THE ADVOCATE

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THE ADVOCATE FEATURES

RAYMOND S. BOGUCKI

Raymond Bogucki, our Mason and Bracken County public advocacy Administrator, began with the Department in June of 1982. He has two Northern Kentucky law offices - one in Augusta and another in Florence - where Ray lives with Vicki, his wife of 13 years and their 11 year old son, Chant Graham. If you happen to run into Ray, get him to tell you how Chant got his name.

Ray's skill as a public defender and resulting reputation has brought clients to his private practice. Ray is proud of that because he attempts to challenge and better the image

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UPCOMING TRAINING

DRUNK DRIVING LAW SEMINAR

On Thursday, September 20, 1984 the Department of Public Advocacy will conduct a seminar on defending the drunk driver. It will feature Mike Adelson, a Los Angeles public defender; James Epstein, a former Los Angeles public defender; and, Jay Williams, a California chemical expert in drunk driving cases. It will also feature: Harry Hellings, Jr. of Covington; Bruce Prizant of Louisville; George Sornberger of Somerset and Senator Mike Moloney of Lexington.

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The Advocate is a publication of the Department of Public Advocacy and is published bi-monthly. Opinions expressed in articles are those of the authors and do not necessarily represent the views of the Department.

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The Advocate welcomes correspondence on subjects treated in its pages.

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that his clients have of public defenders. Ray queried, "how many times have you heard, 'I couldn't get a real attorney, so I had to get a public defender.'"? Ray continues vehemently, "We have to change people's perception of assigned counsel. Frequently the client is getting the most competent attorney who is well-prepared with sophisticated resources at his or her disposal." Ray went on to comment on a particularly excellent resource - the Department's Northern Kentucky investigator, Mike Zaiden, who does an infinite amount of work for him.

From the time he's appointed, Ray works to undermine the client's negative attitude. He takes time to thoroughly identify the client's legal needs and he says they respond favorably to his attention. Apart from time, Ray is careful to address the clients respectfully and to talk to them on their own level. He tries to interject some humor to relax their tension. Ray's approach encourages the client to open up to him and he gets results as his clients work with him.

Mason County jailer, Floyd B. Berry, said that Ray is "very considerate of his clients and does a very good job. He devotes a lot of time to his clients. We enjoy his sense of humor, too. He's an asset to the community."

So why would any attorney, let alone a lawyer with a thriving private practice, undertake public defender work? Partly because Ray trusts our legal system. He feels that in order

(Continued, P. 3)

for it to work "an indigent person charged with whatever crime must be as well protected as anyone else because basic rights cut across economic barriers." In addition to that, Ray admits shyly that he feels he's been lucky and he wants to give something back. Also, he gets to do "what others dream about." He explains, in the sense that he gets to be in the courtroom battling to protect an "inherently good" system and protecting everybody's rights. He marvels that some law school graduates from his Chase Law School class of 1979 have never participated in a trial. Ray finds the courtroom experience pleasurable and that contributes to his success as a public defender.

Ray is a transplanted Hammond, Indiana native who was admitted to the Kentucky Bar in May of 1980. He has taught the course "The Law of Mass Communication" at Northern Kentucky University for the last three years.

Ray says regardless of what happens with his offices, he'll probably always be a public defender. We're lucky to have him on our side.

CRIS PURDOM

* * * * * *

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal to do with the syllogism in determining the rules by which men should be governed.

OLIVER WENDELL HOLMES, JR.

SEARCH AND SEIZURE SEMINAR

On Thursday, September 6, 1984, the Louisville Bar Association in conjunction with the Criminal Law Section of the Kentucky Bar Association will present a daylong seminar at the Galt House in Louisville on "Search and Seizure Law: Three Perspectives."

The registration fee for members of either the Louisville Bar Association or the Criminal Law Section of the KBA is $55.00; the registration fee for non-members is $75.00.

TRIAL PRACTICE INSTITUTE

DPA's Third Trial Practice Institute will again be held in Richmond from November 14-17, 1984. This is a chance to practice trial skills with feedback from national and in-state faculty.

ANNUAL MAY SEMINAR

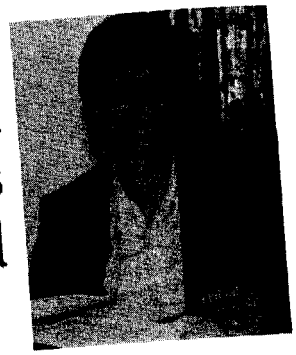
DPA's 13th Annual May Seminar is scheduled for May 12, 13 and 14, 1985. It will again be at the Radisson in Lexington. Mark your calendars.

Further information on DPA seminars will appear in separate mailings, or you can contact Ed Monahan at (502) 564-5258.

To register for or to obtain additional information on the Search and Seizure Seminar contact the CLE Department, Louisville Bar Center, Suite 200, 717 West Main Street, Louisville, Kentucky 40202, (502) 583-5314.

West's Review

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



UNITED STATES SUPREME COURT

The conservative jurisprudence of the United States Supreme Court continued to reshape criminal law as the Court closed its 1983 term of court.

In its most controversial decision, the Court has recognized a "public safety" exception to the requirement that custodial interrogation be preceded by Miranda warnings. New York v. Quarles, 35 CrL 3135 (June 12, 1984). In Quarles, police officers were approached by a woman who told them she had just been raped at gunpoint. The woman gave a description of the suspect and said the man had gone into a nearby supermarket. Entering the supermarket the police spotted the defendant who fled to the rear of the store. The police apprehended the defendant and found that he had on an empty shoulder holster. The police handcuffed the defendant and, without first giving Miranda warnings, asked him "where the gun was." The defendant indicated some empty cartons and said "The gun is over there." At the defendant's trial, the trial court suppressed the gun and the statement because the defendant was not first advised of his Miranda rights. The Supreme Court agreed that the defendant was in police custody at the time of the question so that "the facts of this case come within the ambit of the Miranda decision..." However, the Court held that "there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence, and the availability of that exception does not depend upon the motivation of the individual officers involved." The Court refused to consider whether the officer's question was in fact, prompted by concern for public safety as opposed to a desire to obtain evidence. The Court found it sufficient that the question was reasonably related to public safety.

The Court's decision in Quarles represents an unprecedented digression from the straight path steadfastly followed by it in applying Miranda. No other exceptions to the dictates of Miranda have been permitted. Clearly, the Court's decision promises to give rise to evidentiary hearings to determine whether an officer's questions served the public safety or were designed solely to elicit an incriminating admission. Justices Marshall, Brennan, and Stevens dissented in an opinion critical of the majority for "destroying forever the clarity of Miranda..."

The Court announced two decisions affecting the Sixth

(Continued, P. 5)

Amendment right to effective assistance of counsel. In U.S. v. Cronic, 35 CrL 3061 (May 14, 1984) a unanimous Court held that an inquiry into counsel's actual performance at trial is a prerequisite to a finding that a defendant was denied the effective assistance of counsel. The defendant in Cronic was charged with complex mail fraud charges involving more than $9,000.000. Twenty-five days before trial a young lawyer who had never participated in a jury trial was appointed to represent the defendant. The Tenth Circuit Court of Appeals held on these facts that there was a deprivation of effective assistance of counsel. The Supreme Court reversed. "Respondent can make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel."

In Strickland v. Washington, 35 CrL 3066 (May 14, 1984), the Court further elaborated on the standards for judging claims of ineffective assistance of counsel. The defendant in Washington entered guilty pleas to three counts of capital murder. At a subsequent capital sentencing hearing before the trial judge, defense counsel called no character witnesses and introduced no psychiatric testimony, even though the defendant asserted during the plea colloquy that he was under extreme stress at the time of the crimes. Counsel chose instead to rely on the defendant's assertions during the plea proceedings, thereby avoiding cross-examination. Counsel also chose not to request a presentence report since this would have revealed the defendant's prior record. No evidence was introduced by the defense. Ultimately the defendant was sentenced to death. The Supreme Court held that the proper standard for assessing counsel's performance was that of "reasonably effective assistance." However, even representation which is less than reasonably effective must be prejudicial before a Sixth Amendment violation will be found. The Court articulated a precise standard for the necessary showing of prejudice: "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." Applying these standards to the facts before it, the Court concluded that "counsel's strategy choice was well within the range of professionally reasonable judgments..." and any error was in any event nonprejudicial "given the overwhelming aggravating factors." Justice Marshall, dissenting, chastised the Court for its failure "to take adequate account of the fact that the locus of this case is a capital sentencing proceeding."

In Nix v. Williams, 35 CrL 3119 (June 11, 1984), the Court again had before it the defendant in Brewer v. Williams, 430 U.S. 387 (1977). In Brewer v. Williams, the defendant successfully challenged the admissibility of statements made by him directing police officers to a child victim's body. The statements were made while the defendant was being transported by the police in response to comments by the police that the victim deserved

(Continued, P. 6)

a "Christian burial." Because the statements were obtained in the absence of the defendant's counsel, the Supreme Court held that the defendant's Sixth Amendment right to counsel was violated. However, the Court noted in Brewer v. Williams that, even though the statements would not be admissible, evidence concerning the body found as a result of the statements might be admissible on the theory that the body would ultimately have been recovered anyway. At the defendant's retrial, the state court found that the body would have been recovered in any event, and therefore evidence regarding it was admissible. The court noted that the body was found within an area being subjected to an intensive search at the time of the defendant's statements. The Supreme Court upheld the reasoning and findings of the state trial court. In so doing the Supreme Court recognized an "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine. "[W]hen, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." In a dissenting opinion, Justices Brennan and Marshall state that they would permit recourse to the "inevitable discovery" exception only on the basis of "clear and convincing" evidence that the evidence would have been discovered.

In Welsh v. Wisconsin, 35 CrL 3051 (May 14, 1984), the Court held that a warrantless nighttime entry into a defendant's home to arrest him for a nonjailable drunk driving

(Continued, P. 7).

offense was not justified by any exigency and therefore violated the Fourth Amendment. A witness told the police that the defendant's vehicle had run off the road and that the defendant had abandoned it, on foot, and in what appeared to be an inebriated condition. The police proceeded to the defendant's home where they arrested him. Under these circumstances, the Court held the arrest unreasonable. The Court had previously held in Payton v. New York, 445 U.S. 573 (1980) that "absent probable cause and exigent circumstances, warrantless arrests in the home are prohibited by the Fourth Amendment." In determining that there was no exigency sufficient to support the defendant's warrantless arrest, the Court emphasized the minor nature of the underlying offense. "[I]t is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." Justices White and Rehnquist dissented.

The Court held that prison inmates subjected to administrative segregation pending the investigation of a prison murder, which the inmates were later indicted for and ultimately convicted of, were not entitled to the appointment of counsel. United States v. Gouveia, 35 CrL 3091 (May 29, 1984). The Court reversed a decision of the Ninth Circuit Court of Appeals which had held that the inmates Sixth Amendment right to counsel attached when they were in segregation for ninety days. The Supreme Court reiterated its view, stated in Kirby v. Illinois 406 U.S. 682 (1972), that "the right to counsel does not attach until the initiation of adversary judicial proceedings..." The Court considered the defendants to be sufficiently protected by the Fifth Amendment prohibition against pre-indictment delay, which would require dismissal of the indictment "if the defendant can prove that the government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." Justice Marshall dissented.

In California v. Trombetta, 35 CrL 3127 (June 11, 1984), a unanimous Court held that due process does not require the police to preserve a sample of the defendant's breath, the alcohol content of which was used to obtain the defendant's conviction of drunken driving. The defendant argued that had the breath sample been saved the defense might have been able to impeach the breathalyzer test results. The Court rejected the defendant's argument: "Whatever duty the Constitution imposes on the states to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." The breathalyzer evidence did not meet this test since it lacked obvious exculpatory value. Moreover, the defendant had access to other means of impeaching the breathalyzer results, such as examination of the machine used in the test.

(Continued, P. 8)

In Ohio v. Johnson, 35 CrL 3119 (June 11, 1984), the Court held that the Fifth Amendment Double Jeopardy clause does not prohibit a state from continuing a prosecution after the trial court's acceptance, over the state's objection, of the defendants guilty plea to a lesser included offense arising from the same incident. The Court held that, while the double jeopardy prohibition protects defendants from multiple punishment for a single offense, it does not prohibit the state from trying a defendant, at a single proceeding, for multiple offenses arising out of a single course of conduct. The Court reasoned that the defendant in Johnson "has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshall its evidence and resources more than once or to hone its presentation of its case through a trial." "The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an 'implied acquittal' which results from a verdict convicting a defendant on lesser included offenses rendered by a jury..." In short, the Court held that a trial court's acceptance, over prosecutorial objection, of a defendant's guilty plea to a lesser included offense does not prevent the prosecutor from continuing to seek the defendant's conviction of the greater offense. Justices Stevens and Marshall dissent.

