The Advocate

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BAR ASSOCIATION SUPPORTS CHANGE IN STRUCTURE OF OFFICE FOR PUBLIC ADVOCACY

The Kentucky Bar Assocation's Board of Governors has adopted a resolution concerning the need to provide effective legal services to poor and needy Kentuckians accused of crimes punishable by loss of liberty.

The Office for Public Advocacy, which was established within the Executive Branch of Kentucky government to provide these services, has encountered grave difficulties due to rising caseloads, inadequate funding and lack of appropriate local systems for providing legal services.

Through the Board's resolution, the Kentucky Bar Association:

(See KBA, p. 2)

INSIDE

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THE ADVOCATE FEATURES

Bill Nixon, director of OPA's Southeast Regional Project (SEPAR), is our featured public defender. Bill has left this office to resume a teaching career at Eastern Kentucky University; featuring Bill in The Advocate is one of the few ways we have of thanking Bill for the work he has done for this office.

Bill attended Eastern as an undergraduate, graduating in 1968 with a major in history. He attended law school at the University of Kentucky, graduating in 1972. During law school, he worked 20-30 hours a week for two years as a recreational supervisor at Kentucky Village, at the time Kentucky's major juvenile institution. It was during this period that Bill developed his interest in criminal law.

(See NIXON, P. 2)

KBA, Continued from Page 1)

1) Endorses the concept of providing legal services to needy Kentuckians through a structured service delivery system, known as a "mixed" system, combining full-time salaried lawyers and lawyers in private practice.

2) Urges the Legislative and Executive Branches of Kentucky government to fund adequately and administer appropriately this mixed system and provide effective legal services to all eligible needy Kentuckians accused of such crimes, and

3) Pledges its cooperation with all efforts to improve and increase legal services to needy Kentuckians accused of such crimes, and urges all Kentucky lawyers to cooperate with the mixed system even if only to provide advice and counsel.

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(NIXON, Continued from P. 1)

After a year as a Department of Transportation attorney, Bill joined the faculty at Eastern as a associate professor of criminal justice. It is this position he is now going back to with an added course in political science.

In May of 1979, OPA lured Bill away from Eastern, hiring him to head the London office of SEPAR. A little over a year later, Bill became SEPAR director. As such, he engineered the establishing of what are now functioning full time public defender offices in Pikeville, Hazard, London, and Somerset. He also reluctantly was a part of the closing of the Winchester office, the Prestonsburg office, and the office planned for Barbourville, all of which took place with the ending of federal funding, and the continued underfunding of OPA by the state.

Bill is "disappointed and sad" about the closing of these offices. He believes the need for full time offices in rural Kentucky is greater than ever, but that he "doesn't know what is going to happen" if OPA's funding is not improved.

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JOHN CLEARY, SAN DIEGO DEFENDER, TO SPEAK IN LOUISVILLE ON SEARCH AND SEIZURE LAW

On Friday, October 2, 1981, the University of Louisville Continuing Legal Education Department will present in Louisville a one-day program of particular interest to public defender attorneys. This seminar will feature John J. Cleary, Executive Director of the Federal Public Defenders of San Diego, California, and Eugene Iredale, Chief Trial Attorney of that office.

John Cleary will focus on a comprehensive and practical review of search and seizure law, highlighting significant recent developments at both the state and federal level.

Eugene Iredale will critically analyze tactics and strategy in evidence, utilizing video-taped vignettes to illustrate evidentiary problems within the context of the courtroom.

The program is tentatively scheduled to be held at the Founder's Union Building on the Shelby Campus of the University of Louisville. A limited number of dormitory rooms will be available for out-of-town attorneys attending the seminar at a cost of $10.00 per room. Additional information concerning the specifics of this continuing legal education program will be provided in a brochure to be mailed by the University of Louisville to all members of the Kentucky Bar Association.

Inquiries should be addressed to Maria C. Meuter, Room 101, Founder's Union Building, University of Louisville, Louisville, Kentucky 40292.

WEST'S REVIEW

Case law for May and June includes a number of noteworthy decisions. Most important of these are two decisions of the United States Supreme Court.

In Edwards v. Arizona, 29 CrL 3037 (May 18, 1981), the Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights." Id., at 3039. Edwards had initially refused to answer police questions until conferring with an attorney. However, the following day, after receiving Miranda warnings a second time, Edwards made incriminating admissions without further invoking his right to counsel. The Court held that the proper standard for determining the admissibility of Edwards' statement was whether he had knowingly and intelligently waived his right to counsel, not whether the statement itself was voluntarily made. The Court additionally held that "an accused. . .having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication. . ." Id., at 3039.

In Michigan v. Summers, 29 CrL 3097 (June 22, 1981), the Court held that a valid warrant to search certain premises implicitly authorizes police officers to detain the occupants while a search is conducted. The police in Summers had proceeded to premises designated to be searched by a valid search warrant. They encountered the defendant leaving the premises and detained him. Following a search of the premises, which produced narcotics, the police placed the defendant under arrest and searched him finding heroin. At trial, the defendant challenged the initial seizure of him prior to the search of the house. The Court found that the defendant's detention was not supported by probable cause. However, the Court upheld the seizure as being nevertheless reasonable. The Court found that the defendant's detention was significantly less intrusive than the detention decried by it in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) in which officers transported a suspect to the police station for questioning. The majority opinion found the seizure before it more nearly like the "stop and frisk" approved by the Court in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A dissenting opinion joined in by Justices Stewart, Brennan, and Marshall condemned the majority holding that an individual may be detained without probable cause in order to "facilitate the execution of a warrant that did not authorize his arrest." Id., at 3102.

In Scott v. Commonwealth, Ky., 28 K.L.S. 7 (May 26, 1981) the Kentucky Supreme Court confronted the novel issue of when a trial may commence without the presence of the accused. The defendant in Scott filed numerous pro se motions during the nine month interim between his arrest and trial, including motions for psychiatric examination, a change of venue, and continuance. Finally, on the scheduled trial date Scott refused to go to court. The trial judge, along with an assistant commonwealth attorney and defense counsel, interviewed Scott at the jail where he told them he had taken a large quantity of drugs that morning. After returning to chambers, the trial court was informed by defense counsel that Scott might harm himself or others if forcibly brought to court. The trial court then ordered defense counsel to return to the jail

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and advise Scott that if he did not appear voluntarily he would waive his right to be present. Defense counsel did so, and in response to questioning by the prosecutor Scott stated "I waive my rights." Scott was absent during the first two days of his six-day trial, and upon appearing on the third day of trial denied that he had knowingly waived his presence inasmuch as he had been under the influence of drugs. Scott asserted on appeal that he had not knowingly and intelligently waived his right to be present and that, under RCr 8.28(1), trial may proceed in the voluntary absence of the defendant only "after the trial has been commenced in his presence." The Court, Justice Lukowsky dissenting, held that the trial court did not abuse its discretion in finding that Scott waived his right to be present in view of Scott's previous efforts to avoid and delay trial. The Court also held that RCr 8.28(1) seeks to avoid trial in absentia and that "for this purpose Scott was constructively present, being confined in the jail and readily available." Id., at 12. The Court did not address the question of whether the trial court could validly find a waiver of Scott's rights when the alleged waiver was not made in its presence. It appears that certiorari will be sought in the case.

In Klee v. Lair, Ky., 28 K.L.S. 8 at 10 (June 6, 1981), the Court reversed a decision of the Court of Appeals denying the defendant's petition for writ of prohibition. The defendant had been tried for trafficking in a controlled substance. The jury convicted him of the lesser included offense of possession. The trial court subsequently granted the defendant's motion for a new trial but denied a motion to dismiss the trafficking charge. The Supreme Court held that the Court of Appeals should have issued its writ prohibiting the trial court from again trying the defendant on the trafficking charge. The Court held that the defendant would be twice put in jeopardy by being again tried on the trafficking charge after the jury had, in effect, acquitted him of that charge by convicting him of a lesser offense.

