsel may never even get to the issues raised above because from available sources, it appears that the test does not even apply to marijuana intoxication.

The NHTSA publication in its opening paragraph makes the following statement:

Horizontal gaze nystagmus (HGN) refers to a lateral or horizontal jerking when the eye gazes to the side. In the impaired

driving context, alcohol consumption or consumption of certain other central nervous system depressants, inhalants or phencyclidine, hinders the ability of the brain to correctly control eye muscles, therefore causing the jerk or bounce associated with HGN.⁷

A correlation between HGN and marijuana is not mentioned anywhere in the NHTSA publication. Marijuana is neither alcohol nor a depressant.⁸ And, while marijuana is usually inhaled (unless you are President Clinton), it is not typically labeled an "inhalant" and is not what is meant by that term as used by the NHTSA.

Yet, some officers will still administer the test when marijuana intoxication is expected, and will even state that the test has been failed. Included within this article is one real example where a state police officer determined that a motorist had failed an HGN test due to marijuana intoxication is included within this article. (The name of the subject, as well as any identifying information, have been deleted to protect the client who eventually was vindicated of driving under the influence.)

Ideally, there is time and funds available for a pharmacist, medical doctor or toxicologist who will be able to testify by affidavit or live, if necessary, that marijuana does not attack the central nervous system in the same manner alcohol, depressants, inhalants or phencyclidine. If not, then defense counsel must ask the Court to force the Commonwealth to establish the connection of HGN to marijuana through credible literature or expert testimony. If the expertise proffered is genuine and truthful, the Commonwealth will not be able to do that. Regardless, defense counsel must be ready with literature and the NHTSA publication to rebut any evidence that HGN applies to marijuana usage, or that marijuana is a depressant or inhalant contemplated by the NHTSA.

4. Making the Challenge

Defense Counsel will have to decide for him or herself the best way to actually make preserve a challenge to the HGN test in district court. One alternative is to file a motion to suppress the evidence, citing and attaching the sources endnotes in this article, and to request an evidentiary hearing. One advantage of this alternative is that defense counsel gets to make the first argument about why the HGN test should be suppressed, leaving the prosecution to make up lost ground. An additional advantage is that under Kentucky RCr 9.78, whenever a defendant moves to suppress evidence consisting of the "fruits of a search," which is arguably what an HGN test is, the trial court must conduct an evidentiary hearing outside the presence of the jury and enter into the record findings of fact and conclusions of law, making clear what the issues on appeal will be, if the evidence is not suppressed. The failure of the Court to make such record findings should result in a reversal and remands, assuming the courts agree that HGN results are the "fruits of a search."

A major disadvantage of this approach is that it gives the prosecution time to get a medical expert and conduct a *Daubert* hearing. Certainly, the police officer will be more

prepared to discuss HGN if he has foreknowledge that he will be cross-examined on this subject.

The other alternative is to wait until trial to challenge the qualifications and knowledge of the officer in front of the judge and jury. There is a greater likelihood that the officer will be surprised, and there may be no opportunity for the prosecution to circle wagons and provide documentary support for the HGN. On the other hand, a district judge, without the benefit of a full briefing and hearing on the subject, may be less inclined to refuse the admission into evidence of the test. Failing to file a motion to suppress in advance of trial often discounts the importance of the motion, and may leave the impression that the objections are more a spontaneous defense outburst than the result of careful research and consideration of the issue.

As for this lawyer, I am reminded of a saying by my father in reference to a fistfight: "whoever gets the first lick in, wins." Stress the importance of the issue by filing a motion to suppress before trial, giving the judge opportunity to consider the matter fully. Sandbagging the Commonwealth may result in sandbagging the judge, leaving the battle to be fought again in a court of appellate jurisdiction.

And we all hate having to appeal.

Next issue, this article concludes with "Part Two: Looking in the Laboratory." The relevance of a positive urine test for marijuana in a DUI case, as well as the effects of "second-hand smoke," will be discussed.

ENDNOTES

1. This publication is available on the internet at www.nhtsa.dot.gov. The National Highway Traffic Safety Administration is a division of the United States Department of Transportation. Your local prosecutor should have one in his office (mine does).
2. "Horizontal Gaze Nystagmus," *supra n. 1*, at p. 11. The publication footnotes no fewer than twenty-seven cases, covering twenty-six states and the District of Columbia, as proof for this statement. They are not listed in this publication due to space considerations.
3. The Court of Appeals cited ten jurisdictions which, at that time, had held the HGN test to be scientific in nature.
4. The Court cited twelve jurisdictions where courts, having found the test to be not scientific, had nevertheless required some foundation as to an officer's qualifications before the results of an HGN test would be admitted.
5. "Horizontal Gaze Nystagmus," *supra n. 1*, at p. 14
6. KRS 189A.103(3)(b) provides: "All breath tests shall be administered by a peace officer holding a certificate, as an operator of a breath analysis instrument, issued by the secretary of the Justice Cabinet or his designee."
7. "Horizontal Gaze Nystagmus," *supra n. 1*, at p. 1
8. "What Every Driver Should Know About Drugs," a publication by the American Trucking Associations, 2200 Mill Road, Alexandria, VA 22314-4677, © 1992. Descriptions of various drugs are contained within this publication, including a table which lists "Depressants" separately from "Cannabis." Although there are possibly hundreds of publications or medical journals which differentiate between marijuana and drugs which suppress the central nervous system, this publication is particularly good because it describes the possible effects and effects of overdose separately, showing the difference ■

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POST ARREST COMPLAINT	
1) DUI (Drugs)	(I smelled marijuana very strong when he pulled up to my traffic check. I had him get in some field sobriety tests: 1. Horizontal Gaze Nystagmus - FAILED, 2. Finger to Nose - FAILED. Subject's eyes were very red and he stated that he had just smoked a joint of marijuana.)