In Mabry v. Johnson, 35 CrL 3133 (June 11, 1984), the Court held that a defendant's acceptance of a plea bargain offered by the prosecution, which the prosecution withdrew before entry of a plea, does not create a right to have the bargain enforced. The defendant ultimately accepted a second plea offer and plead guilty. A majority of the Eight Circuit Court of Appeals subsequently held that "fairness" precluded the prosecution's withdrawal of the first plea bargain once accepted by the defendant. The Supreme Court unanimously reversed the Eight Circuit after concluding that the defendant's guilty plea was voluntary and intelligent and "in no sense induced by the prosecutor's withdrawn offer."

The Court unanimously held that the Sixth Amendment right to a public trial extends to pretrial suppression hearings. Waller v. Georgia, 35 CrL 3089 (May 21, 1984). The Sixth Amendment forbids the closure of such a hearing over defense objection unless the party seeking closure advances an overriding interest that is likely to be prejudiced without closure, closure is no broader than needed to protect the interest, there are no alternatives to closure, and the trial court makes adequate findings to support closure. Applying these standards the Court concluded that closure of an entire seven-day suppression hearing in order to avoid "publication" of two and one-half hours of wiretap tapes was unjustified.

In Patton v. Yount, 35 CrL 3149 (June 27, 1984), the Court addressed a claim that pretrial publicity so infected a criminal trial as to deprive the

(Continued, P. 9)

defendant of his right to an impartial jury. The defendant's first conviction was reversed. At his second trial some four years later, the defendant sught a change of venue on the grounds that prejudicial publicity prevented the selection of an impartial jury. The voir dire showed that all but two of 163 veniremen had heard of the case and 77% would carry an opinion into the jury box. The trial court nevertheless succeeded in seating a jury and denied the change of venue. The Supreme Court upheld that denial. The Court noted that, under Irvin v. Dowd, 366 U.S. 717 (1961), pervasive adverse publicity may rise to such a level as to create a "presumption of prejudice" which is not rebutted by jurors' statements of impartiality. However, the Court also noted that Irvin held that "the trial court's findings of impartiality might be overturned only for "manifest error." The Court went on to hold that the trial court's findings of impartiality answered questions of fact, not ones of mixed law and fact. Consequently, those findings were entitled to a presumption of correctness by a federal habeas court. Justice Stevens and Brennan dissent and would have defined the question of juror partiality as a mixed question of law and fact. Based on the record the dissenting justices would have held that the defendant was denied an impartial jury.

Pepper . . . and Salt

"If we can drum up a little more pre-trial publicity, I think we can get a change of venue."

"From The Wall Street Journal - Permission, Cartoon Features Syndicate"

Finally, in Thigpen v. Roberts, 35 CrL 3168 (June 27, 1984) the Court held that the defendant's manslaughter conviction must be vacated because of prosecutorial vindictiveness in obtaining it. Following an accident, the defendant was convicted of reckless driving, driving while intoxicated, driving with a revoked license, and driving on the wrong side of the road. When the defendant appealed these misdemeanor convictions the state district attorney obtained an indictment for manslaughter based on a death which had resulted from the incident. The Supreme Court found that this procedural sequence suggested a "realistic likelihood of vindictiveness," requiring reversal of the manslaughter conviction under Blackledge v. Perry, 417 U.S. 21 (1974). The Court dismissed as irrelevant the fact that the misdemeanor convictions were

(Continued, P. 10)

obtained by the county attorney while the felony conviction was obtained by the district attorney. "To the extent the presumption [of vindictiveness] reflects 'institutional pressure that...might... sub-consciously motivate a vindictive prosecutorial... response to a defendant's exercise of his right to obtain a retrial...' it does not hinge on the continued involvement of a particular individual." Justices Rehnquist, O'Connor, and Powell dissent.

KENTUCKY SUPREME COURT

The Kentucky Supreme Court rendered a number of important decisions in May and June. In a surprising decision the Court overruled Cotton v. Commonwealth, Ky., 454 S.W.2d 698 (1970). Commonwealth v. Richardson, Ky., 31 K.L.S. 8 at 5 (June 14, 1984). In Richardson v. Commonwealth, Ky.App., 30 K.L.S. 7 at 1 (May 13, 1983), the Court of Appeals sought to expand Cotton by holding that a defendant on trial for burglary may not be impeached with a prior burglary conviction which is identified as such to the jury. The Kentucky Supreme Court granted discretionary review to reverse the decision of the Court of Appeals and overrule Cotton. The Court noted that the effect of its decision was to reinstate Cowan v. Commonwealth, Ky., 407 S.W. 2d 695 (1966). Pursuant to Cowan, a witness may be asked if he has been previously convicted of a felony. If he denies it, proof of the prior conviction may be introduced. However, in no case may evidence of the nature of the prior felony be placed before the jury. The trial court may still exercise discretion in excluding prior convictions as too remote. The Richardson Court observed "[w]ith this holding we put all prior felonies on the same footing for purposes of impeachment." The holding in Richardson also reinstates the literal language of CR 43.07 that a witness may be impeached by showing that "he has been convicted of a felony."

In Diehl v. Commonwealth, Ky., 31 K.L.S. 8 at 6 (June 14, 1984) the Court applied its decision in Richardson, supra, to hold that the trial court properly admitted evidence of the defendant's prior burglary conviction. The Court also held that the trial court properly excluded defense evidence that the defendant's wife's consent to a search was involuntary. The trial court had earlier held at a pretrial suppression hearing that the consent was voluntary. The Supreme Court found that the trial court's ruling was supported by substantial evidence, "therefore, there was no error in the court's refusal to submit the issue to the jury." Finally, citing Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984), the Court held that the defendant could not challenge the validity of a prior felony conviction introduced at PFO proceedings because "[t]he question of the validity of a prior conviction is a preliminary matter and any attack on its validity must be made prior to trial."

In Rackley v. Commonwealth, Ky., 31 K.L.S. 8 at 4 (June 14, 1984), the Court held that

(Continued, P. 11)

capital murder cases constitute an exception to the limitation on a judge's sentencing authority imposed by KRS 532.110 (1)(c). The statute provides that "[t]he aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed." At the conclusion of Rackley's death penalty trial, the trial court sentenced Rackley to life imprisonment for murder and to twenty years for burglary and ordered that the terms be served consecutively. The Kentucky Supreme Court held that this was permissible. The Court had previously held in Shannon v. Commonwealth, Ky., 562 S.W. 2d 301 (1978) that KRS 532.110 (1)(c) precludes a life sentence and a sentence to a term of years from being served consecutively. The Rackley Court emphasized that "[a]n examination of KRS 532.080... discloses that capital murder cases are specifically excluded from mention." The Court concluded that "[i]nasmuch as discretion is given to the trial court in the absence of the statutory exceptions, we find no error in running these sentences consecutively." The Court also held that the defendant's rights were not violated by an identification procedure which resulted in the identification of the defendant's car as a vehicle seen at the scene. "We are cited numerous cases involving lineups but none requiring a lineup of similar inanimate objects before identification is permitted." The Court similarly rejected argument that the trial court should have excluded evidence that the defendant's wife was an heir of the victim.

The Court addressed an ethics issue in Summit v. Mudd, Ky., 31 K.L.S. 8 at 3 (June 14, 1984). The plaintiff in Summit, a criminal defendant represented by the Jefferson County Public Defender, sought a writ of prohibition disqualifying the entire office of the commonwealth attorney from participating in the prosecution of his case because a member of the staff had formerly represented the defendant. After the lawyer in question was appointed to represent the defendant he accepted a job with the commonwealth attorney's office. The defendant sought a writ of prohibition based on the appearance of impropriety which these facts created. The trial court denied the writ and the Court of Appeals affirmed. The Supreme Court remanded for a "hearing to determine if there has been any actual prejudice as a result of a breach of attorney/client confidentiality." The Court held that "actual prejudice must be shown before the commonwealth attorney's entire staff is disqualified." "The mere possibility of the appearance of impropriety is not sufficient to disqualify the entire staff of the commonwealth attorneys office from further prosecution of the case."

Finally, the Court held in Garrett v. Commonwealth, Ky., 31 K.L.S. 8 at 7 (June 14, 1984), that for purposes of KRS 532.080(3)(b) a person is "over the age of eighteen" "from the first moment of the day on

(Continued, P. 12)

which his eighteenth birthday falls..." With this decision the Court rebuffed the argument that "over the age of eighteen" means at least nineteen.

KENTUCKY COURT OF APPEALS

The Kentucky Court of Appeals rendered several decisions during May and June. In Thurman v. Commonwealth, Ky.App., 31 K.L.S. 6 at 8 (May 4, 1984) the Court reversed the defendant's conviction of first-degree perjury. A conviction of first-degree perjury requires that the defendant have made "a material false statement... under an oath required or authorized by law." (Emphasis added.) Conviction of false swearing requires only that the defendant make "a false statement...under oath required or authorized by law." Thurman testified to inconsistent alibi's at a preliminary hearing and later at trial. At trial of the resulting perjury charge the trial court failed to instruct the jury on false swearing. The Court of Appeals held that the trial court was obligated to submit only the issue of false swearing to the jury under KRS 523.050(2). The statute provides that when a charge of perjury is based on the making of inconsistent statements "[i]f perjury or false swearing would be established by the making of the two statements, the person may only be convicted of false swearing." The Court held that the defendant did not waive his statutory right to have the charge restricted to false swearing by failing to object.

In Estep v. Commonwealth, Ky. App., 31 K.L.S. 6 at 8 (May 4, 1984) the Court reversed the defendant's convictions of burglary and as a persistent felony offender based on error of the trial court in advising the jury panel in voir dire that the trial was to be bifurcated and that at the second stage the defendant's prior felony convictions would be introduced in support of an enhanced sentence. The matter of the PFO charge was then fully explored in the commonwealth's voir dire in an effort to "smoke out" any jurors who could not impose an enhanced sentence. One such juror was excused. The Court of Appeals found this procedure to be reversible error.

The Court of Appeals held that it was reversible error to fail to sequester a jury during their deliberations on a felony charge. McIntyre v. Commonwealth, Ky.App., 31 K.L.S. 6 at 9 (May 4, 1984). RCr 9.66 specifically states that: "Whether the jurors in any case shall be sequestered shall be within the discretion of the court, except that in the trial of a felony charge, after the case is submitted for their verdict, they shall be sequestered unless otherwise agreed to by the parties with approval of the court." The Court of Appeals stated as its holding that "[I]t is the duty of the trial judge to see that the sequestration rule is complied with unless there is a waiver noted in the record."

In Cheeks v. Commonwealth, Ky.App., 31 K.L.S. 7 at 1 (May 11, 1984), the Court held that the situs of an alleged crime must be proven as a prerequisite to the exercise of

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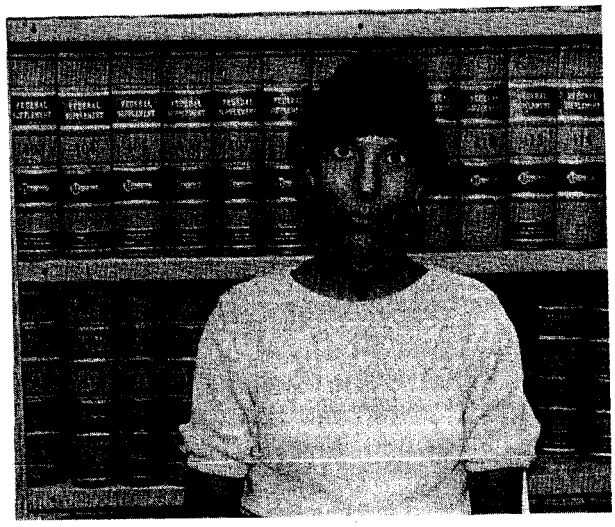
jurisdiction by the trial court. "[T]he situs of an alleged crime is not a venue matter, but is a matter of jurisdiction which must be proven by the evidence." The Court reversed Cheek's conviction since no evidence was introduced at Cheek's trial in the Fayette Circuit Court to show that the charged offense took place in Fayette County. Judge White dissented.

