The Advocate

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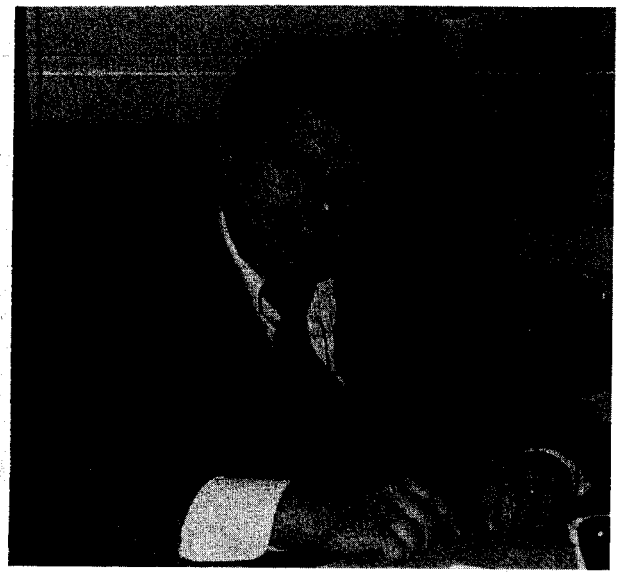

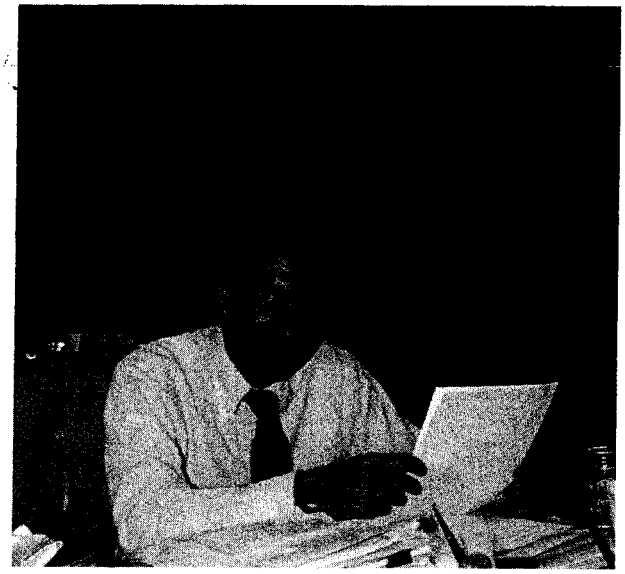

THE ADVOCATE FEATURES

JACK EMORY FARLEY

I can still see him, pointer in hand, demonstrating on a chart in the State Office Building Annex conference room yet another reorganization of the Department of Public Advocacy (DPA). I can still recall the surprise I felt when I heard his resonant voice singing carols at an office Christmas party. And I can still feel the pride I felt when he stood,

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PAUL ISAACS NAMED PUBLIC ADVOCATE

Paul F. Isaacs has been appointed Public Advocate effective October 1, 1983.

Paul, 39, grew up in Somerset, Kentucky. He received a B.A. from Union College, where he graduated cum laude in 1966, and a law degree from the University of Kentucky three years later.

Paul was in private practice in Lexington, Kentucky from 1971-

(See Isaacs, P. 28)

courageously and defiantly, arguing for the right of persons charged with capital murder to obtain the death penalty data from the Kentucky Supreme Court.

Jack Emory Farley ceased being the Public Advocate on October 1, 1983. With his leaving, the Department of Public Advocacy reached the end of an era. Begun in 1972, the DPA was headed by Jack Farley for eight of its first eleven years. In a profound sense, the DPA as it is presently constituted bears his personal mark.

His accomplishments during those eights years were many. Primarily he directed the growth of the office from a small agency located in a house now holding a doctor's office to a complex agency with 122 employees. When Jack took over, counsel was being provided to persons on a hit or miss basis at the trial level. The "central office" did not really know who was doing public defender work at the local level. It did not know how many cases were being done by public defenders. And it certainly had not yet come to grips with the implications of Argersinger v. Hamlin, essentially granting the right to counsel to indigent persons charged with misdemeanors.

Jack changed all that during his tenure. He immediately set out to learn who was doing public defender work at the trial level, to establish a current roster, and to start managing that system. He began insisting that public defenders had to keep accurate records of the cases they had done. Indeed, he served on the Project Advisory Board for the Defender Management Information Systems of NLADA, which developed DMIS, now called AMICUS, the recommended system for collecting and analyzing defender caseload data (now being used in Lexington, Northern Kentucky, Owensboro, Henderson, all nine full-time regional offices, the Post-Conviction Services Branch and the Appellate Branch). And Jack clearly understood Argersinger, and even more, as a Pike County native and former Pikeville public defender, knew the extent to which the right to counsel was being denied poor persons charged with crimes in rural Kentucky. Jack did everything he could to flesh out Argersinger, to establish a structure in the field which would be there to provide counsel to eligible persons, and to get that structure fully funded by a reluctant legislature.

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The structure Jack constructed he called a "mixed system". By that he meant that Kentucky's public defender system should feature no one structure but should rather have the kind of structure which best served the client's interest in that particular geographical locale.

In rural eastern Kentucky, Jack imagined, and erected, a system of full-time offices. He obtained a grant from LEAA, established offices in Pikeville, Hazard, London and Somerset and then persuaded the Kentucky General Assembly to fund those offices when LEAA funding ended. He sought legislation ending the inefficient and ineffective assigned counsel method of delivery, and he sought adequate funding for the contract public defender systems.

Visionary that he is, Jack then went to the legislature in 1982 and asked for a statewide system of regional trial offices. He asked them to fund thirteen trial offices in addition to the four mountain offices and the LaGrange and Paducah Offices then in existence. Responding to his plea for effective public advocacy services, the General Assembly gave Jack what he asked for. And in November of 1982, the first three of those offices, Hopkinsville, Stanton and Morehead opened.

One of Jack's crowning accomplishments occurred in an area technically outside traditional public defender work, but philosophically at the heart of what DPA is all about. In 1976, Jack served on a planning group attempting to place a newly authorized program to advocate on behalf of persons who were developmentally disabled. When Protection and Advocacy was placed in the DPA, Jack immediately became vitally interested in the new program, and a driving force behind the direction P & A would ultimately take. He pushed P & A in the direction of service primarily to individual clients, although he was receptive to cases which would result in a change in the system. He sought incorporation of the federal legislation into KRS Chapter 31, and aided Kentucky in becoming one of the first states in the nation to do so. He presently serves as

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a member of the Architectural Barriers Advisory Committee, and has helped effectuate a number of progressive architectural barriers regulations. Jack has demonstrated throughout a devotion to persons whose rights have been denied them due to their developmental disability or any other inappropriate factor.

Other significant accomplishments come to mind. Jack organized the DPA into effective and rational units, with Defense Services being divided into the Appellate Branch, the Post-Conviction Services Branch, and the Trial Service Branch. He moved the DPA into the computer age (kicking and screaming) with word processing equipment, a brief bank, and West Law. He fought hard for adequate salaries for public defenders, arguing persuasively for parity with private industry and the prosecution. He has served on numerous boards and commissions including the Kentucky Crime Commission, the Governor's Task Force on Drunk Driving, the Commission on Sentencing and Prison Overcrowding, and the Appalachian Research and Defense Fund Board of Directors.

There have been some disappointments, false starts, and toe stubbing over the years. Jack went to the legislature year after year to argue that DPA was grossly underfunded, and that as a result poor persons accused of crimes were going unserved. Year after year Jack came back empty handed, only to be vindicated when public defender moneys annually proved insufficient to meet the caseload. Jack had to close the Winchester Office for fiscal reasons. And over the years, Jack stepped on people's toes, both in and out of the DPA. Anyone who knows Jack knows that stepping on other people's toes hurt him deeply.

