The Advocate

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THE ADVOCATE FEATURES

How do you get through to a client that others have labeled difficult? Maria Ransdell of the Fayette Legal Aide Office has found an attitude of respect for the client works for her. In her role as advocate she actively involves the client by presenting the alternatives and allowing the client to make the decision.

Maria began working at Fayette Legal Aide in Lexington as a third year law student and then joined the staff in November, 1979. She is a May 1979 graduate of the University of Kentucky School of Law.

Maria likes her job as a public defender, because, as she expressed it, she understands "how easily a person becomes embroiled in the system and how difficult it is to become untangled".

She particularly enjoys trial work, partly, she admits because she was briefly a theatre major as an undergraduate, but more importantly

(See Ransdell, P. 2)

MAY SEMINAR

The Twelfth Annual Public Advocacy Training Seminar will be held May 6-8, 1984 at the Radisson Plaza Hotel at Broadway and Vine in Lexington, Kentucky. Speakers for the Seminar include:

Vince Aprile
Edward J. Imwinkelried
Rikki Klieman
William Murphy
Jim Neuhard
Harry Rothgerber, Jr.

Brochures have been sent. If you need any further information, please contact Cris Purdom at (502) 564-5245.

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INSIDE

(Ransdell, Continued from P. 1)

trial work gives her the opportunity to present the good that she finds in her clients to the jury. One can't separate from that her firm belief in the system of trial by jury as "the most important right a defendant has, and the most important tool a defense attorney can use."

Her positive attitude is extended to judges, prosecutors and police officers, and she feels that they respond in kind. She doesn't feel that being an "advocate" gives one the right to be an antagonist. She agrees at times that is a fine line, but she feels that a "right" attitude has given her success.

As you've guessed people are important to Maria. Although her caseload doesn't allow for a great deal of free time she enjoys meeting with friends after work. Maria is a member of a women attorney support group. Bill Broberg, her fiancee, is also important to Maria. She says Bill is very supportive of her career and listens to her, which helps to relieve the day's tensions. Maria enjoys working on the house that she and Bill have bought.

So what's in the future? Marriage certainly in June. Maria also sees private practice as a possiblity in order to "keep up with other areas of law and to stay interested." When or if she'll make the move, she can't say, but she stressed that it's important to feel good about her clients and her job, and if the time comes when she can't do that she'll move on.

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NOTICE

The Department of Public Advocacy often receives requests from indigent defendants and prisoners to be represented by DPA attorneys in federal litigation to obtain monetary damages for violations of their federal civil rights. Since such actions under 42 U.S.C. § 1983 are potentially fee generating and thus generally outside the authority of DPA to pursue, this office is often asked to refer the indigent defendant or prisoner to a private practitioner who would be interested in pursuing the client's claim in federal court.

To aid indigent clients seeking these referrals, DPA is attempting to compile a list of private practitioners who have affirmatively expressed a willingness to consider providing representation in these matters where legal fees will be available only if the indigent plaintiff is successful in the suit.

If you are interested, please send your name, address, telephone number and the geographical locations in which you would be willing to litigate federal claims as well as a statement of your experience in federal court to the Post-Conviction Services Branch, Department of Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601.

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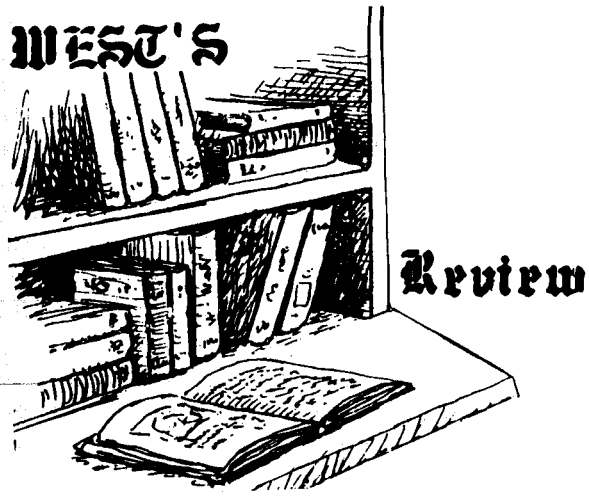

In Milsap v. Commonwealth, Ky.App., 31 K.L.S. 1 at 7 (January 13, 1984), the Court of Appeals held that a movant under RCr 11.42 was not entitled to a second evidentiary hearing on the grounds that counsel who represented him at the first evidentiary hearing had a conflicting interest. In his 11.42 challenge the movant had alleged ineffective assistance of counsel against a Jefferson County assistant public defender. Movant was also represented by a Jefferson County assistant public defender at the hearing on his 11.42 motion. The Court of Appeals acknowledged that the facts before it presented a clear conflict of interest. However, the Court held that the movant was not entitled to a new hearing because he failed to show how the conflict of interest affected the adequacy of the representation which he received at his 11.42 hearing. On a cautionary note the Court observed that "[a]lthough there is no criminal rule directing a trial court what to do when conflict situations such as this arise, we believe the proper course for the trial court to take is to establish briefly in the record that the defendant is aware of the potential conflict and elects to waive it."

In Holbrook v. Commonwealth, Ky.App., 31 K.L.S. 1 at 8 (January 13, 1984), the Court affirmed the defendant's conviction of the use of a minor in a sexual performance. The defendant was convicted on the basis of a video tape which displayed him and the minor in question involved in homosexual lovemaking. During jury selection, defense counsel sought to determine which jurors would convict the defendant solely because he had engaged in homosexual sexual activity. The Court held that the trial court did not err in limiting counsel's voir dire questions in view of the confusing nature of the hypothetical questions posed. The Court rejected as improper hypothetical questions which summarized the commonwealth's anticipated proof and asked jurors whether they would convict on the basis of such proof. The questions asked too much in that they sought a prejudgment of the case. The Court also held that the minor's consent to engage in sexual activity did not constitute a defense to the crime.

The Court has held that an indigent movant under RCr 11.42 was properly denied appointment of Ivey counsel to represent him at an evidentiary hearing on his RCr 11.42 motion where the circuit court determined that an evidentiary hearing was not required. Allen v. Commonwealth, Ky. App., 31 K.L.S. 2 at 2 (January 20,

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1984). In Ivey v. Commonwealth, Ky., 599 S.W.2d 456 (1980), the Kentucky Supreme Court held that counsel must be appointed, when requested, to assist needy persons in the preparation of an RCr 11.42 motion to vacate judgment. In Beecham v. Commonwealth, Ky., 657 S.W.2d 234 (1983), the Court held that counsel need be appointed only upon specific request. Taking its lead from Beecham, the Allen decision makes it clear that a request for Ivey counsel will be held to its own terms. Thus, since Allen requested counsel to represent him at an evidentiary hearing, but not to assist him in preparing the motion to vacate, and since Allen was not entitled to a hearing, it followed that Allen's request for appointment of counsel was properly denied.

In Whisman v. Commonwealth, Ky.App., 31 K.L.S. 2 at 10 (February 10, 1984), the Court upheld a seizure of evidence pursuant to the defendant's arrest. The Court found that the police had probable cause, based on an anonymous phone tip by an informant, to stop the defendant's vehicle. The informant related that someone in a white Camaro on "Forest Street" had just pointed a gun at the informant and then pulled into a Save Mart parking lot. Officers found a white Camaro at the described location. The officers ordered the occupants out of the car and observed the defendant put something in the glove compartment before exiting the vehicle. Two pills were visible on the seat of the car. The defendant became belligerent, whereupon the police searched the car, finding a quantity of controlled substances and a pistol. The Court held that the police had probable cause to stop the vehicle since the circumstances presented at the scene corroborated the informant's information. The Court applied the "totality of the circumstances" test enunciated in Gates v. Illinois, 103 S.Ct. 2317 (1983), in determining that probable cause for the stop existed. The Court also held that once the police were confronted with a belligerent subject, and saw pills in plain view in the car, these exigent circumstances justified the warrantless search of the car. The Court also held in Whisman that it was not error to continue to seat a juror who failed to disclose that his son was killed while a police officer. During voir dire jurors were asked by defense counsel whether they had any relatives who were police officers. Juror Hay gave no response. It was later learned that Hay's son was killed while a police officer. The Court reasoned that Hay was under no duty to reveal this fact "since he was not asked." The Court noted that the impartiality of jurors is presumed until rebutted. In the Court's view the facts before it did not rebut the presumption.

The Court in Whisman also had before it a cross-appeal taken by the commonwealth from a ruling by the trial judge that the jury's action in failing to indicate a verdict on counts 2 and 3 constituted an acquittal. The Court held that, since the court below accepted the jury's "verdicts" without question, and since it would now be impossible to determine the

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jury's intent, it must be considered that the jury had acquitted the defendant and that the defendant was not subject to being retried.