In Cloar v. Commonwealth, Ky.App., K.L.S. (June 29, 1984), the Court upheld the warrantless seizure of a motorcycle cover from the defendant's driveway. A police officer came to the defendant's home to investigate an unrelated matter. No one was at home; however, the officer observed the motorcycle cover, which fit the description of a motorcycle cover reported as stolen, in plain view in the driveway. The Court cited Texas v. Brown, U.S. , 103 S.Ct. 1535 (1983) for the rule that the plain view seizure of property is lawful so long as the seizing officer was entitled to be where he was at the time he observed the property. The Court then held that "a police officer in the furtherance of a legitimate criminal investigation has a legal right to enter those parts of a private residential property which are impliedly open to public use. We limit the permissible scope of this right, however, to driveways, access roads, and as much of the property's sidewalks, pathways, and other areas as are necessary to enable the officer to find and talk to the occupants of the residence."

LINDA WEST

JULIE NAMKIN



Julie joins the Appellate Branch of the Frankfort office.

ATTORNEY RESIGNS

Mark Posnansky has been an Assistant Public Advocate with the Department of Public Advocacy since April, 1977. He served as a full-time appellate attorney until being promoted to Chief of the Appellate Branch in October, 1982. His resignation is effective August 31, 1984. Mark will engage in the private practice of law in Louisville at 730 West Main Street.

* * * * * *

Post-Conviction

Law and Comment

HEALTH CARE FOR CLIENTS CONFINED IN COUNTY JAILS

The Minimum Standards for Local Jails, 501 KAR 3:090E, require that all persons being admitted to a county jail be screened for health problems at that time. 501 KAR 3:090E, §1(9). The jailer has the responsibility of inquiring into a person's current illnesses, necessary medications or special health requirements, behavior, body marks and the condition of his skin and orifices. Under these standards inmates must also be informed verbally and in writing of the methods to obtain health care while incarcerated in the jail. 501 KAR 3:090E,§1(7). But what happens when the jailer identifies an inmate who is ill upon admittance or an inmate later encounters some health problem?

Although the arresting officer has the primary responsibility of obtaining medical assistance for an ill or injured person being taken to jail, the jailer cannot refuse to accept the prisoner as long as he is lawfully committed. KRS 71.040; OAG 82-116, 83-324. The jailer then has the responsibility in relation to the new admittance, or any other inmate who needs attention to health needs during incarceration, to obtain assistance from proper medical authorities, either on site or at a health care facility. OAG 79-455; See Sudderth v. White, Ky.App., 621 S.W.2d 33 (1981). Failure to do so will result in a deprivation of constitutional due process. Tate v. Kassulke, 409 F.Supp. 651, 659 (W.D.Ky. 1976); OAG 83-324. It is incumbent upon the jailer to ensure that the inmate is transported, if necessary, to a hospital or other facility and to provide any necessary security. OAG 80-607, 82-166.

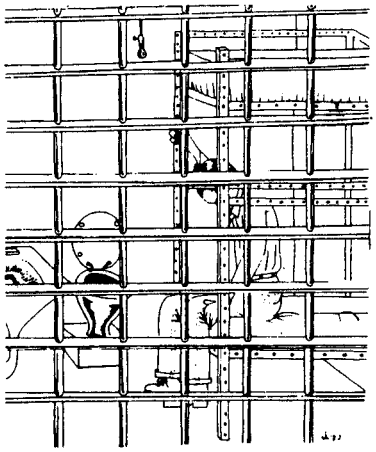
The most often asked question, however, is not who has the responsibility for obtaining these services on behalf of the inmate but who will pay for such services to the indigent inmate. Kentucky law clearly provides that an indigent inmate can not be denied access to necessary health care simply because he can not afford the cost. If the inmate needs care of a medical, dental or psychological nature, KRS 441.010 (3) will generally require the county to bear the expense from the county jail budget. However, if the inmate is a federal prisoner payment is made as provided by contract between the United States government and the county or as may otherwise be provided by federal law. KRS 411.010(4). Also, if the inmate is held pursuant to a contractual agreement with the state the provision of these services, beyond routine care and diagnostic services, is paid as provided by the contract. KRS 441.010(5). If the county re-

(Continued, P. 15)

ceives a per diem payment the services will be paid entirely by the state. Id. Different considerations come into play when the cost of necessary medical, dental or psychological care exceeds $2500. In that situation the state must reimburse the county for the excess cost but only if, 1) the care is "necessary", 2) the inmate is indigent or is uninsured and, 3) the reimbursement will not exceed the maximum payments allowed to similar persons or facilities for the same or similar services under the Kentucky medical assistance program. KRS 441.010(6).

If an inmate has previously received the services of an attorney by the appointment of the public advocacy system, the determination of whether a particular unit of government will bear the expense of health care will be easily determined since KRS 31.120 is the basis for the relevant inquiry. KRS 441.010(7). However, no costs for the provision of health services will be paid or reimbursed by any unit of government unless it is "necessary care" which is defined as care of a non-elective nature that can not be postponed until after the period of confinement without hazard to the life or health of the prisoner. KRS 411.010(9). The attending physician must certify, under oath, that such was the case in order to obtain payment. Id. If it is later determined that an inmate was not indigent at the time services were received or is no longer a needy person, he will be required to repay the particular unit of government that has borne the expense for the medical services. KRS 441.010(7). The standard for requiring repayment is once again comparable to the standard used relating to similar circumstances for services by the public advocacy system under KRS Chapters 31 and 431. KRS 441.010(8).

It is interesting to note that while the Attorney General in 1979 interpreted medical care under KRS 411.010 to include psychiatric care by a licensed medical doctor and exclude dental care, neither was specifically included until KRS 411.010 was amended by the 1984 General Assembly. OAG 79-356, 79-642. (The Minimum Standards for Local Jails, however, have specifically required since January 1, 1983, that emergency dental and psychiatric care, as well as medical care, be available to the inmate at a



level equivalent to services provided to the community in general. 501 KAR 3:090E, §1(13).) A previous opinion by the Attorney General which determined that the cost of transportation of a needy inmate to a medical facility is not included in medical "care" and can not be paid as provided in KRS 441.010, but must be borne by the county in all

(Continued, P. 16)

situations, appears to remain unchanged by the amended KRS 411.010. OAG 80-434. Security costs will also apparently still be considered in a similar manner. Id.; OAG 81-213. These expenses, however, would appear to be negotiable in any contract between the county and the state or federal government.

To allow inmates to alert the jailer to health problems, the Minimum Standards for Local Jails require such facilities to establish a sick call once a week for facilities with less than fifty (50) inmates during the preceding month, three times per week for those facilities with between fifty-one (51) and two hundred (200) inmates the preceding month and five times per week in those facilities which house greater than two hundred (200) inmates during that same period. 501 KAR 3:090E,§1(10). The standards also ensure ongoing adequate medical treatment while the inmate is incarcerated in the jail by requiring that any medication administered by the jail staff be given by persons trained by a medical authority. 501 KAR 3:090E,§1(19). But inmates are prohibited from performing any medical functions. 501 KAR 3:090E,§1(6). The standards further require that if an inmate cannot obtain prescribed treatment while incarcerated in the jail that he be moved to another jail or hospital where those services can be provided. 501 KAR 3:090 E.§1(21).

The foregoing information, although brief, hopefully will allow you to assist any client in need of attention to health problems to receive that help without undue delay and in the proper manner. Since the availability of free health services for necessary care will depend on a determination of indigency equivalent to that made for the appointment of counsel, it is likely that any client of the public advocacy system will qualify for this treatment. Your client should therefore be assured that should the need arise he will not be left to cope with a health problem alone due to his inability to pay.

RANDY WHEELER

* * * * * *

DEATHS IN JAILS

Robert Hogan, Jr., a prisoner in the Franklin County Jail, died on July 11, 1984 while in the jail's isolation cell with another inmate.

The cell was 5' x 7' feet with no toliet, no light and ventilation only through a metal grill in the door.

The State Corrections Cabinet determined the cell substandard and ordered it not used under any circumstances.

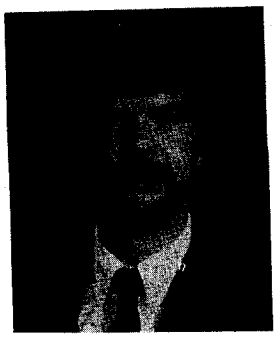
Hogan suffered from epilepsy, and was in jail on two minor offenses.

The Frankfort State Journal editorialized:

It is that isolation cell where Robert Hogan Jr. died that deserves the attention-and the moral outrage-of everyone in the Frankfort community. Jailer Stewart told The State Journal last week, "I don't like to put a dog in there." We can understand why.

* * * * * *

The Death Penalty



MORE EXECUTIONS

The deceased since the listing in The Advocate, Vol. 6, No. 4 at 23 (June, 1984):

20) Carl Shriner (FLA.) 6/20/84
21) Ivon Stanley (GA.) 7/11/84
22) David Washington (FLA.) 7/12/84

EXECUTION DATES IN KENTUCKY

Rehearing was denied by the Kentucky Supreme Court in Harold McQueen's case on June 14, 1984 and in Gene White's case on July 5, 1984. Executions were set for July 13 and August 3 respectively. Although both men have many legitimate legal avenues remaining, and it is inconceivable they could be executed anytime soon, the Court was apparently required to set these dates by KRS 431.218. "When a judgment sentencing the defendant to death has been affirmed, the mandate shall fix the day of the execution as the fifth Friday following the date of the mandate of the court." Stays were entered on June 21 for McQueen and July 6 for White. Such stays are automatic. See Williams v. Missouri, 103 S.Ct. 3521, 3522 (1983) (Blackmun, J.) "I must stay... [any] execution pending completion of direct review as a matter of course." CR 76.44(a), as amended effective January 1, 1985, reflects this reality, providing for an automatic stay in all cases appealed to the United States Supreme Court.

ACTION UNDER THE BIG TENT: NINE IN A ROW

This column has noted a few times the recent string of defeats the condemned have suffered of late in the U.S. Supreme Court. Spaziano v. Florida, 35 CrL 3179 (1984) makes 9 in a row. It seems that defense attorneys are having no luck at all in convincing this Court that any federal constitutional error occurs in capital trials. The Court seems intent on granting review and foreclosing as many federal constitutional claims as possible.

In Spaziano, at issue was Florida's statute which permits the trial judge to override the jury decision on life or death. A second issue was whether Beck v. Alabama, 447 U.S. 625 (1980), was violated by the trial court's decision not to instruct on lesser included offenses unless the defendant would waive the expired statute of limitations as to those lesser included degrees of homicide.

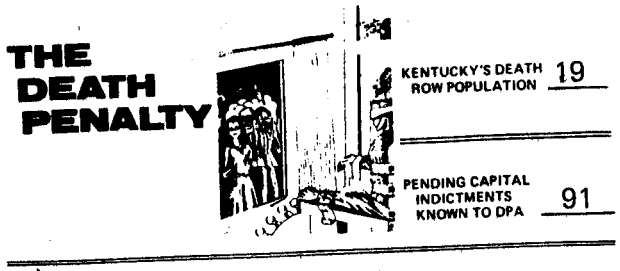
The Court quickly disposed of Beck issue. "In this case, petitioner was given a choice of whether to waive the statute of limitations on the lesser offenses included in capital murder. He knowingly chose not to do so. Under those circumstances, it was not error for the trial judge to refuse to

(Continued, P. 18)

instruct the jury on the lesser included offenses." 35 CrL at 3202.

Of more concern was Spaziano's 5th. 6th, 8th and 14th Amendment challenge to the trial judge's sentence of death in light of the jury's decision that life imprisonment was sufficient. A majority of the jury had recommended life imprisonment. "While the crime for which petitioner was convicted was quite horrible, the case against him was rather weak, resting as it did on the largely uncorroborated testimony of a drug addict who said that petitioner had bragged to him of having killed a number of women, and had led him to the victim's body." Spaziano, 35 CrL at 3210 n. 34 (Stephens, J. dissenting).

The Court (6-3) rejected Spaziano's constitutional attacks on Florida's jury override procedure. The Court notes that only Florida, Alabama and Indiana are "the only states that allow a judge to override a jury's recommendation of life..." 35 CrL at 3204 n. 9. Noticeably absent is Kentucky which, in practice, does not permit a judge to reject a jury's recommendation of life. Of approximately seventy-five cases which have proceeded to the sentencing phase in eight years in Kentucky, no judge has rejected a jury's recommendation. In contrast, Florida judges have "sentenced the defendant to death after a jury had recommended a sentence of life imprisonment" eighty-three times. 35 CrL at 3205 (Stephens, J. dissenting).



