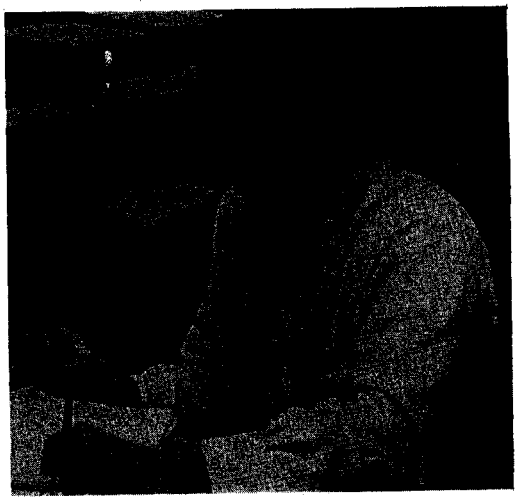
THE ADVOCATE

Vol. 7 No. 3 A Bi-Monthly Publication of the DPA April, 1985

THE ADVOCATE FEATURES



JIM COX

After four years of trying scores of cases in Laurel, Knox, Pulaski, Wayne, Russell, Adair, Casey and Rockcastle counties, Jim has his own definition of success: "Success is turning around that client who started out with a bad attitude about public defenders, and had no respect for the law. But by listening and sympathizing, by caring and showing that you will be there to help, that client changes. And maybe you have been fortunate indeed and gained some relief for the client on his charges. And some time later he meets you on the street, and greets you as a friend."

A 1980 graduate of the University of Tennessee, Jim began his career with DPA's London Office in April 1981,

(See Jim Cox, Continued, P. 48)

13TH ANNUAL
PUBLIC ADVOCACY SEMINAR

The 13th Annual Public Advocacy Seminar will be held May 12-14, 1985 at the Radisson Plaza Hotel in Lexington. On Sunday, May 12, there will be the Supreme Court Review, a Movie and evening presentations.

Topics for the seminar include:

- **Creative Approaches to the Impossible Criminal Case;**
- **Search & Seizure;**
- **Trial Preparation;**
- **Jury Challenges of Pools and For Cause and Prosecutorial Use of Peremptories;**
- **Direct Examination;**
- **Cross-Examination;**
- **Recoupment;**
- **Federal Considerations in State Criminal Proceedings Joint Jurisdiction; Sentencing; Parole Revocation**
- **Stress**
- **Women Attorneys and the Practice of Law**
- **Juvenile Law**
- **Post-Conviction Law**
- **Incest Defense**

In addition to lectures on Direct Examination there will be large group demonstrations and small groups with individual critiquing.

The faculty for the seminar includes:

Barbara Fleisher	Mike Moloney
Garvin Isaacs	Campbell Cantrill
Richard Lustig	Allen Holbrook
Bob Carran	Dr. Tom Miller
Harry P. Hellings	Ivan Ray Weir

If you need further information, please contact Ed Monahan.

THE ADVOCATE

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Inside

DISTRICT COURT PRACTICE SEMINAR COMPLETED

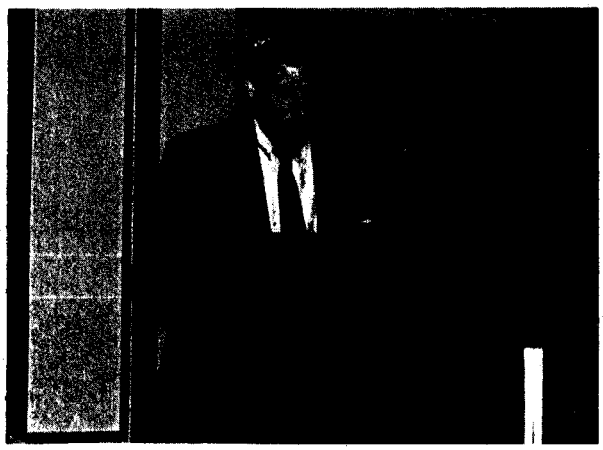
The Department held a one-day seminar on District court Practice on February 28, 1985 in Frankfort. Over 80 attorneys were in attendance. Allen Button spoke on Preliminary Hearings and District Court Appeals. A panel composed of Judge Richard J. Fitzgerald, Pre-trial Services Director John Hendricks and Jay Barrett presented the topic Bail. Bob Lotz and Mike Hammons lectured on Involuntary Commitments. Harry P. Hellings addressed District Court Motion Practice and Will Zevely spoke on Bench Trials, Jury Trials, Plea Bargaining and Sentencing in District Court.

Thanks to all who made it a success!

ALLEN BUTTON AND PAUL F. ISAACS

ED MONAHAN WITH WILL ZEVELY

JUDGE RICHARD FITZGERALD WITH JOHN HENDRICKS



HARRY HELLINGS

JUDGE FITZGERALD, JAY BARRETT AND ALLEN BUTTON

West's Review

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

Linda K. West

Kentucky Court of Appeals

In **McMurray v. Commonwealth**, Ky.App., 32 K.L.S. 1 at 13 (January 11, 1985), the Court of Appeals held that the trial court should have granted the defendant's RCr 11.42 motion to vacate the judgment against him. The judgment in question was entered November 16, 1983, and sentenced the defendant to five years imprisonment. The judgment attempted to rescind an earlier judgment entered October 4, 1983, which sentenced the defendant to five years probation and six months in jail. The probated sentence was imposed based on the defendant's assertion that he had no prior record. When his probation officer later obtained records showing that, in fact, the defendant had an extensive criminal record in Iowa, the trial court entered the second judgment. This was error since under CR 59.05 a trial court loses any authority to modify a judgment after 10 days of its entry except pursuant to a proper motion under RCr 11.42 or CR 60.02. In McMurray, no such motion was made by the commonwealth.

In **Commonwealth v. Hager**, Ky.App., 32 K.L.S. 2 at 1 (January 18, 1985) the Court held that it was error to introduce as evidence the fact that the defendant to a drunk driving charge refused to take a breathalyzer test. The Court noted that such comment was at one time specifically permitted by KRS 189.520(6). However, that statute was struck down as violative of the guarantee against self-incrimination provided by Kentucky Constitution Section 11. See Hovious v. Riley, Ky., 403 S.W.2d 17 (1966); Compare South Dakota v. Neville, 103 S.Ct. 916 (1983) (comment on refusal to take a breathalyzer test does not violate the Fifth Amendment). The Court found Hovious to be determinative of the issue before it. The Court also concluded that the introduction of such evidence was more prejudicial than probative. "There are many reasons why a motorist would choose not to submit to testing... he or she may be suffering from other maladies characteristic of drunkenness, or no maladies at all."

In **Sharp v. Commonwealth**, Ky.App., 32 K.L.S. 2 at 6 (January 25, 1985) the Court found error in the admission of a doctor's deposition regarding the extent of the victim's injuries. The commonwealth obtained admission of the deposition on the grounds that the doctor would be unavailable to testify at trial since he would be quail hunting. The doctor was not subpoenaed nor did the record show that he was asked to delay his hunting trip. The Court concluded that "the commonwealth failed to make a good-faith effort to obtain the physician's presence at the trial." In the absence of a good-faith effort to obtain the witness' testimony the witness was not "unavailable." Ohio v. Roberts, 448 U.S. 56, 74 (1980). Consequently, the admission of the deposition violated the defendant's right of confrontation.

The Court of Appeals reversed the defendant's reckless homicide conviction because of prosecutorial miscon-

(Continued, P. 5)

duct in **Cole v. Commonwealth**, Ky. App., 32 K.L.S. 3 at 2 (February 8, 1985). The defendant presented a highly credible self-protection defense. The defendant also filed a motion in limine seeking to disallow any comment by the prosecutor on the defendant's prior offenses involving guns, or the defendant's alleged practice of carrying a gun. The charged homicide involved a shooting death. Despite the motion in limine, the prosecutor chose to repeatedly ask the defendant in cross-examination about his previous use of guns and whether he was "quick to pull a gun." The prosecutor advised the trial court that he had asked the questions to show that the defendant was "trigger-happy." The Court of Appeals held that this was misconduct warranting a mistrial. "In view of the prior motion in limine and the persistent questions by the Commonwealth Attorney, we are convinced that appellant was denied his right to a fair trail."

The Court held that Harrel Rogers was unfairly prejudiced by being tried with a codefendant. **Rogers v. Commonwealth**, Ky.App., 32 K.L.S. 3 at 2 (February 8, 1985). Rogers and his codefendant, Chisholm, were charged with receiving a stolen tractor. Chisholm admitted possession but claimed Rogers told him they had permission to take the tractor. Rogers relied on an alibi defense. The Court, citing Compton v. Commonwealth, Ky., 602 S.W.2d 150 (1980), held that the defendant should have been granted a separate trial. "In this case, Chisholm would not have been acquitted unless he and the commonwealth had convinced the jury that Rogers was guilty." Thus, the codefendant's antagonistic defense was a probable factor in Rogers' conviction.

In **Hopewell v. Commonwealth**, Ky.App., 32 K.L.S. 3 at 7 (February 15, 1985), the Court of Appeals affirmed the trial court's denial of relief under RCr 11.42. Hopewell had alleged ineffective assistance of counsel in his trial attorney's failure to move for a directed verdict or to request an instruction on facilitation. However, no prejudice was shown. "Even if we concede that trial counsel should have requested a directed verdict or the instructions, we find no prejudice, because Hopewell was not entitled to a directed verdict, and the appropriate instructions were given." The Court also agreed, in passing, with the trial court's refusal to appoint counsel on Hopewell's 11.42 motion. See Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984).

In **Foley v. Commonwealth**, Ky.App., 32 K.L.S. 3 at 12 (February 22, 1985) the Court upheld the defendant's conviction of assaulting a seven-week-old infant. The Court held that circumstantial evidence, consisting of the infant's injuries, medical evidence regarding how the injuries must have occurred, and the fact that the defendant had sole custody of the infant at the time of the injury, was sufficient to sustain the conviction. The Court also held that it was permissible to introduce evidence that the infant victim had several old rib fractures and bruises. The Court found this evidence relevant as tending to controvert the defendant's defense of accident. "While the old injuries were not linked to appellant, their presence tends to show that the child was not 'involved in many accidents' but rather was the victim of assaults."

Kentucky Supreme Court

The Court delineated those circumstances in which an instruction on criminal trespass must be given. **Commonwealth v. Sanders**, Ky., 32

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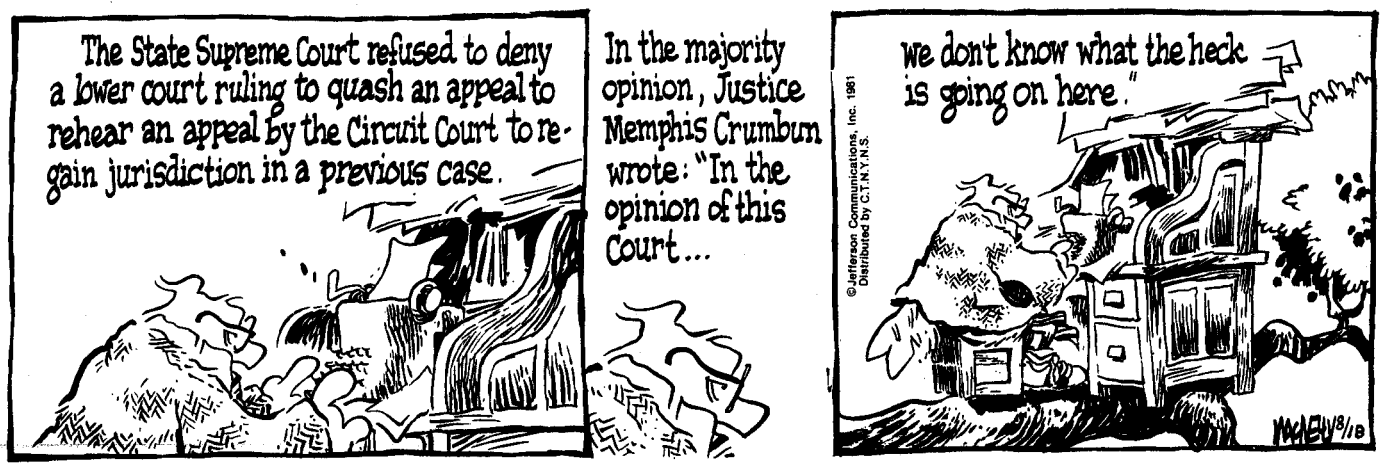

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K.L.S. 3 at 15 (February 28, 1985). The defendant was seen fleeing from a burglarized home from which items of property were found to be missing. The defendant asserted an alibi defense. The Court of Appeals reversed the defendant's second degree burglary conviction because of the failure to instruct on criminal trespass. Criminal trespass differs from second degree burglary, only in that burglary has the added element of "with intent to commit a crime." Reversing the Court of Appeals, the Supreme Court noted that a different panel of the Court of Appeals had previously held, on "markedly similar" facts, that the defendant was not entitled to a criminal trespass instruction. Polk v. Commonwealth, Ky.App., 574 S.W.2d 335 (1978). The Supreme Court concluded that Polk was the sounder decision. The Court compared its own decision in Martin v. Commonwealth, Ky., 571 S.W.2d 613 (1978), wherein the Court held that an instruction on criminal trespass was required. In Martin, the defendants admitted entering the dwelling but testified they were so intoxicated they could not have formed a culpable intent. Sanders, in contrast, relied on an alibi defense. However, the Court observed "[w]e are not saying that in some circumstances a criminal trespass instruction would not be required even when the defense is alibi." The rule ultimately articulated by the Court is that a showing of unlawful entry "permits the jury to infer intent to commit a crime in the absence of other facts which would justify the lesser degree instruction."

In **Crane v. Commonwealth**, Ky., 32 K.L.S. 3 at 15 (February 28, 1985) the Court held that, once a hearing is held pursuant to RCr 9.78 and a finding is made by the trial judge that a confession is voluntary, that finding is conclusive of the issue at trial and evidence relating to the voluntariness of the confession may be excluded from the jury's consideration. Under this rule the voluntariness of the confession is not an issue for the jury's consideration. However, the Court noted that "[t]his shall not preclude the defendant from introduction of any competent evidence relating to authenticity, reliability or credibility of the confession." Justice Leibson dissented.

