# The Advocate

Vol. 3, No. 1 A bi-monthly publication of the Office for Public Advocacy December, 1980

## LOCAL ASSISTANCE BRANCH FORMED

In an effort to increase the quantity and quality of service to the local defenders, the Public Advocate has reduced the appellate caseload of five attorneys, Donna Proctor, Rodney McDaniel, Ernie Lewis, Kevin McNally and Ed Monahan, and increased their local assistance duties.

These five Local Assistance Branch attorneys will be an increased staff for statewide and regional seminars, administrators of the expenditures of local public defender funds, developers of educational materials, and providers of legal assistance to local defenders.

The state has been divided among the five attorneys as indicated on the map on the back. If you have a legal or administrative problem call the attorney assigned to your county.

(See LAB, Back Page)

INSIDE



## THE ADVOCATE FEATURES

Tom Noe, Logan County Public Defender, is our featured public defender. Tom graduated from the University of Kentucky with a degree in Economics and Political Science and then attended UK Law School, completing his J.D. work in 1968.

Since that time Tom's work experience has been quite varied. He began his legal career by working as an attorney for the Kentucky Human Rights Commission. He then turned his talents toward the field of higher education, initially teaching American Government and doing administrative work at Lees College in Jackson, Kentucky for approximately four years. Tom then taught and did administrative work at Kentucky State University. While he was there, he started an undergraduate legal studies program and worked as a public defender in Franklin County.

(See Noe, p. 2)

(NOE, Continued from Page 1)

Tom then moved to Denver, Colorado where he worked at Metropolitan State College performing both administrative and legal work for approximately three years. In June of 1978 he returned to his native Logan County to practice law. His is a general practice with approximately half criminal law which is mostly public defender work. Tom very much enjoys public defender work in the rural area where he is living. He believes communicating and counseling are the most interesting aspects of practicing law. The need to understand a client in order to represent him properly is very important to Tom.

Tom lives on a farm in Logan County where he raises cows and horses, including a prized Tennessee Walking Horse. Our public defender system thanks Tom for the outstanding job he is doing.

*******

## MOTIONS WANTED

For the last two years, we have published a Motion File with one update. We have overlooked, however, a major source of motions, and that is you, our local public defenders. If you have any motions you would like to share, please send them to Donna Proctor, Office for Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601.

*******

## NEW OFFICES OPENED, POSITIONS AVAILABLE

The Office for Public Advocacy is in the process of opening four new regional offices located in Somerset, Barbourville, Pikeville, and Harlan. Twelve attorneys are needed to staff these offices. Attorneys interested in gaining valuable criminal trial experience send resume to William M. Nixon, Assistant Deputy Public Advocate, P. O. Box 277, London, Kentucky 40741.

*******

## OFFICE REORGANIZES

Effective October 1, 1980, the Office for Public Advocacy (OPA) was reorganized by Governor Brown's Executive Order No. 80-771. The office now has three distinct divisions each headed by a director:

| | |
|---|---|
| Defense Services | -- David Norat |
| Protection & Advocacy Services | -- Gayla Keown |
| Administrative Services | -- David Adams |

The purpose of the reorganization is to provide a more logical and more efficient structure for the operation of the Office for Public Advocacy by establishing an operating division for each of the OPA's two major programs: Defense of the Indigent and Protection and Advocacy for the Developmentally Disabled. Also, an Administrative Services Division has been established to consolidate and improve logistical and administrative services to the statewide public advocacy system.

Major changes in organizational structure have occurred within the Defense Services Division by including Post-Conviction as a branch rather than a separate division, establishing a Local Assistance Branch to handle local public advocacy systems development, and redefining the duties of the Appellate Branch to focus on appeals.

The following individuals are chiefs of their respective branches in the Defense Services Division:

| | |
|---|---|
| Appeals | -- Tim Riddell |
| Local Assistance | -- Ed Monahan |
| Post-Conviction | -- Randy Wheeler |
| Involuntary Commitment | -- Bill Radigan |
| SEPAR | -- Bill Nixon |
| Investigation | -- Dave Stewart |

*******

# WEST'S REVIEW

Kentucky decisional law for September and October came primarily from the Kentucky Court of Appeals.

In Williams v. Commonwealth, Ky. App., 27 K.L.S. 12 at 2 (September 5, 1980), the court attempted to reconcile KRS 439.510, which makes privileged all information obtained by a probation or parole officer in the discharge of his duties, with the persistent felony offender statute's provision requiring proof of the offender's parole status. Williams' parole officer was permitted to testify concerning Williams' age and parole status at his trial as a persistent felony offender. The Court of Appeals held the privilege created by KRS 439.510 inapplicable at the trial of a persistent felony offender charge "lest there be no method of proving the basic elements of the persistent felony offender charge." Williams, at 3.

The court has held in Sutton v. Commonwealth, Ky.App., 27 K.L.S 12 at 2 (September 5, 1980), that proof of theft by unlawful taking is sufficient to support a conviction of receiving stolen property. Sutton was apprehended in Edmonson County for thefts committed in another county and was charged with receiving the stolen property. The Court of Appeals noted that receiving stolen property may be committed by one who "retains or disposes of" the property, and that theft by unlawful taking may be committed not only by a taking but by "exercising control over." The court then stated "[w]e are unable to perceive a distinction between one who 'exercises control over' stolen property and one who 'retains or disposes of' stolen property." "[A] person who retains or disposes of stolen property knowing it to be stolen may be convicted of the offense of receiving stolen property even though the property was stolen by him."

The court has continued the effort, endorsed by the Kentucky Supreme Court in Wells v. Commonwealth, Ky., 562 S.W.2d 622 (1978), to "trim" the marital privilege as a rule of evidence. Commonwealth v. Boarman, Ky.App., 27 K.L.S. 12 (September 12, 1980). The defendant's wife in Boarman had reported to the police that her husband had sexually abused their infant daughter. At appellant's trial the wife asserted the marital privilege. The Court of Appeals held the privilege was not available to her by virtue of KRS 199.335(7), which abrogates the privilege "in any judicial proceeding" resulting from a report of child abuse pursuant to KRS Chapter 199. The court held that the language "any judicial proceeding" was not limited to proceedings to effect the removal of the abused child but encompasses any resulting criminal proceedings.