The Court of Appeals has held in Polk v. Commonwealth, Ky.App., 28 K.L.S. 7 at 3 (May 15, 1981), that an indigent offender's probation may be revoked for failure to make restitution due solely to his indigency where restitution is agreed to as a condition of probation. The Court distinguished the failure to make agreed restitution from the failure to pay fines on the grounds that appellant agreed to make restitution as "a firm commitment as a condition to his probation." Id., at 4. The Court's opinion, however, does little to explain how a probationer who merely acquiesces in restitution as a condition of probation may, consistent with the holding of Tate v. Short, 401 U.S. 395, 28 L.Ed.2d 130, 91 S.Ct. 668 (1971), forfeit his liberty solely because of his indigency. The constitutionality of probation revocation based on an indigent offender's failure to make ordered restitution should still be considered open to challenge.

In another appeal of a probation revocation, the Court of Appeals has held that where the judge revoking probation was formerly the prosecuting attorney at the defendant's original guilty plea proceeding the judge should have disqualified himself. Small v. Commonwealth, Ky.App., 28 K.L.S. 7 at 7 (May 27, 1981). The Court cited KRS 26A.015(a) and (e) which state that a judge "shall disqualify himself" where he has (a) "a personal bias or prejudice concerning a party. . .or has expressed an opinion concerning the merits of the proceeding," or" (e) has knowledge of any other circumstances in which his impartiality might reasonably be questioned." The Court rejected the commonwealth's argument that the defendant waived the matter by failing to object, and held that "any waiver of such right may be made under proper circumstances, either in writing or on the record, but will not be presumed from silence."

RIGHT TO TRANSCRIPT FOR PREPARATION OF COLLATERAL ATTACKS

The Post-Conviction Services Branch is often contacted by indigent defendants with requests for assistance in obtaining a transcript of their trial (record and evidence) to prepare a collateral attack on their convictions. Generally, if there was a direct appeal, the appellate attorney merely borrowed the transcript from the appellate court. However, after the mandate was issued the transcript was most likely returned to the trial court. CR 76.46(3). Therefore, unless an office copy was made, the transcript is unavailable from the appellate attorney. Further, if no appeal was prosecuted, a transcript generally will not even exist.

The question that invariably results then is whether an indigent defendant has the right to obtain a previously prepared transcript and have one prepared if the trial has not been transcribed. Clearly, the indigent is so entitled. However, the indigent must meet what appears to be a two part test: He must show that the grounds for his collateral attack are not frivolous and that the transcript is necessary to adequately prepare for the collateral proceedings.

There has been extensive litigation concerning this issue since the Supreme Court in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956), decided that all defendants are entitled under the United States Constitution to an adequate review of their conviction if the state provides for appellate review. Due to this decision there is no question now that an indigent defendant is entitled to the use of some sort of transcript to prepare his direct appeal. See Goins v. Meade, Ky., 528 S.W.2d 680 (1975). It is also clear that the indigent is entitled to a transcript for an appeal of a post-conviction action. Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768 (1963). However, neither Griffin supra, nor Lane, supra, cover a situation where the transcript is desired to prepare a post-conviction action.

In this regard it appears that the requirements will be the same whether the situation involves a federal prisoner desiring to file a federal petition or a state prisoner desiring to file a state or federal petition. All will have to meet the two part test before a transcript will be made available at no cost.

The Fourth Circuit Court of Appeals in United States v. Glass, 317 F.2d 200, 202 (4th Cir. 1963), stated in relation to a federal prisoner's request for a transcript that:

> ...[W]e could not uphold the contention, that an indigent may obtain a free transcript merely for examination in order to determine whether he wishes to engage in litigation. An indigent is not entitled to a transcript at government expense without a showing of the need, merely to comb the record in hope of discovering some flaw.

See also, United States v. Hoskins, 85 F.Supp. 313 (E.D.Ky. 1949). The bottom line, the court indicated, was that a petition for collateral relief must be filed containing non-frivolous grounds and that the transcript must be needed before it will be provided. The Fourth Circuit has issued a similar decision in relation to a state prisoner's request for a transcript to prepare a state collateral attack. Jones v. Superintendent, 460 F.2d 150 (4th Cir. 1972). Both of these Fourth Circuit decisions were based on Fifth and Fourteenth Amendment due process considerations.

The Sixth Circuit has followed this line of reasoning in a number of cases by holding that a federal prisoner must state reasons why he believes his conviction is contrary to law and that the transcript is indispensible to the motion. Ketcherside v. United States, 317 F.2d 807 (6th Cir. 1963); Dorsey v. United States, 333 F.2d 1015 (6th Cir. 1964); Hoover v. United States, 416 F.2d 431 (6th Cir. 1969); Smith v. United States, 421 F.2d 1300 (6th Cir. 1970); Lucas v. United States, 423 F.2d 683 (6th Cir. 1970); Bentley v.

(Continued, P. 6)

United States, 431 F.2d 250 (6th Cir. 1970). However, these decisions were based on an interpretation of a federal statute dealing with free transcripts, 28 U.S.C §753(f), rather than any constitutional principle.

In Wade v. Wilson, 396 U.S. 282, 90 S.Ct. 501 (1970), a state prisoner attempted to obtain a copy of his trial transcript to enable him to file a federal habeas corpus petition. However, the Supreme Court explicitly refused to determine whether the defendant was constitutionally entitled to a transcript. The defendant had a co-defendant who possessed a copy of the transcript and since he had not shown that he could not borrow that transcript or a transcript on file in the trial court, the Court remanded with a direction that the defendant do so or get the lower court to order the co-defendant to let the defendant use his copy. The Court did seem to indicate that in undefined special circumstances a prisoner may be allowed to borrow an existing transcript from the trial court to frame a collateral petition absent a showing of non-frivolity and need. See also Bennett v. United States, 437 F.2d 1210 (5th Cir. 1971). (Some cases however have indicated specifically that without meeting these tests, a transcript need not be provided "regardless of how easily and inexpensively the state could furnish it." Jones, supra at 153).

But the Supreme Court has also upheld the procedure for federal prisoners of requiring a petitioner to file his collateral petition for a determination of non-frivolity and need before the petitioner is entitled to a transcript. United States v. MacCollum, 426 U.S. 362, 96 S.Ct. 2086 (1976). The Court held that this procedure violated neither due process nor the right to equal protection. Kentucky follows a similar procedure, at least in relation to RCr 11.42. A defendant is entitled to a transcript for a motion to vacate only if "on its face his RCr 11.42 motion states grounds which, if true, would furnish a basis for relief." Gregory v Knuckles, Ky., 471 S.W.2d 306 (1971). Additionally the Kentucky Supreme Court has indicated that when counsel is appointed (and this must occur if the movant requests assistance pursuant to Ivey v. Commonwealth, Ky., 599 S.W.2d 456 (1980)), "he may take action to obtain the appropriate record if it is necessary." Oakes v. Gentry, Ky., 380 S.W.2d 237 (1964). See also Jones v. Breslin, Ky., 385 S.W.2d 71 (1964); Allen v Wolfinbarger, Ky., 385 S.W.2d 160 (1964). Presumably, this decision would also apply to the indigent defendant who elects to proceed pro se.

Due to the Supreme Court decision in United States v. MacCollum, supra, it appears that this procedure would pass constitutional muster (although that case dealt with due process under the Fifth rather than the Fourteenth Amendment). Accordingly, it appears that if a transcript is needed to prepare any collateral attack, the indigent defendant or counsel who initiates a post-conviction action, must file a motion to proceed in forma pauperis, the post-conviction motion, a motion for the transcript and a motion to allow a supplement to the post-conviction motion after the transcript is received. See Potts, "Obtaining a Transcript to Aid in Post-Conviction Relief Action," 2 Prison Law Monitor 114 (1979). If an RCr 11.42 motion is begun pro se and counsel is appointed the motion to supplement may not be needed since Ivey, supra, indicates that counsel is entitled to file a supplemental pleading. Additionally, the appointed counsel, under Oakes, supra, will be entitled to move for the transcript so an initial pro se motion for it would also be unneccsary.

Since the original collateral motion is actually a tool to obtain the transcript it would not have to be extremely thorough. However, it must not be drafted carelessly. If the factual allegations and legal claims are not sufficient to show non-frivolity and need for the transcript, it may be dismissed as frivolous and the transcript will not be obtained. Also, in the case of an RCr 11.42 motion, the movant may not be allowed to refile.

