

THE ADVOCATE

ADVOCACY ROOTED IN JUSTICE

OCTOBER, 1989

STARTING SALARIES FOR PUBLIC DEFENDERS 7 SURROUNDING STATES AND KENTUCKY

1. West Virginia	\$28,500
2. Ohio	\$25,896
3. Missouri	\$23,220
4. Virginia	\$23,000
5. Illinois	\$22,500
6. Tennessee	\$22,000
7. Indiana	\$20,640
Average for 7 Surrounding States	\$23,794
Kentucky	\$15,000-16,608

Unfairly Low Salaries and High Caseloads for Kentucky Public Defenders *Focus on the Jefferson County Public Defender System*

Judge William McAnulty on the Jefferson County Justice System

West Virginia Public Defender Rates Increased to \$45 - \$65

Representative Martin Sheehan's Bill on a Capital Defense Fund

Battered Women Syndrome and Its Natural Sequela

Video Transcripts-Views of the Chief Justice and Court Reporters

Public Advocacy Alternative Sentencing Project

The National Alliance for the Mentally Ill

Kentucky's Criminal Rules Process Started Up Again

A Review of the 5th Edition of the Comprehensive Textbook of Psychiatry
Experts in Criminal Cases

From The Editor:

Like rain endlessly dropping on a rock, the chronic underfunding of the Kentucky public defender system wears away the ability to properly defend poor Kentucky citizens. This is manifested most in the Jefferson County public defender system. Caseloads are insanely high. Salaries unjustly low. Major financial help is essential to insure the viability of that system.

Kentucky's public defender crisis is once again set out in *The Advocate* through Dan Goyette, Judge William McAnulty, Bill Radigan and Representative Martin Sheehan.

ECM



The Advocate

The *Advocate* is a bi-monthly publication of the Department of Public Advocacy, an independent agency that is within the Public Protection and Regulation Cabinet for administrative purposes. 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.

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IN THIS ISSUE

JEFFERSON PUBLIC DEFENDER SYSTEM UNDERFUNDED	3
JUDGE MCANULTY ON THE JEFFERSON CO. SYSTEM	7
NLADA & ABA CASELOAD GUIDELINES.....	9
WEST VIRGINIA PUBLIC DEFENDER RATES INCREASE.....	10
REP. SHEEHAN'S CAPITAL DEFENSE FUND BILL.....	11
BILL RADIGAN ON CAPITAL TRIAL DEFENSE	14
WEST'S REVIEW	16
Ky. Court of Appeals	16
Hannan v. Commonwealth.....	16
Farley v. Commonwealth.....	16
Logan v. Commonwealth.....	16
THE DEATH PENALTY: Public Hanging	17
DISTRICT COURT PRACTICE: Bad Checks and Their Collection ..	19
PUBLIC ADVOCATE CAN ACCEPT NO FEE	20
6TH CIRCUIT HIGHLIGHTS.....	21
Dunn v. Simmons.....	21
United States v. Wolf.....	21
Dick v. Scroggy.....	21
PLAIN VIEW:	
Challenging DUI Stops Based on Anonymous Phone Tips	23
JUVENILE LAW: Appeals and Extraordinary Writs.....	26
EVIDENCE: A Review of the Past Year's Appellate Decisions	28
Morris v. Commonwealth	28
Moore v. Commonwealth	28
Glass v. Commonwealth	28
Turner v. Commonwealth	28
Perry v. Leeke	28
Jett v. Commonwealth.....	29
Askew v. Commonwealth.....	29
Commonwealth v. Sawhill.....	29
Barnett v. Commonwealth	29
Asher v. Commonwealth	29
Tipton v. Commonwealth	29
Melson v. Commonwealth	30
Wehr Constructors, Inc. v. Steel Fabricators, Inc.	30
Barnett v. Commonwealth	30
Morris v. Commonwealth	30
Brown v. Commonwealth	30
Tipton v. Commonwealth.....	31
Mozev v. Commonwealth	31
Baker v. Hancock	31
Tinsley v. Jackson.....	31
Davenport v. E. McDowell Hospital.....	31
Underhill v. Stephenson	31
Commonwealth v. Pevely.....	31
TRIAL TIPS	32
Your Expert is Confused.....	32
Battered Woman Syndrome and the Natural Sequela.....	35
Views of the Chief Justice on Video Records	40
Supreme Court's Criminal Rules Committee	41
Views of Court Reporters on Computers.....	42
Videotape Project Criticized	44
Should Lawyers Be More Critical of Courts?.....	45
Public Advocacy Alternative Sentencing Project	49
National Alliance of the Mentally Ill	51
Ask Corrections.....	53
BOOK REVIEWS:	
<i>The Criminal Prosecution and Capital Punishment of Animals</i>	18
<i>Comprehensive Textbook of Psychiatry</i>	54

THE ADVOCATE FEATURES

The Louisville/ Jefferson County Public Defender's Office

How many attorneys are in your office?

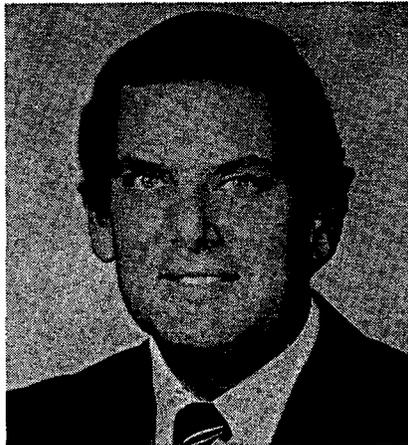
When we are fully staffed, we have a total of 30 attorneys handling cases in our adult, juvenile, mental inquest and appellate divisions. However, given the demands of the job and the conditions of employment, it is difficult to keep positions filled with the exceptional litigators we require.

What was your office's caseload during fiscal year 1989 (July 1, 1988 through June 30, 1989)?

In FY '89 we handled a total of 43,860 cases. These included matters in all 16 divisions of circuit court, the felony, misdemeanor, traffic, juvenile and mental inquest divisions of the district court, and the various appellate courts, both state and federal. When this office opened its doors in 1972, it had a staff of 7 attorneys that handled approximately 1,700 cases in the first year of operation. Simple arithmetic shows that staffing has not even remotely kept pace with caseload. That is primarily a result of chronic underfunding over the years, certainly of the public advocacy system as a whole, but also from within the system in terms of the allocation of available funds. This office is responsible for well over 50% of the total caseload handled by the statewide public advocacy system, yet we receive less than 15% of the overall budget. Such a disparity cannot be justified, nor should it be tolerated within our system.

How many felonies/misdemeanors does an attorney in your office handle on average?

We operate a mixed caseload/vertical representation system in accordance with ABA Standards. By that I mean that each staff attorney is randomly assigned to represent clients who may be charged with either felonies or misdemeanors, or both. Representation by that individual attorney continues throughout the prosecution of the case until ultimate disposition. Therefore, it is somewhat



Daniel T. Goyette
Jefferson County Public Defender

difficult to give you an accurate average, especially with staff turnover. Perhaps the best measure of workload is the fact that each staff attorney routinely carries an open file caseload in excess of 150. That is more than twice the number recommended by national standards and, as far as I am concerned, a disgrace to the county and state as well as the public advocacy system. Insult is added to injury when you consider that with the highest caseload in the state we have the lowest starting salary for staff attorneys.

How can defendants be adequately represented by an attorney handling that many cases? Your office has achieved national recognition for its record in both trial and appellate courts. How do you do it?

It is a major challenge to say the least, and one which takes its toll in human terms. To get the job done, staff attorneys put in lengthy hours in court, in jail, in the office, in the library and on the streets doing investigations. This is required week in and week out with no let up if the job is to be done properly and in conformance with the standards we set. It takes a special person to perform under such conditions and we are very selective

in hiring. But for the talented and dedicated staff we presently have, I have no doubt the job would *not* get done. It is a daily struggle to cope with the staggering caseload we are responsible for, and one which no amount of talent and dedication will enable us to continue to deal with if we do not get needed and long overdue relief soon.

Do you feel that all of your clients are fully and fairly represented under the limited resources that you have?

That's a difficult question to answer, and a loaded one at that. I'm not sure what "fully and fairly represented" means in the context of today's criminal justice system. Essentially, we are involved in an emergency room-type practice. Under the circumstances in which we are required to provide representation, I believe we do an extraordinary job, but that doesn't necessarily mean all our clients are fully and fairly represented, any more than the standards in *Strickland* or *Henderson* mean that effective assistance of counsel has actually been rendered. The real question is, given more staff and resources, could we do a better job of effectuating justice? The answer is most definitely yes - and that should be of the utmost concern to DPA and the entire criminal justice system, as well as to every citizen of the Commonwealth.

Let me depart from the usual format for a moment because I sense a certain amount of frustration and perhaps even anger on your part over the state the public defender system is in - is that an accurate assessment?

Among your many other fine qualities, Ed, you're very perceptive. I've been reading this series in *The Advocate* since April, and I've seen the same questions and virtually the same answers in each issue. These are the same questions and answers I've been hearing for the last ten years. Yet there has been no improvement in the situation whatsoever and, if anything, things have gotten worse as the



ADULT DIVISION Standing (L to R) Chris Polk, Roger Gibbs, Jay Lambert, JoAnne Linn, Mike Rudicil, John Vandertoll, Sandy Arbuckle, Karen Collins, Gary Stewart, Mike Davis, Ken McCardle Seated (L to R) Stephanie Geromes, Lynn Fleming, Rob Eggert, Stan Chauvin [Leo Smith and John Olash not shown].

caseload has grown and the population on death row has increased. Leadership has been lacking on all fronts. In Kentucky, it seems that the only time people who are in a position to make a difference confront a problem is when it has reached crisis proportions, and by then we are ill-equipped to deal with it because years of neglect have made it that much more difficult to resolve. We've seen it in education, in the area of corrections, and now we're going to see it in the courts because defense services and indigent representation have reached the crisis point. Unfortunately, no one seems to recognize the magnitude of the problem or its consequences, which will probably be more disruptive and expensive than prison and jail overcrowding has been because the effects will be more widespread throughout the system.

I guess I'm also frustrated by having read the Dash Committee Report for the ABA contemporaneous with the announcement of the Bush Drug Strategy...but I digress.

What needs to happen in order to avoid the chaos you predict?

More so than ever before, it is imperative that a concerted effort be made to secure a substantial increase in state funding for the next biennium so that staff expansion and a corresponding reduction in the caseload per attorney can be accomplished. Additionally, staff attorney salaries must be paid at a rate of compensation which is more competitive and commensurate with the demands of the job. If this cannot be achieved, there will

be profound implications for the operation of the criminal justice system in Kentucky. And that is really the message that needs to get across - this is a problem with far-reaching consequences that needs to be addressed now or the solution will come at a much greater cost, financial and otherwise. Failure to provide effective representation which comports with due process of law results in reversals of convictions which, in turn, result in costly retrial of cases and, in some instances, can result in costly money judgments from malpractice suits. Secondly, other jurisdictions with funding and caseload problems no worse than

ours have experienced lawsuits and federal court intervention imposing caseload caps, cutbacks in services and other restrictions which have not only been expensive but had a serious impact on the flow of cases through the court system, causing delays and releases. While I recognize that our clients are not part of a politically powerful constituency, these consequences do affect the main concerns of the voting public: crime and taxes. If there is a way to prevent this situation from boiling over, it would be incredibly irresponsible not to take the action that is so clearly indicated. After all, the staffed defender system has proven to be far and away the most cost effective and efficient method of providing defense services, and considering the relative expense connected with the inevitable alternatives, it makes sense to take action now.

Of course, in order to get the message across, a much more aggressive approach needs to be taken with the legislature. We can't afford to be content with the *status quo* any longer. The "go along, get along" philosophy just doesn't cut it and really is an abdication of our professional responsibility.

Any other ideas before we return to the questionnaire?

Just that it seems to me we need a long-range plan which deals with these issues as well as other problems that confront us, one that has input from defender offices across the state. We need to be more pro-active.

How many capital cases did your office handle in the last year?



APPELLATE DIVISION : Bruce Hackett, David Niehaus, Frank Heft.

In FY '89, we had 56 murder cases pending, 32 of which we were appointed to during the course of the year, the remainder being carryovers. Of that number, 14 were prosecuted as capital cases. As you know, death penalty litigation is a legal and emotional experience that is unparalleled in trial practice of any kind. It is extremely time-consuming, demanding work that soaks up all your energy and drains your psyche. Combined with an unreasonable caseload, it is a near impossible task which takes a heavy toll. On more than one occasion, our best and most experienced trial attorneys have left the staff after concluding a death penalty case. It's really a microcosm of all our problems.

How many conflict cases did you have last year and what do you pay per case?

We had 52 cases which had to be referred to our Assigned Counsel Panel because of conflicts last year. The rate of compensation is the same as it was when the Assigned Counsel Panel Plan was adopted in 1975, that is \$30 per hour in court and \$20 per hour out of court up to a maximum of \$250 for misdemeanors and other district court representation; the same hourly rates for felonies up to a maximum of \$500; and \$1,000 for capital cases. Obviously, this is as grossly inadequate as our funding is and directly reflects that inadequacy. By and large, these fees do nothing more than defray the expenses of what is essentially *pro bono* work. Understandably, the pool of volunteers is small and dwindling. Another microcosm of our problems.

What are the biggest problems your office faces?

As with all the others you have interviewed, the single biggest problem is **RESOURCES**. It was pointed out in the Dash Committee Report that, as currently funded, the criminal justice system cannot provide the quality of justice that the public legitimately expects and that the people working within the system wish to deliver. Absent additional resources, the only ethical alternative available to public defenders is a cutback in services which will result in the dire consequences I mentioned earlier.

How do your resources compare to the Commonwealth's resources?

The combined budgets of the County Attorney and Commonwealth Attorney's offices for criminal prosecution are approximately twice as large as ours. It is significant to note that Assis-



JUVENILE DIVISION- Don Meier, Bev Jenkins, Bill Wilson, Fred Huggins, Sharon May, Pete Schuler, Eric McDonald, Harry Rothgerber.

tant County Attorneys receive more for their part-time work than do many full-time Public Defender Assistants.

How much more money do you need to do the job adequately?

Our budget needs to double in size if we are to be in a position to comply with national standards for maximum allowable attorney caseloads.

What 3 substantive criminal legislative changes would you like to see enacted in the 1990 session of the Legislature?

- 1) Abolish the death penalty for juveniles and the mentally retarded;
- 2) Revise truth in sentencing and the PFO



INVESTIGATORS: Bill Caudill, Becky Wilson, Rose Nunn, Sharon Bowling, Jerry Smothers.



SECRETARIAL STAFF: Standing: (L to R) Vicki Quill, Robin Embry, Kim Beam, Mary Barr, Marie Powers, Barbara Parrott, Lisa Brooks, Tracee Mills, Seated: Susan Reasor.

statutes, *i.e.* permit the court and counsel to inform the jury about the range of penalties for all indicted offenses during voir dire examination; limit admissibility of prior convictions to those occurring before the commission of the offense being prosecuted; put a cap on 50% parole eligibility not to exceed 12 years; exempt Class D felonies from PFO I prosecution, etc.;

3) Raise the threshold for felony theft to \$500.

Average Starting Salary for UL Graduate \$27,488; Two-Thirds Started At or Above \$24,000

The University of Louisville School of Law Placement Survey (July, 1987- November, 1987) of 1987 revealed that 3% of their graduates went into public interest law.

The average starting salary of all UL Law School graduates was \$27,488.

Of the 1987 graduates, 33% started at a salary above \$34,000.

While public defenders in Kentucky start at best at \$16,608, 67% of all 1987 UL Law School graduates started at or above \$24,000.

Additionally, laws pertaining to mentally ill offenders need to be re-examined. I also think KRS Chapter 26A should be clarified and revised to include peremptory recusals, and, obviously, KRS Chapter 31 needs to be reinforced. Finally, I think there is merit to Judge Potter's views on vehicular homicide.

Contempt and sanctions of defense lawyers in criminal cases is ever increasing. How has this problem influenced the work of your attorneys?

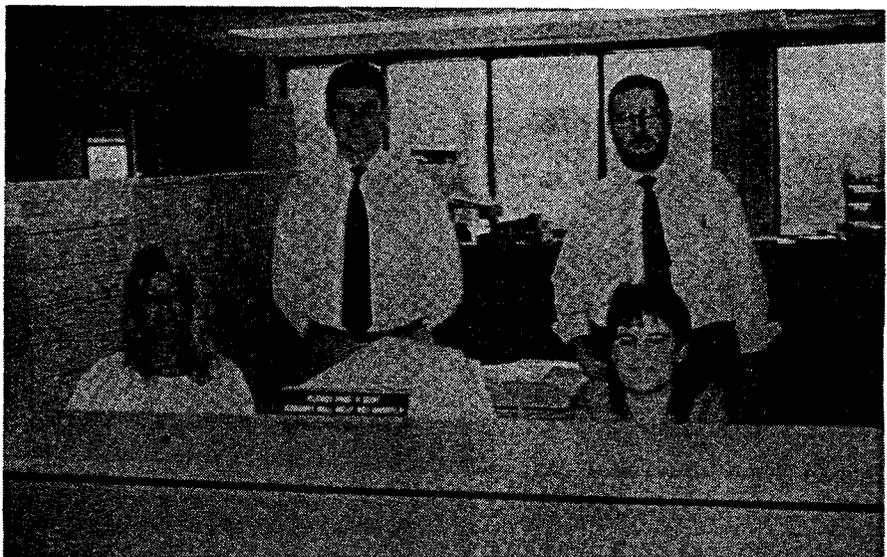
It is an increasing problem, but we haven't let it influence our work or inhibit the aggressive representation of our clients. Able and experienced judges who are competent and professional in their work conduct proceedings with fairness and dignity and don't need to resort to such tactics. Fortunately, most of the judges in Jefferson County fall into this category. As for the others, we don't let them bother us.

Any other thoughts?

Only to reiterate that this is a critical time for the statewide public defender system and its continued vitality. Energetic, decisive and immediate action is required if we are to fulfill our mission and properly discharge our role in the adversary legal system. I hope the organized bar, the judiciary and other components of the criminal justice system will support our efforts because the system will fall apart if we can't hold up our end. I also hope the Legislature will recognize the importance of our needs and exercise the leadership necessary to solve the problem.

We appreciate you taking the time to do this interview with *The Advocate*. Perhaps we can do it again sometime in the future when better conditions prevail?

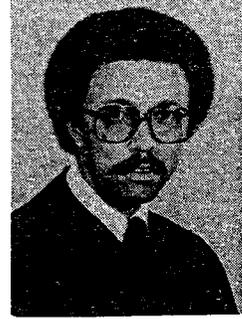
If and when that day arrives, it would be my pleasure. Thanks for the opportunity to share my views.



INTAKE/DOCKET CONTROL STAFF: (L to R) Charles Humphrey, Paul Rehberg, Seated: Cindy Downs, Sharon Franklin

JUDGE WILLIAM McANULTY

An Interview on the Jefferson County Criminal Justice System



Judge McNulty

As you know, Jefferson County has more criminal cases than any other jurisdiction in Kentucky. You have experienced this large volume of criminal cases both as a district and circuit judge. What kinds of problems does the huge volume of cases cause the criminal justice system in Jefferson County?

I think the obvious concern for most judges, and lawyers as well, is that the criminal justice system not become a cafeteria or a "fast food"-type industry and that, given the volume, the constitutional rights and procedural rights of defendants accused of crimes are protected. You hope that you don't become so cynical that it's just another case, a case that has to be moved. Of course, it has other negative consequences, one of which is the burden that it directly places upon the public defender system; because probably 70% of the representation, that figure may be a little high, but certainly the vast majority are cases that qualify under Chapter 31, and the local Public Defender's office has to provide representation. So, it's obviously a tremendous burden on that office to maintain the high level of assistance that they provide. Of course, the other side of the coin is that it takes a lot of prosecutors as well, but prosecutors, to some extent, control the number of cases that come into the system. So, they have more control over their caseloads, and certainly the disposition of those cases, than does the public defender or the private defense bar that ultimately represents the defendants. Also, for the most part, prosecutors in our system are only responsible for cases at one court level whereas defenders must handle cases in district, circuit and appellate courts.

From a judge's point of view, and you've been a judge for many years, why is it important to have criminal defendants represented by good lawyers?

That should be kind of obvious. I suppose it's a rhetorical question, and I guess the

easy answer is that we're a constitutional form of government and effective representation is at the very heart of our system of due process. If we're to subscribe to the system, and I think most of us do that, there must be a presumption of innocence. Oftentimes the wheels start to roll and the presumption erodes before there's an opportunity to require the state, if you will, to prove what it has asserted. So sometimes, actually at all times, it takes diligent counsel and effective counsel to make sure that the burden is appropriately placed and that the system is honest in terms of the outcome.

From your perspective as a judge, what are the advantages in Jefferson County of having a public defender system that is full-time versus a system that is appointed or otherwise?

I'm not really in a position to make a comparison with the rest of the state. I can comment, however, that the quality of representation provided by the public defender here in Louisville is quite high. I would submit, without even knowing the other operations out in the state, that it is due to the standards of practice set in the Louisville office and the effective training program which insures a degree of consistency and continuity that I find amazing in view of the low salaries that

they pay. The quality of individuals that they've developed and been able to retain over the years are both things that benefit our local office. Part of it's process, part of it's personnel. I have a very high opinion of the leadership in the Public Defender's office here and I think any office is only going to be as good as its leadership. We're just very fortunate to have someone who provides that type of leadership for our local public defenders.

The Jefferson Co. Public Defender Office has a reputation, as you said, for vigorous, competent advocacy. At the same time, each of the attorneys carry very large caseloads. What problems do these large public defender caseloads cause the courts and the criminal justice system, in general?

Well, necessarily the courts have to adjust and understand that a lawyer can only try one case at a time and, therefore, a continuance may be necessary due to a public defender being in another trial. That's just become the price of doing business here. I'm sure from their perspective, given their heavy caseloads, it's a source of great anxiety. Fortunately, because of their extraordinary efforts, I've not had occasion to observe an individual represented by the PD being slighted because of the press of other matters. The results they have achieved, at least that I've seen over the course of the years, are remarkable. I'm not sure that many people could withstand the strain and the volume and yet at the same time deliver the quality of service that they deliver.

Has that caused, from your viewpoint, consequences that are undesirable to the criminal justice system? For instance, the inability of the public defender system to attract and retain as many experienced lawyers as one might hope if the caseloads were more reasonable and manageable and the salaries more competitive?

Beginning Salaries for Kentucky Attorneys & Professionals

UK Law School Faculty	\$40-\$42,000
UL Law School Faculty	\$40,000
Chase Law School Faculty	\$38,000
Registered Nurse	\$25,680
Supreme Court Law Clerk Attorney	\$21,504
Kenton County Police Officer	\$19,906
Court of Appeals Law Clerk Attorney	\$19,512
Kentucky State Police	\$18,058
Assistant County Attorney	\$18,000
Assistant Commonwealth Attorney	\$17,904
Fruit and Vegetable Grader	\$17,496
Senior Park Chef	\$16,608
Senior Photographer	\$16,608
Highway Crew Foreman	\$16,608
Assistant Attorney General	\$16,608
Assistant Public Defender	\$16,608
Lexington Public Defender	\$15,500
Louisville Public Defender	\$15,000

Salaries for Legal Services Attorney

Florida Rural Legal Services, Bartow, Fla.:	\$20,015- \$56,923
Legal Aid Society of Polk County, Des Moines, Iowa:	\$18,000- \$54,096
Legal Services of North Central Alabama, Huntsville, Ala.:	\$15,208- \$37,187
Napa County Legal Assistance Agency, Napa, California:	\$20,616- \$28,884
The Legal Aid Society, New York:	\$29,749- \$80,900
Pueblo County Legal Services, Pueblo, Colo.:	\$16,000- \$29,400

Salaries for Public Defenders

Boston:	\$28,600- \$59,800
Columbus, Ohio:	\$18,150- \$70,225
San Diego:	\$29,973- \$105,000
Solano County (Fairfield), Calif.:	\$34,634- \$75,000
Virginia Beach, Va.:	\$23,000- \$67,000

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I don't have the empirical data, but the retention rate, I think, has been very good here in Louisville. By that, I mean com

pared to other defender offices I've heard about. That's a real accomplishment considering the lack of compensation and the pressures of the job. However, I think that's more of a tribute and testament to the way the Jefferson County office is run—its administration, the working environment, the camaraderie, etc. The problem with that is that it's dependent upon certain people and, absent those people, there is no assurance that such an operation could be maintained. It probably could not. So it's important that you have a well-funded system that does not have to rely solely on the special talents of particular individuals. The institution has to be independent and self-sustaining in order to guarantee effectiveness long term.

Jefferson County public defenders start at \$15,000. This low starting salary has many consequences. Is it in the interest of the Jefferson County criminal justice system for the public defender office to receive an increase in funding to allow for better paid attorneys as well as more staff attorneys to handle the cases?

Well, you've asked two questions. First, it would be both appropriate and

desirable to provide a higher salary for the existing public defenders. Certainly, it would also be beneficial to have additional staff attorneys to ease the volume and the caseload they are presently carrying. So, as far as Jefferson County is concerned, that's an easy question—it would definitely be in the best interest of the criminal justice system to increase public defender funding.

As a final question, Judge, do you have any other thoughts you'd like to share with our readers?

Just to summarize. I've been around for 14 years and, quite frankly, the level of defense provided for indigent defendants in this state certainly falls outside of the usual stereotype of "public defender." I think, that stereotype is totally unwarranted. When I hear people indicate that they don't want a public defender, it causes me some amusement and, to a degree, a bit of anger over their lack of understanding and appreciation as to the quality of representation that they will be receiving. I have felt, like many of my colleagues, quite secure in knowing that those same people receive vigorous representation. Outcome is not always the measure of vigorous representation, it's a consequence of a number of other things like preparation and commitment. If there's any one thing which has reduced my level of anxiety about our criminal justice system, it has been knowing that there are people of the quality and dedication of the Jefferson County Public Defender's Office who are representing the interests of the individuals who society may not hold in the highest esteem. That's been a source of considerable comfort.

We sure appreciate your time and comments, Judge.

I enjoyed talking to you and giving you my thoughts.

Hon. William E. McNulty, Jr., was appointed a Jefferson County juvenile court judge in 1975 and was elected to the district court bench in 1977. In 1983 he was elected to the Jefferson County Circuit Court. Among other celebrated cases, in 1986 he presided over the trials of George Ellis Wade and Victor Dewayne Taylor in the murders of two Trinity High School students. After a lengthy trial, he sentenced Taylor to death. Recently he announced his retirement from the bench, effective in January, 1990 to become a partner in the Louisville law firm of Greenbaum, Doll and McDonald. He is leaving the bench, in part, because his judicial salary will not allow him to send his two children to college without going into debt. During his tenure as an elected judge, he has consistently received high ranking in the judicial evaluations conducted by the Louisville Bar Association.

Government Attorneys

Central Intelligence Agency

General Counsel:	\$80,700
Deputy General Counsel:	\$76,400
Entry-Level Position: (without passing the bar); (with passing bar)	\$30,636 \$34,624

Department of Justice

Attorney General:	\$99,500
Deputy Attorney General:	\$89,500
Entry Level Position: (with one-year clerkship)	\$28,852

Department of Labor

Solicitor of Labor:	\$80,700
Deputy Solicitor:	\$78,600
Entry-Level Position:	\$28,852

Department of State

Legal Advisor:	\$80,700
Principle Deputy Legal Advisor:	\$76,400 or \$78,600
Entry-Level position:	\$28,852

Environmental Protection Agency

General Counsel:	\$80,700
Deputy General Counsel:	\$74,900
Entry-Level Position:	\$28,852

Federal Communications Commission

General Counsel:	\$78,600
Deputy General Counsel:	\$74,900
Entry-Level Position:	\$28,852

Securities and Exchange Commission

General Counsel:	\$80,700
Associate General Counsel:	\$68,700- \$80,700
Entry-Level Position:	\$28,852

General Staff Attorney Classification

GS-9/Attorneys I:	\$23,843- \$31,001
GS-11/ Attorneys II:	\$28,852- \$37,510
GS-12/Attorneys III:	\$34,580- \$44,957
GS-13/ Attorneys IV:	\$41,121- \$53,460
GS-14/ Attorney V:	\$48,592- \$63,172
GS-15/Attorneys VI:	\$57,158- \$74,303
Average Salary:	\$50,188

Army, Navy, Air Force and Marine Judge Advocate General's Corps

Top Salary:	\$85,963
[(married) with \$10,489 of this amount non-taxable]	
Entry-Level Position :	\$23,770
[(unmarried), with \$5,280 of this amount non-taxable];	\$24,840
[(married), with \$6,336 of this amount non-taxable]	

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NLADA Caseload Guidelines

Last issue we indicated that the National Legal Aid and Defender Association (NLADA) endorsed the Dash Report's caseload maximums. NLADA has not done so because it is their belief that in some situations these maximums may be too high. NLADA's *Standards for Defender Services* sets out their following workload guidelines:

1. No defender office or defender attorney shall accept a workload which, by reason of the excessive size thereof, threatens to deny clients due process of law or places the office or the attorney in imminent danger of violating any ethical canons governing the practice of law. To this end, the following actions should be taken and principles should apply:

a. In each jurisdiction, formulas establishing maximum workloads shall be established for defender organizations and shall govern the size of attorney and other staff workloads. In establishing such maximum workloads, up-to-date, accepted principles of manpower planning, statistical analysis and methods, and systems analysis shall be used. Such formulas shall include or be addressed to, the following:

i. In establishing such formulas, it must be recognized that no single rigid numerical formula can be valid for all time or valid in all places. Therefore, maximum workload formulas must be sufficiently specific and definite in their application to objectively and promptly demonstrate with credibility whenever a work peak or work overload is approached or reached, yet must also be capable of scientifically sound modification based on changes (including upgrading) in the practice of criminal defense law and variables as they exist between communities and jurisdictions.

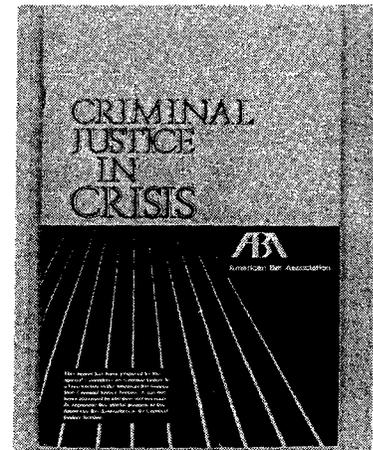
ii. In establishing such formulas, the goal of overall total high quality criminal defense representation must be kept paramount, with due regard for the fact that in most jurisdictions today the concept of overall total high quality criminal defense representation tends to be an unrealized aspiration rather than an attained reality.

iii. No defender office or appointed attorney shall accept any appointment which exceeds or jeopardizes his ability to render effective assistance of counsel in each case. No defender office or appointed attorney shall represent co-defendants in the same case, or otherwise accept appointment to any case which potentially places the organization or such attorney in danger of violating accepted standards of professional responsibility.

iv. In jurisdictions possessed of, or having reasonable expectations of obtaining electronic data processing programs which include workload management components, it is desirable that the defender workloads formulas established hereunder be capable of implementation through such electronic data processing and that such implementation occur at the earliest feasible date.