In a surprising decision, the court has attempted to retreat from its own decisions and decisions of the Kentucky Supreme Court construing Kentucky's rules and statutes governing jury selection. Trent v. Commonwealth, Ky.App., 27 K.L.S. 13 at 8 (October 3, 1980). The jury in Trent was selected by drawing the names of twenty-five jurors. After voir dire of the twenty-five, and exercise of peremptory strikes by the Commonwealth and defendant, the top twelve of those remaining became the jury. The Court of Appeals has previously held such a procedure to be error in Allen v. Commonwealth, Ky.App., 596 S.W.2d 21 (1979). The Allen court based its holding on KRS 29A.060 and RCr 9.30, which require the clerk to draw as many names as are sufficient to compose a jury and to draw additional names only as jurors are excused. The court in Trent, however, relied on RCr 9.36(2), which makes CR 47.03 applicable in criminal cases. Pursuant to CR 47.03(3), the procedure followed

(Continued, p. 4)

by the trial court was proper with the exception of the trial court's announcement that the top twelve numbered veniremen would compose the jury. Under CR 47.03(3) the jury should have been randomly selected from those veniremen remaining after the exercise of peremptory challenges. The most interesting portion of the court's decision is its holding that CR 47.03(3) takes precedence over KRS 29A.060, with which it conflicts. CR 47.03(3) also directly conflicts with RCr 9.30. However, the court does not address or attempt to resolve this conflict. Clearly, Trent is not the last word on the law of jury selection and defense counsel should continue to object to selection procedures which do not comply with RCr 9.30.

The Kentucky Supreme Court has answered the question of when the jurisdiction of the district court attaches in a juvenile proceeding. Johnson v. Commonwealth, Ky., 27 K.L.S. 13 at 13 (October 14, 1980). The defendant in Johnson committed a robbery while still a juvenile. The defendant was charged with the offense by a petition filed in district court but no action was taken on the petition. However, when the defendant reached age eighteen he was indicted in circuit court and tried as an adult, over his objection that there had been no transfer of jurisdiction from the district court. The Kentucky Supreme Court, reversing, held that "once a juvenile court assumes jurisdiction of an alleged offense committed by a juvenile, the court must either adjudicate the matter or conduct a hearing and transfer the case to circuit court pursuant to KRS 208.170."

Two noteworthy decisions were issued by the Sixth Circuit Court of Appeals during the period reviewed. In Cleaver v. Bordenkircher, ___ F.2d ___ (October 31, 1980), and Brown v. Smith, ___ F.2d ___ (October 31, 1980) the court held that the defendants were denied both equal protection and due process of law when appointed counsel were unable because of their caseloads to timely perfect the defendants' appeals. Because of the failure to perfect them, the indigent defendants' appeals were dismissed by the Kentucky Court of Appeals. The Sixth Circuit observed that counsels' assertions that an excessive caseload prevented them from perfecting the appeals were undisputed and noted that "[a]n affluent defendant who sought to retain an overburdened lawyer could and would have hired another." The court cited Ross v. Moffit, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), for the principle that "a state cannot arbirtarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."

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

LINDA WEST

*******

CONGRATULATIONS. These Assistant Public Advocates have passed the Bar. From left to right: John O'Brien, Peggy Guier, William E. Spicer, Janie Fitzpatrick and Gordon B. Long.

# -NOTE-

# Protection & Advocacy for the Developmentally Disabled

## KENTUCKY GROUP HOMES

In the October issue of The Advocate, a list of Group Homes for Status Offenders was published. The following lists the remaining three kinds of group homes available in Kentucky.

## GROUP HOMES FOR PUBLIC OFFENDERS

Relates to: KRS 199.640, 199.011(6), (12); 208.200(1)(b); 208.300; 208.430(1)(d)

Pursuant to: KRS 13.082; 194.050

Regulations: 905 KAR 1:091; See also 905 KAR 1:120

Grant House Group Home
2009 Fredrica Street
Owensboro, Kentucky 42301
Richard Cornelius
(502) 685-3494
Male; ages 15-18

Hopkinsville Group Home
Route 2, Box 420
Hopkinsville, Kentucky 42240
James Garnett
(502) 885-4206

Louisville Group Home
5408 Regent Way
Louisville, Kentucky 40218
Louis Mucker
(502) 968-7202

Middlesboro Group Home
105 Rochester Avenue
Middlesboro, Kentucky 40965
Wilford Constable
(606) 248-6719

## NEGLECTED ABUSED AND DEPENDENT CHILDREN'S GROUP HOMES

Relates to: KRS 199.011, 199.640 to 199.670

Pursuant to: KRS 13.082, 194.050

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

Coleman House
115 Cisco Road
Lexington, Kentucky 40504
R. Wingate
(606) 254-0361
Male - Female; Up to 17

Hope Haven House
Box 176
Paintsville, Kentucky
Norma McGraham
(606) 789-5433

Reidland Church of Chirst
Children's Home
Box 444, Route 4
Paducah, Kentucky 42001
Randall Jernigan
(502) 898-2152
Male - Female; Up to 18

Youth Haven
3510 Alexandria Pike
Highalnd Heights, Kentucky 41076
Tom Calme
(606) 781-0131
Male - Female; Up to 16

## DEVELOPMENTAL DISABILITIES GROUP HOMES

Realtes to: KRS 216.405 to 216.485; 216.990(2)

Pursuant to: KRS 13.082, 216.425

Regulations: 902 KAR 20:077

Children's Group Home
1708 Highland Avenue
Ft. Wright, Kentucky 41011
(606) 341-0231
Male - Female; ages 5-12

Corbin Boys' Group Home
c/o Cumberland River CCC
P. O. Box 568
Corbin, Kentucky 40701
(606) 528-7010
Male; ages 13-17

Council for Retarded Citizens
1146 South Third Street
Louisville, Kentucky 40203
Charles Siler
(502) 584-1239
Adult Males

Wendover House
336 East 16th Street
Covington, Kentucky 41011
Ted Clinger
(606) 899-2752
Adult Females

Mulberry Helm Group Home
c/o North Central CCC
225 College Street
Elizabethtown, Kentucky 42071
Jewell Jones
(502) 769-3377
Adult Females

Cave Lake
Route 6
Glasgow, Kentucky 42171
(502) 678-2096
Co-Ed Adults

Grant House
2009 Fredrica Street
Owensboro, Kentucky 42301
Carl Davis
(502) 685-3494
Male - ages 13-17

Harlan Girls Group Home
c/o Cumberland River CCC
Route 1
(606) 573-1624
Female; ages 17-27

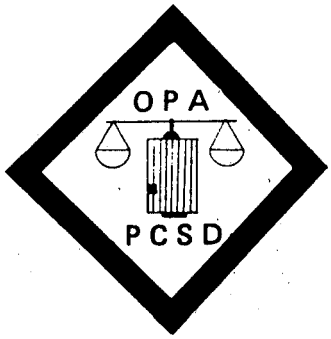
Middlesboro Boys' Group Home
c/o Cumberland River CCC
Box 92, Route 1, 46th Street
Middlesboro, Kentucky 40965
(606) 573-1624
Male; ages 17-23

Green Street
43 Green Street
Ft. Thomas, Kentucky 41075
(606) 491-2752
Adult Males

Bluegrass Residential Facility
1613 South Limestone
Lexington, Kentucky 40503
Martha Honick
(606) 278-8674