OBTAINING POST-CONVICTION EXPERT FUNDING “REVIVING THE SEEMINGLY HOPELESS CASE”

by **Brian Ruff and Robert Hubbard**

INTRODUCTION

The use of expert witnesses by post-conviction counsel to aid in the preparation and presentation of varying types of collateral attack is becoming increasingly widespread. Here in Kentucky, attorneys representing indigent persons routinely request funding for experts in cases brought pursuant to RCr 11.42, “ineffective assistance of counsel,” and CR 60.02, “motions to alter, amend or vacate the existing judgment.” Requests for expert funding are often utilized in state and federal habeas corpus actions as well.

In the post-conviction context, clients are usually incarcerated and indigent. They often lack even the normal support system of family and friends that most indigent clients have available. Due primarily to the lengthy periods of time they have been separated from the community and to a lesser extent due to the belief among those that care about them that everything is now over. These clients also face a court system that is extremely reluctant to look back at existing judgments and sentencing orders. All of the reasons that exist in any criminal case for utilizing expert help are present in corresponding post-conviction cases, and are, in fact, often even more crucial to success than in their trial level counterpart. With the help of an expert in analyzing the existing data, helping to explain problems or issues that exist from the original trial level case, and ultimately in many cases the presentation of testimony from your expert at an evidentiary hearing you can truly breath life back into the case that seemed dead. By obtaining expert funding and properly utilizing these experts to present our clients post-conviction cases fully and in the manner they deserve, we can bring back hope to people who have lost all hope.

I. LEGAL CHANGES EFFECTING POST-CONVICTION CASES

(A) CASE LAW

Clearly, whether faced with the trial stage of his or her case or at the post-conviction level the need for expert assistance involves fundamental rights under both the United States and Kentucky Constitutions. The bright line authority on the issue of this fundamental right to expert assistance is *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985). A thorough explanation of the *Ake* decision and its relevance to these issues is offered in the Department of Public Advocacy’s Expert Funds Manual at Chapter 19, pg. 5, and can be briefly explained as follows:

The specific issue of the *Ake* decision in relevant part, was the petitioner’s entitlement to an independent expert witness on mental health issues to assist his defense counsel with the preparation and presentation of a defense. The trial court had forced the defendant to utilize the “state employed psychiatrist,” with the result thereby that the defendant was left unable to offer an available defense, in which a defense mental health expert would have been necessary and would have clearly played a “substantial part.”

The U.S. Supreme Court determined in *Ake* that without the needed expertise, the petitioner was denied the ability to “meaningfully participate” in his judicial proceedings. The court stated as follows:

This court has long recognized that when a state brings its judicial power to bear on an indigent defendant in criminal proceedings, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the 14th Amendment’s due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. (*Ake, supra*, at 1093.)

The following is a list of various ways in which a defense expert could reasonably be utilized to assist defense counsel as listed by the Supreme Court in *Ake, supra*: (1) to conduct a professional exam on issues relevant to the defense; (2) to help determine whether the anticipated defense is viable; (3) to testify; (4) to assist the defense in preparation of cross-examination of the state’s expert; (5) to aid in preparation of a penalty phase; (6) to rebut aggravating evidence in capital penalty phases; and, (7) to present mitigating evidence.

Following *Ake, supra*, the Kentucky Supreme Court in *Sommers v. Commonwealth*, Ky., 843 S.W.2d 879 (1992) reversed the murder convictions of David Sommers. One of the major issues for this reversal was the denial of funding for independent expert and investigative assistance in the form of consultants and/or (trial) witnesses for the defense in the fields of pathology and arson. The court observed that due process requires that indigence may not deprive a criminal defendant of the right to present an effective defense. (See also KRS 31.110.)

(B) STATUTORY CHANGES

Recognizing the federal and state constitutional protections as set forth in *Ake, supra*, and later in *Sommers, supra*, the Kentucky General Assembly budgeted funds to implement the protections inherent in the Sixth and 14th Amendments to the U.S. Constitution and Sections Seven and 11 of the Kentucky Constitution.

These funding considerations were set out in the 1994 and 1998 changes to KRS 31.185 and KRS 31.200. House Bill 388, which became law on April 11, 1994, created a state wide public defender fund for experts and other resources. This change addressed the funding of expert witness fees and other direct expenses of representation, including the cost of transcripts in cases covered by KRS Chapter 31. This Bill set forth appropriation of funds from each county annually to pay for court orders entered against counties pursuant to Chapter 31. This law also allowed for amendment of KRS Chapter 31.185 to allow any defendant's attorney operating under this chapter to use the same state facilities for the evaluation of evidence as are available to attorneys representing the Commonwealth.

In 1998, two significant changes were made regarding funding by HB 337, (1) Jefferson County now contributes to the statewide expert fund, (2) **expert expenses for incarcerated persons are now funded through the KRS 31.185 expert fund like all other expert fees. Previously DPA bore these expenses directly through its budget.**

II. REQUESTING EXPERT FUNDS EX PARTE**(A) GREATER ACCEPTANCE IN GENERAL**

Although each case should be approached based upon its own facts and individual circumstances, the writers of this article would strongly urge counsel to consider seeking funding "ex parte" and "in camera." The usual question at this juncture is; why is it necessary or at least preferable that requests for funds be heard privately and without the knowledge or presence of the Commonwealth? The usual and obvious answer is that the matter or subject for which expert help is sought involves precisely the type of investigation, review and consultation which at the early stages would remain completely privileged for a financially solvent defendant or movant, with personal funds available to hire a privately retained expert. In essence, if a financially solvent defendant would have a right to privacy in developing his or her pre-hearing preparation and attorney-client pre-hearing strategy. Then an indigent client has these same rights and his legal counsel should take all necessary steps to guarantee that he would be afforded these protections in the same manner as any other defendant. These rights have been enunciated by the Kentucky courts in *Young v. Commonwealth*, Ky., 585 S.W.2d 378 (1979) and *Lincoln County Fiscal Court v. Department of Public Advocacy*, Ky., 794 S.W.2d 162 (1990).

