THE ADVOCATE

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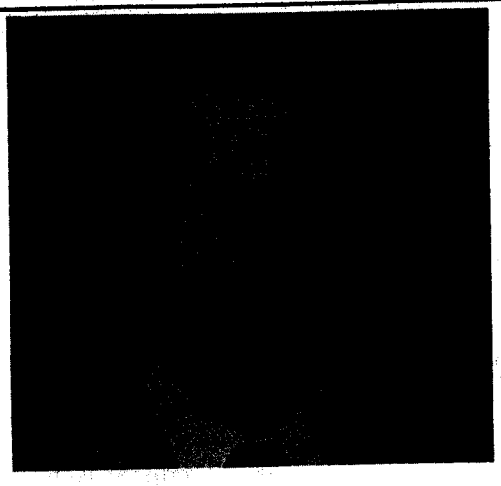
THE ADVOCATE FEATURES



BOB CAUMMISAR

Bob Caummisar, Carter County Public Defender Administrator, has served in that capacity since 1980. A former Executive Director of North Eastern Kentucky Legal Services, he was one of the Services three founding attorneys. Bob is credited with first using the insanity defense in Carter County. The defendant, a former Eastern State Hospital mental patient, having been released earlier than his commitment expiration date, pulled up to a car in a parking lot and killed the man in the car next to him. Bob made the jury aware of the man's mental defect, and the defendant received a two year sentence.

Bob received an acquittal in a case where a son shot his father. Bob utilized a spouse-abuse related syndrome defense. The man had continu-

(Continued on page 40)

Legislative Update

The 1986 General Assembly could be a very exciting session because several very important criminal justice issues are on the agenda. However the legislature resolves these issues, they could drastically change the practice of criminal law. Of course, adequate funding for the public advocacy system is our department's major objective for this session, but in this article I would like to discuss some of the non-budget issues.

PFO AND OVERCROWDING

There is no relief in sight for the overcrowded condition of Kentucky's prison system and this will necessitate that the legislature consider revising Kentucky's persistent felony offender statute and raising the $100 threshold level for felony theft offenses over one hundred dollars. The combination of Kentucky's extremely broad persistent offender statute which allows for incarceration for ten years for $100 theft offenses has made the largest contribution to Kentucky's overcrowded prisons. The study conducted by the Urban Studies Center of the University of Louisville for Kentucky's Statistical Analysis Center on Kentucky's persistent felony offender population determined that 64.5% are incarcerated for property

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offenses. A study conducted for the Program Review Committee of the Legislative Research Commission on Kentucky's persistent felony offender found that the $100 threshold for felony theft offenses is one of the lowest in the nation and is 1/3 of the national average property value for felony theft, which is $335.

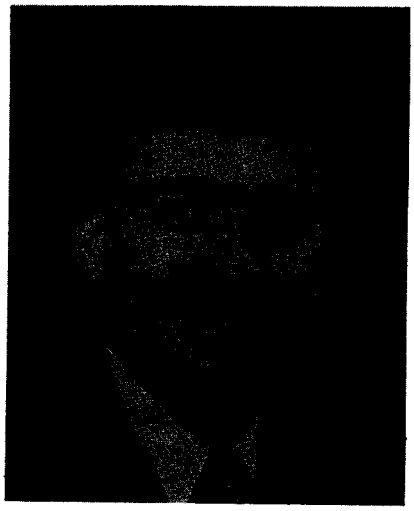
The legislature is faced with changing these two statutes or building several new prisons over the next several years.

HOME INCARCERATION

Another legislative proposal on the agenda which is related to jail overcrowding is a bill to permit home incarceration in nonviolent misdemeanor and possibly felony cases. This proposal allows a judge to sentence a defendant to serve his term of incarceration within the walls of his home except to go to work, school, or church. An experimental program for misdemeanors is being tried in Kenton County and a bill to expand the concept statewide will be introduced in the session.

PI AND JUVENILE CODE

Two proposals which have already passed the General Assembly but have had their effective dates delayed are expected to be considered again this term: decriminalization of public intoxication and the juvenile code revision. Decriminalization of public intoxication will reduce public advocacy cases to some extent, but the new juvenile code, if passed in substantially the same form as earlier versions, would increase the caseloads of public advocates. The earlier version of the new code definitively established the duty of the department to represent children in status offense cases, in cases involving dependency and neglect petitions, and in terminations of parental rights cases.



PAUL F. ISAACS

P & A BILL OF RIGHTS

The department will be working closely with Kentuckians Together, Inc. (a self-advocacy consumer coalition), the Protection and Advocacy Advisory Board, and Parent and Consumer Networks for a state Bill of Rights for persons with developmental disabilities in order to assure our clients that they will receive the services they need in order to fully participate as citizens of our society. A similar bill was introduced last session and the department is committed to the adoption of this proposal.

SENTENCING

The department intends to push for legislation which returns to circuit judges the power to determine whether a person convicted of a felony committed while on parole, probation, shock probation, conditional discharge or while awaiting trial on another offense should serve the sentence given concurrently or consecutively. The department believes that the trial judges throughout the Commonwealth should have the ability to tailor the sentence to appropriately fashion a remedy in each case.

DUI SERVICE FEES

Another departmental proposal is to include the department as one of the recipients of the service fees imposed in the drunk driving statute. Increasingly, the department is required to represent indigent clients under Kentucky's new drunk driving statute because incarceration is possible for first offenses and mandatory for second and subsequent offenses. All other agencies which are required to provide increased services under this act (enforcement, jails, record keeping, treatment, and education programs) are allowed to receive part of the service fee. The increased demand on the department created by this statute entitles us to a portion of the service fee.

VICTIM'S BILL OF RIGHTS

The Attorney General's office is working on a Victim's Bill of Rights statute. At this point, there is no public draft of the bill so we will have to wait to see what specific proposals the bill contains. Although victims of crime should be treated with respect and dignity in the criminal justice system, too often these bills have been camouflaged attempts to dilute the defendant's rights in the name of victim's rights. This legislation should be watched carefully in order to assure that it addresses only victim's rights and does not attempt to diminish the defendant's rights.

SEX OFFENDERS

During the legislative session, there will be some consideration of legislation relating to the treatment of sexual offenders. The department will be closely monitoring this legislation to ensure that the defendant's rights are protected and that any new proposal encompasses new sentencing alternatives for judges and not another mandatory sentencing statute.

MENTAL HEALTH

Two mental health issues which will be considered in the next session include: the problem of getting competency determinations in criminal cases in a reasonable amount of time and expediting involuntary commitment proceedings without violating due process in order to remove individuals incarcerated under mental inquest warrants from our jails. Specific proposals are being developed concerning these issues and should be watched.

CONCLUSION

All of us who are interested in the criminal justice system should follow closely the proceedings of the 1986 General Assembly. The department will keep you informed as these issues, and others develop during the session. In the January edition of The Advocate, we will publish an update on current issues in the legislature.

PAUL F. ISAACS
PUBLIC ADVOCATE

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NLADA Looks into Harrassment of Defenders

NLADA's Defender Committee has formed a subcommittee to investigate cases where harrassment of defense attorneys has had an impact on effective representation. This was in response to governmental attempts to compromise the defense function. The subcommittee is currently putting together a fact sheet to be distributed to the Defender Committee. For more information on NLADA's efforts in this area, contact: John Moran, 210 W. Illinois Street, Chicago, Illinois 60610 or call (312) 670-0312. (NLADA Cornerstone, March/April 1985, p. 4).

Plan Suggests Felon Work-Release Program

FRANKFORT - State Rep. Joe Meyer has proposed changing the state constitution to allow jailed felons to take part in a work-release program.

The plan would permit the General Assembly to establish guidelines relating to work release, which is viewed as a means to establish a workable way of providing some compensation for crime victims.