Whenever, by reason of excessive caseload, in his sole discretion, the defender determines that the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in these or other cases handled by him, he shall have the power and duty to declare such a fact to the courts (who shall then appoint private counsel at public expense in such cases) and may refuse to accept or retain such cases for representation by his office.

ABA Defense Caseload Standard



ABA's Dash Report

The ABA *Standards Relating to Criminal Justice, Providing Defense Services* address what defender organizations are required to do when their workloads are intolerable:

"Standards 5-4.3 Workload

Neither defender organizations nor assigned counsel should accept caseloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Whenever defender organizations or assigned counsel determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organizations or assigned counsel must take such steps as may be appropriate to reduce their pending or projected workloads.

The ABA Dash Report

The ABA supports the following maximum allowable attorney caseloads as adopted by the National Advisory Committee on Criminal Justice Standards and Goals:

- a. 150 felonies per attorney per year; or
- b. 300 misdemeanors per attorney per year; or
- c. 200 juvenile cases per attorney per year; or
- d. 200 mental commitment cases per attorney per year; or
- e. 25 appeals per attorney per year

ABA Criminal Justice in Crisis (1986)

WEST VIRGINIA PUBLIC DEFENDER RATES INCREASED TO \$45/\$65

Hourly Rates of \$20/\$25 and the \$1000 Fee Cap Held Unconstitutional; Funding Increased

Unconstitutionally Low Funding

Recently, the West Virginia Supreme Court in *Jewell v. Maynard*, ___ S.E.2d ___ (April 25, 1989) addressed the constitutionality of its state's system for providing counsel to indigents in criminal cases that provided for hourly rates of \$20 for out of court work and \$25 for in court work with a maximum of \$1,000 per case.

The Court concluded that "...the current system does not consistently ensure experienced, competent, capable counsel to all indigent defendants and others entitled to appointed counsel." *Id.* at ___. The Court recognized that inadequate rates and artificial fee caps have unacceptable consequences:

We have a high opinion of the dedication, generosity, and selflessness of this States' lawyers. But, at the same time, we conclude that it is unrealistic to expect all appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work. It is counter-intuitive to expect that appointed counsel will be unaffected by the fact that after expending 50 hours on a case they are working for free. Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted. *Id.* at ___.

With adequate service to the client being the highest value, the Court determined that the West Virginia Legislature had to fund the public defender/appointed counsel systems with "substantially more money than is currently appropriated to meet constitutional standards." *Id.* at ___.

\$45/\$65 Required

According to Jewell, the constitutional right to effective assistance of counsel requires that no lawyer can be "involuntarily appointed to a case unless the hourly rate of pay is at least \$45 per hour for out of court work and \$65 per hour for in court work." *Id.* at ___.

Legislature Increases Funding

In 1989, the West Virginia Public

Defender Services received a 40% increase in its state budget from the West Virginia legislature to continue to implement a full-time public defender system across the state.

Full-time Public Defenders

Jack Rogers, the Director of Criminal Law Research and Administration for West Virginia's Public Defender Services, recognized the advantages of the full-time method of delivering public defender services. "There is an efficiency of scale with full-time defenders since they do nothing but criminal law. The client not only has better representation but his case is disposed of quicker and more effectively with the full-time system."

When asked how the costs of the West Virginia full-time system compared to the appointed counsel system with the \$45/\$65 rates, Rogers said, "we are providing full-time public defender services as cost-efficiently or more cost-efficiently than the appointed counsel system in West Virginia."

Starting Salaries

Rogers was astonished at Kentucky's starting salary of \$16,608 for full-time defenders. "I don't see how you can attract competent attorneys for what an average, competent legal secretary is paid." West Virginia public defenders start at \$28,500.

Kentucky's Funding Unconstitutionally Low

Jewell details the obvious. Appointed counsel and local and state public defender systems cannot competently function without adequate funding. Many state public defender programs are currently grossly underfunded. *Jewell* instructs us that attorneys can demand fair compensation for their services when representing indigents in criminal cases.

For a long time these obvious inadequacies of funding have not been fully litigated in many states, including Kentucky. The trend in case holdings and the recent commitment of some state Supreme Courts to realistically face the lack of proper compensation should inspire long overdue challenges in Kentucky to inadequate allocations of money for the defense of the poor.

It is common knowledge that Kentucky ranks among the lowest states in the country in many critical education categories. It is not very well known that Kentucky ranks at the bottom in its commitment of money to the defense of indigent citizens accused of crimes. Only 4 jurisdictions allocate less per indigent criminal case than does Kentucky. The national trend of fair compensation for attorneys representing indigents accused of crimes is inexorable, and eventually will even reach Kentucky.

Public Defender Money Allocated per Case, Kentucky, Nationally

States	Rank in Nation	Amount per Case
New Jersey	1	\$540
Alaska	2	\$468
Wyoming	3	\$431
Montana	4	\$413
Kentucky	47	\$118
Virginia	48	\$116
Mississippi	49	\$107
Oklahoma	50	\$102
Arkansas	51	\$ 63
Average of All 51 States		\$223

Bureau of Justice Statistics, Report of Indigent Defense Services, September, 1988, U.S. Department of Justice.

STATEWIDE CAPITAL DEFENSE FUND PROPOSED

Representative Martin Sheehan's 1990 Regular Session Bill

How many capital cases does the public defender system handle each year at the trial level?

I'm told by DPA it is about 80-90 per year.

What caused you to address the problem of inadequate compensation for attorneys representing indigent capital clients?

As a criminal defense attorney and a former public defender it was impossible not to notice that Kentucky had a major problem in the area of public defender financing, particularly in capital cases. The major event that served as a catalyst for reform was a Kenton County rape/murder trial styled *Commonwealth of Kentucky vs. Gregory Wilson*. In this case, the trial judge searched in vain for months seeking competent counsel to represent the defendant, and was literally forced to plead with the local bar for someone to step forth. Once counsel was finally appointed it became increasingly clear that the local public defender's office lacked sufficient resources to adequately compensate them. There simply was not enough money to defend such a major action without crippling the rest of the public defender system.

The problem intensified when a dispute arose as to whether the fiscal court should, or could, be ordered to contribute to the costs of the defense. The county contended that budgetary constraints would not allow them to offer any additional funds beyond their \$5,000.00 yearly contribution to the system.

Thus, this single capital case highlighted three major problems with our present system, to-wit:

- 1) The difficulty of finding competent counsel at the local level for capital trials;
- 2) The financial burden such trials could place on the county fiscal court;
- 3) The crippling effect that the financial burden of such trials places on the local public defender system.



Representative Martin Sheehan

What are you proposing as a solution to this problem?

To help resolve the problem, I have drafted legislation to introduce in the 1990 Regular Session of the General Assembly which would establish a statewide capital defense fund. This fund would be financed by a ten dollar (\$10) surcharge on all misdemeanor and felony convictions. Such a fund would enable the State Public Advocate to create a capital defense team to handle all indigent capital cases on a statewide basis.

Why do you think this approach is the best available approach?

To be completely honest, the best available approach would be simply to adequately fund the Department of Public Advocacy from the general fund. Kentucky's current financial crisis, however, makes such increased funding unlikely.

This approach allows us to immediately address a major problem without placing additional burden on the taxpayer by further depleting the general fund. It offers a realistic means of generating increased revenue for the public defender system

without taxing the common man a penny. Additionally, it places part of the burden of operating our criminal justice system on the users of that system — the convicted criminal. Finally, by establishing a statewide capital defense team, the competence of attorneys defending such crimes should be greatly enhanced, and the burden that such trials place on the local public advocates and county fiscal courts should be relieved.

How much money do you expect this to generate?

Estimates have placed it around \$700,000 per year.

How have judges, prosecutors, and county judge executives reacted to this legislative approach?

At this point, reaction has been fairly limited although all feedback that I have received has been extremely positive. Hopefully, exposure such as this will generate widespread support for the concept.

Does an indigent criminal defendant have to pay this \$10.00 fee?

In all criminal cases a trial judge should have the discretion to "write off" court costs as uncollectible. This proposal is not intended to restrict such discretion.

How will the \$10.00 fee be collected from indigents?

The \$10.00 fee will be collected with other court costs and fines levied by the trial court.

Who will do the collecting?

The fee will be collected by the court clerk and forwarded to the state treasurer for placement in the newly-created public advocacy fund.

Do you think there is any conflict in money coming from criminal defendants to fund this capital defense effort in light of the fact that DPA benefits from the fining of a criminal defen-

dant, the same defendant that DPA is charged with representing?

No. The situation is no different from DPA receiving general fund revenues, a portion of which are generated from fines and court costs levied by the trial courts. To think that a public advocate would not zealously represent his client because \$10 will go to such fund upon conviction is absurd.

If a conflict exists, it exists in theory only and is inherent in any system where the state is financing its public defenders, as well as its prosecutors.

Why did you choose to not include motor vehicle and DUI offenses in your bill?

The decision to exclude traffic offenses was not taken lightly. The basic reason for such exclusion was that public defenders generally do not represent traffic offenders. The theory underlying this legislation is to place part of the burden of financing the public defender system on the users of that system.

How much more money would be generated if you had included motor vehicle and DUI offenses in your bill?

Approximately \$1.6 million dollars.

Why did you decide not to put a filing fee on civil cases since that would raise so much more money and not have the collection problems that will exist in the criminal conviction cases?

As stated above, the theory behind this proposal is to make those that burden the system help finance it. As such, the use of a surcharge in civil cases was not considered.

Had you done that, how much money would you expect to be generated?

To my knowledge this figure has not been estimated.

Rep. Sheehan (Democrat) Ludlow, represents the 65th District. He has a J.D. from Salmon P. Chase College of Law. He is a past President of the Kenton Co. Young Democrats. He is the Treasurer of the Kenton County Democrat Club.

Representative Sheehan's Proposed Capital Defense Fund Bill:

AN ACT RELATING TO COURT COSTS.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 23A IS CREATED TO READ AS FOLLOWS:

(1) In addition to any other court cost or fee, there shall be assessed a public advocacy fee of ten dollars (\$10) in each criminal case (other than motor vehicle offenses under KRS Chapters 186, 189, or 189A) which results in a conviction. The imposition of this fee shall not be probated, suspended, or otherwise not imposed unless, after reasonable inquiry by the trial court into the financial condition of the defendant, the court makes a finding on the record that imposition of this fee would impose an undue financial hardship on the defendant.

(2) Fees imposed under this section shall be collected by the circuit clerk and transmitted to the state treasurer for placement in the public advocacy fund.

SECTION 2. A NEW SECTION OF KRS CHAPTER 24A IS CREATED TO READ AS FOLLOWS:

(1) In addition to any other court cost or fee, there shall be assessed a public advocacy fee of ten dollars (\$10) in each criminal case (other than motor vehicle offenses under KRS Chapter 186, 189, or 189A) which results in a conviction. The imposition of this fee shall not be probated, suspended, or otherwise not imposed unless, after reasonable inquiry by the trial judge into the financial condition of the defendant, the court makes a finding on the record that imposition of this fee would impose an undue financial hardship on the defendant.

(2) Fees imposed under this section shall be collected by the circuit clerk and transmitted to the state treasurer for placement in the public advocacy fund.

SECTION 3. A NEW SECTION OF KRS CHAPTER 31 IS CREATED TO READ AS FOLLOWS:

(1) There is hereby created in the state treasury a public advocacy fund which shall not lapse and which may be expended only by the department of public advocacy for the following purposes:

- (a) Defense of indigent person charged with capital offenses;
- (b) Psychological, psychiatric, medical and social evaluation, treatment, and testimony relating to persons charged with capital offenses;
- (c) Investigative services, with regard to criminal defense of persons charged with capital offenses;
- (d) Laboratory services, the services and testimony of expert witnesses and similar services relating to the criminal defense of persons charged with capital offenses.

(2) Moneys in the public advocacy fund shall not be expended for any other purpose than one permitted herein, until the end of each fiscal year at which time they shall be transferred to the general operating account of the Department of Public Advocacy.

Selected Examples of Appointed Trial Counsel Fees in Indigent Capital Cases

State	Average Fee	Maximum Fee
1. Alabama	\$10-14,000	—
2. California	\$60,000	\$150,00
3. Connecticut	\$39,850	\$39,850
4. Georgia	—	\$150,000
5. Maryland	\$20,000	\$44,000
6. Nebraska	\$10-20,000	\$29,650 +
7. New Jersey	\$43,000	\$100,000
8. Ohio	\$25,000	\$25,000+
9. Washington	\$40,000	\$69,000
10. Kentucky	\$2,500	\$2,500

STATE FUND FOR DEATH DEFENDANTS

By Jeanne Houck Kentucky Post Staff Reporter

State Rep. Martin Sheehan wants to create a statewide fund that would pay legal expenses for poor defendants facing the death penalty. Sheehan, a Democrat from Covington, has drafted legislation that would place a \$10 surcharge on court costs paid by defendants convicted of misdemeanor and felony offenses. Traffic offenders would be excluded.

Sheehan said he estimates that \$700,000 would be raised annually by such a surcharge on court costs, which now range from \$42.50 to \$65. Sheehan said the money would enable the Kentucky Public Advocate's Office to create a team of lawyers to handle all death-penalty cases in the state that involve indigents.

The fund also would pay for psychological and medical evaluations, investigative services, laboratory tests, and expert witnesses

Sheehan wants the bill to be considered in the 1990 General Assembly session, which begins in January. He said it would ensure that defendants facing the death penalty have the benefit of experienced attorneys

and the resources to pay related expenses. It also would relieve the financial strain now facing public defender systems and county fiscal courts, he said. About 80 to 90 such cases go to trial each year.

Representatives of the state Public Advocate's Office and local public defender programs say they have difficulty attracting experienced attorneys to death-penalty cases because of the many hours of work and low pay involved. In addition, county fiscal courts are balking at paying some related legal expenses.

Neal Walker, chief of the Major Litigation Section of the state Public Advocate's Office, called Sheehan's proposal "visionary."

Kenton County Judge-Executive Robert Aldemeyer said Sheehan's bill appears to be a step in the right direction. "We are going to have to get some relief from the situation, because these kind of court cases - any kind of court cases - have nothing to do with the county," Aldemeyer said.

"The attorneys, the prosecution, the courts themselves are all under the jurisdiction of the state judicial system and it's unfair that the taxpayers of this county should be burdened with paying those expenses."

Sheehan said he believes it is fair to put part of the burden on convicted criminals. "It's a realistic way to

generate additional revenue for the public defender system without raising taxes or without depleting the general fund."

Sheehan, a lawyer, said he decided to draft the bill after a Kenton County murder case in which Circuit Judge Raymond Lape Jr. posted notices at the courthouse saying he was "desperate" to find public defenders.

William Hagedorn and John Foote volunteered to represent Gregory Wilson three months before the trial in September 1988. Deanna Denison also agreed to assist Dennis Alerding, who represented Wilson's co-defendant, Brenda Humphrey.

Lape subsequently ordered the county fiscal court to pay the four lawyers a total of \$20,500. But Lape said the money must come from state funding the fiscal court normally passes on to the local public defender program - not from county money.

Robert Carran, director of Kenton-Gallatin-Boone Public Defender Inc., has challenged the order and the matter is pending before the Kentucky Court of Appeals. Carran has contended that the fiscal court should be responsible for providing extra funding.

-Kentucky Post, September 4, 1989.

Fact #6

The Death Penalty means Executing Children.

There are over 30 young people now sentenced to die for crimes committed before they were 18 years old. Some were as young as 15. Three have been executed already.

For more information :

National Coalition to Abolish the Death Penalty, 1419 V. St., NW, Washington, DC 20009

**It's easy to believe in the death penalty
... if you ignore the facts.**

CAPITAL TRIAL DEFENSE

Written Interview with Bill Radigan



Bill Radigan

You are a prominent Kentucky criminal defense attorney who has defended capital clients. How were you and are you affected by your client being sentenced to death?

When my client Brian Keith Moore was sentenced to death in October of 1984 it was probably one of the greatest shocks that I have ever had. The implications of such a result are mind boggling to say the least. Regardless of what your client might or might not have done, you are now saddled with the responsibility for the result. As such, it is something that stays with you and now, nearly 5 years later, I am still working on that same case. It is the sense of responsibility that I feel the most.

Often victims of serious crimes, especially the family of victims of capital murder, have harsh feelings toward defense lawyers who fight hard for their capital client. What are your reflections about that experience?

If something ever happened to my wife, I am certain that my feelings toward the defendant could be readily described as "harsh". That feeling would probably bleed over towards his attorney. I think that is a natural and response to have anger towards those who have hurt you or those who you love. With this in mind I have to have sense of understanding towards the family of victims of capital murder, or for that matter, any crime. The problem that I have the most difficulty dealing with is the sense of vengeance that I sometimes feel. The concept of an "eye for an eye" is something that I thought society had outgrown. Unfortunately you still find it in existence.

What are the hardest aspects of defending capital clients?

Without question it has to be the time involved and the dedication that has to be given to defending capital clients. An acquaintance of mine who had been a Public Defender for a number of years and had gone into private practice was asked to represent a client on a capital case. It nearly ruined the practice of law

he had developed. He had a difficult time recovering from it both professionally and financially. When you accept a capital case you have to make a commitment that that particular case will be your primary responsibility regardless of what might come down the road.

Why have you been willing to take on the immense responsibility of defending a capital client?

There are probably 2 primary reasons. First, I think its somewhat aberrant that the state can justify the concept of taking a life in this day and time. It cannot be allowed to occur. Secondly, if any defendant in a criminal case needs assistance, it would be one facing a capital charge. I have an obligation to provide that type of assistance to such individuals.

Having gone through the extraordinary process of a capital trial, do you feel the death penalty serves a useful purpose in our criminal justice system?

I will not go through the litany of arguments against the death penalty. The lack of a deterrent effect, the economic cost of such litigation, the burden on the

courts and the personnel have all been studied and discussed by individuals much more qualified than I am. Simply stated, the answer to your question is no.

What kind of money and resources does it take to fully defend a capital client in Kentucky?

It is nearly impossible to make any such assessment, but let me try to put it into perspective. Since I have been in private practice, I have been involved in 2 death penalty cases at the Circuit Court level-one went to trial, and the other was resolved by a plea to 20 years.

In the case that went to trial, I spent nearly 120 hours in court and well over 200 hours out of court- all in 1984. This does not include the year that I spent on the case while at Public Advocacy. This amounts to nearly 2 months of billable time, or approximately \$24,000.00. I was paid \$2,000.00 for that particular case.

In the case that was eventually plead to 20 years, I spent over 40 hours in court and some 120 hours out of court. For this month's worth of time, I received the grand total of \$500.00.

So in answer to your question, Kentucky

NLADA President Comments on Death Penalty Fees

James Neuhard, President of NLADA, Chair of the American Bar Association Bar Information Program (BIP), and head of the Michigan State Appellate Defender Office (SADO), responded in May to a request by the United States Administrative Office of the Courts (AO) for comments on the establishment of guidelines for attorney compensation in federal capital cases and death penalty habeas corpus cases.

In his response Neuhard discussed the myth that lawyers have a duty to handle criminal cases for free or below cost and the threat which that myth poses to adequate, effective representation. Setting out facts about office overhead, noting that attorneys in other types of cases are not subjected to fee cutting, and explaining how difficult death cases are, Neuhard suggested using overhead as the base point, plus a reasonable fee, in establishing fee guidelines. He stated that a "reasonable bellwether for setting fees in a district in a death penalty cases would be to refer to current Bankruptcy and other fee shifting rates." He offered his assistance and that of NLADA and BIP as the Administrative Office continues to grapple with the question of attorney fees in death penalty cases.

Reprinted by permission of *NLADA Capital Report*.

**Average Attorney Hours Documented Cases
Capital Post-Conviction**

	State Lower	State Supreme Court	U.S. Supreme Court	Federal District	Federal Circuit	U.S. Supreme Court
Nationwide (24 States)	887	506	123	606	573	428

- Time and Expense Analysis in Post-conviction Death Penalty Cases, Prepared by Robert Spangenberg for the Florida Legislature and Office of the Governor (Feb. 1987)

does not believe it takes much money at all to defend a capital client. But perhaps your question should be rephrased- how much should it take to fully defend a capital client in Kentucky?

First, there should not be a flat fee. Cases will vary in the amount of time required to properly represent the capital client, and a "cap" would be an artificial limitation. Second, a private attorney should be paid an hourly rate for his work probably in the range of \$50.00 to 100.00 per hour. If Kentucky wants private attorneys to be willing to work on death penalty cases, then the state must be willing to spend the needed money.

The Department of Public Advocacy has been able to pay attorneys handling capital cases only \$2500, the lowest attorney fee in the nation for a capital defense. Is that enough for an appointed lawyer in Kentucky to do an adequate job?

If you broke down the hours that I spent on my last capital trial by the amount of money that I received, then I would have been paid at less than minimum wage. Suffice it to say that my partner was not exactly thrilled at my taking over the case simply for financial reasons, even though she understood why I did it and in fact encouraged me to do so. The biggest problem with this maximum fee is that private attorneys can only afford to

**Hourly Rates for Capital Cases
in California are Raised**

Effective June 1, 1989, California compensation rates for appointed counsel increased from \$60-\$75 per allowable hour for death penalty representation and from \$50 - \$65 per allowable hour for cases on review. These same rates apply for associate counsel. In addition the reimbursement rate for paralegals and law clerks is now \$25 per allowable hour.

"volunteer" their time infrequently.

They simply cannot afford to take on many cases like this and still be able to pay their bills.

Seven of Kentucky's death row inmates had criminal lawyers represent them who are now in prison, disbarred, or disciplined by the bar, or left the profession before being disbarred. Can the ultimate decision survive that kind of representation?

This is probably a more complicated question than you initially might think. My initial response was to categorically challenge such representation. However, in all fairness, you would have to look at each individual case to see if the reason for the disciplinary action could in any way be linked to the attorney's representation at trial. In all fairness the question cannot be answered in general terms.

Do you think capital punishment for drug dealers will have any influence on the drug problem in Kentucky?

I seem to recall in the Middle Ages in England a serf could be executed for hiding food that was supposed to be turned over to the King. Such concept did not survive the growth of what we now call civilization. The idea of expanding the death penalty to those who deal in drugs seems to me to be a knee-jerk reaction by the general population to what is now being called the number one problem in the United States. I hope that reasoned minds will be able to understand and differentiate the necessity for the death penalty to suit certain crimes only. But I have been wrong before.

Any other thoughts?

In my region of the state I have seen recently 2 Commonwealth's Attorneys fighting over the "honor" of prosecuting a defendant in a possible capital case. Obviously this is being done simply for the publicity that can be gained by prosecuting what is becoming a notorious case. It angers me - and even

more frightens me- that such actions occur. Unfortunately, it seems to be a

reflection of a large segment of our society. There are no rational reasons for the death penalty to exist. It is unfortunately merely a return to the concept of revenge, without any thought pattern beyond that. I realize that I am in a minority on these thoughts. However, to me they are important enough to be a framework of my personal philosophy. That is why I believe that it is important for private attorneys like myself to maintain their involvement in death penalty cases, and to continue to practice what they believe.

WILLIAM M. RADIGAN

Richard, Walker and Radigan
800 Republic Building
429 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 569-2777

Bill graduated from University of Louisville Law School in 1975. He worked at DPA from 1975-1983. He has been a partner of Richard, Walker & Radigan from 1984-present, specializing in personal injury and criminal law. Bill's two most recent capital cases were Brian Keith Moore (trial in 1984; cert. petition filed 8/89) and Tyrus Mozee (Jefferson County conflict case- plea to 20 years).

**PLEAD GUILTY
SAVE A TREE**

The defendant alleged in his appeal ... that the trial counsel failed to effectively advise of the range of punishment available; he adds that said counsel told him it would save "a lot of paperwork" if Manns were to go ahead and plead guilty. The Court of Appeals ruled the law in Kentucky does not require that a criminal defendant be informed of every possible consequence and aspect before pleading guilty.

Manns v. Commonwealth. 87 CA 2369. MR Judgment affirmed. Court of Appeals. June 30, 1989. Not to be published.

WEST'S REVIEW



Linda West

KENTUCKY COURT OF APPEALS

BATSON NOT APPLICABLE TO GENDER

Hannan v. Commonwealth
36 K.L.S. 8 at 12
(July 21, 1989)

The issue in this case was whether the commonwealth's alleged use of peremptories to strike female jurors violated the Equal Protection Clause in the same manner that the racially discriminatory use of peremptories did in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The Court held that "*Batson, supra*, does not offer any authority for the extension of the principles contained therein beyond racial discrimination."

The Court also held that, in any event, Hannan had failed to make out a prima facie showing of discrimination as required by *Batson* since although 70% of the jury panel was female; more men than women were struck.

MARITAL PRIVILEGE/ STATEMENTS OF WITNESSES

Farley v. Commonwealth
36 K.L.S. 9 at 11
(August 18, 1989)

In this case the Court held that KRS 421.210(1), the marital privilege, which makes confidential "all knowledge obtained by reason of the marriage relation..." does not include physical evidence. Thus, the statute did not forbid the evidentiary use of a photograph of the defendant involuntarily surrendered to police by his wife.

The court also held that no reversible error resulted when a prosecution wit-

ness testified that he had given the police a written statement but the officer involved denied ever recording the witness' statement and no written statement was produced under RCr 7.26. The Court held that, absent a showing of prejudice, "not every failure to comply with RCr 7.26 requires automatic reversal."

LESSER INCLUDED OFFENSES- UNAUTHORIZED USE OF A VEHICLE/ TRUTH IN SENTENCING - "PRIOR OFFENSE"

Logan v. Commonwealth
36 K.L.S. 10 at
(August 25, 1989)

Logan was convicted of receiving stolen property based on his possession of a stolen van. Logan's defense had been that he thought the van belonged to a friend. Under this evidence the Court held that Logan was not entitled to an instruction on unauthorized use of a vehicle. "Logan's testimony, if believed, would appear to exonerate him of any criminal wrongdoing, rather than convict him of unauthorized use of a vehicle."

Logan also argued that a prior conviction introduced during the sentencing portion of his trial pursuant to KRS 532.055 should have been excluded as not truly "prior" since his conviction of that offense followed the commission of his present offense. The Court disagreed. "Both the offense and the conviction in question certainly occurred prior to the trial of the present case, and their use was in accordance with both the plain meaning and the broader purpose of the statute."

There were no reported cases for the United States Supreme Court or the Kentucky Supreme Court in July and August.

Cars not 'Weapons' Court Says

The Kentucky Court of Appeals declined to define motor vehicles as "deadly weapons" but said any vehicle driven by a drunk "can be as dangerous as a person with a firearm."

In an opinion written by Judge Judy West, the court concurred that "while a deadly weapon ordinarily is a dangerous instrument, not every dangerous instrument is a deadly weapon." Three judges of the appeals court said Kentucky courts already recognize that motor vehicles may be dangerous instruments- an important distinction. The ruling came in a Jefferson County case involving the death of a woman whose car crashed into the rear of a tractor trailer that had been stopped on I-64.

The crash occurred at 2 a.m. Jan. 24, 1987. The appeals court opinion said evidence showed that the truck driver, Dwight David Ball, was intoxicated. He had run out of fuel, stopped his rig in a traffic lane and failed to set up emergency reflectors.

The dead woman's minor son, Ronald Clark Shepherd, filed suit under a Kentucky law that allows children under 18 to sue if someone causes the death of a parent by "careless, wanton or malicious use of a deadly weapon." Jefferson County Circuit Court ruled that motor vehicles were not covered by the penal code's definition of deadly weapons. Examples listed in the code included knives, clubs, guns, and karate sticks.

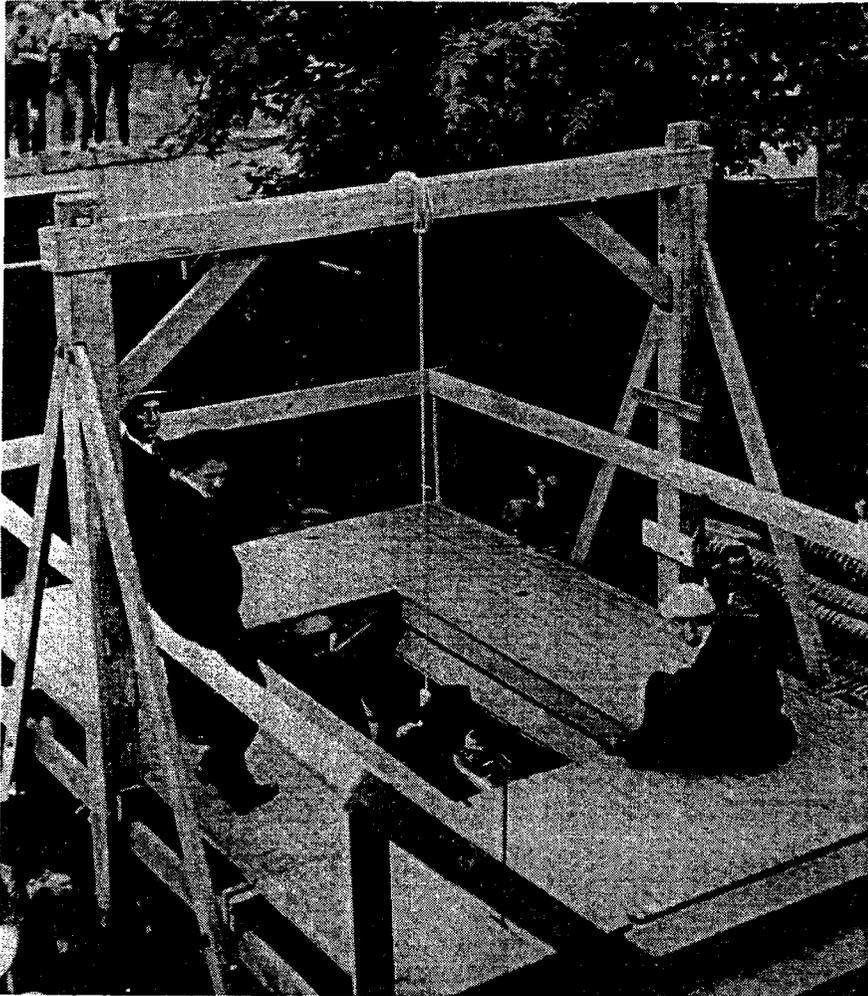
Shepherd contended on appeal that the list was not all inclusive. The appeals court agreed that the list is not all inclusive, but said neither the legislature nor the supreme court had specified a vehicle as a deadly weapon.

