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*The Advocate* (Since May 1998):

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Defender Annual Caseload Report:

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We hope that you find this service useful. If you have any suggestions or comments, please send them to DPA Webmaster, 100 Fair Oaks Lane, Suite 302, Frankfort, 40601 or e-mail to [webmaster@mail.pa.state.ky.us](mailto:webmaster@mail.pa.state.ky.us)

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## *The Advocate*

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

October 6, 1999

Re: Article (Kentucky's RCr 11.42's) in *The Advocate*

Dear Ms. Balliet:

Having been a trial judge and now being an appellate judge, I have read with interest the first two parts [Ed. : [Part 1](#), [Part 2](#)] of your series of articles regarding RCr 11.42. As I look forward to the [third article](#), I must say "good job!"

Sincerely,  
David C. Buckingham  
Kentucky Court of Appeals  
Murray, Kentucky  
October 22, 1999

Re: Article (Kentucky's RCr 11.42's) in *The Advocate*

Dear Susan:

I want to compliment you in *The Advocate* dealing with the post judgment remedy of Criminal Rule 11.42. You have done a good job in covering this rule which has generated a considerable amount of litigation for trial judges.

## EDITORS:

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**Erwin W. Lewis**, Editor: 1978-1983

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You mention, however, in the article that, "The Court in *Strickland* never used "but for language" . In reading the case, I find that the "but for language" appears in Keynote No. 19 as well as in Paragraph 19, Page 2068 of the 104 Supreme Court Reporter. Justice O'Connor states specifically that, "The defendant must show that there is a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different." (Emphasis added.) It appears that the "but for" standard and the "absence of error" standard are interchangeable.

I would welcome your thoughts on this, and once again, that you very much for your fine work.

Sincerely,  
Bill Cunningham  
Circuit Judge

### Response to Judge Cunningham:

Thank you for your kind comments on the 11.42 series. You are correct in pointing out my error regarding "but for" language in *Strickland*. However, the "but for" standard and the "absence of error" standards are far from interchangeable, as explained more fully in [Part III](#) of the series, included in this issue.

–Susan Balliet



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# REVENUE REPORT FOR 1998-1999

By Ernie Lewis, Public Advocate

Revenue figures for the Department of Public Advocacy have now become available. While we are still analyzing the results, some preliminary observations can be made based upon these figures. First, it is important to set the 1998-1999 figures into context, particularly the context provided by the Blue Ribbon Group which met and reported during the Spring of 1999.

## The Blue Ribbon Group Examined Revenue

The three sources of revenue relied upon by DPA for 15% of its budget were addressed during the past fiscal year by the *Blue Ribbon Group on Improving Indigent Defense for the 21<sup>st</sup> Century* (hereinafter BRG). The BRG Report reached some of the following conclusions:

- Finding #2: "The Department of Public Advocacy is Effective in Indigent Defense Recovery Compared to Other States."
- "At almost 15% of the total DPA budget, Kentucky's public defender program is more dependent on alternative revenue than any other state public defender program."
- Kentucky has the highest administrative fee collection rate per capita of any of the comparison states.
- "It is our strong belief that these revenue funds are virtually tapped out."
- "Kentucky is already at the top of the list of comparable states when it comes to alternative revenue collections."
- Finding #9: "Without Additional General Fund Revenues, a Deficit will Occur in the Non-General Fund Account On or Before July 1, 2000."
- Recommendation #7: "The Department of Public Advocacy and the Court of Justice Must Increase their Efforts to Collect Reasonable Fees from Public Defender Clients, Including Considering the use of Private Collection Organizations."

There are then two messages being given to all of us by the Blue Ribbon Group: first, DPA is the most effect public defender agency in the nation at collecting revenue from clients, and is also the most highly reliant upon these alternative sources of revenue; second, unless revenue collections increase significantly, a significant deficit will occur.

### **Recoupment Revenue is Up**

In 1998, DPA received \$995,582 in recoupment, which is the partial fee collected from our clients pursuant to KRS 31.120. In 1998-1999, DPA collected \$1,012,473 in recoupment. This represented an increase of 2% over the previous year.

### **DUI Revenue is Up**

\$1,120,711 was recovered from clients convicted of DUI in 1997-1998. In 1998-1999, this figure was up 5%, to \$1,170,513.

### **The Administrative Fee is Up**

In 1997-1998, \$691,650 was collected from indigents appointed counsel. This is the administrative fee established in KRS 31.051(2). It is intended to be a mandatory fee, with a liberal waiver provision. In 1997-1998, the fee was \$40. In 1998-1999, beginning on July 15, 1999, the fee moved to \$52.50. \$2.50 of the fee goes to the clerks for salary improvements. \$50 is provided to the DPA for delivery of services. In 1998-1999, DPA received \$810,497 from the administrative fee, an increase of approximately 17%.

The increase in the statutory fee from 1998 to 1999 was 25%, from \$40 to \$50. DPA experienced a 17% increase in the amount collected between the two years. It is too early to say whether the administrative fee is being collected at a higher rate than previously. It appears, however, that DPA is continuing to collect in only approximately 15-20% of the cases.

Fayette County continues to collect the administrative fee at a high level. Fayette County moved from \$113,495 to \$123,976, and constituted 15% of the total funds. Fayette County handled approximately 7% of the total cases in 1998-1999.

On the other hand, Jefferson County continues to show a relatively low collection rate. They moved from \$51,521 in 1997-1998 to \$39,795 in 1998-1999, a decline of 29%. This occurred despite the fact that Jefferson County's caseload represented 34.25% of the cases, up from 1997-1998. In comparison, Hardin County collected \$36,428, while Christian County, with 3.53% of the cases collected \$37,328. DPA is considering private collections in Jefferson County in order to address this problem, utilizing one of the recommendations of the BRG. DPA is also going to study the collection practices of the two largest counties.

Some counties are doing particularly well. Some examples? Boyd County has .83% of the total caseload, but collects 1.40% of the administrative fee. Boyle County has .12% of the caseload, with .58% of the administrative fee. Bullitt County has .76% of the caseload and .89% of the fee. Campbell has 1.65% of the caseload, with 2.29% of the fee. Floyd County has 1.09% of the cases, with 2.41% of the fee. Hopkins County has 1.36% of the cases, with 2.26% of the fee. Mason County has .79% of the caseload and 1.49% of the fee. Montgomery County has 1.08% of the cases, and 1.61% of the fee. Rowan County has .64% of the caseload, with 1.71% of the administrative fee. DPA is appreciative of the judges and their clerks who are conscientiously applying this statute to assist the DPA in delivering services.

### **Revenue is Up 6%**

*In FY 98, DPA collected a total of \$2,807,944. This increased to \$2,976,592 in FY99, a 6% increase.*

### **DPA is experiencing a serious revenue shortfall**

The BRG found that the DPA was going to experience a serious shortfall in the nonGeneral Fund by or before July 1, 2000. This has occurred for several reasons. The primary reason is that DPA has been chronically underfunded for many years. While caseloads have gone up, DPA's funding has not kept pace. Between 1996-1998, about the only increase in funding occurred from the collection of additional revenue. While positions can be funded with revenue, revenue has not gone up sufficiently to pay for increased overhead, Block 50s, reclassifications, and annual increments for state employees. At this time, DPA provides \$3.8 million of services yearly beyond that which is provided by the General Fund. Yet, in FY 99, we collected only \$2.9 million. It is increasingly clear that DPA has a budgetary structural imbalance of about \$900,000 per year that must be addressed. A significant cause of the structural imbalance is the increased reliance upon revenue, revenue which has "tapped out" according to the BRG and the Spangenberg Group.

### **We must continue to do better**

That does not mean, however, that we should throw up our hands. DPA is seeking an appropriation in the 2000 General Assembly intended to address the structural imbalance. At the same time, however, DPA must do all it can in concert with the Court of Justice to collect a reasonable amount from the three revenue sources. It is not impractical to expect a 30% return from the administrative fee. If that goal were reached, DPA would collect approximately \$1,350,000 from the administrative fee, an addition of \$500,000. This would go a long way toward addressing the budget problems of DPA.

Ernie Lewis  
Public Advocate



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## 12 Recommendations of the Blue Ribbon Group

Kentucky *Blue Ribbon Group on Improving Indigent Defense in the 21<sup>st</sup> Century* consists of more than 20 distinguished members representing all three branches of government, the bar and key officials of criminal justice agencies across the state (the membership of the group appears on the back page of this newsletter).

As part of their final report, The Blue Ribbon Group approved the following 12 recommendations:

**#1 – Indigent Defense is a Necessary Function of Government, and an Essential and Co-Equal Partner in the Criminal Justice System.**

**#2 – The Kentucky Public Defender System Cannot Play its Necessary Role for Courts, Clients, and the Public in this Criminal Justice System Without a Significant Increase in Funding.**

**#3 – The Full-Time System should be completed.**

**#4 – Higher Salaries Should Be Paid to Defenders and Prosecutors; Salary Parity is the Goal.**

**#5 – Loan Forgiveness Programs Should Be Made Available to Prosecutors and Defenders.**

**#6 – Full-Time Trial Staff Should Be Increased to Bring Caseloads Per Attorney Closer to the National Standards. The Figure Should Be No More Than 350 in Rural Areas and 450 in Urban Areas.**

**#7 – The Department of Public Advocacy and the Court of Justice Must Increase their Efforts to Collect Reasonable Fees from Public Defender Clients, Including Considering the Use of Private Collection Organizations.**

**#8 – Prosecutor and Defender Increases Should be Considered when a Judicial Position is Added.**

**#9 – It is Important that Public Defender Counsel be Available to Children in Juvenile Court Proceedings.**

**#10 – It is Imperative that Kentucky Reasonably Fund Indigent Capital Defense both at the Trial and Post-Trial Levels.**

**#11 – Public Defender Services are Constitutionally Mandated while Resources are Scarce. It is Important for all Eligible Persons who want to be Represented by a Lawyer, but only those who are Eligible to be Appointed a Public Defender. The Court of Justice, and Especially AOC and DPA are Encouraged to Work Cooperatively to Ensure Appropriate Public Defender Appointments.**

**#12 – The \$11.7 Million Additional Funding for Each of the 2 Years Is Reasonable and Necessary to Meet DPA’s Documented Funding Needs as Described in PD21.**



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## **\$11.7 Million Additional Revenue Requested by *Blue Ribbon Group***

The General Assembly's Joint Appropriations and Revenue Committee heard from Public Advocate Ernie Lewis on October 28, 1999 that Kentucky has had one of the lowest funded public defender systems in the nation for many years and needed \$11.7 million additional General Fund dollars as recommended by the *Blue Ribbon Group on Improving Indigent Defense in the 21<sup>st</sup> Century*(BRG). That Group consisted of 22 prominent legislators, criminal justice professional and Kentuckians.