Felon work release was first considered in August 1984 by Gov. Martha Layne Collins' Task Force on Prison Options, of which Meyer, a Covington Democrat, was a member. The task force was charged with formulating a plan to deal with the state's critical prison overpopulation problem. The special session of the General Assembly that met in July dealt with a portion of the task force recommendation when it committed itself to approving a new, 500-bed, medium-security prison during the 1986 session.

Lawmakers will consider the felon work-release program, along with several other task force recommendations, beginning in January. Work release presents a special problem since voters will have to approve a change in the state constitution to have it implemented.

According to state law, those confined to the state penitentiary "shall be confined at labor within the walls of the penitentiary." The legislature doesn't have the power to authorize prison labor except for public works projects, during a period of pestilence, or when a prison building has been destroyed and there's no place to house the prisoners.

As an example, the LaGrange State Reformatory, built in the late 1930s during the first administration of Gov. A.B. "Happy" Chandler, was built by prison labor as a public works project.

Under work-release laws approved for misdemeanor offenders housed in local jails, participants in the program leave at an established time to go to work and return to jail when the day's work is complete. The program allows the person to keep his job and continue to provide for his family.

Meyer contends that a constitutional change to permit felon work release would allow offenders to get a job, earn money and make monetary restitution to those affected by their crimes. "Passage of this bill would put us in a posture where we can develop an effective restitution program for felons," Meyer said. "It is appropriate we develop a restitution program to enable the victims of crime to be paid back. We want to send the clear message that crime doesn't pay."

The Kentucky General Assembly at one time had a restitution program, enacted during early '70s under the administration of Gov. Wendell Ford. But the constitutionality of the program was successfully challenged in court by state Attorney General Ed Hancock.

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Kentucky Post
10-18-85

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ALL THAT IS NECESSARY FOR THE FORCES OF EVIL TO WIN THE WORLD IS FOR ENOUGH GOOD MEN TO DO NOTHING.

Edmund Burke, 1729-1797.

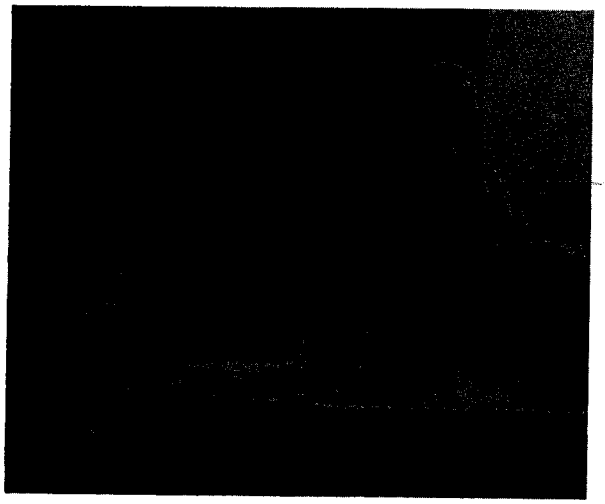
DEFENSE OF SEXUAL ASSAULT CASES

Over 100 persons attended the one-day seminar held at the Marriott Griffin Gate Resort in Lexington, Kentucky, September 23, 1985. Faculty included: Cynthia Dember, Robert Lotz, Vince Aprile, Tom Hectus, John Schrader, and Michael Nietzel.

Thanks to all those who made the seminar a success. Join us at our Annual Seminar at the Capital Plaza Hotel, Frankfort, Kentucky, June 8-10, 1986.

Bob Lotz

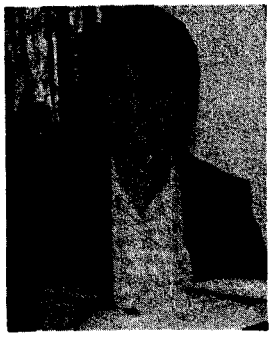
Cynthia Dember



Tom Hectus, Vince Aprile, John Schrader

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

CONFRONTATION/PFO
Bray v. Commonwealth
32 K.L.S. 12 at 15 (September 5, 1985)

At Bray's robbery trial the principal prosecution witness was Sherry Collins, who waited in the getaway car while Bray performed the robbery. The defense cross-examined Collins regarding immunity from prosecution granted her by the Commonwealth in exchange for her testimony. However, the trial court disallowed cross-examination as to police investigation of the witness with regard to forged checks, and as to charges pending against her in Indiana. The Court considered evidence of these additional charges irrelevant and held that Davis v. Alaska, 415 U.S. 308 (1974) did not require it to hold otherwise. "Davis does not authorize a general exploration of other criminal activity on the part of a witness where there is no showing that the cross-examination would expose some motivation for the testimony being given."

The Court reversed Bray's first degree PFO conviction. Reversal was required because the underlying offense was committed before Bray's most recent prior felony conviction was obtained. The underlying offense was committed on January 25, 1984, while the most recent felony conviction was not obtained until February 13, 1984. The Court held that this progression of events did not comport with the intent of the PFO statute to penalize only those offenders who have demonstrated that they cannot be rehabilitated. The Court cited with approval the same holding as reached by the Court of Appeals in Commonwealth v. Dillingham, Ky.App., 684 S.W.2d 307 (1985).

NO WANTON SELF-PROTECTION
Gray v. Commonwealth
32 K.L.S. 12 at 17 (September 5, 1985)

In this case, the Court reversed Gray's conviction of second degree manslaughter. Gray argued that he could not be convicted of second degree manslaughter (an offense having wantonness as its mental element) since all the evidence showed that he intentionally shot the victim. The defense asserted a claim of self-protection. The trial court, relying on Blake v. Commonwealth, Ky., 607 S.W.2d 422 (1980), reasoned that a jury might conclude that Gray was wanton in his belief that self-protection was necessary, and based on this logic, instructed the jury on second degree manslaughter. The trial court's action disregarded the decision of the Kentucky Supreme Court in Baker v. Commonwealth, Ky., 677 S.W.2d 876 (1984), overruling Blake. In Baker the Court noted that wantonness and recklessness by definition require the "disregard of" or "failure to perceive" "a substantial and unjustifiable risk that a particular result will occur." KRS 501.020 (3) and (4) (Emphasis added). A claim of self-protection, which necessarily asserts that the defendant intended the result of death or injury of the victim, contradicts any finding of wantonness or recklessness as statutorily defined. Gray reaffirms this holding as

announced in Baker. Justices Leibson and Wintersheimer dissented.

DOUBLE JEOPARDY
Jordan v. Commonwealth
32 K.L.S. 12 at 18 (September 5, 1985)

The Court rejected Jordan's double jeopardy challenge to convictions of first degree burglary, first degree robbery, first degree unlawful imprisonment and theft. All of the offenses arose from Jordan's conduct in breaking into a home, removing a car and other property, and tying up and abandoning the homeowners.

The Court stated Jordan's argument as "that where the evidence discloses a continuing course of conduct throughout which the elements of more than one statutory offense are present double jeopardy prevents prosecution for more than a single offense." The Court found that prosecution for the multiple offenses was not barred under KRS 505.020. The Court also found that the multiple convictions were permissible under the standard test of Blockburger v. United States, 284 U.S. 299 (1932) which finds no double jeopardy violation "if each statute requires proof of an additional fact which the other does not...."

The Court did reverse Jordan's theft conviction. Prior to trial, Jordan plead guilty to the theft of the property taken in the robbery. Under Ohio v. Johnson, ____ U.S. __ __, 104 S.Ct. 2536 (1984), this guilty plea did not preclude the prosecutor from still pursuing a conviction of the higher offense - robbery. Achievement of the robbery conviction required that the theft conviction be set aside.

