The Advocate

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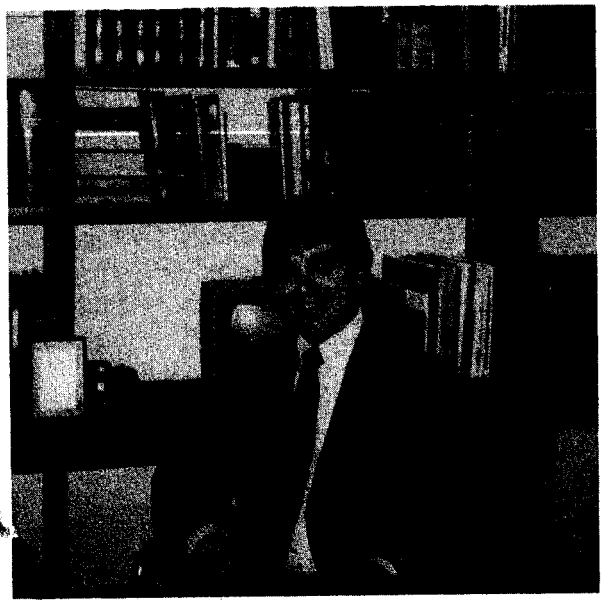

THE ADVOCATE FEATURES

The editor always has a problem in choosing an advocate to feature. After all, we are proud of this department and believe we have scores of talented and dedicated attorneys and support staff working with us. The editor's list of nominees is long. Then there are always other considerations - full time or contract? What region of the state? Should we avoid Frankfort personnel?

This issue's choice should please everyone. Tom Hectus' experience spans each segment of our system. A native of Newburg, New York, Tom grad-

(See Hectus, P. 3)

1983 MAY SEMINAR

THE PROGRAM

You are invited to attend the Department of Public Advocacy's Eleventh Annual Public Defender Training Seminar on May 15, 16, and 17, 1983 at the Drawbridge Inn, in Fort Mitchell, Kentucky.

(See Seminar, P. 2)

INSIDE

(Seminar, Continued from P. 1)

TOPICS

Topics at this year's seminar will include a review of Supreme Court criminal cases, discovery, plea negotiations, cross-examination, voir dire, client interviewing, evidence, and ethics including offensive and defensive uses of civil contempt.

SUNDAY

On Sunday evening May 15, 1983, during registration, between 3:00 and 7:00 p.m., optional video tape presentations will be available. Tape topics include: Preparation for Trial by Steve Rench, Plea Bargaining and Sentencing by Vince Aprile, Cross-Examination by Steve Rench, Psychological Methods of Jury Selections in Death Penalty Cases by Cathy Bennett, Opening Statements by Terrence McCarthy, and Defense of a PFO Charge by a panel of attorneys.

Following the video tape presentations, between 7:00 and 8:00 p.m., there will be a U.S. Supreme Court Review. A movie will be shown at 8:00 p.m.

MONDAY

On Monday afternoon May 16, Juanita Brooks will speak on the art of cross-examination. That presentation will be followed by a two hour time period with some of the participants breaking up into small groups. Each group will have five participants and two critiquers. Each participant will be required to conduct a demonstration cross-examination on a witness. The participants will then be critiqued by both critiquers on the skill of cross-examination. Enrollment in these small groups will be limited to 25 participants. Preference will be given to full-time and part-time public defenders. Check the appropriate box on the registration form and return the form as soon as possible if you wish to attend the small group sessions.

MONDAY ELECTIVE SESSIONS

On Monday evening from 7:00 to 8:30 p.m. we will simultaneously present several elective sessions. Topics for these sessions include juvenile and district court practice, motion practice in involuntary commitment cases, RCr 11.42 appointments, discussions concerning women attorneys and the practice of law, guardianship implications, appeals, and the death penalty with two short voir dire demonstrations and a group discussion on tactics in the penalty phase.

We are mailing brochures with registration forms for the Eleventh Annual Public Defender Training Seminar. If you have not received a brochure, and would like one, please call (502) 564-5245 and one will be sent to you.

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(Hectus, Continued from P. 1)

uated from Manhattan College with a BA in psychology in May of 1972. After a 3 year stint as a juvenile social worker in Louisville, Tom (AKA "Hectus" to his friends) decided to go to law school. He was frustrated, he explains, by merely being an observer on the fringe of the action. He wanted in the ring.

In May of 1978, Hectus graduated from the University of Louisville Law School. Although drawn to trial work, he felt he needed more exposure to the criminal law than law school provided. Tom accepted a position with the appellate staff of DPA in Frankfort in June of 1978 to, in part, increase the breadth of his knowledge. In addition to handling appeals, Tom also did federal habeas corpus work. He joined the death penalty task force.

Tom's first exposure to trial work was in a very difficult death penalty case in Logan County which was resolved by a bench trial on the defendant's mental state. After having heard the evidence, the trial court imposed a life sentence. That experience led him to decide that he should move from the appellate arena to trial work. In February of 1980, Tom was hired away by the Louisville-Jefferson County Public Defender. He returned to his old haunt in juvenile court - this time in a different role and well-armed to fight for his clients. Tom's tenacity in advocating for his young clients won the respect of friend and foe alike.

In November of 1980, Tom received an offer he couldn't refuse from the law firm of Gittleman and Barber in Louisville. He formerly worked for the firm as a law clerk while attending U of L. However, by no means did Hectus abandon his work on behalf of the indigent accused. With the firm's blessing, Tom negotiated the public defender contract in neighboring Shelby County. Although hardly financially lucrative, the contract permits Hectus to do work he enjoys - intensive trial practice in circuit and district court.

That is not the only public defender work Tom handles. He files about 8 briefs a year on contract with the appellate branch of DPA. Tom occasionally will handle a conflict case for the Jefferson District Defender. One such case culminated in a widely publicized death penalty trial before Judge Charles Leibson. Although the co-defendant received the death penalty, Tom's client, David Buchanan, was spared due to a ruling by the Court excluding death as a punishment for a non-triggerman under Enmund v. Florida, 102 S.Ct. 3368 (1982).

Hectus says that he enjoys the variety (civil and criminal, trial and appellate) his practice affords. On March 30, 1983, the Kentucky Supreme Court decided Hollis v. Commonwealth, Ky., ___ S.W.2d ___ (1983). This was one of two cases Tom is involved in presenting the constitutional and statutory question of whether a fetus is a person for

(Continued, P. 4)

purposes of criminal prosecution. For various reasons, the court held that a person "who kills a viable fetus" can not "at this time and under the statutes of this state be charged with 'criminal homicide' as set out in Chapter 507 of the Kentucky Revised Statutes. The much larger metaphysical question of 'WHEN DOES LIFE BEGIN?' is not the subject of this opinion." Slip Op. at 1 (emphasis and caps in original).

In another appeal, an outgrowth of the Buchanan case, the Supreme Court has granted discretionary review to decide whether a juvenile waiver order may be directly appealed.

On the civil side, Tom and one of his law partners, Oliver H. Barber, Jr., recently lost an appeal of a refusal to certify a class action against county jailers and others. Sowders v. Atkins, Ky., ____ S.W.2d ____ (January 18, 1983). Hectus and Barber, again representing juveniles, sought to end the practice "of jailing juveniles charged with status offenses and jailing juvenile public offenders who are not sight and sound seperated from adult inmates." Unfortunately, they met with substantial procedural roadblocks.

The decision of which Tom is most proud, and which had the greatest effect, was Commonwealth v. Ivey, Ky., 599 S.W.2d 456, 457 (1980). Ivey established that a "needy person" as defined in the "public advocacy statutes" was entitled to "the appointment of counsel upon request...to represent him in RCr 11.42 proceedings. [The Court held] that the legislature has so provided." A second choice for Tom's most significant case would be his contribution to the ultimate decision in Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981), which held, in part: "In those rare cases where counsel advises his client that the latter's guilt should be admitted [during trial], the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin...".

Happily ensconced in his firm's offices in a newly renovated building on Main Street overlooking the river in downtown Louisville, Hectus ruminated on the criminal justice system as he sees it. "In some ways I agree with Eugene Debs", he said with a half-smile, "the criminal justice system is the only railroad in America that works." "My ambition", he continued, "is to be more than a conductor on the train. I hope I do that for my clients." He does.

KEVIN McNALLY

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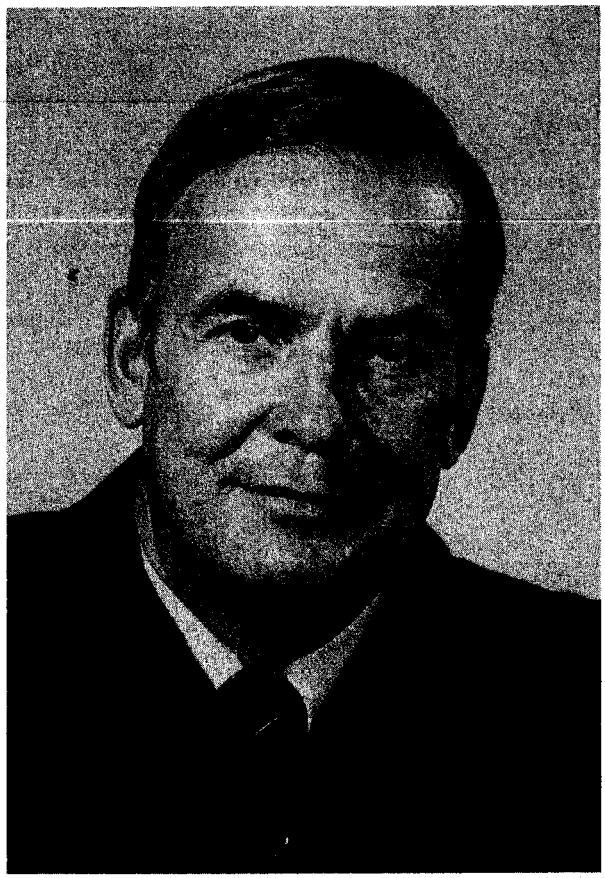
INTERVIEW WITH CHIEF JUSTICE ROBERT STEPHENS



The following is an interview Chief Justice Robert Stephens gave to Ernie Lewis on March 10, 1983, at his office in the Capitol. The Advocate appreciates the time he shared with us, and the candor with which he answered questions. This interview was edited for clarity and space limitations.

