The Advocate

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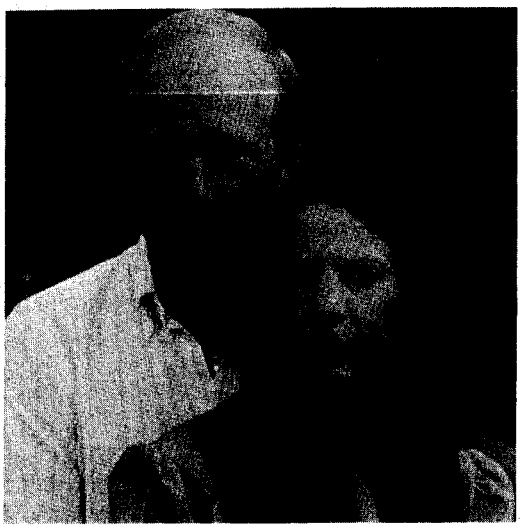
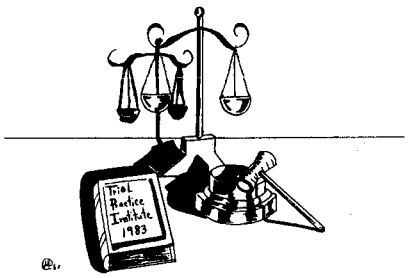


The Advocate's featured attorney this month is Tod Megibow. Tod is the administrator of the Graves Co. Public Advocacy Program. Tod is no newcomer to public advocacy. After graduation from Loyola University law school in New Orleans, Tod joined the DPA in its post-conviction office at the Kentucky State Penitentiary at Eddyville. Tod says working in post-conviction provided an opportunity to learn criminal law "backwards" in that by seeing the mistakes and techniques of others he learned what techniques to avoid and what techniques to emulate.

Tod enjoys criminal defense trial work because of the challenge of combining the roles

(See Megibow, Page 36)



TRIAL PRACTICE INSTITUTE

The Department of Public Advocacy will conduct its second Trial Practice Institute at Eastern Kentucky University in Richmond on October 26-29, 1983.

(See TPI, Page 36)

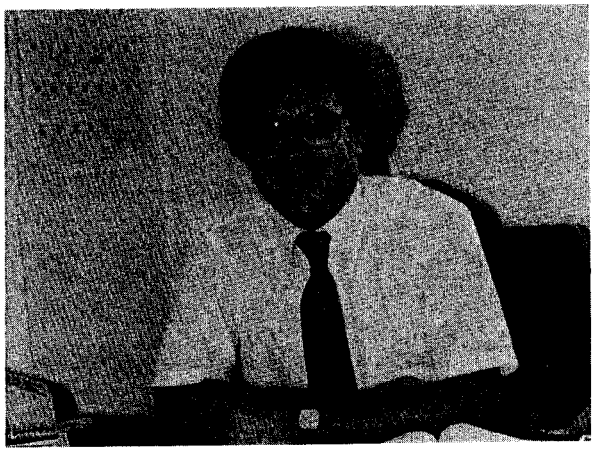
INSIDE

APPELLATE BRANCH

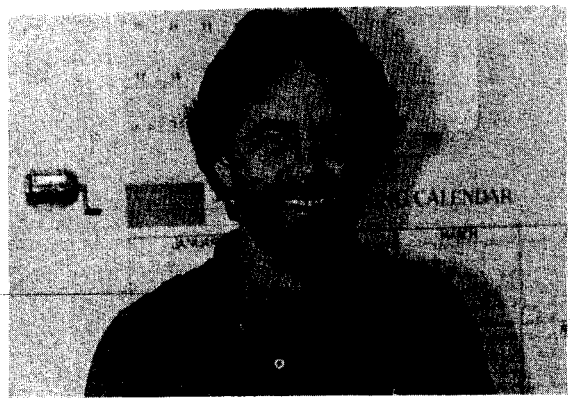
Pursuant to Chapter 31 of the Kentucky Revised Statutes, the Appellate Branch of the Department of Public Advocacy directs appellate services for indigent criminal defendants throughout the state. The Appellate Branch is responsible for handling all criminal felony appeals from circuit court to the Kentucky Court of Appeals and Kentucky Supreme Court.

All felony appeals which are referred to the Appellate Branch are processed and are handled either "in house" or "of counsel." There are presently nine full-time Assistant Public Advocates handling appeals. During the first six months of 1983, a total of one hundred eight (108) appeals were assigned to these "in house" attorneys. A number of other cases, however, are assigned to a battery of attorneys around the state. These attorneys handle criminal appeals for the Department under the "of counsel" plan. During the first six months of 1983, a total of one hundred six (106) appeals were assigned to "of counsel" attorneys.

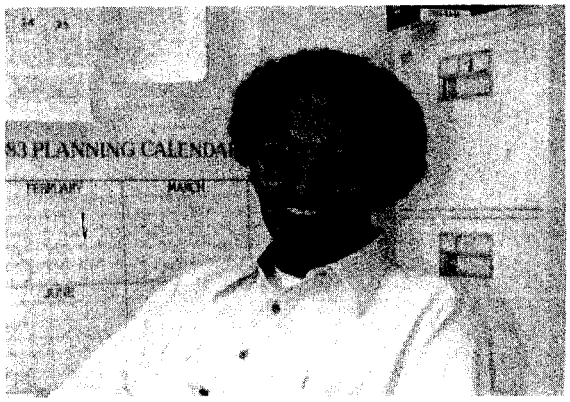
Since the Appellate Branch handles only felony appeals from the circuit to the appellate courts, district court convictions which are appealed to the circuit court must be handled by local attorneys rather than the central office. If discretionary review is granted by the Court of Appeals, the central office will assume representation. Any public advocate having questions about appellate procedure should contact Mark A. Posnansky, Chief, Appellate Branch, at (502) 564-5234.



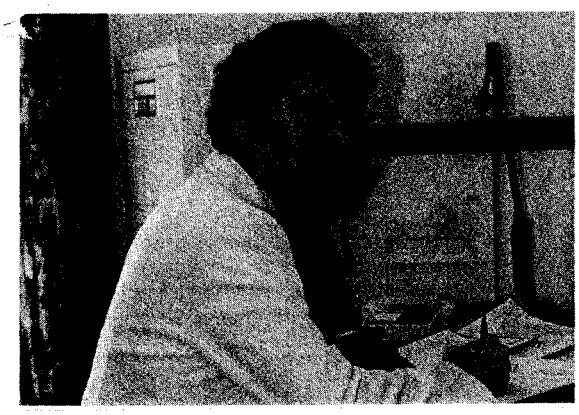
Mark A. Posnansky, a 1973 graduate of the University of Kentucky and a 1976 graduate of the University of Louisville Law School, has been associated with the Department of Public Advocacy and the Appellate Branch since April, 1977. He was named Chief of the Appellate Branch in October, 1982.



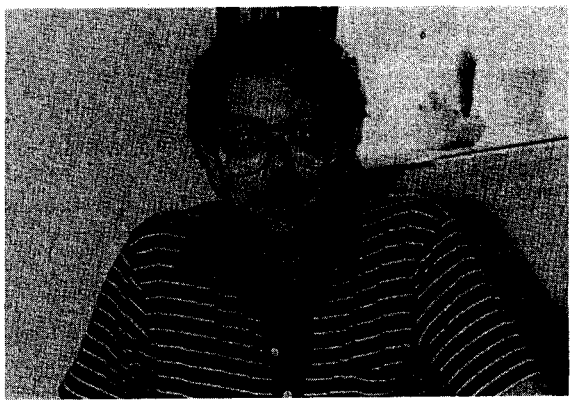
Tim Riddell has been with the Department of Public Advocacy since January, 1973. He graduated from the University of Kentucky Law School in December, 1973. Tim, a former chief of the Appellate Branch, is now devoting his energies to representing indigent clients on appeal.



Larry Marshall, a 1971 graduate of Kentucky State University and a 1974 graduate of the University of Kentucky College of Law, has been with the Department since June of 1975. Larry is considered one of the "senior litigators" in the Appellate Branch.



Michael Wright, a graduate of the University of Kentucky and the University of Louisville School of Law, began his legal career with the Jefferson District Public Defender. Mike came to the Department of Public Advocacy in 1979 where, in addition to his appellate work, he has maintained an active capital trial caseload and has continued to monitor juvenile law developments.

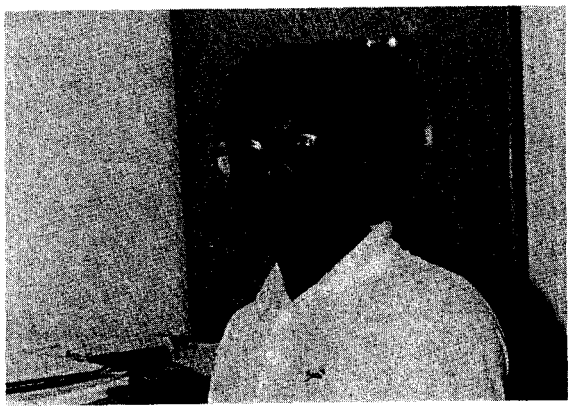


Bill Radigan, a graduate of the University of Louisville School of Law has been on the staff of the Department of Public Advocacy since 1975. Until recently, Bill was the mental health advocate for the office, working extensively with the General Assembly and various statewide committees and organizations in all aspects of mental health law. Bill has now returned to his former position, working full time on appellate and trial work.

