25th Anniversary of The Advocate

# The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

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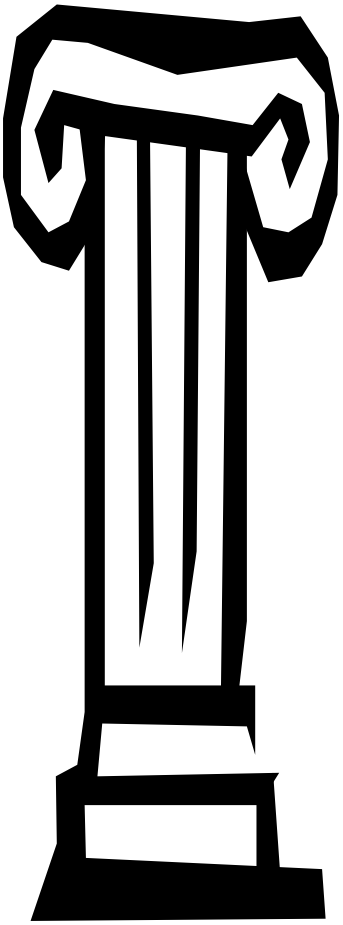
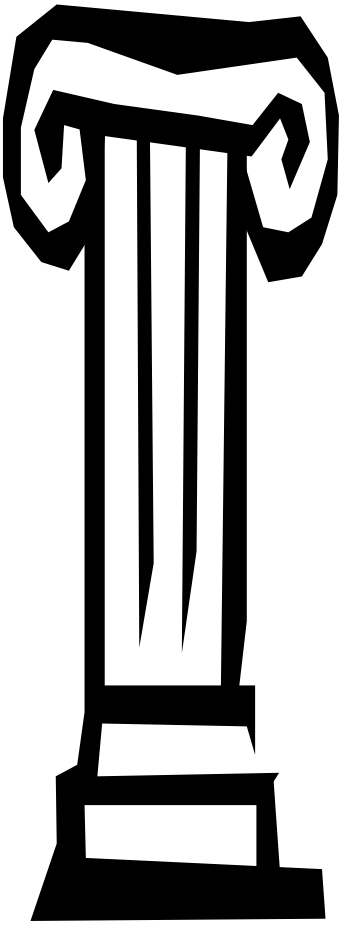
## Alcohol Intake by Pregnant Women and the Criminal Justice System



## Pretrial Release — Working to do Better

## Risk Assessment Instrument Implemented by Parole Board

## Litigating Contempt of Status Offenders



## Our *Gideon* Feature: Patrick Roemer

## Long Time Defenders Dave Norat & Bill Spicer Retire

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**That is what learning is. You suddenly understand something you've understood all your life, but in a new way.**

**— Doris Lessing**

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

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

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# FROM THE EDITOR...

***Ed Monahan***

***"Quality is never an accident; it is always the result of intelligent effort."*** — John Ruskin

**Alcohol intake by pregnant women** has devastating consequences for the permanent injury of the child's brain. The behavior of a child that has a damaged brain sometimes winds up vaulting the person into the criminal justice system. Are Kentucky's criminal justice professionals, prosecutors, judges, probation and parole officers, defenders, aware of this reality and taking it into account as they do their job? We begin this issue with a series of articles in the hope that our awareness is raised and our behavior changes.

**Pretrial release** is one of the most critical issues judges, prosecutors and defenders face. Citizens constitutionally presumed innocent find it important, too. All of us need to do a better job of providing pretrial release to those entitled to it. Defenders must work better with Pretrial Release Officers. Defenders must advocate more persuasively. We continue in this issue to shine the light on Kentucky's pretrial releases realities and call all of us to do better.

**Litigation standards and *Wiggins.*** William A. Foster observes that "Quality is never an accident; it is always the result of high intention, sincere effort, intelligent direction and skillful execution; it represents the wise choice of many alternatives." Criminal defense litigation standards set out a national consensus on what constitutes quality. Serious professionals do not provide quality service by accident. They use standards to elevate their practice to the national level that is being held out in the standards. National standards are important guidelines for public defenders and courts in determining what the attorney should be doing to competently represent clients. The US Supreme Court relied on the ABA Capital representation guidelines to determine that the attorney in the capital case of *Wiggins v. Smith* was ineffective. *The Advocate* has focused in its previous two issues on national standards of practice. This issue, *Wiggins* is reviewed in the capital column.

**Contempt in juvenile status offender cases** is an important area for criminal justice professionals to understand. **Risks.** The parole board is implementing a risk assessment instrument. We bring you straight forward information on these significant issues.

Our *Gideon* feature this issue is Patrick Roemer. We also remember the good work of Dave Norat and Bill Spicer upon their retirement.

**Ed Monahan, Editor**

"If there is anything the nonconformist hates worse than a conformist, it's another nonconformist who doesn't conform to the prevailing standard of nonconformity." — Bill Vaughan

# FETAL ALCOHOL SPECTRUM DISORDERS

*Brain damage caused by prenatal exposure to alcohol can result in behaviors that increase an individual's likelihood of becoming involved in the justice system. This article will provide a foundation of knowledge about the effects alcohol can have on a developing brain, and the connection between brain function and behavior. Future articles will continue to explore the impact of FASD on the criminal justice system.*

### Brief Overview of an Enormous Issue

Every day in the United States, there are approximately 10,076 babies born.[1] Statistically, one of those babies is HIV positive.[2] Four of those babies are born with Spina Bifida.[3] Ten of those babies, statistically, are born with Down Syndrome.[4] Twenty are born with Fetal Alcohol Syndrome (FAS).[5] More than a hundred and twenty are born with Fetal Alcohol Spectrum Disorders (FASD),[6] twenty of whom have FAS, which means that they have brain damage caused by prenatal exposure to alcohol. These numbers are staggering, especially when we realize that FASD is an unfamiliar term to most of us.

A recent survey conducted by Bluegrass Prevention Center in Lexington asked 3,500 rural Kentucky citizens some questions about alcohol use during pregnancy.[7] 70% of respondents stated that FAS means that a baby is born drunk. This is a common misperception, and it is a dangerous one because it implies that a child will then "sober up," or grow out of their condition. Fetal Alcohol Spectrum Disorders are lifelong disabilities.

Most individuals living with FASD are not fortunate enough to have a diagnosis. This disability can be an invisible one; a person with a FASD often has an IQ in the average range and no obvious facial characteristics. To make the situation even more confusing, many people with FASD "talk better than they think." From the outside, they appear to be competent. Parents, caregivers and teachers experience burnout and frustration towards this child who "just doesn't get it." Service providers and employers feel irritated and angry at this teenager or adult who "just doesn't care" or "refuses to follow through." Well-meaning and supportive people try as hard as they can to help, and then give up. Without understanding the underlying brain damage, traditional strategies for teaching, intervening and supporting will not be effective.

Brain dysfunction is the primary disability of FASD, and it is invisible. It manifests itself in behaviors such as the following:

- difficulty understanding cause and effect relationships
- difficulty understanding abstract concepts and phrases
- inability to change behavior depending on the situation
- inconsistent memory / poor short term memory
- chronic poor judgement

If we do not understand FASD, we assume that the individual could do better if s/he "only tried harder." As professionals, it is our responsibility to educate ourselves about the impact this invisible disability has on our community as a whole. Learning to recognize warning signs and respond accordingly can make a tremendous difference for the individuals and families we work so hard to support.

### FASD: Background Information

Researchers from the University of Washington in Seattle first introduced the term "Fetal Alcohol Syndrome" in 1973 to describe a pattern of characteristics and birth defects found in infants born to mothers addicted to alcohol. These characteristics in the newborns included central nervous system damage, a specific pattern of facial abnormalities and growth deficiencies. Since 1973, researchers around the world have continued to come to the same conclusion: alcohol can cause specific and extensive damage to a developing fetus.

When FAS was first identified in 1973, only the most extreme cases were included in the definition. Research focused on children exposed to heavy amounts of alcohol throughout the duration of pregnancy; these children were born with mental retardation or a severe developmental delay. In the years after FAS was first identified, research broadened to include the impact of moderate drinking and sporadic binge drinking during pregnancy.[8]

The following terms have been used to describe the effects of prenatal exposure to alcohol: Fetal Alcohol Syndrome (FAS), Fetal Alcohol Effects (FAE); Alcohol Related Birth Defects (ARBD); Alcohol Related Neurodevelopmental Disorder (ARND). Currently, the field is moving towards the term "Fetal Alcohol Spectrum Disorders" (FASD). This is a descriptive, not a diagnostic, term that is meant to convey the fact that this disability occurs on a continuum that is not only reflected by the presence of obvious facial features.

### Alcohol and Fetal Development

In order to understand this disability, we must understand the way alcohol affects the developing fetus. The most important thing to remember is this fact: Alcohol can affect anything that is developing at the time that alcohol is present in the fetus' body. And what develops every single day of gestation? The brain. Every time alcohol is present, the developing brain is affected.

Fetal Alcohol Spectrum Disorders can only be caused by alcohol consumption during pregnancy. Drinking by a male before conception cannot cause this particular disability, nor can drinking by a female before conception. However, many women do not realize that they are pregnant until well into the second month of pregnancy. Significant damage can be done if alcohol is consumed during the short period of time before a woman knows she is pregnant. A prevention message is this: If you're pregnant, don't drink. If you drink, don't get pregnant.

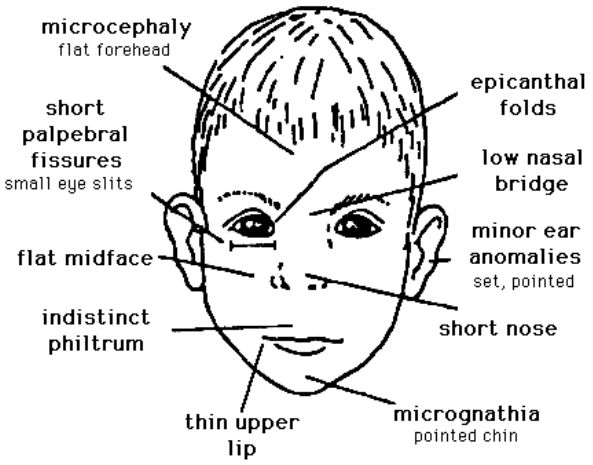
The Institute of Medicine states: "Of all the substances of abuse, including heroin, cocaine and marijuana, alcohol produces by far the most serious neurobehavioral effects in the fetus, resulting in life-long permanent disorders of memory function, impulse control and judgment."[9] Since alcohol is a legal drug, many people do not realize the extent of the damage it can cause to a developing fetus. Any substance that causes damage to a fetus is called a teratogen, a Greek word that means "monster making." Teratogens affect developing cells in four different ways: cell death, cell malformation, growth deficiency of cells and cell mutation. Alcohol is a teratogen that causes all four of these adverse outcomes.[10]

Each teratogen has a period of time when the substance can cause damage to the developing fetus. For example, thalidomide was a medication prescribed for morning sickness in early pregnancy, which was found to be a teratogen. The window of exposure, or the time period where thalidomide could damage the fetus, was between three and six weeks of gestation. During that period of time, the arms and hands are forming in the fetus. People prenatally exposed to thalidomide were generally born with deformities to their arms and hands, because this is what was developing during that window of exposure. After six weeks of gestation, thalidomide was no longer teratogenic.

The window of exposure for the teratogen alcohol is the entire nine months of pregnancy. There is no time period where the fetus is safe from the effects of alcohol. Alcohol is classified as a "neurobehavioral teratogen" because it produces Central Nervous System (CNS) damage, which causes brain damage and modified behavior. According to Dr. Ann Streissguth at the University of Washington's Fetal Alcohol and Drug Unit, the neurobehavioral effects of alcohol can be observed at levels of exposure that produce no physical abnormalities, due to the fact that it takes a higher dose of a neurobehavioral teratogen to produce physical malformations than it does to cause CNS damage.[11]

Alcohol has a direct toxic affect on cells, and can produce cell death. This causes areas of the brain or the body to contain fewer cells than normal. Alcohol can block the transport of amino acids (which are the important building blocks of cells) and glucose (which is the main energy source of cells). Alcohol can also impair the placental-fetal blood flow, causing hypoxia (oxygen deprivation) or disrupting the hormonal and chemical regulatory systems that control the maturation and migration of nerve cells in the brain.[12]

During the first trimester, the physical structure of body organs develop. Beginning from undifferentiated cells, or stem cells, each of these organs grows, and together they rapidly form complex body systems. Alcohol in early pregnancy can disrupt the actual structural formation of the organs and systems on which we depend. Every organ and system can be affected. Arms, legs, teeth, palate, genitalia, eyes and the heart are highly sensitive during the first trimester. The main regions of the brain are differentiated by the 10th week of pregnancy. A brain affected by alcohol exposure during the first trimester may have significant structural damage, including missing lobes or regions, agenesis of the corpus calossum and microcephaly.




The facial characteristics of Fetal Alcohol Syndrome (elongated philtrum, thin upper lip, small eye sockets) are directly connected to alcohol exposure in early pregnancy. For example, the philtrum and upper lip form around Day 19 of pregnancy. If alcohol is not present in the fetus on that particular day, the child will not have those identifiable characteristics. Therefore, if an individual does not have those facial features of Fetal Alcohol Syndrome, that only tells us that alcohol was not present in sufficient amounts around Day 19 of pregnancy to cause that damage. During the second trimester, cells continue to grow, divide and refine to meet their specific designation. Critical reflexes such as breathing, sucking and swallowing develop as the brainstem matures. Eyes, teeth and genitalia continue to develop, and the Central Nervous System becomes more mature. The corpus colosum is fully formed by the 15th week of pregnancy, but neural connections continue to spread throughout the brain. Alcohol exposure during this period of time can affect the development of neural pathways, which allow us to think, reason and manage our emotional responses.

The third trimester is a period of rapid growth and connection between neurons. More brain connections are formed during the third trimester of gestation than any other period

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in the life of a child.[13] Alcohol during the third trimester can impede physical growth and the development of neural connections.

Understanding the complex specificity of the many regions of the brain will make it easier to see a link between behavior and brain function in individuals with FASD. For example, the frontal lobe of the brain controls the following functions: impulse control, judgment, regulation of emotions. What would behaviors look like if this brain region didn't function properly?

[14]

| Brain Region | Function |
|---|---|
| Cerebellum | Balance, Fine/Gross Motor Skills, Attention, Classical Conditioning |
| Frontal Lobe | Planning, Reasoning, Inhibition, Judgment, Self Control, Conscience |
| Corpus Callosum | Integration of Logic and Emotion |
| Temporal Lobe | Tactile Sensations, Spatial Orientation, Language Comprehension, Visual Perception |
| Limbic System (Hypothalamus / Thalamus) | Sleep / Appetite Cycles, Emotional Memory, Emotional Response |
| Basal Ganglia | Movement; Emotional Integration, Controls Anxiety Levels |
| Hippocampus | Forms, Stores and Packages Memories and Information; control of aggression |

**"He just doesn't get it."**

Since alcohol affects cell growth at the precise moment of exposure, every single individual with FASD has different challenges, abilities and "quirks." It is impossible to compile a behavioral checklist, due to the varying manifestations of alcohol exposure to the many regions of the brain. However, there are several characteristics common to many children, adolescents and adults prenatally exposed to alcohol.

**Difficulty With Abstract Thinking:** Many people with FASD experience the world in a very concrete and literal way. As children, most of us were not taught to think abstractly – we learned to understand abstractions inferentially. For example, one paper dollar is the same as four quarters, even though four is a bigger number than one. One dollar (or four quarters) equals one Jr. Bacon Cheeseburger at Wendy's. One dollar (or ten dimes) equals two Hot Apple Pies at McDonalds. The same number, one, can also represent "one television program," "one feature-length movie," "one day," "one hour" and "one year." From a young age, we were able to hear the concrete number "one" and distinguish the abstractions of money, value and time.

Due to brain injury, most people with FASD cannot understand abstractions without being taught in a concrete way. Start paying attention to the words and phrases that we use. It's surprising how many of them are abstract. *"Behave." "Act your age." "Don't get smart with me." "Do the right thing." "Drink responsibly." "Practice safe sex."* In a Kentucky school, the principal told a 7th grade student, "*Don't let me down*." The student responded, confused, "But you're standing on the ground." This student with FASD was suspended for "*smarting off*" to the principal. In reality, he was responding to a concrete phrase that didn't make any sense to him.

Think about all of the abstract concepts, both subtle and overt, that we have to understand in order to get through our own day relatively successfully. Most of these abstractions are unspoken, and require us to "*read*" our environment and infer meaning based on the situation.

- Appropriate dress. (If the policy says I can't wear jeans, that includes jean shorts and denim skirts. No Tube Tops is implied, not stated. Appropriate dress is different for the staff picnic than it is for a meeting.)
- Punctuality. (Don't be late. But, it's better to be late than to not show up at all.)
- Relationships With Co-Workers. (I talk to co-workers differently in the break room than I do at a Board meeting. Even if co-workers are friendly to each other, it isn't the place to reveal too much personal information.)
- Ownership. (At the office, my pen is mine and I can take it home without getting in trouble. The computer on my desk is also mine, but if I take it home, I get in trouble. Even though no one is touching the boxed lunch in the refrigerator and no one's name is on it, it still belongs to someone and I shouldn't eat it.)

Most of our social rules and expectations are unspoken. Imagine trying to navigate all the layers of "personal space," "time management," "body language," or "organizational hierarchy" without understanding any of the abstractions or subtleties that accompany them.

**Difficulty Generalizing Information from One Setting to Another:** A healthy, typical brain is able to learn information and then transfer that information to a similar, yet different situation. For example, we learn addition and subtraction from worksheets, but are then able to use those skills in the "*real world*" to balance a checkbook or stay within a grocery budget. People with FASD have a hard time taking information learned in one setting and applying it elsewhere.

- Austin, a young man with a FASD was caught stealing chocolate milk and a candy bar from a gas station. His parents, trying very hard to be concrete, told him that it was wrong to take things from the gas station. He wasn't allowed to go to the gas station with his friends anymore.

Two weeks later he stole shoelaces from Kmart. When questioned, he said, "But I didn't go near the gas station." He truly didn't see the similarity between the situations.

- Nora, a young woman with a FASD, got her driver's license, and often helped her grandmother by driving her to the post office and the bank. A friend asked Nora to help her out by driving the car while a group of friends robbed a bank. When they got caught, Nora was arrested as an accomplice. She said, "I was just doing a favor for a friend who needed a ride." She didn't see the difference between driving her grandmother on an errand and driving a friend on a robbery.
- Justin, a young man with a FASD, went to the grocery store for his mother to pick up milk and bread. He returned, saying "They don't have milk and bread." Confused, his mother went back to the store with him, and discovered that their regular grocery store had been remodeled, changing the familiar layout. When Justin didn't find the milk or the bread in their usual places, he came home, saying that the store didn't have any. He wasn't able to generalize the fact that ALL grocery stores have milk and bread.

Without understanding the brain dysfunction, this behavior looks like "no common sense" or "a smart aleck." What 24-year-old with an average IQ wouldn't look around the store until he found the milk and bread? People with FASD often appear much more competent than they truly are, so friends, family members and outsiders don't understand the severity of the disability.

**Problems Sequencing / Organizing Information:** Children, adolescents and adults with FASD often have difficulty organizing tasks without assistance. For example, if we have an appointment at 11:00 in the morning, we are able to arrange our activities to accommodate our schedule. We know what time we need to leave in order to be on time for our appointment, depending on a number of factors: if we're driving or walking, if it's raining, if it's rush hour, if we have to fill up the car with gas first. We are able to calculate time in our head and organize ourselves in order to be on time.

A person with a FASD may have every intention to be on time or complete a task as required, but the end result may not show that intention due to the difficulty of getting all of the steps in place. Instructing a person with a FASD to "clean your room" will only lead to success if specific, written step-by-step instructions are provided. (For example: First, pick up your dirty clothes. Carry them to the laundry room. Next, hang your clean shirts in the closet. Put your clean socks in the drawer. Then, bring dirty dishes and glasses to the kitchen). Even with written specific tasks, they may well need someone to go over the instructions one at a time with them. Non-compliance or failure to complete a task may actually be an inability to plan, sequence and organize.

**Difficulty Predicting Outcomes:** People with FASD generally have a hard time understanding cause and effect relationships. This makes sense when we understand the brain's difficulties with time, abstractions and generalizing information. Predicting future outcomes requires all of these skills, plus the ability to remember lessons learned from the past. People with FASD often do not have the benefit of learning from their mistakes, and will often repeat similar mistakes over and over. Without understanding the brain dysfunction, this looks like a person who may be "sociopathic" and "just doesn't care."

- Will, a young adult with a FASD, was making a box of macaroni and cheese. After he had boiled the pasta, he realized that he was out of milk. His girlfriend had just left for work and he didn't have a car, but he saw his neighbor's car sitting in the driveway next door. When he returned from the grocery store, the neighbor had called the police. Will said, "But I didn't steal the car. I brought it right back." He didn't understand that someone would see the car missing and report it stolen, because he knew that the car was safe.
- Tony, a young man with a FASD was upset with his boss for making him stay late one afternoon to fill in for a co-worker, so he called in a bomb threat to the store later that evening. "I didn't really have a bomb. I just wanted to show him what happened when he messed with me," he said, when he got caught. He couldn't think ahead to the consequence of making such a threat.

**Slow Intake / Output of Information:** Alcohol can affect a developing brain in many ways. One of the things it does is decrease the number of cells, or neural pathways, in the brain. This means that it physically takes more time for information to travel in and out of the brain. With the rapid pace of our daily life, this sometimes means that people with FASD only hear every fourth or fifth word we say. Imagine if this is what you heard:

You… right… Anything…. can… be… you …court….
You…right …attorney…
one … the police…cannot ….one …..appointed . Understand… you?

DO YOU UNDERSTAND?

Often, when we are trying to explain something to a person who doesn't seem to understand, we try to explain it better and better, using more words and talking faster. For a person who has a slow intake of information, this makes it harder and harder for the brain to "catch up." Many people with FASD learn to nod and act as though they heard and understood the information to avoid having it repeated over and over, faster and faster. It might take an alcohol-affected brain fifteen seconds to come up with an answer to a seemingly simple question. Without understanding the brain dysfunction, it looks as though the person is avoiding the question or ignoring the questioner. In reality, the individual may need

*Continued on page 8*

*Continued from page 7*

much more time than a person with a typical brain to respond to questions and conversation.

**Sensory Overload:** Due to the underdevelopment or overdevelopment of nerve cells, people with FASD are often affected by environmental factors such as bright lights, noises or distractions because the alcohol-affected brain is not able to filter out these external stimuli.

Behavior is often directly related to sensory overload. Imagine that you're driving home from work after an especially long day. You're hungry because you didn't have time for lunch, and you've had too much coffee, so you're a little shaky. The sun is starting to set, and it's glaring through the windshield right into your eyes. It's hard to see the road and the stoplights. Your favorite song is on the radio, but it's fading in and out, and you can barely hear the song through the static. Your pants are too tight around your waist and the backs of your heels have blisters from your shoes. There is a truck right in front of you blowing exhaust at you and driving too slowly. Can you feel the tension and anxiety growing in your body? This is sensory overload. Now imagine that your neighbor approaches you as you get out of your car to inform you that your dog has stolen his newspaper again. What is your reaction? How is your reaction different based on the state of your body and mind? A person with a FASD reaches this threshold of overload at a much earlier point than a person with a fully functioning brain. Often, behavior occurs as a direct result from this sensory overload and the inability to handle it appropriately.

**Poor short-term memory:** When developing brain cells die, the missing cells cause gaps or holes to be left in the brain. As information travels through the neural pathways of the brain, sometimes it reaches an area that simply didn't develop. When information hits one of these holes, the information cannot travel any further, and it disappears. The next piece of information may travel on a pathway that is complete; this leads to an inconsistent memory and an inconsistent skill level. One day a person with a FASD may not remember something, but can recall it perfectly the next day. One day a person with a FASD may be able to complete a task correctly; the next day s/he me be unable to complete the same task. From the outside, the individual appears to be lazy or manipulative; however, the affected brain is simply incapable of performing to the same standard.

### Lifespan Issues

As discussed earlier, many individuals with brain damage caused by prenatal exposure to alcohol are not identified or diagnosed, and grow up believing the labels of "lazy," "just doesn't care." and "bad kid." The individual affected by prenatal alcohol exposure doesn't understand why s/he keeps making the same mistakes over and over again, why s/he can't memorize the multiplication tables like everyone else, why s/he can't ever say or do the right thing. These feelings of frustration and worthlessness lead to secondary disabilities, caused by a failure to address the brain damage, the primary disability.

A study conducted by the University of Washington Medical School's Fetal Alcohol and Drug Unit looked at secondary disabilities in a sample of 473 individuals with FASD[15] The range of IQ in the sample was from 29 to 142, with a mean IQ being 85. Only 16% of all the individuals in the study qualified as having mental retardation; 84% of individuals have an IQ in the "normal" range and therefore do not qualify for services for developmental disabilities.

Six main categories of secondary disabilities are defined:

- **Mental Health Problems:** 94% of the full sample have experienced mental health problems. During childhood, 60% had a diagnosis or behaviors consistent with ADHD. 23% of the sample have attempted suicide.
- **Disrupted School Experience:** 70% experienced a disruption in schooling, including suspension, expulsion or dropping out. Common school problems include: not paying attention, incomplete homework, can't get along with peers, talking back to teacher, and truancy.
- **Trouble With the Law:** 60% were charged or convicted of a crime. The most common first criminal behavior reported was shoplifting. The most common crimes committed were crimes against persons (theft, burglary, assault, child molestation, domestic violence, running away), followed by property damage, possession / selling drugs, sexual assault and vehicular crimes.
- **Confinement:** 60% of the sample had spent time in a psychiatric hospital, an alcohol/drug rehab facility or jail/prison. 40% had been incarcerated, 35% had spent time in a psychiatric hospital and 25% had been confined for substance abuse treatment.
- **Inappropriate Sexual Behavior:** 45% of the sample displayed inappropriate sexual behavior that was repeatedly problematic or had required incarceration or treatment; 65% of the males sampled displayed inappropriate sexual behavior. The most common problematic sexual behaviors include: sexual advances, sexual touching, promiscuity, exposure and masturbation in public.
- **Alcohol / Drug Problems:** 30% of the sample experienced severe problems with drugs or alcohol.

