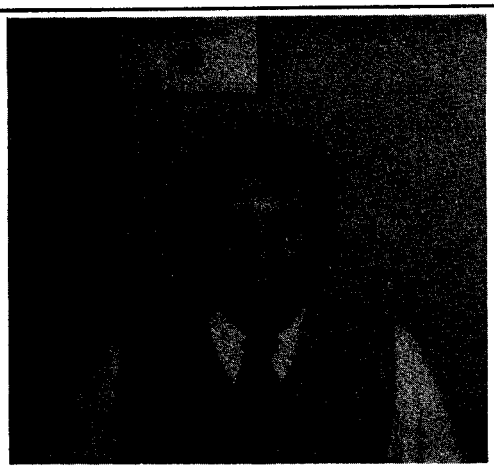
THE ADVOCATE

Vol. 7 No. 6 A Bi-Monthly Publication of the DPA October, 1985

THE ADVOCATE FEATURES



OLEH TUSTANIWSKY

"What you learn can be taken with you, even if everything else is taken from you." Oleh Tustaniwsky's parents, refugees from the war-effaced Ukraine, shared hardship's lessons with their Detroit-born children. Oleh's maternal grandfather had studied law in Vienna, Austria and had a civil practice. For the dream of peace, he came to America and worked as a janitor.

Oleh learned English in kindergarten. He grew up speaking Ukrainian which was, and still is, spoken by his parents in their home. His exposure to languages gave him a command of Polish as well. He later studied Russian and German in college. After law school he volunteered to act as an interpreter at a hospital for

(Continued, See Tustaniwsky, P. 52)

Future Seminars

TRIAL PRACTICE INSTITUTE

The Fourth Trial Practice Institute will again be held in Richmond, Kentucky November 20-23, 1985. Faculty include:

John Delgado -South Carolina
Judy Clarke - San Diego
Larry Pozner - Colorado
Roberta Illg - Atlanta
Greg Weeks - North Carolina
Bob Carran - Covington

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

There will also be lectures on preparation, the theory of defense, trial objections and communication.

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

ANNUAL SEMINAR

The 14th Annual Public Defender Training Seminar will be held at the Capital Plaza Hotel in Frankfort on June 8-10, 1986.

For more information on these seminars contact Ed Monahan, Director of Training at (502) 564-5258.

THE ADVOCATE

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Plain View
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Book Review

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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The Advocate welcomes correspondence on subject treated in its pages.

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IN THIS ISSUE

ADMINISTRATIVE NEWS

REORGANIZATION CHARTED

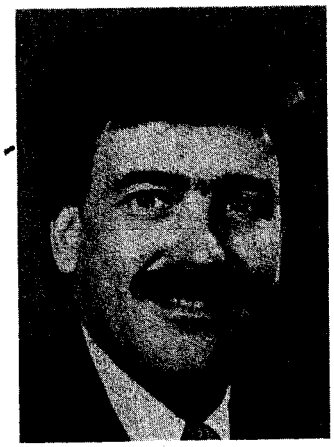
The Department of Public Advocacy's Defense Services Division has reorganized the Trial Services Branch into three field office branches: Western, Central and Eastern; and two sections: Training and Major Litigation. The Division will also retain the present Appeals, Investigative & Post-Conviction Services Branches.

The new field office branches will be headed up by **Bette Niemi** - (502) 222-9441 ext. 331, Manager of the Western Branch; **Ernie Lewis** - (606) 623-8413, Manager of the Central Branch; and **George Sornberger** - (606) 679-8323, Manager of the Eastern Branch. The Training Section will be directed by **Ed Monahan. Kevin McNally** will lead the Major Litigation Section.

It is my belief the Department will operate more efficiently by having field office supervision in the field, while allowing the central office staff the opportunity to concentrate in two extremely critical areas: training and major litigation.

Private attorneys in the public advocacy system should contact Dave Norat - (502) 564-5223 or myself (502) 564-5213 if you are having any problems getting your money, forms, or for resolution of any administrative problems. Listed in this edition of The Advocate are the attorneys you should contact concerning any legal issue on which you need assistance.

This reorganization does represent some unchartered territory for the Department but this new structure should prove to be a good method for allocating our sparse resources in



PAUL F. ISAACS

order to maintain the high quality of services that we have been able to provide our clients. As the Department works through this process, I would appreciate any suggestions you might have in order to improve our services.

Paul F. Isaacs

Legislative Ideas

LEGISLATIVE IDEAS SOUGHT

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

Paul Isaacs, Public Advocate
151 Elkhorn Court
Frankfort, Kentucky 40601
(502) 564-5213

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

* * * * * *

NEED QUICK ANSWERS OR ADVICE?

The attorneys in the Central Office will provide quick answers and immediate advice about any legal issues which may arise in your defense practice. Due to time restraints this will not be a research service. It is merely intended to allow you quick access to the wealth of knowledge that the Central Office attorneys have acquired over the years. If your specific issue is not delineated below, please find the nearest relevant issue and contact the attorney listed. An answer to almost any question is just a phone call away.

A.

Access to courts - Mike
Appellate procedure - Mark, Larry Tim
Arrest, general - Tim
Arrest, at home - Gail
Arrest, probable cause - Linda

B.

Battered Women Syndrome - Neal
Belated appeals - Randy, JoAnne, McGehee, Gail, Tim

C.

Caselaw, recent - Linda
Collateral attacks (11.42/60.02) - Randy
Comment on silence (Doyle) - Larry
Confessions, Anti-Sweating Act - Marie
Confessions, juveniles - Kathleen
Contempt of Court - Mike
Controlled substances - Tim
Cotton issues - Larry, JoAnne
Counsel, conflict of interest - Linda, Mike
Counsel, right to - Linda
Criminal Facilitation - Mike
Criminal Syndicate - Linda

D.

Death Penalty - Kevin, Gail, Donna, Rodney
Defense, right to present - JoAnne, Mike
Detainers/IAD - Randy, Dave, McGehee
Double Jeopardy - Larry, Rodney
DUI - Ed
Dying Declarations - JoAnne

E.

Ethics - Vince
Evidence, admissibility - Rodney
Evidence, character - Linda
Evidence, co-defendant's guilt - Larry
Evidence, flight/escape - Linda
Evidence, hearsay - Linda
Evidence, prior sexual conduct - Mike, Marie
Evidence, relevancy - Linda, Mark
Evidence, sufficiency - Linda, Gail
Evidence - tampering with - Mike
Ex Post Facto - Linda
Expert witnesses, funds for - Donna, Mike
Extradition - McGehee
Extraordinary Writs - Gail
Extreme Emotional Disturbance - Rodney, Mike, Gail, Ed
Eyewitness Identification - Rodney, Kevin, Neal

F.

Federal Habeas Corpus - Kevin, Neal
Fiber evidence - Neal
Firearm offenses - Larry
Forensic evidence - Ed

G.

Guilty pleas, constitutional validity - Ed, McGehee

H.

Habeas corpus, cause/prejudice - JoAnne, McGehee, Gail
Habeas corpus, federal - Randy, McGehee, Rodney, Gail
Habeas corpus, state - Randy, McGehee

I.

Impeachment-Bias/Interest/Hostility - Ed, McGehee
In forma pauperis, denial review - Mark, Tim, Ed
Insanity defenses - Gail

J.

Jail credits - McGehee, Randy
Juror, challenges for cause - Gail
Juror misconduct - Tim, Mike
Juror testimony re verdict - Mike
Juvenile rights and procedure - Gail, Mike
Juvenile waivers - Gail
Jury panel challenges - Donna, Gail

K.

Kidnapping exemption - Larry

L.

Lineup/Showup/Photo display - Larry, Linda

N.

Notice of Appeal - Mark, Tim

O.

Offenses, single vs. multiple - Marie, Mike
Opinion evidence - Ed

P.

Pardons and commutations - Randy, Dave
Parole - Randy, Dave, McGehee
Peremptories, improper use of - Tim, Ed
PFO proceedings - Rodney, Mike, Ed
Polygraph - Ed
Possession, what constitutes - Marie, Dave
Prisons - Dave
Privilege, psychiatrist/patient - JoAnne
Prosecutorial misconduct, arguments to jury - Mike, Gail
Prosecutorial vindictiveness - Mike
Psychiatrist - Ed

S.

Search and Seizure - Tim, Linda, Rodney
Self-protection - Tim, Mike
Sentencing, delay in - Gail
Separate trials, co-defendants - Marie
Separate trials, counts - Tim, Linda
Sexual Abuse-Legal Defense & Strategies - Vince
Sexual offenses, mistake as to age - Tim, Randy, McGehee, Dave
Shock Probation - Randy, McGehee, Dave
Speedy trial - Linda, Rodney, Gail
Stop and frisk - Tim

T.

Trial tactics - Kevin

V.

Venue - Ed, Donna

W.

Waiver, counsel - Tim
Waiver, effect of mental retardation- JoAnne
Waiver, jury trial - Tim
Wiretap - Linda
Witness, competency - Larry
Witness, improper intimidation - Mike
Witnesses, obtaining (out-of-state) - Ed
Writs, mandamus prohibition - Donna

Marie Allison	*564-5228
Donna Boyce	564-7693
Kathleen Kallaher	564-5228
Larry Marshall	564-5231
Rodney McDaniel	564-5231
Kevin McNally	564-5255
Ed Monahan	564-5258
Dave Norat	564-5223
Mark Posnansky	564-5254
Tim Riddell	564-5212
Gail Robinson	564-5226
Neal Walker	564-5229
Linda West	564-5234
Randy Wheeler	564-5233
Mike Wright	564-5219
JoAnne Yanish	564-5219

*All Numbers 502 Area Code.

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which makes the internal characters of a given act so different in different men.

OLIVER WENDELL HOLMES, JR.

West's Review

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

Linda K. West

Kentucky Court of Appeals

COMPETENCY
Moody v. Commonwealth
32 K.L.S. 10 at 2 (July 5, 1985)

The Court was confronted in Moody with the question of whether Kentucky law requires that a convicted felon be competent at the time of his sentencing proceeding.

Moody was adjudged guilty but mentally ill of first degree robbery. At his sentencing the defense introduced the testimony of a psychologist that Moody was presently "acutely mentally ill." The defense then moved the court to make a determination as to Moody's competency before sentencing. The trial court refused, stating that Kentucky law does not require a defendant to be competent at sentencing.

The Court of Appeals resolved this issue in the defendant's favor by referring to KRS 504.090, which provides that "no defendant who is incompetent to stand trial shall be tried, convicted or sentenced so long as the incompetency continues" (Emphasis added).

SPEEDY TRIAL
Vanmeerten v. Goad
32 K.L.S. 10 at 6 (July 5, 1985)

In September, 1976, Vanmeerten was indicted for second degree manslaughter following a vehicle collision which resulted in six deaths. A trial held in January, 1977, ended with a hung jury. The jury was again unable to reach a verdict at a second trial held in February, 1979. In December, 1982, Vanmeerten moved to dismiss the indictment for lack of speedy trial. Upon the Commonwealth's third attempt to obtain a conviction, Vanmeerten sought a writ of prohibition.

The Court of Appeals analyzed the issue before it in light of Barker v. Wingo, 407 U.S. 514 (1972). The U.S. Supreme Court in Barker provided for the resolution of speedy trial claims based on a weighing of four factors - the length of the delay, the reasons for the delay, the defendant's assertion of his right to speedy trial, and the existence of prejudice. Applying these factors to the case before it the Court of Appeals found that the six year delay in retrying Vanmeerten was "of sufficient duration to trigger an inquiry." No "reasonable explanation" for the delay was offered by the Commonwealth and the delay was not attributable to the defendant, who had never requested a continuance. The defendant did not request a speedy trial. However, the Court concluded that the absence of any requests for a continuance, coupled with the defense motions to dismiss, "demonstrates a desire on the petitioner's part to be tried in a speedy manner." Finally, the Court found that Vanmeerten had been prejudiced by the delay. Although Vanmeerten alleged no specific prejudice to his ability to mount a defense, he was personally prejudiced by being under indictment for nine years. The Court of Appeals relied on Moore v. Arizona for this "expanded concept of prejudice." Based on this analysis, the Court granted the writ.

SENTENCING/PROBATION
Tiryung v. Commonwealth
32 K.L.S. 11 at 4 (July 26, 1985)

Tiryung appealed the revocation of his probation asserting that his probation could not be revoked since a term of imprisonment had never been imposed at his original sentencing.

Following his guilty plea, the trial court had entered into the record an "Order of Probation" which provided that Tiryung "be sentenced to probation... for a period of three years from the date of the judgment." No judgment was in fact entered. Tiryung subsequently violated the terms of his probation, following which his probation was revoked and a one-year sentence was imposed.

The Court of Appeals agreed with Tiryung that "the order revoking his probation and imposing a one-year sentence to serve is invalid as there was no judgment imposing sentence in the first instance...." The Court found that at the time of sentencing a penalty must be fixed in accordance with KRS 532.030 without "unreasonable delay." RCr 11.02. "The reason for the scheme, as we perceive it to be, is that fundamental fairness requires that one convicted of a felony know the entire legal consequences of the guilt he has admitted or has been convicted of and that he be apprised of those consequences without unreasonable delay." The Court also cited its former holding in Wilson v. Commonwealth, Ky.App., 577 S.W.2d 618, 620 (1979) that "any delay in the fixing of penalty which permits the intervention of subsequent circumstances that may change the outcome... is an unreasonable delay under RCr 11.02(1)." Wilson was overruled in Cole v. Commonwealth, Ky.App., 609 S.W.2d 371 (1980). The opinion of the Court in Tiryung specifically overrules Cole, thereby reinstating Wilson.

CRIMINAL ABUSE/DIRECTED VERDICT
Cutrer v. Commonwealth
32 K.L.S. 11 at 5 (August 2, 1985)

In this case the defendants argued that the term "cruel punishment" as contained in KRS 508.110 and KRS 508.120, which define first and second degree criminal abuse, is unconstitutionally vague. The Court rejected this argument and observed "[i]t is ironic that appellants attack the term 'cruel punishment' as being unconstitutionally vague when that very term is found in the Eighth Amendment of the United States Constitution...." The Court concluded that "the plain language of KRS 508.110 and KRS 508.120 is sufficiently clear to apprise ordinary sensible persons of the type of acts they sanction...."

The Court in Cutrer also rejected argument that the defendants were entitled to directed verdicts at the close of the Commonwealth's case. Regardless of the insufficiency in the Commonwealth's case, the defendants' own testimony supplies the deficiency. In the words of the court "if a party chooses to proceed with his case after the motion is denied, he assumes the risk that his evidence will fill the gaps in his opponent's case, forfeiting his claim of error."

NEWLY DISCOVERED EVIDENCE
Carwile v. Commonwealth
32 K.L.S. 11 at 8 (August 9, 1985)

In this appeal from the denial of a motion for new trial the Court of Appeals discussed the term "newly discovered evidence." The Court noted as its characteristics that such evidence must have been "discovered after the trial" and must be such that it "would, with reasonable certainty, change the verdict upon retrial."

Carwile's claim of newly discovered evidence was based on the affidavit of his brother, a witness to the crime. The brother's testimony was unavail-

able at trial because he was himself indicted for the offense and asserted his Fifth Amendment privilege. Following Carwile's conviction, charges against the brother were dismissed. The Court of Appeals held that this was not newly discovered evidence since "[the brother's] testimony was or should have been known to appellant at the time of the trial when he sought, unsuccessfully, to call him as a witness." The Court also noted that the brother's testimony would only corroborate that of appellant and thus was "cumulative."

DIRECTED VERDICT
Commer v. Commonwealth
32 K.L.S. 11 at 9 (August 9, 1985)

The Court reversed Coomer's conviction of setting fire to timberland owned by another on grounds of insufficient evidence.

KRS 149.380(1), under which Coomer was convicted, provides that "No person shall willfully, maliciously, or wantonly set on fire or cause or procure to be set on fire any timberland...." "Timberland" is defined in KRS 149.365(4). At trial the Commonwealth offered no direct proof that the land set on fire by Coomer was in fact "timberland." The location of the land was testified to. The land was in Lee County, much of which is National Forest. The prosecutor referred to the land as "timberland" and the fire was extinguished by forestry workers. However, no evidence was offered that the land was in fact "timberland." The Court, citing Trowel v. Commonwealth, Ky., 550 S.W.2d 530 (1977), held that "[i]n this case there was a total failure of proof by the Commonwealth concerning the character of the land burned."

PRESERVATION/PALPABLE ERROR
Perkins v. Commonwealth
32 K.L.S. 11 at 10 (August 9, 1985)

In this case the Court of Appeals reversed the defendant's conviction of criminal possession of a forged instrument based on an unpreserved claim of insufficiency of the evidence. The Court found "no evidence" that the $50 check which was the subject of the charge was forged. The Court then held that the defendant's conviction was "not supported by the evidence and must be reversed as violative of due process."