RANDY WHEELER

OFFICE FOR PUBLIC ADVOCACY
POLYGRAPH PROCEDURES

Within the Investigations Section of the Office for Public Advocacy are two Polygraph Examiners: Orlester H. Mahoney and James F. Lord, who travel statewide, administering polygraph examinations to indigents accused of felonies. They can be reached at (502-564-3765) or (502-564-5257).

Upon arrival at a public defender's office, the examiner should be given a copy of the indictment plus an informal memorandum, giving the accused's version and, if possible, the police version of the incident.

Only the examiner and the accused are in a room during the examination. The room should contain two chairs and a table/desk. A quiet area is essential and if the room has windows, they should be covered during the actual examination. The defender should bring the client to the room and introduce him to the examiner. The public defender should make arrangements for the room and any necessary security precautions beforehand.

During the pre-examination interview, the client signs a notarized (if possible) "Office for Public Advocacy Consent to Take the Polygraph Examination" form. The examiner then reviews the incident/charge with the accused (alone), prepares questions to be used during the examination, reviews these questions with the accused so that he/she thoroughly understands them, then re-asks the same questions during the actual examination. No trick questions are asked during the course of the examination. During the post-exam interview, the examiner will approach the client regarding any deceptive responses if so desired by the public defender. Upon completion of the examination oral results will be presented to the public defender followed by a written report (if desired), as soon as practical, usually within three days.

Polygraph examinations should be considered only as a <u>supplement</u> 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; never withhold any pertinent/relevant information from the examiner regarding the case. When asking a client to take a polygraph examination, inform him/her that only the offense of which he is charged will be covered during the examination. Inform the client that taking a polygraph examination is the best way to verify that he is telling the truth. If the client volunteers to take a polygraph examination, advise him/her to get a good night's rest, do not drink intoxicants and take no unnecessary medication or medicine prior to the examination. Explain to the client that only his attorney/public defender will receive the results of the examination unless a stipulation has been made.

There are several factors that may prohibit administering a polygraph examination. A polygraph examination will not be conducted on any client if the examiner feels the subject to be physically or mentally unfit or that the examination may be a detriment to the client's health. 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. A pregnant woman will not be given a polygraph examination, nor will a person with a known serious heart condition.

In conclusion, the purpose of a polygraph examination is to determine if a person is telling the truth. If this can be scientifically determined, the public defender can then better evaluate the evidence and determine what his next steps should be in best representing his client.

Hopefully, the above procedures will facilitate the use of the polygraph by public defenders in the future.

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THE DEATH PENALTY

Death is Different

CAPITAL CASE LAW

ESTELLE V. SMITH
101 S.Ct. 1866 (May 18, 1981)

The trial judge in this case decided without giving defense counsel notice to have the defendant examined for competency purposes only by a psychiatrist. Defendant was found competent.

At the sentencing phase of the capital trial, the psychiatrist was called by the state of Texas as a rebuttal witness. He testified that the defendant had no remorse, and was incurably a dangerous person.

The Supreme Court held that the defendant's fifth amendment rights were violated since the psychiatrist's examination of the defendant was done without informing him that under Miranda he had a constitutional right to refuse to talk to the psychiatrist. The defendant had the right to remain silent on a critical issue (his future dangerousness) which the state had the burden of proving beyond a reasonable doubt under the Texas capital statute.

Even though the psychiatrist was appointed by the court to conduct a neutral competency exam, the fifth amendment was violated because the psychiatrist's "role changed and became essentially like that of an agent of the state recounting unwarned statements made in a post-arrest custodial setting."

Further, the sixth amendment was violated becuase he had already been indicted, and had appointed counsel. The psychiatrist's interview was a critical stage of the proceedings. "Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and [the defendant] was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." Id. at 1877

It is plausable that the Smith rationale could be extended to confessions obtained without the accused being informed that he is admitting a capital crime.

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DEATH ROW U.S.A.

AS OF JUNE 20, 1981, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE NAACP LEGAL DEFENSE FUND: 827

Race:

Black	337	(40.75%)
Hispanic	37	(4.47%)
White	446	(53.93%)
Native American	4	(0.48%)
Unknown	1	(0.12%)
Asian	2	(0.24%)

Crime: Homicide

Sex:	Male	818	(98.92%)
	Female	9	(1.08%)

DISPOSITIONS SINCE JULY, 1976

Executions:	4
Suicides:	6
Commutations:	7
Died of natural causes, or killed while under death sentence:	3
Number of Jurisdictions with Capital Punishment Statutes:	37
Number of Jurisdictions with Death Sentences Imposed:	30

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SELFISH REFLECTIONS ON DEATH

As a defense attorney, few experiences can evoke more humility than standing along side another and hearing that others have decided to kill him.

Killing another human being, whether done by the violent act of a defendant or the deliberate decision of 12 jurors or a trial judge, is bonechilling. The legal forethought involved is frightening. A defense attorney's living death at this level requires dealing with hardcore values of life. Literally, life is redefined...by others.

Killing is done with such ease on both sides of the law. Dare we forgive great wrong? Dare we take the risk of hope in another? How dare we care about the outcasts?

Is not the greatest sin of our age the premeditated unwillingness to forgive, to unconditionally love?

Killing gets rid of killers. Oh, how we solve our deepseated problems of life when we kill. He's gone forever. Never more to live.

He slew his brother. ....before me. And part of me dies...never to live again. Kill. Kill on. ...and we survive. Where is our longing for more than survival existance? Kill. Survive.

ED MONAHAN

CAPITAL COMMENTS

On June 9, 1981 the Senate Judicary Committee approved S. 114, which would restore the death penalty for treason, espionage, carrying explosives across the state line, kidnapping, hijacking an airplane, and the attempted or actual assasination of a president. The vote was 13-5 (Against passage: Kennedy, Biden, Mathias, Metzenbam, Leahy).

BRIEF SUMMARIES

Conduct of trial
Closing Arguments

TRIAL COURT CANNOT PROHIBIT COUNSEL FROM ARGUING THE SIGNIFICANCE OF EVIDENCE INTRODUCED OVER OBJECTION, AFTER SUBSEQUENTLY REVERSING ITS RULING REGARDING ADMISSIBILITY

Appellant was charged with murder. At trial he produced evidence of a series of violent encounters between himself and the deceased. Over objection he also produced evidence of violent encounters between the deceased and Appellant's sister, who was the wife of the deceased. Evidence also portrayed Appellant as one who felt great responsibility for the welfare of his sister. Psychological testimony was introduced to explain the significant fear of the deceased created in Appellant's mind as a result of those encounters. Appellant's defense was, in essence, one of self-protection and/or protection of another.

Before closing arguments the trial court concluded that it should have sustained the state's objections to testimony about specific past violent acts of the deceased which had been directed toward Appellant's sister. No corrective action was taken; however, the trial court ordered defense counsel to refrain from incorporating that evidence into his closing argument.

Appellant contends that such a ruling deprived him of his right to present his defense to the jury in that he was unable to argue how Appellant's belief that he had to act in self defense was shaped by his knowledge of these prior incidents. Relying upon Johnson v. Commonwealth, Ky., 609 S.W.2d 360 (1980), Appellant contends that his closing argument was impermissibly restricted even if the evidence was in fact inadmissible.

Samuel Joseph White v. Commonwealth
Brief for Appellant

(Continued, P. 10)

Evidence
Opinion

HEARSAY TESTIMONY BY A POLICE OFFICER THAT OTHER OFFICERS HAD IDENTIFIED APPELLANT FROM SURVEILLANCE PHOTOS AS A ROBBER IN SURVEILLANCE PHOTOS DENIES APPELLANT RIGHT OF CONFRONTATION AND INVADES PROVINCE OF THE JURY

Appellant was charged with several store robberies. Investigating officers testified that they took photographs made by a surveillance camera and displayed them to other officers within the police department who identified Appellant. The officers who made the identification were not produced as witnesses.

