The Advocate

Vol. 2, No. 3 A bi-monthly publication of the Office for Public Advocacy April, 1980

8TH ANNUAL P. D. SEMINAR

On May 18, 19 and 20, 1980 the Office for Public Advocacy will conduct the 8th Annual Public Defender Training Seminar at the Ramada Inn-Hurstbourne in Louisville, Kentucky. This year's program will feature Terence F. MacCarthy, Director of the Federal Defender Program for the Northern District of Illinois.

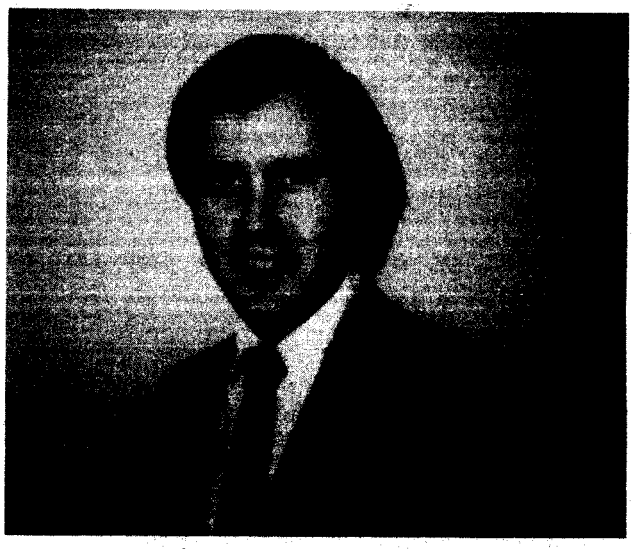
Terence MacCarthy's main presentation will focus on the uses and abuses of opening statements. If his schedule permits, Mr. MacCarthy will also present a session on the tactics and strategy involved in the defense use of character witnesses.

Other sessions will include a comprehensive analysis of procedure and strategy applicable to the defense of a persistent felony offender charge, a review of recent United States Supreme Court decisions in criminal cases and their impact on Kentucky criminal law

(See Seminar, Page 2)

INSIDE

THE ADVOCATE FEATURES. . .



Dave Johnstone of the Jefferson District Public Defender is a true veteran of the public defender system. After graduating from the University of Kentucky with a degree in history in 1971, Dave attended the University of Louisville Law School. He began work at the Louisville Public Defender Office in May of 1974 and he has worked there ever since.

Dave is now the chief trial attorney of the adult division. He carries his own caseload and supervises eleven people. He is also teaching a trial practice seminar at the University of Louisville where he is responsible for eleven interns in the court system.

(See Johnstone, Page 2)

(SEMINAR, Continued from Page 1)

practice, an evaluation of both the legal and psychological aspects of the penal code concept of "extreme emotional disturbance," defense tactics to counter the prosecution's use of hypnosis to revive a witness's memory, and practical demonstrations on procedural and evidentiary trial problems.

Following the format introduced last year, on Sunday, May 18, at 7:30 p.m., immediately following the close of registration, the substantive portion of the seminar will begin with an instructional session. To conclude Sunday's program the seminar will present a 95-minute feature film specially selected to illustrate the dynamics of the jury function within the criminal justice system.

On Monday evening, the seminar will simultaneously present several informal elective sessions on various topics. Each participant will be free to choose whichever session most appeals to his or her interests or specific training need.

The registration fee for this year's seminar is $50.00 per attorney. For Kentucky public defender attorneys this fee will cover registration, meals and accommodations. The seminar will provide breakfast and lunch on Monday and Tuesday, May 19 and 20, but participants will be required to obtain at their own expense the evening meal on all three seminar days. Additional charges will be made for any Kentucky public defender attorney who desires either a private single room or a private double room.

As presently scheduled, this seminar should qualify for fourteen (14) hours of credit from the Kentucky Bar Association Continuing Legal Education Commission.

(JOHNSTONE, Continued from Page 1)

Dave says that while he is not a "do-gooder" it rankles him to see poor people treated unequally by any system. He describes himself as a firm believer in equal protection who tries to give his clients the best possible representation.

Dave has tried more than fifty cases before juries and feels that he has learned a great deal from that experience. The case that meant the most to him was a case of alleged welfare fraud. The state spent a lot of money prosecuting the case, and the trial lasted three days. It took the jury less then ten minutes to acquit his clients. Dave sees this case as a prime example of waste of money by the state.

Dave believes that the key to being a good public defender without letting the job get to you too much is to maintain a sense of humor and to draw support from your fellow public defenders. He really likes the sense of camaraderie among public defenders. He also finds teaching rewarding.

Dave recognizes that it is difficult to keep the human misery that a public defender sees around him from affecting him so much that his performance of his job suffers. He feels that when a client thanks him that it makes all the hard work worthwhile.

In the spare time that he has Dave is an avid snow and water skier. He also likes to play racquet ball.

Thank you, Dave, for your long and outstanding service as a public defender.

****

WEST'S REVIEW

During the months of January and February only two published opinions were issued in criminal cases by Kentucky's appellate courts.

In Phillips v. Commonwealth, 27 K.L.S. 2 at 9 (February 8, 1980), the Court of Appeals confronted the question of whether a witness' out-of-court statement can be introduced under Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969), when the witness has refused to give any testimony. A witness, called at the defendant's trial for arson, refused to respond to examination by either the commonwealth or the defense. Over defense objection, the commonwealth then introduced testimony concerning an out-of-court statement by the witness, and played a tape of the statement for the jury. The Court of Appeals reversed, reasoning that the witness' refusal to testify rendered the statement inadmissible because it precluded the laying of a proper foundation for the statement's introduction and denied the defendant the opportunity for cross-examination. The Kentucky Supreme Court had previously suggested the adoption of such a rule in dictum in Owsley v. Commonwealth, Ky., 458 S.W.2d 457 (1970).

The Kentucky Supreme Court has affirmed the holding of the Court of Appeals in Commonwealth v. Keller, Ky.App., 26 K.L.S. 14 at 3 (October 19, 1979). Keller v. Commonwealth, Ky., 27 K.L.S. 2 at 13 (February 12, 1980). The Supreme Court found that the Court of Appeals properly granted a writ of prohibition sought by the commonwealth after the Fayette Circuit Court refused jurisdiction of a misdemeanor joined with a felony in an indictment. The Supreme Court found that KRS 24A.110(2) creates an exception to the misdemeanor jurisdiction of the district courts with regard to misdemeanors joined in an indictment with a felony.

