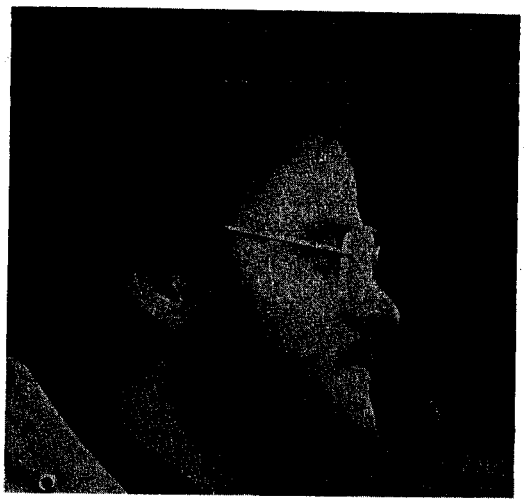
THE ADVOCATE

Vol. 6 No. 7 A Bi-Monthly Publication of the DPA Dec. 1984

THE ADVOCATE FEATURES



JAY BARRETT

James John Barrett III was born and reared during his early childhood in Massachusetts, but calls Valley Forge, Pennsylvania home. He is the oldest of seven children. Having been raised by a stepmother of German descent, Jay speaks German well. As a youth he spent one month in Duseldorf, Northern Germany with his step-grandmother.

Jay is directing attorney of the Deparatment of Public Advocacy's four attorney Stanton office, covering Powell, Estill, Wolfe, Lee, Breathitt and Owsley Counties. He's not doing public defender work by accident.

He has consistently served the indigent. He was an intern with New Haven Legal Assistance Association's Criminal Law Unit; assisted in

(Continued, P. 2)

Ethics:
Quandaries & Quagmires

QUERY: Is a criminal defense attorney ethically obligated to disclose to his client(s) that he has applied for a legal position with a prosecutorial or judicial agency? Is a public defender attorney ethically required to inform his supervisors that he has applied for a legal position with a prosecutorial or judicial agency?

Often criminal defense attorneys, whether retained or appointed, are oblivious of their own personal interests as potential or actual conflicts of interests. Obviously when either a private practitioner with active criminal cases or a public defender elects to apply for a legal position with a prosecutorial

(Continued, P. 3)

INSIDE

THE ADVOCATE

EDITORS

- Edward C. Monahan
- Cris Purdom

CONTRIBUTING EDITORS

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

providing legal assistance to Norwich State Hospital community; provided trial and appellate representation in the University of Connecticut School of Law Criminal Legal Clinic. After his graduation in 1979 from the University of Connecticut Law School, he worked for two years with rural Legal Services in Oak Ridge and Cookeville, Tennessee. For the next year, he worked with the Oak Ridge Community Defender Office.

His intensity for life is shown when he speaks of his work and things he believes in. His attitudes are also shared by his wife, Sue Prater, who works in Eastern Kentucky with Legal Services. Their home is near Campton, Kentucky, which is part of the Red River Gorge area. They both are fond of rural areas and have been active in their community.

Jay loves to read, especially stories of espionage. He is very sports-minded and competitive. Two of his favorite sports are racketball and tennis. Traveling is another of Jay's passions.

Jay is known to be an "ideas" man. If he has an opinion, he'll express it. Because of his dedication and skill, Jay has often been a presenter at seminars held by this Department.

A former staff attorney of Jay's in Stanton, Lee Rowland, glows about Jay: "Jay's expertise and legal ability provide an example for others to follow. Jay is always available for advice. Whether the question relates to personal or professional matters, he always finds the time for consultation."

We're fortunate to have Jay. There can never be enough public defenders and human beings like him. We're much more because of him. Thanks for your example, Jay!

* * * * * *

(Ethics, Continued from P. 1)

or judicial agency, that attorney's personal interest in obtaining this new job is in certain ways antithetical to the criminal practitioner's ethical obligation of zealous advocacy and undivided loyalty to his or her client who is facing criminal charges.

Whenever the specter of a potential or actual conflict of interest appears, a criminal defense counsel has an ethical duty to bring the matter to the client's attention. "At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him or her." I ABA Standards for Criminal Justice (2nd Ed. 1980), The Defense Function, § 4-3.5(a); (emphasis added).

"The obligation of an attorney to disclose to a potential client any relationship to other parties or the subject matter of the case that might undermine or draw into question the attorney's ability to guard the client's confidences and zealously pursue the client's interest governs members of the bar in all aspects of their professional activity." ABA Standards, supra, Commentary, §4-3.5.

General precepts of ethical conduct dictate that an attorney's financial, business, or personal interests which have the capability of adversely influencing the lawyer's professional judgment must be revealed completely to the client. Only after an informed consent by the client may the lawyer facing such a conflict continue to represent the client.

"Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests." ABA Model Code of Professional Conduct (1980), DR [Disciplinary Rule] 5-101(A).

Does a criminal defense attorney's pending job application with a prosecutorial or judicial agency constitute the type of personal, business or financial interest which would be reasonably likely to limit materially his or her representation of a criminal defendant? The answer is an unqualified yes.

As early as 1960 this type of situation was recognized as a conflict of interest. "At the very time of their appointment as [the indigent defendant's] counsel each of the young [defense] lawyers had on file with the [local prosecutor's office] a request for employment." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960). "[T]heir inexperience and the conflict of interest created by their filing an application for employment in the [prosecutor's office] prevented their defending [the defendant] with the vigor and the undivided dedication to their client's cause to which any accused person is entitled." Id. at 600.

"Only individuals of extraordinary character would not be affected in some way by their interest in future employment." Smith v. Phillips, 102 S.Ct. 940, 952 (1982), Marshall, J., dissenting.

For example, a woman who knew at the time she was selected as a juror in a criminal case that her husband was seeking a position in the prosecutor's office, was held to be impliedly bias. Haak v. State, Ind., 417 N.E.2d 321 (1981). "To expect a juror in this situation to act with an even hand toward both parties,

(Continued, P. 4)

when she knows her spouse is soon to become an advocate for one of those parties ignores human nature." Id. at 326. "In spite of his or her most sincere efforts to become or remain impartial, the juror in this situation would unquestionably be subjected to extraneous pressures." Id.

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties." ABA Model Code of Professional Conduct (1980), EC [Ethical Consideration] 5-1. "Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." Id.

"A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client." EC 5-2. "After accepting employment, a lawyer should carefully refrain from ... assuming a position that would tend to make his judgment less protective of the interests of his client." Id.

"Loyalty is an essential element in the lawyer's relationship to a client." ABA Model Rules, supra, Comment, Rule 1.7. "An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined." Id. "If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation." Id.

In the final analysis this type of ethical problem presents two distinct lines of inquiry for the advocate. First, the criminal defense attorney must determine subjectively whether his or her representation of the defendant will not be unduly hampered by the pending job application. Second, if the lawyer believes that despite the conflict of interest the quality of representation will not be lessened, the client must then be apprised of the pending application and the potential adverse effects on the attorney. Only if the client consents to the representation with full knowledge of the conflict may the lawyer ethically continue as counsel.

"A lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." ABA Model Rules, supra, Rule 1.7(b).

Clearly in this situation the lawyer's subjective determination that his or her pending job application will not present a conflict of interest is not a sufficient basis for declining to disclose the situation to the affected client. See Kentucky Bar Association v. Roberts, Ky., 579 S.W.2d 107, (1979), where the Kentucky Supreme Court held that a lawyer's conduct was unethical where he failed to advise his clients of a potential conflict of interest and failed to obtain the consent of each client before proceeding with the representation.

Various ethical considerations require a public defender attorney to inform his supervisors that he has applied for a legal position with a prosecutorial or judicial agency. For example, the collegial atmosphere of a public defender office insures that individual defense attorneys will discuss their cases with their associates. But, once apprised that his associate has a job application pending with the local prosecutor's

(Continued, P. 5)

office, a public defender would be ethically required to limit substantially any discussions of his cases with the associate in question.

"Unless the client otherwise directs, a lawyer may disclose the affairs of his clients to partners or associates of his firm." EC 4-2. "A lawyer must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship." Id. "[A] lawyer should be diligent in his efforts to prevent the misuse of" information acquired in the course of the representation of the client "by his ... associates." EC 4-5.

Similarly, a supervisor of a public defender office has an obligation to take prophylactic measures to prevent office clients from losing confidence in their assigned attorneys on the basis of organizational or image problems. When an attorney assumes the position of prosecutor in the same locale where he had recently been a public defender, indigent defendants will automatically assume that they cannot trust their appointed counsel who tomorrow may be on the local prosecutor's staff.

Only when the possible transfer from defender to prosecutor is handled by an open and aboveboard administrative procedure within the defender office can all the staff attorneys assure their clients that they were aware of their colleague's contemplated job action and took appropriate actions to protect their clients' interests.

Lastly, the office supervisor must be aware of the public defender's possible switch to the prosecutor's office to facilitate the assignment of cases and a minimal disruption of the clients' representation. In the normal situation an attorney who leaves the public defender office to take other employment is available to successor counsel, albeit on a limited basis, to discuss strategy, facts and law. When the former public defender becomes a member of the staff which is now prosecuting his prior clients the successor attorneys and their clients may decide that they have no interest in discussing any aspect of their cases with the new prosecutor despite his status as a former defense counsel in these prosecutions. Consequently, without the assistance of the former defense counsel to ease the transition, the successor defender will normally encounter more difficulties in establishing his relationship with the client and in fully preparing himself to represent his client.

With knowledge of a staff defender's contemplated switch to the prosecutor's office, the office supervisor can assign that defender cases which are likely to be completed in a relatively short time and avoid giving that defender complex cases which will require extensive investigative and legal work.

Since the public defender attorney has an ethical obligation to inform his clients about his pending job application, there is nothing to prevent those clients from informing the defender's supervisor of the contemplated change of employment.

By informing both his clients and his supervisor of his job application, the public defender insures that the interests of his clients, his colleagues, and even their clients are protected. Additionally, this type of full disclosure protects the image of both the legal profession and the public defender system.

VINCE APRILE

* * * * * *

Protection and Advocacy

for the Developmentally Disabled

LANDMARK DECISION

Pennsylvania to Close Institution For Mentally Retarded

The first lawsuit in the nation to argue that mentally retarded people have a constitutional right to living quarters and education in their home communities has been settled after 10 years of litigation. Pennsylvania officials have now agreed to shut down a state institution for the mentally retarded.

The state agreed to close the Pennhurst Center for the Mentally Retarded by July 1, 1986. Its 460 residents will be moved into group homes if they are aged or ill.

The landmark case, in which EFA (Epilepsy Foundation of America) filed two friend-of-the-court briefs, was based upon almost 70 years of well-documented abuse and neglect.

"The struggle is over", said Thomas K. Gilhool, an attorney for Pennsylvania's Association for Retarded Citizens, an organization that was instrumental in the negotiations.

"This settlement is a very important mark of how far the country has come and where it is committed to go after seven or eight decades of state-imposed segregation. The retarded have won their rightful place in the community."

Pennhurst was established in 1903 as the Eastern Pennsylvania State Institution for Feeble-Minded and Epileptic.

Designed to hold 1,200 patients, it often housed as many as 3,500, and was frequently criticized as dehumanizing and of no help to its residents.

The class action suit was brought in 1974 as a result of complaints from the mother of a resident whose toe had been broken under unexplained circumstances. The aim of the original suit was to alleviate harsh conditions at Pennhurst, but in 1975 the plaintiffs began seeking to close the facility completely.