Probably Jack's biggest disappointment has occurred recently. I previously said that Jack had obtained authorization to open thirteen full-time offices during FY 82-84. Only three have opened. The remainder have gone unopened due to the Governor's personnel hiring freeze and budget cuts attributable to the revenue shortfall and to the priorities of the Public Protection and Regulation Cabinet. Jack's dream of fully staffed public advocacy offices across the Commonwealth remains dormant.

But this disappointment does little to lessen the significant and solid accomplishments Jack Farley has achieved over the years. And the disappointments do nothing to sully the courage and dignity that he has displayed. And finally, those disappointments have not dulled his compassion for the poor or his commitment to high quality legal services for indigents who have been accused of crimes.

I will deeply miss Jack Farley. More importantly, DPA will miss him. And in the words Jack customarily uses for those who have left DPA over the years, we all say, "Bon voyage and Godspeed."

ERNIE LEWIS

* * * * * *

WEST'S REVIEW

A number of significant decisions were issued by the Kentucky Supreme Court during July and August.

In Hobbs v. Commonwealth, Ky., 30 K.L.S. 8 at 7 (July 6, 1983), the Court held that reversal of a conviction by an appellate court on the grounds that the only evidence introduced as proof of an essential element of the offense was incompetent does not bar a retrial. In Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), the U.S. Supreme Court held that the reversal of a conviction on grounds of insufficient evidence precludes a retrial under double jeopardy principles. The Court declined to extend the holding of Burks. "We are not disposed to hold that an error by a trial court in the admission of testimony in evidence precludes a retrial when an appellate reversal is procured by a defendant on that ground."

In Taylor v. Commonwealth, Ky., 30 K.L.S. 8 at 7 (July 6, 1983), the Court held that the defendant was not denied a fair trial when, in the course of trial, his co-defendant entered a plea of guilty. The plea was made outside the presence of the jury and following it the co-defendant testified for the prosecution. Taylor argued that under the circumstances the jury could only infer that, having heard the prosecution's case, the co-defendant chose to strike a "deal" and change his plea. The Court rejected this argument, distinguishing Tipton v. Commonwealth, Ky., 640 S.W.2d 818 (1982), which found reversible error in the prosecution's introduction of testimony that a co-defendant had plead guilty. The Court also emphasized that trial defense counsel cross-examined the co-defendant concerning the "deal", thus making it clear to the jury that the co-defendant had plead guilty.

In Combs v. Commonwealth, Ky., 30 K.L.S. 8 at 8 (July 6, 1982) the court held that the defendant was not entitled to an instruction on second degree wanton endangerment. The evidence showed that during a struggle with employees of a Kroger supermarket Combs pulled a gun and fired several shots, narrowly missing various employees. A person is guilty of first degree wanton endangerment when he engages in wanton conduct "under circumstances manifesting an extreme indifference to the value of human life" and which "creates a substantial danger of death or serious physical

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injury " A conviction of second degree wanton endangerment requires only that the conduct be "wanton" and "create a substantial danger of physical injury." The Court held that a reasonable juror could not doubt that Combs' conduct constituted first degree wanton endangerment. "Our cases have now established that an instruction on a lesser included offense is not required unless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged but yet conclude that he is guilty of a lesser included offense." The Court also rejected argument that Combs could not be convicted as a first degree persistent felony offender because he had only one prior felony conviction. While on parole from his sentence for burlgary Combs was convicted of a second felony. The sentence on the second felony was ordered to run concurrently with any other sentence Combs was serving. Under KRS 532.080(4) "two or more convictions of crimes for which [the defendant] served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be one (1) conviction..." However, the Court adopted the reasoning of Williams v. Commonwealth, Ky.App., 639 S.W.2d 788 (1982), which held that "the concurrent sentence break is provided only to those who may have committed more than one crime but received their sentences for these crimes prior to serving any time in prison" (Emphasis added).

In Fair v. Commonwealth, Ky., 30 K.L.S. 8 at 9 (July 6, 1982), the Court reversed the defendant's convictions of three counts of theft by unlawful taking. The three counts were based on thefts of three separate items of property belonging to different individuals but stolen from a single location at the same time. The Court held that the three counts should have been consolidated into one. The Court reaffirmed its longstanding rule that "where several items of property are stolen at the same time and the same place there is but a single offense, whether the property belonged to one or several persons..."

The Court affirmed the decision of the Court of Appeals in Crooks v. Commonwealth, Ky.App., 29 K.L.S. 9 at 4 (July 16, 1982), that in the absence of a recommendation from the jury a trial court may not fix the defendant's penalty pursuant to his conviction as a persistent felony offender. Commonwealth v. Crooks, Ky., 30 K.L.S. 8 at 10 (July 6, 1983). After the jury convicted Crooks as a persistent felon but failed to agree on a sentence, the trial judge imposed the minimum enhanced sentence. The Supreme Court held that KRS 532.080, which provides that in a PFO proceeding the jury "shall" fix the sentence, was dispositive. The Court also affirmed the decision of the Court of Appeals that Crooks was subject to being retried on the PFO charge. The Court found that the jury's failure to agree on a sentence was "tantamount to a mistrial and thus does not prevent Crooks' retrial..." The Court rejected

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as "bad advice" the Commentary to KRS 532.080 which suggest that "if the jury is unable to agree unanimously, the sentence fixed by the jury (for the primary offense) shall stand."

The Court in Lexington Herald-Leader Co. v. Meigs, Ky., 30 K.L.S. 10 at 9 (August 31, 1983) considered under what circumstances the public and press should be excluded when an accused, charged with a capital offense, so requests as a corollary to individual voir dire of prospective jurors. In its effort to reconcile the defendant's right to an impartial jury with the First Amendment rights of the public and press the Court relied on Ashland Publishing Co. v. Asbury, Ky.App., 612 S.W.2d 749 (1980). "It is only when necessary for the protection of a defendant's Sixth Amendment fair trial rights that a court may, after a proper hearing, bar members of the press and public." The court, explaining the rules governing closure of trial proceedings, specified that closure is permissible only when the proponent of closure asserts a right sufficiently important to warrant extraordinary protection, such as the right to a neutral jury, which will be protected by closure and cannot be adequately protected by less restricted means. Applying these rules to the case before it, the Court found that the trial court did not abuse its discretion in ordering closure of individual voir dire in a case where there had been extensive pretrial publicity.

In Hamilton v. Commonwealth, Ky., 30 K.L.S. 10 at 11 (August 31, 1983), the Court held that the defendant's convictions of both rape and incest with respect to a single act of intercourse with his daughter violated the prohibition against double jeopardy. The Court noted that the test to be applied was that stated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), which held that conviction of two offenses is permissible where each conviction "requires proof of a fact which the other does not..." The Court held that the defendant's convictions of both rape and incest violated this rule because "[t]he only additional fact - the relationship of father/daughter - was required in the incest charge." Justices Aker and Wintersheimer in dissenting opinions pointed out that the defendant's rape conviction did require proof of a fact not required by the incest charge - that the victim be less than twelve years old.

