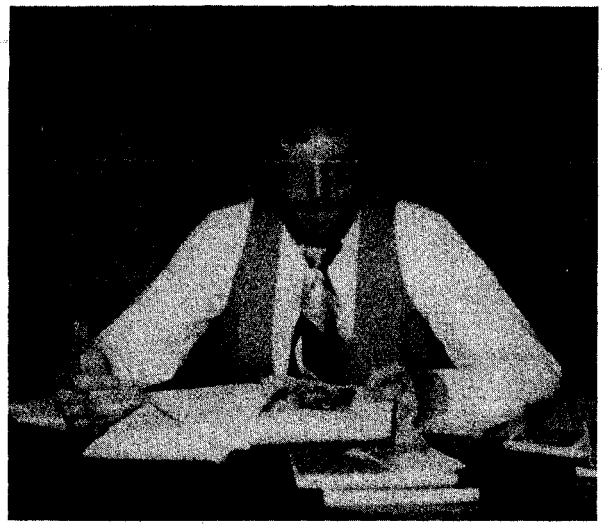
The Advocate

Vol. 5, No. 4 A bi-monthly publication of the DPA June, 1983



THE ADVOCATE FEATURES

George Sornberger, directing attorney of the Somerset Regional Office, is the Advocate's featured attorney this month. George graduated from Syracuse University in 1969 with a degree in Psychology. He then attended law school at Syracuse University and graduated with honors and as the youngest in his class in 1972.

Since graduation from law school, most of George's experience has been in the area of criminal defense work, including four years as a public defender in Lincoln, Nebraska, several years of private practice and the past year as a public defender in

(See Sornberger, P. 2)

CLAIM FORMS DUE BY JULY 15

Claim forms for payment on cases disposed of by June 30, 1983, are due in the Frankfort Office no later than July 15, 1983. Claim forms received after this date will likely not be paid due to Department of Finance regulations.

If you are in an assigned counsel public advocacy system, that means you need to have the judge sign the form and send it in time to be received by July 15.

(See Claim Forms, P. 2)

INSIDE

(Sornberger, Con't from P.1)

the six counties covered by the Somerset Regional Office. Outside the area of criminal law, George worked as an administrative law judge and counsel to the insurance commissioner in Nevada and as managing attorney of the Northeast Kentucky Legal Services Office in Ashland.

George likes being a public defender because it allows him the luxury of practicing criminal defense work without consideration of the fee. He feels that the best part of his job is working with the other members of the Somerset office staff and seeing that their efforts can and do make a difference for an individual client. George especially enjoys hearing the words "not guilty" from the jury and has been successful and fortunate enough to have won not guilty verdicts in five of his last seven trials. George contributes much of his success to the support he receives from his co-workers in Somerset and Frankfort and, especially his wife.

George and his family live on a farm in Pulaski County where they raise horses and have two jennies named Benny and Ray. Thanks, George, for your diligent representation of your clients and your outstanding contribution to our public defender system. We wish you continued success.

DONNA PROCTOR

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(Claim Forms, Con't. from P. 1)

On the other hand, if you are a conflict attorney for one of our full-time offices, you need to have the judge sign the form and submit it to the directing attorney of your full-time office in time for him or her to review the claim and mail to the Frankfort Office by July 15.

If you have any questions regarding this, call the Trial Services Branch Supervisor for your area.

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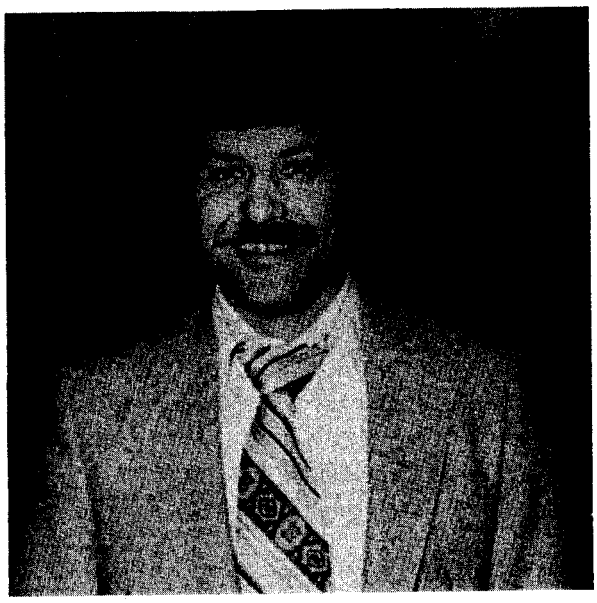
IN MEMORIAM



WILLIAM F. MOORE, JR.
1945 - 1983

WEST'S REVIEW

A number of significant decisions were issued by the Kentucky Supreme Court during March and April.

In Blake v. Commonwealth, Ky., 130 K.L.S. 3 at 3 (March 9, 1983), the Court expounded on the nature of the "harmless error" test as applied to constitutional error. Such error is presumed to be prejudicial unless found to be "harmless beyond a reasonable doubt." The Court in Blake found error in the prosecutor's questions to the defendant concerning his failure to assert his claim of self-defense until some eight months after his arrest. However, the Court held that this error was "harmless beyond a reasonable doubt." The Court noted that the minimum sentence imposed on Blake militated against a finding of harmless error. "It is as reasonable to surmise from a minimum sentence that the jury would have acquitted but for the unfair attack upon the testimony as to conjecture that the minimum sentence means that the jury disregarded the matter." However, the Court considered this factor to be outweighed by the overwhelming evidence of the defendant's guilt. The Court also emphasized that Blake explained his earlier failure to assert self-defense by stating that he remained silent on advice of counsel. In the Court's judgment this explanation "mitigates the possibility that any prejudice to Blake resulted."

The murder conviction of Charles Douglas Miracle was reversed by the Court because of the jury's awareness that Miracle had previously entered and withdrawn a guilty plea. Miracle v. Commonwealth, Ky., 130 K.L.S. 3 at 4 (March 9, 1983). Miracle entered a plea of guilty to the charged offense "including all the incriminating admissions attendant to it" in the presence of many of the panel who later tried him. Six days later Miracle withdrew the plea and proceeded to trial. The Kentucky Supreme Court held that it was reversible error for the trial court to refuse to disqualify the jury panel given their awareness of the withdrawn guilty plea. The Court's decision was buttressed by the prosecutor's action in closing argument in reminding the jury that Miracle had pleaded guilty to the charged murder.

The Court considered several issues in James v. Commonwealth, Ky., 30 K.L.S. 4 at 6 (March 30, 1983). The Court validated the search of a bag which was in the defendant's possession at the time of his arrest. The bag was searched after it was left by the defendant in a police cruiser. The Court found that no right of the defendant was violated by the search because the defendant had denied ownership of the bag stating that some

(Continued, P. 4)

"dude" had handed it to him. Under these circumstances the defendant had no "expectation of privacy" in the bag. The Court in James held that the defense was not entitled to an admonition to the jury that no consideration be given James' failure to testify. The defense was, of course, entitled to an instruction on the matter under Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), but failed to request an instruction. The Court in James also held that James' conviction of forgery in Nebraska, for which a sentence of two years probation was imposed, constituted a prior felony conviction under the PFO statute. That James was never actually imprisoned was irrelevant. And finally, the Court held that James' sentence on a misdemeanor conviction could be made consecutive to sentences simultaneously imposed on his PFO conviction. KRS 532.110 (1)(a) provides that when sentences are imposed for definite and indeterminate terms they shall run concurrently. The court held that KRS 533.060(2), which provides that when a defendant "is convicted or enters a plea of guilty to a felony committed while on parole...the period of confinement for that felony shall not run concurrently with any other sentence" is an exception to the command of KRS 532.110(1)(a).

