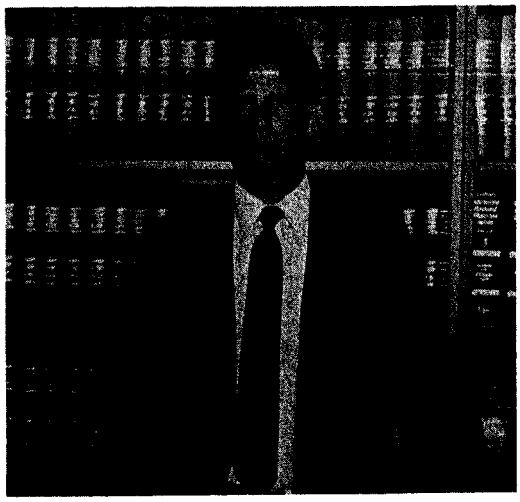
THE ADVOCATE

Vol. 6 No. 6 A Bi-Monthly Publication of the DPA October 1984

THE ADVOCATE FEATURES



BILL SPICER

Lauded as the "Nice Person of the Week of June 20th" by the local London newspaper, Bill Spicer of our Department received a fraction of the attention he deserves.

Bill joined our staff in October of 1980. He had some reservations about beginning his career with the office, even though defender work was something he'd "always wanted to do." To begin with, Bill sized it up as a high pressure job, given the felony caseload and his lack of trial experience, and to make matters worse, he had a residual bad impression of criminal defense attorneys. He expressed his relief after working with the office that "one doesn't have to suborn perjury or break the law to defend a client." Speaking of the tremendous caseload,

(Continued, P. 2)

Future Seminars

The Department of Public Advocacy will conduct its Third Trial Practice Institute at Eastern Kentucky University in Richmond on November 14-17, 1984. The National faculty include Steve Rench of Denver, Colorado; Tony Natale of West Palm Beach, Florida; and, Deryl Dantzler of Macon, Georgia.

There will be lectures and demonstrations on voir dire, opening statements, direct examination, cross-examination, cross-examination of experts, and closing arguments. Every participant will perform each of these aspects of the trial in a small group with critiques from two faculty members. Each participant will be video taped for their review.

(Continued, P. 3)

INSIDE

PAGE

Protection & Advocacy..... 4
West's Review..... 5
Urinalysis Testing..... 12
The Death Penalty..... 15
Sixth Circuit Survey..... 21

TRIAL TIPS:
- DUI Enhanced Punishment..... 24
- Serious Physical Injury... ... 29
- Rules Changes..... 33
- Parole Board Chairman Speaks.. 39
- No Comment..... 45
- Book Review..... 46

THE ADVOCATE

EDITORS

- Edward C. Monahan
- Cris Purdom

CONTRIBUTING EDITORS

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

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.

Changes or incorrect address? Receiving two copies? Let us know:

NAME _____

ADDRESS _____

_____

_____

The Advocate welcomes correspondence on subjects treated in its pages.

Printed with State Funds KRS 57.375

Bill told me of an experience he'd had as a new public defender by way of illustration. He'd been in court awaiting his client before the judge was to hear the plea. The "client," who Bill hadn't seen for awhile walked in and Bill began to advise him of the procedure, the deal and that he'd have to return to jail as a result of the plea. He'd spoken for several minutes, when the client stopped Bill in mid-sentence. "Wait a minute, do you know who I am? I'm a juror." Bill paused a moment nonplussed, then came back with, "Okay, if my client doesn't show, will you plead guilty to this robbery?" Bill ended by saying the caseload although large is bearable because of the support provided by Frankfort.

Since beginning with the Department Bill has decided he doesn't want to do anything else because of the "good Kentucky [Public Defender] System and his contact with defense lawyers." "It's the best job in the world; I can't think of anything else I'd rather do - even being a rock star." He smiles. Exploring that further, Bill synthesized: "It's a Renaissance field because there are so many things to learn, not only criminal law, but human psychology, theater and science. I never stop trying to improve and since every case is different it never becomes boring."

Bill has an undergraduate degree in Political Science from Western Virginia University. He graduated in 1980 from the University of Kentucky School of Law. While there he was on The Kentucky Law Journal staff. Bill loves to cook - his specialty is chicken breasts stuffed with mushrooms and shallots smothered in vermouth. Other pursuits are tennis, basketball and "trying to be funny." Bill has served as Directing Attorney of the London Office since October.

CRIS PURDOM

(Seminars, Continued from P. 1)

There will also be lectures on preparation, the theory of defense, preservation and courtroom communication.

This is a working seminar with preparation and active participation essential.

DISTRICT COURT SEMINAR

After the first of the year, DPA will be conducting a one-day seminar on district court practice.

DEATH PENALTY SEMINAR

On March 15 & 16, 1985 a 1-1/2 day seminar on the death penalty will be presented by DPA. It will be held at Natural Bridge State Park.

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.

FURTHER INFO

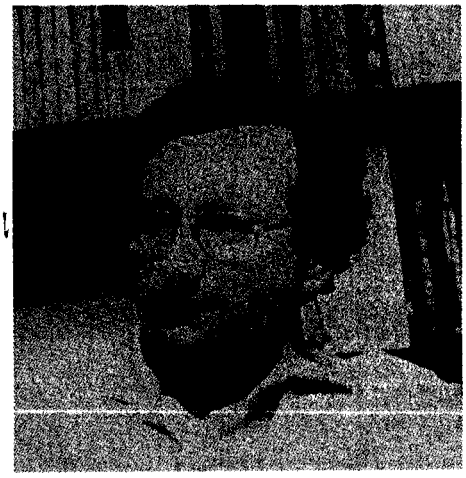
Further information on DPA seminars will appear in separate mailings, or you can contact Ed Monahan at (502) 564-5258.

* * * * * *

Patricia Van Houten is the new Directing Attorney of our Morehead Office.

PATRICIA VAN HOUTEN

SYMPOSIUM ON CAPITAL PUNISHMENT



REV. INGLE

"Christians for Peace and Justice" are conducting a symposium on capital punishment on Saturday, November 10, 1984.

The featured speaker is Rev. Joseph B. Ingle, Director of the Southern Coalition on Jails and Prisons. For the last 10 years he has ministered to men and women on death row.

There will be workshops on:

1) Retribution, Deterrence and Justice by Violence;
2) The Religious Community and Capital Punishment;
3) Bias in Death Sentencing: The effect of race and ecomonic or social status; and,
4) The devaluation of life: a cross cultural approach.

Workshops Nos. 1 & 3 carry 3 CLE credits from the KBA.

The sumposium is at Thomas More College in Edgewood, Kentucky. It is modestly priced at $9.00.

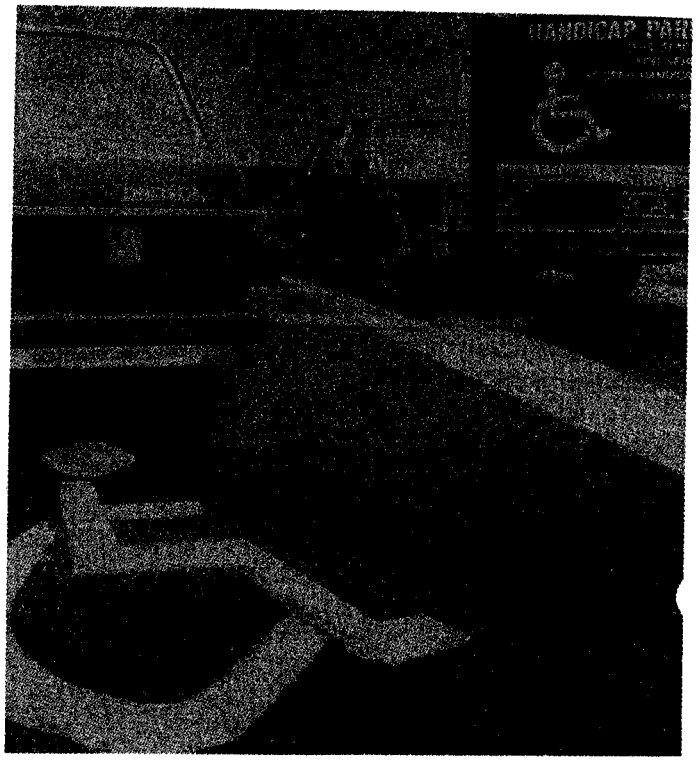
For more information call:

Kate Cunningham - 606/291-1616 or
Ed Stieritz - 606/781-1093.

Protection and Advocacy

for the Developmentally Disabled

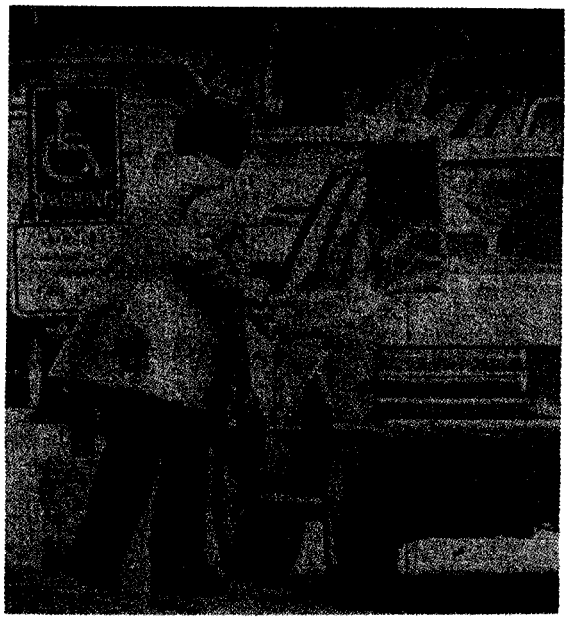
The following editorial and pictures appeared in the Kentucky Post on June 27, 1984. They are reprinted here with permission.



FEEL LAZY?

Most of you don't need to read this. Most of you are considerate people, not in the habit of making it tough on others. Most of you wouldn't dream of pulling into one of those parking spaces set aside for the handicapped at supermarkets and shopping centers.

These remarks are addressed to those among you who slide right into handicapped parking spaces because you figure they're more convenient.



Those spaces are there for a reason. Handicapped people find enough barriers in their lives. It's hard enough for them to get around without you getting in their way.

But you probably wouldn't know anything about that because you've never been in a wheelchair or suffered a debilitating heart condition.

But you do know something about being insensitive and inconsiderate. Don't tell the rest of us what it's like, though. We'd rather not know.

* * * * * *

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 U.S. Supreme Court continued to rechart the course of criminal law.

In landmark decisions, the Court in United States v. Leon, 35 CrL 3272 (July 5, 1984) and Massachusetts v. Sheppard, 35 CrL 3296 (July 5, 1984) has created a "good faith exception" to the exclusionary rule. In Leon, the Court was confronted with a search conducted pursuant to a facially valid warrant which, however, was issued on less than probable cause. The Court reviewed the case to decide whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good faith reliance on a search warrant which is later held to be defective.

Addressing the issue thus framed, the Court initially held that the exclusionary rule is not a necessary corollary of the Fourth Amendment. The Court then engaged in a weighing of "costs and benefits" to determine whether a good faith exception to the exclusionary rule should be allowed. The Court opined that the exclusionary rule lacks deterrent effect as to judges and magistrates issuing warrants. Thus, where a warrant is defective as a consequence of these individuals' actions, application of the exclusionary rule would, in the Court's view, serve no purpose. The Court further reasoned that the exclusionary rule could serve no deterrent purpose against police actions taken "in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." The Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." The Court emphasized, however, that "[w]e do not suggest... that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms." The Court gave as examples of situations in which the exclusionary rule would still apply those instances in which the officer gave false information in support of a warrant, or where the issuing magistrate "wholly abandoned his judicial role." See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

Justices Brennan, Marshall and Stevens, in a powerful dissent, noted that "[i]t is difficult to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements." The dissenters would also have held that "the exclusion of illegally obtained evidence was compelled not by judicially fashioned remedial purposes, but rather by direct constitutional command."

Similar facts were presented to the Court in Sheppard, supra. The Court

(Continued, P. 6)

in Sheppard stated that, in view of its holding in Leon, supra, "the sole issue before us in this case is whether the officers reasonably believed that the search they conducted was authorized by a valid warrant." The Court found that the officers were reasonable in their belief. The Court placed great reliance on the fact that the officers were assured by the judge issuing the warrant that it was proper in form.

In another decision designed to erode the exclusionary rule, the Court held in Segura v. United States, 35 CrL 3298 (July 5, 1984), that the rule need not apply if the connection between illegal police conduct and the discovery and seizure of evidence is so attenuated as to dissipate any taint. In Segura, federal drug enforcement agents received information establishing probable cause for the search of the defendant's apartment for drugs. However, because of the late hour, the agents were unable to obtain a warrant. In order to secure any evidence the agents proceeded to the apartment, entered the apartment without the occupants' permission, and arrested them. The agents then briefly searched the apartment for other occupants and, having "secured" the apartment waited for 19 hours until a warrant was obtained before conducting a full search.

The Court, in an opinion by Chief Justice Burger, found no constitutional violation in these facts. The Court rejected defense argument that the seizure of evidence was complete when the agents seized the apartment and its contents, thus reducing the warrant to an after-the-fact irrelevancy. In so doing, the Court drew a narrow distinction between "seizures" and "searches." "A seizure affects only the person's possessary interests; a search

"By George! I've got a feeling this is going to be one of those terrific days where everywhere you look you can see probable cause!"

Reprinted with Permission

affects a person's privacy interests."

In the Court's analysis the warrantless seizure of the apartment was lawful as limited to the purpose of securing the apartment until a warrant could be obtained. The Court cited Chambers v. Maroney, 399 U.S. 42 (1970) (permitting the warrantless seizure of an automobile until a warrant could be obtained) and United States v. Chadwick, 433 U.S. 1 (1977) (permitting the similar seizure of a footlocker) as authority. However, the holding in Segura goes considerably beyond Chambers and Chadwick in permitting a warrantless entry into the home and its "seizure" for 19 hours pending the obtaining of a search warrant. In the Court's view Segura's privacy interests were unaffected by this police conduct. "We hold, therefore, that securing a

(Continued, P. 7)

dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." The Court also considered that, even if the initial entry into the apartment was illegal, the police already had an independent source of probable cause for obtaining a search warrant. Consequently, the evidence seized during the search pursuant to the warrant was not obtained by exploiting any police illegality.

Justices Stevens, Marshall, Brennan, and Blackmun dissented. The dissent would have found the warrantless entry of the home unlawful, characterizing the 18-20 hour occupation of the defendant's home as "blatantly unconstitutional." The dissenters also noted that the Court's decision is at variance with the spirit of its longstanding recognition of the home as an especially protected zone of privacy.