The Court rejected argument by the Commonwealth that reversal was inappropriate because no motion for directed verdict was ever made. The Court explained: "Ordinarily we would agree with appellee, but a conviction in violation of due process constitutes '[a] palpable error which affects the substantial rights of a party' which we may consider and relieve even though it was insufficiently raised or preserved for our review." See RCr 10.26.

APPOINTMENT OF COUNSEL
Goodlett v. Commonwealth
32 K.L.S. 12 at 6 (August 23, 1985)

Prior to Goodlett's trial for first degree assault Goodlett sought and was denied appointment of counsel. The

trial court found that Goodlett was not indigent inasmuch as Goodlett owned land worth $18,000 and had mortgage, personal and credit card debts leaving him with a net worth of $3,500. Goodlett proceeded to trial without counsel while asserting that he desired counsel but lacked funds to hire an attorney.

The Court of Appeals held that "the trial court properly concluded that he had a net estate of at least $3,500 and was ineligible for court-appointed counsel." The Court also noted that Goodlett made only one effort to obtain counsel.

PRESERVATION OF ERROR
White v. Commonwealth
32 K.L.S. 12 at 15 (August 30, 1985)

In this case the Court of Appeals declined to reverse the defendant's conviction based on prosecutorial misconduct in closing argument where trial defense counsel's objection to the argument was sustained but no relief was requested. The Court cited Ferguson v. Commonwealth, Ky., 512 S.W.2d 501, 504 (1974) for the rule that: "If an objection is made after the error complained of has occurred, it is incumbent upon the objector to ask for such remedial relief as he desires." Thus, unless an admonition or mistrial is requested and denied a claim of error will be unpreserved.

The Court of Appeals also refused to consider the defendant's claim that his trial counsel was ineffective in admitting the defendant's guilt in PFO proceedings. The claim of ineffective assistance was raised for the first time on appeal rather than in the trial court by way of RCr 11.42. The Court noted that: "Our courts have consistently held that the issue of ineffective assistance of counsel must be raised at the trial level by means of a post-trial motion for it be considered on appeal."

AMENDMENT OF INDICTMENT
Jones v. Commonwealth
32 K.L.S. 12 at 12 (August 30, 1985)

RCr 6.16 provides that a court may "permit an indictment...to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Jones argued, and the Court of Appeals agreed, that when the trial court instructed the jury on theft by unlawful taking when Jones was indicted for receiving stolen property the trial court impermissibly amended the indictment.

The Court was unpersuaded by the Commonwealth's contention that under Jackson v. Commonwealth, Ky., 670 S.W.2d 828 (1984) theft and receiving stolen property are not different offenses. In Jackson, the Kentucky Supreme Court overruled Sutton v. Commonwealth, Ky., 623 S.W.2d 879 (1981) to hold that a defendant's convictions of both theft and receiving the same stolen property constitute double jeopardy. Stated otherwise, the two offenses merge. From this holding the Commonwealth reasoned that an indictment for either offense may be amended to charge the other without charging a "different" offense. The Court of Appeals rejected this argument because "it overlooks the concluding part of Jackson's discussion which states 'although a person may be convicted of knowingly receiving stolen property on less proof than is necessary for a conviction of theft, a conviction for theft precludes a separate conviction for knowingly receiving stolen property.'" Based on this language, the Court of Appeals concluded that "the Jackson court regarded receiving as a lesser included offense of the crime of theft...." It followed that, theft being a greater offense than receiving, an indictment charging receiving cannot be amended to charge theft.

Kentucky Supreme Court

REASONABLE DOUBT INSTRUCTION/PRESERVATION
Commonwealth v. Goforth
32 K.L.S. 9 at 18 (July 3, 1985)

At the defendant's sodomy trial, the trial court erred by giving the jury an instruction defining reasonable doubt. RCr 9.56 provides that: "The instructions should not attempt to define the term 'reasonable doubt.'"

While recognizing the trial court's error, the Supreme Court refused to reverse since there was no objection to the giving of the instruction. RCr 9.54, the governing rule at the time of trial, stated:

> No party may assign as error ...the failure to give an instruction unless he has fairly and adequately presented his position... or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.[1]

Trial defense counsel objected to the wording of the trial court's definition but made no objection to defining reasonable doubt for the jury. The objection made failed "to comply with the minimum necessary to preserve error" because it did not "fairly and adequately present the reason why the instruction was improper." The Court also declined to treat the error as "plain error" under CR 61.02 since the error was not, in its judgment, one of constitutional magnitude.

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[1] RCr 9.54 was amended effective January 1, 1985, by the addition of the requirement that objections to instructions be "specific."

United States Supreme Court

RIGHT TO EXCULPATORY EVIDENCE
United States v. Bagley
37 CrL 3185 (July 2, 1985)

The U.S. Supreme Court held in Brady v. Maryland, 373 U.S. 83, 87 (1963) that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." In Bagley, the Court articulated a materiality standard to be applied in determining when the failure to disclose exculpatory evidence requires reversal.

The evidence involved in Bagley consisted of the fact that two principal prosecution witnesses were informants paid "commensurate with the information furnished." The evidence thus tended to reflect on the credibility of the witnesses. The Supreme Court noted that "[i]mpeachment evidence, as well as exculpatory evidence, falls within the Brady rule." Both types of evidence are subject to the same materiality standard which the Court stated as follows: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." The Court considered this standard sufficiently flexible to govern situations where the defense makes no request for exculpatory evidence, only a general request, or a specific request. The materiality standard enunciated by the Court displaces the "harmless beyond a reasonable doubt" standard with respect to Brady issues. Justices Marshall, Brennan, and Stevens dissented.

DETAINERS
Carchman v. Nash
37 CrL 3198 (July 2, 1985)

In this case, the Court determined that Article III of the Interstate Agreement on Detainers (IAD) does not apply to detainers based on probation violation charges.

Article III of the IAD provides that a prisoner incarcerated in one state may demand speedy disposition of "any untried indictment, information or complaint" that is the basis of a detainer lodged against him by another state. If the pending charges are not disposed of within 180 days the charges must be dismissed.

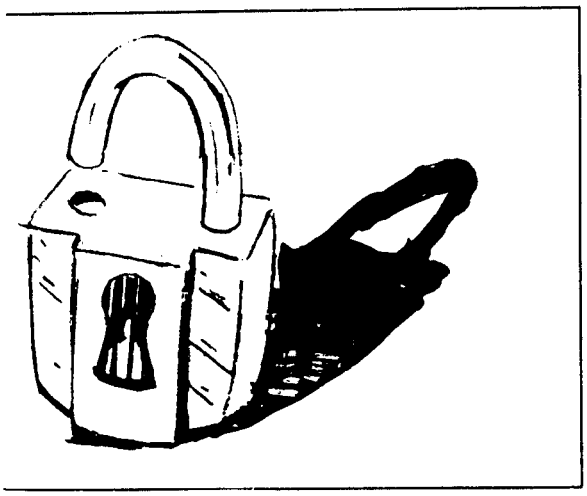


ILLUSTRATION BY LEIGH ANN SMITH

Nash, a Pennsylvania prisoner, sought disposition under the IAD of a New Jersey detainer based on a probation violation charge. New Jersey failed to respond within 180 days and subsequently revoked Nash's probation. Nash was granted habeas corpus relief by federal district court and the grant was affirmed by the Third Circuit. The Supreme Court granted certiorari to hold that "[a] probation-violation charge, which does not accuse an individual of having committed a criminal offense in the sense of initiating a prosecution, does not come within the terms of Article III." Justices Brennan, Marshall and Stevens dissent based on their interpretation of the IAD as intended to provide "a comprehensive solution for the problem of detainers."

LINDA WEST

* * * * * *

The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. Glasser v. United States, 315 U.S. 60, 70.... Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent. Justice Black in VanMoltke v. Gillies, 332 U.S.708, 725-26 (1948).

* * * * * *

Many have observed the system and wondered. In a book, the famous justice William O. Douglas tells whimsically how at the beginning of his career on the court the formidable bearded chief justice, Charles Evans Hughes, whispered the shattering truth to the novice: "You must remember one thing. At the constitutional level where we work, 90 percent of any decision is emotional. The rational part of us supplies the reason for supporting our predilections."

* * * * * *

Laughter is the shortest distance between two people.

VICTOR BORGE

Post-Conviction
Law and Comment

Mark Posnansky

EXHAUSTION PROBLEMS IN STATE COURT

One of the most vexing problems now facing appellate criminal counsel in Kentucky is how to be assured that you have exhausted your state remedies in every case. This is a particular problem for appointed attorneys since they are not afforded the luxury of refusing to take cases which do not appear to likely warrant reversal. Every criminal defendant is entitled to counsel. This right extends to the appellate process. Anders v. State of California, 366 U.S. 743 (1967); Ross v. Moffitt, 417 U.S. 600 (1974). In addition, there is a state constitutional right in Kentucky to "at least one appeal to another court...." Kentucky Constitution, §115.

In order to provide effective assistance of counsel on appeal, appointed counsel in criminal cases must seek to ensure that the client's right to obtain relief in federal court has been protected. Even if appointed counsel is not planning to pursue the client's case in federal court, every effort must be made so that the client, either through another attorney or pro se, is not precluded from going into federal court at a later date.

Federal law has long required that state remedies be exhausted before federal habeas corpus relief can be pursued. Title 28, §2254 of the United States Code reads as follows:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of a prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The language of the federal statute is quite clear. A defendant must pursue all available state avenues of relief in order to be entitled to federal habeas corpus relief. Pritchess v. Davis, 421 U.S. 482 (1975). It is therefore necessary for the practitioner to understand what constitutes exhaustion of state remedies in a state criminal case.

The Kentucky Constitution states that all criminal appeals from a sentence of death, a sentence of life imprisonment or a sentence of twenty years or more shall be taken directly to the Kentucky Supreme Court. Kentucky Constitution, §110. All other felony appeals go directly to the Kentucky Court of Appeals. Obviously, the state court of last resort is the Kentucky Supreme Court in any case appealed directly to that court. But what about other felony cases?

Or misdemeanor cases? Such cases can present problems.

Federal cases have long held that §2254 is to be strictly construed and that exhaustion of state remedies must occur before federal review can be allowed. Duckworth v. Serrano, 454 U.S. 1 (1981); Pitchess v. Davis, supra.

In Fay v. Noia, 372 U.S. 391, 434 (1963), it was held that §2254 does not bar habeas corpus relief because of a prisoner's "failure to exhaust state remedies no longer available at the time habeas is sought," but requires only an exhaustion of those "remedies still open to the habeas applicant at the time he files his application in federal court." Even if a state prisoner fails to appeal his conviction and the time for appeal has expired, relief may be had in federal court even though the claim was never presented to a state court, unless some other post-conviction remedy is available. The same rule applies where an appellate or post-conviction remedy is unavailable or is ineffective to protect the prisoner's rights. Keener v. Ridenour, 594 F.2d 581, 584 (6th Cir. 1979).

But the rule is not absolute and should not be read to mean that the state route can be overlooked or ignored. If it can be shown that the prisoner "deliberately bypassed" state remedies or is precluded from raising his claim because of "inexcusable procedural default," federal habeas corpus relief is precluded. Wainwright v. Sykes, 433 U.S. 72 (1977).

The Sixth Circuit has always followed the general rule that exhaustion must occur before federal habeas corpus relief can be pursued. Gully v. Kunzman, 592 F.2d 283 (6th Cir. 1979), cert. den. 442 U.S. 924; Gallagher v. Commonwealth of Kentucky 224 F.2d 559 (6th Cir. 1955).

In Davis v. United States, 411 U.S. 233 (1973) and later in Wainwright v. Sykes, supra, the court held that the proper standard for habeas corpus review of a trial error to which no contemporaneous objection has been made at trial was the "cause and actual prejudice" standard. Under such standard, the defendant must show both (1) "cause" excusing his procedural default, and (2) "actual prejudice" resulting from the error of which he complains. The "cause and prejudice" standard was applied in United States v. Frady, 456 U.S. 152 (1982) to a petitioner who raised issues in a habeas corpus action which had not been raised on direct appeal. The "cause and actual prejudice" principal of Frady was followed by the Sixth Circuit in Fornash v. Marshall, 686 F.2d 1179 (6th Cir. 1982) and, most recently, in Leroy v. Marshall, 757 F.2d 94 (6th Cir. 1985).

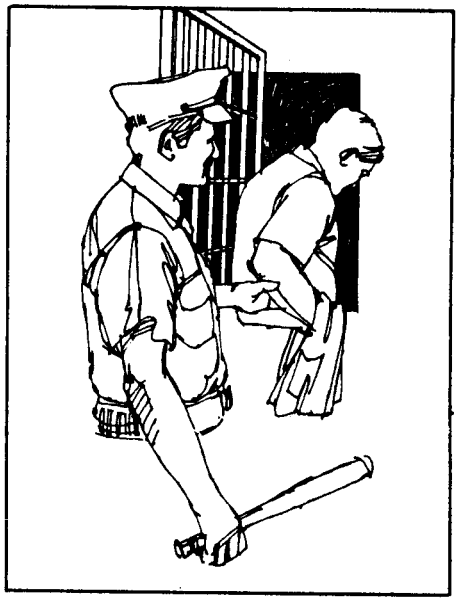
It is clear under recent case law that it is necessary in Kentucky to file a motion for discretionary review before state remedies have been exhausted. Two very recent federal cases indicate that a defendant must seek discretionary redress in the highest state court before state remedies have been exhausted.

In Richardson v. Procunier, 762 F.2d 429 (5th Cir. 1985), the Court held that an inmate, who had failed to petition the Texas Court of Criminal Appeals for discretionary review of his case, had not exhausted his state remedies and was thereby precluded from seeking habeas corpus relief. The Court held that the Texas Court of Criminal Appeals "exercises broad discretion in accepting appeals for review." It would appear that the decision in Richardson v. Procunier, supra, would be persuasive in

Kentucky. The Kentucky Supreme Court is certainly the court of last resort in Kentucky and grants review of decisions of the Kentucky Court of Appeals on both issues of law and fact. Richardson points out that "it is not necessary to seek discretionary review from a second appellate level when review will almost certainly be denied, [however] a petitioner is not considered to have exhausted his state remedies where additional appellate review would possibly be granted." 762 F.2d at 431. The Court pointed out that "the Texas Court of Appeals exercises broad discretion in accepting appeals for review." The Kentucky Supreme Court exercises similar power. There is no constitutional provision, statute or court rule which limits the power of the Kentucky Supreme Court to grant review. Therefore, it is necessary to ask the Kentucky Supreme Court for discretionary review before state remedies have been exhausted.

Another recent case on point is Nutall v. Greer, 764 F.2d 462 (7th Cir. 1985). In that case, the Seventh Circuit held that the petitioner had waived his right to habeas corpus relief because he had not asked the Illinois Supreme Court to review a decision of an intermediate appellate court. The court acknowledged that Nutall had no avenue of state relief open to him at the time the federal action was filed. The court, however, applied the "cause and prejudice" rule and held that Nutall had forfeited his right to habeas corpus relief.

Until the Kentucky rules are amended, it is clear that a motion for discretionary review to the Kentucky Supreme Court must be filed from an adverse decision of the Kentucky Court of Appeals in order to exhaust state remedies. Likewise, the rules now provide for a motion for discretionary review to the Supreme Court from a denial of such a motion by the Court of Appeals. For example, suppose a person is convicted of a misdemeanor offense in district court. An appeal is then taken to the circuit court which affirms the district court. Discretionary review is then sought in the Kentucky Court of Appeals, but the motion is denied. CR 76.20 (2)(c) now provides for a motion for discretionary review in the Supreme Court from the order of the Court of Appeals denying discretionary review. It therefore follows that such a motion is necessary in order to exhaust state remedies since it is clearly provided for in the Kentucky Rules of Civil Procedure. In order to ensure that state remedies have been exhausted, it is necessary to petition the Kentucky Supreme Court, the state court of last resort, in all criminal cases.



The problem has been compounded recently by an amendment to the Kentucky Rules of Civil Procedure. Effective January 1, 1985, CR 73.02 was amended to include the following paragraph:

> (4) If an appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee. An appeal

is frivolous if the court finds that the appeal is so totally lacking in merit that it appears to have been taken in bad faith.