Marie Allison, a 1972 graduate from the University of Kentucky Law School has been with the Appellate Branch since October 1982. Previously she has served as Deputy General Counsel for the Human Resources Department, and has specialized in disability law for several years.

Linda K. West has been with the Department of Public Advocacy since 1976, the year in which she graduated from the University of Kentucky School of Law. Linda has authored "West's Review," a regular feature of The Advocate, since April, 1979.

JoAnne Yannish is a 1978 graduate of Notre Dame Law School. She worked 2-1/2 years in Legal Services. JoAnne joined the Department of Public Advocacy in May, 1981, first in the Post-Conviction Branch and then in the Appellate Branch.



Rodney McDaniel graduated from the University of Kentucky School of Law in 1976. Rodney has worked with the Department of Public Advocacy since that date.

WEST'S REVIEW

The new Kentucky Supreme Court has been vigorously placing its imprint on the state's criminal case law. An unusual number of published opinions were issued by the Court during May and June.

The Court has overruled its holding, stated in Commonwealth v. Brown, Ky., 619 S.W.2d 699 (1981), that the abolition of RCr 9.62, the accomplice testimony rule, is ex post facto when applied to crimes committed before the rule was abolished but tried after its abolition. In Murphy v. Commonwealth, Ky., 30 K.L.S. 6 at 7 (May 11, 1983), the Court held that RCr 9.62, which prohibited a conviction based solely on the uncorroborated testimony of an accomplice, was merely procedural. "It does not take less evidence to convict now than before the rule was abolished." Consequently, denial of the benefit of RCr 9.62 to defendants charged with crimes committed before the abolition of the rule does not violate the ex post facto proscription against retroactive application of any change permitting an accused to be convicted on less proof than formerly required. The decision is a complete reversal of the Court's holding in Brown, supra, that abolition of RCr 9.62 "enables the Commonwealth to convict on less evidence than previously required." A petition for rehearing is pending.

The Court in Murphy also considered whether a taped confession of a co-defendant, which incriminated the defendant, was improperly admitted. The defendant took the stand in his own defense, following which the co-defendant took the stand. The co-defendant was thus subject to cross-examination by defense counsel so that there was no denial of confrontation. However, the defendant contended that the introduction of the confession, at a time when it was unknown whether the co-defendant would take the stand, forced the defendant to take the stand to deny the co-defendant's statements. This argument was rejected since no objection on this ground was made at trial. "Had he made such an objection, [the co-defendant] could have been given the opportunity to testify first."

In Commonwealth v. Phillips, Ky., 30 K.L.S. 6 at 9 (May 11, 1983), the Court was confronted with a question of sufficiency of the evidence under KRS

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506.120, the criminal syndication statute. The statute proscribes various listed acts when performed "with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities." Subsection (3) of the statute defines a "criminal syndicate" as "five or more persons collaborating to promote or engage in [various listed offenses] on a continuing basis...." The Court rejected argument by the defendant that the evidence did not establish that five people had collaborated on a continuing basis, but did not analyze the evidence in its opinion. The Court also rejected argument that, where the Commonwealth attempted to prove that nine people had taken part in the syndicate, the defendant was entitled to an instruction allowing the jury to find the existence of a syndicate based only on those individuals as to whom the proof was sufficient. The defendant argued that, unless the proof was sufficient as to all nine individuals it was error to submit the issue of their involvement to the jury. The defendant submitted that to do so could result in a non-unanimous verdict. The Court was unpersuaded, stating: "[T]he Commonwealth is at liberty to prove or attempt to prove as many persons 'collaborated' as enabled to do so by available witnesses." "This is not giving a jury the option of finding alternative grounds of guilt."

In Carwile v. Commonwealth, Ky., 30 K.L.S. 6 at 10 (May 11, 1983), the Court held that RCr 9.56 does not require an instruction to the jury that "if you find the defendant guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree." The rule formerly required such an instruction as to lesser offenses but the requirement was eliminated by amendment in 1978.

The decision of the Court of Appeals in Commonwealth v. Jackson, Ky.App., 29 K.L.S. 10 at 5 (August 20, 1982), has been affirmed by the Kentucky Supreme Court. The Court of Appeals held in Jackson that a prior conviction of possession of a handgun by a convicted felon may be used, like any other felony conviction, to later obtain enhanced punishment under the PFO statute. See "West's Review", The Advocate, V. 4, No. 6 at 13. The Supreme Court granted discretionary review and agreed with the Court of Appeals. Jackson v. Commonwealth, Ky., 30 K.L.S. 6 at 11 (May 11, 1983). The Court found Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980) to be inapposite. "The holding of Boulder...is merely that when a single prior felony is utilized to create an offense or enhance a punishment at the trial of the second crime so created or enhanced, it may not be used at the trial to prosecute the defendant under KRS 532.080." (Emphasis added). "It is our holding that where an accused has been previously convicted

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of the crime of possession of a handgun by a convicted felon, that conviction assumes the status of any other offense at a subsequent trial and that both the felony conviction which was the basis of the handgun offense and the handgun offense may be utilized under KRS 532.080 in the persistent felony phase of the trial."

In Senay v. Commonwealth, Ky., 30 K.L.S. 6 at 11 (May 11, 1983) the Court delineated what must be shown in order to establish a "choice of evils" defense. The defendant in Senay testified in defense to a charge of possession of a handgun by a convicted felon that he obtained the handgun in response to a threat made by one Lewis that he would kill the defendant if the defendant gave evidence incriminating Lewis to the Commonwealth. The threat was not communicated directly to the defendant but to the defendant's brother-in-law. The defendant retained the handgun for two months after hearing of the threat. The trial court held that this evidence did not entitle the defendant to an instruction on choice of evils. The Supreme Court affirmed. "For this defense to be available...it must be shown that a defendant's conduct was necessitated by a specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative, other than the violation of the law for which he stands charged...." The defense is codified in KRS 503.030: ...[C]onduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged...." The Court found that since the defendant asserted "only a general fear posed by a single threat communicated through a third person, the possession of the handgun over a two month period was unlawful."

In Thompson v. Commonwealth, Ky., 30 K.L.S. 7 at 13 (June 15, 1983) the Court certified as the law that a prior criminal record is not admissible to establish a propensity for violence and aggression. The Court held that evidence of prior specific acts is inadmissible to prove character. "Such can only be proved by evidence of the individual's reputation in the community, not by personal opinion, nor by specific acts of conduct." The Court also upheld its ruling in Kohlheim v. Commonwealth, Ky.App., 618 S.W.2d 591 (1981), that a defendant charged with an offense based on wanton or reckless conduct is entitled to assert a defense of self-protection so long as the defendant was not wanton or reckless in believing the use of force to be necessary.

In Partee v. Commonwealth, Ky., 30 K.L.S. 7 at 14 (June 15, 1983), the Court held that the defendant had not introduced sufficient proof to demonstrate a systematic exclusion of a particular group from the jury pool. The defendant had alleged that doctors and lawyers were systematically

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excluded from the jury pool from which the grand jury and petit jury were selected, thus violating his right to be tried from a jury drawn from a cross-section of the community. Three jury commissioners variously testified that they "avoided" the selection of doctors and lawyers, "did not consider" doctors and lawyers, and did not "disregard" doctors and lawyers but did not select them. Justice Leibson in a dissenting opinion would have found the evidence sufficient to show a pattern of systematic exclusion.

The Court has held in Gilliam v. Commonwealth, Ky., 30 K.L.S. 7 at 14 (June 15, 1983), that an indigent movant, who did not appeal his conviction, is not entitled to a free transcript preparatory to filing a motion under RCr 11.42. The Court cited United States v. MacCollum, 426 U.S. 317, 96 S.Ct. 2086, 49 L.Ed.2d 666 (1976) as dispositive. The U.S. Supreme Court in MacCollum held that a defendant is entitled to a free transcript to aid him in a post-conviction challenge only after he has filled a collateral attack which is not frivolous, and where a transcript "is needed to decide the issues presented."

In Buchanan v. Commonwealth, Ky., 30 K.L.S. 7 at 15 (June 15, 1983), the Court reaffirmed the holding of C.E.H. v. Commonwealth, Ky.App., 619 S.W.2d 725 (1981) that an order waiving jurisdiction of a juvenile to the circuit court is not appealable. The Court rejected argument by the defendant that KRS 208.380(1) authorizes an appeal to the circuit court of a district court order waiving juvenile jurisdiction. KRS 208.380(1) provides for appeal of any district court order which causes a juvenile to be "restrained of his liberty, or placed in the custody of any institution, or fined or punished in any manner." The Supreme Court concluded that a waiver order does not result in any consequence listed by the statute but "addresses only the question of jurisdiction to deal with the charge against the juvenile."

In Hensley v. Commonwealth, Ky.,30 K.L.S. 7 at 15 (June 15, 1983), the defendant attacked his conviction of four counts of receiving stolen property which were based on his possession of cattle stolen from four different owners. The defendant argued that since there was no evidence of when the property was received he could be convicted of only one count based on his single act of possession. The defendant also argued that the purpose of KRS 514.110, which defines the offense of receiving stolen property, is to punish a "course of conduct" and thus only one count could be charged under the statute. The Court rejected the defendant's arguments, holding that a separate count was correctly charged as to each owner. The statute "is not directed at a course of conduct, such as a general fencing operation, but prohibits the act of receiving, retaining or disposing of the property of another." In the Court's opinion the statute "is designed for the protection of an owner."