Chief Justice Robert Stephens has had a very impressive legal career. He is a former Assistant County Attorney in Fayette County who served under Judge Armand Angelucci. In 1969, he was elected County Judge of Fayette County, and was re-elected to that position in 1973. From 1976 to 1980, Chief Justice Stephens was the Attorney General for the Commonwealth. In December of 1979, he was appointed Justice to the Supreme Court of Kentucky, to which he was elected on November 4, 1980 for a four year unexpired term replacing Justice Scott Reed. In 1982, he became Chief Justice of the Supreme Court of Kentucky after being elected on October 2, 1982.

Chief Justice Stephens has also held very prominent positions within the state of Kentucky including first President of the Kentucky County Judges Association, Chairman of the Southern Conference of Attorneys' General, and State Chairman of the Arthritis Fund and the Kentucky Heart Association.

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ERNIE LEWIS: How are you enjoying being Chief Justice?

JUSTICE STEPHENS: Well, I certainly am enjoying it. It's even a bigger job than I

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envisioned. I spend about 85% of my time on administrative work and I would like to spend more time on research and writing... .

I think lawyers and judges today don't have a very good public image. The cost of litigation is getting out of sight, civil litigation particularly. I think the cost of civil litigation today is sort of in a position where criminal litigation was years ago where too many people went before the criminal bar and didn't have a lawyer. It's reached that point where litigation has to be speeded up.

I've got 4 new judges on the Court which has presented a lot of very pleasant problems. They are all workaholics, they are all interested, our conferences are much longer, our cases are getting thoroughly discussed, and really they are all just very eager and very, very good at this time, and very experienced. So I guess, in a word, I am enjoying the job but I'm not settled in enough yet to where I can, you know, feel comfortable. I am comfortable but I am not comfortable because I am not being able to spend enough time writing opinons, myself, which I enjoy doing.

ERNIE LEWIS: What do you see as the Court of Justice's biggest problem right now?

JUSTICE STEPHENS: Well, I think our biggest problem is to continue to maintain the level and quality of work that we have gotten into and to improve it and to fill in a lot of the gaps that have not been filled in. For example, we have 77 district judges in the state who have no secretarial help. We have a highly over-worked Court of Appeals. Each judge is probably writing 110 to 130 opinions a year which is far too many. We have many circuit judges that are approaching the 1100 per year case load, which is way above the national average. It's way too many. Those are three areas in which we are working to try to address the problem. As you know, Judge Warren Burger has said many times this system is going to collapse by its own weight, and I am very concerned that too many judges don't have the time to just sit down and think about cases. We are not turning out automobiles, you know, we are turning out justice, hopefully. And if you don't have time to sit down and think and consider it and walk away from it, and come back the next day and think about it...too many of us don't have that pleasure and that

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opportunity. I consider that serious, and there are many other problems that go along with it, including the fact that the public has a very low opinion of lawyers and judges, a very low opinion. I really don't think it is deserved. I think the reason is that they really don't know what we do. They don't know what our problems are. They don't know what constraints we are under, and I think we need a massive public educational program about our court system.

ERNIE LEWIS: Well, you've taken that on yourself a great deal, haven't you?

JUSTICE STEPHENS: Well, not specifically. You know I intend to be very visible out in public. But it's one of my pet projects, yes. For example, another problem is education of judges and education of lawyers. The Court has just adopted in principle mandatory continuing education for the judiciary. Justice Wintersheimer has agreed to head up a committee to develop the plan for continuing judicial education. As you probably know, the Bar Association has submitted to us, the Supreme Court, the recommendation that we adopt mandatory continuing legal education for attorneys.

There are a lot of things happening right now. Don't get me started on that, or I will never shut up. I will keep you here all afternoon.

ERNIE LEWIS: I would like to talk about the criminal justice system. I would like to know what you see as the most significant problem in that system?

JUSTICE STEPHENS: Well, I think many of the same problems exist in the criminal justice system as in the entire system, and that is the tremendous number of cases that we are getting. Particularly the Public Advocate's Office, has just been terribly over-worked, both at the trial level and appellate level. You all that

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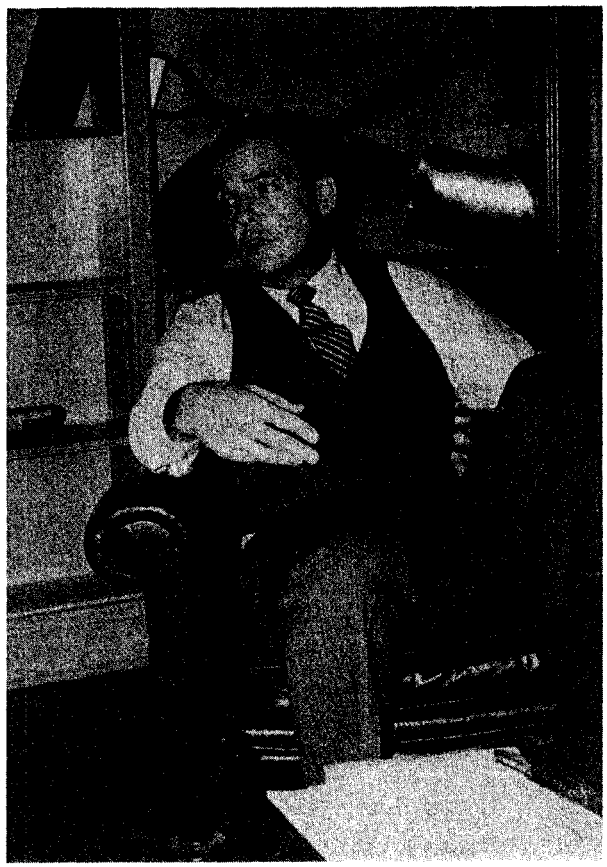

are in that profession, all defense lawyers, have an ethical obligation, and perhaps a legal obligation, to raise a lot of points and yet many of them, I am sure, don't bear much validity, but you have to do that any way; and I understand that. At the appellate level, the quality of work by the Public Advocate's Office, I think, is excellent. Probably the biggest complaint that the appellate judges have may be that the briefs are too long. But I don't think there's anything we can do about it, with these ethical obligations. I don't know that there's anything we can do about it.

ERNIE LEWIS: Do you see the new Court changing significantly the case law in the area of criminal law? Do you see any new direction?

JUSTICE STEPHENS: No, not at this point in time. I really am not able to evaluate it at this time. I don't see a lot of differences now. I see a lot of the "new broom syndrome" on the court which is perfectly natural and in which in no way, shape, or form, is any criticism or commentary on the old members of the Court.

I think it is a little early to tell, frankly. I mean after all we've only had three conference weeks so far since they've been in. I don't think any one should feel uncomfortable, quite the contrary, they are all very hard workers. They're very interested. When you are up there, you better believe they know what's in that record and they've read their briefs. It's just too early to tell whether there will be any major direction changes at this time.

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ERNIE LEWIS: Will there be any new rule changes?

JUSTICE STEPHENS: Well, one of the complaints that lawyers had in the last several years, at least back to the year 1980 when I ran, we had the almost unanimous complaint that we changed the rules too frequently, and I agree with that. I have taken a little bit of a different tack on the rules...I have assigned all requests for rule changes in the criminal area to Judge Vance, and in the civil area to Judge Leibson. Judge Leibson, with my total approval, has formed a committee of lawyers and trial lawyers to consider the many change requests that come in from members of the bar. If you write me a request for a criminal rule law change, I will refer it to Judge Vance. He looks at it, and he may talk to the commonwealth attorneys and the public advocates and then he comes up with a recommendation.

I would predict that there will be fewer changes under my administration and I would predict that ultimately we will enact a rule or adopt a policy that rule changes, emergencies aside, would only be done once a year. We have not adopted that as a formal policy yet, but I am going to recommend it. I think going along with that there will be adequate notice and we'll have public hearings.

ERNIE LEWIS: As I am sure you know, lately the Public Advocate's Office, at the trial level, has been opening up a number of full time trial offices, staffed by full-time attorneys. During the summer and fall of 1983 six to eight new offices are scheduled to open in different parts of the Commonwealth. I was wondering what you think of that kind of direction?

JUSTICE STEPHENS: I am very supportive of that. I think you need to take the lawyers where the clients are. I am not aware of the budgetary problems. I assume, like everything else, there are budgetary limitations and problems. My own view is that's a very effective, the most effective way, of doing it. It's just my own personal viewpoint.

