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Through the generosity of **Dr. Ron Dillehay**, the Department of Public Advocacy has purchased a framed copy of a powerful ABA poster celebrating the right to counsel. It graces the entrance to DPA's Frankfort Office. We thank Dr. Dillehay for his donation.



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## From the Editor

The 1998 General Assembly has completed its work. There is much of interest to those in the criminal justice community. A crime bill with significant changes. As the front cover demonstrates, DPA received a substantial increase in public defender funding, \$2.3 million. Much other criminal justice legislation, including the historic [Kentucky Racial Justice Act](#).

A brief review of these changes are in this issue.

Do not miss the June 15-17, 1998 26th Annual Public Defender Conference at the Holiday Inn/Newtown Pike in Lexington, KY where there will be 57 presentations and workshops with education on how to competently represent clients under new Kentucky criminal laws.

Do not miss reading **Mark Stanziano's** insightful [article on taint hearings](#).

**Joyce Hudspeth**, an employee with DPA since 1976 is

## The Advocate

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

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

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featured [in an article written by Lisa Hayden](#), an intern from Georgetown College.

Michael Folk of our Covington Office has been our contributing editor for the District Court Column for the last year. He's moving on to edit our District Court Manual. We thank him for educating us so well.

*Edward C. Monahan*  
Editor, *The Advocate*

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Bruce Hackett – 6th Circuit Review

Bob Hubbard – Retrospection

Ernie Lewis – Plain View

Julie Namkin – West's Review

David Niehaus – Evidence



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# *The Advocate Features:* **Joyce Hudspeth**

**Lisa Hayden**, Intern  
Georgetown College Communications Department

"You try to help those in need, not all cases are won, but those that are, make you feel good." This statement is the driving force behind Joyce Hudspeth, Legal Secretary Senior at the Department of Public Advocacy in Frankfort. Joyce came to the DPA on April 1, 1976. Over these twenty-two years, she has seen many changes in the DPA. However, she feels one thing remains constant, "the quality of work brought about through the quality people doing the work."

Joyce currently works for two attorneys and the Appellate Branch Manager in the Frankfort office. Her many responsibilities include, but are not limited to, assigning of appeals in a timely manner to eleven of-counsel attorneys, filing motions on time and handling briefs, which includes typing, formatting, copying and filing. Due to her heavy workload, she even transcribes videos after hours.

Joyce has always found the legal profession very interesting and challenging. She states, "I feel that I am a part of a process that is doing something worthwhile for humanity." She likes how attorneys give their all to help clients and feels whatever she can do, helps the attorneys do their work better. One memorable time of her career with the DPA was in 1996, when Governor Jones granted clemency to women who had been convicted of killing their abusive spouses or boyfriends. The long hours put in on saving these abused women was well worth the outcome. "This really made you feel good to work for the department," Joyce stated. Joyce does feel; however, at times the criminal justice system is unbalanced. The time in her career that she found the most frustrating was the Harold McQueen execution. This was a difficult time for Joyce and the DPA as a whole. This experience really took its toll on Joyce; however, if confronted with the same situation in the future, she would, again, put in the long hours to save a life.

Joyce says that she is not experiencing burnout because of the diversity of her present job. She feels trusted in her job due to the fact that she works a lot on her own. She has reached the point of retirement, but thoroughly enjoys her job, and does not want to give it up.

Joyce is a very valuable asset to the Frankfort office. One of the attorneys for whom she works, Donna Boyce, Manager of the Appellate Branch, states, "DPA is fortunate to have an extraordinary support staff that is an integral part of the appellate defense team. Legal secretaries Joyce Hudspeth, Marian Gordon, Madeline Jones and administrative assistant Mary Roberts have a combined total of 78 years experience with DPA. Joyce typifies the knowledge and dedication that these four bring to all that they do. Joyce coordinates the appellate of-counsel program in video transcripts, motions and briefs. She deals frequently with clients and their families, appellate and circuit court clerks, court reporters and attorneys. She is professional, diplomatic and compassionate in all those contacts. Joyce is very efficient, works well under pressure and has a good sense of humor. It is a pleasure to work with her. When she retires, I'm going to have to retire too because I don't think I could get along without her!"

Joyce lives in Frankfort with her husband, Gregory. She enjoys her church work, which includes teaching Sunday school

and singing in the choir. She also enjoys listening to religious music, fishing, cooking and spending time with her godson, A.J.

Thanks Joyce for your hard work and dedication to the DPA!



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# DPA AT THE 1998 LEGISLATURE

**Ernie Lewis**, Public Advocate, Department of Public Advocacy

It was a good legislative session, by and large, for the Department of Public Advocacy. This can be seen by comparing our goals to our accomplishments.

## DPA Goals

DPA went into the 1998 General Assembly with five goals:

- We asked for approximately 3 million dollars in new money.
- We advocated for the Fair and Reliable Death Penalty Act, consisting of the Racial Justice Act, the abolition of the death penalty for juveniles, and the retroactivity of the abolition of the death penalty for persons with mental retardation.
- We advocated for significant changes in KRS Chapter 31.
- We asked for affirmation of our departmental reorganization.
- We monitored the progress of [HB 455](#), the Crime Bill, and sought to influence some of its provisions.

### INDIGENTS REPRESENTED WELL

As the Commonwealth's Public Advocate, Ernie Lewis represented the significant interests of the commonwealth's indigent criminal defendants well before the legislature, thus securing substantial additional funds for very needed improvement in the provision of counsel, especially in rural Kentucky. He had a realistic, focused plan, and he tirelessly presented it to legislative leaders, the chairs of the A & R Committee, members of the A & R Committee and subcommittee for DPA in persuasive, professional manner. Ernie worked successfully to create the necessary coalitions to advance the Department's mission on funding and substantive legislation. These alliances will continue to pay dividends to DPA clients in the future. Because of Ernie's work in the 1998 General Assembly, the resources available to DPA's clients has increased tremendously. Working with Ernie is clearly one of the most important highlights of my experience as a Cabinet Secretary.

**Laura Douglas**, Secretary  
Public Protection & Regulation

## **DPA Accomplishments**

### **The Budget**

DPA did very well on our budgetary request. We received an additional 2.2 million dollars. The legislature funded the following requests:

- The enhancement of our juvenile representation. We will be able to hire 5 trial lawyers for existing offices to lower caseloads and enhance the representation of juveniles there. We will hire a juvenile trainer to train the new lawyers, existing full-time and part-time lawyers in how to represent juveniles. Two appellate lawyers will be hired to focus on juvenile appellate issues.
- Five new full-time offices were funded during the biennium. These offices will be located in Owensboro, Campbellsville, Paintsville, Mays-ville, and Bowling Green.
- Nine counties will be incorporated into existing full-time offices.

Full-time attorneys will cover 85% of the DPA caseload in 70 counties. This will enable DPA to match prosecutors in the 64 counties with full-time Commonwealth's Attorneys. (Prosecutors received funding for additional conversions to full-time during the biennium).

#### **REMARKABLE**

Needless to say, considering the odds and obstacles we faced going into this session of the legislature, the outcome was a relative success overall, and in many respects quite a remarkable achievement. This was due in no small part to your persistent and tireless efforts, as well as those of a number of others both within and outside of the defender system. Once again, it just goes to show what a "never say die" defender attitude can accomplish, particularly when combined with a concerted, coordinated effort that includes natural allies as well as converts, no matter how limited or temporary their support. Congratulations to us all, and let's enjoy the moment before returning to the fray.

**Daniel T. Goyette**

Jefferson District Public Defender

- Jefferson and Fayette County Public Defender Offices will receive \$500,000 in new moneys during the biennium. While this was \$100,000 short of the budget request, it will go a long way toward lowering caseloads, achieving salary equity, and enabling these busy offices to meet their responsibilities.
- The Capital Post-Conviction Branch was funded. DPA lost the Byrne Grant federal funding for the former Resource Center in July of 1997. Staff for the Branch was paid from agency revenues until July of 1998, when new funding provided in the Governor's Budget and affirmed by the legislature will be available.
- The Juvenile Post-Disposition Branch was funded through DPA. DPA previously received funding from DJJ, which was required to provide the funding as a result of a consent decree. Henceforth, the money for this Branch will be provided in DPA's budget.
- Overtime payment for DPA staff mandated by state regulations was funded.

These are very significant developments for DPA. DPA will be able to make major advancements in providing defender services during the next two years. The full-time method of delivery of trial level services will predominate. Vital participation of the private bar will be used in 15% of the cases in 50 counties, and in conflict situations. A structure of full-time offices managed by regional managers will be in place by 2000.

## The Death Penalty

DPA also achieved some success on the death penalty. While the Fair and Reliable Death Penalty Act was initially written as a whole, shortly after the session began, it was split into three acts. Rep. Eleanor Jordan sponsored the bill to abolish death for juveniles. Rep. Jim Wayne sponsored the bill to make the prohibition of the execution of the mentally retarded retroactive. Both bills were delayed by the progress of the Racial Justice Act, sponsored by Senator Gerald Neal and Rep. Jesse Crenshaw. Eventually, they died in the House when time ran out.

### **GRATEFUL**

I am most grateful to our legislators who realized the magnitude and exigency of our needs in serving indigent Kentuckians and helped us secure the funding to meet those needs.

**Joe Barbieri**

Fayette County Legal Aid  
Lexington, KY

Not so for the Racial Justice Act. That Act, which was supported by a broad group of people, was passed in January by the Senate. Prosecutors stepped up their opposition to the bill in the House, but were unable to derail it. It passed on March 23, 1998.

Kentucky becomes the first state in the nation to attack the troubling racist aspects of capital punishment. In addition, Kentucky has now addressed two major components of the February 1997 ABA Call for a Moratorium. The Moratorium was called for by the ABA, which does not oppose capital punishment, due to arbitrariness primarily as a result of the inadequacy of funding for indigent defense, the shrinking of habeas corpus, the killing of juveniles, the killing of the mentally retarded, and racism. Kentucky has now addressed in historic fashion racist aspects of the death penalty and the death penalty for persons with mental retardation.

This success must be followed by vigorous advocacy by defenders. Training and brainstorming on how to present effectively claims of prosecutorial racism in capital cases must occur.

Further, the ABA Call for Moratorium needs to be completed. Children should not be subject to capital punishment. This is particularly the case now that life without parole has become a reality in Kentucky. DPA will help lead the way to the eventual abolition of the death penalty for the children of Kentucky.

### KRS Chapter 31

[HB 337](#), DPA's rewriting of KRS Chapter 31, was passed during the last week of the session.

### **WOW**

I wanted to express my heartfelt admiration for Ernie Lewis, Pat Delahanty, Bob Lotz and Ed Monahan and the stunning work you have done on death penalty, funding and other criminal law issues in the Kentucky legislature. All I can say is I'm in awe of this great effort. I know of no one in the country who has ever done this good a job with this challenging of an environment. WOW!

**Kevin McNally**  
McNally & Robinson  
Frankfort, Kentucky

Sponsored by Rep. Kathy Stein, and driven in the Senate by Senator Ernesto Scorsone, this bill will make significant changes to KRS Chapter 31, including:

- The administrative fee will be raised from \$40 to \$50. This will allow DPA to continue the significant programming, including moneys to Louisville, Lexington, and many of our offices, which is revenue-based. An additional \$600,000 needs to be raised.
- The clerks will receive \$2.50 when the administrative fee is collected. This is expected to enhance the collection rate, which is presently at approximately 18% of the cases.
- The administrative fee will be treated as a civil judgment.
- The administrative fee waiver will be mandatory for those unable to pay.
- Statutory maximums and hourly rates have been abolished; these have been replaced with the prevailing rate. This will give DPA necessary flexibility in contract situations. Further, it clarifies that the two methods of service delivery are the full-time and the contract methods.
- Expert expenses for cases involving incarcerated persons will be funded through KRS 31.185, the statewide Superfund.
- Jefferson County will now contribute to the Superfund. The County government will no longer be required to make expert payments, but will be required to contribute to the statewide fund along with all of the other counties.
- Inconsistencies in the statute have been eliminated.

### **KACDL THANKS DPA**

As legislative representative for the Kentucky Association of Criminal Defense Attorneys, I wish to convey the greatest possible thanks to Ernie Lewis, Ed Monahan, Bill Stewart, Rebecca DiLoreto and others at DPA for their recent legislative work. It had crucial impact in getting increased funding for Public Advocacy, securing passage of the Racial Justice Act, and eliminating a number of death penalty aggravators in the Governor's Crime Bill, among numerous other changes in that Bill. It is through just this type of shared cooperation that we achieve reasonable success for the Defense Bar in Frankfort while providing important information to the hardworking membership of the House and Senate Judiciary Committees.

**W. Robert Lotz**  
KACDL Vice President &  
Legislative Representative

A copy of the text of all of the changes made by HB 337 follows this article.

### Reorganization

DPA previously had been reorganized through an Executive Order. The General Assembly has affirmed this order. DPA now consists of four divisions, Law Operations, Trials, Post-Trials, and Protection and Advocacy. Majority leader Greg Stumbo sponsored [HB 359](#) that created this change.

### The Crime Bill

[House Bill 455](#) has now passed and been signed into law. It is the most significant criminal law legislation in the past two decades. Massive changes will occur in the way most of us practice law. It is a bill that was driven by the Governor, informed by the Criminal Justice Response Team, written largely by the Justice Cabinet, and influenced by many groups, including KACDL, through the extraordinary work of Bob Lotz, DPA, prosecutors, victims groups, law enforcement, and others. Much training will need to be done to inform our defenders of the particulars of this bill.

Some of the major changes that will take place with this bill are:

- 85% parole eligibility for violent offenders. My opposition at the CJRT and before various committees and legislators was to no avail.
- 50 years becomes the maximum sentence for a Class A felony.
- 70 years becomes the maximum sentence for consecutive sentencing.

#### **GROUP EFFORT**

It has taken a group effort to produce one of the largest and most effective overhauls of any state's criminal justice system in years. I believe all Kentuckians can take pride in the governor's crime initiative. The various elements of the act -- from protecting victims to reducing juvenile crime -- will impact every community in Kentucky.

**Daniel Cherry**  
Secretary  
Kentucky Justice Cabinet

- Life without parole is the penultimate penalty for capital murder. (*See the chart following this article comparing current parole eligibilities to the new parole eligibilities.*) Alternative sentencing should become the pre-dominant sentence for nonviolent offenders.
- Pretrial diversion is established in all juris-dictions for Class D felons.

- Gang involvement, including recruitment, can result in slightly higher penalties.
- Higher penalties for 3<sup>rd</sup> offense DUI.
- Graduated sanctions for juveniles.
- Higher penalties for methamphetamine.
- Lessened penalties for nonviolent PFOs.
- A 9<sup>th</sup> aggravating circumstance - the killing of someone protected by a court order.
- Victim impact statement admissible in the penalty phase of a felony trial.
- Defendant's evidence regarding leniency becomes admissible in the penalty phase of a felony trial.
- The Criminal Justice Council becomes a significant new player in the criminal justice system. This Council will be staffed, which will be located in the Justice Cabinet. The Public Advocate and a representative of KACDL will be members of the Council, as will 2 prosecutors, 4 law enforcement members, 3 law professors, and others. The Council will become the preeminent planning body in the criminal justice system. It has been directed to report to the legislature July 1 prior to each session. It has also been directed to look at the Penal Code, capital punishment, gangs, and sentencing.

### **Conclusion**

Our success is the result of a good, solid, well-thought out plan, the support of the administration, especially Secretary of Public Protection & Regulation, Laura Douglas, the cooperative efforts of coalitions of advocates and supporters, including (*we apologize to anyone we leave out through oversight*) Deborah Miller and the *Kentucky Youth Advocates*; Kim Brooks and the Northern *Kentucky Children's Law Center*; Bob Lotz and KACDL; Everett Hoffman and Carl Wedekind and KCLU; the Kentucky Bar Association Board of Governors; the Department of Justice's Juvenile Justice Advisory Board; Bob Spangenberg and *The Spangenberg Group*; Nancy Jo Kemper and the *Kentucky Council of Churches*; Jane Chiles and Scott Wegenast and the *Kentucky Catholic Conference*; Rowly Brucken and *Amnesty International*; Department of Juvenile Justice Commissioner Dr. Ralph Kelly; Corrections Commissioner Doug Sapp; Law Enforcement Training Commissioner John Bizzack; Judge James Keller, Judge Larry Raikes, Justice Cabinet Secretary Dan Cherry; Commonwealth Attorney Dave Stengel, Pat Delahanty, Judge Ben Shobe, the many Representatives and Senators, including Harry Moberly, Mark Brown, Charles Siler, Jim Wayne, Roger Thomas, Jim Gooch, Jr., Drew Graham, Stan Cave, Jim Lovell, Jeff Hoover, Kathy Stein, Eleanor Jordon, Joe Barrows, Mary Lou Marzion, Greg Stumbo, Jesse Crenshaw, Larry Saunders, David Karem, Gerald Neal, Dan Kelly, Benny Ray Bailey, David Williams, Ernesto Scorson, Royce Adams, Denny Nunnally, Rob Wilkey, Mike Bowling, Elizabeth Tori, Lindy Casebier, Tim Philpot, Fred Bradley, Jack Westwood, Robert Stivers, Walter Blevins, Cory Johnson, Nick Kafoglis, Barry Metcalf, Charles Geveden, Gross Lindsay, Brent Yonts, Woody Allen, Jody Richards, Steve Nunn, E. Porter Hatcher, Larry Clark, Jim Callahan, Paul Mason, John Vincent and the many employees of DPA who led the way in influencing the success.

I thank everybody who worked so hard to achieve the success that DPA achieved. I have learned a lot during this 1998 General Assembly Session. I look forward to additional success in the legislature in the future.

## Parole Eligibility for Violent Offenders (in years)

SENTENCE	CURRENT	UNDER HB 455
10	5	8.5
20	10	17
30	12	25.5
40	12	34
50	12	42.5
70	12	59.5
Life	12	20
Capital	Life Without for 25	Life Without for 25
Capital	Death	Life Without Parole
Capital		Death

[This section originally contained articles by the *Lexington Herald Leader*. These have not been reproduced here due to copyright restrictions]

AN ACT relating to the statewide public advocacy system.

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

Section 1. KRS 31.051 is amended to read as follows:

**(1) With the exception of the administrative fee contained in subsection (2) of this section, all moneys received by the public advocate from indigent defendants pursuant to KRS Chapter 31 or which are collected by the public advocate pursuant to KRS Chapter 431 shall be credited to the public advocate fund of the county in which the trial is held and shall not be credited to any general account maintained by or for the public advocate. Moneys credited to a county public advocate fund may be used only to support the public advocate program of that county.**

**(2) Any person provided counsel under the provisions of this chapter shall be assessed at the time of appointment, a nonrefundable ~~fifty~~~~forty~~ dollar ~~(\$50)~~~~(\$40)~~ administrative fee, payable, at the court's discretion, in a lump sum or in installments. The first payment shall be accompanied by a handling fee of two dollars and fifty-cents (\$2.50) to be paid**

directly to the Circuit Clerk and deposited in a trust and agency account to the credit of the Administrative Office of the Courts. The account shall be used to assist the circuit clerks in hiring additional employees and providing salary adjustments for deputy clerks. The court ~~shall~~~~may~~ reduce or waive the fee if the person ~~remains in custody or~~ does not have the financial resources to pay the fee. In any case or legal action a needy person shall be assessed a total administrative fee of no more than ~~fifty~~~~forty~~ dollars ~~(\$50)~~~~(\$40)~~, regardless of the stages of the matter at which the needy person is provided appointed counsel. In the event the defendant fails to pay the fee, the fee shall be deducted from any posted cash bond or shall constitute a lien upon any property which secures the person's bail, regardless of whether the bond is posted by the needy person or another. The failure to pay the fee shall not reduce or in any way affect the rendering of public defender services to the person.

(3) The administrative fee shall be in addition to any other contribution or recoupment assessed by the court pursuant to KRS 31.120 and shall be collected in accordance with that section.

(4) The administrative fees collected pursuant to this subsection (2) shall be placed in a special trust and agency account for the Department of Public Advocacy, and the funds shall not lapse.

(5) If the administrative fee, or any portion thereof, is not paid by the due date, the court's order is a civil judgment subject to collection under Civil Rule 69.03 and KRS Chapter 426.