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In Nichols v. Commonwealth, Ky., 30 K.L.S. 7 at 16 (June 15, 1983), the defendant asserted that his retrial following a first trial which ended in a hung jury was violative of double jeopardy because he was entitled to a directed verdict at the first trial. The Court of Appeals held that Nichols preserved a challenge to the sufficiency of the evidence at his first trial by his motion to dismiss the indictment at his second trial. Nichols v. Commonwealth, Ky.App., 29 K.L.S. 5 at 2 (April 2, 1982). The Supreme Court granted discretionary review and affirmed the holding of the Court of Appeals. However, upon reviewing the evidence the Court held that it was sufficient to withstand the motion for directed verdict.

Brown v. Commonwealth, Ky., 30 K.L.S. 7 at 16 (June 15, 1983), involved the construction of KRS 514.040, the statute denouncing the offense of theft by deception. The defendant, the manager of a transmission repair shop, was convicted of theft by deception after he knowingly accepted payment from an undercover police officer for unnecessary repairs on a car transmission. The defendant also represented that the transmission would be repaired while in fact it was replaced with a used transmission. The defendant argued at trial that he was entitled to a directed verdict because the Commonwealth failed to prove an essential element of the offense - reliance by the detective upon the misrepresentation of the movant. KRS 514.040(1)(a) provides that a person deceives when he intentionally "creates or reinforces a false impression." The Court held that reliance upon the false impression is a necessary element under the statute. The Court then went on to find that, while the undercover agent had not, in fact, relied on the defendant's misrepresentation that the transmission required repairs, the agent had relied on the misrepresentation that the transmission would be repaired rather than replaced. Thus, replacing the original transmission with a used one violated the statute.

Two published opinions were issued by the Court of Appeals during May and June. In Richardson v. Commonwealth, Ky.App., 30 K.L.S. 7 (May 13, 1983), in a surprising opinion, the Court of Appeals held that "prior burglary convictions cannot be used in impeaching a defendant-witness upon a trial involving a burglary charge." The Court weighed the probative value of a burglary conviction as impeaching evidence against the risk that its introduction will prejudice a defendant on trial for burglary. The Court stated as the basis for its holding that "[w]e believe that the jury would more readily use a prior burglary conviction as...proof of guilt...than it would in weighing the truthfulness of the defendant's testimony." The Court additionally held in Richardson that a felony conviction for which a probated sentence is imposed and "which results in no servitude at all" may be used to obtain an enhanced penalty under the PFO statute.

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In Eggerson v. Commonwealth, Ky.App., 30 K.L.S. 7 at 4 (May 27, 1983), the defendant asserted that his trial defense counsel rendered ineffective assistance by failing to object to the use of an invalid prior conviction at the defendant's adjudication as a persistent felony offender in the Fayette Circuit Court. Subsequent to the PFO conviction the Bourbon Circuit Court held one of the prior felonies on which it rested invalid. The defendant then filed an RCr 11.42 motion in the Fayette Circuit Court alleging ineffective assistance of trial counsel. The Fayette Circuit Court declined to accept the finding of the Bourbon Circuit Court. The Court of Appeals held that, regardless of the Fayette Circuit Court's failure to accept such finding, "we do not believe that counsel's failure to object to a guilty plea conviction which on its face was perfectly valid, and to which there is no indication that he was apprised by appellant that the guilty plea was involuntary or otherwise improper, renders his assistance less than reasonable." In a dissenting opinion Judge Miller stated he would hold that the Fayette Circuit Court was bound by the findings of the Bourbon Circuit Court, and that, the prior felony having been held invalid, the Fayette Circuit Court was required to vacate the PFO conviction.

The United States Supreme Court issued a number of significant decisions during the two months under review.

The Court held in Kolender v. Lawson, 33 CrL 3063 (May 2, 1983) that a California statute which requires persons loitering on the streets to provide "credible and reliable" identification when stopped by police, but that provides no standards for what will satisfy the identification requirement, is unconstitutionally vague on its face. Under the statute, failure to produce the required identification permitted the individual's arrest. The Court concluded that, by leaving the determination of what identification is "credible and reliable" to the arresting officer the statute "confers on police a virtually unrestrained power to arrest and charge persons with a violation." Justices White and Rehnquist dissent.

The Court has overruled its holdings in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) that, before a search warrant may be issued based on the tip of an unidentified informant "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant...was 'credible' or his information 'reliable.'"

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Aguilar, at 114. Illinois v. Gates, 33 CrL 3109 (June 8, 1983). The test as stated in Aguilar and Spinelli became known as the "two-pronged test" requiring a showing of the basis for the informant's information, and the facts supporting the information's reliability or the informant's crediblity. In Gates, a search warrant was issued based on an anonymous tip given to the police concerning drug sales by the defendants. The informant's claims were partially corroborated by police surveillance and investigation of otherwise innocent activities of the defendants. There was no showing of the factual basis for the informant's assertion that the defendants were selling drugs. The Illinois Supreme Court, relying on Aguilar, held that, absent such a showing, the informant's tip could not justify the issuance of a search warrant. The Supreme Court disagreed, holding that the two factors set out in Aguilar do not constitute absolute prerequisites to the issuance of a search warrant, but rather are "relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." The Court concluded that the informant's tip in Gates, coupled with other facts obtained by the police, gave rise to probable cause for issuance of the warrant. Justices Marshall, Brennan and Stevens dissented.

In Illinois v. LaFayette, 33 CrL 3183 (June 20, 1983), the Court held that the warrantless inventory search of a container taken from an arrestee as part of the procedure of processing him for incarceration does not violate the Fourth Amendment. The Court cited its holding in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), that "the inventory search constitutes a well-defined exception to the warrant requirement." The Court saw no basis for distinguishing between the inventory search of an impounded vehicle and an arrestee's possessions.

In U.S. v. Place, 33 CrL 3196 (June 20, 1983), the Court held that detention of the defendant's luggage for ninety minutes following his arrival at LaGuardia Airport until a trained narcotics dog could be obtained to "sniff" the luggage exceeded the limits of the investigative stop permitted by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The defendant's behavior aroused the suspicions of police officers. The defendant refused to consent to a search of his luggage. The officers then removed the defendant's luggage to another location, unknown to the defendant, where it was held until subjected to the sniff test. The Court noted that Terry, supra, permits a brief investigative stop on less than probable cause and that the

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authority of Terry extends to both persons and their personal effects. "[T]he principles of Terry and its progency would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope." However, the Court concluded that the ninety minute detention of Place's luggage, involving its removal to another location, exceeded that permissible scope. The agents' action constituted a "seizure" of the evidence which was lawful only if based on probable cause.

The Court has narrowed its holding in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Oregon v. Bradshaw, 33 CrL 3211 (June 23, 1983). The Court held in Edwards that, once a suspect has asked to speak to an attorney, a later resumption of interrogation is violative of Miranda, even though the suspect responds to questions, unless the suspect himself initiates further communication. In Bradshaw, the defendant terminated questioning by invoking his right to counsel but later asked the police "Well, what is going to happen to me now?" The officer again advised the defendant of his rights, discussed what offense he would be charged with, and told him he might help himself by taking a polygraph. The defendant subsequently took the polygraph. After being told that he had "failed" the test the defendant gave a full confession. The Court concluded that the defendant's inquiry as to what would happen to him reinitiated interrogation because it "evinced a willingness and a desire for a generalized discussion about the investigation." Thus, there was no violation of Edwards. As the second step of its analysis, the Court determined that the defedant's waiver of his previously invoked right to counsel was voluntary under "the totality of the circumstances." Justices Marshall, Brennan, Blackmun and Stevens dissented.

Finally, in Solem v. Helm, 33 CrL 3217 (June 27, 1983), the Court held that a sentence of life without parole under a recidivist statute was cruel and unusual punishment where the defendant's record consisted entirely of property offenses, the most recent conviction being the uttering of a "no account" $100 check. The Court distinguished its holding in Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1981), that a life sentence for the commission of a third non-violent offense does not violate the prohibition against cruel and unusual punishment, on the grounds that Rummel was not denied eligibility for parole. Chief Justice Burger, and Justices White, Rehnquist, and O'Connor dissent.

LINDA WEST

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SPECIAL NEEDS OF MENTALLY AND PHYSICALLY DISABLED PRISONERS EXPLORED

Care and treatment of disabled prisoners in the criminal justice system is becoming an issue of considerable concern. Little progress has been made to date in implementing comprehensive programs to provide the special care that the disabled prisoner requires while at the same time satisfying the public's need for secure custody. The following cases illustrate some of the difficulties facing both prisoners and prison officials. The issues seem to be typical: services for a severely physically disabled convict; a class action to obtain improved mental health services for prisoners; treatment for individuals found incompetent to stand trial; providing high security for individuals found not guilty by reason of insanity; problems with a special needs unit in a state prison system; a determination of whether a prisoner is actually in need of mental health services; a jurisdictional dispute over payment for special services; and force feeding a mentally ill prisoner who threatens to take his own life by starvation.

1. $hackelford v. Mabry, No. PB-C-79-35 (E.D. Ark. July 8, 1982)--A U.S. magistrate found that the Arkansas Department of Correction acted with "deliberate indifference" to the medical needs of a paraplegic inmate and that the prisoner had been subjected to cruel and unusual punishment. The magistrate recommended that the disabled inmate be awarded $11,000 in damages, concluding that injunctive relief was inappropriate because the inmate had been granted parole.

2. Finney v. Mabry, 534 F. Supp. 1026 (E.D. Ark. 1982)--In a class action challenging the adequacy of conditions at institutions administered by the Arkansas Department of Correction, a federal district court determined that the department's mental health arrangements were unconstitutional.

