The Advocate

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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. This year's program will feature Howard B. Eisenberg, Executive Director, National Legal Aid and Defender Association (NLADA), and former Wisconsin Public Defender. (See Burger v. Eisenberg, p. 18).

Howard Eisenberg's presentation will focus on problems and pitfalls that confront the trial level attorney as he seeks to provide effective assistance of counsel.

Edward H. Johnstone, Judge, United States District Court, Paducah, Kentucky, and Benjamin Shobe, Chief Judge, 30th Judicial Circuit, Jefferson Circuit Court, Louisville, Kentucky, will participate in a panel discussion evaluating and analyzing the Kentucky criminal defense attorney in the trial arena.

(See Seminar, P. 2)

INSIDE

THE ADVOCATE FEATURES...

Linda Brumleve of Fayette County Legal Aide has been working as a Public Defender at that office since 1977. Prior to that time, Linda attended the University of Kentucky for her undergraduate and legal studies. After graduating in 1974, she worked with the Department of Human Resorces until 1976. For the next year Linda traveled out West as a "treat" to herself although she did spend six months of that time clerking for a private firm in Colorado.

Recently, Linda obtained four felony acquittals in a row. She is particularly proud of one of those wins because the acquittal was based on a defense of insanty which she believes is the first in Fayette County in a

(See Brumleve, P. 2)

(Seminar, Continued from P. 1)

Susan E. Loggans, a Chicago trial attorney, will speak on the psychology of the initial client interview with emphasis on techniques she employs to maintain a meaningful attorney-client relationship.

William E. Johnson of Johnson, Judy and Gaines, Frankfort, Kentucky, will explore the do's and don't's for the defense in a criminal trial.

Other sessions will include a comprehensive analysis of ethical problems confronting the criminal defense attorney, a detailed discussion of the use of theory-of-the-defense instructions, a review of recent United States Supreme Court decisions in criminal cases and their impact on Kentucky criminal law, and a defense strategy for obtaining expert witnesses.

The Protection and Advocacy Division's presentation will feature Dolores Boland Norley, lawyer, lecturer and educator, who will address the issues and problems involved in the representation of the mentally retarded offender in the criminal justice system. Oliver H. Barber, Jr., of Gittleman, Charney and Barber, Louisville, Kentucky, will share the podium with Ms. Norley and address some of the more parochial aspects of this topic.

On Sunday, May 10, at 7:30 p.m., immediately following the close of registration, the substantive portion of the seminar will begin with an instructional session. To conclude Sunday's program, the seminar will present a feature film specifically selected not only for its entertainment value, but for its insights into the role of defense counsel in the criminal justice system.

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(Brumleve, Continued from P. 1)

number of years. She also successfully defended a client on a First-Degree Persistent Felony charge. It should be mentioned also that due to her fine trial representation that the Court of Appeals recently reversed a case due to insufficient evidence.

Linda has not done much appellate work although she clerked at the central office during her time in law school. Her primary interest is working in trials. She is particularly pleased with public defender work since it gives her the chance to develop effective trial techniques.

According to Linda, one of the most beneficial experiences she has had since becoming a public defender, was attending the National College for Criminal Defense in Houston during the summer of 1979.

Linda's hobbies are snow skiing and baseball. In fact, she played in an organized league in Lexington last summer and plans to do the same this year.

We appreciate Linda's fine efforts in the public defender system and wish her continued success.

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ADMINISTRATIVE NEWS

As of March 13, 1981, public defender monies have been exhausted in these 18 counties: Bell, Ballard, Casey, Floyd, Fulton, Jackson, Jessamine, Magoffin, Pendleton, Perry, Henry, Monroe, Carlisle, Estill, Knott, Laurel, Owsley and McCreary. There is less than $1000.00 left in seven other counties: Nicholas, Trimble, Powell, Hickman, Lincoln, Hancock and Butler.

On January 7, 1981, the Public Advocate, consistent with Bradshaw v. Ball, Ky., 487 S.W.2d 294 (1972), requested from the Department of Finance a supplemental appropriation of at least $150,000.00 for the current

(See News, P. 18)

WEST'S REVIEW

A reading of decisions rendered by Kentucky's appellate courts during the months of January and February shows some interesting legal developments coming out of both courts.

The Court of Appeals held that reversible error was committed in the case of Gray v. Commonwealth, Ky.App., 28 K.L.S. 1 at 8 (January 9, 1981), when the trial court instructed the jury that "the law presumes every man sane until the contrary is shown by the evidence." The Court cited Mason v. Commonwealth, Ky., 565 S.W.2d 140 (1978), in which the Kentucky Supreme Court held that giving such an instruction to the jury was error. The erroneous instruction appears in Palmore's Kentucky Instructions to Juries, Vol. 1, § 1031.

The Court of Appeals also held in Gray that the defendant was entitled to a directed verdict of acquittal for reasons of insanity. The defendant's psychiatric testimony in support of his insanity defense was controverted only by lay testimony from a former employer who had not seen the defendant during the ten months prior to commission of the charged offense. Given this posture of the evidence, the Court of Appeals held that the trial court should have found that the defendant was insane as a matter of law.

In Commonwealth v. Hurd, Ky.App., 28 K.L.S. 3 at 2 (February 20, 1981), the Court held that once a district court decision has been reviewed in the circuit court the disappointed party's only access to the appellate courts is through a motion for discretionary review, and not by way of appeal. The Court rejected the Commonwealth's argument that § 115 of the Kentucky Constitution gives to each party a right of one appeal. "The Constitution says that one appeal shall be allowed in each case. It does not say that one appeal is allowed to each party in each case."

In an important decision the Court in Davidson and Davidson v. Commonwealth, Ky.App., 27 K.L.S. 3 at 3 (rendered February 27, 1981), has delineated the principles governing the arrest of a juvenile. The defendants, both juveniles under fourteen years old, were arrested at their homes for vandalism. The officer arresting them did so because they had been seen near the scene of the vandalism only two minutes after glass-breaking had been heard and because a neighbor said that her husband had seen the defendants vandalize another vacant house at some unspecified previous time. The Court held that this information was insufficient to establish probable cause for the boys' arrest. The Court also held that the defendants had been detained in violation of KRS 208.110. At the time of their arrest the only other person present in the home was their sixteen year old sister. The arresting officer did not inform her of the charge against the boys or wait until their parents came home although the sister said they would return shortly. This action by the officer was in contravention of the statute. It was also unlawful for the officer to detain the juveniles at all in light of the statute's directive that "unless the nature of the offense or other circumstances are such as to indicate the necessity of keeping the child in secure custody, the officer shall release the child to the custody of his parent. . ." The officer additionally violated KRS 208.120 which provides that "no child under sixteen shall at any time be detained in any police station. . .except that on the basis of a hearing for that purpose, by the juvenile court judge, a child whose conduct or condition is such as to endanger his safety or welfare or that of others in the detention facility for children, may be placed in a jail or other place of detention. . ." In view of the illegal arrest and detention of the juveniles, all statements made by them while in custody should have been suppressed.