Additionally, the following information was revealed:

- 80% of adults with FASD lived dependently (with family, in group home or in residential facility)
- 80% experienced significant problems with employment.
- The greatest risk factors for developing secondary disabilities are: IQ *over* 70 and exposure to violence, and a diagnosis of FAE rather than FAS. Individuals with a lower IQ received more services, support and realistic expectations.
- The greatest protective factors against secondary disabilities are: diagnosis before age 6, eligibility for state Developmental Disabilities services, living in a stable

home and protection from witnessing or being victimized by violence.

### Diagnosis of FASD

Fetal Alcohol Syndrome is a medical diagnosis, and is not included in the DSM. According to the University of Washington Medical School's Fetal Alcohol and Drug Unit, four factors are considered when screening for diagnosis: facial characteristics, growth retardation, Central Nervous System damage and confirmed maternal use of alcohol. Each of these factors are assessed and weighted before a diagnosis can be made.

The discriminant analysis conducted by the University of Washington identified three specific facial features that are strongly correlated with prenatal alcohol exposure: flat philtrum, thin upper lip and small palpebral fissures (eye openings).[16] On some individuals, these features may not be particularly striking in appearance, but precise measurements reveal that the features are indeed present. Oftentimes, individuals appear to outgrow these facial characteristics during puberty; this is an optical illusion. When measurements are conducted, most of the features remain constant; however, changes to the rest of the facial structure make the features less obvious.

Central Nervous System damage can be measured using a variety of cognitive and neuro-psychological testing. Microcephaly, or small head circumference, is one indication of Central Nervous System damage, as is a structural deformity such is agenesis of the corpus colossum. Without obvious structural abnormalities, other assessments can be used to prove Central Nervous System involvement, including: IQ tests, adaptive skill assessments, speech and language comprehension evaluations, neourological assessments and physical/occupational therapy evaluations. A low IQ score isn't enough to prove Central Nervous System dysfunction; on the other hand, a high IQ score doesn't eliminate Fetal Alcohol Syndrome as a diagnosis.

Confirmed prenatal alcohol exposure can be proven in several ways, including firsthand accounts from family members, social service records, police reports citing intoxication during the period of pregnancy and hospital records. Any documentation during the mother's pregnancy can be used to assist in diagnosis. This is the most difficult part of diagnosing FASD; documentation doesn't always exist. However, a diagnosis of Fetal Alcohol Syndrome can be made if the other three categories receive the highest score on the diagnostic 4-point scale and prenatal alcohol exposure is unknown. Behavioral screenings and checklists are not used when diagnosing FASD, due to the fact that abilities and behavioral issues vary greatly depending on the specific brain regions affected by alcohol. Currently, most physicians are not trained to diagnose FASD. A recent survey conducted by Bluegrass Prevention Center asked 118 Pediatricians and Family Practitioners about their experience with Fetal Alcohol Syndrome. 65% reported feeling "very uncomfortable" using Fetal Alcohol Syndrome as a diagnosis.[17] Kentucky is in the beginning stages of developing diagnostic resources for both children and adults.

### Working With Individuals Affected by FASD: What Can I Do Differently?

Individuals with FASD learn, communicate and experience the world in a different way; therefore, we need to adapt both our expectations and our style of interaction in order to be effective. Deb Evensen, a FAS Specialist from the SAMHSA FAS Center for Excellence, has developed "8 Magic Keys" for working with individuals who have FASD.[18] These 8 concepts are the basis for effective intervention, and can be adapted for any environment or age.

1. Concrete. Pay attention to the words and phrases that you use. (For example, think about how the term "Waive your rights" might be misunderstood.) Be as concrete as possible. When in doubt, explain things as if you are explaining to a young child. Check often for deeper understanding. (For example, if you say "Be on your best behavior," then ask, "What does it mean to be on your best behavior.") Don't ever assume that your client understands the deeper meaning, even if s/he can repeat the right words back to you.
2. Consistent. Be consistent with the words and phrases that you use. Whenever possible, use the same words and phrases as cues for desirable behaviors. (For example, if you want someone to learn to stop interrupting when another person is talking, and you say "Not now" the first time, "Quiet, please" the second time and "It's rude to interrupt," the third time, s/he might not understand that you're asking for the same behavior each time.)
3. Repetition. Memory is a constant problem. Expect to repeat each small piece of information as many times as necessary. Write down as much as you can. Don't make the individual rely on his or her memory.
4. Routine. Changes or transitions are extremely difficult. People with FASD do best when they know what to expect. Discuss any changes in routine and provide reminders and reassurances.
5. Simplicity. Remember the KISS rule: Keep it Short and Sweet. People with FASD can become overwhelmed by too many words and too much stimulation. Use as few words as possible and keep the environment simple.
6. Specific. Say exactly what you mean. Don't assume that the individual can "read between the lines" and know all the steps necessary to complete and activity. Tell the person what to do, step by step, even when it seems too obvious. Write down each step so s/he doesn't have to rely on memory.
7. Structure. Structure is absolutely essential to the success of an individual with FASD. Boundaries, limits and a consistent framework help people with FASD make

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safe decisions and be successful. (For example, a person with a FASD may need a "wake-up call" every morning and a "curfew call" at night to check in.)

8. Supervision. People with FASD always need an External Brain in their environment to help them navigate new and unfamiliar situations. Impulse control and judgment will always be challenges. Supervision needs to be constant, and should not be removed when the individual is doing well.

These intervention strategies are simple and can be used to improve communication with individuals with challenging behaviors. Most people with FASD do not show up for services already having a diagnosis. Although a diagnosis is the best thing that can happen for a person with a FASD, this is often a lengthy process. These intervention strategies can be helpful, even before an individual has been assessed for a FASD. If the person has not been prenatally exposed to alcohol, these strategies cannot be harmful. In fact, they are also effective for individuals with other learning disorders.

## Conclusion

Fetal Alcohol Spectrum Disorders affect our communities in more ways than we know. Every single system – education, public health, social services, mental health, substance abuse, corrections – feels the long-term impact of prenatal exposure to alcohol. This is an invisible disability; most individuals with FASD appear much more competent than they truly are. In order to effectively meet the needs of clients with FASD, we need to understand the link between brain function and behavior. We would never punish a man who is blind for knocking over the furniture or for reacting out of anger when we rearranged the room without warning; instead we would take the time to explain the environment in a way that made sense to him. People with FASD deserve similar understanding and consideration.

As professionals, we must educate ourselves about this disability. We dedicate ourselves to giving everything we can to serve our clients and our community to the best of our ability. However, if we do not consider the effects of prenatal exposure to alcohol, we are sometimes missing an important piece of the puzzle.

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*Bluegrass Prevention Center can provide resources and technical support on this subject. Please call 859-623-1973 with questions and comments.* ■


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# Does Presumed Innocent Also Mean Presumed Released?

*Bryce Amburgey*

Kentucky has created a unique pretrial release process that often allows DPA clients to be free before trial more frequently and more justly than most other states. However, the public (and at times those who work within the criminal justice system) often misunderstand pretrial release. It is this basic misunderstanding and resulting misapplications that inspired the creation of the AOC/DPA Workgroup, which has addressed several aspects of the pretrial release system in Kentucky. An extension of this workgroup is a collaborative grant program sponsored by AOC and DPA. The grant is made possible by federal Byrne funds through the Kentucky Justice Cabinet, and it deals with pretrial release issues through a combination of two cross-training sessions among criminal justice professionals (including Pretrial Release Officers, public defenders, prosecutors, judges, service providers, and others) followed by a public forum led by a panel of the cross-trainers. This format was used in the Paintsville area in April-May 2003 and three other areas throughout the state will hold this program before the end of 2003. Through greater collaboration and understanding, this grant program is designed to benefit DPA clients.

All of these efforts are meant to improve the justice system and to answer some fundamental questions about pretrial release. The most frequently asked questions, along with basic answers for each, are listed below. Many of these answers are also relevant to more than one question, and the information should be read with this breadth in mind. Several of these observations may seem apparent to the seasoned trial practitioner, but this article is also designed to assist individuals who are perhaps not as familiar with this unique part of our system.

**(1) What is the history and future of "pretrial release"?**

"In 1976, Kentucky became the first state to abolish bail bonding for profit. The General Assembly created the Pretrial Services Agency, as a division of Kentucky's Administrative Office of the Courts, to administer a pretrial release program. Since the program was initiated, more than 2.7 million defendants had been interviewed by pretrial officers"[1] as of August 2001. The agency helps the state's trial court judges reach knowledgeable decisions relating to the release or continued custody of defendants awaiting trial on criminal charges. Kentucky was the first and remains the only state in the nation to statutorily abolish the practice of bail bonding for profit and to replace it with pretrial services.[2] Bail and its limitations has a lengthy history, extending into the Kentucky Constitution (§ 17), the U.S. Constitution (8th Amendment), and even the Magna Carta, which declared that no free man could be taken or imprisoned except by the law of the land.[3] Pretrial release is not unique to Kentucky, and the growing emphasis on its importance nationally validates the prescient decisions made in this state over 25 years ago for the rights of defendants. The American Bar Association has recently updated its "ABA Criminal Justice Standards on Pretrial Release" to include the following language:

**Standard 10-1.1 Purposes of the pretrial release decision**

> The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference. The judge or judicial officer decides whether to release a defendant on personal recognizance or unsecured appearance bond, release a defendant on a condition or combination of conditions, temporarily detain a defendant, or detain a defendant according to procedures outlined in these Standards. The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings.[4]

In its report on the ABA standards, that entity's Criminal Justice Section stated that the Standards view "the pretrial release decision as assigning appropriate release conditions to accused persons when possible and, when no appropriate conditions of release can be identified, permitting pretrial detention based on specific criteria and according to clear procedures…The presumption favors pretrial release."[5] The section went on to indicate that "As reorganized and revised, the Standards now explicitly identify the essential principles relating to release under least restrictive conditions, a broader conceptualization of conditions of release, and an emphasis on non-financial conditions (as well as diversion and newer adjudication alternatives, such as drug courts)."[6] The ABA standards target many of the questions

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raised in this article, and will be referenced in subsequent sections, as well.

The goal in various states and in the efforts of those like the ABA is improved decision-making. For example, two authors discussed how, collectively, state statutes and various organizational standards have implemented numerous changes to the pretrial release decision making process that can be summarized by one, three-pronged objective of improved pretrial release decision making by: (1) having pretrial release decisions be made only by a qualified decision maker; (2) basing such decisions on specific, relevant, timely, and accurate information; and (3) making available to the decision maker a range of relevant options from which to choose when making a decision.[7]

**(2) Why are people who are arrested allowed to get out of jail prior to their trial?**

The ABA recommends pretrial release as the proper alternative whenever reasonable, when it states that "In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person."[8] From the same set of standards, the ABA establishes its overall position in the title to Standard 10-1.6., "Detention as an exception to policy favoring release." A major reason for pretrial release was discussed by Pretrial Services Resource Center:

> Research has shown that decisions made when an individual first enters the criminal justice system have far-reaching implications, particularly for defendants who are unnecessarily detained. Defendants detained pretrial plead guilty more often, are convicted more often, and are sentenced to prison more often than defendants who are released pretrial. These relationships hold true even when other relevant factors are controlled for, such as current charge, prior criminal history, family ties, and type of counsel.[9]

When a court is deciding whether to grant pretrial release in a case, it is faced with two sometimes inconsistent societal goals: (1) the desire to maximize the availability of pretrial release for persons who have been accused of criminal offenses pending adjudication of their charges; and (2) the need to assure that accused persons appear in court to face their charges and that they do not pose a danger to any person or the public at the same time.[10]

Add to this tension the fact that many assumptions about predicted behavior of the accused have not proven true. Most laypersons would assume that accused individuals facing a serious charge would be most likely to abscond if released, but DPA anecdotal evidence, the findings of the AOC/DPA Workgroup,[11] and "the research that has shown that, contrary to conventional wisdom, defendants charged with the more serious offenses and facing lengthy prison terms are among the most likely to appear in court."[12]

The performance standards of the National Association of Pretrial Services Agencies (NAPSA) indicate that "a presumption in favor of pretrial release on a simple promise to appear should apply to all persons arrested and charged with a crime."[13] The NAPSA standard elaborates in its commentary that this position is supported by three factors. First, constitutional principles, such as due process, equal protection, and the right to bail that is not excessive, all create a legal foundation for reasonable non-financial release. Second, policy considerations should be considered, like the financial burden to society of unnecessary incarceration, stemming not only from the cost of jail but also the lost tax revenue and the lost ability of the accused to support his or her family, the ability to aid in defense, the self-fulfilling prophecy of detention impacting case outcome, and first-time or juvenile offenders being exposed to the dangerous effects of jail. Third, practical experience has shown that there is little relationship between non-financial release rates and failure to appear rates.[14]

Under the Kentucky Rules of Criminal Procedure, the basic premise is in favor of pretrial release, and RCr 4.02 states that any bailable offense (all offenses where death is not a possible punishment) *shall* be considered for pretrial release without making a formal application. RCr 4.10 indicates that the "defendant shall be released on personal recognizance or upon an unsecured bond unless the court determines, in the exercise of its discretion, that such release will not reasonably assure the appearance of the defendant as required." The rule also states that the court shall give due consideration to the pretrial release officer's recommendation when exercising this discretion. The Kentucky approach is consistent with the standards proposed by the ABA and NAPSA. If the court feels that nonfinancial conditions are necessary (release on recognizance or unsecured bail bond is not enough to reasonably insure the defendant's appearance), then RCr 4.12 states that these nonfinancial conditions should be the least onerous conditions reasonably likely to insure appearance.

**(3) What are the different ways a person can be released?**

In RCr 4.04, the Kentucky Rules of Criminal Procedure indicate that there are four basic authorized methods of pretrial release in Kentucky: (1) personal recognizance, (2) unsecured bail bond, (3) nonfinancial conditions, and (4) executed bail bond. Any individual method or combination of these methods is authorized. The executed bail bond option may be secured via personal surety, ten percent deposit, full cash amount, stocks or bonds, real property equal to twice the value of the bond, or a guaranteed arrest bond certificate (in cases of motor vehicle traffic violations, as provided in KRS 431.020). In certain situations the bond schedule provided

by the Rules may be used. In her presentations for the AOC/DPA PTRO Byrne Grant program, District Judge Susan Johnson (24th District) noted that the exceptions to this bond schedule include (a) DUI cases where the blood alcohol reading is over .15 – the defendant must remain in custody for at least 4 hours, (b) alcohol intoxication first or second – release after 8 hours, (c) KRS Chapter 218A drug offenses, and (d) per KRS 431.064, KRS Chapter 508 assault related offenses, KRS Chapter 510 sexual offenses, and KRS 403.740 or 750 domestic violence offenses. With the recommendations of the Pretrial Release officer before it, the court in Kentucky "has a broad range of release alternatives, from release on recognizance to full cash bond paid to the state. When the defendant appears for trial, the full bond (less a $4.00 processing fee) is returned."[15] The responsibility of Pretrial Release Officer does not end after the detention or release decision, since "Once the defendant is released, the pretrial officer must track him or her through the court system to verify attendance at each scheduled court appearance."[16]

In the federal courts, there exists a similar variety of release types. For example, in the U.S. District Courts in Fiscal Year 2000, 45.7% of federal defendants were released at some time before the case disposition. Of these, the types of release granted ranged as follows: Unsecured bond: 47.8%, personal recognizance: 28.0%, financial: 18.4%, conditional release: 5.7%.[17] For a Kentucky example, in 1998 in Jefferson County, KY, 78% of felony defendants were released at some point before case disposition. Additionally, in that year in Jefferson County, 21% of all felony defendants were granted financial release, and 58% were granted nonfinancial release, including 52% of all felony defendants who were released on their own recognizance.[18]

The ABA Standards recommend that the procedures in each jurisdiction throughout the nation be devised to release the accused on his or her own recognizance. When this is not appropriate, the jurisdiction should employ constitutionally permissible, non-financial conditions of release. Financial conditions should only be employed barring these, and in the preferred order recommended above, and a financial condition should not be imposed that results in pretrial detention solely due to the accused's inability to pay. Further, other jurisdictions should follow Kentucky's example in that compensated sureties should be abolished.[19] Additionally, the standards advise that "jurisdictions should develop diversion and alternative adjudication options, including drug, mental health and other treatment courts or other approaches to monitoring defendants during pretrial release."[20] In making the determination if the accused's release on her own recognizance creates "a substantial risk of nonappearance or threat to the community or any person or to the integrity of the judicial process" the decision maker "should consider the pretrial services assessment", including such factors as (1) the relevant nature and circumstances of the offense; (2) the defendant's character, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; (3) status of probation, parole, etc. at the time of the current offense or (4) availability of persons who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community; (5) any facts justifying a concern that the defendant will violate the law if released without restrictions; and (6) factors that may make the defendant eligible and an appropriate subject for conditional release and supervision options, including participation in medical, drug, mental health or other treatment, diversion or alternative adjudication release options.[21]

**(4) How do other jurisdictions provide for pretrial release?**

The federal court system has an "Office of Probation and Pretrial Services" that operates within the Administrative Office of the U.S. Courts. Of the 94 U.S. District Courts nationwide (including the U.S. territories), there are U.S. probation and pretrial services offices in 93 of them.[22] It is a system with a common mission and function, but there are variations among offices, including the number of officers, office workload, and rural/urban differences.[23] One significant difference from other federal agencies is that the U.S. probation and pretrial services system is not centralized, and "local administration is in the hands of chief probation officers and chief pretrial services officers, who are directly responsible to the courts they serve."[24]

In 1996, Clark and Henry found that "A preliminary scan of data — across time and across jurisdictions — relating to the pretrial release decision making process reveals a number of indicators of problems" in striking the balance between the interests of the defendant and society. Among their findings were the following: (1) Jail populations more than doubled between 1982 and 1992, and that one-half the inmates in local jails were awaiting trial, (2) studies of failure to appear in felony cases in the 1960s and 1970s showed substantially lower rates than were being recorded by the 1990s, (3) wide variations existed in local jurisdictions in the proportion of felony arrestees released pending trial, (4) Wide variations in release rates also existed in the Federal system, even though the same statute governs pretrial release decisions in all Federal districts. (5) Widely disparate rates of failure to appear and rearrest were found in local jurisdictions, (6) Financial bail was set in large numbers of felony cases, leaving the ultimate outcome of release or detention to defendants' ability to post the bail or to hire a commercial bail bonding agent, (7) Minorities — especially African-Americans — had a greater likelihood to be detained pretrial, even when controlling for charge and prior record, a greater likelihood to be detained longer before obtaining pretrial release, and a lesser likelihood to be released by financial means, particularly through a commercial bail bond-

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ing agent.[25] The authors felt that "Any of these indicators considered alone may not be cause for concern" but combined they warranted "further examination as to whether the goals of the pretrial release decision making process are being accomplished."[26] Further, "There is also evidence that decisions made at each stage of the criminal justice process, beginning with the pretrial release decision, have a cumulative effect that have racially disparate outcomes."[27]

The various statutes and standards have generally agreed about the basics of pretrial release, but usually differ significantly in the efficacy of the commercial bail bonding industry. The standards oppose it, but most state statutes allow it as an option, with the notable exceptions of Kentucky, Oregon, and Wisconsin. The standards (and the law of Kentucky) are consistent with all other common law countries in the world, and the idea of pretrial release decisions being made with an eye toward profit is hopefully a fading anachronism.[28] Other jurisdictions have devised a variety of strategies to handle pretrial release, many of which are identified by the Bureau of Justice Assistance (BJA) as being geared toward alleviating the jail crowding problem. One example of this occurs in case initiation, where some jurisdictions have created a screening process for warrant requests requiring a summons to be issued instead of a warrant under specified situations. Jurisdictions in Florida and California have made judicial warrant review a part of their overall strategy to help with jail crowding.[29] Another method is to establish prompt bail setting. In every county in Virginia (and in some in North and South Carolina), magistrates are available 24 hours a day to set bail before booking takes place at a jail. Maricopa County, Arizona holds bail hearings four times a day, and Milwaukee County, Wisconsin holds Sunday Circuit Court sessions to supplement its weekday and Saturday court intake.[30] Many localities concentrate on delegating the release authority. For example, the entire state of Oregon, as well as counties in Arizona, Florida, and Tennessee, have delegated the authority to release defendants charged with misdemeanors to the pretrial services program. BJA reports that in Shelby County, Tennessee, this procedure has decreased the average length of confinement for misdemeanor defendants from 24 to 10 hours.[31] An effort with a tremendous impact on length of confinement issues is intensive case management, which has been tried in counties in states such as Oregon, Florida, Nevada, Indiana, Virginia, Michigan, California, Massachusetts, and Alabama. For example, In Multnomah County, Oregon, both the defense and the prosecution attend the initial appearance and a plea agreement can be taken at that time. In this arrangement, "The public defender can act as temporary counsel to all defendants and discuss an immediate plea with defendants charged with nonviolent offenses."[32] BJA notes that this arrangement causes faster case processing and shorter detention times for defendants. An experimental fast-track court has been established in St. Lucie County, Florida, to accept pleas in certain categories of cases. Experienced public defenders and prosecutors review cases at intake and identify those cases likely to result in a plea, reaching a plea agreement on average in two-thirds the previous time required.[33]

The other states listed above have employed similar "rocket docket" strategies, all with the goal of reducing court delays and reducing time defendants spend needlessly incarcerated pretrial. All reported by BJA have achieved a level of success and many have established creative alternatives, such as cooperative efforts among the parties (when appropriate) and enhanced efforts toward diversion and treatment programs.[34] One attribute many of these and other programs share is emphasizing the early role of defenders. In Montgomery County, Maryland, defense counsel is assigned to every defendant at the initial appearance, even if only for that hearing. Also, in King County, Washington, a public defender is on duty 24 hours a day to receive phone referrals, and to visit the jail for more serious cases.[35] In Monroe County, New York, the public defender holds an early case conference with the judge and prosecutor to screen cases for possible negotiation. The public defender office there reported to BJA that this process increased the percentage of preindictment pleas from 44 percent to 66 percent and decreased the average case-processing time to 6 months from the previous 18 months.[36]

**(5) What are the roles of the following people in Kentucky's pretrial release process? – PTRO, prosecutor, defense attorney, judge, person arrested, and the public.**

Defenders must intervene early and intensively in the case to ensure that pretrial release is received quickly and fairly. Inordinate caseloads diminish the trial attorney's ability to invest large amounts of time on each case. Caseloads stood at 435 cases per attorney in the Trial Division field offices in FY 2002, and preliminary numbers for FY 2003 indicate a probable average of over 480 cases per attorney. Improved pretrial release statistics and procedures would undoubtedly result if the strain of excessive caseloads could be alleviated.

Kentucky RCr 4.06 indicates that the duty of the pretrial services agency include (1) to serve the trial court, (2) interview defendants eligible for pretrial release, (3) verifying information obtained from defendants, (4) making recommendations to the court as to whether defendants interviewed should be released on personal recognizance, an d (5) any other duties ordered by the Supreme Court. Under RCr 4.07, the pretrial services agency records are considered confidential. The judge should give due consideration to the pretrial services officer within the exercise of her discretion, but is not necessarily bound to follow the pretrial release officer's recommendation. The job of the federal Pretrial Services Officer "is to identify persons who are likely to fail to appear or be arrested if released, to recommend re-

strictive conditions that would reasonably assure the defendant's appearance in court and the safety of the community, and to recommend detention when no such conditions exist." If the officer determines that the accused "does not pose such risk, the officer's mandate is to recommend to the court the *least restrictive* conditions that will reasonably assure that the person appears in court and poses no danger."[37]

The ABA pretrial standards touch on the role of law enforcement in diminishing jail overcrowding and the unnecessary deprivation of individual liberty when they recommend that the policy of every law enforcement agency should be "to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability."[38] In general, the issue of overcrowding is essential to any debate on the merits of pretrial release, and all of the key actors in the pretrial release process have a hand in this aspect, in terms of cost, constitutionality, and overall public policy. "Extra-system agencies," such as drug and mental health professionals, shelters, vocational education, employers, church groups and social service providers that operate from outside what is traditionally identified as within the criminal justice system "are essential to alleviating jail crowding."[39] The issue of jail crowding, like most other complex criminal justice issues, requires cooperative, thoughtful efforts. Such is the benefit of endeavors such as the AOC/DPA Workgroup, the PTRO Byrne Grant Program, and even the Unified Criminal Justice Information System, since "A chief benefit of the collective involvement of all key system actors is an increased awareness of the impact of various actions on other system agencies and the procedures."[40]

The NAPSA Standards indicate that the burden of proving that the defendant should have restrictive release conditions should fall on the prosecutor, especially given that since many facts at that stage, including evidence against the accused or danger or deficiencies in community ties, are especially known by the prosecution. Further, the standards state that "liberty is a fundamental right and the decision to restrict that liberty is a formidable one" such that the burden of proof should be "clear and convincing evidence," since "a preponderance of the evidence" is unfair to the defendant's liberty interest and "beyond a reasonable doubt" is too strict at this stage.[41] For the system to work, the defendant is obligated to follow the orders of the court and the recommendations of the pretrial release officer. This is in the best interest of the defendant, as the court is authorized to revoke release for violations by the defendant. The defendant does not always comply, of course, but if the other parties (defense counsel, prosecutor, judge, pretrial release officer, etc.) are experienced and observant, usually the release conditions will be tailored to improve the chances of the defendant's success. The role of the public is intertwined in the roles of all the individual parties. An effective pretrial release system will demonstrate to the public why some individuals are released pretrial and will enhance public confidence in the system. Further, public education efforts like those initiated individually by AOC and DPA and collectively through the Byrne Grant program will continue to increase public understanding and thus diminish misplaced public outcry over pretrial release.