The Court has resolved the troublesome question of whether a fetus is a "person" within the meaning of Kentucky's criminal homicide provisions. In Hollis v. Commonwealth, Ky., 30 K.L.S. 4 at 7 (March 30, 1983), the Court held that causing the death of a viable fetus will not give rise to a charge of criminal homicide under this state's statutes. The defendant in Hollis had assaulted his estranged, pregnant wife with the intention of destroying the fetus. The assault resulted in death to the fetus. Hollis was subsequently indicted for murder. The Court of Appeals denied Hollis a writ of prohibition to prohibit his trial for murder of the fetus. Commonwealth v. Hollis, Ky. App., 29 K.L.S. 6 at 7 (May 21, 1982). The Supreme Court granted discretionary review. The Court deferred to the overwhelming weight of authority from sister states holding that a conviction for murder may be sustained only when the victim was "born alive." The court also anticipated problems of unconstitutional vagueness in a holding which would extend the status of "person" to a viable fetus since it might be impossible to determine whether a particular fetus was viable and that the defendant knew it was viable. The Court did, however, hold that Hollis could be prosecuted under KRS 311.750 for performing an unlawful abortion. That statute provides that "no person other than a licensed physician should perform an abortion." The Court also held that Hollis might be convicted of both unlawful abortion and assault upon the mother.

In Gross v. Commonwealth, Ky., 30 K.L.S. 4 at 9 (March 30, 1983), the Court strictly delimited the availability of relief under CR 60.02. Moving under CR 60.02, Gross had attacked his guilty plea

(Continued, P. 5)

proceeding, asserting the plea was involuntary. Gross' motion was denied by the trial court and the Court of Appeals affirmed the denial (See West's Review, The Advocate, Vol. 5, No. 1). The Supreme Court in turn affirmed the decision of the Court of Appeals. The Court held that "CR 60.02 is not intended merely as an additional opportunity to raise Boykin defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42." The court made clear that claims, such as ineffective assistance of counsel which could be raised under RCr 11.42, cannot be raised under CR 60.02. CR 60.02 provides relief only for those grounds specified in the rule. The effect of the Court's holding is to make RCr 11.42 the exclusive vehicle for relief in most post-conviction attacks. The Court also held that indigent movants under CR 60.02 are not entitled to appointment of counsel. The court reasoned that KRS 31.110, which provides for appointment of counsel in post-conviction proceedings brought by a needy person who "is being detained under conviction of a serious crime, "only encompasses challenges to convictions for which the needy person is presently incarcerated." Finally, the Court held that a proceeding under CR 60.02 must be brought within a reasonable time and that the determination of what constitutes a "reasonable time" is within the discretion of the trial court.

The court also decided Alvey v. Commonwealth, Ky., 30 K.L.S. 4 at 11 (March 30, 1983), a companion case to Gross, supra. In 1976 Alvey entered guilty pleas to various felony charges. In 1980 those convictions were used to obtain Alvey's further conviction of PFO. Alvey subsequently attacked his 1976 convictions under RCr 11.42. The Court affirmed the denial of Alvey's motion, stating "where a defendant has been convicted of one or more felonies and is subsequently tried and convicted as a persistent felon based on the earlier convictions, this jurisdiction requires him to raise any issues about the validity of those earlier convictions at the time he is tried as a persistent felon. If he does not, he is precluded from contesting the validity of the earlier convictions in subsequent post-conviction proceedings."

In Stamps v. Commonwealth, Ky., 30 K.L.S. 5 at 9 (April 20, 1983), the Court held that a defendant's retrial following declaration of a mistrial is not barred by double jeopardy unless the prosecutorial action resulting in the mistrial was "intended to provoke the defendant into moving for a mistrial." The Court relied on the United States Supreme Court decision in Oregon v. Kennedy, ____ U.S. ____, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) which rejected "harassment" and "overreaching" as standards for triggering the application of double jeopardy to the mistrial-retrial sequence.

Kimbro v. Lassiter, Ky., 30 K.L.S. 5 at 9 (April 20, 1983) presented the issue of whether a misdemeanor charge may be remanded to the district court

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after a felony count joined with the misdemeanor was dismissed by the circuit court. The Court held that it could. "The district court has exclusive jurisdiction of a misdemeanor unless it is joined with a felony."

In Cook v. Commonwealth, Ky., 30 K.L.S. 5 at 9 (April 20, 1983), the Court considered the legality of a vehicle stop based on a tip from an unidentified but reliable informant. The court held that such a vehicle stop is legal so long as it is based on facts which would "warrant a man of reasonable caution in the belief that the action taken was appropriate." The Court viewed the vehicle stop as governed by the U.S. Supreme Court's decision in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The court interpreted Terry as standing for the principle that "a police officer may make an arrest or 'investigatory stop' of an individual in limited circumstances even though no probable cause exists for a belief that a person has committed a felony." The Court stated its opinion that Terry's holding is not limited to reasonable investigatory stops based upon the individual observations of an officer, but extends to stops based on an informant's tip.

Two decisions were issued by the Court of Appeals during the period under review. In Thompson v. Commonwealth, Ky.App., 30 K.L.S. 3 at 2, (March 4, 1983), the Court held that the identity of a confidential informant, who supplied information leading to the defendant's arrest on drug charges, need not be divulged to the defense. The Court distinguished Burks v. Commonwealth, Ky., 471 S.W.2d 298 (1971) in which it was held that the defense was entitled to the identity of an informant who "actually made the buy from the accused thereby becoming a participant in and a material witness to the sale of unlawful drugs." If the informant is a material witness, then under Burks the defense is entitled to his name just as the defense is entitled to the name of any material witness. The court in Thompson also held that any issue as to the inadmissibility of evidence of other crimes was waived by the defendant when, following his objection to the evidence, trial defense counsel so conducted his case as to emphasize the evidence to the jury. "It appears from a reading of this record that appellant, through his own testimony and through cross-examination of other witnesses, participated in the introduction of inadmissible evidence as much as the Commonwealth did ... ."

In Pack v. Commonwealth, Ky. App., 30 K.L.S 4 at 2 (March 18, 1983), the Court reversed the defendant's convictions of burglary and criminal mischief based on action of the trial court in disallowing defense comment on the reasonable doubt standard while permitting the Commonwealth to argue to the jury its construction of the reasonable doubt standard. "[T]o allow the prosecution to comment upon the proper construction of reasonable doubt without extending the same privilege to the

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defendant...could cause the jury to conclude that a higher degree of doubt was required for an acquittal than their ordinary understanding of the term would have indicated." The Court in Pack also found that reversible error was committed when the trial court admitted hearsay, in the form of a written estimate of damages, to establish as an element of the criminal mischief charge that the defendant had caused $1,000 in property damage.

The United States Supreme Court issued several important decisions. United States v. Knotts, 32 CrL 3069 (March 2, 1983) deals with the issue of whether the warrantless use of a radio transmitter to monitor an automobile's progress on public roads and its arrival at a private residence constitutes a search and seizure under the Fourth Amendment. By concealing a "beeper" in a container of chloroform purchased by the defendant, police were able to trace the container to its ultimate destination at an illicit drug "factory." The court, in an opinion by Justice Rehnquist, held that this police action did not constitute a search and seizure because it did not invade any legitimate expectation of privacy. The court reasoned that a person travelling on a public road has no expectation of privacy in his movements. The Court noted that "a police car following Retschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent..." The court concluded that "[i]nsofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation."

Florida v. Royer, 32 CrL 3095 (March 23, 1983) defines the limits of the temporary, investigatory detention permitted under Terry v. Ohio, 392 U.S. 1, ___ U.S. ___, L.Ed.2d ___ (1968). The defendant in Royer was stopped for questioning by police detectives at an airport based solely on the fact that he fit a "drug courier" profile. The detectives told the defendant that they suspected him of transporting narcotics and asked him to accompany them to a private office without indicating that he could choose not to. The detectives requested and retained his airline ticket and driver's license and had his luggage brought to the office without his consent. Royer was then asked for the key to the luggage, which he produced enabling the detectives to open and search the luggage. The Supreme Court initially noted that the detectives did not have probable cause for Royer's arrest. The Court then analyzed Royer's detention under Terry, supra. The court concluded that Royer's detention exceeded the limited detention justifiable under Terry. "In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects." "Reasonable suspicion of crime is insufficient to justify custodial interrogation even

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though the interrogation is investigative." Royers' "consent" to the search of the luggage was tainted by his unlawful detention, thus requiring that evidence yielded by the search be suppressed.

