The Advocate

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THE ADVOCATE FEATURES

AN INTERVIEW WITH PAUL ISAACS

You have been Public Advocate for a month. What are your first impressions?

The most striking "first impression" I have after one month is the dedicated staff that I have inherited. I have been impressed with the dedication to professionalism not only among the attorneys but with the support staff. I guess I presumed the commitment of the attorneys or they would be doing something else, but in Frankfort and in every Public Advocacy office I have visited, I have been extremely pleased with the professional commitment to doing a good job of the investigators, secretaries, clerks and administrative staff and their real pride in their work.

What major problems do you seek to address over the next year?

Probably the major concern which I must address in the next year is the budget for DPA because that issue determines how every other problem must be addressed. If the agency had limitless supply of funds, then solving all of our problems would be relatively simple. Since that possibility is unlikely, then we must be more creative in our solutions. One major concern I have is the caseload of our trial attorneys and our appellate attorneys. Another equally important concern is the level of funding to contract attorneys who have not had a significant increase in funding for several years. How we solve these problems will be determined in large part by how much money the legislature appropriates.

Other than the financial concerns, the other important goal I hope to achieve is to narrow some of the division I see between the full-time public advocates and the

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private bar. Both are necessary to an effective public defender system and we need to complement each other so that we can work together to improve the system.

What is your highest priority for the DPA?

The highest priority for this office has to be the provision of services to our clients. My priority is to provide that service the most cost effective and efficient way possible with the resources made available to us. This doesn't mean that I won't seek more funds if I believe we need them in order to provide the services we are required to provide.

What are DPA's goals for the 1984 General Assembly?

Basically I have two major goals in the 1984 General Assembly. One goal is to obtain the level of funding necessary to provide our essential services. In terms of the budget I have three primary objectives which I think are crucial: the reinstatement of funding lost in the current fiscal year; more funds to the grants to counties program which has not had a significant increase in recent years; and personnel expansion in our present full-time offices in order to meet the present caseload. As to non-budgetary issues, my primary objective is the passage of the Bill of Rights for the Developmental Disabled legislation (BR-286).

Are there any specific pieces of legislation which the DPA is backing?

The department has a legislative package containing seventeen separate legislative proposals, some of which are merely housekeeping. However, the major proposals are the Bill of Rights mentioned earlier, payment of expert witnesses, equitable treatment of defense witnesses, raise felony offenses threshold from one hundred to five hundred dollars, and creation of a statutory statewide pretrial diversion program.

A new prison opened recently at Northpoint near Danville. Does DPA have any plans to serve the inmates there and how?

Recently, the department was authorized to staff an inmate legal services program for the Northpoint Correctional Complex near Danville, Kentucky. We are now in the process of staffing that office and hope to have it opened and operating in December.

The numbers of appeals from eligible clients continues to increase. How does DPA plan to meet this ever-increasing caseload?

The best solution would be to win more cases at trial but since that decision is made by twelve individuals

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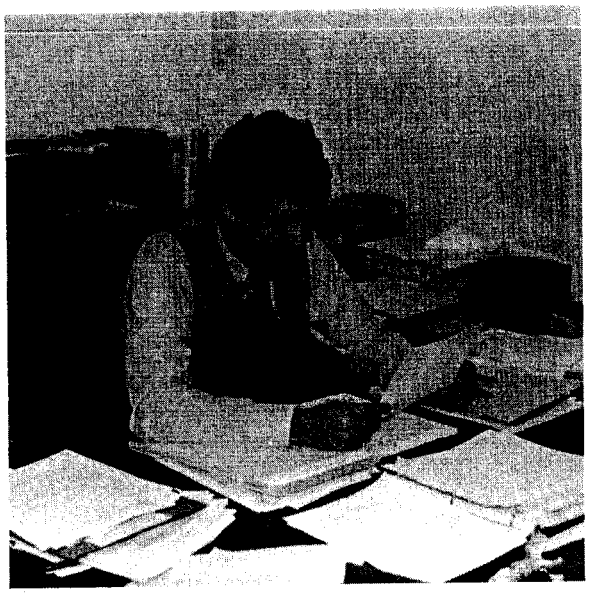
at a given time, we don't have a lot of control over our caseload from that angle. The decision to appeal or not is that of the client and caseload control is not feasible. Increased appellate staff is not an available remedy at this time and I don't have any idea if or when that option will come available. The only option available is to find more attorneys available for appeals from within the system. I am exploring every reasonable alternative available. Recently, I negotiated with the Fayette County public defender office to handle their own appeals and I am looking at an increased role for "of counsel" attorneys. I have a committee looking at the issue of RCr 11.42 appeals and whether we can legally and ethically refuse to represent every client on an RCr 11.42 appeal. I am also looking at the structure of the Frankfort office to see if we are best utilizing our staff. I don't have any magical solutions but think by working together and creatively we can discover some solutions to the problem.

Do you plan any major changes in the goals and directions of the Protection and Advocacy Division?

No, I have been extremely pleased with the staff and programs of the Protection and Advocacy Division. It has been particularly gratifying to see the staff's dedication and the respect they have earned from both their clients and their adversaries. At this point, I am still learning about the multitude of problems and issues Protection and Advocacy must work with on a daily basis and I think it would be extremely presumptuous to make any major changes at this time.



What new trial offices do you now plan to open over the next year?

I can't really answer that question at this time. My first goal is to get all of our present offices up to full staff before any expansion. Also the current hiring freeze and our current budget preclude any new offices at this time. I can tell you my criteria for opening new trial offices provided there is funding and staff available. In looking at new offices, the first

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requirement is that the current system is not working. There also must be an insufficient number of attorneys in the area willing to serve in a public defender program and there must be sufficient local support for a full-time office to make it viable. Another way of expressing this, is the simple statement that if something is working, don't "fix" it and a corollary to that is you don't buy a new car simply because the ashtray is full. Where full-time public defenders are the most efficient and competent delivery system available with the funds allotted us, that's where I want them. Where other systems work better, then we should use that system.

The local public advocates serving under a contract system have not received an increase in their allotment for years, despite their traditional low funding and the effects of inflation. How do you plan to rectify this situation?

A major priority for me in our budget for the next biennium (FY 85-86) is an expansion in the grants to counties. We have requested an increase from .53 per capita at the present to .76 per capita in the first fiscal year and .83 per capita in the second fiscal year. After reinstatement of current budget cuts, this is my first priority of expansion money and I am committed to using every resource I have available to getting an increase in funds for the allotment counties.

The death penalty has an effect on every level of DPA, from the trial and appellate stages all the way to the post-conviction stage. What ideas do you have to mitigate the effects of the death penalty on public advocates?

A death penalty case puts an awesome responsibility on the individual attorney, and if he is a public defender, on the entire system. The enormous amount of time in preparation, trial, and appeal eats away at the resources available locally and statewide. Like so many other problems, I don't have magical solutions other than more money. I am concerned about this problem and I am searching for some method for providing more direct assistance from Frankfort in cases where it is appropriate.

ERNIE LEWIS

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COUNTY MUST PAY FOR EXPERTS

No subject matter is more important to the hearts of public defenders than their client's rights to defend themselves by hiring necessary expert witness. No one disputes anymore that a poor person accused of a crime has a right to those experts free of charge. The sticky point has always been, who pays for those experts?

Young v. Commonwealth, Ky., 585 S.W.2d 378 (1979) went a long way toward answering that question. There, the Supreme Court stated that it was the county's responsibility to pay under KRS Chapter 31. Young, however, could be read to be limited only to counties which featured a contract system of delivery of public advocacy services. Some courts read Young to not require the counties to pay where no contract existed between the defenders and the county, as for example where a full-time office is in place or where the contract is between the DPA and the local defenders.

The Court of Appeals has rejected this interpretation, and seems to have given a definitive answer to the "who pays" quandary. In Commonwealth v. Douglass and Gwinn, Ky.App., ___ S.W.2d ___ (Nov. 4, 1983), the Court affirmed Young and again held that it is the county's responsibility to pay for necessary expert witnesses and other costs. This is so no matter what kind of public defender system exists in the local level. The Court bases this ruling on KRS 31.185, which states that where state facilities cannot be used, the court can order "the use of private facilities to be paid for a court order by the county."

There is no longer any reason for the rights of a criminally accused to be hung up on the "who pays" dilemma. Douglas and Gwinn have answered the question.

ERNIE LEWIS

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FARLEY HONORED

On November 10, 1983, over 100 people gathered at Spindletop Hall outside of Lexington to honor Jack Emory Farley. The celebrants included members of the DPA Commission, the appellate courts, past and present members of the DPA staff, and friends of Jack's. Court of Appeals Judge Anthony Wilhoit spoke on Jack's behalf. Well wishes were sent by Senator Wendell Ford, Governor-elect Martha Layne Collins, Chief Justice Robert Stephens, former Chief Justice John Palmore, Shelvin Singer, professor of law at Chicago-Kent College of Law, and National Legal Aid and Defender Association Defender Director Rick Wilson.

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September and October saw a large number of published opinions issued by the Kentucky Supreme Court.

In Commonwealth v. Karnes, Ky., 30 K.L.S. 11 at 16 (September 21, 1983), the Court affirmed a decision of the Court of Appeals and adopted the Court of Appeals' opinion. Judgment convicting the defendant in Karnes of a misdemeanor was entered in the district court. Later that day the grand jury returned an indictment charging the defendant with a felony based on the same incident which had resulted in the misdemeanor conviction. The circuit court subsequently dismissed the indictment on double jeopardy grounds. On appeal by the commonwealth, the Court of Appeals affirmed the judgment of the circuit court dismissing. The Court held that until the return of an indictment the district court has concurrent jurisdiction with the circuit court and may dispose of charges. "Consequently, the trial court was correct in dismissing the indictment because the matter had been disposed of by the district court..."

Haymon v. Commonwealth, Ky., 30 K.L.S. 11 at 16 (September 21, 1983) presented the question of whether possession of a gun stolen during the commission of burglary constitutes use of a weapon so as to preclude eligibility for probation, shock probation, or conditional discharge as specified by KRS 533.060(1). The statute provides that "when a person has been convicted of an offense... and the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged... such person shall not be eligible for probation, shock probation or conditional discharge." (Emphasis added). The Court found the statute ambiguous as to whether the mere possession of a weapon constituted the "use of a weapon", or whether the weapon must be employed in the commission of the offense. The Court held that the defendant was "entitled to the benefit of the ambiguity," and that since there was no showing that the weapon was used to commit the offense probation was not precluded.