Section 2. KRS 31.070 is amended to read as follows:

If a court, after finding that the Department of Public Advocacy fails to provide an attorney to a person eligible for representation under KRS Chapter 31, appoints, under the court's inherent authority, an attorney to provide representation to the needy person, ~~judicial circuit, through the county or counties therein, adopts a plan involving appointed counsel~~ the public advocate is hereby authorized to pay reasonable and necessary fees and expenses subject to the following limitations:

(1) No fee shall be paid in excess of the prevailing maximum fee per attorney paid by the Department of Public Advocacy for the type of representation provided, and no hourly rate shall be paid in excess of the prevailing hourly rate paid by the Department of Public Advocacy for the type of representation provided~~[\$1,000 for any defense of a single person in any case]; and~~

(2)~~In the case of multiple defendants no fee shall be paid in excess of \$1,000 for each defendant in the case; and~~

~~(3)~~ Each fee plus expenses incurred in the defense shall be presented by the defense attorney to the Circuit Court Judge who shall review the fee and expenses request and shall approve, deny, or modify the amount of compensation and fee listed therein. After final approval of the fee and expenses the Circuit Judge shall, if state compensation is desired, certify the amount and transmit the document to the public advocate who shall review the fee and expense request and shall approve, deny, or modify the request. The request as approved or modified shall then be paid. Requests for payment of assigned counsel by the state shall be denied if the district has exceeded the amount of funds which may be allotted to it, if the district plan has not been approved, or if the public advocate finds that compensation is otherwise not warranted. The decision of the public advocate in all matters of fee and expense compensation shall be final.

Section 3. KRS 31.120 is amended to read as follows:

(1) The determination of whether a person covered by KRS 31.110 is a needy person shall be deferred no later than his first appearance in court or in a suit for payment or reimbursement under KRS 31.150, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each step in the proceedings, whether he is a needy person. However, nothing herein shall prevent appointment of counsel at the earliest necessary proceeding at which

the person is entitled to counsel, upon declaration by the person that he is needy under the terms of this chapter. In that event, the person involved shall be required to make reimbursement for the representation involved if he later is determined not a needy person under the terms of this chapter. At arraignment, the court shall conduct a nonadversarial hearing to determine whether a person who has requested a public defender is able to pay a partial fee.

(2) In determining whether a person is a needy person and in determining the extent of his, and, in the case of an unemancipated minor under KRS 31.100(3)(c), his custodial parent's or guardian's inability to pay, the court concerned shall consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail, or any other method of release provided in KRS Chapter 431, shall not necessarily prevent him from being a needy person. In each case, the person, and, if an unemancipated minor under KRS 31.100(3)(c) and (d), his custodial parent or guardian, subject to the penalties for perjury, shall certify by affidavit of indigency which shall be compiled by the pretrial release officer, as provided under KRS Chapter 431 and Supreme Court Rules or orders promulgated pursuant thereto, the material factors relating to his ability to pay in the form the Supreme Court prescribes.

(3) It shall be prima facie evidence that a person is not indigent or needy within the meaning of this chapter if he and, in the case of an unemancipated minor under KRS 31.100(3)(c) and (d), if his custodial parent or guardian:

(a) Owns real property in the Commonwealth or without the Commonwealth;

(b) Is not receiving, or if not receiving is not eligible to receive, public assistance payments at the time the affidavit of indigency is executed;

(c) Has paid money bail (other than a property bond of another), whether deposited by himself or another, to secure his release from confinement on the present charge of which he stands accused or convicted; or

(d) Owns more than one (1) motor vehicle.

(4) To the extent that a person covered by KRS 31.110, and, in the case of an unemancipated minor under KRS 31.100(3)(c) and (d), his custodial parent or guardian, is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments. The determination shall be made at each stage of the proceedings.

(5) The court shall order all moneys collected pursuant to subsection (4) of this section be paid to the clerk of that court pursuant to the schedule of payment. The clerk shall forward to the Department of Public Advocacy on a monthly basis a copy of all the orders or an electronic report compiled by the Administrative Office of the Courts listing those orders. Additionally, the clerk shall forward to the Department of Public Advocacy on a monthly basis an accounting of and the moneys collected in~~and the moneys collected pursuant thereto with an accounting as to~~ each case.

(6) The affidavit of indigency, to be subscribed and sworn to by the person, and, in the case of an unemancipated minor under KRS 31.100(3)(c), by his custodial parent or guardian, shall be as set out herein:

Commonwealth of Kentucky

County of.....

Affiant....., being first duly sworn says that he is not now represented by private counsel and that he does not have the money or assets out of which to employ one; that he is indigent and requests the court to appoint counsel.

Affiant states that his income is .....; that he owns the following property:

Description	Value
.....	
.....	
.....;	

that he has the following dependents:

Name	Age	Relationship
.....	.....	.....
.....	.....	.....;

and that he has the following obligations:

To whom owed	Amount owing
.....	.....
.....	.....

.....  
Signature of affiant

Subscribed and sworn to before me this ..... , day of ....., 19 .....

.....  
Signature and title of officer  
administering the oath

Any persons making false statements in the above affidavit shall be subject to the penalties for perjury under KRS Chapter 523, the maximum penalty for which is five (5) years imprisonment.

Section 4. KRS 31.170 is amended to read as follows:

(1) If the fiscal court of a county elects to establish and maintain an office for public advocacy, it shall:

(a) Appoint the district public advocate and any number of assistant district public advocates necessary to adequately perform the functions of said office.

(b) Prescribe the qualifications of the district public advocate, his term of office which may not be more than four (4) years and fix the rate of annual compensation for him and his assistants. In order to be qualified for appointment as district public advocate a person must have been admitted to the practice of law and licensed to practice in the Commonwealth of Kentucky and be competent to counsel and defend a person charged with a crime.

(c) Provide for the establishment, maintenance and support of his office.

(2) If the fiscal court of a county elects to arrange with a nonprofit organization to provide attorneys, the county and any cities involved may reimburse the organization for such expenses as the fiscal courts respectively concerned have determined to be necessary in the representation of needy persons under this chapter, or may provide facilities described in KRS 31.180(2)(a) in addition to or in lieu of said reimbursement.

(3) If, in a county where the fiscal court has elected to provide representation under subsection (1) or (2) of this section, after finding that the fiscal court fails to provide an attorney to a person eligible for representation under KRS Chapter 31, a court assigns, under the court's inherent authority, an attorney to represent a needy person it shall prescribe a reasonable rate of compensation for his services and shall determine the direct expenses necessary to representation for which he would be reimbursed. The county shall pay the attorney the amounts so prescribed from the funds made available by the Department of Public Advocacy.

(4) An attorney under subsection (3) shall be compensated for his services with regard to the complexity of the issues, the time involved, and other relevant considerations. However, no fee shall be paid in excess of the prevailing maximum fee per attorney paid by the Department of Public Advocacy for the type of representation provided, and no hourly rate shall be paid in excess of the prevailing hourly rate paid by the Department of Public Advocacy for the type of representation provided~~he may be compensated at a rate no higher than thirty-five dollars (\$35) an hour for time spent in court and no higher than twenty-five dollars (\$25) an hour for time spent out of court subject in each case to a maximum total fee of one thousand two hundred fifty dollars (\$1,250) in case of a felony and five hundred dollars (\$500) in any other case, unless the court concerned finds that special circumstances warrant a higher total fee~~.

Section 5. KRS 31.185 is amended to read as follows:

(1) Any defending attorney operating under the provisions of this chapter is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county.

(2) The fiscal court of each county or legislative body of an urban-county government ~~[containing less than ten (10)-~~

Circuit Judges shall annually appropriate twelve and a half (\$.125) cents per capita of the population of the county, as determined by the Council of Local Governments' most recent population statistics, to a special account to be administered by the Finance and Administration Cabinet to pay court orders entered against counties pursuant to subsection (1) of this section. The funds in this account shall not lapse and shall remain in the special account.

(3) The Finance and Administration Cabinet shall pay all court orders entered pursuant to subsection (1) of this section from the special account until the funds in the account are depleted. If in any given year the special account including any funds from prior years is depleted and court orders entered against counties pursuant to subsection (1) of this section for that year or any prior year remain unpaid, the Finance and Administration Cabinet shall pay those orders from the Treasury in the same manner in which judgments against the Commonwealth and its agencies are paid.

(4) Only court orders entered after July 15, 1994, shall be payable from the special account administered by the Finance and Administration Cabinet or from the Treasury as provided in subsections (2) and (3) of this section.

[(5) Each county with a judicial district containing ten (10) or more Circuit Judges shall be solely liable for any court order entered against it pursuant to subsection (1) of this section.]

Section 6. KRS 31.200 is amended to read as follows:

(1) Subject to KRS 31.190, any direct expense, including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript that is necessarily incurred in representing a needy person under this chapter, is a charge against the county on behalf of which the service is performed; provided, however, that such a charge shall not exceed the established rate charged by the Commonwealth and its agencies.

(2) Any direct expense including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript shall be paid from the special account established in KRS 31.185(2) and in accordance with the procedures provided in KRS 31.185(3).

(3) If two (2) or more counties jointly establish an office for public advocacy, the expenses not otherwise allocable among the participating counties under subsection (1) shall be allocated, unless the counties otherwise agree, on the basis of population according to the most recent decennial census.

(4) Expenses incurred in the representation of needy persons confined in a state correctional institution shall be paid from the special account established in subsection (2) of Section 5 of this Act and in accordance with the procedures provided in subsection (3) of Section 5 of this Act~~borne by the state Department of Public Advocacy~~.

Section 7. KRS 31.240 is amended to read as follows:

In the area of relation of local programs to the state program the following are permitted:

Each county or counties in a district may compensate district advocates appointed pursuant to KRS 31.170, under their own employ at rates greater than the state district advocate but must pay from their own funds all amounts in excess of the state contribution.

**(2) Each county or counties in a district may adopt their own plan of aid to the indigent provided all plans in a district, viewed as a whole, are approved by the Department for Public Advocacy.**

**(3) [Each county or counties providing for assigned counsel may compensate them at rates provided for in KRS 31.170; however, the state contribution to such compensation shall not be greater than is provided for by KRS 31.070. ]The county or counties shall be obligated to pay and shall pay all amounts in excess of the state contribution. No county shall be required to pay the maximum amounts provided for in KRS 31.170 unless the amounts be approved by the circuit judge.**



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# West's Review

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***Bowling v. Commonwealth,***  
**964 S.W.2d 803 (Ky. 2/19/98)**

Ronnie Bowling was convicted and sentenced to death by a Laurel Circuit Court jury. His convictions and death sentences were affirmed on appeal by the Kentucky Supreme Court and certiorari was denied by the U.S. Supreme Court. As a result, on November 21, 1997, the Governor of Kentucky signed a warrant setting December 23, 1997 as the date for Bowling's execution.

On December 1, 1997, Ronnie Bowling filed three motions in the Laurel Circuit Court: a motion for a stay of execution; a motion for funds to conduct an investigation in support of a forthcoming RCr 11.42 motion to vacate; and a motion to lift an order prohibiting him from contacting members of the jury that convicted him. Bowling did not file a RCr 11.42 motion at the time.

On December 15, 1997, the Laurel Circuit Court Judge denied all three motions because of lack of jurisdiction.

On December 18, 1997, the Kentucky Supreme Court granted Bowling a temporary stay of execution pending the outcome of this appeal.

Bowling argued on appeal that under 18 U.S.C. section 2244(d)(2) of the federal Anti-Terrorism and Effective Death Penalty Act there is a one year grace period in which to file a motion in the state courts for post-conviction relief during which time the Governor is precluded from setting an execution date.

In a unanimous opinion the Kentucky Supreme Court disagreed. The Court held that 28 U.S.C. section 2244(d) does not affect the time for filing a motion under RCr 11.42 or the Governor's authority under KRS 431.218 to set an execution date.

The Court also held the trial judge correctly concluded the Laurel Circuit Court had no jurisdiction to hear Bowling's motions because it lost jurisdiction of Bowling's case ten days after the entry of the final judgment. The circuit court could be reinvested with jurisdiction only upon the filing of a proper motion under RCr 11.42, CR 60.02 or a petition for a writ of habeas corpus under KRS 439.020, *et seq.* Since Bowling did not file a RCr 11.42 motion along with the three above-mentioned motions that he filed, the trial court was not reinvested with jurisdiction to hear his motions.

The Supreme Court affirmed the December 15<sup>th</sup>, 1997 order of the Laurel Circuit Court and vacated the temporary stay of execution it entered on December 18, 1997.

***Danner v. Commonwealth,***  
**963 S.W.2d 632 (Ky. 2/19/98)**

Danner was convicted of two counts of first degree sodomy and one count of first-degree rape. He was sentenced to 24 years' imprisonment on each count to run concurrently.

The victim was Danner's daughter. At trial, the victim testified outside her father's presence pursuant to KRS 421.350. The only issue on appeal concerns the propriety of allowing the victim to testify outside her father's presence.

The victim was between five and ten years old when the abuse occurred, but she was fifteen years old at the time of trial. The prosecutor felt the victim could not testify in the presence of her father, so it moved for an in camera interview with the victim so the trial court could determine whether there was a "compelling need" for the victim to testify outside her father's presence. Danner objected on two grounds: 1) that fifteen years old was too old under the statute, and 2) that even if it was not too old, the Commonwealth had failed to establish there was a "compelling need" for the daughter to testify outside the presence of her father.

The trial court interviewed the victim *in camera* and concluded there was a "compelling need" for the victim to testify via closed circuit television.

On appeal, the Kentucky Supreme Court held the age provisions of KRS 421.350 refer to the age of the victim at the time the crime was committed, rather than at the time of the trial testimony. Thus, since the victim was between the ages of five and ten at the time the sexual acts occurred, the statute allows her testimony to be taken outside the presence of the accused.

The Supreme Court then addressed whether the Commonwealth established there was a "compelling need" for the victim's testimony to be taken outside the presence of her father as required by KRS 421.350 (2)& (3). The Court stated, citing *Commonwealth v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986)(emphasis added), a trial court should consider the following factors in making a compelling need determination: " the trial court must have wide discretion to consider the **age** and **demeanor** of the child witness, the **nature of the offense** and the likely **impact of testimony in court or facing the defendant**." Other factors the trial court should consider, especially in a case where the victim is older than twelve, are the age of the victim and the time that has elapsed between the date of the crime and the date of the trial. The trial court is vested with broad discretion in making its determination.

In the case at bar, the trial court concluded that due to the nature of the testimony the victim would give at trial and the age of the victim, face to face testimony "would inhibit the victim to a degree that the jury's search for the truth would be clouded." The trial court was convinced the victim would not be able to testify in the presence of her father.

The Kentucky Supreme Court held the trial court did not abuse its discretion in finding there was a "compelling need" to have the fifteen year old victim testify via closed circuit television outside the presence of her father.

Danner's convictions were affirmed.

***Humphrey v. Commonwealth,***  
**962 S.W.2d 870 (Ky. 2/19/98)**

Michael Humphrey was charged with first degree rape of three different female children under the age of twelve. The circuit court directed a verdict of not guilty on one of the charges and the other two counts were submitted to the jury. The jury found Humphrey guilty of one count of first-degree rape and on the other count of the lesser included offense of first-degree sexual abuse. He was sentenced to life and five years respectively.

On direct appeal, Humphrey claimed he received ineffective assistance of counsel both prior to and during his trial.

The Kentucky Supreme Court stated that "[a]s a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal...because there is usually no record or trial court ruling on which such a claim can be properly considered." The Court also noted "it is unethical for counsel to assert his or her own ineffectiveness.... KBA Op. E-321 (July 1987)." However, the Court pointed out that where allegations of ineffectiveness are raised in a motion for a new trial and an evidentiary hearing is held on said motion and the trial court rules on the issues raised in the motion, a sufficient record is made from which the issues may be reviewed on appeal.

In the instant case, Humphrey raised some of his ineffective assistance of counsel claims in his motion for a new trial and the trial court ruled on said claims. Thus those claims were properly before the Kentucky Supreme Court. However, the Court noted that a better approach would have been to present the unpreserved errors, [which were the basis for the ineffectiveness claims], if such could have been done in good faith, as palpable error under RCr 10.26.

The Court addressed four separate allegations of ineffective assistance by Humphrey's trial counsel and found no merit to any of them.

The Court also addressed two issues that were not specifically raised by Humphrey on appeal but were addressed by the trial court during the course of the arguments on Humphrey's new trial motion.

Lastly, the Court found no merit to Humphrey's argument that he was entitled to a directed verdict of acquittal on the first-degree rape charge of which he was found guilty and sentenced to life imprisonment.

Humphrey's convictions were affirmed.

***Rabovsky v. Commonwealth,***  
**973 S.W.2d 6 (Ky. 2/19/98)**

Sue Rabovsky was convicted for the murder of her husband and sentenced to 25 years in prison. Three doctors testified the cause of death was hypoglycemia caused by an external administration of a massive dose of insulin. There was substantial circumstantial evidence that Sue had the motive, opportunity and animus to inject a lethal dose of insulin into her husband's body while he was asleep. On appeal she raised three issues.

Mr. Rabovsky was taken to Audubon hospital by EMS on March 18, 1995. He was comatose at the time and remained in such a state until his death eleven days later. During this time period, blood samples were taken at periodic intervals. Although the blood samples were sent to National Health Laboratories (N.H.L.) in Louisville for testing, the actual tests were performed by National Reference Laboratory (N.R.L.) in Nashville. The test results were reported to Audubon on

N.H.L.'s computer generated forms.

At trial, Audubon's medical records were introduced into evidence *in toto* pursuant to KRE 803(6), but Appellant objected to various specific entries in those records including N.H.L.'s printouts reporting the blood test results as well as nurses' notes contained in the records. Some of the computer printouts had numbers written in by hand next to the computer generated numbers. The hospital's primary treating physician testified over objection that the handwritten numbers reflected the actual insulin levels in the victim's blood when the first two samples were collected.

On appeal Appellant argued it was error to admit the blood test reports containing the handwritten annotation and in permitting the primary treating physician to base his opinion on those reports. The Kentucky Supreme Court agreed error occurred, but said it was rendered harmless when the technical director of the lab that was formerly N.H.L testified *without objection* that he had checked N.H.L.'s records and determined that the exact blood insulin level on the first test was 1672 micro units per milliliter and the exact blood insulin level on the second test was 483 micro units per milliliter. Although the technical director of the lab was not the custodian of N.H.L.'s records, he was a "qualified witness" to testify to the contents of those records as permitted by KRE 806(3).

However, the Kentucky Supreme Court found it was reversible error to admit the blood test results because the Commonwealth failed to establish the chain of custody of the blood samples which is part of the authentication requirement of KRE 901(a) (authentication is a condition precedent to admissibility). The Court pointed out that the purpose of requiring proof of the chain of custody of a blood sample is to show that the blood tested in the laboratory was the same blood drawn from the victim. The Court distinguished between the requirement of a chain of custody for blood samples or other specimens taken from a human body versus the lack of need for a chain of custody for weapons or similar items of physical evidence which are clearly identifiable and distinguishable.

In the case at bar there was no attempt to establish the chain of custody of the blood samples. No evidence was introduced to prove who collected the blood samples, how they were stored, how they were transported to N.H.L., how they were transported (if they were) to N.R.L., or what method was used to test the samples. At no time did the Commonwealth establish that the blood which was tested was that of Mr. Rabovsky. That the blood test reports were ultimately placed in the hospital's business records did not alter or satisfy the requirement. As a result, Mrs. Rabovsky's conviction was reversed for a new trial.

The second issue raised on appeal concerned the introduction of notes written by nurses who did not testify at trial. These notes were introduced into evidence as "business records" of the hospital under KRE 803(6).

The hospital's treating physician suspected Mrs. Rabovsky of foul play. Thus he instructed the hospital nurses to record in their notes anything they overheard Mrs. Rabovsky say about her husband. The nurses recorded incriminating comments made by Mrs. Rabovsky while her husband was still alive, such as that she was "through mourning" and that her husband was not "here" but "in heaven." The nurses also recorded that Mrs. Rabovsky said her husband had been out drinking with friends on the night before he was taken to the hospital. This fact conflicted with evidence that Mr. Rabovsky had been on National Guard duty that night.

Since the nurses did not testify at trial, their notes were not admissible as "business records" of the hospital under KRE 803(6). However, if the nurses had testified, they could have testified to what they heard Mrs. Rabovsky say under KRE 801A(b)(1) (admission of a party).

The third issue raised on appeal concerned the testimony of Dr. William Smock, an assistant medical examiner trained in clinical forensics, who read from selected entries in the medical records. Appellant argued this testimony was inadmissible

hearsay.

The Kentucky Supreme Court disagreed because the medical records were properly introduced under KRE 803(6). The Court further stated that even if any specific entries in the records were inadmissible, Smock could have "reasonably relied" on those entries in forming his expert opinion as to the diagnosis and cause of the victim's condition. KRE 703(a). The Court noted it was error to allow Smock to read from the inadmissible entries without first addressing the factual determinations required by KRE 703(b), but such an error should not occur upon retrial.