Although conceding that Spaziano's "argument obviously has some appeal" and "acknowledg[ing] the presence of the majority view that capital sentencing, unlike other sentencing, should be performed by a jury", the majority refused to "conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional." 35 CrL at 3203-04. "We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life or death decision." 35 CrL at 3204.

Interestingly, the Court seems yet unconvinced of the worth of the "new" death penalty. "While it is to be hoped that current procedures have greatly reduced the risk that jury sentencing will result in arbitrary or discriminatory application of the death penalty..." 35 CrL at 3203. Worth reading is Justice Stephens dissent as it crystalizes his view of capital punishment. Perhaps surprising is Stephen's out- of- hand re-

(Continued, P. 19)

jection of "protection of society" as a rationale supporting the death penalty. "[I]n view of the availability of imprisonment as an alternate means of preventing the defendant from violating the law in the future, the death sentence would clearly be an excessive response to this concern. We are thus left with deterrence and retribution as the justifications for capital punishment." 35 CrL at 3207 (dissenting opinion). "Thus, in the final analysis, capital punishment rests not on a legal but an ethical judgment - an assessment of what we called in Enmund 'moral guilt' of the defendant." 35 CrL at 3208 (dissenting opinion). Justice Stephens concedes he was wrong when he joined the opinion in Profit v. Florida, 428 U.S. 242, 252 (1976) (opinion of Stewart, Powell and Stephens, J.), suggesting that judicial sentencing would lead to "greater consistency in the imposition at the trial court level of capital punishment..." The Spaziano's dissent states "[i]f anything the evidence in override cases suggest that the jury reaches the appropriate result more often than does the judge." 35 CrL at 3207. Apparently, Kentucky judges agree.

SANE ENOUGH TO DIE

At Alvin Ford's last press conference before he was scheduled to die in Florida's electric chair, he was led into the room "his eyes held tightly closed and his hands cuffed across his chest like a mummy. 'Hello Satan, hello Satan, turn them back,' Ford began. Then he spoke for a bit about David and Goliath and force fields and, for no apparent reason, began

ALVIN FORD

to laugh. He told one questioner that he had not spoken to his mother because he was traveling on 'flying saucer number 210.' Finally, a reporter asked him whether he was acting crazy. 'God told me to act crazy', he said, 'because you all been acting crazy to me.'" Newsweek at 69 (June 11, 1984).

On May 31, 1984, the Supreme Court refused to lift a stay of Ford's execution (Burger, Rehnquist and O'Connor dissenting) based on the 11th Circuits opinion which held that "Ford's claim that he is entitled under the Eighth and Fourteenth Amendments to a procedural due process hearing to determine whether he is currently insane...raises substantial [procedural and substantive] issues..." Wainwright v. Ford, 52 L.W. 3873 (1984).

KRS 431.240(2) states that "[i]f the condemned person is insane...on the day designated for the execution, the execu-

(Continued, P. 20)

tion shall be suspended until the condemned is restored to sanity... If execution is suspended...the commissioner of corrections may transfer the condemned...to the state forensic psychiatric facility... until such time as he is restored to sanity..." No standards are given for "sanity" nor is the statute clear on who makes this determination -- although presumably it is the governor. As of yet, no formal procedures have been set up to handle the Governor's consideration of issues such as clemency and sanity.

KEVIN MCNALLY

* * * * * *

Since I share the view that even if the appellant is guilty he "should have had twelve people with open minds," it also "bother[s] my conscience" that he did not. I find nothing curious in the attitude of these two jurors. On the contrary, we must cease to view the constitutional requirement of a neutral jury as a procedural hurdle in the race to convict the guilty and open our eyes to its intrinsic value. It is the essential for justice under the law.

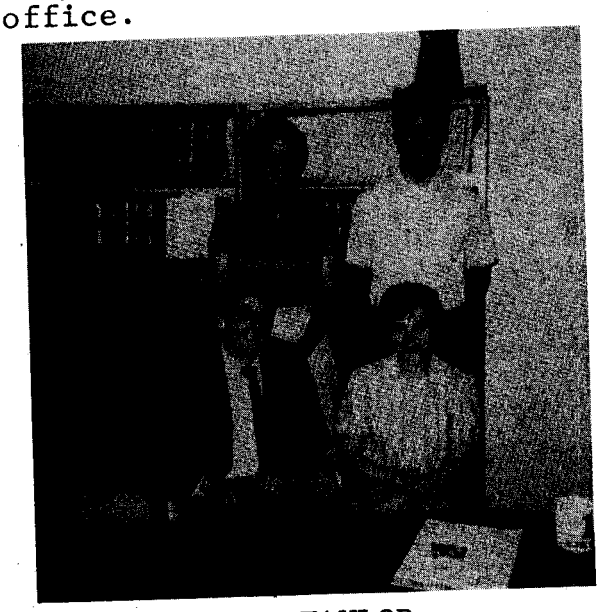
Dissenting opinion, Justice Liebson (joined by Chief Justice Stephens) in Glen Hicks, Jr. v. Commonwealth, Ky., ___ S.W.2d ___ (March 29, 1984).

* * * * * *

NEW ASSISTANT PUBLIC ADVOCATES IN OUR FIELD OFFICES

LYNDA CAMPBELL

Lynda works at the London Office, she is shown here with Gary Hudson, also of that office.

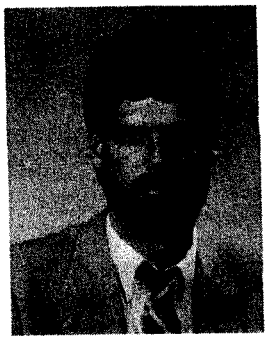


KEN TAYLOR

Shown here with Allison Connelly (seated) and (standing) secretary Brenda Kramer and McGehee Isaacs, directing attorney, works at the Northpoint Facility near Danville, Kentucky.

Federal Review

A Review of Selected Federal Cases



I. ADMISSIBILITY OF DEFENSE EXPERT TESTIMONY

A. UNRELIABILITY OF EYEWITNESS IDENTIFICATION

The Sixth Circuit considered the "perplexing" issues of the admissibility of expert witness testimony concerning the reliability of eyewitness identification. In United States v. Smith, No. 83-3436 (June 7, 1984), the court reviewed the conviction of a black male whose conviction for bank robbery was based in part on the pretrial and in-court identifications by three white female bank employees.

At trial, the defense sought to introduce the testimony of psychologist Solomon M. Fulero (who, along with Dr. Elizabeth Loftus, had appeared as an expert on eyewitness identification in over 60 criminal cases) to rebut the eyewitness testimony. The trial judge, however, ruled the expert testimony inadmissible on the grounds that the evidence did not involve a "proper subject" for expert testimony, that the testimony would not assist the jury, and that the defense had not demonstrated that Dr. Fulero's research had gained the requisite level of acceptance in the field.

A majority of the Court rejected these findings and ruled that the trial judge erred in excluding the expert testimony. Reviewing the admissibility of the excluded evidence under the Federal Rules of Evidence and prior Sixth Circuit decisions, the panel concluded that the issue was a proper subject for expert testimony since it would have assisted the jury in evaluating the eyewitness testimony. "Dr. Fulero's testimony would have provided insight into an eyewitnesses' general inability to perceive and remember what is seen under a stressful situation". Slip Opinion at 4. Such insight is not within the "common sense" of the jury under the meaning of Rule 702 of the Federal Rules of Evidence. Indeed, such expert testimony "explodes common myths about an individual's capacity for perception under stress". Slip Opinion at 4.

Of critical importance to the "proper subject" inquiry was that Dr. Fulero, in his proffer, offered proof based upon the particular facts of the case by analyzing the reliability of eyewitness identification in a hypothetical factual scenario identical to the actual case. Thus, the testimony was not simply an abstract discourse on the reliability of eyewitness identification in general.

In the hypothetical, three witnesses were shown a photo spread containing the defendant's picture. Four months later, they were shown a lineup

(Continued, P. 22)

containing the defendant, who was the only person common to the photo display and the lineup. Dr. Fulero testified that the later line-up was not independent of the earlier photo spread and that the eyewitnesses "incorrectly transferred" the "familiar" figure from one procedure to the next. "Such testimony might have been relevant to the exact facts before the court and not only might have assisted the jury, but might have refuted their otherwise common assumptions about the reliability of eyewitness identification". Slip Opinion at 5.

Additionally, the expert might have provided insight outside the jury's "ken" about the possibility of cross-racial misidentification due to the fact that all three witnesses were white and since it was unusual for black customers to patronize the bank. Further, the fact that a weapon was used would, according to Dr. Fulero, increase stress and decrease the possibility of a proper identification. "The proffer in this case, therefore, demonstrated that Dr. Fulero's testimony may have helped the factfinder understand the facts of this case". Slip Opinion at 5.

The panel also rejected the trial judge's finding concerning the level of reliability of expert psychological testimony in the field of eyewitness identification. Dr. Fulero's proffer established that the American Psychological Association had developed a subfield in the area of eyewitness identification and that his particular discipline contained the exactness, methodology, and reliability of any psychological research. While in 1979 the level of reliability of the expert testimony may not have surpassed the quality of common sense evaluation, see United States v. Fosher, 590 F.2d 381 (1st Cir. 1979), four years later the psychology of eyewitness identification was gained reliability. "Moreover, [Dr. Fulero's] testimony would not only 'surpass' common-sense evaluation, it would question common sense evaluation." Slip Opinion at 6.

Reviewing some of its prior related opinions, the panel emphasized that "[t]his Circuit has been particularly mindful of the dangers of misperception and has itself relied upon psychological studies of the problems of misidentification and suggestion." Slip Opinion at 6 (emphasis added). See United States v. Russell, 532 F.2d 1063 (6th Cir. 1976). "The day may have arrived, therefore, when Dr. Fulero's testimony can be said to conform to a generally accepted explanatory theory." Slip Opinion at 7.

Finally, the panel undertook to balance the probative value of the evidence against its prejudicial effect. The probative value of the evidence had been established since the evidence involved a proper subject and conformed to a generally accepted explanatory theory.

Regarding the issue of prejudice, the panel held that the prejudice envisioned by Rules 403 and 702 of the Federal Rules of Evidence was prejudice to a criminal defendant, not to

(Continued, P. 23)

the government. The panel suggested that a different, more restrictive standard of prejudice would apply when it was a defendant, rather than the government, who was seeking to introduce expert testimony. The defendant's right to a fair trial is a "strong countervailing restraint" on the government's right to introduce expert testimony. Slip Opinion at 7. Such a countervailing restraint is not implicated in a case like this one where it is the defendant who seeks to admit the expert testimony.

However, although the exclusion of the expert testimony was error, it was harmless in this case since the government presented uncontroverted evidence that the defendant's palm print was found at the bank. This evidence was said to have wholly discredited Smith's alibi defense, since he denied having ever been in the bank.

B. BATTERED WOMAN SYNDROME

The concurring opinion of Judge Jones in Thomas v. Arn, No. 83-3095 (March 9, 1984) (Jones, J. concurring) represents the first time that a federal circuit judge has commented on the right of a battered female defendant facing a murder charge to introduce expert testimony on the "battered woman syndrome" to support her defense that she killed her spouse in self defense.

Kathy Thomas was convicted of murder for the death of her husband in state court in Ohio. At her trial, she alleged that she shot him in self defense. The evidence at trial established that the decedent was a violent man who had beaten Thomas on numerous occasions, including just before the shooting. In support of her defense, Thomas attempted to offer the testimony of a social worker as an expert witness on the "battered woman syndrome". However, the trial judge found the witness unqualified and excluded the testimony.

Ultimately, Thomas' conviction was upheld by the Ohio Supreme Court. She then filed a petition for a writ of habeas corpus in federal court. The case was referred by the District Court to a magistrate, who recommended that the writ be denied. Although Thomas was informed that she would have ten days to file objection to the magistrate's report, none were filed, and the District Court adopted the magistrate's report and denied the petition.

Thomas timely filed a notice of appeal to the Sixth Circuit. However, since she had failed to file objections to the magistrate's report, the Sixth Circuit held that she waived her right to appeal and affirmed the decision of the District Court dismissing her petition.

While Judge Jones concurred with the majority opinion, he wrote separately to note that, if he had reached the merits of the case, he would have granted the writ. According to Judge Jones, the exclusion of the expert testimony on the battered woman syndrome "impugned the fundamental fairness of the trial process thereby depriving Thomas of her constitutional right to a fair trial." Slip Opinion at 4 (Jones J. con-

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curring). Citing a 1978 Attorney General Report on Domestic Violence, Jones recognized that the public and thus, juries, do not understand the scope of the problem concerning battered women. "Furthermore, they tend to be unsympathetic toward battered women. They fail to understand, for instance, why battered women do not leave their partners." Id. The expert testimony could have "clarified the unique psychological state of the battered woman" and provided an explanation for Thomas' actions. Id. Thus, it should have been admitted by the trial judge. "The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight." Id.