In United States v. Karo, 35 CrL 3246 (July 3, 1984), the Court held that drug agents' installation of an electronic tracking devise ("beeper") in a can of ether with the original owner's consent did not become a Fourth Amendment search or seizure when the can was transferred to an unwitting purchaser. The defendant purchased the can of ether apparently for use in chemical processing of cocaine. Using the beeper, drug agents were then able to track the ether through a series of moves between various houses and storage facilities. Ultimately, the agents obtained a search warrant for the defendant's home based in part on information obtained with the beeper. The District Court held that a warrant was required for the use of the beeper in private dwellings and that the seized evidence, as fruit of the beeper's illegal use, must be suppressed. The Tenth Circuit agreed.

The Supreme Court, reversing the Tenth Circuit, held that the transfer of the "bugged" can of ether to the defendant did not constitute a search or seizure. However, the monitoring

(Continued, P. 8)

Reprinted with Permission of United Feature Syndicate

of the beeper after it was conveyed to a private residence did violate the Fourth Amendment. "Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." The Court distinguished United States v. Knotts, 460 U.S. 276 (1983) in which the Court upheld the use of an electronic monitor to track the movements of a vehicle on public roads. The monitoring of the beeper in a private home, unlike the tracking of a vehicle, conveyed to the agents information not otherwise available to them. Despite the illegal use of the beeper, the Court concluded that there was sufficient untainted information in the agents' possession to provide probable cause for issuing the search warrant. Justices Stevens, Brennan, and Marshall dissented from this portion of the Court's holding.

A unanimous Court has made clear that Miranda v. Arizona, 384 U.S. 436 (1966) governs the admissibility of statements made during custodial interrogation by an individual accused of a misdemeanor traffic offense. Berkemer v. McCarty, 35 CrL 3192 (July 2, 1984). The defendant was convicted of driving while intoxicated based in part on his admission under police station house interrogation that he had used intoxicants. No Miranda warnings were given the defendant. The sixth Circuit ultimately held that the defendant was entitled to Miranda warnings and the Supreme Court agreed. The Court expressed its reluctance to "impair the simplicity and clarity of the holding of Miranda." However, the Court declined to extend the requirement of Miranda warnings to the roadside questioning of a motorist. The Court held that in view of the brief, public character of the typical traffic stop such a stop is not "custodial." Thus, statements made by the defendant prior to his interrogation at the station house were admissible.

In Wasman v. United States, 35 CrL 3242 (July 3, 1984), the Court dealt with an issue of prosecutorial vindictiveness. The defendant in Wasman was given a greater sentence after retrial following a successful appeal than he had been given after his original conviction. The greater sentence resulted when the sentencing court considered an intervening criminal conviction for acts committed prior to the original sentencing. The Court unanimously held that "after retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings." The trial court's express consideration of the intervening conviction when fixing a greater penalty met this standard. "Consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial is manifestly legitimate." The Court distinguished North Carolina v. Pearce, 395 U.S. 711 (1969), in which the trial court imposed a greater sentence following an appeal and retrial without any attempt to justify the increased penalty.

Several significant decisions were issued by the Kentucky Supreme Court and Court of Appeals.

KENTUCKY SUPREME COURT

In Mangrum v. Commonwealth, Ky., 31 K.L.S. 9 at 21 (July 5, 1984), the Supreme Court held that the defendant's convictions of both being an accomplice to the "possession" with intent to sell and the "sale" of

(Continued, P. 9)

marijuana, based on a single incident, violated double jeopardy. The defendant argued that his conviction of the two offenses violated double jeopardy and that, moreover, there was no evidence that he assisted in the "possession" of the marijuana. "We do not find it necessary to discuss whether or not he aided in the possession other than to say that if Appellant did not aid in the possession of marijuana, then the evidence could not have been sufficient to support his conviction. Conversely, if he did aid in the possession of the marijuana, then this would clearly be a violation of the prohibition against double jeopardy as defined in Blockburger v. United States, 284 U.S. 299 (1932)." Justice Wintersheimer dissented.

In Commonwealth v. Hinton, Ky., 31 K.L.S. 9 at 22 (July 5, 1984) the Court reversed a decision of the Court of Appeals which had reversed the defendant's first degree persistent felony offender conviction. The Court of Appeals had relied on the holding of Zachery v. Commonwealth, Ky., 580 S.W.2d 220 (1979) that, as regards prior felony convictions, a probated sentence merges into a later sentence of imprisonment to form one conviction. The holding of Zachery was based on the Commentary to KRS 532.080(4) which states: "when an individual has been convicted two times before serving any time in prison, his convictions shall be considered a single conviction for purposes of this section." However, in 1976 the statute was amended to include within the definition of a prior felony those convictions which resulted in probation, parole, or conditional release. The Supreme Court found that this amendment of the statute effectively nullified the portion of the Commentary on which the decision in Zachery was based. "While the Commentary is a source of interpretation for the original Act, once there is an amendment the portion of the Commentary on that subject loses its validity." The Court went on to expressly overrule Zachery.

The Court has again wrestled with the recurring question of when and how to provide an accused charged as a persistent felon an opportunity to challenge his prior felony convictions. In Commonwealth v. Stamps, 31 K.L.S. 9 at 23 (July 5, 1984), the Court reviewed a decision of the Court of Appeals which had held that the defendant, a convicted persistent felon, was entitled to appointment of Ivey counsel on an RCr 11.42 motion attacking his prior felony conviction so that Ivey counsel could "present for adjudication any supplementary grounds that might reasonable appear..."

The Supreme Court reversed the Court of Appeals, citing its previous decisions in Alvey v. Commonwealth, Ky., 648 S.W.2d 858 (1983) and Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984). The Court held in Alvey that any challenge to a prior felony conviction must be raised at the persistent felony offender proceeding or be waived. In Gadd, the Court refined its holding in Alvey to further require that such a challenge must be raised by pre-trial motion. Under the holdings in Alvey and Gadd, Stamps had waived any objection to the use of his prior felony conviction to obtain his enhanced sentence. However, the prior felony conviction which Stamps sought to attack, in addition to being the basis of Stamps PFO conviction, was itself a conviction for which Stamps was imprisoned at the time of filing his RCr 11.42 motion. The Court noted this fact and, without specifically holding that it entitled Stamps to challenge his prior conviction, addressed the question whether appointment of Ivey counsel is

(Continued, P. 10)

required in every case in which an indigent movant requests it. In what can only be deemed a retreat from the unequivocal directive of Ivey, the Court then held that the trial courts refusal to appoint Ivey counsel was, at most, harmless error. The Court based its decision on its determination, after examining the record, that to appoint counsel would be an "exercise in futility."

In Macklin v. Ryan, Ky., 31 K.L.S. 9 at 24 (July 5, 1984) the Court reversed a decision of the Court of Appeals denying the defendant's petition for writ of mandamus. A mistrial was declared at the joint trial of the defendant and a codefendant after a juror told the trial court that she knew the codefendant's mother. The jury had already deliberated for two hours at that time. The defendant's request that the trial court ask the jury whether it had reached a verdict in his case was denied. The defendant subsequently moved to dismiss the charges against him and submitted the avowal testimony of the jury foreman that, at the time of the mistrial, the jury had voted unanimously to acquit the defendant but had not signed the verdict form. This motion was likewise denied. The defendant then unsuccessfully sought mandamus from the Court of Appeals to prevent his retrial.

The Supreme Court held that the trial court improperly declared the mistrial as to the defendant. "The inability of the jury to reach a verdict as to one defendant does not compromise the verdict as to the other defendant." "Under these circumstances it was not 'manifestly necessary' for the trial court to declare a mistrial, and it would be a violation of the appellant's right against double jeopardy to be retried in this case."

KENTUCKY COURT OF APPEALS

In Cabbil v. Commonwealth, Ky.App., 31 K.L.S. 10 at 2 (July 6, 1984), the Court of Appeals reversed the defendant's convictions of trafficking in a controlled substance and as a persistent felony offender. The Court found that the prosecution withheld exculpatory evidence when it failed to disclose to the defense that an undercover police officer, who was a principal commonwealth witness, was under investigation for misconduct in his undercover work. "[A]s the credibility of Detective Fletcher was the mainstay of the commonwealth's case, evidence of the investigation into his misconduct would have a significant impact on his believability." "We are convinced that the withholding of this information denied appellant a fair trial."

In Bowling v. Commonwealth, Ky.App., 31 K.L.S. 10 at 13 (July 20, 1984), the Court held that no right of the defendant was violated when the trial court imposed consecutive sentences on the defendant's guilty pleas rather than concurrent sentences as recommended by the commonwealth pursuant to its plea bargain with the defendant. Due to a prior dispute between the defense and the commonwealth as to the terms of the plea bargain, the trial court had entered an order stating:

> 'It appearing that there was a disagreement between the Commonwealth's Attorney and the attorney for the defendant, as to the recommended sentence for the defendant, and the Court, being advised, and under the authority of Commonwealth vs. Workman, orders that the record reflect, in accordance with the bargaining of the parties, that

(Continued, P. 11)

the sentences herein run concurrently.'

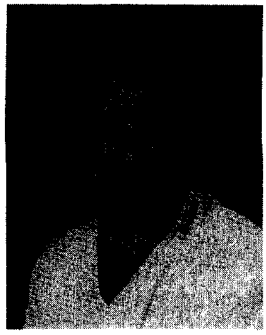
The defendant contended that this order constituted an acceptance of the commonwealth's recommendation, which precluded the trial court from later imposing consecutive sentences. The Court of Appeals disagreed: ""[t]he court below was merely placing the plea bargain correctly on the record...." The Court of Appeals pointed out that at the time of entry of the Order the trial court could not have accepted a sentencing recommendation since it had not yet considered a presentence report. Moreover, the trial court offered to permit the defendant to withdraw her guilty plea but she declined to do so.

In Green v. Commonwealth, Ky.App., 31 K.L.S. 11 at 2 (August 10, 1984) the Court of Appeals reversed the defendant's conviction of trafficking in a controlled substance (dilaudid) because the controlled substance in question was consumed by the commonwealth in testing, thereby depriving the defendant of any opportunity to conduct independent testing. The trial court had previously sustained a defense motion to conduct independent testing of the substance. However, when it was learned that the substance had been destroyed by the commonwealth in testing, the trial court nevertheless permitted introduction of the commonwealth's test results. The commonwealth's expert acknowledged that the destruction of the substance was unnecessary. The Court of Appeals stated the issue as follows: "The single question is whether, after a defendant is charged, the unnecessary consumption of the entire incriminatory drug sample may render the test results inadmissible in a drug prosecution." The Court concluded that it did. "We hold the unnecessary (though unintentional) destruction of the total drug sample, after the defendant stands charged, renders the test result inadmissible, unless the defendant is provided a reasonable opportunity to participate in the testing, or is provided with the notes and other information incidental to the testing, sufficient to enable him to obtain his own expert evaluation."

Finally, in Harris v. Commonwealth, Ky.App., 31 K.L.S. 11 at 7 (August 17, 1984), the Court restated the basic rule that "[a] definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term...." KRS 532.110(1)(a). A definite term is, of course, a sentence for a misdemeanor while an indeterminate term is a sentence for a felony. The defendant in Harris was convicted of a misdemeanor. The resulting sentence was probated. While on probation Harris was convicted of a felony. The trial court then revoked Harris' probation and ordered that the sentences for the misdemeanor and the felony run consecutively. The Court of Appeals held that this was impermissible. The Court rejected argument by the commonwealth that KRS 533.060(2) and James v. Commonwealth, Ky., 647 S.W. 2d 794 (1983) authorized the consecutive sentences. In James, the Kentucky Supreme Court held that a definite term and indeterminate term may run consecutively if KRS 533.060 (2) is applicable. That statute provides that when a person is convicted of a felony and released on probation and is subsequently convicted of a second felony, committed while he was released on probation, the sentence for the second felony shall not run concurrently with any other sentence. The statute was inapplicable to Harris since he had been convicted of a misdemeanor, not a felony, and released on probation.

LINDA WEST

Post-Conviction
Law and Comment



REALIBILITY OF URINALYSIS IN PRISON QUESTIONED

In 1980 the Syva Company of Palo Alto, California developed a technology which tested urine for traces of marijuana without the need for complicated laboratory analysis. This enzyme multiplied immunoassay test (EMIT) is now used extensively in the military, employment, drug treatment centers and prisons, including those in Kentucky. In 1982 alone the United States Navy estimated that it conducted 1.5 million urine screens. But even though the use of this testing method has gained wide acceptance it has definite limitations, most notably reliability. Even the Syva Company admits that positive results should be confirmed by an alternative method.

In a suit currently pending in the United States District Court for the Western District of Kentucky at Paducah, Higgs v. Wilson, No. 83-0256-P, the reliability of the Syva EMIT test utilized by the Corrections Cabinet to provide the sole proof of a disciplinary infraction for the use of marijuana has now been called into question. Indeed, on July 30, 1984 Magistrate W. David King recommended that a preliminary injunction be issued by the court to prohibit the Corrections Cabinet from using the Syva EMIT test as the sole indication of intoxication in disciplinary proceedings until the merit of the issue could be determined. Magistrate King also recommended that no violation be based on the results of the EMIT test alone but did not state what corroboration should be required.

Also due to concerns about the integrity of the samples tested and the right to confrontation in disciplinary proceedings absent justification for security, Magistrate King recommended that procedures to assure the integrity and freshness of specimens be implemented and that the chain of custody from the time of taking the sample until its return to the particular institution be recorded. Further, it was recommended that the inmate be allowed to cross-examine the testing laboratory technician concerning the validity of the results either in person or through written interrogatories.

While it remains to be seen whether the district court will adopt the magistrate's recommendations, the magistrate's findings and conclusions are indicative of a developing body of law recognizing that the result of the EMIT test alone is not reliable enough to base a finding of a disciplinary infraction for drug use without violating due process. See Isaacks v. State, 646 S.W. 2d 603 (Tex.App.4 Dist. 1983). See generally Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975); Chavis v. Rose, 643 F.2d 1281 (7th Cir. 1981). Although incarceration itself necessarily abridges an inmate's rights, Bell v. Wolfish, 441 U.S. 520, 545-547 (1979), those rights are not abridged to the point of allowing further restraints based

(Continued, P. 13)

on unreliable evidence. An inmate found guilty of such a disciplinary infraction may lose good time credits, be placed in segregation, be denied furloughs and lose privileged housing. Transfers may also be restricted and parole may be denied or deferred.

In 1923, the Federal Court of Appeals for the District of Columbia enunciated the generally accepted standard for admissibility of scientific test results in Frye v. United States, 293 F.1013 (D.C. App.1923). The court indicated that before such evidence can be admitted it must have become "sufficiently established to have gained general acceptance in the field in which it belongs." United States v. Stifel, 433 F.2d 431, 438 (6th Cir. 1970). The Sixth Circuit has concluded that general acceptance is synonymous with reliability and therefore "[i]f a scientific process is reliable, or sufficiently accurate, courts may also deem it 'generally accepted.'" United States v. Franks, 511 F.2d 25, 33 n.12 (6th Cir. 1975).

