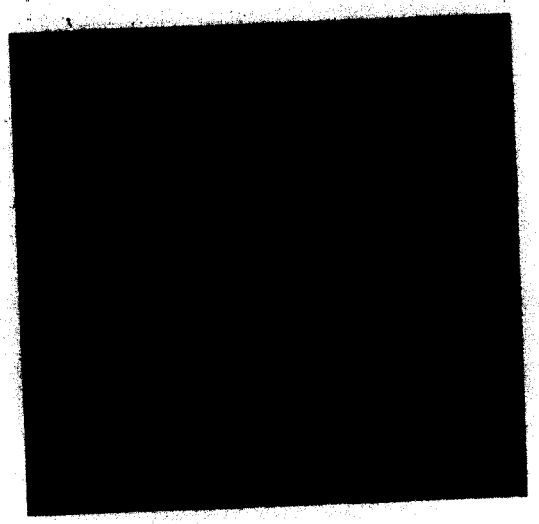
THE ADVOCATE

Vol. 7 No. 2 A Bi-Monthly Publication of the DPA February, 1985

THE ADVOCATE FEATURES



JAMES C. JERNIGAN

"In my opinion the greatest attribute an attorney can have is raw unadulterated courage." This from a man whose very life has fed on his courage and determination. Time and again it has replenished him.

In 1920, a time when there were no provisions for high risk infants, James C. Jernigan was born weighing two and a half pounds. He attributes his survival then and now to his toughness.

He veritably storms an untoward life. In 1966, he built back his law practice after a fire demolished the building. More importantly, he wins year after year in his battle with leukemia--now sixteen years altogether. It has claimed the sight in his left eye, but it does not conquer him.

He began to love the law as a child when he sat on the bench with his grandfather, Judge James C. Carter, Sr. who held the 29th Judicial District Circuit seat for 36 consecutive years. Judge Carter ran on the platform "Equal justice to all and a square deal for the poor and rich alike." Jernigan continues to breathe life into that precept.

Jernigan musters his energy to fiercely advocate the rights of blacks and indigents in the economically and racially mixed community of Tompkinsville. Whereas, once they might have come to him because there was no one else who would represent

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The Advocate welcomes correspondence on subjects treated in its pages.

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them, now they come because they don't want anyone else to defend them. He does not flinch from even the most difficult cases. In his last four murder trials he has won acquittals.

Jernigan doesn't evaluate his success by general practice standards. Monetary gains are nominal, if existent. He does get the satisfaction of not seeing unfortunates routinely sent to the Penitentiary simply because they can't afford the best of attorneys, have no political influence, or are not articulate. For him, that is enough.

Jernigan jokes that his clients get "a 10 cent imitation of F. Lee Bailey" but credits his continued success to his love of trial work and willingness to experiment.

Once, in a capital trial he asked the prospective veniremen for their first impression of his cherubic client. The Bench immediately said "objection sustained!" Having made his point, Jernigan began another line of questioning. When the time for a verdict came his client had been acquitted.

Besides law, Jernigan treasures his beautiful wife Patsy who is at once supportive and was an asset to his practice for fourteen (14) years. He also loves his son, James Carter, his grandfather's namesake, who is as old as the battle his father fights.

A spell binding storyteller, Jernigan has interests as broad as bass fishing and playing steel guitar to raising gaming fowl. A modest man, he expresses surprise at his successes personally and professionally. He says finally, "Never Quit. (The) Only time to quit is when you're dead." From that we can take heart and resume our own struggles, better for his nonpareil example.

CRIS PURDOM

TRIAL PRACTICE INSTITUTE COMPLETED

This Department's third Trial Practice Institute was held in November in Richmond. Over 50 attorneys from around the state were trained in trial skills.

In addition to DPA attorneys, the faculty included Bob Carran, Tom Hectus, Steve Rench, Tony Natale, Deryl Dantzler, Joe Guastaferro and Dennis Balske.

During the 4 days of training, the participants practiced each aspect of a criminal trial. Each exercise was preceded by a lecture on the topic and followed with a demonstration by a faculty member. Through the help of Professor Mike Neitzel of the University of Kentucky, we had psychologists and graduate students in psychology play the role of our expert witnesses. Actors from Eastern Kentucky University and Richmond played the roles of jurors and witnesses.

Thanks to all those who made this training effort a huge success.

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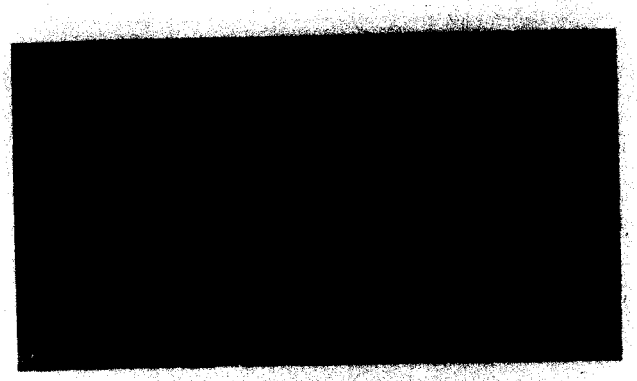
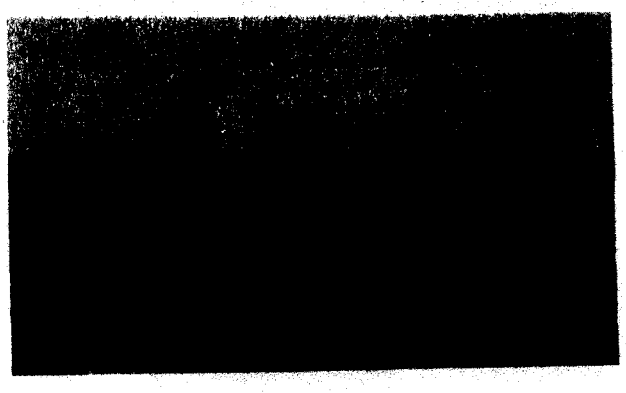


TONY NATALE VOIR DIRES

MARY PARSONS, BOB RANEY, BOB CARRAN AND JOE GUASTAFERRO

GAIL ROBINSON AND DERYL DANTZLER



"Now mam, can you identify the man who attacked you out of this lineup?" "Yes, officer, it won't be too hard. He wore glasses; had a moustache; was balding; had a tie, coat and vest on and could never look me in the eyes! Just give me a minute officer."

West's Review

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

Kentucky Court of Appeals

In Dunn v. Commonwealth, Ky.App., 31 K.L.S. 15 at 2 (November 9, 1984) the Court of Appeals held that the defendant's arrest was lawful. Police received a report that "two or three" black males were seen leaving the scene of a break-in. A license number and description of the car were also given. Although the facts were disputed, the Court of Appeals also found evidence in the record to show that the owner of the burglarized home reported missing jewelry and that the arresting officers were aware of her report. Some hours after the break-in, officers spotted a car matching the described vehicle. The defendant was ordered from the back seat and patted down when a bulge was observed in his pocket. The bulge turned out to be jewelry. At that point the defendant was placed under arrest and taken to the police station where he made incriminating admissions and consented to a search of his apartment for other stolen items. The Court of Appeals held that the police investigation of the lump in the defendant's pocket was lawful under Terry v. Ohio, 88 S.Ct. 1868 (1968) and that the subsequent arrest of the defendant was based on probable cause.

The Court of Appeals held in **Rolli v. Commonwealth**, Ky.App., 31 K.L.S. 15 at 6 (November 2, 1984) that the commonwealth violated its obligation to disclose exculpatory evidence when it failed to reveal evidence which reflected on the credibility of a key prosecution witness. The commonwealth had failed to disclose that the witness had cooperated with the commonwealth in attempting to obtain incriminating statements from a suspected complicitor, that the complicitor had sent an affidavit to the commonwealth attorney stating that the witness had attempted to extort money from him, and that the witness had denied any knowledge of the charged offenses in testimony to the grand jury. These matters were first made known to the defense during the trial. The defense's motion for a continuance was denied. The Court of Appeals held that this was reversible error since the defense was entitled to disclosure of the evidence prior to trial: "[W]hile it is true that defense counsel was apparently able to cast some doubt on Sutton's believability, had he known of the undisclosed evidence prior to trial, he might have been able to present it in such a manner as to completely discredit her testimony." The Court also noted "If the government has doubt about the discoverability of the evidence, it should have submitted it to the court prior to trial for an in-camera determination."

In **Macklin v. Commonwealth**, Ky.App., 31 K.L.S. 15 at 12 (November 9, 1984), the Court of Appeals reversed the defendant's burglary conviction because of the trial court's refusal to grant the defense a transcript of a first trial which had ended in a mistrial. The defense relied on Britt v. North Carolina, 92 S.Ct. 431 (1971) which holds that an indigent

(Continued, P. 5)

is entitled to a transcript of a mistrial, or its equivalent alternative, for use in preparing for his new trial. The commonwealth contended that tapes of the mistrial were an "equivalent alternative" and that the trial court properly refused to order a transcript. The Court of Appeals disagreed. The court emphasized that: "In the case at bar, there were two trials, separated in time by approximately seven months, with different attorneys representing the defendant at the two proceedings." Based on these facts the Court concluded that the commonwealth had not met its burden of demonstrating that the tapes were an alternative to a transcript. The Court in Macklin also held that the second trial did not violate the defendant's protection against double jeopardy since the mistrial was not caused by conduct "intended to provoke the defendant into moving for a mistrial." Oregon v. Kennedy, 102 S.Ct. 2083, 2091 (1982). Finally, the court held that the defendant was not entitled to an instruction on receiving stolen property under $100 as a lesser included offense to burglary. "Receiving stolen property is a separate offense and not a lesser included offense of burglary." See Sebastian v. Commonwealth, Ky., 623 S.W.2d 880 (1981).

The Court has attempted to write a definitive statement on the law of entrapment in **Gibson v. Commonwealth**, Ky.App., 31 K.L.S. 16 at 9 (November 30, 1984). The Court noted that KRS 505.010, which sets out the elements of the entrapment defense, requires a showing that the commonwealth induced or encouraged the defendant to commit the offense and that the defendant was not "predisposed" to commit the offense. In fact, the statute requires a showing that "[a]t the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct." [Emphasis added). As with all affirmative defenses, the burden of proof falls upon the accused. Turning to the facts before it the Court found that Chuck King, an informant for the state police, negotiated and arranged for William Gibson to purchase some "hits" of LSD. King later arranged for the LSD to be sold by Gibson to an undercover drug agent. The evidence clearly showed that King "induced and encouraged" the sale. The Court also found that "Nothing in the record would even remotely cast the pall of predisposition over the appellant to commit a trafficking offense." The Court concluded that, based on the evidence, Gibson was entitled to an instruction on entrapment.

In **Crone v. Commonwealth**, Ky.App., 31 K.L.S. 16 at 8 (November 30, 1984), the Court of Appeals reversed the defendant's convictions of driving under the influence and driving without a license. Sentences of six months imprisonment were imposed on each count. The defendant's motion for a jury trial made immediately prior to trial was denied. The commonwealth contended that the defendant had waived his right to a jury trial by failing to request a jury trial before his case was called as provided by KRS 29A.270(1). However, the statute provides only that "The defendant may request a jury trial at any time prior to the time his case is called for trial." The Court of Appeals concluded "[W]e do not believe that KRS 29A.270(1) sets a time after which a defendant is automatically precluded from exercising his right to a jury trial." Moreover the Court emphasized that the defendant could only validly waive his constitutional right to a jury trial if the record affirmatively shows that he did so knowingly and voluntarily. See Short v. Commonwealth, Ky., 519 S.W.2d 828 (1975).

(Continued, P. 6)

In **Peacock v. Commonwealth**, Ky.App., 31 K.L.S. 17 at 1 (December 7, 1984), the Court delineated the standards for appellate review of a circuit court's denial of an appeal bond. Peacock sought an appeal bond from the Court of Appeals pursuant to RCr 12.82 after an application to the trial court was denied. The Court of Appeals initially noted that "[a]n appellate court becomes involved only if it is determined that the trial court has abused its discretion in considering bail pending appeal or has failed to exercise its discretion." The Court found from the facts before it that the trial court had abused its discretion. A single judge of the Court of Appeals then issued an order so finding and setting an appeal bond. The commonwealth subsequently moved for a reconsideration of the Court's order, arguing that RCr 12.82 does not authorize the Court of Appeals to grant bail pending appeal, and that setting bail requires a three judge panel. The Court rejected both contentions. The Court held that the "plain reading and simple meaning of RCr 12.82" granted it authority to set an appeal bond. The Court also held that a three judge panel was not required to set such bond since CR 76.34(4) requires a three judge panel only when action is taken that will be a "final disposition" of an appeal or original action. The Court reasoned that, since an appeal bond is subject to modification, its granting is not a final order.

In a case of first impression, the Court of Appeals has upheld the constitutionality of KRS 525.070(1)(6). **Commonwealth v. Musselman**, Ky.App., 31 K.L.S. 17 at 7 (December 21, 1984). The statute provides that:

> '(1) A person is guilty of harassment when with the intent to harass, annoy or alarm another person he:
>
> '(b) In a public place, makes an offensively coarse utterance, gesture or display, or addresses abusive language to any person present.'

Musselman challenged the statute as an impermissible restriction on the First Amendment guarantee of free speech. The Court of Appeals upheld the constitutionality of the statute by construing it as prohibiting only "fighting words" - "words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 62 S.Ct. 766 (1942). The Court of Appeals specified that the statute did not apply to "words which merely offend or cause indignation or anger..." In view of its construction of the statute as applying only to fighting words the Court also rejected a challenge to the statute as void for vagueness.

The Court of Appeals reversed the first degree robbery conviction of Zenada Greer. **Greer v. Commonwealth**, Ky.App., 31 K.L.S. 16 at 6 (November 23, 1984). An informant implicated Greer in the robbery but provided insufficient information to create probable cause for her arrest. However, acting on the information available, an officer located Greer and asked her to accompany him to the police station. At the station Greer's palm print was taken and matched to one found at the scene. Greer sought to suppress the print evidence on the ground that her detention was unlawful. The commonwealth contended that Greer voluntarily accompanied the officer, but the Court of Appeals rejected this characterization of the facts where Greer went as the result of a "show of authority." The Court considered the case to be a "virtual replica" of Dunaway v. New York, 99 S.Ct. 2248 (1979), in which the U.S. Supreme

(Continued, P. 7)

Court held that police detention (but not arrest) of the defendant in the hopes that "something would turn up" violated the Fourth Amendment.

In **Dillingham v. Commonwealth**, Ky. App., 32 K.L.S. 1 at 1 (December 28, 1984) the Court held that the defendant received ineffective assistance of counsel when his trial counsel failed to object to the use of a felony conviction for enhancement purposes when the conviction was obtained after the commission of the principal offense. "We find that KRS 532.080 requires that all prior felony convictions used as a basis for enhancing a present felony conviction must have been obtained prior to the date of the commission of the present felony." This issue had been previously raised by the defendant on direct appeal but was not considered by the Court of Appeals because of a lack of preservation. The Court applied Henderson v. Commonwealth, Ky., 636 S.W.2d 648 (1982) to hold that counsel was ineffective in failing to preserve the issue.