Mrs. Rabovsky's conviction was reversed and remanded for a new trial.

***Commonwealth v. Frodge,***  
**962 S.W.2d 864 (Ky. 2/19/98)**

Morris Frodge was charged with violating KRS 219.330, which prohibits the operation of a mobile home park without a permit. Mobile home park is defined in KRS 219.320(5).

At the conclusion of the Commonwealth's case, the district court granted Frodge's motion for a directed verdict of acquittal and dismissed the charges because the Commonwealth failed to prove the element of "available to the public."

The Commonwealth petitioned for a certification of the law.

The Kentucky Supreme Court held that the term "'available to the public,' as used in KRS 219.320(5), does not refer to whether the general public has access to the property via a public roadway, but to whether the mobile home lots are available for lease to persons who are neither members of the owner's family nor employed as laborers on the owner's farm."

***Britt v. Commonwealth &***  
***Morris v. Commonwealth,***  
**965 S.W.2d 147 (Ky. 3/19/98)**

This appeal involves a question of statutory interpretation. The Kentucky Supreme Court held that juveniles accused of committing a felony with a firearm who are transferred to circuit court pursuant to the 1994 version of KRS 635.020(4) are to be considered "youthful offenders" eligible for the ameliorative sentencing provisions of KRS Chapter 640. The Court concluded that subsection (4) of KRS 635.020 was designed to facilitate transfer of juveniles accused of committing a felony with a firearm to the circuit court by bypassing proof required under KRS 640.010.

***Combs v. Commonwealth,***  
**965 S.W.2d 161 (Ky. 3/19/98)**

The issue in this case is whether the police may use a search warrant to take a suspected drunk driver's blood after the driver has refused to submit to a blood alcohol test pursuant to the Implied Consent Statute, KRS 189A.103 and 189A.105(2)(b), in a case not involving death or physical injury.

The Kentucky Court of Appeals upheld the use of a blood alcohol test in a DUI case that did not involve death or physical injury.

The Kentucky Supreme Court disagreed. The Court held the clear language of KRS 189A.105 prevents the issuance of a search warrant unless death or physical injury is involved and held the admission of the results of a blood test in a DUI case not involving death or physical injury is improper. However, in the case at bar, since there was overwhelming evidence of Combs' intoxication at the time of his arrest, the blood test evidence was cumulative and the error was harmless.

The Court also held, contrary to the holding of the Court of Appeals, that the implied consent statute does not violate the separation of powers doctrine set out in Sections 27 and 28 of the Kentucky Constitution.

Combs' conviction was affirmed.

***Davis v. Commonwealth &  
Felts v. Commonwealth,***  
**967 S.W.2d 574 (Ky. 3/19/98)**

Sherman Davis and Melissa Felts were jointly tried for offenses allegedly occurring while Davis was babysitting Felts' two year old daughter and resulting in her death. Davis was charged with murder and first degree criminal abuse while Felts was charged only with first-degree criminal abuse. Davis was convicted of wanton murder and first degree criminal abuse and Felts was convicted of first degree criminal abuse (intentionally permitting Davis to inflict serious physical injuries upon her child).

Davis raised the following four issues on appeal.

First, Davis argued he was entitled to an instruction on first degree manslaughter (intentional killing under extreme emotional disturbance) because the Commonwealth's theory of the case was that Davis killed the child in a fit of jealous anger because Felts was "out on the town" while he was left at home to baby-sit the child. However, the trial court only instructed the jury on offenses with an unintentional mental state: wanton murder, second-degree manslaughter and reckless homicide. The Kentucky Supreme Court found no error because there was no "definitive," "non-speculative," "probative, tangible and independent evidence" of a triggering event.

Second, Davis argued it was error to admit the out of court statements of codefendant Felts that Davis abused and killed her child. The Kentucky Supreme Court found no error in the admission of Felts' statements at this joint trial because the statements were admissible against Felts to prove her prior knowledge that Davis had been abusing her child. The Court also held Felts' statements were admissible under the excited utterance exception to the hearsay rule. The Court held Felts' statements opining on Davis' guilt did not rise to the level of palpable error because Felts' opinion was not based on her personal knowledge of the facts since she was not present when the injuries occurred to her daughter. Lastly, the Court found no palpable error because Felts testified after her statements were admitted and thus Davis had an opportunity to cross-examine her.

Third, Davis argued he was prejudiced and denied a fair trial by numerous instances of prosecutorial misconduct. The Kentucky Supreme Court disagreed and found no prejudicial error.

Fourth, Davis argued he was denied a unanimous verdict by the trial court's first degree criminal abuse instruction which allowed the jury to find him guilty of first degree criminal abuse if it believed beyond a reasonable doubt that he intentionally permitted the child to be abused (by a third party) when he had actual custody of her. The Court concluded that since Davis testified that at least one of the injuries to Felts' daughter was caused by another child while Felts' daughter was in Davis' care, there was sufficient evidence for a jury to conclude Davis intentionally permitted Felts' daughter to be abused.

Davis' convictions and one hundred ten-year sentence were affirmed.

Melissa Felts raised three arguments in her appeal.

First, she argued the evidence was insufficient to prove she intentionally permitted the abuse to occur and she was entitled to a directed verdict of acquittal. The Kentucky Supreme Court disagreed. It found there was ample evidence from which a reasonable juror could conclude that Felts knew her daughter was being abused whenever she left her with Davis.

Second, Felts argued she was entitled to be tried separately from codefendant Davis. The Kentucky Supreme Court disagreed because the evidence of abuse perpetrated by Davis against the child would have been admissible in a separate trial to prove that Felts had permitted the abuse to occur.

Third, Felts argued she was denied a unanimous verdict by the trial court's first degree criminal abuse instruction which allowed the jury to find Felts guilty if it believed beyond a reasonable doubt that she caused her daughter torture, cruel confinement or cruel punishment. Finding the evidence was insufficient to support a conviction of first-degree criminal abuse by causing torture or cruel confinement, the Kentucky Supreme Court agreed and reversed Felts' conviction and granted her a new trial.

***Eldred v. Commonwealth,***  
**973 S.W.2d 43 (Ky. 3/19/98)**  
**(Rehearing Denied 9/3/98)**

Eldred was tried for capital murder and first degree arson. The jury found him guilty of these offenses. The Commonwealth sought the death penalty, but the jury fixed his punishment at life in prison without the possibility of parole for 25 years (LWOP 25) even though it found the aggravating circumstance of murder for profit beyond a reasonable doubt. Eldred's convictions were reversed on appeal and remanded for a new trial.

Upon retrial, the Commonwealth gave notice that it would again seek the death penalty. Eldred moved the trial court to prohibit the Commonwealth from seeking the death penalty under principles of double jeopardy set out in *Bullington v. Missouri*, 101 S.Ct. 1852 (1981), and *Arizona v. Ramsey*, 104 S.Ct. 2305. The trial court granted Eldred's motion and the Commonwealth appealed.

Four Justices of the Kentucky Supreme Court held that "under Kentucky's capital sentencing procedure, after a conviction of a capital crime and upon a written finding by a jury of a statutory aggravating factor beyond a reasonable doubt, an imposed sentence of less than death at the defendant's first trial does not prevent, in the case of a successful appeal, the

Commonwealth from again seeking the death penalty at a subsequent retrial."

To reach this conclusion, the Kentucky Supreme Court distinguished Kentucky's capital sentencing procedure from Missouri's and Arizona's capital sentencing procedures on the ground that the jury in Kentucky is not restricted to only two choices in the range of punishment it may select from in fixing the defendant's sentence. In Kentucky the jury may choose between death, LWOP 25, life, or a term of years with the minimum being twenty. In contrast, Missouri and Arizona permit the jury or judge to choose between only two punishments, death or life in prison without the possibility of parole for a specific number of years. Thus, the "implied acquittal" theory of *Green v. U.S.*, 78 S.Ct. 221 (1957), does not apply to Kentucky's capital sentencing procedure. *Green* stands for the proposition that a conviction of a lesser-included offense operates as an implied acquittal of the greater offense.

The Court also distinguished *Bullington, supra*, and *Rumsey, supra*, because in the former case the jury did not include in its verdict any determination as to the existence of aggravating factors since the Missouri statute only required the jury to make written findings concerning aggravating factors if it fixed the defendant's sentence at death. In the latter case, the trial court entered written findings denying the existence of each of the statutory aggravating factors. In contrast, Eldred's jury found beyond a reasonable doubt the existence of the aggravating circumstance of murder for profit.

***Talbott v. Commonwealth,***  
**968 S.W.2d 76 (Ky. 3/19/98)**

Debra Talbott was convicted of complicity to murder her seventeen-year-old daughter and sentenced to life in prison.

Talbott reported her daughter missing on January 18, 1995. On March 5, 1995, her daughter's body was found in the Green River. On the same day, KSP Detective Harlow interviewed Talbott's husband who was in the Meade County Jail on other charges. Gerald Talbott gave a written statement indicating he had no idea how his stepdaughter ended up in the Green River.

On March 16, 1995, Gerald gave a second written statement to the Det. Harlow. This time Gerald stated his wife killed her daughter and he assisted her in disposing of the body.

Based on this information, Det. Harlow sought a warrant for Debra Talbott's arrest. Because the circuit judge, the district judge and the trial commissioner were all out of the county, Harlow obtained an arrest warrant from the circuit court clerk. Harlow's affidavit in support of the arrest warrant contained nothing more than the conclusory statement that Debra Talbott intentionally caused the death of her daughter.

On appeal, Debra Talbott challenged the validity of this arrest warrant because it was not based on probable cause. The Kentucky Supreme Court held the affidavit was insufficient to support a finding of probable cause because Det. Harlow had no personal knowledge of the events. Since Harlow had obtained his information about the alleged offense from someone else, the affidavit must disclose that fact. Since the affidavit did not, the warrant was invalid and provided no basis to arrest Debra Talbott. However, the arrest could still be valid if Harlow had probable cause to believe Debra had committed a felony. KRS 431.005(1)(c). The Court held that Gerald Talbott's signed confession accusing his wife of murdering her daughter was sufficient probable cause for Harlow to arrest Debra without a warrant. Moreover, since

Debra was standing in the doorway of her home at the time Harlow arrested her, rather than inside her home, the warrantless arrest was valid.

After arresting Debra on March 17, 1995, and advising her of her *Miranda* rights, Debra signed a written waiver of those rights and a written consent to search her home and vehicles. The search revealed her daughter's eyeglasses and a sleeping bag, that according to Gerald's statement, in which her daughter was placed and then transported to the Green River. Debra was then taken to jail for booking. At the jail she gave Det. Harlow a written statement in which she said her husband and her daughter were having an affair and her husband was afraid the daughter would bring criminal charges against him so he killed her. Debra stated her only involvement was to help her husband dispose of the dead body.

On March 18, 1995, Debra contacted Det. Harlow and told him she wanted to tell him "the whole story." After again advising Debra of her *Miranda* rights, Debra admitted her participation in her daughter's murder and gave a written statement to that effect.

Gerald Talbott committed suicide prior to trial. At the suppression hearing, Debra argued her consent to search was not voluntary and was the product of duress and coercion because Det. Harlow told her that if she didn't sign the consent form, he would seal off her residence for several hours while he went to get a search warrant. Debra implied at the suppression hearing that she signed the consent to search form because she wanted her mother, who was visiting from another state, to have access to her home. However, on appeal, Debra argued her consent was not voluntary because she had already been placed under arrest. The Kentucky Supreme Court held the trial court's findings that Debra's consent was voluntary and not the product of duress or coercion was supported by substantial evidence.

Debra also argued at the suppression hearing that both of her written statements should have been suppressed because they were obtained after she had asserted her right to counsel. Debra, her mother and Det. Harlow testified at the suppression hearing.

Debra testified that she asked Harlow three different times if she could call a named attorney, but Harlow told her she could not make a phone call until she was "booked" and that the named attorney was already representing her husband and thus could not represent her. Debra also testified that she asked Harlow if she could have a public defender, but Harlow told her she had to wait until her first court appearance on Tuesday (it was presently Friday) to have a public defender appointed.

Harlow denied telling Debra she could not call an attorney.

The Kentucky Supreme Court held that once Debra told Harlow she did not want to make a statement until she talked to a lawyer, any further questioning should have ceased, and the March 17<sup>th</sup> statement should have been suppressed. However, the Court agreed with the trial court's finding that there was substantial evidence that Debra initiated the March 18 conversation with the police. Thus, since Debra's March 18<sup>th</sup> statement was admissible, the admission of her March 17<sup>th</sup> statement was harmless error. The Court also held that any delay between Debra's arrest on a Friday and her first court appearance on the following Tuesday did not affect the admissibility of her second statement.

During trial, Debra sought to introduce the opinion of an expert on battered women that she was acting under the influence of extreme emotional disturbance when she participated in the killing of her daughter. The Commonwealth's objection to this testimony was sustained. The expert's opinion was placed into the record by avowal. The trial court also refused Debra's request for an instruction on first degree manslaughter based on the theory that Debra was acting under the influence of extreme emotional disturbance at the time she planned and participated in the murder of her daughter.

On appeal, the Kentucky Supreme Court found no error in either of these rulings by the trial court. As to the exclusion of the expert's opinion, the Court stated the expert never defined what she meant by extreme emotional disturbance. At one point in her avowal testimony she said Debra's judgment was "impaired" (as opposed to "overcome") and at another point she said Debra could not distinguish right from wrong. The Court concluded that unless the expert's "testimony is directed to the concept of extreme emotional disturbance as defined by Kentucky law, an expert's opinion in this regard does not 'assist the trier of fact to understand the evidence or to determine a fact in issue.' KRE 702."

The Court also pointed out that where the defendant does not testify (as in the case at bar) "and there is no other factual basis to support a defense of extreme emotional disturbance, that defense cannot be bootstrapped into the evidence by an expert opinion premised primarily on out-of-court information furnished by the defendant...To permit this type of evidence would allow a defendant to testify by proxy without being subjected to the crucible of cross-examination."

As to the failure to instruct on first degree manslaughter because Debra was acting under extreme emotional disturbance, the Court pointed out that since Debra did not testify, her confession was the only factual basis for determining whether the jury might have a reasonable doubt whether she was acting under extreme emotional disturbance. The thrust of Debra's confession was not that she was so enraged, inflamed or disturbed that she acted uncontrollably, but that she and her husband carefully planned the murder because her husband feared going to prison if his affair with his stepdaughter was revealed. A reference in Debra's confession to being "hurt" and "angry" was not sufficient to entitle Debra to an instruction on extreme emotional disturbance. Rather, extreme emotional disturbance must be proven by some "definitive, unspeculative evidence."

The Kentucky Supreme Court also held the trial court correctly sustained the Commonwealth's objection as irrelevant to Debra's attempt to introduce a life photograph of her husband "sitting behind the wheel of a vehicle, scowling, unshaven, and smoking a cigarette."

The Court also found that any error in the sheriff, a Commonwealth witness, having conversed with three different jurors was harmless because none of the conversations had any relationship to Debra's trial.

Lastly, the Court held the evidence was sufficient to support Debra's conviction because her March 18<sup>th</sup> confession was corroborated by the location of the victim's body, the autopsy results and the physical evidence obtained during the search of her home.

Debra's conviction and life sentence were affirmed.

***Commonwealth v. Hay,***  
**987 S.W.2d 792 (Ky. Ct. App. 2/27/98)**

The defendants were charged with numerous offenses in a multi count indictment. Three counts charged the defendants with theft by failure to make the required disposition of property over \$300.00 in violation of KRS 514.070. The charges were the result of the Franklin County Jailer and his wife having had four vending machines installed in the Franklin County Jail and using county employees to stock and tend the machines during working hours. The defendants received all profits from the machines and they did not turn over any of the monies nor make any accounting of the monies to the Franklin Fiscal Court.

Prior to trial, the Hays moved to dismiss the three counts as violating due process because they did not have "fair warning" that their conduct in retaining the monies was criminal. After a hearing was held on the motion to dismiss, the trial court granted the motion "based upon the authorities cited by the defendants in reliance thereon."

The Commonwealth appealed the trial court's ruling.

The Kentucky Court of Appeals held that since a trial court lacks the authority to use a summary judgment procedure in a criminal case, dismissal of the three counts of the indictment prior to trial when the indictment was not defective was improper.

The Court of Appeals also held there was no violation of the defendants' due process rights since KRS 514.070(3) was on the books prior to the defendants' conduct. "The statute criminalizes the failure to make required disposition of property and specifically provides that government officers and employees are presumed to know their legal obligations under the statute." Also, Section 173 of the Kentucky Constitution prohibits a public official from "receiving, directly or indirectly...profit or perquisites arising from the use or loan of public funds."

The trial court's dismissal of the three counts of the indictment was reversed and the case was remanded for further proceedings.

***Newcomb v. Commonwealth,***  
**964 S.W.2d 228 (Ky. Ct. App. 3/6/98)**

In 1996, Newcomb was charged with operating a motor vehicle (OMV) while license is revoked or suspended for driving under the influence (DUI), third offense. Newcomb had previously been convicted of said offense in 1991, 1992 and 1994. Since Newcomb's 1994 offense was his third offense, it resulted in his conviction of a Class D felony at that time. The 1996 charge was alleged to be a third offense on the basis of the two prior convictions in 1991 and 1992. Newcomb also had been convicted of a felony in 1974. The 1996 indictment also charged Newcomb with being a first-degree persistent felony offender (PFO) based on the 1974 and the 1994 convictions. After a jury trial, Newcomb was convicted of both charges.

Prior to trial Newcomb moved to dismiss the PFO charge on the basis of double enhancement because the 1991 and 1992 charges were the basis for elevating the 1994 misdemeanor OMV charge into a felony which was then used to support the charge of PFO I.

Relying on *Eary v. Commonwealth*, 659 S.W.2d 198 (Ky. 1983), and *Jackson v. Commonwealth*, 650 S.W.2d 250, 251 (Ky. 1983), the Court of Appeals held the 1991 and 1992 OMV offenses may be used to enhance the 1996 charge to a felony. The 1994 felony OMV charge has "the status of any other offense at a subsequent trial" and may be used to support the PFO charge without constituting double enhancement.

Also prior to trial, the parties and the court discussed whether Newcomb's prior convictions for OMV while license is revoked or suspended for DUI could be introduced in the guilt phase of his trial. The trial court made no ruling, and the Commonwealth introduced the prior convictions into evidence during the guilt phase with no objection by Newcomb. On appeal, the Commonwealth conceded it was error to introduce said convictions under *Ramsey v. Commonwealth*, 920 S.W.2d 526 (Ky. 1996). However, the Court of Appeals held the error was harmless because Newcomb admitted at trial he was driving while his license was revoked or suspended due to DUI and he received the minimum sentence of one year. Newcomb's convictions were affirmed.

***Moore v. Commonwealth,***  
**96-CA-2652-MR**  
**(Ky. Ct. App. 3/13/98)**  
**Not Published**

The issue before the Court of Appeals in this case was whether a defendant who had been indicted but had not yet been arraigned on the charges was "awaiting trial" within the meaning of KRS 533.060(3).

Moore argued that he was not "awaiting trial" because he had not yet been arraigned. The Kentucky Court of Appeals disagreed and held that a defendant is "awaiting trial" once he is indicted on the charges.

***Beatus v. Commonwealth,***  
**965 S.W.2d 107 (Ky. Ct. App. 3/20/98)**

Beatus was convicted in the McCracken District Court of operating a commercial vehicle under the influence of alcohol under KRS 281A.210. Penalties were imposed pursuant to KRS 189A.010. The McCracken Circuit Court affirmed Beatus' conviction and sentence. The Kentucky Court of Appeals granted Beatus' motion for discretionary review.

The sole issue before the Court of Appeals was whether the penalties set out in KRS 189A.010 can be imposed upon a person convicted under KRS 281A.210.

The Court of Appeals held that the district court erred when it commingled the two statutory chapters and allowed the defendant to be prosecuted under one chapter and punished under the other chapter. By electing to prosecute Beatus under KRS 281A.210, the Commonwealth was bound to select a punishment for Beatus from the same chapter. It could not select a punishment from KRS Chapter 189A for a violation of an offense in KRS Chapter 281A.

The case was reversed and remanded with orders that Beatus' punishment be selected from the provisions of KRS Chapter 281A.

**TRUTH IN SENTENCING REAL CHANGES FROM THE CRIME BILL**

The Legislative session that recently completed its work made significant changes in the law for the criminal defense practitioner. Many of these changes are in the Crime Bill including some of the most significant changes made in KRS 532.055, also known as Truth in Sentencing since its passage. All trial attorneys should study the changes closely, and be aware of the enormous impact the changes will have on the defense practice.