In Norris v. Commonwealth, Ky.App., 31 K.L.S. 2 at 12 (February 10, 1984), the Court held that the defendant's convictions of first-degree sodomy and aiding and abetting first-degree rape did not offend the prohibition against double jeopardy. The defendant sat on the victim's chest and orally sodomized her while an accomplice raped the victim. The Court held that the fact that the defendant's act of restraining the victim in furtherance of the rape occurred simultaneously with the sodomy did not preclude the defendant's conviction of both offenses. The Court found that each offense included an element which the other did not. The Court also held that it was not error to permit a nurse to testify that it was not unusual for a physical examination of an alleged rape victim to reveal no sperm. The Court concluded that the nurse's testimony did not constitute unqualified expert testimony because the testimony merely related to observations based on the nurse's work experience.

In McRay v. Commonwealth, Ky.App., 31 K.L.S. 3 at 1 (February 17, 1984), the Court affirmed the defendant's conviction of cultivating marijuana. The Court held that the defendant was entitled under RCr 7.26 to review and examine the official report of a police officer who testified for the commonwealth. However, based on its examination of the report, the Court concluded that the defendant was not prejudiced by the failure to provide it to him. The Court also found that the defendant was not prejudiced by the erroneous inclusion of the words "knowingly permitted" in the trial court's instruction to the jury on the offense of cultivation of marijuana. While acknowledging that the unauthorized inclusion of these words in the instruction caused it "concern" the Court nevertheless found "no real prejudice or manifest injustice." The Court in McRay additionally rejected the defendant's challenge to the legality of the search which resulted in discovery of the marijuana. The marijuana was located on McRay's fenced 110 acre farm by state police officers who entered the farm without either a warrant or McRay's consent. The Court of Appeals relied on the open fields doctrine to uphold the search, citing Oliver v. United States, 686 F.2d 356 (6th Cir. 1982). The doctrine originated with the holding of the U.S. Supreme Court in Hester v. United States, 44 S.Ct. 445, 446 (1924), that: "[t]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." The doctrine amounts to a per se rule that the owner of open fields has no reasonable expectation of privacy in them. A majority of the Sixth Circuit, sitting en banc, approved the doctrine in Oliver, supra. However, adherence to the doctrine represents a minority position

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among both state courts and the federal circuits.

The Kentucky Supreme Court has held that the maximum sentence provision of KRS 532.110(1)(c) offers no protection to individuals who fall within the terms of KRS 533.060(2). Devore v. Commonwealth, Ky., 31 K.L.S. 1 at 17 (January 19, 1984). Devore was convicted of five felony counts, the sentences for which were enhanced to fifteen years each following his adjudication as a first degree persistent felony offender. The sentences were orderd to run consecutively for a total of seventy-five years. KRS 532.110(1)(c) prohibits such a sentence: "The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed." In Devore's case the longest extended term authorized for any of his felony convictions was twenty years. The Court nevertheless held that Devore's seventy-five year sentence was permissible. The Court concluded that KRS 533.060(2) controlled. KRS 533.060(2) provides that:

> 'When a person has been convicted of a felony and is committed to a correctional facility-...and released on parole...and is convicted or enters a plea of guilty to a felony committed while on parole...such person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.' [Emphasis added.]

Because Devore was convicted of offenses committed while he was on parole he was ineligible for concurrent sentencing by virtue of KRS 533.060(2). Justices Leibson and Aker dissented.

In Jackson, Riggsbee and Lemons v. Commonwealth, Ky., 31 K.L.S. 2 at 22 (February 17, 1984), the Court specifically overruled its prior decision in Sutton v. Commonwealth, Ky., 623 S.W.2d 879 (1981). The Court held in Sutton that the prohibition against double jeopardy was not violated by a defendant's convictions of both theft and receiving the same stolen property. The Jackson Court concluded that the holding of Sutton was erroneous and that charges of theft and receiving property stolen in the theft merge. The Court in Jackson also held that "[w]here there is a breaking and entering and property taken from a dwelling and the property is found in the possession of the accused, such showing makes a submissible case for the jury on a charge of burglary...." The Court's holding that such evidence constitutes prima facie proof of burglary has been rejected in other states and the same evidence held insufficient to support a burglary conviction. McLemore v. State, Tex.App., 638 S.W.2d 211 (1982); People v. Phoenix, Ill.App., 421 N.E. 2d 1022 (1981); Wood v. State, Ga., 248 S.E.2d 337

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(1978); State v. Bergeron, La., 371 So.2d 1309 (1979). Finally, the Court held that the defendants waived any objection to improper venue when they failed to move for a transfer of certain theft counts from Warren County to the county in which the thefts occurred. The Court also noted that venue in Warren County was, in any event, proper since the stolen goods were transported to Warren County. KRS 452.580 provides that: "Where a person obtains property by larceny... in one county and brings the property so obtained into or through any other county, he may be tried in the county in which he obtains the property or in any other county into or through which he brings it."

In Posey v. Commonwealth, Ky., 31 K.L.S. 2 at 26 (February 17, 1984), the Court delimited the scope of the discovery mandated by KRS 504.070(4). That statute provides with respect to cases in which an insanity defense is proferred that "[n]o less than 10 days before trial, the prosecution shall file the names and addresses of witnesses it proposes to offer in rebuttal along with reports prepared by its witnesses." At Posey's trial the commonwealth was allowed to introduce the testimony of lay witnesses in rebuttal to appellant's insanity defense over defense objection that the names and addresses of the witnesses had not been provided in compliance with KRS 504.070(4). The Kentucky Supreme Court found no error. "Construing the statute as a whole, it does not appear to be directed toward lay witnesses, but toward discovery as to the 'names and addresses' of expert witnesses."

The Court affirmed the murder-robbery convictions and death sentence of Harold McQueen. McQueen v. Commonwealth, Ky., 31 K.L.S. 2 at 20 (February 16, 1984). The Court declined to reverse the convictions although a sitting juror was discharged following unsubstantiated allegations that, after her selection, she had stated to various persons her inability to assess a death sentence. The allegations were made by a police officer who was also the juror's brother-in-law. The juror steadfastly denied stating that she could not consider the death penalty. Reviewing these facts the Court found that "it is uncontradicted that any alleged conversations were instigated by others, not by the juror, and that her greatest impropriety, if any, was in not reporting those persons to the court." However, this "impropriety" breached the trial court's admonition to the jury to "not permit anyone to speak to...them on any subject connected with the trial." In the Court's view this breach justified the trial court's exercise of discretion in dismissing the juror. The Court held that the juror's dismissal was "not based on her alleged statement of doubt about her feelings in regard to the death penalty...." The Court thus sidestepped the federal issue involved and based its decision on state law grounds. Justice Leibson dissented and noted that there was "a continuing controversy during the trial as to whether [the juror] had answered the Witherspoon question with integrity." Justice Leibson

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would have reversed because "[i]n the pervasive atmosphere of a trial, there is some likelihood that the remaining jurors would pick up the undertone that Juror Winkler was excused because she might not be willing to give McQueen the death sentence."

The Court in McQueen rejected a challenge to the composition of the jury pool from which Harold McQueen's jury was selected. The Court reaffirmed its holding in Ford v. Commonwealth, Ky., ___ S.W.2d ___ (1983) that Kentucky does not recognize young adults as a cognizable group. The Court also held that the trial court correctly refused to strike Juror Leo Johnson for cause. Johnson stated on voir dire that he knew four of the prosecution's witnesses, that he had formed an opinion as to guilt, and that he believed that any defendant should be required to prove his innocence. However, when questioned by the trial judge Johnson stated that he could decide the case based on the evidence and that he would abide by the presumption of innocence. Based on this "rehabilitation" of the juror, the Supreme Court held that the trial judge did not abuse his discretion in refusing to strike the juror. The defense struck the juror with one of its peremptories. Justice Leibson also dissented on the basis of this assigned error, stating that the trial judge's "rehabilitation" did no more than "substitute form for substance."

Addressing penalty phase issues, the Court in McQueen held that a defendant's record of prior criminal convictions is admissible as part of the commonwealth's case in chief at the penalty phase of the bifurcated trial. The Court referred to its footnote in Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1981), in which the Court stated that prior felony convictions are "relevant only because one of the mitigating circumstances listed by KRS 532.025(2)(b) [is] 'The defendant has no significant history of prior criminal activity.' Only by proving the criminal history of a defendant can the commonwealth preclude defendant's reliance upon this particular mitigating circumstance." The Court saw no obstacle in the fact that McQueen did not introduce evidence of "no significant history of prior criminal activity" and objected to the introduction of the commonwealth's "rebuttal" evidence. Justice Leibson again dissented: "Here the commonwealth managed to bootstrap in before the jury prior criminal history intended solely to aggravate the jury under the pretext that it would rebut mitigating evidence that was not forthcoming.