II. PERJURY, SUFFICIENCY AND PROSECUTORIAL VINDICTIVENESS

In United States v. Eddy, No. 83-5675 (June 21, 1984), the Sixth Circuit reversed both of the defendant's convictions for perjury and dismissed the indictment.

In October, 1982, Eddy was acquitted by jury on the charge of making a false statement for the purpose of influencing the action of a federally insured bank. Six months later he was indicted for two counts of perjury for testimony which he gave during an in camera hearing in his previous trial while being cross-examined by the prosecutor concerning prior bad acts. Prior to trial, Eddy filed motions to dismiss the indictment on the grounds that the prosecutor's questions were ambiguous, that the indictment failed to set forth the precise falsehoods charged, and that the decision to prosecute Eddy was vindictively motivated.

The statements which were the basis of the perjury indictment were made in a hearing in chambers where the government sought to prove that Eddy had used an Ohio State University College of Medicine diploma and an Ohio State University college transcript in a fraudulent attempt to enlist as a physician in the United States Navy. Specifically, Eddy was asked if he had a submitted a diploma from the Ohio State University College of Medicine to the Naval recruiter. Eddy denied this. He was also asked if he submitted an "official college transcript." He denied doing this as well. At trial Eddy's defense was that he spoke the literal truth because, though he conceded contacting the Navy and submitted various documents, he did not submit an authentic medical diploma or an "official" college transcript. The evidence at trial showed that the documents were in fact not authentic. Thus, he argued, his answers were not false and he could not be convicted of perjury.

The Sixth Circuit agreed. Relying on Branston v. United States, 409 U.S. 352 (1973), the court held that a literally true answer cannot form the basis for a perjury conviction even though made with the intent to deceive the questioner. The duty is on the prosecutor to pin the witness down. "If the Assistant United States Attorney sought to inquire about Eddy's submitting

(Continued, P. 25)

false documentation, the burden was on the United States, and not the witness, to be concise and to the point." Slip Opinion at 11. "[I]f the prosecutor never asks the critical question and never presses for an unequivocal answer the defendant may not be convicted of false swearing." Slip Opinion at 10.

Eddy's conviction under Count II was also reversed and the indictment dismissed. The basis for the perjury conviction on this count was Eddy's response to "a multiple question with at least from separate inquiries." In response to this question, Eddy stated that he did not remember contacting a Florida hospital and representing himself to be a physician in an attempt to secure employment. The indictment, however, did not precisely allege what was false about this response - it simply alleged that he had in fact contacted the hospital claiming to be a physician, but not that there was sufficient proof that he had remembered going there. The indictment did not allege how Eddy's failure to remember was perjurious. "Any reading of the charges found in Count II of the indictment leads one to believe that it has failed to set forth with sufficient clarity the precise falsehood alleged, the factual basis of that falsehood, and the objective truth in stark contrast so that the claim of falsity is clear to all who read the charge." Slip Opinion at 13.

An alternative ground for reversing the convictions and dismissing the indictment was that there was a "realistic likelihood" that the decision to prosecute Eddy for perjury after he was acquitted at the earlier trial was vindictively motivated. While an acquittal is not a per se bar to the filing of perjury charges, in this case "the perjurious nature of Eddy's testimony was not manifest." Slip Opinion at 15. Thus, the circumstances pre-sented warranted application of a presumption of vindictiveness. See United States v. Goodwin, 102 S.Ct. 2485 (1982).

III. RESTRICTED VOIR DIRE

Although federal district courts are vested with wide discretion in controlling voir dire, the Court made clear in United States v. Hill, Nos. 83-5587 and 83-5588 (June 29, 1984), that this discretion can be abused.

In the cited case, the trial judge committed reversible error by failing to honor a defense request to question the prospective jurors on the principles of reasonable doubt and the presumption of innocence. Citing Swain v. Alabama, 380 U.S. 202 (1965), the Court acknowledged that the peremptory challenge right is a fundamental part of a criminal trial and that its violation requires reversal without a showing of prejudice. Here, the trial court's failure to query prospective jurors on the requested principles of law substantially impaired the right to exercise peremptory challenges. Thus, the convictions were reversed and the case remanded for a new trial.

NEAL WALKER

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Trial Tips

MOTION PRACTICE -- A MOVING EXPERIENCE

The following represents one person's approach to the art of motion practice. While the drafter of this article primarily files pleadings in the appellate courts, he has found that the same rationale applies to any pleadings filed at the lower court level. It is hoped that this step-by-step breakdown of motion practice will provide some enlightenment to the local practitioner.

Any pleading filed in any court is designed primarily to communicate and persuade. Such pleadings come in all forms. The most common is where the practitioner affirmatively requests some sort of relief. Others are filed in an effort to defeat the Commonwealth's request for relief. And finally, some are filed to preserve certain rights for the defendant even though you are fully aware that the trial court will not grant the relief requested.

COMPONENTS

CAPTION

Each motion must have a caption which should contain the name of the court to which the motion is being addressed and the file number of the case (usually the indictment number). Next comes the listing of the parties. In pre-trial practice the parties listed are usually those as found in the indictment (e.g., Commonwealth v. Joe Todd). The title of your motion should allow the court to be immediately apprised of what relief you are requesting (e.g., "Motion for Continuance Based on Missing Witness").

OPENING PARAGRAPH

The opening paragraph of your motion should state with particularity the authorities under which you are filing the motion (e.g., "pursuant to RCr 9.04"). It should also contain a clear statement as to what relief you are requesting.

BODY

In the body of the motion you should initially set out any procedural history which is germane to the particular issue. For example in a motion for a continuance you may want to demonstrate that the defendant was indicted on May 1 and the trial was set for May 10. The next part of the body of the motion should explain your need for relief in as much detail as necessary. You should support such a request for relief with persuasive argumentation. At this point you can include any pertinent caselaw which supports your claim. But make sure you relate

(Continued, P. 27)

your argumentation to the facts of your case.

The next part of the body of a motion should be any showing of good faith. For example, in a situation where you are asking for a continuance you should demonstrate what steps you have taken in order to prepare for the case or in order to procure the missing witness. During the last portion of the body of a motion you should cover yourself in the expectancy that the relief you have requested will not be forthcoming. For example, if you have moved for a continuance based on the absence of a missing witness, then ask the court to allow the affidavit containing the proposed testimony of that witness to be read to the jury if the continuance is denied.

WHEREFORE CLAUSE

The next portion of the motion should be the wherefore clause. This particular clause should be in the form of a "mini order." The judge should be able to take the clause and make it readily into an order granting relief with a change of only a few words.

SIGNATURE

After the wherefore clause comes the signature line. You would, of course, place your name, your address, your phone number and you should identify yourself as an attorney for a certain party. After the signature line you should place a notary block if you have made statements in the motion which are within your personal knowledge and not supportable by the records. In that context, you may wish to deem the entire

TIM RIDDELL

pleading a "Motion and Affidavit."

NOTICE

After any signature line or notary statement you should give notice as to where the particular pleading is to be filed, when it is to be filed, and, if you know, when it is to be heard.

CERTIFICATE OF SERVICE

The certificate of service is perhaps the most indispensable part of your motion. You clearly must serve opposing parties and their attorneys. If you have doubts as to whom to serve, follow this maxim: "Cover yourself with paper." In other words, serve everyone and their brother and their sister.

ATTACHMENTS

Some pleadings require that certain documents be attached

(Continued, P. 28)

in support of the relief requested (e.g., affidavit in support of a "Motion for Continuance Based on Missing Witness"). Attachments should be placed on the back of pleadings when they are mandatorily required and/or when it will assist the judge in making a ruling on the motion. If there are certain documents in the record which will be referred to, it would probably be the best practice to attach them to the pleading if you wish the judge to read them.

PROPOSED ORDER

While undoubtedly some local rules require the tendering of proposed orders in support of the pleadings that you file, it is not a universal requirement. It is suggested, however, that you always attach a proposed order detailing the relief requested. If neither the judge nor the Commonwealth's Attorney have to draft orders when motions are granted, then perhaps more motions will be granted.

The foregoing is a broad outline of the basic components of motion practice. The rules governing motion practice in criminal cases are primarily found in RCr 8.14 through RCr 8.24. Familiarizing yourself with these particular rules will undoubtedly aid you in properly and completely representing your client.

Motion practice, like all communication, is a highly personal art. While it may be advantageous to peruse motions filed by local counsel on similar issues in order to determine the proper format, it is suggested that the words used in the motion be your own.

TIM RIDDELL

* * * * * *

OBJECT IN LAYMEN'S TERMS

When counsel objects to the propriety of certain actions or the admissibility of certain evidence and the objection is done in the presence of the jury, make sure that the jurors can understand what the objection is all about. In other words, object in language jurors can understand.

For example, usually when the Commonwealth attempts to have one of its witnesses testify about a statement made by someone else outside the presence of the defendant, your immediate reaction is to object because it is "hearsay." However, if you object in the following manner in the presence of the jury not only will your record be preserved for appellate review but the jurors will better understand why the objection has been made and why such evidence should not carry much weight:

> Judge, the person who made that statement isn't here. I can't ask him if he even made such a statement. And how can I possibly show the jury what possible motive he would have for making such a statement or whether or not he has anything against the man I am representing. I object. It would be unconstitutional for you to let this statement in without giving me and the

(Continued, P. 29)

jurors an opportunity to find out who this man was and what he really said, and why he said it.

As can be seen from the above, an objection was made; a constitutional basis was given; and the record has been preserved. But at the same time you have communicated clearly to the jury why this particular evidence is so suspect.

As a recent member of a jury pool, it became evident to me that jurors on the whole are woefully uninformed about the criminal justice system. By using legalese when objecting, as we admittedly have been taught to do, we unnecessarily leave jurors in the dark. By making your objections in laymen's terms, you can make your record and at the same time enlighten the jurors that there really are valid, logical reasons why you are objecting.

TIM RIDDELL

* * * * * *

If we take habitual drunkards as a class, their heads and their hearts will bear an advantageous comparison with those of any other class. There seems ever to have been a proneness in the brilliant and warm-hearted to fall into this vice. The demon of intemperance ever seems to have delighted in sucking the blood of genius and generosity.

ABRAHAM LINCOLN

* * * * * *

KENTUCKY'S NEW DUI LAW

On July 13, 1984, Kentucky's tough new Drunk Driving law went in effect. Follow with me the hypothetical plight of Ron Bailey, one of the first individuals to be prosecuted under the new law, and together we can see first hand some of the many changes and challenges facing the bench and bar.

All citations, unless otherwise noted, are to 1984 SB 20 as enacted, the new DUI law.

Ron Bailey, a previous resident of Kentucky, recently of Huntsville, Tennessee, is 32, divorced and unemployed. In January 1981 Ron plead guilty, without benefit of counsel, to his first DUI conviction. His second conviction occurred in April 1983 after trial by jury. On Friday, July 13, while visiting some friends in Kentucky, Ron's vehicle was involved in a two car accident at a four way stop type intersection at about 11:00 p.m. Sally Cummins, the driver of the other vehicle, suffered a blow to the head from her steering wheel, was unconscious when officers arrived, and was removed by the Rescue Squad to a local hospital.

