The Advocate

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SHAKERTOWN SITE OF DEATH PENALTY SEMINAR

A seminar on the practical aspects of trying a death penalty case will be held at Shakertown on Saturday and Sunday, March 29 and 30, 1980. It will begin at 2:00 p.m. on Saturday and will run until 5:30 p.m. on Sunday afternoon.

At the present time we are in contact with a number of outstanding people who hopefully will come and teach us how to try death penalty cases. John Carroll, the director of the Southern Poverty Law Center, has agreed to come and is also planning to bring a psychologist with him. He is talking to Cathy Bennett about accompanying him to Shakertown. Ms. Bennett is a well-known psychologist with a great deal of experience in jury selection in capital cases. Stuart Kinard, an outstanding defense lawyer from Texas, has also been contacted. Mr. Kinard is a regular contributor to seminars put on by the National College of Criminal Defense Lawyers, and is especially well-known for his closing argument expertise. Finally, Reverend Tom Feamster, who was John Spinkelink's minister and spent a great deal of time at the end with Spinkelink, may also be there.

Information on reservations, cost, etc. will be forthcoming in a separate mailing to all local public defenders. Any questions should be directed to Ed Monahan, Chairman of the Death Penalty Task Force, 564-5231.

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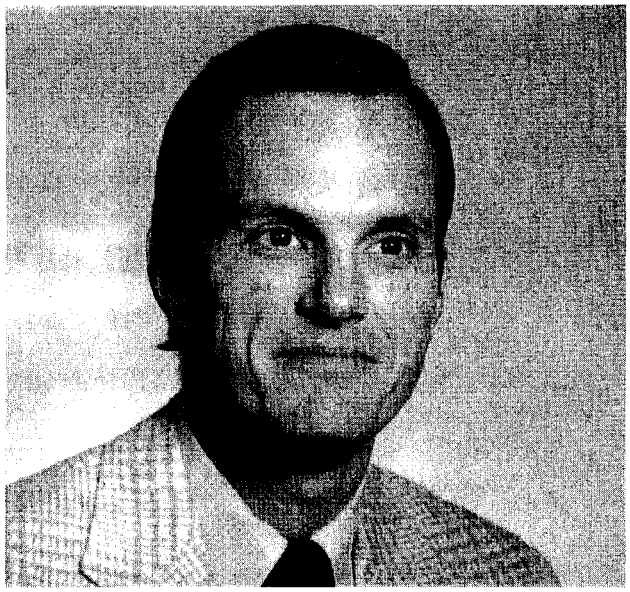
PUBLIC DEFENDER OF THE MONTH



BOB CARRAN

Anybody that knows Bob, the Kenton County Public Defender, has no difficulty in believing that he's a 1964 graduate of Centre College. He claims to have graduated in 1969 from Chase Law School, and somehow has obtained documentation of this!

As Kenton County Public Defender, Bob administers the program which involves upwards of 45 public defenders. Because of the open roster system and because over half of the attorneys have less then 5 felony trials, Bob conducts periodic seminars to ensure competent representation by the roster attorneys. When a new

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attorney joins the system, Bob educates the attorney on how the system works, on the services available to the attorney and on how he wants each case handled. He insists on a number of things in each case. Among these are a signed statement from the defendant of the witnesses he wants to testify, whether he wants to accept or reject any Commonwealth plea offer, and whether he wants to testify in his own defense.

Before trying the case, each attorney must discuss with Bob the theory of the case and the defense which will be put forth. Bob also ensures at this stage that the defendant is participating knowingly and intelligently in his defense.

Bob believes the biggest assist to the PD system would be to make attendance at a topflight trial advocacy course a prerequisite to representation of the criminal indigent. "The difference it would make would be unreal," according to Bob. He presently teaches a trial advocacy course at Chase Law School.

Bob is adamantly opposed to capital punishment. His strong opposition combined with his recognition of prevailing public opinion has led him to the conclusion that, as the lesser of two evils, life without parole should be the maximum punishment in this state. Its use should only be with the proper guided discretion and the presence of aggravating factors. He has urged this view on the Commonwealth Attorney, the local state senators and representatives, and he is most interested in hearing how others feel on this matter.

Bob Carran cares. He is zealously committed to the public defender/ defense philosophy, and is truly a servant of the public in the defense of individual rights.

PUBLIC DEFENDER MALPRACTICE

On December 4, 1979, the United States Supreme Court rendered its long-awaited and controversial decision in Ferri v. Ackerman, 26 Cr.L. 3025 (1979) - the Pennsylvania case concerning the liability of court-appointed counsel in malpractice actions. The decision, of course, was anxiously anticipated by all attorneys who represent indigent defendants on a full or part-time basis.

