The Advocate

Vol. 2, No. 5 A bi-monthly publication of the Office for Public Advocacy August, 1980

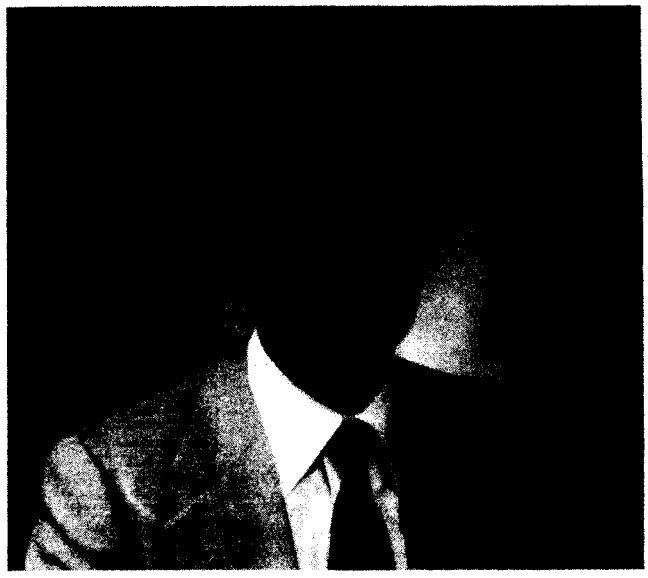
APPELLATE PROCEDURE CHANGED

Recently the Court of Appeals of Kentucky, in a published Opinion and Order, placed members of the bar on notice that the Designation of Record filed pursuant to 75.01 must "state with particularity those portions of the evidence or proceedings stenographically reported as the party wishes to be included in the record on appeal". Seale v. Riley, Ky. App., ___S.W. 2d___ (Decision rendered June 6, 1980). In the cited case the Court of Appeals had before it a motion to dismiss the appeal because the Designation of Record merely stated that "the plaintiff/appellant designates the entire trial court record to be included in the record on appeal". The Court ruled that that Designation failed to clearly define those portions of the stenographically recorded proceedings

(Continued, P. 2)

INSIDE

THE ADVOCATE FEATURES...



Burr Travis works as a part-time public defender in Boone and Gallatin counties. He has been doing that work since July of 1979 with obvious enthusiasm and has handled eighty to one-hundred public defender cases. Burr does public defender work because he believes in our system of justice but feels that if it is to work there must be people fighting just as hard for the person without money as for the person with unlimited funds. He also believes he has been fortunate and wants to give something in return.

Burr, who is thirty-six and married to Darla Algie Travis, graduated from the University of Cincinnati with a social science major in 1974. He worked for Westinghouse as district manager of their credit company from 1964 to 1978. He obtained his law degree from Chase Law School in December of 1977.

(See Burr, P. 2)

in the Circuit Court which the appellant wished to add to the Clerk's original record and, thus, it was inadequate under CR 75.01. The Court did not dismiss the appeal in the cited case; however, it put the bar on notice that if any Designation of Record after August 1, 1980 specifies only "the entire trial court record" or something as equally non-descriptive, that Designation will be held improper and will be grounds for dismissal of the appeal.

In response to the Seale case, our Office has drawn up a sample Designation of Record which complies with the requirements of CR 75.01. Accordingly, in the future you should file the following Designation of Record within 10 days of the filing of the Notice of Appeal:

FAYETTE CIRCUIT COURT
THIRD DIVISION
79-CR-367

COMMONWEALTH OF KENTUCKY

VS. DESIGNATION OF RECORD

ROY THOMAS JOHNSON
* * * * * * * * * *

Comes now the defendant and hereby designates as the record on appeal the entire evidence and the entire proceedings stenographically reported in this action including voir dire, the opening and closing statements of all counsel, and all hearings conducted outside the presence of the jury.

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

The rules as they are now written only require the Designation to be served on the Commonwealth's Attorney; however, it is strongly suggested that a copy of the Designation be mailed to the Court Reporter in your defendant's case so that the Court Reporter can be put on notice that the transcription of the evidence specifically designated should be commenced immediately. If you have any questions in regard to this or any other aspect of appellate procedure, please do not hesitate to contact Tim Riddell at 502-564-5214.

****

(Burr, Continued from Page 1)

About seventy-five percent of Burr's practice is criminal cases. He feels that incarceration is often not the best alternative for either the defendant or society, and he favors diversion, probation and conditional release.

Burr plays a little golf and jogs religiously, even running in marathons. He has the unfortunate distinction of having had three cars stolen in the last month, one of which was parked at the time of the theft in front of the insurance agency where he was collecting for the previous stolen car. Thanks for your enthusiastic efforts as a public defender, Burr.

****

PERSONNEL APPOINTMENTS

Bill Ayer was recently named to be the Deputy Public Advocate by Public Advocate Jack Farley. Ayer, the first attorney to be hired by former Public Defender Anthony M. Wilhoit, has been with the Office since October of 1972.

Gayla Oldham Keown has been appointed Director, Protection and Advocacy Division. Gayla has been with the Division since it was founded in October, 1977.

****

WEST'S REVIEW

The months of May and June saw a number of important decisions emanating from the U.S. Supreme Court.

In Rhode Island v. Innis, 27 CrL 3093 (May 12, 1980), the Court delimited the meaning of "interrogation" in the context of an arrestee's right to remain silent. The defendant was arrested near the scene of a robbery. After being given Miranda warnings the defendant requested a lawyer and was placed in a police cruiser to be transported to police headquarters. However, while en route, police officers engaged in conversation concerning a missing shotgun used in the robbery and the risk that handicapped children attending a special school in the area might find it and injure themselves. At this point the defendant told the officers that he would direct them to the hidden shotgun. The shotgun and the defendant's statement were later introduced at trial over defense objection. Rejecting the defendant's argument that this evidence was inadmissible because obtained through subtle compulsion," the Supreme Court held that the evidence was admissible because it was not the product of "interrogation." However, the Court did not restrict its definition of interrogation to direct questioning, but defined it as including "words or actions on the part of police officers which they should have known were reasonably likely to elicit an incriminating response." In concluding that the conduct of the officers in Innis did not amount to interrogation, the Court noted the brevity of the conversation and the absence of any reason for the police to believe that the defendant was "peculiarly susceptible to an appeal to his conscience" or was "unusually disoriented or upset."

The Court has held in United States v. Havens, 27 CrL 3134 (May 27, 1980), that unlawfully seized evidence, while clearly inadmissible as part of the prosecution's case in chief, may be used by the prosecution for impeachment purposes. The holding is analogous to the Court's holding in Harris v. New York, 401 U.S. 222 (1971), permitting the impeachment use of statements obtained without proper "Miranda warnings." Under Harris, such statements could be used only to impeach matters asserted by a defendant in direct testimony. This limitation precluded the prosecution from itself eliciting statements on cross-examination and then introducing a defendant's prior admission as impeachment. Havens, however, modifies this rule by permitting the use of unlawfully obtained evidence to impeach testimony given in cross-examination when the matter developed in cross-examination is "connected with matters gone into in direct examination." Defense counsel should be aware of the pitfalls created by Havens when planning the direct examination of their client.

The Court has held in Jenkins v. Anderson, 27 CrL 3147 (June 10, 1980), that an accused's prearrest silence may be used to impeach his testimony at trial. Like the Court's holding in United States v. Havens the Jenkins holding is a factor to be weighed in the decision of an accused to take the stand and in the planned scope of his testimony.

The Court has reaffirmed its holding in Massiah v. United States, 377 U.S. 201 (1964), that admissions obtained from an accused after indictment and in the absence of counsel are inadmissible unless the accused has knowingly waived the right to counsel. United States v. Henry, 27 CrL 3155 (June 16, 1980). In Henry the police obtained incriminating admissions from the defendant through his jail cellmate - a paid informer who engaged the defendant in conversation. "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of

(Continued, Page 4)

counsel, the government violated Henry's Sixth Amendment right to counsel." Henry, at 3158.

