THE ADVOCATE

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THE ADVOCATE FEATURES

Recently a Floyd County capital case, on a venue change to Fayette County, received a great deal of state-wide attention. Ned Pillersdorf of the Pikeville Office was one of the attorneys on the case in which Clyde Douglas Marshall was acquitted of plotting the death of his wife. Ned is quick to say that the Marshall verdict is not his biggest win. Largely, Ned credits the verdict to talking through the case with his co-counsel Mary Lou Chandler. He commented,"the combined effort produced a product that was better than what we could have gotten individually."

Ned uses the resource of fellow attorneys often. He seeks their advice and confers with them on his cases and has gained many trial skills. In particular, Gary Johnson and Mary Lou Chandler have helped him tremendously. He said about them "the LaGrange population would be a great deal larger, but for their uncompensated assistance."

Ned has been with the Pikeville Office since August of 1981. Prior to that he worked six months with the San Joaquin County, California public defender's office, after graduating from University of the Pacific Law School in California. His academic career also includes an undergraduate degree from Vanderbilt and high school in Nanuet, New York.

(Continued, P. 2)

INSIDE

THE ADVOCATE

EDITORS

- Edward C. Monahan
- Cris Purdom

CONTRIBUTING EDITORS

- Linda K. West
  West's Review
- Randy Wheeler
  Post-Conviction
- Kevin M. McNally
  The Death Penalty
- Gayla Peach
  Protection & Advocacy
- J. Vincent Aprile, II
  Ethics
- Michael A. Wright
  Juvenile Law
- Neal Walker
  Federal Review

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The Advocate welcomes correspondence on subjects treated in its pages.

"If you see only what the light reveals and hear only what the sound announces, then you do not see nor do you hear."

KAHLIL GIBRAN

When asked to contrast the California experience with his current practice, Ned said that a person's rights were better protected in California. "There are instances in Eastern Kentucky when a client desperately needs a competent attorney." Irbnically the juries in California aren't as compassionate. Ned characterized the juries of Floyd and Knott Counties where he works predominantly as "compassionate and fair." He feels because they understand poverty and identify with his clients they don't convict, as other juries do, because of the client's status.

Jury research is essential to Ned's trial strategy. He goes into the community to learn about prospective jurors. Community involvement is essential. For example, Ned coaches little league baseball. He also takes the juror list up to the jail to allow other prisoners to review it for possible alliances an out-sider couldn't know. Ned emphasized the importance of understanding the jury. Ned tries not to interject his own personality into his cases as he has learned the jury responds better to a low key approach of obvious respect and compassion for the client.

The compassion is genuine. Ned believes that "many of the people who come through the system in Floyd and Knott Counties have been taken (advantage of) because they're poor." Most of the cases he's handled have involved real questions of innocence. Ned cautioned that it's common as a defense attorney to typecast

(Continued, P. 3)

a defendant which causes the attorney to lose the ability to communicate compassion to the jury. He stressed the importance of looking at each client as an individual and each case as new.

The proudest moment in Ned's career came when a client so shaken up by the police interrogation confessed to every fire on the books in Floyd County, was acquitted. That is not to say Ned isn't proud of the Marshall verdict or that the case was easily won. It wasn't. The acquittal was so received by the courtroom audience that there were moments when Ned was concerned for his client's life. The repercussions have carried back to Floyd County. Anonymous telephone threats are part of the price paid for being a public defender who fights hard for his clients...and wins.

And win he does. A prosecutor facing Ned Pillersdorf at the start of a trial must deal with the startling and unpleasant reality that Ned wins more often than he loses. There is no such thing as second best for this public defender's clients.

CRIS PURDOM

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NOTE:

The "Search and Seizure Law: Three Perspectives" Seminar originally slated for March 23, 1984 in Louisville has been rescheduled to be held September 6, 1984.

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DPA UPDATE FROM THE PUBLIC ADVOCATE

After six months as Public Advocate, I have learned a lot about our public advocacy system but have realized that I still have more to learn and I expect to spend more time traveling and meeting with our contract attorneys throughout the state.

CONTINUATION BUDGET

One of the major disappointments of the legislative session was lack of any increased funding. Basically, our Department, like other state agencies, was given a strict continuation budget for the biennium. This means that our office will be unable to increase its allotment to any of the counties for the next two years nor will we be able to increase our full-time offices to cover more counties. Basically, we are going to have to continue our services with the same level of funding.

RECOUPMENT

The only area where there is the possibility of more funding available to the system is through recoupment of funds from clients who can make some payments for their services. The Public Advocacy Commission considered the issue of recoupment at their last meeting and Chairman Max Smith appointed a committee comprised of Bob Carran, Frank Heft, and Paula Raines to work with me in developing a recoupment policy for the Department. We are currently developing materials from areas where there have

(Continued, P. 4)

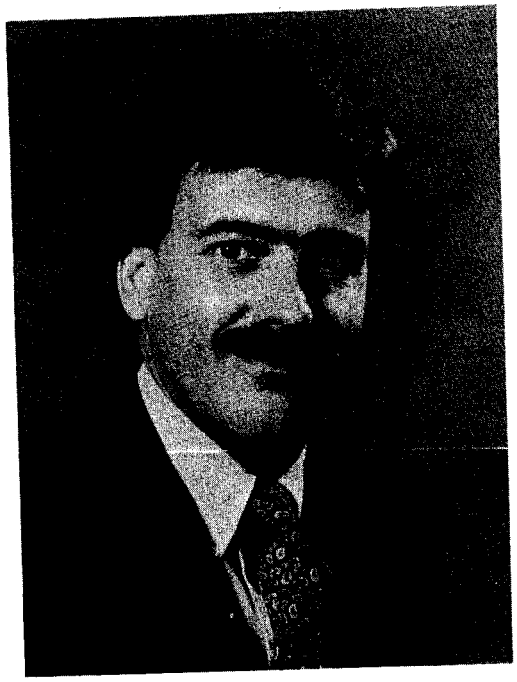
been successful recoupment programs in Kentucky and in other states. I would appreciate any ideas that any of our readers might have concerning recoupment.

CAPITAL CASES

One area that continues to be a major concern is the number of capital cases throughout the system. These cases by their very nature consume a major part of our resources both in terms of the personnel committed to each case and the monetary costs of litigation. These cases continue to increase and with a continuation budget, the Department is going to have to develop a method of meeting the increased caseload with existing funds and personnel while maintaining the high level of competence we have provided in the past. In any changes in the Department's structure, one commitment I have is to make more assistance available from the central office to attorneys with capital cases.

TRAINING

One area that has impressed me about the Department is the high quality of training that we are currently providing attorneys in our system. Since becoming Public Advocate, I have attended our Trial Practice Institute, Death Penalty Seminar, Appellate Practice Seminar, Juvenile Law Seminar, and our Annual May Seminar. These sessions were impressive in both the substantive law presented and also in the advocacy skills demonstrated by the faculty plus their critiques of the participants' "live presentations." I believe that



PAUL F. ISAACS

all our attorneys in the system can benefit from these programs and I hope to make them more widely available in the next year.

QUALITY OF SERVICE

I am even more impressed with the high quality of services provided by the Department to our clients as I learn more about the system. For the most part, I believe that any person represented by an attorney in the Public Advocacy system receives very competent assistance throughout the system, from the investigator who works his case to the post-conviction attorney who assists the client if incarcerated. Even in this time of continuation budgets and increased demand for services, I am committed to retaining that quality of service that distinguishes the agency.

PAUL F. ISAACS

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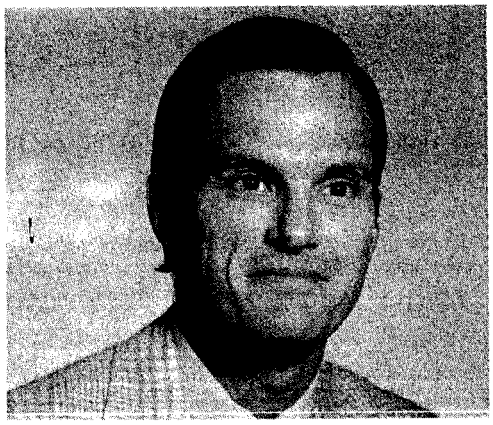
RECENT APPOINTMENTS TO THE PUBLIC ADVOCACY COMMISSION

PAULA M. RAINES



ROBERT W. CARRAN

Attorneys Paula M. Raines and Robert W. Carran have been appointed to serve on the Public Advocacy Commission.

Paula M. Raines of 203 West Second Street in Lexington is a court of Justice Appointee. Pauls says she feels good about the appointment and hopes she can make a difference. She expressed that public defender work is essential and went on to say that public defenders are the best people practicing in the field because they are dedicated to what they're doing. Paula is a 1977 graduate of the University of Kentucky School of law. Paula replaces Anthony Wilhoit on the Commission. Judge Wilhoit was the Chairperson of the Commission.

Robert W. Carran is a 1969 graduate of Chase Law School and is a Kentucky Bar Association Representative on the Commission. Both is very pleased with the appointment. He hopes to make the voices of public defenders within the state heard. Bob's office is located at 314 Greenup Street in Covington. Bob replaces Henry Hughes on the Commission.

The Commission is composed of Judges, Law School Deans, private attorneys as well as public defenders. The other commission members are:

Helen Cleavinger
Jesse Crenshaw
Frank W. Heft, Jr.
Lambert Hehl, Jr.
Paul F. Isaacs
Dean Will R. Jones
Dean Robert Lawson
Dean Barbara B. Lewis
James Park, Jr.
William Rummage
Max M. Smith, Chairperson

Among its numerous duties, the Commission upon a vacancy recommends three attorneys to the governor for appointment as Public Advocate. The Commission also reviews and adopts an annual budget for the Department and provides support for budgetary requests.

We congratulate you, Paula and Bob!

CRIS PURDOM

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West's Review

A Review of the Published Opinions of the Kentucky Supreme Court and Court of Appeals and United States Supreme Court.

A reading of opinions rendered by Kentucky's appellate courts for the months of March and April shows some interesting decisions from both courts.

In Commonwealth v. Howard, Ky.App., 31 K.L.S. 4 at 1 (March 9, 1984), the Court of Appeals was asked to decide whether an absent witness' prior sworn testimony could be introduced by the Commonwealth at the defendant's trial. The appeal was brought by the commonwealth. As a preliminary matter, the Court held that it had jurisdiction to hear the appeal. The defendant contended that the Court of Appeals lacked jurisdiction to hear the case because the commonwealth was, in reality, seeking a certification of the law, which only the Supreme Court has jurisdiction to hear. Thompson v. Commonwealth, Ky., 652 S.W.2d 78 (1983). The Court of Appeals rejected this argument, reasoning that a certification of the law is an adjudication of an issue after a final judgment has been rendered. In the case before it, the commonwealth's appeal was from an interlocutory order pursuant to KRS 22A.020. Turning to the substantive issue before it, the Court held that the trial court erred by refusing to admit at trial the testimony of an absent witness given at a bond reduction hearing in the defendant's case. The Court relied upon Ohio v. Roberts, 448 U.S. 56 (1980), and RCr 7.20, which provides for the introduction of a deposition in lieu of live testimony where a witness is unavailable. "It is our opinion that if the prior testimony is found by the trial court to be reliable and trustworthy, and the witness was subjected to cross-examination, it makes no difference whether the prior testimony comes by way of deposition, previous trial, preliminary hearing, or as in this case, a bond reduction hearing, provided the same offense and charge are being dealt with."

In Boyle County Fiscal Court v. Shewmaker, Ky.App., 31 K.L.S. 4 at 6 (March 23, 1984), the Court was presented with a complex appeal by the Boyle Fiscal Court from an order of the Boyle Circuit Court holding the fiscal court in contempt. The contempt was based on the fiscal court's failure to comply with an earlier order directing it to pay an attorney's fee to an attorney who had represented a criminal defendant under the Boyle County Public Defender program. The fiscal court failed to pay because funds for the program had been depleted. The Court

(Continued, P. 7)

of Appeals held that "[w]ithout question the fiscal court had the responsibility to provide funds to pay the fee." KRS 31.190 directs the counties to appropriate sufficient funds to administer a public advocacy program. The Boyle Fiscal Court had provided that funding for the Boyle County public advocacy program should come from state funds allocated to the program and any partial payments made by indigent defendants. The Court of Appeals held that this reliance on state funds and partial payments did not constitute "appropriating" funds as required by the statute. Based on its failure to appropriate funds, the fiscal court subjected itself to being held in contempt. However, when holding the fiscal court in contempt the circuit court proceeded improperly. The trial court committed error when it summarily held the fiscal court in contempt for a contempt not committed in his presence. Due process required that the circuit first issue an order setting a date for the fiscal court to show cause why it should not be held in contempt. Because the circuit court failed to comply with this fundamental prerequisite of due process, its order holding the fiscal court in contempt was void.

In Sanders v. Commonwealth, Ky.App., 31 K.L.S. 5 at 3 (April 6, 1984), the Court of Appeals held that the trial court erred in the defendant's prosecution for second degree burglary when it refused to instruct the jury on the lesser included offense of first degree criminal trespass. Criminal trespass differs from burglary in that it does not require the offender to have acted "with the intent to commit a crime." The trial court refused to so instruct because the defendant had relied on an alibi defense. The Court of Appeals held that "[t]he defense evidence is not controlling." "If this defendant had remained mute and introduced no evidence whatsoever as he had a right to do, in view of the commonwealth's evidence, the trial court would have had to have given the requested instruction...." The Court also instructed the commonwealth that "[a]t a new trial, the commonwealth is directed to refrain from interrogating the accused concerning his silence in violation of Kentucky Constitution §11, and the Fifth Amendment of the United States Constitution." The Court additionally noted that it was improper for the prosecutor in questioning witnesses to refer to the defendant as a "burglar," since this term assumed the defendant's guilt.

