The Advocate

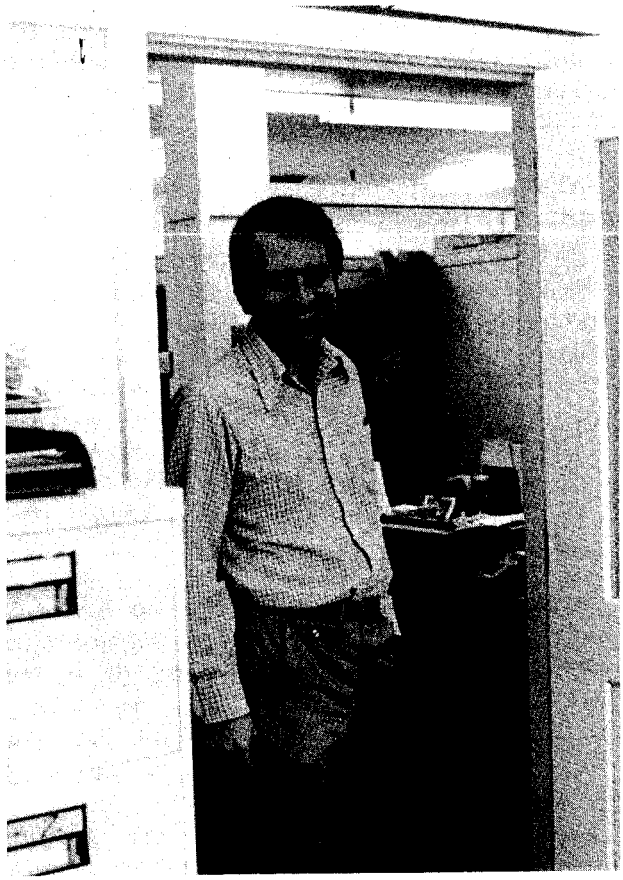
Vol. 4, No. 3 A bi-monthly publication of the Office for Public Advocacy April, 1982

10TH ANNUAL PUBLIC DEFENDER TRAINING SEMINAR

The 10th Annual Public Defender Training Seminar will be conducted on May 9, 10 and 11, 1982 at the Ramada Inn-Hurstbourne in Louisville. The format for the seminar this year is like that we have used in the past five years. Registration will be held on Sunday afternoon with the first substantive session beginning at 7:00 p.m. Sunday.

(See Seminar, P. 2)

INSIDE



THE ADVOCATE FEATURES

Ed Monahan has a home he rarely visits and friends he seldom sees unless they work for the OPA. The after-hours security guard at the State Office Building Annex is his close companion. This month The Advocate features Ed, who has guided the Local Assistance Branch during its first 18 months and who chairs the OPA Death Penalty Task Force.

(See Monahan, P. 2)

(Seminar, Continued from P. 1)

Topics for the seminar include communication skills in the courtroom, sentencing alternatives, the use of the "Psychiatric Autopsy" in the criminal case, blood tests and mistakes in the crime lab, ethics and the criminal defense attorney, and discovery in the criminal case. As in the past there will be presentations on the representation of clients charged with capital offenses and the representation of clients with developmental disabilities.

We believe that the Annual Public Defender Training Seminar has become one of the more beneficial continuing legal education programs. You will be eligible to receive CLE credits from the Kentucky Bar Association for this program.

The cost for this year will be $60 per attorney. For attorneys participating in a local public advocacy program the fee includes registration, breakfast and lunch on Monday and Tuesday and overnight lodging for Sunday and Monday night. For attorneys not in a local public advocacy program the fee of $60 only includes registration and the meals.

This seminar is scheduled during the Judicial Conference and just prior to the KBA Annual Convention with a view toward minimizing conflicts with trial dates. We hope that you will be able to attend. If you have not received a mailing by April 5, 1982, please call (502) 564-5213 and ask for registration information.

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(Monahan, Continued from P. 1)

Ed is the product of 19 years of Catholic Schooling, culminating with a B.A. in Mathematics from Thomas More College in 1973 and a J.D. from Catholic University in 1976. A law review article on the right to a pretrial lineup was one of his outstanding accomplishments as a student. Ed's legal career has been devoted to the representation of indigent defendants. He is dedicated to the eventual abolition of the death penalty and has spent countless hours advising other attorneys involved in capital cases and handling cases himself. The Death Penalty Task Force has been active under his direction. Ed has also been Chief of the Local Assistance Branch during its fledgling period and has focused on improved and expanded training as well as better local defender services.

The little free time Ed has is spent with family and friends for whom he always has a sympathetic ear and a reassuring word. His dry wit is a delight. Ed is very active in the Catholic Church and co-ordinates his local church's religious education program for students who attend non-Catholic schools. Birthright, an organization which assists pregnant women who wish to give birth but are facing problems, also commands a substantial portion of his time.

Ed's most unusual accomplishment is spending an entire month out of the last year in individual voir dire. That has had to suffice as his "hobby".

The public defender system owes Ed a debt of gratitude for giving unselfishly of his time and energy over the years. Thanks, Ed, from all of us.

