THE ADVOCATE

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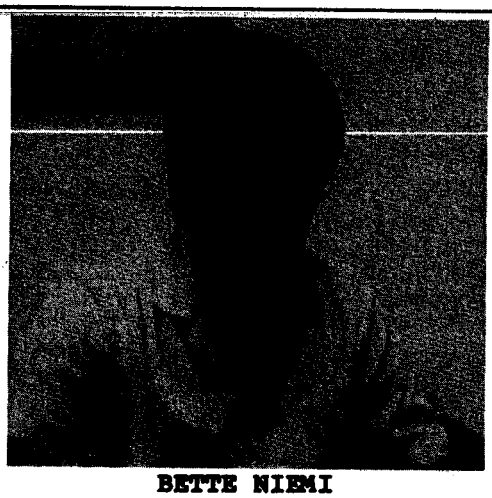
THE ADVOCATE FEATURES



BETTE NIEMI

From April, 1973 until October, 1975 Bette J. Niemi worked for DHR in Louisville. As a social worker, she met with continual frustration. Experiencing her powerlessness to end the problems she dealt with daily and caught between anger and despair, she finally resigned.

While working at DHR, Bette had been attending law school at night at the University of Louisville (J.D. conferred 1976) so she was able to go from DHR to enter private practice. Oddly enough revelations akin to those that had driven her from social work resurfaced. Bette found the fee arrangement conflicted with her loyalties to her clients as she was unwilling to disengage as counsel when a client's money ran out. Because of that conflict she decided that private practice didn't meet her needs but also decided that criminal law allowed her to do her most productive and satisfying work.

(See NIEMI, P. 52)

Drunk Driving Law

CHALLENGING DUI ENHANCED PUNISHMENT

On June 23, 1985 the Supreme Court of Kentucky decided in Commonwealth v. Ball, Ky., ___ S.W.2d ___ (1985) [32 KLS 8 at 15] that convictions for driving under the influence received prior to the effective date (July 13, 1984) of the present statute (KRS 189A.010) can be used in applying the penalty section of the statute in determining whether a person is a multiple offender.

Obviously, this greatly raises the penalty possibilities for many defendants. Challenging prior offenses is now even more critical. The Advocate has published an extensive article by Jay Barrett on such challenges in the October, 1984 issue. (See Vol. 6 No. 6 pp. 24-28).

Future Seminars

DEFENSE OF
SEXUAL ASSAULT CASES

A one-day DPA seminar on the Defense of Sexual Assault Cases will be held September 23, 1985 at the Marriott Resort in Lexington. Contact Ed Monahan, Director of Training for more information at (502) 564-5258.

THE ADVOCATE

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

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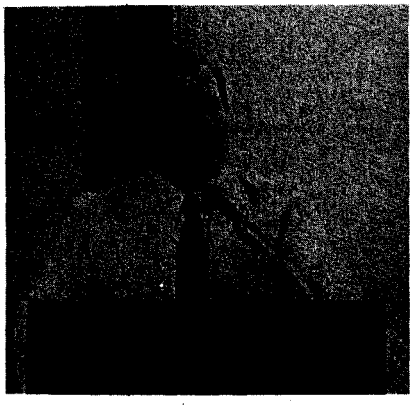
PAGE

MAY SEMINAR COMPLETED

Over 200 persons attended the 2-1/2 day Annual Training Seminar. National faculty included Garvin Isaacs of Oklahoma City, Oklahoma, Richard Lustig of Southfield, Michigan. Other faculty included Ned Pillersdorf, Bob Carran, Bette Niemi, Cam Cantrill, Ivan Weir, Dr. Tom Miller and others. Senator Mike Moloney gave the luncheon address.

Thanks to all those that made the seminar a great success. **Don't miss next year's seminar to be held June 8, 9 and 10th, 1986 at the Capital Plaza Hotel in Frankfort.**



GARVIN ISAACS

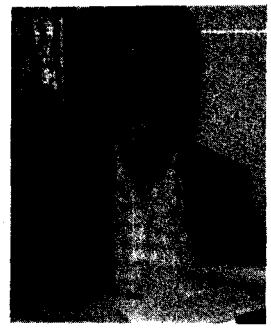
TOM HECTUS, ALLEN BUTTON

PAUL ISAACS, KEVIN MCNALLY

MCGEHEE ISAACS, KEN TAYLOR, ALLISON CONNELLY

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

This installment of West's Review is written by Ed Monahan.

Kentucky Court of Appeals

MARITAL PRIVILEGE
Commonwealth v. Byrd
32 KLS 7 at 7 (May 10, 1985)

In this case, the trial court sustained the defendant's request to prohibit his spouse from testifying at all during his robbery and second degree PFO trial.

As a result of the Commonwealth's appeal of that ruling, the Court of Appeals determined that KRS 421.210 (1) allows a spouse to "testify as to any and all nonconfidential communications made during the marriage, and for that matter, any confidential communications between the couple prior to or after marriage but not during the marriage."

Further, the Court decided that "where the subject matter of the testimony given by a spouse involves acts, occurrences or verbal exchanges which may have been known or seen by any person, the privilege under the statute does not apply."

Based on this rationale, the Court held that the defendant's wife could not testify to his statements to her of his intent to commit the robbery, or his statements to her that the victim struggled and got hurt since they were made outside the presence of third parties. Also, she could not testify to what happened in their home since this occurred as a result of their being married. However, the Court held that the wife could testify to what she saw of the robbery since this could have been seen by any person.

DIRECTED VERDICT MOTIONS
Heflin v. Commonwealth
32 KLS 7 at 11 (May 17, 1985)

The defendant in this case was convicted in McCracken district court of distributing obscene materials in violation of KRS 531.020 as a result of selling a movie entitled "Craig's Double Dream" and a magazine called "Swedish Erotica No. 26" to a Kentucky State Police undercover officer.

The Court of Appeals affirmed the conviction deciding that, if there was any error in the district court's denial of the directed verdict motion at the close of the Commonwealth's case, it was cured when the defendant subsequently took the stand and supplied the missing essential element of the Commonwealth's case: that the defendant sold the items with knowledge of their content.

PERSISTENT FELONY OFFENDER LAW
Hobbs v. Commonwealth
32 KLS 8 at 7 (May 31, 1985)

Hobbs appealed his first degree PFO conviction and sentence of 15 years challenging the fact that he had no prior conviction within the 5 year rule.

Hobbs' original minimum expiration date, which included his good time credits, was outside the 5 year requirement. However, Hobbs was paroled before the minimum expiration

date, and had his parole revoked and was returned to prison on that revocation.

The Court held that the date of his final discharge, not his minimum expiration date, controlled for the 5 year rule's applicability, and that time on parole did not count towards the minimum expiration date. In effect, the Court determined that 1) a person can be paroled for a length of time beyond their minimum expiration date, and 2) that a parole revocation effectively causes a loss of good time for a person on parole past the minimum expiration date.

INFORMANT/VERDICT
Lewis v. Commonwealth
32 KLS 9 at 3 (June 14, 1985)

The Court determined that it was not error for the trial court to refuse to order the Commonwealth to reveal its confidential informant in this drug case since disclosure is required only where the informant participates in or is a witness to the criminal transaction for which the defendant is accused, or testifies at trial.

However, the jury's verdicts were defective since they included both a sentence "and/or" fine. These verdicts were ambiguous since it required speculation as to the exact punishment. As a result of this error, the Court of Appeals fashioned a perplexing remedy: the trial court is to sentence the defendant as if a guilty plea had been entered. Why? Because defense counsel did not object to the verdict until after the jury was discharged.

BRIBERY AND TAPE RECORDINGS
Lovell v. Commonwealth
32 KLS 9 at 4 (June 14, 1985)

In this case, a Richmond city commissioner appealed his conviction and one year sentence for the offense of agreeing to accept a sum of money to influence his vote.

In affirming the conviction, the Court interpreted the meaning of KRS 521.020's "agrees to accept" to include not only the acceptance of or agreement to accept a bribe but also the solicitation of one. The court interpreted "upon an agreement or understanding" to refer to the "state of mind of the public servant and the condition upon which his agreement to receive or his acceptance of the bribe is made."

Lovell also contended that it was hearsay and a denial of confrontation guarantees to allow the prosecution to introduce a tape recording of two people into evidence when the prosecution only called one of those persons. This error was rendered harmless when Lovell called the witness, himself.

Lovell also argued that the tape recording was made to blackmail and had to be suppressed under the 18 USC §2515 prohibition of using oral communications obtained in violation of that chapter. That chapter prohibits the use of recordings if made "for the purpose of committing any other injurious act." The trial court ultimately denied the motion to suppress; however, there was ambivalence about it and a statement by the judge: "that's a question for the jury" since the evidence was in conflict. The Court of Appeals tersely rejected the error saying that Lovell did not meet his burden of proof and did not ask for specific findings of fact, citing CR 52.04; RCr 13.04; Blankenship v. Commonwealth, Ky.App., 554 S.W.2d 898 (1977).

JEOPARDY AND SPECIFIC BAD ACTS
Taylor v. Commonwealth
32 KLS 9 at 10 (June 21, 1985)

The Court ruled that Mary Taylor was improperly placed in double jeopardy

because the mistrial motion of the prosecution was granted without a showing of manifest necessity.

Mary was charged with murder and pleaded self-defense. The trial judge improperly granted the mistrial because the defense made numerous references to specific bad acts of the victim in violation of the law that prohibits such evidence to prove the character of the victim.

The Court of Appeals recognized that specific bad acts could not be used to show character but could be used to prove the defendant's state of mind.

The character of a victim is admissible to show that the victim committed the act(s) which caused the defendant to kill. Likewise, "the mental state of a defendant is always relevant to the factfinder's evaluation of a defendant's acts and the reasonableness thereof."

How are these proven?

Character is proven by evidence of general reputation in the community, or under Federal Rule of Evidence 405 by testimony in the form of an opinion. Evidence of specific acts is not admissible to prove character.

To prove state of mind, evidence is "admissible if it tends to affect one's mental state at the time in question. This includes evidence of a victim's specific bad acts directed toward a defendant or others if known to the defendant... as well as information concerning drug usage or escape from custody."

Evidence of specific bad acts may not be "excluded simply because it is inadmissible in proving a victim's character under a different rule of evidence. See, e. g. F.R.E. 404(6)."

Kentucky Supreme Court

CRIMINAL ATTEMPT

Commonwealth v. Prather

32 KLS 7 at 25 (May 23, 1985)

Prather's convictions for criminal intent to commit first degree robbery and for first degree PFO were reversed by the Court of Appeals. On review via discretionary review the Supreme Court reversed the Court of Appeals.

The "substantial steps" delineated in the criminal attempt statute, KRS 506.010, are overt acts which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based on observation of such incriminating conduct, in order to prevent the crime when criminal intent becomes apparent. The steps must be strongly corroborative.

According to the Court, there is no "absolute" applicable to this statute except to say that the overt acts, the substantial step, must be considered under all the circumstances of the case to discover whether they manifest a clear intent to commit the crime.

BELATED APPEALS
Commonwealth v. Wine
32 KLS 7 at 18 (May 23, 1985)

Only George Steinbrenner has so radically and repeatedly changed his mind more often than the Kentucky Supreme Court has on belated appeals.

The Court stated that "this case... has a tendency to bring our judicial system to its knees." In reality, the Court's changing, contrary decisions have turned stare decis on its head.

The Supreme Court of Kentucky recognized that it was "compelled to abide by the decisions of the United State Supreme Court...."

"It seems abundantly clear from the decisions of the United States Supreme Court that State rules of procedure, however important they may be to the orderly administration of justice, cannot be allowed to frustrate an appeal of an indigent defendant who has been denied effective assistance of counsel." Evitts v. Lucey, 469 U.S. ___, 105 S.Ct. ___, 83 L.Ed.2d 821 (1985).

The Kentucky Supreme Court determined that "the failure of counsel to file an appellate brief which results in the dismissal of an appeal constitutes ineffective assistance."

How is the remedy effected?

Relief must be sought from the court that has jurisdiction to hear the appeal, not the trial court. The appellate court can hold a hearing to resolve issues of fact, or remand to the trial court for findings of facts and conclusions of law.

IDENTIFICATION/DOUBLE JEOPARDY/ SEPARATE TRIALS
Wilson v. Commonwealth
32 KLS 7 at 16 (May 23, 1985)

Each of the three defendants in this case were convicted of conspiracy to commit first degree robbery and two counts of accomplice to second degree assault, and two of the three as first degree persistent felony offenders.

One of the defendants was placed in a lineup and identified by two victims. One of the victims knew four or five of the six other men in the lineup. The other victim knew everyone in the lineup. The Supreme Court found this was unduly suggestive, and under the five factors in Neil v. Biggers, 409 U.S. 188 (1972) "their in-court identification of [the defendant] constituted a violation of his due process rights." However, for a variety of reasons the Court held the error harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967).

Importantly, the Supreme Court recognized that a trial judge has the right to conduct defense requested lineups to insure the reliability of identification evidence. Moore v. Illinois, 434 U.S. 220 (1977).

In denying any error in the trial court's refusal for separate trials, the Court stated, "Although each appellant raised additional grounds for severance during the trial, these grounds were not properly presented to the trial court before the swearing of the jury and, so, will not be considered on appeal. RCr 9.16."

Since the conviction for each principle offense required proof of at least one additional element not required to prove the other, the convictions for both offenses did not violate either statutory or constitutional prohibitions against double jeopardy.

DOUBLE JEOPARDY
Kruse v. Commonwealth
32 KLS 7 at 26 (May 23, 1985)

Tried jointly for murder, first degree assault, and first degree robbery, Kruse pled guilty to first degree robbery during the trial.

The Court found that the subsequent convictions for wanton murder and first degree assault placed Kruse in double jeopardy.

"Here the only acts charged against Kruse as a basis for his conviction for murder and assault are the same acts as charged against him for the robbery to which he had already plead guilty. Jeopardy attached when the trial court accepted his robbery plea. The appellant was then subjected to further convictions and cumulative sentences based on evidence which is, as to him, limited solely to his complicity and participation in the robbery.

Justice Wintersheimer was the lone dissenter arguing that a defendant is not entitled to use the double jeopardy claim as a sword.

DRUNK DRIVING LAW
Commonwealth v. Ball
32 KLS 8 at 15 (June 13, 1985)

The Court held that under the "slammer bill," KRS 189A.010, convictions for driving under the influence received prior to the effective date of the present statute (July 13, 1984) can be used in applying the penalty section of the statute in determining whether a person is a multiple offender.

The Court determined that this was not a violation of ex post facto guarantees since the new statute merely imposed different penalties on a previously existing criminal act.

This case makes challenges to prior offenses essential. The Advocate has published an extensive article by Jay Barrett on such challenges in its October, 1984 issue (See Vol. 6 No. 6 pp. 24-28).

GBMI/EED/PFO
Wellman v. Commonwealth
32 K.L.S. 8 at 21 (June 13, 1985)

The defendant was found guilty but mentally ill of murdering his mother.

Those portions of Ratliff v. Commonwealth, Ky., 567 S.W.2d 307 (1978); Bartrug v. Commonwealth, Ky., 568 S.W.2d 925 (1978); and Edmondson v. Commonwealth, Ky., 586 S.W.2d 24 (1979) "which declare that the absence of extreme emotional distress is an essential element of the crime of murder and require the Commonwealth to prove such absence..." are overruled. Obviously, this ruling presents significant federal issues.

It was reversible error for the trial court to fail to appoint at the time of sentencing under KRS 504.140 a psychologist or psychiatrist to examine, treat and report on defendant's mental condition.

The Court expressly overruled Shannon v. Commonwealth, Ky., 562 S.W.2d 301 (1978) to the extent that case required the defense to object to an illegal sentence for it to be preserved for appellate review. In Wellman, the Court remanded for resentencing the defendant to a single life sentence as a PFO instead of life imprisonment on each count.

EED
Buchanan v. Commonwealth
32 KLS 8 at 14 (June 13, 1985)

The introduction by the defense of three DHR reports is not evidence of EED. Evidence of a mental defect alone does not support a defense of EED.

PERJURY/PRESERVATION
Commonwealth v. Thurman
32 KLS 8 at 16 (June 13, 1985)

On discretionary review, the Supreme Court reversed the Court of Appeals' decision in this case.

The defendant testified as to one set of facts at his preliminary hearing, and to an opposite set at trial. The Court of Appeals determined that the defendant could not have been convicted of perjury but only of false swearing.