(Continued, P. 4)

The Kentucky Supreme Court reversed the robbery-murder conviction of Tony Baril. Baril v. Commonwealth, Ky., 28 K.L.S. 2 at 14 (February 17, 1981). The Court found that all statements made by Baril during post-arrest interrogation should have been suppressed. Baril, a teenager, was questioned twice on consecutive evenings. On both occasions Baril broke down and cried, and he requested an attorney at least once. However, counsel was not appointed for him until two days after his interrogation. The Court, reversing, observed: "The failure to provide counsel when requested and the continued questioning of the accused is a serious deprivation of the rights of appellant."

The United States Supreme Court has reached an important decision on the constitutional right to a hearing outside the presence of the jury to determine the admissibility of identification testimony. Watkins v. Sowders 28 CrL 3037 (January 13, 1981). The Court held that the Constitution does not require a per se rule compelling a hearing in every case where a due process challenge to an identification procedure is raised. However, the Court went on to hold that "[i]n some circumstances. . .such a determination may be constitutionally necessary." Unfortunately, the Court's opinion gives no guidance as to what those circumstances might be. Caution would thus seem to dictate that a hearing be conducted. The Kentucky Supreme Court has identified this as "the preferred course to follow." Watkins v. Commonwealth, Ky., 565 S.W.2d 630, 631 (1978).

In a landmark decision the U.S. Supreme Court has held that television or radio broadcasts of a criminal trial do not, in and of themselves, deprive an accused of due process. Chandler v. Florida, 28 CrL 3067 (January 26, 1981). The Court rejected the defendant's argument that its plurality opinion in Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1964) stood for the principle that such media coverage was a constitutional violation per se. The Court also rejected the suggestion by amici that the broadcasting of trials amounts to a form of punishment before a finding of guilt. The Court acknowledged this concern as "far from trivial," but held that this risk, as well as any danger posed to the fairness of trial proceedings themselves, must be resolved on a case by case basis following a particularized showing of prejudice.

In other decisions, the Court held in Weaver v. Graham, 28 CrL 3077 (February 24, 1981), that a Florida statute reducing the amount of "good time" accruable by convicted prisoners was an ex post facto law as applied to the petitioner whose crime was committed before the statute's enactment. And in Hudson v. Louisiana, 28 CrL 3081 (February 24, 1981), the Court overturned a decision of the Louisiana Supreme Court which held that an accused's retrial is barred by Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) only when it is determined by the trial court or an appellate court that there was no evidence to support the verdict. The Supreme Court held in Burks that the double jeopardy clause was violated by an accused's retrial after his conviction was set aside as supported by insufficient evidence. The Court's decision in Hudson reaffirms that principle.

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"We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Oliver Wendell Holmes, in Olmstead v. U.S., 277 U.S. 438 (1928).

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INMATE'S ACCESS TO THE COURTS

In 1967, the Supreme Court held that prisoners have a fundamental constitutional right of meaningful access to the courts. Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747 (1947). The Court relied on both the Due Process Clause and the Equal Protection Clause in reaching its decision: the Due Process Clause to require the access to be meaningful, and the Equal Protection Clause to require that poor, illiterate persons be given the same access to the courts as is available to wealthy, literate persons. See also Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437 (1974). Although the Supreme Court had stated that this fundamental right existed, it was not until Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491 (1978), that the Court began to define what constituted meaningful access to the courts.

The Bounds' decision clearly gives prison officials two methods of providing for prisioners' access to the courts. Access can be acheived by providing adequate legal assistance or by providing an adequate law library with "jailhouse lawyers" to aid those inmates who would not be able to help themselves.

Concerning what is an adequate law library, the Court in Bounds, supra, provided lists of books they found to be adequate including one from the American Correctional Association of Law Libraries Committee on Law Library Services to Prisoners. Of course, the inmates must have adequate access to the library materials, but every case considering the problem has indicated that reasonable time/location regulations are acceptable.

If prison officials decide to provide access to the courts by providing "jailhouse lawyers" the restrictions placed on them must be considered. Clearly Johnson v. Avery, supra, makes a total ban on their activities unconstitutional. However, reasonable regulations on "jailhouse lawyers" are permissible, such as a prohibition on accepting benefits for work.

Finally, all inmates in the correctional system must have access to the library and "jailhouse lawyers". In Stevenson v. Reed, 391 F. Supp. 1375 (N.D. Miss. 1975), the court held that inmates in scattered residential camps must be provided access to law libraries. However, this does not mean that a law library must be provided at each camp. In Bounds, the Supreme Court approved transportation to the facilities that did have libraries providing overnight accommodations if necessary.

If corrections officials decide to provide direct legal assistance it may do so with attorneys, para-legals and law students in varying combinations. See Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800 (1974). The difficult problem lies in determining the number of persons necessary to provide adequate legal assistance. The courts have provided very little guidance in resolving this question.

Finally, with any method of assistance an inmate's right of access to the courts doesn't just apply to criminal cases, but also to civil actions such as divorce, bankruptcy, probate, and small civil claims. Corpus v. Estelle, 551 F.2d 68 (5th Cir. 1977). Also, this right clearly applies to habeas corpus and civil rights actions. Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974).

Ben Haydon

-NOTE-

Protection & Advocacy for the Developmentally Disabled

University of Texas v. Camenisch

A case of major significance to all advocates for developmentally disabled persons has been briefed before the Supreme Court and will probably be argued and decided before July 1981. The respondent, Mr. Camenisch, is a deaf man who has challenged the university's refusal to provide an interpreter for his classes under Section 504 of the Rehabilitation Act of 1973, as amended. At the time he filed the suit, Mr. Camenisch was a graduate student at the University of Texas at Austin and was employed as acting dean of students at the Texas School for the Deaf. Because his job was contingent upon supplementing his education, Mr. Camenisch enrolled in the university's master degree program in education. The university agreed that he needed the assistance of a qualified sign-language interpreter in order to participate in and benefit from this academic program, but refused to pay for such assistance.

The district court issued a preliminary injunction, requiring the university to pay for his interpreter, upheld by the Fifth Circuit in April 1980.

In its petition for certiorari to the Supreme Court, the university took the position that section 84.44(d) of the HEW regulations, which imposes the responsibility to provide interpreters, is invalid because it is not reasonably related to section 504.