During the period under review no pertinent opinions were issued by the U.S. Supreme Court. However, in an extremely interesting opinion, the Sixth Circuit Court of Appeals has held that a state's action in withholding the retroactive benefit of a new statutory interpretation from a defendant on the grounds that he failed to assert the right at trial may be a denial of due process. Isaac v. Engle, 6th Cir. ___ F.2d ___ (February 8, 1980). The defendant in Isaac claimed self-protection as a defense. In accordance with the then interpretation of governing Ohio statutes, the trial judge instructed the jury that the defendant must prove this affirmative defense by a preponderance of the evidence. No objection to this instruction was made. Subsequent to the defendant's conviction, the Supreme Court of Ohio, based on its revised statutory interpretation, discarded the rule that affirmative defenses must be proven by a preponderence of the evidence. The court specifically held its decision to be retroactive. On appeal, Isaac argued that the new rule was applicable to his case. Although agreeing that the revised rule was applicable to Isaacs, Ohio's appellate courts held that he had waived the error by his failure to object at trial. The Sixth Circuit granted habeas corpus relief, holding that the state's application of its contemporaneous objection rule to Isaac violated due process inasmuch as there was no basis for an objection at the time of Isaac's trial. The decision is interesting for its holding that a state application of its contemporaneous objection rule may be constitutionally impermissible under some circumstances.

****

OFFICE FOR PUBLIC ADVOCACY
POLYGRAPH PROCEDURES

Within the Investigations Section of the Office for Public Advocacy are two Polygraph Examiners: Orlester H. Mahoney and James F. Lord, who travel statewide, administering polygraph examinations to indigents accused of felonies. They can be reached at (502-564-3765) or (502-564-5257).

Upon arrival at a public defender's office, the examiner should be given a copy of the indictment plus an informal memorandum, giving the accused's version and, if possible, the police version of the incident.

Only the examiner and the accused are in a room during the examination. The room should contain two chairs and a table/desk. A quiet area is essential and if the room has windows, they should be covered during the actual examination. The defender should bring the client to this room and introduce him to the examiner. The public defender should make arrangements for the room and any necessary security precautions beforehand.

During the pre-examination interview, the client signs a notarized (if possible) "Office for Public Advocacy Consent to Take the Polygraph Examination" form. The examiner then reviews the incident/charge with the accused, (alone), prepares questions to be used during the examination, reviews these questions with the accused so that he/she thoroughly understands them, then re-asks the same questions during the actual examination. No trick questions are asked during the course of the examination. During the post-interview, the examiner will approach the client regarding any deceptive responses if so desired by the public defender. Upon completion of the examination, oral results will be presented to the public defender, followed by a written report (if desired) as soon as practical, usually within three days.

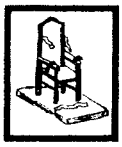
Polygraph examinations should be considered only as a supplement to a thorough and complete investigation. The effectiveness of the polygraph examination is dependent upon the public defender, investigator and examiner all working together as a team; never withhold any pertinent/relevant information from the examiner regarding the case. When asking a client to take a polygraph examination, inform him/her that only the offense of which he is charged will be covered during the examination. Inform the client that taking a polygraph examination is the best way to verify that he is telling the truth. If the client volunteers to take a polygraph examination, advise him/her to get a good night's rest, do not drink intoxicants and take no unnecessary medication or medicine prior to the examination. Explain to the client that only his attorney/public defender will receive the results of the examination unless a stipulation has been made.

There are several factors that may prohibit administering a polygraph examination. A polygraph examination will not be conducted on any client if the examiner feels the subject to be physically or mentally unfit or that the examination may be a detriment to the client's health. If the client is a juvenile, his/her parent or guardian, or the juvenile judge of the jurisdiction, must sign a form giving permission for the child to be examined. A pregnant woman will not be given a polygraph examination, nor will a person with a known serious heart condition.

In conclusion, the purpose of a polygraph examination is to determine if a person is telling the truth. If this can be scientifically determined, the public defender can then better evaluate the evidence and determine what his next steps should be in best representing his client.

Hopefully, the above procedures will facilitate the use of the polygraph by public defenders in the future.

****



THE DEATH PENALTY

Death is Different

LIFE/DEATH UPDATE

Over the last several months death has been avoided in a number of capital cases in this state. Death was returned in two capital cases.

Rejecting the Commonwealth's plea for a murder conviction and a sentence of death, a Maysville jury convicted Gary Wilson of manslaughter of a Maysville city policeman and sentenced him to 20 years. He was represented by private counsel. It was reported in a Kentucky Post and Times article that legal fees to defend him exceeded $10,000.

Myron Gleberman, 59, was convicted in Kenton County of hiring men to murder his wife, 50, and mother-in-law, 72. The key prosecution witness was a convicted felon who is serving a 50 year federal sentence.

An Assistant Jefferson County Commonwealth Attorney asked the circuit judge to dismiss a death penalty indictment against Larry Bendingfield. Numerous challenges were made to the four year delay in indicting the defendant, and to the constitutionality of the death penalty. The court granted the requested dismissal. Larry was defended by Gail Robinson and Kevin McNally of this office.

Gene Dauer, the 5th judicial circuit public defender, represented Gary Brooks in a capital case involving murder and robbery charges. Gary pled guilty and was sentenced to life imprisonment.

Bill Nixon, director of the OPA's London public defender office, represented Michael Gerald in a Madison County death penalty case. In that case, which was transferred to Lexington on a change of venue, Mike pled guilty and was sentenced to 20 years imprisonment. Bill was assisted by Kevin McNally of this office.

In Louisville David Becker was represented by retained counsel and was acquitted of raping and killing his 9-year-old niece and killing his parents. Over $70,000 was expended in his defense according to a March 7, 1980 Louisville Times article. The money was used for the following: 3 attorneys; a private investigative force; a psychic; a hypnotist; a polygraphist; scuba divers; a psychiatrist; a tape recording expert; a former New York City Chief Detective; a California criminologist; a forensic pathologist; a helicopter for aerial photos; a testing laboratory; a graphic design firm; video taping; and a psychologist for jury selection. The defendant was acquitted of all charges.