Appellant argues that he was denied his right to confront witnesses against him by admission of the above-detailed hearsay testimony. Additionally, the testimony that Appellant was the man in the photos invaded the province of the jury in that the truth or falsity of that statement was a question of fact which should have been reserved for jury determination.

Elsworth Samuels v. Commonwealth
Brief for Appellant

Sentencing
Modification of Sentence

JUDGE MUST EXERCISE DISCRETION BEFORE DECIDING WHETHER TO ACCEPT JURY'S SENTENCE RECOMMENDATION

Upon convictions for robbery, kidnapping and murder a penalty phase hearing was conducted, after which the jury recommended a death sentence for murder. At sentencing the trial court remarked that to disregard the jury recommendation would be placing himself "above the law." Appellant argues that in this Commonwealth the trial judge has a duty to exercise sound discretion in determining sentence, that such was not done, and that, therefore, due process of law was denied. The argument analyzes the unique position the trial court holds in regards to facts not known to juries, concluding that a showing of reasoned discretion is required before a sentencing decision is made.

Brian Keith Moore v. Commonwealth
Brief for Appellant

Defenses
double jeopardy

OFFENSE OF ROBBERY CANNOT BE USED TO ESTABLISH AGGRAVATING CIRCUMSTANCES OF TWO CAPITAL OFFENSES AND AS ELEMENT OF ONE SUCH OFFENSE IN VIEW OF DOUBLE JEOPARDY CLAUSE

Appellant was indicted and convicted of robbery, kidnapping and murder. The robbery was used as an aggravating circumstance for kidnapping and as an aggravating circumstance for murder during the penalty phase of the trial. It was also used to establish an element of the kidnapping charge. Appellant argues that such multiple usage of the robbery offense violates his constitutional guarantees against double jeopardy.

Brian Keith Moore v. Commonwealth
Brief for Appellant

Interference with Judicial Administration
intimidating a witness

THREAT MADE TO ROBBERY VICTIM AT THE TIME OF THE ROBBERY CANNOT BE USED AS BASIS FOR SEPARATE CHARGE OF INTIMIDATING A WITNESS

At scene of alleged robbery, Appellant was said to have told the victim that nobody would be hurt "unless you identify us, and then you will get hurt." Appellant was indicted for robbery and - on the basis of the above statement - one count of intimidating a witness.

(Continued, P. 11)

Appellant argues that such conduct cannot justify a charge of intimidating a witness. Support for Appellant's position is found in Palmore, Instructions To Juries and Brickey, Kentucky Criminal Law.

David Jackman v. Commonwealth Brief for Appellant

Defendant's Rights
Retroactive

LAW REDUCING PENALTY FOR BURGLARY WHICH BECAME EFFECTIVE AFTER OFFENSE AND BEFORE TRIAL SHOULD BE APPLIED UPON DEFENDANT'S REQUEST

Appellant was charged with committing a burglary of a dwelling on June 18, 1981. At that time burglary of a dwelling was first degree burglary and carried a penalty of ten (10) to twenty (20) years imprisonment. Prior to indictment the burglary statutes were amended to make burglary of a dwelling second degree burglary and reducing the penalty to five (5) to ten (10) years imprisonment.

At trial, over objection, Appellant was tried under the old statute. Appellant argues that legislative intent and KRS 446.110 operate to require trial under the new statute when requested by him.

William Orville Capps v. Commonwealth Brief for Appellant

Procedure
capital cases
discovery

COMPLIANCE WITH KRS 532.025 REQUIRES AN AFFIRMATIVE ACT BY THE PROSECUTOR

Appellant stood trial for a capital offense. The prosecutor's first "notice of aggravating circumstances" was ruled inadequate by the trial court because of its general language which did no more than restate the provisions of KRS 532.025. Despite an order for the state to provide a more definite statement of aggravating circumstances, none was forthcoming. The state was still permitted to seek the death penalty on the theory that the only aggravating circumstance was that the murder was committed during the course of a robbery, and that since Appellant was indicted for the robbery he had "constructive notice" of the potential aggravating factor.

Appellant argues that the legislature intended, and basic principles of procedural due process require, an affirmative act by the prosecution in order to satisfy the statute in question. Therefore, since there was none in the instant case, the state should have been precluded from seeking a death sentence.

Brian Keith Moore v. Commonwealth Brief for Appellant

MICHAEL A. WRIGHT

If you want 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 at (502) 564-3754 or by writing to OPA, Third Floor, State Office Building Annex, Frankfort, Kentucky 40601.

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-NOTE-

Protection & Advocacy for the Developmentally Disablec

PENNHURST VS. HALDERMAN
The DD Act Does Not Create Substantive Rights

Pennhurst was a class action on behalf of Terri Lee Halderman and approximately 1,200 mentally retarded residents against the institution known as Pennhurst State School and various officials of the Commonwealth of Pennsylvania. The complaint alleged that conditions at Pennhurst denied plaintiffs due process and equal protection in violation of the 14th amendment, inflicted upon them cruel and unusual punishment in violation of the 8th and 14th amendments, denied them certain rights conferred by Section 504 of the Rehabilitation Act of 1973, 29 USCA§794 (1976) the Developmentally Disabled Assistance and Bill of Rights Act, (DD Act) 42 USCA §§6001-6081 (1976), and certain Pennsylvania statutes dealing with mental health and mental retardation. The complaint urged that Pennhurst be closed and that "community living arrangements" be established for its residents.

The United States District Court for the Eastern District of Pennsylvania held that conditions at Pennhurst were dangerous, unsanitary and inhuman. It ordered Pennhurst closed because the facility could not provide adequate habilitation as mandated by law and further ordered that suitable community living arrangements be provided for all residents. Conditions at Pennhurst were to be improved in the interim and individual treatment plans be developed for each resident.

The United States Court of Appeals, Third Circuit, substantially affirmed the District Court as far as recognizing the rights of developmentally disabled persons but did not agree with the closing of Pennhurst. This Court avoided the Constitutional claims that the District Court relied on and instead rested its holding primarily on the DD Act. It held that the Bill of Rights portion of the DD Act (42 USCA §6010) granted the persons who are developmentally disabled the right to "appropriate treatment, services, and habilitation" in the "setting that is least restrictive of personal liberty." The Court agreed that "deinstitutionalization is the favored approach" to habilitation but did not construe the DD Act to require the closing of large institutions such as Pennhurst. It felt that adequate habilitation and treatment could be provided at Pennhurst if the conditions were improved.

The Supreme Court agreed with the finding of facts by the lower court in that conditions at Pennhurst were not conducive to habilitation. However, beyond that the Supreme Court disagreed with the decision of the Third Circuit and reversed its holding.

In summary, the Court said, "Congress intended to encourage rather than mandate" rights for the disabled. The DD Act's provisions are not clear enough to impose conditions on the states. It should be construed as nothing more than a "typical funding statute" not one that created a bill of rights for disabled persons. Thus, the impact of the case is that the DD Act can no longer be asserted by advocates of developmentally disabled persons as a legal authority which created a substantive right to treatment services and habilitation in the least restrictive environment. Advocates must now resort to reliance upon §504 of the Rehabilitation Act of 1973, state laws and the Constitution as legal bases in support of the position that persons with D.D. have the right to treatment, services and habilitation in the least restrictive environment.

Since the U.S. Supreme Court remanded the Pennhurst case to the Court of Appeals for consideration of the applicability of the Constitution, Section 504 of the Rehabilitation Act and state law to the plaintiffs' claims, the status of these authorities should soon be addressed.

TRIAL TIPS

C. Y. B.

(In this issue of the Advocate, we are honored to feature an article by Kathleen C. King, Clinic Director, Salmon P. Chase College of Law, Northern Kentucky University)

As a delicate and soft spoken person, I entitle this article C.Y.B. Most attorneys probably are more familiar with the initials C.Y.A. A rose is a rose, however, and no matter what initials you use, you need to "cover your behind" when trying a criminal case. Five years from now an attorney working on a federal habeas proceeding will probably be reading the appellate record you made last week. He or she will silently thank or curse you, depending on the manner in which that record was made. So that you may be blessed with more thanks than curses, I have compiled some suggestions for making a good record for appeal.