The subtantive questions presented for review by the Supreme Court are:

1. Whether the Department of Health, Education and Welfare was authorized by section 504 of the Rehabilitation Act of 1973 to require universities receiving federal aid to provide sign language interpreters for deaf students who are qualified for the universities' programs;

2. Whether an individual may bring a private action for injunctive relief against an institution that is allegedly denying him auxiliary aids required by section 504 and the HEW regulations issued thereunder;

3. Whether section 504 and its implementing regulations require the provision of auxiliary aid if federal aid was not designated for the specific program in which the handicapped student is enrolled.

Perhaps more important than the Court's ruling on these specific issues will be the implications of its decision for the validity overall of the HEW regulations and for future understanding of the concept of reasonable accommodation to otherwise qualified handicapped individuals. If a decision is rendered on the merits in Camenisch, the Supreme Court will of necessity be required to interpret and clarify its 1979 decision in Southeastern Community College v. Davis concerning the definition of "otherwise qualified handicapped individual" and the concept of reasonable accommodation.

The brief filed on behalf of Camenisch makes the following basic points of law:

1. The university seeks review of a preliminary injunction that expired more than two years ago. It does not contend that the district court abused its discretion in granting the preliminary injunction at that time. Under the unchallenged standards for review of such preliminary orders, the order should be affirmed.

2. The University of Texas concedes that the applicable HEW regulation, 45 C.F.R. Section 84.44(d) (1979), concededly requires it to provide a sign-language interpreter to Camenisch, a graduate student fully qualified for the program in which he was enrolled.

That regulation struck a balance between the nondiscrimination mandate of section 504 of the Rehabilitation Act of 1973 and the costs of compliance by recipient institutions. It is consistent with both the language and legislative history of the original act and the legislative history of the 1978 amendments. The university contends that the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), means that section 504 was not intended to impose any financial obligation on recipient institutions. The Davis ruling, however, acknowledged that the elimination of discrimination under section 504 might involve costs to recipient institutions. Id. at 411 n. 10. In addition, it specifically recognized the role of HEW in identifying "those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped." Id. at 413. HEW's regulatory determination that provision of interpreters is necessary to eliminate discrimination against the handicapped is directly supported by the Court's decision in Lau v. Nichols, 414 U.S. 563 (1974). Hence, the regulation does not require the kind of "affirmative action" which the Davis decision held to be unauthorized by section 504.

3. Whether section 504 confers a private right of action for injunctive relief need not be resolved in this case after Maine v. Thiboutot, 48 U.S.L.W. 4859 (June 25, 1980). That decision establishes that Camenisch had a right of action for injunctive relief against the officials of the university (a state institution) under 42 U.S.C. Section 1983. In any event, the court of appeals decision that section 504 confers such a private right of action is correct in light of Cannon v. University of Chicago, 441 U.S. 677 (1979), and is consistent with the decisions of the six other federal courts of appeal that have ruled on the issue.

4. Quite apart from the merits, the appeal from the preliminary injunction was satisfied when Camenisch completed his course requirements for a master's degree. The court of appeals ruling that the appeal was not moot because Camenisch was required to post an injunction bond is inconsistent with the prevailing rule on liability on injunction bonds and with the policies underlying 28 U.S.C. Section 1292(a)(1). Liability under the injunction bond does not turn on affirmance or reversal of the preliminary injunction, but on the final outcome of the underlying lawsuit. The possibility that a plaintiff may ultimately lose on the merits of his lawsuit does not prevent a preliminary injunction order from becoming moot. 28 U.S.C. Section 1292(a)(1) does not authorize interlocutory appeals from expired preliminary injunctions.

(Synopsis prepared by Paul Rosenberg, Mental Health Law Project, Washington, D.C.)

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NOMINATIONS WANTED

The Association for the Severely Handicapped (TASH) is seeking nominations for their Distinguished Parent Award and Distinguished Professional Award, which are presented annually to at least one parent and at least one professional who have contributed greatly toward improving the opportunitites for growth and as independent a lifestyle as possible for our severely handicapped citizens. You are invited to submit nominations for these awards by sending the name(s) of an outstanding parent and/or professional and a description of his or her contributions to the field. Awards will be presented at the Eighth Annual TASH Conference, which takes place October 15-17 at the Statler Hotel in New York City.

Send your nomination BY AUGUST 14, 1981, to:

Mary Anderson
The Association for the
Severely Handicapped
7010 Roosevelt Way, N.E.
Seattle, WA 98115

THE DEATH PENALTY

Death is Different

CAPITAL CASE LAW
State v. Myles

On a petition for rehearing the Louisiana Supreme Court reversed Elvin Myles' sentence of death since he was not effectively represented at the penalty phase. State v. Myles, 389 So.2d 12 (La. 1980).

Defense counsel waived opening statements and rested his client's case without introducing any evidence. "Defense counsel's closing argument consisted of a very brief statement in which he conceded Myles' commission of armed robbery as one aggravating circumstance, denied that the murder was especially heinous, and implied that Myles' life should be spared because he confessed his crime and because 'he's never going to be back from life imprisonment.' Defense counsel did not expressly ask the jury to spare Myles' life or directly argue that it should not impose a death sentence." Id. at 28.

Defense counsel did not object to the prosecutor's argument which implied that death should be imposed to insure that the murderer never returns to society because a true life sentence is an illusion.

"In his closing argument the defense counsel did little more than acknowledge the existence of an aggravating circumstance, state that the confession may be regarded as a mitigating circumstance, and submit the matter to the jury. He did not ask the jury to spare the defendant's life. He did not remind the jury that Elvin Myles is a human being or urge the jurors to be mindful of their awesome responsibility in deliberately choosing whether he should live or die. Nor did he emphasize to the jurors any of their legal obligations designed to prevent the arbitrary or capricious imposition of the death penalty, e.g., the requirement that they base their findings upon a beyond a reasonable doubt certainty; their duty to weigh any aggravating circumstance found against any and all mitigating circumstances; the duty of each individual juror to hold fast to his honest convictions and to vote to prevent a unanimous verdict in the event he is convinced that the death penalty is inappropriate.

Moreover, the defense attorney's lackluster argument followed his submission of the case for his client's life without evidence. We cannot say that counsel acted unreasonably in deciding not to present any evidence. Although the sentencing report reveals some mitigating evidence, consisting of a severely deprived childhood resulting from the death of his mother at the hand of his father, the countervailing evidence of Myles' antisocial character and propensities was substantial. Having rested his client's case without evidence, however, it was even more imperative that defense counsel advocate his client's cause in closing argument. The practice of law is a partisan endeavor requiring those who engage in it to represent their clients vigorously even in the face of overwhelming adversity." Id. at 30-31.