Finally, the Court held that Harold McQueen's sentence of death was not disproportionate. The sole statutory aggravating factor was that the execution style killing was committed during a robbery. Evidence of severe intoxication was offered in mitigation. In weighing the proportionality of the death sentence, the Court continued its practice of comparing the case before it only to other cases in which the death

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penalty has been imposed. No comparison was made to similar or more aggravated cases in which the death sentence was not imposed.

The United States Supreme Court issued several important decisions. In Michigan v. Clifford, 34 CrL 3007 (January 11, 1984), the Court held that a criminal search warrant, consent, or exigent circumstances are required to validate the search of a fire-damaged home for evidence of arson. The Court recognized that a property owner may have a continuing "reasonable privacy expectation" in the damaged premises. In Clifford, some five hours after a fire at the defendants' home had been brought under control, arson investigators searched the damaged home in the defendants' absence. The defendants' home was uninhabitable, but for the most part only smoke-damaged, and personal belongings remained in it. Under these circumstances the Court concluded that the defendants retained a reasonable privacy interest in their home. Thus, the warrantless search, conducted in the absence of exigent circumstances, was unlawful. The Court distinguished Michigan v. Tyler, 436 U.S. 499 (1978), on the grounds that the search in Tyler was of a store, not a private home, and was largely contemporaneous with fire-fighting efforts. Justices Rehnquist, O'Connor, Blackmun, and Chief Justice Burger dissented.

In McKasle v. Wiggins, 34 CrL 3037 (January 23, 1984), the Court rejected the defendant's argument that the participation of standby counsel at his pro se trial violated his Sixth Amendment right of self-representation. The Court held that "[t]he pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and jury at appropriate points in the trial." However, while the defendants' right of self-representation demands a "fair chance to present his case in his own way" it does not bar the participation of standby counsel over the defendant's objection. The participation of standby counsel will not defeat the right of self-representation so long as the defendant "preserves actual control over the case he chooses to present to the jury" and counsel's participation does not "destroy the jury's perception that the defendant is representing himself." Justices White, Brennan, and Marshall dissented and would have held that standby counsel's unwelcome participation frustrated the conduct of the defendant's pro se defense.

Finally, in Minnesota v. Murphy, 34 CrL 3057 (February 22, 1984), the Court held that a confession made by the defendant in response to questioning by a probation officer, and in the absence of Miranda warnings, was not obtained in violation of the fifth amendment. The defendant was required by the terms of his probation to be "truthful" with his probation officer "in all matters." The probation

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officer questioned the defendant after the officer was told by a treatment counselor that the defendant had admitted to a murder. The Court concluded that the defendant was not "in custody" so that Miranda warnings were not required. Rather, the Court considered the defendant's position with respect to the probation officer as analogous to the position of a witness on the stand. The defendant was entitled to assert his fifth amendment privilege in response to the questioning but voluntarily chose not to. He thus waived the privilege. The Court contrasted custodial interrogation, which, because of its inherently coercive character, represents an exception to the general rule that the fifth amendment is "self-executing." Justices Marshall, Stevens, and Brennan dissented and would have held that the circumstances under which the defendant was questioned were sufficiently coercive so as to deprive the defendant of the "free choice to admit, to deny, or to refuse to answer."

LINDA WEST

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WILLIAM M. RADIGAN RECEIVES NLADA DEFENDER SERVICES AWARD

On February 24, 1984 the Defender Committee of the National Legal Aid & Defender Association presented its Defender Services Award to William M. Radigan, a former assistant public advocate in the Department of Public Advocacy's central office in Frankfort. According to the award certificiate, the Defender Committee of NLADA, "in recognition of the outstanding contribution made by William M. Radigan to high quality criminal defense services for the indigent accused, hereby presents its Defender Services Award, for his dedicated service for the Kentucky Department of Public Advocacy, including his expertise as a mental health advocate and role in revamping Kentucky's involuntary commitment laws."

The purpose of the NLADA Defender Services Awards is "to recognize defender staff members who have made a great contribution to defense services." The criteria for selection as a recipient of this award are twofold: (1) extraordinary service beyond the staff member's normal job on a particular case or issue; or (2) extraordinary continuous and committed service. This award is granted quarterly by NLADA's Defender Committee and no more than twelve awards may be made in any given calendar year.

Perhaps the award is best explained by the quotation which appears at the top of the award certificate. The words are those of the Honorable Rose Elizabeth Bird, Chief Justice, California Supreme Court, in 1979: "It is your skill, your diligence, and your intelligence that help breathe life into the Bill of Rights."

VINCE APRILE

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ATTORNEY CONDUCT AS "CAUSE" IN THE SIXTH CIRCUIT

In 1977 the United States Supreme Court in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977) held that a state prisoner may not raise in a federal habeas corpus proceeding a constitutional claim he did not present to the state courts because of his failure to comply with a state procedural rule absent some showing of "cause" for his non-compliance and "prejudice" resulting from the alleged constitutional violation. See also Carter v. Jago,637 F.2d 449 (6th Cir. 1980), cert.den. 456 U.S. 980 (1982). Although the Supreme Court did not define what would constitute "cause," most U.S. Circuit Courts of Appeal have held that ineffective assistance of counsel is "cause". See Salter v. Johnson, 579 F.2d 1007 (6th Cir. 1979). Indeed, since Wainwright addressed errors peculiarly within the attorney's control, particularly at trial, an argument of ineffective assistance of counsel is a typical argument in a number of cases to establish "cause."

Recently, however, the Sixth Circuit Court of Appeals issued an opinion which may inhibit, or at least delay, the use of an ineffective assistance of counsel argument to establish "cause." In Alcorn v. Smith, No. 82-5623 (6th Cir., Dec. 20, 1983) (petition for rehearing pending), the Sixth Circuit ruled that ineffective assistance could not be used to constitute "cause" since the ineffective assistance claim had not been adequately presented to the state courts to satisfy the requirement of exhaustion of available state remedies. Since ineffective assistance of counsel had not been raised on the direct appeal within the state, the Sixth Circuit recommended that the petitioner return to state court and litigate the issue by way of an RCr 11.42 motion. The court made this decision even though ineffective assistance of counsel was not raised as a substantive issue itself, but merely as a procedural argument to allow the substantive issue of the insufficiency of the evidence at trial to be addressed.

Alcorn did not overrule Rachel v. Bordenkircher, 590 F.2d 200(6th Cir. 1978), although it does appear to be inconsistent with that decision. Actually, the Sixth Circuit distinguished these cases. In Rachel the federal district court had dismissed a petition for a writ of habeas corpus holding that an issue concerning the prosecution's comment on post-arrest silence should have been litigated in the state on the basis of "incompetence of counsel" since the petitioner's attorney failed to object to the comment. The Sixth Circuit disagreed, finding the issue concerning the prosecutor's comment to be exhausted. The Court also concluded that even though the Kentucky appellate court had found the issue to be

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unpreserved, forcing the petitioner to utilize Kentucky's post-conviction relief procedures would simply "delay redress of a clear infraction of his constitutional rights." Additionally, the Sixth Circuit noted that an RCr 11.42 remedy might not be available to Rachel anyway since the substantive claim of improper comments by the prosecution had already been presented on appeal.

The Sixth Circuit indicated that it would decline to return the case to the state due to a "plain error." But the court also found that affidavits from the petitioner's attorneys at trial, indicating that the failure to object was the result of "inexperience, inattention or lack of knowledge of the law," satisfied the "cause" requirement of the Wainwright test. The Court did not address the need to exhaust on the underlying argument of attorney error as "cause."

The Sixth Circuit distinguished Rachel in Alcorn by indicating that Rachel's claim was exhausted because it was presented to the Kentucky courts as a "manifest injustice" to excuse the procedural default and the state court rejected this contention. According to the Sixth Circuit, presenting the issue to the state courts in those terms would have allowed the state to consider an excuse for the failure to object sufficient for exhaustion.

Although the Sixth Circuit may modify Alcorn pursuant to petition for rehearing, the opinion may ultimately remain unaltered. If so, it may be difficult to raise attorney error as "cause" in the Sixth Circuit without first exhausting the issue in the state courts as one of ineffective assistance of counsel. But cases from other circuits are support for an argument that the conduct of a petitioner's counsel in state court is "cause" without exhaustion as long as the attorney's conduct is unreasonable but does not amount to ineffective assistance in violation of the sixth amendment.