The Court has affirmed the decision of the Court of Appeals in Eary v. Commonwealth, Ky.App., 29 K.L.S. 12 at 1 (October 1, 1982). Eary v. Commonwealth, Ky., 30 K.L.S. 10 at 11 (August 31, 1983). Eary was convicted of possession of a handgun by a convicted felon and the penalty imposed was subsequently enhanced when Eary was found to be a persistent felony offender. Separate prior felony convictions were used to obtain Eary's convictions of the principal offense and of the PFO charge. The Court distinguished Boulder v. Commonwealth, Ky., 610 S.W.2d

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615 (1980) in which the same prior felony was used to obtain conviction of the principal offense and to obtain an enhanced penalty at the PFO stage. The Court has previously held in Jackson v. Commonwealth, Ky., 30 K.L.S. 6 at 11 (May 11, 1983), that a conviction of possession of a handgun may be enhanced just as any other felony conviction. The Court in Eary also held that the Commonwealth was not required to prove as an element of the possession of a handgun charge that the defendant had not been granted a full pardon. Additionally, the Court held that the offense of possession of a handgun by a convicted felon is not at odds with Section 1(7) of the Kentucky Constitution which guarantees "the right to bear arms." The Court held that denunciation of the offense was "constitutionally permissible as a reasonable and legitimate exercise of the police power..."

Finally, in Sullivan v. Commonwealth, Ky., 30 K.L.S. 10 at 12 (August 31, 1983), the Court affirmed a decision of the Court of Appeals that an indigent movant under RCr 11.42 is entitled "only to a transcript of that limited portion of the evidence that would afford him an adequate review of the allegations contained in his RCr 11.42 motion." The Court reiterated its holding in Gilliam v. Commonwealth, Ky., 652 S.W.2d 856 (1983) that "the stated purpose of [RCr 11.42] is to provide a forum for known grievances, not to provide an opportunity to research for grievances."

The Court of Appeals issued three published opinions during the two months under review.

In Handley v. Commonwealth, Ky.App., 30 K.L.S. 9 (July 5, 1983), the Court held that the defendant was not entitled to have an indeterminate sentence ordered to run concurrently with a determinate sentence. While released on bail awaiting trial on felony charges, the defendant committed and was convicted of a misdemeanor. The defendant was subsequently convicted of the felony charges. The defendant argued that the sentence on his felony convictions should be served concurrently with the determinate sentence. The Court of Appeals rejected the defendant's argument, citing KRS 533.060(3) which provides "[w]hen a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which said person is awaiting trial."

In another sentencing decision the Court of Appeals upheld a sentence of three consecutive five year terms imposed for 105 counts of theft by unlawful taking. Milner v. Commonwealth, Ky.App., 30 K.L.S. 9 at 4 (July 22, 1983). KRS 532.110(1)(c) provides that "[t]he aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for

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the highest class of crime for which any of the sentences is imposed." KRS 532.080, the persistent felony offender statute, establishes twenty years as the maximum indeterminate term for a Class D felony. Milner's offenses were Class D felonies. Thus, the Court reasoned that Milner's fifteen year cumulative sentence was proper.

In Reid v. Commonwealth, Ky.App., 30 K.L.S. 10 at 1 (July 12, 1983), the Court of Appeals held that the defendant's rights under KRS 29A.090 and the Fourteenth Amendment were violated when he was tried by a jury drawn from a pool from which doctors, lawyers and policemen were excluded. Jury commissioners testified that they were directed to exclude these groups because they would be "excused anyway". The Court particularly founded its decision on KRS 29A.090 which states that "[t]here shall be no automatic exemptions from jury service." The Court distinguished Partee v. Commonwealth, Ky., 30 K.L.S. 7 at 14 (June 15, 1983), in which the Court considered only the constitutional requirement of a jury drawn from a fair cross-section of the community and found insufficient evidence of a violation of that requirement.

In an important decision dealing with the right to counsel, the U.S. Supreme Court has held that an indigent defendant has no right to compel his appointed attorney to argue non-frivolous issues that the defendant wishes to press but that counsel decides, in the exercise of his professional judgment, not to present to the appellate court. Jones v. Barnes, 33 CrL 3263 (July 5, 1983). The court was unpersuaded by argument that since counsel is barred from abandoning a non-frivolous appeal under Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel must also be barred from abandoning non-frivolous issues. The Court emphasized that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." In the Court's view, a rule which would require counsel to raise all non-frivolous issues requested by a client would "seriously undermine the ability of counsel to present the client's case in accord with counsel's professional evaluation." The Court's decision addressed only the narrow question of whether the Sixth Amendment right to counsel would require counsel to raise all non-frivolous issues. The Court did not consider whether, as an ethical matter, counsel may be required to raise non-frivolous issues which a client requests be raised. Justices Brennan and Marshall dissent.

Two decisions dealing with search and seizure were issued by the Court. In Illinois Andreas, 33 CrL 3269 (July 5, 1983), the Court upheld the warrantless search of a package, known by police to

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contain drugs, after it was delivered to its addressee.

The package had been previously lawfully searched by customs officials as it entered the country. Upon finding drugs in the package, the package was resealed and turned over to police who posed as delivery men and delivered it to the defendant. The defendant took the package into his apartment. While one officer "staked out" the apartment a second left to obtain a search warrant. However, after a lapse of 45 minutes, but before a warrant was obtained, the defendant, with the package in his possession, proceeded to leave the apartment. At this point the defendant was arrested and the package subjected to a warrantless search. The Court held that the reseizure of the container did not constitute a "search" within the meaning of the Fourth Amendment because "[n]o protected privacy interest remains in contraband in a container once government officials lawfully have opened that container and identified its contents as illegal." The Court also concluded that the 45 minute hiatus between delivery of the package and its reseizure did not restore an expectation of privacy. "[A]bsent a substantial likelihood that the contents have been changed, there is no legitimate expectation of privacy in the contents of a container previously opened under lawful authority." Justices Brennen, Marshall and Stevens dissent.

In Michigan v. Long, 33 CrL 3275 (July 6, 1983), the Court justified the warrantless search of the passenger compartment of the defendant's vehicle under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The defendant's vehicle was stopped after he was observed driving erratically. Upon stopping, the defendant exited the car. Officers observed a hunting knife on the floorboard of the car. They then subjected the defendant to a patdown. No weapon was found. The officers then shined a flashlight into the vehicle. The armsrest inside the vehicle was raised to reveal a bag of marijuana. Upholding this search, the Court noted that Terry validated a limited search on less than probable cause for the purpose of protecting an officer investigating suspicious conduct. The Court then held that "Terry need not be read as restricting the protective search to the person of the detained suspect." The Court concluded that the officers could reasonably have believed there was a danger that the defendant would gain access to a weapon, and that their search was properly circumscribed by the exigency which necessitated it. Justices Brennan and Marshall, in a vigorous dissent, characterized the Court's decision as "distorting Terry beyond recognition and forcing it into service as an unlikely weapon against the Fourth Amendment's fundamental requirement that searches and seizures be based on probable cause."

LINDA WEST

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THE DEATH PENALTY

KENTUCKY'S DEATH ROW POPULATION 18

PENDING CAPITAL INDICTMENTS KNOWN TO DPA 78

GRAY EXECUTED IN MISSISSIPPI

The end-of-term decisions of the Supreme Court discussed below and in the last issue of the Advocate eased the way, perhaps, for the latest execution. On September 1, Jimmy Lee Gray was executed in Mississippi's gas chamber. Gray's lawyer, Dennis Balske of the Southern Poverty Law Center [SPLC] in Montgomery, Alabama, described the execution:

> A valve is opened and the sound of gas can be heard. No vapor is visible. Jimmy draws in deep breaths of the gas to speed up his death. He stops and drops his head. Then he rises up and bangs the back of his head against the metal pole behind the chair. He moans, and moans, and moans. No more moaning. The head goes back and forth, hitting the pole, dropping down. We wait and wait. Will his head stop raising up?
>
> A phone rings. Someone says it is time for the press to leave. Jimmy is still breathing. Why do they have to leave? I'm the only one left except a guard. The guard asks me to leave. I tell him I'm not with the press. I'm Jimmy's lawyer. He wants me here and I'm staying until he stops breathing.
>
> The man in charge calls my name and instructs me to leave. Jimmy's still breathing. His head is still going up and down, though less often and with less force. Jimmy is not dead. He's been strangling over eight minutes now and they won't let me stay.
>
> As I leave, I think about our legal attack describing the slow strangulation caused by lethal gas. I

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think to myself, "Our evidence was accurate."

