The Advocate

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PAROLE REGULATIONS AMENDED

At 12:01; a.m. December 4, 1980, new parole regulations promulgated by the Kentucky Board of Parole came into effect. Accordingly, these regulations will apply to any person who commits a crime after the effective date.

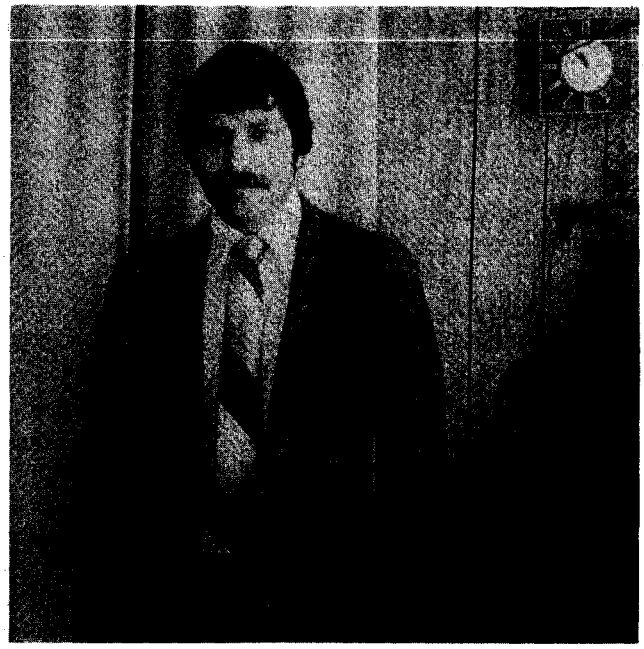
The major change in the regulations was made under 501 KAR 1:010 which relates to parole eligibility. Specifically the Board has devised a new schedule to determine the amount of time to be served before becoming eligible for parole:

Sentence Being Served	Time Required Before First Review
1 year up to but not including 2 years	4 Months
2 years up to and including 39 years	20% of sentence received
More than 39 years and up to and including life	8 years

(See Parole, p. 2)

INSIDE

THE ADVOCATE FEATURES...



The Advocate features Bill Moore of Monticello this month. Bill attended the University of Kentucky to obtain both his B.A. and his law degree. His law school education was interrupted by a two year stint in the armed forces where he worked in an operating room in El Paso, Texas. After his graduation in 1972, he went to Somerset where he was in private practice for a year.

Bill moved to Monticello in 1973 and has been working with the firm now known as Bertram, Hull, Moore and Germaine for nearly seven years. His is a general practice, but he, David Hull and Gordon Germaine do a substantial

(See Moore, p. 2)

(Parole, p. 2)

The Board indicated in a study concerning the new regulations that a major consideration was the fiscal impact on the Bureau of Corrections since the regulation will result in an eventual reduction in population. However, the average time inmates will now spend before eligibility for parole is approximately the same as it was prior to the new regulations. Nevertheless, there will be a difference in specific cases.

For persons with light sentences less time may be spent before parole eligibility. This is deemed appropriate by the Board since a light sentence is usually given to a first offender who has committed a property crime. However, persons with larger sentences may spend an increased amount of time before parole eligibility. This increase is justified according to the Board, since those who have longer sentences will generally have committed more serious offenses, usually involving violence.

After the initial review by the Board, a deferment may be given to the inmate. However, the new regulations prohibit a deferment greater than eight years. Prior to this regulation it was possible for a person to receive up to a serve out on a life sentence, although that was unusual.

Parole Regulations Amended

Two further changes were made that are of particular importance. First, if a new crime is committed while the person is on parole, he will receive credit for all purposes on the day he is arrested, either for the new charge or the parole violation. Also, the Board will begin to see inmates either during the month they are eligible or the prior month if the institution in which the person is incarcerated has bi-monthly parole eligibility hearings. Prior to the new regulations the inmate would generally be seen during the month after his eligibility date.

Finally, new regulations in relation to parole revocation procedures were promulgated. However, there were no substantial changes from the previous practice by the Board. See 501 KAR 1:020. Also, there are new regulations concerning conditions of parole and discharge from parole. For the first time an inmate may be eligible for a final discharge from parole after a period of time shorter than the maximum expiration of his sentence. See 501 KAR 1:030.

If you have any questions concerning the new regulations, please contact the Post-Conviction Services Branch of this office.

RANDY WHEELER

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(Moore, Continued from Page 1)

amount of public defender work. Bill enjoys public defender work and believes that one of the most valuable tools public defenders have is the public defender investigators. As he says, cases aren't won on "fancy speeches", they are won on the evidence. Because most attorneys are so busy, the services of a good investigator are invaluable.

Bill has appealed a number of his cases to the Kentucky appellate courts for the public defender's office. In fact, he had quite a streak of reversals going at one time. Bill enjoys doing appellate work and has found it educational because a lawyer prosecuting an appeal quickly learns what needs to be in the record in order to pursue an issue successfully on appeal.

Commenting that there is a lot of public defender work in his area, Bill praised the cooperation of the local bar but lamented the lack of adequate compensation available. In his free time Bill enjoys playing golf, bowling, fishing and skiing. He is married, and he and his wife have one child and another due shortly.

We appreciate the fine work you are doing as a public defender in Monticello, Bill.

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WEST'S REVIEW

November and December saw an unusual number of noteworthy opinions issuing from the Kentucky Supreme Court and Court of Appeals.

The Kentucky Supreme Court reversed a decision of the Court of Appeals affirming the first degree manslaughter conviction of Darrell Blake. Blake v. Commonwealth, Ky., 27 K.L.S. 14 at 12 (November 3, 1980). Blake had asserted a defense of self-protection. Blake also requested instructions on second degree manslaughter and reckless homicide, arguing that, while a finding by the jury that Blake had acted in self-protection would preclude his conviction of any intentional homicide, the jury might nevertheless conclude that Blake was wanton or reckless in believing deadly force was necessary. This precise limitation on self-protection as a defense is stated in KRS 503.120 which provides that "the justification provided by this section is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability." Based on this provision, and on facts in Blake's case which would support an inference of wantonness or recklessness, the Supreme Court found it was error for the trial court to refuse to instruct the jury on second degree manslaughter and reckless homicide.

In Stepp v. Commonwealth, Ky., 27 K.L.S. 14 at (November 3, 1980), the Court reversed another Court of Appeals decision to hold that the trial court had improperly qualified its self-defense instruction. The trial court had instructed the jury that Stepp was not entitled to rely on self-defense if he was the initial aggressor as defined by KRS 503.060(3). Stepp was convicted of second-degree manslaughter. The facts showed that on the day of the charged offense's occurrence the defendant and the victim engaged in a shoving match during which threats were exchanged. The fatal shooting followed a second altercation, occurring shortly afterward, during which the victim pointed a shotgun at the defendant. The Supreme Court held under these facts that Stepp's initial encounter with the victim was separate from the second encounter and could not be the basis for a finding that Stepp was the aggressor.