**(6) What is the pretrial officer's interview and what are the criteria used?**

In Kentucky, Pretrial officers are required to interview an accused within 12 hours of the beginning of their detention. Through these interviews, "the officers gain insight into the defendants' backgrounds, prior criminal histories, community ties, among other things, and report findings to the trial judges. This process enables judges to make more knowledgeable decisions relating to bail and other pretrial issues."[42] The defendant receives a score in each of these relevant areas, by which the judge determines the likelihood of the accused appearing for trial or posing a threat to the community, and this information is kept confidential.[43] The Kentucky program, by using a uniform sheet with an aggregate score based on specific, measurable criteria, meets the crucial need for pretrial services' recommendations being based on an objective instrument. An objective instrument severely diminishes the risk of subjective judgment being applied, ensures consistency in the application of criteria to assess risks, treats similarly situated persons similarly, makes the criteria that form the basis of the assessment more visible, and isolates risk factors, which allows for continual refinement of risk assessment.[44]

Pretrial services programs can help alleviate jail crowding by helping the judicial officer make an appropriate pretrial release/detention decision, providing options for safely releasing the defendant, and by monitoring and supervising defendants released before trial.[45] Often pretrial services officers may also review the jail population for candidates for either release or an expedited case. Since court rules in Kentucky require the pretrial investigation to be completed within 12 hours after the arrest, pretrial interviewers are on call 24 hours a day and often must travel long distances to rural parts of the state to complete their interviews and investigations.[46] The Kentucky Pretrial Services Agency is a part of Kentucky's Administrative Office of the Courts, and it assists local courts in conducting statutorily required bail review within 24 hours of a defendant's initial bail setting. Within this period, further information may be gathered on specific problems, probation and parole officers may be contacted about defendants under their supervision, the accused's family may be contacted, and extra-system referral agencies may be contacted to see if they will provide supervision.[47]

NAPSA Standards indicate that every jurisdiction should have a pretrial services agency, and the pretrial release in-

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quiry should focus on such factors as community ties, drug or alcohol dependency, current probation or parole on a prior offense, and past failure to appear or violation or conditions of release. This inquiry should not delve into the present charge, due to the risk of such things as defendant self-incrimination, or diminishing the pretrial release officer's ability to conduct an impartial inquiry with objective recommendations. Recommendations submitted to the judicial officer should be based on "articulated objective criteria" and copies should be made available to the defense and the prosecution.[48] In Kentucky the Pretrial Services within AOC are fulfilling and even exceeding the standards on performing these duties and balancing the interests of the defendant and the public.

**(7) How does a judge make a decision on whether to release a person prior to trial?**

The ABA Standards speak forcefully to what the judge should not consider in making this decision when they state that "The judicial officer should not be influenced by publicity surrounding a case or attempt to placate public opinion in making a pretrial release decision."[49] Also, the standards indicate that the judge should have other options available besides an arrest warrant, and indicate that "All judicial officers should be given statutory authority to issue a summons rather than an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody…"[50]

Clark and Henry found that the federal courts, along with most states, "have adopted specific statutory wording requiring that in making a decision to release or hold in custody, judicial officers start with the presumption that a person charged with an offense should be released pending trial, a presumption that must be overcome before pretrial incarceration can be allowed."[51] Other factors have emerged to influence the pretrial release decision, such as the extensive growth of jail populations. Clark and Henry also noted how "The crowding crisis has forced greater attention to front-end decision making, with jurisdiction after jurisdiction establishing task forces to look into ways that the pretrial release decision making process has contributed to crowding."[52] Before the defense practitioner gets too excited over this it is also important to recognize that "In other ways, however, the jail population growth has impeded progress, by shifting the focus of the pretrial release decision making process away from an assessment and management of risks function to a management of the jail population function."[53]

The recently released Bureau of Justice Statistics bulletin entitled "Prisoners in 2002" gives even more startling insight into the problem of prison crowding and prison populations. At the end of 2002, the U.S. incarcerated over 2.1 million persons, of which more than 1.38 million were inmates serving sentences of one year of prison or more. This leaves over 785,000, or about 36.3%, of all incarcerated individuals either (1) serving a sentence of less than one year, or (2) being detained prior to conviction. Nationwide, state prisons were operating anywhere between 1% and 16% above capacity, while Federal prisons were operating at 33% above capacity.[54] The rate of prison and jail incarceration was 701 inmates per 100,000 residents in 2002, up from 601 in 1995. At the end of 2002, 1 in every 143 U.S. residents were incarcerated in State or Federal prison or local jail.[55] Prisoners under the jurisdiction of State or Federal correctional facilities in Kentucky increased by 3.3% between yearend 2001 and yearend 2002.[56] As a point of comparison, the population of the entire state of Kentucky increased by only six-tenths of one percent between July 1, 2001 and July 1, 2002 (the closest available 12 month period)[57] Additionally, sentenced prisoners under jurisdiction in Kentucky increased by 3.1% between yearend 2001 and 2002 and by 29.1% between yearend 1995 and 2002.[58] Finally, at yearend 2002, Kentucky was third nationally among all states in the percentage of its state and federal prisoners held in local jails, with 23.0% (only Louisiana and Tennessee had higher percentages).[59]

**(8) What happens when someone violates a condition of release?**

Human nature being an infinitely complex and often unpredictable thing, some released defendants will inevitably fail to comply with all conditions. This is true even under the best possible system. The best pretrial release programs are those that most correctly predict behavior, and do the most to work the odds, but no person, and thus no system, is perfect. As a result, a series of procedures must be developed to deal with a violation and to properly evaluate the severity of the violation. Under RCr 4.42, the court may change conditions of release or order forfeiture of bail upon the appropriate findings. However, the court may only change conditions on clear and convincing evidence of a willful violation of release conditions or a substantial risk of nonappearance, and the defendant is entitled to an adversary hearing on the matter.

The NAPSA pretrial release standards envision that these procedures should include at least the following: (1) submission of a written report by the monitoring agency to the court; (2) distribution of a written notice of the allegation to the defendant, his attorney, and the prosecutor; and (3) authority for the court to order a hearing with written notice of the hearing date and the alleged violations distributed to the defendant, his attorney, and the prosecution (a warrant may be issued for the defendant's arrest, and if executed, a hearing should be held within 72 hours of arrest.)[60] According to the standards, three types of sanctions are available to the court: remedial, restrictive, and punitive. Examples of remedial sanctions include requiring the defendant to participate in drug or alcohol abuse treatment, to obtain or maintain employment, to obtain marital or psychological counseling,

and involvement in other programs designed to stabilize the defendant's behavior and minimize the probability of his or her nonappearance or pretrial crime. Examples of restrictive sanctions include requiring the defendant to obey a curfew, to restrict his movement, travel and associations, and if necessary, revocation of release. Examples of punitive sanctions include imposition of jail sentences, fines, conviction for contempt of court, consecutive jail sentences and other penalties.[61] If a defendant either fails to appear or is convicted of another crime committed while on pretrial release, the standards deem these serious violations where a court should be authorized to enforce punitive sanctions (including jail sentences), and any sentence should run consecutive to the other original act's sentence.[62] The standards also indicate that the court should be required to make positive findings of fact before revocation of release, since the defendant's liberty is at stake. The court must find (1) that the initial release conditions were reasonably calculated to decrease the risk of flight or the danger and that the conditions were directly related to some specific indicator of that risk, (2) the violation indicates a substantial increase in the likelihood of flight or pretrial crime, and (3) no other conditions or sanctions would diminish the supposed risk (and all of these findings should be stated in writing and the prosecutor should have the burden of proving the findings by clear and convincing evidence).[63]

**(9) What are the statistics for pretrial release?**

According to AOC studies and the work of the 2002 AOC/DPA Workgroup, Kentucky has an excellent rate of appearance by defendants, in no small part due to our system favoring effective and objective pretrial release analysis. For example, the Workgroup found that nonfinancial release appearances are *more* effective in returning defendants before the court, and that national standards indicate a 30% failure to appear rate while Kentucky's statewide rate is 8% for nonfinancial release.[64] Despite this, the trend observed by AOC over the 15 year period from 1987-2002 is a decrease in nonfinancial release from 51% of arrests in 1985 to 35% in 2002, and an increase in those not released at all from 23% in 1985 to 31% in 2002.[65] The *Sourcebook of Criminal Justice Statistics 2001* notes that Federal defendants released prior to trial in U.S. District Courts in FY 2000, 81.8% had no violation of the terms of their release, and of the four types of release identified, financial release had the highest rate of committing at least one violation (24.2%), followed by unsecured bond (18.2%), personal recognizance (17.8%), and conditional release (2.0%)[66] Also, among federal defendants released or detained prior to trial in U.S. District Courts in FY 2000, only 22.5% of Hispanic defendants were released, while 61.9% of non-Hispanic defendants were released. The percent of defendants released mirrored their education, ranging from 38.3% released for those defendants with less than a high school diploma to 79.6% released for those with at least a college degree.[67]

The Bureau of Justice Statistics, in its publication "State Court Processing Statistics, Felony Defendants in Large Urban Counties, 1998" made several relevant findings relating to pretrial release, such as the following:

- An estimated 64% of felony defendants in the 75 largest counties were released prior to the final disposition of their case.
- A majority of the defendants released prior to case disposition, 34% of defendants overall, were released under financial conditions that required the posting of bail.
- Among defendants released prior to case disposition, 54% were released within 1 day of arrest, and 80% within 1 week…Nearly all releases during the one-year study occurred within a month of arrest (94%).
- When differences among types of offense are held constant, defendants released under financial terms generally took longer to secure their release than those who were released under nonfinancial conditions. Among defendants who were released under financial conditions, the amount of time from arrest to pretrial release tended to increase as the bail amount did.
- Among defendants who were released prior to case disposition, 31% committed some type of misconduct while in a release status.
- About three-fourths of the defendants who were released prior to case disposition made all scheduled court appearances (76%). Bench warrants for failing to appear in court were issued for the remaining 24%.[68]

In the federal system, among defendants released pending trial in FY 2001 and handled by the U.S. Probation and Pretrial Services System, 94% appeared in court as required and were not rearrested. Only 2% failed to appear and only 4% revoked after being rearrested. Around 12% were revoked for "technical" violations of conditions of release. Therefore, 18% had a negative issue with an impact on release and 82% were successful in meeting all release conditions.[69] Despite all of the information listed above, the proportion of local jail inmates who are awaiting trial rather than incarcerated post-sentencing has risen. Around 51 percent of local jail inmates were awaiting trial in mid-1983 compared with 57 percent in mid-1998.[70]

**(10) What is the value to the public to have a pretrial release process?**

Kentucky Pretrial Services has stated the value of pretrial release most succinctly. "Pretrial release alternatives save time and money, while permitting defendants the opportunity to act responsibly by maintaining employment and complying with pretrial release conditions. Pretrial programs help provide reason and compassion to Kentucky's judicial system."[71] Similarly, according to U.S. Probation and Pretrial Services (serving the federal system), the benefits of pretrial supervision include the following: it gives officers the means to enforce conditions of release, protects the pub-

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lic by reducing the risk of future crimes, may provide substance abuse treatment or mental health treatment, may provide educational or vocational training, and allows individuals to live with their families, hold jobs, and be productive members of society.[72]

If the pretrial release process is underutilized, it can lead to the increasingly relevant problem of overcrowding. The Bureau of Justice Assistance determined that the "Length of Confinement (LOC) may be extended due to unnecessary delays…Higher bails generally result in longer pretrial confinement. Indigents and others unable to furnish bail represent a substantial proportion of the jail population…local analysis often reveals that excessive LOC is the most serious underlying cause of crowding."[73]

**Conclusion**

Pretrial release depends on a variety of complex factors, and while the work isn't done, the Commonwealth is leading most other states and localities in this area. Our state has embraced the same side of this issue as centuries of history and common law. Whenever reasonable, a person should be free prior to trial while no conviction exists. In the vast majority of cases, "presumed innocent" should indeed mean presumed released as well.

**Endnotes:**

1.Kentucky Administrative Office of the Courts, "Kentucky's Pretrial Services: Releasing the Possibilities," AOC PrintShop, Revised August 2001.
2. Kentucky Administrative Office of the Courts, "Justice in Our Commonwealth: A Citizen's Guide to the Kentucky Courts," Revised May 2000, p.13.
3. History information derived from training discussion created by Jay Barrett, Attorney with the DPA Paintsville Trial Office, and presented at the AOC/DPA Byrne-sponsored "Cross-training" grant sessions. Presentation slides are available upon request.
4. ABA Criminal Justice Section, "ABA Criminal Justice Standards on Pretrial Release," approved by the ABA House of Delegates February 2002.
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6. *Id.* at 2.
7. John Clark and D. Alan Henry, "The Pretrial Release Decision Making Process: Goals, Current Practices, and Challenges," Pretrial Services Resource Center, November 1996.
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11. *See* Footnote 65.
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14. *Id.* at 4-6.
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16. *Id.*
17. Sourcebook of Criminal Justice Statistics 2001, p. 410-411, citing U.S. Department of Justice, Bureau of Justice Statistics, "Compendium of Federal Justice Statistics, 2000," NCJ 194067 (Washington, DC: U.S. Department of Justice, 2002).
18. Bureau of Justice Statistics, "State Court Processing Statistics: Felony Defendants in Large Urban Counties, 1998," Nov. 2001, p. 44.
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21. *Id.* at 10-5.1.
22. Administrative Office of the U.S. Courts: Office of Probation and Pretrial Services, "The U.S. Probation and Pretrial Services System," Court & Community: An Information Series About U.S. Probation and Pretrial Services, January 2003, p. 1.
23. *Id.* at 2
24. *Id.*
25. Clark and Henry, at 3-4. For further reference, each of the examples listed by Clark and Henry cited to additional resources with detailed information for each.
26. *Id.* at 4.
27. *Id.* at 4, f. 13.
28. Clark and Henry, at 9, f. 29.
29. BJA "Jail Crowding" at 54.
30. *Id.*
31. *Id.*
32. *Id.* at 55.
33. *Id.*
34. *Id.* at 55-57.
35. *Id.* at 62 (for both Maryland and Washington).
36. *Id.* at 63.
37. Administrative Office of the U.S. Courts: Office of Probation and Pretrial Services, "Pretrial Services Officers," Court & Community: An Information Series About U.S. Probation and Pretrial Services, January 2003, p. 1.
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40. *Id.* at 78.
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42. Kentucky Administrative Office of the Courts, "Justice in Our Commonwealth: A Citizen's Guide to the Kentucky Courts," revised May 2000, p.13.
43. Kentucky Administrative Office of the Courts, "Kentucky's Pretrial Services: Releasing the Possibilities," Brochure, revised August 2001.
44. Clark and Henry, at 10.
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46. *Id.*
47. *Id.* at 52.

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49. ABA Criminal Justice Standards on Pretrial Release, 10-1.8.
50. *Id.* at 10-3.1.
51. Clark and Henry, at 2.
52. *Id.* at 19.
53. *Id.* at 20.
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55. *Id*. at 2.
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57. Population Division, U.S. Census Bureau, *Table ST-EST2002-01 – State Population Estimates: April 1, 2000 to July 1, 2002*, Release Date: December 20, 2002.
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66. BJS, Sourcebook of Criminal Justice Statistics 2001, p. 413, table adapted by Sourcebook staff from U.S. Department of Justice, Bureau of Justice Statistics, "Compendium of Federal Justice Statistics, 2000," NCJ 194067 (Washington, DC: U.S. Department of Justice, 2002), pp. 47, 48.
67. *Id.* at 412(also *Id.* at pp. 42, 44 for "Compendium" original source).
68. BJS, State Court Processing Statistics, Felony Defendants in Large Urban Counties, 1998, Nov 2001, p. 16-21.
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71. Kentucky Administrative Office of the Courts, "Kentucky's Pretrial Services: Releasing the Possibilities," AOC PrintShop, Revised August 2001.
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**Bryce H. Amburgey**
**Assistant Public Advocate**
**Law Operations**

# RECRUITMENT

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

**Henderson**
**Hopkinsville**
**London**
**Maysville**
**Morehead**
**Paducah**
**Owensboro**

***Gill Pilati***

For further information and employment opportunities, please contact:

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# KENTUCKY PAROLE GUIDELINES RISK ASSESSMENT PROJECT

The Kentucky Parole Board has a new tool at its disposal to assist it in carrying out its mission to protect the public by making reasoned and rational conditional release decisions, based on good and sufficient information. Pursuant to KRS 439.340 the Board may order parole for an inmate "...only for the best interest society…" and "…when the board believes he is willing and able to fulfill the obligations of a law abiding citizen." 501 KAR 1:030 Section 4 (1) set out a list of criteria, many fairly general, that the Board may use in recommending or denying parole.

In 1991 the Program Review and Investigations Committee of the Legislative Research Commission examined Kentucky's parole system. It recommended that Kentucky, as have several other states, add structure to it parole decision making process by developing and implementing a risk assessment instrument to use as a factor in evaluating an inmates readiness for parole. The Committee further recommended that, "The instrument should be constructed to group inmates into risk categories based on characteristics and recidivism patterns of previous Kentucky parolees."

Properly validated and administered statistical risk assessments are generally found to be more accurate than clinical judgment. They have been used for years in the fields of medicine and insurance. Many view their adaptation to use in the field of corrections as having revolutionized correctional practice. They are used currently, among other things, to make decisions on institutional assignments, programming and community supervision levels.

In 1993 the Parole Board constructed a risk assessment instrument. It was used for a short period of time but fell out of use because there was no staff in place to gather the information needed to complete the instrument.

In 2001 the Board obtained Byrne grant funding and hired criminologist Dr. James Austin of the George Washington University Institute on Crime, Justice and Corrections to construct a new instrument and assist the Board in its implementation. In developing the risk assessment he undertook a recidivism study. The study consisted of drawing a sample of approximately 7,600 prisoners who were released in 1998 and tracking them for three years. A large amount of information was collected on each prisoner including whether they were returned to prison and for what reasons.

Factors that were found to have an independent statistical relationship with a return to prison (for either a technical violation or a new sentence) were used to identify prisoners by their level of risk. The risk instrument was pilot tested by the Parole Board staff to ensure the guidelines could be applied in an accurate and reliable manner. The overall result was a risk based decision-making tool that was both reliable and valid.

As indicated by the accompanying chart, the higher the offender scores on the risk assessment instrument the higher the chances are that he will re-offend. As you will notice, the chart displays not only the chances of returning to prison, but also the chances of doing so for a new felony.

Unlike the previous instrument, the new one contains both static and dynamic factors. Static factors are those that will never change subsequent to incarceration, such as the type of crime committed and the number of prior incarcerations and revocations. The dynamic variables, such as age, custody level and program participation, can and do change over the course of an inmate's incarceration. Even the score an inmate receives for having a serious substance abuse problem can change with the completion of treatment.

Recognizing that offense severity also plays a role in the release decision-making process the Board developed an "offense severity index" that groups all felony offenses into four categories. A copy of this index accompanies this article.

In order to not repeat the mistakes of the past, the Board hired staff and stationed them at the various correctional facilities to gather the information necessary to complete the risk assessment and assign a severity level. In the weeks preceding an inmate's parole consideration a Parole Board Specialist will review the inmate's Department of Corrections file and, using the form and a detailed set of instructions, developed with Dr. Austin's help, make a preliminary assessment of the inmate's risk level.

The Specialist will then conduct an interview with the inmate to clarify any unclear information and gather information that may not be available from the file. Following this interview the Specialist will meet with the inmate again to explain the completed instrument to the inmate and present him a copy.[1] For those inmates housed in jails or community centers, a Specialist housed in the Central office will complete the instrument by a file review only.

The risk assessment form which also includes the offense severity rating, is filed and is available to the Board when they interview the inmate, or in the case of an inmate convicted of a Class D felony who is housed in a jail, when their file is reviewed. While this assessment does not dictate the decision of the Board it is a tool they can use to assist them in rendering a reasoned and rational decision based upon information about objective factors that have been scientifically proven to relate to an inmates chances for returning to the community without returning to criminal conduct.

As a part of the development and implementation of the risk assessment and offense severity index, Dr. Austin's staff has created a database that will not only allow the assessment form to be complete electronically but will store the data about the risk level score and the offense severity rating as well as the individual factor scores that make up the final rating. Once the Board renders a decision it will also be included in the database. This will allow the Board to analyze its decision making process as it has never before been able to do. Our hope is to also include a component in the database to analyze the cases of the parolees who return to prison to see what factors appear to be related to their failure on supervision.

The decision to release someone from incarceration has serious public safety implications. All available resources and tools must be marshaled to assist in the decision making process. We believe that the Kentucky Parole Board now has state of the art technology to accomplish its mission.

**Endnote:**
1. The actual form produced by Parole Board staff and provided to the inmate and Board will be a computer generated form. The manual version of the form that accompanies this article better illustrates the scoring system used.

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**OFFENSE SEVERITY AND RISK ASSESSMENT MATRIX**
*(Place Check in appropriate box)*

| *Offense Severity* | *Risk Level* | | | |
|---|---|---|---|---|
| | **IV** | **III** | **II** | **I** |
| **Highest** | | | | |
| **High** | | | | |
| **Moderate** | | | | |
| **Low** | | | | |

**STATE OF KENTUCKY RECIDIVISM RATE BY RISK LEVEL**

| Characteristic | Number | Percent | % Returned | % New Conviction |
|---|---|---|---|---|
| **Level I** | **1,658** | **24.3** | **20.3** | **9.5** |
| **Level II** | **3,938** | **57.8** | **36.8** | **16.8** |
| **Level III** | **947** | **13.9** | **43.4** | **22.7** |
| **Level IV** | **267** | **4.0** | **54.3** | **27.0** |
| ***Total*** | ***6,810*** | ***100.0*** | ***34.4*** | ***16.3*** |

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## OFFENSE SEVERITY INDEX

This index is to be used when determining the severity of the current offense committed by an inmate to whom parole guidelines are being applied. It is compiled from the Kentucky Revised Statutes, Orion listings and consultation among the Board.

### INTRODUCTION

KRS 532.020 designates the class of offenses as follows:

At least 1 but not more than 5 year sentence - Class D Felony
At least 5 but not more than 10 year sentence - Class C Felony
At least 10 but not more than 20 year sentence- Class B Felony
At least 20 but not more than 50 years or life - Class A Felony

The statutes which set forth the definition of the various crimes also designate the Class of the felony described. Although this index closely follows the statutory classifications, it does depart from it in instances due to the nature of the crime. e.*g.* violence or offense involving a child of tender years. The statutory designations are helpful for our purposes where the age of the victim or the fact that the victim receives physical injuries enhances the statutory Class of Felony. (For example, use of minor in a sexual performance is a Class C Felony if the minor is less than 18 years old, a Class B Felony if the minor is less than 16 years old, and a Class A felony if the minor receives physical injury.)

This index classifies offenses in the categories of **HIGHEST, HIGH, MODERATE** or **LOW**.

### GENERAL PRINCIPLES

The current offense committed shall be determined from the Resident Record Card or the Judgment of the court. Any discrepancies or uncertainties shall be resolved by designating the offense in the higher class of severity.

If the offense and the number of years sentenced do not agree, the discrepancy shall be resolved by designating the offense in the higher class of severity indicated either by the number of years sentenced or the current offense.

If the current offense involves more than one offense, offense severity shall be determined by the offense in the higher class of severity.

If the current offense is **facilitation** to commit an offense, the offense severity shall be determined by locating the offense severity category of the offense facilitated and reducing the severity to the next lower category. (For example, kidnapping is in the "HIGHEST" offense severity category, facilitation to kidnapping would fall in the "HIGH" category.)

**Complicity, Aiding and Abetting, Conspiracy, Criminal Attempt** and **Persistent Felony Offender** offenses shall be designated as having the same offense severity as the basic charge.

## OFFENSE SEVERITY DESIGNATION

The offense severity designation of offenses for purposes of the Kentucky Parole Board Decision Guidelines is as follows:

### HIGHEST

Murder
Manslaughter I
Kidnapping
Arson I
Rape I
Sodomy I
Assault I
Robbery I
Promoting Prostitution I
Sexual Abuse I
Use of a Minor in a Sexual Performance (Class A or B felony)
Promoting Sexual Performance by a Minor (Class A or B Felony)
Unlawful Transaction with a Minor I (Class A or B Felony)
Criminal Abuse I

### HIGH

Arson II and III
Manslaughter II
Rape II and III
Sodomy II and III
Robbery II
Assault II and III
Prostitution with Knowledge of HIV Infection
Procuring Prostitution With Knowledge of HIV Infection
Assault Under Extreme Emotional Disturbance
Burglary I
Criminal Abuse II
*Criminal Possession of a Destructive Device or Booby Trap
Abandonment of a Minor
Escape I
Attempt to Escape from Penitentiary
Engaging in Organized Crime
Disarming a Peace Officer
Incest
Intimidating a Judicial Officer
Intimidating a Juror
Intimidating a Witness
Manufacture of Methamphetamine
*Possession of Anhydrous Ammonia in Unapproved Container with Intent to Manufacture, First, Second or Subsequent Offense
Possession of Firearm at Time of Drug Offense
Possession of Firearm by Convicted Felon
Abuse or Neglect of Adult (Class C Felony)
Receiving Stolen Property (Anhydrous Ammonia to Manufacture Meth)
Reckless Homicide
Retaliating Against a Witness
Riot I
Selling Controlled Substances to a Minor
Stalking I
*Terroristic Threatening First and Second Degree
Theft of Identity
Trafficking in a Controlled Substance I
Trafficking in Stolen Identities
Unlawful Imprisonment I
Unlawful Possession of Weapon on School Property
Unlawfully Providing Handgun to Juvenile

Unlawful Transaction With a Minor I (Class C Felony)
Use of Minor to distribute Material Portraying Sexual Performance by a Minor
Using Restricted Ammunition in Commission of Crime
Wanton Endangerment I

**MODERATE**

Abuse of a Corpse
Assault IV (Class D Felony)
Bail Jumping I
Bribery of a Public Servant
Providing Pecuniary Benefit for Bribery of a Public Servant
Receiving Bribe by Juror
Receiving Bribe by Witness
Bribing a Juror
Bribing a Witness
Burglary II and III
Burning Personal Property to Defraud Insurer
Criminal Gang Recruitment
Carrying Concealed Weapon
Criminal Possession of a Forged Instrument I
Cruelty to Animals I
Custodial Interference
Desecration of Venerated Objects I
Distribution of Matter Portraying Sexual Performance by Minor
Escape II
*Exploitation of an Adult by Caregiver Over $300 (Any Class)
Failure to Register as a Sex Offender
Fleeing or Evading Police I
Forgery I and II
Forgery of a Prescription
Fraud or False Statement in Obtaining Controlled Substances or Regarding Prescriptions
Hindering Prosecution or Apprehension I
Institutional Vandalism
*Misuse of Computer Information
Marijuana Cultivation
Operating Motor Vehicle Under the Influence
Operating Motor Vehicle While License Suspended for DUI
*Operating a Motor Vehicle While License Suspended (the language "While License Suspended for DUI" is stricken)
Possession of Handgun by a Minor
Procuring Another to Commit Prostitution with Knowledge of HIV Infection
Promoting Contraband I
Promoting Sale of Material Promoting Sexual Performance by a Minor
Abuse or Neglect of Adult (Class D Felony)
*Tampering with Anhydrous Ammonia Equipment with Intent to Manufacture First, Second, or Subsequent Offense
Theft by Extortion
Theft of Mail Matter
Trafficking in a Controlled Substance in or Near a School
Trafficking in a Controlled Substance II
Trafficking in Marijuana
*Unlawful Access to Computer First Degree
Unlawful Transaction with a Minor II
Use of Minor to Distribute Obscene Material
Violating Graves
*Any Unlisted drug offense which is a Class C Felony or above.
*Any unlisted theft or fraud offense which is a Class C Felony or above.