In **Commonwealth v. Liuzzi**, Ky., 32 K.L.S. 3 at 16 (February 28, 1985), the Court affirmed the denial of Liuzzi's RCr 11.42 motion alleging ineffective assistance of counsel. The decision reversed the decision of the Court of Appeals which found that Liuzzi's counsel was ineffective for failing to request a directed verdict at Liuzzi's PFO trial when the commonwealth introduced no direct proof of Liuzzi's age at the time of commission of his prior felonies. See

(Continued, P. 7)

Hon v. Commonwealth, Ky., 670 S.W.2d 851 (1984). The Supreme Court, by contrast, found that "evidence of the age at time of each prior offense was faultlessly developed." The Commonwealth introduced proof of the dates of commission of the prior offenses and of the defendant's birth date. According to the Court "[t]his was precisely the direct evidence envisioned by this court in Hon, supra, and failure to ask any witness of the ultimate conclusion is not error."

The Court held that a six-year-old rape victim was competent to testify in **Pendleton v. Commonwealth**, Ky., 32 K.L.S. 3 at 17 (February 28, 1985). The Court found that the decision that the witness was competent to testify was within the sound discretion of the trial court and therefore "will not be disturbed on appeal." The Court also held that the trial court properly admitted testimony by the victim's sister that she had been sexually assaulted by the defendant over a period of years. "Evidence of independent sexual acts between the accused and persons other than the victim are admissible if such acts are similar to that charged and not too remote in time, provided the acts are relevant to prove intent, motive or a common plan or pattern of activity." The Court overruled Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972) and Rigsby v. Commonwealth, Ky., 335 S.W.2d 949 (1960) to the extent that they would admit such evidence to show "lustful inclination." Finally, the Court held that the defendant was not entitled to introduce a psychologist's testimony that the defendant's psychological profile was not consistent with that of a sex offender. The testimony was inadmissible "because it is an opinion on the ultimate fact, that is, innocence or guilt." Justices Leibson, Aker, and Gant dissented.

United States Supreme Court

In a case originating in Kentucky, the Supreme Court has held that due process guarantees a state criminal defendant the right to effective assistance of counsel on an appeal of right. **Evitts v. Lucey,*** 469 U.S. ___, 105 S.Ct. 830, 83 L.Ed.2d 821, (January 21, 1985). On appeal of Lucey's conviction to the Kentucky Court of Appeals Lucey's counsel perfected the appeal in a timely manner with the exception of failing to file a statement of appeal. The Court of Appeals dismissed the appeal and the Kentucky Supreme Court affirmed. Lucey's motion for a belated appeal filed in the trial court was denied. The U.S. Supreme Court affirmed a grant of habeas on the grounds of ineffective assistance. The Court noted that Lucey's appeal to the Court of Appeals was an appeal as a matter of right. Kentucky Constitution, §115. The Court has, of course, long since recognized that a state which affords a right of appeal must also insure that such an appeal is more than a "meaningless ritual" by supplying indigent appellants with counsel. Douglas v. California, 372 U.S. 353 (1963). Based on the premise of Douglas and on the Sixth Amendment right to effective assistance of counsel at trial, the Court concluded that "[a] first appeal as of right... is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Chief Justice Burger and Justice Relinquist dissented.

(Continued, P. 8)

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*Bill Radigan, formerly an Assistant Public Advocate, represented Lucey in the United States Supreme Court. Congratulations, Bill!

The Court has held that its ruling in Edwards v. Arizona, 451 U.S. 477 (1981) is to be retroactive to the extent of applying to cases on direct appeal at the time Edwards was rendered. **Shea v. Louisiana**, 36 CrL 3153 (February 20, 1985). The Court in Shea adopted a rule identical to the rule stated by it in United States v. Johnson, 457 U.S. 537 (1982). In that case the Court held that Payton v. New York, 445 U.S. 573 (1980), a Fourth Amendment case, was to be applied retroactively to all convictions that were not yet final at the time that Payton was rendered, except in those situations that would be clearly controlled by existing retroactivity precedents to the contrary. The Court saw no reason for adopting a different rule as regarded the Fifth Amendment holding in Edwards. The Court distinguished Solem v. Stumes, ___ U.S. ___, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), in which the Court denied the retroactive benefit of its holding in Edwards although a clear Edwards violation was presented. Stumes had exhausted his state court appeals and was appealing a denial of habeas corpus at the time Edwards was decided. Thus, the difference between Johnson and Stumes was, respectively, "the difference between a pending and undecided direct review of a judgment of conviction and a federal collateral attack upon a state conviction which has become final." Because Shea's conviction was on appeal at the time Edwards was decided it was not yet "final" and thus garnered the benefit of Edwards. Chief Justice Burger, and Justices Rehnquist, O'Conner, and White dissent.

LINDA WEST

Linda has been with the DPA since 1976, the year in which she graduated from the University of Kentucky School of Law. Linda has authored "West's Review", a regular feature of The Advocate, since April 1979.

Post-Conviction
Law and Comment


McGehee Isaacs

PFO STATUTE: IS IT FAIR?

GUEST ARTICLE BY J. ROBERT LILLY

The following article appeared in the September 9, 1984 Lexington Herald-Leader and is reprinted with permission.

Within the last few months, the Kentucky news media have devoted considerable attention to overcrowding in the state's prisons and jails.

Much of that overcrowding is the result of "get-tough laws" passed in recent years. The problem is so serious that one out of every 325 United States citizens are now in jail or prison, one of the highest incarceration rates in the modern world. The magnitude of the problem has generated demands for new jails and prisons and alternatives to incarceration.

One example of the "get-tough" approach is Kentucky's Persistent Felony Offender law. Attorney General David Armstrong, in a recent interview in the Herald-Leader, said he opposes any changes in the PFO law because it attacks the problems of recidivism and the habitual criminal. He has said publicly that to change the law would "turn career criminals back on the street." He also has said publicly that elected leaders should "determine the appropriate response to crime in their commonwealth." Unfortunately these seemingly simple and unquestionable conclusions are misleading.

It should be kept in mind that the occupant of the attorney general's office is an elected official whose primary decisions are most likely politically expedient. But this does not mean the decisions are just. Consider the fact that the PFO statute has caused a dramatic increase in people being sent to prison. In 1979 only 70 people were in Kentucky's prisons under PFO statute. By June 1984, 1,187 people were in Kentucky's prisons because of the PFO statute. Moreover, this 1,500 percent increase has not reduced Kentucky's crime rate, although it has generated good press for those advocating the construction of new prisons.

The PFO law also prevents offender access to a parole hearing for a longer than normal time. This is a significant problem because it prohibits a first-degree persistent felony offender's eligibility for parole until that offender has served a term of incarceration of not less than 10 years. This minimum term applies irrespective of the class of felony the underlying conviction falls under (A, B, C, or D) and irrespective of the sentence imposed by the jury or judge.

This means that virtually all first-degree persistent felony offenders will serve the same effective term of incarceration. The forger serving a 10-year sentence for a $150 bad check does the same 10-year minimum term as the first-degree rapist doing life. The shoplifter of a color TV does the same 10-year minimum term as the armed robber. This result runs directly contrary to the beliefs that (a) the punishment should fit the

(Continued, P. 10)

crime, and (b) the jury, judge and parole board are best equipped to fix punishment.

The 10-year minimum term without parole also means that a first-degree PFO's self-improvement or good behavior while incarcerated in prison will have no reward. Without such incentive these offenders present serious disciplinary problems in the prisons and serious recidivism problems when they finally get out. As study after study has found, keeping a person in prison is a near perfect predictor that they will return again to prison. Do we want this to occur?

THE 10-YEAR MINIMUM SENTENCE IS PRESENTLY THE MAJOR HAMMER OVER THE HEADS OF THOSE CHARGED WITH FIRST DEGREE PFO.

Next, consider the impact of the PFO statute on plea bargaining and prison overcrowding. The 10-year minimum sentence is presently the major hammer over the heads of those charged with first degree PFO, and it results in forced guilty pleas for lesser offenses. People from counties where the prosecutors will deal to drop PFO I, irrespective of the crime committed, will fare better than those who are not offered, or will not accept, such a bargain namely the poorly represented, the underprivileged and the innocent. This argument is strengthened when it is realized that those sentenced in Kentucky under the PFO law are 42 percent black and 58 percent white. This suggests that, proportionate to their population in Kentucky, blacks are more criminal than whites, an argument that no one seriously considers.

But what does it mean? It might mean that blacks are subjected to prosecutors' discretionary use of the PFO law at a suspiciously higher rate than whites. Is this just, or politically expedient to elected county prosecutors? The answer may possibly be found in the fact that 76 percent of all convicted PFOs come from only seven counties in Kentucky. Does this mean that there are no PFOs in the remaining 113 counties? Or does it mean the prosecutors in the seven counties have in the PFO statute a dangerous discretionary tool that may be used to force guilty pleas for lesser offenses? This is a fundamentally unfair situation because it places almost total sentencing power in the prosecutor's exercise of his plea bargaining discretion. This is why the prosecutors do not want this law amended.

As currently used, the PFO law is extremely costly to Kentucky citizens. For instance, a person convicted of passing a $150 bad check that results in a 10-year minimum sentence under the current PFO law, would cost taxpayers approximately $15,000 per year in prisoner support alone. In other words, this nonviolent crime would cost the taxpayer approximately $150,000 because some Kentucky legislators, judges and prosecutors think the PFO is a good thing. Simple arithmetic tells us that we cannot afford this kind of usage of the PFO law. To continue, it would cost $270 million to keep 2,000 PFOs, and this is without building the necessary new prisons to house them.

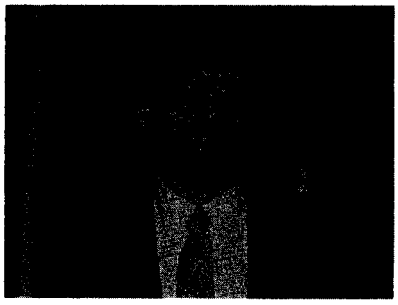
The PFO statute is a valuable instrument for dealing with the truly dangerous criminal. However, there is ample reason to doubt that this is occurring. It appears the PFO law has been used to get quick and politically advantageous convictions at the expense of our most disadvantaged citizens. Modification of this law is therefore needed. At the very least, the 10-year minimum section of the

(Continued, P. 11)

current PFO law could be removed. This would not eliminate the enhancement of sentences for multiple felony offenders found elsewhere in the statute. Such a modified statute would result in better discrimination between PFO offenders so as to reserve prison space for the truly violent offenders.

* * * * * *

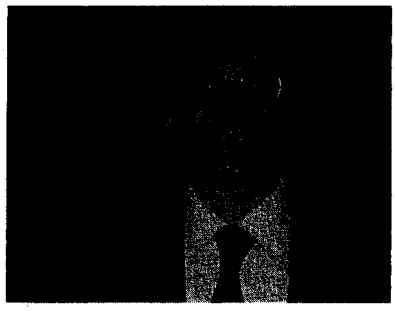
NEW ASSISTANT PUBLIC ADVOCATES



PHIL CHANEY
joins our Somerset Office

LOU ANN DARLING
joins our Stanton (Gorge) Office

RITCHIE BOTTOMS
joins our Northpoint Office



BILL WARDMAN
joins our Hazard Office

JAMES CARTER
joins our Hopkinsville Office

SANDRA SIMMONS
joins our Pikeville Office

NEW ASSISTANT PUBLIC ADVOCATES IN EASTERN KENTUCKY

The Death Penalty

Kevin M. McNally

KENTUCKY'S DEATH ROW POPULATION - 23
PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 95

EQUAL JUSTICE UNDER LAW: WE WIN A BIG ONE

AKE V. OKLAHOMA, 36 Crim.L.Rptr. 3159 (Feb. 26, 1985)

The last death penalty column appeared in The Advocate (Vol. 6, No. 6) (Oct. 1984) six months ago and focused on the issue of money for experts in indigent cases. The United States Supreme Court has gone a long way towards clarifying this potent issue in capital and non-capital cases alike. The question was "whether the Constitution requires that an indigent defendant have access to psychiatric examination and assistance...[as to] mental condition, when his sanity...is seriously in question." 36 Cr.L. at 360. Not surprising, the answer is a resounding yes. What is noteworthy is the near unanimity (8-1) and sweep of the opinion.

A. NON-CAPITAL CASES, TOO!

Despite the Chief Justice's attempt to state otherwise in a brief, but puzzling, concurrence, the decision is not limited to capital cases. "We hold that when a defendant has made a preliminary showing that his sanity ...is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance.... 36 Cr.L. at 3161.

A separate section of the opinion was devoted to the sentencing phase of Ake's capital trial (§III B). "[D]ue process requires access to a psychiatric examination on relevant issue, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase." 36 Cr.L. at 3163. The sole dissent by Justice Rehnquist "would limit the rule to capital cases...", thus indicating that the rule isn't so limited. 36 Cr.L. at 3164.

B. EX PARTE HEARING

"When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." 36 Cr.L. at 3163.

C. CONFIDENTIALITY

Ake holds that an indigent defendant is entitled to "access to an expert of his own." 36 Cr.L. at 3163. See generally Barefoot v. Estelle, 463 U.S. 800, 899 n.5 (1983). This constitutional right goes far beyond the "independent psychiatric evaluation" argued by Justice Rehnquist. 36 Cr.L. at 3164. The dissenter feels that the Constitution only requires "a psychiatrist who acts independently of the prosecutor's office... [not] an opposing view, or a 'defense' advocate." 36 Cr.L. at 3166.

D. RIGHT TO A COMPETENT DEFENSE CONSULTANT

While Justice Rehnquist would require the "independent" expert to "be available to answer defense counsel's questions prior to trial", he objects to providing, as the Court does, "a defense consultant." 36 Cr.L. at 3165, 3164. The majority does make it

(Continued, P. 13)

clear that Ake's right includes more than just a psychological test. "[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 36 Cr.L. at 3163 (emphasis added).

The Court sees the psychiatrist's role as "gather[ing] facts both through professional examination, interviews and elsewhere... analyz-[ing] the information...draw[ing] plausible conclusions... They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." 36 Cr.L. at 3162 (emphasis added). The constitutional right at stake here can only be satisfied by appointment of one competent psychiatrist devoted to assisting defense counsel in preparing the case. The Court repeated "competent" three times... clearly indicating that not any warm body will do. 36 Cr.L. at 3162, 3163.

E. STATE PSYCHIATRISTS NOT A SUBSTITUTE

Ake was committed to a state mental hospital for 3 months to be evaluated for competency. At trial, defense counsel called 3 psychiatrists but "none testified about his mental state at the time of the offense because none had examined [Ake] on that point." 36 Cr.L. at 3160. Nevertheless, federal constitutional error was found because "Ake's mental state was a substantial factor in his defense."