The Court has held that a "Kentucky judgment directing that Kentucky sentences be served concurrently with another state's sentence, absent explicit statutory authority but resulting from a plea bargaining agreement, must be honored by the Kentucky Bureau of Corrections." Brock v. Sowders, 27 K.L.S. 14 at 13 (November 3, 1980). Brock plead guilty to charges in Kentucky after the Commonwealth agreed that his sentences should be served concurrently with a sentence being served by Brock in Indiana. Brock was then returned to incarceration in Indiana. Three years later Brock was paroled. Brock was immediately taken into custody by Kentucky authorities, and was refused credit on his Kentucky sentence for the time served by him in Indiana. In addition to holding that the plea bargain must be honored, the Supreme Court held that Brock must be released because time served on parole from the Indiana sentence satisfies the Kentucky sentence running concurrently with it. The Supreme Court also held that a concurrent sentence starts on the same date as the first sentence, rather than on the date the concurrent sentence is imposed. KRS 197.035(2). Finally, the Court held that service of a concurrent sentence is satisfied by service of the longest term involved. KRS 532.120(1).

In Barrett v. Commonwealth, Ky., 27 K.L.S. 14 at 14 (November 3, 1980), the Court reversed the defendant's conviction because of the trial court's action in excluding testimony regarding "bad blood" between the defendant's

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family and the family of an accomplice who was a principal witness against him. Citing Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Court reiterated the principle that "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right to confrontation." Counsel for Barrett had properly preserved this error by entering an avowal into the record.

The Supreme Court also reversed Vikki Morrison's conviction of attempting to obtain a Schedule II narcotic by use of a forged prescription in violation of KRS 218A.140. Morrison v. Commonwealth, Ky., 27 K.L.S. 14 at 11 (November 3, 1980). The trial court had instructed the jury that the defendant could be convicted if she "knew or could have known" that the prescription was forged. Although KRS 218A.140 does not expressly include a mental state as an element of the offense, the Kentucky Supreme Court held that "knowledge is necessary to sustain a conviction under this section." The Court found the phrase "could have known" inconsistent with this requirement.

In Smith v. Commonwealth, Ky., 27 K.L.S. 15 at 12 (November 25, 1980), the Supreme Court reaffirmed its "three hoop" test for application of KRS 509.050, which exempts an offender from conviction of first degree unlawful imprisonment when his interference with the victim's liberty is incidental to the commission of another offense and does not exceed the interference ordinarily incidental to the commission of the offense. Smith had tied his wife and then assaulted her. The Court held that the exemption statute applied to Smith because: a) Smith's intent was to commit an offense defined outside Chapter 509; b) the interference with the victim's liberty was incidental to the commission of that other offense; and c) the interference was of the type normally incidental to the commission of that offense.

The Court has decided the Fifth Amendment question reserved by it in King v. Venters, Ky., 596 S.W.2d 721 (1980). Commonwealth v. Donovan, Ky., 27 K.L.S. 15 at 14 (November 25, 1980). In King, the Court held that RCr 7.24, which specifies those things which a defendant may be required to divulge as a condition of discovery against the Commonwealth, grants no authority for requiring a defendant to give the Commonwealth a list of his witnesses. The Court declined to decide whether such a requirement also presented a constitutional problem. At Donovan's trial, the trial court, as in King, required the defendant to supply the Commonwealth with a list of defense witnesses. Shortly thereafter King was decided. The trial court, believing it had committed constitutional error, dismissed the indictment. On appeal by the Commonwealth, the Kentucky Supreme Court held that the trial court's discovery order did not violate the defendant's privilege against self-incrimination. Because the trial court's discovery order presented only an instance of simple error, and since the defendant had made no showing of prejudice, the indictment was ordered reinstated.

In Johnson v. Commonwealth, Ky., 27 K.L.S. 15 at 15 (1980), the Court reversed Roy Thomas Johnson's conviction of first degree robbery because of actions of the trial court which led Johnson "down a primrose path into virtually confessing his guilt." Prior to testifying at his trial, Johnson advised the trial court that he intended to give testimony which would support convictions of attempted theft and menacing, but which, if believed by the jury, would preclude a conviction of first degree robbery. After hearing defense counsel's statement of

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the proposed testimony, the trial court indicated it would reluctantly instruct the jury on attempted theft and menacing if the testimony was given. Johnson then took the stand. The trial court, however, subsequently refused to instruct the jury as it had indicated it would. The Kentucky Supreme Court reversed after concluding that "the court did not carry out its agreement with appellant" and citing the trial court's "strict obligation to see that every defendant receives a fair trial." Interestingly, the Court reversed on the basis of this issue although it was not raised by appellate counsel.

In an important decision the Court has held that an accused's status as a felon may not be used to convict him of the offense of possession of a handgun by a convicted felon (KRS 527.040), and then again used to enhance the penalty imposed on a second principal conviction be establishing the accused as a persistent felony offender. Boulder v. Commonwealth, Ky., 27 K.L.S. 16 at 13 (December 16, 1980). The decision appears to overrule the Court's previous holding in Wilhite v. Commonwealth, Ky., 574 S.W.2d 304 (1978), in which the Court upheld the enhancement of both of the defendant's principal convictions through use of his status as a persistent felony offender. The Court in Boulder also held that Boulder's status as a felon could not be used to convict him of possession of a handgun by a convicted felon and then used through the persistent felony offender statute to enhance the sentence imposed for that offense. This result is consistent with the Court's decision in Heady v. Commonwealth, Ky., 597 S.W.2d 613 (1980), disallowing the double enhancement of a single conviction.

In Beavers v. Commonwealth, Ky., 27 K.L.S. 16 at 14 (December 16, 1980), the Court reversed the defendant's convictions of receiving stolen property and as a persistent felony offender on the basis of "misconduct" by the prosecutor in his argument to the jury. At the time of his arrest the defendant was driving a van owned by his employer, Wells. Wells later called the defendant concerning the van. The employer, testifying at the defendant's trial, denied that they discussed the charged offense. Nevertheless, in his closing argument the prosecutor argued to the jury that according to Wells the defendant "did not deny committing the crimes" and that "silence is an admission of guilt." The Supreme Court unhesitatingly characterized the argument as "reprehensible and not befitting the conduct of the high office of prosecutor."

Several decisions by the Kentucky Court of Appeals merit attention.