Although there is no statewide statute or rule particularly specifying that motions for expert funds may be brought ex parte, as a practical matter, these motions are regularly and routinely presented ex parte in circuit courts throughout the Commonwealth of Kentucky. The ex parte presentation of these requests for funds are now an acceptable method of protecting the rights of indigent defendants and post-conviction litigants to prepare his or her case strategy within the protections of the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. The United States Supreme Court explained over 30 years ago in the context of the case of *United States v. Jackson*, 390 U.S. 570 (1968), that it would be an impermissible burden upon the exercise of a defendant's constitutional rights if the price for exercising a right was the waiver of another valuable right. *Id.* at 572. Clearly, the dilemma of surrendering the constitutional right to attorney-client privilege and confidentiality in order to acquire funding assistance has been in the past unique to indigent persons. Clients with adequate financial resources and their legal counsel would certainly never tolerate an intrusion by state prosecutors. For this reason, whenever possible counsel for the indigent client should resist any trend or tendency to backslide on this issue. To lose the gains that have been made in this crucial area of the defense due to lack of routine diligence by defense or post-conviction counsel would be a grave loss indeed for all of our clients, today and in the future.

Those instances where local prosecutors attempt to challenge indigent defendants and post-conviction litigants efforts to secure funding assistance and to control how that funding is applied, raise serious equal protection issues. (See, U.S. Constitution, Amend. 14; Kentucky Constitution, Sections 2-3.)

(B) ACCEPTANCE AS A LOCAL RULE

The Kentucky Supreme Court must approve all local rules of court adopted by the circuit courts of Kentucky. Recently, the local rules of court for Fayette County incorporated specific provisions applying to the need for processing requests ex parte for expert funds, where (Rule 7, A) reads as follows: (Emphasis added)

A. EX PARTE REQUESTS FOR FUNDS

A defendant in a pending criminal proceeding, who is a needy person as defined by KRS Chapter 31, may apply ex parte to the court, without notice to the Commonwealth's Attorney, for the payment of investigative, expert or other services necessary for an adequate defense.

The adoption and approval of the Fayette Circuit Court rule, can be offered as an example of the proper use of ex parte requests in those now rare instances where a local court may for example have suggested that post-conviction counsel is trying to "go behind the prosecutors back."

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III. HOW TO DRAFT YOUR EX PARTE MOTION FOR FUNDS

In drafting your motion it is important that you set out on the face of the document that you are requesting expert funds ex parte and in camera and that you wish for your order to be sealed. (You will place on the bottom of the proposed order the limited parties you wish for the order to be distributed to.) It is as a practical matter a good idea to send a brief cover letter of one or two sentences to the clerk when you send your motion explaining that it is requested in camera. This avoids mix-ups such as a clerk inadvertently listing your motion and its subject on the next motion day docket sheet.

It is also important that you explain briefly why you need an expert of this type. Tailor this portion of the motion to reflect the facts and circumstances of your case. You should list the name and briefly the credentials of your expert. It is also as a practical matter a good idea to attach a letter from your expert, where he or she has agreed to work on the case. You should list in your motion the rate of pay per hour that your expert charges and an estimate of the expected hours required to complete the services. You should include the expert's rate for travel as well. (See, the attached sample motion for expert funds and sample proposed order.) It is advisable to also send a proposed order along with your motion. This gives the court the obvious option to sign the proposed order "as is" or to modify it.

CONCLUSION

The fair and truly equal treatment of all persons has been set out as an ideal of our Nation from its founding. All too often we have fallen short however of this goal. All lawyers who regularly represent indigent defendants, particularly those who have already been convicted and sentenced, can through the proper and diligent use of expert advice and testimony offer hope to the hopeless and even from time to time revive the seemingly hopeless case.

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COMMONWEALTH OF KENTUCKY
 _____ CIRCUIT COURT
 INDICTMENT NO. _____

 MOVANT

VS. EX PARTE MOTION FOR EXPERT FUNDS

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * *

Comes the movant, by counsel, and requests that this matter be sealed and reviewed by the court "in camera". Movant urges that he is entitled to file this motion ex parte. Movant also urges this court to take notice that the matter for which expert help is sought, is precisely the sort of inquiry that a solvent defendant with funds to hire private counsel and privately retained experts could expect to remain privileged at this stage of the proceedings and thus as yet unavailable to the Commonwealth. The movant, a needy person confined in a state institution, asserts that he is entitled to the same protections as a defendant with funds.

WHEREFORE, the movant requests this Honorable Court to approve and order that funds be made available to provide expert assistance. Movant urges that the requested assistance is both proper and necessary in the interest of justice. Movant asserts, that this motion should be granted pursuant to the authority of *Ake v. Oklahoma*, 470 U.S. 68, 106 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *Young v. Commonwealth, Ky.*, 585 S.W.2d 378 (1979); *Lincoln County Fiscal Court v. Department of Public Advocacy, Ky.*, 794 S.W.2d 162 (1990) (copy attached). The requested expert funds are necessitated by the provisions of KRS 31.110; KRS 31.185; KRS 31.200; (note this statute was amended effective July 15, 1998: new amendment simply shifted payment responsibility from the Department of Public Advo-

cacy to the super fund) Section 11 of the Kentucky Constitution and the Sixth and 14th Amendments to the United States Constitution. In support thereof, the movant states as follows:

1. The undersigned counsel for movant after reviewing this case specifically regarding issues of Technical Ballistics and Firearms Use, including Terminal Ballistics (the study of the effects on a target by the passage of a projectile), contacted _____. _____ has agreed to act as consultant to the movant and to provide other services that may appear necessary to aid counsel in preparing and evaluating these issues upon proper approval of this court. (See letter of _____, attached.) (See also Curriculum Vitae, attached.)

2. The *Lincoln County* case, *supra*, held that it is the duty of Department of Public Advocacy to bear the expenses of the defense of needy persons confined in state institutions.

3. _____ will charge for his necessary services at an hourly rate of \$150.00 for the following probable services: evaluation, consultation, research, correspondence, interviewing, courtroom attendance and testimony. A maximum day being ten hours including travel with reimbursement for out of pocket travel expenses. _____ has advised that typically about \$3,000 total costs and fees are required to complete the necessary services. He has explained he will advise in a timely fashion if additional hours become necessary.