**LOW**

Bigamy
Conspiracy to Promote Gambling
Counterfeiting
Criminal Mischief I
Criminal Possession of a Forged Instrument II
Criminal Possession of a Forged Prescription
Defrauding Secured Creditors
Eavesdropping
*False Making or Embossing Credit/Debit Card
*False Statement as to Identity or Financial Condition
Filing an Illegal Lien
*Forging, Altering or Counterfeiting a State Lottery Ticket
*Fraudulent Use of a Credit Card
Fraud or False Statement in Obtaining Assistance Benefits for Families, Children, Elders
Fraud or False Statement in Obtaining Health Cre Assistance Benefits
Illegal Participation in Business of Insurance
Impersonating a Peace Officer
Installing an Eavesdropping Device
Misuse of Confidential Information
Nonsupport and Flagrant Nonsupport
Obscuring Identity of Machine or Other Property
Operating a Sham or Front Company
Perjury I
Possession of Controlled Substance I
*Possession of a Controlled Substance Third Degree First, Second and SubsequentOffense
Possession of a Forgery Device
Possession of Gambling Records I
Possession of Matter Portraying a Sexual Performance by a Minor
Possession of Stolen Mail Matter
Possession, Use or Transfer of Device for theft of Telecommunications Services
*Prohibited Activities Relating to Controlled Substances First, Second or Subsequent Offense
Promoting Gambling I
Promoting Prostitution II
Promoting Sale of Obscenity
Receiving Deposits in Failing Financial Institution
Receiving Sports Bribe
*Receiving Goods, Services etc Obtained by Fraud
Receiving Stolen Property
Sale and Transport of Alcoholic Beverages
*Simulating a Controlled Substance First, Second or Subsequent Offense
Sports Bribery
*Tampering with Anhydrous Ammonia Equipment
Tampering With Physical Evidence
Tampering With Public Records
Theft by Deception
Theft by Failure to Make Required Disposition
Theft by Unlawful Taking
*Theft by Unlawful Taking-Firearm
Theft of Controlled Substance or Legend Drug
Theft, Possession or Trafficking in Prescription Blanks
Theft of Property Lost, Mislaid or Delivered by Mistake
Theft of Services
Unauthorized Use of a Vehicle
Use, Possession or Advertisement of Drug Paraphernalia
*Unlawful Access to a Computer Second Degree

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*Unlawful Distribution of Methamphetamine Precursor First, Second or Subsequent Offense
*Unlawful Possession of Methamphetamine Precursor First, Second, or Subsequent Offense
Using Slugs I
*Any unlisted drug offense which is a Class D Felony.
*Any unlisted theft or fraud offense which is a Class D Felony

**Offenses that were added to the Offense Severity Index through Addendum I on May 16, 2003.* ■

STATE OF KENTUCKY
PAROLE GUIDELINES RISK ASSESSMENT FORM

**Inmate Name:** _____ **Inmate #:** _____

Institution: _____ PED: _____

| Static Items | Pts | Dynamic Items | Pts |
|---|---|---|---|
| **1. Current Offense** | | **6. Age At Time of Hearing** | |
| Theft/Burglary/Robbery | 2 | 21 or Under | 4 |
| Other | 0 | 22-30 | 3 |
| List Offense: | | 31-40 | 2 |
| | | 41-50 | 1 |
| | | 51 and above | 0 |
| **2. Any Felon Revocation(s)** | | **7. Current Classification Level** | |
| Yes | 2 | Community/ Min /Restricted/Medium | 0 |
| No | 0 | Close/Maximum | 2 |
| List Type of Revocation and the date: | | List Current Classification Level: | |
| | | **8. Completed Ed/Voc/Treatment Programs** | |
| **3. Prior DOC Incarcerations** | | No | 2 |
| One or More | 1 | Yes | 0 |
| None | 0 | List Programs and Date Completed: | |
| **4. High School Degree/GED or Attending School or Employed for at least 6 months prior to arrest** | | | |
| None | 2 | | |
| One Condition Met | 1 | **9. Most Severe Disciplinary Report in the last 2 years** (If in local jail match with DOC category & list here) | |
| Two Conditions Met | 0 | | |
| List which Condition was met and the Source: | | Category VI or VII | 2 |
| | | Category IV or V | 1 |
| | | None/Category III or below | 0 |
| | | **10. Current Drug Abuse Rating** | |
| **5. Marital Status at Most Recent DOC Admission** | | None/Occasional/Serious-Addressed | 0 |
| | | Serious Abuse – Not Addressed | 2 |
| Single - Never Married | 1 | **Comments:** | |
| Other | 0 | | |
| **Total Static Score:** _____ | | **Total Dynamic Score:** _____ | |

**Total Risk Assessment Score:** _____

**Overall Risk Level: (Check Correct Risk Level)**

☐ **Level I (0-6 pts)** ☐ **Level II (7-11 pts)** ☐ **Level III (12-14 pts)** ☐ **Level IV (15+ pts)**

**Parole Board Specialist Name:** _____ **Date** ___/___/___

# Contempt Cases and Maximizing the Defense for Status Offenders under Kentucky's Valid Court Order Provisions

- A Valid Court Order Must Be In Effect Before A Child Can Be Found In Contempt And Punished
- KRS 630.080(3) Requires That A VCO Be In Force, And That A Report By An Appropriate Public Agency State That Secure Detention Is Necessary To Justify Holding A Child In Detention Longer Than Seventy-Two Hours
- KRS 630.080(3)(C) Requires That To Detain A Status Offender Longer Than Seventy-Two Hours There Must Be Either A Verbal Or Written Report That All Dispositions Other Than Secure Detention Have Been Exhausted Or Are Inappropriate
- KRS 600.020(60) Which Defines A VCO Also Sets Forth A Number Of Safeguards That Can Benefit The Status Offender Charged With Contempt
- What Can Be Done If The Court Has Both The "Appropriate Agency Report" In The Record, And Has Carefully Complied With KRS 600.020(60)?
- Vague Orders Can Be Challenged
- hallenge Orders Requiring A Behavioral Result Whenever Treatment Has Not Been Addressed
- Other States Uphold The Notion That The Court's Inherent Contempt Power May Be Limited In Status Offender Cases
- The Bottom Line
- VCO Checklist

***This article is designed to present legal defense theories under the "valid court order" requirement for status offenders when charged with contempt pursuant to KRS 630.010(3); 630.070; 630.080; 600.020 (60).***

Of all our DPA clients, who is probably the easiest target for a sentence in secure confinement? I would venture to say this person is one of the most minor offenders. It is the person who probably has not broken a law or committed a criminal offense. The person who can be confined the easiest is the status offender, who oftentimes merely came to court because he or she was acting out in school or who was fighting with their parents, or who did not go to school and was determined to be truant.

The typical scenario is that our status offender client has been "dissing" the parents, or staying out late at night and hanging out with the wrong crowd. Or the status offender sees no use for school, isn't doing homework, isn't very successful with school, and thinks time is better spent at a friend's house, or is playing "hooky." Either mom and dad or the school have had enough, someone files a complaint and the petition makes its way to juvenile court. The adults hope that the child will see how serious they are about the bad behavior. Maybe our status offender client has some behavioral issues that need to be addressed, or perhaps there is a learning disability and this is driving poor performance at school. Regardless of the reasons for the problem, the petition is filed, and this case goes in front of the juvenile or the family court. Because this is a status offender, the child cannot be ***directly punished*** with detention in secure confinement. Status offenders are to receive treatment, and there is no authorization in Chapter 630 to use secure detention to punish status offenders directly. In fact, KRS 630.070 and KRS 630.100 expressly ***forbid*** the detention of status offenders unless the court has found that the child violated a valid court order. But, the court does have the authority under KRS 630.120 to enter an order that will then subject the child to a contempt finding and then punish with secure detention if the court later finds the child committed contempt.

**A valid court order must be in effect before a child can be found in contempt and punished.** The requirement of the "valid court order" stems from common law. Orders that are not valid are not enforceable. *Wilson v. West*, Ky. App., 709 S.W.2d 468 (1986). Kentucky has codified the concept of

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the valid court order in several sections of the juvenile code that apply to status offenders. KRS 630.010(3), 630.070 and 630.080 consider the use of the valid court order, and this term is defined in KRS 600.020 (60). These sections all state that in order to punish a status offender for contempt that a valid court order (VCO) must be a part of the former record.

In July 2000, the Kentucky Legislature had the wisdom of codifying the valid court order provision for status offenders. This was an effort to assure that before a court could hold a status offender in contempt and sentence them to secure detention that the child and the parents had notice that a court order was in effect. The "valid court order provision" (VCO) is found at KRS 630.070 which states:

> **No status offender shall be placed in a secure juvenile detention facility or juvenile holding facility as a means or form of punishment except following a finding that the child has violated a valid court order.**

KRS 600.020(60) defines that a valid court order is one that was issued by a judge, to a child alleged or found to be a status offender:

> **(a) who was brought before the court an made subject to the order;**
> **(b) whose future conduct was regulated by the order;**
> **(c) who was given written and verbal warning of the consequences of the violation of the order at the time the order was issued and whose attorney or parent or legal guardian was also provided with a written notice of the consequences of violation of the order, which notification is reflected in the record of the court proceedings; and**
> **(d) who received, before the issuance of the order, the full due process rights guaranteed by the Constitution of the United States.**

The Legislature has sought to limit the use of contempt by providing certain procedural statutes. Before a court can detain a status offender the court must assure that certain safeguards have been met. First, the child must be given a warning of the consequences of the violation of the order and the child's attorney, parents, or legal guardian must be given a copy of the written statement setting forth the consequences for the order. The court must give child and his representative adult not only a verbal warning of the court order, but also must give a written warning. KRS 630.120. KRS 630.080 (3) then controls what must take place in order to send the status offender to secure detention for a contempt violation.

**KRS 630.080(3) requires that a VCO be in force, and that a report by an appropriate public agency state that secure detention is necessary to justify holding a child in detention longer than seventy-two hours.** KRS 630.080 (3) sets out what has to happen before any child who is subject to a valid court order is detained. Three processes are specified by this subsection of the statute. First, the court must affirm that the valid court order exists. KRS 630.080 (3)(a). Second, the court must provide a detention hearing if the court detained the child prior to having a contempt hearing. KRS 630.080(3)(b). And finally, there are the lengthy provisions of KRS 630.080(3)(c) which mandate that an oral or written report be received by the court, made by an appropriate public agency other than the court or a law enforcement agency.

This report is to review the behavior of the child and the circumstances under which the child was brought before the court, determine the reasons for the child's behavior, and further must determine whether all dispositions other than secure detention have been exhausted or are inappropriate. Prior reports placed in the file may be used to satisfy this requirement. The child can be detained for up to seventy-two hours before receipt and review of the report. A violation hearing must be conducted within twenty-four (24) hours of the receipt of the report. The statute contemplates that if the report is available at the time of the detention hearing, that the violation hearing can be conducted at the same time as the detention hearing.

And finally, KRS 630.080(3) (c) concludes by stating that these hearings are to be conducted like all other formal juvenile proceedings according to KRS 610.060, and that **"[t]he findings required by this subsection shall be included in any order issued by the court which results in the secure detention of a status offender."**

**KRS 630.080(3)(c) requires that to detain a status offender longer than seventy-two hours there must be either a verbal or written report that all dispositions other than secure detention have been exhausted or are inappropriate.** KRS 630.080(3) (a) and (c) can be a real tool for the defense attorney representing a status offender. This is the most often overlooked provision by the court. The court is not supposed to detain a status offender for contempt for more than seventy-two hours unless "an appropriate agency" has delivered either a written or oral report that all other dispositions other than secure detention have been exhausted or are inappropriate.

While the courts may tend to believe that they have an inherent contempt power, and that their powers shall not be limited, the Legislature in its wisdom has elected to assure that before our courts impose a contempt sentence longer than seventy-two hours on a status offender, that an appropriate agency deems that this kind of punishment is actually necessary. Thus, mom and dad's word that their child did not do the dishes on time, or that the child was out after an 8 p.m. curfew; or the Director of Pupil Personnel's statement that the truant continues to miss more school after being found to be truant, is not sufficient to impose a five day secure detention term without the required report by a caseworker or other official in the employ of a state agency.

Courts would like to interpret KRS 630.080(3) as only applying to the time limit after the initial detention hearing. But the statute is not drafted to be interpreted in this way. KRS 630.080(3)(c) ends stating that **anytime** a status offender is subject to secure detention that this section and all requirements apply.

**KRS 600.020(60) which defines a VCO also sets forth a number of safeguards that can benefit the status offender charged with contempt.** The VCO can also be challenged under 600.020(60). First, check the record and make sure there is a written copy of the court's order in the file. If you want to be very thorough, you can review the tape of the proceedings and see if the required verbal warning was given. According to KRS 600.020(60) both the verbal and written orders are required and must be part of the record. Make sure that the ***consequences*** of the actions are in ***written and verbal*** form in the record. This is required by statute as well. Generally, the proof of the written warning may be evidenced by the parent and child's signature on a form placed in the file, and some courts, but not all, are doing this to assure an accurate record. Finally, you can challenge the former proceedings for a lack of full due process rights. Make sure the child was represented by counsel at the initial hearing. Many courts will urge the child to waive their right to counsel and take an admission to a status offense without first appointing counsel. However, under *D.R. v. Commonwealth*, Ky.App., 64 S.W.3d 292 (2001), a child cannot knowingly waive their right to counsel without first discussing with counsel what manner in which counsel could assist them. Thus, an admission by a child who has not had counsel appointed to discuss the advisability of waiver of counsel is an invalid admission under the *D.R.* ruling.

Finally, most juvenile courts do not provide a sufficient *Boykin* colloquy when taking an admission. Be especially alert to cases where the admission was made without counsel and the *Boykin* colloquy was deficient. This admission may be challenged on the basis of being ***"void ab initio."***

**What can be done if the court has both the "appropriate agency report" in the record, and has carefully complied with KRS 600.020(60)?** Some courts (but certainly not all or even the majority of courts) comply with the provisions of KRS 630.080(3)(c) and 600.020(60). Even when the procedural substance of the VCO requirement is satisfied challenges exist.

**Vague orders can be challenged.** Courts enter orders that are incredibly vague, including telling status offenders that they must "go home and obey and respect your parents" or in the case of one child who I represented that was in counseling "obey your counselor." This kind of order is not specific enough to put our clients on notice of the kind of behavior that would subject them to future punishment and detention. An order must be specific and reasonable in order to permit a contempt finding and the finding may only be based on a valid and enforceable order. Invalid orders are not enforceable. *Wilson v. West*, Ky. App., 709 S.W.2d 468 (1986). The defendant must have knowledge of a valid court order and must intentionally violate in order to be held in contempt. *Butts v. Commonwealth*, Ky. App., 953 S.W.2d 943 (1997). The order that any child "obey" their parents, school staff or his counselor lacks the kind of specific language that would put a status offender on notice that they might be subject to a contempt finding.

**Challenge orders requiring a behavioral result whenever treatment has not been addressed.** Courts should not order behavioral results in lieu of assuring that treatment will be put in place for the child. While courts do have the ability to order specific behavior, it is contrary to the code for the court to order a behavioral result that should be dealt with via a treatment plan. Attorneys must always be ready to challenge a court order that requires the child shall "behave himself" or "be on good behavior." This kind of order implies that treatment is needed, and in many cases it is not just the child who needs help, but holistic services for the entire family need to be put into place.

The most egregious example of the misuse of an order of "good behavior" is when the court orders the child to behave himself at the pre-adjudication or pre-dispositional phase, with the intent of then subjecting the child to a contempt finding before any services have been put in place. In some instances a court may send a child home rather than back to detention but enters a provisional order that the child shall "behave" in order to remain at home.

Remember too that the language in KRS 630.080(3)(c) requires that least restrictive alternatives must be shown to have been exhausted or are inappropriate. Absent any specific findings by the court that the least restrictive alternatives have been attempted and failed, or are not feasible, a child should not be removed from their home. *X.B. v. Commonwealth*, Ky.App., 105 S.W.3d 459 (2003). In *X.B.* the court's order committing the child was found to be invalid when the caseworker had recommended probation and the court had not made specific findings regarding why the commitment was necessary.

All children that come before Kentucky courts have a right to treatment reasonably calculated to bring about improvement. KRS 600.010 (2)(d). Thus, defense attorneys should emphasize that treatment and least restrictive alternatives be explored before the court brings contempt charges against the status offender. If the court is trying to find contempt, then the defense attorney should have an agency worker at the hearing enter into the record the treatment options and least restrictive alternatives that are available and that have not yet been put into place. This information may defeat a detention term in excess of seventy-two hours pursuant to KRS 630.080(3)(c).

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**Other states uphold the notion that the court's inherent contempt power may be limited in status offender cases.** There are a number of states providing law regarding limitations on the court's inherent contempt powers in status offender contempt cases. A number of jurisdictions have held that courts should not use its contempt powers against a status offender, or should use them in the most narrow and sparing of manners.

Contempt powers are to be narrowly defined in line with the policy of utilizing the least restrictive means. *In re Ann*, 525 A.2d 1054, 1057 (Md. 1987). This court found that no disposition of juvenile petitions, whether delinquent child or CHINS (child in need of services), may result in criminal conviction. In this case the court found that the juvenile court may not commit a child to a facility for delinquents as a result of criminal contempt without first considering all alternatives to criminal conviction. To fail to consider alternatives was found to be an abuse of the court's criminal contempt powers. *In re Ann* at 1058. This rationale resonates and supports the provisions in KRS 630.080(3)(c) which states that an appropriate agency must deliver either a verbal or written report to the court stating that all less restrictive alternatives have been exhausted or are inappropriate if the court is going to hold the child more than seventy-two hours in detention. *See also Wayburn v. Schupf*, 365 N.Y.S.2d 235 (N.Y. App. Div. 1975), holding that contempt powers should be used sparingly in the case of juveniles.

Yet another court has found that the inherent contempt powers of the courts do not permit juvenile courts to exceed any statutorily provided time limits for the detention of children. New Mexico has held that the incarceration of a CHINS for contempt of a probation order is contrary to public policy when the statute does not provide for incarceration. *State v. Julia S.* 719 P.2d 449 (N.M. App. 1986). In *Julia S.*, the court made the contempt finding and detained the child 15 days. The New Mexico Children's Code limited confinement in secure facility for ten days. The New Mexico Court of Appeals found that the inherent power of the court did not validate the court order placing the child in detention 15 days, when the code limited the detention term to ten days, and found that the children's code was a reasonable regulation of the court's inherent contempt power. This case can also be argued by analogy to the seventy-two hour time limit provision for status offenders in KRS 630.080 (3).

**The Bottom Line.** The bottom line is that in order to properly defend the status offender on contempt charges, you have to know how all the VCO provisions relate to each other, and maximize their use. Status offenders must have a warning, both verbally and in written form, of the orders to which they will be subject to. They must be warned of the consequences of their actions, and the orders must be reasonable and specific enough to put the child on notice for the kinds of actions that would subject them to contempt. The child must have been given all due process rights afforded under the United States Constitution before being subjected to secure detention. This includes counsel at the original hearing under the *D.R.* case, and a proper *Boykin* colloquy. Remember too, that there is language in KRS 630.080(3)(c) that supports limitation on the amount of time any status offender can spend in secure detention. These tools can be an effective measure of damage control for the status offender who is being charged with contempt.

**VCO CHECKLIST**

- ❑ Is VCO in record in both written and oral form? KRS 600.020 (60).
- ❑ Was child and adult both given warning of consequences of violation of order? 600.020(60).
- ❑ Were all due process rights afforded before order issued and at the time the underlying offense found by the court?
- ❑ Was counsel appointed pursuant to *D.R.*?
- ❑ Was proper *Boykin* colloquy given?
- ❑ If child held in excess of 72 hours did appropriate state agency submit report to court that all other remedies or alternatives were exhausted or not appropriate? KRS 630.080(3)(c).
- ❑ Was order unduly vague or lacking in specificity so that the child did not have notice as to the kind of behavior that might subject them to contempt?
- ❑ Did order require a behavioral result but ignore treatment that underlies the problem?
- ❑ Can a state worker testify to other alternatives or treatment options not attempted?
- ❑ Is the court ordering a term of detention that could be challenged as being excessive under limitations suggested in KRS 630.080(3)(c)?

Two cases may soon provide some guidance for Kentucky on contempt proceedings against juveniles. While not yet final because motions for discretionary review are pending in the Supreme Court at the time of publication of this article, *C.G. v. Commonwealth*, Ky.App., __S.W.3d ____(2003), 2003 WL 1113330 (Ky.App.) establishes that a juvenile court may commit palpable error when ordering a 60 day detention for contempt when the child never admitted to the offense and when the court had not conducted a proper *Boykin* colloquy. *A.W. v. Commonwealth*, ___ S.W.3d___ (2003), 2003 WL 2003802 (Ky.App.) states that the juvenile court must make a specific finding that the child's conduct amounted to indirect criminal contempt, and courts must also find that all least restrictive alternatives were considered before imposing the punishment of a detention sentence. ■

**Suzanne A Hopf**
**JAIBG Coordinator**
**Dept. of Public Advocacy**

# IN THE SPOTLIGHT. . . .PATRICK ROEMER

"Justice, justice shalt thou pursue."
- Deuteronomy

"My father taught me, 'You stand up for what you believe and you fight for what you believe.' Mom and Dad both were an inspiration to me. They taught me that you do the right thing and if you're going to do something, do it with all your heart."

In the five years that Patrick Roemer worked as a prosecutor with the Warren County office in Bowling Green, Kentucky, he was guided by his parents' advice. A level playing field is one of the tenets of fundamental fairness guaranteed to us in the U.S. Constitution. As a prosecutor, he worked with passion and dedication. Over time, though, he observed a disturbing trend. He recalls, "I noticed clients being hauled away because their attorney seemingly didn't care." It looked as though they had not done their homework and he felt that justice was not being served. He recognized this was often the case with private defense attorneys. But private defense work is difficult and Patrick acknowledges this, "Private attorneys are always under pressure to get back to the office and pay the bills." It is an ongoing and inherent problem with private offices, which Patrick recognizes because he also once worked in a private firm.

For these reasons, the opening of the public defenders' office in Bowling Green was closely watched by the law community. Patrick recalls that in law school, "there is a perception that you go into private law to make good money and the good money comes to good attorneys, but you become a public defender only if you can't make it anywhere else. It was a refuge for lawyers who couldn't cut it." This myth was quickly shattered. He recalls, "I saw their level of preparation and they knew their cases. It wasn't easy to prosecute their clients." He continues, "I saw the nucleus of what was being created here and I wanted to be a part of it."

In November 2000, Patrick, joined the Bowling Green Public Defender Office. There were immediate adjustments he had to make, of course. He observes, "Prosecution is easier in that you have the police and detectives and all of these assets available to you. They gather the evidence for you." But there was an even greater adjustment he had to make. Patrick was startled by his own reaction to his first big win in court. It had been a difficult case involving a violent client. When Patrick returned to the office, he was greeted by cheering and accolades from his co-workers. He recalls his response, "I walked right past them, came into my office, shut the door and sat down at my desk. I stared out the window and thought, 'My God, what have I done?'" It is a difficult question most defense attorneys must face at some point and certainly one which they are asked repeatedly by friends and family members who do not understand why defenders do the work they do.

To answer it, Patrick fell back onto the advice his parents had given him as a young boy, as well as the passage from Deuteronomy regarding justice. He doesn't question the balance required in the courtroom necessary to see that justice is served. It had disturbed him to watch innocent people go to jail or to be charged and convicted of more than what they had committed. He resolved, "If I was going to pursue justice, I was going to do it as a public defender."

Resolved in his answer, there was no turning back for Patrick at this point. "I'm just really, really happy right now and have never regretted one day of joining DPA," he states.

Patrick is good at what he does, too. In talking about his work with DPA, his eyes suddenly gleam as one who enjoys good competition. He grins, "I don't like to lose." There is a slight pause and he seems amused at himself as he shakes his head and repeats, "I *really* don't like to lose." ■

**Patti Heying**
**Program Coordinator**

# CAPITAL CASE REVIEW

## UNITED STATES SUPREME COURT

***Wiggins v. Smith*, 123 S.Ct. 2527 (2003)**

**Majority: O'Connor (writing), Rehnquist, Stevens, Kennedy, Souter, Ginsburg, Breyer**
**Minority: Scalia (writing), Thomas**

Several justices of the Court have expressed concern with capital punishment over the last several years. In 2001, Justice O'Connor[1] said "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases." *Richmond Times Dispatch*, July 8, 2001. Justice Ginsburg and Justice Breyer have also expressed concerns about lawyering in capital cases. It is interesting to watch those concerns come to light in the Court's jurisprudence, at least as it pertains to the right to counsel and a fair trial. In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), Justices Ginsburg, Breyer and O'Connor joined the majority giving teeth to its holdings in *Strickland v. Washington*, 466 U.S. 668 (1984). While the Court focused on mitigation investigation, the same analysis holds true for investigating guilt phase issues.

Counsel does not have a duty "to investigate every conceivable line of mitigating evidence," nor does counsel have a duty to present mitigating in every sentencing phase. However, in cases where counsel makes strategic choices based on limited, partial or no investigation, those choices "'are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Wiggins*, at 2541, quoting *Strickland*, at 690-691. In assessing that investigation, "a court must consider **not only** the quantum of evidence already known to counsel, but also **whether the evidence would lead a reasonable attorney to investigate further**." *Id.*, at 2538.

Among the mitigation areas which must be investigated are: medical, educational, employment and training history, family and social history, prior correctional experience, both as an adult and a juvenile; and religious and cultural influences. An argument could be made that the Court has, for the first time, found the employment of at least a Licensed Clinical Social Worker to prepare a social history necessary in the investigation and preparation of a capital case. *Id.*, at 2533, 2536.