Having been Attorney General, you know, I know a little something about prosecution and I've done a lot of defense work when I was a lawyer, practicing lawyer. I think this would be a much better way to do it, personally. I really think also that full-time public advocates are much more satisfactory than part-time. You can live within your budget. You know what your budget is going to be, and you know the appropriation is going to last for a whole year or 2 years. And there is, of course, the obvious side of the argument, that you can get more experience. I support the full-time regional concept. I don't have a vote in the Legislature, obviously, but I support the principle.

ERNIE LEWIS: Thank you.

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WEST'S REVIEW

Kentucky criminal case law came exclusively from the Kentucky Supreme Court during January and February.

The Court affirmed the defendant's convictions of first degree escape and first degree assault in Cope v. Commonwealth, Ky., 30 K.L.S. 2 at 7 (February 16, 1983). The Court rejected argument that the Commonwealth was bound to honor a plea bargain agreement to accept a plea of guilty in return for a ten-year sentence. The Court noted that "the agreement was never consummated by a plea of guilty, new negotiations were begun after [a] second indictment was returned, and appellant elected to go to trial." The Court stated as its holding that "It is our opinion that a plea bargain agreement which has not been consummated is not enforceable unless there has been a reliance on the bargain by the defendant which has resulted in detriment to him..." Id., at 8. The Court also rejected argument that the trial court should have instructed the jury on attempted escape. The defendant's escape took him as far as the lobby of the jail where he was stopped by a trusty. There were no locked doors between the lobby and the street. The Court held that under these facts the defendant had completed the offense of "escape from a detention facility." The Court viewed the KRS 520.020(4) definition of detention facility as "any place used for the confinement of a person...[c]harged with or convicted of an offense" as dispositive.

The defendant in Cope also argued that he was subjected to double jeopardy by instructions of the trial court which required the jury to find that the assault was committed during the course of the escape. The Supreme Court held that double jeopardy was not violated, since escape from a detention facility is not an element of assault as statutorally defined. "The use of reference to the escape was merely descriptive of this particular case and did not result in two punishments for the escape..." (Id.).

Finally, the Court in Cope also held that the defendant was not deprived of due process by the prosecution's action in supplying the trial court with false information. On cross-examination, the defendant sought to impeach an accomplice

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by showing that her testimony was motivated by a favorable plea bargain. The commonwealth attorney interjected that he had recommended a sentence of two years without probation. In fact, the Commonwealth had agreed to recommend probation if the accomplice would testify. The Supreme Court found the error harmless after applying the standard stated in Williams v. Commonwealth, Ky., 569 S.W.2d 139, 143 (1978), which requires a new trial on the basis of perjury only if the perjury "could in any likelihood have affected the judgment of the jury."

The Court has repudiated the long-standing rule that failure to give a requested instruction on second degree persistent felony offender charge at the trial of a first degree PFO is reversible error. Payne v. Commonwealth, Ky., 30 K.L.S. 2 at 8 (February 16, 1983). To reach its holding the Court specifically overruled Satterly v. Commonwealth, Ky., 437 S.W.2d 929 (1968); Brown v. Commonwealth, Ky., 378 S.W.2d 608 (1964); Marcum v. Commonwealth, Ky., 398 S.W.2d 886 (1966); Rodgers v. Commonwealth, Ky., 339 S.W.2d 299 (1966); and Boyd v. Commonwealth, 521 S.W.2d 84 (1975). The Court reasoned that "[t]he fact that two convictions must be proven does not justify breaking down the charge into two parts so as to give the jury the opportunity to pass on each prior conviction in the absence of some evidence bringing one or both prior convictions into dispute." Id.

In Commonwealth v. McIntosh, Ky., 30 K.L.S. 2 at 9 (February 16, 1983), the Court reversed a Court of Appeals decision holding that the trial court committed reversible error by refusing to instruct the jury that no adverse inference should be drawn from the failure of the defendant to testify, as required by Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). The United States Supreme Court in Carter did not address the question of whether a refusal to so instruct the jury could be harmless error. Reversing the Court of Appeals the Kentucky Supreme Court has now held that such a refusal may be harmless error. "It is the holding of this Court that the failure to give a requested instruction on the effect of the defendant's refusal to testify can be nonprejudicial error if there is overwhelming evidence of guilt and the result would not have been any different when the case is considered as a whole." Id.

In Smith v. Commonwealth, Ky., 30 K.L.S. 2 at 9 (February 16, 1983), the Court reversed the defendant's convictions of burglary and rape because of error in permitting the jury to take to the jury room a piece of plasterboard ostensibly removed from the scene and bearing scratches which might have been made by the defendant's belt buckle. No foundation was laid for the admission of this "evidence" since it was never shown that the plasterboard was taken from the scene or when or where the markings on it were made. "It is a fundamental principle that the state must establish guilt solely on the basis of evidence

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produced in the courtroom under safeguards assuring a fair trial. Jurors have no right to investigate or acquire information relating to the case outside of that which is presented to them in the course of the trial in accordance with established trial procedure..." Id., at 10. The Court relied on its previous holding in Reed v. Commonwealth, Ky., 579 S.W.2d 109 (1979) that evidence must be "identified as that which it purports to be."

In Garner v. Commonwealth, Ky., 30 K.L.S. 2 at 10 (February 16, 1983), the Court held that the testimony of a probation and parole officer is admissible to prove the age of a defendant for purposes of establishing his persistent felony offender status. The defendant had argued that Bureau of Corrections records, used to prove his age, were inadmissible hearsay. The Court rejected this argument, holding that the records were admissible to prove age under the "regular business entries" exception to the hearsay rule. The defendant also argued that his conviction must be reversed because of the trial court's action in resubmitting the case to the jury with amended instructions after the jury had already reached a verdict under the original instructions. The trial court had determined that the original instructions were erroneous. The Supreme Court cited RCr 9.82 which provides that a verdict "shall be returned by the jury in open court," and RCr 9.76, which provides that "the court shall be deemed open for every purpose connected with the case submitted to the jury until the verdict is returned..." The Court concluded that a verdict had not been returned in open court at the time the instructions were amended. Consequently, the trial court's action was proper.

The United States Supreme Court delivered several significant decisions during the two months under review.

In Missouri v. Hunter, 32 CrL 3021 (January 19, 1983), the Court upheld the imposition of multiple punishments for two statutorally defined offenses which, while constituting the "same" offense under Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), specifically expressed a legislative intent to impose separate punishments. Pursuant to two Missouri statutes the defendant was convicted of both first degree robbery and "armed criminal action." Consecutive sentences were imposed. On appeal the defendant asserted, and the Missouri Supreme Court agreed, that imposition of the two sentences violated the Double Jeopardy Clause of the Fifth Amendment. The Missouri appellate court applied the test enunciated in Blockburger v. United States, supra, which states that two statutes proscribe the "same" offense unless "each provision requires proof of a fact which the other does not." The U. S. Supreme Court granted certiorari and held that application of the Blockburger test was only the starting point of the required analysis. The Court concluded that even though the Blockburger test is met, "the rule should not be controlling

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where, for example, there is a clear indication of contrary legislative intent." Hunter, at 3023, citing Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The Court characterized the Blockburger test as a "rule of statutory construction," which becomes immaterial when the legislative intent to impose cumulative sentences is clear. In a dissenting opinion, Justices Marshall and Stevens would have upheld the Missouri Supreme Court's finding of a double jeopardy violation on the grounds that the Blockburger test is "a rule of constitutional stature."

In Marshall v. Lonberger, 32 CrL 3027 (February 22, 1983), the Supreme Court dealt with the conclusiveness of a state court's factual findings upon a reviewing federal habeas court. Under 28 U.S.C. sect. 2254(d) such findings bear a "presumption of correctness" if reached after a hearing participated in by both parties. An exception to this presumption occurs when the federal court, on reviewing the state court record, concludes that the state court's findings are not "fairly supported by the record." In Lonberger, the Supreme Court had before it the conclusion of the Sixth Circuit Court of Appeals that an Ohio trial court's finding that a guilty plea was voluntary was "not fairly supported by the record." The Supreme Court held that the Sixth Circuit had misapplied the standard. The Sixth Circuit's reliance upon the uncontroverted testimony of the defendant was erroneous in view of the state court's implicit finding that the defendant's testimony lacked credibility. "28 U.S.C. sect. 2254(d) gives federal habeas court's no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." Id., at 3030. Justices Stevens, Brennan, Marshall, and Blackmun dissented.

In South Dakota v. Neville, 23 CrL 3047 (February 22, 1983), the Court held that the introduction of the defendant's refusal to take a blood alcohol test at his trial for driving while intoxicated did not violate the privilege against self-incrimination. A South Dakota statute specifically made the defendant's refusal to take the test admissible evidence. The Supreme Court initially noted its previous decision in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), that the state may compel submission to a blood alcohol test without violating the Fifth Amendment right against self-incrimination. The Court, however, declined to hold that the refusal to take a blood alcohol test is non-testimonial. It instead based its decision on its view that "no impermissible coercion is involved when the suspect refuses to submit to the test." The Court reasoned that, no coercion being involved, there could be no Fifth Amendment

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violation. The Court distinguished its holding in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), that a defendant's silence after Miranda warnings may not be used against him, on the grounds that, "the right to silence underlying the Miranda warnings is one of constitutional dimension, and thus cannot be unduly burdened." "Respondent's right to refuse the blood alcohol test, by contrast, is simply a matter of grace bestowed by the South Dakota legislature." Id., at 3050.