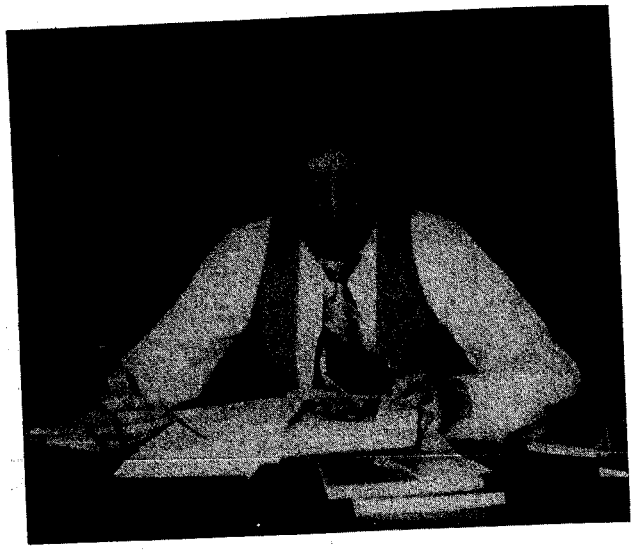
Gidge Martin saw the accident; called the law, and informed the officers that Ron Bailey ran the stop sign, and appeared to have been drinking. Officers Smith and Ledford approached Bailey's vehicle, and asked for his license and registration. Bailey furnished him a Kentucky license. Officer Smith, who was closest to him, detected the odor of alcohol and asked

(Continued, P. 30)

Bailey if he had been drinking. He replied "Yes, a little, but I'm not drunk." Officer Smith asked him to step out of the car and Officer Ledford retrieved a video camera and light bar from his crusier. While Officer Smith had Bailey perform several field sobriety tests, including "finger to nose", "walk the line" and "foot on bumper," Officer Ledford recorded the event on film over Bailey's objection, who said the lights hurt his eyes. Officer Smith asked Bailey to submit to an Alcotest, a field or screening type Preliminary Breath Test, but Bailey refused. He was placed under arrest for DUI and transported to headquarters.

Once there, he did submit to testing and blew .16 on a Smith and Wesson 2000 BA unit. When searched before being lodged in the jail, several Contac capsules and a Physician's Sample packet of Advil, with one tablet missing, was taken from his shirt pocket.

Ron demanded that he be told the amount of his bail and given a phone to use. After conferring with his supervisor, Officer Ledford informed Bailey that he had checked with the hospital and the Cummins woman had not regained consciousness. His bail was to be $5,000 cash, Ledford said, and, even if Bailey could arrange for bail, he would not be released for four hours. Bailey reached by phone the attorney at home who had represented him on the second DUI conviction. The attorney informed Bailey that the officers had followed Section 14(1) of the new DUI law in setting bail because he was an out of state resident and



GEORGE SORNBERGER

serious injury was alleged, and were allowed to detain him a minimum of four hours because his BA was over .15 (See Section 11).

Ron's sister arranged bail on Monday. A warrant had been obtained for the operating on revoked license charge. At his arraignment, Ron Bailey was charged with DUI 3rd offense, (Section 1) Operating on Revoked License and Running a Stop Sign. Upon motion of the County Attorney under Section 6(1)(a) and (b), a hearing was held to determine if Bailey's license would be suspended immediately pending final disposition of the case. The Court heard evidence as to Bailey's previous DUI convictions, his alleged suspension status in Kentucky from the last DUI conviction and evidence of the medical condition of Sally Cummins, who remained unconscious. The Court heard the account of the arresting officers concerning the present arrest. After the hearing, the Court had Bailey surrender his

(Continued, P. 31)

driver's license to the Court, advised him of his right, after 14 days, to request a review of the status of this suspension, and set the case for trial in 30 days.

Several pre-trial motions were filed by Bailey's attorney. A hearing date was obtained, and prior to the hearing, Bailey's attorney visited the County Attorney to see if a suitable disposition could be achieved without trial. Bailey's counsel was informed by the County Attorney that he could not plea bargain on this case because of Section 12(2) of the new law, which requires the prosecutor to oppose amendment of the charge unless all prosecution witnesses are unavailable for trial. Hearings were held on the various motions, and a summary of their disposition follows:

The court overruled a Motion to Dismiss that argued illegal arrest because the officers had not seen Bailey driving and had not witnessed the accident. The Court, citing Section 23(e) of the new law, found the arrest to be permissible without a warrant even though not committed in the officers' presence if the officers had probable cause to believe Bailey had violated Section 1. The Court took under advisement whether there was sufficient probable cause to arrest but eventually ruled there was probable cause just prior to trial. The Court also took under advisement Bailey's Motion to Suppress Results of Roadside Testing. Bailey argued that roadside sobriety testing constitutes a full "search" that must be supported by probable cause to arrest at the onset of the examination and cited People v. Carlson, 677 P.2d 310 (Colo. 1984). The Court deferred ruling pending hearing testimony from the arresting officers.

The Court sustained Bailey's Motion in Limine that no mention be made by any prosecution witness of his refusal to submit to a preliminary breath test, finding that Section 10(1) provided that "A person's refusal to take a preliminary breath test shall not be used against him in a court of law...." The Court also ruled that Bailey's request that there be no mention of the Court's pre-trial suspension of his license be granted.

Several motions were heard in connection with the allegations of previous convictions. Bailey first made a Motion to Strike the previous convictions, citing Baldasar v. Illinois, 446 U.S. 222 (1980), arguing that the Commonwealth was prohibited from using uncounseled misdemeanor convictions for enhancement. The Court struck the 1981 conviction from the complaint, finding that there was no evidence that Bailey was properly advised of his right to counsel nor that he made a knowing waiver of that right, and ordered that the case go do trial as a second offense. The Court overruled Bailey's Request For a Bifurcated Trial but sustained his Motion in Limine that there be no reference to the previous conviction. The Court ruled that the instructions would reflect the penalty for second offense only, finding that the pros-

(Continued, P. 33)

ecutor had made sufficient showing as to the regularity of that previous conviction.

The Court also ruled that the charge of Operating on Revoked License would be prosecuted under KRS 186.620, ($12 to $500 and/or 6 months) finding that Section 9 of the new law, with increased penalties [1st offense, Class B Misdemeanor; 2nd offense, Class A Misdemeanor; 3rd offense, Class D Felony. See Section 9(2)(a)(b)(c). In addition to the above penalties, revocation for 2X the original period. See Section 9(3)] upon conviction, applied to convictions for operating a motor vehicle while under suspension or revocation for a violation of the new law again DUI.

The Court took under advisement an additional Motion to Strike based on the claim that the one previous conviction the Court was allowing to be used was a conviction under the old DUI law and that only convictions under the new law could be used for enhancement purposes.

The Court overruled the Motion to Suppress the seizure of the Contac and Advil, and ruled that upon a sufficient foundation being laid as to whether either was a substance which may impair one's driving ability, that the prosecution could introduce them into evidence. (See Section 1).

The Court, also ruled on various motions in connection with the videotape. See Section 10 (2). The defense moved under Section 10(d) for an opportunity to view the entire recording before trial, which was granted. A hearing was later held to determine if the testing was recorded in its entirety (Section 10(2)(a)) and whether other necessary foun-

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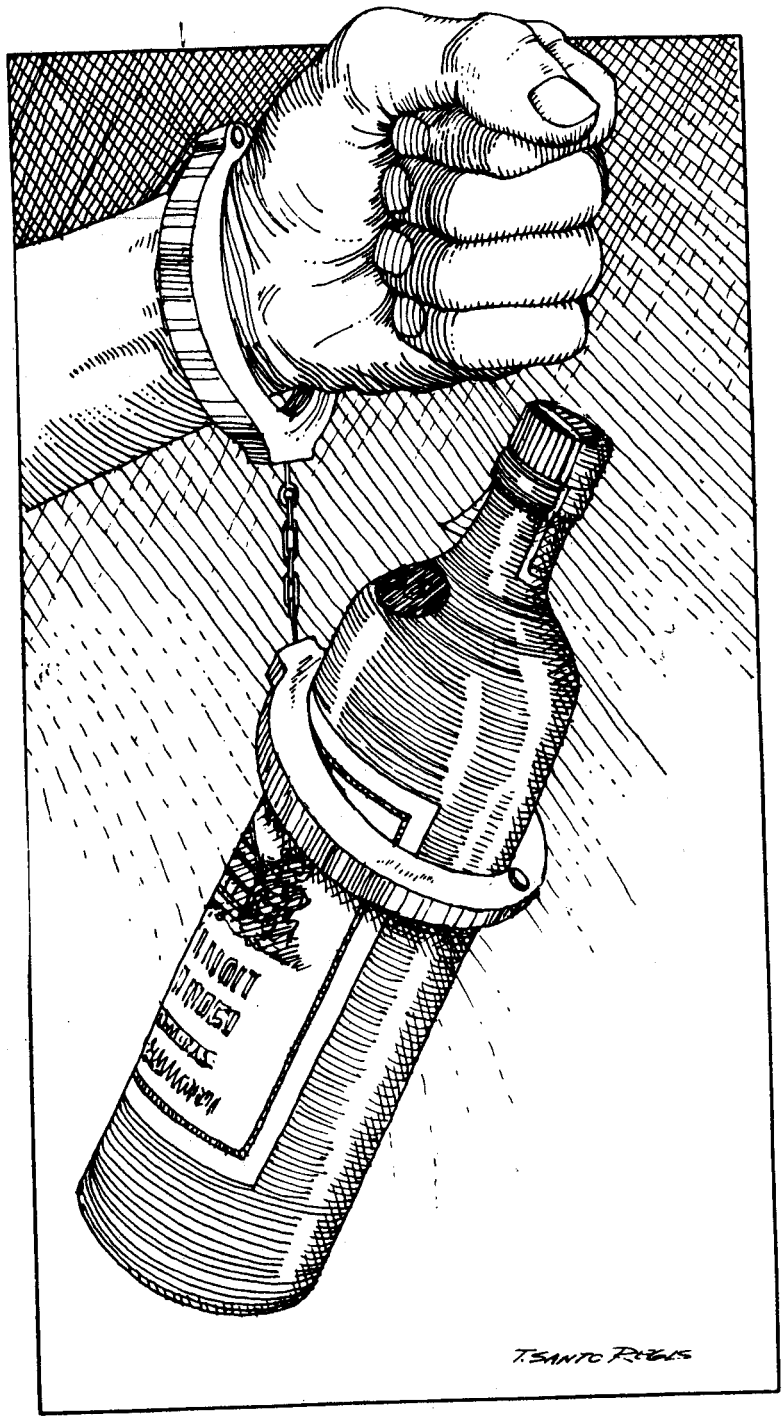

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dation could be laid by the prosecution, including 1) clear and convincing evidence of the accuracy, authenticity and truthfulness of the records, see United States v. Blakey, 607 F.2d 779 (7th Cir. 1979); 2) whether the audio portion was audible, see United States v. Llinas, 603 F.2d 506 (5th Cir. 1979); 3) chain of custody, see Carrier v. Commonwealth, Ky.App., 607 S.W.2d 115 (1980); 4) other foundational requirements including identity of the accused, competency of the operator, equipment and film used, playback speed, etc., see People v. Strozier, 116 Misc.2d 103 (NY Justice Court Monroe County, 1982).

The Court ruled that the entire videotape of Bailey's field sobriety tests could come into evidence.

Finally, the Court ruled on Bailey's Motion to Dismiss the stop sign violation. The Court sustained the motion and dismissed the charge, having found that this arrest was without a warrant, this alleged violation was not committed in the officer's presence, and that Section 23(e) of the new law did not apply to a violation of KRS 189.330(4).

Trial was had and the jury was instructed as to the penalty for second offense. See Section 1(2)(b). A verdict of guilty was returned on the DUI and a sentence of a $500 fine and 90 days in jail was recommended. A verdict of guilty on the Operating on Revoked License was returned, with a $100 fine recommended.

At a subsequent sentencing hearing, Bailey's counsel made a Motion for Probation. The Court denied the motion, but ruled that upon proper application and showing, 60 days community labor could be substituted for 60 days of the 90 day jail sentence. The final judgment of the Court sentenced Bailey on the DUI charge as follows:

Fine-$500 (See Section 1(2)(b))

Jail-90 days (60 days of community labor may be substituted for 60 days of jail upon proper application) (See Section 2(1)-(8))

Service Fee-$150 (See Section 5(1)

Court Costs-$67.50

Treatment-Alcohol abuse treatment program for one year at defendant's cost. (See Section 4(2)(a)(b))

Suspension-12 months (See Section 7(1)(b))

If the Court had not previously taken up the license of Bailey, he would have had to surrender it to the Court at his sentencing (See Section 7(3)).

The procedure for applying to the Circuit Clerk for reinstatement was explained to him (See Section 8(3)).

The Court advised Bailey pursuant to Section 2(8) that failure to complete the community labor or to perform diligently at that labor shall be grounds for contempt of court, and that the Court, in addition to any other remedy for contempt, would reinstitute

(Continued, P. 35)

the 60 days that were being suspended. The Court further advised Bailey, pursuant to Section 3(1) that because this was not a 3rd offense, defendant could apply for work or school release, but, if granted, no individual period of incarceration could be less than 24 hours. Also, Bailey was advised pursuant to Section 4(2)(d) that failure to complete the mandatory treatment program or to pay the amount specified by the Court for treatment shall be grounds for contempt of Court.