The Court's decision in Graham v. Commonwealth, Ky.App., 31 K.L.S. 5 at 8 (April 11, 1984), provides an interesting contrast to its decision in Whisman v. Commonwealth, Ky. App., 31 K.L.S. 2 at 10 (February 10, 1984)(see West's Review, The Advocate, vol. 6, no. 3). Graham was present as a passenger in a white Camaro driven by Whisman when the car was stopped by police. The stop was based on an anonymous informant's tip that someone in a white Camaro, in the area of the stop, had pointed a pistol at the informant. Pills were

(Continued, P. 8)

in plain view in the vehicle, and a search revealed more contraband. Both Whisman and Graham appealed their resulting convictions of possession of controlled substances and challenged the legality of the stop of the vehicle. Separate panels of the Court of Appeals validated the vehicle stop in the two cases, but resolved the issue in different ways. In Whisman, the Court held that there was probable cause to stop the vehicle since circumstances at the scene corroborated the informant's tip. However, in Graham the Court held that probable cause was not required to justify stopping the vehicle. The Court upheld the stop as "investigatory" under Delaware v. Prouse, 440 U.S. 648 (1979) and cited Prouse for the proposition that such stops are proper where there is "articulable and reasonable suspicion that ...either the vehicle or an occupant is otherwise subject to seizure for violation of law...." The Graham Court went on to conclude that an anonymous tip may give rise to a "reasonable suspicion" when the totality of the circumstances corroborate the tip.

The Kentucky Supreme Court has held that an accused defending a charge of persistent felony offender is not entitled to attack the validity of a previous conviction, for the first time, at the trial of the persistent felon charge. Commonwealth v. Gadd, Ky., 31 K.L.S 3 at 16 (March 8, 1984). The Court recognized that an accused may not be adjudicated a persistent felony offender on the basis of a prior conviction which is constitutionally infirm. The Court also considered that under its decisions in Gross v. Commonwealth, Ky., 648 S.W.2d 858 (1983) and Alvey v. Commonwealth, Ky., 648 S.W.2d 853 (1983), a prior conviction may not be challenged under CR 60.02, or RCr 11.42 once the prior conviction has been used to obtain a persistent felony offender conviction. Consequently, a defendant is entitled to attack the validity of the prior conviction once he is charged as a persistent felon. However, the Court held that the defendant's challenge must be done by pretrial motion. "The question of some underlying constitutional invalidity should be raised by the defendant and decided before the trial as a threshold issue to the admissibility of the evidence of conviction at the trial itself." The defendant's challenge to the validity of a prior conviction, made at the trial of the persistent felon charge, came too late.

The Court has significantly undermined the impact of RCr 8.30(1). The rule provides that coindictees, charged with an offense punishable by confinement or a fine of more than $500, may not be represented by a single attorney unless the trial judge explains to them the possibility of a conflict of interest and each defendant enters into the record a written waiver of his right to separate counsel. In Smith v. Commonwealth, Ky., 31 K.L.S. 3 at 7 (March 8, 1984) the Court held that a trial court's failure to comply with RCr 8.30 may be harmless error if there is no actual conflict between the two defendants. The Court

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specifically overruled the decision of the Court of Appeals in Trulock v. Commonwealth, Ky.App., 620 S.W.2d 329 (1981), which held that RCr 8.30 is mandatory and that failure to comply with it may never be harmless error. The effect of Smith is to reinstitute the necessity of a case by case determination of whether a conflict of interest prejudiced the defendant. The Court also held that failure to comply with the rule must be preserved by defense objection. Justices Gant and Stephenson dissented and would have reversed under the authority of Trulock.

In Hampton v. Commonwealth, Ky., 31 K.L.S. 3 at 18 (March 8, 1984) the Court rejected the defendant's claim that his convictions of both sodomy and first degree sexual abuse violated the prohibition against double jeopardy. The defendant was convicted of the two offenses based on his act of orally sodomizing the victim, a twelve-year-old boy, while simultaneously forcing the victim to perform oral sodomy on him. The Court held that the two acts constituted two separate offenses. "The fact that the two sexual acts occurred either simultaneously or nearly so is irrelevant." The Court distinguished Hamilton v. Commonwealth, Ky., 659 S.W.2d 201 (1983), in which the Court held a defendant could not be convicted of both statutory rape and incest based on a single act of intercourse with his ten-year-old daughter. In the Court's view, the flaw in Hamilton was that a "single act of sexual gratification was utilized to convict the defendant of both offenses," while in Hampton two acts of sexual gratification were involved. The Court in Hampton also rejected argument that the defendant's 105 year sentence violated KRS 532.110(i)(c) and the Eighth Amendment's prohibition against cruel and unusual punishment. The longest term to which the defendant could have been sentenced under the statute was life. Neither did the Court consider 105 years for multiple counts of sodomy and sexual abuse to be cruel and unusual punishment. The Court distinguished Solem v. Helm, ____ U.S. ____, 103 S.Ct. 3001 (1983), which held that a recidivist sentence of life without parole for uttering a worthless check was impermissible, on the grounds that Solem did not involve crimes "against a person." Finally, the Court held that the trial court properly excluded psychological testimony by a "clinical social worker," offered as an expert witness, where the defense failed to qualify the witness as an expert.

In Beemer v. Commonwealth, Ky., 31 K.L.S. 3 at 20 (March 8, 1984), the Court adopted the "totality of the circumstances" test for assessing the legality of a search warrant based on a tip from an anonymous informant. The test was announced by the U.S. Supreme Court in Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317 (1983), and replaced the two-pronged requirement, pursuant to Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), that the basis of the informant's knowledge be shown

(Continued, P. 10)

and that there be indications of the informant's reliability. The Kentucky Supreme Court declined to hold that Kentucky's constitution requires a stricter standard than does the federal constitution.

The Court held in Hicks v. Commonwealth, Ky., 31 K.L.S. 4 at 11 (March 19, 1984), that the defense was not entitled to funds to employ experts to aid in adequately defending against serological evidence to be introduced by the commonwealth. KRS 31.110(b) provides that a needy person is entitled "to be provided with necessary services and facilities of representation including investigation and other preparation." The Court has previously stated in Young v. Commonwealth, Ky., 585 S.W.2d 378 (1979) that indigent defendants are entitled to "reasonably necessary" expert assistance. However, Hicks failed to show how the expert assistance requested by him was reasonably necessary. He made no showing as to the manner in which the assistance would help him. Hicks also alleged on a motion for new trial that one of the jurors admitted during deliberations that she was a close friend of the victim's mother. The juror failed to acknowledge any relationship to the victim's family during voir dire. The defense allegation was supported by the affidavits' of two jurors. The Court cited RCr 10.04 for the rule that "A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." The Court concluded that the jurors' affidavits were "incompetent." Justice Leibson and Chief Justice Stephens dissented and would have held that the uncontradicted evidence of juror bias entitled Hicks to a new trial.

The Court has held that a defendant may be charged as a persistent felony offender in an indictment separate from the indictment charging him with the underlying substantive offense. Price v. Commonwealth, Ky., 31 K.L.S. 4 at 12 (March 19, 1984). The second indictment, charging Price with PFO, referred to the date of commission of the underlying offense but did not incorporate it by specific reference. The Court found no error since KRS 532.080, the PFO statute, does not require that a PFO indictment be presented only in an indictment charging a substantive offense. The Court also found that the defendant was not prejudiced by his separate indictment on the PFO charge since he was arraigned on the PFO charge a month prior to trial and thus was not deprived of notice or an opportunity to defend against the charge.

In Gavel v. Commonwealth, Ky., 31 K.L.S. 4 at 13 (March 29, 2984) the Court held that the trial court erred when it ordered that the defendant's sentence be served consecutively to a federal sentence to be served by him. The federal sentence was imposed subsequently to the defendant's probated state sentence. After the defendant was sentenced on his federal conviction, the state trial judge revoked the defendant's probation and ordered his state sentence to run

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consecutively to the federal term. The trial court justified its order under KRS 533.060(2), which provides with respect to a person convicted of an offense committed while he is released on probation or parole that "the period of confinement for that felony shall not run concurrently with any other sentence." (Emphasis added). The Supreme Court, however, held that KRS 533.060(2) was inapplicable since "that felony" referred to the felony committed while the defendant was on probation. "In the present case 'that' felony would be the federal conviction, which the state court has no control over." The sentencing decision before the trial court was instead governed by KRS 532.115, which provides that "[t]he court, in sentencing a person convicted of a felony, shall be authorized to run such sentence concurrent with any federal sentence received by that same defendant for a federal crime."

In Denny v. Commonwealth, Ky., 31 K.L.S. 5 at 14 (April 19, 1984), the Court held that the defendant's incriminating admission was lawfully obtained. The defendant was advised of his Miranda rights at the time of his arrest and again when he was taken before the district judge for fixing bail. The sheriff escorted the defendant back to jail following the hearing and remarked to the defendant "I feel like you have something else you want to tell me." The defendant then stated "I do, I did it, I raped her." The Court held that the failure to give the defendant fresh Miranda warnings immediately before he made the incriminating statement did not violate the defendant's Fifth Amendment rights. The Court also held that "assuming, but not deciding" that the defendant's Sixth Amendment right to counsel had attached, the sheriff's remark to the defendant in the absence of counsel did not violate the Sixth Amendment. See Massiah v. United States, 372 U.S. 201 (1964). The Court based this conclusion on its holding that "the comments of the sheriff constituted neither an interrogation of the appellant nor a ruse designed to elicit information from him...." The Court held that Brewer v. Williams, 430 U.S. 387 (1977), in which the defendant was induced to make incriminating admissions by a police conversation regarding the need for a "Christian burial" of the victim, was factually distinguishable. Justice Leibson dissented and would have reversed inasmuch as the right to counsel had attached and the sheriff's comment was "designed to elicit information from the accused." Although the majority affirmed the defendant's conviction of rape they reversed his conviction of incest pursuant to Hamilton v. Commonwealth, Ky., 659 S.W.2d 201 (1983). Justices Wintersheimer and Aker dissent from this portion of the Court's opinion.

The Court has held that evidence obtained through a wiretap operation conducted by federal authorities may be used in Kentucky courts. Basham and Scott v. Commonwealth, Ky., 31 K.L.S. 5 at 15 (April 19, 1984). The wiretap, which yielded evidence used to convict the defendants of receiv-

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ing stolen property, was conducted by the F.B.I. pursuant to a wiretap order obtained from a U.S. District Judge. The Court concluded that the wiretap was permissible under KRS Chapter 526, which prohibits "eavesdropping" but provides an exemption over conduct which is "required or authorized by a provision of law imposing a public duty or by a judicial decree." "Thus, if the federal wiretap conformed to the requirements of the Federal Wiretap Statute, the evidence was not obtained illegally...."The Court recognized, however, that Kentucky law enforcement officials were themselves prohibited under Kentucky law from conducting such an operation. This prohibition gave rise to a point conceded by the commonwealth - "that if there were no independent, bona fide federal investigation in progress, if there were collusion between federal and state authorities seeking to avoid the limitations of the state statute... the evidence thus obtained should be suppressed." The Court pointed to the fact that the federal investigation of the defendants existed prior to the state investigation and held that there was no collusion. The Court also held that the police did not act unreasonably in executing a search warrant at the defendants' home when they obtained the serial numbers of guns found in the home which were not described in the search warrant and which were not plainly identifiable as stolen property. Chief Justice Stephens dissented and would have excluded the wiretap evidence under KRS Chapter 526.

In Hon v. Commonwealth, Ky., 31 K.L.S. 5 at 18 (April 19, 1983), the Court held that the commonwealth must affirmatively prove that the defendant to a charge of persistent felony offender was at least eighteen years old when the previous felony was committed. The commonwealth showed that Hon was born on October 1, 1954, and was convicted of escape in February, 1977. Under KRS 532.080(2)(b), the commonwealth was required to show that the defendant was eighteen years of age or older at the time of the commission of the prior felony. The commonwealth argued that the date of conviction of the prior felony supported an inference that the defendant was eighteen at the time of its commission since it was "unlikely" that any court would have waited four years to try him. The commonwealth cited as authority Kendricks v. Commonwealth, Ky., 557 S.W.2d 417 (1977), where similar evidence was held sufficient to give rise to an inference that the defendant was the requisite age. The Court rejected this argument. "Because the persistent felony offender statute is so clear in its requirements, and so strictly penal in nature, we believe that it is improper for proof of an inferential nature to be used to obtain and sentence a conviction under its terms." The Court's holding overrules Kendricks. Because the commonwealth introduced no direct proof of Hon's age at the time of commission of the prior felony, his conviction was reversed on grounds of insuf-

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ficient evidence. Justice Wintersheimer dissented.

The U.S. Supreme Court has continued to retract the law of search and seizure. In United States v. Jacobsen, 35 CrL 3001 (April 2, 1984) the Court validated a police field test of a white powder discovered by a private freight carrier in a package being transmitted by the carrier. When the package was damaged the carrier searched it, discovered the powder, and notified the police. A drug agent removed the powder from its box and conducted an on-the-spot test which showed it to be cocaine. A majority of the Court held that the warrantless removal of the powder from the package by the drug agent did not infringe a reasonable expectation of privacy inasmuch as it did not exceed the scope of the private search to which the package had already been subjected. "The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." The Court also validated the field test, which clearly exceeded the scope of the original private search, by reference to United States v. Place, ___ U.S. ___, 103 S.Ct. 2637 (1983). The Court in Place upheld a "sniff test" by a trained narcotics dog because it involved a "minimal intrusion." The Court stated as its view that such a test does not constitute a search since "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." Justices Brennan and Marshall dissented, stating "It is difficult to understand how respondents can be said to have no expectation of privacy in a closed container simply because a private party has previously opened the container and viewed its contents." The dissenters also criticized the majority's emphasis, in determining whether the defendant had a reasonable expectation of privacy, on the "identity of the concealed item" rather than "the context in which an item is concealed."

In a case of particular interest to Kentucky's criminal jurisprudence, the Court has upheld the "open fields" doctrine. Oliver v. United States, 35 CrL 3011 (April 17, 1984). Oliver challenged the validity of a warrantless search of his farm, conducted by Kentucky State Police, which led to the discovery of a field of marijuana. In order to enter the farm the officers took a foot path around the side of a locked gate bearing a "No Trespassing" sign. Oliver contended that the officer's warrantless entry violated his reasonable expectation of privacy. The Court rejected Oliver's contention under the open fields doctrine. The doctrine, first announced in Hester v. United States, 265 U.S. 57 (1924), specifically excludes "open fields" from the protection of the Fourth Amendment. "Hester v. United States may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." The

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Court based the doctrine, in part, on the language of the Fourth Amendment, which protects the people in their "persons, houses, papers, and effects."

