

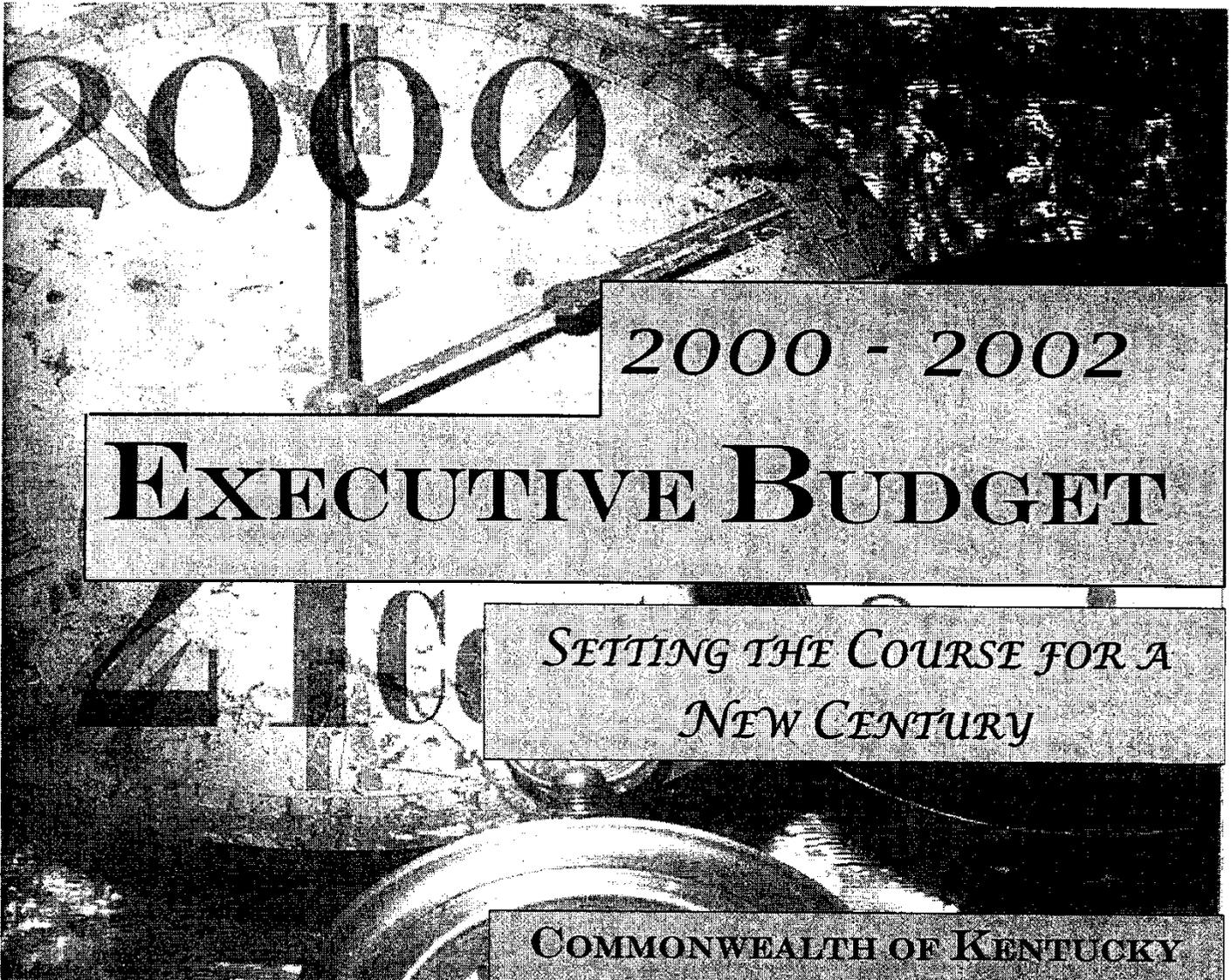


The Advocate

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

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2000 - 2002

EXECUTIVE BUDGET

SETTING THE COURSE FOR A
NEW CENTURY

COMMONWEALTH OF KENTUCKY

PAUL E. PATTON
GOVERNOR

JAMES R. RAMSEY
STATE BUDGET DIRECTOR

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The Advocate

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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EDITORS:

Edward C. Monahan, Editor: 1984 – present

Erwin W. Lewis, Editor: 1978-1983

Patti Heying, Graphics, Design, Layout

Contributing Editors:

Rebecca DiLoreto – Juvenile Law

Dan Goyette – Ethics

Bob Hubbard – Retrospection

Ernie Lewis – Plain View

Dave Norat – Ask Corrections

Julia Pearson – Capital Case Review

Jeff Sherr - District Court

Department of Public Advocacy
Education & Development
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

Tel: (502) 564-8006, ext. 236; Fax: (520) 564-7890

E-mail: pheyng@mail.pa.state.ky.us

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From The Editor...

ON OUR COVER: DEFENDER FUNDING

Governor Paul E. Patton has submitted his 2000-2002 Executive Budget: *Setting the Course for a New Century*. The Governor has five funding priorities: Lifelong Learning, Healthier Kentuckians, Growing Our Economy, Protecting Our People, and Fiscal Responsibility.

Under Protecting Our People, the Governor has 3 major funding priorities listed in the following order: Public Advocacy, Juvenile Justice, and Domestic Violence & Sexual Assault. The unprecedented support of DPA's funding needs is a tribute to the leadership of *The Blue Ribbon Group on Improving Indigent Defense for the 21st Century*, the Public Advocacy Commission and Public Advocate Ernie Lewis. The one page summary of Governor Patton's request for funding for public advocacy appears on page 4 of this issue.

JUVENILES AND THE DEATH PENALTY

A major initiative of DPA in the 2000 General Assembly is House Bill 311 which would eliminate the death penalty for juveniles. It is sponsored by Representative Eleanor Jordan with co-sponsors Bob Heleringer and Mary Lou Marzian. It is supported by the Department of Juvenile Justice. We present in this issue many of the facts about the death penalty and juveniles.

Edward C. Monahan
Editor

Nothing in the world can take the place of persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent. The slogan "press on" has solved and always will solve the problems of the human race.

Calvin Coolidge
30th U.S. President

Public Advocacy

Blue Ribbon Group
\$10 Million

Public defenders represent those who have been accused of crimes but are unable to hire their own attorney. There are 227 full time and 90 part-time public defenders in Kentucky. There are 41 people on death row in Kentucky, all of whom are being represented by public defenders.

In the spring of 1999, the Public Advocate and the Public Advocacy Commission formed a Blue Ribbon Group to assess the status of Kentucky's public defender system and to compare it to national counterparts:

- Kentucky ranks among the bottom five in funding of public defender systems.
- Kentucky ranks near the bottom for public defender salaries.
- Kentucky provides inadequate juvenile representation.
- Kentucky public defender caseloads are two times the national average.
- Private lawyers are inadequately compensated for public defender work.

The 2000-2002 budget responds to the Blue Ribbon report and ensures that Kentucky meets its constitutional obligation to provide legal representation for indigent citizens accused of serious crimes. The Governor's budget recommendation includes \$4 million in fiscal year 2001 and \$6 million in fiscal year 2002 to:

- Correct a budget imbalance caused by increased caseloads.
- Bring public defender salaries even with comparable positions in the southeast region.
- Open new offices in 21 counties to expand the system to improve access and raise quality of representation.
- Reduce public defender caseloads by adding 10 public defenders to the system.
- Expand the appellate capacity by one attorney.
- Provide adequate support services to the public defender system.

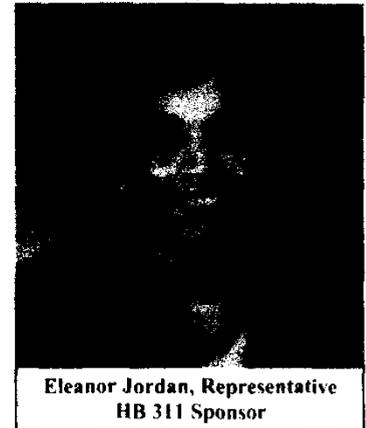
“Over the years we have admirably delivered services to Kentucky’s indigents who stand accused or convicted of crimes. However, due to funding limitations, the Department has never been able to serve all those in need.”

Michael D. Bowling
Robert F. Stephens
Co-Chairs, Blue Ribbon Group

FACTS

ON THE JUVENILE DEATH PENALTY

AND HB 311, COMMITTEE SUBSTITUTE



THE DEATH PENALTY IS CONTRARY TO THE FUNDAMENTAL PREMISE OF THE JUVENILE JUSTICE SYSTEM: THAT CHILDREN CAN BENEFIT FROM A TREATMENT-ORIENTED APPROACH WHICH INCLUDES ACCOUNTABILITY AND GRADUATED SANCTIONS. IT IS NOT IN SOCIETY'S INTEREST TO GIVE UP ON CHILDREN.

A review of the literature by the American Psychological Association (APA) has led the APA to include the state-sanctioned taking of lives, including taking the lives of juveniles, in an August, 1996 policy statement on social practices that induce violence.

THE DEATH PENALTY IS NOT A DETERRENT FOR CHILDREN.

- *Children are often impulsive and reckless.*
- *Children often have little concept of death.*

LIFE WITHOUT PAROLE FOR 25 YEARS HOLDS JUVENILES RESPONSIBLE FOR THEIR CRIMES.

The new 1998 provision of 85% parole eligibility for a term of years for violent offenders also now holds juveniles accountable in a significant way.

CHILDREN ARE DENIED MANY RIGHTS DUE TO THEIR INABILITY TO EXERCISE MATURE AND SOUND JUDGMENT.

- 18 is the age to vote under the 26th Amendment to the United States Constitution.
- 18 is the age of majority in Kentucky. KRS 2.015.
- 21 is the age to buy and possess alcohol. KRS 244.080, .085, 087, .090.
- Children are not allowed to contract until they are 18. KRS 371.010(2).
- Children must be 18 before they are allowed to buy cigarettes. KRS 438.300.
- Persons under 18 are not permitted a driver's license if they have not graduated from high school or are not enrolled in school.
- Children must be 18 before donating their bodily organs. KRS 311.175.
- Children must be 18 generally (unless they are parents) before they are allowed to make a will. KRS 394.020-030.
- Children must be 18 (unless there is parental or judicial consent) in order to marry. KRS 402.020.

(Continued on page 6)

(Continued from page 5)

THERE HAS BEEN A STEEP DECLINE IN VIOLENT JUVENILE CRIME NATIONALLY AND IN KENTUCKY

Nationally, the FBI has reported that for the seventh straight year serious crimes fell for juveniles and adults. The rate for all violent crime last year fell to its lowest level since 1985 for adults and juveniles. Arrests for those under 18 fell 4.2%. Arrests of those under 18 for murder decreased 11.6% and arrests for Part I (murder, rape, robbery, aggravated assault, burglary, theft) crimes fell from 3,741 to 3,136 from 1996 to 1997. See Kentucky State Police *Crime in Kentucky Reports*.

THE DEATH PENALTY IS SELDOM USED AGAINST CHILDREN

- Only 2% of the total of persons executed in this country were children at the time of the crime.
- In Kentucky, only 3 juveniles (*Ice, Stanford, Osborne*) were sentenced to death since 1976; only two persons (*Stanford* and *Osborne*) remain on death row who were juveniles at the time of their crimes.

WHEN THE DEATH PENALTY IS USED AGAINST CHILDREN IN THE UNITED STATES, COURTS REVERSE AT A HIGH RATE.

- Between January 1973 and June 1999, there have been 180 juvenile death sentences. Of those 180, 70 are still under the sentence of death, 13 have been executed, and 97 or 54% have been reversed on appeal. Of the 180, 110 have been finally resolved as the remainder are still in litigation. Of those 110, 97 or 88% have been reversed. See Victor Streib, *The Juvenile Death Penalty Today; Death Sentences and Executioners for Juvenile Crime, January 1973-June 1999* (1999). This is a very high reversal rate in the criminal justice system and indicates that there are either many errors in these trials or that death is not an appropriate sentence for these offenders.

THE DEATH PENALTY IS USED IN ONLY HALF THE STATES FOR JUVENILES.

- In 16 of the jurisdictions (15 states and the federal government) with the death penalty, 18 is the age of accountability: CA, CO, CT, IL, KS, MD, MT, NE, NJ, NM, NY*, OH, OR, TN, WA (by Court decision), and U.S. Other states have either no minimum age or a minimum under 18. *NY's law only allows the death penalty for those "more than 18."
- In 5 states, 17 year olds are eligible for death: FL, GA, NH, NC, TX.
- In 18 states, 16 year olds are eligible for the death penalty: AL, AZ, AK, DL, ID, IN, KY, LA, MS, MO, NV, OK, PA, SC, SD, UT, VA, WY.

THE DEATH PENALTY IS UNCONSTITUTIONAL FOR THOSE BELOW THE AGE OF 16.

- The United States Supreme Court declared in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) that it is a violation of the 8th Amendment to impose death upon children below the age of 16.
- The United States Supreme Court rejected a challenge under the 8th Amendment to capital punishment for those who are 16 or 17 years of age. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

(Continued from page 6)

THE UNITED STATES IS ISOLATED IN THE WORLD IN THE KILLING OF JUVENILES.

- Since 1990, only 6 countries have executed juveniles - the United States, Iran, Nigeria Pakistan, Saudi Arabia, and Yemen.
- 3/4ths of the nations of the world (73 of 93 reporting to the ABA in 1986) set 18 as the minimum age for executions.
- In 1966, the General Assembly of the United Nations agreed in the International Convention of Civil and Political Rights, Article 6(5) that the "sentence of death shall not be imposed for crimes committed by persons below 18 years of age..." President Carter signed this covenant for the United States in 1978. In 1992, the Senate ratified this International Convention but only after attaching a specific reservation to Article 6(5).

The Convention on Rights of the Child, Article 37(a), states, "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age. . ." Every nation except the United States and Somalia have agreed to this Convention.

THE 1997 AMERICAN BAR ASSOCIATION (ABA) MORATORIUM CALL IS BASED IN PART ON THE FACT THAT THE STATES CONTINUE TO SENTENCE CHILDREN TO DEATH.

In the 1988 report of the Criminal Justice Section of the ABA, it was stated that "The spectacle of our society seeking legal vengeance through execution of a child should not be countenanced by the ABA."

OTHER FACTS

- 7 children were executed prior to 1800.
- 97 children were executed prior to 1900.
- The youngest child to be executed in this country was 10.
- The American Law Institute Model Penal Code recommends against the death penalty for juveniles.
- Of 13,847 legal executions in American history, 288 of them were of children.
- Kentucky has not executed a juvenile in 40 years.

NATIONALLY

- There are currently 70 death row inmates (all male) sentenced as juveniles, about 2% of the total death row.
- 37% of these juveniles are in Texas.
- 13 men have been executed for crimes committed as juveniles since 1976.
- Characteristics of offenders and victims in national juvenile death penalty cases as of June, 1999, are:

OFFENDERS	
Age at Crime	Race
16 = 18 (26%)	B = 30 (43%)
	L = 14 (20%)
17 = 52 (76%)	W = 26 (37%)

VICTIMS		
Age	Race	Sex
Under 18 = 18 (20%)	A = 5 (5%)	M = 45 (48%)
18 TO 49 = 57 (63%)	B = 13 (14%)	F = 48 (52%)
50 & over = 16 (18%)	L = 9 (10%)	Unknown = 2
unknown = 4	W = 64 (70%)	
	Unknown = 2	

**THE JUVENILE DEATH PENALTY IS RACIALLY BIASED
IN KENTUCKY.**

- 2/3rds of the 288 children executed in the nation's history were black.
- 100% of the 40 children executed in the U.S. for the crimes of rape or attempted rape were black.
- 2/3rds of children now on death row in the United States are black, including one of two individuals on Kentucky's death row who committed their crimes as juveniles.
- Four of six (67%) children executed in Kentucky history have been black:

NAME	RACE	COUNTY	CRIME	DATE EXECUTED	AGE
1. Silas Williams	B	Woodford	Murder	1913	16
2. Frank Carson	W	Nelson	Murder	1933	17
3. Burnett Sexton	W	Perry	Murder	1943	17
4. William Gray	B	Fayette	Murder	1943	17
5. Carl Fox	B	Campbell	Rape	1945	17
6. Arthur Jones	B	Mason	Murder	1946	16

HOUSE BILL 311

Committee Substitute

- Eleanor Jordan, Bob Heleringer, Mary Lou Marzian

AN ACT relating to the Kentucky Unified Juvenile Code.