3. United States v. Juarez, 540 F. Supp. 1288 (W.D. Tex. 1982)--A federal district court ruled that it is the duty of the federal government to supply adequate treatment facilities to care for a defendant found incompetent to stand trial for federal violations. The court also held that if the defendant's

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chances of becoming competent to stand trial are remote, the court must give the defendant a hearing for purposes of indefinite commitment. In this case, the defendant already had a hearing on his indefinite commitment, so he was not entitled to an additional hearing.

4. Bowman v. Wilson, 672 F.2d 1145 (3rd Cir. 1982)--The Third Circuit held that a military prisoner found incompetent to stand trial was not entitled to psychiatric care and treatment ordered by a trial court in the District of Columbia once he was returned to the army's jurisdiction. In denying the serviceman's writ of habeas corpus, the appeals court concluded that the proper remedy for inadequate treatment was not release from military custody but a suit against the military for lack of care.

5. Bradley v. Commissioner of Mental Health, 436 N.E.2d 135 (Mass. Sup. Jud. Ct. 1982)--The Commonwealth of Massachusetts won a remand of a trial court order directing its department of mental health to provide at least one high security facility in which committed persons could be restricted in their movements.

6. Kendrick v. Bland, 541 F. Supp. 21 (W.D. Ky. 1982)--A federal district court held that the assignment of guards to the Kentucky State Penitentiary's special needs unit who were untrained in dealing with the mentally impaired inmates housed there constituted cruel and unusual punishment in violation of inmates' rights under the eighth amendment.

7. In re L.B., 645 P.2d 498 (Okla. Sup. Ct. 1982)--The Oklahoma Supreme Court held that a jury's determination that a prisoner required mental health services was prejudiced because the prisoner was brought to the courtroom in handcuffs and was later shackled and gagged despite the lack of a known history of violent behavior.

8. Von Holden v. Chapman, 450 N.Y.S.2d 623 (N.Y. App. Div. 1982)--An appeals court in New York affirmed a lower court ruling authorizing the director of a state psychiatric center to take all steps necessary to force feed a prisoner to keep him alive.

9. Pennsylvania Department of Public Welfare v. Kallinger, 443 A.2d 1219 (Pa. Commw. Ct. 1982)--The Commonwealth Court of Pennsylvania held that the county of a prisoner's residence prior to his incarceration is responsible for the costs of involuntary mental health treatment.

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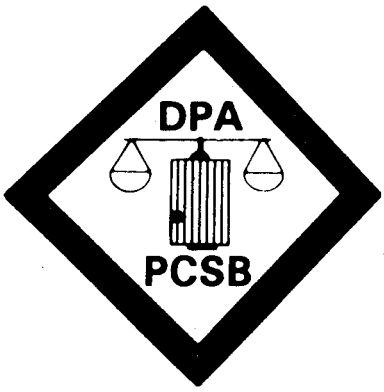

AUTOMATIC REVOCATION OF INDIGENT'S PROBATION PROHIBITED BY U.S. SUPREME COURT

In 1956 the Supreme Court stated that "there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956). Since then the Supreme Court has followed this principle on numerous occasions. For example, in Williams v. Illinois, 399 U.S. 235 (1970), the defendant was sentenced to a term of imprisonment and fined. However, he was unable to pay the fine due to his indigency. Therefore, the defendant was held in prison beyond the original release date to "work out" the fine. The Court ruled that a state cannot subject a certain class of defendants to a period of imprisonment beyond the statutory maximum solely because of their indigency.

The following year in Tate v. Short, 401 U.S. 395 (1971), the Supreme Court encountered a similar situation in which a fine imposed was converted into a jail term due to the defendant's inability to immediately pay. The Court also disallowed this procedure.

Following Williams and Tate, the Supreme Court on May 24, in Bearden v. Georgia, 33 Cr.L. 3103 (May 24, 1983), held that the automatic revocation of probation, due to a failure to pay a fine or meet the condition of restitution, violated the Fourteenth Amendment. In Bearden, the defendant pled guilty to burglary and theft by receiving stolen property and was sentenced to three years probation with the condition that he pay a $500 fine and $250 restitution. The defendant paid $200 within two days by borrowing money from his parents. The remaining $550 was due within four months. Unfortunately, the defendant was laid off work about one month later and, apparently due to his limited education and inability to read, could not obtain a new job although he repeatedly attempted to do so. Shortly before the balance came due, the defendant notified his probation officer that he would be late. Three months later, the state filed a motion to revoke probation which was granted by the court.

The Supreme Court recognized the state's "fundamental interest" in punishing violators of its criminal laws and that indigency cannot immunize an offender from the state's sanctions. But the Court viewed the initial decision to place the defendant on probation as an indication that the sentencing court had already determined that imprisonment was not required to satisfy the state's interests. Therefore even though the probationer failed to satisfy

(Continued, P. 16)

the fine or the condition of probation requiring restitution, if he made a bona fide effort to pay, imprisonment should still not be required.

The state argued that automatic revocation would insure that restitution would be made. The Court, however, said that this goal would be fully served if probation is revoked only when no bona fide effort has been made to comply with the conditions of probation. Indeed, the Court indicated that adopting the state's argument might have the reverse effect of inducing the defendant to acquire funds by illegal means to avoid revocation.

The state also argued that imprisonment would remove the defendant from the temptation of committing other crimes. But the Court pointed out that the sentencing court had already determined that imprisonment was unnecessary by placing the defendant on probation. The Court therefore labeled this argument a "naked assertion" that poverty disposes a defendant to crime and that poverty alone should be a reason for incarceration.

In response to the state's final argument, that a policy of automatic revocation would further the goal of deterrence and punishment, the Supreme Court indicated that these goals could be met through alternatives to incarceration. Specifically, the Court stated that if a probationer fails to pay a fine or restitution as a condition of his probation, the Court must not only consider whether bona fide efforts have been made to comply, but also alternative measures of enforcement such as extending the time for making payments, reducing the fine, or requiring a probationer to perform some form of labor or public service.

Accordingly, after Bearden when a probationer fails to pay a fine or make restitution, a two step inquiry must be made by the court. First, it must determine whether the nonpayment is a result of a willful refusal or the failure of bona fide efforts to acquire the resources to pay. If the probationer is not willful in his failure to pay, alternate measures of punishment other than imprisonment must be considered. Imprisonment without this inquiry will now be "contrary to the fundamental fairness required by the Fourteenth Amendment." Bearden, 33 Cr.L. at 3107.

RANDY WHEELER

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TRIAL TIPS

SEVERANCE OF OFFENSES FOR TRIAL

RCr 6.18 provides that "...two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment...in a separate count for each offense, if the offenses are the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan."

"Otherwise there is no authority for a joinder." Sebastian v. Commonwealth, Ky., 623 S.W.2d 880, 881 (1981).

RCr 9.16 requires a separate trial of counts "[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment...."

"Even though the joinder of offenses is permissible under RCr 6.18, if a defendant makes timely motion under RCr 9.16 and shows prejudice, the court should grant separate trials." Russell v. Commonwealth, Ky., 482 S.W.2d 584, 588 (1972). See ABA Standards Relating to Joinder and Severance, Section 13-3.1 (2d.ed. 1980).

Improper joinder of offenses is "...inherently prejudicial and the granting of a motion for severance, where there has been misjoinder, is mandatory and not discretionary..." with the trial judge. United States v. Marionneaux, 514 F.2d 1244, 1248 (5th Cir. 1975) (Rule 8 of the Federal Rules).

"RCr 9.16, which requires a showing of prejudice, applies only when the requirements of RCr 6.18 are satisfied - that is, when technically a joinder is proper but as a matter of fact will be prejudicial." Sebastian, supra, at 881.

Brown v. Commonwealth, Ky., 458 S.W.2d 444 (1970) details some factors in determining permissibility of joint trial of counts: 1) similarity of offenses, and 2) close connection in time between their commission. Id. at 447. If the offenses contained in the separate counts are not similar in character and are not closely related in time, they cannot be jointly tried. Cargill v. Commonwealth, Ky., 528 S.W.2d 735, 736-37 (1975).

(Continued, P. 18)

In Sears v. Commonwealth, Ky., 561 S.W.2d 672 (1979) the defendant was jointly tried and convicted of three counts of first degree robbery occurring on July 7, 13 and 14, 1976 and one count of second degree escape occurring on January 13, 1977, six months later. Distinguishing Brown, supra, the Court held that "the joinder of the charge of escape with the three charges of armed robbery was error." Id. at 674.

According to the Court, the sky is not the limit in joining offenses for trial. Sears, supra, at 674; Cargill, supra. The Court seems to recognize in Sears that sufficient prejudice can be the desire of the defendant to testify on one, but not all, of the charges.

Sears' conviction was not reversed because the error was determined to be harmless in light of the overwhelming, uncontradicted evidence, and positive identifications by seven eyewitnesses. Sears, supra, at 673-74.

The inability of a defendant to testify on one but not all counts does, indeed, unfairly prejudice him:

> Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent. Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964).

In Romans v. Commonwealth, Ky., 547 S.W.2d 128 (1977) the defendant was jointly tried on two indictments - one for forcible rape of McClellan on November 24, 1974, and one for the forcible rape of Burnett on December 7, 1974.

Romans' defense to the McClellan charge was consent. He denied any knowledge of the Burnett charge.