Lewis told the A & R Committee Members that the Blue Ribbon Group found this sum to be "reasonable and necessary to meet DPA's documented funding needs as described in PD21." (Recommendation #12).

The wisdom of this funding recommendation can be seen readily by examining where an \$11.7 increase would place the Kentucky public defender system in comparison to other states.

### **\$11.7 Million Would Place Kentucky in the Middle of the Nation**

An \$11.7 million increase, according to the BRG and Lewis' testimony before A & R, would place Kentucky's in the middle when compared with other public defender systems. Examining the two benchmarks demonstrates this reality:

- Kentucky would increase from \$187 funding-per-case to \$303. In comparison, Kansas paid \$550 per case in 1998; Wisconsin paid \$532; Iowa paid \$472; Colorado paid \$420; North Carolina paid \$380; Missouri paid \$325; Oklahoma paid \$324; Minnesota paid \$243; Tennessee paid \$235.
- Kentucky would increase from \$4.90 funding-per-capita in 1998 to \$7.91. In comparison, Wisconsin was funded at \$12.13; Iowa was funded at \$10.30; Minnesota was funded at \$9.68; Florida was funded at \$8.58; North Carolina was funded at \$8.01; Tennessee was funded at \$6.73; Oklahoma was funded at \$5.82; Missouri was funded at \$4.61.

These increases would make up for years of neglect. As stated in the Blue Ribbon Group's Final Report, "Supplementing the DPA budget by \$11.7 million will bring Kentucky up to a more comparable position

on the national scene, and equip public defenders with the resources they need to provide competent representation."

### **An Investment in the Future**

The \$11.7 million increase would invest in the future. The funding would allow for the necessary completion of the full-time system in Kentucky, and will create a structure for effective leadership, management and supervision for the 21<sup>st</sup> Century.

New laws involving additional caseload will be able to be absorbed. Judges will have public defenders available in their juvenile, district, and circuit courtrooms. The General Assembly can rest assured that the public defender system is solid and stable, and that any future budget increases will be requested when the caseload increases, not due to the latest crisis in delivery or the latest lawsuit. Employees, particularly attorneys, will be treated fairly rather than their present status as the lowest paid defenders in the nation. Our state, courts, indigent clients and their families will be better served by a decent and fair public defender and criminal justice system that provides fair process and insures reliable results.

Kentucky newspaper Editorial Boards have endorsed the BRG Recommendations. The August 20, 1999 Lexington Herald-Leader's editorial, *Justice for All: Legislature must properly fund public defender system*, appears on the cover of this issue. The September 7, 1999 Courier-Journal editorial, *Equal Justice*, stated, "Kentucky can't have a decent system of representation for indigent defendants, including those facing death row, without putting more money into it." The Owensboro Messenger-Inquirer's August 17, 1999 editorial, *State Should Fund Indigent Defense Better*, urged that the right to a fair trial be upheld by providing additional funds to Kentucky's defender program.

In addition, the Criminal Justice Council endorsed recommendations #1 – 11, taking no position on #12 (as a policy matter, the CJC will not pass on specific agency budget requests). This endorsement by the pre-eminent long-range planning body for the Kentucky criminal justice system is strong support for the necessity of funding these recommendations.



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# The Juvenile Death Penalty

by Gary W. Potter

Department of Justice and Police Studies

In the United States twenty-five states allow the execution of juveniles, twenty-one states set the minimum age for execution at 16 and four states at 17. No other Western nation, no other industrial nation, no other democracy in the world allows the execution of juveniles. In fact, since 1990, the United States joins only Iran, Nigeria, Pakistan, Saudi Arabia and Yemen as nations that have executed children. With nine executions of juveniles since 1990, the United States criminal justice system kills more children than the rest of the world combined. In fact, the state of Texas, with five juvenile executions since 1990, kills more children than any other country in the world (Amnesty International, 1998).

One of the major reasons for this paucity of juvenile executions worldwide is that executing children, simply put, is a war crime. Almost all nations, even those with a death penalty, conform to the seven major international instruments which forbid juvenile executions. Those instruments are (Amnesty International, 1998):

1. *International Covenant on Civil and Political Rights (Article 6(5))*
2. *Convention on the Rights of the Child (Article 37(a))*
3. *American Convention on Human Rights (Article 4(5))*
4. *Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention) (Article 68)*
5. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (Article 77(5))*
6. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)*

*Article 6(4))*

*7. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (UN Economic and Social Council resolution 1984/50, adopted on 25 May 1984 and endorsed by the UN General Assembly in resolution 39/118, adopted without a vote on 14 December 1984)*

But violations of treaties and protocols designed to maintain international civility is only one of the problems with executing children in America.

**The juvenile death penalty is even more arbitrary and capricious than the death penalty for adults.**

Research has consistently shown that the application of capital punishment in the United States is entirely arbitrary. From state to state, and even from jurisdiction to jurisdiction within states, defendants who commit similar homicides are treated differently for no apparent reason. Sometimes the state seeks the death penalty, sometimes not. Sometimes juries sentence the offender to death, sometimes not. Researchers have compared the application of the death penalty to a lottery governed by no rational process at all (Berk, et al., 1993; Gross and Mauro, 1989; Paternoster 1991). The juvenile death penalty is even worse. About 1.8% of all persons executed in the United States were children (under 18 years of age) at the time of the crime (Capital Punishment Research Project, 1998). In the post-*Furman* era (up to December 1, 1998) there have been twelve juvenile executions, or about 2% of all executions since 1973 (Strieb, 1998: 3). Despite significant increases and declines in juvenile homicide rates in the 1980s and 1990s, the rate of juvenile death sentences has remained constant at about 2% of all executions, raising the question of whether its use is even related to incidence of homicide (Bureau of Justice Statistics, 1997).

**The juvenile death penalty is blatantly racist.** Over 2/3 of the 288 children executed in the United States have been African-Americans. In addition, all of the children executed in the United States for the crimes of rape or attempted rape (40 children in all) have been black. As of October 1, 1998 sixty-five percent (33 blacks and 15 Latinos compared to 26 whites) of the children on death row in the United States are minority offenders (Strieb, 1998). In addition, the issue of bias by victim race is also present in juvenile death penalty cases. As of October 1, 1998 sixty-eight percent (n=64) of the cases in which a juvenile was sentenced to death in the United States in the post-*Furman* era involved a white victim. Additionally, questions of age and gender bias also arise in view of the fact that 83% of the victims in these cases were adults and half were women. Ninety-eight percent of the juveniles sentenced to death were male (Strieb, 1998: 12). Only four cases involved females.

**Juvenile death sentences are subject to an extraordinarily high rate of reversal by the courts.** Of the 177 juvenile death sentences imposed since 1973, only 74 (42%) remain in force. Twelve have resulted in executions (7%) and ninety-one (51%) have been reversed on appeal (Strieb, 1998). For the 103 juvenile death sentences that have been resolved (excluding the seventy-four still under litigation) **the reversal rate is 88%** (91 out of 103) (Strieb, 1998). The clear implication of this sobering fact is that in cases where the state wishes to execute a child, serious problems of prosecutorial misconduct, defense

attorney incompetence, and judicial error appear to dominate.

**The juvenile death penalty contradicts virtually every other law concerning children in the United States.** The law in most states assumes that juveniles are not of sufficient maturity and judgment to exercise a wide range of rights. In most states the age of majority is 18; 21 is earliest age at which alcohol may be bought, possessed and consumed; children may not enter into contracts until the age of 18; children may not buy cigarettes until the age of 18; children must be 18 before agreeing to donate their organs; children must be 18 before they may execute a will; children must be 18 before entering into a marriage; and, of course, the 26<sup>th</sup> Amendment to the Constitution sets the voting age in the United States at 18. The contradictions inherent in the laws which assume that juveniles do not have sufficient responsibility, maturity or judgment to make these many decisions, while at the same time assuming that they are fully in control of their judgments when they engage in criminal behavior is a horrific and illogical contradiction in the law. This is particularly the case in homicides where much evidence indicates that (1) children have an undeveloped and unsophisticated concept of death; and (2) the children are often impulsive and reckless in their actions.

But most importantly the horror of executing children cannot be fully understood until we look at the children who have been murdered by the state in America. Consistently, pervasively, and invariably the children we execute have four common characteristics: (1) they were mentally ill or mentally retarded at the time they committed they crime; (2) they were victims of horrifying sexual and physical abuse; (3) they were victimized by a society which has one of the highest child poverty and infant mortality rates in the world and which consigns many children to lives of hopelessness and grinding poverty; and, (4) they were represented by inexperienced, unskilled, and incompetent counsel. So the truth of juvenile executions in the United States is that we execute the ill and infirm without providing them with any advocacy. To say that such a policy reeks of eugenics and "ethnic cleansing" is almost an understatement. Consider the following (Amnesty International, 1998):

In 1977, Dalton Prejean, at the age of 17 murdered a police officer in Louisiana. This black child was tried before an all-white jury and represented by a court-appointed defense attorney. His IQ was measured at 71, which means he had virtually no capacity to reason. When we has two weeks old his mother abandoned him to the care of a relative with a long history of violence. At the age of 13 he was institutionalized suffering from a series of mental illnesses including schizophrenia. At the age of 14, after having been released from care because of inadequate state resources allocated to mental illness, he murdered a taxi driver. He was recommitted after the murder and doctors recommended long-term hospitalization related to his mental illness. Nonetheless, when state funds once again ran out, Dalton was once again released, and committed the crime for which he was executed in May 18, 1990. Dalton Prejean was murdered by a state that refused to provide him with medical care, refused to provide him with a fair trial and adequate counsel, and that apparently seeks to cure mental illness through execution.