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

Section 1. KRS 640.030 is amended to read as follows:

A youthful offender, if he is convicted of, or pleads guilty to, a felony offense in Circuit Court, shall be subject to the same type of sentencing procedures and duration of sentence, including probation and conditional discharge, as an adult convicted of a felony offense, except that:

- (1) The presentence investigation required by KRS 532.050 shall be prepared by the Department of Juvenile Justice or by its designated representative;
- (2) Except as provided in KRS 640.070, **and subsection (5) of this section**, any sentence imposed upon the youthful offender shall be served in a youth facility or program operated by the Department of Juvenile Justice until the expiration of the sentence, the youthful offender is paroled, the youthful offender is probated, or the youthful offender reaches the age of eighteen (18), whichever first occurs. If an individual sentenced as a youthful offender attains the age of eighteen (18) prior to the expiration of his sentence, and has not been probated or released on parole, that individual shall be returned to the sentencing court. At that time, the sentencing court shall make one (1) of the following determinations:

- (a) Whether the youthful offender shall be placed on probation or conditional discharge;
 - (b) Whether the youthful offender shall be returned to the Department of Juvenile Justice to complete a treatment program, which treatment program shall not exceed a period in excess of six (6) months. At the conclusion of the treatment program or at the expiration of six (6) months, whichever first occurs, the individual shall be finally discharged; or
 - (c) Whether the youthful offender shall be incarcerated in an institution operated by the Department of Corrections;
- (3) If a child has attained the age of eighteen (18) prior to sentencing, **except as provided in subsection (5) of this section**, he shall be returned to the sentencing court at the end of a six (6) month period if he has been sentenced to a period of placement or treatment in a Department of Juvenile Justice youth facility or program. The court shall have the same dispositional options as currently provided in subsection (2) of this section, except that youthful offenders shall not remain in the care of the Department of Juvenile Justice after the age of nineteen (19); ~~and~~—
- (4) A youthful offender who is a sexual offender as defined by KRS 197.410(1) shall be provided a sexual offender treatment program as mandated by KRS 439.340(10) by the Department of Juvenile Justice pursuant to KRS 635.500 if the youthful offender has not been transferred to the Department of Corrections pursuant to KRS 640.070; **and**
- (5) Any youthful offender who has been sentenced to life imprisonment without benefit of parole for twenty-five (25) years shall, without further court review, be incarcerated in an institution operated by the Department of Corrections upon attainment of the age of eighteen (18) years.**

Section 2. KRS 640.040 is amended to read as follows:

- (1) No youthful offender who has been convicted of a capital offense [~~who was under the age of sixteen (16) years at the time of the commission of the offense~~] shall be sentenced to capital punishment. ~~TA youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense.~~ A youthful offender convicted of a capital offense [~~regardless of age~~] may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years.
- (2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.
- (3) **Except for youth sentenced pursuant to subsection (1) of this section**, no youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.
- (4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from KRS 635.020(2), (3), (4), (5), (6), (7), or (8) shall be disposed of by the Circuit Court in accordance with the provisions of KRS 635.060.

Terroristic Threatening in Kentucky:

“Sticks and Stones May Break My Bones – But Words May Get You 12 Months in Jail”

by Brian “Scott” West, Assistant Public Defender

Like “finders, keepers; losers, weepers,” another childhood “truth” is exposed when you get to law school and read the casebooks and statutes. Words *can* harm you, if the words are threatening and you are the one who says them. Then you go to district court and discover that belief in this childhood cliché isn’t limited to children at all – your client is astounded that the words he said during a shouting match over who owns a piece of property led to a warrant for his arrest. Now he faces up to a year in jail for having an argument with someone else who *really* deserves to be put in jail (but, of course, nobody will write him a warrant).

Chances are this case is going to be dismissed on the condition of no further unlawful contact between your client and the “victim” for a year, especially if this is the first or second time in court. (I often tell the County Attorney that my client would be his complaining witness and vice-versa but for his witness winning a foot race to the courthouse, and that the county ought not to be choosing sides in a petty argument over a property line where no one ever gets hurt.) Eventually, though, the prosecutor is going to get tired of seeing your client in the courtroom, and insist that he serve six months in jail, else he takes the case to trial.

In the event you and your client opt for the latter, this article attempts to a resource guide for anyone defending terroristic threatening cases, and at the same time, an invitation for comment, correction and criticism from those who have additional or other insights. It begins with defining the offense of terroristic threatening, and then discussing available defenses, both those which have actually been used in court, and those which are applicable, at least in theory. Finally, this article discusses in depth *Thomas v. Commonwealth*, 574 S.W.2d 903 (Ky. Ct. App. 1978), a case which I believe is under-utilized by criminal defense attorneys and which stands for far more than which is contained in the annotations of WestGroup’s *Criminal Law of Kentucky*, hereinafter the “blue book.”

I. The Offense of Terroristic Threatening

Kentucky’s terroristic threatening statute KRS 508.080 covers two general kinds of threats – threats to a specific person or his property, and threats used to cause public evacuations of buildings and other structures. Unlike the offense of “menacing,”¹ the victim (or victims) does not have to be placed in reasonable apprehension of immediate injury² – in fact, the offense can be

committed even if the victim has no knowledge of the threat.³

KRS 508.080(1)(a) covers the most commonly encountered form of terroristic threatening and requires (1) a threat to commit any crime, which is (2) likely to result in death, serious physical injury, or substantial property damage to another person. “Crime” means any misdemeanor or felony.⁴ “Person” includes any human being, corporation, partnership or governmental authority.⁵ “Serious physical injury” means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.⁶ “Physical injury” means substantial physical pain or any impairment of a physical condition.⁷

KRS 580.080(2) covers the “public threat,” and makes it an offense for a person to intentionally make false statements for the purpose of causing evacuation of a building, place of assembly, or facility of public transportation. Phoning in a bomb threat to a school, or shouting “fire” in a crowded theatre immediately come to mind as examples.

Terroristic threatening is a Class A misdemeanor punishable by up to 12 months in jail and/or up to a \$500 fine.

II. Defending the Terroristic Threatening Case: What’s Out There?

There are a variety of “defenses”⁸ available to attack a terroristic threatening charge. I have organized these defenses into three categories for no other reason than because it outlines well: (A) removing an element of the prosecution’s case, (B) proving an affirmative defense after the prosecution has already made its case, and (C) establishing double jeopardy. Included within (A) are lesser included offenses which may be applicable in a given case. While this list is intended to be as complete as possible, it is also intended to spur the imaginations of attorneys out there in the trenches defending these cases. There are no doubt other defenses or ideas out there in use. Please e-mail them to the editors and we will try to print them in a future issue.

A. Knocking a Leg Out from the Prosecution’s Table – Exploiting the Limits of Terroristic Threatening

Removing an element of the prosecution’s case is the easiest

way to resolve a case short of a jury verdict. When it is apparent that the prosecution is going to fail to make its case a district judge may dismiss the case. This is especially true if the case is scheduled for a bench trial instead of a jury trial. However, in my experience, no judge will dismiss when it is apparent that the prosecution is going to make a prima facie case, even if it is equally apparent that the defendant will establish an affirmative defense. But even when the judge does not dismiss, you always have the following approach with the jury:

1. Likely to Result in "Serious Physical Injury?"

Of the above definitions, "serious physical injury" offers the best and most frequent chance to have a case dismissed prior to trial. Occasionally, someone will swear out a warrant for terroristic threatening on such threats as he said he would "bust me in the mouth," or "stomp me in the ground." Often, the county prosecutor acknowledges that these statements are slang for a fistfight, not literal descriptions of what the person uttering threats intends to do, but may still argue that they are threats to beat someone up, and that such beatings are "likely to result in a serious physical injury." Defense counsel will take the position that it is mere "trash talk" that may lead to a to brawl where eyes get blacked and noses busted, but hardly likely to cause "serious physical injury as that term is defined by statute and interpreted by courts. Certainly, "I'll bust your mouth" does not invoke the same imagery of blood and gore as the phrase, "I'll get a gun and blow your brains out!" When the threats are vague, there is usually a lot of pressure put on the complaining witness to allow the prosecutor to dismiss the case on condition of no unlawful contact. Sometimes, though, the complaining witness will insist on prosecuting his warrant and the prosecutor will agree to proceed. When that happens, an oral or written motion to dismiss is warranted, or a lesser included offense is applicable.

While there are few terroristic threatening cases upon which to rely, there are several assault cases where the courts have shown the difficulty of proving serious physical injury. In *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977), the Supreme Court found that a police officer who had been shot in the chest with birdshot from a shotgun was not so seriously injured so as to justify a first degree, rather than second degree, assault. In *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986), the Court held that in the absence of proof that a three year old child was in danger of death from cigarette burns intentionally inflicted upon him, serious physical injury was not established. If serious physical injury was not established in these cases, how can a vague and speculative "busted mouth" or "stomp in the ground" meet this standard? If the victim did not even hear the threat, or take it seriously, a dismissal should be requested. If the judge doesn't dismiss, maybe the jury will be persuaded in closing argument.

Sometimes, if the prosecutor has evidence that the intended victim was placed in reasonable apprehension of imminent physical injury, he will amend the charge to "menacing." If he

doesn't, request an instruction and question on "menacing" as a lesser included offense. A Class B misdemeanor, carrying a sentence of up to 90 days in jail and/or a \$250 fine, menacing differs from terroristic threatening only in that it requires a threat of "physical injury" as opposed to "serious physical injury", and that the victim must be placed in "reasonable apprehension" of immediate injury.¹⁰

Even when the facts adduced at trial do not support a question on menacing, I still tender the definition of "physical injury" along with the definition of "serious physical injury." This request is always granted because "physical injury" appears in the definition of "serious physical injury," and a jury has to understand the former to understand the latter. Really, the value of having "physical injury" defined for the jury is that it shows them what *isn't* a "serious" physical injury: "Even if you believe that had this threat been carried out, [the victim] would have suffered substantial pain or an some impairment to his physical condition, that *still* isn't enough to convict [defendant] of terroristic threatening. The threat has to be *terroristic*, not mere 'fighting words'....etc., etc."

2. Likely to Result in "Substantial Property Damage?"

Kentucky's version of the Model Penal Code does not define "substantial property damage," and there is *no* case I have found which defines "substantial property damage" in the context of terroristic threatening. (If anyone has any authority, published or unpublished, please respond.) Moreover, I've never even seen in court any case involving a threat to property, other than bomb threats, which are covered by subsection (2) of the statute.

Assuming, however, that a property damage threat *is* brought under subsection (1) (e.g., "I'll huff, and puff, and blow your house down"), "substantial property damage" at the least ought to be damage equal to or in excess of \$1,000. After all, the offense criminalizes threats to commit crimes likely to result in "death or serious physical injury....or substantial property damage" to another person. The first two results in this triad are crimes which would be prosecuted as felonies. By analogy, a threat to cause substantial property damage ought also to be a threat to cause felonious property damage. Other property crimes used \$1000.00 as a benchmark separating felony damage from misdemeanor damage. Criminal mischief in the first degree is a Class D felony which requires causing property damage equal to or in excess of \$1,000.00, while criminal mischief in the second degree is a Class A misdemeanor and requires damage of \$500 or more, up to \$1,000.00. Criminal mischief in the third degree is a Class C misdemeanor, and covers property damage less than \$500.00.

If terroristic threatening can be sustained on damage of less than \$1,000.00, then the result is an anomaly in the law: a

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threat to destroy property carries the same or a lesser penalty as actually destroying that property. It ought not to be the law that a person can chop up a \$400 television set and serve 90 days in jail, but just threaten to do it and get a year.

3. Idle Talk or Jestng

While "idle talk or jesting" will not constitute the offense of terroristic threatening,¹¹ what constitutes a joke is the province of a jury. Usually, if a statement was truly intended as a joke, the circumstances and context will so indicate. It is far more likely that a jury will believe that a threat toward an individual was a joke more than it would a threat to bomb a school or torch a building — some things are just considered not joking matters. Nevertheless, the defense counsel should argue for the right to argue that the threats were a joke, since *Thomas* holds that jesting is a defense. More problematic is the statement which lies somewhere between an obvious joke and a true threat, made by someone who did not actually intend to threaten anyone. This scenario is discussed in part III.

Arguably, "idle talk and jesting" is not a redundancy, but two different concepts. A threat which not intended as a jest may be portrayed as idle talk, as in the situation where no one could reasonably believe the utterer could carry out his threat, no matter how serious he was. Imagine the scrawny client who shouts to three offensive lineman-sized "victims" that he is going to "break their necks with his bare hands" and all who witness are absolutely convinced he was dead serious. Or the student who claims that he has a vial of the "Ebola virus" and is going to unleash it during first period class tomorrow. It's worth arguing to the judge (or jury) that, in these cases, there could be no better example of "idle" talk, and that the appropriate punishment is for him to be ridiculed, not sent to jail.

In appropriate cases, the judge may grant a request for a question on lesser offenses of disorderly conduct,¹² harassment¹³ or harassing communications.¹⁴ Briefly, a person is guilty of disorderly conduct when in a public place and with intent to cause public inconvenience, annoyance or alarm, or wantonly creating a risk thereof, he "engages in fighting or in violent, tumultuous or threatening behavior."¹⁵ A person is guilty of harassment when, with intent to harass, annoy or alarm another person, he, among other things, makes an "extremely coarse utterance, gesture, or display, or addresses abusive language to any person present."¹⁶ A person is guilty of harassing communications when, with intent to harass, annoy or alarm, he communicates by telephone, telegraph, mail or other mode of communication in a manner which annoys or causes alarm.¹⁷ These three offenses are all Class B misdemeanors, and also apply to conduct other than that described above. They are worth a look.

4. The Conditional Threat

"[T]he mere fact that the harm is made upon a condition....does not prevent it from being anything less than a real threat under

KRS 508.080(1)(a)."¹⁸ Thus, theoretically, it is not a defense that the client threatened to slit someone's throat only if that someone talked to the client's girlfriend again. However, the very case which held that a conditional threat is still a threat also stated: "A statement of an intention to inflict harm on another, conditioned upon a future happening would tend to generate fear in direct proportion to the likelihood that the condition would be fulfilled."¹⁹ Thus, the more unlikely that the condition will be fulfilled, the closer the threat comes to being "idle talk."

B. Trumping the Prosecutor's Ace — Affirmative Defenses

As recently proven by Mark Stanziano, Somerset criminal defense attorney and past president of KACDL, virtually any justification listed in KRS Chapter 503 can be tailored to a terroristic threatening case, given the right set of facts. Three are specifically discussed here — self protection, choice of evils, and protection of others. However protection of property and others are also out there. Affirmative defenses applicable to any misdemeanor, such as statute of limitations, are too general to be discussed in this article, but they too, are out there.

1. Self-protection

Coincidentally, as I began writing this article, Jeff Sherr, *The Advocate's* District Court Column Editor, shared with me a note from Mark Stanziano concerning a recent terroristic threatening case where Mark had achieved an acquittal. In that case, Mark's client was charged with threatening his 19 year old stepson. The client told the stepson to leave the home, and after the boy refused, he told his stepson that he was going to kill him if he didn't leave. The client was holding a gun at the time, although it was not pointed at his stepson. The incident occurred after a long history of verbal fights between the two, and a few physical altercations in which the client had been bested by the stepson.

The judge granted a self-protection instruction submitted by Mark (and co-drafted by Katie Woods), tailored after the self-protection statute at KRS 503.050, printed in its entirety below:

Even though the Defendant might otherwise be guilty of terroristic threatening under Instruction No. ____, if at the time the defendant made the threat, he believed either that there was an impending danger that [the complaining witness] was about to use physical force upon the defendant, or, was otherwise acting in a manner which the defendant believed to be threatening, then the defendant was privileged to make such threats as he believed necessary in order to respond to and end the threat. If the defendant was not so privileged, you shall find him not guilty.

Mark notes that there is no proportionality requirement for a

threat – you can basically *threaten* to do *anything* in order to stop an aggressor from using force upon you.

2. Choice of Evils / Protection of Others

Look for the chance to use a choice of evils defense to terroristic threatening. Suppose a father thinks that a 21-year-old male with a reputation for dating underage females has designs on his 15-year-old daughter. He tells the 21 year old: "If I catch you in bed with my daughter, I'll slit your throat."

Even though the threat is conditional in nature, the prosecutor can still prosecute for terroristic threatening. But the choice of evils defense (or protection of others) is applicable. KRS 503.030 provides in pertinent part:

- (1) [C]onduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged,...
- (2) When the defendant believes that conduct which would otherwise constitute an offense is necessary for the purpose described in subsection (1), but is wanton or reckless in having such belief, ...the justification afforded by this section is unavailable....

In this example, the father could argue in defense that the conduct for which he is being prosecuted (terroristic threatening, a Class A misdemeanor), was necessary to avoid the imminent public and private injury to his daughter (third degree rape, a Class D felony), and that he was therefore justified in making the threat. Likewise, the "protection of another" statute²⁰ can be tailored a la Stanziano to apply here. The extent to which the father's belief that a third degree rape was imminent was wanton or reckless is a problem of proof for the father (who has the burden of going forward with such evidence before the burden of persuasion switches to the Commonwealth), but not an insurmountable one. Besides, what jury comprised of fathers and mothers wouldn't sympathize?

C. Double Jeopardy

According to *Commonwealth v. Watson*,²¹ a defendant cannot be convicted of terroristic threatening after he has been convicted of wantonly endangering the same victims. "Simply put, the terroristic threat is included in the wanton endangerment."²² This holding is premised on KRS 505.020, which provides in pertinent part that "[w]hen a single course of conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense...[except when]...[one] offense is included in the other..."

The Court reasoned that terroristic threatening is included

within wanton endangerment because:

In order to convict on the terroristic threatening counts the jury had to believe that Watson threatened to shoot [the victims]. In order to convict on the wanton endangerment counts the jury had to believe that Watson fired a shotgun at [the victims]. The only difference between the threat and the act in this case is the increased risk of injury to [the victims].

This case pre-dates *Burge v. Commonwealth*²³ which overruled a host of cases decided on traditional, constitutional double jeopardy analysis, and held that "double jeopardy" does not occur when a person is charged with two crimes arising from the same course of conduct, so long as each statute requires proof of additional fact which the other does not.²⁴ Nevertheless, were *Watson* decided on traditional double jeopardy grounds, it would still survive *Burge*, based on the reasoning of the court. The only reason *Burge* is even mentioned here is because, if you ever have the opportunity to assert *Watson* as authority for having a terroristic threatening case dismissed, the prosecutor will undoubtedly point out to the court that *Watson* pre-dates *Burge*, and therefore its authority is suspect.

III. *Thomas v. Commonwealth: Beyond the "Blue Book"*

Thomas v. Commonwealth is the most important case that has been decided concerning terroristic threatening. It has been cited several times already in this article on the issues of idle talk and jesting, and conditional threats. Moreover, it is annotated twice in the "blue book" on issues not yet discussed in this article. Some of the issues could have been included in Section II, but because of the importance of this case I have reserved Section III entirely to itself. I believe this case should be copied and carried to court every single time a terroristic threatening case is scheduled on the docket.