Green River Community Residence
1309 Allen Street
Owensboro, Kentucky 42301
(502) 683-0227
Co-Ed Adults

Comprehend, Inc.
434 West Second Street
Maysville, Kentucky 41056
(606) 564-4016
Gwen Haggard




## APPEALING PROBATION CONDITIONS

KRS 533.030 delineates a number of conditions which can be included in an order of probation. Under this statute every order of probation must include a condition that no other offense be committed while the sentence remains subject to revocation but all other conditions are left to the judge's discretion. Essentially, the condition must be "reasonably necessary to insure that the defendant will lead a law-abiding life." KRS 533.030(1)

Some courts have been strict in construing similar provisions. For example, California has held that a condition will be invalid if it 1) has no relation to the offense committed; 2) relates to non-criminal conduct; and 3) requires or forbids conduct not reasonably related to possible future criminality. People v. Dominquez, 256 Cal.App. 2d 623, 64 Cal.Rptr. 290 (1967); See generally Note, "Limitations upon Trial Court Discretion in Imposing Conditions of Probation," 8 Ga. L.Rev. 466 (1974).

Kentucky's courts have not formulated a test similar to California's. Basically a condition of probation in this state will be reviewed only if an abuse of discretion is shown. See Darden v. Commonwealth, Ky., 125 S.W.2d 1031 (1939); Ridley v. Commonwealth, Ky., 287 S.W.2d 156 (1956). But even if there has been an abuse of discretion the defendant will receive no benefit unless he has contested the conditions correctly.

In an unpublished opinion, Anderson v. Commonwealth, No. 80-CA-312-MR (decided August 22, 1980), the Court of Appeals recently indicated that a defendant who accepts conditions of probation cannot complain that the conditions are improper if he thereafter violates them. The Court indicated that if the defendant objects to the conditions he should appeal the order of probation rather than wait until after it has been revoked.

In Anderson, the defendant had been convicted of writing a "cold check". His one year sentence was probated upon a number of conditions including a prohibition against "practicing law" or "abusing the courts by filing vexatious suits or other documents". Thereafter, Anderson filed a suit in Franklin Circuit Court which was dismissed since it was found to be a "sham and contumacious". Accordingly his probation was revoked and he appealed claiming the condition to be unenforceable. Even though the Court believed the probation order may be void since the condition was "more than questionable" by preventing access to the courts, the revocation was upheld due to Anderson's failure to appeal the condition when initially imposed.

A similar result was reached in Weigand v. Commonwealth, Ky., 397 S.W.2d 780 (1966) in which the Court indicated that a German national who had also passed worthless checks could not be required, as a condition of probation to "remain out of the country." Unfortunately, however, this was the only condition which had been imposed and there were indications that the judge would not have granted probation on any other condition. Therefore, the Court found the probation order to be void but the separability of the order from the judgment of conviction prevented the conviction itself from being void.

(Continued, p. 8)

Accordingly the court stated "The probation itself being a nullity there is nothing left for appellant to do but serve his sentences." Id. at 781.

The Court indicated that Weigand could have appealed from the original order but chose to accept the improper condition and subsequently violated it.

The decision in Anderson is questionable in its reliance on Weigand. Anderson's probation, unlike Weigand's, was based on a number of conditions. Therefore the inclusion of one improper condition may not necessarily have rendered the entire probation order void. There was no indication that probation would not have originally been granted absent that condition. Accordingly, it seems that Anderson could have been reinstated to probation omitting the condition dealing with access to the courts.

This suggested result was indeed reached by the Court of Appeals in another unpublished opinion, Whelan v. Commonwealth, No. 79-CA-1487-MR (decided October 3, 1980) in which the Court reversed a probation revocation due to an improper condition that the defendant pay an ex-employer's attorney fees. The Court remanded the case with a directive that the defendant be reinstated on probation with the condition deleted. (The discrepancy between Anderson and Whelan might be explained by the fact that the appeal of Whelan's probation revocation was consolidated with the appeal of the original conviction).

Although Whelan indicates that in certain situations an appeal of a condition of probation may be made after a revocation, Anderson and Weigand demand caution in this procedure. If a condition is believed to be improper an appeal of the probation order should be pursued. Once the defendant accepts and violates even a void probation condition those cases seem to indicate that the defendant may not be able to complain.

RANDY WHEELER

## PUBLIC DEFENDER'S RESPONSIBILITIES AT INTERROGATION STAGE

Few guarantees are more important than the right to have guilt proven beyond a reasonable doubt absent being compelled to incriminate oneself. As a practical matter, the giving of a confession by a defendant and its admission into evidence dramatically alters a trial. A statement of guilt, true or untrue, is a nearly impossible psychological hurdle for a jury to surmount.

As public defenders, we bear a special responsibility to insure that indigent clients are "...counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney...." KRS 31.110(2)(a). This means that a "needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed...a serious crime..." is entitled to be represented by a public defender. KRS 31.110 (1)(a).

There is no point in providing superb legal representation at trial if the case is for all practical purposes over due to a statement given by an uncounseled defendant at an early stage in the accusatory process. As legal representatives for the needy, we have an obligation to represent them from the inception of their legal problem. Anything less makes our subsequent assistance significantly less meaningful.

As stated in Amsterdam, Trial Manual 3 for the Defense of Criminal Cases (1977): "The first and most emphatic advice that the attorney should give a client reached by telephone, is to say nothing to the police, to tell them nothing at all, and to answer no questions from the police until the

(Continued, p. 9)

attorney and client have had a further chance to talk privately. (Do not tell the client, Make no statement to the police. Many clients think a "statement" means a signed confession. Tell him, Say nothing to the police officers; nothing at all, except that your lawyer told you to say nothing. If they ask you any questions or try to talk to you at all--about anything--tell them your lawyer told you not to talk. If they say anything about having evidence against you, or if they tell you what the evidence is, or if they bring in someone else who says something against you, then they are just trying to get you to talk. Don't fall for it. Whatever they say, tell them your lawyer told you not to talk.)

The client should be told to refuse to answer all police questioning very politely, on the advice of his attorney. He should also be told to say nothing to anyone else, including cellmates, persons arrested with him, codefendants, their attorneys, and reporters. It is not uncommon for detectives or police to listen through extensions to telephone calls made or received by defendants in custody. The conversation, therefore, except for the advice to remain silent, should be most circumspect. Counsel should also ask to speak to the officers who have the defendant in charge and should (a) tell them that he has informed the defendant to say nothing and to answer no questions until the lawyer arrives, (b) demand, specifically but politely, that the defendant not be questioned further until he has had a chance to discuss the matter with counsel, and (c) request the officers' name, rank, and number. If the whereabouts of the defendant has been determined, but the attorney is unable to speak to him on the telephone, then the demand that the defendant not be questioned until the attorney can be present should nevertheless be made by telephone to the detective or officer having custody of the defendant."