The Court has, in two separate cases, reevaluated the "automatic standing" rule created in Jones v. United States, 362 U.S. 357 (1960), and found it to be lacking. United States v. Salvucci, 27 CrL 2141 (June 25, 1980); Rawlings v. Kentucky, 27 CrL 3245 (June 25, 1980). The automatic standing rule provided that an individual charged with a crime of possession need not assert possession of the seized contraband in order to gain standing to challenge its seizure. More recently, in Simmons v. United States, 390 U.S. 377 (1968), the Court held that testimony given by a defendant in support of a motion to suppress cannot be introduced against him at trial. Citing its decision in Simmons, the Court has now concluded that the rationale behind the automatic standing rule is no longer viable. United States v. Salvucci, supra, specifically overrules the automatic standing rule. The Court goes on to hold in Salvucci that standing is not conferred by the fact of legal possession sufficient to support a conviction, but by "an expectation of privacy in the area searched." Salvucci, at 3244. "[D]efendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated." Salvucci, at 3242.

In Rawlings v. Kentucky, 27 CrL 3245 (June 25, 1980), the Court applied the test enunciated in Salvucci to find that the defendant lacked standing to challenge the search of a woman's purse where he had concealed drugs. The Court affirmed the holding of the Kentucky Supreme Court that petitioner had no legitimate expectation of privacy in the purse given his brief acquaintanceship with the woman, the access of other people to the purse, and the defendant's admission that he had no subjective expectation of privacy.

Kentucky's appellate courts rendered several noteworthy decisions during the two months under review.

The Kentucky Supreme Court affirmed the decision of the Court of Appeals in Ivey v. Commonwealth, Ky.App., (June 29, 1979). Commonwealth v. Ivey, Ky., 27 K.L.S. 6 at 16 (May 13, 1980). The Court agreed with the conclusion of the Court of Appeals that indigents are entitled under KRS 31.110 (the "public advocate statute") to appointment of counsel in RCr 11.42 proceedings. The Court reasoned, as did the Court of Appeals, that "[w]ithout the assistance of counsel Ivey could be effectively precluded from raising valid grounds by failure to include such grounds at the time of his first motion." Ivey, at 17.

In a rare decision the Kentucky Supreme Court has reversed a robbery conviction on the grounds that the defendant's request for a trial separate from his codefendant should have been granted. Compton v. Commonwealth, Ky., 27 K.L.S. at 9 (June 3, 1980). Richard and Chester Compton were initially given separate trials for robbery. However, after Richard's trial ended with a hung jury, the trial court ordered a joint trial. At this second trial the prosecution introduced testimony concerning statements made by Chester in an effort to establish an alibi. The statements conflicted in detail with similar statements made by Richard. Chester did not take the stand and no adequate explanation of the inconsistencies in the statements was presented. Moreover, the evidence established that Richard and Chester were travelling together at the time of the robbery. The prosecutor emphasized the conflicts in the two mens' stories in his argument to the jury. The Kentucky Supreme Court reversed, citing RCr 9.16 which provides: "If it appears that a defendant or the commonwealth is or will be prejudiced by a joinder of defendants . . . the court shall . . . grant

(Continued, P. 5)

separate trials of defendants or provide whatever other relief justice requires." The Court found that "the refusal of the trial judge to grant a severance amounted to a clear abuse of discretion."

The Court has reversed a decision of the Court of Appeals denying the defendant's petition for writ of prohibition to prohibit the Estill Circuit Court from trying him. Spivey v. Jackson, Ky., 27 K.L.S. 8 at 10 (June 24, 1980). The defendant, an inmate at Kentucky State Reformatory, had filed a formal request, pursuant to the Intrastate Agreement on Detainers, for final disposition of charges pending against him in the Estill Circuit Court. Two hundred and forty-five days later the trial court had not responded to the request. The trial court likewise failed to respond to a motion to dismiss the indictment. The Supreme Court, directing the Court of Appeals to issue a writ of prohibition, held that KRS 500.110 leaves no room for disagreement with its provision that an incarcerated defendant "shall be brought to trial within 180 days of his request for trial."

LINDA WEST

****

CLE CREDIT

During the period July 1, 1979 through June 30, 1980, the Office for Public Advocacy sponsored two CLE activities.

On March 29-30, 1980 the Death Penalty Task Force of the OPA presented its Death Penalty Seminar in Shakertown, Kentucky. That program was approved by the KBA-CLE Commission for thirteen hours of credit. The OPA's 8th Annual Public Defender Training Seminar, held on May 18-20, 1980 in Louisville, has been approved for fourteen hours of credit.

However, your attendance at either or both of these OPA programs only qualifies you to receive the CLE credit hours. To obtain the credits for your attendance at these programs, you must list them and any other seminars that you have attended since July 1, 1979 on a KBA-CLE Commission Form 3, Affidavit of Attendance at Approved CLE Activities, and submit it to the KBA office, 403 Wapping Street, Frankfort, Kentucky 40601. Although the form ideally should be filed before July 31, 1980, the KBA-CLE Commission apparently will accept late filings of the Form 3.

No sponsor of an approved CLE activity is authorized to secure credit hours for individuals who have attended that seminar. The only way you will receive your credits for attending any CLE program is to file your own notarized affidavit of attendance covering the reporting period. If you have not filed KBA-CLE Form 3 for July 1, 1979 through June 30, 1980, file it immediately. Don't lose the credit hours you earned during the twelve-month reporting period.

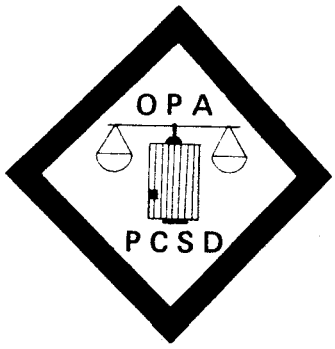
****

ANNOUNCEMENT:
KENTUCKY JUVENILE JUSTICE
LEGAL ASSISTANCE PROJECT

The Kentucky Department of Justice recently awarded a grant to the Office of Kentucky Legal Services Programs (OKLSP) to establish the Kentucky Juvenile Justice Legal Assistance Project.

The purpose of the project is to reduce the number of juvenile status offenders and non-offenders confined in jails, to reduce the number of juvenile public offenders confined in jails where total separation between juveniles and adults is lacking, to heighten public awareness of jailing problems in Kentucky, and to identify major obstacles in changing unlawful jailing practices and recommend strategies to overcome these obstacles through a program of legal advocacy.

For further information about the project, contact: Henry Hinton, P.O. Box 679, Morehead, Kentucky 40351, phone (606) 784-8921.



THE BELATED APPEAL DILEMMA

On May 2, 1980, the Court of Appeals issued an opinion in Able v. Commonwealth, Ky. App., 27 K.L.S. 6 (May 2, 1980) which has left doubt as to the proper procedure to secure a belated appeal. Basing its opinion on Cleaver v. Commonwealth, Ky., 569 S.W.2d 166 (1978), the Court in Able held that an RCr 11.42 motion can never be utilized to secure a belated appeal. The Able court indicated that in all cases Cleaver demanded a motion for a belated appeal to the appellate court that is to entertain the appeal. Cleaver did state that an RCr 11.42 motion could not be used to obtain a belated appeal but the case only addressed a situation in which an appeal had been previously dismissed by an appellate court.

Last year, the Court of Appeals issued another opinion interpreting Cleaver which held that a defendant can utilize RCr 11.42 to have his right to appeal reinstated if an appellate court has not dismissed the appeal. These were called "waiver" cases since the relevant question is whether the movant waived his right to appeal. Jones v. Commonwealth, Ky. App., ____ S.W.2d ____; 26 K.L.S. 7 (May 4, 1980) disc. rev. den. 594 S.W.2d 279 (1980). In "dismissal" cases the motion requesting a belated appeal would have to be made to the appellate court since the trial court would have no authority under RCr 11.42 to, in affect, overrule the appellate court's dismissal.