F. DUE PROCESS RIGHT

The Ake holding is not based on the right to counsel or the equal protection clause but "that the denial of that assistance deprived him of due process." 36 Cr.L. at 3164. U.S. CONST., 14th AMENDS. This could be significant for private counsel who represent indigent defendants and for issues involving access to scientific testing (i.e., production of evidence, transfer of the client to an environment suitable for psychiatric testing).

THE AKE HOLDING IS NOT BASED ON THE RIGHT TO COUNSEL OR THE EQUAL PROTECTION CLAUSE BUT "THAT THE DENIAL OF THAT ASSISTANCE DEPRIVED HIM OF DUE PROCESS."

G. OTHER EXPERTS

The Court will soon decide whether an indigent capital defendant was entitled to "appointment of investigator and ballistics and fingerprint experts at state expense..." Caldwell v. Mississippi, 36 Cr.L. 4044 (1984). Caldwell was argued on February 25.

H. INDEPENDENT STATE GROUND OR SILLY PROCEDURAL RULE?

The Oklahoma Attorney General attempted to convince the Court to sidestep the merits by relying on the Oklahoma Supreme Court's holding that Ake's claim was waived. "...[I]n his motion for a new trial Ake had not repeated his request for a psychiatrist...." 36 Cr.L. at 3161. The United States Supreme Court refused to go for the bait, pointing out that the Oklahoma court reached the merits as well. Anyway, the "Oklahoma waiver rule does not apply to fundamental trial error... [F]ederal constitutional errors are 'fundamental'... [Therefore] before applying the waiver doctrine...the state court must rule, either explicitly or implicitly, on the merits of the constitutional question." 36 Cr.L. at 3161. See also James v. Kentucky, 104 S.Ct. 1830 (1984).

(Continued, P. 14)

REHNQUIST'S REVENGE! WAINWRIGHT V. WITT, 105 S.Ct. 844 (1985)

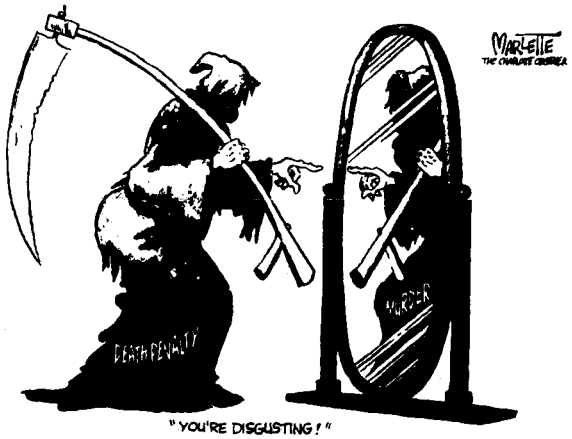
A. THE STANDARD

The Court has once again struggled with the question of who may be excluded from participation on capital juries. In Witt, the court has adopted a (temporary? helpful?) revisionist view of both Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980). The standard for excluding jurors in death penalty cases was contained in the much-cited footnote 21 of the Witherspoon opinion. The court permitted a venireman's exclusion for cause only if he made "unmistakably clear" either:

> (1) that [he] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before [him], or (2) that [his] attitude toward the death penalty would prevent [him] from making an impartial decision as to the defendant's guilt. 391 U.S. at 522 n.21 (emphasis the Court's).

The Court endorsed that standard for excusing death-scrupled jurors as recently as 1980 in Adams. 448 U.S. at 44. However, in Witt Justice Rehnquist noted "the statements in the Witherspoon footnotes are in any event dicta." 105 S.Ct. at 851. The Witt majority emphasized a standard supposedly promulgated in Adams which "differs markedly from the language of footnote 2." Id.

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Adams, 448 U.S. at 44 (emphasis added by the Court, quoting Adams in Witt, 105 S.Ct. at 850).



credit: Marlette/Charlotte Observer

Importantly, the Supreme Court did not overrule Witherspoon or Adams. It said it was "clarifying" Witherspoon and "reaffirming" Adams. Witt, 105 S.Ct. at 852. "We adhere to the essential balance struck by the Witherspoon decision rendered in 1968...." Id. at n.5. "We begin by reiterating Adams' acknowledgement that 'Witherspoon is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude....' Adams v. Texas, 448 U.S. at 47-48." Witt, 105 S.Ct. at 851.

On the surface, it appears that Witt has done three things. First, the separate guilt and sentencing tests are simplified and combined. Second, the Court has moved away from words like "automatic" and "unmistakable clarity" and towards the less rigid standard of "prevention or substantial impairment." Finally, the prosecution's burden of proof, Rehnquist claims, is not as "extreme." 105 S.Ct. at 851.

(Continued, P. 15)

However, it is unclear what these adjustments actually mean in terms of who can be excluded from capital sentencing juries in Kentucky. First, Witherspoon notwithstanding, unmistakable clarity has not been the standard in Kentucky for some time. Gall v. Commonwealth, Ky., 607 S.W.2d 97, 103-104 (1980). Addressing the problem as a "technical error", the Gall Court upheld exclusion of a juror who did "not say whether he can or cannot consider without prejudice the options from which he must choose...."

Second, Witt may have more to do with its factual context and defense counsel's acquiescence in the excusal of the juror than a major shift in direction. Adams is the basis upon which it is claimed that a retreat from Witherspoon has occurred. But there was no mention of this in Adams. In fact, Witherspoon was reaffirmed in Adams and the burden placed upon Texas to show that the excluded jurors were "so irrevocably opposed to capital punishment as to frustrate the State's legitimate" pursuit of the death penalty. In fact, "Adams quoted Witherspoon's footnote 21 with approval..." Witt, 105 S.Ct. at 866 (Brennan, J., dissenting).

Third, it is simply not clear how far the rest of the court is willing to go with Justice Rehnquist. The author of Witt, it must be remembered, was the lone dissenter in Adams. Only five years ago, Justice Rehnquist denounced the Adams majority as "expanding" Witherspoon not restricting it. As usual, Justice Stevens puts it all into perspective. Explaining why he can't join in "so much discussion that is unnecessary to this case", he drops a footnote: "I do agree with the Court's observation that dicta is not binding in future cases." 105 S.Ct. at 858 n.1 (Stevens, J., concurring).

B. TRIAL JUDGE'S DISCRETION

The Adams standard, as did Witherspoon's, gives the trial judge considerable leeway in making credibility determinations. The Court equated death-qualification with "excluding jurors for innumerable other reasons which result in bias...." 105 S.Ct. at 855. As in Patton v. Yount, 104 S.Ct. 2885 (1984), a non-death case, a trial judge's ruling on a challenge for cause is a factual finding entitled to a "presumption of correctness" in federal habeas corpus cases unless one of 8 exceptions apply. 28 U.S.C. §2254(d). Witherspoon reversals will occur in federal court when the judge's excusal of a veniremen is not "fairly supported" by the record (exception 8 in 2254(d).)

The Witt Court was quick to caution trial judges that the decision was not meant "to denigrate the importance of an impartial jury... 'The trial court has a serious duty to determine the question of actual bias... In exercising its discretion, the trial court must be zealous to protect the rights of an accused.'" 105 S.Ct. at 855 (emphasis added); quoting United States v. Dennis, 339 U.S. 162, 168 (1950). Hopefully, these are not empty words.

One way to ensure this is to request findings by the trial judge, where appropriate, as required by 2254(d). While Witt holds that "under the circumstances...the judge was [not] required to announce for the record his conclusion that [the] juror was biased, or his reasoning...", Witt goes on to state "the Court was given no reason to think that elaboration was necessary..." 105 S.Ct. at 855-56 (emphasis added). It is up to defense counsel to protect the record by requesting specific findings which explain the basis of an excusal for cause. Trial judges should be re-

(Continued, P. 16)

minded that "it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." 105 S.Ct. at 852. The prosecutor has the burden of proving a venireman is, in effect, biased. "Lack of impartiality" is strong language we can use to our advantage.

C. NO OBJECTION.
NO REHABILITATION:
THE IMPLIED RIGHT TO ASK QUESTIONS

The juror in Witt acknowledged personal beliefs against the death penalty and this colloquy with the prosecutor followed:

> [Q] Now, would that interfere with you sitting as a juror in this case?
>
> [A] I am afraid it would.
>
> [Q] You are afraid it would?
>
> [A] Yes, sir.
>
> [Q] Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> [A] I think so.
>
> [Q] You think it would.
>
> [A] I think it would.
>
> [Q] Your honor, I would move for cause at this point.
>
> THE COURT: All right. Step down.

The Court described it as "noteworthy that in this case...defense counsel did not see fit to object to juror Colby's excusal, or to attempt rehabilitation." 105 S.Ct. at 856 (emphasis added). Justice Stevens's concurring opinion focused solely on counsel's failure to object. 105 S.Ct. at 858-859. He believed competent trial counsel "could well have made a deliberate decision not to object to the exclusion of Colby because he did not want her to serve as a juror." Id. It is quite obvious from Witt that counsel has the right to supplement the court's or prosecutor's death-qualifying questions with interrogation of his own. White v. Commonwealth, Ky., 671 S.W.2d 241 (1983) so indicates. "The Witherspoon test" is "sometimes not readily understood by laymen and frequently requires additional questioning." 671 S.W.2d at 245 (emphasis added).

IT IS QUITE OBVIOUS FROM WITT THAT COUNSEL HAS THE RIGHT TO SUPPLEMENT THE COURT'S OR PROSECUTOR'S DEATH-QUALIFYING QUESTIONS WITH INTERROGATION OF HIS OWN.

D. AN EXCUSAL WILL BE FAIRLY SUPPORTED BY THE RECORD WHEN THE RECORD IS ONE-SIDED

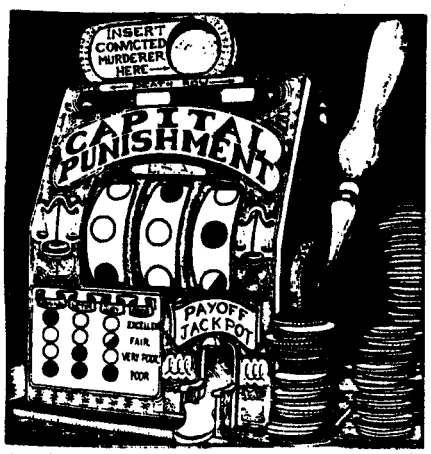
In refusing to find a 2254(d)(8) exception, the majority found the juror's excusal "fairly supported by the record". Ambiguity was countenanced principally because defense counsel failed to attempt to resolve any -- implicitly declaring the defendant's satisfaction with the juror's excusal. By failing to exercise his right to rehabilitate, Witt will not be heard to complain.

> This questioning might have resolved any perceived ambiguities in the questions; its absence is all the more conspicious because counsel did object to the trial court's excusing other veniremen... Indeed, from what appears on the record it seems that at the time Colby was excused no one in the courtroom questioned the fact that her beliefs prevented her from sitting. The

(Continued, P. 17)

reasons for this, although not crystal clear from the printed record, may well have been readily apparent to those viewing Colby as she answered the questions.
105 S.Ct. at 858.

Certainly Witt teaches us that we must attempt to rehabilitate death-scrupled veniremen and object to their removal. "[C]ounsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing [Witt's] claims." 105 S.Ct. at 856 n.11.



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E. WATCH OUT JUSTICE REHNQUIST: REVERSE WITHERSPOON OR WITT'S BOOMERANG!

Of course, the motivations of the author of Witt are readily apparent to all who follow capital punishment jurisprudence. If the aim is to relax the standard for excusing veniremen with reservations about capital punishment, thereby creating more "hanging juries", Witherspoon, 391 U.S. at 523, the result may be the opposite. As support for the death penalty continues to rise, the so called "automatic death penalty" [ADP] veniremen may begin to outnumber the "Witherspoon excludables" [WE]. As that happens, Witt will have a boomerang effect. A Media General-Associated Press [MG-AP] (Lexington Herald-Leader, A2 (1/29/85)) poll taken in January, 1985 reveals these attitudes regarding the death penalty:

should be used in all murder cases	- 27%
appropriate for some murders	- 57%
never appropriate	- 12%
unsure	- 4%

The 27% of the population who are ADPs is over twice the percentage of WEs (12%). Although many trial judges already do so, one searches the Southwest Reporter in vain to find a discussion of exclusion of a Kentucky ADP on appeal. This means that many Kentucky trial lawyers and some of the judiciary have ignored or been insensitive to the flip side of Witherspoon excusal -- otherwise known as "reverse-Witherspoon."

This type of challenge for cause has been recognized elsewhere - even by the United States Supreme Court. As Justice Black, dissenting in Witherspoon, 391 U.S. at 536, stated:

> [I] would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against not inflicting the death sentence on any person convicted of murder (a juror who claims, for example, that he adheres literally to the Biblical admonition "an eye for an eye").

Justice Rehnquist himself takes note of "reverse-Witherspoon" challenges in his dissent in Adams, 448 U.S. at 53. Exclusion must be the same, he wrote, for "someone who was 'too hard' ...on the death penalty...[as

(Continued, P. 18)

for] a person...[who is] 'too soft'..."

> I cannot believe that the court would question the excusal of a juror who [was an ADP]... The question is...of logical consistency.... Id. (emphasis added).

In Patterson v. Commonwealth, 283 So.2d 212 (Va. 1981), the Supreme Court of Virginia found reversible error in the trial court's refusal to permit questions designed to expose cause challenges to ADP jurors. See also Pierce v. State, 604 S.W.2d 185 (Tex.Cr.App. 1980).

Some would dispute the number of ADPs identified in the MG-AP survey. "Despite the hypothetical existence of [ADPs]...such jurors will be few indeed." Adams, 448 U.S. at 50. See also Grigsby v. Mabry, ___ F.2d ___, slip opinion at 18 n.14, 19 (Jan. 30, 1985) [death qualification violates the U.S. Constitution, Amendment VI; ADPs one or two percent... "negligible"]; Hovey v. Superior Court, 616 P.2d 1301, 1344 (Cal. 1980) ["There are tentative indications in the record that this group may be as small as 1% (or less)...or as large as 28%."]

This debate is essentially irrelevant to the Kentucky experience for two reasons: 1) The difference between polls and actual exclusions of ADPs is due, in large part, to our failure to develop and pursue this issue. However great or small the percentage of ADPs, it certainly is more than zero. 2) No matter what the percentage of ADPs, reverse-Witherspoon jurors in Kentucky are numerically significant because of Kentucky's statutory scheme - which includes a possible punishment of 20 years. Even if a venireman can fairly consider a less than death sentence in a capital case, some will still balk at a 20 year sentence, one of "the options from which [they] must choose." Gall, 607 S.W.2d at 103.