The court determined that the two charges should not have been tried together because of

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the prejudice to the separate defenses:

> In the McClellan case appellant admitted the act of intercourse but claimed it was by consent. That the prosecuting witness had been previously involved in prostitution lent some degree of credence to his defense. It was a matter of his word against hers. In the other case it is undisputed that Miss Burnett was forcibly raped, but he denied being the guilty party. If the jury was convinced that the appellant did in fact rape Miss Burnett, it would for that reason be less inclined to doubt that he did the same thing in the McClellan case. Stated another way, the evidence in the Burnett case was calculated to and most probably did diminish the credibility of his testimony in the McClellan case. Id. at 131.

In Hubbard v. Commonwealth, Ky., 633 S.W.2d 67 (1982) the court held it improper to jointly try a defendant for possessing a handgun and other charges. The joinder of those offenses is unfairly prejudicial to a defendant since the introduction of a previous felony conviction for purposes of the handgun charge prejudices the guilt or innocence determination on the other charges. The prior felony conviction is simply inadmissible on the other charges.

It has also been recognized that a joint trial on a sufficient number of counts can "embarrass or confound" the effort to defend oneself, making severance necessary. Davis v. Commonwealth, Ky., 464 S.W.2d 250, 253 (1970).

The prejudicial aspects of impermissible joinder of charges was examined by the court in Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964) (Cited with approval by the Supreme Court of Kentucky in Russell, supra at 588): (1) the defendant "may become embarrassed or confounded in presenting separate defenses;" (2) "the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged;" (3) "the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find," or (4) "prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one." Id. at 88.

"A person who is charged with the commission of the crimes' may not always have a perfect trial, but he is entitled to a fair trial." Cargill, supra, at 737. The fourteenth amendment right to a fair trial often requires separate trials of multiple charges.

ED MONAHAN

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VIDEO GAMES

Modern technology is moving into the courtroom at an alarming rate, the latest craze being the video tape as evidence. Modernized courtrooms are equipped for lights, camera and action on the T.V. screen. While video tape has its uses in the courtroom its use is also fraught with danger to the defendant. The proponents of the use of video tapes urge that they are more reliable than the testimony of witnesses i.e. police officers; and that they more accurately and completely present the circumstances surrounding the event, especially where the tape contains a confession, or witness' statement.

The introduction of a videotaped confession is viewed by the prosecution as the coup de grace in a criminal case, and for good reason. The tape provides the evidence from the horse's mouth. There in living color is the culprit detailing the dirty deeds. These tapes will often include profanity and slang expressions common to the police station, but which are offensive in a courtroom that serve to affirm the picture of your client as a criminal and separate him or her from the mainstream juror.

Faced with this overwhelming evidence what can defense counsel do? Several strategies may come into play. First, as with all confessions, a motion to suppress based on a violation of either the 4th, 5th or 6th Amendment rights of the client is the springboard. Since it is not routine procedure to video tape the entirety of police interrogations, the motion will generally rely on a violation of rights prior to the videotaped event.

If the event is not a video taped confession, but a covert taping of the actual crime or admissions made to an informant or undercover police agents, the options for suppression are more limited. In this case, as in the case where suppression based on constitutional violations is denied, counsel should be aware of challenges to the tape itself.

As with other items of demonstrative evidence an adequate foundation must be laid before the evidence can be admitted. Since the evidence will, in all likelihood, be admitted for substantive purposes, Litton v. Commonwealth, Ky., 597 S.W.2d 616 (1980), the foundational requirements are very important. The Kentucky Supreme Court has not yet directly ruled on what foundation must predicate admission of videotapes. Other jurisdictions are fairly evenly divided requiring either the same foundation as for photographs or those for audio-tape recordings.

In Kentucky a seven point predicate is required for the introduction of audio recordings. The foundation must show: 1) that the device was capable of recording; 2) that the operator was competent to operate the device; 3) that the recording being offered is an authentic and correct recording of the actual conversation; 4) that no changes, additions or deletions have been made to the recording; 5) proper chain of

(Continued, P. 21)

custody and preservation of the tape recording; 6) the identity of the speakers; and 7) that the contents of the tape were freely and voluntarily made without duress. See Commonwealth v. Brinkley, Ky., 362 S.W.2d 494, 497 (1962). The admission of photographs must be premised merely on a showing that the photograph truly and accurately portrays the event which it purports to portray. The admission of photographs taken by a mechanical device in the absence of an operator e.g. a bank or store camera, are admissible upon the foundational showing of the accuracy of the process by which the mechanism works, since no person can testify as to the actual event. The "accuracy of the process" is established upon a showing of the device's ability to operate and that the resultant photograph is surrounded by "evidence of reality" sufficient to obviate any question as to when, and where the photograph was taken. Litton, supra.

Videotapes combine the qualities of all of the foregoing in that they are capable of operation without the presence of an operator (in some situations), and they consist of sound recordings, and "photographs" at least to the extent that they are pictoral representation of an event. Presumably all of the foundational requirements for both photographs and sound recordings come into play. One can assume however that the less stringent requirements of Litton will be imposed for introduction of videotapes, largely due to the perception that videotapes are highly reliable and more accurately portray the process than does the testimony of witnesses.

A third consideration is the viewability and audiobility of the tape. In Lemar v. State, 282 N.E.2d 795 (Ind. 1972), a garbled and largely unintelligible sound tape recording was introduced over the defendant's objection. The objection centered largely on a dispute between prosecution and defense as to the actual contents of the tape. The prosecution claimed the tape contained admissions by the defendant, which the defendant strenuously denied. In holding that the tape should have been suppressed the court stated that the poor quality of the tape negated any probative value the tape may have had. Moreoever the court found prejudice in "the obvious prospects for confusion" the introduction of the tape gave rise to. In Melvin v. State, 48 So.2d 856 (Miss., 1950), the court reversed a conviction where an inaudible sound recording was introduced reasoning that it was only logical to assume that the tape was viewed as damning evidence by the jury since the prosecution offered it as proof of guilt.

The use of conjectural or speculative videotapes is susceptible to the same challenge as sound recordings, although less likely to succeed in a pretrial suppression context.

(Continued, P. 22)

The next strategy to consider and probably the one that will most commonly be of aid is use of the video by the defense. A recent article in the National Law Journal 1, "Beating the Videotape" (July 4, 1983) demonstrated the technique of attacking a videotaped confession as being an unrealistic rendition of the event and the defendant. To show the confession's lack of reliability the defense portrayed, through police officers and psychologists, the events preceding the taping and the defendant's state of mind at the time of the taping.

In a time where television characters are often perceived as real people a video tape can assume a seemingly unassailable indicia of reliability, and convictability for a defendant. Avenues of attack are available and should be fully explored by trial counsel.

DEBBIE HUNT

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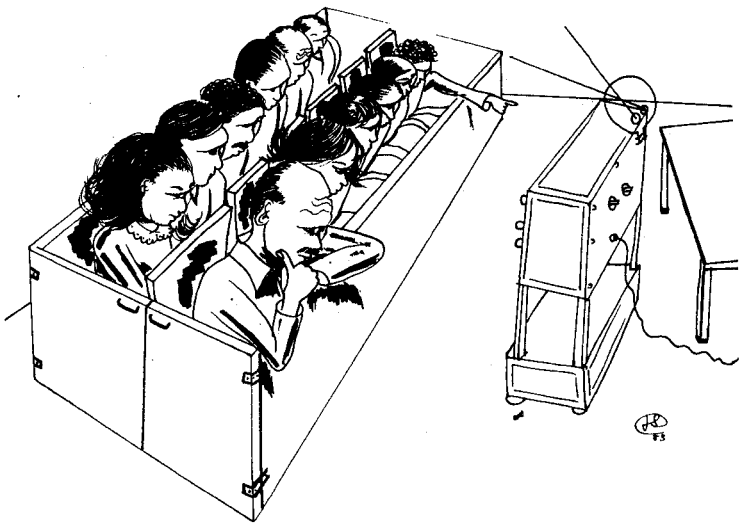

INDIGENCY AND THIRD PARTY MONEY

Can the wealth of a third party be used to determine a defendant's financial condition?

KRS §31.120(3)(c) indicates that the deposit of money bail by a third party is prima facie evidence that a defendant is not indigent. Of course, that evidence is rebuttable. Case law indicates that the presumption of nonindigency created by third party money bail is relatively easily overcome.

In Tolson v. Lane, Ky., 560 S.W.2d 159 (1978) the Supreme Court of Kentucky addressed the issue of the affect of third party monies on the determination of whether a litigant in a divorce action should be permitted to proceed without the payment of costs. The Court determined that "before a party may proceed in forma pauperis, he must show that there are not available any persons or organizations who might have a legal duty, and who are willing and able, to supply the costs of the action." Id. at 161.

The Court found the litigant in Tolson to be indigent since her grandmother, who had some income, had no legal obligation to her grandaughter. Id. See also Braden v. Commonwealth, Ky., 277 S.W.2d 7 (1953).

It is therefore clear that the financial condition of a third party cannot be taken into

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account when determining whether a person is indigent unless the third party has a specific legal duty to the defendant.

ED MONAHAN

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WHOSE BAIL IS IT ANYWAY?

Third Party Bail

When a third party puts up the bail for an indigent defendant, that security remains the property of that third party, and must be returned to the third party upon completion of the conditions of release. KRS 431.532(2). The clerk is permitted to retain a 10% bail fee. Id.

The court cannot use the third party bail deposits to satisfy any fines levied, any public advocate services, KRS 431.532 (3), or court costs. Id.; KRS 453.190; KRS 31.110(1)(b).