Although a disciplinary action is obviously not a criminal prosecution and a less stringent standard of admissibility may be employed, the Syva EMIT test has not been shown to be so reliable, and therefore generally accepted, that it can be utilized in disciplinary actions without corroboration from some other source. Kane v. Fair, 33 CrL 2492 (Mass. Super. 1983). Reports of inaccuracies range from 1 percent to 50 percent. Zeese, "Marijuana Urinalysis Tests", Drug Law Report (May-June, 1983). While the Center for Disease Control in Atlanta has tested the EMIT procedure to show a 97 to 99 percent accuracy and the Syva Company cites a 95 percent accuracy, other reports indicate only an 87 percent accuracy or less. See O'Connor and Rejent, "Emit Cannabinoid Assay: Confirmation by R/A and GC/MS",

Journal of Analytical Toxicology (July-Aug. 1981). Indeed, the United States Defense Department after a six month test, concluded that the EMIT test will render in 52 percent "false positives." Zeese, supra at 26.

A major reason for inaccuracy with the EMIT, and for that matter any other urinalysis test, is cross-reactivity. This means that other substances can show up as if they were marijuana, thus creating false positives. These substances include amphetamine, amitriptyline, benzocyclecgonine, diazepam, meperdine, methaqualone, morphine, phencyclidine, propoxyphene, secobarbital and even asprin. Clarke et al., EMIT Cannabinoid Assay: Clinical Study No. 74 Summary Report (Palo Alto, The Syva Company, 1980). Corroboration of the results of an EMIT test is therefore essential to support its accuracy in any particular case.

Recognizing the inaccuracy of the EMIT test, the military requires confirmation of its results by further testing before disciplinary

(Continued, P. 14)

action is taken. However, even these "confirmation" tests are not without fault. The radioimmunoassay screen (RIA), due to the procedures involved and subjective interpretation required, is likely to produce more false results than the Syva system. Zeese, supra at 26. Also, the results of another commonly used test, gas-chromatography/mass-spectrophotometer (GC/MS) can be affected by various factors such as plastic tubing used in the test itself. Houfs, Bassett and Cravey, Courtroom Toxicology (1981); Ambrose, Gas Chromatography (1971). Unfortunately, at present the GC/MS is the only acceptable confirmation test available. Zeese, supra at 27. Furthermore, The Journal of the American Medical Association (February 18, 1983) indicated that it is "virtually impossible, in practice to standardize immunoassays so that results are comparable when urine is analyzed by two different immunoassays or even the same immunoassay using different batches of antibody. Thus a single urine specimen can be positive by one immunoassay and negative by another."

Another problem with any of the aforementioned tests is that they cannot differentiate between active and passive inhalation. The American Journal of Psychiatry conducted a study in 1977 that showed that a passive inhaler will test positive and often at levels higher than would be expected. Certainly an inmate could not be disciplined for having been near someone smoking marijuana but this study lends support for an assumption that such has been the case on at least a few occasions.

Since Magistrate King's recommendations in Higgs v. Wilson relate to a request for a preliminary injunction, it is not clear whether the plaintiff will prevail on the merits or even obtain a concurrence from the district judge on the issuance of a preliminary injunction. However, the cases and studies cited above strongly suggest that the plaintiff should ultimately prevail. Recording the chain of custody and allowing examination of the tests would undoubtedly make the finding of a violation more trustworthy. But, unfortunately, it appears inevitable that some innocent parties will still suffer due to passive inhalation and the inaccuracy of all testing methods including confirmation testing. These faults should cause the district court to require more than confirmation testing to support the Syva EMIT results. All positive test results should be corroborated by some evidence other than testing. Zeese, supra, at 31.

RANDY WHEELER

* * * * * *

ADMINISTRATIVE NEWS

Allotment Counties

Allotments are paid on a fiscal year quarterly basis. Checks are mailed by the 15th of the first month following the close of the previous quarter.

Conflict Claims

Conflict claims are paid monthly. Claims received during the month will be paid the following month.

Assigned Counsel Claims

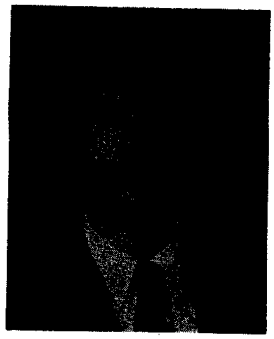
Assigned counsel claims are paid on a fiscal year quarter and are prorated. All claims must be received within one week after the end of the quarter to be paid in that quarter.

These schedules are subject to change due to changes by the Department of Finance.

DAVID E. NORAT

* * * * * *

The Death Penalty



LAWYERS, FUNDS AND MONEY

The question of how good a defense (i.e., how many, if any, experts... support services) the public can or will permit an indigent defendant to mount is a difficult one, especially in a capital prosecution. A case involving a poor capital defendant and expert psychiatric services is pending before the U.S. Supreme Court. Ake v. State, 663 P.2d 1, 6 (Okl. 1983), cert. granted, 104 S.Ct. 1591 (1984). Many Kentucky capital cases involve controversy over this issue. Witness this editorial from the Kentucky Post (May 5, 1980):

EQUAL JUSTICE FOR ALL

When an accused man's life hangs in the balance, he deserves the best defense possible.

It is not a time to cut corners.

Our system of justice is based on the principle that everyone is equal in the eyes of the law. That principle is threatened if the accused does not have the means to defense himself.

Paul Kordenbrock cannot afford to hire the expert witnesses necessary to make the strongest possible defense on the murder charge facing him in Boone County.

"Do you think every indigent is entitled to resources the same as a millionaire?" Boone Circuit Judge Sam Neace asked Kordenbrock's court-appointed attorney Friday.

The answer must be that an indigent like Kordenbrock who faces the death penalty deserves justice equal to that of a millionaire.

The question of who should pay for that defense - the county or the state - is more difficult to answer. The state pays for Kordenbrock's attorney, why not witnesses, too?

But that question is secondary. The important thing is that Kordenbrock receive a full and fair trial. Anything less would be a betrayal of our principles. And we would all be the losers.

Requests for experts by indigents have not fared well in either the Kentucky trial or appellate courts of late. Young v. Commonwealth, Ky., 585 S W.2d 378, 379 (1979) recognizes the indigents right to "reasonably necessary" experts...at least in theory. In Ford v. Commonwealth, Ky., 665 S.W.2d 304, 309 (1983), for example, a request for assistance to complete a jury composition challenge was mistakenly viewed as a motion for a "statistician and mathematician" (Ford already had one) and was denounced as a "witch hunt". A similar claim, as well as one for a jury/conviction proneness expert was rejected in a death penalty appeal. McQueen v. Commonwealth, Ky., 669

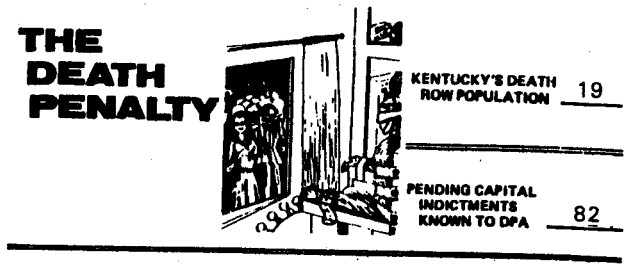
(Continued, P. 16)

S W.2d 519, 521 (1984). In Hicks v. Commonwealth, Ky., 670 S.W.2d 837, 838 (1984) a serologist was properly denied. "The trial courts are not required to provide funds to defense experts for fishing expeditions." Compare Corenevsky v. Superior Court, 682 P.2d 360, 368 (Cal. 1984), where the non-capital defendant requested "$8,740 for a jury selection expert." An order granting funds for this expert was "well within [the court's] discretion...." Additionally, the California Supreme Court held that a request for two law clerks was not merely a "staffing problem" for the public defender but a matter within the scope of the trial court's review of what assistance is "reasonably necessary." 682 P.2d at 369.

Another thorny question is who pays? The state or the county? In various unpublished orders last year, the Court of Appeals provided some answers. For example, a writ of prohibition filed by the Oldham County Fiscal Court was denied. The Court stated that "the use of private facilities [by an indigent criminal defendant] is a charge against the county, pursuant to KRS 31.185." Commonwealth v. Corey, No. 83-CA-2146-OA (Nov. 28, 1983). The Court relied on a decision to the same effect in Commonwealth v. Douglass, No. 83-CA-1927-OA (Nov. 4, 1983), aff'd sub nom., Perry County Fiscal Court v. Commonwealth, et.al., Ky., __ S W.2d __ (1984). See also Department of Public Advocacy v. Cook, No. 83-CA-1294-OA (August 5, 1983), rev'd on other grounds, Cook v. Department of Public Advocacy, 83-SC-801-MR (March 8, 1984) [DPA has an "adequate remedy by means of direct appeal" from order requiring it to pay for fees of experts.]

COUNTY LIABLE FOR EXPERTS

The Supreme Court has now answered the question of who is liable for expert witness fees incurred



by indigent criminal defendants (except penitentiary cases)in the same manner as the Court of Appeals. Quoting Judge Wilhoit's opinion, Perry County at ___ states:

> Considering the legislative intent expressed in KRS 31.185, we view the furnishing of non-state facilities for the evaluation of evidence in appropriate circumstances to be a necessary governmental expense which must be met by counties. See Mill v. Quertermous, 304 Ky. 733, 202 S W.2d 389 (1947); Landrum v. Ingram, 274 Ky. 736, 120 S.W.2d 393 (1938).

See also Boyle County Fiscal Court v. Shewmaker, Ky.App., 666 S.W.2d 759 (1984), holding that the county was liable for attorney fees in public defender cases after the state allotment had been depleted. "KRS 31.050 provides that counties shall be obliged to pay all costs incurred in their program which are in excess of the maximum amount allotted to the program from state funds granted under KRS Chapter 31." 666 S.W.2d at 762.

TRIAL JUDGE'S POWER TO EXCLUDE DEATH PENALTY: SANCTIONS FOR DENIAL OF EXPERTS

In Harlow Gwinn's capital prosecution, Judge Douglass originally ruled that the Commonwealth could not seek the death penalty "because of the inability of the fiscal court to pay the fees of two expert witness." Perry County at ____. The sanction of

(Continued, P. 17)

contempt is available in a situation where the fiscal court refuses to pay, Boyle County at 763, but contempt is an ineffective remedy when there is no money. However, the Supreme Court held that the circuit judge should not exclude "before trial...death...as a possible penalty..." Perry County at ___. At least this is so in a case where there is no demonstrated connection between the expert(s) and the punishment of death. Denial of funds for sentencing phase witnesses might be another story.

In Corenevsky a similar situation arose. The California county became obligated to pay for second counsel in a capital case under the decision in Keenan v. Superior Court, 640 P.2d 108 (Cal. 1982). When the auditor refused to do so because the attorney fees "would allegedly 'bankrupt' the county", the trial court ordered that second counsel be discharged and that death was no longer a possible punishment. No review was sought of this order. 682 P.2d at 363. Later litigation, however, culminated in a decision that the county auditor could be held in contempt for refusing to disburse funds for expert assistance. 682 P.2d at 369-373.

While Perry County at ___ limits a trial judge's power to bar death as a possible punishment for local fiscal problems, it restates the circuit judge's authority to do so for other reasons. Clearly, disproportionality, at issue in Smith, is not the only reason a trial judge can decide not to waste time on a capital trial. (Harlow Gwinn received a life sentence after a long trial).

> Smith v. Commonwealth, Ky., 634 S W.2d 411 (1982), stands for the proposition that a trial court has authority to relieve the jury of any consideration of the death penalty where it has determined prior to the penalty stage of the trial that such penalty would be unconstitutionally disproportionate or for an equally significant reason. (emphasis added).

Perry County at ___ also states that denial of necessary experts "might have a bearing upon whether the defendant should be tried at all..." A motion to dismiss the indictment may be appropriate in some cases.

ARIZONA VS. RUMSEY: DOUBLE JEOPARDY AND CAPITAL CASES

Mistakenly edited from the last Advocate was mention of Arizona v. Rumsey, 104 S.Ct. 2305 (1984), decided before Spaziano v. Florida, 104 S Ct. __ (1984) (reviewed last time). Rumsey represents the only victory of late by a death row inmate in a case argued before the United States Supreme Court.

(Continued, P. 18)

Rumsey reaffirmed Bullington v. Missouri, 451 U.S. 430 (1980) in a slightly different context. Bullington held that the double jeopardy clause of the Fifth Amendment applied to the capital sentencing phase of a murder trial in Missouri because the "capital sentencing procedure... resembles and is like a trial on the issue of guilt or innocence..." 451 U.S. at 438. This was true even where, as in Kentucky, the jury has "broad discretion to decide whether capital punishment [is] appropriate." Rumsey, 104 S.Ct. at 2312 (Rehnquist, J. dissenting).

Rumsey won his first appeal from a life sentence but the Arizona Supreme Court disagreed with the trial court's finding that the death penalty was automatically barred because "no aggravating circumstances" existed as a matter of law. 104 S.Ct. at 2308. After reevaluation of the same evidence on remand, the trial court sentenced Rumsey to death--finding its previous statutory interpretation erroneous. The Arizona Supreme Court reversed again, this time in light of Bullington. The United States Supreme Court affirmed (7-2), Justice O'Connor writing.

In Rumsey it was the judge, not the jury, who sentenced the defendant to death. This distinction was not constitutionally significant. There is some question whether Kentucky is a jury or judge (or both) sentencing state. Compare Spaziano, 104 S Ct. at __ n.9; Ex Parte Farley, Ky., 520 S.W.2d 617, 619 n.1 (1978); Gall v. Commonwealth, Ky., 607 S.W.2d 97, 104 (1980). Be that as it may, Rumsey teaches us that Bullington is clearly applicable to Kentucky law. In Arizona, as here, "the sentencer is to make its decision guided by substantive standards and based on evidence introduced in a separate proceeding that formally resembles a trial...the prosecution has to prove certain statutorily defined facts beyond a reasonable doubt... [Regardless, the sentencer is free to determine] the prosecution has failed to prove its case." Rumsey, 104 S.Ct. at 2310. Such a failure "bars any retrial of the appropriateness of the death penalty." 104 S.Ct. at 2310 (emphasis added). "Having received 'one fair opportunity to offer whatever proof it could assemble,' Burks... 437 U.S. at 16 ...the State is not entitled to another." Bullington, 451 U.S. at 446.

The Court specifically refused Arizona's invitation "to overrule Bullington, decided only 3 years ago. We decline the invitation... [Arizona] has suggested no reason sufficient to warrant...any departure from the doctrine of stare decisis..." 104 S.Ct. at 2311.

THE NEXT STEP: A FEDERAL CONSTITUTIONAL MINIMUM LEVEL OF APPROPRIATENESS

It is unclear what standards a Kentucky trial judge must apply in reviewing a death sentence--1) for sufficient evidentiary support and/or 2) as a final sentencer. Of course, the circuit judge's role as a sentencer permits greater leeway than his/her role in reviewing the evidentiary support for the death sentence. The state judge is free to reject a death sentence as inappropriate even after an "aggravating circumstance...[is] found beyond a reasonable doubt." KRS 532.030(3). "[T]he trial court is not bound" by the jury's recommendation. Gall, 607 S.W.2d at 104. Importantly, this clearly implies, as a matter of state law, a judicial role in determining whether a death sentence is appropriate in a particular case. Of course, the court can give "great weight" to the jury's decision in this regard. White v. Commonwealth, Ky., 671 S W.2d 241, 247 (1984).