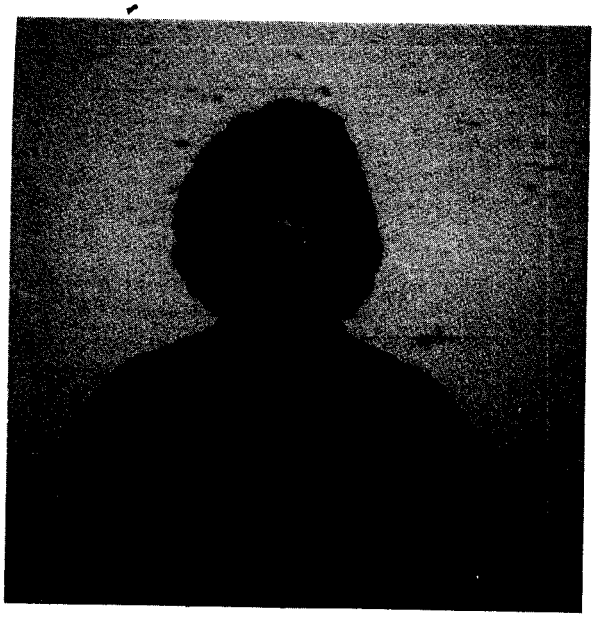
It can immediately be seen that the criminal advocate is now in a bit of a quandary. The attorney is ethically bound to represent the client zealously and to safeguard the client's right to someday take the case into federal court. To do this, the attorney needs to exhaust state remedies. At the same time, the state court has now announced that an attorney can be fined for pursuing an appeal which the court deems to be frivolous. This dilemma is, of course, intensified by the fact that every defendant in Kentucky has the right to appeal and to be represented on appeal. In addition, of course, the Public Advocate is appointed and cannot "pick and chose" his or her cases. To date, the Kentucky Supreme Court has issued several orders requiring attorneys to show cause why they should not be cited for filing "frivolous" motions for discretionary review.

The criminal practitioner is faced with a dilemma in regard to exhausting state remedies in cases which are weak, but not necessarily frivolous. The test as to whether an appeal is frivolous is certainly a subjective one. There are many ethical considerations involved in the dilemma. A discussion of those considerations will not be attempted in this article. But the criminal practitioner should be aware that in order to exhaust state remedies, review must be sought in the Kentucky Supreme Court.

MARK A. POSNANSKY

A former Appellate Branch Chief from October 1982 to August 1984, Mark now works as an Assistant Public Advocate with the Post-Conviction Services Branch.

DPA Staff Changes



Charlotte Scott
joins our Paducah Office

* * * * * *

Phaedra Spradlin, Assistant Public Advocate with our Stanton/Gorge Office is no longer with that office effective July 31, 1985. Her position is now filled by **Bill Chambliss** formerly of the Hopkinsville Office.

* * * * * *

Billy Riley, former Assistant Public Post-Conviction Advocate at the Kentucky State Penitentiary from June 16, 1981 to April 15, 1983 has rejoined the Paducah Office effective October 1, 1985.

The Death Penalty

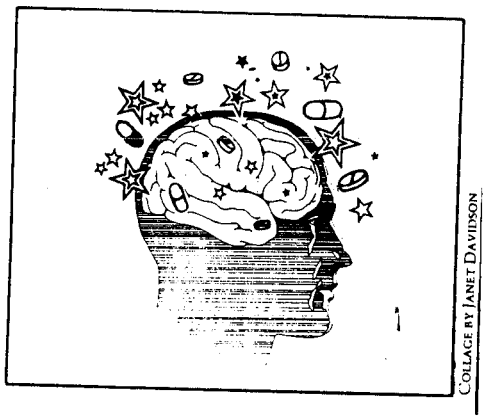
Kevin M. McNally

KENTUCKY'S DEATH ROW POPULATION - 24
PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 108

AKE'S WAKE: PAUL KORDENBROCK'S DEATH SENTENCE UPHELD

Stanley Allen was shot by Paul Kordenbrock during a robbery of an auto-parts store in Boone County. So was William Thompson. He survived. Allen did not. The two robbers - Paul Kordenbrock and Michael Kruse - met different fates themselves at the hands of the Kentucky Supreme Court.

Kruse's murder/first degree assault convictions were overturned on double jeopardy grounds because he pled guilty to robbery at the beginning of trial based on the same facts said to support his complicity liability for the shootings. Kruse v. Commonwealth, 32 KLS 7 at 26 (1985). See The Advocate, Vol. 7, No. 5 at 9 (Aug. 1985). Kordenbrock's death sentence was affirmed [K] on September 5, 1985 with one justice dissenting (Leibson) [KD] and one justice dissenting without opinion (Vance).



COLLAGE BY JANET DAVIDSON

A principal issue on appeal was Kordenbrock's failed attempt to obtain psychiatric testimony at trial. "[T]he Ohio psychiatrist who examined Kordenbrock[,] refuse[d] to file a report until he was paid for work" already done. "[T]he Commonwealth and the trial court agreed that the defense was entitled to a psychiatrist...[at least] for diminished capacity or insanity..." [K at 3-4]. Defense counsel "made an agreement with the psychiatrist that he would be paid in two stages." The first was "before he filed his report. The trial court declined to order the fiscal court to pay the fees until the report was filed. The situation was aggravated by a public announcement that the fiscal court would not pay for the expert assistance [in any event]. This impasse continued, and the case went to trial without the testimony of the psychiatrist" [K at 4].

Justice Stephenson, who has written a majority of the opinions affirming death sentences of late, states that: "The proper procedure would have been for the report to be filed then a proceeding to compel the fiscal court to pay..." Nevertheless, denial of a psychiatrist even for this reason would "provide a difficult problem, particularly if Kordenbrock had raised the defense of insanity" [K at 5]. The actual holding of Kordenbrock was that expert assistance was not required under the state and federal constitutions.

Taking an extremely narrow view of Ake v. Oklahoma, 105 S.Ct. 1087 (1985) [The Advocate, Vol. 7, No. 3 at 14 (April, 1985)], the court apparently limits Ake to insanity defenses. "We do not believe a defendant in a case such as this has a right to a psychiatric fishing expedition at public expense, or in-depth analysis on matters irrelevant to a

legal defense of the crime." In other words, the court apparently sees no right to a psychiatric examination and testimony "primarily for the penalty phase of the trial" [K at 5, 6]. Kordenbrock's lawyers argued:

> Without the assistance of a psychiatrist, defense counsel were unable to present expert testimony on 1) Paul's mental state at the time of his confession; 2) on whether Paul's actions in the... store were less than intentional - whether they were wanton, did he act under extreme emotional disturbance; 3) the meaning of and effect on Paul of his motorcycle wreck, his military service, his relationship with his mother and father; 4) the explanation for his heavy use of drugs; 5) what effect Michael Kruse had on Paul; 6) whether Paul was the follower or leader; 7) whether he could be rehabilitated; 8) what factors mitigated Paul's acts [K at 5].

Justice Stephenson notes that Kordenbrock was sent to a state psychiatric facility and declined to communicate with the state psychiatrist "upon being advised this facility would provide only an objective evaluation..." [K at 6]. (Actually, KCPC declined to do an evaluation directed at possible mitigating circumstances. Justice Stephenson ignores this fact of record.) The Court saw Lockett v. Ohio, 438 U.S. 586 (1978) as inapplicable.

The Court also rejects a change of venue argument pointing out that "18 months elapsed between the commission of the crime and the time of the trial" [K at 7].

Another major issue was an attack by Kordenbrock on a confession alleged to be involuntary. The police officers threatened to involve some friends of Kordenbrock in the crime. The majority finds that these "remarks by the police officers... were not of such a nature as to overcome his will..." [K at 9]. Likewise, the court rejects an assertion that Kordenbrock tried to stop the interrogation [K at 9]. (No mention is made that the police destroyed the tape recording of the interrogation.)

Finally, Kordenbrock had no right to question the trial court as to possible impartiality, reference to the jury's sentence as a "recommendation" was not "to such an extent as to denigrate the responsibility of the jury..." Proportionality review was conducted by simply referring to the cases cited in Harper v. Commonwealth, Ky., ___ S.W.2d ___ (1985). The court concludes: "The one aspect of the case that stands out is the casual killing of a human being, not in anger or out of fear, or any other strong emotion, but just a casual murder."

In dissent, Justice Leibson finds three issues requiring reversal. "There were a number of potential issues bearing on appellant's mental state at the time of the crime, relating to both the question of intentional murder and to the appropriate punishment, which supported the appointment of a psychiatrist..." [KD at 2]. Leibson found Ake applicable.

Justice Leibson points out that the actual tape of the custodial interrogation was erased by the police department. The dissent finds this tape crucial evidence which could have supported Kordenbrock's claim that his confession was involuntary. "Where, as here, the written transcription used as evidence raises serious questions about the manner of [interrogation], questions which could only be answered properly by listening to the tape, preserving the tape becomes crucial to the use of the confession. Without it, the

written statement should have been suppressed" [KD at 4].

Justice Leibson finds that the use of the term recommendation in this case exceeded the limitations in Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) and was reversible error. See The Advocate, Vol. 7, No. 5 at 23 (Aug. 1985).

JUDGE SENTENCING AND THE MANDATORY JURY VERDICT

In Baldwin v. Alabama, 105 S.Ct. 2727 (1985), the Supreme Court upheld a death sentence and rejected a challenge to Alabama's requirement (under its since repealed 1975 death penalty law) that a jury convicting a defendant of any one of a number of specified aggravated crimes must return a sentence of death along with its guilty verdict. Rejecting Ritter v. Smith, 726 F.2d 1505, 1515-17, (5th Cir. 1984), cert. denied, 105 S.Ct. 218 (1984), Baldwin refused a challenge premised on Woodson v. North Carolina, 428 U.S. 280 (1976) [Mandatory death sentences are unconstitutional]. The Court, Justice Blackman writing, conceded that Baldwin was correct if Alabama trial judges "were required to consider the jury's 'sentence' as a recommendation as to the sentence the jury believed would be appropriate..." Baldwin, 105 S.Ct. at 2733. However, the majority claimed the "jury's verdict is not considered in that fashion..." 105 S.Ct. at 2733. "The Alabama appellate courts have interpreted the 1975 act expressly to mean that the sentencing judge is to impose a sentence without regard to the jury's mandatory 'sentence'." 105 S.Ct. at 2734. Likewise, the trial judge involved in this case gave no indication he was considering the jury's "sentence". 105 S.Ct. at 2735.

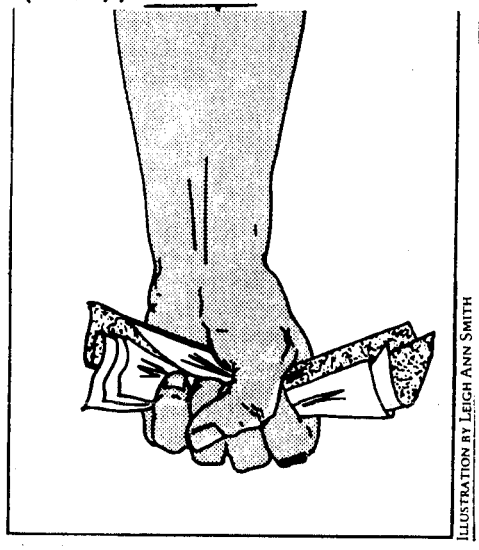


ILLUSTRATION BY LEIGH ANN SMITH

In concurrence, Chief Justice Burger attacks the majority for its construction of state law, finding it: 1) inconsistent with the statute, 2) absent from any opinion of the Alabama Supreme Court and 3) never argued by Alabama. Nevertheless, Burger would permit Baldwin's execution because he thinks it is constitutionally permissible for a trial judge to consider a mandatory jury sentence of death. (The Chief Justice dissented in Woodson.)

In dissent, three Justices (Stevens, Brennan and Marshall) repudiate the majority's fanciful interpretation of Alabama law and reality. "The record in this case plainly indicates that the jury's sentence was, in fact, on the mind of the judge..." 105 S.Ct. at 2727. Indeed, the dissenters seem in touch with the political and practical realities of judge sentencing in capital cases. "[I]t is unrealistic to maintain that a sentence from the jury does not enter the mind of the sentencing judge." 105 S.Ct. at 2727. This proposition would seem obvious. Indeed, the Court as much as said so in Beck v. Alabama, 447 U.S. 625, 645 (1980). "Today, three Justices have changed their view... [since Beck, but we] cannot so easily change [our] appraisal of human nature." 105 S.Ct. at 2741 (dissent).

Stevens points out that if a trial judge sentences a defendant to life,

instead of death, this decision is perceived as a rejection of the jury's sentence, whether it is or not. "The pressures on a judge that inevitably result should not be ignored... [O]nly the court's distance from the realities of an elected state trial bench can explain its declaration that, as a matter of fact, a jury's mandatory sentence of death will not enter the judge's mind when he considers whether to 'refuse' or 'accept' the jury's sentence." 105 S.Ct. at 2741-42 (dissent).

The logic of Baldwin is, to put it mildly, hard to understand. Without minimizing the value of ten human beings, the decision only affects this number of condemned. Therefore, the court's decision upholding a repealed Alabama statute can't be explained by fear of upsetting the entire application of the death penalty in that state. Perhaps the real answer is as explained by the Alabama court in Baldwin's case: "[T]he Supreme Court would [not] have allowed the execution [of John Evans] to take place if it had even the slightest doubt whether Evans' challenge to the sentencing procedure had some merit." Ex Parte Baldwin, 456 S 2d 129 (Alabama 1984). Since John Evans was executed under the statute in question, a decision in favor of Baldwin would have been a tacit admission that Evans' death was unconstitutional. Perhaps the Baldwin majority did not wish to add to the list of the executed who have questions still remaining about their cases.

RECENT EXECUTIONS

Since the listing in The Advocate, Vol. 7, No. 3 at 18 (April, 1985) the following have been executed:
41) John Young (Ga.) 3/20/85, B/W; 42) James Briley (Va.) 4/18/85, B/W; 43) Jessie De LaRosa (Tex.) 5/15/85, H/W; 44) Marvin Francois (Fla.) 5/29/85, B/B; 45) Charles Milton (Tex.) 6/25/85, B/B; 46) Morris Mason (Va.) 6/25/85, B/W; 47) Henry Martinez Porter (Tex.) 7/9/85, H/W; 48) Charles Rumbaugh (Tex.) 9/11/85, W/W.

Rumbaugh was the first juvenile executed under the "new" death penalty. After ten years on death row, he refused to continue with his appeals. Attempts by his family to convince him otherwise and to litigate the issue failed. Rumbaugh v. Procunier, 730 F.2d 291 (5th Cir. 1984), 753 F.2d 395, 758 F.2d 651 (1985), cert. denied, 105 S.Ct. 3544 (1985) [competency to drop appeal]. Dissenting, Justices Marshall and Brennan condemned allowing "the state capital punishment scheme to become an instrument for the effectuation of a suicide by a mentally ill man..." The lower court (2 to 1) "relied on a determination that Rumbaugh 'logically' chose death because he had become a victim of mental illness, suffering from 'frequent bouts of paranoia,' 'auditory hallucinations,' and severe 'depression'". 105 S.Ct. at 3545 (emphasis in original). In their final opinion of the term, these Justices described the death penalty as becoming a tool offered to the hopeless... 105 S.Ct. at 3546.

When Morris Mason was killed, Virginia executed a "retarded black man with an IQ of 66, who had been diagnosed by the state on three occasions as a paranoid schizophrenic... [Mason had asked Virginia officials, before the killing] to be taken off the streets and put back into custody." Wicker, "Recent Executions Reinforce Doubts About Death Penalty", Lexington Herald (6/30/85).

The Ku Klux Klan demonstrated in support of the execution of John Young and other blacks. Associated Press (3/20/85).

KEVIN MCNALLY

Sixth Circuit Highlights

Donna Boyce

DOG-BITE CONFESSION

In United States v. Murphy, 763 F.2d 202 (6th Cir. 1985), the Sixth Circuit Court of Appeals held that incriminating statements made by a robbery suspect who was being attacked and severely bitten by an 88 pound police dog should have been excluded at trial as involuntary. Following a bank robbery, the police used a German shepherd attack dog to assist in the apprehension of one of the suspects from behind a large spruce tree. The dog attacked the suspect, biting him severely on the neck, arms and legs, and dragged him out from under the tree. In an effort to have the police call off the attacking dog, the suspect screamed, "You caught us.... We shouldn't have robbed the bank...." The attack dog was not called off until after the suspect was handcuffed. The trial court allowed the statements to be introduced because they were reliable (the suspect could not have known he was wanted for a bank robbery unless he had robbed the bank) and were not made in response to any police attempt to elicit a confession. However, the Court of Appeals, following Supreme Court precedent, rejected the argument that reliability may be considered in determining voluntariness. The Court further stated that the fact that a suspect confessed when the police had no intention of eliciting a confession and in the absence of any police misconduct was not conclusive on the issue of voluntariness. The Court found that the suspects' statements were made under undeniably coercive circumstances and were not the product of free and rational choice. Despite holding that the statements should have been excluded as involuntary, the Court affirmed, finding the admission of the statements to be harmless beyond a reasonable doubt because the suspects had been observed by one witness or another almost without interruption from just before the robbery until their unusual apprehension.