Also, in Louisville, Carl Green, 25, was charged with 12 felony counts, including capital murder (intentional), first degree burglary and first degree rape of a 78 year old woman. He was convicted of wanton murder thus excluding the possibility of a death sentence, and his punishment was fixed at life imprisonment. Carl was represented by John Curtas and Bill Grimes, Louisville public defenders.

Janice Hurt, 22, who was charged with murdering her mother and father, and on a plea to two counts of murder she received two twenty-five year sentences. Janice was represented by Tim Riddell of this office, assisted by Marvin Prince of Benton.

Jeff Cummins was charged with the intentional murder of a Kentucky State Policeman. He pled guilty to murder, and the Franklin Circuit Court sentenced him to life imprisonment over the Commonwealth's recommendation of death. Judge Squire Williams stated that he could not in good conscience sentence Jeff to die under all the circumstances of the case. Jeff was represented by Mike Judy, a Frankfort public defender, and was assisted by Ed Monahan of this Office.

In a Warren County capital prosecution of Sherill Harston for double murder of his girlfriend and her five year old son, the jury convicted him of one count of murder and one count of manslaughter and imposed a sentence of 99 years on the murder count and 20 years on the manslaughter count. Bill Radigan and Flora Stuart represented Sherill in the two week trial. Individual, sequestered voir dire lasted five days. In excess of 75 jurors were struck for cause.

David King, 30, who had been previously convicted of armed robbery in Florida and Ohio was charged with murder and kidnapping of a hotel clerk by tying him to a tree and shooting him. He pled guilty to life imprisonment. The court permitted payment of expert witness fees for both a hypnotist and handwriting expert. King was represented by Kevin McNally and M. Gail Robinson of this office.

In March of 1980 in Breathitt County and Jefferson County, Gary White and Brian Keith Moore were convicted of murder and sentenced to die in the electric chair. It was October 6, 1978 -- one year and six months ago -- when the last death penalty was returned in this state.

x x x x x

I may be wrong but it seems to me that the message from the death penalty defenses in this state is that the marshalling of sufficient resources precludes the imposition of the sentence of death. This being the state of the criminal justice system, the intentional killing of the unlucky or those not wealthy is not an acceptable endeavor of society.

ED MONAHAN

GLOSSARY OF CORRECTIONS TERMINOLOGY

In this and future issues of The Advocate a number of terms used in relation to corrections will be defined. If you have come upon any terms which you cannot define or which would be of benefit to other readers of The Advocate please send them to the PCSD at the central office.

1. Adjustment Committee:

   A 3-5 member institution committee composed of treatment and security staff to determine what disciplinary actions should be taken in cases of reported rules violations by inmates.

2. Administrative Control Unit:

   A maximum security housing unit for confinement of residents who present a serious threat to other inmates or staff.

3. Administrative Segregation:

   A maximum security unit for confinement of residents awaiting Adjustment Committee action, disciplinary transfer, or other action, and for residents who voluntarily request it out of fear for their own personal safety among the general population.

4. Admission and Orientation Unit ("Fishtank"):

   Diagnostic Unit at Kentucky State Reformatory where all new residents spend their first month. During this time they are tested, interviewed, and involved in developing an initial classification and treatment program.

THE DEFENSE PSYCHIATRIST AND THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is given on the grounds of public policy in the belief that the benefits of the privilege justify the risk that otherwise relevant information may be suppressed. Adequate legal representation carries as a prerequisite the full disclosure of the facts by the client to his attorney. Unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks may be unfavorable facts. Given the privilege, a client may make such a disclosure without fear that his attorney may be forced to reveal the information confided to him. "[T]he absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent." 8 Wigmore on Evidence Section 2380a.

Traditionally, this privilege would extend only to direct confidential communications between the attorney and the client - the presence of a third party would serve to defeat the privilege. See, e.g., Hyden v. Grissom, 306 Ky. 261, 206 S.W.2d 960 (1948). Similarly, communication to a third party was regarded a defeating the confidentiality of the privilege.

However, the more modern view has extended the privilege to cover those third persons who, of necessity, assist the attorney in his practice of law. Without question, the complexities of the modern practice of law precludes an attorney from effectively handling a client's affairs without the direct assistance of other individuals. Such assistants (secretary, law clerks, messengers, investigators and the like) must frequently have almost as much information as to the confidential business of the client as the attorney himself. For this reason, numerous courts have concluded that "it would be clearly against [the attorney-client privilege] to allow such an assistant to be subpoenaed and required to testify" concerning confidential communications. Taylor v. Taylor, Ga., 117 S.E.2d 582, 583 (1934) (clerk and secretary); Wartell v. Novograd, RI, 137 A 776 (1927) (law student); United States v. Kovel, 296 F.2d 918 (2nd Cir. 1961) (accountant); and People v. Knippenberg, 66 Ill.2d 276, 362 N.E.2d 681 (1977) (defense investigator).

The inclusion of this principle in 8 Wigmore on Evidence Section 2301 raises it to the level of black letter law:

> It has never been questioned that the privilege protects communications to the attorney's clerks and his other agents (including stenographers) for rendering his services. The assistance of these agents being indispensible to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents. (emphasis added).

When, in the course of preparing for a criminal trial, a defense attorney becomes aware of the possibility of a psychiatric defense (insanity, extreme emotional disturbance, diminished capacity, competency to stand trial), the need for consulting a psychiatrist or psychologist becomes apparent. As Chief Judge Haynsworth explained in United States v. Taylor, 437 F.2d 371, 377 at fn. 9 (4th Cir. 1971):

> The assistance of a psychiatrist is crucial in a number of respects to an effective insanity defense. In the first place, the presence or absence of

(Continued, Page 8)

> psychiatric testimony is critical to presentation of the defense at trial.
>
> . . .
>
> Moreover the use of an expert for other, non-testimonial, functions can be equally important. Consultation with counsel attunes the lay attorney to unfamiliar but central medical concepts and enables him, as an initial matter, to assess the soundness and advisability of offering the defense. The aid of a psychiatrist informs and guides the presentation of the defense, and perhaps most importantly it permits a lawyer inexpert in the science of psychiatry to probe intelligently the foundations of adverse testimony.