Perjury requires that the false statement be material, false swearing does not. The Supreme Court decided in Thurman that the false statement was material, even though not related to the principal issue in the case because the statement could, in the juror's minds, undermine the credibility of a prosecution witness.

The Supreme Court also determined that the Court of Appeals' ruling that the defense could raise on appeal an unpreserved instruction error was itself in error under RCr 9.54(2).

There continues to be a reasonable exception to every rule known to mankind except the Kentucky Supreme Court's rules on appellate preservation.

PROHIBITION
Graham v. Mills
32 KLS 8 at 17 (June 13, 1985)

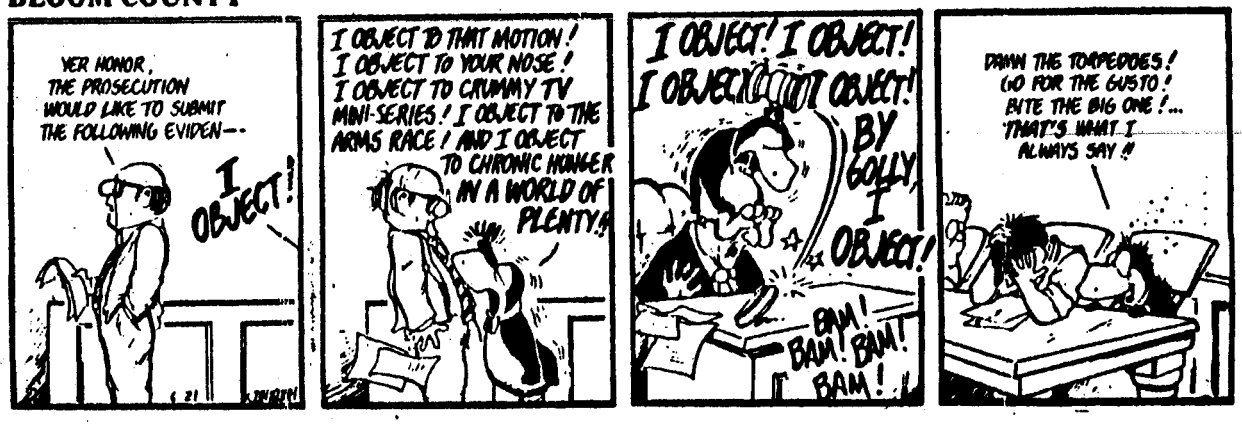
The Court reversed the Court of Appeals' grant of the writ of prohibition in this prosecution of the Kentucky State Treasurer by the Attorney General since the trial court had jurisdiction, Mills had an adequate remedy by appeal, and since the trial court was not clearly incorrect in allowing the Attorney General to act as prosecutor.

United States Supreme Court

CONFRONTATION
Tennessee v. Street
37 CrL 3039 (May 13, 1985)

The Sixth Amendment's Confrontation Clause was not violated by the admission of a confession given by a nontestifying codefendant and implicating the defendant in the crime for the limited purpose, reflected in a jury instruction, of rebutting the defendant's claim that his confession

BLOOM COUNTY



was a coerced "copy" of the co-defendant's statement.

DEFENDANT'S KNOWLEDGE OF
Liparota v. United States
37 CrL 3042 (May 13, 1985)

A conviction for food stamp fraud in violation of 7 USC 2024(b), which provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations" is guilty of a criminal offense, requires proof that the defendant knew that his acquisition or possession of food stamps was unauthorized by statute or regulations.

PRISON DISCIPLINARY HEARING
Ponte v. Real
37 CrL 3051 (May 20, 1985)

Prison officials' reasons for refusing to call witnesses requested by an inmate at a disciplinary hearing need not, under the Fourteenth Amendment's Due Process Clause, be placed in writing or otherwise made part of the administrative record but, if not stated at the time of the hearing, must be presented by the way of testimony if the officials' decision is subsequently challenged in a judicial action.

PROBATION
Black v. Romano
37 CrL 3060 (May 20, 1985)

The Fourteenth Amendment's Due Process Clause imposes no general requirement that a sentencing court indicate on the record that it has considered alternatives to incarceration before revoking probation.

CIVIL RIGHTS ACTION
Oklahoma City v. Tuttle
37 CrL 3077 (June 3, 1985)

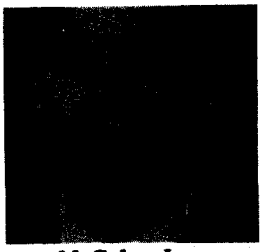
A decision by the United States Court of Appeals for the Tenth Circuit holding that a single incident of unusually excessive use of force by a police officer could create an inference of municipal "policy" of inadequate training or supervision, sufficient to hold the municipality liable under 42 USC 1983, is reversed.

GOOD TIME CREDIT
Superintendent, Massachusetts Correctional Institute at Walpole v. Hill
37 CrL 3107 (June 17, 1985)

A decision by a prison discipline board to revoke good time credits in which an inmate has a constitutionally protected liberty interest will pass scrutiny under the Fourteenth Amendment's Due Process Clause if there is some evidence in the record to support the board's conclusions; evidence consisting of a prison guard's report that he heard a commotion, discovered an inmate who had apparently been assaulted, and observed three other inmates, including the respondents in this case, fleeing down an enclosed walkway was sufficient to support the disciplinary board's adjudication of guilt.

UNBECOMING CONDUCT OF ATTORNEY
In Re Snyder
37 CrL 3137 (June 24, 1985)

An attorney's letter to a federal district judge's secretary, in which the attorney refused to submit requested additional documentation to support his fee request under the Criminal Justice Act, refused to accept further assignments to represent indigents under the Act, and criticized the administration of the Act, together with the attorney's refusal to apologize for this "disrespectful" letter, do not constitute "conduct unbecoming a member of the bar" under Fed.R.App.P. 46, and thus do not warrant a six-month suspension from the practice of law in the federal courts in the Eighth Circuit.



McGehee Isaacs

GUEST ARTICLE

KENTUCKY'S PERSISTENT FELONY OFFENDER STATUTE

This article was originally printed in the December 1984 Law Examiner. It is reprinted here by permission.

The Kentucky General Assembly's Program Review and Investigations Committee recently agreed to investigate the effect of the state's Persistent Felony Offender statute on prison overcrowding. The committee's action came in response to a recommendation from the Governor's Task Force on Prison Options, a group which was formed to study Kentucky's current and future prison population and conditions and make recommendations to accommodate those needs. Among the options discussed was the modification of the Persistent Felony Offender statute, KRS 532.080.

Task Force testimony and prior legislative research has indicated a concern that perhaps the statute is being applied inappropriately in some areas of the Commonwealth. Specifically:

1) *the number of persons convicted under the PFO statute has increased from 79 in 1980 to 1,187 by July, 1984;*
2) *46% of those incarcerated as of July, 1984, under the PFO statute were property or drug offenders;*
3) *approximately 63% of such property offenders had no prior violent offense;*
4) *approximately 48% of those convicted under the PFO statute are from Louisville compared to 29% in the general prison population from Louisville;*
5) *approximately 42% of those convicted under the PFO statute are black compared to 29% in the general prison population;*
6) *at a rate of increase similar to past experience, there will be approximately 2,734 PFO's incarcerated by 1990 (1,258 of which are non-violent) at an annual operational cost of approximately $19,958,200, not including construction costs necessary for the additional 1,547 inmates which would be approximately $54,145,000, based on $35,000 per bed.*

While the Task Force said this data was "indicative," it said it was incomplete and a more detailed analysis by the Program Review Committee was needed. The committee will undertake that analysis and report its findings to the General Assembly next year as legislators are preparing for the 1986 session.

THE STATE'S ATTORNEY GENERAL THINKS ITS WORKING

by David L. Armstrong

David L. Armstrong is the Attorney General of Kentucky. He is a 1969 graduate of the University of Louisville School of Law who was elected to the state's top law enforcement post in 1983 after serving as Commonwealth's Attorney for Jefferson County.

In recent months, prison overcrowding has become a major topic of discussion throughout the Commonwealth. This problem is real, and not one to

be taken lightly. We find ourselves in the unusual and uncomfortable position of facing, on the one hand, a federal court order demanding that the prison population be decreased and, on the other, facing the reality that we have no place to house those convicted of crimes. As a member of the Governor's Task Force on Prison Options, I have reviewed carefully the issues surrounding this critical problem.

Many of the recommendations to come from this task force are viable ones, combining both short-term and long-term approaches. Indeed, Governor Collins has indicated that she sees great promise for most of the information and recommendations provided to her. One solution that has been repeatedly suggested as a method for reduction of prisoners from our prisons is not only ineffective, but, I believe, poses a great threat to Kentucky citizens. That proposal would alter the Persistent Felony Offender statute, a statute which I, as many criminal justice professionals, view as an important tool in crime reduction in our country and our Commonwealth.

Persistent felony offenders are criminals with previous felony convictions. They have been found unresponsive to rehabilitation and, therefore, are subject to longer sentences and later parole eligibility. This harsher treatment imposed upon convicted offenders who repeatedly victimize Kentuckians was instituted in 1975 as a response to a national and state increase in the crime rate.

As one will understand upon reading the PFO law in Kentucky (KRS 532.080), a persistent felony offender conviction does not come easily in this state. Before a conviction can occur, all of the following must take place:

(1) The crime must be reported.
(2) The criminal defendant must be apprehended. (National data shows fewer than 20 percent of major crimes result in arrest).
(3) The prosecutor must exercise discretion to charge the defendant as a PFO and the grand jury must exercise its discretion to indict.
(4) The defendant must be over 21 years of age.
(5) Subsequent to becoming age 18, the defendant must have at least one (PFO II) or two (PFO I) previous felony convictions for which he received sentences of one year or more.
(6) Within five years of the date the present felony was committed, the defendant must meet at least one of the following criteria for any of the previous felonies:

    (a) Completed service of sentence.
    (b) Was on probation, parole or other form of release.
    (c) Was discharged from probation, parole, or other form of release.
    (d) Escaped from custody.

(7) Finally, after a defendant is found guilty of the present felony in circuit court, the trial jury is then informed of the defendant's prior felony conviction record and must unanimously decide whether the defendant deserves an enhanced sentence.

MULTIPLE MURDERS ARE COUNTED AS ONLY ONE PREVIOUS FELONY

It is very important to note that multiple convictions, for which concurrent or uninterrupted consecutive sentences are imposed, are counted as only one previous felony. For example, the thief who commits 50 fel-

onies before being apprehended will be deemed to have only one felony conviction. In other words, offenses must be committed "progressively" (after conviction for the previous offense) before they will be counted as separate offenses for PFO purposes.

Sentences vary depending upon the nature of the present offense and the number of previous felony convictions. Second degree PFO status requires at least one previous felony conviction and permits enhancement of the present offense to the sentence of the next higher grade. For a present Class D felony, the maximum enhanced sentence is five to ten years. Parole eligibility is the same as for the first offender, i.e. 20 percent of the sentence.

First degree PFO status requires at least two previous felony convictions and permits enhancement as follows: Class C or D felonies, sentence range is 10 to 20 years and Class A or B felonies, sentence range is 20 years to life. Features of the statute to be noted are that most property offenses fall into the Class D category and are subject to less enhancement than violent offenses, that juvenile offenses are not considered, and that multiple offenses are often deemed to be a single offense. As one can see, the Kentucky PFO statute is designed to take into consideration the nature of the offense and provides sentences for property offenders which are typically lower than for violent offenders.

To those who cry that the PFO law is too harsh, I would point out that Kentucky's is extremely gentle when compared with the habitual criminal laws of our neighbors. For example, in Alabama those convicted of three or more prior felonies and subsequently convicted of a Class A felony (ranging from non-capital murder, robbery, rape and certain types of burglary involving the use or threat of violence) are sentenced to life without parole under the habitual offender statute of that state. Kentucky already confines the lowest percentage of convicted adult offenders of those states which surround us (Kentucky, 21.4 percent; Tennessee, 47.8 percent; Virginia, 42.4 percent; Missouri, 29.0 percent, and Indiana 29.9 percent). In addition, based on 1982 statistics, Kentucky paroles prisoners with the lowest average length of stay of any state in the country. Our maximum sentence of a household burglar with two prior felonies is 20 years, low compared to other states such as Illinois where the maximum sentence is life; Indiana, 40 years; Missouri, 30 years; Ohio, 25 years, and West Virginia, life.

There are those who maintain that exemptions should be made for certain offenders who repeat certain categories of crime, such as burglary and theft. However, studies show that career criminals do not specialize. An habitual burglar will not likely continue simply on a theft spree. Instead, studies show that the burglar is apt to branch out and commit more serious crimes such as rape or murder.

In addition, while habitual offenders are a small part of the prison population, they commit a large number of the crimes. A Philadelphia study showed that chronic offenders accounted for 23 percent of male offenders, but they had committed 61 percent of all crimes. While only 53 percent of those with one arrest went on to a second arrest, 71 percent of those with three arrests went on to a fourth.

I believe that the PFO law has been an effective tool for prosecutors and has served to protect Kentuckians from not only property offenders, but from those who switch to violent offenses as well. We do know that the crime rate has dropped significantly. Some say that a chief reason for the drop has been the aging of the "baby boom" generation. But others at least give cursory credit to changes in the way chronic offenders are treated in states across the country.

To lessen the PFO law as a response to prison overcrowding seems to ask us to forget why it was implemented in the first place. We enacted this habitual offender law to protect the people of Kentucky, to keep unrehabilitative criminals off the streets and out of our homes and businesses. To turn around at this point and tell Kentuckians that we have changed our minds, that one more time, they will have to fend for themselves, seems calloused and uncaring. We are placing the citizens of Kentucky in a strange version of double jeopardy, where the victim is victimized twice, once by the criminal and once by the criminal justice system designed to protect him or her.

Rather than be unresponsive to the needs of Kentuckians, it is time to face the reality that is before us. Rather than putting career criminals out of jails and into our communities, it is time to face the fact that more prison space is needed and begin to address that need, not amend the one effective tool we have in combating the crime rate.

BUT A PUBLIC ADVOCATE SAYS AMENDMENTS NEEDED

By J. Vincent Aprile II

J. Vincent Aprile II is the Assistant Public Advocate, General Counsel/ Training Consultant for the state's Department of Public Advocacy. He is a 1968 graduate of the University of Louisville School of Law who has been with the Public Advocate's office since 1973.

Virtually all penal codes in this country contain special provisions for the recidivist. Numerous rationales for enhanced punishment for repeat offenders have been advanced by everyone from prosecutors to social scientists and those philosophical and/or pragmatic justifications will not be debated here. Assuming, at least arguendo, the necessity for some type of enhancement statute for recidivists, it is still necessary to examine the results produced by laws such as Kentucky's persistent felony offender sentencing statute.

Studies of the operation of various persistent felony offender statutes have revealed a number of serious deficiencies. First, the individuals actually incarcerated under enhanced sentences tend not to be the professional or dangerous criminal that the legislature wanted to remove from society by these laws, but instead are severely inadequate people whose crimes are often only petty property offenses. See Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99 (1971).

Second, because the enhanced sentences normally bear little or no relationship to the convicted defendant's most recent crime - the trig-

gering offense, grossly disproportionate sentences are frequently imposed on persistent felony offenders. See Clinton v. State, Kan., 502 P.2d 852 (1972), where a Kansas offender received a sentence of up to fifteen years for the triggering offense of shoplifting a $69.95 coat; Wilson v. State, Ark., 475 S.W.2d 543 (1972), where an Arkansas offender received a sentence of twenty-four years for the crime of forging two checks totaling $77.46; Brown v. Parratt, 560 F.2d 303 (8th Cir. 1977), where the triggering offense of the theft of $17.00 and a watch produced a ten-year sentence.

Third, penal statutes which mandate enhanced punishment for recidivists are infrequently invoked by prosecutors who traditionally have substantial discretion in the decision to charge a person under a persistent felon law. As a result, the threat of charging a defendant under an enhancement statute often provides the prosecution with significant leverage to extract a guilty plea to the current offense from a recidivist. The repeat offender's refusal to go to trial on the current offense if he is prosecuted as a persistent felony offender is understandable when his possible sentence is increased in some instances from a maximum of five years to twenty years or from a maximum of twenty years to life imprisonment.