The first change that will impact defendants is the addition of a section in the law allowing victim impact information to be presented to the sentencing jury (note the use of the phrase "may offer" at the beginning of this section). Specifically the law provides for the jury to hear "The impact of the crime upon the victim, as defined in KRS 421.500, including a description of the nature and extent of any physical, psy-chological, or financial harm suffered by the

victim.” The defense attorney must develop a pre-trial motion practice to set the limits for this part of the trial. The definitions in KRS 421.500 indicate specific persons who can be a victim or stand in for a victim. Not everybody can testify. The court must first find the offered witnesses meet the statutory definitions.

Clients must be advised that the jury that finds them guilty will hear victim information. The jury setting the sentence will now hear information that was previously seen only by the Judge, often after the sentence was determined. The defense attorney in advising the client cannot underestimate the potential impact of this change. The most positive change for the defendant reads: “The defendant may introduce evidence in mitigation or in support of leniency.” The old language about negating the prosecution's evidence and limiting defense proof to no significant criminal history is gone. With the language change, the defense attorney must now look to the client as the foundation of proof for the penalty phase.

What is it about this person that calls for leniency? Is it job history, jail history (similar to Skipper evidence in Capital cases), family issues, health issues, victim of domestic violence, good deeds, or lesser culpability? The list goes on. A list limited only by our ability to show, that which makes this person qualify for leniency. Leniency is a word with great possibilities. I found it defined in Webster's II New Revised University Dictionary as the act of being lenient, not harsh, merciful. There could not have been a richer field to plant in then was laid out in this statute. It is up to the defense attorney to take the next steps to yield a bumper crop.

Finally, the Legislature amended section three by combining the non-capital phase with the Penalty phase of capital trials under 532.080. This change in conjunction with the new life without parole provision will alter death penalty litigation in significant ways. However, for the purposes of this article I have only noted the change. What should the defense practitioner do with these changes? I suggest a vigorous pre-trial motion practice for dealing with the victim impact evidence. A client centered penalty phase, which maximizes the potential for mitigation and leniency is the next step. Preparing death penalty cases with the changes in the penalty phase in mind rounds out the steps the defense practitioner must take. For the last decade, we on the defense side have not prepared penalty cases for all felony trials. A statute that left little room to focus on our client and his situation stopped us. We must change our approach. Let us begin with the people most affected by the outcome of the sentencing part of any trial, our clients.



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# PLAIN VIEW

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***Baker v. Commonwealth***  
**96-CA-0876-MR**  
**(Ky. Ct. App. 1/30/98)**  
**Not Published**

Two officers saw a known prostitute and Baker on a corner in Lexington. The officers told them to leave, and they did. However, when the officers returned, the two were back. The officers stopped and approached Baker and the prostitute. Baker had his hands in his pockets. The officer asked Baker to "remove his hands from his pockets so that the detective could see his hands," although the officer would later say he "had not reasonable suspicion that Baker already had committed a crime or was about to commit a crime." When Baker did not remove his hands, the officer repeated his order. Baker then took his hands out of his pockets and threw a crack pipe on the ground along with suspected crack cocaine.

Baker was arrested and charged, and later moved to suppress the search, which was overruled. The trial court found that there "was no stop," but that if there was a stop that there was an articulable suspicion due to Baker's keeping his hands in his pockets. Further, the judge found that there was no search because Baker threw the pipe and cocaine to the ground.

The Court of Appeals in an opinion written by Judge Abramson affirmed the trial court. The Court first held that there was not a seizure when the police first approached Baker. "The initial request that Baker take his hands from his pockets was merely a pre-seizure consensual encounter." Nor did asking Baker to take his hands from his pockets convert a consensual encounter into a seizure.

However, the Court went on to hold that when the officer ordered Baker to take his hands from his pocket, a seizure had occurred. This seizure was not unreasonable because there were articulable facts justifying the officer's belief that criminal activity may be occurring. The Court relied upon Baker's initial refusal to take his hands from his pocket, the fact that this all occurred in a high crime area at night, that Baker was "wearing baggy clothes that could easily have concealed a weapon, and he was in the company of a known prostitute." Based upon all of these facts, the officer could legally require Baker to take his hands from his pockets.

Finally, the Court found that no search had occurred when Baker took the crack pipe and cocaine and threw them to the ground. "Baker's voluntary dropping or throwing of the crack pipe and drugs does not constitute a search."

***Wells v. Commonwealth,***

**96-CA-1767-MR (Ky. Ct. App. 2/30/98)**

The Court of Appeals decided another drug case with search and seizure overtones recently. Unfortunately, this decision is not to be published. In this case, agents of the Buffalo Trace Narcotics Task Force were working with a confidential informant to purchase 30 pounds of marijuana for \$70,000. The informant went to the Wells' farm and was shown 10 pounds of marijuana; thereafter he was told that another person would deliver the rest of the marijuana.

The next morning, the informant went back to Wells' farm accompanied by four agents. The agents overheard on the informant's wire that the agents should "come on in." The agents entered the property and arrested Wells in the yard. The agent and the informant went to the barn and found the marijuana in a milk tank. Then a search warrant was obtained, producing cash and drugs.

The trial court found that the search of the barn was justified by the "consent once removed" doctrine. The Court of Appeals disagreed and reversed in an opinion written by Judge Gudgel.

The Court noted that the consent once removed doctrine was not based upon a Kentucky case, nor had it been adopted by the Sixth Circuit. The doctrine was outlined in *United States v. Akinsanya*, 53 F. 3d 852 (7<sup>th</sup> Cir. 1995): the doctrine is applicable "'where the undercover agent or government informant: (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers.'" The Court questioned whether this doctrine was consistent with Section 10 of the Kentucky Constitution. The Court further stated that it would leave to the Kentucky Supreme Court the decision to adopt this new doctrine.

As a result, the Court held that the Commonwealth had failed to justify a warrantless search and seizure. The Commonwealth had "made no showing justifying the warrantless search herein under any of previously recognized doctrines such as emergency, exigent circumstances, plain view or search incident to arrest."

***Richardson v. Commonwealth,***  
**975 S.W. 2d 932**  
**(Ky. Ct. App. 3/6/98)**

This is one of the last cases I handled as a trial lawyer in Richmond. It has come to the Court of Appeals on a conditional plea following the overruling of the defendant's motion to suppress in Madison Circuit Court.

The case involved the arrest of the defendant following the receipt of an anonymous tip saying that someone was driving drunk on I-75. Trooper Adams saw the car meeting the tipster's description, and pulled the car over after witnessing the driver weaving, crossing the center line, and failing to signal. Richardson was asked to get out of the car. He had his hands in his pocket, and failed to take his hands out of his pocket upon four different requests. Adams asked Richardson if he had a weapon, and received a denial. Adams would later claim to hear plastic rustling. Adams proceeded to reach into Richardson's pockets and pull out marijuana. A search of the remaining pockets revealed fourteen baggies of cocaine.

The trial court found that the drugs would have been discovered in a search incident to arrest, and that the police had probable cause to search based upon smelling marijuana in the car and the officer's knowledge that "baggies are commonly used to package controlled substances and marijuana."

On appeal, in an opinion written by Judge Emberton, the Court of Appeals sustained the ruling by the Madison Circuit Court. The Court agreed that the search could not be sustained as a "plain feel" search under *Crowder v. Commonwealth*, Ky., 884 S.W. 2d 649 (1994). However, the Court found that there "was independent probable cause justifying the search." The Court found that "probable cause existed to conduct a search of appellant's person." However, the Court did not identify the exception to the warrant requirement; nor did the Court cite to a case upholding the proposition that a person can be searched without a warrant where there is probable cause to believe that he has contraband on them. The Court also found that there was probable cause for an arrest, and that "a search and seizure incident to appellant's lawful arrest inevitably would have produced the contraband." In essence, the Court held that where the officer intended to arrest the defendant, and the discovery of contraband was inevitable, that the search incident exception can be utilized to justify the warrantless search and seizure.

Russ Baldani has filed a motion for discretionary review in this case. The reason for granting review was a creative one: "in upholding the warrantless search of movant's person, the Court of Appeals relied upon the probable cause automobile exception to the warrant requirement, effectively creating an entirely new exception to the rule against warrantless searches of individuals."

***Combs v. Commonwealth,***  
**965 S.W. 2d 161 (Ky. 3/19/98)**

The Kentucky Supreme Court has reversed the decision of the Court of Appeals in this case. You will recall that Combs had been arrested for DUI, refused testing after the field sobriety tests, including a blood test. In reaction, the officer obtained a search warrant, and Combs' blood was seized. Combs challenged this, saying that the police could not seize his blood involuntarily, and that the only time this could be done was pursuant to a warrant following an injury accident, citing KRS 189A.105(2)(b).

The Court of Appeals had affirmed the trial court, saying that while the plain meaning of the statute was that blood could not be seized involuntarily with a warrant outside of the injury accident exception, that KRS 189A.105(2)(b) was an "unconstitutional infringement on the powers of the judiciary to the extent that it attempted to limit when a search warrant may be issued." Thus, the statute was a "violation of the separation of powers provisions of the constitution."

The Supreme Court, in an opinion written by Justice Wintersheimer for a unanimous Court, reversed the Court of Appeals. The Court stated that KRS 189A.105(2)(b) meant that no person could be compelled to submit to any test in a DUI case other than the exception of an injury accident. This is a "limitation on the power of government." Neither the Fourth Amendment or Section Ten establish the right to obtain warrants or to issue warrants; rather, "the constitutional sections place restrictions on when the executive branch of the government can conduct any search or seizure." Thus, KRS 189A.105(2)(b) is not unconstitutional because it is an "attempt to regulate and limit when a search warrant may be issued."

The Court also rejected the Court of Appeals' separation of powers argument by relying upon the concept of comity. "The establishment of reasonable conditions upon the issuance of a search warrant in a non-injury DUI case is no less statutorily acceptable than a complete overhaul of the trial procedure as upheld in *Commonwealth v. Reneer*, Ky., 734 S.W. 2d 794 (1987).

This is an important decision for the DUI practitioner. It clearly establishes the absolute right of the legislature to regulate in this area. It establishes that a person has a right to refuse to take tests in the normal DUI case. Of course, nothing in the opinion reduces the penalty for refusing to submit to tests; nothing changes the implied consent portion of the statute. However, what the opinion does do is clearly establish that a warrant cannot be issued when the statutory exception does not exist.

In the long run, however, the decision was not helpful to Combs. The Court found that "due to the overwhelming evidence of Combs' intoxication at the time of his arrest, the blood test evidence was merely cumulative and, thus, harmless error in this case."

## Short View

- 1. *United States v. Kennedy***, 131 F.3d 1371 (10th Cir. 12/3/97). Giving incomplete information regarding a narcotics dog was not sufficient to spoil a warrant issued as a result of evidence discovered by the dog. Here, the State had failed to disclose that the dog's handler had not maintained the dog's field records nor had he personally trained the dog. That was not sufficient to constitute a *Franks v. Delaware*, 438 U.S. 154 (1978) violation. "We...hold that, even assuming that Lujan's carelessness had been disclosed in the affidavit, the affidavit would have been sufficient to establish probable cause, especially given the other facts in the affidavit..."
- 2. *United States v. Jones***, 133 F.3d 358 (5<sup>th</sup> Cir. 1/20/98). Fifteen-twenty seconds is sufficient to comply with the constitutional knock and announce requirements. The Court noted that because drug traffickers can dispose of evidence quickly, that a forced entry after 15 seconds does not violate the Constitution under the circumstances of this case.
- 3. *State v. Tolsdorf***, 574 N.W.2d 290 (Iowa, 1/21/98). A person who is arrested and then requests to secure his car is vulnerable thereafter to having the car searched under *New York v. Belton*, 453 U.S. 454 (1981) according to the Iowa Supreme Court.
- 4. *State v. Scott***, 951 P.2d 1243 (Haw. 1/8/98). The Hawaii Supreme Court has held that anticipatory warrants violate Hawaii statutes authorizing the issuance of warrants. No opinion was rendered regarding the constitutionality of these warrants.
- 5. *United States v. Cooper***, 133 F.3d 1394 (11<sup>th</sup> Cir. 1/26/98). A person with a rental car retains a reasonable expectation of privacy in the car even when the car is overdue. "In our view, Cooper retained a sufficient amount of control and possession over the rental car for it to fall within the zone of constitutional sanctity."
- 6. *United States v. Guitterez***, 59 Cal.Rptr. 491 (DC N.Cal. 1/23/98). An undocumented person has standing to challenge a search and seizure, despite dicta in *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990). "Given the lack of any clear appellate guidance which alters the applicable standard or otherwise sets forth a definitive analysis in making these vital determinations, the Court is disinclined to impose a greater burden on this category of criminal defendants as a prerequisite to seeking the shelter of the Fourth Amendment. To adopt the Government's position that illegal aliens presumptively enjoy no Fourth Amendment protection would require federal courts, without any consistent or clear standard, 'to jump into a quagmire of weighing relative "societal obligations" in determining the applicability of the Fourth Amendment to illegal aliens within the United States.'"

7. **Graham v. State**, 705 A.2d 82 (Md., 2/2/98). A 25-minute detention of a passenger during a traffic stop while waiting for a drug dog violates the Fourth Amendment. The New Jersey Supreme Court reached the same conclusion with a one hour search in *State v. Dickey*, 62 Cr. L. 1498 (N.J. 3/4/98)
8. **Minnesota v. Carter**, 118 S.Ct. 1183 (3/9/98). The Supreme Court has granted cert. from *State v. Carter*, 569 N.W. 2d 169 (Minn. 1997). The issue is whether a person invited into a residence in order to commit an illegal act has a reasonable expectation of privacy or not. A secondary issue is whether an officer can use extraordinary means to peer inside a residence.
9. **State v. Titus**, 707 So. 2d 706 (Fla. 3/5/98). People living in rooming houses have a reasonable expectation of privacy in the common areas such as kitchens and hallways, according to the Florida Supreme Court. Quoting from a New York Court, the Court states that "'it is economic necessity that requires those who live in such humble circumstances to dwell there. That they cannot afford to have their own kitchens and bathrooms, and hallway access thereto, does not render such areas "public" with respect to the constitutional prerequisites for permissible entry by the police.'"
10. **State v. Barney**, 708 So. 2d 1205 (La. Ct. App. 5<sup>th</sup> Cir. 2/25/98). The police cannot use the plain feel exception to open a matchbox lawfully seized during a Terry frisk. This search and seizure also violated the "plain feel" exception of *Minnesota v. Dickerson*, 508 U.S. 366 (1993). Once the matchbox was seized, it was neither readily identifiable as contraband nor did it raise safety concerns, and thus could not be opened.

### Articles of Interest

"Driving while black" and all other traffic offenses: the Supreme Court and pretextual traffic stops. Harris, David A., 87 *J. Crim. L. & Criminology* 544-582 (1997)

The appellate role in ensuring justice in Fourth Amendment controversies.... (*Ornelas v. United States*, 116 S.Ct. 1657 (1996), 7 Grybowski, Jeffrey M., Note. 5 *N.C.L.Rev.* 1819-1847 (1997).

**Sat. 3-28-98- AFGHANISTAN:**

2 Afghans convicted of murder had their throats cut by their victims' relatives on Friday before about 30,000 spectators in Kabul's sports stadium. The convicts, their legs shackled and hands tied behind their backs, were made to kneel on the grass. Their throats were then cut with knives after the murder victims' families refused a Taleban appeal to for-give the convicted killers.

The convicts -- Sulaiman, in his late 20s, and Mehrajuddin, about 40 -- had been driven to the stadium in a car with tinted glass. "This is not a place for picnic. It is for others to repent...be it murder, theft or adultery, and to protect the honor of our countrymen," said a Taleban speaker wearing a white turban. Spectators, including women and children, shouted and yelled as blood poured from Sulaiman's throat after it was cut by Saleh Mohammad, whose son and em-ployer had been murdered. A few meters (yards) away, another man, Aziz, did the same to the other convict, Mehra-juddin, to avenge the murder of his father.

After the executions, both Aziz and Saleh Mohammad shouted slogans in support of the Taleban for enforcing a strict Islamic law in 2/3 of Afghanistan under its control. "I feel better now," Saleh said. "He (Sulaiman) had mercilessly killed my son and my boss with a knife. And now my heart is relieved."

Under Islamic law, a murderer should be executed by he victim's family members or be acquitted. Friday's throat-cuttings were 1st such executions in the Taleban territory for murder. 2 weeks ago, one man was shot from behind in Kabul on the charge of murder while many people have been given Islamic punishments also for crimes such as adul-tery, theft and murder.

(Source: Reuters) - Rick Halperin, AI-Texas



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# Capital Case Review

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The first part of this article concerns the litigation surrounding the July 1, 1997 execution of Harold McQueen, Jr., beginning with the Sixth Circuit Court of Appeals decision affirming the district court's denial of Mr. McQueen's habeas petition. The second half concerns Kentucky Supreme Court cases. The July article will report on cases from the United States Supreme Court and the lower federal courts.

***McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996)**

**Majority: Boggs (writing), Kennedy**

**Minority: Keith**

Harold McQueen, Jr. was convicted of the 1981 murder of Rebecca O'Hearn, a convenience store clerk in Richmond, Kentucky. After his convictions were affirmed, Mr. McQueen filed a state post-conviction action, which was overruled and affirmed by the Kentucky Supreme Court. *See McQueen v. Commonwealth*, 669 S.W.2d 519 (Ky. 1984); *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1987).

## Ineffective Assistance Of Counsel

The majority first described the standard for ineffective assistance of counsel: 1) counsel's deficient performance; which 2) so prejudiced the defendant as to render the trial unfair and the result unreliable. *Strickland v. Washington*, 104 S.Ct. 2052 (1984). However, the majority opined that *Lockhart v. Fretwell*, 113 S.Ct. 838 (1993) clarified *Strickland* by "instruct[ing] courts] to focus on whether counsel's errors have undermined the reliability of and confidence in the result, i.e., can one confidently say that the trial or proceeding has reached a fair and just result." *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996).

Dr. Martin Gebrow, a psychiatrist called in the penalty phase testified about Mr. McQueen's past and his family history and that Mr. McQueen was a sociopathic personality and that it was possible for a person to become acclimated to heavy drinking and drug use. [N.B. the court found this information from one paragraph in Gebrow's testimony].

Trial counsel, faced with the dilemma of having **no** expert testimony and **some** testimony placed in the best possible light, made the "reasonable tactical decision under the circumstances" to have Gebrow testify. Gebrow had told trial counsel that Mr. McQueen was "just a mean boy", but also said that he would "lean as far as [he could]" to testify in Mr. McQueen's behalf. *Id.*, 99 F.3d at 1313.

### **IAC--Decision Not To Call Family Members**

The court acknowledged that calling family members to the stand humanizes the defendant, but after examining the facts, determined that in this case, counsel's decision not to was reasonable. One member of the venire had been dismissed because he was the victim of a crime Mr. McQueen's father committed. It was well known that the senior McQueen was an alcoholic; "it was reasonable for Fish to fear that the proverbial sins of the father would be visited on the son." *Id.*, at 1314. Trial counsel testified that he felt Mr. McQueen's family had a bad reputation, and that the jury would hold it against his client.

Furthermore, the three family members Mr. McQueen alleged should have been called as witnesses knew little about Mr. McQueen's adult life. "Taken as a whole, it cannot be said that the decision not to call witnesses who knew little about McQueen's adult life amounted to ineffective assistance of counsel." *Id.* Mr. McQueen failed to meet either *Strickland* prong, much less *Fretwell*.

### **Reliance On Co-Defendant's Counsel**

Mr. McQueen's co-defendant, his half-brother, Keith Burnell, was represented by private counsel. Mr. McQueen argued that Fish abdicated his responsibility to his client by relying on co-counsel to make certain motions. "Fish did make motions when it was necessary to protect his client's interest"; he moved for a psychiatric evaluation, for additional time to obtain an expert, and for funds to pay that expert. The court found, more importantly, that Mr. McQueen did not identify "a single motion" Fish should have made and did not. Thus, no prejudice resulted. *Id.*, 99 F.3d at 1316.

### **Decision Not To Seek A Separate Trial**

Fish's decision not to seek a separate trial was a reasonable, tactical decision, because he hoped that Mr. McQueen could "hide behind his less culpable half-brother." *Id.* Mr. McQueen was not prejudiced; it was clear that any motion to sever would have been denied.

### **Jury Composition Challenge**

McQueen's argument that women were systematically excluded from the jury panel failed because he did not produce any evidence that the allegation was true. It was also difficult for the court "to conclude that it is ineffective assistance of counsel for an attorney not to challenge the purported under-inclusion of females when the accused is a male accused of murdering a young woman." *Id.*, 99 F.3d at 1317.