We must provide competent, aggressive representation at the outset of a person's criminal difficulties--not after irrevocable damage is done.

ED MONAHAN

*******

"If the advocate refuses to defend, from what he may think of the charge and of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused." Erslein, Trial of Thomas Paine (1792) 22 How.St.Tr., 358, 412.

*******

## CLAIM FORMS PAST DUE

Claim forms for the past fiscal year (July 1979-June 30, 1980) are now past due. The Department of Finance requires all claim forms to be filed no later than August 1, 1980. Any claim form received in this office past that date will be carefully scrutinized, and will not be considered absent a showing of good cause for a late filing. Any defender with a claim form not yet filed for services rendered prior to July 1, 1980, should immediately submit those claim forms, showing cause for the late filing.

*******

## PUBLIC INTEREST SECTION OF KBA TO HAVE INITIAL MEETING

The newly formed Public Interest Section of the Kentucky Bar Association will have its first meeting on January 14, 1981, at 2:00 p.m. at the Bar Center Office in Frankfort. Public defenders have a real interest in the success of this section. All interested persons are invited to attend.

# THE DEATH PENALTY

## Death is Different

STATUS OF KENTUCKY
CAPITAL CASES

Lest we forget, there are persons presently in Kentucky's institutions for whom the death penalty is very much of a daily reality. An update of their status is included below.

Only one person has had his conviction affirmed by an appellate court. Eugene Gall's conviction and sentence was affirmed on September 2, 1980, with modification occurring on October 14, 1980. An execution date of November 14, 1980 was set, and then stayed pending a petition for writ of certiorari to the United States Supreme Court.

There are four other persons whose convictions have yet to be reviewed by an appellate court. Brian Keith Moore, twenty-two, was sentenced to die by Judge Ravell on April 25, 1980 in Jefferson County on murder, kidnapping and first degree robbery. Gene White, also twenty-two, was sentenced to die on May 29, 1980 on his convictions of murder, burglary and robbery. White was sentenced by Judge Graham in Powell County. Judge Graham also sentenced a seventeen year old youth, Todd Ice, to death in the electric chair. The sentence was entered on October 9, 1980 in Powell County. Finally, LaVerne O'Bryan, the only woman on death row, was sentenced by Jefferson Circuit Judge Nicholson on September 12, 1980 for the murder of her ex-husband, and the attempted murder of her sister-in-law.

Statement made at Florida clemency hearing for James Dupree Henry (on death row) by the victim's son, William Riley: "If my father taught me anything about life, it is that God gives life and only He has the right to take it away. The God that I came to know, through my father, was one of love and mercy...not one of vengeance. We suffered as a family when he died. But we have found it in ourselves to feel compassion for this young man and we ask you to do the same. Killing him, to us, simply would not be right."

KILLING HIM WOULD NOT BE RIGHT

## DEATH ROW U.S.A.

TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO LDF: 691

Race:

| | | |
|---|---|---|
| Black | 285 | (41.24%) |
| Spanish Surname | 32 | ( 4.63%) |
| White | 367 | (53.27%) |
| Native American | 3 | ( 0.43%) |
| Oriental | 2 | ( 0.29%) |
| Unknown | 1 | ( 0.14%) |

Crime: Homicide

| | | | |
|---|---|---|---|
| Sex: | Male | 682 | (98.70%) |
| | Female | 9 | ( 1.30%) |

DISPOSITIONS SINCE JULY, 1976

Executions: 3
Suicides: 4
Death Sentences vacated as unconstitutional: 516
Convictions or sentences reversed: 270 Commutations: 6
*Other: 2

NUMBER OF JURISDICTIONS WITH CAPITAL PUNISHMENT STATUTES: 38

NUMBER OF JURISDICTIONS WITH DEATH SENTENCES IMPOSED: 30

*******

## REMINDER FOR SELF-DEFENSE CASES

A trio of cases recently reversed by the Kentucky Supreme Court underscores the importance of an issue easily overlooked in self-defense cases. On November 3, 1980, the Court reversed convictions in Blake v. Commonwealth (opinion to be published), Newsome v. Commonwealth (unpublished opinion) and Wise v. Commonwealth (unpublished opinion) because the trial courts failed to instruct on the appropriate lesser-included offenses where there was an issue of fact as to whether the defendants were wanton or reckless in their beliefs that it was necessary to use deadly force to defend themselves or others.

The Court's decisions in these cases is based upon KRS 503.120 which provides:

> When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justification of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

The Commentary (1974) to KRS 503.120 explains the practical effects of this provision:

> ...If the belief upon which a defendant's use of force is based is so unreasonable as to constitute 'wantonness' or 'recklessness', justification is not available for offenses having either of these culpable mental states as the essential element of culpability. For example, if a defendant, in killing another, believes himself in danger of death but is wanton in having such a belief, he cannot be convicted of murder. But since manslaughter in the second degree is committed through 'wantonness' and since this subsection denies a defendant justification for such an offense, he can be convicted of this lesser degree of homicide.

Thus, a defendant who is wanton or reckless in his belief in the necessity of acting in self-defense or in his belief as to the degree of force necessary is entitled to instructions on offenses which have these mental states as the essential elements of culpability - i.e., second degree manslaughter or reckless homicide, second degree assault or third degree assault. If you have a case where these issues of fact are present, tender instructions comparable to those found in Palmore's Kentucky Instructions to Juries, §10.25 and 10.26.

# TRIAL TIPS

## THE DEFENSE OF EYEWITNESS IDENTIFICATION CASES

### PART III

In the last two issues of the Advocate, we have examined the relevant case law regarding eyewitness identification and methods of gathering information regarding the identification process. Once armed with the facts and the law, counsel must begin to make his tactical decisions. In this concluding article, we will examine active defense involvement in the identification process, the problem of missing evidence, the suppression hearing and the trial.

### DEFENSE INVOLVEMENT IN IDENTIFICATION PROCESS

Too often we, as defense counsel, merely react to the police and prosecution investigatory practices after the fact. In some eyewitness cases, it is possible for counsel to take affirmative action to affect, to some degree, the validity of the identification process. Although such techniques are inherently dangerous as they may strengthen, or even constitutionalize, the prosecution's case, it can't be argued that these approaches should not at least be considered. Based on counsel's sound judgment of the particular situation, it may be decided that the risk is worth taking.

Some of the alternative tactics were referred to in Moore v. Illinois, 434 U.S. 220, 230 n.5 (1977). Counsel can request that in-court situations not be suggestive until the eyewitness' ability to identify the defendant and degree of positiveness have been conclusively documented in an objective manner. Waiver of the defendant's presence at pretrial hearings while eyewitnesses are there is the simplest manner to accomplish this. Additionally, defense counsel and/or his investigator are always free to conduct their own photo-displays with witnesses. United States v. Ash, 413 U.S. 300, 318 (1973). ["No greater limitations are placed on defense counsel in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution."] Certainly counsel must carefully choose the situation and witness before conducting a photo-display. However, there are cases where this can be effective.