GAIL ROBINSON

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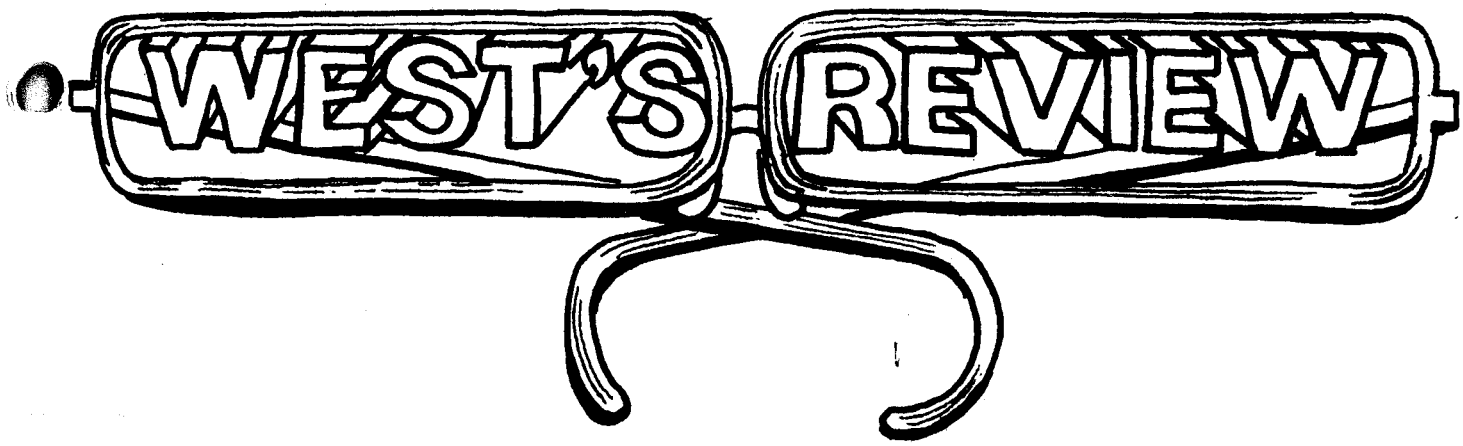

Several appellate decisions for the months of January and February merit discussion.

In Meredith v. Commonwealth, Ky. App., 29 K.L.S. 2 at 1 (January 15, 1982), the Court of Appeals considered what evidence is sufficient to establish the "physical injury" element of second degree assault. The defendant, a disgruntled used car buyer, had flourished a knife at the salesman victim resulting in a "superficial wound" to the victim's hand. On appeal, the defendant argued that the superficial wound did not constitute a "physical injury" as defined by KRS 500.080(13), which provides that: "'Physical injury' means substantial physical pain or any impairment of physical condition." The Court of Appeals held that the superficial wound constitutes a "physical injury" as defined by the statute because "the requirements of KRS 508.020(1)(b) are met when any injury results." (Emphasis by the Court).

Another question of statutory construction was before the Court of Appeals in Cooper v. Commonwealth, Ky.App., 29 K.L.S. 2 at 5 (February 5, 1982). The defendant in Cooper had been convicted of promoting contraband in the first degree, a Class D felony, based on his possession of marijuana while incarcerated as an inmate at the reformatory. Conviction of the charged offense required a finding that the defendant possessed "dangerous contraband" as opposed to mere "contraband," such as liquor. If the defendant had possessed only "contraband" he could have been convicted only of promoting contraband in the second degree, a Class A misdemeanor. The defendant argued that as a matter of law marijuana cannot constitute "dangerous contraband." KRS 520.010(3) defines dangerous contraband as "contraband which is capable of such use as may endanger the safety or security of a detention facility or persons therein." The Court of Appeals, relying in part on the commentary to KRS 520.010, agreed that marijuana, like alcohol, was not "dangerous contraband." "There was no evidence that marijuana... could be used in any way to facilitate an escape or to cause damage or physical injury..." Id., at 6. Interestingly, another panel of the Court of Appeals reached a contrary conclusion in an unpublished opinion issued in Sampson v. Commonwealth, Memo., (February 5, 1982). The Court in Sampson specifically declined to follow the holding of Cooper and stated "[w]e hold that the issue of whether particular contraband is dangerous is one of fact for the jury under proper instructions from the court." Discretionary review is being sought in both cases to resolve this conflict.

(Continued, P. 4)

The Kentucky Supreme Court has reversed the second degree assault conviction of Carl Engler. Engler v. Commonwealth, Ky., 29 K.L.S. 2 at 13 (February 16, 1982). The defendant stabbed two victims during a fracas. According to the defendant's testimony, the victims chased the defendant's brother with a towchain and hook and threatened the defendant with a knife. The defendant testified that he stabbed the victims because he was "scared." The trial court refused a request to instruct the jury on assault under extreme emotional disturbance, reasoning that the defendant's testimony supported a theory that he acted in self-protection rather than under an extreme emotional disturbance. The Supreme Court held that the jury should have been instructed on the effect of extreme emotional disturbance. "[U]nder the evidence in this case it would not have been unreasonable for a juror to believe beyond a reasonable doubt that Carl was not acting in self-protection or in defense of his brother, yet still believe that he was acting in a state of 'extreme emotional disturbance for which there was a reasonable justification or excuse under the circumstances as he believed them to be.'"

In Creamer v. Commonwealth, Ky., 29 K.L.S. 2 at 16 (February 16, 1982), the Kentucky Supreme Court reversed another second degree assault conviction based on the trial court's failure to instruct the jury on assault under extreme emotional disturbance. The victim of the assault was the defendant's mother whom he attacked after she removed his dog from his bed. The defendant was initially found incompetent to stand trial based on a psychiatric diagnosis of him as suffering from "paranoid reaction." The defendant was committed to a mental institution and, seven months later, was found competent. The Kentucky Supreme Court held that two separate factors must be present to justify an instruction on assault under exteme emotional disturbance. "First, there must be evidence of extreme emotional disturbance, and, second, there must be a reasonable justification or excuse under the circumstances as the accused believes them to be." The Court then found that the evidence entitled the defendant to the requested instruction.