DANGEROUS INSTRUMENT
Roney v. Commonwealth
32 K.L.S. 12 at 22 (September 5, 1985)

The Court was called upon in Roney to decide whether an assault with the defendant's fists may be considered an assault with a dangerous instrument so as to constitute first degree assault. KRS 500.080(3) defines "dangerous instrument" as "any instrument, article or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury." The Court noted that ordinarily "instrument, article or substance" refer to things other than parts of the human body. The Court also noted that "it is simply not clear whether the general assembly intended that fists be considered to be a dangerous instrument...." Consistent with its practice, the Court applied the "rule of lenity" to hold that "dangerous instrument" does not encompass a defendant's hands or feet. Justice Wintersheimer and Chief Justice Stephens dissented.

CHILD SEXUAL ABUSE SYNDROME/
PRIOR SEX CRIMES/HEARSAY
Bussey v. Commonwealth
32 K.L.S. 13 at 9 (September 26, 1985)

The defendant in Bussey was convicted of the attempted sodomy of his daughter. At his trial a prosecution psychiatrist testified that the victim displayed symptoms of "child sexual abuse accommodation syndrome." However, the psychiatrist admitted that the symptoms could have resulted from sexual abuse of the victim by someone other than her father. The Court held that, because the victim's display of the syndrome could not be linked to any act of the defendant, evidence of the syndrome was irrelevant.

The Court upheld the action of the trial court in admitting evidence of prior, uncharged instances of sexual abuse of the victim by the defendant. "Since appellant was being tried for attempted sodomy, this evidence was admissible to show the intent of the appellant in this case." The Court indicated, however, that an admonition to the jury concerning the signif-

icance of such evidence should not state that it is admitted to show "lustful inclination."

Finally, the Court held that the testimony of a social worker that the victim had told her about prior instances of sexual abuse was inadmissible hearsay where the victim refused to testify concerning the prior abuse.

BAIL PENDING APPEAL
Commonwealth v. Peacock
32 K.L.S. 13 at 10 (Sept. 26, 1985)

In this case, the Court held that the Court of Appeals abused its discretion by granting bail pending appeal based on ex parte communications solicited by it. The trial court denied Peacock bail on appeal without stating its reasons into the record. Peacock obtained Court of Appeals' review of this ruling under RCr 12.82. In an effort to determine the reasons for the denial of bail the Court of Appeals called both the trial judge and a probation officer. The Court of Appeals subsequently held that the reasons communicated to it by this ex parte procedure were inadequate, and granted bail.

The Supreme Court noted that "[w]hen a request for bail pending appeal is denied, the proper practice for the trial court is to follow the standards listed in RCr 4.16 by giving written reasons for the denial..." In the absence of written reasons the proper procedure was not to solicit an ex parte statement of the reasons, but to remand the case to the trial court for an "appropriate adversarial evidentiary hearing" followed by written reasons for a denial of bail. Justices Leibson and Vance dissented.

DRUNK DRIVING
Commonwealth v. Steiber
32 K.L.S. 13 at 11 (Sept. 26, 1985)

In this certification of the law the Court held that it is improper to instruct the jury in a drunk driving trial that the defendant's driver's license will be revoked upon conviction. Such revocation is required under KRS 189A.080 and is court administered. The revocation is not a penalty to be assessed by the jury. The Court cited its holding in Payne v. Commonwealth, Ky., 623 S.W.2d 867 (1981) forbidding comment concerning the consequences of a particular verdict and held that "the jury should not be instructed or be allowed to speculate on whether the defendant's license shall be revoked upon conviction."

JUVENILE WAIVER/PRESERVATION
Commonwealth v. Thompson
32 K.L.S. 13 at 11 (Sept. 26, 1985)

Thompson, a juvenile, challenged the sufficiency of the district court's waiver of its jurisdiction of him to the circuit court. The Supreme Court rejected the challenge based on lack of preservation: "At the outset of this opinion, we note there was never any objection raised in the District Court or in the Circuit Court to any portion of the juvenile proceedings, to the transfer order itself, nor was any objection made to the investigative requirements of KRS 708.140, nor to the Grand Jury instructions under KRS 208.170(5)(b)." The Court cited as dispositive the case of Anderson v. Commonwealth, Ky., 465 S.W.2d 70 (1971) which held prospectively that insufficiency of a juvenile waiver must be preserved by objection in district or circuit court.

Although the Court held the lack of preservation to be fatal, it additionally held that the order from the district court waiving jurisdiction of Thompson was not insufficient on its face. Unfortunately, while holding that the order did not merely "parrot" KRS 208.170, the Court limited its discussion of the order to the statement that "it addresses each of the criteria set out in the statute and

states by what witnesses the elements were proved."

Kentucky Court of Appeals

DOUBLE JEOPARDY/PALPABLE ERROR
Fortney v. Commonwealth
32 K.L.S. 13 at 2 (September 6, 1985)

Fortney entered guilty pleas to two robbery counts based on the robbery of a gas station and the station's attendant. Fortney's subsequent Motion to Vacate under RCr 11.42 was denied. On appeal, Fortney argued that his conviction of both the robbery of the gas station attendant and the robbery of the gas station was "constitutionally impermissible because he gave the court an account of only one robbery in explaining how the crime occurred." The Court of Appeals agreed that, if the facts were as described by Fortney, he could be convicted of only one robbery. The situation described by Fortney was distinguishable from that contemplated by the Kentucky Supreme Court in Douglas v. Commonwealth, Ky., 586 S.W.2d 16 (1979). In Douglas, the Court upheld two robbery convictions where "[t]he taking of Gnau's wallet and the taking of the motel's money clearly constituted two separate thefts."

The Court of Appeals reversed and remanded Fortney's case even though the double jeopardy claim had not been asserted below. "Ordinarily, we would decline to settle an unpreserved claim of error, 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. RCr 10.26."

FUNDS FOR EXPERTS
Commonwealth v. Thacker
32 K.L.S. 14 at 2 (Sept. 27, 1985).

In this case, the Court followed the path taken by the Kentucky Supreme Court in Hicks v. Commonwealth, Ky., 670 S.W.2d 837 (1984), to hold that the trial court did not err in refusing funds for a defense serologist where the defendant made no showing as to what manner he expected to be assisted by an expert. The Court noted in passing the U.S. Supreme Court decision in Ake v. Oklahoma, 470 U.S. ____, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), which recognized an indigent's due process right to funds for a psychiatrist to help present an insanity defense. However, the Court of Appeals characterized the denial of funds for a serologist as "discretionary."

AMENDMENT OF INDICTMENT
Basham v. Commonwealth
32 K.L.S. 14 at 11 (October 11, 1985)

In this case the Court held that it was not error for the trial court to permit an amendment of the indictment at the close of the Commonwealth's case which consisted of adding an omitted element of scienter to the indictment's recitation of facts constituting the offense. The indictment "described the specific offenses and noted their statutory bases." The Court cited RCr 6.16 which allows amendment of an indictment" if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

Linda West

* * * * * *

It is a very easy thing to devise good laws; the difficulty is to make them effective. The great mistake is that of looking upon men as virtuous, of thinking that they can be made so by laws.

Henry St. John Bolingbroke

Protection and Advocacy

for the Developmentally Disabled

SUPREME COURT DECISION OPENS NEIGHBORHOODS TO PEOPLE WITH MENTAL RETARDATION

In October 1980 the City of Cleburne, a residential community southwest of Dallas, denied a special use permit for a group home for persons with mental retardation. The result was a series of lawsuits centering on the designation of persons with mental retardation as a protected class and the use of local zoning laws to prevent citizens with mental retardation from living in the community.