In a recent death penalty case, an eyewitness ("Mrs. Smith") had a limited opportunity to observe the perpetrator under very poor conditions. The witness had identified a picture of our client as being near the scene moments before the murder. However, the description was sketchy and the only distinguishing feature was that the person she saw had long, blond hair. The photo-display from which Mrs. Smith identified our client was prepared by the local police and was clearly suggestive. It contained five pictures--our client's photo was in the center and he was the only individual with long blond hair. His facial features in the picture were not very discernable. Meanwhile, the state police had prepared a second and more objective photo-display, clearly emphasizing each person's facial features. The defendant had short hair in this display. Although there were again five pictures, this time our client's photo was not placed in the center. At the suppression hearing, a state trooper admitted he was concerned with the first display and therefore constructed the second for use with other witnesses. Mrs. Smith did not view the second display.

Realizing that Mrs. Smith had not participated in any corporeal identification procedure, we requested that

(Continued, p. 13)

our client be excused from attendance at the suppression hearing. This motion was quickly granted. This proved to be a very fortunate move. Mrs. Smith, as expected, repeated her identification from the first display and was quite positive about it. We had attempted to question the witness first, but the prosecution, sensing danger, thwarted this attempt, and solidified Mrs. Smith's identification. On cross-examination, Mrs. Smith proved to be a very hostile witness who seemed to take positions contrary to defense counsel almost instinctively. The witness was asked to examine a series of pictures and photo-displays which did not contain the picture of our client. She was asked to state whether the perpetrator's picture was included. Appearing to be on guard not to be "tricked" by defense counsel into identifying another individual, the witness answered in the negative each time. Finally, the witness was handed the second photo-display, including our client's picture, and asked the same question. After a lengthy pause, Mrs. Smith denied that the person she saw was pictured in the display. When pressed further, the witness became more emphatic. This revealing in-court photo-display would have been impossible had our client been present.

As suggested in Moore, 434 U.S. at 230, counsel may also request an in-court or out-of-court lineup procedure. There is increasing support for the proposition that a trial judge cannot arbitrarily deny a defense motion to conduct a lineup. Berryman v. United States, 378 A.2d 1317, 1319-1320 (D.C. 1977); Commonwealth v. Sexton, 400 A.2d 1289, 1293 (Pa. 1979) ["...where as here...identification is legitimately at issue, a timely request for a pre-trial or pre-hearing identification procedure should be granted."]; Evans v. Superior Court, 114 Cal.Rptr. 121, 522 P.2d 681, 686 (1974)["The right to a lineup arises... when eyewitness identification is shown to be in material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve."] The Evans decision suggests that the issue of whether a defendant may receive a lineup at his request involved considerations of due process and fairness. See Comment, Due Process Fairness Requires that Counsel Be Given a Pre-trial Discovery Right to a Line-up, 24 CATH. U.L. REV. 360 (1975) [written by our own Ed Monahan].

Of course, before counsel can request a lineup or conduct his own photo-display, he must have sufficient information on which to base a rational decision regarding the risks involved. Similarly, once a lineup or photo-display is ordered or agreed upon, counsel must be conscious of the possibility of intervening suggestive influences. See Buchanan v. State, 554 P.2d 1153, 1161-1162 (Alaska 1976), where the prosecutor showed the witness a photo-display containing the defendant's picture on the eve of the agreed in-court lineup. The court remanded the case to determine if sanctions were appropriate due to the prosecutor's conduct.

Defense attorneys have, in the eyes of some, gone too far in insuring that the in-court identification is not suggestive. In People v. Gow, 65 Ill.App.3d 723, 382 N.E.2d 673, 675 (1978), the "defendant sat in the spectator section of the courtroom wearing a wig, mustache, and horn-rimmed glasses while the State presented its case. A male model, hired by the defense, whose appearance had been altered to resemble the defendant's appearance, sat at the defense counsel table." All three witnesses identified the model. Defense counsel was held in contempt when he revealed his ploy. However, the contempt action was dismissed. Id. at 676. On appeal the conviction was affirmed. While some will argue that such conduct was unethical, it is certainly a clear example of active defense involvement in the identification process. It also graphically demonstrates how suggestive the in-court situation really is.

(Continued, p. 14)

in-court identification procedure. In Duke v. State, 298 N.E.2d 453 (Ind. 1973), the Indiana Supreme Court dealt with a situation where the defendant, his lawyer and a fingerprint expert were seated at counsel table. The fingerprint expert was identified as the perpetrator at trial. When this mistake was revealed, the trial judge simply convicted the fingerprint expert and sent him to jail. A few days later the expert was released and the original defendant ordered to take his place. However, the defendant's conviction was reversed on appeal.

Defense conducted or requested identification procedures are not the only method of influencing the identification process. Counsel can have input into prosecution sponsored photo-displays or lineups. Although, under federal and Kentucky law, counsel has no right to be present at photo-displays and pre-charge lineups, there is nothing to prevent an informal request and then a motion requesting that he or she be permitted to attend [MF, C-13, Memorandum In Support of Defendant's Oral Motion for Counsel to be Present at any Pretrial Identification Procedure]. This motion should be made as early as possible in the case--usually at counsel's first appearance. If the prosecution agrees or the motion is granted, further identification procedures, or at least suggestive ones, will be discouraged. If the prosecution refuses the request and then opposes the motion, counsel can reveal this during cross-examination and suggest to the jury and/or judge that secrecy may reflect bias in the process.

Counsel should not be deterred from requesting that he or she be present, or complaining of his absence, at photo-displays or pre-indictment lineups. Although the case law presently freezes counsel out of these crucial confrontations in Kentucky, this situation will not and cannot change unless counsel asks the trial court and then the appellate court for the relief desired. See Ash and Kirby; Cane v. Commonwealth, Ky.App., 556 S.W.2d 902, 906 (1977). (It is worthy of note that there is apparently no reported case adopting Kirby's plurality decision by a Kentucky appellate court under the Kentucky Constitution, Section 11). In fact, state courts have rejected the Ash/Kirby rationale and found state constitutions to require counsel's presence at photo-displays and pre-indictment lineups. See Blue v. State, 558 P.2d 636, 640-642 (Alaska 1977)[Alaska Constitution entitles suspect to have "counsel present at pre-indictment lineup unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation."]; People v. Anderson, 389 Mich. 155, 205 N.W.2d 461, 476 (1973)["1. Subject to certain exceptions, identification by photographs should not be used when the accused is in custody. 2. Where there is a legitimate reason to use photographs... (the accused) has the right to counsel..."]. See also Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974) and People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974)[right to counsel at pre-indictment lineup]; Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970)[right to counsel at post-arrest photo-display].