Although the controversy in Ferri arose out of a federal criminal prosecution, the long-range effects of the decision on the entire realm of public defender liability is undeniable. Ackerman, a private attorney, was appointed by the Federal District Court for the Western District of Pennsylvania, pursuant to the Criminal Justice Act (18 U.S.C. Section 3006A), to represent Francis Ferri, who was named as a defendant in five counts of a nine-count federal indictment alleging federal firearms violations and Internal Revenue Code violations. Ferri was convicted on all counts and subsequently sued Ackerman in state court alleging 67 different instances of malpractice, including the failure to plead the statute of limitations as a bar to the I.R.S. violations. The Pennsylvania Court of Common Pleas, however, dismissed the complaint, holding that both public policy and case law (primarily federal) granted absolute immunity to appointed counsel in federal trials. The Pennsylvania Supreme Court agreed.

Speaking through Justice John Paul Stevens, however, a unanimous U.S. Supreme Court reversed the holding of the Pennsylvania state courts and ruled that appointed counsel is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit. Likening the role of

(See MALPRACTICE, Page 15)

WEST'S REVIEW

A survey of cases decided in November and December shows a number of interesting, and sometimes significant decisions, coming from Kentucky's appellate courts and the U. S. Supreme Court.

The Court of Appeals was called on in Commonwealth v. Jeter, 26 K.L.S. 15 at 2 (November 2, 1979), to certify the law in response to the question of whether the offense of theft by failure to make required disposition, defined by KRS 514.070, was applicable to the defendant's conduct. The defendant operated a second hand appliance business. During the course of his business, he accepted sums of money as payment for certain goods which he was later to deliver. Delivery was never made. Based on his failure to deliver, the defendant was indicted for theft by failure to make required disposition. However, the indictments were dismissed by the Fayette Circuit Court as not alleging conduct within the purview of KRS 514.070. The Court of Appeals agreed. Referring to the official commentary to the statute, which advises that the offense requires a "breach of trust, growing out of a contract or confidential relation" the Court found that the statute is directed at such conduct as an employer's failure to apply an employee's withheld wages to a pension fund. The alleged actions of the defendant would "more properly have supported an indictment for theft by deception."

The convictions of Roderick Blincoe and John Maratty for complicity to facilitate the offense of first degree robbery were reversed by the Court of Appeals. The Court found that their convictions were unsupported by sufficient evidence. Blincoe and Maratty v. Commonwealth, 26 K.L.S. 15 at 2 (November 2, 1979). The evidence showed that two black men had entered Settle's Liquor Store, purchased a pint of Little Richard's Irish Rose Wine, and then pulled out a gun and relieved the store's clerk of a King Edward cigar box in which cash was kept. Shortly after the robbers fled, two black men were seen entering a blue and white Mercury Marquis driven by two other men. The evidence at trial additionally showed that the defendants were apprehended three days later, driving a blue and white Mercury Marquis owned by Maratty. A search of the car produced a gun, a pint of Little Richard's Irish Rose Wine, an empty King Edward cigar box, and a jacket said to be similar to that worn by one of the robbers. However, no witness was able to identify either defendant. Apparently persuaded by this critical flaw in the Commonwealth's case, the Court held that "the record before us contains no relevant evidence linking Maratty and Blincoe to the charged offense." Interestingly, the Court reversed despite the fact that the defendant's motion for directed verdict had not been renewed at the close of all the evidence as required by Kimbrough v. Commonwealth, Ky., S.W.2d 525 (1977). On its face, this would appear to put the Court's decision in conflict with the Kentucky Supreme Court's subsequent holding in Commonwealth v. Blair, 26 K.L.S. 15 at 11 (November 20, 1979)(discussed infra). Discretionary review has been sought by the Commonwealth.

In Redd v. Commonwealth, 26 K.L.S. 17 at 2 (December 7, 1979), the Court of Appeals reversed Redd's conviction of first degree robbery after finding prejudicial error in the Commonwealth's use of mug shots at Redd's trial. Redd was picked out of a photographic

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lineup, consisting of mug shots, prior to trial. At trial the robbery victim again identified Redd. However, the Commonwealth then chose to introduce the mug shots along with testimony that the photographs were "mug shots taken from past incidents" and, moreover, were being used in the investigation of another armed robbery. The Court held that the introduction of the mug shots was reversible error based on its application of a three part test. First, the Court found that there was no demonstrable need to introduce the photographs. Secondly, the photos themselves clearly implied that Redd had a prior criminal record. And, finally, the manner of their introduction called unnecessary attention to that implication.

In a decision which defense counsel will want to take note of, the Court of Appeals had held that it will not reverse on the basis of irregularities in impanelling the jury when no objection is made and the defense does not exaust its peremptory challenges. Moore v. Commonwealth, 26 K.L.S. 18 (December 28, 1979). The court has held in Allen v. Commonwealth, 26 K.L.S. 13 at 3 (September 21, 1979), that the failure of a trial court to comply with the jury selection procedures set out in KRS 29 A.060 and RCr 9.30(1)(a) is reversible error.