4. Counsel for the movant must explore all possible grounds to further the movant's case in this post-trial motion. *The American Bar Association Standards for Criminal Justice, 2d Ed.*, the Defense Function, Standard 4-4-1 (1980) states that; "it is the duty of the lawyer to conduct a prompt

investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." Plain and simple, a ballistics and firearms expert is necessary to preparation and/or presentation of movant's case. (On page 2 of _____ letter, he indicates that his early review indicates the technical evidence contradicts the prosecutor's theory of the case.)

WHEREFORE, movant respectfully requests the court to enter an order authorizing the movant to employ _____. That the cost of this employment be paid by the Finance and Administration Cabinet, Commonwealth of Kentucky, pursuant to the authority set out in the *Lincoln County* case, *supra* and the above cited statutory authority as amended effective 7/15/98.

Respectfully submitted,

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COUNSEL FOR MOVANT

NOTICE

Please take notice that the foregoing motion has been mailed via first-class certified postage prepaid to _____ Circuit Court Clerk, _____ on this ____ day of _____, _____ for direct submission to the Court.

BRIAN THOMAS RUFF

COUNSEL FOR MOVANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing ex parte motion has been served by mailing same to Department of Public Advocacy, ATTN: Post-Conviction Branch, 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky 40601 on this ____ day of _____, _____.

BRIAN THOMAS RUFF
COUNSEL FOR MOVANT

COMMONWEALTH OF KENTUCKY

CIRCUIT COURT
INDICTMENT NO. _____

MOVANT

VS. ORDER

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * *

This matter having been brought before the court upon movant's ex parte sealed motion requesting a sealed order directing the Finance and Administration Cabinet, Commonwealth of Kentucky, to provide funds for a reasonably necessary expert, and the court having been sufficiently advised, the court hereby finds that the services of a technical ballistics expert is necessary to the movant and counsel for the investigation of, preparation for, and presentation of issues and evidence during the RCr 11.42 proceedings in the above styled case.

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to KRS 31.200(3) and *Lincoln County Fiscal Court v. Department of Public Advocacy*, Ky., 794 S.W.2d 162 (1990), the Finance and Administration Cabinet, Commonwealth of Kentucky, shall pay; _____, for his services as a technical ballistics expert, as specifically regards reviewing appropriate records, consulting with movant, evaluating ballistics records and crime scene reports, evaluating records and testing methods relating to effects on targets by

passage of the projectiles, including evaluations previously done by other ballistics and/or crime scene experts, reporting his findings to movant's counsel and appearing for court, if necessary.

_____ rate shall be \$150.00 per hour for these services. He shall further be reimbursed for travel and for necessary and reasonable travel expenses. It is understood and further ordered that if this expert anticipates the need for significant additional hours or services to be expended he will advise counsel for the movant and the court in advance so that this court may rule separately on the need for said additional services.

IT IS FURTHER ORDERED that movant's Motion for Funds in the above styled case, as well as all attachments thereto, this order, and any related documents be placed under seal by the clerk of this court until further order of this court, and that no copies shall be distributed beyond the Department of Public Advocacy, Cabinet for Public Protection and Regulation, the Finance Cabinet, and Hon Brian T. Ruff, Assistant Public Advocate.

Entered this ____ day of _____, _____.

JUDGE, _____ CIRCUIT COURT

Distribute to:

Hon. Brian T. Ruff
Assistant Public Advocate
Department of Public Advocacy
Kentucky State Reformatory
LaGrange, Kentucky 40032

Department of Public Advocacy
Attention: Post-Conviction Branch
100 Fair Oaks Lane
Suite 301
Frankfort, Kentucky 40601

Finance and Administration Cabinet
Room 383, Capitol Annex
Frankfort, Kentucky 40601 ■

DEPARTMENT OF PUBLIC ADVOCACY POSITION ON CAPITAL PUNISHMENT

Prepared for the Criminal Justice Council Capital Committee by Ernie Lewis, July 14, 2000

INTRODUCTION

I welcome the opportunity to present on this significant issue before this committee. This committee has a vital task: to review the issue of capital punishment in Kentucky to ensure that due process, fairness, and reliability are occurring throughout the system of the administration of capital punishment. I come before you as the Public Advocate, and also as a public defender of 23 years, as a person who has represented clients in 14 capital cases from McCracken County to Clark and Madison Counties, including the trial of 6 cases before a death qualified jury, and including the representation of one person who has been on Kentucky's death row since 1978. I have represented capital clients at trial, appeal, in state RCr 11.42 proceedings and in federal habeas before the district court and the 6th Circuit Court of Appeals.

The death penalty continues to maintain significant support among Americans. The latest Gallup Poll shows that 66% of Americans favor capital punishment while 26% oppose it. Other polls have shown that this support drops significantly when other penalty options are present such as life without parole, now a penalty option in Kentucky. DPA has no official position on the death penalty, and has within its staff persons on both sides of the issue. The present Public Advocate has a lifelong stance of opposition to capital punishment for religious reasons. This presentation will not seek to address the pros and cons of this most significant moral issue. Rather, it will seek to describe the present reality of the death penalty in Kentucky with a focus on the system of delivery of indigent defense services. Strengths and problems with the present system will be highlighted. Finally, a series of recommendations will be made for improving the present system in order to bring fairness and reliability into Kentucky's capital punishment scheme.

THE PRESENT REALITY

KRS Chapter 31 established the Department of Public Advocacy as an "independent agency of state government...in order to provide for the establishment, maintenance and operation of a state sponsored and controlled system for: (1) The representation of indigent persons accused of crimes or mental states which may result in their incarceration or confinement." The Department consists of 4 divisions: the Trial Division; the Post-Trial Division; the Law-Operations Division; the Protection and Advocacy Division.

