The Advocate

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OBTAINING EXPERT WITNESSES

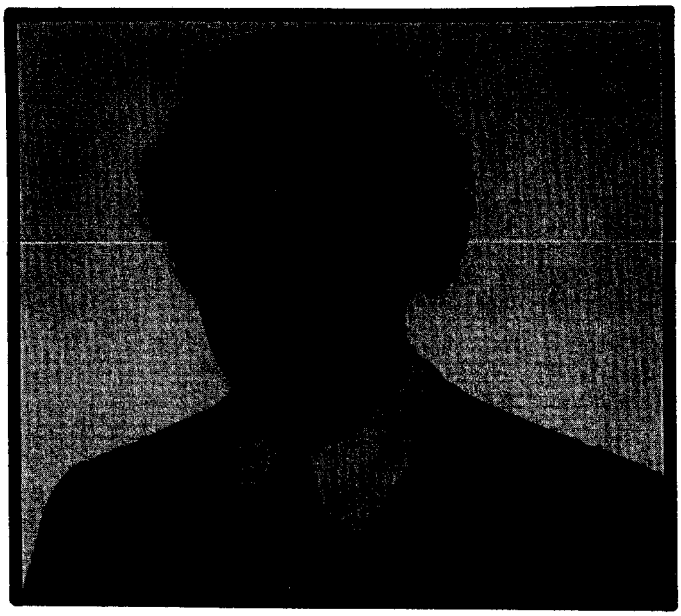
The purpose of this article is to briefly explain how to obtain expert assistance for your indigent client. There will be a short discussion of what should be included in the motion for funds for expert witnesses, followed by a skeletal overview of the points and authorities which counsel will want to rely on in the memorandum of law which should accompany the motion. Note that the Office for Public Advocacy has a sample motion and supporting memorandum available to all public defenders. Any attorney who needs expert assistance for his indigent client should contact the Local Assistance Branch in this office, and supply the name of the Defendant, the indictment number, and the county in which the action is pending. Counsel will then be provided with the sample motion and the supporting memorandum which can then be used in obtaining the requested services.

Initially, in the motion for appointment of defense experts, counsel must demonstrate the necessity of the requested expert existence. "The request should advise the court why the

(See Experts, P. 16)

INSIDE

THE ADVOCATE FEATURES...



In April, 1975 Bob Lotz, Jr. became a member of the Kentucky Bar. At that time he was working with the firm of Cobb and Oldfield in Covington and had been a member of the Wisconsin Bar for a year (Bob became a partner with Cobb and Oldfield in 1977). 1975 also marked the first year of Bob's Public Defender work in the Commonwealth.

After completing his undergraduate work at Dartmouth, Bob attended the University of Wisconsin Law School, receiving his J.D. degree in 1974. During law school he worked with the Wisconsin Appellate Public Defender's office, the Community Law Office in Madison, Wisconsin, and was particularly active in working with prisoners. Bob coordinated a prison concert program at Waupun Maximum Security Prison and was awarded an "Honorary Inmate" certificate for his efforts.

(See Lotz, P. 2)

"OF COUNSEL" APPEALS

Due to the financial situation that the Office for Public Advocacy presently finds itself in, it has become necessary to lower the maximum amount that could be paid for each "Of Counsel" appeal. For all appeals assigned out of the Office for Public Advocacy after March 31, 1981, the maximum amount allowable per each will be $750 at a rate of $25 an hour out of court and $35 an hour in court. If any local counsel is interested in handling appeals under the reduced rate, please contact Tim Riddell in the Office for Public Advocacy. Local counsel who do wish to handle such appeals should be fairly warned that they will not be paid for any work done on those appeals unless they have received prior approval to handle the appeals from the Office for Public Advocacy.

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CLAIMS MUST BE IN BY AUGUST 1, 1981

Just a reminder to the defenders in assigned counsel counties: You must have your claims into this office by August 1, 1981, for all cases which have been finished by July 1, 1981. Claims received in this office after that date will not be paid.

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JUVENILE STATUS CASES

Many defenders have been appointed to represent juveniles or their parents in cases to determine the status of the child. These cases include dependency, neglect, abuse, truancy, and other such actions under KRS 208.020. Defenders should not accept such appointments. KRS Chapter 31 allows for appointment of public defenders only in delinquency cases, i.e. cases where but for the age of the child a crime would have been charged.

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(Lotz, Continued from P. 1)

However, Bob's interest in prisoners has apparently not subsided since his law school days. The year 1979 supports this conclusion. In that year Bob won a judgment in federal district court on behalf of a client who had been denied medical treatment at the FCI in Lexington, Kentucky and the Madison County Jail, obtaining what he believes to be the largest sum ever awarded a prisoner under the Federal Tort Claims Act. Also in 1979 Bob challenged OAG 79-314 which allowed the refusal of psychiatric treatment in jail. OAG 79-642 resulted, requiring the provision of this care.

Bob also founded the Prisoner's Mental Health Coalition of Northern Kentucky in 1979 and has been chairman since that time. The coalition's goals are to reduce the use of jails and prisons to house the mentally ill and retarded, improve mental health care for Northern Kentucky inmates, and develop alternative mental health programs.

Finally Bob began an entertainment program for inmates at The Kentucky State Reformatory in 1979 and has sponsored numerous shows and tours at that institution. The program was recently featured on "P. M. Magazine."

During Bob's off-hours he lives on a 71 acre farm in Campbell County with his wife, Sallie, a faculty member at the University of Cincinnati College of Medicine and psychiatric social worker at Cincinnati General Hospital. Bob and Sallie have restored a number of historic buildings on their farm and now devote their spare time to raising cattle, corn, tobacco and hay. Bob is also an accomplished harmonica player and has appeared in a number of Cincinnati clubs, festivals and various studio projects.

We appreciate Bob's efforts and wish him success in the future.

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WEST'S REVIEW

Appellate opinions issued in March and April include a number of important decisions.

The Kentucky Supreme Court has attempted to give final form to the procedures for obtaining a belated appeal. Stahl v. Commonwealth, Ky., 28 K.L.S. 4 at 6 (March 31, 1981). Consistent with its holding in Cleaver v. Commonwealth, Ky., 569 S.W.2d 166 (1978), the Court noted that "[the] right to a belated appeal or to reinstatement of a lapsed appeal can be granted only by the appellate court that is to entertain it." Stahl, at 6. However, the Court went on to hold that a new appeal can be obtained by filing an RCr 11.42 motion to vacate in the circuit court, requesting the entry of a new judgment from which a new appeal can be taken. Stahl thus suggests two methods of obtaining a belated appeal.

The Court in Stahl also noted that "[t]he trial court can entertain issues of fact, such as overwork, which might result in ineffective assistance of counsel at the appellate level." (Id.). This last language seems to suggest that a motion pursuant to RCr 11.42 is appropriate both in cases in which "waiver" of the right to appeal is at issue and in those cases in which an appeal is taken and dismissed by the appellate court. This possibility points to several questions left unanswered by Stahl. If an appeal is dismissed by the appellate court and a motion for reconsideration alleging overwork or other facts is denied, is an RCr 11.42 motion foreclosed because the issues presented have already been adjudicated? Conversely, if all grounds for reconsideration of an order dismissing are not presented to the appellate court can these "reserved" grounds then be sumittted in support of an RCr 11.42 motion? Stahl gives no guidance to the resolution of these questions.

It should be emphasized that Stahl, and the line of decisions preceding it, set out a procedural tightrope to be walked in obtaining a belated appeal. The specificity of the procedure permitted in Stahl may be illustrated by comparing Stahl with Gregory v. Commonwealth, Ky., 574 S.W. 2d 308 (1978), in which the Supreme Court disallowed the procedure of entering a new judgment from which an appeal could be taken. Gregory had styled his RCr 11.42 motion as one aimed not at vacating the judgment but at reinstatement of the right to appeal. The trial court in entering the new judgment indicated on its face that it was entered only for the purpose of reinstating the appeal. These procedural irregularities were not present in Stahl and should be avoided by counsel seeking a belated appeal for his client.