Johnny Garret had a long history of mental illness, a history of severe sexual and physical abuse as a child, and suffered from chronic brain damage as a result of head injuries sustained in that abuse. At the age of 17 he murdered a 76-year-old nun and despite direct intervention by Pope John Paul II and the

Franciscan Sisters (the order to which the nun had belonged), Johnny was finally provided with treatment by the state of Texas for his mental illness, chronic physical ailments and childhood sexual abuse by being executed February 11, 1992.

Curtis Harris was one of nine children brought up in family with an alcoholic father who regularly beat him throughout his childhood. Curtis was one of the 21% of all U.S. children raised in poverty (44% of all black children, and 37.9% of all Latino children in the U.S. are raised in poverty) (U.S. Bureau of the Census, 1994). Incidentally, the U.S. child poverty rate is double that of the United Kingdom (9.9%); triple that of France (6.5%), the Netherlands (6.2%) and Germany (6.8%) and eight times higher than Sweden (2.7%) (Rainwater and Smeeding, 1995). At his trial, despite the fact that Curtis was an African-American, the state excluded all black jurors. Curtis had an IQ of 77 and suffered from organic brain damage as a result of the beatings inflicted by his father. Once again, however, the state of Texas treated his physical and social infirmities by prescribing death on July 1, 1993.

Frederick Lashley murdered his cousin at the age of 17. At the time of the murder he was acting under the influence of drugs. Frederick had been abandoned by his mother as a young child, had become a heavy drinker of alcohol by the time he was ten, and was homeless at the time he committed the murder. Once again, this African-American child was sentenced to death by an all-white jury, after being represented by an attorney who had never handled a capital case. Incompetent counsel and a racist jury was the only drug treatment ever provided Frederick by the state of Missouri which murdered him July 28, 1993.

Christopher Burger had a low IQ; he was mentally ill; he was brain damaged as a result of severe physical abuse he received as a young child; he grew up in an unstable and highly disturbed family; and he attempted suicide at the age of 15. Despite the fact that these conditions are all statutory mitigators, which juries are required by law to consider in death penalty cases, his attorney, who had never previously handled a capital case, neglected to present any mitigating evidence. Once again, in the state of Georgia, the remedy for mental illness, child abuse and incompetent counsel is execution, which was carried out on December 7, 1993.

At four-years-old, Joseph John Cannon, was hit by a truck. He was left with a severe head injury, hyperactivity, and a speech impediment. Needless to say these conditions did not lead to great success in school, and at the age of six he was expelled and received no further education or care from the state of Texas. He filled his days, when he should have been in school or under medical care, with glue and solvent sniffing and at the age of ten was diagnosed as suffering from severe organic brain damage. Joseph attempted suicide at the age of 15 and was subsequently diagnosed as being schizophrenic and borderline mentally retarded. From the age of seven to the time he committed his murder, he suffered repeated and severe sexual abuse from a series of male relatives. So horrifying was Joseph's childhood that when he finally escaped his family after being confined on death row he was able to learn to read and write. The state of Texas had not protected him from his family, had not provided him with medical care for his chronic brain injuries, and had not treated his mental illness. Texas did however, reward the educational progress he made when finally sheltered from the day-to-day nightmare of his childhood by killing him in 1998.

Robert Anthony Carter was one of six children in an impoverished black family who grew up in one of the poorest neighborhoods in Houston, Texas. His mother and stepfather routinely beat him throughout his childhood with electrical cords. He suffered serious childhood head injuries, including being struck in the head by brick at age five and being hit on the head so hard with a baseball bat at age ten that the bat broke. Robert received no medical attention for either of these injuries. Shortly before the murder for which he was ultimately convicted, Robert was shot in the head by his brother and suffered thereafter from regular fainting spells and seizures. Nonetheless it took a Texas jury, who heard no mitigating evidence, only ten minutes to sentence him to death.

Dwayne Allen Wright was raised in a poor family in an economically depressed neighborhood of Washington, D.C. When he was four his father was sent to prison. His mother suffered from mental illness and was unemployed throughout much of his childhood. When he was ten his half-brother, the only person Dwayne was close to was murdered. Dwayne developed serious emotional difficulties, did poorly at school and between the ages of 12 and 17 spent most of his time in juvenile detention facilities and hospitals. During this period he was treated for major depression with psychotic episodes, his verbal ability was evaluated as retarded, and doctors diagnosed him with organic brain damage. Upon release, at the age of 17 Dwayne committed a murder for which the commonwealth of Virginia executed him in 1998. The American Bar Association appealed for clemency, stating that his proposed execution "demeans our system of justice" and asserting that "a borderline mentally retarded child simply cannot be held to the same degree of culpability and accountability for the actions to which we would hold an adult."

Lastly, Ruben Cantu, a Latino child in Texas, was executed in 1993. He was 17 at the time of the crime. He was represented by an inexperienced lawyer, had a troubled family upbringing and was of limited intellectual capacity.

So what children are selected for execution in the United States? For what conditions does this nation commit "war crimes?" The answers are the poor, the mentally retarded, the sexually and physically abused, those with chronic and congenital physical defects, those represented by incompetent counsel and those refused treatment for their maladies by the state which will ultimately murder them. We engage in state murder of children who are our social trash. That's why there's a Geneva Convention on war crimes, and that's why judges, prosecutors and juries who sentence children to death are guilty of war crimes.

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The 10th anniversary of the United Nation's convention on the rights of the child was on November 20th. As you know, the convention prohibits imposing a death sentence or an lwop sentence on anyone who was under the age of 18 at the time the crime was committed. The U.S. and Somalia are the only two countries that have not ratified the convention.



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## ***SANDERS IS STILL GOOD LAW***

By Roger Gibbs, Eastern Regional Manger

Around the time the new sentencing laws took effect in July 1998, the question was raised "Is *Sanders* still good law?" (*Sanders v Commonwealth*, 844 S. W. 2d 391 (Ky. 1992)). The reason for the question is that a quick reading of the new statutes gave the appearance that the new parole eligibility laws have "overruled" *Sanders*. The new law has not done so, and at least one Circuit Judge has agreed.

Following our murder trial where our client received a forty-year sentence recommendation from the jury, a group of attorneys were sitting around doing a post-operative review. Jim Norris asked if the sentence of forty years our client received ran afoul of *Sanders*. The initial reaction was no, since the law had been changed in 1998. Further review of the statute and cases led the defense team to challenge the new parole eligibility.

KRS 439.3401 controls parole eligibility for violent offenders. Specifically, subsection (1) defines violent offender as any person convicted of or pled guilty to a capital offense, Class A or Class B felony involving the death or serious physical injury to a victim. It also specifically includes anyone convicted of rape in the first degree or sodomy in the first degree.

Subsection (2) sets parole eligibility for violent offenders who receive a life sentence at 20 years. The legislative effort to get around *Sanders* is found here. "Violent offenders may have a greater minimum parole eligibility date than other offenders who receive longer sentences, including a sentence of life imprisonment."

Subsection (3) sets parole eligibility at 85% for violent offenders who receive a sentence of a term of years. In the documents distributed by the Department of Corrections, any defendant who receives a sentence greater than 23 years will have a greater parole eligibility than 20 years. (See Attachment A) [*Ed note: Attachment A not reproduced - Please see print edition, p. 13-14*]

As indicated our client received a sentence recommendation of forty years. Her parole eligibility would be set under the 85% guidelines at 34 years. This gave her eligibility 14 years greater than if she had received a sentence of life imprisonment.

Two cases made clear that our client was entitled to some relief. *Sanders v Commonwealth*, 844 S. W. 2d 391 (Ky. 1992) and *Smith v Commonwealth*, 806 S. W. 2d 647 (KY. 1991) left little doubt that our client's situation required some action. As noted in the attached motion, both cases pointed in a very

clear direction. (See [Attachment B](#))

*Sanders* was a question of interpretation. If the defendant literally received 50% of his sentence, he would have parole eligibility of 85 years at a time when life sentences received eligibility of 12 years. The court changed the interpretation to be one of 50% up to 12 years of eligibility.

*Smith* made clear that in Kentucky, a life sentence is greater than a term of years and the parole eligibility must reflect that. It is important to note the constitutional underpinnings of due process and equal protection that support this decision. The Supreme Court decided to correct a problem rather than find the statute unconstitutional. That was the choice we presented to our Judge.

In our motion we asked for alternative relief of either finding the statute unconstitutional or granting our client parole eligibility of twenty-years. Our Judge reviewed our authorities and at formal sentencing granted our motion to the extent that our client was ordered to serve the lesser of 85% or twenty years. (See [Attachment C](#)) This is consistent with *Smith*.

Our client was convicted of offenses for August 13, 1998, shortly after the new laws took effect. For the violent offender cases that should be coming to trial now, the application of the law argued for in our motion affords our clients some relief. The legislative effort to allow violent offenders to have longer sentences than other offenses does not change the fact that violent offenders, as a group, must be rationally treated within the category in sentencing decisions. A life sentence is still greater than a term of years. Had our client received a sentence of life without possibility of parole for 25 years, she would still have parole eligibility 9 years less than she had under the strict reading of the 85% rule. *Sanders* and *Smith* compel a different result.

Our case will soon be on appeal. The Commonwealth Attorney has indicated he would seek certification of the law. The Kentucky Supreme Court will have a say in the future viability of *Smith* and *Sanders*. Until that time, defense counsel needs to seek the individualized relief available under these cases.

A special note of thanks to everyone who contributed to this motion. Thanks to my co-counsel Kristen Bailey, to Jim Norris, to Carol Camp for her once over on the motion, and to everyone else who gave suggestions large and small. Fourteen years is a lot of time.