Lastly, the Court of Appeals has held that Kentucky does not recognize a plea of nolo contendere. In **Commonwealth v. Hillhaven Corporation**, Ky.App., 32 K.L.S. 1 at 3 (December 28, 1984) the trial court accepted a plea of nolo contendere from the defendant corporation to charges of wanton endangerment. The commonwealth appealed. The Court of Appeals reversed, citing RCr 8.08 which provides that "A defendant may plead not guilty or guilty" and RCr 8.12 which states:

> Pleadings in criminal proceedings shall be the indictment, information, complaint or uniform citation, and the plea of guilty or not guilty. No other plea, demurrer, or motion to quash shall be used....

Kentucky Supreme Court

In **Phillips v. Commonwealth**, Ky., 31 K.L.S. 15 at 16 (November 15, 1984), the Kentucky Supreme Court held that Phillips' convictions of burglary and receiving stolen property taken in the burglary did not violate the prohibition against double jeopardy. The Court had previously held in Sebastian v. Commonwealth, Ky., 623 S.W.2d 880 (1981) that a defendant may be convicted of burglary and retaining property taken in the burglary. Phillips asked that the Court reexamine Sebastian in light of its later decision in Jackson v. Commonwealth, Ky., _____ S.W.2d _____ (1984), disallowing convictions of both theft and receiving the same stolen property. The Court declined to overrule Jackson and held that Phillips could be convicted of burglary and either theft of or unlawfully receiving property taken in the burglary. Of course, under Sebastian, any such conviction of receiving stolen property must be based on a retaining theory. The Court in Phillips also held that a witness' isolated, non-responsive reference to other crimes, did not deprive Phillips of a fair trial in view of all the evidence.

The Court has again affirmed the rape, burglary, and PFO convictions of Mike James. **James v. Commonwealth**, Ky., 31 K.L.S. 15 at 17 (November 15, 1984). The Court first affirmed James' convictions in James v. Commonwealth, Ky., 647 S.W.2d 794 (1983) when it held that James was not entitled to an admonition, as opposed to an instruction, to the jury to draw no adverse inference from James' failure to testify. The U.S. Supreme

(Continued, P. 8)

Court granted certiorari, and in James v. Kentucky, 104 S.Ct. 1830 (1984), held that James' request for an admonition sufficiently invoked his federal constitutional right to stand. The introduction of this testimony was error since the defendant had not placed his reputation for truth and veracity in issue. The Court also found reversible error in the introduction of evidence of the defendant's sexual relationships with his daughter and stepdaughter. There was no evidence that the murder victim knew of the relationships and therefore, contrary to the commonwealth's argument, they could not have provided the motive for her murder. The Court rejected defense argument that the defendant was denied due process when the victim's body was released by the coroner and cremated following its examination by a state forensic anthropologist but before an independent examination could be conducted by a defense expert. The coroner was not aware of the defense request for an independent examination and acted in good faith in releasing the body. In addition, the commonwealth's examination of the body resulted in an "extensive forensic report." The Court held that, because the defense did not utilize this report to demonstrate the alleged need for an independent examination, it had failed to show prejudicial error.

In **Commonwealth v. McFerron and Kirby**, Ky., 31 K.L.S. 16 at 12 (December 6, 1984) the Court reexamined the showing which must be made in order to establish a prima facie case of systematic exclusion of distinctive groups from grand or petit jury panels. Defense counsel for McFerron had moved to quash the indictment. The motion was supported by defense counsel's personal affidavit alleging that 1) no lawyer or doctor had been called for jury service in Rockcastle County since 1960 and that 2) although school teachers names were placed in the jury drum, any teachers called for jury duty during the March and November terms were automatically excused by the court. The Supreme Court held that, as to the first allegation, the defense failed to make out a prima facie case because it failed to introduce proof demonstrating that lawyers and doctors were "distinctive groups." The Court stated: "[W]e are of the opinion that ordinarily professions or occupations are not distinctive groups in a community absent a showing of numerosity and lack of community needs to establish a prima facie case of systematic exclusion." This portion of the Court's decision overrules Colvin v. Commonwealth, Ky., 570 S.W.2d 281 (1978), in which an "avowal" by defense counsel that schoolteachers were excluded from the jury wheel was held to establish a prima facie case of exclusion of a distinctive group. As to defense counsel's second allegation, the Court held that "This allegation does not concern exclusion from the jury drum and does not rise to constitutional proportions." Justice Leibson dissented.

Finally, in **Commonwealth v. Hollingsworth**, Ky., 31 K.L.S. 17 at 14 (December 10, 1984), the Court held that KRS 218A.020(1), a section of Kentucky's controlled substance law, which empowers the cabinet for human resources to "by regulation add substances to or delete or reschedule all substances enumerated in the schedules set forth in this chapter," is not an unconstitutional delegation of legislative authority. The Court noted that a delegation of legislative authority is constitutional if the legislature delegates only "the administration of the law itself" and not "the exercise of its discretion as to what the law shall be." KRS 218A.020(2) provides that the cabinet may adopt a regulation

(Continued, P. 9)

controlling a substance only after considering certain enumerated factors and "if it finds the substance has a potential for abuse." Moreover, KRS 218A.040, 218A.060, and 218A.080 set out specific standards to be applied by the cabinet when deciding in what schedule to classify a given drug. In view of these specific standards the Court concluded that the legislature had not unconstitutionally delegated to the cabinet discretion as to what the law shall be. Justice Vance dissented.

LINDA WEST

* * * * * *

ADMINISTRATIVE NEWS

RESPONSIBILITY FOR DISTRICT COURT APPEALS

QUESTION Who is responsible for perfecting an appeal from district court?

ANSWER The responsibility lies with the local defending attorney. KRS 31.115(1); 504 KAR 1:010(3).

The local "defending attorney [has] the responsibility of preparing any appeal from [an] inferior court to circuit court." 501 KAR 1:010(3). As to the procedures to follow in perfecting a district court appeal to the circuit court see The Advocate, Appeals from District Court, June 1983, p. 28.

If the circuit court affirms the district court's judgment, then local counsel has the responsibility to file a Motion For Discretionary Review (MDR) in the Court of Appeals of that adverse circuit court ruling. That must be done within 30 days of the circuit courts order.

When a Motion For Discretionary Review has been granted, the defending attorney has the option of either perfecting the appeal in the appropriate court or notifying the central office that it is to handle the appeal.

If the central office is asked to handle the appeal, notice must be timely so as not to endanger loss of the appeal on procedural grounds. As for notification requirements, see KRS 31.115(3). Notifications should be sent to Tim Riddell.

The Department has a handout on "Appeals From District Court" available through the librarian, Karen McDaniel, (502) 564-5252. Tim Riddell is also available for any questions you may have concerning your appeal. 502-564-5223.

DAVE NORAT

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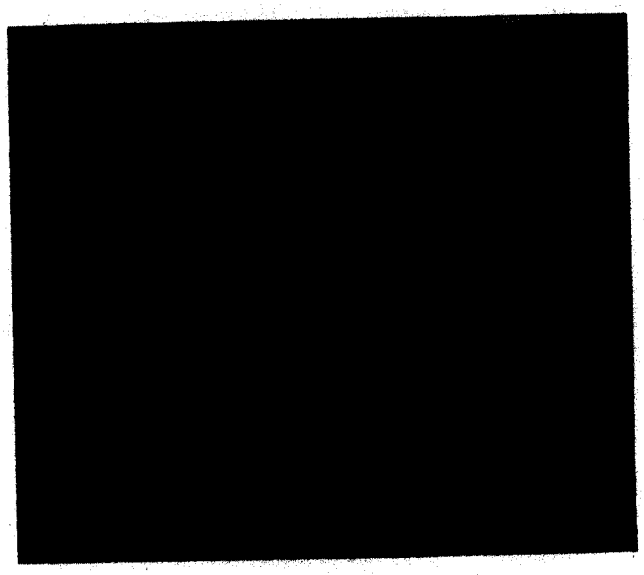

Oleh Tustaniwsky has replaced Peter Kunen as the Directing Attorney of the Hazard Office.

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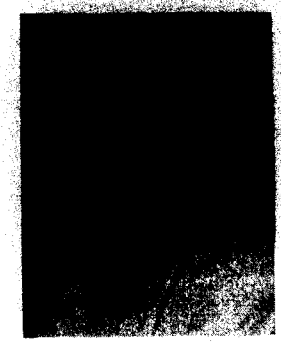
Post-Conviction
Law and Comment



SENTENCE CREDIT AWARDED TO PAROLE VIOLATORS HELD IN JAIL

In two recently issued unpublished Orders the Court of Appeals has recognized that parole violators in certain circumstances, are entitled to credit for time spent incarcerated in local jails prior to their return to the state correctional system for the parole violation. These decisions reverse the long standing policy of the Corrections Cabinet and Parole Board to deny credit in these situations.

In the first case, **Rees v. Watkins**, No. 84-CA-1904-MR (October 1, 1984), the former parolee filed a petition for a writ of habeas corpus in the Oldham Circuit Court arguing that he should be credited with all time he spent in local detention facilities during his term of parole. The petitioner, while on parole, was convicted of misdemeanors in two counties and received sentences of six and twelve months. During service of those sentences the Parole Board issued and lodged a parole violation warrant against the petitioner. Approximately two months later the petitioner was returned to the Kentucky State Reformatory.

In his petition the petitioner relied on an administrative regulation of the Parole Board and statutory and case law to argue that he was entitled to credit on the indeterminate sentence on which his parole was revoked for all time spent in jail on the misdemeanors. It was asserted that 501 KAR 1:011(5) requires that a parole violator accrue jail-time credit for all purposes beginning on the day he was arrested for a new crime committed while on parole and that KRS 532.110(3) requires that when a defendant is sentenced to imprisonment while on parole, the term, unless ordered otherwise by the sentencing Court, must run concurrently with any time the Parole Board requires the defendant to serve upon revocation of his parole. The petitioner also relied on Powell v. Payton, Ky., 544 S.W.2d 1 (1976) which held that a misdemeanor and felony sentence must run concurrently even though imposed by different courts. It was conceded that if he had been convicted of felonies rather than misdemeanors while on parole KRS 533.060(2) would have prohibited concurrent service.

The Oldham Circuit Court granted the petition and ordered that the petitioner be credited with time spent in jail prior to his return to prison. However, the Court did not order credit for the entire time the petitioner spent in jail on the misdemeanors. Rather, the Court held that the petitioner was not serving time on the parole violations while serving the misdemeanors until the parole violation warrant was issued by the Parole Board. From that time, the Court held, the misdemeanor and felony sentences must run concurrently thereby requiring credit by the Corrections Cabinet for the remainder of time the petitioner served in jail until his return. The order was appealed and affirmed by the Court of Appeals on October 1, 1984.

(Continued, P. 11)

In **Bunyard v. Wilson**, No. 84-CA-2409-MR, (November 29, 1984), the Court of Appeals addressed the corollary issue of whether a parolee who has been violated on technical grounds alone is entitled to time spent in jail prior to his return to prison. In Bunyard v. Wilson, the petitioner filed a petition for a writ of habeas corpus in the Franklin Circuit Court requesting that his sentence be credited with jail time he spent or three such occasions.

Unlike the petitioner in Rees v. Watkins, the petitioner in Bunyard v. Wilson did not rely on statutory authority; instead, constitutional arguments were asserted. The petitioner argued that a refusal to credit this time violated substantive and procedural due process, the guarantee against multiple punishment for the same offense under North Carolina v. Pearce, 395 U.S.711 (1969), and equal protection since inmates in other similar situations receive such credit. Although the Franklin Circuit Court dismissed the petition the Court of Appeals vacated that order on November 29, 1984 holding that the petitioner "should be credited with any and all time he spent incarcerated in jails pursuant to parole violation warrants issued on technical grounds and not for commission of new criminal acts." Unfortunately, the Court did not indicate the specific constitutional provisions on which it relied.

Furthermore, due to the brevity of the Court of Appeals' Order it is not clear whether the actual issuance of a parole violation warrant will be considered the trigger for credit as in Rees v. Watkins or whether credit must also be given for the time a technical parole violator is held prior to the issuance of a warrant under a holder by the parole officer pursuant to KRS 439.430. However, the constitutional principles asserted by the petitioner would seem to dictate that this time must be credited, too. Although the parolee may have been held for some time prior to the issuance of the warrant the fact remains that the parolee will have served time solely pursuant to the parole violation and denial of credit for any such time would seem to be an unconstitutional increase of his sentence and inconsistent with the situations in which credit is awarded.

Nevertheless, these decisions have effectively foreclosed future reliance by the Corrections Cabinet and Parole Board on KRS 439.344 to deny jail credit to parole violators in all situations. In both cases it was argued that under that statute time incarcerated in jail awaiting return for a parole violation is "dead" time on the sentence for which the parolee is returned. KRS 439.344, it was argued, required that such time be considered as "time spent on parole" and therefore not "a part of the prisoner's maximum sentence except in determining eligibility for a final discharge from parole...." It was also argued that no statute specifically required this credit.

Since such credit has apparently been denied by the Corrections Cabinet in numerous other cases the holdings by the Court of Appeals may have a far reaching effect on Kentucky's correctional system. Prisoners that have been denied this credit in the past now have a specific acknowledgment that the denial was improper. Accordingly, it is anticipated that many inmates will now be making similar requests for credit. However, it remains to be seen whether the Corrections Cabinet and Parole Board will await further court action by each person so aggrieved or by the class or will institute a policy of administratively awarding this credit.

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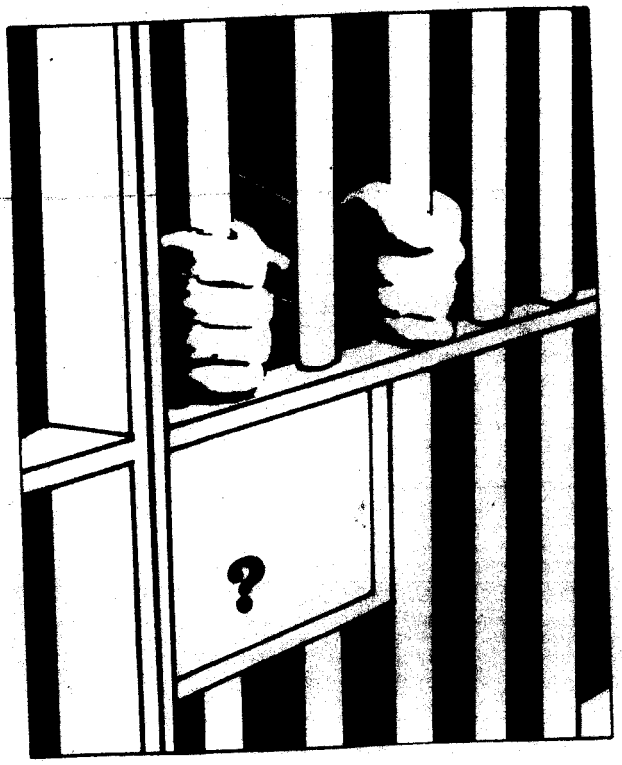
It does appear that such a policy may be instituted and that future court action may be unnecessary since in Bunyard v. Wilson the Corrections



Cabinet moved the Franklin Circuit Court to dismiss the action as moot due to its intention to adopt a policy of awarding such credit pursuant to the Court of Appeals' holding in Rees v. Watkins. However, in documents submitted by the Corrections Cabinet in Bunyard, it appears that the policy proposed would have limited such credit to only those persons held to await transfer to the Kentucky State Reformatory pursuant to the controlled intake procedure adopted by the Corrections Cabinet on July 1, 1982 to cope with prison overcrowding. This intended limitation may have been based on the Oldham Circuit Court's finding in Rees v. Watkins that the petitioner in that case was held in jail prior to his return to prison due to overcrowded conditions.