HABITUAL OFFENDER STATUTES HAVE ACTUALLY DIMINISHED THE DETERRENT VALUE OF THOSE LAWS

Fourth, to the surprise of the advocates of recidivist statutes, certain empirical evidence indicates that habitual offender statutes have actually diminished the deterrent value of those laws. For example, the adoption in New York of very severe recidivist sentencing laws in the 1970's apparently had the effect of reducing the likelihood of imprisonment for the repeat offender due in part to the court congestion the tougher laws generated and the nullifying response of the entire criminal justice system to these disproportionate punishments. Ass'n of Bar of City of N.Y. & Drug Abuse Council, The Nation's Toughest Drug Law (1977).

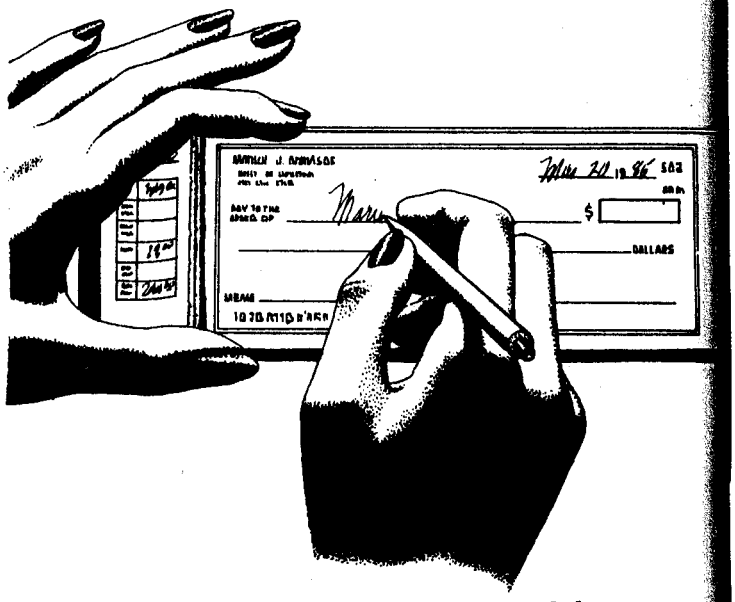
These deficiencies in the operation of recidivist statutes are not catalogued to demonstrate the need to abolish enhanced punishment for repeat offenders, but to demonstrate the necessity for reforms in persistent felony offender sentencing. Obviously, more specific criteria must be employed to select the recidivist who is dangerous to society from the repeater who is only a nuisance to the community. One or more past felony convictions, standing alone, without regard to their type or seriousness, can never be a specific enough criterion for this purpose.

At present KRS 532.080, Kentucky's persistent felony offender sentencing statute, punishes a repeat offender regardless of whether his current offense or his prior convictions are property crimes or involve violence against persons. In June 1983, the United States Supreme Court held that the Eighth Amendment to the United States Constitution "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Solem v. Helm, 103 S.Ct. 3001, 3006 (1983). According to the United States Supreme Court in Solem, "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. at 3009.

In August 1983, the Commission on Sentencing and Prison Overcrowding in Kentucky submitted to the Governor its report and recommendations. Ac-

cording to that report, "[t]he records of persons serving sentences [in Kentucky] as persistent felony offenders [as of July 13, 1983] were examined to determine the type of offense for which they were convicted and their conditional release or parole eligibility dates." Commission on Sentencing and Prison Overcrowding, Report and Recommendations (1983), p. 7. "The purpose of this research was twofold - first to determine how many PFO's had been convicted of property offenses only, and second, to try to provide some estimate of how long the current population of PFO's can be expected to remain in state correctional facilities." Id. The Commission "found that almost one-third of the 345 persons classified as persistent felony offenders in the first degree had been convicted of property offenses." Id. "A similar percentage of the PFO II's had been convicted of property offenses." Id. "An additional seven of the 27 persons classified only as persistent felony offenders or habitual criminals had been convicted of property offenses." Id. The conclusion is apparent: approximately one-third of the persistent felony offenders presently incarcerated in Kentucky prisons were convicted of property offenses. As a result of this empirical data, the Kentucky Commission on Sentencing and Prison Overcrowding specifically recommended that "KRS 532.080 commonly referred to as 'the Persistent Felony Offender Statute' be revised to insure that the original intent of the statute is being carried out, i.e., that only offenders who commit multiple serious felony offenses are given flat-time sentences." Id. at p. 23.

To clarify the focus and impact of Kentucky's persistent felony offender statute, certain amendments to that law are necessary. The statute should be amended to prohibit its application to a recidivist offender when either the present charge against him is a nonviolent property offense or his prior felony convictions involve only nonviolent property offenses. Even this simple alteration of Kentucky's recidivist statute would make it a more efficient tool against the dangerous repeat offender and reduce substantially the disproportionate sentences for nonviolent property offenders who have one or more prior felony convictions.



"To reduce the disparities" caused by persistent felony offender laws and "to ensure that adequate provision is made for the exceptional offender, it would be preferable if, in place of a special statutory extended term for the habitual offender," the legislature would (1) "develop more specific criteria by which to identify the persistent felony offender who poses a danger to society," and (2) "promulgate special enhanced guideline ranges for exceptional offenders with a single outer maximum term authorized by the legislature for the offense." IV ABA Standards for Criminal Justice (2nd Ed. 1980), Sentencing Alternatives and Procedures, § 18-4.4(a)(i) & (ii).

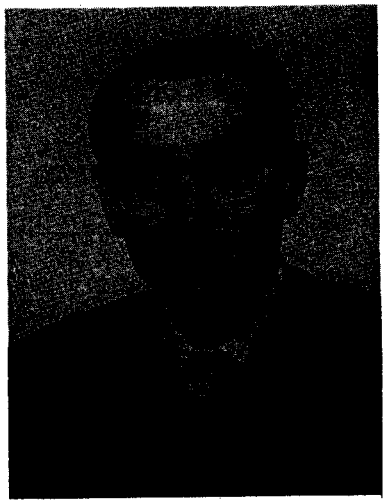
Under the second prong of the recommendation, the recidivist's enhanced sentence would be directly

linked to the authorized sentence for the specific triggering offense. Thus, not only would the recidivist's past felony conviction be utilized to determine whether he should be treated as a danger to society, but his enhanced sentence would be within the term specifically designated as appropriate punishment for his current offense.

"To the extent that existing statutes prescribing special enhanced terms for habitual offenders are retained, they should be revised to conform to the following minimum standards: (i) [a]ny increased term which can be imposed because of prior criminality should be reasonably related in severity to the sentence otherwise provided for the new offense; [and] (ii) [g]uidelines should be adopted fixing presumptive ranges within the limits authorized by the legislature ... [with] a limit for extreme cases [of] twenty-five years ... [as] a maximum authorized prison term." ABA Standards, supra, § 18-4.4(b)(i) & (ii).

These general recommendations of the American Bar Association should be the touchstone for an enlightened restructuring of Kentucky's Persistent Felony Offender law.

In the final analysis, the myopic view that the present generic persistent felony offender statute must remain unaltered as the prosecution's chief weapon against the career criminal is indefensible. Kentucky's current recidivist statute, with its inherent inability to focus on the dangerous, hardened criminal and its propensity to inflict severe sentences on nonviolent repeat offenders, is a blunderbuss in the modern arsenal of Kentucky's penal code, possessing the same lack of accuracy and the same unintentioned destruction as that archaic weapon.



JUSTICE LIEBSON

SUPREME COURT JUSTICE HONORED

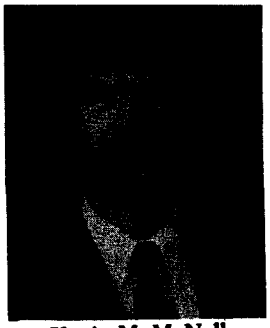
Kentucky Supreme Court Justice Charles M. Leibson is the recipient of the 1985 ATLA Judicial Achievement Award by the Association of Trial Lawyers of America (ATLA) given to him for being 1985's outstanding judge. The organization's president, Scott Baldwin, or Marshall, Texas, said, "Justice Leibson has written significant decisions in all aspects of the law, and he has the uncommon distinction of also having been voted by ATLA the Outstanding State Trial Judge in 1980."

Justice Leibson was honored at the Chicago ATLA Convention in late July.

**THE PASSION FOR TRUTH
IS SILENCED BY ANSWERS
WHICH HAVE THE WEIGHT
OF UNDISPUTED AUTHORITY.**

- Paul Tillich

The Death Penalty



Kevin M. McNally

KENTUCKY'S DEATH ROW POPULATION - 24
PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 86

EDDIE HARPER'S DEATH SENTENCE AFFIRMED

On May 2, 1985, the Court affirmed Edward Lee Harper's death sentence imposed by Judge Nicholson in Louisville. Harper was convicted of killing his parents. Both court appointed, state experts from KCPC, a psychiatrist and a psychologist, diagnosed Harper as suffering from schizophrenia form disorder and testified that he was insane. The jury apparently disagreed.

The Supreme Court rejected various "jury" issues - veniremen who expressed reservations regarding the insanity defense but who testified they could follow the law, alleged Witherspoon v. Illinois, 391 U.S. 510 (1968) violations and "that the trial court should have excused a juror reluctant to impose the minimum sentence." Harper [H] at 4. Either no error was found or, in the case of Harper's reverse Wainwright v. Witt, 105 S.Ct. 844 (1985) challenge, no prejudice. "As this juror was excused by the Commonwealth, it is impossible to see how Harper was prejudiced" [H at 4]. See The Advocate at 14-18 (Vol. 7 No. 3) (April 1985).

A principal issue on appeal was an alleged Edwards v. Arizona, 451 U.S. 477 (1981) [request for a lawyer during questioning] violation. During the appeal a tape was discovered by the Attorney General and tendered to the court in the form of a partial transcript of a suppression hearing. This was an attempt to rebut Harper's lawyers' contention that no suppression hearing was held (or could be located if it was held) despite a motion to suppress. The partial transcript revealed an Edwards violation. However, the majority held that "Harper has made no effort to demonstrate that the ruling is clearly erroneous. In the absence of any showing to the contrary, we assume the correctness of the ruling by the trial court" [H at 7]. The burden was placed on Harper to provide a narrative statement pursuant to CR 75.13 or 75.14 even though the record, as it stood, supported his position.

In a concurrence, Justice Leibson [JL at 1-2] points out that the burden of proof is on the prosecution. Lego v. Twomey, 404 U.S. 477 (1972). "I see no duty on the appellant to provide a narrative statement...all he could add is what he claims was not said..." [JL at 2; emphasis in original]. However, because this issue wasn't raised until a supplemental brief and because "by implication" from the police trial testimony no Edwards request for counsel was made, Justice Leibson is "convinced the claimed error did not occur" [JL at 2-3].

Other arguments were rejected. "The "gruesome" pictures were admissible [H at 9-10]. Because Harper stood to inherit the family possessions, "the jury could reasonably infer... that Harper was motivated by profit" pursuant to KRS 532.025(2)(a)(4) [H at 11]. No mid-trial competency hearing was needed [H at 12]. A directed verdict on the insanity defense was not authorized because of lay testimony for the prosecution and "equivocal" defense expert testimony [H at 8-9]. The Court found "proper" allowing jurors "to take notes for their own use but advis[ing] the jury

that the notes could not be used to influence other jurors..." [H at 9]. The "use of 'recommend' by the Commonwealth's Attorney here was not of such a character as to lead the jury to believe its responsibility was diminished" [H at 10]. In analyzing this last issue, trial counsel should note the court's emphasis on the defense closing argument -- apparently curing any error. "[T]here must be a look at the entire scenario... [In this case it did not] denigrate the function of the jury in imposing the death penalty" [H at 9-10].

The Harper opinion contains caustic language by Justice Stephenson expressing surprise that "[f]or some reason, obscure to use, the Public Advocate keeps insisting on access to the data collected by this court under the provisions of KRS 532.075(6)... The Public Advocate has the curious idea that we consider all previous cases which were tried or could have been tried as capital cases." The Court relies on KRS 532.075(6) which refers to "death penalt[ies]...imposed after January 1, 1970, or such earlier date..." and implies the court is so bound.

Strangely, Harper at 12 then states the contrary: "We have used such cases commencing in 1972..." and, as is usual, proceeds to list as the comparison pool some but not all death penalty decisions since then without comment and without similarities as to the crime or the defendant. The Court has yet to say what useful information it hopes to gleen from this approach.

Ignored are the main provisions of the same statute requiring the court to compare Harper's case to "similar cases, considering the crime and the defendant... The court shall include in its decision a reference to those similar cases which it took into consideration." KRS 532.075(3)(c) and (5) (emphasis added). Likewise, the Court ignores its express statutory power to "compile such data as... appropriate and relevant" to the comparison of the penalty to that in similar cases. KRS 532.075(6)(c). Finally, Harper ignores the data printed in the last issue of The Advocate and supplied to the Supreme Court. "There is no articulated reason why the Public Advocate cannot assemble this data for use in capital cases" [H at 12].

The opinion is replete with references to confessions, etc. For example, the Court ruled that the trial judge did not have to recuse himself when "Harper wrote a letter to the trial court confessing to the murders" [H at 5]. Despite Harper's apparent remorse, Justice Stephenson emphasized: "Harper was determined to tell anybody who cared to listen that he had committed the murders... From the letter to the trial court ..to his testimony at trial, he admitted the murders" [H at 8].

DAVID SKAGGS
DEATH SENTENCE AFFIRMED

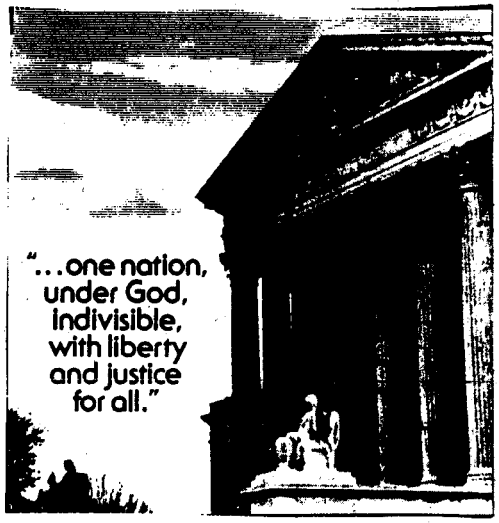
A few weeks later, on May 23, the Court also affirmed David Skaggs sentence of death for the murders of Herman and Mae Matthews during a robbery at their home. The first jury hung on penalty. The sentencing hearing was retried and resulted in a death sentence.

As is often the case, jury issues were important. Challenges for cause were rejected. The Court said it was proper to refuse a change of venue after the first jury hung. Skaggs [S] at 4-6. Justice Liebson didn't think so. "The new trial took place only three months after... The prosecutor had been quoted extensively in local news media...[regarding] potential for parole," the "enormous" cost of retrial, "and that the jury was

derelict...at the first trial..." Liebson dissent [LD] at 3.

The court rejected voluntariness and right to counsel challenges to "incriminating statements" despite the prior appointment of counsel and questioning of Skaggs in counsel's absence [S at 6-7]. Justice Liebson disagreed [LD at 2], believing the case controlled by Edwards v. Arizona. All agreed that a "passing reference" by the prosecutor to a deletion in the confession was harmless [S at 8].

"[E]vidence of the criminal record of Skaggs was properly introduced...to prove that the mitigating circumstance of the absence of a criminal record did not exist...[T]he defendant himself introduced [such] evidence" through his father. Justice Liebson disagreed. "Skaggs presented no such evidence. He did not open the door..." [LD at 1]. In dicta, the court went on to hold that: "Once the



requisite statutory aggravating factor has been found to exist, the aggravating factor of a prior criminal history may be considered in aggravation by the jury..." [S at 9].

The dissent objects to this "unfettered use of nonstatutory aggravating circumstances." [LD at 2].

In contrast to Doug Ward's case discussed below, the court upheld the prosecutor's use of the word "recommendation". "The error occurs when, because of additional comments, a message is conveyed that the jurors decision is not the final one" [S at 10]. Liebson disagreed [LD at 4].

The "penalty phase instructions were proper... The jury was made aware of its option not to impose the death penalty." The...instructions were "essentially the same as those in Smith v. Commonwealth", Ky., 599 S.W.2d 900 (1980). "[T]he jury knew it could recommend a life sentence even if it found an aggravating circumstance beyond a reasonable doubt." No instruction was required on the "elements of the aggravating factors" [S at 12]. The mitigation instruction was adequate and no specific findings were required. No burden of proof instruction was necessary. Aggravating circumstances need not outweigh mitigating circumstances beyond a reasonable doubt [S at 13]. Further, the jury need not "be instructed to find that death is the appropriate punishment beyond a reasonable doubt." A failure to testify instruction must be requested. The jury needn't be told to "disregard passion or prejudice. This matter was taken care of on voir dire." No instruction was needed on parole. No definition of reasonable doubt was necessary [S at 14].