Witt then, if it is viewed as a relaxation of the use of cause challenges, applies to ADPs as well as minimum sentence excludables [MSEs] -- those who would object to twenty years. Additionally, under Witt it appears that automatic death penalty veniremen need not necessarily be automatic. Now if a juror's views on capital punishment or on a minimum sentence (20 years) "would prevent or substantially impair the performance of his duties", he must be excluded. The bottom line is that we must demand consistency from our trial and appellate judges. What is good for the goose is good for the gander. Witt may come back to haunt its author yet.

RECENT EXECUTIONS

26) Linwood Briley (VA.) 10/12/84;
27) Thomas Barefoot (TX.) 10/30/84;
28) Ernest Knighton (LA.) 10/30/84;
29) Velma Barfield (N.C.) 11/2/84;
30) Timothy Palmes (FL.) 11/8/84;
31) Alpha Otis Stephens (GA.)12/12/84
32) Robert Lee Willie (LA.) 12/28/84;
33) David Martin (LA.) 1/4/84;
34) Roosevelt Green (GA.) 1/9/84;
35) Joseph Carl Shaw (S.C.) 1/11/85;
36) Doyle Skillern (TX.) 1/16/85;
37) James Raulerson (FL.) 1/30/85;
38) Van Roosevelt Solomon(GA.)2/20/85
39) John Paul Witt (FL.) 3/6/85;
40) Steven Morin (TX.) 3/13/85.

KEVIN MCNALLY

Kevin has been a trial and appellate public defender with the Department of Public Advocacy since 1976 and Death Penalty Coordinator since 1982.

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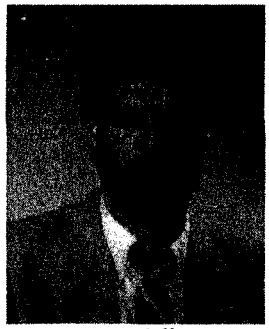
Sixth Circuit Survey



Neal Walker

THE FEDERAL CONSTITUTION AND PERSISTENT FELONY OFFENDER PROCEEDINGS

FINNEY v. ROTHGERBER

In Finney v. Rothgerber, No. 84-5157 (6th Cir., decided January 8, 1985), the Sixth Circuit ruled in a habeas corpus case that, as a matter of federal constitutional law, the defendant has the right to have the jury instructed that no adverse inference may be drawn from his failure to testify during a sentence enhancement proceeding. "We conclude that the Due Process Clause requires a trial court, if requested, to instruct the jury during the enhancement portion of a bifurcated trial of one charged as a persistent felony offender that no adverse inference may be drawn from the defendant's failure to testify." Id. at 12.

This case is significant for its recognition that the Federal Constitution is implicated in the enhancement phase of a persistent felony offender proceeding. "In many respects the enhancement phase of a persistent felony offender proceeding is a new and separate trial." Id. at 11. "Much is at stake in these proceedings." Id. 11.

Of interest is the fact that the court noted (in a footnote) that the Supreme Court of Kentucky had recently ruled that a trial court was required to give a no adverse inference instruction during the enhancement phase of a persistent felony offender trial. See Hibbard v. Commonwealth, Ky., 661 S.W.2d 473 (1983). However, the Sixth Circuit expressly noted that the Kentucky case did not rest on federal constitutional grounds. "This decision rested on a provision of Kentucky Criminal Rules rather than the Constitution of the United States." Finney, slip opinion, p. 12, n.2.

This case, then, stands for the proposition that a defendant in a persistent felony offender proceeding is entitled to the Fifth Amendment's protection against self incrimination. Counsel should not be reluctant to cite this opinion in support of arguments that other federal constitutional protections should apply during the enhancement phase of a P.F.O. proceeding.

ENTRAPMENT: TIME OF PREDISPOSITION

UNITED STATES v. LASUITA

In United States v. Lasuita, No. 83-1478 (6th Cir. decided Jan. 18, 1985), the Sixth Circuit reversed the defendant's conviction for conspiring to sell marijuana on the grounds that the jury had been improperly instructed on the law of entrapment. At issue in the case was the time at which the government must prove that the defendant was predisposed to commit the crime. The time when the predisposition must exist is not usually important issue in entrapment cases because the time of contact is usually simultaneous with, or very close to, the time the crime was committed. However, in the cited

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case, there was a lapse of time of three weeks between the initial contact by the undercover D.E.A. agent and the actual marijuana sale.

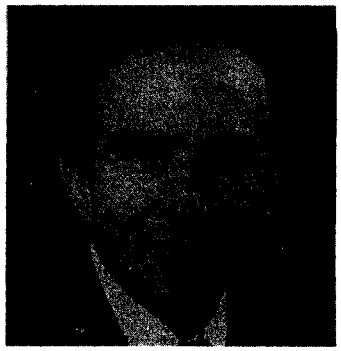
In the cited case, the judge effectively instructed the jury that the prosecution did not have to prove that the defendant was willing to commit the offense at the time that he was initially approached by the government agent, but rather only that the defendant was predisposed to commit the crime at the time of the offense. This was error. "[T]he prosecution must show that the defendant was willing to commit the offense at the time when the government agents initially contacted the defendant to propose the wrongful conduct." Id. at 8. "The agents may not take a defendant who is initially truly unwilling to commit the offense and then induce him to become a criminal." Id. at 8. Thus, the critical time for the existence of a defendant's predisposition is the time when the criminal opportunity is presented to the defendant.

NEAL WALKER

* * * * * *

POLYGRAPH EXAMINATIONS

Patrick J. Livingston has recently been hired full-time by the Department of Public Advocacy as a polygraph examiner. Pat is a graduate of the University of Miami, Coral Gables, Florida, and received his polygraph training at the Zorn Institute of Polygraph, Miami, Florida. He has been employed as Security Consultant and Polygraph Examiner in Louisville, Ky., as well as taught at the Criminal Justice Institute, University of Louisville prior to coming aboard with the Department of Public Advocacy. Pat's background includes employment with the Federal Bureau of Investigation as a Special Agent with assignments in Louisville, Ky., Oklahoma City, Oklahoma, Miami, Florida, and Detroit, Michigan. Pat will be conducting tests throughout the state and looks forward to assisting Department of Public Advocacy attorneys with specific issues concerning defendants they are representing.



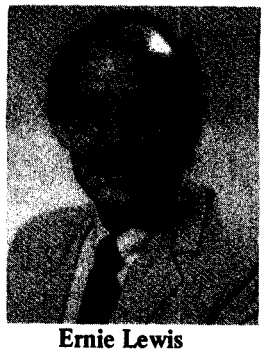
PATRICK J. LIVINGSTON

The primary polygraph technique that he utilizes is the Baxter's zone of comparison (modified military) technique. This polygraph technique incorporates control questions allowing the non-deceptive or innocent person equal reactions on the polygram charts. To provide credible results during the polygraph exams, questions are limited to single issues. For example, "did he or she commit the particular criminal act involved" or "did he or she have specific knowledge of the criminal activity involved." Individuals with specific medical conditions, such as pregnant women, recent heart patients or diabetics using insulin, cannot be tested.

Requests for polygraph examinations should be made in writing to Patrick J. Livingston, Department of Public Advocacy, 151 Elkhorn Court, Frankfort, Kentucky 40601 (tel: 502/564-3765) on a timely basis. The request should state the defendant's name, a synopsis of the case facts and the objective of the polygraph exam. Specific issues to be tested for should be stated.

DAVID STEWART

Plain View



Ernie Lewis

THE PLAIN VIEW

The United States Supreme Court, in the month of January, made three relatively significant decisions. In two of them, the court continued to explore police intrusion short of the traditional standard of probable cause. In the third decision, the court extended even further the reach of the arm of the police into that most American of institutions, the car. And, all too typically, in all three cases, the state won over the rights of defendants charged with crimes.

UNITED STATES V. HENSLEY

In the first case, **United States v. Hensley**, 469 U.S. ___, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985), the Court once again appeared to try to meet the exigencies of the modern police department. In Hensley, the court was examining the issue of whether a police officer can stop and detain a person who is the subject of a wanted flyer from a foreign police department in order for the detaining officer to discover whether an arrest warrant has in fact been issued. Justice O'Connor, in writing for a unanimous court, held that a police officer may in fact rely upon a wanted flyer from a foreign police department in detaining a person who meets the particular description of that wanted flyer. The court stated that evidence discovered as a result of the detention is admissible if the police department who issued the flyer had a "reasonable suspicion" to justify the detention and the detention which ultimately occurred is not significantly more intrusive than the original police department would have been justified in accomplishing.

The Court in rendering its decision reversed a decision of the Sixth Circuit whereby the Court had held that due to the fact that there was no warrant by the original police department, and that there was no ongoing crime by the suspect, that there was no reasonable suspicion and thus no justification for making a Terry stop, United States v. Hensley, 713 F.2d 220 (6th Cir. 1983). The Sixth Circuit had held that in order for a stop under these circumstances to occur, criminal activity had to be imminent, and reasonable suspicion that the suspect was involved in that criminal activity had to be present.

In summing up the decision, the Court stated that "we conclude that if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification...to pose questions to the person, or to detain the person briefly while attempting to obtain further information."

The decision the Court reached in Hensley makes sense on one level, an observation which is not particularly shocking given the unanimity of the court. Police departments rely upon communications from other police departments and from other officers within their department all of the time. We live in a transient society and the "fleeing felon" is not an uncommon occurrence. On this level, it makes sense to impute the probable

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cause or reasonable suspicion of one police department to that of another police department relying upon a wanted flyer from the original police department.

What I am concerned about in the Hensley decision is the potential for abuse inherent in this holding. Accurate information upon which to base an arrest, or a Terry stop, is hard enough to maintain within a police department. However, the moment that information is placed on a wanted flyer and becomes stale, the moment that information is entered into the N.C.I.C., in other words, as soon as information is communicated to officers who have no first-hand knowledge concerning the suspect or the crime, then the potential for abuse is great.

It will be recalled that Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) relied a great deal upon a police officer's instincts. The intrusion into the privacy of the individual in Terry was partly justified because of the experience of the police officer, and his instincts concerning whether a crime was about to occur or had just occurred. Hensley, however, removes that element of Terry and allows police officers to act based upon the cold statements in a wanted flyer or coming off an N.C.I.C. printout. Thus, whereas one could justify Terry based upon the exigencies of police work, those protections are not available in a situation such as we have in Hensley.

Once again, a balancing test is used in arriving at the decision. Increasingly, the Supreme Court is using these balancing tests, balancing the interests of society against the interests of the individual. Here the Court states that they were balancing "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." The results of the balancing tests were obvious when the test was stated in that fashion.

It is important to note that, so far anyway, no good faith exception has developped to meet this particular situation. The Court stated specifically that "if a flyer has been issued in the absence of a reasonable suspicion, then a stop and the objective reliance upon it violates the Fourth Amendment. In such a situation, of course, the officers making the stop may have a good faith defense to any civil suit." However, the Court makes clear that the second police department's good faith reliance upon the flyer does not allow the evidence discovered to be admitted.

The Court further left a very significant question open as a result of its opinion. The flyer in this case said "to pick up and hold," based upon a reasonable suspicion. Obviously, Terry v. Ohio, supra, does not allow for an extensive intrusion into the privacy of an individual by prolonged detention. See Dunaway v. New York, 442 U.S. 299, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). Hensley is not saying that the officers in this case could have taken Hensley down to the police department to do what the flyer asked them to do, which was to hold for the first police department. "Our decision today does not suggest that such a detention, whether at the scene or at the Covington Police Headquarters, would have been justified given the distance involved and the time required to identify and communicate with the department that issued the flyer. Such a detention might well be so lengthy and intrusive as to exceed the plausible limits of the Terry stop."

(Continued, P. 23)

The public defender faced with a situation such as we have in Hensley will need to go back into the information of the original police department to see whether either probable cause or reasonable and articulable suspicion existed. In order to make a motion to suppress based upon an illegal arrest, counsel cannot rely solely upon the testimony of the police officers of the second police department. All they will have to say in order to justify their search is that they operated in objective reliance upon a wanted flyer. Thus, counsel will need to attack the articulable suspicion or probable cause of police department number one.

NEW JERSEY v. T.L.O.

The Hensley case is a case that public defenders will come to know and use. On the other hand, public defenders likely will seldom use the case of **New Jersey v. T.L.O.**, 469 U.S. ___, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). Here the Court, by Justice White, in a decision must praised by the educational community, held that searches of students by teachers and administrators do not have to be supported by probable cause but rather must only be supported by reasonable grounds. Under the circumstances, there must be reasonable grounds for suspecting that the search will turn up evidence of a student's violation of either rules of the school or of the law. Further, the search which is conducted must be reasonably related to the objectives of the search and must not be excessively intrusive given both the age and sex of the student and the nature of the particular infraction which is involved.

That is what the court held. This decision, while obviously of great importance to the educational community, is of little direct importance to the kind of law in which most public defenders are involved. However, the decision is of interest

for many other reasons. First of all, the court rejected New Jersey's attempt to take student searches outside of the Fourth Amendment. The court held that the Fourth Amendment in fact applies to students, that they have an expectation of privacy, and that the search of students by an administrator is not a private search.

A second interesting aspect of the decision is the relative unanimity of the desire to forego a requirement for warrants in the schools. The dissent was willing to carve out an exception in student search cases where probable cause existed similar to a search incident to a lawful arrest. Thus, the court agreed that in the instance of the public school, other rules need apply than classic Fourth Amendment doctrine.

However, the dissenters harshly criticized the majority for going too far in venturing outside of traditional Fourth Amendment concepts. The majority held that probable cause is not required for making a warrantless search of a student. The dissenters, including Justices Stephens, Brennan

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and Marshall, would require probable cause prior to allowing for a warrantless search.

Another interesting aspect of the opinion is that it gave Justice Stephens another opportunity to criticize the majority for emasculating the Fourth Amendment. He observed that the majority "not only grants prosecutors relief from suppression orders with distressing regularity, but also is prone to rely on grounds not advanced by the parties in order to protect evidence from exclusion." He goes on to call the decision to allow for full blown searches based upon a reasonableness test "a curious moral for the nations' youth."

It is suspected that public defenders will use the T.L.O. case in juvenile court and will need to aggressively explore what it is that is meant by reasonable grounds for a search. Further, defense counsel will need to get the school official to articulate exactly what it is that made him/her suspect the student of a violation of the law, and to articulate precisely what law and/or school rule or regulation was involved. Further, defense counsel will need to explore the particular means and measures used in searching for evidence by the teacher to ensure that a suspicion, for example, possession of marijuana in a purse such as existed in the T.L.O. case, does not turn into a complete full blown search of a locker or a gym bag.