In Carrier v. Hutto, 34 CrL 2332 (4th Cir., Dec.27, 1983), the Fourth Circuit Court of Appeals addressed both the availability of the argument that an attorney error short of ineffective assistance can constitute "cause" and whether exhaustion of such an allegation would be necessary. The Fourth Circuit concluded that an error short of wholesale ineffectiveness of counsel can constitute "cause" if the act or omission resulting in the procedural error was the consequence of ignorance or inadvertence rather than a deliberate strategy. The court did indicate that a calculated avoidance of state procedures for raising specific issues in hopes of obtaining a favorable judgment could not furnish "cause" even though the strategy may have failed. Such decisions can only be considered as "cause" if the error falls outside the range of attorney competence under the Sixth Amendment. The court said that procedural default will be excused not when counsel reasonably but incorrectly exercises judgment,

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but when through ignorance or oversight no judgment is exercised at all. The Fourth Circuit believed that in such situations, the defendant should not be penalized for a momentary lapse by counsel. See also, Runnels v. Hess, 653 F.2d 1359 (10th Cir. 1981); Jurek v. Estelle, 593 F.2d, 672 (5th Cir.1979).

In dismissing the habeas petition in Carrier, the district court indicated that the petitioner might be able to establish "cause" for the default due to attorney error but that the issue should be presented initially to the state courts to satisfy the requirement of exhaustion. But the Fourth Circuit noted that the exhaustion requirement of 28 U.S.C §2254 pertains to independent claims for habeas relief and not to a proffer of "cause" and "prejudice." Nevertheless, the Fourth Circuit did indicate that if the habeas petitioner asserted a substantive claim of ineffective assistance as a ground for relief, he would be required to exhaust that claim in state court. As noted earlier, the Sixth Circuit pursuant to its position in Alcorn apparently would have required that even the underlying reason for the procedural default be exhausted if made in terms of ineffective assistance of counsel. It is not clear how the Court would treat an argument of "cause" based on an attorney's error if not presented as a sixth amendment violation.

Although the Sixth Circuit has recently addressed an attorney's "ignorance of law" and "mistakes in judgment" as "cause" and has determined that these do not establish that requirement, it must be noted that the decisions in which this conclusion was reached are all related to Ohio's self-defense instructions and an attorney's failure to challenge them. The results were therefore dictated by Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558 (1982) which also addressed those instructions and identical or similar attorney errors. Long v. McKeen, No. 83-3160 (6th Cir., Nov. 16, 1983); Nieb v. Jago, 695 F.2d 228 (6th Cir. 1983); Jones v. Jago, 701 F.2d 45 (6th Cir. 1983); Henderson v. Jago, 681 F.2d 471 (1982). Accordingly, these Sixth Circuit decisions may be limited in scope. It remains to be seen whether Engle will be applied more broadly by the Sixth Circuit. Also, it appears that the issue of "cause" was presented and addressed in terms of ineffective assistance of counsel in each of these cases. (It should also be noted that the Sixth Circuit did not require exhaustion of the underlying argument for "cause", contrary to Alcorn.)

Until such time as the Sixth Circuit or the Supreme Court clarifies whether an argument of unreasonable conduct by an attorney not amounting to ineffective assistance of counsel can constitute "cause," cases from other circuits will provide authority to make that argument without a concern for exhaustion. Of course, since the Sixth Circuit has taken a position in Alcorn inconsistent with the position taken by the Fourth Circuit in Carrier, that

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even an underlying allegation of "cause" will need to be exhausted, an argument of unreasonable conduct as "cause", may also run the risk of allowing the federal court to conclude from Alcorn that the issue is actually one of ineffective assistance of counsel and should be exhausted. But the Fourth Circuit was critical of similar "mislabeling" by the district court in Carrier and a court would apparently be hard pressed to require exhaustion of the underlying allegation if that argument is not framed as a violation of the sixth amendment.

RANDY WHEELER

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BILL TO ALLOW FELONY SHOCK PROBATION FROM JAIL NOW IN EFFECT

On February 23, Governor Martha Layne Collins signed into law Senate Bill No. 57. Due to an amendment by the House declaring an emergency, the bill went into effect on the day it was signed.

The bill amends KRS 439.265 to allow the filing of a shock probation motion "not earlier than thirty (30) days nor later than (90) days after the defendant has been incarcerated in a county jail following his conviction and sentencing pending delivery to the institution to which he has been sentenced or delivered to the keeper of the institution to which he has been sentenced...." The statute was also amended to prohibit the use of time spent on any form of release following conviction toward the thirty (30) day minimum.

RANDY WHEELER

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THE DEATH PENALTY

KENTUCKY'S DEATH ROW POPULATION 20

PENDING CAPITAL INDICTMENTS KNOWN TO DPA 82

REHEARING GRANTED IN ICE

On February 16, 1984, a new opinion was issued in Todd Ice's case. Ice v. Commonwealth, 31 KLS 2 at 24. Some portions of the original opinion were deleted, other sections were moved to a concurrence by Justice Liebson in which the Chief Justice joined. The dissenters, somewhat appeased, toned down their opinion. The bottom line is that Justices Gant and Vance apparently changed their minds on sending the case back to juvenile court. However, even this is unclear as the "opinion of the Court" (Gant and Vance) is silent on this crucial issue. Reference should be made to The Advocate, Vol. 6, No. 1 at 18-24 (Dec. 1983). We will detail only changes in the opinion.

a,b,c) JUVENILE ISSUES

The opinion of the Court ignores Ice's "juvenile court" claims regarding a) ex parte conversations, b) the child's presence, and c) background investigation. These sections now appear in the Leibson/Stephens concurrence.

d) CHANGE OF VENUE

Likewise, the opinion on change of venue is now a concurrence. The opinion of the Court [Slip Opinion] simply states: "Nothing in this opinion, however, shall be construed to foreclose a subsequent motion for change of venue, if filed" [SO 21].

f) JUROR QUALIFICATION FORMS

This section is also now a concurrence.

h) LAY OPINION ON SANITY

j3) COMMENT ON DEFENDANT'S SILENCE AT TIME OF ARREST AND AT TRIAL

These sections of the Court's opinion may now be found in the concurrence [CO 8-9]. The only change is that Justices Leibson and Stephens no longer state that it is "debatable" whether 5th amendment errors occurred or whether a foundation was laid for the police officers' testimony that Ice was not insane. The concurrence now simply states that Ice's 5th amendment rights were violated and that "[t]he testimony as to police expertise on mental condition was improper." [CO 9]

j) PROSECUTION MISCONDUCT

1) ARGUMENTATIVE QUESTIONS AND MISSTATEMENT OF EVIDENCE

The Court removed some examples of argumentative and leading questions although language condemning such tactics remains intact. The Court dropped this line: "A prosecutor should

(Continued, P. 16)

undertake to ask questions fairly and properly or find some other line of work" [SO 9]. (Ice's prosecutor already has, albeit for other reasons.)

k) RECUSAL OF JUDGE WHEN RELATIVES ON THE JURY

This section was dropped entirely, perhaps because it is not likely to occur again below.

t) CONSTITUTIONALITY OF DEATH PENALTY FOR JUVENILE

The decision remains the same but a section of the opinion was removed which attempted to distinguish Workman v. Commonwealth, Ky., 429 S.W.2d 374 (1968) on the basis that Workman's crime was rape and not murder. (The Court had relied upon a quote purportedly from Workman which was not, in fact, from that case.)

Also gone is the discussion of the new juvenile code with its provisions abolishing the death penalty for juveniles, effective in July of 1984. Similarly, a general discussion of the Court's role in dealing with constitutional questions, "even one as profound as the appropriateness of the death penalty for a boy barely fifteen" lies on the editor's floor.

v) CONCLUSION: JUVENILE'S RIGHT TO TREATMENT AND TRANSFER FROM DEATH ROW

Needless to say, this section has been entirely eliminated. Ice remains under a death sentence for the time being as he has now filed a petition for rehearing.

DISSENT

The dissent is now drastically shortened. Removed is a lengthy discussion of the venue issue (which ironically detailed the various examples of threats and intimidation found in the record and only alluded to in Justice Leibson's opinion). Gone is the accusation that the majority "misstated the record to arrive at the result" and that the "majority opinion...is factually wrong."

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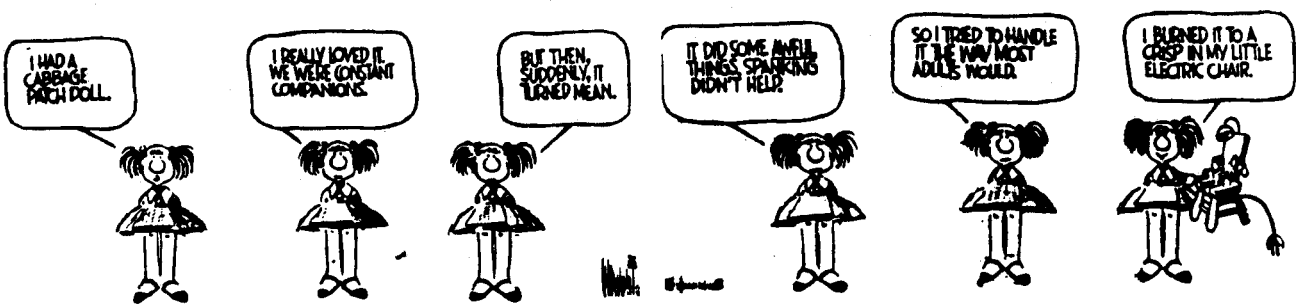

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Also deleted, however, are objections to the Court's holdings as to 1) the photographs of the victim while alive; 2) criticism of the prosecutor's direct and cross-examination; and 3) Witherspoon v. Illinois, 391 U.S. 510 (1968). Presumably, the dissenters now agree with these holdings.