Simply put, it would be a fool-hardy lawyer who would attempt to determine tactical and evidentiary strategy in a case with psychiatric issues without the guidance and interpretation of psychiatrists and others trained in this field.

It is for this reason that a number of courts have analogized an attorney's consultation with a psychiatric expert to the use of an interpreter or accountant, without whom neither the attorney or client could understand the significance of the client's information. As was stated in Pratt v. State, 39 Md. App. 442, 387 A.2d 779, 783 (1978):

> As the assistance of a psychiatrist is essential where the criminal responsibility of a client is in question, we hold that communications made to a psychiatrist for the purpose of seeking legal advice are within the scope of the attorney-client privilege.

Similarly, the court in United States v. Alvarez, 519 F.2d 1036, 1046 (1975), explained:

> We see no distinction between the need of defense counsel for expert assistance in accounting matters and the same need in matters of psychiatry. The effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting. If the expert is later used as a witness on behalf of the defendant, obviously the cloak of privilege ends. But when, as here, the defendant does not call the expert the same privilege applies with respect to communications from the defendant as applies to such communications to the attorney himself.

The vast majority of courts and commentators that have considered the question have agreed that any pretrial consultation between an attorney and psychiatric expert falls under the protection of the attorney-client privilege. See, e.g.: City and County of San Francisco v. Superior Court, Cal., 231 P.2d 26 (1951), (consulting physician); People v. Hilliker, 29 Mich.App. 543, 185 N.W.2d 831 (1971), (defense psychiatrist); Jones v. Superior Court, 58 Cal.2d 56, 372 P.2d 919 (1962); State v. Kociolek, 23 N.J. 400, 129 A.2d 417 (1957); F. Wharton, Criminal Evidence ¢ 559 at 79 (13th ed. 1973); and C. McCormick, Evidence Section 91 at 188 (2d ed. 1972). Consequently, communications made to a psychiatric expert for the purpose of seeking legal advice fall within the ambit of the attorney-client privilege and are not subject to pretrial discovery.

BILL RADIGAN

APPELLATE ISSUES LOOKING FOR A CASE PERSISTENT FELONY OFFENDER PROCEEDINGS

Over the last five years, the legislature has made four attempts to draft a satisfactory statute dealing with persistent felony offenders. Possibly because of these frequent revisions, there is little case law interpreting the provisions of the statute or its application. The following discussion sets forth some of the potential issues in PFO proceedings.

Indictment Issue In some counties, the substantive (or principal) offense and the persistent felony offender charge are being returned in separate indictments. It would seem that this is an impermisible practice that should bar the enhancement of the sentence received on the substantive offense. KRS 532.080 "does not create or define a criminal offense". Hardin v. Commonwealth, Ky., 573 S.W.2d 657, 661 (1978). Rather, it is an enhancement provision that addresses itself "only to the penalty" that is applicable to persons who have attained the status of being persistent felons. Luna v. Commonwealth, Ky. App., 571 S.W.2d 88, 89 (1977) and Hardin, supra. Since it is the duty of the grand jury to charge only offenses (RCr 5.02) and since an indictment is only sufficient when it charges a specific offense (RCr 6.10), the grand jury has no authority to return a separate indictment alleging only the defendant's status as a persistent felon. Clearly, the status itself, standing alone, cannot support a criminal sentence. See State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977). For these reasons, the sentence given for a substantive offense should not be subject to enhancement pursuant to KRS 532.080 unless a single indictment charges both the substantive offense and the prior felony convictions that give the defendant his or her persistent felon status. This issue probably should be raised when the court initiates the persistent felon phase of the bifurcated trial.

Double Jeopardy Issue This issue arises where one or more of the prior convictions used to support enhancement of the sentence received on the principal offense was used in an earlier PFO proceeding to enhance the sentence on another offense. This use of the same essential element (i.e., the same prior conviction) to elevate the sentences of both the previous and present substantive offenses may be a violation of the double jeopardy guarantee under the 5th and 14th amendments. See Sherley v. Commonwealth, Ky., 558 S.W.2d 615, 617-18 (1977). The appellate court of Texas has repeatedly held that the same conviction cannot be used twice to enhance a defendant's punishment to persistent felony offender levels in two separate cases. Ex parte Montgomery, 571 S.W.2d 182 (Tex. Ct. Crim. App. 1978); Ex Parte Williams, 571 S.W.2d 26 (Tex. Ct. Crim. App. 1978).

Affirmative Evidence The defendant should be permitted to present mitigating evidence at a PFO sentencing hearing. The refusal to permit the introduction of such evidence may result in a denial of due process and a fair trial in violation of the 6th and 14th amendments to the U.S. Constitution and Section 11 of the Kentucky Constitution. Kentucky appellate courts have recognized that jurors have the right in PFO proceedings to disregard conclusively established proof of prior convictions. Satterly v. Commonwealth, Ky., 437 S.W.2d 929 (1969). In Coleman v. Commonwealth, 276 Ky. 802, 125 S.W.2d 728, 729 (1939), the Court explained why juries occasionally disregard prior convictions in such cases by stating that "[p]erhaps they deemed the principal crime for which the accused was being tried not to merit such severe punishment or that the character of the man himself did not justify it." This explanation by the Court implicitly presumes the ability of the defendant to present mitigating evidence for the jury's consideration. The defendant has the constitutional right to have the sentencer consider as mitigating factors

any aspect of his or her character and any aspect of the offense that he proffers. Cf. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978).

Instructions When the evidence warrants an instruction on being a first degree persistent felon, the trial court, upon request, must also instruct on being a second degree persistent felon. Berning v. Commonwealth, Ky., 550 S.W.2d 561 (1977); See also Satterly v. Commonwealth, Ky., 437 S.W.2d 929 (1969) and Boyd v. Commonwealth, Ky., 521 S.W.2d 84 (1975).