The court elaborated on the plain view doctrine in Texas v. Brown, 33 CrL 3001 (April 19, 1983). Brown was stopped at a routine driver's license checkpoint. The officer involved shined a flashlight into Brown's car and observed an opaque balloon knotted at the tip. The officer was aware that balloons are used to package drugs. The officer then shifted his position to obtain a better view and noticed small plastic vials, loose white powder, and a bag of balloons in the car's open glove compartment. After Brown failed to produce a driver's license the officer asked that he get out of the car. The officer then picked up the balloon which was found to contain a white powdery substance. Brown was then placed under arrest and the car subjected to a full inventory search. The Supreme Court held that the initial stop of the vehicle was lawful and the officer's action in shining the flashlight into the car and changing his position to see inside did not violate the Fourth Amendment. The items in the car were in "plain view". The court rejected argument by the defendant that not only must the items be in plain view but it must be immediately apparent to the police that they have evidence before them. The court held that the police need only have "probable cause to associate the property with criminal activity."

Finally, in Morris v. Slappy, 33 CrL 3013 (April 20, 1983), the Supreme Court considered the nature of an indigent defendant's Sixth Amendment right to counsel. The defendant in Slappy was represented by appointed counsel. Shortly before trial his counsel was hospitalized and six days before trial another assistant public defender was assigned to represent the defendant. At trial the defendant requested a continuance on the grounds that his substitute counsel needed more time to prepare. The continuance was denied after the defendant's attorney stated that he was prepared. The defendant subsequently refused to cooperate with his attorney. The Ninth Circuit Court of Appeals held that the trial court's refusal to grant a continuance violated the defendant's Sixth Amendment right to counsel by depriving the defendant of a "meaningful attorney-client relationship." The Supreme Court rejected this constitutional standard as "novel", stating "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney... that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel."

LINDA WEST

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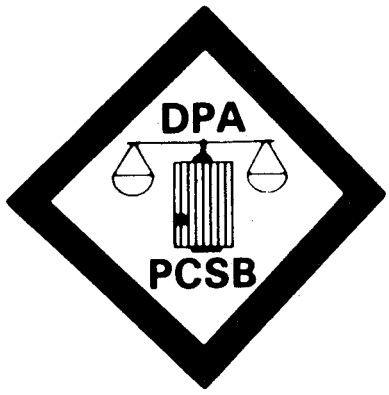

EXHAUSTING STATE REMEDIES:
HOW TO SAY WHAT YOU SAY

It is an old and well settled principle that claims made in federal court in habeas corpus petitions must be presented first to the state courts for their consideration. Ex parte Royall, 117 U.S. 241 (1886). Indeed, the Supreme Court recently held that entire habeas corpus petitions must be dismissed if only one claim has not met this exhaustion requirement. Rose v. Lundy, ___ U.S. ___, 102 S.Ct. 1198 (1982); Bowen v. State of Tennessee, 698 F.2d 241 (6th Cir. 1982). With the strict application now being given this rule, how can we best assure ourselves that the state courts have been properly apprised of our client's claims?

First, the Supreme Court recently emphasized that it is not sufficient that a general set of facts used to support a claim in a federal petition is referred to in the state courts. Anderson v. Harless, ___ U.S. ___, 103 S.Ct. 276 (1982); Picard v. Connor, 404 U.S. 270, 277 (1971). Each legal claim on which a petitioner intends to rely and the facts on which each is based must be presented initially in state court proceedings. Only if the state courts have had a "'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim" will a petitioner be able to maintain the claims in federal court. Anderson, 103 S.Ct. at 277.

Furthermore, both the facts and the legal claims must be stated in a form sufficient to permit the state courts the "fair opportunity" to address them as the Supreme Court requires. The surest way to ensure this is to cite the specific section of the United States Constitution that has been violated. Kirksey v. Jones, 673 F.2d 58, 59 (2nd Cir. 1982). A minority of courts have made this an absolute requirement. See Daye v. Attorney General, 663 F.2d 1155 (2nd Cir. 1981). Allegations that the petitioner was denied "due process" or a "fair trial" without further elucidation may be insufficient. See Gayles v. LeFevre, 613 F.2d 21 (2nd Cir. 1980).

It is also wise to cite decisions from the United States Supreme Court or other federal courts based on the controlling principles. Morrow v. Wyrick, 646 F.2d 1229, 1232 (8th Cir. 1981). Citing cases decided in state court might also be sufficient; however, care should be taken that the cited decisions do not rely solely on state law even if the litigants raised federal constitutional issues in those cases. Anderson, 103 S.Ct. at 278.

The Supreme Court also requires that the claim presented to the state courts be "the substantial equivalent" of that presented to the federal court. Picard, supra at 278. But a

(Continued, P. 10)

claim may not be equivalent even if a state legal provision relied upon in the state court is identical to the federal provision later asserted. Johnson v. Metz, 609 F.2d 1052 (2nd Cir. 1979). Trouble may also be encountered if the claims are made under different federal constitutional provisions, different clauses within the same provision or even under the same provision or clause if the arguments are logically different or are based on an unrelated precedent. Brown v. Cuyler, 669 F.2d 155 (3rd Cir. 1982). The rule of thumb is that the claims must present the same "ultimate question for disposition." Picard, supra at 277.

However, counsel should not pay so much attention to drafting the legal claim that the factual support is neglected. A claim may not be exhausted even if the issue presented has been identical throughout every state court if different facts are stressed. The state court must have been allowed to examine all facts to which the constitutional principle applies. Daughtery v. Gladden, 257 F.2d 750 (9th Cir. 1958).

To avoid any exhaustion problems counsel would be well advised to draft state court pleadings which include federal claims in such a manner that the federal claims may later be asserted verbatim in federal court. Separate allegations of all federal constitutional theories and the facts on which each is based should be presented as specifically and clearly as possible. Counsel should remember, too, that allegations not sufficiently pleaded either legally or factually might be corrected by pursuing a post-conviction proceeding in which the claim is more accurately defined.

RANDY WHEELER

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SUPREME COURT RULES AGAINST AUTOMATIC PROBATION REVOCATION FOR FAILURE TO PAY FINE OR RESTITUTION

On May 24, the Supreme Court in Bearden v. Georgia, 33 CrL 3103 (May 24, 1983), held that the automatic revocation of probation due to a failure to meet the condition of a fine or restitution violates the Fourteenth Amendment. Revocation can occur only if a finding is made that the probationer willfully refused to make bona fide efforts to pay or that alternative forms of punishment, other than imprisonment, are inadequate to meet the state's interest in punishment and deterrence. A full discussion of the issues involved in this case will appear in the next issue of The Advocate.

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THE FOLLOWING ARE PAROLE ELIGIBILITY GUIDELINES INCLUDING OLD AND NEW PAROLE REGULATIONS.