The Kentucky Supreme Court, in its first post-Dunaway encounter with a confession resulting from custodial interrogation conducted with less than probable cause for arrest, has followed the directive of the U. S. Supreme Court that such a confession is inadmissible. Martin v. Commonwealth, 26 K.L.S. 15 at 8 (November 20, 1979); cf. Dunaway v. New York, 99 S.Ct. 2248 (1979). An anonymous informant told police that Martin was AWOL and responsible for a burglary-murder then under investigation. Without verifying Martin's AWOL status, the police arrested him and after transporting him to the police station confirmed that he had been AWOL for over thirty days. Twenty-four hours later Martin confessed. The Kentucky Supreme Court, agreeing with Martin that the confession was inadmissable, held that "civil officers have no authority to arrest members of the armed forces who are merely unauthorized absentees." The Court acknowledged that civil police may arrest a "deserter" (defined as an individual absent more than thirty days), but held that "because any probable cause to arrest Martin for desertion arose only after he was taken into custody, the arrest was invalid." The Court went on to find a clear causal connection between the unlawful arrest and Martin's confession since there were no intervening circumstances between arrest and confession, and since the arrest bore the earmarks of a purely "investigatory detention."

In Commonwealth v. Blair 26 K.L.S. 15 at 11 (November 29, 1979), the Supreme Court reinstated the wanton endangerment and criminal mischief convictions of three Louisville Police officers whose convictions had been reversed by the Court of Appeals. The convictions had been reversed on grounds of insufficient evidence despite the defendants' failure to renew their motions for directed verdict at the close of all the evidence. The Supreme Court, citing Kimbrough v. Commonwealth, Ky., 550 S.W.2d 525 (1977), reaffirmed its holding in that case that an issue as to the sufficiency of evidence is preserved for review only when motions for directed verdict are made at both the close of the Commonwealth's case and at the close of all the evidence.

The Kentucky Supreme Court reversed another Court of Appeals decision in Hardy v. Commonwealth, 26 K.L.S. 16 at 3 (December 4, 1979). Hardy had been sentenced to two consecutive six months terms for misdemeanor offenses.

(Continued, Page 5)

When Hardy was convicted of a third misdemeanor yet another six months sentence was imposed and ordered to run consecutively to his previous sentences for a total sentence of eighteen months. This sentence was upheld by the Court of Appeals. However, the Supreme Court found that Hardy's eighteen-month sentence was precluded by KRS 532.110(1)(b), which provides with regard to misdemeanor sentencing that: "The aggregate of consecutive definite terms shall not exceed one year . . ."

Finally, in Ybarra v. Illinois, 26 CrL 3017 (November 28, 1979), the U. S. Supreme Court declined to broaden the "stop and frisk" exception to the requirement of probable cause to search as recognized in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Ybarra was present as a customer at the Aurora Tap Tavern when police officers, armed with a warrant authorizing a search of the tavern, entered to execute the warrant. In addition to searching the tavern, the police subjected those customers present to a patdown for weapons. During the patdown of Ybarra a "cigarette pack with objects in it" was felt in one of his pockets, and, when removed, was found to contain heroin. The Court rejected the state's contention that Terry permitted such a generalized "cursory search for weapons." "The narrow scope of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be searched, . . ." The Court additionally held that Ybarra's "mere propinquity to others independently suspected of criminal activity" was not alone sufficient to create the requisite reasonable grounds for the initial patdown.

LINDA WEST

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OPA PCSD

MISDEMEANANT PAROLE

Like convicted felons, defendants convicted of misdemeanors are eligible for probation, shock probation and parole. The provisions concerning probation, KRS Chapter 533, apply to both circumstances, as does KRS 439.265, the statute allowing for the suspension of a sentence or shock probation. But although parole of misdemeanants is also statutorily allowed, interesting constitutional questions have arisen due to the scheme fixed by the legislature.

KRS 439.177(1) states that "[a]ny misdemeanant may petition the sentencing court for parole privileges." This means that in most circumstances the district judge has the responsibility of studying the defendant's record and determining after appropriate procedures whether the defendant should be released on parole and if so what conditions should be imposed. Id.

Section 28 of the Kentucky Constitution provides that no person or a branch of government shall exercise any power properly belonging to either of the other branches. In relation to this provision the Court of Appeals in Peck v. Conder, Ky., 540 S.W.2d 10 (1976) discussed a prior version of KRS 439.177 which gave the county judge the power of parole:

(Continued, Page 6)

> "[W]hen a person has been convicted of a crime and has begun to serve his sentence the function and authority of the trial court is finished. What then happens to the prisoner is entirely in the bailiwick of the executive branch of government, and is no business of the courts, including the trial court. In granting parole the county judge acts in an executive capacity, not a judicial capacity. Murphy v. Cranfill, Ky., 416 S.W.2d 363, 365 (1967)"

Peck narrowly held therefore that under KRS 439.177 the county judge/ executive only "in his capacity as an officer of the executive branch, may grant parole to a misdemeanant." The court stated specifically, however, that it did not express an opinion with respect to the invalidity of the statute on grounds not raised. Nevertheless, the holding is persuasive that normally a judge can not perform the executive function of granting parole.

Prior to January 2, 1978 the county judge had executive, administrative and judicial functions. But under KRS 439.177 as amended the primary concern is with the role of the district judge who has basically a judicial role only.