Kentucky Post, August 5, 1989

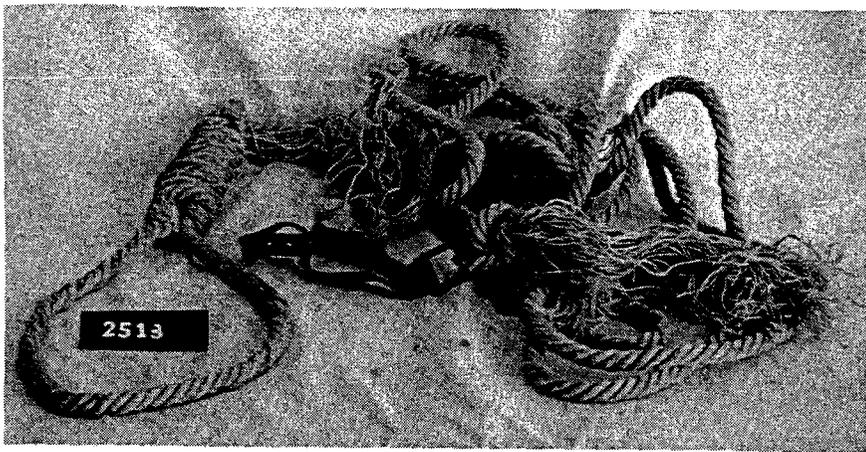
FIFTH AMENDMENT

No Person shall be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself...

THE DEATH PENALTY



The Roger Warren hanging, May 7, 1911 at the Frankfort Jail



An exhibit entitled "Seldom Seen," is currently on display at the Kentucky Historical Society at the old Capitol in Frankfort until January, 1990. It includes the noose (shown here) used at the last public hanging - that of Roger Warren in 1911.

Here's the story of the last public hanging

About that last public hanging in Kentucky ...

Here's the background, says Assistant Attorney General Perry T. Ryan of Lexington:

In 1920, the General Assembly amended the 1910 electrocution law to include public hanging for rape or attempted rape. It called for the event to take place in the county where the crime occurred.

The last *public* hanging, that of Rainey Bethea, took place Aug. 14, 1936, in Owensboro, and it attracted 20,000 witnesses. The picnic-and-circus atmosphere, covered by the New York Times, Chicago Tribune and other national publications, created so much outrage that it was the last- and the last public execution of any kind anywhere in the United States.

The last legal hanging in the state was that of Harold Van Venlson. It occurred June 3, 1938, in Covington.

In 1938, when the law was repealed, only one white man had been hanged, in Livingston County's Smithland. The victim: a pregnant white woman.

Former UK Professor George Wright, director of Afro-American Studies at the University of Texas has written *Racial Violence in Kentucky, 1865-1940: Lynchings, Mob Rule and Legal Lynchings*. To be published in January by the Louisiana State University Press.

By Dick Burdette, Columnist. Permission to Reprint Granted by *Lexington Herald Leader*.

Kentucky's Death Row

As of September 1, 1989

Men	25
Women	1
Total	26

White	21
Non-White	6

BOOK REVIEW

E.P. Evans

The Criminal Prosecution and Capital Punishment of Animals

Faber and Faber (Boston and London)

336 Pages (1987)

\$7.95

A professor of mine used to say that the Middle Ages do not warrant the popular term "The Age of Faith," but should be referred to instead as "the Age of Law." A recent reissue in paperback of E.P. Evans' book, originally published in 1906, provides some diverting evidence to support that interpretation.

Evans (1831-1917) details a number of legal cases, chiefly from the late Middle Ages (although there are later examples as well, one as recent as 1906) in which animals-rats, slugs, weevils, locusts, pigs, mules, cows, dogs- were prosecuted on charges such as murder, buggering, and the destruction of crops. The animals were represented by counsel and were subject to sentences including anathematization, banishment, and public execution by hanging or burning alive. A few examples should suffice:

New in the Death Penalty Library

1. *Motions Manual for Capital Cases* — Ohio Death Penalty Task Force.

2. Materials from the Mennonite Central Committee: *Capital Punishment Study Guide for Groups and Organizations* Zehr, Howard. *Mediating the Victim-Offender Conflict* Zehr, Howard. *Death As A Penalty: a moral, practical and theological discussion Choose Life* pamphlet *Statement on the Death Penalty* Mennonite Central Committee U.S. Peace Section.

3. Arbutnot, Jack. *Juror's Views on Due Process and the Death Penalty: A Sociomoral Framework for Voir Dire and Jury Selection*

4. *When the State Kills... the death penalty: a human rights issue.* Amnesty International

5. *1989 Survey of State Legislation.* National Coalition to Abolish the Death Penalty.

In 1386, the tribunal of Falaise sentenced a sow to be mangled and maimed in the head and forearms, and then to be hanged, for having torn the face and arms of a child, and thus caused its death.... As if to make the travesty of justice complete, the sow was dressed in man's clothes and executed on the public square near the city-hall...

And again:

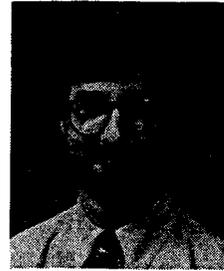
[I]n a case of infanticide, it is expressly stated in the plaintiff's declaration that the pig killed the child and ate of its flesh, "although it was Friday," and this violation of the *jejunium sextae*, prescribed by the Church, was urged by the prosecuting attorney and accepted by the court as a serious aggravation of the porker's offenses.

Things did not always go poorly for the animals however:

In the case of Jacques Ferron, who was taken in the act of coition with a she-ass at Vanvres in 1750, and after due process of law, sentenced to death, the animal was acquitted on the ground that she was a victim of violence and had not participated in her master's crime of her own free-will. [Community members] signed a certificate stating that they had known the said she-ass for four years, and that she had always shown herself to be virtuous and well-behaved....

This is a book to be savored by those with a taste for archaic juridical trivia. As striking as Evans' material is, his resolutely superficial treatment makes it of merely antiquarian, rather than historical, interest. Unfortunately, he makes essentially no attempt to explain the oddities he documents so well, and so misses the real stories here. For instance, the many cases of pigs killing babies, often in their cradles, raises the obvious question: How and why did so many pigs get to so many babies?

The second and shorter, section of the book is an essay comparing modern (in 1906) penological practices with those in the Middle Ages. Evans discusses, but does not succeed in answering, questions about the relationship between the various causes of- and moral responsibility for- crime and its punishment (especially the death penalty). He recognizes that criminal behavior can have



Woodson Smith

varying psychological and social causes ("the present egoistic organization of our social and industrial system... and the brute forces of ignorance driven to despair by the disheartening and debasing pressure of poverty... the unjust and injurious conditions of life, that society itself has created."), but takes the view that society's concern should be to protect itself against every criminal assault, "no matter what its source or character may be." He also thinks (in 1906) that the insanity defense is used too often. This all ties back into the treatment of animals earlier in the book:

If it could be conclusively proved or even rendered highly probable, that the capital punishment of an ox, which had gored a man to death, deterred other oxen from pushing with their horns, it would be the unquestionable right and imperative duty of our legislatures and tribunals to re-enact and execute old Mosaic law on this subject. In like manner, if it can be satisfactorily shown that the hanging of an admittedly insane person, who has committed murder, prevents other insane persons from perpetrating the same crime... it is clearly the duty of society to hang such persons, whatever may be the opinion of the [psychiatrist] concerning their moral responsibility.

More than 80 years later, society has still not succeeded in achieving general agreement on the issues of crime and punishment Evans discusses.

WOODSON SMITH
Advisor, Student Publications
Kentucky State University
Frankfort

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

BAD CHECKS, DEBTOR'S PRISONS, AND PROSECUTING ATTORNEYS

State v. Orth and Criminal Justice Policy

While the decriminalization of indebtedness is a constitutional promise in America, the so-called bad-check laws have rendered it a promise often broken; the jailing of poor people for insufficient-funds checks had been commonplace in some localities. A recent and unique decision of West Virginia's highest court, *State v. Orth*, may be the harbinger of a policy shift. The *Orth* decision ends the prosecuting attorney's role as the handmaiden of commercial business interests and enhances economic class neutrality, in the criminal justice system.

FACTS OF THE CASE

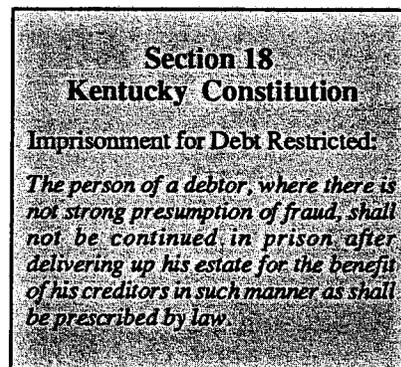
A local court had convicted Nancy Orth for giving two worthless checks totaling \$5,600 at a racetrack in Wheeling. The West Virginia Supreme Court of Appeals¹ overturned her conviction, saying the racetrack had reason to believe the checks were worthless when it cashed them because Orth had bounced six other checks in question and because the West Virginia worthless check statute specifically did not apply where someone accepting a check "knows . . . or has reason to believe" the check is not good.

More interesting, the court went on, in *dicta*, to castigate the common practice of the prosecuting attorney's office of bringing criminal charges on worthless checks for merchants and then dropping the charges if and when restitution was made. "The prosecutorial services of the state are not for private use in civil debt collection," Chief Justice McGraw wrote. "Prosecuting attorneys in this state are not authorized to divert cases prior to bringing formal charges where there is probable cause to believe the accused is guilty."

Justice Brotherton's concurring opinion was even bolder: "The assistant prosecutor's arrangement with Orth to forestall presentment of the bad check warrant to the grand jury, so long as Orth made restitution to Wheeling Downs, cannot be disguised as some sort of plea bargaining arrangement. . . . The restitution arrangement, in fact, constituted

debt collection by a government official for a private party and borders on malfeasance in office."

The prosecutor's practice was not an exercise of permissible prosecutorial discretion, the court said, because such discretion applies only where the prosecutor, in good faith, doubts the guilt of the accused or feels the case is not capable of adequate proof. The court reiterated its earlier opinion in *State ex rel. Ginsberg v. Naum*,² which held that because it is the legislature's function to define what activity is a crime, a prosecuting attorney has a nondiscretionary duty to prosecute when he has probable cause to believe that any criminal law has been violated and a conviction can be obtained.



JAILS AND DEBT COLLECTION

Dickens' poignant descriptions of English debtor's prisons are historically accurate. Even in early colonial American, debtor's prisons were at times common, but the new American nation outlawed the practice by the early nineteenth century. Most state constitutions specifically prohibit imprisonment for debt.³

American jurisprudence long has held that institution of a criminal prosecution for the actual purpose of collecting a civil debt constitutes the actionable tort of abuse of process. The key elements of the

tort are the ulterior motive and the perversion of the purpose of the criminal law.⁴ Thus, where a creditor invoked the criminal justice process simply to force payment of a civil debt, the debtor could sue the creditor in a private damage suit. American jurisprudence records a number of such cases.⁵

What makes the *Orth* case different is that it is, apparently, the first time a prosecuting attorney has been judicially condemned for participating in the practice. Interestingly, there have been several such claims against judicial officers.⁶ One such case, *State ex rel. Richardson v. Edgeworth*,⁷ is particularly informative. It involved several justices of the peace who regularly allowed business people to institute bad-check warrants against customers whose checks had bounced without informing the creditors of the criminal nature of the documents and without obtaining any proof of fraudulent intent on the part of the makers of the checks.

In *Edgeworth*, a deputy had served two such warrants on a destitute young father in the predawn hours and told him that he must take him to jail unless he immediately produced \$10 to cover the checks and \$60 for the fines and costs. The young man was unable to raise the money from neighbors and, before departing for jail, asked to reenter his home to get some socks. In his bedroom, the young man committed suicide with a shotgun. The Mississippi Supreme Court ruled that the facts could sustain a wrongful death claim against the justices of the peace based on abuse of criminal process.

It should be emphasized that the mere fact that an underlying civil debt remains unpaid does not mean that a criminal proceeding cannot be maintained against a debtor; the problem arises only when the actual motive for the criminal charge is collection of the civil debt. For example, the Iowa Supreme Court recently held in *Tomash v. John Deere*⁸ that a tractor dealer's actions in prosecuting

criminal charges against a defaulted purchaser who sold a mortgaged tractor to a third party did not constitute abuse of process because there was no evidence the seller had threatened the purchaser with prosecution if payments were not made or any other proof that an underlying motive was collection of the debt.

SOCIAL JUSTICE IMPLICATIONS

Radical criminologists long have suggested that the criminal law exists to serve the dominant economic class. Politics aside, there can be no doubt that the justice system does perpetuate existing social and power relationships. Even moderate critics have acknowledged that the criminal justice system "to a very large extent consists of the members of one social class putting members of another social class in jail"⁹ because it is mostly "poor, uneducated or stupid"¹⁰ people who are prosecuted for crimes.

Whether injustices in the criminal justice system are themselves criminogenic is a question yet unanswered and the subject of continuing, strident debate. However, if criminal conduct is to any degree the result of alienation from the parent society, a transaction of the criminal justice system that is economic class partisan might be expected to undermine

social allegiance and exacerbate crime. One palpable representation of this is found in labeling theory. It holds that once a person is swept into the justice system, society labels the person as deviant and criminal, and he or she responds by self-conceptualizing as a criminal. Later antisocial posturing inevitably follows.¹¹

CONCLUSION

The *Orth* decision grapples with fundamental societal questions: human freedom versus property rights, the differing purposes and provinces of civil and criminal law, and, obliquely, the root causes of social fragmentation and crime. The immediate result of the decision is to halt the actions of prosecuting attorneys as collection agencies for local merchants. Its broader consequence may be seen as a judicial attempt not to weaken the criminal justice process but to legitimate the system by the elimination of overt systematic injustice.

MICHAEL CLAY SMITH

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Hattiesburg, Mississippi.

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FOOTNOTES

1 *State v. Orth*, 359 S.E.2d 136 (W. Va. 1987).

2 319 S.E.2d 454 (W. Va. 1984).

3 L. Friedman, *A History of American Law* 121, 271-272 (2d ed. 1985).

4 Annotation, "Use of Criminal Process to Collect Debt as Abuse of Process," 27 A.L.R.3d 1202 (1974).

5 See, e.g., *Bradley v. Peaden*, 347 So.2d 455 (Fla. Dist. Ct. App. 1977); *Baker v. Oklahoma Tire & Supply Co.*, 344 F. Supp. 780 (W.D. Ark. 1972).

6 E.g., *Mangum v. Jones*, 236 So.2d 741 (Miss. 1970); *Kitchens v. Barlow*, 164 So.2d 745 (Miss. 1964).

7 214 So.2d 589 (Miss. 1964).

8 399 N.W.2d 387 (Iowa 1987).

9 R. Neely, *How Courts Govern America* 153-154 (1981).

10 *Id.*

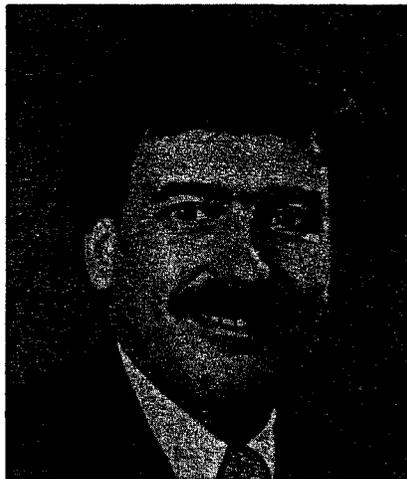
11 E. Lemert, *Human Deviance, Social Problems, and Social Control* 16-18 (2d ed. 1972); E. Schur, *Radical Nonintervention; Rethinking the Delinquency Problem* 118-126 (1973).

PUBLIC ADVOCATES CAN ACCEPT NO FEE

The Supreme Court of Kentucky in a case styled *Kentucky Bar Association v. An Unnamed Attorney*, reevaluated the case of *KBA v. Kemper*, Ky., 637 S.W.2d 637, KRS 31.250(1), and KBA Opinion E-165.

The Court specifically overruled the *Kemper* case and held that KRS 31.250(1) prohibits any part-time public advocate from accepting a fee from a client he was appointed to represent in any circumstance.

This decision specifically prohibits the practice of withdrawing or being discharged from appointment as a public advocate and then representing the client as a private attorney for a fee. The court ruled that KRS 31.250 (1) clearly prohibits a part-time public advocate from accepting any fee from an appointed client.



Paul F. Isaacs

Based on that ruling it is no longer appropriate for an attorney who has been appointed to a specific client to represent that client in that proceeding in any manner except as a public advocate.

Private attorneys can no longer go before the court and move to withdraw as public advocate so they may represent that individual as private counsel. If the attorney withdraws as public advocate, the withdrawal must be complete. In those counties where specific attorneys are not appointed but the local office is appointed and then an attorney is assigned to that case, it is the opinion of the Department that the attorney who is assigned the case is in the same position as if he had been appointed by the court. In other words, after this case, once you are representing an indigent client as a public advocate, you are prohibited from representing him for a fee in any circumstance in the specific case to which you are appointed or any collateral matter arising out of that appointment.

PAUL F. ISAACS
Public Advocate
Frankfort

6TH CIRCUIT HIGHLIGHTS



Donna Boyce

REVIEW OF GUILTY PLEAS

In *Dunn v. Simmons*, ___ F.2d ___, 18 S.C.R. 14, 45 Cr.L. 2241 (1989), the Sixth Circuit Court of Appeals held that the methodology and standards utilized by the Kentucky Supreme Court do not comply with federal standards for determining whether a guilty plea is intelligent and voluntary under the U.S. Constitution.

Prior to trial, Dunn sought to have his PFO indictment dismissed, contending that his 1970, 1973 & 1976 convictions were based upon invalid guilty pleas since they were accepted without Dunn having intelligently and voluntarily waived his federal constitutional rights. The trial judge expressed concern that Kentucky case law conflicted with federal standards for determining whether rights are validly waived but overruled the motion.

Boykin v. Adams, 395 U.S. 238 (1969), held that for purposes of establishing that when a state court defendant entered a guilty plea he also waived federal constitutional rights concerning trial by jury, confrontation and self-incrimination, the state is required to prove that the plea was intelligent and voluntary. Under *Boykin*, waiver of these three important federal rights cannot be presumed from a silent record. When a waiver is later challenged, the state can attempt to show its validity by introducing the transcript of the guilty plea proceedings. If that is not sufficient or available, extrinsic evidence can be used. However, as the Sixth Circuit made clear in *Roddy v. Black*, 516 F.2d 1380 (1975), the state must make a clear and convincing showing with this extrinsic evidence that the plea was intelligently and voluntarily entered.

Federal law governs the standards for determining whether a guilty plea is intelligent and voluntary for the purposes of the U.S. Constitution. In view of *Boykin* and *Roddy*, the Sixth Circuit concluded that those standards require the following: First, where the trial court record is inadequate to affirmatively

demonstrate that the plea was intelligent and voluntary, the state may not use a presumption to satisfy its burden of persuasion. Second, where the state tries to satisfy that burden by supplementing an incomplete contemporaneous record with extrinsic evidence, that evidence must be clear and convincing.

Kentucky's Supreme Court said that the presumption of regularity of judgment is sufficient to meet the state's original burden of proof. The court did note, however, that the burden shifts back to the prosecution if the defense rebuts the presumption. The Sixth Circuit stated that manifestly this methodology results in a standard different from federal standards for proving a valid waiver of federal constitutional rights. Although the Kentucky procedure ostensibly permits the use of the presumption only to satisfy a burden of production, in reality it may be used by the state to carry its alternate burden of persuasion. That is because, if the defendant offers no rebuttal, the state will prevail; the presumption becomes a substitute for evidence supplementing the conviction record. The practical effect of this procedure is to allow the state to prevail by carrying its burden of persuasion upon the bare record of the fact that a conviction was entered against a defendant. This offends the requirements of both *Boykin* and *Roddy*.

The Sixth Circuit concluded that the methodology and standards used by the Kentucky Supreme Court did not comply with federal standards for determining whether a guilty plea is intelligent and voluntary, and that the Court's findings of fact were not entitled to the presumption of correctness and were unsupported by the record.

CONFESSIONS - RIGHT TO COUNSEL

A confession elicited by federal agents from a suspect who is in state custody on unrelated state charges and had requested appointment of counsel at arraignment on those charges was obtained

in violation of her 5th Amendment right to counsel. *United States v. Wolf*, ___ F.2d ___, 18 S.C.R. 15, 13, 45 Cr.L. 2305 (1989).

Wolf had appeared before the Jefferson County District Court for arraignment on a theft charge. She requested counsel and the court ordered that a public defender be appointed to represent her. After arraignment she returned to jail. Later that day, while still in custody and before she had spoken to an attorney, she was visited by federal agents who advised her of her *Miranda* rights. She signed a form waiving those rights and confessed to her involvement in a scheme to kill the wife of a former boyfriend.

Edwards v. Arizona, 451 U.S. 477 (1981) holds that a suspect who has expressed a desire to deal with the police through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications with the police. In *Arizona v. Roberson*, 108 S.Ct. 2093 (1988), the Supreme Court held that this prophylactic rule applies when a police initiated interrogation following a suspect's request for counsel occurs in the context of an unrelated criminal investigation.

The Sixth Circuit found a *Roberson* violation: Wolf invoked her 5th Amendment right to counsel at arraignment; she remained in custody and did not consult with counsel from that time until after she gave her statement; and the federal agents, not Wolf, initiated the interrogation that resulted in the statement. The Court rejected the government's claim that Wolf's request for counsel at arraignment did not trigger the 5th Amendment protections of *Roberson* because it was not made during a custodial interrogation.

PROSECUTORS IN DUAL ROLES

In *Dick v. Scroggy*, ___ F.2d ___, 18 S.C.R. 17, 11, 45 Cr.L. 2403 (1989), the Sixth Circuit held that a prosecutor's

dual role in prosecuting Dick's state felony assault charge and representing the injured victim in a civil suit for damages filed against Dick did not render his conviction constitutionally infirm. The Sixth Circuit acknowledged that prosecutors are vested with a good deal of discretion and, regardless of the defendant's culpability, it is unseemly for such discretion to be exercised by a prosecutor who is not reasonably disinterested. However, the Court noted that politically ambitious and aggressive prosecutors are by no means uncommon and the zeal of the prosecutor who covets higher office or who has a personal political axe to grind may well exceed the zeal of the prosecutor who has the kind of interest present in the case at bar. The Sixth Circuit concluded that absent a demonstration of selective prosecution, even a clear appearance of impropriety in the participation of the prosecutor is normally insufficient to justify a decision, in collateral proceedings, setting aside a conviction of one found guilty beyond a reasonable doubt in a fair trial before an impartial judge and an unbiased jury.

DONNA BOYCE
Assistant Public Advocate
Frankfort

STAFF CHANGES



Steve Mirken joined MLS on August 16, 1989. J.D., University of Tennessee, 1978. He practiced in a private firm in Hazard with Kay Guinane and Bill Pennick from 1979-82, and frequently acted as assigned counsel in indigent cases before the Hazard DPA office opened. From 1983-1989, Steve worked for the New Hampshire Public Defender office, the last 4 years exclusively on homicide cases. He also taught Trial Advocacy classes at the Franklin Pierce Law Center in Concord, N.H.



Margaret S. Foley joined the Northpoint Trial/Post-Conviction Office on August 1, 1989. She was a law clerk in the Frankfort DPA office from 1980-81. She is a 1981 graduate of the University of Kentucky. She clerked for Judge Unthank in the Pikeville Division of the Federal District Court for Eastern Kentucky before going into private practice in Danville for 6 years, during which time she did "of counsel" appeals for the Department of Public Advocacy.

Former bar owner wins a new trial

Kentucky Post staff report

A man convicted of setting fire to a bar in Newport won a new trial this week when the U.S. Court of Appeals for the Sixth District ruled that his witnesses should have been given more time to get to court.

The ruling Monday said Patrick Vilardo of Cincinnati was denied a fair trial by visiting Judge Thomas G. Hull in 1988. According to the appeal, the prosecuting attorney told Vilardo and the court that the government's case would take two full days. Vilardo relied on that information in scheduling his witnesses. When the prosecution

completed its case at 3:30 p.m. on the second day of trial, Vilardo's witnesses were not in court to testify.

The appeals court ruled that Vilardo's request for a continuance to bring his witnesses in the next morning "was entirely reasonable."

Vilardo was convicted of conspiracy to defraud an insurance company, arson, mail fraud and wire fraud in connection with the burning of the Top Shelf Lounge in Newport. Vilardo was co-owner of the bar, which burned in 1985.

Vilardo has been imprisoned in Ashland for the past 12 months. "There's nobody who can give him back that 12 months of his life," said his attorney, Harry P. Hellings Jr.

Hellings said the government has 30 days to request a re-hearing of the appeal decision.

If the government does not request a re-hearing, Vilardo could be transported to a Northern Kentucky jail. "A district judge will have to set a bond on him," Hellings said. He said Judge Hull had refused to set an appeal bond, which could have freed Vilardo while he was awaiting appeal. Vilardo had been sentenced to six years in prison and fined \$30,000.

The Kentucky Post, August 2, 1989

SIXTH AMENDMENT

... the accused shall enjoy the right to a speedy and public trial by an impartial jury... and be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

PLAIN VIEW

Challenging DUI Stops Based on Anonymous Phone Tips



Rob Riley

In this era of a perceived *get tough* attitude by juries in D.U.I. cases, it is more important than ever before to investigate potential defects in the prosecution's case in hopes of reaching a disposition short of trial. The advent of public interest programs encouraging the public to report suspected drunk drivers, although well-intentioned, can lead to fertile grounds for error. An increasing number of D.U.I. citations recite an anonymous phone tip as the basis for the initial stop. From the outset, counsel should determine what, if anything, the officer personally observed. If the officer, prior to the stop, observed erratic driving or violations of the law, then the tip becomes irrelevant and the issue is simply whether what was observed justified the stop. If, however, the officer observed nothing out of the ordinary prior to the stop, then counsel must be prepared to investigate and challenge the sufficiency of the anonymous tip.

In Kentucky, the appropriate analysis for anonymous tip cases was established in *Graham v. Commonwealth*, 667 S.W.2d 697 (Ky.App. 1983). A careful reading of *Graham* reveals a two step analysis: 1) does the tip suggest that the person involved is *subject to seizure*, and, if so, 2) does the description carry with it the necessary *indicia of reliability* to justify the stop.

The first step stems from *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). In *Prouse*, the United States Supreme Court applied the traditional "stop and frisk" analysis of *Terry v. Ohio*,¹⁰ to automobile stops, authorizing brief,² investigatory stops:

in those situations where there is at least an articulable and reasonable suspicion that a *motorist is unlicensed or that an automobile is not registered or that either the vehicle or an occupant is otherwise subject to seizure*.³

In *Graham*, the Court focused first on the information the tip contained, the brandishing of a gun, and concluded that such

activity violated the statutory offense of menacing.⁴ This the Court held made the driver "subject to seizure" for *Terry/Prouse* purposes.⁵

The second step of the analysis is required by *Adams v. Williams*, 407 U.S. 143, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972), and its progeny. In *Adams*, the U.S. Supreme Court first established guidelines for dealing with informant tips in a *Terry* type situation.⁶ *Adams* establishes as the touchstone in all tip cases that the tip must provide a sufficient "indicia of reliability"⁷ in order to satisfy the "articulable and reasonable suspicion" test of *Terry/Prouse*. The factors utilized by the *Adams* court in finding the necessary indicia all stem from the fact that the informant was a readily discernible individual present at the scene. The Court was careful to point out that "[t]his is a stronger case than obtains in the case of an anonymous tip."⁸ The Court further clarified its holding by pointing out that:

[O]ne simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the *victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime*—the subtleties of the hearsay rule should not thwart an appropriate police response.⁹

Although arguably bound by the facts of the case, the Court's chosen examples of situations giving rise to immediate action, *i.e.*, an indicia of reliability, both involve readily discernible and identifiable informants. In fact, had the tip in *Adams* been anonymous, none of the factors relied upon by the Court in reaching its holding would have existed. As such, lower courts "have been most ready to hold unreasonable a stop based on infor-

mation from an anonymous informant."¹⁰

The *Graham* court, in finding the required indicia of reliability from the facts presented, applied a virtual certainty test. In *Graham*, the Court held:

given the circumstances of reference to a particular location at a time when traffic was very light, thereby creating little doubt as to what vehicle was involved, the indicia of reliability were present as to support the anonymous tip.¹¹

The analysis, while simple to discern, is complicated to apply due to the various ways the issue can arise in DUI cases.

In the purest of cases, the anonymous caller will provide some type of description of the vehicle and merely allege that the driver is drunk. In *Campbell v. Dept. of Licensing*, 644 P.2d 1219 (Wash.App. 1982), the Court dealt with the issue in this form. The police officer was parked along the side of a state highway when a passing motorist "yelled at him that there was a drunk headed southbound."¹² The officer located the described vehicle, followed it and, although observing no erratic driving, pulled the vehicle over. The Washington court first established the standard that has evolved since *Adams*:

where, as here, an informant's uncorroborated tip constitutes the sole justification for the officer's initial detention of the suspect, the tip must possess an "indicia of reliability."¹³ (Citations Omitted).

In applying that test to invalidate the stop, the Court noted:

The case before us involves the unusual situation of a police officer on traffic detail stopping an automobile driver for suspicion of drunken driving when the officer has absolutely nothing to suggest that the driver was under the influence of intoxicating liquor except a conclusory tip from an unidentified passing motorist that

the driver was drunk.¹⁴

Substituting an anonymous phone tip for the conscientious, but unidentified, motorist would yield the same logical result. The absence of any information to establish the credibility of the informant combined with only the conclusory allegation of "drunk driver" cannot provide the articulable and reasonable suspicion of criminal activity required at the outset by *Terry v. Ohio*.¹⁵ As the *Adams* court noted, a tip such as this would require further police investigation prior to the stop. Counsel should attack such a stop by arguing the reasoning of the *Campbell* court precludes a finding of the necessary indicia of reliability.¹⁶

There are, however, tips that are less conclusory and suggest impaired driving ability to the trained officer: for example, weaving, driving on and off the roadway, crossing the center line, traffic or other minor violations. Here, as in the pure case above, counsel should attack the indicia of reliability. The tip, under *Graham*, must reliably connect the subject of the tip and the car stopped. Counsel should expose any facts that diminish the likelihood that the car stopped is the subject of the tip: a mismatch between the description given and the car stopped, a general description that fails to narrow significantly the class of suspects (Chevy; blue car), time between the tip and the stop as opposed to the distance covered, traffic patterns at the time of day the stop occurred,¹⁷ or anything else counsel can present to suggest that the wrong individual was stopped.