SENTENCE	NEW MINIMUM TIME FOR PAROLE ELIGIBILITY	OLD MINIMUM TIME FOR PAROLE ELIGIBILITY
1 yr.	4 mos.	4 mos.
2 yrs	4.8 mos.	6 mos.
3 yrs.	7.2 mos.	10 mos.
4 yrs.	9.6 mos.	1 yr.
5 yrs.	1 yr.	1 yr.
6 yrs	1 yr., 2.4 mos.	1 yr.
7 yrs.	1 yr., 4.8 mos.	1 yr.
8 yrs.	1 yr., 7.2 mos.	1 yr.
9 yrs.	1 yr., 9.6 mos.	1 yr.
10 yrs.	2 yrs.	2 yrs.
11 yrs	2 yrs., 2.4 mos.	2 yrs.
12 yrs.	2 yrs., 4.8 mos.	2 yrs.
13 yrs.	2 yrs., 7.2 mos.	2 yrs.
14 yrs.	2 yrs., 9.6 mos.	2 yrs.
15 yrs.	3 yrs.	2 yrs.
16 yrs.	3 yrs., 2.4 mos.	4 yrs.
17 yrs.	3 yrs., 4.8 mos.	4 yrs.
18 yrs.	3 yrs., 7.2 mos.	4 yrs.
19 yrs.	3 yrs., 9.6 mos.	4 yrs.
20 yrs.	4 yrs.	4 yrs.
21 yrs.	4 yrs., 2.4 mos.	6 yrs.
22 yrs.	4 yrs., 4.8 mos.	6 yrs.
23 yrs.	4 yrs., 7.2 mos.	6 yrs.
24 yrs.	4 yrs., 9.6 mos.	6 yrs.
25 yrs.	5 yrs.	6 yrs.
26 yrs.	5 yrs., 2.4 mos.	6 yrs.
27 yrs.	5 yrs., 4.8 mos.	6 yrs.
28 yrs.	5 yrs., 7.2 mos.	6 yrs.
29 yrs.	5 yrs., 9.6 mos.	6 yrs.
30 yrs.	6 yrs.	6 yrs.
31 yrs.	6 yrs., 2.4 mos.	6 yrs.
32 yrs.	6 yrs., 4.8 mos.	6 yrs.
33 yrs.	6 yrs., 7.2 mos.	6 yrs.
34 yrs.	6 yrs., 9.6 mos.	6 yrs.
35 yrs.	7 yrs.	6 yrs.
36 yrs.	7 yrs., 2.4 mos.	6 yrs.
37 yrs.	7 yrs., 4.8 mos.	6 yrs.
38 yrs.	7 yrs., 7.2 mos.	6 yrs.
39 yrs.	7 yrs., 9.6 mos.	6 yrs.
More than 39 years and up to and including life	8 yrs.	6 yrs.

PAROLE ELIGIBILITY REGULATIONS

CRIME COMMITTED BEFORE 12/4/80

501 KAR 1:010

SENTENCE BEING SERVED	TIME REQUIRED BEFORE FIRST REVIEW
1 year	4 months
More than 1 year and less than 1 1/2 years	5 months
1 1/2 years, up to and including 2 years	6 months
More than 2 years and less than 2 1/2 years	7 months
More than 2 1/2 years and less than 3 years	8 months
3 years	10 months
Over 3 years, up to and including 9 years	1 year
Over 9 years, up to and including 15 years	2 years
Over 15 years, up to and including 21 years	4 years
Over 21 years, up to and including life	6 years

CRIME COMMITTED 12/4/80 OR AFTER

501 KAR 1:011

SENTENCE BEING SERVED	TIME REQUIRED BEFORE FIRST REVIEW
1 year up to but not including 2 years	4 months
2 years up to and including 39 years	20% of sentence received
More than 39 years up to and including life	8 years

WE NEED TO RETHINK IDEAS ABOUT PRISONS

In several thousand years of what we are fond of calling civilization, it is remarkable that we have not yet evolved a way of dealing with law-breakers that makes any long-term sense for them and for society at large.

Almost everything we have tried has been half-hearted, or wrong-headed, or futile, or actually self-defeating. It now costs the public more to keep a man in prison for a year than to send a child to the best college, but the time and money spent seem utterly wasted. We now have about twice as many convicts in prison as we had a decade ago.

What the public fails to understand is that prison alone is punishment enough for the vast majority of inmates. Being denied a normal life is an acute deprivation; anything more does not reform or rehabilitate, but merely embitters.

Since more than 90% of inmates will be walking the streets again in a matter of a few years, if they learn nothing in prison -- about themselves and the way they can fit into society -- they will inevitably return to the streets as ill-equipped, both emotionally and vocationally, as they were before, and considerably hardened.

Those who speak out against the "coddling" of prisoners are either ignorant or vengeful, or both. Almost anyone can go to prison, for a wide variety of reasons.

Our prison population is not an effective constituency for a politician, and therefore it gets the lowest priority in terms of attention, understanding and intelligent treatment. All the public cares about is getting these people behind bars; what happens to them there, or in what frame of mind they are released, is a matter of total indifference.

Our short-sightedness in this respect is bearing fatal fruit, both inside and outside prison walls. The United States has the highest rate of imprisonment of any developed country, and the highest number of repeaters. Building more prisons to overcome dangerously crowded conditions is the most expensive and least efficacious way to deal with this mounting problem.

The plain fact is that nobody much cares, and nothing much is done until a situation explodes as it did at Ossining this winter. Then a band-aid is applied until the next infection breaks out. What society has yet to learn is that inmates will soon be outmates, and they will repeat their patterns of conduct until we provide otherwise.

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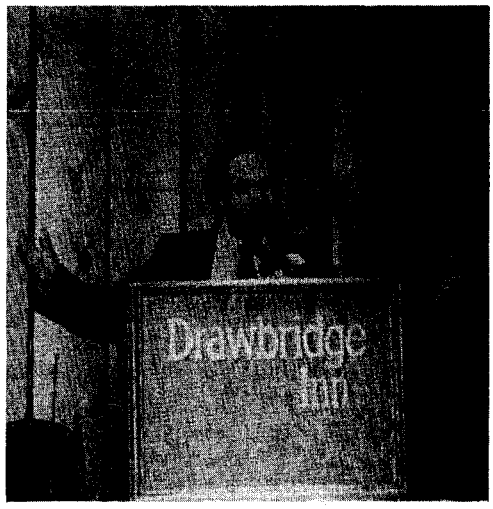
MAY SEMINAR COMPLETED

The Eleventh Annual Public Defender Seminar was conducted at the Drawbridge Inn in Northern Kentucky. Over 210 people attended the 2-1/2 day seminar.

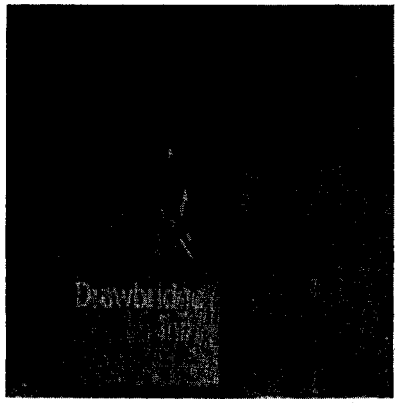
Topics from interviewing clients to ethics were covered during the seminar.

Thanks to those who made this training effort a success.