In Wallen v. Commonwealth, Ky., 30 K.L.S. 11 at 17h (September 21, 1983), the Court held that the defendant was not denied a unanimous jury verdict when the jury was instructed on both wanton and intentional murder. The Court specifically rejected argument by the defendant that there was no evidence from which the jury could have concluded that the defendant acted other than intentionally. The defendant testified that he

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shot the victim in self-defense, i.e., intentionally. The Court, however, considered that it was also "reasonable to infer that appellant was shooting wantonly while overcome by a combination of anger and alcohol." The Court's decision seems at odds with its decision in Hayes v. Commonwealth, Ky., 625 S.W.2d 583 (1981), in which the Court held that where the defendant testified that he shot the victim to "stop him" and there was no evidence of random shooting, an instruction on wanton murder was improper. The Court also noted that the issue was unpreserved since trial defense counsel objected to instructing the jury on intentional murder, but not to instructing the jury on wanton murder.

The Court has held in Beecham v. Commonwealth, Ky., 30 K.L.S. 11 at 20 (September 21, 1983) that a request for counsel made by an indigent movant under RCr 11.42 must be "clear and unambiguous and contained in the body of the RCr 11.42 motion." Beecham did not request appointment of counsel in his pro se RCr 11.42 motion but did attach an affidavit of indigency at the conclusion of which he requested counsel. The Court affirmed the holding of the Court of Appeals that this request was fatally obscure. The Court also emphasized that "[n]othing in RCr 11.42 requires that counsel be automatically appointed whether a request is made or not." The Court also noted that the failure to appoint counsel was first raised in the defendant's reply brief to the Court of Appeals and that the assertion that the affidavit of indigency constituted a request for counsel was not presented to the Court of Appeals at all. The Court concluded that "[t]his is a situation which was not properly preserved before the Court of Appeals..."

In Commonwealth v. Justice, Ky., 30 K.L.S. 11 at 21 (September 21, 1983), the Court certified as the law that the commonwealth need not identify the specific items stolen in a case of theft by deception in order to overcome a motion for directed verdict. The evidence in Justice showed that the defendant had written bad checks in amounts exceeding or near $100. However, the merchants to whom the checks were issued were unable to state what items of merchandise were purchased with the checks. On the basis of this omission the circuit court directed a verdict of acquittal. The Supreme Court held that "[w]here the proof establishes that the recipient of a dishonored check is in the business of selling merchandise on a cash basis and that the check was received by it from the maker in the ordinary course of business, this evidence is sufficient to meet the burden required under KRS 514.040 to show that the maker obtained property..." The Court reasoned that to require a showing of the specific items of property obtained "would place an untenable burden on the merchants of this state."

In Faught v. Commonwealth, Ky., 30 K.L.S. 11 at 22 (September 21, 1983), the Court held that the police acted lawfully when they arrested the defendant

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based on a "reliable" informant's tip that the defendant's truck was transporting drugs. The Court also held that the defendant's possession of 4.7 grams of cocaine, an apparatus used to sift cocaine, and a laxative commonly used to "cut" cocaine, together with testimony that cocaine is sold by the gram, raised a jury question as to whether appellant possessed the cocaine with intent to sell. Finally, the Court held that a court order indicating the defendant was placed on probation following a conviction of trafficking in a controlled substance was competent evidence that the defendant had been previously convicted of a drug offense for the purpose of penalty enhancement under KRS 218A.990(8)(1). The Court observed that the statute does "not specify the manner in which prior convictions must be proved."

The Court has held in Haynes v. Commonwealth, Ky., 30 K.L.S. 12 at 11 (October 12, 1983) that a police officer's investigative reports are not exempt from RCr 7.26. The rule requires that written reports or statements of a witness which relate to the subject of the witness' testimony and which are signed by the witness must be provided to the defendant prior to the witness testifying. The Court found "no generic work product exception for [police] investigative reports..." However, the Court found that the failure of the commonwealth to produce a testifying officer's report was harmless error since "the report would not have established some other fact which might reasonably have altered the verdict." The Court also rejected argument by the defendant that his right to counsel was violated when, after indictment and in the absence of counsel, the defendant told police that he was "guilty." The Court found that Massiah v. United States, 377 U.S. 201 (1964) and Brewer v. Williams, 430 U.S. 387 (1977) were inopposite since the defendant's statement was not obtained via surveillance and was unsolicited. Finally, the Court held that the defendant was not denied a fair trial by the prosecutor's closing argument comment that the defendant did not put on any witnesses. The Court considered that such argument was proper.

Finally, the Court reversed the manslaughter conviction of Hobert Roberts. Roberts v. Commonwealth, Ky., 30 K.L.S. 12 at 13 (October 12, 1983). In Roberts, a witness gave police a statement, while being monitored by a polygraph, in which the witness exonerated the defendant. The polygraph indicated that the witness was not honest. When confronted with the polygraph results the witness "remembered" that the defendant had fired a gun. At trial, the trial court ruled that the prosecution could refer to the polygraph to show why the witness had regained his memory, but that the results of the polygraph could not be introduced. The Supreme Court rejected argument by the commonwealth that there is error only when the results of a polygraph are introduced. "This Court has held not only are the results inadmissible,

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but any reference to an offer or refusal to take a polygraph test is inadmissible as well." The Court also rejected the commonwealth's argument that polygraph test results are only inadmissible as to one charged with a crime but are not inadmissible as to witnesses. See Ice v. Commonealth, Ky., 30 K.L.S. 11 at 17 (September 21, 1983) (Death Penalty).

A number of important decisions were also issued by the Court of Appeals.

In Ivey v. Commonwealth, Ky.App., 30 K.L.S. 11 at 2 (September 2, 1983), the Court held that Ivey's RCr 11.42 motion to vacate judgment on the grounds of ineffective assistance of counsel should have been granted. The test for assessing the effective assistance of counsel is counsel "reasonably likely to render and rendering reasonably effective assistance." Henderson v. Commonwealth, Ky., 636 S.W.2d 648 (1982). The Court in Ivey held that this test is applicable to both appointed and retained counsel. Applying the standard to the facts before it the Court concluded that Ivey was denied the effective assistance of counsel. Trial counsel failed to request dismissal of the charges against Ivey although the commonwealth failed to bring Ivey to trial within 180 days of Ivey's request for a speedy trial made under the Interstate Act on Detainers. Had such a request been made the trial court would have been compelled to dismiss the charges. "We hold that it is ineffective assistance of counsel to fail, without a reasonable basis, to present a defense that would compel a dismissal of the charges."

In discretionary review of a Jefferson Circuit Court decision the Court of Appeals held that the defendant's rights were violated when he was tried and convicted of misdemeanors by the Jefferson District Court in absentia. Burns v. Commonwealth, Ky.App., 30 K.L.S. 11 at 6 (September 9, 1983). RCr 8.28(4) provides for trial in absentia of a misdemeanant. However, his absence must be a voluntary waiver of his right to be present. Where the commonwealth proves that the defendant knew of the trial date a rebuttable inference arises that the defendant's absence was voluntary waiver. In Burns the defendant was not present when his case was called for trial at 9:00 a.m. The district court proceeded to try and convict the defendant. At 10:00 a.m. the defendant appeared and explained that he had mistakenly thought the trial date was the following day. The trial court denied the defendant's motion for a new trial. The Court of Appeals noted that the defendant had on all other occasions met his court appearances and concluded that "the trial court abused its discretion."

In Sanders v. Commonwealth, Ky.App., 30 K.L.S. 11 at 8 (September 9, 1983), the Court of Appeals held that cocaine is "a substance classified in Schedules I or II which is a narcotic," the possession of which carries permissible sentence of one to five years.

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KRS 218A.990. The defendant had argued that while cocaine was a Schedule II drug it was not a narcotic. The defendant's argument was based on an amendment of KRS 218A.990(7) which provided that a penalty range of one to five years also applies to any drug "which is included in KRS 218A.070 (1)(d)." KRS 218A.070(1)(d) includes "coca leaves and any salt, compound, derivative, or preparation of coca leaves..." The amendment was made subsequent to the defendant's arrest. The defendant argued that the amendment made it clear that the legislature did not define cocaine as a narcotic, and thus, prior to the amendment, cocaine was not a drug covered by the penalty provision of KRS 218A.990. The defendant's argument failed in light of KRS 218A.010(10)(d) which defines "narcotic drug" to include "coca leaves and any salt, derivative, or preparation of coca leaves..."

The Court upheld the validity of a roadblock in Kinslow v. Commonwealth, Ky.App., 30 K.L.S. 11 at 12 (September 16, 1983). In upholding the stop of the defendant's vehicle the Court stated "[t]he key here is the fact that all vehicles were stopped." The Court held that stopping all vehicles travelling on a given road created a situation distinguishable from that in Delaware v. Prouse, 440 U.S. 648 (1979), in which random stops of some vehicles permitted the exercise of "unconstrained discretion."

In McFerron and Kirby v. Commonwealth, Ky.App., 30 K.L.S. 12 at 6 (October 7, 1983), the Court was confronted with a claim that the jury selection procedure in the defendant's case violated the Sixth Amendment and KRS 29A.090. The defendants introduced into the record the affidavit of a local attorney asserting that no lawyers or physicians had been called for jury duty in Rockcastle County since 1960. The affidavit also asserted that although teachers were included in the jury panels they were automatically excused from service. No evidence was offered by the commonwealth. The Sixth Amendment guarantees an accused a jury "selected at random from a fair cross-section of the community..." In addition, KRS 29A.090 provides "[t]here shall be no automatic exemptions from jury service." The Court of Appeals held that the commonwealth bore the burden of showing that the jury was lawfully constituted and had not sustained its burden. The Court remanded the case to enable the commonwealth to demonstrate that the jury was lawfully constituted, and directed that if the commonwealth again failed to meet its burden that the defendant's conviction be vacated. The Court has previously held in Reid v. Commonwealth, Ky.App., 30 K.L.S. 10 at 1 (July 12, 1983), that lawyers, doctors, and police may not be lawfully excluded from the jury pool.

In an interesting decision the Court has held that a warrantless vehicle search was invalid and that passengers in the vehicle have standing to assert the illegality of the search. Williamson v. Commonwealth, Ky.App., 30 K.L.S. 13

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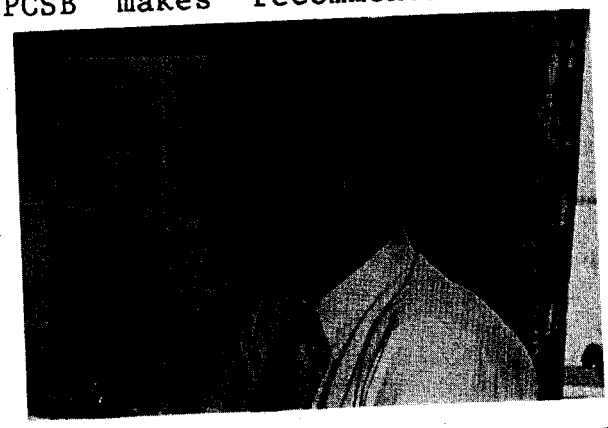
POST-CONVICTION SERVICES BRANCH

The Post-Conviction Services Branch of the Department of Public Advocacy assists residents at Kentucky's correctional institutions as well as persons on parole, probation and other types of release by representing or advising them in various post-conviction matters. The branch primarily deals with collateral attacks on convictions and other challenges to the legality of the defendant's custody. However, the PCSB also handles a myriad of miscellaneous problems, such as sentencing issues, probation, parole, belated appeals and extradition.