In Frazier v. Commonwealth, Ky., 28 K.L.S. 4 at 6 (March 31, 1981), the Court delineated the elements of first and second degree criminal possession of a forged instrument. First degree criminal possession of a forged instrument covers government issues and corporate documents. Pursuant to KRS 516.020 a conviction of first degree criminal possession of a forged instrument requires that the instrument have been falsely made, completed, or altered. The Court in Frazier held that falsely endorsing an otherwise complete and authentic government check does not constitute "falsely making, completing, or altering" the check. Consequently, the possession of such a check will not support a conviction of first degree criminal possession of a forged instrument. Possession of a falsely endorsed check will, however, support a conviction of second degree criminal possession of a forged instrument.

The Court has established the standard of proof which must be met by the commonwealth in establishing the

(Continued, P. 4)

voluntariness of a confession. Tabor v. Commonwealth, Ky., 28 K.L.S. 3 at 12 (March 10, 1981). "At a hearing on a motion to suppress pursuant to RCr 9.78, the prosecution must affirmatively establish the voluntariness of a confession by a preponderance of the evidence." Tabor, at 13. Because the prosecution offered no evidence to controvert Tabor's testimony that he confessed after police beat him, the trial court should have granted his motion to suppress.

The Court of Appeals clarified the law regarding complicity in Commonwealth v. Caswell, Ky.App., 28 K.L.S. 4 at 2 (March 20, 1981). The Court opened its opinion with the observation that "KRS 502.020 provides that a person is guilty of an offense committed by another person when, with the intention of promotion or facilitating the commission of the offense, he aids, counsels, or attempts to aid such person in planning or committing the offense." Caswell, at 2. The Court found that the trial court had erred when it dismissed an indictment alleging complicity because there is no specific statutory penalty provided for the violation of KRS 502.020. The penalty applicable to the defendant was that provided for the substantive offense to which the defendant was an accomplice.

In Commonwealth v. Hamblen, Ky. App., 28 K.L.S. 4 at 3 (March 27, 1981), the Court of Appeals answered the question of whether the issuance of an indictment on a felony charge "places sole jurisdiction in the circuit court, thereby terminating jurisdiction in the district court." After an indictment was returned the defendant plead guilty to a misdemeanor degree of the charged offense in district court. The circuit court then dismissed the indictment on the ground of double jeopardy. The commonwealth appealed. The Court of Appeals reversed, holding there was no double jeopardy because "once the indictment was issued, the district court no longer had power to make a final disposition of the case."

Two decisions by the U.S. Supreme Court require attention. In Wood v. Georgia, 28 CrL 3085 (March 4, 1981), the Court identified a potential conflict of interest on the part of the defendants' attorney and remanded for a determination of whether an actual conflict existed. The defendants, employees of a theater and bookstore, were convicted of distributing obscene material. Pursuant to an agreement with their employer the employer hired an attorney for them and was to pay any fines. Terms of probation were imposed on the defendants along with fines to be paid on an installment basis. When the defendants failed to pay the fines their probation was revoked. Represented by counsel hired by their employer, the defendants obtained certiorari to determine whether the equal protection clause prohibits a probationer from being imprisoned solely because of his inability to pay a fine. The Court, however, never reached this question. The Court found that "since it was the decision by the employer [not to pay the fines] that placed petitioners in their present predicament, and since their counsel has acted as the agent of the employer and has been paid by the employer, the risk of conflict of interest in this situation is evident." Wood, at 3087. The facts suggested that by not paying the fines the employer "was seeking in its own interest a resolution of the equal protection claim raised here." (Id.). Because of the possible due process violation presented by this apparent conflict, the Court remanded the case for a determination of whether an actual conflict existed.

The Court has answered in the negative the question of whether, under the Fourth Amendment, a law officer may legally search for the subject of

(Continued, P. 5)

an arrest warrant in the home of a third party without first obtaining a search warrant. Steagald v. United States, 29 CrL 3007 (April 21, 1981). In Steagald, DEA officers obtained an arrest warrant for one Ricky Lyons. On the basis of probable cause to believe that they would find Lyons at the defendant's home the officers then searched the house. The officers did not find Lyons, but did discover cocaine in the house which later served as the basis for drug charges against the defendant. The officers admitted that there were no exigent circumstances or other "hindrance" to obtaining a search warrant permitting them to search the house for Lyons. The government instead argued that the officers' possession of the arrest warrant removed their entry into the home from the category of warrantless searches. The Court rejected this contention. The Court noted that the arrest warrant, based on probable cause to believe that Lyons had committed a felony, contained no probable cause determination by a detached magistrate that Lyons could be found at the defendant's home. That determination was made by the police and as such was violative of the Fourth Amendment. "A contrary conclusion-that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant. . .would create a significant potential for abuse." Steagald, at 3010.

Two opinions by the Sixth Circuit Court of Appeals require mention. In Gilbert v. Sowders, 6th Cir., F.2d _____ (April 2, 1981), the Court affirmed the district court's decision granting habeus corpus relief based on the Kentucky Supreme Court's action in dismissing the petitioner's appeal. The appeal was dismissed because, although a motion for an extension of time for filing the record on appeal was granted within the 60 day time limit, the order granting it was not entered within the 60 days. The Sixth Circuit found that, even though "Kentucky has a right to enforce its own rules of procedure" the dismissal of the petitioner's appeal was "arbitrary and capricious, and an abuse of due process of law." In Wiley v. Sowders, 6th Cir., _____ F.2d _____ (April 24, 1981), the Sixth Circuit granted a writ of habeus corpus because of conduct of the petitioners' trial attorneys in repeatedly asserting to the jury in argument that petitioners were guilty. The argument, made without the petitioners' consent, "represented the precise admission which the defendant rejected in making his earlier plea of 'not guilty.'" Counsels' conduct amounted to ineffective assistance of counsel.

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OPA
PCSD

SUPREME COURT RULES HEARING NECESSARY PRIOR TO TRANSFER UNDER INTERSTATE AGREEMENT ON DETAINERS

On January 21, 1981, the United States Supreme Court in Cuyler v. Adams, 101 S.Ct. 703 (1981), resolved a question which until that time had caused a division among the federal Courts of Appeals and various state courts. Compare Atkinson v. Hanberry, 589 F.2d 917 (5th Cir. 1979); Commonwealth ex el Coleman v Cuyler, 261 Pa. Super 274, 396 A.2d 394 (1978); McQueen v. Wyrick, Mo., 543 S.W. 2d 778 (1976).

Continued, P. 6)

Specifically, the Court decided that a prisoner incarcerated in a jurisdiction that has adopted the Interstate Agreement on Detainers is entitled to the procedural protections of the Uniform Criminal Extradition Act if that act has also been adopted. Kentucky has adopted both KRS 440.450; KRS 440.150 et seq.

In Cuyler, a detainer had been lodged against the respondent, Adams, at his place of incarceration in Pennsylvania, by a prosecutor's office in New Jersey. Subsequently that prosecutor filed a "Request for Temporary Custody" pursuant to Article IV of the IAD to bring Adams to trial on the pending New Jersey charges. Adams thereafter filed a complaint in federal district court pursuant to 42 U.S.C. §1981 and §1983, alleging a violation of the Due Process and Equal Protection Clauses by the petitioner's failure to grant a pre-transfer hearing as provided under the Extradition Act. Eventually the case reached the Supreme Court on a petition for certiorari.

Like the Third Circuit Court of Appeals, the Supreme Court found no need to reach Adams' constitutional claims. Instead the Supreme Court held as a matter of statutory construction that he was entitled to this pre-transfer hearing. The Court examined the language, purpose and legislative history of the IAD in reaching it's decision.