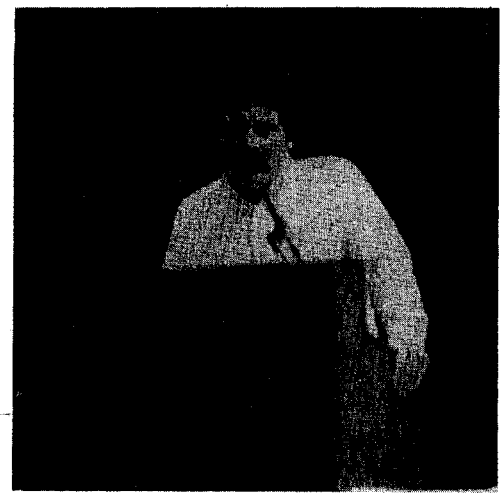
JUANITA BROOKS



EDDIE OHLBAM



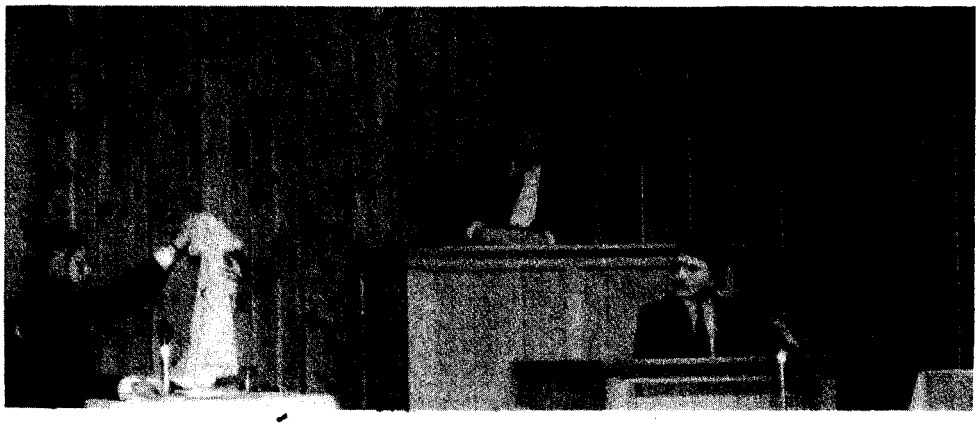
RONALD CARLSON



VINCE APRILE

JACK EMORY FARLEY

BILL AYER RECEIVING
THE DEFENDER SERVICES AWARD
FROM RICK WILSON, DEFENDER DIRECTOR OF NLADA



THE DEATH PENALTY

KENTUCKY'S DEATH ROW POPULATION 16

PENDING CAPITAL INDICTMENTS KNOWN TO DPA 59

GUEST ARTICLE

Have you ever heard a prosecutor in a death case argue in closing: "You can be sure of one thing, if Johnny Defendant is executed he won't murder anyone else"? This phenomena, known as "special deterrence" is viewed, by some at least, as a powerful argument for the death penalty. In response to those readers who feel this column is doctrinaire, we now present a responsible opposing view. This guest article by Professor Robert Bartels is, one must concede, a brilliant analysis of the problem. Professor Bartels' scholarly use of empirical data is sure to impress both supporters and foes of capital punishment alike. Thanks to Professor Bartels and the Iowa Law Review for permission to reprint.

KEVIN MCNALLY

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CAPITAL PUNISHMENT: THE UNEXAMINED ISSUE OF SPECIAL DETERRENCE

Robert Bartels*

Few, if any, topics have generated as many Supreme Court decisions(1) or law review articles,(2) or as much confusion, as the death penalty. The debate has focused on a number of related issues, including the proper standards for determining whether punishment is "cruel and unusual"; the procedures that must be followed in imposing the penalty of death; whether the death penalty is imposed disproportionately on certain identifiable groups, such as racial minorities or poor persons; and whether the death penalty acts as a deterrent. The first two issues mentioned above relate primarily to the constitutionality of capital punishment; the last two speak both to the constitutional question and to the question whether the death penalty is good social policy.

The deterrent effect of the death penalty has sparked a wave of empirical work, which in turn has generated a good deal of critical reaction. Essentially all of this scholarly commentary has focused on one aspect of deterrence: general deterrence. In the process, the issue of special deterrence(3) -- or the effect of the death penalty on recidivism -- has not been

(Continued, P. 17)

examined. This Article seeks to fill that gap.

I. AN EMPIRICAL INQUIRY

The existence and extent of any special deterrent effect from the imposition of the death penalty are of course essentially empirical questions. In order to examine these questions, this study employed a methodology relying in part on previously assembled data concerning the imposition of the death penalty. The first inquiry was: Of the persons executed in jurisdictions with the death penalty, how many were specially deterred from committing further capital offenses? The results are summarized in the following table.

TABLE 1

Capital Offense Recidivism as a Function of the Imposition of the Death Penalty (1940-1959)

Juris.	(4) No. of Persons Executed	(5) Number of Persons Executed Who Committed Further Capital Offenses
Ohio	83	0
Arkansas	56	0
California	154	0
Georgia	215	0
New York	166	0
U.S. (Total)	2001	0

The strength and uniformity of the results summarized in Table 1 motivated a further inquiry into the special deterrent effects of the imposition of the death penalty on the commission of future noncapital crimes. The results of that inquiry are summarized in the following table.

TABLE 2

Noncapital Offense Recidivism as a Function of the Imposition of the Death Penalty (1940-1959)

Juris.	(6) No. of Persons Executed	(7) Number of Persons Executed Who Committed Further Noncapital Offenses
Ohio	83	0
Arkansas	56	0
California	154	0
Georgia	215	0
New York	166	0
U.S. (Total)	2001	0

The numbers reflected in Tables 1 and 2 evidence a powerful special deterrent effect from the imposition of the death penalty.(8) This would seem to imply that the death penalty is a socially desirable penal sanction. However, this

(Continued, P. 18)

conclusion requires further evaluation in light of a number of other considerations.

First, the statistics in Tables 1 and 2 tell us nothing about the number of persons executed for capital offenses who later did something socially useful. To the extent that the death penalty deters those who are executed from later performing socially useful tasks, the utilities of the death penalty reflected in Tables 1 and 2 are balanced by disutilities. Table 3 shows the impact of executions on socially useful behavior.

TABLE 3

Future Socially Useful Behavior as a Function of the Imposition of the Death Penalty (1940-1959)

Juris.	(9) No.of Persons Executed	(10) Number of Persons Executed Who Later Engaged in Socially Useful Behavior
Ohio	83	0
Arkansas	56	0
California	154	0
Georgia	215	0
New York	166	0
U.S. (Total)	2001	0

Although Table 3 seems to demonstrate a disfunctional impact on socially useful behavior that is as powerful as the beneficial impacts reflected in Tables 1 and 2, one caveat must be observed: Table 3 does not indicate how much socially useful behavior those who were executed would have engaged in if they had not been executed. Since most of them were, after all, convicted felons who would have spent a considerable amount of time in prison anyway, it seems fair to conclude that the amount of socially useful behavior that their executions prevented was relatively small.

However, this caveat concerning Table 3 suggests a second possible limitation on the implications of Tables 1 and 2: they do not indicate how many of those who were executed would have committed further offenses, capital or non-capital, if they had not been executed. If they had received long prison sentences instead of the death penalty, their ability to commit further offenses certainly would have been restricted. Nevertheless, it is highly likely that at least some of them would have committed further offenses, either in prison or following release. This conclusion is supported by existing empirical data on recidivism by persons convicted of murder but not sentenced to death; although the recidivism rate is exceedingly low, it does exist.(11)

(Continued, P. 19)

A third arguable qualification on the implications of Tables 1 and 2 is that they do not disclose how many of those who were executed were factually innocent of the crime for which they were executed. If a benefit of the death penalty is that it specially deters convicted murderers from killing further innocent victims, then it may be argued that a countervailing cost of the death penalty is that it may itself kill innocent persons; and, of course, this is a cost that cannot be undone even if the error is discovered later.

One answer to this argument may be that, on the whole, most people who are executed for murder probably were factually guilty. This point was made in the following manner by the State of Iowa's Supreme Court brief in Brewer v. Williams.(12)

> [I]t has not been a hundred years that when a man committed murder one day and was captured the next, he was tried on the third day and hanged on the fourth. And that was with due process of law, including judge, jury, defense counsel and all. Of course errors were made, perhaps some of them grievous, and innocent men were executed. But there is little clear and convincing proof, that, as a whole, justice cannot ordinarily be achieved in such a system.(13)

Of course, the general accuracy of our criminal justice system may not be of much comfort to the objects of its occasional inaccuracies. But a more fundamental argument is that the guilt or innocence of the person being executed is simply irrelevant to special deterrence. Obviously, not all murders are committed by persons who have murdered before, and an innocent executee will be just as specially deterred from committing future murders as a guilty executee. To the extent that the statistics in Tables 1 and 2 include executees who were factually innocent of the crimes for which they were executed, the figures in the right hand columns of these tables empirically demonstrate the validity of this conclusion.(14)

It must be conceded, however, that the point made above raises a question about the necessity of relying on the death penalty as a special deterrent to future criminal conduct. If the death penalty has such a special deterrent effect, then so does any means of death. To confirm this point empirically, Table 4 shows the special deterrent effect of automobile accident deaths.