The case, City of Cleburne v. Cleburne Living Center, was argued before the U.S. Supreme Court last spring. Attorneys for Advocacy, Inc., the state's protection and advocacy system for persons with developmental disabilities, represented the Cleburne Living Center. An interpretation of the Court's decision, by Diane Shisk, one of Advocacy, Inc.'s, attorneys on the case, follows:

On July 1, 1985, the U.S. Supreme Court addressed the rights of people with mental retardation to equal protection of the law under the U.S. Constitution. The Supreme Court unanimously ruled unconstitutional the use of a local zoning ordinance to prevent a group of people with mental retardation from living in a neighborhood where other congregate living arrangements were allowed without restriction.

In the City of Cleburne v. Cleburne Living Center case, the court found that the city's requirement of a special use permit for a group home for mildly and moderately retarded persons rested on an irrational prejudice against people with mental retardation. The court noted that while people with mental retardation have a reduced ability to function in the everyday world, Cleburne had no rational basis for believing these "differences" to be relevant in this circumstance. Here, the court noted, the group home would pose no more threat to any legitimate interest of the city than would be posed by permitted uses such as boarding houses, nursing homes and fraternity houses.

While the Supreme Court declined to adopt the reasoning of the Fifth Circuit Court and thus did not apply in this case the heightened judicial scrutiny required in cases involving intentional discrimination against women, the decision nonetheless represents a step forward in securing equal rights for people with mental retardation. The decision directs the lower courts to review legislative distinctions based on mental retardation to determine whether or not the attributes of mental retardation will pose a threat to legitimate governmental interests being furthered by the legislation beyond those posed by permissible groups. In the absence of such threats to legitimate interests, the distinction will fail as unconstitutional.

Possibly even more important is the underlying principle affirmed by the court--that mental retardation per se cannot be used as a proxy for depriving people with mental retardation of their rights and interests without regard to individual abilities and needs. While the majority of the court leaves open the possibility

that a city may have more legitimate interests in restricting some subgroups of people with mental retardation, such as people with severe mental retardation, the Cleburne decision clearly states that people with mental retardation can no longer be treated as second-class citizens.

The article first appeared in Texas Planning Council for Developmental Disabilities October 1985 issue of "Highlights." Reprinted with permission of W. D. Nielson, Grants Manager, Texas DD Council.

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Coalition Seeks Changes In Rape, Sex-offender Laws

OWENSBORO - A coalition representing 30 women's groups is trying to find a legislator willing to sponsor a package of sweeping changes for Kentucky's rape and sex-offender laws in the 1986 General Assembly.

Among the major recommendations by the Kentucky Coalition Against Rape and Sexual Assault are proposals to abolish marital immunity for rape and establish requirements that convicted sex offenders participate in treatment programs.

Lexie Greene Hicks, who supervises Rape Victims Services for Western Kentucky from her Owensboro office, estimated that 90 percent of the women she had counseled had been raped by husbands, some repeatedly.

National studies have found that one of every seven married women has been or will be raped by her husband, Ms. Hicks said. There are no solid estimates for Kentucky, which is among 21 states where spousal rape is not a crime.

Legislators have been reluctant to impose laws invading marital bedrooms, but there appears to be more support for the proposal heading into the January session than in the past, said Claude Turpin, chief caseworker at the State Reformatory at LaGrange.

Ms. Hicks said a group of Owensboro women representing at least five groups planned to ask House Speaker Don Blandford, D-Philpot, either to sponsor the legislation or to support it publicly. There has been no opposition to the marital rape proposal, she said, but the group is prepared for any opposition. One objection always raised is that women might falsely report their husbands for rape to strike back after an argument, she said, adding, "Research does not support this." Twice as many women are raped by their husbands as by strangers, she said. "When you're raped by someone you love, there are feelings of anger and betrayal," Ms. Hicks said.

Turpin said the plan to require treatment for convicted sex offenders would help Kentucky rehabilitate them. Just 100 of 500 such inmates in state prisons now have volunteered for treatment programs, he said. Studies have found that 70 percent of sex offenders who don't receive treatment are arrested again for similar offenses after being released from prison, Turpin said. The rate drops to between 30 percent and 10 percent for those who receive two years of counseling, he said.

To expand its program to meet additional demands, Turpin said the Corrections Cabinet would need five additional social workers and four probation and parole officers to counsel sex offenders, he said.

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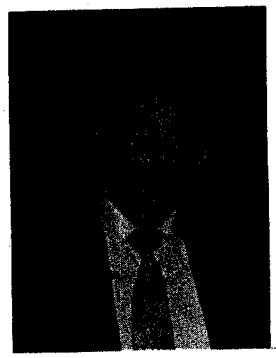
Post-Conviction

Law and Comment



Kenneth R. Taylor

BENEFITING FROM ERRONEOUS SENTENCES

Every experienced criminal lawyer in this state knows that Kentucky's sentencing laws are in a state of disarray. The statutes have been amended, deleted, reworked and judicially interpreted so many times that the result is a collage of laws that are obtusely worded, sometimes patently contradictory, see, e. g., Commonwealth v. Hunt, Ky. App., 619 S.W.2d 733 (1981); and are dispersed throughout several chapters of the Kentucky Revised Statutes. There are statutes which restrict the court's authority to grant probation and shock probation where certain facts exist, KRS 533.060(1)(2) and (3); statutes which direct that additional sentences must run consecutively under certain conditions, KRS 532.110 (4), 533.060 (1)(2) and (3); other statutes which indicate that the sentences may run concurrently under some of the same circumstances just described, KRS 532.110(3); statutes which limit the amount of cumulative time a defendant can receive on certain classes of felonies, KRS 532.110 (1)(c); and statutes which have been interpreted to overrule these sentencing caps in certain situations, see, Devore v. Commonwealth, 662 S.W.2d 829 (1984), KRS 533.060(2). And, this is just scratching the surface. There are PFO laws, classification laws, calculation laws, laws relating to fines, laws dealing with concurrent federal time, capital sentencing statutes, presentence procedure statutes, court modification laws, and parole revocation statutes.

It is no small wonder that sentencing judgments are occasionally "incorrect" or "erroneous," in the sense that the court, either inadvertently, ignorantly, or even intentionally, failed to take cognizance of certain adjudicatory facts present in the case and to apply a specific sentencing statute. Many times these errors inure to the benefit of the criminal defendant, and are occasionally part of the plea negotiations.

If these erroneous sentencing provisions can be disregarded by the Corrections Cabinet, Parole Board or other executive agency, or if they can be overturned at any time by the prosecution on the ground that they are void, then their existence is of only academic interest to the defense attorney. If, on the other hand, these errors must be appealed by the Commonwealth, and, until so challenged are enforceable as written, then they become the objects of practical and tactical consideration. A recent unpublished Court of Appeals decision makes them just that.

In **Perkins v. Commonwealth**, No. 85-CA-425-MR (Ky.App., July 26, 1985), the court held that the Corrections Cabinet must enforce an erroneous sentence to concurrent prison terms because the error was not appealed by the Commonwealth. The action of the Corrections Cabinet in ignoring the erroneous concurrency provision by running the sentences consecutively was held to constitute unauthorized administrative action. This decision was based upon, and extended the rationale of, two previous Kentucky cases, Brock v. Sowders, Ky., 610 S.W.2d 591 (1980), and Commonwealth v. Crawford, Ky., 147 S.W.2d 1019

(1941), both of which disapproved of similar kinds of disregard by prison officials of the erroneous provisions of sentencing orders.

A brief look at the facts of these three cases will put the issue into perspective. In Commonwealth v. Crawford, supra, the juvenile defendant was committed to the house of reform for a definite period of years. The judgment was erroneous in that a state law required juvenile commitments to be indeterminate until age twenty-one. The superintendent of the house of reform ignored the determinate portion of the commitment order and kept the boy past the normal expiration date, intending to release him at age twenty-one, as required by state law. The Kentucky Court of Appeals held that, despite the incorrect determinate designation, the superintendent had to obey the clear sentencing mandate of the juvenile court, until that judgment was properly overturned.