Defense Immunity

A defendant has a right under certain circumstances to obtain judicial immunity for a witness capable of providing clearly exculpatory evidence on behalf of the defendant. Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980). American Law Reports now has an Annotation on this matter. 4 A.L.R. 4th 617 (1981).

(Continued, P. 9)

I MAY BE WRONG...

I may be wrong but it seems to me that we live in a strange society. Condemned killer Steven Judy tries to commit suicide but the State of Indiana makes sure he isn't successful. But Steven Judy waives his appeals and asks the people of the state to kill him. They do as he wishes by electrocuting him. He is punished by giving him what he wants. Strange.

Why do we kill? To show that killing is wrong? What do we accomplish?

Viciously, people heckle the foster parents of Steven Judy. Revenge abounds in this society. Retaliation through satisfaction in kind... Returning evil for evil...Who are we?

We chose to ignore the core of Judy's severe problems. Through the years of his life, his difficulties were not treated. Instead we killed him. And we think crime is being solved? It's not. Henry Ford said it best, "Capital punishment is as fundamentally wrong as a cure for crime as charity is wrong as a cure for poverty."

Death Vetoed

Kansas Governor Carlin recently vetoed a death penalty bill that would have reinstituted capital punishment.

Carlin urged lawmakers to enact his alternative proposal of life without parole for 30 years.

Anti-Death Group

Law enforcement officers have united to work against capital punishment. In forming, they stated, "We wish to express our strong opposition to the use of the death penalty, which amounts to a fraudulent hoax on the American people -pandering to our baser instincts, while perpetuating the myth that capital punishment is a cure-all for crime.

Among the organization's 32 members are: Clinton Duffy, the former warden of San Quentin prison; Patrick Murphy, the former New York Police Commissioner; Richard Hongisto, former chief of San Francisco Police; Benjamin J. Malcolm, vice chairman of the U.S. Parole Commission; and Ramsey Clark, the former Attorney General.

Latest Gallup Poll

A February, 1981 Gallup Poll indicates two-thirds of the American public support death for murderers. This is the highest support since 68% in 1958. In 1966 only 42% favored capital punishment.

There are, however, large differences on the issue among several segments of the population. In the 1981 poll 71% of the men interviewed favored death, 62% of the women did. Totals for favoring death for other segments are as follows: 70% of the whites and 44% of non-whites; 73% of Republicans and 64% of the Democrats and 65% of independents; 72% of those with high school education, 62% with college education and 55% of those with grade school education.

Ed Monahan

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"Since the world began a procession of the weak and the poor and the helpless has been going to our jails and our prisons and to their deaths. They have been judged as if they were strong and rich and intelligent. They have been victims, whether punishable by death for one crime or one hundred and seventy crimes...In the end, this question is simply one of humane feelings against the brutal feelings. One who likes to see suffering, out of what he thinks is righteous indignation, or any other, will hold fast to capital punishment. One who has sympathy, imagination, kindness and understanding will hate it and detest it as he hates and detests death." Clarence Darrow from debate with Judge Alfred J. Talley, 1924, in New York.

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TRIAL TIPS

CRIMINAL SYNDICATE

In recent years many legislative bodies have enacted legislation aimed at organized crime. To this same end the Kentucky legislature enacted a criminal syndicate statute, KRS 506.120, which became effective June 17, 1978. Anyone who violates this law is guilty of engaging in organized crime, a Class B felony. KRS 506.120(2).

A criminal syndicate is defined in section (3) of the statute as follows:

> (3) As used in this section "criminal syndicate" means five or more persons collaborating to promote or engage in any of the following on a continuing basis:
> (a) Extortion or coercion in violation of KRS 514.080, 276.280, 276.310, or 521.020;
> (b) Engaging in, promoting, or permitting prostitution in violation of KRS Chapter 529;
> (c) Any theft offense as defined in KRS Chapter 514;
> (d) Any gambling offense as defined in KRS 411.090, KRS Chapter 528, or Section 226 of the Constitution.
> (e) Illegal trafficking in controlled substances as prohibited by KRS Chapter 218A, in intoxicating or spirituous liquor as defined in KRS Chapters 242 or 244, or in destructive devices or booby traps as defined in KRS Chapter 237;
> (f) Lending at usurious interest, and enforcing repayment by illegal means in violation of KRS Chapter 360.

As can be seen, KRS 506.120(3) requires the participation of at least five persons for the existence of a criminal syndicate. In Morgan v. Commonwealth, an unpublished opinion rendered on March 13, 1981, the Court of Appeals of Kentucky held that a criminal syndicate conviction could not be sustained where one of the five persons indicted with Morgan was acquitted. The result reached by the Court of Appeals in the Morgan case is consistent with the results reached in conspiracy cases in which all but one of the alleged co-conspirators are acquitted. The general rule is that the conviction of only one defendant in a conspiracy case will not be upheld where the disposition of the charges against all other alleged conspirators is by acquittal. Annot., 91 A.L.R.2d 700, 704. This general rule is followed in this Commonwealth. Green v. Commonwealth, 264 Ky. 725, 95 S.W.2d 561 (1936). The reason for this rule is that a conspiracy cannot be committed by one person alone. Id. This same reason applies in criminal syndicate cases; a person cannot be part of a criminal syndicate unless at least five persons are involved.

Seven specific activities are proscribed by section (1) of the statute:

> (1) No person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:
> (a) Organize or participate in organizing a criminal syndicate or any of its activities;
> (b) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
> (c) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
> (d) Knowingly furnish legal accounting or other managerial services to a criminal syndicate;
> (e) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

(Continued, P. 11)

(f) Commit, or conspire or attempt to commit or act as an accomplice in the commission of, any offense of violence;
(g) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of KRS Chapters 518, or 521, or KRS 121.025, 121.055, 156.465, 119.205, 61.096, 63.090, 6.080, 18.320, 244.600 or 29.350.

A serious question exists as to the constitutionality of KRS 506.120(1). It is entirely possible that lawful activity could be punished under KRS 506.120 (1) as written. This section of the statute provides that a person must act with a "purpose to establish or maintain a criminal syndicate or to facilitate any of its activities" to be brought within the statute's prohibition. The statute, however, does not provide that this purpose is limited to the facilitation of a syndicate's illegal activities. In discussing Ohio RC 2923.04(A), which is identical to KRS 506.120(1), the Court in Amusement Devices Assn v. Ohio, 443 F.Supp. 1040, 1051 (S.D.Ohio 1977) observed: The scienter element in RC 2923.04 does little to limit the reach of the statute. The intent required is a "purpose to... facilitate any of [the criminal syndicate's] activities. As written, then, the scienter element is not limited to activities undertaken to facilitate the illegal activities of a criminal syndicate. This is important; a criminal syndicate may engage in many activities which are not in and of themselves illegal. Some such activities, such as reporting income for federal tax purposes, are in fact required by law.