The Court additionally noted that fences and no trespassing signs do not bar the public from viewing open fields and such fields may also be surveyed from the air. The Court reasoned that this accessibility of open fields precluded any "reasonable" expectation of privacy. The rule adopted by the Court is thus a per se rule which specifically rejects a case-by-case analysis. Justices Marshall, Brennan, and Stevens dissented. The dissenters found the majority's narrow construction of the language of the Fourth Amendment inconsistent with the fundamental precept that the Amendment "protects people, not places." The dissenters also considered that Oliver had a reasonable expectation of privacy in his land as evidenced by the Kentucky Penal Code's sanctions against trespass, the precautions taken by Oliver to exclude intruders, and the many legitimate, private uses to which the land might be put.

In another case originating in Kentucky, the Court has held that a defense request for an "admonition" to the jury that it must draw no adverse inference from the defendant's failure to testify, rather than a request for an "instruction," is not a sufficient procedural default to bar a claim of constitutional violation based on the trial court's failure to give the jury the requested guidance. James v. Kentucky, 35 CrL 3029 (April 18, 1984). In Carter v. Kentucky, 450 U.S. 288 (1981), the Court held that a defendant is entitled, upon request, to an instruction to the jury not to draw an adverse inference from his failure to testify. At the conclusion of the evidence James' counsel requested that the trial court so advise the jury by an admonition. The request was denied. On appeal the Kentucky Supreme Court held that, while James was entitled to an instruction, none was requested, and the admonition was properly denied. The U.S. Supreme Court held that James had adequately invoked his right to the required guidance and whether that guidance was given in the form of an instruction or admonition was irrelevant. "[T]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Justice Rehnquist dissented.

LINDA WEST

P.S. Our public defender in Shelby County, Tom Hectus, represented James in the United States Supreme Court.

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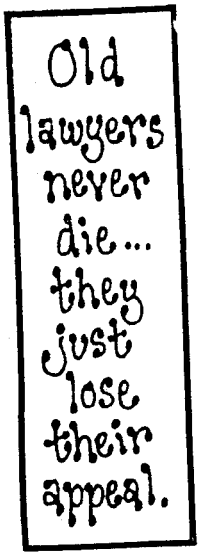

Protection and Advocacy

for the Developmentally Disabled

BILLS RELATING TO PEOPLE WITH DEVELOPMENTAL DISABILITIES THAT PASSED DURING 1984 LEGISLATURE

Senate Bill 24 allows a member of the Kentucky Teacher's Retirement System who is the parent of a mentally handicapped adopted adult child, as well as a natural such child, to receive a $200 monthly allowance upon retirement.

Senate Bill 133 allows grandparents visitation rights as such are in the best interests of the child.

Senate Bill 15 is a guardianship statute amendment reducing the qualification level of a social worker required to prepare interdisciplinary evaluation reports in guardianship cases from a graduate degree to licensed and certified. Also provides for an extension of time to hold a guardianship hearing on a motion for cause.

Senate Joint Resolution 1 declares August 2 of each year to be Handicapped Day throughout the Commonwealth.

House Bill 39 amends the guardianship law to establish qualifications for the court to consider when appointing a guardian or conservator.

House Bill 147 allows the court to authorize a private sale of realty by the fiduciary when the sale of all or any part of the real estate or any interest therein of his ward, decedent, or trust is ordered by the court.

House Bill 301 amends the guardianship law to require that a county pay for an interdisciplinary report in a guardianship case only if the person evaluated is a poor person.

House Bill 306 prohibits employees of the Cabinet for Human Resources and officers and employees of regional community mental health/mental retardation programs from making sales or contracts in which they or their families have a vested interest in and are under the Cabinet's control.

House Concurrent Resolution 30 directs a Legislative Program Review and Investigations Committee to study the Cabinet for Human Resources reimbursement system for services rendered to dependent, neglected, abused, and status offense children.

Senate Bill 26 requires the Department of Education to allow local school districts to exempt exceptional children from being tested with the statewide test used to measure basic skills achievement when it is determined that such tests are not appropriate for such children because of the severity of their handicapping condition.

Senate Bill 118 establishes a personal care assistance services program for severely physically disabled adults. Defines eligibility require-

(Continued, P. 16)

ments for participation in such programs and defines the responsibility of the Cabinet for Human Resources to evaluate program applicants. Authorizes the Cabinet to promulgate the regulations to implement such programs and establish an appeal procedure.

House Bill 780 requires the county clerk to index the judgment of disability of a person for whom a fiduciary is appointed.

House Bill 826 prohibits an insurer from failing or refusing to issue or renew insurance to any person because of blindness or degree of blindness.

House Resolution 72 requests the Secretary of the Cabinet for Human Resources to include nonsteroid and other anti-arthritic drugs in the Kentucky Medical Assistance Program outpatient drug list.

House Bill 981 which changes the designation of children in state-operated institutions from out of district to state agency children and amends the definition of such children to include those in programs contracted for by the Cabinet for Human Resources, was piggybacked onto an unrelated but successful House Bill 771.

House Concurrent Resolution 18 which directs the Legislative Research Commission through the Interim Joint Committee on Health and Welfare to study the advisability and feasibility of separation of mental health/ mental retardation delivery services, was piggybacked on the unrelated but successful Senate Bill 191.

HOUSE BILL 33 FAILS!
The Department was active in assisting parents and persons with developmental disabilities in promoting this bill. Had the bill been successful, it would have significantly increased the civil rights of persons with developmental disabilities. Efforts will be made in the near future to promote the bill during the interim.

GAYLA PEACH

* * * * * *

AN HONEST ANSWER

Because of the intense pretrial publicity in the murder trial, the prospective jurors were examined individually on voir dire out of the presence of other jurors. That's the way **Sanford Shapiro**, a lawyer in Rochester, N.Y., tells it.

The defendant sat at counsel table next to his lawyer, **John Speranza** of Rochester. One woman juror was brought in for questioning, and the prosecutor started first.

When the prosecutor was done, Speranza got up, identified himself and asked if she knew the defendant or anything about him that would affect her ability to be impartial.

"Why no," she said. "And in fact, until you just stood up, I didn't know which of you was the lawyer and which one was guilty."

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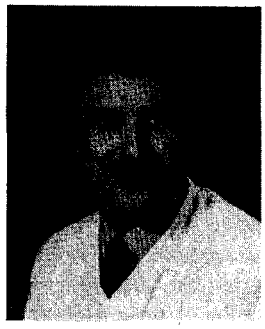
Post-Conviction

Law and Comment



THE PAROLE PROBLEM

What the criminal justice system needs to do is to get rid of the uncertainty, soft-headedness and misguided sympathy for criminals. It needs, in short, to get rid of indeterminate sentencing and parole.

What the criminal justice system needs is an approach that seeks not merely to punish but, where possible, to restore criminals to responsible citizenship, it needs the discretion to treat individuals as individuals, not mere cogs in an uncaring machine. It needs, in short, the flexibility of indeterminate sentencing and parole.

May of us who think about crime and justice have, at one time or another, embraced both points of view. Which one we embrace at a given time depends a good deal on which cases trigger our thinking on the subject.

New York Gov. Mario Cuomo's thinking is triggered by the spector of unrepentant parolees preying on law-abiding citizens when they ought, by rights, to be in the slammer. His mind was pretty well made up on the subject even before 24-year old George Acosta, free on parole on a manslaughter conviction, was charged with the Feb. 14 shootings of three New York police officers, one of whom died. As a result of that tragedy, Cuomo may get his wish: fixed sentencing without parole.

A lot of us would welcome such a development - until the first time a previously law-abiding colleague was convicted of a major offense in circumstances indicating that he would be unlikely to commit other offenses. And then we might find ourselves questioning the blind rigidity of a system that was incapable of distinguishing, in the sentencing process, between our temporarily fallen paragon and an unrepentant sociopath.

It's easier to recognize the paradox than to devise satisfactory ways of resolving it. Naturally we've tried.

One example of our effort to take sociopathic behavior into account is the three-time loser legislation on the books in several states. The idea here is that judicial discretion may be appropriate for first or second offenses but that, by committing a third offense, a felon was proven himself to be a sociopath unworthy of freedom, and deserves to be locked up for life.

That sounds good, too, until we contemplate a twice-convicted felon who has managed to stay straight, gainfully employed and responsible for several years but who then is convicted of buying a stolen radio from a first-offender thief. Would we

(Continued, P. 18)

be willing to sentence him to life imprisonment while allowing the thief the possibility of parole? Would a jury, knowing a conviction would mean a life sentence, be willing to convict?

What confuses us is the notion that the proper test of criminal sanctions ought to be whether they "work" - that is, whether they tend to discourage criminality. The fact is the threat of sanctions works better for some than for others. You might be deterred from crime by the mere prospect of being arrested and charged. Someone else might not be deterred even by the prospect of a long sentence since he expects not to be caught. If deterrence is our goal, shouldn't the law take into account the fact that deterrence is an individual matter?

The idea of fixed sentences without parole might be more palatable if our statutory sentences were not so long. But during periods when we are frightened of crime, it's politically impossible to enact shorter sentences.

One way to ease the dilemma might be to take the average of time actually served for various offenses and make that the fixed, mandatory sentence. That might make the system seem fairer, although it wouldn't necessarily "work" in the sense of reducing the amount of crime.

Perhaps nothing will work in that sense. Else, the very fact of dehumanizing, brutal, grossly overcrowded prisons would diminish crime.

Maybe we'll just have to forget about deterring crime and concentrate on making punishment predictable, consistent and fair.

WILLIAM RASPBERRY

* * * * * *

PAROLE BOARD CHAIRMAN'S VIEWS

Harry Rothgerber, Chairman of Kentucky's Parole Board was quoted in the May 21, 1984 Courier Journal about parole:

Rothgerber said it is a "common misconception" that all prisoners are paroled when first eligible. During the last fiscal year, he said, only about half of the 4,409 inmates who had parole hearings were granted their freedom.

Of the 991 people committed to state prisons since Jan. 1, Rothgerber said, 8.9 percent were parolees who had committed new felonies. Another 19 percent of the 991 represented parolees who committed technical violation such as failure to report or associating with another felon, he said.

He denied that prison overcrowding affects parole decisions in Kentucky and said that doing away with parole would only make the recidivism problem worse.

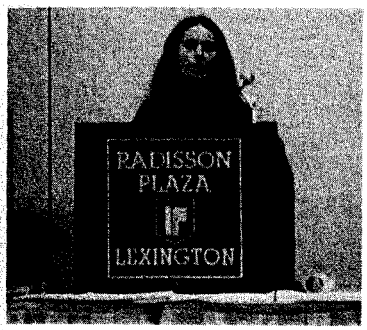
"Many studies have shown that people who serve out their entire sentences return with new sentences at a far greater rate than persons who are released under parole supervision. Supervision is the cornerstone of parole."

* * * * * *

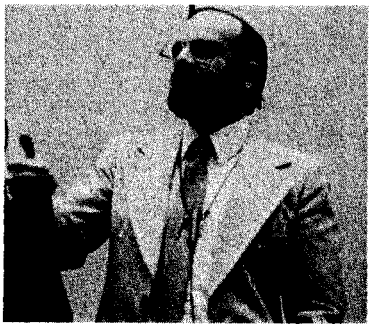
MAY SEMINAR

Over 170 persons attended the 2-1/2 day Annual May Seminar. They were treated to the expertise of Rikki Klieman of Boston, Bill Murphy of Chicago, Ed Imwinkelried of St. Louis, Jim Neuhard of Detroit, Harry Rothgerber and others. Chief Justice Stephens gave the luncheon address.

Thanks to all those that made the seminar such a great success. Don't miss next year's seminar.



RIKKI KLIEMAN



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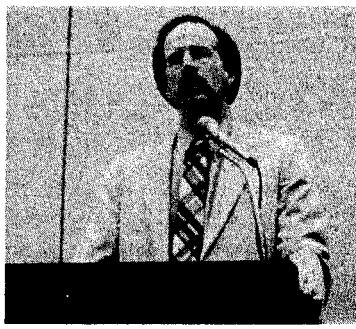
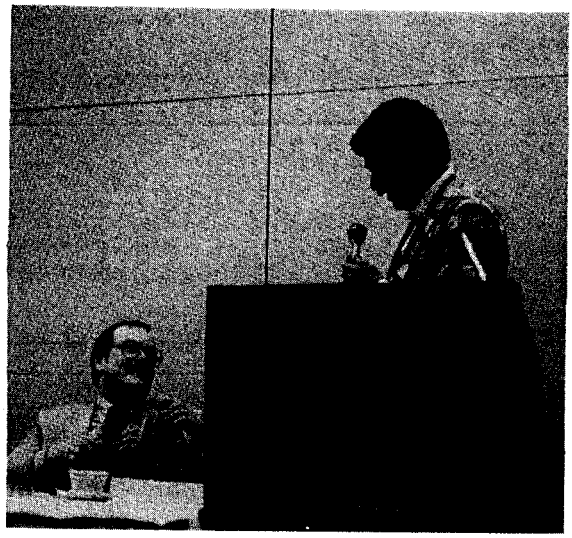


HARRY ROTHGERBER



PAUL PRESENTS JIM WITH DPA T-SHIRT

MAY SEMINAR MATERIALS AVAILABLE

The May Seminar Handouts are available.

Expert Witness List	$ 5.00
Motion File I	$17.50
Motion File II	$17.50
BOTH	$35.00
Seminar Notebook	$15.00

Plus $3.00 postage & handling.

Send check payable to Kentucky State Treasurer to:

May Seminar
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

TRAINING MATERIALS AVAILABLE

The 1984 updated listing of all DPA training materials is now available. The materials include written handouts, audio tapes, and video tapes.

This list will be updated yearly to include all DPA seminar and training materials generated in that year. Each new edition of the list will initially appear at our Annual May Seminar.

Requests for copies of the list or copies of the handouts, contained in the list, should be sent to the library. The audio tapes are available for loan to public defenders. Video tapes may be borrowed for group training, or may be viewed by appointment in Frankfort.

If you have similar materials, which you would like to share with other public defenders, please send a copy of them to the librarian. Any other questions or requests should be directed to:

Karen C. McDaniel
Law Librarian
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601
(502) 564-5252

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Freedom of expression is the indispensable condition of nearly every other freedom.

