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Holding the Promise

John W. Stevenson
KBA President

It makes a Difference to have a Lawyer

Anthony Lewis

Pretrial Release

Cicely Jaracz Lambert
AOC Director

A Promise within Reach

Public Advocate Ernie Lewis

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- *In Memory of Christopher F. Polk*

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

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

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FROM THE EDITOR...

Ed Monahan

Right to Counsel. How is the promise of *Gideon* being met in Kentucky? Our reflections on the right to counsel continue with no less than our KBA President John Stevenson, the nations trumpeter of the meaning of Gideon, Anthony Lewis, and our Public Advocate Ernie Lewis. We appreciate the benefit of their wisdom and encouragement.

Pretrial Release. What a pleasure to have the AOC Director Cicely Lambert speaking to us at our Annual Public Defender Conference about the importance of pretrial release, AOC's efforts across the state on pretrial release, and on the work she and DPA are doing to better work together. This has been a model of cooperative leadership by Cicely Lambert and Public Advocate Ernie Lewis.

RJA. Who says the Kentucky Racial Justice Act has had little impact? Rob Sexton educates us on its use and results in a Western KY case.

ABA Capital Guidelines. NLADA and the ABA have led the way on developing and promulgating important national guidelines for representation and appointment in capital cases. Their recent revisions are discussed. Quality is defined as meeting a standard. The ABA sets out standards for providing quality representation to capital clients.

Life is ever so fragile. We remember Chris Polk in this issue.

The Right to Counsel is brought to life day by day in Kentucky Courts by our litigators. Tina McFarland from the Henderson County DPA Office is spotlighted in this issue.

Ed Monahan
Editor

If you believe in what you are doing, then let nothing hold you up in your work. Much of the best work of the world has been done against seeming impossibilities. The thing is to get the work done.

Dale Carnegie

If We Do Not Hold To The Promise, We Fail To Be A Society Governed By The Law

The following remarks were made by John W. Stevenson, President of the KBA at DPA's June 11, 2003 Awards Banquet.

Good evening, it is a pleasure and honor to be with you tonight. This is the second year and hopefully many more years to come, that DPA has held its annual meeting in conjunction with the Kentucky Bar's Convention. Your participation at the convention is extremely meaningful and we hope to see you next year in Owensboro for the 2004 convention.

Those that work in the legal profession are people who have an innate desire to help people. That desire comes within ones self, it is not a learned attribute.

Those who work in the public criminal defense system, I believe, have risen to a higher calling. The job is not a glamorous one and it will certainly not make you wealthy. Daily you work and represent the poor, and down-trodden who otherwise cannot afford legal representation. All of you are to be commended for your tireless effort to represent a segment of society that deserves representation.

As you know, this is the 40th anniversary of the U.S. Supreme Court case, *Gideon v. Wainwright*, which held that a defendant charged with a crime has a right to counsel. As a result of that case Clarence Gideon's story was told in *Gideon's Trumpet*, a book written by Anthony Lewis.

I believe *Gideon v. Wainwright* did not only speak of the right of counsel. To illustrate, I am reminded of a true story that happened more than 35 years ago.

A man charged with several felonies and was appointed a public defender, who was a young attorney, fresh from law school, practicing in a firm which did no criminal defense. The case went to trial and the jury found the man guilty. On sentencing day, the judge asked the defendant if he had any last words. The defendant said, "Yes, all I have to say is I have a mean prosecutor, a fat judge and a dumb lawyer."

John W. Stevenson
KBA President

The purpose of telling you that true story was to illustrate that even though *Gideon v. Wainwright* afforded a defendant right to counsel, what *Gideon* strongly infers is that a defendant is entitled to effective counsel. Whether that young lawyer was effective in his defense of the defendant has long been forgotten. It is important to remember that without effective counsel for the defense, justice will not prevail. Today we know that, by virtue of DNA testing where hundreds of imprisoned defendants have been released and there ultimate innocence proven. Each day those of you who work in the defense of ones liberties must give 110%, even when the odds appear against you.

Years ago, when I practiced criminal defense, many of my friends would ask how I could represent someone charged with a heinous crime. My answer: laws are made to protect the innocent, you may be charged for something one day that you did not commit, wouldn't you want the same protection that is afforded to someone you think is guilty even before he or she is tried by a jury of their peers? One is innocent until proven guilty, but society does not always judge that way — only the justice system does.

If we do not hold to the premise, innocent until proven guilty, we fail to be a society governed by law.

Again, it has been a pleasure visiting with you. I hope you enjoy the convention. I hope to see you in Owensboro in 2004. ■

There are no secrets to success. It is the result of preparation, hard work, and learning from failure.

-- Colin L. Powell

IT MAKES A DIFFERENCE TO HAVE A LAWYER

Remarks made at the DPA June 11, 2003 Annual Awards Banquet.

Ladies and Gentlemen, I have a profound admiration for you who provide what Justice Hugo Black called the guiding hand of counsel for poor criminal defendants. In a book on constitutional issues, it may seem a romantic occupation. In reality, it is hard, often grinding work, with clients who are not always uplifting. But I think it is noble work, the legal profession at its best, a great contribution to your community and your country.

That a lawyer is essential for anyone charged with crime seems obvious, yet it is easy to miss that truth. Let me give you a homely example. Years after the Supreme Court decided the *Gideon* case, a movie was made about it, starring Henry Fonda as Gideon. I went out to Los Angeles to watch it being filmed. I had no say in what was done; I watched. One day they filmed Gideon's second trial, using an old courthouse south of Los Angeles. Gideon was charged with breaking and entering the Bay Harbor Poolroom in Panama City, Florida, in the early morning hours. At his first trial a taxi driver, Preston Bray, testified that Gideon had telephoned him and he had picked Gideon up near the poolroom. When he got into the cab, Bray said, Gideon told him: Don't tell anyone you picked me up. That was damaging testimony. And Gideon, without a lawyer, let it stand without any cross-examination. But now, in the second trial, Gideon had a skillful lawyer: Fred Turner.

In the movie Fred Turner was played by a young character actor, Lane Smith. After the taxi driver testified again that Gideon had told him not to tell anyone about picking him up that morning, Lane Smith as Turner asked: "Had he ever said that to you before?" The taxi driver answered, "Oh yes, he said that to me every time I picked him up." "Do you know why?" "I think it was some kind of woman trouble?" And Lane Smith, ad-libbing, walked over to the jury, winked and said, "Well, we all know about that."

Well, I sat watching that scene. I had lived the Gideon case for years. But when the director said "cut," I turned to the person sitting next to me and said, "My God, it really makes a difference to have a lawyer, doesn't it?"

When Gideon's case was in the Supreme Court, a young assistant attorney general of Florida, Bruce Jacob, argued against his claim of a right to counsel. In *Gideon's Trumpet* I portrayed Jacob as a young man overmatched by the lawyer appointed by the Supreme Court to argue for Gideon, Abe Fortas. That he was, in terms of experience. But he was not overmatched in dedication of moral understanding. I have come to **understand** that in knowing Bruce Jacob over the years and reading his reflections on the case, in an article to be published by the Stetson Law Review.

Anthony Lewis

Jacob has served on both the defense and the prosecution side of criminal justice. Forty years after *Gideon v. Wainwright* was decided, he takes a broad view of the constitutional right to counsel. It should include civil as well as criminal proceedings, he says: "The Due Process and Equal Protection clauses do not differentiate between criminal and civil cases." Paraphrasing Justice Black's opinion in the Gideon case, Jacob says: "Certainly any person haled into court or brought before any tribunal, whether criminal, civil or administrative, should, if indigent, be afforded counsel at public expense."

I want to say a word now about Clarence Earl Gideon. He was not a clear thinker, an easy person to deal with. He was a petty criminal, stubborn, cranky. But he knew what he wanted.

When the time came for his second trial, Gideon asked the American Civil Liberties Union to provide a lawyer for him. But when two ACLU lawyers appeared in court in Panama City, Gideon said he did not want them. The court reporter typed it in capital letters: "I DO NOT WANT THEM." He wanted a local lawyer, Fred Turner, and that was a wise choice.

Turner said later that Gideon came to him with "a valise full of motions." One was to move the trial, to Tallahassee. Turner pointed out that he knew people in Panama City, in fact he knew most of the jurors, but none in Tallahassee. Gideon agreed to drop that idea. Then Turner told him, "I'll only represent you if you stop trying to be the lawyer and let me handle the case." Gideon agreed.

People ask me whether Gideon ever got in trouble with the law again after his acquittal in the second trial. The answer: only once. He went to the Kentucky Derby, lost his money and was arrested for vagrancy. When he was brought to court, he asked the judge to take a look at something first. It was a copy of *Gideon's Trumpet*, which he had with him. The judge said he would read it overnight. The next morning the judge said he was pleased to meet the man who had changed the law of the Constitution. "As I understand it," the judge

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said, "the decision in your case only applied to felonies. This charge is a petty misdemeanor. Perhaps the Supreme Court will expand its decision to require counsel in this kind of case, too. I was just going to let you go. But if you like, I'll sentence you to six months, and you can go on up on appeal." Gideon said, "If it's all the same to you, judge, I'd rather go."

In 1972 I was reporting from London for *The New York Times*. One day I got a letter from Abe Fortas. In it was a funeral notice for Clarence Earl Gideon. It was from Hannibal, Missouri, his birthplace. I telephoned the funeral parlor to find out what had happened. The owner told me that Gideon had died in Ft. Lauderdale, Florida; his mother had brought his body back to Hannibal. I got his mother's telephone number. Before hanging up, the funeral parlor owner asked whether I knew that Hannibal was the birthplace of Mark Twain. I did. When I telephoned Gideon's mother, she said, "You're the man who wrote that terrible book." "What do you mean?" I asked. "You said his stepfather was a bad man, and he was a good man." Well, I hadn't said that; Gideon had. His mother ended the conversation by saying, "Clarence could have been most anything if he'd gone to school as he ought to, and behaved himself."

But he was something. That is why we are talking about him today. There is a monument to him now in Hannibal, Missouri, and tourists go to that as well as to Mark Twain's birthplace. The other day I had a letter from the president of the Historical Society of Bay County, Florida, telling me that they are putting up a marker for Clarence Earl Gideon. He **was** something. ■

Anthony Lewis

DEB YETTER RECEIVES ANTHONY LEWIS AWARD

Remarks made by Anthony Lewis at the June 11, 2003 DPA Awards Banquet.

Ladies and Gentlemen, four years ago the Public Advocate did me the great honor of attaching my name to a media award for informing the public on the crucial role of public defenders in our society. You can imagine how happy I am to be here, taking part in the presentation of that award.

It goes this year to Deborah Yetter of the *Courier-Journal*, for articles on various aspects of indigent representation: the need for adequate funding, the special problem of juveniles in the criminal justice system and so on. Reading her stories gave me a lift as a journalist and as a citizen. So it is a pleasure for me to hand her the letter of congratulations that I wrote her. Perhaps I should read it.

"It was a thrill to me," I wrote, "to read the pieces that have won you the Anthony Lewis Media award for 2003. You understand so well the interest that we all have in proper representation of poor defendants, and you conveyed it tellingly. In these hard times it is good to know that people care." ■

Anthony Lewis

Deb Yetter receives the Anthony Lewis Media Award from Anthony Lewis

PRETRIAL RELEASE

Cicely Jaracz Lambert

Thank you for the opportunity to be with you here today. *The Blue Ribbon Group* provided the genesis for my being here.

- Recommendation #11 stated that "public defender services are constitutionally mandated while resources are scarce. It is important for all eligible persons to be appointed a public defender. The Court of Justice, and especially AOC and DPA are encouraged to work cooperatively to ensure appropriate public defender appointments."
- Therefore, the *Blue Ribbon Group* encouraged the Administrative Office of the Courts and the Department of Public Advocacy to work cooperatively to ensure appropriate public defender appointments.
- In discussions with Ernie a workgroup was formed to discuss not only eligibility but also issues of pretrial release.
- The workgroup consisted of judges, DPA directing attorneys, pretrial officers and leaders from both AOC and DPA. Coined as "the AOC/DPA workgroup" the group met 5 times in 2001/2002 and the report was issued one year ago this month. The report was distributed to all judges and to all defenders.
- You have seen the report so I won't repeat its contents except to point out some important findings upon which the recommendations were based:
  - In looking at that time period after an arrest, it was found:
    - The first few days are vital
    - The defendant is at his/her most vulnerable: without liberty, maybe mentally ill, maybe addicted, maybe not healthy
    - The defendant is forced at this vulnerable stage to make vital comprehensions and decisions: they are informed of their rights; they are informed of the right to appointed counsel; they are in the process at the end of which is the determination of whether they will be released back to the community or held pending trial
    - ABA standards provide that counsel should be provided as soon as feasible after custody partly to enable counsel to argue for pretrial release
    - Pretrial release and appointment of counsel are in fact connected because if a person is not released pretrial then they may not be able to afford counsel

My reason for being here today is to focus on what was achieved from the workgroup from the perspective of AOC.

One of the recommendations of the workgroup with regard to both pretrial release and eligibility is to educate all defenders, prosecutors, pretrial release officers and judges on eligibility and pretrial release issues.

- AOC's pretrial services division is staffed by approximately 200 pretrial services officers servicing 120 counties, 24 hours a day, 7 days a week.
- They collect background interviews on approximately 172,000 of the 200,000 arrests that occur annually in Kentucky.
- At the same time they annually collect over 60,000 affidavits of indigence to determine eligibility for the appointment of a public defender.
- Pretrial officers are required to interview and present defendants within 12 hours of arrest to the appropriate court of jurisdiction for consideration of non-financial release.
- Pretrial officers are required to present information to the court from a neutral perspective. It is not their role to advocate release or detention.
- Supreme Court rules and statutes require defendants to be released until they present a risk of flight or danger to the community. It may be surprising but failure to appear back in court (FTA) rates are lower on defendants released on non-financial conditions than those posting money to obtain release pending trial. Statistically, FTA rates in Kentucky are significantly lower than those reported on a national basis.
- The Pretrial Services Division of the AOC was created in 1976 with the elimination of commercial bail bonding. The elimination of the commercial bail bonding entities in the system was considered essential due to the pervasive corruption found in the bail bond enterprise during the 1970s both in Kentucky and nationally.
- The Kentucky General Assembly placed Pretrial Services under the direction of the Administrative Office of the Courts in the Judicial Branch rather than in the Executive Branch as the first phase of implementing the recently passed Constitutional Amendment creating the new unified court system.
- Operating standards for Pretrial Services are derived from Supreme Court Rules of Criminal Procedure and various Kentucky Revised Statutes.
- This month Pretrial Services celebrates its 27th year of service to the Commonwealth.
- Because the work of Pretrial Services was to provide information to judges on a defendant's criminal history and pending cases, Kentucky's Court of Justice developed COURTNET, the first statewide court disposition/criminal history program in the nation.
- In 1979, Pretrial Services launched the first Diversion program and criminal Mediation programs.

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- Internet based access to court records for court of justice users has been developed. Marvel Detherage from my office will present more information on internet based access in a later afternoon session.
- Without dissent, all of the participants of the workgroup felt the following statement summed up the impact of Kentucky's nationally recognized Pretrial Services program:
  - "The creation of a more equitable system of pretrial release for Kentucky has enhanced our system of criminal justice. The previous system of commercial surety resulted in release decisions based solely on financial resources in lieu of community interests. Risk of flight and danger to the community are not necessarily reduced by imposing financial standards on the defendant."

Since the publication of the workgroup's report one year ago, AOC has responded to the report's recommendations and implemented the following changes:

- Within 48 hours on all warrantless arrests, Pretrial Officers present information to judicial officers for the purpose of conducting probable cause reviews pursuant to *Riverside*.
- All persons arrested are offered the opportunity to complete an affidavit for consideration of appointment of a public defender; based on the workgroup recommendation, the number taken has risen from 8% to over 30% of the arrest population.
- Pretrial Officers are providing more information on the defendant population of local jails to the courts, prosecutors, public defenders and the defense bar.
- Pretrial Officers are now providing broader non-financial alternatives on all defendants that are charged with criminal activity.
- Pretrial interviews are now available to appointed counsel by weight of Supreme Court rule.
- Affidavits of Indigence are available to all public defenders that request them.
- The AOC has begun work on an automated case management system for Pretrial Services to start the process of analysis on pretrial conduct and other risk factors.
- Work has continued in the development of a more user friendly form that will determine eligibility for appointment of public defenders.
- Design has started on a comprehensive analysis of bond forfeiture processes across the Commonwealth to promote consistency in the use of financial requirements as an alternative to non-financial release.
- Educational programs such as this one today are intended to raise the level of awareness on the constitutional basis for pretrial release, capacities of the system to monitor defendants, and the significant costs associated with pretrial detention.
- Additionally, local pretrial services officers will meet regionally with the DPA directing attorneys to discuss issues at the local level.

One of the most important results of the workgroup is the fact that two agencies consisting of people wanting to work together can make a difference. Many issues were discussed and hashed out. Awareness of differing perspectives was raised. And there were common interests found in making sure that the indigent received their constitutional and statutory rights – the presumption of innocence, the right to bail, and the right to counsel.

Working in response to the report, the AOC implemented the *Riverside* process statewide in less than a month.

The mission of Pretrial Services is to support the courts, but that includes improving the system of justice to the extent we can. While the AOC and DPA may disagree on what is improvement, improvement won't happen without contact between the agencies.

Obviously you are focused on your individual counties and the difficulties you face locally. While the AOC and pretrial services cannot resolve every issue, without the knowledge that such problems exist nothing will ever be accomplished to improve the system.

Our roles are clearly defined and there are times that the AOC and DPA will have to "agree to disagree." The only absolute is that without discussion, nothing will improve.

In the upcoming months, the focus of pretrial will be to continue to implement the recommendations of the report, but to also address the direction of clearly limited resources to improving the quality of the system.

The workgroup's report, above all else, has opened lines of communication heretofore unknown between our agencies. Success in our goals with regard to society's most vulnerable has started with this report but will continue with an ongoing dialogue between our agencies both on a local and state level.

Before I close, I do want to introduce Ed Crockett. Ed is currently the Assistant General Manager of Pretrial Services. He began his career as a pretrial officer in 1976. In August, he will be the head of Pretrial Services for the AOC. Any questions/comments with regard to pretrial should be directed to Ed.

Thank you for allowing me this opportunity. ■

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A Promise Within Reach 2003 Annual Seminar

Introduction

Clarence Earl Gideon, when told he had no right to counsel, said simply: "The United States Supreme Court says I am entitled to be represented by counsel." *Gideon's Trumpet* (1964). He could not understand why the promise of which he read in the Sixth Amendment to the United States Constitution was so far from the reality he was facing with that Florida trial court judge. Later, in his petition to the United States Supreme Court hand-written in pencil, he said, "it makes no difference how old I am or what color I am or what church I belong to, if any. The question is, I did not get a fair trial. I have no illusions about law and courts or the people who are involved in them…I believe that each era finds an improvement in law; each year brings something new for the benefit of mankind. Maybe this will be one of those small steps forward." Despite the setbacks he faced, Clarence Earl Gideon continued to do what he could to move the promise forward.

That is a great and inspiring story for all public defenders. Yet, we must also recognize the reality of Gideon's Promise today. Steve Bright states in "Turning Celebrated Principles into Reality," "Forty years after *Gideon*, many state legislatures are still unwilling to create the structure and pay the price for adequate representation; the Supreme Court is unwilling to enforce the right to counsel by adopting a standard of competence, and many of those responsible for the justice system resist implementing *Gideon*, regarding it as an unfunded mandate from the federal government, or are indifferent to the scandalous quality of legal representation provided to those who cannot afford a lawyer."

The juxtaposition of Clarence Earl Gideon's seemingly naïve petition to the US Supreme Court based upon the Sixth Amendment, and the stark reality of *Gideon*'s implementation 40 years later leads us to ask several questions. Why did it take so long for *Gideon* to be decided in the first place? Why is it taking so long for it to be implemented today? Why did the Attorney General for the State of Florida object to the petitioner's position on the basis that 5000 Florida inmates had been tried without counsel? Why did prosecutors in Georgia in 1976, in response to a proposal for the establishment of a statewide public defender system, state that the proposal was "the greatest threat to the proper enforcement of the criminal laws of this state ever presented?" If we are to celebrate truly the *Gideon* decision, it is vital to understand why there has been such resistance to this simple proposition that every poor person charged with a crime cannot be held unless he is provided an attorney by the state. We must understand that *Gideon* is a decision about more than just the right to have an attorney standing by a defendant. Rather, *Gideon* is a decision about a promise of fairness, about a vision of equal justice, and about a poor person's right to justice irrespective of governmental power.

The Promise of *Gideon* in Kentucky

I envision much when I contemplate *Gideon's* promise for Kentucky. What I hope for in Kentucky is a seamless system of full-time offices delivering high quality representation to every poor person charged with a crime. I see offices where poor people and their families can go to receive justice and hope. I see offices where poor people at the trial and post-trial levels are represented by lawyers and support staff who exhibits the highest degree of professionalism and excellence. I envision an office where poor people truly believe when they walk in that they are being treated with respect and dignity. I hope for offices where attorneys have reasonable caseloads. I envision offices where lawyers are supervised by caring mentors to ensure that the representation poor people receive is of the highest quality. I see offices where national standards are known and used. I see offices where clients are seen by the office soon after arrest and in no instance over 48 hours. I see offices where clients have the same lawyer throughout the process rather than being handed off from one lawyer to another. I see a system where pretrial release is litigated aggressively and passionately so that people are not held due to their poverty.

I see a system that is independent of political pressure that would compromise the ethics of the lawyers operating within that system. I see a system where lawyers are required to and indeed seek out educational opportunities. I see offices where there are sufficient numbers of support staff, including investigators, mitigation specialists, and social workers. These offices would feature representation that looks at the whole client and her family, where civil legal service needs and other needs are addressed. I see a criminal justice system where the public defender perspective is sought out and considered in making policy decisions. I see offices where we have sufficient staff to deal with specialty courts, whether they are drug courts, family courts, reentry or mental health courts. I see offices where Spanish-speaking clients have someone on staff who speaks their language. I envision a system where conflicts of interest are recognized and the person has an excellent lawyer representing them. I see a system where there is parity between the prosecution and the defense in terms of resources and experts.

How did Kentucky Stack up to Gideon's Promise this Year?

The most important manner in which *Gideon* was honored this year was in fact a nonevent. While many state agencies experienced budget cuts, Kentucky's public defender agency was not cut. While DPA had been told to prepare contingencies of cuts of 2.6%, 5%, and even 9%, and while DPA had prepared to turn cases back to the Court of Justice under two of those

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contingencies, the fact is that cuts were avoided. The Public Advocacy Commission, the KBA Board of Governors, the major newspapers, and many public defenders were largely responsible for this development. Services were maintained. Clients and courts continued to be served. That was huge.

Another significant nonevent this year is that no one was sentenced to death this year. There were 11 trials in which the jury was death qualified, and not one of them returned a death verdict. In addition, no one on Kentucky's death row was executed this year. Kentucky's post-*Gregg* tally of two persons executed has remained at that. Kentucky's death row, in fact, was reduced this year by the reversal secured by Randy Wheeler and Tom Ransdell in the *Furnish* case.

One young man, Larry Osborne, who had been sentenced as a juvenile and had his case reversed, was retried this year. In a stunning development, he was acquitted at trial in Whitley County. His case becomes a symbol of what is wrong both with the juvenile death penalty and the death penalty in general. His exoneration joins over 100 nationwide, whereby persons have been freed from death row and either not retried or retried and acquitted.

There were several *Gideon* events during the year. First, the Kentucky Bar Association Board of Governors passed a unanimous resolution declaring March 18, 2003, as Gideon Day throughout the Bar Associations of Kentucky. The resolution also implored the Governor and the General Assembly to avoid budget cuts for indigent defense and to fund the public defense system fully in Kentucky. The Kentucky House of Representatives also passed HJR 111 declaring March 18, 2003 Gideon Day, honoring Kentucky's public defenders, and rededicating Kentucky to the principle of equal justice for all. On March 27, 2003, over 120 persons gathered to celebrate Gideon Day, and to vision for the future.

The full-time system in Kentucky continued to expand this year. In February, we opened a new office in Bullitt County in order to cover Bullitt, Nelson, and Spencer Counties. DPA now covers 112 of 120 counties with a full-time office. Further, the 2003 General Assembly passed HB 269, the budget bill, in which 2 additional offices were funded. Offices in Boone and Harrison Counties will open hopefully by October 1, 2003. Once those offices open, 117 counties will be covered by a full-time office. We have 3 new directing attorneys in the system: Rebecca Murrell in the new Bullitt Office, Melissa Bellew in the Columbia Office who replaced Teresa Whitaker who has relocated to our Somerset Office, and Steve Geurin, who replaced the retired Hugh Convery in our Morehead Office.

The AOC and DPA continued its collaboration on the AOC/DPA Workgroup Report. This report was issued in June of 2002, and was implemented during this past fiscal year. We now have many district judges who are making probable cause determinations as required by *Gerstein* and *Riverside*. This is being accomplished through the method of pretrial release officers bringing the post-arrest complaint to the attention of the district judge, who then reviews the complaint for probable cause. This is a significant development. Further, DPA and AOC have engaged in joint training with district judges, defenders, trial commissioners, and pretrial release officers on various aspects of pretrial release.

The ABA/Children's Law Center issued a report this year entitled *Advancing Justice*, reviewing the state of juvenile representation in Kentucky. The Children's Law Center had previously reported the sad state of this representation in 1996. Their report indicated significant progress over the past 7 years, including lower caseloads, higher quality, better training, and higher quality representation overall. DPA has created a workgroup to review the report and make recommendations on how to make further improvement in juvenile representation in Kentucky.

Lexington Legal Aid investigator Bob Giles was recognized in the Lexington *Herald-Leader* for work he did on 2 cases. In both cases, he demonstrated that the defendants had been erroneously identified through faulty eyewitness identifications. Both felony charges were dropped.

The Kentucky Innocence Project has continued to develop this year. KIP is now located at the University of Kentucky Law School and School of Social Work, at Chase Law School, and at Eastern Kentucky University. Recently, KIP staff relocated from the Eddyville Post-Conviction Office, which has closed, to the Murray Trial Office. This begins a new collaboration with an already successful internship program that has been operating for several years at Murray State University. Significantly, KIP experienced its first exoneration this year when Herman May was released as a result of DNA testing. Amy Robinson and Dennis Burke also secured a new trial for an innocent Robert Coleman who had been falsely charged and convicted of rape.