The Court was called on in Schooley v. Commonwealth, Ky., 29 K.L.S. 2 at 13 (February 16, 1982) to elucidate the law governing an accused's right to disclosure of an informant's identity. The defendant in Schooley was arrested after an informant tipped off the police that someone had just broken into a Western Auto Store and was leaving it in a maroon car. Evidence concerning the informant's tip was not introduced at trial and the defendant's request that the name of the informant be disclosed to him was denied. The Court held that Schooley was not entitled to the informant's name. The Court distinguished the facts in Schooley's case from those in Burks v. Commonwealth, Ky., 471 S.W.2d 298 (1971), in which the Court held that an informant's identity should have been disclosed to the defense. The informant in Burks was a party to a drug transaction which formed the basis for the charge against the defendant. The Court found that under those circumstances the informant was not only an informant but also a witness, whose identity the Commonwealth could not withhold. By contrast, the information supplied by the informant in Schooley was never a part of the Commonwealth's case. The Court, citing

Continued, P. 5

Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), stated "[W]e are of the opinion that disclosure is not required, that disclosure of the informant was not necessary to a fair determination of guilt or innocence, nor would disclosure have been helpful to the defendant." Id., at 14.

Two significant decisions were issued by the United States Supreme Court during the two months under review.

The Court vacated the death sentence of Monty Eddings, who was convicted of the murder of a police officer committed when he was sixteen years old. Eddings v. Oklahoma, 30 CrL 3047 (January 20, 1982). The Court granted certiorari on the question of whether the constitution permits the imposition of the death penalty on a juvenile offender. However, the majority opinion does not address that issue. The Court instead vacated Eddings' death sentence and remanded for resentencing because the trial court had declined to consider Eddings' "unhappy upbringing and emotional disturbance" as mitigating factors in reaching its sentencing decision. The Court has previously held in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) that due process requires that the sentencing authority in a death case "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id., at 604. Chief Justice Burger and Justices White, Blackmun, and Rehnquist filed a dissenting opinion stating that they would have limited the Court's opinion to the question of whether the death sentence may be constitutionally imposed on a juvenile and would have affirmed Eddings' death sentence. The majority, however, while not reaching that question, found that in the case of a juvenile offender evidence of "a turbulent family history... and extreme emotional disturbance is particularly relevant." The majority clearly seem to suggest that, at a minimum, the presence of mitigating factors must be weighed more heavily when sentencing a juvenile.

In Smith v. Phillips, 30 CrL 3055 (January 27, 1982), the Court held that a prosecutor's failure to disclose to the defense that a juror had filed a job application with the prosecutor's office did not violate due process. The prosecutor revealed this information to the defendant after his conviction. After a hearing the trial court denied a defense motion for a new trial. The Supreme Court refused to impute bias to the juror in question, instead holding that the defendant's due process rights were observed when the trial court conducted a hearing on the matter "with all interested parties permitted to participate." Id., at 3057. The Court also held that the defendant was not denied due process of law by the prosecutor's "misconduct" in failing to disclose the information, inasmuch as the juror's conduct did not so seriously compromise his ability to render a fair verdict that a new trial was required.

LINDA WEST

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SUPREME COURT RULES DISMISSAL OF "MIXED PETITIONS" REQUIRED

On March 3, Justice Sandra O'Connor delivered an opinion of the United States Supreme Court reversing a decision by the Sixth Circuit in Rose v. Lundy, 30 CrL 3084 (March 3, 1982). Stating that "a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute" the Court held that a District Court must dismiss any petition for writ of habeas corpus containing claims that have not been exhausted in the state court. Id. at 3085. This now leaves the petitioner with a choice of returning to the state for exhaustion or amending or resubmitting the petition to include only exhausted claims. Until this case, a majority of federal Courts of Appeals had permitted review of at least the exhausted claims.

In Rose v. Lundy, the petitioner filed his petition with the federal District Court alleging four grounds for relief, only two of which had been exhausted. However, the District Court concluded that, "In assessing the atmosphere of the cause taken as a whole, these items may be referred to collaterally." Id., at 3085. In rendering a decision in the petitioner's favor, the District Court accordingly considered several instances of prosecutorial misconduct that had never been challenged in state court, or even raised in the petition. The Sixth Circuit affirmed, specifically rejecting an argument by the state that the petition should have been dismissed because it included both exhausted and unexhausted claims.

The Supreme Court indicated that exhaustion has been a requirement for issues in habeas corpus petitions since Ex Parte Royall, 117 U.S. 241, 251 (1886). Additionally, Congress codified the exhaustion doctrine in 28 U.S.C. § 2254 in 1948. However, neither case nor statutory law provided assistance to the Court in a determining the "mixed petition" issue. The problem was never addressed in previous Supreme Court cases nor was it apparently even contemplated by Congress when enacting the habeas corpus statutes. Therefore, the Court analyzed the policy underlying the statutory provisions to determine their scope.