But, Bunyard v. Wilson broadens the class of those affected considerably. The petitioner there served time in jail as a parole violator on two occasions prior to the effective date of the controlled intake procedure. Additionally, Bunyard v. Wilson extends Rees v. Watkins to those parolees held purely due to parole violations and does not limit that holding to any authority requiring credit due to the manner in which an additional sentence must be calculated.

At a minimum, it does appear that in all cases, past, present and future, a parole violator held in a local detention facility for a parole violation is at least entitled to credit for the time after the parole violation warrant has been issued unless the parolee has been convicted of and is being held for a felony committed while on parole, in which case the restriction of KRS 533.060(2) will presumably apply, or the Court, upon conviction of a misdemeanor, specifically orders that the time run consecutively to the time the Parole Board will require on revocation of the parole for the felony. KRS 532.110(3).

Although the Court of Appeals held against the Corrections Cabinet and Parole Board in these cases, the decisions will have at least one beneficial implication for those parties. Such credit for parole violators, even though not amounting to many days in some cases, will have the cumulative effect of drastically reducing the amount of time parole violators in general must serve upon returning to prison. This, in turn, will allow release of those persons at an earlier date thereby assisting the Corrections Cabinet in meeting its obligation to prevent overcrowding in the state correctional system.

RANDY WHEELER

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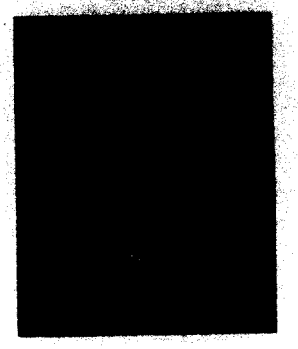
Sixth Circuit Survey



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.

PROOF OF POSSESSION

The defendant in United States v. Beverly, No. 83-1862 (December 3, 1984), was convicted of receipt by a convicted felon of a firearm shipped in interstate commerce, a federal offense. On appeal he argued that the trial court should have granted his motion for a judgment of acquittal on the grounds that the government had failed to prove that he had possessed a firearm. The Sixth Circuit agreed and reversed the conviction due to the insufficiency of the evidence.

This case is noteworthy since the defendant's fingerprints were found on the firearm. It can be cited for the proposition that proof of touching (established by fingerprint evidence) does not necessarily establish proof of possession.

In the cited case, the firearm was found in a waste basket in the kitchen on the residence of a third party. During the execution of a search warrant, the defendant was found in the kitchen, standing next to the waste basket. Another person was standing on the other side of the waste basket.

There was one identifiable fingerprint found on the gun, the defendant's. The print, of the defendant's left ring finger, was on the barrel. According to the fingerprint expert's testimony, because of the location of the print, the gun "would have had to have been laid down," when the defendant touched it. Slip Opinion at 4.

The Court held that this evidence established "only that [the defendant] was in the kitchen of [the third party's] resident, that [the defendant] was standing close to a waste basket containing two guns, and that [the defendant] had at some point touched one of the guns." Slip Opinion at 5.

NEAL WALKER
FEDERAL PUBLIC DEFENDER

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LEGISLATIVE IDEAS SOUGHT

The 1986 legislative process is at hand. We're interested in your criminal law 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 in the criminal law area.

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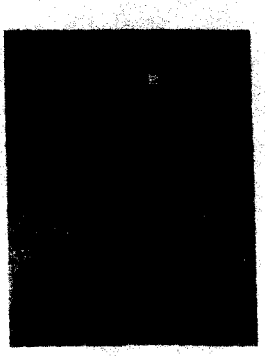
Plain View



[EDITOR'S NOTE: At the time The Advocate went to the printers new search and seizure cases were rendered by the United States Supreme Court. They will be discussed in the next issue.].

Beginning in this month's Advocate, we will begin to regularly consider search and seizure questions. The Advocate has long neglected this vital area of the law, neglect which recent changes in search and seizure law can no longer permit. The title is a deliberate one and reflects what I hope to do with the article, and that is to make commonsensical observations about the law of search and seizure and to keep local public defenders abreast of interesting and important cases from this and other jurisdictions. I am not a constitutional scholar, and hence the emphasis on "plain." I do welcome your comments and questions and will attempt to answer the needs expressed by you, the reader, in this area.

In a recent issue of The Search and Seizure Law Reporter, Volume 11, Number 7, (August, 1984) entitled "The Reasonable Good Faith Exception to the Exclusionary Rule in Search Warrant Cases," the author observed that "the states are, of course, free to accept or reject this exception -- as some has already done -- under their state constitutions or evidentiary law. It may well be the case, therefore, that the catastrophic impact of these decisions in search and seizure law...may be ameliorated by the restraining influence of state judges concerned about their own constitutional law. Certainly prosecutors, defense counselors, judges, and magistrates acting in state jurisdictions should be very cautious about making automatic assumptions with respect to the applicability of Leon and Sheppard decisions in their states."

Theoretically, the author's advise is well taken. And, in fact, the law in Kentucky following Leon and Sheppard is as yet unsettled. However, language coming out of the Kentucky appellate courts over the past two years does not bode well for the rejection of the good faith exception in Kentucky.

I say this for a couple of reasons. First of all, the court in Estepp v. Commonwealth, Ky., 663 S.W.2d 213 (1983) adopted a substantial change in search and seizure law in response to United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). There the court stated that Ross was in harmony with section 10 of the Kentucky Constitution and overruled two decisions which had made Kentucky's constitutional provisions in automobile searches more stringent than the fourth amendment had previously been. See Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979); City of Danville v. Dawson, Ky., 528 S.W.2d 687 (1975). Kentucky had proudly held onto the Wagner and Danville cases and its more stringent section 10 requirements, and Estepp gives little indication of why the court abandoned those requirements. The point here, however, is that the court readily followed the invitation of Ross and the more stringent Ken-

tucky constitutional law went out with a whimper.

Once again, this past spring, in the decision of Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984), the Court agreed to follow the change in the fourth amendment law established by the United States Supreme Court in Illinois v. Gates, 103 S.Ct. 436, 76 L.Ed.2d 527 (1983). Particularly disturbing in the Beemer case is the language of the court which implies that Kentucky's Section 10 would be much less stringent in its requirements were it not for the decisions of the United States Supreme Court. "Our [past] decisions...were required of because we must, of necessity, comply with the decisions of the United States Supreme Court. They did not constitute an independent determination of Kentucky law but were compelled by the federal law. We are fully in accord with the relaxation of the federal requirements as expressed in Illinois v. Gates...."

The Kentucky Court of Appeals has followed the lead of the Kentucky Supreme Court in cases in which a change of the law was not necessarily appropriate. For example, in Whisman v. Commonwealth, Ky.App., 667 S.W.2d 394 (1984), the court used Illinois v. Gates in affirming a particular search. What is interesting about the Whisman case is that it involved a warrantless search, whereas Illinois v. Gates establishes the law for the issuing of search warrants. Whisman uses Gates to imply that proof required for probable cause now is less than it once was. That could be an accurate interpretation of Gates were Whisman a warrant case involving an anonymous tip. If, in fact, Illinois v. Gates reduced the quantum of proof necessary for issuing a search warrant where there exists an anonymous tip by an informant, that should not lessen the amount of proof in the less favored warrantless search. Whisman, however, seems to make that assumption.

The plunge toward reducing the quantum of proof necessary for probable cause, and the general protections established by the fourth amendment, continued in Dunn v. Commonwealth, Ky.App., ___ S.W.2d ___, 31 KLS 15 (11-16-84). Here the court observes with relish that "what disturbs most criminal defendants and their representatives is that the so called security of invasion of privacy of their persons, luggage, vehicles, ...has been consistently liberalized...." One could only imagine the glee on the face of the author of the Dunn case.

By the time that this article was written, the Kentucky courts had not written an opinion utilizing the good faith exception to the exclusionary rule. One can continue to hope that as the author of The Search and Seizure Law Reporter stated, the Kentucky courts will cherish their own constitutional provisions and decline to apply the good faith exception to Section 10 of the Kentucky Constitution. However, given the adoption of Ross and Gates, and the further relish with which the courts have applied the so called liberalization of search and seizure law, the cautious public defender should not hold his/her breath.

What is important then is for public defenders to be aware of the changes that have occurred in search and seizure law by the United States Supreme Court, and react to those changes. What will follow are some observations that hopefully will be useful in trying to deal with these changes. I welcome your thoughts on the ways that we can cope with the changes in the law.

Probably as big a change that has been made occurred in last year's Illinois v. Gates, supra. There, the

Supreme Court, while avoiding establishing the good faith exception to the exclusionary rule, did at least as much damage to the fourth amendment by changing Aguilar/ Spinelli's long established requirements for the issuance of a search warrant where an informant or anonymous tip establishes the basis for that search. You will recall that in Aguilar and Spinelli the courts had held that the veracity of the informant, and the basis of knowledge of the informant's observations, had to be included in the affidavit prior to the issuance of a search warrant. A search warrant could be declined for either reason. Those requirements now are no longer to be rigidly applied. In fact, the United States Supreme Court in an acidly stated opinion has said that Gates means what it says and it is not to be confined to its facts. See Massachusetts v. Upton, 462 U.S. ___, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984).

After Illinois v. Gates, defense counsel must understand that Aguilar/ Spinelli still lives. It is no longer a rigid test to be applied to an affidavit, but is still "highly relevant" in determining whether there was probable cause. If the veracity and basis of knowledge requirements are omitted from the affidavit, defense counsel should stress that Gates does not omit these requirements and that these continue to be highly relevant to the determination of probable cause under the Gates totality of the circumstance standard.

Gates continues to express the courts' bias toward warrants as the court continues to do in Leon and Sheppard. In a typical case of a warrantless search, which is my estimation occurs at least as often as a search based upon a warrant, counsel can use Illinois v. Gates to say that the court has a bias toward warrants and that where there is no warrant, probable cause determinations should be made using a more stringent standard.

Thirdly, following Illinois v. Gates, conclusory statements in the affidavit on which the search warrant is to be based simply will not do. Prosecutors and police departments will interpret Gates to their peril if they believe that what Gates says is that any time an anonymous tip comes in that the police can simply get a warrant based upon that anonymous tip without doing anything else. Conclusory statements concerning a tip without other parts of the totality of the circumstance should lead to the suppression of a search based upon such a warrant. The affidavit must continue to "provide the magistrate with a substantial basis for determining the existence of probable cause." Illinois v. Gates, 76 L.Ed.2d at 549.

Finally, corroboration of the anonymous tip now becomes all the more important in determining whether probable cause exists or not. Where the anonymous tip is not corroborated by what in fact the police find in executing the search warrant or the arrest warrant, then this should be used by defense counsel to say that probable cause did not exist at the time and that the search warrant was invalid.

Following the left jab of Illinois v. Gates, the Supreme Court landed a strong right in United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). You will recall that in Leon the Supreme Court held that the exclusionary rule does not bar the use of evidence seized pursuant to a warrant which is ultimately found to be unsupported by probable cause where the law enforcement officers acted in objectively reasonable reliance upon that search warrant. In conjunction with Gates, one could readily foresee

an officer using an anonymous tip to obtain a warrant which prior to Gates would have been invalid under Aguilar/Spinelli, and then in fact relying upon that search warrant to search and/or arrest under facts that previously would not have sufficed under the fourth amendment. It is only in considering the combination of Gates and Leon that defense counsel can see what a knock out punch the court has done to the fourth amendment. However, defense counsel must respond creatively to Leon and understand what can still be done in search cases.

For example, where the affidavit is knowingly or recklessly false, reliance upon the ultimate search warrant is not going to be viewed as reasonable under Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

A second explicit exception to the good faith exception occurs when a magistrate abandons his/her neutral and detached role and becomes partisan during the search warrant process. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979). However, I have got to wonder what this means? Does it mean that this exception is fact bound under Lo-Ji Sales, and that the only time it is going to be useful occurs when the magistrate goes with the police officers to accompany them on their search? Or, does it mean that defense counsel should in some way prove the prosecutorial bias of the district judge, showing that the judge takes an adversarial role in the issuance of search warrants? If it means the latter, then this exception to Leon may in fact provide a fruitful area of challenge. Then, counsel will need to show in a suppression hearing what went on between the police officer and the district judge. What was said? What is the history of this particular judge in the issuance of search warrants?

A third explicit exception, and the most potentially useful, occurs when there is no substantial basis for probable cause in the affidavit. Under these circumstances, the United States Supreme Court states that deference to the warrant process is not justifiable and the exclusionary rule should in fact apply. The reason that this is potentially fruitful is that it seems to open up the entire inquiry of probable cause once again, going back to pre-Leon law. What this exception does is state that in clear areas where probable cause does not exist, despite the issuance of a warrant, reliance upon that warrant cannot be objectively reasonable. Under this view of Leon, Leon merely eliminates the grey areas in between probable cause and no probable cause. Where there exists no probable cause, defense counsel should continue to use the exclusionary rule to suppress evidence which comes in as a result of a warrant.

The method of execution of a warrant has not changed as a result of Leon. Thus, if the police officers do not execute the warrant promptly, or they go well beyond the scope of the warrant, Leon does not offer them any solace. Suppression of evidence seized while improperly executing a warrant still should be suppressed.

It must be kept in mind that the good faith of the police officer spoken about in Leon and to be applied in future cases is not the subjective good faith of the police officer. Thus, it matters not whether the police officer stands up and says that he relied upon the warrant in this particular case. What matters, rather, is objective good faith, and whether it was objectively reasonable for an officer to rely upon a particular warrant. Thus, in outrageous cases where a search warrant

obviously should not have been issued, a police officer cannot hide behind the absurd warrant simply by saying that he, in good faith, relied upon that warrant. In attempting to prove the objective good faith of a police officer, the totality of the circumstances should be used. The court explicitly states that "all of the circumstances -- including whether the warrant application had previously been rejected by a different magistrate -- may be concerned." See Leon, fn. 23. Again, this footnote authorizes counsel to go after what occurred between the police officer and the court. In suppression hearings, both can be witnesses in the evidentiary hearing on the motion to suppress. This opens up all kinds of worms which can be pursued by aggressive counsel.

One interesting aspect of the Leon case is that circumstances regarding training of local police departments are now relevant inquiries. Counsel can prove that in fact the police officers on the particular police department have never received any training in fourth amendment law. Counsel can show that search warrants are never reviewed by prosecutorial staffs or by anyone in a supervisory position not trained in constitutional or search and seizure law. The fact that good faith reliance is being asserted by the prosecution, in other words, opens up a new area of inquiry for defense counsel in motions to suppress.