Attorneys frequently make their most eloquent legal objections and arguments during side bar conferences. Defense counsel and the prosecuting attorney both leave the side bar conference with smiles on their faces, hoping the jury will believe they've just won the judge over to their respective side. Someone probably lost and, unless he's taken the court reporter to the side bar conference, should not be smiling. If an appealable issue is discussed side bar, the court reporter should be there to record the arguments of counsel. If counsel is not sure whether an appealable issue will be discussed, it is best to play it safe. TAKE THE REPORTER WITH YOU.

Maps, charts and other types of demonstrative evidence are frequently used to show the movements of prosecuting witnesses and/or defendants. In the heat of battle, it is not uncommon for attorneys to ask questions like: "Then where did you go?" The witness points to a location on the map and responds, "I ran over next to this building here." The appellate record cannot reflect the area to which the witness has pointed unless counsel affirmatively takes steps to assure that it's included. Three suggestions are made which may assist counsel in overcoming this problem.

First, the use of blackboards is not the best method. Blackboards do not always erase completely and the second witness can see outlines of what the first witness has drawn or marked. This permits the second witness to "adjust" his testimony. If you are forced to use the blackboard, make sure it is completely erased between prosecuting witnesses.

Even more critical is the fact that blackboards cannot readily be made a part of the record on appeal. If you are forced into a situation where a blackboard must be used, be sure to take pictures of the drawings and markings the various witnesses have made. The pictures, then, can be made a part of the record.

The better practice is to have several copies of drawings or maps made in advance of trial which accurately reflect the geographic location which is to be discussed. (This could be a "map" of the inside of a room or building as well as outside locations). If you are attempting to discredit prosecuting witnesses, you may give each one of them a clean map upon which to make their markings. Ask the witness to designate the various locations by placing letters on the drawing you've given them. Do not ask questions like, "Miss Smith, where was the defendant standing when he pointd the gun at his mother?" Instead, instruct the witness to write an "A" on the map to demonstrate where the defendant was standing. The witness can verbally describe the location as well. If the defendant is

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alleged to have made changes in his location at later times, those changes can be demonstrated by having the witness mark "B", "C", "D" and so on, for the various movements. The maps are then introduced into evidence and the appellate courts have a clear picture of what is alleged to have transpired by each witness.

One may argue that this time consuming technique isn't worth the effort. After all, it's not where the defendant was standing at any particular moment. It's a question of whether he shot his mother. Hogwash! If prosecuting witnesses give conflicting testimony, which they do more often than not, the jurors have vivid, concrete evidence in their hands which demonstrates those conflicts. Further, the real issue on many appeals is whether or not error was "harmless". Clear demonstration of conflicting stories by prosecuting witnesses or stories which are logically impossible can persuade appellate courts that an error was not harmless. Chapman v. Claifornia, 386 U.S. 18 (1967). See also RCr 9.26.

During the course of a trial, a judge, prosecutor or witness may make an inappropriate gesture. For example, a judge who shakes his head with an expression of disbelief while your client is testifying is acting improperly. Court reporters seldom, if ever, record head movements and facial expressions of judges. If prejudicial non-verbal communication occurs it is imperative that counsel verbally record that which has happened. While this can be an embarrassing procedure, it can also be very important to your client. It may be that, once you describe what has happened, the judge will deny your allegation on the record. This is not to suggest that a judge would actually lie. Judges are human beings and, like all of us, sometimes make unconscious facial expressions. It may become necessary to place witnesses on the stand who will support your perceptions of what has transpired. Because good relationships with judges and prosecutors are important, the matter should be handled as politely, professionally and privately as possible. The point is, however, that non-verbal communications need to be recorded if it will help your client on appeal--no matter how painful that might be for you.

In order for jurors, judges and attorneys to better visualize that which is being told, it is not uncommon for attorneys to ask witnesses to give comparison. Counsel may ask, "Was he standing as far away as you are from the judge?" Counsel should, after asking such a question, state for the record the approximate distance described by the witness. This is true for descriptions of weights, heights, skin colors and any other comparative descriptions which witnesses give.

There may be occasions when your attempts to introduce exhibits are thwarted. Also, you may find yourself in a position of having a question objected to by opposing counsel. Despite the propriety of your question, the judge sustains the objection. When either of these situations occur, defense counsel must make an offer of proof (also called an avowal). If the offer of proof involves testimony of a witness, defense should conduct an examination of the witness with the court reporter present, but outside the hearing of the jurors. The examination should include all questions and answers one would include if the jurors were present and considering the testimony. See RCr 9.52 and CR 43.10.

What, you ask, should you do if the judge refuses you an opportunity to make an offer of proof? Some attorneys describe the physical evidence or simply state for the record what they expect the testimony to be. This is sometimes impossible to do without angering the judge and/or jury to the point of significantly prejudicing them against you and your client. Counsel may wish to consider filing a post-trial motion (if, in fact, the defendant is found guilty) asking for a new trial. RCr 10.02. Aside from the motion and memorandum, counsel should attach affidavits, reports or whatever else is necessary to describe the offer of proof he or she was attempting to

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make. The advantages of such a move are twofold: First, the judge may have calmed down, talked with other judges and discovered his or her mistake. If this happens, the defendant may receive a new trial. Secondly, if the judge does not grant a new trial, the record will include the evidence that would have been presented had you been given the opportunity. This increases your chances for a reversal (assuming the offer of proof demonstrates the propriety of the evidence and its significant effect). It also decreases the need for a remand for an evidentiary hearing. Avoiding remands for evidentiary hearings saves unnecessary expenditures of time for all concerned. Additionally, your client may get out of jail earlier because his trial can be held after the first appeal instead of waiting for the appeal emanating from the evidentiary hearing!

Another area in which counsel should carefully make a record involves those situations in which it may appear as though he or she has rendered ineffective assistance of counsel. Examples might include counsel's failure to subpoena certain witnesses, the defendant's decision to testify on his own behalf or to remain silent, or a risky strategy decision to which your client has agreed. Attorneys should always be careful to not compromise their client's position or to disclose confidential information in order to make a good record, however.

Counsel for the defendant should, however, talk with the defendant on the record about certain decisions. The conversation might go something like this:

Attorney: Mr. Jones, you and I talked about whether or not you should testify, didn't we?

Mr. Jones: Yes.

Attorney: I told you I didn't think you should testify, didn't I?

Mr. Jones: Yes.

Attorney: And did you decide you would testify, anyway?

Mr. Jones: Yes.

This conversation should occur on the record, but outside the presence of the jury. Then when Mr. Jones takes the stand and testifies that he killed his mother because he was angry when she turned off the television, he hangs himself. You have protected yourself from a later accusation that you rendered ineffective assistance of counsel when you told him to testify. (After sitting in jail a few years, defendants sometimes have distorted memories of what actually transpired).

If a strategy decision is made soon enough before trial, there is frequently no need to converse with your client on the record. Let's say you and your client decide to move the court to order a line-up. You may attach to your motion an affidavit signed by the defendant. The affidavit should outline the risks and indicate that, despite those risks, the defendant wants a line-up conducted. This procedure is particularly important when counsel filed motions which are not "standard" and which have not been extensively reviewed by appellate courts. Although appellate courts have been generally kind to attorneys accused of ineffective assistance of counsel, there is no way of knowing if or how long that trend will continue. Nor is it always possible to know in advance whether your unique strategy will be considered acceptable under current standards. See Wiley v. Sowders, 6th Cir., ___ F.2d ___, (April 24, 1981).

This article is not meant to include an exhaustive listing of all methods used to protect the record. It is, instead, meant to outline some methods and to stimulate the imaginations of defense lawyers. Defending individuals accused of crimes is a creative process. Our creativity must be applied carefully, however, and with the appellate and habeas corpus proceedings in mind.