Bailey could not pay the entire fine and Court costs and fees, as ordered, so, pursuant to Section 24, he made application for installment payments (See KRS 534.020).

The final motion Bailey's counsel made was for the mandatory 12 month revocation (See Section 7(1)(b)) to run concurrently with the suspension order Bailey was presently under. (Proof at trial had shown that DOT had revoked Bailey's license for one year on September 1, 1983, when his second DUI conviction became final after appeal).

The Court ruled that under Section 6(5) Bailey was entitled to credit against his new 12 month suspension for the period of time that his license had been suspended before trial, but ruled that under Section 15(6), the suspension must run consecutive.

GEORGE SORNBERGER

* * * * * *

ADMISSIBILITY OF DEATH CERTIFICATES IN HOMICIDE CASES

The coroner of each county is required to investigate the cause and manner of all deaths that are defined by statute as a "coroner's case." KRS 72.410. According to KRS 72.405(2), "Coroner's case" means a case in which the coroner has reasonable cause for believing that the death of a human being within his county was caused by any of the seventeen conditions set forth in KRS 72.025. Those conditions are:

(1) When the death of a human being appears to be caused by homicide or violence;

(2) When the death of a human being appears to be the result of suicide;

(3) When the death of a human being appears to be the result of the presence of drugs or poisons in the body;

(4) When the death of a human being appears to be the result of a motor vehicular accident and the operator of the motor vehicle left the scene of the accident or the body was found in or near a roadway or railroad;

(5) When the death of a human being occurs while the person is in a state mental institution or mental hospital when there is no previous medical history to explain the death, or while the person is in police custody, a jail or penal institution, except pursuant to a sentence of death;

(Continued, P. 36)

(6) When the death of a human being occurs in a motor vehicle accident and when an external examination of the body does not reveal a lethal traumatic injury;

(7) When the death of a human being appears to be the result of a fire or explosion;

(8) When the death of a child appears to indicate child abuse prior to the death;

(9) When the manner of death appears to be other than natural;

(10) When human skeletonized remains are found;

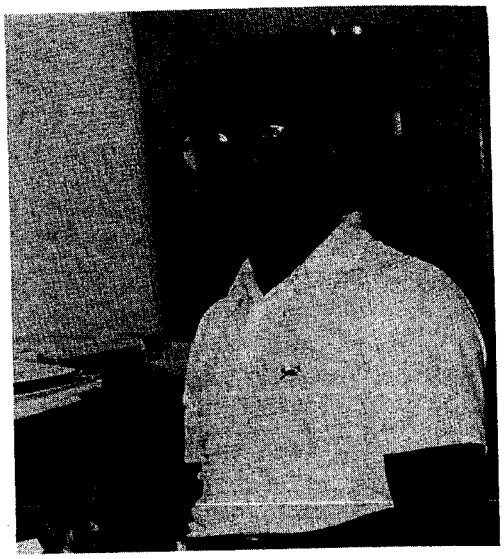
(11) When postmortem decomposition of a human corpse exists to the extent that external examination of the corpse cannot rule out injury or where the circumstances of death cannot rule out the commission of a crime;

(12) When the death of a human being appears to be the result of drowning;

(13) When the death of an infant appears to be caused by sudden infant death syndrome in that the infant has no previous medical history to explain the death;

(14) When the death of a human being occurs as a result of an accident involving an airplane;

(15) When the death of a human being occurs under the age of forty (40) and there is no past medical history to explain the death;



RODNEY MCDANIEL

(16) When the death of a human being occurs at the work site and there is no apparent cause of death such as an injury or when the industrial toxics may have contributed to the cause of death; and

(17) When the body is to be cremated and there is no past medical history to explain the death.

KRS 213.090(2) requires the coroner to "state in his certificate of death the nature of the disease or other cause of death." This statute also provides that "If the death was from external causes of violence, he shall state whether in his opinion the death was accidental, suicidal or homicidal." To what extent is such a death certificate admissible in a homicide case in the absence of the person who prepared it?

In homicide cases, the most litigated issue is whether the death certificate can be used

(Continued, P. 37)

to establish the cause of death. Most courts which have considered the issue have held that death certificates are not competent to establish the cause of death in a homicide case.

In Vanderheiden v. State, Neb., 57 N.W.2d 761, 767 (1953), the Court held that a death certificate is not competent evidence of the cause of death in a controversy where the cause of death is a material issue. "To apply a different rule in a criminal case could be gravely unjust to a defendant and deprive him of his constitutional right...to meet the witnesses against him face to face...since death certificates are made ex parte without a hearing and without the right of cross-examination."

In State v. Watson, N.C., 188 S.E.2d 289, 295-296 (1972), the court found that constitutional error had been committed in the use of a death certificate to establish the cause of death in a murder prosecution." The clear mandate of Article I, §11 (now Article I, §23) of the North Carolina Constitution and the Sixth Amendment to the United States Constitution guaranteeing the right of confrontation and cross-examination, and the fundamental fairness guaranteed by due process of law require that we hold that the trial judge erroneously admitted the hearsay and conclusory statement contained in the death certificate "that the immediate cause of death was hemorrhage and asphyxia due to or as a consequence of stab wound of the left neck."

In Commonwealth v. McCloud, Pa., 322 A.2d 653, 656 (1974), the court held that the use of an autopsy report as direct evidence in establishing the cause of death (an element of the crime) denied the defendant the fundamental constitutional right of confrontation.

Although it does not involve death certificates, the opinion of the Sixth Circuit in Stewart v. Cowan, 528 F.2d 79 (6th Cir. 1976) supports the view that death certificates are not admissible in the absence of the persons who prepared them. In the cited case, the court considered the propriety of the introduction of a ballistics report in the absence of the F.B.I. technician who prepared it. The Court held that the Constitution imposed upon the prosecution the burden of showing the unavailability of the F.B.I. technician before it could seek to introduce the ballistics report under an exception to the hearsay rule. Id., at 84-85. Because the ballistics testimony constituted a significant link in the chain of circumstantial evidence against the defendant and because the prosecution failed to justify the unavailability of the person who prepared the ballistics report, the Sixth Amendment was held to have been violated when testimony about the results of the report was introduced. Id., at 80.

Other courts have found it to be error to admit death certificates to establish the cause of death on the ground that the statement of the cause of death

(Continued, P. 38)

is not a "fact" admissible as prima facie evidence within the meaning of the statute. See People v. Fiddler, Ohio, 258 N.E.2d 359 (1970); State v. Martin, Minn., 197 N.W.2d 219, 222 (1972); Ward v. Commonwealth, Va., 217 S.E.2d 810, 811 (1975). These cases recognize that a statement in a death certificate concerning the cause of death is the expression of an opinion, not the statement of a fact.

The Supreme Court of Kentucky has considered this issue in only one published opinion in a criminal case. See Bralley v. Commonwealth, Ky., 525 S.W.2d 123, 125 (1975). Relying on civil cases, the Court rejected the defendant's argument that the introduction of a death certificate violated his constitutional right to confrontation. The Court held that "death certificates may be used as prima facie evidence of the facts therein stated." See KRS 213.190(1). The Court then treated the coroner's opinion as to the cause of death as a fact, holding that the certificate "was offered only to establish the cause of death from a factual standpoint and therefore was properly admitted." Id. The Court added that "It is only to the extent that a certificate states an opinion as to legal responsibility for the death that the certificate is not admissible." Id. Finally, the Court rejected Bralley's contention that the corpus delicti was not established, holding that certain facts "coupled with the certificate which stated the cause of death as 'multiple injuries' as a result of an auto accident, were amply sufficient." Id.

The Supreme Court of Kentucky has not been reluctant to overrule prior cases that it considered to be unsound. It is arguable that Bralley should be overruled on this basis. Bralley is unsound for two reasons. First, it treats a statement as to cause of death as a fact that is admissible within the meaning of KRS 213.190(1). Plainly, however, a statement as to cause of death is an opinion, not a fact. See People v. Fiddler; Ward v. Commonwealth; and State v. Martin, supra. A statement as to cause of death is often the result of complex value judgments. Fiddler, supra. An "opinion as to the cause of death is not converted into a fact by the process of including it in a certified copy of the coroner's death certificate." Secondly, Bralley is unsound because it relied only on civil authority in rejecting the defendant's argument that introduction of the death certificate violated his constitutional right to confrontation. The Court in Bralley failed to recognize that civil rules of evidence do not govern in criminal cases if they infringe the constitutional rights of an accused. State v. Tims, Oh., 224 N.E.2d 348, 350 (1967). "In the context of a criminal case...the applicability of the constitutional right to confront witnesses must be carefully considered." People v. Fiddler, supra, P. 361.

If the prosecution seeks to introduce a death certificate to prove the cause of death in a criminal case, it is recommended that an objection be

(Continued, P. 39)

made on the grounds that a statement as to cause of death is not a fact within the meaning of KRS 213.190(1) and on the basis that introduction of the death certificate in the absence of the person who prepared it violates the defendant's state and federal constitutional right to confront the witnesses against him.

RODNEY McDANIEL

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Cases of Note... ...in Brief

PUBLIC INTOXICATION STATUTE OVERTURNED

In Commonwealth v. Sheldon, 83-979C, the Fayette Circuit Court overturned a District Court conviction and fine of $100 for public intoxication under KRS 244.020. The Circuit Court held the statute unconstitutional because it was vague and provided no reasonable standard to measure the conduct of the accused.

The opinion reads in part:

> The Statute requires only that a person be "under the influence" of alcoholic beverages in a public place. This Statute does not require any particular degree of intoxication and under the Statute a person could be found guilty for any offense ranging from eating too many pieces of grandma's bourbon laced fruitcake to being blind, falling down, staggering drunk. Neither does the requirement that the conduct be in a public place remove it from constitutional infirmity. The state licenses and approves the sale and consumption of alcoholic beverages in public places. For the state to then criminalize that which they have already legalized without any definition of the harm sought to be remedied would be a violation of due process.
>
> The practical application of this proposition was demonstrated in the case at bar when the jury after having retired to consider their verdict asked the Court to define "under the influence." There being no recognized judicial or legislative definition, the Trial Court declined to give a definition.

FUNDING FOR EXPERT WITNESSES

In United States v. Patterson, 724 F.2d 1128 (5th Cir. 1984) the Court held that the defendant was entitled to appointment and funding of a fingerprint analyst under the federal indigent expert witness statute, 18 U.S.C. Section 3006 A(e). That statute, like Kentucky's KRS 31.200, requires appointment when the expert is "necessary" for the defense.

In Patterson, the prosecution had introduced fingerprint evidence against the defendant along with eyewitness identifications. The defense expert was required not only because a defense expert "might have reached a different result" but also because "the assistance of an expert undoubtedly would

(Continued, P. 40)

have facilitated [the defendant's] cross-examination of the government's expert."

INVOLUNTARY MEDICATION OF DEFENDANT DURING TRIAL

In Commonwealth v. Louraine, 453 N.E.2d 437 (Mass. 1983) the defendant had a substantial background of mental illness. From the time he was arrested throughout the trial he was given antipsychotic medications including prolixin, thorazine, mellaril, and trilafon.

His defense at trial was that he did not have the mental capacity to commit the murder he was charged with.

Prior to trial the defendant asked to be permitted to attend the trial unmedicated if he was found competent to stand trial. He was found competent but only if he continued on the medication. He was tried medicated.

The Court recognized that a defendant is constitutionally entitled to present his version of the facts, and to place before the jury any evidence probative of his mental condition.

The Court held that, when a defendant's mental capacity is at issue, he cannot be involuntarily medicated at trial since to do so would visibly affect his demeanor and mental processes at trial and deny the jurors from accurately viewing evidence probative of his mental condition.

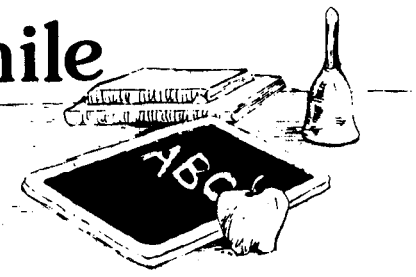
PRISON GARB

In Pike v. State, 312 S.E.2d 808 (Ga. App. 1983) the defendant's "only civilian clothing was taken from him at the time of his arrest and sent to the crime laboratory. His clothing had not been returned to him at the time of trial."

The Court held that forcing a defendant to wear prison garb when his only civilian clothes were taken from him and not returned violated his presumption of innocence. See also Scrivener v. Commonwealth, Ky., 539 S.W.2d 291 (1976); Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

ED MONAHAN

Juvenile Law



PREVENTIVE DETENTION

The United States Supreme Court's ruling June 4, 1984 in Schall v. Martin upheld New York's law allowing accused juvenile delinquents to be detained prior to trial if there is a risk they will commit a crime if released.