In addition, the PCSB advances the interests of residents in a number of indirect ways. The PCSB makes recommendations to the legislature for changes in laws affecting the post-conviction area. The PCSB staff also trains and advises resident legal aides or "jail house lawyers" at all correctional institutions in cooperation with the Corrections' Cabinet. The branch further serves as a resource center for attorneys throughout the state by providing information and assistance in particular cases and by publicizing significant developments in the area of post-conviction law.

Any questions concerning the branch or post-conviction issues should be directed to Randy Wheeler, Chief, Post-Conviction Services Branch at (502) 564-2677.



Randy Wheeler, a graduate of the University of Kentucky and the University of Kentucky College of Law, came to work with the Department of Public Advocacy in 1977 as a law clerk with the Appellate Branch. In 1978 he became a staff attorney with the Post-Conviction Services Branch and was named Chief of the branch in October, 1980.

Richard Arvedon, a graduate of Northeastern University School of Law, has been with the staff of the Department of Public Advocacy since March of 1981. Richard worked as a trial attorney in the Somerset Office until May of 1982, at which time he transferred to our Post-Conviction Services Branch in Frankfort. Currently his energies are primarily devoted to federal habeas corpus and 1983 litigation.

at 1 (October 14, 1983). The police had stopped a vehicle, in which the defendants were riding, in order to execute arrest warrants against them. The two defendants fled on foot but were apprehended. The driver of the car was also placed under arrest. The car was left on the roadside while the officers made arrangments to have it towed. However, before the car was towed, officers returned to it and through the car windows observed the muzzle of shotgun case. The officers reentered the car and retrieved a shotgun determined to have been stolen in a recent burglary. The Court of Appeals acknowledged that the shotgun was in "plain view" but noted the fundamental principle that "plain view alone never justifies a search and seizure." The Court emphasized that the warrantless seizure of evidence, even when in plain view, must be justified by exigent circumstances: "[T]he states may not authorize the seizure of contraband under the plain view doctrine unless a delay may result in loss of opportunity to seize. The Court concluded that the warrantless seizure of the shotgun was unjustified. The Court also held that the passengers who fled the car had standing to challenge the seizure. The Court found that passengers in an automobile have a reasonable expectation of privacy: "We hold the general rule to be that a rightful occupant of an automobile possesses both a legitimate and reasonable expectation of privacy and freedom from governmental intrusion..."

No opinions were issued by the United States Supreme Court during the two months under review.

LINDA WEST

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TRAINING SEMINARS SCHEDULED

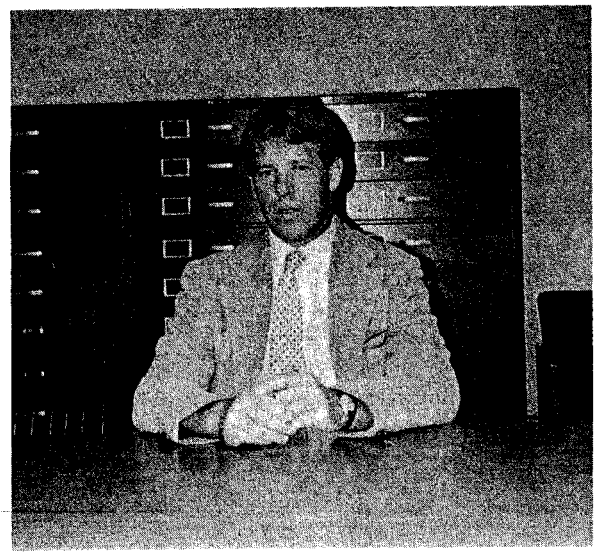
The Department of Public Advocacy is planning three seminars during the coming months.

First, over ninety local public defenders attended the Death Penalty Seminar at the Barren River State Park from December 1-4, 1983. Faculty for this seminar featured a number of nationally acclaimed figures, including Team Defense lawyer, Millard Farmer, Southern Poverty Law Center attorney, Dennis Balske, Homicide Task Force member, Andrea Lyon of the Chicago Public Defender's Office, and Cathy Bennett, a psychologist from Houston, Texas. Other outstanding national and state death penalty experts completed the faculty.

A seminar on juvenile law is now on the drawing board, and will be held sometime during the winter of 1984. A detailed notice of this seminar will be sent out to local public defenders shortly.

The annual Public Defender Seminar is to be held on May 6-8, 1984 at the new Capital Plaza Hotel now being built in Frankfort, Kentucky.

For information regarding these and other parts of DPA's training program, contact Ed Monahan, Director of Training, DPA, (502) 564-5258.

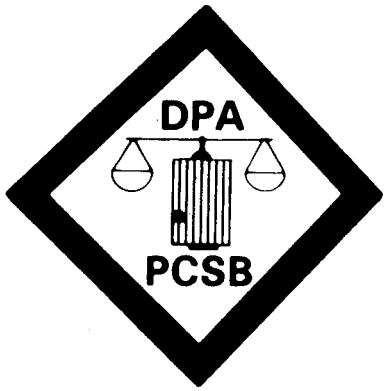


Hank Eddy has been with the Department of Public Advocacy since January, 1982. He graduated from the University of the South, Sewanee, Tennessee in 1974, and from Chase College of Law in 1978. Hank works with the Post-Conviction Services Branch at Kentucky State Penitentiary.

Bob Little has been with the Department of Public Advocacy since September, 1983. A graduate of Murray State University and the University of Kentucky College of Law, Bob works at Eddyville with the Post-Conviction Services Branch.

Ed Gafford graduated from the University of Kentucky Law School. He has worked in the Post-Conviction Services Branch at the Kentucky State Reformatory since 1978.

Barbara Parsons is a 1975 graduate of Vassar College and a 1979 graduate of the University of Louisville School of Law. She worked for a legal publishing company and a legal services program before joining the Post-Conviction Services Branch of the Department of Public Advocacy in June of 1982.



RECOMMENDATIONS TO RELIEVE PRISON OVERCROWDING SUBMITTED TO GOVERNOR BROWN

As of July, 1983, there were approximately 4,500 defendants sentenced to terms of imprisonment in the Commonwealth's state-run correctional institutions. However, at that time there were only 4,151 beds available. Accordingly, many defendants have been held in county jails for months to await an opening. While this arrangement does reduce the population in state institutions, it ultimately does nothing for the overcrowding problem since it merely shifts the burden to the local facilities. And, unfortunately, there appears to be no relief in sight, at least in the current circumstances. There is now approximately a 10% per year increase in the number of defendants entering the correctional system and the Corrections Cabinet has projected this trend to continue.

The adverse affects of overcrowding on prisoners are well known. Such conditions can lead to violence, disciplinary infractions, deaths and suicides. But the cost of constructing new prisons and incarceration is now prohibitively high. It is estimated that the cost of a new prison would be $50,000 per cell and $10,000 for incarcerating a person for one year in a state-run institution.

Accordingly, by Executive Order 83-186, Governor John Y. Brown, Jr., on February 22, 1983 created a Commission on Sentencing and Prison Overcrowding to explore the state's alternatives for addressing the problem. The Commission, which included then Public Advocate Jack Farley, was chaired by Secretary George Wilson of the Corrections Cabinet, and consisted of members representing corrections, the judiciary, the Parole Board, defense attorneys, prosecutors, jailors and legislators from throughout the Commonwealth. In late October, the Commission made recommendations to the Governor that, if approved, will be submitted to the General Assembly for its consideration in the upcoming session. The Commission recommended changes in areas affecting the number of people who enter prison, the length of time people spend in prison and altering the system's capacity.

Options Affecting Who Enters Prison - The Commission first recommended that a "triage" system for the Kentucky Corrections Cabinet be implemented. This advises that a defendant sentenced to imprisonment should be evaluated not only on the basis of the crime for which he has been convicted, but also in relation to the resources available now and in the future. Many offenders who do not pose a

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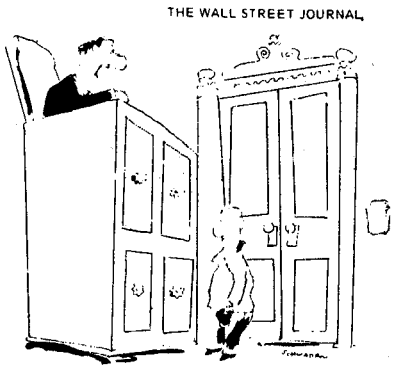
serious threat to others might be housed or treated through alternatives to maximum or medium security.

The Commission also recommended a number of alternatives short of incarceration, including the adoption of a uniform pretrial diversion program throughout the Commonwealth, a program of probation with intensive supervision, expansion of the use of community based restitution programs and expansion of the use of probation with specific conditional requirements.

Under this category the Commission also endorsed the plan to decriminalize the offense of public intoxication, contingent upon the development and funding of alternative treatment programs. It also recommended that the dollar amounts that determine whether a property offense is a felony or misdemeanor should be adjusted to take into account inflationary factors.

Pepper . . . and Salt



"I sentence you to be put on a waiting list for a prison cell."

Finally the Commission recommended that a program for educating the judiciary, prosecutors and defense attorneys about the use of sentencing alternatives be implemented.

Options Affecting Length of Stay In Prison or Jail - A number of statutory amendments were recommended in this section of the Commission's report. These include:

Amending KRS 439.344 to allow jail time credit for parole violators held in local jails awaiting return to a state correctional institution.

Amending KRS 439.265 to allow detention at a local facility to count toward the requisite time to serve before filing of a felony shock probation motion.

Amending KRS 439.177 to allow the county judge executive the power of parole for misdemeanants.

Amending KRS 197.140 to allow for the development of a work-orientated pre-release program to gradually reintegrate an offender into society.

Amending KRS 439.267 to specifically allow the sentencing judge to exercise the option of shock probation any time during incarceration for a misdemeanor.

Creating a new section of the Kentucky Revised Statutes to allow good time credits to misdemeanant offenders sentenced to jail for a period longer than 30 days.

The Commission also recommended that judges make greater use of "split" sentences, combining

(Continued, P. 16)

both probation and intermittent confinement on weekends or nights. It advised that a constitutional amendment authorizing work release for convicted felons be placed on a ballot as soon as possible. It also recommended that KRS 532.080, the persistent felony offender statute, be reevaluated with the possibility of removing certain offenses from its coverage. Finally, in what may be the most controversal recommendation, the Commission recommended that judicial sentencing, with guidelines, be adopted in the Commonwealth.