KRS 532.080(3) provides that a person may be convicted of being a first degree persistent felony offender if he is more than 21 years old and has been convicted of two or more felonies. In order for a felony conviction to qualify as a "previous felony conviction" under the PFO scheme, the prosecutor must prove: a. that the defendant was sentenced to at least one year in prison for the offense, b. that he was over age 18 at the time the offense was committed, and c. one of the following: (1) that he completed service of the sentence within 5 years of the date of the commission of the principal offense; or (2) that he was on probation or parole for the offense at the time of the commission of the principal felony; or (3) that he was discharged from probation or parole for the offense within 5 years prior to the date of the commission of the principal offense. KRS 532.080(3)(c). Some trial courts are interpreting KRS 532.080(3)(c) to require that only one of the prior convictions satisfy one of the three listed categories. Object if the court's instructions do not require that each of the prior convictions satisfy at least one of the (3)(c) categories. Under the older version of the statute, both of the prior felony convictions were subject to the requirement that the defendant had been discharged from probation or parole on the conviction within five years of the commission of the principal offense. The 1976 amendment broadened the circumstances in which a prosecutor could seek a persistent felon indictment by saying that a prior felony conviction could now satisfy one of the three categories listed in (3)(c). The confusion over the meaning of the amendment arises from the use of the word "any" in 3(c)(1), (2) and (3), i.e., "That the offender. . . [c]ompleted service of the sentence imposed on any of the previous felony convictions within five [5] years. . . ." The most logical and consistent interpretation of this provision suggests that the word "any" was used to indicate that while both prior convictions had to satisfy one of the three categories enumerated in (3)(c), they both need not satisfy the same category. One conviction could fall within one category while another came within one of the other categories. Moreover, if there is any doubt in the interpretation of the language of a statute whose sole purpose is to enhance punishment, it must be construed strictly against the state and liberally in favor of the defendant. Gressman v. State, 500 P.2d 1092, 1095 (Okla. Ct.Crim.App. 1972); Black v. Erickson, 191 N.W.2d 174, 176 (1971); Moore v. Coiner, 303 F.Supp. 185, 188 (ND W.Va. 1969). If the prosecutor introduces evidence on the KRS 532.080(3)(c) categories for only one of the prior convictions, a motion for a directed verdict should be made with respect to the first degree persistent felon charge.

NOTE: A much more extensive presentation on the defense of this type of case is planned for the 8th Annual Public Defender Training Seminar which will be held in Louisville in May.

DONNA PROCTOR

****

TRIAL TIPS

A CHECKLIST OF CROSS-EXAMINATION: CONCEPTS AND TECHNIQUES

The following is an article written by Steven C. Rench, Esq., and reprinted here with his permission. Mr. Rench is one of this country's leading experts on cross-examination and thus we are honored to include this article in The Advocate.

Far too often a cross-examination consists of a number of unplanned questions without purpose filling in gaps in the prosecutor's case, repetition of direct testimony, and argument with the witness, all having the net effect of making rather than helping the cross-examiner's cause.

It is the purpose of this article to assist the cross-examiner in avoiding these difficulties by utilizing a systematic approach to this most challenging art.

A. GENERAL OBSERVATIONS

The only absolute rule in the trial of a case is that everything one does, including in cross-examination, must be done with consideration of the jury's belief in one's integrity and the integrity of one's case.

In this article will appear what might be considered to be rules of cross-examination. They are not to be considered as rules. They are to be considered more as red flags since experience demonstrates that most mistakes in cross-examination are made when these red flags are disregarded. But there are circumstances when a violation is precisely the proper tactic. If these are regarded not as rules but as presumptions and the reasons for them and the dangers to be avoided are understood, then the attorney can exercise the necessary judgment.

Judgment, not rules, must determine what the cross-examiner does.

Cross-examination is a very difficult art. No reading of this article can begin to make one proficient. It takes a very deep understanding of the considerations involved, experience and an ability to make immediate judgments and to execute without having time to think. Most cross-examinations are conducted without real prior thought having been given to what is involved in cross-examination. None of this should be discouraging, however, since being an excellent examiner will come gradually with study and experience.

The concepts and techniques important to cross-examination are overlapping and not subject to being placed into neat categories or lists. This must be kept in mind while considering the concepts and techniques listed here. It is often a combination that is useful.

It should be noted that some techniques are designed to persuade a witness to answer a question a particular way. These techniques should not be employed except to elicit an answer the examiner believes to be the truth.

Behind the concepts and techniques discussed here is psychology. We deal with what the examiner can do to produce the desired conduct on the part of the witness.

The cross-examiner must have a considerable number of concepts and techniques that are a "part of him" and are "second nature."

It is felt that the attorney is aided in this process by having cross-examination analyzed and a terminology applied to the concepts and techniques that are recurring. This is done in sports and other endeavors and it is hoped it can be useful in cross-examination as well, thus justifying the approach of this article.

B. PREPARATION IN GENERAL

At least 70% of the effectiveness of cross-examination is determined before the cross-examination begins. Preparation is that important!

1. The Process of Preparation

The trial attorney does not go down a list of things to do and then consider he is finished because he has gone through the entire list. In a general way, he will go through preparation in the order listed here. But all these matters are being considered by the trial attorney simultaneously. Further, some thought emerging during the last phases of planning the individual cross-examination may result in additional investigation or changes in the trial plan. The process never really ends until closing argument is completed.

2. Background Development

a. General Knowledge

A knowledge of the area covered by the testimony is a first requirement. One cannot cross-examine in a vacuum. If the witness is an identification witness, a knowledge of identification in general is essential. The same applies as to psychiatry if the witness is a psychiatrist or to criminal investigation techniques if one is to cross-examine the investigating detective. It is, of course, not possible to attain expertise in all areas but the more general knowledge one possesses the more efficient and successful one can expect the cross-examination to be.

b. Specific Knowledge

Closer to home is the required knowledge of available approaches to the particular kind of testimony in question and methods of demonstrating weaknesses in that testimony. Criminal trial attorneys are sharing approaches as never before.

C. PREPARATION OF THE CASE

Learning everything possible about the individual case is absolutely vital. Since that is dealt with elsewhere, we will only briefly discuss certain concepts particularly applicable to cross-examination. First learn all the facts possible. The natural tendency is to investigate only those matters the importance of which is obvious before the trial. This is not sufficient since witnesses unexpectedly testify at trial to things which could be refuted if the contrary facts were known.

1. Prepare a Trial Notebook

Important to cross-examination are separate pages in this notebook for each witness so all points for the examination of that witness can be listed as they occur to the attorney.