In Justice v. Commonwealth, Ky.App., 27 K.L.S. 15 at 1 (November 7, 1980), the Court reversed the defendant's conviction of wanton endangerment on the basis of the trial court's refusal to instruct on self-protection as a defense to the charge. The defendant was charged with murder in the shooting death of one individual (Smith) and with wanton endangerment with respect to another (Dotson) who escaped unharmed from the line of fire. The trial court instructed the jury on self-protection with respect to the murder charge and the jury acquitted. However, the trial court ruled that self-protection was not a defense to the charge of wanton endangerment. Holding that appellant was entitled to assert self-protection as a defense to the wanton endangerment charge the Court of Appeals stated: "The presence of Dotson between the appellant and Smith did not diminish the appellant's apprehension of serious injury or impending death nor did it modify his right to protect himself."

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The Court defined the procedural rules governing a motion for credit for time spent in custody prior to entry of a final judgment. Duncan v. Commonwealth, Ky.App., 27 K.L.S. 15 at 5 (November 14, 1980). The Court held in Duncan that the defendant had properly filed his motion for jail time credit as a motion pursuant to CR 60.02. RCr 11.42 was not applicable because the defendant was seeking to correct a mistake in sentencing rather than challenging the trial court's judgment. However, motions pursuant to CR 60.02 are required by that rule to be filed within one year of entry of the final judgment. Because the defendant's motion was not filed within the required time, the Court of Appeals held that the trial court correctly denied him credit for 462 days spent in custody prior to entry of the judgment.

In Ashland Publishing Co. v. Asbury, Ky.App., 27 K.L.S. 15 at 6 (November 14, 1980), the Court wrestled with the question of whether a trial court's order closing pretrial proceedings in a murder case was violative of the First Amendment. The Court, citing Richmond Newspapers Inc. v. Virginia, ____ U.S. ____, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), initially noted that the First Amendment "guarantees the right of both the public and press to attend criminal trials." The Court held that a similar right arises under Sections 8, 11, and 14 of the Kentucky Constitution. However, these rights must be balanced against an accused's right to a fair trial. Fashioning a standard against which these competing rights could be measured, the Court held that "a pretrial hearing should be closed to the public and press only after a determination is made that there is a substantial probability that the right of the accused to a fair trial or his other constitutional rights will be otherwise irreparably damaged." The Court then found that the trial court order before it, closing "all pre-trial hearings involving evidentiary matters presented by only one side" and "all pre-trial suppression of evidence hearings" was too broad in that it failed to consider the specific evidentiary matters to be heard.

In Anderson v. Commonwealth, Ky. App., 27 K.L.S. 15 at 9 (November 21, 1980), the Court reversed the defendant's convictions of second degree manslaughter and as a persistent felony offender because of the trial court's action in permitting the indictment to be amended from "intentional murder" to "murder." The Court held that by striking the word "intentional" the trial court had broadened the charges against the defendant so as to include wanton murder and lesser offenses having wantonness or recklessness as an element. However, under RCr 6.16 a trial court may amend an indictment before trial only "if no additional or different offense is charged..." The Court reversed despite trial defense counsel's failure to object, stating: "Consent cannot authorize a trial court to do what the law has not given it the authority to do."

The Court has held in Thurman v. Commonwealth, Ky.App., 27 K.L.S. 16 at 8 (December 12, 1980) that once an alternate juror is discharged it is reversible error to recall and reseat him on the jury. The jury at Thurman's trial had deliberated an hour when one of its members fell ill and had to be taken to the hospital. A thirteenth juror, Peyton, who had been discharged, was still in the courthouse. After questioning him to determine his activities since his discharge, Peyton was reseated on the jury. Noting that "the discharge of Peyton released him from his oath and relieved him of his responsibilities as a juror" the Court concluded that he was no longer a juror and that a mistrial should have been declared.

Two unpublished opinions also deserve brief attention for their instructive value to criminal law practitioners. In

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Bradley v. Commonwealth, mem. per curiam, Ky., File No. 80-SC-79-MR (December 16, 1980), the Kentucky Supreme Court reversed the defendant's convictions because of the introduction of his unlawfully obtained confession. The defendant requested an attorney shortly after his arrest and after receiving Miranda warnings. However, when he was unable to contact an attorney, the police proceeded to question him. A parole officer who saw the defendant during questioning observed that he had a "busted lip" and that one of the police officers had a bleeding knuckle. Under these facts the Supreme Court held that it was clearly erroneous for the trial court to rule that Bradley had waived his right to counsel when he made the statement and that his statement was voluntary.

In Hamilton v. Commonwealth, Ky. App., File No. 80-CA-410-MR (December 19, 1980), the Court of Appeals reversed the defendant's convictions of drug offenses on the ground that evidence introduced at his trial was illegally obtained. A police officer observed the defendant exchange some pills for cash at a fairgrounds. The officer then approached the defendant and, reaching into his pocket, retrieved a bag of pills. The Court of Appeals held that this warrantless search was not justifiable as incidental to the defendant's arrest and was not a frisk for weapons as permitted by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Moreover, since the defendant's subsequent arrest was founded on the illegal search, it too was illegal. The drugs, as well as evidence flowing from the illegal arrest, such as the defendant's incriminating statements, should have been suppressed.

LINDA WEST

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ADMINISTRATIVE NEWS

MONEY

On January 7, 1981, the Public Advocate requested from the Department of Finance at least $75,000 to pay for necessary legal services for the defense of indigents for unpaid claims from local counsel for the 1979-80 fiscal year.

He also asked for $150,000 for the current fiscal year (July 1, 1980-June 30, 1981) for supplemental allotments for 17 counties which already have or are about to exhaust their public defender monies. These counties are: Bell, Ballard, Casey, Fulton, Jessamine, Magoffin, Pendleton, Perry, Henry, Monroe, Nicholas, Carlisle, Estill, Knott, Laurel, Owsley, and McCreary.

Bradshaw v. Ball, Ky., 487 S.W.2d 294 (1972) makes it clear that attorneys can no longer be required to represent indigents without compensation. The General Assembly has failed to appropriate sufficient monies to run the system. Without additional money, the clients we represent will suffer unfairly.

Arraignment/Waiting In Court Time

Between August, and November, 1980 this office was being billed in assigned counsel counties for arraignment and waiting-in-court time at the rate of $120,000.00 per year. Becasue of our severely underfunded position, the Public Advocate has decided, pursuant to his authority under KRS Chapter 31, that as of February 1, 1981 the office will no longer pay for billings for waiting in court time in assigned counsel counties. Effective that same day, the office will pay for billings for no more than one-half hour for arraignment.

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We believe this is the fairest way to spend our shrinking monies consistent with our goal of providing services to all indigents accused of crimes.