At all identification procedures at which counsel is permitted or required to be present, the defense should take an active, not a passive, role. While counsel can not and should not obstruct the police procedure in any manner, he is expected to make suggestions on how the identification is to be attempted. United States v. Allen, 408 F.2d 1287, 1289 (D.C.Cir. 1969). We should request "in advance of the lineup the names of witnesses who would attend; the time, place and nature of the crimes involved; and the descriptions of the suspect, if any, which the witnesses had given to the police. Counsel also might be allowed to have a role in setting up the lineup and proposing changes to avoid suggestive features." For example, counsel might request (in addition to the obvious request for a

(Continued, p. 15)

sufficient number of similarly appearing individuals) that 1) two full lineups (photo-displays) be conducted with the defendant appearing in the second group only; 2) the witnesses be separated; 3) the witness(es) be told that a suspect may or may not be included in the lineup (photo-display); 4) the witness(es) write down any identifications or comments, or, if discussion is permitted, that it be tape recorded; 5) counsel be permitted to interview the witness(es) before and after the identification procedure, etc. If counsel's suggestions are ignored, the argument for suppression may be strengthened. However, it is important to remember that if counsel expresses agreement with the procedure, he may not be heard to complain later.

We should always request that we be permitted to witness the crucial post-lineup identification. People v. Williams, 3 Cal.3d 853, 478 P.2d 942, 944 (1971)[presence of counsel at post-lineup interview with witness required by 6th Amendment]; People v. Sweeney, 57 Ill.App.3d 879, 373 N.E.2d 663, 668 (1978)[counsel present in room where lineup assembled but was denied access to separate room where witnesses viewed lineup and made identification; however, harmless error].

There is no specific constitutional bar, of course, to the police rejection of any suggestions or requests by counsel. However, if the police restrict counsel's opportunity to witness the entire lineup procedure to a significant degree a 6th Amendment violation may have occurred. People v. Johnson, 99 Misc.2d 450, 416 N.Y.S.2d 495 (1979) [defendant denied effective assistance of counsel when viewing area of lineup was separated by a sheet and lawyer was prevented from seeing witnesses during lineup].

## PROSECUTION'S DUTY TO PRESERVE EVIDENCE

One of the biggest problems in many eyewitness cases is in reconstructing the identification process. This problem is aggravated by the denial of the right to counsel at photo-displays and pre-charge/indictment lineups. United States v. Ash, supra; Kirby v. Illinois, supra. Indeed, a primary rationale of Ash was the "equality of access to photographs..." Ash, 413 U.S. at 319. Thus the defendant must often rely upon the prosecution to accurately preserve statements of witnesses, photographs and other records. However, because such information can sometimes benefit the defense, police officers may have little motivation to preserve photo-displays that go awry or accurately record descriptions that are not consistent with the defendant's appearance. If the prosecution admits or the defense investigation reveals missing records, photos, etc., counsel should register a due process objection. "If that safeguard [the prosecutor's ethical duty] fails, review remains available under due process standards." Ash, 413 U.S. at 321. See Smith v. Commonwealth, Ky.App., 563 S.W.2d 494, 496 (1978)[loss of a mug shot book from which an identification was made was a factor in the court's reversal]; Cotton v. United States, 388 A.2d 865, 869 (D.C. 1978)["There is no question that (the government) has a duty to preserve and the defendant has a right to discover all photographic arrays..."]. See Thompson v. State, 451 P.2d 704, 707 (Nev. 1969), cert. denied 396 U.S. 893 (1969), where the Supreme Court of Nevada held that a suspect had the right to counsel at a pre-indictment photo-display unless "...local law enforcement authorities... preserve completely in the legal sense the photographs that are displayed to witnesses, provide guidelines for proper photographic identification procedure, and follow these guidelines." [Emphasis added.]

## SUPPRESSION HEARING

The first issues to be resolved regarding an evidentiary hearing are whether and when to request one and whether, if requested, the defendant has a right to explore any identifications out of the presence of the jury. While

(Continued, p. 16)

counsel should never file frivolous motions to suppress, it would seem imperative to request an evidentiary hearing in any case where eyewitness identification is a bona fide issue. Frankly, the failure to make even an arguably meritorious suppression motion has been held to constitute ineffective assistance of counsel. Saltys v. Adams, 465 F.2d 1023, 1028 (2nd Cir. 1972); United States v. Easter, 539 F.2d 663 (8th Cir. 1976). The better practice is to make the suppression motion well in advance of trial, although under Kentucky practice a motion is apparently proper even in the midst of trial. See RCr 8.22; RCr 9.78; Freeman v. Commonwealth, Ky., 425 S.W.2d 575, 577-578 (1968). The advantage to the court is in efficiency: "the trial can be shortened and the issues simplified. In some cases it may eliminate the trial altogether." Id. at 578. However, there are also important considerations for the defense. Trial strategy can be solidified after the court rules on the suppression motion. Importantly, time is permitted to construct an effective cross-examination of the eyewitness(es) as a transcript can be prepared of the testimony at the hearing.

The second question posed is another matter. The defendant's right to a hearing is in a state of suspended animation. In Summit v. Bordenkircher, 608 F.2d 247, 251 (6th Cir. 1979), cert. granted 100 S.Ct. 1312 (1980), argued November 10, 1980, the Sixth Circuit (in a 2-1 decision) held, although it was the preferable procedure, there was no due process right to a hearing on the reliability of an identification outside the presence of the jury. Certiorari was granted and Frank Heft of the Louisville Office recently argued the case. Regardless of which way the U.S. Supreme Court swings on this issue, counsel should request an in-chambers hearing, detailing the areas he or she would like to explore but is reluctant to in the presence of the jury. Further, a right to an in-chambers hearing apparently now exists under Kentucky law. In Brown v. Commonwealth, Ky.App., 564 S.W.2d 24 (1978), the appellant argued and the Commonwealth conceded that a hearing should have been held on the reliability of the identification. The Court ordered a new trial and "an evidentiary hearing out of the presence of the jury..." Id. at 29. Shortly thereafter, the Supreme Court of Kentucky, in Moore v. Commonwealth, Ky., 569 S.W.2d 150, 153 (1978), held that the trial court's refusal to conduct a suppression hearing was error (although "remanding for a hearing would serve no purpose because the error was harmless)." The Court stated the Kentucky standard for conducting such hearings: "Wherever there is a substan tial basis for the claim that a forthcoming in-court identification is tainted by an improper pretrial identification procedure, a suppression hearing, if affirmatively requested, should be conducted." [Emphasis added.] Id. See also Jones v. Commonwealth, Ky.App., 556 S.W.2d 918, 921 (1977), suggesting a hearing before retrial. Finally, should a hearing be flatly rejected in state court, a hearing may be required on habeas review. See generally Robinson v. Smith, 624 F.2d 54 (6th Cir. 1980).