Last year, after a long fight against the suit, Pennsylvania agreed in principle to eliminate its large institutions for the mentally retarded.

Under terms of the settlement, the State Legislature is required to make available $43 million over the next two years to develop programs to integrate the residents into the community and to provide for the operation of Pennhurst until its doors are permanently closed.

Part of that money will also go to provide community homes for 150 residents of two other state institutions for the retarded, which are also scheduled to be closed, and to support other mentally handicapped people who are not currently receiving state aid.

(Continued, P. 7)

Attorneys representing the Pennhurst residents said the settlement, like the suit itself, would have implications for the rest of the country.

"The Pennhurst case has been the model for lawsuits and court decisions guaranteeing decent alternatives to institutions," said David Ferleger, the attorney who filed the original class-action suit. "Now the settlement of the Pennhurst case will be the model for ending such lawsuits by closing the institution and replacing it with community services."

"This marks an end to the debate," Mr. Gilhool said. "Pennhurst demonstrates that the day of warehouse-like institutions is coming to an end and that family-sized accommodations for the retarded are cheaper and better."

Reprinted from "National Spokesman," Vol. 17, No. 8, October, 1984 with permission of Sharon Snyder, Editor.

* * * * * *

Ned Pillersdorf who has been with the Department since 1981 is now the Directing Attorney of the Pikeville Office.

LEGISLATIVE IDEAS SOUGHT

The 1986 legislative process is at hand. We're interested in your legislative ideas. Send them to:

Paul Isaacs, Public Advocate
151 Elkhorn Court
Frankfort, Kentucky 40601

We'll share with you in future issues what our readers want to see happen in the next General Assembly.

* * * * * *

Future Seminars

DISTRICT COURT SEMINAR

At the end of February, the Department of Public Advocacy (DPA) will be conducting a one-day seminar on district court practice.

DEATH PENALTY SEMINAR

On March 22 and 23, 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. Please note that this seminar was previously scheduled for March 15 and 16, 1985.

ANNUAL MAY SEMINAR

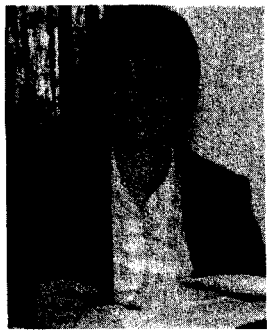
DPA's 13th Annual May Seminar is scheduled for May 12, 13 and 14, 1985. It will again be at the Radisson in Lexington.

FURTHER INFO

Further information on DPA seminars will appear in separate mailings, or you can contact Ed Monahan at (502) 564-5258. If you have suggestions about our training, please let us know.

* * * * * *

West's Review



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

Kentucky Supreme Court

The Kentucky Supreme Court has held that any definition of the term reasonable doubt, by counsel is prohibited. "Prospectively, trial courts shall prohibit counsel from any definition of 'reasonable doubt' at any point in a trial, and any cases in this jurisdiction to the contrary are specifically overruled." Commonwealth v. Callahan and Pack, Ky., 31 K.L.S. 12 at 10 (September 13, 1984). The decision reversed a decision of the Court of Appeals.

At trial, defense counsel attempted to define 'reasonable doubt' in closing argument. The trial court sustained the commonwealth's objection to the argument. However, the trial court permitted the commonwealth to make comments disparaging defense counsel's definition of reasonable doubt and referring the jury to the trial court's instructions as defining reasonable doubt. In fact, the instructions, in compliance with RCr 9.56, gave no definition of reasonable doubt. The Court of Appeals held that the trial court, having sustained objection to defense counsel's argument, erred by then permitting the commonwealth to discuss reasonable doubt. Pack v. Commonwealth, Ky.App., 30 K.L.S. 4 at 2 (March 18, 1983).

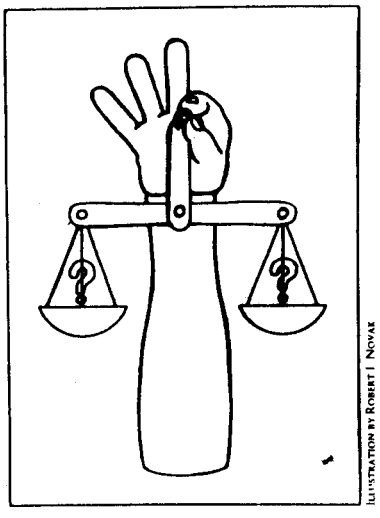


ILLUSTRATION BY ROBERT I. NOVAK

Reprinted with permission of
The New York State
Defenders Association, Inc.

The Kentucky Supreme Court disagreed, finding that the prosecutor's comments did not constitute an attempt to define reasonable doubt. However, the Court went on to hold that any such attempt would, in the future, be error. The Court explained "[w]e do not intend by this holding that counsel cannot point out to the jury which evidence, or lack thereof, creates reasonable doubt, but all counsel shall refrain from any expression of the meaning or definition of the phrase 'reasonable doubt.'"

In Booth and Harris v. Commonwealth, Ky., 31 K.L.S. 12 at 9 (September 13, 1984), the Court addressed a question of double jeopardy arising out of the defendants' contention that state and federal courts had exercised concurrent jurisdiction of their case. During the course of robbing a bank the defendants also robbed a bank customer of money on her person. The

(Continued, P. 9)

defendants pled guilty to federal bank robbery charges under 18 U.S.C. §2113 based on their taking of money which was in the "care, custody, control, management, or possession of" the bank. The defendants were later convicted of robbery of the bank customer in Fayette Circuit Court. The defendants asserted that this conviction violated KRS 505.050. The statute in question provides:

> When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state, a prosecution in such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:
>
> (1) The former prosecution resulted in a conviction which has not subsequently been set aside.

The Court rejected this argument. In the Court's view the federal court did not have jurisdiction of the robbery of the customer since the money taken from her was not in the "care, custody, control, management, or possession of" the bank. The Court also held that the defendants' convictions of robbing both the bank and the customer did not violate their right against double jeopardy since separate offenses were involved.

The Court in Booth and Harris additionally held that the defendants' privileges against self-incrimination were not violated when a probation officer testified to the date of birth and probationary status of each defendant, utilizing information which the defendants had previously given him while voluntarily assisting in a pre-sentence investigation.

In Baker v. Commonwealth, Ky., 31 K.L.S. 13 at 21 (October 4, 1984), the Court overruled Blake v. Commonwealth, Ky., 607 S.W.2d 422 (1980). The Court had held in Blake that a jury might find that a defendant charged with homicide had acted in self-defense and yet convict him of second degree manslaughter or reckless homicide based on a finding that the defendant was wanton or reckless in his belief that deadly force was necessary. Thus, in a situation presenting a factual issue as to the reasonableness of the defendant's use of force the defendant would, under Blake, be entitled to instructions on homicide offenses having wantonness or recklessness as an element.

The Blake Court based its holding in part on KRS 503.120 which provides that the defense of self-protection "is unavailable in a prosecution for an offense for which wantonness or recklessness...suffices to establish culpability."

The Court in Baker found the reasoning of Blake to be "erroneous" when applied to reckless homicide. The Court observed that KRS 501.020 defines recklessness as "the failure to perceive a substantial and unjustifiable risk that a particular result will occur." (Emphasis added). From this definition the Court concluded that a defendant is entitled to an instruction on reckless homicide only when "the perpetrator of the homicide is unaware that his conduct entails a substantial and unjustifiable risk of death."

The facts in Baker showed that the defendant had shot the victim because he assertedly believed she was about to get a gun from her purse to shoot him. Since the defendant did not contend that he failed to perceive the risk of death to the victim,

(Continued, P. 10)

there was no basis for an instruction on reckless homicide.

The Court has held that defendants' convictions of both first degree burglary and first degree assault did not violate the prohibition against double jeopardy. Polk v. Commonwealth, Ky., 31 K.L.S. 13 at 23 (October 4, 1984). The defendants had unlawfully entered the victim's home and stabbed him with a knife. The defendants argued that the assault was used to elevate the burglary from second degree to first degree burglary and was thus included in the burglary offense.

Under KRS 505.020 an offense is included within a charged offense when it is established by proof of "the same of less than all the facts" required to establish the charged offense. KRS 505.020 is based on the rule expressed in Blockburger v. United States, 284 U.S. 299 (1932) that two statutes define separate offenses if "each provision requires proof of a fact which the other does not."

Applying this test to the facts before it the Court concluded there was no double jeopardy violation. Under KRS 511.020, the defendants committed first degree burglary when they unlawfully entered the victim's home and while there 1) were armed with a deadly weapon, or 2) caused "physical injury" to a nonparticipant in the crime, or 3) threatened the use of a dangerous instrument. The charged burglary offense could have been elevated to first degree burglary under any one of these additional elements since all were sustained by the proof. Thus, the assault of the victim was not necessary to establish the first degree burglary. Moreover, even if the "physical injury" of the victim was the basis for establishing first degree burglary the burglary did not thereby subsume the assault since the first degree assault conviction required proof of the additional elements that the assault was "intentional" and caused "serious" physical injury. The Court's decision overrules Whorton v. Commonwealth, Ky., 570 S.W.2d 627 (1978). Justice Vance dissented.

In Commonwealth v. Littrell, Ky., 31 K.L.S. 13 at 22 (October 4, 1984), the Court was confronted with an appeal by the commonwealth challenging an order of the trial court which granted the defendant a new trial on the basis of newly discovered evidence. Following the trial court's granting of the motion for new trial, the commonwealth appealed from the trial court's order to the Court of Appeals. In an unpublished opinion the Court of Appeals set aside the trial court's order and directed it to proceed with sentencing. The Kentucky Supreme Court granted discretionary review and reversed the Court of Appeals after holding that an order granting a new trial was interlocutory and an appeal would not lie from it. The trial court subsequently retried the defendant. When the defendant was acquitted the commonwealth again appealed, contending that since the new trial was improperly granted the verdict of acquittal should be set aside and the defendant sentenced.

On this second appeal, the Supreme Court renunciated its earlier holding that review of an order granting a new trial was unavailable. "The better rule, and the rule which we here enunciate, is that a review will lie, in proper cases, from the granting of a new trial in a criminal case, but only for the purpose of certifying the law." Thus, the decision of the Court of Appeals was in error to the extent that it not only held that the order granting the new trial was improperly granted but

(Continued, P. 11)

also attempted to set it aside. The Court additionally noted that, in any event, once the defendant was acquitted, his acquittal served as a "final bar as to any further proceedings against him."

Kentucky Court of Appeals

The Court of Appeals found reversible error in Perry County's jury selection procedure. Baker v. Commonwealth, Ky.App., 31 K.L.S. 12 at 1 (August 31, 1984). The Court of Appeals found error in that insufficient names were placed in the jury wheel. KRS 29A.050 specifies the number of names which must be placed in the jury wheel based on a county's population. The Court also found error in the trial court's action in permitting the names of the previous year's jury commissioners to be placed in the jury wheel.

In a civil case of interest to the criminal law practitioner, the Court, in American Hardware Mutual Insurance Co. v. Fryer, Ky.App., 31 K.L.S. 13 at 2 (September 14, 1984), considered the admissibility of hearsay evidence. The case arose from a suit by an insured against its insurer for indemnification following the destruction of a building by fire. The insurer resisted the claim on the ground that the fire was set as part of an arson fraud scheme. As proof the insurer sought to introduce hearsay testimony regarding statements by a third party declarant (Ballard) to the effect that another individual (Wilkerson) had hired Ballard in behalf of the insured to burn the insured property.