Be sensitive that the officer will generally feel highly justified in his/her selection of your client. As such, consider presenting defense evidence on the points relevant to your case rather than relying entirely on cross-examination: for example, be able to show how many cars of the given description passed the stopping point during a period of time equal to that used in your case; use photos to show similarities of various body styles of autos so as to enlarge the window of misidentification; introduce maps of the area showing the various ways your client could have gotten to the point without having been where the tip indicated; check with the local or state highway department for data on road use. On

BOYD DUI PROSECUTOR SAYS BREATHALYZER UNRELIABLE

A July 16, 1989 Associated Press article in the *Courier-Journal* reported:

ASHLAND, Ky. - Boyd County Attorney Jerry Vincent has said he would have been proven innocent if he had thought to have a blood test after he was arrested early Wednesday morning and charged with driving while intoxicated. Vincent, 42, said he refused to take a Breathalyzer test when stopped by Patrolman Tim Wallin because the machines are not reliable and he feared the test would not be accurate. "I didn't even think about it (the blood test)," Vincent said. "I was pretty angry at the time."

A Breathalyzer expert at the state police laboratory in Frankfort said Friday that the older model Breathalyzers - Models 900 and 900A - can be misread or adjusted improperly and that the accuracy of those machines is "dependent on the integrity of the police officer involved." City police confirmed Friday that the Breathalyzer that Wallin was carrying early Wednesday was a Model 900A.

Vincent contends that the arrest stems from a feud between the two men over two dogs that Wallin used to own. Wallin lives near Vincent. The report filed by Wallin stated that Vincent's vehicle was traveling between 45 mph and 50 mph in a 35-mph zone and that it crossed the highway's center line several times. Vincent also was cited for speeding.

The report also says that there was a strong odor of alcoholic beverages around Vincent, that the prosecutor was unsteady on his feet, that he failed several field sobriety tests and that he was uncooperative with police officers. Vincent has said that he had been drinking before his arrest, but he has not said how much. Vincent was scheduled to appear in Boyd District Court July 28.

A July 29, 1989 article in the *Lexington-Herald* reported that Vincent's trial was delayed until a special prosecutor was appointed to try the case. Additionally, the article reported that both district judges removed themselves from the case due to their relationship to the prosecutor. A special district court judge has been requested. Vincent has responsibility for prosecuting DUI cases.

DEATH THREAT REPORTED IN DUI CASE

Ashland, Ky. (AP)- An Ashland police officer's wife said a caller threatened to kill her if her husband did not drop a drunk driving case against Boyd County Attorney Jerry Vincent.

Beth Wallin, wife of Ashland Police officer Tim Wallin, said the call came at about 10:15 p.m. "He told me, 'You better tell your husband to drop the Vincent case or you're going to be dead,'" Mrs. Wallin said. "It scared me to death." Mrs. Wallin has filed a complaint with the Ashland Police Department. - *Kentucky Post*, August 12, 1989.

cross-examination, pin down the officer on items such as how long he/she would have looked if he had not stopped your client, how loose would he/she have been with the description, how did he/she happen to be where the stop was made. Ultimately, your goal is to show that rather than a carefully designed plan to stop the specific erratic driver, the tip served to declare open season on a large number of innocent citizens, governed only by the unbridled discretion of the officer involved. As such, the offered indicia can realistically be viewed by the Court in determining its relative reliability.

Graham is not a blanket endorsement of stops based on anonymous tips. It is a narrowly drawn decision that in most cases, if properly applied, will be good authority for holding the stop unreasonable. Cases where the tip involves illegal conduct, such as *Graham* itself, however, are also potentially subject to

direct legal challenge. As indicated above, the first step in the analysis stems from the *Prouse* "subject to seizure" requirement. Counsel should evaluate the tip carefully to determine if the individual client involved was, in fact, subject to seizure based on the information the tip provided. The *Graham* court concluded that the anonymous tip described facts that would establish the misdemeanor offense of menacing and, therefore, met the *Prouse* test. However, KRS 431.005 specifically defines and limits the situations and necessary requirements for a seizure of the person.

KRS 431.005 allows for an arrest on misdemeanors committed in the officer's presence or for any felony supported by probable cause. For crimes less than felonies, not committed in the officer's presence, a warrant is required. The *Graham* court did not address this problem. *Graham* could not, consistent with

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause....

KRS 431.005, have been arrested for the "menacing" offense. In fact, Graham was arrested, i.e., seized, due to pills in "plain view" following the stop and pills found in the ensuing search. *Graham*, however, sidesteps the black letter requirement that for "plain view" the officer must be entitled to be where the "plain view" occurred.¹⁹ Since the tip was, at best, indicative of a misdemeanor, had the police not found some infraction of the law by their own observation, then, pursuant to KRS 431.005, any detention of Graham would have been illegal. He was, therefore, at the time of the stop, not "subject to seizure." Thus, in the vast majority of cases of this nature, *Graham* will produce the absurd result that the defendant may only be arrested if, in fact, he/she is doing something different than the tip advised. Only in the pure case will the detained suspect be committing both a misdemeanor and the reported infraction in the officers presence and, therefore, be subject to seizure.²⁰ Absent some showing that KRS 431.005 was considered and rejected in *Graham*, counsel is free ethically to argue that *Graham* is bad law under the appropriate facts regardless of the indicia of reliability present.

Counsel should be aware that KRS 431.005(1)(e) purports to alleviate the "in the officer's presence" requirement for warrantless arrest in D.U.I. cases. However, for anonymous tip cases, KRS 431.005(1)(e) is not a factor. Pursuant to *Whiteley v. Warden*, 401 U.S. 560, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971), an anonymous tip, standing alone, cannot provide probable cause for an arrest and probable cause is the standard that triggers KRS 431.005(1)(e). Absent probable cause, the traditional rules of KRS 431.005, as described above, govern the arrest.

In sum, litigate the stop issue. Absent personal observation by the officer, many available challenges exist. Challenge whether, legally, your client was "subject to seizure." If she/he was, challenge whether the tip itself provided sufficient "articulable and reasonable suspicion" to justify the stop. If it did, challenge the "indicia of reliability" that connects the tip to your client. All are legally available, nonfrivolous avenues whereby relief can be procured for the client without subjecting him or her to the uncertainties of jury trial. In the event that no relief is forthcoming, at least the facts are "locked in" and can be later presented in the light most favorable to the client. Do not allow the prosecution to bolster its case at trial by referring to the tip. Absent testimony from the caller, the tip is hearsay and a denial of confrontation. See *Hughes v. Commonwealth*, 730 S.W.2d 934 (Ky. 1987). Counsel should remember that, in challenging the anonymous tip stop, prior preparation as well as an understanding of the legal issues is crucial to success.

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¹ 392 U.S. 1, 20 L.Ed. 889, 88 S.Ct. 1868 (1968).

² See *U.S. v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L. Ed. 2d 605 (1985) (Upholding a 20 minute investigative detention).

³ 440 U.S. at 663.

⁴ 697 S.W. 2d at 699

⁵ *Id.*

⁶ *Adams* involved a known informant present at the scene. The Kentucky courts have had little problem upholding tips where the informant

is known to the officer. See, e.g. *Commonwealth v. Hagan*, 464 S.W. 2d 261 (Ky. 1971); *Cook v. Commonwealth*, 649 S.W. 2d 198 (Ky. 1983); *Dunn v. Commonwealth*, 689 S.W. 2d 23 (Ky. 1985); *Brock v. Commonwealth*, 627 S.W. 2d 827 (Ky. App. 1986). See also Lefave, SEARCH AND SEIZURE, Subsection 9.3 (e) (2nd Ed. 1987).

⁷ 407 U.S. at 147

⁸ *Id.*

⁹ *Id.* at 146 (Emphasis Added).

¹⁰ Lefave, SEARCH AND SEIZURE, 9.3 (e), p. 482, (2nd Ed. 1987).

¹¹ 667 S.W. 2d at 699. Counsel should be aware that the indicia of reliability relied on by the *Graham* court follows its determination that Graham was subject to seizure due to the facts presented by the anonymous caller. See text following n. 18. Other courts have analyzed the problem differently. See *State v. Lesnick*, 530 P. 2d 243 (Wash. 1975); *State v. Temple*, 650 P. 2d 1358 (Hawaii 1982); *State v. Hobson*, 523 P.2d 523 (Idaho 1974) (upholding tip)

¹² 644 P.2d at 1220

¹³ *Id.*

¹⁴ *Id.* at 1221

¹⁵ While, if the tip was correct, the driver will no doubt be "subject to seizure" for *Prouse* purposes, see text following n. 18, here is the conclusory nature of the allegation that causes the problem. *Campbell* would probably pass the *Graham* certainty test as to specificity of description.

¹⁶ On January 4, 1989, the Court of Appeals granted discretionary review in *Manning v. Commonwealth*, 88 C.A. 2524-D. The specific issue to be addressed was "whether an anonymous daytime phone tip provided a reasonable suspicion justifying the investigatory stop of movant's automobile." Factually *Manning* is a pure type case where the officer relied solely on the tip of a "drunk driver."

¹⁷ *Graham* turned on this point. The Court took judicial notice of light traffic patterns in Maysville, Kentucky, p. 7410 (1986 census) at 2:00 a.m.

¹⁸ 667 S. W. 2d at 699

¹⁹ See *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L. Ed. 2d 502 (1983)

²⁰ See, n. 15

²¹ By removing the "in the presence" requirement for warrantless DUI arrests, 431.005(1)(e) allows police to arrest where no driving was observed. This scenario commonly occurs in DUI accident cases.

²² The Court's dicta in *Hughes* regarding the validity of anonymous tips, although in a different legal context, provides handy ammunition for arguments suggested in this article. See also *Whalen v. Commonwealth*, KY. App. (April 20, 1988) (unpublished), where the Court of Appeals found error in the Commonwealth's hearsay use of a "Crime Stopper" call.

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JUVENILE LAW

Appeals and Extraordinary Writs



Barb Holthaus

On some occasions, the district court, in its attempt to fulfill its role as *parens patriae* or simply from total frustration with a wayward child defendant, will overlook its obligation to follow the statutes and case law governing juveniles. In those cases, obtaining review through appeals and extraordinary writs can be a useful reminder to the court that it must function within the bounds of due process and equal protection even when dealing with children.

Although the United States Supreme Court has never expressly held that a juvenile defendant is guaranteed an appeal under the federal Constitution, it is clear from its decision in *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) that juveniles are entitled to due process. Since Section 115 of the Kentucky Constitution guarantees an appeal as a matter of right from any case, it is unlikely that an attempt to withhold or limit a child's right to appeal a final order of the juvenile court would survive a due process and/or equal protection challenge. The Kentucky Supreme Court, in *Brewer v. Commonwealth*, 283 S.W.2d 702 (Ky. 1955), held that a circuit court's refusal to hear an appeal from juvenile court where the appeal was granted by statute violates equal protection.

The Kentucky Unified Juvenile Code, KRS 600, *et. seq.*, explicitly provides for appeals in four separate sections:

1. KRS 610.130 permits an appeal from a dispositional order under KRS 610.110 "as a matter of right." The appeal is permitted "unless otherwise exempted." The exemptions are not listed. The Rules of Criminal Procedure apply. Appeals are to be heard "expeditiously" although no procedure is outlined to accelerate the appeal process.

2. KRS 610.150 authorizes the circuit court to hear appeals on "all issues relating to detention, custody or participation in court-ordered programs upon motion being filed by the child provided notice is given to the county and Commonwealth's attorney."

3. KRS 620.155 provides a right to appeal to any party aggrieved by a proceeding under dependency, neglect or abuse actions.

4. KRS 645.260 permits appeals from proceedings under the Mental Health Act of the code.

Case law provides that orders transferring jurisdiction of youthful offenders to the circuit court pursuant to KRS Chapter 640 are not final, appealable orders. An appeal can only be pursued once the charges are finally disposed of. *Buchanan v. Commonwealth*, 652 S.W.2d 87 (Ky. 1980).

Any other issue involving any aspect of a case could and should be raised on appeal once the final disposition is held.

Since the Rules of Criminal Procedure govern the appeal, counsel can use RCr 12.76 (except, of course, the bail provisions), to move the court for a stay of the disposition pending appeal. The "best interest of the child" concept can be used to bolster this argument.

Civil Rule 72 governs appeals from district court to circuit court. As with any criminal appeal, RCr 12.04 requires a final order to be entered before an appeal can be taken. Notice of appeal must be filed within 10 days of the entry of the final order. In general, a calendar page or docket sheet signed by the district judge should be sufficient for a final order entry.

Oral arguments should almost always be requested and are frequently granted in district court appeal. Arguments are quite useful in educating the circuit court judge who has minimal juvenile court experience. They are usually essential to dispel misconceptions concerning the case. Try to use the opportunity to educate your judge on juvenile law.

A useful negotiation tool with both the district court and the prosecutor is a "motion to reconsider" the offending final

disposition or court order. Often a formal written motion by defense counsel outlining the grounds for the appeal and the supporting law will alert the court to the probability of potential reversal and the prosecution to the fact that a tedious research and writing project may be in store if the matter goes up on appeal. In addition, the motion serves to formally present objections and preserve issues for appeal on proceedings that are frequently broken down into separate hearings over a period of weeks or months and often conducted informally.

As with any other appeal from district court, any further appeal is discretionary with the appellate court. Motions for discretionary review in the Court of Appeals of Kentucky are governed by CR 76.20(2).

Although KRS 610.156 permits appeals from issues relating to detention, a speedier mechanism, the writ of habeas corpus, is authorized by KRS 610.290(1): "Any persons aggrieved by a proceeding under this subsection may proceed by habeas corpus to the circuit court."

The petition for a writ of habeas corpus is the most useful extraordinary measure to deal with adverse rulings which result in detention. The general law governing habeas petitions is found in KRS Chapter 419. A writ of habeas corpus is available to anyone upon a showing that the individual is being detained without lawful authority. It may be issued by any judge at any time and can provide a vehicle for immediate release. An appeal to the Court of Appeals is available from an adverse decision. See KRS 419.130.

The general procedure for the writ is to present a motion to proceed *in forma pauperis* to the circuit court along with a motion and affidavit outlining why the detention is illegal. Keep the motion short and to the point. A writ should also be tendered demanding the production of the petitioner for a hearing at a date and time certain. For expediency's sake, especially in multi-county judicial dis-

Protecting juveniles

Court cases involving juveniles often seem to demand the wisdom of Solomon.

Consider a district court judge faced with a 13-year-old runaway who argues if he is sent back home he'll run away again. The judge decides to place the child in a state facility only to learn it will be two days before any room is available.

A judge in Grant County juvenile court faced a similar dilemma. The judge decided the lesser of two evils was to put the child in the Kenton County jail. The child ended up in a cell with three older boys who collectively had charges of wanton endangerment, kidnapping, sexual assault, rape and criminal trespassing against them. There was trouble and the three were charged with beating and sexually assaulting the 13-year-old.

We have some sympathy for the judge who has to make decisions under seemingly impossible conditions. Still, a 13-year-old runaway should never have been placed in a jail cell with other youths charged with such serious crimes. The situation is even more absurd when one considers the 13-year-old was in isolation for some time, then, on

recommendation of a state-certified specialist in juvenile detention, was moved to the cell with the three other teen-agers.

Kentucky must come to terms with the fact that it is the only state in the country to still hold juveniles in jail. Every other state has developed regional juvenile detention systems. The Justice Cabinet in Kentucky developed a plan two years ago that calls for a system of five regional detention centers, alternative programs to detention and a state-funded program to reimburse law enforcement personnel for transporting juveniles. The plan was unheeded and unfunded.

Court and jail officials who say that an assault on a juvenile in jail is rare miss the point. The possibility that even one juvenile could be harmed should have been reason enough to take steps to ensure such an assault would never happen.

Now that such an unfortunate incident has taken place it is imperative for Kentucky to implement measures to ensure that something similar never again takes place.

The Kentucky Post, September 9, 1989 Editorial

tracts the best practice is for counsel to personally obtain the circuit judge's signature on the writ, instead of waiting for the clerk to contact the judge.

Once the writ has been signed and a hearing date set, the respondent (the actual custodian of the child), the county attorney, the district judge and any other parties involved (such as C.H.R.) should be served.

The hearing itself will probably be quite informal in nature. Again, bear in mind that a circuit judge with little or no district court experience may require a lot of educating on the concept of the "least restrictive alternatives" and "best interest of the child," as well as the applicable provisions of the juvenile code itself. Insist on written Findings of Fact and Conclusions of Law as well as a formal

record if an appeal is anticipated.

A few other extraordinary writs may be utilized in juvenile court practice. Original actions include the writs of mandamus and prohibition. "A writ of mandamus is an attempt to compel a lower court to act, whereas a writ of prohibition is an attempt to compel a lower court to refrain from acting." Milward, *Kentucky Criminal Practice*, (2nd ed. 1983) Sec. 53.07, p. 283.

Practical application of these writs is hard to define as they are largely used to respond to a particular situation. A general rule of thumb is they can be used to obtain relief in situations where a wrong needs an immediate remedy and no other remedy is immediately available. Discretionary actions of the court are not subject to extraordinary writs.

See *Eaton v. Commonwealth*, 562 S.W.2d 637 (Ky. 1978).

In *Wise v. United States*, 369 F.Supp. 30 (W.D. Ky. 1973), the Court set forth a three-part requirement for a party seeking mandamus. The Court held that plaintiff must show: (1) a clear right to relief; (2) a duty on the part of the defendant to do the act in question; and (3) that no other adequate remedy is available.

For example, the Kentucky courts have allowed a writ of prohibition as a remedy against double jeopardy in *Klee v. Lair*, 621 S.W.2d 892 (Ky. 1981), and to prevent the disclosure of a psychiatrist-patient privilege where disclosure would destroy the privilege. See *Southern Bluegrass Mental Health and Mental Retardation Board, Inc. v. Angelucci*, 609 S.W.2d 22 931 (Ky.App. 1980) affirmed by 609 S.W.2d 928 (Ky. 1980). The rules outlining the procedures governing original actions are found in CR 76.36.

Any juvenile court practitioner can tell you that the avenues for obtaining relief for the child defendant are bound only by the imagination and creativity of the advocate. This article should serve only as a foundation to make counsel aware of the alternatives available for obtaining judicial review of juvenile court actions.

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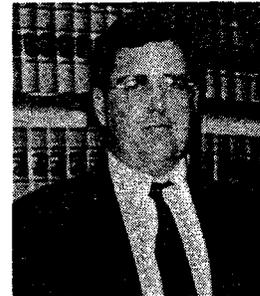
"FAIR" CROSS-SECTION

Counsel requested a *Batson* hearing because the Commonwealth had used a peremptory challenge to strike the only black juror. The Commonwealth gave as [a reason] for his action that he felt he needed an older jury and the stricken juror was about 35. One white juror, a 25 year-old female, was not stricken, however. The Commonwealth Attorney explained he left her on because she was attractive and would "pump him up" during the trial. The Commonwealth did strike other white jurors in the 25 to 35 age group.

David Lee White v. Commonwealth. Appeal from McCracken County. Court of Appeals. 87 CR 217, April 14, 1989, Not to be published.

EVIDENCE IN CRIMINAL LAW CASES

A Review of the Past Year's Kentucky Appellate Decisions



David Niehaus

In this article I propose a review of the important evidence cases decided by the Kentucky appellate courts within the last year. I also include a Sixth Circuit case because of its importance in PFO proceedings. The courts have been fairly active on evidence issues since last summer and on a few issues have spoken a number of times. I am organizing this article to discuss 9 major points covered by the courts in the past year. In addition, I will include at the end a number of what might be called "note cases" which are useful to know about since these cases largely restate or explain well known principles of evidence law and are convenient to have to cite in support of arguments.

(1) Introduction of Photographs

In *Morris v. Commonwealth, Ky., 766 S.W.2d 58* (1989) the defendant complained that 19 photographs of the deceased were introduced into evidence and that introduction of this number prejudiced his defense. The Supreme Court held in this case that standing alone, the introduction of this number of photographs of the deceased might not be error, but that on retrial *the court* should review the photographs and use only those photographs which fairly present the evidence sought to be introduced by the Commonwealth and to avoid overwhelming the jury with a number of photographs of the same thing. The key words in this case are that the court should review the photographs and decide which ones should be presented. Typical practice, at least in Jefferson County, allows the Commonwealth's Attorney to choose which photos of a limited number he will use. Whether this case represents a shift of attitude by the Supreme Court concerning photographic evidence or whether it was an unthinking use of words, the plain language of the opinion allows a defense attorney to leave it up to the judgment of the trial court rather than of the Commonwealth Attorney which photographs shall be introduced.

(2) Other Crimes Evidence

In *Moore v. Commonwealth II, Ky., 771 S.W.2d 34* (1989) the Supreme Court set out a fairly detailed discussion of other crimes evidence. The court noted that evidence of the commission of other crimes is not admissible to prove criminal disposition and that other crimes cannot be admitted to prove the offense being tried unless offered to prove motive, intent, knowledge, identity, plan or scheme. The court did refer to an Alabama case, *Bates v. State, 405 So.2d 1334* (Ala. Cr. App., 1981) as setting forth the standard on which other crimes evidence may be admitted. The Supreme Court quoted *Bates* as saying that the main question is whether the other crimes evidence is "material" to the case. If it is material and logically relevant to an issue in the case, whether to prove an element of the offense or to controvert a material contention of the defendant, the evidence may be admitted even though it proves commission of an unconnected crime. This case may prove handy in discussing other crimes evidence since it is a convenient statement of the two hurdles that the Commonwealth must get over before introducing other crimes evidence.

(3) Preservation of Error - Jury Uncertainty

In *Glass v. Commonwealth, Ky. App., 769 S.W.2d 764* (1989) the defense lawyer was faced with a novel situation. During a poll of the jury a juror indicated some uncertainty as to whether or not she agreed with the verdict. The defense lawyer asked to voir dire the juror concerning her uncertainty but the trial judge denied this motion. The juror did eventually agree that the verdict of the jury was also hers. This case points out clearly the need for specificity of objection when unusual events occur, even though it is difficult in these situations to know exactly what to do. However, in this case the Court of Appeals held that any error that might have occurred was not preserved because the defense lawyer

was bound either to ask for further deliberations or mistrial.

(4) Physical Examination of Prosecuting Witness

The Supreme Court in *Turner v. Commonwealth, Ky., 767 S.W.2d 557* (1989) determined that the Sixth Amendment of the U.S. Constitution requires a court in some cases to allow the defense to observe the physical condition of an alleged victim of a sex or abuse crime. In *Turner* the court noted that in some cases the physical condition of the prosecuting witness might by itself negate the claim that a particular crime has been committed. Therefore, the court determined to allow physical examinations by the defendant's expert witness but only on certain conditions. The critical question according to the court is whether the importance of evidence to the defense is such that it outweighs the potential for harm caused by the invasion of privacy of the prosecuting witness and the probability that the examination could be used to harass that prosecuting witness. Although a defendant will have a fairly heavy burden to meet, it will not be possible at least in some cases to have a defense expert look at the prosecuting witness.

(5) Orders Prohibiting Consultation With Counsel

The U.S. Supreme Court decision in *Perry v. Leeke, 109 S.Ct. 594* (1989) was incorporated (although not by name) in the determination of the Supreme Court of Kentucky in *Moore v. Commonwealth II, Ky., 771 S.W.2d 34* (1989) in which decision the court determined that an order denying Moore an opportunity to consult with his attorney over a lunch recess was not prejudicial. In this case, the lunch recess was taken three-fourths of the way through the direct examination of the defendant. The trial court ruled that Moore could not discuss his testimony with his attorneys but that he could discuss any other matter. The court rejected the *per se* rule previously adopted by the Sixth Circuit, and instead

relied on the Fourth Circuit Court of Appeals case of *Perry v. Leeke* which eventually was affirmed by the U.S. Supreme Court in a case styled the same way. The basic point of *Perry v. Leeke*, 109 S.Ct. 594 (1989) is that once a defendant becomes a witness he has no constitutional right to consult with his lawyer. The U.S. Supreme Court said that for Sixth Amendment purposes once the defendant takes the stand he is no different from any other witness. Therefore, as long as the gag order does not take on the dimensions of a complete denial of the right to consult with counsel, either by particular terms or by duration of the prohibition, the Sixth Amendment would not be offended. This was the interpretation of *Leeke* set out in Chief Justice Stephens' dissent. In all cases other than those where the duration or terms deny any consultation, the key inquiry is going to be whether or not the defendant was prejudiced by the order. Obviously, this is a standard that will require great reliance on the facts of the particular case and will put a heavy and unfair burden on the defendant.

(6) Use of the *Jett* Rule

The appellate courts decided two cases dealing with the correct use of *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969) during the past year. In *Wilson v. Commonwealth*, Ky. App., 761 S.W.2d 182 (1988) the Court of Appeals noted that the *Jett* rule was designed not only to allow impeachment of a witness who cannot or will not remember certain prior statements but also to allow "augmentation" of what the witness would not or could not recall at trial. In *Wilson* the witness was reluctant to stick by his pretrial testimony ostensibly to escape the blame for "rattling" on the defendant. The Court of Appeals ruled that the *Jett* rule allowed for supplementation of the in-court testimony by all of the previous statements made by the reluctant witness.

This ruling was limited somewhat in *Askew v. Commonwealth*, Ky., 768 S.W.2d 51 (1989) a case in which the Supreme Court discussed the foundation requirements and limitations on the use of *Jett*. As a condition of admission of out-of-court statements the Supreme Court emphasized that the proponent must meet the CR 43.08 foundation requirements and must show that the statements are material and relevant to the issues at trial. Just as a witness may not be impeached on collateral matters, a witness may not be "Jetted" on such collateral matters. The *Jett* rule permits impeachment of a witness but only will permit impeachment of a witness who

has personal knowledge of the facts. The problem in *Askew's* case was that the Commonwealth was attempting to prove by second hand hearsay that *Askew* admitted the shooting. The real mischief in such a practice, according to the court, was that a connection between *Askew* and the statement attributed to him was never shown by the Commonwealth. Under these circumstances the court ruled that the statement was "inherently unreliable" and that if *Jett* was used to allow admission of such evidence the hearsay rule would be done away with.

Askew is an important case because it prohibits the Commonwealth from avoiding the hearsay rule and back-dooring incriminatory statements by the defendant through persons with no personal knowledge. The strong language of the court indicates that it does not want similar future attempts and therefore this case can be used to limit a parade of witnesses who heard something from someone else.

(7) Burden of Proof

In this past year the courts have had occasion to comment on *Commonwealth v. Sawhill*, Ky., 660 S.W.2d 3 (1983) in two cases. Neither case settled finally what *Sawhill* means on appeal, but one did settle the standard to be used by a trial judge in determining whether to take a case from a jury. In *Askew v. Commonwealth*, Ky., 768 S.W.2d 51 (1989) the court affirmed that the first statement of law found on page 4 of *Sawhill* is the proper rule for determining whether or not the case should be submitted to the jury. In that portion the rule states that if the evidence is such that the jury might fairly find beyond reasonable doubt all the elements of the offense then the evidence is sufficient and the case should be submitted to the jury. This ruling is not anything new, but is a convenient restatement of the standard that should be cited to the circuit court or district court judge at the close of all evidence.

The next case dealing with this issue is *Barnett v. Commonwealth*, Ky., 763 S.W.2d 119 (1989). Here the court was required to consider the apparent difference in language between *Sawhill* and the federal standard of *Jackson v. Virginia*, discussed in *Moore v. Parke*, 846 F.2d 375 (6th Cir. 1988). The *Jackson* standard requires a habeas corpus court to look at the evidence in the light most favorable to the Commonwealth and to determine if any finder of fact could find guilt under the evidence. In *Barnett* the court observed that there was no difference between this standard and *Sawhill*. This is a somewhat disturbing

ruling because there is a difference in the language between *Sawhill* and *Jackson v. Virginia*. On page 5 of the *Sawhill* case the standard is declared to be that if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty he is not entitled to a directed verdict of acquittal. In *Sawhill* the court noted that this was a higher standard and constituted the appellate standard of review. In addition, *Sawhill* rejected the "scintilla" rule and required evidence of substance to uphold the verdict. The question in *Sawhill* has always been whether the middle paragraph on page 5 which requires the trial court to draw all fair and reasonable inferences in favor of the party opposing the directed verdict applies only to the determination of the trial judge when presented with a motion for directed verdict or whether it also applies to the determination of the appellate court. None of the cases decided since 1983 has specifically dealt with this question. By now saying in *Barnett* that the *Jackson v. Virginia* standard does not differ in any substantial way from the *Sawhill* standard the court may be indicating that in Kentucky inferences should be drawn in favor of the Commonwealth on appeal as well.

(8) Use of Prior Convictions

As might well be expected given the number of instances in which prior convictions are used to enhance current penalties the courts have been fairly busy in this area. Four important cases have been decided by the Kentucky courts and one important case has been decided by the Sixth Circuit. The Kentucky cases deal with DUI, truth-in-sentencing and PFO. The first case decided was *Asher v. Commonwealth*, Ky.App., 763 S.W.2d 153 (1988) which presented the question of whether the Commonwealth was entitled to introduce a prior DUI conviction during its case-in-chief of a subsequent offense if the defendant was willing to stipulate the existence and validity of the prior and agreed to submit an enhanced penalty range to the jury. Relying on previous practices the Court of Appeals held that the Commonwealth is entitled to introduce the prior because the decision as to bifurcation of proceedings is one that has customarily been left up to the General Assembly and therefore the use of a prior conviction in the case-in-chief where the General Assembly has not provided for bifurcation is not necessarily prejudicial. The court did say that the trial judge should give an admonition about proper use of the prior conviction.

The next case decided by the court was *Tipton v. Commonwealth*, Ky.App., 770

S.W.2d 239 (1989). In that case the court dealt with a situation in which a defendant had entered a guilty plea through his attorney under RCr 8.28(4) but had not been personally present at the time of the entry. The Court of Appeals ruled that such a plea violated *Boykin v. Alabama* despite the provisions of RCr 8.28(4) which allowed an *in absentia* guilty plea in misdemeanors. The specific holding was that it is an abuse of discretion for a district court judge to accept plea of guilty *in absentia* for any offense which might subsequently be the basis of an enhanced penalty. The reason given by the Court of Appeals was fairly straightforward: if, for example, a DUI conviction was entered *in absentia* then the subsequent offense could never be revoked because the prior plea was invalid. Presumably this language will apply across the board for any offense which might subsequently be the basis of an enhanced penalty, which means that any type of offense, whether failure to pay taxes or licensing fee or something of that sort, must be pleaded to by the defendant in person.