Finally, all public defenders will need to know the T.L.O. case for what it says about the course of Fourth Amendment law and to be able to further anticipate where this Court will be moving.

UNITED STATES v. JOHNS

The third case to be decided by the court in January was the case of the **United States v. Johns**, 105 S.Ct. 881 (1985). In this particular case, the police seized a vehicle with probable cause to believe that it contained marijuana. Thereafter, they waited three days from the time of the seizure of the vehicle until they searched the contents of the truck at which time they found that the truck contained marijuana. The issue raised by the decision was whether the passage of time of three days tendered an otherwise lawful search under United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), an illegal search.

The Court held that the seizure did not violate the Fourth Amendment, stating "there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure." The Court did not state, however, that there was no outer limit beyond which the seizure would be illegal. Rather, the Court states that "we do not suggest that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search."

The petitioner had argued that the United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) was dispositive of the case. You will recall that Chadwick held that a warrant was required to search the contents of a footlocker despite the fact that probable cause existed to believe that the footlocker contained contraband. Rather, the Court used the automobile exception to the warrant requirement of Carroll v. United States, 267 U.S. 132, 45 S.Ct.

(Continued, P. 25)

280, 69 L.Ed.2d 543 (1925), and United States v. Ross, supra, to hold that no warrant is required to search either a vehicle or the contents of anything in the vehicle where probable cause exists to believe that contraband is within that vehicle.

In dissent, Justice Brennan joined by Justice Marshall, repeated his displeasure with the United States v. Ross case. He stated that under his view of the Fourth Amendment, only a seizure of the container from the car could be done without a warrant. In order to search the container, a warrant should be required.

The opinion is important for two reasons. First of all, it demonstrates that the decision in United States v. Ross upholding the warrantless search of a car and anything found therein where probable cause exists continues to be an accurate statement of Fourth Amendment law, and that extensions of that particular holding can be expected to occur.

Even more importantly is an issue that was not argued in the case. The United States Supreme Court has never held that probable cause can be established based upon "plain odor." In dicta to United States v. Johns, the Court appears to be asking for the right case to hold explicitly that a plain odor exception to the warrant requirement in fact exists. Counsel for the defense should be aware that the plain odor issue exists and that it is in fact an issue which looks like it will be certworthy at some point.

Besides the three major opinions of the court, the Court also held against the defense and in favor of the state in three summary dispositions. These cases were **California v. Howard**, ___ U.S. ___, 105 S.Ct. 64, 83 L.Ed.2d 15 (10-1-84), in which the court overturned the California Appellate Court's finding that a person was in custody at the time of his station house questioning despite his being there voluntarily, **Perella v. New Jersey**, ___ U.S. ___, 105 S.Ct. 56, 83 L.Ed.2d 7 (10-1-84), in which the court turned down a defendant's appeal where the plain view seizure of untaxed cigarettes in a car turned into the more serious seizure of illegal narcotics, and **Florida v. Rodriguez**, 469 U.S. ___, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984), in the the Florida Appellate Court was overturned where the Florida Court had suppressed the seizure of cocaine at an airport. Together with the three opinions of T.L.O., Johns, and Hensley, these decisions demonstrate a continued pattern of doing what has to be done to admit evidence against a criminal defendant in derogation of his or her Fourth Amendment rights.

THE SHORT VIEW

The United States Supreme Court has granted certiorari in a case out of Florida named Hayes v. Florida, from the lower court decision, at 439 So.2d 896 (1983), in order to look at the question of whether Terry v. Ohio can be extended to permit a warrantless, non-consensual detention of an individual in order to obtain fingerprints to compare with fingerprints found at the crime scene. This is a question left open in Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). The state is arguing that Terry v. Ohio should be used to allow for the seizure of these prints, and that the inevitable discovery doctrine of **Nix v. Williams**, ___ U.S. ___, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), also justified the intrusion.

On January 9th, 1985, the Supreme Court heard arguments in this case. The Court, during that argument, appeared to be sympathetic to the fact

(Continued, P. 26)

that the defendant was moved from the scene to the police station in order to take his fingerprints. Thus, the intrusion which occurred was major. On the other hand, the court was very concerned that they were spinning their wheels in the sense that under the inevitable discovery doctrine of Nix v. Williams, a warrant could be obtained to get the defendant's prints for retrial.

The New York Court of Appeals has held that it is illegal for a police officer stopping a car for a traffic violation to then enter the car to look for the "vehicle identification number" or VIN. **People v. Class**, 472 N.E.2d 1009 (1984). Here the act of looking for the VIN resulted in seeing an illegal weapon in plain view.

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

The Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) case has been explored in the case of **State v. Schaffer**, 693 P.2d 458 (1984). Here the Court states that where a police officer acts innocently or negligently in presenting false information to the reviewing magistrate, that under Franks v. Delaware, and Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the reviewing court must then look at that information to decide whether the magistrate "had a substantial basis to find probable cause. Conversely, if the information was given intentionally or was the product of a reckless disregard for the truth, then it must be set aside and the magistrate's finding of probable cause must be reviewed upon the remaining evidence."

In **People v. Stewart**, Ill., 471 N.E.2d 253 (1984), the court held that material omissions, similarly to intentional or reckless misstatements under Franks v. Delaware, assumes the same role and can in fact lead to a suppression of evidence seized pursuant to a warrant.

In **United States v. Lewis**, 486 A.2d 729 (D.C.Cir 1984), the court rejected a claim that evidence would have been inevitably discovered which was illegally seized from a napsack pursuant to a Terry stop. This case gives us hope that the inevitable discovery doctrine of Nix, the public safety exception of Quarles, and the good faith of exception of Leon may not, just may not, swallow the Fourth Amendment.

In **United States v. Satterfield**, 743 F.2d 827 (11th Cir. 1984), in reversing a conviction, the Court held that the inevitable discovery doctrine of Nix applies only where a reasonable probability exists that the evidence would have been found by lawful means, and that the police were pursuing those lawful means prior to the taking of illegal police action.

The Colorado Supreme Court explored the limits of a Terry stop in **People v. Cobbin**, Col., 692 P.2d 1069 (1984). In that case, officers conducted a Terry frisk and seized money which they felt during their frisk. The court stated that such a Terry stop does not justify a full blown search, and held that the seizure of the money and a subsequent identification were violations of the exclusionary rule.

(Continued, P. 27)

The Montana Supreme Court in **State v. Sierra**, Mont., 692 P.2d 1273 (1985), has relied upon its own state constitution to hold that a container belonging to an arrestee may not be opened incident to his incarceration, therefore rejecting Illinois v. LaFayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) following their prior rejection of South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) in State v. Sawyer, Mont., 571 P.2d 1131 (1977).

The reach of Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), was explored in **State v. Chaisson**, 486 A.2d 297 (N.D. 1984) where the Court held that the defendant was illegally arrested when the police executed a search warrant and then remained in the house to await the defendant's arrival. The resulting statement given by the defendant following his seizure at the house, was suppressed as the fruit of the poisonous tree.

In **People v. Hampton**, Cal. Ct. App. 1st Div., 36 Cr.L. 2378 (1-25-85) a police officer who drove an apparently intoxicated driver home rather than arrest her, and shortly afterwards saw her driving her car again could pursue her and arrest her inside her apartment without a warrant. The Court distinguishes **Welsh v. Wisconsin**, 104 S.Ct. 2091 (1984) on the grounds that under California law, D.U.I. is a criminal violation involving a potential jail term, substantial fine, and license revocation, as opposed to the Wisconsin statute where a first offense for D.U.I. is a non-criminal violation involving a civil forfeiture procedure.

Finally, in **People v. Mallory**, Mich. 36 Cr.L. 2376 (2-1-85), the Court held that where defendants are held for three days without being arraigned, that not only would statements made during that illegal detention have to be suppressed, but that physical evidence in the form of a pair of shoes containing the victim's blood seized during that period would also have to be suppressed. Note that the period of time in which an arraignment has to be held was based both upon a state statute and a state constitutional guarantee of due process.

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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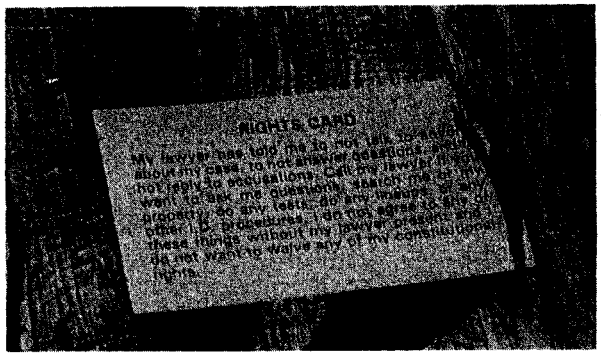

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Trial Tips

For the Criminal Defense Attorney

DEFINING REASONABLE DOUBT: THE CALLAHAN DECISION

FRANK E. HADDAD, JR.

THE CALLAHAN DECISION:

On September 13, 1984, the Supreme Court of Kentucky reaffirmed that RCr 9.56(2) provides that "the instructions should not attempt to define the term 'reasonable doubt.'" Commonwealth vs. Callahan, Ky., 675 S.W.2d 391, 392 (1984). In Callahan, the Court additionally held that trial courts shall prohibit attorneys from any definition of reasonable doubt at trial:

> Prospectively, trial courts shall prohibit counsel from any definition of "reasonable doubt" at any point in the trial, and any cases in this jurisdiction to the contrary are specifically overruled. Id., p. 393.

In Callahan, the Court explained that counsel could still point out reasonable doubts in the evidence to the jury, but that "all counsel shall refrain from any expression of the meaning or definition of the phrase 'reasonable doubt.'" Id. The Court reasoned that any definition of reasonable doubt is unnecessary because qualified jurors "know that a doubt of the guilt of the accused, honestly entertained, is a reasonable doubt." Id.

JURY LACKS GUIDANCE:

In light of Callahan, the only guidance on reasonable doubt the jury will receive is that contained in the model instruction set forth in RCr 9.56(1):

> The law presumes a defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty. [RCr 9.56(1)].

The same non-defining instruction is set forth at Section 11.01 of Palmore's 1979 Supplement, Instructions to Juries in Kentucky, Vol. I - Criminal.

Because Kentucky law and procedure now prohibit any definition of reasonable doubt to the jury, a vacuum exists in which the jury is left without guidance as to the standard of proof for conviction or acquittal. Jurors may well ask, "Just what is proof of guilt beyond a reasonable doubt?" and "What is a reasonable doubt?" No aspect of the trial is more basic to the jury's verdict in a criminal case. Is there a need for the jury to be given some guidance and assistance in correctly and intelligently understanding exactly what constitutes reasonable doubt, or

(Continued, P. 29)

should the jury be free to use their own idea of what constitutes a reasonable doubt?

DIFFICULT TO DEFINE:

Balanced against the jury's need for guidance in this regard is a perceived difficulty in defining reasonable doubt. The United States Supreme Court has stated that, "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Holland v. United States, 348 U.S. 121, 140 (1954). Cf., Whiteside v. Parke, 705 F.2d 869, 871 (6th Cir. 1983). The Kentucky Court long ago noted how difficult it is "to give a precise and intelligible definition of reasonable doubt." See, for instance, Swopshire v. Commonwealth, Ky., 55 S.W.2d 356, 358 (1932). Professor Lawson has clearly discussed the difficulty in defining reasonable doubt, as follows:

> [S]ome have assumed that the phrase, "beyond a reasonable doubt," can be rendered more intelligible by definition, and have ruled that an accused is entitled to have its proper meaning and application delineated. ...[O]ther courts, including the Kentucky Court of Appeals, have taken a different approach, one that imagines the existence of such a connection between the "reasonable doubt" phrase and the signification attributed to it that no juror can help but understand its meaning. The fault with this approach, if any, is that even in the minds of the communicators the phrase does not represent a precise idea. Robert G. Lawson, "The Law of Presumptions," Kentucky Law Journal, Vol. 57, No. 1 (Fall 1968-1969), pp. 17-18.

Notwithstanding this perceived difficulty in defining reasonable doubt, accepted definitions are widely used.

ACCEPTED DEFINITIONS:

Reasonable doubt is defined in all federal criminal cases. The most widely accepted definition of reasonable doubt in federal criminal trials is the following:

> A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. Devitt and Blackmar, Federal Jury Practice and Instructions, Vol. I: Section 11.14 "Burden of Proof - Reasonable Doubt."

The Matthew-Bender 1984 model federal instruction is similar but adds the following definitional phrases:

> A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy. Sand et al., Modern Federal Jury Instructions, Vol. I (1984), Section 4-2 "Reasonable Doubt."

In United States v. Releford, 352 F.2d 36 (6th Cir. 1966), cert. denied 382 U.S. 984, the Sixth Circuit approved an instruction which defined reasonable doubt as follows:

> [P]roof beyond a reasonable doubt is established if the evidence is such as you would be willing to

(Continued, P. 30)

> rely and act on in the most important of your own affairs, ...but no defendant is ever to be convicted on mere suspicion or speculation or conjecture. Id., pp. 40-41.

Prior to adoption of the present RCr 9.56(2), prohibiting definition of reasonable doubt, Kentucky law and procedure approved the use of a model definition of reasonable doubt, as follows:

> The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether, after hearing all the evidence, you actually doubt that the defendant is guilty. Section 11.01 of Palmore and Lawson's Instructions to Juries in Kentucky (1975) Vol. I - Criminal.

This instruction was repeatedly approved by the Kentucky Court. See, inter alia, Evans v. Commonwealth, Ky., 474 S.W.2d 370, 371-372 (1971); Urbanski v. Commonwealth, Ky., 526 S.W.2d 7, 8 (1975). Although the Supreme Court of the United States characterized this Kentucky instruction as "hardly a model of clarity," Taylor v. Kentucky, 436 U.S. 478, 488 (1978), the Sixth Circuit has held the same instruction to be "constitutionally adequate." Payne v. Smith, 667 F.2d 541, 547 (6th Cir. 1981), cert. denied, 102 S.Ct. 1983.

But all of the above definitions of reasonable doubt clearly favor the prosecution. They define reasonable doubt as something more than it is. These definitions actually negate reasonable doubt and make it virtually impossible for a jury to find a reasonable doubt. Except for the first phrase in the first definition, that "a reasonable doubt is a doubt based on reason and common sense...," there is nothing really helpful to the jury -- only damaging to the defendant.