AFTERMATH

On March 1, 1984, the Kentucky House passed a bill "that would move Powell and three other counties from" the Chief Justice's district. Powell County, the scene of much outcry after the Court's original decision, would be moved to Justice Stephenson's district. Lexington Herald-Leader (March 2, 1984) at B1.

GENE WHITE'S
DEATH SENTENCE AFFIRMED

On December 22, 1983, the Kentucky Supreme Court affirmed Karu Gene White's death sentence. White v. Commonwealth, 30 KLS 15 at 22. White was indicted, along with his step-brother, Tommy Bowling, and a friend, Chuck Fisher, with the beating death and robbery of three elderly shopkeepers in rural Breathitt County. Fisher was given immunity from prosecution. Bowling was tried separately and sentenced to various terms, including 20 years for each of three counts of manslaughter, after White's trial. These issues were addressed:

a) CONFLICT OF INTEREST

White, Bowling and Fisher were represented by the same retained counsel. Fisher accepted the Commonwealth's offer of immunity toward the close of White's jury selection. Until then White was to present an alibi defense. At that point, the defendant announced reliance upon an insanity/intoxication defense. "During the course of his testimony, [White] stated that he took drugs, LSD being his favorite.... He further testified that he did not hit anyone and did not mean to hurt anyone.... He denied hitting the victims, but said he must have.... Members of his family testified as to his mental problems, violent nature and bizarre habits." [SO at 2].

The Court addressed the "conflict of interest" question on direct appeal because it was "outside the rule in Cleaver v. Commonwealth, Ky., 569 S.W.2d 166 (1978), which requires that the issue of ineffective assistance...be first determined by the trial court." [SO at 7]. Justice Stephenson's unanimous opinion refused to adopt the Georgia rule that "joint representation constitutes a per se violation of the constitutional guarantee of effective assistance of counsel..." in death penalty cases. [SO at 3]. See Fleming v. State, 270 S.E.2d 185 (Ga. 1980). "[I]n this respect a death penalty case should not be treated any differently than any other criminal case." [SO at 4].

The "[p]otential conflict... was raised by the prosecution..." but no error was found because "White made an informed and intelligent waiver of separate representation."

(Continued, P. 18)

[So at 4]. (Of course, this waiver was signed prior to Fisher's turning state's evidence and was not renewed thereafter. However, the Court makes no mention of this). Nor was there any "demonstrated conflict." [SO at 4]. "Out of an abundance of caution... [we] hold that White has not established from the record that an actual conflict... adversely affected his lawyer's performance." [SO at 6].

"As to Fisher, White made much of Fisher's [new lawyer's] invoking the client/attorney privilege" as to any cross-examination by White's lawyers at trial. [SO at 6]. (This argument was rejected although White's lawyers agreed the privilege applied, that it would be respected and that it was bound to prejudice White.) "There is nothing in the record to suggest that there was any such information" obtained from Fisher which could have been used during his cross-examination. [SO at 6].

As to Bowling, there was no conflict of interest in "the trial tactics designed to show bizarre behavior on the part of White...." [SO at 7]. White's lawyers, in cross-examination of Fisher and others, "attempted to establish that the crimes... had been committed by a 'berserk' individual...." [SO at 7; emphasis added].

(Unfortunately, the Court failed to discuss White's essential argument that a conflict existed because the lawyers representing both White and Bowling could give no consideration to defense of relative culpability. White's lawyers withdrew from representation of Bowling only after White's trial. They stated at that time that "because of [Bowling's] youth...he involved himself in this... due to Gene White..." At Bowling's trial, the prosecution's theory was that Bowling, not White, killed 2 of the 3 deceased. The prosecutor presented proof to support that theory. Also ignored on appeal was White's counsel's sentencing phase argument at White's trial which unnecessarily compared White's "history of criminal activity" [actually White had no prior convictions] with the "other two kids [who] have no history of anything.")

b) MISTRIAL OR PEREMPTORY STRIKES ON JURORS ALREADY SEATED

The Court held that there was no right to exercise peremptory challenges on jurors already qualified when the defense is changed in mid-voir dire. "White misses the point. These eleven jurors had been qualified to try the case on the evidence before them, free of prejudice or bias. This is all White was entitled to, no more." [SO at 8]. Nor was White entitled to a mistrial because the defense was changed.

c) ADDITIONAL PEREMPTORIES

"The trial court had already granted four additional peremptories over and above the eight mandated by RCr 9.40 and there was no abuse of discretion in declining to grant additional peremptories." [SO at 8].

(Continued, P. 19)

d) CONSEQUENCES OF AN NGRI VERDICT

Despite Ice and Payne v. Commonwealth, Ky., 623 S.W.2d 867 (1981), to the contrary, the Court approved a "line of questioning" by the trial judge who "asked if the jurors believed... White was insane would they be willing to 'turn him loose?"' [SO at 8]. "This expression is clearly...a colloquialism for 'not guilty'... All in all, we cannot see that White has any complaint in this respect." [SO at 9].

e) ADDITIONAL VOIR DIRE AND CHALLENGES FOR CAUSE BECAUSE OF THE INSANITY DEFENSE

"[T]he voir dire of the jury had been based on a circumstantial case/alibi defense" [SO at 5]. "The trial court did permit further voir dire of those jurors already accepted on the insanity defense." [SO at 8]. "White's argument to the contrary, all of the jurors stated they could follow the law on the insanity defense." [SO at 9].

f) CONTINUANCE FOR PSYCHOLOGICAL TESTIMONY

"Counsel urged the trial court to continue the case since the defense had completely changed. The trial court denied this motion, but did recess for six days to permit psychological and psychiatric review." [SO at 5]. "White argues that he did not have sufficient time to procure expert testimony to bolster his defense of insanity... White called neither [expert]...who conducted...tests, nor did he make a showing as to what they would testify. The inescapable conclusion is that in this respect the testimony would not have been favorable to White...Dr. Drew, the psychopharmacologist White intended to call, could not appear because of illness. No attempt was made to take his deposition or to subpoena him. White's counsel stated that he would have testified extensively about the effects psychologically and physiologically on any individual who made extensive use of drugs. We are of the opinion there was no error... White testified extensively about himself, including the use of drugs and alcohol." [SO at 10].

g) EMOTIONAL OUTBURSTS BY VICTIM'S DAUGHTER

Despite "emotional outbursts by the daughter of the victims... we observe that if the jury was inflamed at all it was by the barbaric nature of the crimes. It would be rare indeed to assemble a group of laymen on a jury that could maintain a clinical detachment after the portrayal of the bestial manner in which the victims were murdered." [SO at 10-11].

(Continued, P. 20)

DEATH PENALTY ISSUES

h) WITHERSPOON

One juror was excused who couldn't recommend the death penalty in a case were there were no eyewitnesses to the crime. This was a hypothetical situation as Fisher was an eyewitness who testified at White's trial. Nevertheless, the White opinion makes no mention of this juror and states that "[a]ll those jurors excused for cause had indicated an irrevocable commitment against the death penalty regardless of any facts or circumstances which might emerge at the trial."

In dicta, the Court approved in-depth inquiry in Witherspoon voir dire but ironically expressed disapproval of certain hypotheticals. "The Witherspoon test is pretty straightforward, but sometimes not readily understood by laymen and frequently requires additional questioning. We observe that qualifying jurors under Witherspoon is not helped along by defense counsel asking if the juror could vote for the death penalty if Hitler were on trial, if the Iranian hostages had been killed and their killers were on trial, or a more outrageous question, if the murderer of a member of the juror's immediate family were on trial. Attempts to elicit a response that a juror could vote for the death penalty in hypothetical situations such as these are not in conformity with Witherspoon and is not permissible." [SO at 9].

This unprecedented dicta is sure to confuse the trial bar and bench especially since Ice condemns death qualification questions about the particular case at hand. The Advocate, Vol. 6, No. 1 at 22-23 (Dec., 1983). It remains unclear what questions can be asked to clarify a juror's position. Certainly, the federal courts will have something to say on this subject.