Thomas is cited in the "blue book" first as authority that the Kentucky statute is not unconstitutionally vague or overbroad and second for the proposition that "the motive that prompts an accused to make threatening statements is immaterial." The unconstitutionality argument having been lost, it is the second annotation that most lawyers on both sides cite during a terroristic threatening trial.

A. Existence of Motive to Carry Out a Threat is Immaterial

If there is a serious question as to whether the defendant actually made the threats, the defense attorney sometimes cites *Thomas* to prevent the Commonwealth from producing testimony or evidence which shows the defendant may have been motivated to make threats e.g., "the victim was dating the defendant's daughter, and the defendant told everyone he didn't

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like it". I have made this objection and had it sustained. On the other hand, especially when there is no doubt that the threats were made, the prosecutor relies upon *Thomas* to exclude or strike any statements by the defendant which attempt to establish a motive which justifies making the threats e.g., "the only reason I threatened him was because he threatened me the day before".

While both the defense lawyer and prosecutor may have their objections sustained after quoting the blue book blurb, in truth, both objections properly should be overruled. This is because sometimes the distinction made by evidence professors in law school between materiality and relevancy is either lost or forgotten by judges, prosecutors and defense counsel alike. To state that "motive is immaterial" is merely to state that the prosecution does not have to prove motive to establish the offense of terroristic threatening. That is true of every crime – anyone who ever tried a criminal case, or who watches *Matlock*, or who saw the O.J. Simpson trial on television, knows the prosecution loves to tell the jury that they never have to establish motive to prove its case. They say this whether or not they have proof of motive – I think they teach that at prosecutor's school.

However, that does not mean that motive is irrelevant. In fact, it is precisely when there *is* a question of whether threats were actually uttered that proof of motive is most relevant. Prosecutors should still attempt to get in evidence of motive under KRE 402 and if applicable, KRE 404.

Likewise, defense counsel should still attempt to put in evidence of motive, especially if the result is exculpatory, if not legally exculpatory, at least maybe in the court of human opinion. This should not be a problem in district court, since there the guilt or innocence phase and the sentencing phase of the trial are combined, and evidence of motive is admissible for purposes of seeking leniency from the jury.

As far as the blue book annotation is concerned, *Thomas* offers pitiful help to the defense counsel; but the case is more important to defendants for the premises of law for which it is *not* cited.

B. Existence of an Intention to Carry Out a Threat is Immaterial

Thomas, quoting a Maine case which it adopts by reference, states:

When the unlawful threat is knowingly and willfully made, the offense is complete, so that the existence of an intention to carry out the threat, or a subsequent abandonment of the bad intent with which the threat is made, is immaterial. *Id.* at 909.

Proof of an *intention* to carry out a threat is extremely damaging to defense of terroristic threatening. Like motive, proof of such

intent tends to show that the disputed threats were more likely made than not. Unlike motive, however, proof of intent takes the case one step beyond mere threat, toward actual completion of another crime, which in turn may inflame the jury against the defendant. Since proof of intent is immaterial, however, even though intent may be relevant, its probative value may be substantially outweighed by the danger of undue prejudice, making a KRE 403 objection proper. An example happened in a case I tried last year.

An elementary school teacher and a principal testified that my client said he was going to "blow this school off the hill" and again, that he would "blow this school up." Later, the arresting officer testified that he searched the defendant's property and "there was some dynamite discovered at [his] residence." There is no doubt that the fact that the defendant had explosives at his residence had an extremely prejudicial effect on the case, especially since the defense was that he did *not* threaten to blow up the school. As I recall, one of the juror's gasped when she heard about the dynamite. At this point in the trial, the case was no longer about whether my client had made the threats, but whether and when he was going to carry them out and blow up the school. Since under *Thomas* this fact is immaterial, and yet undoubtedly inflammatory, I argued that any probative value was substantially outweighed by the danger of undue prejudice, and that the statement was excludable under KRE 403, and that a mistrial should be ordered. At trial, the judge sustained my objection, but overruled my motion for a mistrial, opting instead to give an admonition to the jury to disregard the officer's testimony. The failure to grant a mistrial is presently on appeal.

Thomas is far more valuable to the defense lawyer for the proposition that "intention is immaterial" than for "motive is immaterial" because evidence of the former, in my opinion, will almost always present a KRE 403 opportunity than will evidence of motive.

C. Terroristic Threatening is a Specific Intent Crime

Thomas raises and resolves the question of whether terroristic threatening is a specific intent crime, an issue discussed by Lawson and Fortune in their book, *Kentucky Criminal Law*:

KRS 508.080 is slightly unclear concerning the state of mind needed for commission of terroristic threatening, partly because of its history. It does not explicitly require intent to terrorize, unlike the Model Code provision from which it comes; however, it easily supports an argument that intent to terrorize is required by implication. The only Kentucky case bearing on the question [*Thomas*] is supportive of that argument.

Early in the case *Thomas* quotes the Model Penal Code's version of Terroristic Threatening²⁵, which provides:

A person is guilty of a felony of the third degree if he threatens to commit any crime of violence *with purpose to terrorize another* or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience. [Emphasis added.]

Obviously, the Kentucky version does not have the above-emphasized language. Yet, later, when rejecting the appellant's argument that the statute is unconstitutional because it does not require a specific intent to terrorize, the court holds that "appellant's assertion that the [Kentucky] statute is defective because it does not require the defendant's threat to be serious or that it does not require an intent to actually convey a serious threat is ludicrous." In so doing, the court apparently incorporates the "with purpose to terrorize" language into the Kentucky version, thus making terroristic threatening a specific intent crime.

Finally, in case there is need for further support, KRS 501.040 provides:

Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the prescribed conduct necessarily involves such culpable mental state.

Given the "ludicrous" language of *Thomas* and the commentary of Fortune & Lawson, it ought to be clear that terroristic threatening is in fact a specific intent crime. This raises other issues:

1. Intent to Make a Threat (As Opposed to Intent to Carry Out a Threat) Becomes Material

The implication of a specific intent it leaves open an opportunity to explain away heated language which was not intended to be an actual threat, but which nevertheless does not rise to the level of idle talk or jesting:

Example: Reggie tells Jughead that he is going shoot Archie in the head the next time he sees him. Jughead tells Archie, and Archie swears out a warrant on Reggie, now your client. On the stand, Reggie (who appears to be a credible witness) admits that he said those words in front of Jughead, but contends he wasn't serious, and he was just blowing off steam. He really didn't intend for it to be a threat, and certainly didn't think it would get back to Archie.

Several scenarios could follow:

- The prosecutor may object, move to strike, and ask for a jury admonition that intent to make a threat is not relevant, and that "they must only consider whether the threat was made, not whether Reggie was serious about carrying out the threat." As support for the objection, the prosecutor may point out the absence of any specific intent language in the statute, and worse, may make the point to the judge that the model code did have the specific intent language, and the failure of the legislature to put it in the Kentucky version illustrates its intent to remove specific intent as a requirement. Without *Thomas* (or at least Fortune and Lawson's book), the judge is going to sustain that objection and might give the admonition, which would be fatal to the case under these facts.
- Alternatively, the prosecutor may not object at all, but wait until closing to tell the jury that they need not consider whether he intended the words he said to be a threat, but only whether he said the words. This provides the excellent opportunity to object and request an admonition of your own, to the effect of "you must consider not only whether he intended to say the words, but also whether he intended them to be a threat."
- Finally, there is an opportunity to take the initiative and put the issue before the court yourself. Request a jury question which puts the word "intentionally" before the word "threatened," and the definition of "intentionally." You probably won't get them – neither is contained in the pattern jury charges – but you can cite *Thomas* and refer Fortune & Lawson's book to the judge, and then ask the judge if you can at least argue to the jury that the threat has to be intended as a threat by your client. Worst case scenario is you have another appeal point if your client is convicted. Pattern jury charges are not infallible, and if you prove to the Circuit Judge's satisfaction that specific intent is in fact an element of the crime, you might also persuade her that the jury ought to be informed of that fact.

2. Voluntary Intoxication Becomes a Defense

How many times is alcohol involved in an incident of terroristic threatening? In my court, almost always KRS 501.080 provides:

Intoxication is a defense to a criminal charge only if such condition either:

- (1) Negatives the existence of an element of the offense; or
- (2) Is not voluntarily produced and deprives the defendant of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

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Obviously, the cases are non-existent where the defendant has been slipped a mickey or has been forced against his will to become intoxicated. Subsection (1) becomes applicable, however, once specific intent is deemed an element of terroristic threatening.

In *McGuire v. Commonwealth*,²⁶ a theft and burglary case, the Kentucky Supreme Court held:

Intoxication, whether voluntary or involuntary, is a defense to an intentional crime if the effect of the intoxication is to completely negate the element of intent; it causes the defendant's mental state to equate with insanity. Voluntary intoxication does not negate culpability for a crime requiring a culpable mental state of wantonness or recklessness, but it does negate specific intent²⁷

Under the Model Penal Code version quoted above, following the specific intent language was a fall back provision which made a threat punishable if made in "reckless disregard" of the risk of causing terror or inconvenience. That language did not make it into the Kentucky version. Thus, since menacing and harassment are also specific intent crimes, voluntary or involuntary intoxication which negates the element of specific intent is a complete defense.

Once the prosecutor or judge has conceded specific intent as an element of the offense, the defense applies, so it is important not to mention the defense until you get a ruling on the specific intent issue. Ideally, this ruling comes after the close of evidence when the defense attorney presents to the court a jury instruction and question based on voluntary intoxication. If you wait until this time to raise the issue, chances are the Commonwealth's own witnesses have already proven intoxication of the defendant, usually in the mistaken belief that evidence of drunkenness is damning, not vindicating.

IV. Conclusion

Apart from reading the few cases that exist which discuss the offense of terroristic threatening, about the only advice that can be given about defending them is to use your imagination. Doors not closed should be presumed open, any argument that is persuasive should be made, if it is factually supported. Thanks to the many people who read this article prior to submission, and offered their insights and comments to the ideas expressed herein. ♦

¹ KRS 508.050

² See Kentucky Crime Commission / LRC 1974 Commentary on KRS 508.080 and *Thomas v. Commonwealth*, 574 S.W.2d 903 (Ky. Ct. App. 1978).

³ See Kentucky Crime Commission / LRC 1974 Commentary on KRS 508.080 and *Brock v. Commonwealth*, 947 S.W.2d 24

(Ky. 1997)(victim's statements to his mother that he was going to kill defendant was terroristic threatening).

⁴ KRS 500.080(2)

⁵ KRS 500.080(12)

⁶ KRS 500.080(15)

⁷ KRS 500.080(13)

⁸ "Defenses" is in quotes because it is used to cover both actual defenses, like an affirmative defense, which is a confession and avoidance of a statute, and situations where an element of the prosecution's case is removed. I do not consider the latter a true defense, since both burdens of production and persuasion remain with the prosecution, unlike an affirmative defense, for which the defendant has the burden of going forward with evidence.

⁹ KRS 508.050

¹⁰ See Kentucky Crime Commission / LRC 1974 Commentary on KRS 508.080.

¹¹ *Thomas v. Commonwealth*, 574 S.W.2d 903, 909 (Ky. App. 1979)

¹² KRS 525.060

¹³ KRS 525.070

¹⁴ KRS 525.080

¹⁵ KRS 525.060(1)(a)

¹⁶ KRS 525.070(1)(c)

¹⁷ KRS 525.080(1)(a)

¹⁸ *Id.* at 910.

¹⁹ *Id.*

²⁰ KRS 503.070

²¹ 579 S.W.2d 103 (Ky. 1979)

²² *Id.* at 104. Wanton Endangerment is codified at KRS 508.060.

²³ 947 S.W.2d 805 (Ky. 1996)

²⁴ *Id.* at 809.

²⁵ Section 211.3

²⁶ 885 S.W.2d 931 (Ky. 1994)

²⁷ *Id.* at 934.

Brian "Scott" West
Assistant Public Defender
205 Lovern Street
Hazard, Kentucky 41701
Tel: (606) 439-4509
Fax: (606) 439-4500
Email: bwest@mail.pa.state.ky.us

IN SEARCH OF PSYCHOLOGY: A JURISPRUDENT THERAPY PERSPECTIVE ON SEXUAL OFFENDER RISK ASSESSMENT

BY ERIC DROGIN, J.D., PH.D., ABPP
UNIVERSITY OF LOUISVILLE SCHOOL OF MEDICINE

Psychologists have grappled for decades with a basic, sobering reality of our profession: absent certain specialized circumstances, we can't predict the future. It makes us feel only a little better to reflect to ourselves, "well, who can?" Incidentally, when we mention this aloud, it doesn't make judges feel any better at all.



Eric Drogin

It's easy to see why clinicians welcome claims that newly developed instruments will enable us to perform reliable and valid "risk assessments" regarding persons convicted of sexual offenses. It's easier still to understand how judges are willing to accept that the administration of these psychological tests will lead to accurate determinations of potential dangerousness -- particularly when these evaluative procedures are mandated by statutory law. Perhaps easiest to understand, however, is the mounting frustration of all participants in this process who come to believe that these measures are not

"administered," nor "psychological," nor even "tests" in the sense we have employed such terms in the past.

In a recent issue of *The Advocate*, I commented on the emerging doctrine of "Jurisprudent Therapy" and provided the following definition:

"Jurisprudent Therapy" [is] an extension of the "Therapeutic Jurisprudence" model proposed by Professors David Wexler and Bruce Winick. Whereas the "Therapeutic Jurisprudence" (or TJ) perspective analyzes substantive law, legal procedure, and legal roles to determine whether their effects are therapeutic, neutral, or antitherapeutic, the "Jurisprudent Therapy" (or JT) approach considers the extent to which mental health science, mental health practice, and mental health roles are jurisprudent, neutral, or antijurisprudent. [1]

In other words, after over a decade of research specifically geared to bringing the work of lawyers and judges into line with the dictates of social science, it is increasingly recognized that psychiatrists, psychologists, and social workers must do their

part to ensure that their own impact on the legal system comports with foundational principles of justice and freedom.

This point of view is forcefully reflected in such cases as *Daubert v. Merrell Dow Pharmaceuticals, Inc.* [2] and *Kumho Tire Co., Ltd. v. Carmichael*. [3] Trial attorneys are thus encouraged -- even compelled -- to ask: "are psychological theories, their clinical and policy-making applications, and the people who develop and provide them making a fair, just, and legally supportable contribution to the lives of the people they are intended to serve?" [4]

Kentucky's current scheme for the assessment of "sex offenders" (see KRS 17.500 *et seq.*) provides an excellent example of how this perspective can be brought to life. The law mandates the use of certain actuarial measures in order to determine the degree of "risk" associated with the background of a given "offender." The two core instruments may be characterized as follows:

The Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR) consists of only four components: the number of prior sexual offenses, the offender's age at release, the gender of the victim, and the offender's relationship to the victim. The RRASOR's predictive accuracy ($r = .27$) is none too impressive.

The Minnesota Sex Offender Screening Tool -- Revised (MnSOST-R), by contrast, is a 16-item measure boasting considerably higher predictive accuracy ($r = .45$). One drawback, however, is that the MnSOST-R is extraordinarily difficult to score, particularly without ready access to the delicate, item-specific exclusionary rules employed and constantly revised by the instrument's developers. [5]

One should not assume that these measures, even when employed by psychologists, are somehow "administered" to individual offenders. In fact, both the RRASOR and the MnSOST-R are *purely* actuarial devices. They are scored entirely on the basis of available, archival data. A third instrument, the Violence Risk Appraisal Guide (VRAG), has a "clinical" component ... but this turns out to be the Hare Psychopathy Check List -- Revised (PCL-R). The PCL-R is claimed to be subject to

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considerable inter-rater reliability issues, absent expensive and rarely-accessed specialized training.

Any errors or omissions in an institutional record are likely to detract from a given instrument's accuracy in a particular case. Attorneys should give serious consideration to the correctional sources from which this information is obtained, and the training and background of the personnel providing this material to the designated evaluators.

If actuarial approaches are truly superior to clinical judgment (as the research consistently suggests they are), then why are "psychological" experts employed to conduct them? It is here that a Jurisprudent Therapy analysis attaches: these actuarial assessments are cloaked in the guise of "clinical" practice (to a litigant's advantage or detriment, depending on a particular judge's regard for clinicians), obscuring their true nature, and thus complicating the fact-finder's ability to gauge their import and value as scientific evidence. [6]

These observations should not be construed as gratuitous criticism of the psychologists chosen to perform these evaluations in the Commonwealth of Kentucky. These valued colleagues have availed themselves of skilled consultation from within and without the state, often possess considerable experience from providing services in other forensic contexts, and work under extreme time and workload pressures. The reliability and validity of their contributions will be limited, however, like those of any professional, by any deficiencies in mandated measures, as well as difficulties in interpreting the statistical and/or psychometric properties of instruments employed.

A few examples from Kentucky's recent mandatory 32-hour Sex Offender Risk Assessment Advisory Board (SORAAB) training serve to illustrate this point. In the first, a clinician performing evaluations to gauge the likelihood of adolescent recidivism admitted directly to conference attendees that all currently available measures designed for that population had only "face" validity, concluding that "we're back to just going by our judgment."

Another presenter, asked by a fellow psychologist to explain why materials touting the efficacy of the RRASOR claimed an ability to "capture .27 of variance" while also describing a "predictive accuracy [of] $r = .27$," admitted that he was unable to explain this assertion.

Still another presenter, when a trainee noted that in one instance a higher MnSOST-R score was actually *less* predictive of re-offending than a lower one, dismissed this phenomenon as a minor statistical anomaly, and intimated that researchers were avoiding making such data readily accessible to courts because it might lead to allegedly groundless criticism of the instrument in forensic applications.