The majority also gave at least a starting point as to how to find the "prevailing norms of practice" it cited in *Strickland*, at 688-689: the ABA Standards for Criminal Justice (2d ed. 1980) and ABA Standards for the Appointment and Performance of Counsel in Death Penalty Cases. (1989).,[2] *Wiggins*, at 2536-2537.

## SIXTH CIRCUIT COURT OF APPEALS

***Zuern v. Tate*, 2003 WL 21665159 (rendered July 17, 2003)**

**Majority: Siler (writing), Norris, Boggs**

Prison guard killed. District Court granted habeas relief on a *Brady* error. The Sixth Circuit reversed the grant and affirmed the district court's refusal to grant relief on all other issues.

**Prior Calculation Design**

There was sufficient evidence to find "prior calculation and design," which is a time of planning how the murder will be carried out (the method, with what instrument), but does not include a plan to kill a specific person. Zuern's statement to another inmate that someone should "do something" about the guards who had allegedly not given him his full complement of telephone time was not enough to find intent. Nor were the facts: 1) someone warned Zuern his cell was about to be raided; 2) instead of hiding or getting rid of the shank he had made, Zuern had it with him at the beginning of the raid; and 3) when guards came to shake down his cell, he initially stood at the bars waiting for them to enter, and only lunged at the dead guard after the guards opened the cell door.

The key here was evidence of the amount of time and planning Zuern had put into forming the shank which killed the guard. *Zuern*, slip op. at *3.

***Brady* Violation**

The defense did not receive a memo from a guard memorializing his conversation with another inmate who had told him Zuern had a knife. Zuern argued that had he been given the memo, he could have argued his intent was to kill the inmate, not the guard.

After hearing testimony about Zuern manufacturing the shank, the jury could just as easily have determined that he desired to kill both the guard and the inmate, and thus, found him guilty of murder by prior calculation or design. Again, the focus is on the planning and calculation presented to the jury. *Id.*, at *6.

**Failure to Grant Mistrial**

An inmate testified he had told the guards Zuern was "crazy," in prison for murder and "won't hesitate to do it again." Defense counsel's request for a mistrial was denied. The Court cited the factors in *United States v. Forrest*, 17 F.3d 916 (6th Cir. 1994), for determining whether a mistrial should have been granted: 1) unsolicited remark; 2) remark in response to a reasonable line of questioning; 3) immediate,

clear and forceful limiting instruction; 4) evidence of governmental bad faith; and 5) the weight of evidence against the defendant.

The Court found the first four factors weighed in favor of the government. The Court's analysis of the fifth factor didn't touch the question of the weight of the evidence. Instead, the Court found no denial of fundamental fairness even though the remark caused greater prejudice to Zuern than to Forrest—the remark in *Forrest* was about a robbery conviction in the middle of a cocaine distribution trial.

***Powell v. Collins*, — F.3d — (rendered June 17, 2003)**
**Gilman (writing) for majority**
**Clay (writing) dissent**

Remanded. Before the state can proceed with a new penalty phase, the trial court must determine (1) whether §2929.06 of the Ohio Revised Code, which sets out procedures for cases remanded for new sentencing hearings, is retroactive, and (2) whether Powell can be lawfully be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002) (Eighth Amendment violated by executing mentally retarded).

***House v. Bell*, 332 F.3d 997 (6th Cir. 2003)**
**Martin, writing**

21 U.S.C. 848(q)(4)(b), which allows appointment of counsel to challenge death sentences in the federal courts, **does not** allow those attorneys to be paid for state work in challenging those death sentences.

***Gall v. Scroggy*,**
**20003 WL 21397880 (rendered June 13, 2003)**

The Court holds that its 2000 opinion did not mandate an involuntary hospitalization proceeding.

## KENTUCKY SUPREME COURT

***Hodge v. Commonwealth*,**
**— S.W.3d — (rendered August 21, 2003)**
**Majority: Wintersheimer (writing), Lambert, Cooper, Johnstone, Keller, Graves**
**Stumbo (not sitting)**

The Court considered the denial of Benny Hodge's RCr 11.42 petition arising from his convictions and sentences for the deaths of Ed and Bessie Morris. *Hodge v. Commonwealth*, Ky., 17 S.W.3d 824 (2000).

*Bowling et al. v. Commonwealth*, Ky., 926 S.W.2d 667 (1996), states permission for extra time to file could be granted upon good cause shown. Hodge initially filed a brief 11.42 motion and 30 days later, filed additional claims or facts. The trial court denied his motion for another 120 days to amend. Hodge did not present facts or amendments showing why he needed the extra time, thus, he did not meet the "good cause" standard. *Hodge*, slip opinion at 9-10.

Hodge could not cite to any fact or evidence he was prevented from presenting in his motion as a result of any due process violation. In any event, due process procedures do not apply to post-conviction proceedings. *Id*., at 11.

The Court considered numerous other issues, but made no new legal pronouncements.

***Parrish v. Commonwealth*,**
**— S.W.3d — (rendered August 21, 2003)**
**Majority: Wintersheimer (writing), Lambert, Cooper, Johnstone, Keller (concur), Graves**
**Minority: Stumbo (Issues III and IX), Johnstone (Issue IX only)**

Medical examiner's testimony that female victim was pregnant was not error. "Evidence about whom and what the victim was prior to death is properly admissible." *Parrish*, slip op. at 4, citing *Templeman v. Commonwealth*, Ky., 785 S.W.2d 259 (1990); *Campbell v. Commonwealth*, Ky., 788 S.W.2d 260 (1990); *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519 (1984).

**Instructional Issues**
Parrish's argument that the jury's findings that the murders were intentional and resulted in multiple deaths is unfounded. There was no evidence that the jury relied on testimony about the female victim's pregnancy in making its decision.

The prosecution stated in guilt phase closing argument that the child victim was murdered so he could not identify Parrish. However, only the robbery aggravator was used in the penalty phase. There was no error in introduction of evidence that the child victim was a witness—all the evidence showed that the victims were killed during commission of a robbery. *Id*., at 8. *But see Jones v. United States*, 526 U.S. 227 (1999) ("[U]nder the Due Process Clause of the Fifth Amendment and the **notice** and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime **must be charged in an indictment**, submitted to a jury, and proven beyond a reasonable doubt. *Jones*, *supra* at 243, n. 6), *Apprendi v. Arizona*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (statutory aggravating factors are the functional equivalent to elements of an offense.).

The trial court properly did not instruct the jury on EED. Even if there had been a triggering event for the female victim, that event did not extend to the child victim. After Parrish stabbed the female victim, she agreed to give him the loan he requested; this interrupted the trigger. A victim's resistance to a robbery does not lend itself to the "emotional state so enraged inflamed or disturbed so as to cause a perpetrator to kill the victim" necessary to warrant an EED instruction. *Id*., slip op. at 6.

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**Penalty Phase Evidence**

The trial court properly refused to allow Parrish's children's testimony or introduction of letters, cards and photographs of the children in the penalty phase. The children's grandmother testified about their relationship. *But see Green v. Georgia*, 4442 U.S. 95, 97 (1979) (regardless of whether testimony comes under hearsay rule, evidence relevant to punishment); citing see *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978).

The Court considered other issues but plowed no new legal ground.

**Keller Concurrence**

Justice Keller agreed with the majority's analysis. However, he disagreed that the trial court properly allowed testimony of the victim's pregnancy. This testimony was not relevant, even to "who she was." Justice Keller found no harm in admission of the evidence, however, because the testimony "was fleeting" and because Parrish was not sentenced to death for the death of the female victim.

Justice Keller also believed "the better practice" would be to dispense entirely with such a reasonable doubt instruction in the penalty phase in order to avoid confusing the jury.

**Dissent**

Justice Stumbo argued that evidence of the victim's pregnancy was irrelevant and could have prejudiced the jury against Parrish.

The reasonable doubt instruction could lead a jury to believe it must dismiss death as the appropriate penalty before moving to another possible sentence.

***Wheeler v. Commonwealth*,**
**— S.W.3d — (rendered August 21, 2003)**
**Majority: Wintersheimer (writing), Lambert, Cooper, Graves, Johnstone, Keller (concur)**
**Minority: Stumbo (writing)**

**Female Victim's Pregnancy**

Following its pronouncements in *Parrish*, rendered on the same day, the Court found no prejudice in the medical examiner's testimony that Nairobi Warfield was pregnant. As in *Parrish*, the fact the victim was pregnant related to her physical condition. Juries are entitled to know "who and what the victim was." *Wheeler v. Commonwealth*, slip op. at 7.

The instructions were not flawed either; the jury was instructed to consider two deaths: that of Nairobi Warfield and Nigel Malone, not the unborn child. *But see Jones v. United States*, 526 U.S. 227 (1999) ("[U]nder the Due Process Clause of the Fifth Amendment and the **notice** and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime **must be charged in an indictment**, submitted to a jury, and proven beyond a reasonable doubt. *Jones*, *supra* at 243, n. 6), *Apprendi v. Arizona*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (statutory aggravating factors are the functional equivalent to elements of an offense.).

**Blood Spatter/Bite-Mark Evidence**

Pathologists may testify as to blood spatter/bite-mark evidence. A pathologist's training and on-scene observations qualify him/her to do so. *Id*., at 11.

**Preparation Of Video Transcript**

While trial judges have discretion to order a transcript from a videotaped trial, it was unnecessary in this trial. Use of videotapes rather than the written word "could eliminate the possibility of errors in transcription and may reveal errors that might" otherwise be overlooked." *Id*., at 15, citing *Marshall v. Commonwealth*, Ky., 60 S.W.3d 513 (2000).

The Court made no other new jurisprudential announcements.

**Concurrence (Keller)**

As he wrote in *Parrish*, Justice Keller found evidence of the female victim's pregnancy irrelevant, but harmless within the context of this case. *Id*., at 1-2.

**Dissent (Stumbo)**

Justice Stumbo believed evidence of the victim's pregnancy was irrelevant and prejudicial.

***Caudill and Goforth v. Commonwealth*,**
**— S.W.3d — (rendered June 12, 2003)**

**Majority: Cooper (writing), Lambert, Wintersheimer, Johnstone, Graves**
**Concur in result only: Keller (writing), Stumbo**

The Court also considered two death cases arising out of Fayette County.

**Joinder**

Caudill and Goforth had antagonistic defenses (each testified the other killed Lonetta White). Caudill asserted that her defense (Goforth did it), the redaction of her confession to delete any reference to Goforth and the court's denial of her motion to separate forced her to testify in order to shift the blame to Goforth.

The Court reaffirmed that joinder is appropriate even in cases where defenses are antagonistic. "'That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place…is a reason **for** rather than **against** a joint trial.'" *Caudill*, slip op. at 7, quoting *Gabow v. Commonwealth*, Ky., 34 S.W.3d 71 (2000); emphasis added.

**Death Qualification**

Kentucky law, at least since *Grooms v. Commonwealth*, Ky., 756 S.W.2d 131 (1988) and *Morris v. Commonwealth*, Ky., 766 S.W.2d 58 (1989), has allowed attorneys to "life-qualify" [ask whether veniremembers can consider a minimum sentence, or at least one less than death] a jury. Defense counsel in this case was permitted to ask such questions.

Interestingly, Kevin Stanford argued this same issue in the actions challenging his death sentence. Parenthetically, the Supreme Court did "not disagree" that Stanford "had a right to life-qualify the jury," but believed that counsel should have asked a second time to question the jurors, after capital, sequestered/individual voir dire had been completed. *Stanford v. Commonwealth*, Ky., 734 S.W.2d 781, 786 (1987). Assuming only for the sake of argument that Stanford was entitled to the benefit of *Morgan*, a panel of the Sixth Circuit agreed. *Stanford v. Parker*, 266 F.3d 442, 453 (6th Cir. 2001).

***Batson* Challenge**

Lonetta White, the victim, was African-American; both co-defendants are Caucasian. When the Commonwealth exercised eight of nine peremptories against Caucasian men, the defense objected on the basis of *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J.E.B. v. Alabama*, 511 U.S. 127 (1994). Citing lower federal court cases holding that *Batson* applies to peremptory strikes against Caucasians, the Court nevertheless found the prosecutor's reasoning for striking eight Caucasian men were not pretextual. *Caudill*, slip op. at 19.

***Bruton* Issue**

Both Caudill and Goforth could have stood on his or her statement and not testified. The trial court told the jury that only parts of Caudill's statement would be read. The Court "was unable to conclude" jurors necessarily believed the omissions inculpated Goforth. *Id*., slip op. at 11.

In *Richardson v. March*, 481 U.S. 200 (1987), an admonition that each statement could be considered only against the party making it was given. The trial court did not err in not giving one. In fact, giving one may call the jury's attention to the fact. Moreover, neither defendant requested one. *Caudill*, slip op. at 22.

**Character Evidence as Proof of an Element of Burglary**

A question regarding Ms. White taking care about the people she let into her home was cured by her sister's explanation that Ms. White, concerned about the part of town her sister lived in, told her sister to take care with her person and her home.

KRS 511.020 and the other burglary and trespass statutes require as an element of the offense that the defendant "knowingly enter[ed] or remain[ed] unlawfully" in a building. Testimony that Ms. White was careful with her person and her home was improperly admitted to prove Caudill and Goforth committed the burglary by "unlawfully" entering her residence with intent to commit a crime. However, the error was harmless because it was only circumstantial evidence. More direct evidence of an element of burglary came from Caudill's admission that she and Goforth did not have permission to enter the house satisfies this element. Goforth also testified Caudill gained entrance by allowing Ms. White to believe they needed to make a telephone call because of car trouble.

**Racial Slur**

During Caudill's statement, she told a detective she "kn[e]w who you talked to out on the street. Jeanette. . . .and I know you talked to that n—— up the street." Admission of this part of the statement was not error, but "at least somewhat probative of an animus against African-Americans" in a case where two Caucasians were accused of the murder of an African-American woman. *Id*., slip op. at 30.

**KRE 609**

Several prosecution witnesses were convicted felons. Goforth argued that questioning those witnesses about their criminal history was prejudicial impeachment under KRE 609 since each witness implicated Caudill, and not him. The questions were posed in anticipation of defusing impeachment on cross and showed that each witness had not been convicted of a crime of violence. Furthermore, KRE 609 only provides that such questions cannot be asked on **cross**; the testimony came out during direct exam.

**Guilt Phase Instructions**

Both Caudill and Goforth were found guilty under a "combination" principal or accomplice murder instruction. Both theories were supported by the evidence. *Caudill*, slip op. at 37, citing *Halvorsen and Willloughby v. Commonwealth*, Ky., 730 S.W.2d 921, 925 (1986). Neither person was denied a trial by an impartial jury or individualized sentencing in the penalty phase. *Id*., citing *Tison v. Arizona*, 481 U.S. 137 (1987).

**Failure to Instruct on Manslaughter First—EED**

Caudill argued that the trial court should have instructed the jury that it could find her guilty of Manslaughter First under EED. There was no evidence of EED; Caudill's reliance on three "triggering" events is misplaced. *Id*., at 39, 40.

**Penalty Phase Severance**

Goforth argued that his penalty phase should have been severed from Caudill's because she presented evidence of a submissive personality. According to the Court, the facts of this case do not rise to the level of error found in *Foster v. Commonwealth*, Ky., 827 S.W.2d 670, 679-683 (1992). Goforth and Caudill hardly knew each other; Foster and her co-defendant, Tina Powell, had a long-term lesbian relationship. Caudill did not testify that Goforth had threatened or otherwise induced her to participate in Ms. White's murder. There was such evidence in *Foster*.

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**Goforth's Prior Criminal Convictions**

During the penalty phase, the prosecutor introduced evidence of Goforth's prior criminal convictions. Goforth argued that he was entitled to a new penalty phase because there was no proof the prosecutor had given notice of his intent to do so. According to the Court, the record shows otherwise: prior to the penalty phase, defense counsel inquired as to the procedure the prosecutor intended to use to introduce the priors; at no time did he complain that he had not been given notice of the prosecutor's intentions.

**EED as a Mitigator**

The *McClellan* definition of EED is to be given only in the guilt phase. When used as a mitigator, EED does not rise to the level of a defense; thus, the *McClellan* definition cannot properly be given. Moreover, the evidence in this case did not warrant an instruction on EED, even as a mitigator. *Id*., at 51. The Court does not identify what definition of EED is to be used in the sentencing phase.

**Other Issues**

The Court considered issues relating to the indictment, closed circuit arraignment, absence from pre-trial hearings, jury selection, evidentiary matters, guilt and penalty phase instructions, prosecutorial misconduct and the death penalty, but made no new additions to Kentucky capital jurisprudence.

**Concurrence**

Justice Keller, joined by Justice Stumbo, concurred in the result, but wrote to clarify his beliefs as to certain issues.

The majority characterized the *Grooms* language that jurors should be excused for cause if they cannot consider imposition of the minimum in any case as "anomalous and mere dictum", while "less than two years ago" reaffirming this principle in *Lawson v. Commonwealth*, Ky., 53 S.W.3d 534, 541 (2001). Justice Keller is prepared to dissent from a future opinion backing away from this precedent. *Caudill*, concurrence at 3.

The majority misstated the objection with regard to the prosecutor's use of his peremptory challenges: the defense objected because eight of nine **male** jurors were excused. *Id*., at 4.

Justice Keller does not agree that entering a home on a pretext can be found to constitute the unlawful entry required in KRS 511.090. *Id*., at 4-5, citing *Tribbett v. Commonwealth*, Ky., 561 S.W.2d 662 (1978) (entry into victim's home ostensibly to use firing range, but in reality to rob and murder victim).

The *McClellan* definition of EED should be used in mitigation instructions. Otherwise, the jury has no ability to make a "meaningful determination" as to whether EED as a mitigator is present. *Id*., at 6.

**Endnotes**

1. Justice O'Connor wrote for the majority in *Strickland*, *Williams v. Taylor*, 120 S.Ct. 1489 (2000) and *Wiggins*.
2. The ABA Appointment Standards have been recently revised and are awaiting final approval. ■

**Julia K. Pearson**
**Assistant Public Advocate**

**At 78, former Governor Edward T. "Ned" Breathitt died October 14, 2003**

"In a state where politicians routinely support the death penalty as a deterrent to crime, Breathitt pressed unsuccessfully for its repeal. No one was executed during his term, and as he left office he commuted the sentences of three men facing execution and stayed three others executions while court challenges to the death penalty were pending." *Courier Journal*, October 15, 2003.

# 6TH CIRCUIT REVIEW

*Emily Holt*

***Clifford v. Chandler***
**333 F.3d 724 (6th Cir. 6/25/03)**

This is a case from Fayette County, Kentucky. Clifford was convicted of trafficking in a controlled substance and PFO based on a controlled buy in which Detective Birkenhauer allegedly purchased crack cocaine from Clifford at police informant Vanover's apartment. At trial Birkenhauer testified he bought the crack from Clifford. Officer Smith, who was listening to the transaction from a remote location, testified that he heard 4 different voices in the apartment, one being Birkenhauer's and the other that of a female. The other 2 voices were both male, and, according to Smith, one "sounded as if it was a male black." This voice belonged to the person who was negotiating the deal with Birkenhauer. Clifford is African-American and Birkenhauer is white. The audiotape of the transaction was ruled inaudible and not admitted into evidence. Vanover testified that he made the sale to Birkenhauer, and, in fact, Clifford never discussed any drug transactions with Birkenhauer. The Kentucky Supreme Court affirmed Clifford's convictions. The 6th Circuit denies the petition for writ of habeas corpus.

**Habeas claim procedurally defaulted even if state appellate court addresses its merits if state court denies claim because of lack of preservation.** Clifford was not denied due process of law by the trial court's refusal to instruct on a lesser-included offense. The Kentucky Supreme Court rejected this argument because it was not preserved. *Clifford v. Commonwealth*, Ky., 7 S.W.3d 371, 376 (2000). When a state court rejects a claim on a state procedural ground, the claim is procedurally defaulted and relief cannot be granted on habeas review unless the petitioner can prove "cause for the procedural default" and "actual prejudice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Clifford argues the claim is not procedurally defaulted because, although the Kentucky Supreme Court denied him relief on the basis of a procedural ground, the Court did address the merits of the claim. Clifford's argument is based on a holding from another Kentucky case, *Gall v. Parker*, 231 F.3d 265, 309 (6th Cir. 2000), in which the Court held that a habeas court only adheres to a state procedural bar when the last state court rendering a reasoned judgment on the matter has clearly and expressly stated that its judgment rests on the procedural bar. In *Gall*, the Kentucky Supreme Court addressed and rejected Gall's argument on the merits, and never mentioned a state procedural bar for rejecting his argument. "When the state court relies on an independent procedural ground in order to deny relief, its discussion on the merits of the claim will not disturb the procedural bar." Thus, Clifford's argument fails because although the Kentucky Supreme Court did address his issue on the merits, it did so only in the alternative, after noting that a procedural bar waived the issue. Furthermore Clifford's trial attorney's ineffectiveness cannot serve as cause for the procedural default since ineffective of assistance of counsel was not raised in state court. *Murray v. Carrier*, 477 U.S. 478, 488-9 (1986)

**State direct appeal counsel must cite to specific U.S. constitution sections to preserve issue for federal habeas review**. The admission of Officer Smith's testimony that he heard a voice from the wire transmission that sounded like an African-American man did not violate Clifford's 14th amendment due process rights. The Court notes that even though the Kentucky Supreme Court held the statement admissible under the Kentucky Rules of Evidence, because Clifford cited the 14th amendment in the issue in his Kentucky Supreme Court brief, he has preserved the issue for federal habeas review. *Carter v. Bell*, 218 F.3d 581, 607 (6th Cir. 2000).

**Racial voice identification only prejudicial "in some circumstances."** Clifford has failed to present any Supreme Court precedent that would compel the exclusion of this testimony. The Court dismisses the claim that admission of the testimony contradicts cases holding that "the likelihood of misidentification" violates a defendant's due process rights. *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 112 (1977). *Neil* and *Manson* deal with impermissibly suggestive procedures that give rise to the likelihood of misidentification. No suggestive procedures were used in this case, and Smith did not even identify Clifford as the speaker, he just said it sounded like a black man. Even if the Court analyzed the issue without the limitation of Supreme Court precedent, Clifford would lose. "[T]he limited research conducted on the issue of racial voice identification indicates this type of identification is extremely reliable." Furthermore, "the vast majority of courts that have addressed the admissibility of racial voice identification have concluded it is admissible."

While, in the case at bar, the voice identification was not unconstitutionally prejudicial, it could be "inappropriately prejudicial in some circumstances." A defendant would "have to demonstrate how the identification was inappropriately prejudicial in his particular case. Appellant, however, has not explained how the voice identification was used inappropriately in this case. For example, we have no

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evidence that the prosecutor used the voice identification to inflame the jury. There is no evidence before us the judge made inappropriate references to the identification. Indeed, in this particular case the officer making the racial identification did not even state it was Appellant he heard. He simply identified the race of the voice he heard engaging in the crime."

***Jurado v. Burt***
**2003 WL 21714592 (6th Cir. 7/24/03)**

**Defendant not entitled to equitable tolling where attorney retained for post-conviction representation knew of AEDPA time limitations but ignored them.** Jurado was convicted of various crimes in Michigan state court. For AEDPA purposes, his conviction became final on March 27, 1996, after the 90-day period during which he could have filed a petition for writ of certiorari in the U.S. Supreme Court. Because AEDPA did not become effective until April 24, 1996, and Jurado's conviction became final before that day, Jurado had a one-year grace period and had until April 24, 1997, to file his federal habeas conviction. *Cook v. Stegall*, 295 F.3d 517, 519 (6th Cir.), *cert. denied*, 123 S.Ct. 699 (2002). Jurado did not file an application for state post-conviction relief, which was subsequently denied, until November 12, 1997. Jurado argues that he is entitled to equitable tolling on federal habeas review because he was investigating and researching his claims for state post-conviction relief from April 24, 1996, until November 12, 1997, when he filed his state post-conviction petition.

Jurado is not entitled to equitable tolling. Under *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988), the court considers (1) petitioner's lack of notice of the filing requirement; (2) petitioner's lack of constructive knowledge of the filing requirement; (3) petitioner's diligence in pursuing his rights; (4) absence of prejudice to the respondent; and (5) petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. These 5 factors are not necessarily comprehensive, and not all factors are relevant in all cases. *Miller v. Collins*, 305 F.3d 491 (6th Cir. 2002).

The first 2 factors weigh against Jurado. The attorney he retained to work on his state post-conviction case was aware of the AEDPA one-year limitations period. "[T]hey made a tactical decision to continue investigating claims for his state post-conviction relief application although they were aware that his time in which to file for habeas relief would expire." As to Jurado's diligence in pursuing his rights, "[a]lthough Jurado's counsel certainly undertook investigatory and preparatory actions in Jurado's case during the nineteen-month period, these actions did not constitute diligence in pursuit of his rights." In fact, the Court notes that this "case was not complex," and "a reasonably diligent attorney could have pursued these claims within one years' time." The 4th factor, absence of prejudice to the respondent, is only relevant after a factor that might justify tolling is identified. *Andrews*, 151. As to petitioner's reasonableness in remaining ignorant of the limitations period, Jurado's attorney was aware of the limitations period, but "believed this section [of AEDPA] was ambiguous as to whether an application [for state post-conviction relief] that had not been filed with any court was 'properly filed' and 'pending.'" The Court notes "a lawyer's mistake is not a valid basis for equitable tolling." *Whalen v. Randle*, 37 Fed. Appx. 113, 120 (6th Cir. 2002). It was not reasonable for counsel to believe that a motion that was being investigated and drafted was "properly filed."

***Hill v. Hofbauer***
**2003 WL 21730554 (6th Cir. 7/28/03)**

**Co-defendant's custodial confessions are unreliable and were not within a 'firmly rooted' hearsay exception even prior to *Lilly v. Virginia.*** Hill was inculpated in the 1995 murder of Jermaine Johnson by co-defendant Jabbar Bulls. Bulls told police after his arrest that Johnson had offered Bulls money in exchange for Bulls' allowing Johnson to perform oral sex on him. Bulls accepted the offer and accompanied Johnson to his home. Bulls quickly excused himself, telling Johnson he would be right back. Bulls went to co-defendant Deonte Matthews' house and recruited Matthews and Hill to assist him in robbing Johnson. Bulls asked Matthews' to bring a gun, which he retrieved from his house in front of Hill and Bulls. At the house, Bulls knocked on the door; and when Johnson opened the door, Bulls and Matthews rushed in. Hill remained outside as a lookout. Matthews shot Johnson when he tried to flee the house.

