The Advocate

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COUNTY'S RESPONSIBILITIES FOR EXPERT FEES

All public defenders should be aware of OAG 80-401 concerning the payment of fees necessary for the defense of indigents. It is reprinted below:

Your recent letter raises the question as to whether or not the county must bear the expense of expert witnesses' fees, psychological examinations, etc., used in defense of indigents charged with felonies and represented by the public defender.

At the outset, it must be noted that county obligations are not created unless expressly authorized by statute. Hazelip v. Fiscal Court of Edmonson County, 228 Ky. 80, 14 S.W.2d 398 (1929) 399.

You have indicated by telephone that under KRS 31.160(1)(b), Boone County is currently committed to a public defender program. Such commitment is permissive, but when a county selects a public defender program under that

(See OAG, p. 2)

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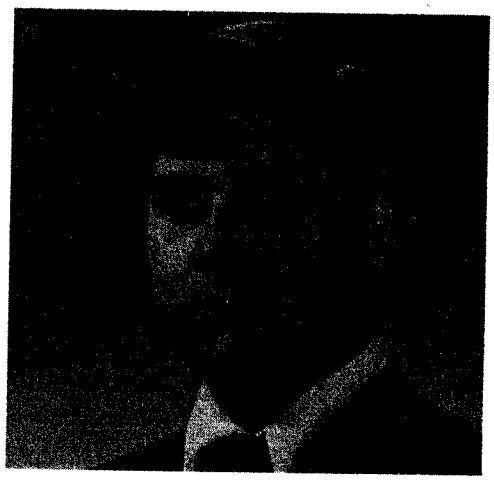

Kent Akers of Nelson County has been doing Public Defender work for five years. He is a sole practitioner with a general practice. Kent grew up in Bloomfield in Nelson County. He graduated from the University of Kentucky in 1971 with a degree in Business Administration and from the University of Louisville law school in 1974. He then returned home to practice law.

Kent is a conscientious public defender who obviously cares about his clients and is willing to work more hours than the few for which he is compensated. He has done criminal defense work for five years, and recently he has undertaken some Protection and Advocacy work which he finds interesting. Kent was initially assigned to represent in a

(See Akers, p. 2)

(OAG, Continued from p. 1)

statue, it is committed for that particular fiscal year. This commitment is on a year by year basis. See 504 KAR 1:020, Sections 1 and 2. Since the county is currently under a public defender program, Boone County must pay the expert witnesses' fees pursuant to KRS 31.190(1), 31.200(1), and 31.240(3). The state furnishes $16,000 a year for the program, but that covers defense counsel fees only. See KRS 31.050(2). Thus under the above mentioned statutes, the county must bear necessary defense expenses other than the defense counsel fees covered in the state's appropriation of $16,000.

As relates to psychological examinations, KRS 31.185 applies. Where the defense attorney considered the use of state facilities as being impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county. Young v. Commonwealth, Ky., 585 S.W.2d 378 (1979).

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SUPPLEMENTS FOR FITZGERALD CRIMINAL PRACTICE AVAILABLE

In May, 1978, the Office for Public Advocacy distributed Volume 8 of the West Kentucky Practice Series at the Annual Public Defender Training Seminar. Volume 8 is Criminal Practice and Procedure by the late Tex Fitzgerald. The 1980 Pocket Part to that work, written by C. David Emerson has recently been released by West Publishing Co. The Office for Public Advocacy has a limited number of copies of the pocket part which can be sold to attorneys at $6.50 each. If you received a copy of Fitzgerald at the seminar and you desire a copy of the pocket part send us a check for $6.50 and we will send one to you by return mail.

(Akers, Continued from p. 1)

dependency proceeding the parents of a mentally retarded juvenile who was about to be expelled from school. After getting the dependency petition dismissed, Kent followed up on the developmentally disabled juvenile's educational problems. His approach to the case demonstrated concern about all of his client's legal problems.

Kent's perception and willingness to pursue new avenues of assistance for his clients are exceptional assets to the Public Defender and Protection and Advocacy systems. That quality is evidenced by his recent efforts to find long-term placement in a mental health facility for a disturbed client who has entered a guilty plea but may have serious problems adjusting to a prison situation if he is simply sentenced to the Bureau of Corrections.

Kent's most time-consuming "hobby" is serving in the National Guard. He recently spent nineteen days at a Cuban refugee camp in Arkansas. His other favorite leisure time pursuit is hunting.

Kent feels that the Office for Public Advocacy seminars are very helpful, and he believes in seeking help from other local attorneys or from the Office for Public Advocacy central office when faced with an unusual problem. Thanks for your contribution to the Public Defender system, Kent.

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The National College For Criminal Defense will hold a Death Penalty Defense Seminar December 5-7, 1980 at the Sheraton Charleston Hotel, Charleston, South Carolina. Tuition is $170.00. For further info or to register, contact Registrar, National College For Criminal Defense, College of Law, University of Houston, Houston, Texas 77004. (713) 749-2283. Contact this same address for the DEATH PENALTY REPORTER, published twelve times per year for $50.00.

WEST'S REVIEW

Kentucky decisional law for July and August includes two Court of Appeals decisions which highlight the confusion generated by the Kentucky Supreme Court's decision in Cleaver v. Commonwealth, Ky., 569 S.W.2d 166 (1978). Cleaver, of course, modified the procedure for obtaining a belated appeal (see "The Belated Appeal Dilemma," The Advocate, v. 2, no. 5, p. 6).

In Able v. Commonwealth, Ky.App., __S.W.2d__ (August 15, 1980), the Court, in an opinion by Judge Vance, held that "Cleaver . . . clearly pointed out that RCr 11.42 does not confer jurisdiction on a circuit court to reinstate a right of appeal." Master Slip Opinion at 2. "A belated appeal or the reinstatement of a lapsed appeal can be granted only by the appellate court that is to entertain it." Id. According to the Able Court, the only avenue of relief for the defendant whose appeal has not been perfected because of the ineffective assistance of counsel lies in petitioning the appellate court for a reinstatement of the appeal. The same is true if a notice of appeal was never filed and the defendant is thus seeking a "belated" appeal.

A conflicting holding was reached by the Court in Hines and Hendron v. Commonwealth, Ky.App., 27 K.L.S. 11 at 2 (August 15, 1980). In an opinion by Judge Wilhoit, the Court found that Cleaver stands only for the principal that "where an appellate court has dismissed an appeal only that court may reinstate the appeal . . ." The Court held that where an appeal had not been perfected, but had not been dismissed by an appellate court, an RCr 11.42 motion to the circuit court is still the proper recourse. If the circuit court finds after a hearing that the failure to perfect the appeal is attributable to the ineffective assistance of counsel, then a new judgment should be entered from which a timely appeal can be taken. This holding is squarely in conflict with the holding in Able. Discretionary review is being sought in both cases.