Finally, in Connecticut v. Johnson, 32 CrL 3053 (February 23, 1983), the Court affirmed a state appellate court's decision that a jury instruction creating a conclusive presumption of intent was reversible error without consideration of its possible harmlessness. The Court had previously held in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), that due process was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" since a jury could conclude that such an instruction created a conclusive presumption of guilt. The Court in Sandstrom left open the question of whether such error may be harmless. That question has now been resolved by the Court's holding in Connecticut v. Johnson that the error "deprived respondent of 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" Id., at 3057, citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Justices Powell, Rehnquist, O'Connor, and Chief Justice Burger dissented.

LINDA WEST

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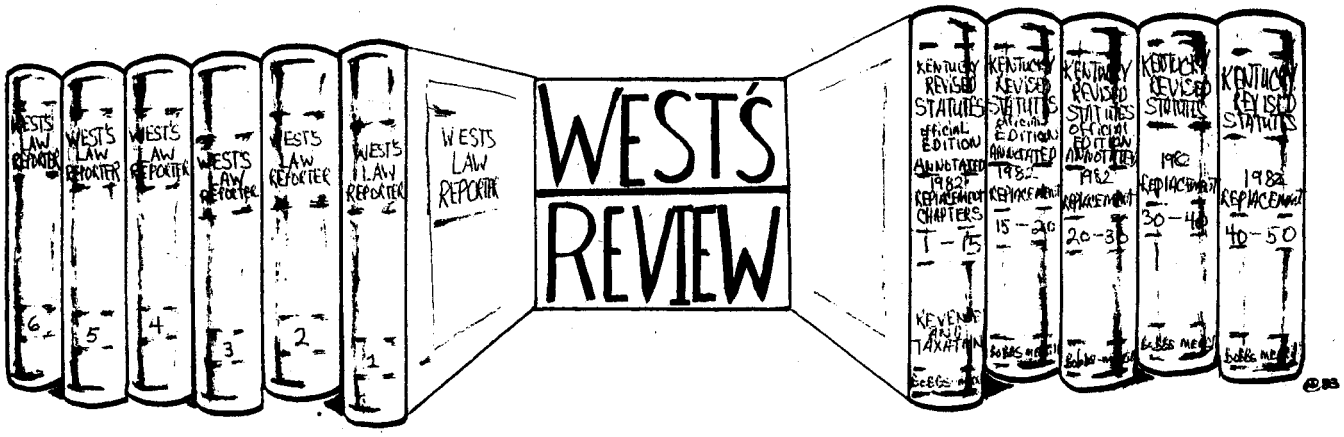

ANALYSIS OF THE ROWLEY DECISION

On June 28, 1982, the United States Supreme Court decided its first case involving the Education for All Handicapped Children Act, Hendrick Hudson School District v. Rowley, No. 80-1002. Although the Supreme Court found that Amy Rowley does not need a Sign Language interpreter, it affirmed the right of all handicapped children to receive personalized instruction and the supportive services they need to benefit from their educational program. In an opinion written by Justice Rehnquist, the Court found that Amy does not need an interpreter because she is doing well in school without an interpreter, and she is receiving other supportive services that enable her to benefit from her education (e.g., a phonic ear listening device and a personal tutor). This does not mean that other deaf children will be unable to get interpreter services or total communication programs. It merely means they must show that they cannot benefit from their education without such a services. Amy's lipreading skills, residual hearing, and high intelligence make her a more special case.

The Court upheld the basic procedures and provisions of the Education for All Handicapped Children Act, Public Law 94-142, so there will be no change in the individualized education program (IEP) procedures and the due process hearing for parents. Parents who believe that their child is not being offered an appropriate public education should still challenge the IEP using the due process hearing procedure. It will be important for parents to collect proof that their child needs special services in order to benefit from their education, by questioning the child's teachers and doctors, or by getting expert opinion from experts in the field of deaf education who can observe the child in the classroom setting. The IEP and the due process hearing remain at the heart of PL 94-142 and give parents an opportunity to provide that their child needs particular service or program. The Court noted that "Congress sought to protect individual children by providing for parental involvement" in the development of both State plans and individual IEPs.

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Background For The Decision

Amy Rowley is a profoundly deaf child enrolled in regular elementary school classes. After evaluating her needs and her disability, the school system provided her with special services, such as individual tutoring and an FM wireless hearing device to assist her in classes. She and her parents contended that she needs a qualified Sign Language interpreter, since she could not understand a significant amount of what was said in her classes, even with the special device provided by her school. After exhausting state administrative procedures, they filed suit in federal district court under the Education for All Handicapped Children Act of 1975, PL 94-142. The District Court found that although Amy was making academic progress, she could only understand about 59 percent of what was said in her class. Therefore, she was not performing as well academically as she would if she could understand everything. The District Court held that she was not receiving a "free appropriate education," because without an interpreter she did not have "an opportunity to achieve (her) full potential commensurate with the opportunity provided to other children." 483 F.Supp. 528, 534 (S.D.N.Y. 1979). The Court of Appeals affirmed this decision. 632 F.2d 945 (2d Cir. 1980).

Free Appropriate Public Education

The five Supreme Court justices who joined the majority opinion agreed that Congress did not intend to give handicapped children a right to "strict equality of opportunity or services" since it would require impossible measurements and comparisons. But the Act does require access to education for handicapped children that is "meaningful."

> "(T)he 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."

The Court held that insofar as a state is required to provide a handicapped child with a free and appropriate public education "...it satisfies this requirement by providing personalized instruction with sufficient supportive services to permit the child to beneift educationally from that instruction."

The Court held that handicapped children do not have a right to the best possible education that would "maximize their potential" for learning. It specifically struck down the

(Continued, P. 17)

standard used by the courts below, that handicapped children are entitled to an equal educational opportunity, "commensurate with the education available to non-handicappd children." It said that there is not one substantive standard for evaluating the level of services for a free, appropriate public education under the Act, but the education must be sufficient to confer some educational benefit on the child. For example, the Court held that Amy does not need interpreter services because, among other factors, she is making satisfactory progress in the regular education system. But it held that while this progress is one factor that may be considered in determining whether a mainstreamed child is receiving an appropriate education, it is not a controlling standard. The Court also noted that "self-sufficiency" is not the proper educational goal for all handicapped children.

Judicial Review

Judicial review under the Act is not limited to review of a State's compliance with procedural requirements. The Court held that federal courts can make an independent decision about any matter related to provision of a free, appropriate public education, but they must give "due weight" to the results of the state administrative proceedings. Compliance with the mandated IEP and due process procedures would "in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." Justice Rehnquist cautioned that courts should not substitute their own notions of sound educational policy for those of the school authorities, and must be careful to avoid imposing their view of preferable education methods upon the States. The primary authority for choosing the most suitable educational method is left to educational agencies in cooperation with each child's parents. "It seems highly unlikely that Congress intended to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to the Act." Because courts lack expertise in educational methodology,

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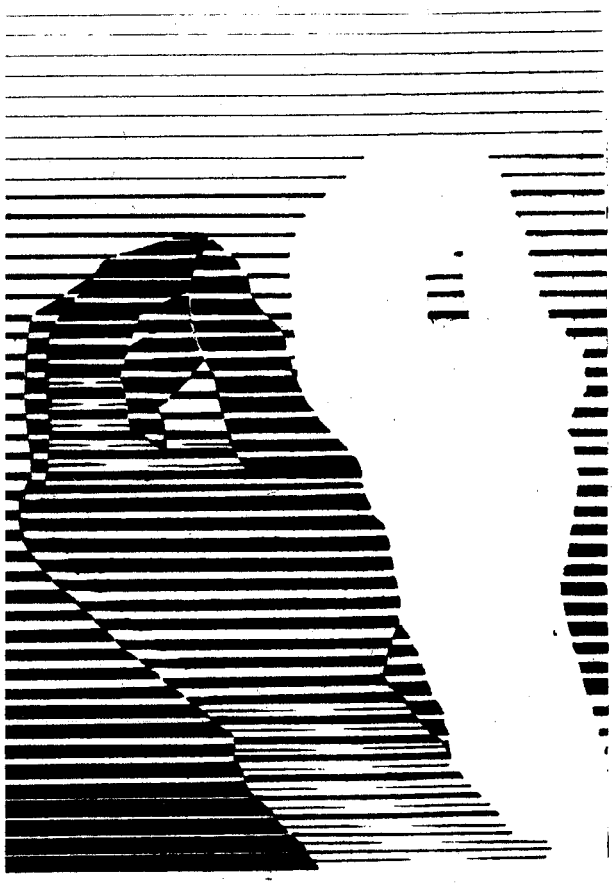

such questions are for resolution by the state. Therefore, the Court's role in judicial review is to determine 1) whether the state has complied with the procedures of the Act (including creating an IEP that sets out specially designed instruction and related services to meet the unique needs of the child), and 2) whether the IEP is reasonably calculated to enable the child to receive educational benefits.

Dissent

Justices White, Brennan, and Marshall dissented from the decision of the majority. They found that a standard that merely requires some "educational benefit" falls far short of what the Act intended. They emphasized that the Act requires a special education program "intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible."

The dissenters also disagreed with Justice Rehnquist on the appropriate standard for judicial review. They found that Congress intended courts to undertake a full and searching inquiry into any aspect of a handicapped child's education.

Conclusion

The Supreme Court upheld the fundamental tenets of the Education for All Handicapped Children Act:

* Individualized instruction.
* Sufficient support services to benefit from education.
* Such instruction and services to be at public expense.
* Parental involvement in development of individualized education programs.
* Due process rights for parents.
* Judicial review.