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# KENTUCKY'S RCR 11.42's: A Farce and Mockery?

## Part III: What to do.

--Susan Jackson Balliet, Assistant Public Advocate

*Parts I and II of this 3-part series of articles (See [May, 1999](#) and [September, 1999](#) issues of The Advocate) addressed the standard for obtaining an RCr 11.42 hearing and the two burdens of proof inside the 11.42 hearing. This article offers practical suggestions for implementing the information in Parts I and II.*

### 1. Seek greater wisdom.

There are two important concerns for anyone pursuing relief under RCr 11.42. The first concern, of course, is to win the 11.42 in state court. However, since 11.42 relief is hard to come by, and the chance of winning in state court is slim, an equal concern is to adopt a strategy that will preserve important 11.42 issues for potential litigation in federal court. Whenever possible, the practitioner should seek consultation with more experienced attorneys for advice regarding the contents of the petition, the timing of the petition relative to the direct appeal and other post-trial litigation—including state or federal habeas, motions under RCr 60.02, or motions for funding to obtain experts or additional investigation. Decisions on 11.42 strategy will depend on the individual case, and sometimes even on the lawyers, or trial judge involved. To sum up, Rule Number One for 11.42's is seek greater wisdom.<sup>1</sup>

### 2. Be aware of the one-year deadline to file a federal habeas.

The deadline for filing a petition under RCr 11.42 is three years after a judgment becomes final, which means, basically, three years after a decision by the Kentucky Supreme Court, or three years after a denial of discretionary review by the Kentucky Supreme Court. However, the three-year 11.42 deadline can be misleading, because there is a brutally short one-year deadline for filing a federal habeas under 28 U.S.C. §2254. Because of the one-year federal habeas deadline, and because defendants are allowed only one habeas, they must not wait three years to file an 11.42. They must file a petition under RCr 11.42 within one year, to ensure that 11.42 issues will be "ripe" in time to include them in their one-and-only habeas proceeding.

Filing the RCr 11.42 petition tolls the deadline, that is, it stops the time from running until the 11.42 also becomes final (again, after decision or denial of discretionary review by the Kentucky Supreme Court). Then the one-year time limit to file a federal habeas starts running again. This means, if you file an 11.42 one month after a final decision, you will have 11 months "left over" to work on your habeas after your 11.42 becomes final. If you take 6 months to file your 11.42, you'll have only 6 months left over to file

the habeas after the 11.42 is final.

In each case, a defendant must decide how much time to spend on preparing and filing the 11.42, and how much time to save for preparing the federal habeas. In a simple case, an 11.42 motion might be put together swiftly, and that might be desirable. And in a death penalty case, unfortunately, the warrant policy/stay law forces the defendant to file a fast 11.42 after the direct appeal. Decisions on timing will depend on the type of case, the issues, what needs to be done to develop them, and what needs to be done to ensure raising every issue and fact that needs to be raised in the 11.42. The federal courts defer so much to state proceedings that it is important to get the 11.42 right from the outset. If it takes 11 months to do that, so be it. But be ready to file the habeas quickly within the month you have left if you lose the 11.42 on appeal.

### **3. List every possible ground for relief, and ask for a hearing.**

In order to qualify for federal habeas relief, a state prisoner must first exhaust state remedies by giving the state courts an opportunity to act on all claims before presenting those claims in a federal habeas petition. In order to avoid the seemingly ever-increasing opportunities for procedural default spawned by *Wainwright v. Sykes*, 433 U.S. 72, 78, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (limiting courts' discretion to entertain procedurally defaulted claims) as well as those contained in 28 U.S.C. § 2254(b)(1), at a minimum it is vital to list in the RCr 11.42 petition every possible ground for relief, and to ask for a hearing. In Kentucky, it is also important to ask for appointment of counsel.<sup>2</sup>

### **4. Support each allegation with as many facts as possible.**

Defendants should provide as many facts as possible in support of each allegation in an RCr 11.42 motion. Also, as to each factual matter stated, defendants should indicate whether it is already in the record, or outside the record. If there are facts in the record as to an allegation, defendants should say in the 11.42 whether these facts are incorrect, or incomplete. If facts in the record are incorrect, the correct facts should be stated, in detail. If facts in the record are incomplete, the additional facts should be stated, in detail.

### **5. Educate the trial court on the ease of proving prejudice under *Strickland*.**

In order to throw out 11.42 claims without a hearing, or even to avoid giving any consideration at all to 11.42 claims, trial courts sometimes use the tactic of making a finding at the outset, without looking at one shred of evidence, and without reviewing the record, that the defendant cannot show sufficient prejudice to meet the standard in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky., 1986). In so doing, trial courts are almost always in error, because this tactic is based on a misunderstanding of *Strickland*.

Under *Strickland*, all the prejudice a defendant need show is a mere "reasonable probability" that "absent the error" the verdict *mighthavebeen* different. But what is a "reasonable probability"? Granted a one-in-a-

million chance of a different verdict, like a one-in-a-million chance of winning the lottery, is not a reasonable probability. But how about a 10 % probability? A 10 % chance of winning a million dollar jackpot sounds very reasonable. Few in Kentucky would refuse to buy such a lottery ticket. And arguably, if there is a 10% chance that absent a lawyer's error, the verdict might have been different, that's a reasonable probability. If there is even a 10% chance that a lawyer's error may have influenced the jury to condemn an innocent person to prison or death, the *Strickland* test has been met. And under *Strickland* a court can't throw such a case out without 1) consideration of the record, and, 2) if the allegations are not conclusively refuted, a hearing. As discussed in Part II of this series (*The Advocate*, September 1999), under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) a hearing must be granted in every case unless there is no reasonable probability, arguably less than a 10% chance that prejudice could possibly be shown.

#### **6. Point out that defendants do not have to prove the big "But For."**

This author asserted in Part II that *Strickland* did not use "but for" language. This was in error. See *Strickland*, 104 S.Ct. at 2068. What the author should have said is that *Strickland* did use the phrase "but for," but did not use it to mean the same thing as the "But For" in *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky., 1986). *Gall* requires proof by clear and convincing evidence that "*butfor*" counsel's errors, the result would have been different. By contrast, *Strickland* requires proof only of a *reasonable probability* (that but for counsel's errors the result would have been different). The difference between the "But For" in Gall and the "but for" in *Strickland* is the difference between a *certainty* that "but for the errors the result would have been different" (Gall) and a *reasonable probability* that "but for the errors the result would have been different." (*Strickland*)

It is hard to prove a certainty. It is much, much easier to prove a "reasonable probability." The test set out in *Gall* is in error. Defendants should point out this error, and urge Kentucky's trial courts to apply the correct test, from *Strickland*.

#### **7. Set out the burdens of proof.**

Each 11.42 motion should include a paragraph setting out the burdens of proof inside the 11.42 hearing (Part II, *The Advocate*, September 1999), and pointing out that if there is a mere "reasonable probability" that counsel's errors have caused prejudice, a "*probability sufficient to undermine confidence in the outcome*," *Strickland* requires a new trial.

In the 11.42 motion itself, defendants should also remind the trial court that a hearing must be granted unless the record conclusively refutes every allegation. Cite *Lewis v. Commonwealth*, Ky., 411 S.W.2d 321, 322 (1967). Under CR 52.01 findings of fact are not essential for appellate review of an RCr 11.42. Thus the defendant does not need to ask for findings.

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<sup>1</sup> And for their "greater wisdom" and contribution to this article, thanks to Randall L. Wheeler, Director of Capital Post-Conviction, and Sue Martin, Capital Post-Conviction.

<sup>2</sup> For additional details on the mechanics and details of litigating an RCr 11.42 petition, the Post Conviction Branch of the Department of Public Advocacy has an "11.42 Packet" available through the Frankfort office by request.

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## SHOULD MOM AND DAD GO TO JAIL WHEN THE KIDS DON'T GO TO SCHOOL?

By Karen Mead, Assistant Public Advocate

When I was a kid I used to skip school on occasion. I never thought that skipping school was a crime that could land my parents in jail. Unfortunately, in some counties in Kentucky, a parent in jail for their child's failure to attend school is becoming a disturbing trend. Why are some prosecutors and judges putting these parents behind bars? What law are the parents breaking? Most important, how can we, as criminal defense lawyers, keep these parents out of jail? All of these questions seem simple to answer at first glance, but on further examination, the answers involve a myriad of complex social and legal issues.

An overview of the law gives part of the answer to these questions. KRS 159, the compulsory education statute, requires parents to enroll and send their children, ages 6 to 16, to school ([KRS 159.010\(1\)](#)). A definition of truancy is provided in [KRS 159.150](#),

Any child who has been absent from school without valid excuse for three (3) or more days, or tardy without valid excuse on three (3) or more days, is a truant. Any child who has been reported as a truant three (3) or more times is an habitual truant. Being absent for less than half of a school day shall be regarded as being tardy. A local board of education may adopt reasonable policies that: (1) Require students to comply with compulsory attendance laws; (2) Require truants and habitual truants to make up unexcused absences; and (3) Impose sanctions for noncompliance.

On the other hand, [KRS 600.020\(25\)](#) defines an habitual truant as:

any child who has been found by the court to have been absent from school without valid excuse for three (3) or more days during a one (1) year period or tardy for three (3) or more days on at least three (3) occasions during a one (1) year period.

In other words, Under [KRS 159.150](#), a child must be absent or tardy without a valid excuse three times to be a truant. To be an habitual truant under 159.150 the child must be reported as truant three or more times. [KRS 600.020\(25\)](#) only requires that a child be absent three or more times without a valid excuse to be an habitual truant. The Attorney General issued two opinions attempting to deal with the inconsistencies in these definitions. OAG 91-79 places the burden to reconcile the definitions on the district courts and the directors of pupil personnel. However, in a later opinion, OAG 93-37, the Attorney General determined that [KRS 600.020\(25\)](#) controls over [KRS 159.150](#).