SPLC Poverty Law Report at 4 (Vol. II, No. 2 Fall 1983).

Balske had argued Gray's present insanity and that the gas chamber was unnecessarily cruel. The Supreme Court refused to issue a stay - 3 Justices dissenting -- Stevens, Brennan and Marshall.

DPA DEATH PENALTY SEMINAR

Balske will be a principle faculty member of DPA's death penalty seminar at Barren River State Park, December 1-4, 1983. Among other things, Dennis will demonstrate voir dire and closing argument techniques. Other faculty members will include Millard Farmer, Team Defense, Atlanta; Andrea Lyons, Homicide Task Force, Chicago; and Cathy Bennett, Psychologist, Houston.

BARCLAY V. FLORIDA HARMLESS ERROR?!

In Barclay v. Florida, 103 S.Ct. 3418 (1983), the Supreme Court, as in Zant v. Stephens, 103 S.Ct. 2733 (1983) [Stephens II], faced a complaint involving a capital defendant's prior record. A fragmented (4-2-3) Court affirmed the death sentence of a black who, with other men, killed a white hitchhiker and was supposedly "part of...the BLACK LIBERATION ARMY...whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war." 103 S.Ct. at 3420. The jury, by a 7 to 5 vote, recommended that Barclay be sentenced to life. The trial judge overruled that decision.

Barclay argued that "the trial judge improperly found that his criminal record was 'an aggravating circumstance.'" The state concedes that this is correct: Florida law plainly provides that a defendant's prior criminal record is not a proper 'aggravating circumstance.' Mikenos v. State, 367 So.2d 606, 610 (Fla. 1978)." 103 S.Ct. at 3422.

While the Rehnquist plurality concedes that Florida, unlike Georgia, "requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances and does not permit non-statutory aggravating circumstances to enter into this weighing process...," the plurality held that a state may apply a harmless error rule. 102 S.Ct. at 3426. In Florida, this harmless error analysis is done only if "the trial court properly found that there are no mitigating circumstances..." 102 S.Ct. 3427. Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977) (emphasis added). Essentially, Barclay stands for the proposition that the narrow Elledge harmless error rule is constitutional. "In this case, like in Zant v. Stephens... nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record." 103 S.Ct. at 3427.

The plurality rejects contentions that other non-statutory aggravating factors

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were improperly considered by the trial judge. "The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder... The judge's discussion [of this] is neither irrational nor arbitrary." 103 S.Ct. at 3424. Likewise, the Court found evidence to support the other statutory aggravating circumstances relied upon by the trial judge: 1) creating a great risk of death to many people; 2) murder during kidnapping; 3) murder to disrupt government; 4) especially heinous, atrocious and cruel. On review, these findings were not sufficiently "unprincipled or arbitrary" as to require reversal. 102 S.Ct. at 3423.

The question addressed by the plurality is narrow since they only recognized the existence of one (state law) error: The judge had considered Barclay's criminal history in aggravation. However, there is no opinion of the Court because Justice Stevens and Powell found that "some of the language [used by] the plurality speaks with unnecessary, and somewhat inappropriate, breadth." 103 S.Ct. at 3429 (concurring) (emphasis added). Justice Stevens conducts his own wide-ranging review of Florida's death penalty law and concludes that no constitutional error occured, although he "do[es] not applaud the "cursory analysis" by the Florida Supreme Court. 103 S.Ct. at 3437. "On 212 occasions since 1972 the Florida Supreme Court has reviewed death sentences; it has affirmed only 120 of them." 103 S.Ct. at 3436 (concurring). Thus, Justice Stevens and Powell conclude that appellate review, as a check against arbitrariness or caprice, seems to be working. At least, they find insufficient evidence that it is not.

Likewise, the plurality believed that appellate review in prior Florida cases buttressed the decision. 103 S.Ct. at 3428. "The Florida Supreme Court has not always found that consideration of improper aggravating factors is harmless, even when no mitigating circumstances exist." 103 S.Ct. at 3427 (emphasis added). The decision is also said to be buttressed "by the rule prohibiting the trial judge from overriding a jury recommendation of life...unless "virtually no reasonable person could differ." 103 S.Ct. at 3428 (plurality). Tedder v. State. 322 So.2d 908, 910 (Fla. 1975).

In a strongly-worded dissent, Justices Marshall and Brennan protest for reasons unnecessary to detail here. The death sentence order is "rife with errors...[a] miscarriage of justice..." The decision, it is said, "is utterly faithless to the safeguards established by the Court's prior decisions." 103 S.Ct. at 3437 (Marshall, Brennan, J.J., dissenting). The trial judge's performance was "abysmal." Id. at 3440. "'Justice of this kind is obviously no less shocking than the crime itself, and the new "official" murder, far from offering redress for the offense committed against society, adds a second defilement to the first.' A. Camus, Reflections on

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the Guillotine 5-6 (Fridtjof-Karla Pub. 1960)." Id. at 3445.

Justice Blackmun also dissented, arguing that the grounds for the death penalty "come close to making a mockery of the Florida statute and are too much for me to condone... The end does not justify the means even in what may be deemed to be a 'deserving' capital punishment situation." 103 S.Ct. at 344 (dissenting).

Of interest to trial attorneys is the plurality's assertion that: "It is entirely fitting for the moral...judgment of...juries to play a meaningful role in sentencing." 103 S.Ct. at 3424 (emphasis added). This suggests that the Kentucky Supreme Court was quite correct as a matter of federal, as well as state, law in finding error in the rejection of a minister's testimony during the sentencing phase in Moore v. Commonwealth, Ky., 634 S.W.2d 426, 434-35 (1982).

The plurality also notes that under Florida law "the sentencer must determine whether 'sufficient aggravating circumstances exist...'" Trial counsel should argue, in appropriate cases, that "a single aggravating circumstance is not 'sufficient'" even though our statute does not specify such a standard. 103 S.ct. at 3426 n.12 (plurality) (emphasis added). See generally Pinch v. North Carolina, 103 S.Ct. 474 (1982) (Stevens, J. respecting denial of cert.)[Justice Stevens suggests an instruction from State v. Wood, 648 P.2d 71, 83 (Utah 1982): "[Y]ou must be persuaded beyond a reasonable doubt that the total aggravation outweighs total mitigation...and that the imposition of the death penalty is justifiable and appropriate in the circumstances"].

Barclay is also an interesting study for us as it may be useful to argue that, contrary to Smith v. Commonwealth, Ky., 599 S.W.2d 900, 912 (1980), mitigation findings are necessary by the sentencer - capable of review. Obviously, a harmless error rule, the "touchstone" of which was "the presence or absence of mitigating circumstances," is of no use in a jurisdiction which requires no finding on the existence of mitigating circumstances. 103 S.Ct. at 3432 n.12.