In Brock v. Sowders, supra, the defendant entered into a plea agreement, pursuant to which his Kentucky sentence would run concurrent with an Indiana sentence he was currently serving. After being paroled from Indiana, he was picked up by the Kentucky Corrections Cabinet and incarcerated. Corrections ignored the portion of the Kentucky order which ran the Kentucky sentence concurrent with Indiana's, arguing that the Court had no authority to so designate. The Kentucky Supreme Court agreed that there was no statutory authority for the concurrent running of sentences, but held that because of the plea agreement, the defendant was entitled to enforcement of the order. The implicit assumption of the Brock opinion, one which was later applied in the Perkins case, was that an erroneous sentence was enforceable and could not be ignored by Corrections.

In Perkins, the defendant had sentences from two different courts--a seven year sentence from Campbell County and a five year sentence from Kenton County. The Kenton judgment specifically ordered that its sentence would run concurrently with the sentence from Campbell County, giving Perkins a total sentence of seven years. The Corrections Cabinet, in a review of the presentence investigation, noted that the Campbell County crime was committed while awaiting trial on the Kenton County charge. Therefore, it calculated the seven year sentence from Campbell County consecutively to the five year sentence from Kenton County, on the theory that KRS 533.060(3) required such a result. That statute provides that a sentence for a crime committed while awaiting trial on another crime shall run consecutively to the sentence for that other crime. The Court of Appeals held that, while the Kenton County Judgment, running the sentences concurrently, violated the above-cited statute, it still was enforceable against the Corrections Cabinet because it was not appealed by the Commonwealth or challenged by post-trial motion. The Court held:

> [i]f we were to adopt the appellant's (Corrections) position, then any time the Corrections Cabinet disagreed with the Circuit Court's interpretation of the law in a ruling, the Cabinet could simply ignore that ruling.
>
> ...
>
> We think that to approve the actions of the Corrections Cabinet in the instant case would also be a dangerous precedent. If the Commonwealth, in its role as prosecutor, felt the Kenton Circuit Court order was in error, it could have appealed to a higher court or perhaps filed a CR 60.02 motion. To allow an agency to disregard a court order

whenever it has an objection, although legally valid, to that order, would disrupt the orderly function of the judicial process. Id.

The Court of Appeals denied a motion by Perkins to publish the opinion. That is difficult to understand in light of the significant precedential value of the case. However, in response to that motion to publish, the Corrections Cabinet submitted to the court an affidavit, executed by the supervisor of their Offender Records Section, indicating that it intended to give system-wide effect to the Perkins decision. The Cabinet's sentence calculation policies were amended to reflect the decision, and, to date, as far as is known to this writer, all those prisoners who have the Perkins fact pattern, have had their sentences recalculated to reflect concurrent terms.

The law is clear that when a circuit court renders a sentence, the Corrections Cabinet may not, either directly or indirectly, disobey or circumvent that order, regardless of its contrary interpretation of the applicable law. And, this principal applies to other executive agencies as well. See, Op. Atty. Gen., No. 83-162 (stating that if a trial court incorrectly imposes concurrent sentences where consecutive sentences are required under KRS 533.060, the parole board is without authority to disregard the designation and to impose consecutive terms for the purpose of determining parole eligibility). The practice pointer to be gleaned from Perkins and the related cases is that if you have a client with an erroneous, yet beneficial, sentence, you can obtain enforcement of that judgment.

THE SILENT ERRONEOUS JUDGMENT

Despite Perkins, there remains to be resolved one additional point of contention with Corrections. The Cabinet has adopted only the fact-specific holding of Perkins. It has not applied the broader, legal policy implications of the decision. In other words, when Corrections receives a case on all-fours with Perkins, it will run the sentences concurrently. However, its internal regulations still have it in the business of interpreting circuit court judgments with the aid of sentencing statutes in one other circumstance. The remaining issue involves the "silent judgment." The Offender Records Manual, the Cabinet's internal manual governing sentence calculations, provides as follows:

If the judgment specifically

states that the new sentence runs concurrent with his present sentences, then there is no question of how the sentence should run, i.e., it runs concurrently with those designated. Likewise, if the judgment specifically states that the new sentence runs consecutively with present sentence or sentences then there is no question, i.e., it runs consecutively with designated sentences. However, if the judgment is silent as to how it runs and the crime was committed under the provisions of KRS 533.060(2) and (3), ...or KRS 532.110(4),... then it runs concurrently. Id. at 11-12.

Clearly, this policy requires a quasi-judicial determination by Corrections that certain sentencing laws are applicable. In essence, Corrections acts as an overseer of the courts, doing in their stead what is required by law. A strong argument can be made that the policy is illegal. For purposes of this discussion, consider the following hypothetical.

Suppose a defendant is indicted for theft in County A and makes bail. Then, while awaiting trial he commits a burglary in County B. He pleads guilty in A and receives two years. The judge in County B is unconcerned with the previous sentence from A.

(Let's assume that a presentence investigation is waived by the defendant, so the existence of the other sentence is never really put before the court.) The defense attorney doesn't mention the other sentence because he knows the two sentences must run consecutively. The part-time prosecutor is thinking about a real estate closing he has scheduled to begin in ten minutes. The result is that no designation is made and the judgment is silent. When the defendant gets to LaGrange, will he receive a cumulative sentence of two years or four years? KRS 532.110(3) provides:

If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence the defendant must serve. Id.

Similarly, KRS 197.035 provides:

(1) A sentence, on conviction of a felony, imposed upon a confined prisoner for a crime committed prior to the date of his instant commitment, if designated to be served consecutively, shall be added to the sentences being served.

(2) If the additional sentence is designated to be served concurrently, Or the commitment is silent, he shall be considered as having started to serve said sentence on the day he was committed on the first sentence. Id. (Emphasis added.)

These provisions seem to dispose of the issue. The sentences must run concurrently and the defendant has two years to serve. However, here is where the above-quoted Corrections policy comes into play. The Corrections Cabinet will look at the PSI (which in this case, would be done after sentencing) and it will see, from the dates provided by the probation and parole officer, that crime B was committed while awaiting trial on crime A. The Corrections official will then turn to KRS 533.060(3), which states:

When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense

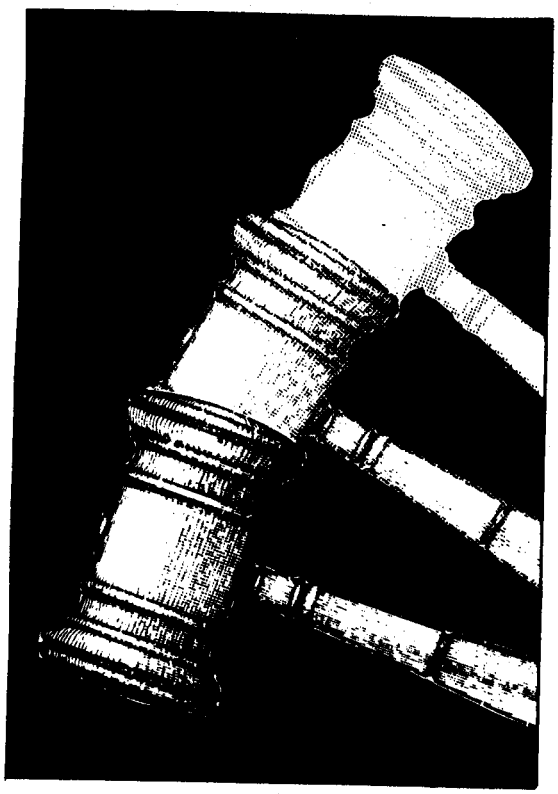
committed while awaiting trial shall not run concurrently with confinement for the offense for which said person is awaiting trial. Id.