[KRS 159.990](#)(1) provides a graduated penalty for any parent who "intentionally" fails to abide by the compulsory education statute. For the first offense a parent is subject to a fine of \$100; the second offense carries a penalty of \$250. For each offense thereafter the parent faces a Class B misdemeanor. In addition, a prosecutor can decide to proceed under [KRS 530.070](#), Unlawful Transaction with a Minor in the Third Degree, a Class A misdemeanor.

Unlawful Transaction with a Minor in the Third Degree makes it a crime for a person to "knowingly induce, assist or cause a minor to become a habitual truant". The commentary to this statute makes it clear that while any person can be charged with this crime, including parents and guardians, it primarily applies to non-parents and non-guardians. OAG 87-40 and OAG 77-514 both addressed the issue of whether parents could be charged with Unlawful Transaction if their children were habitually truant. The Attorney General makes it clear that a charge can be brought against a parent under [KRS 530.070](#).

The compulsory education statute and the use of [KRS 530.070](#) against parents seem designed to force children to attend school. Education is certainly important in today's society. However, are children more likely to go to school while Mom and Dad are sitting in a cell in the county jail? Apparently some prosecutors and judges believe that putting parents behind bars will effectively deal with the problem of habitual truancy.

Defending a parent charged with Unlawful Transaction with a Minor for their children's failure to attend school can be difficult and time consuming. In general, the following steps can be taken when defending against this charge.

Find out why the child is not going to school. Maybe there is a valid medical reason and the parents are too indigent to take the kid to a doctor for every illness. Inability to perform the school work could be another reason children refuse to go to school. If this is the case, the defense lawyer should subpoena the child's records and discover whether this child should be evaluated for special education classes. Perhaps the child has been evaluated and for one reason or another the child was not placed in the appropriate class, then, depending on when the evaluation was performed, the child may need to be reevaluated. Often, when a child is placed in a setting where they are not frustrated with the schoolwork, the child will want to go to school. Finally there could be a dependency, neglect or abuse problem in the household. With your client's consent, it might be appropriate to make a motion to have the case transferred to the juvenile docket and heard as a dependency, neglect or abuse action.

Through discovery, find out what steps the school has taken to remedy the truancy problems with the child and family. Every school district has a Director of Pupil Personnel. KRS 159.140 clearly describes the duties of the school when a child is failing to attend. The Director of Pupil Personnel is required to "... (3) Acquaint the school with the home conditions of the student, and the home with the work and advantages of the school; (4) Ascertain the causes of irregular attendance and truancy, and seek the elimination of these causes; ... (6) Visit the homes of students who are absent from school or who are reported to be in need of books, clothing or parental care; ... [and] (8) Report to the superintendent of

schools in the district in which the student resides the number and cost of books and school supplies needed by any student whose parent, guardian, or custodian does not have sufficient income to furnish the child with the necessary books and school supplies..." [KRS 159.140](#).

In conclusion, while not many defense lawyers have had to defend a parent charged with Unlawful Transaction with a Minor in the Third Degree, there is a trend in our society to hold parents accountable for their children's actions and/or inaction. There are many avenues available to defend against this charge, including a constitutional attack on the statute. Perhaps the most effective method, however, is to address the underlying reason the child is not attending school. Education is one of the most important assets a person can have. Nevertheless, a child cannot become a productive citizen of this society if her parents are behind bars because she didn't go to school.

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**PLAIN VIEW . . .****Ernie Lewis, Public Advocate**

*Farmer v. Commonwealth*  
*6 S.W.3d. 144*  
*(Ky. App. 8/20/99)*

Farmer had a wreck in Madison County and was taken to the hospital. The person he hit was killed. Before going to the hospital, a breathalyzer test was given to him. While at the hospital, he was interviewed, at which time he "consented" to blood and urine testing. After he was indicted, he moved to suppress the results of the testing, and he eventually was convicted and given 5 years on reckless homicide. He appealed.

One of the issues before the Court of Appeals was the trial court's denial of Farmer's motion to suppress. Farmer contended that his consent at the hospital was not valid, and thus the search was illegal. The Court of Appeals, in a unanimous decision written by Judge Combs and joined by Judges Emberton and McAnulty, affirmed the trial court. The Court agreed that the taking of blood or urine was appropriate for a Fourth Amendment analysis. "The taking of a blood sample from a criminal suspect for testing constitutes a search for real or physical evidence which implicates and activates the Fourth Amendment to the United States Constitution." However, the Court agreed with the trial court that the consent was valid. While Farmer had contended that the officer had told him he was required to submit to the testing, the Court agreed that the officer had told the defendant he was not under arrest, that Farmer had consented both verbally and in writing. As a result, the Court found that the trial court had not erred in denying Farmer's suppression motion.

*Wilson v. Commonwealth*  
*998 S.W.2d. 473*  
*(Ky. 8/26/1999)*

The Kentucky Supreme Court has adopted the opinion of the Court of Appeals in *Wilson v. Commonwealth*. The case involves the warrantless search of a parolee by a parole officer. Wilson had received a positive drug test and had been sent to a half-way house as a result. Two parole officers went to see him at the halfway house to arrest him. They found \$373 in his pocket during a patdown. While waiting for the police to arrive, Wilson asked if he could call someone to move his car. The parole officers instead went to the car and searched it, finding marijuana and a scale in the trunk. Wilson was then charged and entered a conditional plea.

The Kentucky Supreme Court adopted the opinion of the Court of Appeals affirming the trial court's denial of Wilson's motion to suppress. The Court agreed that the condition of being on parole does not suspend the Fourth Amendment. On the other hand, the Court affirmed the applicability of *Griffin v. Wisconsin*, 483 U.S. 868 (1987), which had established probation searches within the special needs category. The Court held that *Griffin* applied, and thus only reasonable suspicion rather than probable cause and a warrant were required to justify the search of Wilson's car. The Court noted that the Department of Corrections had authority to place certain conditions of the parolees they are charged with supervising, that one of the conditions they had imposed was that Wilson would be subject to "search and seizure based upon a parole officer's reasonable belief that he had contraband on his person or property." Accordingly, because the parole officers in this case had reasonable suspicion, their warrantless search was legal.

***United States v. Ford***  
***191 F.3d. 461 (table)***  
***(6<sup>th</sup> Cir. 9/1/1999)***

This case began with the issuance of an extremely general search warrant in Jefferson County, Kentucky in August of 1992. The police executing the search warrant took virtually all of the records from Don Ford's bingo business. These records were later turned over to the IRS.

Ford challenged one of the searches saying that a warrant to search for all records was overbroad and allowed for a general search. The Government argued that the records were admissible to prove the defendant's entire financial picture, and that the business was completely fraudulent.

The Court reversed in a decision written by Judges Gibson, Nelson, and Clay. This is an exceptionally fact specific case. The Court examined the issue under the particularity requirement, noting that the broad warrant clause involved in this case was identical to one they had previously approved in *United States v. Ables*, 167 F. 3d 1021 (6<sup>th</sup> Cir. 1999). The Court further noted that the "degree of specificity required in a warrant depends on what information is reasonably available to the police in the case." In this case, the warrant "authorized a broader search than was reasonable given the facts in the affidavit supporting the warrant." Accordingly, the search was a violation of the Fourth Amendment.

***Ingram v. Columbus***  
***185 F. 3d 579***  
***(6<sup>th</sup> Cir. 7/19/1999)***

The Sixth Circuit has examined the relationship of the hot pursuit and knock and announce doctrines in this civil rights case written by Judge Clay, and joined by Judge Daughtrey.

This case began as a street drug effort gone bad. Anthony Carroll offered to sell cocaine to the police, but later told them that someone had taken the money the police had given to him. When told he was under

arrest, Carroll fled into a nearby house and hid under a bed. The police entered the house without a warrant, handcuffed one of the people in the house and pointed a gun at his head, eventually finding and arresting Carroll. The officers told some of the residents to shut up. One of the officers hit Betty Ingram in the face. They handcuffed two women, including Ingram. When asked why they were taking Ingram to jail, the officers cursed the questioner and told her to shut up. As Ingram sat handcuffed on the couch, one of the officers "shook her violently and banged her head against the couch." Eventually, Ingram and Patricia Collins were charged with "obstructing official business." They spent 12 hours in jail prior to being released on bond. They then went to the hospital and were diagnosed with minor contusions of the scalp. Their charges were eventually dropped upon forfeiture of the bond.

Four residents, including Ingram and Collins, sued the City of Columbus, Ohio, and several of the police officers under 42 U.S.C. # 1983. The district court granted a summary judgment in favor of the defendants, and the plaintiffs sued. In an extensive opinion, the Court reversed the district judge's granting of the summary judgment motion.

The Court found that the officers had probable cause to believe Carroll had committed a felony when they began to pursue him. Thus, there were exigent circumstances for the police to enter the house without a warrant. In this regard, the district judge's summary judgment was upheld.

The Court also found that the police had failed to knock and announce prior to entering the house. The Court rejected the defendants' arguments that their entry was justifiable based upon the possibility of the destruction of evidence by Carroll and based upon "hot pursuit." "In this case, where no other justification for an unannounced entry exists and where Defendants did not know whether the home they entered was only the home of the suspect they pursued or had no reason to believe the occupants of 395 Stoddart were prepared for Defendants' entrance or were aware of their presence, we believe knocking and announcing would have been more than a superfluous act."

The Court rejected the defendant's arguments that they could handcuff the residents of the house without probable cause or reasonable suspicion. The Court also found that there was an issue of fact to be determined whether the defendants arrested Ingram and Collins without probable cause. Thus, a summary judgment was not appropriate on that issue.

The Court also held that the district court had erred in granting summary judgment on the issue of excessive force.

Judge Kennedy wrote concurring in part and dissenting in part. Judge Kennedy believed that the same exigent circumstances excusing the officers from obtaining a warrant prior to entering the house also excused the officers from knocking and announcing. "I would hold that the exigent circumstances of hot pursuit in this case excused the officers from complying with the knock and announce requirement." Judge Kennedy also would have held that the bond forfeitures by Ingram and Collins precluded their #1983 false arrest claims.