### **IAC Claims Not Based In Fact**

Mr. McQueen argued that he had never been advised of his right to testify at the penalty phase because trial counsel and the judge had not made it clear after he decided not to testify at the guilt phase, that he had a right to testify at both phases of the trial. The issue was not subject to habeas review because the state post-conviction court made a finding of fact that Mr. McQueen had been advised of his right to testify at the penalty phase. The Kentucky Supreme Court's conclusion was presumed correct because it was fairly supported by the record. *Id.*, citing 28 U.S.C. §2254(d); *Patton v. Yount*, 104 S.Ct. 2885 (1984).

In deciding whether Fish was ineffective for failing to develop a strategy to deal with pre-trial publicity, the court

examined the copies of articles included in the joint appendix, and determined that 33 of 55 articles dealt with trial or post-trial developments and were not "pre-trial" publicity. Of the remaining articles, most were contemporaneous with the crime, which occurred one year before the trial.

Fish's decision not to seek a separate trial was based on four factors: his belief that 1) jurors in nearby Fayette County would be more likely to impose the death sentence; 2) the Madison County judge hearing the case was more competent to hear a case than judges in an adjoining county; 3) because Madison County housed two colleges, Mr. McQueen would have a more intelligent jury willing to listen to the evidence presented; and 4) the pre-trial publicity was not that bad. "This is just the type of reasonable tactical decision that is insulated from attack. Nowhere does McQueen offer any credible evidence that these reasons are not valid." *Id.*, 99 F.3d at 1318.

"When the totality of Fish's work is reviewed, our conclusion is that he exceeded the constitutional standard. Fish was not a perfect attorney, but the Constitution does not require perfection. What the Constitution requires is an attorney capable of advancing his client's interest." *Id.*

### **Juror Leo Johnson**

Leo Johnson, a venireman, admitted during voir dire that he was a friend of two police officers who had investigated the case, that he knew the police chief, and had a passing acquaintance with the star prosecution witness. The trial court refused to excuse Johnson for cause, and counsel had to use a peremptory challenge. *Id.*, 99 F.3d at 1320, quoting *Patton v. Yount*, 104 S.Ct. at 2892. The trial judge's determination of Johnson's credibility is entitled to great deference because there was fair support in the record for his conclusion. Johnson made it clear that he was willing to weigh the testimony without relying on his acquaintance with witnesses; he could put aside whatever contamination had occurred from his reading of pre-trial publicity; and he accepted Mr. McQueen's right not to testify and presumption of innocence. *Id.*, 99 F.3d at 1320.

### **Excusal Of Juror Sherry Winkler**

Juror Sherry Winkler was dismissed from the panel after the trial began, purportedly because she had made statements about her attitudes toward the death penalty. The prosecutor first mentioned Ms. Winkler because a spouse of one of the veniremen had told him "in strictest confidence" that Ms. Winkler had stated she did not know why she was left on the panel when she had made it clear that she could not give the death penalty. The trial court questioned Ms. Winkler about her statements and, satisfied with her answers, determined that she would not be dismissed from the jury.

However, on the following day, the prosecutor again approached the judge, saying that Ms. Winkler's brother-in-law, a policeman, told him that at a family gathering on the Sunday prior, he had spoken with Ms. Winkler about her duties, and that she had told him that she could not give anyone the death penalty. The judge then stated that someone had approached him and said that Ms. Winkler had said to some members of the faculty of the high school where she taught that she did not understand why she had been left on the jury when she had made it clear that she could not give the death sentence. After taking testimony from Officer Winkler and Ms. Winkler, the court determined that Ms. Winkler had violated her oath as a juror and disqualified her.

The Kentucky Supreme Court twice found that the judge's decision was correct. See *McQueen v. Commonwealth*, 669 S.W.2d 519, 521 (Ky. 1984); *McQueen v. Commonwealth*, 721 S.W.2d 694, 700-01 (Ky. 1987). McQueen did not offer any persuasive evidence that Winkler had not violated her admonition; in fact, the facts surrounding her conversation with her brother-in-law indicated just the opposite. *Id.* Winkler's dismissal did not violate the constitution, because Mr. McQueen did not have a right to have particular person sit on his jury.

## Voir Dire

McQueen's argument that he was not allowed to ask *voir dire* questions regarding juror attitudes toward alcohol and drug use fails; the one question excluded by the trial court dealt with a legal standard, and was correctly excluded. Other permissible questions investigated jurors' attitudes toward alcohol and drug use. The court did not violate the dictates of *Morgan v. Illinois*, 112 S.Ct. 2222 (1992); each juror was asked whether he could impose any penalty within the range given. *Id.*, at 1329.

## Fed.R.Civ.P. 60(B) Appeal

Mr. McQueen's motion under Fed.R.Civ.P. 60(b) included allegations of ineffective assistance of appellate counsel and organic brain damage. The majority agreed with the district court's determination that the motion was a successive habeas petition and an abuse of the writ. *Id.*; citing *McCleskey v. Zant*, 499 U.S. 467 (1991), which held that abuse of the writ exists when a petitioner fails to raise or present a claim in his initial petition, whether that failure is the result of a deliberate choice or inexcusable neglect and fails to disprove the government's allegation of abuse of the writ.

The rules do not require that a petitioner be given notice that the trial court may find "abuse of the writ"; Mr. McQueen's notice came from the respondent's brief, which alleged abuse of the writ, rather than responding to the merits of the issue. *McQueen*, 99 F.3d at 1335. The second claim, that the motion was not an attempt at a successive habeas petition, "is both legally and factually implausible." *Id.*, citing *Blair v. Armontrout*, 976 F.2d 1130 (8th Cir. 1992); *Lindsey v. Thigpen*, 875 F.2d 1509 (11th Cir. 1989); *Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1990); *Jones v. Murray*, 976 F.2d 169 (4th Cir. 1992); *Clark v. Lewis*, 1 F.3d 814 (9th Cir. 1993); *Williams v. Whitley*, 994 F.2d 226 (5th Cir. 1993). Thus, because Mr. McQueen "never made a colorable attempt" to prove cause and prejudice for not raising the claims in his initial habeas, the district court was correct. *Id.*, 99 F.3d at 1335.

## Dissent

In a ringing dissent, Judge Keith addressed several ineffective assistance of counsel claims and the *Morgan* issue.

## IAC--Conflict Of Interest

It was clear to Keith that Jerome Fish's "failure to act independently" of Mr. McQueen's co-defendant's counsel gave rise to an actual conflict of interest, especially in light of Fish's testimony that he and the other attorney acted "as 'co-counsel' and that he shared his trial strategies with [the other counsel]". *Id.*, 99 F.3d at 1336. On the other hand, the other attorney testified that his strategy was to paint Harold McQueen as the triggerperson, "responsible not only for the death of the victim, but also for the corruption of his client, Burnell." *Id.* This was made clear in closing argument, which reminded the jury about McQueen's past violent behavior and how "immature" and "easily led" his half-brother was.

"Fish, in his characteristically oblivious fashion, did not notice or object" to the remarks. . . On the contrary, Fish responded by telling the jurors that his 'co-counsel gave a beautiful summary' of the case. . . [and] reminded the jury to heed" co-counsel's words. *Id.*

## IAC--Failure To Investigate

Fish did not perform any of the tasks outlined in *Burger v. Kemp*, 483 U.S. 776 (1987) as indicators of sound legal

representation. He did not investigate Harold McQueen's background, which would have revealed a troubled childhood and a long-term addiction to drugs and alcohol. "[I]t is apparent that Fish did not do enough work to even make a reasonable decision as to whether an investigation into McQueen's background should have been conducted." That decision cannot be deemed "reasonable. . . under the circumstances." *Id.*, 99 F.3d at 1338; citing *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992).

### **IAC--Failure To Prepare Expert**

The prejudicial effect of Fish's failure to prepare Dr. Martin Gebrow "is best summed up by co-defendant's counsel, who stated, 'I just almost went through the chair. I was just so shocked to hear that from McQueen's own witness'" that McQueen was "just one of those asses. . . you know what I mean, just bad." *Id.*, 99 F.3d at 1339.

### ***Morgan* Issue**

The majority's reasoning that jurors were indirectly questioned about their propensity to automatically impose a death sentence "is reminiscent" of that rejected by the *Morgan* court. *Id.*

Petition for certiorari was denied on June 2, 1997. Late in June, a CR 60.02 motion and Motion for Stay of Execution were filed in the Madison Circuit Court. That court denied both motions, finding his 60.02 both untimely and meritless.

***McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. June 26, 1997).**

**7-0 decision.**

### **Purpose Of CR 60.02**

RCr 11.42 and CR 60.02 are interrelated. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), citing *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). In a criminal case, each plays a separate role: RCr 11.42 proceedings provide an opportunity for a person in custody to present grounds to overturn his sentence. CR 60.02 is not another opportunity to present the same grounds, but a substitute for Writ of *coram nobis* proceedings. *Id.*, citing *Gross*. Nothing in *Fryrear v. Commonwealth*, 920 S.W.2d 519 (Ky. 1996) changed those principles.

### **New Evidence**

In January, 1994, habeas counsel found an entry in the police investigative file which indicated that Mr. McQueen claimed several days after the 1981 robbery/murder of Rebecca O'Hearn that his half-brother, Keith Burnell, had actually committed the murder.

Motions for relief because of newly discovered evidence must be filed within one year after entry of the final judgment. CR 60.02(b). Even if it could be argued that the evidence was deliberately concealed, a defendant is still precluded from raising the issue after the expiration of one year from the date of discovery. In other words, Mr. McQueen should have filed a motion dealing with the new evidence before January 11, 1995. A motion under Fed.R.Civ.P. 60(b) was filed in the federal district court on May 5, 1994; it did not include the new evidence as part of the grounds for relief.

The evidence was not "newly discovered"; it was in no way *Brady* evidence but a statement Harold McQueen himself made. Thus, evidence about which Harold McQueen knew could not have been "newly discovered". Moreover, the

Madison Commonwealth's Attorney had an open file discovery policy. The admission could not be classified or admitted as a prior statement under KRE 801A(a).

CR 60.02 provides a mechanism for a new trial, not a commutation to life without parole. *Id.*

### **Changed Condition**

Mr. McQueen requested a stay in order to present evidence of his changed character during his incarceration. The court was "unpersuaded" by *State v. Richmond*, 886 P.2d 1329 (Ariz. 1994), in which the Arizona Supreme Court commuted a death row inmate's sentence to life because of the evidence of his changed character. The Kentucky court believed the more proper route was through a request for executive clemency under §77 of the Kentucky Constitution.

Cert was denied on the CR 60.02 motion on June 30, 1997.

### ***McQueen v. Patton*, 948 S.W.2d 418 (Ky. June 27, 1997) 7-0 decision.**

Mr. McQueen sought declaratory and injunctive relief on the grounds that Governor Paul Patton's policy of refusing to grant clemency to death row inmates violated §77 of the Kentucky Constitution. The Franklin Circuit Court dismissed Mr. McQueen's complaint.

In a press release issued when he signed Mr. McQueen's death warrant, the governor stated that his policy was not to grant clemency in cases where the death penalty had been recommended by a jury and imposed by a circuit judge because he would not "substitute [his] judgment" for that of Kentucky's legislative bodies, juries and judges. *McQueen v. Patton*, 948 S.W.2d 418 (Ky. 1997).

The Kentucky Supreme Court found "patently clear" that §77 mandated two things: that a movant file an application for clemency with the governor; and that the governor must file a statement of reasons for granting or denying clemency in each case. *Id.*

The Court was "unpersuaded" by Mr. McQueen's argument that the governor's announced policy made any effort to file a clemency application futile. Thus, because Mr. McQueen had not filed an application for clemency, no controversy existed, and the trial court properly dismissed his lawsuit for failure to state a claim.

Certiorari was denied on June 30, 1997.

### ***McQueen v. Parker*, 950 S.W.2d 226 (Ky. June 30, 1997)**

**Majority: Cooper, Graves, Lambert, Johnstone and Wintersheimer**  
**Dissenters: Stumbo (writing), Stephens**

The Kentucky Civil Liberties Union filed suit in Lyon Circuit Court seeking injunctive and interlocutory relief on a claim that execution by electrocution was cruel and unusual punishment in that it violated §17 of the Kentucky Constitution.

The court had a number of times previously decided that execution by electrocution was constitutional. It relied on those cases in "sustain[ing] the constitutionality of the statute. *McQueen v. Commonwealth*, 950 S.W.2d 226 (Ky. June 30, 1997), citing *Foley v. Commonwealth*, 942 S.W.2d 876 (Ky. 1996); *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997); other citations omitted. The court also noted that in other jurisdictions where a record was fully developed, similar claims had been rejected. *Id.*, citing *Sawyer v. Whitley*, 772 F.Supp. 297 (E.D.La. 1991); *Thomas v. Jones*, 742 F.Supp. 598 (S.D. Ala. 1990).

The court next "observe[d]" that Mr. McQueen had known since his conviction in 1981 that he was to die by electrocution. Bringing suit in which a hearing and expert testimony were demanded delayed less than two weeks before a scheduled execution delayed "enforcement of the judgement", and was untimely, especially in light of the court's rejection of previous challenges to the constitutionality of capital punishment.

Although some states had changed the method of execution from electrocution to lethal injection, all had not done so. Furthermore, the Kentucky General Assembly had not changed the method of execution. Therefore, the court felt this question of public policy should be dealt with by the Kentucky General Assembly.

### **Dissent**

Justice Stumbo, joined by Chief Justice Stephens, dissented, saying, "[i]n the rush to see that this long-delayed execution actually takes place," by foregoing an evidentiary hearing, the court abdicated its responsibility to see that both Kentucky law and the requirements of the Kentucky Constitution were honored by the judicial bodies of the Commonwealth of Kentucky.

Only after the execution warrant setting a date for execution was signed was the issue ripe for judicial examination.

Further, *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968), on which the majority relied, did not examine the means by which a person was to be executed; rather, the question was whether a colorable claim that societal views had changed could be made.

The fact that other courts had rejected the same issue was of little value. "Those jurisdictions are not Kentucky and may not have the rich tradition of zealously guarding the protections provided by our own Constitution." *Id.*

Harold McQueen was pronounced dead by electrocution at 12:15 a.m. CDT on July 1, 1997.

### **Kentucky Supreme Court**

***Baze v. Commonwealth*, 953 S.W.2d 514 (March 27, 1997) (Withdrawn from publication)**

**This case was removed from the West reporters between publication of the advance sheets and the hardbound copy.**

### **Affirmed**

**Majority: Wintersheimer (writing), Stephens, Baker, Graves, Stumbo**

**Minority: Stumbo (in part)**

Ralph Baze appealed from his conviction and death sentences for the shooting deaths of Powell County Sheriff Steve Bennett and Deputy Arthur Briscoe, as the officers were attempting to serve Ohio fugitive warrants on him. Baze confessed to the incidents, both to his arresting officers, and to a reporter from the *Courier-Journal* in January and February of 1992. *Baze*, slip opinion at 2, and 3.

### **Right To Present A Defense**

At trial, Baze admitted that he killed the two officers in self-defense, but said that he was under the influence of extreme emotional disturbance as the result of his in-laws' family feud. The court limited the amount of

testimony about the feud because it did not directly involve Baze and the two officers. *Id.*, slip opinion at 4.

Baze argued that a reasonable explanation of EED "may relate to any circumstance that could reasonably cause an extreme emotional disturbance." *Id.*, at 5, citing *McClellan v. Commonwealth*, 715 S.W.2d 464 (Ky. 1987). Justice Wintersheimer said the trial court had made the correct decision because the feud did not directly involve Baze and the officers. Presentation of evidence and the perimeters of cross-examination are within the trial court's "sound discretion." *Id.*, citing *Moore v. Commonwealth*, 771 S.W.2d 34 (Ky. 1988).

### **Admonition**

Baze testified that he resisted the first attempt to arrest him because he did not believe there were such charges and because the deputy did not have a warrant. He argued that the trial court's admonition to the jury that Baze's belief as to the existence of the Ohio charges was "legally irrelevant" to the events of January 30, 1992 prevented him from explaining his actions.

Baze was fully able to explain his beliefs; the admonition "merely informed the jury that under the law, Baze's beliefs were either incorrect or irrelevant to any claim of justification." *Id.*, slip opinion at 7.

### **Instruction On Imperfect Self-Defense**

The court correctly refused to instruct the jury on imperfect self-defense. Baze knew both men were police officers whose purpose in coming to his cabin was to arrest him. Baze knew that valid charges existed. There was no testimony that Deputy Briscoe pulled his gun when he first visited the cabin. *Id.*, at 7-8.

### **EED Instruction**

Baze's argument that the court's instruction told the jury that EED existed only if the jury found that Deputy Briscoe fired first was erroneous failed. All the witnesses save Baze testified that neither officer fired the first shot. *Id.*, at 9.

The court erred in giving an instruction requiring the Commonwealth to prove the presence of EED as an element of first-degree manslaughter because it required the Commonwealth to prove the absence of EED beyond a reasonable doubt in order to convict Baze of murder. Thus,

[t]heoretically, the jury could have found by a preponderance of the evidence, but not beyond a reasonable doubt, that Baze was or was not acting under the influence of extreme emotional disturbance. If so, the jury would have been required to acquit Baze of both charges.

*Id.*, at 11. However, Baze was not harmed by the error.

### **Victim Character Evidence**

The Powell County Coroner testified on direct that neither man could be described as an aggressive individual. On cross, defense counsel attempted to ask about an incident in which Deputy Briscoe shot out three tires of a vehicle he was chasing. The Commonwealth's objection was sustained, as was an objection to a defense attempt to place a copy of a newspaper article describing the incident and an attempt to call the person involved in the chase as a witness.

The testimony "marginally qualified" as evidence of the victims' peaceful character. Baze should have been permitted to inquire further into the matter. However, because further inquiry was not entered by avowal, and the error was unpreserved, "it is impossible to ascertain from the record whether the error was harmless or prejudicial." *Id.*

***Haight v. Commonwealth*, 938 S.W.2d 243 (Ky. 1996)**

### **Affirmed**

**Majority: Lambert (writing), Stephens, Baker, Graves, Stumbo, Wintersheimer**

**Not sitting: King**

In 1988, Randy Haight's death sentence from a guilty plea was reversed. *Haight v. Commonwealth*, 760 S.W.2d 84 (Ky. 1988). After an extraordinary writ to the Kentucky Supreme Court seeking enforcement of the original plea agreement entered into in 1985, was unsuccessful, *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992), Haight was tried and resentenced to death in Jefferson Circuit Court.

### **Jury Issues**

Haight argued that a juror who had read a newspaper article regarding the case prior to voir dire had failed to give full information during voir dire, prematurely decided the case and possibly furnished information to the other jurors. The juror admitted during voir dire that he had seen the article but could remember little about it other than the victims' names.

At a hearing on Haight's motion for new trial, the trial court made fact findings that the juror truthfully answered the voir dire questions and also found not "extraordinary in human experience" that as the trial passed, the juror would remember more of the article.

The court had not abused its discretion in those fact findings. "The trial judge was immersed in the case and it would be utterly extraordinary for an appellate court to disregard his view as to questions of candor and impartiality of a juror." *Haight*, 938 S.W.2d 243, 246 (Ky. 1996), citing *Riley v. Commonwealth*, 271 S.W.2d 882 (1954). The court also distinguished *Haight* from *Paenitz v. Commonwealth*, 820 S.W.2d 480 (Ky. 1991) (juror withheld information that she had spoken with a key witness) and *Randolph v. Commonwealth*, 716 S.W.2d 253 (Ky. 1986) (implied bias because juror did not reveal that she was employed by Commonwealth's Attorney).

### **Random Jury Selection**

After cause and peremptory challenges had been made, seventeen prospective jurors remained. In order to reduce the total to fourteen, the clerk wrote all seventeen names on pieces of paper and drew three names from the total. After a question regarding that procedure, the clerk returned the three names to the total and withdrew fourteen pieces of paper. The same three names were again withdrawn. The court first found no evidence of impropriety and then said that the first procedure was permitted under RCr 9.36.

### **Failure To Give Specific Instruction Regarding Certain Mitigation**

Haight presented extensive evidence of his childhood abuse and deprived family background. The only instruction regarding this evidence was found in the "catch-all" mitigation instruction--"any other circumstances arising from the evidence which you the jury deem to have mitigating value", which Haight argued violated the dictates of *Penry v. Lynaugh*, 492 U.S. 302 (1989).