(Continued, P. 20)

TABLE 4

Commission of Capital Offenses as a Function of Death by Automobile Accident (1959)

Juris.	(15) No. of Persons Killed in Automobile Accidents	(16) Number of Persons Killed in Automobile Accidents Who Subsequently Committed Capital Offenses
Ohio	1193	0
Arkansas	493	0
California	3823	0
Georgia	987	0
New York	2334	0
U.S. (Total)	37,910	0

It may be too much, even for this Article, to suggest on the basis of Table 4 that convicted murderers should be required to drive automobiles, rather than be executed. But Tables 1 and 4 do show that death by automobile accident is an equally effective - and far more widespread(17) -- special deterrent.(18) This may suggest that the death penalty is a relatively unimportant special deterrent, especially in light of its considerable costs. To the extent that society wishes to specially deter capital crimes, encouraging the building of automobiles and highways may be more effective than promoting the death penalty.

II. CONCLUSION

Available data unquestionably demonstrate a clear special deterrent effect from the imposition of the death penalty, whether or not the executee is guilty. However, the data do not permit us to quantify the marginal special deterrent effects of the death penalty, as compared to other forms of punishment such as incarceration or torture. Moreover, the death penalty apparently is considerably less important as a special deterrent than other societal phenomena. Thus, the policy implications of the death penalty's special deterrent effects are unclear.(19)

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FOOTNOTES

(1) See, e.g., Beck v. Alabama, 447 U.S. 625 (1980); Godfrey v. Georgia, 446 U.S. 420 (1980);

(Continued, P. 21)

Lockett v. Ohio, 438 U.S. 586 (1978); Coker v. Georgia, 433 U.S. 584 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

(2) See, e.g., Baldus & Cole, Statistical Evidence on the Deterrent Effect of Capital Punishment: A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 YALE L.J. 164 (1975); Baldus, Pulaski, Woodworth & Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 STAN. L.REV. 1 (1980); Wheeler, Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia, 25 STAN. L. REV. 838 (1972); Special Issue, A Study of the California Penalty Jury in First - Degree - Murder Cases, 21 STAN. L. REV. 1297 (1969). But don't see Bartels, Better Living Through Legislation: The Control of Mind -Altering Drugs, 21 U.KAN.L.REV. 439 (1973).

(3) "Special deterrence" was defined by Professor Packer as "after-the-fact inhibition of the person being punished." H. Packer, THE LIMITS OF THE CRIMINAL SANCTION 39 (1968).

(4) The figures in this column were derived from 1980 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 538 (1981).

(5) The figures in this column are not based on a case-by-case follow-up of the persons whose executions are reflected in the preceding column. However, none of the literature reports any further criminal conduct by those persons.

(6) See note 4 supra.

(7) See note 5 supra. Of course, these figures do not include crimes of omission. See MODEL PENAL CODE Sec. 2.01 (Proposed Official Draft 1962).

(8) Indeed, the correlation co-efficient between execution and lack of subsequent criminal behavior is a perfect 1.

(9) See note 4 supra.

(10) See note 5 supra. It should perhaps be noted that one Middle Eastern jurisdiction has reported one case in which a person did engage in socially useful behavior after being executed. Matthew 27:35, 28:6-7. Of course, quite apart from whether the experience of a foreign jurisdiction has any implications for the United States, this single case does not significantly affect the strength of the negative correlation between execution and subsequent socially useful behavior.

(11) Out of 232 convicted Canadian murderers who, between 1920 and 1975, were paroled (and did not leave the country), one was convicted a second time of murder; he was promptly executed. MINISTER OF INDUSTRY, TRADE & COMMERCE, HOMICIDE IN CANADA: A STATISTICAL SYNOPSIS 151, 170 (1976). Ten of the 232 were convicted of other crimes against the person. Id. at 152,

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170. Out of 707 convicted Canadian murderers who were neither executed nor paroled between 1961 and 1973, five were convicted of some new homicide offense (all while in prison or out on escapes). Id. at 170. See also 1979 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 6.58 (1980)(only 0.7 percent of parolees released between 1974 and 1976 who had been convicted of willful homicide had been convicted of new willful homicide by 1976).

(12) 430 U.S. 387 (1977).

(13) Brief for Petitioner at 72, Brewer v. Williams, 430 U.S. 387 (1977).

(14) Of course, the logic of the preceding argument may seem to raise questions about the desirability of executing murderers if we are really concerned about special deterrence; to the extent that unexecuted murderers would commit further murders, they would be specially deterring their victims from committing future murders themselves. Perhaps the best answer to this point is that, because we can have no assurance that an unexecuted murderer will kill again, executing him will provide more certain special deterrence.

(15) Figures in this column are derived from NAT'L SAFETY COUNCIL, ACCIDENT FACTS 64 (1961).

(16) See note 4 supra.

(17) For example, the number of people killed in the United States in automobile accidents in 1959 alone was more than 18 times the number of people executed during the 20-year period 1940-1959. See Tables 1 and 4 supra. It may be interesting to note the wide variations among the states in the ratio of persons killed in automobile accidents to persons executed. In Georgia, for example, the ratio of persons killed in automobile accidents in 1959 to persons executed between 1940 and 1959 was 4.6:1; in California, the same ratio was 24.8:1.

(18) Although this Article does not address the point empirically, it seems likely that death by drowning, heart attack, and the like also may be more widespread special deterrents to future criminal conduct than the death penalty.

(19) The economic and other social costs of imposing the death penalty are also relevant policy considerations, but are beyond the scope of this Article.

A final note lest there be any possibility that even one reader might get this far with the impression that this Article is an entirely serious piece of scholarship or that the author favors capital punishment: It isn't, and he doesn't.

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TRIAL TIPS

PAYMENT FOR NECESSARY TRANSCRIPTS

Assuming that you convince the trial court of your indigent client's right to a transcript of some prior proceeding (see "The Right to Necessary Transcripts", The Advocate, Vol. 5, No. 3 (April 1983)), the next question inevitably is "who pays". Certainly the indigent defendant is not responsible for payment. KRS 31.110(1)(b); KRS 453.190. The Administrative Office of the Courts (AOC) pays for "transcripts for pauper appeals only." VI Administrative Procedures of the Court of Justice Sec. 5.01(1). The Department of Public Advocacy cannot pay for transcripts except when the crime is committed while the defendant is confined in a state correctional institution. KRS 31.200(3).

Who then is responsible for payment? The county where the charged crime was committed.

KRS 31.200(1) provides that "any direct expense, including the cost of a transcript...that is necessarily incurred in representing a needy person under this Chapter, is a charge against the county on behalf of which the service is performed." KRS 31.200(1) contains no alternative method of financing such services. The phrase, "[s]ubject to KRS 31.190," which begins the first section of KRS 31.200, does not indicate that KRS 31.190 provides a procedure by which a county may evade its responsibilities to pay for "any direct expense, including a transcript...that is necessarily incurred in representing a needy person" under KRS Chapter 31.

The reference to KRS 31.190 is apparently intended to acknowledge that under the first section of that statute "[t]he fiscal court of each county together with any cities involved shall annually appropriate enough money to administer the program of representation it has elected under KRS 31.160." KRS 31.190(1); emphasis added. Thus, if a fiscal court of a county is involved with cities in administering its program of representation under KRS Chapter 31, the costs of "any direct expense...necessarily incurred in representing a needy person" may be allocated

(Continued, P. 24)

between the fiscal court and any cities involved in accordance with their own arrangment.

Any other construction of the phrase, "[s]ubject to KRS 31.190," would result in a legislative recognition of these "direct expenses... necessarily incurred in representing a needy person" without any legislative directive as to what governmental body is required to pay for the expenses.