PLEA TO JUDGES

In an effort to minimize the financial consequences to you, we have sent a plea to all circuit and district judges in assigned counsel counties urging them to limit the amount of time public defenders spend waiting in court on public defender cases. We have every reason to expect their full cooperation.

RESPONSE

Concerned by our inability to compensate you fully for the legal services you render to indigents? Outraged by the fact that attorneys on state personal service contracts are being reimbursed for civil matters at a substantially higher rate than public defenders? So are we.

What can be done? We suggest you contact the people that count: your state representative and senator, the Secretary of Finance, the Director of the Administrative Office of the Courts, and the Chief Justice of the Court of Justice.

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ATTORNEYS NEEDED

The Office for Public Advocacy seeks full-time public defense attorneys to staff regional offices in Winchester, Hazard, Harlan, Barbourville, Somerset, Pikeville, and Prestonsburg. Attorneys interested in gaining valuable criminal trial experience send resume to William M. Nixon, Assistant Deputy Public Advocate, 111 Elizabeth Street, Winchester, Kentucky or call 606/744-5064.

PREVUE OF COMING ATTRACTION: 9TH ANNUAL P.D. SEMINAR

On May 10, 11 and 12, 1981 the Office for Public Advocacy will conduct the 9th Annual Public Defender Training Seminar at the Ramada Inn-Hurstbourne in Louisville, Kentucky.

As in the past, this year's seminar will coincide with the Kentucky Judicial Conference sponsored by the Administrative Office of the Courts to minimize conflicts with court dockets throughout the state.

Plan to attend this year's statewide training seminar; reserve those dates on your calendar today.

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EDITOR'S NOTE

On January 14, 1981, at the Kentucky Bar Center, about forty attorneys met to organize a Public Interest Section of the Kentucky Bar Association. Among the committees of interest formed that day was a committee to study the criminal justice system, particularly as it effects indigents accused of crimes. This section has a lot of potential for meeting the problems of our public defender system, and your interest and support will be appreciated... There have been a few staff changes in the office. Bill Nixon, Director of the Southeast Regional Project, has relocated in Winchester. Bob Howell and Clyde Simmons, both of the Winchester Office, have resigned, although Clyde will now handle some public defender cases in Breathitt County. Jon Barber is the new directing attorney in the London Office... On January 14, 1981, Kevin McNally of this Office argued a case before the United States Supreme Court. The case is Carter v. Commonwealth, and is before the Court on a grant of certiorari. Gail Robinson, also of this office, was co-counsel with Kevin on the case...

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-NOTE-

Protection & Advocacy for the Developmentally Disabled

OFFICE FOR PUBLIC ADVOCACY JOINS IN AMICUS

The Kentucky Office for Public Advocacy has joined the National Association of Protection and Advocacy Systems in filing a "friend of the court" brief in the Pennhurst Case. The United States Supreme Court in the case of Halderman v. Pennhurst will, for the first time, be interpreting the Developmental Disabilities Assistance (DD) and Bill of Rights Act. The following summary of the action is reprinted with permission from Newsletter, Protection & Advocacy Incorporated, Sacramento, CA - Issue No. 6, Autumn 1980.

The suit, Halderman v. Pennhurst State School and Hospital et. al., involves the question of whether the federal DD Assistance and Bill of Rights Act guarantees residents of the Pennhurst State School and Hospital the right to "that education, training and care required to reach their maximum development," rights to habilitation in an environment that infringes least on personal liberty, and individual rights to enforce the federal statutory right to treatment or habilitation through a private legal action.

The Court of Appeals for the Third Circuit held that the Act guaranteed these rights. The United States Supreme Court, during its current term, will review this decision.

The brief, which [was] prepared by the Development Disabilities Law Project in Baltimore, develops the following arguments:

1. Not only did Congress intend the DD Act to be enforceable, but it set up a specific system of Protection and Advocacy agencies (P & A's) to enforce the Act.

2. The P & As are state and Congressionally authorized to protect the rights of developmentally disabled people, and in particular, those in institutions.

3. The legislative history of the DD Act clearly supports the enforceability of the Act and the role of P & As in its enforcement.

4. Examples will be given of how the P & As have used the DD Act to protect the rights of disabled persons.

5. This case concerns the primary legal basis granting rights to developmentally disabled people. A reversal would leave P & As with a mandate but no method for protecting the rights of individuals with developmental disabilities and would frustrate state and federal intent.

Because of its significance to the developmentally disabled community the case has attracted amicus participation on behalf of the hospital residents and from many groups including National Association for Retarded Citizens, United Cerebral Palsy Association, Epilepsy Foundation of American, People First, and Center for Independent Living.

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SOCIAL SECURITY ACT AMENDED

President Carter signed into law the Social Security Amendments Act (H.R. 3236, PL 96-265) in June, 1980. Here are some of the changes that affect people who receive SSI benefits because of a disability. The major emphasis of these amendments is on eliminating or at least minimizing barriers to employment.

TRIAL WORK PERIOD:

After 9 months of being involved in substantial gainful activity, a person is no longer considered disabled and will receive SSI for only 3 more months before being considered ineligible for benefits.

The amendments provide that after the 9-month period and the 3 months of SSI benefits following that, a person will not receive SSI benefits but will remain eligible for SSI for 12 more months. If a person's earnings from work become less than that income level considered to be substantial gainful activity during this 12-month period, a person will automatically start receiving SSI benefits again instead of having to reapply for SSI.

This change went into effect in June, 1980.

DISABILITY-RELATED WORK EXPENSES

Present regulations state that certain disability-related work expenses can be deducted from a person's earning before deciding whether that person's amount of earning is substantial gainful activity, making them ineligible for SSI benefits.

The amendments now allow that disability-related expenses which are necessary whether or not a person is employed may be deducted from earnings. Regulations will be issued to specify which expenses may be deducted (such as attendant care services and medical devices).

This change goes into effect in January, 1981.

SPECIAL BENEFITS FOR PEOPLE INVOLVED IN SUBSTANTIAL GAINFUL ACTIVITY:

Each state can take part in a 3-year pilot program that allows a person to continue to receive special SSI benefits even after eligibility for regular SSI benefits has ended because that person is involved in substantial gainful activity. Special benefits include MediCal, social services, and an amount of money equal to what a person would receive in the regular SSI program.

The purpose is to assure that no one receives less from being employed than being without a job and receiving SSI benefits. Regulations for this program should be in effect by January, 1981.

SHELTERED WORKSHOP INCOME:

Effective October, 1980, income received from work in a sheltered workshop or work activity center will be considered to be earned income for purposes of SSI.