In *Penry*, although the defendant presented evidence regarding his mental retardation, the jury could give the evidence no weight in its decision as to sentence. The United States Supreme Court found the Texas death penalty statute inadequate regarding non-statutory mitigating factors because the jury was never instructed that it could consider the mental retardation evidence in its sentencing decision. In *Haight*, there was no such restriction. Admission of the evidence and counsel's argument as to its significance "could have left no doubt in the mind of the jury that it had a right to consider such evidence in its penalty determination." *Haight*, at 246.

### **EED Instruction**

The penalty phase instruction told the jury that the extent of either extreme mental or emotional disturbance need not rise to the level that it would be a defense to the crime. It was therefore sufficient to let the jury know that the standard for the penalty phase mitigator of extreme emotional or mental disturbance was different from the guilt phase--defense standard.

### **Manslaughter First Instruction**

Haight argued that when the Commonwealth failed to prove the absence of EED in connection with the murder charge, the law results in a determination of guilt of manslaughter first. However, the court felt that the murder and manslaughter first statutes "go hand in hand": under the murder statute, if a person kills another person and is not under the influence of EED, he is guilty of murder. Under the manslaughter statute, the same action under the influence of EED mandates guilt of manslaughter first. Thus, in circumstances, such as in *Haight*, where there is evidence from which the jury could find EED, but is not required to do so, "it is entirely reasonable to submit both offenses to the jury for its finding." *Id.*, at 248.

Haight's tendered instructions lacked any mention of the mental state which distinguishes murder from manslaughter. Had they been given, the jury could have been "misled" to the conclusion that Haight's acts could only result in a conviction for manslaughter first. "A person cannot at once be not under the influence of EED and under the influence of EED. Such mental states are utterly inconsistent and a finding of one precludes the other." Finally, any error in the manslaughter instruction was rendered harmless by the jury's verdict of guilty for murder. *Id.*

### **Structure Of Verdict Forms**

The court understood the contention that the verdict forms effectively precluded the jury from considering any sentence

other than Life Without Parole for 25 years or death, but nevertheless found no prejudice. The jury was informed that a term of twenty years to life was available for its consideration. The jury was also informed that if it had a reasonable doubt as to whether Haight should be sentenced to death, then it should sentence him to something less than death. "Most significant[]" to the court, the jury passed over the verdict form which authorized Life Without Parole for 25 years and instead, used the verdict form imposing the death penalty.

Although "better practice would dictate modification of the verdict form to more forthrightly tell the jury that it may find" aggravators and still impose a sentence of a term of years, there was no error. *Haight*, at 249, citing *Thomas v. Commonwealth*, 864 S.W.2d 252 (Ky. 1993).

### **1986 Plea Agreement**

In *Haight I*, 760 S.W.2d 84 (Ky. 1988), the Supreme Court reversed the death sentence because Haight had been misled into believing the trial court would sentence in accordance with the Commonwealth's recommendation, and enforced the agreement that Haight be permitted to withdraw his guilty plea after the trial court did not follow the recommendation, but instead sentenced Haight to death. Thus, the Supreme Court "wiped the slate clean" and reinstated the charges as returned by the grand jury. *Id.*, at 16. That opinion and *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992) became the law of the case. *Haight II*, at 250.

Haight contended that under the 1989 amendment to RCr 8.10, a defendant has a right to withdraw a guilty plea without prejudice if the trial court determines that it will not follow the plea agreement formed between prosecutor and defendant. However, at the time of Haight's guilty plea, RCr 8.10 only required a judge to sentence a defendant who pled guilty "within the range provided by law." Thus, after the trial court rejected Haight's plea agreement, the Court directed the parties to begin again, which placed Haight in exactly the same position as the new RCr 8.10 would have. "[D]espite his argument to the contrary, [Haight's] predicament is no different than other persons who have negotiated non-death sentences but failed to obtain trial court approval" and were forced to go to trial. *Id.*

The argument that the trial court's conduct during the original plea agreement denied his right to have the jury fix punishment had "appeal", but also failed. Haight asked for relief when he moved to withdraw his 1986 guilty plea. The Supreme Court granted that request. The Court believed that Haight actually desired enforcement of his original plea agreement, despite the court's negative answer to that request.

### **Double Jeopardy Argument**

Haight argued that jeopardy had attached during the 1986 proceedings and that because RCr 9.84 precluded imposition of the death penalty, he could not be resentenced to death. However, the court found that the trial court's conduct was not such as to preclude re-prosecution. While the trial court misled Haight, it was neither malicious nor deliberate, but based on a desire to accommodate both the prosecutor and defense counsel.

### **Bad Act Evidence**

The Court believed that introduction of collateral bad acts such as the attempted murder of a state trooper, evidence of his guilty plea to that crime, evidence of two thefts and a burglary and as to a witness's fear of did not deny Haight a meaningful opportunity to present his EED evidence. Evidence of Haight's mental state shortly before and after the crimes was relevant to the prosecution's burden to prove the absence of EED.

## Future Dangerousness

In his penalty phase close, the prosecutor pointed out Haight's other criminal convictions as proof that he had not benefitted from previous incarceration. Contrary to Haight's argument, the court did not find that the disclosure amounted to use of a non-statutory aggravator. Although the prosecutor's "prison is doing nothing" argument concerned the court, it did not rise to the level of that condemned in *Perdue v. Commonwealth*, 916 S.W.2d 148 (Ky. 1996) or *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984).

***Foley v. Commonwealth*, 942 S.W.2d 876 (Ky. 1996)**

**Affirmed.**

**Majority: Graves (writing), Baker, Lambert, Wintersheimer, King (§§ III, IV, VI, VIII, IX, X)**

**Minority: Stumbo (writing), Stephens, King (§§ I, II)**

Robert Foley was sentenced to death for the murders of two brothers, Harry Lynn Vaughn and Rodney Vaughn, which occurred after an August 1991 party at Foley's home.

## Venue

In 1993, Foley filed a motion for change of venue based upon media reports appearing in the two years between the murders and the motion. Foley argued that it should have been granted, and included a number of pages of exhibits in his appellate brief. The court noted that the most recent reports only outlined the charges, and that the total impact of the articles was not so inflammatory as to render Foley's trial unfair.

At voir dire, 68 of 93 jurors were excused. The court pointed out, however, that although nearly all the jurors had heard about the case, "only" 18 were excused because they believed Foley was guilty, 17 were excused because they could not presume Foley innocent. Another 6 jurors were cause challenges. Other jurors were excused for bias, relationships or other reasons. Most of the fourteen jurors who actually heard the case had read of the crime when it happened in 1991, but had not read of it since. Thus, "[t]here was no showing that the media accounts had persuaded the prospective jurors to the extent of prejudgment. At best they were aware of the crime and [Foley's] name attached to it." *Foley v. Commonwealth*, 942 S.W.2d 876, 881 (Ky. 1996), citing *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1991).

Foley's counsel also did not give sufficient notice to the prosecution so that it could prepare for the change of venue motion. The August trial date was set in January 1993. Foley had requested a gag order for law enforcement officers some months before that, but did not move for change of venue in the months in between the gag order and filing the change of venue motion in 1993. *Id.*

## Jury Qualifications

Foley asserted that ten jurors, nine of whom sat on the case, should have been excused for cause. A juror knew that the bodies had been dumped in a creek, and knew other people who felt that Foley was probably guilty. Another juror was equivocal as to his feelings of Foley's guilt. Yet another juror "ha[d] suspicions" because of the evidence implicating Foley and because Foley had been arrested. A fourth juror knew that Foley was an FBI informant and also was unsure that she could remove all the information she had from her mind. The juror who later became foreman stated that he wanted Foley to produce evidence proving his innocence, but then said he had not understood that Foley did not have to put on evidence.

Defense counsel had been allowed to explore each juror's knowledge and preconceptions of guilt or innocence; therefore, the cause challenges were properly denied.

The court distinguished *Foley* from *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1991), saying that unlike *Montgomery*, the trial court had allowed extensive questioning", "carefully considered the challenges for cause advanced by trial counsel" and "excused those jurors who had prejudged [Foley]." *Id.* The trial court did not abuse its discretion in denying the cause challenges.

### **Instructions**

Foley argued that as a result of the omission of the "intent" element from the trial court's oral instructions, the jury believed that in order to convict Foley, they only had to find that he had killed Harry Lynn Vaughn. However, the Justice Graves noted that defense counsel had pointed out the omission to the trial court, who corrected the written instructions which went into the jury room.

The court noted that the instruction, viewed in light of the medical examiner's testimony that Lynn Vaughn had been shot in the back of the head, an injury intended to cause immediate death and a witness's statement that Lynn Vaughn had been shot after his brother, that at the time of the shooting, Lynn Vaughn had his back to Foley, who had explained that he shot Lynn Vaughn because "blood is thicker than water", required an implicit finding of intent. Thus, any error in the oral instructions was harmless. *Id.*, citing *Chapman v. California*, 386 U.S. 18 (1967). Instructions in either phase of a capital trial have also been held harmless where there is overwhelming evidence that the victim was killed intentionally and where the defendant asserted that he was not involved in the murders. Foley claimed that Ronnie Dugger killed Lynn Vaughn; thus, "[t]he decision not to contest the issue of intent or object to the instructions is consistent with legitimate trial tactics." *Id.*, at 886.

### **Witness Intimidation**

On cross-examination, Foley elicited the fact that Ms. Foley had charges pending against her. Ronnie Dugger, a Commonwealth's witness, testified that after the shooting, he was taken to Harlan with Ms. Foley and her father-in-law, where he stayed several days because he had no means of transportation elsewhere. On defense cross-examination, Dugger also said that Foley's father told him that anybody who testified against his son would not "make it a block from the courthouse." The trial court correctly ruled that Foley had opened the door to this questioning by his cross-examination on Ms. Foley's charges because evidence of witness intimidation by the accused or someone acting on his behalf, is inconsistent with innocence. *Id.*, at 20-21. Moreover, Ms. Foley was clearly involved: she assisted in cleaning up the crime scene, told a witness to "swear" he wouldn't mention what had happened, and was among the people transporting the murder weapons. Foley stayed with his parents the night of the shooting and for several nights afterward. The facts certainly support the inference that Ms. Foley and Foley, Sr. acted on behalf of Foley. *Id.*, at 885, citing *United States v. Gatto*, 995 F.2d 449 (3d Cir. 1993).

### **Character Impeachment**

On cross-examination, Ms. Foley revealed that not only did she have pending charges, but also she was in the middle of a child custody battle with his parents. After Foley denied attempting to have his wife charged with crimes, the prosecution moved to introduce Foley's letter to Eugene Castene in which Foley attempted to have his wife set up for criminal charges, to which defense counsel objected only because it had not been provided in discovery.

However, Foley opened the door to introduction of this evidence by his testimony that he had not done so. *Id.*, at 887,

citing KRE 404. Furthermore, the jury was aware of Foley's bad character; other witnesses testified that Foley had a plan to shift blame for the Vaughn brothers' killing onto the Collins family; Foley himself and Aaron Caldwell also testified about Foley's idea to have Caldwell lie under oath and say he had looked through the window and had seen Ronnie Dugger shoot Harry Lynn Vaughn.

### **Use Of "Recommend"**

The trial court used the word "recommend" once in the penalty phase instructions. However, the court noted that the penalty phase instructions were 14 pages long, in which the word was used only once. Thus, no reversible error occurred. *Id.*, at 888, citing *Bussell v. Commonwealth*, 882 S.W.2d 111 (Ky. 1994).

### **Verdict Forms**

Foley argued that the verdict forms provided for the jury to note which aggravator they found in connection with the death sentence. The majority found no substantial error in the use of these forms because the instructions informed the jury of their right to find a sentence of less than death.

### **Dissent**

In dissent, Justice Stumbo, citing the statistics mentioned by the majority, wrote that the trial court erred when it did not grant a change of venue, and also wrote that of the fourteen jurors who actually heard the case, only two had never before heard of Foley or the crimes with which he was charged. "Newspaper coverage between August of 1991 and the trial date was comprehensive and repetitive"; even the majority noted the inflammatory information included in some articles. *Id.*

Justice Stumbo found the venire's knowledge of the crime, "evident, almost alarming." She noted the jury foreperson's awareness of who Foley was and the crime, and his inability to presume Foley innocent, as did thirteen members of the jury pool. Another juror thought Foley guilty, but was rehabilitated when she said she could wipe her mind clean of her knowledge and consider only that evidence presented to her. Two other jurors knew the details of the crime and had heard members of the community express their opinions of Foley's guilt. One juror could not recall making such statements himself, but was not sure that he had not. Another stated that he had never heard anything positive about Foley. *Id.*, at 890, citing and quoting *Jacobs v. Commonwealth*, 870 S.W.2d 412 (Ky. 1994).

### **Jury Qualification**

Justice Stumbo cited the majority's detailing of the voir dire of the ten jurors challenged for cause, but also cited that "[a] careful reading of the record confirms what is only hinted at...that extensive rehabilitation of most of these jurors was necessary in order to qualify them for service on this jury." *Id.*, at 4. Thus, although each juror denied bias or prejudice, their knowledge of the media coverage and facts of the crimes implied bias. *Id.*, at 891-892, quoting *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1991).

### **Instructions**

In *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988), the Supreme Court decreed that the word "recommend" could not be used in voir dire or penalty phase instructions or closing argument. That decree was violated by the trial court's use, even once, of the word "recommend".

## Rebuttal Evidence

*United States v. Gatto*, 995 F.2d 449 (3d Cir. 1993), cited in the majority's reasoning in this issue, is not controlling precedent. Moreover, the court requires a showing that the threats were made on behalf of the accused, not evidence of an inference. *Id.*, citing *Campbell v. Commonwealth*, 564 S.W.2d 528 (Ky. 1978).

### INTERDEPENDENCE

"Today, the mission of one institution can be accomplished only by recognizing that it lives in an interdependent world, with conflicts and overlapping interests."

- Jacqueline Wexler



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# Probation Eligibility for PFO's

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As all criminal practitioners in Kentucky know by now, the Legislature did another "weird thing" in 1996. It eliminated a clause in KRS 532.080 which had previously prohibited probation for anyone convicted of a class "D" felony while being a Persistent Felony Offender **First Degree**.

Great!

Thereafter, of course, defense attorneys, being able to read, began to ask for probation for PFO 1<sup>st</sup> defendants with a class "D" felony as the underlying charge, since there was now no prohibition against it. Prosecutors objected, arguing that the Legislature didn't intend to do that. The Legislature only intended, it was argued, to eliminate the provision requiring no parole for ten years, and not the probation prohibition. Most judges agreed with the defense, and occasionally probated a PFO 1<sup>st</sup> on a class "D" felony.

Then the same defense attorneys, clever devils all, began asking for probation for *PFO 2d* defendants with an underlying class "D" felony. The argument was that since a PFO 1<sup>st</sup> defendant was eligible, clearly a PFO 2<sup>nd</sup>, with one less felony on his record, should also be eligible.

Prosecutors countered with their same argument as before, that the Legislature didn't intend to allow probation for *any* PFO, but certainly not a PFO 2<sup>nd</sup> since that subsection was not even touched by the Legislature. Some judges, certainly not all, again agreed with the defense, pointing out that if a PFO 1<sup>st</sup> was eligible for probation, certainly a PFO 2d should be, assuming a class "D" felony was the underlying new conviction.

Prosecutors appealed some of these rulings, arguing that the statute, KRS 532.080(5), was clear and unequivocal: no person convicted of being a *PFO 2d* is eligible for probation. The Attorney General even argued on appeal that there was a rational basis for the Legislature to intend to allow probation for PFO 1<sup>st</sup> defendants, but not PFO 2d defendants. (I'm not making this up, as Dave Barry might say.)

Now it gets even more interesting!

The appeals took their normal course, with the briefs for the Commonwealth being filed in the Court of Appeals by the Attorney General as in almost all criminal appeals. Both sides made their arguments. Finally the Court of Appeals ruled, settling the issue.

Right?

Wrong!

The Court of Appeals began reversing that portion of the judgement which probated the PFO 2d defendant, saying that a hearing on the constitutionality of KRS 532.080(5) must be held in the trial courts with the Attorney General being notified of the hearing as required by KRS 418.075(1). Never mind that the Attorney General had argued the cases before the Court of Appeals, and made the same arguments that they would make to the trial courts. The Court of Appeals sent the cases back to the trial courts so that the Attorney General could make its argument to the trial judge, and it could be appealed again. The same arguments could be presented again to the Court of Appeals.

And another year could pass. Meanwhile, the defendant, hopefully, would still be on probation. I just had one of these hearings a week or so ago in Fayette County, on a new case (not having been sent back for such a hearing). I properly filed a motion to hold the statute unconstitutional, properly notified the Attorney General, and went to court with pages of research ready to make my devastating arguments before the Attorney General to the trial court. I knew, of course, that I would win, since the judge had already, more than a year ago, begun probating an occasional PFO 2d with a class "D" felony conviction. Those are fun arguments, when you know the outcome in advance!

I argued, from *Sanders v Commonwealth*, 844 S.W.2d 391 (Ky. 1992), that when a statute as written has no rational basis for a distinction that it makes between two groups the courts can correct it. *Sanders* involved the requirement under the violent offender statute that a person serve half of his sentence before being eligible for parole, or twelve years if the sentence was life. That meant that if the sentence was eighty years the defendant had to serve forty years before seeing the board. For a long period of time defense attorneys had been asking jurors to fix a penalty at life, rather than any term of years (on the most serious cases) while the Commonwealth Attorney would ask for a term of years, more than 24, but not life. It was absurd, and eventually the Supreme Court corrected it by adding the phrase "whichever is less," so that anyone would see the board after serving half of their sentence, or twelve years, whichever was less. It didn't take a rocket scientist to see that the legislature had made a mistake in that situation. The Court said that there was no rational basis for such a distinction.

In my argument to the court I further pointed out some comments from Justice Scalia, from *Green v Bock Laundry Machine Co.*, 109 S.Ct. 1981 (1989), that the meaning of a statute should be construed according to the body of law into which it is being assimilated, rather than what a few individual legislators might intend. Also, Justice Scalia said in a footnote in *K Mart Corp. v Cartier, Inc.*, 108 S.Ct. 1811, 1834, n. 2 (1988), that a statute should not be construed in such a way as to make the result absurd.

I argued that it would be absurd to have probation eligibility if you had two or more prior felonies, but not if you had only one! In order to allow the possibility of probation a defense would be filing motions to add prior felony convictions to an indictment, where the prosecutor either didn't know about an old prior, or left it off intentionally to prevent probation.

So what counter arguments did the Attorney General make?

What Attorney General? They didn't even show up. They relegated the responsibility to the Commonwealth Attorney for making the arguments. The same futile ones they had already made.

But at least we followed the proper process. The Court of Appeals will be happy.

The trial court said that the statute prohibiting probation for a PFO 2d was unconstitutional for a variety of reasons, including the lack of a rational basis for the distinction made, denial of equal protection, or achieving an absurd result.

The Commonwealth has appealed, and we will repeat the process in the Court of Appeals.

But stay tuned! Rumors abound that prosecutors are taking their arguments to the Legislature to again eliminate probation for all PFO convictions.

That will take all of the fun out of it again!

*Gene Lewter has been a public defender in Fayette County since February 1979. Prior to that he served two years as a prosecutor in Arizona then was in private practice for eight years and wrote for the ALR.*

## **A Word to the Wise**

In *Cornett v. Commonwealth*, No. 96-CA-3503-MR (Ky.App. Dec. 31, 1997) (unpublished), (Before: Guidugle, Johnson, Schroder) the Court stated:

Cornett did not give any notice to the Attorney General of her intent to challenge the constitutionality of KRS 532.080, and we believe this is dispositive of this issue. KRS 418.075(1) provides as follows:

In any proceeding which involves the validity of a statute, the Attorney General or the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

Although defense counsel did not explicitly announce that he was challenging the constitutionality of

KRS 532.080(5) in light of KRS 532.080(7), clearly there were due process and equal protection implications in the argument for probation such that KRS 418.075(1) would apply. In *Jacobs v. Commonwealth*, Ky.App., 947 S.W.2d 416 (1997), a defendant failed to give the Attorney General notice at the trial level that he was challenging the constitutionality of KRS Chapter 507. This Court refused to consider the constitutional challenge on appeal because the notice requirement of KRS 418.075 (1) had not been met. The Court stated:

The Supreme Court has made it clear that "the requirement of KRS 418.075 are mandatory in order for a court to consider the constitutionality of a statute and...strict enforcement of the statute will eliminate procedural uncertainty." *Adventist Health Systems/Sunbelt Health Care Corp. v. Trude*, Ky., 880 S.W.2d 539, 542 (1994)....