The Court has reaffirmed the right of a probation revocee to notice of the grounds upon which his probation is sought to be revoked. Lynch v. Commonwealth, Ky.App., 27 K.L.S. 11 at 7 (August 22, 1980). Notice of Lynch's probation revocation hearing was served upon counsel who had represented him at guilty plea proceedings more than a year previously. No notice was served upon Lynch himself The Court, citing Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973), found that this was inadequate notice in view of the lack of continuity between the guilty plea proceedings and the probation revocation hearing. Under these circumstances, notice to the revocee himself was required.

In Waugh v. Commonwealth, Ky.App., 27 K.L.S. 11 at 12 (August 29, 1980), the Court reversed the appellant's conviction of trafficking in a controlled substance. The drugs recovered from Waugh's person were obtained as a result of his unlawful arrest. Officers received a tip from an anonymous informant that Waugh would be in a certain location at a certain time. The officers knew that Waugh had been previously arrested on drug-related charges. Based on this information, the police proceeded to the designated location where they found and arrested Waugh. The Court of Appeals agreed with Waugh that the police lacked probable cause for his arrest inasmuch as there was nothing to indicate that Waugh was about to engage in criminal activity.

The most noteworthy decision from the Kentucky Supreme Court for the period under review is the Court's multi-faceted decision in Gall v. Commonwealth, Ky., 27 K.L.S. 11 at 16 (September 2, 1980)(see "Death Penalty" for a review of those death

(Continued, p. 4)

penalty related issues discussed in Gall). The Court affirmed Gall's death sentence imposed under KRS 532.025, Kentucky's new capital sentencing statute. A number of issues of general concern are addressed by the opinion. Of broadest impact may be the Court's explication of the law pertaining to the absence of "extreme emotional disturbance" as an element of murder. The Court held that "[a]n instruction on murder need not require the jury to find that the defendant was not acting under the influence of extreme emotional disturbance unless there is something in the evidence to suggest that he was . . ." Gall, at 19. Once the issue of extreme emotional disturbance is raised the burden of proving its absence rests with the commonwealth. However, the fact that the commonwealth fails to introduce any evidence does not, apparently, entitle the defendant to a directed verdict. "Unless the evidence raising the issue is of such probative force that otherwise the defendant would be entitled to a directed verdict of acquittal, the prosecution is not required to come forth with negating evidence in order to sustain its burden of proof." Id. Unfortunately, the Court's analysis of this issue is less than completely clear. However, it appears that, as practical reality, the defense bears the burden of proving the existence of extreme emotional disturbance.

Also addressed in Gall was the question of the extent to which a jury may be made aware by defense counsel of the possibility of civil committment of the defendant in the event he is acquitted by reason of insanity. The Court had previously held in Edwards v. Commonwealth, Ky., 554 S.W.2d 380 (1977), that the defendant was not entitled to an instruction advising the jury that he could be committed if acquitted by reason of insanity. However, the Court has observed in Gall that defense counsel is not prohibited from arguing to the jury that, if the defendant should be acquitted and again lapse into insanity, there are means to obtain his civil commitment.

No opinions were issued by the United States Supreme Court during the period reviewed.

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DEFENDER'S CREDO

I am a Public Defender
I am the guardian of the presumption of innocence, due process, and fair trial
To me is entrusted the preservation of those sacred principles
I will promulgate them with courtesy and respect
But not with obsequiousness and not with fear
For I am partisan; I am counsel for the defense
Let none who oppose me forget that
With every fibre of my being I will fight for my clients
My clients are the indigent accused
They are the lonely, the friendless
There is no one to speak for them but me
My voice will be raised in their defense
I will resolve all doubt in their favor
This will be my credo; this and the Golden Rule
I will seek acclaim and approval only from my own conscience. And if upon my death
there are a few lonely people who have benefited
my efforts will not have been in vain.

JIM DOHERTY
PUBLIC DEFENDER
CHICAGO, ILLINOIS

-NOTE-

Protection & Advocacy for the Developmentally Disabled

KENTUCKY GROUP HOMES

At the 1980 Annual Public Advocate Training Seminar several local public advocates indicated that they would be able to more adequately represent clients with and/or without developmental disabilities if they were familiar with community group homes available for those clients. To assist in this matter the Protection and Advocacy Division has compiled the following information about the various group homes existing in Kentucky.

The Department for Human Resources has been involved in a variety of group home programs for several years through actual operation of homes, provision of consultation and technical assistance to operators and through contracts to develop resources with the private sector. The Department has primarily four (4) types of on-going group homes; 1) group homes for developmentally disabled, 2) group homes for foster children, 3) treatment oriented group homes, and 4) group homes for treatment of adjudicated delinquents.

During its initial stages, group homes were often managed by a live-in couple who found themselves acting in the role of surrogate parents. These group homes operated more as foster homes rather than providing active treatment programs for its residents.

As time passed, it became increasingly apparent that the Department would have to modify these programs and provide consistent care for youths with behavior problems.

In 1974 the focus shifted from the foster family-type program to programs with professional staff to provide care during scheduled hours over a twenty-four hour period. The Department was able to accomplish this by funding they received from the Kentucky Crime Commission with Law Enforcement Assistance Administration (LEAA) funds. As the grants expired, group home programs were continued with state funding.

Due to the escalating costs of residential programs and the efficiency in treating youths with behavioral problems in a lesser restrictive environment, the Department plans to direct the care and treatment of youthful offenders on community-based group homes.

The following information is broken down into four (4) groups, each including their statutory and regulatory authority. Only the first group will be listed in this issue. Group Homes for Public Offenders, Neglected, Abused and Dependent Children's Group Homes and Developmental Disabilities Group Homes will be listed in the next issue of THE ADVOCATE.

GROUP HOMES FOR STATUS OFFENDERS

Relates to: KRS 199.011(5), (6), (7), (12); KRS 199.640 to KRS 199.670

Pursuant to: KRS 13.082, KRS 194.050

Regulations: 905 KAR 1:091; See also 905 KAR 1:110

Waddy Group Home
Route 2, I-64 - 365 Int.
Waddy, Kentucky 40076
Diane Smith (502) 829-5391
Female; ages 13-15
Female; ages 13-15

Outlook House Group Home
1710 Terrace View Drive
Lexington, Kentucky 40504
Kathy Christopher (606) 252-7490
Female; ages 13-17

Morehead Group Home
334 Old Flemingsburg Road
Morehead, Kentucky 40351
Jo Ann Stapleton (606) 784-8143
Female; ages 13-15

London Group Home
Route 2, Box 4
London, Kentucky 40741
Norma Sizemore (606) 864-7911
Female; ages 15-17

Ashland Group Home
3700 Thirteenth Street
Ashland, Kentucky 41101
William Vance (606) 324-8141
Male; ages 15-17

Chaney House Group Home
115 South Green Street
Henderson, Kentucky 42420
Tom Marshall (502) 827-2253
Male; ages 10-16