Retrial of the penalty phase only, and instructing the new jury that Skaggs was guilty, is acceptable. Georgia case authority holding the opposite was rejected because "the Kentucky death penalty statute has distinct differences from Georgia" [S at 17]. There was no error in the trial judge's failure to sentence Skaggs himself after the hung jury as "Skaggs waived judge sentencing... [and i]n the absence of findings by a [deadlocked] jury...the trial judge has no authority to fix any sentence"

[S at 17]. Furthermore, the judge did not provoke a mistrial by talking to a single juror, with counsel's consent, during the first trial. Therefore, double jeopardy was no bar [S at 11, 14-18]. Counsel's specific consent in a situation calling for a clear tactical choice precludes complaint on appeal, even in a death penalty case [S at 16]. Ice v. Commonwealth, Ky., 667 S.W.2d 671, 674 (1984).

Summarily rejecting various system-wide challenges, the Court again refuses to reconsider Ex Parte Farley, Ky., 570 S.W.2d 617 (1978). However, for the first time the Court specifically mentions two "similar" cases -- i.e. robbery/murder -- in conducting a comparative review. See McQueen v. Commonwealth, Ky., 669 S.W.2d 519 (1984) and White v. Commonwealth, Ky., 671 S.W.2d 241 (1984).

However, the court concludes only that the death penalty is "not disproportionate to the type of offense" [S at 19] (emphasis added). It is already clear from decisions of the Kentucky and United States Supreme Court that the death penalty is not disproportionate for a robbery/murder. It is not the prupose of proportionality review to designate which offenses are death eligible -- the statute already does that. By mentioning only the category of crime, the court ignores both the "circumstances of the offense" and "the defendant's character and record." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Finally, the court attaches it's usual litany of capital appeals, again eliminating, without explanation, reversals. One of these cases was a murder/robbery. Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982).

In dissent, Justice Leibson also objected to Skaggs execution because "Jurors Stilts and Mills should have been excused for cause at the penalty trial." Mills knew about and would be influenced by the possibility of parole. "Stilts stated that he had formed an opinion that the death penalty was appropriate at the time of the first trial. Such a juror should not be 'rehabilitated' by asking him whether he could put his opinion aside and be fair... The situation calls for the application of the principle of implied or presumed bias..." [LD at 3]. Leibson was also troubled by "repeated references to collateral criminal activity" [LD at 4]. Finally, "the defense was shut off in four different directions: the court refused to either change venue or limit to life; the court refused individual voir dire of jurors regarding exposure to pretrial publicity and group voir dire in such circumstances is impossible." [LD at 4].

The same day the court handed down a separate unpublished opinion and rejected a new trial request filed by Skaggs after he discovered that the clinical psychologist he hired at state expense turned out to be a fraud -- not a psychologist at all. Because the phony expert testified "on the whole...favorably for" Skaggs and the "jury had no knowledge of the falsity" there was no "reasonable certainty" a real psychologist would "probably change the result if a new trial was granted..." Skaggs v. Commonwealth (File No. 84-SC-1181-TG).

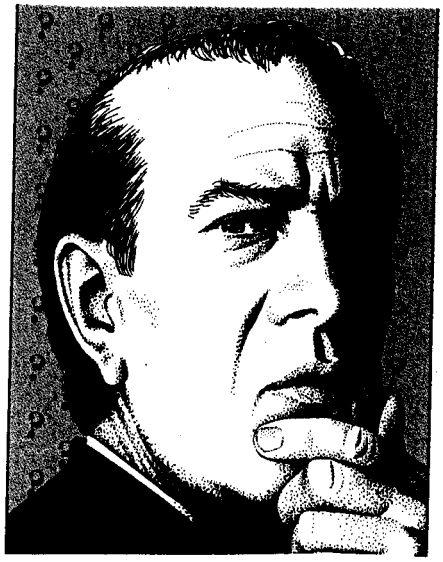
DOUG WARD'S DEATH SENTENCE AND CONVICTION REVERSED

Another reversal in a murder/robbery case was ignored in the Skaggs proportionality review, although decided the same day. Douglas Ward [W] was granted a new trial due to failure to instruct on the lesser included offense of manslaughter in the second degree [W at 2]. KRS 507.040. The case involved 6 co-defendants who were involved in "an

ambush robbery" of Lucy Asher "as she drove her truck down a road" [W at 1]. Ward was the only one to receive a death sentence. There was much evidence of an intentional killing. However, because evidence existed that "there was no scheme to kill" and that "the plan called for shooting out the tires" and because Ward shouted afterwards "the gun had gotten away from him," instructions were required on wanton murder and wanton manslaughter [W at 2]. (In dicta, the court describes wanton murder as a "capital offense" [W at 2]. But see Enmund v. Florida, 458 U.S. 782 (1982).) Although "the probability of a different result is small...we are averse to catergorizing such an error as harmless, especially in a [death] case..." [W at 3].

Exclusion of testimony by a "psychiatrist/pharmacologist...concerning the effect of certain drugs taken alone or in combination with alcohol...as ...to the question of intent..." was upheld. In the absence of the defendant's testimony there was insufficient "foundation by competent evidence...concerning the type, amount, concentration or frequency of use of such drugs or of their effect" [W at 3].

Without reaching the "significance" of the error, "on retrial and in other cases [KRS 29A.070 and 29A.100] should be complied with." These statutes require "the trial judge who excuses a juror from service... 'enter this determination...on the jury form...'" [W at 4]. Next, a challenge was considered to 3 jurors who "were related to the Commonwealth's Attorney in varying degrees ...an ex-brother-in-law and a distant cousin...[and] sort of an uncle..." The Court held that a trial judge should "presume the likelihood of prejudice...[when] the potential juror has such a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses..." [W at 4]. See Commonwealth v. Stamm, 429 A.2d 4, 7 (Pa.Super. 1981). Regardless of "protestations of lack of bias", such jurors should be excused. "[W]e trust that...no uncles will survive the challenge for cause on retrial," although apparently the other two were not impliedly biased [W at 5].



The Court rejected a complaint about the trial judge's limitation of a few voir dire questions by counsel. "[Q]uestions of jurors in criminal cases should be as varied and elaborated as the circumstances require... Notwithstanding, questions are not competent when their evident purpose is to have jurors indicate in advance or commit themselves to certain ideas and views..." [W at 5-6].

The most "grievous" error dealt with KRS 532.025(1)(b) which provides that the jury shall "recommend" a sentence. Although "totally aware [of] the statute... the death penalty cannot be assessed by any judge unless recommended by the jury, so the responsibility of the jury in such cases remains undiminished" [W at 6; emphasis added]. Reversal was required because the prosecutor "repeatedly minimiz[ed] the responsi-

bility of the jury..." "It is the responsibility of each juror to decide whether the defendant will be executed, and they shall not be informed, either directly or by implication, that this responsibility can be passed along to someone else" [W at 7].

> "Also, should any inadvertent reference implying a dimunition of the jury's duty in fixing a death penalty creep into any case, the trial judge should immediately inform the jury that their duty to fix the death penalty should be considered as if there were no possibility of review by any source" [W at 7].

A final error occurred when the trial judge refused evidence that Ward had "never been convicted of a crime of violence" [W at 7]. Justice Leibson's concurrence at 2, joined by Justice Vance, agrees that "[u]nless the jury so recommends, the trial judge cannot impose...a [death] sentence." He would go further, however, and substitute "fix" for "recommend" in "voir dire, instructions, argument, or elsewhere" and "once and for all ...get rid of the unfair prejudice inhering in use of the word 'recommend' to describe the jury's function in setting a penalty.'" Id. Justices Stephenson and Wintersheimer dissent separately. Of note, Stephenson [SP at 1] states: "[T]he defendant's theory of the case... should always be presented in the instructions." He also is concerned that expansion of the implied bias doctrine beyond "parties...will be a real trouble-maker" [S at 2]. Wintersheimer agreed, finding this point a "very flimsy ground" to reverse a murder conviction [WD at 2].

LIFE, 25 YEARS WITHOUT PAROLE RETROACTIVE WITH DEFENDANT'S CONSENT

In an unpublished decision, the Kentucky Supreme Court held that the new penalty of life, 25 years without parole may be applied retroactively -- at least where the defendant agrees. KRS 446.110 permits new sentencing provisions to apply "by consent of the party affected." The memorandum opinion suggests, at least in this situation, that there is no ex post facto bar to applying the new penalty to crimes committed before the effective date of July 13, 1984. Jackson v. Commonwealth, (File No. 84-SC-980-MR) (July 3, 1985).

VICTORY IN CALDWELL V. MISSISSIPPI: EXPERTS AND PROSECUTORIAL MISCONDUCT

Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), presented issues involving expert assistance for an indigent capital defendant and prosecutorial misconduct. The Ake v. Oklahoma, 105 S.Ct. 1087 (1985) issue was disposed of in a footnote as "petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial..." Therefore, Caldwell left for another day the question of "what if any showing would have entitled a defendant to assistance... of a criminal investigator, a fingerprint expert, and a ballistics expert..." Caldwell, 105 S.Ct. at 2637 n.1.

Caldwell also presented "the issue whether a capital sentence is valid when the sentencing jury is led to believe that the responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." 105 S.Ct. at 2636. The answer is no.

The defense lawyer argued that the jury had an "awesome responsibility." However, "the prosecutor sought to minimize the jury's sense of the importance of its role." 105 S.Ct. at 2637. He stated: "[y]our decision is not the final decision...your job is reviewable." After objection, the

trial judge agreed with the prosecutor that "it is reviewable automatically..." 105 S.Ct. at 2637-38.

The court, Justice Marshall writing, brushed aside a claim that the Mississippi Supreme Court's affirmance (4-4) of the death sentence rested on Caldwell's failure to "initially assign the issue as error on appeal." 105 S.Ct. at 2638. In the absence of any "clear or express indication" that the Mississippi Supreme Court relied on procedural default, the court had jurisdiction. 105 S.Ct. at 2639.

"In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility..." 105 S.Ct. at 2640. First, there are "institutional limits on what an appellate court can do" in a capital case. Jurors may not know this. Second, even if a jury is "unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval..." falsely believing that any error would be corrected later. 105 S.Ct. at 2641. Third, "some jurors may correctly assume that a sentence of life...could not be increased to a death sentence..." 105 S.Ct. at 2633. Thus, if unsure, it would be better to vote for death. Finally, capital jurors are especially suceptible to suggestions that they "pass the buck."

Clearly, the Caldwell decision was correctly anticipated by our own Supreme Court in Ice and Ward. Indeed, "legal authorities almost uniformly" agree with Kentucky's position. 105 S.Ct. at 2642. As did our court, the United States Supreme Court took a narrow view of California v. Ramos, 463 U.S. 992 (1983), where the emphasis was on "accurate" and "relevant" information regarding the Governor's commutation power.

Caldwell held that defense counsel's "religious themes and texts" in closing argument did not "invite" the error. 105 S.Ct. at 2644. "Because we cannot say that [the prosecutor's argument] had no effect on the sentencing decision," reversal of the death sentence was required. 105 S.Ct. at 2646. The swing vote (4-1-3) was provided by Justice O'Connor, author of Ramos, who emphasized the constitutional requirement of "non-misleading and accurate information..." for the capital sentencer 105 S.Ct. at 2646 (emphasis in original).

KEVIN MCNALLY

* * * * * *

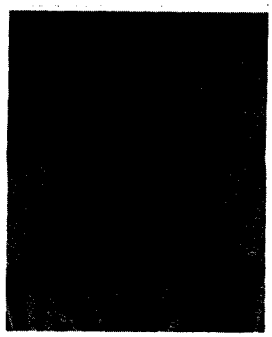
Credit: Marlette/Charlotte Observer

JEFFERSON'S VIEW

I shall ask for the abolition of the punishment of death, until I have the infallibility of human judgment demonstrated to me.

- THOMAS JEFFERSON

Sixth Circuit Survey



Donna Boyce

SIXTH CIRCUIT HIGHLIGHTS

Starting with this issue Donna Boyce begins to edit this column in place of Neal Walker. Donna has served in Frankfort as an assistant public advocate since 1977. She brings to this column vast experience in appeals, capital trials and federal habeas work.

SUBSTITUTION OF COUNSEL

In **Wilson v. Mintzes**, 761 F.2d 275 (6th Cir. 1985), a majority of the Sixth Circuit Court of Appeals recently held that the two-prong ineffective assistance test announced in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), was not applicable to cases involving requests for substitution of counsel.

The court stated that when an accused seeks a mid-trial substitution of counsel, he or she must show good cause such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict with counsel. In considering such a request, the trial court must balance the accused's right to counsel of his or her choice with the public's interest in the prompt and efficient administration of justice. Factors to be considered include length of delay, previous continuances, inconvenience to litigants, witnesses, counsel and the court, whether the delay is purposeful or is caused by the accused, the availability of other competent counsel, complexity of the case, and whether denying a continuance to obtain substitute counsel will lead to identifiable prejudice.

The Court held that the trial judge in the instant case, after questioning the competence of Wilson's counsel and provoking counsel into acts inconsistent with his duty of loyalty to his client, acted unreasonably and in violation of Wilson's Sixth Amendment rights by failing to heed Wilson's expressions of dissatisfaction with his counsel.

The Court found that the application of the two-prong Strickland ineffectiveness test to a motion for substitution of counsel would be inappropriate and unworkable because of the nature of the right protected (constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding) and the context in which the right is asserted (pretrial or mid-trial rather than post-trial).

The Court further held that in raising on appeal the issue of a trial judge's abuse of discretion in denying a request for substitution of counsel, the defendant need not show that prejudice resulted from the judge's denial. The Court nonetheless noted that in this case Wilson was prejudiced by the trial court's action because of the conflict between the interests of defense counsel and Wilson as well as counsel's refusal to cross-examine the witness who was on the stand during the confrontation between counsel and the trial judge.

"GOOD FAITH" EXCEPTION

In **United States v. Savoca**, 761 F.2d 292 (6th Cir. 1985), a majority of the Sixth Circuit Court of Appeals used the recently created objective

good faith exception to the exclusionary rule to affirm on rehearing a case it had reversed last year because evidence used against Savoca was obtained by means of a search warrant not supported by probable cause. The warrant affidavit was deficient in that it only tenuously connected the place to be searched with the persons for whom arrest warrants were outstanding. The legal principle that the existence of probable cause to arrest does not necessarily establish probable cause to search (or that a suspect's, mere presence at a place is too insignificant a connection with such place to establish relationship necessary to a finding of probable cause) is well established. However, the Court found that the existence of this well-established rule does not preclude a finding of objective good faith. Rather, the Court concluded that a reasonably well-trained officer would be aware of this principle of law but could believe that cases supporting this principle were distinguishable. Thus, the majority concluded that the affidavit, although insufficient to establish probable cause, was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

NO "AUTOMATIC COMPANION" RULE

In **United States v. Bell**, 14 SCR 11, 37 Cr.L. 2219 (May 22, 1985), the Sixth Circuit refused to adopt an "automatic companion" rule that would allow officers to frisk all persons in the immediate vicinity of an arrestee. The rejection of such rule was based on the Court's belief that the Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) requirement of reasonable suspicion has not been eroded to the point that an individual may be frisked based on nothing more than an unfortunate choice of associates. The Court did, however, find that this particular patdown search of the arrestee's companion passed constitutional muster under a traditional Fourth Amendment totality of the circumstances analysis.

DONNA L. BOYCE

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NLADA DEFENDER DIRECTOR TO TEACH LAW SCHOOL

After five years of dedicated service with NLADA, Rick Wilson, Director of the Defender Division, has announced his resignation. Mr. Wilson will assume his new responsibilities teaching law school at the City University of New York Law School at Queens College.

In his role as Defender Director, Mr. Wilson completed work on such federal and foundation grants as the Appellate Defender Development Project, Defender Management Information Systems, Caseweighting For The Public Defender, and the Alternative Sentencing/Sentencing Advocacy Project. Mr. Wilson has personally authored more than a dozen amicus briefs for the Association, and has testified frequently in congressional and state legislative proceedings.

"I am both saddened to leave NLADA and tremendously excited to undertake my career at CUNY," said Mr. Wilson. He described the legal education program at CUNY as "the most exciting experiment in law school education ever conducted."