The Court held that subsection A(4) of the statute, which prohibits any person from furnishing legal, accounting, or other managerial services to a criminal syndicate, was impermissibly vague under the Due Process Clause of the United States Constitution because it "fails to specify the reasonable clarity which kind or kinds of conduct it prohibits." The Court also found that the Ohio statute, in imposing sanctions on the rendering of legal services, "carries a grave potential for impairing important rights under the First, Sixth and Fourteenth Amendments to the United States Constitution." Id.

In State v. Young, Ohio, 406 N.E.2d 499, 503 (1980) the Supreme Court of Ohio held that "RC 2923.04(A) as drafted...fails to specify with reasonable clarity what kinds of activity it prohibits and, therefore, is unconstitutionally vague." In reaching this conclusion the Court was concerned that the statute was not limited to the illegal activities of the syndicate. As previously indicated, RC 2923.04(A) is identical to KRS 506.120(1).

Another defect which the Court found in the Ohio statute, which also exists in KRS 506.120(1), is that there is no requirement that a person know that his actions are aiding a criminal syndicate. State v. Young, supra, pp. 503-504:

(Continued, P. 12)

> The vague language of the statute, which subjects an individual to criminal sanctions for activities, the legality of which cannot be determined solely by the conduct itself but must be determined by factors which a person may be unaware of at the time of the conduct, violates due process. RC 2923.04 lacks the ascertainable standards of guilt that "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.... Id., p. 504.

KRS 506.120(1) is also of doubtful constitutionality because the term "facilitate" is not defined. This same deficiency in the identical Ohio statute contributed to the Court's decision in State v. Young, supra to declare the statute unconstitutional:

> A third problem with RC 2923.04 (A) is the undefined term "facilitate." No guidance is given in this statute as to the point at which incidental assistance to a criminal syndicate is transformed into "facilitation," which will render one open to harsh criminal sanctions. It is also not clear whether one must act affirmatively to be brought within this term, or whether a person by failing to act may be found to "facilitate" the activities of a criminal syndicate. One trying to ascertain whether his conduct is unlawful under this provision must guess at the meaning of the statute, contrary to the demands of due process of law. Id., p. 505.

Another problem area for KRS 506.120 has to do with the fact that the term "continuing basis" contained in subsection (3) is susceptible to more than one meaning. In discussing the identical provision in the Ohio statute, the Court in State v. Young, supra, p. 506, stated:

> A fourth major difficulty with the statute is that the definitional term "continuing basis," contained in subsection (C) of R.C. 2923.04, is susceptible to more than one meaning. R.C. 2923.04 defines a criminal syndicate to encompass five or more persons who promote or engage in enumerated activities on a continuing basis. This requirement appears intended to limit the statute's reach to established criminal operations, but this provision apparently applies with equal force to a group which kidnaps an individual and detains him for several weeks or, indeed for several hours or minutes. There is only one offense, but it is committed on a continuing basis. In comparable federal legislation similar terminology is clearly defined to encompass a minimum number of offenses, and a maximum period of time over which these offenses must occur. See Paragraph 5 of Section 1961, Title 18, U.S. Code. Anyone viewing this statute is unable to ascertain whether two offenses committed within ten years will bring about criminal responsibility under the statute. Due to the fact that there is no definition of what constitutes a "continuing basis" this basic policy decision is impermissibly delegated to prosecutors and judges for resolution on an ad hoc basis.

Finally, subsection (1)(e) of KRS 506.120 appears to be unconstitutionally vague. This section makes it unlawful for a person to "[c]ommit or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis." As can be readily seen, this section of the statute does not specifically define what offense is

(Continued, P. 13)

prohibited. This statute strangely leaves it up to criminals themselves to determine what conduct of others may be prosecuted under the statute. An identical provision of the Ohio statute was declared unconstitutional in State v. Young, supra, p. 506:

> Aside from the difficulty of determining what constitutes a continuing basis, discussed supra, this subsection demonstrates failure by the General Assembly to provide an ascertainable standard of guilt. The offense which the provision seeks to prohibit is not defined. Further, the creation of boundaries of the conduct sought to be prohibited by this subsection has been delegated to those who engage in criminal activities. It is the criminal syndicate that will decide what offenses to engage in on a continuing basis. Their decision will determine what conduct on the part of others will in the future constitute a violation of R.C. 2923.04(A)(5). Just as a legislative body may not delegate basic policy decisions to prosecutors and judges, such matters may not be delegated to the very criminals to be reached under a penal statute. This provision, with its circular wording exemplifies the vagueness that renders this statute unconstitutional.

The appropriate method for raising these constitutional challenges to KRS 506.120 would be a motion to dismiss the indictment on the grounds that the statute is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Rodney McDaniel

UPDATE: THE DIRECTED VERDICT MOTION

No longer will a general motion for a directed verdict of acquittal after the Commonwealth's proof and its renewal at the close of all the evidence suffice as proper preservation of a sufficiency issue on appeal. From now on, a specific motion for directed verdict of acquittal naming each particular charge must be made at the close of both the Commonwealth's proof and at the end of the case and those motions must be accompanied by a specific objection to the instruction which lacks sufficient evidentiary support. These three steps must be followed in all cases where more than one instruction on separate counts is given to the jury and where the evidence supports lesser included instructions. Only if defense counsel preserves the sufficiency issue in this manner will the appellate courts review the error.

The Supreme Court of Kentucky recently decided the case of Seay v. Commonwealth, Ky., ____S.W. 2d____ (November 25, 1980). It was this decision which put defense attorneys on notice of the additional requirements necessary for preservation of a sufficiency issue. Charles Seay was indicted for multiple counts in two separate indictments. He was tried on all of these counts in a single proceeding. Defense counsel at trial made a general motion for directed verdict of acquittal as to all the charges at the close of both the Commonwealth's case and at the close of all evidence. However, defense counsel did not specifically name each count when he moved for a directed verdict of acquittal. Nor did defense counsel specifically object to each instruction which lacked sufficient evidentiary support. On appeal, one of the issues questioned whether the trial court should have directed a verdict of acquittal on one of the rape charges. The Supreme Court held that defense counsel's general motions on all counts

(Continued, P. 14)

of both indictments "were insufficient to apprise the trial court of the precise nature of the objection." The Court stated that "the proper procedure for challenging the sufficiency of evidence on one specific count is an objection to the giving of an instruction on that charge" citing Queens v. Commonwealth, Ky., 551 S.W.2d 239 (1977); Kimbrough v. Commonwealth, Ky., 550 S.W.2d 525 (1977). In making this ruling, the Court rejected appellate counsel's argument that general motions for acquittal were sufficient since Seay was either guilty of that specific rape count or nothing, there being no evidence to support lesser included instructions.