Defense strategy at the hearing will vary according to the priorities of counsel. From the defense perspective, there are two purposes to such a procedure. The first, obviously, is to present as compelling a case as possible demonstrating the unreliability (suggestiveness and lack of independent basis) of any identification. A secondary purpose is to obtain as much information from the eyewitness(es) as possible in the form of recorded testimony which can then be transcribed for use at trial. First hand experience with a witness under cross-examination is invaluable preparation for the trial confrontation as the witness(es)' strengths and weaknesses can be avoided and emphasized as the case may be.

(Continued, p. 17)

The two approaches suggested above are, unfortunately, often at cross-purposes. Terse, closed-ended cross-examination (questions which require a "yes" or "no" answer) is the most effective style for channeling testimony to fit counsel's legal theory. On the other hand, open-ended questions are best suited to eliciting information from the witness. Counsel must assess in a realistic manner the chances that the particular judge involved will suppress the pretrial and/or in-court identification. Generally speaking, counsel should avoid playing his best cards with the witness during the suppression hearing. If we exhaust our supply of damaging cross-examination questions before trial, the witness will be able to learn from the experience and parry our thrusts when it counts most in front of the jury. The reality is the vast majority of suppression motions will be denied. Since most key points can be elicited at the hearing even using an open-ended style, it is the better approach in most cases.

Prior to the hearing, of course, counsel has filed a motion requesting suppression of the identification. There is no need to delineate the precise facts counsel hopes to prove through testimony of generally hostile witnesses. These facts are usually in the exclusive control of the Commonwealth. Furthermore, one sure way to guarantee that a hostile witness contradicts your expected factual scenario is to inform him of it prior to or during cross-examination. A general motion detailing the constitutional claim should be sufficient [MF, S-21]. If additional detail is demanded, it should be provided, if possible. However, often more than one fact or legal theory is in issue in any suppression hearing. Since the "totality of the circumstances" is always relevant, ( see Manson v. Brathwaite, 432 U.S. 98 (1977)) the "announced" theory is not the only one that may be explored. While a hostile witness may be aggressively splitting hairs with counsel over an assumed crucial point, counsel may move the witness with ease through other details erroneously assumed to be insignificant by the witness. Importantly, in this type of situation, open-ended questioning can be as effective as closed-ended and far less likely to telegraph counsel's intentions.

"CAN YOU PICK HIM OUT?"

(Reprinted by permission of McNaught Syndicate).

Whether or not counsel's legal theory is spelled out in detail in his motion, it must not be fuzzy in his mind. Preparation for an evidentiary hearing not only includes the factual legwork discussed earlier but also the necessary legal research. In order to conduct a successful legal challenge, we must grasp the significance of prior decisions (principally of the U.S. Supreme Court), the factors deemed critical and the possible application of any emerging legal theory. At the same time, we should not have a one-track mind because all too often previously unknown facts come to light which may give rise to additional constitutional claims.

Where counsel chooses to use the hearing for the secondary, as well as primary, purpose discussed above, attention to detail is essential. Reconstruction of the incident or identification procedure in question is a time-consuming job requiring stamina and patience. It should be approached in an organized and methodical manner.

(Continued, p. 18)

What may not appear crucial at a suppression hearing ("color of his hat") may be significant at trial if the witness alters the description. On the other hand, if counsel didn't bother to request a detailed description at the hearing, change in detail in the witnesses' own mind will never come to light. For those of us without computers for brains, a checklist of details is useful.

Use of an exploratory style in a suppression hearing is generally of little value unless some method is used to preserve the testimony for preparation and impeachment. If time permits, a transcript can be typed and is guaranteed an indigent when reasonably necessary under an equal protection analysis. Britt v. North Carolina, 404 U.S. 226, 227 (1971)["...there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense..."] If time does not permit, a tape recorder or shorthand notes can be used by the defense to record the hearing and excerpts of relevant testimony on crucial points reduced to transcript form by counsel's secretary even in the midst of trial.

## THE TRIAL

Attacking eyewitness testimony at trial is impossible unless the groundwork has been laid. By this time the inconsistencies or other weaknesses in the witness' testimony have been located. We should isolate these factors and repeatedly focus on them throughout the trial. As with any other defense, a consistent theme is necessary--through voir dire, opening statement, cross-examination, etc. If the defense is mistaken identification, counsel should stand up after the prosecution's opening and say so--and why.

The crucial portion of the trial is generally expected to be the cross-examination of the eyewitness. Counsel should work to deflate this expectation. Eyewitnesses are almost always "sincere but mistaken" and rarely, if ever, "just plain mean." This must be explained to the jury, along with the fact that such a person cannot be influenced by facts (as the jury can) and will not admit error during cross-examination. Details raising doubts must be emphasized, especially if the prosecution avoids mentioning flaws in the identification process during opening statement. ("As Mr. Prosecutor failed to mention, the evidence will show...")

The cross-examination must be limited to the inconsistencies and weaknesses revealed by the pretrial preparation. All questions (there are exceptions to every rule) must be closed-ended. After the witness admits (or denies and is impeached) each inconsistency or weak point counsel has isolated (even if only two), he or she should sit down. Repetition of damaging direct testimony emphasizes it. See Rench, A Checklist Of Cross Examination Concepts and Techniques, 2 (3) THE ADVOCATE 11-20 (April, 1980). An attorney who uses "exploratory" cross-examination with an eyewitness at trial will only "discover" how certain the witness is that the defendant is "Guilty, guilty, guilty."

Once counsel has resigned himself to the fact that he will not force the eyewitness to rush weeping from the stand after admitting the error in identification, he can realisticly appraise his situation. After an admittedly sparse (often but not always) but effective cross-examination, we can turn to other techniques which help to put eyewitness identification in its proper perspective. Many defense lawyers, with mixed results, are attempting to bring the emerging sociological data on the unreliability of eyewitness identification into the courtroom. Expert testimony has been permitted in numerous trials throughout the nation with significant success. See Buckhout, Nobody Likes a Smartass, 3(4) SOCIAL ACTION AND THE LAW 41 (1976), listing twenty trials in which he has testified before

(Continued, p. 19)

a jury. Unfortunately, the propriety of expert testimony on eyewitness identification has only reached the appellate level in cases where the testimony was excluded. Decisions generally find no error in such instances. See, e.g., United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973). But see State v. Higgins, 592 S.W.2d 151, 163-164 (Mo. 1980)(Siler, J. concurring), discussing an excellent article which advocates "the admission at trial of expert testimony on the cognitive and social factors affecting the reliability of eyewitness identification evidence" as a middle ground remedy between the extremes of no protection and exclusion. Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 STAN.L.REV. 969, 1029 (1977). Contra Pankey v. Commonwealth, Ky., 485 S.W.2d 513, 522 (1972), rejecting expert testimony because the expert "had not administered any test to any of the eyewitnesses...[and would invade] the province of the jury..." However, the state of the art is much advanced since Pankey and the decision must be reconsidered eventually. Furthermore, Pankey's rationale is contradictory. In fact, it would be improper for a scientist to give his expert opinion on the accuracy of a particular identification. Instead, the purpose of such testimony is to provide a framework for the jury to weigh eyewitness testimony by informing the jury of relevant factors to consider. This does not invade the province of the jury. Expert testimony regarding a particular witness would.