In a related event, it was announced that Mr. Wilson had been nominated to serve as Secretary of the Criminal Justice Section Council of the American Bar Association. Mr. Wilson has served on various committees of the section, most recently filling a two year term as chairman of the Providing Defense Services Committee.

Plain View

Ernie Lewis

The author regrets having been unable to write this column for the June issue of The Advocate. This is especially so because the Supreme Court of the United States has been busy in addressing search and seizure issues during the past four months. In contra-distinction to the last few years, at the very least there is some good news to go along with some of the bad news coming from the high court.

UNITED STATES V. SHARPE

In **United States v. Sharpe**, 470 U.S. ___, 106 S.Ct. ___, 84 L.Ed.2d 605 (1985), the Court continues to address the complex and ambiguous encounters between police and persons who behave in a suspicious manner short of probable cause. In Sharpe, a DEA agent viewed two vehicles driving down the highway in a "area known to be frequented by drug traffickers." One vehicle was low to the ground and its windows were covered by a tarpaulin of some sort. One vehicle was stopped and detained for thirty to forty minutes. The other vehicle "evaded" the police for some time, after which this vehicle was detained. Marijuana was found in one Savage's pickup truck. Savage was detained for a twenty minute period of time awaiting the arrival of a DEA agent. The Court looked squarely at the question of whether this detention was unreasonably long under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The Court held that the detention was not unreasonable under Terry. It held that no de facto arrest had occurred as it had in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) and Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). The Court rejected the American Law Institute's recommendation that a bright line of a twenty minute detention be established for a stop and frisk under Terry. Rather, the Court stated that the time spent in detention is not as important as other things which occur during the detention, such as transporting the person to a police station. The court states that in such cases, rather than looking at just the time spent, it will also look at "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicion quickly, during which time it was necessary to detain the defendant." The Court also explicitly states that even though there are other alternatives to the Terry stop, the Court will not second guess the police action.

Interestingly, Justice Marshall concurs mainly due to the fact that Savage had evaded the police and as a result helped cause the length of the detention which followed. However, he attempts to bring the majority opinion back to Terry's initial limitations. Justice Marshall expresses that under Terry, "'the critical threshold issue is the intrusiveness of this seizure,'" citing Place v. U.S., 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). He goes on to

state that "a seizure that in duration, scope, or means goes beyond the bounds of Terry cannot be reconciled with the Fourth Amendment in the absence of probable cause." (Emphasis added).

Justice Brennan delivered a blistering dissent. He said "the Framers did not enact the Fourth Amendment to further the investigative powers of the authorities, however, but to curtail them." Terry's exception to the probable cause safeguard must not be expanded to the point where the constitutionality of citizens' detention turns only on whether the individual officers were coping as best they could given inadequate training, marginal resources, negligent supervision, or botched communications." Justice Brennan views the case as seriously expanding the reach of Terry and as a case which threatens to swallow entirely the Fourth Amendment's probable cause requirement.

Following the United States's Supreme Court decision this past winter, in United States v. Hensley, 469 U.S. ___, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985), it is clear that this Court is allowing the police to expand their use of investigative detention. What appears to be developing is a rule that so long as the police do not in fact move the person seized, or unnecessarily detain him without action on their part, a detention based upon articulable suspicion can take place.

HAYES V. FLORIDA

This view of Terry is readily apparent in another decision of the United States Supreme Court written by Justice White in **Hayes v. Florida**, 470 U.S. ___, 106 S.Ct. ___, 84 L.Ed.2d 705 (1985). In Hayes, the court looked at the question of whether a person could be taken to the police station for fingerprinting short of probable cause. In the Hayes case, the defendant was a "principle suspect." The police had a hunch that the defendant was involved and they had fingerprints from the crime scene. They needed the defendant's fingerprints. When the defendant refused to go downtown with them they seized him, took him to the police station, fingerprinted him, and used that evidence to ultimately secure a conviction.

The Court held that under Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), the police had clearly violated the defendant's Fourth Amendment rights. The Court emphasizes what was inherent in Sharpe and that is that the violation occurred when the defendant was moved to the police station. See also Dunaway v. New York, supra.

The Supreme Court then goes on to render an advisory opinion concerning in-the-field fingerprint testing. This of course continues a pattern of the Court in reaching out to decide Fourth Amendment questions, as consistently criticized by the dissenters in recent Supreme Court decisions. The Court explicitly states that a Terry stop may be effected for the purpose of doing a field fingerprint test where it is reasonable to assume that "the suspect has committed a criminal act," and "if there is a reasonable basis for believing the fingerprinting will establish or negate the suspect's connection with that crime and if the procedure is carried out with dispatch." One can only imagine that the nation's police departments will quickly take the court's lead and begin to utilize in-field fingerprint testing of persons that they suspect have been involved in criminal activity. If this occurs, counsel must be vigilant in holding the police to the reasonableness

standard. One can guess the utility in the right case of getting fingerprints from ten to fifteen "suspects." Counsel must ensure that this sort of general roundup of possible suspects and in-field testing of those suspects is not allowed. In hearings on motions to suppress, counsel should find out how many persons were field tested, and the articulable facts upon which each of the suspects was fingerprinted.

Both Justice Brennan and Justice Marshall concurred in the opinion, declining to join the majority based upon the fact that the Court had issued the advisory opinion on in-field fingerprinting, calling this a continuation of the court's "regrettable assault on the Fourth Amendment."

CALIFORNIA V. CARNEY

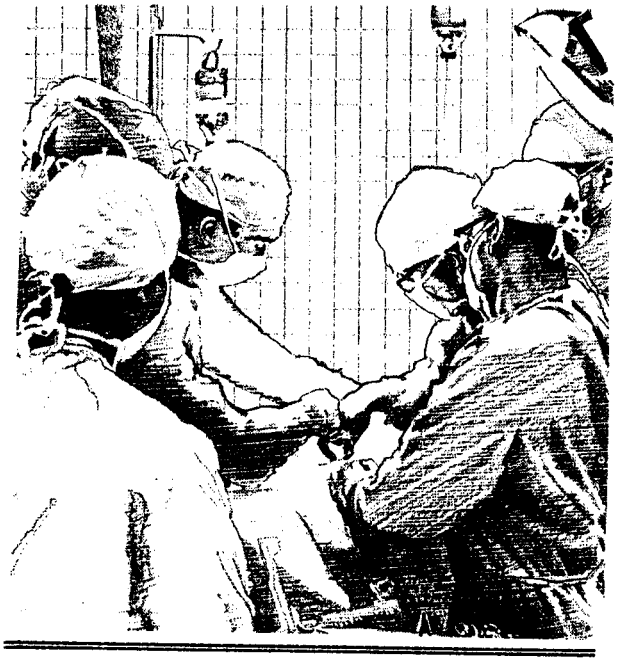
In California v. Carney, 471 U.S. ___, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) in an opinion written by Justice Burger, the Court had occasion to review an increasingly common search and seizure issue. That issue is the extent to which the automobile exception to the warrant requirement, first established in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925), is applicable to the different kinds of vehicles now being produced by automobile manufacturers.

In this case, the defendant was living in a Dodge Midas Mini-Motor Home. It was parked in a parking lot in downtown San Diego. A person went inside the vehicle/home, and later came back out. Upon questioning by DEA agents the youth admitted exchanging sex for marijuana. The defendant was arrested when he came out of his motor home, and the vehicle was then searched without a warrant. The Court held that the search conducted without a warrant was not a violation of the Fourth Amendment. The court emphasized that the motor home was "readily mobile," was licensed to operate on a public street and was regulated by laws regarding vehicles. These factors, the court emphasized, reduced the expectation of privacy in the vehicle. The Court also noted, in a statement of much interest to persons in Kentucky, that a less mobile vehicle or a more obviously residential vehicle, such as one placed on blocks, might be a different story under this particular analysis.

Justices Brennan and Marshall dissented from the majority opinion. They would have held that "a warrantless search of living quarters in a motor home is 'presumptively unreasonable, absent exigent circumstances.'"

This issue will arise repeatedly given the different kinds of vehicles which persons drive and/or live in, the different circumstances surrounding a particular seizure, and the defendant's particular living arrangements. Counsel should not read California v. Carney, supra, to mean that any sort of mobile vehicle capable of being driven or moved can be searched without a warrant where probable cause exists to believe that contraband is inside that particular vehicle. Clearly, the Court is not saying that the mobile home on blocks in a mobile home park of some sort is for Fourth Amendment purposes an automobile. What is unknown is whether a large Winnebago parked in a mobile home park or campground is such a vehicle or not. If a person has been living inside such a vehicle for many weeks or months without moving the vehicle, it is unknown whether the California v. Carney decision would apply. Certainly relevant to the inquiry would be the extent to which the defendant had a

reasonable expectation of privacy in that vehicle. If it is a large vehicle, if the defendant is exhibiting many signs of privacy expectations such as curtains, and if he has clearly been living in that vehicle for some period of time, it is hoped that the Court would find those factors persuasive.



TENNESSEE V. GARNER

The Supreme Court has definitively stated that deadly force may not be used to prevent the escape of a person who is suspected of having committed a felony unless "it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Tennessee v. Garner, 471 U.S. ___, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

Justice White wrote the majority opinion from which Justices O'Connor and Rehnquist dissented. Interestingly the Court analyzed this fact situation from a Fourth Amendment perspective. The Court saw that the use of deadly physical force by an officer was the ultimate seizure of a person. It balanced the interest of the individual's Fourth Amendment rights against the importance of the governmental interests alleged to justify the intrusion. Most likely because most police departments in the country do not utilize deadly physical force under the circumstances contained in Tennessee v. Garner, the Court viewed the interest of the individual as outweighing the interest of society.

WINSTON V. LEE

In Winston v. Lee, 470 U.S. ___, 106 S.Ct. ___, 84 L.Ed.2d 662 (1985), in an opinion by Justice Brennan, the Court held that the Fourth Amendment prohibits the taking of a bullet from the chest of an accused.

The Court analyzed the seizure based upon Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). You will recall that Schmerber involved the seizure of blood from an individual, a seizure which did not violate the Fourth Amendment. In this case, in contradistinction to Schmerber, Justice Brennan held that surgery to extract a bullet from the chest of a robbery suspect was simply too substantial of an intrusion to be allowed by the Fourth Amendment. Interestingly, Justice Brennan conducted a balancing test to arrive at his conclusion, a balancing test which had been much criticized by him in the past. Here he simply stated that under this balancing test the individuals' interest outweigh the interest of society and that such an intrusion into the chest of a suspect to seize a bullet could not comport with Fourth Amendment requirements.

Justices Blackman, Rehnquist, and Burger concurred in the majority opinion.

OKLAHOMA V. CASTLEBERRY

In a surprising decision by the United States Supreme Court, the Court let a decision by the Oklahoma Court of Appeals stand when it divided equally. **Oklahoma v. Castleberry**, 471 U.S. ___, 105 S.Ct. 1859, 85 L.Ed.2d 112 (1985). Many observers of the Court anticipated that Oklahoma v. Castleberry would be used by the court to further allow the seizure of containers inside cars, thereby overruling Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), and United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

Courts have divided over the question of whether containers found in cars could be seized without a warrant, where there was no probable cause to believe that the car itself as opposed to a particular container held contraband in it. United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). The Oklahoma Court of Criminal Appeals had held that police officers were required to obtain a warrant before they could remove a suitcase in which they suspected drugs were located. By dividing, the Court affirmed this decision, and the expected expansion of United States v. Ross has been avoided.

MARYLAND V. MACON

Finally, on June 17, 1985, the Supreme Court decided the case of **Maryland v. Macon**, 37 Cr.L. 3111 (6-17-85). The Court looked at a situation involving the purchase of allegedly obscene materials followed by the warrantless arrest of the proprietor of a bookstore. In an opinion by Justice O'Connor, the Court held that by intentionally exposing these books to public view and possible public purchase, the proprietor had no reasonable expectation of privacy in regard to those books. Thus, no search occurred when the officer purchased the allegedly obscene materials. Further, when the officer purchased the materials, no seizure occurred since the owner of the store voluntarily transferred his interest in the book based upon payment by the officer. The Court declined to consider the issue of whether the arrest of the proprietor without a warrant violated the Fourth Amendment due to the fact that the arrest did not lead to any evidence which was necessary for a conviction. Any evidence against the person had already been lawfully obtained.

In dissent, Justice Brennan, joined by Justice Marshall, argued that because of the important values at stake when the Fourth Amendment converges with the First Amendment, he would have required a warrant prior to any purchase of the materials, citing Roaden v. Kentucky, 413 U.S. 1986 (1973). Justice Brennan also commented on the potential for abuse in the Court's declining to address the warrantless arrest issue. "The disruptive potential of an effectively unbounded power to arrest should be apparent. In this case, for example, the arrest caused respondent to usher out patrons and padlock the entrance to the bookstore... several cases from the lower courts make plain that the systematic use of an unbridled power to arrest alone provides a potent means for harassing those who sell books and magazines that do not conform to the majority's dictates of taste."

BAKER V. COMMONWEALTH

The Kentucky Court of Appeals has also issued a significant decision in

the Fourth Amendment arena. The case is **Baker v. Commonwealth**, Ky.App., (4-19-85). Readers should be aware that while this opinion was not to be published, motion for discretionary review has been filed and is pending at the time that this goes to print.

In this case, the police conducted an aerial search of a farm noting that a particular trailer similar to one which had been stolen was present on the premises. Next, a warrant was issued by the circuit clerk. The affidavit in support of the petition for the warrant was not signed. The warrant was presented to the defendant, who thereupon consented to the search at which time many stolen items were seized.

The Court first of all dismissed the fact that this case should be analyzed under a consent analysis, since there had been a demonstration of a search warrant by the police officer, citing Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

The Court then stated that the search warrant was not valid for a number of reasons. First of all, the affidavit in support of the search warrant was not signed. The court said that this was the same as no affidavit at all, citing Campbell v. Blankenship, 308 Ky. 808, 215 S.W.2d 960 (1948).

More importantly, the Court held that a circuit clerk is not authorized to issue search warrants. The Court disagreed with a decision by another panel of the Court of Appeals in Commonwealth v. Bertram, Ky.App., 596 S.W.2d 379 (1980). The Court went on to state that KRS 15.725(4) does not apply to search warrants but is confined rather to arrest warrants. However, the Court stated that if KRS 15.725(4) does apply, it is violative of the Fourth Amendment and Section 10 of the Kentucky Constitution. The Court analyzed the issue by citing Shadwick v. City of Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972), emphasizing the greater privacy interests of a search warrant over an arrest warrant. The Court doubted whether clerks "would be able to recognize or make a determination of the existence of probable cause when so requested" in search warrant situations.

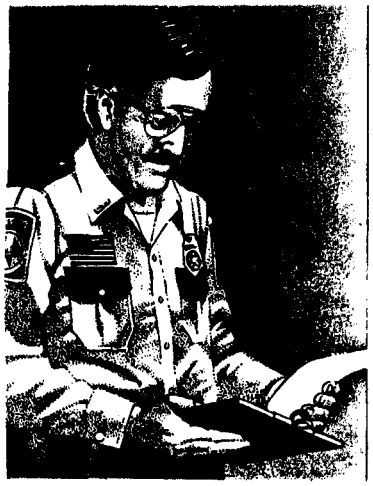
Counsel should watch the disposition of Baker v. Commonwealth, supra, and utilize it if the decision stands.

It should be noted that Baker is entirely consistent with Leon v. United States, 468 U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). What I mean by this is that under Leon, once a warrant issues, that particular warrant and the seizure based upon it are presumptively correct. The United States Supreme Court has placed great reliance upon the ability of the magistrate to look at the issue of probable cause. If it ever can be said that this was a clerical function, it is clear that under United States v. Leon, the issuance of search warrants is no longer a clerical matter. Rather, the magistrates across the Commonwealth of Kentucky are being called upon to be the virtual court of last resort on the Fourth Amendment. Under these circumstances, Baker v. Commonwealth clearly is the correct decision relying only upon judges to decide whether search warrants should be issued.