Comments on the draft Agreement by the Council of State Governments in 1956 specifically provided that if a prisoner does not waive extradition "it is not appropriate to attempt to force him to give up the safeguards of the extradition process" Cuyler, 101 S.Ct. at 711. The Supreme Court interpreted this as a suggestion that those safeguards would include the procedural protections provided by the Extradition Act as well as any others the sending state guaranteed in the extradition process. Id. at 711-712. Furthermore, the Court concluded that the drafters intended a prisoner's request under Article III to act as a waiver of these procedures. Id. at 712.

Indeed, in interpreting the provisions of the IAD itself the Court concluded that the prisoner's own Article III request would act as a waiver. Article III (5). However, Article IV (4) was held to indicate that if the prosecutor requested the disposition that the procedural protections of extradition would apply. That provision states that, "Nothing contained in this article should be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery." The waiver provision of Article III (5) was held to lend implicit support to this conclusion.

Finally, the Court believed that the remedial purpose of the IAD supported its interpretation. Accordingly the Court stated that Adams had indeed alleged a valid claim for relief under 42 U.S.C. §1983 for the refusal of state officials to comply with the terms of the IAD.

In conclusion, it must be noted that the Supreme Court also decided in Cuyler that the IAD is a congressionally sanctioned interstate compact and as such its interpretation presents a question of federal law. The Court stated that if Congress has authorized the states to enter into such an agreement and the subject matter is appropriate for congressional legislation that congressional consent transforms the agreement into federal law within the scope of the Compact Clause of the United States Constitution. Congress gave consent to the IAD by enacting the Crime Control Consent Act of 1934. Accordingly, problems encountered under the IAD will always present a federal question and may be litigated in federal rather than state courts. Cuyler, 101 S.Ct. at 706-709.

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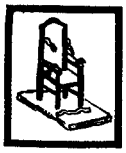

THE DEATH PENALTY

Death is Different

CAPITAL CASE LAW

Bullington v. Missouri

The Supreme Court of the United States held on May 6, 1981 that a capital defendant sentenced to something other than death cannot be sentenced to death at his retrial.

The double jeopardy clause prevents the retrial of a defendant who has been acquitted of the charged offense. Generally, that clause has been interpretted as not prohibiting the imposition of a harsher sentence at a retrial. Two important exceptions: 1) a defendant cannot be retried if he obtains a reversal of his conviction because of insufficient evidence, 2) a defendant cannot be retried for a crime higher than the one he was convicted of originally.

However, in Bullington the Court noted that the bifurcated death penalty sentencing procedure was significantly different from the procedure in other sentencing hearings. The significant difference of requiring proof of additional facts, proof of these facts by the "beyond a reasonable doubt" standard, with standards to guide the sentencer's exercise of discretion amount to "hallmarks of the trial on guilt or innocence."

These procedural differences are important because they create a sentencing proceeding at which the state can either succeed or fail to "prove its sentence". There is an explicit requirement under this system for the sentencer to decide whether the Commonwealth has "proved its sentence." A sentence to a term of years in a capital case means that the sentencer acquitted the defendant of whatever was necessary to impose the death sentence. "Having received 'one fair opportunity to offer whatever proof it could assemble,' Burks v. United States, 437 U.S., at 16, the State is not entitled to another."

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DEATH ROW U.S.A.

AS OF April 20, 1981, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE NAACP LEGAL DEFENSE FUND: 794

Race:

Black	322	(40.46%)
Hispanic	35	(4.40%)
White	429	(54.15%)
Native American	4	(0.33%)
Unknown	2	(0.26%)
Asian	2	(0.26%)

Crime: Homicide

Sex:	Male	786	(99.00%)
	Female	8	(1.00%)

DISPOSITIONS SINCE JULY, 1976

Executions: 4
Suicides: 6
Commutations: 6
Died of natural causes, or killed while under death sentence: 3

Number of Jurisdictions with Capital Punishment Statutes: 36

Number of Jurisdictions with Death Sentences Imposed: 30

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-NOTE-

Protection & Advocacy for the Developmentally Disabled

T.V. & THE HEARING IMPAIRED

Recently, in Gottfried v. FCC, No. 79-1722 (D.C. Cir., Apr. 17, 1981), the District of Columbia Circuit Court of Appeals held that public television stations receiving federal funds must comply with the requirements of § 504 and must demonstrate that they have made efforts to provide service to hearing impaired persons before their federal broadcasting licenses can be renewed. Similarly, the Court held that while commercial television stations are not within the scope of § 504's obligations simply because of their receipt of a federal broadcasting license, the FCC should require that these facilities demonstrate that they have ascertained and are taking steps to meet the needs of hearing impaired members of the community under the "public interest" obligations of the stations. In the Court's words, "[i]t is time for the [FCC] to act realistically to require, in the public interest, that the benefits of television be made available to the hard of hearing now." Slip op. at 4.

This case arose when a single plaintiff (later joined by the Greater Los Angeles Council on Deafness, Inc.) challenged the license renewal applications of eight television stations serving the Los Angeles area on the grounds that the stations were violating their obligations under §504 and the Communications Act, 47 U.S.C. §§ 307-309 (1976), by failing to meet the needs of hearing impaired persons. In an administrative hearing, the FCC denied the plaintiff's petition on the grounds that she had failed to allege specific facts which would raise the question of whether the public interest would be served by a station's continued operation.

The Court of Appeals disagreed, ruling first that the public television station involved in the case was a recipient of significant levels of federal funding and therefore was within the requirements of § 504. As such, the FCC was obligated to determine whether the station had complied with its obligation to provide service to handicapped persons in a non-discriminatory manner. The case was remanded to the FCC for a determination of the facts relating to this question. The court based this conclusion on its reasoning that the obligation of the FCC to renew the licenses of only those stations who serve the "public interest" necessarily required the FCC segments of the population including those with hearing impairments. In the view of the court, "[t]he Commission's obligation is ...to effectuate the underlying national policy of providing federally assisted programs, including public television, to handicapped persons, such as the deaf, who are capable of benefitting from them." Slip op. at 25-26.

Upon a review of the legislative history of § 504 and its relationship to Title VI of the Civil Rights Act, the Court concludes that Congress did not intend that federal broadcasting licenses be considered federal financial assistance for the purposes of those two statutes. Therefore, the court rules that the commercial television stations are not obligated to meet the specific requirements of § 504 so long as their only federal assistance is in the form of a broadcasting license. In strong language, however, the court instructs the FCC to consider in future license renewal petitions whether the applicant is acting within the "public interest" if it does not attempt to serve qualified handicapped persons.

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TRIAL TIPS

DON'T MINCE WITH MINCEY

The crime: Triple murder.

The scene: The defendant's home.

The facts: The defendant shoots his wife and their two children. The defendant then calls the police and tells them this story -- "while holding a gun, my wife grabbed me, the gun goes off striking my youngest child. When I see that the child has been accidentally shot, I freak out and just shoot everybody, including myself." The police and coroner then arrive. The coroner determines that all three of the victims are dead. The police then place the defendant into custody and take him to the station. The crime scene is secured. Within ten minutes, the lab boys arrive to take charge of the investigation. They enter the house, without a warrant, and take photographs; make diagrams; recover bullets, bullet fragments, locate bullet holes; and they determine the angles and paths of the bullets to refute the defendant's theory of accidental death as to the youngest child and to paint the defendant's attempted suicide as being contrived.

The question: Are the testimony and items obtained in the warrantless search of the defendant's home, after the home has been secured by the police, admissible into evidence?

The answer: NO.

The law: Under the Fourth Amendment, it is settled law that "searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable." Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971). Before a warrantless search will be upheld, the party seeking exemption from this presumption of inherent unreasonableness must demonstrate that the search was justified by some exigent circumstances, and that the search fell within one of six "jealously and carefully drawn" exceptions: a search incident to a lawful arrest; a plain view search; a consent search; a probable cause search with exigent circumstances; hot pursuit; and stop and frisk. Where a warrantless search and seizure cannot be justified under one of these theories and under the exigencies of the situation, both the testimony and the items seized must be excluded from evidence. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974).