Options For Altering System Capacity - Although the Commission began its work with a proviso that new construction should be avoided, the Commission did recommend that a separate intake and processing center be established for the correctional system. At present all male defendants enter the correctional system through the Kentucky State Reformatory. Many, however, will not stay at that institution once they have been classified. To promote the "triage" concept and to create over 200 additional beds at the reformatory, the separate intake and processing center was seen as a necessity. The Commission also recommended that minimum security facilities be renovated and that their use be increased. Finally, the Commission strongly endorsed the concept of a regional correctional system.

RANDY WHEELER

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Fenwilder & Jones ——— *by Charles Fincher*

BILL OF RIGHTS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES NEEDS YOUR SUPPORT

BR 286 is a bill establishing a statutory right to residential, developmental, vocational, and related services and to appropriate residential placements for persons with developmental disabilities. The Act recognizes that services to Kentucky's more than 50,000 citizens with developmental disabilities must be made available and that existing services must be improved in order to meet the individual needs of the person.

The bill requires the Cabinet for Human Resources and the Education and Humanities Cabinet to jointly develop and implement a statewide plan and make available services to serve all persons with developmental disabilities who are not entitled to and receiving the same services under other state and federal acts. The bill also requires prompt interdisciplinary assessment of the individual and provides that all services and residential placements occur in the least restrictive, individually appropriate environment. There are placement protections for developmentally disabled people who are transferred between institutional and noninstitutional settings, and there is a requirement that all services and residential placements be developed and provided pursuant to a written plan.

On November 16, the bill was passed out of the Interim Joint Committee on Health and Welfare and referred to the Interim Joint Committee on Appropriations and Revenue. The members of this committee are as follows: Senator Michael R. Moloney, Co-Chairman, Representative Joseph P. Clarke, Co-Chairman, Senators Benny Ray Bailey, Charles W. Berger, James P. "Jim" Bunning, John Doug Hays, Gene Huff, Robert R. Martin, and Joe Wright, and Representatives Thomas J. Burch, Barry G. Caldwell, Fred Cowan, Allene A. Craddock, William "Bill" Donnermeyer, Lewis Foster, C. M. "Hank" Hancock, Kenneth Harper, Edward L. Holloway, Robert A. "Bob" Jones, Marshall Long, Jerry Lundergan, Harry Moberly Jr., H. Ramsey Morris Jr., Carl A. Nett, Roger Noe, Albert Robinson, Arthur L. Schmidt, David H. Thomason, and Pete Worthington.

If you wish to support this bill, please write or call your legislators to let them know of your interest. The toll-free number in Frankfort for your legislator is 1-800-372-7181. The legislators on the Appropriations and Revenue Committee should be contacted as soon as possible because the bill is on that committee's agenda. If you wish to be on the mailing list for periodic updates on the status of the bill, please call 1-800-372-2988 and leave your name and address for the mailing list. If you have any questions concerning the bill, please contact Gayla Oldham Peach, director, Protection and Advocacy Division, Dept. of Public Advocacy, who is serving as a communications link for the committee of consumers and parents who drafted the bill.

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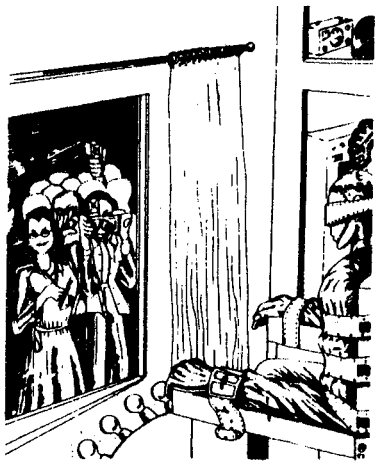
THE DEATH PENALTY



KENTUCKY'S DEATH ROW POPULATION 19

PENDING CAPITAL INDICTMENTS KNOWN TO DPA 76

ICE DEATH SENTENCE REVERSED

On September 21, 1983, the Kentucky Supreme Court reversed the conviction and death sentence of Todd Ice. Todd was barely 15 at the time he was charged with murdering a 7 year old neighbor girl and seriously wounding her mother. A divided court reversed on numerous grounds and sent the case back to juvenile court for further proceedings. The following issues were discussed:

JUVENILE COURT

a) EX PARTE CONVERSATIONS

Todd was transferred "primarily on the seriousness of the alleged offense and... concern for adequate protection of the public" [Slip Opinion (SO) at 7]. While "transfer... is the exception, not the rule," the court found no abuse of discretion in Todd's waiver. The majority [Leibson, Stephens, Gant and Vance], however, returned the case to juvenile court. While Justices Gant and Vance concurred in the result only, the court's opinion finds error in ex parte discussions about the case between the Commonwealth Attorney, a KSP Detective and the District Judge. "In such circumstances, prejudice must be presumed... [A]fter participating in such a conversation the judge was obliged to recuse himself. KRS 26A.015(2)(b)" [SO, 8].

b) CHILD'S PRESENCE

Todd was not present at his waiver hearing, although he was briefly present at the probable cause hearing. Despite a waiver of his presence by Ice's first lawyer (because of fear for his life), the court stated that "a judge should make every effort to personally observe the child. If circumstances make his presence in the County difficult or impossible, the judge should consider conducting the hearing in part at the facility where the child is being held. He should see and evaluate the child before making a decision" [SO, 9].

c) BACKGROUND INVESTIGATION

Pursuant to KRS 208.140, a "background investigation" should have been conducted "before the case is disposed of in Juvenile Court. The kind of investigation required by that section was not performed..." Further, testimony "from police officers was not a substitute for the investigation and report required by the statute..." [SO, 9-10].

(Continued, P. 19)

OTHER REVERSIBLE ERRORS

d) CHANGE OF VENUE

Over defense objection, venue was changed from Powell Co. to Wolfe Co. - "an adjoining county in the 39th Judicial District... So far as this case is concerned, the difference lacks substance... The two areas are in fact not only adjacent, but part of an integrated rural community... The line between Wolfe and Powell County is an imaginary one drawn on a map and a distinction without a difference..." [SO, 10]. "Voir dire revealed that about every juror was familiar with the case. Sixteen were excused because of fixed opinions and two others on account of involvement with the victim's family..." [SO, 11]. "The fact that it is ultimately possible to seat a jury...whose answers on voir dire do not show they were knowingly or intentionally biased does not deal with the problem nor cure the error" [SO, 12; emphasis added].

Because the trial lawyers objected to the first change of venue, they were not barred from seeking another one. Those connected with the defense were subjected to "threats, intimidation and harassment... A trial should never have taken place in such an atmosphere" [SO, 11]. "The change of venue shall be granted... to a place sufficiently separated by both distance and character..." [SO, 13; emphasis added].

e) POLYGRAPH EVIDENCE

Someone else confessed to the murder. After the defense announced its intention to rely on this evidence, the Commonwealth conducted a polygraph examination of the self-proclaimed killer and his mother. They allegedly passed and this evidence was, over vehement objection, introduced to "corroborate [the witnesses'] subsequent denial of any involvement." Relying on the "repeated and consistent" rulings barring such evidence, the court reversed. "It is difficult to understand an error of this magnitude" [SO, 13]. Justice Aker voted to reverse on this ground alone.

TRIAL ERROR

Because the court had already identified so many reversible errors, the court did not feel compelled to reach the question of whether various "trial errors" also required reversal. Nevertheless, the majority directed that these errors "not be repeated at a subsequent trial" [SO, 15].

f) JUROR QUALIFICATION FORMS

"[T]he judge failed to follow the directions of KRS 29A.070, 'Juror Qualification Forms'... [I]f the judge does disqualify a juror, he shall record the reason on the qualification form... [which] 'shall be made available to parties or their attorneys...' [These provisions] insure a fair and impartial jury and... due process... In this case jurors were permitted to refuse to fill out the forms and released by telephone... Defense counsel was thus deprived of any opportunity to check on whether jurors were properly excused. Failure to substantially comply with the mandated procedures was erroneous" [SO, 21].

(Continued, P. 20)

g) CONSEQUENCES OF NGRI VERDICT

"[It] was improper to inject into [voir dire] questioning whether a verdict of not guilty by reason on insanity would result in 'turning the defendant loose.' The consequences of such a verdict are irrelevant to the jury's function and not a proper subject for questions. Paul v. Commonwealth, Ky., 625 S.W.2d 569 (1982)" [SO, 19-20]. Likewise, the court condemned the prosecutor's argument about the consequences of a NGRI verdict [SO, 28].

h) LAY OPINION ON SANITY

At trial, two police officers testified "in their opinion Ice appeared 'normal.' One went further... [testifying] in his work 'with the Kentucky State Police' he had 'developed some expertise' in judging insanity..." He testified Todd was not insane. The court stated that it was "debatable" whether "sufficient foundation was laid [for lay opinion testimony]... by showing facts 'evincing a familiarity' [or acquaintanceship] with the accused." The court made it clear that a solid foundation must be laid.

As to the "expert" conclusion by the second police officer: "[S]upposed expertise...based on experience as a police officer... [does not qualify the] officer to express an opinion regarding insanity" [SO, 21-22].

i) DIRECTED VERDICT ON SANITY

"The psychiatric experts all agreed that Ice does not remember what happened because he could not tolerate knowing that he was involved in a crime of this nature, that he hallucinated an alibi for the time involved, and that he did not know the difference between right and wrong and could not control his behavior at that time" [SO, 3]. Nevertheless, the court declined to hold that a directed verdict should have been granted because "there was lay testimony to rebut the defendant's proof of insanity albeit the question of whether a sufficient foundation was laid to express these opinions is arguable. Further, the circumstances [surrounding] the commission of the crime... when taken as a whole were sufficient to submit the issue of insanity to the jury..." [SO, 26-27].

j) PROSECUTION MISCONDUCT
1) ARGUMENTATIVE QUESTIONS AND MISSTATEMENT OF EVIDENCE

The court held that the Commonweath's Attorney had engaged in extensive misconduct. For example, the prosecutor's "direct and cross examination of witnesses read like a bad television scenario" [SO, 15]. The "prosecutor repeatedly and consistently misstated the doctor's testimony... It is not possible in this opinion to give a course in direct and cross examination... A prosecutor should undertake to ask questions fairly and properly or find some other line of work... Suffice it to say that direct examination that not only states the premise but argues for it is objectionable on both scores [as is]... cross examination that misstates the witness' previous answer..." [SO, 16-17].

(Continued, P. 21)

2) INFLAMMATORY EVIDENCE: PHOTOGRAPHS OF THE VICTIM AND TESTIMONY OF VICTIM'S FAMILY

"[P]hotographs of the deceased child were introduced through the mother of the victim interspersed with questions regarding her great love for the child and the terrible loss she had sustained." This testimony was "highly inflammatory" but "of little or no probative value" [SO, 17].