GUILTY PLEAS AND THE FAILURE TO DISCLOSE BRADY EVIDENCE

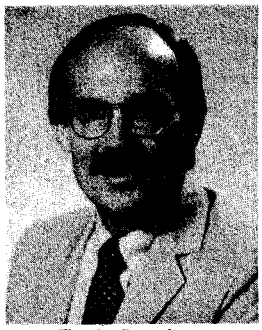
In Campbell v. Marshall, 14 SCR 15, 18, 36 Cr.L. 2363 (6th Cir. 1985), the Court of Appeals held that the prosecution's failure to disclose exculpatory evidence did not invalidate a defendant's otherwise voluntary guilty plea. The key question, the Court indicates, is not so much whether the prosecution's conduct violated Brady v. Maryland, 373 U.S. 83 (1963), but whether under such circumstances the defendant's plea was intelligently and voluntarily made with the advice of competent counsel. The Court found that it was in this defendant's case. The plea-taking in this case included the establishment of a factual basis for the plea and complied with Boykin v. Alabama, 395 U.S. 238 (1969). Additionally, the plea was made with the advice of competent counsel.

Finally, the Court noted, that there is no authority holding that suppression of Brady material prior to trial amounts to a denial of due process and that it was uncertain whether the defendant could have shown that nondisclosure would have had a prejudicial effect at trial so as to prove a Brady violation.

DONNA BOYCE

Plain View

Search and Seizure Law and Comment



Ernie Lewis

"Something has gone fundamentally awry in our constitutional jurisprudence when a neutral and detached magistrate's authorization is required before the authorities may inspect 'the plumbing, heating, ventilation, gas and electrical systems' in a person's home, investigate the backrooms of his work places, or poke through the remains of his gutted garage, but not before they may hold him in indefinite, involuntary isolation at the nation's border to investigate whether he may be engaged in criminal wrongdoing."

UNITED STATES V. MONTOYA DE HERNANDEZ

The source of these strong words is the United States Supreme Court's most recent pronouncement interpreting the detention of individuals short of probable cause pursuant to Terry v. Ohio, 392 U.S. 1 (1968). The name of the case is United States v. Montoya de Hernandez, 473 U.S. ___, 87 L.Ed.2d 381, 105 S.Ct. ___ (1985). This case was the last decision of the October term and appropriately ended a string of cases detailing the extent of Terry's deterioration. See United States v. Hensley, 469 U.S. ___, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985); United States v. Sharpe, 470 U.S. ___, 106 S.Ct. ___, 84 L.Ed.2d 605 (1985).

The facts of the case are rather simple. Here, Rosa Elvira Montoya de Hernandez entered the country in Los Angeles following a direct ten-hour flight from Bogota, Columbia. Because she apparently met a standard drug courier's profile, she was examined with particular scrutiny. Following a number of questions, which she was unable to answer to the custom agent's satisfaction, it was suspected that she was a "balloon swallower." She was then subjected to a number of strip searches which revealed nothing. Following this she agreed to an x-ray but withdrew the consent after learning she would be handcuffed on the way to the hospital. She was then offered and accepted the option of leaving the country, but this option did not come to fruition. De Hernandez was placed in a room awaiting excretion into a waste basket. Finally, a federal magistrate issued an order authorizing an examination and an involuntary x-ray. When these revealed evidence of a balloon containing a foreign substance, she was arrested and eventually convicted of a violation of federal law.

The Court, with Justice Rehnquist as its author, held that "the detention

of a traveler at the border, beyond the scope of a routine custom search and inspection, is justified at its inception if customs' agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in his alimentary canal." In doing so, the 9th Circuit had reversed De Hernandez's conviction. The Supreme Court, however, reinstated the conviction, holding that under Terry's reasonable suspicion standard, the agents were clearly justified in doing what they had done in order to find out just what she was carrying in her body.

One way to view this case would be with indifference, since as Kentucky lawyers we seldom encounter the extraordinary situation of a border search. And indeed, it appears that the Court was greatly concerned with the exigencies of law enforcement on our nation's borders. Justice Rehnquist notes that "[w]hat is reasonable depends upon all of the circumstances surrounding the search and seizure and the nature of the search and seizure itself...here the seizure of respondent took place at the international border. Since the founding of our republic, Congress has granted the executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." Given the country's significant interest in protecting the borders, once the Court engaged in its now familiar balancing standard, the rights of the foreign traveler came out secondbest.

I would suggest that this case be viewed not, however, as just another border case, but rather as the investing in the nation's police with the discretion to detain virtually anyone whom they deem to be suspicious.

This view can be buttressed by looking more deeply at exactly what kind of detention occurred here. Even the Court acknowledges "that this length of time undoubtedly exceeds any other detention that we have approved under reasonable suspicion... respondent's detention was long, uncomfortable, indeed, humiliating." Justice Brennan, who was joined in dissent by Justice Marshall, demonstrated the extent to which a Terry stop can be taken. Brennan noted that De Hernandez was locked up in a room for 24 hours. She had no bed or couch, and could only sit down on hard chairs and a table. She sat in the room spending most of her time weeping and pleading to go home. She repeatedly asked for a phone call to tell her husband what was going on, but this was denied her. "Sobbing, she insisted that she had to make a phone call home so that she could talk to her children and to let them know that everything was alright.'" It was 27 hours after her initial detention before she was arrested following the issuance of a court order by a magistrate.

These facts demonstrate the extent to which Terry can now be extended. The brief Terry "stop and frisk" has been extended into an incommunicado holding of up to 27 hours. While this was

suggested in the United States v. Sharpe, supra, case, where a 20 minute investigatory stop was accepted, it appeared that a 27 hour detention even surprised Justice Brennan. Perhaps Brennan characterizes the case best when he says that "today's opinion is the most extraordinary example to date of the court's studied effort to employ the Terry decision as a means of converting the Fourth Amendment into a general 'reasonableness' balancing process---process in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales.'"

Finally, Justice Brennan engages in only a bit of hyperbole when he suggests the extent to which Terry might be going. "Allowing such warrantless searches under Terry suggests that the authorities might hold a person on suspicion for 'however long it takes' to get him to cooperate or to transport him to the station where the 'legitimate' state interest more fully can be pursued, or simply to lock him away while deciding what the state's 'legitimate' interests require."

It should also be noted that in this case the Court had six votes, a solid majority. Justice Stephens concurred further with the majority, stating that the problem in this case occurred due to De Hernandez's refusal to consent to an x-ray examination "that would have easily determined whether the reasonable suspicion that she was concealing contraband was justified." Together with the other six, this solid majority bodes ill for the kinds of preliminary seizures allowed by Terry.

The Kentucky Court of Appeals has held that a blood test given by a hospital technician at the physician's request was not a search for Fourth Amendment purposes. Thus, the .27 blood alcohol level was admissible at trial due to there being no "state action." **Marks v. Commonwealth**, Ky.App., ___ S.W.2d ___, (August 30, 1985). The Court emphasizes the fact that the test was performed for diagnostic purposes only, and not at the direction or request of the police.

The Short View

UNITED STATES V. FREITAS

1) **United States v. Freitas**, 37 Cr.L. 2276 (California 1985). The District Court for the Northern District of California held that a warrant allowing the police to enter a house and search without leaving a copy of the warrant there or without seizing the property, as required in Fed. R.Crim.P. 41, was a violation of both statutory and constitutional law. The Court further held that the good faith exception would not save the search, saying that the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," one of the intriguing exceptions to United States v. Leon, 468 U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

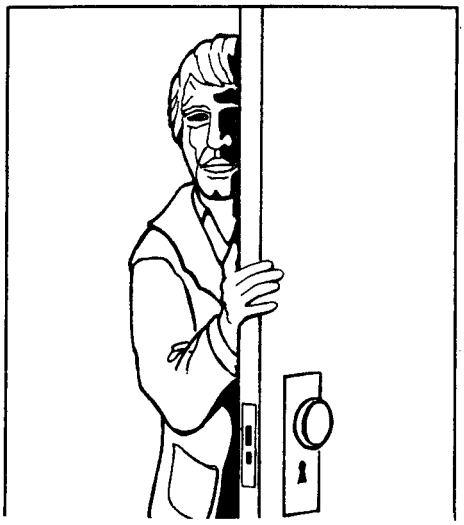
Interestingly, in this case, the Court held an evidentiary hearing in which the training of the DEA was probed. The court in its opinion took note of the fact that reasonably well-trained agents would have known that the search conducted here was illegal.

STATE V. TANAKA

2) **State v. Tanaka**, 701 P.2d 1274 (Hawaii 1985). The Hawaii Supreme Court has held that the police may not search a person's trash bags without a warrant or exigent circumstances. The Court held that a person does, in fact, have an expectation of privacy in their closed trash.

STATE V. PETERS

3) **State v. Peters**, 37 Cr.L. 2278 (Missouri 1985). The police may not knock on the door where a person resides, hoping that he will answer the door, thereby allowing for an arrest. The Missouri Court of Appeals in this case held that Payton v. New York, 445 U.S. 473 (1980) cannot be avoided by knocking on the door and hoping that the person will arrive at the threshold of the house. A warrant is required according to the Missouri Court, and of course Payton.



STATE V. HERT

4) **State v. Hert**, 370 N.W.2d 166 (Neb. 1985). The Nebraska Supreme Court also looked at the question of a Payton arrest. In the Hert case, the Nebraska Supreme Court states that exigent circumstances are present and thus a person may be arrested at his home without a warrant when the officer has "probable cause to believe the suspect has committed a serious offense," the officer has a "reasonable belief from a present factual basis that the suspect is on the premises to be entered," and he has a "factual basis to reasonably believe that, during the time that would be necessarily consumed in obtaining an arrest warrant under existing circumstances, there will be a danger to the officer or another, evidence will be removed or destroyed or the suspect will escape."

UNITED STATES V. BROADHURST

5) **United States v. Broadhurst**, Cal. __ F.2d ___, 37 Cr.L. 2319 (Cal. 1985). The United States District Court, Eastern District of California has held that the warrantless flying over a greenhouse in order to peer inside that greenhouse is a violation of the defendant's privacy rights and thus the Fourth Amendment. The Court rejected the application of Oliver v. United States, ___ U.S. ___, 104 S.Ct. ___, 80 L.Ed.2d 214 (1984), and held that the officers wanted to look at the inside of the greenhouse, as opposed to simply examining open fields. Further, the Court stated that the plain view exception did not apply because the police officers flew continually around the greenhouse in an effort to situate themselves in such a way as to see inside the greenhouse.

UNITED STATES V. DUNN

6) **United States v. Dunn**, 37 Cr.L. 2375 (July 1985). A barn fifty yards from a house is not a part of the curtilage, the 9th Circuit Court of Appeals has held. Curtilage you will recall was defined in Oliver v.

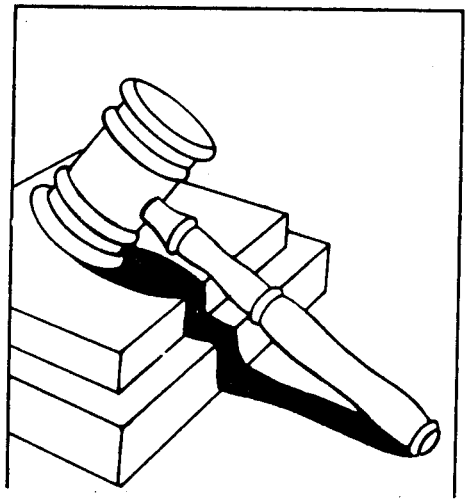
United States, supra as "the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life.'" Despite that fact, however, the Court did not end its inquiry. Rather, the Court held that while a barn is not curtilage, neither is it an open field. The Court does a factual analysis of the circumstances involved and held that the owner was entitled to Fourth Amendment protections inside of his barn. "Considering the location, type, and placement of the structure, and the other steps Dunn took to limit access to the barn, we find that Dunn had a reasonable expectation of privacy in the barn and its contents." Thus, a warrant should have been procured in order to search the barn.

OLSEN V. COMMISSIONER OF PUBLIC SAFETY

7) **Olsen v. Commissioner of Public Safety**, 37 Cr.L. 2380 (Minn. 1985). The Minnesota Supreme Court holds here in a rare opinion that a Terry stop was without articulable circumstances, and thus the subsequent arrest was illegal. This occurred in the context of a typical DUI arrest. Here, an officer received an anonymous tip from a person who stated that he had seen a driver who was possibly intoxicated. No further information was given other than the license number. The officer followed the car and noticed no further erratic driving. The Court held that because there was no indicia of reliability in the tip, and because the driver did not corroborate that tip with his driving, the officer could not stop the car, and thus the breathalyzer results had to be suppressed. "If the police chose to stop on the basis of the tip alone, the anonymous caller must provide at least some specific and articulable facts to support the bare allegation of criminal activity."

STATE V. SUGAR

8) **State v. Sugar**, 495 A.2d 90 (New Jersey 1985). The New Jersey Supreme Court in this case has established a strict standard for the inevitable discovery exception contained in Nix v. Williams, ___ U.S. ___, 104 S.Ct. ___, 81 L.Ed.2d 377 (1984). Here the court requires a showing by the state, before the inevitable discovery exception will apply, that "1) proper, normal, and specific investigatory procedures would have been pursued in order to complete the investigation of the case; 2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and 3) discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means."



The New Jersey Supreme Court goes on to require, as opposed to Nix v. Williams, a "clear and convincing" showing by the state, as opposed to Nix's "preponderance of the evidence" standard.

BATES V. STATE

9) **Bates v. State**, 494 A.2d 976 (Md.App. 1985). The Maryland Court of Special Appeals held that persons who have hired a taxi have standing to challenge a search of the common area of the taxi.

GILMORE V. MARKS

10) **Gilmore v. Marks**, 37 Cr.L. 2406 (Pa. 1985). While Stone v. Powell, 428 U.S. 465 (1976) precludes the examination of Fourth Amendment issues by a federal court pursuant to a habeas corpus petition, the United States District Court for the Eastern District of Pennsylvania holds that if the state court finds a search and seizure error but also finds it to be harmless, then the federal court may review the harmless error holding.

STATE V. ROBINSON

11) **State v. Robinson**, 37 Cr.L. 2407 (Minn. 1985). The Minnesota Court of Appeals holds that a general warrant authorizing a search of all persons in a bar on a Friday night is much too general to pass Fourth Amendment scrutiny, and a conviction based upon that warrant and subsequent search and seizure cannot stand.

EDITORS NOTE: *In the last issue of The Advocate, Baker v. Commonwealth was listed as a not to be published case. That case is to be published and is now pending discretionary review. Again, counsel should watch the disposition of that case.*

ERNIE LEWIS

* * * * * *

It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance.

ROBERT F. KENNEDY

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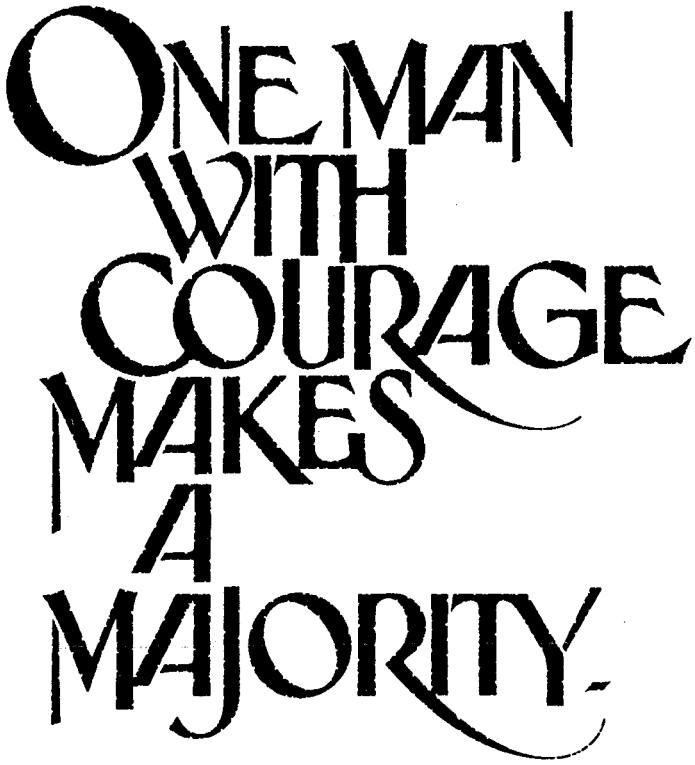


In the right key one can say anything, in the wrong key, nothing: the only delicate part of the job is the establishment of the key.