## Short View

1. *Commonwealth v. E.M.*, 735 A.2d 654 (Pa. 7/21/99). Seeing a man with a plastic baggie in his hand signal to other men and then exchange something for cash does not constitute probable cause. This activity constituted only reasonable suspicion; thus, there was no probable cause to arrest and search for the baggie, invalidating the seizure of drugs from the defendant.
2. *State v. Benson*, 983 P.2d 225 (Idaho Ct. App. 7/21/99). A mother does not have the authority to consent to the search of a garage apartment occupied by her daughter and her daughter's boyfriend where the daughter is strongly objecting to the search, and where the daughter and her boyfriend have the only keys. The Court analyzed the issue under both the common and apparent authority doctrines, and found no consent under either theory.
3. *Pool v. McKune*, 987 P.2d 1023 (Kan. 7/16/99). The use of a plethysmograph during sex offender therapy in a prison setting, while implicating the Fourth Amendment privacy rights of the inmate, is not unconstitutional under the familiar balancing test.
4. The ABA House of Delegates has called for law enforcement agencies to collect data on racial profiling in traffic stops. This occurred at their August 10, 1999 meeting, apparently in response to the plea of Detroit Mayor Dennis Archer, who also serves as an ABA Delegate. Governments are urged to determine whether stops are being conducted in a disproportionate fashion against persons of color.
5. *Morton v. United States*, 182 F.3d 1 (DC Cir. 8/12/99). The DC Court of Appeals has interpreted *Minnesota v. Carter*, 119 S. Ct. 469 (1998) to read that a person who is seen selling drugs, and then goes to the home of a family friend, has a privacy interest in that house. Thus, because the police came to the house, were admitted, and arrested the defendant without a warrant, that violated the defendant's Fourth Amendment rights.
6. *Middleton v. State*, 714 N.E. 2d 1099 (Ind. 6/29/99). A police officer who has probable cause to seize an item in plain view, may not return later to the defendant's house and seize the item without a warrant. It is now or never; the only option after leaving the defendant's house is to obtain a warrant. Here, the officer was looking at a house to buy. He saw marijuana growing in the defendant's house. After leaving the house, he radioed for other officers to come and seize the marijuana. Their illegal entry and seizure of the plants violated the Fourth Amendment, according to the Indiana Supreme Court.
7. *State v. Ladson*, 979 P.2d 833 (Wash. 7/1/99). The trend to interpret state constitutions more broadly than the Fourth Amendment, while a bit atrophied, continues in this case. The Washington Supreme Court holds, in contradistinction to *Whren v. United States*, 517 U.S. 806 (1994), that a pretextual stopping of a vehicle is violative of the Washington State Constitution. The majority opinion noted that the problem with a pretextual traffic stop is that "the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving."
8. *Edmond v. Goldsmith*, 183 F.3d 659 (7<sup>th</sup> Cir. 7/7/99). The Seventh Circuit has held, in this civil rights case, that roadblocks to search for drugs are violative of the Fourth Amendment.
9. *Ferris v. State*, 735 A.2d 491 (Md. 8/18/99). When a traffic stop is completed, and the police continue to question the motorist regarding drugs, that amounts to a seizure requiring reasonable suspicion, according to the Maryland Court of Appeals. "[O]nce the underlying basis for the

initial traffic stop has concluded, a police-driver encounter which implicates the Fourth Amendment is constitutionally permissible only if either (1) the driver consents to the continuing intrusion or (2) the officer has, at a minimum, a reasonable, articulable suspicion that criminal activity is afoot."

10. *Commonwealth v. Scavello*, 734 A.2d 386 (Pa. 7/2/99). Turning around to avoid a roadblock does not give the police probable cause to stop the driver.
11. *Walls v. State*, 714 N.E. 2d 1266 (Ind. Ct. App. 8/20/99). A passenger may not be ordered to return to the scene of a traffic stop, according to the Indiana Court of Appeals. The Court recognized that *Maryland v. Wilson*, 519 U.S. 408 (1997) had recently held that for police officer safety a passenger may be ordered to leave a car. This situation is different, however, because the passenger in *Walls* was leaving the scene, eliminating the concern regarding officer safety.
12. *United States v. Gwinn*, 191 F.3d 874 (8<sup>th</sup> Cir. 9/15/99). A police officer cannot feel the outside of luggage aboard a train without reasonable suspicion or probable cause. Thus, when the officer took the luggage, which smelled of marijuana when manipulated, and the defendant said that the bag was his, the resulting arrest and search and seizure of the luggage was a 4<sup>th</sup> Amendment violation.. "While a passenger can expect that others will perhaps push aside or briefly touch his bag in an attempt to accommodate their own luggage, even those pieces placed in an overhead compartment, to be subject to a calculated and thorough squeezing and manipulation of their interiors. Unlike a canine sniff or the incidental touching that accompanies the moving of luggage from the overhead, the feeling and manipulation of a bag's exterior involves a much more intrusive and prolonged contact with the piece..."

Ernie Lewis  
Public Advocate



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# CAPITAL CASES REVIEW

Julia K. Pearson,  
Paralegal / Law Clerk

Julia K. Pearson,

## KENTUCKY SUPREME COURT

*Moore v. Commonwealth*, 983 S.W.2d 479 (Ky. 1998)

**Unanimous decision, Stumbo (writing)**

Brian Keith Moore was retried and resentenced to death for the kidnapping, robbery and murder of Virgil Harris, the father of a Louisville police officer, in 1984. His sentence was affirmed on direct appeal. *Moore v. Commonwealth*, 771 S.W.2d 34 (Ky. 1989). In September, 1990, he filed a post-conviction motion under Kentucky Rule of Criminal Procedure, RCr 11.42. In October, 1995, he filed a CR 60.02 motion based on newly discovered evidence. After an evidentiary hearing, the Jefferson Circuit Court denied both motions in January 1997.

## ARGUMENTS RELATING TO GUILT

During the trial, Moore attempted to create reasonable doubt by showing that his co-defendant, Kenny Blair, shot the victim. Blair testified at both trials that he was getting his driver's license at about the time the victim was kidnaped.

At the second trial in 1984, Doris Riddle, who worked at the driver's licensing office, testified that she assisted Blair sometime between 11 a.m. and 12:30 p.m. on the day of the murder. However, her testimony was inconsistent with a statement given to a police officer three days after the murder. In the statement, she said that she was unsure exactly when Blair had been in the office. Another employee, Faye Thomas, told police officers that when she returned from lunch, co-workers told her about a couple who had been in the office while she was away from the office between 1 and 1:45 p.m. Trial counsel had the police report available for use, but failed to spot the inconsistencies. Moore argued that the

failure to use the report to impeach Riddle and the failure to call Faye Thomas eliminated any doubt in the juror's minds that Blair was the real killer. Faye Thomas's testimony also bolstered Moore's testimony that Blair had gone to get his driver's license at about 1 p.m.

The Court found that trial counsels' failure to impeach Riddle with her statement was deficient performance, under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984). However, Moore could not satisfy the second prong: a reasonable probability that but for counsel's error, the outcome of the trial would have been different. That decision must be made upon the "totality of the evidence before the judge or jury." *Moore*, 983 S.W.2d 479, 484, quoting *Strickland*, 466 U.S. at 695.

Riddle's testimony did not completely destroy Moore's defense: the jury could have found that Blair was being assisted by Riddle at 11 a.m. and still have had time to kidnap the victim at 11:45. Blair's girlfriend also testified that she was with Blair as he did his errand. Lastly, Moore owned the gun which shot the victim, his fingerprints were found in the car and on a coin wrapper inside the car, and the victim's watch was found in the backseat of the cruiser in which Moore was transported. Lastly, Moore confessed.

Blair's mother testified that Moore was wearing a pair of pants containing soil from the crime scene shortly after the murder. Moore argued that by demonstrating that the pants did not fit him, defense counsel could have disproved Moore's linkage to the crime scene with physical evidence and impeached Blair's mother's testimony. The Court found that counsel's failure to present this evidence was a strategic decision. The retrial was five years after the crime; a demonstration that the pants were too small for Moore "was of limited evidentiary value." *Id.* In his closing argument, counsel had urged the jurors to compare the pants for themselves and made the same point much more forcefully than a demonstration during trial would have been.

Counsel was also not ineffective for failing to call two witnesses to testify that they heard Blair state that he had set Moore up. An investigator's memo about Ronald Daugherty showed that Daugherty did not actually hear Blair make the statement, but had gotten a message from Blair through an intermediary. Failure to call Tonya Benet, Blair's former girlfriend was also not improper. Her testimony was cumulative to seven other witnesses.

## **INTOXICATION IN GUILT AND PENALTY PHASES**

At the first trial, counsel introduced an attorney's testimony that he had seen needle tracks on Moore's arms following his arrest. Moore argued that counsels' failure to introduce this testimony and photographs of Moore's arms resulted in the denial of a manslaughter instruction at the guilt phase and the lack of evidence of intoxication as a mitigator in the penalty phase. Evidence of Moore's intoxication was introduced at the second trial through other means. Counsel's failure to introduce the photographs, which did not clearly show the track marks was a strategic decision.

## **INTRODUCTION OF EVIDENCE THAT MOORE HAD A PREVIOUS FELONY**

Moore argued that defense counsel should have argued that he would be unduly prejudiced in the penalty phase in order to exclude the evidence that Moore had a previous felony conviction from a guilty plea to robbery after his first trial. The Court found the argument speculative and without merit. The Supreme Court upheld the trial court's determination that introduction of this evidence was proper. *Id.*, at 485, citing *Moore v. Commonwealth*, at 37-38. Moore's argument that defense counsel should have been found ineffective for failing to request a penalty phase admonition that the jury should disregard the evidence. The Court found that counsel made a decision not to ask for the admonition because it would draw even more attention to the evidence. Such a decision was not unreasonable, under the *Strickland* standard.

During her testimony, Moore's aunt, Florine Shoptaw, read part of a statement in which she told the police that Moore told "tall tales" in order to get out of trouble. Counsel testified at the evidentiary hearing that he did not know why he did not make an objection. The Court found evidence in Mrs. Shoptaw's testimony: she angrily testified that her comment was taken out of context. According to the Court, counsel decided that Mrs. Shoptaw's later statement was more helpful than an objection.