D.A.T.A. House
1633 Beechwood
Louisville, Kentucky 40204
David Riffe (502) 454-7626
Male; ages 12-18

Kennedy Group Home
109 Kennedy Avenue
Louisville, Kentucky 40206
David Riffe (502) 493-7670
Female; ages 12-18

Audubon Youth Development
Center - Boy's Group Home
Route 2, Box 47A
3001 Leitchfield Road
Owensboro, Kentucky 42311
David Peak (502) 685-4477
Male; ages 13-17

Audubon YDC Girl's Group Home
Rt. 2, Box 47A; 3001 Leitchfield Rd.
Owensboro, Kentucky 42311
Rita Howard (502) 685-4477
Female; ages 15-18

Breckinridge Group Home
P. O. Box 740
Elizabethtown, Kentucky 42701
Priscilla King (502) 737-5637
Female; ages 14-18

Shelby Group Home
P. O. Box 740
Elizabethtown, Kentucky 42701
William Beeler (502) 737-5637
Male; ages 14-18

Camp Street Group Home
537 Camp Street
Louisville, Kentucky 40203
David Riffe (502) 636-2108
Female; ages 12-18

Crescent House
316 Crescent Court
Louisville, Kentucky 40206
David Riffe (502) 897-9959
Male; ages 12-18

Metro Group Homes, Inc. (2 Homes)
617 Price Avenue
Lexington, Kentucky 40508
Vicki Reed (606) 259-0061
Male-Female; ages 13-17

Phoenix House
612 West Ormsby
Louisville, Kentucky 40203
Kathy Lawkins (502) 637-6680
Male-Female; ages 13-17

Boone Group Home
P. O. Box 740
Elizabethtown, Kentucky 42701
Steve Bower (502) 737-5637
Male; ages 14-18

Clay Group Home
P. O. Box 740
Elizabethtown, Kentucky 42701
Wendy List (502) 737-5637
Female; ages 14-18

Ervin S. Pruitt House
159 South College Street
Pikeville, Kentucky 41501
Charles McCoy (606) 432-4782
Male - Female; Up to 18

Mason Manor, Inc.
221 Wood Street
Maysville, Kentucky 41056
Ann Johnson (606) 564-6818
Male - Female; Up to 18

Boys Orientation Group Home
1523 Winter Avenue
Louisville, Kentucky 40204
Kathleen Gunderson (502) 589-1689

Girls Orientation Group Home
1212 East Broadway
Louisville, Kentucky 40204
David Riffe (502) 581-6060

Central Kentucky Group Home
401 West Eighth Street
Parts, Kentucky 40361
Betty Daugherty (606) 987-7587

Christian Appalachian Project Group Home
Route 3
Mt. Vernon, Kentucky 40456
Tony DeLeon (606) 256-5724

Hollen House, Inc.
Old Frankfort Pike
Georgetown, Kentucky 40324
Mrs. John Ward (502) 863-6494

Maplewood Home, Inc.
481 Idlewild Road
Burlington, Kentucky 41005
Billie Jo Morris (606) 586-7280

West Home for Girls
2110 North Elm Street
Henderson, Kentucky 42420
Tom Marshall (592) 827-2253
Female; ages 9-17

YMCA Shelter House II
1410 South First Street
Louisville, Kentucky 40208
Allen Mathews (502) 634-4786
Male - Female; ages 16-18

Agape Group Home
Route 2
Leitchfield, Kentucky 42754
Ronald Miller (502) 257-2500
Male - Female; Up to 16

Camp Street Girl's Home
500 Camp Street
Louisville, Kentucky 40203
David Riffe (502) 637-6197

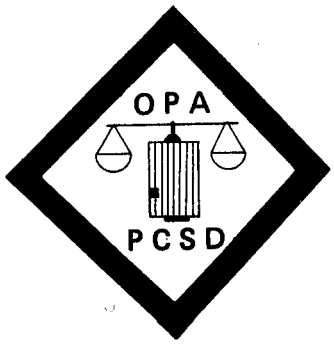
Renaissance Committee Group Home
406 South Seventh Street
Paducah, Kentucky 42002
Pam Haines (502) 443-3726

YWCA Halfway House
604 South Third Street
Louisville, Kentucky 40202
Donna Rutledge (502) 585-2331

Bardstown Road Group Home
1619 Bardstown Road
Louisville, Kentucky 40205
David Riffe (502) 458-7390

Jefferson Street Boys Group Home
1924 West Jefferson Street
Louisville, Kentucky
David Riffe (502) 584-3440

Jefferson Street Girls Group Home
1922 West Jefferson Street
Louisville, Kentucky 40203
David Riffe (502) 584-3384
Female; ages 12-18



INTERSTATE AGREEMENT ON DETAINERS (KRS 440.450)

Often a person imprisoned in this state will be wanted to face pending charges in another jurisdiction. Likewise a prisoner in another state may be wanted in Kentucky for the same reason. Therefore a detainer may be filed at the prisoner's institution. In this situation the Interstate Agreement on Detainers, KRS 440.450, will generally come into play. That compact allows either the prosecuting state or the inmate to demand a trial on the charges.

If the inmate is wanted in another jurisdiction (even if a detainer has not been filed) he may want to attempt to get the charge dismissed rather than demand a trial. In this case a number of factors must be examined to determine whether or not negotiations with the prosecutor should take place and if so what should be considered. These factors include the seriousness of the outstanding charges, the length and nature of the prisoner's current conviction, his institutional record, the impact of the detainer on his incarceration, the distance from the demanding state, the willingness of the prisoner to make restitution, the possibility of concurrent sentences and any benefits to the prosecutor in dropping the charges. It must be remembered that if the prosecutor is contacted it may cause him to file a detainer or request a disposition under the Interstate Agreement on Detainers if a detainer has already been filed.

If negotiations fail or if they are deemed to be useless the inmate may wish to request under Article III of the IAD that he be brought to trial on those charges. The inmate may desire this disposition for a number of reasons. First, he may be denied the chance to become involved in rehabilitative programs since rehabilitation is often deemed useless for an inmate that will be transferred to another jurisdiction when he has served his sentence or is released on parole. He may be denied a number of privileges since he is considered a greater escape risk. He may also be placed in maximum security without a consideration of the seriousness of his offense, his institutional attitude or even the likelihood that the detainer will be acted upon. Disposition of the charge and the subsequent lifting of the detainer may alleviate all these problems. The inmate may also hope to receive a sentence from the other jurisdiction which will run concurrently with the sentence he is serving. See Peale v. Sigler, 392 F.Supp. 325 (E.D. Wash. 1974) for a general discussion of the effects of a detainer.