The judiciary can be given the power to administer a criminal law. However, this simply means that the court has the function of trying a person charged with a criminal violation. Campbell v. Commonwealth, 229 Ky. 264, 17 S.W.2d 227 (1929). Accordingly, the Attorney General has expressed his opinion that the legislature cannot, under the constitution, confer the executive power of parole upon judges of the Court of Justice. See OAG 78-151 and 78-281. The Attorney General points to Peck and Huggins v. Caldwell, 223 Ky. 468, 3 S.W.2d 110 (1928) as authority for his opinion. In Huggins the Court of Appeals held that a circuit court could not be given authority to grant parole due to Sections 27 and 28 of the Kentucky Constitution.

In Kentucky Practice: Criminal Practice and Procedure, Tex Fitzgerald opines that if the statute is taken literally it would be unconstitutional. His solution however, is to interpret the statute liberally as an extended authority to grant shock probation or suspend the execution of the sentence.

KRS 439.265, the shock probation statute, has been held constitutional by the Court of Appeals in Commonwealth v. Williamson, Ky., 492 S.W.2d 874 (1973) although it allows the court to exercise control over its judgment after it has been imposed. The court emphasized that:

> "After a court has lost statutory control over its judgment imposing a criminal sentence, the court cannot exercise the power, whether called probation, parole or pardon, to suspend the execution of sentence." (Emphasis added).

However, the court stated that there is no definition of the time limit within which a court with statutory power could act and therefore upheld the shock probation statute as constitutional. Under a similar rationale KRS 439.177 is constitutional since the statutory power, rather than what the action is called, seems most important. The Court of Appeals in Williamson also considered the worth of the purpose of the shock probation statute. Such a consideration with regard to misdemeanant parole would also support the validity of the statute.

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-NOTE-

Protection & Advocacy for the Developmentally Disabled

TAX TIPS FOR PARENTS OF CHILDREN WITH DISABILITIES

A. General Information:

Since many parents of children with disabilities spend substantial amounts of money on behalf of their child, their deductible expenses usually exceed the standard deduction. Therefore, it is often to their advantage to itemize expenses and file Form 1040.

Parents should be advised to keep accurate records of all expenses related to their child's disability, including date of payment, the name and address of the person providing the service, a brief description of the service provided, and the amount paid. Parents should also obtain receipts for all services.

Parents should further be advised to enclose a letter from a physician explaining the nature of their child's disability and the prescribed care. This is to help the IRS understand the listed claims should the computer single out the return due to high deductions.

B. Possible Deductions:

(Do not use any deduction reimbursed by insurance)

1. Operations and Drugs-Including:

   Any operation advised by a doctor

   Prescription drugs

   Over-the-counter drugs (if recommended by a doctor for the treatment of a specific illness)

   Special food or beverage prescribed by a doctor solely to treat an illness and in addition to normal diet.

2. Special Services - i.e., those necessary to treating the child's disability, including:

   Emergency ward treatment

   Lab fees, x-rays

   Equipment rental

   Ambulance service

3. Special Aids - including: (partial listing)

   Specially designed automobile

   Mechanical lifting devices

   Tape recorder, braille books

   Seeing-eye dog

   Oxygen equipment

   Remedial program to correct dyslexia

4. Therapeutic Activities for Parents - e.g., where a doctor advises the parent to attend meetings, etc.

5. When parents pay for Special Education - where the child attends a special school or institution at the suggestion of a practioner, so long as treatment of the disability is the primary purpose of such a placement. However, in a case where the school primarily served "normal" children and offered remedial reading to any student, no deduction was allowed since the school had no special program to treat the child's disability.

6. Community Residences; Camps - e.g., a specially selected home to facilitate the transition and adjustment from institutional to community living.

7. Transportation - Including:

(Continued, Page 8)

To and from a doctor's office, special school;

To visit a child living away from home;

A trip determined by a physician to be necessary to the child's health;

Cost of meals and lodging on long trips.

8. Child Care Credit - Althouth the Tax Reform Act of 1976 eliminated deductions for employment-related child care expenses, recently enacted tax laws give child care credit. To qualify for the child-care credit, the parent must have:

1. A dependent under fifteen or

2. A spouse or dependent of any age who is incapable of self care.

Taxpayers earn a credit of twenty percent of all household personal care expenses up to $2,000 for one such dependent, and up to $4,000 for two or more such dependents.

C. IRS BOOKLETS RELEVANT TO PARENTS OF CHILDREN WITH DISABILITIES

Publication #17 - Your Federal Income Tax

Publication #502 - Deductions for Medical and Dental Expenses

Publication #503 - Child Care and Disabled Dependent Credit

Publication #526 - Income Tax Deductions for Contributions

These publications are available from Kentucky Association for Retarded Citizens, P. O. Box 275, 833 Main, Frankfort, Kentucky 40601.

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STAFF NOTES

As with any organization, there have been a number of staff changes since the last Advocate. In an attempt to keep you advised we note the following changes:

TOM HECTUS who has been with us since November 1978 as an Assistant Public Advocate, primarily writing appellate briefs, is leaving us effective January 31, 1980. He will be joining the staff of the Louisville-Jefferson County Public Defender office.