BENJAMIN CARDOZO

* * * * * *

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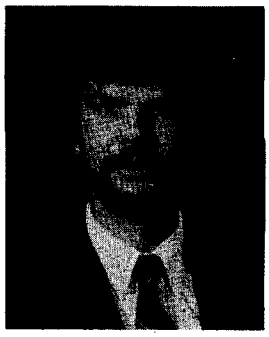
The law must be stable but it must not stand still.

ROSCOE POUND

* * * * * *

The Death Penalty



SUPREME COURT ANNOUNCES STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

On May 14, 1984, the Court handed down its long awaited decisions in United States v. Chronic, 52 L.W. 4560 (1984) [non-capital] and Strickland v. Washington, 52 L.W. 4565 (1984) [capital] on the due process/ Sixth Amendment standard governing claims of ineffective assistance of counsel. The condemned inmate (as did his non-capital equivalent) lost.

Chronic announced when a prejudice inquiry was unnecessary. "There are... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious is the complete denial of counsel.... Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing...." 52 L.W. at 4563. However, this second category of claims is limited to extreme cases. One example is Powell v. Alabama, 287 U.S. 45 (1982)[entire bar appointed]. An acutal conflict of interest is a third situation where prejudice can be presumed. See Cuyler v. Sullivan, 446 U.S. 335 (1980). "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." 52 L.W. at 4563 n.26.

Washington, in turn, announced the standard for evaluating trial attorney performance and for measuring prejudice in capital and non-capital cases alike. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 52 L.W. at 4570. Essentially embracing the standard hinted at in McMann v. Richardson, 397 U.S. 759, 770, 771 (1970), the Court requires a defendant to first show "that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are inappropriate.... The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Justice O'Connor, writing for the majority (7-1-1), notes that the ABA Standards "are guides to determining what is reasonable, but they are only guides." 52 L.W. at 4570.

"A convicted defendant...must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment" and then prove that these "acts or omissions were outside the wide range of professionally competent assistance." 52 L.W.

(Continued, P. 22)

at 4571 (emphasis added). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions... [I]nquiry into counsel's conversations with the defendant may be critical...." Id.

As to the "prejudice" prong of the inquiry, the Court rejects the "strict outcome-determinative test...[used by some courts which] imposes a heavier burden on defendants than the test laid down today." 52 L.W. at 4573. "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." 52 L.W. at 4572. Instead, the Court adopts the same test as for "materiality of exculpatory information not disclosed...." United States v. Agurs, 427 U.S. 97, 104, 112-113 (1976). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 52 L.W. at 4572 (emphasis added).

Counsel's role as an advocate, thus the applicable standard of performance, does not differ significantly between the guilt and sentencing phases. "A capital sentencing proceeding... is sufficiently like a trial in its adversarial format and in the existence of standards for decision... that counsel's role... [is] to ensure that the adversarial testing process works to produce a just result under the standards governing decision." 52 L.W. at 4570. A death row inmate must show "there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 52 L.W. at 4572.

Also at issue was testimony of the state trial judge as to his "mental processes" in sentencing Washington to death. Such testimony, even if admissible (an issue not decided), was "irrelevant to the prejudice inquiry." 52 L.W. at 4574. "The assessment of prejudice... should not depend on the idiosyncrasies of the particular decisionmaker.... [E]vidence about, for example, a particular judge's sentencing practices [such as unusual propensities toward harshness or leniency] should not be considered in the prejudice determination." On the other hand, "assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullifica-

(Continued, P. 23)

tion,' and the like." 52 L.W. at 4572.

The Court does take pains to point out that these standards "do not establish mechanical rules.... In every case the court should be concerned with whether...the result...is unreliable because of a breakdown in the adversary process that our system counts on to produce just results." 52 L.W. at 4573. This flexibility leads Justice Marshall to suggest in dissent (without contradiction by the majority) that "the Court...does not preclude... adjustment of the legal standard" to require that the defendant only "establish a significant chance that the outcome would have been different...." 52 L.W. at 4578. At any rate, the question is a mixed one of law and fact and not "a finding of fact binding on the federal court...." 52 L.W. at 4573.

On the merits, Washington loses on both the performance and prejudice tests. He had gone on a crime spree which included "three brutal stabbing murders" and assorted accompanying felonies. Counsel experienced some "understandabl[e] hopelessness" and "cut his efforts short" when Washington rejected his advice, confessed, pled guilty and waived jury sentencing. 52 L.W. at 4566. "The aggravating circumstances were utterly overwhelming.... [T]he decision not to seek more character or psychological evidence than was already in hand was... reasonable." 52 L.W. at 4573. Likewise, "there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." 52 L.W. at 4574.

In the final analysis, Washington sealed his own fate. Whether the impulsive and, ultimately, deadly waiver of his rights was connected to his relationship, or lack thereof, with his counsel is unknown. It is ironic that this most crucial aspect of the right at issue (that of counselor) is of no interest to the Court and is untouched by any standard. But then again, you can't constitutionalize caring. For a real exposition of the defense advocate's role in a death penalty trial, see Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299 (1983).

EXECUTIONS INCREASE

In the past 4 1/2 months there have been 11 executions, all involuntary. Prior to November, 1983, there had only been 4 involuntary executions since Gregg v. Georgia in 1976. This is a national rate of about 30 executions per year. Prior to 1983, the most executions in any calendar year was two (1979, 1982). The deceased since November of last year are:

9) Robert Sullivan (Fla.) 11/30/83
10) Robert Wayne Williams (La.) 12/14/83
11) John Eldon Smith (Ga.) 12/15/83
12) Anthony Antone (Fla.) 1/26/84
13) John Taylor (La.) 2/29/84
14) James Autry (Tex.) 3/14/84

(Continued, P. 24)

15) James Hutchins (N.C.) 3/16/84
16) Ronald O'Bryan (Tex.) 3/31/84
17) Arthur Goode (Fla.) 4/5/84
18) Elmo Sonnier (La.) 4/5/84
19) James Adams (Fla.) 5/10/84

KENTUCKY'S DEATH ROW

Of course, Kentucky's death row continues to grow slowly, although the total is down one since Todd Ice's reversal became final on May 10, 1984. The condemned and the county of the crime(s) are:

1. GALL, Eugene (Boone)
2. WHITE, Gene (Breathitt)
3. HOLLAND, Jack (Oldham)
4. JAMES, Larry (Oldham)
5. MCQUEEN, Harold (Madison)
6. KORDENBROCK, Paul (Boone)
7. MCCLELLAN, Ray (Jefferson
8. SKAGGS, David (Barren)
9. MARLOWE, Hugh (Harlan)
10. STANFORD, Kevin (Jefferson)
11. MATTHEWS, David (Jefferson)
12. HARPER, Eddie Lee (Jefferson)
13. BEVINS, William (Floyd)
14. WARD, Douglas (Clay)
15. SMITH, David (Pike)
16. WILLOUGHBY, Mitchell (Fayette)
17. HALVORSEN, Leif (Fayette)
18. SLAWTER, James (Jefferson)
19. SANBORN, Parramore (Henry)

HOT ISSUES IN WASHINGTON

It is quite obvious the increasing number of executions is closely related to eight consecutive (and 9 of 10) losses (including two per curiam opinions in Goode and Antone) by death row inmates in the U.S. Supreme Court in the last year. (Previously, the condemned had won 15 of 17). There are still more! "hot" issues before the Court--hopefully they all won't turn cold.

a) MONEY

In Ake v. State, 663 P.2d 1, 6 (Okla. 1983), cert. granted, 104 S.Ct. 1591 (1984), the Oklahoma Court stated: "We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services [court appointed psychiatrist and investigators] to indigents charged with capital crimes." The actual question presented apparently deals only with the denial of expert psychiatric assistance. "Where [an] indigent['s] sanity... is seriously in issue, can [a] state constitutionally refuse to provide any opportunity whatsoever...to obtain [an] expert psychiatric examination ...[for] his insanity defense and [for]... mitigation... and [for] the rebuttal... of predicted future violence proved by state through psychiatric testimony?" 34 Cr.L. at 4239. Interestingly, the Oklahoma court alternatively held "the argument... not preserved..." 663 P.2d at 6. Also of interest is that the Supreme Court sat on the petition from September 13, 1983 until March 19, 1984--an unusual length of time.

Ake "was ejected from his... arraignment... for disruptive

(Continued, P. 25)

behavior... [T]he judge... [sua sponte] ordered...[a] psychiatric evaluation.... [Ake] was found to be mentally ill.... He was subsequently adjudged competent..." and went to trial. 663 P.2d at 5. "[N]one of the psychologists who examined him could offer an opinion [on] the state of the appellant's mental condition prior to the time they observed him." 663 P.2d at 8. Ake presented some expert testimony ("three doctors... a psychologist") but the nature of their testimony remains unclear. 663 P.2d at 8. 10. Ake had "no history of mental illness." 663 P.2d at 10.

b) DRUGS AND COMPETENCY

The second issue in Ake is a competency issue: "Can a state constitutionally force a criminal defendant to be heavily sedated with Thorazine while attending criminal proceedings.. in absence of any evidence that he failed to conduct himself properly in court?" 34 Cr.L. at 4239. "Dr. Garcia [had]... testified that... the dosage of Thorazine... would sedate a normal individual...." 663 P.2d at 7. Ake "remained mute throughout the trial." 663 P.2d at 6. The Oklahoma court had little trouble with this issue. "It is quite possible that the defense of insanity interposed by the appellant fostered such behavior...." 663 P.2d at 7.

c) WITHERSPOON

The principal sources of "due process" death penalty law, aside from the Supreme Court, have been the 5th and 11th Circuits. They have struggled with Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980). Especially problematic has been the standard of review and the degree of deference to be accorded the state trial judge under 28 U.S.C. Sec. 2254(d). See, e.g., O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied sub nom., O'Bryan v. McKaskle, 104 S.Ct. 1015 (1984); Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984) (en banc).

In Mead v. State, 645 S.W.2d 279 (Tex.Cr.App. 1983) (en banc), reh'ing denied, 656 S.W.2d 494 (1983), cert. denied, 104 S.Ct. 1318 (1984), Justices Rehnquist, O'Connor and the Chief Justice voted to grant certiorari on the issue of the standard of review. The Texas court had found a Witherspoon violation (5-4) after allegedly conducting a de novo review of the voir dire. The dissenters denounced the "near chaos" on this issue. "[I]n Witherspoon...cases... the language of deference is conspicuous by its absence." 104 S.Ct. at 1321 n.3. Death qualification, it is said, "has become an elaborate and frustrating process." 104 S.Ct. at 1322 (dissenting opinion).

Justice Stevens, respecting the denial of certiorari, pointedly notes that none of the dissenters were concerned about the issue in O'Bryan where it was extensively briefed but the condemned inmate had lost in the 5th Circuit (2-1), only to be executed shortly thereafter. Anyway, Stevens writes, the "question is not... presented... in [the] petition in this case." 104 S.Ct. at 1319 (concurring opinion).

(Continued, P. 26)

Shortly thereafter, the Court granted certiorari in Wainwright v. Witt, 35 Cr.L. 4029 (1984), a case where the 11th Circuit had granted relief on Witherspoon grounds to a Florida death row inmate. The relevant voir dire exchange was:

> PROSECUTOR: Now, would [your personal beliefs against the death penalty] interfere with you sitting as a juror in this case?
>
> JUROR: I am afraid it would.
>
> * * * *
>
> PROSECUTOR: Would it interfere with judging the guilt or innocence of the defendant in this case?
>
> JUROR: I think so.

Witt v. Wainwright, 714 F.2d 1069, 1081-82 (11th Cir. 1983). On the deference issue, the panel stated it didn't matter what standard of review was used. "We are convinced that the trial court erred in finding cause for excusal in this instance under even the least rigorous standard of appellate review." 714 F.2d at 1083 n.11

d) JURY OVERRIDE

Arguably, in Kentucky, as in Florida, the judge technically has the power to reject a jury "recommendation" of life or less in a capital case. KRS 532.025 (1)(b). Certainly, the converse is true. If it finds the existence of one or more aggravating circumstances... [the jury] is authorized to recommend the death penalty, but the trial judge is not bound to impose it." Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980), cert. denied 450 U.S. 989 (1981). As a practical matter, override never happens in Kentucky. Of approximately 75 jury recommendations in 7 1/2 years, none were rejected by the judge.

This is not true in Florida. "[A]ccording to a University of North Florida survey of 214 capital cases, judges lowered sentences on just five occasions. They increased them 22 times.... Of the 83 instances so far [of jury override] 21 have been upheld--but 34 judges have themselves been reversed for reversing juries." NEWSWEEK at 81 (April 30, 1984).

The Supreme Court has suggested that jury override is constitutional. Proffitt v. Florida, 428 U.S. 242, 252 (1976); Dobbert v. Florida, 432 U.S. 282, 294-96 (1980); Barclay v. Florida, 103 S.Ct. 3418, 3426-27 (1983)(Stevens and Powell, J.J. concurring). Nevertheless, the Court has granted certiorari on this question. Spaziano v. State, 433 So.2d 508 (Fla. 1983), cert. granted, 34 Cr.L. 4159, argued, 35 Cr.L. 4010 (1984).

e) LESSER INCLUDED

Also at issue in Spaziano is whether a death sentence is unconstitutional when the "jury was not instructed as to any lesser included offenses because [the] statute of limitations had run...." 35 Cr.L. at 4010. See Beck v. Alabama, 447 U.S. 625 (1980).

f) DOUBLE JEOPARDY

In Rumsey v. State, 665 P.2d 48 (Ariz. 1983), cert. granted, 34 Cr.L. 4141 (1984), the Court has

(Continued, P. 27)

decided to take another look at Bullington v. Missouri, 451 U.S. 430 (1981) in another context. In Bullington, the Court held that a death sentence was barred on remand by the double jeopardy clause after an initial verdict of the jury sentenced Bullington to life imprisonment. In Rumsey, the question is whether a trial judge may resentence a defendant to death after initially sentencing him to life imprisonment based on an erroneous interpretation of state law that an aggravating circumstance did not exist. Of some worry is the slim majority in Bullington (5-4) and the replacement of Justice Stewart, who was in the majority, with Justice O'Connor.

g) ARBITRARINESS AND DISCRIMINATION

As discussed in The Advocate (Vol. 6, No. 2) at 12-13 (February 1984), some executions in Georgia have been halted pending evidentiary hearings on claims of arbitrariness and discrimination. Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983), stay granted, 104 S.Ct. 562 (Dec. 13, 1983). Further action awaits the 11th Circuit's en banc decision in Spencer v. Zant, 715 F.2d 1562, 1578-83 (11th Cir. 1983), reh'ing en banc granted, 715 F.2d 1583 (1983). Recently an evidentiary hearing was held in another case on arbitrariness and discrimination and the district court ruled against the death row inmate in a lengthy opinion. McClesky v. Zant, 580 F.Supp. 338-403 (N.D.Ga. 1984) (to be argued in the 11th Cir. in June, 1984). The claim is based on a comprehensive study of Georgia homicides by David Baldus of the University of Iowa.