In looking to Kimbrough, Queens, and Seay, the requirements to preserve a sufficiency issue for appeal are established. The facts and holding of Kimbrough show that motions for acquittal after the Commonwealth's proof and at the end of all evidence as well as an objection to the instruction embodying a specific offense must be made to preserve the sufficiency issue where more than one instruction on separate counts is given to the jury.

Queens, on the other hand, calls for motions for directed verdict of acquittal following the Commonwealth's case and the introduction of all evidence and an objection to the instruction concerning a particular offense whenever lesser included instructions are submitted to the jury. Seay not only reaffirms these two cases but also requires that the nature of the motions for directed verdict and the objections to the instructions on sufficiency be specific. Each specific count must be named in relation to the directed verdict motions and the instruction objection must specifically note the insufficiency of the evidence.

The proper procedure, therefore, to preserve sufficiency issues in cases where there is more than one instruction on different counts and where lesser included instructions are submitted is: (1) Motion for directed verdict of acquittal after the Commonwealth's proof specifically naming each particular count; (2) Motion for directed verdict of acquittal after the close of all evidence again naming each individual count; and (3) Specifically object to the instruction lacking evidentiary support. The key is to be specific on the grounds for your motion or objection. It is also recommended that these three steps be followed in all cases including those where only one instruction on one count is submitted to the jury.

Sara Collins

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RESTRAINT OF ACCUSED UNCONSTITUTIONAL

At common law a criminal defendant was entitled to appear in his case without any of the physical constraints of imprisonment. 21 Am.Jur.2d Criminal Law Section 240 at 276 (1965). So foundational is the constitutional presumption of innocence that the Supreme Court of the United States has held that it precludes trying a defendant, over objection, "while dressed in identifiable prison clothes...." Estell v. Williams, 425 U.S. 501, 512, 96 S.Ct. 1691, 1697, 48 L.Ed.2d 126 (1976). The "constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment," and an "unacceptable risk is presented of impermissible factors coming into play." Id. at 504-05, 96 S.Ct. at 1693.

In Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), the Court recognized that a "disruptive, contumacious, stubbornly defiant" defendant could be dealt with by binding and gagging him. Id. at 344-45, 90 S.Ct. at 1061. However, the Court determined that the severity of this remedy required it be done only as a "last resort." Id. at 345, 90 S.Ct. at 1061. Recognizing the mandate of Estelle v. Williams, supra, the Supreme Court of Kentucky has held

(Continued, P. 15)

that it was reversible error to try a defendant in prison clothing even in the face of overwhelming evidence of guilt. Scrivener v. Commonwealth, Ky., 539 S.W.2d 291, 292 (1976). In other words, the error is not subject to being harmless beyond a reasonable doubt.

In Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390 (1916), the Court "strongly condemned" handcuffing of an accused in the presence of the jury. Id. at 393. Such action is excusable only upon a showing of "manifest necessity" to prevent escape or injury. Id.; Marion v. Commonwealth, 269 Ky. 729, 108 S.W.2d 721, 723-24 (1937) (handcuffing permitted only in "exceptional cases" where there is "evident danger" of escape or injury). But see Williams v. Commonwealth, Ky., 474 S.W.2d 381 (1971). Importantly, since Williams was decided well before Estelle v. Williams, supra, its continuing viability on federal constitutional grounds is seriously suspect.

In addition to a showing of manifest necessity to prevent escape or injury, it must be affirmatively demonstrated that a less prejudicial but adequate remedy was unavailable to insure the security of the court. See Anthony v. State, 521 P.2d 486, 496 (Alaska 1974) (restraints imposed must be the "least intrusive" necessary to accomplish the desired result); Kennedy v. Cardwell, 487 F.2d 101, 111 (6th Cir. 1973); State v. Crawford, 577 P.2d 1135, 1145 (Idaho 1978). Sufficient court guards could be one such alternative. See Brewster v. Commonwealth, Ky., 568 S.W.2d 232, 236 (1978).

The burden rests on the Commonwealth to demonstrate that restraint is a "manifest necessity." State v. Tolley, 226 S.E.2d 353, 367 (N.C. 1976). This must amount to a "clear showing." Kennedy, supra at 111. Furthermore, the court abuses its discretion when it fails to affirmatively find sufficient reasons for such drastic action. Moore v. State, 535 S.W.2d 357, 358 (Tex.Ct.Crim.App. 1976).

"Counsel should make sure that the defendant is dressed in civilian clothes and decently groomed at trial. He should insist that the defendant not be manacled or closely attended by guards while in the courtroom. If any such visible restraints are used, counsel should vigorously object to the court before the jury is brought in, and should state for the record that the defendant has not been obstreperous or menacing in any way. Counsel should also insist that the jury be brought into the courtroom after the defendant has been brought in and seated; that the jury be removed before the defendant is taken out; and that steps be taken in the corridors to prevent the jury from seeing the defendant chained or dogged by guards." Amsterdam, Trial Manual For the Defense of Criminal Cases Section 341 (1977).

Restraints are unconstitutional even if the defendant has a history of escape or is on trial for bail jumping, or even if he is being tried as a persistent felony offender before a jury which just convicted him. Norton v. Commonwealth, Ky. App., (Oct. 5, 1978) unpublished). In Norton, the Court of Appeals said, "While persistent disorderly conduct during trial can enable a court the right to shackle a defendant without risk of error,... a history of escape does not necessarily have the same effect. Surely some alternate less damaging to defendant's appearance... can, in most instances, be found.... We believe that shackling imposed [in the PFO proceeding] with the objective of preventing escape may be imposed in open court only where a defendant's past conduct demonstrates that he is likely to attempt to escape from the courtroom.

An accused is entitled to the indicia of innocence. Absent the required detailed showings by the Commonwealth and adequate fundings by the court, the use of restraints violates an accused's presumption of innocence. Woodards v. Cardwell, 430 F.2d 978, 982 (6th Cir. 1970).