PARENTS' INCOME DEEMED TO DISABLED CHILDREN:

Effective in October, 1980, deeming of parents' income in deciding SSI eligibility for children will apply only to children up to age 18 rather than the age of 21.

SSI RECIPIENTS IN VOCATIONAL REHABILITATION PROGRAMS:

SSI recipients in certain vocational rehabilitation programs who medically recover from their disability while in the program may be allowed to continue receiving SSI benefits. This will occur when the Commissioner of Social Security determines that continuing in the program will increase the changes that the person will be permanently removed from the SSI program.

This amendment is effective starting in January, 1981.

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THE DEATH PENALTY

Death is Different

CAPITAL CASE LAW
Hovey

In Hovey v. Superior Court of Alameda Cty, 616 P.2d 1301 (Cal. 1980) the Supreme Court of California in a most extensive opinion declared, pursuant to its supervisory authority over criminal procedure, that in capital cases "that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration." Id. at 1354.

Current modes of group death-qualification, according to the studies, increase jurors' willingness to impose a sentence of death. The dismissal by the trial judge of those jurors unequivocally opposed to the death penalty is "likely to be interpreted by the remaining jurors as an indication that the judge in particular and the lawyer in general disapprove of such attitudes." Id. at 1350. Desensitization also results from this group voir dire. Prospective jurors in capital group voir dire are prompted repeatedly to think about the penalty decision. "What was critically regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." Id. A voir dire process "which systematically erodes these attitudes would make the jury less representative of the community and more inclined to impose death." Id.

The practical way to minimize these alterations of attitudes is to conduct the voir dire individually and sequestered. Id. at 1353. Collaterally jurors will be insulated from any prejudicial remarks of other jurors and will be more revealing in their responses. Id. at 1353 n.134.

The Kentucky Supreme Court approves this type of voir dire. Ferguson v. Commonwealth, Ky., 512 S.W.2d 501, 503 n.1 (1974).

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DEATH ROW U.S.A.

AS OF DECEMBER 20, 1980, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE NAACP LEGAL DEFENSE FUND: 718

Race:

Black	290	(40.39%)
Hispanic	32	(4.45%)
White	390	(54.32%)
Native American	3	(0.42%)
Asian	2	(0.28%)
Unknown	1	(0.14%)

Crime: Homicide

Sex:	Male	709	(98.75%)
	Female	9	(1.25%)

DISPOSITIONS SINCE JULY, 1976

Executions: 3
Suicides: 4
Death Sentences vacated as unconstitutional: 515
Convictions or sentences reversed: 293
Commutations: 6
Other: 2

NUMBER OF JURISDICTIONS WITH CAPITAL PUNISHMENT STATUTES: 38

NUMBER OF JURISDICTIONS WITH DEATH SENTENCES IMPOSED: 31

TRIAL TIPS

ARREST
THE THRESHOLD QUESTION

One of the first matters defense counsel should look into when he is appointed is precisely how it was that his or her client came to be where he is, incarcerated. This question, has my client been jailed illegally, is one which is too often left unasked by defense attorneys. And by failing to ask that question, much tainted evidence is admitted against the accused, and avenues of challenge on appeal are reduced.

It is vital to remember that an arrest is a seizure of a person. Thus, an accused who has been arrested is protected by the Fourth Amendment's proscription of unreasonable seizures. Any seizure of the person which can in some way be characterized as unreasonable is a Fourth Amendment violation. United States v. Henry, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 124 (1959).

An arrest, to be reasonable, can only be made upon probable cause. Probable cause, typically, means reasonable grounds to believe that the person to be arrested has committed a crime. Suspicion, or even a strong reason to suspect, do not constitute probable cause. DeBerry v. Commonwealth, Ky., 500 S.W.2d 64 (1973), cert. den. 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed. 2d 473.

An arrest may be made with or without a warrant. If an arrest is made with a warrant, the person to be seized must be described with particularity, just as would an item to be seized. Arrest warrants are encouraged, and because of that, judicial scrutiny of arrests made with a warrant is somewhat reduced.

However, even if there is time to secure an arrest warrant, such a warrant is not required. Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948). A warrantless arrest for a felony can be made by an officer solely upon probable cause. KRS 431.005(1). A warrantless arrest for a misdemeanor however, can only be effected if the misdemeanor has been committed in the officer's presence.

Allowing for arrests without a warrant, and absent exigent circumstances, is a recognition by the Courts of the realities of day to day police work. This is balanced, however, by the requirement that once an arrest without a warrant has been made, a probable cause determination must be made by a neutral magistrate if the accused's detention is to continue to be legal. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

There is a category of seizure of the person which is legal notwithstanding the fact that probable cause is nonexistent. In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Court held that the Fourth Amendment allowed the temporary seizing of the person for investigative purposes. However, Terry and later case law require this seizure, to be characterized as reasonable, to be based upon articulable suspicion. Restraint here is justified only where the officer's information carries "enough indicia of reliability to justify the restraint." Adams v. Williams, 407 U.S. 143, 148, 92 S.Ct. 1921, 32 L.Ed. 2d 612 (1972).

This is a simple overview of the law pertaining to arrests. It follows that an arrest should be challenged as illegal any time the law has not been

(Continued, p. 13)

followed. Some of the reasons why an arrest can be deemed illegal are as follows:

1. The arrest was made without probable cause. If the arresting officer seizes the accused based upon suspicion, this violates the Fourth Amendment.

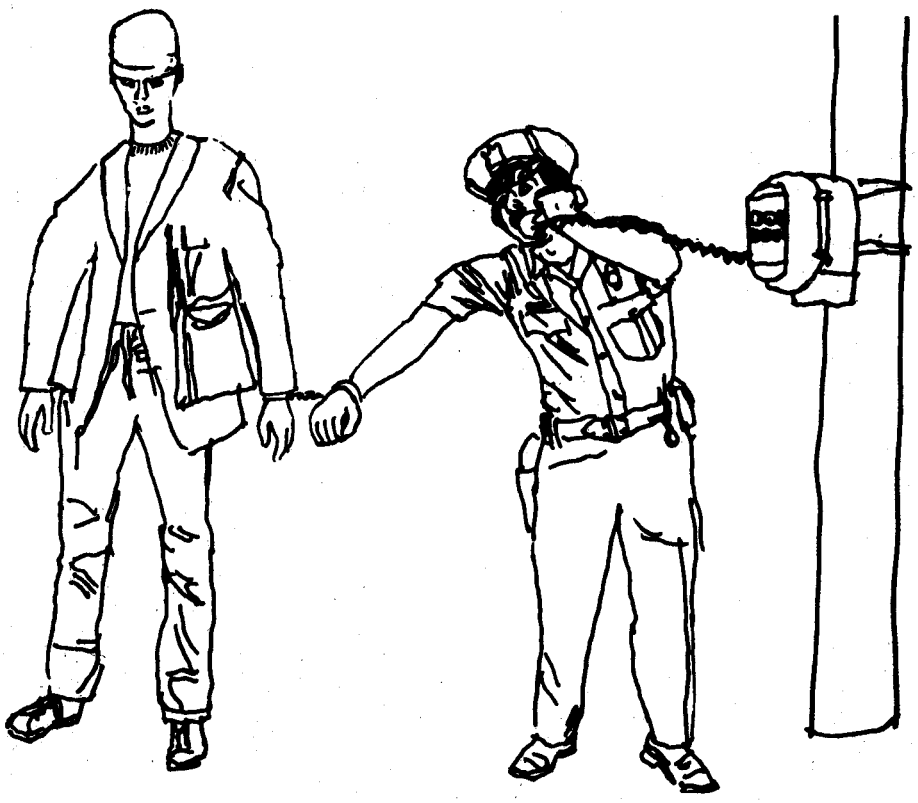
2. Probable cause to arrest developed only after the initial seizure. Probable cause must precede an arrest. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 684 (1965). For example, in Martin v. Commonwealth, Ky., 592 S.W.2d 134 (1979), the officers seized Martin to "see if he was AWOL." They took Martin to the police station, where they corroborated an earlier anonymous tip that Martin was AWOL. The Court held that