If he does desire to be tried on the charge, a written request must be conveyed to the appropriate prosecuting officer and court in the jurisdiction where the charges are pending. Article III(1). The Kentucky Supreme Court has held in Lovitt v. Commonwealth, Ky., 592 S.W.2d 133 (1979), that it is sufficient if the request is given to the prisoner's custodian. The custodian must then forward the request along with a certificate stating the term being served, time already served, time remaining to be served, good time accrued and parole eligibility date to the prosecutor. Art. III(1).

After the request has been made trial must commence within 180 days. Art. III(1); Franks v. Johnson, 401 F. Supp. 669 (E.D. Mich. 1975). If not, the appropriate court must enter an order dismissing the charge with

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prejudice. Also the detainer is of no further effect. However, it should be noted that continuances can be granted for good cause if "necessary and reasonable." Art. III(1). Charges must similarly be dismissed if the prisoner is returned to his place of incarceration without a trial having taken place. Art. III(4).

Another important factor to remember about Article III is that the request is for a disposition of all charges in the receiving state on which a detainer has been placed. Id. Therefore the certificate and the request must be forwarded to all of the appropriate prosecutors. This holds true even if the inmate has requested trial on only one of those pending charges.

There may be situations in which the inmate is satisfied with leaving the charges pending. However he cannot rest assured that he will not be tried on those charges before his present incarceration has ended. Article IV of the IAD provides that the prosecutor who has lodged a detainer is entitled to have the prisoner appear for trial if he presents a written request through the appropriate court to the holding jurisdiction. Art. IV(1). After this request a prisoner has a period of thirty (30) days in which to contest the request before transfer is mandated. Id. During this time the inmate may request the Governor to disapprove of the transfer or may file an action seeking to stop the transfer. Id.

As under Article III, the holding authorities must forward a certificate to the prosecutor similar to that under Article III. Art. IV(2). This certificate must be sent to all other prosecutors in the state where charges are pending who have also lodged detainers. Id.

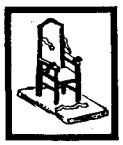
Under Article IV(3) trial must be commenced within 120 days after the prisoner has arrived in the state for trial. Failure to do so will result in a dismissal of the charges. United States v. Woods, 465 F.Supp. 89 (D.C. Ky. 1979). As under Article III a return to the state of incarceration without trial will cause the dismissal of both the charges and the detainer. See United States v. Eaddy, 595 F.2d 341 (6th Cir. 1979); But see Shanks v. Commonwealth, Ky. App., 574 S.W.2d 688 (1978). Continuances under Article IV may also be granted. Art. IV(3).

One important point to remember is that although the IAD provides time limits, the right of the prisoner to a speedy trial is not measured solely by those requirements but may also be judged in terms of his constitutional right to a speedy trial under the Sixth Amendment. See Watson v. Ralston, 419 F.Supp. 536 (N.D. Wis. 1976). Whether or not the inmate requested a disposition of the charges will be an important factor if the issue is raised. See Payne v. Commonwealth, Ky. 27 K.L.S. 4 (4-1-80).

The IAD does not apply in all situations in which a detainer is involved. First, both the sending and receiving states must be parties to the IAD. But even if this is not the case the IAD will not apply when a federal detainer is lodged against a federal prisoner, when a detainer is lodged against a person incarcerated awaiting trial, when a detainer is lodged based on a parole or probation violation (Kentucky is the only jurisdiction which has applied the IAD to these situations. See KRS 440.455). If untried charges exist but no detainer has been lodged the IAD similarly does not apply. However it should be remembered that in this situation the Uniform Criminal Extradition Act, KRS 440.150 to .420, may come into play.

Two good sources of information on the IAD are 98 ALR 3rd 160 and Criminal Detainers, by Professor Leslie W. Abramson of the University of Louisville, College of Law. If there are any questions concerning the Interstate Agreement on Detainers please feel free to contact the Post-Conviction Services Division.

RANDY WHEELER



THE DEATH PENALTY

Death is Different

GENE GALL'S SENTENCE OF DEATH AFFIRMED BY SUPREME COURT

Eugene Gall's conviction for murder with the aggravating factor of first degree rape and sentence of death were affirmed by the Supreme Court of Kentucky on September 2, 1980.

The Court rejected Gene's claim that a juror was improperly excluded under Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 100 S.Ct. 2521 (1980). The excluded juror was equivocal as to whether he could impose the sentence of death. At no time did the juror state he was unable to impose a capital sentence. Adams held that Witherspoon was a limitation on the power of the state to exclude a juror. A juror can only be excluded when he is irrevocably opposed to imposing a sentence of death: "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."

The Kentucky Supreme Court determined that Adams was inapplicable to Gene's case since the juror never indicated that he could consider death as an option. Further, the Kentucky Court held that "Witherspoon does not require the acceptance of a juror who is unable to say that he can exercise open-minded discretion with regard to the vital issues he will be called upon to decide." In so deciding, it seems that the Court, like the state of Texas in Adams, has mistaken Witherspoon as a grounds for disqualifying prospective jurors, instead of being a limitation on the state's power to exclude.

The Court refused to substitute its personal viewpoints with regard to Gene's severe mental condition for the jury's determination that no mitigating circumstances existed. Paradoxically, the Court observed, "Perhaps the real problem lies in the very nature of the defense of insanity. It may be too much to ask of any set of men or women to make a dispassionate assessment of a criminal defendant's mental condition, especially in the setting of a revolting offense he has committed." Yet, the Court did nothing to legally account for this human reality.

The Court dealt with the many challenges to the constitutionality, under the Kentucky and United States Constitutions, of the statute by stating, "In our opinion it is not a constitutional issue and we do not find it unconstitutional."

In its proportionality review of the sentence, the Supreme Court compared Gene's sentence to 16 cases since 1972 in which the sentence of death was imposed, and citing 13 of these cases found the sentence "...not excessive or disproportionate to the penalty imposed in similar cases." The Court reached this conclusion with no explanation. All but one of the 13 cases involved unconstitutionally imposed sentences of death. The Court refused to consider 9 Kentucky capital cases conducted under the present statute which had more aggravating factors and less mitigating factors, and for which a sentence other than death was imposed.

ADVOCACY IN JUVENILE COURT

As Mr. Justice Douglas, writing for the United States Supreme Court, so aptly stated, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." Haley v. Ohio, 332 U.S. 596, 601 (1948). Notwithstanding such lofty rhetoric, almost two more decades would pass before the full Court spelled out exactly what due process afforded in the context of juvenile proceedings. Beginning in 1966, the Court would articulate those rights which would ensure such "procedural regularity" as would be "sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness." Kent v. United States, 383 U.S. 541, 553 (1966). Those rights would be held to include adequate notice of charges, assistance of counsel; confrontation and cross-examination; conviction only upon proof beyond a reasonable doubt; and, the prohibition against double jeopardy. Kent, supra; In Re Gault, 387 U.S. 1 (1967); In Re Winship, 397 U.S. 358 (1970); Breed v. Jones, 421 U.S. 519 (1975).