Ed Monahan

UNITED STATES SUPREME COURT REQUIRES FIFTH AMENDMENT INSTRUCTION UPON REQUEST

On March 9, 1981, the United States Supreme Court, in an 8 to 1 decision, held that, upon proper request, a Kentucky trial judge must instruct a jury in a criminal trial that the defendant "is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." Carter v. Kentucky, ___ U.S. ___, slip opinion at 1 (1981). The case arose in Hopkinsville, Kentucky. In December of 1978, Lonnie Joe Carter was arrested near the scene of a burglary under incriminating circumstances. Hon. W.E. Rogers, III, was appointed to represent the defendant at trial. In addition to the burglary charge, the defendant was faced with a persistent felon indictment. Carter wished to testify at trial but declined to do so because of his fear of impeachment by the prior felonies to be at issue in the second phase. Mr. Rogers requested an instruction on Carter's Fifth Amendment right which, consistent with Kentucky law, was refused by Judge White.

On appeal Kevin McNally of the state office represented Carter. The Kentucky Supreme Court rejected Carter's arguments that the Fifth and Fourteenth Amendments require a protective instruction regarding a defendant's Fifth Amendment right not to testify. The opinion was unpublished and relied upon the Court's previous decision in Green v. Commonwealth, Ky., 488 S.W.2d 339 (1972). Not satisfied with this result a Petition for Writ of Certiorari was filed in July of 1980 granted last November. Carter was represented by McNally and Gail Robinson, also of the state office, in the United States Supreme Court. The case was argued in Washington on January 14, 1981.

The Court's decision represents a strong Fifth Amendment pronouncement. Although free to do so, the Court did not limit the decision to the individual facts in Lonnie Joe Carter's case. Mr. Justice Stewart writing for the Court, laid down a per se rule requiring a prophylactic instruction regarding the defendant's right not to testify in any case where trial counsel requests it. "Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." Carter v. Kentucky at 17. Justice Powell concurred, stating that he felt that he was bound by prior decisions. Justices Stevens and Brennan concurred to emphasize that the instruction should only be given when requested by the defendant and his lawyer. Justice Rehnquist registered a vigorous dissent, accusing the majority of employing a "mysterious process of transmogrification..." Carter v. Kentucky dissenting opinion of Rehnquist, J. at 2. The decision changes the law of at least four other states besides Kentucky (Minnesota, Nevada, Oklahoma and Wyoming).

Trial counsel should be advised that a protective instruction regarding the defendant's Fifth Amendment right should be requested in each case where the defendant does not testify and counsel decides the instruction will be helpful in reducing the inevitable jury speculation regarding the defendant's failure to testify. For sample instructions contact the Local Assistance Branch.

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U.S. SUPREME COURT TO DECIDE WHETHER PUBLIC DEFENDERS ARE SUABLE UNDER 42 U.S.C. § 1983

On March 2, 1981, the United States Supreme Court agreed to review two questions directly affecting the ability of indigent defendants to sue in federal court their public defender attorneys for violations of 42 U.S.C. § 1983.

The petition for certiorari in Polk County v. Dodson presents two related questions concerning the liability under 42 U.S.C. § 1983 of a state or county-employed public defender: first, whether a public defender, in representing an indigent defendant, acts under color of state law; and second, whether the defender enjoys immunity, either qualified or absolute, for conduct during that representation.

In Dodson v. Polk County, 628 F.2d 1104 (8th Cir. 1980), an indigent state prisoner filed a complaint in federal court under 42 U.S.C. § 1983 alleging that his attorney, a public defender in the Polk County, Iowa office, failed to represent him adequately on his appeal of a robbery conviction to the Iowa Supreme Court. According to the allegations in the complaint, the appointed appellate defender moved for permission to withdraw as counsel and to have the appeal dismissed as frivolous. The motion was ultimately granted and the appeal was dismissed.

Since "[p]ublic defenders receive their power not because they are selected by their clients, but because they are employed by the County to represent a certain class of clients, who likely have little or no choice in selecting the lawyer who will defend them," the Eighth Circuit Court of Appeals held that "an attorney in a county or state funded public defender's office acts under color of state law in representing indigent defendants." Id. at 1106. At present the majority of courts which have considered this issue have reached the opposite conclusion. The federal circuit court did not question the often-stated rule that a private attorney appointed by a state court to represent an indigent defendant does not act under color of state law. Id. at 1106 n.2.

Additionally, the Eighth Circuit held that in § 1983 suits attorneys employed by public defender offices do not have absolute immunity, but enjoy "qualified immunity" for actions taken while representing indigent clients. Id. at 1108. Under such an approach, "[t]he defender oversteps the immunity boundary, however, if he acts in a manner which he knows or reasonably should know will violate the constitutional rights of his client, or if he acts with the malicious intention to injure his client." Id. "The touchstone" for qualified immunity "is good faith." Id.

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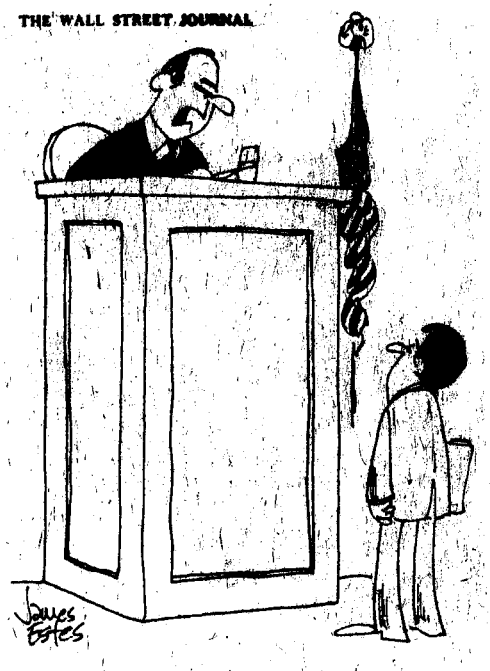
PEPPER . . . and Salt



"Is that all you have to say in your client's defense? 'He's a nice guy and we'll all miss him if he goes to prison'?"

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BURGER V. EISENBERG

The search for perfect justice has led us on a course found nowhere else in the world. A true miscarriage of justice, whether 20, 30 or 40 years old, should always be open to review, but the judicial process becomes a mockery of justice if it is forever open to appeals and retrials for errors, in the arrest, the search or the trial."