LEWIS V. COMMONWEALTH

The Court of Appeals also issued a published opinion entitled **Lewis v. Commonwealth**, Ky.App., ___ S.W.2d ___ 1985 (6-14-85). In this case, the Court considered the situation of a confidential informant calling the police and telling them that the defendant would be in possession of

illegal drugs and would be in a particular kind of car. The police stopped the defendant, in a car similar to that predicted by the informant. They noticed two weapons in the car, and also noticed the defendant slumped over the steering wheel. The defendant was ordered to get out of the car and he was frisked. He was told to take his shoes off at which time a bulge was noticed and a further search revealed the presence of LSD. The Court held, first of all, that there was probable cause to stop the car. Note that the Court did not



require any basis of the informant's knowledge as should still be required under the old Aguilar/Spinelli test as incorporated by Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The Court does not seem to be troubled by the fact that the informant did not tell the police how he came to his knowledge. The second prong of the Aguilar/Spinelli is present, that is that the informant was a person who was reliable and whose information had led to arrests on prior occasions. Further, there was corroboration of the informant's tip. The Court used the totality of the circumstances analysis as required in Gates, citing Whisman v. Commonwealth, Ky.App., 667 S.W.2d 394 (1984). After the Court held that there was probable cause to stop, they also held that the search of the person was appropriate and reasonable due to the fact that they had seen weapons in the defendant's car and thus, could have been expecting to see weapons on the defendant's person.

COLLINS V. COMMONWEALTH

In an interesting unpublished opinion, the Court of Appeals looked at a question of search and seizure following a guilty plea. In **Collins v. Commonwealth**, Ky.App., (5-17-85) the defendant pled guilty and appealed a search and seizure issue. The opinion is bereft of any discussion regarding the procedure used and why it should be addressing the search and seizure question. The court simply looked at the question of whether the Fourth Amendment had been violated or not. This is a procedure similar to the Federal Rule of Criminal Procedure 11(a)(2) whereupon a person can in fact plead guilty and then appeal the overruling of his motion to suppress below. Counsel should be aware, however, that the general rule in Kentucky has been that a guilty plea waives all such constitutional issues. It is questionable whether the Kentucky Court of Appeals intended to address this on the merits despite what would be called the waiver by the entry of the guilty plea. It is also clear evidence of the need for a rule in Kentucky similar to the Federal Rule.

THE SHORT VIEW

Leon/Good Faith

1) In **Blalock v. State**, 476 N.E.2d 901 (4-18-85), the Court looked at a situation of illegal police surveillance of a greenhouse followed by the issuance of a search warrant and a subsequent seizing of marijuana plants. The Court first held that the aerial surveillance was a violation

of the Fourth Amendment. They then rejected the good faith exception to the exclusionary rule because the search warrant had been based upon evidence seized in violation of the Fourth Amendment, and because no reasonable police officer could have believed that there was probable cause. Note that the Court readily rejected the Leon good faith exception where the warrant itself was based upon an illegality and where they believed no reasonable police officer could think that there was probable cause (despite the fact that a magistrate had in fact believed that there was probable cause).

2) **United States v. Savoca**, 37 Cr.L. 2160 (6th Cir. 5-29-85). In the Savoca case, the 6th Circuit initially reversed a conviction based upon a fact that the warrant issued did not connect the person to the place to be searched. Following Leon, the Court reversed themselves under the good faith exception. "Thus, although a reasonably well-trained officer must recognize the general rule which controls the probable cause determination in this case, we cannot conclude under the particular facts of this case that the affidavit was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'... or that a 'reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.'"

3) In **United States v. Strand**, 37 Cr.L. 2161 (8th Cir. 5-29-85) the Eighth Circuit also examined the particularity issue. In this case the warrant allowed for the seizure of "stolen mail." Instead, the police officers seized items which looked more like household goods than mail. The Court first stated that there was a violation of the Fourth Amendment because the officers had gone outside the warrant. Because of this fact, there could be no good faith reliance upon that warrant. Note then that where police officers go outside the scope of the warrant, they cannot then turn around and rely on Leon's good faith exception to the exclusionary rule.

4) **State v. Anderson**, Ark., 37 Cr.L. 2180 (6-5-85). In the Anderson case, the Arkansas Court was confronted with the situation where a warrant had issued which was not supported by affidavit or recorded testimony as required by State rule. The Court held that the good faith exception to the exclusionary rule would not save the search based on this warrant due to the fact that basic procedural safeguards were not met. The Court stressed the fact that without an affidavit or recorded testimony, a defendant could not scrutinize the Fourth Amendment procedures utilized in a particular case. Because of that, the Court does not even engage in a good faith analysis.

5) **State v. Johnson**, Ind. Ct.App. 37 Cr.L. 2218 (5-21-85). The police officer entered without a warrant into the home of the defendant after being invited to do so by a third party. While there he seized marijuana. He obtained a warrant from a judge, thereafter seizing the marijuana and arresting the defendant. The Court holds first of all that the officer was in a place where he had no right to be and that his observations violated the Fourth Amendment when he entered the home without a warrant. Significantly, the Court then rejects the good faith exception to the search stating that the officer should not be allowed to gain from his own illegality by turning around and relying upon good faith reliance upon the judge's issuance of a warrant. The Court explicitly states that while Leon contains four exceptions, that Segura v. United States, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 599 (1984) implicitly recognizes a fifth exception to the

good faith rule. The Court states that the exception is that no good faith reliance can save a search where the warrant was issued based upon illegally obtained evidence.

6) In two recent articles in The Champion, interesting questions are being asked regarding good faith litigation. John Wesley Hall, Jr. states that a number of questions remain as a result of Leon. He questions what the court means by objective reasonableness and whether the specific police officer's bad faith in a particular search is relevant to this inquiry. He wonders who has the burdens of going forward and proof on the lack of objective reasonableness, good faith or bad faith. He questions how much evidence of subjective belief and intent of the officer is relevant under the objective reasonableness standard of Leon. Significantly, he stresses that "the most obvious result of Leon shake-out will be a greater reliance on independent state grounds as the rule of decision in state cases." As will be noted later in this column, many states are responding affirmatively to the independent state ground analysis. Kentucky has not done so as of yet.

Roger L. Cosack in an article entitled "Then There Were Nine: (Some Thoughts on Leon)," suggests that Leon is going to require that counsel have greater access to materials upon which a police officer bases his actions. He states that unknown informants should now be brought forth at suppression hearings to test the circumstances of information given to the police. He states that magistrates perhaps need to be called as witnesses in suppression hearings. He also suggests that magistrates now have greater duties than they did prior to Leon. "Since it now appears the issuing magistrate is for most purposes the final arbiter of credibility of informants, the believability of hearsay statements, and finally for the existence for probable cause itself; it seems that the magistrates should now take upon themselves, to do more than simply review an affidavit. They must now actively investigate what is before them... the ex parte nature of the procedure for an issuance of a warrant combined with a lack of meaningful review by another court requires that the magistrate now employ aggressive techniques in making sure that what is contained in the affidavit is truthful, and reliable."

All of these decisions and comments make it clear that Fourth Amendment litigation on Leon is vital to the continuation of the Fourth Amendment. Counsel in Kentucky is obligated to learn what Leon says and what litigation is possible under this particular decision. We are writing on a clean slate in Kentucky on the Leon issue and should not let this opportunity go by.

MORE STRINGENT STANDARDS

The development of more stringent standards in the Fourth Amendment area by state courts and the development of independent state grounds for Fourth Amendment decisions is occurring in numerous state courts, as seen below:

1) **People v. Sherbine**, 364 N.W.2d 658 (Mich. 1985). In this case the Court stated that Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) would not be the standard for probable cause in Michigan. In fact, the Michigan Court established a more stringent standard than that contained in Aguilar/ Spinelli.

2) In **Commonwealth v. Upton**, 476 N.E.2d 548 (Mass. 1985), the Massachusetts Court similiarly rejected Gates and goes back to the Aguilar/Spinelli test. The

court called the Gates test ''unacceptably shapeless and permissive.'"

3) The traditionally liberal court, the Mississippi Supreme Court, similiarly rejects the good faith exception under the state constitution in **Stringer v. State**, Miss., 37 Cr.L. 2045 (4-17-85). The court noted that the Leon good faith exception is a mere federal rule of evidence and not "constitutional dogma." The Court states that "however passe" the idea may be in other circles this Court still regards it as important that our citizens be free from unreasonable searches and seizures and from searches made pursuant to warrants issued without probable cause... considering the realities of the warrant process, we perceive no vehicle for protecting these rights of our citizens in assuring that issuing magistrates take seriously their responsibilities other than continued enforcement of this state's exclusionary rule."

4) **People v. Oates**, Col., 37 Cr.L. 2157 (5-6-85). Here the Colorado Court based its decision upon the state constitution in rejecting United States v. Karo, 35 Cr.L. 3246 (1984), in stating that a beeper could not be placed on an item for sale without a warrant.

5) **State v. Novembrino**, 491 A.2d 37 (N.J. Super. A.D. 1985). The Court rejected the good faith exception to the exclusionary rule, stating that "...the Leon good faith exception eliminates any meaningful review of probable cause determinations... the Leon good faith exception contemplates that appellate courts defer to trial courts and trial courts defer to the police. It fosters a careless attitude towards details by the police and issuing judicial officers and it even encourages them to attempt to get away with conduct which was heretofore viewed as unconstitutional... By admitting evidence unconstitutionally seized, the courts condone this lawlessness and in the process dirty their hands with the unconstitutional spoils."

OTHER SIGNIFICANT CASES

1) **United States v. Bell**, 14 S.C.R. 11 (6th Cir. 5-22-85). In this case, the 6th Circuit declined to hold that where a defendant is in the car with a person who is lawfully arrested based upon a warrant, that the defendant may be frisked for weapons. Rather, the Court required an extensive analysis of the factors articulated by the police officer in deciding whether or not to search the defendant. In this particular case, the FBI agent was able to articulate five particular factors which indicated to him that he had reasonable suspicion that the defendant was armed, justifying a frisk. Due to these factors, the Court held that no Fourth Amendment violation occurred.

2) **State v. Chisholm**, Wash., 696 P.2d 41 (Wash.App. 1985) (2-28-85). The Court held that where benign stop is made to tell the driver of a particularly unsafe condition, and thereafter property is seized in plain view, that no violation of the Fourth Amendment occurs.

3) **United States v. Cherry**, 37 Cr.L. 2182 (5th Cir. 6-5-85). In this case, the Court holds that where the defendant asks for a lawyer followed by continued questioning and subsequent evidence is found, that under Oregon v. Elstadt, 36 Cr.L. 3167 (1985), derivative evidence is not necessarily excluded

and thus physical evidence could come in. The court makes a traditional Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975) analysis by looking at the question of whether there were any circumstances attenuating the primary illegality and the evidence seized.

4) **State v. Raheem**, La., 464 So.2d 293 (La. 1985) (3-27-85). The Louisiana court in this situation rejected a decision by the trial court that probable cause existed under Illinois v. Gates, 462 U.S. 213 (1983). In this case, an informant had given information that the defendant was selling drugs from a specific car. There was no basis of knowledge indicated. However, the police officers had corroborated the information given concerning the car. The car was seized and evidence was taken. The Court held that under Illinois v. Gates, supra, this did not amount to probable cause. Note that this decision by the Louisiana Court

does not indicate a lessening of the probable cause standard and does indicate a continued emphasis on the Aguilar/Spinelli test.

5) **United States v. Miller**, 36 Cr.L. 2467 (9th Cir. 2-20-85). The Court held that the failure to check an informer's background which included a perjury conviction was not a reckless disregard for the truth under Franks v. Delaware, 438 U.S. 154 (1978).

6) **United States v. Boyce**, 36 Cr.L. 2456 (U.S.D.C. Minn. 3-20-85). In the instant case, the appellate court found that a Franks violation had occurred. Note that when a Franks violation occurs, which is in fact a misrepresentation or reckless disregard for the truth, that the Court then evaluates probable cause leaving out the misrepresentation or falsehood or putting in the omission. The Court then finds whether or not probable cause would have existed. The Court indicates that you do not evaluate good faith under Leon when you have the circumstances as described above.

7) **State v. Blair**, Mo., 37 Cr.L. 2220 (5-29-85). Police officers in this case lacked probable cause to arrest the person for suspected murder. They used an outstanding traffic warrant to arrest her after which they followed homicide booking procedures as opposed to traffic booking procedures. The Court recognized that the arrest was a pretext and therefore suppressed fingerprints which were seized as a result of the arrest.

8) The Washington Supreme Court issued a decision discussing the problem of trying to establish a Franks violation where the informant is unknown. **State v. Casal**, Wash. 37 Cr.L. 2238 (5-23-85). In this case, the Court was examining a situation where an anonymous informant had given a tip which became the basis of a search warrant. Later, the defendant asserted that a person that he knew told him that a Franks violation

had occurred and that he in fact was the informant. The defendant asked for a hearing. The trial court stated that no Franks hearing would take place because a substantial showing, as required in Franks, had not been made.

The Court held that when a defendant desires to make a Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) challenge to an affidavit supporting a search warrant, and the Court has a situation where an anonymous informant is involved, see Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), that an ex parte hearing would be held. At that hearing, the defendant and his counsel would be excluded. However, questions would be submitted by defense counsel which the Court would ask of the informant who would have to be produced by the prosecution. The ex parte hearing would be reviewable by an appellate court. Counsel should assert in this situation that if an anonymous informant is involved, and he is unable then to make a substantial showing that the affiant lied or acted in reckless disregard to the truth as required by Franks v. Delaware, that the Court should hold an ex parte hearing and require the prosecution to produce the informant at that hearing. While this does not allow for counsel to discover who the informant is, or to inquire into the facts of the affidavit, it at least allows for the entire process to be on the record and reviewed. It further may put the prosecution into a situation of having to drop the case due to not wanting to reveal who the informant is.

ERNIE LEWIS

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CERTIORARI GRANTED IN LOUISVILLE P.D. CASE TO REVIEW PROSECUTOR'S ALLEGED RACIALLY MOTIVATED USE OF PEREMPTORY CHALLENGES

On April 22, 1985, the United States Supreme Court granted a writ of certiorari to review the decision of the Kentucky Supreme Court in the case of Batson v. Commonwealth (decided December 20, 1984). The question presented by this case is whether the state trial court violated the defendant's federal constitutional rights to an impartial jury and to a jury representing a fair cross-section of the community by swearing in an all white jury, over the objection of a black defendant, after the prosecutor exercised four of six peremptory challenges to strike all black veniremen from the panel.

The Batson case will challenge the viability of the twenty-year precedent of Swain v. Alabama, 380 U.S. 202 (1965), which held that the presumption is a prosecutor is using the government's peremptory challenges to obtain a fair and impartial jury and that the defense, to overcome that presumption, must establish on the record that the prosecutor's systematic use of peremptory challenges against blacks over the years.

According to Batson's attorney, David Niehaus, a deputy appellate defender of the Jefferson County Louisville Public Defender Office, the United States Supreme Court must answer the question, "Is it more important for both parties to exercise peremptories or to have the right to a jury not stacked by either side one way or another."

Batson's brief on the merits was filed in the United States Supreme Court in early July of this year and oral argument will be heard sometime after the next term of court opens in October.

Trial Tips

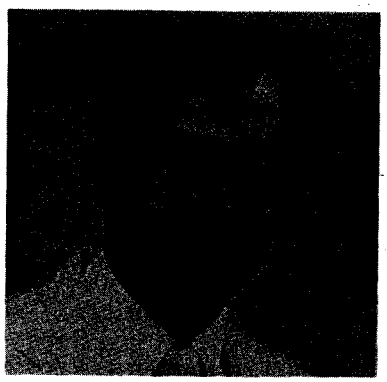
For the Criminal Defense Attorney

SUFFICIENCY OF EVIDENCE IN PROSECUTIONS FOR CULTIVATING MARIJUANA

KRS 218A.140 makes it unlawful for any person to traffic in a controlled substance. By reading together the definitions of "Traffic," "Manufacture" and "Production" contained in KRS 218A.010, this prohibition can be said to include the planting, cultivating, growing or harvesting of marijuana, hereinafter referred to as cultivating. KRS 218A.990(6)(a), effective July 15, 1982, provides that "Any person who knowingly and unlawfully plants, cultivates or harvests marijuana for the purposes of sale" shall be imprisoned for one to five years and fined $3,000 to $5,000 or both. Subsection (b) of KRS 218A.990 (6) further creates a presumption of purpose of sale from the planting, cultivating or harvesting of 25 or more marijuana plants. Under what circumstances might a defendant be entitled to a directed verdict of acquittal in a prosecution for cultivating marijuana?

A prerequisite to a conviction of cultivating marijuana is, of course, proof that the substance allegedly cultivated was in fact marijuana as defined by KRS 218A.010(9). Absent such proof, a defendant obviously would be entitled to a directed verdict of acquittal.