He will then apply KRS 533.060(3), instead of the above-quoted statutes, and run the sentences consecutively. When questioned about why he considers one statute to take precedence over the others, he will cite Commonwealth v. Hunt, Ky., 619 S.W.2d 733 (1981), which held that where 532.110 and 533.060 are in direct conflict, and are irreconcilable, the most recent controls.

There are two problems with that argument. First, Hunt dealt with a direct and irreconcilable conflict. Different subsections of the two statutes were involved in that case. The two subsections involved in our hypothetical can be reconciled. One of them directs the court to rule a certain way, and the others determine how the judgment should be interpreted in the event the court fails to so rule. Contrast that with Hunt, wherein one statute gave the judge the authority to make a probation violator's new time concurrent, and the other statute specifically said no such discretion exists--the time must be consecutive. No such direct conflict exists in our hypothetical.

The primary problem with the Corrections position, however, is that it again places that agency in the position of a fact-finder and sentencer. It violates the doctrine of separation of powers. The question of whether or not a crime was committed while awaiting trial on another offense is a question of fact. The PSI is not inerrant, irrefutable authority for the facts contained therein. The determination of the applicability of the sentencing statutes is being made outside the four corners of the sentencing judgment, and the inmate has no notice and opportunity to be heard as to the fact question.

Applying KRS 532.110(3) or 197.035 does not require any finding of fact, other than simply noting that the new judgment is silent as to concurrency or consecutiveness. The statutes are self-implementing. By operation of law, a silent judgment is a concurrent one, so applying 533.060(3) to a silent judgment is tantamount to disobeying the judgment in favor of a statute, the very thing prohibited in Perkins.



Commonwealth v. Hunt, supra, simply deals with how a sentencing court should resolve a direct conflict between two sentencing statutes. The courts are often called upon to determine which of two sentencing laws applies to a particular fact pattern. See, Devore v. Commonwealth, Ky., 662 S.W.2d 829 (1984), (conflict between 532.220(1)(c) and 533.060(2); Handley v. Commonwealth, Ky. App., 653 S.W.2d 165 (1985) (conflict between 532.110 (1)(a) and 533.060(3)); and Hampton

v. Commonwealth, Ky., 666 S.W.2d 737 (1984), (conflict between 532.080 and 532.110(1)(c)). What all these cases, along with Hunt, have in common is that a sentencing court, not Corrections, is making the sentencing decision from which the appeal is taken. In Brock and Perkins, Corrections was making the determination, and, in both cases, the court implied that Corrections function was purely executive---i.e., to execute the judgment, not to put an interpretative gloss upon it, or to disregard its provisions. Therefore, a persuasive argument can be made that when Corrections receives a silent judgment, it must run the sentences concurrently and cannot apply the special sentencing laws which require it to go beyond the four corners of a sentencing order.

Corrections, of course, will argue that in applying the sentencing laws it is simply applying facts which are verifiable from public records, not just from the PSI. And, that is true. Probation, shock probation, conditional discharge, awaiting trial, and conviction for escape, are all statutes which should show up in court documents. But the question is not whether Corrections can do as good a job as the courts in applying sentencing laws. The question involves authority to determine maximum lengths of sentence. The bottom line is that the judicial branch determines sentences; the executive branch executes them.[1] When Corrections goes beyond the four corners of the sentencing order to determine facts and apply statutes, however uncontroverted the facts may be, it is nonetheless determining the length of sentence, and it is invading the prerogative of the courts. Corrections should not apply Chapters 532 and 533; those chapters are directed to the sentencing courts. By contrast, Chapters 196, 197 and 439 provide direction to Corrections.

There are also practical reasons for this policy of administrative restraint, in addition to the above-stated legalistic ones. Public records can be mistaken. If the judge announces that he must run the new sentence consecutively, because the defendant appears to be on probation, and assuming the defendant contests that fact, the defendant can, then and there, object, make a record, and if he loses the factual question, appeal. By contrast, when Corrections determines that the defendant was on probation, parole, conditional discharge or was awaiting trial, it is done ex parte and the defendant has no immediate recourse or appeal. He must file an independent action for declaratory judgment.

There are undoubtedly numerous inmates in our prisons who have silent judgments being interpreted as providing for consecutive sentences. This practice should be challenged. Perhaps then we can get the Corrections Cabinet out of the judiciary and back in the executive branch where it belongs.

KENNETH R. TAYLOR

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[1]Of course, the general assembly, in other KRS Chapters, has delegated to the executive branch the authority to determine parole eligibility, custody classification, and good time allowances. But, nowhere is the executive branch given the authority to determine whether sentences are concurrent or consecutive.

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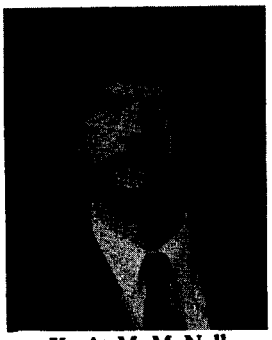
"WHEN YOU RELEASE THE WRONGDOER FROM THE WRONG, YOU CUT A MALIGNANT TUMOR OUT OF YOUR INNER LIFE."

LEWIS B. SMEDES

The Death Penalty


Kevin M. McNally

KENTUCKY'S DEATH ROW POPULATION - 25
PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 104

GALL NEARS END OF STATE POST-CONVICTION

On November 21, 1985, the Kentucky Supreme Court affirmed the denial of Eugene Gall's RCr 11.42 motion. Gall claimed that his two public defenders were ineffective in representing him at trial. Applying Strickland v. Washington, 104 S.Ct. 2052 (1984), for the first time, the Court scrutinized counsel's investigation and preparation of an insanity defense.

A. INEFFECTIVE ASSISTANCE

Noting that "Dr. Noelker saw Gall 21 or 22 times prior to trial," Justice Aker, writing for a unanimous Court, found there was no need to "produce [any more than] one live expert witness..." Gall II at 3. Noelker's diagnosis of "chronic paranoid schizophrenia, severe sexual disturbance" was adequately supported by his "diagnostic clinical session, the taking of a history...a series of structured and objective tests... [which were submitted] for blind analysis..." Therefore, Noelker's review of reports from previous psychiatrists was adequate. Gall's lawyers indicated they wanted to avoid a "battle of the experts... [T]he decision of Gall's trial attorneys to introduce a limited amount of insanity evidence was a reasonable trial tactic..." Id. Additionally, the prejudice prong of Strickland's test was lacking.

Although the defense produced none of the prior experts involved in treating or evaluating Gall, Dr. Noelker did testify to Gall's history of mental illness. Therefore, the Court held that counsel's "leg work" was constitutionally acceptable. Gall II at 4.

Since the Court previously held in Gall v. Commonwealth, Ky., 607 S.W.2d 97, 101-104 (1980) [Gall I], that Gall had an impartial jury, there was no ineffective assistance in not aggressively pursuing the change of venue petition. Gall II at 5.

Nor was there ineffective assistance at the penalty phase since "an abundance of evidence was introduced... Gall's mother, father, ex-wife and Dr. Noelker...testified..." Gall II at 7-8. Additionally, the affidavits of two absent witnesses (a witness to executions and a prison psychologist) were read to the jury.

The Court refused to find the failure to independently test serological and ballistic evidence ineffective assistance of counsel. One lawyer for Gall had a degree and seven years work experience in chemistry and personally interviewed the serologist and the ballistics expert. Since the identification of Gall was "clearly established by other evidence", and since there was vigorous cross-examination, there was no error. Gall II at 8.

"Counsel decided that the massive amount of time necessary to do a jury composition study on 'young people' would be too unproductive and time consuming. We agree." Gall II at 9. Anyway, the jury commissioners allegedly choose jurors from the voter registration list and tax roles by

random. Nor was it ineffective assistance to fail to file a discovery motion, in light of the prosecutor's "open file" discovery. No prejudice was shown. Id.