1 *Melson v. Commonwealth, Ky., 772 S.W.2d 631* (1989) the Supreme Court set out a list of when prior convictions can and cannot be used for truth-in-sentencing (TIS) or PFO purposes. The court held that where a conviction has been entered it cannot be used in either TIS or PFO unless the time for appealing has expired without an appeal having been taken or the Section 115 matter of right appeal has been affirmed. A prior conviction currently being attacked under RCr 1.42 will not prevent use in these proceedings nor will a pending motion for discretionary review prohibit use. It is only where the motion for discretionary review has been granted that the prior conviction may not be used. Justice Leibman filed a dissent which made a good deal of sense with respect to the discretionary review rule. There is generally going to be a period of 40 days or so while the paperwork for the motion for discretionary review is filed. Then there is a certain length of time necessary for termination of the motion. If the defendant is unlucky enough to have a second offense come to trial during this period apparently the Commonwealth can use the prior conviction. If during the trial of the second charge a motion for discretionary review is granted the Commonwealth will be prohibited from using the conviction. It seems clear that the wisest rule would have been to prohibit the use of all appealed convictions until the final action of the Supreme Court, whether by hearing or motion for discretionary review, is taken.

The next decision of importance is a civil case which contains a definition of *clear and convincing evidence*. The definition is of importance in light of the Sixth Circuit Court of Appeals decision in *Dunn v. Simmons*, 877 F.2d 1275 (6th Cir. 1989) which holds the Kentucky *Dunn* rule, *Dunn v. Commonwealth, Ky., 703 S.W.2d 874* (1985) unconstitutional.

In *Wehr Constructors, Inc. v. Steel Fabricators, Inc., Ky.App., 769 S.W.2d 51* (1989) the Court of Appeals in another context defined clear and convincing evidence. Clear and convincing evidence does not mean that the matter is established beyond a reasonable doubt but does mean that the evidence must not be vague, ambiguous or contradictory and it must come from a credible source. Clear and convincing evidence does not have to be undisputed or uncontradicted, but it must meet the tests set out above.

The importance of this definition is revealed when *Dunn v. Simmons* is reviewed. In that case the Sixth Circuit reviewed *Boykin v. Alabama* and held that the basic point of that case was that the State is required to prove that the plea was intelligent and voluntary whenever the plea is challenged. The Court refused to presume a waiver of important federal constitutional rights inherent in a guilty plea from a silent record and therefore held that where the waiver is subsequently challenged the State must demonstrate the validity of the waiver by introducing a transcript of the proceedings or, in the absence of a transcript or where the transcript is insufficient, it must look to extrinsic evidence such as the recollections of those attending the plea proceedings. If the record is inadequate to demonstrate the regularity of proceedings at the time of a guilty plea's acceptance the State must make a *clear and convincing showing* with this extrinsic evidence that the plea was in fact intelligently and voluntarily entered.

The Kentucky *Dunn* rule was rejected because it failed to meet federal standards, which govern the determination of whether a plea of guilty is intelligent and voluntary. The state *Dunn* rule was rejected because it allowed the Commonwealth to carry its ultimate burden of persuasion by substituting a presumption for the clear and convincing evidence required to demonstrate the validity of prior guilty pleas. The Sixth Circuit ruled that the presumption accorded to the Commonwealth in *Dunn v. Commonwealth* could not meet the state's ultimate burden of persuasion of clear and convincing evidence.

The Sixth Circuit ruling is a welcome rejection of the *Dunn* rule which has allowed the Commonwealth to profit from its failure to follow the clear dictates of *Boykin v. Alabama* to create a suitable record showing the knowing and voluntary entry of guilty pleas. It allows the defendant to point out that a presumption of regularity should not be given where a record obviously is not regular, that is, where the absence of a record shows clearly that the state has not complied with *Boykin v. Alabama's* direction to create a contemporaneous record of the proceedings.

(9) Use of Character Evidence

In three cases the courts have considered different types of character evidence that have not really been dealt with in recent years. In *Barnett v. Commonwealth, Ky., 763 S.W.2d 119* (1989) the Supreme Court held that marital infidelity is irrelevant and incompetent as evidence of character. In this case the Commonwealth sought to introduce the fact that the defendant was unfaithful to his wife as part of its case showing that he killed her for money. The Supreme Court rejected this with a fairly categorical statement that infidelity is irrelevant as evidence of character.

The next case *Morris v. Commonwealth* concerned the Commonwealth's right to "humanize" the deceased in homicide cases. In *Morris, Ky., 766 S.W.2d 58* (1989) the court noted that it had permitted some latitude in establishing the identity and general character of the deceased when the evidence is not emotional, condemnatory, accusatory, or demanding of vindication. In *Morris* the prosecutor eulogized the deceased throughout the trial, introducing his prior war record and emphasizing the fact that he was killed in the act of defending his family during a break-in. The court condemned this type of argument and stated the limitations that it would require.

The last case decided was a peculiar instance in which the Commonwealth tried to use prior offenses of which the defendant had been acquitted as evidence of bad character. In *Brown v. Commonwealth, Ky., 763 S.W.2d 128* (1989) the court noted that as a general proposition evidence of good character may be rebutted by evidence of bad character, even if it reveals the commission of another crime. However, the court held that evidence that a person has been tried and acquitted does not show bad character. Such evidence is without any probative value and is potentially prejudicial in that the jury may feel that the defendant escaped justice the first time and

therefore decide not to let it happen again. Although the defendant's character may be attacked, the court in this case determined that there must be some reasonable evidence to show bad character.

(10) Note Cases

(a) *Tipton v. Commonwealth*, Ky.App., 770 S.W.2d 239 (1989). This case, in clearly identified *dicta*, construed the 20 minute *eyeball* rule of DUI/breathalyzer cases to mean that as long as the officer can observe by a *presence-sense* perception of the arrestee, the standard operating procedure has been met. The court noted that the officer need not stare at the arrestee for the full 20 minutes.

(b) *Moze v. Commonwealth*, Ky., 769 S.W.2d 757 (1989). In this case the court noted that a trial judge is not absolutely bound by the testimony of medical experts in making a competency determination. The court ruled that the trial judge may consider the testimony of lay witnesses and rely on his own observations and impressions of the accused based on conduct at the hearing and other proceedings.

(c) *Baker v. Hancock*, Ky.App., 772 S.W.2d 638 (1989). This case presents a summary of the rules concerning custom, habit and admissibility of character evidence. This case primarily cites to

Lawson's *Kentucky Evidence Law Handbook* but is a convenient citation for business customs and habit evidence.

(d) *Tinsley v. Jackson*, Ky., 771 S.W.2d 331 (1989). This is a further explanation of the *Sanborn* lost evidence instruction authorized by a plurality of the Supreme Court in *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988). This case explains a little bit more about how the missing evidence instruction is to be applied and was agreed to by 6 of the 7 members of the court. The court also noted that in addition to the instruction the judge has the option of limiting the use of the evidence or prohibiting its introduction.

(e) *Davenport v. Ephraim McDowell Hospital*, Ky.App., 769 S.W.2d 56 (1989). This case is useful because it contains the statement that closing arguments are not to be considered evidence by the jury. In addition, it describes a peculiar situation in which an attorney's notes of the cross-examination of an expert were admitted into evidence at a medical malpractice case. These notes were authenticated by the witness as an accurate summary of his testimony and were therefore admitted as an exhibit. The court clearly stated that such notes should never be admitted into evidence because they are "shrouded in slanted subjectivity" and the prejudicial effect of their admission is compounded by the

court's imprimatur which will cause the jury to be unduly impressed with their significance.

(f) *Underhill v. Stephenson*, Ky., 756 S.W.2d 459 (1988). This case contains the statement that the witness always has the right to explain facts or inferences from his testimony. In addition, it describes the purpose of an avowal as a device to permit a reviewing court to have before it the information needed to consider the ruling of the trial court. It also contains the proviso that where there is sufficient evidence before the reviewing court on an issue the avowal is unnecessary to determination on the merits.

(g) *Commonwealth v. Pevely*, Ky.App., 759 S.W.2d 822 (1988). This case construes RCr 10.24 to mean that the directed verdict at the close of all evidence should be made when all the evidence that is going to be introduced has been introduced.

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Fact #7

Minority defendants are more likely to be sentenced to death than white defendants, for the same crimes.

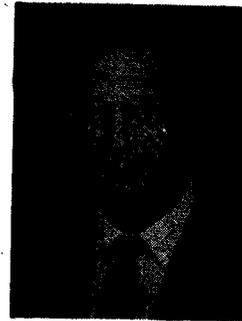
Recent research into sentencing patterns shows that in Georgia, for example, in cases in which the murder victim was white, blacks are nearly three times as likely to be sentenced to death as whites.

For more information:

National Coalition to Abolish the Death Penalty, 1419 V. St. NW, Washington, DC 20009

**It's easy to believe in the death penalty
...if you ignore the facts.**

TIME OUT: YOUR EXPERT IS CONFUSED



Curtis Barrett

Nearly twenty years ago I followed the footsteps of a mentor, rather than the advice of colleagues, and entered my first courtroom as an expert witness. Hundreds of cases and jury trials later, I can say that my mentor's promises of challenge, hours of unpaid hard work, personal growth, and valued collaborative relationships have been more than kept. Forensic psychology, for me, is unlike anything else in the general field of psychology. It is not for the faint of heart or for the rigid. It is not for those with a reluctance to commit to a case for the duration.

Among the most rewarding aspects of forensic psychology is consulting with or teaching practicing attorneys and mental health professionals about making expert witnesses effective. In this article I build on a more general, pioneering effort to bring the law and other disciplines together in Kentucky. I refer to the popular "Law and Psychology" elective begun by Steve Smith, J.D., (Professor Smith is now Dean of the School of Law, Cleveland State University) and Robert G. Meyer, Ph.D., ABPP for the University of Louisville's Law School and Department of Psychology in the early 1970's. For me, teaching challenges have come not only from our Medical School elective (the Forensic Behavioral Sciences Study Group) but also from such diverse activities as: workshops for the American Academy of Forensic Psychology, Law Schools, Bar Associations, and the National Legal Aid and Defender Association consulting on complex civil and criminal law cases: forensic seminars for psychiatry residents; and giving examinations for the American Board of Forensic Psychology. Based on my experience, there seems to be one sure bet for the attorney who calls any but the few forensically experienced mental health professionals: your expert is confused.

The areas of confusion are numerous. However, there are some areas of confusion that seem more important to note than others:

- The nature of expert witness testimony
- The adversary system as a truth finding process
- The definition of a crime
- The results of finding a person not responsible for an act
- Responsibility for dangerous persons
- The competencies needed to stand trial

Here, my goal is to alert both legal and mental health professionals to these areas of confusion. We may hope that, in the future, these areas of confusion will be addressed to good effect early in each instance that the two professions interact.

The Nature of Expert Witness Testimony

The term *expert*, when applied to oneself, is usually flattering. Therefore, it should come as no surprise that mental health professionals may be flattered when asked to be an *expert witness*. In fact, I still recall what I felt, as a *fresh-caught Ph.D.*, when I was asked to be an *expert witness*. Hearing my very modest credentials presented by an experienced attorney enhanced that feeling. A few days before the trial I was certain, in my own mind, that I was to go into court and set the record straight about what really had happened in the case! Today, of course, I evaluate my credentials much more modestly and accept my role as assistant to the trier of fact. Presentation of credentials, for example, I recognize as a technical procedure rather than an ego enhancer. However, more important, I am aware that my qualification as an *expert* simply changes the rules for my testimony and does not inherently make my testimony more credible, or more valuable, than that of any other witness.

The attorney can help the expert avoid

being confused, or shocked, by the treatment given his credentials or opinions by the other side. This can be done by providing a clear idea of why there is, under the law, a role such as *expert witness*. For my own part, I teach that expert witnesses are sort of *secondary witnesses*. Attorneys use them only when facts will not carry the case without proper interpretation. In other words, it is no honor simply to be qualified as an *expert* but, rather, the label defines a role that is useful to the courts and must be played according to the court's rules.

Truth Finding and the Adversary Process

Professionals in the mental health fields are usually grounded in one of three organized bodies of knowledge: *medicine*, *science*, or *theology*. Each of these has its unique method of determining when a *truth*, worthy of integrating into practice, has been found.

For medicine, truth permits a physician to be properly calibrated. Medical school, despite its emphasis on scientific findings, really aims to prepare each physician graduating to make the same diagnosis, to prescribe equivalent treatment(s), and to state the same prognosis as any other properly calibrated physician who is provided with the same information. There is almost always a *standard physician* whom new physicians are expected to match.

Mental health professionals trained in social work or psychology generally utilize *statistical* methods of discerning *truth*. Findings that can be demonstrated to occur, by chance, only 5 times in 100 (the magic .05 level) are acceptable for use in practice, and findings that have been replicated at the same level are *even more acceptable*. Clinical knowledge is less acceptable and the practitioner utilizes this with much more reluctance than does a physician.

Experts trained in theology, as a basis for their mental health interventions, include pastoral counselors. These persons may

have met very rigorous academic and Board Certification standards that compare quite well with those of the other professions. These experts are used to proceeding from an organized body of knowledge that assesses truth on the basis of such techniques as: reference to authority (e.g., Biblical teachings), Divine revelation, and exegesis. Such an expert might, for example, help decide whether a defendant's belief reflected accepted theological thinking or delusion.

Obviously, none of the mental health professions share either the law's adversary system or its idea of *standards of proof*: i.e., beyond reasonable doubt, clear and convincing evidence, weight of evidence. *Beyond reasonable doubt* probably comes closest to the .05 level of statistics. Consistently, in my experience, naive expert witnesses are stunned when attorneys ask whether a specific opinion can be given and supported. Equally, they are surprised when a concept from the mental health fields seems to be forced to match a concept from the law. It is not unusual for the attorney to find the potential expert quite amenable to legal arguments in the early stages of trial preparation and, later, to start contradicting himself/herself. This may stem from the expert's failure to understand the adversary process and its need to hone legal arguments to a fine point. The expert, used to dealing mostly in *shades of gray*, may well feel that early statements have been modified to put forth a position more strongly than the data warrant. Naturally, this is frustrating for the attorney, whose workload is increasing as the trial nears, and out of frustration the expert's testimony may be discarded. Using more sophisticated experts, of course, reduces this problem but is not always practical. More reliably, the attorney can start the education of the expert witness very early in the process and prepare the expert for what has to be supported, by evidence, under the law. If the expert cannot provide that evidence, it should be made clear to the attorney right away.

Perhaps the most confusing situation occurs when both the attorney and the expert emphasize testimony on the ultimate issue rather than presenting, for use by the trier of fact, the evidence and logic that seems to compel a particular professional opinion. An idea advanced by Shapiro, [D.L.(1984) *Psychological evaluation and expert testimony*. New York: Van Nostrand Reinhold Company.] has proved to be helpful in clarifying the expert's role in an adversary setting. Shapiro holds that the expert should advocate his or her opinion rather than

advocating that the trier of fact reach a specific conclusion. In that way, the expert may consider, state, and reject, other interpretations of the data at hand. Obviously, this process gives the trier of fact the most complete and clear statement of the expert's reasoning from the evidence available.

Criminal Responsibility

Attorneys know that for an event to equate to a crime it must be proved that there was an inherently bad or forbidden act (*actus reus*) and an evil state of mind (*mens rea*.) However, mental health professionals generally have great difficulty understanding this. Instead, they seem to proceed from the idea that a crime has occurred when *actus reus* has occurred. In nearly every case discussion I have heard concerning criminal responsibility, it has become clear that the mental health professionals see the mentally ill defendant as *guilty* of a crime. The question is whether the defendant should be *let off*. If *let off* for mental reasons, the mentally ill defendant is still seen as guilty in the same way that other convicted persons are guilty: they deserve punishment, usually meaning restriction of their freedom. The term "not guilty," in the phrase "not guilty by reason of insanity" is usually lost entirely on these professionals. Thus, with the issue of "guilt" supposedly resolved, the mental health professional can become confused when told that no crime may have been committed and no punishment is due. Typically, I am asked something like: "If he did it, and we know he did it, how come he isn't guilty, and how come he can go free?" These observations suggest that an attorney who retains an expert witness in a criminal responsibility case would be well advised to determine whether the expert understands how *crime* is defined under the law.

The dimensions of this problem, and its importance, often become clear when the discussion moves on to "guilty but mentally ill (GBMI)." I have found GBMI to be compatible with the thinking of quite a large percentage of mental health professionals. They seem to perceive that GBMI takes into account both the need of the defendant for therapy and the need of the public to respond to danger. It has been quite difficult to convince mental health professionals that there can be no guilty party when there has been no crime, i.e., because *mens rea* was lacking. I ask, often, "If there has been no crime and there is no guilty party, how can anyone be found GBMI?" The response from the mental health professional is, usually, that a crime was committed but that, due to current mental

illness, the defendant is to receive care, not incarceration. Often, to make the point, I then resort to hyperbole, suggesting other sorts of "guilty" findings, i.e., guilty but short, guilty but from Indiana, guilty but allergic to cats, etc.

Usually, it is possible, eventually, to make the point that guilty, is guilty, is guilty. Persons who are found guilty lose their civil rights. At least two individuals, one in Indiana and another in Illinois, are under death sentence after having been found guilty but mentally ill. Nothing is really gained by adding adjectives to a guilty finding other than, perhaps, easing the feelings of a jury. Those found guilty, whether GBMI or simply guilty, receive what mental health care there is available in the overloaded correctional systems just as they receive other medical and educational services there. Being in prison "GBMI" gives the convicted person no special status and assures no particular attention to the *mentally ill* part of the jury's findings.

The Issue of Dangerousness

Dangerous persons present the mental health professional with many dilemmas. Very often mental health professionals deem themselves responsible, somehow, for protecting society from the dangerous mentally ill. Certainly, on those rare occasions when a mentally ill person commits a violent act, mental health professionals are likely to be taken to task for any furlough or release decision. Thus, when called upon to testify as an expert witness about criminal responsibility, and exposed to a person who has committed a homicide, the mental health professional may become caught up in the questions of what it is *right* to do with a dangerous person rather than what the law specifies. As on psychiatry resident put it, "Dangerous people belong in prisons. That's what prisons are for!" This psychiatrist-in-training did not say, "Dangerous, convicted (guilty) people belong in prisons."

A mental health professional who does not make the critical discrimination just illustrated might make a very ineffective expert witness. Fear that a "not guilty by reason of insanity (NGRI)" finding might put a previously dangerous person back on the street could easily bias testimony and the opinion that was rendered. This is especially so in a case where there is a close call. Of course, it is precisely these "close call" cases that come to court since defense and prosecution experts generally agree on the diagnosis in the vast majority of insanity defense cases.

Obviously, there is some reality in the mental health professional's concern. The movement, in the United States, away from a *parens patriae* view of civil commitment (need for treatment) toward a police powers formulation (dangerous to self or others) has concerned many mental health professionals. Effective treatments for dangerous persons, no matter how well executed while those dangerous persons are under control, have no effect when not used. For example, a patient who responds to psychoactive drugs, but who is not incarcerated, is very likely to stop taking the drugs after being discharged. The medication effect is then lost. It is only a matter of time and circumstance, for many, until they are again troubling or dangerous.

Attorneys probably will find it worth calling *time out* in order to explain to mental health professionals the distinction between responsibility in a criminal proceeding and responsibility in a civil commitment proceeding. Unfortunately, the mental health professional usually has far more experience with the many weaknesses of the civil commitment statutes than does the attorney and the explanation probably will fall on deaf ears. As an alternative, the attorney can help the mental health professional by showing that *dangerousness* is generally a *civil* matter, dealing with the present or the future, and that determining responsibility for a criminal act deals with a *past* event being assessed according to *criminal* law. A finding under civil law does not directly affect a finding under criminal law, or vice versa. At the end of a criminal trial, resulting in a finding of not guilty by reason of insanity, any proper *civil* proceedings can be started. The attorney's explanation can go on to say that, having been found not guilty (though by reason of insanity) the defendant will soon go outside the jurisdiction of criminal procedure and to stand before the civil system just like any other citizen. If there is a real difference, that difference is in the wealth of information available to the civil proceeding indicating the *past* dangerousness of the individual found NGRI. The burden of proving *present* dangerousness to self or others, in the civil proceeding, remains.

Competence (Fitness) to Stand Trial

As with so many mental health professionals, my first case involving competence to stand trial was not recognized as such at the time. The issue emerged after successful appeal when a second trial was attempted. Clearer, in my memory, is the first case where I was retained, formally, to assess a

defendant's competence to stand trial (CST). After the initial examination I announced, with confidence, that the defendant could not be competent to stand trial since he was severely schizophrenic. Thanks to a patient and highly competent attorney, my education about CST really started then!

From my experience, I believe that mental health professionals generally share the lay perception that defendants have little of importance to do in the presentation of their case. Attorneys are presumed to defend a relatively passive client. Almost always it comes as a surprise that there are decisions that the attorney *must* leave up to the defendant. Believing that the defendant has little to do, and that the attorney calls all of the shots, a mental health professional who has never seen a full criminal trial or defended himself/herself in court, may well feel all right about saying a defendant is fit for trial. There might be more reluctance to state that the same mentally ill defendant is fit to serve in the space shuttle or to make critical decisions about the mental health professional's investment portfolio! Yet, in the United States at least, we espouse the view that personal liberty is to be valued *more* than property (witness the differing standards of proof in criminal and civil cases).

Quite often mental health professionals conclude that a defendant can collaborate with his/her attorney even though that process, or its equivalent, has never been observed. This may stem from ignorance as well as confusion about what the process entails. For example, the skills that a defendant must have in order for a *prosecutor* to carry out most of his or her required courtroom roles seem to be few. The prosecutor has very little interaction with a defendant and, except for cross examination, would seldom need the defendant to have followed testimony or recalled events. The prosecutor might actually find more advantage in conducting cross examination if the defendant had *not* followed what went on in the trial. It is the *defense* attorney who is most likely to have concern about incompetence in the defendant and to be concerned about that lack of competence. In point of fact, however, *every officer of the court*, has a duty to assure that the defendant is competent to stand trial. While each may apply the *Dusky* standard differently, for different reasons, the duty is still the same. It can help for the attorney to point out that the mental health professional's focus on advocating an opinion, rather than assuming that there is a "win-lose" situation in a competence hearing, helps all officers of the court to meet a duty. Trial of a

defendant who is not competent to stand trial is a loss for everyone. The adversary system, in competency hearings as in all other proceedings, is what assures that the trial can be fair.

These comments about CST and courtroom process are, of course, what the law requires but in specific cases, unfortunately, may not reflect the real world of the adversary system very well. One need only consider recently publicized trials in which the competency of defendants to stand trial may have been less important than the pressure to dispose of cases with strong community interest. Nevertheless, it is helpful to give the confused potential expert witness the correct perspective. This is no different than the expert's daily world in which, for example, the ideal of a perfectly reliable psychological test is problematic but all strive for it. Competent witness behavior by the mental health professional can help immeasurably as the adversary system moves to accomplish a just result.

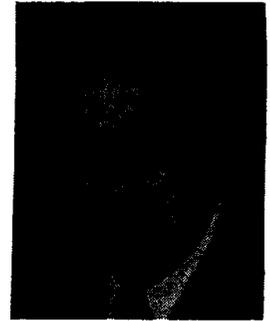
Summary

After some two decades of practice and teaching in the Forensic Behavioral Sciences, and many appearances as an expert witness, I have become convinced that most mental health professionals remain rather confused about the role of an expert witness in the courtroom. This confusion stems largely from confusion about fundamental concepts and procedures in the practice of law. Here, some of the confusions and some ways to eliminate or reduce the confusion have been stated. I hope that this effort has been worthwhile and that the suggestions made here will prove useful. However, my strongest hope is that attorneys who read this paper will be motivated to monitor their own assumptions about what mental health professionals think and do in the courtroom. Explicating those assumptions should lead to a more careful development of the attorney-expert witness relationship and, in turn, more effective testimony by mental health professionals.

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THE NATURAL SEQUELA TO THE BATTERED WOMAN SYNDROME



A.V. Conway, II

INTRODUCTION

There are occasions in a domestic homicide case where there is no ready or apparent defense. Before accepting the Commonwealth's version of what transpired, it is imperative that you as a defense attorney step back and fully consider and understand the various intra-family relationships and the significance of the "battered woman syndrome" concept and what now reasonably flows therefrom. This author had the occasion to try two separate homicide cases involving the killing of a husband by a battered and abused wife. *Commonwealth v. Daisy Piper*, Muhlenberg Circuit Court, CR #800 (1973). *Commonwealth v. Marjorie Taylor*, Ohio Circuit Court, CR #10,403 (1976). The decedent's prior acts and the physical and emotional toll that it took on the defendant's wife was an integral part of each defense. We certainly did not possess the mental acuity to understand the psychological aspects of the defense raised, nor did we anticipate that it would later be refined into what we now know as the battered woman syndrome. Psychological testimony was not introduced, although we now recognize that it would have substantially enhanced the jury's understanding of both the defendant wife's fears and the reasons for her apparent precipitous behavior.

More recently, I was confronted with a defendant who was charged with killing his son. *Commonwealth v. Charles Chadwick*, Ohio Circuit Court, CR #86-CR-053. There was no apparent indication of evidence of self-defense. Five eye-witnesses gave consistently inconsistent versions of the events leading up to the shooting. At first blush, none of the witnesses gave statements which in any way could be construed to support the commonly accepted theories of self-defense. Many hours of legal research left this author without any vision as to how a defense could be made for the defendant's father. Through chance rather than design, I happened to read a KATA bulletin in which our colleague, Robert E. Sanders, reported on his successful

defense in the case of *Commonwealth vs. Heidi Harmeling*, Kenton Circuit Court, 4th Division, 86-CR-298. Several conversations with Bob ensued and he was kind enough to open his entire file in the *Harmeling* case to me. From his assistance sprang a defense based upon an extension of the battered woman syndrome to other familial relationships. Based upon our experience in the *Chadwick* case, it is submitted that the accepted theory of self-defense arising from the existence of the battered woman syndrome can, does, and should extend to all forms of domestic intra-family violence and homicides. It is the sequela of the battered woman syndrome that is the subject of this article.

I. DEFENSE CONCEPTS APPLICABLE TO INTRA-FAMILY VIOLENCE AND HOMICIDES.

A) SELF-DEFENSE

The use of physical force by one person upon another is justified only when the individual believes that such force is necessary to protect himself against the imminent use of unlawful physical force by the other person. The use of deadly force is justified only when the individual believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat. *KRS 503.050*. Thus, what the defendant believed immediately prior to his use of force is the crux of all self-defense cases.

Our present law of self-defense is little more than a codification of what the law of this jurisdiction has always been. The reasonableness of the actions of an individual using deadly force and asserting self-defense has always been the primary focus of the jury's inquiry. In *Rose v. Commonwealth, Ky., 422 S.W.2d 130* (1968), the Supreme Court was confronted with an admitted killing where the defendant claimed self-defense. The deceased was not armed at the time of the shooting. The defendant alleged that the

trial court erred in failing to direct a verdict of acquittal. The Supreme Court stated:

Defendant contends he was entitled to a directed verdict because the deceased was the aggressor and he was justified in killing him in self-defense. However, since the deceased was not armed, the significant question was presented as to whether defendant had reason to believe his life was in danger or that he would suffer serious bodily harm. No one has the right to kill another for a threatened simple assault. *Sikes v. Commonwealth, 304 Ky. 429, 200 S.W.2d 956*. Defendant must have a reasonable belief of imminent danger and there must be a necessity to kill in order to avert that danger. See *Martin v. Commonwealth, Ky., 406 S.W.2d 843*. A jury could properly conclude that defendant had no reason to believe himself in "serious" danger or there was no apparent necessity for the killing. *Id.* at 132.

See also *Poe v. Commonwealth, Ky., 51 S.W.2d 937* (1932); *Pelfrey v. Commonwealth, Ky., 75 S.W.2d 510* (1934); *Wireman v. Commonwealth, Ky., 162 S.W.2d 557* (1942); *Chinn v. Commonwealth, Ky., 310 S.W.2d 65* (1957).

Because of its obvious subjective nature, it is incumbent upon the trained practitioner to introduce adequate evidence to substantiate both the basis and the reasonableness of the defendant's beliefs. The defense's burden is not lessened by the intra-family violence setting, although the defendant will have had a prolonged and repetitive exposure to the violent and abusive behavior of the other family member. Ultimately, the jury's verdict is a measurement of your ability to meet that reasonableness standard.

In domestic homicide, the actions of the deceased in the days, weeks, months and yes, years, preceding the homicide and which brought your client to the moment in which he chose to use deadly force, are

of paramount importance. You must establish the deceased as having a violent abusive type personality. His character must be placed before the jury at the beginning of the trial and there should be no let-up on that point until the trial is concluded. Simultaneously, you want to portray your client as being basically non-violent and hopefully, that this is the sole occasion in his life in which he used any form of deadly force. As Bob Sanders correctly states in his article: "Self Defense: Battered Woman Syndrome", *The Advocate* Vol. 11 No.5 at 37 (August, 1989), a battered woman case is, in essence, like every other self-defense case. The issues remain the same. Those same issues are equally applicable to any other battered family member who chooses to use deadly force in his or her own defense against another family member.

B) DEFENSE OF OTHERS

In the *Chadwick* case, our defense was not only self-defense but also defense of others. After the trial, members of the jury confirmed that they based their acquittal on the belief that Mr. Chadwick was protecting other members of his family, rather than acting in his own necessary and reasonable self-defense.

Our jurisdiction has long recognized that an individual can justifiably use deadly force in defense of another person. Where the defense is raised, it is the burden of the defendant to show that the other person he chose to defend was at that time in imminent danger of serious physical injury or death and that the defendant acted reasonable under the circumstances. In *Adkins vs. Commonwealth, Ky.*, 168 S.W.2d 1008 (1943), the Court of Appeals succinctly defined the law of this jurisdiction as it relates to defense of others. The Court stated:

The right to take a human life in one's self-defense, or apparently necessary self-defense, extends to acting in defense of another under the same circumstances; so facts which will excuse a killing in defense of self, likewise will excuse a killing in defense of another, for it is a general rule that whatever a person may lawfully do for himself, he may lawfully do for another.
Id. at 1008.

See also *Tucker v. Commonwealth, Ky.*, 140 S.W.2d 73 (1911); *Pelfrey v. Commonwealth, Ky.*, 74 S.W.2d 913 (1934); *Brown v. Commonwealth, Ky.*, 214 S.W.2d 1018 (1948); *Bowles v. Katzman, Ky.*, 214 S.W.2d 1021; *Halcomb v. Commonwealth, Ky.*, 280 S.W.2d 499 (1955); *White v. Common-*

wealth, Ky., 333 S.W.2d 521 (1960); and *Kilbourn v. Commonwealth, Ky.*, 394 S.W.2d 948 (1965).