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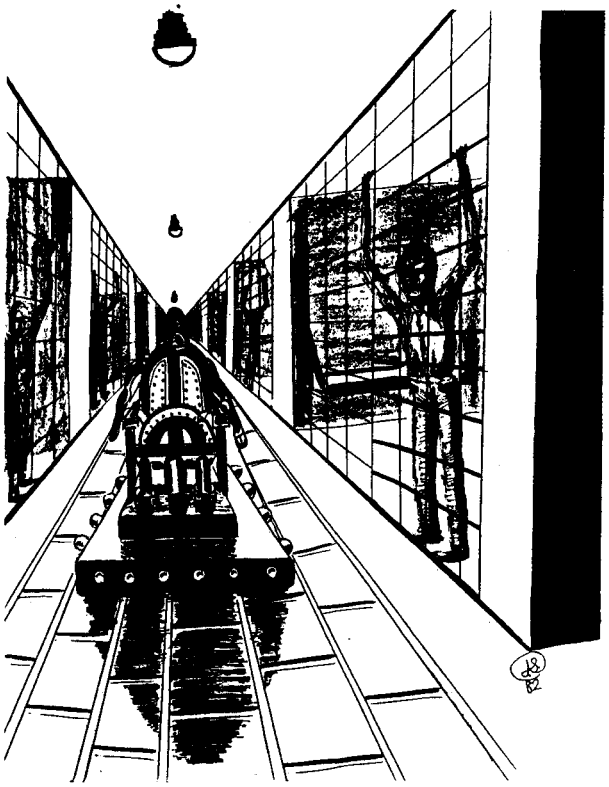

In the final analysis Barclay, like Stephens, is no more than another federal harmless error case. The same qualifications apply as we discussed last time. Barclay's prior criminal record, which included "breaking and entering with intent to commit the felony of grand larceny," was not the only aggravating factor relied upon. There were many valid statutory circumstances present. The evidence was accurate and not misleading. The evidence was relevant to sentencing. Kentucky's procedure, moreover, is different. See The Advocate at 26-28 (Vol. 5 No. 5, August 1983).

BAREFOOT V. ESTELLE: STAYS PENDING FEDERAL REVIEW AND EXPERT TESTIMONY ON FUTURE DANGEROUSNESS

The Court chose Thomas Barefoot's case as a vehicle to delinate the standards for granting/denying stays of execution on appeal from the denial of habeas corpus relief in federal district court. Calling the 5th Circuit's handling of the case "tolerable," Barefoot v. Estelle, 103 S.Ct. 3383, 3393 (1983), the Court affirmed the death sentence - both on the procedural issue and on the merits (the widespread use in Texas of future hypothetical expert testimony on future dangerousness by the prosecution). The essential holding on the stay issue was not, as reported by the media, a wipeout for the condemned. First, if probable cause to appeal has been granted, the appellate court must reach the merits. "Approving the execution of a defendant before his appeal is decided on the merits would clearly be improper..." Second, "nothing... prevents a Court of Appeals from adopting summary procedures..." 103 S.Ct. at 3392, "provided that counsel has adequate opportunity to address the merits and knows the he is expected to do so..." 103 S.Ct. at 3395.

In order to get a certificate of probable cause, and thus a stay, the condemned must make a "substantial showing of the denial of [a] federal right." 103 S.Ct. at 3394. "[Obviously], the petitioner need not show that he should prevail on the merits.... Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" 103 S.Ct. at 3394 n.4. The Court was careful to note that affirmance did not suggest that aborted procedures "should be accepted as the norm or as the preferred procedure." 103 S.Ct. at 3393.

From the media accounts, one would think that the Court had approved shortcuts. Actually, the situation seems better-at least better than that in Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982), stay and cert. denied, 103 S.Ct. 1490 (1982). Charles Brooks was executed after federal court procedures which would not pass muster

(Continued, P. 16)

under Barefoot--although there is no mention of this anywhere in Barefoot. On August 24, 1983, for example, Justice Powell refused to lift a stay, entered (2-1 vote) by the 11th Circuit stopping the execution in Kemp v. Smith, 33 Cr.L. 4150 (1983). It was Smith's second federal habeas proceeding.

In dissent, Justices Marshall and Brennan, joined in part by Stevens and Blackmum, find great fault with the aborted procedures used by the 5th Circuit. Marshall's dissent also attacks the "special truncated procedures" now officially permitted. 103 S.Ct. at 3404. Interestingly, the dissent points out "that prisoners on death row have succeeded in an extraordinary number of their appeals. Of the 34 capital cases decided on the merits by courts of appeals since 1976 in which a prisoner has appealed from the denial of habeas corpus relief, the prisoner has prevailed in no fewer than 23 cases, or approximately 70% of the time." 103 S.Ct. at 3405 (dissenting opinion, Marshall, J.).

On the merits, Justice White writing, the Court refuses to bar expert testimony by a psychiatrist on a defendant's future dangerousness - even when the testimony is based on hypothetical questions rather than a clinical evaluation. The issue arises because two Texas psychiatrists testified in this manner at Barefoot's trial. The first, Dr. Holbrook, was employed by the Texas Department of Corrections. The second, Dr. Grigson, is the notorious "Dr. Death," having testified in scores of death penalty cases for the prosecution. See Smith v. Estelle, 602 F.2d 694, 701 n.7 (5th Cir. 1979), aff'd, 451 U.S. 454 (1981).

The majority did not dispute the American Psychiatric Association's estimate that "two out of three predictions of long-term future violence made by psychiatrists are wrong." 103 S.Ct. 3408 (dissenting opinion, Blackmun, J.) (emphasis in original). However, Justice White argues that they are not "always wrong...only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials. We are unconvinced, however, at least as of now, that the adversary process can be trusted to sort out the reliable from the unreliable..." 103 S.Ct. at 3398 (emphasis added).

Testimony on future dangerousness is permitted because the death penalty in Texas depends upon a specific jury finding "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing danger to society." TEX.CODE CRIM.PROC. ANN. SEC. 37.071(b)(2). To the extent the Court hedged ("as of now"), it can be attributed to Justice Blackmun's forceful dissent, jointed by Justices Brennan and Marshall. "In a capital case, the specious testimony of a psychiatrist... [before] an impressionable jury...equates with death itself." 103 S.Ct. at 3406. "In view of the total scientific groundlessness of these predictions, psychiatric testimony is fatally mis-

(Continued, P. 17)

leading... at bottom, false testimony." 103 S.Ct. at 3417 (Blackmun, J. dissenting).

An interesting sidelight of Barefoot for trial counsel is the assumption that expert rebuttal testimony could and would be presented by the defense in each case. "[T]he adversary process can...be trusted...particularly when the convicted felon has the opportunity to present his own side of the case." 103 S.Ct. at 3398. This necessarily means expert testimony. The Court noted that "no evidence was offered by petitioner at trial to contradict...Holbrook and Grigson... [But there is no] contention that, despite petitioner's claim of indigence, the court refused to provide an expert for petitioner." 103 S.Ct. at 3397 n.5. This language would seem to strongly imply a federal constitutional right to expert psychiatric assistance in capital cases at least under these circumstances.

In Kentucky, of course, testimony of "future dangerousness" should not be a problem since it is barred by caselaw. Payne v. Commonwealth, Ky., 623 S.W.2d 867, 870 (1981) states: "[w]e now hold that neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial." In fact, "[t]he consideration of future consequences...have no place in the jury's finding of fact and may serve to distort it." A jury's concern about future dangerousness would necessarily assume that the accused will be paroled.

CALIFORNIA V. RAMOS: GOVERNOR'S COMMUTATION POWER AND JUDICIAL ACTIVISM

Kentucky law is clear. In Farmer v. Commonwealth, Ky., 450 S.W.2d 494, 495 (1970), the Court stated:

> We agreed that probation and parole should not be mentioned to the jury at any time, in general or otherwise, except in response to an inquiry from the jurors, in which instance it is unavoidable and should be confined to an admonition that it is not a matter for the jury to consider, that the jury must base its verdict solely on the evidence and instructions.