The Court placed great emphasis on the doctrine of comity. It believed that state courts should have the opportunity to correct constitutional violations before federal courts become involved. But the Court also considered practical advantages for requiring complete exhaustion. State courts would become increasingly familiar with and hospitable toward federal constitutional issues and full exhaustion would create a more complete record to aid the federal courts in review. Dismissal would also relieve the District Court of the task of deciding when claims are related and would reduce the temptation to consider any unexhausted claims.

The Court concluded that under its holding and Rule 9(b) governing habeas petitions, petitioners who decide to amend a petition to delete unexhausted claims rather than return to state court to exhaust all claims, will risk forfeiting future consideration of unexhausted claims in federal court. In other words, although some issues might be appropriate for consideration by the federal court, this conclusion will to the prudent petitioner necessitate a return to the state court with unexhausted claims before those that have been exhausted can be pursued in federal court.

(Continued, P. 7)

Four members of the court rejected this approach. Justice Brennan, with whom Justice Marshall joined, dissented on this issue while concurring in all other aspects. First, Justice Brennan indicated that the issue of successive applications was not presented to the Court and should not have been addressed. But since the issue was addressed, Brennan considered it at length. Relying on legislative history and Sanders v. United States, 373 U.S. 1(1973), he concluded that dismissal of a second petition should result only if there has been an abuse of the writ. This, according to Brennan, would occur only when the petitioner could have included all claims in the first petition but "knowingly and deliberately chose not to do so in order to get more than 'one bite at the apple'." Rose v. Lundy, supra, at 3091. Brennan believed the plurality's interpretation would allow dismissal in a broader class of cases, including those in which a petitioner had honestly attempted to present unexhausted claims but had been rejected. Only in unusual factual circumstances truly suggesting abuse would Brennan allow a second petition containing previously unexhausted claims to be dismissed.

Justices White and Blackmun concurred with Brennan in his dissent on the successive petition issue. Also, both disagreed with the Court's conclusion that a "mixed petition" must always be dismissed in its entirety. White and Blackmun indicated that the district judge can not rule on unexhausted issues and should dismiss them but that exhausted claims should be ruled on unless they are intertwined with those that must be dismissed.

Because Justice Stevens believed the court was involved in an "adventure in unnecessary lawmaking" he dissented. Id., at 3092. Stevens would allow district judges to exercise discretion to determine whether the presence of claims that are unexhausted render it inappropriate to consider the merits of exhausted ones. Stevens also rejected the Court's "mechanical rule" as an arbitrary denial of the district judges' authority to manage their calendars.

Finally, he suggested that the Court's ruling, as well as a number of other procedural barriers to habeas relief, might have been avoided if federal courts had reserved habeas for cases of true fundamental unfairness.

Perhaps the Supreme Court by requiring the dismissal of "mixed petitions" believes that District Court caseloads will be reduced. But this conclusion is probably inaccurate due to the Court's vague indication that successive petitions containing issues deleted on the initial petition might be dismissed. Whether this approach constitutes an "abuse" of the writ will have to await further complicated and time consuming litigation.

Justice Blackmun's conclusion that the new rule will operate as a trap for the uneducated pro se petitioner is probably well founded. Even if a petitioner mistakenly includes unexhausted as well as exhausted claims, the petitioner will have the difficult choice of evaluating the issues to determine whether it is worthwhile to abandon the unexhausted issues and proceed or delay the petition in its entirety. The former choice may forever foreclose from federal consideration the unexhausted claims; the latter may delay federal consideration of meritorious issues to await exhaustion of weaker or even frivolous issues. Before proceeding, the pro se petitioner will need not only knowledge of the exhaustion doctrine but also the ability to weigh the relative merits of the issues he wishes to present. Justice Blackmun's suggestion that the Court has decided to "throw the baby out with the bathwater" seems to be an accurate assessment of the ruling. Id., at 3088.

RANDY WHEELER

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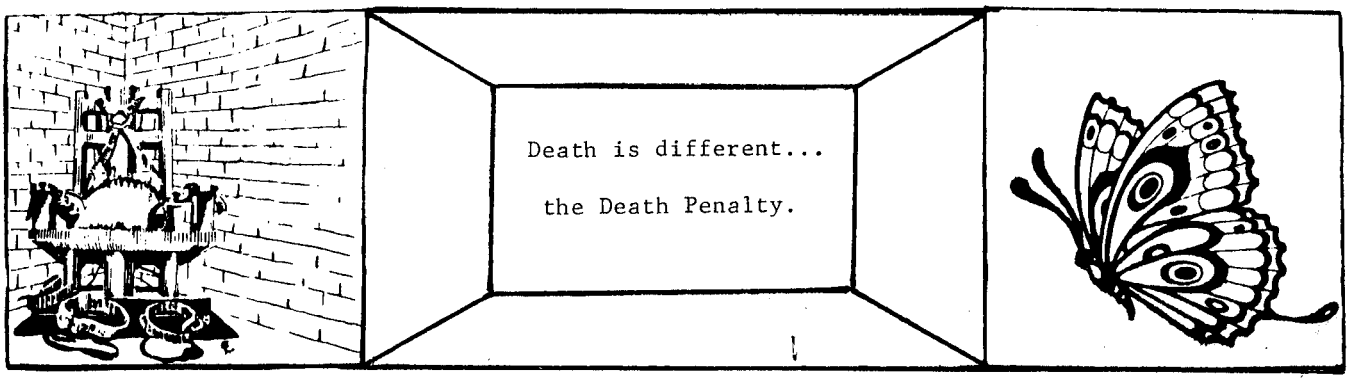

CAPITAL COMMENTS
Killing him would not be right

Killing is not right no matter which side of the law it's done on. But what about the victim and the victim's family? Aren't we defense attorneys callous towards their feelings and their unbearable agony? Isn't it inhuman to expect a victim's family to have anything other than a desire for revenge? After all the clients we represent in capital cases often have irrevocably ruined the lives of the victim's family.