Finally, the Court observed: "For what it is worth, when the jury was finally accepted White still had not exercised one peremptory challenge." [SO at 10]. Although in fact untrue and of questionable relevance to this issue, it behooves defense counsel to exhaust all peremptory challenges in capital cases.

i) ENMUND ISSUE

Rejecting (without explanation) White's assertion that there was no jury finding that White killed, intended to kill or attempted to kill, the Court distinguished Enmund v. Florida, 104 S.Ct. 3368 (1982) on its facts (a point which had been conceded by White). [SO at 11].

j) INSTRUCTIONS ON NON-STATUTORY MITIGATING CIRCUMSTANCES

White's tendered instruction on a non-statutory mitigating circumstance dealing with the issue of relative culpability (his as compared to Bowling and Fisher) was rejected. Nevertheless, the opinion erron-

(Continued, P. 21)

eously states there were "no objections to the instructions. The apparent reason is that the instructions were all inclusive...." [SO at 11]. The Court held that the catch-all language of the mitigating circumstances instruction ["including but not limited to..."] "permits the jury to consider every circumstance in mitigation offered by White." [SO at 12].

k) TRIAL JUDGE SENTENCING: CONSIDERATION OF CHILDHOOD AND UPBRINGING

"The trial judge is entitled to give 'great weight' to the recommendation of the jury." [SO at 13]. "Further, the record refutes White's argument that the trial judge sentenced him to death without considering relevant mitigating evidence concerning White's childhood and upbringing." [SO at 12]. The trial judge simply stated he had considered "the mitigation of circumstances..." [SO at 13]. (The opinion ignores White's complaint that the trial judge sentenced White to death because of "irresponsible parole boards that release them within a very short time and turn them loose on the public again... we have... a wave of this type of crime... A young fellow that is going from place to place looking for someone to kill where they can get dope and live with their habits and without work. There are young people all over [this] state... looking at this case....")

l) CONSTITUTIONALITY AND PROPORTIONALITY REVIEW

Again, the Court rejects a constitutional challenge to the death penalty statute. Proportionality review, of sorts, was conducted in the same manner as in Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980). "We have considered all of the cases in which the death penalty was imposed after January 1, 1970...." [SO at 14]. Actually, all the Court really did was to inaccurately paraphrase the language and then copy the list of cases in Gall, 607 S.W.2d at 112-115, add Gall to the list, but forget to otherwise update it. (The same is true of the proportionality review in McQueen, discussed below.) There appears little or nothing "similar" about the cases compared.

m) ISSUES IGNORED

In Todd Ice's original opinion and again on rehearing the Court reversed a death sentence from the same judicial district, involving the same district and circuit judges and the same prosecutor. Some allegations of error were similar and a few were based on identical facts. For example, White and Ice both alleged that a judge should be recused for ex parte conversations, that the prosecutor engaged in gross misconduct, that jurors were excused without cause for alleged hardship, that Witherspoon was violated in the same manner, that the circuit judge made improper comments (including "turn 'em loose"), that the character of the victim(s) was needlessly made an issue, that emotional displays by a relative of the deceased were highly inflammatory, that a change of venue should have been granted,

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that polygraph evidence shouldn't have been introduced, that the prosecutor can't argue that the jury's death verdict is only a "recommendation" and that there will be an "appeal," and that the judge must independently sentence in a capital case. Ice prevailed on all of these contentions in the original opinion and on rehearing with at least two members of the Court and sometimes more. Of these 11 instances of error found in Ice not one allegation of error was even made mention of in White. The various Ice opinions were neither distinguished nor rejected. They were simply ignored.

HAROLD MCQUEEN'S DEATH SENTENCE AFFIRMED

On February 16, the Court affirmed its third death sentence since the 1976 effective date of our statute. A summary of most issues may be found in West's Review, this issue at 3. McQueen v. Commonwealth, 31 KLS 2 at 20 (1984).

a) FUNDS FOR EXPERTS

Also of interest is the Court's treatment of the indigent's request for experts. In Ford v. Commonwealth, 30 KLS 15 at 19 (1983), also a capital case (but one not resulting in a death penalty), the Court denounced Ford's request for funds (mislabeled a second expert) to complete his jury challenge in Franklin and Scott Counties. The Court refused in Ford and McQueen to "authorize expenditures of public funds to conduct such a witch hunt." McQueen at 21, quoting Ford at 20 (emphasis added). Despite prima facie showings in Ford (two years) and McQueen (five years) regarding underrepresentation of certain groups, the Court indicates that under state law an indigent must do without money to help in investigating and analyzing the composition of the jury pool absent something called "specific knowledge of irregularities." Id. Federal review of these decisions will be sought if rehearing is denied.

A second expert requested was "to show that death qualified juries are unconstitutionally more conviction prone.... [T]he expert sought had published works on the subject" and this would, the Court implied, suffice as proof. Since the trial judge had "sustained a motion to provide the defendants with a ballistic expert and a toxicologist [,w]e find no abuse of discretion... We see no reasonable necessity for these experts in the instant case." McQueen at 21 (emphasis added).

b) JURY CHALLENGES

The issue of whether young people (under 30) and/or college students are a cognizable group(s) will ultimately be decided by the United States Supreme Court. It is difficult to see how they are not in McQueen since 44.64% of the Madison County eligible juror population fits the under 30 category. "[B]oth this case and Ford involved communities in which colleges and universities are located...." McQueen at 21.

(Continued, P. 23)

Jury challenge evidence in "another case which was tried some four years prior" should have been updated the Court held. "[W]e are furnished with no [recent] evidence from which we may make a determination." McQueen at 21. Thus, a claim that "doctors, lawyers, policeman, unemployed, elderly who were ill, trouble-makers, etc..." were improperly excluded by the jury commissioners could be, and was, ignored.

c) PRESERVATION OF ERROR

Despite Ice and other decisions carving out an exception to the contemporaneous objection rule for capital cases, language about trial counsel's failure to object can be found in both White and McQueen. "No objection was made by appellant to this question...." McQueen at 21. Trial counsel is advised that the record must be protected even in - especially in - capital cases.

d) TESTIMONY BY VICTIM'S FAMILY

An argument deemed "totally offensive to the court" centered around the testimony of the father of the victim who described his deceased daughter. No error was found since the witness wasn't "emotional, condemnatory, accusative or demanding vindication." McQueen at 21-22.

APPELLATE CONSISTENCY AND THE DEATH PENALTY

When asked if the Florida Supreme Court had succeeded in removing arbitrariness to any degree in death penalty cases, former Chief Justice Arthur J. England, Jr., recently stated: "No...I thought the Supreme Court of Florida would be able to set standards that made sense...that were predictable in the capital punishment area. One needs [this].... My experience on the court [1975-1981] was that it's impossible to prescribe those standards and to adhere to them." Sherill, "Death Row on Trial", New York Times Magazine at 116 (Nov. 13, 1983).

KEVIN McNALLY

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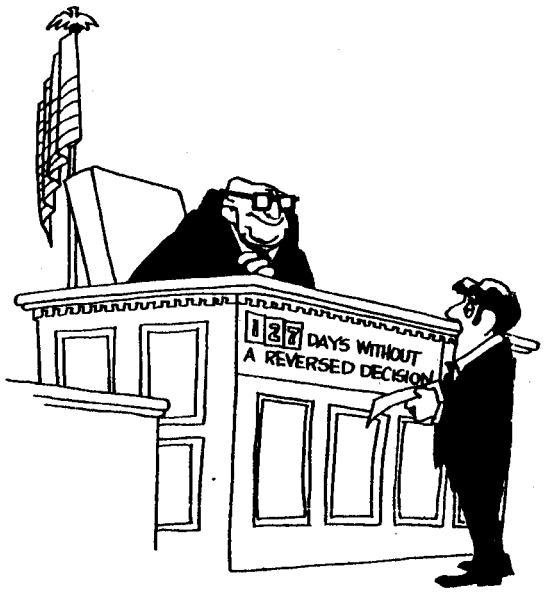

**When I hear a man talk of unalterable law, the effect it produces upon me is to convince me that he is an unalterable fool.

Sidney Smith

TRIAL TIPS

WAIVER OF COSTS FOR INDIGENT DEFENDANTS IN DISTRICT COURT

QUESTION: In the area of court costs and indigent defendants, how does KRS 24A.175(4) ["Taxation of costs against a defendant, upon conviction,... shall be mandatory..."] affect KRS 453.190(1) & 31.110(1)(b) [court shall waive all costs for indigents]?

FACTS: In some jurisdictions in Kentucky it is a common practice to impose court costs on public defender clients when they enter guilty pleas in district court. This imposition of costs is often made a condition of the plea bargain. Even though the district court judge is made aware of KRS 453.190(1) and 31.110(1)(b), he still maintains that KRS 24A.175(4) bars him from waiving costs for indigent defendants.

SUMMARY OF OPINION: Under both rules of statutory construction and federal constitutional principles, a district court judge is not only legally able to waive the costs against the defendant upon conviction in district court, he is required to waive those costs upon a showing that the defendant is indigent and lacks in the future the ability to pay the assessed costs.