Our post-trial attorneys have succeeded often in the appellate courts this year, obtaining relief for their clients and changing the law in the process. These victories are too numerous to detail, but include Gene Lewter's *Hughes v. Commonwealth*, in which a significant limitation of the 85% parole eligibility rule was secured. Lisa Clare won a *Batson* issue in *Pryor v. Commonwealth*. David Niehaus won *Commonwealth v. Christie*, establishing the right to put on an expert in an eyewitness identification case.

On a national level, two developments are worth mentioning. Georgia passed a major reform bill, establishing a statewide system of indigent defense in a state that had previously featured one of the worst violations of *Gideon* in the country. And Illinois just passed a series of stunning death penalty reforms, including eliminating the death penalty for persons with mental retardation, requiring sequential lineups, requiring pretrial hearings prior to the testimony of an informant, and reducing the number of eligibility factors in their death penalty statute.

DPA Must Do a Better Job at Diversity

There is an issue that I want to raise with all public defenders in Kentucky. The United States has a 24% minority population. The last time the figure was computed, the legal profession had only a 7% minority population. I wish I could tell you that at DPA we are doing better than the profession is doing at large. After all, I have made this a priority during my 2 terms as Public Advocate since 1996. We send recruiters to numerous minority job fairs every year. We have had several diversity work groups working on this issue for a number of years. We have talked about the need to enhance our recruitment and retention of minority employees. However, we continue to fail at this issue. DPA presently has a 5.4% minority staff. The Cabinet has set a goal of 7.5% for us. We simply do not hire or retain sufficient numbers of people of color particularly in our lawyer staff. Al Adams, Suzanne Hopf, and Jan Powe, are now leading a newly formed and re-energized Diversity Task Force that will lead us to do better. We have a diversity definition, and a diversity mission statement. Agency-wide education on diversity is in the planning stage.

We as public defenders need to pay more attention to this issue. All of us need to recommit to recruiting and retaining a more diverse work force. When we hire minority candidates, we need to create an environment in which they flourish. I want minorities in more positions of leadership within the agency. I want our litigators to be challenging racial prejudice in the criminal justice system through the Racial Justice Act, the Racial Profiling Act, and equal protection clause, and other available mechanisms.

I am committed to having DPA be a leader on diversity in Kentucky State Government. I am also committed to having DPA be a leader on diversity in the criminal justice system.

Several of Gideon's Champions Have Left us this Year

DPA has been in existence since 1973. We can expect each year to lose valued employees and friends who have served long and well. This year was no exception. Long-time investigator leader Dave Stewart died this spring after a long and courageous battle with cancer. He virtually invented the role of defender investigator, and brought much professionalism to that role. Chris Polk, a former Jefferson County public defender who continued to represent poor people on appeal, passed away at the end of June. Paul Stevens, the Kentucky Saint of Death Row, who invested so much of his passion and love to those on death row in Eddyville, passed away this year as well. Jim Early, a Lexington criminal defense lawyer and former DPA trial attorney passed away this year. Jim was one of the first DPA lawyers to devote all of his time to being a trial attorney. Former Chief Justice and Justice Cabinet Secretary Robert F. Stephens died in the spring of 2002, also after a long battle with cancer. Justice Stephens co-chaired the *Blue Ribbon Group*, and was indeed a friend of indigent defense in Kentucky. Finally, Hugh Convery retired as the directing attorney of the Morehead Office after many years as a lawyer. He was the only directing attorney the Morehead Office had ever had.

Gideon's Trumpet is Muted Throughout the Nation

Gideon challenges us in many ways. In many ways, the promise of Gideon is being muted throughout the nation. We now incarcerate over 2 million people each year, now surpassing Russia as the nation with the highest percentage of incarceration of a citizenry of any nation in the world. We have not lost our love affair with the warehousing of persons convicted of crime as the default method in our criminal justice system.

Budget cuts threaten public defender systems across the country. While Kentucky remains underfunded, and while a caseload crisis is growing, our budget was not cut in FY03. On the other hand, in Oregon, the legislature cut $20 million from the $80 million budget. Arraignments there were delayed until the first of the new fiscal year. Defenders were laid off for the last three weeks of the year. Mississippi's Legislature passed a statewide public defender system, and then turned around and defunded it, putting it out of existence. Delta County has now filed a lawsuit for the failure to provide adequate funding for indigent defense. Gov. Jeb Bush has privatized one of the three Florida capital post-conviction offices. Virginia continues to have a cap of $112 for misdemeanors and $395 for felonies that carry up to 20 years.

On the national level, the Bush Administration is asserting that an entire class of defendants classified as enemy combatants can be denied their right to counsel altogether, even when they are, like Jose Padilla, an American citizen detained on American soil stepping off an American airplane onto an American tarmac. The US Government has stated in a pleading supported by an affidavit from Vice Admiral Jacoby of the Defense Intelligence Agency that providing access to counsel for Padilla and other enemy combatants is unwise because it can "undo months of work and may permanently shut down the interrogation process."

The US Justice Department's own Inspector General just issued a report saying that of 762 detainees rounded up after 9/11, only 1 has been charged with an act of terrorism. Some of these persons were locked up for 23 hours a day, held in cells lit 24 hours a day. Some of them were allowed to contact their lawyer 1 time per week, while others were held for a month prior to being told what they were charged with. Yet, shortly after this report, the US Attorney General asserted that the American Patriot Act needed to be expanded, not restricted.

Let's not forget the secret spy court called the Foreign Intelligence Surveillance Court. It received requests to grant 1228 surveillance and search warrants in 2002. All but 2 of the requests were granted. This compares to only 1358 wiretap applications made nationwide through our federal courts. This demonstrates in stark fashion the effects of the War on Terrorism, whereby almost 50% of the search warrants are granted through a secret, virtually unreviewable procedure.

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Racial bias continues to haunt our capital punishment system, with 40% of the nation's death rows being occupied by an African-American. African-Americans constitute only 12% of our population. A federal judge has found conditions on Mississippi's death row to be in violation of the Constitution, saying "no one in a civilized society should be forced to live under conditions that force exposure to another person's bodily waste." A recent Gallup Poll has found that support for the death penalty has gone back up to 74%; 60% believe that it is applied fairly, a figure that has increased despite repeated stories of innocent persons being released from death row as a result of DNA and other evidence, including 24 persons in Florida and 17 persons in Illinois.

The United States Supreme Court in *Ewing v. California* and *Lockyer v. Andrade* affirmed the 3-strikes law this year from California, finding the statute not in violation of the 8th Amendment to the US Constitution. Ewing had shoplifted 3 golf clubs worth $1200 and received a 25-life sentence. The defendant in *Lockyer* stole $150 worth of videotapes, and also received 25-life. Justice Kennedy was part of the majority agreeing that a 25-life sentence was not disproportionate to the crimes committed; as an aside, Justice Kennedy's disproportionality scale was offended by a jury's awarding a large amount of punitive damages in *Campbell v. State Farm*.

Lee Boyd Malvo's confession was not suppressed by a trial judge despite his being a juvenile, and despite his being questioned without a lawyer after he had been appointed a lawyer. Malvo had stated, "Do I get to talk to my attorneys? Because the lawyers told me don't talk until they get here." The trial judge found this to be a request for a clarification of his rights, and refused to suppress the confession.

We are today a country incarcerating more, wiretapping more, racially profiling more, and valuing due process and equal protection less. The promise of *Gideon*, of resilient due process, of equal justice under the law, remains unfulfilled in this nation.

The Same is True in Kentucky

Gideon's Promise is not muted just at the national level. In Kentucky, the caseloads of DPA are far too high to meet Gideon's Promise. DPA has 10 offices featuring caseloads of over 500 new cases per lawyer per year, a level unprecedented and far in excess of national and ethical norms and standards. The *Advancing Justice* report on juvenile representation found that while great progress had been made, caseloads of lawyers representing juveniles was far too high and threatened quality.

There continue to be far too many people eligible for a public defender who are forced to handle their caseloads without the guiding hand of counsel, particularly in district court, in violation of *Alabama v. Shelton*. We continue to see persons in jail without having counsel appointed for several days after arrest. We have thousands of Class C and Class D felons in our county jails without access to courts or to the treatment available to inmates in our state's prison system.

DPA has not been funded to staff the growing numbers of family courts, despite the significant added workload created by these courts. Nor has DPA been funded to handle drug court. DPA has only 2 social workers in the entire system, despite the requirement to develop alternative sentencing plans for persons convicted of particularly nonviolent felonies. We have innocent inmates in our state's prisons who have no one available to work on their case in order to prove their innocence.

Kentucky continues to have a juvenile death penalty, despite consecutive polling by the University of Kentucky demonstrating that Kentuckians do not favor the death penalty for children. We have prosecutors driving judges from hearing juvenile death penalty cases, turning over prosecutorial discretion to victims and their families, and allowing the victims to berate the criminal justice system. Despite the Kentucky Criminal Justice Council calling for a study of the death penalty in Kentucky, the General Assembly declined to fund such a study.

DPA continues to hire new lawyers out of law school with massive student loans. Even more young lawyers who want a career in public service cannot do so due to their large debts.

Closing

We cannot let the Muted Trumpet still us as we seek to bring *Gideon*'s promise to reality. Clarence Earl Gideon did not stop when the judge said he had no right to counsel at his trial. A vision of a more just society caused him to go beyond what the other 5000 Florida inmates incarcerated without counsel had done. We must follow that example.

I read recently of a woman (it turns out to have been Phyllis Subin's mother) in Women Strike for Peace, an antinuclear organization in the United States in 1963. This group helped achieve an end to above ground nuclear testing with its radioactive fallout that was showing up in mother's milk and baby teeth. She told of how "foolish and futile she felt standing in the rain one morning protesting at the Kennedy White House. Years later, she heard Dr. Benjamin Spock, one of the most high-profile activists on the issue then say that the turning point for him was seeing a small group of women standing in the rain, protesting at the White House. If they were so passionately committed, he thought, he should give the issue more consideration himself."

You never know when your act of vision or of courage will inspire a future Dr. Spock. So look at Gideon's Promise. Examine today's failures to meet Gideon's Promise. And work to broach the distance between the promise and reality. ■

Ernie Lewis
Public Advocate
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IN THE SPOTLIGHT. . . .TINA MCFARLAND

"You may encounter many defeats, but you must not be defeated.
In fact, it may be necessary to encounter the defeats, so you can know who you are,
what you can rise from, how you can still come out of it."
- Maya Angelou

The young attorney watches in astonishment as a clerk at the utility company fills in "legal secretary" under "occupation" on the application form. Tina had told the clerk that she worked for a law firm and the clerk assumed Tina's occupation was secretarial. It's frustrating because it is not the first time it has happened. Since moving to Kentucky from New Jersey, where she had been practicing law for 2 years, Tina has repeatedly corrected similar assumptions.

Comments she has endured range from the wide-eyed, "You look too young to be an attorney," to the more clearly condescending, "Sweetie, that's so cute that you want to be an attorney." She handles these personal affronts with humor and diplomacy, often ignoring the more minor comments.

Tina McFarland was recruited into a private law firm in Owensboro, Kentucky. While working on medical malpractice and personal injury cases, she realized that she liked working and interacting with people as well as being in the courtroom. She became interested in taking on *guardian ad litum* work while at the firm. She felt like she was making a difference in these cases. Tina's courtroom skills were noticed by other attorneys, particularly the directing attorney leading the Henderson Public Defender's office. She was offered juvenile contract work and Tina jumped at the chance. She loved the juvenile cases because, "You give more of yourself in juvenile cases and though it can be emotionally taxing, there is still a chance to make a difference in their lives because they are younger."

Tina became a full-time public defender when offered a position with the Henderson Public Defender's Office in 1999. She has observed the vast gap that exists between many of her clients and the majority of those working in the judicial system. Regarding the lack of understanding and tolerance, Tina says, "People don't think they could ever be in the same shoes as our clients and they feel very superior. You don't *know* what you will ever do under the right set of circumstances."

There is a thread of bias against race and socioeconomic background that exists toward many clients in the judicial system. Perhaps because of her own personal experiences in this area, Tina rarely hesitates to uncover it. "We have an obligation every single time to speak out. You have to work within the system, but you have to speak out for what you know is right, no matter the circumstances," she says.

A recent case Tina took to trial involved a young man with an extensive misdemeanor record. He was being prosecuted for biting a paramedic's hand while in the throes of a seizure. It seemed that everyone wanted him to serve jail time, not based on the current charges but because of his past record. The prosecutor was asking for 10 days to serve and a fine. Tina felt that her client was being railroaded largely in part because of his past record. The jury deliberated for just over one hour and determined that he should serve no jail time and pay a fine of $75. Even though her client was thrilled with the outcome, Tina is still concerned over the guilty verdict. It is just another example of how insidiously bias works its way through the system and even into the jury.

Public Defenders must often feel trapped in the Myth of Sisyphus, eternally pushing the large boulder up a hill, only to have it roll back again. Tina's answer to this is to "speak out and persevere. . .every day is a challenge." Tina McFarland is one attorney who meets every daily challenge with fierce determination and admirable tenacity. ■

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CAPITAL TRIAL OF AFRICAN AMERICAN IN BARREN COUNTY RESULTS IN LIFE WITHOUT PAROLE SENTENCE

Rob Sexton

Nate Wood, an African-American, was tried in Barren County from April 22 to May 23, 2003 on allegations of kidnapping and killing his former girlfriend in the daytime on a busy street in downtown Glasgow, and for breaking into a home and taking an elderly hostage after leaving the scene. The level of pretrial publicity and community interest and discussion was constantly high during the case. Nearly everyone in the community had knowledge of the case, and a large segment seemed to have settled and extremely hostile views about Mr. Wood. The case was universally regarded as shocking and disturbing, even by those with no preconceived views that Mr. Wood should receive a death sentence. A defense motion for a change of venue was denied. Barren County is a small, predominately rural community where African-Americans constitute about 4.5% of the population.

The Commonwealth moved for severely limited individual voir dire, even seeking an order mandating that certain questions be asked, and no others. The defense filed the following Racial Justice Act motion, asking for several remedies including individual voir dire sufficient to deal with the reality of racial discrimination. There was a hearing on the motion that seemed inconclusive and, initially, somewhat disappointing. The Court refused to exclude death as a sentence, and the Judge appeared to counsel to be somewhat irritated that the motion had been filed.

The Court did, however, ultimately provide for voir dire that recognized the context of the case. Voir dire lasted three and one half weeks and was searching and deliberate. After a trial of 6 days, the jurors convicted Mr. Wood of wanton murder and capital kidnapping and after a sentencing hearing the jurors sentenced him to life without parole.

* * * * * * *

COMMONWEALTH OF KENTUCKY
BARREN CIRCUIT COURT
NO. 01-CR-00059

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. **DEFENDANT'S MOTION TO BAR THE COMMONWEALTH FROM SUBJECTING HIM TO A SENTENCE OF DEATH SOUGHT ON THE BASIS OF RACE**

NATHANIEL WOOD DEFENDANT

The Defendant, Nathaniel Wood, by counsel, hereby moves the Court to bar the Commonwealth from subjecting him to a sentence of death sought on the basis of race. This relief is sought pursuant to the Thirteenth and Fourteenth Amendments to the United States Constitution and to Sections Two, Three and Twenty-five of the Kentucky Constitution; as well as to 18 USCA §242 and to KRS 532.300.

FACTS

Throughout the history of the Commonwealth, until very recent times, it has been the legal policy of the Commonwealth to deprive African-Americans of their rights. In slavery times, from the foundation of the Commonwealth until after the Civil War, African Americans had the legal status of chattel, unless freed by their owners. After abolition, the Commonwealth's policy was in every way to degrade and to abase African American citizens and to deprive them of equality formally guaranteed by the Fourteenth Amendment. Since the Civil Rights Movement of the 1960s, the legal status of black citizens has improved, but racism remains a constant presence in Kentucky life.

The death penalty, since the foundation of the Commonwealth, has been a potent tool in the hands of those who sought the legalized oppression of African-Americans. In every decade from the foundation of the Commonwealth until 1960, blacks were executed at a rate far in excess of their proportion of the general population. After the Civil War, lynching broke out in Kentucky. In addition, therefore, to the numerous citizens executed by the Commonwealth in the period from 1870 to 1940 some 400 additional people were lynched within our state. Many were lynched for such "crimes" as "looking disrespectfully at a white woman." Lynching, to be sure, was an extra-legal action, but one which was looked upon with no grave disfavor by the Commonwealth. Indeed, the General Assembly, early in the twentieth century, in an attempt to appeal to popular demand, reinstituted public hanging for rape, after having once mandated private executions of the condemned. It was publicly acknowledged at the time that this was a means of expressing social outrage, primarily at black men who raped white women. As a result of this statute, the last public hanging in America took place in Kentucky, in Owensboro, on August 14, 1936.

Since 1960, the history of the death penalty in Kentucky has

been curious and contradictory, reflective perhaps of a deep ambivalence in the public mind concerning the use of this irreversible penalty. While a rather slight majority of Kentuckians tends to support the continued availability of the death penalty, there has been a de facto moratorium on executions here since 1962, interrupted only upon two occasions in the 1990s. The courts have held that the death penalty is not cruel, but its execution has become unusual. However, while executions are very rare, death verdicts are far more common. Now there are 36 people on death row awaiting execution. Black people are included in this number in a proportion exceeding their percentage of the population. Racism remains present in Kentucky society. *Gregg v. Georgia*, which does not forbid but mandates individualized discretion being given to the jury, does not address within its calculus the continued presence of racism, which, in contemporary society, now is often covert.

In the case at bar, the Defendant is aware of no personal racist animus on the part of the Commonwealth's Attorney, nor can he be, for such matters can only be adjudicated in foro conscientiae. It is both needless and ultra vires for the court to plumb the conscience of Karen Davis. See Kentucky Constitution, Section 5, last sentence in section. Indeed it were far better to grant the prosecutor here a presumption of good will.

However, on the part of the Commonwealth as a collective entity, there is clear and irrefutable evidence of a pronounced racial anemus, cruel, violent, and destructive, which has been but slowly abating in a process that began in recent memory. The death penalty, and its illegitimate cousin, lynching, have been powerful tools in the hands of the oppressor. When, in our times, the Commonwealth seeks the death penalty it does so with hands deeply stained by its violent history, and it invites its courts to risk the perpetuation of that history. The collective and historical conscience of the Commonwealth, and not the personal conscience of its legal representatives, is what the court must weigh.

As will be discussed in far greater detail herein, the proceedings contemplated against the Defendant will but serve to perpetuate the tarnished history of the death penalty in Kentucky. Accordingly, he here moves the court to bar the Commonwealth from seeking it against him.

DISCUSSION

I. AT ITS FOUNDATION THE COMMONWEALTH PROVIDED LEGAL SANCTION TO SLAVERY

A. SLAVERY REDUCED SLAVES TO CHATTEL

In 1828, one Jarman petitioned the Madison Circuit Court for a writ of replevin. The Defendant, Patterson, the jailer of Madison County, had seized Jarman's slave and confined him in the jail because the slave was working for himself in Richmond. Patterson complained that the slave was thus confined with no notice given to himself or to the slave. This was done by the jailer, under color of a statute giving him arrest powers as to slaves found in his jurisdiction without passes from their owners, or who remained away from home for more than one day.

In its opinion dealing with this case, the High Court found it entirely unobjectionable that the statute in question provided for no notice to the slave. *Jarman v. Patterson*, 23 Ky. 644 (1828). It spoke as follows:

> It cannot be pretended that any rights secured to the slave by the constitution are infringed by this act; for there are no rights secured to slaves by the constitution except the right of trial by a petit jury in charges of felony, and a power granted to the legislature to compel their masters to treat them humanely.
>
> Slaves in Kentucky have no rights secured to them by the constitution except of trial by jury in cases of felony.
>
> Slaves, although they are human beings, are by our laws placed on the same footing with living property of the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code is not treated as a person but a thing, as he stood in the civil code of the Roman Empire.
>
> In other respects, slaves are regarded by our laws, not as persons but as things.
>
> It is then to the rights of the master we must look in deciding this question. *Jarman*, 23 Ky. at 644.

In considering whether the rights of the master Jarman had been violated by his slave's detention, the Court drew analogies between wandering slaves and stray cattle, wild beasts, dangerous deposits of gunpowder, and harmful public nuisances. It noted that slaves found on the plantation of another could be given ten stripes, summarily, by the owner of the plantation. A patrol appointed under color of law could seize slaves found away from home and chastise them with stripes. The purpose of these laws was to compel the owners of slaves to use them in a manner consistent with the rights of other white people. Justices of the peace, too, were empowered to inflict stripes upon slaves found away from home without a pass. The Court affirmed the judgment of the Circuit Court dismissing Jarman's declaration.

B. SLAVES WERE SUBJECT TO SUMMARY ARREST

Black people summarily arrested on suspicion of being runaway slaves could be taken, not before the County Judge, but solely before a local justice of the peace. If the local justice of the peace found that there was reasonable cause to suspect that the black person was a runaway slave, the justice of the peace was directed by law to commit the black person to the jailer, for an indefinite term until demanded by the owner. *Arthur v. Green*, 60 Ky. 75 (1860).

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C. SLAVES COULD NOT ASSEMBLE, EVEN PEACEFULLY

Slaves from various plantations who gathered together could be arrested by a patrol and even shot when trying to flee, even when the purpose of the gathering was merely to sing and dance. *Bosworth v. Brand*, 31 Ky. 377 (1833).

D. SLAVES COULD BE BEATEN BY THEIR OWNERS

Masters had a legal duty to keep their slaves both outwardly and psychologically subordinate, and, when dereliction of this duty caused injury to others, the master could be held liable. *Worthington v. Crabtree*, 58 Ky. 478 (1858). In support of the master's duty to keep his slaves subordinate, the law vested the master with the right to chastise his slaves freely, provided he did not maim or kill them. *Craig's Administrator v. Lee*, 53 Ky. 119 (1853).

E. SLAVE MARRIAGES WERE DEEMED LEGALLY INVALID

Slave marriages were, by law, invalid, and slaves had no legally recognized right to remain with their spouses and children. *See Lindsay's Devisee v. Smith*, 131 Ky. 179, 114 S.W. 779 (1909). Because of this, slave owners had no duty to keep slave families intact.

F. THE LAW RECOGNIZED SLAVES' POTENTIALLY GREAT ECONOMIC VALUE

Slaves were regarded as not merely property, but as particularly valuable property. A bailee of a slave had a duty to prevent escape, and was liable to the master when, by his negligence, he failed in it. *Meeken v. Thomas*, 56 Ky. 710 (1856). When a slave was hired out to a railroad to work as a brakeman and the slave was injured, the negligence of the employee, the railroad, in an apparent exception to the fellow-servant rule, was held liable. *L & N Railroad v. Yandell*, 56 Ky. 586 (1856). Even a peace officer could be held liable to the master when a false arrest led to the escape of the slave. *Mumford v. Taylor*, 59 Ky. 599 (1859). The owner of a slave could thus be seen as both economically and legally privileged.

G FREE BLACKS LIVED IN A STATE OF GRAVE LEGAL PERIL

Free blacks had to be very careful when traveling. When traveling in places where they were not known to the authorities, they were in constant peril of arrest. If they lacked sufficient means of proving to the captain of the patrol or to the justice of the peace that they were free, they could be beaten and committed to jail. If they were so bold (or so unwise) as to travel out of state, they were subject to arrest and chastisement in some states by anyone at all who believed them to be slaves.

As may well be expected, there were cases where free blacks were impressed into slavery. *See, e.g., Gentry v. McGinnis*, 33 Ky. 382 (1855). Free blacks were indeed, in constant peril of this very fate, especially when traveling, and the right fully to participate in the economic life of the Commonwealth was thereby limited.

H. THE HUMAN COSTS OF SLAVERY

Immediately before the start of the Civil War, a Kentucky slave named Francis Frederick escaped. He made his way first to Toronto and then to England. In 1863, with the assistance of Charles Lee, a minister of the Church of England, he wrote an account of his life as a slave. Frederick, *Slave Life in Virginia and Kentucky*, (1863) (attached hereto as Exhibit 1). When read alongside the appellate opinions cited above, it may be seen as a vivid and clearly truthful exposure of the human misery imposed by the law of the Commonwealth at the time.

Kentucky slaves were taught by their owners, as well as by the law, that they were equivalent to cattle, sheep and mules in their dignity and worth. (Exhibit 1, p. 9). Kentucky slaves were discouraged and even upon occasion forbidden to attend religious services, lest they obtain "dangerous" ideas as to their human worth. *Id.*, p.9. When allowed exposure to religion, slaves attendance at services was strictly controlled and monitored by the owners. *Id.*, p.15. They thereby were carefully exposed to a message that approved of their subjugation, and gave sanction even to their physical chastisement. *Id.*, p.15. To further cement the message of degradation, Kentucky slaves were often fed like animals, and were deliberately kept hungry. *Id.*, p.9.

Although the law did not allow masters to kill their slaves, and, in Kentucky, made provision only for "humane" chastisement, slaves were frequently subjected to treatment that reasonably could be described as extremely cruel. Kentucky slaves were often flogged, up to the point of death. *Id.*, p.16. *See also Commonwealth v. Lee and Bledsoe*, 60 Ky. 299 (1860), in which it was held that masters were free to chastise slaves as long as they were not maimed or killed. Others could not beat slaves without the master's consent. The court reasoned that this rule made slaves more valuable to their owners.

The law made provision for each Kentucky county to have a sworn slave patrol, formed for the purpose of searching for slaves going abroad without a pass or permit from their masters. *See Bosworth v. Brand*, 31 Ky. 377 (1833). The slave patrols were formed on New Year's Day, and lasted for the duration of each calendar year. They went about the countryside entering into slave cabins, and administering beatings to slaves, both male and female, who were found without a pass. Exhibit 1, at p.16. Service on the slave patrol was a popular civic duty in Kentucky and the arrival of the patrol at a plantation and the beatings it administered, was often

looked on as a source of amusement for the white bystanders. *Id.*, at p.16.

The intention, and the bitter fruit of all this cruelty was to reduce Kentucky slaves to a state of whining, cringing servitude. *Id.*, p.16. Slaves, of necessity, grew furtive and cunning. *Id.*, at 11, 16. They developed subtle, understated and backhanded ways of expressing the humanity that in contemplation of our law, they did not have. *Id.*, at p.11. The difficulties were legion when a slave had a "good" master, but they were magnified a hundredfold when the master was bad. *Id.*, at 19. Even when a slave's owner was merely a bad or unlucky businessman, the slave would suffer. *Id.*, at 20. The slaves' main earthly consolation was found in the few human relationships they were able to form with other slaves. *Id.*, at 14, 17. Although slave weddings were often looked upon by white people as a form of low amusement, marriage was typically received by slaves as a powerful consolation. *Id.*, at 17. Accordingly, slaves suffered terribly when their families were sundered by the trader. *Id.*, at 20. Because slaves became so attached to their friends and families, owners found it at times expedient to make slaves administer chastisements to their own relatives. *Id.*, at 9. Slaves often quite understandably became severely depressed and welcomed death as their only portal into freedom. *Id.*, at 10. Indeed, masters did not fully fulfill their legal duty until they produced this cringing, servile depression in their slaves. *Worthing v. Crabtree*, *supra*.