If the defendant satisfies all the conditions of his release, and he is found not guilty of the charge or if the charge is dismissed then all of the bail money deposited must be returned to the third party. KRS 431.532(4). The clerk is not entitled to any bail fee.

Bail by Defendant

If the defendant, himself, posts his own bail, the court is permitted in its discretion to order any amount of that bail in excess of the clerk's fee to be deposited into the public advocate account. KRS 431.530(3).

However, if the defendant satisfies the conditions of his release and is found not guilty or if the charge is dropped than all bail money must be returned to him. KRS 431.530(5). There can be no deduction for clerk's fees or for public advocate services.

ED MONAHAN

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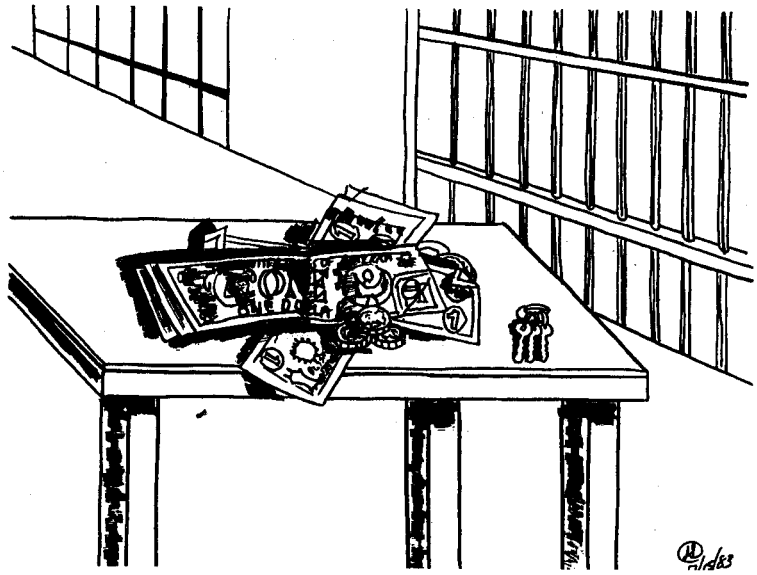

THE DEATH PENALTY

KENTUCKY'S DEATH ROW POPULATION 16

PENDING CAPITAL INDICTMENTS KNOWN TO DPA 72

DARK CLOUDS ON THE HORIZON: U.S. SUPREME COURT ENDS TERM WITH 4 "DEATH" DECISIONS

The legal struggle over the issue of capital punishment intensified in the waning days of the U.S. Supreme Court's 1982 term. A majority of the Court, albeit sometimes slim and over vehement dissent, ruled against the condemned in 4 of 4 cases. The negative outcome of all 4 cases, perhaps even more than the rulings themselves, sent a not-so-subtle message to the lower federal courts that some of the justices were ready, even anxious, to permit involuntary executions at a far greater rate than the 3 since 1976, and perhaps even greater than this country has ever experienced.

If the 4 "death" decisions didn't get the message across, Justice Powell's public statement to a conference of judges from the 11th Circuit certainly did. Citing an "intolerable" backlog of death row appeals, Powell said: "We have found no effective way to assure careful and fair and yet final review.... Unless the courts--and Congress--discharge their duty to move effectively to address this problem, the legislatures of the several states should abolish capital punishment." Lexington Herald-Leader, A3 (May 10, 1983); 69 ABAJ 1000 (Aug. 1983).

Recognizing that legislative abolition is hardly imminent, the presently prevailing majority has apparently taken matters into their own hands. The results in these 4 cases contrast markedly with the outcome of death penalty cases in previous years. Prior to the conclusion of this term, condemned inmates had a 15-2 (won-loss) record in the High Court. No longer. Indeed, the condemned have lost 5 of the last 6. The only victor since the 1980 term was a 16 year old. Eddings v. Oklahoma, 455 U.S. 104 (1982).

This issue of The Advocate will review only the first, and most relevant, of these decisions, Zant v. Stephens, 33 Cr.L. 3195 (1983). The other 3 will be examined in the next issue.

While these recent decisions will have little or no impact (depending on the case) on Kentucky law and procedure, they teach an important lesson. If your capital client is to be spared, it is increasingly

(Continued, P. 25)

likely that relief will come from the jury, the trial judge or the Kentucky Supreme Court. The scope of federal review of state criminal cases has been steadily shrinking. See e.g., Stone v. Powell, 428 U.S. 465 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 102 S.Ct. 1558 (1982). There are powerful voices on the Court that wish to shut down federal review completely. See, e.g., Spaulding v. Aiken, 102 S.Ct. 1795 (1983) (Burger, C.J., statement concerning denial of certiorari): "The time has come to consider limitations on the availability of the writ of habeas corpus in federal courts, especially for prisoners pressing state claims that were fully ventilated in state courts." Death cases, it appears, are to be no exception to this trend. Indeed, aborted procedures, as we shall see next time, may be used in federal court to review your client's death sentence. Barefoot v. Estelle, 33 Cr.L. 3275 (1983). The majority of the Court has stated its reluctance to reverse a state appellate decision in a death penalty appeal when the best that can be argued is that the decision is not "so unprincipled or arbitrary [or irrational] as to somehow violate the United States Constitution." Barclay v. Florida, 33 Cr.L. 3292, 94 (1983) (emphasis added). This is true, as we shall also see, unless the state appellate decision happens to be in favor of the condemned. California v. Ramos, 33 Cr.L. 3306 (1983). In such a case, judicial activism is apparently called for. 33 Cr.L. at 3317 (Stevens, J. dissenting).

If you are tempted to relax when defending a capital indictment in the hope that some federal judge will someday invent a reason to spare your client or because you think the death penalty is only a symbol, think again.

ZANT V. STEPHENS: FEDERAL HARMLESS ERROR

As previewed in The Advocate, Vol. 5, No. 1 (Dec. 1982), the U.S. Supreme Court certified a question last year to Georgia's Supreme Court, in essence requesting "an exposition" of how Georgia's death penalty scheme operated. Zant v. Stephens, 456 U.S. 410 (1982). Georgia's answer, 297 S.E.2d 1 (1982), led to a (7-2) decision that a finding by a jury of a partially invalid aggravating factor ([(b)(1): "substantial history of serious assaultive criminal convictions") was not sufficient grounds for a federal court of appeals, 648 F.2d 446 (5th Cir. 1981), to set aside a death sentence. In Arnold v. State, 224 S.E.2d 386 (Ga. 1976), the Georgia Court held the second part of (b)(1) unconstitutionally vague. (This aggravating factor is identical to KRS 532.025(2)(a)(1).) "[T]he statutory language was too vague and nonspecific to be applied evenhandedly by a jury." Stephens, 33 Cr.L. at 3197 n.5.

(Continued, P. 26)

Central to Justice Stevens majority opinion, however, was Georgia's interpretation of their sentencing scheme: "Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 33 Cr.L. at 3198. Stephens' jury also found other aggravating circumstances, including the first part of (b)(1): "prior record of conviction for a capital felony" and another: "escape[e] from lawful custody." Additionally, under Georgia law all of Stephens' prior convictions were admissible in the presentence phase, notwithstanding the constitutional invalidity of "substantial history" as an aggravating factor. Stephens, 297 S.E.2d at 4; 33 Cr.L. at 3202. Since "the underlying evidence is nevertheless fully admissible at the sentencing phase...[t]he effect the erroneous instruction may have had on the jury is therefore merely a consequence of the statutory label 'aggravating circumstance.'" 33 Cr.L. at 3202. The majority agreed with Georgia that instructing the jury on the second (and vague) part of (b)(1) "had 'an inconsequential impact on the jury's decision regarding the death penalty.'" 297 S.E.2d at 4; 33 Cr.L. at 3202.

The decision in Stephens turned, in part, over a dispute (unnecessary to examine here) as to the applicability of Stromberg v. California, 283 U.S. 359 (1931). At bottom however, Stephens merely sets up a "federal harmless error analysis" when otherwise lawful and accurate aggravating evidence is mistakenly labeled as a statutory aggravating factor and other valid aggravating factor(s) were found by the jury. Barclay v. Florida, 33 Cr.L. 3292, 95 n.8 (1983).

Additionally, Stephens is rife with qualifications and possible exceptions. First, it is no great surprise that the error was held harmless in Stephens since his "prior record included 5 counts of burglary, 2 counts of armed robbery and 1 count of murder...." 297 S.E.2d at 4. Stephens conceded he had been convicted of a "substantial number of serious assaultive offenses...." 33 Cr.L. at 3202. A defendant with a better track record might be in a different position.

Second, although Stephens necessarily means that: "Nothing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination..." 33 Cr.L. at 3202 (emphasis added), this is strictly a state, not a federal, issue. Our statute indicates, by negative implication, that only the judge "shall hear...the record of any prior criminal

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convictions and pleas of guilty or pleas of nolo contendere of the defendant...." KRS 532.025(1)(a). Subsection (1)(b) of our statute deals with the hearing before the jury and omits reference to the defendant's prior record. Instead, the jury is only permitted to determine whether the defendant has a "substantial history..." where that aggravating circumstance is relied upon. KRS 532.025(2)(a)(1). Georgia law is different: "[T]he jury or judge shall hear additional evidence...including the record of any prior criminal convictions...." etc. Code Ann. Sec. 27-2503; Ga. Laws, 1973, p. 159, 162 Act No. 74, quoted in Gregg v. Georgia, 428 U.S. 153, 208 n.2 (1976) (White, J., concurring)(emphasis added). Obviously, Kentucky is "free to decide as a matter of state law to limit the evidence of aggravating factors.... A number of states do not permit the sentencer to consider aggravating circumstances other than those enumerated in the statute." Stephens, 33 Cr.L. at 3200 n.17. Florida, for example, "does not permit non-statutory aggravating circumstances to enter into [its]...weighing process." Barclay, 33 Cr.L. at 3296. Since the decision in Stephens turned on Georgia's law permitting introduction before the jury of a defendant's prior criminal record, the decision is of limited application. "[A] different result might be reached if the failed circumstance had been supported by evidence not otherwise admissible or, if there was reason to believe that, because of the failure, the sentence was imposed under the influence of an arbitrary factor." 33 Cr.L. at 3198 (emphasis added).