The United States Supreme Court has reaffirmed that searches outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, and in the course of decision, rejected the doctrine that the mere fact of homicide creates an exigent circumstance that will justify a warrantless search under the federal constitution. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

In the cited case, an undercover police officer, Barry Headricks, knocked on the door of an apartment occupied by Mincey. When the door was opened, Headricks moved quickly in the bedroom. As the other officers entered the apartment, a rapid volley of shots was heard from the bedroom. Headricks emerged and collapsed on the floor, and Mincey was found lying on the floor, wounded and semiconscious. After the shooting, the narcotic agents, thinking that other persons in the apartment might have been injured, looked about quickly for other victims. However, the agents refrained from further investigation since they were directly involved in the incident. Within ten minutes, homicide detectives arrived and took charge of the investigation. Their search lasted

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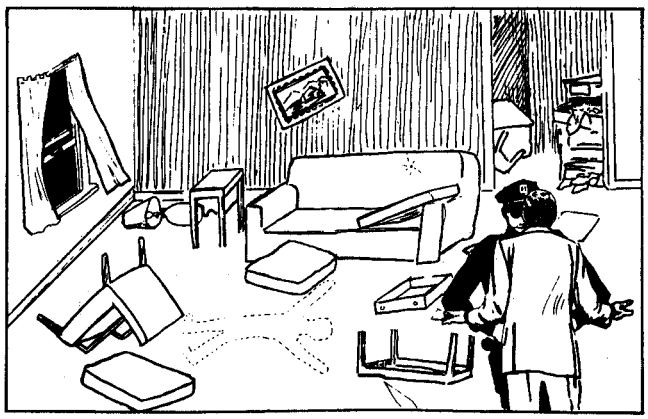
four days, during which period the entire apartment was photographed and diagrammed, and bullet fragments were dug out of the walls and floor. Reversing Mincey's conviction, the Supreme Court stated:

> Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case.... There was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.



. . . .

> In sum, we hold that the "murder scene exception" created by the Arizona Supreme Court is inconsistent with the Fourth and Fourteenth Amendments--that the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there. Id., 98 S.Ct. at 2414-2415.

Also, in People v. Draper, Colo., 580 P.2d 231 (1978), Draper, at approximately 10:30 a.m., telephoned the fire department to request emergency assistance for an unconscious baby being cared for by Draper, a babysitter. After rendering aid, the firemen pronounced the baby dead. It was later determined from an autopsy that the baby died as a result of "blunt trauma to the abdomen with internal bleeding." At 11:00 a.m., after escorting and questioning Draper outside of her house, police officers began an intensive search. The police made diagrams, took photographs and fingerprints, and seized numerous items. At 2:30 p.m., the search was terminated, although police officers remained to maintain the integrity of the premises. Affirming the suppression order of the trial court, the Supreme Court of Colorado stated:

> In the present case, however, prior to the search, death had occurred, and the defendant had left her house which remained under the complete control of the police. There was no danger of removal, destruction, or loss of evidence. In short, there was no immediate crisis, no probability that police presence would be helpful, and no other exigent circumstance existed which could be a basis for creating an exception to the warrant requirement. We find ample support in the record and therefore affirm the

> trial court's finding that there was no justification for the failure of the police to obtain a warrant before conducting this general search. Id., at 232.

See also Root v. Gauper, 438 F.2d 361, 365 (8th Cir. 1971).

Finally, in State v. Rogers, 573 S.W. 2d 710 (Mo. 1978), the victim encouraged Rogers to attend a party where Rogers was set upon and raped by the male company. To get revenge on the victim, Rogers, during a bacchanalia which extended over two days, denuded the victim of pubic hair in the presence of the men and on their wager. Rogers also forced the victim to drink excessive amounts of alcohol, struck her repeatedly, first with a belt and whiffle ball bat and then beat her head upon the floor. The police then received a call that there was a dead body at the Sowards residence where Rogers stayed as a house guest. When the first two officers arrived around 5:30 p.m., they saw two men take flight from the rear. As they gave chase, two other officers arrived on the premises and found the dead body of the victim laid out on a recliner chair in the front room. These officers then went outside where they arrested Rogers. About this time, three additional officers arrived and began to search the premises. A search of the premises disclosed a rope behind the heater, which was used to bind the victim; an extension cord; and numerous bottles of alcohol. Reversing Rogers' conviction for second degree murder, the Missouri Court of Appeals stated:

> One constant rationale underlies each of these cases: when the emergency which validates the original warrantless entry ceases, further investigation may not proceed without authority of warrant.... Id., at 716.

The conclusion: There is no homicide scene exception to the requirement of the Fourth Amendment. Thus, when evidence and testimony obtained from such a search are sought to be introduced at trial, OBJECT to the admissibility of that evidence. Turn every Fourth Amendment "stone" at the trial level. Don't mince with Mincey.

LARRY H. MARSHALL

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THE ATTORNEY IN CONTEMPT OF COURT

Though the phrase "contempt of court" is often heard and greatly feared little is understood about the subject, about the possible defenses to a contempt citation or about the procedural due process rights attendant in contempt proceedings. That, perhaps, is not surprising when even the United States Supreme Court has classified its decisions in the area of contempt as a "hodgepodge of legal doctrine". Codispoti v. Pennsylvania, 418 U.S. 506, 94 S.Ct. 2707, 41 L.Ed.2d 912 (1974), dissenting opinion by Mr. Justice Rehnquist. Indeed, a different body of law has grown to control criminal contempts than that which governs civil contempts. See, Dobbs, Contempt of Court: A Survey, 56 Cornell L.Rev. 183 (1971). The rationale for such a development is perplexing, however. While it may generally be said that criminal contempt punishes past misconduct and civil contempt coerces future behavior, both are punitive and thus deserving of the same constitutional protections, at least in the mind of the author.

Nonetheless, this article will attempt to provide for the reader a statement only on that part of the "hodgepodge" of contempt as applies to the attorney as contemnor for actions occurring during trial. No effort is made to carefully detail all conduct which may

(Continued, P. 12)

be viewed as properly the subject of a contempt citation, for surely an imaginative mind could further add to such a list. Suffice it to say that contempt has generally been viewed as a despising of the authority or dignity of the court through conduct which tends to impede, embarrass, or obstruct it in the discharge of its duties. 17 Am Jur.2d, Contempt § 3.

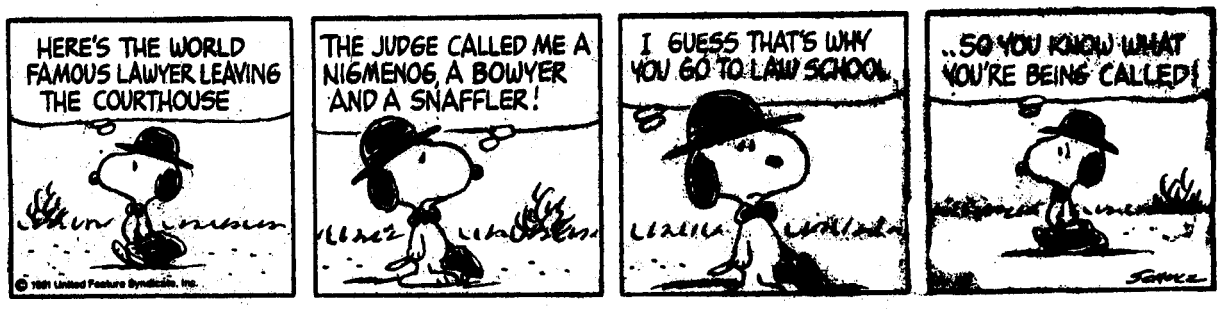
But, once an attorney has been cited for offensive conduct, use of abusive language or the like, certain procedural due process rights must be observed before punishment may be imposed. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed 682 (1948). "Reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed is basic to our system of jurisprudence". Groppi v. Leslie, 404 U.S. 496, 92 S.Ct. 582, 586, 30 L.Ed.2d 632 (1972). The above language, however, has not foreclosed summary punishment of an attorney/contemnor during trial. Groppi reasoned that even when the judge imposes punishment during trial for conduct occuring during the trial, "the contemnor has been given an opportunity to speak in his own behalf..." Groppi, supra at 92 S.Ct. 587. Fortunately, the use of **summ**ary punishment is infrequent and "is regarded with disfavor." Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952).