There is apparent tension between the requirement that the county pay for indigent transcripts and the provision that AOC will pay for appellate transcripts for indigents. Obviously one cannot predict prior to trial whether a trial will result in an appeal. If it does, the court reporter will be reimbursed for transcribing all proceedings designated by trial counsel as part of the appellate record. Thus trial counsel may assert that the trial judge should order a necessary proceeding (preliminary hearing, bail hearing, suppression hearing, previous trial) transcribed prior to trial and determine after trial the appropriate body to pay for the transcript. If the case is appealed, AOC would be responsible; if not, the fiscal court of the county would be required to pay.

GAIL ROBINSON

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ROLE OF COUNSEL IN PFO PROCEEDINGS EXPANDED

On March 30 the Kentucky Supreme Court decided a number of cases limiting the availability of CR 60.02 and RCr 11.42 relief from prior convictions which underlie current PFO sentences. (See West's Review for an analysis of Gross v. Commonwealth and Alvey v. Commonwealth.)

Basically Gross and Alvey stand for the proposition that Kentucky appellate courts will not consider challenges to prior convictions used for enhancement under the PFO sentencing statute where the validity of the priors was not challenged at the PFO proceeding. Consequently a new burden rests on the shoulders of trial counsel representing a client indicted as a persistent felony offender.

If the underlying felony convictions are challengeable by way of RCr 11.42, i.e. if the client is in custody or on probation or parole or is under conditional discharge on the underlying felony, trial counsel must thoroughly investigate the availability of an 11.42 challenge to that conviction. If available, counsel may mount such an attack in the court where the initial conviction was returned. Counsel must then seek to limit the use of that conviction in the PFO court based on the pendency of the 11.42 action or seek the

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continuance of the PFO proceeding until such time as the 11.42 has been disposed of, including appeal. [Counsel should note the recent decision of the Kentucky Court of Appeals in Eggerson v. Commonwealth, rendered May 27, 1983, which indicates that the Court with jurisdiction over the PFO proceeding may be free to disregard the findings of fact of the court having jurisdiction in the post-conviction action challenging the validity of a prior used to enhance. It is likely discretionary review of this decision will be sought.] If an 11.42 in the Court having jurisdiction of the prior is not feasible, a challenge to the validity of the prior for PFO purposes must be made in the PFO court. The client will be unable to challenge the prior's use if not challenged in the PFO court.

If the underlying felony convictions are not subject to 11.42 then counsel is still under an obligation to thoroughly investigate and research the validity of the priors. If the priors are invalid then their admissibility as an element of the PFO charge/status should be challenged in the PFO court. Clearly, the PFO court may be unable to vacate the judgment; however, it is the use of the convictions to establish a PFO status that is being attacked. Counsel should be prepared to conduct a full-blown post-conviction type hearing regarding the admissiblity of the priors. While the defendant bears only the burden of going forward in this action, the burden encompasses not merely a written or oral claim of invalidity, but some proof that the prior conviction is invalid and thus inadmissible under the PFO statute.

Under Gross and Alvey the last shot your client may have to challenge invalid priors is at the PFO proceeding. The only avenue open after that may be an 11.42 action on the PFO conviction alleging your ineffective assistance for failing to thoroughly investigate and challenge the priors underlying the PFO.

DEBBIE HUNT

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IN BRIEF

The following is a brief look at some recent cases from other jurisdictions which may be of some use to trial counsel.

JUVENILE CONTEMPT AS DELINQUENCY

A juvenile has been found to be a status offender under KRS 208.020(b) and (c). After being disposed of, the child violates the court's order in some manner. In some parts of the Commonwealth, at that point the

(Continued, P. 26)

child may be found to be in contempt of court. This act is then the basis for a delinquency adjudication, and ultimately incarceration as a delinquent.

Nothing in KRS Chapter 208 either allows or disallows a finding that contempt of court is an act upon which a juvenile petition may be based. However, KRS 208.020(1)(a) talks in terms of a "public offense", within whose parameters contempt would not logically fall. KRS 208.200(5) allows for detention for noncompliance with an order only imposed after a delinquency finding. The converse would mean that detention cannot follow the finding of noncompliance with a status order.

This position is supported by two recent cases from other jurisdictions. In W.M. v. State, Ind. App., 437 N.E.2d 1028 (1982), the Court held that contempt of court could not be used as the act of delinquency resulting in incarceration. In a thoughtful opinion, the Court reviews the sparse case law from Alaska, Minnesota, Pennsylvania, and California. Counsel with such a case should review this opinion and the cases cited therein. See also In re Baker, Ill., 376 N.E.2d 1005 (1978), which holds under a statute similar to Kentucky's that "[j]uvenile contemnors, civil or criminal, may be punished for their contumacy, but the court clearly cannot use a contempt finding as a basis for an adjudication of delinquency... ." Id., at 1007.

Accordingly, counsel should not allow the juvenile court to use a contempt order as an act of delinquency in order to incarcerate the accused child.

Under the new Juvenile Code, this will no longer be a problem. Under KRS 208A.020 (38), which is scheduled to take effect on July 15, 1984, a status offense "includes instances in which the child who has previously been adjuciated a status offender and who has subsequently violated a court order and is found to be in contempt of court." Thus, a status offender who is held in contempt of court remains a status offender, with the dispositional alternatives appropriate under KRS 208D.

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HOME ARRESTS REQUIRE SEARCH WARRANT

Counsel should be aware of the way the Ninth Circuit has extended the holding of Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). You may recall that in Payton the Court held that absent a warrant or consent a person could not be arrested in their own home consistent with the mandates of the Fourth Amendment.

(Continued, P. 27)

The Ninth Circuit, in United States v. Underwood, ___ F.2d ___ (9th Cir. 1982) 32 Cr.L. 2254 (December 7, 1982) rehearing en banc granted, 704 F.2d 1059 (9th Cir. 1983) has taken Payton one step further. In that case the Court holds that an arrest warrant is not sufficient to allow an arrest of a person within their own home. Rather, a search warrant is required before officers can enter the home to effect an arrest. Such a warrant is required in order to protect a "suspect from an unreasonable intrusion into his 'zone' of privacy, whether that zone embraces his own home or a room at a friend's home", and to protect the "privacy interests of third persons whose homes are invaded by police looking for suspects who happen to be invited guests."

Counsel should thus insist that persons arrested in their homes, or in places in which they have a valid privacy interest, without a search warrant are entitled to have suppressed any evidence seized as a result of that arrest.

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PROBING THE MENTAL STATUS OF A PROSECUTION WITNESS

Finally, counsel should look at the case of United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983). In that case, the main prosecuting witness had a history of mental illness. Defense counsel, however, was prohibited from gaining access to her psychiatric records, and was restrained in cross-examination from inquiring into the extent of her mental illness.

The Court reversed on both counts. First of all, they held that because mental illness is quite relevant to credibility, that wide cross-examination should be allowed. Secondly, the Court held that because "the treatment received, the observations made, and the diagnoses were all relevant to the issue of the witness' mental condition," that the defense should have had access to the witness' psychiatric records prior to trial.

In Kentucky, it is clear that a witness may be impeached by evidence of a mental illness. Mosley v. Commonwealth, Ky., 420 S.W.2d 679 (1967). However, it is not so clear that a defendant in Kentucky has a right through discovery to the psychiatric records of complainants. In Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979), the Court held that the trial court had properly denied a motion under RCr 7.24 to psychiatric records. It is suggested that Wagner does not prohibit a subpoena duces tecum of necessary records.

Counsel should use the Lindstrom decision whenever a prosecution witness has a history of mental illness to gain access to his or her psychiatric records and wide latitude on cross-examination.

ERNIE LEWIS

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APPEALS FROM DISTRICT COURT

The following is a broad outline of the procedures for appealing criminal convictions from the district court through the circuit court and into the appellate courts if necessary. While it is not intended to answer every question about every procedural hurdle you may face, it should be of some assistance in properly processing appeals of district court convictions. Most of the rules governing district court appeals can be found in CR 72.01 through CR 72.12, CR 76.20 and RCr 12.04.