"[p]robable cause must exist before any arrest... Because any probable cause to arrest Martin for desertion arose only after he was taken into custody, the arrest was invalid." Id., at 139.

3. The information acted on by the police came from an unreliable informant. Martin v. Commonwealth, supra.

4. The information acted upon by the arresting officer came from a reliable informant, but was without particularity.

5. Illegal force was used in making the arrest. Professor LaFave argues that, "[g]iven the fact that an arrest will be deemed unlawful, necessitating suppression of evidence obtained incident thereto, if the arrest is accomplished by an unnecessary breaking into the premises for purposes of arrest, Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963), the arrest should not be considered otherwise when it is accomplished by an unnecessary use of force against the person." LaFave, Search and Seizure, A Treatise on the Fourth Amendment, Section 5.1(d) (1978).



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6. The arrest warrant is invalid. Here, an arrest warrant cannot validate an arrest if the warrant is a blank warrant, or if the person to be seized is not specified with particularity.

7. The arrest was made in order to question the accused. Investigatory seizures of the person are clearly violative of the Fourth Amendment. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

8. An investigatory stop and frisk occurred without articulable suspicion, or upon information with no indicia of reliability. See Terry v. Ohio, supra, and Adams v. Williams, supra.

9. Arrest was made in a house without the consent of the accused, and without a warrant. Payton v. New York, ___ U.S. ____, 100 S.Ct. 1371 (1980).

10. The arrest was a sham, an excuse to have the accused in custody so that a confession could be procured, or as a pretext for a warrantless search. Ortiz v United States, 317 F.2d 277 (5th Cir. 1963).

11. Any other reason the arrest appears to have been unreasonable.

Once you have shown an arrest to be illegal, you are only part way there. An illegal arrest does not invalidate a subsequent conviction. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). What's the point then? The point is that once an arrest is ruled to be illegal, the evidentiary fruits of that illegal arrest must be suppressed under the exclusionary rule. Only where the connection between the arrest and the evidence seized can be shown to have "become so attenuated as to dissipate the taint," Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), can the evidence be admitted. Under this test, any evidence seized incident to the arrest must be suppressed. Further, if a confession occurs, it becomes the burden of the prosecution to prove the taint of the illegality had been broken, taking into account the temporal proximity between the arrest and the confession, the intervening circumstances, and the purpose and flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 410 (1975); Dunaway v. New York, supra, and Martin v. Commonwealth, supra.

Defense counsel should not only look at the details of the arrest itself. Any subsequent post-arrest illegality may also invalidate evidence obtained as a result of detention. The clearest example of this is the failure of the police to take the accused before a magistrate shortly after arrest. RCr 3.02. If such an appearance does not occur, it is very likely that a Fourth Amendment violation has occurred. Gerstein v. Pugh, supra; Mayhew v. Commonwealth, 297 Ky. 172, 178 S.W.2d 928 (1944). Attention should also be paid to any brutalizing of the accused, denial of access to an attorney, or any other unreasonable conditions of confinement.

A few last words, before I close, on how to present this issue to the trial court:

1. Make a written motion, with only a few facts alleged. Wait until the evidentiary hearing to get specific.

2. The burden is on you at the hearing. However, you may be able to dispense with your burden by proving an arrest without a warrant. You should decide which way you want to go, depending upon whether you want the officers to narrate while being shaped by the prosecutor or whether you wish to control the direction of the narration yourself.

3. Invoke the rule. Generally your case is going to be made with the testimony of police officers. Do not permit any of them to sit at the prosecutor's table.

(Continued, p. 15)

4. Decide before hand when it you want "the arrest" to have occurred. Usually, you want the arrest to occur as early as possible, so that any evidence seized thereafter is illegal. Sometimes, however, you will want the arrest later, for example to prove that the search was not incident to an arrest but rather occurred prior to the arrest.

5. Be prepared with as much documentation as possible. Before the hearing, examine the arrest warrant, the complaint, booking records. Try to procure the policeman's report and handwritten notes. If you can't see them prior to the hearing, get them after the officer testifies on direct, under RCr 7.26. Talk to the arresting officers, bystanders at the arrest, booking officers, the jailor. This can be valuable. For example, in Martin v. Commonwealth, supra, the arresting officers told the jailor that he had been arrested ostensibly for AWOL, but really he was arrested on suspicion of murder.

6. Press the officers for the particularities of information upon which they acted in arresting your client without a warrant. Specifically press them on the use of informants, why the informant is viewed as reliable, when he has given reliable information in the past, how many convictions his information has lead to, etc.

7. If you wish, your client can take the stand without having his statement used against him. United States v. Simmons, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). You may want to avoid this, however, both to keep the prosecutor from practicing cross-examination on your client, and to eliminate the possibility of your client being impeached with his testimony if his later trial testimony is inconsistent.

8. If the arrest is patently illegal, go after the Brown factors to show the arrest tainted the evidence.

This summary of arrest law is not meant to be exhaustive by any means. As with any search and seizure issue, upon the precise facts of the arrest, including the officer's knowledge prior to the arrest, will rest your chances of successfully urging that your client has been seized in violation of the Fourth Amendment.

ERNIE LEWIS
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MOTION IN LIMINE

A motion in limine is a pretrial request for an order prohibiting opposing counsel from utilizing certain prejudicial matters before the jury, or permitting the use of a matter at trial.