When punishment is not imposed during trial, but is delayed until after the proceedings which prompted the contempt citation, a hearing for the attorney/contemnor is required by Groppi. This does not necessarily mean that a fullblown trial is required to satisfy procedural due process safeguards. It does mean that the contemnor has the right to an impartial judge, one who is not so embroiled in the controversy that he would be unlikely to "maintain...calm detachment necessary for fair adjudication." Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 2704, 41 L.Ed.2d 897 (1974). At this hearing the contemnor may call witnesses (In re Oliver, supra) and must be presumed innocent until proven guilty beyond a reasonable doubt (Gompers v. Bucks Stove and Range Company, 221 U.S. 418, 444, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

If the punishment is to exceed six months incarceration, the contemnor has the right to a trial by a jury. Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968). Further, that trial must be an open, public trial. Id.; see also In re Oliver, supra.

What can be offered by way of defense at this trial? Truthfully, little.

(Continued, P. 13)



1981 United Feature Syndicate, Inc.

Generally, the contemnor is placed in a position of offering circumstances in mitigation or attempting to make amends with the court for his actions. Groppi, supra; Taylor, supra. In at least three instances, however, there is hope for the defense. First, if the basis for the contempt citation was solely a declaration that the judge was in error on some legal or factual matter, no contempt exists. In re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959). And this is true even if the contemnor's legal or factual position was incorrect. People v. Kuelper, 361 N.E.2d 29 (Ill. 1977). Secondly, if the transcripts of the proceeding from which the contempt citation occurred show or if evidence is produced by the contemnor at the "contempt trial" that the trial judge provoked the contempt by deed or word, a strong argument can be made that no contempt properly exists. Connell v. State, 114 N.W. 294 (Neb. 1907). Finally, if the conduct prompting the contempt was procedurally necessary in order to preserve on appeal an issue for contemnor's client, no contempt is warranted. See, e.g., In re Schwartz, 391 A.2d 278 (D.C. 1978).

The foregoing should not be viewed as a thorough treatment of the complicated and evolving area of contempt law. It is designed only to outline the procedural due process rights granted to one faced with a contempt citation and to suggest the areas of defense, however sparse they may be.

MICHAEL A. WRIGHT

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ACCESS TO CORONERS' REPORTS AND INVESTIGATORY FILES UNDER OPEN RECORDS LAW

In many homicide cases, information concerning the victim's cause of death as well as the nature and extent of his or her injuries can be helpful -- and sometimes crucial -- to defense counsel. One possible source of such information is the coroner's reports and investigatory files concerning the victim. A recent Attorney General's Opinion makes it clear that such records are public records and are not exempt from the mandatory disclosure requirement of the Open Records Law (KRS 61.870 - 61.884). In OAG 81-149, the Attorney General states that a coroner's reports and investigatory files developed in connection with the death of any person are open to public inspection under the Open Records Law. The Opinion notes, however, that any inspection of an investigatory file is subject to KRS 61.878(1)(g) which provides that "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency" are subject to inspection only upon court order.

Under the Open Records Law, all public records must be open for inspection during the regular office hours of the particular public agency, although the official custodian may require a written application describing the records to be inspected. KRS 61.872 (1) and (2). If the public record is in active use, in storage or otherwise unavailable, the custodian must designate a place, time and date for inspection by the applicant. KRS 61.872(4). Upon inspection, a person has the right to obtain copies of all written public records but may be required to make a written request for copies and charged a reasonable fee to cover the actual cost of copying the records. KRS 61.874. However, a public agency does not have to provide copies of records to a person who has not first inspected them. The right to have copies of public records made is ancillary to the right of inspection and does not stand by itself. OAG 76-375.

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APPELLATE SUMMARIES

Beginning with this issue of The Advocate you will find capsule summaries of issues briefed by the OPA staff for appellate review. Space does not permit summarizing every issue raised on appeal and, therefore, this article will not attempt to be an exhaustive catalogue of appellate defense efforts. What we hope to present are selective, novel issues which contain legal analysis which can be useful to you at both the trial and appellate stages of defense. It is our goal to provide for the attorney reading these summaries a research base for a problem he or she encounters, and to suggest an approach for tackling that problem. Please let us know if we fail to achieve our objectives.

Should you desire a copy of the issue summarized or should you have need for copies of other issues we may have briefed, please contact Michael Wright or JoEllen McComb by calling (502)564-3754 or by writing to OPA, Third Floor, State Office Building Annex, Frankfort, Kentucky 40601.

Inchoate Offenses
Criminal Syndicate

KENTUCKY'S CRIMINAL SYNDICATE STATUTE (KRS 501.120) IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Appellant notes that Kentucky's criminal syndicate statute is almost identical to Ohio's organized crime statute. In a recent Ohio state case and in a federal district court case, that Ohio statute was declared unconstitutional as it was "impermissibly vague under the Due Process Clause of the United States Constitution." Appellant analyzes those cases and United States Supreme Court case law to support a similar finding for KRS 506.120.

Terry Smith v. Commonwealth
Brief for Appellant

Modification of Sentence

SENTENCE MUST BE MITIGATED WHERE STATUTE IS AMENDED REDUCING PUNISHMENT FOR AN OFFENSE PRIOR TO FINAL JUDGMENT

Appellant was indicted on July 17, 1980, for burglaries of dwellings committed on June 19, 1980 and July 10, 1980. On July 15, 1980, the burglary statute was amended to make burglary of a dwelling second instead of first degree burglary, and making the punishment 5-10 years instead of 10-20 years. Construing the provisions of KRS 446.110 and cases from outside the jurisdiction, Appellant argues that in order to satisfy legislative intent, the lesser penalty must be applied in his case where the amendment became effective prior to final judgment; indeed, before indictment in this case.

Joseph Stewart Wayne v. Commonwealth
Brief for Appellant

Right to Counsel
- Incompetent/Ineffective

DEFENDANT IS DENIED RIGHT TO COUNSEL WHERE ATTORNEY-CLIENT RELATIONSHIP BREAKS DOWN PRIOR TO APPEAL

Appellant was appointed counsel by the trial court. During an interview, Appellant became embroiled in verbal conflict with attorney. Prior to trial counsel sought to withdraw and have substitute counsel appointed. At trial conflict continued to the extent that Appellant was ordered shackled. Counsel stated that he was in fear for his safety. Throughout trial, a third party sat between counsel and client to "arbitrate".

Appellant argues that in view of the abovestated facts he was denied the effective assistance of counsel. The argument squarely deals with the line of cases which holds that an indigent is not entitled necessarily to counsel of his choice, and finds them distinquishable.

Darren McAfee v. Commonwealth
Brief for Appellant

Search and Seizure
- Wiretap

INTERCEPTION OF INMATE PHONE CALLS WHICH IS NOT RANDOM OR ROUTINE IS VIOLATIVE OF TITLE III, 18 U.S.C. SECTIONS 2510-2520 AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND EVIDENCE OF THEM IS ADMISSIBLE

Appellant's phone calls were monitored from a "yard" phone at the state prison by use of a device which was designed specifically to monitor and record phone conversations from a group of eight telephones. Monitoring of Appellant's calls was not "random" in that the interceptions represented an investigative effort uniquely focused on him. No prior judicial involvement in authorizing the wiretaps was demonstrated by the evidence. Title III permits official eavesdropping and wiretaps only with probable cause and a warrant. Exceptions are drawn with narrow specificity. Appellant analyzes the exceptions and finds that none apply to his situation. Furthermore, a detailed distinction is drawn between the facts in Appellant's case and the facts in United States v. Paul, 614 F.2d 115 (6th Cir. 1980), a case authorizing prison monitoring in situations where conducted by an "investigative or law enforcement officer in the ordinary course of his duties." [Note: The federal courts are in conflict now over such practices; thus the issue may be ripe for cert].