The Court held that there were "sufficient pretrial contacts" to maintain a "viable attorney-client relationship with Gall." Gall II at 10. "Gall's self-representation was attributable only to his deteriorating mental state", according to Dr. Noelker. Therefore, "Gall's decision to represent himself was independent and not the result of ineffective assistance of counsel." Id.

There was no need to include the "phrase...extreme emotional disturbance" in the instructions since the court previously found the omission proper in Gall I. It follows that it wasn't ineffective assistance in Gall II.

Applying Washington, the Court found it "unlikely that the result would have been favorable to Gall had counsel proceeded any differently." The "allegedly deficient conduct in this case was not so serious as to have 'undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced the just result.'" Gall II at 11, quoting Washington, 80 L.Ed.2d at 693.

B. OTHER ISSUES

After his conviction, Gall was improperly sent to Ohio to stand trial and then returned to Kentucky's death row. The Court found no error. "We can only agree that Gall was denied his right to petition the Governor of Kentucky to disapprove Ohio's request for temporary custody under the... IAD... and that he was not allowed the opportunity to file a writ of habeas corpus under the Uniform Criminal Extradition Act..." Gall II at 12. Since the warden "who transferred Gall was authorized to do so under the IAD" and the policy supporting relevant statutes and cases "was to prevent the interruption of the rehabilitative function...", the Court found no error. Gall's death sentence makes any concern for his rehabilitation irrelevant. Gall II at 14.

Claims that the jury did not "properly consider [Gall's] mental illness" and improperly consider parole were rejected on the basis of RCr 10.04, which generally prohibits juror testimony after trial. Nevertheless, the Court examined the "testimony of one juror and hearsay testimony of another...". Justice Aker distinguished Necamp v. Commonwealth, Ky., 225 S.W.2d 109 (1949) which involved a juror who consulted with a priest about the death penalty during deliberations. Gall II at 14. Anyway, the Court holds, the juror testimony presented by Gall does not convince us..." Gall II at 15.

Gall II also rejected arguments that: it was improper to refer to a polygraph examination during the 11.42 hearing; a continuance should have been granted to secure out of state witnesses for the hearing; prosecutorial misconduct not raised on the direct appeal required a new trial; Gall's Fifth Amendment privilege was violated when he was cross-examined, beyond the scope of direct, at the 11.42 hearing; there was need to reexamine the issues previously presented in Gall I in light of subsequent decisions; and that the trial court had authority to order the Supreme Court to release it's death penalty data. See Ex Parte Farley, Ky., 570 S.W.2d 617 (1978).

The Court also found no "abuse of discretion" in denying funds for various experts at the 11.42 hearing. Nor did it violate the federal constitution for Gall to be sentenced to die "by a judge who had doubts about

his mental status..." Gall II at 16. Finally, counsel's failure to elicit testimony from Gall's mother concerning Gall's being "molested as a child" was not error since the testimony would have been hearsay. Gall II at 18-19.

KILLING KIDS

Eugene Gall was sentenced to death despite a strong showing of past and present mental illness. No doubt this was due, in part, because his victim was a child. In this country, the race, sex and age of the victim is a significant, often decisive, factor in who gets sent to death row. See, e.g., Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN.L. REV. 27 (1984). Child victims, especially white and female, can propel the most unlikely candidates towards execution. Witness Todd Ice, barely fifteen at the time of his arrest.

The Ice case, and others like it, demonstrate a sad irony. Our repugnance for child killers doesn't seem to inhibit our ability to do the same. The execution of Charles Rumbaugh, Jr., on September 11, 1985, "marked a legal watershed of sorts, because...Rumbaugh was put to death for a crime he committed when he was just 17 years old... [i]t had been more than twenty years since any American had been executed for a crime committed while he or she was a minor." Bruck, "Executing Teenage Killers Again", The Washington Post, D1 (9/15/85). South Africa, Libya, Iran, Iraq, the Soviet Union and China don't execute juveniles. We do.

Rumbaugh, who suffered from severe mental illness, THE ADVOCATE (Vol. 7, No. 6) at 19 (1985), was no where near the youngest to be executed in this century. "That distinction belongs to a 14 year old black boy named George...Stinney, Jr." He was executed in South Carolina on June 16, 1944, "less than two months after being convicted of the murder of an eleven year old white girl...At the time of his death, he was five feet one inch tall and weighed ninety-five pounds." Bruck describes him as being "a fourteen year old who, in many ways, was too small for the chair."

It appears that the youngest Kentuckian executed in the last 75 years was 16 at the time of the crime. Silas Williams, a black child from Woodford County was executed on March 21, 1913. More recently, Arthur Jones, from Mason County, also black 16 year old, met the same fate on March 22, 1946. There have been six juveniles executed in Kentucky in the last 75 years. Four were black and two were white.

Frank Carson was executed on April 7, 1933 at the age of 17 for a Nelson County murder. Neither Carson nor Williams even had an appeal. Burnett Sexton, a 17 year old, was executed for a Perry County murder on January 15, 1943. William Gray, a black 17 year old, was executed for a Fayette County murder on June 25, 1943. As did the other five, Gray killed a white person. Gray v. Commonwealth, 170 S.W.2d 870, 873 (1943).

Carl Fox was 17 years old and black when he committed a crime for which he was executed at Eddyville on April 6, 1945. Fox's case did not engender the sympathy of the court. "True, the penalty imposed is extreme, but so was the crime." Fox v. Commonwealth, 185 S.W.2d 394, 399 (1945). That crime, however, was not murder. Fox was convicted of a Campbell County rape of a 16 year old "white girl."

KEVIN MCNALLY

Sixth Circuit Highlights

Donna Boyce

DESTRUCTION OF POTENTIALLY EXCULPATORY EVIDENCE

In Elmore v. Foltz, 14 SCR 15, 13 (July 26, 1985), the Sixth Circuit Court of Appeals held that the state's destruction of potentially exculpatory evidence did not constitute a due process violation. In this case, the police obtained audio tape recordings of several alleged drug transactions through use of a "wired" informant. At trial, the defendant testified that he never sold heroin to the informant, but that he simply had been returning drugs belonging to the informant that the defendant had been storing for him. The defense claimed that despite the testimony of the informant to the contrary, any of the taped transactions would confirm this. Alas, the state had erased all the tapes for budgetary reasons. To determine if the state's suppression - destruction of potentially exculpatory evidence violated the defendant's due process rights, the Sixth Circuit followed the guidelines set forth by the United States Supreme Court in California v. Trombetta, ___ U.S. ___, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Under Trombetta, supra at 2534, to meet the standard of constitutional materiality, the destroyed evidence must posses an exculpatory value that was apparent before the evidence was destroyed and must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

The Sixth Circuit noted that the chances that the tapes would have exculpated Elmore were negligible and other means were available to cast aspersions on the informant's reliability.

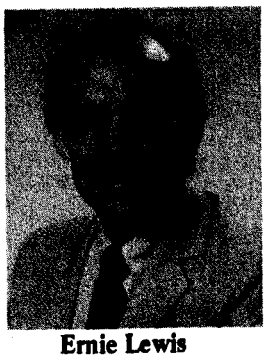
FALSE ALIBI AS EVIDENCE OF GUILT

Although admitting that the case presented a very close issue, in Bronston v. Rees, 14 SCR 20 (October 4, 1985), the Sixth Circuit held that Bronston's conviction was supported by substantial evidence and affirmed. The only evidence presented at trial concerning Bronston's alleged involvement in the charged offense was 1) that he and the two co-defendants had left the home of one of them 1 1/2 to 2 hours before the offense occurred, 2) that he went back to the co-defendant's house the next day to tell him the other co-defendant had been arrested and 3) that Bronston testified he had not been with his co-defendants at all on the night of the offense, a claim that was convincingly refuted. The Court found that Bronston's presence with the co-defendants before the offense raised a rational inference that he was with them when the crime was committed, although this evidence alone was not sufficient to establish guilt. That Bronston went back to one co-defendant's house the next day to advise him of their friend's arrest was as indicative of innocence as guilt according to the Court. However, the fact that Bronston offered false alibi testimony could be used by the jury to strengthen the other permissible inference of guilt, and together they constituted substantial evidence of guilt.