Finally, Justice Blackmun states in Leon that Leon is a provisional case, and that the police are now on their good behavior. If police departments and courts view Leon to say that anything can be searched and anything can be seized as long as the talisman of good faith can be waived over it, at least Justice Blackmun states that this would be going much too far. As a result, it is the public defender's role to monitor compliance with the Leon decision. It is now to be our role to show that neutral and detached magistrates are complying with the fourth amendment, that the warrant process is not being abused, that there is a substantial basis for probable cause in these warrants, that police department are not obtaining warrants from judges who view their role as assistant prosecutors. While Leon clearly is a step backwards in fourth amendment law, there is much that can be done and should be done.

Following Gates and Leon, the other decisions of the 1984 court were not as far reaching in their impact. Massachusetts v. Sheppard, 468 U.S. ___, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), should be understood as a companion case to the United States v. Leon decision and demonstrates how search and seizure law has now changed following Leon. You will recall that the Sheppard decision simply holds that the exclusionary rule did not require the exclusion of the evidence seized by the police officers pursuant to a warrant which had been invalidated because of the error by the judge in issuing the warrant. Here, the warrant used by the police officer and by the judge had erroneous language in it. The judge assured the police officer that he was going to be making changes in that warrant, changes which were in fact not made, thereby rendering the warrant invalid. Defense counsel should argue that Sheppard is fact bound and should rarely be applied. One must admit that a repeat of the Sheppard circumstances are seldom going to occur where a judge assures a police officer that changes which would make the warrant valid and then does not make those changes. Sheppard should not apply in the case where the judge's warrant obviously does not authorize a particular kind of search and the police officer goes ahead and conducts that kind of search. Particularity, hopefully,

continues to be a requirement of the fourth amendment.

THE SHORT VIEW

Cases of interest of which counsel should be aware:

1) In **People v. Thiret**, Col., 685 P.2d 193 (1984), the Court held that "a consent to look around" given by the person there does not justify a complete forty-five minute search of the premises.

2) **State v. Morse**, N.H., 480 A.2d 183 (1984), held that a motel room is the same as a house for Payton v. New York purposes. Thus, police may not cross the "threshold" of a motel room without a warrant of consent by the persons therein. See also Mowrer v. State, Ind.App., 447 N.W.2d 1129 (1983) applying Payton to a hotel room, and United States v. Torres, 705 F.2d 1287 (11th Cir. 1983), holding that a warrant is required if a guest is more than a mere transient.

3) The Supreme Court recently heard arguments in the **United States v. Sharpe**, 712 F.2d 65 (4th Cir. 1983), on the issue of how long a detention under Terry can last. Also in United States v. Johns, on the next day, the court heard arguments on an interpretation of the United States v. Ross case.

4) Washington State has recently rejected the totality of the circumstances standard of Illinois v. Gates, in **State v. Jackson**, Wash., 688 P.2d 137 (1984).

5) **People v. Ponto**, 36 Cr.L. 2186 (1984), the New York Supreme Court, 2nd Department held that being behind in your rent does not give the landlady the right to give consent to a warrantless search of the tenant's room.

6) **United States v. Raab**, 720 F.2d 669 (1984) held that a parolee may be arrested on a parole violation on "reasonable belief" of the breaking of conditions, a lesser standard than probable cause, arguably.

7) In **People v. Joseph**, Ill.App., 1st Div., 470 N.E.2d 1303 (1984) the Illinois court refused to apply the good faith exception of Leon where a bond forfeiture warrant had been vacated eleven days before it was executed by the officer who had been told the warrant was good. Here the court refused to permit the police to take advantage of their own error.

8) In **United States v. Morgan**, 743 F.2d 1158 (6th Cir. 1984) the court applied Payton to the circumstances of a person coming out of his house in a response to a show of force then throwing his weapon back into the house, holding that both an arrest and a search warrant are required prior to the seizure of the weapon and the defendant.

9) On November 5, 1984 the Supreme Court has granted certiorari in **Oklahoma v. Castleberry**, 83-2126, in a review of the Oklahoma Court of Criminal Appeals case, 678 P.2d 720 where the court had held against the state. The Supreme Court will be examining the issue of whether a container can be searched without a warrant either pursuant to a lawful arrest or under United States v. Ross when a person standing next to a car throws the container into the car.

ERNIE LEWIS

Ernie Lewis has worked for the Department of Public Advocacy for 8 years. He is the former Editor of The Advocate, and formerly chief of the Trial Services Branch. He now is the public defender for Madison County.

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Trial Tips

For the Criminal Defense Attorney

OTHER CRIMES EVIDENCE

One of the most prejudicial elements injected by the prosecution is evidence that your client has in the past committed "other crimes." While courts have long recognized the overwhelming prejudice of such evidence by developing a general rule of inadmissibility, so many exceptions have developed as to make the rule the exception. This article will briefly review those exceptions and hopefully provide some useful strategies for avoiding the interjection of other crimes evidence.

IMPEACHMENT WITH OTHER CRIMES

This summer the Kentucky Supreme Court completely revamped the law of evidence concerning the impeachment of witnesses with evidence of other crimes. In Commonwealth v. Richardson, Ky., ___ S.W.2d ___ (June 14, 1984) the venerable Cotton rule was done away with and the Court retreated to the rule of Cowan v. Commonwealth, Ky., 407 S.W.2d 695 (1966). Gone is the protection of Cotton that impeachment be made with only those crimes bearing a logical connection to the credibility of a witness. Now any witness may be impeached by a showing that s/he has been convicted of a felony, regardless of the nature of the crime. The impeaching party is limited, however, in that the nature of the offense may not be revealed. If the witness admits prior felony conviction, the inquiry is ended. The impeaching party may not inquire as to the number of felony convictions.

If the witness denies prior felony conviction, then the impeaching party may prove all prior felony convictions. However, there remains an absolute bar to identifying the offense(s). Thus records used to prove the instances of prior felony convictions may not be admitted into evidence for the jury's inspection if they indicate the nature of the prior offense(s). The "usual" admonition must be given upon request, and the trial court retains discretion as to the admissibility of the particular offense for impeachment based upon the remoteness of the prior conviction.

You can use voir dire to determine your jurors' attitude toward the fact your client, or witness has previously been convicted. When dealing with an impeachable defendant, you may want to pre-empt the prosecution by having your client testify about his priors, or at least admit that s/he has previously been convicted of the crime. From a tactical standpoint, it always looks better for the accused to be open, that way the prosecution doesn't get the opportunity to immediately pounce and reveal to the jury that your client has something to hide. Always request the Court to admonish the jury and ask for a jury instruction regarding the purposes for which the prior conviction can be considered. If you think that the admission is questionable, or the admonition insufficient, move for a mistrial, if not the admonition will be considered curative of any harm occasioned by the error.

Character witnesses, like any other, are subject to impeachment of their

(Continued, P. 21)

credibility by prior felony conviction. Their testimony itself, however, is subject to impeachment based on your client's prior record.

A character witness' testimony may be impeached by questioning as to whether the witness has "heard" of the accused's prior conviction for a crime relevant to the character trait which the witness spoke to. Fugate v. Commonwealth, 277 S.W. 1029 (1925). The impeaching party must have a good faith basis for the question. Broyles v. Commonwealth, Ky., 267 S.W.2d 73 (1954). In this instance the nature of the prior crime is obviously relevant and admissible as it directly relates to the subject of the witness' testimony.

SUBSTANTIVE USE OF OTHER CRIMES

Evidence of "other crimes" may be admitted for substantive purposes under limited exceptions to the general rule that evidence of other crimes is inadmissible to prove an accused's "criminal" disposition. Other crimes may come in where they "tend to establish" identity, intent, motive, common scheme or plan or are so interwoven with the crime being tried that they cannot be separated (continuous transaction). See Lawson's, Kentucky Evidence Law Handbook.

Identity: The accused's identity as the perpetrator of the instant crime may be proven by uncharged/other crimes. Leigh v. Commonwealth, Ky., 481 S.W.2d 75 (1972). However, where identity is not challenged otherwise admissible other crimes evidence tending to prove identity is not admissible Hendrickson v. Commonwealth, Ky., 486 S.W.2d 55 (1972). The identity exception should not be used to justify admission of other crimes evidence to establish the defendant's "true identity" where s/he is charged under an assumed name. While this has been upheld on appeal, Williams v. Commonwealth, Ky., 560 S.W.2d 1 (1978), the logic behind the exception is faulty. Evidence of other crimes should be admitted only where it bears some logical association to the issues at trial. Spencer v. Commonwealth, Ky., 554 S.W.2d 355 (1977).

Motive: Evidence of other crimes may be introduced to show the accused's motive for committing the charged crime, i.e. In Rake v. Commonwealth, Ky., 450 S.W.2d 527 (1970) the defendant was charged with carrying a concealed weapon. He disputed concealment. The prosecution was properly permitted to introduce evidence that the gun in question had at some previous time been stolen. The court on appeal rationalized that the stolen nature of the gun was motive for Rake to conceal it. The test here is logical relevance and the burden is on the introducing party.

Evidence that the victim of the charged crime has previously obtained a warrant against the accused is likewise admissible to show motive. However, the prosecution may not introduce proof that the accused was guilty of that prior offense, nor may the prosecution introduce the complaint or affidavits accompanying or underlying the warrant. See Powell v. Commonwealth, Ky., 214 S.W.2d 1002 (1948)

Common Plan or Scheme: Evidence tending to show that the accused has committed other criminal acts using the same pattern may be admitted where there is evidence of 1) a substantial nature that the defendant committed the prior act; 2) the evidence is relevant to the issues at trial; and 3) the prior conduct/act is not too remote. O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153 (1982). In O'Bryan, twelve years was deemed too remote. This exception

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should be limited to "signature" type crimes. It is not designed to permit proof of a general criminal disposition, or of the accused's moral capability to commit crime. Marshall v. Commonwealth, Ky., 482 S.W.2d 765 (1972).

Sex Crimes: In the trial of sexual offenses any prior criminal sexual behavior by the accused is admissible not only to corroborate the instant victim's testimony, but to show the accused's "disposition and intent, as to the acts charged, lustful inclination, motive, a common pattern, scheme or plan." Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972). The alleged other crimes must be of a similar or identical nature and not too remote in time. The Supreme Court has indicated that the other sex crimes exception may be limited to cases where children were the victims and the current charge alleges the victimization of a child. Warner v. Commonwealth, Ky., 621 S.W.2d 22 (1981).

The rationale underlying the sex crimes exception is one that is obscured in legal history, apparently developed from a notion that sexual offenders are more prone to recidivism. It began as a form of corroboration of the child victim, and due to the nature and public reaction to sex offenses grew to its present stature. As with other exceptions, admission is contingent upon a balancing of the proferred evidence's probative value against its prejudicial consequences.

The Kentucky Supreme Court has vasculated on the procedure whereby the probative value of other crimes evidence is to be balanced against the prejudice likely to ensue from such evidence. While relevant and competent evidence cannot be excluded simply because it is prejudicial to the accused, Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980), the trial court must take into account the possibility of prejudice in assessing the relevancy of the proferred evidence. See Jones v. Commonwealth, Ky., 554 S.W.2d 363 (1977) and Quarles v. Commonwealth, Ky., 245 S.W.2d 947 (1952). In this area you have an opportunity to present logical arguments of relevancy to the court prior to the use of the other crime. Evidence is not limited to prior convictions, but may include behavior which did not result in criminal charges at all.

Forewarned is forearmed: Pre-trial motions in limine and hearings are particularly appropriate vehicles for determining the admissibility of other crimes evidence. The recognized prejudicial effects of the misuse of other crimes, and the recognition, even by the Kentucky Supreme Court, of the insufficiency of curative admonitions justifies a pretrial determination of what uncharged crimes may be introduced and for what purpose. It also allows for a better forum to present arguments in opposition to or (in those rare instances where you are proferring the evidence) in support of the evidence. Demand that witnesses be informed of any ruling in limine to prevent "inadvertant" testimony relative to other crimes. Even indirect references to other crimes which are not admissible is prejudicial and should be banished from testimony, i.e. "mug shot" identifications Redd v. Commonwealth, Ky.,App., 591 S.W.2d 704 (1979); references to witnesses place of abode "Mr X, of Eddyville" who has been "in close proximity with the accused." Estep v. Commonwealth, Ky. App., ___ S.W.2d ___ (1984).

A pretrial ruling in conformity with these cases at a minimum puts the prosecutor on notice that s/he must avoid even "indirect" references to other crimes. Deliberate circumven-

(Continued, P. 23)

tion of the ruling arguably constitutes "goading" your request for mistrial and may prevent a retrial should your request be granted.

DEBBIE HUNT

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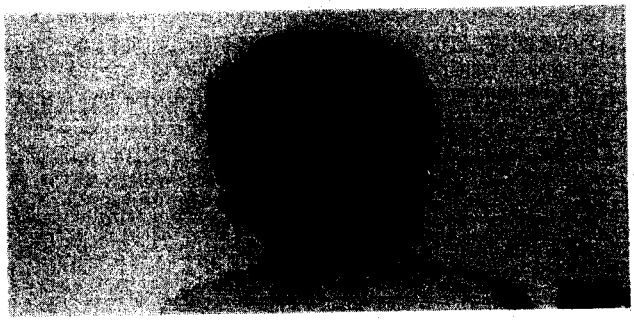
DEBORAH S. HUNT

Debbie tendered her resignation effective January 31, 1985 ending a long career with the Department. She began with the Winchester Trial Office in February of 1981, and when that office closed she came to the Frankfort Trial Services Branch. Thank you, Debbie, for your dedication and service to the defense of those without means. She joins the Child Welfare Office serving the Arizona Navaho Reservation.



RICHARD ARVEDON

Richard joined the Somerset Office as an Assistant Public Advocate March 1, 1981. He came to the Frankfort Post-Conviction Services Branch in May of 1982. He resigned from the Department on January 4, 1985. Thank you, Richard, for your untiring dedication to the rights of indigents accused of crimes. He continues that work on the Arizona Navaho Reservation.

FISCAL COURTS MUST SUPPLEMENT STATE PUBLIC DEFENDER ALLOTMENT WITH ENOUGH MONEY TO OPERATE AN ADEQUATE COUNTY PUBLIC DEFENDER PROGRAM.

In 1972 in Bradshaw v. Ball, Ky., 487 S.W.2d 294 (1972) the Kentucky Supreme Court held that attorneys could "no longer be required to accept court appointments to represent indigent criminal defendants, nor will they be subject to sanction if they decline such appointments," Id. at 300, because "the burden of such service [is] a substantial deprivation of property and constitutionally infirm." Id. at 298. The "constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose service does not unconstitutionally deprive him of his property without just compensation." Id.

In 1972 the General Assembly enacted the Kentucky Public Defender Act, KRS Chapter 31, determining that the fiscal responsibility for public defender programs would be shared between the state and the county fiscal courts with the ultimate responsibility on the fiscal courts.

I. ATTORNEY GENERAL OPINION

In the August 8, 1984 Opinion of the Attorney General (OAG) 84 280 a part-time public defender in a county that has a contract public defender program asked the Attorney General for his opinion on the following questions:

> Q: **"If a county fiscal court contracts with an individual attorney or group of attorneys to provide public advocate services for that county with the compensation to be only what is paid to the county by the state for**

(Continued, P. 24)

such services and what can be collected from the individual defendants, without regard to the number of clients or number of hours required by the attorney or attorneys for such representation, has the county appropriated enough money to administer the program under Chapter 31 of the Kentucky Revised Statutes, or must some consideration to the number of hours provided by the attorney be considered in determining what, if any, money the fiscal court must provide to the system when attempting to make the county's plan conform to the statute?