A qualified expert is ordinarily required to prove that a substance is marijuana. Indeed, it is a difficult and error prone task for anyone other than an expert to determine that a substance is marijuana. A one-year study in one state revealed that 14.4 percent, or one out of every seven samples, turned in as suspected marijuana were not marijuana. See People v. Park, Ill., 380 N.E.2d 795, 798 (1978). "At the very least, these



RODNEY MCDANIEL

statistics demonstrate that even if it is possible...to reliably identify cannabis in the manner he claimed to have used (feel, smell, sight and touch), such means are highly prone to error in the hands of anyone but an expert because of the number of plants whose gross morphological characteristics closely resemble Cannabis sativa" Id.

The case of Turner v. Commonwealth, Ky.App., 562 S.W.2d 85 (1978) should prove useful in a situation where the Commonwealth attempts to prove that a substance is marijuana without using a qualified expert. Turner involved the alleged unlawful possession of alcoholic beverages for purpose of sale in a dry territory. The liquid in question, however, was not chemically analyzed and was never presented at trial for inspection by the jury. The only evidence offered to prove that the liquid was alcohol was the law enforcement officer's testimony that the liquid was "Galaxy" whiskey. The Court of Appeals held that the officer's belief that the liquid was alcohol as prohibited by statute was insufficient and that the Commonwealth failed to prove every element of the crime beyond a reasonable doubt. Id., p. 87.

It should be noted that it is erroneous for a prosecutor or nonexpert

witnesses to refer to the substance in question as marijuana during the trial. It is up to the jury to determine if the substance is in fact marijuana. Cf. Holland v. Commonwealth, Ky., 272 S.W.2d 458, 460 (1954).

An issue as to whether there is sufficient proof that a substance is in fact marijuana can be presented to the trial court and preserved for appellate review by a motion for a directed verdict of acquittal on the general grounds of insufficiency of the evidence. Turner, supra. Another way to preserve such an issue would be to move for a directed verdict of acquittal on the specific ground that the evidence introduced was not sufficient to prove beyond a reasonable doubt that the substance was marijuana.

Even if the substance is shown to be marijuana, there still must be proof to connect the defendant with the marijuana. KRS 218A.990(6)(c) provides that "no owner, occupant or person having control or management of land on which marijuana had been planted, cultivated or harvested shall be found guilty of violating the provisions of this subsection, unless the Commonwealth proves that he knew of the planting, cultivating or harvesting of the marijuana." This provision would appear to require the Commonwealth to prove more than that the marijuana was found on land that the defendant owned or controlled. "[M]ere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession." Annot., 91 A.L.R.2d 810, 811. See Franklin v. Commonwealth, Ky., 490 S.W.2d 148 (1973) (wife's conviction for possession of marijuana, found in a barn on a farm where she lived with husband, reversed because Commonwealth did not sufficiently show that wife had knowledge of the presence of the marijuana in the barn).

In McRay v. Commonwealth, Ky.App., 675 S.W.2d 397 (1984), the court noted that a conviction for cultivating marijuana could be based on circumstantial evidence and held that the evidence in that case was sufficient even though there were no eyewitnesses to prove that McRay was ever observed in the vicinity of the marijuana patch. Unfortunately, the Court in McRay did not identify the circumstantial evidence that supported its conclusion that the circumstantial evidence was sufficient to prove that the defendant was guilty of cultivating marijuana. For this reason, the McRay opinion has little, if any, precedential value on this issue.

In cases where the Commonwealth relies on circumstantial evidence to prove that a defendant is guilty of cultivating marijuana, counsel should endeavor to produce testimony that there were no eyewitnesses to prove that the defendant was ever in the vicinity of the marijuana patch. If it is the case, counsel should offer proof that the marijuana patch was not located on land under the defendant's control. Even if the marijuana is near land under the defendant's control, the two areas may have been separated by fence. It may also be helpful to measure the actual distance from the marijuana patch to the defendant's home. A significant distance between the defendant's home and the marijuana patch would lend credence to his testimony that he had no knowledge of the patch. If the defendant's home was searched and no drugs were found, counsel should emphasize that fact also. There no doubt are probably many other factors which, in a particular case, may tend to show that the defendant had no connection with the marijuana.

An issue as to the sufficiency of the evidence to connect the defendant to the marijuana in question can be preserved by a motion for a directed verdict of acquittal on the general grounds of insufficiency of the evidence or by a motion made on the specific grounds that the evidence is insufficient to prove that the defendant cultivated the marijuana or that he had knowledge of the cultivating.

RODNEY McDANIEL

Rodney is a 1976 graduate of the University of Kentucky School of Law. He has worked with the Department since that date in our Frankfort Office.

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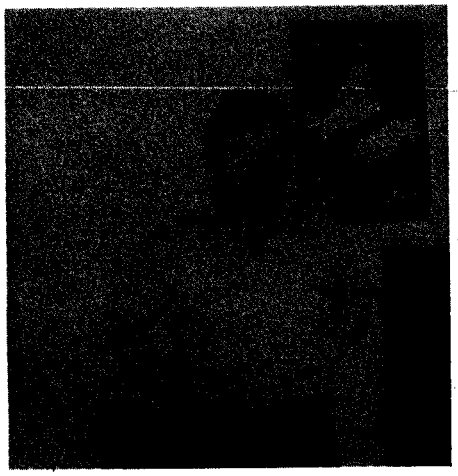
DPA Librarian, Karen McDaniel, tendered her resignation effective April 15, 1985. Her replacement, Tezeta G. Lynes, joined the Department on August 1, 1985.

Please direct all matters to her attention at (502) 564-5252.

NEW ASSISTANT PUBLIC ADVOCATE



Warren Taylor has joined the Hazard Office for Public Advocacy.

Trial Tip

TRADE SECRETS OF A TRIAL LAWYER- CROSS-EXAMINATION TECHNIQUES

This is the fourth of a series of five articles on trial skills. They originally appeared in NLADA'S Cornerstone and are reprinted with permission.

Our last article dealt mainly with mistakes to avoid in cross-examination; here we will emphasize positive techniques which can help to win in the courtroom.

As we go through cross-examination techniques, note the method for analysis and arrival at a particular technique. You first determine the objective - what is to be accomplished with the witness - and then consider human nature and what questions will bring desired answers. You may use many questions to patiently place the witness in a position resulting in the desired answer. Cross-examination methods will work only if psychologically sound; thus, psychology itself furnishes the basic framework within which you operate.

The following are useful techniques:

SHORT, PLAIN, LEADING, FACTUAL QUESTIONS

The importance of knowing and skillfully utilizing this one technique cannot be overemphasized. It brings the greatest results while providing all three qualities important to effectiveness: momentum, impact, and control. Have a list of facts to which the witness must admit. These facts should take the form of leading questions which are unambiguous, which advance only one point at a time, and to which the only reasonable answers will be "yes"

or "no". [A "yes" answer is preferable, because it will sound more like a series of admissions; the examiner will be in effect "testifying," with the witness reduced to agreeing.]

STRETCHOUT TECHNIQUE

A point which could be made in a single question can be stretched into several questions for greater impact. In a rape case, for example, you might substitute "You didn't do anything to resist, did you?" with "You didn't hit him?" "You didn't scratch him?" "You didn't kick him?", and so forth.

FAVORABLE FACTS

This topic was touched on in the previous article, but again bears emphasizing. You should decide which facts supporting the defense position can be obtained on cross-examination, and plan to bring these affirmatively forth.

INVESTIGATIVE OMISSIONS

Make a list of investigatory techniques, scientific tests, etc., that could have been performed by (or under supervision of) the witness and were not. Ask him/her (investigating detective, psychiatrist, etc.) if the particular technique or test exists; when the answer is "yes" ask, "You didn't do that or have that done, did you, sir/ma'am?" Follow this procedure for each thing not done. Jurors want a proper investigation, and failures in this regard can hurt the prosecution significantly.

OMISSIONS IN THE REPORT

When a trial witness testifies to something not mentioned in the witness' previous report, build up the report by showing it as the official record meant to inform others and avoid the forgetting of details, etc. Then hand the witness

STEVE RENCH

the report and ask him/her to tell you where the matter he/she is now testifying to is in the report. This will imply a willingness by the witness to make the case better when needed at trial.

COLLATERAL CROSS-EXAMINATION

Witnesses are often prepared on the central issue of their testimony. Ask instead for details on the outer fringes. For example, asking two police officers with overlapping testimony for fringe details may result in inconsistencies which will be gained in no other way.

More techniques will follow in the next article.

STEPHEN RENCH

Stephen Rench is a NCDC faculty member and former Deputy Colorado public defender. He is the author of many books including The Rench Book. He is now in private practice in Denver.

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Trial Tip

FINES AND COSTS FOR INDIGENTS, ESPECIALLY IN DRIVING UNDER THE INFLUENCE CASES

Excessive fines and costs for indigent defendants can be a very serious problem. This is especially true with the high fines available in driving under the influence (DUI) cases. Minimum fines for first, second and third offense DUI are $200, $350 and $500 respectively. KRS 189A.010(2). A mandatory $150 service fee and court costs must also be assessed. KRS 189A.050.

The bottom line is a minimum total of fines and costs for first offense DUI of approximately $400, second offense of approximately $550 and third offense of approximately $700.

A person with either no income or no steady income can find the fines and costs impossible to pay. The fines and costs can also take away from the daily needs of the defendant or the defendant's family.

The question to be addressed in this article has two basic parts. First - Can large fines and costs be avoided, without subjecting the defendant to additional jail time in lieu of the fine? Secondly - Once fines are imposed, what happens if the defendant cannot pay them? This article hopes to provide some answers to those questions.

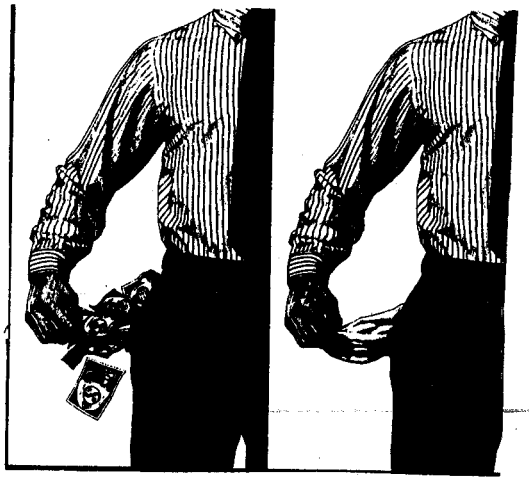
KENTUCKY STATUTES

Kentucky statutory law requires that court costs not be assessed to indigent defendants. First, KRS 453.190 says that "[A] Court shall allow a poor person residing in this state to file or defend any action therein without paying costs...."

Secondly, KRS 31.110(1)(b) says, in reference to a "needy" or "indigent" person, "[T]he Court in which the defendant is tried shall waive all costs."

The definition of a poor person in KRS 453.190(2) is one "who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter or clothing." A needy or indigent person in KRS 31.100(3) is "a person who at the time his need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation."

The filing of a poverty affidavit should be a sufficient showing under either statute. KRS 453.190(3); KRS 31.120 (2). Pursuant to KRS 453.190 and KRS 31.110(1)(b) an indigent defendant does not have to pay court costs.



A statute which appears to conflict with KRS 453.190 and KRS 31.110(1)(b) must be addressed. The statute, KRS 24A.175(4), states that court costs shall be mandatory and shall not be probated or suspended." KRS 24A.175 (4) is a general statute dealing with "court costs for criminal cases in district court." Since KRS 24A.175(4)

is a general statute it is controlled by the more specific statutes, KRS 453.190(1) and KRS 31.110(1)(b), concerning court costs for indigent defendants. See Land v. Newsome, Ky., 614 S.W.2d 948, 949 (1981); Heady v. Commonwealth, Ky., 597 S.W.2d 613, 614 (1980). (Holding that the more specific statute controls the general statute.) Therefore indigent defendants cannot be required to pay court costs.

FINE OR COST?

A question to be raised under the DUI statutory scheme is whether the $150 service fee of KRS 189A.050 is a fine or a cost. If it is a cost then it cannot be assessed to an indigent defendant. If the service fee is more in the nature of a fine then it must be imposed. KRS 189A.050(2). The statute, KRS 189A.050, calls the $150 a service "fee." KRS 453.190 uses both the terms costs and fees in saying an indigent defendant is to proceed "without paying costs" and "without any fees." However, KRS 189A.050(2) refers to KRS 534.020, "methods of imposing fines," and KRS 534.060, "response to nonpayment of fines," in determining how the fee is to be collected. Counsel should argue that the service fee is a fee under KRS 453.190 and should not be imposed on an indigent defendant. This is additionally true where the service fee more closely resembles a court cost, imposed to fund KRS Chapter 198, than a fine. See KRS 189A.010 (3).

ALTERNATIVES TO FINES

The next question - Is there an alternative to the imposition of the large fines of KRS 189A.010? In general fines can be probated. Commonwealth v. Ballinger, Ky., 412 S.W.2d 576, 578 (1967). Specifically there is nothing in KRS 189A.010 which prohibits the fines from being probated. Under KRS 189A.010(2)(A) community labor may be substituted for a fine. Under KRS 189A.010(2)(b,c)(3) nothing in the statute prohibits the fine from being probated, although imprisonment or community labor cannot be probated. Therefore the trial court has the power to probate the large fines under KRS 189A.010.

PROBATING FINE

The problem remains of how to convince a court to probate a fine without having the court impose a jail sentence instead of a fine. There is, of course, no certain method, but some suggested strategies follow:

1) Determine client's income and necessary expenditures. Once this is done and you have determined the client's excess income, if any, let the court know that a fine or monthly payments near or above this amount is excessive. Such a fine is unfair and harsh and would cut into the defendant's and the defendant's families' living expenses. This is the same result KRS 453.190(2) seeks to prevent when it says "without depriving himself or his dependents of the necessities of life, including food, shelter or clothing." See also KRS 534.060(3)(d).

2) Demonstrate that a reduced fine and or community labor would have the desired effect of deterrence and punishment. Community labor should be stressed because it provides a public service and acts to curtail the defendant's movements by placing him at work for a certain amount of time.

3) Additionally, if part of the fine is probated, the probated portion will act as a deterrent. The court should be made aware that a small fine for an indigent defendant will impact his finances, and therefore punish him, to a greater degree than

the biggest fine on a wealthy defendant.

BEARDEN

The final problem comes after the fines have been assessed and the defendant cannot pay them. There is one recent United States Supreme Court case and one Kentucky Statute that help answer this question. Bearden v. Georgia, ___ U.S. ___, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); KRS 534.060. In Bearden the United States Supreme Court faced the issue of "whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." 76 L.Ed.2d at 228. The Court looked at Williams v. Illinois, 399 U.S. 235, 26 L.Ed.2d 586, 90 S.Ct. 2018 (1970) and Tate v. Short, 401 U.S. 395, 28 L.Ed.2d 130, 91 S.Ct. 668 (1971) and summed up the existing law by saying that "the rule of Williams and Tate is that the State cannot impose a fine as a sentence and then automatically convert it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full...Both Williams and Tate carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine." Bearden, 76 L.Ed.2d at 230.

The Bearden Court then came to its holding. The state can imprison a defendant who has willfully refused to pay the fine or restitution when he has the means to pay. Id. Additionally, the defendant can be imprisoned where he has failed to make sufficient bona fide efforts to seek employment or borrow the money. Id. However, the Court held, "if the probationer has made all reasonable efforts to pay the fine or restitution and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." Id.

KENTUCKY'S STATUTE

Kentucky's response to nonpayment of fines statute, KRS 534.060, is similar to Bearden. The defendant must show that he did not willfully disobey the court order, and that sufficient good faith efforts were made to obtain the funds to pay the fine. The penalties of KRS 534.060 can be harsh if these showings are not made. The statute, KRS 534.060(2)(a)(b) allows up to six (6) months in jail for nonpayment of a felony fine, and up to one third of the maximum authorized term of imprisonment for failure to pay a misdemeanor fine. Additionally KRS 534.060(2)(c) allows imprisonment of ten (10) days for nonpayment of a fine for a violation.