Although the Court found that this individual child did not need a Sign Language interpreter, other hearing-impaired children may be able to demonstrate that they do need such services in order to benefit from their educational program. Therefore, the decision has no direct effect on existing IEP's and educational programs now being offered to handicapped children.

Section 504 was not an issue in the Rowley case and, therefore, is not affected by this decision. Colleges, hospitals, and other institutions which receive federal finanical assistance are still required to provide Sign Language interpreters to deaf persons under Section 504 of the Rehabilitation Act of 1973. The Rowley decision is limited to the responsibilities of public elementary and secondary school systems under another federal law, PL 94-142.

National Center for Law and the Deaf - 800 Florida Avenue, N.E. Washington, D.C. 20002

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THE DEATH PENALTY

KENTUCKY'S DEATH ROW POPULATION 13

PENDING CAPITAL INDICTMENTS KNOWN TO DPA 62

ACTION UNDER THE BIG TENT

COURT GRANTS CERT. ON PROPORTIONALITY REVIEW

On March 21, as we go to press, the Supreme Court granted review in Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982). Harris is the lead death case from California. Among other issues, the Ninth Circuit held that the case must be remanded to the California Supreme Court because that body "gave no indication that any type of proportionality review, as required under Gregg v. Georgia and Proffitt v. Florida, was undertaken." The Court noted that a plurality of the U.S. Supreme Court "has approved proportionality review whether such is provided by statute [Gregg]...or by case law [Proffitt]..." The question is whether "the penalty in the case was proportionate to other sentences imposed for similar crimes... [P]roportionality review [was] intended to prevent the arbitrary and capricious application of the [death] penalty..." 692 F.2d at 1196.

Harris also alleged discriminatory application (inter alia, race of victim and sex of defendant) of the death penalty in California. He asserted that in 1980, for example, "67 percent of the persons receiving a death sentence in robbery murder circumstances had murdered white victims, while only 4 percent had murdered black victims, and 29 percent had murdered victims of other minority groups." The Court did not state how this differed from what would normally be expected based on crime and census data. Nevertheless, it was held: "In the absence of at least some indication that the disproportionate impact can be explained on non-racial grounds, Harris would seem to be entitled to an evidentiary hearing..." 692 F.2d at 1197. Although disclaiming any intent to do so, the Court seems to

(Continued, P. 20)

reject the language in Spinkellink v. Wainwright, 578 F.2d 582, 604 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979), suggesting that if a statute is held constitutional in federal court "then the arbitrariness and capriciousness condemned in Furman have been conclusively removed, and a closer comparison of the defendant's case with other death-penalty cases is unnecessary." 692 F.2d at 1198 n. 3. [A subsequent 11th Circuit case has read Godfrey v. Georgia, 446 U.S. 420 (1980) as implicitly disapproving of this language in Spinkellink. See Proffitt v. Wainwright, 685 F.2d 1227, 1261-62 n. 52 (11th Cir. 1962).]

Harris also raised a related claim regarding gender discrimination. "He submitted affidavits showing that, in California between 1978-80, 1,164 persons were convicted of murder [1st or 2nd degree]... of which only 64, or 5.5 percent, were females. Of the 98 persons sentenced to death during this period, none were females." The Court ordered an evidentiary hearing.

Attorney General George Deukmejian, now governor of California, requested and received review of two issues by the Supreme Court. First, whether the federal constitution requires "any specific form of 'proportionality review'" and "If so, what is the constitutionally required focus, scope and procedural structure of such review?" 32 Cr.L. at 4201.

PROPORTIONALITY REVIEW: WHAT KIND?

Regardless of the ultimate decision in Harris, proportionality review is required in Kentucky. But what kind? Our Court must determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." KRS 532.075(3) (c) (emphasis added). But what are "similar cases"?

The universe of similar cases could be defined in a number of ways. For example, 1) all potential capital cases (since the effective date of the statute - or another reasonable starting date); 2) all potential capital cases involving similar crimes (i.e. robbery/murder) and similar defendants (i.e. middle-aged defendants with a history of assaultive criminal convictions); 3) only those cases resulting in a death sentence; or 4) a combination of two and three. Kentucky's Supreme Court has opted for the narrowest approach (No. 3) possible. In Gall v. Commonwealth, Ky., 607 S.W.2d 97, 113-14 (1980), the Court stated: "Gall is the 17th person who has appealed a death sentence...since...1970. We have made a comparative study of his sentence with reference to the other 16. Considering both the nature of the crime and the defendant, Gall's sentence is not excessive or

(Continued, P. 21)

disproportionate to the penalty imposed in similar cases."

Unfortunately, an examination of these cases reveals that not one of the thirteen cases is a rape/murder case (as was Gall). One is a domestic murder, nine are robbery/murders, two are double murders, and one is a murder for profit or hire. Additionally, all but two were tried under an unconstitutional sentencing scheme and no case was compared in which the defendant escaped the death penalty.

Other courts use different approaches. In Nebraska the Court compares "cases in which the defendant was found guilty of first degree murder." State v. Moore, 316 N.W.2d 33, 42 (Neb. 1982). In Nebraska, as in other states, this includes cases in which the death penalty was not imposed. "We will...continue to make comparisons. Each District Court will continue to furnish to this Court, in accordance with our administrative order, the records of all convictions of first degree murder not appealed to this court... . If either [party] wishes...for purposes of comparison, the facts and sentence in any case of first degree homicide...[can be presented] at the sentencing hearing by means of admissible evidence..." 316 N.W.2d at 44. For example, in State v. Williams, 287 N.W.2d 18, 29 (Neb. 1979), the court said: "We find no case in which a life sentence was given which involves the same or similar circumstances to that of the case at bar."

In Missouri, "[o]ur inquiry would be unduly slanted were we to compare only those cases in which the death penalty has been imposed. We therefore can consider as similar '[t]hose cases in which both death and life imprisonment were submitted to the jury.'" State v. Boulder, 635 S.W.2d 673, 685 (Mo. 1982), quoting State v. Mercer, 618 S.W.2d 1, 11 (Mo. banc. 1981), cert. denied, 454 U.S. 933 (1981). "We may also consider cases pending before this Court in order to determine what penalties juries have imposed in factually similar situations." Bolder, 635 S.W.2d at 685.

In Louisiana the district attorney is required to file "a list of each first degree

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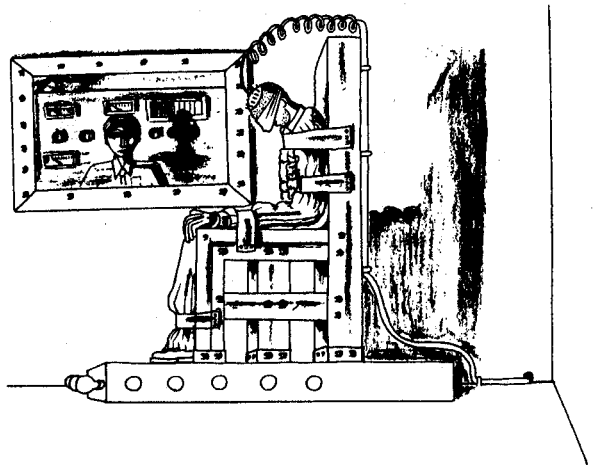

murder case in the district in which sentence was imposed after January 1, 1976. The list shall include...a synopsis of the facts... concerning the crime and the defendant." Louisiana Supreme Court Rule 28 Sec. 4(b) (i). For example in, State v. Williams, 383 So.2d 369, 375 (1980), cert. denied 449 U.S. 1103 (1981), "...there have been 28 murder prosecutions in East Baton Rouge Parish with 11 resulting in first degree murder convictions. Of these 11, only 3...were sentenced to death.... [I]n the cases most similar to the defendant's, the death penalty was imposed." In Williams v. Maggio, 679 F.2d 381, 395 (5th Cir., Unit A, 1982), the Court upheld the constitutionality of this geographically localized (but otherwise expansive) proportionality review.

In Blake v. Zant, 513 F.Supp. 772, 804 (S.D.Ga. 1981), a federal district court reviewed a Georgia death sentence imposed for a 1974 murder, armed robbery and burglary. The court was faced with a challenge to the Georgia Supreme Court's proportionality review. Georgia's procedure also requires examination of "similar" cases. (Kentucky's statute was based upon Georgia's law.) The Blake court stated: "It was particularly important... to examine other cases where homes were burglarized and the residents killed to determine whether such conduct had in fact brought the death penalty with some discernable regularity even in the presence of mitigating circumstances. Examination of the cases cited by the Georgia Supreme Court in its sentencing review clearly demonstrates that it did not in fact consider 'similar cases' ... . [T]he Georgia Supreme Court lists 23 cases which were considered on the basis of 'similarity' to the petitioner's crime. In fact, it appears that only three of the$e cases involved victims who were attacked in their homes. Furthermore, only one [received the death penalty], which is hardly suggestive of any particular sentencing pattern... . Quite the opposite, they compel the conclusion that petitioner's sentence is not appropriate... To permit petitioner to be executed in these circumstances would indeed 'shock the conscience.'" 513 F.Supp. at 815, 816, 818.