KATHLEEN C. KING

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EXTREME EMOTIONAL DISTURBANCE, WHAT IS IT AND WHO HAS THE BURDEN OF PROOF

The legislature has included within the definition of murder the absence of extreme emotional disturbance. KRS 507.020. If a reasonable doubt exists as to whether a defendant, who is otherwise guilty, was acting under the influence of extreme emotional disturbance he should not be found guilty of murder but should be found guilty of first degree manslaughter. See Palmore's Kentucky Instructions to Juries, Section 2.02, Instruction 5(a) and Section 1.06, 1979 Supplement; Edmonds v. Commonwealth, Ky., 586 S.W.2s 24, 27 (1979). The concept of extreme emotional disturbance is also contained in the assault statutes. See KRS 508.040. "The purpose of this statute is to provide the same type of mitigating degree-reducing factor in the law of assault as exists in the law of homicide." KRS 508.040, Commentary (1974).

Extreme emotional disturbance is not defined by the penal code. Nor has it been defined by the Supreme Court. In Edmonds, supra, p. 27, the Court said it was "unnecessary to define extreme emotional disturbance" and concluded "we know it when we see it." Thus, the concept of extreme emotional disturbance is still being fleshed out on a case by case basis.

In Ratliff v. Commonwealth, Ky., 567 S.W.2d 307, 309 (1978), the Supreme Court found that the following evidence supported an instruction on the concept of extreme emotional disturbance: two expert psychiatrists testified that Ratliff suffered from schizophrenia - paranoid type; both experts agreed that she was very likely psychotic at the time of the offense and was unable to comprehend what was occurring. Ratliff's own testimony indicated that she was under the delusion that a number of town's people, including the victim, had formed a conspiracy against her; Ratliff had been on medication and had been visiting the local Comprehensive Care Center for some time prior to the offense for treatment of her mental condition. The Supreme Court indicated that "if the foregoing evidence would not permit an objective jury to reasonably doubt the absence of extreme emotional disturbance in this case, there is no use having this element expressed in the Penal Code as a circumstance permitting mitigation." Id.

In Edmonds, supra, p. 26, the Supreme Court indicated that the following evidence was sufficient to submit the issue of extreme emotional disturbance to the jury: Edmonds, a married man, was infatuated with a woman named Betty; he was jealous of Betty and on the day of the offense was laboring under the impression that she was going out with another man; Edmonds had on several occasions been hospitalized for a psychoneurotic condition; prior to the time he shot Betty he had been taking a self-prescribed and self-compounded medication for headaches and nervousness; the medication would sometimes cause Edmonds to "blank out" and act in a bizarre manner. Id.

Bartrug v. Commonwealth, Ky., 568 S.W.2d 925 (1978) involved the issue of the placement of the explanation of the effect of the mitigation element extreme emotional disturbance in the instructions, not the sufficiency of the evidence to support an instruction on that element. Nevertheless, in its opinion the court did point out what the evidence showed and which was apparently sufficient to support an instruction on the element of extreme emotional disturbance: Bartrug had been drinking on the day of the killing but was not "staggering" drunk and could still make rational judgment; he complained to Walker about his neighbors; he then walked up the street where he met Mrs. Thornsberry and an argument ensued; Mrs. Thornsberry struck Bartrug knocking him to the ground; Bartrug said, "I'm going to kill you" and then shot Mrs. Thornsberry four times in the back; Bartrug testified that he had been

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drinking during the day and could not remember much of what transpired; he also stated he did not intend to kill Mrs. Thornsberry but only to scare her. Id.

The cases cited above obviously do not provided a definitive answer to the question of what is extreme emotional disturbance. They were, however, at least a step in that direction. The recent case of Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980) has, unfortunately, injected an air of confusion into this area. Ratliff, supra, appears to stand for the proposition that a mental illness can be an extreme emotional disturbance. Indeed, the only evidence in Ratliff centered around her mental illness--schizophrenia-paranoid type--and the court declared in no uncertain terms that this constituted extreme emotional disturbance. Edmonds, supra also supports the analysis that mental illness can constitute extreme emotional disturbance; part of the evidence which the Court relied on in finding a jury issue on this question was that Edmonds had been hospitalized several times for mental problems and had been taking a self-prescribed and self-concocted medication which affected him mentally. Notwithstanding Ratliff and Edmonds, Gall stated for the first time that "[t]here is much to be said for the proposition that an emotional disturbance inhering in a mental illness is not the kind of an emotional disturbance contemplated by the statute..." [Gall suffered from the same mental illness that Ratliff did--schizophrenia-paranoid type]. Significantly, the Court did not squarely hold that an emotional disturbance inhering in a mental illness is not the kind of emotional disturbance contemplated by the statute. The fact, however, that the Court commended this proposition certainly creates problems for an attorney defending a case where extreme emotional disturbance is an issue. In view of the above-quoted statement from Gall the defense attorney should, if possible, present more than mere mental illness when he expects to rely on the mitigating element of extreme emotional disturbance. For example, perhaps the defendant or a witness to the offense could testify that there was an argument which precipitated the offense; maybe jealousy was involved or maybe the offense resulted from reactions to medicine being taken for the mental illness.

If the defense attorney can show no more than that the defendant suffered from a mental illness at the time of the offense, it can still be argued that the mental illness standing alone constitutes extreme emotional disturbance. As previously indicated, Gall did not squarely hold that an emotional disturbance inhering in a mental illness is not the kind of emotional disturbance contemplated by the statute; Gall merely indicated there was much to be said for that proposition. Thus, Ratliff and Edmonds can be cited for the proposition that a mental illness can constitute an extreme emotional disturbance within the contemplation of the statute. Henley, supra, which was decided after Gall, supports this analysis. There the Court acknowledged that it was evidence of mental illness which led to a finding of extreme emotional disturbance in Ratliff and Edmonds:

> In those cases considered by this Court involving the necessity of an extreme emotional disturbance instruction, we have uniformly required some definitive, nonspeculative evidence. In Ratliff, supra, the instruction was mandated because two psychiatrists testified that the defendant was "very likely" psychotic at the time she committed the homicide. Even in the face of that evidence, three members of this court disagreed, denying this was adequate evidence. In Edmonds supra, there was strong evidence to substantiate the claim of extreme emotional disturbance. The appellant had been hospitalized

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several times for mental problems, and shortly prior to the shooting, he had been taking a self-prescribed and self-concocted medication which affected him mentally.

It may also be possible to distinguish Gall from your case on the basis of the issue in Gall and the evidence relevant to that issue. Gall argued that the trial court should not have instructed on murder because the Commonwealth did not produce any evidence that he did not act under the influence of extreme emotional disturbance. Gall can be explained on the simple basis that the defendant in that case did not produce sufficient evidence to require the Commonwealth to come forward with countervailing evidence. Gall held that the prosecution is not required to come forward with negating evidence unless the evidence raising the issue of extreme emotional disturbance is of such probative force that otherwise the defendant would be entitled as a matter of law to an acquittal on the higher charge (murder). Id., p. 109. The evidence which Gall produced simply was not sufficient to meet this test. Indeed, the Supreme Court found that "considerable doubt" existed that Gall was even afflicted with chronic paranoid schizophrenia on the day of the offense. Id., p. 107. While the Supreme Court did indicate that "we are not entirely convinced that Gall was entitled to any instruction based on the mitigating theory of emotional disturbance." Id., at 110, it did not actually decide that issue because the theory was presented to the jury by an instruction tendered by defense counsel. Id., pp. 109-110.

To properly preserve an issue as to the sufficiency of the evidence vis-a-vis absence of extreme emotional disturbance an objection should be made to any instruction on murder on the ground that the Commonwealth failed to prove the absence of extreme emotional disturbance which is an essential element of murder.

If a murder instruction is given it should require the jury to find that the defendant was not acting under the influence of extreme emotional disturbance. If it does not an objection should be made on this ground. An instruction on first degree manslaughter should also be requested where the Commonwealth has not proved the absence of extreme emotional disturbance, even if the evidence does not affirmatively show the presence of extreme emotional disturbance. When making such a request in this situation, it must be kept in mind that Gall requires the evidence to affirmatively show the presence of extreme emotional disturbance. However, as will be demonstrated below, it

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can be argued that requiring the evidence to affirmatively show the presence of extreme emotional disturbance unconstitutionally shifts the burden of proof to the defense.