Again, attorneys should note that much important, useful, and clinically and forensically valid information was imparted at the above-referenced training conference. No one should fail to recognize the effort necessary to keep up with the immense caseloads faced by SORAAB evaluators. This having been acknowledged, however, both prosecutors and defense counsel should be in a position to undertake a measured, stepwise analysis of the sources, nature, and generalizability of the data employed in these evaluations. [7]

One source of guidance in this regard is the codes and guidelines from which psychologists derive ethical standards for professional conduct. They include specific reference to ways in which testing must be conducted and interpreted. Foremost in influence among these resources are the *Specialty Guidelines for Forensic Psychologists* [8] and the *Ethical Principles of Psychologists and Code of Conduct* [9]. In addition, recently promulgated regulations concerning psychological practice in the Commonwealth of Kentucky may be found at 201 KAR 26:115 *et seq.*

Another organizing tool for attorneys exploring the reliability and validity of any forensic measure is Professor Kirk Heilbrun's seminal 1992 article on "The Role of Psychological Testing in Forensic Assessment," [10] a core workshop and board preparation training reference for the American Academy of Forensic Psychology. The key points of this resource may be summarized as follows:

- 1) The test is commercially available and adequately **documented** in two sources. First, it is accompanied by a manual describing its development, psychometric properties, and procedure for administration. Second, it is listed and reviewed in *Mental Measurements Yearbook* or some other readily available source.
- 2) **Reliability** should be considered. The use of tests with a reliability coefficient of less than .80 is not advisable. The use of less reliable tests would require an explicit justification by the psychologist.
- 3) The test should be **relevant** to the underlying legal issue, or to a psychological construct underlying the legal issue. Whenever possible, this relevance should be supported by the availability of validation research published in refereed journals.
- 4) **Standard administration** should be used, with testing conditions as close as possible to the quiet, distraction-free ideal.

- 5) **Applicability** to this population and for this purpose should guide both test selection and interpretation. The results of a test (distinct from behavior observed during testing) should not be applied toward a purpose for which the test was not developed (*e.g.*, inferring psychopathology from the results of an intelligence test).
- 6) **Objective tests** and actuarial data are preferable when there are appropriate outcome data and a "formula" exists.
- 7) **Response style** should be explicitly assessed using approaches sensitive to distortion, and the results of psychological testing interpreted within the context of the individual's response style. When response style appears to be malingering, defensive, or irrelevant rather than honest/reliable, the results of psychological testing need to be discounted or even ignored and other data sources emphasized to a greater degree.

Attorneys who employ such resources when wading through sexual offender assessments "in search of psychology" may quickly find themselves in uncharted territory. While articles such as this provide tips for general exploration, they are no substitute for consultation with behavioral scientists who may provide assistance relevant to the unique variants of a specific case. ♦

NOTES

- [1] Eric Drogin, "WAIS Not, Want Not?": A Jurisprudent Therapy Approach to Innovations in Forensic Assessment of Intellectual Functioning, *Advocate* 4-5 (September, 1999). See also Eric Drogin, "Evidence and Expert Mental Health Witnesses: A Jurisprudent Therapy Perspective," in *New Developments in Personal Injury Litigation* 295-333 (E. Pierson, ed., 2000); and Eric Drogin, "The Behavioral Science Committee: A Foray into Jurisprudent Therapy?" *Bull. L. Sci. Tech.* 9-10 (October, 1999).
- [2] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 469 (1993).
- [3] 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed. 238 (1999).
- [4] Eric Drogin, "From Therapeutic Jurisprudence ... To Jurisprudent Therapy," 18 *Behav. Sci. L.* --- (2000, in press).
- [5] Eric Drogin, "Sexual Offender Risk Assessment and Scientific Evidence: A Jurisprudent Therapy Perspective," *Bull. L. Sci. Tech.* 3-4 (December, 1999).
- [6] See Donald Bersoff, "Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law," 46 *SMU L. Rev.* 329 (1992).
- [7] See Eric Drogin & Curtis Barrett, "'But Doctor, Isn't that Just Your Opinion?': Contributing to the Decision-Making Process of the Forensic Psychologist as Expert Witness," *Advocate* 14-20 (May, 1996); Eric Drogin & Curtis Barrett, "*Daubert v. Merrell Dow Pharmaceuticals* and Scientific Evidence: A Note of Caution," 7 *Ky. Prac. Advances* 3-4 (1996); and Eric Drogin & Curtis Barrett, "Forensic Mental Health Assessment: Moving from Examination to Evaluation," *Advocate* 129-33 (January, 1996).
- [8] Committee on Ethical Guidelines for Forensic Psychologists, "Specialty Guidelines for Forensic Psychologists," 15 *L. Hum. Behav.* 655-65 (1991).
- [9] American Psychological Association, "Ethical Principles of Psychologists and Code of Conduct," 47 *Am. Psychol.* 1597-1611 (1992).
- [10] Kirk Heilbrun, "The Role of Psychological Testing in Forensic Assessment," 16 *L. Hum. Behav.* 257-72 (1992).

Eric Drogin, J.D., Ph.D., ABPP is an attorney and board-certified forensic psychologist on the clinical faculty of the University of Louisville School of Medicine. Serving on the Commission on Mental and Physical Disability Law of the American Bar Association, Dr. Drogin also chairs the ABA Behavioral Sciences Committee.

Eric Drogin
P.O. Box 22576
Louisville, Kentucky 40252-0576
(877) 877-6692 (voice; toll-free)
(877) 877-6685 (facsimile; toll-free)
eyd@drogin.net (e-mail)

DUE PROCESS CHALLENGES TO KENTUCKY'S SEX OFFENDER REGISTRATION AND NOTIFICATION STATUTE

by Carol Camp, Assistant Public Advocate

A. Introduction

In the September, 1999 issue of *The Advocate*, I provided a brief overview of KRS 17.500 et seq., Kentucky's sex offender registration and notification statute. Since then, I have briefed two appeals in the Kentucky Court of Appeals and consulted with several DPA trial attorneys on possible challenges that can be raised. This article summarizes due process challenges to the statute.

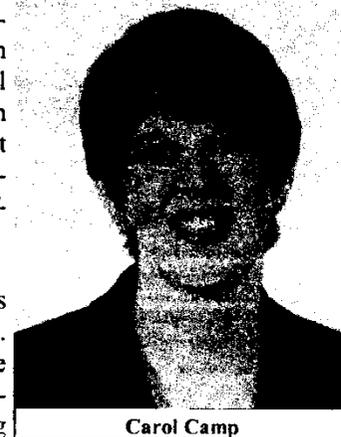
B. The definition of "sex offender" in KRS 17.550(2) impermissibly places the burden of proof upon the accused.

The definition of "sex offender" in KRS 17.550(2) presumes that an accused is a sex offender long before he goes to court for his scheduled risk assessment hearing. The definition presumes that an accused who is convicted of any of the sex crimes enumerated in KRS 17.500(4) also suffers from a "mental or behavioral abnormality or personality disorder characterized by a pattern or [sic] repetitive, compulsive behavior that makes the offender a threat to public safety." A "mental or behavioral abnormality" is characterized as "a congenital or acquired condition that affects the emotional or volitional capacity of a person in a manner that predisposes that individual to the commission of a sex crime." KRS 17.550(6). A "personality disorder" is "a condition where a person exhibits personality traits which are inflexible and maladaptive and causes either significant functional impairment or subjective distress." KRS 17.550(7).

The Kentucky definitions seem to be somewhat at odds with their federal counterparts. The federal statute, which is known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, is codified at 42 U.S.C.A. sec. 14071. The Wetterling Act does not include a definition of personality disorder; instead, it focuses upon "sexually violent predators." Under the federal scheme, a "sexually violent predator" is a person who is convicted of a sexually violent offense who also suffers "from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 U.S.C.A. sec. 14071(a)(3)(C). A "mental abnormality" refers to "a congenital or acquired condition...that affects the emotional or volitional capacity of the person in a manner that makes the person likely to engage in predatory sexually violent offenses." 42 U.S.C.A. sec. 14071(a)(3)(D). "Predatory" acts are acts that are "directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization." 42 U.S.C.A. sec. 14071(a)(3)(E). The emphasis of the

federal act, therefore, seems to be placed upon sex offenders who prey upon their victims and is arguably considerably narrower in scope than the Kentucky statute. Also, the inclusion of the definition of "personality disorder" in the Kentucky statute is particularly troublesome. This expansive definition makes it possible for courts to mischaracterize as high risk sex offenders individuals who may suffer from common conditions such as alcohol or drug abuse, and who, although convicted of a "sex crime," do not otherwise do not present a significant risk of recidivism as sex offenders.

The term "sex offender" appears throughout KRS 17.500 et seq.. KRS 17.570, which sets forth the procedure for risk assessment hearings, does not require a sentencing court to hold a separate hearing to determine whether or not an accused actually meets the statutory definition of "sex offender." In fact, from the time that the sentencing court signs the order scheduling an accused's risk assessment hearing, the accused is automatically presumed to be a "sex offender." Therefore, from the outset, the statutory framework requires the accused to disprove this onerous presumption. KRS 17.570 further compounds this problem by failing to specify the burden of proof that is required in sex offender risk assessment hearings. By presuming that the accused is a "sex offender," and then requiring the accused to disprove this presumption by some completely unknown burden of proof, the General Assembly and the Kentucky courts have violated the due process rights of offenders under both the Fourteenth Amendment to the United States Constitution and sections 2 and 11 of the Kentucky Constitution. *Com. v. Williams*, 733 A.2d 593, 603 (Pa. 1999).



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C. The instruments that the Sex Offender Risk Assessment Advisory Board currently utilizes to determine a sex offender's risk of recidivism fail to satisfy the standards set forth in *Stringer v. Com.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and *Kumho Tire Co., Ltd. v. Carmichael*.

The Kentucky Supreme Court has held that "[e]xpert opinion is admissible so long as (1) the witness is qualified to render an

opinion on the subject matter; (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*; (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702." *Stringer v. Com.*, 956 S.W.2d 883, 891 (Ky., 1997).

Daubert requires a trial court judge to perform a gatekeeping function before admitting into evidence expert scientific testimony. The trial judge must decide whether the expert will testify "to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993). This requires a preliminary determination "of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-593, 113 S.Ct. at 2796. Although general acceptance in the scientific community "is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence...Rule 702...[does] assign to the trial judge the task of ensuring an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597, 113 S.Ct. at 2799.

Last year, the Supreme Court of the United States expanded the trial judge's gatekeeping role to "testimony based on 'technical' and 'other specialized' knowledge"; in other words, *Daubert* now applies to all expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, ---, 119 S.Ct. 1167, 1171, 1174, 143 L.Ed.2d 238 (1999). The trial judge's failure to determine the relevance and reliability of expert testimony constitutes an abuse of discretion. *Id.* at ---, 119 S.Ct. at 1176.

Advocates should insist that sentencing courts hold preassessment hearings pursuant to *Stringer*, *Daubert* and *Kumho Tire*. Arguably, a sentencing judge's refusal to do so would be an abuse of discretion, and would also violate an accused's federal and state due process rights.

There are several reasons why advocates should regularly request preassessment hearings in sex offender risk assessment cases.

First, the three actuarial instruments that the Sex Offender Risk Assessment Advisory Board uses to determine an accused's risk level—the RRASOR, the MnSOST-R and the VRAG—have never been validated for use on the basis of race, sex or for use on juvenile youthful offenders. Hanson and Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 *Journal of Consulting and Clinical Psychology* 348, 350 (1998); Epperson, Kaul and Hesselton, *Final Report on the Development of the Minnesota Sex Offender Screening Tool—Revised (MnSOST-R)*, ATSA Presentation of the MnSOST-R, 1, 26 (1998).

Second, there is no conclusive proof that sex offenders recidi-

vate at higher rates than other offenders. Heilbrun, Nezu, Keeney, Chung and Wasserman, *Sexual Offending: Linking Assessment, Intervention and Decision Making*, 4 *Psychology, Public Policy and Law* 138, 142-143 (June 1998).

Third, the VRAG, which is supposed to be given only to persons whose sex offenses involve penetration or the use of force pursuant to 501 KAR 6:200 Section 2(d), only predicts sex offender recidivism with .20% accuracy. Harris, Rice and Quinsey, *Appraisal and Management of Risk in Sexual Aggressors: Implications for Criminal Justice Policy*, 4 *Psychology, Public Policy and Law* 73, 89 (June 1998).

Fourth, the impact of dynamic factors, (i.e., response to treatment, stable employment, a supportive family) on recidivism is unknown. Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 *Psychology, Public Policy and Law* 50, 68 (June 1998).

And finally, "[a] full scientific explanation of sexual aggression has yet to be provided" because "actuarial instruments (or any other method) cannot identify all dangerous sex offenders without an unacceptably high false-positive rate." Harris, Rice and Quinsey, *supra*, at 81.

Because of these and other issues, an accused must have the right to present expert testimony to preliminarily challenge the state's proposed classification level, the methods used to determine the proposed classification level, and the specific manner proposed for notification. *Doe v. Poritz*, 662 A.2d 36, 384 (N.J. 1995); *In Re G.B.*, 685 A.2d 1252, 1265-1266 (N.J. 1996). Indigent persons must be provided with the opportunity to seek and obtain expert funds pursuant to KRS 31.110 (1)(b) and KRS 31.185(1) to review and refute an assessor's report. If the sentencing court determines, after an initial hearing, that the actuarial instruments relied upon in making the assessment of risk are relevant and reliable, the judge must then determine the appropriate risk level after balancing the interests of the accused and the community, and not by "blindly follow[ing] the numerical calculation provided...". *In Re C.A.*, 679 A.2d 1153, 1171 (N.J. 1996).

C. Conclusion

The current statutory framework, as well as the actuarial instruments being used to assess an accused's risk of recidivism, are highly susceptible to challenge for the reasons discussed herein because of their implications for an accused's due process rights. Advocates

should vigorously assert these and other challenges to insure that the process afforded to their clients is constitutionally sufficient. ♦

Carol R. Camp
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
(502) 564-8006 ext. 167
(502) 564-7890 (fax)
email: ccamp@mail.pa.state.ky.us

A CHANCE TO START OVER STRATEGIES TO SUCCESSFULLY LITIGATE THE 18-YEAR-OLD HEARING

by Thomas D. Collins, Assistant Public Advocate

INTRODUCTION

In Kentucky's judicial system, when your youthful offender client turns 18, if he has not been previously probated, paroled or in rare circumstances, transferred to the Department of Corrections, he will be returned to his sentencing court for a hearing pursuant to KRS 640.030. At that time, the court will choose either to probate your client; return him to the custody of the Department of Juvenile Justice for six months additional treatment ending in final discharge of his sentence; or commit him to prison. As the code fails to provide a name for this critical hearing, this article will refer to it as the "18 year old hearing."

The 18 year old hearing, a unique hybrid of juvenile and adult law, is one of the most important hearings of your client's life. At stake is nothing less than a second chance at life. The goal for defense counsel at the hearing is to convince the court that your client has been rehabilitated and deserves another chance to lead a meaningful life through probation. This article provides an overview of the process for such hearings and the steps that defense attorneys can take to maximize the possibility of your client receiving probation.

THE ORIGIN OF THE 18-YEAR-OLD HEARING

In Kentucky, except for certain traffic offenses, any person under age 18 accused of a crime is brought before the Juvenile Court. KRS 610.010. However, juvenile offenders who meet certain criteria, may be transferred from juvenile court to the circuit court to be tried and sentenced as youthful offenders pursuant to KRS 635.020, which permits transfer for several reasons. First, if a child is at least age 14 and has been charged with the commission of either a capital offense, class A felony or class B felony, he may be transferred to circuit court. KRS 635.020(2). Second, KRS 635.020(3) permits transfer if the juvenile is at least 16 years old and is presently charged with a class C or D felony and has one prior juvenile felony adjudication. The preceding provisions of KRS 635.020 are discretionary. If the County Attorney seeks to transfer a juvenile, a hearing must be held according to the provisions of KRS 640.010. Finally, KRS 635.020(4) mandates transfer for juveniles age 14 or older who are alleged to have used a firearm in the commission of a felony. A probable cause hearing is the only requirement to transfer under that statute. For this article's purposes, the reader shall assume that the client has been transferred.

Subsequent to transfer, your client will be indicted, arraigned, and either be found guilty at trial or enter a guilty plea in circuit

court. At this point, he will be sentenced according to KRS 640.030, which provides for the same penalties for which an adult is eligible with the exception of the death penalty or life without parole if your client was under 16 at the time of the commission of the offense. KRS 640.040. After sentencing, if your client is still under age 18, he will be start serving his sentence at a Department of Juvenile Justice (DJJ hereafter) residential treatment facility. Also subsequent to sentencing, your client may receive shock probation or parole.

However, many youthful offenders will not receive probation or parole prior to achieving age 18.

THE 18-YEAR-OLD HEARING: WHAT TO EXPECT IN COURT

Unlike a trial, there is no set procedure for an 18-year-old hearing. Accordingly, the procedure is determined by the trial judge and often corresponds to a motion hearing with the defense presenting its argument first. Also, most judges will permit the defense a rebuttal if requested. The hearing may be conducted in open court (more formal), or in a closed conference room (closer to a conversation but still on the record). Additionally, the time allotted to these hearings is inconsistent. Witnesses and documents may be subpoenaed. Cross-examination is permitted and additionally, the judge may choose to participate more actively in questioning witnesses than in a trial. As a result of large dockets, some judges tend to rush these hearings. However, it is incumbent upon defense counsel to convince the court that this hearing will determine the rest of your client's life and as such, is a worthy use of the court's time. Following the hearing, a decision will most often be issued immediately from the bench, however, some judges choose to reserve their decision and rule subsequent to the hearing. In sum, the defense attorney may enter the 18-year-old hearing without a clear idea of how it will proceed.

In spite of its procedural inconsistencies, one certainty faces defense counsel: the judge's ruling is completely discretionary, subject only to the abuse of discretion standard on review. Indeed, some jurists have dismissed all efforts of the defense attorney and summarily committed the client to prison. Unfortunately, the Kentucky Court of Appeals has yet to overturn such a decision. Therefore, defense counsel must be prepared to take full advantage of the hearing. To win a second chance for your client, counsel must prepare for the hearing as diligently as if going to trial. The informal hearing permits a well-prepared attorney to direct the tone of the hearing to issues important to the client. Some generalizations regarding the substance of the hearing will now be examined.