2. Develop a Trial Plan

A coherent, consistent defense position must be determined prior to trial. Once the defense position is formulated, each individual part of the trial -- voir dire, opening statement, cross-examinations, etc. -- is tailored to advance this trial plan.

3. Factual Analysis

As mentioned previously, one must know every fact possible. In addition, thought must be given to what might be termed latent facts - facts which are not found in statements, etc. but which are available only on thought. Much of what the defense relies on is what was not done. The fact that the detective completed three investigatory procedures is a fact. The seven others that should have been completed and were not constitute latent facts. Consideration of what was not done leads to a cross-examination demonstrating inadequacy of investigation.

Thought about motives, reasonableness of actions, etc. will reveal additional latent facts.

4. Relate Cross-Examination to Summation

Important to effective cross-examination is the realization that the cross-

examination and summation go hand-in-hand. The most important purpose of cross-examination is to gather material for closing argument. The examiner must know what he intends to say in closing so the necessary supporting material will be gathered.

5. Panning for Gold

To insure that questions asked on cross-examination elicit only favorable or useful responses, much work before trial is required.

A useful concept is "panning for gold." In searching for gold, the prospector used a pan to lift material from the bed of a stream. He would swirl the pan causing any gold nuggets to sink to the bottom and would then throw away the useless material keeping only the nuggets. The defense attorney should utilize discovery, preliminary hearings, hearings on motions, witness interviews, etc., to find out everything favorable to the defense (the nuggets) to which the witness will testify. The attorney can then ask about that which is favorable and nothing else.

6. Pinning Down the Witness

Once you have the "nugget" it is important to "pin down" the witness. This means having a way of proving the witness stated the favorable thing in case the witness testifies differently on the stand. Written or signed statements, testimony at the preliminary or other hearing, and statements heard by other persons are all useful.

7. Create Inconsistencies

The fact that inconsistencies exist can be used with telling effect in summation. The attorney needs to use a tough approach if the inconsistency shows calculated change in testimony and a more tolerant approach if the inconsistency merely shows lack of certainty in perception or in memory.

The word "create" is used because that is exactly what can be done at various stages before trial. Before trial, the inclination of the defense must be to get the witness to talk and recollection of witnesses being as poor as psychology and our experience demonstrates it to be, inconsistencies will result. The attorney should not, however, leave the matter to chance. He should be sure the same subjects are brought up repeatedly since statements cannot be inconsistent unless on the same topic. For example, on preliminary hearing, bring up the items previously covered by the witness in his statement to the police. Bring up the same matters in interviewing the witness. By trial, the attorney will have various inconsistencies ready to be used. The important consideration is to be cognizant of the need to do this during preparatory phases of the case.

At this point, we have learned the facts, have a trial plan, have learned what is favorable to us and have the witnesses pinned down on the favorable material. We are now ready to plan the individual cross-examination.

D. THE PREPARATION AND CONDUCT OF THE INDIVIDUAL CROSS-EXAMINATION

A number of factors must be kept in mind to insure a planned, disciplined, safe and effective cross-examination.

1. Cross-Examine by Objective - Advance the Trial Plan

Management experts teach that "management by objective" is essential for achievement. The same applies to cross-examination. Many rambling and haphazard cross-examinations are so because the examiner is "just asking questions" without any apparent goal or objective in mind. If the examiner were stopped before the cross-examination and asked his goal or objective, he should have an immediate clear answer. The overriding objective must be to advance the trial plan by getting favorable material to be used in the closing argument. If a proposed question does not advance the trial plan, it

is unlikely to serve any useful purpose. Further, by knowing the objective of a particular cross-examination the specific questions to ask are apparent and it all falls into place.

2. Tailormake Each Cross-Examination

The natural tendency of the trial attorney is to use the same manner and same technique for every cross-examination he conducts. This is analogous to the surgeon who uses the saw for everything he does. The examiner must develop a repertoire of devices, techniques, etc. and choose the appropriate instrument for the specific situation. Having his objective firmly in mind the attorney chooses the proper tactic to elicit the testimony which satisfies that objective.

3. Make the Examination Psychologically Sound

The witness testifying is engaged in human behavior. Witnesses react differently. One witness if pushed may back down while another witness if pushed may remain firm and thus strengthen his testimony.

The examiner must choose the techniques to be used, the wording of the questions, the sequence of the question, etc. which will cause the human behavior (the testimony) the attorney desires.

4. Get Favorable Facts

The terms "favorable facts" refers to those facts which support the constructive position taken by the defense as opposed to impeachment. These are facts, for example, which would support a conclusion of misidentification if that were the defense. Obtaining the favorable facts from the opposing witness is often ignored in the zeal to destroy him by impeachment. Instead it should be first priority.

5. Be Conservative

Cross-examination is dangerous! It often happens in our courts that the defendant is convicted by evidence elicited by the defense attorney - evidence which fills in the gaps in the prosecutor's case or is extremely prejudicial to the defense. The impact is several times as great when the harmful evidence comes on cross-examination.

Several of the succeeding points are designed to reduce mistakes of commission in cross-examination to a minimum. Also the suggestions in the section on Preparation will make gambling in cross-examining far less necessary.

6. Consider No Cross-Examination

If there are no favorable facts to be elicited, the presumption should be in favor of no cross-examination. Saying "No cross-examination, your Honor" effectively communicates to the jury that the testimony was not important.

A second strategy consideration is important. If a witness is "solid," develop, if possible, a defense position that recognizes the testimony as true. Aim the defense attack against a weaker point of the prosecution so no cross-examination is needed on the "solid" point.

7. Don't Question Without Purpose

It seems the natural tendency is to feel that it doesn't hurt to ask and "something might turn up." Occasionally something does turn up but the percentages are substantially against the good outweighing the bad. The attorney should be in a really desperate situation before he resorts to an "all over the place" "vigorous" cross-examination.

8. Don't Permit Repetition of Direct Testimony

Once again the natural tendency results in emphasizing the prosecution's

evidence. The attorney has just taken notes of the direct examination and uses those notes for cross-examination. He starts out by saying, "Mr. Witness, you just testified that _____, is that correct?" and proceeds through the entire direct testimony cementing that testimony in the minds of the jurors.