The white slave owners of Kentucky did not escape the fetid embrace of slavery. It coarsened their manners. *Id.*, 16-17. It made them inclined to shirk work, and to be contemptuous of labor. *Id.*, at 29. They became inclined to vainglory, and were contemptuous of other white people who had to do their own work. *Id.*, at 29. Slaveowners became callous to human suffering, to the extent of bearing to see their own offspring by slave women sold as slaves. *Id.*, at 20. Slaveowners became inured to violence, having, as we have seen, the legal duty to employ violence in the subjugation of their slaves. Slaveowners, as the beneficiaries of a legal system bent on the terrorization and subjugation of the slaves, lived in constant fear.

II. THE DEATH PENALTY BECAME A MAINSTAY OF SLAVERY

Although violence was the root of slavery, it was not, as has been shown, intended in the first instance to maim or kill. It was intended to desensitize the slave to his own humanity, and to reduce him psychologically to a cringing, abject servitude. It appears that the psychological life of the average slave was, therefore, lived out on the razor's edge of resigned depression and furious rage and anger. Ex. 1 at 21. Slaves harbored murderous impulses, which they, at times, found difficult to check. *Id.*, at 21. Upon occasion, it seems, they would not contain their rage and committed, or were accused of committing, very serious crimes.

The fear of violence from slaves appears to have haunted the South like a specter. This fear intensified when, in 1831, the slave Nat Turner, led a violent slave revolt in Virginia. See McFeeley, *A Legacy of Slavery and Lynching: The Death Penalty as a Tool of Social Control*, 1997 (attached hereto as Exhibit 2). In South Carolina, too, the free black man Denmark Vesey presided over a similar paroxysm of violence. See *An Official Report of the Trial of Sundry Negroes*, (attached hereto as Exhibit 3). Deplore as they might the loss of their "property," slaveowners as a group did not shrink from employing the fear of death as a tool to subjugate the minds of slaves. Frederick Douglas was wont to account in his lectures the death of a slave named Denby, whom the overseer of the plantation shot for refusing meekly to submit to a beating. (See Ex. 2) At Denby's death, as Douglas pointed out, "a thrill of horror flashed through every soul on the plantation." This thrill of horror was valued for the message it sent to the slaves: no resistance is possible, and the humanity of slaves is not to be acknowledged. Although the disciplinary killing of slaves was legally proscribed in every state, Denby's overseer received no punishment.

It was not always necessary for slaveowners thus to take the law into their own hands, for the courts stood ready to punish disobedient slaves. To obviate the danger that slaveowners would hide the offenses of their slaves to save their "property" from the gallows, some states provided public compensation to owners whose slaves were executed. (Ex. 3, p.5) Counsel has been unable to discover whether or not such a practice was followed in Kentucky. In some states, slaves could receive the death penalty for any offense, whereas it appears that in Kentucky they could receive death only for capital offenses. Compare Exhibit 3, p.3 to *Jarman*, *supra*.

Leniency in the cases of slaves found guilty was discouraged both by law and custom, for the deterrent effect of the death penalty among slaves was much prized. (See Ex. 3, p.5) The gallows was believed to send many messages of social utility. It warned slaves against becoming violent. It bore silent but vivid testimony to the fact that slaveowners were in control of the social order, and that the law supported their ascendancy. It taught slaves that their very existence was dependent upon their obedience, and that the wisdom of a slave was co-extensive with his docility. In general terms, the gallows taught slaves their proper status, that of chattel.

As these messages could be more vividly delivered by a system that administered the death penalty in an arbitrary way, it would not surprise one to discover that the trials of slaves could be extremely swift, with few of the evidentiary and procedural safeguards that are accepted as the hallmarks of modern jurisprudence. Counsel, for instance, has been unable to discover a single appellate opinion dealing with the criminal trial of a Kentucky slave, giving rise at least to the hypothesis that there may indeed have been no such

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appeals. When the law classifies a group of people as the equivalent to farm animals, it can doubtless justify dealing with their cases without great ado.

III. THE COMMONWEALTH EXECUTED SLAVES FAR IN EXCESS OF THEIR REPRESENTATION IN THE GENERAL POPULATION

In every decade from 1780, the population of Kentucky rose. The slave population rose at an ever increasing rate as the economy of Kentucky became more and more dependent upon slavery. In every decade, however, whites remained in the majority. In every decade, moreover, slaves were executed in numbers greater than their proportion in the general population. (See Exhibits 4, 5, 6.) As far as can be now determined, it appears that all of the African-Americans executed before Emancipation were slaves. (See Ex. 4) The last execution of a female in Kentucky took place in Kentucky in 1868, shortly after Emancipation. The condemned was a thirteen-year-old African-American girl named Susan. (See Ex. 4) Prior to that, eleven other women had been executed. In addition to Susan, the Commonwealth has executed nine African-American women, one white woman, and one of unknown origin. (See Ex. 4 & 6) Between 1780 and 1868, the Commonwealth executed three children. Two were black. The youngest, James Bill, was a slave executed on July 30, 1791. He was twelve years of age and had been convicted of murder.

Violence against slaves was sanctioned by the law as the most powerful tool, and perhaps the only tool society could use to reduce human beings to a dignity equivalent to beasts. When slaves transgressed the many, strict bonds placed upon them, no mercy could be shown, for mercy requires empathy, and empathy cannot be extended to men made chattels. It is no wonder that black people before Emancipation were executed in such numbers. The gallows tree was the main beam supporting the entire structure of slavery. The shadow and specter of the hangman's noose was one of the badges and incidents born by Kentucky slaves throughout their lives.

IV. VIOLENCE AGAINST BLACK PEOPLE INTENSIFIED AFTER THE CIVIL WAR

The Kentucky Court of Appeals held that the Emancipation Proclamation, issued by President Abraham Lincoln on January 1, 1864, did not apply to slaves held in Kentucky, nor to slaves owned by masters in others states if the slaves were physically present in Kentucky. Emancipation did not take place in Kentucky until December 1865, when the Thirteenth Amendment became effective.[1] *Mark v. McGeorge*, 6 Ky. Op. 117 (1872). An estimated 65,000 blacks remained in bondage in Kentucky after the war ended. Wetherington, *Kentucky Joins the Confederacy*, attached hereto as Exhibit 7. When the federal military commander, John Palmer, told 2,000 slaves they were free in a speech he gave in 1865, the Jefferson County Grand Jury indicted him for violation of the Slave Code. *Id.*, p.6.

When Emancipation finally did take place in Kentucky, a wave of resentment swept over white Kentuckians. Groups of vigilante nightriders, the most famous of which was the Ku Klux Klan, were formed and became powerful. Violence against blacks had been a perennial feature of Kentucky life, and it continued and intensified, although formally unlawful. *Id.*, p.6 Many Kentucky whites were determined to preserve the abject racial subservience that had prevailed before the Civil War. Others even attempted to keep "their" blacks enslaved without legal warrant. Wright, *Racial Violence in Kentucky*, 19-26 (Louisiana State University Press, 1990). The beating of black workers by their employers continued at least until the middle of the 1870s. Wright, *Racial Violence in Kentucky*, 24-25. Although, through the intervention of the federal Freedmen's Bureau, some arrests of employers were made for beating black employees, the courts seem invariable to have refused to impose sanctions. *Id.*, 25-25.

A. KU KLUX KLAN

In 1868, the Ku Klux Klan was formed. Kentucky was deemed by the Klan to be "territory within the jurisdiction of this order." *See The Original Precepts of the Ku Klux Klan*, attached hereto as Exhibit 8. The Klan excluded Union Veterans from its membership. It also excluded members of the Republican Party and those who supported its principles. It was formed on the basis of secrecy, and it existed to work in opposition to the civil rights of blacks. It favored the continuance of a "white man's government" in the United States, and it committed itself to ending the political disabilities imposed upon the rebellious states. Even more ominously, it stated its support for the "restoration to the Southern People" all their rights, including their property rights, which, in context, was a lightly veiled reference for the reestablishment of slavery. (See Ex. 8)

The Klan resorted to violence to achieve these ends, and its violence was directed to anyone, black or white, who worked to advance the equality of African-Americans. The Klan immediately became a powerful force throughout the Commonwealth. The violence that the Klan perpetuated here equaled in intensity anything seen in the states of the erstwhile Confederacy. Wright, *Racial Violence in Kentucky*, at 26. The Klan intimidated Republican voters into staying home on Election Day. *Id.*, at 26. It, and other bands of nightriders, was implicated in the murders of Union Veterans. See, *e.g.*, *The Death of Captain Bill Strong*, attached hereto as Exhibit 9. The Klan directed violence toward white workers for the Freedmen's Bureau, and, even more malevolently, was able to convert some Freedmen's Bureau agents into working to advance white supremacy. Wright, *Racial Violence in Kentucky*, at 22. The Klan directed efforts to frightening blacks and sympathetic whites into leaving Kentucky. *Id.*, at 30. The Klan gained control of local governments and courts in large areas of Kentucky. *Id.*, at 27. It had open support from a large segment of the General Assembly. *Id.*, at 27. It received support from the Louisville *Courier Journal*, to the

point that the *Courier* went on record blaming Republicans and blacks for the very violence directed against them. *Id.*, at 28. Indeed, it was no mere figure of speech when the Klan referred to Kentucky as "territory under the jurisdiction of this order." The Klan's control in Kentucky waned, but slowly. The Klan is still active here.

B. AFRICAN AMERICAN POPULATION DECLINE

In every prewar decade since 1780, the African-American population of Kentucky grew as Kentucky's economy became more dependent upon slavery. See Exhibit 5. The total black population in 1860 was 236,167. *Id.*

When the violence of Reconstruction began, the black population in Kentucky began a century long period of stasis. At no point prior to 1960 did Kentucky's black population reach 300,000. By 1960, it had declined from its total in 1860 to 213,949. *Id*. This is a clear result of the violence directed against blacks during most of that century, and of the pressures placed upon them to leave the state.

C. SEGREGATION

During the period of Reconstruction and well onward into the twentieth century, Kentucky maintained a policy of de jure separation of the races. In the years immediately following the Civil War, the idea of the provision of an education to blacks was deeply offensive to many whites. Wright, *Racial Violence in Kentucky*, at 35-38. Violence broke out against schoolteachers and black children enrolled in school. Teachers received death threats from the Klan, school buildings were burned to the ground, and there are even instances on record of black schoolchildren being murdered. *Id.*, at 36. Berea College, founded by Ohio abolitionists in the years before the war, was the target of much violence for its policy of integration. *Id.*, at 36. The Commonwealth eventually reached an uneasy peace upon this point by adopting the policy enshrined in law that black and white children be educated separately. *See, e.g. Board of Education of Woodford County v. Board of Education of Midway Independent Graded Common School*, 264 Ky. 245, 92 S.W.2d 687 (1936).

The policy of educational segregation became especially deeply rooted; and of even broader application with the passage of the so-called Day Law by the 1904 General Assembly. This law proscribed integrated education, even in private institutions, and imposed criminal penalties upon it. Berea College, in its capacity as a corporation, suffered a criminal conviction in Madison Circuit Court for practicing integration. Its conviction was affirmed. *Berea College v. Commonwealth*, 123 Ky. 209, 94 S.W. 623 (1906); affirmed *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908); but see *Brown v. Board of Education*, 349 S. W. 294, 75 S.Ct. 753, 99 L.Ed.2d 1083 (1955). The case brought national attention. The Kentucky Court reasoned as follows:

> The separation of the human family into races, distinguished no less by color than by temperament and other qualities, is as certain as anything in nature. Those of us who believe that all of this was divinely ordered have no doubt that there was wisdom in the provision; albeit we are unable to say with assurance why it is so. Those who see in it only nature's work must also concede that in this order, as in all others in nature, there is an unerring justification. There exists in each race a homogenesis by which it will perpetually reproduce itself if unadulterated. Its instinct is gregarious. As a check there is another, an antipathy to other races, which some call race prejudice. This is nature's guard to prevent amalgamation of the races. A disregard of this antipathy to the point of mating is unnatural, and begets a resentment in the normal mind. 94 S.W. at 623.

Racism was thus held to be sanctioned by divine, natural, common and constitutional law. As it was engendered at its root by a horror of interracial families, those who were <u>not</u> racists were legitimate targets of resentment. The Court went on as follows:

> No higher welfare of society can be thought of then the preservation of the best qualities of manhood in all its races. If then it is a legitimate exercise of the police power of government to prevent the mixing of the races in cross breeding, it would seem to be equally within the same power to regulate that character of association which tends to a breach of the main desideratum – the purity of racial blood. *Id*.

The "natural" way to maintain this racial purity of blood was for the stronger race to annihilate the weaker. The only way to prevent this was to keep blacks in their natural, separate, and subordinate status. 94 S.W. at 63.

Not only was segregated education rigidly enforced, but segregated housing was legitimated, even when this tended to cause blacks to live in substandard housing. *Harris v. City of Louisville*, 165 Ky. 559, 177 S.W. 472 (1915). Public accommodations, such as parks, and many transportation facilities were segregated. *See, e.g., Berea College*, *supra*; *Sweeney v. City of Louisville*, 309 Ky. 465, 218 S.W.2d 30 (1949).

During slavery, marriages between slaves were legally invalid. However, by an Act of the 1866 General Assembly, they were extended a retroactive validity, and could be registered with the county clerk. *Lindsey's Devisee v. Smith*, 131 Ky. 176, 114 S.W. 779 (1908); *Thomas v. McBeth's Administrator*, 259 Ky. 484, 82 S.W.2d 790 (1935).

Despite this, marriage between white and black, of course, was strictly proscribed. As late as 1952, KRS 402.020 provided that an interracial marriage was void. *Beddow v. Beddow*, Ky., 257 S.W.2d 45 (1952). Proof that one party was

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of another race was grounds for an annulment. *Theophanis v. Theophanis*, 244 Ky. 689, 51 S.W.2d 957 (1932). Children of an interracial marriage were deemed to be illegitimate *Martin v. Coburn*, 266 Ky. 176, 98 S.W.2d 483 (1936). As shall be seen below, the legal proscription on interracial marriage was rooted in an unusually deep-seated horror. It was presumed that God or Nature had implanted racial antipathy into humans to prevent the biological mixing of the races. *See Berea College v. Commonwealth*, *supra*, for its endorsement of this proposition.

D. LYNCHING IN KENTUCKY

Southern trees bear strange fruit.
Blood on the leaves and blood at the root.
Black bodies swinging in the Southern breeze.
Strange fruit hanging from the poplar trees.

(Strange Fruit, Lewis Allen/Billie Holiday, attached hereto as Exhibit 10. See also "A Lynching in Logan County," attached as Exhibit 11.)

By one estimation, there were 171 lynchings carried out by Kentucky mobs in the period between 1860-1940. (*See Kentucky Lynchings*, attached hereto as Exhibit 12.) By another count, there were 353 lynchings carried out in Kentucky. Wright, *Racial Violence in Kentucky*, 71. Wright based his count on records kept by the NAACP, the Tuskegee Institute and from stories in newspapers in Kentucky and elsewhere. He followed a conservative methodology to separate lynchings from "ordinary" race-based murders. *Id.*, at 68. His count, therefore, may be an underestimation of the true numbers.

At any rate, the fact is clear that, in the period between 1860-1940, roughly between 200 and 400 Kentuckians were accused of crimes and violently executed by the mob without the opportunity to defend themselves in court. Most of these were blacks. Wright, 71, 73. It appears that most of the victims of this violence were billed as pretended retribution for offenses that were not capital offenses. Wright at 77; see also Ex. 12. Some were killed upon accusations of behavior that was not even criminal. Wright at 77-104; Ex. 12. The most common accusation leading to the lynchings of blacks was an accusation of rape. Wright at 77. In a social context where racial hatred was seen as impressed in the human mind by Nature to prevent the mixing of the races, an accusation of rape against a white woman was a particularly deadly charge to level against a black man. *See Berea College v. Commonwealth*, *supra*, for its reasoning approving of racial antipathy. Indeed there was a diabolical logic that attended such charges: the weaker the case, the greater the chance of an acquittal; the greater the chance of an acquittal, the higher the likelihood of the accused being lynched. Wright, 77-104.

Lynching was not necessarily carried out by hanging. It typically involved a firestorm of violence, including humiliation, torture, burning, dismemberment and castration. Large crowds often assembled to view the killing. *See Lynching in America: Carnival of Death*, attached hereto as Exhibit 13. Despite the illegal nature of their contemplated actions, members of lynch mobs would usually shun disguises. This was to signify community approval of the lynching, and to make it clear to blacks that due process of law afforded them no protection. Wright, *Racial Violence in Kentucky*, at 89.

The authorities of the Commonwealth and the leaders of public opinion in Kentucky tended to look upon lynching with favor, or, at worst to regard it as a necessary evil. For instance, when in 1897, Raymond Bushrod was lynched in the presence of the coroner of Hancock County, at a large carnival held in Hawesville on a Sunday afternoon, the coroner thereafter swore that the killing was carried out by persons unknown. Wright, at 89. Even when evidence later appeared that, if aired in court, could have exonerated a lynching victim, the authorities did little or nothing either to deplore the lynching or to arrest the actual perpetrator. Wright, at 91-92. When a mob in Maysville burned 18 year old Richard Coleman at the stake on December 6, 1899, the Commonwealth refused to bring charges against the well-known perpetrators. *Id.*, at 93-95.

African-American lynching victims were vilified in the press in the vilest terms. They were characterized as "fiends," "devils," "ape-like," as "Darwin's Missing Link." *Id.*, at 80. Lynchings were characterized as humorous occasions, and reported with relish when the victim of the lynching betrayed justifiable fear. *Id.*, at 81.

The roots of the lynching mentality were often identified in the "natural" antipathy between the races. Wright, at 95. Some groped for an explanation for lynchings in the hypothesis that legal executions were not painful and humiliating enough to shake the thirst for retribution in an outraged community. See Wright at 95. Perhaps the clearest analysis was expressed by the *New York Times*: "Underlying these motives and rendering them more savage was the mysterious and subtle and venomous race hatred distilled <u>in the days of slavery</u>." Quoted in Wright at 95, commenting on the burning of Richard Coleman, emphasis added.

Lynching had its evil roots in the hatred and objectification of black people born in the days of slavery. The lynching tree also bore bitter fruit, in that the law did not oppose, but appeased the mob. The law of Kentucky, influenced by the General Assembly and the courts, sought to appease the mob by providing black capital defendants with a truncated form of due process and by providing a vividly humiliating form of execution available in cases of rape. Slavery led to hatred, hatred led to lynching, and lynching led to the abasement of our law.

E. THE GALLOWS FAIR ACT

During the Eighteenth, Nineteenth and early Twentieth Centuries, hangings in Kentucky took place in public. By the

beginning of the twentieth century, executions, like many lynchings, had come to be conducted in a carnival like atmosphere. Large, excited and liquored-up crowds would assemble, and would be catered to by vendors selling hot dogs, candy and souvenirs. The atmosphere of grotesque high holiday would reign from early morning on execution day until the body of the condemned was born away in a wicker coffin to the Potter's Field.

In 1910, the General Assembly enacted a statute to end this practice. It decreed thereafter that executions would be carried out in Kentucky by electrocution, and would take place within the gothic walls of the state penitentiary in Eddyville. Wright, at 256. It was commonly supposed at the time that electrocution was a painless death, and that a relatively dignified death behind prison walls was too lenient in case of rape. This statute was much criticized as overly lenient. Accordingly, in 1920, the General Assembly reinstituted hanging as a penalty for rape, and directed that such hangings take place in the county of conviction, in an enclosure provided by the county that would admit no more than 100 people. Wright, at 256.

Some counties managed to reinstitute public hanging under what came to be known as the Gallows Fair Act, by placing a low fence around their execution enclosure. In June, 1932, Sam Jennings, an African-American, was hanged in Hardinsburg, before a large and festive crowd, who, with glad anticipation, watch him struggle on the gallows for twenty minutes before he died. Wright, at 276.

On August 14, 1936, Rainey Bethea, an African-American, was hanged in public in Owensboro before a crowd of 20,000 people. Many citizens held "hanging parties" and invited in out-of-town guests. The newspaper in nearby Henderson complained that the hanging was held at an inconvenient hour, and that it should have been held at Rash Stadium at Owensboro High School so that spectators could have been comfortable. See Wright, at 258. The national criticism of this event was severe and sustained. It was to become the last public hanging in North America, to counsel's information and belief.[2]

Although the hanging of Rainey Bethea ended the practice of public hanging, hanging remained the penalty for rape until 1937, when Harold Van Venison, an African-American, was hanged in the jail in Covington. The widespread willingness to subject blacks accused of rape to the humiliating degradation of public hanging, which willingness endured well into the twentieth century, reflected the high emotions with which whites regarded this crime, and the terror of miscegenation in which those emotions found their root. Public execution, as in the days of slavery, was prized for its terrifying effect on the black population, and for its tendency to terrorize blacks into subjugation and passivity. Right up to the verge of World War II, Kentucky was using the gallows to achieve the same goals for which it had been used in slavery times. All these goals coalesced in two overarching purposes: the exaltation of whites and the degradation of blacks.

For an account of the trial and execution of Harold Van Vennison, and several others condemned under the Gallows Fair Act, see *A History of a Famous Scaffold*, attached hereto as Exhibit 14. See also Exhibit 15, a photographic depiction of the crowd viewing the execution of Rainey Bethea, published in Wright, after 163.

F. A QUESTION OF DUE PROCESS

Wright points out that the research of several scholars agrees that the gradual decline in lynching in the earlier twentieth century was due to the state stepping in to take the role of the mob. Wright, at 223. The mob outside the courtroom frequently demanded that public officials impose the death penalty in a hasty mockery of a trial. Whether through fear or sympathy, public officials in Kentucky were known to oblige. Wright, 223-225. Leading journals of opinion in Kentucky went on record praising lynch mobs as ardent seekers after justice, and urged the courts to grant their demands for ever swifter justice. Wright, at 225.

The courts responded to public opinion. The trials of African-Americans in the late nineteenth and early twentieth centuries began to take on a pattern. Pretrial publicity, of a lurid hue, was a hallmark in the capital trials of black defendants, and the community often accepted the guilt of the defendant as a foregone conclusion. See Wright, *e.g.*, 237-238. The pressure to make a quick arrest led to conclusory police investigation. *Id.* The legal proceedings had to be conducted before crowds of highly excited white people, and all knew well that, at any moment, the crowd could become a lynch mob. Frequently, these interfering mobs were led by prominent public citizens. For example, in the Louisville trial of William Patterson and Albert Turner, held in 1887, an unsuccessful lynch mob was led by, among others, John Letterie, a member of the General Assembly. The influence of the mob was so strong that there is at least one case, that of 17 year old Earl Thompson, in which the circuit judge made a speech at the train station before the mob and promised them before a jury had even been impaneled, that the defendant would be convicted and condemned. Wright, at 255, quoting from the *Louisville Courier Journal*, December 8, 1909.

Extreme speed was a hallmark of the trials of blacks in the period from 1860-1960. Wright, at 251-255. This was often justified as an instance of the majestic swiftness of outraged justice. *Id.* The extreme speed of proceedings actually served to hinder the cause of justice to the extent that in many century old Kentucky cases the guilt of the Defendant shall forever remain an open question. See Perry Ryan, *Legal Lynching: The Plight of Sam Jennings* (1989).

Although very able lawyers were appointed on occasion,

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these lawyers had a nearly impossible task. Their clients were often moved long distances away to protect them from the mob. If counsel wished to interview their client before trial day, they had to travel a long distance at their own expense. *See, e.g.*, Perry T. Ryan, *The Last Public Execution in America*, (1992), Chapter 13. The presence of the mob doubtless had a chilling effect on even the most able, locally prominent, and courageous trial counsel. Counsel also often had many barriers to overcome in communication with the client. For example, Rainey Bethea, who was hanged for rape in Owensboro on August 14, 1936, had a very able Owensboro lawyer, William W. Kirtley, as his trial counsel. Kirtley, however, at one point in his career, had been the lawyer for the local Ku Klux Klan. *See Jackson v. Ku Klux Klan*, 231 Ky. 370, 21 S.W.2d 477 (1929). Lawyers, who until fairly recent times, were nearly all white, were influenced at least to a certain degree by the passions and prejudices of the community at large.

Speed in trial proceedings also ensured that the defendant would go to trial at a time when community passions were at their zenith. The calm deliberation productive of justice was, in very many instances, unknown. Often, the self-conscious goal of the proceedings became merely to avoid a lynching. While being transported long distances to and from the venue of the trial, many blacks confessed. It is unknown, and impossible to know, how many of these confessions were true, and how many were made falsely merely to obtain a "good" death from the professional hangman in lieu of torture, castration and possibly burning at the stake from the hands of the lynch mob.

During Reconstruction, as before the Civil War, Kentucky limited jury service to white males. Although, in 1879 the United States Supreme Court ruled that a statutory bar to blacks serving on the jury was unconstitutional, Kentucky kept its prohibition against black jury service on the books until 1882. *See Strauder v. West Virginia*, 100 U.S. 303 (1879); Wright, at 274. On the other hand, the Court held that the mere de facto absence of blacks was not sufficient to prove discrimination. *Virginia v. Rives*, 100 U.S. 313 (1879). After the *Strauder* case, blacks began appearing on juries for the first time. Social pressure and clerical subterfuge soon brought the practice to an end. When blacks again began appearing on juries in the 1940s, everyone assumed that this was the beginning of black citizen's participation in the legal process. Wright, at 250.

The most common accusations leading black men to be executed were rape and murder. In the nineteenth century, due to the pandemic of lynching, relatively few blacks were legally executed for rape. The rate of execution for rape went up as the rate of lynching went down. Wright, at 230. The rate of execution for murder also increased in the twentieth century. Indeed, the growing similarity of legal proceedings to lynchings may well have been the main cause of the decline in lynching after the turn of the century. Wright, at 250; *see also, e.g.*, Ryan, *Legal Lynching: The Plight of Sam Jennings*, (1989). Blacks were not always executed for crimes against whites. A common accusation leading a black man to execution was that he had killed his wife or girlfriend in a fit of anger. Wright, at 231. While white defendants could hope that the men on the jury would feel sympathy for them, this hope was withheld when blacks went on trial. *Id.*, at 231.