KAREN SUDDUTH who was with us for a brief period of time as telephone-receptionist has left to go with another agency in the Department of Justice. Replacing her is TINA HAYS, who had been with us previously and is now returning.

A new librarian, JO ELLEN McCOMB, joined us on January 16, 1980. She has had previous experience at the libraries at Miami University and has just received her Master of Library Science from the University of Kentucky

After a short period we now have a new Messenger-Clerical Assistant. He is MIKE PULLEN who is taking some time off from studies at Kentucky State University.

The London office has recently lost DON FULCHER who has chosen to go into private practice in McKee. He has been replaced by BILL CHAMBLISS, a recent graduate of the University of Kentucky Law School. LINDA HOUNCHELL, a Secretary in the London office since its opening,

(See STAFF, Page 14)

DON'T BE DEFICIENT WHEN THE EVIDENCE IS INSUFFICIENT

The question of the insufficiency of the prosecution's evidence in a criminal case presents numerous procedural traps for the trial defense attorney. Defense counsel's failure to make the proper motion or objection at the appropriate time may preclude review of the issue in the state appellate courts. Similarly, counsel's failure to present the federal constitutional nature of the prosecution's insufficient evidence to the state trial judge may bar the defendant from litigating the issue in a federal forum.

At the conclusion of the prosecution's case in chief, the defense may elect to challenge the sufficiency of the Commonwealth's evidence by a motion for the trial court to direct a verdict of acquittal. Scruggs v. Commonwealth, Ky., 566 S.W.2d 405, 412 (1978). Such a motion may be made because of either (1) the absence of any evidence on one or more of the elements of the charged offense including the identity of the perpetrator or (2) the deficient quality of the evidence presented on one or more of the elements of the charge.

In deciding to make this motion, defense counsel should be aware that Kentucky law indicates that a trial court may permit the prosecution to reopen its case to cure a defect in its proof. See Shaw v. Commonwealth, Ky., 497 S.W.2d 706 (1973); Rogers v. Commonwealth, Ky., 424 S.W.2d 130 (1968). However, the constitutional validity of this practice is suspect.

If the defense motion is granted, then the charge or charges will be dismissed. Scruggs v. Commonwealth, supra at 412. But, if the motion is denied, defense counsel must either stand on the directed verdict motion and decline to present any proof or present evidence to support the defense theory of the case. Id.

(See DEFICIENT, Page 13)

ETHICS: QUANDRIES & QUAGMIRES

QUERY: Is it ethically proper for a criminal defense attorney to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom he knows to be telling the truth?

"A [defense attorney's] belief or knowledge that the witness is telling the truth does not preclude cross-examination, but should, if possible, be taken into consideration by counsel in conducting the cross-examination." ABA Standards, The Defense Function, Section 7.6(b) (2nd Ed. Tentative Draft 1978).

Originally, Standard 7.6(b) of the Defense Function provided that "[a] lawyer's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination, but may affect the method and scope of cross-examination." As originally worded, the standard in question added the caveat that counsel "should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully."

According to the comments accompanying the new version of Standard 7.6(b), for "[t]his standard has been changed to make it clear that it is permissible, if necessary, for defense counsel to cross-examine witnesses who are believed or known to be testifying truthfully." In some situations, unless defense counsel challenges the prosecution's known truthful witnesses through cross-examination, "there will be no opposition to the prosecution's evidence and the defendant will be denied an effective defense." ABA Standards, The Defense Function, supra, History of Standard, Section 7.6.

(Continued, Page 10)

A prosecution witness, for example, may testify in a manner that confirms precisely what the defense lawyer has learned from the defendant and has substantiated by independent defense investigation and pretrial discovery. Nevertheless, "defense counsel may believe that the temperament, personality, or inexperience of the witness provide an opportunity, by adroit cross-examination, to confuse the witness and undermine the witness's testimony in the eyes of the jury." ABA Standards, The Defense Function, supra, Commentary, Section 7.6.

Assume that the defense attorney knows from his client's confidential disclosures that the prosecution witness has testified truthfully about the circumstances of the crime and the defendant's involvement in the incident. Despite his knowledge of the truthfulness of the testimony, the defense attorney wishes to impeach the prosecution witness by proof of the witness's prior felony conviction for theft, pursuant to the rule enunciated in Cotton v. Commonwealth, Ky., 454 S.W.2d 698 (1970). Failure to pursue that line of questioning in some circumstances would constitute unethical conduct as well as ineffective assistance of counsel.

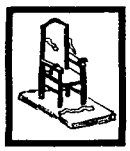
Similarly, defense counsel in a sex offense case may be ethically required to impeach a known truthful prosecutrix by expert psychological or psychiatric evidence as to the witness's prior or present mental disorders. See Mosley v. Commonwealth, Ky., 420 S.W.2d 679 (1967), authorizing this mode of impeachment. In many scenarios a defense attorney could not provide the accused with any defense if he were ethically precluded from engaging in vigorous cross-examination of witnesses either believed or known to have testified truthfully. For example, where the defendant has admitted guilt to the lawyer and does not plan to testify, and the lawyer simply intends to put the state to its proof and raise a reasonable doubt, skillful cross-examination of the prosecution's witness is essential. Indeed, were counsel in this circumstance to forego vigorous cross-examination of the prosecution's witness, counsel would violate the clear duty of zealous representation that is owed to the client. ABA Standards, The Defense Function, supra, Commentary, Section 7.6.