### **PENALTY PHASE INEFFECTIVE ASSISTANCE**

Moore was not prejudiced by counsel's failure to request a directed verdict on the "no significant history of prior criminal activity" mitigator. The Court found such a request "ha[d]. . . never before been authorized by Kentucky law.

Counsel's other decisions during the penalty phase preparation and presentation did "not overcome the strong presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Moore*, at 486, citing *Strickland*, 466 U.S. at 690.

### **DISQUALIFICATION OF PROSECUTOR'S OFFICE**

The victim was the father of a Jefferson County police officer. Defense counsel testified at the evidentiary hearing that the prosecutor's office was unwilling to negotiate a plea bargain because the police department was insistent upon the death penalty. However, counsel also testified that neither thought to move for disqualification of the prosecutor's office. Moore argued that counsel was ineffective as a result.

The Court stated that prosecutors have broad discretion regarding what crime to charge, whether to seek the death penalty or to enter into plea negotiations. Although there was pressure on the prosecutor's office to seek the death penalty in this case, the same would exist throughout the case, not just at the first or second trial.

### **PRESENCE OF UNIFORMED POLICE OFFICERS IN COURTROOM**

Although the court denied counsels' pre-trial motion to exclude uniformed police officers from the

courtroom, he told counsel that the decision may be re-examined if it became a problem. At various times during the trial, as many as ten uniformed officers were in the courtroom; counsel never renewed the motion because he "forgot about it". The Court found counsels' decision not ineffective; had the disturbance from the officers' presence been so much that counsel would notice, the objection would have been renewed. The court found support in the trial court's failure to re-examine his decision.

### **APPELLATE INEFFECTIVE ASSISTANCE OF COUNSEL**

The court found counsel not ineffective for not raising several unpreserved errors on the direct appeal. Counsel was merely "winnowing out" the weaker arguments.

### **TRIAL COURT'S CONSIDERATION OF COUNSELS' EXPERIENCE**

Moore argued that the trial court improperly permitted testimony about trial counsels' reputation and abilities and then considered counsels' experience in criminal matters in deciding whether the 11.42 should be granted.

The Court found that the trial court was not concerned about trial counsel, but about the facts regarding counsels' representation of Moore. Thus, the Court found the trial court fairly weighed the allegations contained in Moore's motion.

### **APPLICATION OF THE WRONG STANDARD**

Moore argued that the trial court applied the wrong legal standard in deciding upon the motion, when he concluded that counsels' errors "did not 'cause the jury's verdict.'" The Supreme Court found that the court had applied the correct, *Strickland* standard of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different", but that even if the court had applied the wrong standard, as Moore alleged, the result would have been the same. *Moore*, at 488.

The United States Supreme Court denied certiorari on October 4, 1999.

***Mills v. Commonwealth*, --- S.W.2d --- (rendered April 22, 1999)**

**Unanimous decision: Johnstone (writing)**

John Mills was convicted of the robbery, burglary and murder of Arthur Phipps. Phipps' body was discovered by his son-in-law, who found a trail of blood leading up the steps to Phipp's house. He found more blood in the living room, bedroom, bathroom and kitchen before finally finding Phipps' body outside the house. While officers were securing the crime scene, they found a trail of blood leading away from Phipps to a house Mills rented from Phipps. There was blood on the exterior of the house, on the front door and another trail of blood leading to a window. Mills stared at the officer, who ordered Mills to remain inside and then entered the house. Mills surrendered tho the policeman. Later, Mills confessed

to the crime. The videotape of Mills' confession was played for the jury.

## **FOURTH AMENDMENT ISSUES**

Mills argued that the police had no exigent circumstances with which to enter his home. The police followed the blood trail to the house. There was fresh blood in several places on the outside of the house. The police detective, Gary Partin, testified that after he saw the blood, he suspected that the person who killed Phipps was inside the house and possibly wounded. Thus, there were sufficient exigent circumstances for the police to enter the house.

Mills also argued that the fruits of the police search of his house after he was taken for medical treatment should have been suppressed. However, the videotape of Mills' confession showed that he acquiesced to the police request to search his house.

## **CONFESSION ISSUES**

Mills filed a motion for the court to conduct an *in camera* review of his confession. He argued that his confession should be suppressed because his intoxication and the effects of his injuries rendered his confession involuntary and unreliable. However, the trial found that Mills' condition did not meet the standard set forth in *Britt v. Commonwealth*, 512 S.W.2d 496 (Ky. 1974) and that his injuries were not sufficiently serious to render the confession involuntary.

On appeal, Mills argued that the trial court did not meet the mandates of RCr 9.78, which mandates that the trial court hold an evidentiary hearing when a defendant moves to suppress his confession. The Supreme Court that while the judge did violate RCr 9.78, the error was harmless, even in light of Mills' low IQ and limited intelligence. Mills willingly answered the questions posed to him, and that he did not appear to be so intoxicated or injured that his confession was unreliable.

Mills also moved to suppress his confession on the grounds that he was not given his *Miranda* rights, or that the rights given to him were inadequate. The trial court found that Mills had been given adequate warnings and voluntarily waived his right to remain silent. Although he did not argue the issue at the evidentiary hearing held before trial, Mills argued on appeal that his waiver was coerced when he was questioned a second time by a detective. Using the analysis set forth in *Michigan v. Mosley*, 423 U.S. 96 (1976), the Supreme Court found that Mills had voluntarily waived his rights. When he was first advised of his rights, Mills told Detective Partin that he would not talk. Thereafter, Partin did not attempt to question Mills, nor did he pressure him to change his mind. A second detective, Hall, readvised Mills of his *Miranda* rights before speaking with him a short time later. This time, Mills was willing to speak and did so. Although the short lapse of time between both detectives speaking with Mills "concern[ed]" the court, examining the confession in the totality of the circumstances still gave evidence that the police scrupulously honored Mills' right to remain silent.

## **PRIOR BAD ACTS**

Mills' wife, Sharon, testified that she and Mills had gotten into a scuffle when he asked her for the keys to the family van. She later testified that Mills had pushed her down and taken the van keys from her. Defense counsel did not object to the latter testimony. The court found concern with the testimony, but found in the totality of the circumstances that even had the evidence not been elicited, Mills would still have been found guilty of murder and sentenced to death.

Mills' former cellmate, Sam Shepherd testified that Mills had been convicted and imprisoned for a previous crime. The trial court denied a defense motion for mistrial. However, the court found nothing to review on appeal: Mills did not argue that the court erred in its failure to grant a mistrial or present evidence to rebut the presumption that the trial court's admonition to the jury cured the error.

Shepherd also testified to the physical confrontation between Mills and his wife, allegedly because Mills wanted to buy marijuana. The Court found counsel's failure to object to the evidence of marijuana usage helpful to Mills' intoxication defense. The remainder of the testimony was cumulative.

Mills' short statement in his videotaped confession that Gary Martin had sent him to the penitentiary was also found not to be reversible error.

## **WAIVER OF COMPETENCY HEARING**

Before the trial, Mills filed notice that he would present psychiatric evidence. About one month later, the trial court ordered a psychiatric examination at Kentucky Correctional Psychiatric Center, at which Mills was found competent to assist in his defense. At a pre-trial hearing, defense counsel waived an evidentiary hearing regarding Mills' competency. KRS 504.100(3) states that after the report from a psychiatric examination is filed, "the court shall hold a hearing" to determine the defendant's competency to stand trial. The Supreme Court examined the circumstances surrounding the failure to hold a hearing under the standard of whether a reasonable judge should have had a doubt about the defendant's competency to stand trial. *Mills*, slip op. at 15, quoting *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6<sup>th</sup> Cir. 1983), and found that the court did not order the KCPC exam because he had a reasonable doubt as to Mills' competency, but rather, because Mills had given notice that he intended to present psychiatric evidence at trial.

## **JURY SELECTION**

The trial court did not improperly limit voir dire. The questions asked by both the defense and prosecution were adequate to elicit the jurors' views.

The trial court did not abuse its discretion by failing to excuse jurors for cause because of their views on drug and alcohol abuse. The court also did not abuse its discretion in excusing another juror for cause: she was excused not because she was equivocal on her views about the death penalty but because of her nervousness in answering the questions posed to her and a medical excuse stating she had a nerve

disorder.

## **VIDEOTAPE OF THE CRIME SCENE**

A videotape of the crime scene was played for the jury. Detective Partin commented on the images as they were portrayed in the video. Defense counsel did not object to either. Partin properly testified—his testimony consisted of opinions and inferences based on his perceptions.

Detective Partin's qualification and testimony as a blood spatter expert was harmless error. Evidence of Mills' guilt was overwhelming.

## **EXCLUSION OF EVIDENCE**

Mills argued that the trial court improperly prevented the presentation of his defense by disallowing portions of the testimony of nine witnesses on hearsay grounds. However, Mills made no showing that the ruling prevented him from introducing the evidence in a manner other than hearsay.

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# PRACTICE TIPS

from DPA's Appellate Division

Collected by Susan Balliet, Assistant Public Advocate

## **Kentucky Supreme Court may rule no accomplice unless there's a principal.**

In the case of Billy Ray Smith, the Kentucky Supreme Court is currently considering whether a defendant who commits some of the elements of a crime, but not all the elements, can be convicted as a principal to the whole crime based on inferred intent and absent an indictment and jury instruction on complicity. At oral argument, the Court posed a disturbing question: doesn't there have to be a principal before there can be an accomplice?

In anticipation that our high court may rule to this effect, trial counsel should immediately start moving for directed verdict on "no principal" grounds in all multiple defendant cases where intent is unclear, and where there is a question as to which defendant's actions *caused* a crime. For instance, consider a case where two people assault a victim with unclear intent, and the victim subsequently dies, but there is no way to tell whose assault caused death.

In such a case, counsel for both defendants should say, "I move for directed verdict on the grounds that no principal has been shown, and therefore my client cannot be convicted as an accomplice." If neither can be shown to be the principal, under the Kentucky Supreme Court's possible new ruling, neither can be convicted as an accomplice.