(Continued, P. 19)

It follows that a minimum level of "appropriateness" must exist apart from proof beyond a reasonable doubt of one aggravating circumstance. Therefore, the trial judge's role shouldn't be limited to reviewing the evidentiary support for the aggravating circumstance(s) but also the evidentiary support for the big question itself--life or death. This analysis takes place by viewing the big picture--aggravation "pitted against" mitigation. Smith v. Commonwealth, Ky., 599 S.W.2d 900, 912 (1980). Directed verdict motions should be made, and renewed, arguing the absence of proof beyond a reasonable doubt of the aggravating circumstance(s) and of "appropriateness" of capital punishment for your client. Thus, if the judge is not inclined toward a life sentence-rejecting the jury's recommendation-then the issues are properly phased for direct appeal and beyond. A death sentence can't then be rationalized away on appeal as "discretionary" without any investigation of the underlying evidentiary support. If worse comes to worst, the condemned can fall back on a strong argument that there is a federal constitutional minimum level of appropriateness (aggravation weighed against mitigation) which can't be ignored if everyone else wishes to pass the buck. Too often the jury relies on the judge, the judge blames the jury and the appellate court can wash its hands of the whole matter.

Bullington and Rumsey were based upon double jeopardy decisions where the "evidence was insufficient to convict[,] Burks v. United States, 437 U.S. 1...(1978)...[i.e., where] the government has failed to prove its case..." Bullington, 451 U.S. at 443; quoting Burks, 437 U.S. at 15-16. Because of the nature of the penalty phase trial, these "evidentiary sufficiency" cases were held equally applicable to the decision of whether the defendant "deserves the death penalty..." Bullington, 451 U.S. at 446.

As Bullington's citation to Jackson v. Virginia, 443 U.S. 307, 320 (1979) suggests, there must be a "due process/cruel and unusual" minimum level of "appropriateness", even assuming the presence of an aggravating factor, before the State can carry out an execution. Cf. Enmund v. Florida, 102 S.Ct. 3386 (1982). "The Court already has held that many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing...in a capital case..." Bullington, 451 U.S. at 446. Should not that most fundamental safeguard - that the death verdict be supported by some minimal evidence of appropriateness other than the mere existence of an aggravating circumstance - also apply?

> The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact-finder will rationally apply that standard to the facts in evidence. Jackson, 443 U.S. at 317-18.

The life and death decision can "not [be] irretrievably committed to jury discretion... The power of the fact-finder to err upon the side of mercy...has never been thought to include a power to enter an unreasonable verdict..." 443 U.S. at 318 n.10. The proper "minimum" standard is that announced in Jackson - modified to meet the question posed by a capital sentencing verdict.

> After Winship the critical inquiry on review of the sufficiency of the evidence to support a [death sentence] must be not simply to determine whether the

(Continued, P. 20)

jury was properly instructed, but to determine whether the record evidence could reasonably support a finding [that death is the appropriate punishment]... but this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established [that the death penalty was the appropriate punishment]... Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the [death penalty appropriate.] Jackson, 443 U.S. at 319-320 (emphasis in original).

"In short, Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer... [death] except upon sufficient proof..." 443 U.S. at 317 (emphasis added). In a capital prosecution, this presumes proof beyond the simple presence of an aggravating factor which is present in all true "death eligible" cases and is merely a threshold requirement before the jury reaches the question of appropriateness of capital punishment in the case before them. Cf. Zant v. Stephens, 103 S.Ct. 2733 (1983).

The federal (and hopefully the state) constitution will permit executions of certain capital murderers but only after a reliable determination that "death is the appropriate punishment in a specific case." Lockett v. Ohio, 438 U.S. at 601 (plurality opinion), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, J.J.). In an opinion respecting the denial of certiorari, Mr. Justice Stevens quoted Utah's requirement that the State must prove "beyond a reasonable doubt[,] that the imposition of the death penalty is justified and appropriate in the circumstances." Smith v. North Carolina, 103 S.Ct. 474 (1982). Arguments, motions, instructions and findings in Kentucky capital cases should reflect these concerns.

MORE DOUBLE JEOPARDY: PAYNE VS. VIRGINIA

In a per curiam order the Court reversed a robbery conviction on double jeopardy grounds where the defendant had already been convicted of capital murder during the same robbery. Payne v. Virginia, 104 S.Ct. 3573 (1984). "In this case, as in Harris v. Oklahoma, 433 U.S. 682...(1977)(per curiam), where 'conviction of a greater crime, murder, cannot be had without conviction of the lesser crime,' robbery..., the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."

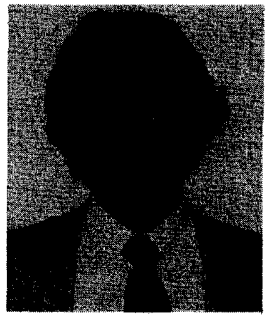
RECENT EXECUTIONS

Executed recently: 23) Ernest Dobbert (FLA.) 9/7/84; 24) Timothy Baldwin (LA.) 9/11/84; and, 25) James Henry (FLA.) 9/20/84. Dobbert, of Dobbert v. Florida, 432 U.S. 282 (1980) fame, could not have been executed in Kentucky. Hudson v. Commonwealth, 597 S.W.2d 610 (Ky. 1980).

KEVIN MCNALLY

* * * * * *

Norman Bennett, Assistant Public Advocate, has joined our Paducah Office.



NORMAN BENNETT

SIXTH CIRCUIT SURVEY

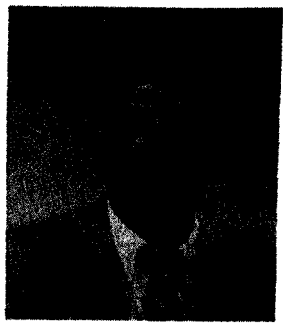
This column will present reviews of selected new opinions issued by the United States Court of Appeals for the Sixth Circuit thought to be of benefit to defense counsel practicing in state court. Opinions selected for review will include direct appeals from convictions in federal district court as well as appeals in habeas corpus actions presented to the federal courts by state prisoners.

HUNG JURIES, MISTRIALS & DOUBLE JEOPARDY

In Jones v. Hogg, No. 83-5529 (April 12, 1984), a habeas corpus petitioner asked the court to decide whether the Fifth Amendment's double jeopardy clause precluded the Commonwealth of Kentucky from prosecuting him a fourth time for murder after three previous trials had ended in hung juries. After each previous trial - all of which lasted only one day - a mistrial had been declared. All three trials were presided over by a different trial judge and prosecuted by a different Commonwealth Attorney. "The record reveals little else, making an informed decision as to what influenced the declaration of each mistrial very difficult." Slip opinion at 2.

The Sixth Circuit reversed the decision of the district court denying Jones' habeas petition because "the record below [was] wholly inadequate to render a proper disposition on the constitutional claims raised in Jones' petition." Slip opinion at 2.

The court recognized that the double jeopardy clause did not bar retrials in cases where a "manifest necessity" exists to declare a mistrial in the initial prosecution, and that a deadlocked jury is a classic example of manifest necessity. However, "[a] state is not free to engage in



oppressive practices which subject an accused to repeated prosecutions in an attempt to gain a criminal conviction." Slip opinion at 3.

While the trial judge has discretion to declare a mistrial without the defendant's consent if a manifest necessity exists, this discretion is not without limits. "[D]iscretion does not equal license; the Fifth Amendment's guarantee against double jeopardy would be a sham if trial judges' declarations of 'necessary' mistrials were in fact to go unreviewed." Slip opinion at 5.

In determining whether sound discretion has been exercised, the following factors must be considered: (1) timely objection by the defendant; (2) the jury's collective opinion that it cannot agree on a verdict; (3) the length of jury deliberations; (4) the length of the trial; (5) the complexity of the issues; (6) any proper communication the judge has with the jury; (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict; and (8) the trial judge's belief that additional trials will result in continued hung juries.

The Sixth Circuit concluded that the case under review did not present an adequate record to determine which of these factors, if any, were considered before a fourth trial was scheduled for Jones.

A "major reason" the court reached this conclusion was that the Kentucky Supreme Court misapplied the manifest necessity standard in denying Jones'

(Continued, P. 22)

petition for a writ of prohibition. The Kentucky Supreme Court had ruled that Jones had not demonstrated that there was a "manifest necessity for invoking the defense of double jeopardy." This was a misapplication of the rule announced in United States v. Perez, 22 U.S. 579 (1824), which requires the trial court to decide that a manifest necessity exists before declaring a mistrial. Requiring a defendant to show a manifest necessity for invoking the defense of double jeopardy "places upon the accused a burden that should be carried by the court." Slip opinion at 7.

The record before the court did not reflect why the trial judges in each prosecution declared a mistrial. Nor did it reflect that Jones was given an adequate opportunity to contest the mistrial order or that the trial judge considered all possible alternatives before declaring a mistrial. Even if Jones consented to the mistrial order - a point the court was unwilling to assume absent circumstances indicating Jones' acquiescence - the record was still insufficiently developed to evaluate the actions of the trial court.

"Although the actions of trial judge in these matters are normally accorded great deference, in this case [there is] no record upon which [a] decision can rest." Slip opinion at 9. Since the record precluded a finding that sound discretion was exercised in accordance with constitutional principles when the mistrials were declared in the three earlier prosecutions, the district court's decision denying the petition was reversed and the case was remanded.

POST-GATES REVIEW OF SEARCH WARRANT AFFIDAVITS

While recognizing that the recent Supreme Court case of Illinois v. Gates, 103 S.Ct. 2331 (1984), prohibits a reviewing court from undertaking a de novo review of the sufficiency of affidavits for search warrants, the Sixth Circuit has nevertheless concluded that an affidavit underlying a search warrant in a case under review failed to establish probable cause. United States v. Savoca, No. 83-3510 (July 17, 1984).

In the cited case, two suspected bank robbers were arrested, pursuant to valid arrest warrants, as they walked out of an Arizona motel room. Following the arrest, FBI agents secured a search warrant to search for fruits and instrumentalities of the bank robberies. The supporting affidavit recited, as probable cause to search the motel room, that the defendants had been arrested on federal bank robbery warrants and that they were suspects in four other bank robberies. All of the bank robberies had occurred in Ohio and Pennsylvania.

A search pursuant to the warrant netted hand guns, false identification, and several masks. A motion to suppress was denied, and the evidence was introduced at trial.

On appeal, the Court ruled that the supporting affidavit did not establish probable cause to believe that evidence of a crime would be found in the motel room. Addressing the scope of review of supporting affidavits, the Court recognized that Gates held that the Fourth Amendment is satisfied so long as the magistrate had a "substantial basis" for concluding that a search would uncover evidence of wrongdoing.

And, while Gates requires reviewing courts to give great deference to a magistrate's probable cause finding, "[t]his does not mean that reviewing

(Continued, P. 23)

courts should rubber stamp a magistrate's finding of probable cause." Slip opinion at 7.

Having determined the scope of review, the Court noted that search warrants are directed against evidence of crime, not persons. "The fact that there is probable cause to arrest a person for a crime does not automatically give police probable cause to search his residence or other area in which he has been observed for evidence of that crime." Slip opinion at 7.

The affidavit under review established only that two persons known to have been involved in several Midwestern bank robberies (at unspecified times) were observed on the same premises in Arizona. While one could reasonably infer that the suspects were staying in the motel room, the robberies occurred 2,000 miles away. More importantly, the affidavit did not specify the amount of time which had passed between the robberies and the issuance of the warrant. "As such, the magistrate could not know from reading the affidavit whether the bank robberies occurred several months ago or several years ago." Slip opinion at 9.

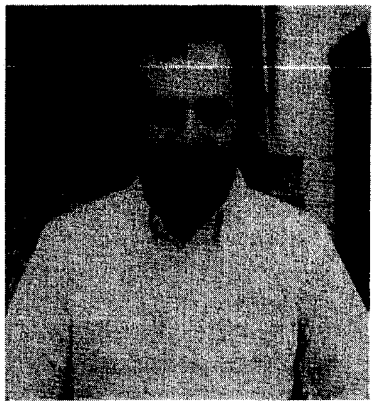
Citing Brinegar v. United States, 338 U.S. 160, 175 (1949), the Court concluded that the affidavit established no more than a "bare suspicion" that incriminating evidence would be found in the motel room. Slip opinion at 9. Accordingly, the bank robbery convictions were reversed since the defendant's motion to suppress should have been granted.

NEAL WALKER

Neal Walker graduated from Chase Law School in 1979. He worked as a trial attorney for DPA in Prestonsburg, and then as an appellate attorney for DPA in Frankfort. For the past year and a half Neal has been a federal public defender doing trial, appellate and habeas work. The Federal Public Defender Office's address is P.O. Box 1489, Lexington, Kentucky 40501; (606) 233-2701.

We thank Neal for his willingness to survey the sixth circuit cases for us.

* * * * * *



PETER KUNEN

Peter Kunen resigned from the Hazard Office effective September 30, 1984. He returns to the family practice in Massachusetts after 5 years of dedicated public defender service. Thanks Peter for your tireless efforts on behalf of our clients.

TIM RIDDELL

Assistant Public Advocate, Tim Riddell, replaces Mark Posnansky as the Chief of the Appellate Branch.

Trial Tips

AVOIDING ENHANCED PUNISHMENT UNDER THE "SLAMMER BULL"

On July 13, 1984 Senate Bill 20, Kentucky's "Slammer Bill," went into effect. This law provides for enhanced punishment with mandatory, non-suspendable minimum jailtime for DUI repeat offenders and also enhances punishment for the offense of operating a motor vehicle while under suspension or revocation as a result of a DUI conviction from a Class B misdemeanor to Class A misdemeanor on second offense, and to Class D felony on third and subsequent offenses. See "Legislative Update," Vol. 6, No. 4 The Advocate (June, 1984) 43, 44. As Senator Moloney observed, "substantial litigation will result from this piece of legislation." Id. at 44.

The purpose of this article is to suggest two procedural and two substantive challenges defense counsel may raise to avoid enhanced punishment for those charged with repeat offenses.

I. RETROACTIVE APPLICATION

S.B. 20 amends KRS 189A.010(b)(c) to provide enhanced punishment for second, third, and subsequent offenses "within a five (5) year period...", but fails to specify whether that period commenced on the effective date of the statute or includes the five (5) years immediately preceding arrests following the statute's effective date. This ambiguity is of critical importance to those charged as repeat offenders arrested since July 13th whose prior convictions were before that date.