G THE RATE OF EXECUTION

In every decade from 1860-1960, blacks were executed at a rate disproportionate to their presence in the Kentucky population. (See Ex. 6.) Indeed this disproportion tended to increase with time: while the white population of Kentucky grew during that century, the black population declined from its 1860 level. After Emancipation, seven children were executed by the Commonwealth. All but one was black. The last execution of a child was that of 17 year old African-American Carl Fox, which took place on April 6, 1945, in the electric chair at Eddyville. The first child executed following Emancipation was a 13 year old black girl named Susan.

V. THE EXPERIENCE SINCE 1960

On March 2, 1962, a white man named Moss Kelly died in the electric chair in Eddyville. Since that date, Kentucky has had a nearly absolute moratorium on the execution of death sentences, which has been interrupted only upon two occasions, both in the decade 1990-2000.

This sudden halt to the execution of inmates was not prefigured by a dearth of executions in the 1950s, although the total in the decade 1950-1960 was far less than that of the high point reached in the decade 1930-1940. (See Ex. 4.) The cause of this long moratorium is difficult to determine. It has been argued by the Commonwealth since that time that evolving standards of human decency in Kentucky do not exclude the death penalty. If so, the cause of the 33 year partial moratorium is even more obscure.

There are now 36 people awaiting execution in Kentucky. See http://www.cor.state.ky.us/deathrowinmates.htm. One is a woman. Eight are black. All were sentenced since 1980.

While 22% of those now awaiting execution in Kentucky are black, blacks comprise 7.3% of the Kentucky population. The percentage of blacks on death row is thus more than three times greater than blacks in the general population. See 2000 Census Results, attached hereto as Exhibit 16.

A. RACIAL VIOLENCE IN CONTEMPORARY KENTUCKY

Although exact knowledge of their identity is difficult to determine, one study has estimated that there are nine racial hate groups active in Kentucky today. (See Ex. 17.) The

largest is probably the oldest: The Ku Klux Klan. The Klan has been recently active in Barbourville, Middlesboro, Bowling Green, Owensboro, Elizabethtown, and Shepherdsville. (See Ex. 18-23.) In at least one Kentucky community, Corbin, sociological researchers have discovered an explicit determination to keep blacks out, and a widespread inculcation of fear and disdain for blacks. (See Ex. 24.) While the days are probably gone forever when the very mention of the Klan caused terror, there are some highly dangerous disciples of racism in Kentucky. For instance, a Christian identity leader in Somerset attracted a worldwide audience to his private radio station that spewed virulent racial hatred and preached racial violence. (See Ex. 25.) Nor is racism confined to the lunatic fringe. Even our bright, young students in our universities often engage in racist activities. (See, *e.g.*, Ex. 26.)

The pandemic of racial violence seen in Kentucky before 1960 has perhaps gone into partial remission, but the disease is not eradicated, and even now it has the deadly potential to become active. For example, in the years 1990-1996 there was a wave of black church burnings throughout the South. The first of these took place in Kentucky. One burned church, the Barren River Baptist Church, stood in Bowling Green, the city immediately down river from Glasgow. (See Ex. 27.) Racism is alive in the recesses of Kentucky society, and it remains doubtful that the long story of Kentucky racial violence is over.

B. THE VOICE OF THE MOB IS NOT YET STILLED

We have seen how, in the early twentieth century, there was a pronounced tendency, in journals of opinion, in the legislatures and in the courts, to praise lynch mobs as ardent seekers after justice, and to conform the law's procedures to their demands. For instance, a North Carolina judge once argued that lynchers wished merely to enforce justice. Judge Clark argued that, "The purpose of hanging a man is not to reform him but to deter others. To have that effect the punishment must be prompt and certain whenever guilt is certain beyond a reasonable doubt. This principle, which is so often ignored by the courts, is one which instinctively actuates lynching mobs. The principle is right and just, and courts should act upon it and not leave it to be at once as a motive and a plea for the illegal execution of justice." Walter Clark, *American Law Review*, XXVIII (November-December, 1894), quoted by Wright, at 225. In similar vein, the *Courier-Journal* condemned a proposal to investigate lynching as a waste of time. It said, "The remedy for this state of things is not obscure. People are pretty generally that the cure lies in a better and more speedy execution of the laws." Wright at 225. As we have seen, these remarks disingenuously avoided the true roots of lynching: the race hatred carefully cultivated in Kentucky and elsewhere in the days of slavery and the nearly hysterical frustration caused by the notion of even an innocent black man receiving enough human regard to be afforded a proper trial.

With such words resounding in the background, the following words take on a haunting tone doubtless unintended by their learned author: "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the penalty they 'deserve,' then are sown the seeds of anarchy, self-help, vigilante justice, and lynch law. *Gregg v. Georgia*, 428 U.S. 153 (1976) (emphasis added). Although our law hedges it about with safeguards, the law makes room for the death penalty by showing deference to an outraged public desire to kill. Our law even now is shaped, in part, by the howls of the lynch mob. As we have seen, this outraged public desire to kill has been, through Kentucky history, engendered by violent racism.

C. THE RACIAL JUSTICE ACT

Recognizing that racism is a continued reality in Kentucky, the General Assembly in 1998, passed the Racial Justice Act, now codified as KRS 532.300. It prohibits the Commonwealth from seeking the death penalty because of race. A finding that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought compels the court to prohibit the seeking of the death penalty. It is not requisite to prove a racist animus on the part of the prosecutor: the statute prohibits the Commonwealth as a collective entity from seeking death because of race.

Here we have seen that every actual execution of a black person that has ever taken place in Kentucky was tainted to a greater or lesser degree by racism. Our law in the twentieth century was marred by a misplaced admiration for the motives of the lynch mob. The real motives of the mob were rooted in a blistering disdain for black people engendered in the crucible of slavery. This race hatred was not hidden, but public and all pervasive. For nearly our entire history it received the approval, not the condemnation of our courts and our journals of opinion.

In our days, racism is still present. Our society is composed of 7% black people. Our death row is compose of 22% black people. Given our history as a background, the conclusion is inescapable: decisions to seek death are still motivated by racism on the part of the Commonwealth as a collective entity.

D. DIFFICULTIES IN THE CASE AT BAR

In the case at bar, some deeply troubling factors emerge:

1. Nate Wood, like many African-American men in the early twentieth century, is to be tried for his life for allegedly killing his former girlfriend. Recently, in this judicial circuit, the Commonwealth offered a white defendant a 15 year sentence for killing his girlfriend.
2. Nate Wood, like many African-American men in the early twentieth century, is to be tried almost certainly by an all

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white jury. The 2000 black population of Barren County was roughly 4.5%. When one excludes from that number children, people with essential jobs, people with physical or legal disabilities, and people who are not registered to vote, there is hardly anyone left. When one excludes those who are acquainted with Nate or the witnesses, the number is even fewer.

3. The Commonwealth, despite this, has moved for severely limited individual voir dire.

4. The level of pretrial publicity, as on many cases in the early twentieth century, has been constantly high during this case.

5. If Nate Wood is sentenced to death for kidnapping, he, an African-American, will be the only person in Kentucky history thus far executed for that cause. On the day of his execution, if it comes, 100% of those executed in Kentucky for kidnapping will be African-American.

The passage of the Racial Justice Act, while not a panacea, is a historic step in our march to a better civilization. It is a clear signal that the time has come in Kentucky to oppose and not to appease the dark impulses of the mob.

WHEREFORE, Nate Wood demands judgment and the further relief set forth below:

1. A finding by the Court that decisions to seek death in the Commonwealth are still based on racism within the Commonwealth as a collective entity; that this racism goes back to the earliest foundation of the Commonwealth and that it is still present.

2. A finding by the Court that, throughout its history, the Commonwealth's administration of the Death Penalty has served to drape its black citizens with the badges and incidents of slavery in contravention of the Thirteenth Amendment to the United States Constitution and to Section 25 of the Kentucky Constitution.

3. An Order directing the Commonwealth to disclose the race of the defendant in all death eligible murder cases at the time this case arose.

4. An Order directing that the venue of this trial be changed to a county with a higher African-American population.

5. A hearing, at which the Commonwealth as a collective entity will bear the burden of proof, inquiring into the following:

   A. The race of the defendant in all death eligible murder cases in Kentucky at the time this case arose; and
   B. The procedures by which the venire was assembled in the current case.

6. An Order providing for extensive and searching individual voir dire.

7. An Order directing the Commonwealth not to seek the death penalty in this case.

8. All other relief to which Nate Wood may be entitled.

Respectfully submitted,

_____

Robert F. Sexton
Joseph H. Bennett
Asst. Public Advocates
Counsel for the Defendant

NOTICE AND CERTIFICATE OF SERVICE

Please take NOTICE that the foregoing MOTION will be brought on for hearing before the Hon. John D. Minton, Jr., Special Judge, Barren Circuit Court, at the Court's convenience.

I do hereby certify that I have caused a true and correct copy of the foregoing MOTION AND NOTICE to be served upon the Plaintiff by mailing a true and correct copy of same to the Commonwealth Attorney's Office as follows: Hon. Karen Davis, Commonwealth Attorney, 221 S. Green St., Glasgow, KY 42141; and Hon. Karen Timmel, Office of the Attorney General, 1024 Capital Center Drive, Suite 200, Frankfort, KY 40601, on this the _____ day of February, 2003. A copy was also mailed to Hon. John D. Minton, Jr., Special Judge, Barren Circuit Court, Justice Center, 1001 Center St., Bowling Green, KY 42101.

_____

Robert F. Sexton

[1]Kentucky did not actually ratify the Thirteenth Amendment until March 18, 1976.

[2]Counsel's office stands but a few yards from the site of the gallows. ■

Rob Sexton
Owensboro Directing Attorney
Rob.Sexton@mail.state.ky.us

Men decide far more problems by hate, love, lust, rage, sorrow, joy, hope, fear, illusion, or some other inward emotion, than by reality, authority, any legal standard, judicial precedent, or statute.

— Cicero (106 B.C. – 43 B.C.)

ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES

I. Introduction

In *Wiggins v. Smit*h, the United States Supreme Court considered the appeal of a Maryland death row inmate whose lawyers had failed to conduct a mitigation investigation or present evidence of Mr. Wiggins' life history or family background in the penalty phase. Had an investigation been conducted, it would have revealed that Mr. Wiggins had experienced severe physical and sexual abuse and profound neglect at the hands of his mother and other authority figures. None of this information was discovered by trial counsel or presented to the jury. In his appeal to the Supreme Court, Mr. Wiggins argued that his lawyers' failure to investigate and present this compelling mitigation evidence constituted ineffective assistance of counsel.

In a 7-2 decision, the Supreme Court agreed. In its analysis, the Court turned to ABA Guidelines and standards as the "prevailing norms of practice" that serve as "guides to determining what is reasonable." *Wiggins v. Smith*, 123 S.Ct. 2527, 2536-7 (2003). The Guidelines provide support for the proposition that an investigation of all reasonably available mitigating evidence was required at the time of Mr. Wiggins' trial. The Court concluded that "counsel's conduct … fell short of the standards for capital defense work articulated by the ABA" and granted Mr. Wiggins a new sentencing hearing. *Id*. The significance the Court placed on the ABA Guidelines makes it likely they will prove to be increasingly relevant regarding the question of attorney competence.

II. 2003 Revised ABA Guidelines

The Wiggins trial occurred in 1989, so the Court focused on the 1989 ABA Guidelines to understand the prevailing norms of that time. But as a measure of current practice, the 1989 Guidelines are out of date. The 1989 version does not include any of the important legal developments that had occurred in the intervening years – for example, the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA) and caselaw interpreting its provisions.

So in the Fall 2001 an Advisory Committee of experts met to review the 1989 Guidelines and identify any necessary revisions or improvements. The Advisory Committee was comprised of experienced capital litigators from former resource counsel offices, as well as representatives from various sections of the ABA, the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, Federal Death Penalty Resource Counsel, Habeas Assistance and Training Counsel, and State Capital Defenders Association. These experts focused on identifying the essential skills and experiences that the defense should possess to be successful today, and confronted the mistakes they had learned should be avoided. Consultants provided drafts of the revisions to the Advisory Committee members for discussion and comment at several daylong meetings and follow-up discussions. Hofstra Law School Professor Eric Freedman was retained as the Reporter and contributed valuable commentary and insight to the final draft. The revised ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* was approved by the ABA House of Delegates in February 2003 with 96% approval.

III. Key Changes/Highlights from the 1989 Edition

The overall objective of the revised Guidelines is to set forth a national standard of care and practice for the defense of capital cases. They are intended to provide guidance to judges and capital litigators regarding the skills and training death penalty counsel should possess when representing a person charged with or convicted of a capital crime. Critically, the Guidelines also address many other issues that impact the quality and availability of legal representation for capital defendants, such as manageable workloads, an independent appointing authority, and adequate funding for the defense team. The ABA is urging all death penalty jurisdictions to adopt the ABA Guidelines as an essential first step toward badly needed reform and improvement to capital defense systems.

The revised Guidelines provide expanded and updated guidance that is consistent with the demands of this specialized field of litigation. Not surprisingly, they indicate the need for a qualified and adequately resourced defense effort and zealous and effective representation of the client in every stage of the proceeding. The Guidelines and commentary detail what such representation should entail. The following is a summary of the highlights and changes to the revised Guidelines.

Guideline 1.1: Objective and Scope of Guidelines. The commentary to the 1989 edition of this Guideline stated that it was designed to express existing "practice norms and constitutional requirements." The statement that the purpose of this document is "to set forth a national standard of practice" has been moved to the black letter in order to emphasize that the Guidelines are *not aspirational*. Instead, they embody the current consensus about what is *minimally required* to provide effective defense representation in capital cases.

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The 1989 edition of this Guideline stated that the objective in providing counsel in death penalty cases should be to ensure the provision of "quality legal representation." The language has been amended to call for "high quality legal representation" to emphasize that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in non-capital cases.

The Guidelines formerly covered only "defendants eligible for appointment of counsel." The scope has been revised for 2003 edition to cover "all persons facing the possible imposition or execution of a death sentence." The purpose of the change is to make clear that the obligations of the revised Guidelines are applicable in all capital cases, including those in which counsel is retained or is providing representation on a *pro bono* basis.

The use of the term "jurisdiction" as now defined in the revised Guideline has the effect of broadening the range of proceedings covered to include, for example, federal criminal prosecutions. In accordance with current ABA policy, the revised Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.

In accordance with the same policy, the words "from the moment the client is taken into custody" have been added to make explicit that these revised Guidelines also apply to circumstances in which an uncharged prisoner who might face the death penalty is denied access to counsel seeking to act on his or her behalf (*e.g.*, by the federal government invoking national security, or by state authorities seeking to evade constitutional mandates). This language replaces phraseology in the 1989 Guidelines that made them applicable to "cases in which the death penalty is sought." The period between an arrest or detention and the prosecutor's declaration of intent to seek the death penalty is often critically important. In addition to enabling an attorney to counsel his or her client and to obtain information through investigation regarding guilt that may later become unavailable, effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty. Thus it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible – well before the prosecution has actually determined that the death penalty will be sought.

The revised Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought; the case remains subject to these revised Guidelines until the imposition of the death penalty is no longer a legal possibility. In addition, as more fully described in the Guideline commentary, these revised Guidelines also recognize that capital defense counsel may be required to pursue related litigation on the client's behalf outside the confines of the criminal prosecution itself.

Guideline 2.1: Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases. Revised Guidelines 2.1 requires jurisdictions to develop a formal "Legal Representation Plan" to provide high quality legal representation in all death penalty cases. 3.1. The Guideline contains overall guidance to jurisdictions regarding the formulation and contents of such a Plan, which should be judicially enforceable in the jurisdiction to be effective.

Guideline 3.1: Designation of a Responsible Agency. Revised Guideline 3.1 makes it clear that an independent entity, not the judiciary nor elected officials, should appoint counsel in death penalty cases. In addition, the revised Guideline contains new subsections describing the acceptable kinds of independent appointing authorities and the duties of the independent appointing authority, including its obligations in the event of a conflict of interest. The revised Guideline emphasizes that the independent appointing authority has the responsibility of ensuring that qualified attorneys are available to represent defendants in death penalty cases. Therefore, it must also promptly investigate complaints about the performance of attorneys and take corrective action without delay so that an attorney who fails to provide high quality legal representation will not be appointed in the future.

Guideline 4.1: The Defense Team and Supporting Services. Revised Guideline 4.1 provides for the assembly of a "defense team" in capital trial and post-conviction proceedings consisting of at least two qualified attorneys, one investigator, and one mitigation specialist. In light of the Supreme Court decision in *Atkins v. Virginia*, the revised Guideline also requires that at least one team member is qualified to screen for mental or psychological disorders or impairments. The revised Guideline emphasizes that the purpose of providing adequate support services (in the nature of investigators and mitigation specialists) is to further the overall goal of providing high quality legal representation, as opposed to merely an adequate defense. The commentary discusses the important role each team member plays in achieving this goal. Finally, the revised Guideline includes a requirement that jurisdictions provide expert and investigative services to defendants with retained or *pro bono* counsel who cannot afford to retain such services.

Guideline 5.1: Qualifications of Defense Counsel. Guideline 5.1 of the 1989 edition is substantially reorganized in the revised edition. In an attempt to focus the inquiry on counsel's ability to provide high quality legal representation, the revised Guideline places a greater emphasis on qualitative indicia of attorney ability, expertise, and skill, as opposed

to quantitative measures such as years of litigation experience and number of jury trials. The revised Guideline also emphasizes that the defense team as a whole must have the necessary qualifications to ensure that the defendant receives high quality legal representation and, to that end, requires each jurisdiction to develop a pool of qualified defense counsel from which such teams may be drawn.

Guideline 6.1: Workload. Revised Guideline 6.1 places an obligation on the responsible appointing authority to ensure that the workload of attorneys representing defendants in death penalty cases does not interfere with the provision of high quality legal representation. The 1989 Guideline stated that attorneys should not accept appointment if their workload would interfere with the provision of "quality representation or lead to the breach of professional obligations." That admonition has been substantially retained in revised Guideline 10.3.

Guideline 7.1: Monitoring; Removal. Revised Guideline 7.1 provides a stricter standard than in the 1989 edition for when an attorney should not receive additional capital assignments. The 1989 edition provided that counsel should no longer receive additional capital appointments if counsel had "inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case." The standard is changed in the revised Guideline to apply whenever counsel "has failed to provide high quality legal representation." The revised Guideline also contains a new subsection dealing with the appointing authority's responsibility to investigate and maintain records of complaints of counsel performance. Lastly, the revised Guideline clearly indicates that zealous advocacy can never be the cause for an attorney's removal from either a specific case or a jurisdiction's list of qualified counsel for appointment.

Guideline 8.1: Training. Revised Guideline 8.1 emphasizes that the Legal Representation Plan must provide for comprehensive, specialized training of all members of the defense team (including the non-lawyers) in order to keep current regarding new developments in the law. This revised Guideline also includes a new list of 11 broad topic areas that must be covered by the comprehensive training programs, these are as follows: (1) an overview of current developments in relevant state and federal caselaw; (2) pleading and motion practice; (3) pretrial investigation, preparation and theory regarding guilt/innocence and penalty; (4) jury selection; (5) trial preparation and presentation, including the use of experts; (6) ethical considerations; (7) preservation of the record and of issues for post-conviction review; (8) counsel's relationship with the client and his or her family; (9) post-conviction litigation in state and federal courts; (10) the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic science; and (11) the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18. Attorneys eligible for appointment are required to attend and complete, at least once every two years, an approved, specialized training program focusing on the defense of death penalty cases. All non-attorney team members should also receive continuing professional education.

Guideline 9.1: Funding and Compensation. Revised Guideline 9.1 includes an express disapproval of flat or fixed fee compensation schemes and statutory fee minimums for representation in death penalty cases. The revised Guideline governs "full" compensation of attorneys and the other members of the defense team. The revised Guideline also states that there should be no distinction between the hourly rates of compensation for in-court versus out-of-court services. Lastly, the revised Guideline provides for additional compensation in unusually protracted or extraordinary cases.

General Comment, Guideline 10. All of Guideline 11 in the 1989 edition is renumbered as Guideline 10 in the revised edition, as the content of the 1989 Guideline 8.1 was incorporated into other Guidelines (chiefly those pertaining to the Defense Team in revised Guideline 4.1). The content of the 1989 edition's Guideline 8.1 was deleted as a separate Guideline in the revised edition. Additionally, several Guidelines have been combined and reorganized in the revised edition.

Guideline 10.1: Establishment of Performance Standards. Revised Guideline 10.1 calls on the Responsible Agency to establish standards of performance for all counsel in death penalty cases, and to refer to the standards when assessing the qualifications or performance of counsel. The Guideline makes clear that the standards of performance should be formulated so as to insure that all counsel provide high quality legal representation in capital cases in accordance with these Guidelines.

Guideline 10.2: Applicability of Performance Standards. Revised Guideline 10.2 clarifies that counsel's obligation to provide high quality legal representation continues for so long as the jurisdiction is legally entitled to seek the death penalty.

Guideline 10.3: Obligations of Counsel Respecting Workload. Revised Guideline 10.3 echoes the obligations stated in revised Guideline 6.1 regarding workload, here with respect to counsel's obligations to limit their caseloads such that each client receives high quality legal representation.

Guideline 10.4: The Defense Team. This Guideline is new to this revised edition of the Guidelines. It parallels revised Guideline 4.1 but also clearly establishes that it is counsel's duty to assemble the defense team, demand all resources necessary to provide high quality legal representation, and direct and supervise the work of other members of the defense team.

Guideline 10.5: Relationship with the Client. Revised Guideline 10.5 expressly states that regular client contact is essen-

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tial throughout *all* stages of a capital case. The revised Guideline also expressly notes counsel's obligation to discuss all matters that might reasonably be expected to have a "material impact" on the case with the client.

Guideline 10.6: Additional Obligations of Counsel Representing a Foreign National. This Guideline is new. It identifies the special obligation of defense counsel to determine whether the client is a foreign national and if so, to advise the client of his or her right to communicate with his or her consular office. This revised Guideline reflects important new caselaw concerning foreign nationals charged with capital crimes and the recent influence of international law in death penalty proceedings.

Guideline 10.7: Investigation. Revised Guideline 10.7 is based on portions of Guideline 11.4.1 of the 1989 edition, which the Court cited to in the *Wiggins* decision. The revised Guideline emphasizes at the outset the scope of investigation that defense counsel should conduct and the critical role of proper and thorough investigation in trial preparation. The revised Guideline notes that the investigation should be conducted regardless of the facts, evidence, or statements by the client. Finally, the revised Guideline indicates that counsel must examine the defense provided to the client at all prior phases of the case, and satisfy himself or herself that the official record of the proceedings is complete.

Guideline 10.8: The Duty to Assert Legal Claims. The title of revised Guideline 10.8 has been changed to emphasize that the duty to assert legal claims exists at every stage of the proceedings, not just the pretrial phase. In addition, the revised Guideline states that counsel should evaluate each motion in light of the "near certainty" that all available avenues of appellate and post-conviction relief will be sought in the event of conviction and imposition of a death sentence. Further, two new subsections appear in the revised Guideline that deal with: (1) the method of presentation of legal issues; and (2) newly discovered issues and supplementing previously raised issues with new information.

Guideline 10.9.1: The Duty to Seek an Agreed-Upon Disposition. Revised Guideline 10.9.1 contains new text to clarify the importance of pursuing an agreed-upon disposition at every phase of the case, and not just as a substitute for proceeding to trial. The revised Guideline also omits the requirement (which appears in the 1989 edition's Guideline 11.6.1) of client consent to <u>initiate</u> plea discussions, in recognition of the possible unintended consequence of premature rejection of plea options by a suicidal or depressed client. The revised Guideline does require counsel to obtain the client's consent before <u>accepting</u> any agreed-upon disposition, however. The revised Guideline also includes the requirement (which appears in Guideline 11.6.3 of the 1989 edition) that counsel enter into a continuing dialogue with the client about the content of any such agreement, including advantages, disadvantages, and potential consequences of the agreement. Aspects of Guideline 11.6.2 in the 1989 edition have been incorporated in this revised Guideline.

Guideline 10.9.2: Entry of a Plea of Guilty. Revised Guideline 10.9.2 clarifies that the decision to enter or not enter a plea of guilty must be informed and counseled, yet ultimately lies with the client.

Guideline 10.10.1: Trial Preparation Overall. Revised Guideline 10.10.1 emphasizes counsel's obligation to develop a defense theory that will be effective in both guilt and penalty phases, with minimal inconsistencies.

Guideline 10.10.2: Voir Dire and Jury Selection. Revised Guideline 10.10.2 clarifies that jury composition challenges should not be limited to the petit jury but should also include the selection of the grand jury and grand jury forepersons. In addition, the revised Guideline is amended to reflect recent scholarship demonstrating that the starkest failures of capital *voir dire* are: (1) the failure to uncover jurors who will automatically impose the death penalty following a conviction or finding of the circumstances making the defendant eligible for the death penalty; and (2) the failure to uncover jurors who are unable to consider particular mitigating circumstances. Lastly, the revised Guideline provides that counsel should consider seeking expert assistance in the jury selection process.

Guideline 10.11: The Defense Case Concerning Penalty. Revised Guideline 10.11 places greater emphasis on the range and importance of expert testimony and the breadth of mitigation evidence in all phases of a capital case. Further, the revised Guideline updates the references to mitigating evidence and arguments that counsel should consider presenting at the sentencing phase.

Guideline 10.12: The Official Presentence Report. Revised Guideline 10.12 is reorganized and contains a few additional requirements, including the following: (1) counsel should become familiar with procedures governing preparation, submission, and verification of official presentence reports where there is a chance that such a report will be presented to the court at any time; (2) counsel should provide information to the person preparing the report that is favorable to the client; and (3) if counsel deems it appropriate for the client to speak with the person preparing the report, counsel should prepare the client for and attend the interview.

Guideline 10.13: The Duty to Facilitate the Work of Successor Counsel. This Guideline is new. It has been added to emphasize the importance of post-conviction proceedings and the critical role of trial counsel in those proceedings. Specific obligations include: (1) maintaining proper records of the case; (2) providing the client's files and all other information about the representation to successor counsel; and

(3) sharing potential further areas of legal and factual research with successor counsel and cooperating with appropriate legal strategies chosen by successor counsel.