The Able opinion did not expressly overrule Jones nor did it mention the distinctions between the types of cases discussed in Jones. Also, the Able opinion stated that Cleaver implicitly overruled Hammershoy v. Commonwealth, Ky., 398 S.W.2d 883 (1966), the leading case on the propriety of using RCr 11.42 for belated appeal motions, whereas Jones cited Hammershoy as authority. For these reasons a Petition for Rehearing is currently being considered by the Court of Appeals in Able.

This confusion has caused a dilemma in which many defendants are being frustrated in their efforts to obtain a delayed appeal. For example, after Cleaver was decided, a belated appeal motion in a "waiver" case was filed by this office in the Court of Appeals. However, before a ruling was made Jones was decided. Accordingly, the Court of Appeals stated that a motion pursuant to RCr 11.42 would be the proper procedure. Discretionary review was denied but due to the movant's release on parole he decided not to pursue the case further.

Another belated appeal motion, also in a "waiver" case, was filed this year in the trial court pursuant to the Jones decision. Unfortunately, Able was decided before a ruling was made. Therefore the trial court ruled that RCr 11.42 could not be used and declined to grant the motion. Other trial courts are still ruling in accordance with Jones.

At this time then it is clear, at least, that an RCr 11.42 motion can not be used to obtain a belated appeal if the appellate court has previously dismissed the appeal. A recent Supreme Court dismissal of a belated appeal granted pursuant to an RCr 11.42 motion also leads us to believe that Able may indeed be the correct interpretation of Cleaver. However, if the appeal has never left the trial court the movant may still be stuck in "limbo" with no remedy since the issue has not been ultimately resolved.

Hopefully, Able will provide the opportunity to correct the situation but until then this confusion makes it particularly important that the proper procedures for initiating and prosecuting appeals be followed.

TRIAL COUNSEL MUST FILE NOTICE OF APPEAL IF CLIENT REQUESTS

The Post-Conviction Services Division is contacted frequently by inmates desiring assistance in obtaining belated appeals. Generally these persons allege that they requested trial counsel to file a Notice of Appeal but that no notice was filed or that they were unaware of the right to appeal and the proper procedures for securing that right. The responsibilities of trial counsel after a trial is completed have been stated numerous times in The Advocate. However, due to the number of requests for belated appeals, we feel it appropriate at this time to reiterate the responsibility of trial counsel in assuring the defendant that an appeal will be prosecuted. If these procedures are followed it will prevent any question of the effectiveness of the trial counsel's representation in relation to the appeal at a later date.

Section 115 of the Kentucky Constitution guarantees every convicted defendant a direct appeal of his conviction. Accordingly, the client must be made aware by counsel of all the rights incident to the appeal and the ramifications of failing to take an appeal. Then, under KRS 31.115 a public defender is obligated to perfect an appeal if the client requests one. Therefore the filing of a Notice of Appeal is definitely a part of trial counsel's responsibility. See also 504 KAR 1.010(1). KRS 31.115 further requires that if the client does not want to take the appeal that a written affidavit be made to that effect.

Also, if the client does not want to appeal, counsel at sentencing, after the trial court has informed the client of his appellate rights and responsibilities, should request the court to question the defendant on the record about this choice. The judge must determine whether this decision is both voluntary and knowing.

However, if the client does want to appeal the conviction a Notice of Appeal must be filed within ten days after the final judgment has been entered in the circuit clerk's office. RCr 12.04. Also, a Designation of Evidence or Proceedings Stenographically Reported should be filed at the same time or within ten days after filing of the notice. CR 75.01.

If a Notice of Appeal is entered or a waiver of appeal is signed by the client there will be no question as to whether the defendant is entitled to an appeal after the ten day period for filing the Notice of Appeal has run. If neither of these procedures are followed, however, the issue will become a swearing contest between the client and the attorney as to whether he did or did not want to appeal the case initially. We urge all attorneys to follow the above procedures to avoid this needless problem.

****

At the June 21st meeting of the Kentucky Polygraph Association, James F. Lord of this office was elected Vice President. Roy Williams was elected President.

****

> "It's the prison system in America that drives us to outrages on one another. We are not animals but we are herded like animals. We are torn by the system of parole that rewards everything base and vile in a man. If we betray our poor comrades we are rewarded. If we compete for the good graces of our jailors we are rewarded. If we refuse to defend ourselves we are rewarded. If a man lets himself be used by the prison staff to catch another prisoner, he is rewarded."
>
> Jack Henry Abbott, The New York Review of Books, p. 35, June 26, 1980.

PRETRIAL DETAINEES AND THE SAFEKEEPING STATUTE

KRS 441.050, commonly referred to as the safekeeping statute, states in pertinent part:

> If there exists threatened violence or intense feeling and public indignation against a person charged with a crime and in the custody of an officer, and the circuit judge of the county that has jurisdiction of the offense charged is of the opinion that the person cannot be safely kept in the jail in that county, the circuit judge, with the consent of the Governor, may order such person removed for safekeeping to the state reformatory or the state penitentiary, whichever is most convenient to the county having jurisdiction of the offense charged (emphasis added).

This statute, adopted originally to safeguard a prisoner from a "lynch-mob" type situation, has been utilized for entirely different purposes in more recent times. Litigation filed in the Oldham Circuit Court last July revealed that during the past ten (10) years the safekeeping statute has been predominately used by the Governor's Office to transfer a pretrial detainee to the Forensic Unit at the Reformatory at LaGrange because of the individual's mental or emotional condition. Other detainees have been transferred because of overcrowded conditions in county jails.

The implications of a safekeeping transfer should be apparent to any defense attorney. The statute has no provision for notice of a proposed transfer for either the individual or his attorney, and, as a matter of course, none is given. Additionally, no hearing is required by KRS 441.050; the proceedings are completely ex parte. Generally, the defense attorney will first learn of the safekeeping transfer when he attempts to see his client in the jail - by then his client may well be 200 miles away at the Reformatory at LaGrange. Inasmuch as the individual is generally not returned until immediately prior to trial, the opportunity for consultation with the client has been eliminated.

It is suggested that there are three avenues of approach when considering a challenge to a proposed safekeeping transfer:

(1) The safekeeping statute is explicit as to when a transfer may be authorized. There must be "threatened violence or intense feeling and public indignation against" the pretrial detainee before KRS 441.050 authorizes a transfer. Clearly, an individual's mental or emotional condition, disruptive behavior, or overcrowded jail conditions do not fall within the ambit of the statute.

In Fryman v. Electric Steam Radiator Corp., Ky., 277 S.W.2d 25 (1955) the Court determined that ". . .a well-known rule of construction is, where the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction, and the statute must be accepted as it is written." Id., at 27. Any transfer, therefore, for reason not specified in KRS 441.050 would be not only contrary to established law on statutory interpretation, but also without statutory authority.

(2) In a series of cases in 1976, the Supreme Court of the United States concluded that a convicted felon does not have a right to a due process hearing prior to an institutional transfer unless state law guarantees that he will not be transferred "except for misbehavior or upon the occurrence of other specified events." Montanye v. Haynes, 427 U.S. 236, 96 S.Ct. 2543, 2547, 49 L.Ed.2d 466 (1976); Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Conversely stated, if a state rule or regulation

gives the prisoner the right not to be transferred absent a condition precedent, then the due process clause mandates a hearing prior to the proposed transfer. Wright v. Enomote, 462 F.Supp. 397 (N.E.Cal. 1976), aff'd 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756.

Consequently, since a pretrial detainee has the right to remain in the county jail unless the conditions set out in KRS 441.050 exist, a due process hearing must be conducted.

(3) In Bell v. Wolfish, ___U.S. ___, 99 S.Ct. 1861, ___L.Ed.2d ___(1979), the Supreme Court examined the due process limitations on treatment of pretrial detainees. In the cited case, the Court concluded that the due process clause applies whenever the state action "amounts to punishment of the detainee." Id., 99 S.Ct. at 1872. Since the safekeeping statute has traditionally been utilized when a mentally disturbed detainee engages in disruptive behavior in a county jail, a hearing prior to the proposed transfer is constitutionally mandated.