The 6-3 ruling was a significant victory for the state which had previously lost at both the District Court and in the Second Circuit Court of Appeals. The lower courts had reasoned that juvenile pretrial detention was unconstitutional, as it imposed punishment prior to a youth being found guilty.

The District of Columbia and a few states have also adopted preventive detention guidelines for adults but the June 4th ruling by the Supreme Court deals solely with juveniles.

Kentucky, pursuant to Chapter 208, allows juveniles to be preventively detained as do all states. New York's statute was much broader than Kentucky's, however, allowing juveniles to be detained for up to 17 (seventeen) days after the initial appearance before the Court. The judge needed to be convinced only that there is a "serious risk" that the youth will commit a crime. The law made no distinctions between previous arrests or violent versus non-violent crimes. The judge could consider reports from juvenile authorities on the child's home life, school record, and any other factors. Failure to consider these factors was not grounds for release.

The challenge to the statute was filed by three youths all of whom were 14 at the time they were detained. In addition, 34 other juveniles joined the action to form a class.

One of the youths was charged with hitting another youth on the head with a loaded gun and stealing clothing from him. The youth was jailed for 15 days before being adjudicated a delinquent and placed on probation.

Another youth was charged with attempted robbery. He was not prosecuted after his detention because the witnesses failed to show.

The third youth was held for eight days for attempted robbery from other youths. He was found guilty of harassment and petit larceny to go along with his four previous arrests. He was placed in the custody of a social services agency.

Associate Justice Rehnquist in delivering the opinion of the Court stated "The Constitution does not mandate elimination of all differences in the treatment of juveniles" from adults. It is very interesting to note that throughout the opinion the term "treatment" and "promoting the welfare" of the child are used. In fact the Court makes a concerted effort to convince the reader that preventive

(Continued, P. 42)

detention is designed to protect the child as well as society.

The Court is able to balance the child's interest to freedom in the following context: "The juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well. But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody". (emphasis added).

The dissent written by Justice Marshall underscores the importance of protecting the "liberty" interests of all persons. The absence of procedural safeguards in the decision making process allows a juvenile accused of a petty crime to be held upon the "caprice" of a judge. The variation in pretrial detention

criteria gives rise to inequality across the board.

Kentucky's detention statute is mild in comparison to New York's when examined on its face. Probable cause for the offense must be established as well as probable cause that the interests of the child's protection are served by his further detention. These decisions must be made within seventy-two hours of detention, exclusive of Sundays and holidays.

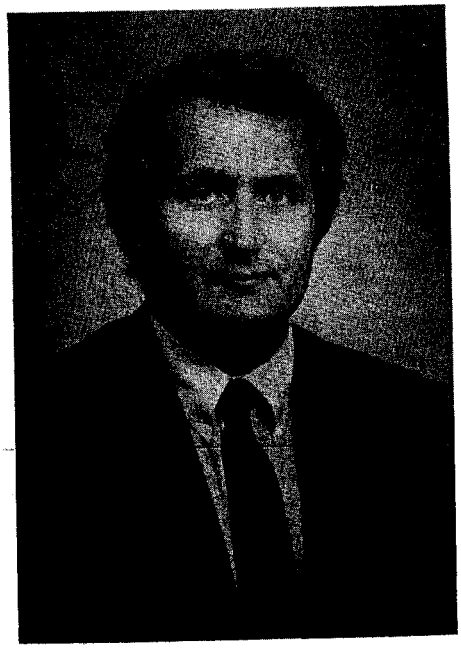
Nevertheless, there is no outer limit to Kentucky's detention statute. Once the Court determines a child is to be detained it is incumbent upon the attorney to keep the detention at a minimum absent compelling reasons to do otherwise.

One final comment is necessary. The Supreme Court was careful to avoid the issue of adult preventive detention. The decision should not be read as a preview on this issue but should be analyzed for its impact on children. Indeed, by relying upon the state's legitimate interests in "treatment" of children as a basis for upholding the statute, it would be difficult to utilize Schall v. Martin as a foundation for altering the law of adult preventive detention.

TOM HECTUS

Tom is a former appellate attorney with the DPA and a former trial attorney with the Jefferson County Public Defender's Office. He currently is engaged in the practice of law with the Louisville firm of Gittleman and Barber, and serves as the Shelby County public advocate.

TV COVERAGE OF A TRIAL CAN AFFECT PARTICIPANTS AND, THUS, THE OUTCOME



JOE GLASS

The Courier-Journal editorial criticizing Judge Edmund P. Karem's banning of cameras from a trial last week was predictable, and predictably short-sighted for several reasons.

Initially, if the editorial writers or their lawyers had read the Criminal Rules governing trials, they would have learned that a judge may exclude all infants under the age of 16 years from a courtroom involving any trial for rape or similar offenses. That rule came about for the logical reason of protecting infants from hearing the sensual aspects of a such a trial, and thus protecting them because of their tender years.

A televised trial involving rape and similar offenses makes the home television an extension of the courtroom if such a trial is televised. Does a rape trial have any less prurient aspects than a Playboy channel or a Hustler channel?

Ironically, the editorial writers wrote in platitudes concerning the "public's interest" and "educating the public" and yet the print media hardly covered the trial. Similarly, the three commercial TV channels did little reporting on the proceedings after their camera crews were refused access to the courtroom.

Why is it that the media only want to educate the public in cases involving sexual offenses or murders? I have yet to see the press hyped up over coverage of an inconsequential burglary or theft case, although the public could be educated about trials and trial practice through the coverage of these types of cases. Obviously, commercialism is the name of their game, whether it be increasing Nielsen ratings or selling newspapers.

I have always favored the public's First Amendment constitutional rights to know, and the press' right to inform, but have never believed that those rights included television cameras in the courtroom. When a reporter is present in the courtroom to cover a trial or a hearing, by the taking of notes, those First Amendment rights are satisfied and protected.

Cameras in the courtroom can affect all of the participants in a trial and their presence may make a substantial difference in the outcome of the

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litigation. Those two factors alone are enough to justify the exclusion of the device. With a camera in the courtroom, all of the participants will be aware of what I call the "looking-good" syndrome which can either result in "show-boating" or inhibitions, and with either factor, the result is something less than a fair trial. The fact that the presence of television cameras may make the active participants - judge, lawyers and witnesses - concerned with their particular method of oratory, exemplifies how the client's interest may suffer, whether that client is the State or a defendant.

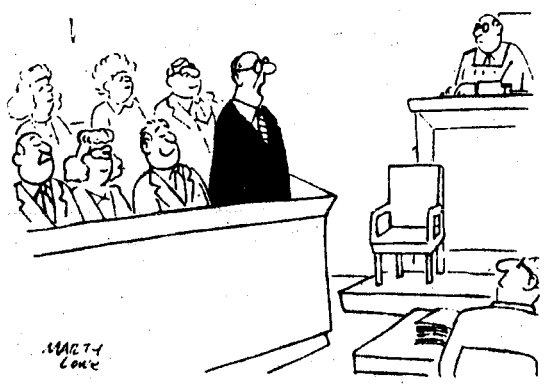
It takes very little imagination to realize that a prosecutor and a defense lawyer may each want to play their roles to the hilt when, in the parlance of the stock market, there are "futures" at stake. The cause of their client may become the secondary interest.

On the other hand, what about the advocate who is made nervous by the presence of the camera to the point that he or she is more preoccupied with that fact than with the protection of the rights of the client? The consequence of that preoccupation could reduce the effectiveness of that advocate. Should either situation occur, neither justice nor the client is served.

Television cameras can have a potential affect on a jury, as well as upon the active trial participants. Instead of being able to obtain the facts of a case under conditions of relative ease, the jury in a televised trial will find himself the object of some camera

Pepper . . . and Salt

THE WALL STREET JOURNAL



"Your honor, before announcing the verdict we would like to discuss media rights, royalties, residuals etc....."

"From the Wall Street Journal
Permission Cartoon Features
Syndicate"

scrutiny, from time to time. At best, this situation may be only discomforting but it may reduce the individual or collective attention and independence of the jurors.

The television camera would enhance the scope of the audience that will evaluate the jurors' decision, and should they, individually or collectively, be reticent about their role in a case, the jury's decision could be affected by some misguided notion or belief about public opinion in particular types of cases.

I suppose that there might be some minuscule educational advantages to the public in

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viewing a televised trial, but these advantages will surely pale when contrasted with the potential for disadvantages to the course of the litigation. More often than not, judicial decisions are called for and made for the first time in the criminal case during the trial, because the opportunity for discovery of evidence is very limited and the evidence usually unfolds for the first time in the trial arena.

In a televised trial, the judge will probably want to control the actions in the courtroom more than he might otherwise be inclined to do. If so, that control may foment argument for the camera's sake or conversely it might quell an otherwise fervent advocate who might fear that he will be critiqued poorly by the viewing public. Any element which is unnecessary to the trial process, but which could have a profound effect upon that process must be viewed as a disadvantage to the litigation as a whole. In my view, televised trials represent such an element.

The press, of late, has rallied behind the First Amendment, using it as both a sword and a shield. In the last several years, the press has begun to tell us what presidents, governors and mayors are thinking even before these people have spoken. It is almost literally true that the press has become a fourth branch of government and to some extent has become the most powerful force in government because so many leaders of the other three branches want to know what the press' reaction will be to a decision, before it is ever finally made.

When the press is truly laboring for First Amendment rights, they deserve all of the praise and accolades that the public can heap upon them, but when they argue First Amendment rights because of commercial motives, they should reap equal amounts of criticism and gall.

JOE GLASS

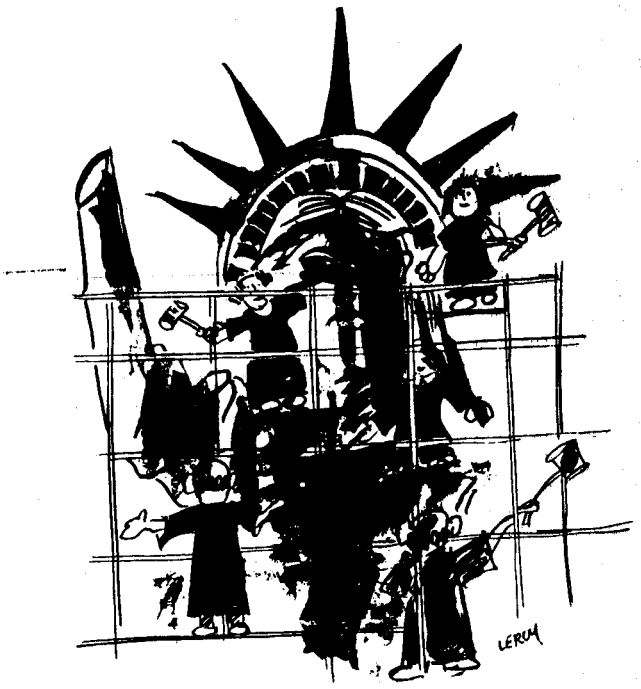
The Joseph Glass office is located at 231 South Fifth Street in Louisville. Joe has a J.D. from the University of Louisville and has been on the graduate faculty there (part-time) for the past year.

Among his achievements, Joe served three years on the Board of Directors of the Louisville Bar Association. He is past president of the Kentucky Academy of Justice; Jefferson County Bar Association and the Federal Bar Association. In 1974, Joe successfully argued Wingo v. Wedding before the United States Supreme Court.

"...vice and crime constitute a 'normal' response to a situation where the cultural emphasis upon pecuniary success has been absorbed, but where there is little access to conventional and legitimate means for becoming successful.... In this setting, a cardinal American virtue, 'ambition' produces a cardinal American vice, deviant behavior."

ROBERT K. MERTON,
Sociologist

IN MEMORIAM:



"OFF WITH HER HEAD"

The fourth amendment to the Constitution of the United States. Born between 1776 and 1791 from the fires of a revolution against tyranny. Created to protect the citizens of a new republic from the power of the state. The Fourth Amendment grew slowly in its youth, but matured in its later years through fierce fights for its life. Gained strength through its journeys in Ohio (Mapp and Terry) and California (Schmerber). In its last year of life, suffered a severe blow in Illinois (Gates), and died during surgery to remove the last of its vitality on July 5, 1984, two hundred and eight years from its conception.

From Allegheny County, Pennsylvania Public Defender Newsletter
Lester G. Nauhaus, Director

THE ADVOCATE

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