The most recent execution, of James Adams, took place despite similar claims "that the death penalty is administered on the basis of impermissible factors, including race and geography" (in Florida instead of Georgia). On May 8, 1984, a panel of the 11th Circuit granted Adams a stay on the basis of this claim because it "only became available to him after his first federal habeas corpus proceedings." The next day the Supreme Court lifted the stay without comment. Justices Marshall and Brennan dissented, complaining bitterly that the Court refused to even "defer its action for 24 hours in order for [us] to write a more elaborate dissent..." Here, "caution has been thrown to the winds with an impetuousness and arrogance that is truly astonishing." Wainwright v. Adams, 52 L.W. 3820 (1984)(dissenting opinion).

Death as a punishment touches us all, even those at the top. As Justice Brennan felt compelled to write recently: "It is difficult to believe that the decision whether to put an individual to death generates any less emotional pressure among juries, trial judges, and appellate courts than it does among Members of this Court." Washington, 52 L.W. at 4574 n.1 (concurring and dissenting opinion).

KEVIN MCNALLY

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POLYGRAPHIST LEAVES

On February 1, 1984 **Jim Lord**, a Department of Public Advocacy polygraphist for 9-1/2 years, resigned from the Department. He continues in private practice in Louisville.

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ATTORNEYS RESIGN

Russell Johnson, our public defender for Lyon, Caldwell, Trigg Counties and the penitentiary resigned from the Department on January 31, 1984. He continues doing public defender work for us while in private practice in Caldwell County.

Kip Cameron, director of the Christian/Hopkins public defender office resigned May 4, 1984 to enter private practice in Christian County.

* * * * * *

"Don't tell me about justice delayed, counselor! I was delaying justice before you were born!"

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Bill Hoest and Parade Magazine

NATIONAL CENTER TO CONDUCT SURVEY OF DEFENSE COUNSEL WITH GBMI EXPERIENCE

The National Center for State Courts located in Virginia is conducting a national survey on the impact of guilty but mentally ill (GBMI) legislation on the criminal justice system in state courts.

Any criminal defense attorney, whether appointed or retained, who has been involved in a case or cases in which the GBMI instruction was given is requested to furnish his or her name, address and phone number as well as the name of <u>each</u> client whose case involved a GBMI instruction to Vince Aprile, Department of Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601. This information should be forwarded as soon as possible to insure inclusion in the survey.

The Department of Public Advocacy will compile a list of defense attorneys and clients whose case involved the GBMI instruction and furnish that to the National Center for State Courts. Defense attorneys may be selected for later telephone contact and interviews by the National Center for State Courts.

VINCE APRILE

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Bumper sticker seen in Lexington:

When You're Right, Be Logical.
When You're Wrong, Befuddle.

* * * * * *

Trial Tips

A POTPOURRI OF FORENSIC SCIENCE[1]

This is the second of a two part series by Edward J. Imwinkelried. The first part of the article appearing in the last issue of The Advocate dealt with general trends of forensic science, including pretrial appointment of defense experts and the standard for admitting scientific evidence at trial.

This second part updates a number of specific scientific techniques.

II. RECENT DEVELOPMENTS IN SPECIFIC SCIENTIFIC TECHNIQUES

A. BLOOD

There are some excellent, new references on serological evidence. For example, Kolko, "Admissibility of HLA Test Results to Determine Paternity," 9 Family Law Reporter 4009 (Feb. 15, 1983) is a state-by-state survey of the admissibility of inclusionary HLA test evidence. The article documents a trend toward the routine admission of the evidence.

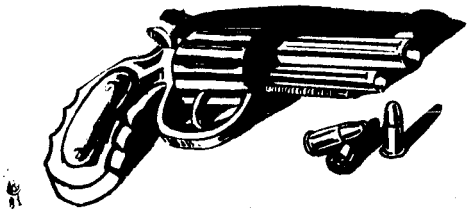
However, other articles sound a cautionary note about the statistical interpretations of HLA and electrophoresis evidence; specifically, the articles attack the population frequencies that the computations are based upon. In "A Few Things You Should Know About Paternity Tests (But Were Afraid to Ask)," 22 Santa Clara Law Review 667 (1982), Professor Paterson attacks the population frequencies used in HLA evidence. He charges that "some of the data about HLA haplotype frequencies is still very sketchy." Professor Jonakait advances the same argument in "When Blood Is Their Argument: Probabilities in Criminal Cases, Genetic Markers, and, Once Again, Bayes' Theorem," 1983 University of Illinois Law Review 369. He notes that: the frequencies are based on donors at blood banks, a non-random group; in some cases, witnesses have been permitted to cite unpublished data as the basis for their testimony; and to date, the number of persons tested for some genetic markers is relatively small. The author quotes a 1980 Public Health Service report, declaring that "although some genetic marker systems have been known for longer than 75 years...no reliable frequency data exists on population as a whole, for various U.S. geographic re-

(Continued, P. 30)

[1]This article is partly based on the author's "Scientific Evidence Updates" in the Fourth Annual Institute on Defense of Criminal Cases published by Georgetown University Law Center. This article appeared in Vol. 8, No. 1 of The Champion, the magazine of the National Association of Criminal Defense Lawyers.

gions, or for sub-classifications by age or sex." The author concludes that many of the available population frequency statistics are at best approximations.

B. BALLISTICS

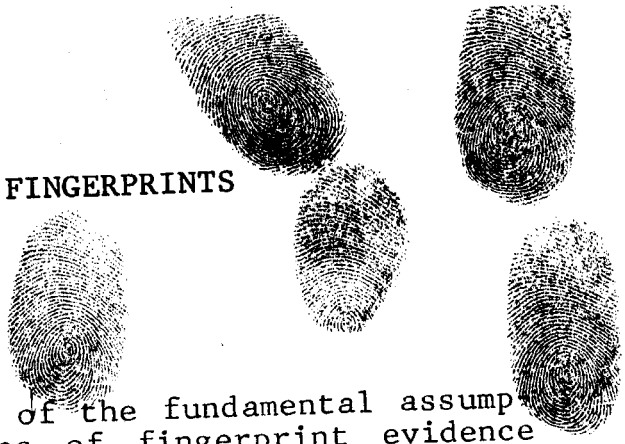


The prosecution sometimes presents ballistics testimony determining the position of the shooter who discharged a firearm. Nennstiel, "Accuracy in Determining Long-Range Firing Position of Gunman," 20 Forensic Science International 257 (1982) discusses the trustworthiness of such testimony. According to the author, several factors affect the accuracy of the determination:

- the bullet's impact angle,
- the longitudinal wind speed,
- the curve for the air resistance coefficient, and
- the bullet's initial velocity.

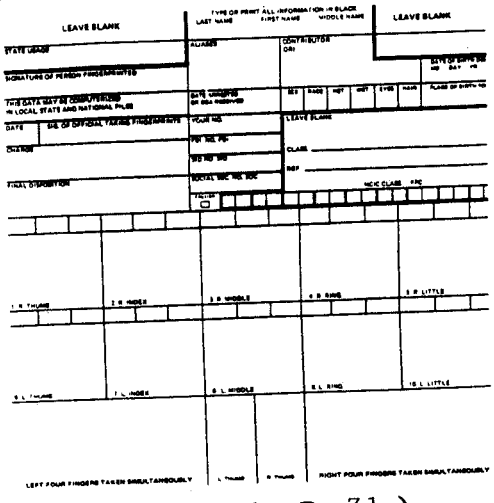
The author stresses that it is difficult or impossible for the ballistics expert to know the correct numbers to insert in the variables. The author concludes that "it is only possible to indicate a region within which the firing point can be found when due account is taken for all the error effects. The effect of longitudinal wind and the fact that the initial velocity is never known exactly give rise unavoidably to inaccuracy in the indication of the range."

C. FINGERPRINTS



One of the fundamental assumptions of fingerprint evidence is that a person's ridge pattern remains constant throughout the person's life. Caarrick, "Ridge Count Reduction," 7 Fingerprint Whorld 71 (1982) reports a case that calls that assumption into question. In the case, an analyst compared fingerprint cards for the same person's right index finger. The cards were made 12 years apart. The second card showed a distinct reduction in the number of ridges even though there had been no intervening damage to that hand.

Research is ongoing to perfect a technique for lifting latent fingerprints off human skin. That technique would be particularly useful in prosecutions for violent crimes such as rape. Menzel, "Laser Detection of Latent Fingerprints on Skin," 27 Journal of Forensic Sciences 918 (1982) discusses



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methodologies for detecting latent fingerprints on the skin of cadavers. Professor Menzel, who teaches at Texas Tech University, is one of the leading authorities on this subject in the world. On the one hand, he believes that the techniques are promising. However, he adds the caveat that "extensive additional research" is needed before the techniques are trustworthy enough to be used in the courtroom.

D. HYPNOSIS

A student Note at 60 Washington University Law Quarterly 1059 (1982) contains an excellent summary of the case law on the admissibility of hypnotically enhanced testimony. The September/October issue of The CHAMPION included Roy Greenwood's "A Review of Hypnotically Induced/Enhanced Testimony" with even more recent citations. During the past year, state appellate courts rendered several decisions that are helpful to the defense and worth highlighting.

In State v. Stolp, 650 P.2d 1195 (Ariz. 1982), the court struggled with the application of the harmless error standard to the erroneous admission of hypnotically enhanced testimony. In Stolp, the primary defense was misidentification. The hypnotized victim was the only witness to her assault. Given this state of the record, the court found the error to be harmful and reversible.

In Strong v. State, 435 N.E.2d 969 (Ind. 1982), the trial judge admitted a composite drawing that was the product of an impermissibly suggestive hypnotic session. The appellate court held that, like recall based on the session, the drawing was inadmissible.

In People v. Gonzalez, 32 Crim. L.Rep. (BNA) 2386 (Mich.Sup.Ct. Dec. 23, 1982), the Michigan Court followed the lead of the California Supreme Court in Shirley. The Michigan Court underscored the distinction between using hypnosis as a therapeutic tool and employing hypnosis to enhance memory: "Until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion, or fantasy, and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses has been attained by hypnosis must be excluded in criminal cases."

In People v. Hughes, 452 N.Y.S.2d 929 (App.Div. 1982), New York joined the ranks of the jurisdictions holding that hypnotic enhancement has not gained sufficient general acceptance to satisfy the Frye test.

In State v. Peoples, 299 S.E.2d 311 (N.C. Ct.App. 1983), the court held that hypnotically enhanced testimony is admissible. However, at trial the judge not only accepted the testimony; the judge also allowed the prosecution to present a videotape of the hypnotic session. The appellate court held that it was error to show the videotape to the jury.

(Continued, P. 32)

E. INTOXICATION TESTS

In early 1982 Smith & Wesson issued a Customer Advisory about its Model 1000 Breathalyzer. The Advisory alerted customers to the possibility that radio frequency interference (RFI) could distort the breathalyzer's readings. At that time, the advisory was limited to the newer Model 1000 which is supposedly more sensitive to RFI than the older Models 900 and 900A. However, in September 1982, Smith & Wesson released another advisory. That advisory states:

> Earlier this year Smith & Wesson issued a customer advisory outlining a potential problem with the Breathalyzer Model 1000's susceptibility to radio frequency interference. Preliminary tests conducted at that time on the Breathalyzer Models 900 and 900A did not indicate a problem. Continuing investigation now suggests this early series of breath-testing instruments may be affected in an unpredictable manner by various frequencies and power levels. Further, the extent of sensitivity to particular frequencies and particular power levels will vary from instrument to instrument.

The second advisory is important because the Model 900 series has captured approximately half the national market for breath-testing instruments. Some states rely exclusively on Model 900 series instruments. In "The Questionable Accuracy of Breathalyzer Tests," Trial, June 1983, at 54, Messrs.

Feldman and Cohen review the research into the topic of RFI. They point out that "the judge in Duran v. City of Woonsocket granted...a statewide injunction prohibiting the use of the model 900A pending regulations by the state Department of Health concerning methods of testing for RFI and acceptable standards of deviation." The prevailing attorneys in Durand, Messrs. John Tarantino and Michael Kelly, describe the background of the case in "How to Get the State to Dismiss Your Case and Pay Your Attorney Fees" in The CHAMPION, Sep./Oct. 1983, at 9. Durand was decided by a Providence County Superior Court in Rhode Island; the docket number is 82-4808. The court not only issued the injunction; the court further found a violation of civil rights under 42 U.S.C. Sec. 1983 and awarded $15,000 in attorney fees. Freed, "Radio Frequency Interference with the Model 1000SA Alco-Analyzer Gas Chromatograph," 28 Journal of Forensic Sciences 985 (1983) adds that the GC is also subject to RFI.