The value of obtaining a pretrial ruling is that (1) counsel knows how to plan the trial based on whether the evidence will be admissible or not; (2) avoids the useless, prejudicial admonition at trial for evidence which is inadmissible; (3) it can allow for discovery of the other side's position; (4) it leaves the record fully preserved; (5) it is a more thorough method of persuading a judge with organized arguments and applicable law.

The motion can be used to determine before trial the applicability of a hearsay objection; the admissibility of bad character evidence of the prosecution; the existence of a privilege; the competency of a witness to testify, see Tinsley v. Commonwealth, Ky., 495 S.W.2d 776, 778 (1973); the qualification of experts; the admissibility of prior criminal convictions of the defendant.

By employing this procedural device defense counsel can determine with more accurate information the best trial strategy and theory of defense. It permits knowledgeable voir dire and opening statement. If prejudicial matters cannot be excluded, the best strategy may be to condition the jury to its admission from the beginning.

(Continued, p. 16)

How do you convince a reluctant judge to make such a pretrial ruling? Inform him of the advantages of this method of ruling. The judge gains time to deliberate with a written statement of the legal positions. It saves trial time, and avoids the problem of possible reversible error due to something prejudicial being wrongfully introduced into evidence.

It is an offensive weapon which allows defense counsel to enter into the trial with knowledge of the critical aspects of his client's case. It allows for more efficient trials, and encourages more knowledgeable decision making by the judge. Pretrial determinations are encouraged by the Kentucky appellate courts. Gray v. Commonwealth, Ky.App., ___S.W.2d___ (January 9, 1981). For further discussion of such motions see Rothblatt and Leroy, The Motion In Limine in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence, 60 Ky.L.J. 611 (1972); Fitzgerald, 8 Kentucky Practice: Criminal Practice and Procedure Section 823 (1978).

ED MONAHAN
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...

...the great trial lawyer, though not necessarily a great orator, must be able to use language to produce results as a skilled craftsman uses a delicate and complicated tool. He must have sympathy, tact and courtesy, and must know men and their ways. By study, experience, and a trained intuition, he will also have acquired an instant appreciation of the significance and force of evidence and will have learned its correct order of presentation. He must be able to control his temper and maintain his poise under trying conditions, and it will steady him and keep him sane if he has a sense of humor, which, however, he can hold in proper subjection. Finally, he must know the law.

--OSBORN, Albert S., The Problem of Proof (Albany, N.Y.: Boyd Printing Company, 1947), p. 84.
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WHAT'S IN A NAME?
A STRATEGY FOR CHALLENGING PRIOR CONVICTIONS

Certain offenses, such as possession of a handgun by a convicted felon, and enhancement laws, such as the persistent felony offender statute, require the prosecution to prove beyond a reasonable doubt that the defendant had previously been convicted of a felony or a misdemeanor. KRS 500.070(1), Adams v. Commonwealth, Ky., 551 S.W.2d 561, 564 (1979). Consequently, the prosecutor must have available probative and competent evidence, either testimonial or documentary, to establish the existence of the prior conviction.

Even though a prosecutor may move to introduce a properly authenticated and, where necessary, certified copy of the defendant's alleged judgment of a prior conviction, trial defense counsel should object to the introduction of the exhibit on the grounds that the prosecution must establish that the person named in the record of the alleged conviction is actually the defendant.

In previous situations where defendants have raised a version of this issue, the Supreme Court of Kentucky has repeatedly endorsed the principle that "[p]roof of identity of name is prima facie evidence of identity of person." Jones v. Commonwealth, Ky., 457 S.W.2d 627, 631 (1970), citing Foster v. Commonwealth, Ky., 415 S.W.2d 373 (1966), and Belcher v. Commonwealth, 216 Ky. 126, 287 S.W. 550 (1926). According to prior Kentucky decisions, "[a] prima facie case having been established, the onus [is] on [the defendant] to show that he [is] not the person who was previously convicted." Jones v. Commonwealth, supra at 631; Green v. Commonwealth, Ky., 413 S.W.2d 329, 331 (1967).

However, in many jurisdictions, such as Louisiana, "proof that a person of the same name has been previously convicted does not constitute prima facie evidence that the two persons are the same." City of Monroe v. French,

(Continued, p. 17)

a., 345 So.2d 23, 24 (1977). "[T]he mere identity of names [in the context of an accused's alleged prior conviction] is not sufficient to show actual identity of person" and, "if the [prosecution] is to carry its burden, it must show more." State v. Forteson, Ariz. App., 447 P.2d 560, 566 (1969), citing State v. Pennye, Ariz., 427 P.2d 525 (1967). "The state must additionally offer proof that the accused is the same person as the defendant previously convicted." City of Monroe v. French, supra at 24.

The principle that "[t]he identity of names raises a prima facie case of identity of persons" is unconstitutional in the context of a criminal case, because it violates the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). "To implement the presumption, courts must be alert to factors that may undermine the fairness of the factfinding process." Id., 96 S.Ct. at 1693. The principles enunciated in Estelle are undeniably violated by an evidentiary policy which permits a simple identity of names between a prior conviction and the accused to establish a prima facie case of identity of persons.

The factual premise for such an evidentiary policy is inherently suspect. "[N]ot infrequently a father and a son of the same name live at the same address"; furthermore, "in an age of an ever more multitudinous and mobile population, identical names of different persons are not uncommon." City of Monroe v. French, supra at 25 n.1.

The evidentiary proposition that identity of names equals identity of persons, absent proof to the contrary, "undermine[s] the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." County Court of Ulster Cty. v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979). Since the "identity of names" principle allows the jury to consider a record of a prior conviction as pertaining to the accused simply because his name is identical or similar to the name in the document, this evidentiary device permits the prosecution to prove an element of the offense "beyond a reasonable doubt" on the basis of incompetent, irrelevant and non-probative evidence.

"Because the defendant is clothed with the presumption of innocence as to the fact of his former conviction as well as any other fact, ... the prior conviction must be proved beyond a reasonable doubt." People v. Langdon, Ill., 392 N.E.2d 142, 144 (1979); see Adams v. Commonwealth, Ky., 551 S.W.2d 561, 564 (1979).

Initially, trial defense counsel should object to the introduction of the record of the prior conviction on both state evidentiary grounds and federal constitutional principles.

Under one respected approach to this evidentiary problem, "the evidence of the [prior] conviction [is] not relevantly admissible, in the absence of proof that the person convicted [is] the same person as the defendant." City of Monroe v. French, supra at 24-25. "Since, if connected up with the defendant, the exhibits [are] admissible, the trial court's proper ruling [is] to admit the exhibits, conditioned upon subsequent proof of the connecting facts proving identity." Id. at 25, citing McCormick on Evidence, Section 58 (2nd ed. 1972).