In addition to the above definitions of reasonable doubt, other authorities suggest more helpful definitions. American Jurisprudence 2d defines "proof beyond a reasonable doubt" as "proof to a moral certainty":

> The phrases "proof beyond a reasonable doubt" and "proof to a moral certainty" are synonymous and equivalent, and each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, that the defendant is guilty of the crime charged. American Jurisprudence 2d, "Trial" Section 841 "Moral Certainty."

In the leading case on sufficiency of evidence to sustain conviction, Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court stated that the standard of proof beyond a reasonable doubt "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself...by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." Id., p. 315. The leading case on reasonable doubt, In re Winship, 397 U.S. 358 (1970), stated that,

> the reasonable doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. Id., p. 364.

Quoted and followed in Johnson v. Louisiana, 406 U.S. 356, 360 (1972). These recent expressions of United States Supreme Court caselaw suggest a proposed definition of reasonable

(Continued, P. 31)

doubt to be 'a subjective state of certitude' reached by each juror that the accused is guilty.

PROSPECTIVE DEFENSE APPROACHES:

Now that the decision in Callahan has eliminated from the jury these definitions of reasonable doubt, what steps can be taken by defense counsel to guide the jury and correct the excessive restrictions imposed by Callahan?

EVEN WITH THE CALLAHAN RESTRICTION MANY EFFECTIVE DEFENSE APPROACHES ARE AVAILABLE.

Even with the Callahan restriction against defining reasonable doubt, many effective defense approaches are available. For instance, defense counsel can "point out to the jury which evidence, or lack thereof, creates reasonable doubt." Callahan, supra, 675 S.W.2d at 393. This can be done without defining reasonable doubt.

*Counsel can repeat the court's instruction regarding reasonable doubt, without defining reasonable doubt.

*Counsel can remind the jurors of their commitment to follow the law of reasonable doubt which they agreed to follow in voir dire, without defining reasonable doubt.

*Counsel can remind the jurors that they are not permitted to convict on mere suspicion, surmise or conjecture but there must be proof beyond a reasonable doubt and to a moral certainty before they can convict, and point out that there is no such proof in this case.

*Counsel can explain to the jurors that, unlike a lot of foreign countries, in America an accused should not and cannot be convicted of committing any crime unless and until the prosecution proves him guilty beyond any reasonable doubt, without defining reasonable doubt.

*Counsel can describe the history of how the law of reasonable doubt came to be in this country, without defining reasonable doubt.

*Counsel can conclude argument with his hope and prayer that the jurors in their deliberations will agree with him that there is more than one reasonable doubt in the case, without defining reasonable doubt.

The above approaches demonstrate that the Callahan decision leaves plenty of latitude for defense argument. However, some defense counsel may feel the prohibition against any definition of reasonable doubt is simply too restrictive. For defense counsel who desire to correct the Callahan holding, the following procedures are suggested. Tender a written instruction to the trial

(Continued, P. 32)

court on reasonable doubt, pursuant to RCr 9.54, including your definition of reasonable doubt. Inform the trial court prior to closing argument that you intend to define reasonable doubt during the course of closing to the jury in such and such a way and, when the trial court states that counsel is not permitted to define reasonable doubt under Callahan, make sure that your desired definition is clearly stated in the record. If the trial court balks at putting your definition in the record, request that it be put into the record by avowal pursuant to RCr 9.52, so that the claimed error may be preserved for appeal. It has been held that, "the right thus to preserve a claim of error is essential to the right of an appeal," and that a trial court's refusal to permit a requested avowal is reversible error. Powell v. Commonwealth, Ky., 554 S.W.2d 386, 390 (1977); Jones v. Commonwealth, Ky., 623 S.W.2d 226, 227 (1981). This properly preserved error may be raised on appeal to the Kentucky appellate courts, by certiorari to the United States Supreme Court, and through federal habeas corpus to the United States District Court and the Sixth Circuit, if necessary, to correct what you might feel is an excessive restriction of the Callahan decision.

LIMITING THE PROSECUTION APPROACH:

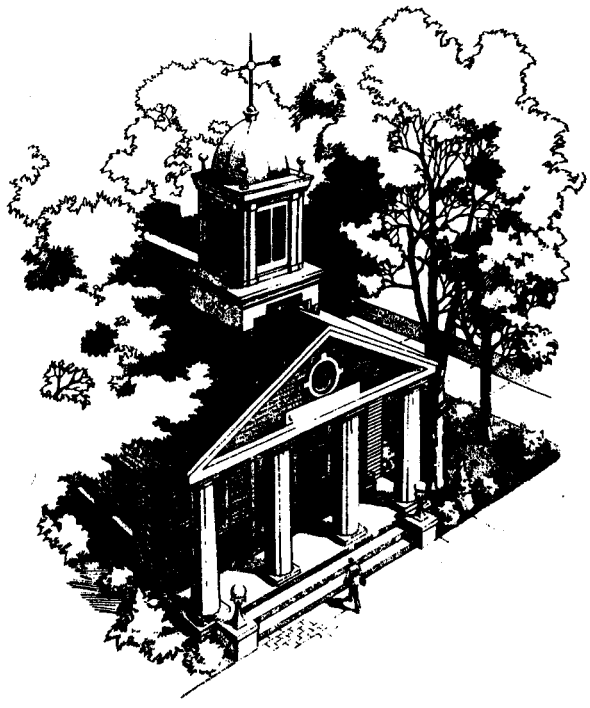
How often have we heard prosecutors in closing argument tell the jury that "proof beyond a reasonable doubt does not mean proof beyond all doubt," and "you can still have some doubt and convict," or pose a question on voir dire similar in content? This has always been very damaging to the defendant. Under Callahan, this is no longer permitted. Be on your toes. Either make a motion in limine to prevent this type of questioning or object in a timely manner -- whichever you feel is best in the case being tried. In some cases, eliminating this type of prosecutorial argument will be well worth giving up a definition of reasonable doubt.

Conclusion:

Under Callahan, the prosecution is prevented from all attempts to define reasonable doubt to the jury. This is clearly a step forward for the defense. Further, all things considered, I don't believe the Callahan decision is going to hamper competent defense counsel in establishing in argument to the jury a reasonable doubt or many reasonable doubts, sufficient to find the defendant not guilty.

FRANK E. HADDAD, JR.

Frank E. Haddad, Jr. is a Past President of the Kentucky Bar Association, a Past President of the National Association of Criminal Defense Lawyers, a Fellow of the American College of Trial Lawyers, a Fellow of the American Board of Criminal Lawyers, and a Fellow of the International Academy of Trial Lawyers.



Trial Tip

OPENING STATEMENTS

Effective opening statements have far greater persuasive potential than is generally realized. Unfortunately, they are treated as an afterthought both in preparation for trial and in the trial itself. The trial lawyer can add a new dimension to his or her repertoire by recognizing that his, too, is an art which deserves thought and development.

STEVE RENCH

Decision to Make an Opening Statement

The decision to give an opening statement should depend not on any rigid rule, but on whether it will advance the trial plan. Do not reject making an opening out of hand. Plan the best possible opening and then decide whether you are better off with it or without it. The decision to make an opening will depend on many factors, including:

1) Whether a defense is strong enough to be disclosed at the beginning or whether surprise should be relied upon;

2) Whether the opening would give the jury a framework to cause them to question the prosecution's case as it is presented;

3) Whether the prosecution's case is so long that it would gain a head-start before the defense begins;

4) The value of primacy in persuasion.

An alternative to a full opening statement is one where the jury is informed there are two sides and asked to postpone its decision until all evidence has been heard.

Nature of the Opening Statement

The natural tendency and most frequent mistake made in opening statements is assuming the intensity of a closing argument. This results in objection that it is "argument", and the judge's indication that it is improper - in general, a bad start.

The psychology of persuasion, however, is even more reason for making a statement rather than an argument. If your position is to be accepted, it will need gradual building up during the case. It is better to start "soft-sell" and use greater intensity in your closing, when the jury is ready for it.

Let the facts do the arguing for you. Humanize the defendant. Tell of the day he was arrested; paint a picture of a person falsely accused, a victim of circumstances. Weave into this picture the issues of the case, and those facts which support the defense side.

(Continued, P. 34)

Contrary to general belief, opening is not confined to a statement of facts. Under the ABA "Standards Relating to the Prosecution Function and the Defense Function," (Sec. 7.4), there may be a "brief statement of the issues in the case." This not only allows a statement of an issue and the facts supporting its defense, but also much of the benefit of argument, as well.

Organization of Opening Statement

The statement must not be "one hundred facts strung together," punctuated here and there by a "The evidence will show...." It should be organized around major points; the facts must then be organized under their appropriate major points. The attorney must work diligently on simplification of the case in his or her own mind so there is "understandability" available to the jury. Remember that you as the lawyer are familiar with the facts, while this is the jury's first exposure to them. Recognize that getting the basic idea across is more important than bogging the jury down in details.

Lastly, tie your facts together, ending your statement on a high point, that demonstrates confidence in the justness of the defense case.

STEVE RENCH

Steve Rench is a NCCD faculty member and the author of many works including The Rench Book. He is now in private practice in Denver.

* * * * * *

Trial Tip

JURY SOURCE LIST CHALLENGES

The master list from which potential jurors are selected in Kentucky is the voter registration list. KRS 29A.040(1); II Administrative Procedures of the Court of Justice, Sec. 3. Jurors are chosen from the voter list either by jury commissioners appointed by the chief circuit judge or by random computer selection. KRS 29A.030(1); II Administrative Procedures of the Court of Justice, Sec. 5[1]. Defense counsel should consider challenging the sole use of voter lists as the source for potential jurors if juries in the county do not appear representative of the population with respect to race, sex, age or other significant characteristic. The challenge is based on the Sixth and Fourteenth Amendment requirement that jury pools be representative of a fair cross-section of the community, the Fourteenth Amendment mandate that equal protection not be denied and the due process protection of Section 11 of the Kentucky Constitution.

A recent study of federal juries selected solely from voter registration lists confirms that "[S]ystematically underrepresented groups include fe-

(Continued, P. 35)

[1]Section 5(1) still provides for using computerized lists of either the voter or tax list. That is in conflict with the requirement of the statute and court procedures present that the master list be solely the voter list. KRS 29A.040(1) was amended effective 10-182 to eliminate property tax rolls from the master list.

males, racial minorities, those with less education, younger persons, and those with low status occupations." Carp, "Federal Grand Juries: How True a 'Cross Section of the Community'", 7 The Justice System Journal, No. 2 (1982). Moreover, a recent article in IV Center for Jury Studies Newsletter 6 (No. 1982) of the National Center for State Courts recommended the use of drivers' license lists to replace or supplement voter lists because registered voters are decreasing. In 1980 67% of citizens of voting age were registered while in 1981 83% of those of driving age were licensed.

Common sense tells us that many otherwise eligible jurors do not register to vote. Some people fail to register not because of apathy but because of problems with the voter registration procedures. Williams, Voting Barriers, Strategies for Removing Obstacles to the Black Ballot, 2 Black L.J. 164, 165 (1972). Jury service may increase an individual's awareness of his duties as a citizen and encourage him to vote. Id.

The Supreme Court of California, In Bank, last year held in a landmark decision that the use solely of voter registration lists as the jury pool source deprived the defendant of his right to a jury drawn from a representative cross-section of the community because those lists significantly underrepresented blacks and Hispanics. People v. Harris, 679 P.2d 433 (Cal. 1984) cert. denied, 105 S.Ct. 365 (1985). However, the Kentucky Supreme Court rejected a challenge to the sole use of voter lists as the source for potential jurors in Ford v. Commonwealth, Ky., 665 S.W.2d 304, 307 (1983), cert. denied, 105 S.Ct. 392 (1984)(Marshall, J., dissenting). "It is our opinion that KRS 29A.040 is constitutional, representing an effective manner by which to insure representative jury panels from segments of the community."

The key difference between Ford and Harris is that in Harris defense counsel introduced proof of the population characteristics of the county and those randomly selected from the voter list who appeared to serve including the percentage of blacks and Hispanics in each group. Harris, 679 P.2d at 437-439. The proof revealed that both blacks and Hispanics were dramatically underrepresented among those who appeared for jury service. Id. The California Court referred to "a gross disparity." Id. at 442. That Court concluded that the defendant had presented a prima facie case that sole use of the voter list resulted in significant and systematic underrepresentation of clearly cognizable groups in spite of: 1) the defendant's reliance on population figures that did not exclude illegal aliens, persons under 18 or others ineligible to serve as jurors; 2) the defendant's using figures on those who appeared for jury service, rather than those originally selected at random from the voter list; and 3) the defendant's surveying jurors who appeared for service over only a three month period.

If a defense attorney believes the juries in a county where he or she practices are not representative of the county population, how does he or she go about investigating/proving such a claim? Counsel will need to examine the lists of jurors drawn from the jury wheel and compare the potential jurors' characteristics (race, sex, age or whatever)[2] with those of the voter list and the over 18 census population. The DPA library has census figures, and the state Board of Elections will provide a

(Continued, P. 36)

[2]The voter registration book available in the county clerk's office contains each voter's race, sex and date of birth.

Voter Registration Statistics Report containing each county's breakdown of blacks, whites, males and females. If the lists of jurors contain more names than you can reasonably gather information on, you may need to take a random sample of 100 from the lists available for a year. Also, if your concern is that juries are under-representative as to age, you may have to take a random sample of the voter list since the Board of Elections computer printout does not contain age breakdowns.

There is disagreement among the Courts about how long a period is considered significant when comparing potential jurors with the source list/eligible population. In Ford v. Commonwealth, 665 S.W.2d at 307 the Kentucky Court held two years was not a significant period. However, the United States Supreme Court upheld challenges to jury pools based on data for one year in Duren v. Missouri, 439 U.S. 357 (1979) and Taylor v. Louisiana, 419 U.S. 522 (1975). Certainly counsel's case is more persuasive when he can show that a substantial underrepresentation of a cognizable group in the jury pool has occurred over an extended period.

Jury challenges of any sort are somewhat technical and generally not an issue to which we want to devote scarce time and resources. Such challenges are crucial, however, since they affect the foundation of our criminal justice system--the right to trial by a jury of one's peers. If we convince the courts that juries in a particular community are not representative and juries containing more of a cross-section of the population begin to serve, we have accomplished something extremely important for all of our clients and ourselves as citizens.

GAIL ROBINSON

Gail has been an assistant public advocate since 1975. She is a graduate of the University of Louisville Law School.