The Court of Appeals rejected the contention that evidence of the statement should have been admitted under the "statements by coconspirators" exception to the hearsay rule. The statement was not admissible under the exception because it was made after the objective of the alleged conspiracy had been accomplished rather than "in furtherance of the conspiracy."

In Holland v. Commonwealth, Ky.App., 31 K.L.S. 13 at 8 (September 21, 1984), the Court of Appeals held that the Jefferson Circuit Court should have vacated the judgment against the defendant because of the ineffectiveness of his trial defense counsel. Trial counsel was ineffective at the defendant's robbery trial when he failed to subpoena alibi witnesses and instead relied on the defendant's girlfriend to see that the witnesses appeared. When the alibi witnesses failed to appear trial defense counsel also omitted to seek a continuance. The commonwealth's sole evidence against the defendant was his identification by a gas station attendant some two and a half months after the robbery. The Court of Appeals held that defense counsel's omissions deprived the defendant of his defense and, consequently, of the effective assistance of counsel.

In Thompson v. Commonwealth, Ky.App., 31 K.L.S. 13 at 12 (September 28, 1984), the Court held that the waiver of the defendant, a juvenile, from district to circuit court was defective. The Court pointed out that

(Continued, P. 12)

KRS 208.140(1) requires that before the district court may dispose of the case of a child before it the court must cause an investigation to be made of "the specific act complained of, and any circumstances surrounding the child which throws light on the future care and guidance which should be given the child." The statute also requires a written report of the investigation to be made a part of the record. The Court of Appeals, citing Schooley v. Commonwealth, Ky. App., 556 S.W.2d 912 (1977), additionally held that the ordering transferring the juvenile to circuit court "must be specific enough to permit reasonable review." The district court's order was inadequate since it did no more than "parrot" the conclusions required by KRS 208.170. Finally, the Court of Appeals held that the waiver was defective since the grand jury was not instructed, as required by KRS 208.170(5)(a), that it has the option of returning the juvenile's case to the district court for disposition.

In Bailey v. Commonwealth, Ky.App., 31 K.L.S. 14 at 4 (October 12, 1984), the Court reversed the defendant's conviction of a third offense of trafficking in alcoholic beverages in a local option territory pursuant to KRS 242.990(i). The statute provides for an enhanced penalty for anyone convicted of a third or subsequent violation of any provision of KRS Chapter 242. At the defendant's trial the commonwealth showed that the defendant had been previously convicted of one count of violating KRS Chapter 242 and one count of criminal attempt to commit a felony (possession of alcoholic beverage in local option territory for purpose of sale), a violation of KRS 431.065 (now KRS 506.010). The commonwealth contended that, since the attempt offense involved an attempt to violate KRS Chapter 242, the commonwealth should be permitted to utilize the offense for purposes of obtaining an enhanced punishment under KRS 242.990(1). The Court of Appeals disagreed. "The fact that appellant's activities that gave rise to the [attempt] conviction may have been violative of KRS Chapter 242...though supporting the commonwealth appellee's argument, do nothing more than cast doubt on the construction of KRS 242.990(1). Doubts in the construction of a statute will be resolved in favor of lenity."

The Court applied similar reasoning in Commonwealth v. Reed, Ky.App., 31 K.L.S. 15 at 1 (October 26, 1984), to hold that a defendant convicted of complicity to commit first degree robbery cannot be denied probation pursuant to KRS 533.060(1). The statute denies eligibility for probation to offenders convicted of a class A, B, or C felony when "the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury...." While Reed's accomplice displayed a pistol during the robbery Reed himself was unarmed. The statute does not specify whether "the use of a weapon" encompasses the conduct of an unarmed accomplice to first degree robbery. The Court of Appeals resolved this interpretive dilemma as follows: "[W]e find that the ambiguity contained in the statute - whether a defendant is guilty of committing an offense involving the use of a weapon if his cocomplicitor, rather than himself, personally used the weapon - is an ambiguity which must be resolved in the appellee's favor. As we construe the statute, we hold that the term 'use' means 'personal use,' not vicarious usage."

In Bell v. Commonwealth, Ky.App., 31 K.L.S. 15 at 3 (October 26, 1984) the Court of Appeals held that the admission, at the defendant's murder

(Continued, P. 13)

trial, of medical records which diagnosed the infant victim as suffering from "battered child syndrome" was not prejudicial error. The defendant contended that the evidence infringed upon the function of the jury by stating an opinion as to the ultimate question of fact. The Court disagreed: "The ultimate question of fact for the jury's determination was not was the child abused, as he obviously was, but whether or not Bell caused his death." The Court noted that no Kentucky cases have previously addressed the issue and "[c]ases from other jurisdictions are split on the issue." The Court also stated as a basis for affirming the conviction that the proof of guilt was sufficient without the contested evidence.

LINDA WEST

* * * * * *

APPELLATE PROCEDURE

The newly amended Rules of Civil Procedure have changed one of the most important steps in the processing of appeals. Beginning January 1, 1985, all extensions of time to certify the record on appeal must be filed in the appropriate appellate court. See CR 73.08.

Once the Notice of Appeal has been filed, the court reporter and the circuit clerk will still have 60 days in which to complete their respective parts of the record on appeal. However, if the record on appeal cannot be certified for any reason by the end of that sixty days, any request for an extension of time will have to be made in the appropriate appellate court. (Appeals from final judgments imposing sentences of twenty years or more go to the Supreme Court; all other appeals go to the Court of Appeals).

If you are handling one of your own appeals and an extension of time is needed, a Motion For Extension Of Time To Certify The Record On Appeal must be filed in the appropriate appellate court before the expiration of the 60th day from the filing of the Notice of Appeal. It will no longer be necessary to have an order extending entered before that 60th day expires.

Certain documents must be attached to any motion for extension of time to certify the record; namely, a certified copy of the Final Judgment and a certified copy of the Notice of Appeal. Also, an affidavit from the court reporter should be attached setting out why the court reporter could not complete the transcription of the evidence by the due date and further estimating how much time the court reporter will need in which to complete the transcription. Five copies of the motion need to be filed in the appropriate appellate court. The Attorney General must be served. The court reporter and the circuit clerk should be served.

If you have notified the Department of Public Advocacy that it is to handle an appeal, the best way to insure that the appeal will be timely processed is to send certified copies of the Final Judgment and the Notice of Appeal with the notification. Your cooperation in this matter will be greatly appreciated.

TIM RIDDELL

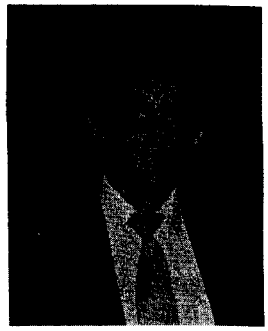
* * * * * *

ATTORNEYS LEAVE DEPARTMENT

Lee Rowland left our Stanton Office on October 30, 1984. He's now in private practice in Winchester

Karen Sherlock has left our London Office to work as a public defender in Dayton, Ohio.

Post-Conviction
Law and Comment



This issue contains a post-conviction article from Ken Taylor, an assistant public advocate at the Northpoint prison. Ken is a 1979 graduate of the University of Kentucky Law School. There, he was a staff member of Kentucky Law Journal. From 1979-82 he was a captain in the United States Marine Corps assigned to the Judge Advocate's office.

DEFENDING AGAINST PRESENTENCE INVESTIGATIONS

Criminal defense attorneys in Kentucky are generally aware of the statute, KRS 532.050, governing presentence investigations (PSI), and they know the local unwritten traditions and rules governing their preparation and use. However, the document may be more significant and powerful than is apparent at first blush. Understandably, many attorneys think of the PSI only as a "presentence" report, as the nomenclature denotes. Their knowledge of its purpose, effects and procedures is founded upon personal experience and a reading of the statute and the official commentary. Consequently, the advice of these attorneys to their clients concerning the PSI, and their involvement in the PSI process, usually involve consideration only of the trial level consequences of discretionary sentencing and the granting of probation, shock probation and conditional release.

Despite its name, the PSI is not just a "presentence" report. In fact, its presentencing uses pale in comparison to its post-sentencing effects. It is used by the Kentucky Corrections Cabinet, the Division of Probation and Parole (a division of Corrections) and the Kentucky Parole Board as a multipurpose, basic working document which follows the defendant through the prison system, to the parole board, and out on parole supervision. A PSI is done by a probation officer in every case, whether or not waived by the defendant for sentencing purposes. Many defense attorneys don't realize that they may be the first, last and only members of the defense bar to see this very important report. Some take for granted the accuracy of the information, unaware of the possible subsequent dire consequences of inaccuracies in the report. Still other trial attorneys think it is improper, unnecessary or inadvisable to coach or prepare a client for his interview with a probation officer.

A better understanding of the post-sentencing consequences of the PSI may cause some defense attorneys to re-evaluate the criteria they use to determine whether or not to waive the PSI, when and how to controvert its contents, whether or not to coach their clients before the PSI interview, and whether to insist on more and better access to the report. This article will examine some of these problem areas.

A. POST-SENTENCING USES OF THE PSI

Institutional usage of the PSI by Corrections begins immediately upon

(Continued, P. 15)

the new inmate's arrival at the Kentucky State Reformatory at LaGrange. The inmate's custody classification (maximum, close, medium, restricted or minimum) is determined by a supposedly objective scoring system in which points are given to a number of background factors. In arriving at the score, heavy reliance is placed upon information taken directly from the PSI for such scoring categories as "severity of current offense," "prior assaultive offense history," "escape history," "alcohol/drug abuse," and "prior felony incarceration." Periodically, classification is reviewed using a slightly modified checklist and scoring system; here again, the PSI is used extensively.

Classification is a very important factor in the inmate's life. It can affect his eligibility for different institutions, job assignments, dormitory or cell assignment, eligibility for furlough, and eligibility for community-based rehabilitation and reassimilation programs. Therefore, an inaccurate, misleading or incomplete PSI can affect the quality of the inmate's existence.

Information taken from the PSI can be used in classification in a more direct method as well. The "crime story" section of the PSI is often determinative of the applicability of statutes such as KRS 197.140, which prohibits a person convicted of robbery or armed assault with the intent to rob involving injury to any person during the commission of the offense from working outside the walls of the prison. The classification officer is not bound by the judgment's identification of charges. Even if the conviction is for second degree robbery, which statutorily doesn't involve injury, the classification officer can read the crime story, determine that an injury occurred and invoke the statute to deny minimum custody. This occurs whenever a charge of first degree robbery, which would involve injury, is reduced to second degree robbery to induce a guilty plea.

Perhaps the most significant post-trial use of the PSI is by the parole board in its consideration of the fitness of the inmate for parole. The parole board is very interested in the nature and extent of the defendant's criminal activity, not just in the official conviction and arrest record or the result of trial. It will even consider against the inmate the facts underlying a dismissed charge if it appears from the PSI that the dismissal was for plea bargaining or other purposes unrelated to guilt or innocence. It is interested in the details of the crime, the defendant's attitude about his crime, and the community and social background of the defendant. In short, just as in the case of classification, while the court and jury were bound by concepts of identity and notice of charges, rules related to variance of proof, and rules of evidence, the parole board is free to consider anything, in any way, it deems helpful.