Keith Phillips v. Commonwealth
Brief for Appellant

Sentencing
- Formalities

JUDGMENT MUST BE VACATED AND THE CASE REMANDED FOR RESENTENCING WHERE ONE JUDGE CONDUCTS TRIAL AND ANOTHER CONDUCTS SENTENCING

A special judge sat during Appellant's trial. After trial, another special judge was appointed to conduct sentencing. There was no record showing of any reason why the first judge could not sit during sentencing. Appellant argues that in such a situation the provisions of RCr 11.32 have been violated. Support is found in ABA Standards Relating To Sentencing Alternatives and Procedures and in cases drawn from other jurisdcitions. Further, Appellant argues that federal due process guarantees demand resentencing even absent a showing of prejudice.

Jimmy Jackson v. Commonwealth
Brief for Appellant

Testimony of Accomplice
- insufficient corroboration

FORMER RCr 9.62 (ACCOMPLICE RULE) MUST BE APPLIED IF CRIME WAS COMMITTED PRIOR TO ITS REVOCATION

Fayette Circuit Court ruled that former RCr 9.62 must be applied to crimes committed before the effective date of its revocation. The Commonwealth appealed. Appellee argues that the circuit court was correct and that any contrary ruling is clearly a violation of the ban on ex post facto laws. Article I, § 10 United States Constitution; § 19 Kentucky Constitution. Appellant asserted that rules of court are procedural as opposed to substantive law and that therefore ex post facto prohibitions are inappropriate. Arguing established United States Supreme Court case law, Appellee concludes that such a distinction cannot be used to escape constitutional bans on ex post facto laws where the rule change significantly alters the quantity of proof necessary to sustain a conviction.

Commonwealth v. Larry Brown
Brief for Appellee

Verdict

VERDICT FORM MUST ALLOW FOR A GENERAL VERDICT OF NOT GUILTY

Appellant was indicted and stood trial for murder. A defense of insanity was proffered. At the conclusion of all

(Continued, P. 16)

evidence the jury was instructed on murder, first degree manslaughter, the defense of insanity and presumption of innocence. Only two verdict forms were given to the jury, however: (1) guilty and (2) not guilty by reason of insanity. Appellant argues that failure to provide on the verdict forms for a general verdict of not guilty constituted a denial of due process of law. The general presumption of innocence instruction was insufficient to cure the error, argues Appellant. Further, the error may be reviewed absent objection to the instructions below.

Jeffrey Ray Lewis v. Commonwealth
Brief for Appellant

MICHAEL A. WRIGHT

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(EXPERTS, Continued from P. 1)

expert services are necessary and should be as specific as possible on this point." Mason v. State of Arizona, 504 F.2d 505 (8th Cir. 1974). Therefore, counsel must hurdle this threshhold showing of necessity in order to be entitled to expert assistance. This factual predicate can be established in the text of the motion, and further developed in a hearing on the motion.

Counsel should make only a skeletal demonstration of the need for expert services in the text of the motion, and indicate that counsel is willing to make a more detailed showing of the relevancy and necessity of the requested assistance in an ex parte hearing. The federal statute which allows for the appointment of experts for indigent federal defendants provides that counsel may demonstrate the necessity of such expert assistance in an ex parte hearing. 18 U.S.C §3006 A(e)(1); See United States v. Sutton, 464 F.2d 1315 (10th Cir. 1970). In arguing that the defense has a right to an ex parte hearing on the issue of the necessity of the requested assistance, counsel should indicate that the prosecutor's right to discovery of the defense's case is limited to that provided in the Rules of Criminal Procedure; there is no right to discover the thoughts and reasoning of defense counsel. King v. Venters, Ky., 596 S.W.2d 721 (1980).

Since requests for expert witnesses must be grounded on a need for such assistance, counsel should carefully investigate the factual bases which would enlighten the trial judge on the necessity for expert assistance in a given case (see infra, §J, on the duty of counsel to request expert assistance in the appropriate case). For instance, if counsel is requesting expert psychological assistance it should be noted if the defendant experiences difficulties in communicating with counsel during jailhouse interviews. Other relevant factors to identify could include: the defendant's prior hospitalization for mental illness, previous judicial declarations of incompetency, instances of bizarre behavior, history of drug or alcohol abuse/addiction, past physical traumas or concussions, etc. Again, counsel should argue that the defendant has a right to detail the factual bases for the request in an ex parte hearing.

Also, counsel should explain in the motion for funds that neither the State Office for Public Advocacy nor the particular local public advocacy plan provide any funds for the payment of defense experts. Counsel should then note that KRS Chapter 31 provides that the county must bear the necessary expenses of expert witnesses used in the defense of indigents charged with felonies and represented by the Office for Public Advocacy (see §A, infra).

It is also important to assert in the motion that the state facilities are inadequate to provide the defendant

(Continued, P. 17)

with the necessary expert assistance he or she has requested. If the request is for psychological assistance, explain to the trial judge, in the motion, that there is a two and one-half month delay between application and admission at the Forensic Psychiatry Unit in Louisville. Also, the staff of the Forensic Psychiatry Unit consider themselves experts for the court and refuse to work as defense experts.

Finally, counsel should give a minimum fee estimate for the requested expert assistance. This figure should estimate all costs relative to testing and/or examination, consultation, and appearing as a witness.

In the accompanying memorandum of law in support of the motion for expert assistance, the following authorities should be cited in support of the requested expert services:

A.

KENTUCKY STATUTES

KRS 31.110 provides that "[a] needy person. . .is entitled

> (b) to be provided with the necessary services and facilities of representation including investigation and other preparations.
> (emphasis added).

KRS 31.185 adds that private facilities should be provided where the use of state facilities are "impractical," and that such private services are to "be paid for on court order by the county."

Also, KRS 31.200 provides that any "direct expense . . . that is is necessarily incurred in representing a needy person under this chapter, is a charge against the county on behalf of which the service is performed."

B.

ATTORNEY GENERAL OPINION

On July 22, 1980, OAG 80-401 was issued regarding the responsibility of a county to pay for expert witnesses "used in defense of indigents charged with felonies and represented by the public defender." The opinion is clear that when a county elects to participate in a public defender program it is responsible for paying the expert witnesses' fees.

C.

KENTUCKY CASE LAW

Kentucky case law interpreting the provisions of KRS Chapter 31 is virtually non-existent. However, in Young v. Commonwealth, Ky., 585 S.W.2d 378 (1979), the Kentucky Supreme Court stated that "[w]e readily concede that indigent defendants are entitled to reasonably necessary expert assistance." Id., at 379. In reaching this result, the court cited with approval KRS Chapter 31, the statutory scheme which requires the fiscal court to pay for defense experts. However, the Young court refused to order the county to pay the expert fees because there was no order authorizing the expert services "in advance" of defense counsel procuring such services, and because the record did not reflect that the defendant was represented by a public defender when the services were provided.

D.

OTHER STATES

Interpreting statutes similar to the Chapter 31 scheme, other state courts have held that indigent defendants have the right to obtain expert assistance at state expense. See e.g.:

(Continued, P. 18)

State ex rel Foster v. Luft, W.Va., 264 S.E.2d 477 (1980); People v. Dumont, Mich.App., 294 N.W.2d 243 (1980).