The substance of the hearing generally involves the court consid-



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ering several issues. These issues are as follows, in no particular order. First, the client's performance in the DJJ facility is often examined in great detail. To this end, a representative from the DJJ facility, usually, your client's counselor is often present to deliver DJJ's position to the court. However, since the responsibility for transporting your client rests with local sheriffs' departments, some facilities attempt to send only a report. Therefore, if the attorney desires a DJJ staff person to be present, a subpoena must issue (strategy is discussed below). The Commonwealth Attorney may call his own witnesses, including the victim and victim's family.

Second, the judge will often consider the criterion set forth in KRS 533.10 whether he formally acknowledges the fact or not. KRS 533.010 provides that the Judge shall award probation unless the following is found: (A) your client poses a danger to the community; (B) your client needs treatment that can most effectively be provided by the department of corrections; (C) probation would unduly depreciate the seriousness of the crime. KRS 533.010. However, in many decisions, a formalized consideration of these factors is not undertaken. In a recent case, where these factors were applied, the judge held that factors A and B did not apply. However, the trial judge ruled against probation for the defendant based solely on the fact that four years of incarceration for his serious crimes would depreciate the seriousness of the crime and send a bad message to other youth. *Johnson v. Commonwealth*, 967 S.W.2d 12 (Ky. 1998). At many 18-year-old hearings, especially if your client has performed well in treatment, factor (C) will be the deciding issue. The defense attorney must be prepared to rebut this argument. One source of rebuttal to the punishment agenda is the following theory of the philosophy of the juvenile code.

THE PHILOSOPHY OF THE JUVENILE CODE FROM A DEFENSE PERSPECTIVE

In spite of the holding in *Johnson*, a strong argument can be made that the Kentucky Unified Juvenile Code envisions rehabilitation and redemption for all youth, including youth who commit serious offenses. Many judges still accept this rationale and will rule in your client's favor if strong arguments are presented. Some of the key provisions of the Code will now be analyzed.

In considering the Unified Juvenile Code, K.R.S. Title 51, the first consideration is what is meant by "unified". Webster's defines unified as the past tense of unify which means to "to make into a coherent group or whole", Webster's Third Int'l. Dictionary, 1976. Thus, in the context of the Code, the plain meaning of unified is that all sections are to be considered together. Hence the Code begins with K.R.S. 600.010. Title and intent of KRS Chapters 600 to 645. K.R.S. 610.010(2)(d) states: "Any child brought before the court under KRS Chapters 600 to 645 shall have a **right** to treatment reasonably calculated to bring about an improvement of his condition." Consequently, from page one, rehabilitation is the clear intent of the entire Code. Accordingly, all subsequent statutes must be read and applied with the goal of rehabilitation in mind. For your

youthful offender clients, K.R.S. 640.030 is the applicable section; hence, that section will now be examined.

K.R.S. 640.030 states that any youthful offender will commence service of his sentence in a DJJ treatment facility and further provides that following the 18-year-old hearing, the sentencing court shall determine whether the youthful offender shall be probated; sent to Corrections; or returned to DJJ for six months. These provisions raise a question: If the Legislature intended youthful offenders to be treated exactly as adults, then why was such mitigating language included in the statute? The answer to this question provides the key to understanding the Code. During the 1998 Legislative session, our Legislature could have changed the language of K.R.S. 640.030 if it had so chosen. Indeed, KRS 635.020(4), the "automatic waiver" provision for juvenile firearm offenders demonstrates past Legislature's willingness to increase penalties for juveniles. Thus, had it chosen to do so, the Legislature could have condemned youthful offenders directly to prison immediately following sentencing, or removed K.R.S. 640.030(2)(a) granting the trial court the option of probation. Yet 640.030 retains its language of mitigation. Additionally, numerous other examples of mitigation for youthful offenders are found throughout the Code. For example, K.R.S. 640.040(1) prohibits imposition of capital punishment for any juvenile under the age of sixteen. Additionally, K.R.S. 640.040(3) states: "No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060." That statute prohibits probation or conditional release for adults convicted of Class A, B, or C felonies in which a firearm was used.

Clearly, from the analysis above, a strong argument can be advanced that the Kentucky Legislature intended that youthful offenders be permitted a second chance through rehabilitation. This argument may be used to persuade your judge that your client has been rehabilitated, is a good candidate for probation, and therefore qualifies under KRS 533.010. Alternatively, one can argue that the punishment philosophy can be reconciled with the treatment philosophy and based upon the time served while in treatment and the fact that probation does not equal freedom.

RELEVANT CASE LAW

Kentucky has produced very little published juvenile case law. However, the *Johnson* decision addresses 18 year old hearings and will now be examined.

In *Johnson*, the 14 year-old defendant was charged with a number of very serious crimes against persons. Eventually, Johnson pled guilty to reduced charges in exchange for a 20 year sentence. In his approximately four years with DJJ, Johnson earned an outstanding record. Indeed, the staff at the DJJ facility informed the court that they wanted Johnson to receive probation so that the facility could then employ him. The court found that the possibility of Johnson committing new crimes was unlikely and that Johnson no longer needed correc-

(Continued on page 24)

tional treatment. In spite of these findings and his excellent treatment record, the trial judge committed Johnson to the Department of Corrections, because "in light of the senselessness of the crimes, to probate Appellant would be to unduly depreciate the seriousness of the offense." The Kentucky Supreme Court affirmed.

On appeal, Johnson argued that the primary purpose of the Juvenile Code was rehabilitation and petitioned the court to hold that the requirements of KRS 533.010 should not apply to eighteen-year-old hearings. The high court did not accept this rationale and specifically held that the factors set out in KRS 533.010 do indeed apply.

In spite of the apparent negative holding, *Johnson* can be distinguished on its facts. If the judge has been convinced that your client is truly rehabilitated or that his crimes were not as serious as the prosecutor contends, he can then find that the KRS 533.010 factors are not present, and thus, award probation. Additionally, while the court held that 533.010 was not unconstitutional, that statute only formalized the balancing test stated above. Thus, for defense attorneys, the strategy remains the same: demonstrate that your client's rehabilitation outweighs the KRS 533.010 factors.

A good starting point for an argument for probation is found in a 1940 case which held that juveniles are a special group to whom the law throws every reasonable protection and in whose favor the tendency is to resolve every doubt. *Elmore v. Com.*, Ky., 138 S.W.2d (1940).

Additional support for probation is found in the recent case of *Britt v. Commonwealth, Ky.*, 965 S.W.2d 147 (1998). In that case, the Court upheld the right to probation consideration both at sentencing and upon achieving age 18 for children convicted for firearms felonies. In *Britt*, the Commonwealth argued that children transferred to circuit court pursuant to KRS 635.020(4) were not eligible for probation, but would be required to go directly to prison upon achieving age 18. The court upheld the right of gun transfer youthful offenders to be considered for probation at sentencing and again upon their 18th birthday. *Britt* directly supports the assertion from *Elmore*, that juveniles are a special category of offender, capable of rehabilitation and consequently, deserving of another chance. The United States Supreme Court has also addressed the issue of probation.

The United States Supreme Court considers probation a viable, even preferable alternative to incarceration. In *Roberts v. United States*, 320 U.S. 264 (1943), an early case involving the then new Federal Probation Act, the Court enunciated the purpose of probation as follows:

"...namely to provide an individualized program offering a **young or unhardened** offender and opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the

event that he abuse this opportunity."

Roberts at 272. Also, in *Roberts*, Justice Frankfurter penned a dissent expressing strong support for probation:

"Since assessment of an appropriate punishment immediately upon conviction becomes vary largely a judgment based on speculation, the function of probation is to supplant such speculative judgment by judgment based on experience."

Roberts at 273.

And

"It would be strange if the Constitution stood in the way of a system so designed for the **humane treatment** of offenders. To vest in courts the power of adjusting the consequences of criminal conduct to the character and capacity of an offender, as revealed by a testing period of probation..."

Roberts at 276.

In another case, Justice Black discussed the onus placed upon the probationer who is under supervision of an officer who completes reports to the court, and who may arrest the probationer at any time without a warrant or that the sentencing court may issue a warrant, *Korematsu v. United States*, 319 U.S. 432 (1943). Also in that case, Justice Black stated the following:

"Probation, like parole, is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency."

Komatsu at 435.

These cases provide some support in law for the defense attorney's position that probation is a preferable alternative to prison.

ACHIEVING A NEW START FOR YOUR CLIENT THROUGH PREPARATION: THE MEMORANDUM WITH ALTERNATIVE SENTENCING PLAN

Judges do not trust promises from our young clients. Often, our clients have made many previous promises they were unable to keep. To overcome this skepticism, use of a **memorandum** supporting probation and alternative sentencing plan is crucial. The **memorandum** will address the positive accomplishments of your client. The **alternative sentencing plan** will demonstrate to the court that your client has taken concrete action to put his future in order. An ideal example of a plan would include a provision that states that if the judge grants probation, your client is enrolled in college with financial aid and housing in place. Such a provision makes a decision for probation much easier than your client promising the judge that he will apply to college if granted probation. Similarly, since your client will need employment, a letter from the potential employer stating that he will employ your client if he be probated

or even a letter promising an interview is far more meaningful to the judge than your client's promise to search for a job. If nothing else, these provisions demonstrate to the judge that your client is serious about his future.

With the discretionary nature of this hearing, the attorney cannot know which facet of your plan will convince the court to grant probation. Thus, an attorney must attempt to cover as much as possible in a plan. Sections should include probation; curfew; drug and alcohol testing; continuing treatment; and any possible positive material. Such a plan should be onerous, but not impossible for your client; onerous, because you are trying to rebut the punishment mentality, but so hard as to set your client up for failure. Sample plans are available upon request from this author or the Juvenile Post Disposition Branch of the D.P.A.

CONDUCTING THE 18-YEAR-OLD HEARING

First, the defense attorney should not assume the prosecutor will oppose probation. Contact the Commonwealth Attorney several months in advance of the hearing. In some cases, when presented with counsel's Memorandum and Alternative Sentencing Plan, the Commonwealth Attorney may either join the recommendation for probation or state conditions required to earn his approval. Also, if agreement cannot be reached, the Commonwealth Attorney may agree to remain neutral. At the very least, through early discussion of the case, defense counsel will learn how hard the prosecutor intends to fight probation. Either of these alternatives is preferable to entering the courtroom unprepared. This discussion now assumes that the Commonwealth Attorney is in an adversarial stance.

For the hearing itself, defense counsel must paint a picture of the client as a human being, not a monster. To paint such a picture, if possible, the defense attorney must attempt to have the client appear in street clothes unshackled. Next, the defense attorney must consider the testimony he will use. Several types of witnesses generally provide relevant testimony.

First, the counselor should be considered. The counselor is the person in the best position to discuss your client's progress in treatment. The attorney must be careful to ascertain beforehand whether the counselor is favorably disposed toward your client. As with all DJJ staff now, the counselor must be subpoenaed to guarantee her appearance. In many cases, the counselor will not appear voluntarily, therefore, there is some discretion the attorney can exercise in the area of damage control. If the counselor does not appear, a report will often be issued by the facility.

Another helpful witness may be the staff psychologist. Psychologists can often give insight into the larger picture of the treatment process and your client's place in the process. In some cases, the psychologist may have worked closely with your client and can add to the specific observations of the counselor. Additionally, the psychologist may direct special treatment programs such as drug and alcohol groups and can further discuss whether specialized treatments such as drug and alcohol therapy are available in the community.

Additionally, a juvenile youth worker should be considered as a witness. Youth workers can provide a contrast to degreed professionals by personalizing your client for the court. Youth workers spend more time with your clients than anyone else in the program because they work with your clients at night, on holidays and weekends. In contrast, the counselor and psychologist often see your clients only several times per week. Finally, if your client is permitted to leave the facility, these workers accompany him and can speak about how well your client behaves in public. Often, your client will have a particular worker with whom he gets along well and can recommend him to the attorney.

Finally, the client's family can participate effectively in this process. The family can prospect for employment for your client. Because judges are sensitive to community opinion, a prominent community member may be recruited to testify for your client. Also, a family member might testify.

CONCLUSION

With great vision, Our Legislature has crafted a system to address the issue of juvenile crime. This system combines elements of the juvenile and adult justice systems to treat young offenders in a humane manner. In our system, youthful offenders are permitted access to meaningful rehabilitative services. If a youthful offender merits it, our system wisely permits him an opportunity to earn probation. Through this scheme, many youthful offenders in Kentucky are spared the harsh reality of adult prison and subsequently become productive citizens. The benefits to society of this process are considerable. Indeed, according to the Kentucky Department of Corrections, the cost to incarcerate a prisoner reached as high as \$22,290 per year in 1997. This figure may be weighed against the cost of probation supervision, which was \$1,181 per year. When these costs are considered over a 10 year sentence, the cost of incarceration could exceed the cost of supervision by over \$200,000. Such expenses do not consider the income our youthful offender might earn and pay taxes upon. Of course, monetary considerations do not consider the incalculable contribution to society a young person might make. As defenders, it is our duty to help our clients earn their opportunity to contribute to society.

Your client's life is literally at stake during the 18-year-old hearing. You can win this hearing with thorough preparation. Thorough preparation requires many small steps. While no step by itself may be pivotal, since the attorney cannot know which one of those small steps will make the difference, no step can be overlooked. By taking all necessary steps, we can win a chance to start over for our clients. ♦

Thomas D. Collins
Assistant Public Advocate
100 Fair Oaks Lane, 3rd floor
Frankfort, KY 40601
Tel: (502) 564-8006 x148
email: tcollins@mail.pa.state.ky.us

DETAINING STATUS OFFENDERS IN EXCESS OF TEN DAYS: A practice that violates statutory limits and which is contrary to the Department of Juvenile Justice recommendations.

by Suzanne A. Hopf, M.A. J.D.
Assistant Public Advocate

punishment for the child status offender by way of the "least restrictive alternative."³ The purpose of the Juvenile Code was to promote sound public policy for Kentucky's juveniles, and

This article gives a statutory, common law and public policy analysis of the juvenile court's attempts to detain status offenders in excess of the ten day limit set by the Kentucky Legislature. This analysis considers Chapter 630 pertaining to status offenders, the ten day detention limitation for detention of status offenders, the legislative requirement of the least restrictive alternative for status offenders, and whether the court's inherent contempt powers may supercede the limitation's on detention set by the legislature. It also provides reasoning from other jurisdictions to assist in understanding why this practice must cease in Kentucky. This article also provides a short account of the Federal Juvenile Justice and Delinquency Prevention Act which provides federal funding for juvenile services and the JJDP's relevance to this practice, and Kentucky's Department of Juvenile Justice's position on this practice.



Suzanne A. Hopf

INTRODUCTION

According to KRS 630.020 a status offender is a child who is a habitual truant, habitual runaway, or is deemed to be beyond control of their parents or school.¹ These children are subject to juvenile court jurisdiction for non-criminal behavior and because of their age; the actions that subject them to juvenile court jurisdiction are not violations of the laws aimed at adults. KRS 630.100 limits the

time that status offenders may be detained post adjudication to a ten day period. Some courts try to make an end run around this statute by making criminal contempt findings against status offenders, and sentence them to detention in secure detention facilities in excess of the ten-day limit. The juvenile court sometimes holds a status offender for longer periods of time than if the child had committed a crime and was adjudicated delinquent. This type of enhanced punishment is what is referred to by legal scholars as "bootstrapping."² Current policy objectives establish that secure detention should be used only in extraordinary circumstances. Our own Kentucky Legislature recodified our juvenile laws in 1988, and the official commentary of the juvenile code clearly establishes that the legislative intent was to **provide treatment and not**

also to promote compliance in Kentucky with the Juvenile Justice and Delinquency Prevention Act which provides substantial amounts of funding to states for the welfare of their children.⁴ Despite this, frustrated juvenile courts will sometimes still remove children from their communities and sentence them to lengthy periods in secure detention facilities.

The Juvenile Justice and Delinquency Prevention Act,⁵ as amended by Juvenile Justice Amendments of 1980,⁶ (JJJPA) was enacted in 1974 and requires that states which receive federal funds demonstrate progress towards removing status offenders from secure facilities and that the juvenile justice programs develop alternative, non-secure programs for these children.⁷ Kentucky's code was developed to comply with this objective and to ensure that status offenders are diverted away from detention centers, and that alternatives to detention are utilized.

The behavior that triggers a status offense is non-criminal, and often involves problems within the child's family. Because of this it is wrong to blame the child for their actions and to then punish the child by imposing detention. Rather, it is incumbent upon the court that it address the underlying problem. This was the rationale that guided the recodification of Kentucky's juvenile code, the reason the legislature emphasized that status offenders should be treated and not punished, and the reason that the least restrictive alternative should be sought in all cases involving status offenders. The least restrictive alternative is consistent with the state's objectives of treatment and rehabilitation. This rationale was also adopted by the JJJPA. It is the basis for Kentucky's policy objectives deinstitutionalizing status offenders. The JJJPA wanted to encourage juvenile courts to provide proper treatment in the least restrictive alternative environment.⁸

Our Kentucky legislature has provided specific sections of Chapter 630 to limit institutionalization of status offenders. The pertinent parts of Chapter 630 for this analysis are the following:

1. **KRS 630.010** which considers the **purpose** of the chapter dealing with status offenders, and which states that detention may only be used for specific and constructive purposes when the least restrictive alternative has been shown to have failed, and that there may be no conversion of status offenders into public offenders.
2. **KRS 630.070** which articulates the **limitations on deten-**

tion of the child, and that no child is to be punished via detention except if the child is in contempt of court.