The Department of Public Advocacy has for many years been one of the lowest funded public defender agencies in the country. In FY 99, the total cost-per-case at all levels was

\$210, including \$170 per case at the trial level. In FY 99, Kentucky funded indigent defense at \$5.90 per capita. In 1999, entry level public defenders were paid \$23,388 per year. In FY 99, each full-time defender opened an average of 475 cases. The *Blue Ribbon Group* report issued in June of 1999 found that 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." Finding #4. Finding #5 reads that DPA "per attorney caseload far exceeds national caseload standards." Finding #6 reads that DPA "ranks at, or near, the bottom of public defender salaries nationwide for attorneys at all experience levels." The *Blue Ribbon Group* recommended that \$11.7 million new General Fund dollars were needed annually to fund reasonably indigent defense in Kentucky. In response, Governor Patton placed \$4 million for 01 and \$6 million for 02 in his budget, which was adopted by the General Assembly. Further, it is expected that the remaining portion of the *Blue Ribbon Group* recommended budget will be funded in 02-04.

The Trial Division

The Trial Division has within it 25 field offices providing services in 82 counties. Public defender services are delivered in the remaining 38 counties by part-time lawyers on contract with DPA. After the present biennium is completed, 109 counties will be covered by 27 field offices. DPA trial attorneys averaged 475 open cases per lawyer in FY 99. The caseload in some offices was much higher: for example, lawyers in Louisville opened over 600 cases per lawyer, as did lawyers in Owensboro (1168), Henderson (618), Bell County (590) and Hazard (780). Cases involving a conflict of interest are usually handled by private lawyers on contract through the local field office. The systems in all 120 counties are supervised by 5 regional managers and the chief defender of the Louisville Office. These managers are responsible for directing their own office, supervising the directing attorneys in the region, and providing oversight of all of the contract counties within their region. The Trial Division also houses the Capital Trial Branch which consists of 6 lawyers, 2 mitigation specialists, and an investigator. The Capital Trial Branch primarily handles capital cases in the contract counties, and provides general oversight of capital case responsibilities throughout the state. The budget for 00-01 in the Trial Division is \$17, 435,798. \$802,587 of this is devoted to the Capital Trial Branch. Capital cases which arise in the 82 counties covered by a field office are typically handled by attorneys in the field office, despite their 475 average open cases per lawyer caseload. The Louisville Office also has a Capital Trial Unit. The Lexington Office has no special capital unit. Typically, 60-90 cases arise each year where a capital notice

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is a possibility. Anywhere from 2-5 death verdicts occur each year.

The Post-Trial Division

The Post-Trial Division is responsible for all Chapter 31 cases beyond the trial level. It contains 5 branches: the Appeals Branch, the Capital Appeals Branch, the Post-Conviction Branch, the Capital Post-Conviction Branch, and the Juvenile Post-Dispositional Branch. The Post-Trial Division has an annual budget of \$3,748,636, including \$676,174 for the Capital Post-Conviction Branch and \$357,464 for the Capital Appeals Branch.

DPA represents all of the 39 men and 1 woman on death row in their 42 cases.

The 9 step process

DPA represents capital clients from the moment of their arrest until the moment of their execution.

Once a death verdict occurs, courts review the propriety of the judgment through three different processes: the state appellate process, the state post-conviction process, and finally review by the federal courts. One commonly accepted method of articulating the different stages is by viewing it as a 9-step process. There are 3 levels in the initial trip through state court: the trial, the appeal to the Kentucky Supreme Court, and the petition for writ of certiorari to the US Supreme Court. There are then 3 levels in state post-conviction: the circuit court where the RCr 11.42 is filed, an appeal to the Kentucky Supreme Court, and a second cert. petition. There are then 3 federal court post-conviction levels: the district court where the habeas petition is filed, the Sixth Circuit Court of Appeals which hears the appeal from the habeas decision by the district court, and the cert. petition. Thereafter, there may be other proceedings, such as a second 11.42 or habeas corpus petition. There is also clemency advocacy which occurs during the final days.

The Trial Division represents the case only in step 1, until the notice of appeal has been filed. The Post-Trial Division handles the case from step 2 through step 9 and beyond. The Appeals Branch handles the case through the first denial of the petition for certiorari before the US Supreme Court. The Capital Post-Conviction Branch represents the client from that point until the point of their execution, including federal court and clemency advocacy.

At the present time, there are 14 cases at stage 2 and 3 (appeal and cert), 9 cases at stage 4 (11.42), 9 cases at stages 5 and 6 (appeal and cert), 6 cases at stage 7 (habeas in district court), 3 at stage 8 (6th Circuit), and no one at stage 9.

Money for Private Lawyers

There are many occasions during this process when a private lawyer will be contracted with to provide services to capital clients. Typically this occurs in a conflict of interest situation.

Until 1986, \$1250 at \$35 in court and \$25 out of court was the most a private lawyer could be paid for representing an indigent capital client. From 1986 until 1995, private lawyers were paid only \$2500 for a capital case. That was raised to \$5000 per case in 1995. In 1997, this was raised again to \$12,500, at an hourly rate of \$50 per hour. Raising this cap to \$20,000 is under consideration; however, the recent budget raises questions of whether this can be accomplished until 2002-2004.

Who is on death row?

The persons on death row share the following characteristics:

- All but 1 is male.
- All are poor.
- Most were represented at the trial level by a public defender.
- All are represented at the appellate and post-conviction levels by a public defender.
- 7 are African-American.
- All but 2 of the victims were white.
- Their average age was 29 at the time of the crime.
- 2 were juveniles at the time of the crime.
- 18 were reported to have been abused as children.
- 10 were reported to have been mentally ill.
- 5 were reported to have some level of mental retardation.
- 9 completed high school or beyond.
- 18 were reported to have been on drugs or alcohol at the time of the crime.
- 12 were reported to have been tried by all white juries.
- 10 were represented by private lawyers
- 13 were represented by only 1 lawyer
- 5 were represented by attorneys who have been disciplined by the KBA.

Reversals

A recent significant study commissioned by the Chair of the US Senate Judiciary Committee has been released by Columbia University Law School Professor James S. Liebman which showed that between 1976 and 1995, serious legal errors resulted in 68% of all death sentences being vacated and remanded for further proceedings. This compares to a 15% error rate in noncapital criminal cases. State courts reversed at a 47% rate, followed by the federal court's reversal in 40% of the remaining cases. When the cases were retried, 82% of the convicted defendants were not resentenced to death. 7% of those retried were found to be actually innocent. His conclusion: "Our 23 years worth of results reveal a death penalty system collapsing under the weight of its own mistakes. They reveal a system in which lives and public order are at stake, yet for decades has made more mistakes than we would tolerate in far less important activities. They

reveal a system that is wasteful and broken and needs to be addressed.”