Also, some state statutes allow for reimbursement for necessary services incurred by attorneys appointed to represent indigent defendants. See, e.g.: Colo.Rev.Stat. §21-1-105. Yet other statutes describe specific services for which reimbursement will be provided. See e.g.: Cal.Evid.Code §730(2) (court may appoint investigators and expert witnesses).

Finally, some state statutes authorize reimbursement for necessary expenses after an ex parte hearing or upon subsequent ratification: Minn.Stat. Ann. §611.21; Mo.Ann.Stat. §600.150.

E.

FEDERAL STATUTE

For nearly 20 years there has been a federal statute authorizing the appointment of experts for indigent defendants. 18 U.S.C. §3006 A(e)(1) provides for the appointment of expert assistance where such services are "necessary for an adequate defense." Moreover, counsel may request such services in an ex parte hearing under the federal scheme. 18 U.S.C. §3006A (e)(1).

F.

FEDERAL CASE LAW

There is an abundance of federal cases construing and interpreting 18 U.S.C. §3006A. The cases unanimously hold that the failure to appoint an expert needed to develop a defense is reversible error. See e.g., United States v. Tate, 419 F.2d 131 (6th Cir. 1969). Obviously, pronouncements by a federal court on a federal statute are not binding on Kentucky courts. However, the various approaches used by federal courts should provide guidance for the appellate courts in this Commonwealth because the federal statute and the Chapter 31 scheme are similar (both contain a "necessity" standard for expert assistance), and because both statutes implement various constitutional guarantees (See §§H-1, infra). For specific case citations, counsel should refer to the memorandum available from the Local Assistance Branch.

G.

NATIONAL STANDARDS

The American Bar Association Standards for Criminal Justice, Providing Defense Service (2nd ed., 1980), supports public defender plans which "provide for investigatory, expert, and other services necessary to an adequate defense." Id. Standard 5-1.4.

Other National Standards also recognize the need for funding of experts for indigent defendants. Refer to the memorandum available from this office for additional information.

H.

DUE PROCESS

Due process requires fundamental fairness in all criminal proceedings, including sentencing. Many courts have used a due process analysis in holding that indigent defendants have a right to funds for necessary expert assistance. See e.g., United States v. Henderson, 525 F.2d 247 (5th Cir. 1975); State v. Lippincott, 124 N.J. Super. 998, 307 A.2d 657 (1973).

The focus in a due process approach is on the fairness between the state and the accused, with a special emphasis on the proper functioning of the adversary system. As was stated in United States v. Theriault, 440 F.2d 713 (5th Cir. 1971):

(Continued, P. 19)

> Our system of law rests on the adversary process. But in criminal cases the process cannot be expected to work unless indigent Defendants are provided with reasonably adequate defense aids to offset the government's far greater resources and far more extensive prosecutorial aids. Id. at 717.

I.

EQUAL PROTECTION

An equal protection approach is perhaps the most widely used rationale employed by the courts in holding that a trial judge must appoint an expert that is needed to assist an indigent defendant in his or her defense. See e.g., People v. Dumont, supra; People v. Worthy, App., 167 Cal.Rptr. 402 (1980).

An illustrative case that recognized the principal that an indigent criminal defendant is to be guaranteed equality of treatment with non-indigent defendants in this context is Jacobs v. United States, 350 F.2d 571 (6th Cir. 1965), where the Court stated:

> It is obvious that only his inability to pay for the services of a psychiatrist prevented a proper presentation of his case. The Supreme Court has unmistakably held that in criminal proceedings it will not tolerate discrimination between indigents and those who possess the means to protect their rights. Id., at 573.

J.

EFFECTIVE ASSISTANCE OF COUNSEL

The right to effective assistance of counsel contemplates the right to expert assistance in the appropriate case. See e.g.: United States ex rel Edney v. Smith, 425 F.Supp. 1038 (E.D.N.Y. 1976). Essentially, then, the state is obligated to provide counsel with the appropriate tools needed to properly investigate a defense. Wolfs v. Britton, 509 F.2d 304 (8th Cir. 1975).

Also, defense counsel has an independent obligation to investigate his client's case in order to ascertain the validity of any and all defenses. See Jones v. Cunningham, 313 F.2d 347 (4th Cir. 1963). Therefore, if there are reasonable grounds for questioning the sanity or competency of his client, and counsel fails to explore the matter, the defendant has been denied effective assistance of counsel. Wood v. Zahradnick, 430 F.Supp. 107 (E.D. Va. 1977). In fact, the failure of counsel to request the appointment of expert witnesses in the appropriate case constitutes ineffective assistance of counsel. United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976). As was stated in Proffit v. United States, 582 F.2d 854 (4th Cir. 1978):

> The failure of defense counsel to seek [expert] assistance when the need is apparent deprives an accused of adequate representation in violation of his sixth amendment right to counsel. Id. at 377.

K.

RIGHTS TO CONFRONTATION AND COMPULSORY PROCESS

The Sixth Amendment guarantees the "right meaningfully to cross-examine the witnesses against [the accused]." United States v. Wade, 388 U.S. 218, 227, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (emphasis added). Counsel cannot effectively cross-examine an expert without extensive knowledge of the expert's field. United States v. Durant, 545 F.2d 823 (2nd Cir. 1976). Therefore, an expert must be appointed for an indigent to assist counsel in preparing for cross-examination when the state intends to call an expert to testify at trial.

(Continued, P. 20)

Also, the Sixth Amendment right to compulsory process and to present witnesses guarantees to an indigent defendant the right for funds for experts necessary to the defense. See e.g. People v. Watson, 36 Ill.2d 228, 221 N.E.2d 645 (1966).

L.

RIGHT TO PRESENT A DEFENSE

The right to present a defense is guaranteed by the Sixth Amendment. Faretta v. California, 922 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A denial of funding for expert witnesses would constitute a denial of the right to present a defense.

Moreover, the right to present a defense includes the right to present evidence in defense of the state's accusations. In this context, the denial of expert assistance would preclude an indigent defendant from fairly defending against the state's charges. An illustrative case is Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980), where it was noted that:

> Just as the state needed an expert to prove the cause of death, [the defendant] needed an expert to prepare his defense. Id. at 1026.

M.

KENTUCKY CONSTITUTION

Section Eleven of the Kentucky Constitution guarantees a criminal defendant the right "to be heard by himself and counsel. . .to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." That Section also provides that a defendant cannot be deprived of his life or liberty "unless by the judgment of. . .the law of the land." Thus, the Kentucky Constitution also provides authority for counsel's argument that his or her indigent client has a right to expert assistance.

N.

RIGHT TO OBTAIN PROSECUTION EVIDENCE FOR INDEPENDENT TESTING

In situations where the Commonwealth has tested physical evidence, and where that evidence is in the Commonwealth's possession, the defendant has a right to obtain such evidence for purposes of conducting independent tests.

As the Court in Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1976), explained:

> Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safe-guards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion.

See also: White v. Maggio, 556 F.2d 1352 (5th Cir. 1977).

CONCLUSION

The Office for Public Advocacy has no funds for the payment of defense experts. However, the legislature has chosen to place the responsibility for paying for such experts on the respective counties. Therefore, in the appropriate case, counsel should recognize the obligation to request expert assistance by filing a motion for funds for defense experts, relying on the relevant provisions of KRS Chapter 31 and other relevant federal and state authorities.

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APPELLATE PROCEDURE

There will be some significant changes in the rules pertaining to processing appeals to the appropriate appellate courts effective July 1, 1981. The main one which affects local counsel is the change found in CR 75.01(2) which requires the local counsel to attach to the designation of record a "certificate as to transcript" which must be signed both by the designating counsel and by the court reporter and which must state: (a) the date on which the transcript was requested; (b) the estimated number of pages in the transcript; (c) the estimated completion date of the transcript; and (d) that satisfactory financial arrangements have been made between counsel and the reporter for the transcription. In light of that last requirement, it is now incumbent upon local counsel to procure an Order allowing the defendant to proceed in forma pauperis on the appeal before the designation of record is filed. A copy of that Order should be attached to the designation of record and to the "certificate as to transcript".