ARBITRARINESS AND DISCRIMINATION

In Bowers and Pierce, Arbitrariness and Discrimination Under Post Furman Capital Statutes, CRIME AND DELINQUENCY, 563 (Oct. 1980), the authors report statistically significant data demonstrating that a person charged with killing a white individual was far more likely to be sentenced to die than a person charged with killing a black. In Texas, 18 times more likely. In Florida and Georgia, 12 times more likely. For example, in Texas:

> "Among black offenders, those with white victims are 87 times more likely than those with black victims to receive the death penalty; and among the killers of whites,

(Continued, P. 23)

> black offenders are 6 times more likely than white offenders to be sentenced to death....

In these four states, which accounted for approximately 70% of the nation's death sentences in the first five years after Furman, race of both offender and victim had a tremendous impact on the chances that a death sentence would be handed down. To understand to some extent the size of the effect of these racial differences, consider the following: The probability that a difference of this magnitude in the four states combined could have occurred by chance is so remote that it cannot be computed with available statistical programs." Bowers and Pierce at 596, 597.

Harris sought an evidentiary hearing to make such a showing in California.

RACE OF VICTIM AND SEX OF DEFENDANT IN KENTUCKY

An examination of Kentucky statistics on "race of victim/ sex of defendant" provides some interesting information. Since the effective date of Kentucky's death penalty statute until January 1, 1982, there have been approximately 361 non-white victims of murder or non-negligent homicide. Crime in Kentucky, Uniform Crime Reports (Dept. of Justice, Com. of Ky., 1977-1981). Each of the 17 persons sentenced to death in Kentucky since Gregg (for crimes committed after December, 1976) have been convicted of killing whites. As there have been 1278 white victims of murder or non-negligent homicides in Kentucky between 1977-1982, the chances of ending up on death row if you kill a white person are .013, approximately 13 out of 1,000. Obviously, if you kill a black, the chances are zero at this time. By way of comparison, there have been 345 female murder victims during the period we are examining (16 fewer than black victims). Yet, 10 convicted slayers of females have been sentenced to death - a likelihood of .029 (incidently, the 3 out of 100 chances of getting a death sentence for murder of a female is over 4 times greater than the 7 out of 1000 chances for murder of a male).

On the other hand, there have been 213 females arrested for murder or non-negligent homicide between 1977-1982 and only 1 female has received the death penalty. Her conviction and sentence was overturned on appeal. O'Bryan v. Commonwealth Ky., 634 S.W.2d 153 (1982). The likelihood of a death sentence for a female committing murder or non-negligent homicide is .0047 or approximately 5 out of 1000. During the same period, there have been 1380 males arrested for murder and non-negligent homicide, 16 of whom were sentenced to death. The likelihood of a male murderer receiving a death sentence is .011 or approximately 11 out of 1000. However, these statistics do not distinguish which murders were potential capital cases. Crime in Kentucky, Uniform Crime Reports (Dept. of Justice, Com. of Ky., 1977-1981).

KEVIN McNALLY

* * * * * *

TRIAL TIPS

THE RIGHT TO NECESSARY TRANSCRIPTS

There are many situations where a transcript of some prior proceeding is useful, if not essential, to a defense attorney. If a mistrial is declared because the jury is hung, a transcript of the testimony of the witnesses is clearly indispensable for impeachment purposes at any retrial. In particular situations other portions of the trial may need to be transcribed. For example, if the defense had petitioned for a change of venue which the judge denied and counsel planned to renew the request, the voir dire might demonstrate that the jury panel had been infected by publicity. Of course, a transcript of the testimony of witnesses is equally important where the judge grants a mistrial during trial for whatever reason and a retrial is imminent. The transcript of a severed co-defendant's trial would also be essential to the attorney who will represent his alleged partner in crime.

The need for transcripts of proceedings other than entire trials arises more regularly. A witness to be called by the Commonwealth at trial may have testified before the grand jury, at a preliminary hearing or at a pretrial suppression hearing. Defense counsel will obviously want to scrutinize his pretrial testimony for inconsistencies with his trial testimony. A transcript is necessary for possible impeachment.

The right to necessary transcripts is based on the guarantees of equal protection, due process and effective assistance of counsel. Sixth and Fourteenth Amendments, United States Constitution. The key case on the right to transcripts is Britt v. North Carolina, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). In that case the United States Supreme Court, analyzing whether a state defendant was entitled to a transcript of his first trial which ended in a mistrial because of a hung jury, emphasized:

> [T]here can be no doubt that the State must provide an indigent defendant with a transcript of a prior proceeding when that transcript is needed for an effective defense or appeal. Id., 404 U.S. at 227.

The Court then noted that the question before it was whether, under the circumstances of that case, a transcript was necessary for an effective defense. Id. Observing that "it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to a defendant...," that Court noted that the defendant conceded that "he had available an

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informal alternative which appears to be substantially equivalent to a transcript." Id., 404 U.S. at 228-230. That was so because in the small town in question the court reporter was a friend to defense counsel and would have read back his notes if there was an informal request. Id.

Therefore, under the very narrow circumstances of that case, the Supreme Court held that the defendant was not entitled to a transcript of his first trial. Significantly, the Court specifically noted that the defendant does not "bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight." Id.

Many federal circuit courts of appeal considered the transcript issue. Our own Sixth Circuit Court of Appeals addressed it in United States v. Young, 472 F.2d 628 (6th Cir. 1972). In that case the jury deadlocked and defense counsel moved for a transcript of the first trial prior to a retrial. Id. at 628. The judge denied his request. Citing Britt v. North Carolina, supra, as "a narrow exception," the Sixth Circuit noted that defense counsel in the case before it had not conceded he had available an informal alternative. United States v. Young, supra at 629. The Court held:

> We are of the opinion that the exception carved out in Britt is not applicable to this case, and we cannot say that the lack of a transcript of prior proceedings was as a matter of law lacking in prejudice to this appellant. Id. at 630.

See also United States v. Jonas, 540 F.2d 566 (7th Cir. 1976); United States ex rel. Wilson v. McMann, 408 F.2d 896 (2nd Cir. 1969); United States v. Baker, 523 F.2d 741 (5th Cir. 1975); United States v. Acosta, 495 F.2d 60 (10th Cir. 1974); Turner v. Malleys, 613 F.2d 264 (10th Cir. 1979).

The United States Supreme Court established in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1955), that the equal protection clause of the Fourteenth Amendment requires that indigent defendants must be provided "with the basic tools of an adequate defense or appeal, when those tools are available for a price to their prisoners." Britt v. North Carolina, supra, 404 U.S. at 227. If a defendant with means would purchase a transcript in the situation your indigent client is facing, the equal protection clause requires that your client be furnished a free transcript. Also, defense counsel's ability to represent his client effectively would certainly be impaired without a transcript with which to impeach the Commonwealth's witnesses.

When requesting necessary transcripts defense counsel has substantial legal authority on which to rely. And if your motion is denied you have preserved a potential issue for appeal.

GAIL ROBINSON

* * * * * *

ETHICS QUANDARIES & QUAGMIRES

BY: VINCE APRILE

Query: May a prosecutor ethically secure the attendance of persons for pretrial interviews by the use of any communication which has the appearance or color of a subpoena or comparable judicial process?

"It is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so." I American Bar Association Standards for Criminal Justice, The Prosecution Function (2nd Ed. 1980), Sec. 3-3.1(d).

"There is evidence that some prosecution offices have occasionally scheduled persons for interviews by means of documents that in format and language resemble official judicial process even though they lack subpoena power in these instances." I ABA Standards, The Prosecution Function, supra, Sec. 3-3.1(d), Commentary. "Absent specific statutory subpoena power, a prosecutor's communication requesting a person to appear for an interview should be couched in terms of a request; it should not simulate a process or summons that the prosecutor does not have power to issue." Id.

In Kentucky "[t]he circuit court, upon request of the foreman of the grand jury, or the attorney for the Commonwealth, shall issue subpoenas for witnesses" to attend and testify before the grand jury. RCr 5.06. Similarly, a subpoena "re-quiring the attendance of a witness at a hearing or trial" shall "state the name of the court and title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified" in the subpoena. RCr 7.02(1) & (4).

In Kentucky at both the grand jury and trial level failure to honor a subpoena may be punished as contempt of court. See RCr 5.06; RCr 7.02(6); KRS 432.230; and KRS 432.280.

Nothing in Kentucky law or procedure authorizes a prosecutor to compel a witness to attend a pretrial interview by use of any document which has the appearance or color of a subpoena or comparable judicial process.

One federal prosecutor was ordered to "cease sending to prospective witnesses whom he wishes to interview before the trial date any form which includes the word 'Summons' or any derivative thereof or which in its format and language

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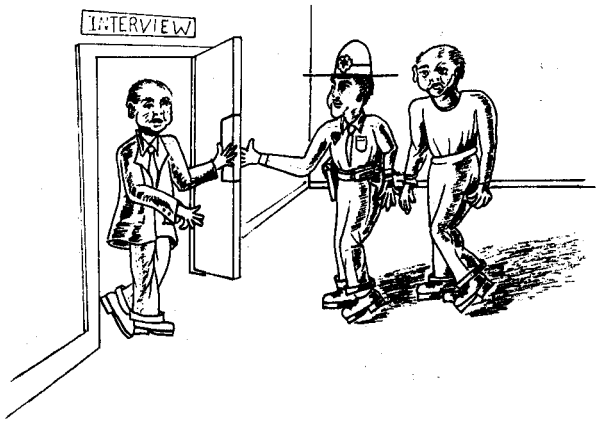

resembles an official judicial subpoena or similar judicial process or which conveys the impression that non-appearance is subject to sanction." United States v. Thomas, 320 F.Supp. 527, 530 (D.C.D.C. 1970).