Speaking at the public defenders' seminar in Lexington, on May 8, 1984, Harry Rothgerber, Chairman of the Kentucky Parole Board, stated that in determining fitness for parole, "the Board relies most heavily on the PSI." He said that in many cases a probation officer who prepares the report will make a "special report to the parole board," in addition to the usual probation recommendation to the court. He told his audience of public defenders to make sure that the information in the PSI is absolutely correct and to prepare their clients to make some kind of statement concerning the crime, especially in guilty plea cases.

(Continued, P. 16)

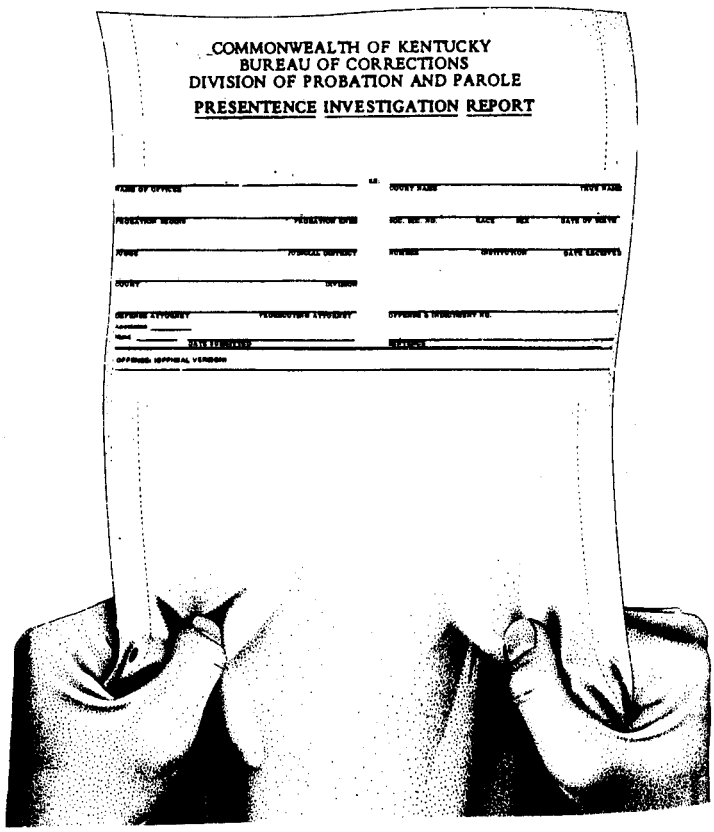
In some cases, the information in the PSI will be used by Corrections to apply various mandatory sentencing laws. Normally, Corrections has little discretion in computing the aggregate of multiple sentences; it must follow court orders. But, whenever a judgment is silent, Corrections looks for sentencing laws which require consecutive running of multiple sentences. Taking the predicate facts directly from the PSI, it can apply statutes like KRS 533.060(2), 533.060(3) and 532.110 (4), (involving sentencing for escape, crimes committed while on probation or parole, crimes committed while awaiting trial on another offense, or crimes committed while in the institution) and run consecutively what would otherwise have to be run concurrently. In every case, Corrections personnel review the PSI to determine if any of these sentencing laws is applicable.

Currently, inmates fall under one of two different sets of parole regulations, depending on whether their crime was committed before or after December, 1980. The date of commission of the offense is determined from the PSI. Therefore, an incorrect date can result in the application of the wrong set of parole regulations.

Information in the PSI is used administratively by Corrections to effect many other aspects of the defendant's incarceration. By reading PSIs, Correction's personnel may identify co-defendants, "gangs" or groups and split them up by administrative transfers. Job assignments are made frequently on the basis of the occupational and educational history section. Dormitory or cell assignment may be made because of subjective impressions the caseworkers obtain from a reading of the PSI.

Many other de facto institutional uses of the PSI are suspected, though not readily documented. Highly inflammatory opinions or statements of the local probation officer are likely to affect the attitude of the caseworker or other staff toward the inmate. This in turn may affect subsequent treatment.

As can be seen, Corrections and its cohorts would hardly know what to do with the defendant without a PSI. The document has become so functional and institutionalized that one must be done in every case. Therefore, even when a defense attorney waives the PSI pursuant to RCr 11.02, all that is being waived is the "presentence" function of the report. The investigation itself is not waived. It merely becomes a post-sentence investigation. The guidelines and regulations for completion of the report remain the same. Waiver may only affect the availability of time in which the report must be completed.


COMMONWEALTH OF KENTUCKY
BUREAU OF CORRECTIONS
DIVISION OF PROBATION AND PAROLE
PRESENTENCE INVESTIGATION REPORT

(Continued, P. 17)

B. THE DEFENDANT'S RIGHT OF ACCESS AND REVIEW OF THE PSI

It stands to reason that a defendant would want to see his PSI at any stage in the system in which decisions are being made based upon that report. However, his right to access to the information involves different legal considerations, depending at which point he is insisting on review. Basically, the legal analysis fall into two basic categories: presentence review and post-trial access.

(1) PRESENTENCE REVIEW

Pursuant to KRS 532.050, the defendant is entitled to be informed of the factual contents and conclusions of the presentence investigation and must be given an opportunity and sufficient time in which to controvert incorrect information prior to sentencing. In practice, the quality and quantity of disclosure to the defense varies greatly between jurisdictions. At one extreme is Fayette County, where, by local court directive, probation officers are required to submit the PSI to the defense attorney at least two days prior to sentencing. That gives the attorney time to prepare the defendant or other witnesses and documents to controvert inaccurate information. Fayette County defense attorneys often retain a copy of the PSI for their case file. In several divisions of Fayette Circuit Court, the judge files the PSI in the official court records where it is available for inspection by general public.

At the other end of the spectrum are those courts which take the extreme position that all the defense attorney is entitled to is exactly what the statute prescribed -- i.e., to be advised of the "factual contents and conclusions" of the report.[1] Under this approach, the defense never actually reads the report. It can only hope the court is giving it the full picture. Usually the defendant has little time and opportunity to put together a good case controverting any inaccuracies he hears.

Between these two extremes are those counties which allow the defendant and his attorney to read the actual report immediately prior to sentencing. He is required to return the report to the Court. This procedure also is problematic because the defense feels rushed while going through the report, and any decision to controvert the contents would require a continuance to muster evidence. Usually, in those counties, controverting the report involves simply having the defendant state "that isn't true."

The state of the law in Kentucky in the area of PSI disclosure is not entirely clear. No Kentucky cases have interpreted KRS 532.050(4). However, strong public policy arguments, model codes, commentary and cases from other jurisdictions will support the defense attorney's insistence upon being allowed to see

(Continued, P. 18)

---

[1] As should be expected, the Kentucky Attorney General's Office takes this extreme position: In Op. Att'y Gen., No. 84-285 (August 13, 1984), which is actually an opinion addressing post-trial access to the PSI, an incidental opinion is set forth to the effect that "the defendant and his counsel have no statutory right to inspect the PSI at all." This gratuitous Attorney General's opinion is unfortunate because it is clearly out of step with developing case law and commentary.

the actual report sufficiently in advance of trial to prepare rebuttal.

The American Bar Association Standards for Criminal Justice, (hereinafter ABA Standards), Sections 18-5.1 through 5.4 (1980), propose expansive review rights for the defendant prior to the court's use of a PSI. The commentary to the ABA standards states:

> No issue in the law of sentencing has attracted the same sustained attention and controversy as that of the defendant's asserted right to disclosure of the presentence report. As voluminous as the literature on this question is, case law and statutory developments since the first edition of these standards now suggest that a degree of consensus is beginning to emerge. Although only a few decisions have held that the defendant has a constitutional right to complete disclosure of the presentence report, the common trend of case law, commentary, and statutory revisions has been to view the arguments for nondisclosure as overbroad and premised on empirical assumptions of dubious validity. As a result, the tendency is to place the burden of justifying nondisclosure increasingly on the court rather than on the defendant seeking access.

The ABA Standards begin with a requirement that the defendant be allowed to inspect the actual report. In "extraordinary" cases disclosure could be excepted where the "confidential" information, if disclosed, "might result either in serious harm, physical or otherwise, to persons other than the defendant, or in a substantial risk of grave physical harm to the defendant." The decision to withhold disclosure would be subject to appellate review. Under the ABA plan, the report would have to be disclosed sufficiently in advance of sentencing to allow time for verification. Any party (the prosecutor would also be served) desiring to controvert the report would be required to so notify his opponent and the court before sentencing.

Several states have adopted PSI statutes similar to the ABA standards. State cases such as State v. Lockwood, 439 So.2d 394 (La. 1983), have recognized that the PSI has many "lingering consequences," including sentencing, probation, parole and classification; that it "cannot easily be corrected long after it has been written"; that it was too crucial to depend on "unverified hearsay" or "preconceived opinions and beliefs"; that a defendant should be allowed to rebut and explain its information; and that an inaccurate report should "be revised so that the defendant is not subsequently unfairly prejudiced by subsequent uses of the PSI report." In Gardner v. Florida, 430 U.S. 349 (1977) the Supreme Court of the United States held that, in a death penalty case, the defendant's right to see and controvert the report outweighed any of the state's arguments for secrecy.

The defense attorney should argue for full and total discovery of the PSI. However, alternative arguments for less than total discovery can be fashioned to meet any argument advanced by the Commonwealth or the probation officer. The rationale often advanced by probation and corrections people for the need for confidentiality of presentence reports is that the sources of sensitive information concerning the defendant will dry up if those sources are aware that the defendant himself will come into possession of the information. Also, probation officers are often reluctant to make the necessary strong statements and

(Continued, P. 19)

recommendations if they believe the defendant will read the report. Even conceding some merit to those arguments, they are not justification for keeping secret objective and verifiable information such as the crime story, prior criminal record, social history, economic status, family background, employment history and the like. All of the "confidential" information can be placed on attachments or in a separate section of the report and its disclosure handled under different rules. Even then, the "confidential" label should be sparingly applied. The right to know only the facts and conclusions of the report, as set forth in the statute, should, at most, apply only to the sensitive portions of the document. It should not apply to the more objective portions which, if inaccurate, can greatly affect the course of incarceration of the defendant.[2]

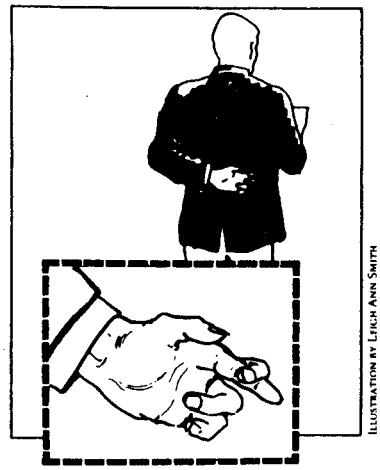
---

[2]An extreme example of this occurred at the Kentucky State Penitentiary at Eddyville where an inmate informed post-conviction attorneys that his PSI contained erroneous information concerning his prior criminal record. Apparently, he was sentenced to consecutive terms of imprisonment because of his "extensive prior record." Despite his attempts to controvert the incorrect information at sentencing, the PSI still showed numerous offenses. The defense attorney's attempts to corroborate what the inmate was saying was frustrated by the institutions refusal to reveal the PSI. Finally, a check with the FBI revealed that indeed, the inmate had only one minor prior offense. When confronted with the new FBI report, the probation officer admitted that he had based his PSI on the wrong man's FBI rap sheet. The attorneys are now attempting to obtain review of the sentencing decision of the court through post-conviction actions. They are also attempting to have the

(footnote continued)

Few judges will take the time to orally disclose every item of factual information in the report. For that reason a literal interpretation of the disclosure provisions of Kentucky's PSI statute is as impractical as it is unfair.