Guideline 10.14: Duties of Trial Counsel After Conviction. Revised Guideline 10.14 stresses that trial counsel should take whatever action(s) will maximize the client's "ability to obtain" appellate and post-conviction review, rather than simply maximizing the client's "opportunity to seek" such review. Also, the revised Guideline is modified to emphasize that trial counsel should take appropriate action to ensure that the client obtains successor counsel as soon as possible.

Guideline 10.15.1: Duties of Post-Conviction Counsel. Revised Guideline 10.15.1 has been revised to identify additional actions that should be taken by post-conviction counsel, including filing a stay of execution for those with execution dates and litigating all arguably meritorious issues.

Guideline 10.15.2: Duties of Clemency Counsel. Revised Guideline 10.15.2 requires that counsel take appropriate steps to ensure that the procedural safeguards applicable in clemency proceedings are in place in the jurisdiction and are applied in the client's case. If they are not in place, counsel must seek judicial review of the clemency process. This addition was made in light of the Supreme Court decision on the duties of clemency counsel, *Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272 (1998).

IV. Conclusion

In Fall 2003, Hofstra Law School will publish the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases along with commentaries by experienced capital defenders and mitigation specialists. On October 24, 2003, Hofstra and the American Bar Association will co-host an academic conference on the revised Guidelines and call for serious reform to capital defender systems. The ABA Guidelines, both 1989 and 2003 editions, can be reviewed and downloaded at www.abanet.org/deathpenalty and www.probono.net/deathpenalty. ■

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THE 2003 ROBERT F. STEPHENS AWARD GIVEN TO AOC'S CICELY LAMBERT, MELINDA WHEELER, ED CROCKET

Remarks by Cicely Lambert on receiving the Robert F. Stephens Award at DPA's June 11, 2003 Annual Awards Banquet.

On behalf of Melinda Wheeler, Ed Crockett and myself, we thank you for this award. Melinda sends her regrets as she is attending the Circuit Clerks' Conference at Kentucky Dam Village.

We are honored to receive the Robert F. Stephens award for our work with the AOC/DPA workgroup. One of the goals of the Kentucky Court of Justice during Chief Justice Lambert's term is to promote public trust and confidence in our justice system. All persons who come to our courts must be treated fairly and the law applied justly. This is most important in our criminal courts, where the presumption of innocence is the cornerstone of our legal tradition. Persons charged with crimes are entitled to the presumption of innocence and deserve the just application of our laws with regard to the setting of bail and pretrial release. Equally important is the right of indigent persons to have appointed counsel. Among the most valuable rights in our society are those guaranteed by law, and none are more important in criminal court than the presumption of innocence, the right to bail, and the determination of eligibility for appointed counsel.

Public Advocate Ernie Lewis presents award to AOC Director Cicely Jaracz Lambert

It is our hope that with continuation of the collaboration and dialogue that began with the AOC/DPA workgroup that published incidents of unfairness and inequity in pretrial release and eligibility for appointment of counsel does not occur. We read or see in the media far too often incidents involving people who spend months in jail pending the dismissal of their case when they were eligible for pretrial release, and cases where defendants languish in pretrial detention pending action by the grand jury or are still in custody after their preliminary hearing and bond reduction where the principals in the system assume that their cases will be dismissed.

Ed and Melinda have been in pretrial services since 1976. Their vision, along with my experiences through practicing criminal appeals in the Attorney General's office, by marriage to a public defender/criminal defense attorney and in the practice myself, as well as as director of the AOC, has demonstrated that it is possible to make a difference. We sincerely thank you for your recognition and we hope to continue toward our mutual goals. ■

UNDERSTANDING SENTENCE CALCULATION AND APPLICATION

Sentence calculation and the practical aspects of application of the sentence to an inmate are areas in which many criminal defense attorneys lack a thorough understanding. That isn't surprising, since defense attorneys are rarely involved in disputed issues of sentence calculation or credit, good time awards, parole eligibility or other problems that may arise after a defendant's criminal case has concluded and service of his sentence has begun.

It is not uncommon, however, for a defendant, to have questions about what a potential sentence "really means." "How much time will I serve?" "When will I see the parole board?" "What good will it do me to get my GED?" Commonly, other prisoners in the county jail supply your client with the phrases the more experienced of them all know: "seven, twenty-one (seven months and twenty-one days) is a year of state time" or "eight months kills a year." Not only are these phrases inadequate to answer questions a first-time felon may have about his sentence, but they are generally incorrect. For instance, a year of "state time," depending upon the total length of the sentence, the offense(s), conduct and various other factors, could be as much as twelve months or as little as half of that time, maybe even less.

The purpose of this article is to give the defense attorney a basic understanding of the factors that affect the determination of what a defendant's sentence will really mean to him or her. Whether the client is considering a guilty plea or weighing the possibility of proceeding to trial, a basic knowledge of the practical side of the sentence will make both the defendant and the attorney feel more confident that they really understand the implications of the proposed punishment. The article will briefly explain what sentence information should be contained in a defendant's final judgment, how to understand the sentence calculations on an inmate's Kentucky Corrections Resident Record Card, what sentence reduction credits may be available to inmates, how to determine parole eligibility, and how these areas are affected by an inmate's status as a sex offender or violent offender.

The Sentence

It is important to remember that, regardless of what is said in the courtroom, once your client is sentenced he will be transferred to the custody of the Department of Corrections, which will then have to determine exactly what sentence the court imposed and apply it according to existing Kentucky law. To do that, the Department of Corrections will rely primarily upon the final judgment entered by the court. Therefore, the importance of reviewing that judgment and making any necessary motions to amend or correct it should be obvious.

When a defendant is sentenced by the court, the important elements to be included in his judgment, for sentence calculation purposes, are: the length of the sentence; the sentencing date; whether the sentences in the judgment are concurrent or consecutive to each other; whether the sentence of this judgment is concurrent or consecutive to any other sentence from another judgment or another jurisdiction.[1]

Another element that may be included in the judgment is the amount of pre-sentence custody credit to which the inmate is entitled under KRS § 532.120(3). If the custody credit is not included by the court, the Department of Corrections will calculate the amount due in accordance with the statute.

When the inmate is turned over to state custody, the Department of Corrections will rely on the judgment and other court records to determine the length of the sentence, concurrent or consecutive sentencing, any special status (such as violent offender or sex offender), the date the defendant is received by the Department of Corrections, the jail credit to be applied, etc.

The trial-level defense attorney will not usually be exposed to the various calculations made by the Department of Corrections, since they are not made until after sentencing. It is helpful to understand these calculations and the related statutes, however, when attempting to accurately describe to a defendant the actual sentence that may result from a choice to plead guilty or proceed to trial. For instance, understanding the impact of violent offender sentencing can illustrate that the maximum sentence for arson in the second degree is significantly better than the minimum sentence for arson in the first degree. Each is 20 years, but one requires service of <u>at least</u> 17 years and receives no statutory good time, while the other can allow parole after four years and final expiration in less than 15 years, with full application of statutory good time.

Much of the information an attorney needs to deal with issues arising out of the execution of a sentence is contained on an inmate's Kentucky Corrections Resident Record Card.

Reading the Resident Record Card

After sentencing, the various calculations that determine the inmate's sentence expiration and parole eligibility will be recorded on a Kentucky Corrections Resident Record Card, a copy of which will be provided to the inmate. If the inmate believes there are errors in the sentence calculation, he can then file a grievance and request that the errors be corrected.

The Resident Record Card can be difficult to understand at first glance, however it is often necessary to understand the card when dealing with post-conviction relief, habeas corpus, and parole or probation revocation issues. Once the attorney understands the Resident Record Card, it can be-

come a valuable source of information regarding everything from the inmate's conduct and parole history and his appearances before the parole board, to his history of institutional transfers and the reasons for them.

The sentence calculation portion of the Resident Record card will look like the following:

SENTENCE CALCULATIONS

	YEAR	MON	DAY
TOTAL TIME TO SERVE	0003	00	00
DATE SENTENCED/RECEIVED[2]	2001	02	15
NORMAL MAXIMUM EXPIRATION DATE	2004	02	15
CREDIT FOR JAIL TIME	0000	03	12
ADJUSTED MAXIMUM EXPIRATION DATE	2003	11	03
GOOD TIME ALLOWANCE	0000	09	00
MINIMUM EXPIRATION DATE	2003	02	03

The particular way the numbers are written, in columns of four (years) two (months) and two (days) allows dates and time periods to be easily added and subtracted from one another. For instance, 0002 years 04 months and 12 days can be easily added to the date 2002 (year) 03 (March) 15 (day) to arrive at the future date 2004 07 27, or July 27, 2004. It is necessary to keep in mind, however, that rather than using ordinary numbers based on tens, this calculation uses thirty day months and twelve month years – this makes it especially tricky when subtracting a larger number of months or days from a smaller number above it. For example:

YEAR	MON	DAY
2000	03	10
-0001	03	20
1998	11	20

On a longer sentence or after some time has been served, the calculations will be more complicated, for example:

SENTENCE CALCULATIONS

	YEAR	MON	DAY	YEAR	MON	DAY
TOTAL TIME TO SERVE	0010	00	00			
DATE SENTENCED/RECEIVED	1994	02	07			
NORMAL MAXIMUM EXPIRATION DATE	2004	02	07			
CREDIT FOR JAIL TIME	0002	03	27			
ADJUSTED MAXIMUM EXPIRATION DATE	2001	10	10			
GOOD TIME ALLOWANCE	0002	06	15			
MINIMUM EXPIRATION DATE	1999	03	25			
MERITORIOUS GOOD TIME AWARD	0000	05	00	1995	03	01
NEW MINIMUM EXP. DATE	1998	10	25			
MERITORIOUS GOOD TIME AWARD	0000	02	00	1996	03	01
NEW MINIMUM EXP. DATE	1998	08	25			
MERITORIOUS GOOD TIME AWARD	0000	02	00	1997	03	01
NEW MINIMUM EXP. DATE	1998	06	25			
PAROLED	1997	06	13			
WARRANT ISSUED	1999	04	20			
RPV WITH WARRANT	1999	04	29			
TIME ON PAROLE	0001	10	16			
CREDIT FOR PV TIME	0000	01	19			
ADJUSTED TIME ON PAROLE	0001	08	27			
NEW MINIMUM EXP. DATE	2000	03	22			

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The Resident Record Card also contains other information, including the dates and lengths of various sentences, which sentences run concurrently with or consecutively to other sentences, the dates, courts, case numbers, etc. Once the attorney understands the information contained on the Resident Record Card, it is then necessary to understand whether that information is correct and how it affects your client. One commonly disputed issue is the award, denial or loss of good time credit.

Good Time

Statutory Good Time

Statutory good time is created by KRS § 197.045(1), which states that: ***Any person convicted and sentenced to a state penal institution may receive a credit on his sentence of not exceeding ten (10) days for each month served, except as otherwise provided in this section, to be determined by the department from the conduct of the prisoner.***

Prospective crediting: Although statutory good time is only "earned" when the month has been served, as a practical matter an allocation of the statutory good time applicable to the inmate's sentence is placed on his Resident Record Card in advance. Statutory good time is the most predictable good time award, although the Department of Corrections retains discretion to decline to award or take away good time based on an inmate's conduct.

Not available for violent offenders: Pursuant to KRS § 439.3401, A violent offender may not be awarded any credit on his sentence authorized by KRS § 197.045(1), except the educational credit.

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The mistake most often made in attempting to calculate good time is to apply 120 days of good time per year, based on the ten days per month allocation. This calculation may lead to the belief, among defendants, that eight months of "state time" is equal to one year of their sentences. The problem is that if you reduce the year by the ten days of good time earned each month, 12 months are not "served." So as the sentence is reduced from the front end by service and from the back end by statutory good time the two ends meet at nine months. The final 3 months are not "served" and no good time is awarded for them.

For example, a one-year sentence, beginning January 1st would receive good time as follows:

Month	Months	Days of	Remaining	
ending	"served"	SGT earned	Months	Days
Jan. 31	1	10	10	20
Feb 28	2	10	9	10
Mar. 31	3	10	8	0
Apr. 30	4	10	6	20
May 31	5	10	5	10
Jun. 30	6	10	4	0
Jul. 31	7	10	2	20
Aug. 31	8	10	1	10
Sep. 30	9	10	0	0
Oct. 31	10	--	--	--
Nov. 30	11	--	--	--
Dec. 31	12	--	--	--

Educational Good Time

Like statutory good time, educational good time is created by KRS § 197.045(1), which states that: ***In addition, the department shall provide an educational good time credit of sixty (60) days to any prisoner who successfully receives a graduate equivalency diploma or a high school diploma, a two (2) or four (4) year college degree, or a two (2) year or four (4) year certification in applied sciences, or who receives a technical education diploma as provided and defined by the department; prisoners may earn additional credit for each program completed.***

Educational good time is the only mandatory good time award. It is also unrelated to length of sentence, so the only limitation on how far an inmate can reduce his sentence with educational good time is his ability to complete the various listed educational programs.

Meritorious Good Time

Meritorious good time is created by KRS § 197.045(3): ***An inmate may, at the discretion of the commissioner, be allowed a deduction from a sentence not to exceed five (5) days per month for performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations and programs. The allowance shall be an addition to commutation of time for good conduct and under the same terms and conditions and without regard to length of sentence.***

Meritorious good time, while awarded fairly liberally, is subject to the discretion of the Commissioner of the Department of Corrections and inmates have no protected liberty interest at stake in its denial. *Anderson v. Parker*, Ky.App., 964 S.W.2d 809 (1977).

Along with reduction of the sentence by good time credit, another area of great interest to inmates is the possibility of parole. Since parole is a more familiar concept to those outside the prison system, the attorney is probably more likely to be asked to answer parole eligibility questions than those regarding sentence reduction credits.

Parole Eligibility

Normal parole eligibility - 501 KAR 1:030*: 501 KAR 1:030 contains a number of revisions, additions and exceptions that have accumulated over the years, so that inmates currently incarcerated are subject to differing parole eligibility. For instance, the notation in the chart below, that an inmate with a life sentence will see the parole board after eight years, is applicable to inmates who committed offenses after December 3, 1980. Since that time, additional amendments have increased the life sentence parole eligibility to twelve years (for offenses committed between July 15, 1986 and July 15, 1998) and then to twenty years (for offenses after July 15, 1998), and have changed violent offender parole eligibility for sentences of terms of years.

The following chart, from 501 KAR 1:030, shows the length of service before an inmate's first appearance at the parole board on non-violent, non-sex offenses:

Sentence Being Served	Time Service Required Before First Review (Minus Jail Credit)
1 year, up to but not including 2 years	4 months
2 years, up to and including 39 years	20% of sentence received
More than 39 years, up to and including life	8 years
Persistent felony offender I in conjunction with a Class A, B, or C felony	10 years

There are several exceptions and amendments that may alter the parole eligibility of particular inmates. Keep in mind that, for a sex offender serving the mandatory three-year conditional discharge subsequent to a completed sentence, "a person confined to a state penal institution or county jail as a result of the revocation of his conditional discharge by the court pursuant to KRS 532.043 and 532.060 shall not be eligible for parole consideration." 501 KAR 1:030. Additionally, an inmate who is within sixty (60) days of being released by minimum expiration, administrative release, or maximum expiration at the time of his next scheduled parole hearing is not eligible for parole. *Id.* Several other exceptions and amendments to ordinary parole eligibility guidelines are set out in 501 KAR 1:030.

As many inmates are aware, parole can be a double-edged sword. While an inmate who can successfully follow his conditions of supervision is benefited by the chance to complete his sentence outside the prison system, many inmates are returned to prison as parole violators before receiving a final discharge from parole.

Results of Parole Revocation

The 2003 General Assembly has drastically altered the sentence consequences of parole revocation for most parolees. Under prior law, which is still applicable to parolees returned as a result of a new felony conviction, the sentence calculation includes a calculation of the net time spent on parole. For example:

	YEAR	MON	DAY
MINIMUM EXP. DATE	2000	03	22
PAROLED	1997	06	13
WARRANT ISSUED	1999	04	20
RPV WITH WARRANT	1999	04	29
TIME ON PAROLE	0001	10	16
CREDIT FOR PV TIME[3]	0000	01	19
ADJUSTED TIME ON PAROLE	0001	08	27
NEW MINIMUM EXP. DATE	2001	12	19

The net time spent on parole (one year, eight months and twenty-seven days in the example above) is then added to both the minimum and maximum expiration dates of the inmate's sentence. In this example, the inmate's minimum expiration of sentence is extended from March 22, 2000, to December 19, 2001, by the time spent on parole that does not count toward completion of the sentence. Clearly, for those inmates who are returned to prison and the time spent on parole added to their remaining sentence, parole no longer looks like a benefit.

The 2003 change to the availability of parole credit for inmates returned for offenses other than new felony convictions is discussed in more detail below.

Violent Offender

With regard to parole eligibility for violent offenders, KRS § 439.3401 says that:

> (2) A violent offender who has been convicted of a capital offense and who has received a life sentence (and has not been sentenced to twenty-five (25) years without parole or imprisonment for life without benefit of probation or parole), or a Class A felony and receives a life sentence, or to death and his sentence is commuted to a life sentence shall not be released on **probation or parole** until he has served **at least twenty (20) years** in the penitentiary.
>
> (3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on **probation or parole** until he has served at least **eighty-five percent (85%)** of the sentence imposed.
>
> KRS § 439.3401 (emphasis added).

In sentence calculation, the 85% or 20-year date is referred to as the "ultimate date," before which the inmate may not be released by either parole or sentence reduction credits (good time).

Like violent offenders, sex offenders are another group that has been singled out for special treatment in recent years and both parole eligibility and sentence reduction credits are among the areas where such offenders have been treated more harshly than have other felons.

Parole and Good Time Credit for Sex Offenders

One controversial recent change to the Kentucky statute establishing good time credits is the addition of paragraph (4) to KRS § 197.045, effective July 15, 1998. Under that section, a sex offender convicted after July 15, 1998, a "sex offender who does not complete the sex offender treatment program for any reason **shall serve his entire sentence without benefit of good time, parole, or other form of early release**." KRS § 197.045 (emphasis added). In addition, KRS § 439.340 provides that "[n]o eligible sexual offender within the meaning of KRS 197.400 to 197.440 shall be granted parole unless he has successfully completed the Sexual Offender Treatment Program." KRS § 439.340. This can create a serious problem for offenders who will not cooperate sufficiently to complete the sex offender program, will not admit their offenses, or are otherwise ineligible for entry into the program (*i.e.*, sex offenders who have committed new sex crimes after having previously completed the Sex Offender Treatment Program). Upon completion of the SOTP, however, the inmate is eligible for parole as set out for other nonviolent offenders. A sex offender convicted prior to July 15,

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1998, may be considered for parole if (a) he has been denied entrance into the Sex Offender Treatment Program; (b) he has been terminated from the SOTP; or (c) he has successfully completed the SOTP.

After completing his sentence, whether on parole or in prison, the sex offender, depending upon his underlying offense, may be faced with another requirement that does not apply to other classes of felons: the three-year sex offender conditional discharge contained in KRS § 532.043.

Sex Offender Conditional Discharge

Unlike other offenders, many sex offenders will be subject to a three-year period of conditional discharge following the completion of their sentence. Only those sex offenders convicted of felony violations of "KRS Chapter 510, KRS 529.030, 530.020, 530.064, 531.310, or 531.320" are subject to this requirement. KRS § 532.043. Therefore, some sex offenders, as defined in KRS Chapter 17, whether convicted of " sex crimes," or "criminal offense[s] against a victim who is a minor" or adjudicated as "sexually violent predator[s]," will not be subject to the period of conditional discharge. Since KRS § 532.043 no longer requires the court to include an express sentence of conditional discharge in its sentencing order, the defendant could be in for an unpleasant surprise if he pleads guilty and then finds out that he has unknowingly accepted this three-year period in addition to the sentence he was offered. It is, therefore, important for defense counsel to remember KRS § 532.043 when explaining a potential sentence to a client charged with a sex crime.

New Developments

In addition to the numerous factors discussed above that may be relevant to the length of an inmate's sentence, the General Assembly has enacted some new measures in 2003. These include a new type of sentence reduction credit and a provision allowing many parolees to receive sentence credit for time spent on parole, when they are returned to custody for minor violations.

Sentence Reduction for Work on a Governmental Services Program

In March 2003 the General Assembly enacted a new method of earning sentence reduction credits. Under Senate Bill 123, "[t]he department may grant sentence credits to inmates confined in a detention facility for labor performed in a Governmental Services Program or within a detention facility for the maintenance of the facility or for the operation of facility services such as food service." S. 123, Reg. Sess. (Ky.2003). The inmate may receive one "credit" for every eight hours worked and one day of sentence reduction, similar to good time, for every five credits – one day off the inmate's sentence for every forty hours of work. The inmates working for sentence reduction credits will receive only half of the normal pay for the job they are doing. This credit is available for most inmates, except for inmates sentenced to life without possibility of parole, violent offenders, inmates serving sentences for escape or attempted escape and sex offenders sentenced for a "sex crime as defined in KRS 17.500." *Id*. Note that all sex offender "registrants" are not excluded, only those who have been convicted of "sex crimes" as defined in KRS § 17.500(6). It appears that sex offenders who are "sexually violent predators" or those who have been convicted of a "criminal offense against a victim who is a minor," other than a sex crime, are eligible (after having completed sex offender treatment, per KRS § 197.045(4)). KRS § 17.500.

Sentence Credit for Time Spent on Parole

Another sentence-related change in 2003 is found in section 36(a) of the 2003 budget bill, HB 269. Previously, Kentucky law specified that "[t]he period of time spent on parole shall not count as a part of the prisoner's maximum sentence except in determining parolee's eligibility for a final discharge from parole as set out in KRS 439.354." KRS § 439.344. This meant that, for instance, an inmate with a ten-year sentence who was paroled after two years and successfully remained on parole for seven years, before being revoked on a misdemeanor DUI conviction, would return to prison with eight years (less good time) remaining to serve.

Under the 2003 change, "[n]otwithstanding KRS 439.344, the period of time spent on parole shall count as a part of the prisoner's remaining unexpired sentence, when it is used to determine a parolee's eligibility for a final discharge from parole as set out in KRS 439.354, or when a parolee is returned as a parole violator for a violation other than a new felony conviction." H.R. 269, Reg. Sess., § 36(a) (Ky.2003). So, the inmate in the example above would now be returned only for long enough to process him out of prison and his sentence will be completed by "minimum expiration," while his parole supervision would have lasted an additional year, had he not been revoked. There are two exceptions, however. Inmates who are revoked/returned due to a "new felony conviction" will not receive credit. Also, inmates who abscond from parole supervision and are then revoked for any reason will not get credit for the period of time between a warrant being issued for absconding and the parolee being returned to custody, since time spent outside supervision and compliance with parole conditions is not "time spent on parole." *Id*. Remember that, even though the section is titled "Probation and Parole Credit" it does not give any credit for time spent on probation. *Id*.

Some Examples of Sentence Calculations

The following examples show how a sentence calculation can differ, based on the offense of which an inmate was convicted, even where the sentence imposed was the same.

Example 1

The defendant was arrested on January 1, 2003, for the offense of Burglary in the First Degree (KRS § 511.020) for unlawfully entering a home and stealing several guns while the occupants were not present. He was recorded by the owner's video surveillance system, his fingerprints were found in the house, the guns were found in his car and he confessed four times to anybody who would listen. The Commonwealth offers the minimum sentence of ten years. The defendant wants to know how much time he's going to have to spend in prison and when he will[4] get out if he pleads guilty on March 17, 2003, and is sentenced on April 1, 2003.

SENTENCE CALCULATIONS

	YEAR	MON	DAY
TOTAL TIME TO SERVE	0010	00	00
DATE SENTENCED/RECEIVED	2003	04	01
NORMAL MAXIMUM EXPIRATION DATE	2013	04	01
CREDIT FOR JAIL TIME	0000	03	00
ADJUSTED MAXIMUM EXPIRATION DATE	2013	01	01
GOOD TIME ALLOWANCE	0002	06	00
MINIMUM EXPIRATION DATE	2010	07	01

Date eligible for first appearance before the parole board: January 1, 2003, + two years (20% of the ten-year sentence) = January 1, 2005.

Example 2

The defendant was arrested on January 1, 2003, for the offense of Promoting a Sexual Performance by a Minor (KRS § 531.320) for promoting a performance which included sexual conduct by a 15 year-old minor (no injury was involved). As in the last example, there is conclusive videotape evidence involved. The Commonwealth offers the minimum sentence of ten years. The defendant wants to know how much time he's going to have to spend in prison and when he'll get out if he pleads guilty on March 17, 2003, and is sentenced on April 1, 2003.

SENTENCE CALCULATIONS

	YEAR	MON	DAY
TOTAL TIME TO SERVE	0010	00	00
DATE SENTENCED/RECEIVED	2003	04	01
NORMAL MAXIMUM EXPIRATION DATE	2013	04	01
CREDIT FOR JAIL TIME	0000	03	00
ADJUSTED MAXIMUM EXPIRATION DATE	2013	01	01
GOOD TIME ALLOWANCE	0000	00	00
MINIMUM EXPIRATION DATE	2013	01	01

Date eligible for first appearance before the parole board: Unknown. The inmate will be eligible for parole at the later of (a) 20% of his sentence, or (b) completion of the Sex Offender Treatment Program.

What other information should the defendant be given in order to understand the full consequences of this plea?

There are numerous sentence considerations affecting the sex offender; particularly where he is faced with a possible guilty plea. For instance he should understand that he will be subject to three years of conditionally discharged time after completion of any prison or probated sentence. He should understand that he will become a sex offender registrant, pursuant to the sex offender, registration requirements of KRS Chapter 17, possibly for the rest of his life. Of more immediate concern is the fact that he could be required to serve his entire sentence without benefit of either parole or good time credit, if he does not complete the Sex Offender Treatment Program.

Example 3

The defendant was arrested on January 1, 2003, for the offense of Assault in the First Degree (KRS § 508.010) for striking his neighbor with a baseball bat, causing serious physical injury. The evidence against him is conclusive. The Commonwealth offers the minimum sentence of ten years. The defendant wants to know how much time he's going to have to spend in prison if he pleads guilty on March 17, 2003, and is sentenced on April 1, 2003.

SENTENCE CALCULATIONS

	YEAR	MON	DAY
TOTAL TIME TO SERVE	0010	00	00
DATE SENTENCED/RECEIVED	2003	04	01
NORMAL MAXIMUM EXPIRATION DATE	2013	04	01
CREDIT FOR JAIL TIME	0000	03	00
ADJUSTED MAXIMUM EXPIRATION DATE	2013	01	01
GOOD TIME ALLOWANCE*	0000	00	00
MINIMUM EXPIRATION DATE	2013	01	01
ULTIMATE DATE**	2011	06	01

Date eligible for first appearance before the parole board: June 1, 2011, since his "ultimate date," as a violent offender, is later than the 20% parole eligibility date that would otherwise apply.