3) COMMENT ON DEFENDANT'S SILENCE AT TIME OF ARREST AND AT TRIAL

It was "debatable" whether the prosecutor adduced evidence and commented on Todd's silence at the time of arrest and failure to testify at the time of trial. On retrial, the court directed, "the prosecutor to steer clear of questions or comments that impose on these rights" [SO, 22-23].

k) RECUSAL OF JUDGE WHEN RELATIVES ON THE JURY

"[T]he trial judge's brother should not have been permitted to sit on the jury." Even in a non-capital case the judge must "exercise an independent judgment as to whether the 'term fixed by the jury is unduly harsh' and should be modified..." There is no reason "for a judge to be placed in the position of second guessing his brother or other close relative." By analogy KRS 26A.015(d) governs "the outer limit of those permitted to serve on a jury in a criminal case...[because] the judge's 'impartiality might reasonably be questioned.' KRS 26A.015(2)(e)" [SO, 20; emphasis added].

1) INSTRUCTIONS

The court rejected a "unanimous jury/due process" argument that an alternative mental state (intentional or wanton) instruction should not have been given. Wells v. Commonwealth, 561 S.W.2d 85 (Ky. 1978)[SO, 23].

Further, no instruction on the right not to testify will be given without a request. Carter v. Kentucky, 450 U.S. 288 (1981) [SO, 23].

Finally, the court again rejected an instruction on the consequences of a NGRI verdict - even when the prosecutor argues the effect of such a verdict to the jury. Edwards v. Commonwealth, 554 S.W.2d 380 (Ky. 1977). "The answer to such a dilemma is that such an argument should not have been permitted in the first place" [SO, 28]. Payne v. Commonwealth, 623 S.W.2d 867 (Ky. 1981).

DEATH PENALTY ISSUES

m) PRESERVATION OF ERROR

Relying on KRS 532.075(2) and Edwards v. Commonwealth, 182 S.W.2d 948 (Ky. 1944), the majority reaffirms that "where the death penalty has been imposed... an exception exists to [Kentucky's] contemporaneous objection rule... [I]n a death penalty case every prejudicial error must be considered, whether or not an objection was made in the trial court... In these circumstances, the question of whether objection was made at the trial level is only significant where it may reasonably be inferred that appellant intentionally failed

(Continued, P. 22)

to object for reasons of trial tactics" [SO, 5-6].

n) PROPORTIONALITY REVIEW

The court implies a change in the type of proportionality review it will conduct. Gall v. Commonwealth, 607 S.W.2d 97, 113-14 (Ky. 1980) looked only at cases where the death penalty had been imposed. However, the court now describes KRS 532.075 as "an elaborate procedure...for accumulating records of other felony offenses where the death penalty was considered..." not necessarily imposed [SO, 6; emphasis added]. At any rate, the court refuses to conduct proportionality review when a death sentence is reversed. "The question is moot at this time and any consideration of it has become theoretical" [SO, 6].

o) RELIGIOUS OPINION TESTIMONY ON PROPER VERDICT

A minister testified for the prosecution that "the bible '(teaches) the death penalty for murder and other crimes.'" On cross-examination, the minister testified that the "jury would be condemned by God if they did not kill Ice." The court stated: "The law specifies when the death penalty is appropriate and neither the prosecutor nor defense counsel should be permitted to adduce evidence as to how this case should be decided on religious grounds" [SO, 17].

This situation should be contrasted with Moore v. Commonwealth, 634 S.W.2d 426, 434-35 (Ky. 1982), where it was reversible error to exclude a minister's testimony during the penalty phase of a capital case. The difference is that in Moore the testimony focused on the defendant and his crime and in Ice the testimony was general in nature and included an "expert" opinion on the ultimate issue - life or death.

p) ERROR FOR PROSECUTOR TO ARGUE THAT THE VERDICT IS ONLY A RECOMMENDATION AND THAT THERE WILL BE AN APPEAL

"For obvious reasons this Court has held that the prosecutor must not comment about the possibility of an appeal. Goff v. Commonwealth, 241 Ky. 428, 44 S.W.2d 306 (1931). The prosecutor broke this rule. For the same reasons emphasis on the jury's sentence as only a recommendation is improper. It conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one... State v. Willie, 410 So.2d 1019, 1034 (La. 1982). The prosecutor broke this rule, telling the jurors that they simply recommend the death penalty and are not killing Todd" [SO, 18].

q) WITHERSPOON ERROR: JUROR NEED NOT BE WILLING TO IMPOSE DEATH "IN THIS CASE."

The court finds a violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), which "authorizes the prosecutor to inquire of prospective jurors as to possible consideration of the death penalty and circumscribes the limits of such inquiry." Thus, there are apparently limits to the type of questions a prosecutor may ask once the juror qualifies under the Witherspoon test. "A venireman cannot be asked on voir dire

(Continued, P. 23)

whether he would consider imposing the death penalty in the particular case before him." Jaggers v. Kentucky, 403 U.S. 946 (1971)[SO, 19; emphasis added].

r) JUDGE MUST INDEPENDENTLY SENTENCE IN A CAPITAL CASE

Ice also gives us some much needed guidance on the trial judge's sentencing role in capital cases. "[T]he obligation on the judge to exercise an independent judgment is as great or greater..." than that in an ordinary felony case. "[T]he judge must make a factual determination, independent of the jury, as to whether or not the punishment imposed by the jury is unduly harsh and should be mitigated" [SO, 20].

s) INSTRUCTION THAT AGGRAVATION OUTWEIGH MITIGATION BEYOND A REASONABLE DOUBT

Adhering to Smith v. Commonwealth, 599 S.W.2d 900 (Ky. 1980), an instruction need not be given requiring aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt [SO, 26].

t) CONSTITUTIONALITY OF DEATH PENALTY FOR JUVENILE

"There is no question but that Todd Ice's young age at the time of the offense is an important factor... that should be given serious consideration... as a mitigating circumstance at the sentencing phase... But it is not a constitutional distinction. The United States Supreme Court has not yet decided that juvenile status puts the death penalty in conflict with the Eighth Amendment" [SO, 30; emphasis added]. "We cannot say that the death penalty would be unconstiutional, per se, in this case assuming all of the safeguards that relate to its application have first been followed."

On a related issue, the majority decides that a juvenile can be sentenced to death on the basis of an aggravating circumstance (burglary) when he couldn't be waived to adult court solely on the basis of that underlying felony [SO, 25].

u) DEATH PENALTY CONSTITUTIONAL FOR MURDER/BURGLARY

As expected, the constitutionality of our statute is reaffirmed. Gall at 113. Likewise, the aggravating circumstance of burglary is upheld as a valid narrowing of the pool of potential cases. "There is no reason for making a distinction between robbery in the first degree... and burglary in the first degree as an aggravating circumstance" [SO, 29-30].

v) CONCLUSION: JUVENILE'S RIGHT TO TREATMENT

The case was remanded to district court for a de novo juvenile proceeding. The district judge was recused. Ice "should be taken forthwith from his present confinement in the state prison at Eddyville to that facility. Pursuant to KRS 280.150 the District Court should consider whether procedures under Chapter 202A, Commitment for the Treatment of the Mentally Ill, are appropriate, and investigate whether there are facilities available

(Continued, P. 24)

suitable to both holding Ice safely detained and at the same time providing treatment for mental illness while his case is pending" [SO, 34].

DISSENT

A vehement dissent was filed by Justice Stephenson, joined by Justice Wintersheimer, "at the same time recognizing the seriousness of the question raised by the polygrah evidence" [SO, dissent, SOD, 1]. There are "serious constitutional questions raised" by sending Ice back to juvenile court at this late date. The majority, it is said, "ignores or misstates the record to arrive at the result" [SOD, 3]. These words might be considered contempuous conduct if uttered by an advocate.

REACTION

"More than 2,000 Powell County residents opposed to the State Supreme Court's recent ruling in the Todd Ice case have signed a petition calling for the removal of ...Justice[s] Stephens and... Leibson." The petition stated that these "two men are not morally and emotionally qualified..." Lexington Herald Leader, 1 (Oct. 8, 1983).

The court has granted the Attorney General's motion for an additional 30 days to file a petition for rehearing.

KEVIN McNALLY

* * * * * *

St. Petersburg Times, July 8, 1983

TRIAL TIPS

...if only we face the facts, as they say, "with both eyes open."

Nicholas Copernicus

OPENING STATEMENT BY THE DEFENSE IN A CRIMINAL CASE

I. IMPORTANCE OF OPENINGS

All too often opening statements are not considered an important part of the trial. Traditionally, defense lawyers have paid little attention to opening statements. They are frequently waived or reserved, or, if made, done mechanically.

About 25 years ago a study was done by Professors Kalven and Zeisel at the University of Chicago Law School to see how juries decided cases. Results suggested that in 80% of the cases the verdict returned after the jury heard all the evidence was the same verdict that the jury would have returned immediately after opening statements.

This finding is in accord with the psychological principle of primacy--people remember best what they hear first. Common sense confirms this principle. Our own experience tells us that first impressions are often long in dying. People are generally more receptive at the beginning of an event or undertaking.

An opening is therefore a major challenge and opportunity to persuade the deciders.

II. THE DEFENSE RIGHT TO GIVE AN OPENING

RCr 9.42(b) sets out the order of proceeding in a criminal trial in Kentucky. It clearly gives both the prosecution and the defense the right to make an opening statement.

The defendant or his attorney is permitted by the rule to state the opening. If your client is not going to testify, consider having him give the opening. The Kentucky criminal rule specifically authorizes it. No doubt this is a consequence of the guarantee of Section Eleven of Kentucky's Constitution that "In all criminal prosecutions the accused has the right to be heard by himself and counsel...." In the right case with the right defendant, this can humanize the client with the jurors. In effect he "testifies" without the usual, concomitant disabilities.

III. PURPOSE AND EXTENT OF DEFENSE OPENING STATEMENTS

The defense may state in its opening the "defense and the evidence upon which he relies to support it." RCr 9.42.

(Continued, P. 26)

This includes the right to discuss the issues in the case. ABA Standards for Criminal Justice 4-7.4 (1980). During your opening, it is also permissible to talk about justice rules and principles of law. Cane v. Commonwealth, Ky.App., 556 SW.2d 902, 909 (1977). For instance:

- the presumption of innocence
- reasonable doubt
- burden of proof
- jury system
- voir dire promises.

"Reasonable latitude" in openings is allowed. Mills v. Commonwealth, Ky., 220 S.W.2d 376, 378 (1949). However, neither the defense nor the prosecution is permitted to make statements which cannot be proven. Sheppard v. Commonwealth, Ky., 322 S.W.2d 115, 117 (1959).

Counsel is permitted to display to the jury during his opening any evidence which will be introduced into evidence. Shelton v. Commonwealth, Ky., 134 S.W.2d 653, 659 (1939). Use that right to your advantage.

Objections to your opening and its content must be met with an education of the judge on your right to discuss the law, your defense, and the evidence upon which you or the prosecutor relies. A motion for mistrial is the proper way to object to evidence a prosecutor tells the jury in opening he will introduce but later does not have admitted. Williams v. Commonwealth, Ky., 602 S.W.2d 148, 149-50 (1980).