Our present law on defense of others is set forth in KRS 503.070 which provides:

- (1) The use of physical force by a defendant upon another person is justifiable when:
 - (a) The defendant believes that such force is necessary to protect a third person against the use or imminent use of unlawful physical force by the other person; and
 - (b) Under the circumstances as the defendant believes them to be, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.
- (2) The use of deadly physical force by a defendant upon another person is justifiable when:
 - (a) The defendant believes that such force is necessary to protect a third person against imminent death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat; and
 - (b) Under the circumstances as they actually exist, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.

As shown in section II of this article, the potential use of this defense in a domestic violence setting is significant. In investigating your case, extensive inquiry should be made not only with regard to the action of the deceased toward the defendant, but also with regard to his actions towards other family members. Only after the deceased's behavior towards the entire family unit is fully known and appreciated can a reasoned determination be made with regard to the nature of your defense.

II. THE SEQUELA TO THE BATTERED WOMAN SYNDROME

There is little reason for this author to attempt to expand on Bob Sanders excellent August *Advocate* article as it pertains to the battered woman syndrome. However, it is important to reiterate certain statements contained in his article so that you can understand how they are equally applicable to other family violence settings. The battered woman syndrome results from repetitive acts of violence and abuse to a woman. Like Pavlov's dog, she learns to recognize the signs that another attack is about to occur. Based upon that anticipated violence and abuse, the battered woman lashes out in her own necessary and reasonable self-defense. If such anticipated behavior is necessary and reasonable in the battered woman, then why would such behavior not equally be applicable to other recipients of

regular violence and abuse within the family unit. By analogy, examples might be:

- (1) A son defending himself against the anticipated violence and abuse of his father or mother.
- (2) A daughter defending herself against the anticipated violence and abuse of her father or mother.
- (3) A husband defending himself against the anticipated violence and abuse of his wife.
- (4) A father defending himself against the anticipated violence and abuse of his son or daughter.
- (5) A mother defending herself against the anticipated violence and abuse of her son or daughter.
- (6) A brother defending himself against the anticipated violence and abuse of another brother or sister.
- (7) A sister defending herself against the anticipated violence and abuse of another sister or brother.
- (8) A grandfather defending himself against the anticipated violence and abuse of a grandson or granddaughter.
- (9) A grandmother defending herself against the anticipated violence and abuse of a grandson or granddaughter.
- (10) A grandson or granddaughter defending themselves against the anticipated violence and abuse of a grandfather or grandmother.
- (11) A nephew defending himself against the anticipated violence and abuse of an uncle or aunt.
- (12) A stepson or adopted son defending himself against the anticipated violence and abuse of his step-father or adoptive father.

As you can see, the possible extension of the accepted theories enunciated in the battered woman syndrome cases to other self-defense cases arising within the intra-family domestic setting are extensive. It is, of course, necessary that the defendant in such a case have regular exposure to the violent and abusive family member and that he learned to recognize the signs that indicate that an attack is imminent. If it is justified for a battered woman to defend herself through the use of deadly force in such situations, then it is equally justified for another member of the family unit to defend him or herself in a like or similar circumstance.

In this author's opinion, the next logical extension of this theory of defense is to the protection of another member of the family unit who is the recipient of regular and repetitive violence and abuse. Again, the defendant, as a member of the family, comes to recognize the signs and symptoms which indicate that the aggressive family member is about to perpetrate his violent and abusive behavior on another member of the family. Frequently, the aggressive individual will choose to single out and direct his abuse towards one particular member of the family. Like the self-defense cases listed above, the potential for one member of a family to protect another member of the same family from the anticipated violent behavior of a third member is obvious, though we suspect not fully appreciated.

In the *Chadwick* case, the jury's acquittal was based on their finding that Mr. Chadwick believed that his son was going to physically attack and abuse his wife. The evidence substantiated a long history of violent behavior and abuse from the son towards his mother, his father, and his grandfather. Although the son had not actually attacked his mother on the date of the shooting, all the recognizable signs and symptoms of attack were present. The son was healthy and strong and his mother was sickly and disabled. If the battered woman syndrome theory extends to the family situation where defense of another becomes applicable as we believe occurred in the *Chadwick* case, then its application is equally applicable to any of the following family violence situations:

- (1) A mother acting in defense of her husband from the anticipated violence and abuse of a son or daughter.
- (2) A brother acting in defense of his sister from the anticipated violence and abuse of a mother or father.
- (3) A sister acting in defense of her brother from the anticipated violence and abuse of a mother or father.
- (4) A mother acting in defense of her daughter or son from the anticipated violence and abuse of her husband.
- (5) A father acting in defense of his daughter or son from the anticipated violence and abuse of his wife.
- (6) A brother acting in defense of his sister from the anticipated violence and abuse of another brother or sister.
- (7) A sister acting in defense of her brother from the anticipated violence and abuse of another brother or sister.

(8) A father acting in defense of his own parents from the anticipated violence and abuse of a son or daughter.

(9) A mother acting in defense of her own parents from the anticipated violence and abuse of a son or daughter.

III. SUGGESTIONS FOR TRIAL PREPARATION

Whether your defense is self-defense, or defense of others, the reputation and behavioral characteristics of your client and the deceased will be the focal point of the trial, and ultimately the basis on which the jury will reach its decision. You must make the deceased a part of the trial, almost as if you had exhumed him from the grave and had him sitting next to your client. With that thought in mind, your pretrial investigation must be extensive with regard to all of the various relationships and associations of the deceased. Interview your client repeatedly with regard to his relationship with the deceased, the deceased's relationship with other family members and with other people. To the extent possible, repeated interviews should be conducted with family members concerning their relationship with both defendant and the deceased. Remember, the attitudes of individual family members frequently change as the emotion of the killing wears off and the realization of a pending murder trial sinks in. Neighbors and friends of the decedent and decedent's family should also be interviewed. The local police, governmental officials, and the family physician are frequently excellent sources of information, if not also witnesses. Medical and hospital records should not be overlooked.

In the *Chadwick* case, we were able to establish the defendant's reputation as a non-violent person from the family, neighbors, local police, community leaders, and family physicians. To the contrary, the deceased's reputation for violence in general and towards specific members of the family was established through the prosecution's own witnesses, from the local police, and from former governmental officials, *i.e.*, a former county attorney and jailer.

In conducting your investigation, don't be afraid to be persistent. Each repeated interview will bring forth new facts which are relevant to your defense.

IV. TRIAL TACTICS

A) VOIR DIRE

You want the prospective jury to know

immediately the nature of the defense which you are raising, so tell them and ask them in your voir dire examination. Tell them that this case involves a father who shot his son and our defense will be self-defense, or defense of others. Ask them as a panel and individually, if appropriate:

Can you and will you find for the defendant if you believe from the evidence that at the time of the shooting he believed that he was in danger of serious physical injury or death, and that he acted in his own necessary and reasonable self-defense; or

Can you and will you find for the defendant if you believe from the evidence that at the time of the shooting he believed that his wife was in danger of serious physical injury or death, and that he reasonably acted in her protection and defense?

In propounding these questions, never accept the jury's silence as having any meaning. Have the jury either nod or state in the affirmative that under these circumstances they will find in favor of your client.

It is also important to explore with the jury the significance of the family relationship. Ask them:

Would the fact that a father shot and killed his son cause you to find against the father, even if the father acted in his own necessary and reasonable self-defense, or in the defense of others?

Make sure that the family relationship alone will not prejudice or cloud any prospective juror's decision.

Recognize any problems areas in your case which are known to the prosecution and which will arise at trial. An example is alcohol use or intoxication by your client at the time of the alleged incident. If your client was intoxicated and if your know or have reason to believe that the evidence is going to be introduced, bring it front and center in voir dire. Tell the jury that you anticipate the evidence is going to be introduced and ask them:

Is there any member of the jury panel that is strongly opposed to the use of alcoholic beverages?

For those that are opposed, ask them individually:

Would the sole fact that the defendant was drinking at the time of the incident cause you to be more likely to find him guilty, regardless of the other evidence introduced?

If you are concerned about the defendant's name, appearance, race, nationality, etc., share your concerns with the jury and ask them the appropriate questions to alleviate those concerns.

If you are in a jurisdiction where you can secure the jury list and qualifications well in advance of trial, no time will be better spent than thoroughly investigating the jury panel. The more you know about the individual juror before trial, the better you will be able to conduct the voir dire examination. If the investigation reveals facts about the individual juror which causes you concern, you should consider asking the juror about your concerns. If appropriately handled, your knowledge of the individual jurors will impress rather than alienate both the individual juror and the entire panel.

The selection of a jury is more difficult in a family violence case because each of us has had a mother, father, grandfather, or grandmother. Most of us have brothers, sisters, children, etc. Each jury member will have an understanding of the various intra-family relationship and a concept as to how those relationships should interact and relate one to the other. Frequently, if not in most cases, the prospective juror will have some "black sheep" member of the family who is dishonest, abusive, and violent. As a consequence, in these type cases, it has always been difficult for me to determine whether the best jurors are young or old, male or female, black or white, catholic or protestant, religious or non-believers. Again extensive pretrial investigation of the individual jurors is not only important, it's mandatory.

However, no amount of investigation can replace the single most important tool in the selection of a jury - the experienced trial lawyer's instincts. If any prospective juror causes you concern, for known or unknown reasons (causes the hair to raise on the back of your neck so to speak) — strike the juror. Remember, your own instincts rarely lie to you.

B) OPENING STATEMENT

In a domestic homicide case where you are asserting either self-defense or defense of others, never reserve your opening statement until the conclusion of the prosecution's proof. Remember, the deceased is a no-count violent individual and you want the jury to know that at the earliest possible moment. Do not assist the opposition in wrapping themselves with the flag of authority by referring to them as the Commonwealth. They are

the prosecution. On the other hand, your client is not the defendant. Personalize him for the jury by referring to him by his given name. In the *Chadwick* case, my client was elderly and disabled, so I either referred to him by his given name or by calling him Mr. Chadwick.

The prosecution's evidence which is detrimental to your defense should be brought out, aired, and to the extent possible, explained in your opening statement. By doing this, you deny the prosecution the benefit derived from the jury first hearing of the evidence in their direct proof. You also establish credibility with the jury not only for your client, but also for yourself.

Tell the jury about the deceased's prior acts of violence and abuse towards your clients and members of the family unit. Take pains to explain your clients' reputation for non-violence.

If your case includes the introduction of exhibits, consider not only discussing them, but also showing them to the jury. In order to display an exhibit in open statement, it is only necessary that you intend to introduce it during trial. See *Shelton v. Commonwealth, Ky.*, 134 S.W.2d 653 (1939); Osborne, *Kentucky Trial Handbook*, Sec. 95 p. 118.

In the *Chadwick* case, both the deceased and the defendant were well over the recognized limit of intoxication at the time of the shooting. In addition, prosecution's laboratory studies on the deceased revealed the presence of a frequently used and abused narcotic drug. That exhibit was enlarged and along with several other exhibits, was displayed to the jury in opening statement. By discussing the deceased's prior acts of violence and abuse and by displaying selected exhibits to the jury in opening statement, we were able to make the deceased's character the focal issue in the trial.

Whether you believe in primacy or recency, the opening statement is equal in importance to the closing summation. Don't waste your time and more importantly, your efforts, by telling the jury that what I am about to say is not evidence. Tell them a story which is later supported by your evidence and they will come to their own conclusion that the deceased "deserved killing."

V. PROSECUTION'S PROOF

With our present discovery rules, there is little excuse for a defense attorney not fully understanding the prosecution's case. Effective cross-examination of the prosecution's witnesses does not just

happen, it comes from thorough and complete preparation. You should anticipate virtually every witness that the prosecution will call and what that witness's testimony will be. You should know before your first question on cross-examination what you wish to elicit from the particular witness. Do not attempt to conduct discovery on cross-examination, for what you are likely to discover will be anything but beneficial to your client.

Limit the investigating officers' testimony to their actual investigation and any statement which your client inevitably gave to them. Do not let the investigating officers bolster their testimony by reciting their version of what some out-of-court declarant told them. The effect of such blatant hearsay can be devastating. Unless you are completely acquainted with the trial judge, do not assume that he understands the rule enunciated in *Jett v. Commonwealth, Ky.*, 436 S.W.2d 788 (1969), and its prodigies. As previously indicated, in the *Chadwick* case, there were 5 eye-witnesses to the shooting. We filed a pretrial motion *in limine* requesting the Court to prevent and prohibit any prosecution witness from bolstering his testimony by reciting the statements made by the various out-of-court declarants. Although the Court refused to rule on the motion prior to trial, all trial objections to hearsay were sustained.

In your pre-trial investigation, check all court records to see whether the deceased has ever been charged with any criminal offense. If so, verify the name of the investigating and arresting officers. In both the *Chadwick* case and the *Piper* case, the prosecution's investigating officers had previously arrested the deceased on several occasions. To the prosecution's utter chagrin, the investigating officers were knowledgeable about the reputation of both the defendant and the deceased. In each case, the defendant's reputation was good and the deceased's reputation was bad. However, don't ask the officers character questions, unless you are sure of their answers.

The prosecution's evidence may also include members of the family who have some knowledge of the killing. These witnesses are frequently closely related to both defendant and deceased. It should be expected that they will be extremely emotional immediately after the incident, so any oral or written statement which they gave may well be inaccurate. These witnesses may ultimately wish to be helpful to the defendant. In any case, you should have ready access to them

prior to the trial and have full knowledge of what the substance of their testimony would be. Because they are the prosecution's witnesses, their response to your leading questions can and should be most beneficial to your client. A note of caution, the intra-family witnesses may want to help so badly that they compromise their own testimony by testifying in a manner which is entirely inconsistent with the original statement that they gave to the investigating officers. Their inconsistencies should be anticipated and explained, if possible.

If, through adequate preparation, you succeed in limiting and mitigating the effectiveness of the prosecution's witnesses, your cross-examination has been successful.

VI. DEFENSE'S PROOF

If at all possible, the defendant must take the stand. Since they invariably give some type of statement to one of the investigating officers, their testimony needs to be as consistent as possible with the statement given. If there are inconsistencies, they need to be explained in the direct proof. The defendant must testify as to the repeated violence and abuse of the deceased and of the recognizable signs which he observed immediately prior to the incident. If your case is one involving defense of others, the defendant needs to testify about the prior acts of violence and abuse which the deceased directed towards the other person. He needs to state why he anticipated that another attack was imminent and why he felt it necessary to intervene and protect the other person.

Defendant's evidence should include any other family members who were not called by the prosecution and who can testify about the prior acts of the deceased and the character propensities of both defendant and deceased. (A memorandum in support of the admissibility of prior acts and threats filed in the *Chadwick* case is available from DPA.) An adequate number of other character witnesses should be called to substantiate the defendant's non-violent nature, and the deceased's contrary disposition. The character witnesses should be well known and respected within the community and where possible, should include individuals with some present or post association to law enforcement.

Do not hesitate to use expert testimony. Most generally, the family physicians will know and may have treated not only the defendant, but also the deceased. They may very well know the reputation of both within the community. They may

have actually witnessed or seen the results of the decedent's violent behavior. In the *Chadwick* case, we called two physicians to testify about the physical and emotional condition of the defendant, his wife, and the defendant's father. One of the physicians had also treated the deceased, in his office and at the jail. His diagnosis — *chronic drug abuse superimposed on a violent anti-social personality*. A pharmacist was called to testify about the narcotic drug taken by the deceased, the effects of the interaction of that drug with alcohol, and the known adverse reactions and side effects from the use of that drug. Lastly, we called Dr. Lenore Walker to testify concerning her psychological evaluation and examination of the defendant. Her testimony established that Mr. Chadwick had a recessive non-violent type personality. She reiterated that from her studies this type of individual only becomes violent out of absolute fear for themselves, or fear for the safety of their loved ones.

It is important to know both your adversary and the trial judge. Do not assume that the prosecution knows the law of the case as well as you do. On occasion, you can take your expert witnesses into otherwise objectionable areas with devastating results. In the *Chadwick* case, after providing Dr. Walker with the appropriate hypothetical facts, we asked her the following question:

Dr. Walker, based upon your educational background, training and experience, your evaluation of Mr. Chadwick, and assuming the correctness of the facts as previously reiterated to you, do you have an opinion based on reasonable psychological probabilities as to whether Mr. Chadwick acted in his own necessary and reasonable self-defense, or in the defense of other members of his family, at the time that he shot and killed Bobby Chadwick?

Answer: Yes, I have an opinion.

Question: What is that opinion?

Answer: In my opinion Mr. Chadwick acted out of self-defense and in defense of his family.

No objection from the prosecutor, no statement from the trial court.

Mr. Conway: That completes the case for the defense.

VII. CLOSING SUMMATION

There is little need to unduly lengthen

this article with a discussion concerning closing summation. If you are prepared, it's the easiest part of the trial. Hopefully, the prosecution and its witnesses will have referred to the deceased as the victim. In the *Chadwick* case, the deceased was called "the victim" 56 times. When you finish with your closing argument, the jury will believe that it is the defendant who has always been and remains to that moment, the true victim. Without you ever having so stated, the jury through their acquittal will also have rendered a verdict on the deceased who you presented and portrayed in all of his abusive splendor — *The bastard deserved to be killed.*

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LESBIAN USING 'BATTERED SPOUSE' MURDER DEFENSE

Associated Press, August 28, 1989

WEST PALM BEACH, Fla. - A woman charged with murdering her lesbian lover is using the "battered spouse" as her defense. Defense lawyers for Annette Green, 30, planned to argue that she killed her 32-year-old live-in lover, Ivonne Julio, because Ms. Julio beat and humiliated her repeatedly during their 11-year relationship.

The trial was to begin today in Palm Beach County Circuit Court.

Ms. Green shot Ms. Julio in the head on Oct. 30, 1988, following a Halloween party and a fight in a trailer park in Palm Beach County, police said.

"She would have killed me because she is very violent," Ms. Green told police. Ms. Green's defense is considered novel because the battered spouse syndrome is usually ascribed to women who suffer repeated beatings by male partners.

VIEWS OF KENTUCKY'S CHIEF JUSTICE

Modernizing Kentucky's Court System

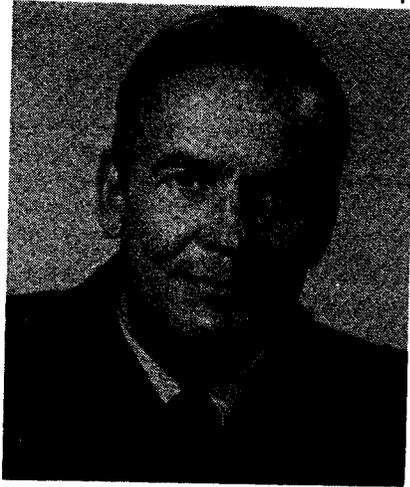
An interview with Chief Justice Robert F. Stephens by Susan Wallar Schwemm appeared in the July-August, 1989 Fayette County Bar Association's Bar News. Selected portions are reprinted below with permission of the Chief Justice and the Fayette County Bar Association.

What are the innovations in the Kentucky court system that you have spearheaded or are particularly proud of?

The most significant one is the videotaping of all the circuit court proceedings. By this time next year, if all goes well, 46 courtrooms in the state will be equipped. There are 56 judicial districts in Kentucky. That will be about one-third to 40% of the courtrooms. The Court is committed to doing this. We are ironing some bugs. We have a few complaints from some of the appellate judges who would rather have the old-fashioned transcript. And I can understand, it is quicker. Some defense lawyers don't like it. When you look at the speed with which the transcript of evidence is prepared, and the negligible cost, what you have to do is prioritize. Which is more important? And it's very clear to me that the speed and the expense to the litigant, and the accuracy, is much better. We are improving the technology. Literally every month the quality of the tapes is improved. The high-speed VCRs that we provide our judges are getting better. It's the coming thing; there's no doubt about it. We've tried the computer-aided transcript here in Fayette County and we don't like it.

What about the computer system in the Boyle Circuit Court in Danville?

Well, I don't know too much about it. I haven't seen it. I'm sure it's fast, but you still have to depend on accuracy, but more importantly, it still costs the litigant a tremendous amount of money. That's one thing that this system doesn't do. I've reviewed a couple of records, and it's really fairly simple. If the lawyer



Chief Justice Robert F. Stephens

writes in the brief that it's on the record at so-and-so, you just turn right to it, and you look at it. It's no big deal. The only problem is when you have to review the entire record, if it's an eight or nine day trial, it takes me half that time to review it, which does take longer. But I would think the lawyers would want it reviewed completely that way, rather than the skim sight reading that most of us do when we review.

Anything else that is an innovation?

The SUSTAIN program. That's an acronym. It's a computer-docket control and information system. It's in three counties, including Kenton, Clark, and Johnson. It provides an instant record for every case that's in court. In those three counties, every case is entered in circuit and district court. It will print the dockets. For example, in Johnson county, in district court, they had a deputy clerk who worked two mornings a week typing the docket in preparation for trial. This machine prints the docket in three minutes. We have made a commitment to put it in every county. They're working now in Bowling Green. It's expensive. When all the system is in, it will have a complete record so that if you're an irate citizen, and want to know what

happened to your case, we can punch it out in Frankfort, because it will all be down there. Periodically, they take the local information and give it to us, and we put it all on the mainframe computer. What we will do, is that I will be able to check the case and find out, or if the press wants to go in and see how many cases are DUIs, or if the case of a certain political person has been delayed sixteen times, or whatever it might be. The Rockcastle County thing - I could find out the status of all DUI cases in any county at any given time. It can be configured to print 80% of what the clerks now type. Let me give you a classic example. We installed the system in Kenton County. The cost was about \$65,000 to \$70,000. They do not have to hire three new deputy clerks now. It's really working wonderfully. The clerks love it.

You're using attrition to reduce staff, rather than firing personnel?

Yes. Probably the other thing that is the most dramatic in terms of savings in cost and efficiency is the laser optic disk storage unit. We have that in Jefferson County. The District Court Civil Division there has between 17,000 and 18,000 cases per year. They have 16 or 17 full-time deputies that take care of all the paperwork. With the laser disk, we can now put all those records on a disk that is about the size of the old 78 rpm records. It puts 64,000 pages on one side and 64,000 pages on the other. It is completely indexed by name, so if you want to look at it, they'll tell you exactly which disk it is and where it's at and you can go right to that. There's a CRT, which you can look at and you can read page such and such of such and such a case. Then there's a printer right next to it. All of the records in a storage room that's about 750 square feet, and 12 feet high, with shelving all the way to the ceiling, will be able to be stored in one filing cabinet in the corner. 25% of all courthouse space today is used for storage. Of course, that's a very expensive piece of equipment. But it's actually working. We keep the records in a civil case until

the judgement is entered and the appeal period is over, and then we destroy the written records and they are right on the disk. Unlike the regular computers, where you have to handle the disks, or the tapes, with care, you can store this disk outside, in the snow and the mud, and it won't hurt it. It's our first step toward a paperless court.

Mainly, I want to get the SUSTAIN program in, because I think that's the most important. And the video program is already committed. The legislature likes it. There may be some courts that we won't ever put a video system in. Some of the rural counties that may not have ten trials a year, or five trials a year. Now why spend \$50,000 or \$60,000 on that? For example, in the western part of the state, in the four counties along the Mississippi River, we are taking the biggest county, and they are remodeling the courthouse, and we're going to put the system in there. The judge is going to move all the trials that he can from the other three counties to be tried there to a jury.

Also, I'm trying to get law clerks for all the Circuit Judges in the state, because they are probably the most over-worked, other than the Court of Appeals. The Court of Appeals has got a system where those judges are really over-worked. They're writing and being assigned between 11 and 13 cases a month, and that's a lot of cases to get out, so we've gotten another law clerk. They each have two law clerks to help.

Amsterdam Receives MacArthur Grant

The John D. and Catherine T. MacArthur Foundation named 29 people who will receive grants up to \$375,000 over five years to use as they wish. The 29 MacArthur winners span a range of disciplines from artistic to health concerns. Since 1981, the foundation has chosen 283 "extraordinarily talented individuals... to work at their highest potential without interference and free of financial constraints."

Anthony Amsterdam, 53, New York was awarded \$320,000. He is a Law Professor at NYU. He has influenced contemporary law in civil rights and race discrimination. He has authored many articles on capital punishment.

CRIMINAL RULES COMMITTEE

Kentucky Supreme Court Considers Rule Changes

THE RULES PROCESS

Justice Donald C. Wintersheimer of Covington, Chairman of the Criminal Rules Committee, has announced that any and all proposed amendments to the criminal rules will be discussed at the next annual meeting of the Kentucky Bar Association which will be held in Lexington on June 5 through 8, 1990.

In order to have the opportunity for members of the profession to consider any suggested rule changes, the Supreme Court has indicated that all suggestions must be printed in the KBA Bench & Bar publication prior to the June annual meeting. Practically, that means that the suggested rule changes must be presented to the Supreme Court in January to meet the printing deadline of the KBA magazine which is in early February.

Accordingly, all suggested rule changes must be submitted to the committee before January 5, 1990. The criminal rules committee will consider the rule changes immediately thereafter and make a report to the Supreme Court on January 30, 1990.

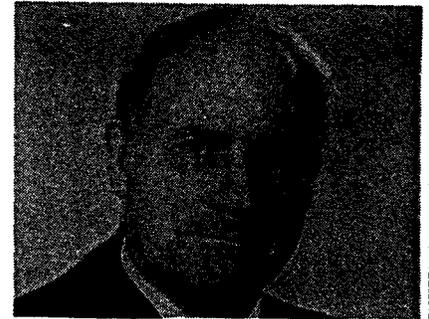
Suggestions for amendments are circulated to all members of the committee for comment. The members express their opinions in writing with copies to other members of the committee and a discussion is held at least one annual meeting as to which amendments will be reported to the Supreme Court. Amendments to the criminal rules are generally initiated as a result of a recommendation by members of the practicing bar. Occasionally, members of the clerk's office or court staff attorneys or members of the Court will make recommendations for changes. Suggestions are also welcome from members of the judiciary at all levels.

MEMBERS

Justice Wintersheimer has indicated that Assistant Attorney General John S. Gillig has been added to the committee. Other members of the committee are:

Hon. William L. Graham
Frankfort Circuit Judge, Frankfort

Hon. Penny R. Warren
Lexington



Justice Donald C. Wintersheimer

Hon. Mark P. Bryant
Commonwealth Attorney Paducah

Hon. Frank E. Haddad, Jr.
Louisville

Hon. William E. Johnson
Frankfort

Hon. Frank W. Heft, Jr.
Public Defender Louisville

SUPREME COURT DECIDES

Justice Wintersheimer indicated that all rule changes are now considered on an annual basis. The entire purpose of the civil and criminal rules committee is to provide members of the legal profession with an opportunity to make suggestions and comments on any proposed rules before they are enacted by the Supreme Court. Naturally, the final rule making authority resides in the Supreme Court.

PROPOSED RULES

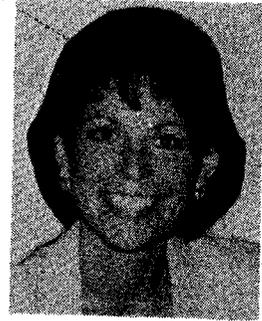
Among the rules changes already submitted is one relating to qualifications for counsel for indigent defendants charged with capital offenses. The current Ohio rule is the basis for a similar proposal in Kentucky. Also suggested is a rule dealing with multiple jury procedures involving joint trial of codefendants where admission of the confession of one defendant might be prejudicial to the other.

RULES OF EVIDENCE

Of interest to all lawyers and judges is the possibility of adopting the Federal Rules of Evidence in the near future. Undoubtedly, numerous reviews and hearings will be conducted prior to any action by either the Supreme Court or the General Assembly.

COMPUTER COURTROOMS

Views of the National Shorthand Reporters Association



B.J. Shorak

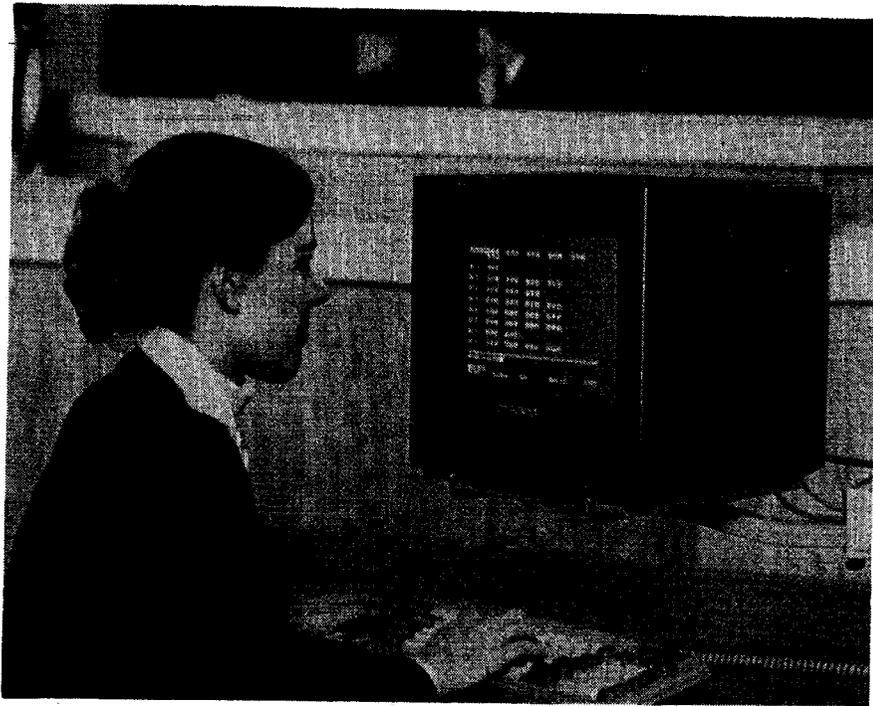


Photo courtesy of the Xscribe Corporation

The computerized courtroom of Circuit Judge Stephen M. Shewmaker in Danville, Kentucky, enjoys excellent company around the U.S. The city of El Paso, Texas has ordered 21 of them. Chicago's leaders announced the purchase of 12 over the next two years. The Columbus (Ohio) Bar Association just bought one as a present to its city. And they currently exist in ten other major cities.

In recent years, *TIME* Magazine and Cable News Network referred to them as "Courtrooms of the Future," but it is time to lay this misnomer to rest. The system, indeed, is the courtroom of today: *the computer-integrated courtroom*, or CIC.

Perhaps the *Arizona Republic* put it best in a story about computerized courtrooms:

Perry Mason had better sharpen some pencils, dust off his law books

and stock up on legal pads because his next court foe might be armed with a 20-megabyte hard disk, a 640K RAM and a handful of floppy disks.