* This inmate is classified as a violent offender and, therefore, receives no statutory good time, pursuant to KRS § 439.3401.

** The "Ultimate Date" is that date on which the inmate will have served the 85% of his sentence, before which he "shall not be released on probation or parole." KRS § 439.3401.

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Example 4

The defendant was arrested on January 1, 2003, for the offenses of Assault in the First Degree (KRS § 508.010) for striking his neighbor with a baseball bat, causing serious physical injury, and for Tampering with Physical Evidence (KRS § 524.100) for burning the baseball bat in his fireplace to prevent the police from finding it to use as evidence against him. The evidence against him is conclusive and his entire family are witnesses for the Commonwealth. The Commonwealth is offering ten years for the assault and two years for the tampering charge, to run consecutively. The defendant wants to know how much time he's going to have to spend in prison and when he will get out if he pleads guilty on March 17, 2003, and is sentenced on April 1, 2003.

SENTENCE CALCULATIONS

	YEAR	MON	DAY
TOTAL TIME TO SERVE	0012	00	00
DATE SENTENCED/RECEIVED	2003	04	01
NORMAL MAXIMUM EXPIRATION DATE	2015	04	01
CREDIT FOR JAIL TIME	0000	03	00
ADJUSTED MAXIMUM EXPIRATION DATE	2015	01	01
GOOD TIME ALLOWANCE*	0000	06	00
MINIMUM EXPIRATION DATE	2014	07	01
ULTIMATE DATE**	2011	06	01

Date eligible for first appearance before the parole board: June 1, 2011, since his "ultimate date," as a violent offender, is later than the 20% parole eligibility date that would otherwise apply to the combined 12-year sentence for violent and nonviolent offenses.

* The inmate is eligible for statutory good time on his two-year consecutive sentence for a non-violent, class D felony.

** The ultimate date is 85% of the ten-year assault sentence, for which the inmate is classified as a violent offender, rather than the combined 12-year sentence.

Endnotes

1. By statute, the court must designate a "specific federal sentence or sentence of another state," or else the sentences "shall not run concurrent." KRS § 532.115.
2. Actual date of appearance for sentencing by the court.
3. Time spent in custody awaiting parole revocation.
4. Remember that you cannot tell the defendant when he "will" get out, since he could, depending upon his conduct, serve the entire ten years, but you can tell him the approximate earliest date on which it is possible for him to be released. ■

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Dan Goyette (R), Executive Director of the Louisville-Jefferson County Public Defender Office, receives the Justice Thomas B. Spain CLE Award from Supreme Court Justice Martin E. Johnstone (L) at the 2003 KBA Annual Convention for his tireless efforts on the KBA Update programs and Annual Convention programs over many years as an active member of the KBA Criminal Law Section as the Section's KBA CLE Liaison.

KENTUCKY COURT OF JUSTICE WEBSITE OFFERS VALUABLE ACCESS TO KENTUCKY'S COURT SYSTEM

The Kentucky Court of Justice unveiled a new web presence, **www.kycourts.net**, in April 2002. All manner of court-related information can be found on this site, ranging from court dockets and electronic forms to searchable opinions, court publications and contact information for court personnel. Specific information for each division of the Court of Justice is available via a series of drop-down menus found at the top of every page. An overview of the site follows, with the links listed in bold:

Supreme Court. This section includes a description of the Supreme Court, biographies of the justices, a map of districts, contact information and rules for court. Also available are sections which allows citizens to search the Supreme Court database for open and closed cases (**Case Information**), view the court calendar by year and month (**Oral Arguments Calendar**), see which cases the Supreme Court has decided to hear (**Discretionary Review**), read a synopsis of court proceedings (**Supreme Court Minutes**), and search, save and print published and nonpublished (since 1999 and 2003 respectively) opinions in PDF format (**Searchable Opinions**).

Court of Appeals. The Court of Appeals section provides a description of the court, biographies of the judges, a map of districts and contact information. Citizens may also view the court calendar by year and month (**Oral Arguments Calendar**), and search, print and save published and nonpublished (since 2003) opinions in PDF format (**Searchable Opinions**).

Circuit Court and District Court. Circuit and District court information includes a description of each court, contact information for judges, rules of court for each circuit and district (**Rules of Practice**), rules for how to obtain emergency protective orders (**Emergency Protective Orders**) and domestic violence protocols (**Domestic Violence Protocol**). A six-day court Circuit and District court docket (**Court Docket**) is available for each county. This section also covers **Family Court** and **Drug Court**, provides information for each county (**Information by County**), with links to dockets, Circuit Court Clerk offices, court officials for each county, juror information and county history.

Circuit Court Clerks. This section describes the role of the circuit court clerk and contact information for each office. Also included are details on how to become a circuit clerk (**Circuit Court Clerk's Exam FAQ**) and information on the **Trust for Life**, an organ donation foundation created by the Kentucky Association of Circuit Court Clerks. When citizens click on **Clerks' Offices by County** and select a county, they will find information concerning the hours of operation, directions, parking, types of payment accepted, docket information and drivers licensing hours.

Administrative Office of the Courts. This drop-down menu provides detailed information concerning each AOC department and the services they provide. The departments include the **Director's Office, Administrative Services, Alternative Dispute Resolution, Budget & Program Review, Court Services, Department of Youth, Families & Community Services, Dependent Children's Services, Drug Court, Education, Facilities, Family Court, Information Systems, Office of General Counsel, Office of Minority Affairs, Personnel, Pretrial & Court Security Services, Research & Statistics** and **State Law Library.**

General. The General section covers other areas pertaining to the entire Court of Justice, such as contests for school children, contact information for all court officials, court forms that can be completed online (**Electronic Forms**), a **Glossary of Legal Terms**, historical documents dating back to 1215 (**History of the Courts**), an **Organizational Chart**, **Press Releases**, **Publications & Resources** and **Copyright, Privacy & Disclaimer Notices**.

In addition to the drop-down menus, the website contains tabs that feature **Frequently Asked Questions** for each AOC department, **Help** tips, a **Search** tool for the entire site, and **Contact Information** for each AOC department. There is also a **Juror Information** section that tells citizens, by county, where jurors are to report, and provides contact information and a link to the *You, The Juror* handbook. The **Online Services** tab provides contact information for circuit court clerks, court administrators and judges statewide (**Address Lists for KCOJ Personnel**), a six-day court docket by county and court (**Court Dockets**), **Domestic Violence Treatment Providers**, **Electronic Forms**, **Publications & Resources**, **Supreme Court**, **Court of Appeals** and **Judicial Ethics Opinions**.

The Kentucky Court of Justice website is updated daily and new features are added frequently. It is best viewed using Internet Explorer with a resolution of 800 by 600 dpi or higher. Adobe Acrobat Reader (available for free from www.adobe.com) version 5.0 or higher is also required to access the more than 2000 PDF documents on the site.

Comments about the website are welcome and may be sent to webmaster@kycourts.net. ■

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Administrative Office of the Courts Announces Online Access to Court Records for DPA Attorneys and Staff

Internet Access to Court Records Can Cut Time Retrieving Information

Department of Public Advocacy attorneys and staff can now save trips to the courthouse by accessing court records online through a new service offered by the Kentucky Court of Justice. The court system is offering two different sites for DPA attorneys and one site for DPA employees.

"These are excellent tools for attorneys and law enforcement professionals," said Marvel Detherage, who introduced the sites at the annual Public Defender Conference in Louisville in June. Detherage, who serves as unit manager of the Pretrial Services Records Division for the Administrative Office of the Courts (AOC), said the court system unveiled the programs only after implementing tight controls on access to the data contained on the sites. "This is to create as many barriers as possible to identity theft and information being leaked to unauthorized parties," she added.

Kentucky Court Records Online Site

The Administrative Office of the Courts introduced the Kentucky Court Records Online (KCRO) program to members of the Kentucky Bar Association in September 2002. KCRO was designed to allow KBA members in good standing to access pending cases in which they are currently representing a party. To date, more than 1,300 attorneys have registered for online access to KCRO.

CourtNet/Criminal Justice Site

This site is available to all employees of the Department of Public Advocacy. CourtNet is the database used by the Court of Justice to collect court information from the local case management system in each Kentucky county. Users of the CourtNet/Criminal Justice site can access information on cases within their jurisdiction and request statewide record checks online.

One word of caution: It is a violation of the user agreement to access the KCRO site or the CourtNet/Criminal Justice site to obtain information that will be used to impeach a witness. The AOC can provide this information at no charge, but there is third-party notification for this type of request.

How Attorneys Can Register for the KCRO Site

Attorneys who want to use the Kentucky Court Records Online program can register at http://courtnetpublic.kycourts.net and then submit a signed user agreement. As soon as the user's information is verified by the Kentucky Bar Association, the user will receive a registration number by e-mail to use when logging onto the system. This will give the user immediate access to the site. A user agreement for KBA members will then be mailed to the user's address on file with the KBA. The user agreement must be returned by mail within 30 days or access will be deactivated.

How DPA Staff Can Register for the CourtNet/Criminal Justice Site

All DPA employees can register for access to the CourtNet/Criminal Justice site at http://kycourtnet.courts.cog.ky.us. Once registered, the user should print and complete the Criminal Justice Agency user agreement. Each person registering must submit a user agreement signed by themselves and Will Geeslin, Department of Public Advocacy administrator. To expedite registration, the user can fax the signed user agreement to (502) 573-1669 and mail the original to Pretrial Services Records Division, Administrative Office of the Courts, 100 Millcreek Park, Frankfort, KY 40601.

For more information about this program, contact Pretrial Customer Service at 502-573-1682, 800-928-6381 or pretrialcustomerservice@mail.aoc.state.ky.us. ■

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The wisest mind has something yet to learn.

— George Santayana (1863-1952)

APPELLATE CASE REVIEW

Euva Hess

***Cobb v. Commonwealth*, 2002-SC-406-MR**
Affirming in Part, Reversing in Part and Remanding
105 S.W.3d 455 (2003)

The trial court erred by failing to require the jury to find the defendant guilty as a second or subsequent offender. Cobb appealed his forty year sentence based on convictions for two counts of trafficking in a controlled substance, second offense. The Supreme Court reversed and remanded for a new sentencing hearing based on the trial court's failure to require the jury find the defendant guilty as a subsequent offender. The trial court's penalty phase instructions presumed guilt and instructed the jury to go ahead and set a penalty within the enhanced range.

Trial court is required to provide a signature line for each count. In this case, the trial court amalgamated the signature lines under guilt. That is despite the fact there were 2 counts, the jury had only one not guilty option and two guilty options, implying that the jury must either convict of both or acquit of both. The Supreme Court held "when a defendant is charged with multiple counts, the jury must receive an authorized verdict instruction and a verdict form that contains an authorized verdict of guilty or not guilty for each individual count." However, in this case, defense counsel failed to object and the Court did not find the error palpable.

Trial court's failure to allow the jury to determine consecutive vs. concurrent sentencing was not palpable error. Moreover, the Supreme Court held that the trial court's failure to allow the jury to recommend concurrent or consecutive sentencing "did not deprive [the defendant] of any constitutional right to fair trial [nor did it] affect any substantive right and it did not result in a manifest injustice."

The Supreme Court found sufficient evidence to convict the defendant of trafficking. Additionally, the Supreme Court found sufficient evidence to convict of trafficking where the confidential informant testified about the buy and defense counsel fully explored the confidential informant's background on cross. The fact that the videotape ran out before the completion of the second buy was not sufficiently mitigating to overcome directed verdict.

***Flynt v. Commonwealth*, 2000-SC-0587**
Affirming in 2000-SC-587
***Commonwealth v. Elliott*, 2000-SC-399-TG**
Reversing and Remanding in 2000-SC-399
105 S.W.3d 415 (2003)

The Commonwealth must consent to pretrial diversion request of the defendant. The issue before the Court was whether the trial court could grant a defendant's application for pretrial diversion over the objection of the Commonwealth. The Supreme Court held that the Commonwealth must consent to pretrial diversion before the trial court may so order. Additionally, the Court held that the appropriate remedy from the trial court's denial of pre-trial diversion is direct appeal rather than writ. The Supreme Court concluded that because pretrial diversion involved abdication of a felony conviction upon successful completion, diversion is more than just another sentencing alternative. Because diversion involves "interruption of prosecution prior to final disposition," the Commonwealth must agree. Any other interpretation renders the pretrial diversion program violative of separation of powers as "it is the duty of the executive department [the Commonwealth]… to enforce the criminal laws."

In Elliott's case, the Commonwealth followed its policy that prevented the Commonwealth from consenting to pretrial diversion for defendants whose charges involved theft from an employer. On appeal, Elliott argued this policy arbitrarily excluded a particular class of defendants. The Supreme Court held "the conscious exercise of some selectivity in enforcement is not in itself a federal constitution violation so long as 'the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Basically, the Court held that employee-theft defendants are not a constitutionally protected class.

***Johnson v. Commonwealth*, 2001-SC-883**
Affirming
105 S.W.3d 430 (2003)

Johnson appealed his 20 year sentence based on convictions for possession of marijuana, possession of drug paraphernalia, and possession of a controlled substance (methamphetamine) all committed while in the possession of a firearm.

The jury should find beyond a reasonable doubt the nexus between the drugs and firearm possession. On appeal, Johnson argued that the jury must find him guilty beyond a reasonable doubt on the firearm possession since it enhanced his sentence per *Apprendi*. Particularly, the Commonwealth had to prove a nexus between the gun and the drugs and the instructions must state that the jury should find the defendant guilty if and only if they believed so beyond a reasonable doubt. In this case, the jury instructions merely told the jury to determine whether Johnson was in possession of a handgun on a particular day. The instruction made no reference to beyond a reasonable doubt or the nexus requirement. Although the Supreme Court noted these errors, defense

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counsel did not object and the error was not palpable because the jury received the standard reasonable doubt instruction that they presumably applied to the whole case.

The Supreme Court found sufficient evidence of the nexus between the firearm and the drugs. In this appeal, Johnson also argued that the Commonwealth presented insufficient evidence of a nexus between the firearm and the drugs as is required for enhancement. The Court found the enhancement appropriate where, at the time of the defendant's arrest, he/she had actual or constructive possession of a firearm and the firearm was within his immediate control. In that case, the Commonwealth need not demonstrate a nexus. In this case, officers arrested Johnson outside his home after seizing and removing him from his living room. The gun was in the living room. The Court held that the weapon was within his immediate control when he was seized, therefore, the Commonwealth need not demonstrate a nexus.

Despite the defendant's offer to stipulate to certain facts, the Supreme Court found no error in the Commonwealth's introduction of the videotape of defendant's arrest. At trial, the Commonwealth introduced a videotape of the arrest and search of Johnson's home. The Commonwealth argued the tape necessary to counter the defendant's allegation that the officer planted the hypodermic needle on him. Johnson objected to the tape and offered to stipulate that the officer did not plant the needle. The trial court allowed the jury to see the tape. The Supreme Court found no error. Despite and without detailed discussion of United States Supreme Court's ruling in *Old Chief v. United States*, the Court held "a stipulation offer cannot provide the foundation for a KRE 403 argument on appeal." The Court then embarked on a purely probative vs. prejudicial analysis finding that although the tape showed the Appellant shirtless, bickering, being handcuffed, searched, and accusing [the officer] of planting the needle, the tape was not unduly prejudicial.

Introduction of defendant's prior bad acts was sufficiently cured by admonition and the defendant opened the door to such questioning. During the trial, the Commonwealth began a question that called upon the witness to state whether Johnson had pled guilty to an offense. The trial court had ruled *in limine* that Johnson's prior bad acts were inadmissible. In response to the partial question, the court gave the jury an admonition. The Supreme Court found the admonition sufficient. Additionally, the Supreme Court held that despite the pre-trial ruling, Johnson opened the door during his direct of the witness by eliciting inadmissible character evidence of the defendant.

The Supreme Court found no error in the trial court allowing the Commonwealth to amend the indictment. The Court found that the trial court properly allowed the Commonwealth to amend Johnson's indictment as it related to the drug paraphernalia charge. Initially the indictment focused on baggies and twist ties. At trial, the Commonwealth focused on the hypodermic needle. Finally, the Court found no error in amending the indictment to correct a statute citation since the amendment did not charge a new or different offense and did not prejudice the defendant.

***Watkins v. Commonwealth*, 2000-SC-1143-MR**
Affirming in Part and Reversing and Remanding in Part
105 S.W.3d 449 (2003)

Watkins appealed his 20-year sentence based on convictions for theft by unlawful taking over $300, second degree escape, and PFO.

The trial court should have given a "no adverse inference" instruction during the penalty phase of trial. The Supreme Court reversed because the trial court erred by failing to give a no adverse inference instruction during the penalty phase. Because the jury had to determine Watkins's guilt or innocence on PFO, he was entitled to an instruction telling the jury to draw no inference from his failure to testify during the penalty phase. However, the Supreme Court re-iterated that such instruction is not required if the penalty phase is purely Truth-in-Sentencing.

The officers did not err by failing to *Mirandize* the defendant at the time he was taken into custody. Watkins made spontaneous statements. Since he was not subject to custodial interrogation, *Miranda* was not required. The trial court did not err allowing the statements in evidence.

The defendant's presence is not required during motions for directed verdict and the conference concerning jury instructions. The Court noted "it is not reversible error to conduct legal arguments between the court and counsel outside the presence of the defendant."

The trial court need not inquire *sua sponte* whether the defendant has knowingly and intelligently waived his right to testify. The trial court does not have to address the voluntariness of the waiver unless there is some question about it raised during trial.

***Anderson v. Commonwealth*, 2000-SC-0373-DG**
Reversing and Remanding
107 S.W.3d 193, (2003)

Anderson appealed his five-year sentence for second-degree assault. Prior to sentencing the judge granted Anderson's motion for a new trial because one of the jurors was a prior felon not qualified to sit as a juror.

Governor's restoration of rights to a convicted felon must specifically include the right to sit as a juror. In this case, the restoration of the juror's rights extended only to the right to vote and the right to hold public office. The Supreme Court went on to describe and explain the different types of pardons available to the Governor, full, conditional, and partial. Thus, the Court held that the trial court correctly granted the defendant's motion for a new trial.

***Crawley v. Commonwealth*, 2001-SC-0002**
Reversing and Remanding
107 S.W.3d 197, (2003)

Crawley appealed his 25-year sentence based on convictions for first degree robbery and PFO 1. The Supreme Court reversed and remanded because the trial court failed to properly inquire into the defendant's waiver of his right to testify.

The trial court has a duty to inquire into the defendant's waiver of his right to testify where there is some question as to its voluntariness. At the close of the Commonwealth's case and counsel's motion for directed verdict, the trial court asked whether defense counsel wanted to put on the record that Crawley was aware of his right to testify and chose not to. Counsel stated she did not want to make that record because Crawley wanted to testify but she would not let him. Additionally, counsel told the jury during closing not to hold the defendant's failure to testify against him because he wanted to and she would not let him. The Court held "[a]lthough the trial courts are not generally required to advise a defendant that he has a right to testify, there are certain circumstances, as in the case at bar, where a direct colloquy with a defendant is necessary to protect his constitutional right to testify." Since the court was aware of the conflict, the court had a duty to inquire of the defendant personally. "Therefore, we hold that a trial court has a duty to conduct further inquiry when it has reason to believe that a defendant's waiver of his right to testify was not knowingly or intelligently made or was somehow wrongly suppressed."

Accomplice robbery jury instruction must state that defendant intended the principal use physical force. Moreover, the Supreme Court found fault with the robbery instruction. The instruction should have required "that Appellant, as an accomplice, intended that the principal use or threaten the immediate use of physical force upon the victim."

***Kotila v. Commonwealth*, 2000-SC-0341-MR**
Reversing and Remanding
— S.W.3d. —, (2003)

A conviction for manufacturing methamphetamine requires that the defendant have either all of the chemicals or all of the equipment necessary to manufacture. The Supreme Court held that a conviction under KRS 218A.1432 (1)(b) requires the defendant possess either ALL of the chemicals or ALL of the equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine. Anything less is insufficient evidence to support the instruction.

Double jeopardy may or may not apply depending on the circumstances. The Court went on to say that double jeopardy does not apply if a defendant is charged with possession of anhydrous ammonia in an authorized container and manufacturing methamphetamine (1)(b). The anhydrous crime has the additional element of unauthorized container. However, the Court held that double jeopardy would bar prosecution for manufacture of methamphetamine and possession of a precursor (ephedrine) under 218A.1437 because possession of ephedrine using the lithium reduction method is a lesser included offense. However, if a conviction under 218A1432 (1)(b) was predicated upon the defendant having all of the equipment (not chemicals) double jeopardy would not bar a second conviction for possession of ephedrine.

Defendant's request for an attorney in order to sue for unlawful arrest is not sufficient to invocate constitutional right to counsel. The Court held that the defendant's request in the Wal-Mart breezeway to contact an attorney "so he could sue" them was not a communication that invoked the constitutional right to counsel. "Unless a defendant articulates a desire for legal counsel with respect to the criminal charges brought against him with sufficient clarity that a reasonable police officer would understand the statement to be an invocation of the defendant's constitutional right to have counsel present during custodial interrogation, there is no invocation of the constitutional right to counsel and no requirement that the officer forego further interrogation." Per *Davis v. U.S.* 512 U.S. 452.

Model instruction in Manufacturing Methamphetamine case.

> You will find the defendant guilty of manufacturing methamphetamine under this instruction if and only if, you believe from the evidence beyond a reasonable doubt that in this county, on or about (date) and before the finding of the indictment herein (he)(she) knowingly

A. Had in (his) (her) possession all of the chemicals or all of the equipment necessary for the manufacture of methamphetamine AND
B. Did so with the intent to manufacture methamphetamine.

An attempt instruction may be appropriate in limited circumstances. The Supreme Court held that since they had interpreted the statute to require possession of all of the chemicals or all of the equipment, an attempt instruction is not merited where the defendant has less than all. The Court indicated that an attempt might be possible in circumstances where a defendant tried to buy a fully operational lab.

The Court found sufficient evidence to support the defendant's firearm enhancement. The weapon was within his immediate control at the time of arrest. Moreover, the Court noted that it would be "entirely proper" to reserve the enhancement issue for the penalty phase. However, the Court found no unfair prejudice resulted from its introduction in the guilt phase in this case because the discovery of the firearm was relevant as to whether the defendant manufactured methamphetamine in this car.

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KRS 218A.1432 is constitutional. The Court found the manufacturing methamphetamine statute constitutional since they interpreted it to require possession of either all the chemicals or all the equipment.

MM v. Henry Williams, et al. & Commonwealth,
2001-SC-645-DG
Affirming
2001-SC-0645-DG
June 12, 2003

Writs of habeas corpus are available only where the detention order is invalid. Juvenile applied for writ of habeas corpus when the district court refused to stay a detention order while appeal pended in circuit court. The Supreme Court found that a writ of habeas corpus was not an appropriate remedy in this case because the district court's order was a legitimate order. Habeas typically only applies where the order causing detention is invalid. The Court held the appropriate remedy in this case was by appeal or a writ of mandamus.

***Rodriguez v. Commonwealth*, 2001-SC-345**
Affirming
107 S.W.3d 215, (2003)

Rodriguez appealed his twenty year sentence based on a conviction for robbery, first degree.

Show ups are proper if they comply with the *Biggars* test. The Supreme Court found that the show up passed the test enunciated in *Biggars* because the victims had a good opportunity to view the defendant; the store was well lit and the robber was inside the store for 5-10 minutes, their descriptions were similar; each remembered specific details as to what the robbery was wearing, and only 2 hours elapsed between the robbery and the show up.

The trial court did not err by admitting evidence that the defendant stole a truck and tried to evade the police. The Court found the theft spatially and temporally close to the crime charged. The evidence was relevant and admissible under 403. Moreover, the Court found the evidence proper under 404 (b) as evidence of "some other purpose, *i.e.* an expression of a sense of guilt." ■

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RECRUITMENT

The Kentucky Department of Public Advocacy is recruiting for staff attorneys to represent the indigent citizens of the Commonwealth of Kentucky for the following locations:

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6TH CIRCUIT REVIEW

Emily Holt

French v. Jones
332 F.3d 430 (6th Cir. 6/11/03)

The 6th Circuit had previously granted French's petition for writ of habeas corpus after concluding that a defendant whose lawyer was not present when the trial court gave a supplemental instruction to a deadlocked jury was denied effective assistance of counsel. *French v. Jones*, 282 F.3d 893 (6th Cir. 2002). The U.S. Supreme Court subsequently granted Michigan's petition for writ of certiorari, vacated the judgment, and remanded the case to the Court of Appeals for consideration in light of *Bell v. Cone*, 535 U.S. 685 (2002). The 6th Circuit concludes that *Cone* does not change the Court's prior decision that French was denied counsel during a critical stage of his trial.

Mr. French was found guilty but mentally ill in the shooting deaths and assaults of 4 fellow union officials. He was sentenced to life without parole. At trial, 2 attorneys, Cornelius Pitts and Monsey Wilson, represented French. Ty Jones was also seated at counsel table. At the beginning of trial, Pitts introduced Jones to the court as an attorney from California specializing in jury selection. Pitts said that Jones was there to assist in the defense so the trial court allowed Jones to remain at counsel table. During *voir dire*, Pitts introduced Jones to the jury as "counsel from California" assisting with the trial. Jones remained at counsel table throughout the trial, but never spoke in the presence of the jury.

Unfortunately Jones was not a lawyer but rather was a motion picture consultant and screenwriter who had attended only a year of law school at NYU. Jones was observing the trial as background for development of a TV show based on the Detroit legal system. Pitts testified at the evidentiary hearing that he thought Jones was a lawyer, but that he never actually intended to have Jones participate in the defense of French. Rather he wanted him at counsel table, and introduced him as "counsel," to "give the impression of a large defense team."

The trial took 2 weeks. During deliberations, jurors twice sent out notes stating it could not reach a unanimous decision. Both times the judge recessed the jury and, when the jury convened again, gave them the standard Michigan deadlocked jury instruction. The jury sent out a third note stating, "We are not able to reach a verdict. We are *not* going to reach a verdict." The judge sent the jury to lunch, instructing them to return at 2:00 p.m. At 2:00 p.m., neither Pitts nor Wilson had returned. The court instructed Jones to try and find them, but he could not. At 2:07 p.m., the judge, without Pitts or Wilson present, gave the jury a supplemental jury instruction. This was not the standard deadlocked jury instruction that had been given before but was instead a jury instruction that stated the following in part: "Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, it at all possible. But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try and reach a verdict. And we told you at the outset it would not be an easy task, but we know you can rise to the occasion." One hour after giving the instruction, the judge dismissed the jury for the day. The next morning, Pitts moved for a mistrial, arguing that the supplemental instruction was coercive. As he was arguing, the jury returned with its verdict. The Michigan state courts denied relief on this issue, finding the error to be harmless.