It may be beyond normal human emotions to want something other than revenge for someone who has killed a loved one but there are those that do not want the infliction of unkind punishment.

Coretta Scott King: "Although both my husband and mother-in-law were murdered, I refuse to accept the cynical notion that their killers deserve the death penalty. There are many reasons why I have taken this position, but first and foremost is the clear message brought down from God, 'Thou shall not kill...'"

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

EDITORIAL COMMENT

The editors of the New York Times commenting on the Supreme Court's reversal of a juvenile's death sentence in Eddings v. Oklahoma:

> The Supreme Court continues its earnest, thus far unavailing search for humane ways to mete out capital punishment. Last week's decision in the case of Eddings v. Oklahoma dramatized the uneven progress, and perhaps the futility, of that quest.
>
> . . . .
>
> On such fine points and close reasoning pivot large issues of justice and humanity. The Supreme Court undergoes this painful process because most of its members appreciate that death is different. The very care these cases now require suggests that the court may have to judge every one. Would it not be better to strike down all death penalties than struggle for such fine distinctions?

(Continued, P. 9)

The Los Angeles Times similarly editorialized:

> In theory, and if its laws are an accurate indication, this society approves of capital punishment. In reality, this society draws back from imposing that punishment with a rigorous consistency.
>
> . . . .
>
> We believe that it is morally wrong for the state to take a life, that official killing in fact brutalizes society and fosters more violence and that, weighing all factors involved, incarceration is more effective than capital punishment as a defense against violent offenders.
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> We agree with Dr. Leon Eisenberg of Harvard medical school, who summed up the issue this way, "Capital punishment is a treatment indistinguishable from the disease for which it is recommended."

ED MONAHAN

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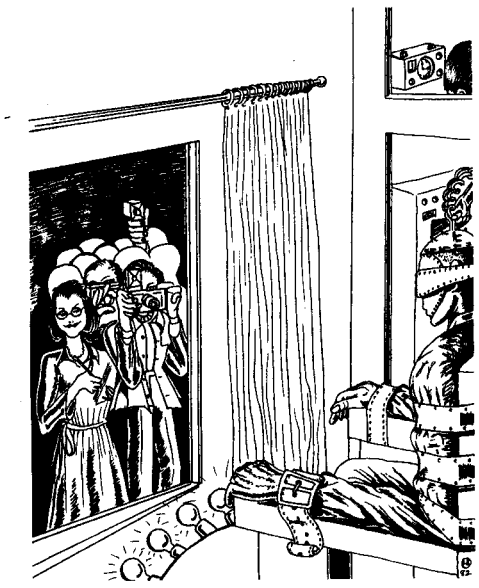

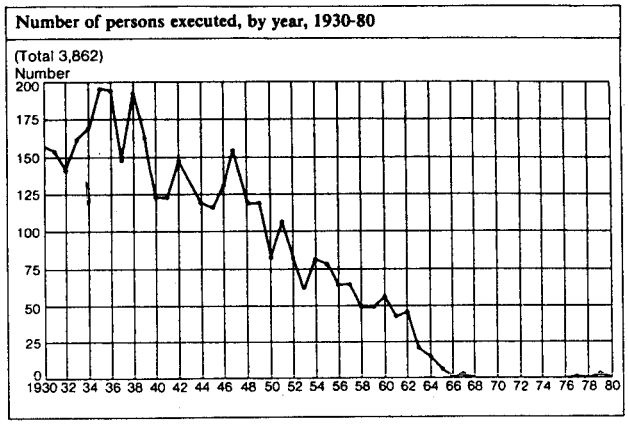

DEATH ROW U.S.A.

TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE LEGAL DEFENSE FUND: 956

Race:

Black	398	(41.63%)
White	502	(52.51%)
Hispanic	47	(4.92%)
Native American	7	(0.73%)
Asian	2	(0.21%)
Unknown	0	(0.21%)

Crime: Homicide

Sex:	Male	945	(98.85%)
	Female	11	(1.15%)

DISPOSITIONS SINCE JANUARY 1, 1973

Executions: 4
Suicides: 8
Commutations: 20
Died of natural causes, or killed while under death sentence: 4

Death Sentences vacated as unconstitutional: 549

Convictions reversed or sentences vacated on other grounds: 373

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TRIAL TIPS

INVOLUNTARY COMMITMENT
Challenging the Experts: Predictions of Dangerousness

Before an individual may be involuntarily hospitalized under KRS Chapter 202A, four criteria must be proven:

(1) that the person is mentally ill;

(2) that, because of the mental illness, the person is an immediate danger to himself or others;

(3) that the person can reasonably benefit from treatment; and

(4) that hospitalization is the least restrictive mode of treatment.

The witnesses who testify as to these criteria are most generally the psychiatrists appointed to examine the individual. In nearly every case, the psychiatrist will give his "expert" opinion which is accepted, without challenge, by judge, jury, attorneys, and laymen alike.

Admittedly, in a majority of cases, it might prove to be foolish to challenge a psychiatrist's diagnosis or recommended treatment. After all, this is the field of expertise of the psychiatrist. However, in preparing to defend a client at an involuntary commitment hearing, the defense attorney should be prepared to strenuously challenge any testimony as to dangerousness.