The prosecution in a criminal trial "has the obligation to present the evidence" and "[d]efense counsel need present nothing, even if he knows what the truth is." United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 1947-48, 18 L.Ed.2d 1149. The judicial system's "interest in not convicting the innocent permits [defense] counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth." Id. "In this respect,... we countenance or require conduct which in many instances has little, if any, relation to the search for the truth." Id.

However, defense counsel should be aware that prosecutors are subject to entirely different ethical standards in their cross-examination of known truthful defense witnesses. "The prosecutor's belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination." ABA Standards, The Prosecution Function, Section 5.7(b) (2nd Ed. Tentative Draft 1978; emphasis added). However, "[a] prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully." Id. (emphasis added).

For additional reading on this question, see Monroe H. Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions," 64 Mich. L.Rev. 1469 (1966), and Monroe H. Freedman, Lawyers' Ethics in an Adversary System, Bobbs-Merrill Company (New York 1975).

VINCE APRILE



THE DEATH PENALTY

Death is Different

CAPITAL CASE LAW

In a most thorough opinion addressing many aspects of difficult penalty phase issues, the Fifth Circuit held in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979) that the state cannot, consistent with the Fifth Amendment, use in the sentencing phase any evidence "based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination."

The psychiatric evidence was inadmissible not only because it had been unconstitutionally obtained, but also because it had been introduced without disclosure to the defense. This prevented defense counsel's meaningful challenge or answer to the evidence which supported the death sentence. Gardner v. Florida's, 97 S.Ct. 1341 (1977) command of extraordinary fairness and reliability in the penalty phase was thus violated.

In a related, non-capital case, State v. Pratt, 398 A.2d 421 (Md. 1979), the court determined that the attorney-client privilege was violated when a defense psychiatrist, retained for purposes of an insanity defense, was required to testify as a prosecution witness that in his opinion the defendant was sane. The defendant's assertion of the insanity defense was not a waiver of the attorney-client privilege as to communications between the psychiatrist and defendant. The court strongly implied a federal constitutional basis for the attorney-client privilege by observing that, if the privilege is limited too severely, the guarantee of effective assistance of counsel would be rendered meaningless.

In Menendez v. State, 368 So.2d 1278 (Fla. 1979), the trial judge found the presence of seven aggravating factors and one mitigating. Some of the aggravating factors were not authorized by the statute. The Supreme Court of Florida vacated the sentence of death since the trial judge relied on nonstatutory aggravating circumstances. The sentence was additionally vacated since there was nothing to set his execution murder "apart from the norm of capital felonies."

The necessary implication of the Menedez holding is that such nonstatutory aggravating evidence is inadmissible in the penalty phase.

Eighth and fourteenth amendment death penalty principles are beginning to have applications beyond the capital context. In Rogers v. Britton, 476 F.Supp. 1036 (E.D. Ark. 1979), the defendant had been convicted of first-degree rape, and sentenced by the jury to life imprisonment with no fixed parole-eligibility date. The sentence range was 30 years to life. The Arkansas legislature "obviously thought that some rapes were more blameworthy than others, and that

(Continued, Page 12)

juries would make the appropriate distinctions in fixing punishments case by case. The rub is that the jury in this case was given no guidance in making these distinctions."

The imposition of the life sentence by a jury exercising standardless discretion violated the eighth and fourteenth amendments since without such guidance there was a high risk of an erroneous deprivation of the defendant's liberty. The "articulation and application of sentencing standards before a verdict of life imprisonment is returned" would impose only a minimal burden on the state when compared with the significant "liberty interest" involved and the significant possibility of an erroneous determination.

Certiorari has been granted by the U.S. Supreme Court in two capital cases. In Beck v. Alabama, Ala., 365 So.2d 1006 (1978), cert. granted October 9, 1979, the question at issue is: May a sentence of death constitutionally be imposed after a jury verdict of guilty of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense, and when the evidence would have supported such a verdict?

In Godfrey v. Georgia, Ga., 253 S.E.2d 710 (1979), cert. granted October 9, 1979, the question presented is: In affirming the death sentence, did the Georgia Supreme Court adopt an unconstitutionally broad and vague construction of the aggravating factor that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim?"

How would Godfrey have any application to the Kentucky death statute that does not contain such an aggravating factor? Any decisions on the degree of specificity required for an aggravating factor would almost necessarily apply to mitigating factors such as Kentucky's KRS 532.025 (2)(b)(1): "The defendant has no significant history of prior criminal activity." Defense counsel should request that the jury be instructed that the defendant--as a matter of law--has no significant history of prior criminal decide, then an objection should be entered that the factor is unconstitutionally vague; it fails to provide sufficient bounds on the jury's discretion, and renders a particular jury's determination unconstitutionally arbitrary and capricious.