Third, central to the decision in Stephens was Georgia's self-definition of their sentencing scheme as not requiring the jury "to balance aggravating against mitigating circumstances...." 33 Cr.L. at 3198. Justice Stevens noted: "[W]e do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty...." 33 Cr.L. at 3203. The opinion recognizes that in various states (among them Arkansas, North Carolina, Tennessee and Wyoming) "the law requires the jury to weigh aggravating circumstances against the mitigating...." 33 Cr.L. at 3198. Florida is another which requires the sentencer to balance...," Barclay, 33 Cr.L. at 3296. So is Kentucky.

In Smith v. Commonwealth, Ky., 599 S.W.2d 900, 912 (1980), our Court stated: "[E]ach and every mitigating circumstance, by reason that it is mitigating, is pitted against aggravating circumstances." In Kentucky's pre-sentence hearing, we "properly instruct jurors to weight [sic] the evidence in

(Continued, P. 28)

their deliberations...." Id. In Gall v. Commonwealth, Ky., 607 S.W.2d 97, 112 (1980), the Court noted without disapproval an instruction that "even through [the jury] might believe the aggravating circumstance outweighed such mitigating circumstances, [the jury] still did not have to recommend the death penalty" (emphasis added). Also, in Moore v. Commonwealth, Ky., 634 S.W.2d 426, 434 (1982), the trial court refused to admit the testimony of a minister on various mitigating factors (age and lack of prior criminal record) because this would be "an instruction as to how the jury ought to consider and weigh the factors used to determine whether to give the death penalty." The Moore Court held "the exclusion of this testimony specifically ruled out what the statute specifically allows." 634 S.W.2d at 435 (emphasis added). Kentucky, unlike Georgia, is a "weighing" state.

ZANT V. STEPHENS: OTHER ASPECTS

Another facet of Stephens worthy of note is the Court's discussion, without disapproval, of Arnold v. State, which held "substantial history" vague. See KRS 532.025(2)(a)(1). Indeed, the Court cast additional doubt on the constitutional validity of this aggravating factor in Kentucky by equating Arnold with the "Court's decision in Godfrey [v. Georgia, 446 U.S. 420 (1980)]..." which "struck down an aggravating circumstance ['heinous, atrocious and cruel'] that failed to narrow the class of persons eligible for the death penalty." Repeating the "view of the Georgia Supreme Court...['substantial history'] did not provide a principled basis for distinguishing Arnold's case from the many other murder cases in which the death penalty was not imposed...." Stephens, 33 Cr.L. at 3199 n.16. To pass constitutional muster, an aggravating circumstance must 1) "genuinely narrow the class of persons eligible for the death penalty" and 2) "reasonably justify the imposition of a more severe sentence...compared to others found guilty of murder." 33 Cr.L. at 3199 (emphasis added).

A second hopeful sidelight of Stephens are various favorable comments, such as that quoted above, regarding the concept of proportionality. 33 Cr.L. at 3200 n.19. Proper state appellate review appears to loom larger than ever in the Court's constitutional analysis. "Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." 33 Cr.L. at 3203 (emphasis added). Perhaps this dicta bodes well for the pending case of Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), cert. granted, 103 S.Ct. 1425 (1983). The Advocate, Vol. 5, No. 3 (April, 1983).

Another future issue noted by the opinion is that even where prior convictions are admitted they are "fully subject to explanation by the defendant." 33 Cr.L. at 3202. Presumably, this would include exposing the facts of a prior conviction to show mitigating circumstances,

(Continued, P. 29)

its non-assaultive nature or, certainly, legal defects (i.e. lack of counsel). "We need not decide in this case whether the death sentence would be impaired in other circumstances, for example, if the jury's finding of an aggravating circumstance relied upon materially inaccurate or misleading information." 33 Cr.L. at 3202 n.24.

ZANT V. STEPHENS: McGAUTHA REVISITED?

More disturbing, however, is the Court's approval of Georgia's scheme where "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 33 Cr.L. at 3198, 3207 (emphasis added). Georgia analogized its scheme to a "pyramid...with the death penalty applying only to those few cases which are contained in the space just beneath the apex...." There are "three planes of division...." The first contains all homicide cases, the second all potential capital cases (at least one aggravating factor present) and the third all cases where death is actually imposed by the jury as punishment (and where the appellate court doesn't reduce the sentence as "excessive or disproportionate"). There is, Georgia says, "absolute discretion" in the jury to sentence a potential capital defendant to death once the "threshold" of one aggravating circumstance has been passed. Stephens, 297 S.E.2d at 3; 33 Cr.L. at 3198. This scheme, the "prevailing view" implicitly holds, is not "a capital sentencing scheme based on 'standardless jury discretion' [which would] violate the Eighth and Fourteenth Amendments. Gregg v. Georgia, 428 U.S. 153, 195 n.47 (1976) (Opinion of Stewart, Powell and Stevens, J.J.), citing Furman v. Georgia, 408 U.S. 238 (1972)." Stephens, 33 Cr.L. at 3207 (Marshall, Brennan, J.J. dissenting). Georgia does not follow the lead of other states and "the Model Penal Code's recommendation that the jury's discretion in weighing aggravating and mitigating circumstances against each other should be governed by specific standards." 33 Cr.L. at 3199.

It remains to be seen whether or how Stephens can be reconciled with the plurality opinion in Gregg or the majority in Furman. The Stephens Court does not address the point forcefully made by the dissent: "The only difference between Georgia's pre-Furman capital sentencing scheme and the 'threshold' theory that the Court embraces today is that the unchecked discretion previously conferred in all cases of murder is now conferred in cases of murder with one statutory aggravating circumstance." 33 Cr.L. at 3208 (dissenting opinion).

It is hard to see how this distinction makes any constitutional sense. Furman's "grievance...[was] that the...system of discretionary sentencing in capital cases has failed to produce even handed justice...that the selection process has followed no rational pattern." 408 U.S.

(Continued, P. 30)

at 398-99 (Burger, C.J., dissenting). In Gregg, Justices Stewart, Stevens and Powell approved Georgia's statute: "[W]hile some jury discretion still exists, 'the discretion is to be exercised by clear and objective standards so as to produce nondiscriminatory application.'" 428 U.S. at 197-98 (emphasis added; footnote and citation omitted). "Furman held [unconstitutional]...sentencing procedures that created a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." Gregg, 428 U.S. at 188 (plurality opinion)(emphasis added).

Will Georgia's sentencing scheme eventually self-destruct because "absolute discretion" must inevitably lead to "arbitrary and capricious" death sentences based on "whims and prejudice"? As Justice Marshall stated, "[i]f this is not a scheme based on 'standardless jury discretion,' Gregg...428 U.S. at 195 n.47.... I do not know what is." Stephens, 33 Cr.L. at 3208.

Or have we returned to McGautha v. California, 402 U.S. 183, 186 (1971)? In McGautha, decided only one term before Furman, the Court reviewed the cases of two condemned, one from California and one from Ohio. "In each case the decision whether the defendant should live or die was left to the absolute discretion of the jury." The "due process" question was whether "the petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards." The Court held: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." 402 U.S. at 205.

Perhaps only time will answer these questions. Or, perhaps, there will be no answers. The Stephens dissent claims that the "decision makes an absolute mockery of...precedents concerning capital procedures." 33 Cr.L. at 3208. Maybe the concerns of Furman have been buried by the shifting dunes of public opinion and the changing personnel of the Court. It appears that Justice Stewart would have voted to affirm the judgment of the 5th Circuit in Stephens. See Martin v. Louisiana, 449 U.S. 998 (1981) and Drake v. Westbrook, 499 U.S. 999 (1981)(Stewart, J. dissenting from denials of certiorari). Perhaps the bottom line is that none of us are having much success finding a logical manner in which to determine who lives and who dies, the United States Supreme Court included.

KEVIN McNALLY

* * * * * *

A JOURNALIST'S ACCOUNT OF EVANS' EXECUTION

by Mark D. Harris

(Editor's Note: UPI Reporter Mark D. Harris was among witnesses to the April 22 execution of John Louis Evans III in Alabama's electric chair - the seventh to die since the Supreme Court lifted its ban on executions. Thanks to UPI for permission to reprint.)

ATMORE, Ala. - Ten hours before being led into a small room to witness the execution of John Louis Evans III, I learned my wife was pregnant with our first child and my notions of life and death became something abruptly personal - beautifully and horribly.

More than a week later, there is a nagging regret that my joy over the impending birth was blurred by the chilling sight of Evans' chest rhythmically rising and falling after what was supposed to be an instantaneously lethal dose of electricity.

And there is a lingering doubt whether Evans still felt anything after the first lightning bolt ripped into his shaven skull.