1. IN FORMA PAUPERIS ORDER.

An order allowing the defendant to proceed on appeal in forma pauperis should be obtained immediately after the defendant has been sentenced. Without such an order, the district court clerk's office may be reluctant to file the Notice of Appeal in the absence of a filing fee. See Manly v. Manly, Ky.App., ___ S.W.2d ___, 30 KLS 2 (Decision rendered March 18, 1983).

2. NOTICE OF APPEAL.

Within ten days of the entry of the judgment a Notice of Appeal must be filed in the district court. RCr 12.04(3).

3. RECORD ON APPEAL.

Nothing needs to be done at this point to ensure that the record on appeal is complete since the record consists "of the entire original record of proceedings in district court, including untranscribed and mechanical recordings made under the supervision and remaining in the custody of the district court clerk". CR 72.04. A copy of the tapes to be used in drafting your Statement of Appeal can be obtained by having the district court judge, in the order allowing the defendant to proceed on appeal in forma pauperis, direct the district court clerk to have a copy made. The clerk should immediately send the original tape to the Administrative Office of the Courts in Frankfort and a copy of the tape(s) will be made and should be given to counsel for the defendant.

4. STATEMENT OF APPEAL.

An appeal must be perfected within thirty days after the date of the filing of the Notice of Appeal. CR 72.08. The appeal is perfected by filing a Statement of Appeal in the circuit court. The Statement of Appeal must contain the following:

a. Jurisdictional Facts:

   i. Names of Appellant and Appellee;

   ii. Name and address of counsel;

   iii. Name and address of trial judge;

   iv. Date judgment appealed from was entered;

   v. Date Notice of Appeal was filed;

   vi. Whether or not Appellant is on bond;

(Continued, P. 29)

vii. Whether or not the Appellant desires an oral argument;

b. Statement of the Case

This is a narrative summary of the evidence heard by the district judge and it will be based on the mechanical recordings made at the district court trial. There is no need to refer to the counter numbers on your tape machine when drafting the Statement of the Case.

c. Questions presented

A short concise statement of the issues raised in the appeal.

d. Arguments

A concise argument (not exceeding ten pages) of the issues mentioned in the Questions Presented; and,

e. Conclusion

The request for relief. CR 72.10.

You must serve the Statement of Appeal on the district court judge, the county attorney, and the Commonwealth's attorney.

5. COUNTERSTATEMENT OF APPEAL.

The Appellee's counsel (usually the county attorney) has thirty days from the date that the Statement of Appeal is filed to file the Counterstatment of Appeal. CR 72.12.

6. REPLY STATEMENT OF APPEAL.

Since Appellant is not prohibited by the rules from filing a Reply Statement, one should be filed within fifteen days of the Appellee's Counterstatement. Cf. CR 76.12(2).

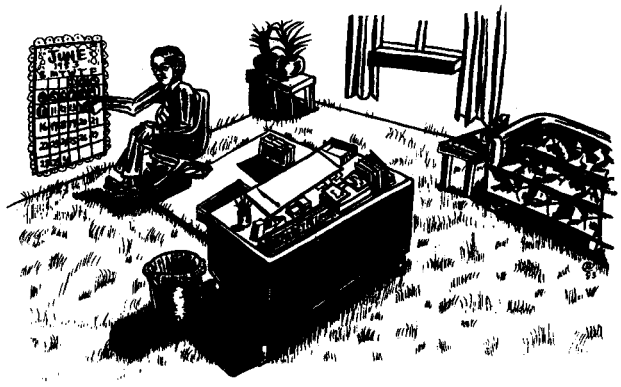
7. PETITION FOR REHEARING.

Again, since such a pleading is not prohibited by the rules, a Petition for Rehearing pursuant to the provisions of CR 76.32 can be filed within twenty days of the circuit court's judgment on appeal. A Petition for Rehearing does not have to be filed in order to process the appeal to the appellate courts. If the petition is overruled, a Motion for Discretionary Review must be filed within thirty days of the date of the order overruling the petition for rehearing. CR 76.20(2).

8. MOTION FOR DISCRETIONARY REVIEW.

If the circuit court upholds the conviction, the Appellant will have thirty days after the date on which the judgment of the circuit court has been entered to file a Motion for Discretionary Review in the

(Continued, P. 30)



Court of Appeals of Kentucky. CR 76.20(2). A Motion for Discretionary Review must contain the following:

a. Jurisdictional Facts:

i. Name of Movant and Respondent and names and addresses of counsel for each;

ii. Date of the entry of the circuit court judgment on appeal (and, if applicable, date of the order overruling the Petition for Rehearing);

iii. Whether or not Movant is on bond;

b. Material Facts.

There should be a clear and concise statement of what occurred in the district court both factually and procedurally and what was argued in the circuit court and the reasons, if any, why such arguments were unavailing;

c. Questions of Law

A clear and concise statement of the specific issues which you wish the appellate court to review.

d. Reasons for Granting Review

Specific reasons should be delineated as to why Appellant's case should be heard by the appellate court.

A copy of the district court judgment and the appellate judgment of the circuit court (plus the order overruling the petition for rehearing, if applicable) must be attached to the Motion for Discretionary Review. Also, in order to facilitate the processing of the appeal, an order allowing the defendant to proceed on appeal in forma pauperis should be attached to the motion.

Five copies of the Motion for Discretionary Review must be filed in the Court of Appeals of Kentucky. CR 76.20(6). A copy of the motion must be served on the circuit court judge, circuit court clerk, the county attorney, and the Commonwealth's Attorney. CR 76.20(7).

The Respondent has twenty days to respond to the motion for discretionary review. CR 76.20(5). No reply to this response is permitted under the rules.

9. DISCRETIONARY REVIEW GRANTED

If the motion is granted "the appeal shall be perfected in the same time and manner as if it were an appeal as a matter of right". CR 76.20(9)(c). There is no need to file a notice of appeal, however, the Designation of Record and Certificate as to Transcript must be filed in the circuit

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court within ten days of the order granting the motion for discretionary review. CR 76.20(9)(c). [In doing research for this outline it became apparent that no one really knew where the Designation of Record had to be filed. Accordingly, it is suggested that the Designation be filed in both the circuit court and in the district court and that it contain the file numbers from each of those courts].

After a Motion for Discretionary Review is granted, the record on appeal must be certified by the clerk of the circuit court within sixty days of the entry of the order granting the motion for discretionary review. CR 73.08. If it cannot be completed within the first sixty days, an extension of time must be entered by the circuit judge on or before the sixtieth day expires. CR 73.08. Any other extensions must be sought in the Court of Appeals.

Once the record is certified, the defendant's attorney (if it is not the Central Office of the Department of Public Advocacy) has thirty days to file the Brief for Appellant on Discretionary Review. CR 76.12(2)(b). Five copies of the Brief for Appellant on Discretionary Review must be filed in the Court of Appeals of Kentucky. CR 76.12(3). Attached to that Brief in the Appendix must be the judgment entered by the district court and the appellate judgment(s) by the circuit court. CR 76.12(4). There is a twenty-five page limit on the Brief for Appellant on Discretionary Review (excluding Index and Appendix). CR 76.12(4)(c).

Appellee has thirty days from the date of the filing of the brief by the Appellant to file the Brief for Appellee on Discretionary Review. CR 76.12(2)(b). Appellant will have fifteen days after Appellee files its brief to file the Reply Brief for Appellant on Discretionary Review. CR 76.12(2)(a).

If the appellate decision of the circuit court is affirmed by the Court of Appeals, a Petition for Rehearing can be filed within twenty days of the adverse opinion. CR 76.32(3). While the appellate rules are not absolutely clear, a Motion for Discretionary Review can probably be filed in the Supreme Court of Kentucky within twenty days of the adverse decision by the Court of Appeals of Kentucky. That Motion for Discretionary Review, like all others, is governed by CR 76.20.

The Department has on file sample documents whose format can be followed in processing district court appeals. If anyone would like to be provided any of these, please contact the Department.

TIM RIDDELL

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