EDWARD C MONAHAN

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DEATH ROW U.S.A.

AS OF DECEMBER 20, 1979, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE NAACP LEGAL DEFENSE FUND: 593

Race:

Black		237	(39.97%)
Spanish Surname		22	(3.71%)
White		329	(55.48%)
Native American		3	(0.51%)
Oriental		2	(0.33%)
Sex:	Male	585	(98.65%)
	Female	8	(1.35%)

DISPOSITIONS SINCE JULY, 1976

Executions: 3
Suicides: 4
Death Sentences vacated as unconstitutional: 505
Convictions or sentences reversed on other grounds: 206
Commutations: 4

(DEFICIENT, Continued from Page 9)

In the event the defense elects to present any evidence, the defense must make or renew its motion for a directed verdict of acquittal at the close of the entire case. Kimbrough v. Commonwealth, Ky., 550 S.W.2d 525, 529 (1977); Scruggs v. Commonwealth, supra at 412.

If the evidence is sufficient to support a conviction for any offense included in the charge, the sufficiency of the evidence to support a conviction on the charged offense and/or any lesser included offense must be challenged by specific objections to the instructions on those particular offenses. Kimbrough v. Commonwealth, supra at 529; Queen v. Commonwealth, Ky., 551 S.W.2d 239, 241 (1977).

For example, if a defendant is charged with first degree robbery committed while armed with a deadly weapon and the proof supports only a conviction for theft, a motion for a directed verdict of acquittal would not be the appropriate procedural device for challenging the insufficiency of the evidence. Defense counsel must specifically object on the grounds of insufficient evidence to the giving of an instruction on the charged offense and all the lesser included offenses save theft.

When defense counsel moves for a directed verdict of acquittal or objects to an instruction on the basis of insufficient evidence, he must convey to the trial judge both his state and federal grounds for his motion or objection.

Kentucky law dictates that, "[i]f under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." Trowel v. Commonwealth, Ky., 550 S.W.2d 530, 533 (1977). Obviously, the standard of "clearly unreasonable" is also the touchstone for determining whether evidence is sufficient to support an instruction on a charged offense and/ or a lesser included offense. When there is absolutely no competent or probative evidence on one or more of the elements of an offense, there is no analytical difficulty in demonstrating that "it would be clearly unreasonable for a jury to find a defendant guilty." When the motion for a directed verdict or the objection to an instruction is premised on the deficient quality of the evidence, the "clearly unreasonable" gauge is obviously harder to interpret. In this context, defense counsel should recall that KRS 500.070(1) mandates that "[t]he Commonwealth has the burden of proving every element of the case beyond a reasonable doubt," except those elements which the defendant by statute is permitted to prove in exculpation of his conduct.

Thus, even though the Kentucky case law utilizes only a "clearly unreasonable" standard for evaluating the sufficiency of the evidence, statutory law in this jurisdiction requires that the prosecution prove "beyond a reasonable doubt" every element of the case. Adams v. Commonwealth, Ky., 551 S.W.2d 561, 564 (1977). Both state tests for insufficient evidence should be argued to the trial judge.

Under federal constitutional law "a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged ... violate[s] due process." Harris v. United States, 404 U.S. 1232, 92 S.Ct. 10, 12, 30 L.Ed.2d 25 (1971); see Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 665, 38 L.Ed.2d 666 (1974).

Each essential ingredient of the crime charged must be supported by some evidence in the record. Johnson v. Florida, 39 U.S. 596, 88 S.Ct. 1713, 1715, 20 L.Ed.2d 838 (1968). See also Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

But when the deficient quality of the evidence against an accused is judged by a federal constitutional standard "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be ... to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. ____, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id., 99 S.Ct. at 2789.

Even after the jury has returned a verdict of guilty against the defendant, the issue of the insufficiency of the evidence may be resubmitted to the trial court. A motion for judgment notwithstanding the verdict, made pursuant to RCr 10.24, is now the proper method after the verdict to raise a challenge to the sufficiency of the evidence. A motion for judgment notwithstanding the verdict may be joined with a motion for a new trial. RCr 10.24.

Not later than five days after the return of a guilty verdict, "a defendant who has moved for a directed verdict of acquittal at the close of all the evidence may move to have the verdict set aside and a judgment of acquittal entered." RCr 10.24. Similarly, if a defendant has been found guilty under any instruction to which at the close of all the evidence he objected on the ground that the evidence was not sufficient to support a verdict of guilty under that instruction, "he may move that to that extent the verdict be set aside and a judgment of acquittal entered." RCr 10.24.

In drafting the motion for judgment notwithstanding the verdict, defense counsel should again emphasize both the state and federal constitutional grounds for the motion and standards for reviewing the evidence.

In the event that the trial judge grants a motion for judgment notwithstanding the verdict, "the Commonwealth [is] barred from securing appellate review of the judgment n.o.v. by the express provision of [the Kentucky] Constitution." Commonwealth v. Burris, Ky., ____ S.W.2d ____, decision rendered November 26, 1979, citing Section 115 of the Kentucky Constitution.