Accord Ringo v. Commonwealth, Ky., 346 S.W.2d 21 (1961) [conviction reversed where trial judge inadvertently mentioned 8 year parole eligibility]; Blanton v. Commonwealth, Ky., 429 S.W.2d 407, 410 (1968) [counsel must move for a mistrial]. Likewise, in Broyles v. Commonwealth, Ky., 267 S.W.2d 73, 75-76 (1954), the prosecutor argued that a life sentence was necessary in a murder case so the defendant wouldn't be eligible for parole for eight years. When a jury anticipates the acts of the executive branch it "circumvents...and infringes upon [their] prerogatives."

All but three states agree with Kentucky's position and two of those have not considered the

(Continued, P. 18)

issue in many years. Nevertheless, the Supreme Court felt compelled to reach out and reverse the California Supreme Court decision in Ramos v. California, 103 S.Ct. 3446 (1983), reversing People v. Ramos, 639 P.2d 908 (Cal. 1982), which agreed with Kentucky and many other states that possible future consequences of a particular verdict should not be an explicit jury consideration. In Ramos the issue was whether an instruction should be given on the Governor's theoretical power to commute a life without parole sentence. California's Supreme Court held that, as a matter of federal constitutional law, such an instruction should not be given.

Certain members of the Court have often spoken and written of the heavy docket facing the justices and the need to permit state experimentation, especially in the area of criminal law. Traditionally this has been a justification by "conservative" members of the Court to uphold (or ignore) decisions of state courts which have a negative impact on a criminal defendant's rights. In his dissent in Ramos, Justice Stevens asks these same Justices: "what harm could have been done to the administration of justice...if the California court [decision] had been left undisturbed...?" 103 S.Ct. at 3468. "No other State would have been required to follow the California precedent... Nothing more than an interest in facilitation the imposition of the death penalty in California justified this Court's exercise of its discretion..." 103 S.Ct. at 3469 (Stevens, J. dissenting) (emphasis added).

Strong words, these are. In fact, had an advocate uttered them, they might border on contempt. Nevertheless, the majority does nothing to dispel the suggestion. The opinion by Justice O'Connor relies upon Jurek v. Texas, 428 U.S. 262 (1976), leading Justice Blackmun in dissent to accuse the Court of "redefin[ing] the issue... [No one has ever] ventured such an argument." 103 S.Ct. at 3467. Fortunately, the Court did note that each state is free to define its own law and interpret its own constitution. 103 S.Ct. at 3459-60. But see Montana v. Jackson, 103 S.Ct. 1418 (1983) (Stevens, J. dissenting). The signals from Washington, however, are clear.

KEVIN McNALLY

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EYEWITNESS EXPERIMENT

We still haven't received enough responses to our eyewitness experiment to publish the results. If you have forgotten, the last issue of The Advocate at 34-35 contains a photo-display. If you attend DPA's seminar and witnessed the "experiment," please cast your vote by mail or phone -- toll free 800-372-2988.

KEVIN MCNALLY

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TRIAL TIPS

RULE CHANGES

The following is a summary of the important rule changes announced by the court on July 8, 1983 which relate to the practice of criminal law:

They are to be effective on January 1, 1984 unless otherwise noted:

CIVIL RULES

1) CR 11 Signing of Pleadings (amendment)

The rule is expanded generally: 1) to include motions and other papers in addition to pleadings that require a signature and address on them; 2) it beefs up the burden on the person who files a pleading to do it not just on the "belief there is good ground to support it" but only on "belief formed after reasonable inquiry it is well grounded in fact...."

A pleading now can't be filed for "any improper purpose." It used to be that delay was the only prohibition against filing a pleading. Now one of the sanctions for violating the rule is the payment of money.

2) CR 75.02(2) Transcript of Evidence and Proceedings (amendment)

A significant change. In the past, voir dire, openings and closings were included in a transcript if designated by a party Now, they are only included under two circumstances: 1) if they are designated by one of the parties and if that portion was properly objected to during the proceeding, or 2) if the trial judge orders them transcribed.

This creates additional burdens on trial counsel: 1) it raises the ante for objecting, 2) it means that when the trial is over trial counsel will have to be more vigorous in securing a transcript that will allow appellate counsel to be able to fully argue the case.

For instance, an unobjected to remark in the voir dire or closing or opening may be needed to demonstrate the prejudice from a trial error

(Continued, P. 20)

that was preserved. That portion of the record may be the only way to show how the prosecutor used the error to the prejudice of your client.

The rule does allow for continued inclusion of all these portions if the trial judge so directs. It is to be expected that trial courts will direct transcription of those portions when requested by counsel. But counsel will now have to insure that the trial judge does direct the transcription.

If a trial judge refuses to direct that these portions be included in the record after trial counsel has set out his reasonable belief of their necessity for appeal, the denial can then become an issue on appeal. The appeal will be bolstered the more specific trial counsel's motion is. Trial counsel may want to listen to the tapes and include critical portions in his request for transcription to, in effect, make an avowal. If the tape is made part of the record, there will be no question of the issue being fully preserved.

Without a doubt, this rule change is constitutionally suspect. It is clear that whenever the defendant is represented on appeal by a different attorney from the one who defended him at trial, a complete, verbatim, transcript of all trial proceedings must be provided. Hardy v. United States, 375 U.S. 277, 84 S.Ct. 424, 431 11 L.Ed.2d 331 (1964); Tate v. United States, 359 F.2d 245 (D.C. Cir. 1966); State v. Pence, 488 P.2d 1177 (Haw 1971); Commonwealth v. Anderson, 272 A.2d 877 (Pa. 1971).

"An appointed lawyer, whether or nor he represented the defendant at trial, needs a complete trial transcript to discharge his full responsibility...." Hardy, 84 S.Ct. at 431 (concurring opinion).

The transcript and the unique assistance which it provides appellate counsel in preparing the brief is of incalculable value. As Mr. Justice Goldberg stated in Hardy:

> As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy. Id.

3) CR 76.20(2)(c) Time for Discretionary Review Motion (new section)

If there was any doubt, it recognizes the right to file a discretionary review in the Supreme Court from an order of the Court of Appeals granting or denying a discretionary review. This filing must be within 20 days of the Court of Appeals' order granting or denying.

(Continued, P. 21)

4) CR 76.20(9)(e) Dispositon of Discretionary Review (amendment)

Makes more specific the prohibition on reconsidering a grant or denial of a motion for reconsideration in the Court of Appeals and Supreme Court.

5) CR 76.28(2) Time of Announcing Opinions (amendment)

Now Supreme Court opinions will be announced on Wednesdays instead of Tuesdays. The Court of Appeals' opinions will continue to be announced on Fridays.

6) CR 76.37(10) Certification of Law by the Commonwealth (new section)

A request for certification by the Commonwealth now must originate in the Supreme Court.

7) CR 76.40(2) Timely Filing (amendment)

A significant change in filing. Up until now, documents mailed had to be received within the filing deadline. There was one possible exception. The Court could direct that a document sent by certified mail be timely filed even if received late as long as it was sent in time to be received on time. Not a very precise, comforting standard.

Now, as long as the document is mailed by certified or registered mail, return receipt requested, within the filing period it is deemed timely filed. The post office date must show a date within the filing period.

Rules of Criminal Procedure

8) RCr 4.18 Motor Vehicle Traffic Violations: Guaranteed Arrest Bond Certificate (amendment)

Raises the limits from $200 to $500.

9) RCr 4.42(6) Change of Conditions of Release: Bond Forfeiture (abolishment)

Eliminates the following: "The return of an indictment shall not, of itself, be treated as a material change in circumstances." This change was effective July 8, 1983.