In Kentucky, 29 cases have been reversed since capital punishment was resumed in 1976. In a recent study by DPA law clerk Jack Gatlin, it was found that 9 cases were reversed for evidentiary reasons, 2 for reasons relating to a change of venue, that 8 cases contained instructional errors, that 7 had serious constitutional errors such as confrontation, failure to properly Mirandize the defendant, double jeopardy or ex post facto, 14 were reversed in whole or in part due to prosecutorial misconduct, 1 was reversed for failure to grant a continuance, 5 were reversed due to errors during jury selection, 1 was reversed due to failure to sever the case from that of the codefendant, 1 was reversed due to a variety of penalty phase issues, and 2 were reversed for other reasons such as improper notice and the failure to allow the withdrawal of a guilty plea.

Executions

Kentucky has executed two persons since 1976. One of those waived his rights to pursue a challenge to his conviction. Nationwide, only 1.3% of the nation's death row are executed each year. According to the study by Professor James Liebman, of the 6700 persons sentenced to die between 1973 and 1999, only 598, less than 1 in 11, has been executed. Approximately 4 times as many had their capital judgments overturned or gained clemency as those who were executed.

CALL FOR A MORATORIUM

The idea of a nationwide moratorium on the execution of persons sentenced to death has been gaining momentum in this country. In 1997, the ABA House of Delegates passed by a 280-119 vote a call for a moratorium on executions in this country until jurisdictions implement policies to insure that death penalty cases are administered fairly, impartially, and in accordance with due process to minimize the risk that innocent persons may be executed. The ABA called the administration of justice in capital cases in American a “haphazard maze of unfair practices with no internal consistency.”

The Department of Public Advocacy issued a Call for a Moratorium on Executions in Kentucky in June of 1997 for many of the reasons expressed by the ABA. The moratorium call was based upon 5 significant areas:

- competency of counsel: 10 cases were highlighted which expressed serious questions of the competency of their trial level attorney.
- racial bias: A study commissioned by the 1992 Kentucky General Assembly of all homicides between 1976 and 1991, Keil & Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing* (Sept. 1993), demonstrates race is a factor in Kentucky capital sentencing. Defendants are more likely to be sentenced to death if their victims are white, especially if the defendant is black.

All 7 African-American men on Kentucky's death row killed white victims.

- mentally retarded persons being on death row: the cases of 3 persons with mental retardation were highlighted in the call for a moratorium.
- persons under 18 years of age being on death row: there are presently 2 persons on death row who were juveniles at the time of their crimes.
- preserving state and federal post-conviction review.

Illinois Governor Ryan has implemented a moratorium on executions in Illinois until he can be personally assured that the capital punishment process is working in that state, where the number of innocent people released from death row has matched the number of people executed.

Bills were introduced in both the House and the Senate during the 2000 General Assembly that would have established a moratorium. Neither made it out of committee.

President Clinton has recently halted the first federal execution until a study can be conducted of the fairness of the federal death penalty.

The newest ABA President has called on all attorneys in the United States to work for a moratorium, despite her being a “reluctant supporter” of the death penalty. Martha Barnett, a Tallahassee, Florida attorney, stated on July 10, 2000 that she was “putting together a call to action on the implementation of a moratorium on the death penalty.” She highlighted concerns about the competency of counsel, racial discrimination, and the possibility of the execution of an innocent person.

STRENGTHS OF THE PRESENT SYSTEM

The following are recognized as strengths of the present system of the administration of capital punishment in this state:

- Prosecutors have discretion to prosecute as capital or noncapital.
- Juries fix the penalty in capital cases, and their decision not to impose a death penalty cannot be overridden by the trial judge.
- Jurors are instructed on the full-range of penalties.
- The utilization of individual attorney-conducted voir dire on race, the death penalty, and publicity to select juries is the superior method.
- The aggravating circumstances in KRS 532.025 are limited.
- The Racial Justice Act has established Kentucky in the forefront of the nation as being concerned about racism in the prosecution of capital crimes.
- Kentucky has a statewide public defender system. DPA has within its ranks highly committed lawyers who work

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exceptionally hard under adverse circumstances to represent their clients. DPA has Capital Trial, Appeal, and Post-Conviction Branches with skilled attorneys staffing each of these. DPA is providing counsel from the moment of arrest until the moment of execution, rather than relying upon a system of volunteer counsel, or no system at all as is present in many other states.

- DPA has adopted the NLADA Performance Guidelines and the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases as guidance in the Trial Division.
- Kentucky has provided for state funding of expert witnesses for the defense.
- By and large, the death penalty has not been a significant political issue in campaigns for statewide public office. As such, it has remained a criminal justice issue rather than a political issue. That is not to say that the death penalty in many instances does not become a political issue, particularly in some local elections or in the decision to seek the death penalty in a particular case.

PROBLEMS WITH THE PRESENT SYSTEM

The following are problems with the current administration of capital punishment in Kentucky:

- Inadequate resources provided to indigent defense. In recent testimony before Congress, Professor James Coleman of Duke University Law School testified that the "ABA's own review of the administration of the death penalty over the past two decades revealed a "legal process stood on its head...Often grossly inadequate resources are devoted to state court trials, appeals, and post-conviction review of capital cases...Poor compensation almost inevitably means that virtually the only lawyers who are available to handle capital cases are inexperienced, ill-prepared and under-funded...Capital cases are the most visible and charged of all criminal cases. And frankly, our legal system is not doing a good job of handling them today."
- Kentucky is not immune from Professor Coleman's description despite having a statewide defender system. The most egregious problem is that public defender field offices in Kentucky have attorneys whose caseloads average 475 open cases per lawyer per year. The field offices are not staffed to handle capital cases. When a capital case goes to trial, the other cases and dockets in that field office suffer. The Capital Trial Branch cannot handle the defense of all capital cases. There have been chronic vacancies in the Capital Trial Branch. Field offices are not staffed to handle the occasional capital case. There are insufficient numbers of support staff to accommodate a capital case. There is only 1 investigator per field office outside of Louisville and Lexington. There are only 3 mitigation specialists in the entire state. Thus, in many instances when a field office gets a capital case it is

handled by overworked investigators, no mitigation specialists, and overworked attorneys who must shut down their other dockets if the case goes to trial.