Perhaps "[a]ny lawyer would know that this 'summons' is not enforceable and can be safely ignored." United States v. Thomas, supra at 529. "A layman cannot be expected to know this, and his reaction upon receiving such a 'summons'" from the prosecution "might well be to take fright and get himself down to the [prosecutor's] office on the indicated date solely to avoid the possibility of punishment." Id.

There is "the danger that by sending a 'summons' to a prospective witness [the prosecutor] may cause him not only to appear at his office at the time indicated, but to arrive there in a frame of mind to say what he thinks the [prosecuting] attorney wants to hear, lest the chastising power that resides in the [courts] be visited upon him." United States v. Thomas, supra at 530.

Even when "[t]he danger that these phony summonses will put the recipient too much under the will of the [prosecuting] attorney is ... inadvertent on the [prosecutor's] part," the "danger nonetheless exists." Id. at 530.

In one instance a federal prosecutor's office sought "to excuse its conduct by stating that it informs witnesses that they are not compelled to talk with the [prosecutor]." United States v. D'Andrea, 585 F.2d 1351, 1365 (7th Cir. 1978). "This misses the mark, for the evil in the practice is not merely in deceiving an unsophisticated layman into feeling compelled to attend what turns out to be an interview rather than a court appearance." Id. "The danger also exists that the sham summons will put the recipient too much under the will of the [prosecutor]." Id. "Having been summoned supposedly under official court process, the prospective witness may be placed in a compromising position conducive to involuntary cooperation with the Government." Id. Additionally, "such practice may discourage the witness from being interviewed by the defense." Id.

"Actually [this] practice is a surreptitious pretrial discovery technique." United States v. D'Andrea, supra at 1365. "It is inherently coercive and it provides opportunities for subtle intimidation." Id. Finally, when "these subpoenas are issued under apparent court sanction, the practice constitutes a gross abuse of the judicial power of the... courts." Id.

Absent statutory authorization, the prosecution's "action of obtaining blank trial subpoenas from the court clerk and of using them to compel witnesses to attend an interview" at the prosecutor's office is "highly improper." United States v. Keen, 509 F.2d 1273, 1274 (6th Cir. 1975); see United States v. Hedge, 402 F.2d 220, 222-23 (5th Cir. 1972).

* * * * * *

UNAUTHORIZED REPRESENTATION

Public advocacy trial attorneys occasionally are appointed to cases which they are not authorized to handle under KRS Chapter 31. Such appointments should not be accepted, and contract and conflict attorneys should understand that if they accept appointments in unauthorized cases, the Department of Public Advocacy cannot pay them for services rendered in such cases. Unauthorized cases include, but are not limited to, the following:

1. Juvenile status actions as defined by KRS 208.010(1)(b) and (c) and juvenile dependency actions as defined by KRS 208.010(1)(d). Public advocates are authorized to represent indigent persons charged with any "act that, but for the age of the person involved, would otherwise be a serious crime," i.e. a felony or a misdemeanor carrying a possible penalty of confinement or a fine of $500 or more. Similarly, KRS 208.065 provides that "[i]n any case in which a juvenile could receive a sentence resulting in detention, the juvenile shall have a right to counsel and the court, upon request... shall appoint the public defender... ." (emphasis added). Juvenile delinquency actions obviously are included within a public advocate's authorized representation, but juvenile dependency actions and status actions are not. Parents or guardians of children involved in such actions may be required to pay attorneys' fees under KRS 405.027.

2. Involuntary termination of parental rights cases. These are civil actions and do not fall within the purview of KRS 31.010(1). The Court may appoint an attorney for parents involved in such actions under KRS 199.603(8), but the Department of Public Advocacy is not authorized to pay for such representation.

3. Guardianship cases. KRS 387.560 authorizes the Court to appoint counsel to be reimbursed by the county in which the proceeding is held.

Any judges or public advocacy attorneys who have questions about authorized or unauthorized representation should contact the Department of Public Advocacy's Trial Services Branch at 502-564-7341.

DONNA PROCTOR

* * * * * *

IS YOUR CLIENT GETTING HIS "2%" WORTH?

BY: VINCE APRILE

Effective July 15, 1982, KRS 533.030(3)(e) provides that, after the "imposi[tion] of a sentence of probation or conditional discharge" which includes payment of restitution, "[t]he circuit clerk shall assess an additional fee of two percent (2%) to defray the administrative costs of collection of payments or property" as restitution. That same statutory provision states that "[t]his fee shall be paid by the defendant and shall enure to the general fund of the state treasury." KRS 533.030(3)(e). Prior to July 15, 1982, KRS 533.030 contained no comparable provision.

Although this "additional fee of two percent" is effective July 15, 1982, any defendant whose offense allegedly occurred prior to that date should be exempt from this administrative fee regardless of when his or her probation or conditional discharge is granted. To hold otherwise would violate the federal and state constitutional prohibitions against ex post facto laws.

Article 1, Section 10 of the United States Constitution prohibits a State from passing any "ex post facto Law." This constitutional prohibition is a limitation upon the powers of state legislatures. "This prohibition of the [Federal] Constitutional has been extended to cover sentencing provisions and penalties as well as offenses." Wethington v. Commonweath, Ky.App., 549 S.W.2d 530, 531 (1977). See Blondell v. Commonwealth, Ky., 556 S.W.2d 682 (1977). Section 19 of the Kentucky Constitution states that "[n]o ex post facto law ... shall be enacted." See Commonwealth v. Brown, Ky., 619 S.W.2d 699, 703 (1981).

If the assessment of "an additional fee of two percent (2%) to defray the administrative costs of collection of [restitution] payments" was not authorized at the time the defendant allegedly committed his offense, he may not now be required to suffer that additional penalty due to the effective date of a state statute enacted after the commission of the crime of which he was convicted. Wethington v. Commonwealth, and Blondell v. Commonwealth, both supra.

In Kentucky, "[n]o statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). Nothing in the act of the legislature amending KRS 533.030 and establishing procedures relevant to restitution as a condition of probation and conditional discharge "even hints at retroactive application, much less expressly declares other than prospective application." Hudson v. Commonwealth, Ky., 597 S.W.2d 610, 611 (1980); (emphasis in original).

Thus, for any defendant whose charged crime occurred before July 15, 1982, the "additional fee of two percent (2%)" on restitution payments authorized

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by KRS 522.030(3)(e) is prohibited by the language of KRS 446.080(3). Therefore, statutorily, this "two percent fee" authorized by KRS 533.030(3)(e) may only be imposed in those cases in which the crime was committed after the effective date of the revised KRS 533.030. Hudson v. Commonwealth, supra at 611.

Since there is no statute of limitations on felony offenses in Kentucky there is high probability that a number of cases will arise in which this two percent fee is erroneously applied to defendants whose crimes allegedly took place before July 15, 1982. KRS 500.050(1).

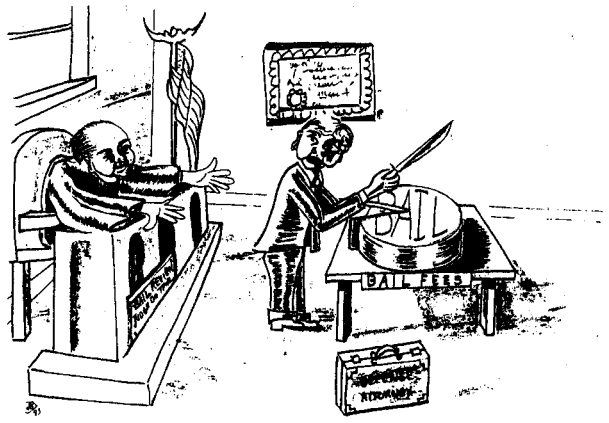
It is clear from the language of KRS 533.030 that its procedures were not intended to apply to "shock probation" authorized under KRS 439.265. KRS 533.030(3)(e) is applicable only in cases where the court is "imposing a sentence of probation or conditional discharge." KRS 533.030(3).

Nothing in KRS 439.265 indicates that the court granting "shock probation" is required to follow the procedures for probation and conditional discharge contained in KRS Chapter 533. Additionally, whenever the provisions of KRS Chapter 533 are intended to apply to "shock probation" under KRS 439.265 that application is specifically noted by use of the phrase "shock probation." See KRS 533.060 (1) & (2).

Since the assessment of "an additional fee of two percent (2%) to defray the administrative costs of collection of [restitution] payments" is not authorized for restitution made as a condition of "shock probation" under KRS 439.265, a defendant may not be required by the trial court or the circuit clerk to pay such an unauthorized fee.

If your client has had the "additional fee of two percent" erroneously collected from him by the circuit court clerk, those monies must be credited against his restitution obligation and paid to the victim as restitution.

* * * * * *



EARLY REPRESENTATION

As every trial attorney knows, individuals who find themselves involved in the criminal justice system often need the assistance of counsel prior to their being formally charged or prior to formal appointment of counsel. To ensure that indigent persons in this situation receive necessary representation, KRS Chapter 31 authorizes public advocates to enter a case at this early stage.

KRS 31.110(1)(a) provides that:

(1) A needy person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:

(a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled;...

It is clear from KRS 31.110(2)(a), that the legislature intended that indigents should receive representation at the earliest states:

(2) A needy person who is entitled to be represented by an attorney under subsection (1) is entitled:

(a) To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney... .