The Supreme Court has held repeatedly that the burden of proving the absence of extreme emotional disturbance rests on the Commonwealth. Ratliff, Bartrug, Edmonds and Henley, supra. While stating this in words, the procedural manner in which the court requires the issue to be presented has in actuality shifted the burden of proof to the defense.

Gall states that "[a]n instruction on murder need not require the jury to find that the defendant was not acting under the influence of extreme emotional disturbance unless there is something in the evidence to suggest that he was, thereby affording room for reasonable doubt in that respect." Id., p. 109. To require the evidence to show the presence of extreme emotional disturbance before the concept is instructed upon when the absence of extreme emotional disturbance is an element which the Commonwealth must prove clearly shifts the burden of proof to the defense which violates due process of law. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977); Sandstrom v. Montana, ___ U.S. ___, 99 S.Ct. 2450, ___ L.Ed.2d ___ (1979). The suggestion in Gall that a reasonable doubt can exist only if the evidence shows that the defendant was acting under the influence of an extreme emotional disturbance fails to recognize that a reasonable doubt may arise from the lack of evidence. See 30 Am.Jur.2d Evidence § 1171 at 351 (1967); IC. Torcia, Wharton's Criminal Evidence § 12, at 18 (13th Ed. 1972). The United States Supreme Court in Johnson v. Louisiana, 406 U.S. 356, 360, 92 S.Ct. 1620, 1624, 32 L.Ed.2d 152 (1972) noted that "[n]umerous cases have defined a reasonable doubt as one 'based on reason which arises from the evidence or lack of evidence." See also People v. Davies, 190 N.W.2d 694 (Mich. Ct.App. 1977) and United States v. Turhick, 451 F.2d 333 (8th Cir. 1971). Thus, when the prosecution has the burden of proof on an element and does not produce any evidence a reasonable doubt exists because of the lack of evidence. Gall further states that "[u]nless the evidence raising the issue is of such probative force that otherwise the defendant would be entitled as a matter of law to an acquittal on the higher charge (murder), the prosecution is not required to come forth with negating evidence in order to sustain its burden of proof." Id., p. 109. A more patent shifting of the burden of proof cannot exist. What the Court has said is that unless the defendant proves that he is not guilty of murder because of extreme emotional disturbance the prosecution does not have to do anything with respect to extreme emotional disturbance.

In State v. Muscatello, 387 N.E.2d 627 (Ohio App. 1977), the Court considered the issue of whether the burden of proof was improperly shifted to the defendant by instructions which allowed an aggravated murder charge to be reduced to the lesser offense of voluntary manslaughter upon a finding beyond a reasonable doubt that the defendant had acted under extreme emotional distress. The Court held that the burden of proof was unconstitutionally shifted to the defendant:

> On the surface, this seems to place no burden upon the appellant to prove anything. The requirement that emotional stress be proved beyond a reasonable doubt by anyone, before the jury may reduce a homicide charge to voluntary manslaughter, in effect, however, places the burden of proof upon the defendant even though the instructions to the jury do not specifically impose that burden upon him. In a case such as the present one, where the defendant is originally charged with aggravated murder or

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murder the State will strive to prove the elements of the highest offense and will seek to disprove the mitigating circumstance of emotional stress.

Since it is the defendant who will benefit from the establishment of that mitigating circumstance, by receiving a lesser punishment, only he will endeavor to convince the trier of fact that he acted under the influence of that circumstance when he committed the homicide. Any burden of proof imposed relative to this circumstance will in reality fall upon the defendant. The effect of the instruction given in the present case is no different than if the jury had been instructed that the appellant had the burden of proving emotional stress beyond a reasonable doubt. Id., pp. 640-641.

In State v. Dault, Wash. App., 578 P.2d 43, 46 (1978), the trial court instructed the jury that every killing of a human is presumed in law to be without excuse or justification and that any matter of excuse or justification that may exist for such killing is a matter of defense and the state is not required to prove to you affirmatively that no such excuse or justification existed. In reversing because the instructions shifted the burden of proof to the defense the Court observed:

Both the first and second-degree murder statutes in effect when this killing occurred contained the following language, "the killing of a human being, unless it is excusable or justifiable," is first- or second-degree murder, depending upon the balance of the respective statutes of the language "unless it is excusable or justifiable" indicates that the lack of excuse or justification is an element of both first and second-degree murder. See State v. Roberts, supra, 88 Wash.2d at 345, 562 P.2d 1259.

Instruction No. 20 allows one of the elements of murder (absence of excuse or justification of the homicide) to be presumed and states that, "the state is not required to prove to you affirmatively that no such excuse or justification existed." Thus, the instruction shifts the burden of proof for this element from the state to defendant. This is an improper shifting of the burden of proof and requires reversal. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); State v. Roberts, supra; State v. Kroll, supra; cf. State v. McDonald, 89 Wash. 2d 256, 571 P.2d 930 (1977). As noted in Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 2330, 53 L.Ed.2d 281 (1977):

Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense... Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

Therefore, we conclude that the giving of instruction No. 20 constituted an impermissible shifting of the burden of proof to the defendants, a denial of due process, and reversible error as to both defendants.

It is of crucial significance that the legislature has included the absence of extreme emotional disturbance within the definition of murder. Addressing

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a similar issue in Holloway v. McElroy, 632 F.2d 605, 635 (5th Cir. 1980), the Court observed:

> In short, in this case, unlike Patterson, it is emphatically not "plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances"--here, the absence of unlawfulness. Rather, it seems to us that unlawfulness--including the absence of self-defense--is an essential element of the offense. If Georgia includes in its murder and manslaughter laws unlawfulness as an element of those crimes while at the same time Georgia courts require the defendant to prove lawfulness by virtue of self-defense, that construction makes the statutes' operation run contrary to the constitution under Winship and Mullaney. Had the Georgia Supreme Court plainly construed its murder and manslaughter statutes so as to delete the unlawfulness requirement as an element of the crime, at least insofar as unlawfulness is inconsistent with the justification of self-defense, or had the Georgia legislature drafted its statutes to the same end, we might be compelled to a different result. But for us to interpret their actions to date as having already done so would be straining beyond any reasonable bounds of legislative or judicial interpretation. (Emphasis added.)

Holloway was followed in Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981).

Any time a trial court declines to instruct on extreme emotional disturbance because the evidence does not show its presence or because the test set forth in Gall, supra was not met, an objection should be made on the ground that the burden of proof on an essential element of the offense is being shifted to the defense, thereby violating due process of law under the United States Constitution.

Footnote

[1]Subsequent to Gall, the Court decided Paul Benjamin Henley v. Commonwealth, Ky., ___ S.W.2d ___ (decided July 7, 1981), which held that the very nature of a homicide itself is not as a matter of law standing by itself sufficient evidence to authorize an instruction on extreme emotional disturbance.

RODNEY McDANIEL

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SYNOPSIS OF SIGNIFICANT AMENDMENTS TO RULES OF CRIMINAL PROCEDURE EFFECTIVE 9-1-81

The following is a synopsis of those Amendments to the Rules of Criminal procedures which the writer considers to be significant. They are effective September 1, 1981.

RCr 2.14 -- This rule is amended to change the requirement that a person has the right to "make immediate communications" to arrange for an attorney. The new statement is that a person has the right to make communication "as soon as practicable."

RCr 3.02 -- This rule has been amended to delete the statement that "only in exceptional cases should the delay [in being taken before a judge] exceed twelve (12) hours." The rule now reads that one arrested should be taken before a judge "without unnecessary delay."

RCr 3.05 -- This is a new rule which replaces 3.08. In paragraph (2) the new rule leaves out the requirement of a fine of more than $500, but places the burden on the defendant of "first establishing his indigency."

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RCr 3.10 -- New paragraph (2) of this rule requires that a person held in custody who does not receive a preliminary hearing within ten (10) days following his initial appearance shall be discharged from custody. If the person is not in custody then the hearing must be within twenty (20) days. The Commonwealth may then proceed on the charge by indictment only. The defendant may agree to an extension of the time limits or the Court may extend the time in "extraordinary circumstances" or by a showing "that delay is indispensable to the interests of justice."