ED MONAHAN

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Upcoming Seminars

October 26-29, 1983 - Trial Practice Institute - Richmond

December 1-4, 1983 - Death Penalty Seminar - Barren River State Park

May 6-8, 1983 - Annual May Seminar - Frankfort

CHALLENGES TO JURY SELECTION PROCEDURES

There are numerous possible challenges to jury selection procedures and the composition of the jury pool. This article will focus solely on violations of the requirements of the statutes and rules. Challenges to such violations are usually far less time-consuming and complex than those to the actual make-up of the jury pool. The time spent is particularly worthwhile since, if you discover that the statutes or rules are not being followed, the legal issue may be applicable to many cases you are handling.

The first step is to check into whether the judges and jury commissioners are following the applicable statutes. You may be surprised at what you find. Recently a local public defender noted that the judge in his order appointing jury commissioners only required them to pick 500-600 names. A check of the census data (available at DPA library), the county clerk's figures on the number of registered voters and KRS 29A.050(3)(b) revealed that the commissioners should have been ordered to select at least 1300 names! Defense counsel had uncovered a compelling ground for moving to quash the indictment/dismiss the petit jury with relatively little time and effort. Counsel have also discovered that the judge did not require the jury commissioners to convene until after the year for which they were to select jurors had begun, that commissioners decided not to include women with young children or particular professionals in the pool and that the judge was excusing people by phone without even noting the reason for disqualifiaction anywhere. Clearly, serious violations of the statutes and rules occur regularly.

TIMELINESS

A motion to quash the indictment because of improper selection of the grand jurors should be made before a plea is entered "but the court may permit it to be made within a reasonable time thereafter without withdrawal of the plea." RCr 8.18, 8.20. If a plea is entered at the time of arraignment, you should reserve the right to make necessary motions, including this one, later. A motion to dismiss the petit jury panel must precede the examination of the jurors. RCr 9.34.

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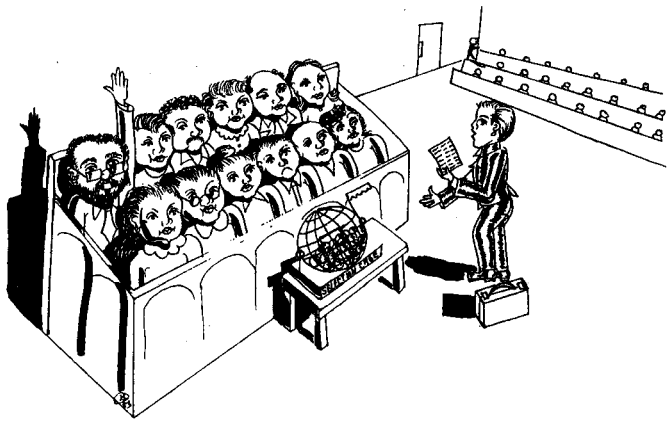

THE STATUTES AND RULES

The chief circuit judge must appoint three jury commissioners no later than the first week of October. KRS 29A.030(1). They must be citizens, eighteen or older, not a party to any act in pending in court nor a holder of public or political office. KRS 29A.030(2). The commissioners serve for a year. KRS 29A.030(4). They compile the master list, which consists either solely of the voter registration list or of both the voter and property tax rolls.(1) The commissioners then consult the list to select a specified number of prospective veniremen. KRS 29A.050. For example, if the county population is 20,000 or more, and there are more than 1,000 jurors on the master list the jury commission must place in the wheel 1,000 plus not less than two percent of the names on the master list.

The commissioners may use names or identifying numbers in selecting jurors. KRS 29A.050(7). Furthermore, the commissioners may use an electronic or mechanical device to carry out their duties. KRS 29A.050(8). Moreover, Sec. 5 of II Administrative Procedures of the Court of Justice provides that the selection of names of prospective jurors may be made by computer in which case jury commissioners need not be appointed. The Comment to that section notes "[s]ince a computer list is the best way to obtain a truly random list of names, it clearly meets constitutional requirements, and its use should be encouraged."

The statute contains no standards or criteria to guide the jury commissioners in deciding whom to select. Once they do choose names, they place them in plastic capsules in the jury wheel and deliver the wheel to the circuit clerk by November 15. KRS 29A.030(5)(b) and (c); 29A.050(6). As jurors are needed for service in court, names are drawn from the wheel. KRS 29A.060. Those names are then made available to the public. KRS 29A.060(13).

After the names of prospective jurors are drawn, each is served with a summons and juror qualification form. KRS 29A.060(8); 29A.070(1). When the qualification form is returned, the judge reviews it to determine if the juror is disqualified for a statutory exclusion such as being under indictment or serving on a jury within the past twelve (12) months. KRS 29A.080. If the judge determines a juror is so disqualified, he notes the reason on the form and on the list of names pulled from the drum. KRS 29A.080(1). The judge may also excuse jurors at their request "upon a showing of undue hardship, extreme inconvenience or public necessity" KRS 29A.100(1). The reason for excuse must be noted on the form and jury list in accordance with KRS 29A.080. "There shall be no automatic exemptions from jury service." KRS 29A.090; emphasis added.

A substantial violation of the statutory requirements on jury

(Continued, P. 24)

selection is reversible error. In Allen v. Commonwealth, Ky.App., 596 S.W.2d 21 (1979), the Court of Appeals held that deviation from the jury selection statutes and rules required reversal of the defendant's conviction even though "[i]t might appear that such a procedure would be more advantageous to a defendant than to the Commonwealth...." Id. at 22. The Court held that "in the interest of justice" jury selection procedures must be "closely followed, and that no substantial deviation be allowed, regardless of prejudice." Id. The Kentucky Supreme Court agreed in Robertson v. Commonwealth, Ky., 597 S.W.2d 864 (1980), reversing a conviction for deviating from the rules and observing that the defendant need not show prejudice.

The Supreme Court has also held violation of the "automatic exemption" prohibition to be prejudicial error. Colvin v. Commonwealth, Ky., 570 S.W.2d 281 (1978). The circuit judge had instructed the commissioners to exclude teachers from the pool which the court held violated the "fair cross-section requirement." Id. at 282. However, the Court recently refused, with one Justice dissenting, to find that commissioners excluded doctors and lawyers from the pool in Caldwell County because of allegedly inconclusive testimony by the commissioners. Partee v. Commonwealth, Ky., ___ S.W.2d ___, 30 K.L.S. 14 (rendered June 15, 1983). Partee is authority for the position that jury commissioners' decision to exclude a certain group of people in the absence of instruction from the judge to do so is reason for challenging the jury pool. However, the defense is held to a strict standard of proof.

LEGAL THEORY

When challenging a violation of the statutes/rules, rely on those enactments as well as the Fourteenth Amendment due process and equal protection guarantees (grand jury) or the Sixth and Fourteenth Amendment rights to an impartial jury, due process and equal protection (petit jury).

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(1) KRS 29A.030(50(a)(eff. 10-1-82) provides that the master list consists solely of the voter list. However, II Administrative Procedures of the Court of Justice, Section 3 (eff. 10-1-77) requires use of both the voter list and the property tax rolls. In Trent v. Commonwealth, Ky.App., 606 S.W.2d 386, 387 (1980), the Court of Appeals held that when there is a conflict between the statutes and the court's rules "it must be resolved by following the rules rather than the statute."

M. GAIL ROBINSON

* * * * * *

The following drug chart is an attempt to simplify the penalty provisions of KRS Chapter 218A, a most awkward drug statute. This chart is not designed to replace the statute, but to act as a quick-reference research tool. In this regard, each statutory penalty provision has been inserted at the bottom of the section labelled "Conduct." Only those provisions that dealt with sanctions have been included. For the convenience of the reader, a chart listing examples of scheduled drugs by brand and/or generic name has been included.