The cross-examination on dangerousness can take two approaches: challenging the qualifications of the witness to reach conclusions on dangerousness; and challenging the evidence in support of that conclusion.

I - challenging the "expert"

Initially, one erroneous assumption must be eliminated -- a diagnosis of mental illness does NOT in itself indicate that the person is or was dangerous. In fact, empirical studies have shown there is little or no correlation between mental illness and actual dangerous activity. The mentally ill are actually less often arrested than the general population. Rubin, "Prediction of Dangerousness in Mentally Ill Criminals," 27 Arch. Gen.Psych. 397 (1972). Of more importance, however, to the challenge to "expert" opinions on dangerousness is the fact psychiatrists are poorly equipped to predict when a patient is dangerous to himself or others. Nothing in the usual training or education of a psychiatrist equips him to predict dangerousness with a higher degree of reliability than any other individuals. In fact, a number of studies have indicated that laymen are as qualified as psychiatrists to give reliable opinions on dangerousness. See: Ziskin, Coping with Psychiatric and Psychological Testimony (2nd Ed. 1975); Ennis and Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif.L.Rev. 693 (1974).

If there was any question on this, it has been resolved by the American Psychiatric Association. In the Supreme Court case of Estelle v. Smith, ___U.S. ___, 101 S.Ct. 1866, ___L.Ed. 2d ___ (1981), the Association filed an amicus curiae brief which, in part, discussed the findings

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of the 1974 APA Task Force on Clinical Aspects of the Violent Individual.

According to the Task Force, "the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence is unproved." Id. at 30. "'Dangerousness' is neither a psychiatric nor a medical diagnosis, but involves issues of legal judgment and definition, as well as issues of social policy. Psychiatric expertise in the prediction of 'dangerousness' is not established and clinicians should avoid 'conclusory' judgments in this regard." Id. at 33.

2 - challenging the foundation

Because of this question of the qualifications of an expert to give an opinion on dangerousness, questions are often raised as to the factual basis of the opinion. A simple diagnosis is not sufficient; there must be demonstratable facts and circumstances which indicate dangerousness.

For this reason, a number of jurisdictions now require a specific and recent overt act which demonstrates dangerousness. Gross v. Pomerleau, 465 F.Supp. 1167 (D.Md. 1979); Bension v. Meredith, 455 F.Supp. 662 (D.D.C. 1978); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976); Doremus v. Farrell, 407 F.Supp. 509 (D.Neb. 1975); Lynch v. Baxley, 386 F.Supp. 378 (MD.Ala. 1974).

This requirement of an overt act is not just a legal conclusion. A number of mental health experts also believe it is necessary. As stated in Kozel, Boucher, and Garofalo, "The Diagnosis and Treatment of Dangerousness," 18 Crime and Delinquency 371, 384 (1972):

> We submit that to properly assess indications of possible dangerousness in the absence of an actual instance of dangerous acting out requires the highest degree of psychiatric expertise and may well exceed the present limits of our knowledge. . .No one can predict dangerous behavior in an individual with no history of dangerous acting out.

In summary, dangerousness is a legal requirement, not a psychiatric diagnosis. The "opinion" of a psychiatrist on the dangerousness of a mentally ill person should never be accepted without question. Consequently, attorneys, as a portion of their preparation for a civil commitment hearing, must not only investigate for any possible overt acts reflecting dangerousness, but also be prepared to challenge the basis for the expert's "opinion" on dangerousness.

BILL RADIGAN

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APPEAL OF BAIL

RCr 4.43 provides that anyone aggrieved by the order of the circuit court setting bail may directly appeal that order to the Court of Appeals. The rule codifies the decision in Abraham v. Commonwealth, Ky.App., 565 S.W.2d 152 (1977) that direct appeal, rather than habeas corpus is the proper action. Habeas corpus remains the proper remedy to challenge bail decisions made in district court.

The rule provides specific procedural requirements of which counsel should be aware when commencing an appeal of bail. First, counsel must move the circuit court to change the conditions of bail. It is the resulting order from which an appeal may be taken. Notice of appeal must be filed within ten (10) days of the entry of the order, in accordance with RCr 12.04. From the filing of the Notice of Appeal the circuit clerk has thirty (30) days in which to certify and file the record with the appellate court. It cannot be too strongly emphasized that certification within thirty (30) days does not meet the requirement; the entire record must be received by the Court of Appeals within that time.

While the time limitations are clearly designed to expedite the review of a pre-trial detainee's grievance, failure to comply could possibly result in dismissal of the appeal and certainly results in delay occasioned by seeking a motion for extension. When the Notice of Appeal is filed, make sure the circuit clerk is aware of the filing requirement. The record on appeal is limited to such portions of the record that relate to bail. This should include all orders relating to bail, all defense motions for a change or reduction of bail, the tapes and/or transcript of any hearings on bail and the court's written reasons (if any were made) for setting bail and denying defendant's motions for reduction.

The appellant's brief, limited to five (5) typed, double-spaced pages, must be filed within fifteen (15) days of the filing of the record. Filing of brief and statement perfects the appeal. The brief must be served on both the Commonwealth's Attorney and the Attorney General.

While the Commonwealth is not required to file a brief, it may do so within ten (10) days. Within ten (10) days of perfection of the appeal by appellant, the appeal stands submitted for final disposition. Bail appeals have an immediate priority on the appellate docket.