3. **KRS 630.100** which establishes the limitations on detention of adjudicated status offenders, which is not to exceed ten days.
4. **KRS 630.070** which allows the court to **punish the child for contempt** by ordering the child into a detention facility.

Detention in excess of ten days

is a constitutionally disproportionate penalty

The practice of ordering status offenders into detention in excess of ten days violates the specific provision of **KRS 630.100** and is a constitutionally disproportionate penalty for status offenders. **KRS 630.100** limits the court's ability to detain a child to a maximum of ten (10) days. The court is allowed to order a child into a detention facility as a form of punishment when the child is in contempt.⁹ **KRS 630.070** does not provide for an exception to the ten-day limit, therefore, a contempt finding must limit its punishment term to a ten-day period or less when the child is in contempt.

Kentucky's rule of lenity and statutory construction establishes that the court may not detain an adjudicated status offender in excess of the ten day limit set in **KRS 630.100**. At this time Kentucky has no case law directly on point considering this statute. Other states, however, have carefully and thoughtfully analyzed the use of their court's inherent contempt powers to attempt circumvention of their statutory limitations to detain status offenders. These states have found that such a use is improper.

Contempt powers should not be used against status offenders, or if used at all, should be used in the most sparing of manners. In considering the use of contempt powers to punish status offenders, the Maryland courts have determined that contempt powers must be narrowly defined so as to stay in line with the public policies mandating that the least restrictive alternative be used.¹⁰ Contempt powers should be used sparingly in the case of juvenile contemptors.¹¹

The New Mexico Court of Appeals held that the incarceration of a CHINS (children in need of services and an analogous category to status offenders in Kentucky) for contempt of a probation order was contrary to public policy when the statute does not provide for incarceration.¹² In *Julia S.* the juvenile court made contempt findings and detained the child 15 days, even though the statutory provisions for CHINS limited detention to ten days.¹³ The limitation in the New Mexico statute was similar to Kentucky's ten-day limit. On review, the appellate court held that the **inherent contempt power of the court did not validate the court order placing the child in detention for fifteen days, and the children's code limiting detention to ten days was a reasonable regulation of the court's inherent contempt powers.**¹⁴

When a statute provides no guidelines for the application of disposition, and at the same time allows classification and treatment of status offenders in the same manner as criminal offenders, such a statute fails to meet equal protection, substantive due process, and

cruel and unusual punishment standards.¹⁵ A statute that allows the truant child to be committed to secure prison-like facilities which also house children guilty of criminal conduct, or needlessly subject status offenders to degradation and physical abuse of incarceration is unconstitutional.¹⁶ The cruel and unusual punishment standard requires that no person be punished unless he or she has done something which is generally recognized as deserving of punishment. The legislature drafted a specific ten-day limitation on detention for status offenders, and it never intended the juvenile court's contempt powers to extend to punish status offenders beyond this limitation. Even if one took the position that the courts could use their inherent contempt power to punish a child to detention in excess of ten days, then the statutes applied as such, would fail to meet equal protection, substantive due process, and the cruel and unusual punishment standard. The state should not be punishing children in fact while they are alleging to rehabilitate or otherwise help them.

Detention in excess of the ten day limit inflicts a constitutionally disproportionate penalty on status offenders, violates equal protection, substantive due process and protection against cruel and unusual punishment of status offenders. West Virginia has held that a child could not be confined to a prison like secure facility unless the record supported a finding that the child was so ungovernable that no other reasonable alternative existed.¹⁷ This court held that the placement of a child in forestry camp for being habitually truant was unconstitutional because his placement in this facility was not consistent with the objective of protecting status offenders from unconstitutional incarceration. The indiscriminate incarceration of status offenders along with juvenile delinquents violates constitutional protections in that it inflicts a disproportionate penalty upon status offenders, and additionally denies status offenders equal protection of the laws, substantive due process and protection against cruel and unusual punishment. The West Virginia court granted the child's habeas corpus petition in light of this analysis.¹⁸

Bootstrapping is improper

Detaining children in excess of ten days is "**bootstrapping**" and is not the least restrictive alternative and therefore violates the intent and purpose of **KRS 630**. Bootstrapping is not permitted through the use of contempt powers. Bootstrapping is a way whereby the courts transform a status offender into a juvenile delinquent or punish a status offender with a punishment reserved only for public offenders.¹⁹

Clearly, the legislature contemplated this potential problem and provided language to forbid this:

(Continued on page 28)

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"Status offenders shall not be converted into public offenders by virtue of status conduct."²⁰

The legislature enacted this section so status offenders would not be subjected to the same punishments and classification as public offenders. The use of the contempt statute is an improper use of the court's contempt powers when the underlying offense is a status offense.²¹ The purpose of the contempt statute is to grant the court jurisdiction over adults involved in the proceedings, and therefore a juvenile who repeatedly left home without permission in violation of the terms of his probation should not be punished under the contempt statute when the underlying offense was status.²² Attempts to bootstrap status offenders to delinquency by treating violations of probation conditions that are merely status offenses (and not crimes) should be challenged.²³

The legislature has the authority to limit the use of the court's contempt power so that a status offender may not be detained in excess of the express limitation of ten days. Legislative limitations on the juvenile court's contempt powers which are reasonable do not unduly burden or substantially interfere with the proper functions of the juvenile court.²⁴

The child may not be converted into a public offender by virtue of their status conduct.²⁵ The process of bootstrapping, outlined in the previous section, violates KRS 630.010(4). The court is not permitted to apply criminal contempt sanctions in order to punish the child status offender in excess of the statutory limit of a ten day sentence when the underlying offense is status. The court should not be allowed to do indirectly, what it was not permitted to do directly under KRS 630.100.

Detention violates the primary objective of the code – providing treatment in the least restrictive alternative context.

Detention is contrary to the least restrictive alternative objectives, the legislative intent of Chapter KRS 630 and the express language of KRS 630.010(3) and 630.120 (3).

The overriding purpose of Chapter 630 is to establish a separate Chapter providing a distinct set of guidelines for dealing with status offenders. The Court should direct its efforts to ensure that both the child and the family receive services to remedy the problems brought to the court's attention. The court should limit any use of detaining offenders in secure juvenile detention facilities to very specific and constructive purposes and only when other less restrictive alternatives to detention have been attempted and are not feasible.

KRS 630.010(3) states that detention is to be used ONLY when other less restrictive alternatives have been attempted and were not feasible. KRS 630.120(3) states that the court is

under an affirmative duty to first determine that all appropriate remedies have been considered and exhausted to assure that the least restrictive alternative has been utilized. Even when the least restrictive alternatives have failed, detention is not the next step, but rather commitment to the cabinet in order to **provide community based and non-secure placement to achieve treatment** is the proper remedy.²⁶

Chapter KRS 630 mandates that the least restrictive alternative must be utilized. The definition of the "least restrictive alternative" is found in KRS 600.020 (31).

"Least restrictive alternative" means, except for purposes of KRS Chapter 645, that the program developed on the child's behalf is no more harsh, hazardous, or intrusive than necessary; or involves no restrictions on physical movements nor requirements for residential care except as reasonably necessary for the protection of the child from physical injury; and is conducted at the suitable available facility closest to the child's place of residence.

Also, the juvenile court must determine that **all appropriate remedies have been considered and exhausted.**²⁷ The court should not shirk this vital duty by imposing other remedies. Detention flies in the face of the primary objective of the juvenile code in providing treatment within the least restrictive alternative context.²⁸

The Children's Court Centennial Communications project illustrates the reasoning behind keeping children out of institutions and utilizing only the least restrictive alternative. Some of our most productive members of society are led astray as youth and may become entangled in the juvenile justice system, incidental brushes with more serious offenders can lead to increased participation in delinquency.²⁹

The legislature intended that any punishment that was ordered by the court be minimal, comport with the ten day limitation, and that the least restrictive alternatives be attempted and affirmatively considered by the court before any use of punishment is inflicted on a status offender.

Long term detention of status offenders who are in contempt of court is a practice violating the policy objectives of the Juvenile Justice and Delinquency Prevention Act. The JJDA was designed specifically to correct the widespread abuses and deficiencies in state juvenile justice systems. States that participate in the program receive funding for projects that are consistent with the three major objectives of the Act: the removal of status offenders from secure detention, the separation of juveniles from adult offenders in jails or other facilities, and the provision of essential due process protections to children in the juvenile justice system.³⁰ States that fail to demonstrate substantial compliance with the requirements of the Act become ineligible for continued funding. In past years, Kentucky has been one of only two states in the

nation to lose a large proportion of its federal funding due to its non-compliance with the JJDP. Kentucky has just recently in the past year come back into compliance with the JJDP and become fully eligible for 100% of all JJDP funding.³¹ However, in its 1999 Report to the Governor and General Assembly the Kentucky Juvenile Justice Advisory Committee stated that even a small increase in the number of status offenders detained could result in funding losses to Kentucky.³²

JJDP's requirement that status offenders be deinstitutionalized came from policy reasons identical to those articulated in the *Official Commentary of Kentucky's Juvenile Code*. The purpose of utilizing the least restrictive alternative is that institutional confinement is neither appropriate nor necessary for the successful treatment of status offenders. The federal program developers believed that local community programs are far more cost effective than large impersonal institutions located far from the child's home community and can better tailor local programs to the unique characteristics of each community's youth population.³³ Most importantly, the legislative history of the federal Act reveals the drafters grave concerns of the danger to status offenders in confinement with more problematic juvenile delinquents.³⁴

The Act further assumes that children should remain with their families or in their communities whenever possible. The drafters of this Act had such serious concerns about the bolstering of large institutions with JJDP funds that it prohibited JJDP funds from supporting such institutions, and also affirmatively required that each state receiving JJDP funds demonstrate "substantial compliance" (75% compliance) with the de-institutionalization requirement.³⁵

SUMMARY

Detention of status offenders is contrary to the legislative intent and the plain meaning of KRS 630.100 and KRS 630.070. It is also contrary to the broad policy objectives of the JJDP and jeopardizes Kentucky's participation in this federal funding. Kentucky has a history of violating the JJDP requirements for deinstitutionalization of status offenders and this has, in the past, contributed to the loss of funds that Kentucky recently experienced. For these reasons, even those courts that find value in detaining status offenders when a contempt finding is issued need to cease exceeding the ten-day limit. ♦

For a copy of a brief and supporting appendices that sets forth the reasoning and citations provided in this article, contact Suzanne A. Hopf at the Department of Public Advocacy, Frankfort, KY. (502) 564-8006 (ext. 284) or at shopf@mail.pa.state.ky.us

Suzanne Hopf is an Assistant Public Advocate for the Department of Public Advocacy in Frankfort, Kentucky, and teaches as visiting faculty at the University of Louisville and as adjunct faculty at Spalding University in Louisville, Kentucky.

¹ KY. REV. STAT. § 630.020 (Michie 1999).

² See Jan C. Costello & Nancy Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice And Delinquency Prevention Act*. 16 HARV. C.R.-C.L. L. REV. 41 (1981).

³ Official Commentary to Juvenile Code, 1986.

⁴ Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601-5640 (1976 & Supp. III 1979).

⁵ *Id.*

⁶ Juvenile Justice and Delinquency Prevention Act, Pub.L. No. 96-509, 94 Stat.2750 (1980).

⁷ *Id.*

⁸ *Id.*

⁹ KY. REV. STAT. § 630.070 (Michie 1999).

¹⁰ In re Ann, 525 A.2d 1054, 1057 (Md. 1987).

¹¹ Wayburn v. Schupf, 365 N.Y.S.2d 235 (N.Y. App. Div. 1973) (the power of the family court to punish for contempts may not be used as a subterfuge to extend the time the juvenile may be otherwise detained prior to fact-finding or dispositional hearing).

¹² State v. Julia S., 719 P.2d 449 (N.M. Ct. App. 1986).

¹³ *Id.* This case was held not to be moot even though the child had already served her sentence.

¹⁴ See also Dept of Juv. Justice v. S.W. & M.W., 647 So.2d 1055 (Fla. 1995) (adjudication of CHINS for contempt of court as delinquent on the basis of contempt finding and then ordering them into detention for failure to attend school violates state statutes limiting detention and punishment).

¹⁵ State ex rel Harris v. Calendine, 233 S.E.2d 318, 324 (W. Va. 1977).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ State ex rel Harris v. Calendine, 233 S.E.2d 318, 324 (W. Va. 1977).

¹⁹ See Jan C. Costello & Nancy Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice*

Excerpts from the 1999 Kentucky Juvenile Justice Advisory Committee Annual Report to the Governor and General Assembly relating to the use of secured detention to punish status offenders for contempt of court.

Detention is used too often by the courts to punish status offenders and too many status offenders are held in contempt of court for failure to follow the orders of a judge relating to their status offense.

Too many status offenders are securely detained in Kentucky. The rate for the secure detention of status offenders reported to the OJJDP in DJJ's monitoring report was 26.64 per 100,000, which is below the 29.4 per 100,000 upper limit established by the OJJDP for a state to receive the 25% of formula grant funding associated with the deinstitutionalization of status offenders, however this rate is still well above the de minimis rate of 5.8 per 100,000 for a state to be in full compliance with the provisions of the JJDP Act. Our rate is uncomfortably close to the upper limit and even a small increase in the number of status offenders securely detained could result in us losing the 25% of formula grant funding associated with this requirement.

The cost of housing a status offender in secured detention does not provide enough benefit to justify the cost for this type of offender.

At an average cost of \$90 per day, this approach is neither a cost effective or efficient method of addressing status offenders. A status offender sentenced to serve 30 days in detention due to contempt will cost the state \$2,700. The same status offender placed in therapeutic foster care or an emergency shelter for the same amount of time at an average cost of \$50 per day will cost the state \$1,500 - a savings of \$1,200 over secure detention. Project this figure out over just one month assuming that just 200 of the available 532 detention beds are filled by status offenders for 30 days and the cost savings achieved through the use of alternative placements is \$240,000. Cost savings should be achieved through the use of crisis intervention and casework services that would permit status offenders to remain in their homes while receiving appropriate services.

- DJJ encourages courts to exercise appropriate discretion in their use of secure detention within Kentucky's juvenile justice system, and emphasizes that they must take care not to use secure detention in inappropriately.
- DJJ believes that early prevention and intervention is the most cost effective and efficient way to ultimately address juvenile crime
- DJJ recommends the development of special services and programs to address the needs of status offenders and their families and encourages courts to utilize these services and programs rather than imposing secure detention on status offenders. ♦

And Delinquency Prevention Act. 16 HARV. C.R.-C.L. L. REV. 41, 58 (1981).

²⁰ KY. REV. STAT. § 630.010(4) (Michie 1999).

²¹ W.M. v. State, 437 N.E. 2d 1028 (Ind. Ct. App. 1982).

²² *Id.*

²³ In re Ricardo A., 38 Cal. Rptr. 2d 586 (Cal. Ct. App. 1995).

²⁴ State v. Aaron D., 571 N.W. 2d 399 (Wis. Ct. App. 1997).

²⁵ KY. REV. STAT. § 630.010(4) (Michie 1999).

²⁶ See KY. REV. STAT. § 630.120(5)(a) & (b) (Michie 1999).

²⁷ See KY. REV. STAT. § 630.120(3) (Michie 1999).

²⁸ See In re the Interest of Stacey R., 428 S.E.2d 869 (S.C. 1993) (least restrictive alternative must be shown to have failed before the child can be placed in detention).

²⁹ See J. Ziedenberg, V. Schiraldi, T. Rowland, et al., *Second Chances*, The Children's Court Centennial Communications Project, (1999)
<<http://www.cjcj.org/centennial/pdf.html>>.

³⁰ Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 102, 223(a)(13) (1976 & Supp. III 1979).

³¹ KENTUCKY JUVENILE JUSTICE ADVISORY COMMITTEE, ANNUAL REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY, 1999.

³² *Id.*, at p. 14.

³³ SENATE COMMITTEE ON THE JUDICIARY, 95th CONG., 1st SESS., JUVENILE JUSTICE AMENDMENTS OF 1977, S. REP. NO. 165, at 33 (1977).

³⁴ 123 CONG. REC. S4, 236 1977) (remarks of Sen. Bayh).

³⁵ Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 102, 223(a)(12)(B) (1976 & Supp. III 1979). (requiring that facilities (1) comport with the requirement that they utilize the "least restrictive alternative" setting, and that (2) the facilities be in reasonable proximity to the family and the home communities of the juvenile).

PLEA AGREEMENTS: WORKING WITH CAPITAL DEFENDANTS

by Rick Kammen, Esq.; McClure, McClure & Kammen
Lee Norton, Ph.D., L.C.S.W., Tallahassee, Florida

combined with trust in the attorneys' intentions, often results in a successful plea.

Dynamics: The Client and the Team

Time

Spending time with the client and the client's family is the most important component of plea negotiations. It provides the framework of a relationship between the client, his family and the attorneys that becomes the context within which the client can make a decision to save his own life. Much of the time initially spent with the client may seem frivolous or futile because it is devoted to topics far outside the realm of legal issues: "How 'bout them Cubs?" as one lawyer oft repeats. Yet, time speaks to clients where words fail. Time allows the client to "test" the lawyers. Many client behaviors are tests silently administered to unwitting attorneys -- tests of commitment, intelligence, skill, compassion, etc. Clients are impaired in many ways, especially with regard to relationships. Their childhoods left them unable to believe that anyone would consistently and sincerely act in their interest. The only way they can learn to trust is to watch what their attorneys do over time.

Time allows the story to emerge. Many times a plea comes only after the client has had an opportunity to make sense of his own suffering. This requires that he fully narrate his story. Attempting to put into words what has only been a hollow sensation of pain and confusion allows the client to understand some of his experiences and assuage his shame and guilt. Rarely does the story come out all at once. It is told by teaspoons, a slow ebb and flow of images and words. Listening to the story is perhaps the greatest contribution made by attorneys and other team members. Good listening takes time and skill; it involves the ability to hear without judgment, relinquish control, and allow the other person to struggle out loud with his demons. Often the client doesn't know the causes of his own pain. Educating him and providing him the means to understand the sources of his confusion and his behavior are important. Creating a space for the client to observe his inner world can reduce his self-loathing and develop the seeds of self-worth, which in turn gives him permission to live.