CICs are popping up all over the United States, from San Francisco to Detroit to Dallas, and parts in between, such as the system in Danville, which was funded by the Kentucky Shorthand Reporters Association to demonstrate the technology's benefits to the bench and bar. However, the system that has been analyzed, poked and prodded the most sits in the Arizona U.S. District Court in Phoenix, under the auspices of The Honorable Roger G. Strand.

Judicial experts from all over the world have traveled to Phoenix to witness the latest in courtroom technology. During demonstrations, Judge Strand speaks of

the possibilities:

As we will show you in a minute, perhaps the more magical part of this whole system is that the entire 8,000 pages of transcript is on the data base of all these computers. It can be searched in a Westlaw/Lexis (litigation support) type of query format so that you can pull from that 8,000 pages anything you want.

Referring to a multidefendant case involving interstate cocaine distribution and conspiracy, Judge Strand described the way that attorneys have taken to the new tools:

One of our defense lawyers in particular had quite a flair for (the system). While the other lead counsel was examining witness, he would be looking (in the CIC's data base) for inconsistencies in the man's testimony that was given at a suppression hearing or at other parts of the trial. And they were constantly handing each other notes about things they found in the data base.

As the old saying goes, "Information is power," and the power offered by a CIC has substantially increased the capabilities of computer-wise lawmakers. But where does the CIC get its power?

The foundation of a CIC is a system used by court reporters called *computer-aided transcription*, or CAT.

For decades, court reporters have used machines called stenotypes to record verbatim testimony. By depressing combinations of keys that correspond to alphabetic symbols, the stenotype produces phoenetic syllables, or shorthand strokes, that print out on a paper tape.

Until the advent of CAT, the reporter then either had to transcribe the notes into written English or dictate them to a person or into a tape recorder to be transcribed later by a typist. The produc-

tion of a written record was tedious and time-consuming.

But advances in computer technology led to what has become known as computer-aided transcription, or CAT. Working on a modified stenotype machine, a court reporter still captures the live legal proceedings in stenographic notes. However, with CAT, these notes are electronically translated into complete English transcripts — the stenographic record is fed into a computer that has been programmed to match the stenographic notes stored in its memory to the correct English word.

Since its introduction in 1974, CAT has dramatically increased the speed and stabilized the cost of preparing transcripts. In the past decade, as microprocessors have gone up in capacity and down in cost, CAT systems have become more compact, more powerful and more affordable. Today, close to 20,000 reporters, or approximately 70% of the profession, use it in their work.

A computer-integrated courtroom brings together all the latest advances offered through CAT technology. In a CIC, computer terminals are located at the counsel tables and judge's bench and are tied into the court reporter's CAT system. Through CAT, judges, lawyers and litigants can see printed English text of testimony on monitors just seconds after the testimony is given. This is especially beneficial to the hearing-impaired community. Deaf judges, attorneys, jurors and litigants have benefited from this technology.

Hard-copy transcripts can be provided almost instantaneously, as can ASCII diskettes. Another feature, litigation support software, allows attorneys to review prior testimony on their monitors during cross-examination without having to interrupt the proceedings to ask the reporter to search through pages of notes. Instead, at the touch of a button, the computer finds the testimony in question and flashes it onto the monitor. Also, the monitors are connected to computerized legal libraries, so quickly-needed precedents are only a few seconds away.

CAT technology has changed the very nature of the transcript. Before CAT, the transcript was a passive document, to be used primarily for appeals after the trial was over.

With the advent of the computer-integrated courtroom, the written record is passive no more. During the course of the Phoenix cocaine trial, attorneys and judges made significant statements about day-to-day uses of the transcript.



Photo courtesy of the Xscribe Corporation

- Defense Attorney — "Even when someone else is being spoken about (and) it doesn't directly relate to my client, I'll go over to the research screen and find out how badly this particularly witness is hurting my client by connecting his testimony with something someone else said."

- Prosecuting Attorney — "We have defendants in the case who have been less prominently mentioned than other defendants. For those defendants, a good way to marshal all of your evidence...is to put the name of the defendant (into the computer). It will go through each transcript to that defendant's name...(providing) an index of every time he is mentioned."

You can do the same thing about the discussion of an exhibit...you can put in any combination of searches that you want."

- Judge (on lawyer strategy) — "Your case has ended...you are going to have motions. You had several defendants. You have motions for directed verdict...you can go back and scan the whole (data) base to find out what has been said about that defendant so you will know whether or not the motion is well taken."

The strategic ramifications of litigation support are becoming more apparent with every case. However, the cumulative effect of the high-tech court on lawyer performance is evidently beneficial.

For example, with access to the written record, allowing witness inconsistencies to pass without challenge will become a thing of the past ("You say he was at this place on this date, but the record shows that earlier you said he was someplace else.")

The written record, in effect, becomes an active tool during the trial. Lawyers can continue to review and analyze testimony while they are still in court. And access to this information can change both their line of questioning as well as their day-to-day strategies. No other system offers the diversity of a CIC, not tape recorders nor videotape.

Will Kentucky see more computers in courts? Most likely, because as its judiciary sees where the rest of the country is going, it surely will not allow the state to become a "video junkyard" surrounded by states with 21-century courts. At least, we hope not.

B. J. SHORAK
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B.J. is Director of Research and Technology for the Association. She joined NSRA in 1987 to administer programs relating to technologies that impact the court reporting profession.

KENTUCKY'S VIDEOTAPE PROJECT CRITICIZED

A videotape program designed to improve the efficiency of Kentucky's courts has increased the time involved in appeals and created other problems, according to some critics in the state's legal community.

The system was implemented in 1981 and became fully automated in 1984. About a third of Kentucky's 90 circuit-level courtrooms are wired and eight to 10 more are scheduled to join in this fiscal year.

With the system under way, court reporters and transcripts are out and VCRs are in. At the trial level, the system has gotten positive reviews by most, but when it comes to appeals the story is different.

Hiram Ely III of Louisville's Greenebaum Doll & McDonald, who does defense and plaintiff's work, said the system has such advantages as reviewing testimony, but there are some limitations.

"It's almost impossible to use a video transcript from a lengthy trial in the appeals process. You end up having to have it transcribed at a cost that is astronomical," he said.

"It's impossible to watch two weeks of a trial in trying to write a brief," added Mr. Ely. "It will take almost another two weeks." He noted, however, that taping works fine in some trials, such as divorce proceedings, where testimony is not so complex.

"Of course court reporters feel strongly [that] it's better to have a human being in there," Mr. Ely said. "I agree with that."

OPPOSITION LINGERS

It may be too late to turn back, but the Kentucky Shorthand Reporters Association (KSRA) is still fighting videotapes.

"What [appellate attorneys] are finding on appeal is video takes five to seven times [as long] to review as a written transcript," said KSRA ex-president Laura Kogut. "It was thought of original-

ly as an innovative new way to keep court records, but they didn't foresee problems," she said.

As an alternative to video-equipped courtrooms, the KSRA has come up with a computerized transcription system that allows for immediate reading of the testimony; one such computer-integrated courtroom is in Danville, Ky. "We've been trying to make the legal community more aware" of the situation, said Ms. Kogut.

Another attorney, who requested anonymity, cited her experience in writing a brief based on a long taped hearing. "It was just a nightmare," she said, noting while taping may be cheaper there is also the problem of tapes not always picking up the proceedings.

"It took days to look at it- four times as long as with a transcript," she added. The extra time was billed to the client.

"Judges think it's one of the greatest technological advantages here," the attorney said. "People have complained but judges are enthralled with it."

BLANK TAPES

But Court of Appeals Judge Charles B. Lester said not all judges are so thrilled by it. "Let's assume you have a three- or four-day trial and it's on day 2 or 3 that the error alleged on appeal occurs," he said. "It's very difficult to get down to that point in the tape. You have to sit and watch a lot of proceedings that have nothing to do with the appeal."

On the plus side, he said, the system does save money. But there are other problems- among them, power failure, voice activation that turns the camera toward non-testimony sound, a reduction in clarity as copies increase and, sometimes, blank spaces.

Frankfort sole practitioner Rudy Yessin, both a plaintiffs' and defense attorney, agreed there is danger of tape breakdown. He likes court reporters because they are on site and can have transcripts ready that day.

"I've talked to several judges and they have a difficult time sitting there and wading through it," he said. "On the other side, judges get to observe witnesses on tape."

"My experience at this stage of the game is that the majority of the bar has not become accustomed to it and by and large likes the older system better," added Mr. Yessin.

For Lexington sole practitioner Larry S. Roberts, some of the criticism rang true in a murder case in which he was defense attorney- his client's testimony failed to appear on tape and led to a new-trial order. *Commonwealth v. Clay*, 89 cr 157 (Circ. Ct., Fayette Cty.).

Despite that, Mr. Roberts said he likes taping because he can look at testimony "to my heart's content." Since the incident, improvements have been announced to prevent a repeat, he said.

Despite the criticism the taping program has drawn, the state will not turn back, says Don P. Cetrulo, director of Kentucky's Administrative Office of Courts. "I can't believe anyone thinks there will be court reporters in the year 2000. You've got to get started," he says.

Mr. Cetrulo said the cost to install the system was in the \$50,000 range per courtroom and chambers, compared with the average court reporter's annual salary of \$20,000. About 30 reporting jobs have been eliminated, mostly via attrition. He admitted that using the tapes can take longer than transcripts, but said more than half of the appeals involve one videotape.

"It's a flexible system. Someone is going to improve it."

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SHOULD LAWYERS BE MORE CRITICAL OF COURTS?

Views of Second Circuit Court of Appeals Judge Roger Miner

In observing the work of lawyers in the courts in which I have served, as well as in other courts, I have been impressed generally with the service that the bar has rendered in the representation of clients. I have not been quite so impressed with the performance of the bar in the discharge of its duty to society as a whole. It is the willingness to accept this public responsibility that distinguishes the bar as a profession. The value of the calling is diminished to the extent that any one lawyer shirks his or her professional obligation of service to the community.

There are many duties implicated in the concept of public responsibility—the duty to undertake the representation of indigent clients without charge¹ (if more lawyers performed this duty, perhaps the public expense for such representation could be greatly reduced or eliminated); the duty to see that able and honest men and women are appointed or elected as judges;² the duty to aid in the improvement of legal education;³ the duty to maintain the competence and integrity of the bar,⁴ and to disclose violations of the rules of professional conduct;⁵ the duty to set an example and maintain public confidence by avoiding even minor violations of law;⁶ the duty to seek legislative and administrative changes to improve the law and the legal system;⁷ and the duty to educate the public⁸ and to protect it from the unauthorized practice of law.⁹

In my opinion, one of the most important societal duties of lawyers is the duty to criticize the courts. It is my premise that informed criticism of the courts and their decisions is not merely a right but an ethical obligation imposed upon every member of the bar. I also believe that judges should not respond to such criticism, directly or indirectly, since judicial response dampens the enthusiasm of the bar and disserves the public interest.

There is a Canon in the Code of Professional Responsibility that instructs lawyers to assist in improving the legal system.¹⁰ The Ethical Considerations relating to that Canon observe that

lawyers are especially qualified to recognize deficiencies in the system and to initiate corrective measures.¹¹ They encourage the legal professional to support changes in the law when existing rules eventuate in unjust results.¹² The Preamble to the new Model Rules of Professional Conduct adopted by the American Bar Association urges that lawyers should employ their knowledge to reform the law.¹³ In my opinion these admonitions speak to a duty on the part of lawyers to identify and discuss incorrect actions by the courts, subject only to the requirement that the criticism be impelled by a good-faith desire for improvement in the law and the legal system.

Malicious or false statements about a judge or disruptive or contemptuous conduct in the courtroom, of course, never can be countenanced. I have kept with me for nearly 30 years a case I read in law school regarding a penalty imposed for behavior of this type. The decision is taken from the ancient English Reports and is one of those collected by Sir James Dyer, sometime Chief Justice of Common Pleas. It is reported as follows:

RICHARDSON, Chief Justice of the C.B. at the assizes at Salisbury in the summer of 1631 was assaulted by a prisoner condemned there for felony, who after his condemnation threw a brick bat at the said Judge, which narrowly missed; and for this an indictment was immediately drawn...against the prisoner, and his right hand cut off and fixed to the gibbet, upon which he was himself immediately hanged in the presence of the Court.¹⁴

It seems to me that the judge overreacted somewhat in spite of the provocation. Of course, there are those today who would consider tossing a brick to be "protected expression." I do realize that occasionally it is necessary for a lawyer to bite his or her tongue when in the presence of some particularly arbitrary tyrant in a black robe. My father, who practiced law for 60 years, held in the highest regard

the lawyer who made some intemperate remark during a long and heated argument with a judge. When the judge shouted: "Counsellor, you have been showing your contempt of this court," the lawyer responded: "No, your honor, I have been trying to conceal it."

FEAR OF REPRISAL

While lawyers generally feel free to criticize the state of the law in relation to rules of court, statutes and even the Constitution itself, there is a noticeable reluctance to criticize judge-made law, specific judicial decisions or individual judges. Yet, the public responsibility function of the bar is just as implicated in the latter as in the former. Why the distinction? I think that the answer lies in the unfortunate, but well-grounded fear on the part of attorneys that affronts to tender judicial sensibilities may result in unnecessary antagonisms, disciplinary action or worse.

For example, in 1830, Judge James H. Peck of the United States District Court for the District of Missouri disbarred and imprisoned a lawyer for publishing a letter critical of one of his decisions.¹⁵ Although this disgraceful episode led to an impeachment proceeding and caused Congress to curtail the summary contempt power of the federal courts,¹⁶ echoes of the Peck incident were heard in a decision handed down by the Supreme Court in 1985. The decision reversed a 6-month suspension from federal practice imposed upon Robert J. Snyder by the 8th Circuit Court of Appeals for conduct said to be prejudicial to the administration of justice and unbecoming a member of the bar.¹⁷

Snyder's difficulties stemmed from a letter he wrote to the United States District Court for the District of North Dakota. The letter was written after the circuit court had twice returned his Criminal Justice Act fee application for insufficient documentation. In his correspondence, Snyder refused to provide further information, criticized generally the inadequacy of the fees authorized in similar cases, expressed his disgust at the

treatment afforded him by the circuit and directed that his name be removed from the list of attorneys available for criminal defense assignments.¹⁸ The district court judge, finding nothing offensive in the letter, and perceiving some merit in Snyder's criticisms, passed the letter on to the circuit. A 3-judge panel of the circuit ultimately found that the statements, which Snyder refused to retract, were disrespectful, contentious and beyond the bounds of proper comment and criticism.¹⁹

In reversing the panel decision, then Chief Justice Burger wrote: "We do not consider a lawyer's criticism of the administration of the [Criminal Justice] Act or criticism of inequities in assignment under the act as cause for discipline or suspension.... Officers of the court may appropriately express criticism on such matters."²⁰ The Chief Justice observed that the circuit court had acknowledged the meritorious nature of Snyder's criticism and, as a result, had instituted a study of the administration of the Criminal Justice Act.²¹

In light of the observation, I believe that the Chief Justice missed an excellent opportunity to comment on the attorney's duty to criticize the courts and the beneficial purposes served by the performance of that duty. Snyder's actions were well within the bounds of the public responsibility he assumed when he became a member of the bar. This is so because a lawyer is obliged not only to educate the public about the law, the legal system, and the judges, but to inform the courts as well.

CONSTANT WATCHFULNESS

Justice Jackson once commented that "lawyers are the only group in a community who really know how well judicial work is being done. The public may rightfully look to them to be the first to condemn practices or tendencies which they see departing from the best judicial traditions."²² Justice Brewer said: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism."²³ "I have no patience," said Chief Justice Harlan F. Stone, "with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."²⁴

Some years ago, in answer to contention that criticism of the Supreme Court and its decisions by the bar was unwise, Raymond Moley, the political analyst, wrote the following:

The bar in this instance is acting in its most significant role. A lawyer is something more than a plain citizen. He is by tradition and law an officer of the court and an agent of the government. To refrain from guidance would be to shirk the bar's responsibility, as a professional association, to the public and to government.

The Court is a responsible, human institution. To elevate it above criticism would be to create a tyranny above the law and above the government of which it is a part.²⁵

And so it is that when the Attorney General of the United States publicly criticizes certain decisions of the Supreme Court, as he has done in recent years,²⁶ he is acting in the highest traditions of the legal profession. By leading serious discussions of constitutional doctrine important to the citizenry and to the courts, he performs the public service encouraged by Moley and by Justices Jackson, Brewer and Stone. It ill behooves members of the bar to ridicule and abuse a fellow member of the profession for fostering the robust and unin-

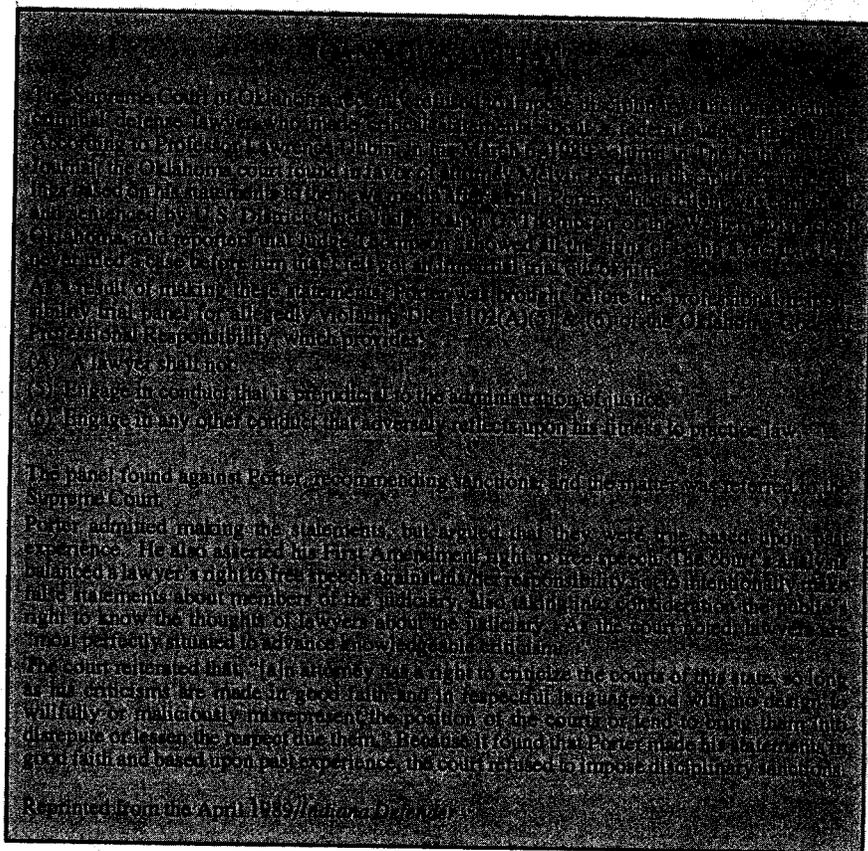
hibited debate that is the hallmark of a free society. When Stephen A. Douglas denounced Abraham Lincoln for questioning the validity of the infamous *Dred Scott* decision, Lincoln replied:

We believe as much as [Mr.] Douglas (perhaps more) in obedience to and respect for the judicial department of government. We think its decisions on constitutional questions, when fully settled, should control not only the particular case decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution, as provided in that instrument itself. More than this would be revolution. But we think the *Dred Scott* decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this.²⁷

Lincoln was a great lawyer who understood the public responsibility of the bar.

RESPONDING TO CRITICISM

It has never been the place of a judge, however, to respond to specific criticism, and I think that it is unseemly for justices of the Supreme Court to engage in public argument with the attorney general or any other lawyer for the purpose of defending the position of the Courts on one issue or another.²⁸ Such discourse not only detracts from the dignity of the



Court but also communicates an unwillingness to maintain the openness of mind so essential for the proper performance of the judicial role.²⁹ When the judiciary undertakes a point-by-point defense of criticism leveled by members of the bar, it discourages what it should encourage and protect. Even in the case of unfair and unjust criticism, the bench should remain silent, leaving to the bar its ethical obligation to come to the defense of the judiciary in such situations.³⁰ It long has been recognized that judges, "not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism."³¹ When Justice Brennan wrote in the *Sawyer* case that "lawyers are free to criticize the state of the law,"³² he reserved no rebuttal time for the judiciary.

Let me hasten to add that there are numerous matters upon which judges can and should be heard - matters affecting administration of the legal system, improvements in substantive and procedural law and ethical standards.³³ A judge also should teach and write about the law in an expository way, pointing to trends and changes in decisions already written and in legislation already adopted.³⁴ Judges should encourage debate about controversial constitutional and legal issues.³⁵ I have lectured and written about the public accountability of judges - the need for judges to report to the citizenry about developments in the law and the legal system.³⁶ Others have advocated judicial participation in policymaking where matters affecting the judicial process are concerned. Judge Irving R. Kaufman, my colleague on the Second Circuit Court of Appeals, holds that "[j]udges may not merely express their views on matters within their judicial province, but have an obligation to do so in the public interest."³⁷ However this may be, there is no reason for judges to argue the merits of their decisions or views directly with their critics. It should always be remembered that judges have an unfair advantage in any debate with lawyers, because judicial decisions - at least until reversed, modified, distinguished or overruled - are the last word.

The judiciary should assure the bar that critical comments of all kinds are welcomed. It should heed the message of Justice Frankfurter that "judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."³⁸ The justices of the Supreme Court and of every other court in the land must recognize, as did Frankfurter, that lawyers "are under a special responsibility to exercise fear-

lessness"³⁹ in criticizing the courts.

Without question, the judiciary is accountable to the public, just as any other public institution is accountable to the public. If judges are arbitrary, if their behavior is improper, if their decisions are not well-grounded in constitutional and legal principles, if their reasoning is faulty, the bar is in the best position to observe and evaluate the deficiencies, to inform the public and to suggest corrections. When lawyers engage in criticism of the courts for constructive and positive purposes, grounded in good faith and reason, the judiciary is strengthened, the rule of law is reinforced and the public duty of the bar is performed.

¹ See ABA Model Code of Professional Responsibility EC 2-25, 8-3 (1981); ABA Model Rules of Professional Conduct Rule 6.1 (1983).

² See ABA Model Code EC 8-6; ABA Model Rule 8.2 comment, para. 1.

³ See ABA Model Code EC 1-2; ABA Model Rules Preamble, para. 5.

⁴ See ABA Model Code Canon 1; ABA Model Rules Preamble, para. 5.

⁵ See ABA Model Code EC 1-4, DR 1-103 (at ABA Model Rule 8.3(a)).

⁶ See ABA Model Code EC 1-5; ABA Model Rule 8.4 comment, para. 1.

⁷ See ABA Model Code EC 8-1; ABA Model Rules Preamble, para. 5, Rule 6.1.

⁸ See ABA Model Code EC 2-1 to 2-2, 8-3; ABA Model Rule 7.2(a) comment, para. 1.

⁹ See ABA Model Code Canon 3; ABA Model Rule 5.5(b).

¹⁰ ABA Model Code Canon 8.

¹¹ *Id.* at EC 8-1.

¹² *Id.* at EC 8-2.

¹³ ABA Model Rules Preamble, para. 5.

¹⁴ Note, 2 Dyer 188b, 73 Eng. Rep. 416 (Michaelmas Term 1631); see also Holdsworth, *A History of the English Law* 391-93 (3d ed. 1947).

¹⁵ See generally, Stansbury, REPORT OF THE TRIAL OF JAMES H. PECK (1883); Rieger, *Lawyers' Criticism of Judges: Is Freedom of Speech a Figure of Speech?*, 2 CONST. COMMENTARY 69, 75-76 (1985); Nelles & King, *Contempt by Publication in the United States: To the Federal Contempt Statute*, 28 COLUM. L. REV. 400, 423-31 (1928).

¹⁶ Act of March 2, 1831, ch. 99, 4 Stat. 487. See generally *United States v. Reed*, 773 F.2d 477, 485-86 (2d Cir. 1985); Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90, 99-101 (1983).

¹⁷ *In re Snyder*, 472 U.S. 634 (1985).

¹⁸ *Snyder's* offending letter is reprinted as an addendum to the circuit court's opinion. *In re Snyder*, 734 F.2d 334, 344 (8th Cir. 1984), *rev'd*, 472 U.S. 634 (1985).

¹⁹ *In re Snyder*, 734 F.2d at 337.

²⁰ *In re Snyder*, 472 U.S. at 646.

²¹ *Id.* For a discussion of the *Snyder* decision, see Stewart, *Are Lawyers Free to Speak Out About the Courts?* A.B.A. J., May 1985, at 81.

²² As quoted in *Memorial Tribute to Justice Robert H. Jackson*, 38 J. Am. JUDICATURE SOC'Y 96, (1954).

²³ Address by Justice David J. Brewer, Lincoln Day (Feb. 12, 1898), quoted in *Bridges v. California*, 314 U.S. 252, 290 n.5 (1941) (Frankfurter, J., dissenting); see Editorial, *Shall We "Curb" The Supreme Court?*, 41 J. Am. JUDICATURE SOC'Y 36 (1957).

²⁴ Remarks of Justice Harlan Fiske Stone to Professor Thomas Reed Howell of Harvard Law School (Nov. 15, 1935), reprinted in Mason, *HARLAN FISKE STONE: PILLAR OF THE LAW* 398 (1956).

²⁵ Moley, *Criticism of the Court*, NEWSWEEK, Mar. 16, 1959, at 100.

²⁶ See e.g., Shenon, *Meese and His Vision of the Constitution*, N.Y. TIMES, Oct. 17, 1985, at B10, col. 3.

²⁷ Speech by Abraham Lincoln at Springfield, Illinois (July 17, 1858), reprinted in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 516 (R. Basler ed. 1953); see Fisher, *Constitutional Speech by Members of Congress*, 63 N.C.L. REV. 707 (1985) (analyzing Lincoln's speech); see also Hall, *Criticizing the Judiciary*, 43 AM. L. REV. 917 (1909).

²⁸ See, e.g., Taylor, *Justice Stevens, in Rare Criticism, Disputes Meese on Constitution*, N.Y. TIMES, Oct. 26, 1985, at 1, col. 1 (discussing criticisms by Justices Stevens and Brennan); Editorial, *The 20th-Century Justice*, N.Y. TIMES, Oct. 15, 1985, at A30, col. 1; see also, e.g., Taylor, *Who's right about the Constitution - Meese v. Brennan*, NEW REPUBLIC, Jan. 6 & 13, 1986, at 17.

²⁹ See Code of Judicial Conduct Canons 2A, 3A(6) (1984).

³⁰ See generally Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181, 1225-50 (1986).

³¹ ABA Model Code EC 8-6.

³² *In re Sawyer*, 360 U.S. 622, 631 (1959) (plurality opinion) (Brennan, J.).

³³ See ABA Judicial Code Canon 4 & commentary; see also Advisory Comm. on Judicial Activities, Advisory Op. 50 (1977).

³⁴ See ABA Judicial Code Canon 4(A), 5(A); see also Advisory Comm. on Judicial Activities, Advisory Op. 55 (1977).

³⁵ See ABA Judicial Code Canon 4 commentary.

³⁶ See, e.g., Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENTARY 2401 (1987); Miner, *Victims and Witnesses; New Concerns in the Criminal Justice System*, 30 N.Y.L. SCH. L. REV. 757 (1985).

³⁷ Kaufman, *Judges Must Speak Out*, N.Y. Times, Jan. 30, 1982, at 23, col. 1.

PRESUMED INNOCENT? NOT ALWAYS

Most Americans probably agree with President Bush that it is time to get tough on crime and *take back the streets* from the criminals - particularly in regard to drug trafficking and the violence it has spawned. In doing so, however, our courts and law enforcement officials must respect the Constitution.

On Thursday, the Supreme Court didn't do that. In its zeal to help police and prosecutors bring criminals to justice, the court turned its back on basic constitutional rights and some fundamental precepts of American justice. The court ruled 5-4 that federal prosecutors may seize money and property that criminal defendants intended to use to pay their attorneys.

The seizure of property and money obtained as a result of criminal activity is now common practice in federal drug and racketeering cases. Basically, there is nothing objectionable about seizing assets derived from criminal activity- after the criminal activity has been proven. But the court ruled that alleged ill-gotten gains could be frozen - in effect, seized- even before the accused comes to trial. That amounts to punishment before conviction and makes it difficult, if not impossible,

for the defendant to hire a lawyer of his own choosing. Justice Byron White, writing the majority opinion, compared the seizure of an indicted criminal's assets to the seizure of money stolen by a bank robber. It's a faulty comparison.

Sure, money stolen from a bank can be seized. The robbery was the crime, and the money is the evidence. It is also the rightful property of the bank and its depositors.

But that is not the case when prosecutors seize all assets of an alleged racketeer or drug trafficker. All of those assets can't be construed as evidence. Nor can police or courts be certain that all the assets were obtained through criminal activity.

The rationale for seizing the assets of an indicted criminal is that it stops the defendant from transferring those assets to someone else's name or liquidating them and moving the case out of the country. That is obviously a valid fear, and prosecutors should be allowed to take reasonable precautions to prevent that from happening.

But denying a defendant that ability to defend himself goes beyond such reasonable precautions. Adequate legal representation is a basic constitutional right. And presumption of innocence until proven guilty is the most basic underlying principle of our criminal justice system. This court decision ignored both.

Editorial, *Lexington Herald Leader*, June 25, 1989

³⁸Bridges v. California, 314 U.S. 252, 289-90 (1941) (Frankfurter, J., dissenting). See generally Note, *Public Criticism of the Courts by Lawyers - Problem in Legal Ethics*, 16 ALA. L. REV. 46 (1964); Comment, *In re Erdmann: What Lawyers Can Say About Judges*, 38 ALB. L. REV. 600 (1974) Annotation, *Attorney's Criticism of Judicial Acts Ground of Disciplinary Action*, 12 A.L.R.3d 145 (1967 & Supp. 1987).

³⁹*In re Sawyer*, 360 U.S. at 669 (Frankfurter, dissenting).

ROGER J. MINER

Mr. Miner is a judge of the United States Court of Appeals for the Second Circuit.

Reprinted by Permission of Judge Miner, and Judicature.

CRIMINAL LAWYERS

From Franklin Circuit Judge Ray Corns:

A tourist asked a service station attendant, "Do you have a criminal lawyer in this town?"

"We think so," the attendant replied. "But we can't prove it."

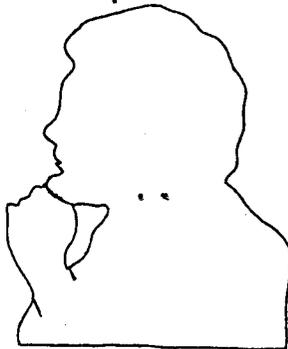
- *Lexington Herald Leader*- Dick Burdett Columnist.