DEBBIE FITZGERALD

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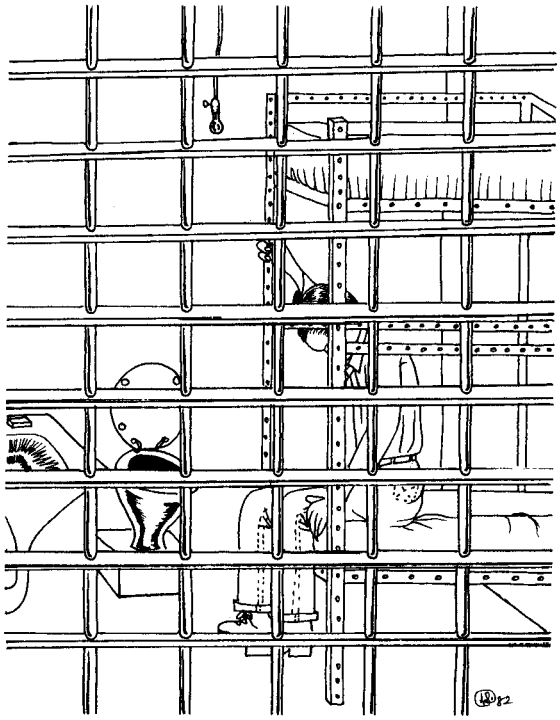

DON'T WAVER; ATTACK THAT WAIVER

Often, when confronted with evidence that the client has executed an apparently proper Miranda waiver prior to a confession, defense counsel immediately assumes that the suppression of the confession on federal constitutional grounds is virtually impossible. That mind set may cause counsel to overlook a variety of factors which could require suppression of the confession despite the existence of a written or oral waiver.

The existence of an initial written or oral waiver of Miranda rights is not presumed conclusive evidence of a valid waiver. "An express written or oral statement of waiver of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979). "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case." Id.

Additionally, the question of voluntariness is only one aspect of the total issue of the constitutionality of a Miranda waiver. "[W]aivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.'" Edwards v. Arizona, ___ U.S. ___, 101 S.Ct. 1880, 1883-84, ___ L.Ed.2d ___ (1981).

In determining the voluntariness of a defendant's statement or confession, a trial court may consider expert psychiatric testimony relating to the defendant's mental condition at the time of the interrogation.

"Although not necessarily determinative on the issue of voluntariness, the defendant's mental condition is a material factor to be taken into consideration, for that condition may bear on suggestability or susceptibility to intimidation." People v. Parks, Colo., 579 P.2d 76, 78 (1978). "Consequently, expert psychiatric testimony regarding the defendant's mental ability to make free and intelligent decisions at the time of his or her arrest is generally relevant to the issues before the court." Id.

In the Parks case, the psychiatrist testified at the suppression hearing that he was of the opinion that at the time of her arrest the defendant was suffering from an "anxiety reaction" which probably reduced or impaired her ability to make a voluntary confession. Additionally, the psychiatrist stated that in his opinion the defendant's state of mind - including her anxiety condition and her concern about returning to her children - made her particularly susceptible to suggestion and willing to do anything to relieve her stress. Id.

Another area of potential challenge to a Miranda waiver focuses on the individual abilities of the defendant to comprehend both written and spoken language and to act on the information communicated. The individual capacities of the defendant are then compared with an objective evaluation of the exact wording of the Miranda warnings given to the defendant both orally and in writing. The language of the actual Miranda warnings given as well as any paraphrases offered by the police are evaluated by a reading or communciations expert as to the degree of reading and hearing difficulty due to such factors as vocabulary, phrasing and complexity of sentence structure.

Most colleges and universities have on their faculties reading specialists, educational psychologists, linguistics

(Continued on P. 14)

experts, or communication specialists who possess the necessary expertise to perform the necessary tests and evaluations of both the individual's comprehension capabilities and the degree of difficulty of the printed and spoken words used to communicate the Miranda rights.

By contrasting the degree of difficulty of the written waiver form and the recital of the Miranda rights with the accused's individual reading and listening capabilities, the reading expert is able to ascertain whether the defendant was capable of knowingly and intelligently waiving his rights.

The validity of a defendant's waiver of his Miranda rights may also be compromised by the existence of a learning disability which would substantially impair his ability to comprehend the information presented or to act intelligently on that information.

Experts estimate that between 5 to 10 million children suffer from some type of learning disability. Recent studies indicate that undetected learning disabilities may be the chief problem of a large number of children who do not do well in school, including children and youth with disciplinary problems and those classified as "underachievers" and "dropouts." Present research is insufficient to confirm the number of adults with learning disabilities.

Learning disabilities occur in many varied forms, such as visual, auditory, motor control, communication, and logic. The symptoms of learning disabilities are a diverse set of characteristics which affect development and achievement. Although some of these symptoms can be found in all children at some time in their development, a learning disability person has a cluster of these symptoms which do not disappear with advancement in age. The most frequently displayed symptoms include short attention span, poor memory, difficulty following directions, inadequate ability to discriminate between and among letters, numerals, or sounds, poor reading ability, eye-hand coordination problems, difficulties with sequencing and disorganization.

As a result of learning disabilities, a person may have an inability to interpret adequately his problems and needs, an inability to draw appropriate conclusions due to deficient reasoning, and illogical reasons for his actions.

Testing performed by a psychometrist (a psychology/education specialist), a psychologist, or an education specialist can detect the presence of learning disabilities in a child or an adult.