"How little may an attorney be paid before it will be held that the plan is inadequately funded under the statute?"

In answering these questions, the Attorney General reviewed several sections of KRS Chapter 31.

The Attorney General noted that KRS 31.190 required a fiscal court "to annually appropriate enough money to administer the public advocacy programs" and that KRS 31.050(2) "states in part that [the state allotment of money to the county] is for the 'purpose of assisting the said plan."

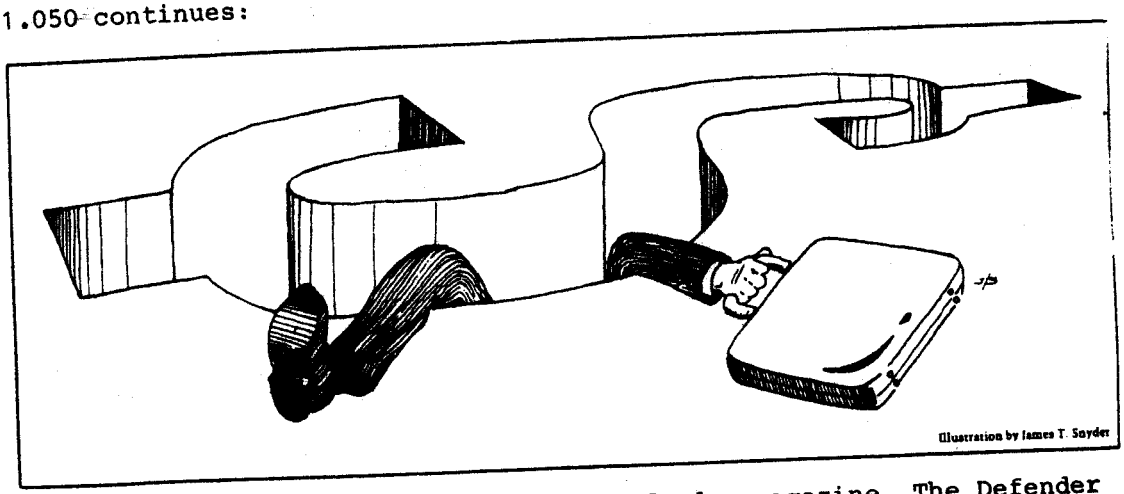
KRS 31.050 continues:

BOB CARRAN

Counties and other units submitting applications under this chapter shall be obligated to pay and shall pay all costs incurred in their own defense of indigent programs which are in excess of the maximum amount allotted or other maximum amount of grant as specified in this chapter.

OAG 84 280 also pointed out that KRS 31.240(3) read, in part: "The county or counties shall be obligated to pay and shall pay all amounts in excess of the state contribution."

(Continued, P. 25)



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After reviewing these statutory commands, the Attorney General concluded in OAG 84 280:

> The court assigning an attorney to represent a needy defendant will prescribe a reasonable fee, which shall be paid by the county.... Under this analysis, the mere agreement of the county to pay only just what the state contributes to the county, plus what the indigent pays, may not meet the requirements of KRS 31.170(3). We do not believe that KRS 31.170(3) was intended to stake out the state contribution as the maximum to be paid by the committed county. In addition, where the court has set the fee under KRS 31.170(3), the fiscal court must, by the terms of KRS 31.190, pay that fee out of county appropriations, even if it equals the maximum provided in KRS 31.170(4). However, the court's prescribed fee should not exceed the legislative maximum set out in KRS 31.170(4).

The Attorney General's conclusion continued:

> It must be noted that in Boyle County Fiscal Court v. Shewmaker, Ky.App., 666 S.W.2d 759 (1984), the Court of Appeals held that a county's plan to fund the local advocacy system with state contribution monies and money paid in by the indigent defendants fell obviously short of the adequate funding contemplated by KRS 31.190. The court said the county had an obligation to pay the fee to the defense lawyer as set by the circuit judge.

II. CONSTITUTIONAL COMMANDS AND ETHICAL DUTIES

In State v. Smith, 681 P.2d 1374 (Ariz. 1984) the Court noted that there were many different methods in the various counties of the state for delivering public defender services. The bidding system in Mohave County was determined to be inadequate by the Supreme Court of Arizona since it 1) did not take into account the time an attorney is expected to spend in representing a client; 2) did not provide for support costs (investigation, paralegals, law clerks); 3) did not account for the competency of the attorney to adequately represent all of his clients assigned him; and 4) did not take into account the complexity of each case. Id. at 1381.

The Court determined that such a system violates state and federal constitutional guarantees of due process and effective assistance of counsel since "an attorney so overburdened cannot adequately represent all his clients properly and be reasonably effective." Id.

Significantly, the Court reminded public defenders of their ethical responsibilities:

(Continued, P. 26)

Therefore, an attorney may be forced to allot his limited amount of time and resources between paying clients and indigent clients or even between different indigent clients. This can result in a breach of the attorney's professional responsibility under DR 5-101, 6-101, 7-101 or 5-105. We remind counsel that accepting more cases than can be properly handled may result not only in refusals for failing to adequately represent clients, but in disciplinary action for violation of the Code of Professional Responsibility. See DR 1-102(A)(6).

The Court noted that the ABA Standards for Criminal Justice, Standards 4-1.2 and 5-4.3 (2d.ed. 1980) required public defenders to decline unreasonable workloads:

> (d) A lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyer's capacity to give each client effective representation. It is unprofessional conduct to accept employment for the purpose of delaying trial.
>
> Neither defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Whenever defender organizations or assigned counsel determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organizations or assigned counsel must take such steps as may be appropriate to reduce their pending or projected workloads.

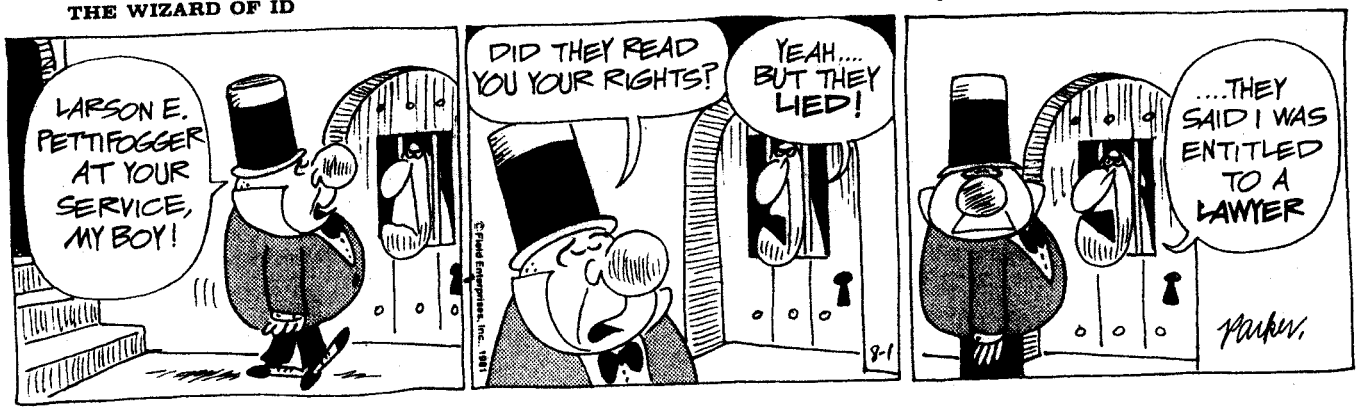
In State v. Robinson, 465 A.2d 1214 (N.H. 1983) the appointed attorney in a misdemeanor theft case submitted a bill for $1,265.00 for legal fees ($20/hour out-of-court and $30/hour in-court) and $429.38 for expenses. The trial court only allowed the appointed attorney $200 of the expenses and the maximum misdemeanor fee of $500.

(Continued, P. 27)

. . . . .

THE WIZARD OF ID

by Brant parker and Johnny hart



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On appeal, the New Hampshire Supreme Court held that the $500 maximum misdemeanor fee could be exceeded for "good cause," and that all "reasonably incurred" expenses had to be paid:

> A fee for the defense of an indigent criminal defendant need not be equal to that which an attorney would expect to receive from a paying client, but should strike a balance between conflicting interests which include the ethical obligation of a lawyer to make legal representation available, and the increasing burden on the legal profession to provide counsel to indigents.
>
> . . . .
>
> The right to counsel as guaranteed by the sixth amendment and part I, article 15 of our own constitution would be meaningless if counsel for an indigent defendant is denied the use of the working tools essential to the establishment of a tenable defense because there are no funds to pay for these items.
>
> . . . .
>
> The State must provide the defense with these tools.

Id. at 1216-17.

III. APPROACHES TO FUTURE LITIGATION

In a September 15, 1984 Draft of NLADA's "Attorney's Fees and Expenses in Criminal and Quasi-Criminal Matters: A Guide for Appointed Defense Counsel and their Clients" it was observed that "Lawyers have been slow to devise arguments which show the factual and legal link between poor compensation and poor representation." That Draft summarizies seven arguments now being presented to demonstrate the link:

"1) Inadequate compensation for defense counsel amounts to an inequality for resources for the defendant. Analogy may be made to cases in which public defender resources, such as a library or investigators, have been unfavorably compared to the resources of the prosecutor. This argument lends itself to equal protection claims when clients of inadequately compensated attorneys are compared to clients of private lawyers or of adequately staffed public defender offices.

2) When uniformly low fees are paid, experienced counsel leave criminal practice to the inexperienced, resulting in a system staffed by novice attorneys. This argument attacks the adequacy of representation throughout the system.

3) Low fees, especially those imposed through inflexible fee schedules, are a "disincentive" for the individual lawyer to investigate and conscientiously prepare a case. See Partian v. Oakley, 227 S.E.2d 314, 322-323 (W.Va. 1976). Even where statutes award reasonable fees, the system encourages plea bargaining, and discourages creative defenses. For example, the court in People v. Parks, 441 N.E.2d 95 (Ill.App. 1982), refused to award compensation for 36 hours the assigned attorney spent working on a novel defense of necessity.

4) ABA Standards, national studies, and available published reports document a connection between low fees and ineffective assistance of counsel. This argument may also be supported by reports and evaluations prepared for legislatures and courts in a particular state or locale. (See the attached annotated bibliography of sources documenting the link between fees and effectiveness of counsel. Appendix C).

(Continued, P. 28)

5) The representation provided by undercompensated attorneys, as a class, results in demonstrably poorer outcomes or harsher penalties than does representation by adequately paid private attorneys or well-staffed public defenders. This argument requires carefully collected data that must take all account all factors which may influence the outcomes on cases assigned to one class of attorneys.

6) Where private counsel are appointed over objection and without regard for their experience in criminal law, they may lack the expertise or the time in which to prepare.

a) This kind of involuntary appointment forces attorneys to violate their professional code of ethics. As an argument, this has the advantage of pitting ethical requirements that an attorney not accept a case for which he or she is unprepared or cannot prepare against ethical obligations to do the best job possible without regard to payment. See Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981).

b) Assigned counsel should appeal to the judicial system's self-interest when challenging fee awards; fees which reflect services rendered actually promote judicial economy. In the long run, low fees cost more than they save. Low fees contribute to a system staffed by young, inexperienced attorneys whose lack of adequate defender training may lead to court backlogs and bottlenecks. Moreover, courts would be free of the additional litigation precipitated by low-fee or fee-less awards.

7. In theory, at least, private counsel might, like the public defender in Cleaver v. Bordenkircher, 634 F.2d 1010 (6th Cir. 1980), become so overloaded with appointments that he or she becomes unable to proceed in a particular case, thereby denying the client's right to effective assistance. This argument may be especially forceful in view of the increase in appointments in quasi-criminal cases.

CONCLUSION

OAG §4 280 details the obvious: local public defender organizations cannot competently and fairly function without adequate funding. Since the 1972 decision in Bradshaw, supra, this obvious inadequacy has been shockingly not litigated until 1984 in Boyle County Fiscal Court v. Shewmaker, supra. The success in Shewmaker coupled with OAG 84 280 should inspire long overdue challenges to longstanding, gross underfunding of local public defender programs.

BOB CARRAN

Bob Carran is a 1969 graduate of Chase Law School. He is in private practice in Covington, and is the administrator of his county's public defender program. Since February 29, 1984, he has served on the Public Advocacy Commission which oversees the Department.

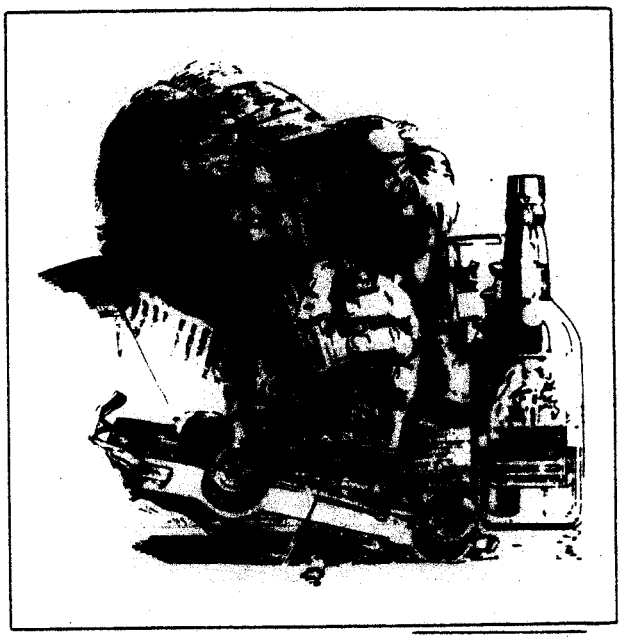
* * * * * *

DEATH PENALTY OPPOSITION

MIAMI - The death penalty "is not necessary to any legitimate goal of the state" and could undermine "the inherent worth of human life," said an interreligious statement signed by Florida's Catholic bishops. The document, issued Nov. 26 and signed by 15 leaders from Chrisitan communities throughout the state in addition to eight Catholic bishops, declared "a moral consensus in opposition to the death penalty." Bishop John Snyder of St. Augustine helped initiate the 1,700-word document, which called for members of the state's churches to curb the use of the death penalty.

Drunk Driving Law

The following two articles appeared on September 22 and 29, 1984 in the Kentucky Post and are reprinted with permission.



JURY ACQUITS MAN,
DOUBTS BREATHALYZER TEST

A Union man whose Breathalyzer reading was well above the legal standard for being considered drunk was found innocent yesterday of drunken driving during a jury trial in Boone County District Court.

In Kentucky, a person is presumed drunk if his Breathalyzer reading is 0.10 or higher. Police say most people slur their speech and have trouble walking when the reading reaches 0.20.

But the jury deliberated for only a short time before Richard Neal, 35, of Hathaway Road, was found innocent. After being arrested in February, Neal had registered 0.18 on the Breathalyzer which measures alcoholic content by analyzing one's breath.

The crux of the jury's decision stemmed from Neal's ability to handle himself before and after he was arrested by Trooper Mike Steward of the Kentucky State Police, jury foreman Mary Anne Scalf said.

The jury also questioned whether Neal was as drunk as the Breathalyzer indicated in light of the fact that he passed most of the initial coordination tests requested of him.