Trial Tip

KCPC: A POTENTIALLY SHOCKING EXPERIENCE

It is not an unusual situation for a defense attorney to have his client transferred to the Kentucky Correctional Psychiatric Center (KCPC) at LaGrange under KRS 504.080 for the purpose of a psychiatric examination. This will occur in nearly every case in which an issue as to competency to stand trial or insanity arises.

Formerly, such an evaluation would not create any greater problem than the question of the accuracy of the resulting opinion. However, in the early part of October, 1984, an event occurred which has ultimately resulted in serious repercussions which all participants in the criminal justice system should be aware.

That event was a policy disagreement between the two psychiatrists who had been conducting pretrial evaluations - Dr. Pran Ravani and Dr. James Bland

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- and officials with the Cabinet for Human Resources. The psychiatrists lost the argument and their jobs.

Since that date KCPC has not had a full-time staff psychiatrist to evaluate the pre-trial detainees. Rather, Human Resources has utilized psychiatrists from the various state mental hospitals (Central State, Eastern State, and Western State) to temporarily staff KCPC for short periods of times. Not only does this action raise serious questions as to the quality of psychiatric care being provided for the pretrial detainees, but also has resulted in the reintroduction of a highly controversial method of "treatment" - electroshock therapy.

There is one psychiatrist from Central State Hospital who evidently believes in electroshock treatment. (ECT). In at least three known cases - two from Jefferson County and one from Eastern Kentucky - pretrial detainees have been transferred from KCPC to Central State Hospital for the exclusive purpose of sessions of ECT. In one of the Jefferson County cases the individual had already been determined to be incompetent to stand trial, and, according to his attorney, wasn't competent to consent to any type of treatment. It is highly conceivable that there have been more cases than just the three known situations.

For those unaware of it, ECT is the introduction of an electric current which induces an epileptic-type seizure which affects the electrical pattern of the brain cells. It has proven to be effective in a highly limited number of cases, however, experts are candid in admitting that there is no definitive answer as to how or why it works.

There are, however, a number of well-recognized adverse side-effects from the administration of ECT. Most

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strikingly, there is severe memory loss and disorientation - in some instances so complete that a patient is unable to recognize members of his own family or recall his occupation. In addition, there may be permanent, total amnesia for the period during which the treatments were given. Other possible side effects include brain damage, a temporary slowing of brain waves, and, despite the use of a muscle relaxant and anesthesia, a possibility of bone fractures caused by contractions. As a result of these questionable aspects of ECT, there is a sharp diversion of opinion among psychiatrists as to the propriety of its use.

There is little question that a mental patient, such as a pretrial detainee undergoing psychiatric evaluation, has a constitutional right to refuse such treatment. Virtually every court to address the issue has concluded that the constitutional right to privacy is broad enough to encompass a patient's decision to refuse treatment. See: Winters v. Miller, 446 F.2d 65 (2nd Cir. 1971), cert. denied 404 U.S. 984; Scott v. Plante, 532 F.2d 939 (3rd Cir. 1976); Wyatt v. Stickney, 344 F.Supp. 387 (M.D. Ala. 1972), affirmed sub. nom. Wyatt v. Aderholt, 503 F.2d 105 (5th Cir. 1974); Nelson v. Heyne, 355

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F.Supp. 451 (N.D. Ind. 1972), aff'd 491 F.2d 352 (7th Cir. 1974); Sawyer v. Sigler, 320 F.Supp. 690 (D. Neb. 1970), aff'd 455 F.2d 818 (8th Cir. 1971); and Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973).

More importantly, the Cabinet for Human Resources has adopted certain administrative regulations which are designed to protect the rights of mental patients, including the right to refuse intrusive treatment such as ECT. 902 KAR 1:020, §8 states, in pertinent part:

> All patients shall have the right to refuse intrusive treatments including electroshock therapy or psychosurgery, subject to the following limitation. Any patient committed on an involuntary basis ...may only be provided electroshock therapy...pursuant to a court order with a determination that such treatment is in the best interest of the patient as providing him the optimal opportunity to reasonably benefit from care and treatment in the hospital....

In Gundy v. Pauley, Ky.App., 619 S.W.2d 730 (1981), the Court of Appeals examined the issue of whether this administrative regulation was in conflict with the patient's constitutional right to refuse such treatment. The Court of Appeals concluded that the patient's rights must prevail over the regulation:

> We hold that in the absence of a judicial declaration of incompetence, or an emergency which poses an immediate danger of harm to others or to the patient, a patient who has been involuntarily committed to a mental hospital for treatment cannot be compelled to undergo electroshock therapy against his will simply because it is considered to be in the best interest of the patient. Id at 731.

In essence, the Court of Appeals determined that the "best interest" standard of the regulation could only apply in two situations: (1) where the patient has been determined to be unable to make decisions for himself; and (2) where the patient is in immediate danger to himself or others. Otherwise, the patient has a constitutional right not to receive such intrusive treatment. See also: KRS 202A.196.

In situations then where an attorney has a client being transferred to KCPC for pretrial evaluation, he should take the following steps to guarantee that his client's constitutional rights are protected:

(1) ensure that the client is aware of his rights as a mental patient, including the right to refuse intrusive treatment such as ECT;

(2) advise the staff of KCPC, including the director Barbara Stead, in writing that the client is not willing to submit to intrusive treatment such as ECT without the intervention of a court; and

(3) be prepared to protect the client's rights at any court proceeding instituted by the Cabinet for Human Resources.

WILLIAM M. RADIGAN

Bill graduated from University of Louisville School of Law in 1975. He was an assistant public advocate from 1975 to 1983 specializing in menatl health, and he was 1982 DPA appointee to Kentucky's Council on Mental Illness/Retardation. He is now with the firm Walker and Radigan.

Trial Tip

CURRENT DEFENSE STRATEGIES TO SHORT CIRCUIT ELECTRONIC TESTIMONY BY YOUNG VICTIMS IN SEX TRIALS

This is the first part of a two-part series by Vince Aprile on testimony of children in sex cases.

The 1984 Kentucky General Assembly enacted legislation which created three separate evidentiary innovations in the trial of sexual offenses where the alleged victim at the time of the crime was a child twelve years of age or younger. KRS 421.350 (eff. 7-13-84). These three evidentiary changes apply only to the statements or testimony of the alleged child victim. KRS 421.350(1).

First, the statute creates an electronic exception to the hearsay rule by allowing in evidence at trial a filmed or videotaped pre-trial, extra-judicial oral statement of the alleged child victim under certain specific circumstances. KRS 421.350 (2).

The recording of the statement is admissible in evidence only when all the following conditions are met:

(1) no attorney for either party was present when the statement was made;
(2) the recording is both visual and oral;
(3) the statement is recorded on film, videotape or other electronic means;
(4) the recording equipment was capable of making an accurate recording;
(5) the operator of the equipment was competent;
(6) the recording is accurate and unaltered;

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(7) the child's statement was not made in response to leading questions;
(8) every voice on the recording is identified;
(9) the person who conducted the interview of the child in the recording is present at trial and available to testify or to be cross-examined by either party;
(10) the defendant or the defense attorney is afforded an opportunity to view the recording before it is offered into evidence; and
(11) the child is available to testify. KRS 421.350(2)(a)-(h).

If the electronic recording of the oral statement of a child is admitted into evidence under this statute, either party may call the child to testify and the opposing party may cross-examine the child. KRS 421.350 (2).

KRS 421.350(2) DOES NOT GRANT THE PROSECUTION EXCLUSIVE RIGHT TO INTRODUCE THE RECORDING.

Interestingly, KRS 421.350(2) makes the pretrial recording admissible evidence, but does not grant to the prosecution the exclusive right to

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introduce the recording. This generates a number of strategic options for the defense.

First, the defense, pursuant to KRS 421.350(2), may move the trial court to order a filmed or videotaped recording of the alleged child witness with a psychologist or sociologist employed by the defense conducting the interview. This would allow a pre-trial deposition of the alleged child victim/witness with the added defense option of subsequently calling the witness.

Additionally, this tactic could allow the defense the opportunity to have a defense made pretrial recording of the witness to counter the prosecution made recorded statement.

As noted supra, the statute requires that the defendant or the defense attorney be afforded an opportunity to view the recording before it is offered into evidence. KRS 421.350 (2)(g). If the prosecution does not intend to introduce the recording, the statute is silent on the Commonwealth's obligation to produce any extant recordings for the defense, but disclosure is mandated by the rules of criminal procedure.

Under RCr 7.26(1), before a Commonwealth witness testifies on direct examination the prosecutor must produce for the defense any statement of the witness in the form of a recording in the Commonwealth's possession which relates to the subject matter of the witness's testimony and is or purports to be a substantially verbatim statement made by the witness. This discovery rule would obviously apply whether the testimony of the child victim/witness was presented live or via a filmed or videotaped pretrial recording.

In every sexual offense case where the alleged victim is a child the defense should file a motion for the prosecution to produce as exculpatory evidence any and all pretrial filmed or videotaped recorded statements of the victim/witness. Brady v. Maryland, 83 S.Ct. 1194 (1963); United States v. Agurs, 96 S.Ct. 2392 (1976). This motion should also request the trial judge to order that all existing filmed or videotaped recordings of the child's statements be preserved even if the prosecution does not intend to use a particular tape or any of the tapes at trial.

It is extremely possible that the prosecution in an endeavor to prepare a recording admissible under KRS 421.350(2) would make several recordings before either filming a usable statement or abandoning the production. These recordings, deemed unusable by the prosecution, may contain statements or activities which could be used by the defense to impeach the child's testimony, to demonstrate the child's incompetence as a witness, or to establish "coaching" of the child by the interviewer or others.

Since this statute allows the prosecution to introduce the electronic recording of the child's statements and then call the child to testify, this creates the opportunity for the Commonwealth to bolster the child's in-court testimony with the witness's prior consistent out-of-court statement recorded in the film or videotape. This type of "bolstering" has been repeatedly condemned in this and other jurisdictions.

"[T]he general rule is that a witness's testimony may not be corroborated or bolstered by his own prior consistent statement." Kellam v. Thomas, Fla.App., 287 So.2d 733, 734 (1974); (emphasis added).

Indeed this general legal principle has been recognized in virtually every jurisdiction. "When the witness

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has merely testified on direct examination without any impeachment, proof of consistent statements is unnecessary and valueless." 4 Wigmore, Evidence §1124 (Chadbourn rev. 1972). "The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it." Id., citing, inter alia, Franklin v. Commonwealth, 105 Ky. 237, 48 S.W. 986, 988-989 (1899).

Kentucky has long endorsed this rule of evidentiary law. "It is well settled that a party is not allowed to introduce evidence for the purpose of sustaining the credit of its own witness when the credit of that witness has not been impeached." Sullivan v. Norris, 71 Ky. (8 Bush) 519 (1871).

The defense should file a motion seeking a pretrial ruling that if the prosecution elects to place the testimony of the child victim/witness in evidence via the filmed recording authorized by KRS 421.350(2), the Commonwealth forfeits the right to call the child to testify. In that situation, only the defense would have the statutory right to compel the child to testify. This would prevent improper bolstering by the prosecution.

In any instance where the prosecution serves notice that it intends to present the child victim's testimony through a filmed pretrial statement, the defense should move the trial court to order the prosecution to disclose to the defense, prior to any ruling on the admissibility of the recording, the following information: (1) a sworn statement indicating whether any attorney for any party, including the child or the child's family, was present when the statement was filmed; (2) specific information on the brand and model of all the film or videotape equipment used to make the recording; (3) the identity and qualifications of the operator or operators of the recording equipment; (4) a sworn statement indicating whether the recording is accurate and unaltered; (5) the identity and particular area of expertise of the person or persons who conducted the interview; (6) a sworn statement indicating whether any off-camera pre-filming interviews were conducted; (7) in the event unfilmed preliminary sessions were conducted, actual copies or reconstructed versions of the questions and answers from those rehearsals; (8) when and where the defense may view the recording before the court conducts a hearing or rules on the admissibility of the recording; and (9) a sworn statement indicating whether the child is available to testify.

The defense should move for an evidentiary hearing at which the prosecution must establish the statutory predicate for the admissibility of the pretrial recording of the child's testimony delineated in section (2)(a)-(h) of KRS 421.350. The burden of proof on these statutory requirements must be on the prosecution when it is seeking to present this type of evidence under the authority of the statute.

Although normally federal constitutional guarantees of the right to confrontation and cross-examination are not violated by the use of an extra-judicial statement of a witness who is eventually available to the defense for cross-examination, a definite federal constitutional problem inheres in the procedure contemplated by KRS 421.350(2). The statute permits the prosecution to present the child's testimony via an electronic recording done at a session where no confrontation or cross-examination was permitted by even a defense attorney. Of course, since the defense

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cannot confront or cross-examine a recorded statement at trial, the evidence of the child's statement can be introduced without confrontation and cross-examination by the defense at either the pretrial filmed interview or at trial. To invoke the constitutional safeguards of confrontation and cross-examination, the defense must call the child to testify. This places the defense in the awkward position of forcing the child, whose recorded statement is already before the jury, to testify apparently during the defense case in order for the defendant to have his or her federal constitutional right of confrontation and cross-examination. For a variety of reasons, such a procedure amounts to placing a penalty on the defendant's exercise of a constitutional right.

To exercise the defendant's right of confrontation and cross-examination, the defense must decide to what extent the jury will resent the defense compelling the child to testify and balance that against the possible gain from the personal appearance of the child before the jury and the testing of the child's testimony under defense questioning. This casts a heavy burden on a defendant's otherwise unconditional right of confrontation and cross-examination. See Brooks v. Tennessee, 92 S.Ct. 1891, 1894-95 (1972). This procedure of requiring the defense to call the child "cuts down on" the rights of confrontation and cross-examination by "making [the] assertion [of these rights] costly." Id.

The defense could lose its right to present no case and simply to rest on its cross-examination of the prosecution's witnesses since no cross-examination of the child victim/witness would occur until the defense opened its case and called the child to testify.

Similarly, the defendant's right to present evidence is guaranteed by the sixth and fourteenth amendments of the federal constitution. Washington v. Texas, 87 S.Ct. 1920 (1967). If the defense believes the prosecution's evidence is legally insufficient to convict, the defense may elect to present no case and rest at the conclusion of the Commonwealth's case-in-chief. To hold the prosecution to its constitutional duty to prove every element of the offense beyond a reasonable doubt in its case-in-chief, the defense would forfeit its constitutional rights of confrontation and cross-examination. If the defense elects to exercise these rights by calling the child witness, the defense runs the risk that the prosecution may during its statutory right of cross-examination of the child bring out matters which could remedy the deficiencies in the Commonwealth's case. This again is a heavy burden on the defendant's exercise of his constitutional rights.