If the Chicago Study of Kalvin and Zeisel is correct, it is important to use this opportunity to persuade the jury to your position. Of course, this should be a continuation of the process begun in voir dire. Be careful. You do not want to peak at this point. You will want the case to build to the verdict.

IV. WHEN DO YOU GIVE AN OPENING?

Always give an opening in a criminal case even when you think you have nothing to say. Never waive it. It is too important in light of the human nature of the jurors, and what the Chicago study tells us. Do not give up the opportunity to persuade the jury. Jurors want to know the defense side, the defense views. Their interest has to be satisfied.

You want to counter the bad impression left by the prosecutor's opening by controlling, to the extent that you can, what the jurors hear. Also, as the trial progresses, jurors will see you put your parts of your opening together. You also let the judge know where you are headed. Perhaps this will give you collateral benefits for your objections.

What if you have a terrible case with nothing to say? You can always say something. At least talk about the important, constitutional principles or urge them to keep an open mind.

Some attorneys refuse to give openings because they do not want to commit themselves to evidence they may not be able to prove. This is not a sound reason for completely waiving

(Continued, P. 27)

the opening since this kind of risk can be limited by talking about facts you know for sure. Opening statements are also waived because attorneys do not want to assume any psychological burden of proof. But you bear that burden anyway as a practical matter. Opening is a way to meet that burden.

Should you reserve your opening until you present the defense case? No! Jurors want to hear from you sooner than that. If you delay, it is likely they will think you waited in order to shape your story to the prosecution's evidence. You do not want to convey any lack of truthfulness or lack of certainty.

V. OPENING STATEMENT PRINCIPLES

A. Prepare and Reflect. Know your case thoroughly. Never give an opening without considered thought. Rehearse it by practicing it out aloud. The spoken word is different from the written word. Practice it in front of another person who will give their honest feedback. Listen to that person's criticisms. To paraphrase Socrates, the unexamined opening statement is not worth giving.

B. Use Plain, Simple English. Talk like a normal person. Do not talk like a lawyer, e.g., I submit. Be clear and direct in what you say. Do not underestimate the difficulty in achieving this. "In actual life it requires the greatest discipline to be simple...," according to the renowned psychiatrist Carl G. Jung. How do you go about achieving this clear language? Consider George Orwell's observation that, "the great enemy of clear language is insincerity."

C. Be Credible. You have to believe in what you say and only say what you believe. Jurors are not likely to be fooled in evaluating the sincerity and trustworthiness of you and your position. People believe in people, not abstract principles.

How do you become credible? Start by never saying anything that you cannot prove. You are likely to increase your believability by dealing with the weak aspects of your case. Where appropriate, make admissions to gain credibilty, e.g. Cotton felonies. Display damaging prosecution evidence (this also preempts the Commonwealth from being the revealer of the horrible, and takes the sting out of their evidence).

D. Understate the Evidence. Leave something for the witnesses and your closing.

E. Personalize Your Client. "Sam"; "Mr. Jones."

F. Depersonalize the other side - "the prosecutor."

G. Explain Complex Terms. Explain in plain, simple English technical matters, e.g. insanity, preponderance vs. reasonable doubt. It will probably take a few explanations for these kinds of things to sink in. This is but another chance to explain after voir dire. If you wanted to emphasize what an intentional state of mind was, you could

(Continued, P. 28)

say it means that a person wanted to do the act or meant to do it.

H. Take the Offensive. Relate the strengths of your case. For example, you may want to tell them that your client will tell them what happened even though he is not required or expected to testify or to prove anything. Your client wants them to know.

Your opening has to have moral force to it:

> The theme of defendant's opening statement in a criminal case must be: "ATTACK!" You must touch the viscera of the jurors by showing how wrong this charge is against the defendant. Stress how important it is to everyone, not only the defendant, that the safeguards of the presumption of innocence, and proof of guilt beyond a reasonable doubt, must be applied rigorously in this case. "'Opening Statement' - An interview with Alfred Julien," Trial Diplomacy Journal (1983) at 5.

I. Never say "Anything I tell you is not evidence...." There is no advantage in emphasizing this.

J. Color the facts. In a true manner, shape the facts to your advantage.

K. No Notes. Do not use notes. The grammer and syntax will suffer, and you'll omit some of your thoughts but it will be more persuasive. You will appear more credible since the opening will be relaying part of you to the jury. You will be able to maintain eye contact. Do you listen better to people who read to you or to people who share what's on their mind without reference to written material?

L. The message. Remember that "'good art conceals itself.' In one sense you must become invisible to the jury; your message must dominate the perceptions of the jury totally, and you must become only a messenger...[k]now and feel what you will say." Richard J. Crawford, "Opening Statement for the Defense in Criminal Cases," Litigation Vol. 8 No. 3 (Spring 1982) at 29.

The message has to be comprehensively appealing. The recognized psychologist Eugene C. Kennedy tells us that "we are not moved totally as human beings by those phenomena that are directed to only a portion of our personality." Over-intellectualization of the message will lessen its persuasiveness.

M. Keep it in Context. See the opening in the context of the entire case. Build on your voir dire and lead to your closing.

VI. FORM AND CONTENT

Give the opening a form. Make sense out of all the facts and law of the case for these folks who know little about the case and court operations. You may choose a form like this:

(Continued, P. 29)

A. Opening

1. Greeting; thank the jury for willingness to serve.

2. Explain process of trial to them.

B. Middle

1. Theory of case.

2. Facts.

3. Issues.

4. Flag waiving.

C. Ending

1. In some manner let jury know you're finished. Maybe a simple thanks.

Or you may ignore the formality of the above and choose a more dramatic form, catching the jurors from the outset of your opening with the action, dialogue, conflicts and emotion of the case. The latter is probably more effective. Either way your opening must have some form, some direction.

Whichever form you decide upon, tell a story, paint a picture. Humans follow and remember the images of a story better than abstract, conclusory statements. Involve the jurors. Make it interesting. More likely than not you will want to narrate the story rather than give a history of what each witness will say. Do not underestimate the power of narrative images. As Samual Johnson has observed, "it is insufficiently considered how much of human life passes in little incidents."

VII. PROSECUTOR'S OPENING.

If the prosecutor misstates the evidence, you can deal with that in two ways. You can object, move for a mistrial, request an admonition. Or you can write down what he misstates and point it out in your closing.

VIII. GOAL OF OPENING.

The ultimate goal of your opening statement is to have the jury leaning your way, wanting to decide the case in favor of your client. At a minimum, you want them to understand that it is not a clear-cut case for the prosecution, that there is another side to the story.

CONCLUSION

"In no branch of the law is the opening statement of greater consequence than in the defense of criminal cases. Nowhere is it more neglected." Julien, Opening Statements (1980) ch. 5 at 1.

Begin to believe in the power of openings.

ED MONAHAN

* * * * * *

REINTERROGATION AND THE RIGHT TO COUNSEL

Once an accused has asserted his or her right to counsel during custodial interrogation, the scrupulous honoring of that right by questioning authorities mandates all questioning cease until counsel is made available to the accused. Any statement made in response to re-interrogation is inadmissible unless the prosecution can prove first that the accused initiated contact with the questioning authorities and then that the resulting inculpatory statements were made following a knowing and intelligent waiver of the accused's Fifth Amendment right to counsel. Oregon v. Bradshaw, U.S. ___, 33 Cr.L. 3211 (6/22/83). Edwards v. Arizona, 451 U.S. 477 (1981) The question of what constitutes initiation by the accused, is addressed at length in Bradshaw, and will be the cornerstone of any suppression hearing. Needless to say, if the approach is made by investigating authorities, then the statement is inadmissible. However, despite the seemingly stringent requirements Bradshaw in effect shifts the burden of proof. The intention of the defendant even in making what may appear to be routine inquiries of authorities must be one that does not "evince a desire or willingness" to commence a generalized conversation about the investigation. In short, in the suppression hearing it may be necessary for the defendant to establish his benign intent in communicating with the questioning authorities.

In Bradshaw the defendant's question, as he was being loaded into a cruiser for transportation to another detention facility, "Well, what is going to happen to me now?" was, according to Rehnquist's plurality opinion, a statement evincing a desire and willingness to discuss the investigation. This interpretation is based largely on the response of the officer. Nowhere in either the plurality, concurring or dissenting opinions is there an indication that the defendant offered proof of a contrary intent.

Despite having mandated a two tier analysis requiring separate inquiries, it is evident the plurality put much store in the defendant's subsequent responses to the interrogation as evidence of his desire to discuss the case further, as well as evidence of an intelligent and voluntary waiver.

Justice Marshall, in dissent, made clear that he viewed Bradshaw's question as a response to custodial surroundings. Unfortunately, the plurality indicated that any initiation by an accused of conversation with authorities that is "not merely a necessary inquiry arising out of the custodial relationship" may meet the first tier of analysis. Trial counsel should be aware that it may be necessary to provide evidence, by way of the suppression hearing, that the defendant's intent was not to engage in a generalized discussion of the investigation.

DEBBIE HUNT

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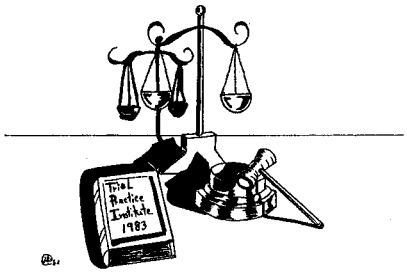

1983 TRIAL PRACTICE INSTITUTE COMPLETED

This Department's second Trial Practice Institute was held in October in Richmond. Over forty public advocates from throughout Kentucky were trained in trial skills.

A faculty of 16 included attorneys from the Frankfort office; our Kenton County public defender, Bob Carran; a private Louisville attorney, Rick Receuver; as well as Tony Natale, a West Palm Beach, Florida public defender; Juanita Brooks, a San Diego attorney and former federal public defender; Deryl Dantzler, a Professor at Macon Law School in Georgia; and Joe Guastaferro, Associate Dean of the Goodman School of Drama of DePaul University, Chicago.

During the 4 days of training, the participants practiced each aspect of a criminal trial. Each exercise was preceded by a lecture on the topic and followed with a demonstration by a faculty member. Through the help of Professor Bob Fraas of Eastern Kentucky University we had students in the Forensic Science Program play the roles of our experts. Actors and paralegals from Eastern Kentucky University played the roles of jurors, the defendant and the victim.

RAPE TRAUMA SYNDROME EVIDENCE

by Dr. Bonita Cade and Professor Edward Imwinkelried

[The following is a reprint of the article which first appeared in Champion, Vol. VII, No. 2, and is reprinted with permission. Dr. Cade is a forensic psychologist at Malcolm Bliss Mental Health Center in St. Louis, Missouri, and is a lawyer. Professor Imwinkelried is a professor of law at Washington University School of Law in St. Louis, Missouri.]