Constitutional challenges under the ex post facto clauses have generally been unsuccessful, see, e.g., State v. Willis, 332 N.W.2d 180 (Minn. 1981). A successful challenge may, however, be found in the Kentucky statute concerning principles of statutory construction. KRS 446.080 (3) provides that "no statute shall be construed to be retroactive, unless it expressly so declared." Since no such declaration is found in Section 1 (DUI), Section 9 (revoked or suspended license), or any other section of S.B. 20, the new law should not be applied retrospectively to include convictions before its effective date as first or second offenses.

II. NOTICE

S.B. 20 makes no provision for how a person is to be put on notice that he or she is charged as a repeat offender. It is not clear whether such notice must be in the charging document (warrant or citation), as PFO charge must recite the prior felony conviction, or may be subsequently filed by the Commonwealth. The Tennessee Supreme Court, in reviewing that state's first DUI enhanced punishment law, held that the provisions "purporting to authorize proof of conviction and increased punishment for subsequent offenses without previous notice thereof given to the defendant" vio-

(Continued, P. 25)

lated the state and federal due process clauses, Frost v. State, 330 S.W.2d 303 (1959).

Counsel should object to the introduction of evidence of prior convictions and jury instructions including subsequent offender sentences at trial where the Commonwealth failed to give any notice of its intent to enhance punishment by use of prior convictions. In Commonwealth v. Gadd, 665 S.W.2d 915 (Ky. 1984) the Supreme Court held that documents which will be used to establish the previous conviction (in a PFO case) are discoverable under RCr 7.24(2). This is one incentive for the defense to file discovery motions in DUI cases, as failure to produce the documents relating to the prior conviction in response to such a motion may lead to their exclusion from evidence at trial under RCr 7.24(9). Notice and disclosure of the prior will also enable defense counsel to challenge the prior by pretrial motion (as required by Gadd in PFO cases) rather than disrupting trial or necessitating a continuance when the commonwealth seeks to introduce the prior at trial.

III. BALDASAR: "UNRELIABLE" PRIOR CONVICTIONS EXCLUDED

Most defense attorneys are aware of the longstanding rule that a felony conviction obtained in violation of the defendant's right to counsel may not be used to enhance punishment on a subsequent conviction (as in PFO cases), Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). Most are not, however, aware of a 1980 decision (which has yet to be cited in any reported Kentucky cases) which extended this principle to preclude enhancement based on misdemeanor convictions which did not result in confinement. Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980).

Baldasar was convicted of his first offense of theft (a misdemeanor) and was sentenced to a fine and a period of probation. The record of that case reflected that he was not represented by a lawyer and did not formally waive any right to counsel. He was subsequently charged with a second offense of theft (a felony under Illinois law) and objected to introduction in evidence of his prior conviction. The court noted that the prior conviction was not obtained in violation of Baldasar's sixth amendment right to counsel, since no jailtime was imposed, Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), but recognized that the defendant would suffer enhanced punishment now as a direct result of the earlier conviction. The court held that the prior uncounselled conviction was too unreliable to justify enhanced punishment: "...a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat offender statute." 100 S.Ct. at 1589 (Marshall, concurring).

State courts around the country have applied Baldasar to preclude enhanced punishment in DUI cases where the prior conviction was uncounselled and the record does not show a specific valid waiver of that right, see, e.g., State v. Mattila, 629 P.2d 845 (Ore. 1981), State v. O'Brien, 666 S.W.2d 484 (Tenn.Crim.App. 1984). This rule applies whether the enhanced punishment is still within the misdemeanor range (as with DUI offenses under the new law), see State v. Ulibarri, 632 P.2d 746 (N. Mex. 1981), or to felony level (as with third offender revoked license cases), see State v. Veniza, 391

(Continued, P. 26)

So.2d 450 (La. 1980). A waiver of the right to counsel is not valid unless the record reflects that the defendant was also advised of the right to court appointed counsel if indigent. In re Smiley, 66 Cal.2d 606 (1967), State v. Cichirillo, 440 So.2d 934 (La.App. 1983).

Few Kentucky district court DUI convictions prior to the effective date of the new act are likely to meet this standard, so counsel should be certain to review the record (docket sheet and tape recording) of the prior if the trial court permits retrospective application of the slammer bill.

IV. BOYKIN - VIOLATIVE PRIORS INADMISSIBLE

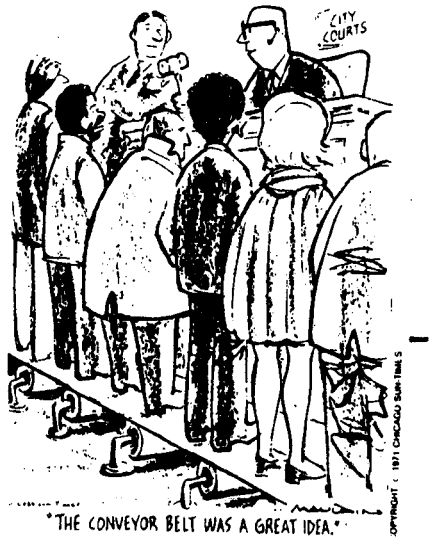
Those who practice in the district courts are aware that the volume of cases disposed of there makes it impractical for the court to conduct a full colloquy of advice and waiver of constitutional rights required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Nonetheless, contrary to popular belief, there is no exception to the Boykin requirements for misdemeanor and traffic guilty pleas, and convictions obtained in violation of Boykin are not admissible at trial to enhance punishment. State v. Smith, 329 N.W.2d 564 (Neb. 1983), People v. Hernandez, 100 Cal.App.3rd 637 (1979). The record must reflect a specific waiver of each right; a docket reciting defendant's waiver of right to trial and trial judge's satisfaction that defendant "knew his rights" is insufficient and constitutionally invalid, since it does not contain advice or waiver of the rights to confrontation and against self-incrimination. State v. Lee, 407 So.2d 1192 (La. 1981).

Many Kentucky cases show confusion or ignorance concerning the Boykin doctrine. Fortunately, the federal Court of Appeals has clarified this for us in a federal habeas corpus appeal of a Kentucky enhanced sentence for DUI and driving with a revoked license. In reviewing the standard for admissibility of prior convictions in Sizemore v. District Court, 735 F.2d 204 (6th Cr., 6/30/84) the court explained:

> It is well-settled that any court accepting a guilty plea must first ascertain that the defendant is fully cognizant of the fundamental constitutional guarantees which are waived upon entry of the plea. (Boykin citation omitted). It is inherently prejudicial to admit a constitutionally infirm plea against a defendant at a subsequent trial on a new offense. (Burgett citation omitted). Accordingly, if Sizemore's prior three pleas were indeed constitutionally offensive then the writ must be granted.
> 13 SCR at 13.

One time-saving practice employed in many district courts is that of the group arraignment, where all defendants on the docket are read their rights together at the beginning of the session of court (morning and afternoon, or even hourly). This practice has been held to be permissible so long as the court ascertains at the plea that each defendant understood these rights and made knowing and voluntary waivers of them. Mills v. Municipal Court, 10 Cal.3rd 288, 515 P.2d 273 (1973). Where the defendant's presence at the group arraignment is a contested issue, the courts have split on the burden of proof: see State v. Ziemba, 346 N.W.2d 208 (Neb. 1984), holding that "the record must disclose that defendant was present at that time", compare Hart v. Municipal Court, 138 Cal.App.3rd 196

(Continued, P. 27)



Reprinted with Permission

(1983), hinting that defendant must submit affidavit or testify that he was not present to render prior invalid.

The determination of the constitutional adequacy of advice and waiver of rights must be made entirely on the face of the court's record (docket sheet, transcript, or tape recording of proceedings). The prosecution may not offer evidence outside the record (such as testimony of judge to show court's habit and practice) to prove a valid wavier; an inadequate record of waiver creates a conclusive presumption of invalidity of the plea. Youkhanna v. Municipal Court, 86 Cal.App.3rd 612 (1978). One possible exception to this rule occurs where the defendant was represented by counsel, as there is a trend to presume that counsel advised the defendant of collateral rights and elements of and defenses to crime. See Marshall v. Lonberger, 459 U.S. __, 103 S.Ct. 843, 853, 74 L.Ed.2d 646 (1982). The presumption is rebuttable, and may be overcome by the testimony of the defendant, resulting in invalid prior due to ineffective assistance of counsel. People v. Bowen, 22 Cal.App.3rd 267 (1974).

The presumption that an attorney has advised the defendant of rights also does not apply where the attorney is entering a plea of guilty for the defendant in the defendant's absence. Such a plea is invalid unless accompanied by a signed, written wavier of rights by the defendant, Mills v. Municipal Court, supra, State v. Pfeifer, 544 S.W.2d 317 (Mo.App. 1976).

V. DRAFTING AND PRESENTING THE MOTION

If the defendant has been given notice of the Commonwealth's intent to rely on prior convictions to enhance punishment, defense counsel should file a written motion to strike the prior convictions. The motion should be filed under the caption of the new charge (not in the prior case), since it does not attack the validity of whatever sentence was imposed in the first charge, but only its subsequent use to enhance in the new proceeding. A favorable ruling will exclude admission of the prior from the trial of the new charge, but does not reverse or vacate the prior conviction itself. People v. Hernandez and State v. Smith, both supra.

The motion should make specific reference to the Sixth and Fourteenth Amendments as authority in order to preserve the issue for appellate and collateral review. Citing Boykin and Baldasar in the body of the motion puts the court on notice of the doctrine on which you will rely. The motion should specifically allege that the defendant was not represented by counsel in the prior proceedings, and did not knowingly or intelligently waive the right to be represented by counsel. If the defendant was indigent at the time of the prior conviction, that should be stated as a separate ground along with the failure of the court to advise the defendant of the right to appointed counsel. Where the record of the prior does not comply with Boykin, a separate ground should state that the prior pleas of guilty

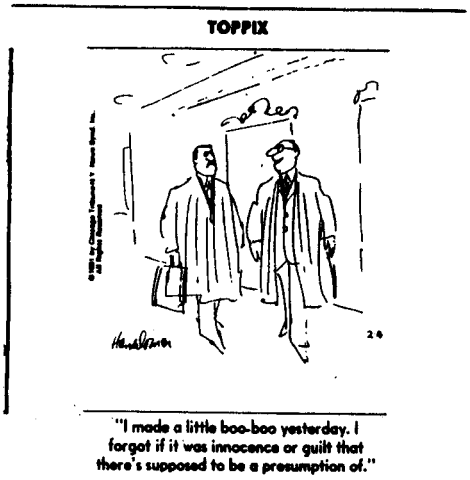
(Continued, P. 28)

were not knowing and voluntary and that the records failed to reflect that the court advised the defendant of and inquired concerning waiver of the Boykin rights.

A certified copy of the docket sheet reflecting the prior convictions should be appended as an exhibit to the motion. This is the first step in making a record for review of this issue. Counsel should also listen to the actual tape recording of the prior proceedings available from the district court clerk. Where the docket sheet recites an adequate waiver of right to counsel and other Boykin rights, but the actual tape recording does not indicate that this took place, the transcript or tape recording is considered the best evidence, and the defendant is entitled to strike the prior. State v. Cichirillo, supra.

The Sizemore case from Kentucky was remanded to the federal district court to enable the Commonwealth to submit the tape recording of the prior convictions to establish their validity. Although that practice is most consistent with the Commonwealth's burden to prove a knowing and intelligent waiver, California courts have held that where the written record reflects that a transcript or tape recording of proceedings is available and the defense fails to produce it at hearing on the motion, the motion to strike the prior may be denied. People v. Zavala, 147 Cal.App.3rd 429 91983), see also State v. Leis, 648 P.2d 1345 (Ore.App. 1982). Counsel should therefore subpoena the actual tape recording from the district court clerk, who will either produce it or testify that it is no longer in existence (in which case the matter will have to be decided solely from the written record).

Some Kentucky authority suggests that whether a defendant was represented



Reprinted with Permission

by counsel at a prior conviction must be put in issue by testimony of the defendant. Phillips v. Commonwealth, 559 S.W.2d 724 (Ky. 1977). Although this rule is constitutionally suspect, counsel would be wise to have the written motion verified under oath by the defendant or offer the defendant's testimony at the hearing.

VI. CONCLUSION

SB 20 has limited the prosecutor's discretion to amend DUI charges,and abolished the court's discretion to suspend sentences for repeat offenders. Striking the prior conviction on the foregoing grounds is the only sure way to avoid mandatory jailtime for second offenders. The attorney who preserves a client's liberty has done his or her job well.

The brief that persuaded the United States Supreme Court in Scott v. Illinois, supra, that defendants are not entitled to appointed counsel unless jail time actually results conceded that uncounselled priors would not be admissible to enhance. "When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for the defendant, he will be precluded from enhancing subsequent offenses.", footnote to Baldasar, 100 S.Ct. at 1587. Competent defense counsel must now make the prosecution abide by the five year old promise.

JAY BARRETT

LET'S GET PHYSICAL, SERIOUSLY

I. SERIOUS PHYSICAL INJURY

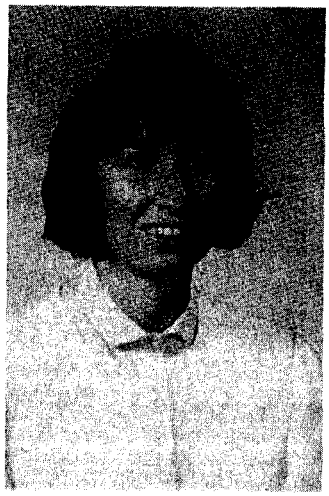
Serious physical injury is an essential element in both first and second degree assault. See KRS 508.010 (1)(a), (b); 508.020(1)(a), (c). Serious physical injury is defined in KRS 500.080(15):

> "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

Because a finding of insufficient evidence of serious physical injury could mean a reduction of the charges from a Class B felony (first degree) to a Class C felony (second degree) on even a Class A misdemeanor (fourth degree) thorough litigation and determination of whether there are sufficient facts to support an instruction including serious physical injury is essential and potentially quite profitable for the defendant.

The problem is that many injuries that appear serious from a "common experience" standpoint are not really serious under the legal definition in the statute, and vice versa. But the evidence presented by the Commonwealth must conform to the legal requirements. In Prince v. Commonwealth, Ky. App., 576 S.W.2d 244, 246 (1979), the Court of Appeals of Kentucky explained:

> We are not prepared to hold that medical proof is an absolute requisite to prove serious physical injury, but do conelude that KRS 500.080(15) sets a fairly strict level of proof which must be met by sufficient evidence of injury, medical and/or non-medical, taken as a whole, before an instruction on first degree assault maybe given. . . .



KATHLEEN KALLAHER

II. LUTRELL

The leading Kentucky case is Luttrell v. Commonwealth, Ky., 554 S.W.2d 75 (1977). In that case, a suspect shot a police officer in the chest with a .38 caliber revolver filled with bird shot. The officer was hospitalized for five days and missed six weeks of work while recuperating. The Supreme Court of Kentucky held that this was insufficient evidence on which to give a first degree assault instruction because "while Officer Phillips suffered from his wounds he was not seriously injured in the statutory sense." Id. at 79.