According to testimony presented during the trial, Neal was driving south on I-75 when a car suddenly cut in front of him.

Neal responded by driving about "a half a car length" from the car's rear bumper as the pair traveled from Erlanger to the Ky. 18 exit in Florence, Steward said.

In Steward's citation, issued after the incident occurred in February, the officer said he originally thought Neal's car was being towed because Neal tailed the man even as they changed lanes.

Wilbur Zevely, Neal's attorney, used that point to defend his client.

"The kind of thing that an intoxicated person has trouble doing, he (Neal) had no trouble doing," Zevely said.

Zevely said Neal also passed the drunken driving tests Steward gave him with the exception of touching his nose with his index finger. Neal failed that test because of an inner ear problem, Zevely said.

The defense attorney also told jurors the Breathalyzer reading would have been unnaturally high because Neal consumed most of his alcohol just before driving.

"It's a well-known fact that it takes a half hour to an hour before alcohol

(Continued, P. 30)

really begins working on your system," Zevely said. By driving just after drinking, Neal's driving was not affected as the Breathalyzer would indicate, he said.

According to Neal's testimony, he consumed four to five beers, Assistant County Attorney Steve Neihaus said. Neihaus prosecuted the case.

"His driving was affected by the alcohol, there's no doubt about that," Neihaus said.

If Neal was sober, he would have "realized the danger he was putting people in and backed off a bit," Neihaus said. "It affected the way he was driving and that's what the statute calls for for a conviction."

But Ms. Scalf said the jury felt the charge was not proper.

"It appeared he was capable of his actions, she said. "To be able to handle the car the way he did showed good judgment. That was impressive."

The jury also questioned the accuracy of the Breathalyzer reading after hearing Zevely's comments, she said.

Neihaus echoed the comments of police officers in defending the machine:

"The machine always rounds a reading down, it never rounds a reading up," he said. "Even a margin of error is taken into account."

"If a guy ends up in the front seat of another guy's car, what would they say then? Is that what you need to get a conviction?"

* * *

ANOTHER BOONE JURY DOUBTS DUI STANDARD, BREATHALYZER

For the second time in two weeks a Boone County jury has acquitted a driver of drunken driving despite a Breathalyzer reading about the legal standard.

The latest case came yesterday when Michael Robbins, 23, of 3247 Jefferson Ave., Cincinnati, was found innocent after about an hour of jury deliberation.

A Union man was similarly acquitted September 21 by a different Boone County jury, despite registering 0.18 on a Breathalyzer. In Kentucky, a reading of 0.10 is considered legally intoxicated. In that case, the jury based much of its verdict on the man's ability to handle himself before and after being arrested. The defense also had challenged the accuracy of the Breathalyzer.

Robbins was arrested February 11 in Florence while driving on Ky. 18 near I-75.

Florence Patrolman Ken Stephens stopped Robbins because his car matched the description of a car seen leaving the scene of another incident.

Stephens said Robbins was the man police were looking for, but he declined to comment on what the incident involved. Stephens said it wasn't a factor in the drunken driving charge.

Stephens said he felt Robbins was under the influence because of the way Robbins was talking and the way he performed on a field sobriety test. A breathalyzer test recorded Robbins' blood-alcohol content at 0.17.

In court, defense attorney Harry Hellings questioned the reliability of Breathalyzer readings and exactly what they mean.

(Continued, P. 31)

He argued that there was no testimony showing that Robbins' actions were impaired, so he could not be driving under the influence.

The jury agreed.

"How can you say that a certain amount makes a person drunk?" said jury foreman Upshere White Sr. "Speaking for just myself, I think each person has their own limits. I think the state of Kentucky should sit down and take a look at the whole process."

As to whether Robbins was under the influence, White said he was impressed by the fact that Robbins cooperated with the police after being stopped.

White added he also has concerns about the overall accuracy of Breathalyzer machines and about the sobriety test police use to check a person's motor skills.

And White noted there was no testimony to indicate Robbins was driving in a reckless matter.

* * *

THIRD TIME

The October 26, 1984 Kentucky Post reported a third DUI acquittal in Boone County. The accused in this third case had a Breathalyzer reading of 0.17.

FOURTH TIME!

It was reported in The Kentucky Post on November 8, 1984 that for the fourth time in less than 7 weeks a person with a breathalyzer reading of more than .10 was found not guilty in Boone County. Burr Travis, the accused's attorney, said that the jury members did not feel alcohol impaired Bose's driving.

MANSLAUGHTER ACQUITTAL

The following stay appeared in the October 5, 1984 edition of the Lexington Herald-Leader, and is reprinted with permission.

A Nicholasville woman who was driving the car in which one of her best friends was killed was found not guilty of manslaughter last night.

The verdict in the trial of Eva Joyce Hager came after two hours of deliberations by a Fayette Circuit Court jury.

Ms. Hager, 26, was driving a car that hit a utility pole on Richmond Road early April 8. Killed in the accident was Laura Lee Moses, 23, of 1949 Cambridge Drive.

The two women were longtime friends and former roommates.

Testimony during the trial showed that Ms. Hager's blood-alcohol level measured 0.15 about three hours after the accident. The law presumes a person to be legally intoxicated when the blood-alcohol level reaches 0.10.

(Continued, P. 32)

At the time of her death, Ms. Moses' blood-alcohol level was 0.21, a state pathologist testified during the trial.

According to other testimony, the women had dinner together at Hall's on the River the evening before the accident. They later went to two Lexington nightspots: the Library Lounge and Circus Disco. The accident occurred about 4 a.m. on Richmond Road near Hanover Avenue shortly after the women left Circus Disco.

Fayette County Deputy Coroner Rolan Taylor, who testified for the prosecution, said Ms. Moses died at the scene of the accident of a fractured skull and massive brain damage. Ms. Hager was injured in the accident.

Assistant Fayette Commonwealth's Attorney Connie Sellars, who prosecuted the case, contended that Ms. Hager had shown a reckless disregard for human life by driving while intoxicated.

Lexington attorney, Jim Early, who represented Ms. Hager, told the jury that Ms. Hager was not acting wantonly or recklessly when the accident occurred. He also maintained that, despite her blood-alcohol level, Ms. Hager was not intoxicated. A nurse at Humana Hospital, where Ms. Hager was taken after the accident, testified that Ms. Hager was coherent and did not appear intoxicated when she was examined.

* * * * * *

Whoever undertakes to set himself up as a judge in the field of truth and knowledge is shipwrecked by the laughter of the gods.

ALBERT EINSTEIN

* * * * * *

Cases of Note... ...in Brief

DRUNK DRIVING LAW: MARGIN OF ERROR IN TESTS

In **State v. Boehmer**, 613 P.2d 916 (Hawaii Ct. App. 1980) the court held that "where there is an absence of the other sufficient evidence to support a conviction for driving under the influence of intoxicating liquor and such conviction is, therefore, based solely on a chemical test, the results of such a test when taken together with its tolerance for error, must equal or exceed the statutory level." Id. at 919. This is so because the prosecution bears the burden of proving beyond a reasonable doubt every element of the charged offense. In Boehmer, the testimony was that the breathalyzer machine the accused was tested on had a margin of error of 0.0165%. See also State v. Bjornsen, 271 N.W.2d 839 (Neb. 1978) where the chemist testified that his blood test was not 100% accurate; rather, it had an error or tolerance of 0.005%.

DRUNK DRIVING LAW: CLOSING ARGUMENT

In **Lovelace v. State**, 662 S.W.2d 390 (Tex. 1983) the accused was convicted of driving while intoxicated and sentenced to 180 days and $50.00. The accused's car struck the rear of a Ford Mustang with the car catching on fire and burning the hands, legs and faces of the two occupants. The prosecutor, over defense objection, argued to the jury with references to "flesh hanging off their arms and

(Continued, P. 33)

hands." The court reversed the conviction holding that these references by the prosecutor "injected matters which were not in evidence and were highly inflammatory and prejudicial..." Id at 392.

PROBABLE CAUSE TO ARREST/ SUPPRESSION OF STATEMENT

In People v. Roybal, 655 P.2d 410 (Colo. 1982) the appellate court affirmed the trial courts suppression of the accused's written statement because there was no probable cause to arrest him.

The defendant was charged with vehicular assault due to a collison with another car. When the police arrived at the scene there was no driver present. The defendant then appeared; volunteered that he was the missing driving, saying that he left to call the police. After the accused was placed in the police car and advised of his Miranda rights, he gave a written statement. He was then taken for a blood alcohol test. At the suppression hearing an officer testified: 1) the defendant had "an odor of alcoholic beverage about him"; 2) he "appeared coherent"; 3) "seemed to walk in a fairly normal manner"; 4) he seemed to understand the questions asked during the Miranda advisement; 5) he was "not what would you say overly drunk."

The Court determined that the defendant's detention was an arrest, not an investigatory stop: "Whenever detention and questioning by a police officer are more than brief and cursory there is an arrest, which must be supported by probable cause." Id. at 412.

Noting that an odor of alcohol "is not inconsistent with ability to operate a motor vehicle in compliance with" the law, the Court held that the state did not meet its burden of proving facts constituting probable cause to arrest without a warrant. The statement was suppressed.

DRUNK DRIVING LAW: INADMISSIBILITY OF BLOOD TEST

In State v. Libbey, 453 A.2d 481 (Me. 1982) the accused was convicted of vehicular manslaughter after a bench trial. The defendant was taken to an emergency room where a blood sample showed the presence of benzoylecgonine, a metabolite of cocaine. The Court reiterated that the results of a blood test are only usable if four requirements are met:

> 1) a sufficient foundation must be shown;
> 2) the person conducting the chemical test must be qualified to make such analysis;
> 3) the ingredients used in the testing must be of appropriate quality; and
> 4) it is necessary to explain to the jury the functions of the various chemicals used in the test so that the reliability of the ultimate analysis can be determined.
> See State v. Brewer, 344 A.2d 54, 56 (Me. 1975).

In Libbey, the doctor did not obtain the syringe used to drain the blood from the standard manufacturer certified blood kit. The state offered no proof that the syringe was sterile. There was testimony from the state's analytical chemist that if there had been cocaine or benzoylecgonine on the hospital syringe before it was used, its presence would have been reflected in the test result. That would have destroyed the accuracy of the test.

The Court concluded, "the chemist had insufficient facts and data on which to base his opinion concerning the reliability of, and results of, the

(Continued, P. 34)

blood test due to a total lack of foundation establishing use of a sterile syringe." Libbey at 489.

ADMISSIBILITY OF BREATHALYZER RESULTS

In **State v. Amato**, 474 A.2d 1 (N.J. 1984) the Court reaffirmed the requirements for admissibility of breathalyzer results. The state must show by clear and convincing proof:

> 1) the equipment was in proper order - that it was periodically inspected in accordance with accepted procedures;
> 2) the operator was qualified to administer the instrument - that these qualifications as a breathalyzer operator were properly certified; and,
> 3) the test was given correctly - that it was administered in accordance with the official instructions for the use of the instrument.

The Court held that since the results of Smith & Wesson Breathalyzer Model 900 have not been shown to be affected by radio frequency interference (RFI) except in unusual circumstances which are highly unlikely to occur in the use of this instrument, that the results of the Model 900 can be received into evidence if the above three criteria are proven.

As to the Model 900A, the Court held that results were admissible only if one of the two conditions was proved by the prosecution by clear and convincing evidence 1) the breathalyzer results must consist of two readings within a tolerance of 0.01 percent of each other, or 2) a determination of the RFI sensitivity of the breathalyzer instrument has been made in accordance with the inspection procedures of the New Jersey State Police (See Smith & Wesson September, 1982 customer advisory on tests to preclude RFI). If the machine is not RFI sensitive, the results are admissible. If the machine is RFI sensitive, then it must be shown that hard-held police transmitters were prohibited in close proximity to the instrument, and further extra case was used to shield the machine from RFI.

According to the Court, in "drunk driving prosecutions a substantial burden of proof to establish the competence or admissibility of the results of the breathalyzer test is appropriate because of the serious consequences of the breathalyzer reading in such prosecutions." Id. at 14.

DICTATED HANDWRITING EXEMPLARS

In **United States v. Campbell**, 732 F.2d 1017 (1st Cir. 1984) the prosecution demanded from the accused a handwriting exemplar. When the defendant was told what words to write down, he asked to see what he was to write, rather than take dictation. In other words, the prosecution "wanted something other than handwriting." They wanted "to discover defendant's choice of spelling."

The defendant refused. The prosecutor then was permitted to show that the defendant violated the court's order to provide a handwriting exemplar, and then to argue to the jury the unfavorable inference. Campbell recognized that handwriting exemplars did not violate fifth amendment protections against compelled testimonial self-incrimination because exemplars were matters of physical characteristics, not testimonial. However, the Court concluded that compelling a person to write the dictated word is saying, "This is how I spell it" which is "a testimonial message in addition to a physical display." Id. at 1022. Just as a defendant could not be compelled to

(Continued, P. 35)

take the stand and given a spelling test, he cannot be forced to write the dictated word consistent with his fifth amendment protections.

REFUSAL TO SUBMIT TO BREATHALYZER TEST IS INADMISSABLE

In Commonwealth vs. Hager, Ky.App., ___ S.W.2d ___ (January 18, 1985) the Kentucky Court of Appeals held that the refusal to submit to a breathalyzer test cannot be admitted at trial:

> KRS 186.565 requires that a would-be defendant be informed of possible driver's license revocation upon refusal to submit to enumerated tests, but does not address the admissibility at trial of a refusal to submit to testing. The statute, of course, authorizes a motorist to refuse the test upon the probable consequence of loss of driving privilege. At one time the Kentucky statute (KRS 189.520[6]) provided for comment at trial by the prosecution upon a defendant's refusal to submit to testing as provided in the statute. This provision was stricken down as violative of a defendant's rights under Section 11 of the Kentucky Constitution in Hovious v. Riley, Ky., 403 S.W.2d 17 (1966), and was subsequently deleted from the statute.

ED MONAHAN

* * * * * *

Truth is forever absolute, but opinion is truth filtered through the moods, the blood, the disposition of the spectator.

WENDELL PHILLIPS

* * * * * *

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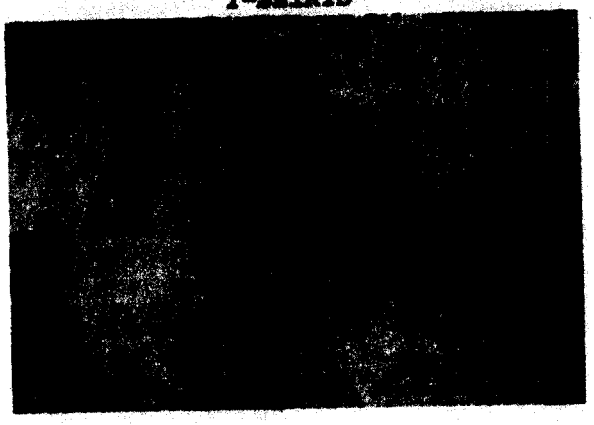

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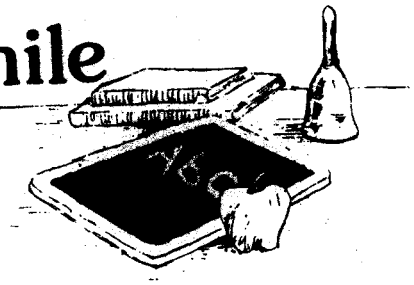
* * * * * *

Adversity reveals genius, prosperity conceals it.