CRIME PAYS

by Edward C. Monahan

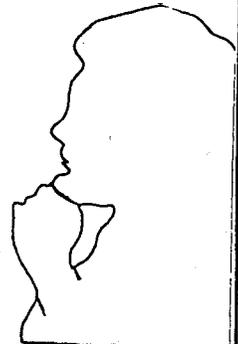
I've finally figured out what the cause of crime is.

Oh. Yeah? Tell me your insight.



Well crime is caused by a desire of a growing number of people to spend time in a crowded prison.

OH!



PUBLIC ADVOCACY ALTERNATIVE SENTENCING PROJECT*

Part of the Solution to Jail and Prison Overcrowding

HOW ALTERNATIVE SENTENCING WORKS IN KENTUCKY

A public defender refers a potential case to the DPA Alternative Placement Worker (APW), usually before a criminal defendant enters a formal plea. The APW conducts a thorough background investigation of the defendant and the offense, drawing upon information provided by law enforcement and probation officers, crime victims, employers, family members and human service professionals. The APW then prepares a detailed written proposal, consistent with the goals of public safety and victim restitution. In most instances, APW's arrange for independent evaluations and assessments of the defendant prior to sentencing. In addition, APW's screen for eligibility and pre-enroll defendants in available punishment and treatment programs in order to minimize delays, thereby enabling defendants to enter community based punishments immediately upon the judge's ruling on the Alternative Sentencing Plan (the Plan).

The Plan is presented to the court through the public defender. The APW is available at sentencing to answer questions or address concerns which the prosecuting attorney or presiding judge may have about the plan.

THE CASE OF ALLEN B.

Let's look at a case example where an alternative to a prison sentence is a possibility. Allen is a 28 year old alcoholic with no prior felonies and 14 misdemeanor arrests in the last 9 years involving alcohol, drugs and assaultive behavior. He was charged with 2 counts of wanton endangerment first degree, criminal mischief first degree and assault fourth degree after a domestic quarrel resulted in his discharging a shotgun towards his nephew. Allen pled guilty to the charges, was sentenced to 3 years and probated to an Alternative Sentencing Plan (ASP) in lieu of prison.

The Plan requires restitution to be made to the victim, for damages done to his vehicle; restitution to the community for

all costs, fines and probation fees relating to the indictment and sentence and payment for counseling and testing fees mandated in the Plan. Restitution is possible because of the condition that Allen maintain full employment. For his alcohol and substance problem, Allen attends individual and group sessions in conjunction with other treatment deemed necessary by the substance abuse counselors. Allen is also required to complete the work necessary to earn his GED certificate with the Adult Learning Center. Allen will continue to live at the same address prior to his arrest.

Deterrence will consist of presenting to the probation officer receipts for all

monies paid through the court clerk to the victim and the counseling center; pay stubs as verification of employment; written verifications of substance abuse treatment(s) and written reports to the probation officer concerning adult education status. The probation officer will determine curfew hours and other restrictions concerning Allen's living conditions.

INCARCERATION VERSUS ALTERNATIVE PUNISHMENT

In Allen's case the court accepted the alternative punishment plan presented by the defense attorney. But there are risks, even with a good alternative punishment

PAASP Selected Cumulative Statistics August 23, 1988

*Cases Referred to PAASP	151
Punishment Plans Presented in Circuit Court	91
Punishment Plans Accepted by Circuit Judge in Whole or in Part	42 (46%)
Jail and Prison Beds Made Available to Corrections	42

	Defendant Restitution: Presented to Courts	Total In Plans Granted by Courts
Dollars to Victim	\$ 46,206.20	\$26,365.13
Service Fees	\$ 3,924.48	\$ 3,684.48
Court Costs	\$ 2,537.26	\$ 1,882.26
Fines	\$ 2,488.50	\$ 2,223.00
Miscellaneous Dollars	\$ 1,670.00	\$1,160.00
Miscellaneous Hours	\$ 100.00	-0-
Community Service Hours	\$ 1,275.00	\$ 875.00

**RESOURCES TO BE UTILIZED by Defendant

Substance Abuse - In Patient	22	14
Substance Abuse - Out Patient	32	22
Mental Health/Retardation	23	12
Vocational Rehabilitation	7	4
Adult Learning Centers	39	19
Vocational Schools	11	4
Family Counseling	9	3
Sexual Abuse Counseling	3	1
Other	39	15

*Some cases involve the same client due to charges in different jurisdictions or ASP Modifications.

**A defendant can utilize more than one resource.

plan, there is no guarantee of success. The same risks exist as if the defendant were placed on parole or released by expiration of sentence from corrections. The criminal justice system model requires that certain types of risks be taken. But risks can be reduced with an alternative punishment plan that is reasonable and accountability.

Kentucky is in a crisis due to jail and prison overcrowding. The average cost of incarceration is \$12,000 annually and new prison construction costs are in excess of \$50,000 per cell. Other options must be presented to the courts for their consideration. This is necessary in order to have the prisons available for those defendants who are truly a threat to society.

If you want to know more about Alternative Sentencing in Kentucky or the Department's efforts to expand the Project to your area call Dave Norat at (502) 564-8006

DAVE NORAT
Director, Defense Services
Frankfort

"PAASP is a joint private and state funded, multi-agency effort involving the DPA, the Developmental Disabilities Counsel and the Public Welfare Foundation. The initial grantor was the Kentucky Developmental Disabilities Planning Counsel (DDPC).

STUDY: TOUGHER RULES DON'T CURB DRUNKEN DRIVERS

Associated Press

WASHINGTON - Special license plates and tough-on-drunks sentences by the only judge in a small Ohio town don't seem to deter drunken drivers, concluded a newly released study.

The study compared drunken driving statistics and interviews of drivers and law enforcement officials in New Philadelphia, where no-nonsense Judge Edward O'Farrell has been handing out unusually strict sentences to intoxicated drivers, and nearby Cambridge, where sentences are more lenient.

Researchers said their surveys "failed to show less drinking and driving in New Philadelphia."

In drunken driving cases, O'Farrell since 1982 routinely has handed out 14-day jail sentences to first-time offenders; imposed a standard \$750 fine; rejected plea bargains; and required the vehicles of restricted drivers to be tagged with a distinctive red-on-yellow license plate.

In Cambridge, 40 miles south of New Philadelphia, drunken drivers usually get sentences of three days or less in special education camps.

JUDGE STEERS TRAFFIC OFFENDERS TOWARD TV DRIVING SPECIAL

Associated Press

OKLAHOMA CITY - A judge with a penchant for creative sentences has ordered nearly 100 traffic offenders to watch a TV special on safe driving. "We have a nice group of youthful offenders who come from the upper economic strata. Fining them 40 to 50 bucks isn't going to do anything," said Robert Manchester, a judge in the suburban enclave The Village.

The judge said he had ordered 75 to 100 offenders to watch last night's "Valvoline National Driving Test" on CBS. The 25-question test covered defensive driving, rules of the road and basic mechanics.

Offenders must return their completed test booklets to the 48-year-old judge, who used to race motorcycles and subscribes to Hot Rod magazine.

It's not the first time Manchester has handed out an unusual punishment in the city of 12,000. "I have required kids to do the family laundry," Manchester said. Other offenders have been required to write reports. Some had to interview the police officer who made the arrest "so they'll know that officer is human and not some cretin just trying to stop their fun," he said.

Then there was the teen-ager who said he was driving fast to make the heater come on more quickly. "I had him do a report on how a cooling system functions," Manchester said. "He came back in and said, 'That was really silly of me, wasn't it?' I said, 'Yes, but I could have told you that and you wouldn't have understood me.'"

DPA MOTION FILE

MOTIONS COLLECTED, CATEGORIZED, LISTED

The Department of Public Advocacy has collected many motions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various motions, and a listing of each motion. Each motion is a copy of a defense motion filed in an actual Kentucky criminal case. Many motions include memorandum of law. They were updated in February, 1989.

CAPITAL CASES

The motion file contains many motions which are applicable to capital cases, and many motions filed in capital cases on non-capital issues.

COPIES AVAILABLE

A copy of the categories and listing of motions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the motions are free to public defenders in Kentucky, whether full-time, part-time, contract, or conflict. Criminal defense advocates can obtain copies of any of the motions for the cost of copying and postage. Each DPA field office has an entire set of the motions.

HOW TO OBTAIN COPIES

If you are interested in receiving an index of the categories of motions, a listing of the available motions, or copies of particular motions, contact:

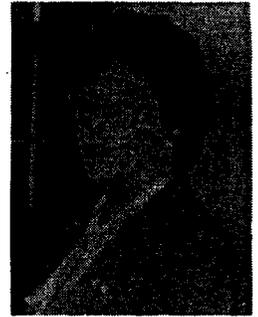
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DPA Librarian
1264 Louisville Road
Frankfort, Kentucky 40601
(502) 564-8006 Extension 119

CROCODILE TEARS

New York Representative Mario Biaggi, a highly decorated policeman who became a popular 10-term congressman, was sentenced to 2 and 1/2 years in jail and fined \$500,000 for accepting free vacations from a political ally.

There's no one in this world more remorseful than myself," he told the judge as he wept. But he said he had done no wrong.

THE NATIONAL ALLIANCE FOR THE MENTALLY ILL



Barbara Rankin

The National Alliance for the Mentally Ill (NAMI) was organized 10 years ago to address the acute needs of families who, after deinstitutionalization of the mentally ill, became primary care givers of their mentally ill family member with no information or education on how best to accomplish this. The goal was to provide support for each other, to educate themselves and others about the illnesses, to improve the quality of life for their loved ones and advocate for improved services and research. All 50 states now have state and local affiliates. Kentucky has a state affiliate and 13 local chapters.

In response to specific need NAMI has developed a number of special committees such as the *Homeless and Missing Network*, the *Sibling Network*, etc. The committee of special focus here is the *Forensic Network*, dealing with the problems of the mentally ill involved in the criminal justice system - a growing number. Nationally, there are now as many mentally ill in prisons and jails as there are in state hospitals.

The serious disabling mental illnesses we are talking about are primarily schizophrenia and affective disorders (manic depression and depression), now known to be no fault brain diseases. The majority of our members are parents with an adult child and the disease most are attempting to cope with is schizophrenia. There is no way to adequately describe the anguish and devastation caused by these brain diseases to the victim of the disease and the family. A previously bright, functioning person loses their future. Most could be helped with appropriate medication and supportive services but herein lies the problem. The brain is the sick organ and logical thinking is disrupted. The person does not believe he needs treatment and the law prohibits us from forcing treatment unless the person becomes dangerous.

As civil commitment became more restrictive it became increasingly difficult to get treatment for a person who

was clearly very disturbed but refused treatment. In 1975, Hawaii enacted a very restrictive civil commitment statute. By 1981, penal code evaluations in the state hospital rose from 9% of all admissions to 29% of all admissions. Civil commitment statutes are a place to keep the mentally ill out of the criminal justice system, and many states are now broadening their criteria.

The focus of the Forensic Committee of NAMI is to assure appropriate treatment for the mentally ill law violator and to urge for the legislative changes necessary to accomplish this. We believe that a person who commits a crime due to untreated, undiagnosed or inappropriately treated brain disease should be treated, not punished, and should be diverted from the criminal justice to the mental health system for treatment. We know how to do better than we are doing, but are unable to do so until legislation and adequate funding allows us to treat sick people BEFORE they become dangerous and to provide the essential community support services.

Nationally, between 1972 and 1980, criminal commitments increased 81%. Criminally committed, or forensic, cases are the fastest growing segment of the state's mental hospital population. We have gone too far in protecting the rights of sick people and are now allowing them to "rot with their rights on." We are discriminating against very sick people by denying them treatment unless they become violent. They are then prosecuted, treated as criminals and punished.

Kentucky has the misfortune of being one of 12 states with Guilty but Mentally Ill (GBMI), hastily adopted in the furor over the Hinckley trial. The intent of the law was admirable - to treat the mentally ill - however the appropriate treatment does not follow and increasingly we are warehousing the mentally ill in jails and prisons. As with other states, our prisons and jails are overcrowded and due to financial constraints, programs for the mentally ill are very limited, if available

at all. Not Guilty by Reason of Insanity (NGRI) was the only protection for truly mentally ill defendants and in Kentucky this verdict has not been given in a major case since juries have an alternative that sounds appropriate.

In Kentucky, GBMI does not result in any different treatment than just plain guilty. If the adjudicated GBMI person enters the prison stabilized on medication, if this medication is not discontinued, treatment will consist of a loud speaker announcement for pill call. A person adjudicated GBMI does not go to any different facility than any other inmate. If he deteriorates and becomes a behavior problem the most usual result is isolation for long periods. This is almost guaranteed to make a psychotic person worse. To protect his constitutional rights, an inmate who is psychotic, delusional and paranoid and refuses voluntary medication will remain psychotic, delusional and paranoid, rather than be taken for a hearing to determine if involuntary medication would help this person get back in touch with reality. A lucky few may be transferred to a mental health unit for stabilizing, though if they do not become rational enough to understand the need for medication, and take it voluntarily, they most likely will not receive it. If stabilized they are then returned to the general prison population.

Research has clearly shown that for schizophrenia and affective disorders medication is an essential basic part of the treatment and used in conjunction with counseling, low stress and structured environment, the great majority of individuals will become stabilized. Prison can never be a low stress environment. The noise, overcrowding, rules, harassment by other inmates are very stressful. Prisons are built for security and punishment. In 1978, in Oregon, while the state hospital population was falling dramatically with restrictive civil commitment, the state penitentiary population was increasing. With the expense involved in the construction of

new correctional beds, state government looked to the state hospital programs for specific mentally ill offender groups that could reduce overcrowding in the state penitentiaries. They legislated a major change for NGRI acqutees. (They rejected GBMI.) They established a Psychiatric Security Review Board (PSRB) whose function was to protect society with careful management of insanity acqutees, by assuring close supervision in the hospital or community as deemed appropriate by the condition of the individual. The person is supervised for the maximum length of time for which they could have been sentenced for the crime. In 1983 they changed the term NGRI to Guilty Except for Insanity as more palatable to juries and the public and more descriptive of their system. In effect, they have instituted an insanity sentence.

Oregon's centralized data keeping has resulted in much information on the effectiveness of the PSRB and many studies have been done. Initially, attorneys were the greatest foe of this innovative program. They are now it's biggest advocates. Their recidivism rate is dramatically decreased. Nationally, the recidivism rate among released offenders is approximately 64%. Under the PSRB for the mentally ill the rate is 13%. (6% felonies and 7% misdemeanors.) A worthy goal. The recidivism appeared to be related to some degree to the quality of care in the community. The PSRB provides both treatment and careful surveillance for a group of very mentally disordered persons.

The Oregon PSRB has received national attention as a very promising method of managing the mentally ill offender and other states are looking more closely at this. Using Oregon as a model, Connecticut legislated a PSRB four years ago. Both states are pleased with their programs. This is not only a more effective and humane way to deal with the mentally ill, it also helps ease prison overcrowding and better protects the public.

In states where studies have been done about 8% of the inmate population had schizophrenia. A study in New York found almost 25% of the inmates severely or significantly psychiatrically and/or functionally disabled. Considering that Kentucky has projected a 600 inmate per year increase and the cost of constructing new beds currently is about \$80,000/bed, perhaps Kentucky should be looking at alternatives for specific groups of offenders before all the states' resources are needed to continue building more prisons.

The Forensic Committee of NAMI has recommended the following to the platform committee of NAMI:

- NAMI unequivocally opposes the death penalty for chronically mentally ill offenders.
- NAMI opposes the adoption of "guilty but mentally ill" statutes and urges their repeal where they now exist.
- NAMI endorses the passing of state statutes providing improved systems for administration in insanity acqutees, released mentally ill prisoners and parolees. (The Psychiatric Security Review Board in place in Oregon and Connecticut for the administration of insanity acqutees is a relevant model.)
- NAMI endorses the passing of state statutes mandating humane treatment of the chronically mentally ill in the criminal justice system and diversion of such individuals to state departments of mental health, who will assume treatment and habitation responsibilities.
- NAMI urges state departments of mental health to include forensic sections in ongoing state planning processes mandated by P.L.99-660.

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BARBARA RANKIN
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(606) 887-2851

Barbara is the past president of the Kentucky Alliance for the Mentally Ill and is current the vice-president. She is the forensic co-ordinator of the the National Alliance and the Kentucky Chapter. She became active in the organization in 1985 due to her son's involvement as a mentally ill offender.

RIGHTS CARDS AVAILABLE

My lawyer has told me not to talk to anyone about my case, not to answer any questions, and not to reply to accusations. Call my lawyer if you want to ask me questions, search me or my property, do any tests, do any lineups, or any other identification procedures. I do not agree to any of these things without my lawyer present and I do not want to waive any of my constitutional rights.

\$5.50 covers Postage and Handling for 100 cards.

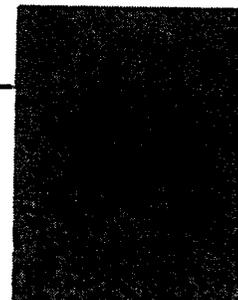
Send your check or money order payable to the Kentucky State Treasurer to:

Rights Cards
DPA
1264 Louisville Road
Frankfort, KY 40601



Dave Norat

ASK CORRECTIONS



Shirley Sharp

TO CORRECTIONS:

My client is presently incarcerated in jail, and is not eligible to meet the Parole Board until Spring, 1991. He has been told he could be released by parole earlier, if he could be placed on Intensive Parole Supervision. Is this true, and what is the criteria?

TO READER:

On a monthly basis Probation and Parole will review cases for possible placement into the Intensive Supervision Program. Names of inmates meeting the criteria will be forwarded to the Parole Board for possible consideration for early parole. The criteria for selection are as follows:

- a. Candidates must have a home placement in a site location.
- b. Candidates must be within 18 months of their parole eligibility date. Persons who have been given serve outs or deferments by the board are not eligible.
- c. Candidates who have been denied consideration by the Board may have their cases resubmitted after a nine-month waiting period, unless otherwise indicated by the Board. All requests for reconsideration must be forwarded to the Assistant Director of Probation and Parole.
- d. Candidates cannot have any outstanding statutory good time loss for major violations less than one year old.
- e. Candidates must not have an outstanding detainer.
- f. Candidates serving sentences for the following offenses will not be considered for early parole to the Intensive Supervision Program:

- 1. Rape - any degree or Attempted Rape;
- 2. Sodomy - any degree or Sexual Abuse I;
- 3. Escape or Attempted Escape - within last 12 months;
- 4. Robbery, First Degree;
- 5. Assault, First Degree;
- 6. Murder;
- 7. Persistent Felony Offender I.

g. After reviewing the inmate file a recommendation will be made to the Parole Board. Probation and Parole may decline to forward an applicant's name based on past performance on probation or parole, the nature of present offense, or prior criminal record.

TO CORRECTIONS:

If my client feels she is eligible for the Intensive Supervision Program and does not know if her name is on the list, is there anyone she can write to?

TO READER:

Your client may write Hazel Combs, Assistant Division Director, Division of Probation and Parole, Corrections Cabinet, Fifth Floor, State Office Building, Frankfort, Kentucky 40601. Your client should provide her name as it appears on the judgment and institution number.

Instructions Manual

The Department of Public Advocacy has collected many instructions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various instructions in a 7 volume manual. Each instruction is a copy of a defense instruction filed in an actual Kentucky criminal case. They are categorized by offense and statute number. They were updated in February, 1989.

CAPITAL CASES

In addition to containing tendered capital instructions, the DPA Instructions Manual contains instructions actually given in many Kentucky capital cases for both the guilt/innocence and penalty phase.

COPIES AVAILABLE

A copy of the index of available instructions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the actual instructions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Criminal defense advocates can obtain copies of any of the instructions for the cost of copying and postage. Each DPA field office has an entire set of the manuals.

If you are interested in receiving an index of instructions, or copies of particular instructions, contact:

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This regular *Advocate* column responds to questions about calculation of sentences in criminal cases. Shirley Sharp is the Correction Cabinet's Offender Records Administrator. For sentence questions not yet addressed in this column, call Shirley Sharp (502) 564-2433 or Dave Norat, (502) 564-8006. Send questions for this column to Dave Norat, Department of Public Advocacy, 1264 Louisville Road, Frankfort, KY 40601.

BOOK REVIEW

Kaplan, H.I. & Sadock, B.J.
Comprehensive Textbook of Psychiatry.
Williams & Wilkins Co.
Baltimore, 1989
Price \$182.50



William Weltzel

When it rains, it pours. There has been a deluge of new and well written psychiatric textbooks. The American Psychiatric Press published the *Textbook of Neuropsychiatry* in 1987 and the *Textbook of Psychiatry* in 1988. J. B. Lippincott's multi-volume textbook *Psychiatry* made its press run in 1987. And the *Comprehensive Textbook of Psychiatry* (CTP-V) arrived in the spring of 1989 as a spiffy, new, two volume 5th edition.

The *Comprehensive Textbook of Psychiatry* has served as a valuable resource for the past 22 years. The latest model weighs 8.5 lbs. and includes 2,158 pages of text. CTP-IV weighed only 6 lbs. with 2,054 pages. Seventy-eight percent of the contributors to the 192 sections of CTP-V make their initial debut. Forensic Psychiatry receives a concise 17 pages which suggest with how much relish most psychiatrists greet involvement with the legal system. The editors claim, "This textbook constitutes the most thorough, complete, integrated, and revised book of record of clinical psychiatry."

CTP-V comes only as a 2 volume set. The list of references at the end of each section has been expanded to include 20-25 other resources. Most sections in the book received new authors and the new summaries reflect current changes in theory and developments in research. Childhood and adolescent disorders have attracted more emphasis and the list of problem areas discussed has been lengthened. The chapter on neural science contains 15 sections that illustrate how much psychiatry plays a part in the exciting discoveries of medicine. Titles include Neuropeptides: Biology & Regulation; Intraneuronal Biochemical Signals; Psychoneuroendocrinology; and Neuronal Development and Plasticity. Sigmund Freud, M.D., who was first of all a neurologist, would smile with pleasure at this turn of events and be pleased with the continuing emergence of a scientific basis for clinical psychiatry.

Geriatric issues receive special emphasis in keeping with population trends and the increased interests that academic centers now give this topic (e.g., the Sanders-Brown Center on Aging at the University of Kentucky). Protecting the individual rights and resources of this increasingly numerous segment of us deserves the collaboration of both professions. The American Board of Psychiatry and Neurology will award certification with special competence in geriatric psychiatry beginning in 1992.

The editors tell us that the text was written to be read like a novel beginning with the 3 pillars of clinical psychiatry: neural science, psychology, & the social sciences, especially anthropology and sociology. Clinical psychiatric syndromes are discussed in ways consistent with the *Diagnostic and Statistical Manual of Mental Disorders, III - Revised* (1987) of the American Psychiatric Association. This latter text is the official nosological compendium of recognized psychiatric disorders. Theories tested with quantification and experimentation make for good clinical science and such a process shows up in evidence in this text.

Despite the editors' invitation to savor, most of us will use this text like a buffet — sampling a little of this and that but zeroing in on what interests us most.

Samples from the menu include:

In the 1982 position statement of the American Psychiatric Association on the Insanity Defense, the recommendation of our profession included the opinion that psychiatric disorders potentially leading to exculpation "Should usually be of the severity (if not always of the quality) of the conditions that psychiatrists diagnose as psychoses." The mental disorders of schizophrenia and other paranoid states along with bipolar and other major depressions fit that description. These disorders are described and explained in a scholarly but understandable fashion. (It would help to have a psychiatric glossary handy.) In

Kentucky, the Model Penal Code was restated in KRS 504. In the cognitive prong, the word *appreciate* substitutes for the M'Naghten term of *know*. One Kansas court opined that "A sense of understanding broader than mere cognition" provides the best opportunity for reconciling the traditional concepts of legal and moral accountability with contemporary scientific knowledge about psychiatric dysfunction. *State v. Smith, Kan., 574 P.2d 548, 554 (1977)*

Sometimes delusions, hallucinations, gross disorganization of behavior, incoherence, or extreme affective disturbance can rise to the level of insanity. Relevant chapters in CTP-V should help you and your expert think through such issues and apply them to a particular set of facts.

Organic (physical) mental syndromes and disorders are described in a chapter that should arouse your curiosity when a client presents with a history of really bizarre behavior. Delirium, dementia, or even a delusional disorder can result from exposure to toxins, head trauma, or even physical illness like a thyroid disorder. Probably the most overlooked component of an evaluation involves neglecting a good neurological exam and many times the needed neuropsychological testing like a Halstead-Reitan Battery or a Luria-Nebraska Neuropsychological Battery. Before accepting a psychological and psycho-social explanation of events, make sure this other possible explanation for seriously deviant behavior is explored. The clues to follow are in CTP-V.

National Institute of Mental Health data document that alcohol and drug abuse affect 25.5 million Americans. Substance dependence victims suffer all the symptoms of abuse plus a tolerance for the drug so that increased amounts of it are necessary for the desired effects. The five major classes of drugs are sedative-hypnotics, opiates, hallucinogens, marijuana and psychostimulants. Not all are physically addictive but all can lead

to psychological addiction and the consequent belief by the user that the drug is needed just to function. When your clients are drug/alcohol users, often these agents have mightily influenced choices and behaviors. You need to know the facts about addictions and the concept of craving— which often undoes the good intentions of well motivated participants in rehabilitation. Relapse is frequent. The chapters on alcohol and substance abuse will prove useful in helping you understand better the behaviors/needs/-motivations of your drug dependent client. Much more is involved beyond greed and opportunism.

I have access to all of the texts mentioned in this review. CTP-V holds its own with the competition and would be a prudent choice for your library if you would choose only one textbook for reference. If you already have easy access to CTP-IV (1985), then I would recommend purchase of American Psychiatric Press's, *Textbook of Psychiatry*, (1988). This latter text has a glossary, is encyclopedic, and comes as one volume.

The textbooks I have mentioned are intended to education and illuminate. None of these volumes should be construed as establishing a standard for psychiatric care. That onerous and dubious distinction may befall *Treatments of Psychiatric Disorders*. This 4 volume text carries such a disclaimer and was published in the spring of 1989 by the American Psychiatric Press. I may rue the day I served as a consultant to that project.

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Dr. Weitzel is a Diplomate of the American Board of Forensic Psychiatry, Psychiatry and Neurology. From 1975-79 he was the Director of the University of Kentucky's Inpatient Psychiatry Service. He has been in private practice in Lexington since 1979 and is presently the Director of the Adult Psychiatry Service at Charter Ridge Hospital. From 1977-82 he was a lecturer at the University of Kentucky Law School for "Law, Psychiatry and Public Policy."

All of the books discussed in this review are available or will be available in DPA's Frankfort Library. Contact Tezeta Lynes, DPA Library for access to these.

STAFF CHANGES

RESIGNATIONS

Jeff Kelly, formerly an Assistant Public Advocate with the Hopkinsville office for two years, resigned on September 1, 1989 to join the Johnson City, Tennessee Public Defender office. Jeff will be receiving a salary of \$29,500 the first year - an \$8,000 increase over what DPA was paying him, and will go up to \$33,000 next year with \$2,000 increases for the next 3-4 years.



Cindy Russell formerly an Assistant Public Advocate with our Stanton office resigned on September 4, 1989 to go to Indiana. Cindy had been with DPA since February, 1987.

Lewis Kuhl formerly an Assistant Public Advocate with our LaGrange office resigned on September 29, 1989 to join a Louisville Car Dealership where he will make approximately \$8,000 more per year. Lewis has been with DPA since September, 1987.

Jane Osbourne formerly as Assistant Public Advocate with our Hopkinsville office resigned on August 31, 1989 to become the Benton Assistant Commonwealth Attorney for more money and to have a private practice. She'd been with DPA for 2 months.

Tom Kimball, formerly the Directing Attorney with our Pikeville office, resigned on September 19, 1989. He joined DPA in September, 1987. He received a \$10,000 salary increase when he joined the Tazwell, Tennessee Public Defenders office.

Experienced Attorneys Leave DPA

Since October 1, 1988, 18 attorneys have left DPA with a combined total service and experience to DPA of 87 years. Three left in September alone. DPA's turnover rate is three and one half times that of other state government agencies.

The three DPA attorneys who left in September went to better paying jobs.

PARALEGAL APPOINTMENT

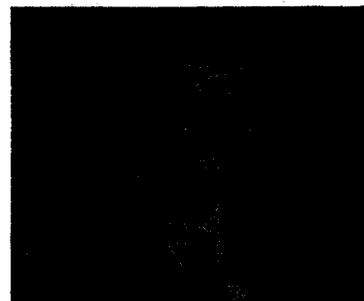
Laurie Grigsby, a 1989 graduate of Eastern Kentucky University joined DPA's LaGrange post-conviction office on August 16, 1989.

Crystal Craddock-Posey, a 1988 graduate of Murray State University joined DPA's Eddyville post-conviction office on August 1, 1989.

Shelly Cope, a 1979 graduate of Murray State University joined DPA's Eddyville post-conviction office on August 1, 1989.

Lynn Toy, a 1989 graduate of Morehead State University joined DPA's Morehead office on August 1, 1989.

NEW ASSISTANT PUBLIC ADVOCATES



Mike Williams joined MLS on September 1, 1989. Mike is a 1974 graduate of Chase Law School. He taught at St. Henry High while attending law school and for a year thereafter. From 1974-78 he was in private practice in Cincinnati, Ohio and was on the public defender roster. In March 1985, he came to Campbell County, Kentucky and served as prosecutor until March, 1985. He went into private practice in March of 1985 until he became the public defender administrator of Campbell County in 1988. As the Campbell County public defender he, along with Mott Plummer, served as counsel in the much publicized Gregory Combs arson case.

FUTURE CRIMINAL DEFENSE SEMINARS

NACDL Seminar
October 27, 1989
Nashville, TN
(202) 872-8688

NCDC Closing Argument
Nov. 3-5, 1989
Portland, ME
(912) 746-4151

NLADA Annual Conference
November 14-17, 1989
Kansas City, Missouri
(202) 452-0620

Advanced Cross-Examination
NCDC
Atlanta, GA
Spring, 1990

**DPA 18th Annual
Public Defender Seminar**
June 3-5, 1990
Lake Cumberland State Park

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The Kentucky Department of Public Advocacy is a statewide public defender system with regional trial offices across Kentucky. The Department has a long tradition of vigorous advocacy on behalf of indigent citizens accused of crime.

There are currently 11 vacancies in DPA offices in Hazard, Stanton, London, Hopkinsville, Morehead, Somerset, Frankfort, and Pikeville.

If you are interested in working for the Department of Public Advocacy, contact:

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Director of Defense Services
1264 Louisville Road
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