It is a commonplace observation that rape trials often become swearing contests. Hibey, The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character, 11 AMERICAN CRIMINAL LAW REVIEW 309 (1973). The complainant testifies that the defendant foced her to have intercourse with him while the defendant maintains that the intercourse was consensual. To make matters worse, there is often no objective, corroborating evidence on the issue of consent. The physical evidence, such as the scientific test for the presence of acid phosphate (Boyce & McCloskey, Legal Applications of Standard Laboratory Tests for the Identification of Seminal Fluid, 7 JOURNAL OF COMTEMPORARY LAW 1 (1982), may clearly establish that there was intercourse, but there may be no corroboration on consent. The lack of physical evidence to resolve the swearing contest may generate the reasonable doubt that leads to an acquittal.

(Continued, P. 32)

It is understandable that prosecutors would search for an evidentiary technique to tip the balance of credibility in the complaintant's favor. Rowland, Rape Experts Dispell Jurors' Preconceptions. THE PROSECUTOR'S BRIEF 21 (Sept.-Oct. 1979). Prosecutors are searching for a method of corroborating the victim's testimony that there was no consent. Id. at 22. Some prosecutors are now convinced that rape trauma syndrome evidence is that method. Id. at 24. A mental health professional such as a psychiatrist testifies that: The typical rape victim displays a unique cluster of symptoms known as rape trauma syndrome; the victim exhibits those syndromes; and the likely cause of the victim's syndrome is that the victim was subjected to a traumatic rape. Id. at 24. In the judgment of one prosecutor who has successfully introduced rape trauma syndrome testimony, the evidence can be the "decisive factor" in persuading the jury to believe the complaintant and convict. Id. at 22. Prosecutors have begun to offer testimony, and the issue of its admissibility has already surfaced in the appellate reports. State v. Marks, 647 P.2d 1292 (Kan. 1982); State v. McGee, 324 N.W.2d 232 (Min.. 1982); State v. Saldana, 324 N.W.2d 227 (Minn. 1982).

The purpose of this article is to acquaint the reader with the rape trauma syndrome. The first section surveys the research and the rape trauma syndrome. The second part of the article lists the various admissibility attacks on the evidence. The third and final part discusses a weight attack on rape trauma syndrome evidence.

1. The Scientific Status of Rape Trauma Syndrome

The expression, "rape trauma syndrome," was coined by Ann Wolbert Burgess, a professor of nursing, and Lynda Lyle Holstrom, a sociologist. Burgess and Holstrom, Rape Trauma Syndrome, 131 AMERICAN JOURNAL OF PSYCHIATRY 981 (1974). Burgess and Holstrom interviewed 146 patients admitted to the emergency ward of Boston City Hospital between July 20, 1972 and July 19, 1973. All 146 patients claimed to be rape victims. Burgess and Holstrom interviewed them within 30 minutes of receiving notice that the patient had entered the emergency room. In addition to the initial interview session, Burgess and Holstrom conducted follow-up interviews by telephone after the patients had been released from the hospital.

The victim population was heterogeneous. One hundred nine were adult women, 34 were female children, and three subjects were male. Burgess and Holstrom described the subjects in this fashion:

> Ethnic groups included fairly equal numbers of black and white women, plus a smaller number of Oriental, Indian and Spanish-speaking women. In regard to work status, the victims were career women, housewives, college students, and women on welfare. The group included single, married,

(Continued, P. 33)

and widowed women as well as women living with men by consensual agreement. Id.

The subjects ranged in age from 17 to 73 years. Id. 982.

Ninety-two of the victims displayed a relatively consistent configuration of symptoms. Id. at 981. These symptoms form the rape trauma syndrome. Burgess and Holstrom defined the syndrome as "the acute phase and longterm reorganization process that occurs as a result of forcible rape or attempted forcible rape." Id. at 982.

A. The Acute Phase

The acute phase consists of symptoms that become manifest within a few hours after the rape and last for the next several weeks. The symptoms include the following somatic reactions.

Physical trauma. The victim experiences general soreness and bruising in such parts of the body as the throat, neck, breast, thighs, legs and arms. The irritation is especially noticeable for victims who were forced to have oral sex.

Skeletal muscular tension. The victim may suffer from tension headaches, fatigue, and sleep pattern disturbance. Suppose, for example, that the rape occurred at 2:30 a.m. The victim may wake each night at that time.

Gastrointestinal irritability. The victim may complain of stomach pains and loss of appetite. Victims frequently report that they become nauseous when they think of the rape.

Genito-urinary disturbance. The victim exhibits such symptoms as vaginal discharge, itching, and a burning sensation on urination. Victims forced to have anal sex oten report rectal bleeding.

These symptoms result in a temporary reorganization of the victim's lifestyle. Id. at 982-983. All victims do not exhibit all the symptoms, and they may experience the symptoms in varying sequences, but all the symptoms point to an acute disorganization of the victim's life. Id.

B. The Longterm Phase. After short term somatic reactions began to disappear, the next phase sets in. In the next phase, the victim attempts to reestablish her life. Burgess and Holstrom refer to this stage as the longterm process of reorganization. Intense emotional disturbances accompany the somatic complaints during the acute phase. These disturbances impel the reorganization.

Affirmatively, this period is characterized by increased motor activity. The victim's activity includes: changing telephone numbers to unlisted numbers, visiting relatives and friends for emotional support, and changing residences.

Negatively, this period is characterized by the emergence of phobic reactions. A phobic reaction is a fear resulting from a unrealistic assessment of

(Continued,, P. 34)

a situation eliciting the fear. Id. at 984. More specifically, these reactions are traumatophobic resulting from the trauma of the rape. The most common phobias developed by the rape victim are the following:

Fear of indoors: This phobia often emerges if the victim was attacked while sleeping in bed. The victim feels trapped inside and more comfortable outside.

Fear of outdoors: The opposite reaction is expectable if the victim was attacked outside her home. The victim feels safe inside. She may venture outside only in another person's company or when absolutely necessary.

Fear of being alone. This phobia is an almost universal symptom. Almost all victims report a fear of being alone after the rape.

Fear of people behind them. If the victim was attacked suddenly from behind, she may develop a fear of persons standing or walking behind her.

Sexual fears. Many victims experience a crisis in their sex life. If the victim had little or no prior sexual activity, the reaction may be particularly upsetting. Even if the victim had been sexually active, she may find it difficult resuming normal sexual relations with her husband or boyfriend.

II. Possible Attacks on the Admissibility of Rape Trauma Syndrome Evidence.

There are three obvious objections to rape trauma syndrome evidence; there is insufficient research to establish the validity of the syndrome; there is insufficient proof of the syndrome's general acceptance to satisfy the Frye test; and the evidence amounts to improper bolstering of the complainant's credibility.

A. The Validity of the Syndrome. All proffered evidence must satisfy the logical relevance doctrine. To begin with, the evidence must be material, that is, logically revelant to the material facts of consequence in the case. Fed. R. Evid. 401, 28 U.S.C.A. Moreover, the proponent must establish the underlying logical relevance or authenticity of the evidence. Id. at R. 901(a). The authentication requirement applies to scientific evidence. For example, Fed. Evid. Rule 901(b)(9) provides that the proponent of "(e)vidence (based on) a (scientific) process or system" must "show that the process or system produces an accurate result." Scientific evidence is the product of the scientific process of formulating hypotheses and experimenting to test the hypotheses. For that reason, many courts require the proponent of novel scientific evidence to prove the theory's experimental verication. Thus, in People v. Collins, 94 Misc.2d 704, 405 N.Y.S.2d 365 (Sup.Ct. 1978), the court mentioned the "preliminary and incomplete experimentation" with voice-prints premises as one reason for excluding sound spectrography evidence.

The proponents of rape trauma evidence argue that the syndrome has been satisfactorily verified. The argument has some merit. Burgess and Holstrom did work with a research population

(Continued, P. 35)

of 134 subjects, and roughly 85 percent of their subjects (92) consistently exhibits the same cluster of syndromes. The larger the research population, the less likely that the observed syndromes represent idiosyncratic reactions. Underwood Psychological Research (1957). Moreover, the syndromes that Burgess and Holstrom recorded are similar to the syndromes of victims of other traumas, including myocardial infarction, concentration camps, and fires. Burgess and Holstrom, Coping Behavior of the Rape Victim, 133 AMERICAN JOURNAL OF PSYCHIATRY, 413 (1976). However, a defense attorney can mount serious quantitative and qualitative attacks on the data base for rape trauma syndrome. There are tens of thousands of rapes every year in the U.S. Note 81 YALE LAW JOURNAL 1365, 1370 n. 38 (1972). Given the size of the universe of rape victims, it seems dangerous to generalize on the basis of Burgess and Holstrom's limited study. In People v. Collins, 94 Misc.2d 704, 405 N.Y.S.2d 365 (Sup.Ct. 1978), the court found the data base for sound spectrography to be inadequate verification of the voice- print technique. The court stressed the need for a large data base to test the new scientific theory "in the crucible of controlled experimentation and study." Id. at 709, 405 N.Y.S.2d at 369.

The defense can attack the research population on qualitative grounds as well. Is the population representative to allow generalizations about the universe? In several cases, courts have cited doubts about a research population representativeness as a ground for excluding scientific evidence. People v. Law, 40 Cal.App.3d 69, 114 Call.Rptr. 708 (1974)(sound spectrography); People v. Alston, 79 Misc.2d 1077, 362, N.Y.S.2d 356 (Sup.Ct. 1974) (bloodstains). The same concern applies to rape trauma syndrome evidence. Burgess and Holstrom's population was not a random sample. UNDERWOOD PSYCHOLOGICAL RESEARCH 93 (1957). The subjects voluntarily admitted themselves to an urban hospital. Thus, the population was a product of self-selection. Can we be confident that the subjects' characteristics typify the female population? Would the syndrome hold true for women who are reluctant to admit themselves to hospitals for treatment? Does the syndrome hold true for rural women as well as urbanites? One study found that such factors as the victim's race and socio-economic background significantly affected her response to the trauma. Sutherland & Scherl, Patterns of Response Among Victims of Rape, 40 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 503 (1970). Another qualitative weakness in Burgess and Holstrom's research base is that the findings depend largely on the subjects' subjective complaints. The researchers did not use any mechanical instruments to generate objective data; rather, they relied on the subjects' self-reports. Those reports are undoubtedly highly colored by the subjects' emotions.

Rape trauma syndrome may ultimately prove to be valid. Although Sutherland & Scherl's research suggests that Burgess and Holstrom's findings over-

(Continued, P. 36)

state the uniformity of victims' responses to rape. Burgess and Holstrom's conclusions are generally in accord with the research and into the symptomatology of victims of other traumas. However, in light of the quantitative and qualitative limitations of the data base, a trial judge could properly exclude the evidence on the ground of inadequate experimental verification.