HORACE (65-8BC)

* * * * * *

Juvenile Law



LIMITS ON THE JUVENILE COURT'S AUTHORITY TO INCARCERATE CHILDREN

For years social scientists have been telling us that the incarceration of youthful offenders is a costly, ineffective, and harsh solution to the problem of juvenile lawlessness. They have pointed out that the incarceration of juveniles adds to the risk of teen suicide, often causes the child to suffer unwarranted emotional and psychological distress, is disruptive to the child's growth and development, and often subjects the child to the negative influences of a more aggressive and delinquent peer group. They have noted further that the threat or imposition of confinement has little or no deterrent effect on negative behavior because problem children rarely operate on a rational, cause-and-effect basis.

They have also shown statistically that states like Iowa and Massachusetts, which treat serious juvenile offenders in the community with intensive supervision, have a much smaller percentage of juvenile crime and adult prisoners with juvenile records than states like California and Florida, which incarcerate a large percentage of juvenile offenders.

The Kentucky legislature evidently accepted these findings when it adopted the state's current Juvenile Code, many provisions having become law in 1976 and 1978. The executive branch of our state government evidently is in agreement with the policy disfavoring incarceration since it, through the Cabinet For Human Resources, maintains only one locked residential facility, capable of housing only 30-40 youthful offenders.

Despite persuasive arguments, statutes, and administrative regulations condemning the incarceration of juveniles, juvenile court judges in this state continue to routinely confine youngsters appearing before them. This illegal practice has continued partly due to ignorance, and partly due to the frustration felt by the bench in dealing daily with complex social problems when resources are scarce and difficulties often seemingly defy solution.

To illustrate, one local judge jails all children appearing before him on his own motion at arraignment if they have any court history whatsoever, in order to "show them that he means business," no matter if the previous offense was minor, or if the child was acquitted. In order to solve the local truancy problem, another judge regularly jailed children awaiting trial for truancy if attendance reports were poor after arraignment.

The juvenile court practitioner must vigorously resist judicial rulings like these, as well as all other illegal attempts to incarcerate his client. Relief from illegal confinement must often be sought on appeal or by writ to the circuit court, but it can usually be obtained with a working knowledge of the law.

CONFINEMENT OF STATUS OFFENDERS

With a minor exception, the Juvenile Justice and Delinquency Prevention Act (Bayh Act) bars detention of status offenders in secure facilities. 42 U.S.C. §5633(a)(12)(A) (1983). The act does permit incarceration of status offenders who violate valid court orders, but before ordering detention on such a basis, the court must comply with the

(Continued, P. 37)

numerous due process safeguards set forth in 28 C.F.R. §31.303(3)(1983). Courts rarely, if ever, comply with these regulations.

Despite the fact that the Bayh Act is a funding statute, the court in Kentucky Association for Retarded Citizens v. Conn, 510 F.Supp. 1233, 1246-47 (W.D. Ky., 1980) ruled that because Kentucky had been receiving funds from the United States under 42 U.S.C. §5633 for more than 3 years, a substantive right was created for all status offenders in the Commonwealth prohibiting their confinement in secure facilities.

These federal guidelines clearly take precedence over the provisions of KRS 208.192(4)(d), which allows for the secure detention of status offenders under limited circumstances in the absence of the violation of a valid court order.

ABUSE OF THE CONTEMPT POWER

Given the legal difficulties in incarcerating status offenders, some judges have attempted to convert truants, runaways, and children with behavior problems into delinquents by finding them guilty of criminal contempt, which is considered to be a misdemeanor in Kentucky. Gordon v. Commonwealth, 141 Ky. 461, 123 S.W. 206 (1911). For instance, using a previous example, a judge would order an alleged truant to attend school daily. If the child missed any school days, the child's case would be redocketed for a contempt hearing, almost always prior to trial. The child would then be adjudicated guilty of criminal contempt and be given a sentence of any where up to six months in secure detention.

While Kentucky has not yet ruled on the legality of this bootstrapping procedure, several state courts, placing importance on substance rather than form, have refused to allow status offenders to be treated as delinquents due to violations of a court order pertaining to nondelinquent behavior. W.M. v. State of Indiana, 437 N.E.2d 1028 (Ind. App. 1982); Matter of Jones, 297 S.E.2d 168 (N.C.App. 1982); State In Interest of M.S., 374 A.2d 445 (N.J. 1977); Dept. of Health ex rel. M.H. v. State, 447 So.2d 359 (Fla. App. 1984).

PRETRIAL DETENTION

While Kentucky's statute providing for pretrial detention has yet to be seriously challenged, the principle, at least in certain instances, seems to have passed constitutional scrutiny in Schall v. Martin, ___ U.S. ___, 104 S.Ct. 2403, ___ L.Ed.2d ___ (1984). After a determination of probable cause is made, KRS 208.192 (4)(b)(c) requires the court to determine whether the child should be detained for his own safety, the safety of the community, and to assure the child's appearance in court. This determination is made after the court considers the seriousness of the offense, the possibility that the child would commit an offense dangerous to himself or the community pending trial, the child's prior record, and whether there are charges pending in another jurisdiction.

Given the vagueness of the first two standards, and the failure of the statute to direct the court concerning how much weight to give each factor in relation to each other, it is not difficult to understand that the power to hold a person without bail is often abused, especially by a judge who pays lip service to the presumption of innocence. The statute gives the judge too much room to exercise his personal prejudices. In a recent case, a judge detained a young child accused of shoplifting a

(Continued, P. 38)

small amount of candy. The child's court history consisted solely of minor thefts, many of which were not prosecuted. Denying the child's request to be released pending trial, the judge made the finding that the child was a danger to himself in that he was likely to shoplift again, which would place him at risk of being shot by a store security guard!

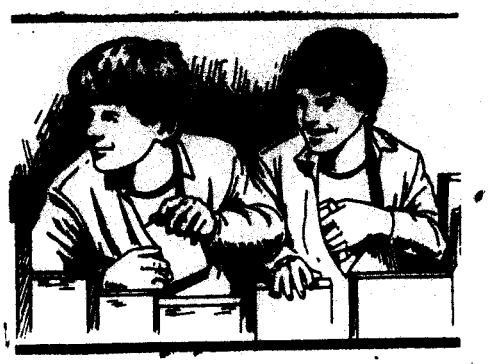
Fortunately, KRS 208.192(6) gives the child statutory authority to seek almost immediate circuit court review by habeas corpus of the legality of all detention orders.

Counsel for the child should always insist that the state's power to hold persons without bail prior to trial should be limited to a handful of cases, where serious, violent felonies are alleged, where the child has a lengthy history of adjudications for similar offenses, where he has refused to appear in court in the past on several occasions, where there are no alternative placements available which provide adequate supervision, and where the evidence of guilt is strong.

DISPOSITIONS

Unless a child is committed at disposition to The Cabinet For Human Resources and is one of the 30 or so selected for residential placement at Central Kentucky Treatment Center in Louisville, incarceration is in most instances not considered a dispositional alternative. [KRS 208.200 (6), (7) does provide, however, for confinement in limited circumstances of adjudicated misdemeanants for up to 30 days.]

The remote possibility of confinement at disposition calls into question the real purpose of pretrial detention. Does it make sense that a person can be required to spend months in confinement while he awaits trial, innocent in the eyes of the law, only



to be released after he is found guilty? Just how dangerous are these formerly detained children, the majority of which, if committed to the state, can be controlled in small, unlocked facilities by a handful of social workers?

It should be clear that, in practice, the pretrial detention statute is used for the purpose of punishment, which is an unacceptable and unlawful goal in juvenile court.

CONCLUSION

KRS 208.060(1) directs that proceedings in juvenile court may be conducted in an informal manner. Some juvenile judges feel that this provision allows them unlimited power to take control over a child's life.

At the first hint that the court is considering incarcerating a child, counsel should immediately demand that the proceedings proceed formally as an adversary process, that the Rules of Criminal Procedure apply as set forth in KRS 208.060(2)(b), and that all due process protections set forth in In Re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and KRS Chapter 208 be applied. If this is not done, the child is more likely to be detained, and counsel's chances for relief on appeal or by writ are diminished.

As Mr. Justice Fortas observed in In Re Gault, 87 S.Ct. 1428, 1444, supra: "Under our Constitution, the condi-

(Continued, P. 39)

tion of being a boy does not justify a Kangaroo court."

PETER L. SCHULER

Pete Schuler is a 1972 graduate of Vanderbilt University and a 1975 graduate of the University of Louisville Law School. After admission to the Bar he was in private practice until 1976 at which time he joined the staff of the Jefferson District Public Defender. Since 1983 he has been Chief Juvenile Defender of that office.

* * * * * *

CAPTAIN KANGAROO

Bob Keesham, TV's Captain Kangaroo, in a speech in New York City on January 29th:

> "In America, we enjoy thinking of ourselves as a society committed to children. Young people are right up there with mother and apple pie.
>
> In reality, we don't eat very much apple pie, we divorce mother, and we usually ignore children."

* * * * * *

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
151 Elkhorn Court
Frankfort, Kentucky 40601
(502) 564-5252

* * * * * *

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The following article appeared in the November, 1984 issue of Criminal Defense Newsletter of the Michigan State Appellate Defender Office.

IMMIGRATION CONSEQUENCES OF CRIMINAL PROSECUTION

For the criminal defendant who is not a United States citizen, conviction may result in severe consequences apart from the judge's sentence, deportation being the most notable. Defense counsel should be aware of these potential consequences before advising a client at any and every level of the criminal process. Knowledge of immigration consequences of conviction should not be thought of as "above and beyond" the duty of defense counsel: at least one court has found that failure to advise a client of the immigration consequences of a guilt plea constitutes ineffective assistance of counsel, People v. Correa, 465 N.E.2d 507 (Ill. App. Ct. 1984).

Asking questions -- lots of questions -- may be the most important rule for criminal defense attorneys handling a case for a client who is not a United States citizen. To begin with, ask the client exactly what his or her immigration status is. Consequences to and rights of the client may vary, depending on whether the client is a legal permanent resident, a person on temporary visa, or an undocumented alien, for example. An alien without proper documentation may already be subject to deportation regardless of criminal proceedings. Someone in the country on only a temporary visa may be made "excludable" (barred from reentering the United States) by a criminal conviction that would not necessarily subject a lawful permanent resident to deportation. Persons eligible for refugee status present special considerations. Title 8 of the United States Code, covering Aliens and Nationality, sets out the rules governing immigration.

Defense attorneys should be certain to ask the client for a detailed account of his or her criminal record. In a manner somewhat analogous to the operation of our habitual offender statute, prior convictions may change a person's immigration status upon imposition of a new conviction.

Ask someone with expertise for help! If you don't know an immigration lawyer who can talk over your case with you, check printed resources. A handbook on Immigration Consequences of Criminal Convictions, updated to early 1984, has been put out by the National Immigration Project of the National Lawyers Guild, Inc., 14 Beacon Street, Suite 407, Boston, MA, 02108 (617) 227-9727. The Project has also produced two more comprehensive volumes available from Clark Boardman (1-800-221-9428), entitled Immigration Law and Defense, 2d ed. (1979), and Immigration Law and Crimes (1984).

A multi-volume treatise covering the whole area of immigration, but including sections on criminal convictions, is Gordon and Rosenfield, Immigration Law and Procedure, Matthew Bender and Co., is available at many law libraries. A shorter version (about 500 pages) is also available: Gordon and Gordon, Immigration and Nationality Law: Desk Edition, Matthew Bender and Co., (1980) (1-800-833-3630).

Speed may be essential when familiarizing yourself with the potential immigration consequences of the charges against your client. Full awareness of immigration consequences of various pleas and sentences is vital for plea bargaining. Plea bargains that would look great in most instances may be inadvisable for an alien client. A client charged with larceny in a fact situation

(Continued, P. 41)

involving prostitution may not want to take a plea to a prostitution misdemeanor, since aliens "who are prostitutes or who have engaged in prostitution" are excludable from the United States, 8 USC 1182(a)(12). Similarly, a great sentence bargain involving only a short time in prison may not be preferable to the risks of trial if the conviction will lead to deportation.

Questions to keep in mind while plea bargaining include:

Can a conviction be avoided? A diversion program that allows the defendant to escape criminal conviction will probably avoid immigration consequences. Voluntary departure under 8 USC 1254(e) might constitute an alternative to prosecution where minor charges are involved.

Will the judge be likely to recommend against deportation? Such judicial recommendation at sentencing will prevent deportation, see 8 USC 1251(b)(2). Note: this has to be done at or within 30 days of sentencing - no nunc pro tunc recommendation is allowed.

Is the crime charged a drug offense or does it involve drugs? Drug convictions result in especially severe consequences, with fewer options to exercise. Furthermore, admissions regarding drug use in nondrug crimes may still lead to immigration problems -- a narcotics addict can be deported just for that status.

Are there any post-conviction proceedings or statutory provisions that may offer the client relief from the immigration consequences of a conviction? In addition to the judicial recommendation against deportation, there are other "waivers" of immigration consequences available in Title 8. The availability of such waivers depends on the client's particular circumstances: conviction of certain crimes, such as drug violations, may bar any practical form of waiver. Post conviction relief such as pardons or expungement may ameliorate immigration consequences in some instances.

Many of these questions are relevant not only to plea bargaining and trial-level strategy, but to appeal strategy as well. The risk of plea-withdrawal or other post-conviction relief may weigh differently when the client faces immigration consequences of a conviction.

Potential issues for appeal may be developed from the client's alien status. For instance, the voluntariness of a plea taken in ignorance of immigration consequences should be questioned, although some courts have held that a defendant need not be advised of immigration consequences at the time a plea is taken. See, e.g. Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976). A sentencing court's misunderstanding or lack of knowledge of immigration consequences might serve as the ground for a resentencing, since a sentence must be based on accurate information. People v. Malkowski, 188 N.W.2d 559 (Mich. 1971).

The nexus between criminal defense and immigration law is obviously too complicated for complete summary here. But as with all issues in criminal law, seeing the existence of a problem is the first step. Asking questions, and doing factual investigation and legal research, are the keys to finding a solution to the

(Continued, P. 42)

problem of immigration consequences of criminal convictions.

MARDI CRAWFORD

The author thanks Rafael Villarruel for suggestions and sources, and specially thanks the National Immigration Project of the National Lawyers Guild and the Federal Defender Program of the Northern District of the United States District Court of Illinois for sponsoring the October conference that made this article possible.

* * * * * *

CYCLIST CLEARED OF BEING THREAT TO SELF, OTHERS

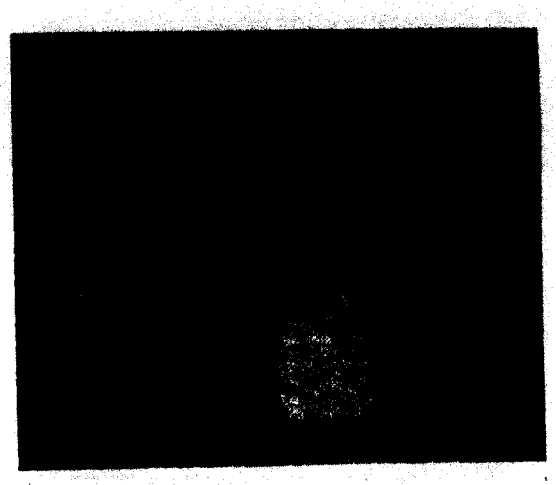
"It was a day for the underdog," his attorney said. That was last Wednesday, when a judge ruled Eddie Merritt wasn't a threat to himself or anyone.