The client needs to know that the attorneys didn't just throw up their hands and give up. He must know that the plea resulted from hundreds of hours of painstaking investigation and analysis of the case. This entails following up on each "lead," -- no matter how pointless it may seem -- and discussing with him every avenue that could be pursued, regardless how irrelevant these efforts may appear to the rest of the team. Discussing issues over time allows for repetition of facts and concepts that are obvious to the attorneys, but which the client may not be able to grasp without hearing and having explained to him many times. An understanding of why the case is unwinnable,

It is important to think about who comprises the team. Typically, the nucleus of a capital team includes counsel and co-counsel, a phase one investigator and a mitigation consultant. It is essential not to forget that the client and his family also are important members of the team, even when they are impaired, difficult to work with or resistant to the rest of the team's best efforts. The client's and his family's roles must be made explicit early on in the team building process. They must be helped to understand that the primary goal is to save the client's life and that they are the most important people in that process. All along the way the mantra, "What are your thoughts?" should be repeated to the client and his family. The rapport that is created by including the client and his family later can become the currency with which the plea is negotiated.

One of the most common traits seen among capital defendants is the compulsion for self-defeating behavior. The ability to "snatch defeat from the hands of victory" permeates most aspects of the client's personality and relationships. This often manifests as "splitting," which means that the client mentally and emotionally divides the team into categories of "good" and "bad," and attempts to develop alignments with whomever he perceives as "good." These categories can change daily, resulting in drastic changes in the client's behavior toward various team members. Along with primitive "black and white" thinking comes the propensity to blame, go on irrelevant tangents, and attempt to co-opt team members into fault-finding with each other. Nothing undermines the team's efforts to effectively resolve the case more quickly than the client's -- and his family's -- unconscious divisiveness. There is often an increase in splitting and other self-defeating behaviors as the case comes to closure. Miscommunications, tension and conflict within the team are generally diagnostic of the client's ambivalence and anxiety and should be handled immediately.

The Client's Wounds: Trauma and Decision Making

It must be assumed that the client is emotionally and intellectually impaired. Most of the damage is done in early childhood. There is no end to the horror that is visited upon our clients: They are rejected, abandoned, beaten, sexually abused, degraded, starved, forced to submit themselves to unspeakable humiliation, and isolated from sources of support and solace. This disrupts their development and causes them

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to re-enact throughout the course of their lives what they experienced as children. Nowhere are the effects of trauma more evident than in the client's consistent inability to make decisions in his own best interest. Obviously, if the client were a good decision-maker he would not find his way to us.

Clients generally use very primitive thinking. They see the world in broad contrasts: Life is "either/or," not "both/and." Thus, they adamantly demand to "free me or fry me," and see any attempt to find a middle ground as a form of betrayal. Their limited ability to reason effectively and know who and when to trust renders the usual approaches used by attorneys ineffective.

While clients cannot think well under any circumstances, increased stress causes further regression, which is why they can become completely irrational at the most critical junctures. There is little that can be done to repair developmental damage. However, the team can be mindful of how the client responds to stress, observe patterns in his thinking, and find the ways that he can save face and honor important relationships. Most important is the capacity of the team to reduce and help the client modulate his response to stress. Unrelenting stress during childhood caused him to remain internally aroused and hypervigilant. He sees danger where it doesn't exist. He alternates between acting out and shutting down. He doesn't understand his body or his emotions. Making the relationship with the team as safe a place for the client as possible is one of the best means to manage his stress. Safety translates into predictability, patience, and benevolence. It includes demonstrating reasoned responses and systematic problem solving skills. Over time, the client may become less anxious and therefore be able to use more complex thought.

Because the client's thinking is so impaired and he is under so much stress, "reasoning" with him -- e.g. laying out the facts and presenting a "case" -- may not be an effective means of arriving at a plea agreement. Sometimes a different tack is necessary. Instead of explaining to the client why the case is unwinnable and why a plea is his best option, try having him explain the case to the attorneys (without fear of being cross examined), and how a decision to go to trial is consistent with who he is and how he wants his life to be. Sometimes the process of talking slowly and calmly, and eliciting his view on a variety of matters enables the team to identify hidden fears and an underlying agenda. Once the real issues are uncovered they can be re-interpreted in light of a plea. A client often accepts a plea when it is no longer seen as inconsistent with the ways in which he defines himself.

The "51%-49%" Rule

Nobody likes to be pressured into anything. It deprives a person of his or her dignity. There sometimes comes a point in a case when the team is working too hard, assuming too much responsibility, and is replicating the client's childhood experi-

ences of being cajoled, coerced or pressured into doing things he didn't want to do or didn't have the capacity to understand. When the client feels pressured he often "polarizes;" i.e. he starts to see the battle as "you against me" instead of "me against the state" or "me against myself." When the client is more concerned with not getting pressured into taking a plea than he is with saving his own life it is usually time to step back and release the tug-of-war rope. Here the balance of effort should be switched so that the client is doing at least 51% of the work. Occasionally it is useful simply to say, "I'm really not sure what you're going to do. You have a tough decision to make. You have all the tools and resources necessary to make that decision and I know you will do not only what is in your best interest, but what is in the best interest of your children (wife, etc.). I am honored to have worked with you and to have been a part of this process. Let me know how I can help you." This can have a powerful paradoxical effect on the client. Once he is free of the external pull, he is left with his own thoughts and with his anxiety. He can now turn his attention away from his attorneys and deeply consider whether he wants to roll the dice with his own life. When he knows it is his decision, he is free to make it. ♦

Please feel free to contact Rick Kammen at (317) 236-0400 or Lee Norton at (850) 681-9357 if you have questions or want to discuss these topics further.

3 Aspects of Relief: Must, Can, Should

The relief requested should be written in at least three parts. The motion should request: a remedy which it would be error to deny, a remedy which can be granted, and a remedy which aims for a more "perfect" level of justice but which will not be granted under the current state of the law. It is important that the prayer for relief state that the alternative requests for relief are lesser acceptable alternatives for relief. Requesting relief in this comprehensive manner takes advantage of the established law as well as the developing law. Since the prosecution often does not or even cannot appeal the relief granted by motions, the body of existing case law is never an accurate measure of the relief that may be given in response to motions and basing motions on existing case law alone is simply inadequate representation. Almost every motion should request, and anticipate use of, an evidentiary hearing. Creativity in the type of relief requested, as well as the quality of the evidence supporting the relief requested, may often be decisive in bringing about favorable results.

Millard Farmer and Joe Nurscy, *The Building Blocks of Capital Cases: Motions and Objections*, The Champion, Vol. 8, No. 2 (March 1984) at 16, 20.

PRACTICE TIPS

from DPA's Appellate Division

Collected by Susan Balliet, Assistant Public Advocate

How to preserve objections to jury instructions after *Bentley*

Ask for a directed verdict due to insufficient evidence, and also object to giving an instruction on that offense due to insufficient evi-

dence. State that if the court insists on instructing on that offense over your objection, your tendered instruction is the version that should be given. Absolutely, continue to tender written instructions. You can print at the bottom of any tendered instruction on unwanted offenses that by tendering this instruction, defendant in no way waives his objections to instructing on that offense.

Donna Boyce, Capital Appeals Manager

Don't tell a client the appellate lawyer will get you a copy of the record

Our clients have a right to the record on appeal, but the Kentucky Supreme Court has interpreted that right very narrowly. Appellate courts will provide the client's appellate lawyer a copy of the record, but only as a loan. And since DPA does not have funds to make additional copies to send clients, our clients can only get their own personal copy of their trial record by contacting the appropriate circuit court and paying for it. Video tapes are typically \$15 apiece, and the cost per page of written materials varies. Fayette County requires individuals to use a copy machine in the clerk's office and charges 25 cents per page.

Emily Holt, Appeals

Don't go "off the record"

Do not discuss your client's case with the court "off the record." It is difficult to imagine a situation in which this practice would be advantageous to your client, and very easy to imagine many situations in which it would hurt your client's appeal due to lack of preservation. Anything important enough to talk about with the court is important enough to be on the record.

If you are somehow forced into an "off the record" conversation with the court, be sure to recount the conversation "on the record" at your earliest opportunity. Check to be sure the video tape is running, or a court reporter is present, during proceedings in chambers.

Julie Namkin, Capital Appeals

How to Photocopy Newspaper Articles

Whenever you include newspaper articles in the record, please follow these basic rules to make sure your articles 1) will not be totally disregarded, and 2) will pack the maximum punch.

Prior to copying, cut all articles to fit 8 ½ by 11 paper, even if this means using extra pages. Include the story headline, and include some indication of what page the article was on. To indicate a front page story, cut out the name of the paper from the top of page one, and include that along with the date, setting out the article underneath. Include all of the article. Always include the date.

Susan Balliet, Appeals

Plain View . . .
Ernie Lewis, Public Advocate

Illinois v. Wardlow
 120 S.Ct. 623
 (1/12/2000)

Hazelwood v. Commonwealth
 1999 WL 1262099
 (Ky. Ct. App. 11/12/99)
 (Not yet final)

United States v. Harris
 2000 WL 125810
 (6th Cir. 1/28/00)

United State v. Dice
 2000 WL 10607
 (6th Cir. 1/6/00)

Illinois v. Wardlow
 120 S.Ct. 623
 (1/12/2000)

This is a case of exceptional importance. It could have marked a turning point in the decline in the protections provided by the Fourth Amendment. It could have indicated that the Court was becoming more sensitive to the rights of minorities and the poor as they bump up against the police in the War on Drugs. It did neither of those things. Rather, it is a case that continues to define the relationship of the police

and citizens, particularly citizens in our poorest neighborhoods and largest cities. It is one that continues to expand the power of the police to search citizens, especially their persons, with little suspicion that the citizen has engaged in wrongdoing. It is one that raises the inquiry whether minority groups and particularly juveniles can be treated fairly by our police and within our criminal justice system.

This case arose out of Chicago. 4 police cars were driving in a caravan into an area known for heavy narcotics trafficking. The purpose of the trip was to investigate narcotics trafficking. Officers Nolan and Harvey saw Wardlow with an opaque bag in his hand. Wardlow fled, and Nolan and Harvey followed, eventually cornering him. A pat-down search was immediately conducted, and a gun was discovered in the opaque bag. Wardlow was arrested.

Wardlow's conviction was reversed by the Illinois Appellate Court, who held that Nolan did not have an articulable suspicion when he stopped Wardlow. The Illinois Supreme Court agreed, holding that sudden flight in a high crime area does not rise to the level of an articulable suspicion sufficient under *Terry v. Ohio*, 392 U.S. 1 (1968) to justify a stopping. The Court held that when one is stopped, the citizen has a right to "decline to answer and simply go on his or her way, and the refusal to respond, alone, does not provide a legitimate basis for an investigative stop" The Court further observed that flight may simply be an exercise of this right to "go on one's way," and thus could not constitute a reasonable suspicion.

The United States Supreme Court granted *Crête*, and reversed in an opinion written by Chief Justice Rehnquist. The Court founded its decision on *Terry v. Ohio*, 392 U.S. 1 (1968). In

so doing, the Court also minimized the standard used for *Terry* stops. The Court reaffirmed that a "reasonable suspicion" is a less demanding standard than probable cause," and more significantly stated that a reasonable suspicion "requires a showing considerably less than preponderance of the evidence."

The Court stated that the nature of a high crime is a factor in the reasonable suspicion calculus. Being in a high crime area does not in itself suffice. However, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."

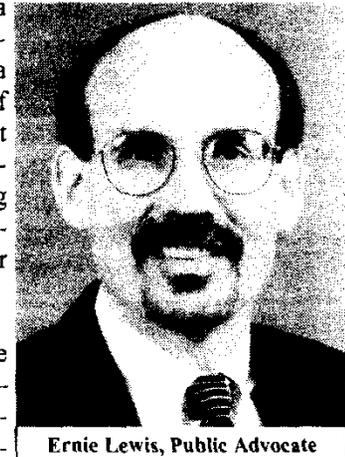
The second factor considered by the Court was flight. "Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." The Court considered flight in a high crime area to be sufficient under the totality of the circumstances to constitute a reasonable and articulable suspicion to justify a *Terry* stop in this case.

The Court did not go as far as requested by the State of Illinois. The Court rejected the State of Illinois' request for a bright line rule that would have allowed for a detention of anyone who fled at the sight of a police officer. Obviously, that rule would have been an even more potent weapon in the war on crime.

In a remarkable statement, the Court acknowledged that innocent people can be effected by their decision. "*Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent." So much for the law going out of its way to protect the innocent even at the risk of the guilty going free.

The opinion of the Chief Justice was joined by Justices Kennedy, Scalia, O'Connor, and Thomas. Justice Stevens wrote a dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer. This opinion applauds the majority opinion for rejecting a *per se* rule that flight upon seeing a police officer suffices for a *Terry* stop.

However, the dissenters disagree with the judgment of the Court regarding whether the totality of the circumstances in this particular case constituted reasonable suspicion. The dissenters were not impressed with the fact that Wardlow's flight had occurred in a high crime neighborhood. The dissenters state that "even in a high crime neighborhood



Ernie Lewis, Public Advocate

unprovoked flight does not invariably lead to reasonable suspicion. On the contrary, because many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so."

In the end, the Court continued to place its thumb heavily on the side of law enforcement and the police. Under this decision, the police will be able to make a *Terry* stop of virtually anyone they want, no matter the pretext. In a long line of cases from *Terry* through *Whren* and now to *Wardlow*, the Court has allowed the police to confront citizens on the streets and in their cars, to frisk them if they can articulate some sort of public safety need, to search them and their cars if something is discovered, and all the while to ignore any proof that the search and seizure is pretextual. The evidence continues to mount that driving while black is a crime in this country. The evidence continues to mount that confronting black street gangs is sufficiently valuable to continue to acquiesce to the long, sad decline of the Fourth Amendment.

Hazelwood v. Commonwealth

1999 WL 1262099

(Ky. Ct. App. 11/12/99) (Not yet final)

The question is posed as follows by the Court: "May a police officer make a warrantless seizure of contraband which has been inadvertently discovered, in plain view, by a firefighter during the legitimate performance of that firefighter's duties?"

Hazelwood experienced a house fire in his kitchen in 1998. When he and a police officer were unable to put out the fire, the fire department was called. After the fire was taken care of, the firefighters inspected the house to ensure that the fire had not spread. While doing this, a firefighter discovered marijuana in a kitchen drawer. The police officer was called back into the house, and he seized the marijuana, and eventually after Hazelwood gave his consent, a large amount of marijuana was seized. Hazelwood was charged with trafficking in marijuana. His motion to suppress was overruled, and he eventually was convicted and sentenced to 5 years in prison.

The Court of Appeals affirmed the trial court in an opinion written by Judge Dyche and joined by Judges Gardner and Knox. The Court first noted that firefighters "may enter a burning building to extinguish the fire without having to obtain a search warrant," citing *Michigan v. Tyler*, 436 U.S. 499 (1978). Further, once the firefighters were on the scene engaged in their job and they come upon contraband inadvertently, "they are allowed to seize the items or material. That initial intrusion being legitimately made, it is not unreasonable for a police officer to be called in to make the actual seizure."

The Court took pains to note that this holding is limited. "The firefighters must be legitimately on the premises; the discovery of the evidence or contraband must be inadvertent; the police must enter only upon request of the firefighter; the seizure must be limited to the evidence or contraband in plain view, and

inadvertently discovered by the firefighter; no further search or seizure is performed; and the seizure is accomplished within a reasonable time." Because all of these limitations were met in this case, the trial court's ruling was affirmed.

United States v. Harris

2000 WL 125810

(6th Cir. 1/28/00)

The Sixth Circuit has issued a case which demonstrates the proper use of a *Terry* stop. In this case, a Mansfield, Ohio police officer was responding to citizens' complaints about trafficking in drugs in their neighborhood. He began to watch a particular "purported crack house" when he saw Harris walking "erratically" near the house, bend down and remove something from his shoe, and cup something in his hand. He also had one pant leg rolled up, which he would later testify was "a common street sign that a person is holding or dealing drugs." Based upon these observations, the officer stopped Harris. Harris indicated that he was going to his cousin's house, but declined to give his cousin's name. The officer asked him to move his hands away from his body, but Harris refused. He then told Harris he was going to pat him down for weapons, but Harris told him he would not allow that. A struggle ensued, and eventually once back-up arrived, Harris was subdued. A weapon and 3.056 grams of cocaine were discovered.

Harris moved to suppress, saying that the stop was illegal under *Terry*. Harris' position was that his actions were all innocent. He relied upon *Brown v. Texas*, 443 U.S. 47 (1979) where Brown was arrested for failing to identify himself. There, the "Supreme Court reversed the defendant's conviction for violating the statute because it found that the officers lacked any reasonable suspicion to believe that the defendant was engaged in or had engaged in criminal conduct, and therefore the officers' seizure of the defendant violated the Fourth Amendment." Finally, Harris claimed that the officer had seized him based solely upon his suspicion that he was intoxicated, and that once that was belied, the officer had no right to continue to hold him. The district court overruled the motion to suppress, and Harris was tried and convicted. He appealed.

The Sixth Circuit, in an opinion by Judge Keith, and joined by Judges Daughtrey and Moore, affirmed the district court. The Court acknowledged that each of Harris' individual acts were as consistent with innocence as with guilt, but that "when viewed in the aggregate, we agree with the district court that Officer Snavely reasonably concluded that criminal activity may have been afoot." The Court relied upon *United States v. Sokolow*, 490 U.S. 1 (1989), "where it held that a series of acts, each of which is consistent with innocent behavior, may when taken together, amount to reasonable suspicion." The Court asserted that "what constitutes reasonable suspicion is heavily dependent on the facts of each case and does not lend itself to precise categorizations within the case law." Based upon all of

(Continued on page 36)

the aggregate facts, the Court agreed with the district court that the officer had a reasonable suspicion that criminal activity was afoot at the time he stopped Harris.