EXAMPLES OF SCHEDULED DRUGS

BY BRAND AND/OR GENERIC NAME

"This list is not intended to be complete."

SCHEDULE I

heroin	mescaline	pcp
LSD	peyote	

SCHEDULE II

opium	codeine
cocaine	Leritine
B & O Suppositories	Dolophin (methadone)
Demerol (meperidine)	Amytal (amobarbital)
Levo-dromoran (levorphanol)	Tuinal (amobarbital + secobarbital)
Nembutal (pentobarbital)	Ritalin (methylphenidate)
Dilaudid (dihydromorphinone)	Preludin (phenmetrazine)
Seconal (secobarbital)	Desoxyn (methamphetamine)

Biphetamine, Benzedrine, Dexedrine, Dexamyl, Eskatrol (amphetamine)
Percodan, Percodan-Demi, Percocet (oxycodone)

SCHEDULE III

phenobarbital	Hycodan	Didrex
Nalorphine	Synalgos DC	Sanorex
paregoric	Noludar	Tussionex
Donnagel PG	Doriden	Fiorinal
Parepectolin	Empirin c Cod.	Fiorinal c Cod.
Talwin (pentazocine)	all forms	

Tylenol c Cod., Empracet c Cod., Phenaphen c Cod.

SCHEDULE IV

choral hydrate	meprobamate	Placidyl
Tenuate	Tepanil	Ionamin
Clonopin	Tranxene	Serax
Valium	Dalmane	

Darvon (propoxyphene)
Librium, SK Lygen, A-poxide (chlordiazepoxide)

SCHEDULE V

terpin hydrate c codeine	Pediacof
Robitussin AC	Nucofed
Cheracol	Ambenyl
Novahistine DH	Triaminic Expt c Codeine
Novahistine Expt.	Phenergan Expt c Codeine

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
Traffics or transfers KRS 218A.990(1)	I or II NARCOTIC or Included in KRS 218A.070(1)(d)	5-10 years 10-20 years*	$ 5,000-$10,000 $10,000-$20,000*
Traffics KRS 218A.990(2)(a)	I or II [non-narcotics; not included in KRS 218A.070(1)(d); not marijuana; not LSD; not PCP] III	1-5 years 5-10 years*	$ 3,000-$5,000 $5,000-$10,000*
Manufactures, sells or possesses with intent to sell KRS 218A.990(2)(b)	I LSD, PCP	5-10 years 10-20 years*	$ 5,000-$10,000 $10,000-$20,000*
Traffics	IV or V	Up to 12 mos. - jail 1-5 years*	Up to $500 $3,000 or $5,000*
Transfers KRS 218A.990(3)	I, II, III [non-narcotics; not included in KRS 218A.070(1)(d); not marijuana]		
Manufactures, sells or possesses with intent to sell a. less than 8 oz.	MARIJUANA	Up to 12 mos. - jail	Up to $500
b. 8 oz. or more but less than 5 lbs.		1-5 years	
c. 5 lbs. or more KRS 218A.990(4)		5-10 years	$5,000-$10,000

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
Sells or transfers [D18 or over - V under 18] KRS 218A.990(5)	MARIJUANA [Any Amount]	1-5 years 5-10 years*	
Plants, cultivates, or harvests for purposes of sale KRS 218A.990(6)(a)	MARIJUANA	1-5 years	$ 3,000-$5,000
Possession KRS 218A.990(7)	I or II narcotic or included in KRS 218A.070(1)(d)	1-5 years 5-10 years*	$ 3,000-$5,000 $ 5,000-$10,000*
Possession KRS 218A.990(8)-(g)	I, II, or III [non-narcotics; not included in KRS 218A.070(1)(d); not marijuana] IV or V	Up to 12 mos. - jail+ Same for subsequent offense	Up to $500 Same for subsequent offense
Possession for own use; Transfers less than 8 oz. KRS 218A.990(9)	MARIJUANA	Up to 90 days - jail+	Up to $250
KRS 218A.140(3-5) violation [False prescriptions, etc.] KRS 218A.990(10)	I, II, or III	1-5 years	$ 3,000-$5,000
KRS 218A.140(3-5) violation [False prescriptions, etc.] KRS 218A.990(11)	IV or V	1-3 years	$ 1,000-$3,000

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
KRS 218A.140(6) violation [Advertising], Catch All KRS 218A.990(12)		Up to 90 days - jail	Up to $500
KRS 218A.350 violation [Simulation] KRS 218A.990(13)		Up to 12 mos. - jail 1-5 years*	
KRS 218A.500(2-4) violation [paraphernalia] KRS 218A.990(14)		Up to 12 mos. - jail	

* Denotes Subsequent Offense
\+ Denotes Optional Commitment Treatment

NO COMMENT

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

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DOES WARREN BURGER HAVE A CAUSE OF ACTION?

"Chief Justice Burger, a liberal member of the Supreme Court, is generally credited with court decisions favoring individual rights of every social element of our society. Many law enforcement officers and court officials believe some of Burger's decisions have made it harder to apprehend and convict criminals, thereby leading to the breakdown of law and order." The Jackson Times (Dec. 2, 1982) (emphasis added).

* * * * * *

THE PUBLIC DEFENDER MANUAL: GOT YOUR COPY?

JUDGE: [Don't ask the jury] all of these broad questions about "If you went back and returned a verdict now, what verdict would you return?" Well, that's a --I know the public defender asks that every time. Maybe the Public Defenders' manual says to ask that question of every juror, but that is a ridiculous question, what verdict would you return before you heard any proof.

PROSECUTOR: It's in the P.D. manual.

Epilogue - What manual?

* * * * * *

Earlier in the week a defendant was found not guilty of murder and receiving stolen property. The judge addressed the jury panel.

JUDGE: [The defendant was acquitted under] this reasonable doubt thing... [He] got out of that...[and] is a pretty slick fella...

If a Judge messes up one thing out of whole Rule Book, you have to try the whole case again...

The police quit working if nothing is getting done in Court, because why should they risk their lives for nothing...

Epilogue - Objection overruled.

* * * * * *

THE "CATCH MORE FLIES WITH HONEY" SCHOOL OF ADVOCACY

During the playing of a taped statement of one of the Commonwealth's witnesses a reference was made to outstanding warrants against the defendant. The

(Continued, P. 28)

trial judge admonished the jury not to consider the remark However, when the tape player was turned back on, the remark was repeated. A bench conference was held.

DEFENSE COUNSEL: ...The Court may... not have heard with all the lawyers out there shuffling about it came out they have got warrants over that tape. Again sir.

JUDGE: I admonished the jury about that.

DEFENSE COUNSEL: No Judge honey it came out after that again. That is what I am trying to tell you.

* * * * * *

Thanks and a tip o' the hat to Jay Barrett, Gail Robinson and Neal Walker.

KEVIN MCNALLY

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(Isaacs, Cont. from P. 1)

1973, during which time he also served as an adjunct instructor in law at U.K. and as an attorney for Kentucky Child Advocacy.

In 1973, Paul served as an assistant public defender with the state Office of Public Defender, where he engaged in both trial and appellate practice. He remained there until 1975, at which time he became staff attorney for the Department of Justice.

After three years as Deputy General Counsel of the Department of Justice, in 1980 Paul was named General Counsel of the same agency. It was from that position that he was chosen by Governor Brown to serve as the new Public Advocate.

The Advocate welcomes Paul to DPA and wishes him well in his tenure here. We hope to feature an interview with Paul in our next issue of The Advocate.

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