If there are questions on the best method to challenge a safekeeping transfer, or if assistance is requested, contact Bill Radigan or Dave Norat at the Office for Public Advocacy in Frankfort.

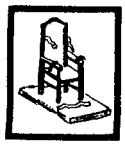
BILL RADIGAN

****

APPLICATION FOR BAIL PENDING APPEAL

RCr 12.78 provides that the trial judge can set bail pending a defendant's appeal unless that defendant has been sentenced to life imprisonment or death. The attorneys in our Office are constantly barraged with queries from their defendants regarding the amount of bail that has been set during the pendency of their appeal. Upon checking the records in the Circuit Courts, it is too frequently determined that not only has bail not been set for those defendants but also applications have not been made by the local public defenders for bail pending appeal. This puts those defendants and the attorneys in our Office at a great disadvantage. At the time of the inquiries, the defendants are already in one of the penal institutions and thus out of their home environment where they could make contacts to assist them in finding places of residence, places of employment, and sources for funds or property that could be used to meet any bail requirements. The attorneys in our Office are at a disadvantage because they usually know nothing of the local practice in regards to applications for the setting of bail pending appeal; they have not developed the personal contacts with the local judges and the local prosecutors which usually help facilitate the procurement of bail pending appeal; and, they are usually too far removed from the defendant's homes to allow them an opportunity to appear personally and plead for bail pending appeal for their defendants.

In this light, when our Office receives a request to look into the question of bail pending appeal and once it is determined that bail has not been set and no application for bail has been made, we contact the defendant and tell that defendant to get in touch with the local public defender and to ask that defender to look into the matter. Obviously, any attempt by a local defender to procure bail at that point proves very difficult because the defendant, as noted before, has been removed from the local community. Accordingly, it is strongly suggested that local public defenders make applications for bail pending appeal at or before sentencing in all cases where their defendants are obviously going to be appealing and in those cases where the defendant is not otherwise disqualified to be considered for bail. Of course, in those situations where the local defense attorney believes the defendant has not been treated fairly in a bail application proceeding in the Circuit Court, the attorneys in our Office will be more than happy to reapply for bail pending appeal in the appropriate appellate court.



THE DEATH PENALTY

Death is Different

U. S. SUPREME COURT
CAPITAL CASE LAW

The U.S. Supreme Court recently rendered three important death decisions:

Godfrey v. Georgia
(May 19, 1980)

Robert Godfrey and his wife were undergoing serious marital strife. They separated and were involved in heated disputes. Eventually, Robert "...got his shotgun and walked with it down the hill from his house to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly." Robert told the police, "I've done a hideous crime....but I have been thinking about it for eight years...I'd do it again."

The sentence of death was supported only by the finding of the aggravating factor of its being a murder "outrageously or wantonly vile, horrible and inhuman."

The Supreme Court held that Robert's death sentence was constitutionally invalid because there is "no principled way" to distinguish the sentence of death in this case from non-death sentences in similar cases.

The facts did not support a "consciousness materially more 'depraved' than that of any person guilty of murder" since 1) the killings were instantaneous, 2) family members caused the extreme emotional trauma, and 3) Robert acknowledged his responsibility and the heinous nature of his acts.

Beck v. Alabama
(June 20, 1980)

The Court determined that a sentence of death cannot be constitutionally imposed when the jury was not permitted to consider lesser included non-capital offenses supported by the evidence.

Without the option of returning a guilty verdict on a lesser included offense, an intolerable level of uncertainty and unreliability is introduced into the factfinding process.

Adams v. Texas
(June 25, 1980)

The Court forcefully reaffirmed its adherence to the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968) in bifurcated capital proceedings. Witherspoon allows the state to exclude jurors for cause only if 1) the juror would automatically vote against a sentence of death without regard to the evidence, or 2) the juror's capital views would prevent an impartial decision on guilt.

Witherspoon is not a ground for challenging any prospective juror; rather, it is a "limitation on the state's power to exclude" for cause.

(Continued, P. 11)

Significantly, the Court made clear that a juror who is equivocal on his ability to sentence to death could not be excluded for cause: "But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty."

****

DEATH ROW U.S.A.

AS OF JUNE 30, 1980, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE NAACP LEGAL DEFENSE FUND: 636

Race:

Black	253	(39.78%)
Spanish Surname	28	(4.40%)
White	346	(54.40%)
Native American	3	(0.31%)
Unknown	4	(0.63%)
Oriental	2	(0.47%)

Crime: Homicide

Sex:	Male	629	(98.90%)
	Female	7	(1.10%)

DISPOSITIONS SINCE JULY, 1976

Executions: 3
Suicides: 4
Death Sentences vacated as unconstitutional: 515
Convictions or sentences reversed: 265 Commutations: 6

****

DEATH PENALTY REPORTER

The National College for Criminal Defense has started publishing a Death Penalty Reporter of July, 1980. Included in the reporter, to be published monthly, will be a digest of all important death penalty cases from the previous month. It will also feature procedural developments, trial tactic advice, legislative news and anything else pertinent to the defense of death penalty cases. Cost is $50.00 annually If interested, write: Death Penalty Reporter, National College for Criminal Defense, College of Law, University of Houston, Houston, Texas 77004, or call (713) 749-2283.

****

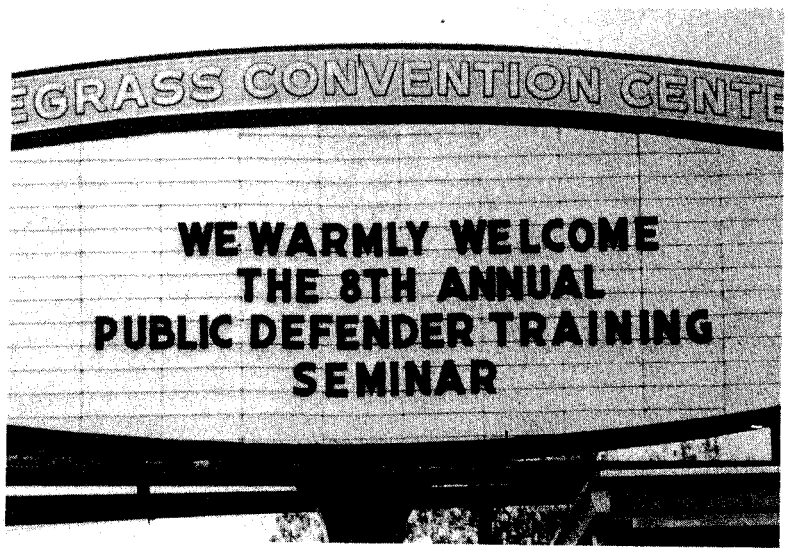
NEED TRAINING?

In the past the Office For Public Advocacy has conducted on a trial basis several mini-seminars to provide supplemental training for trial level public defenders. Normally these are one-day seminars conducted by OPA staff members and held in various areas of the state. Attendance at these programs is normally limited to attorneys participating in public defender programs in the general vicinity of the seminar site as well as other local attorneys who practice criminal law.

The results of the experiment with the mini-seminars have been quite encouraging. Consequently, the OPA is announcing a plan to conduct these mini-seminars upon request of the local public defenders in any area of the state. Scheduling and subject matter of the programs are open to negotiation.