The RFI research enables the defense attorney to challenge the operational condition of the breathalyzer at the time of the test. New legal and scien-

(Continued, P. 33)

tific research is opening up other avenues of attack. For example, assume that the breathalyzer was in perfect working condition. The breathalyzer measures breath alcohol and converts that measurement into a blood alcohol reading. Thompson, "The Constitutionality of Chemical Test Presumptions of Intoxication in Motor Vehicle Statutes," 20 San Diego Law Review 301 (1983) attacks the conversion. The author points out that most states have statutory presumptions regarding intoxication; thus, in most states, if the defendant's blood alcohol concentration exceeds 0.10%, the subject is presumptively intoxicated. In some states, the presumption is permissive; but in other jurisdictions, the inference is mandatory. Moreover, some statutes creating the presumption refer to "blood alcohol concentration as determined by chemical analysis of breath." The conversion from breath alcohol to blood alcohol is made on the basis of a 1:2,100 ratio; the analyst assumes that there is as much alcohol in one part of blood as there is in 2,100 parts of breath. In states with mandatory presumptions, the statute in effect requires the jury to accept the 1:2,100 ratio. The author assails that practice under the Supreme Court's 1979 decision in County Court of Ulster County v. Allen, 442 U.S. 140 (1979). In that case, the Supreme Court announced that the due process standard for the constitutionality of a presumption varies, depending on whether the "presumption" embodies a permissive or mandatory inference. If the "presumption" is merely a permissive inference, the presumption is valid so long as the underlying or foundational fact makes it more likely than not that the presumed fact exists. However, when the "presumption" operates as a mandatory inference, the foundational facts must have sufficient probative value to establish the presumed fact beyond a reasonable doubt. Applying the latter standard, the author asserts that mandatory inferences, based on breath tests, are unconstitutional. The author states that the 1:2,100 ratio may be true as an average; but the published studies document a wide range from 1,600 to 3,200 and there is little data as to the frequency distribution of conversion ratios. Consequently, although the ratio may satisfy the standard for permissive inferences, the ratio arguably violates the test applicable to mandatory inferences.

Now assume that there is no problem with the 1:2,100 conversion ratio. The statute criminalizing drunken driving typically forbids only the act of driving while intoxicated, and the breathalyzer test ordinarily occurs sometime after the act of driving. The prosecution experts often work backward in time from the test to the time of driving on these assumptions: The subject's BAC peaked 20 minutes after the end of consumption; after peaking, the BAC steadily; and the decline was at the rate of 0.015% per hour. Comment, "Driving With 0.10% Blood Alcohol: Can the State Prove It?" 16 University of San Francisco Law Review 817 (1982) questions those assumptions.

(Continued, P. 34)

The comment surveys scientific research, including a recent study by the United States Department of Transportation. The comment concludes that:

- For some persons, the BAC peak does not occur until two hours after the end of consumption.

- The BAC of some persons does not decline steadily; it can peak, decline, peak again, and then decline.

- The rate of decline or elimination varies from person to person. Some persons have elimination rates as fast as 0.040% per hour.

- The rate of decline is not even constant for a particular person. A person's elimination rate can vary, depending on what the person has eaten immediately before alcohol consumption.

F. PATHOLOGY

One of the most difficult determinations for the pathologist is time of death. The recent literature discusses the contribution that entomology can make to that determination. "Tale Told by a Fly," 69 American Bar Association Journal 571 (1982) discusses the research by Dr. Bernard Greenberg of the University of Illinois in Chicago. Dr. Greenberg has found that different types of insects are attracted to a cadaver at different postmortem periods. Thus the presence of a particular type of insect on the body can aid the pathologist in determining the time of death. Rodriguez and Bazz, "Insect Activity and its Relationship to Decay Rates of Human Cadavers in East Tennessee," 28 Journal of Forensic Science 423 (1983) correlates the rate of decay with the succession of insect species found on the cadaver in that geographic region.

G. POLYGRAPHY

Witherspoon v. Superior Court, 183 Cal.Rptr. 615 (1982) holds that under the California Evidence Code, the defendant is entitled to a pretrial evidentiary hearing at which he or she may attempt to demonstrate the admissibility of polygraph evidence; the judge may not summarily exclude the evidence. The court remarked that "we can perceive of no sound legal basis for denying defendant the opportunity to persuade a trial judge of the expert qualifications of the polygraph examiner and of the validity of the basic premises upon which the examiner's opinion is based." A defense attorney may invoke Witherspoon in any state which has adopted a version of the Federal Rules of Evidence, including Rule 402. Rule 402 provides that if an item of evidence is relevant, the

(Continued, P. 35)

evidence is admissible unless there is authority to exclude the evidence under a constitution, statute, or court rule. The rules themselves do not contain any express ban on polygraph evidence, and in most states there is no constitutional provision or statute excluding the evidence. The exclusionary rule is a creature of case law, namely the Frye decision. Hence, the proponent of polygraph evidence should be entitled to an opportunity to demonstrate the relevance of the evidence, that is, that the evidence passes muster under Rules 401 (logical relevance) and 403 (legal relevance).

New Mexico has adopted an amendment to its version of the Federal rules, expressly permitting the introduction of polygraph evidence even absent a stipulation:

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE
ADOPTION OF RULE 707 OF THE
RULES OF EVIDENCE

This matter coming on for the consideration by the court, and the court being sufficiently advised, Mr. Chief Justice Payne, Mr. Senior Justice Sosa, Mr. Justice Federici, Mr. Justice Riordan and Mr. Justice Stowers concurring:

NOW THEREFORE, IT IS ORDERED that Rule 707 of the Rules of Evidence be and the same is hereby adopted.

IT IS FURTHER ORDERED that the adoption of Rule 707 shall be effective for all cases filed on or after June 1, 1983;

IT IS FURTHER ORDERED that the clerk of the court be and she hereby is authorized and directed to give notice of the adoption of Rule 707 of the Rules of Evidence by publishing the same in the NMSA 1978.

DONE at Santa Fe, New Mexico this 20th day of April, 1978.

RULES OF EVIDENCE

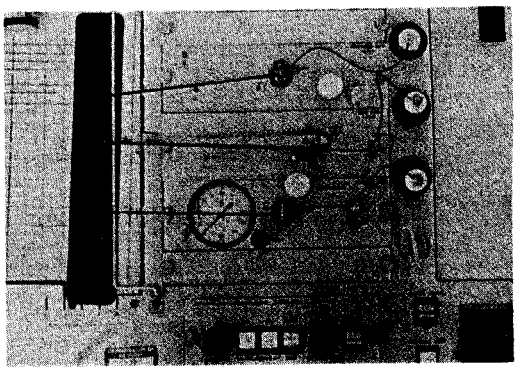
Rule 707. Polygraph examinations.

(a) Definitions. As used in this rule:

(1) "charts" means the record of bodily reactions by a polygraph instrument that is attached to the human body during a series of questions:

(2) "polygraph examination: means a test using a polygraph instrument which at a minimum simultaneously graphically records on a chart the physiological changes in human respiration, cardiovascular activity, galvanic skin resistance or reflex for the purpose of lie detection:

(3) "polygraph examiner" means any person who is qualified to administer or interpret a polygraph examination; and



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(4) "relevant question" means a clear and concise question which refers to specific objective facts directly related to the purpose of the examination and does not allow rationalization in the answer.

(b) Minimum qualifications of polygraph examiner. To be qualified as an expert witness on the truthfulness of a witness, a polygraph examiner must have at least the following minimum qualifications:

(1) at least five years experience in administration or interpretation of polygraph examinations or equivalent academic training;

(2) conducted or reviewed the examination in accordance with the provisions of this rule; and

(3) successfully completed at least twenty hours of continuing education in the field of polygraph examinations during the twelve month period immediately prior to the date of the examination.

(c) Admissibility of Results. Subject to the provisions of this rule, the opinion of a polygraph examiner may in the discretion of the trial judge be admitted as evidence as to the truthfulness of any person called as a witness if the examination was performed by a person who is qualified as an expert polygraph examiner pursuant to the provisions of this rule and if:

(1) the polygraph examination was conducted in accordance with the provisions of this rule;

(2) the polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts:

(3) prior to conducting the polygraph examination the polygraph examiner was informed as to the examinee's background, health, education and other relevant information;

(4) at least two relevant questions were asked during the examination; and

(5) at least three charts were taken of the examinee.

(d) Notice of examination. Any party who intends to use polygraph evidence at trial shall, not less than ten days before trial or such other time as the district court may direct, serve upon the opposing party a notice in writing of his intention to use such evidence. The following reports shall be served with the notice:

(1) a copy of the polygraph examiner's report, if any;

(2) a copy of each chart;

(3) a copy of the audio or video recording of the pre-test interview, actual testing and post-test interview; and

(4) a list of any prior polygraph examinations taken by the examinee in the matter under question, including the names of all persons administering such examinations, the dates and results of the examinations.

(Continued, P. 37)

(e) Recording of tests. The pre-test interview and actual testing shall be recorded in full on an audio or video recording device.

(f) Determination of admissibility. The court shall make a determination as to the admissibility of a polygraph examination outside the presence of the jury.

(g) Compelled polygraph examinations. No witness shall be compelled to take a polygraph examination over objection. However, for good cause shown, the court may compel the taking of a polygraph examination by a witness who has previously voluntarily taken an examination and has been given notice pursuant to Paragraph (d) that the party intends to use the polygraph examination. If a witness refuses to take a polygraph examination ordered by the court under this paragraph, opinions of other polygraph examiners as to the truthfulness of the witness shall be inadmissible as evidence. [Adopted, effective October 1, 1983]

H. PSYCHIATRY

Both defense counsel and prosecutors attempted to introduce innovative psychiatric evidence during the past year. For their part, defense counsel attempted to persuade the courts to accept premenstrual syndrome evidence (PMS). There is an excellent discussion of the syndrome in Taylor & Dalton, "Premenstrual Syndrome: A New Criminal Defense," 19 California Western Law Review 269 (1983). The syndrome is the result of a deficiency in the defendant's level of the hormone progesterone. That deficiency triggers a behavioral disorder; it can influence and perhaps even cause antisocial behavior. The authors acknowledge there are medical and legal controversies surrounding the syndrome. Some physicians dispute that the syndrome exists; and the opponents of the syndrome's admission in court argue both that the syndrome is too novel to satisfy Frye and that the syndrome cannot qualify as insanity in a M'Naghton jurisdiction with a strictly cognitive definition of insanity. However, there is growing recognition of the syndrome within medical circles; and the courts in England and France have already accepted testimony about the syndrome. The authors

contend that in the United States; the syndrome should qualify as insanity in the jurisdictions following the Model Penal Code test including a behavioral element. Moreover, syndrome evidence should qualify as mitigating matter during sentencing.

In People v. Santos, 1K046229 in Brooklyn, the defendant announced that she intended to raise a PMS defense. The defendant was charged with assault and endangering the welfare of a child. The case promised to be the first American test of the admissibility of PMS evidence. How-

(Continued, P. 38)

ever, before trial, the prosecution and defense entered into a plea bargain, reducing the charge to a misdemeanor. The Brooklyn District Attorney, Elizabeth Holtzman, stated that the PMS issue had no effect on the disposition of the case, she asserted that the bargain was merely "an appropriate disposition." However, the defendant's Legal Aid lawyer, Stephanie Benson, asserted that it was the potency of PMS as a defense that persuaded the district attorney's office to offer such a favorable plea bargain.

For their part, prosecutors pressed for acceptance of rape trauma syndrome evidence. Prosecutors suffered a defeat in a Missouri case, People v. Taylor, 33 Crim.L.Rep. (BNA) 2123 (Mo.App. March 15, 1983). In that case, an intermediate appellate court questioned the scientific status of rape trauma syndrome and added that the admission of such evidence would "inevitably lead to a battle of the experts that would...add confusion rather than clarity." The state appealed the decision, and the case has already been argued before the Missouri Supreme Court. A decision should be forthcoming soon.

I. SPEED DETECTION

In 1981, the Illinois Department of Law Enforcement Bureau of Planning and Development issued its report, MOVING RADAR - AN ASSESSMENT OF ITS ROLE IN TRAFFIC LAW ENFORCEMENT. The report is a comprehensive collection of the legal and technical literature on stationary and moving radar. The report contains a discussion of the various malfunctions that moving radar is prone to you. You can obtain a copy of the report by writing to the Bureau in Springfield, Illinois 62701.

On March 10, 1982, in the Sanders case, a King County, Washington, Superior Court judge found that state patrolmen's training is inadequate to permit convictions on the basis of their radar testimony. Judge David Summers issued an opinion, noting that in Washington there are no minimum qualifications for certification of radar operators and no established standards of competence for the police academy instructors who train patrolmen in the use of radar. Although the record reflected that each patrolman received 30 hours of formal training in radar operations at the police academy, that testimony did not convince Judge Summers that Washington patrolmen are competent to detect operational errors and malfunctions in radar equipment.

J. TRACE METAL DETECTION

People v. Gallagher, 32 Crim.L. Rep.(BNA) 2383 (Colo.Sup.Ct. Jan. 10, 1983) involved trace metal detection evidence. TMDT is a technique for determining whether a person has recently held a metalic object. In Gallagher, the defendant was arrested for murder. From the outset, the defendant claimed that he killed his wife in self-defense; he told police that his wife pointed a pistol at him and that the pistol accidentally discharged while he attempted to disarm his wife. Defense counsel immedi-

(Continued, P. 39)

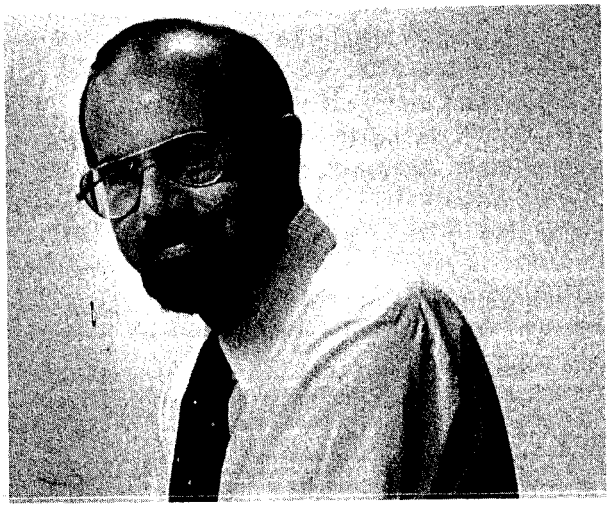
ately requested that the police department conduct a TMDT test of the victim's hands. The police crime laboratory denied the request. The body was taken to a mortuary. To prepare the body for burial, the mortician massaged the victim's hands with a solution of surgical soap and Clorox bleach - a procedure which precluded a subsequent TMDT test. At trial, the expert testimony indicated that "[o]nly in approximately four percent of tests conducted under laboratory conditions on a subject who has held metal is it possible to identify the particular object that was grasped." Nevertheless, the Colorado Supreme Court held that the failure to conduct the test denied the defendant due process. The court declared:

> Under the circumstances here we conclude that at a minimum the prosecution had the duty to preserve the hands in a condition suitable for testing and to make available to the defendant an opportunity for independent trace metal testing of the victim's hands before trial. It failed to do so, with the result that the defendant has been deprived of due process of law.