B. The General Acceptance of the Syndrome

In most jurisdictions, authenticating scientific evidence does not guarantee its admission. The reason is the familiar Frye test. In Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the court excluded systolic blood pressure evidence. Although the expert expressed his opinion that the technique was valid, the court demanded more: the witness' voucher that the theory has gained general acceptance within the relevant scientific circles of psychology and physiology. Id. at 1014. During the past few years, there has been slippage away from the Frye test; more and more jurisdictions require only the witness' testimony that the theory is valid in his or her judgment. Imwinkelried, A new Era in the Evolution of Scientific Evidence -- a Primer on Evaluating the Weight of Scientific Evidence, 23 WILLIAM AND MARY LAW REVIEW 261 (1981). However, Frye is still the majority view in the United States. Giannilli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 COLUMBIA LAW 1197 (1980). Moreover, several state supreme courts have recently reaffirmed their adherence to the Frye test. People v. Kelly, 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976); State v. Washington, 229 Kan. 47, 622 P.2d 986 (1981).

Does rape trauma syndrome pass muster under Frye? The Kansas Supreme Court answered that question in the affirmative in State v. Marks, 647 P.2d 1292 (Kan. 1982). The court conceded that "(a)n examination of the literature clearly demonstrates that the so-called 'rape trauma syndrome' is generally accepted to be a common reaction to sexual assault." Id. The court cited several psychiatric texts and articles recognizing the syndrome. Id.

The court's ringing endorsement of rape trauma syndrome reflects the high quality of the prosecution brief in Marks. Brief of Appellee, State of Kansas v. Elmore Marks, Jr., Docket No. 81-53780-S (Kan. Sup. Ct.). The brief noted that the prosecution expert at trial testified that rape trauma syndrome has been recognized for approximately eight years. Id. at 30. The expert also pointed out that the 1980 edition of one of the leading psychiatric texts, Comprehensive Textbook Of Psychiatry by Dr. Kaplan, mentions the syndrome. Id. at 31. The brief finally cited two prior cases, People v. Matthews, 91 Cal.App.3d 1018, 154 Cal. Rptr. 628 91979) and White v. Violent Crimes Compensation Board, 388 A.2d 206 (N.J. 1978) which make passing reference to the syndrome. If the brief's research had been more thorough, the brief might have uncovered the approving references to the

(Continued, P. 37)

syndrome in Justice Larsen's dissent in Matter of Pittsburgh Action Against Rape, 428 A.2d 126, 135 (Pa. 1981).

Although the Marks opinion and brief are persuasive, there is contrary authority. The best defense precedents are State v. Saldana, 324 N.W.2d 227 (Minn. 1982) and State v. McGee, 324 N.W.2d 232 (Minn. 1982). In both cases, the Minnesota Supreme Court adopted a skeptical attitude toward rape trauma syndrome. In Saldana, the court acknowledged that the syndrome is recognized as "a therapeutic tool useful in counselling." 324 N.W.2d at 230. However, the court stated that the issue before the court was whether the syndrome is generally recognized as "a fact- finding tool." Id. The court declared that it would not admit rape trauma syndrome evidence until "further evidence of the scientific accuracy and reliability of (the) syndrome... can be established." Id. The court excluded the evidence in Saldana and McGee. [Editor's Note: The Missouri Court of Appeals has also excluded this evidence, in State v. Taylor, 33 Crim. L. Rep. (BNA) 2123 (Mo. App., March 15, 1983)].

Under Frye, the Minnesota court's exclusion of the evidence is defensible. The court quite correctly distinguished between the acceptance of a scientific technique for clinical and investigative uses. The courts made the same distinction in several of the cases excluding the testimony of prosectuion witnesses, whose memory has been hypnotically enhanced. See e.g. People v. Shirley, 31 Cal.3d 18, 181 Cal.Rptr. 243, 641 P.2d 775 (1982). Most of the published literature on rape trauma syndrome focuses on its clinical counselling application rather than its use to corroborate a complaintant's testimony.

To satisfy Frye, the prosecution must demonstrate that the particular application of the scientific technique involved in the pending case is generally accepted. In State v. Stout, 478 S.W.2d 368 (Mo. 1972), the Missouri court confronted the admissibility of neutron activation analysis of blood. In prior cases, the court had sustained the admission of neutron activation of hair. However, the court held that each application of the technique must satisfy Frye and that there was inadequate proof of the general acceptance of neutron activation analysis of blood. A similar analysis applies to rape trauma syndrome. The syndrome is a specific application of a well-recognized diagnostic category. The second edition of the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL uses the terminology, "acute stress reaction" while the current edition refers to "post-traumatic stress disorder." Other applications of post-traumatic stress disorder have already won judicial acceptance. Jack, The Vietnam Connection: Charles Head's Verdict. CRIMINAL DEFENSE, Jan. - Feb., 1982 at 9 (war trauma). However, the prosecution's burden is to prove that the appplication of the diagnostic category to rape victims has attained general acceptance. Absent that proof, Frye bars the admission of rape trauma syndrome evidence. The Marks

(Continued, P. 38)

court's announcement that the syndrome is generally accepted may be premature.

C. Bolstering the Complaintant's Credibility

The last major objection to rape trauma syndrome evidence is that the evidence amounts to improper bolstering of the complaintant's credibility. To understand this objection, we must appreciate the distinction between bolstering and corroboration. E. IMWINKELRIED, P. GIANNELLI, F. GILLIAN & F. LEDERER, CRIMINAL EVIDENCE 43 (1979). On the one hand, the witness' proponent may not bolster the witness' believability before any attempted impeachment. For example, the proponent may not offer evidence of the witness' character trait of truthfulness unless the opponent has already introduced reputation or opinion evidence of the witness' untruthfulness. Fed. R. Evid. 608(a), 28 U.S.C.A. On its face, the bolstering evidence is logically relevant to only the witness' credibility; and the judge will not admit the evidence until the opponent sharpens the need for the evidence by assaying the witness' impeachment. On the other hand, corroborating evidence is routinely admissible. Corroborating evidence is logically relevant to the case, historical merits and its probative value on the issue of credibility is indirect; if a second witness gives the same version of the historical events, the coincidence between the two witness' testimony inferentially supports the first witness' credibility.

The prosecution has a plausible argument that rape trauma syndrome evidence is corroborating rather than bolstering. The psychiatrist is not testifying that the complaintant is a truthful person. The psychiatrist is testifying that the complaintant exhibits some of the symptoms of the victim of a traumatic rape. The prosecution can contend that like a doctor's testimony about an acid phosphatase test, the psychiatrist's testimony about the syndrome is corroborative. On its face, the testimony relates to symptoms relevant to the historical issue whether there was consent.

However, the defense has a powerful counterargument that functionally, rape trauma syndrome evidence is bolstering. The psychiatrist is relying primarily or exclusively on subjective reports from the complainant herself. Syndrome evidence is distinguishable from testimony about bruises or acid phosphatase. Those symptoms have much more objectivity than the complainant's self-reports; their probative value rests on the credibility of the doctor or criminalist rather than that of the victim. In the final analysis, the value of syndrome evidence depends largely on the complainant's believability. When the judge admits rape trauma syndrome evidence to "corroborate" the victim, the prosecution bootstraps its case; the ruling allows the prosecution to increase the complainant's credibility by using evidence dependent on the complainant's credibility.

In other contexts, the courts have adopted a functional definition of bolstering. For example, under Federal Rule of

(Continued, P. 39)

Evidence 404(b), a prosecutor may corroborate the victim's testimony by introducing evidence of the defendant's other misdeeds to prove motive, identity, or intent. Fed. R. Evid. 404(b), 28 U.S.C.A. Thus, the prosecutor may corroborate a rape victim's identification of the defendant by proof of the defendant's commission of other strikingly similar crimes. Suppose, however, that the witness to the other crimes is the rape victim; the victim not only testifies about the charged crime but also describes other misdeeds seemingly admissible to corroborate her identification of the defendant. On its face, the admission of the evidence of the defendant's other crimes, is proper corroboration. However, functionally, the evidence is bolstering; the evidence used to corroborate the victim also depends on the victim's credibility. In this situation, a number of courts have concluded that the evidence should be treated as bolstering and accordingly excluded. See e.g., People v. Stanley, 67 Cal.2d 812, 63 Cal.Rptr. 825, 433 P.2d 913 (1967). In short, there is both a strong policy argument and precedent that the courts should bar syndrome evidence on the ground that it is functionally bolstering.

III. Attack on the Weight of Rape Trauma Syndrome Evidence

Assume arguendo that the judge decides to overrule the admissibility objections to syndrome evidence. Can the defense successfully attack the weight of the evidence after its admission? The defense should be able to mount an effective attack based on the concept of differential diagnosis. Flaxman, Importance of Differential Diagnosis, 1957 MEDICAL TRIAL TECHNIQUE QUARTERLY 79. There may be more than one possible cause for a symptom or set of symptoms. In this circumstance, it is critical to conduct a test specific for the disease or disorder in question; that test would permit a differential diagnosis between that disease and other related illnesses. Id.

A careful review of Burgess and Holstrom's writings indicates that there are events other than a rape that may account for many of the symptoms forming the rape trauma syndrome. Their writings include Assessing Trauma in the Rape Victim, 75 AMERICAN JOURNAL OF NURSING 1288 (19750. The article mentions two diagnostic categories in addition to rape trauma syndrome.

One is the accessory-to-sex reaction. Id. at 1289. In this category, the "victim... contribute(s) in a secondary way to the offense." Id. Although the victim formally consented to intercourse, the offender "stands in a relationship of power over the victim..." Id. The offender pressures the victim "to take material goods such as... money... and pressure(s) the victim to believe that sexual activity is appropriate and enjoyable." Id. While most victims falling in this categories are children or adolescents, some are adults. Id.

The second category is the sex-stress situation, both parties initially consented to intercourse, but "something

(Continued, P. 40)

later 'went wrong'-- the man demanded perversion or used violence or people in authority came upon the consenting couple and this created the stress..." Id.

The significance of these categories for the defense should be evident. The subjects in these categories exhibit many of the same symptoms as victims of forcible rape, but these subjects consented at the outset of or throughout intercourse. In short, the presence of the symptoms is not a specific test for nonconsensual intercourse. If the defense counsel forces the prosecution expert to make these concessions, the cross-examination will drastically reduce the weight of the syndrome testimony on the consent issue.

IV. Conclusion

Rape trauma syndrome is a promising psychiatric technique. With additional experimentation, the researchers may conclusively validate the technique, win general acceptance for the syndrome, and develop a specific test for differentiating the syndrome from the symptoms caused by consensual intercourse. However, at this point, the extent of the research is limited. The data base is very small; the proof of general acceptance is scanty; and a differential diagnosis is difficult, if not impossible. Given the current state of the art, the defense can make telling admissibility and weight attacks on syndrome evidence. Mounting those attacks may be the most important contribution that the defense bar can make to the advancement of the state of the art. By pressing these attacks, the defense bar will give rape trauma syndrome proponents the most powerful incentive for further research to refine the technique. The prospect of vigorous legal attacks on the technique may be the needed stimulus for scientific progress.

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