Three reporters and the two witnesses Evans asked to attend his execution were searched at Holman Prison, then ushered through a raging thunderstorm to a back door. After a short walk along a hall lined by prison guards, we were in the observation room.

Beyond the window was Evans, strapped around his legs, chest, arms and trunk to the yellow electric chair. The leather straps pulled his shoulders back into an awkward and uncomfortable final position.

"Eaglelike" - that's how he looked with shaven head and sharp, handsome nose and chin.

A Picture of Calm

But Evans' face was pure calm. His pale blue eyes stared straight ahead, blinking occasionally. He had said he was prepared to die. If that wasn't true, his face didn't betray him.

Inside the red brick death chamber with Evans - attired in a white button up prison smock and white socks - were Holman Warden J. D. White and two uniformed guards.

White, standing directly in front of Evans, read the death warrant. That was supposed to take 3 minutes, but it seemed much shorter - perhaps because I was intent on committing the scene to memory. No paper or

(Continued, P. 32)

pen was allowed the media witnesses.

Evans, 33, a drifter from Beaumont, Texas, convicted of killing a Mobile, Ala., pawnbroker, had asked that his final statement remain private.

But when the warrant was read and it was Evans' turn to speak, prison chaplain Martin Weber, one of nine men in the small observation room, began to quote the condemned man's last words.

"He's saying, 'I have no malice for anyone, no hatred for anyone,'" Weber, apparently knowing what Evans intended to say, whispered to the witnesses. Prison Commissioner Fred Smith turned and shook a finger as if scolding a child, and Weber fell silent.

One of Evans' final wishes had been violated.

Silent Last Words

Evans' words weren't audible to the spectators, but he delivered them in unrushed sentences and even smiled once before the guards attached the electrode-filled skullcap to his shaven head.

Evans' head was snugged to the chair with a chin strap and a black belt across the forehead. His casual expression disappeared behind a black veil.

Smith opened a telephone line to Gov. George Wallace in Montgomery.

I folded my arms across my chest and said to myself I was ready.

A man I love and respect had witnessed an electrocution as a young reporter. He had given me a novelist's description of an electric chair execution, along with the warning, "It'll be loud and it will stink."

At the instant White pulled the switch and sent 1,900 volts burning into Evans, who clenched his fists and arched his body rigidly into the restraining straps, the folly of being prepared was gone.

A moment later, as spark and flame crackled around Evans' head and shaven, razor-nicked left leg, white smoke seeped from beneath the veil and curled from his head and leg.

Midway through the surge of electricity his body quivered, then fell back into the chair as the current ended.

We thought that was it - bad enough, but expected and bearable.

Examining the Body

Two doctors filed out of the witness room to examine the body and pronounce Evans dead.

The prison doctor, dressed in a blue surgical costume and tan loafers with tassels, placed a red stethoscope to the smock, turned and nodded, the natural signal for "yes, he's dead."

But the nod meant he had found a heartbeat. The other doctor confirmed the gruesome discovery.

(Continued, P. 33)

They and the warden walked from the death chamber and a guard reattached the power lines to the chair and the electrode that fell away when a leg strap burned through.

Evans' chest rose against the straps the first time. It rose evenly once, twice, maybe again.

A stream of saliva ran down the front of the white prison smock.

"God, he's trying to signal them," I thought.

I had been told a body might continue to spasm after taking a massive electric charge. I strained to figure out if this was convulsive movement in Evans' strapped-crossed chest, and concluded absolutely not. This was too measured. Just slow deep breathing.

Turning to another witness, I said: "He survived." He nodded.

Behind us, Russell Canan, the attorney who 90 minutes earlier lost his battle to win Evans a reprieve, stared resolutely ahead.

A Second Jolt

Spark and flame again accompanied the onset of the second charge, but this time, for a grim second, the veil slipped a fraction of an inch on the left side, giving the impression it was burning through and would fall away - exposing the face I'd noted was handsome minutes earlier.

Almost in unison a kind of shuttering grunt came from the witnesses, but the mask stayed in place.

When the second charge subsided the doctor reexamined Evans and again it was clear they found a pulsating heart. Smith knocked on the viewing room window for a clue to Evans' state. Deputy Warden Ron Jones turned and shook his head.

From the back of the room, Canan suddenly, urgently blurted: "Commissioner, I ask for clemency. This is cruel and unusual punishment."

Smith, his back to Canan, did not respond or even indicate he had heard the plea, which Canan repeated, begging that the request be relayed to Gov. Wallace.

The Third Surge

The commissioner then conveyed the appeal for clemency, but before a reply came back from the governor's office in Montgomery, the third charge was administered.

Again Evans' head and leg smoldered. His fists, which clenched with the first jolt, remained locked on the chair's arms.

The doctors went back for the third time and Canan begged for clemency "in case they have to do it again."

(Continued, P. 34)

Smith, eyes welling, communicated the message. His voice broke.

I thought Canan had snapped. Surely he didn't want Evans unstrapped at this point. I was convinced things were out of hand and was not sure the chair, for whatever reason, was capable of killing Evans. But surely the only thing worse than proceeding was stopping.

I seriously thought they would have to bring in a gun and shoot Evans in the chair.

Smith signaled White out of the death chamber as the doctors again listened for a heartbeat. The warden cracked the door to the witness room and heard Smith order: "Hold everything. They're asking for clemency."

Moments later, with things spiraling faster out of control, word came back from Wallace.

"The governor will not interfere. Proceed," Smith said.

Almost simultaneously a witness to my right said, "He's dead."

Cold as it sounds, it was welcome news. Evans' ordeal was over. And for the time being, so was the ordeal, however great or small, of those picked to watch him die.

* * * * * *

EYEWITNESS EXPERIMENT

Where you at the seminar? Did you attend Vince Aprile's Supreme Court Review? If so, you saw the "Northern Kentucky attorney" who denounced Frankfort for our usual arrogance and high-handedness! Can you pick him out from the next page? Is he there?

In the next issue of The Advocate we will print the results of our eyewitness survey taken immediately after this local yokel embarrased all of us Frankforters. We would also like to have enough responses to the photo-display on the next page to be worth reporting. Therefore, if you were there, please respond by mail or phone. Negative responses ("I can't identify him") are just as important. Simply cut out the form below and mail it Kevin McNally, State Office Building Annex, Frankfort, Kentucky 40601 or call our toll free number-800-372-2988- and say: "Eyewitness Experiment. The person is No. ___." If the perpetrator isn't pictured, say: "None." If you don't know, say so. Tell us how sure you are! Simple, huh? Oh yeah, one person, one vote. Anonymity guaranteed.

KEVIN McNALLY

CHECK APPROPRIATE SPACE

The perpetrator is No. ____.
The perpetrator isn't there.__
I don't know. ____
****
I am 100% positive. _____
He looks like him. _____
He might be him. _____
It has been too long, I can't identify anyone. _____

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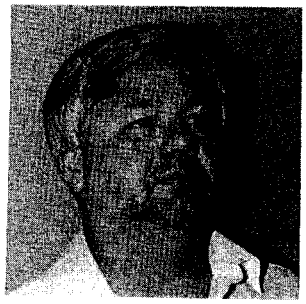

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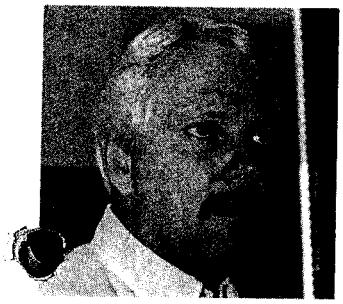

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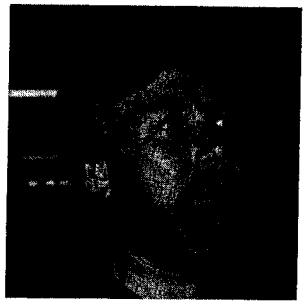

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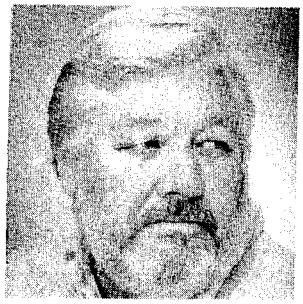

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(Megibow, Continued from P. 1)

of "actor, advocate, humanitarian, and hopefully scholar." His greatest satisfaction in a case came recently when he was able to prove his client's claim of accident in a murder prosecution. He credits the investigative work of John Rogers, DPA staff investigator, with the victory as well.

Tod's practice includes not only criminal trial work for the DPA, but "of counsel" appeals. He recently became a partner in the Paducah firm Freeland, Glanville & Megibow. His expanding practice combined with his current renovation of a historic home in Paducah have forced him to abandon his beloved rugby.

We take this opportunity to extend our congratulations to Tod on his recent marriage. We also extend our congratulations and wishes for continued success in his diligent representation of indients charged with crime in Graves Co.

DEBBIE HUNT

* * * * * *

(TPI, Continued from P. 1)

There will be lectures and demonstrations on voir dire, opening statements, direct examination, cross-examination, cross-examination of experts, and closing arguments. Every participant will perform each of these aspects of the trial in a small group with critiques from two faculty members. Each participant will be video taped for this review. There will also be lectures on the theory of defense and preservation.

This is a working seminar with preparation and active participation essential.

In addition to the Trial Practice Institute, a Death Penalty Seminar will be conducted on December 1-4, 1983 at Barren River State Park in Lucas, Kentucky.

Further information concerning either seminar is available from Ed Monahan (502) 564-5258 or Karen Carney (502) 564-5245.

* * * * * *

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