9. Don't Fight Losing Battles

For various reasons attorneys ask questions knowing full well that the answers are likely to be harmful to his case. Often he does this because he wishes the witness to make extensive admissions when such wishes are not realistic. It is better to know what admissions are possible and get just those than to try for too much and elicit denials. Further, the attorney often feels that all testimony must be cross-examined or he is not doing his job. This results in emphasizing the damaging evidence and greatly increases the harmful effects from it.

It is essential to note here that the cross-examination that fails doesn't just accomplish nothing. It is harmful. It has the effect of making the testimony like cold hard steel because "it stood up on cross-examination." Testimony not cross-examined may attract less attention, may not be believed or may be considered of lesser importance thus having less negative impact.

10. Don't Question Without Knowing The Answer

This oft-repeated admonition is still violated in the vain hope that the answer will be something beneficial. It is a gamble which will likely produce results devastating to the examiner's case.

11. Don't Argue with the Witness

A large percentage of cross-examinations consist of an attorney arguing with the witness in an attempt to get the witness to agree with the attorney. Any dispassionate look convinces that this attempt is based on wishful thinking. The witness sticks to his previous conclusion and the attorney has fought a losing battle.

12. Deal with Facts, Not Conclusions

A witness is highly unlikely to change his testimony and agree with the attorney on matters of conclusion. One can more easily get agreement with facts from which the attorney can reach his own conclusion on summation.

13. Don't Ask the One Question Too Many

The natural tendency when one has scored a point is to attempt to emphasize it at that time. It is important in cross-examination to know whether the witness is objective or wants the defense to lose. If the witness wants the defense to lose, there is a great likelihood that the additional question will have given the witness time to recover and he will then explain or claim misunderstanding. The point is then lost. To avoid this difficultly with this type of witness, as soon as the witness has provided that which is needed for closing argument, the attorney should stop on that point and leave the emphasis for summation.

14. Control the Witness

The examiner needs to maintain control of the witness particularly when the witness has prejudicial information and has a tendency to volunteer or wishes the defense to lose. A number of methods to control are available:

a. A training session before reaching the critical point. Utilize any possible in camera hearing or the preliminary cross-examination to teach the witness not to volunteer.

b. Use short, plain, unambiguous questions so as to give the witness no reasonable excuse for volunteering.

c. Ask about only one new fact per question.

d. Use leading questions that legitimately call for only a yes or no answer.

e. Ask nothing that provides any excuse for explanations.

f. Utilize the aid of the court by requesting instruction to the witness to only answer the question.

g. Make a friend of the witness before the testimony. This makes him less likely to want to "get" the defense.

All of these methods must be used in a way that avoids the impression of withholding truth from the jury.

15. Decide the Manner of Cross-Examination

Thought needs to be given to what manner will best serve the cross-examiner. One must avoid the attorney's natural tendency to conduct every cross-examination in the same manner.

While there are others, the two basic ways are the friendly approach and an adversary approach. A combination in which the examiner elicits what he can with a friendly manner and then suddenly shifts to a firmer manner to disconcert the witness may be effective.

Another is the fumbling approach which leads the witness to believe that the attorney does not know the critical information and to therefore decide that he, the witness can get by with false statements.

16. Put the Cross-Examination in the Most Effective Sequence

There is a most effective sequence for each cross-examination. The first point should ordinarily be an effective one. One point may be used to "set up" another. If the witness is trying to outguess the examiner so the witness can answer the opposite of what the examiner wants, the witness may be misled by the sequence.

17. End on a High Note

Above all, the examination must end on a high note. The natural tendency is to cross-examine in the same order as the direct examination or to take up the strongest point first, the next strongest next and so on ending with the weakest point of all.

To be sure of ending on a high note select the ending point prior to examination and list it at the bottom of the cross-examination notes with space to fill in other notes above.

18. Word the Questions to Achieve the Purpose

How one words questions will often determine what answers will be elicited. All witnesses wish their testimony will be reasonable. Therefore, if the question is worded with the implication that the only reasonable answer is the one the examiner expects, he will likely receive that answer. For example, if the question is worded with the implication that the only reasonable answer is the one the examiner expects he will likely receive that answer. For example, if the question is worded, "Mrs. Jones, I suppose it's only natural then that you expected to see the robber among the pictures shown you?", one is likely to receive an affirmative response.

19. Maximize the Impact

Be brief. Emphasis is far greater if not too much is attempted. Favorable responses may be forgotten and the impact is lessened.

Consider how to make your point or points most dramatically.

Use demonstrative evidence.

Ask leading questions only and only those questions to which there will be favorable answers. This list of questions has impact because it comes across as a "List of Admissions" - a useful concept.

Another effective impact device is "Stretching out a Point." Use several questions instead of one to make a point.

20. Sustain the Momentum

A cross-examination must move and "live" if it is to be effective. Trial work must utilize the principles of show business in many respects. The examiner must know his subject so well that he does not have to study before each question and can "keep it moving."

Once again, short leading questions sustain momentum. Any response unfavorable to the examiner stops momentum and must be avoided. If however, such an answer is given, the examiner must minimize the damage by completely ignoring what has just been said and immediately proceeding to the next question as though the response were not significant.

E. TACTICS FOR CROSS-EXAMINATION

Planning and conducting the individual cross-examination also requires careful selection of tactics. The choice of tactic depends on the objective to be attained, the evidentiary situation and the personality of the witness. The choice of tactic may determine success or failure.

To be useful the tactic must be well understood along with the psychology upon which it is based. It is hoped the following discussion will be helpful in this understanding.

1. BACK-DOWN

Witness situation: The witness is not confident of his testimony and his personality is such that if pushed he will back down.

Execution: "Set up" the witness by confronting him with facts as to which he is wrong (inconsistencies, etc.) then go to the crucial point and push hard for an admission that this fact was not as the witness has said; that the witness has only assumed, that the witness has only heard, that the witness does not remember, or that the witness does not really know.

It should be noted that this tactic is attempted too often. The mistake is that it is employed with the witness who does not have a personality such that if pushed he will back down.

2. MINIMIZATION

Witness situation: The heart of the testimony is true but part of it is exaggerated, inaccurate, or otherwise subject to attack.