Even if the defendant and his counsel desire to put on a full blown defense, the procedures contained in KRS 421.350(2) require the defense to include in its presentation of evidence the live testimony of the victim or to forfeit its rights of confrontation and cross-examination. Certainly the defense should be free to decide the contents of its own

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case without losing such valuable trial rights.

In the same vein, these situations demonstrate how this portion of the statute deprives the defendant of "the guiding hand of counsel" in choosing to exercise the right of confrontation and cross-examination, in challenging the failure of the prosecution to prove its case beyond a reasonable doubt in its initial presentation and in deciding which witnesses will testify during the defense case. Brooks v. Tennessee, supra at 1895.

In the event these challenges to the statute fail, defense counsel should move the court to adopt the following procedures to implement the statute. If the prosecution introduces the child's recorded statement, the defense may in chambers demand that the child be called. The child would then have to be called during the prosecution's case-in-chief and the jury could not be informed that the defense had compelled the presence of the child witness. Additionally, contrary to the language of the statute, even though the defense would have called the witness, defense counsel would be allowed to cross-examine rather than simply question the witness.

The statute specifically states that this procedure may be employed only if "[t]he child is available to testify." KRS 421.350(2)(h). Under federal constitutional standards, mere physical availability to testify may be insufficient to satisfy the rights of confrontation and cross-examination.

If, when the child witness takes the stand, he is unable or unwilling to recall either the incident giving rise to the charge or the session at which his statement was recorded, the defendant may be denied confrontation and cross-examination. A witness's lapse of memory, whether real or feigned, may so effect a defendant's opportunity to cross-examine that the Confrontation Clause of the federal constitution is violated. California v. Green, 90 S.Ct. 1930, 1940 (1970). For example, when "a witness ... disclaims all present knowledge of the ultimate event[,] ... [c]ommentators have noted that ... the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished." Id. at 1940 n. 18. See Ky. Cont., §11.

For this reason, defense counsel should move the court to conduct an in chambers hearing to determine the child's present memory of both the alleged offense and the recording of his statement as a condition precedent to the prosecution's use of the child's recorded statement.

At first glance the absence of a present memory would appear to satisfy the requirement of the child witness's unavailability and to justify resort to the pretrial recording as an evidentiary substitute for the live witness. However, the statutory method of procuring the recorded statement (e.g., no attorneys were present at the filming session, the recording is made for the purpose of prosecution, the interviewer does not have to be an objective, disinterested person) is devoid of any "adequate indicia of reliability" and "must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Ohio v. Roberts, 100 S.Ct. 2531, 2539 (1980).

In cases of suspected sexual crimes with child victims, it is not unusual for prosecutors and social workers to employ leading questions, to coach the children, to suggest the type of details needed, and to subject the

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children to repeated interview sessions in an effort to insure convincing testimony by the child. See "The Youngest Witnesses: Is There A 'Witch Hunt' Mentality In Sex-Abuse Cases?" Newsweek, Feb. 18, 1985, pp. 72-75. All of these factors demonstrate the lack of any adequate indicia of reliability in the pretrial, extra-judicial recorded statements made pursuant to KRS 421.350(1).

The electronic exception to the hearsay rule is also constitutionally suspect because it is available to the prosecution in every case of a sexual crime where the alleged child victim is a potential witness without a showing of the child's individualized need for the procedure. Additionally, the pretrial, filmed deposition is not employed to protect the child from testifying in court, being questioned by defense counsel, or recounting his story in the presence of the alleged perpetrator. Under the statute, even when the recording is admitted, either party may still force the child to testify.

NEXT ISSUE: A LOOK AT CLOSED-CIRCUIT AND VIDEOTAPED "COURTROOM" TESTIMONY. KRS 421.350(3) & (4).

NEW LAW ALLOWING CHILD VICTIM TO TESTIFY OUTSIDE DEFENDANT'S PRESENCE IN SEX CASES RULED UNCONSTITUTIONAL

On February 20, 1985, Fayette Circuit Court Judge George E. Barker ruled unconstitutional those portions of the newly enacted KRS 421.350 which permit children twelve and younger who are allegedly sex-abuse victims to testify outside of court and outside the presence of the adult accused of the crime.

KRS 421.350(3) & (4) provide in such cases that the child's testimony be taken in a room other than the courtroom and either simultaneously televised by closed circuit to the courtroom or recorded for subsequent showing in the courtroom.

Although the defense attorney may be present in the room with the child, the defendant is not allowed to be present but must be permitted to observe and hear the testimony of the child in person without the child seeing or hearing the defendant. If the court orders the child's testimony taken in either of these manners, the child may not be required to testify in court. KRS 421.350(5).

Judge Barker ruled that these portions of the statute dealt with procedure rather than substance, and constituted intrusion by the legislature into the province of the judiciary in contravention of sections 28 and 109 of the Kentucky Constitution.

Addressing the most fundamental issue in the case, the circuit court ruled that "the privilege of viewing a witness through a one-way mirror or a video monitor" is not "a constitutionally acceptable substitute for face to face confrontation." Commonwealth v. Leslie Willis, Fayette Circuit Court, Div. 6, Ind. No. 84-CR-346 (2-20-85).

Judge Barker acknowledged "both the strong public interest" in the prosecution of child sex abuse cases and the "sometimes insurmountable difficulties" of having a small child recount in court in the defendant's presence the events of sexual abuse. But the judge noted that "closely following the wave of public concern regarding child abuse may be seen the wave of public concern regarding false accusations of child abuse and the irreparable damage which can occur."

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Lexington attorney John P. Schrader, who is representing Leslie Willis on two charges of sexually abusing a four-year-old girl, filed the pre-trial motion challenging the constitutionality of KRS 421.350.

VINCE APRILE

Vince has been a trial and appellate public defender with the Department of Public Advocacy since 1973. He has been a lecturer at the University of Louisville Law School since 1975. He has also lectured nationally on criminal law topics and taught trial advocacy skills. He is on the faculty of the National College of Criminal Defense.

A DEFENDANT'S RIGHT

The following is a March 1, 1985 editorial of the Kentucky Post, and is reprinted with permission.

The victims of crimes seem to be the forgotten people in our justice system. Their sufferings are multiplied by lengthy court procedures, the need for them to testify in a room full of strangers, the glare of the public spotlight at a difficult time.

When the victim is a child, the pain is increased tenfold.

The natural concern of any humane person is to shield a child, particularly a child who already has suffered as the victim of a crime, from the pain inflicted by an impersonal justice system. If a child has been sexually abused, we want to protect him from any trauma he may suffer from facing his abuser in the courtroom. There should be a better way, we tell ourselves. Couldn't the child's testimony be videotaped away from the courtroom, some have asked, and then the videotape be presented to the judge and jury?

COULDN'T THE CHILD'S TESTIMONY BE VIDEOTAPED AWAY FROM THE COURTROOM?

That's just what a new state law allows. But even the law's sponsor, Rep. Bobby Richardson, has had doubts about its constitutionality.

Richardson's doubts were proven well-founded recently when a Fayette County circuit judge ruled that the use of testimony of sexually abused children videotaped outside the courtroom is unconstitutional.

The reason is simple and elemental to our criminal justice system: A defendant has the right to face his accuser.

Fayette Circuit Court Judge George Barker's ruling came in response to a prosecution motion to used taped testimony in a sexual abuse case involving a 4 year old girl. The young age of the child makes the issue that much tougher to deal with. But if such a constitutional infraction is permitted, where do we draw the line? Do we say it is lawful and appropriate to throw out the defendant's rights granted under our constitution when the victim is 4 years old, but not when he is 6 years old or 8 years old or...? Do we say, well, maybe sometimes -- or maybe just this once -- it's all right to overlook the defendant's constitutional rights and allow his accuser to testify against him through a TV monitor or a one-way mirror or any other gimmick that will keep the victim from confronting the accused face to face?

No, we must not play such games with our constitution.

Our constitution clearly says the accused has the right to face his

(Continued, P. 46)

accuser. We do not have the authority to rob him of that constitutional right.

That does not mean, however, that our courts and our lawmakers can't ease the pain of crime victims. It doesn't mean that they can't lessen the trauma that a sexually abused child may experience in the courtroom. It certainly doesn't mean that we shouldn't all be more humane in our dealing with crime victims.

But we caution our legislators against their habitual approval of popular legislation that violates the constitution. And we applaud Judge Barker's clear-cut ruling on the constitutionality of videotaped testimony.

Book Review

THE BEST DEFENSE

by Alan M. Dershowitz (1983), Vintage Books

THE BEST DEFENSE is an exciting and thought provoking description of some of the famous civil and criminal cases that Alan Dershowitz, Harvard Law Professor, has been involved in.

The Professor says that he began his teaching career at Harvard Law School (after clerking for Chief Judge David Bazelon of the U.S. Court of Appeals for the District of Columbia, and Associate Justice Arthur Goldberg of the U.S. Supreme Court), "as a naive idealist with an abiding faith in the system: trust in the integrity of judges, in the good faith of prosecutors, and in the dedication of defense attorneys."

His real legal education began in 1972 when he agreed to represent a member of the Jewish Defense League accused of capital murder. His first chapter entitled "The Boro Connection" has everything in it for lawyer and non-lawyer alike: illegal wiretaps, promises/threats to informants, "fruits of the poisonous tree", illegal searches, police officer perjury, suppression hearings, the tricky appellate process, the granting of immunity to unwilling defendants, the destruction of evidence by the government, civil contempt, judicial disqualification, Soviet-U.S. relations, the Jewish Defense League, Boro Park in Brooklyn, and a brief autobiography.

By the end of his first defense case, the naive attitudes of the ivory tower have been changed by the realities of representing an individual charged with a criminal offense in our society. He lists the following as the "rules" of the Criminal Justice System:

Rule I: *Almost all criminal defendants are, in fact, guilty.*

Rule II: *All criminal defense lawyers, prosecutors, and judges understand and believe Rule I.*

Rule III: *It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution.*

Rule IV: *Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.*

Rule V: *All prosecutors, judges and defense attorneys are aware of Rule IV.*

Rule VI: *Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.*

Rule VII: *All judges are aware of Rule VI.*

Rule VIII: *Most trial judges pretend to believe police officers who they know are lying.*

Rule IX: *All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judge who pretend to believe the lying police officers.*

Rule X: *Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth.*

Rule XI: *Most judges and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charged (or a closely related crime).*

Rule XII: *Rule XI does not apply to members of organized crime, drug dealers, career criminals, or potential informers.*

Rule XIII: *Nobody really wants justice.*

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His book contains the experiences that he has had which led him to "discover" these rules.

Despite, or because of these "rules", Professor Dershowitz is the total advocate and in THE BEST DEFENSE he pursued that goal and that role through a myriad of interesting

HE STATES THAT ONCE HE TAKES A CASE HE HAS ONLY ONE AGENDA: TO WIN BY USING EVERY FAIR AND LEGAL MEANS TO GET HIS CLIENT OFF, WITHOUT REGARD TO THE CONSEQUENCES.

cases. He states that once he takes a case he has only one agenda: to win by using every fair and legal means to get his client off, without regard to the consequences.

He demonstrates that by diligently representing unpopular clients and clients whose attitudes and beliefs are diametrically opposed to his. One such client was a Maoist and Stalinist Professor from Stanford who was fired for his political beliefs. Another case involved the highly publicized witch hunt of the wealthy Bernard Bergman, charged with operating substandard nursing homes in New York. In the later case, Dershowitz struggled with the aftermath of a plea bargain agreement that the prosecutor reneged on. It is a fascinating discussion of plea bargaining, the effect of publicity on judges and prosecutors, and the personalities and politics of the appeal process.

In most of these cases, Professor Dershowitz's involvement began after the trial was over and as the appeal process was beginning. In the seemingly hopeless case, the best defense often was to put the government on trial for its misconduct which included not only the activities of crooked police officers, but also serious and highly unethical prosecutorial misconduct (specifically the U.S. Attorney's Office for the Southern District of N.Y.). Whenever that was the "best defense", it was generally met by judges who took it personally and who swiftly threatened Dershowitz with unethical conduct charges, contempt, and disciplinary action. A particularly interesting case of this nature was the appeal of Edmund Rosner, a highly visible and successful lawyer convicted of brib-

ing witnesses. The major witness against Rosner was Bob Leuci of "The Prince of The City" movie fame. Mention is also made of the fact that millions of dollars worth of cocaine and heroin seized in the "The French Connection" case disappeared and probably went back out on the streets.

Dershowitz concludes his book with remarks on the role of the defense attorney. He notes that the role of the defense attorney who defends guilty clients is the most difficult to explain to the public. Yet he is convinced that it is the zealous advocate who is the buffer between the over-reaching government and its citizens. He ends by stating that he knows of no title more honorable than defense attorney.

PATRICIA VAN HOUTEN

moving to Somerset's Office in November of that year. He likes the fast pace of being a trial lawyer in a field office, and especially enjoys meeting all the people he encounters during his work.

The most frustrating part of his job is, "to not get the outcome on a case that in your heart you feel should have been the outcome."

What trends does he see developing? "The greater emphasis on victim's rights has effectively taken the presumption of innocence away. Juries expect you to prove your client innocent."

What are the most difficult cases? "Child victim cases."

Biggest surprise in Court? "Meeting my client for the first time just minutes before trial on an arson/ assault case (prepared for trial by other counsel). His fatigue jacket pockets were so full of pills that he rattled when he walked. He had shoulder-length hair and a beard to his chest. I'd give anything if I could show you his hat." (But rapport was established, and the client was acquitted.)

Active in sports, Jim plays racketball, basketball and golf. He and a co-worker recently entered an upcoming modified triathalon. An avid reader, he favors westerns and books about other trial lawyers. Jim's coworkers and friends enjoy his fine sense of humor and respect his skill and dedication.

Growing up in Memphis, Jim worked at the Memphian Theater, where Elvis often came for private screenings. While working for a furniture moving company, he got his first job as a law clerk during an impromptu interview while moving a Knoxville attorney's furniture. It was at the University of Tennessee's Criminal Clinic that Jim first learned about the high cost of representing the indigent accused. Jim's client, caught dismantling a sink in the bus station men's room, had claimed to be trying to retrieve a lost quarter. The Judge accepted Jim's proposed disposition, with one exception. He held Jim personally responsible for paying restitution if his client failed to do so.

But the experience of the Criminal Clinic did even more to shape the career of this excellent trial lawyer. For it was here that Jim saw and heard the leaders in Knoxville's criminal defense bar, including Bob Ritchie, and the fire was lit. For this, DPA is grateful.

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