We recognize that in criminal case such as this the Commonwealth is represented at the trial level by local prosecuting officials. However, Kentucky, unlike the United States and some sister states, does not have a unified prosecutorial system. Although there is a relationship between the Attorney General and local prosecuting officials, Commonwealth's Attorneys do not answer to the Attorney General. See generally KRS 15.200 and 15.725. Since the Attorney General is elected by registered voters from throughout the Commonwealth, he is in a unique position to defend the constitutionality of an act of the General Assembly. The attorney General must be given this opportunity at the trial level because a declaration regarding the constitutionality of a statute affects all the citizens of the Commonwealth, not just the citizens represented by the local prosecuting official. For that reason, we conclude that the notice requirement of KRS 418.074 must be met in criminal, we well as civil, actions.

*Id.* at 418-419.

Since Cornett did not give the Attorney General notice of her constitutional challenge to the statute as required by KRS 418.075(1), the trial court erred in granting her request for probation based on that constitutional challenge. The proper remedy is to vacate the judgment of the trial court and to remand this case with Cornett being given the opportunity to join the Attorney General before the circuit Court. *Maney v. Mary Chiles Hospital*, Ky., 785 S.W.2d 480, 482 (1990). See CR 24.03; *Stewart v. William H. Jolly Plumbing Co.*, Ky.App., 743 S.W.2d 861 (1988).

**MISSOURI:** In an unusual ruling, the Missouri Supreme Court on Tuesday lifted the death sentence imposed against a Springfield man con-victed of fatally stabbing a 12-year-old girl in 1995. In a 4-3 decision, the state's highest court ruled that the death penalty imposed against Timothy S. Chaney, 47, "is disproportionate when compared to other like cases in which the death penalty was imposed." The ruling means Chaney will spend the rest of his life in prison without chance of parole. Missouri law requires the Supreme Court to review the appropriateness of the use of the death penalty, case by case. Among other factors, the judges must weigh "the strength of the evidence" and scrutinize the defendant's background. The court noted that the death penalty has been imposed before in Missouri for the "horrendous crime of murdering a child." But the majority said that while there was sufficient evidence to find Chaney guilty of the slaying of Michelle Winter, its review found the death sentence was "disproportionate." "To perform this duty necessarily requires a comparison of the weight of the evidence in other cases in which the death penalty was given," the majority said in a decision written by Judge John C. Holstein. But in none of the other death penalty cases "was the conviction based primarily on trace and pathological evidence of the type and quantity presented here." "In this case there is no eyewitness, confession, admission, document, fingerprint or blood evidence directly pointing to the defendant. Neither is there evidence of defendant's involvement in any similar or related crimes from which one might infer his involvement here," Holstein wrote. "While sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, the evidence here is not as strong as evidence in similar cases..."

From his prison cell at Potosi Correctional Center in southeast:

Missouri, Chaney declined an interview request from The Associated Press. Attorney General Jay Nixon's office, which has 15 days to ask the court to reconsider its decision, also declined comment. The victim's family could not be reached. There is ample precedent for the Missouri Supreme Court to commute death sentences, usually because of errors at trial. But only once before in court officials' recollections have the judges declared evidence was insufficient to warrant capital punishment while simultaneously concluding the defendant was guilty beyond a reasonable doubt. The only prior similar case happened in the early 1980s, a court official said. In November 1996, a jury imported to Stone County from southeast Missouri found Chaney guilty of 1st-degree murder. The girl's body was found under a pile of leaves near Cape Fair, 6 days after she disappeared in Springfield. Investigators said Chaney was a suspect from the time the girl's body was found. The victim was last seen alive leaving the Chaney home after watching a movie there.

(Source: *Hannibal Courier-Post*)



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# How Young is Too Young?

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Several years ago a neighbor called and asked if I would go to the Court Designated Worker's office with her children who had been charged with criminal trespass after playing in a barn which belonged to someone else. She was particularly concerned that the youngest child, who was five, would be frightened by the experience. I was surprised and thought there must have been a mistake. Surely a five year old could not be charged with committing a public offense in this Commonwealth. A bit of research and conversations with the judge, assistant county attorney and CDW convinced me my assumption was wrong. I learned that there was no minimum age, either in our Juvenile Code or as a matter of policy in our local court, for being charged with delinquent conduct. I attended the meeting with the CDW and my "client," age five, sat on my lap.

The recent tragic shooting by boys ages 11 and 13 in Jonesboro, Arkansas has ignited a national debate about whether the minimum age for adult court jurisdiction over juveniles should be lowered. A related issue is whether there should be a minimum age for juvenile court jurisdiction and possible detention. While KRS 605.090(c) precludes children under 11 from being housed in residential treatment centers, no law prevents a child as young as five from being held in a juvenile detention facility.

Lawyers who represent juvenile clients need to be familiar with the defense of infancy and to raise the defense whenever appropriate. The Juvenile Branch is currently litigating whether a juvenile court was required to conduct a hearing to determine whether an eleven year old boy with an IQ of 72 was legally capable of committing the offense of first degree sodomy against his younger brother. We began representing the child, who did not have an attorney in juvenile court, during his placement at Owensboro Treatment Center. Pursuant to RCr 11.42 and KRS 610.120 we moved to set aside the adjudication of guilt because he had no attorney and his youth at the time of the offense raised a rebuttable presumption that he was incapable of committing a crime. *See Spurlock v. Commonwealth*, Ky. 223 S.W. 2d 910, 912 (1949). ("The common law rule raises a presumption of infancy of an infant between the ages of seven and fourteen which is rebuttable, and the presumption is that the incapacity after seven years of age decreases with the progress of his years"). Unfortunately, we lost in district court, but the case is on appeal to circuit court.

If an attorney is appointed to represent a child who is under 14, he should consider a motion to dismiss the charge(s) based on the defense of infancy. The common law differentiated between children and adults through rules on criminal capacity even prior to the establishment of juvenile courts. "Those rules defined 14 as the age of adulthood for purposes of criminal responsibility, seven as the minimum age for those same purposes, and the period between seven and 14 as the zone of presumptive incapacity with a duty on the government to prove capacity beyond a reasonable doubt if it wished to prosecute the youngster for a crime". Shepherd, R., "Juvenile Justice: Rebirth of the Infancy Defense", *Criminal Justice* p. 45 (Summer, 1997). The presumption was strongest at seven and diminished as the juvenile neared age 14. *Id.*

Before *In re Gault*, 387 U.S. 1 (1967) was decided some courts rejected the notion of an infancy defense in juvenile court because juvenile courts were designed to protect children. Certainly the pendulum has swung from protection toward punishment in recent years, and that trend combined with the constitutional rights afforded juveniles by *Gault* gives continued life to the defense of infancy.

The question of age is very relevant to the existence of criminal intent. Does an 11 year old know that sexual contact with his younger brother is criminal? While the IJA-ABA Standards Relating to Juvenile Delinquency and Sanctions do not propose codifying infancy as a defense, standard 2.1 proposes limiting delinquency jurisdiction to children "not less than ten" and standard 3.2 asserts that "where an applicable criminal statute or ordinance penalizes risk-creating conduct, it should be a defense to juvenile delinquency liability that the juvenile's conduct conformed to the standard of care that a reasonable person of the juvenile's age, maturity and mental capacity would observe in the juvenile's situation". The Commentary to Standard 2.1 states "common sense requires the specification of some age below which such [delinquency] liability cannot extend."

In litigating an infancy defense, urge the court that there must be an individualized inquiry with attention to the child's age, psychological capacity, intelligence, experience and general behavior. See *In re Roderick P.*, 500 P. 2d 1 (Cal. In Bank 1972) where the court examined a 14 year old child's IQ, education level and a report from a psychologist in determining that he was incapable of waiving his *Miranda* rights. See also *In re Gladys R.*, 464 P. 2d 127, 132-133 (Cal. In Bank 1970) where the court emphasized that a child under 14 must be able to appreciate the wrongfulness of her conduct to become a ward of juvenile court. With respect to our 11 year old client, we asserted that his IQ of 72, several prior psychiatric hospitalizations and low academic ability indicated strongly that the presumption of incapacity to commit an act of delinquency could not be rebutted in his case. Urge the court that a hearing on this critical issue is necessary; comparison to a competency hearing may be helpful.



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## DPA on the Web

### DPA Home Page:

At <http://dpa.state.ky.us/> contains a history of defenders in Kentucky; DPA's mission; caseload information; the Public Advocacy Commission; the agency's 4 divisions: Trial, Post-Trial, Protection & Advocacy, Law Operations; Kentucky defender funding relative to national defender funding; maps of counties covered by full-time defenders and prosecutors; the agency's core values; and links to defender employment opportunities; the National Legal Aid and Defender Association's home page and other links. Thanks to Randy Wheeler for placing this information on our page!

We hope that you find this service useful. If you have any suggestions or comments, please send them to Randy Wheeler at DPA, 100 Fair Oaks Lane, Frankfort, 40601 or by email at [rwheeler@mail.pa.state.ky.us](mailto:rwheeler@mail.pa.state.ky.us).



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# Taint Hearings:

## Looking for Reliability Amidst Incompetence While Searching for the "Truth"

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1. Did law enforcement officers use "unduly suggestive" procedures? That is, did the procedures give rise to a substantial likelihood of irreparable misidentification?<sup>15</sup>
2. If the procedures were suggestive, were they nevertheless necessary under the totality of the circumstances?
3. If the procedures were both suggestive and unnecessary, was the identification nevertheless reliable under the totality of the circumstances?

In the Fall, 1997 issue of *Bench & Bar*, Mary Jane Phelps devoted her article to the question of the propriety of, and the legal necessity for, "taint hearings." While I have only been on the other side of one case with Ms. Phelps, I consider her to be one of the most conscientious and hard-working prosecutors I have had the privilege to work with in my 15 years as a criminal defense attorney. Additionally, the one case in which we shared a common interest in the outcome was a case where my client was accused of the molestation of a child.

However, notwithstanding my admiration for Ms. Phelps and her abilities, I find myself at odds with her on the issue of whether, and to what extent, Kentucky should adopt the procedural safeguard of "taint hearings" when allegations of child sexual abuse are made. Her article makes clear that she opposes the advent of "taint hearings" and, I suspect, she speaks for most of the attorneys in Kentucky who make the prosecution of crime at least a part of their day-to-day practice.

I, on the other hand, believe in them. I do not believe that such hearings offer a panacea for all of the obstacles encountered by the myriad of citizens who are falsely accused of child sexual abuse and find

themselves facing substantial prison terms within our correctional system. However, they do offer a way to check the unlimited--and, to the layman, the unimaginable--power of the state to create, distort and destroy the memories of children in order to produce the false allegations in the first instance.

### **What is A "Taint Hearing?"**

The legal authority for "taint hearings" comes from the procedure developed, discussed, and adopted by the New Jersey Supreme Court in what has now come to be known as the *Michaels* decision.<sup>1</sup>In the case cited by Ms. Phelps in her article<sup>2</sup> the state has argued that the *Michaels* decision is wrong because the concept of a "taint hearing" is based on outdated and disproved premises; some of which date all the way back to the time of England's Queen Victoria.

Moreover, it is important to note that the *Michaels* Court based its decision upon an extensive review of social science research.<sup>3</sup> To that extent, it made a number of findings and acknowledgements which appear throughout the text of the *Michaels* opinion consistent with that research. In other words, the whole concept of the "tainting" of children's memories has its basis in the science of the present and not in the superstition of the past, and that basis has been judicially recognized by the highest court of one of Kentucky's sister states.

At the outset, it is indisputable that, at one time or another, children, the elderly, the mentally retarded, the psychologically infirm, women who have suffered rape, and numerous others, have been thought, rightly or wrongly, to be incapable of giving competent or, even, reliable testimony. Additionally, Ms. Phelps also adopts this theme when she suggests that the natural result of allowing such pretrial challenges to the testimony of children will be to subject "the mentally ill, the mentally retarded, the old, the infirm, and the gullible" to the rigors of taint hearings as well. This is not really the issue.

Today, all of these people can be competent to testify in any particular case; provided only that they can accurately perceive, accurately recollect, and adequately express the facts, and do so under the penalties of an oath knowingly taken and understood.<sup>4</sup>

However, problems still exist with regard to children. Ceci and Bruck, in their seminal work, *Jeopardy in the Courtroom*,<sup>5</sup> explain that there exists a clear nexus between youth and suggestibility; *i.e.*, generally, as age decreases, suggestibility increases. This nexus mandates that mental health professionals, social workers, police, therapists, attorneys, judges and everyone else who becomes involved with a child, after an allegation of abuse is made, use extreme care and caution in dealing with the child so as not to suggest information to them and aid in the formation of false memories.

### **More Than A Difference of Perspective**

Let me start by disagreeing with the typical prosecutorial characterization of what a taint hearing is; *i.e.*, a hearing on the *credibility* of a child victim's statement(s). In fact, the hearing addresses the *reliability* of the child accuser's current memory given what has happened during the investigation of the claims in the

past.

Ms. Phelps draws heavily on the Myers article<sup>6</sup> for her view of how the *Michaels* universe is designed. Under the view of the *Michaels* universe, as set out in the Myers article, the issue of taint revolves around the *credibility* of child witness. The argument is that the true focus of *Michaels* was on either the status or on the competency of the child witness *per se*.

Under this view, the citizen-accused can get a fair trial simply by reference to the Confrontation Clauses of both the United States and Kentucky Constitutions. A trial court need never conduct a "taint hearing." The court should just let everybody testify at trial and merely allow extensive cross-examination by defense counsel. Cross-examination, alone, is sufficient to insure the protection of even the most falsely-accused of citizens.

This view is dangerously wrong. It ignores the very real distinction between children who give factually-incorrect<sup>7</sup> testimony in the belief that what they are saying is factually-correct, and those children who take the stand and deliberately testify to facts they know to be false. In the case of the latter group of witnesses--the liars--properly prepared and executed cross-examination *can be* an effective method of developing the truth. This is because the central issue when dealing with lying witnesses is credibility.

When dealing with those child accusers who believe what they are saying, but who are factually incorrect, cross-examination, even if properly prepared and executed, will rarely be able to uncover the truth. Such witnesses believe that they are testifying "truthfully" in accordance with their actual memories, despite the false origins of those memories.

The difference is that witnesses who *believe* they are telling the truth are not going to suddenly break-down, and confess to lying about someone sexually abusing them and explain that they did so only because someone else told them to say so. The *reliability* of a witness' memories cannot be impeached through the cross-examination of the witness. The cross-examiner can only hope to impeach the source of the memories by attacking those who have investigated the case and created the memories.

Cross-examination into the credibility of what a witness is saying about "an event" and not the origin and subsequent reliability of a witness' memories of that "event," is *never* sufficient to protect an accused from the witness who has been subjected to suggestive and leading investigatory and interrogation techniques. There must be other procedural safeguards for the citizen-accused.

In the more accurate view of the *Michaels* universe, the issue of taint focuses on the competency of the state's validators;<sup>8</sup> social workers, police, prosecutors, and in some cases even state-sponsored doctors and therapists. The issue is whether these validators, out of incompetence, negligence, or their improper assumption of the role of an advocate, have irrevocably damaged or destroyed the memories of the child witness through improper investigatory techniques.

The scope of the inquiry in this area is much broader than has been argued Ms. Phelps. The issues raised

when an individual is accused of sexual abuse by a child are two-fold: credibility *and* reliability. A pretrial hearing is not necessary to deal with the issue of credibility because cross-examination at trial is sufficient to deal with this problem. However, *only a pretrial hearing* provides the procedural due process safeguards necessary in dealing with the issue of reliability. Cross-examination is insufficient to deal with the memory-shaping processes to which the child has been exposed during the investigation of the allegations.

### **What About The Practical Effects Of "Taint Hearings?"**

Ms. Phelps' argument makes various references to the practical effects of allowing taint hearings but ignores the most important of practical effects which occurs when such hearing are not allowed: it is impossible to cross-examine the state's validators regarding the proper procedures for conducting interviews, or the latest research in the field of child sexual abuse, or inter-rater reliability, or source monitoring problems, or interviewer bias, or the requirement of taping interviews, because *none of them know anything about any of these issues*.

The validators don't read peer review journals. They don't keep-up in their fields through independent study. They have virtually no incentive to increase their knowledge base in these areas. They have no idea who the experts in the field are; for the prosecution or for the defense. At trial, trying to cross-examine the validators shortly becomes an exercise in utter futility for even the best criminal defense attorney.

In addition to ignoring the bad effects of *not* having "taint hearings", Ms. Phelps sets forth a number of ways which she thinks prosecutions will be harmed if taint hearings are allowed. However, if one looks closely, it can be seen that these concerns are nothing more than ghosts and shadows.

Ms. Phelps first argues that having a taint hearing might afford defense counsel a full blown attack on the children; the effect of which might be to traumatize the child into not testifying at trial. I think this argument is wrong and demonstrates just how poorly the whole idea of "taint hearings" is understood by the prosecutorial community.

Now, while it *is* possible for children to testify at such a hearing, defense counsel should not, except under the most extreme of circumstances, have them actually take the stand. That is because the process of letting them testify and tell their stories yet again contributes to the taint. In reality, a "taint hearing" would challenge a child witness' prior statements and current memories by showing that improper interrogation and investigation techniques by state-sponsored validators have produced *unreliable* (not uncredible) memories and, hence, testimony.

Ms. Phelps also suggests that such hearings might be used as discovery devices by defense counsel. Let me say categorically that if a defense attorney is attempting to conduct a "taint hearing" for the purpose of obtaining discovery, he or she is misusing the procedure. If the parties in the case do not already know

what all of the evidence at trial would be *prior* to defense counsel asking for a "taint hearing," then the issue cannot be properly before the trial court. There isn't any "discovery" at such a hearing. The parties must cooperate to learn all they can about the case and obtain all the relevant documentation and statements, *prior* to the hearing, in pre-trial discovery. Prior to the "taint hearing" both sides must be fully informed of the evidence.<sup>9</sup>

Moreover, Ms. Phelps seems concerned that defense counsel are likely to "over-utilize" taint hearings. That is to say, she believes defense counsel will ask for such hearings in a large percentage of cases, with relatively little regard for the quality of pretrial, validator interviews of the complaining children. I believe that this blanket indictment of the entire defense bar does not hold water.

The fundamental flaw with this argument is that to lump all lawyers who practice criminal defense law together is nonsense. The group is so diverse it makes the bar scene in Star Wars look like an IBM management seminar. Further, the number of different approaches taken by these attorneys in practicing their cases is similarly varied.

I believe that, on the whole, criminal defense attorneys do not tend to err on the side of being *over-*zealous in the representation of their clients but, generally, exercise prudence and caution in deciding what motions to file and what hearings to ask for during the pendency of their cases.

Additionally, whether the client can avail himself or herself of a "taint hearing" will depend upon numerous factors such as the availability of an expert; whether funds exist with which to pay the expert; the particular trial strategy of the attorney and her client; the weight of the evidence against the client; and a host of other factors.

Like anything else, there are both good and bad reasons for asking for, and conducting, a "taint hearing." "Taint hearings" can be more dangerous to the defense than to the prosecution and, it seems to me, that only a fool would ask for such a hearing to be conducted unless it was clearly indicated by the specific facts of the case. Prudence dictates that an attorney ask for such a hearing only when it is genuinely in the client's interests given the attorney's reasoned analysis of all of the facts and circumstances of the case. Using this benchmark, the end result will be that the number of taint hearings held will *not* cause our criminal justice system to implode.

### **Analogous Procedures**

In addressing the argument that "taint hearings" in child sex abuse cases are a relatively new phenomenon, I can do nothing other than freely admit that fact. But, just because the idea is new in this specific context does not mean that the idea is new in the much broader framework of the criminal law.

For example, the due process clauses of the Fifth and Fourteenth Amendments provide analogous protections against unfair *identification procedures* used by law enforcement officers. In *Stovall v Denno*,<sup>10</sup> the Supreme Court held that a due process violation occurs if the pretrial identification

procedures are "unnecessarily suggestive and conducive to irreparable mistaken identification." The following year the Supreme Court further clarified the contours of the due process right as it relates to identification procedures. The Court held in *Simmons v United States*,<sup>11</sup> that the admission at trial of an identification procedure offends the due process clause only if the pretrial identification (a display of photographs in *Simmons*) was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Thus, the linchpin of the due process analysis was the likelihood of an irreparable misidentification of the suspect. In *Neil v Biggers*,<sup>12</sup> and *Manson v Braithwaite*,<sup>13</sup> the Court clarified that an identification procedure which was both suggestive and unnecessary did not require *per se* exclusion. If an identification arising from the unnecessarily suggestive procedure was reliable under the totality of the circumstances, testimony about the out-of-court identification was nevertheless admissible at trial. The same analysis applies to the admissibility of a later in-court identification by the same witness.