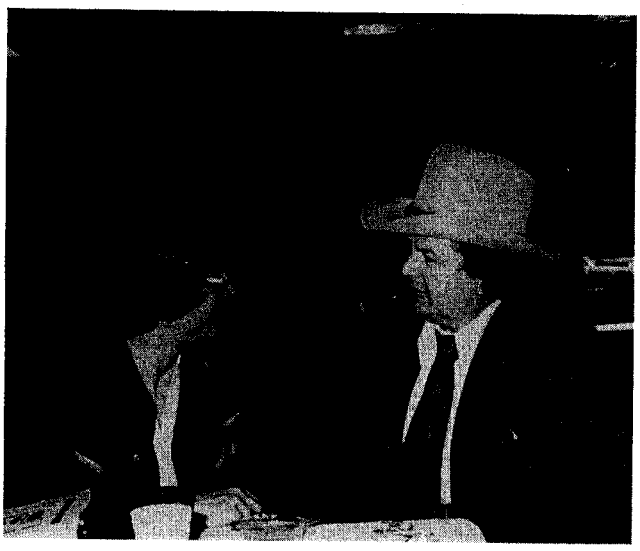
Because of the informality, restricted size and in-house nature of this type of training program, no attempt to obtain approval of this activity from the KBA-CLE Commission is contemplated. Although you will not earn CLE credits for your attendance at these mini-seminars, experience indicates you will learn pragmatic techniques, strategies, and skills to increase your effectiveness as a criminal defense attorney.

If you and the criminal defense attorneys in your area are interested in having a mini-seminar presented in your locale, please contact either your area supervisior in the OPA Frankfort office or Vince Aprile.



PFO PANEL

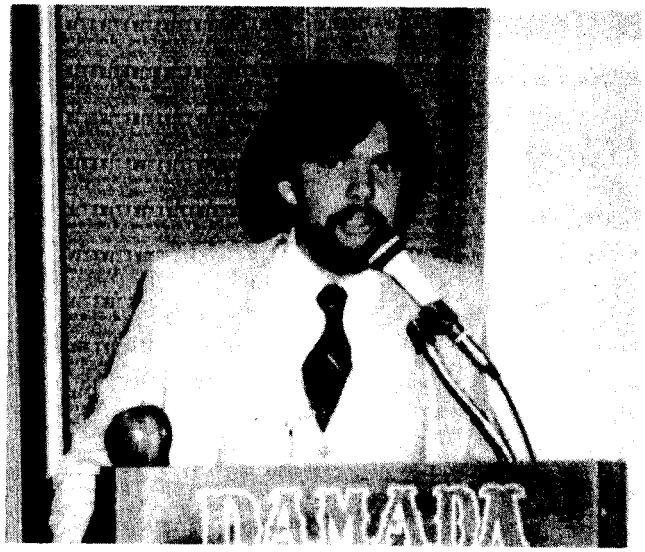
TWO HUNDRED ATTENDED



BOBBY TALKS TO J.R.

TWO HUNDRED ATE

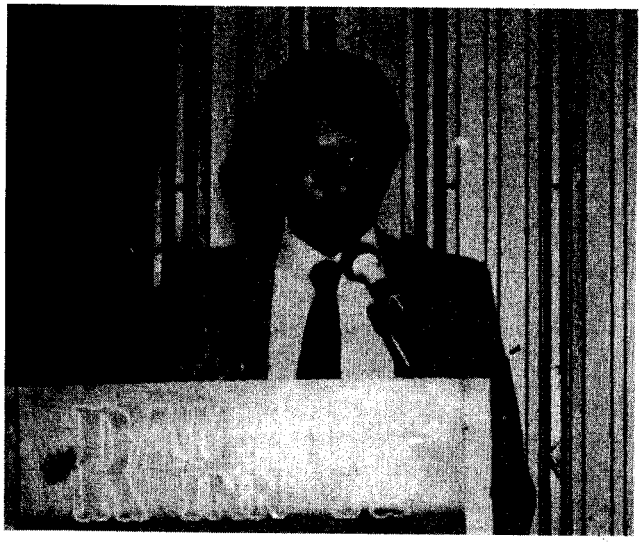
TERENCE MacCARTHY



KEVIN McNALLY

STEPHEN RENCH

JERRY ABRAMSON



ALEX MOSCHELLA

VINCE APRILE

ETHICS: QUANDARIES & QUAGMIRES

QUERY: Is it ethically proper for a prosecutor or criminal defense attorney to call a witness the attorney knows will claim a valid privilege not to testify in an effort to draw the jury's attention to the witness' claim of privilege?

"A prosecutor should not call a witness who the prosecutor knows will claim a valid privilege not to testify for the purpose of impressing upon the jury the fact of the claim of privilege." ABA Standards, The Prosecution Function, Standard 3-5.7(c), (2nd Ed. Tentative Draft 1978); emphasis added. "In some instances, as defined in codes of professional responsibility, doing so will constitute unprofessional conduct." Id.

Under the rules established in Namet v. United States, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963), and Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), the practice of compelling a witness to invoke his fifth amendment privilege may require reversal in two situations: (1) when the prosecutor consciously attempts to influence the jury by building his case out of inferences arising from use of the testimonial privilege, thus depriving a defendant of due process of law; or (2) when inferences from a witness' refusal to answer add critical weight to the prosecutor's case in a manner that does not allow the defendant to subject the witness to cross-examination and thus unfairly prejudices the defendant by precluding him from exercising his sixth amendment right to confrontation.

If these constitutional problems are to be avoided or minimized, "it is desirable that, whenever possible, issues relating to a claim of privilege be heard out of the presence of the jury." ABA Standards, The Prosecution Function, Standard 5.7(c), (Approved Draft 1971), Commentary, p. 125. "If the prosecutor is informed in advance that the witness will claim a privilege and he wishes to contest the claim, the matter should be treated without the presence of the jury and a ruling obtained." Id., citing Namet v. United States, supra, 83 S.Ct. at 1156 n.9.

Without preliminary screening of the witness' testimony outside the presence of the jury, the jury may be substantially misled by the substance of the prosecutor's questions and the witness' refusals to answer.

Although a prosecutor's questions and the witness' refusals to answer are "not technically testimony," the prosecutor's questions "may well [be] the equivalent in the jury's mind of testimony that [the witness] in fact" did or said what the questions imply. Douglas v. Alabama, supra, 85 S.Ct. at 1077. And the witness' "reliance upon the privilege" may create "a situation in which the jury might infer" that the substance of the prosecutor's questions "was true." Id.

The danger of such a prosecutorial ploy can seldom be exaggerated. "With the jury's tendency to accept as true a statement unanswered by a witness who invokes the Fifth Amendment privilege, together with the defendant's inability to cross-examine the witness, [a] defendant is unduly prejudiced." Higgs v. Commonwealth, Ky., 554 S.W.2d 74, 75 (1977).

When a witness is not called by the prosecution as a result of the preliminary screening of his testimony, the jury will, of course, be unaware that the witness refused to answer on claim of privilege. Consequently, prosecutors express concern that the unexplained absence of a potential government witness "will leave an opening for argument based on the failure of the adversary to call the

(Continued, P. 15)

witness." ABA Standards, Prosecution Function, supra, Commentary, p. 125. "Since the prosecutor is precluded from calling a person who will claim a privilege, the defense counsel is under a correlative obligation not to argue any inference from the absence of the person as a witness." Id.

According to Standard 4-7.6(c) of the ABA Standards, The Defense Function (2nd Ed. Tentative Draft 1978), "[a] [defense] lawyer should not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege." The standard adds that "[i]n some instances, doing so will constitute unprofessional conduct." Id.

"Although the situation arises more frequently for the prosecutor than it does for defense counsel, it is equally unprofessional for either to call a witness he knows will assert a claim of privilege in order to encourage the jury to draw inferences from the fact that the witness claims a privilege." ABA Standards, The Defense Function, Standard 7.7(c), (Approved Draft 1971), Commentary, p. 274. "If there is genuine doubt whether the witness will claim the privilege or whether the validity of the privilege will be recognized, the matter should be resolved out of the presence of the jury." Id.

Defense counsel should realize that in certain circumstances it may be constitutionally permissible for the defense to call a witness for the purpose of compelling that witness to assert the privilege against self-incrimination. Such a procedure may be justified when the witness' assertion of his right against self-incrimination would corroborate the defense theory and raise a reasonable doubt as to the defendant's guilt.