In a recent interview, the Director of the Kentucky Division of Probation and Parole, Mr. Dan Yeary, commented that he believed that the system worked better with full disclosure of the PSI to defense attorneys. He pointed out that, prior to our current statute, the PSI was completely secret. That secrecy often resulted in overly strong statements by the probation officer and the inclusion of inaccurate information.



Reprinted with permission of
New York State Public Defender Assoc.

He sees defense attorneys as providing a vital check and balance on the authority and autonomy of probation officers. He cited the Fayette County disclosure procedures as being ideal, with the exception of the public access to the document. Ironically, while the Attorney General's Office and Corrections harp about the need for confidentiality,

(Continued, P. 20)

---

probation officer submit a corrected PSI.

the person who would seem to have the greatest standing to invoke the probation officer's privilege and need for confidentiality, favors full disclosure.

Of course, the right of disclosure is meaningless without the right to controvert. The Kentucky statute affords both a "fair opportunity" and "a reasonable period of time" for controversion. A continuance must be requested, if needed. There is no statutory limit on the type or quality of evidence which can be introduced in controversion.

A helpful adjunct to the right to controvert is a requirement that the adverse information in the PSI be reliable, substantiated or corroborated.[3] Kentucky, as yet, does not specifically recognize any informational competency requirement. However, there exists federal and state authority which can be used to arguefor substantiation. Case law in Illinois, which utilizes a statutory PSI similar to Kentucky's, holds that when the PSI contains evidence of "other criminal activity", the accuracy and reliability of such evidence must be established and the defendant is entitled to cross-examine persons with first hand knowledge of the supposed criminal activity. See, e.g., People v. Kirk, 378 N.E.2d 795 (Ill. App. 1978). The United States Supreme Court has held that where an enhanced sentence depends on a new finding of fact, the defendant is entitled to his due process rights of confrontation and cross-examination. Specht v. Patterson, 386 U.S. 605 (1967).

The ABA Standards require that all material information in the PSI be verified by the preparer, and that he be present at sentencing to answer questions. ABA Standards, supra, Section 18-5.1. If challenged on reliability, the preparer must provide verification to the court. If the information is not sufficiently verified, it must be disregarded.

A competency and verification requirement can be most important in cases involving PSIs which contain generalized statements of criminal activity (the kind most likely to appear in the PSI). For example, how can the defendant prove negatives like, "I am not a drug dealer," or, "I do not have sexual perversions." It makes more sense to require the probation officer to put his evidence where his pencil is.

(2) POST-TRIAL ACCESS

Despite the extensive post-trial uses of the PSI, the Corrections Cabinet has repeatedly refused to make the PSI available to defense attorneys in the post-trial representation of their clients. It has invoked various sections of the "open records law" to prevent disclosure to even the inmate himself. Corrections has the authority to designate anyone it chooses as a person authorized to have access to the inmate's records. The warden at each institution has similar authority. Public Advocates at the institutions are conspicuously absent from the list of persons granted access. For instance, at Northpoint Training Center, by a combination of Cabinet level and warden designa-

(Continued, P. 21)

[3]The level of verification and reliability of PSI information varies greatly among jurisdictions. So does the level of pro-prosecution bias. Many probation officers take their job very seriously, strive to differentiate between rumor and fact, and work meticulously to insure that the background data is accurate. Others, not so dedicated, are more likely to include erroneous data and to give opinion, innuendo and speculation as though it were fact.

tions, the following classes of persons have access to the files, and therefore the PSI:

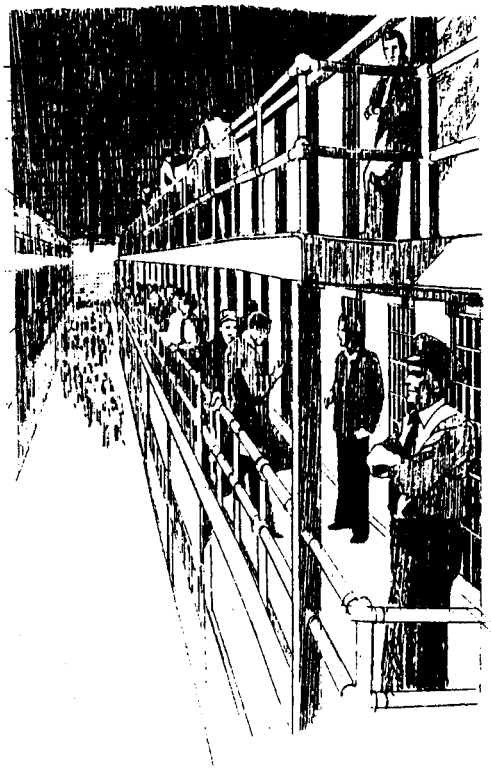
> Secretary's Office-Department of Justice; Kentucky State Police; Governor's Office, Attorney General's Office; Circuit Judges; Federal Law Enforcement Agencies; Federal Probation and Parole Officers; Staff of other Social Service Agencies working within a state correctional institution; Records Supervisor and other records staff; Warden; Deputy Warden for Administration; Deputy Warden for Security and Programs; Program Services Manager; Senior Captain; Captains; Lieutenants; Doctor; Dentist; Chaplain; School Principal; Classification/Treatment Officers; Psychiatrist; Psychologist; Personnel designated by above mentioned staff.

Corrections has refused to do designate Public Advocates.

The argument that the defendant has a opportunity to insure accuracy before sentencing is destroyed by the fact that probation officers have the authority to amend the report after sentencing and after the defendant has reviewed it. The statutory PSI is the presentencing document, not the corrections document. There is no statutory right of review of the document in its latter role.

This issue is ripe for litigation. There are virtually no strong public policy arguments for preventing the defendant or his attorney from seeing perfectly objective and verifiable information which is being used by the institutions to classify, grant parole, and to affect many other aspects of incarceration. In most cases, the need for confidentiality in even the limited sensitive areas is outweighed by the inmate's due process concerns.

The issue of disclosure has been litigated with success in several federal circuits, see, e.g., Carson v. U.S. Dept. of Justice, 631 F.2d 1008 (D.C. Cir. 1980), and the Supreme Court of the United States has implied in passing on a related issue that a constitutional argument might be made from the failure of an institution or parole board to reveal possibly erroneous and prejudicial information in the parole file. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 15, n.7 (1979).



The policy arguments for disclosures are weighty and the potential for prejudice from lack of disclosure is great. A few true case examples might illustrate the point. At the Kentucky State Reformatory at LaGrange, an inmate was repeatedly being denied parole and favorable custody classification. After his apparently equally culpable co-defendants had long since been

(Continued, P. 22)

paroled, the inmate raised serious questions about his parole denials. The "official" reasons given for denial were not convincing. Upon further probing, a Corrections official quietly informed the inmate that the real reason was a statement in his PSI to the effect that the defendant had laid an ambush for a man and shot and killed him. An investigation by the defense attorneys revealed that the criminal charge resulting from that particular incident had been dismissed at trial for insufficient evidence. The defendant was doing time on separate charges. The inmate had done years of time following successive parole denials because of a false statement in the PSI. The man had never seen the PSI and his post-trial attorneys were powerless to obtain it for him.

In another LaGrange situation, an inmate could not get a favorable custody classification because of an alleged prior conviction for robbery. At sentencing, the defendant had informed his defense attorney that he had no such prior conviction, rather, he had been convicted of a burglary. The trial defense attorney told him it wouldn't make any difference in sentencing. However, it made a significant difference in custody classification. (Any element of violence or assaultive behavior greatly affects classification). The post-conviction attorneys verified from court records that the information was incorrect, then attempted to have the probation officer who did the initial report change the official records. This process was greatly protracted by the guarded secrecy of the PSI.

At Northpoint Training Center, an inmate lucky enough to have obtained a copy of his PSI from his trial attorney, showed post-trial attorneys what he alleged to be a blatantly false statement in the PSI that was prejudicing him. In the section on mental and emotional history the probation officer had written:

> He has a history of violent behavior and was convicted of voluntary manslaughter in Chicago, and it was reported to this officer that he threatened to kill Trooper _____ (name omitted) of the Kentucky State Police.

The probation officer had not revealed the source of his information. When asked why he had not controverted the alleged threat to kill the police officer, the inmate replied that he had. A review of the final judgment and the sentence revealed the following language:

> ...the Court having received the presentencing report from the probation officer, the defendant and his counsel having examined same and announced to the Court that they did not take issue with anything contained therein, except the defendant denies that he threatened to kill Trooper _____ (name omitted).

Despite controversion of the false statement at trial, the inmate is still being treated as a potential cop killer for purposes of classification, treatment and parole--all without notice, an opportunity to be heard, and due process of law.

C. THE DEFENDANT'S INVOLVEMENT IN THE PSI

Contrary to the belief of some defense attorneys, the defendant has no absolute obligation to make a statement to the probation officer or to cooperate in the presentence investigation. Some jurisdictions have specifically ruled that a defendant maintains his Fifth Amendment right to remain silent after trial and that his silence or lack of

(Continued, P. 23)

cooperation cannot be used against him by the judge in sentencing. E.g., Jones v. Cardwell, 686 F.2d 754 (9th Cir. 1982). Kentucky has not addressed this issue directly, see, Commonwealth v. Callahan and Pack, 31 K.L.S. 12, p.10 (September 13, 1984) (holding that a defendant's unwarned but uncoerced, verification to the probation officer of information which is a matter of public record could be used against the defendant in the PFO phase of trial), but basic

principles of Fifth Amendment application can be utilized. See, Estelle v. Smith, 451 U.S. 454 (1981) (holding that Miranda applies to a post-trial psychiatric interview where the defendant's statements might be used against him to increase punishment). Obviously, in a case involving a plea of not guilty where the defendant did not take the stand, the potential for reversal and retrial would dictate that a defendant would not want to make any statement concerning the crime.

The absence of an absolute duty to cooperate does not necessarily mean that recalcitrance or silence would be beneficial. A lack of cooperation may have many de facto effects on the PSI and sentencing. Often the attitude of the defendant may effect the recommendations and even the objective material which is collected and placed in the report. An uncooperative defendant may cause the probation officer to write a biased report. Additionally, a defendant may lose his one opportunity to contribute to the information in the report.

Some defense attorneys labor under the misapprehension that it is somehow unethical or improper to coach their client prior to a presentence investigation. Nothing could be farther from the truth. In some cases, extensive preparation for such an interview might be in order. Such would be the case where the defendant wishes to discuss his version of the present crime but risks incriminating himself on related, but uncharged, crimes. In such a case, he would need to know when and how to invoke his Fifth Amendment privilege. A defendant should be informed of some of the potential future consequences of the PSI so that any information beneficial to him can be included. In cases involving inarticulate clients, a prepared written version of the crime story can be prepared by counsel and client and submitted to the probation officer. Before sentencing, the attorney should insist that the statement be attached to the report.

D. RECOMMENDATIONS

Handling of the PSI is not amenable to a checklist of procedures to be employed in every case. However, a few suggestions can help as different issues related to the PSI procedures are encountered.