It is undisputed that "the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). A supplemental jury instruction is a "critical stage" of a trial. *Rogers v. U.S.*, 422 U.S. 35 (1975). The absence of counsel during a critical stage of trial is *per se* reversible error. *U.S. v. Cronic*, 466 U.S. 648, 666 (1984). "The existence of [structural] defects—deprivation of the right to counsel, for example—requires automatic reversal of the conviction because they infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993).

Instructions to Deadlocked Jury Should Not be Coercive and Ideally Should Follow ABA Model Instruction 5.4

The 6th Circuit also notes that the trial court's supplemental instruction was inappropriate "and likely had a substantial and injurious influence on the jury's verdict." The trial court should have continued to use the Michigan standard jury instruction, which was based on ABA standard jury instruction 5.4. This instruction specifically "minimize[s] any coercive effect of jury instructions." In particular the model jury instruction reminds jurors "they should not give up their honest convictions solely because of the opinion of the other jurors or in order to reach a verdict." The Court notes that the giving of this supplemental instruction is especially troubling because it was the third such instruction given and it varied dramatically from the initial instructions. The

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omission of the "honest convictions" language "risks the jurors believing their responsibilities have changed." Furthermore this omission "was amplified by the trial judge telling the jurors three separate times they took an oath to reach a verdict." Finally, "the time line of the jury's deliberation suggests that the third supplemental instruction had an effect." Only after receiving the third jury instruction with its harsh language was the jury able to reach a verdict. ■

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***Stogner v. California*, 123 S.Ct. 2446 (6/26/03)**
Majority: Breyer (writing), Stevens, O'Connor, Souter, and Ginsburg
Minority: Kennedy (writing), Rehnquist, Scalia, and Thomas

Law enacted after expiration of a previously applicable limitations period violates the *ex post facto* clause, Art. I, § 10, cl. 1, when the law is applied to revive a previously time-barred prosecution.

In 1993, California enacted a criminal statute of limitations governing sex-related child abuse crimes that permits prosecution even when the prior statute of limitations has expired if (1) a victim has reported an allegation of abuse to the police; (2) "there is independent evidence that clearly and convincingly corroborates the victim's allegation;" and (3) the prosecution is begun within a year of the victim's report. Cal.Penal Code Ann.§ 803(g). In 1996, a provision was added to the statute that stated that if the 3 enumerated conditions are satisfied, any cause of action barred by prior statutes of limitations is "revived." Cal.Penal Code Ann. § 803(g)(3)(A). Stogner was indicted in 1998 for sex abuse of a child committed between 1955 and 1973. Without Cal.Penal Code Ann. § 803(g)(3), prosecution would have been barred as the prior statute of limitations was only 3 years.

This law violates the *ex post facto* clause for 3 reasons. First, the law creates the type of harm that the *ex post facto* clause was designed to prevent. The purpose of the clause is to prevent governments from enacting statutes with "manifestly unjust and oppressive" retroactive effects. *Calder v. Bull*, 3 Dall. 386, 391, 1 L.Ed. 648 (1978). Particularly offensive are those laws that extend a limitations period after the state has told "a man that he has become safe from its pursuit." *Falter v. U.S.*, 23 F.2d 420, 426 (2nd Cir.), *cert. denied*, 277 U.S. 590 (1928).

Second, the law falls into one of the 4 established categories of *ex post facto* laws, set out by Justice Chase, that are *per se* unconstitutional. Specifically, it is a "law that aggravates a crime, or makes it greater than it was, when committed." *Calder*, *supra*, 3 Dall at 390-391. The California law in question "inflict[s] punishments, where the party was not, by law, liable to any punishment." *Id.*, at 389. Stogner was no longer "liable" for the crimes after the original statute of limitations had expired.

Finally, state and federal precedent prohibit laws that resurrect a time-barred prosecution. A ban on such laws has always been recognized by Congress and by virtually every state Supreme Court. In contrast, courts have upheld extensions of unexpired statutes of limitations, and this opinion does not affect those laws.

The dissent characterizes the California law as a "retroactive extension of statutes of limitations for serious sexual offense committed against minors," and argues that the law is not covered by any of Judge Chase's categories. The dissent believes "the Court also disregards the interests of those victims of child abuse who have found the courage to face their accusers and bring them to justice."

Emily Holt

PLAIN VIEW . . .

Public Advocate Ernie Lewis

Commonwealth v. McManus and Keister,
Ky., 107 S.W.3d 175 (2003)

The McCracken County Sheriff's Department received information from a Murray police officer that McManus and Keister were cultivating marijuana at their house in Paducah. On August 6, 1998, three deputies went to the house to investigate the information. Believing they had no probable cause, they had not sought to obtain a search warrant. McManus answered the deputies' knock. He declined their request to search his house. The deputies told McManus "that if there was marijuana being grown inside the residence, he should dispose of it, as the officers would likely return." The deputies then watched from the sidewalk through a window while McManus and another man ran "in a frenzied manner throughout the residence carrying items the officers deemed to be related to the indoor cultivation of marijuana, including pots and grow lights." The deputy contacted the Chief Deputy, who told him to secure the house. The deputies broke into the house and seized marijuana plants and other evidence. McManus and Keister were both charged with cultivating marijuana. Their motion to suppress was denied, so they entered conditional pleas of guilty. The Court of Appeals held that the trial court had erred because the officers had created any exigent circumstances themselves, and that there were no sufficient exigent circumstances that would waive the warrant requirement. Discretionary review was granted.

In a 4-3 decision, the Supreme Court affirmed the Court of Appeals. Justice Stumbo, joined by Justices Cooper, Johnstone, and Keller, wrote the majority opinion. The Court rejected the Commonwealth's reliance upon *Segura v. United States*, 468 U.S. 796 (1984) because in *Segura*, the officers had probable cause. "Here the officers had not conducted a surveillance operation of the appellees' residence. Furthermore, Deputy Hayden admitted that he and the other officers did not have probable cause to obtain a search warrant based solely on the information originating from Keister's estranged wife." The Court found that the observations of the officers did not rise to probable cause. "Under the circumstances, we do not think it was reasonable for the officers to enter the appellees' residence without prior judicial evaluation."

Justice Graves wrote a dissenting opinion, joined by Justices Lambert and Wintersheimer. First, the dissenters would have remanded for more fleshed out findings of fact by the trial court. "Meaningful appellate review is impeded in this case because the trial court did not enter findings of fact." Further, the dissenters believed that exigent circumstances were present in this case. "[T]he frenzied destruction of marijuana cultivation paraphernalia, plainly observed by sheriff's deputies from a public sidewalk, created a exigency of sufficient magnitude to justify the warrantless entry into Appellees' home."

Riley v. Commonwealth
2003 WL 21255989, 2003 Ky. LEXIS 119 (2003)

This is a case about the extent of a search of a parolee. Riley was at home on November 16, 1999, when a probation parole officer, accompanied by a deputy sheriff and another police officer visited him pursuant to "Operation Night Vision." "Operation Night Vision" was a "cooperative agreement between the McCracken County probation and parole office and local police authorities by which parole officers would make home visits to parolees' residences at night under police protection." Riley answered the door when his parole officer knocked. Riley allowed everyone to come in. The parole officer saw a rifle and a shotgun lying within 6-8 feet of where Riley was sitting. Riley told them the weapons belonged to his father, who was living in the house. The parole officer opened the drawer of an end table near Riley, and discovered a tin can with 46.5 grams of marijuana and paraphernalia. A further search revealed 114.5 grams of marijuana in another room and twelve other weapons. Riley was arrested and charged. His suppression motion was overruled. At trial he was convicted of two misdemeanor counts, raised to felonies by the firearm enhancement, enhanced again by PFO, resulting in a twenty-year sentence. One of the issues before the Kentucky Supreme Court was the legality of the search.

Justice Cooper wrote the opinion affirming the search. Riley challenged only the marijuana and the guns found elsewhere in the house, conceding he had let the officers in consensually and that the two weapons were within plain view. "The only issue is whether the search, conducted after the officers discovered the guns in plain view and after Appellant volunteered that there were other firearms in the mobile home, was valid."

The Court found that Riley had signed a Department of Corrections release allowing for a search of his house without a warrant if "reasonable suspicion exists to believe that an offender is violating a condition of supervision…" The officer's observation of two illegal weapons in Riley's house combined with Riley's acknowledgement that there were other weapons in the house constituted reasonable suspicion allowing for the warrantless search to take place." "Knowl-

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edge that there were firearms present in Appellant's residence was sufficient to trigger the requisite reasonable suspicion to justify the subsequent search."

The Court rejected Riley's allegation that the parole search was in reality a "stalking horse" in that "Operation Night Vision" "was a subterfuge to enable other police agencies to conduct unconstitutional searches of parolees' residences under the guise of a parole officer's 'routine visit.'" The Court found that the "stalking horse" defense had been rejected in *United States v. Knights*, 534 U.S. 112 (2001). The Court cited *United States v. Stokes*, 292 F. 3d 964 (9th Cir. 2002) to say that "'our circuit's line of cases holding searches of probationers invalid on the ground that they were subterfuges for criminal investigations is, in that respect, no longer good law.'"

Kotila v. Commonwealth
2003 Ky. LEXIS 127 (2003)
[Not available on Westlaw]

We have previously covered the search and seizure aspects of *Kotila v. Commonwealth* (see *The Advocate*, Vol. 25, Issue No. 2). The Supreme Court has issued a new *Kotila* opinion as of June 2003, and with it additional language applicable to its holding on search and seizure. The Court continues to affirm the search. However, since the defendant had raised on the petition for rehearing that *Terry* was not applicable to the misdemeanor offense, the Court opined a bit further.

The Court stated that "whereas the Supreme Court has never specifically held that a *Terry* stop is authorized on suspicion of a misdemeanor, there is little doubt about how the Court would decide this question." The Court observed that in *Maryland v. Wilson*, 519 U.S. 408 (1997), it had held that the police are authorized to stop a car on suspicion of having committed a traffic violation and to order the driver and passenger out of the car. The Court further noted that in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Court had observed that it was "often impossible for a police officer to tell whether the suspect, who is committing a crime in her presence, is committing a 'jailable' or 'fine-only' offense…Thus, it would be unworkable to require officers to make arrests only when they are sure that their probable cause applies to a 'jailable' crime…The same logic applies when the officer develops a reasonable suspicion, short of probable cause, that 'criminal activity is afoot.'"

United States v. Townsend,
330 F.3d 438, 2003 Fed.App. 0160P (6th Cir. 2003)

A Wal-Mart employee contacted the Milan, Tennessee, Police Department after seeing two men purchase a large quantity of pseudoephedrine tablets, lithium batteries, and camping fuel. This information was radioed to Officer Jason Williams, who was also told to be looking for a white Chevrolet Blazer with a particular license plate number. Williams was also told that Townsend was someone who "had been 'involved in an explosion in a meth lab and had burnt himself at Atwood…'" Another officer radioed that he had stopped Townsend in a case related to manufacturing methamphetamine. Williams saw the Blazer, and stopped Townsend. He saw Wal-Mart shopping bags containing the items he had been told about. Townsend got out, was frisked, and an orange plastic tube was found in his back pocket. There was residue on it. Williams recognized it as a device for inhaling methamphetamine. Williams arrested Townsend, and during the search found a baggie containing methamphetamine. Townsend was tried and convicted of manufacturing methamphetamine, and he appealed to the Sixth Circuit.

The Sixth Circuit affirmed the conviction in an opinion written by Judge Siler. The Court held that the stopping of Townsend was reasonable based upon the information given to Officer Williams. Relying upon *United States v. Hensley*, 469 U.S. 221 (1985), the Court noted that probable cause or reasonable suspicion did not have to be in the possession of the arresting officer, but that the officer could rely upon information that others in the police department had. "Williams's knowledge of the alleged purchase of methamphetamine precursors, coupled with his contemporaneous observation of a car closely matching the description of the vehicle linked to that purchase, in addition to the information regarding Townsend's possible previous involvement in the illegal manufacture of methamphetamine, provided him with specific and articulable facts justifying the brief investigatory stop."

United States v. Burton,
334 F.3d 514, 2003 Fed.App. 0219A, (6th Cir. 2003)

Officer Davidson of the Henderson Police Department was told by Assistant Police Chief Haltom that he had been told that two black men were selling narcotics on Baughn Street, an area that Davidson knew to feature a high crime rate. Davidson went to Baughn Street, and saw a car turn onto the street and park, with the individuals moving into the back seat. Davidson pulled up behind them, got out, asked Burton, the driver, for his license, and then asked Burton to get out. Burton was asked if Davidson could search the car, which Burton agreed to. Before frisking Burton, Davidson asked if he had anything on him, and Burton told him about both marijuana and other drugs on his person. After arrest, a search of the car revealed a firearm. Burton was charged, and after losing a suppression motion, he filed an appeal.

The Sixth Circuit affirmed the trial court's denial of the motion to suppress in a decision written by Judge Gilman and joined by Judges Siler and Krupansky. The Court found that the officer had probable cause to believe Burton was parked illegally since he was parked 10 feet from a no parking sign. The Court relied upon Tennessee law to hold that Burton was illegally parked despite still being in the car. Thus, the initial stop was legal.

The Court also rejected Burton's second argument that the

scope of the stop was excessive. Burton's contention was that he should have been cited for illegal parking, and the stop should have ended at that point since there was no other evidence that Burton was doing anything illegal. The Court relied upon *Ohio v. Robinette*¸519 U.S. 33 (1996) to say that the officer could require Burton to get out of the car, and to ask Burton if he would consent to a search of his car. The Court attempted to reconcile *United States v. Mesa*, 62 F. 3d 159 (6th Cir. 1995), *United States v. Guimond*, 116 F. 3d 166 (6th Cir. 1997), and *United States v. Smith*, 263 F. 3d 571 (6th Cir. 2001). "The crucial difference between the facts of *Smith* and those of *Guimond* or the present case is that the police officer in Smith searched the stopped automobile without the motorist's consent."

The Court finally found that asking Burton to consent was a "reasonable request under the circumstances." The Court utilized the soccer mom case, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), as interpreted in *United States v. Childs*, 277 F.3d 947, 954 (7th Cir.) (en banc), *cert. Den.*, 123 S.Ct. 126 (2002) as follows: "'Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. They do not signal or facilitate oppressive police tactics that may burden the public—for all suspects (even the guilty ones) may protect themselves fully by declining to answer.'…In this case, after Burton gave Officer Davidson a valid driver's license, he was asked only a handful of questions, including whether he would consent to a search of the automobile. The record provides no reason to suspect either that these questions were unusually intrusive or that asking them made this traffic stop any more coercive than a typical traffic stop…Particularly where, as here, the traffic stop took place on a street known to the police as a high-crime area, we believe that asking a few questions about illegal activity to the driver of an automobile stopped for a traffic violation at 11:30 p.m. is not unreasonable."

Alkire v. Judge Irving,
330 F.3d 802, 2003 Fed.App. 0165A (6th.Cir.)

Lloyd Alkire was arrested for drunk driving and placed in jail in Holmes County, Ohio. He was held for over 72 hours without a probable cause hearing. He later filed a 42 USCA #1983 lawsuit over this and other issues. The district judge granted the defendants' summary judgment motion, and Alkire appealed.

In a decision by Judge Tarnow and joined by Judges Moore and Cole, the decision on the summary judgment was reversed and remanded. Because there was a factual dispute regarding whether Alkire was held on the drunk driving charge or on a holder on another charge, the case was not in a posture for a decision, and was remanded for further proceedings.

However, there is some very important language in this decision. It is common practice in rural Kentucky for a person to be arrested on a Friday night and not go to court until Monday morning at the earliest. This practice is on its face in violation of the 48 hour rule as established in *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The Sixth Circuit recognizes as much, saying that if Alkire was indeed held on the DUI arrest over 72 hours without a probable cause determination, then "his Fourth Amendment rights were violated, because he was entitled to a probable cause hearing within forty-eight hours, in the absence of an 'extraordinary circumstance' to explain the delay."

What is significant about this case is that Kentucky's common practice places district judges and jailers in particular, and the state and county governments more generally, in significant fiscal peril. This case explicitly states that individuals and the agencies they represent are liable for a violation of the 48-hour rule.

This is an issue broached in the AOC/DPA Workgroup Report. That Report recommended in full as follows: "12. The Fourth Amendment, *Riverside County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 29 (1991) and *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) require that there be probable cause to detain an individual charged and arrested without a warrant for a criminal offense. Probable cause in this context means that the charging document properly states a criminal offense and that there is factual information to support the arrest of the particular individual who has been charged. This type of probable cause determination must be done within 48 hours and can be accomplished at or before arraignment by a review of the citation or post-arrest complaint or by a phone call between the pretrial release officer and the judge or trial commissioner. This probable cause determination is separate and part from a preliminary hearing as required by RCr 3.10 & 3.14." Apparently, many pretrial release officers are now presenting the citation and post-arrest complaints to district judges and in many places *Riverside* is being followed. This case indicates that where it is not being followed, a civil suit could be filed and might prevail.

United States v. Loney,
331 F. 3d 516, 2003 Fed.App. 0181P (6th Cir. 2003)

Steven Loney was on parole in Ohio. He had signed an agreement allowing for warrantless searches of his person, car, and home, upon "reasonable grounds to believe that you are not abiding by the law or terms and conditions of your supervision." Thereafter, he repeatedly tested positive for drugs and began to fail to report. One day, he answered the phone at his mother's home, and parole officers went to his house. They arrested him, and searched his bedroom and basement, where they found an AK-47. He was charged in federal court with a violation of 18 U.S.C. # 922 (g)(1), the possession of a firearm by a felon. His motion to suppress was overruled, and he appealed.

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The Sixth Circuit affirmed in an opinion by Judge Rosen joined by Judges Nelson and Cole. The Court analyzed the case as a special needs case under *Griffin v. Wisconsin*, 483 U.S. 868 (1987) rather than as a reasonableness case under *United States v. Knights*, 534 U.S. 112 (2001). The Court found the Ohio regulation to have been consistent with the Fourth Amendment reasonableness clause because it requires "reasonable suspicion" prior to the conducting of a parole search. Second, the Court found that numerous dirty drug tests constituted reasonable suspicion allowing for a search of the bedroom. The search of the basement was justified because Loney's conviction was for a concealed weapons charge, and because ammunition was found in Loney's bedroom. "[T]hese undisputed and articulable facts formed a solid foundation for Officer Dykstra to reasonably suspect that there was contraband in the basement in violation of Defendant's parole terms and conditions."

***United States v. Jones*,**
335 F.3d 527, 2003 Fed.App. 0181P (6th Cir. 2003)

Both the FBI and the ATF along with Knoxville, Tennessee Police Department were interested in Jones during 2000. On August 9, 2000, he was pulled over and arrested. He declined the officer's request for consent to search his house. The police went anyway, and found 2 individuals. One of the men told the police that his ID was in a duffel bag, and allowed the police to look in the duffel bag. While there, the officer saw a rifle, 2 other guns, and a crossbow as well as a crack pipe. Jones was charged with and entered a conditional guilty plea to possession of more than 50 grams of cocaine base with intent to distribute as well as possession of a firearm by a convicted felon. He appealed to the Sixth Circuit, which reversed the judgment of the district judge in an opinion by Judge Gilman joined by Judge Sargus.

The Court focused on whether Teasley, a handyman present to clean the house, had authority to consent to the search. The Court held that when "the primary occupant has denied permission to enter and conduct a search, his employee does not have the authority to override that denial." Further, the Court found that Teasley did not have "apparent authority" to consent. "Officer Gilreath knew that the individual who opened the door was simply a handyman. This fact, combined with Jones's denial of consent to a search, made it impossible for a 'man of reasonable caution' to believe that Teasley had the authority to consent to a search of the residence, or even to permit entry."

Judge Kennedy dissented, saying that Officer Gilreath could have believed that Teasley had apparent authority. "I believe that the facts available to Officer Gilreath at the time he asked permission to step into the foyer of Jones' home were such as to warrant a reasonable belief that Teasley had sufficient authority over the premises to consent to Gilreath's entry for the purpose of continuing the conversation with Teasley, even in light of Jones' prior denial of consent to search the residence."

***Adams v. City of Auburn Hills*,**
2003 WL 21686365, 2003 Fed.App. 0236P,
2003 U.S. App. LEXIS 14524 (6th Cir. 2003)

This is a 42 USCA #1983 case involving whether an officer violated Adams' Fourth Amendment rights by shooting at his car. Officer Backstrom had shot Adams' car while Adams was leaving a motel following an altercation with his ex-girlfriend. Adams had witnessed his ex-girlfriend knock a window out of a motel room, and when the police were called, he attempted to leave. There was a dispute over the ownership of the car. Adams asked the officer if he had done anything illegal, and when told no, he attempted to leave, resulting in Backstrom's shooting his car.

The Sixth Circuit, in an opinion by Judge Carr, reversed the district court's decision that the officer did not have qualified immunity. The Court held that no constitutional violation had occurred because shooting at a car but not hitting it does not constitute a seizure. Despite the fact that the tire was hit by the shooting, the "car still was operable and Adams reached his destination…Hence, Adams never was seized, and our holding that no seizure occurred makes the discussion of the reasonableness of Backstrom's conduct unnecessary. Because the Fourth Amendment is not implicated, Adams has not alleged a constitutional violation to support a #1983 claim."

SHORT VIEW . . .

1. *Behrel v. State*, 823 A.2d 696 (Md. Ct. Spec. App. 2003). The passing of 16 years did not make stale evidence sought in a search warrant petition. Here, a priest, who had moved, was alleged to have sexually abused 2 men when they were children. They stated that the priest kept certain items in a locker he used as a coffee table. The information was 16 years old when presented to a magistrate, who issued a search warrant. The locker did indeed contain evidence of child pornography. The nature of the evidence rather than the passage of time was dispositive of the issue.
2. *State v. Diaz*, Fla., 2003 WL 21087992, 2003 Fla. LEXIS 802 (Fla. 2003). An officer stopped a car because he could not read the expiration date on the license plate. When he realized that the license had not expired, he proceeded to ask for identification. This led to a charge of driving on a suspended license. The Florida Supreme Court held in these circumstances that the officer had no right to hold the defendant for any time following his realization that the reason for the stop was no longer valid.
3. *Seldon v. State*, 824 A.2d 999 (Md. Ct. Spec. App. 2003). A car owner had his Fourth Amendment rights violated when a mechanic allowed the police to search the car left with him for repairs. Here, the mechanic had noti-

fied the police that there were hidden compartments in the car. The police found the compartments to be empty. However, nine months later the police stopped the defendant, and the officer used his knowledge of the compartments to find drugs by searching the car. "There is a significant difference between (1) authorizing a mechanic to observe what is located in those portions of a vehicle being repaired, and (2) authorizing a mechanic to consent to a law enforcement officer's request for permission to conduct a post-repair examination of those portions of the vehicle that are no longer clearly visible."

4. *United States v. Davis*, 332 F.3d 1163 (9th Cir. 2003). A housemate living at an apartment at which Davis and his girlfriend lived gave consent to the police executing a search warrant to search Davis' gym bag located under a bed. Did she have authority to consent? Not according to the 9th Circuit Court of Appeals. Relying upon *United States v. Matlock*, 415 U.S. 164 (1974), the Court stated that the housemate could not consent because she did not have joint access or control over the gym bag found under the bed. "By staying in a shared house, one does not assume the risk that a housemate will snoop under one's bed, much less permit others to do so."

5. There is an excellent article entitled "When the Government Seizes and Searches your Client's Computer" by Amy Baron-Evans in the June 2003 issue of *The Champion*. Some of the most interesting suggestions follow. "[A] number of courts have approved computer searches that in the physical world would have been ruled unconstitutional general searches…The same Fourth Amendment principles that apply to other kinds of searches apply to computer searches. The search and seizure must not only be reasonable, but must be performed pursuant to a warrant, issued on probable cause and particularly describing the place to be searched and the things to be seized. In a rare case, one of the few exceptions to the warrant requirement may apply. The scope of the search may not exceed the scope of the warrant or the applicable exception to the warrant requirement, or, in any case, the bounds of probable cause. The mere fact that a suspect uses a computer along with 'expert' law enforcement opinion that this type of offender uses computers to store or communicate incriminating information does not amount to probable cause…A developing challenge to computer searches is the claim that a technical search methodology that minimizes unwarranted intrusions on privacy is required as a constitutional matter…" You get the idea. I highly recommend reading this article.■

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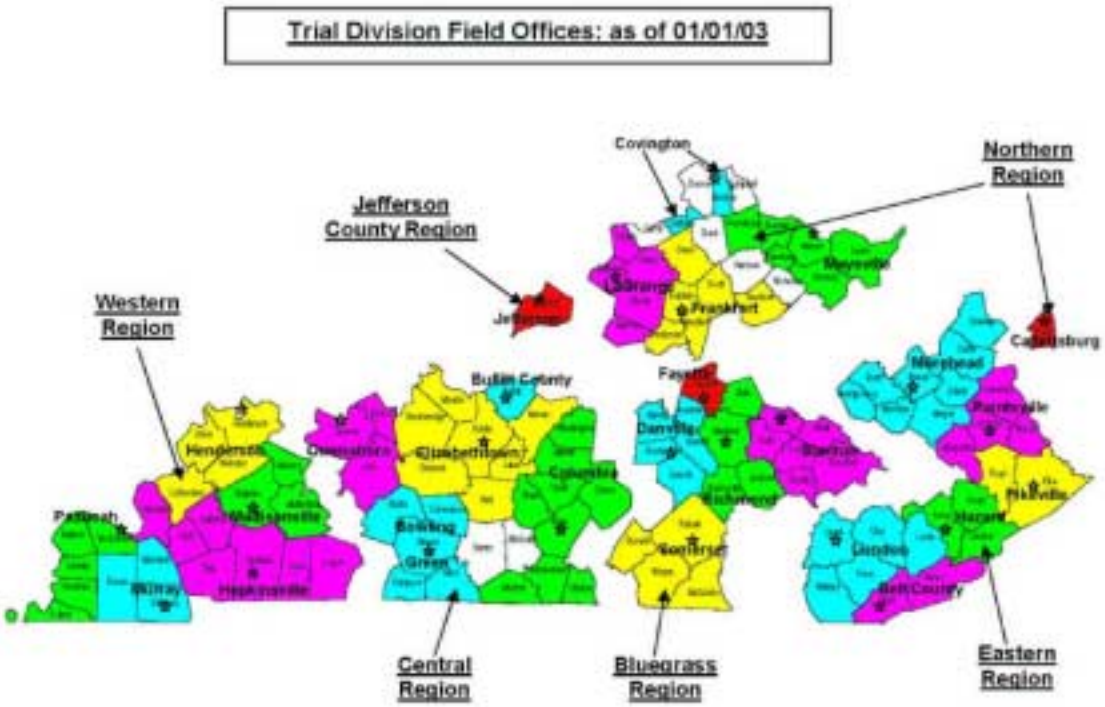

UNCHAINING THE *KOTILA* GORILLA: UTILIZING *KOTILA II* TO REQUIRE THE GOVERNMENT TO STATE WHICH METHOD IT BELIEVES THE DEFENDANT USED OR WAS PLANNING TO USE FOR THE MANUFACTURE OF METHAMPHETAMINE

Requiring the Government to Establish Method of Methamphetamine Manufacture

The Kentucky Supreme Court's recent opinion in *Kotila v. Commonwealth* (2000-SC-0341-MR; Original Opinion Rendered, December 19, 2002; Petition for Rehearing and Modification Granted, April 24, 2003; Original Opinion Withdrawn, April 24, 2003; Modified Opinion Rendered, June 12, 2003; *hereafter*, *Kotila II*) raises the issue of which method the government believes a defendant was using or planning to use to produce methamphetamine. According to *Kotila II*, unless the defendant possesses all the chemicals necessary to produce methamphetamine, and/or all the equipment necessary to produce methamphetamine, the Commonwealth cannot obtain a conviction for manufacturing methamphetamine under KRS 218.1432(1)(b). *Id.*, 18. If the defendant possesses less than all the chemicals and/or all the equipment, the government may be able to obtain a conviction for criminal attempt to manufacture methamphetamine if the defendant fell short of completing the manufacturing process, or tried and failed to obtain all the necessary chemicals or equipment (in other words, if it can somehow show the intent to manufacture). *Id.*, 33-34.