However, even when the defense believes it is constitutionally entitled to call a witness for the purpose of compelling a claim of privilege, the correct ethical and legal approach appears to require a preliminary screening of the witness' testimony outside the presence of the jury and then the presentation to the court of the constitutional theories which guarantee the defense the right to bring the witness' refusal to answer before the jury for its consideration in evaluating the strength of the evidence against the accused.

It must be remembered that the prosecution has no federal or state constitutional right of confrontation which would be violated by the defense introducing into evidence a witness' refusal to answer on the grounds of privilege.

Additionally, "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 282 (1973). Certainly, the refusal of a witness to testify for fear of self-incrimination may constitute an integral element of the accused's defense and merit on constitutional grounds an exemption from the normal ethical and legal prohibition against calling a witness to force a claim of privilege before the jury.

J. VINCENT APRILE II

****

FORENSIC GRANT ENDS

The grant from LEAA paying for forensic professionals, including psychiatrists and psychologists, will end on September 30, 1980. No services performed after that date, other than testimony, will be paid for by the Office for Public Advocacy.

****

TRIAL TIPS

THE DEFENSE OF EYEWITNESS IDENTIFICATION CASES

It is indeed ironic that the type of evidence generally regarded by jurors as the most significant--eyewitness identification--is in actuality one of the least reliable. The usual eyewitness in a criminal case has gone through a series of preparatory stages before finally taking the witness stand. Any doubts or hesitancy have been removed from the witness' testimony, if not his mind, after repeated contacts with police and prosecution. The further away from the actual event in question, the degree of positiveness on the part of the witness grows. The internal psychological and external suggestive forces at work through pretrial interviews, identification procedures and hearings culminates all too often in the "unshakable" eyewitness identification. Such a witness immunizes (or at least attempts to immunize) himself from effective cross-examination at trial. Whether out of inate or learned hostility to the defense or because of a psychological inability to "give an inch" on the witness stand, such an eyewitness is a tough nut for even the most skilled of cross-examiners to crack.

The unreliability of many eyewitness identifications, the extraordinary faith put in such testimony by the average juror, and the practical difficulty of exposing mistaken identification at trial, creates a dangerous problem for defense counsel. The nightmare of any conscientious counsel is to let an innocent client slip through his hands and into the penitentiary. If this ever happens, it is as likely as not to result from mistaken identification. The purpose of this article is to explore the problem, review the Supreme Court cases controlling eyewitness identification, and examine the use of the suppression hearing and other techniques which can be used to put eyewitness testimony in its proper perspective.

The Unreliability of Eyewitness Identification

Are we exaggerating the dangers inherent in eyewitness testimony? Is this a defense lawyer's myth? Having been an eyewitness to crimes on three occasions, I think not. Giving a description of a stranger seen under stressful conditions for only a few moments is a very difficult task. Accurately identifying that person from pictures or in person days, weeks or months later is a chancy proposition at best. The Supreme Court, in United States v. Wade, 388 U.S. 218, 228 (1967), stated: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Felix Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.'" All of us are familiar, of course, with the celebrated case of Nicola Sacco and Bartolomeo Vanzetti of which Justice Frankfurter wrote. But must we be seriously concerned regarding cases of mistaken identification in this age of due process and enlightened law enforcement procedures?

Actually, cases of mistaken eyewitness identification occur all too often. Many are familiar with the recent case where a Catholic priest was tried for six "Gentlemen Bandit" holdups. The government's case was built "almost exclusively on identifications made by the robbery victims." During the trial, however, another man came forward and admitted guilt. He bore a reasonable, but not a strong, resemblance to the priest. "Man Claims Involvement In HoldUps that Catholic Priest Is On Trial For." The Louisville Courier Journal, Wednesday, August 22, 1979. "Priest Relieved."

(Continued, P. 17)

The Lexington Herald, Friday, August 24, 1979. A Kentucky man recently "spent seven months in jail accused of armed robbery and murder because of mistaken identification." "Kentuckian In Jail Months By Mistake." The Louisville Courier Journal, Friday, January 11, 1980. Even policemen are not immune from mistaken eyewitness identification, as the officer falsely accused of twenty rapes in a suburb of Detroit knows. "End of a Nightmare." The Louisville Courier Journal, Wednesday, August 24, 1977. However, the nightmare does not always end so soon. An innocent man recently served five years in prison for a murder he did not commit. His conviction was based upon eyewitness testimony. "Tip Leads to Actual Killer, Freedom for Innocent Man." The New York Times, Monday, December 31, 1979. The list of examples could go on and on.

These real life dramas have been reconstructed in laboratories many times. Research in the field of social psychology has increasingly directed itself to the question of the reliability of eyewitness identification. The experiments are far too numerous to discuss here. Many are described in a recent book, Loftus, E.F., Eyewitness Testimony (Harvard University Press, 1979). See Buckout, R., Eyewitness Testimony, 231 Scientific American, No. 6 at 23 (Dec. 1974); Loftus, E.F., Reconstructing Memory, The Incredible Eyewitness, Psychology Today at 116 (Dec. 1974). Perhaps the largest, if not the most scientific, experiment was done on December 19, 1974, when a staged pursesnatching incident was broadcast by NBC in New York. Following this, the announcer presented a lineup of six men who resembled the attacker. He told the audience that the perpetrator may, or may not, be in the lineup. Any viewer who wished could call a special number to attempt an identification or indicate that the attacker was not in the lineup. Over 2,000 calls were received. Amazingly, only 14.1% of the "eyewitnesses" identified the actual perpetrator. There were 1,843 mistaken identifications. The 14.1% of correct identifications was no different from the expected results (by chance) had all the witnesses been guessing. Loftus, Eyewitness Testimony, supra at 135. It is no wonder then that the Supreme Court, quoting Wall, Eyewitness Identification in Criminal Cases, 26 (1965), has stated "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor perhaps it is responsible for more such errors than all other factors combined." Wade, supra at 229.

The Impact of Eyewitness Testimony on Jurors

Scientific research has demonstrated what trial lawyers already know to be true - jurors tend to accept even highly suspect eyewitness identification testimony with little or no question. Elizabeth Loftus conducted a study designed to gauge how willing jurors were to discount eyewitness testimony when given sufficient reason. Jurors were presented with a criminal trial situation. Of the first 50 jurors who voted on guilt or innocence, only 18% judged the defendant guilty based solely on circumstantial evidence. The second 50 jurors were given an additional piece of prosecution evidence: a store clerk's testimony that he saw the defendant shoot the two victims. Of the second jury panel, 72% judged the defendant guilty. The third jury panel was given the same case except the defense completely discredited the eyewitness by showing that he had extremely poor vision (20/400), was not wearing his glasses at the time, and could not possibly have seen the robber from where he was standing. Nevertheless, 68% of the third jury panel still voted for conviction. "This result suggests that jurors give eyewitness testimony much more weight

(Continued, P. 18)

than other sorts of evidence when reaching a verdict." Loftus, Eyewitness Testimony, supra at 10. Loftus details numerous studies to this effect. "All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says "That's the one!" Id at 19.

The Law

Prior to 1967, the courts did little or nothing to build safeguards into the system to reduce the chance of mistaken eyewitness identification. The landmark cases are, of course, United States v. Wade, supra; Gilbert v. California, 388 U.S. 263 (1967); and Stovall v. Denno, 388 U.S. 293 (1967). In Billy Joe Wade's case, the Court held that it does not violate the 5th Amendment privilege against compulsory self-incrimination to force a defendant to appear in a lineup and even to speak words used by the perpetrator. The Court also held that under the 6th Amendment the accused is entitled to the aid of counsel at the lineup. However, the absence of counsel at Wade's lineup did not necessarily require exclusion of any eyewitness identification at trial. The Court stated that the prosecution must first be given "the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." Wade, supra at 240. The Court listed some factors counsel should watch for: 1) the opportunity to observe the alleged criminal act..." 2) any "discrepancy between...pre-lineup description and the defendant's actual description"; 3) "any identification prior to the lineup" whether of the defendant or another; and 4) "the lapse of time between the alleged act and the lineup..." Id. at 241.