(1) THE DECISION TO WAIVE

Because a PSI, if waived before sentencing, will be done after sentencing anyway, and because waiving the PSI deprives your client of his only chance to see and controvert the

(Continued, P. 24)

contents, a waiver should be rare. Even where your client is anxious to get on to prison and doesn't want to wait in the county jail for the report, explain to him all of the subsequent possible adverse uses of the PSI. He'll probably want to make certain it's accurate. Even in cases where the sentence is mandatory, ask for the PSI. Obviously, in any case where your client has a chance for probation, get a PSI.

The only kind of case where you might want to waive the PSI is one where the less the judge knows about your client, the better sentence he can expect. Even then it's a tradeoff. That's the situation where you expect the most adverse information to be included in the report. So remember, by waiving, you are giving the probation officer an unchallenged shot at your client.

(2) THE RIGHT TO SEE THE REPORT

Assuming you have not waived the PSI, begin trying to see the report early. You may not get it, but it won't hurt to ask. If denied, ask the court to see the report before sentencing. If the best you can do is to see the report right before the court pronounces sentence, take your time, read the report to the client, and have him acknowledge its accuracy. If the court presses you to expedite the process, try to explain the significance of your review. Many judges do not understand the full impact of a PSI. Being concerned only with sentencing, they may not be sympathetic to post-trial concerns. Explain that now is the defendant's last chance to controvert the report. Of course, point out that the statute says you shall have reasonable time and opportunity to controvert it.[4]

[4]A number of defense attorneys in your circuit, or the director of the local public defender's office, may

(footnote continued)

If you are in one of those jurisdictions which strictly applies the statute, and does not afford you the opportunity to read the report, don't quietly settle for that "half loaf." Object and make a record. Point out that it is impossible to know exactly what the facts and conclusions are without seeing the report. If the court is going to strictly apply the statute, make sure you also strictly apply its advantageous sections. In other words, have the court inform you of every single fact in the report, not just the ones the court considers relevant to sentencing. He may get tired and hand you the PSI itself.

(3) THE DECISION TO CONTROVERT

Assume you have reviewed the PSI and have discovered inaccurate information. Should you controvert it and how? As previously stated, accuracy is very important. What may appear insignificant to you for sentencing purposes may have dire post-trial consequences. Make sure the facts of the crime story are absolutely correct.[5] Check on the prior criminal history. If you see highly inflammatory, unsubstantiated hearsay and opinions, ask that they be verified. Cite cases for the proposition

(Continued, P. 25)

want to approach the chief circuit judge about issuing a local procedural rule requiring advance disclosure of the PSI. A proposed draft of the order can be presented to the judge. The ABA Standards can be used as a model.

[5]In many cases, especially where the probation officer has very limited time for each PSI, the "crime story" consists only of summarization of grand jury testimony and police reports.

that due process requires corroboration and substantiation.

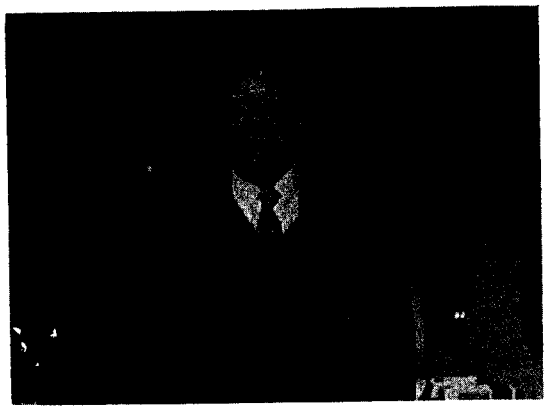
The quality of the evidence needed to controvert the PSI is a judgment call. The more significant the information, the more certain you will want your controversion. For some things just having your client deny it may be enough. For other, witnesses and documents are in order.

You may feel silly making a big deal out of what everyone thinks is a little problem, and the court may not understand. However, if you do not exercise your right to controvert under the statute, you probably have waived any objection to the inaccuracy in the PSI. See, Brown v. U.S., 610 F.2d 672, 675-76 (9th Cir. 1980). Don't settle for assurances from the court that it will not consider what you find objectionable. Explain that that information is just as objectionable for post-trial purposes. Put your controverting evidence in the record. Also, ask that the PSI be modified appropriately. It is not enough to just have the sentencing record reflect the controversion. If the PSI goes to Corrections unmodified, you haven't accomplished much.

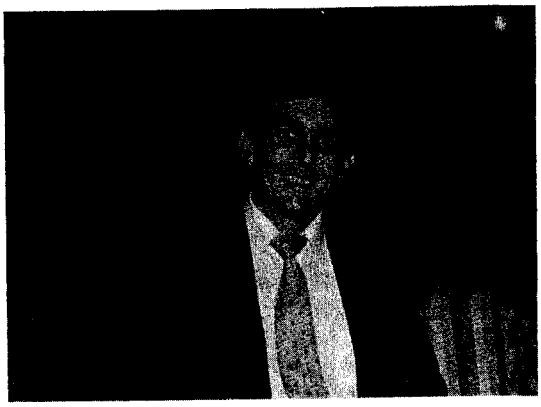
In every case where you don't receive what you think you're entitled to under broad constitutional principles, not just under the statute, place a timely objection in the record. That way, eventually, appellate attorneys will be able to develop some much-needed Kentucky case law in these areas.

KEN TAYLOR

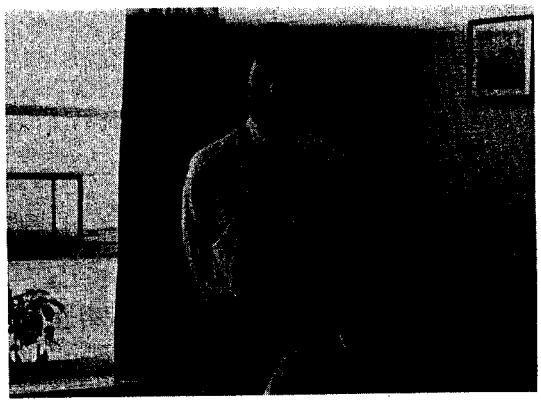
* * * * * *



Mike Monce has joined the Hazard Office.

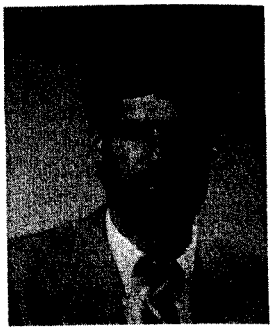


Ken Taylor replaces McGehee Isaacs as the Directing Attorney at our office at the Northpoint Correctional Facility.



McGehee Isaacs of our Northpoint office replaces Randy Wheeler as the Post-Conviction Branch Chief. Randy who has worked with DPA since 1977 now works with the Appellate Branch.

Sixth Circuit Survey



This column presents 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 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.

ENTRAPMENT:
PROOF OF PREDISPOSITION

In United States v. McLernon, Nos. 83-3519, etc. (September 18, 1984), the Sixth Circuit reversed a conviction for conspiracy to distribute cocaine, finding that the defendant was entrapped as a matter of law into committing the offense. While entrapment usually presents a jury question, such a defense may be established as a matter of law where the government presents insufficient evidence to meet its burden of proving that the defendant was predisposed to break the law before he received the opportunity afforded by government agents.

The Court undertook a detailed analysis of the kind and degree of evidence sufficient to support a predisposition finding. Predisposition is "by definition, the defendant's state of mind before his initial exposure to government agents." Slip opinion at 20 (emphasis in original).

The factors relevant to determining a defendant's prior disposition include: the character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated government inducement or persuasion; and the nature of the inducement or persuasion supplied by the government.

Regarding the defendant's character or reputation, the court observed that evidence of a prior criminal record alone is insufficient as a matter of law to establish predisposition. See Sherman v. United States, 356 U.S. 369 (1958).

In the case under review, there was no evidence that the defendant's character or reputation inclined him toward criminal activity, no evidence that the defendant initiated the criminal activity, no evidence that he readily accepted the opportunity presented by government agents, and no evidence that he would have committed the crime absent the overwhelming strength of the undercover D.E.A. agent's inducement. Instead, the court found that the agent "induced an unwary and innocent man into committing crimes he was not predisposed to commit by becoming his 'blood brother' and preying upon the love and loyalty of that special relationship." Slip opinion at 24.

(Continued, P. 27)

INDIRECT ENTRAPMENT

Two of the other defendants in McLernon argued on appeal that the trial court erred in refusing to instruct the jury on the doctrine of "indirect entrapment." They alleged that they engaged in the cocaine transaction because of threats made by government agents communicated to them by the defendant who had been directly entrapped.

In addressing these claims, the court recognized that the entrapment defense had been expanded to include those situations where the initiator of the criminal activity acts as an agent of the government upon the government's instructions or directions.

Neither can the government avoid an entrapment defense by exploiting a "special relationship," such as a marriage, by coercing one member of the relationship in order to incriminate the other targeted member.

However, the Sixth Circuit found no evidence of any such special relationship or third-party agency between the entrapped defendant and the other defendants in the case under review. Thus, the district court did not err in refusing to charge the jury on the doctrine of indirect entrapment of the other defendants.

HEARSAY EXCEPTIONS AND THE CONFRONTATION CLAUSE

In Stevens v. Bordenkircher, No. 83-5714 (October 18, 1984), the Sixth Circuit granted habeas corpus relief to a state prisoner on the grounds that he had been denied his Sixth Amendment right to confront witnesses against him during his murder trial.

Two independent Sixth Amendment violations occurred at the petitioner's trial, both of which involved a curtailment or total restriction of cross-examination of the prosecution's key witness concerning his pending criminal charges. Further cross-examination to elicit evidence of bias and motive was disallowed.

This was a violation of the Sixth Amendment, since a defendant's inquiry into the issues of motive, bias, and prejudice is not limited to establishing the "mere fact" of a conviction. Slip opinion at 7. Defense counsel may also question a witness concerning why he is biased. See Davis v. Alaska, 415 U.S. 308, 318 (1974). Moreover, "failure to permit cross-examination of a key government witness concerning bias, prejudice, or motive cannot be construed reasonably as harmless error." Slip opinion at 8 (emphasis in original).

Of particular importance, though, was the Court's analysis of the relationship between the Confrontation Clause and exceptions to the hearsay rule. At trial, the prosecution was permitted to introduce the victim's death certificate without presenting the coroner, who authored the document, as a witness. The document was highly incriminating.

The federal district court ruled that the admission of the document did not violate the Confrontation Clause on the grounds that it was admitted under an exception to the hearsay rule and, thus, was presumed to be reliable.

The Sixth Circuit rejected the district court's conclusion and held that the introduction of the death certificate violated the Confrontation Clause. The Court acknowledged that there were traditional exception to the hearsay rule which allowed the introduction of evidence even if the

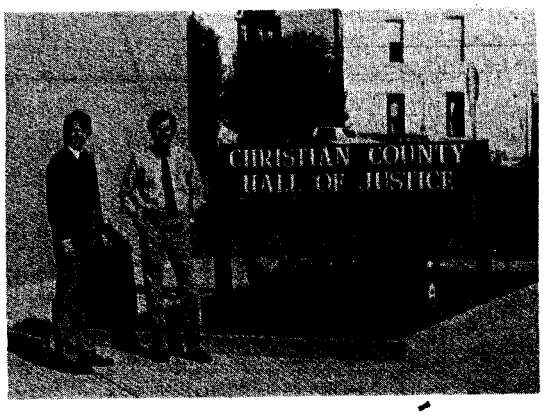
(Continued, P. 28)

declarant was unavailable. However, the court emphasized that while the Confrontation Clause and traditional exceptions to the hearsay rule sometimes overlap, the two concepts are not of equal status. "The Confrontation Clause goes beyond the hearsay rule to ensure that prosecution witnesses testify under oath, are subject to cross-examination, and are observed first-hand by the jury." Slip opinion at 8-9, n.5, citing California v. Green, 399 U.S. 149, 158 (1970). Accordingly, even if evidence is admissible under an exception to the hearsay rule, it must also be evaluated under the Confrontation Clause.