As a sanction for the violation, the court reduced the conviction from first degree murder to second degree.

K. WITNESS PSYCHOLOGY

In a rare decision, State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983), the Arizona Supreme Court held that a trial judge erred by excluding expert testimony on the inaccuracy of



EDWARD J. IMWINKELRIED

eyewitness identification. The court acknowledged that the trial judge has great discretion in deciding whether to admit expert testimony on this subject. However, the court added that in the instant case, there was a clear abuse of discretion. The eyewitnesses in question had never seen the defendant before the day of the crime, and they picked the defendant out of a photographic lineup more than a year after the crime.

III. CONCLUSION

At first glance, the developments during 1982-83 seem paradoxical. The trend toward the relaxation of the general standards for admitting scientific evidence is continuing. When Coppolino v. State, 223 So.2d 68 (Fla. Dist. Ct.App. 1968) was decided in the late 1960's, it was an isolated case; and the regime of Frye hardly seemed threatened. Today Frye's precedential value is suspect in almost a third of the states. However, in the same year in which the courts

(Continued, P. 40)

continued the erosion of Frye, the courts exhibited new skepticism about some particular scientific techniques, notably intoxication tests and a radar. These two trends appear contradictory.

However, the contradiction is more apparent than real; both trends are the product of the courts' growing familiarity with scientific evidence. In part, the courts' rigid adherence to Frye in the past reflected the courts' unfamiliarity with scientific evidence; scientific proof seemed strange and unfamiliar, and the courts understandably reacted by erecting formidable barriers such as the general acceptance standard to the admission of scientific evidence. As the courts become increasingly familiar with scientific evidence, their growing sophistication may make them less fearful that scientific evidence will overwhelm the trial judge and jurors. However, the same increasing sophistication enables the courts to be more selective and discriminating in their evaluation of particular scientific techniques. The more knowledgeable the courts become in the field of scientific evidence, the more apt the courts are to ask the right, discerning questions: To what extent has the scientific technique been experimentally verified? Are there any factors such as RFI that can cause the instrument to malfunction? Does the expert have reliable population frequency figures as the basis for the expert's statistical opinion? The courts have largely overcome their initial, undifferentiated fear of scientific evidence; and the task now facing the defense bar is to learn enough science to teach the courts about the precise weaknesses of the forensic techniques profferred in the courtroom.

Mr. Imwinkelried is a professor of law at Washington University in St. Louis, Missouri. In the past 12 months he released two books, The Methods of Attacking Scientific Evidence (Michie Publishing Co.). He has also completed a manuscript (called Uncharged Misconduct Evidence (Callaghan & Co.)), which should be released in May of 1984. He has begun work, in collaboration with Professor Paul Giannelli at Case Western Reserve University, on a Scientific Evidence treatise for Michie Publishing Co.; and he has just agreed to write a test on pretrial and discovery for Callaghan & Co.

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DEFENSE'S ATTORNEYS RESPONSIBILITIES AT SUSPICION STAGE

Few guarantees are more important than the right to have guilt proven beyond a reasonable doubt absent being compelled to incriminate oneself. As a practical matter, the giving of a confession by a defendant and its admission into evidence dramatically alters a trial. A statement of guilt, true or untrue, is a nearly impossible psychological hurdle for a jury to surmount.

As public defenders, we bear a special responsibility to insure that indigent clients are "...counseled and defended at all stages of the matter beginning with the earliest

(Continued, P. 41)

time when a person providing his own counsel would be entitled to be represented by an attorney...." KRS 31.110 (2)(a). This means that a "needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed...a serious crime..." is entitled to be represented by a public defender. KRS 31.110 (1)(a) (emphasis added).

There is no point in providing superb legal representation at trial if the case is for all practical purposes over due to a statement given by an uncounseled defendant at an early stage in the accusatory process. As legal representatives for the needy, we have an obligation to represent them from the inception of their legal problem. Anything less makes our subsequent assistance significantly less meaningful.

As stated in Amsterdam, Trial Manual 3 for the Defense of Criminal Cases (1977): "The first and most emphatic advice that the attorney should give a client reached by telephone, is to say nothing to the police, to tell them nothing at all, and to answer no questions from the police until the attorney and client have had a further chance to talk privately. (Do not tell the client, make no statement to the police. Many clients think a "statement" means a signed confession. Tell him, Say nothing to the police officers; nothing at all, except that your lawyer told you to say nothing. If they ask you any questions or try to talk to you at all -- about anything -- tell them your lawyer told you not to talk. If they say anything about having evidence against you, or if they tell you what the evidence is, or if they bring in someone else who says something against you, then they are just trying to get you to talk. Don't fall for it. Whatever they say, tell them your lawyer told you not to talk.)

The client should be told to refuse to answer all police questioning very politely, on the advice of his attorney. He should also be told to say nothing to anyone else, including cellmates, persons arrested with him, codefendants, their attorneys, and reporters. It is not uncommon for detectives or police to listen through extensions to telephone calls made or received by defendant in custody. The conversation, therefore, except for the advice to remain silent, should be most circumspect. Counsel should also ask to speak to the officers who have the defendant in charge and should (a) tell them that he has informed the defendant to say nothing and to answer no questions until the lawyer arrives, (b) demand, specifically but politely, that the defendant not be questioned further until he has had a chance to discuss the matter with counsel, and (c) request the officers' name, rank and number. If the whereabouts of the defendant has been determined, but the attorney is unable to speak to him on the telephone, then the demand that the defendant not be questioned until the attorney can be present should nevertheless be made by telephone to the

(Continued, P. 42)

detective or officer having custody of the defendant."

We must provide competent, aggressive representation at the outset of a person's criminal difficulties -- not after irrevocable damage is done.

ED MONAHAN

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Legislative Update

Mike Maloney is a Senator for the Thirteenth District which includes Fayette County. He has practiced as a criminal defense lawyer for 15 years in Lexington.

Legislation enacted by the 1984 session of the General Assembly will go into effect July 13, except for those matters which carried either an emergency clause or a different specific effective date. Several additions and changes to statutes relating to criminal defense practice were enacted during the session. The following is a brief summary of the more significant additions or changes. Copies of the legislation can be obtained by contacting the Legislative Research Commission, Third Floor, State Capitol Building, Frankfort, Kentucky 40601, or by phoning (502) 564-8100.

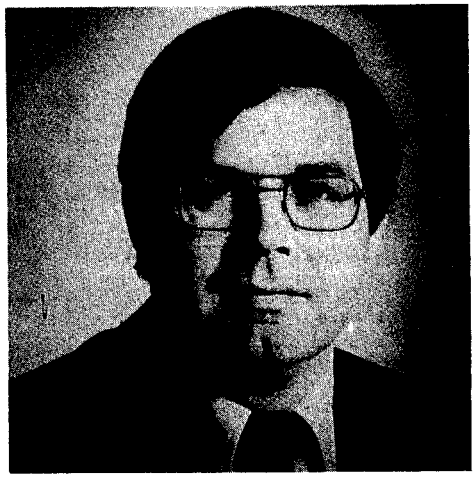
I. CRIMINAL LEGISLATION

SENATE BILL 7 This legislation will permit the use of a photograph of property involved in either a theft or robbery offense if the photo-graph will reveal the nature and identity of the property in question and if the photograph is otherwise admissible under the rules of evidence. The property may be returned to the rightful owner under certain conditions. A defendant may upon motion filed within 20 days of arrest, or later, with leave of court, object to the use of photo-

(Continued, P. 43)

graphs and require the property itself to be available.

SENATE BILL 20 Existing law relating to driving under the influence of intoxicants has changed substantially. This legislation, adopted in response to perceived public demands for change in this area, cannot be explained briefly. The following is an outline of the changes. A specific reading of the legislation is highly recommended.



MIKE MALONEY

A. PUNISHMENT RANGES WILL BE AS FOLLOWS:

FIRST OFFENSE. A fine of $200.00 to $500.00 or 48 hours to 30 days in jail or both, or participation in a community labor program for not less than 2 days nor more than 30 days in lieu of fine or imprisonment or both fine and imprisonment.

SECOND OFFENSE. A fine of $350.00 to $500.00 and 7 days to 6 months incarceration and possible participation in a community labor program for not less than 10 days nor more than 6 months.

THIRD OR SUBSEQUENT OFFENSES. A fine of $500.00 to $1,000.00 and incarceration for 30 days to 12 months with possible participation in a community labor program for not less than 10 days nor more than 12 months.

The minimum sentences of 7 days and 30 days established for second, third and subsequent offenders, as above described, are mandatory and suspension, probation, conditional discharge or any other form of early release is specifically prohibited by statute. Further, while the term of imprisonment for first and second offenders is directed by statute to be served on weekends or at such other times as to preserve the employment or education of an offender, no such language applies to third or subsequent offenders.

License suspension for a first offender over 18 years of age shall be for a period of six months unless the offender enrolls and successfully completes an approved driver improvement clinic or an approved education program in which case license suspension shall be reduced to 30 days. For second offenders, license suspension shall be for 12 months and for third and subsequent offenders, license suspension shall be for 24 months. Drivers under the age of 18 shall have their license suspended for the period described above or until age 18, whichever period is longer.

Preconviction suspension of license for a period of up to 60 days is authorized under

(Continued, P. 44)

certain circumstances. This suspension shall be effectuated by decision of the court.

Sentences for operating a motor vehicle while under suspension or revocation as a result of a DUI conviction will be as follows:

FIRST OFFENSE A Class B Misdemeanor

SECOND OFFENSE A Class A Misdemeanor

THIRD AND SUBSEQUENT OFFENSES A Class D Felony

SUSPENSION OF OPERATING PRIVILEGES FOR A PERIOD OF TIME DOUBLE THAT ORIGINALLY IMPOSED.

Preliminary breath tests to be administered in the field have been authorized by the legislation but there is a provision that specifically provides that refusal by a suspect to submit to a preliminary breath test will not be admissible either in a court of law or in an administrative hearing.

Bail for non-residents has been statutorily fixed at $500.00 full cash for a DUI arrest unless there is a property damage accident or an accident resulting in physical injury, in which instance it will be $1,500.00 full cash or unless there is an accident which results in serious physical injury or death, in which case the bond will be $5,000.00 full cash.

Authority has been granted to peace officers to arrest one suspected of violating the DUI laws without a warrant upon probable cause.

There is further language in the legislation authorizing the assessment of a $150.00 fee to be charged each individual convicted of DUI and that the money will be utilized for financing enforcement and administration of the act and will be utilized to develop education and counseling programs.

Needless to say, substantial litigation will result from this piece of legislation.

SENATE BILL 54 Repeals the Kentucky unified Juvenile Code, which was scheduled to become effective July 15, 1984.

SENATE BILL 57 Enacted with an emergency clause and effective on February 23, 1984, permits time spent in a local jail following sentencing upon a felony conviction to be counted toward the 30 day period for filing a motion for shock probation.

SENATE BILL 173 Authorizes the assessment of parolees, probationers and other individuals released an assessment fee if they are misdemeanants being supervised by an adult, misdemeanant probation and work release agency of an urban county government.

HOUSE BILL 41 Extends the current forfeiture law relating to drug offenses to marijuana and further designates that funds realized from the confiscation and/or sale of forfeited property be used for law enforcement purposes and for the development of drug educa-

(Continued, P. 45)

tion, abuse and treatment programs.

HOUSE BILL 106 Creates the new offenses of unlawful access to a computer in the first and second degrees and misuse of computer information. The legislation effectively designates computer information, systems, programs and software as property and prohibits the unauthorized access and utilization of same.

HOUSE BILL 194 Permits the judge of the juvenile section of District Court to suspend the operators license or prohibit the issuance of an operators license to a juvenile adjudicated delinquent of an offense proscribed by the provisions of KRS Chapter 218A.

HOUSE BILL 200 Amends the loitering statutes to create the specific offense of loitering for prostitution purposes. First offense: violation; second and subsequent offenses: class B misdemeanor.

HOUSE BILL 229 Prohibits detention of an individual charged with a violation in a jail unless the individual:

(1) has failed to previously appear in court;

(2) is a fugitive; or,

(3) the offense is one specified under the provisions of KRS 431.015.

HOUSE BILL 282 Deletes the exception presently granted to relatives of victims in custodial interference matters so as to make all custodial interference matters a class D felony.

HOUSE BILL 311 prohibits local government from in any way regulating transfer, ownership, possession, carrying or transportation of firearms or ammunition.

HOUSE BILL 433 Makes dogfighting a felony.

HOUSE BILL 478 Adds as an alternate sentence in capital cases a sentence of life without the privilege of parole for 25 years. Following 25 years service a defendant would be eligible for parole.

HOUSE BILL 486 Relates to sexually abused, missing and exploited children and enhances current penalties for those convicted of violating the statutes relating to such children.

There is substantial procedural language in this act which needs to be carefully reviewed prior to representation of an individual charged with such an offense.

HOUSE BILL 728 Delays the effective date of the decriminalization of public intoxication legislation, originally passed by previous sessions of the General Assembly, until July 15, 1986.

HOUSE BILL 900 Increases court costs in all criminal cases by $5.00 with the money to go to the sheriff for their services rendered to the courts.

II. RELATED LEGISLATION

There are other pieces of legislation not criminal in nature which would have impact

(Continued, P. 46)

on individuals employed by the Office of Public Advocacy and on others practicing law in the criminal area. That legislation is as follows:

SENATE BILL 316 Extends the time within which a preliminary hearing under KRS 202A.071 is to be held from 5 days to 6 days.

SENATE BILL 380 Authorizes cities of the first, second, third and fourth classes and urban county governments to establish a hearing board to dispose of traffic tickets and provides for an appeal from that hearing board to the district court upon an adverse decision.

HOUSE BILL 72 Provides that contraband alcohol seized will be destroyed by the sheriff in the county in which it was seized rather than by the Department of Alcohol Beverage Control.

Some cynics have indicated that this legislation might result in less destruction, at least in the normal usage of that language.

HOUSE BILL 196 Provides that rape examinations will be paid for the Attorney General. Appropriations were made to the Attorney General's Office to provide for these services.

HOUSE BILL 631 Relates to protective services for children. Grants a clergy-penitent privilege as a ground for refusing to file a child abuse report.