Counsel should also request an instruction in such cases to inform the jury they must first determine who is the principal, before any other defendant can be convicted as an accomplice.

Finally, in any case where no one has been convicted as a principal, a motion for JNOV should be filed arguing it is an "inconsistent verdict" to find your client guilty as an accomplice when no one has been convicted as a principal.

*Susan Balliet, Assistant Public Advocate*

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**Notify Ben Chandler III if you are challenging constitutionality**

The newly amended version of CR 24.03 requires notice not just to the local commonwealth's attorney but also to the Attorney General (Himself) for any constitutional challenge to any statute. Challenges on appeal may not be allowed if a trial attorney fails to give the requisite notice prior to trial to the Hon. A. B. Chandler III, Attorney General, at 1024 Capital Center Drive, Frankfort, Kentucky 40601.

*Carol Camp, Assistant Public Advocate*

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### **Consider requesting *Daubert* hearing and expert funds in Megan's Law risk assessment**

In conjunction with a Megan's Law risk assessment hearing, you should request a *Daubert* hearing on the scientific acceptance and reliability of the actuarial instruments used to do risk assessments, currently the RRASOR, the MnSOST-R and the VRAG. You should also file a motion requesting expert funds for your own expert to challenge the use of these actuarial instruments and/or to do an independent assessment.

*Carol Camp, Assistant Public Advocate*

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### **Be aware of illegal DOC policy affecting Megan's Law cases**

Also, you need to be aware that DOC apparently has a policy of taking the highest score and basing an individual's risk level on it if there is a conflict in scores. This is a direct violation of 501 KAR 6:200 and must be challenged. You can obtain a copy of 501 KAR 6:200 from the legislative research commission's website.

*Carol Camp, Assistant Public Advocate*

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### **Spend Extra Time with Juvenile Clients**

Juvenile practice tip number one: you can't spend too much time with a juvenile client. When talking with young children, teenagers, or any client with suspect cognitive capacity, make sure you have them repeat key points of the discussion. A competency motion can be based on the fact that a juvenile (even with heavy coaching) did not understand a *Boykin* colloquy well enough to repeat back a basic explanation of the role of the prosecutor, or witnesses.

*Tim Shull, Assistant Public Advocate, Juvenile Branch*

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## Try Football Analogies

In trying to understand the justice system, teenage (and other) clients may respond to football analogies. For instance, try comparing probable cause to a situation in football, when the government is moving the ball, but all they have to do is get the ball to the 50 yard line on the set of downs. If the case is weak, try asking the client who the best and worst teams are in pro football, and describe the prosecution as the best and us as the worst (due to unequal power not ability). For proof beyond a reasonable doubt, try explaining they don't have to score a touch down, but they have to get way, way down the field, at least to where it's first and goal for them.

*Tim Shull, Assistant Public Advocate, Juvenile Branch*

*Kudos and thanks to District Judge Robert Heaton for inviting DPA attorneys to come to Nelson County to address a group of school personnel, parents, and staff from the Department of Juvenile Justice. Judge Heaton was concerned with a number of petitions filed by school personnel against special education children.*

*DPA Attorney Bill Morrison gave a presentation on why the Individuals with Disabilities Education Act (IDEA) is important and how schools and parents should be working together and not against each other.*

*Attorneys Tim Shull and Carol Camp talked about why schools must comply with IDEA due process procedures before filing juvenile court petitions against kids who either have been identified as needing special ed or who should have been identified as special ed kids.*

*The presentation was November 4, 1999 at the Nelson County Civic Center in Bardstown*

### **THERE HAS BEEN A STEEP DECLINE IN VIOLENT JUVENILE CRIME**

Nationally, the FBI has reported that for the seventh straight year serious crimes fell for juveniles and adults. The rate for all violent crime last year fell to its lowest level since 1985 for adults and juveniles. Arrests for those under 18 fell 4.2%. Arrests of those under 18 for murder decreased 11.6%.



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# Facts on the Juvenile Death Penalty

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

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

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

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

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

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

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

## **THE DEATH PENALTY IS CONTRARY TO THE FUNDAMENTAL PREMISE OF THE JUVENILE JUSTICE SYSTEM: THAT CHILDREN CAN BENEFIT FROM A TREATMENT ORIENTED APPROACH WHICH INCLUDES ACCOUNTABILITY AND GRADUATED SANCTIONS.**

### **IT IS NOT IN SOCIETY'S INTEREST TO GIVE UP ON CHILDREN.**

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

### **THE DEATH PENALTY IS SELDOM USED AGAINST CHILDREN**

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

## **When the Death Penalty is Used against Children in the United States, Courts Reverse at a High Rate**

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

### **THE DEATH PENALTY IS USED IN ONLY HALF THE STATES FOR JUVENILES**

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

### **THE DEATH PENALTY IS UNCONSTITUTIONAL FOR THOSE BELOW THE AGE OF 16**

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



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KY Department of Public Advocacy

## Welcome From the Public Advocate



**[Ernie Lewis](#)**  
**Public Advocate**

### **THE CASELOAD REPORT** **FOR FY 2004 IS NOW** **AVAILABLE**

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#### **HEADLINES:**



***Justice Jeopardized***

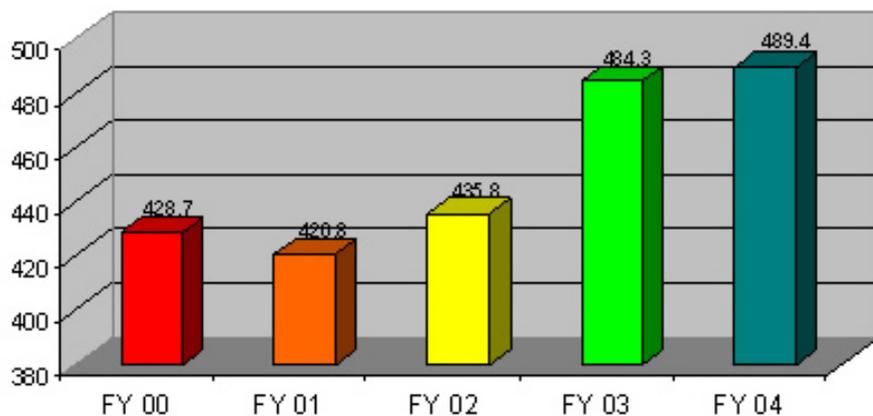
Wednesday December 22, 2004

### DPA Launches Justice Jeopardized Campaign to reduce caseloads of public defenders in Kentucky.

Forty years ago, in the landmark case of Gideon v. Wainwright, the United States Supreme Court declared "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." As the justices said, "This seems an obvious truth." Yet decades later has the promise of Gideon been fulfilled in Kentucky?

**[FULL REPORT](#)**

Cases per DPA Attorney



Wednesday December 22, 2004

Most recent data demonstrates that the quality of justice being provided by Kentucky's public defenders is compromised by the continued significant increase in caseload.

[Graphical Findings of 2004 Caseload Report](#)

DPA represents over 100,000 citizens each year in Kentucky's trial and appellate courts. The staff of the Kentucky's statewide defender program protects what we value most - our liberty and our life. Every day in KY's 120 counties our defenders, supported by our staff of legal secretaries, investigators, paralegals, mitigation specialists, social workers and administrators, stand up for citizens who are accused by the state of having committed a crime. Defenders insure the criminal justice process is fair, the result reached by jurors and judges is just, and that individual liberties are protected. Enjoy learning about the many faces of justice our Department presents to the people of KY. It is a privilege to represent our clients. We do so on behalf of the people of Kentucky.

## About Us

**General Counsel** is Karen Quinn. **Post Trial Division Director** is [Rebecca Diloreto](#). **Director of the Administrative Division, Law Operations Division Director** is [Alfred G. Adams](#). [Jeff Sherr](#) heads up DPA's **Education & Strategic Planning Branch**. The **Louisville Public Defender Office** is led by Dan Goyette. The **Lexington Legal Aid Office** is led by Joe Barbieri. [Maureen Fitzgerald](#) is the **Protection & Advocacy Division Director**. DPA's governing statute is [KRS Chapter 31](#). DPA's [mission](#), [core values](#), and [long term goals](#) provide clear direction for DPA. DPA provides significant [public value](#) DPA's [Legislative Update](#) covers criminal justice legislative issues. In June 2002 the [AOC/DPA Workgroup issued special Report on Eligibility & Pretrial Release](#). The ABA Juvenile Justice Center with the Children's Law Center has released "Advancing Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings." It is at: <http://www.abanet.org/crimjust/juvjus/kentuckyhome.htm> The ABA adopted The Ten Principles of a public Defense Delivery System February 2002, which constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality,

ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.  
<http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf>

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# KY Department of Public Advocacy

## Career Opportunities

Applicants will be required to complete and submit a [standard state application form](#).

Parties interested in Staff Attorney positions should submit a resume and writing sample to:

Tim Shull, Recruiter  
Department Of Public Advocacy  
100 Fair Oaks Lane, Suite 302  
Frankfort, Ky 40601  
(502) 564-8006 (Phone)  
(502) 564-7890 (Fax)  
[Tim.Shull@ky.gov](mailto:Tim.Shull@ky.gov)

All DPA positions are filled according to Kentucky Personnel Cabinet policies. Please contact the DPA recruiter listed above for further position information and current hiring status.

As of November 13, 2003 positions are on a contract basis per the Governor's hiring freeze.

This page is updated around the 10th of each month

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The Department of Public Advocacy is currently recruiting for the following positions:

**Staff Attorney I -**

**Bell County**

**Boone County**

**Bullitt County**

**Maysville**

**Murray**

**Paintsville**

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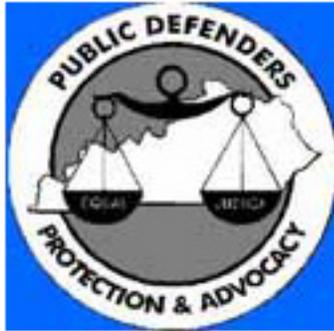
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