Hill's statement to police was similar to Bulls. However Hill said although he knew Matthews was going to bring a gun, he never saw him with one. Furthermore Hill said when Bulls knocked on the door, Hills decided to abandon his role in the plan and walked away. As he did so, he heard a shot. Neighbors saw men running from the house, and described a man resembling Hill. In fact, Hill was stopped and questioned that night about the crime, but police determined he was not involved and let him go. It was not until the next year that Bulls' girlfriend turned Bulls, who inculpated Hill and Matthews, into the police.

Hill and Bull were tried together in Michigan state court. Although neither testified, both of their statements were entered into evidence. Hill was convicted of second-degree murder and assault with intent to rob while armed, and was sentenced to life imprisonment. The Michigan appellate courts refused to grant Hill relief on his claim that his 6th amendment confrontation clause rights were violated by the introduction of Bulls' statements. In Bulls' case, the Michigan appellate courts found a confrontation clause error but determined it was harmless. The 6th Circuit disagreed, and in 2001, granted Bulls' writ of habeas corpus. *Bulls v. Jones*, 274 F.3d 329, 336 (6th Cir. 2001).

Hill is also entitled to habeas corpus relief. The Michigan appellate court held that under *Ohio v. Roberts*, 448 U.S. 56 (1980), Bulls' statements were reliable because they fell within the "firmly rooted" hearsay exception for statements against penal interest. In *Lilly v. Virginia*, 527 U.S. 116 (1999), the U.S. Supreme Court held that statements made by a co-defendant inculpating himself and co-defendants are "inherently unreliable" and not within a "firmly rooted hearsay exception" for statements against penal interest. *Lilly*, 527 U.S. at 131. Thus, a co-defendant's confession, made while in custody, can only be admissible if there are additional "guarantees of trustworthiness." *Id.* However, *Lilly* was not decided until 1999, a year after the Michigan appellate court rejected Hill's appeal. The 6th Circuit holds that *Lilly* was "pre-ordained" by earlier clearly established Supreme Court law. *See Teague v. Lane*, 489 U.S. 288, 301 (1989), in regard to habeas cases, a subsequently decided case does not present new law if it is "dictated by precedent existing at the time the defendant's conviction became final."

**Fact that co-defendant's confession is self-inculpatory does not satisfy "guarantees of trustworthiness."** In *Lilly*, *supra*, the U.S. Supreme Court expressly based its holding on past Supreme Court cases: "it is clear that our cases consistently have viewed an accomplice's statements that shift or spread blame to a criminal defendant as falling outside the realm of the 'hearsay exception[s] that are so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability.'" *Lilly*, *supra*, 527 U.S. at 133, *quoting White v. Illinois*, 502 U.S. 346, 357 (1992). The 6th Circuit holds "*Douglas v. Alabama*, 380 U.S. 415 (1965), *Bruton v. U.S.*, 391 U.S. 123 (1968), and *Lee v. Illinois*, 476 U.S. 530 (1986), evidence that the Supreme Court has clearly established the principle that a co-defendant's custodial confessions are unreliable and not within a 'firmly rooted' hearsay exception prior to *Lilly*." Furthermore, the fact that Bulls' confession was a self-inculpatory confession does not establish "guarantees of trustworthiness."

**Error not harmless where only co-defendant's statement proves elements of the crime.** This error is subject to harmless error analysis. *Chapman v. California*, 386 U.S. 18, 24 (1967). The 6th Circuit determines that the other evidence (including Hill's own statement) was not overwhelming and sufficient to establish beyond a reasonable doubt the elements of second-degree murder and armed assault with intent to rob. While Hill's and Bulls' statements are similar, Hill unequivocally stated he did not know Matthews had a gun while Bulls' statement said Hill did know about the firearm. A determination of whether or not Hill knew Matthews had a gun is relevant to the jury's determination that Hill committed second-degree murder. Thus, the error is not harmless.

**Short Takes**

**—*U.S. v. Price*, 329 F.3d 903(6th Cir. 5/30/03):** In trial for being a felon in possession of a firearm and ammunition, there is no violation of KRE 404(b) where the prosecution introduced a document entitled "State of Tennessee Department of Safety Certificate of Completion for Handgun Safety Course" that was dated April 17, 2001, and issued to the defendant. Price's prior felony conviction occurred on March 25, 1991. The certificate was found in a nightstand next to a dresser and a box, both containing firearms. The certificate was not being offered to prove an extraneous "other act," but was offered as circumstantial evidence of the crime charged.

**—*Griffin v. U.S.*, 330 F.3d 733 (6th Cir. 6/4/03):** Trial attorney failed to convey a plea offer to Griffin. *Strickland v. Washington*, 466 U.S. 668 (1984), applies to guilt pleas, and it is easier to show prejudice in the guilty plea context: ". . .in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). The first element of *Strickland* is automatically met when an attorney fails to notify a client of a plea offer.

**—*U.S. v. Camejo*, 333 F.3d 669 (6th Cir. 6/26/03):** Camejo's right to a fair trial was not violated when Spanish-English interpreter made many errors translating the testimony of the victim. While the record "support's [Camejo's] contention that there were, at times, difficulties," trial counsel failed to object; the translated testimony came from the victim, not the defendant; and both the defendant and his attorney spoke Spanish.

**—*Regalado v. U.S.*, 2003 WL 21517170 (6th Cir. 7/7/03):** Trial counsel was not ineffective in failing to file a notice of appeal when he was not expressly instructed to do so by the client. It is "professionally unreasonable" for a lawyer to fail to file a notice of appeal when specifically instructed to do so. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). When a lawyer is instructed to do so and fails to, the defendant is entitled to a delayed appeal and need not demonstrate any likelihood of success on its merits. *Id.*

When the client did not "clearly convey his wishes one way or another," a reviewing court must ask "whether the attorney 'consulted' with the defendant about the advantages and disadvantages of taking an appeal" and "makes a reasonable effort to discover the defendant's wishes." Trial counsel in the instant case did consult with client about drawbacks and benefits of an appeal, and filed instead a motion to reduce the client's sentence for substantial assistance to authorities as he felt there was a good chance of prevailing on that motion. The Court also holds that *Apprendi v. New Jersey*, 530 U.S. 466 (2000),does not apply retroactively to cases on collateral review.

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**—*U.S. v. Boothe*, 2003 WL 21523661 (6th Cir. 7/8/03):** Trial court repeatedly told co-indictee defense witness, who had already plead guilty, that he did not have to testify and that testifying "was not in his interest." While it is an abuse of discretion for a court to actively discourage a witness from testifying, *U.S. v. Arthur*, 949 F.2d 211 (6th Cir. 1991), it was not in the case at bar because the witness did not invoke his 5th amendment privilege until speaking with his attorney after the judge's warnings. Furthermore, while the defense witness had already plead guilty to the charges, he still had a right to assert the 5th amendment because he had not yet been sentenced and was subject to the risk of enhancement of his sentence. *Mitchell v. U.S.*, 526 U.S. 314, 325 (1999).

**—*Roberts v. Carter*, 2003 WL 21699471 (6th Cir. 7/23/03):** The 6th Circuit refuses to address Roberts' claim that permitting alternate jurors to be present during jury deliberations deprived him of his right to a fair trial, a trial by jury, and due process because he failed to mention those specific constitutional violations during the state appellate process. *Teague v. Lane*, 489 U.S. 288, 297-8 (1989). His claim that he was denied effective assistance of counsel when appellate counsel failed to raise as error the trial court's order that alternate jurors be present during deliberations fails under *Strickland v. Washington*, 466 U.S. 668, 687-694 (1984). The result of his direct appeal would not have been different if the alternate jurors issue had been raised because Rule 24(F) was inapplicable to capital cases, and Roberts' case was tried as a capital case. *State v. Voorhies*, 1995 WL 495820 (Ohio App. 5 Dist. 1995).

**—*U.S. v. Rocha*, 2003 WL 21729911 (6th Cir. 7/25/03):** Facing a charge of unlawful re-entry into the U.S. after being deported, Rocha cannot challenge the underlying 1999 Kentucky DUI conviction that was classified as an aggravated felony and caused him to be deported. This is because before his deportation, Rocha signed a waiver stating that he was deportable and that he did not wish to fight his removal. Further, the waiver was voluntary and intelligent despite Rocha's poor command of the English language because the waiver was read to him in English and Spanish.

**— *Tesmer, et al. v. Granholm and Kowalski et al.*, 333 F.3d 683 (6th Cir. 6/17/03):** In this *en banc* opinion, the 6th Circuit reverses a panel's prior decision in *Tesmer v. Granholm*, 295 F.3d 536 (6th Cir. 2002), and holds indigent defendants who plead guilty are entitled to appointed counsel on appeal. In 1994 a constitutional amendment was enacted in Michigan that eliminated appeals as of right for criminal defendants who plead guilty, guilty but mentally ill, or *nolo contendre*. Defendants who plead guilty in Michigan state court must seek leave for appeal from the state court of appeals. In 2000 a statute was enacted that essentially denies most indigent defendants appointed counsel to assist in preparing petitions for appeal. Although there has been no mandate from the U.S. Supreme Court that states must provide appellate counsel in every case, "appellate processes must be fair and may not be implemented in a manner that discriminates based on indigency." Entering a plea of guilty "is not an infallible procedure. . .an appellate court may find error as we frequently find in appeals from guilty pleas in federal district courts. Under Michigan law, a plea of guilty or *nolo contendre* waives issues that could have been raised on appeal, such as search and seizure claims or Fifth Amendment claims. A guilty plea does not foreclose a defendant from raising other issues, such as double jeopardy claims or jurisdictional claims. These issues, we note, are legally complex to a layperson."(citations omitted). ■

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# KENTUCKY CASELAW REVIEW

***Stephon Harbin v. Commonwealth of Kentucky*, Ky., __ S.W.3d __ (08/21/03)**

**(Affirming, in part, and reversing and remanding, in part)**
**(Commonwealth's Petition for Modification pending)**

A Louisville police officer observed Stephon Harbin and co-defendant Eric Henderson sitting in a blue minivan on the corner of Nineteenth and Broadway in Louisville. According to the officer, Harbin, who was in the driver's seat, was holding a bag of white powder and talking to a third male who was standing outside the van. The third person took the bag, looked at it, and returned it to Harbin. The man then walked away and Harbin drove off. When the officers activated their emergency lights and sirens, Harbin accelerated and attempted to evade the police. After a high-speed chase, Harbin was eventually apprehended and charged with trafficking in a controlled substance (cocaine), three counts of first-degree wanton endangerment, first-degree persistent felony offender, and various other misdemeanor offenses. At trial, the jury convicted Harbin of trafficking, wanton endangerment, resisting arrest, and attempting to elude police. Harbin thereafter pled guilty to being a first-degree persistent felony offender (PFO I).

Pursuant to the plea agreement, Harbin was sentenced to twenty years imprisonment, the minimum permissible sentence for a first-degree persistent felony offender under KRS 532.080(6)(a). The trial court appointed the Department of Public Advocacy (DPA) to provide counsel on appeal.

One month later, the Commonwealth moved to forfeit Harbin's minivan, $6,500 found therein, and a handgun. The Commonwealth's motion was noticed only to Harbin's former trial attorney. The Commonwealth's motion was heard at motion hour by a judge who did not preside at Harbin's trial. After the prosecutor misrepresented that the forfeiture of Harbin's property was a part of the PFO plea agreement, the trial court granted the forfeiture motion.

***Lawson* error deemed harmless because of PFO guilty plea and minimum sentence.** On appeal, Harbin contended that the trial court impermissibly limited his voir dire by ruling that he could only inform the jury panel that the possible range of penalties was "one day to life," without any further explanation. Harbin argued that the panel was misled by information that the penalty range was anywhere from one day to life in prison without delineating the specific offenses and the penalty range carried by each offense.

Citing *Lawson v. Commonwealth*, Ky., 53 S.W.3d 534 (2001), which was decided after Harbin's trial, the Court noted that defense counsel should have been permitted to inform the jury panel of the specific penalty range for each charged offense. However, quoting *Lawson*, the Court explained that the purpose of allowing sentencing information to be discussed in voir dire "'is to assess [a potential juror's ability] to consider the range of permissible penalties **in the event the trial proceeds[s] to a sentencing phase**.'" *Lawson*, *supra* at 541 (emphasis added). Therefore, the Court held that because Harbin pled guilty to the PFO I charge and received the minimum sentence, any error "must be deemed harmless."

**Failure to renew objection rendered KRE 404(b) error harmless.** Harbin also argued that the trial court erred in allowing the prosecutor to question him about a photograph of a nude woman lying on a bed surrounded by large amounts of cash found in his minivan. The photograph itself was excluded on the grounds that any probative value was outweighed by its prejudicial effect. However, the trial court ruled that if Harbin "opened the door," the Commonwealth would be permitted to question him concerning the contents of the photograph.

After Harbin testified on direct that the $6,500 found in the minivan had come from various legal sources, the Commonwealth again moved to admit the photograph. Apparently concerned that the trial court would reverse its earlier ruling, defense counsel agreed to the prosecutor's questioning Harbin about the large amount of money that was depicted in the photograph. The Court opined that the contents of the photograph were "arguably relevant" in light of Harbin's explanation for the money. While noting that it was questionable whether Harbin actually "opened the door" by claiming the money was legitimately obtained, the Court held the issue was rendered moot in light of defense counsel's concession to the prosecutor's questioning. Citing *Salisbury v. Commonwealth*, Ky.App., 556 S.W.2d 922 (1977), the Court held that "failure to object must be viewed as a trial strategy which is not reviewable on appeal." Therefore, the Court found that "error, if any, was harmless."

**Due process rights violated when minivan and $6,500 forfeited without proper notice and an opportunity for a hearing.** Finally, the Court held that Harbin's due process rights were violated when his minivan and $6,500 were forfeited on the Commonwealth's motion without proper notice and an opportunity for a hearing. The Court found that notice to Harbin's former trial attorney was insufficient to apprise him of the pendency of the forfeiture action. Since the Commonwealth was aware that Harbin was incarcerated at the time forfeiture was sought, notice should have been provided to the DPA, which had been appointed to represent Harbin for

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purposes of his appeal, or to Harbin himself. In addition, the Court noted that the Commonwealth had presented no evidence at trial to indicate that the money ($6,500) was traceable to drug trafficking activities, which is required under the forfeiture statute.

Justice Stumbo dissented, joined by Justice Johnstone. Justice Stumbo disagreed with the majority opinion on the voir dire and KRE 404(b) issues. In her view, the error on voir dire could never be harmless because it infected the entire trial process. With respect to the KRE 404(b) issue, forcing Harbin to testify about the large sum of money in the photograph, which was never proven to be proceeds from illegal activity, was far more prejudicial than probative and should not have been allowed.

***Christopher Lee Florence v. Commonwealth of Kentucky,***
**Ky., __S.W.3d__ (08/21/03)**

**(Affirming)**
**(Appellant's Petition for Rehearing pending)**

After opening bank accounts under a fictitious name and engaging in several forged check transactions, Florence was convicted of second-degree criminal possession of a forged instrument, two counts of theft by deception over $300, and of being a persistent felony offender in the first degree. He was sentenced to a total of 20 years in prison.

Florence raised the following issues on appeal: 1) whether the trial court improperly disallowed a *Daubert* hearing to determine the admissibility of proposed expert testimony regarding handwriting analysis, 2) whether the trial court erroneously failed to inquire into the reasoning behind Florence's failure to testify, and 3) whether the trial court should have directed a verdict on one or both counts of theft by deception.

**Hearing not required where *Daubert* test of reliability has been previously satisfied.** Prior to trial, Florence objected to any testimony from a police detective, who was the Commonwealth's handwriting analysis expert, regarding the "science" of handwriting analysis without a *Daubert* hearing. The trial court overruled Florence's motion, finding that handwriting evidence had been admissible for a long period of time and therefore a hearing was not necessary. Prior to putting the detective on the stand, the Commonwealth suggested that the trial court revisit the *Daubert* hearing issue, noting that it could not in good faith argue that the handwriting analysis testimony was admissible without a hearing. The trial court disagreed, stating that handwriting evidence had been admissible for "eons."

The detective's qualifications included completion of a course offered by the United States Secret Service and a two-year internship in the field. Also, the detective was a member of a professional "document examiner" association and had trained other document examiners. According to the detective, all of the questioned documents in the case were written by Florence.

The Court reaffirmed its ruling in *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258 (1999), which held that once an appropriate appellate court holds that the *Daubert* test of reliability is satisfied, "lower courts can take judicial notice of reliability and validity of the scientific method, technique or theory at issue." The Court further found that handwriting analysis had achieved acceptance in Kentucky law, and thus was acceptable for judicial notice. However, the Court cautioned that a *Daubert* hearing is still required under *Johnson* when the opposing party requests to present evidence that the scientific evidence at issue is not or is no longer scientifically reliable. Since Florence did not come forward and request to challenge the reliability of handwriting analysis by proffering evidence to the contrary, a *Daubert* hearing was not required in his case.

**Waiver of right to testify: under certain circumstances, direct colloquy between trial court and defendant necessary.** On appeal, Florence argued that due to a certain statement made by his defense counsel in closing argument, the trial court should have had reason to believe that Florence's waiver of his right to testify at trial was not voluntary. The Court noted that in *Crawley v. Commonwealth*, Ky., 107 S.W.3d 197 (2003) it held that "a trial court has a duty to conduct further inquiry when it has reason to believe that a defendant's waiver of his right to testify was not knowingly or intelligently made or was somehow suppressed." In *Crawley*, refusal of counsel to allow a defendant to testify was such a circumstance. In Florence's case, there was no statement by defense counsel that he had refused to allow Florence to take the stand. Therefore, there was no need for a direct colloquy between the trial court and Florence.

**Denial of motion for directed verdict proper.** Finally, the Court held that the evidence showed that Florence was the person cashing checks and the person pictured on a Kentucky identification card for a "William C. Vance." Based upon all of the evidence, it was not unreasonable for the jury to find Florence guilty of the charged offenses.

***Charles E. Jackson v. Commonwealth of Kentucky,***
**Ky., __ S.W.3d __ (09/11/03)**

**(Vacating and remanding for evidentiary hearing)**

Following a one-day bench trial, Jackson was found guilty of first-degree assault and sentenced to 20 years in prison. On appeal, Jackson argued that his conviction must be reversed for a new trial because "the record is silent as to any knowing and intelligent waiver by the Appellant of his right to a trial by jury."

**Waiver of trial by jury: failure to comply with RCr 9.26 (1) writing requirement does not automatically require reversal for a new trial.** After reviewing both the Sixth Amendment to the United States Constitution and Section 7 of the Kentucky Constitution right to a trial by jury provisions, the Court noted that in 1981, it promulgated RCr 9.26(1). RCr 9.26(1) states "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial **in writing** with the approval of the Commonwealth." However, after reviewing FRCP 23(a), which is virtually identical to RCr 9.26(1), and after reviewing federal cases interpreting FRCP 23(a), the Court noted that the federal courts have not required strict compliance with the "in writing" provision if it is clear from the record that the defendant personally waived the right in open court, knowingly and intelligently. Since there was no personal colloquy with Jackson on the record, the Court vacated and remanded Jackson's case to the trial court for an evidentiary hearing to determine if Jackson's waiver of his right to jury trial was knowingly, voluntarily, and intelligently made. On remand, the Court noted that the Commonwealth has the burden of proving that Jackson's waiver was constitutionally valid. In short, the Court remanded the case to the trial court "to evaluate whether its failure to require [Jackson's] written waiver was a mere technical error or a prejudicial error that wrongfully deprived [Jackson] of his right to trial by jury."

Justice Cooper dissented, joined by Justice Stumbo. In Justice Cooper's view, the "in writing" requirement set forth in RCr 9.26(1) is clear and should be enforced. Because there was no written waiver, Jackson's case should be reversed and remanded for a new trial.

***Melissa Phillips Holland v. Commonwealth of Kentucky,***
**Ky., __ S.W.3d __ (09/18/03)**

**(Reversing and remanding for a new trial)**

**Failure to define "voluntary intoxication" and to instruct on lesser-included offense of attempted first-degree manslaughter requires reversal for a new trial.** Holland was convicted of two counts of attempted murder and one count of first-degree burglary. She was sentenced to 15 years for each count of attempted murder and 10 years for the burglary, said sentences to run consecutively for a total of 40 years. At trial, Holland did not dispute that she shot her lover, Danny Darnell and his ex-wife, Rebecca, inside of Darnell's apartment with a handgun. Instead, the issues for jury resolution at trial related to Holland's state of mind at the time of the shooting, *i.e.*, her degree of intoxication and whether she intended to kill Danny and Rebecca Darnell.

Testimony at trial revealed that Holland had received several medications following back surgery less than a week before the shootings and had been observed on the day of the shootings as "groggy, incoherent, overmedicated, and uncoordinated." Also, expert psychiatric testimony revealed that Holland suffered from chronic borderline personality disorder and depression and that Holland had attempted suicide on more than one occasion prior to the shootings.

The Court reversed and remanded for a new trial because the trial court, over defense counsel's objections, refused to define the term "voluntary intoxication" in the jury instructions and because the trial court refused to instruct on the lesser-included offense of attempted first-degree manslaughter (extreme emotional distress theory).

***Gary Brooks v. Commonwealth of Kentucky,***
**Ky., __ S.W.3d __ (09/18/03)**

**(Affirming)**

After two mistrials, Brooks was convicted of criminal attempt to commit murder, first-degree robbery, and two counts of second-degree unlawful transaction with a minor. He was found to be a second-degree persistent felony offender and his sentence was enhanced to a total of 70 years in prison.

The evidence at trial indicated that Brooks, acting in complicity with others, including Wood and her minor son, robbed a cab driver, and during the struggle that followed, he also slashed and stabbed the cab driver in the face and on his hands and arms.

**No error in admitting prior videotaped testimony.** The day before trial, the prosecutor advised the trial court that Wood had attempted suicide in prison and would not be available for trial. The prosecutor then moved to admit the videotape of Wood's testimony from Brooks' earlier trial, which had ended in a mistrial. Defense counsel objected on the grounds that Wood was not legally unavailable, and that even if she were, her unavailability was due to the inaction of the Commonwealth in not preventing her suicide. After reviewing an affidavit from the prosecutor on the matter, the trial court personally called the correctional facility to verify the prosecutor's assertions in the affidavit and to check on Wood's health and condition. An officer at the correctional facility confirmed the circumstances the prosecutor had reported. The trial court then found Wood to be "unavailable," and granted the Commonwealth's motion to admit the videotaped testimony. After making the ruling, the trial court asked Brooks if he would like a continuance in light of the court's decision, but Brooks declined. On appeal, Brooks argued that is was error for the trial court to declare Wood "unavailable" and error to permit the prior videotaped testimony of Wood to be seen by the jury. The Court held that the decision of the trial judge was not clearly unreasonable. According to the Court, the trial court correctly concluded that the Commonwealth had made a sufficient showing as to the unavailability of Wood because of health concerns.

**Trial court correctly admitted Wood's taped statement to the police.** As noted above, prior to Brooks' third trial, defense counsel objected to the admission of the videotaped testimony of Wood from the second trial. As a part of that

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objection, defense counsel stated that he, unlike his predecessor in the previous trial, did not intend to cross-examine Wood by introducing her taped statement to the police. The trial court permitted the unredacted taped statement of Wood to be played for the jury. On appeal, Brooks argued that he was denied his Sixth Amendment right of confrontation as a result of the admission of the taped statement. The Court first noted that Brooks waived the issue because he declined a continuance after the trial court ruled the videotaped testimony admissible. The Court further noted that defense counsel's change in trial strategy was not sufficient grounds to sustain Brooks' objection. KRE 804(b)(1) does not require the exclusion of "otherwise admissible testimony because of changes in, or second thoughts about, trial strategy."

**No error in finding Brooks a "violent offender" as a result of the victim suffering "serious physical injury."** For purposes of the violent offender parole eligibility provisions of KRS 439.3401, the trial court found Brooks to be a "violent offender" and that the victim suffered "serious physical injury." On appeal, Brooks argued the trial court's ruling was in error because the jury specifically rejected a finding of "serious physical injury" and because there was no evidence in the record that the victim had suffered a serious physical injury. After detailing the injuries sustained by the victim (stab wounds and slashes to the face and neck), the Court held that there was sufficient evidence in the record to support the trial court's ruling.

The Court also ruled that there was no prosecutorial misconduct in the Commonwealth's closing argument and that there was not too much description of prior misdemeanor offenses during the sentencing phase of the trial.

Justice Keller dissented, joined by Justice Stumbo. Justice Stumbo also wrote a separate dissenting opinion. In Justice Keller's view, reversal for a new trial was required because the trial court erred when it permitted the introduction of Wood's "audiotaped, unsworn, out-of-court interview with investigating officers as part and parcel of her prior trial testimony." Justice Keller noted that the taped statement, unlike Wood's videotaped trial testimony, did not fall within the hearsay exception for unavailable witnesses. In her separate dissenting opinion, Justice Stumbo emphasized that the admission of the taped statement was a Confrontation Clause violation. ■

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## Some Criminal Justice Resources on the Web

- KY Statutes: http://www.lrc.state.ky.us/KRS/TITLES.HTM
- KY Court of Justice page: http://www.kycourts.net/Supreme/SC_Main.shtm
- Ky Clemency information http://dpa.ky.gov/text/cj.html
- NLADA Litigation Performance Guidelines: http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines
- ABA Capital Performance Guidelines: http://www.abanet.org/deathpenalty/DPGuidelines42003.pdf
- The Sentencing Project: http://www.sentencingproject.org/
- DPA *The Advocate*, since 1997: http://dpa.state.ky.us/library/advocate/default.htm
- Evidence Manual: http://dpa.ky.gov/library/advocate/sept00/default.htm
- Preservation Manual: http://dpa.ky.gov/library/advocate/nov00/default.html

# PLAIN VIEW . . .

*Ernie Lewis, Public Advocate*

The Sixth Circuit in particular has been quite active with Fourth Amendment cases during the past few months. I have not been able to review all of them, nor all of the most recent Kentucky cases from our appellate courts. I hope to catch up by the next issue. In the meantime, please do not rely upon the below for a complete review of all Kentucky and Sixth Circuit Fourth Amendment cases during this time period.