Gilbert dealt with another aspect of eyewitness identification - testimony about the pre-trial identification itself. As in Wade, the Court required as a matter of federal constitutional law a showing that the in-court identifications of Jesse James Gilbert were "not tainted by the illegal [without counsel] lineup but were of independent origin..." Gilbert, supra at 272. However, at Gilbert's trial there was also extensive testimony about the line-up identifications themselves, used to bolster the in-court identifications. This, the Court said, was a different matter. "The State is therefore not entitled to an opportunity to show that the testimony had an independent source. Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." Id. at 272-273. [Emphasis added.]

Stovall v. Denno, supra, was a different case as it dealt with a hospital room "showup" in front of a critically wounded victim. The defendant was not permitted to obtain an attorney before being displayed, alone, to the victim. The Court held that the exclusionary rules fashioned in Wade and Gilbert were not to be applied retroactively. Stovall, supra at 297. Nevertheless, a criminal defendant may always prove, the Court said, that "the confrontation conducted...was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground for attack upon a conviction independent of any right to counsel claim." Id. at 302. The Court noted that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances..."

(Continued, P. 19)

Id. Because of the emergency conditions in Stovall, a lineup was not possible, therefore no violation of due process occurred.

The Wade, Gilbert and Stovall trilogy signal defense counsel to be aware of four distinct questions. Did your client have counsel at any corporeal identification procedure? (Wade.) Is there an independent basis despite the denial of counsel? (Wade.) Is the prosecution trying to introduce testimony about the lawyer-less pre-trial identification in violation of the per se exclusionary rule? (Gilbert.) Regardless of any question of the right to counsel, was the pre-trial identification procedure "unnecessarily suggestive...?" (Stovall.)

It is important to focus our terminology in this often confusing area. There are three types of pre-trial identification techniques used by police and prosecution. A "lineup" is an in-person procedure where your client is displayed to a witness or witnesses with at least one other person (Wade; Gilbert.) A "showup" is a "one man lineup" identification technique. Your client is the only person displayed to one or more witnesses. (Stovall.) The third type of identification technique, and the most widely used, is the "photo-display." Photographic identification may take the form of one or more photographs of your client displayed alone or with photographs of other persons. This latter category was at issue in Simmons v. United States, 390 U.S. 377 (1968), where the Supreme Court, while warning of the dangers of photographic identification, refused to prohibit the use of this technique. Id. at 384. The Court confined its due process analysis to the question of suggestiveness. Significantly, the Court changed the suggestiveness test, reducing the emphasis on the necessity of the particular technique and requiring a "very substantial likelihood" of misidentification. The question defense counsel must now pursue is whether "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"? Id. [Emphasis added.] This is now the appropriate test for any identification technique, whether photos are involved or not.

Although in Simmons the photo-display was held proper, the Court did point out "danger" signs counsel should look for. Did the police show only one picture? Or did the police show the witness "the pictures of several persons among which the photograph of a single...individual recurs or is in some way emphasized"? Did "the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime"? The Court noted that "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." Id. at 383-384. The Court indicated that lineup identifications are preferred because they are "normally more accurate." Id. at 386, n.6. Also, "it probably would have been preferrable for the witness to have been shown more than six snapshots..." Id.

Foster v. California, 394 U.S. 440 (1969), represents the only decision by the Supreme Court specifically holding an identification procedure unconstitutionally suggestive. In Foster, the defendant was placed in a lineup with two other persons approximately six inches shorter than him. Walter Foster was the only participant in the lineup wearing a leather jacket similar to that worn by the robber. An eyewitness made a tentative identification. The police then immediately conducted a showup. Even after speaking to the defendant, the witness was unsure. Approximately a week later the witness viewed a lineup

(Continued, P. 20)

containing five men. Foster was the only person in the second lineup that appeared in the first. At this point the witness became "convinced" that Foster "was the man." Id. at 441-442. Since no question as to the right to counsel was presented, the Stovall suggestiveness test was applied. (Technically, the Simmons test should have been used.) The Supreme Court stated: "Judged by that standard, this case presents a compelling example of unfair lineup procedures... The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, ' This is the man'... This procedure so undermined the reliability of the eyewitness identification as to violate due process." Id. at 443. [Emphasis added.]

Perhaps the closest case on the issue of suggestiveness ever decided by the Supreme Court was Biggers v. Tennessee, 390 U.S. 404 (1968) and the second version, Neil v. Biggers, 409 U.S. 188 (1972). Biggers involved a classic showup situation. Eight months after a rape, the victim was brought to the police station where she looked at and listened to Archie Biggers who was sitting among the police officers. An equally divided court affirmed Biggers' conviction without an opinion. The defendant filed a federal habeas action and obtained relief in the district court and 6th Circuit. The Supreme Court again granted certiorari, and in a 5-3 decision held that "[w]eighing all the factors, we find no substantial likelihood of misidentification." Id., 409 U.S. at 201.

At issue in Biggers II was testimony regarding the pre-trial identification. The court stated that the Simmons test "with the deletion of 'irreparable'... serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." Id., 409 U.S. at 198. The Court held that unnecessary suggestiveness alone does not require exclusion of the pre-trial identification procedure. Again, the Court stated that the "totality" is the "central question." The Court restated the factors counsel should look for: 1) "the opportunity of the witness to view the criminal at the time of the crime," 2) "the witness' degree of attention," 3) "the accuracy of the witness' prior description of the criminal," 4) "the level of certainty demonstrated by the witness" at the lineup, showup or photo display, and 5) "the length of time between the crime" and the identification. Id., 409 U.S. at 199. See also Coleman v. Alabama, 399 U.S. 1 (1970), holding a lineup not "so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id. at 5.

Phase I of the Supreme Court's treatment of eyewitness identification was the Wade, Gilbert and Stovall trilogy and the Simmons case. In Phase II, the Court applied the broad standards to facts in particular cases. Foster, Biggers I, Biggers II and Coleman. Still, many questions were unanswered. Did the right to counsel apply to all pre-trial identification techniques no matter when they were used? This question was answered in Kirby v. Illinois, 406 U.S. 682 (1972) and United States v. Ash, 413 U.S. 300 (1973). Kirby and Ash represent a partial erosion of the safeguard enunciated in Wade. In a 5-4 decision, the Supreme Court held in Kirby that the constitutional right to counsel did not attach until judicial criminal proceedings were initiated. The right to counsel at a lineup or a showup, the Court stated, does not attach until "formal charge, preliminary hearing, indictment, information or arraignment" has occurred. Id. at 689. In Ash, the Court dealt with the question of whether the right to counsel applies at photographic displays. In a 6-3 decision, the Court held that it did

(Continued, P. 21)

not. (In Cane v. Commonwealth, Ky.App., 556 S.W.2d 902, 906 (1977), the Kentucky Court of Appeals held that there was no right to counsel at photo displays under Section 11 of the Kentucky Constitution.) The decisions in Kirby and Ash mean that the right to counsel only exists at post-arrest, in-person identification procedures. However, other questions remain to be answered. Suppose your client is incarcerated on other charges at the time he is placed in a lineup or a showup, does he have the right to counsel? Regardless of the timing or type of identification procedure used, counsel should always require that the record reflect whether or not the defendant had an attorney present. Did the police deliberately delay initiation of formal charges until the identification procedures were complete to avoid the requirement of counsel? Did the prosecution use photos instead of a lineup to circumvent the 6th Amendment? A due process violation may have occurred.

In Moore v. Illinois, 434 U.S. 220 (1977), the Court dealt with the interesting question of what constitutes an identification procedure. Must there be a formal lineup, show up or photo display? In Moore, a policeman brought the victim of a rape to a preliminary hearing the day after the defendant was arrested. The defendant was not represented by counsel at the preliminary hearing. The Court held that the preliminary hearing was, in fact, a showup. "It is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case." Id. at 229. Moore specifically reaffirmed the per se exclusionary rule of Gilbert. No testimony regarding the preliminary hearing would be permitted upon retrial. Id. at 231. Defense counsel should take note that Moore stands for the important proposition that even in-court identification procedures can be suggestive in nature.