OPINION: In a criminal case in district court in Kentucky "[t]axation of costs against the defendant, upon conviction, including persons sentenced to a drivers' improvement program as provided under KRS 186.574, shall be mandatory and shall not be probated or suspended." KRS 24A.175(4). It is clear from this legislation that the intent of the legislature was to deny district court judges the discretion to probate or suspend the costs assessed against the defendant, upon conviction. Thus, in general, the district court has no discretion to suspend or probate for a time certain the costs assessed against a convicted defendant. It should be noted, however, that nothing in KRS 24A.175(4) prohibits the waiver of those costs for an identifiable good cause.

In Kentucky "[a] court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs...." KRS 453.190(1). In this context "[a] 'poor person' means a person who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing." KRS 453.190(2). Similarly, when a needy person is found to be eligible for representation by a public advocate pursuant to KRS Chapter 31 "[t]he courts in

(Continued, P. 25)

which the defendant is tried shall waive all costs." KRS 31.110(1)(b). It is clear that whether a person is determined to be a "needy person" under KRS 31 or a "poor person" under KRS 453.190, a district court judge is required by law to waive all costs of his conviction.

"It is a well settled principle of statutory construction that a specific provision concerning a particular subject must govern a general provision to the contrary when both provisions apply." Neighborhood Develop. v. Advisory Council, Etc., 632 F.2d 21, 24 (6th Cir. 1980). "A basic rule of statutory construction to be applied to resolve a conflict between two different enactments each of whose literal terms cover a specific subject is that 'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one....'" Brown-Forman Distillers Corp. v. Mathews, 435 F.Supp. 5, 13 (W.D.Ky. 1976), citing, inter alia, Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974).

This rule of statutory construction is well established in Kentucky. "One of the established rules of statutory construction is that when two statute deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails." Land v. Newsome, Ky., 614 S.W.2d 948, 949 (1981), citing City of Bowling Green v. Board of Education of Bowling Green Independent School District, Ky., 443 S.W.2d 243 (1969).

"Simply put, the specific statute controls a more general statute." Heady v. Commonwealth, Ky., 597 S.W.2d 613, 614 (1980). "This rule of statutory construction is firmly established in the law of the Commonwealth." Id. "It is the general rule as well." Id. "Where two statutes deal with common subject matter, the one dealing with the subject in a minute way will prevail over the general statute." Morton v. Auburndale Realty Company, Ky., 340 S.W.2d 445, 446 (1960).

Obviously, assuming arguendo that KRS 24A.175(4) may be read to prohibit a district court from waiving costs against a defendant, upon conviction, it is nevertheless clear that the two specific statutes, KRS 453.190(1) and KRS 31.110(1)(b), would still prevail over the general non-waiver requirement of KRS 24A.175(4). In fact, this type of statutory construction was the subject of a 1978 Opinion of the Kentucky Attorney General which dealt with this exact subsection of KRS 24A.175. According to the Opinion of the Attorney General, as between legislation of a broad and general nature on one hand and legislation

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dealing minutely with a specific matter on the other hand, the specific will prevail over the general, and, accordingly, the specific prohibition of KRS 189.990 against imposing of costs in parking violations prevails over the generality of KRS 24A.175(4), which purports to require payment of costs in all criminal prosecutions upon conviction. OAG 78-328.

Federal constitutional principles of both equal protection and due process prohibit a district court judge from requiring a defendant to agree to pay court costs as a condition of the plea bargain, revoking a defendant's probation as a result of his financial inability to pay court costs, or imprisoning the defendant for failure to pay his court costs. See Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970); Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971); Bearden v. Georgia, 103 S.Ct. 2064 (1983). It must be remembered that the United States Supreme Court "has long been sensitive to the treatment of indigents in our criminal justice system." Bearden v. Georgia, supra at 2068. A policy that requires a district court judge to always impose costs against a convicted defendant, even when that person has been ruled by the court to be a "poor" or "needy" person would violate both equal protection and due process constitutional precepts. "Indeed, such a policy may have the perverse effect of inducing the [convicted defendant] to use illegal means to acquire funds to pay in order to avoid" the other choices proposed by the trial judge. Id. at 2072.

It may be constitutionally proper for a district court judge to impose costs on a convicted defendant who is indigent when the order imposing costs allows the defendant to pay those costs back over an extended period of time should he later actually become capable of repaying the court system. Those who remain indigent or for whom repayment would work a manifest hardship would be exempt from any obligation to repay. See Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 2124, 40 L.Ed.2d 642 (1974).

Nothing in KRS 24A.175(4) indicates that it is to apply to prohibit district court judges from waiving costs for poor or needy persons. Additionally, accepted rules of statutory construction indicate that the specific rights of poor and needy persons to have costs in criminal cases waived takes precedence over the general proscription of KRS 24A.175(4) which makes taxation of costs in this circumstance mandatory. Additionally, federal constitutional principles of equal protection and due process would preclude a prosecutor and/or a district court judge from denying a defendant any statutory or constitutional right on the basis of his financial inability to pay court costs following conviction.

VINCE APRILE

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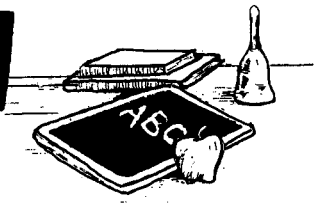
JUVENILE LAW



THE USE OF EXPERT WITNESSES IN JUVENILE COURT PROCEEDINGS

As the stepchild of the court system, juvenile court, rarely receives the attention of practicing criminal defense attorneys. Unfortunately, this only serves to underline the low priority of juvenile court and more importantly ignores the substantive rights of a large segment of Kentucky's population.

Often ignored is the use of expert testimony in the preparation of a case in juvenile court. There is a luxury in juvenile court: 1) the use of experts prior to adjudication, 2) the use of experts to protect a child's post-adjudicative rights.

Private attorneys and public advocates are reluctant to use experts for two simple reasons. First, the cost, and secondly an inability to properly identify the need of experts. Both problems can be fairly well handled.

For private attorneys the "client" who pays is generally the parent. It is often perceived that the parent is in fact the client. This is a mistake which is played out regularly in juvenile courts throughout the state. The parents should realize from the beginning the client is the child.

The use of experts should be explained to the parents to allow them to understand the benefit to the child. If a child needs psychiatric help but is before this court for a criminal offense, the parent needs to know that a delinquent commitment does not insure psychiatric treatment. The use of an expert on behalf of the child may well insure that the final disposition treats the child.

An "up front" explanation of potential defenses and ensuring costs will inure to the benefit of both the child and his parents. It will also warrant that the private counsel is ethically representing the child to the full extent of his abilities.

For the public advocate Chapter 31 of the Kentucky Revised Statutes provides ample ammunition for expert testimony in juvenile court. Examples of evidence secured by Chapter 31 are: behavioral scientists to discuss hyperactivity, psychiatric nurse to discuss sexually abused, an educational psychologist to determine reading and comprehension, drug and alcohol therapist to discuss children's reactions to drugs, psychiatrist on the effects of violence on television, etc.

The key is to be innovative and of course know your judge. The Court generally wants to help the child. It is your job to provide information either to

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convince the court the child needs no help because of legal or factual innocence; or, to convince the court where the available treatment resources are.

Why are attorneys unable to recognize the use of experts? Often attorneys have a bias against a child-defendant. We too want to see a child get help for his violent tendencies, his drug abuse, or her sexually promiscuous behavior. Attorneys need to spend less time trying to be social workers or "super parents" and get on with criminal defense work.

The Court is already primed for the use of expert testimony. By practice and case law a Cabinet for Human Resources social worker is an expert in juvenile court. All defense counsel need do is apply this theory to witnesses on behalf of the child.

The expert witness, whether it be a school psychologist or behavioral scientist, can be beneficial at all pre-adjudicatory phases of juvenile court. If a child states he or she did not understand their respective rights, do not discount this. Too often police, school officials or local sheriff departments rely on oral or written confessions.

Be aware; 1) Children are much more intimidated by arrest than adults; 2) their environmental age is generally much lower than their adult counterpart; 3) how is the client doing in school, can he read; 4) what promises were made. These issues are all very integral to the voluntary statements of juveniles. An experienced child psychologist can give you insight as to the comprehension abilities of your client.

These same issues can be used effectively at waiver hearings to protect your client from trial in adult court. Furthermore, if you can convince a District Judge of mitigating factors it may well serve to reduce the seriousness of a felony charge waived to circuit court.

It is also important to recognize the use of experts at the dispositional and post dispositional phase of juvenile court. Juveniles are entitled to be treated for their problems. If effective evidence can be offered to show that this treatment can be provided while the child is at liberty as opposed to institutionalized, please prepare such evidence. Community resources are available which may well save your client from a state institution.