The Court further distinguished *Brown*, saying that "*Brown* presents a stark contrast to the instant case, where Officer Snively testified that his suspicions were aroused by Harris's actions and mannerisms, as well as the mysterious items Harris removed from his shoe or sock which he appeared to be counting as he walked along." This was contrasted to *Brown*, which featured a "classic example of the 'unparticularized suspicion or hunch' warned against in *Terry*."

United State v. Dice
2000 WL 10607
(6th Cir. 1/6/00)

The police here obtained evidence that Dice was growing marijuana, so they got a warrant. However, when they executed the warrant, they forgot the rules of knock and announce. Instead, they knocked on the door but did not give the residents an opportunity to respond. They kicked the door in, and found 1900 marijuana plants inside.

Dice moved to suppress the evidence, and this motion was granted by the district court. The Sixth Circuit affirmed the district court. The Court rejected the position of the State that the evidence should be admitted because the police had obtained a warrant and had knocked, saying that this should avoid the application of the exclusionary rule. The Court further rejected the State's position that there was an independent source apart from the illegality. The Court held that the exclusionary rule should apply precisely because waiting for a response following the knock was an important part of the knock and announce rule. "[K]nocking without properly waiting for admittance contravenes each of these three interests as much as if the knock had never taken place at all." The three interests of the knock and announce rule, the Court reminded, are to reduce the potential for violence, to avoid the destruction of private property, and to protect the privacy of residents. ♦

Short View. . . Ernie Lewis, Public Advocate

1. *Vasquez v. State*, 990 P.2d 476 (Wyo. 11/16/99). The Wyoming Supreme Court has held that the bright line rule of *New York v. Belton*, 453 U.S. 454 (1981) is not necessarily the rule under the Wyoming Constitution. In Wyoming, when a person is arrested, the passenger compartment of the arrestee is not to be searched necessarily. Rather, the Court will look at whether a search of the passenger compartment is reasonable or not. "This result eschews a bright-line rule and maintains a standard that requires a search be reasonable under all of the circumstances as determined by the judiciary, in light of the historical intent of our search and seizure provision." While this provided no relief to Vasquez, it is an interesting analysis of a state constitutional provision.
2. *State v. Parker*, 987 P.2d, 486 (Wash. 11/4/99). The Washington Supreme Court has gone further than the Wyoming Court. The Court was reviewing a situation of an arrest for driving with a revoked or suspended driver's license. Passengers were requested to leave the car, after which the passenger compartment was searched, including the passengers' belongings. The Court held that the Washington Constitution provides additional protection to passengers. "We hold that the arrest of one or more vehicle occupants does not, without more, provide the 'authority of law' under article I, section 7 of our state constitution to search other, non-arrested vehicle passengers, including personal belongs clearly associated with such nonarrested individuals."
3. *State v. Reinholz*, 66 Cr. L. 177 (Neb. 11/19/99). Finding drug paraphernalia in the trash a single time does not provide probable cause to believe that drugs will be found in the house. Thus, a search warrant issued based solely upon the finding of drug paraphernalia in the trash was illegally issued, and evidence found during the execution of the search warrant must be suppressed.
4. *Lovelace v. Commonwealth*, 522 S.E.2d. 856 (Va. 11/5/99). The Virginia Supreme Court has held that a pedestrian may not be searched incident to the detention of someone who cannot be arrested. The Court used the rationale of *Knowles v. Iowa*, 525 U.S. 113 (1998), which held that a search incident to an arrest cannot be conducted for an offense during which the officer intends to issue a citation rather than effect an arrest.
5. The Drake University Law Review (47 Drake L.R. 833) features a lecture given by Richard M. and Azita Calkins on March 30, 1999, in which they review the many exceptions (they number 30), to the warrant requirement for automobiles. Their conclusion is insightful, and worth reproducing here at some length, both for its wisdom regarding automobiles, and for 4th Amendment jurisprudence as a whole. I also like the basketball analogy. "The courts have taken a bifurcated view of the Fourth Amendment. Opinions continually recognize the need for strong privacy protection from the government. But, the action in support of that protection is quite muted. Instead, police efficiency in criminal apprehension and judicial efficiency in litigating exclusionary rule applications by presumably guilty individuals has drowned out the perceived need for Fourth Amendment protection. The drift in the Fourth Amendment decisions can be compared to the contrary action in adopting *Miranda*. In *Miranda*, the Court recognized it would never know the real facts under which confessions were obtained but the Court knew it was not pretty. Dealing with the reality, the Court imposed a warning device to at least alleviate some of the unfairness in the process. The Court is unwilling to do the same in search and seizure cases where the reality of discriminatory and expansive auto stops and consents, unless videotaped, are impossible to recreate. The Court hides behind fictions to preserve police action. The current drift can be somewhat analogized to the evolution in basketball in the past thirty years. Basketball involves written rules to provide a level playing court between two adversaries, each of whom is trying to gain an advantage on

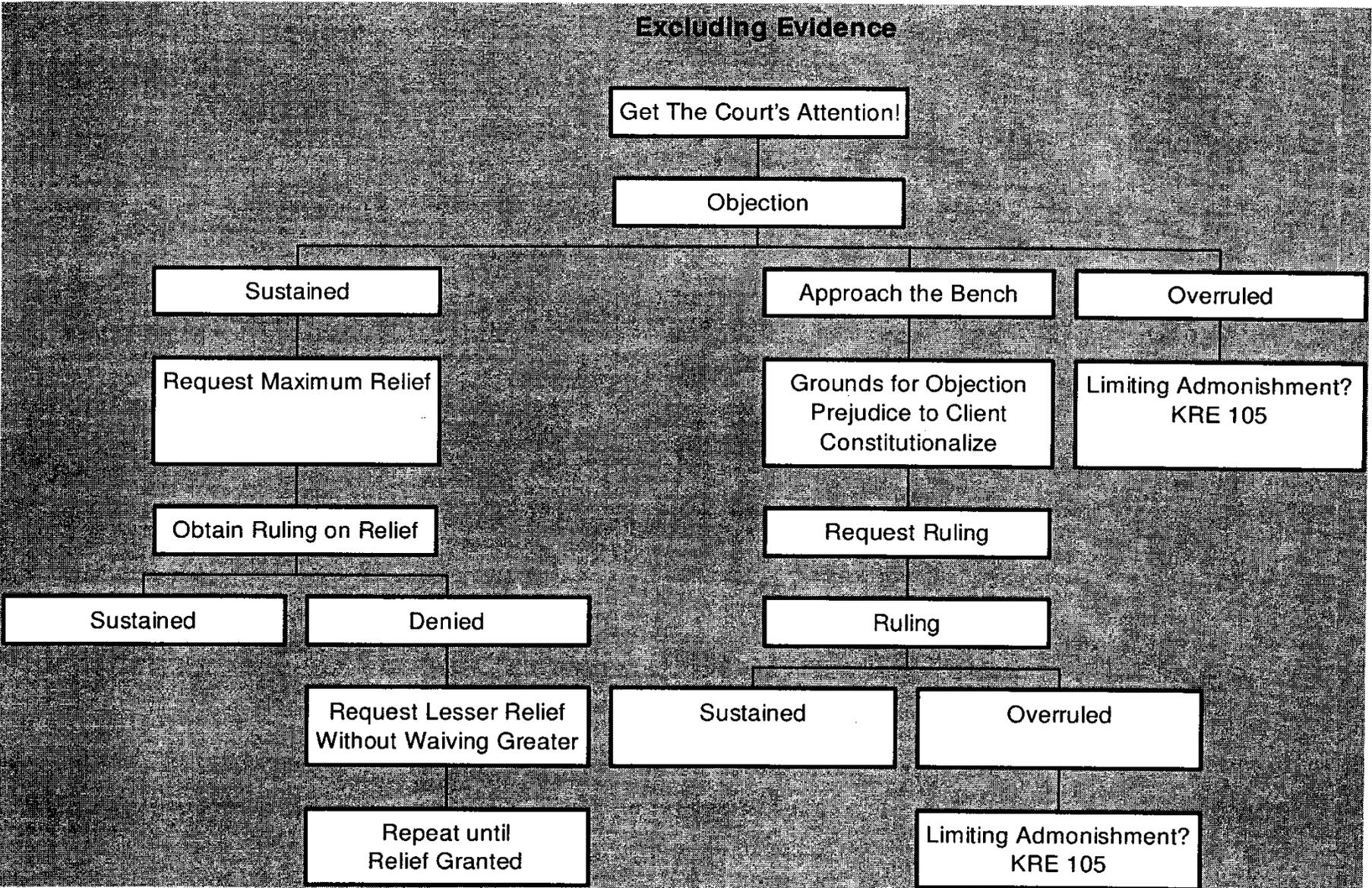
through the back door and leave the defendant. The front door would have been left open for the police to enter, and, apparently, the police did not knock on the door. This prompted them to enter the house without a warrant. The Colorado Supreme Court held that this entry was illegal, and evidence obtained as a result had to be suppressed. The Court rejected the State's argument that the odor plus the sword constituted exigent circumstances sufficient to overcome the warrant requirement.

The game remains interesting and must evolve to keep the playing. To understand, we must be financially driven by facts. The same concept is occurring between the police and criminals in the cops and robbers game. Police are engaged in the competitive business of ferreting out crime. The constitutional rules only apply if police get caught violating the rules and only then if the government wants to use the evidence. Obviously, the robber squad has no rules. Police responses under game pressure occur so often that the police continue to pressure the referees, the judiciary, to give the officers greater leeway with some of the rules. For judicial and police efficiency, the courts are slowly drifting that direction, permitting broader warrantless intrusions. The game changes and what used to be perceived of as rights are slowly diminished. A major difference between basketball and the game of cops and robbers is the intimate involvement of the third entity, the rest of the community. The community and its individual members are involved in the role of innocent victims, either of criminal acts or of warrantless police intrusions. But the role of victim does not offer significant opportunities to affect the rules of the game through litigation. Thus, the community is without a real voice in Fourth Amendment litigation. Nevertheless, public rights are being reconfigured whenever the courts make adjustments in the rules of cops and robbers. The courts need to reemphasize that Fourth Amendment rights go beyond merely protecting criminals. To protect the rights of both the innocent and the guilty, the courts must reaffirm the basic underpinnings of the Fourth Amendment for all of us in all situations and not merely focus on the microcosm of police and criminals.

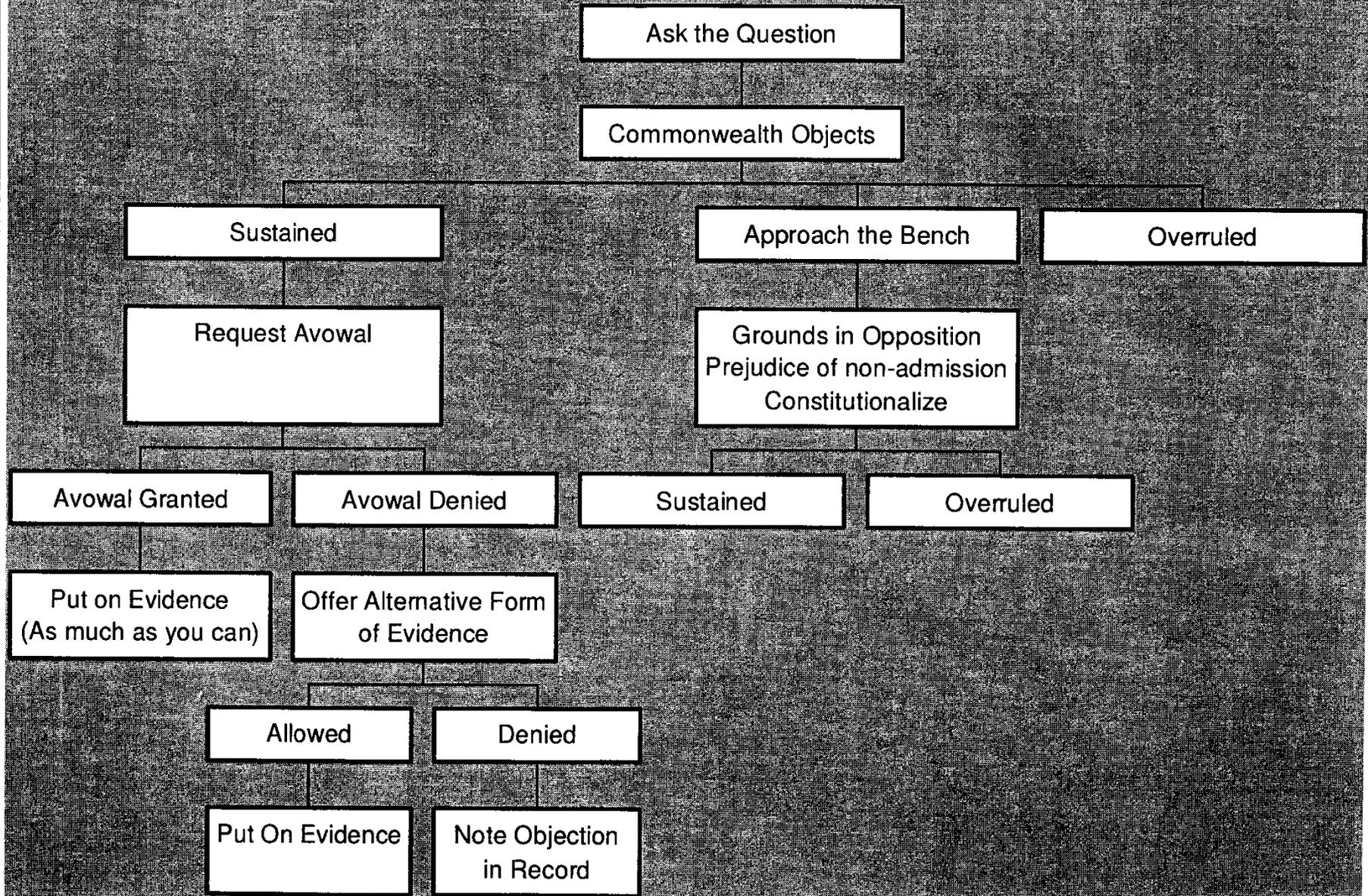
6. *State v. Colpe*, 1999 WL 1074111 (not yet final) (Tenn. Crim. App., 11/30/99). Finding rolling papers in a cigarette pack during a legal traffic stop does not give the police probable cause to search the entire car. The Court found unimpressive the State's argument that the presence of the rolling papers allowed for an arrest for paraphernalia, with a subsequent search incident to arrest, the Court further rejected the argument that the presence of the rolling papers constituted probable cause that the car had marijuana in it.
7. *People v. Wampler*, 1999 WL 1095470 (Colo. 12/6/99). The police gained evidence during a routine traffic stop that the defendant was trafficking in methamphetamine at his home. They went to his home, and talked with someone other than the defendant. That person promised to go

8. *Reynolds v. State*, 742 A.2d 55 (Md.Ct. Spec. App., 12/9/99). When the police see a group of individuals, and ask one of them for his name and date of birth, and where the person wants while a computer checks the information given, that encounter implicates the Fourth Amendment requiring some level of suspicion. In this case, where there was no level of suspicion, a search incident to an arrest was illegally conducted under those circumstances. The Court determined that Reynolds would not have felt free to leave under the circumstances while the computer was checking the personal information, and thus that detention was illegal.
9. A recent law review article entitled www.warrant.com: Arrest and Search Warrants by E-Mail in the Vol. 30 of the *McGeorge Law Review* (30 *McGeorge L.R.* 590) provides a fascinating preview of what will happen someday in Kentucky. The article by Michael John James Kuznuch reviews a California statute authorizing warrants by e-mail. The article reviews others applications of technology to the Fourth Amendment, including the 1977 change in the Federal Rules of Criminal Procedure allowing for the issuance of search warrants by telephone, the 1993 amendment allowing for the use of fax machines, and some states' statutes allowing for the use of cell phones. In this context, California passed Chapter 692 allowing for warrants to be issued by e-mail. The law provides certain protections. For example, the officer continues to give his/her oath by telephone, documents and the affidavit are transmitted by fax or e-mail, the officer signs using a digital signature. The author further states that while there are legitimate concerns regarding tampering and hacking, that encryption technology can alleviate those concerns. He concludes that this law "is an effective way to bring law enforcement capabilities up to par with modern technology. Although the use of telephones and fax transmissions have proven to be a secure and effective means of obtaining a warrant, e-mail transmissions will be even more effective as patrol cars can be easily outfitted with the proper equipment. This allows peace officers to obtain necessary approval for warrants without leaving their vehicles, thus accelerating the entire warrant process." While I am troubled by some of the privacy concerns, I further believe that technology can reinforce the need for a warrant, which in the long run will better protect the privacy rights of citizens than our present proclivity toward warrantless stops and searches and seizures. ♦

Lack of preservation is the bane of the appellate lawyer's existence. The first sentence of every argument on appeal must indicate whether the issue is preserved and how it is preserved. This can set the tone for the entire argument. If an issue is unpreserved, an appellate court will only examine it if the error is such that there is a **substantial possibility that the result of the trial would have been different** absent the error. These charts are a rough guide to the steps that should be followed when preserving an evidentiary error. - John Palombi, Appellate Branch Manager



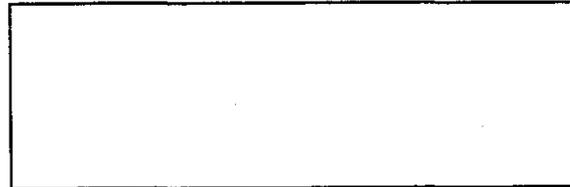
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