An alternative method of sensitizing the jurors to the dangers of eyewitness identification is through an instruction from the court. A cautionary instruction regarding eyewitness testimony is routinely given in federal court and required in other jurisdictions. In the leading case of United States v. Telfaire, 469 F.2d 552, 555, 558-559 (D.C. 1972), the court set out a model "instruction on the key issue of identification, which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt." Chief Judge Bazelon, concurring, went even further, stating that an instruction was necessary, where relevant, on the problem of cross-racial identification. "The available data, while not exhaustive, unanimously supports the view that members of one race have greater difficulty in accurately identifying members of a different race." Id. at 559. Another model instruction was included. Id. at 561. See, e.g., United States v. Holley, 502 F.2d 273 (4th Cir. 1974) and United States v. Greene, 591 F.2d 471 (8th Cir. 1979) [adopting Telfaire instruction]; Commonwealth v. Rodriguez, 391 N.E.2d 889, 893 (Mass. 1979)[ Telfaire instruction "more enlightened rule"]. But see Jones, supra at 921 ["...the trial court did not err in refusing to give the tendered instruction on reasonable doubt concerning the identification"]. See also the excellent analysis in Levine & Tapp, The Psychology of Criminal Identification: The Gap From Wade to Kirby, 121 U.PENN. L.REV. 1079, 1130-1131 (1973).

If the trial court declines to permit expert testimony or a cautionary instruction, counsel should make his record for appeal on "due process" grounds and turn his attention to the more "coventional" modes of attacking eyewitness testimony discussed above. Counsel can also attempt to argue sociological data or, at least, use it to structure the closing argument, focusing the jury on traditional factors indicating unreliability. Finally, we should be on guard for prosecution tactics during trial which increase the already suggestive nature of in-court identification. If the prosecutor feels a need to point towards the defendant when asking the witness to identify the perpetrator (this recently happened to us), counsel must object and ask the court (and the jury) why the prosecutor feels a need to do this. See generally Pruitt v. Hutto, 574 F.2d 956 (8th Cir. 1978).

(Continued, p. 20)

Application of the various techniques discussed will hardly insure success in attacking eyewitness identification. However, it will guarantee that your client receives the most essential right in the adversary system--the effective assistance of counsel. Lakeside v. Oregon, 435 U.S. 333, 341 (1978).

*******

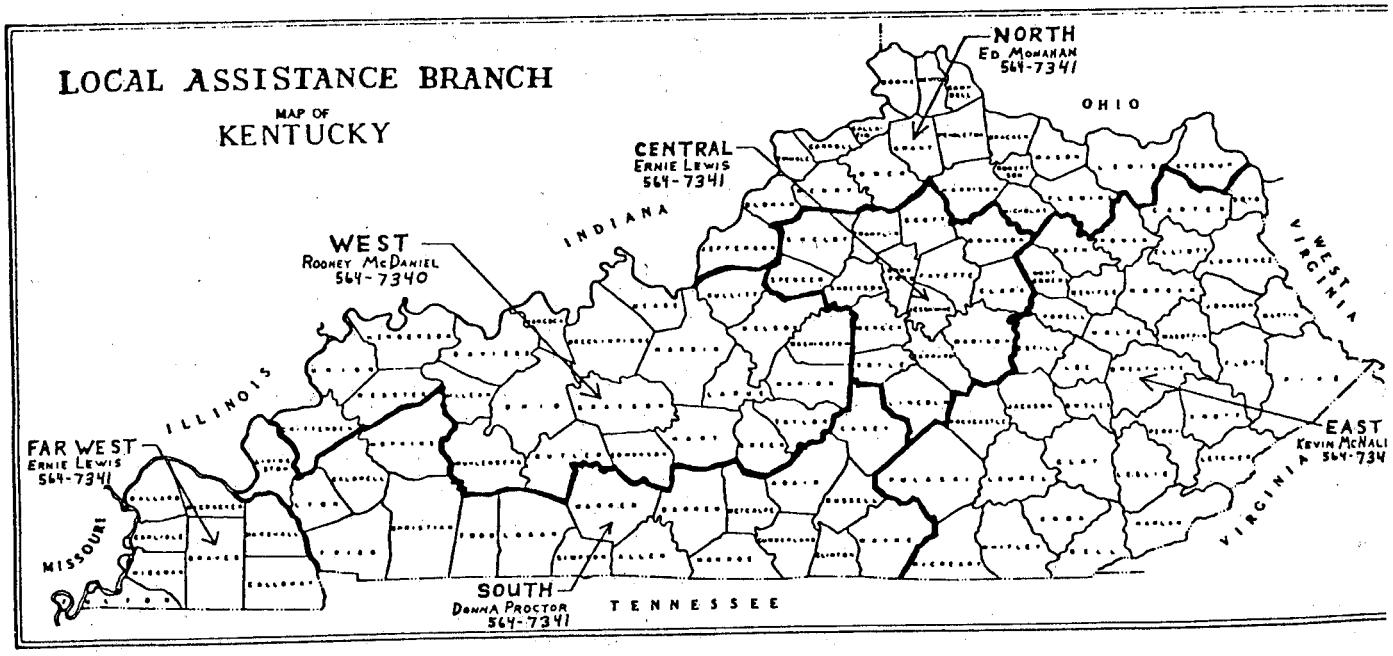
EDITOR'S NOTE: Thanksgiving week brings two more dramatic examples of mistaken eyewitness identification. "Innocent man is freed" (a former Baptist deacon released after five years in prison for two rapes "prosecutor's now say he did not commit.") A second case deals with the termination of a government prosecution against Frank Walres, mistakenly identified as a Gestapo agent during WW II. The Courier Journal, November 26, 1980, A2.

The Advocate is a bimonthly publication of the Office for Public Advocacy and is Edited by Ernie Lewis. Thanks for this issue go to Gail Robinson, Donna Proctor, Ed Monahan, Randy Wheeler, Mike Pullen, Linda West and Tom Uno. Special thanks go to JoEllen McComb for preparing the Index and to Kevin McNally for his excellent three part article on eyewitness identification.

*******

(LAB, Continued from p. 1)

An important aspect to the local assistance branch function is the legal assistance to local counsel. We have no intention of being your law clerk, but we're eager to share the legal work product that we have developed over time, and to consult with you on substantive and tactical criminal matters. Use us.




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

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

Printed with State Funds
KRS 57.375

ADDRESS CORRECTION REQUESTED