GEORGE BENARD SHAW

Trial Tips

For the Criminal Defense Attorney

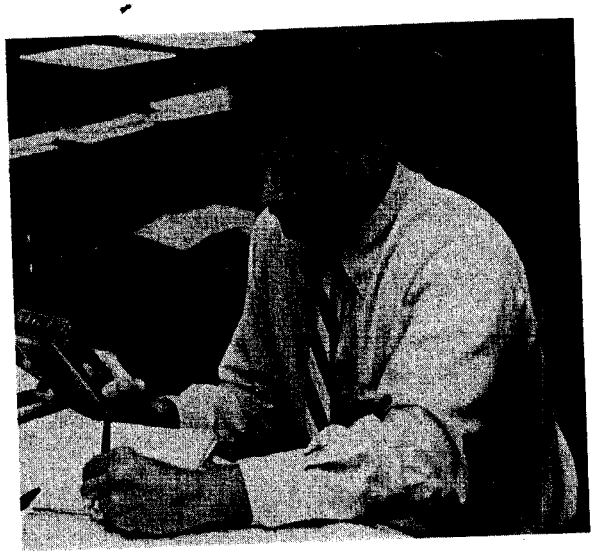
DEFENDING THE BOOTLEGGING CASE

In many dry counties throughout the Commonwealth of Kentucky, attorneys are faced with defending clients charged with the offense of illegal possession of alcoholic beverages for the purpose of resale in a dry territory, or as it is commonly referred to, "bootlegging." The statute that prohibits the illegal possession of alcoholic beverages in a dry territory is KRS 242.230. KRS 242.230 is a broad statute that reads:

(1) No person in dry territory shall sell, barter, loan, give, procure for or furnish another, or keep or transport for sale, barter or loan, directly or indirectly, any alcoholic beverage.

(2) No person shall possess any alcoholic beverage unless it has been lawfully acquired and is intended to be used lawfully, and in any action the defendant shall have the burden of proving that the alcoholic beverages found in his possession were lawfully acquired and were intended for lawful use.

The penalties for violations of KRS 242.230 are found in KRS 242.990. These penalties make violations of this statute extremely harsh. For the offense a person faces a fine from $20.00 to $100.00, and a jail sentence of from 30 days to 60 days. If a person is adjudged guilty of a second violation of this statute, the penalty is a fine from $40.00 to $200.00, and a jail sentence from 60 days to 120 days. The third offense is a felony carrying with it a sentence of 1 to 2 years. It is



JIM COX

also interesting to note that KRS 242.410 mandates that:

(1) For a first or second conviction for violation of any of the provisions of this chapter, the court shall require the defendant, in addition to the penalty provided by subsection (1) of KRS 242.990, to execute bond of not less than five hundred ($500) nor more than one thousand dollars ($1,000) to be of good behavior for twelve (12) months and not violate any of the provisions of this chapter. If the bond is not executed, the defendant shall be imprisoned in the county jail for sixty (60) days.

(2) The order of the trial court, requiring the execution of the peace bond, shall not be subject to appeal and shall not be considered as punishment.

This can have a devastating effect on the indigent client, that under KRS

242.410, the posting of this bond is not subject to appeal not is it considered punishment.

The following is a common scenario of one charged with illegal possession of alcoholic beverages in a dry territory. John Doe and his wife lived in a house that they rented from John's brother, Bill. Knowing that John and his wife would be having a wedding anniversary in two days, John's brother wanted to give them a surprise party. He went to Richmond and bought eighteen cases of beer and two fifths of whiskey for the party. Upon returning to the dry county, the brother stored the beverages in an outbuilding on the property John rented. Bill did not tell John for fear that it would ruin the surprise. Later that same night, John and his wife were watching television when there came a knock upon the door. The Sheriff, with two deputies, told John they had a search warrant pursuant to KRS 242.370 to search the premises and vehicles for alcoholic beverages being possessed illegally. The Sheriff said that a confidential informant had seen a large quantity of alcoholic beverages being possessed for the purpose of resale on John's premises. The Sheriff searched the cars and the house. No alcohol was found in either place, but the Sheriff's deputy found the beer and whiskey in the shed. Pursuant to KRS 242.370(3), the Sheriff arrested John and his wife and seized the alcoholic beverages. John and his wife were charged with illegal possession of alcoholic beverages in a dry territory in violation of KRS 242.230.

Defending John will be a difficult task due to some unique provisions found in Chapter 242. Attacking the search warrant will be of little use unless the premises are inadequately described or unless the search warrant was not executed on the day it was received as mandated by KRS 242.370(2). However, the attorney should carefully inspect when the affidavit was filed and when the judge signed the search warrant. The trial court will normally not allow the attorney for the defendant to go behind the search warrant to attack the factual contents of the affidavit supporting the search warrant. The attorney can find a great deal of important information from the affidavit to the search warrant, such as if a confidential informant has stated that he or she has bought alcohol from a client. Should a confidential information be mentioned in the warrant, a motion should be filed requiring the Commonwealth to reveal the identity of the confidential informant, citing the cases of Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) and Burks v. Commonwealth, Ky., 471 S.W.2d 298 (1971). If the informant's identity is not revealed, a motion in limine to exclude all testimony of any alleged sale to the informant by the client needs to be made.

In the hypothetical mentioned above, the prosecution will seek to prove a violation of KRS 242.230 by possession of a large quantity of alcoholic beverages and reputation of the defendant for bootlegging, under KRS 242.390. It has been held that a large quantity of alcoholic beverages in the defendant's possession may give rise to an inference that the alcoholic beverages are being possessed for the purpose of sale or some other illicit purpose. Howard v. Commonwealth, Ky., App., 558 S.W.2d 643, 645 (1977); Johnson v. Commonwealth, Ky., 509 S.W.2d 274 (1974); Smith v. Commonwealth, Ky., 467 S.W.2d 606 (1971). However, in Howard the Court of Appeals went on to state that:

> "We are not willing to concede, in the absence of proof of sale or intention to sell, that the mere possession of five cases of beer can be construed as a large

quantity so as to raise such an inference here." Id. at 645.

It was held in the case of Johnson, supra, at 275, that seventeen cases of beer was a sufficiently large quantity so as to support a finding by a jury that the possession was for resale or some other illegal purpose. This case overruled the prior cases of Irvin v. Commonwealth, Ky., 317 S.W.2d 178 (1958), and Holbrook v. Commonwealth, Ky., 327 S.W.2d 950 (1959), that held mere possession of alcoholic beverages did not amount to a violation of KRS 242.230(1). There seems to be a gray area in the law as to what amount constitutes a sufficiently large quantity of alcoholic beverages so as to create an inference that the alcoholic beverages are being possessed for the purpose of sale or some other illicit purpose. Howard held that five cases of beer was not a large quantity so as to raise an inference that the alcoholic beverages were being possessed for an illegal purpose, but Johnson held that seventeen cases of beer was a large enough quantity to support a finding by a jury that the possession was for resale or some other illegal purpose. In the cases where the defendant is found in possession of more than five cases of beer but less than seventeen, counsel for the defendant needs to move for a directed verdict at the end of the prosecution's case based upon the case of Howard.

In John Doe's case, the quantity of alcohol may not pose a problem for him, because KRS 242.420 enables him to produce the true owner of the alcoholic beverages. KRS 242.420 states:

> No witness before a grand jury, court of inquiry or on a trial for any violation of this chapter shall be permitted to refuse to answer any question because the answer will incriminate him, but this evidence shall not be used against him in any subsequent action and he shall not be prosecuted for any offense disclosed in his testimony.

This statute is basically an immunity statute. In the example previously mentioned, the defense is able to call to the stand the true owner of the alcohol, John's brother. Under this statute, John's brother cannot refuse to answer on the grounds of self-incrimination, because he is barred from any prosecution that is part of his testimony.

Possibly the most unique and hardest statute to combat in Chapter 242 is KRS 242.390, the statute bearing on the defendant's general reputation for bootlegging. KRS 242.390 allows this type of reputation evidence to be admissible against the defendant. Counsel should make sure that the reputation question is asked in its proper form. The defendant should also call reputation witnesses, when it is possible. It should be stressed to the jury that where a case is based largely on reputation of the defendant that people may say things about others based only upon rumor or gossip.

The attorney who is called upon to defend a bootlegging case has a difficult task. The statutes are broad and call for stiff penalties upon conviction, including the possibility of a felony charge after two (2) convictions. However, bootlegging cases can be challenging and can give the attorney a chance to hone his skills.

JIM COX

Jim, an Assistant Public Advocate of our Somerset office, has been with the Department since April, 1981.

* * * * * *

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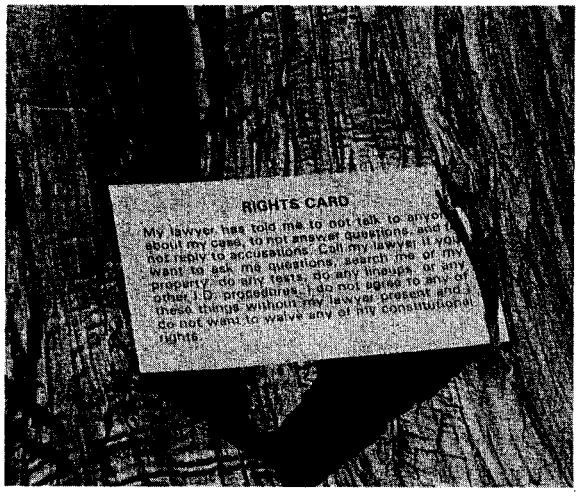

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Trial Tip

PROSECUTORIAL MISCONDUCT

The purpose of this article is to outline prosecutorial misconduct which may occur during trial. The article will not deal with misconduct outside of trial such as withholding exculpatory evidence or vindictiveness in plea negotiations.

OPENING STATEMENT

The purpose of a prosecutor's opening statement "is to outline to the jury the nature of the charge against the accused and the law and the evidence upon which counsel will rely to support it." Shepperd v. Commonwealth, Ky., 322 S.W.2d 115, 117 (1959). The prosecutor may not refer to facts he does not intend to prove or to inadmissible evidence. Mills v. Commonwealth, Ky., 220 S.W.2d 376, 378 (1949). For example, discussion of an unrelated crime by the defendant is improper, Nantz v. Commonwealth, Ky., 243 S.W.2d 1007, 1010 (1952), as is comment about misconduct by the accused not pertinent to the charged crime. Shepperd, 322 S.W.2d at 118; Brummitt v. Commonwealth, Ky., 357 S.W.2d 37, 40-41 (1962). Further, the prosecutor may not inject his personal opinions into the opening statement. Turner v. Commonwealth, Ky., 240 S.W.2d 80, 81 (1951).

PRESENTATION OF EVIDENCE

There are limitations on the information a prosecutor may elicit on direct examination, the topics he may explore in cross-examination and comments he may make during the presentation of evidence. Calling an alleged accomplice to "take the Fifth" in front of the jury is prohibited. Commonwealth v. Brown, Ky.,

619 S.W.2d 699 (1981). Asking witnesses about evidence the judge has suppressed is also forbidden. Schaefer v. Commonwealth, Ky., 622 S.W. 2d 218, 219 (1981) [suppressed tape recorded statement of defendant]. Inquiring about threats a witness for the Commonwealth has received without linking them to the defendant is improper. Campbell v. Commonwealth, Ky., 564 S.W.2d 528, 531 (1978)).

A prosecutor is also precluded from eliciting prejudicial or inflammatory information from witnesses he calls. He cannot bring out that the victim's widow has many children, Campbell v. Commonwealth, Ky., 157 S.W.2d 729, 731 (1941), that the victim of a rape or homicide was pregnant, Romans v. Commonwealth, Ky., 547 S.W.2d 128, 130 (1977) and Neeley v. Commonwealth, Ky., 591 S.W.2d 366 (1979), that the defendant may have killed a dog and her pups at the time of the crime, Elmore v. Commonwealth, Ky., 520 S.W.2d 328, 332 (1975), or that the victim might be unable to perform manual labor, Claypoole v. Commonwealth, Ky., 337 S.W.2d 30 (1960). While photographs of the victim may be admissible, a prosecutor may not introduce them through the victim's mother "interspersed with questions regarding her great love for the child and the terrible loss she had sustained." Ice v. Commonwealth, Ky., 667 S.W.2d 671, 676 (1984). Finally, he cannot ask about misconduct concerning which he has no proof. Bowler v Commonwealth, Ky., 558 S.W.2d 169, 170-171 (1977) [questions to accused's stepdaughter about whether he ever tried to molest her].

Cross-examination of the accused, while it may be vigorous, has definite limitations. The prosecutor cannot abuse or insult the defendant. Dethridge v. Commonwealth, Ky., 34 S.W.2d 732, 733 (1931). Nor can he inquire about the defendant's relationship with a woman other than his wife. Choate v. Commonwealth, Ky.,

GAIL ROBINSON

195 S.W. 1080, 1083, 1084 (1917). The typical tactic of asking the deendant whether other witnesses whose testimony differs from his are lying is also improper. Howard v. Commonwealth, Ky., 12 S.W.2d 324, 329 (1928). Further, prosecutors may not cross-examine the defendant or defense witnesses about inadmissible and prejudicial matters. Shipp v. Commonwealth, Ky., 99 S.W.2d 945, 951 (1907) [whether accused had killed a man or been arrested previously and whether his family was lawless]. And they may not misstate a witness's direct testimony on cross. Ice, 667 S.W.2d at 676.

Our Supreme Court has condemned another prosecutorial technique: negative comments about objections by defense attorneys. Oldham v. Commonwealth, Ky., 58 S.W. 418, 419 (1900). ["I knew you would object, for it cooks your goose"]. The Court recently held improper a prosecutor's remark that defense counsel was objecting because something was "hurting" the defense. Parrish v Commonwealth, Ky., 581 S.W.2d 560, 562 (1979).

CLOSING ARGUMENT

Prosecutorial misconduct most frequently occurs during closing argu-

ment. It has many faces. The Kentucky Supreme Court purports to hold prosecutors to a high standard of conduct. "No one except for the judge himself is under a stricter obligation to see that every defendant receives a fair trial, a trial in accordance with the law, which means the law as laid down by the duly constituted authorities, and not as the prosecuting attorney may think it ought to be." Niemeyer v. Commonwealth, Ky., 533 S.W.2d 218, 222 (1976). Niemeyer involved a very common prosecutorial impropriety--comment on a defendant's exercise of his constitutional rights, specifically the exercise of the Fifth Amendment privilege to remain silent after arrest. "We consider this to be an inexcusable example of abuse by a public prosecutor." Id. Likewise a prosecutor may not remark on the accused's failure to testify at trial. Rachel v Bordenkircher, 590 F.2d 200 (6th Cir. 1978) [granting writ of habeas corpus because of such remarks in spite of Kentucky Supreme Court's affirmance of Rachel's conviction on direct appeal]. And he is prohibited from excoriating the defendant for causing the court time and trouble by his not guilty plea. Norton v. Commonwealth, Ky., 471 S.W.2d 302, 306 (1971).

As is true with opening statement and examination of witnesses, the prosecutor may not misstate evidence or refer to inadmissible evidence. Ice, 667 S.W.2d at 676 [psyhiatrist's testimony]; Bradshaw v. Commonwealth, Ky., 219 S.W. 170, 171 (1920) [defendant's record which court excluded]; Stumbo v. Seabold, 704 F.2d 910, 912 (6th Cir. 1983) ["conspiracy" of which there was no proof]; Moore v. Commonwealth, Ky., 634 S.W.2d 426, 438 (1982) [parts of tape which court excluded]. Nor may he express his personal opinion that the defendant is guilty, United States v. Bess, 593 F.2d 749, 753 (6th Cir. 1979), that defense witnesses are "rotten to the core," Terry v Commonwealth, Ky., 471 S.W.2d 730, 732 (1971), or that the victim's reputation was good, McHargue v. Commonwealth, Ky., 21 S.W.2d 115, 120 (1929). Vouching for the credibility of police officers, Armstrong v. Commonwealth, Ky., 517 S.W.2d 233, 236 (1974) or expounding on a theory of the case unsupported by the evidence, Barnett v. Commonwealth, Ky., 403 S.W.2d 40, 43 (1966) also constitute misconduct.