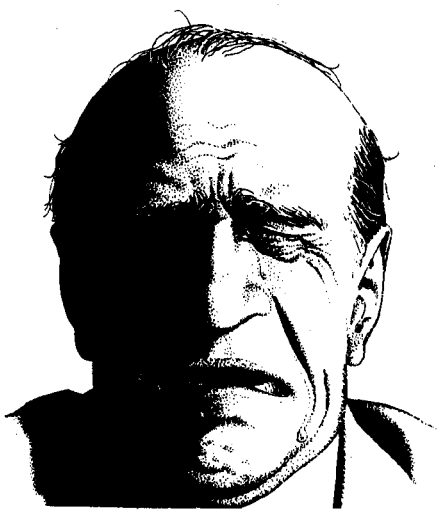
The statute then lists the available alternatives if failure to pay the fine is excusable. KRS 534.060(3). The court may extend the time for payment or reduce the amount of each installment. Id. Additionally, the court may modify "the manner of payment in any other way," which should include suspending part or all of the remaining fine. Id. Finally the court, subject to four conditions, may order that the defendant work for a department of local government, and that up to forty percent of his gross compensation be credited towards the fine.

RAMIFICATIONS OF BEARDEN

The Supreme Court's opinion in Bearden presents three problems. The first is the Court's statement that, "[A] defendant's poverty in no way immunizes him from punishment. Thus,

when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources." Bearden, ___ U.S. ___, 103 S.Ct. 2064, 76 L.Ed.2d 231 (1983). The statement appears to invite courts to make an initial determination of the defendant's poverty, and then impose a jail sentence instead of a fine. This is simply a back door way to get where the court, in the end, says you cannot go, i.e., jailing an indigent defendant because he is unable to pay a fine. The same Bearden conclusion and list of alternatives should be used in setting the original punishment. If the court determines that a fine is appropriate for the case, but that the defendant would have trouble paying a fine, the court should order extended time for payment, a reduced fine, or public service work. See Bearden, ___ U.S. ___, 103 S.Ct. 2064, 76 L.Ed.2d 232 (1983). The sentencing court should be resisted when, in identical cases, it makes the determination that the indigent defendant would have trouble paying a fine, and therefore is given a jail sentence, while the defendant with money is probated. This is the same result the Bearden Court prohibits after the fine has been imposed. The defense attorney should search for appropriate alternatives when the court attempts to reach this result.

The second Bearden problem is avoided in KRS 534.060. The Bearden Court says "Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the state imprison a probationer who has made sufficient bona fide efforts to pay." Id. at 233. The Court's language, speaking of inadequate alternatives to the fine, is extremely broad and allows punishment based solely on inability to pay a fine. It should be noted that where a fine is imposed, and a good faith effort to pay has been made, seldom will the State's interest shift so dramatically that alternatives cannot be found. If the State's interests are so strong, then it should be argued that the fine would not originally have been imposed. The Kentucky Statute, KRS 534.060(3) avoids the problem by not giving the Court the alternative of jail where the failure to pay the fine is excusable.



The third problem with Bearden and KRS 534.060 is a practical one. Both Bearden and KRS 534.060(2) allow the defendant to show that he has made good faith efforts to pay the fine as imposed. Bearden, ___ U.S. ___, 103 S.Ct. 2064, 76 L.Ed.2d 233 (1983). The problem is in getting the defendant to document his work or his effort to obtain work, document his efforts at borrowing the money, or at least to make partial payments. It sometimes happens where three or more months pass by with nothing having been paid and the client not remembering where he worked or looked for work. The argument that your client could make no payments for three months is a difficult one to win. The client must be made aware when the fine is imposed that he should 1)

document his work efforts, both where he worked and where he has tried to find work, 2) document his effort to borrow the money and 3) try and make some partial payments, even if they are below the monthly installments due. If the client does this, a hearing under KRS 534.060 will be easier to win.

HEARINGS

If a KRS 534.060 hearing is required, here are a few suggested ideas for preparation. First, obtain the defendant's documentation of his effort to obtain the money. If the defendant has no documentation, sit down with him and have him recall, as best as possible, the effort to obtain the money. Secondly, determine the clients income and necessary expenditures. Then determine what reduced payments, if any, the defendant can begin to make. Thirdly, find out what type of community labor is available and if the defendant is willing and able to do the work. Be prepared to present these and any other alternatives to the court. Prehearing preparation may help the defendant avoid a jail sentence in a KRS 543.060 hearing.

CONCLUSION

Fines and costs for indigents are a troublesome area. This is especially true in driving under the influence cases where the total amounts of fine and costs can be extremely high. An attorney must determine what fine is excessive for his or her client, and when and how the client can make payments. The sentencing court must be presented with these facts and the defendant must know he has to make a good faith, documented, effort to obtain the funds. By following these ideas it is hoped that fines and costs for indigents can become more reasonable.

JOHN R. HALSTEAD

John is a graduate of the University of Cincinnati Law School. Since 1982 he has worked as an assistant public defender in Somerset.

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Drunk Driving Law

POLICE TO ABANDON DUI VIDEO-TAPING

Kenton County will not videotape drunken driving suspects after July 1. County police chief R.C. Richardson and County Attorney John Elfers told the fiscal court yesterday that a year-old experiment to use videotapes as an aid in prosecution of drunken driving cases has not worked. "Some thought it would result in more convictions, but it hasn't" Richardson said last night. "Police in other areas have had the same problem."

Elfers said the Lexington-Fayette County Métro police abandoned a similar program two years ago. He said they concluded the tapes were hindering rather than helping prosecution, too.

County officials initiated the program despite questions about its effectiveness because they knew the videotape equipment could be used for other purposes if it wasn't successful.

Elfers said the tapes have influenced juries to ignore Breathalyzer results. A person is presumed drunk under Kentucky law when he registers .10 on the blood-alcohol test. But Elfers said juries have placed more importance on what the tapes show. For example, they have acquitted people who registered .20 and .21 on a Breathalyzer when the tapes showed the suspect walking a straight line, touching his nose with his fingertip and standing on one foot.

The best example of how ineffective videotaping can be, Elfers said, occurred when a man blew .24 on the Breathalyer, then passed a field sobriety test. "The jury acquitted the man. He talked perfectly. He was able to do the physical test," Elfers said.

Last year, the fiscal court spent $6,000 for videotape equipment. The idea was to tape people charged with DUI as they went through the arrest process.

According to Kenton County assistant chief Joseph Schmiade, county officials thought that once a suspect saw how bad he looked, he'd decide not to fight the charge. In some cases, that's not what has happened.

Some juries believe a person who tests at, say, 0.2 on a Breathalyer should appear falling-down drunk. But that's often not the case. Often, even that Breathalyer rating - twice the level at which a person can be convicted of DUI - doesn't result in outlandish physical appearances, Schmiade said.

Several hundred DUI cases currently are awaiting jury trials, Schmiade said. That fills up video tape pretty fast, and the tapes have to be preserved until a case has gone as far as it can in the court system - sometimes including an appeal.

"Those tapes are pretty expensive," Schmiade said. He said the equipment will be used in other areas of police work. One use, he suggested, would be in the case of suspected stolen property that has been seized.

Kenton County police could tape the property, and show it on a police channel that is part of the Storer cable TV system, he said.

-Bertram A. Workman & William Weathers

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Cases of Note... ...in Brief

DRUNK DRIVING LAW

State v. Franklin
327 S.E.2d 449 (W. Va. 1985)

The defendant was sentenced to 1-3 years for the offense of driving under the influence of alcohol, resulting in death. He had a blood alcohol reading of .17.

Shortly after the defendant's arrest, Mothers Against Drunk Drivers (MADD) established a chapter in the state with its first president being the sheriff of the county where the defendant was tried.

During voir dire, a prospective juror had a large, bright yellow MADD lapel button on her blouse. The sheriff had given the button to her as she entered the courthouse. While that woman was excused and the sheriff was censured, the sheriff and other MADD activists were "highly visible in the courtroom for the three day trial. Ten to thirty MADD adherents sat directly in front of the jury.

The trial judge refused to grant a mistrial and to require removal of the MADD buttons from the spectators and removal of the spectators from the courtroom.

Since the "spectators were clearly distinguishable from other visitors in the court and, led by the sheriff, they constituted a formidable, albeit passive, influence on the jury," and denied the defendant a fair trial by an impartial jury.

EXPERTS AND CONFESSIONS

United States v. Roark
753 F.2d 991 (11th Cir. 1985)

Once a confession is ruled admissible by a trial court, a jury is entitled to give the confession whatever weight the jury feel it deserves under the circumstances.

Recognizing this, the Eleventh Circuit held it reversible error to fail to allow a psychiatrist to testify at trial that the defendant "was extremely susceptible to suggestions and that someone with her level of suggestibility could be 'suggested' into making untrue stories." Id. at 994. The psychiatrist also had to be permitted to testify to the conditions of the interrogation and their influences on the defendant's state of mind.

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BATTERED WOMAN ACQUITTED IN MURDER TRIAL

A New York trial court has joined courts in several other states in the developing trend to accept testimony of the existence of the "battered woman's syndrome" as a justification defense to murder.

Lydia Torres shot her common-law husband three times while he sat in a chair in their apartment. At trial she offered evidence of death threats that night and of recurring violence over the course of their 10-year relationship. A psychologist testified that Torres suffered from battered woman's syndrome - certain psychological characteristics exhibited by women who have experienced physical and emotional abuse in an intimate relationship over an extended period of time.

A Bronx jury acquitted Torres, and New York Supreme Court Justice Lawrence H. Bernstein followed with an opinion explaining his decision to allow the psychologist to testify.

The expert testimony had a substantial bearing on Torres's state of mind at the time of the shooting and was "relevant to the jury's evaluation of the reasonableness of her perceptions and behavior at that time," the judge wrote. The psychologist's opinions countered the jury's commonsense conclusions that a woman who stays in an abusive relationship is free to leave her abuser at any time, he noted.

Judge Bernstein also found that "the theory underlying the battered woman's syndrome has passed beyond the experimental stage and gained a substantial enough scientific acceptance to warrant admissibility." New York v. Torres, April 16, 1985, 488 N.Y.S.2d 358.

- ABA Journal
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Book Review

CONFESSIONS OF A CRIMINAL LAWYER
by Seymour Wishman
Penguin Books, 1981. Paperback $4.95.

"Seymour, you need a vacation. You're overwrought. You've lost all sense of proportion. I know what went on here, and I'm going to throw the case out.... But what I'm more concerned about is you, Seymour."

So says Judge Rice to Wishman at the bench after repeated efforts to get Wishman's attention during his heated cross-examination of a police officer at a preliminary hearing for assault on a police officer.

Wishman's client, Jesus Torres, a Puerto Rican, was on his way to his job when two policemen stopped him and beat him, probably in retaliation for a Puerto Rican riot that had earlier caused the injury of three police officers. Due to Wishman's rage over the situation, he loses control during the cross-examination and begins to rant and rave at the witness, thus prompting the above reproach from the judge.

After practicing law as a criminal defense attorney for fifteen years in New York and New Jersey, Wishman is "burned out." The human misery and pain has finally left him questioning the criminal justice system, and his role in it.

He says he begins to have trouble with the question, "Don't you take responsibility for what a criminal you get off may do next?" But he is also troubled with the behavior of his clients as well. He is frightened by his ferocious courtroom performances on their behalf. He is confused by his rage and his increasing loss of control.

Nonetheless, he still has compassion for his clients, and the clients of less skilled attorneys. He recognizes them as victims. He tells of a client, Mr. Lanza, who says he has been indicted for two counts of armed robbery. In a totally sober and compelling manner, Mr. and Mrs. Lanza tell Wishman that yes, he has a defense and yes, it is insanity. When asked why insanity, he plainly replies, "when I committed the crime, I didn't understand the nature and quality of my actions, nor could I distinguish right from wrong." This, of course, is the correct legal definition for criminal insanity.

Wishman is amazed. He learns that, indeed, Mr. Lanza had been hospitalized while in the Navy, been given shock treatments, and takes massive dosages of Thorazine daily.

The book is fairly short and concise. It is written in a day-in-the-life style with a lot of verbatim conversations and courtroom dialogue. It is interspersed with anecdotes and observations of his experiences as a defense attorney. He "confesses" his conversations with clients, judges, prosecutors, and fellow defense law-

yers; as well as his feelings and his behavior.

One of the only insensitive discussions in the book was a couple of snide paragraphs about the lack of competent women defense attorneys, attributable, says Wishman, to their emotional involvement with their clients, and to the fact that they "habitually fell victim to massive dosages of sexism." Fortunately, this tone does not crop up very often, and he addresses other issues with more introspection and honesty.

Should the book be recommended? Most actors in the criminal justice system could write similar books outlining their frustrations and irritation with the system. Not much of it is a surprise; there are disgusting, funny, sad, and touching incidents throughout the book. Perhaps there is some comfort in knowing that another attorney has set out the conflicts inherent in criminal defense work.

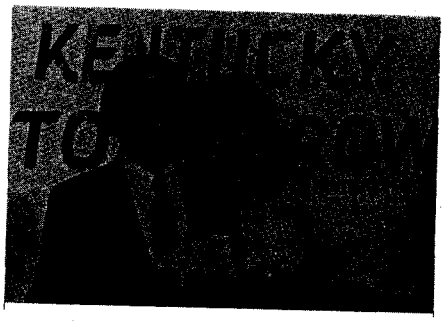
He concludes with the determination to pick and choose his cases more carefully, and to get to the root of his growing anger and rage. Probably in recognition of his need for an interlude in his defense work, Wishman did leave his private practice in 1977 to work as a Deputy Assistant to the President at the White House for a year.

PATRICIA VAN HOUTEN

* * * * * *

KENTUCKY TOMORROW DISCUSSES THE FUTURE OF CRIME AND JUSTICE

Kentucky Tomorrow: The Commission on Kentucky's Future, created and chaired by Lieutenant Governor Steven L. Beshear, is currently working with its 13 issue committees to develop an "agenda for the future" of Kentucky. The commission and committees have reviewed Kentucky's history, assessed



the trends that will impact the future, developed plausible and possible future scenarios and in the fall will select specific public policy options to prepare Kentucky for the rapid social, economic and technological changes to come.

The Crime and Justice Committee has identified the effects of an aging society, increases in victim services, and the increased use of technology in surveillance and incarceration as some of the key trends likely to impact Kentucky's future. The committee is interested in receiving input, reference bibliographies or brief information papers on these topics, as well as the impact of community crime prevention programs, changes in the criminal justice system, and the changing definition of crime.

Kentucky Tomorrow is an experiment in "participatory democracy" involving thousands of Kentuckians. It is the hope of Kentucky Tomorrow to "elevate the level of dialogue" in the state, and "develop a climate for change." If you are interested in being involved in the Kentucky Tomorrow Project please contact Pat Miller, Administrative Director.

* * * * * *

The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth, and the object represented in this opinion is the real.

CHARLES S. PIERCE

(NIEMI, Continued from P. 1)

She sought a position in the Department.

In March 1979, Bette joined the London Public Defender Office. She covered Rockcastle, Pulaski and McCreary counties by working out of her home and car although she was technically with the London office. In the first year she put 50,000 miles on her car.

Bette began again to trust her natural tendency to attempt to have a positive impact on her client's lives. That ability to empathize contributed and has continued to contribute to her rapport with her clients and her success as a public defender.

In September, 1980 she transferred to the LaGrange Post-Conviction Branch. She met with reminders of the weight of the scale against the inmate. For example, one inmate she defended had, ironically, been charged with arson after an attempt to incinerate himself.

Her clients were for the most part jaded. First interviews consisted of listening to complaints about attorneys, judges or prosecutors. But Bette lent an ear and showed them that she'd work as hard as possible for them. "Once you see (the prison) you realize you don't want any of your clients to be here." Bette had never been inside a prison before she transferred to LaGrange and said in reflection, "I found it shocking then but, I've become desensitized. Now, I don't even hear the gates slam."

Since April, 1982, she's been the directing attorney for the LaGrange trial office, which covers Oldham, Henry and Trimble counties, and feels that trial efforts offer more hope to clients. Promoting contraband charges are her most interesting institutional cases. "At the trial, it naturally comes out that the defendant is a convicted felon. All the witnesses for the defense are for the most part convicts and all the witnesses for the state wear uniforms of authority." Bette feels especially good when she wins institutional cases because it gives the inmate a "renewal of faith in the system."

Bette enjoys her work "If I had to design a job for me, this is it." She's trying to "dispel the notion that defense work is just a stepping stone to something else." She stresses, "public defender work isn't just an introductory exercise in criminal law. You have to understand why this is so important and have a commitment to the job." She has that commitment to the job and her clients and does an excellent job. She's won acquittals in the last 6 felony trials.

Maybe by the time this is printed Bette's broken ankle from a softball injury will be healed. Just an impediment, but the job goes on.

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