It is critical to be prepared to cross-examine the state or other person who presents evidence to the Court concerning your client. Know in advance what the state intends to recommend. Questions to ask: 1) How many times has the worker interviewed the child; 2) Has the worker been to the child's home; 3) Has he or she seen the child's school record; 4) Has the worker visited any state institutions; 5) Does the worker have a degree in a juvenile justice

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area. Educate the court with your own witness.

When a child is sent to an institution, he or she may not receive the help the Court intends the child to have. Defense counsel should be prepared to call witnesses at a hearing pursuant to KRS 208.205 to review a child's disposition. A child intended for a psychiatric placement who ends up in a delinquent residential facility is most likely inappropriately placed. Do not make the mistake of assuming every case is over at disposition.

Finally do not be afraid to take a chance. If the judge is not receptive - make your record. Every chance you get to educate the court of juvenile trends and theories enhances your client's chances.

ALLEN BUTTON

(Mr. Button is engaged in the practice of law in Louisville. He was a guest lecturer at the DPA's recent Juvenile Law Seminar, and graciously agreed to prepare this article for the benefit of those persons unable to attend that conference. The Advocate wishes to express its appreciation for Allen's continuing commitment to the rights of children and to the DPA's training efforts.)

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A POTPOURRI OF FORENSIC SCIENCE

(First of Two Parts)

1982-83 was an eventful year for forensic science. Several promising new techniques emerged, and many old controversies over well-known techniques persisted. The purpose of this column is to give the reader an overview of some of the more significant developments during the past year. The first section of the article deals with general trends related to forensic science, including such issues as pretrial appointment of defense experts and the standard for admitting scientific evidence at trial. The second section updates the reader on a number of specific scientific techniques, including ballistics and polygraphy.

I. GENERAL TRENDS RELATED TO FORENSIC SCIENCE

In 1982, Professor John Decker of DePaul University College of Law published "Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents," 51 Cincinnati Law Review 574. The article is must reading for defense attorneys. As Professor Decker notes, the lower courts constantly cite United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953) as authority that there is no constitutional right to the appointment of a defense forensic expert. Professor Decker initially advances several persuasive arguments for distinguishing and overruling Baldi. He then collects the favorable lower court decisions recognizing a

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constitutional right premised on various theories: due process, equal protection, compulsory process, and effective assistance of counsel. Finally, he presents a detailed analysis of 18 U.S.C. Sec. 3006 (A)(e)(a) of the Criminal Justice Act of 1964. That subsection permits the court to authorize defense experts "necessary to an adequate defense." Professor Decker points out that many courts construe the statute narrowly; they appoint defense experts only when the lack of expert services would deprive the defendant of a fair trial in violation of due process. However, Professor Decker marshalls the legislative history of the statute to show that Congress had a broader intent in mind. He contends that to the extent feasible, Congress wanted to eradicate the effects of a defendant's poverty on the quality of the criminal justice meted out to the defendant. He quotes one Senate Subcommittee report as encouraging counsel to "be bold in seeking subsection (e) authorizations" and judges to "be tolerant in entertaining and relatively generous in granting them." Before you file your next motion for court appointment of a defense expert, you should carefully digest Professor Decker's article.

The topic of court appointment of defense experts takes on added significance in light of another general trend, namely, the continued movement toward relaxation of the Frye standard for admitting scientific evidence. There is a need for greater liberality in making defense appointments because the courts are admitting prosecution scientific evidence more routinely. On the one hand, some courts continue to apply Frye and insist that the proponent of scientific evidence demonstrate the general acceptance of the underlying scientific theory. For example, in United States v. Clifford, 543 F.Supp. 424 (W.D.Pa. 1982), the court excluded forensic linguistic analysis on this ground. The court cited Frye as the controlling test for the admission of scientific evidence.

On the other hand, the commentators continue their criticism of Frye. Justice Mark McCormick of the Iowa Supreme court added his voice to the ranks of the critics of Frye during the past year. Justice McCormick authored "scientific Evidence: Defining a New Approach to Admissibility," 67 Iowa Law Review 879 (1982). Justice McCormick proposes a general reliability standard to supplant Frye. His article lists various factors that the courts should consider in assessing the reliability of proferred scientific evidence. "The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology," 28 Villanova Law Review 554 (1983) lends support to Justice McCormick's position. The article points out that most courts subscribing to Frye assume that scientific evidence will overwhelm lay jurors. On that assumption, the Frye test makes good sense; if lay jurors are going to ascribe exceptional weight to scientific proof, that proof should have to surmount an extraordinarily rigorous test

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of admissibility. However, the article adds that there is little or no scientific research to support the assumption. In fact, almost all of the research points to the contrary conclusion that most lay jurors have a healthy skepticism of scientific evidence and often reach verdicts at odds with the scientific testimony in the case.

Many courts are now responding to these criticisms of Frye. The Villanova article cites cases from 13 states either overruling Frye or at least indicating that Frye's precedential value is suspect in those jurisdictions. The number increases to 15 if we add State v. Cantanese, 368 So.2d 975, 978-81 (La. 1971) and Cullin v. State, 565 P.2d 445, 458 (Wyo. 1977). Even more importantly, by early 1984 26 states will have adopted a version of the Federal Rules of Evidence, Federal Rules of Evidence News, Sep. 1983, at 83. A growing number of courts hold that the Federal Rules impliedly abolish Frye. Within the past year, Montana and Ohio reached that result. Barmeyer v. Montana Power Co., 657 P.2d 594 (Mont. 1983); State v. Williams, 4 ohio St.3d 53, 446 N.E.2d 444 (1983).

Yet, at the same time that the courts are liberalizing the common-law and statutory barriers to the admission of scientific evidence, the courts seem to be tightening some of the constitutional limitations.

One constitutional limitation is the fourth amendment prohibition of unreasonable seraches and seizures. In a number of recent cases, courts invoked that prohibition to restrict warrantless collection of physical evidence for forensic analysis. In State v. Mahon, 648 S.W.2d 271 (Tenn.Cr. App. 1982), the court held that absent exigent circumstances, the police need probable cause and a warrant to subject a suspect to an x-ray examination. The court notes that x-rays penetrate the body. The court concluded that an x-ray examination amounts to a bodily intrusion, triggering the fourth amendment. In re Abe A, 51 U.S.L.W. (BNA) 2036, 31 Crim.L.Rep. (BNA) 2277 (N.Y.Ct. Apps. June 17, 1982) is in accord. In that case, the New York court decreed that the police must ordinarily have probable cause and a court order for a pre-charge extraction of blood. State v. Allen, 291 S.E.2d 459 (S.C. 1982) and Lee v. Winston, 551 F.Supp. 247 (E.D.Va. 1982) both hold that the fourth amendment prohibits major surgery to remove bullets from suspects' bodies. In Lee, the bullet was lodged between 2.5 and 3.0 centimeters below the suspect's skin surface, and a general anesthetic would have been necessary. The court found that major surgery would be an unreasonable search violative of the fourth amendment.

While the fourth amendment limits the prosecution's abilty to collect evidence before trial, the sixth amendment can restrict the prosecution's ability to introduce evidence at trial. State v. Towne, 32 Crim.L.Rep. (BNA) 2196 (Vt.Sup. Ct. Nov. 2, 1982). In Towne, the prosecution called a forensic psychiatrist to test-

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ify that the defendant was mentally responsible. During his testimony, the psychiatrist alluded to the concurring opinion of a Dr. Rada. The witness described Dr. Rada as "the man who wrote the book" on the subject. The Vermont Supreme Court held that the admission of the reference to Rada's opinion violated sixth amendment confrontation. The court asserted:

> The expert was not relying on facts or data provided by Dr. Rada, but was rather "acting as a conduit" for the other doctor's opinion. The jury was asked to base its decision upon the testimony of a witness never brought before the trier of fact and never cross-examined. This violated the defendant's confrontation rights secured by both the United States and Vermont Constitutions.

Some courts are also applying other constitutional limitations more vigorously at trial. People v. Cornille, 448 N.E.2d 857 (Ill. 1983) is a case in point. In Cornille, the defendant was charged with arson. At trial, the prosecution called an expert in fire investigation. The expert testified that he received degrees from two academic institutions and had done postgraduate work. In truth, the expert had not obtained the degrees. When the defendant learned of the expert's perjury, the defendant filed a petition for post-conviction relief. Even though the prosecutor did not realize the falsity of the testimony at the time of trial, the Illinois Supreme Court found a due process violation. The court stated that the prosecutor should have attempted to verify the expert's credentials before trial. The prosecutor's negligence was a sufficient basis for imputing the expert's perjury to the prosecution. Based on that imputation, the court granted the defendant relief.

EDWARD J. IMWINKELRIED

(Conclusion next issue)

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