Representatives of the Commonwealth must observe some rules of decorum when discussing the defendant or defense counsel. Calling the defendant a "young buck" and his witnesses "vultures" is error. East v. Commonwealth, Ky., 60 S.W.2d 137, 140 (1933). So is labelling him a "professional" if not supported by the evidence, Lynch v. Commonwealth, Ky., 472 S.W.2d 263, 267 (1971), or naming him "Johnny Murder Boy," Stumbo, 704 F.2d at 912. Arguing that the defendant is frequently in court without being tried or convicted, Canada v. Commonwealth, Ky., 136 S.W.2d 1061, 1064 (1940), or that the accused has a "track record" of crime, Messmear v. Commonwealth, Ky., 472 S.W.2d 682, 686 (1971) is improper. Prosecutors may not attack defense counsel by referring to their fees, Whitaker v. Commonwealth, Ky., 183 S.W.2d 18 (1944), or indicating a particular attorney is only employed in "bad cases." Howard v. Commonwealth, Ky., 67 S.W. 1003, 1004 (1902).

Prosecutors must also refrain from coercing verdicts based on improper factors. Reference should not be made to local sentiment about the case, Biggs v. Commonwealth, Ky., 245 S.W. 292, 293 (1922). Appeals to local prejudice against "outsiders" must be avoided. Taulbee v. Commonwealth, Ky., 438 S.W.2d 777 (1969). Prosecutors may not inform jurors the community will disapprove if they

return a not guilty verdict. Stasel v. Commonwealth, Ky., 278 S.W.2d 727 (1955). Comments on possible consequences of the jury's verdict are strictly prohibited. Ice, 667 S.W.2d at 676 ["turned loose to kill again" if not guilty by reason of insanity verdict]; Goff v. Commonwealth, Ky., 44 S.W.2d 306, 309 (1931) [appeal]; Broyles v. Commonwealth, Ky., 267 S.W.2d 73 (1954) [parole].

Several classic prosecutorial arguments are clearly improper. The "Golden Rule" argument which urges jurors to put themselves in the shoes of the victim is one. Lycans v. Commonwealth, Ky., 562 S.W.2d 303, 305-306 (1978). The "empty chair" argument where the prosecutor places an empty chair before the jury to represent the victim during summation is another. Sexton v. Commonwealth, Ky., 200 S.W.2d 290, 293 (1970). Another graphic but improper tactic is to refer to a child in the courtroom who's the alleged product of incest, inviting comparison with the defendant. Salyers v. Commonwealth, Ky., 255 S.W.2d 605, 606-607 (1953).

Prosecutors may not mislead jurors about the ramifications of legal procedures. A prosecutor who agrees that the affidavit of an absent witness maybe read to prevent a continuance may not belittle the affidavit. Barnett v. Commonwealth, Ky., 9 S.W.2d 715, 716-717 (1928). Because of the existence of the Fifth Amendment privilege he may not comment on the defendant's failure to call his wife/co-defendant. Sexton at 293. Because the court's instructions do not define "reasonable doubt," the prosecutor may not. Commonwealth v. Callahan, Ky., 675 S.W.2d 391 (1984). He may not insinuate that the evidence must be sufficient since the judge is letting the case go to the jury. Gregory v. Commonwealth, Ky.App., 557 S.W.2d 439, 441 (1977). And he is forbidden to tell the jurors they must find the police officers lied in order to acquit the accused. Sams v. Commonwealth, Ky., 171 S.W.2d 989, 994 (1943).

PRESERVATION

Of course, defense counsel must preserve all issues relating to prosecutorial misconduct by appropriate objections and motions. Objections to opening statement can present special problems. While a prosecutor's reference to inflammatory or inadmissible evidence may obviously call for an objection, defense counsel may not realize until the close of the Commonwealth's case that the prosecutor discussed evidence in opening which was never produced. In that situation a motion for a mistrial or, at a minimum, for the judge to admonish the jury to disregard what the prosecutor said may be sufficient. See generally Rowe v. Commonwealth, Ky., 269 S.W.2d 247 (1954).

When a prosecutor elicits improper material through examination of witnesses or makes improper remarks in closing argument, a prompt objection is necessary. Mahan v. Commonwealth, Ky., 286 S.W.2d 93, 94 (1956); Luckett v. Commonwealth, Ky., 550 S.W.2d 517, 520 (1977). Objection at the conclusion of summation comes too late. Mahan at 94. Counsel must also obtain a ruling on his objection or any error will be waived. Wilcher v. Commonwealth, Ky.App. 566 S.W.2d 812, 813 (1978). Furthermore, if the court grants the relief requested, no error is preserved. Humphrey v. Commonwealth, Ky., 442 S.W.2d 599, 601 (1969) [counsel required to request

mistrial or admonition if he did not believe sustaining objection was sufficient remedy]; Brown v. Commonwealth, Ky., 449 S.W.2d 738, 741 (1969) [counsel had to request mistrial if not satisfied with court's sustaining objections and giving admonitions].

In reviewing alleged errors on direct appeal the Kentucky appellate courts adhere strictly to preservation requirements, routinely refusing to examine claims of prosecutorial misconduct because of the absence of objection. While there is a "manifest injustice" exception to the preservation requirements, RCr 10.26 and Stone v. Commonwealth, Ky., 456 S.W.2d 43, 44 (1970), the courts apply it most sparingly.

GAIL ROBINSON

COUPLE TO GET $40,000 OVER RAID'S BACKGROUND

A couple who contended that Philadelphia vice officers raided their house using a faulty search warrant obtained a $40,000 settlement from the city.

The settlement was reached late during a U.S. District Court trial in which an attorney for Harry and Loretta Hagendorf said that police officer Daniel Englert fabricated a story about an informant to get a search warrant.

The attorney, Bruce Thall, said the informant never existed and suggested that Englert may have fabricated causes for other search warrants as well, court records show.

The warrant for the Dec. 10, 1980, raid on the Hagendorfs' home in the city's Bridesburg community said officers were looking for an illegal lottery operation.

Trial Tip

TRADE SECRETS OF A TRIAL LAWYER- THE CLOSING ARGUMENT

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

Previously, we emphasized that in most cases, preparation and compilation of material are prelude to the closing argument. It is indeed vital to the success as well as the most dramatic part of most trials. Effectiveness depends on the facts, of course, but you can increase your impact by proper organization and delivery.

ORGANIZATION

Usually you should organize by issue rather than by witnesses (discussing each witness testimony in turn). Select and write down the major issue(s) and then reduce the bulky trial notes to manageable size. This can be done by marking with different colored pens those items in the trial notes important to closing, and using separate sheets for each item; writing a major point at the top of the sheet and outlining the facts and conclusions which support that major point. The result is an outline similar to those composed in high school.

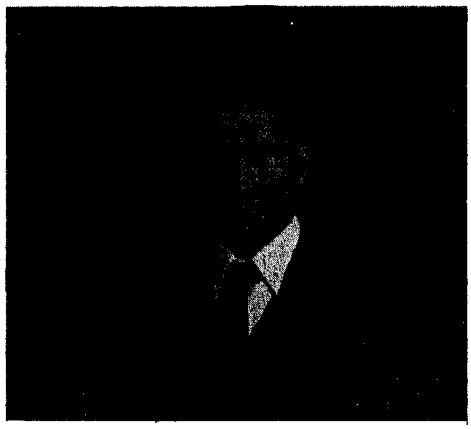
Too often seen is the "hundred-facts-strung-together" closing. Instead you should use the organized material and tell the jury what was proved from the facts for the impact and the significance to be apparent to the jury.

The argument should be in short sentences. You should not forget the oft repeated but important idea of: 1) telling the jury what you are going to tell them (your point), 2) actually telling them, and then 3) telling them what you told them (repeating).

For those with little time to prepare, using a basic format for every argument is advantageous. It should contain: 1) a beginning which stresses the seriousness of the charge (to create hesitancy to convict), 2) an admissions of things not in issue (to gain credibility with the jury), 3) a statement of the issue(s), 4) an argument supporting the defense side of the issue, 5) a challenge to the prosecutor putting him on the spot by saying, "let him deal with (your best issue) when he speaks," 6) a guarded warning and plea putting the jury on the spot by reminding them, "It won't do any good to wake up a week or six months from now thinking that that evidence was not good enough, and maybe we convicted an innocent man," and 7) the final appeal.

DELIVERY

Remember that the delivery is, after all, a persuasive speech and should be delivered from the premise that your client is innocent (not just that he/she has not met the legal requirement of proof beyond a reasonable doubt). Take the offensive. Look for and present facts showing that someone else committed the offense. Show the intensity a person would possess in defending an innocent person. At the same time use speech devices, such as changing pace, changing tone of voice, pausing, etc., to provide variety and maintain interest. This can and must be done naturally, because it would be disastrous to appear phony.



STEVE RENCH

USE EMOTION

Finally, use emotion. An emotional appeal without the facts upon which to base it is, of course, of little value. Use of facts and emotion should be in proper proportion. Emotion is still the basis of persuasion (as the advertising and entertainment industries well understand). It is a valuable tool to use in giving impact to the facts and drama to the argument.

The most compelling emotion on the side of the defense is fear; the fear of convicting an innocent person. We create awareness of the possibility of convicting an innocent person through using the facts to make this dominant in the minds of the jurors in our final appeal.

THE FINAL APPEAL

The final appeal might end something like this: "Everything we have done in this trial is for one purpose--to insure that no innocent person is unjustly convicted. That's all that I ask of you--that's all Johnny Defendant asks of you--that when you have

finished your deliberations, you can be sure in your heart and your conscience that no innocent person has been unjustly convicted."

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.

* * * * * * *

Drunk Driving Law

RULING RAISES QUESTIONS OVER BREATHALYZERS

A Jefferson District Court ruling on the admissibility of a Breathalyzer test has raised a question about the use of the machines throughout Kentucky.

Judge John K. Carter ruled that the results of a Breathalyzer test were inadmissible in a drunken driving trial because of testimony that the machines could not be proved to measure the alcohol content properly.

The machines used in Jefferson County and other counties are models called Breathalyzer 2000, made by Smith and Wesson. Fayette County uses the Intoxilyer CMI, Sgt. Keith Buford of the Fayette County Detention Center said.

However, Jefferson Corrections Secretary Richard Frey Jr. said the issue raised was just one of many posed by defense attorneys to challenge the reliability of the infrared testing devices.

The Breathalyzer 2000 models originally contained humidity-sensing devices, defense attorney John Longmeyer said. When the machines were returned to the manufacturer for repairs, "Smith and Wesson's solution to this was to remove the humidity-sensing device," he said.

Case law in Kentucky says the Breathalyzer is an accurate test for determining blood-alcohol content if the technician is able to operate the machine properly and if the machine is in proper operating condition, Carter said.

In this case, the defense argued that because the machine no longer contained a humidity-sensing device, it was not in proper operating condition on Jan. 1, when the test was done.

"Basically, the problem is that nobody really knows whether the breath sample has too much humidity," Longmeyer said.

Therefore, Carter ruled that the test results could not be used in the jury trial.

Carter said the case did not set a precedent because it did not alter case law. However, he said that if faced with similar testimony again, he would tend to rule the test inadmissible.

Capt. Larry Duncan, the Breathalyzer operations supervisor for Jefferson County, said the federal Department of Transportation had approved the original Model 2000 and the modified Model 2000 without the sensors.

The humidity sensors were removed because they were overly sensitive, Duncan said. The sensing devices caused the machines to shut down about 74 percent of the time, he said.

Previous models used by the department did not have humidity sensors, and the revised Model 2000 has a modified detector that takes humidity into account, Duncan said. Besides he said, breath is heated as it leaves the mouth and travels into the Breathalyzer, taking out the humidity.

Some of Thursday's testimony came from a defense witness, Dr. Jonathan Cowan, a pharmacologist and toxicologist who is an expert witness in drug and alcohol-related cases.

Cowan said the problem with the Breathalyzer 2000 models, which he said were used in all Kentucky counties except Fayette, was "going to be a big mess."

The toxicologist predicted that the court finding "will have profound implications."

Duncan said he planned to review a tape of the court proceedings on Monday.

"Our only concern is...will other judges suppress test results," Duncan said. "This could affect the integrity of the entire breath-testing program in Kentucky.

Duncan and Frey are concerned that the judge suppressed not only the machine's test results but also the field sobriety test and clinical observations of the machine operator.

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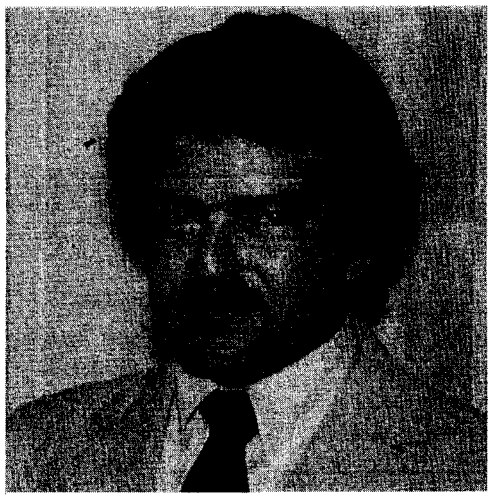
THE BREATHALYZER 2000: WAS IT KNOWINGLY MODIFIED TO BE INACCURATE?

On July 25th, Jefferson District Court (Louisville, Kentucky) Judge John Carter ruled that the Breathalyzer 2000's results were inadmissible in a DUI trial. This ruling may potentially extend to the 119 coun-



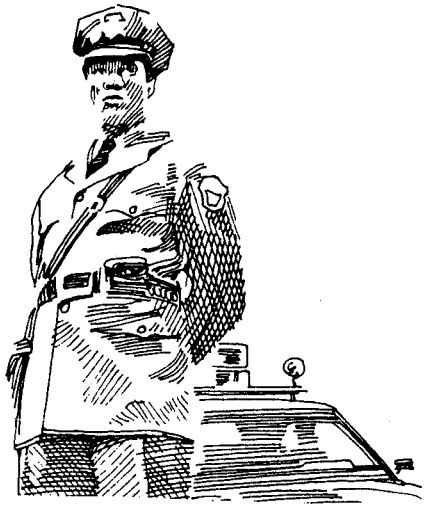
JONATHAN D. COWAN

ties (except Fayette) in Kentucky which currently use the Breathalyzer 2000 as the principal method of determining breath alcohol, and it may also permit re-opening of cases as far back as March 1985. In a separate suppression hearing, Judge Carter ruled that the Commonwealth could not demonstrate that the instrument was in "proper working order," one of the essential elements of foundation required for admissibility.

The problem developed when the Commonwealth sent back all of its Breathalyzer 2000s to the manufacturer, Smith and Wesson, for removal of the humidity detector. The humidity detector was designed as an essential safeguard against false positive (too high) results. During the hearing, defense attorney John Longmeyer called the Jefferson County police officer who maintained the machine--simply to establish that the humidity detector on this Breathalyzer 2000 had been removed by Smith and Wesson prior to the test administered to his client. Judge Carter took the opportunity to question the witness, and established that during the officer's training by Smith and Wesson he had been told that the purpose of the humidity detector was to prevent false positive results. Since this clearly took place before

the decision to ship these breathalyzers back to Smith and Wesson, it appears that some Jefferson County officials knew that they would create a potential problem with false arrests and false convictions before they shipped the machine back to Smith and Wesson. It is not yet clear how many other Breathalyzer technicians, Kentucky State Police officers, and local officials knew about this potential problem at the time it was decided to return the machines to Smith and Wesson.

Police officials were faced with a difficult problem. Their new machines purchased in late 1983 and early 1984, were shutting down--refusing to print the results of breath tests--as much as 74% of the time, according to the supervisor for breathalyzer operations in Jefferson County. The humidity detector, which was designed to prevent printing in conditions of



high breath humidity, was too sensitive for convenience in Kentucky's humid climate. It would be politically embarrassing to admit that these new machines, which the State Police had purchased for every county (120) in Kentucky did not work properly. Smith and Wesson, which was in the process of going out of the Breathalyzer business and selling its patents to the National Draeger Company, was not very cooperative. They offered the Commonwealth two choices: either continually repair the overly sensitive humidity detectors, or have these sensors removed. Despite the fact that at least one of these officials knew that removing the sensors would or could convict innocent people, Jefferson County officials chose to do so. Between March and June of 1984, each of the Breathalyzer 2000s in Kentucky was sent back to Smith and Wesson for modification. Although there are rumors that other steps were taken to deal with the problem of excess humidity, no correspondence from Smith and Wesson describing these changes of any tests ran to verify their effectiveness had been uncovered despite several discovery requests in different counties. State Police officials have known of this potential defense for several months, but do not seem to be able to provide the documentation necessary to establish that the machines were in "proper working order."