After Stovall and Biggers II (which was a pre-Stovall case), there was a split of authority on the question of whether a per se exclusionary rule, as required by Gilbert for counselless lineups, should apply to impermissibly suggestive pre-trial identification techniques. This question was answered by the Court in Manson v. Brathwaite, 432 U.S. 98 (1977), where the Court held that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations." Id. at 114. The Court rejected a per se exclusionary rule regarding testimony about admittedly suggestive pre-trial procedures. In Manson, the witness was shown a single photograph of the defendant. The Court balanced the factors listed in Biggers II against the "corrupting effect of the suggestive identification..." Id. Mr. Justice Marshall's dissenting opinion is noteworthy. It begins: "Today's decision can come as no surprise to those who have been watching the Court dismantle the protection against mistaken eyewitness testimony erected a decade ago...The crux of the Wade decisions...was the unusual threat to the truth-seeking process posed by the frequent untrustworthiness of eyewitness identification testimony. This, combined with the fact that juries unfortunately will often unduly be receptive to such evidence, is the fundamental fact of judicial experience ignored by the Court today." Id. at 118, 119-120. Nevertheless, Manson specifically reaffirms defense counsel's right to seek exclusion of impermissibly suggestive pre-trial identification procedures under the "totality of the circumstances" test. It just makes our job more difficult.

Manson apparently clouds the question of whether it is relevant to the admissibility of eyewitness identification testimony that more reliable pre-trial identification procedures than used in a particular case were available to

(Continued, P. 22)

police and prosecution. (Stovall considered whether it was proper to use a showup instead of a lineup). The Supreme Court has granted certiorari in Sumner v. Mata, 611 F.2d 754 (9th Cir. 1979), cert. granted 27 CrL 4129 (July 2, 1980), to consider whether the availability of a suspect for a physical lineup renders the use of a photographic identification procedure constitutionally suspect. See Mr. Justice Rhenquist's opinion granting a stay, Sumner v. Mata, ___ U.S. ___, 100 S.Ct. 1630, 64 L.Ed.2d 216 (1980). Counsel should continue to insist, however, that the availability of more reliable identification procedures is very relevant to the question of admissibility of eyewitness identification testimony.

A final Supreme Court case on eyewitness identification is United States v. Crews, ___ U.S. ___, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980). In Crews, the Court held that an illegal arrest did not preclude the in-court identification of the defendant since the police already had reason to suspect the defendant and would have obtained his picture for identification purposes anyway. Id., 63 L.Ed.2d at 548. The plurality opinion did note that "[t]he pre-trial identification obtained through use of the photograph taken during the defendant's illegal detention cannot be introduced; but the in-court identification is admissible... Id., 63 L.Ed.2d at 549. Apparently, however, five members of the Court would never permit an in-court identification to be suppressed merely because it results from an illegal arrest. The practical application of these principles of law to the defense of eyewitness identification cases will be discussed in the next issue of The Advocate.

KEVIN McNALLY

****

ACCOMPLICE RULE CHANGED

On September 1, 1980, by order of the Kentucky Supreme Court, RCr 9.62 which prohibits a criminal conviction based on the uncorroborated testimony of an accomplice will be abolished.

According to RCr 9.62, "[a] conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof." "In the absence of corroboration as required by law, the court shall instruct the jury to render a verdict of acquittal." RCr 9.62.

After RCr 9.62 is abolished, convictions based solely on an accomplice's uncorroborated testimony will be permissible in the state courts of Kentucky.

The abolition of RCr 9.62 necessitates certain strategic maneuvers by trial defense attorneys.

Although the abolition of RCr 9.62 is effective September 1, 1980, any defendant tried or retried after that date should nevertheless be entitled to the protection of RCr 9.62 as long as his charged offense allegedly occurred before September 1, 1980. To hold otherwise would violate the Fourteenth Amendment's prohibition against a state court's ex post facto judicial action.

Article I, §10, of the United States Constitution prohibits a State from passing any "ex post facto Law." This constitutional prohibition is a limitation upon the powers of state legislatures and thus does not of its own force apply to the judicial branch of state governments. Marks v. United States, 430 U.S. 188, 97 S.Ct. 990, 992, 51 L.Ed.2d 260 (1977). But the principle on which the ex post facto limitation is based is fundamental

to the concept of constitutional liberty and, as such, that right is protected against judicial action by the Due Process Clause of the Constitution. Id., 97 S.Ct. at 992-993, citing Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894 (1964).

In Government of Virgin Islands v. Civil, 591 F.2d 255, 256 (3rd Cir. 1979), a repealed Virgin Island statute requiring that accomplice testimony be corroborated to sustain a conviction, was held on federal constitutional grounds "applicable to crimes committed before its revocation."

The abolition of the accomplice corroboration rule, like the repeal of the Virgin Island corroboration statute, "reduces the amount of proof necessary for conviction." Gov. of Virgin Islands v. Civil, supra at 259. Consequently, the rule's repeal would "alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1884), cited approvingly in Gov. of Virgin Islands v. Civil, supra at 259.

"Since it would deprive the accuseds of a substantial right that the law gave [the defendant] at the time of the [offense]," the abolition of Kentucky's corroboration rule would fall within the classes of judicial changes prohibited by the ex post facto analogue of the due process clause of the federal constitution. Gov. of Virgin Islands v. Civil, supra at 259.

Thus, trial counsel for any defendant whose charged crime allegedly occurred before September 1, 1980 should move the trial court on federal constitutional grounds to rule that the accused is entitled to the protections contained in RCr 9.62 even though that rule was previously abolished by judicial action. If a defendant is not entitled to the benefit of RCr 9.62 because his alleged crime occurred on or after September 1, 1980, trial defense counsel should request a cautionary instruction on the unreliability of the accomplice's testimony.

Because the possibility always exists that an accomplice will falsify his testimony and will incriminate an innocent party in an effort to secure more favorable treatment for himself, the reliabilty of an accomplice's testimony is inherently suspect.

"Historically, the original controversy over the testimony of an accomplice centered on whether it was admissible at all because its admission was so fraught with danger of injustice to an accused." Rue v. Commonwealth, Ky., 347 S.W.2d 74, 75 (1961). "With the unfolding power of the common law trial judges to comment on the evidence, it soon became the practice to admit the testimony of the accomplice followed by a counsel of caution by the judge to the jury as to the weight to be given it." Id. "In states like Kentucky where the trial judges are not usually permitted to comment to the jury on the weight to be given certain evidence, the common law judge's cautionary practice regarding the testimony of an accomplice became crystallized into a rule of law" - RCr 9.62. Id.

Now with the abolition of RCr 9.62, the defendant is without any protection against the danger of conviction based solely on the traditionally suspect testimony of an accomplice.

To offset this loss and to protect the defendant's due process right to a fair trial, defense counsel should tender a cautionary instruction on the testimony of an accomplice. The following sample instructions have been culled from model federal instructions on this issue.

Model Instruction

[There has been testimony in this trial from witnesses whom you may find to have been accomplices.]*

An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. [On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have.]

[The testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence.] The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.

You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

*Sentence in brackets ([]) to be used only if appropriate. Instructions to be inserted or modified as appropriate to the proof and contentions.

J. VINCENT APRILE II

****

THE ADVOCATE is the responsibility of the Public Information Committee, and is edited by Ernie Lewis. Special thanks for this issue to Brenda Hughes, Linda West, Randy Wheeler, Bill Radigan, Ed Monahan, Gail Robinson, Vince Aprile, Tim Riddell, and Kevin McNally. 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

ADDRESS CORRECTION REQUESTED

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

Printed with State Funds
KRS 57.375