III. OTHER CASES

Although there is a paucity of other published cases which speakly directly to this issue, two cases shed some light on what Kentucky courts consider to be serious physical injury. In Cheeks v. Commonwealth, Ky.App., ____ S W.2d ___ (decided May 11, 1984), disc. review pending, a defendant was convicted of the second degree assault of his sister-in-law's five-month old son after the baby received second degree burns on most of his abdomen and left hand from an aluminum

(Continued, P. 30)

skillet. While reversing on another issue, the Court of Appeals stated that "a serious question could be raised as to whether or not the burns actually suffered by the child were a serious, physical injury within the meaning of K.R.S. 508.020(1)(c)." The court did not reach the issue because it was not raised in the brief. KRS 508.020(1)(c).

In Commonwealth v. Hammond, Ky.App., 633 S.W.2d 73 (1982), the Court of Appeals held that a trial court should have given a tendered Commonwealth instruction for second degree assault which included the theory that the defendant intentionally shot the victim, causing as nonserious physical injury. The victim had been shot in the abdomen near the spine with a .38 caliber gun and evidence, medical and otherwise, was presented that showed he underwent several operations and was unable to walk without crutches. Id. at 74. The court's decision implies that this evidence would suport a jury verdict based on a finding that the injury was not a serious one.

IV. OTHER JURISDICTIONS

Several cases from other jurisdictions whose statutes are similar to Kentucky's may be helpful in persuading the trial court that there is insufficient evidence to give an instruction which includes serious physical injury as an element.

The Court of Appeals of Oregon has produced two such cases. In State v. Dazhan, Or.App., 516 P.2d 92 (1973), evidence showed the victim who had been beaten suffered a cut under the right eye, resulting in a permanent scar, a cut under the right eyebrow, a severe black eye, a cracked nose and bruises on his chest. He could not see out of his swollen eye for a little over a week, but there was no permanent impairment of his sight. The court held these injuries were not serious as defined by the Oregon statute which is virtually identical to Kentucky's.

In State v. Moyer, Or.App., 587 P.2d 1054 (1978) a trial court found, based on medical testimony, that a knife wound, requiring surgery, had not damaged any vital organs and thus had not created a substantial risk of death. The Court of Appeals of Oregon then held that the resulting one and a quarter inch scar located to the left of the sternum, and the surgery scar, beginning four inches below the neck and extending down six to seven inches, did not constitute a serious and protracted disfigurement. The Court noted that the scars were "located... in an area normally covered by clothing." Id. at 1056.

Dazhan and Moyer are interesting and important because they deal with scars.

In both cases, such scars, either because they are small, as in Dazhan, or hidden by clothing, as in Moyer, did not fulfill the element of "serious and prolonged disfigurement" in the statutory definition. So even some permanent injuries still do not qualify as serious physical ones under the statute.

In Bolden v. Commonwealth, Ark., 593 S.W.2d 156 (1980), the Supreme Court of Arkansas held that a defendant had not inflicted "life endangering" injuries when he beat an officer on the head and chest, causing him to suffer a broken jaw and broken ribs. The court reversed his conviction for first-degree battery.

State v. Rossier, Conn., 397 A.2d 110 (978) is an interesting case in that it dealt with medical evidence of injuries consisting of contusions, a sprained ankle, and an emotional post-trauma reaction of the victim to

(Continued, P. 31)

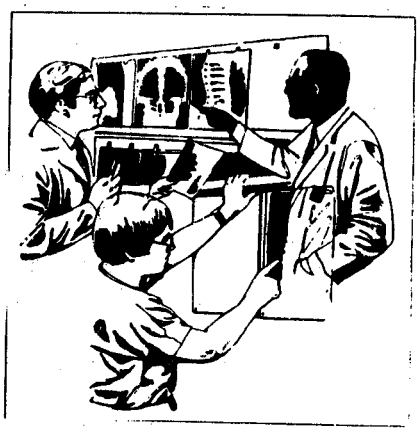
the beating he suffered. The court reversed the first degree assault conviction, holding that such evidence was insufficient to support a finding that the physical injury was serious. It could be argued that this case means that adverse physical affects on one's health, caused by emotional or mental reactions to a sustained injury, cannot be considered serious physical injuries, at least without very strong medical proof.

V. SUBSTANTIAL RISK OF DEATH

This leads to consideration of another element of the statutory definition- that the injury must create a substantial risk of death. Usually, medical evidence is necessary to sufficiently establish this element. However, often the physician will say not that the particular injury in question created a substantial risk of death, but that the type of injury is generally life-threatening. That testimony does not fulfill the requirements of the statutes. Also, the "quantum of risk involved is to be determined as of the time of the act, not at some point later in time." People v. Martinez, Colo., 540 P.2d 1091, 1093 (1975). Thus, the timing, extent, and existence of any substantial risk of death must relate to the specific injury involved when it was inflicted.

VI. PRESERVATION

A short discussion about preserving this issue for appellant review may be useful at this point. It is well known that to preserve an issue concerning sufficiency of the evidence, a motion for a directed verdict of acquittal must be made at the close of the commonwealth's case-in-chief, at the close of the defense case, and at the close of any rebuttal evidence. See Kimbrough v. Commonwealth, Ky , 550 S.W.2d 525 (1977). However, this does not preserve the issue if there is insufficient evidence to support the principal offense but there is sufficient evidence to support a lesser included offense. See Campbell v. Commonwealth, Ky., 569 S.W.2d 528 (1978). In that case, specific objections to the instructions, as well as directed verdict motions, must be made. See Queen v. Commonwealth, Ky., 551 S.W.2d 239 (1977). This is complicated by the fact that a defendant tried for first degree assault generally wants a charge on second degree assault but that lesser included also includes a theory based on serious physical injury. Thus, trial counsel must object not only to the first degree assault instruction because of insufficient evidence to show serious physical injury but also to any second degree instruction which



includes serious physical injury as an element.

VII. IMPORTANCE OF ISSUE

In closing, it must be reemphasized how important it is to litigate this issue in an assault case within the statutory definition of serious physical injury even when the victim has injuries that, to the ordinary person, would appear serious. A recent case from the Court of Appeals aptly illustrates this principle. In Drake v. Commonwealth, Ky.App., (decided June 29, 1984) (decision not to be published), the Court of Appeals reversed a first degree assault

(Continued, P. 32)

conviction because there was insufficient evidence of serious physical injury. The court pointed out that the victim suffered "multiple lacerations to the chest, arms, and abdomen, possibly involving the right kidney." She spent five days in the hospital and convalesced at home after that. She had no permanent effects from her wounds, except for various scars.

What the court did not mention in its opinion was the evidence that the victim was injured when stabbed twice in the arm with an icepick, the tip of which broke off in her arm, and then was stabbed repeatedly with a butcher knife! Gruesome facts indeed, yet, citing Prince, supra, the court still found that the evidence presented, which consisted of only the victim's testimony and hospital records, was insufficient under the statute to show a serious physical injury. Thus, success in winning a directed verdict motion depends not on an absence of a painful or bloody injury to the victim, but whether the Commonwealth can prove that the wound (1) created a substantial risk of death or (2) caused serious and prolonged disfigurement, (3) prolonged impairment of health, or (4) prolonged loss or impairment of the function of any bodily organ.

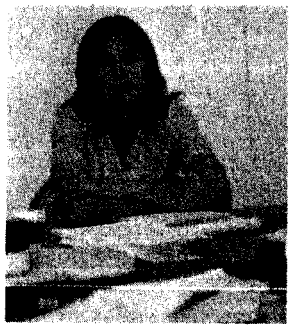
Until one of these elements has been proven beyond a reasonable doubt, no criminal defendant can be convicted of first or second degree assault under a theory which relies on serious physical injury as an essential element.

KATHLEEN KALLAHER

Special thanks to Bill Robinson!

* * * * * *

Assistant Public Advocate, Mary Obermeyer, left the Somerset Office the end of September, and has relocated in Florida. She is shown here with Patrick McNally of our Hazard Office.



MARY OBERMEYER

Our Readers Write...

Dear Editor:

Presently a 1962 law (439.344) prevents prisoners from recieving credit for the time served on parole unless they complete their parole satisfactorily.

. . . .

If someone could have the court make a declaratory judgment that 532.100 and 439.346 and 439.348 are controlling over 439.344, the overcrowding would be greatly resolved, the prisoners in jail could be accepted, and time would be enhanced to work out possible future solutions. The questions now is HOW & WHEN?.

Ed Wagner, Jr., 79259
Kentucky State Reformatory

* * * * * *

Kentucky Supreme Court Rule Changes

The following is a summary of the important rules changes announced by the Supreme Court of Kentucky on June 29, 1984 which relate to the practice of criminal law:

The rules changes are to be effective on January 1, 1985, unless otherwise noted:

BILL AYER

CIVIL RULES

1. CR 72.10 Statement of Appeal from District Court

A new Paragraph (f) is added to the rule which requires the Statement of Appeal in a criminal case appealed from the District Court to Circuit Court to be served upon both the County Attorney and the Commonwealth Attorney.

2. CR 73.02(2)

The amendment to this Paragraph of CR 73.02 relates to failure of a party to file a timely Notice of Appeal or failure of a party to file a timely Notice of Cross-Appeal. Under the amendment the failure to file those Notices of Appeal and Cross-Appeal may result in the dismissal of the appeal, striking of pleadings, briefs, record or portions thereof, imposition of fines on Counsel for failing to comply with the rules of not less than Two Hundred Fifty Dollars ($250.00) nor more than Five Hundred Dollars ($500.00) and such further remedies as are specified in the applicable rules.

It appears for the first time the Court is beginning to impose sanctions upon counsel who fail to file timely Notices of Appeal on behalf of their clients rather than automatically dismissing the appeals.

3. CR 73.02(4)

This is a new Paragraph of CR 73.02 which provides that if an Appellate Court determines an appeal to be frivolous then it may award just damages as well as up to double costs to the Appellee. In light of the fact that many of the appeals which many of you handle would be in forma pauperis appeals it would appear unlikely that the Court would take the drastic step of awarding damages and double costs to the Commonwealth for a determination of a frivolous appeal. It should be noted however that this rule would in all likelihood apply in those cases in which the appeal was not being taken in forma pauperis.

The Court goes on to note in the rule that an appeal is frivolous if it is found that the appeal is "so totally lacking in merit that it appears to have been taken in bad faith."

4. CR 73.03 Notice of Appeal

The Court has divided CR 73.03 into two numbered paragraphs which are essentially the same as the old CR 73.03. There is one addition to Paragraph (1) which now requires the party or attorney filing a Notice of Appeal to certify that a copy of the Notice has been served upon all op-

(Continued, P. 34)

posing counsel or if a party is not represented by an attorney, then it must be served upon the party at his last known address. The new addition to the rule requires the certificate to indicate that the Notice was served prior to filing of the Notice with the Clerk of the Court.

5. CR 73.08 Certification of Record on Appeal

The change in this rule is that following the initial sixty (60) day period for the certification of a record on appeal after filing of the Notice of Appeal, any further extensions must be requested from the Appellate Court. As you will recall, the previous rule permitted the Trial Court to grant one, sixty day extension, however, under the amended rule the Trial Court can grant no extensions of time for certification of the record on appeal and any extensions must be requested from the Appellate Court. The rule is specific in noting that the Motion for Extension must be made before the expiration of the original period of time.

SUPREME COURT OF KENTUCKY

IN RE:

ORDER AMENDING

. RULES OF THE SUPREME COURT (SCR),

RULES OF CIVIL PROCEDURE (CR),

RULES OF CRIMINAL PROCEDURE (RCr), and

ADMINISTRATIVE PROCEDURES OF THE

COURT OF JUSTICE (AP)

84-2

This includes the new

Mandatory Continuing Legal Education Rule

SCR 3.665, et seq.

6. CR 76.12(4)(c)(iv) Form and Content of Briefs-Argument:

This Subsection (iv) has been amended to require a statement at the beginning of each Argument showing whether the issue raised by the Argument has been properly preserved for review and if it has been properly preserved for review in what manner the preservation has taken place. The amendment requires that the statement refer to the portion of the record which indicates whether or not the issue has been properly preserved.

7. CR 76.20(2)(a) Time for Motion for Discretionary Review

A new sentence has been added to Subsection (a) which makes it clear that the failure of a party to file a timely Motion for Discretionary Review shall result in the dismissal of the Motion for Discretionary Review. While I am sure that we all assumed that such was the case, in fact, there was no provision in the previous rule which specified the penalty for failure to file a timely Motion for Discretionary Review.

8. CR 76.28(4)(a) Publication of Opinions

This Subsection is an amendment to the existing rule relating to the publication of opinions when a Motion for Discretionary Review has been filed with the Supreme Court. Under this new amendment, any time a Motion for Discretionary Review is filed with the Supreme Court, then the opinion of the Court of Appeals in the case which is under review will not be published unless the Supreme Court so orders. Previously the rule provided that the opinion of the Court of Appeals would not be

(Continued, P. 35)

published unless ordered by the Supreme Court only in those cases in which the Motion for Discretionary Review is granted. It appears now that in any case in which the Court of Appeals has directed that its opinion be published and the opposing party files a Motion for Discretionary Review, that opinion will not be published unless so ordered by the Supreme Court of Kentucky, even if the MDR is not granted.

9. CR 76.34(3) Motions - Number of Copies

This amendment requires that five (5) copies of all motions and responses shall be filed in both the Court of Appeals and the Supreme Court, unless directed otherwise by the appropriate court. Previously, in the Supreme Court, only the original of a motion or response needed to be filed.

10. CR 76.36(1) and (2) Original Proceedings in Appellant Court - Petition for Relief and Response

The amendment of Paragraphs (1) and (2) merely includes a "real party in interest" in those persons upon whom service must be made of the petition as well as notice of the filing of the petition by the clerk. The "real party in interest" is defined in a new Subsection (8) which will be discussed later.

11. CR 76.36(7)(h)(i)(j)and(8) Appeals to Supreme Court and Real Party in Interest

The amendment to Subparagraph (h) now requires briefs in response to an appeal or cross-appeal. Apparently there was some question as to whether they were required previously. The amendment also requires that in any case where an appeal is taken against a judge and where that appeal concerns the performance of an official act, the party appealing is required to serve notice on the "real party in interest" who is then required to file a brief on behalf of the judge against whom the appeal or cross-appeal is taken. The amendment also points out that no attorney is required or permitted to file such a brief where his doing so would be a conflict of interest of that of his client.

Subparagraph (i) now specifies the number of copies of briefs to be filed on original action appeals. That number is ten (10) and the briefs do not need to be printed.

Subparagraph (j) is merely a relettering of subparagraph (i) as it existed previously.