RCr 3.14 -- Paragraph (2) of this rule allows a finding of probable cause to be based on hearsay evidence "in whole or in part." Paragraph (3) specifies that objections to evidence on the ground that it was illegally obtained are not to be made at the preliminary hearing and that motions to suppress must be made in the trial court. Thus a person may be held in jail to await the action of the grand jury and trial court based on evidence that will not be admitted at a future trial.

RCr 4.04 -- The amendment recognizes that a judge may release a person on the four (4) recognized methods of pretrial release or any combination of them. In the past the use of combinations was questionable.

RCr 4.34(5) -- The amendment makes it clear that bail bond secured by real estate must involve the "unencumbered equity" of the real estate.

RCr 4.42(6) -- This addition of another paragraph relating to change of circumstances makes it clear that the return of an indictment, by itself, shall not be treated as a material change of circumstance.

RCr 4.43 -- This is a new rule codifying Abraham v. Commonwealth, Ky. App. 565 S.W.2d 152 (1977) relating to the method for appealing bail determinations by the Circuit Court. Paragraph (2) of the rule reaffirms that habeas corpus is the proper method for seeking Circuit Court review of District Court actions relating to bail.

RCr 5.08 -- A very slight amendment require the Commonwealth Attorney to inform the grand jury if a defendant notifies him in writing that he desires to present evidence before the grand jury. The jury is still under no duty to hear the evidence.

RCr 5.16 -- This, essentially new, rule requires the Commonwealth Attorney to see that all testimony before the grand jury is recorded, either by shorthand or by mechanical device. Paragraph (2) establishes dismissal of the indictment as the remedy for failure to have the record made unless the Commonwealth can show good cause. The rule also says that failure of a recording device shall constitute good cause. [The Rose Mary Woods' exception.]

RCr 5.18 -- The amendment will allow "a parent, guardian, or custodian of a minor witness or other person under disability" into the grand jury room, if needed.

RCr 5.22 -- The rule continues the requirement that a person held in custody, who is not indicted by the grand jury, shall be released upon the adjournment of the grand jury. But, if the grand jury, in writing, refers the matter to the next grand jury then the person may be held to the next grand jury. In no case may a person be held longer than 60 days without having been indicted.

RCr 6.02 -- The amendment allows a defendant to waive indictment in writing and have the matter proceed by information.

RCr 6.10 -- A substitute paragraph (4) abolishes the requirement that indictments end with the phrase "against the peace and dignity of the Commonwealth."

RCr 7.04 -- This rule is abolished.

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RCr 7.10 -- A new paragraph (3) is added which allows the taking of a deposition by agreement of the parties.

RCr 7.26 -- This amendment requires production of a statement by a defendant, whether in writing or recording, before the witness is examined by the Commonwealth in order that the defense may use it in preparing for cross-examination. Paragraph (2) remains essentially the same and paragraph (3) is entirely deleted.

RCr 8.22 -- The amendment specifies that no motion raising defenses or objections shall be deferred if that deferral adversely affects a party's right to appeal. Amendment also requires a verbatim record of all proceedings of the hearing including findings of fact and conclusions of law that have been made orally.

RCr 8.28 -- A new paragraph (2) allows the court to exclude from the courtroom any defendant "who persists in engaging in disruptive conduct after being warned by the court that such conduct will cause him to be removed..." A new paragraph (5) forbids appearance in court of a defendant in the "distinctive clothing of a prisoner." Further the jury is not to see the defendant in shackles or other devices for physical restraint "except for good cause shown."

RCr 9.26 -- Trial by jury may be waived with approval of the court and the consent of the Commonwealth. If a case is tried without a jury the Court must make a general finding, and, on request, made before the general finding, "find the facts specifically."

RCr 9.64 -- The amendment changes the time when the Commonwealth may dismiss the indictment. It now must be done "prior to the swearing of a jury," or in a non-jury case prior to the swearing of the first witness. Prior to the amendment the indictment could be dismissed up to the time the case was submitted to the jury.

RCr 9.72 -- The amendment allows jurors to take notes and take them to the jury room.

RCr 11.02 -- An addition to paragraph (1) merely brings into the rule the requirements of KRS 532.050 relating to presentence investigation.

RCr 11.42 -- In paragraph (1) the phrase "or a defendant on probation, parole or conditional discharge" is added after the word "sentence" before "who claims...." This makes it clear that persons on probation, parole or conditional discharge may file motions under RCr 11.42. The amendment also abolishes paragraph (9).

RCr 12.78 -- The amendment to paragraph (1) adds the phrase "notwithstanding that service of the sentence has commenced" after the word "appeal." This amendment makes it clear that a person already in the penitentiary may be allowed bail pending his appeal.

BILL AYER

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EDITOR'S NOTE

June, 1981, The Advocate had a fine article in it on "Obtaining Expert Witnesses." The only problem is I failed to identify the authors. Bill Radigan and Neil Walker wrote the article, and they are to be commended for their excellent work... The July 23, 1981 edition of the LEXINGTON LEADER reported that the new juvenile code will cost $6.4 million to $9.3 million for facilities and services. In contrast, the OPA has repeatedly requested $6.5 to $7 million to run a comprehensive public defender system, and has been turned down by the legislature. Very interesting contrast between funding for a new and much stricter way of treating juveniles, and for the delivery of services to indigents accused of crimes...

LOCAL ASSISTANCE

Need legal or administrative help? Refer to the map below for the name and number of the attorney who supervises the public defender system in your area.

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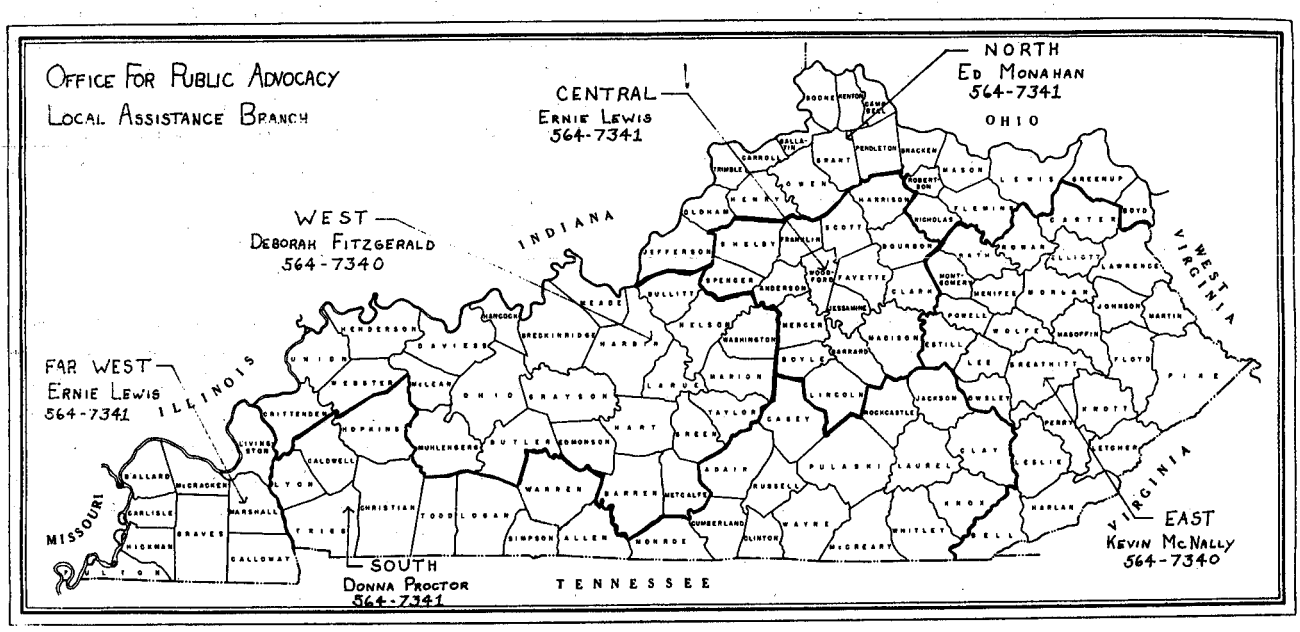

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