Execution: Decrease the significance of the evidence and reduce its effect by procuring admissions as to the exaggerations, inaccuracies, etc., rather than attacking the heart of the testimony.

3. COLLATERAL CROSS-EXAMINATION

Witness situation: A witness or two or more witnesses are expected to be prepared as to the central thrust of their testimony but not likely to be prepared as to matters on the fringes.

Execution: Ask questions as to the fringe matters developing contradictions and hazy recollection. This may work well on police officers who prepare by reading their offense reports just before testifying.

4. WEDGE (NO PROOF)

Witness situation: The witness probably has knowledge favorable to the defense but is reluctant and the examiner has little provable knowledge of the matter.

Execution: The little information available is stretched into several

questions with a knowing attitude and the questions so worded as to lead the witness to believe the examiner knows all about the subject. A witness who believes the examiner already knows is likely to tell the whole story.

5. WEDGE (WITH PROOF)

Witness situation: The witness has knowledge favorable to the defense but is reluctant. The examiner has a document or other proof of the information desired.

Execution: Let the witness know of the proof and the witness will realize there is no point in withholding the information.

6. TRAP

Witness situation: The witness is willing to lie or is lying and the examiner has the ammunition with which to demolish his testimony.

Execution: Get the witness thoroughly committed to the untruthful position and destroy him then or by later evidence. To get the witness committed:

a. Keep the objective hidden.

b. Use the fumbling approach - pretend not to know.

c. Get the witness to take the untruthful position several times in different ways.

d. In general, go from the very general to the specific camouflaging the objective by interspersing questions on other subjects.

7. CROSS-EXAMINE AS TO PROBABILITIES

The witness is led into taking positions or making statements which the jury will regard as unreasonable or which can be demonstrated to be unreasonable.

Examples of this technique are found in books containing cross-examination by F. Lee Bailey.

8. IMPRESSION CROSS-EXAMINATION

Witness situation: There is no particular point with which to destroy the witness but the total picture gives an impression favorable to the defense. Examples are that the witness does not remember, the witness is making up a story as he goes along, there was a frameup, etc.

Execution: There is no magic formula. Create the examination so that every question adds to the impression which the jury sees as it unfolds.

9. DEMEANOR CROSS-EXAMINATION

Witness situation: The witness is subject to showing characteristics which affect credibility.

Execution: Get into areas that will cause the witness to show hostility, overzealousness in convicting the defendant, prejudice, evasiveness, etc., to the point where it is clear to the jury.

10. CHANNELING

Witness situation: The witness is reluctant to testify favorably to the defense and the only thing the examiner has is reasonableness of the way he thinks the event occurred and the unreasonableness of the witness' story.

Execution: Ask each question in a way such that the only reasonable answer is the one desired and believed to be true. The witness does not want his testimony to appear unreasonable or illogical.

11. SHADING

Witness situation: The witness testifies to a relative matter or any matter subject to interpretation.

Execution: Since no basis exists for the witness' interpretation as opposed to one more favorable to the defense, the witness if pushed may agree with the examiner, i.e., the time involved could have been one minute rather than five, etc.

12. EXPOSING FALLACIES IN LOGIC

No attempt can be made here to discuss all the possible fallacies and how to expose them. Suffice it to say that such knowledge is an important part of the crossexaminer's repertoire. A study of logic is most rewarding.

13. DILEMMA

Look for situations as to which the witness can take only certain positions both or all of which are helpful to the defense.

14. FAKE

Witness situation: The witness attempts to adapt his testimony so as to testify contrary to that which he feels the examiner desires.

Execution: Keep the objective hidden and mislead the witness as to the facts wanted. This is often done by changing the sequence from that of normal conversation.

15. UNDERMINING

Witness situation: The witness gives a firm opinion or conclusion, such as "That is the man".

Execution: Do not try to get the witness to change his opinion or conclusion if this is not likely (and it is seldom likely). Instead, bring out the underlying facts which show the lack of basis for the conclusion or that the conclusion is wrong. The opposite conclusion is then argued on summation supported by the undermining facts.

The technique is highly useful in identification cases. Undermine by getting evidence of suggestiveness, description given to police differing from that of defendant, etc.

16. FORGING "I DON'T KNOWS"

Witness situation: Witnesses have a tendency to fill in details when they do not really remember and the proper answer would be "I don't know" or "I don't remember."

Execution: Give the witness tough questions and be firm. Then when the witness says "I don't know" let him off the hook. Be considerate and say "I understand, it was a long time ago" etc. to essentially teach the witness that the easy "out" is to say "I don't know."

F. METHODS OF IMPEACHMENT

Impeachment is an important part of cross-examination and the following may be shown as to any witness and must be a part of any checklist. They can be shown in any appropriate way.

1. Bias, prejudice, or interest.

2. Convictions.

3. Bad acts.

4. "Setting" of the witness.

One may place the witness in his proper setting identifying him with his environment. Alford v. United States, 282 U.S. 687, quoted and relied on in Smith v. Illinois, 390 U.S. 129, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968).

5. Inconsistent statements.

6. Inadequate perception.

The combination of inadequate perception and bad memory makes it so that testimony in court is highly inaccurate providing great opportunities on cross-examination.

7. Bad memory.

8. Contradiction by other evidence, best of all by physical evidence.

CONCLUSION

The concepts and techniques of cross-examination discussed here are, it is hoped, enough to show how much is involved in this very challenging and useful skill. It is sincerely desired that it will interest the reader in attempting its mastery.

The future development of cross-examination is for each trial attorney as we make use of our constantly expanding knowledge of human nature to find better ways of arriving at the truth.

(Reprinted with permission of the Colorado Public Defender System)

THE ADVOCATE is the responsibility of the Public Information Committee, and is edited by Ernie Lewis. Special thanks for this issue go to Brenda Hughes, Donna Proctor, Linda West, Randy Wheeler, Bill Radigan, Ed Monahan, Gail Robinson, Jim Lord, and Bill Ayer. Responses to the articles included here, letters to the editor, or other contributions are welcomed.

****

THE ADVOCATE
Office for Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

BULK RATE
U. S. Postage Paid
Frankfort, KY. 40601
Permit No. 1

Printed with State Funds
KRS 57.375

ADDRESS CORRECTION REQUESTED