Paragraph (8) is one paragraph which defines the term "real party in interest." That term is defined as "any party in the Circuit Court action from which the original action arises who may be adversely affected by the relief sought pursuant to this rule." Obviously in a criminal case in which there is a Petition for Writ of Prohibition or Petition for Writ of Mandamus filed against a circuit judge it is likely that the Commonwealth Attorney or Attorney General will be a real party in interest and therefore those of you filing original actions must be prepared to serve the Commonwealth's Attorney or Attorney General in accordance with the requirements stated previously.

12. CR 76.37(5) and (6) Certification of Question of Law; Costs of Certification and Briefs and Argument:

Paragraphs (5) and (6) have both been amended to establish that briefing time on certification of questions of law is now thirty (30) days rather

(Continued, P. 36)

than sixty (60) days as it was in the previous rule.

13. CR 76.37(10) Certification of Law by the Commonwealth

This amendment clarifies the manner in which the Commonwealth initiates the certification procedure. Under this amendment the Commonwealth shall file a motion in the Supreme Court requesting that the Court accept the questions for review. The motion is required to contain the same elements as provided in Paragraph (3) of this rule for a certification order. The motion is required to be served and a response is permitted in conformity with the other rules. If the motion is sustained then thereafter the case shall proceed in the same manner as any other appeal.

14. CR 76.40(2) Timely Filing

The amendment to this rule removes the permission to use "certified mail, return receipt requested" and in place thereof allows the use of "express mail" or "mail by other recognized mail carriers." Thus, one can no longer use "certified mail, return receipt requested" for the purposes of being considered safe under the timely filing rule. However, it does appear that one can now use United States Postal Service "express mail" as well as United Parcel Service or other such recognized carriers provided the document has been placed with the United States Postal Service or the other carrier within the time allowed for filing.

15. CR 76.44(a) Stay Pending Review by United States Supreme Court

The amendment here indicates that stays pending review by the United States Supreme Court shall be granted in those cases involving a sentence of death. Obviously all of the procedural requirements must be followed under the rules of the United States Supreme Court in order to obtain the automatic stay. The previous rule did not automatically require a stay in death penalty cases.

16. RCr 4.08(b)

This amendment provides that any information furnished by a defendant to the pretrial release officer and recorded on the pretrial release officer's completed interview form shall be furnished to law enforcement officials upon request if the defendant fails to appear in Court when he is required to do so. The previous rule only required the release of information concerning the defendant's last known address.

17. RCr 7.02(2)(3)(4)(5)and(6) Subpoenas

Paragraphs (2),(3),(4),(5) and (6) of this rule have been redesignated as Paragraphs (3),(4),(5),(6) and (7). A new Paragraph (2) has been added and Paragraph (6) which is now Paragraph (7) has been amended.

Paragraph (2) provides that subpoenas which are to be served upon unmarried infants are to be served upon the resident guardian of the unmarried infant. If there is no resident guardian known to the party requesting the subpoena, then service shall be by serving either the mother or father of the unmarried infant within the state. If there is no mother or father within the state service shall be had by serving the person within this state having control of the infant and it shall command that person to attend the proceedings with the infant for the purpose of giving testimony.

The amended Paragraph (7) provides that the appearance of the unmarried

(Continued, P. 37)

infant, specified in a subpoena, shall be deemed compliance by the person who was served on behalf of the infant. Thus, if the unmarried infant appears as a witness as required by the subpoena then there can be no contempt proceeding against the person who received the service for the unmarried infant even if he (the person receiving service) fails to appear.

18. RCr 7.06(1) Indispensable Witness

The amendment to this Paragraph makes it clear that there must be an order issued by the Court to a peace officer to bring the indispensable witness before the court after which a hearing is to beheld "without unreasonable delay." While one would assume that such was the intent of the previous rule, it was not specified and thus this amendment clarifies that point.

19. RCr 7.14 Notice of Taking Depositions

The Court has divided this rule into two (2) numbered paragraphs. Paragraph (1) is essentially the same as the first sentence of the old rule with the addition of a second sentence which specifies that in the absence of good cause shown notice of less than seventy-two (72) hours shall not be deemed as a reasonable time for notice.

Paragraph (2) is exactly the same as the second and third sentences of the old rule with no additions.

20. RCr 8.08 Pleas

This is merely an amendment to recognize the plea of "guilty but mentally ill."

21. RCr 8.10 Withdrawal of Plea

Once again this amendment merely recognizes that the defendant may withdraw a plea of guilty or guilty but mentally ill.

22. RCr 8.12 Pleadings

Again, the amendment merely incorporates the plea of guilty but mentally ill as one of the pleadings in a criminal proceeding.

23. RCr 8.32 Transfer from the Circuit or District for Plea and Sentence

This is a new rule which has been added by the Supreme Court. It consists of three (3) paragraphs. It provides that a defendant who is being held in a county of a circuit or a district other than that in which an indictment or information is pending against him may waive trial in the county of the circuit or district in which the indictment or information is pending and consent to disposition of the case in the county in which he is being held. The consent and request must be done in writing and is subject to approval of the Commonwealth's Attorney for each of the counties when the matter involves a Circuit Court action or the approval of the County Attorney for each of the counties when the matter is in the District Court.

There is a procedure set up for the clerk of the court to transmit the papers from the original county to the new county. The rule also provides the same type of procedure where only a complaint is pending and there is no indictment at that time.

(Continued, P. 38)

Paragraph (3) of the rule provides that after the action has been transferred pursuant to Paragraphs (1) or (2) should the defendant then enter a plea of not guilty then the clerk is to return the papers to the original court and the matter is to be restored to the docket at that court.

24. RCr 9.54(1) and (2) Instructions

The amendment to Paragraph (1) makes it clear the requirement that instructions be in writing and be read to the jury may not be waived except by agreement of both the defense and the prosecution.

The amendment to Paragraph (2) sets out that any party may tender instructions and further requires that if a party is going to assign as error the giving or failure to give an instruction he must make "specific" objection to the giving or failure to give of an instruction.

25. RCr 11.42(5)

The amendment to this rule requires that in order for an individual to receive the assistance of counsel under RCr 11.42, he must make specific written request for the appointment of counsel. The previous rule did not require specific written request for counsel.

26. Administrative Procedure, VI, Section 2

The amendment to Paragraph (1) makes it mandatory that the Trial Judge assume control of all shorthand notes and other materials used in the preparation of a record of a civil or criminal proceeding when the Court Reporter is terminated from employment or becomes incapacitated due to illness or failure to prepare and deliver the transcript. In the past, the assumption of those records by the Trial Court was merely permissive and not mandated.

The amendment to Paragraph (2) attempts to define the term "exhibits" as used in this administrative procedure. Specifically, exhibits does not include property which was alleged or suspected to be the proceeds of a crime or used to facilitate the commission of a crime or those items which are subject to confiscation or forfeiture under the Kentucky Revised Statutes. The rule directs attention to KRS 67.592, 67.594 and 95.845.

WILLIAM C. AYER, JR.

Bill Ayer served with DPA for more than 10 years, and was Deputy for many years. He left the office on January 1, 1983 to enter private practice in Frankfort. Prior to working for DPA, Bill served as Assistant Director of the KBA.

* * * * * *

Assistant Public Advocates, Chris Burke and Denise Regan, resigned from their positions effective August 15, 1984. They now reside in Arlington, Massachusetts. They are shown here with Patrick McNally of our Hazard Office, and John Halstead of our Office in Somerset.

PAROLE BOARD CHAIRMAN SPEAKS

Harry Rothgerber, Jr., has been a member of the Kentucky Parole Board since 1979, and has been its chairperson since 1982. He is the former chief of the juvenile division of the Jefferson County public defender office. He addressed the Kentucky public advocates at our May, 1984 seminar. In a series of articles his comments, in a condensed and edited version, will be set out. Below is the first article.

It is my pleasure to be here. I'm not here to talk about philosophies or theories. I am up here to tell you about some practical ramifications of our parole practices and our parole policies and regulations.

One of the most embarrassing things I could say was that, as a public defender, my knowledge of the parole system was just about limited to the four corners of the parole schedule and that was it. I knew nothing at all about sentencing calculations which the Corrections Cabinet is responsible for. And it's to my discredit that I have to say but once I get back in private practice again, or public defense work, I will certainly be better and more adequately prepared to represent my clients fully in all phases of criminal proceedings because of my knowledge of the parole system.

I. PAROLE DISCUSSIONS WITH A DEFENDANT

To begin with, when discussing pleas with your clients, don't make any promises to them. Don't make anything that comes near a promise to them. Don't intimate any action at all by the Board. We hear this constantly. We've seen suits. We have seen actions brought to the Bar Association because of, and we've seen 11.42's brought on the basis

HARRY ROTHGERBER, JR.

that promises were made at plea bargaining stage regarding parole. Be up front with your client, tell them "no promises" - send them a letter after the plea. In it, put "no promises" regarding parole can be made. Protect yourself.

Discuss with them, if you wish, the positive and negative factors that are involved in their case. If they want to know if they're going to make parole or not, you can't tell them. But you can tell them that the negative factors are these. You've committed a serious crime. You've gotten a 20-year sentence for assault I. You have 3 prior incarcerations and a half dozen different felony convictions. Those are all negative factors. Tell them that a positive factor would be if they went to the institution and did well. Discuss it in terms of positive and negative factors, if you wish.

II. PAROLE THE FIRST TIME UP

They are going to want to know if they are going to make parole the first time up. For fiscal year 1982-83, exactly 52.8 percent of the persons who came up the first time for parole made it. For this fiscal year, although I don't have exact stats, the number will be substantially less the first time up.

(Continued, P. 40)

Your client has less than a 50 percent chance at this point of being recommended for parole the first time up. To suggest to them otherwise is to me quite unethical.

III. PSI

Let me go to some other areas: the PSI, the Presentence Investigation, is the main body of information on which the Board relies in getting information on the crime, the crime story, the defendant's story of the crime, the defendant's background and any other factors which the court might consider when deciding whether or not to probate your client. Make sure the crime story and the other pertinent facts in the PSI are correct. Make sure they accurately reflect what happened so that the Board has good information before it in making its decision.

If you see inaccuracies, try to correct them before the sentencing court. If the sentencing judge won't correct what you perceive as inaccuracies, then send the Board a letter simply stating that "I disagree with the PSI in these areas." And be specific.

IV. SPECIAL REPORT TO THE BOARD

Many of you may not be aware of the fact that at the time of sentencing, the probation and parole officer will also prepare a special report to the Parole Board, in addition to the PSI. Now this special report to the Parole Board is not available to you, but it relates the attitudes of the sentencing judge, the commonwealth attorney and any other public officials in that county or district who may wish to render opinions about parole for your client. Sometimes community attitudes, that is attitudes from the employer or neighbor of your client, may be in this special report also.

I have seen some situations in which a defense counsel has plea bargained for a statement, a positive statement, by an assistant commonwealth attorney on behalf of the defendant in this special report to the Parole Board. Not that the Board is going to be bound by it and not that we're not going to give it any more weight than ordinary. I just relate that because you may not be aware that there is such an animal. And it may be worthwhile information to you in the future. It's entitled "Special Report to the Parole Board" and if you want more detailed information on it I would suggest you talk to somebody in your local parole office.

V. DEFENDANT'S STATEMENT IN PSI

If I were you, I would prepare your client to make some type of statement for the preparation of the PSI. As you know, there is a space there for the defendant's version. There may be reasons that you can't let your client make that statement because of appeal or other problems that might be raised in the case, and obviously that is your decision to make. But if your client has pled guilty, I would suggest that it might be to his or her benefit to make such a statement and to make a truthful statement.

VI. REQUESTS FOR MINIMUM SECURITY PLACEMENT

In the case of a first time or minimal offender, it might be to your client's benefit to send a letter to the Corrections Cabinet requesting some type of minimum security institutional placement be made. Again, no promises can be made but if there are verifiable reasons and you think your client would be a good risk in a minimum security

(Continued, P. 41)

situation, it doesn't hurt to point that out to the officials in the Corrections Cabinet.

VII. EARLY PAROLE

Let me say a few words about early parole consideration. Not long ago, in December, I stood in this very same room and addressed the statewide conference of the Commonwealth Attorneys Association. And I would say that fully half of them did not understand what early parole was. By "early parole" I do not mean parole the first time up. Early parole is exactly what it means: parole earlier than our regular eligibility schedule.

You know that as of December 3, 1980, the Board greatly simplified its parole eligibility schedule. Basically now, for all sentences, ranging from 2 to 39 years, your client is eligible after 20 percent of service of time for an initial parole hearing.

However, the Board's regulations allow it to go outside that schedule. In fact, the regulations state that upon majority vote of the Board, whenever it deems advisable to do so, which is about as broad a language as you can get, the Board can see any inmate at any time. Theoretically then, a person on a life sentence could be seen, if a majority of the Board wanted to, upon his first day in the institution, and could be paroled at that time. That is what I mean by early parole consideration.

This is a possibility. But it's not a very likely possibility. I point this out to you in case you have a good case which you think would merit it in the future. The Board receives literally hundreds of requests for early parole consideration each week.

In fiscal year 1982-83, the Board granted 31 of these requests and gave early parole, actually, to 27 people. So far, in fiscal year 1983-84, the Board has granted 5 early parole requests. As I said, it's a possibility but not a very likely one.

There are 5 members of the Board and every member has his or her own opinion about voting on early parole cases and the most positive factors that can be considered in those cases. So I can't tell you what specific items you need in each and every early parole request. To start off with though, it would help if you had a recommendation from the sentencing judge and the commonwealth attorney. Lots of luck!...

You would be surprised how many requests we do receive from such officials though. Again, we don't even bind ourselves to honor their requests. We consider them like any other request.

Furthermore, when an early parole request has been denied, it is a policy of the Board not to consider another such request for at least 12 months.

VIII. RECONSIDERATION OF DEFERMENTS

When a client of yours receives a deferment, which is known in common parlance, as a setback or a flop, or when that person receives a serve-out, it is also common for them to request reconsideration of that decision by the Board.

In order to curb the tremendous number of such requests that come in, the Board has also made it a policy not to reconsider such deferments or serve-outs within 12 months of those decisions. So if you have that piece of information

(Continued, P. 42)

there, if a convicted former client of yours would ever ask, he or she can't do anything within 12 months after getting that decision.

IX. INFO TO THE BOARD

Many of you have compiled the usual letters on behalf of a client's motion for probation or shock probation. These letters would include letters from employers, past employers, from clergy persons, family and friends, and anybody who has a good word to say about your client. I would suggest that you might want to also send that packet of information to the Board in the likelihood that your client isn't probated or shocked, or make copies of that information and send those copies for inclusion in your client's file. It can't hurt. Dave Norat is back there, saying "I know it can't help." Audience, it can't hurt. Believe it or not, the Board does consider each and every piece of information before it either in support of or in opposition to an inmate.

If you have mitigating factors that you want to bring to the Board's attention, do so in the form of a letter. Counsel is not allowed to appear at the parole hearing itself. That's a closed hearing, only the inmate, the board members and the Board's staff are allowed to be present. Not even institutional staff are allowed to be present and the Board has no intention of opening this hearing up into an adversary proceeding. Choose your words carefully, briefly, concisely; put it in a letter. It will be read. Your letter will be answered and all the board members will consider it at the time the decision is made.