As the defense expert during the trial, I outlined the potential problem with humidity. The humidity in exhaled breath is higher than the humidity in room air, since the lungs are full of blood spread over a large surface area. The water from the blood evaporates into the exhaled breath. Everybody has seen that exhaled breath can produce a fog on a mirror; this layer of condensation is actually liquid water. This condensation can also occur on the internal glass surface of breath testing machines. Some of these glass surfaces are involved in the measurement of the concentration of alcohol in the vapor. When this condensation forms inside the machine, alcohol will dissolve in it with the same 2100 to 1 preference shows for any water layer over any vapor phase. (Defense attorneys are familiar with this 2100:1 ratio as the ratio used to calibrate breath testing devices in order to derive a blood measurement from a

breath testing measurement). The machine reads the alcohol in the moisture layer on the glass walls as if it were in the vapor which is being tested. This produces the potential for false positive readings. Since the calibration cycle of these machines involves a much smaller volume of less humid air, it is possible that false positives can occur even if the machine calibrates properly. The degree of error is impossible to know or to correct for on the basis of subsequent information, since the humidity of that particular breath was never determined.

The suppression of a breathalyzer reading can certainly help the defense's case. However, it is not a guarantee of victory. In the particular Jefferson District Court case, despite the fact that the client's admissions and the field sobriety tests were also suppressed on constitutional grounds that are somewhat unique to the Jefferson County Police procedure, the client was still convicted of the DUI. The jury's reasons were obscure, but the date of the offense (New Year's Day) and the FBI employee who was the jury foreman may have tipped the scales of justice.

The legal implications of the evidence that has been developed here are quite intriguing. Clearly other DUI cases that are still in process may benefit from this, if the defense attorney can develop the expertise to present the evidence. All cases adjudicated since the breathalyzers were made defective in 1984 may be ripe for judicial reconsideration under a Rule 60.02 motion or some other procedure. Since Smith and Wesson is not longer available to take responsibility for these machines, they will probably have to be replaced. In the meantime, the Commonwealth will probably return to the older machines that are currently used as standby units. The possibilities for a civil class action suit against Smith and Wesson, Jefferson County, and other state officials on behalf of those falsely arrested or convicted remain to be explored.

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* * * * * *

DEVICE HELPS DETECT DRUNKEN DRIVERS

Drunken drivers will have a harder time escaping detection if a new device attached to a flashlight becomes widespread among police departments.

The device, called a passive alcohol sensor, is held near a driver's face and quickly measures the amount of alcohol in his breath.

Using the sensor at checkpoints, police in Charlottesville, Va., were able to detect 68 percent of the drivers with blood alcohol concentrations of 0.10 percent or greater and 45 percent of drivers with concentrations of 0.05 percent to 0.099 percent.

"In wide use, we expect the sensor to greatly improve both the efficiency and effectiveness of police enforcement of drinking-and-driving laws," said Brian O'Neill, executive vice president of the Insurance Institute for Highway Safety.

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Cases of Note... ...in Brief

INSANITY

People v. Banks

361 N.W.2d 1 (Mich. App. 1984)

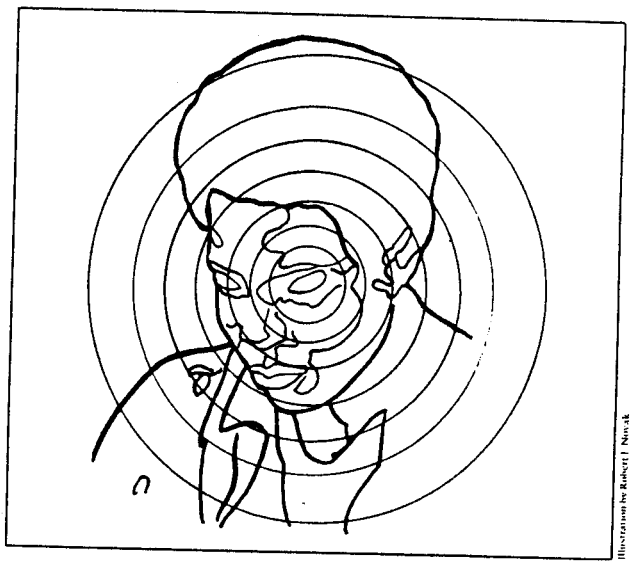
Nathaniel Banks was found guilty but mentally ill of assault with intent to murder after a nonjury trial.

With the only issue being insanity, the defense produced the testimony of three forensic medical doctors "who were unanimous in the opinion that defendant was legally insane at the time of the offense." They found him to have an "organic mental disorder" which caused "documented episodes of combative, assaultive, paranoid and disoriented conduct...."

The prosecutor produced no evidence of sanity much less enough evidence of sanity to overcome the defense evidence of insanity. Therefore, the appellate court reversed, and remanded for an entry of an order of not guilty by reason of insanity. In so holding, the court reviewed the law on burdens and their consequences in insanity cases:

A verdict of guilty but mentally ill necessarily means that the defendant is found to be sane at the time the offense was committed.... People v. Murphy, 416 Mich. 453, 457, 331 N.W.2d 152 (1982). A defendant in a criminal proceeding is presumed sane. Once any evidence of insanity is introduced, however, the prosecutor bears the burden of establishing defendant's sanity beyond a reasonable doubt. People v. Murphy, supra, p. 463-464, 331 N.W.2d 152.

The presumption of sanity is merely procedural and has no weight as evidence. The prosecutor may rest upon the assumption that the accused was sane until that presumption is overcome by the defendant's evidence, at which time the presumption vanishes and has no continued significance. Murphy, supra, p. 464, 331 N.W.2d 152, quoting People v. Garbutt, 17 Mich. 9, 22 (1868). The Court in Murphy stated:



"The nature and quantum of rebuttal evidence of sanity sufficient to present an issue for a jury is to some extent determined by the strength of the case for insanity. United States v. Bass, 490 F.2d 846, 851 (CA 5, 1974). Necessarily, the sufficiency of evidence needed to put the question of sanity before a jury will vary from case to case. Wright v. United States, 102 U.S. App. DC 36, 39; 250 F.2d 4, 7 (1957). Alto v. State, 565 P.2d 492 (Alas, 1977). Merely some evidence of sanity may be sufficient to meet some evidence of insanity and yet wholly insufficient to meet substantial evidence of insanity. People v. Ware, 187 Colo. 28, 31-32; 528

P.2d 224, 226 (1974)." 416 Mich. 464, 331 N.W.2d 152.
Id at 2.

INSANITY

People v. Ware

528 P.2d 224 (Colo. 1974)

The Colorado Supreme Court affirmed the trial court's entering a directed verdict of not guilty by reason of insanity on the charge of premeditated murder.

The state's case-in-chief consisted of two eyewitnesses testifying that the defendant was angry and upset. No witnesses expressed an opinion about the defendant's sanity.

The defense produced 4 lay witnesses. Each stated that the defendant was not normal. One described his emotional disturbances; another testified to his delusions and fears, and two co-workers described his erratic work habits. In addition, 3 court-appointed psychiatrists expressed their opinion that the defendant was a paranoid schizophrenic; was legally insane, and could not refrain from doing wrong.

The prosecution's rebuttal consisted of a police officer, who saw the defendant for 40 minutes. He testified that the defendant "appeared substantially similar to others in his same situation" with no opinion expressed on his sanity.

The court reviewed the legal rules for the proof and disproof of insanity:

> Every person is presumed sane, but once any evidence of insanity is introduced, due process requires that the People prove sanity beyond a reasonable doubt. Colo.Sess.Laws 1972, ch. 44, 39-8-105(2) at 227; Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895); People ex rel. Juhan v. District Court, 165 Colo. 253, 439 P.2d 741 (1968); Wright v. United States, 102 U.S.App.D.C. 36, 250 F.2d 4 (1957). If, after considering all the evidence, the jury has a reasonable doubt whether the defendant was sane or insane at the time of committing the act, the verdict must be that the defendant is insane. Graham v. People, 95 Colo. 544, 38 P.2d 87 (1934).

The kind and quantity of evidence of sanity which the prosecution must produce to meet its burden and take the issue to the jury will vary in different cases. The presumption of sanity will stand if no evidence of insanity is offered by the defense. Some competent lay evidence of sanity may suffice when the defendant has introduced only token evidence of insanity. However, this same evidence of sanity may be totally inadequate when the defendant's evidence of insanity is substantial. See Wright, supra.
Id at 226.

The Court found that there was "no substantial competent evidence to support the jury verdict" of sanity. The prosecution failed to meet its burden of proof. The Court noted the following facts in support of its conclusion:

1. There was plenty of lay corroboration of the defendant's delusions, inappropriate behavior, ambivalence, paranoid reactions and irrational crying.

2. There was a history of mental illness that continued after the killing.

3. The defendant's symptoms were not assumed from his own narrative but were shown by lay and expert personal observations.

4. The defendant was examined by 3 psychiatrists for a total of 25 hours.

5. Most importantly, the state's evidence contained no opinions but only conclusions about the defendant's looks and actions.

PFO/PRESERVATION

Keith Lane v. Commonwealth

No. 84-CA-59-MR (Aug. 2, 1985)

In this unpublished case, the Court of Appeals decided that there was insufficient evidence under KRS 532.080(2)(b) of the essential element, "that the offender was over the age of eighteen (18) years at the time the offense was committed...."

The prosecutor only introduced evidence of when the defendant was previously convicted of his two previous felonies but no evidence of the age of the defendant at the commission of his 1974 offense except through a fact assumed in the prosecutor's question.

However, the court's ultimate ruling was that the failure to preserve the issue for review on appeal waived the right to obtain appellate relief on the insufficiency of the evidence.

ED MONAHAN

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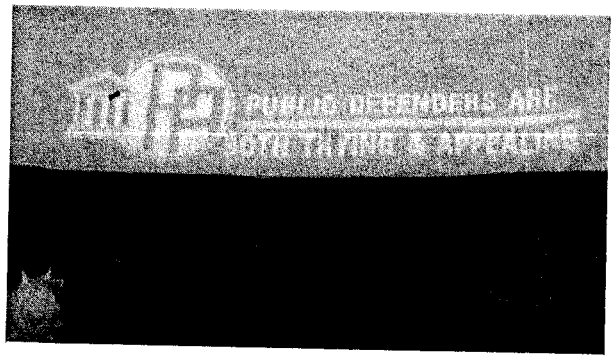

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No human being is constituted to know the truth, the whole truth, and nothing but the truth; and even the best of men must be content with fragments, with partial glimpses, never the full fruition....

WILLIAM OSLER

* * * * * *

Kentucky Supreme Court Rule Changes

The following is a summary of the important rules changes announced by the Supreme Court of Kentucky on July 5, 1985 which relate to the practice of criminal law. The rules changes are effective January 1, 1986 unless otherwise noted.

I. CIVIL RULES

1. CR 5.05(4) FILING

A new paragraph is added to state that any matter filed in a trial or appellate court that is accompanied by a motion and affidavit to proceed in forma pauperis is considered filed on the date tendered. If the motion is denied, the party then has 10 days to appeal that decision or to pay the fees or costs.

This rule recognizes the right of a defendant to appeal adverse indigency determinations. See Gabbard v. Lair, Ky., 528 S.W.2d 675, 677 (1975).

2. CR 6.02 ENLARGEMENT

This rule allows a court to extend the time an act is required or allowed to be done except for certain civil rules which are set out in the rule. The rule is now amended to delete CR 73.08, Certification of Record on Appeal, from the exceptions for enlargement. The effect is that a court can now allow enlargements for the time within which a record must be certified on appeal.

3. CR 65.03(1) RESTRAINING ORDER

This section delineates when a restraining order can be granted, and under what circumstances it can be granted when the adverse party has no written or oral notice. The amended rule now allows the granting of a restraining order without notice to the opposing party 1) if the verified complaint or affidavit contains "specific facts" and 2) "the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claims that notice should not be required."

4. CR 65.03(3) ISSUANCE, SIGNING AND FILING

Requires every restraining order granted without notice to also define the injury and state why it is irreparable and why the order was granted without notice.

5. CR 73.02(2) WHEN AND HOW TAKEN (APPEALS)

This section sets out that the failure of a party to file a notice of appeal or cross appeal timely shall result in a dismissal of the action. It also provides for a variety of possible sanctions up to dismissal for the failure to comply with other appellate rules. The amendment makes the variety of possible sanctions also apply to motions for discretionary review. However, the amended RCr 12.02 makes clear that the only sanction among all those listed that can apply in a criminal appeal is CR 73.02(2)(c):

> Imposition of fines on counsel for failing to comply with these rules of not less than $250 nor more than $500.

This limitation of sanctions in criminal appeals is no doubt in

response to Evitts v. Lucey, 469 U.S. ___, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

This rule was effective on July 5, 1985.

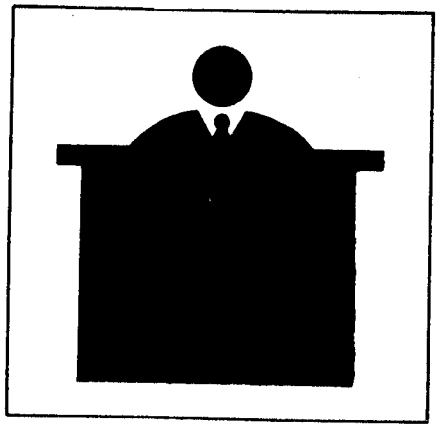
6. CR 73.02(4) WHEN AND HOW TAKEN (APPEALS)

This rule allows the awarding of damages for frivolous appeals taken in bad faith. The amendment applies these discretionary sanctions to discretionary reviews also.

Effective July 5, 1985.

7. CR 76.14 PREHEARING CONFERENCE

The rule greatly expands the prehearing conference but excludes all criminal cases and all "prisoner applications seeking relief relating to confinement or conditions of confinement," i.e., RCr 11.42.



8. CR 76.21 CROSS MOTION FOR DISCRETIONARY REVIEW

Creates a new rule that allows a respondent 10 days to file a cross motion for discretionary review if the movant's motion for discretionary review is granted. However, the rules under which this cross motion are filed are the rules for a regular non-discretionary review motion (CR 76.34). This allows a response to the cross appeal but requires it to be filed within 10 days.

9. CR 76.28(4)(a) OPINIONS - PUBLICATIONS

Changes the rules on publication of Court of Appeals' decisions when a motion for discretionary review is filed.

The rule now puts on hold the publication when a discretionary review is filed until the motion is ruled on by the Supreme Court. Unless ordered otherwise by the Supreme Court, the Court of Appeals opinions which were to be published are published when a discretionary review is denied. Unless otherwise ordered by the Supreme Court, a granting of a discretionary review means that the Court of Appeals opinion will not be published.

10. CR 76.33(2) INTERMEDIATE RELIEF IN APPELLATE COURT - RECORD REQUIRED

Sets out the record required when intermediate relief is requested, and expands that to include a copy of the Certificate as to Transcript under CR 75.01(2) if applicable.

11. CR 76.37(10) CERTIFICATION OF LAW BY THE COMMONWEALTH

Adds requirements to the Commonwealth's certification requests. It must be "initiated" in the Supreme Court within 30 days of a final, adverse order by motion setting out the question(s) for review as set out in section (3) of the rule.

II. RULES OF CRIMINAL PROCEDURE

1. RCr 7.24(1) DISCOVERY AND INSPECTION

Adds to the defendant's ability to discover Commonwealth information the disclosure of "any oral incriminating statement made by a defendant to any witness."

2. RCr 7.26(1)
DEMANDS FOR PRODUCTION OF STATEMENT AND REPORTS OF WITNESSES

This rule had required that a signed or initialed or substantially verbatim statement or recording of a witness called by the Commonwealth on direct examination must be provided the defendants before the witness testifies. The amendment deletes the direct examination requirement.

The intent of this rule may be to make clearer the ruling of Wright v. Commonwealth, Ky., 637 S.W.2d 635 (1982). As stated there, the rationale for the rule is to "allow defense counsel a reasonable opportunity to inspect previous statements made by a prosecution witness without interrupting the trial in order to do so." In Wright, the Court determined:

> Though it may be that in a technical sense a witness is not "called" until a bailiff calls him to the witness stand, we think the commonsense construction of the rule is the one given to it by the trial court in this instance, which is that if the Commonwealth intends to use a witness and the defense seeks access to his recorded statements it is within the trial court's sound discretion whether to allow it prior to the trial, subject of course to the limitations provided in RCr 7.26(1) and (2). Moore v. Commonwealth, Ky., 634 S.W.2d 426, 431 (1982), in which the question arose under the rule before it was amended, is not applicable.
> Id. at 636.

3. RCr 11.42(4) MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

Still requires both the Attorney General and the Commonwealth's Attorney to be notified by the clerk of the court when an 11.42 motion is filed but changes the responsibility for answering the motion from the "Commonwealth" to the "Commonwealth's Attorney."