Merritt is the young man commonly seen riding a bicycle -- its handlebars reversed, a knapsack on his back -- around Prestonsburg or on the road to Emma, where he lives in a disabled van.

He wheels to his own rhythm, a beat sufficiently out of sync with the rest of the world that some thought he should be locked up. A district court jury heard law enforcement officers and others argue that he should be "involuntarily committed" to Eastern State Hospital.

Merritt insisted on conducting his own defense -- with occasional advice from Public Defender Ned Pillersdorf -- cross-examining a psychiatrist and police officers who appeared as witnesses against him.

Special Judge John Gardner, district judge in Johnson County, who sat in for the ailing Floyd District Judge Harold Stumbo, said the prosecution had not made enough of a case to



NED PILLERSDORF

submit it to a jury. For one thing, testimony had been heard from only one psychiatrist -- the law requires two opinions before a person can be confined against his will -- and, for another, the evidence of Merritt's erratic cycling fell short of proving he was a danger to himself or anyone else, he said.

The judge issued a directed verdict of acquittal.

"The point is, he got to question his accusers," said Pillersdorf. "He did a good job." And attorney Gary Johnson, commenting on the case, called it "a victory for the right to be eccentric."

Reprinted with permission of the Floyd County Times.

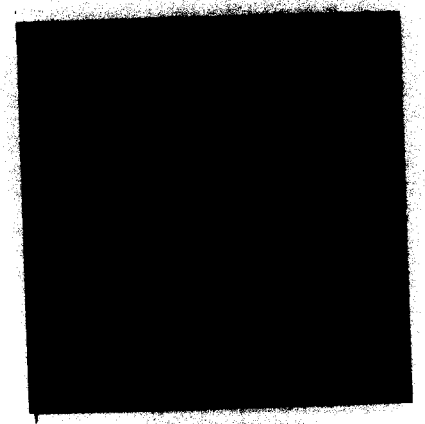
* * * * * *

"When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not close to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self respect are more compelling in the dehumanizing prison environment."

U.S. SUPREME COURT JUSTICE THURGOOD MARSHALL

This is the first of a 5-part series on the defense position, opening statements, cross-examination and closings. These articles originally appeared in NLADA's newsletter.

TRADE SECRETS OF A TRIAL LAWYER - THE DEFENSE POSITION



STEVE RENCH

Before starting a trial, a "game plan" must be developed. This should contain our basic position, and above all, what it is that we are going to "sell" the jury in closing argument.

The defense position is the sum of the various positions to be taken during the trial. These must be consistent with each other so that each step of the trial advances the defense position by putting it in the spotlight and making it emphatically the dominant issue in the trial. It is formulated in the brainstorming process before trial. Areas to consider are as follows:

Choosing a defense
Think of and write down every possible defense. The one which immediately comes to mind may not be the best and probably will be one the prosecution prepares for.

The shotgun or multiple defense may be used when the prosecution has a strong case and your only hope is to attack everything hoping something will turn up.

There are two major disadvantages: (1) There is no way to emphasize all of a number of defenses, and (2) the case lacks integrity since the jury thinks you are fishing.

These disadvantages dictate that normally you choose your single best defense. This permits concentrating total strength and emphasis on one point. Thus, when the jury goes into the jury room your issue cannot help but be the central topic of discussion.

Your best and most fertile defense is ordinarily one which attacks the prosecution at its weakest point - the "fuzzy areas," where the prosecution cannot have mathematical proof. Don't deny the bullet holes, use self-defense, lack of intent, misidentification, no intent to defraud, no intent to steal, etc.

Hypothesis of innocence
A defense which merely attacks the prosecution and says there is a reasonable doubt lacks persuasion. Time spent putting the facts together in a way which explains an incident consistent with the defendant's innocence is most worthwhile.

Answering jury questions
Lawyers think in terms of "lawyer points." Jurors think more deeply and in a more common-sense way. They want to know how the misidentification came about and why the witness is lying. Put yourself in the place of the lay juror, analyze the case from his standpoint and build that into your defense position.

Basic position
With the above considerations in mind, choose a basic position which allows the strongest possible attack on the prosecution case while making the defense least vulnerable. From this we arrive at decisions on subsidiary matters, such as calling the defendant, the psychology of the case, etc. These will be considered in forthcoming columns.

STEVE RENCH

The following article appeared in the September 15, 1984 Lexington Herald-Leader, and is reprinted with permission.

CHURCH MEMBERS REACH OUT TO PRISONERS' FAMILIES

Having a spouse or parent in jail or prison often is similar to a death in the family.

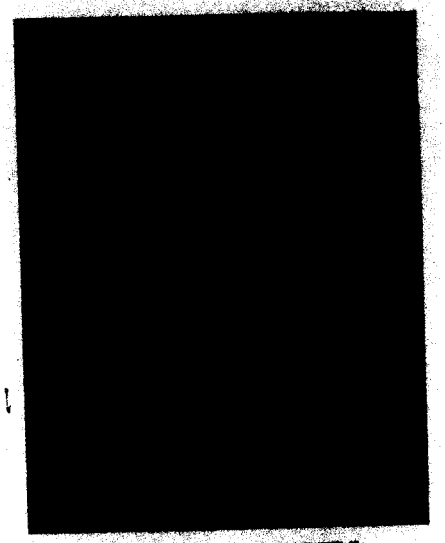
But sometimes it's worse, says the Rev. Thomas Campbell of Lansdowne Cumberland Presbyterian Church. "With death, you don't have embarrassment, isolation and harassment. Some of our families have experienced that loss and heartache. I've witnessed what it means to suffer that loss."

To respond to the needs of those left behind, Campbell has formed a Prison Family Support Group. It meets at 8:00 p.m. at the church on the fourth Tuesday of the month.

As many as 250 families in Fayette County could have a loved one in this situation. Statistics from 1983 show 5,000 inmates in state prisons and reformatories. Five percent of this population is estimated to be from Fayette County.

The need exists because a stigma is placed on people with imprisoned relatives, Campbell said. "It doesn't matter how long or how short the sentence or necessarily what the crime is. The fact is that a loved one has gone to prison.

"If it's a husband and father, all of a sudden the wife is head of the household. She has to pay the bills, get the car fixed, make the decisions that both used to make. Other children aren't kind all the time. They joke, point or isolate the child, and the kid comes home in tears."



THOMAS CAMPBELL

"Friends and neighbors don't know how to respond. They don't know whether to stay away or stay in touch. Even worse, they may not want to be identified with that family anymore. In many instances, the family discovers who their friends really are, the ones who stand by them, regardless of sentence, no questions asked."

Ministers and church members also may be unsure about how to respond. Affected families occasionally have been told not to return to church.

"The church is for sinners," Campbell said. "There's no such thing as purity of the church. We're all sinners, and we all need support, forgiveness and mercy."

"No one has the right to exclude anyone from the congregation because we're all guilty. There's no room for self-righteousness, especially in this category."

Campbell has been encouraged by his parishioners' response to the problem. "It's because of the quality of their lives," he said. "It's the true caring that goes on here."

"This opportunity (to minister) 'found' us," Campbell said. "A committee trying to come up with a

(Continued, P. 45)

way to serve the community would never have come up with this idea."

But several church families have been directly affected. Four members have been found guilty of serious crimes and sentenced to prison.

Lansdowne Cumberland Presbyterian and Campbell responded immediately to the first incident. The pastor recalls what happened.

"This was before sentencing and when the family was under a cloud," he said. "We had a church dinner and invited ourselves to the man's house. Forty or 50 of us were there."

"On the day of his release, 30 of us went to the courtroom. That same night, we had a church dinner at his house to celebrate. The man has been rehabilitated, and he's a productive person. He's warm and caring and very involved in our church."

Campbell found his own involvement growing as he ministered to the prisoners and their families from his church. He also encountered other families experiencing the same thing. And he has since joined Prison Fellowship, founded by Charles Colson, who served time in prison for his part in Watergate.

"Prison Fellowship takes the gospel of Christ to the inmates," Campbell said. "That's fine, but our emphasis (with the new ministry) is to be a supporting and sharing group for the loved ones left behind."

As he has visited prisoners, including one man who has joined his church, Campbell has wondered about their lives behind bars.

"Americans haven't decided what they want their prisons to be and do," Campbell said. "Some want punishment with no holds barred. Some want a holding place where the prisoner can reflect on his life. Some are concerned with rehabilitation. That's the ideal, but little of that takes place."

"Society in general doesn't think about what it's like to be in prison. When they do, they lump all offenders together and say, 'This is where they need to be.'"

That kind of attitude doesn't help those on the outside separated from their loved ones. In some correctional institutions, ministers and attorneys can see the prisoners during the week, but the family can visit only on Saturday or Sunday. Some inmates are limited to one phone call a month.

"Families feel completely out of touch," Campbell said. "They must deal with their grief and their loneliness. And the total terror they feel can be unimaginable."

* * *

For further information and/or transportation, call the church, (606) 272-4315; Campbell's home, (606) 269-5830; or (606) 266-8074.

* * * * * *

He that cannot forgive others breaks the bridge overwhich he must pass himself; for every man has need to be forgiven.

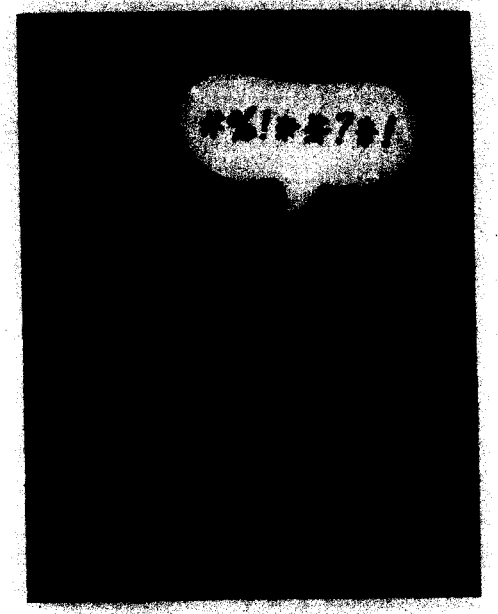
THOMAS FULLER (1608-1661)

* * * * * *

The gem cannot be polished without friction -- nor man perfected without trials.

* * * * * *

Criminal Defense Work: Why?



JIM DOHERTY

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

The lack of response is probably because Bill Johnson really said it all.

Lawyers could compile inspiring phrases from the beginning of time, or quote persons like Vince Aprile. But, you asked for personal comments. All I can offer is words that I wrote in 1958:

DEFENDER'S CREDO

I am a public defender
I am the guardian of the presumption of innocence, due process, and fair trial
To me is entrusted the promulgation of those sacred principles
I will promulgate them with courtesy and respect
But not with obsequiousness and not with fear
For I am partisan; I am counsel for the defense
Let none who oppose me forget that
With every fibre of my being I will fight for my clients
My clients are the indigent accused
They are the lonely, the friendless
There is no one to speak for them but me
My voice will be raised in their defense
I will resolve all doubt in their favor
This will be my credo; this and the Golden Rule
I will seek acclaim and approval only from my own conscience.
And if upon my death there are a few lonely people who have benefited my efforts will not have been in vain.

I have tried to live up to those words. I am still in good health. The good Lord still has work for me. Indeed He still has work for all public defenders.

JIM DOHERTY

Jim Doherty has been an assistant public defender of Cook County, Illinois since 1956, and public defender since 1972. He has been a guest lecturer for the Kentucky Department of Public Advocacy, and Harvard Law School trial seminars, a faculty member of the National College for Criminal Defense. He is the author of a trial manual "Ready for Trial, Your Honor" and a book "Garrett, the Anatomy of a Criminal Appeal." Jim has also been the Chaplain of his American Legion Post for 29 years.

Book Review

The Executioner's Song
By Norman Mailer
Boston: Little, Brown & Company, 1979
1056 pp./$4.95 paperback

And it grew into a calm rage and
I opened the gate and let it out.
- Gary Gilmore

Do not open this book thinking it is the historical best seller of a sensationalized crime. Nor is it entirely the creation of a hefty author. Surprisingly the novel focuses not entirely on Gary Gilmore's life, but exposes the vein fine network of people his life touched, who were not left unscathed, whose gains would be bittersweet and whose losses would be unrecoverable. The prose is supported by letters, newspaper articles and interviews with those most close to Gary Gilmore. Although seemingly lengthy the book flows with prose and dialogue and so captivates that reading becomes a compulsion.

Executioner's Song is a Franklian odyssey for meaning by a marginal person whose life purpose has been defined for years by the Correctional System. Freed at last from that routine, Gary struggles with his liberty. Matters of work and relationships are hurdles he stumbles through ungracefully. Mailer allows you to feel Gilmore's pain, frustration and alienation. Finally, meaning is flung in a relationship and the sheer humaness of that love draws you further in. But for that love, its end, and the series of events following, it seems that his life would not have reached the ultimate historical conclusion.

When I thought I had lost you - Nicole, that Monday night, the next day, and the days that followed, I felt like a man whose flesh had been stripped. I've never felt such pain. And it kept building. I couldn't drown it and I couldn't shake it. It shadowed all my hours.

From a letter to Nicole from Gary.

Ordinary lives are not ended as Gary's was. The execution is discussed matter of factly. Even so the incongruity of the "balm" of execution for society, in proportion to the concern for the life to be taken and the manner in which it was carried out is staggering. Before that end, the media blitz of Gary Gilmore's life became a process beyond containment that engulfed all personal moments and communications. Mailer does not rave, glorify or scorn the life vivisected by the press and dissected post-humously. He pulls a wider range of thoughts from the reader.

Mailer ties up most story lines, but the denouement leaves the reader ever as curious. Had Gary been any less than a man of acknowledged intelligence, skillful communication or perplexing make-up the story would have read less brilliantly. As it is, Gilmore's words are brick work that builds the story to a final scream at the cessation of his life.

CRIS PURDOM

* * * * * *

"There is always a right way and a wrong way, and the wrong way always seems the more reasonable."

GEORGE MOORE

* * * * * *

Future Seminars

DISTRICT COURT SEMINAR

On Thursday, February 28, 1985, the Department of Public Advocacy (DPA) will be conducting a one-day seminar on district court practice at the Capital Plaza Hotel in Frankfort. It will include presentations on:

- Preliminary Hearings
- Motion Practice
- Bail
- Involuntary Commitments
- Trials, Pleas and Sentencing
- Appeals

The faculty will include:

- Harry Hellings
- Bob Lotz
- Jay Barrett
- Will Zevely
- Alan Button
- John Hendricks
- Judge Richard Fitzgerald

DEATH PENALTY SEMINAR

On March 22, 23 and 24, 1985 a 2-1/2 day seminar on the death penalty will be presented by DPA. It will be held at Natural Bridge State Park. Faculty will include Craig Haney and Scharlette Holdman.

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.

THE ADVOCATE
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151 Elkhorn Court
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