HOUSE BILL 492 Relating to child support. Provides for administrative action being taken by the Cabinet for Human Resources to determine and enforce support obligations and amends the non-support statues to provide that administrative orders of the Cabinet will be included within the statute to enhance enforcement.

SENATOR MIKE MALONEY

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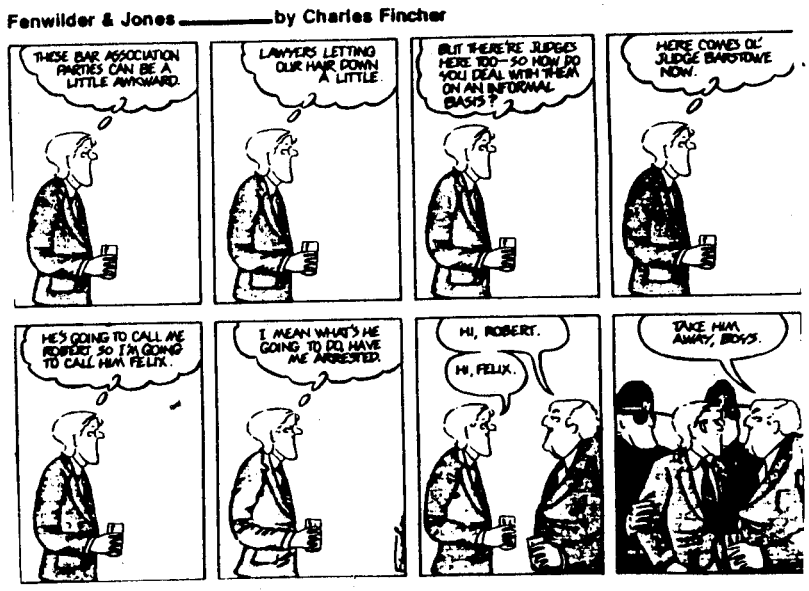

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Ethics:
Quandaries & Quagmires

KBA E-279 FORMAL

QUESTION 1: May an attorney secretly record conversations with client, attorneys, judges, and the public, including public officials, where said persons are not witnesses in a criminal proceedings in which the attorney is employed as defense counsel?

ANSWER: NO.

QUESTION 2: May an attorney employed to defend a person accused in a criminal proceeding secretly record conversations with witnesses in that proceeding?

ANSWER: YES.

REFERENCES: ABA Formal Opinion 337; Code of Professional Responsibility: Canons 1,4,7 and 9; Disciplinary Rule 1-102 (A)(4); and Ethical Consideration 1-5, 4-4, 4-5, 7-1, 9-2 and 9-6; Opinion No. 80-95, The Committee on Professional and Judicial Ethics of the Bar Association of the City of New York; KBA E-98.

OPINION

ABA Formal Opinion 337 generally stated that with certain exceptions spelled out in the opinion, no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation. The basis for this opinion was that Canon 9 of the Code of Professional Responsibility stated that a lawyer should avoid even the appearance of professional impropriety. The opinion also relied upon DR 1-102(A)(4) of the Code of Professional Responsibility which stated that "a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The opinion went on to say: "Canons 1,4,7 and 9, and Ethical Consideration all clearly express axiomatic norms for attorney conduct. Each in the view of the Committee supports the conclusion that lawyers should not make recordings without consent of all parties. Ethical Considerations EC 1-5, 4-4, 4-5, 7-1, 9-2 and 9-6 all state in various ways the conduct of which lawyers should aspire. None would condone such conduct. The conduct prescribed in DR 1-102(A)(4), i.e., conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties..."

Thus, where the lawyer <u>is not</u> representing a client in a criminal case and is not conversing with a witness in that proceeding, then the recording of the conversation without the consent of all parties would be deemed a breach of the Canons of Ethics.

However, when the attorney is representing a person accused in a criminal case it may be proper for him to secretly record conversations with witnesses in that proceedings.

(Continued, P. 48)

ABA Formal Opinion 337, in the last paragraph of the opinion stated that there may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements. However, nothing was said about a defense attorney in a criminal proceeding ethically making and using secret recordings if acting within strict statutory limitations conforming to constitutional requirements. This oversight was noted by the Committee on Professional and Judicial Ethics of the Bar Association of the City of New York in Opinion No. 80-95. In that opinion, the Committee stated that its conclusion was limited to the secret recording of conversations with witnesses in criminal proceedings. The Committee stated: "We continue to endorse the view that secret recordings of conversations with other lawyers or with clients is improper in any context, criminal or civil. Moreover, we continue to view as unethical secret recordings of witnesses in civil or commercial matters."

There are several valid reasons for permitting a lawyer acting as defense counsel to secretly record conversations with witnesses in the proceeding. Those reasons are as follows:

1. The Omnibus Crime Control and Safe Streets Act, passed in 1968 by Congress, contains Title III and authorized unconsented electronic interception of conversations through wiretaps and bugs. 18 U.S.C. §2516. The statute provided that secret recordings by consent, that is, by a participant to a conversation, were legal. 18 U.S.C. 2511(d). In United States v. White, 401 U.S. 745 (1971), the Supreme Court of the United States upheld the constitutionally of using such secret recordings in trials. "Thus, there is both legislative and judicial sanction for the use of such secret recordings by the government in criminal cases, and Congress expected prosecutors to play a role in the making of such recordings."
Opinion 80-95, pp 3-4.

2. Why should a prosecutor be permitted to secretly record conversations and rely upon them by [sic] defense counsel not be entitled to record conversations of witnesses in the proceeding? To deny a defendant this right may well violate his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution.

3. While agreeing with ABA Opinion 337 that a legislative determination that conduct is lawful does not always make the conduct ethical, by permitting defense counsel to secretly record the conversations of witnesses "is one which does not so plainly diverge from accepted standards of candor

(Continued, P. 49)

and fairness that it is inconsistent with ethical behavior..." Opinion 80-95, p. 9.

4. Canons 6 and 7 of the Code of Professional Responsibility require a lawyer to exercise competence in the zealous representation of his client. These duties apply in the context of criminal cases and justify his secret recording of conversations of witnesses in the representation of his client.

There are additional reasons why it may be necessary for an attorney representing a defendant in a criminal case to secretly record the conversations with witnesses. In some instances, law enforcement officials may be attempting to entrap the defense attorney into making some statement that could be used against the attorney, either during the course of the trial that he is defending or in a prosecution against the attorney. A recording of what was said is the best evidence under the circumstances. This will preclude a future swearing contest between the witness and the attorney as to what was said.

The distinction made here between secretly recording the conversation of a witness and the lawyer's client is simply that if the client will refuse to consent to the recording of a conversation with the attorney, the attorney is free to withdraw from the case either by consent of the client or with court approval. There should be a degree of mutual trust between the attorney and his client. However, while the attorney seeks the truth from his witness, there generally does not exist a feeling of mutual trust. The attorney by law has a right to record the conversation even without the consent of the witness. 18 U.S.C. 2511(d). If the witness later disputes the conversation or what was said during the conversation, the recording will be the best evidence. Questions may arise as to whether the recording was tampered with so as to change the meaning thereof. However, in this day of scientific electronic equipment, it can generally be determined whether there has been any alteration of the recording following its initial recording. Any attorney secretly recording a conversation should take steps to preserve the integrity of the recording so as to preclude any serious question being raised about a subsequent alteration thereof.

This Opinion revokes KBA E-98.

VINCE APRILE

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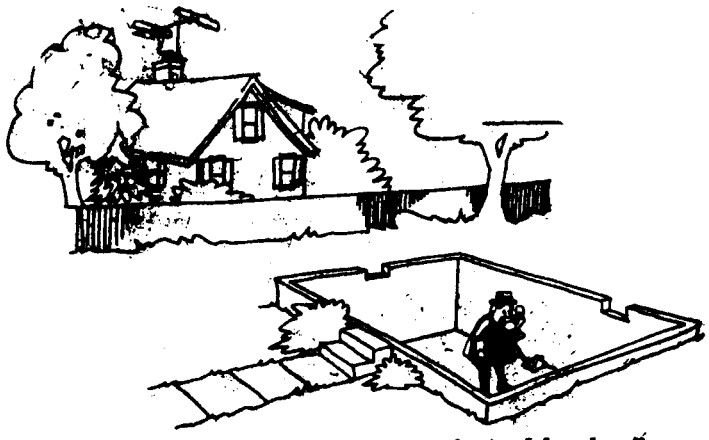


"I'd like to report a very thorough burglary."

MOTION PRACTICE -- PFO PROCEEDINGS

RCr 8.18 requires a defendant to raise by motion prior to trial "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment". The Supreme Court of Kentucky recently ruled in Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984), that that particular rule governs attacks on PFO charges found in any indictment.

In the cited case, the Court ruled that since the face of the indictment apprises a defendant of any previous conviction which will be used against him in a PFO proceeding, that defendant should challenge the constitutionality of any of the previous convictions prior to trial.

If the invalidity of the prior conviction does not surface until the midst of the trial, RCr 8.18 does permit a trial court, "for cause shown", to allow defense counsel to present an untimely defense or objection to the proposed use of a prior conviction.

In sum, in order to timely challenge the use of a prior conviction in a PFO proceeding, counsel must file a motion prior to trial setting out with particularity the grounds relied on for relief. The failure to challenge such a conviction prior to trial will constitute a waiver of any objection to that conviction unless counsel can show cause why the challenge was not made prior to trial.

TIM RIDDELL

USE KENTUCKY'S "BILL OF RIGHTS"

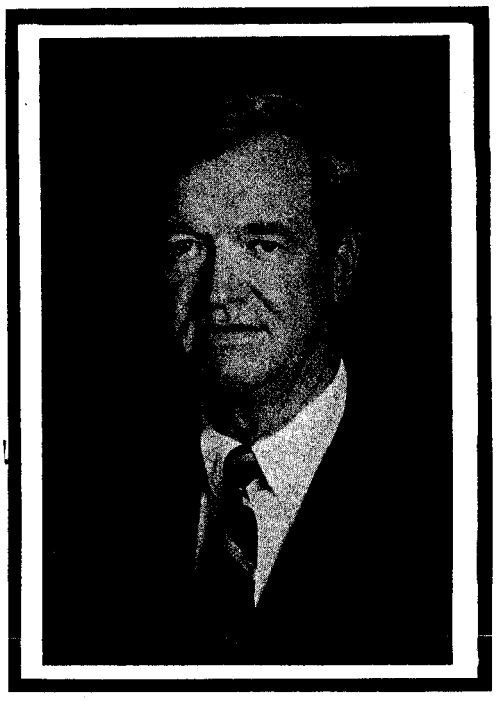
During these times of judicial conservatism on the federal level, practitioners are looking more frequently and successfully to their own state's constitutions in an effort to preserve those basic protections which are no longer provided under the federal constitution.

When you make a constitutional attack on any impropriety which occurs while defending your client, phrase the objection in terms of being unconstitutional both under the federal and the Kentucky Constitution. (Kentucky's "Bill of Rights" is found in Sections 1 through 26 of the Constitution of the Commonwealth of Kentucky).

Taking a consistent approach to constitutionalizing your objections in terms of both the federal and Kentucky Constitution may prove fruitful in the longrun. Numerous courts throughout this land have harkened to their own constitutions to specifically reject the recent limitations that the United States Supreme Court has placed on your defendant's rights. In the not too distant past, Kentucky's own Supreme Court has used Kentucky's Constitution to provide broader personal liberties than would have been provided by the federal constitution. See Kentucky State Board, etc., vs. Rudasill, Ky., 589 S.W.2d 877, 879, fn. 3 (1979). See also, Wagner v. Commonwealth, Ky., 581 S.W.2d 353, 356 (1979) overruled in part by Estep v. Commonwealth, Ky., 663 S.W.2d 213, 216 (1984).

TIM RIDDELL

Criminal Defense Work: Why?



BILL JOHNSON

This is the first of a series of articles by prominent criminal defense attorneys on why they choose to do criminal defense work. We're delighted with their willingness to share their thoughts and feelings.

Why do I do criminal defense work? This is a question often asked of me. Lawyers handling exclusively civil matters will often say that there is more money to be made in handling civil cases. Some will even speak of the practice of criminal defense law as if it is somewhat dirty. Our families are often questioned about why a criminal defense lawyer will undertake the defense of an individual in a particular case.

I practice criminal defense law because I believe there is no higher calling than defending a citizen accused of a crime. To be accused of any crime is the most frightening experience that an individual will undergo short of pain and death. It matters little whether the offense is speeding or a serious felony. To the citizen accused, the crime is severe since it not only subjects him to possible punishment but also to embarrassment and damage to his reputation.

Many has been the time, after an adverse verdict by jury, that I have seriously considered abandoning the practice of criminal law. However, the excitement of the next criminal defense is always present and this opportunity has snapped me back from the bitter pain of defeat to another day in court. There are few moments of satisfaction greater than seeing the happiness on the face of a citizen accused after a jury has announced a verdict of not guilty. When a citizen accused is found not guilty of the charge, everybody wins.

Those of us who practice criminal defense law live in a world of emotions. In nearly every case our participation antagonizes the alleged victim, his family, and a certain segment of the citizenry. But we, as criminal lawyers, know that the citizen accused is entitled to his day in court, and no matter how unpopular the case, we strive to give him that day.

Perhaps my judgment is poor. Perhaps I could make substantially more money by rejecting

(Continued, P. 52)

the practice of criminal defense law and devoting my time entirely in the civil area where I do considerable practice. But if I did that, I would miss the enjoyment of seeing the gleem in the citizen's eye, the smile on his face and the laughter in his voice when he is acquitted of the charge, whether it be in district court of this Commonwealth or the highest tribunal in this nation. I hope that I never lose the zest for the practice of criminal law.

WILLIAM E. JOHNSON

Bill Johnson has practiced law since 1957. He has been a member of the Kentucky Bar's Board of Governors, Chairman of its House of Delegates, member of the Association of Trial Lawyers of America Board of Governors and President of the Kentucky Academy of Trial Attorneys.

Presently, Bill practices as a partner in the merged law firm of Johnson, Judy, Stoll, Keenon and Park.

* * * * * *

THE ADVOCATE

Our Readers Write...

This space is blank because you haven't written us. We're interested in your thoughts on subjects treated in our pages, or on information on criminal defense or protection and advocacy matters that would benefit our readers.

Write us and share your thoughts.

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