X. RAMIFICATIONS OF CONVICTION FOR A CRIME INVOLVING A FIREARM WHILE ON PAROLE FROM A LIKE CONVICTION

There is something else that you should consider in plea bargaining. The Board has taken, last year, a very harsh attitude toward the use or the repeated use of firearms in crimes. The Board has made it a policy that when a person has been paroled on a crime involving the use of a firearm, that if that person is returned with a new conviction for any crime involving the use of a firearm, that person will receive either a serve-out or an extremely long deferment. And by extremely long deferment, I am not talking about 12 months, I am talking about years.

If you've been following some of the Board's decision, you can see what I mean. The 60, 72, 84, or 96 month deferments are not at all uncommon these days.

I think that's a piece of vital information that you need to know in advising your client whether to cop out or not. Of course, your client's going to blame you all the time anyway if the wrong ...when your client appears before us, I don't know whether you all are aware of that but they are never guilty, it's always the plea bargain they got from their public defender. Usually, the key words are "well, I couldn't afford my own attorney, so I had to get a public defender." We have a lot of fun with that, with the other board members knowing my past background.

XI. MISCONCEPTIONS

Let me get to a list of misconceptions about the parole process and the parole policies.

A. Release at First Eligibility Date

I've already pointed out the fact that everybody thinks (especially

(Continued, P. 43)

the public) the initial parole hearing date, which is usually cited in the newspapers, is when the person's going to be released. I've tried to dispell that. For fiscal year 1982-83 approximately 53 percent were actually paroled the first time up, 39 percent were deferred, and 8 percent were served out. That's the total for all institutions.

B. Recidivism

There is a misconception that most prison commitments consist of parolees who have new felony convictions. That's certainly not true. The latest figures from Corrections Cabinet show that of the persons who have been committed to prison during this fiscal year exactly 9.1 percent were parolees who were returned with either new concurrent or new consecutive sentences. So the persons coming to prison for the most part are not parolees who committed new felonies.

Also, for this current fiscal year, so far 19.4 percent of prison commitments are technical parole violators. That is persons who, while on parole, have failed to report, have absconded, have picked up a misdemeanor conviction or violated their parole in some manner other than a new felony conviction. It's really not the technical parole violators that bother me so much as it is the felony violators.

C. Parole Due to No Room

It's a misconception that the Board recommends persons for parole because of over-population problems and over-crowded problems. Please don't cite that as one of the reasons you think your client should be paroled. The Board is only going to recommend for parole when we think a person is no longer a threat to society and is ready, willing and able to be a law-abiding citizen.

Again, that's broad language but that's our statutory mandate and that's the only thing we can go by. The statute doesn't say anything about the population problems. We leave that to Secretary Wilson and the Corrections Cabinet to work out. I sympathize with them but I am not going to vote to set somebody loose if that person is going to go out and commit another crime.

D. Release Other Than Parole

It's a misconception that every ex-con on the streets is a parolee. A person can be released from prison through numerous methods besides parole. You can be shocked, you can escape, you can be served-out; oh, believe me, we've gotten blamed for crimes committed by escapees while on escape. You can be furloughed. You can be released on a court order or an appeal bond. Some persons in prison are still serving under the old maximum expiration law and could be released under maximum expiration of sentence. These are all ways that an inmate could be released other than parole.

E. Parole on PFO Convictions

There is a misconception that the Board paroles P.F.O.1's prior to 10 years. It is true that P.F.O.1's can't be released prior to 10 years. On numerous occasions, I see some familiar faces here in the audience who have called me right during plea bargaining with the commonwealth attorney and asked me about this.

P.F.O.1's who receive a minimum 10-year sentence and who do nothing in prison to screw up their good time or to lose their good time, will

(Continued, P. 44)

serve out after 7 1/2 years. Inmates are entitled to 1/4th of their sentence as good time. On a 10-year sentence, you get 2 1/2 years' good time. The P.F.O.1 laws do not erase the right to get statutory good time.

Therefore, I will repeat it again: if your client gets a P.F.O. 1 conviction, with a 10-year sentence, he will never meet the Board. He will serve out in 7 1/2 years.

That has nothing to do with Board policy or Board procedure, it's a simple matter of reconciling a few statutes. Again, many of the commonwealth attorneys blame us for that, but we don't have anything to do with it.

F. Early Parole

As I told you before, I mentioned early parole, it's a misconception that we recommend many people for early parole. And I think I've already given you the stat which should disprove that.

Another statistic which you should know is that the Board held 4,409 hearings last fiscal year. So, of those 4,409 hearings, 31 were early parole hearings which even makes that 31 figure more miniscule.

G. Deferments of Technical Parole Violators

The Jefferson County Grand Jury, among others, is of the opinion that the Board automatically defers all technical parole violators for 1 month only. They cited this in about 3 of their last 5 grand jury reports and it's to the point now where this is information which is being spread around among the defense bars. It is simply not true.

By regulation, the Board can defer as long as 96 months. We can defer anywhere from 1 to 96 months. When we see persons at their final parole revocation hearings, the same 3 options are then available to us as they are in regular hearings. Persons can be recommended for parole reinstatement. They can be give a deferment or they can be served out. There is no 1 month or 1 year policy or practice by which the Board goes.

H. Opinions from Citizens and Defense Bar

There is a misconception that the Board does not respect or consider opinions from officials and citizens, and the defense bar. We appreciate those comments that you have to make, that the citizenry has to make. We welcome them; we want your comments, especially if you have unique information to give about your client's case.

I. Parole Eligibility on Life Sentence

I notice that some of you may be familiar with the case at Olive Hill that occurred within the last couple of weeks where a person convicted of a vehicular homicide received a life sentence. It's typical that I should have read the article which appeared in the Lexington Herald-Leader about that case. It quoted the commonwealth attorney as saying he thought that a person would be eligible for parole after 6 years.

As of December 3, 1980, it was 8 years. And this crime certainly happened after that and it seems to me that the commonwealth attorney does not know the parole regs. I told them that. So, it's not anything I am talking behind his back about but if they should know them, you should know them.

No Comment

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

* * * * *

THE GARY JOHNSON SCHOOL
OF DEFENSE ADVOCACY

(Prosecutor cross-examining defense attorney.)

PROSECUTOR: You did what you did to represent the best interest of your client?

DEFENSE ATTORNEY: Yes, ma'am.

PROSECUTOR: Were you trying to weasle out of anything?

DEFENSE ATTORNEY: I was trying to weasle him out of a criminal charge, yes, if it took weasling, yes.

PROSECUTOR: That was to the best interest of your client?

DEFENSE ATTORNEY: Well, yes.

Epilogue: Welcome back, Gary!

* * * * *

ADVOCACY IS NEVER
HAVING TO SAY YOU'RE SORRY

DEFENSE ATTORNEY: And the star witness for the Commonwealth is this trained liar that lied to you and told you lies and changed that testimony today under oath?

PROSECUTOR: Objection and move the Court to admonish the jury.

JUDGE: You will not consider the statement by [defense counsel] about somebody being a liar. I want you to apologize to the Court.

DEFENSE ATTORNEY: I will not apologize, the lady--

JUDGE: I am asking you to apologize to the Court for making that statement.

DEFENSE ATTORNEY: I apologize to the Court and to the jury but not to her.

JUDGE: Well---

DEFENSE ATTORNEY: And not to [prosecutor] or [assistant prosecutor].

PROSECUTOR: You don't owe me any apology.

ASSISTANT PROSECUTOR: I wouldn't have your apology.

DEFENSE ATTORNEY: Thank you. No further questions.

* * * * *

DOES THIS VIOLATE
THE SEQUESTRATION RULE?

PROSECUTOR (during voir dire): Okay. Now this case may last for two weeks or it may last longer than that. In view of this is there any undue hardship that you would suffer which would make it impractical for you to serve on this Jury?

JUROR: Can I keep my wife with me all the time? I don't like to sleep by myself.

* * * * *

(Continued, P. 46)

At 3:50 p.m., the jury retired to deliberate a verdict. At 5:10 they returned to open Court and the following was heard:

JUROR: We can't reach a decision, Judge.

JUDGE: Well, can you tell me how you stand in numbers? How many are for one thing and how many are for something else?

JUROR: There was one guilty, one innocent...

JUDGE: No, don't tell me that. How do you stand in numbers?

JUROR: One, one and ten...

JUDGE: Can you answer the question how far you are in numbers? How many are for one thing and how many are for someting else? Don't tell me what you're for.

JUROR: Ten is for one thing.

JUDGE: Ten to two?

JURORS: Not really. Ten and one and one.

JUDGE: Well, if you've got ten for something you're pretty close to a verdict... I think I'll send you back in. Go back in and try to make a verdict.

[Defense mistrial motion overruled, then granted. Jury recalled.]

JUDGE: I've been thinking about what [the foreman] said about it and it probably wasn't very fair for me to send you back in. I told you not to tell me how you stood, but you did tell me. I guess we can't do it, so we'll have to get another jury to try the case.

PUBLIC DEFENDER: Your Honor, I think [the prosecutor] and I would both like to ask them how they did stand now that they have been discharged.

JUDGE: There's nothing wrong with telling now how you stood.

JUROR: One guilty, one not guilty and ten undecided.

JUDGE: Ten undecided? How in the world?

JUROR: Ten felt like there wasn't enough evidence, but that he was guilty.

JUDGE: Well, if there wasn't enough evidence then he was innocent. If you didn't believe what the officers said, he's innocent.

JUROR: But don't all twelve have to go?

JUDGE: Yes, you all have to go. We'll have to find another jury to try him. You may be excused. Court is adjourned.

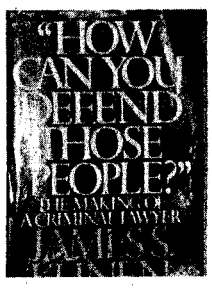
* * * * *

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

KEVIN MCNALLY

* * * * * *

Book Review



"HOW CAN YOU DEFEND THOSE PEOPLE?"
The making of a Criminal Lawyer

by James S. Kunen

270 pp. New York: Random House
$15.95

(Continued, P. 47)

The role of the defense attorney is the hardest role in the criminal justice system to explain. Defense attorneys are very often having to justify their work to the public, their friends and even their relatives. In How Can You Defend Those People? James S. Kunen attempts to explain why lawyer would want to represent a person charged with a crime. Mr. Kunen worked as a staff attorney for a the District of Columbia Public Defender Service for two and a half years. During that time he represented about 150 alleged criminals.

In telling his story he provides a real sense of how the justice system works. The cases he described are typical of what goes on in criminal court everyday. He records the facts with insight and conveys his feelings for the job. He lets the reader know the enormous toll it takes and the special satisfactions it brings.

In the criminal field trials are the exception. Most cases are settled through plea-bargaining -- the procedure by which both the prosecutor and the defense attorney can maintain their batting averages, although their slugging percentage suffers a little. There are many people who argue with the plea-bargaining system, Mr. Kunen explains why, in the welter of overcrowded dockets, the process makes reasonable sense for society as well as for the defendants.

Mr. Kunen's best writing is in descriptions of actual trials, explaining why he and others did what they did in each case. He also comments on a wide range of current issues involving the criminal law. He discusses the insanity defense at length and explains, very clearly, why "guilty but insane" is a contradiction in terms. His explanation of reasonable doubt is much better than many criminal law textbooks: "Like any other instruction, it means whatever the jury decides it means. It is my job to argue that there is a reasonable doubt. I can't create that doubt; it has to be there, in the evidence. I do my job with pride, believing that the advocacy system is not only the fairest method of determining guilt but also the most reliable--reliable because it is fair: each side has the opportunity to negate the distortions of the other." The adversarial nature of the criminal process requires lawyers to take sides: "This sort of nimble dance is perfectly proper and takes place all the time, but it does have an effect on how lawyers think of 'the truth': the truth is what the evidence proves, and the evidence proves what you want it to."

The system within which he worked is fair but hardly perfect. The justice dispensed by our legal system depends very much on money. The constitutional right to legal counsel for criminal defendants is implemented unevenly and uncertainly, even in the District of Columbia which provides as good defense counsel for an indigent accused of a crime as anyplace in the country. The legal help they receive is, sometimes, not all it should be because of the heavy caseloads, inadequate time for preparation and endless other pressures facing public defenders. For those who can afford their own attorneys the picture is quite different. Defendants with private attorneys are more likely to escape prosecution; if prosecuted, they are more likely to avoid conviction; and if convicted, they are more likely to stay out of jail.

Justice is a public enterprise and the government has a monopoly on the judicial system. Yet, the private

(Continued, P. 48)

market essentially shapes the results in the courts because lawyers are needed to make it work.

The Courts provide a balance between the rights of society and the accused. They work in the sense that they help society contain aberrant behavior and at the same time provide some process for dealing with that misconduct. There's no argument that justice should be equal for all people, but how is equal access to the system that provides justice attained? Mr. Kunen does not comment on these issues of inequity. Rather, he reveals how well the current arrangements can work if an accused individual, though indigent, is fortunate enough to be represented by a public defender with energy and ability. One who still has some of the idealism he had when he chose defense work in a public defender's office over private practice. One who has not yet sunk into the cynicism and stoicism of Sisyphus.

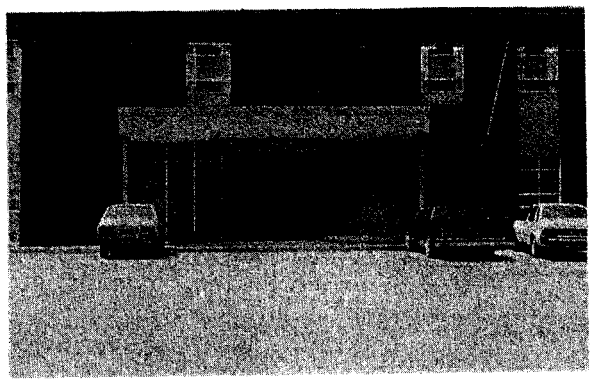
Although he does not delve into the broader issues of the law and the delivery of justice, Mr. Kunen's progress from naive' law school graduate to competent trial lawyer will make interesting reading for law school students and newly practicing attorneys.

* * * * * *

WE'VE MOVED

The Department of Public Advocacy has moved from the State Office Building Annex. The new address is:

DEPARTMENT OF PUBLIC ADVOCACY
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601



Most telephone numbers have remained the same, but please make note of the following changes:

1. Office Receptionist - 564-8006
2. Appellate Branch - 564-5234
3. Investigative Branch - 564-3765
4. Post-Conviction Branch - 564-2677
5. Protection & Advocacy - 564 7181
6. Trial Services Branch - 564-7204

Toll Free Number (800) 372-2988 (For Messages Only).

THE ADVOCATE

Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601

Bulk Rate
U.S. Postage
PAID
Frankfort, KY
40601
Permit No. 1

ADDRESS CORRECTION REQUESTED