Thus, whenever an individual appears to be a needy person as defined by KRS 31.100, has requested or is interested in having counsel, and is a person entitled to counsel as provided by KRS 31.110(1), it is the duty of the public advocacy system to undertake representation of that person. In all such cases, the public advocate should make a preliminary inquiry as to indigency and, as soon as feasible, obtain an affidavit of indigency from the person.

DONNA PROCTOR

* * * * * *

GENTLEMEN, MORE THAN A MOMENT, PLEASE

by

Lawrence P. Rapp, Sr.
Senior Investigator, DPA

Following six weeks of investigation, after the investigator logged several hundred miles crossing cities and farmlands, after hostile encounters with uncooperative witnesses, the murder case went to trial. At the conclusion of the Commonwealth's evidence, the Circuit Judge directed a verdict of acquittal. The defense won!

The public advocate congratulated the defendant, then spoke briefly to the prosecutor. As he left the courtroom, the defense attorney saw his public advocacy investigator. He threw up a hand, saying, "Andy, thanks for all the help." In a moment he was headed back toward his

(Continued, P. 32)

office of waiting clients, phone messages, and heavy caseload.

* * *

Do you treat your investigator that way? Do you reduce weeks of hard work, perseverance, frustration, and imagination to a hasty phrase or two of thanks?

If so, the quality of attorney-investigator teamwork offered your clients may be suffering. Investigators are people with ordinary human needs who react like other people to little or no reward for extra effort.

If an investigator is not actively encouraged by you, he may receive no recognition at all for his efforts. Certainly, he can expect none from judges, prosecutors, jailers and police officers.

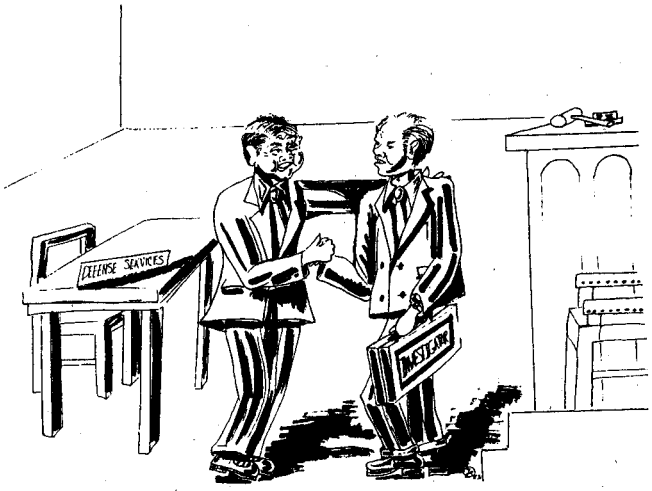
Treat an investigator as you would any other trained professional in the legal community--with courtesy, respect, and sincere gratitude. Encourage an investigator's input; draw upon his knowledge and expertise; be aware that investigators also have court deadlines to meet while serving several attorneys; make him part of the defense team "brain-storming," rather than just a "go-fer."

Some errands, however, such as the timely filing of documents, an investigator can perform to the significant benefit of a client. But each time you unload non-essentials upon an investigator, you reduce the time he can devote to applying his skills to help your current client, your other clients, and the clients of other attorneys for whom he works. Don't feed an investigator a "hundred visions and revisions, before the taking of a toast and tea."

It is important "that the attorney take time to explain the case to the investigator, discuss theories of defense and prosecution, the charge, its elements and proof, and to set priorities and time limits on the investigative work." (James D. Ford, Jr., "Toward a Better Attorney-Investigator Relationship," NLADA Briefcase, Vol. 35, No. 3).

Time deadlines given investigators should be realistic and assignments should allow sufficient "lead-time" for successful completion. Giving investigators "urgent" assignments may suit your impatience, but may also create time-binds or overtime hours for an investigator.

(Continued, p. 33)



Of course, some last minute items cannot be avoided, but repeated "to be done today" assignments will seem false to an observant investigator and will create enough schedule havoc for him that he may come to resent your thoughtlessness.

Don't ask the impossible of an investigator, then castigate him for not producing expected results; don't always dump on him the hostile interview; don't expect him to do more than is humanly possible; don't waste his time and talents. If you need a document, provide the date of birth, place of birth, and social security number he will be expected by other agencies to have when requesting that document. If you need to explore several possibilities with witnesses, explain them so he doesn't have to guess at what you haven't told him.

Above all, don't lie to him. When you mislead an investigator you fracture his trust in you, create for him the added burden of representing your lie on the street, and distract him from investigative goals by making him ferret out your untruth--sometimes during interviews with key witnesses. To be fully effective, an investigator must be fully informed.

Like expert witnesses, a public advocacy investigator can be a potentially valuable resource. Some investigators have experience in the fields of locking devices, polygraphy, locating missing witnesses, photography, and other specialites. An investigator is a team member, an assistant, a sounding board who can bring to a case some understanding of law, an awareness of "street" realities, a familiarity with witnesses in his investigative district, imagination, and a variety of formal training experiences. Use him, don't abuse him.

Attorneys need the time, effort, experience, training, and imagination of investigators: investigators need the intelligent guidance, full cooperation, and sincere gratitude of their attorneys. A little effort by public advocates can significantly improve an investigator's morale, stimulate an eagerness to help, and lead to important contributions to the defense effort. If an investigator significantly contributes to a case, write a letter to recognize his achievement to his Chief Investigator or superior.

As both investigators and attorneys face budget cuts, heavier and heavier caseloads, and the, by comparison, formidable resources available to prosecutors, we cannot afford the luxury of wasting talent. We need to work together in a spirit of mutual respect. "United we stand," as the Kentucky state motto says, "divided we fall."

On that principle may rest the success or failure of our client's case. So, please, give your investigator more than a moment.

* * * * * *

NO COMMENT

Our version of Chuck Sevilla's "Great Moments in Courtroom History" continues. Send your contributions to The Advocate, c/o Department of Public Advocacy, Frankfort. All dialogue guaranteed verbatim from Kentucky courtroom records.

* * * *

DON'T BE SO LITERAL

OFFICER: Okay...before I ask you any questions I am going to advise you of your Rights. Okay?

SUSPECT: Um huh.

OFFICER: [Reads Miranda warning.]

OFFICER: Do you understand your Rights?

SUSPECT: Yeah.

OFFICER: Do you wish to make a statement?

SUSPECT: I would like to have a lawyer with me.

OFFICER: You don't want to make any statement at all?

SUSPECT: I'll make a, I'll...

OFFICER: Well, what I'm saying is do you want to make a statement to me now?

SUSPECT: Yeah, go ahead.

OFFICER: Okay. So you don't need a lawyer present?

SUSPECT: Could I get one now?

OFFICER: No, you can't get one right now but I won't ask you any questions.

SUSPECT: Okay, go ahead, I'll answer them.

Epilogue - Circuit judge granted motion to suppress.

* * * *

DON'T WORRY YOUR PRETTY LITTLE HEAD

OFFICER: After advising you of your Rights I am going to ask you some questions about this.

SUSPECT: Alright.

OFFICER: [Reads Miranda warning.]

SUSPECT: Okay.

OFFICER: But if you wish to do so you may waive your Rights outlined above and answer questions. Do you understand what I've just told you? Do you understand your Rights?

SUSPECT: Most of them.

OFFICER: What ones don't you understand?

SUSPECT: You may remain silent, what do you mean by that?

OFFICER: Ah, don't worry about that, I was just reading something there. Alright. Okay. Do you understand what I just read you?

SUSPECT: Yeah, I think so.

OFFICER: Okay. Will you make a statement to me?

SUSPECT: What kind of statement?

OFFICER: About what took place is what I am going to ask you.

SUSPECT: Yeah.

Epilogue - No suppression motion filed. Defendant probated.

* * * *

"EVERYBODY KNOWS
MIRANDA IS DEAD AWAY"

OFFICER: I have charged you with robbery in the first degree. I am going to read you your rights...[Reads Miranda warnings.] Do you wish to give me a statement on this charge of robbery...?

SUSPECT: I want to ask you something? Do I get to talk to my lawyer?

OFFICER: You have the right to consult an attorney if you want to. You have the right not to talk to me about this case.

SUSPECT: Can I talk to my lawyer about it?

OFFICER: Are you saying you commit the crime?

SUSPECT: Yes, sir.

Epilogue - Circuit judge denied motion to suppress.

* * * *

Thanks and a tip o' the hat to Jay Barrett and the Stanton staff for collecting and sending these in.

KEVIN MCNALLY

* * * * * *

RULES OF THE CRIMINAL JUSTICE SYSTEM

The following is an excerpt from Alan M. Dershowitz's The Best Defense. He describes the 13 Rules that govern "the justice game" and says "Although these rules never appear in print, they seem to control the realities of the process."

Rule I: Almost all criminal defendants are, in fact, guilty.
Rule II: All criminal defense lawyers, prosecutors, and judges understand and believe Rule I.
Rule III: It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution.
Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.
Rule V: All prosecutors, judges, and defense attorneys are aware of Rule IV.
Rule VI: Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.
Rule VII: All judges are aware of Rule VI.
Rule VIII: Most trial judges pretend to believe police officers who they know are lying.
Rule IX: All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers.
Rule X: Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth.
Rule XI: Most judges and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charged (or a closely related crime).
Rule XII: Rule XI does not apply to members of organized crime, drug dealers, career criminals, or potential informers.
Rule XIII: Nobody really wants justice.

THE ADVOCATE
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