At least one major distinction between adults and juveniles continues to be the jury trial. The Supreme Court has held that a jury trial is not constitutionally required in juvenile proceedings because a jury is not "a necessary component of accurate fact-finding." McKeiver v. Pennsylvania, 403 U.S. 528 (1971). It should be noted that in McKeiver, the Court was at least trying to stress the "rehabilitative" function of the juvenile court, versus the full-blown adversary, punishment-oriented function of adult criminal courts.

The Kentucky legislature has attempted to maintain the distinctive treatment of juveniles in promulgating KRS Chapter 208. This chapter is an umbrella, covering everything from arrest to disposition, including separate sections on those juveniles who should be treated as adults. That chapter grants exclusive jurisdiction to the juvenile session of the district court of any person who at the time of committing a public offense was under the age of eighteen years. KRS 208.020. The juvenile session also has exclusive jurisdiction of children who are dependent, abused or neglected; habitually truant; or, beyond the control of parents or other legal guardians. The focus of this article, however, will be on delinquency proceedings.

Juvenile proceedings consist of two distinct hearings: the adjudicatory, or guilty-innocence, stage; and, the disposition stage. It should be noted that it is left to the discretion of the child to invoke the Rules of Criminal Procedure during the adjudicatory stage. KRS 208.060(1)(b).

The law of arrest is applicable in toto to children. KRS 208.110. Juveniles have at least one safeguard not afforded adults: immediate notice must be given to the parents of an arrested child. KRS 208.110(3). The child must be released to the parents upon a promise to produce the child before the juvenile court. Id. This statutory requirement is very often not complied with by police officers, who rather will detain a child for questioning in order to procure a statement. [The author has had success in suppressing a child's statement due to failure to comply with this section.] Other common grounds asserted for suppression of in-custody statements relate to supposed "waivers" of Miranda rights. Studies have shown that only a very small percentage of juveniles are capable of knowingly and intelligently waiving such rights. See Ferguson and Douglas, "A Study of Juvenile Waiver", 7 San Diego L.R. 39. Defense counsel should take note, however, that while a custodial request to consult a probation officer does not require termination of interrogation,

Fare v. Michael C., 99 S.Ct. 2560 (1979), there is a developing concern that a juvenile be counseled by some interested adult (parent, guardian, etc.) as a prerequisite to the admissibility of any custodial statements by a juvenile. See Riley v. State of Illinois, ___ U.S. ___, 98 S.Ct. 1657 (1978) (Mr. Justice Marshall and Mr. Justice Brennan, dissenting from denial of cert.)

There is some discretion on the part of arresting officers to detain a child based upon "the nature of the offense or other circumstances." Id. If a child is to be detained, such detention must be in a suitable juvenile detention center; if a child is detained in jail, he or she must be sight and sound separated from adult prisoners.

In the event a child is detained upon arrest, he must be given a hearing within 72 hours. KRS 208.192. The detention hearing must address two distinct issues: first, the county must show probable cause that the child committed the offense of which he stands accused; second, the county must prove that "detention is necessary to assure the safety of the child, protection of the community, and the appearance of the child in court." The juvenile probable cause hearing is distinguishable from an adult hearing in one crucial respect: KRS 208.192 specifically affords the juvenile all constitutionally guaranteed rights, including but not limited to confrontation and cross-examination. It is common practice in adult probable cause hearings to admit "investigative hearsay", particularly from police officers. The juvenile statutes specifically prohibit this practice by providing for confrontation. The rationale of the rule probably lies in the fact that children are not entitled to bail, KRS 208.110, and hence the Commonwealth bears a greater burden before depriving a child of liberty.

As noted supra, during the next phase, or adjudicatory stage of the proceedings, a child is entitled to the same rights as an adult, except for trial by jury.

If a child is adjudicated delinquent, i.e., guilty, of an offense, the court must then proceed to a proper disposition. The court has available to it a panorama of alternatives. The court may commit the child to the state Department of Human Resources for institutionalization. KRS 208.194. In that event, the child, like his adult counterpart, may be granted "shock probation."

If a child is not committed to either a public or private agency for residential treatment, the court may place the child on probation in his own home. KRS 208.200. Of course, if a child is to be removed from his home for residential "treatment", counsel should always ensure that such treatment is both appropriate, and entails the least restrictive alternative. Remember that the whole rationale of the juvenile system is treatment, consequently the constitutional "right-to-treatment" cases are persuasive. For example, the United States Supreme Court in Jackson v. Indiana, 406 U.S. 715, 738 (1972) stated that "...due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Because defense counsel usually do not have any particular expertise in the diagnosis or treatment of disturbed youths, ask the court for funds for independent testing by psychologists, psychiatrists, or other appropriate professionals. KRS Chapter 31 provides indigents a broad right of access to "necessary services and facilities or representation including investigation and other preparations." KRS 31.110. Such services are chargeable against the county in which the proceeding occurs. KRS 31.200. Of course, as the statute provides, there must be a

showing of necessity. If the juvenile court orders any defense services to be performed by a state facility, rather than providing funds for private experts, make sure that any report or evaluation is disclosed only to defense counsel. There are several bases for such reports remaining privileged: first, they are "work-product" much the same as any other investigative reports procured by defense counsel; second, particular communications may be privileged pursuant to KRS Chapter 421 (psychiatrist; school counselors); third, the child's Fifth Amendment privilege against self-incrimination may preclude disclosure of incriminating information given to experts during the course of evaluation or treatment. These communications should remain privileged unless and until defense counsel decides to use any reports or evaluations in court on behalf of his client.

In the event a child is adjudicated delinquent and restrained of his liberty or punished in any manner, the child may appeal to the circuit court as a matter of right. KRS 208.380. Such appeal shall be taken in conformity with the Criminal Rules. Id. Note that since some punishment is a condition precedent to the taking of an appeal, the notice of appeal should not be filed until after disposition, rather than calculating the time for notice of appeal from the date of adjudication. A child has a right to a hearing to determine whether he should be released during the pendency of the appeal. KRS 208.380(2). Again, the county bears the same burden as at the initial detention hearing. Id.

Of course, not all juveniles are entitled to the benefits of the juvenile justice system. The juvenile court may waive its exclusive jurisdiction of the child, and transfer the case to the circuit court. KRS 208.170. Only those children 16 years of age or older and charged with a felony, or less than 16 and charged with a Class A felony or capital offense, are susceptible to waiver.

At the waiver hearing, the county must prove probable cause that the child committed the offense. Upon a showing of probable cause, the court must then consider the seriousness of the offense, with greater weight given to offenses against property; the maturity of the child; the child's prior record; and, perhaps most importantly, the likelihood of rehabilitation if the child is retained in juvenile court.