***Mobley v. Commonwealth***
2003 WL 22110885,
2003 Ky. App. Lexis 223 (Ky. Ct. App. 2003)

On July 22, 2001, Lexington Police Office Mike Abbondanza saw a black Chevy pickup truck parked in an unlit area of Martin Luther King Park at around 11:00 p.m. He placed his headlights on the truck and saw 3 men sitting in it. He asked the driver why he was there, what was in his truck, for identification, etc. Based upon receiving conflicting stories, the officer asked for identification from the two passengers, and he called for back up. He ran a records check on all three. He was refused permission to search the truck. Then the officer asked the driver to step out so he could pat him down for weapons. No weapons were found. He asked the passengers to get out for a pat down, and observed a crack pipe on the floor of the passenger side of the truck. Nothing was found on the passengers. All three denied ownership of the crack pipe, and as a result, all three were charged with possession of drug paraphernalia. The officer then searched the truck incident to the arrest, and found a .2 gram rock of cocaine.

When Mobley, a passenger, was searched at the jail, .36 grams of cocaine was found. He was indicted for possession, promoting contraband, and possession of drug paraphernalia. Mobley moved to suppress, alleging an illegal arrest. This motion was denied. Mobley pled guilty conditionally, and appealed to the Court of Appeals.

The Court of Appeals reversed in a decision written by Judge Schroder and joined by Judges Johnson and Tackett. The Court noted that in order to arrest for a misdemeanor, the officer had to have witnessed Mobley possessing the crack pipe, citing KRS 431.005(1)(d). The pipe was observed on the floor of the passenger side. The Court examined a line of cases from *Mash v. Commonwealth*, Ky., 769 S.W. 2d 42 (1989), to *Leavell v. Commonwealth*, Ky., 737 S.W. 2d 695 (1987), to *Burnett v. Commonwealth*, Ky., 31 S.w. 3d 878 (2000). The Court held that since "Mobley's physical proximity to the crack pipe was his only connection to the pipe in the present case, there was not sufficient evidence that Mobley committed the misdemeanor offense of possession of drug paraphernalia in the presence of the police and thus his arrest was illegal."

***Commonwealth v. Vaughn***
2003 WL 21992970
2003 Ky. App. Lexis 229 (Ky. Ct. App. 2003)

Officer Charles of the Frankfort Police Department was told by dispatch of a warrant for violation of a DVO on Louis Vaughn, and told to serve it on him at the Corvettes Lounge in Frankfort. Charles went to the bar, and was told by both Vaughn's wife and the manager of the bar that Vaughn had already been arrested that day on the warrant. Vaughn was arrested, and he said the same thing. Vaughn was arrested and charged. Because Vaughn had been arrested the previous afternoon, he filed a motion to suppress, which was granted by the trial court, holding that "the warrant on which appellee was arrested had already been served and therefore it was not valid."

The Court of Appeals reversed and remanded in an opinion by Judge McAnulty joined by Judges Emberton and Huddleston. The Court agreed that the warrant was not valid, and that Officer Charles could be "held to the collective knowledge of other officers." The Court cited Professor LaFave for the proposition that given the invalid warrant, the arrest of Vaughn would have to be suppressed "when the arresting officer acts pursuant to information in the law enforcement records which remains improperly in the system through the fault of the police or some other government official acting in a law enforcement capacity with the police." The Court noted that some time needs to be allowed for an arrest warrant to be removed from a system. "[W]e do not believe it would be reasonable or fair to hold the police to collective knowledge of the warrant if, during the time in question, it was not possible to disseminate that 'knowledge' to other officers who might use it." The Court remanded the case for a hearing to determine what procedure was used to remove inactive warrants and whether that procedure was followed in this case.

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***United States v. Calor***
340 F.3d 428, 2003 Fed.App. 0291P, (6th Cir. 2003)

This case involves a Harrison County EPO on Alexander Calor. He was ordered to vacate his residence, and to turn in all firearms to the Sheriff's Department. The EPO was violated by Calor's returning to his house. When deputy sheriffs arrested him, 5 handguns were found in his car. He was indicted on two counts of possessing a firearm in violation of 18 USCA #922(g)(8) & #5861(d). He filed a motion to suppress one of the firearms, which was denied. His position was that an EPO is not a search warrant, and that a pre-hearing seizure of firearms violates the Fourth Amendment. After he was convicted by a jury, he appealed to the Sixth Circuit.

Judge Kennedy wrote an opinion affirming Calor's conviction. On the Fourth Amendment issue, the Court held that Calor had consented to an entry into his house to retrieve his firearms prior to the EPO hearing, "sheriffs permission to enter and the deputies relied on the EPO to search for and seize Calor's guns, we then would have a basis for considering whether an EPO, which requires the removal of an alleged domestic abuser and his firearms from the home, is a valid search warrant under the Fourth Amendment."

***United States v. Williams***
342 F.3d 430, 2003 Fed.App. 0317P (6th Cir. 2003)

A property owner became concerned about a water leak at a home she rented, so she entered the home and became suspicious that criminal activity was occurring. She contacted the DEA, who accompanied the landlord to the property, leading to the discovery of marijuana growing. The police then obtained an arrest warrant for Leek and George. Ultimately, several other properties were searched, and Leek, George, and Williams were charged with conspiracy to manufacture, possess, and distribute 100 or more marijuana plants. They moved to suppress based upon the warrantless entry into the first property. The district judge found that the entry was legal because there were exigent circumstances, *i.e.*, the possibility of a water leak and damage to the property. The defendants appealed.

The Sixth Circuit reversed in a decision by Judge Cole and joined by Judges Keith and Weber. The Court defined "exigent circumstances" as those situations where "'real immediate and serious consequences' will 'certainly occur' if a police officer postpones action to obtain a warrant." "This Court has explained that the following situations may give rise to exigent circumstances: '(1) hot pursuit of a fleeing felon; (2) imminent destruction of evidence; (3) the need to prevent a suspect's escape; and (4) a risk of danger to the police or others.'"

The Court held that none of the exigent circumstances applied in this case. "Danger of water damage to a carpet is certainly not urgent within the meaning of the 'risk of danger' exigency. Precedent is clear that the 'risk of danger' exigency applies only to situations involving the 'need to protect or preserve life or avoid serious injury either of police officers themselves or of others.'" The Court also rejected the government's assertion that this was merely a private search.

The Court reiterates the fundamental value involved. "The Supreme Court emphatically held that the Fourth Amendment protects "'the sanctity of a man's home and the privacies of life' from unreasonable government invasions…Every citizen has a fundamental right to the protections guaranteed by the Fourth Amendment. Here, experienced government agents committed an egregious violation of the Fourth Amendment when they failed to obtain a warrant prior to entering the Bluegrass residence. The agents knew that there was absolutely no exigency, and they clearly could have obtained a warrant. What occurred in the circumstances of this case is precisely what the Fourth Amendment seeks to avoid."

***United States v. Vite-Espinoza***
342 F.3d 462, 2003 Fed.App. 0300P (6th Cir. 2003)

Numerous federal and state law enforcement officers executed a search warrant at a house in Springfield, Tennessee. During the execution, Vite-Espinoza and Martinez-Rivera were found in the back yard, handcuffed, and patted down, during which a gun and illegal documents were found. They were charged with federal offenses, and their motions to suppress denied. The district court held that the police had performed a legal *Terry* frisk, and that a gun found in a truck was admissible under the inevitable discovery doctrine. The defendants entered a conditional plea of guilty, and appealed.

In an opinion by Judge Boggs, the Court affirmed. The Court relied upon the fact that the police executing the warrant had reason to suspect that the house was being used for both illegal drug and immigration document counterfeiting. The Court relied also upon *United States v. Bohannon*, 225 F. 3d 615 (6th Cir. 2000), which had held that where officers are executing a warrant of a house suspected of housing a methamphetamine laboratory, officers could frisk two people walking up to the house before they were allowed to walk in. The Court held that "the combination of the close factual resemblance to *Bohannon* and the additional suspicious circumstances, in particular the defendants' presence without apparent lawful purpose outside the facility and their appearance, was sufficient to create reasonable, articulable suspicion. Therefore the police officers were permitted to stop and frisk the defendants and the handgun found on Martinez-Rivera was admissible." The Court also held that a gun found on the ground near the defendants and their cars

was admissible as an inevitable discovery absent any alleged illegality. A gun found in one of the vehicles was also admitted as an inevitable discovery pursuant to a routine impoundment and inventory.

Judge Clay concurred in the judgment, but wrote about his concerns regarding the manner in which the search was conducted. "[T]he conduct of the law enforcement officers in arriving on the scene with guns drawn, ordering the occupants of the home to lie on the ground while the officers forced their knees into the backs of the occupants (including both Defendants), and immediately handcuffing and questioning the individuals, all after the officers had blocked ingress and egress to the street on which the residence was located, was not reasonable because the conduct went beyond the 'limited intrusions on an individual's personal security' required by the circumstances."

***United States v. Akridge***
2003 WL 22249747, 2003 U.S. App. LEXIS 20113
2003 Fed.App. 0351P (6th Cir. 2003)

Chattanooga police officers searched Akridge's apartment following a "knock and talk." The search revealed marijuana, cocaine, and 3 semi-automatic pistols. 6 weeks later, ATF officers interviewed Akridge and two others with whom he shared the apartment. All three admitted to selling crack cocaine and marijuana. Akridge admitted to possessing the guns. The other codefendants negotiated settlements, while Akridge moved to suppress both the physical and testimonial evidence against him. The district judge sustained the motion to suppress the evidence found at Akridge's apartment. However, the court also overruled the defendant's motion to suppress testimony from the codefendants as fruit of the poisonous tree. The district judge found that the trial testimony of the codefendants would have been discovered inevitably because one of them was already under investigation. The Court also ruled that under *United States v. Ceccolini*, 435 U.s. 268 (1977), the testimony was too attenuated from the primary illegality to require suppression. Akridge went to trial at which his codefendants testified against him. Akridge was convicted and appealed to the Sixth Circuit.

Judge Katz wrote the opinion for the Court affirming the denial of the motion to suppress. The Court found the district court's reliance upon *Ceccolini* to be persuasive. The Court analyzed "(a) the degree of free will exercised by the witnesses; (b) the role of the illegality in obtaining the testimony; (c) the time elapsed between the illegal behavior, the decision to cooperate, and the actual testimony at trial; and (d) the purpose and flagrancy of the officials' misconduct." Based upon all of these factors, the Court determined that "the statements and trial testimony of Ellison and Stewart were procured through means sufficiently distinguishable from the illegal search as to be purged from the primary taint."

Judge Moore dissented. She read the *Ceccolini* factors dramatically differently. "The first factor, the issue of free will, is the most fatal to the prosecution's case. The majority argues that Ellison's and Stewart's testimony was not a product of any governmental coercion or inducement, but was a product of their own volition. I completely disagree. Ellison and Stewart had just been found with large quantities of drugs and several firearms; the statutory sentencing ceiling for the charges in their initial indictments was life in prison. The government offered Ellison and Stewart the following options in the form of a plea bargain: testify against Akridge and receive a lighter sentence, or litigate the suppression issue and risk a significantly increased prison sentence. Ellison and Stewart chose the former...To say that these defendants acted 'freely' is to strip all the meaning that the Supreme Court has attached to this phrase."

***United States v. Herbin***
343 F.3d 807, 2003 Fed.App. 0328P (6th Cir. 2003)

Several narcotics officers began to follows two cars in Johnson City, Tennessee in order to investigate their suspicion that Terry Herbin was in town to sell drugs. When several traffic violations occurred, the police pulled both cars over. The police asked the driver of the car in which Terry Herbin was a passenger if she would consent to a search of her car. She agreed, and a gun was found under Herbin's seat. He was charged with being a felon in possession of a handgun in violation of 18 U.S.C. # 922(g).

Herbin moved to suppress and the district judge agreed. The judge found that "'the initial traffic stop in this case was a pretext… the subsequent detention of the defendant and the officers' actions were not related to the circumstances justifying the initial stop, and…the search incident to that stop was in violation of the defendant's Fourth Amendment rights." The Government appealed.

The Sixth Circuit reversed in a decision written by Judge Sutton and joined by Judges Daughtrey and Moore. The Court relied exclusively upon *Whren v. United States*, 517 U.S. 806 (1996), which had held that a stop of a vehicle was legal irrespective of the subjective intent of the officer so long as it was based upon a legitimate traffic violation. "Here, the circumstances of the stop and detention were within legal limits." Thereafter, the driver consented to a search of the car.

***United States v. Jones***
335 F.3d 527, 2003 Fed.App. 0227P, (6th Cir. 2003)

Knoxville police officers from both the city and the federal government began to watch Jones's house during the summer of 2000. In August, he was pulled over and arrested on a federal warrant. He was asked for consent to search his house, but he refused. An FBI Agent and 2 other officers

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then went to Jones' house, which they knew was also occupied by two others. They first talked with James Teasley, and entered the house while doing so. Once inside, they also saw Thomas Dickason. The officer asked Dickason for permission to look for his ID in the bedroom, and consent was given. While there, the officer saw a rifle in the corner of the bedroom, and two other firearms, a crossbow, and a crack pipe. The officers secured the house while a federal search warrant was obtained. The warrant application noted that Jones had declined permission to search his house. Jones was charged with and entered a conditional guilty plea to possession of more than 50 grams of cocaine base with intent to distribute. He appealed to the Sixth Circuit.

The Sixth Circuit reversed in an opinion written by Judge Gilman. The Court noted that whether Teasley gave permission to the police to enter was not clearly erroneous. The Court considered Teasley, a handyman, to be an employee of Jones rather than an overnight guest. As a result, he "lacked actual authority to permit Officer Gilreath to enter the residence. His authority, even assuming that he had any, would have ceased at the point that Jones denied consent to a search…When the primary occupant has denied permission to enter and conduct a search, his employee does not have the authority to override that denial." The Court also rejected the notion that the officer could rely in good faith upon Teasley's apparent authority. "Officer Gilreath knew that the individual who opened the door was simply a handyman. This fact, combined with Jones's prior denial of consent to a search, made it impossible for a 'man of reasonable caution' to believe that Teasley had the authority to consent to a search of the residence, or even to permit entry." Everything that followed the illegal entry was a fruit of the poisonous tree.

Judge Kennedy wrote a dissenting opinion. It was his position that the "facts available to Officer Gilreath at the time he asked permission to step into the foyer of Jones' home were such as to warrant a reasonable belief that Teasley had sufficient authority over the premises to consent to Gilreath's entry for the purpose of continuing the conversation with Teasley, even in light of Jones' prior denial of consent to search the residence."

***Joshua v. DeWitt***

341 F.3d 430, 2003 Fed.App. 0276P, (6th Cir. 2003)

Joshua was traveling with Chapman and her child on March 2, 1998, when he was stopped for speeding by Trooper Hannon of the Ohio Highway Patrol. Hannon found that there was not an outstanding warrant on Joshua. However, he also learned from a "Read and Sign Book" at the station that police intelligence revealed that Joshua was a known drug courier. As a result, Hannon extended Joshua's detention. 42 minutes after the initial stopping, a canine unit arrived, and ultimately a large quantity of crack cocaine was found. Joshua and Chapman were charged with possessing more than 100 grams of crack cocaine.

Joshua filed a motion to suppress based upon the length of the detention. He did not challenge the factual predicate of the police intelligence upon which Hannon relied to detain Joshua past the time necessary for processing the speeding ticket. Ultimately, Joshua was convicted and lost his appeal. He filed a petition for writ of habeas corpus, alleging ineffective assistance of counsel for the failing to challenge the factual basis for the police flyer. The district court denied the petition.

The Sixth Circuit reversed in an opinion by Judge Haynes. The reader should note that this is a lengthy, fact-bound decision that should be read for its full import. It will be of interest to both trial and post-trial attorneys. The Court relied upon *United States v. Hensley*, 469 U.s. 221 (1985). "'The Supreme Court held that for a past crime, reliance upon a flyer or bulletin could justify "a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information," but only if the officer who issued the flyer or bulletin had "articulable facts supporting a reasonable suspicion that the person wanted ha[d] committed an offense."'" The Court noted that under *Hensley*, the issue "of whether the evidence discovered during Petitioner's stop is admissible turns on whether the officer who provided the information in the 'Read & Sign' book had articulable facts supporting a reasonable suspicion that Petitioner was involved in criminal activity."

Based upon *Hensley*, the Court concluded that a "reasonable trial attorney would have raised the *Hensley* issue at trial." The Court noted that the State had failed to produce the original officer who had filed the information in the "Read & Sign" book, and thus the State could not show the factual basis for the entry. The Court also held that *Hensley* was not confined to initial stops. "We conclude that *Hensley* requires any police flyer relied upon for a *Terry* stop and to **'further detain'** an individual, must be supported by articulable facts from the issuing officer to show reasonable suspicion that the individual has been involved in criminal activity." The Court also held that appellate counsel was ineffective for failure to raise the *Hensley* issue. Finally, the Court held that the Petitioner had been prejudiced. "[I]f defense counsel had made a *Hensley* challenge, there would not be any facts to support Trooper Hannon's detention of Petitioner. Thus, the evidence uncovered from the stop would have been inadmissible. Without the evidence from the stop, there is a substantial probability that Petitioner would not have been convicted."

The Court also rejected the State's argument that there was a basis for holding Joshua independent from the "Read &

Sign" information. The Court rejected the discrepancy in rental car papers because Trooper Hannon had found that the car was properly rented. The Court also rejected furtive movements, nervousness, and the route taken by Joshua as bases for the stopping.

Judge Clay wrote a concurring opinion. He was persuaded that "Joshua's habeas petition should be granted because the Read & Sign did not provide the requisite reasonable suspicion to justify the detention which eventually led to the discovery of the illegal drugs, and the additional justification for the detention…was wholly inadequate and failed to establish reasonable suspicion."

Judge Nelson wrote a lengthy dissent. He primarily focused upon the fact that "Joshua suffered no prejudice as a result of his lawyers' failure to cite *Hensley*." He also believed that there were sufficient facts brought out at the suppression hearing to suggest that the state had proven a reasonable suspicion, and thus "the failure to cite *Hensley* in support of the suppression motion" did not indicate ineffectiveness of counsel.

***United States v. Ware***
63 Fed.Appx. 863, 2003 WL 2007937,
2003 U.S. App. LEXIS 8424, (6th Cir. 2003)

A Louisville Police Detective noticed a package at Federal Express that appeared "suspicious." A dog "alerted" on the package. Detective Dotson then obtained two search warrants authorizing the opening of the package and the inserting of a tracking device. An anticipatory warrant was then obtained for the place where the package was to be delivered. A controlled delivery was made, at which point Eulric Ware signed for the package. Ware then left his apartment carrying the package and went to U of L, where he was arrested. The police took Ware back to his apartment and searched it, finding drug paraphernalia and a weapon. After Ware was charged, a suppression motion was filed. A magistrate judge recommended denying the motion. However, the district judge granted the motion, finding the anticipatory warrant technically deficient and not supported by probable cause. The Government appealed.

The Sixth Circuit reversed in an opinion written by Judge McKeague. The Court did not review the anticipatory warrant. Instead, the Court found the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984) applied. The Court found that although the warrant application was "boilerplate," "an objectively reasonable officer would likely have concluded that the warrant legally authorized a search of the apartment only upon the controlled delivery of the package."

# SHORT VIEW . . .

1. *United States v. Jarrett*, 338 F.3d 339 (4th Cir 2003). The Fourth Circuit has allowed the government to put into evidence information obtained illegally by a computer hacker who had been in communication with the FBI. Here, a person allegedly from Turkey hacked into the defendant's computer illegally, finding evidence of child molestation. He entered into an e-mail relationship with the FBI, ultimately resulting in a warrant being obtained for the defendant's computer. The Fourth Circuit reversed a motion to suppress, holding that the hacker had not become an "agent" for Fourth Amendment purposes, thereby allowing the evidence to be admitted as a "private search." The Court looked at whether the government knew of the private search, and whether the private individual had a law enforcement purpose. The Court held that the government "must do more than passively accept or acquiesce in a private party's search efforts. Rather, there must be some degree of Government participation in the private search…That the Government did not actively discourage Unknownuser from engaging in illicit hacking does not transform Unknownuser into a government agent."
2. *State v. Miller*, 188 Or.App. 514 (03). The failure of the magistrate to authorize a seizure in a search warrant will invalidate the evidence as a result of an execution of a search warrant. Here the warrant described only that which could be searched, not seized. As a result, this failed to guide the discretion of the executing officer.
3. *People v. Sanders*, 73 P.3d 496 (Cal. 2003). The police may not conduct a "parole search" based upon a parole condition about which they knew nothing at the time of the search. Here, the police went to a disturbance and entered the defendant's apartment without a warrant. They discovered evidence there that they later used against the defendant. The search was illegal, and it was not transformed into a legal search by the later discovery that the defendant was on parole and that he had consented to a search based upon reasonable suspicion. "[W]hether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted."
4. *State v. Brown*, 792 N.E.2d 175 (Ohio 2003). Another state has rejected *Atwater v. Lago Vista*, 532 U.S. 318 (2001) under their state constitution. Custodial arrests for minor misdemeanors, in this case jaywalking, violate the Ohio Constitution.
5. *State v. Henning*, Minn., 666 N.W.2d 379 (Minn. 2003). In Minnesota, one convicted of DUI can obtain a special license plate allowing them to drive. The state statute allows for a stopping of the driver solely on the basis of the license plate. The Minnesota Supreme Court

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ruled that the state statute was unconstitutional and that the presence of the license plate does not constitute a reasonable suspicion. Because someone other than the person convicted of DUI may be driving, it is not reasonable to assume that the person driving the car with the special plate is driving on a revoked license. "While the special series plates may be a factor for law enforcement to consider and would provide a basis for closer scrutiny of these vehicles, the special series plates may not provide the sole justification for a stop."

6. *People v. Hulland*, 2 Cal.Rptr.3d 919 (Cal. Ct. App. 2003). A 52-day lapse between a controlled buy of marijuana and the execution of a search warrant was fatal to the admission of evidence. The evidence was stale, according to the California Court of Appeals, and no reasonably trained police officer could have relied upon the decision of the magistrate to grant the warrant. "[T]he hiatus between the sale and the search in the instant matter evidences a lack of probable cause to search absent additional factors, such as proof of ongoing transactions, suspicious activity at the premises to be searched, or other evidence of ongoing criminal activity."
7. *United States v. Brigham*, 343 F.3d 490 (5th Cir 2003). Where a police officer delays checking on information such as the driver's license and registration status in order to ask unrelated questions, a legal stop is transformed into an illegal stop in violation of the Fourth Amendment. Thus, the questioning about drugs prior to the computer check, rather than during the computer check, which led to a discovery of drugs, required suppression. This is an area that has divided at least three circuits, and is thus a possible area of Supreme Court involvement in the future. *See United States v. Burton*, 334 F.3d 514 (6th Cir. 2003) for a recent Sixth Circuit case on this issue.
8. *People v. Bunch*, 2003 WL 21983271, 2003 Ill. LEXIS 1419 (8/21/03). Where a traffic stop has ended, the holding and interrogation of a passenger, which prolongs the stop, is a violation of the Fourth Amendment, and evidence of drugs found as a result had to be suppressed.
9. *People v. Miller*, Colo., 75 P.3d 1108 (Col. 2003). The police applied for a warrant 30 days after an informant had stated that he had smoked methamphetamine at the defendant's house. The Colorado Supreme Court held that because additional evidence of ongoing criminal activity connected to the defendant's house was not contained in the warrant, that it was stale and thus the warrant lacked probable cause. Further, the Court stated that the good faith exception did not apply. "A reasonably well-trained police officer is held to know that an affidavit without any current information of illegal activity or the presence of contraband at a residence does not create probable cause to search the residence."
10. *State v. Jackson*, Wash., 76 P.3d 217 (Wash. 2003). The placing of a global positioning device (GPS) onto a care requires a warrant under the Washington State Constitution. The constitutional provision reads that no "person shall be disturbed in his private affairs, or his home invaded, without protection of law." The Court noted that a GPS reveals a great deal of information about a person's private life, and that the prevalent use of the automobile makes a GPS highly intrusive to privacy. The Court registered no opinion on whether this violated the Fourth Amendment.
11. *State v. Warren*, Utah, 2003 WL 22111, 2003 Utah LEXIS 90 (Utah 2003). A police officer saw a driver and a pedestrian speaking in a parked car in a deserted part of a city late at night. When the pedestrian left, the police followed the driver and pulled him over when he committed traffic violations. The officer ordered Warren out of his car and frisked him, finding cocaine. He later would testify that he had no fear of his own safety. The Utah Supreme Court held that the officer's subjective state of mind is not outcome determinative. However, that subjective state of mind is one factor in a reasonable suspicion analysis. Here, the Court weighed the fact that the driver was in a deserted part of town late at night and that he had lied about having a legal driver's license with the fact that he was cooperative and the fact that the officer had no subjective fear. Based upon all of the circumstances, the Court held that there was no reasonable suspicion, and that the evidence should have been suppressed.
12. *State v. Dean*, 76 P.3d 429 (Ariz 2003). The car of an arrested driver cannot be searched without probable cause as a search incident to a lawful arrest when then driver is away from the car, according to the Arizona Supreme Court. This is an interpretation of *New York v. Belton*, 453 U.s. 454 (1981), which had held that the police could search a vehicle of a "recent occupant" following an arrest. The Arizona Court held that when someone is arrested in his home with his car parked outside, he was not a "recent occupant" and the car could not be searched without probable cause. This is the precise issue the U.S. Supreme Court will be examining in *State v. Gant*.■

**Ernie Lewis**
**Public Advocate**

**…a bill of rights are what the people are entitled to against every government on earth….and what no just government should refuse.**

**— Thomas Jefferson**

# Arrest Warrant Specificity Revisited: Challenging Complaints Based Upon Information Not Personally Witnessed by the Affiant

*Robert Stephens*

**Arrest Warrant Specificity in All Cases.** We have previously addressed the sufficiency of arrest warrants based upon criminal complaints which lack specificity in stating the facts alleged and from whom this information was obtained. (*The Advocate*, Vol. 23, No. 6, November 2001, p. 21-23; also published in *The Kentucky Criminal Defense Lawyer*, Vol. 15, No. 21, September 2001, p. 6-7). That argument deals with **all** complaints, regardless of from whom the information in the complaint affidavit was obtained, and essentially is as follows:

According to the Kentucky Rules of Criminal Procedure, RCr 2.02, "the complaint is a written statement of the essential facts constituting the offense charged. It shall be made under oath and signed by the complaining party." RCr 2.04 states "(1) If **from an examination of the complaint** it appears to the judge…that there is **probable cause** to believe that an offense has been committed and that the defendant committed it, the judge…shall issue a warrant for the arrest of the defendant." (emphasis added)

The intent of RCr 2.02 and 2.04 is clear (and in conformity with Section 10 of the Kentucky Constitution and the 4th Amendment to the U.S. Constitution). Only if, from an examination of the "four corners" of the complaint, there is probable cause to believe that an offense has been committed and the defendant was the perpetrator, can the judge issue a warrant of arrest. A warrant of arrest cannot issue unless on its face the wording sworn to in the complaint establishes probable cause to believe a crime was committed, and that the defendant was the person who committed that crime.