"...Our Fourth and Fifth amendments give the same broad protection to drug pushers as they give to you and me, and judges are oath-bound to apply those commands." - Warren E. Burger, Chief Justice, U.S. Supreme Court, ABA Meeting, Houston, Texas, February 8, 1981

"Mr. Burger suggests that the extension of the Bill of Rights to criminal defendants results not only in such persons being set free in larger numbers, but also - somehow - in more crime. The former suggestion is refuted by every study of the issue, while the latter notion is supported by no evidence at all. The Chief Justice's assertion that a substantial percentage of convicted defendants seek collateral relief and that many obtain retrial is simply refuted by the facts. According to the Justice Department's Source Book of Criminal Justice Statistics there are approximately 450,000 persons confined annually in American jails serving sentences, and 1.5 million persons on probation or parole. Of these roughly 2 million potential habeas corpus petitioners only about 17,000 annually seek relief in federal courts. Few of these petitions are granted, and less than 700 are appealed to the Courts of Appeal by either party."

"Neither the Bill of Rights nor collateral review of convictions are the cause of crime in this country, and Mr. Burger does not assist us in reducing crime by blaming the Fourth, Fifth, and Sixth Amendments." - Howard B. Eisenberg, Executive Director, NLADA, The Cornerstone, March, 1981.

POLYGRAPHISTS AVAILABLE

The Office for Public Advocacy has two polygraph examiners, O. H. Mahoney and James F. Lord, who travel statewide, administering polygraph examinations to indigents accused of felonies. They can be reached by writing or phoning this office.

Consideration should be given for as much advance notice as possible to the examiner, prior to a scheduled test; as they are usually booked at least one week ahead.

Upon completion of the polygraph examination, oral results will be presented to the requesting Public Defender, followed by a written report (if desired) as soon as practicable, usually within 3 days.

Polygraph examinations should be considered only as a supplement to a thorough and complete investigation. The effectiveness of the polygraph examination is dependent upon the Public Defender, Investigator and Examiner, all working together as a team.

A polygraph examination will not be conducted on any client if he or she is known to have a serious heart condition, or is pregnant. If the client is a juvenile, his/her parent or guardian, or the Juvenile Judge of the Jurisdiction, must sign a form giving permission for the child to be examined.

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(News, Continued from P. 2)

fiscal year for these counties. In a February 4, 1981 letter, the Secretary of Finance denied the Public Advocate's request stating, "...we are having to cut back services and programs to the elderly, the handicapped, and the poor for everything from food to medical assistance. I cannot justify, while cutting these programs, adding more dollars for services to law violators."

(Continued, P. 19)

Allotments for Next Fiscal Year

The budget process for the next fiscal year is underway. We will be soon determining allotments for each of the 120 counties during the next several months. Each public defender administrator has been asked for the critical data for his county and for the amount of money he requests for next fiscal year. The review process of allotments for the upcoming fiscal year will be more detailed than ever before. Every allotment will be more closely scrutinized. Because of this closer look and recent policy determinations, it is not unlikely for many allotments to be adjusted both up and down. As a matter of policy, we will encourage full-time public defender systems where caseloads warrant by allocating more money to those counties. As a matter of policy we will encourage allotment counties (counties with locally administered systems) over assigned counsel counties (counties which are administered from this office) by increasing allotments to allotment counties and decreasing allotments to assigned counsel counties. We cannot continue to operate with the present 65 assigned counsel counties.

New Assigned Counsel System

Absent an infusion of additional money into the local public defender system, we are instituting a new system of payment for assigned counsel counties for next year. Every assigned counsel county will have individual claims paid on a quarterly basis and prorated quarterly. More specifically, the allotted monies for all assigned counsel counties will be combined and divided into fourths. At the end of each quarter, all claims received will be added together and prorated according to the money available from 1/4 of the combined assigned counsel monies. Under present conditions this is the fairest way to proceed especially since most allotment counties already operate in this manner.

Arraignment/Waiting-In-Court Time

Because of our severely underfunded position, this office will no longer pay for waiting-in-court time and for no more than 1/2 hour for arraignments in assigned counsel counties.

Claim Form Deadlines

Make sure you submit your claim forms for this fiscal year (July 1, 1980 - June 30, 1981) to us by August 1, 1981. Due to Department of Finance regulations we cannot pay for current year claims submitted after that date.

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EDITOR'S NOTE

"When are you going to get a real job?" "Don't you think it's time you went into private practice?" "You know, if you stay there too long, it will hurt your career." These are just a few of the comments I have received from family, friends, and even one Commonwealth's Attorney, over the past couple of years as I continued to be a public defender. Can I blame my friends for these sentiments? I think not. Consider, if you will, the following:

Item: Law firms can earn $75.00 per hour on professional services contracts (PSC) from the state. Public defenders can earn only $25.00 per hour out of court, and $35.00 per hour in court, again from the state. In some counties, the hourly rate is considerably less. Merit system public defenders earn only $12,576.00 in their first year.

Item: In black lung cases, attorneys can recover fees of $5,000.00 per case, $6,000.00 if an appeal is involved. In PSCs, there is no maximum payment. Public defenders, however, are limited by statute to $1,250.00 per case. What are the underlying assumptions there? That you must be a better attorney to recover delinquent taxes than to defend a man on a charge of first degree robbery and being a first degree persistent felony offender?

Item: In 1977, the median hourly rate in Kentucky as reported by the KBA among all attorneys was $40.00 per hour. Four years later, it must be considerably higher. Yet, the maximum paid out to public defenders now is $25.00 and $35.00 per hour.

Item: In October of 1980, it was reported that a PSC was made with a banker. Hourly rate? $62.50 per hour. Maximum? $60,000.00 per year. In contrast, attorneys in Fulton and Hickman counties, to name a few, are doing public defender cases pro bono, because allotments to those counties have been exhausted.

Item: A $20,000.00 PSC was recently approved to hire a law firm to represent a university in its action against its president.

Item: OAG 80-74 speaks in terms of "sheer economic and political necessity for recognizing the consistent change each year in the actual purchasing power of the dollar." It is this "sheer economic and political necessity" which is used to justify maximum salaries for Commonwealth's Attorneys and County Attorneys in the sum of $38,640.00 per year. How about the "sheer economic necessity" of trying to run a public defender system where over 18 counties have no money to spend between February and July of 1981?

The point is that the Commonwealth of Kentucky treats "real attorneys" very differently than it treats public defenders. And that this treatment has to do not with the skill required in a particular case, or the complexity of the issues involved. Rather, it has to do with something much less justifiable, but something as old as the law itself. The Secretary of Finance expressed it well recently in a letter in which he turned down an emergency appropriation for counties which are presently out of money, for public defender services. In that letter, he said, "There is a very real need, both moral and legal, for assistance to indigents for services. However, in the area of the Department for Human Resources, we are having to cut back services and programs to the elderly, the handicapped, and the poor for everything from food to medical assistance. I cannot justify, while cutting these programs, adding more dollars for services to law violators." I think maybe it's time we all became "real attorneys."

Ernie Lewis

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