- Many of the persons on death row were represented by a public defender system that historically provided ineffective assistance of counsel due to insufficient resources. Kentucky's first person to be executed since 1976 was represented by a public defender who was paid \$1000 for his representation. A person is presently on death row who was represented by an unpaid volunteer attorney whose phone number was a local bar, who operated out of his home, who had a drinking problem, who presented no mitigation phase testimony, who was not present during the direct of the medical examiner and then conducted cross, and who represented a black defendant who was charged with killing a white victim. The white codefendant received a life without the possibility of parole for 25 years sentence.
- The inadequate funding of indigent defense historically raises the specter that innocent people are on death row, including in Kentucky, and that others are on death row as much for the inadequacy of their representation at the trial level as the viciousness of their criminal act. 87 persons have been released nationwide since 1976 who were later proven to be innocent. For every 7 people executed since 1976, 1 person has been exonerated. It is fair to say that the situation in Kentucky is no different from the nationwide experience.
- Significant time is being wasted in the Post-Trial Division on warrant practice necessitated by the requesting of warrants prematurely. DPA has had to spend precious resources on 15 cases since 1997 where premature death warrants were requested, and eventually stayed; 15 cases where any reasonable observer would know that a court would eventually grant a stay. The warrant practice caused not only the wasting of time. More importantly, it resulted in the premature, hurried preparation and filing of post-conviction actions, which had the effect of the risking of the missing of issues or the filing of claims prior to the complete researching of the issues, and finally the duplicating of efforts in order to amend hurriedly filed briefs and pleadings. The premature request of death warrants is particularly unnecessary due to the 1 year statute of limitations established by the AEDPA.
- The passage of the Antiterrorism and Effective Death Penalty Act has limited severely the reach of the federal court in overseeing the fairness of death penalty verdicts. The standard of review has become quite limited, highlighting the necessity for full and fair review in state post-conviction. Yet, the trend in state post-conviction is away from conducting evidentiary hearings into the adequacy of counsel and the fairness of the trial level proceedings. The care with which death penalty cases have been scrutinized has been severely undermined by the passage of the AEDPA.

- There are insufficient resources to pay private counsel adequately.
- There are 2 people on death row who were children at the time of the crime.
- Prosecutors' discretion particularly in seeking the death penalty is unguided. In the hands of the wrong prosecutor, this can result in the arbitrary use of the death penalty in cases where mitigation is overwhelming, or worse where race of defendant or victim plays a part in the charging decision.

RECOMMENDATIONS

The following is recommended to improve the administration of justice regarding capital punishment:

- A Moratorium on Executions should be seriously considered until all parts of the system are reviewed and adequate funding of indigent defense is ensured.
- All parts of the system must be funded adequately, especially indigent defense. All parts of the system should work for the highest level of professionalism in the policing, judging, prosecuting, and defending of capital cases. Attorney General Janet Reno said on June 16, 2000, that "people should not be prosecuted for a capital crime until they have a lawyer who can properly represent them, and they have the investigative and other resources to properly investigate the charges against them."
- There should be standards for the defense of each case. These should include two lawyers with sufficient training and skills to defend a capital case, an experienced investigator, a mitigation specialist, and access to resources for forensic testing. These standards should be enforced by Court rule or by statute. The trial court should conduct a hearing into whether these standards are being met prior to the trial of any capital case. Duke Law Professor James Coleman testified on behalf of the ABA recently advocating for a system of guidelines that would require the appointing authority to monitor the performance of assigned counsel, including defender offices, based upon publicized standards and procedures. "Where there is compelling evidence that an attorney or defender office has inexcusably ignored basic responsibilities of an effective lawyer, whether or not the inadequate performance is constitutionally deficient, neither the attorney nor the defender office should be appointed in future capital cases."
- DPA should be funded to implement a plan of regional capital trial teams so that a field office will not have to shut down during the representation of a capital case. These teams should include adequate numbers of investigators and mitigation specialists
- Private attorneys involved in representing indigent capital defendants should be paid \$75 per hour at a minimum with no cap.
- The independence of the judiciary must be protected.
- The Death Warrant practice should be streamlined to eliminate the waste of resources by both the Attorney General's Office and DPA. Warrants should not be requested until the 9-step process is concluded or until the defendant has waived further appeals. The proposed criminal rule presently pending before the Kentucky Supreme Court would improve the present system. It would create a one-year statute of limitations (consistent with the AEDPA) for the filing of state post-conviction actions and would further mandate the granting of a stay of execution where the statute of limitations had not run.
- Proof of actual innocence should be allowed whenever the evidence arises prior to the execution. The use of DNA should be encouraged at the trial and post-trial levels in order to ensure that no innocent person is executed or lives a significant period of time on death row.
- The death penalty for juveniles should be eliminated. Both DPA and the Department of Juvenile Justice supported a bill before the 2000 General Assembly which would have abolished the death penalty for children. The death penalty for juveniles is contrary to the rationale for other laws limiting the rights of children due to their immaturity, such as the rights to vote, to contract, to write a will, to possess alcohol and tobacco, to drive, etc. Juvenile murders are not a significant problem in Kentucky. The death penalty is seldom used against children. When the death penalty is used, reversals have occurred in 88% of the cases. The death penalty for juveniles is only used in 23 states. 63% of juveniles on death row are black or Latino. All 40 children executed in the US for the crimes of rape or attempted rape were black. 4 of the 6 children executed in Kentucky history have been black. The ABA, which takes no position on the death penalty as a whole, strongly favors abolition of the death penalty for children.
- The creation of new aggravating circumstances should be resisted. Policy makers should consider the repeal of some of the vague aggravators so that the statute remains carefully and narrowly drawn.
- The charging decision by prosecutors should be reviewed by policy makers so that capital prosecutions are implemented consistently and fairly. This should include a procedure for the defense to have the opportunity to present the case for not seeking the death penalty. This could include the creation of an advisory group either under the Attorney General or PAC, and could also include private citizens as well as prosecutors. This could also include written guidelines which would guide both the advisory body and local prosecutors.
- Protocols for the police, the prosecution and courts should be created for the use of eye witnesses, informant, and confession evidence, including jury instructions cautioning the jury on reliance upon this kind of