To summarize, identification procedures raise the following issues to the Defendant's due process rights:<sup>14</sup>

1. Did law enforcement officers use "unduly suggestive" procedures? That is, did the procedures give rise to a substantial likelihood of irreparable misidentification?<sup>15</sup>
2. If the procedures were suggestive, were they nevertheless necessary under the totality of the circumstances?
3. If the procedures were both suggestive and unnecessary, was the identification nevertheless reliable under the totality of the circumstances?

The defendant bears the burden of proving that the identification was suggestive and unnecessary under numbers 1 and 2, above. If the defendant meets these burdens, then the prosecution bears the burden of proving that the identification was nevertheless reliable under the third prong of the test.

This long-standing, generally-accepted line of cases starts to sound a whole lot like what the New Jersey Supreme court was trying to do in *Michaels*: the due process rights extend only to those procedures employed by state agents or employees;<sup>16</sup> the Defendant bears the initial burden to justify the need for a hearing; upon meeting this burden, the burden shifts to the state to prove reliability; a totality of the circumstances test is used; etc. And, in thinking about the "taint" hearing issue in an historical sense, prosecutors must have been saying all of the same things in *Stovall*, *Simmons*, *Biggers*, and *Braithwaite* as Ms. Phelps and other prosecutors are saying now. Yet, the concept of conducting pre-trial reliability hearings for out-of-court, pretrial identifications has not caused criminal prosecutions to be abandoned or an eternal backlog of cases.

Lastly, purely as a matter of fairness, prosecutors should remember that the presumption of innocence

must be something of substance and not just an empty platitude. The complaining children are not "victims" in the legal sense, unless and until the guilt of the citizen-accused is proven beyond a reasonable doubt in a fair trial. If the state is responsible for creating memories and the concomitant testimony which goes with those memories, then the trial is not fair and the results are not just.

The whole issue of "taint hearings" is all about whether the citizen-accused will be deprived of a very real and meaningful opportunity for pretrial due process in cases where it is exceedingly difficult to get a fair trial, because of the very nature of the allegations. There must be a judicially-approved method of checking on the quality of the investigations and interrogations of the state validators; police, social workers, "therapists," etc.

### **In Conclusion**

The importance of "taint hearings" cannot be understated. The understanding of this concept is essential to everyone who navigates this mine field of criminal law. The approval of these procedures is vital to the citizen-accused's due process rights to a fair trial. "Taint hearings" are not obstacles to conscientious and hard-working prosecutors. They are only obstacles to prosecutors who, unlike Ms. Phelps, simply don't care whether they are prosecuting and attempting to incarcerate the falsely accused. Kentucky needs to adopt this form of procedural due process now.

### **Footnotes**

<sup>1</sup> *State v Michaels*, 642 A.2d 1372 (N.J. 1994).

<sup>2</sup> *Commonwealth v Jerry Rainwater*, 96-CA-1394-MR, (affirming the trial court's decision to hold a taint hearing), petition for discretionary review filed with the Kentucky Supreme Court in early November, 1997.

<sup>3</sup> In fact, Drs. Stephen Ceci and Maggie Bruck--both of whom are cited in the state's pleadings in the Kentucky appellate courts in the *Rainwater* case--wrote an amicus brief in the *Michaels* case which was presented by the Committee of Concerned Social Scientists. The New Jersey Supreme Court cited extensively from their brief in its opinion.

<sup>4</sup> KRE 601; and, *Pendleton v Commonwealth*, 685 S.W.2d 549 (Ky. 1985).

<sup>5</sup> Ceci, Stephen J. and Bruck, Maggie, *Jeopardy in the Courtroom: A scientific analysis of children's testimony*, American Psychological Association, 1995.

<sup>6</sup> Myers, J., *Taint Hearings For Child Witnesses? A Step in the Wrong Direction*. 46 Baylor Law Review 873 (1994).

<sup>7</sup> By "factually-incorrect," I am referring to testimony which could be shown to be wrong if everyone at the trial could be transported back in time to witness the event(s) being testified about and see for themselves that the testimony is in error.

<sup>8</sup> As apposed to "investigators." The difference is that an investigator takes the position that an allegation must be proved by reference to objective evidence. In their search for such evidence, investigators are careful not to destroy or damage other evidence. They do not ignore evidence which tends to disprove an allegation. In fact, they welcome such evidence because it allows them to be thorough in their work, fair in their method, and to test the credibility of the people they have interviewed during the investigative process. Like good doctors, they are concerned with being able to *rule out* alternative hypotheses and will come to their conclusions only after all alternative hypotheses have been eliminated. Like Sherlock Holmes, good investigators know that it is error to theorize before all the facts are known. Once all of the facts are gathered, those theories which are impossible, given the facts, must be discarded. Whatever theory remains, however improbable, is the truth.

<sup>9</sup> "Validators," on the other hand, always believe the allegation without regard to other proof; usually don't have the first idea of how to conduct an investigation; are utterly unfamiliar with the research and scientific literature in their field; *rule in* abuse; theorize just as soon as they can without being burdened by the facts; and frequently destroy meaningful opportunities to gather and preserve evidence, as well as the evidence itself.

<sup>10</sup> In this vein, I might remind Ms. Phelps of the case we worked on together. She had provided me with "all the discovery she had in her file" which included 12 pages of CHR records. Once an Order was signed which authorized me to see and obtain the CHR file for myself, an additional 174 pages of records were photocopied and given to both sides. The records contained much exculpatory material. The case was quickly settled after both counsel's review of the new material. This story shows importance of *both* sides possessing all of the relevant information.

<sup>11</sup> 388 U.S. 293 (1967).

<sup>12</sup> 390 U.S. 377 (1968)

<sup>13</sup> 409 U.S. 188 (1972).

<sup>14</sup> 432 U.S. 2243 (1977).

<sup>15</sup> See, *Unites States v Concepcion*, 983 F.2d 369 (2d Cir. 1992) for as general discussion of the law controlling due process scrutiny of identification procedures.

<sup>16</sup> *Ledbetter v Edwards*, 35 F.3d 1062 (6th Cir. 1994).

<sup>17</sup> Of course, more difficult is determining the degree of governmental complicity in a suggestive procedure sufficient to implicate the due process clause. However, this is addressed in *United States v Emanuele*, 51 F.3d 1123 (3rd Cir. 1995) where the appellate court held that the government's intent may be one factor in determining the risk of misidentification but it is not an essential element of the Defendant's proof. A series of suggestive events that is suggestive and creates a substantial risk of misidentification is no less a due process violation, even absent evil intent on the part of the government. [...] On the other hand, evidence that the government intended and arranged such an encounter would be a substantial factor in the court's analysis.

*Mr. Stanziano, a 1982 graduate of the University of Louisville School of Law, is the President-elect of the Kentucky Association of Criminal Defense Lawyers. He practices law in Somerset, Kentucky and limits his practice to the defense of the citizen-accused. He is a leading proponent of taint hearings.*

*The author wishes to thank his associates, Kathryn Wood, as well as Teresa Whitaker, Robert Sexton, and Glenn McClister of the Office of Public Advocacy in Somerset, for their suggestions and assistance in preparing this article.*



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## **DPA Seeks Equal Employment**

"Congratulations go out to the Department of Public Advocacy for their ongoing commitment to removing all barriers to meaningful equal employment opportunities in their workplace. Every four months, the Cabinet compiles and submits a report to the Personnel Cabinet which includes affirmative action initiatives of each of our eleven agencies. The Department of Public Advocacy serves as a role model for our other agencies in these efforts. Thanks and keep up the good work!"

**Carol Czirr**, Public Information Officer  
[Public Protection & Regulation Cabinet](#)



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# Seeking 'A Level Playing Field'

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"While the [United States] Constitution does not confer a right to peremptory challenges, ... those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson v. Kentucky*, 106 S.Ct. 1712, 1720 (1986).

Kentucky practice has long recognized the importance and necessity of the peremptory strike. Peremptory challenges have been a part of criminal practice in Kentucky since January 1877 when the Code of Practice in Criminal Cases granted the defense twenty (20) peremptory challenges in a felony case while giving the prosecution five (5) such strikes.

**RCr 9.40**, Kentucky's rule on peremptory challenges in criminal cases read as follows in 1990: "If the offense charged is a felony, the Commonwealth is entitled to five (5) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges..." RCr 9.40(1), prior to 1994 amendment.

## Kentucky Equalized Peremptories In 1994

Effective October 1, 1994, the rule was significantly changed to read, "If the offense charged is a felony, the Commonwealth is entitled to eight (8) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges." RCr 9.40(1).

The rationale for equalizing the number of peremptory challenges for the prosecution and the defense is presented under the banner of "leveling the playing field." But such an argument is fallacious and is based on a misanalysis of the prosecution's position in voir dire as contrasted with the defense situation.

## The Institutional Delivery Of Prosecutorial Services

In Kentucky every felony case in each circuit court will normally be prosecuted by the local Commonwealth's Attorney's Office. Exceptions occur when a special prosecutor handles the case. For example, "each regular Commonwealth's attorney and county attorney, shall be, *ex officio*, a special prosecutor of the Commonwealth." KRS 15.730. Similarly, the Attorney General of Kentucky may serve as a special prosecutor. KRS 15.715. Finally, a special prosecutor may be retained from the private bar by the victim of the charged crime or the family of the alleged victim. *See Commonwealth v. Hubbard*, Ky., 777 S.W.2d 882, 883-84 (1989).

Unlike England, where prosecutors in criminal cases are selected from private lawyers on an assignment basis, the prosecutorial function in Kentucky in felony cases is normally delivered by prosecutors, whether full-time or part-time, who are members of the local Commonwealth's Attorney's staff.

### **Prosecutors Have An Institutional Advantage In Voir Dire**

Consequently, in any given circuit court, attorneys in the local Commonwealth Attorney's Office will normally conduct the voir dire in every criminal case. As a result, prosecutors in each circuit have a distinct advantage with the venire in each successive jury selection using venire persons from a particular jury pool.

During the first voir dire conducted in a criminal case during the life of a particular jury pool, the prosecution will learn information relating to venire persons who are questioned by judge, prosecutor and/or defense counsel. That information, whether volunteered or elicited, is not on the venire person's jury qualification form and is not readily accessible to defense lawyers in future jury selections in other cases where venire persons are still selected from their same jury pool. Of course, the memories and notes of that initial jury selection can and will often be used legitimately by the local prosecutors in succeeding jury selections taken from the same jury pool.

Normally, the life of a jury pool is thirty (30) days. KRS 29A.130(1). During that thirty-day period individual venire persons may be questioned on voir dire in a number of criminal cases. Regardless of whether an individual venire person serves on a jury, his or her answers in the course of one or more prior voir dire sessions constitute invaluable background information to each lawyer who has access to that venire person's responses.

The prosecution's experience with the venire persons in a particular jury pool grows through repeated questioning in successive cases of the individuals making up the pool. As a result, as a jury pool is called upon to provide jurors for more and more criminal cases, the local prosecutors have an extensive amount of non-record data on the individual venire members which enables the prosecution in any given case to exercise peremptory challenges on the basis of information not generated by the voir dire in the case in question and generally not available to the defense lawyers in that particular case.

A prosecutor may retain this knowledge of venire persons, culled from prior voir dire sessions,

unconsciously or intentionally, by happenstance or systematically. It matters little. Since in either event it is non-record information about the venire obtained solely as a result of prosecutor's unique institutional role in the criminal justice system.

Even though any given prosecutor or prosecutor's office may not intentionally and systematically take advantage of this cumulating information about the members of the jury pool, a system of institutionalized prosecutors inherently offers this jury selection advantage to the prosecution. Significantly, this advantage may be capitalized on at any time by any prosecutor or prosecutor's office.

### **The Defense Has No Comparable Institutional Advantage**

Conversely, the criminal defense bar has no comparable institutional advantage. A private defense lawyer and even that lawyer's firm may have only one jury trial in a criminal case during a term of a particular jury pool.

Even a public defender office does not have the institutional knowledge of the jury pool that a prosecutor's office has since a significant number of criminal jury trials in the life of any jury pool will be tried by the private bar as retained counsel or conflict public defenders.

The cumulative knowledge of a single prosecutor or a prosecution office about the jury pool will give the prosecution in any given jury selection situation more knowledge about some of the venire persons which will facilitate more successful challenges for cause and more informed peremptory challenges than those made by the defense.

In Kentucky in the past the prosecution's institutional advantage in voir dire was checked or balanced to some limited degree by the three (3) additional peremptory challenges given the defense in felony cases. With the amendment of RCr 9.40(1) in 1994, the prosecution's unchecked institutional advantage in voir dire was restored.

### **Parties Have Equal Number Of Peremptory Strikes In Civil Cases**

The equalization of peremptory challenges in civil cases, three each for the plaintiff and the defendant, reflects the reality that private or government attorneys representing these parties have no institutional advantage in voir dire during any given term of a jury pool. CR 47.03(1). In the life of any given jury pool, private firms or government lawyers representing parties in civil cases will seldom have repeated exposure to the jury pool through voir dire in a number of civil cases.

Even when certain retained lawyers or government attorneys do have several cases tried during the life of a particular jury pool, seldom would the voir dire information learned in one type of civil case, *e.g.*, product liability, be useful in another type of civil case, *e.g.*, personal injury litigation.

In most instances, however, the basic type of juror information sought by the prosecution in criminal cases remains the same from cases to case. The institutionalization of the prosecution function in certain government lawyers, rather than assigning private bar lawyers on a case-by-case basis to prosecute, creates an inherent potential information advantage for the prosecution in most of the voir dire sessions conducted in criminal cases in Kentucky.

### **Additional Defense Peremptories Are The Solution**

Granting additional peremptories to the criminal defendant in felony cases is the least onerous remedy for that systemic imbalance.

Interestingly, in those jurisdictions which provide the defense with more peremptory strikes than the government, there appears to be no evidence, empirical or anecdotal, that the defense's additional peremptory challenges have created any unfairness or disadvantage to the prosecution's ability either to select fair and unbiased juries or to obtain convictions where warranted by the evidence.

In fact, nothing in Kentucky's previous experience with granting the defense more peremptories than the prosecution suggests that this approach in any way jeopardized the fairness of jury trials in criminal cases.

A jurisdiction that provides the defense with more peremptory challenges than the prosecution implicitly recognizes the inherent informational advantage the prosecution has in the jury selection portion of a criminal trial and attempts to compensate for the imbalance in an effort to "level the playing field."

## **"UNLEVELING THE PLAYING FIELD"**

### **PEREMPTORY CHALLENGES TIMELINE KENTUCKY STATE COURTS CRIMINAL CASES**

**1877 - 1893**

Felony: Defense (20)

Misdemeanors:

Defense (3)

Prosecution (5)

Prosecution (3)

1893 – 1978

Felony: Defense (15)  
Prosecution (5)

Misdemeanor:

Defense (3)  
Prosecution (3)

1978 – 1994

Felony: Defense (8)  
Prosecution (5)

Misdemeanor:

Defense (3)  
Prosecution (3)

1994 - PRESENT

Felony: Defense (8)  
Prosecution (8)

Misdemeanor:

Defense (3)  
Prosecution (3)

Information compiled by Will Hilyerd, Esq., Librarian, Department of Public Advocacy.

**Peremptories in England: One Under the Number of 3 Full Juries**

But in criminal cases, or at least in capital ones, there is in *favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.; 2. Because upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the jurors, perhaps the bare questioning his indifference may sometimes provide a resentment; to prevent all ill consequence3s from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

This privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. Stat. 4, which enacts, that the king shall challenge no jurors without assigning a cause certain to be tried and approved by the court. However, it is held that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not

sooner, the king's counsel must show the cause; otherwise the juror shall be sworn.

The peremptory challenges of the prisoner must, however, have some reasonable boundary; otherwise he might never be tried. This reasonable boundary is settled by the common law to be the number of thirty-five; that is, one under the number of three full juries. For the law judges that five and thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all.

*Blackstone's Commentaries*, Book IV, Ch. XXVII (Chase's 1977 American Students' Ed. at 1024-25).



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# District Court Practice: A Trio Of Cases

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Last fall saw three published cases from the Supreme Court of Kentucky that will have a profound influence on the practice of law in the District Court. The first was an appeal of the Court of Appeals case of *Commonwealth v. Maguire*. Although unpublished, this appeal consolidated two cases and affirmed the lower court's ruling that some Field Sobriety Tests in DUI cases required "utterances" by the defendant and given the "custodial nature" of the tests, *Miranda* warnings were required. Following additional consolidation, the Supreme Court rendered *Hourigan v. Commonwealth*, 962 S.W.2d 860 (Ky. 1998) and have once again, denied defendants new and novel defenses that have been used with some success.

## MIRANDA

The first issue decided is that during a traffic stop, typical field sobriety tests are requested before an arrest is made. The citizen is not in custody at that time and *Miranda* warnings are not required. I guess if I am ever pulled over and asked to perform field sobriety tests, I will just get in my car and drive away since I would not be in custody at the time.

## DOUBLE JEOPARDY

The Court also addressed the tip of the iceberg revolving around the double jeopardy inflicted by pre-trial suspension of licenses. There is no doubt that in *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1997), the Court renounced former Justice Leibson's "single impulse" test of *Ingram v. Commonwealth*, 801 S.W.2d 321 (Ky. 1990) and returned to the "is one offense included within another" standard defined in *Blockberger v. United States*, 284 U.S. 299 (1932).

The Court has now determined that the elements of KRS 189A.200 which require a pre-trial suspension in certain situations are so different from the elements required to convict pursuant to KRS 189A.010 for DUI, there is no dispute about double jeopardy. The Court goes on however to indicate that the suspension is not punishment and double jeopardy does not apply. Without this additional hint, the Court

created a very cut and dried analysis applying *Blockberger* and its progeny to this question. Out of the blue, additional language suggests that it is not the *Blockberger* elements test but rather actual punishment which is the determining factor. Counsel would do well to continue pressing this issue by evidentiary hearings to try to get the District Court to understand that the pre-trial suspension is indeed punishment and that double jeopardy should apply.

The opinion also leaves unanswered the constitutional issues created when a jury acquits a defendant but the Commonwealth seeks a 6 month suspension because of a refusal to submit to a breath test. Until such time as cases in progress reach ultimate conclusions from the Supreme Court, this issue remains fertile ground for the creative practitioner.

## **AUTOMOBILE INSURANCE**

In *Estes v. Commonwealth*, 952 S.W.2d 701 (Ky., 1997) the Court analyzed KRS 304.99, the mandatory automobile insurance statute. Although KRS 304.99-60 was amended in 1994 to define penalties for both owners and operators, the companion legislation, KRS 304.99-080(5) which defines the actual crime, was never modified. It still requires only owners of motor vehicles to maintain adequate insurance and does not mention operators. The Court held that the amended penalties can only apply to owners of vehicles and not mere operators. The prudent attorney will always check the vehicle registration to see if your client actually owned the vehicle and is therefore responsible for the insurance. If not, dismissal is appropriate.

## **HEARSAY**

In *Owens v. Commonwealth*, 950 S.W.2d 837, (Ky., 1997) the Court appears to have placed a double edged sword into the hands of both prosecutors and defense attorneys. This could end up as a bloody mess for all. When police arrived at the scene, the victim was on the floor bleeding from a stab wound. He identified the defendant as his attacker. The victim testified at trial that he made the statement and both officers also testified that they heard the statement of identification. The Court allowed the testimony from the officers holding that pursuant to KRE 801A(a)(3) which allows as an exception to the hearsay rule, statements of identification if the declarant testifies and is examined concerning the statement. After the victim testifies, the hearsay testimony of those overhearing the statement is proper.

Two scenarios spring to mind. Suppose Dee Fendant is charged with domestic violence against her paramour Vic Timm. At trial Vic testifies in one of two ways. He either acknowledges that he identified Dee as the person who hit him with the skillet or he denies making the statement. Police officers can now testify that they heard the statement regardless of how Vic testifies. Score one for the prosecution. If however, as is often the case, others were present after the police arrived on the scene the defense will no doubt call all of the witnesses to discredit the memory of the police officers. What was a simple trial of domestic violence has now shifted to a tale of epic proportions where the jury is no longer asked to

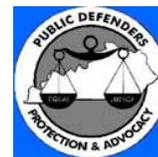
determine if a crime was committed and if so, who did it but rather, who should be believed, police officers intent on showing probable cause for the arrest or a potentially large group of disinterested bystanders. Neither option bodes well for the justice system.



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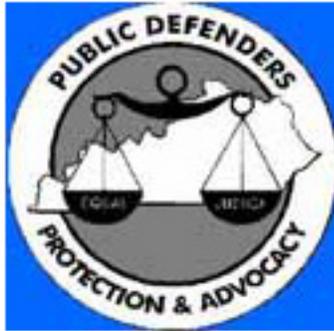
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