In general, evidence admitted under an exception to the hearsay rule violates the Confrontation Clause unless the prosecution proves both that the declarant is unavailable and that the evidence is trustworthy. In the case under review, the coroner was not "unavailable" since the prosecutor informally released him from testifying after he had been subpoenaed. Thus, the introduction of the death certificate violated the Sixth Amendment.

NEAL WALKER

* * * * * *



Bill Chambliss, a former Director of our London and Somerset offices, joins the Hopkinsville office. Rob Soder shown here on Bill's left is also new to that office.

TRAINING MATERIALS AVAILABLE

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

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

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

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

Karen C. McDaniel
Law Librarian
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601
(502) 564-5252

* * * * * *

JIMMY CARTER, July, 1976

"I see no reason why big-shot crooks should go free while the poor ones go to jail."

* * * * * *

Trial Tips

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. This is the second of two articles setting out his comments, in a condensed and edited version.

XII. WRITTEN QUESTIONS TO ROTHGERBER AND QUESTIONS FROM THE AUDIENCE

There were several questions that were already submitted to me in preparation for this presentation. I'd like to go ahead and read them at this point and answer them, and then throw the floor open to any questions you might have.

Q: Explain when a person meets the Parole Board after returning to prison on a new charge while having backup time on a parole violation?

A: Let me cite this hypothetical: a person receives a 5-year sentence for a crime committed after December 3, 1980. Our new regulations are in effect. Persons are seen after 20 percent service of time. The person is seen in 1 year. Let's presume the person is recommended for parole. All right, they go out, having an amount of backup time, not 4 years backup time, because they've gotten 1/4th good time. They've gotten 15 months of good time already. So, when you subtract 12 months and subtract 15 months from their 60-month sentence, we come up with 33 months backup time.

They go out, and while on parole, commit a new crime. They get another 5-year sentence. They are returned to the institution on that new sentence. As soon as that person walks through the door of that institution, that person is an automatic parole violator. That person is not entitled to a preliminary parole revocation hearing. The statute automatically says that person's parole is automatically terminated.

That person's sentence is recalculated by the Corrections Cabinet at 10 years: 5 and 5, 5 and 5 wild makes 10. And after they do that, then the Corrections Cabinet starts applying the time they're already served. They apply the 12 months they've already served and they subtract the 1/4th good time from the 10 years, which is a total of 2 1/2 years' good time, and the Offender Records Section, headed by Betty Lou Vaughn who will recalculate that and get a new serve-out figure.

But the question is: when is that person eligible for parole. That person is eligible for parole when they've met the minimum on the new sentence, not when they are eligible on 10 years, but when they are eligible on the new sentence, they are eligible under the new 5. That person will be seen again in 12 months after they come to the

(Continued, P. 30)

institution, less the jail time that they've credited on their new sentence. So, no matter how much backup time they have, we'll see them when they are eligible on the new conviction. That's a popular question.

Q: What effect do consecutive P.F.O.1 convictions have on parole eligibility as opposed to a single P.F.O. 1 conviction?

A: It has none. A person who comes in on 2 consecutive P.F.O.1's is eligible no less than 10 years after they come in. You can't run the eligibility time wild unless that crime, a second crime, is committed while in the institution. So, if someone comes in on a P.F.O. 1 conviction and is sent to Eddyville, and kills a guard at Eddyville, and gets another P.F.O. 1 consecutive, then you can run the P.F.O. 1's wild. Then you can stack them.

But in your normal situation that we see more often, they are run - it's a 10-year limit. And there's an opinion, I can't cite the opinion, but there is an opinion from the Attorney General in this regard. And that's also how the Offender Records Section calculates those cases.

Q: What is the effect of consecutive life sentences on parole eligibility?

A: The same. It's well settled in the courts that a person can only serve 1 life sentence. Consecutive life sentence means, at the present time, that a person is eligible after serving 8 years.

Q: Does the time in jail on a parole violation awaiting return to the institution count for the expiration of sentence?

A: No. If you have a client in jail who's had a preliminary parole revocation hearing and one of our administrative law judges has found probable cause and your client is still waiting to be transported back to the Reformatory after 3 months, sorry but that 3 months doesn't count toward the expiration of his sentence. That's by statute. The time on parole does not count toward that serve-out date. And your client is still on parole until the Board revokes it.

You know, we have 2 stages in our revocation process. We have the preliminary hearing before our administrative law judge and we have the final hearing before the full Board. Until that final hearing, and until the Board listens to that case and makes a decision, until that time, your client is still on parole. None of the jail time counts.

The Board does consider it to be a mitigating factor in determining how long a deferment your client should receive.*

Q: Does statutory good time come off the front or back end of a sentence? That is if a person is sentenced to a term of 5 years in the pen, are they eligible for parole after serving 1 year of the term, or is it possible that they might be considered at an earlier date due to the accumulation of good time?

A: It comes off the back end. It means that they have less time to serve if they get a serve-out. Good

(Continued, P. 31)

*__Editor's Note:__ This ruling by the parole board is clearly a fertile area for legal challenge in light of KRS 532.120(3) and Polsgrove v. Kentucky Bureau of Corrections, Ky., 559 S.W.2d 736 (1977), or at a minimum a fertile area for legislative action.

time does not affect parole eligibility computation whatsoever. The only time that affects parole eligibility time is jail credit. Jail credit counts toward a person's initial parole eligibility date.

Q: If you have somebody in jail on a new charge in addition to a parole violation, does the jail credit time count toward the new sentence?

A: Let me make this answer simple. As far as the Board is concerned, you are eligible for the jail credit that the judge gives you. No more - no less. When this judgment is sent in, the judgment says that the defendant is entitled to x number of days in jail credit - that's how many days you are entitled to. That's when the Offender Records looks at it, computing the sentence, and that's what they are governed by.

Your problem there is to convince the judge that your client is entitled to that other time, that he might have spent awaiting a P.V. hearing. So, the judge won't go along with that.

Offender Records sometimes does look behind what the judge says if they see that the judge is giving too much time. Often-times they will make a call to the judge and point this out. I don't know if they do it if a mistake is made in the other direction. I'm not saying that as a criticism, I'm just saying that as a fact.

Sometimes there is a multiple count and a judge will order jail credit for each count. If a person serves 6 months in jail, the judge might mistakenly send an order in that says the defendant should get 6 months' credit on each count. And in these cases and other obvious areas, Offender Records will sometimes call the sentencing judge to straighten the matter out.

Q: Differentiating the amount of time spent in jail prior to his conviction with the time spent in jail after his conviction when the prisoner awaits transportation to prison when an individual arrives in prison on a 1-year sentence, on his first conviction, and he's already got 5 months in, what happens?

A: When a person arrives in prison, already having accrued enough jail time credit to make that person eligible, then that person is put on the next Board. They're not required to serve - let's see on a 1-year sentence, which is the most common time that this situation occurs, on

HARRY ROTHGERBER, JR.

a 1-year sentence, a person is eligible in 4 months. If a person serves 5 months, then he comes in and is received at the Reformatory, that person will be put on the very next Board. They're not going to be required to serve another 4 months. They get their credit and they are put on the next Board. That's automatically computed and that happens quite often on your short sentences nowadays.

The second part of your question involves a practice that Corrections Cabinet has now, known as controlled intake, which means that because of

(Continued, P. 32)

the over-crowded prisons, you've got inmates waiting to come to prison who are starting a backup in your county facilities. I think the last figure I heard of the number of jail inmates was over 500 - again those persons are received in a controlled manner according to some policies that the Corrections Cabinet has set forth.

Now what about the gap from sentencing to the time your client is actually received in the institution. I would suggest that you better follow this and watch it closely, to make sure your client gets every day that they are entitled to. Sometimes, this extra time is included in the court's order and sometimes it's not. I can't be any more specific than that. Some judges are aware of the situation and will amend their original order or will phrase their order in such a way as to cover all that time. I think your client's entitled to it, but somebody needs to point this out to Offender Records and needs to verify that your client does have this amount of time. As I said, your client's entitled to it but you've got to take steps make sure they get it.

Q: On the second P.F.O. - an offense which occurred while lodged in the county jail would the parole eligibility be the same - 15 years?

A: Even if it occurred in a county facility while awaiting trial or while waiting a further proceeding, whatever, no, I can't see that that parole eligibility time should run to 20 in that case, no.

Q: Specifically, I'm thinking of escape from a county jail.

A: I don't think so. The reason the P.F.O.1's would be figured that way in a state facility is because of the fact that the Board's own regulations call for the stacking of parole eligibility time for crimes committed in the institution. This is the Board's way of supporting the institution in making it less desirable to get involved in crime while in the institution.

Q: How about an escape which occurs after a man is convicted of a PFO during transportation and say he escapes?

A: I would say at that point I would still think that the 10, it should be just the 10 flat and not 20. That's my opinion.

Q: How long can a parolee be held in the county jail before the preliminary revocation hearing?

A: The Board has no regulation or no policy or practice in regard to the length of time that a person is held pending a preliminary revocation hearing.

Q: After the preliminary revocation hearing, how long can they hold an individual before transporting him to an institution?

A: All right, that's up to the Corrections Cabinet. The Board has nothing to do at all with transporting the prisoners. That's strictly a matter within the purview of the Corrections Cabinet and how long it takes is - is how long it takes.

Q: Do you have a statistic on the probability of success for the first time felony offender to make on his first meeting parole?

A: No, I don't have any statistics in that regard.

Let me tell you some other things the Board has no jurisdiction or

(Continued, P. 33)

authority over: institutional transfers or furloughs. If you want your client transferred, as I said, write to the Corrections Cabinet, don't write to us. If you want a furlough or, in some cases, if you are objecting to a furlough, don't object to us, object to the Corrections Cabinet. Specifically, the person who is in charge of that is Mr. Steve Berry, who is located on the 5th floor of the State Office Building in Frankfort, Kentucky 40601.

Q: A person is sentenced for 2 crimes and through an error, the sentences run consecutively, and he goes to the penitentiary and serves the time to a point where he would be eligible for a parole hearing, had the sentences run concurrently, at that point he writes back to the court and gets the order corrected and now about 3 months past when he would have been up for parole. What do you think? What effect would this have on him meeting?

A: The person would be put on the very next Board at that institution. That's not to say that if the error is corrected on Monday, he will be seen on Tuesday because there is a process by which we have to set up hearings. But, that's not an uncommon situation. It does happen and the person is put on the next Board, and then we will start the sentencing.

Q: Does the Parole Board set the conditions for a parole? How free are parole officers to make changes and additions to the conditions once they are set by the board?

A: The Board has no authority or jurisdiction over the parole officers. It's a unique situation. In some states, the Board has authority over line staff but not in Kentucky. In Kentucky, parole officers are a part of the Office of Community Services of the Corrections Cabinet. They supervise our parolees but we can't tell them what to do.