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evidence. 25% of cases involving a rape conviction based upon eyewitness testimony have later been proven by DNA evidence to have been false. Faulty eyewitness identification is a major cause of innocent people being convicted in capital cases, and this must be addressed by law enforcement, the courts, the prosecution, and the defense. Finally, all interrogations of the defendant should be videotaped as a matter of practice in order to address the issue of the false confession. 20% of cases of innocent people being convicted and later exonerated by DNA evidence involved a false confession.

- Kentucky should consider a statute or a rule which would require a jury to be instructed that they should not sentence to death unless all doubt had been foreclosed, and that would further allow the trial court to lower a death verdict to life in prison in cases in which all doubt had not been foreclosed.
- Kentucky should resist the temptation to create a truncated system of post-trial review, given the large numbers of reversals nationwide and in Kentucky at all levels. We should all recognize that it is in our interests that any death verdicts be recognized as legitimate, fair, and reliable, and that we not affirm any procedure that would reduce this legitimate interest.

CLOSING

As an opponent of the death penalty, I take no pleasure in describing to you what I believe would correct many of the most egregious problems with capital punishment. However, I say most sincerely that the single most important thing that can be done to assure a level of fairness and reliability in the administration of our system of capital punishment is the ensuring of a professional, excellent, adequately funded system of indigent defense. I believe in the adversary system. I believe that an adversary system on a level playing field will result in fewer innocent people being convicted, in fewer instances of racial discrimination, in more reliable verdicts overall, and in fewer appellate reversals. I believe that the trial should be the main event in a capital case. I believe it is exceptionally wasteful of taxpayers' money and the resources of courts, prosecutors and defense, to have an inadequately funded trial system and then spend inordinate time and resources at the post-trial stages.

I thank you for the opportunity to make these observations.

Ernie Lewis
Public Advocate
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NBC News/Wall Street Journal Poll conducted by the polling organizations of Peter Hart (D) and Robert Teeter (R). July 27-28, 2000.

N=500 registered voters nationwide.

"From what you know, do you think that the death penalty is or is not applied fairly?"

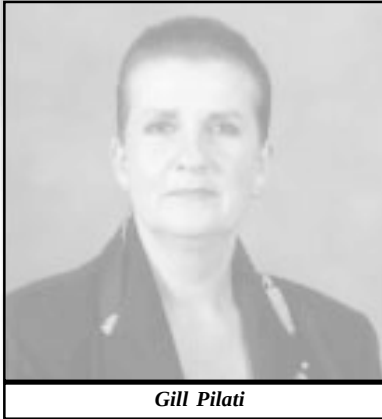
Applied fairly	42%
Not applied fairly	42%
Depends (vol.)	8%
Not sure	8%

"As you may have heard, there have been several instances in which criminals sentenced to be executed have been released based on new evidence or new DNA testing. Based on this information, would you favor or oppose a suspension of the death penalty until questions about its fairness can be studied?"

Favor suspension	63%
Oppose suspension	30%
Depends (vol.)	4%
Not sure	3%

"Racial prejudice infects the administration of the death penalty in the USA; for many innocent prisoners from ethnic minorities, racism was a significant factor in their prosecution and conviction. Racial bias is an especially persistent structural problem which is largely immune to correction under existing procedural safeguards. ". Amnesty International, November 1998

A Recruiter's Philosophy, Code of Ethics, Goals for 2001



Gill Pilati

As the Department of Public Advocacy's new recruiter I would like to share what I believe to be the basic tenets of professional recruitment that ultimately results in the empowerment of the organization's mission.

To be a successful recruiter one must believe in the mission and philosophy of the organization and support that mission by the recruitment of highly qualified and respectful individuals that

possess the same values, mind-set and philosophy of the organization's culture. The recruitment of such professionals I believe can be accomplished by having a recruitment program that is authentically and professionally.

- Selecting the appropriate market for recruitment.
- Developing specific messages and activities to reach the appropriate market.
- Developing recruitment messages and activities that promote the employment opportunities.
- Creating an interviewing climate that is welcoming for prospective job candidates.
- Creating a positive and professional recruitment image.
- Collaborating with others to achieve recruitment goals.
- Recognizing that recruitment is a key survival issue to the energy and life of the organization.
- Avoiding the "tried and true" recruitment methods that are no longer effective.
- Trying a variety of recruitment messages and activities to reach a diverse- labor market.
- Developing a strategic recruitment action plan.

With these objectives and goals, I enthusiastically look forward to a successful 2001 recruitment year, by providing the Department of Public Advocacy with highly qualified and skillful Public Advocates that will carry out and fulfill the mission of "putting a face on justice."

DPA'S Recruitment

Currently, DPA has openings for attorneys in:

- Western Region offices in Madisonville, Paducah and Hopkinsville.
- Eastern Region office in Pineville.
- Bluegrass Region office in Stanford.
- Central Region offices in Bowling Green, Elizabethtown and Owensboro.
- Capital Trial Branch office in Frankfort.

For further information regarding employment opportunities, contact:

Gill Pilati, Recruiter
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100 Fair Oaks Lane, Suite 302
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Tel: (502) 564-8006
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THE ADVOCATE

Department of Public Advocacy

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October 7 – 12, 2001

**NOTE: DPA Education is open only
to criminal defense advocates.**

For more information:
[http://dpa.state.ky.us/
career/htm](http://dpa.state.ky.us/career/htm)

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Sornberger at (502) 564-8006, ext.
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June 17-30, 2001
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