VINCE APRILE

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(STAFF, Continued from Page 8)

recently resigned. PAUL NEWTON has joined the London office as an Investigator. He is replacing RANDY JEWELL who has been transferred back to his original work station in Russell Springs. Should you need to contact PAUL you can reach him at the London office, telephone (696) 878-8042. For RANDY call (502) 866-2286.

We continue to have a need for a Director-Senior Attorney for the Paducah office. We are looking for someone with roughly two to three years experience, preferably with substantial experience in the criminal courts of Kentucky. If you are interested or if you know someone who might be interested please get in touch with us.

The employees of the OPA would like to welcome the new Secretary of Justice, WILLIAM E. McANULTY. We look forward to working with him during his term. We also would like to welcome GEORGE WILSON, the new Commissioner of the Bureau of Corrections. Many of us have known George during our time with OPA. He is an outstanding person, and we wish him the best of luck.

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(MALPRACTICE, Continued from Page 2)

appointed counsel to that of retained counsel, the Court held:

> "...the primary office performed by appointed counsel parallels the office of privately retained counsel.... His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation."

It should be pointed out that the Supreme Court's opinion was narrow in the sense that it was specifically based upon federal law. The Court explicitly stated that while federal law grants no immunity, the states are nevertheless free to prescribe their own standards relating to immunity. Such immunity is permissible as long as it does not conflict with federal law.

While there are no Kentucky cases on record concerning the liability of public defenders for malpractice, a recent Pennsylvania Supreme Court case, Reese v. Danforth, Pa., 406 A.2d 735 (1979) holds that

> "once the appointment of a public defender in a given case is made, his public or state function ceases and therafter he functions purely as a private attorney concerned with serving his client." 406 A.2d at 739

There can be no doubt that every public defender in Kentucky, both full and part-time, needs to be cognizant of these decisions and of the current trend toward civil liability for court-appointed counsel in criminal cases. While no Kentucky case yet specifically holds public defenders liable, "the handwriting is on the wall" and the ramifications must not be ignored.

While these decisions may, at first, blush, be viewed with skepticism and even dread by some public defenders, the underlying rationale supporting the decisions may well have a positive overall effect on the public defender system. At last the highest court in the land has explicitly and emphatically stated that the role and duty of the public defender parallels the role and the duty of the privately retained defense counsel. The wording of Ferri, hopefully, will succeed in convincing judges, prosecutors, defendants and even ourselves that we are not merely a tool of the system. Our role is, in the truest and most complete sense of the word, that of "advocate" for our client, no matter who pays our salaries or fees.

The highest court in the land now says that we can be expected to make no more concessions or sacrifices than the highest paid retained defense lawyer. That is the underlying rationale of these decisions, and if these cases help to implement these noble precepts and make them a reality in our judicial system, then the best interests of our clients, the best interests of justice, and, in turn, our own best interests will be well served.

Malpractice insurance is available at extremely low rates to Kentucky attorneys engaged in full or part-time public defender work through the National Legal Aid and Defender Association (NLADA). This insurance, of course, does not cover any type of legal activity other than public defender work. Anyone desiring more information about this coverage should contact the NLADA, Suite 601, 2100 M Street, N.W., Washington, D.C. 20037; phone (202) 452-0620.

MARK POSNANSKY

EDITOR'S NOTE

We are heartened by the response by our readers to the survey sent out with the last issue of the Advocate. So far it looks like we're doing some things right and clearly some things wrong. In general, it appears that you want more trial tips, current legal information and in future issues we will try to do that. Some readers used the survey to express opinions about the office as a whole. These opinions, while appreciated, would be even more welcomed if sent as a Letter to the Editor, so we could print your opinions, hostilities and dislikes. And there were a few of those. . . . Many things have been happening lately that have shaken me a good bit. A boy allegedly shoots a state trooper, and flees. The family of the boy is harassed and threatened. Allegedly, a trooper expressed the opinion that the boy would never come back alive. He didn't, of course, and I was depressed and outraged when I considered the cavalier attitude toward conviction beyond a reasonable doubt that this case demonstrated. And yet, I soon realized that I did not give to the trooper who shot the boy the same presumption of innocence that I was so willing to give to the boy himself. The question is, do the law enforcement officers in this Commonwealth, and do we criminal defense lawyers, really believe in the presumption of innocence? Do we get so caught up in the presumption that law enforcement officers will do anything for a conviction that we undermine the very principles that we repeatedly give lip service to? And do law enforcement officers and prosecutors in their zeal to convict lose sight of of the fact that it is their job to uphold the law for all citizens? In that light it was disturbing to see in Fayette County that the prosecutor's office was pursuing a reckless homicide case against a UK instructor whose child wandered away from home and died as a result of "huffing" paint, while at the same time they dropped charges of shoplifting against the wife of a school board member. We do nothing for the criminal justice system when our ideology is used to the detriment of consistency in law enforcement . . . . Let us hear from you.

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