There are numerous ways of producing methamphetamine,[1] especially when one considers the different items which could be used in a home meth "laboratory" where otherwise legal equipment and chemicals are used to produce methamphetamine. This begs the question, however: which method was the defendant allegedly using or planning to use to manufacture methamphetamine? This is not a mere academic contention. If there are so many different ways to produce methamphetamine, even if there are only the three methods proposed by the Commonwealth's expert in *Kotilla II*, the intended method is not only relevant to the government's case, it is a vital element. Which formula the defendant used or was planning to use, which steps he took or planned to take, with what equipment, is vitally important to determining whether the defendant was, in fact, manufacturing or attempting to manufacture methamphetamine. If the defendant is alleged to have intended to produce methamphetamine by a "cold" method not requiring a heating or cooking process, the presence of a hot plate on the premises is irrelevant. Different formulas and methods for producing methamphetamine require different chemicals and/or different equipment. The government, therefore, at trial will be required per *Kotila II* to prove beyond a reasonable doubt which method the defendant was using (if all the chemicals and/or all the equipment for a particular manufacturing method were present), or was planning to use (if only some chemicals and/or equipment for a particular manufacturing method were present). Nothing else is viable in light of the *Kotila II* decision, or valid from a logical standpoint.

Robert Stephens

Practical Application

What steps can the defense practitioner take to protect his or her client from the Commonwealth failing to prove which method of manufacture the client is alleged to have used or intended to use? One is to begin raising the issue at the pretrial stage. For example, one could ask the officer testifying at the preliminary hearing which method of manufacture the defendant was using or attempting to use. The officer probably will not have had sufficient training to know specifically which method was supposed to have been used or attempted, but he might have such knowledge, and at least you will have ensured you did not waive the issue by silence. It also will show your client you are fighting for him, and are not just a well dressed potted plant sitting in the seat next to him. The issue should be raised at the preliminary hearing, at any rate, because for the reasons explained above it goes to the very issue of probable cause.

Another step might be to make a written request to present evidence to the Grand Jury under RCr 5.08 before an indictment is returned. One's investigator could "bone up" on the different manufacturing methods, and he or she could present that information to the Grand Jury, with your inquiry to the Commonwealth's attorney of which method the Commonwealth is contending the defendant used or was planning to use to manufacture methamphetamine.

Pretrial motions are a fertile ground for educating the trial court to the necessity of the Commonwealth's establishing the purported manufacturing method, as well as preserving the issue for appeal in the event the trial court does not see the logic as plainly as we do. A simple "Motion to Require the Commonwealth to Elect Which Manufacturing Method it Purports the Defendant to have Used or Attempted to Use" should suffice.

At trial, one can utilize an expert (even by cross-examining the Commonwealth's lab expert) to establish there are indeed different methods, with different required chemicals and equipment, for the manufacture of methamphetamine. One could of course move for directed verdict when the Commonwealth has failed to establish the particular manufacturing method.

Regardless of the way the issue is raised, the important point is that we should all, as criminal defense practitioners, begin requiring the Commonwealth to state which method of methamphetamine manufacture it contends our client was using or attempting to use. Under the new case law of *Kotila II*, establishing the manufacturing method must be vital to the Commonwealth's case; and forcing the establishment of the same by the government, at pretrial and trial stages, is vital to the presentation of our clients' defense in methamphetamine manufacture cases.

Endnotes

1. A recent National Drug Threat Assessment recognized five distinct methods: four subtypes of Ephedrine/Pseudoephedrine Reduction plus Phenyl-2-Propanone. (National Drug Intelligence Center, *National Drug Threat Assessment 2003*, January 2003, p. 7-8, available at http://www.usdoj.gov/ndic/pubs3/3300/meth.htm). Indeed, the Commonwealth's expert in *Kotila* had testified there are three different ways to manufacture methamphetamine, *Id.*, 15. ■

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VICTORIES FOR YOUTH IN KENTUCKY'S CIRCUIT COURTS

The month of July was a hot one for victories on behalf of youth in our circuit courts in Kentucky. Two cases described below enunciate bedrock principles necessary for correct application of the juvenile code.

Right of Confrontation and Right to Be Present: Trial attorney, Sally Wasielewski protected her client's rights to confrontation, to be present at every stage of the proceeding and to present evidence on his behalf in a contempt proceeding in an appeal from a juvenile court judgment. In a well written opinion, the Hart Circuit Court found that when the lower juvenile court ordered the child removed from the courtroom during the presentation of evidence by a social worker about what form of punishment was in the child's best interests, the removal of the child violated the child's right to confront the witness against him and to be present at a critical stage of the proceeding.

Right to Present Evidence: In juvenile court, Sally had also sought to introduce into evidence that the child suffered from a disability which prevented him from complying with the juvenile court's order. On appeal, the circuit court found that the juvenile should have an opportunity to present evidence that his disability was the cause of his disobedience.

Limited Jurisdiction: Appellate and trial attorneys Gail Robinson and Harold Dunaway won a reversal of a juvenile court order that had purported to give the juvenile court jurisdiction over the juvenile until he graduated from high school or turned eighteen, whichever occurred later. The Commonwealth asserted that the case was not ripe for review because the child was not yet eighteen and still enrolled in school. Citing *Franklin v. Natural Resources and Envtl. Protection Cabinet*, Ky., 799 S.W.2d 1, 2-3 (1990) and *Department of Conservation v. Sowders*, Ky., 244 S.W.2d 464, 467 (1951), the circuit court noted when an agency or administrative body acts outside of its statutory authority or without jurisdiction, a claimant is not required to exhaust administrative remedies before seeking a judicial remedy. In like manner, when a juvenile court order is being challenged for lack of subject matter jurisdiction, the circuit court found that the case would be ripe for immediate review. The circuit court held that a juvenile court may not retain jurisdiction or extend it beyond its statutory boundaries merely by wording an order to that effect, citing *Shumaker v. Paxton*, Ky., 613 S.W.2d 130, 131 (1981) and *Honigsberg v. Goad*, Ky., 550 S.W.2d 471, 472 (1976).

Rebecca DiLoreto

The commonwealth argued that a court's inherent contempt power gave it authority to order a status offender to attend school beyond his eighteenth birthday to effectuate Kentucky's public policy of promoting education for all its

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citizenry. The circuit court responded that absent a specific grant of statutory jurisdiction, a juvenile court can no more order an eighteen year old to school than a forty year old high school drop out to complete his GED. Both actions would further the public policy of educating our citizenry but they would exceed the jurisdiction of a juvenile court judge.

These cases reflect a growing recognition that children are people under the law and that focused attention on enforcement of the juvenile code provisions can protect your client's liberty interests.

Applying Cutting Edge Analysis of Brain Development/ Impairment to Our Juvenile Court Practice

In July 2003, the United States Supreme Court reversed a death sentence for a defendant where trial counsel had failed to fully investigate the defendant's youth. *Wiggins v. Smith*, ___ U.S. ___ (2003). The trial lawyer had relied upon social service records and the presentence investigation report and did no further investigation. An in depth investigation would have revealed that Wiggins' mother was an alcoholic, that he was sexually and physically abused from a young age.

In October of 2002, four members of the United States Supreme Court dissented from the decision of the Court to deny Kevin Stanford habeas relief. These four justices noted that "Neuroscientific evidence of the last few years has revealed that adolescent brains are not fully developed, which often leads to erratic behavior and thought processes in that age group. (internal citation omitted) Scientific advances such as the use of functional magnetic resonance imaging-MRI scans have provided valuable data that serve to make the case even stronger that adolescents 'are more vulnerable, more impulsive, and less self-disciplined than adults." *In re Kevin Stanford, petitioner,* ___ U.S. ___, 123 S.Ct. 472, 473, 154 L.Ed. 2d 364 (2002).

Tapping into Scientific Research on Normal Brain Development

A group of scientists from Harvard and the National Institute of Mental Health have collaborated on a project to map brain development from childhood to adulthood using MRI scans over several years. What came as a surprise to these scientists was the discovery that the brain undergoes an intense overproduction of gray matter.

> "In the first such longitudinal study of 145 children and adolescents, reported in 1999, -NIMH scientists-were surprised to discover a second wave of overproduction of gray matter, the thinking part of the brain-neurons and their branch-like extensions-just prior to puberty. Possibly related to the influence of surging sex hormones, this thickening peaks at around age 11 in girls, 12 in boys, after which the gray matter actually thins some…Prior to this study, research had shown that the brain overproduced gray matter for a brief period in early development-in the womb and for about the first 18 months of life-and then underwent just one bout of pruning. Researchers are now confronted with structural changes that occur much later in adolescence. The teen's gray matter waxes and wanes in different functional brain areas at different times in development. For example, the gray matter growth spurt just prior to puberty predominates in the frontal lobe, the seat of "executive functions" – planning, impulse control and reasoning. In teens affected by a rare, childhood onset form of schizophrenia that impairs these functions, the MRI scans revealed four times as much gray matter loss in the frontal lobe as normally occurs. Unlike gray matter, the brain's white matter-wire like fibers that establish neurons' long-distance connections between brain regions-thickens progressively, from birth in humans. A layer of insulation called myelin progressively envelops these nerve fibers, making them more efficient, just like insulation on electric wires improves their conductivity." *National Institute of Mental Health: Teenage Brain A Work in Progress* www.nimh.nih.gov/publicat/teenbrain.cfm

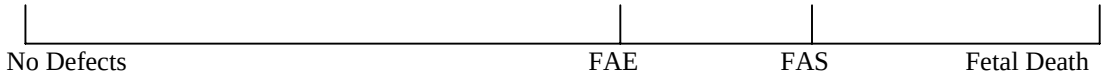
Tapping Into Scientific Research on the Impact of Domestic Violence on Children

More and more evidence is amassing that children exposed to domestic violence as observers or as those who are assaulted suffer immediate and long term consequences.

> "Current research has investigated the direct effects of trauma on developing children as well as the indirect effects children experience through the exposure to violence through the media…The brains of infants born to women who were abused during pregnancy are significantly smaller in size and weight. Research also indicates that abnormalities in the structures in the brain have been found in children who have been abused." *The Prevention Connection, Connecting Research with Practice A Research Newsletter of the TYC Office of Prevention,* Volume 2, No. 4 Winter 2003.

Tapping Into Scientific Research on the Impact of Alcohol on the Fetus

At the DPA Annual Seminar 2003 we were fortunate to learn from Dan Dubovsky of the Center for Substance Abuse Prevention Fetal Alcohol Syndrome Center for Excellence. The title of his presentation was "They Just Don's Get It: Unrecognized Fetal Alcohol Spectrum Disorders in the Corrections System." He and his colleagues presented on the continuum of effects of prenatal alcohol exposure.



FAE refers to fetal alcohol effects. FAS refers to fetal alcohol syndrome. A diagnosis of fetal alcohol syndrome includes prenatal maternal alcohol use, growth deficiency, central nervous system deficits and dysmorphic features. Dubovsky's handout and list of reference material is available in the DPA Education and Strategic Planning web folder. DPA brought Dubovsky and his colleagues to the annual seminar so that they might educate us about FAS and local initiatives. The Bluegrass Prevention Center was selected by the Center for Substance Abuse Prevention (CSAP) to conduct a three year research project focusing on fetal alcohol spectrum disorder. Consequently, the Center has resources that defenders may want to access in defense of clients who suffer from FAE or FAS. These include a resource library, experts and community advocates. The Center is located at 401 Gibson Lane, Richmond, Kentucky.

One handout of particular interest at their session came from a joint effort by the University of Washington School of Law and the Department of Psychiatry and Behavioral Medicine, University of Washington School of Medicine. The two schools collaborated to create a Medical Information for Police Card for those with FAE or FAS. A web site contains the card and recommends how to use it. For defenders who frequently represent the same client on multiple offenses over years or decades, such a card may be one we want to encourage appropriate clients to use. The card reads as follows:

> **MEDICAL INFORMATION FOR POLICE**:
> "I have the birth defect Fetal Alcohol Syndrome/ Fetal Alcohol Effects, which causes brain damage. If I need assistance, or if you need my cooperation, you should contact the person listed on the back of this card. Because of this birth defect, I do not understand abstract concepts like legal rights. I could be persuaded to admit to acts that I did not actually commit. I am unable to knowingly waive any of my constitutional rights, including my *Miranda* rights. Because of my disability, I do not wish to talk with law enforcement officials except in the presence of and after consulting with an attorney. I do not consent to any search of my person or property."

The web site recommends that contact information be placed on the back of the card. http//depts.washington.edu/fadu/legalissues/usingcard.html

Resources Available to Assist the Child Advocate

- Ortiz, Adam, "Adolescent Brain Development and Legal Culpability," National Juvenile Defender Center, April 2003;
- "A Lawyer's Guide to Psychological Assessment of Adolescents," National Juvenile Defender Center, April 2003;
- McCann, Joseph T., "Malinger and deception in adolescents: Assessing credibility in clinical and forensic settings." Washington D.C. American Psychological Association (1998);
- Osgood, D.Wayne and Chambers, Jeff, "Community Correlates of Rural Youth Violence" OJJDP Juvenile Justice Bulletin, May 2003;
- GAO, "Federal Agencies Could Play a Stronger Role in Helping States Reduce the Number of Children Placed Solely to Obtain Mental Health Services," Child Welfare and Juvenile Justice, April 2003;
- Pope, Carl and Snyder, Howard, "Race as Factor in Juvenile Arrests" OJJDP Juvenile Justice Bulletin, April 2003;
- Richart, David; Brooks, Kim; Soler, Mark; Unintended Consequences: *The Impact of "Zero Tolerance" And Other Exclusionary Policies on Kentucky Students*, Building Blocks for Youth, February 2003. ■

Rebecca Ballard DiLoreto
Post Trials Division Director
Rebecca.DiLoreto@mail.state.ky.us

There is no denying the fact that we cannot write these children off forever. Some day they will grow up and at some point they will have to be freed from incarceration. We will inevitably hear from [these children] again, and the kind of society we have in the years to come will in no small measure depend on our treatment of them now.

***United States v. Bland*, 472 F.2d 1329, 1349 (D.C. Cir. 1972)**

PRACTICE CORNER
LITIGATION TIPS & COMMENTS

Misty Dugger

Jury Instructions for KRS 218A.992(1) Conviction Must Require the Jury to Find a Nexus Between Possession of Firearm and Possession of Drugs Beyond a Reasonable Doubt

In the landmark decision *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 2356, 147 L.Ed.2d 435 (2000), the U.S. Supreme Court established that the constitutional right to be found guilty by a jury of every element of the crime with which he was charged "beyond a reasonable doubt" also applies to every fact, with the exception of a prior conviction, that increases the penalty for a crime beyond the statutory maximum. 530 U.S. at 490, 120 S.Ct. at 2362-63.

KRS 218A.992(1), the so-called "firearm enhancement statute," works such an increase in the penalty beyond the statutory maximum. Thus, *Apprendi*, requires that the jury be instructed to find the facts necessary to apply KRS 218A.992(1) beyond a reasonable doubt just as they were instructed to find the existence of the elements necessary to prove the underlying offenses. Jury instructions for KRS 218A.992(1) also must allude to the "nexus" requirement. In *Commonwealth v. Montaque*, Ky., 23 S.W.3d 629 (2000), the Court held that KRS 218A.992(1) "requires a nexus between the crime committed and the possession of a firearm." *Id.* at 632. "Mere contemporaneous possession of a firearm is not sufficient to satisfy the nexus requirement." *Id.*

Most recently in *Johnson v. Commonwealth*, Ky., 105 S.W.3d 430, 435 (2003), the Court writes: "A proper [KRS 218A.992(1) firearms possession enhancement] instruction would have required the jury to find beyond a reasonable doubt the existence of some nexus between Appellant's possession of the pistol and each of the individual drug and paraphernalia possession charges; *i.e.*, that Appellant possessed the firearm 'in furtherance of' the underlying offenses."

Thus, the practice tip is two-fold: (1) in KRS 218A.992-enhancement cases, trial attorneys should do more than move for a direct verdict and reference *Montague* — they need to request a proper "nexus" instruction and argue that instruction to the jury; and (2) the sample instruction in 1 Cooper, *Kentucky Instructions to Juries (Criminal)* § 9.34D, at 629 (4th ed. Anderson 1993) which requires only contemporaneous possession, is a pre-*Montague* anachronism, and a proper instruction requires a finding beyond a reasonable doubt that "Appellant possessed the firearm 'in furtherance of' the underlying offense."

This is significant in many drug possession cases that should be charged as Class A misdemeanors, but instead are charged as Class D felonies solely because a gun is found in the same house or area as the defendant. The higher felony charge is only sufficient if the Commonwealth can prove beyond a reasonable doubt a nexus between the defendant's possession of the firearm 'in furtherance of' the underlying drug possession offense.

~Misty Dugger, Frankfort Appeals Branch

Non-Capital Post-Conviction Motions Should Be Appealed to the Kentucky Court of Appeals

The automatic transfer rule that applies to all capital post conviction motion appeals does not apply to non-capital post conviction motion appeals. In *Cardine v. Commonwealth*, Ky., 102 S.W.3d 927 (2003), the Kentucky Supreme Court held that the automatic transfer rule, which provides that all death penalty post conviction motion appeals should automatically come before the Kentucky Supreme Court, does not apply in other post conviction cases even when the defendant receives a sentence of 20 years or more. "[B]oth an RCr 11.42 motion and an RCr 60.02 motion concern post conviction relief and, as such, are appealable to the Court of Appeals in all cases except those involving a death sentence." *Cardine* at 929.

~ Euva Hess, Frankfort Appeals Branch

Beware of Making the Wrong Objection to the Right to Confront Witnesses

Contrary to the language and headnotes found in *Lundy v. Commonwealth*, Ky.App., 2003 WL 1389131, 3 (2003) and *Bush v. Commonwealth*, Ky., 839 S.W.2d 550, 553 (1992), **the right to confront witnesses is contained in the Sixth Amendment, <u>not</u> the Fifth Amendment to the U.S. Constitution**.

In *Lundy*, the Court states: "[W]e are compelled to point out that it was erroneous for the Commonwealth to introduce Tabor's statement after she asserted her right not to testify. To admit the witness' statement under such circumstances violates the accused's Fifth Amendment right to confront witnesses against him. *Bush v. Commonwealth*, Ky., 839 S.W.2d 550, 553 (1992)." The confusion seems to stem from *Lundy's* reference to *Commonwealth v. Bush, supra*, which similarly states that to introduce a witness' statement after the witness has asserted their Fifth Amendment right "violates the accused's Fifth Amendment right to confront witnesses against him." *Bush* at 553. These misstatements are repeated in each case's Key Cite Notes.

The Commonwealth's introduction of prior statements to police made by a witness who invokes her Fifth Amendment right not to testify at trial violates a defendant's Sixth Amendment right to confront witnesses against him. The witness is asserting her Fifth Amendment right, but the inability to cross examine or confront the witness regarding the statements introduced by the Commonwealth violates the defendant's Sixth Amendment rights to cross examination and to confront the witnesses against him. Additionally, the right against self incrimination and right to confrontation are both also found under Section 11 of the Constitution of Kentucky. Therefore, counsel should properly preserve this error by objecting to the admission of the witness' prior statement (1) under any applicable evidentiary basis and (2) as a violation of the defendant's right to confrontation and cross examination under the Sixth and Fourteenth Amendments to the U.S. Constitution and Section 11 of the Kentucky Constitution.

~ Jay Barrett, Paintsville Trial Office

Practice Corner needs your tips, too. If you have a practice tip to share, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to <u>Mdugger@mail.pa.state.ky.us</u>. ■

IN MEMORY
CHRISTOPHER F. POLK

Christopher F. Polk
May 31, 1959 – June 28, 2003

Those of us fortunate enough to know Chris Polk were shocked and saddened to learn of his sudden death on June 28th. A member of the Public Defender family since 1983, Chris was loved and respected for his humanity, his humor, his compassion, his kindness, his advocacy and for his intellectual brilliance. While we continue to grieve, we humbly pay tribute to this extraordinary man.

A graduate of Trinity High School, Chris received his undergraduate degree from the University of Louisville in 1981 majoring in history with a focus on World War II. Dan Goyette, Executive Director of the Louisville-Jefferson County Public Defender's Office, first encountered Chris in 1982 when he was a student at the Brandeis School of Law at the University of Louisville:

"As a student, Chris' civil libertarian streak was already well-developed. I could always rely upon him to keep class discussion alive when no one else would take up the defense side in arguing the hypothetical cases posed to the students. He was bright, articulate and engaging, and always prepared. When he applied for a clerking position after posting one of the top grades in my class, needless to say I hired him. Not only was it a good fit, he blossomed both personally and professionally after joining the staff. As a law clerk, he exhibited legal ability that was precocious and prodigious, perhaps best demonstrated by his initial research and drafting of the *Batson* issue in the Kentucky Supreme Court. Our relationship grew and expanded over the ensuing years, finally coming full circle 12 years later when I asked him to co-teach that same course with me at the law school. He proved to be as talented a teacher as he was a student."

A recipient of the Greenebaum Writing Award and several Book Awards in Constitutional Law, Chris graduated Cum Laude from the Brandeis School of Law in 1984. Immediately after passing the Bar, Chris was hired as a staff attorney in the Louisville-Jefferson County Public Defender's Office where he served with distinction over the next 14 years. During that time, he received 12 Walker Awards for excellence in advocacy resulting in a verdict of acquittal after trial by jury and 2 Disconnected Switch Awards for excellence in advocacy in the defense of a capital case resulting in a non-death verdict. Chris served as a Trial Division Chief and established himself as a consummate criminal defense lawyer capable of effectively handling virtually any kind of case at both the trial and appellate levels. In addition to the respect Chris earned for his exceptional intellectual abilities, he enjoyed a reputation as one of the most helpful, giving individuals in the legal community, always willing to brainstorm cases and share his knowledge of the law and criminal practice and procedure with any attorney who needed help.

Chris and Joanne Lynch left the Public Defender's Office in January 1999 to establish the firm of Polk and Lynch. Chris and Joanne were much more than law partners, they were best friends. Together, they fought to protect the constitution and civil rights of each client, regardless of their financial means. Chris and Joanne also continued their commitment to public defender clients by handling conflict cases for Louisville-Jefferson County Public Defender's Office and for the Department of Public Advocacy.

Chris is also survived by Martha Clark. Although both were graduates of the Brandeis School of Law, Martha and Chris didn't begin dating until each joined the legendary Public Defender Softball Team during the summer of 1985. They married in December 1985. During the next seventeen and a half years their partnership flourished by virtue of the mutual love and respect they had for each other and which they nurtured with humor, patience and passion.

Martha described Chris' work as his hobby. He was an avid reader on a wide array of topics including constitutional law, science fiction, religion, history, philosophy, and physics. His desire to learn and to expand his knowledge of the world and the universe beyond was insatiable. As a result, Chris had the unique ability to view issues from a variety of perspectives and to think issues through before forming an opinion. However, between openings and closing arguments practiced in morning showers, Internet searches on the home computer to peruse new court opinions and all of the weekends and evenings spent in trial preparation, Chris also had a variety of other loves and interests. He designed and planted a beautiful perennial garden complete with a water pond. Chris also loved to travel and as a precursor to the numerous adventures he and Martha embarked upon, thoroughly researched their destination until he was an authority on local history, geography, cuisine and custom. Chris had completed an outline for a book he aspired to write on historical Victorian science fiction. He was also a budding chef, an accomplished martini maker, a talented impressionist of characters from The Holy Grail, and although not particularly athletic, Chris was reportedly somewhat adept at riding an inner tube down a river.

Although Chris' death has left a hole in our hearts and tears in our eyes, we honor his memory through this resolve: we will speak a little softer, treat each other a little kinder, love a little harder and we will live each day as if it were our last. ■

Bette J. Niemi
Capital Trial Branch Manager
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Martha, Joanne and Chris' mother and aunts, Betty Polk, Dolly Polk and Norma Zasadzinski, ask those individuals who would like to share memories they have of Chris to please visit the *Courier Journal* Web Site and sign the guest book that has been posted in Chris' memory. The guest book will remain on line through June 2004. To reach the guest book go to www.courierjournal.com. From the directory, click on obituaries and then on "Visit a Guest book."

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For more information regarding NCDC programs:

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Macon, Georgia 31207
Tel: (912) 746-4151
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Thoughts to Contemplate

I think and think for months and years. Ninety-nine times, the conclusion is false. The hundredth time I am right.

– Albert Einstein

All the President is, is a glorified public relations man who spends his time flattering, kissing and kicking people to get them to do what they are supposed to do anyway.

– Harry Truman

The best way to have a good idea is to have lots of ideas.

– Linus Pauling