Today the role of the forensic psychiatrist and psychologist is expanding to include the assessment of whether a defendant had the capacity to waive his constitutional rights when he confessed to a crime. Wulach, "The Assessment of Competency to Waive Miranda Rights," Journal of Psychiatry and Law (Summer 1981), p. 209.

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"In a psychiatric assessment of a defendant's functioning at the time of confession, the clinician may be called upon to consider the defendant's capacity to make knowing and intelligent waiver of Miranda rights, and/or to consider the susceptibility of the defendant to various degrees of pressure or coercion." Id. at 210-11. Typical cases referred to psychiatrists involve questions of retardation, psychosis or a juvenile defendant's maturity.

After discussing the Miranda words and concepts with a defendant, a psychiatrist normally would complete a mental status examination. In addition to considerations of the accused's intelligence, psychosis, and maturity, the psychiatrist should determine whether the defendant "lacks the autonomy and ego strength to resist police pressure to waive his rights or participate warily in a tough interrogation." Id. at 216. These factors may, under the "totality of the circumstances" doctrine, render the confession "involuntary" and, consequently, inadmissible on federal constitutional grounds.

Existing research on the comprehension of Miranda rights, drawn from studies of hundreds of juveniles and adults, emphasizes the correlation between results of IQ tests and performance on Miranda questions. See T. Grisso, Juveniles' Waiver of Rights: Legal and Psychological Competence (New York: Plenum Press, 1981). For example, a vast majority of juveniles below age 15 misunderstand at least one of the standard Miranda warnings. However, juveniles within the age bracket of 15-16 who have IQ scores of 80 and below overwhelmingly misunderstand at least one Miranda warning. Although an increase in chronological maturity often brings an increase in comprehension of written and spoken words, even older persons with below average IQ scores may lack the requisite facility to understand and act on the constitutional principles discussed in any Miranda warning.

For example, two boys, ages fifteen and sixteen, were taken into police custody for interrogation. Both signed waiver forms. Because the IQ's of the boys ranged between 61 and 67, the waivers by the two youths were not knowingly and intelligently made. Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972), citing United States ex rel Simon v. Maroney, 228 F.Supp. 800 (W.D. Penn. 1964), and United States ex rel Lynch v. Fay, 184 F.Supp. 277 (S.D.N.Y. 1960), where IQ's of 55 to 74 invalidated each defendant's waiver of his constitutional rights.

Psychological coercion, emotional suggestability, deficient reading skills, learning disabilities, below average intelligence, and mental retardation are but a few of the bases for challenging a defendant's ability to waive his federal constitutional rights. The existence of an oral or written Miranda waiver is not the end of the inquiry, it is only the beginning.

VINCE APRILE

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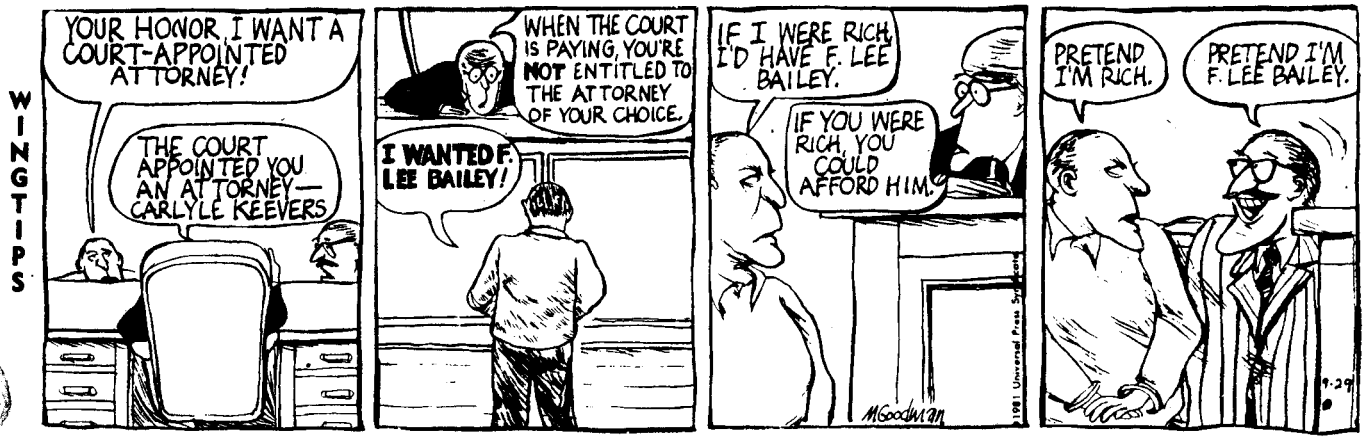

CONGRATULATIONS TO JIM LORD

Jim Lord was recently elected President of the Kentucky Polygraph Association.

Jim received his polygraph training from the U.S. Army Polygraph School in Fort Gordon, Georgia and from the Special Lie Detector Examiner's Course in Washington, D.C.

He has been a self-employed polygraphist in Louisville, Kentucky. He has been employed by the Federal and State Governments, and in 1970-71, he was the Chief Polygraphist for the Kentucky State Police.

Since November of 1974, Jim has been working with the Office for Public Advocacy. He travels statewide and administers polygraph examinations to indigents accused of felonies.

Congratulations on your new position Jim.

****

This publication is written by the employees of the Office for Public Advocacy. Individually those responsible for this newsletter are as follows:

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Any comments or suggestions concerning THE ADVOCATE will be welcomed.

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