*Henson v. Commonwealth*, Ky., 347 S.W. 2d 546 (1961) is in agreement. That case established that a warrant which merely states the "ultimate fact" (*i.e.*: a statement of the facts, the existence of which would constitute the crime charged), without stating how and when the fact was observed, was an unconstitutional invasion of Section 10 of the Kentucky Constitution. *Id.*, 548. As Judge Palmore opined for the Court, "the onus of being specific is little enough price for the suspension of so valuable a right." *Id.*, 548. The *Henson* Court declared, "[t]he necessity for a simple statement of how and when an allegedly existing fact was observed could be **unreasonable or burdensome only to one who actually does not have enough reliable information to justify the warrant**." *Id.*, 548 (emphasis added).

*Henson* is not distinguishable from the criminal complaint/arrest warrant situation merely because *Henson* deals with a search warrant rather than an arrest warrant. The 4th Amendment and Section 10 both protect equally the person and property of individuals from unreasonable searches and seizures. One's person is no less secure under our constitutions than one's property.

Whenever an arrest warrant is obtained in District Court, the defense may thus be able to challenge the illegal arrest because, regardless of from whom the information was obtained, it is insufficient if it states only the "ultimate fact" of the crime alleged.

**Arrest Warrant Specificity for Complaints Based on Source(s) Other than the Affiant.** The District Court practitioner, however, should be aware of case law crystallizing this argument in a quite common subset of cases: those cases in which the information contained in the criminal complaint affidavit was obtained from someone other than the person swearing to the truthfulness of the affidavit. In other words, cases where the affidavit is not based on the personal knowledge of the affiant. This situation is not at all uncommon. The author has confronted complaints brought by relatives of alleged victims, especially parents that have brought charges on behalf of children. Police officers routinely bring charges on behalf of alleged victims, although as we will see below the Supreme Court has carved an exception in this circumstance if the officer himself has probable cause to believe the accused committed a felony.[1]

*Talbott v. Commonwealth*, Ky., 968 S.W. 2d 76, 81 (1998) stands for the proposition that complaints containing information "obtained from someone other than the affiant…must disclose that fact." Indeed, the Court in *Talbott* cites an opinion of the Attorney General stating "In order for a complaint not based on the personal observation of the affiant to be sufficient to support a warrant of arrest, it must disclose (1) the name of the informant, (2) the factual observation he has made and not just the 'ultimate fact' of the offense, and (3) how, when and where such observation was made. OAG 65-275." *Id.*

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The Court in *Talbott* found fault not with the Commonwealth's using a "fill-in-the-blanks form [complaint], but [with] the information used to fill in the blanks, which rendered the criminal complaint insufficient." *Id.* By adopting the OAG, the Court in *Talbott* thus requires that the complaint, in cases where the affiant lacks first hand knowledge of the information sworn:

1. Tell from whom the information actually came;
2. State the facts alleged to have occurred and been observed, not merely a recounting of the "ultimate fact", *i.e.*: a renaming of the statute allegedly violated; and,
3. State how, when, and where the information was observed.[2]
4. As noted above, however, the Court carves out an exception to this rule in cases where, despite the invalidity of the arrest warrant, a police officer making the arrest himself had probable cause to arrest the defendant for a *felony*. Many cases will obviously fall into this exception, especially considering the required probable cause may be based on information provided by third parties. *Id.*

Please note this exception applies only to felony charges, not to misdemeanors. The inapplicability of the Court's exception to misdemeanors is mandated by the language of KRS 431.005(1), quoted below, which permits arrest of persons by peace officers for felonies (*but not misdemeanors*[3]) not committed in their presence, if probable cause exists.

KRS 431.005 Arrest by peace officers; by private persons

(1) A peace officer may make an arrest:
(a) In obedience to a warrant; or
(b) Without a warrant when a felony is committed in his presence; or
(c) Without a warrant when he has probable cause to believe that the person being arrested has committed a felony; or
(d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence; or
(e) Without a warrant when a violation of KRS 189.290, 189.393, 189.520, 189.580, 511.080, or 525.070 has been committed in his presence, except that a violation of KRS 189A.010 or KRS 281A.210 need not be committed in his presence in order to make an arrest without a warrant if the officer has probable cause to believe that the person has violated KRS 189A.010 or KRS 281A.210.

For most District Court cases, then, the exception carved out by the Court in *Talbott* for police officers simply will not apply. Any misdemeanor affidavit sworn to by someone other than the person who *personally witnessed* the alleged facts will not stand unless the requirements clarified by the *Talbott* Court are otherwise met. Indeed, it is this author's opinion, previously described and based on the 4th Amendment, Section 11, and the *Henson* decision, that such particularity is always required. But in the subset of cases where the complaint affidavit was sworn to by one who lacked personal knowledge of the alleged facts, the Kentucky Supreme Court has clearly stated the rule that particularity in the affidavit is required with regard to what facts are alleged to have been observed, who perceived them, as well as where and how they were perceived.

**Endnotes:**

1. Felony, but not misdemeanor, as we discuss below.
2. In rendering its *Talbott* decision, the Court relies in part on the case of *Huff v. Knauf*, Ky., 233 S.W. 2d 276 (1950), a potentially confusing case if one reads only the headnotes preceding. Headnote 2, not part of the opinion, seemingly suggests that "ultimate fact" affidavits are always permissible. What the case really says, however, is that "ultimate fact" affidavits are sufficient if based on the personal knowledge of the affiant. *Id.*, 277. Whether complaints are insufficient without proper enunciation of the facts and sources, even if based on the personal knowledge of the affiant, we have raised in the previous section and article on that topic.
3. With certain very limited exceptions. ■

**Robert E. Stephens, Jr.**
**Assistant Public Advocate**

**Are long sentences wise or just?**

**United States Supreme Court Justice Anthony Kennedy's recent comments on sentencing at the American Bar Association: "Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just."**

# DAVE NORAT RETIRES AFTER 30 YEARS

**Dave Norat** retired from the Department of Public Advocacy on September 1, 2003. A 1970 graduate of the University of Kentucky, and a 1973 graduate of the University of Kentucky School of Law, Dave began his work with the Department in 1973. Highlights of his tenure were expanding the Department's post conviction services to two prison offices and increasing their staff from one attorney to 7 attorneys and 5 paralegals, directing the Defense Services Division overseeing trial, appeal, post-conviction, investigation, training capital trial and post-conviction efforts, developing from its infancy the Department's Alternative Sentencing Workers program and most recently serving as Director of the Law Operations Division - the Department's fiscal, human resources, information systems and technology services.

Public Advocate Ernie Lewis states that "Dave Norat has been both a creative and steady presence at DPA for 30 years. His creativity has led to the creation of the Post-Conviction Branch, to the creation of alternative sentencing specialists in Kentucky, and to our present system of e-mail and electronic research. His steadiness involved working hard, every day, persisting at the mundane but necessary functions of running a large organization. He was forever upbeat and positive even in the face of many difficult times. Dave contributed greatly to the development of the Department of Public Advocacy."

Ed Monahan, Deputy Public Advocate, stated that for "over three decades Dave has worked hard day in and day out to do his part in leading Kentucky's statewide defender program into the future in so many ways. He leads the state in creative, successful alternative sentencing plans. He has been ahead of the times in advocating for sentencing in place of prison. At some point the rest of the state will catch up with him on this and Kentucky will be all the better for it. We will miss Dave, his energy and his work ethic."

Many of you have worked with Dave on alternative sentencing issues which was a major love of Dave's. George Sornberger reminded us of a case that he and Dave worked on.

In 1995/1996, I represented a client on charges of sexual assault in Larue County. The community was outraged. The media was out in force, and it was apparent that we had a challenge on our hands. We turned to Dave Norat for assistance for our developmentally disabled client. Almost overnight, the momentum shifted. Dave put together a team of mental health professionals who began the formidable task of plugging our client into a variety of programs and into several sources of funds. When a permanent plan was in place —a group home on a fishing lake with the help and support he needed - the charges were dismissed. Having Dave on the team made all the difference in the world. Many folks in DPA know Dave for all the administrative support he provided to DPA over the years. I wish more could have experienced Dave's excellent assistance with their clients.

Not only did Dave thrive when working with clients, he made a lasting impression on DPA employees as well. Here are some quotes from his closest co-workers.

*Two things have always amazed me about Dave. The first was his ability to stay relaxed and creative in stressful situations and dismiss them as merely "challenges." The second is the uncanny frequency with which he could be a resource on some issue, whether the information was someone he knew at some obscure agency, or some file from 1983 that somehow he knew exactly where to find in the vast expanse of papers in his office. I imagine Dave will now be spending his time picking up drive-thru hamburgers at White Castle in his yellow convertible, before heading to the beach for a good book and an even better margarita.*-- Bryce Amburgey

*My memorable experience with Dave would have to be my first day of work, which was March 1, 1997 - the time of the last big flood in Frankfort. When I got here, the whole area was flooded and the only visible thing was the hoods of two state vehicles. Imagine my dismay that on my first day of work I can't get to the agency because of high water. I went to a friend's house that lives in Blanton Acres to call in, and Dave Norat answered the phone. He was literally the only person in the 100 Fair Oaks Building. He could have possibly been the only person here at all, even the 200 Building. But when no one else could make it in to work, Dave Norat did.* -- Ann Harris

*Dave has been great to work with and has been a very good teacher. He cares deeply about DPA and our clients and always has them in the forefront of any decision-making. His patience is endless - or so it seems - and he's always ready to listen to the folks in his division. He has been instrumental in our division's "food fests" and our ability to have fun together as co-workers.*-- Ruth Schiller

Dave is married with three children and plans to enjoy retirement by volunteering his services to the Hispanic community. Dave will also be presenting on alternative sentencing for the Kentucky Bar Association at two of the district bar programs. Who knows where the road will take him? But we do know that it will be one paved with success. Best wishes Dave! ■

**Debbie Garrison**

# BILL SPICER RETIRES

*Remember When?...*

On September 1, 2003 **Bill Spicer** (Covington) retired from the Department of Public Advocacy after serving for over 23 years as a public defender in the ranks and as the leader of two different field offices.

Bill began his career with the Department as a legal assistant in 1980 in the London Trial Office. Upon passing the bar a month and a half later, he was appointed as an assistant public advocate -working in that capacity until 1985 when he was appointed to serve as Director of the London Office. Bill directed this office until December of 1987. His fondest memories of the London Office were his work with Investigator Lowell Humphrey and his work with co-counsel Lynda Campbell (Richmond) on two capital cases that were tried within an eight-month span in 1984 and 1985. The office at that time consisted of *twenty-something* lawyers who worked hard, and had great success in establishing a strong public defender presence in the area. Lynda Campbell notes that "Bill eagerly and aggressively represented clients charged with murder in Southeastern Kentucky. Never one to shy away from a case with bad facts, Bill often said, '*turn lemons into lemonade*' and found a way to make the bad facts help his theory of defense. He never lost his cool, and his good humor made him a great colleague. Thousands of people have been helped by Bill, and he truly made a difference in the lives of our clients."

Bill married [temporarily] in 1987 and moved to Lexington whereby transferring to the Stanton office. He became the director of the Stanton Office in 1989 and served as regional manager from 1989-1993 covering the Pikeville, Hazard, and Stanton Offices. He remained in Stanton until 1996. [Bill remembers that during the years in Stanton, the office always had 6 to 10 active murder cases and that if not for Stanton Office employees Bill Burt, Bruce Franciscy and Investigator Ginny Campbell, he would never have survived those years. Bill's most vivid and painful memory of the Stanton years is the *Baze* capital case. However, he will always have great memories of working with Rob Riley on that case.]

In September 1996, Bill's [then permanent] wife accepted an offer with Toyota Motor Manufacturing in North American Headquarters in Northern Kentucky and they moved to Northern Kentucky.

Still going and not being finished with his career as a public defender yet, he sought to transfer to Covington and began working for the Covington Office in July of 1996 where he remained until his retirement. Bill thanks the people in the Covington office for being so supportive of his transition to an urban office. He hopes to continue the relationships he made in that office. Mary Rafizadeh (Covington Directing Attorney) noted that "[w]e at the Covington Office will miss Bill tremendously. He has a great sense of humor, and always kept us laughing. He was loved by his clients, and believe it or not, police officers, probation & parole, clerks, prosecutors & judges all are fond of Bill. I believe the reason for this is that Bill has a very cordial and light-hearted approach toward life. I personally will always remember the cases we worked together - with great fondness."

In 1983-1984, DPA gave *Walker* awards - awards obtained for *walking a client* out of the courtroom. In 1983, Bill obtained 9 acquittals in felony trials including a murder case. In 1984, he received 3 more Walker awards, including another murder trial acquittal, and two life awards for the *Leach* case (tried in Danville) and the *Hale* case (tried in Harlan).

Public Advocate Ernie Lewis noted that "Bill has served in the London, Stanton, and Covington Offices with distinction. He has tried innumerable cases with both excellence and skill. He has demonstrated how to perform the often heart-breaking task of being a public defender with good humor. I will miss his humor and his cartoons!" Deputy Public Advocate Ed Monahan added that "DPA and its clients will miss the good representation Bill has provided for over two decades and the spirit and humor brought to us all."

We will definitely miss Bill and his ***stick man*** approach to life. A stick man cartoon done by Bill and published in *The Advocate* in February 1990 follows this article. ■

**Debbie Garrison**

# PRACTICE CORNER
## LITIGATION TIPS & COMMENTS

*Misty Dugger*

### Keep an Eye on Who is in Charge of the Jury

The Kentucky Supreme Court has held that it is a violation of the principle of separation of witnesses to place the jury in the custody of a sheriff who had been an important prosecution witness. *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534, 547 (1988). The Court in *Sanborn* cited *Turner v. Louisiana*, 379 U.S. 466, 473, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965), in which the United States Supreme Court found a due process violation when a jury, during a three day trial, was placed in the custody and "continual association" of two deputies who were "key prosecution witnesses."

However, in a case which predated *Turner*, Kentucky's highest court held that it was not reversible error for the jury to be placed in the custody of a sheriff who was not deemed a key witness in the case. The court noted that the sheriff's testimony served only to place in evidence a bullet which had been delivered to him. The evidence was not challenged by the defense and was not a significant part of the case. The Court, therefore, found no error. *See Carson v. Commonwealth*, Ky., 382 S.W.2d 85, 95 (1964).

Most recently in the unpublished case of *Strange v. Commonwealth*, 2000-CA-001940-MR, the Court reversed for a new trial when the lower court erroneously placed the deputy sheriff, who was also a key prosecution witness, in charge of the jury. No objection was made by counsel, but in reviewing for palpable error, the court noted that the sheriff was a key witness regarding matters which were of consequence to the decision in the case and as such, his involvement with the jury was error.

It is clear that placing a jury in the custody of a sheriff or deputy who is more than a minor witness is improper. But to insure appellate review of this error, always object and bring this error to the attention of the trial court.

### Object to Prosecutor's Use of the "Send a Message" Closing Argument

In *Mitchell v. Commonwealth*, 2002-CA-001471-MR, the prosecution asked the jury to "send a message" with their verdict in this drug trafficking case. The Court of Appeals held that such argument was improper, noting that a trial is about guilt or innocence and that anger over a perceived drug problem in the community is not pertinent to that determination.

The Court held that a prosecutor may not suggest that a jury convict or punish on grounds or for reasons not reasonably inferred from the evidence, nor may a prosecutor make a remark in closing argument which tends to cajole or coerce a jury to reach a verdict that would meet with the public favor, citing *Wallen v. Commonwealth*, Ky., 657 S.W.2d 232, 234 (1983) and *Jackson v. Commonwealth*, Ky., 192 S.W.2d 480 (1946). The Court further noted:

> The function of the jury is to determine guilt or innocence. In this case, the jury was called upon only to determine whether Mitchell was guilty of trafficking in a controlled substance. Anger over a perceived drug problem in the community has no bearing on an individual's guilt or innocence. It was improper for the Commonwealth to suggest that the jury had some obligation to cure the community's problems through its verdict and hereby divert attention from the jury's true function of evaluating whether the evidence presented established Mitchell's guilt. Further, the prosecutor suggested that the only way for the jury to "do its job" was to return a guilty verdict, which is patently untrue. As discussed above, the jury's function is to consider the evidence and return a verdict; whether the verdict is "guilty" or "not guilty," the jury has in either instance fulfilled its obligation.

However, this issue was not preserved for appellate review as the objection was untimely. Thus *Mitchell* did not decide if such a closing argument amounted to reversible error by itself, instead finding cumulative errors from the trial required reversal. Be sure and make a contemporaneous objection if the prosecutor makes these improper remarks during closing argument.

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

# KY Defenders Educated on Capital Persuasion Skills

Kentucky citizens deserve a criminal justice system that has defenders representing capital clients competently. This meets the public's interests in insuring the reliability of the results and confidence in the fairness of a system that determines whether someone lives or dies. The Department of Public Advocacy is working to insure competent capital defense counsel amidst its limited resources and large caseloads. Education is one essential way for DPA to provide effective capital counsel.

DPA's 22d Litigation Persuasion Institute educated 78 defenders from across Kentucky in early October 2003 at the Kentucky Leadership Center at Jabez, Ky. This year's week long Institute focused on the special skills of capital litigation at the trial, appeal and post-conviction stages.

DPA began its Litigation Institutes in Richmond in August 1982. Public Advocate Ernie Lewis considers these Institutes the soul of the Department.

We know that effective lawyering makes a difference. Good lawyers influence the fact finders to sentence a capital client to something other than death. These successful lawyers have a secret weapon.... *Persuasion.*

This secret weapon of persuasion is an intense commitment to persuade with integrity using high level critical judgment skills. All compelled by a theory of the defense rigorously implemented in all forums.

The law is important. What we learned in law school is important. Thinking like a lawyer is important. However, *thinking like a persuader* is paramount.

National faculty educated us skillfully. Denver's **Steve Rench** focused on understanding what influenced jurors and judges in capital cases, Colorado's **Bert Nieslanik** taught us about the critical nature of client relationships, Indiana's **Bob Hill** demonstrated the necessity for an in-depth mitigation investigation and communication of the client's story. "Story is the strongest non-violent persuasive method we know. Tell me facts and maybe I will hear a few of them. Tell me an argument and I might consider it. Tell me a story and I am yours. That is why every persuasive enterprise from the Bible to television commercials relies on *story* more than on every other kind of communicative structure put together." David Ball, *Theater Tips and Strategies for Jury Trials* (1994) at 66.

North Carolina's **Steve Lindsay** told us that if we build a persuasive case, they will come. **NY's Ira Mickenberg** demonstrated how to effective preserve error, and on the law and practice of *Brady* errors. Nashville's **Skip Gant** set out the essentials of theory of the case development.

Kentucky's capital experts educated us on important litigation skills. **Margaret O'Donnell** and **Margaret Case** laid out a wide-ranging list of challenges to aggravators and current hot issues. They informed us about case law on the improper limiting of mitigation: In *Ex Parte Smith,*Ala., ___ S.W..2d ___, 2003 WL 1145475 (March 14, 2003) the death sentence reversed where trial court's evidentiary rulings improperly barred defendant from fully presenting evidence showing the dysfunctional nature of his family and the impact this had on defendant's development. They also educated us on prosecutorial misconduct: in *Depew v. Anderson,* 311 F.3d 742 (6th Cir. 2002) the prosecution's evidence/argument violated the Fifth and Eighth Amendments. Those arguments were:

— factually unsupported knife fight
— irrelevant photograph next to a marijuana plant
— comment on failure to testify

Here, "[e]ach of the prosecutor's improper remarks . . . was designed to completely undercut the defendant's sole mitigation theory," that the defendant had a law-abiding past and a reputation for peaceful conduct, thereby "effectively denying him fair jury consideration." Cumulatively, these errors were not harmless under *Brecht*.

**Bette Niemi** showed us how to rigorously evaluate jurors according to a rating system. **George Sornberger** along with Texas' **John Niland** lectured on the power of negotiation, neurobiology and the importance of representing your client from the beginning.

**Ernie Lewis** set out the law and practice of individual voir dire. He drew our attention to what John Blume observes, "Meaningful voir dire is absolutely essential to a capital defendant's ability to obtain a fair trial. If, as a last resort (since all cases should be negotiated if at all possible) a case proceeds to trial, it will often be won or lost during jury selection. The cold, hard facts are that a substantial number of jurors who actually serve in capital cases are not qualified under existing law either because (1) they will automatically vote for death if the defendant is found guilty of murder (ADP jurors); (2) once the defendant is convicted of murder these jurors will shift the burden to the defendant to prove that the death penalty is not the appropriate punishment

(burden shifters); or because (3) they can not (or will not) consider particular types of mitigating evidence (mitigation impaired jurors). It does not, however, appear that significant numbers of *Witherspoon*-excludables actually sit on capital juries. Moreover, the voir dire process itself adds to the problem as it implies to many jurors that death is the appropriate verdict. Race and religion also matter. Black jurors are less likely to vote for the death penalty than are white jurors, and white fundamentalist jurors are most likely to vote for the death penalty. Additionally, many juror's attitudes are impervious to evidence or information; in other words, their views about the death penalty are fixed. Thus it is critical that counsel determine – during voir dire – what those views are."

Other attorneys assisting with the vital coaching in the small group practice sessions were: **Rebecca DiLoreto**, **Lynda Campbell**, **Bob Carran, Jerry Cox, Terry Richmond** from Indiana**, Gail Robinson, Jeff Sherr, Marguerite Thomas, Patti Heying, and Ed Monahan**.

DPA provides this capital education in order to meet its statutory responsibilities according to the national standards for defender programs. National standards require defender programs to provide significant education of its staff to insure the representation is competently achieved. The American Bar Association Criminal Justice Standards, *Providing Defense Services*, Standard 5-1.5 states, "The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services…." The National Legal Aid and Defender Association *Training and Development Standards* (1997), Standard 1.1 states, "The defender organization must provide training opportunities that insure the delivery of zealous and quality representation to clients." The ABA *Ten Principles of a Public Defense System* (Feb 2002), Principle 9 states, "Defense counsel is provided with and required to attend continuing legal education."

The national standards also are specific to capital education. NLADA *Training and Development Standards* (1997), Standard 7.1 states, "Defender organizations should provide employees responsible for the representation of death penalty clients with all training necessary for high quality service to the client at every stage of the process: pretrial, trial, penalty phase, appeal and post-conviction." The *ABA Guidelines for the Appointment and performance of Defense Counsel in Death Penalty Cases* (2003) Guideline 8.1, Training, states:

A. The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.
B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:
   1. relevant state, federal, and international law;
   2. pleading and motion practice;
   3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
   4. jury selection;
   5. trial preparation and presentation, including the use of experts;
   6. ethical considerations particular to capital defense representation;
   7. preservation of the record and of issues for post-conviction review;
   8. counsel's relationship with the client and his family;
   9. post-conviction litigation in state and federal courts;
   10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
   11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.
C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.
D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

We heard from **Dick Burr**, the attorney in *Ford v. Wainwright*, 477 U.S. 399 (1986), which established the right of incompetent death-sentenced prisoners to be spared from execution, and *Selvage v. Lynaugh*, 494 U.S. 108 (1990), which set the stage for the relaxation of procedural default rules for claims under *Penry v. Lynaugh*. He recently served as one of the attorneys for Timothy McVeigh in the Oklahoma City bombing trial, coordinating the penalty phase defense for Mr. McVeigh. Dick educated us on developing and presenting mental health evidence. He called us to faithful representation of our capital clients: "I claim to be no more than an average man with less than average ability. Nor can I claim any special merit for such non-violence or continence as I have been able to reach with laborious research. I have not the shadow of a doubt that any man or woman can achieve what I have, if he or she would make the same effort and cultivate the same hope and faith. Work without faith is like an attempt to reach the bottom of a bottomless pit." - Mahatma Ghandi

Laws do not persuade just because they threaten. - Seneca

The most important persuasion tool you have in your entire arsenal is integrity. -Zig Ziglar ■

# THE ADVOCATE

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## Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

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Holiday Inn North
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June 22-24, 2004

**Note: Since the 2004 KBA Convention has moved from Owensboro to Lexington, the DPA Conference will now be in Lexington.**

**** KBA ****

**2004 Annual Convention**
Radisson &
Lexington Convention Center
Lexington, KY
June 23-25, 2004

****KACDL****

**2003 Annual Seminar & Meeting**
Lexington, KY
Nov. 21-22, 2003

**NOTE: DPA Education is open only to criminal defense advocates.**

**For more information:**
http://dpa.state.ky.us/train/train.htm

**For more information regarding KACDL programs:**

**Lesa F. Watson, Executive Director**
**Tel: (859) 236-7088**
**Web: www.kyacdl.org**

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**For more information regarding NLADA programs:**

**NLADA**
**1625 K Street, N.W., Suite 800**
**Washington, D.C. 20006**
**Tel: (202) 452-0620**
**Fax: (202) 872-1031**
**Web:** http://www.nlada.org

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**For more information regarding NCDC programs:**

**Rosie Flanagan**
**NCDC, c/o Mercer Law School**
**Macon, Georgia 31207**
**Tel: (912) 746-4151**
**Fax: (912) 743-0160**

### Thoughts to Contemplate

The basis of optimism is sheer terror.

Oscar Wilde (1854 - 1900),
The Picture of Dorian Gray, 1891

They that can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.

Benjamin Franklin, 1759

The first step towards amendment is the recognition of error.

Seneca (5 BC - 65 AD)

Liberty without learning is always in peril; learning without liberty is always in vain.

John F. Kennedy (1917 - 1963)