Now, to answer your question, they have our full and total support to put down any additional stipulations or conditions of parole. We rely a great deal and we trust the discretion of the local parole officer whom we feel is in a better position to know what the local situation is, perhaps, having some knowledge of that parolee, having supervised that parolee before or having supervised that person as a probationer, or having knowledge of that person's family. Basically, we give them full range to add any other condition in addition to the ones that we put.

Q: Does it also mean that they would be able to make amendments and those conditions you've already set or are those fixed for the time period of parole?

A: The conditions that we place are fixed, to this extent, if we say a person must have full supervision for 6 months, it has to be a minimum of 6 months. It could be longer. If we say a person must attend comprehensive care counseling for a minimum of 2 years, it means a minimum of 2 years. But it could be longer. But the Board in those situations, usually the Board has released those conditions if the parole officer wants the conditions released prior to those time limits.

Q: When a client returns to the institution as a parole violator for something other than a new commitment, he's eligible for final revocation hearing under what conditions does the Parole Board advise him with the attorney representing him at the preliminary hearing to suggest to that client that he be

(Continued, P. 34)

put as counsel at the second hearing - revocation?

A: Once an alleged parole violator is returned to the institution, the Board does have to give that person a final revocation hearing within 30 days.

I would say that you should be telling your client, as soon as you possibly can, reminding him to request a special revocation hearing, if that's what they want. You can send a letter to the Board but we've had many instances in which we have said to that parolee at the final hearing, your attorney sent a letter requesting a special hearing, requesting to be present at a special hearing in Frankfort, is that what you want? And the parolee will say, "well, no, I want to go ahead and get it over with." If that's the case, then we're going to ignore the letter from counsel as long as we make sure the parolee knows what they're doing in making that statement.

So, if you want to have a special hearing and be present in Frankfort at that final revocation hearing, you should begin from day one, to drum it in your client's head to request that hearing when they meet the Board the first time at the institution.

Q: A while back for early parole consideration - the board used to consider terminal illness or dire family situation. Is there any situation or rule of thumb the board will consider now along those lines for early parole?

A: Those are helpful factors. Those are factors. If you have a client who has a terminal illness, point it out to the Board. That is a popular ground for early parole requests.

Of course many of the situations which we encounter, we follow up and there is no terminal illness. As a matter of fact, right now, just this day, there's another letter from a man on my desk who received a 60-month deferment 5 years ago and...well at that time he informed us he had a life expectancy of 6 months because of cancer. Now I sympathize with the man's medical problems but I just use this as an example of the lengths that inmates will go to to gain any type of early release.

But, point out to the Board - we will investigate it and if you do have a good claim and verifiable facts, the Board will consider it. We can't make any promises about what we'll do but it's something to be considered.

Q: A client just got a 2-1/2 year flop and something you said earlier suggested that nothing could be done for a year. You can't ask for reconsideration?

A: You can ask but my secretary or one of the secretaries in the office will send you back a form letter, saying that it is the policy of the Board that not to consider such cases within 12 months from the last hearing.

(Continued, P. 35)

Q: I have another question about the final revocation hearing, the proceedings that are followed for an inmate, who does not know his right to a special hearing in Frankfort. I am wondering what does the parole board do to advise him of his rights at that final hearing that he has within 30 days?

A: That's easy, nothing. We don't tell them they have a right to counsel. If they request it, we give it to them. But they're not told that as an introduction to that hearing.

Q: Well, I guess I don't understand what the procedures are that are followed at the hearing. An inmate comes before the Board and...what happens at that point?

A: Well, at that point the warrant is read, the alleged violations are read to the inmate. The inmate's prison history is related to the inmate. The inmate, at that point, after getting all this information, all the facts of the case straight, I might say, "Mr. Doe, you've heard the violation, or you've heard the allegation that you did fail to report. Now at this time, do you wish to admit or deny that?" And they enter an admission or denial. Ninety-nine percent of the time, it will be an admission.

At that point, if he denies it, and he denies every allegation against him, or against her, at that point we would ask if there's a need or a special hearing at that point. And we would ask if they want to be represented by counsel.

Q: You indicated that a man on parole violation is not going to get any credit for jail time served, having gone to the institution...but there is a regulation which states for all purposes.

A: Let me find my records here...you are referring to Section 5. The crime committed in that section refers to a felony.

Q: But what if a man is a technical parole violator and he fails to report. All right, he's picked up and he's arrested on this technical parole violation, which he is in jail after x number of days, it's found out that he's committed another crime. He is charged with that crime and then is he sentenced on that crime? It seems to me he would get credit for that time in jail on the parole violation as well.

A: I think in that narrow instance, your man is entitled to that jail time. That's a very, very narrow situation which is not applicable in the majority of situations that arise.

Q: Is a man lodged in the county jail, waiting a P.V. hearing, is he eligible for bail, if he's been arrested and charged with parole violation, is he entitled to bail?

A: No.

Q: He's eligible for bail and does not get any credit for his time....?

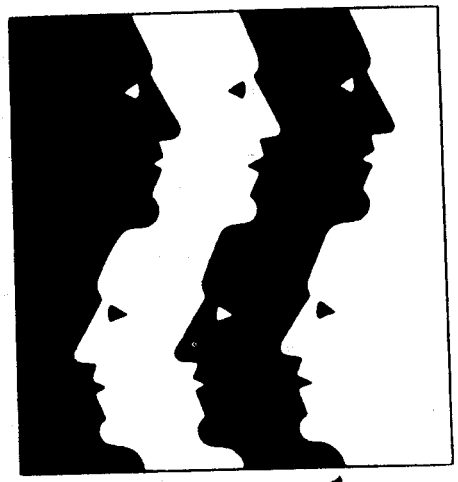
A: Oh, absolutely. I won't deny that. Several Commissions have recommended a change in that statute. I served on the Governor's Sentencing Commission last year. We looked at that statute. I vigorously supported a change in it and there was a Bill introduced in the past session of the Legislature to give a person credit for that time. But it never came out of committee, which is not surprising, considering other things that happened during the session. But, in the long run, it would be of benefit to Corrections.

(Continued, P. 36)

It would be a tremendous benefit to Corrections to have those people get their jail time.

Q: Is there a Federal habeas ...perhaps being held without bail?

A: Well, I'm not one to en-courage Federal habeas or any type of habeases against the Board since I am sure, you are undoubtedly looking at a person who has been sued more times than anybody else you will come in contact with, and for a greater aggregate amount than the several hotels are worth in this area I am sure. I'm not one to encourage it - another habeas or civil rights action or anything. But I would point out that all efforts in this regard have been unsuccessful in the past and there's a statute right on point that we are fighting with. And the Board can't give it - we might like to give it. I personally might like to give it but I can't give it in the face of the statute which says time spent on parole shall not count toward that serve-out deal. It shall only count toward getting a final discharge from parole.



Q: What if you have a situation of a client who is charged with a new crime and is put in jail, and his parole officer, after writing the charges, files, say 3 or 4 technical violations against him, and there is a preliminary revocation hearing, assuming he is convicted on the new charge and comes back out of the institution, he comes back to the institution on the new convictions, how does the Parole Board see the technical violations he has charged against him. Do they just revoke parole solely on the new sentence, the new conviction, or say on all 4 things...?

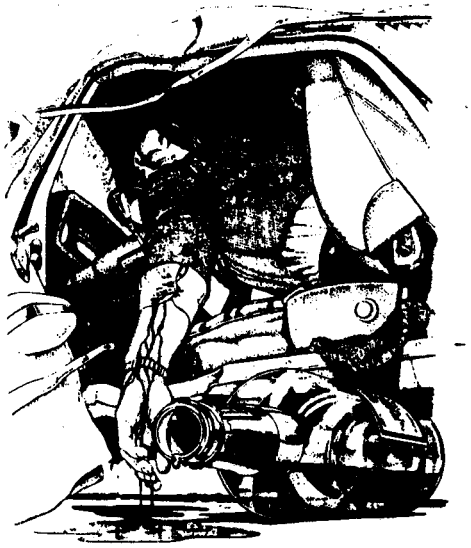
A: It's a matter of what happens first. If a person comes back and is recommitted on a new felony conviction, and the person is an automatic parole violator, when they walk through the doors of the institution, they will not get a hearing, they will not get a hearing on a technical parole violation and the Board will void - if the Board has issued a warrant already alleging those technical parole violations, the Board will void that warrant when he's seen as eligible on a new conviction. Does that make sense?

If he's returned as a technical parole violator, first on the warrant and thereafter receives new convictions, or new felonies committed while on parole, then he will be given a final revocation hearing within 30 days because he was returned as a technical parole violator. Whatever status he was returned at as governs the Board's handling of that case. Now, let me ask this (it's almost 3:30) one last question before we adjourn - if anybody has any last stickler to throw up here. To "throw up" is probably a bad phrase to use after last night, according to what Dan Goyette told me.

EDITOR'S NOTE: This ws the end of the presentation. There were no more questions.

* * * * * *

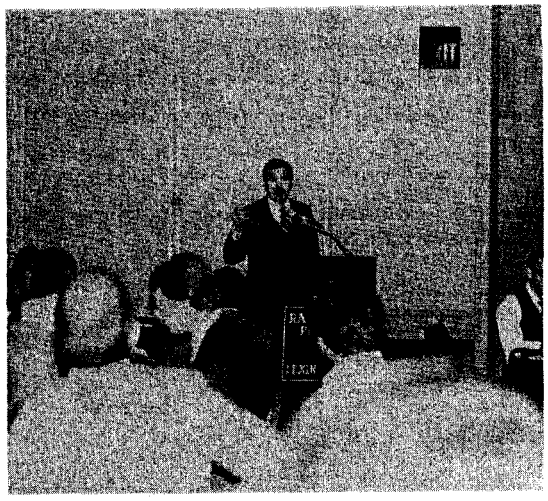
Drunk Driving Law Seminar



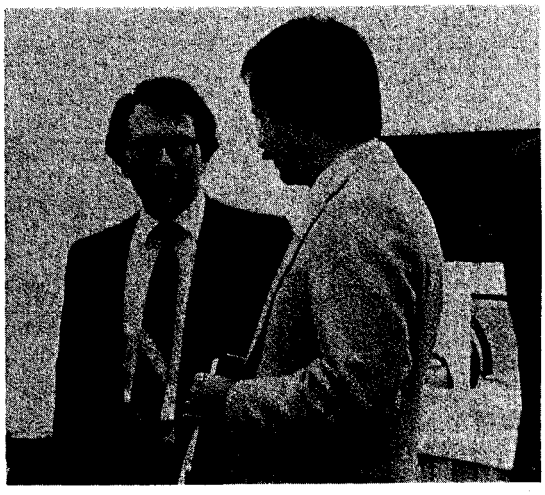
The Department of Public Advocacy's one-day Drunk Driving Law Seminar in Lexington attracted over 160 attorneys from all parts of the state.

We heard from Senator Mike Moloney of Lexington, Harry Hellings of Covington, Bruce Prizant of Louisville, Dr. Cowen of Prospect; Larry Rivitz and Jim Epstein of California, and our own George Sornberger and Jim Cox.

Much thanks to all our presenters for their efforts.



MIKE MOLONEY



BRUCE PRIZANT, ED MONAHAN

Glad Tidings

FROM THE EDITOR

The persons who write for The Advocate provide each of us an important service. They do so in addition to their regular duties. We owe each of them our continued thanks. Without their longstanding dedicated efforts, we would be much less.

Oh, yes. We hope the Holiday season increases your life and the life of those around you.

* * * * * *

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