There is scant Kentucky case law on the exact showing required by these factors. However, there is authority from other jurisdictions that imply at least the necessity of a competent juvenile as a prerequisite to wavier. For example, in interpreting a similar statutory scheme (juvenile court to consider "maturity and sophistication" of child) the Texas Court of Civil Appeals has held that the statutory requirement "refers to the question of culpability and responsibility for his conduct, as well as to the consideration of whether he can intelligently waive rights and assist in the preparation of his defense." In Re C.L.Y., Tex., 570 S.W.2d 238 (1978). See also In Re S.W.T., Minn., ___ N.W.2d ___ (1979).

Defense counsel should always be familiar with the availability of services for children both in the community and the Commonwealth. It is an unusual child for whom some treatment facility, heretofore untried, could not be found. A showing of the availability of such a facility might support an argument for amenability to treatment.

In the event the court does waive its jurisdiction, the case will be transferred to the grand jury. At this stage, the grand jury still must be instructed that it may return the case to the juvenile court. KRS 208.170(5)(a).

Of special importance is the child's right to appeal any waiver order. Indeed, at present an appeal appears to be necessary in order to preserve any error in the waiver proceeding. Newsome v. Commonwealth, Ky. App., ___ S.W.2d ___ (19). (Note however, that the Commonwealth successfully received discretionary review on this case and that the decision of the Kentucky Supreme Court was pending at the time this issue of THE ADVOCATE went to the printer). A failure to properly preserve any error in the transfer proceedings will result in an inability to raise the issue on direct appeal in the event of a conviction in the circuit court. Schooley v. Commonwealth, Ky.App., ___ S.W.2d ___ (19). Possible grounds for appeal include the failure to properly investigate the child prior to transfer, or the failure of the juvenile court to state in specific terms the reasons for the transfer. Hopson v. Commonwealth, Ky., 500 S.W.2d 792 (1973); Richardson v. Commonwealth, Ky., 550 S.W.2d 538 (1977).

In the event a child is transferred to circuit court, tried, and convicted before his eighteenth birthday, the circuit court may in its discretion direct the commitment of the child to the Department of Human Resources for that part of any sentence up to and including the child's twenty-first birthday. KRS 208.180.

In the unlikely event that a juvenile is tried for a capital offense in which the Commonwealth seeks the death penalty, be aware that it has already been held that a sentence of life without parole for a juvenile violates the guarantee against cruel and unusual punishment. Workman v. Commonwealth, Ky., 429 S.W.2d 274 (1968). It would seem to follow then that a sentence of death is at least as cruel and unusual.

Although the Kentucky Supreme Court recently declined to prohibit the Commonwealth, prior to trial, from seeking the death penalty as to a juvenile, the Court in its unpublished order indicated that it was not convinced that the child would not have an "adequate remedy" on appeal. Ice v. Graham, 80-SC-469-MR, August 27, 1980. However, the court might be convinced if there were an adequate pretrial showing of psychological or other traumatic damage resulting from the very fact of a capital trial. Use KRS Chapter 31 to ask for funds for experts in an attempt to document the reason why a writ of prohibition should issue in your particular case.

As final note, counsel who defend children accused of crime should always be aware of their proper role, and that role is as an advocate. A juvenile court is just that, a court, wherein the child is not seeking its paternalistic assistance, but rather is appearing against his will. Defense counsel should represent the juvenile client as any other, i.e., after thorough investigation of the facts and the law, and with a zealous presentation of his client's position to the court. Nothing less will suffice to make real the promise of child advocacy.

C. THOMAS HECTUS
ASSISTANT DISTRICT DEFENDER
JEFFERSON COUNTY

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"Under our Constitution, the condition of being a boy does not justify a kangaroo court." In re Gault, 387 U.S. (1967).

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TRIAL TIPS

THE DEFENSE OF IDENTIFICATION CASES -- PART II

Having reviewed the pronouncements of the United States Supreme Court in the last issue of the Advocate, we turn to our own case law and some suggestions regarding the necessary preparation for defending eyewitness identification cases in Kentucky.

KENTUCKY CASES

Our own appellate decisions do not provide much additional assistance in this area as they have been, for the most part, concerned with interpreting the decisions of the United States Supreme Court. While our Courts have occasionally found identification techniques to be suggestive, they have apparently never in a published opinion precluded an in-court identification on this basis. See Moore v. Commonwealth, Ky., 569 S.W.2d 150, 153 (1978), where the Court observed that "...there is no question that the display...of a single mug shot...was unnecessarily suggestive," but found the in-court identification "reliable" regardless. But see Jones v. Commonwealth, Ky.App., 556 S.W.2d 918 (1977), ordering a new trial because a "mug shot" was introduced which was the product of an illegal arrest. The photo was part of a display from which a pretrial identification was made and was referred to at trial to bolster the witnesses' in-court identification. The Court of Appeals also noted that "...the photograph of Jones bore a date which was the next day after the robbery in question, and the only date shown on any of the photographs which was close to the date of the crime...it was one of two bearing the notation "ROB" ...it was one of two in which the individuals were wearing caps, we believe it was impermissibly suggestive." Id. at 921. On retrial it was suggested the trial court explore the issue of reliability at another hearing since findings were lacking after the first.

An additional noteworthy case, again by the Court of Appeals, also dealt with mug shots which had the notation "ROB" and the date of the offense on the photographs of the defendants. Brown v. Commonwealth, Ky.App., 564 S.W.2d 24 (1978). Although the two defendants were pictured in a group of seven mug shots, the Court again found the display "unnecessarily and unduly suggestive." Id. at 27. However, this time the Court ordered the evidence of the pretrial display suppressed, apparently as a matter of state law, because "the evidence of the prior identification had no value for purposes of corroborating the in-court identification..." Id. at 28. The Court remanded for a hearing on the question of the admissibility of the in-court identification.

There have been a few decisions by the former Court of Appeals which, although not dealing with the problem of suggestive identification, have implicitly recognized that eyewitness identification is not always conclusive of guilt. Counsel should not hesitate to make (and renew) motions for directed verdict even in cases where the motion to exclude eyewitness identification is overruled. See Fry v. Commonwealth, 259 Ky. 337, 82 S.W.2d 431, 441 (1935), where there were, at least, five positive eyewitnesses and other more tentative ones; Davis v. Commonwealth, 290 Ky. 745, 162 S.W. 2d 778 (1942), where the testimony of two eyewitnesses did not preclude the Court's reversal on appeal. See also Fyfee v. Commonwealth, 301 Ky. 165, 190 S.W.2d 674 (1945).

The paucity of appellate decisions by our Courts addressing the dangers of mistaken identification perhaps results from the misimpression that such a problem does not exist in our Commonwealth. A couple of years ago, the Louisville Public Defender exposed the

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mistaken convictions of two black brothers. The convictions of robbery, kidnapping and sodomy were based solely on the eyewitness testimony of a single, white victim. "A Nightmare: Overheard Boast Helps Free 2 Brothers Wrongly Convicted." The Louisville Times, Tuesday, November 28, 1978, page 1. However, regardless of how sensitive or insensitive the judiciary is to the problem, our responsibility is to attack eyewitness testimony in each case with as much force and skill as possible and hope that the adversary process will insure that no mistaken convictions result.