When the trial court overrules the defense objection and admits this type of evidence "unconditionally, without requiring the state to prove (then or subsequently) the requisite connexity of identity," reversible error occurs. City of Monroe v. French, supra at 25. See Williams v. Commonwealth, Ky., 602 S.W.2d 148, 149 (1980).

If, at the conclusion of the Commonwealth's case-in-chief, the prosecution has failed to connect the documentary

(Continued, p. 18)

evidence to the defendant, defense counsel should then move to strike the record of the prior conviction and, if appropriate, request any additional curative relief, such as an admonition. See Williams v. Commonwealth, supra at 149.

Should the trial judge decline to strike the challenged document, defense counsel must at that point move for a directed verdict on the grounds that the prosecution has failed to prove an essential element of the charged offense --the defendant's prior conviction. Kimbrough v. Commonwealth, Ky., 550 S.W.2d 525, 529 (1977). Of course, if overruled, that motion must be renewed at the close of the entire case. Id.

The federal constitution "requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977). Similarly, the Kentucky Penal Code emphatically states that "[t]he Commonwealth has the burden of proving every element of the case beyond a reasonable doubt." KRS 500.070(1).

Defense counsel should argue on the record that the record of the prior conviction, although erroneously admitted, is not competent or probative evidence that the defendant has a prior conviction absent proof that he is the person named in the challenged document. Consequently, it would be "clearly unreasonable for a jury to find [the defendant] guilty," so he would be entitled to a directed verdict on the charge. Trowell v. Commonwealth, Ky., 550 S.W.2d 530, 533 (1977); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

In People v. Langdon, Ill., 392 N.E.2d 142, 143 (1979), "the only proof offered by the State to establish [the] defendant's prior conviction was a certified copy of conviction bearing the same name as that of [the] defendant." "Because the State failed to prove that [the] defendant was the same person named in the conviction statement, the evidence was insufficient to establish [the] defendant's former conviction" and, as a result, his conviction on the charged offense had to be reversed. Id.

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

For example, a defendant is charged with the offense of carrying a concealed weapon with the enhancement factor of a prior felony conviction in which a deadly weapon was possessed, used or displayed. If the record of the prior conviction is not connected with the defendant, a motion for a directed verdict of acquittal would not be the appropriate procedural device for challenging the insufficiency of the evidence. Instead, when the judge states his intention to instruct on both the Class D felony of carrying a concealed weapon with the aggravating factor of the prior felony conviction and the lesser included misdemeanor offense of carrying a concealed weapon, defense counsel must specifically object on the grounds of insufficient evidence to the giving of an instruction on the charged felony offense of carrying a concealed weapon.

Prosecutors will undoubtedly raise the argument that it is impractical and inconvenient for the Commonwealth to be required to prove that the defendant is the person named in the record of the prior conviction. However, there are "various methods that may be used to prove that the person

(Continued, p. 19)

named in the conviction statement and the defendant are identical." People v. Langdon, supra, 392 N.E.2d at 144. "These include testimony as to the former conviction by the arresting officer on the prior felony charge, by the presiding judge at the prior trial, or by parole counselors, corrections officers, and the like." Id. at 144. "Similarly, the defendant may himself testify as to the former conviction, or make statements sufficient to establish that he is the same man as is named in the conviction statement, or the parties may so stipulate." Id. at 144-145.

J. VINCENT APRILE, III

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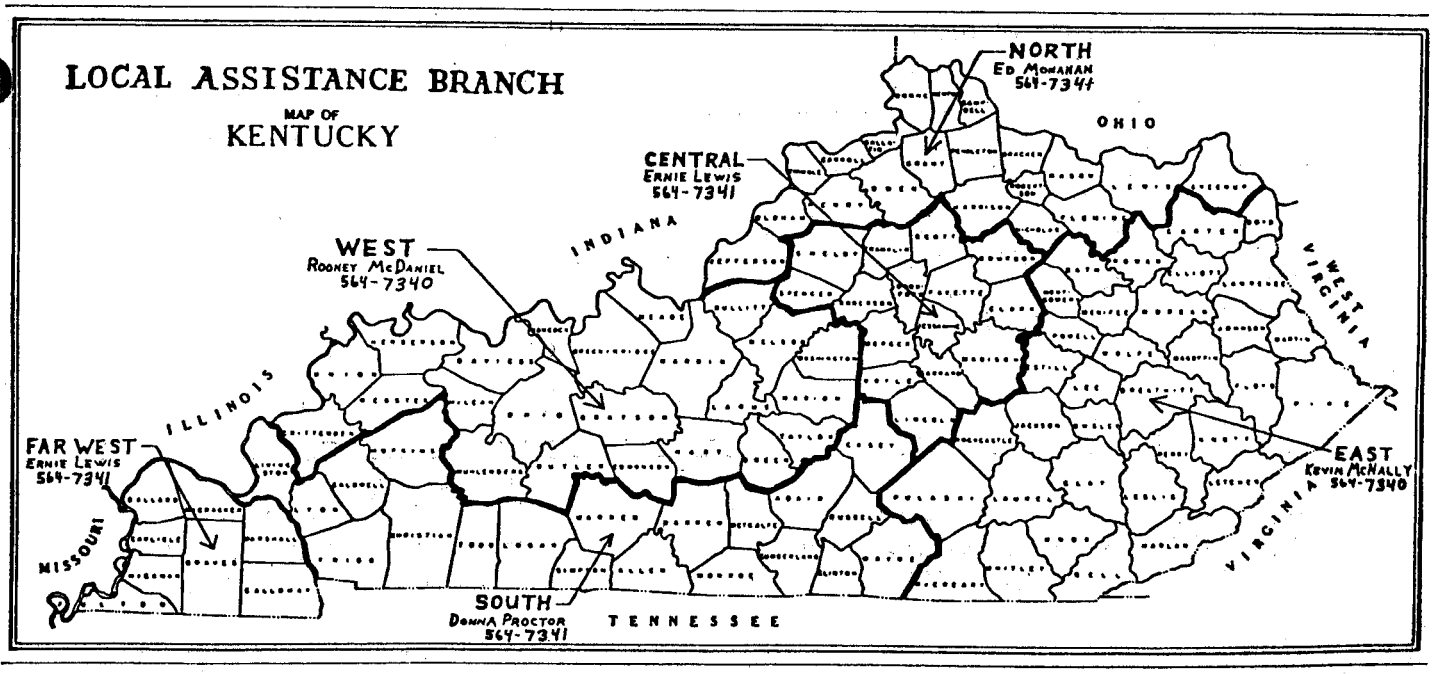

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