4. RCr 12.02
APPLICABILITY OF CIVIL RULES

It no longer makes CR 75.02, Transcript of Evidence and Proceedings, applicable to criminal appeals. There is no longer the following two limits on appellate records in criminal cases: 1) only these designated portions of voir dire, opening statements and closing arguments properly objected to; and 2) no transcription of mechanically recorded proceedings. In other words the change in this rule eliminates these 2 limitations on the nature of criminal appellate records.

It adds CR 73.02(4), supra and CR 73.02(2)(c), supra, to the list.

Effective July 5, 1985.

ED MONAHAN

11.42 APPEALS - STATUS QUO

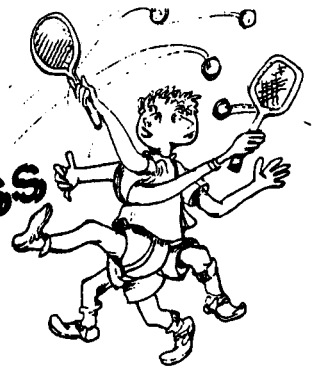
In April of this year the Supreme Court of Kentucky promulgated rules drastically changing RCr 11.42 appeals. Those rules were to go into effect on July 1, 1985.

Because of numerous problems which arose regarding the implementation of these new changes in RCr 11.42 appeals, the Supreme Court of Kentucky decided to scrap them for this year. Thus, RCr 11.42 appeals will continue to be handled like any other appeal.

TIM RIDDELL

plain talk about...

handling stress



You need stress in your life! Does that surprise you? Perhaps so, but it is quite true. Without stress, life would be dull and unexciting. Stress adds flavor, challenge, and opportunity to life. Too much stress, however, can seriously affect your physical and mental well-being. A major challenge in this stress-filled world of today is to make the stress in your life work for you instead of against you.

Stress is with us all the time. It comes from mental or emotional activity and physical activity. It is unique and personal to each of us. So personal, in fact, that what may be relaxing to one person may be stressful to another. For example, if you're a busy executive who likes to keep busy all the time, "taking it easy" at the beach on a beautiful day may feel extremely frustrating, nonproductive, and upsetting. You may be emotionally distressed from "doing nothing." Too much emotional stress can cause physical illness such as high blood pressure, ulcers, or even heart disease; physical stress from work or exercise is not likely to cause such ailments. The truth is that physical exercise can help you to relax and to handle your mental or emotional stress.

Hans Selye, M.D., a recognized expert in the field, has defined stress as a "non-specific response of the body to a demand." The important issue is learning how our bodies respond to these demands. When stress becomes prolonged or particularly frustrating, it can become harmful - causing distress or "bad stress." Recognizing the early signs of distress and then doing something about them can make an important difference in the quality of your life, and may actually influence your survival.

REACTING TO STRESS

To use stress in a positive way and prevent it from becoming distress, you should become aware of your own reactions to stressful events. The body responds to stress by going through three stages: (1) alarm, (2) resistance, and (3) exhaustion.

Let's take the example of a typical commuter in rush-hour traffic. If a car suddenly pulls out in front of him, his initial alarm reaction may include fear of an accident, anger at the driver who committed the action, and general frustration. His body may respond in the alarm stage by releasing hormones into the bloodstream which cause his face to flush, perspiration to form, his stomach to have a sinking feeling, and his arms and legs to tighten. The next stage is resistance, in which the body repairs damage caused by the stress. If the stress of driving continues with repeated close calls or traffic jams, however, his body will not have time to make repairs. He may become so conditioned to expect potential problems when he drives that he tightens up at the beginning of each commuting day. Eventually, he may even develop one of the diseases of stress, such as migraine headaches, high blood pressure, backaches, or insomnia. While it is impossible to live completely free of stress and distress, it is possible to prevent some distress as well as to minimize its impact when it can't be avoided.

HELPING YOURSELF

When stress does occur, it is important to recognize and deal with

it. Here are some suggestions for ways to handle stress. As you begin to understand more about how stress affects you as an individual, you will come up with your own ideas of helping to ease the tensions.

- **Try physical activity.** When you are nervous, angry, or upset, release the pressures through exercise or physical activity. Running, walking, playing tennis, or working in your garden are just some of the activities you might try. Physical exercise will relieve that "up tight" feeling, relax you, and turn the frowns into smiles. Remember, your body and your mind work together.

- **Share your stress.** It helps to talk to someone about your concerns and worries. Perhaps a friend, family member, teacher, or counselor can help you see your problem in a different light. If you feel your problem is serious, you might seek professional help from a psychologist, psychiatrist, or social worker. Knowing when to ask for help may avoid more serious problems later.

- **Know your limits.** If a problem is beyond your control and cannot be changed at the moment, don't fight the situation. Learn to accept what is - for now - until such time when you can change it.

- **Take care of yourself.** You are special. Get enough rest and eat well. If you are irritable and tense from lack of sleep or if you are not eating correctly, you will have less ability to deal with stressful situations. If stress repeatedly keeps you from sleeping, you should ask your doctor for help.

- **Make time for fun.** Schedule time for both work and recreation. Play can be just as important to your well-being as work; you need a break from your daily routine to just relax and have fun.

- **Be a participant.** One way to keep from getting bored, sad, and lonely is to go where it's all happening. Sitting alone can make you feel frustrated. Instead of feeling sorry for yourself, get involved and become a participant. Offer your services in neighborhood or volunteer organizations. Help yourself by helping other people. Get involved in the work and the people around you, and you'll find they will be attracted to you. You're on your way to making new friends and enjoying new activities.

- **Check off your tasks.** Trying to take care of everything at once can seem overwhelming, and, as a result, you may not accomplish anything. Instead, make a list of what tasks you have to do, then do one at a time, checking them off as they're completed. Give priority to the most important ones and do those first.

- **Must you always be right?** Do other people upset you - particularly when they don't do things your way? Try cooperation instead of confrontation; it's better than fighting and always being "right." A little give and take on both sides will reduce the strain and make you both feel more comfortable.

- **It's o.k. to cry.** A good cry can be a healthy way to bring relief to your anxiety, and it might even prevent a headache or other physical consequence. Take some deep breaths; they also release tension.

- **Create a quiet scene.** You can't always run away, but you can "dream the impossible dream." A quiet country scene painted mentally, or on canvas, can take you out of the turmoil of a stressful situation. Change the scene by reading a good book or playing beautiful music to create a sense of peace and tranquility.

- **Avoid self-medication.** Although you can use drugs to relieve stress

temporarily, drugs do not remove the conditions that caused the stress in the first place. Drugs, in fact, may be habit-forming and create more stress than they take away. They should be taken only on the advice of your doctor.

THE ART OF RELAXATION

The best strategy for avoiding stress is to learn how to relax. Unfortunately, many people try to relax at the same pace that they lead the rest of their lives. For a while, tune out your worries about time, productivity, and "doing right." You will find satisfaction in just being, without striving. Find activities that give you pleasure and that are good for your mental and physical well-being. Forget about always winning. Focus on relaxation, enjoyment, and health. Be good to yourself.

Louis E. Kopolow, M.D.
Staff Psychiatrist
Div. of Mental Health Service Prog.
Cabinet for Human Resources

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Legislative Update

Lt. Governor Beshear said he hoped the 1986 session could find the money to fund the Juvenile Justice Code, which would make major reforms in laws relating to juveniles. The reform effort is spearheaded by Sen. Michael Moloney, D-Lexington. Moloney has said that the state's revenue picture would affect whether he would sponsor the bill next year. It is expected to cost at least $6 million.

The special session approved a resolution to let the state make plans for another 500-bed, medium-security prison but left the matter of raising the money to pay for it -- probably by issuing bonds -- for the regular session.

Corrections Secretary George Wilson told the legislators that Kentucky would need at least five 500-bed prisons in the next decade if the state was to keep pace with the expected increase in criminals. He estimated the cost of a 500-bed, medium-security prison at $40 million to $45 million.

Kentucky's prison population has grown from 3,700 in 1980 to 6,000. It is expected to grow to 9,400 by 1989, and Wilson said the prison population could double or triple by 1995. About two-thirds of the increase will rquire medium-security supervision, Deputy Corrections Secretary Jack Lewis said. "We imagine prisons will be at the top of the list for legislative business in the 1986 session," Lewis said.

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Book Review

Ed Monahan

Be certain what you do, lest your justice prove violence....
Shakespeare, The Winter's Tale

THE MORALITY OF CAPITAL JUSTICE: EQUAL JUSTICE UNDER THE LAW?
BY: Michael E. Endres, Ph.D.

These are times when more and more we care less and less about life at its beginning and end, as well as in between. We are no longer committed to declaring war on the poverty within us and within our society that so directly contributes to create society's unwanted, whether it be the life of the unborn, the deprived or the depraved.

In his book, Dr. Endres, a professor of Criminal Justice at Xavier University in Cincinnati, confronts the morality of capital punishment by viewing it as one of the important questions of how society really sanctifies and promotes life when dealing with those viewed as dangerous, irredeemable outcasts.

Throughout, Dr. Endres observes that whether we kill others is really a moral decision of society; one that transcends the law. He also reminds us of our personal responsibility: "Whatever the policy... the posture taken by the state is ultimately the responsibility of individuals in a democratic society."

Dr. Endres demonstrates that the sentence of death has always been unjustly applied, and can never be otherwise, given the realities of the humanness of our criminal justice system. The discretion, biases, and moral stances of the actors in the criminal justice system bear on it to shape evidence, to control the makeup of jurors and the localities of trials, to determine the effectiveness of defense counsel, and to create selective and varying enforcement and plea policies, and to cause disparities and inequalities that directly influence and cause outcomes. There is no effective human way to retain any semblance of fair decisionmaking in the death process and at the same time entirely eliminate arbitrary, unfair decisions. More often than not, the exigencies, whims or politics of the moment determine the outcome of the death penalty process. Endres persuasively details this institutional unfairness.

Unfortunately, society derives "deep-seated satisfaction in meting out just deserts to malefactors" instead of overcoming the human emotion of returning evil for evil. Dr. Endres details why the criminal justice system is not and cannot be an agency of personal retribution. It would be helpful had he further explored why it so often has been misused in this manner.

To any who doubt the fact that we are unfairly killing people today under our "civilized, enlightened" approach, Dr. Endres asks us to consider Charlie Brooks, Jr., who was executed in 1982:

> Brooks and his lone accomplice were charged with murder in the commission of another felony, defined as aggravated murder under Texas law. Consequently they were both eligible for the death penalty. Neither Brooks nor his accomplice would ever admit

to being the triggerman. And the state was never clearly able to establish the triggerman's identity. Still, Brooks' accomplice was sentenced to 40 years in prison as the result of an eventual plea bargain; Brooks was sentenced to death by lethal injection. Despite desperate legal efforts on his behalf (ironically, including those of the prosecutor who had originally tried his case), the federal appellate courts refused to rehear the merits of his appeal. Finally, when the United States Supreme Court refused an eleventh hour stay of execution, time ran out for Charlie Brooks. The Supreme Court's refusal to block the Brooks' execution has an irony of its own. At the end of its 1982 summer term, the Court had ruled in the case of Enmund v. Florida that the death penalty was disproportionately severe for a nontriggerman accomplice in such felony murders and was thus cruel and unusual under the Eighth Amendment.

The Morality of Capital Justice requires the reader to ask: What kind of society do we choose this to be? What kind of values do we want to insure and reverence? Is capital punishment good or bad? Moral or immoral? Dr. Endres rightly concludes that what diminishes one of us, diminishes us all, and that our personal and societal value must be to promote life - all life, no matter what. We cannot, through actions or inactions become accomplices to the state's efforts to adopt the murderer's viewpoint. We must break the cycle of violence.

ED MONAHAN

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THE JUROR WHO SLEPT IS CITED FOR CONTEMPT

Colorado Springs, Colo. - A retired Army Colonel who caused a mistrial in a civil lawsuit because he napped and read while serving on the jury has been cited for contempt.

Chief Judge Donald Campbell of the El Paso County District Court issued the citation to Lyndon Kramer, 69, who retired from the Army in 1970. Judge Campbell said he cautioned Mr. Kramer about falling asleep while witnesses were testifying. But he said Mr. Krammer dozed again during testimony Thursday, was seen reading a book and admitted to a fellow juror he had violated jury instructions by reading a newspaper story on the trial.

PROSECUTOR SAYS HE TOOK NO NOTES

Los Angeles - The chief prosecutor in the John De Lorean cocaine case, stung by defense accusations of deception and unethical conduct, angrily declared one day in court, "I am not a liar." In an extraordinary admission, however, prosecutor James Walsh said he purposely took no notes during five sessions with star government witness James Hoffman because he would have been required to turn them over to the defense. Lawyers for De Lorean were visibly shocked at the revelation, which they called a concession that Walsh "intentionally withheld evidence."

No Comment

Send your contributions to The Advocate, c/o Department of Public Advocacy, Frankfort. All dialogue guaranteed verbatim from Kentucky courtroom records or newspapers. This issue we focus on murder/death penalty cases, hopefully no laughing matter. But not always...

DRESS FOR SUCCESS

DEFENSE COUNSEL: [Are]...we... going to approach the Bench as usual? I got up this morning and it was dark, Your Honor; I put...on the wrong pair of trousers -- didn't match this suit, so I -- I hesitate to stand up in front of the Jury but they're going to see it, so I might just as well -- that's the new style I'm starting, Your Honor.

THERE GOES THE ONLY MITIGATION WITNESS

PROSECUTOR: May it please the Court, the Defendant is harassing one of the witnesses over here.

THE COURT: Just a minute. Court will come to order. The witnesses please step against the wall. That is the Defendant's father, I think.

NEW WITHERSPOON REHABILITATION TECHNIQUE: THE WELL-ENDOWED MURDERER

DEFENSE LAWYER (TO POTENTIAL JUROR OPPOSED TO CAPITAL PUNISHMENT): Let's say that we had Adolph Hitler, or Enos Con [sic] or Tilla the Hung [sic] or Timberlanger [?], one of these famous tyrants...on trial...you could not recommend the death penalty?

YOUNG RASCALS

THE COURT: The motion of the defendant to require the Commonwealth to furnish police investigation reports prior to trial is...[long pause] overruled.

DEFENSE LAWYER: You keep me hanging on.

ALWAYS START WITH A JOKE AND DON'T FORGET TO THANK THE BAND

DEFENSE COUNSEL (CLOSING ARGUMENT IN PENALTY PHASE): If Your Honor please, the first thing I would like to do is pay the Greenup County High School cheerleaders, the Musketeers, a high compliment. When you have young ladies such as those such as to go to national competition and defeat every state and every team in those states, and do it more than once, I want to commend those fine young ladies and their supervisors and the county for backing them.

As I stand here this moment, I stand here in deep sorrow. Occasionally through a trial you will hear laughter, and I've heard that today. Let me say to you on either side of this aisle, out in the hallway or up here, ...there is [nothing] to laugh about with five men buried...

NOTHING TO LAUGH ABOUT

[The victim's mother] was happy with the verdict. But she was less pleased with the relaxed demeanor of [the defense lawyer] and the defendants.

"They've been laughing all week. I wonder if they think it's funny now," she said.

[The defense lawyer described the murder case as] "nickel and dime." Louisville Times at B1 (3/29/85).

KEVIN MCNALLY

(Tustaniwsky, Continued from P. 1)

Jewish immigrants from the Soviet Union.

In keeping with his parents' ambitions for him, inextricable from his own, Oleh went to college. He worked at the Chrysler Dodge Assembly plant to pay his way to college. Graduating with a B.S. in Psychology, Oleh wanted a graduate degree so he continued at Wayne State University entering law school. He kept his job at the factory to pay his way, attending law school at night.

Oleh wanted to be a lawyer. He'd seen the power of the law to enact needed social change during the civil rights strife. Even though he most enjoyed the constitutional and criminal law classes, he felt unsure that he could practice criminal law because of his tendency toward shyness. Oleh graduated from law school in December of 1978 and was admitted to the bar in October, 1979. He wanted a change from Detroit, a new start, a way to serve, so he answered an ad to interview for Kentucky Public Defender jobs.

A month after the interview, March of 1981, Oleh began to work at the Hazard Office. His fervor to help his clients made him forget his reticence. Oleh is a two-time recipient of the Life Award receiving life sentences in two death penalty cases that he tried within months of each other. He is the recipient of numerous Walker Awards for acquittals on felony indictments after proof is heard. He serves as the directing attorney of DPA's Hazard Office.

A colleague admired his dedication, "Oleh is a real advocate, he does what's best for the clients, and he has managed to do this over a long period of time under extremely adverse conditions. Oleh doesn't shy away from the most difficult cases. He even volunteers to take cases out of his region. He's shown amazing perseverance."

The job has given him a sense of satisfaction that he can make a difference by his work and he's gained good friends along the way. Thanks, Oleh for the gift of your time and energy to indigents.

CRIS PURDOM

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