PREPARATION

There is, of course, no one way to challenge the testimony of a witness who points to your client and says: "That's the one." We all learn very quickly (after the first time) that the way not to do it is to blindly ask questions like: "How can you be so sure?" or "Are you 100% positive?" No lawyer can effectively challenge an eyewitness (any witness) unless he or she has laid the groundwork prior to trial. The only effective way to challenge the eyewitness (either before the judge or the jury) is to use every possible information gathering technique available from the entry of counsel into the case.

PRELIMINARY HEARING

Discovery may start, obviously, well in advance of your discovery motion. No effective challenge can be mounted to the eyewitness unless you know all there is to know about the incident in question, the personalities involved and the identification procedure used by the police and prosecution. Therefore, we must take advantage of all opportunities for obtaining information. The preliminary hearing is the first. RCr 3.04. While the purpose of the hearing is not discovery, the relevance of identification to probable cause is obvious. Therefore, counsel should be able to obtain recorded eyewitness testimony which can and should be transcribed for use at trial. RCr 3.16. Attention to detail at every encounter with the eyewitness will pay dividends later. In addition to a complete description of the "perpetrator," the manner in which the eyewitness came to identify your client is relevant to probable cause. RCr 3.10(2). Thus, there should be no obstacle to the obtaining of the basic information necessary to begin your investigation of the identification process.

Because the preliminary hearing is overwhelmingly suggestive, Moore v. Illinois, 434 U.S. 220 (1977), counsel should give serious consideration to waiver of the defendant's right to be present at the hearing, at least during the appearance of any eyewitness, in appropriate cases. "While RCr 3.04 appears to contemplate the actual presence of the defendant, he would seem to have the power to make a knowing and intelligent waiver of the right to be present at any stage of the proceedings. The defendant would seem to have an even stronger case for waiver of the right at a preliminary hearing, since he may waive the hearing altogether." Fitzgerald, 8 Kentucky Practice, Criminal Practice and Procedure § 336 at 143 n.27 (1978). In a case where the eyewitness has not yet been involved in a corporeal identification procedure: "It is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation..." Moore, 434 U.S. at 229.

Aside from waiver of the defendant's presence, other alternatives should be considered. Moore is persuasive authority for an imaginative approach to the question of in-court suggestion and actually implies that effective counsel will pursue alternatives. "For example, counsel could have requested that the hearing be postponed until a

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lineup could be arranged at which the victim would view [the defendant] in a less suggestive setting... Short of that, counsel could have asked that the victim be excused from the courtroom while the charges were read and the evidence against [the defendant] was recited, and that [the defendant] be seated with other people in the audience when the victim attempted an identification... Counsel might have sought to cross-examine the victim to test her identification before it hardened." Id., 434 U.S. at 230 n.5. Other examples of defense counsel's active participation in the identification process will be discussed later.

DISCOVERY

Since in many cases the prosecution, for obvious reasons, will not choose to proceed by way of a preliminary hearing, alternative discovery procedures should be sought. A transcript of the grand jury testimony of any eyewitness can be requested. RCr 5.16. If the prosecutor intends not to record grand jury testimony, a request and/or motion can be made in advance. But see Lawless v. Commonwealth, Ky., 539 S.W.2d 101 (1976). Or a request could be made after-the-fact for a narrative statement of the witnesses' testimony. [Kentucky Public Advocate Motion File, MF, G-1.] The names of eyewitnesses may be on the indictment. RCr 6.08. Information relevant to identification may be obtained at a bail or bail reduction hearing. RCr 4.02(3); RCr 4.40(1). Kuhnle v. Kassulke, Ky., 489 S.W.2d 833, 835 (1973) [the defendant "should have been permitted to examine the chief prosecuting witness at the hearing to reduce bail to the extent that the object of such an examination had any relevant bearing upon the factors that the court must consider..."] Occasionally, in homicide cases, relevant information will surface at a coroner's inquest, at which testimony may be recorded. KRS 72.420(1) and (2). In apparently narrow circumstances a deposition of an eyewitness may be taken. RCr 7.10. However, this must be done with caution as the deposition may be admissible at trial and counsel is rarely, if ever, prepared at an early stage of the case to fully cross-examine an eyewitness. RCr 7.20. Even after indictment, a preliminary hearing may be requested on equal protection and due process grounds. See Hawkins v. Superior Court, 160 Cal.Rptr. 435, 586 P.2d 916 (1978). Contra King v. Venters, Ky., 595 S.W.2d 714 (1980). Finally, the Bill of Particulars may be used to pin down the exact time, location and duration of the incident to facilitate checking the lighting, weather conditions and other environmental factors relevant to any identification. RCr 6.22.

The discovery motion is the conventional mode of obtaining necessary information. Even in areas where the prosecution reveals information without a formal motion process, it is a good idea to go on record, in appropriate cases, with a detailed discovery request regarding the identification process. It is sometimes not considered to be in the interest of the Commonwealth to make an effort to accurately reconstruct what exactly happened. Especially in urban areas, a prosecutor or individual officer may not know the exact nature of the pretrial identification procedures used. Without a timely request for such information placing an affirmative duty of disclosure on the prosecution, the defense may not "discover" important information until too late (at trial) or not at all.

Certainly, a clear request should be made to disclose all eyewitnesses. See generally Roviaro v. United States, 353 U.S. 53 (1957); Burks v. Commonwealth, Ky., 471 S.W.2d 298 (1971). Although not specifically mentioned in RCr 7.24, information relevant to the identification procedure used should be discoverable at least to the extent that

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would enable counsel to make a suppression motion and subpoena all relevant witnesses. Due process would certainly require this. Stovall v. Denno, 388 U.S. 293, 302 (1967). Kentucky Practice, §§ 596-597. Counsel should make a detailed discovery request for the exact date, time and place of each lineup, show-up, photo-display or "mug-book" and composite identification procedure. A request should be made for the identity of each person involved in each procedure, copies of any pictures taken of lineups or used in small photo-displays, copies of any composites and for the disclosure of any positive or tentative identifications of anyone [MF, D-53 #19-23]. A defendant would have strong 6th and 14th Amendment arguments for the disclosure and production of this information which is crucial to an effective investigation of the identification procedure. But see Pankey v. Commonwealth, Ky., 485 S.W.2d 513 (1972), where the Supreme Court held, on one hand, that it was error to deny a defendant's motion to produce a photo-display from which a witness made contradictory identifications of two co-defendants. On the other hand, the Court held that it was proper to deny the defendants' request to produce pictures of a lineup since the Commonwealth denied there were any mistaken identifications at the lineup. See generally Luttrell v. Commonwealth, Ky., 554 S.W.2d 75, 79 (1977), where the Court noted that the Commonwealth was required to produce the composite drawing. Counsel should also request disclosure prior to trial of all written and recorded statements by eyewitnesses [MF, W-2]. But see RCr 7.26.