Local counsel should also be aware that rule 75.02 has been amended to facilitate the use of mechanical recordings on appeal in lieu of the transcription of the evidence. In order to comply with this change in the rule, it is suggested that local counsel now place the following sentence in the designation of record: "Appellant also designates the record on appeal to include all proceedings which were mechanically recorded but not stenographically reported."

Other substantive changes in the rules that local counsel should be made aware of are that all pleadings must now be double spaced (CR 7.02(4)) and that a Motion for Discretionary Review of an appellate decision of the Court of Appeals must be filed in the Supreme Court of Kentucky within twenty days of the issuance of the opinion unless a timely petition for rehearing has been filed (CR 76.20(2)(b)). Also if local counsel is handling an appeal and if mechanical recordings are used in lieu of a transcript of the evidence, counsel must listen to the tapes in the Clerk's Office (CR 75.07(6)) and counsel must also refer to the digital counter number of the tape recorder when citing to the evidence. (CR 76.12(4)(d)(iii)). Of course, if you have any questions about any procedural aspect of processing an appeal, please do not hesitate to contact Tim Riddell in the Office for Public Advocacy.

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ADMINISTRATIVE NEWS

Educational materials

We now have a listing of all of our training materials: written handouts, audio tapes and video tapes.

The collection includes overviews of recent caselaw, as well as local applications of state and federal law on specific topics. As the collection grows, the list will be updated. Also, subject groupings of materials in all formats will be published in upcoming issues of The Advocate.

Copies of handouts may be requested through the library. Audiotapes are available for loan to public defenders. Videotapes may be borrowed for group training, or viewed by appointment in Frankfort.

If you have similar materials which you would like to share with other public defenders, please send a copy for duplication to the librarian. Any other questions or requests should be directed to:

JoEllen S. McComb, Librarian
Office for Public Advocacy State Office Building Annex Frankfort, Kentucky 40601 (502) 564-5252

(Continued, P. 22)

We also have available a Motion File and two supplements for $35.00. The Motion File contains well over 1,000 pages of motions and memos. You shouldn't be without one! We also have an expert witness list available for $3.00.

Allotments

We will be paying all assigned counsel claims in the fiscal year July 1, 1981 - June 30, 1981 quarterly on a pro-rated basis.

Local Plans

We have a model Local Public Advocacy Plan which contains important criteria for the operation of local systems. This plan should be in effect in each allotment county.

Action

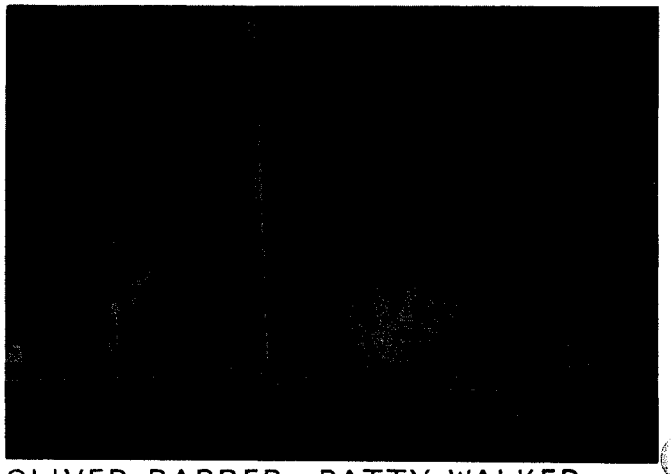
We're underfunded. We - at this office - can't by ourselves get the money needed for the local systems. But together with your influence at the local level, we do have a chance to correct our underfunded position. Help us help you. Please affect your legislators and judges.

SPEAKERS AT 9TH ANNUAL PUBLIC DEFENDER TRAINING SEMINAR

JUDGE JOHNSTONE, JUDGE SHOBE

HOWARD EISENBERG

BILL JOHNSON



OLIVER BARBER, PATTY WALKER, DELORES NORLEY

EDITOR'S NOTE

The first time I experienced it, it came as something of a shock. We had placed a new attorney into a full-time office, and were able to pay her the going state merit position rate, which was somewhere around $11,400 per year (it has only recently gone up to $13,800). She had been there only a short time, when she was offered $22,000 per year to go with the Commonwealth's Attorney's office in the same town. She left.

Since that time, I have witnessed this basic inequity time and again. The criminal justice system in this Commonwealth very simply does not provide the same size of pie for the prosecution and defense of criminal cases. Let me make a couple of comparisons:

1. Jessamine, Garrard and Lincoln Counties. In the third judicial district, this office allots $8,000, $2,500 and $4,000 respectively, for a total of $14,500, for the defense of indigents accused of crime. The Commonwealth's Attorney in that district receives $24, 575. He has an assistant, who gets $10,344, and a secretary at $4,116. This is all state funded. But that is not all. The Jessamine County Attorney gets $33,207.84, with a $14,672 assistant, $7,150.20 for secretarial staff and $2,000 for "expenses". The Garrard County Attorney receives $19,334 from the state, while the Lincoln County attorney receives $24,575. We don't have the figures on the remainder of their staffs, as we have shown above for Jessamine. So our figures are low. Combined, the County Attorneys in these three counties receive at least $98,939.04, while the Commonwealth's Attorney receives $39,035. Thus the prosecutorial bodies in the thirteenth judicial district have at least $137,974.04 to spend on prosecuting criminal cases. Subtracting the cases for prosecuting nonindigents, and the nonprosecutorial duties of the county attorneys, one can readily see that the prosecutors' budget significantly outweighs with the $14,500 public defender budget. And this is not atypical. See below.

2. Christian County.

Public Defender Allotment	--	$ 42,000.00
Commonwealth's Attorney	--	24,575.04
Assistant	--	13,860.00
Detective	--	10,344.00
County Attorney	--	33,575.04
Assistant	--	13,860.00
Assistant	--	13,860.00
Secretary	--	5,520.00
Expenses	--	1,000.00
TOTAL		$116,594.08

3. Boyd County.

Public Defender Allotment	--	$ 41,000.00
County Contribution	--	27,000.00
TOTAL		$ 68,000.00
Commonwealth's Attorney	--	$ 40,958.04
Assistant	--	24,888.00
Detective	--	11,976.00
Secretary	--	9,852.00
Secretary	--	8,940.00
County Attorney	--	38,538.04
Assistant	--	13,488.00
Assistant	--	13,488.00
Assistant	--	13,488.00
Secretary	--	13,020.84
Secretary	--	11,120.40
Secretary	--	3,924.00
Expenses	--	100.00
TOTAL		$203,781.32

4. Franklin County.

Public Defender Allotment	--	$ 31,000.00
Commonwealth's Attorney	--	40,958.40
Assistant	--	10,872.00
Assistant	--	10,872.00
Secretary	--	12,576.00
County Attorney	--	36,575.04
Assistant	--	11,976.00
Secretary	--	5,570.00
Expenses	--	10,800.00
TOTAL		$140,199.44

5. Boone County.

Public Defender Allotment--$ 16,000.00

Commonwealth's Attorney	--	24,575.04
Assistant	--	10,872.00
Detective	--	10,872.00
Secretary	--	5,520.00
County Attorney	--	37,090.92
Assistant	--	11,412.00
Secretary	--	5,520.00
TOTAL		$106,680.96

These are the figures from seven counties, in Kentucky. The public defenders allotments to those counties total $171,500.00 In contrast, the total money allotted to the prosecutorial bodies in those same counties is $705,229.84, over four times the amount spent on public defender services in those same counties.

"...nor shall any State...deny to any person within its jurisdiction the equal protection of the laws." 14th Amendment to the United States Constitution.

ERNIE LEWIS

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