The whole question of what constitutes exculpatory evidence in the eyewitness situation is a difficult question. Certainly both general and specific requests for exculpatory information should be made of record. Because a general request may not be sufficient to put the prosecution on notice, United States v. Agurs, 427 U.S. 97, 106-107 (1976), counsel must narrow his motion and demand, in regard to eyewitness identification, "any positive, tentative, hesitant or "look-a-like" identification, even if subsequently retracted, of any person other than the defendant as the perpetrator or involved in the crime(s) in any manner..." [MF, D-53 #35(f)]. If counsel knows of specific eyewitnesses, the request may be narrowed further. Additionally, a detailed request should be made for disclosure of situations where a witness or potential witness failed to identify the defendant positively or tentatively when given an opportunity to do so. These two types of evidence (failure to identify defendant, identification of another) are clearly exculpatory in nature and, if not already disclosed by virtue of the discovery request relating to identification procedures, certainly must be revealed upon defendant's motion to disclose exculpatory evidence. See Grant v. Alldredge, 498 F.2d 376, 380 (2nd Cir. 1974); Jackson v. Wainwright, 390 F.2d 288, 298 (5th Cir. 1968). But see Sweatt v. Commonwealth, Ky., 550 S.W.2d 520, 523 (1977), suggesting that a tentative identification of another may not be exculpatory; Pankey at 513, where the Court stated by way of dicta: "That a witness was unable to identify one or more of the appellants was not evidence of his innocence because failure to identify could be the result of lack of opportunity of observation, inability of the witness to recall or many other factors."

Another problem raised by Sweatt is the suggestion that because the prosecutor didn't personally know of the tentative identification of another, the Commonwealth was under no duty to disclose it. While this also appears to be dicta, and the constitutionality of such a rule quite doubtful, Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964), counsel should specifically request information in the possession

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of police, naming individuals if possible. Kentucky Practice, § 594. [See MF, D-53 #1]. Finally, counsel should always file a "discovery inventory" for the record so that in the event important information surfaces during or after trial the record will accurately reflect exactly what information relevant to identification counsel did receive.

Because of the recognized narrowness of our discovery rules and appellate decisions interpreting them, counsel should consider all possible techniques for gathering information and take advantage of other procedural rules whose secondary effect permits disclosure of information. See Kentucky Practice, Chap. 15; Murrell, Kentucky Criminal Practice, Chap. 9 (1975).

INVESTIGATION

Information obtained through judicially required procedural devices or even voluntary prosecutorial compliance is merely the tip of the iceberg. There is no substitute for legwork. Counsel should take advantage of our limited investigatory resources and obtain, where possible, thorough interviews with eyewitnesses prior to the initial courtroom confrontation. Ideally, a verbatim recording or a signed statement is the most valuable tool for later use as impeachment ammunition. In cases where the investigator is limited by the attitude of the witness or other circumstances, counsel must rely upon a memorandum based upon the interviewer's recall. In any event, the defense will again have the eyewitness on record prior to the courtroom confrontation - the essential prerequisite to effective cross-examination.

Again, attention to detail is of the utmost importance. The investigator should know that there is a twofold purpose to the interview: 1) gathering information and 2) making the witness commit himself or herself early in the case when the effects of suggestion may be at a minimum. The investigator must use, where practical, the same exhaustive approach counsel would use in examining the witness at a preliminary hearing or suppression hearing. In an organized sequence the witness should be required to commit himself on: 1) recall of the incident, 2) description of the perpetrator, 3) physical or psychological limitations (of the eyewitness), 4) environmental factors at the scene, and 5) details of all identification procedures. See Dollar, Bending the Pointed Finger: The Defense Investigator's Approach to An Eyewitness, National Defender Investigators Association Newsletter (Fall 1980), where it is suggested that the investigator use logical patterns in questioning. For example, the interviewer should move the eyewitness from head to feet in obtaining a description or in a chronological order in describing a photographic display (i.e., "What is the first thing Officer Jones said to you...")?

The hostile witness who refuses to cooperate with the defense, often a police officer involved in the identification process, is always a serious problem for counsel. The right of an accused to interview potential prosecution witnesses has long been recognized. United States v. Long, 449 F.2d 288, 295 (8th Cir. 1971). However, no witness is required to speak to either the defense or the prosecution. United States ex rel. Trantino v. Hatrak, 408 F.Supp. 476 (D.N.J. 1976). The situation counsel must watch for is when the prosecution directly or indirectly suggests "to a witness that he not submit to an interview by opposing counsel." Gammom v. State, Tenn., 506 S.W.2d 188, 190 (1973). This is objectionable conduct and should be brought to the attention of the court. American Bar Association Standards Relating to Prosecution Function § 3-3.1(c) (1978) [Motion to Obtain Relief from Prosecutor Obstructing Communication Between Prospective Witnesses and the

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Defense, MF, W-5]. If a witness flatly refuses to be interviewed, counsel would have a stronger argument for pretrial disclosure of written or recorded eyewitness statements, even if normally not permitted. RCr 7.26. Finally, a witness' refusal to talk to the defense should be accurately documented in a manner admissible at trial. Jurors sometimes do not approve of stonewalling on the part of police officers or eyewitnesses.

As a last step in the investigatory process, it is often (in an appropriate case) desirable for counsel to talk to the eyewitness prior to meeting in court. In addition to obtaining another statement, this permits counsel to let the witness know that defense counsel is not necessarily the "enemy" and may counteract the eyewitness' natural tendency to embellish testimony in an effort to help the cause of law enforcement. Counsel should always discuss the case with a potential witness in the presence of a third person so as not to put himself or herself in the position of having to testify should the witness modify details.

As a final note, both counsel and his investigator should be on guard for accidental or non-prosecutorial identification procedures which may be disclosed during investigation. In a recent case, our client's picture appeared in the newspaper which a key witness sometimes read. Merely because the police do not conduct the identification procedure does not mean that a due process violation has not occurred. As distinguished from 4th Amendment search and seizure issues, the exclusionary rule relating to identification procedures is not a sanction for police misconduct. " Reliability is the linchpin in determining the admissibility of identification testimony..." Manson v. Brathwaite, 432 U.S. 98, 114 (1976). See Green v. Loggins, 614 F.2d 219 (9th Cir. 1980), holding that an accidental show-up (defendant and eyewitness placed in same cell) was so impermissibly suggestive that the introduction of the identification was a denial of due process.

In the next issue of the Advocate we will conclude by examining defense involvement in the identification process, the prosecution's duty to preserve evidence of the identification process and some suggestions regarding the suppression hearing and trial.

KEVIN McNALLY

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

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