DONNA L. BOYCE

Plain View

Search and Seizure Law and Comment



Ernie Lewis

I have always suffered from near-sightedness both as a physical condition and as a professional inability to learn the lessons of history as it applies to jurisprudence. I am one of the those lawyers who thinks that until the Warren Court, no one in any of the states had any rights. Among those rights, I assumed, regularly denied citizens was the right to be free from unreasonable searches and seizures. This has typically led me to overestimate the effect of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) on the rights of the citizens of Kentucky. Conversely, this has also led me to assume that the radical shift in attitude by the Berger Court toward the Fourth Amendment has had and will have a greater impact than perhaps may be the case.

Former KBA president and Madison County sage Charles Coy has on a number of occasions told me that one of the biggest mistakes Kentucky defense lawyers make is in failing to use the state constitution to buttress their search and seizure claims. He has told me that before the Warren Court, Kentucky had many appellate cases which at least equalled or bettered the case law of the Warren Court.

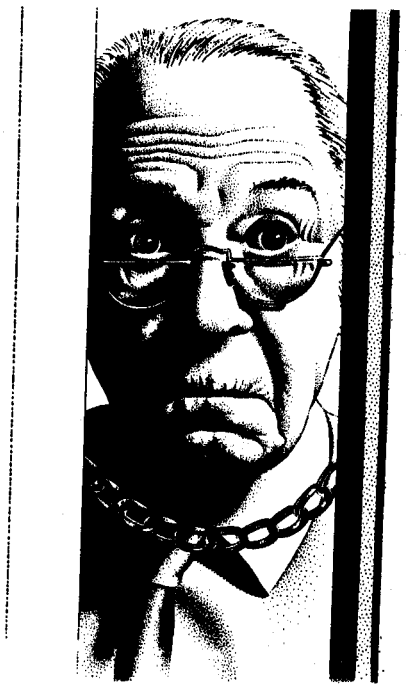
I decided to take him up on that and spent one recent rainy Saturday afternoon leafing through the Kentucky Digest to see if in fact there were any cases of note in this area of the law pre-dating the Warren court. I was pleasantly surprised. What I found was a number of good search and seizure cases, and more importantly, an attitude by the pre-1960 Kentucky Court of Appeals cherishing the rights that we have under Section 10 of the Kentucky Constitution.

One such case is the case of **Benge v. Commonwealth**, Ky., 321 S.W.2d 247 (1959). There, police officers serving a bench warrant had not only arrested the defendant with a warrant but also searched the premises without one. A number of years earlier the United States Supreme Court in United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950) had held that evidence seized under these circumstances were admissible. The Kentucky Court of Appeals on the other hand held that such evidence would not be admitted in the Kentucky courts. "It is our view that every pertinent provision of the Fourth Amendment to the Federal Constitution was bypassed when each search and the results thereof were stamped by those cases with validity," remarking on the decision in Rabinowitz. The Court observes that Section 10 of the Kentucky Constitution does not differ a great deal from the Fourth Amendment to the United State Constitution. However, it should make the Kentucky defense lawyer proud to note the Court's allegiance to Section 10 and its rejection at that time of what was to become later a temptation the United States Supreme Court could not resist when it established the good faith exception in United States v. Leon, 468 U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The Court said "in forbidding unreasonable searches and seizures, Section 10 of the Constitution of Kentucky made certain procedural requirements

requirements indispensable for lawful searches and seizures, as has been pointed out. **It did not mean to substitute the good intentions of the police for judicial authorization except in narrowly confined situations. History, both before and after the adoption of the Fourth Amendment upon which Section 10 of Kentucky's Constitution is based, has shown good police intentions to be inadequate safeguards for certain fundamental rights of man."** 321 S.W.2d at 250 (Emphasis added).

When faced with a good faith pleading by a prosecutor counsel should use the Benge case to argue that our tradition rejects that policy argument, stressing instead the importance of compliance with Section 10 procedure.

This same attitude is demonstrated in **Byrd et.al. v. Commonwealth, Ky., 261 S.W.2d 437 (1953).** The language used to express the opinion in Byrd is really more important than the facts. One cannot even imagine the present Court's viewing Section 10 in the following manner: "...the rules of law pertaining to search warrants are of more than ordinary strictness. Courts never regard lightly the extraordinary and unusual procedure authorized by search warrants and are evermindful of the constitutional guarantee to citizens to be free from unreasonable search and seizure. If it were not so, officers in their zeal to enforce the criminal laws... would not regard the constitutional safeguard as seriously as the framers of the Constitution of Kentucky and the Constitution of the United States intended." 261 S.W.2d at 438. There are many other interesting cases similar to the above ones cited. A couple of examples will demonstrates my point. In **Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920),** the Court held that despite the lawful arrest of an individual, it was a violation of Section 10 to search that person's bags without a warrant. **Simmons v. Commonwealth, 203 Ky. 621, 262 S.W. 972 (1924),** held that an officer who legally was knocking on the door in order to find the source of a noise disturbance, and who thereupon viewed contraband when the resident opened that door could not then seize that contraband without a warrant.



These cases demonstrate the wisdom of Mr. Coy's look backwards. I would suggest that any attorney with a search and seizure issue in one of their cases would be doing their client a great service to not only cite the Kentucky Constitution's Section 10 in their pleadings, but to also use a rainy Saturday afternoon to look back for a wealth of constitutional jurisprudence. It is up to us to become educated on the old search and seizure law of our Commonwealth. More importantly, it is up to us to educate the Court of Appeals and the Supreme Court of Kentucky who can be expected to have forgotten the old search and seizure law just as much as Kentucky lawyers have relegated those cases to forgotten history.

Just such a resurrection or at least the beginning of resurrection of ancient case law has occurred in Vermont. There, the Vermont Supreme Court in **State v. Jewett, 37 Cr.L. 2409 (Vt. 1985)**, implores the state's bar to begin to utilize the state's constitutional provisions on search and seizure. The Court noted that since 1970 over 250 cases across the country have interpreted state constitutional provisions as broader than that provided by the United States Constitution. The Court urged the lawyers of the bar of Vermont to rediscover the old cases, to find legislative history, to resurrect old arguments. They criticized the tendency that we all have of immediately going to the Fourth Amendment when analyzed search and seizure questions, saying "all too often legal argument consists of a litany of federal buzzwords memorized like baseball cards." Ouch. The Court goes on to state that "to protect his/her client, it is the duty of the advocate to raise state constitutional issues where appropriate, at the trial level, and to diligently develop and plausibly maintain them on appeal."

One would doubt whether our appellate courts will be issuing such a clarion call to the state's bar to begin to resurrect our rich Section 10 heritage in cases before them. We cannot expect them to resurrect that heritage on their own. Rather, it is up to us to begin to place before them cases, facts and issues which will make it possible to once again preserve our rights against unreasonable searches and seizures in this Commonwealth.

The Short View

1) The Court of Appeals of Kentucky has recently issued a significant opinion in the search and seizure arena. Unfortunately, the decision is unpublished, despite the fact that it apparently is one of the first times that the appellate courts in Kentucky have considered the good faith exception under United States v. Leon, 468 U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In **Maddox v. Commonwealth, unpublished (Oct. 10, 1985)**, the Court considered and rejected the good faith exception to the warrant requirement. In this case, a Kentucky State Police Officer with nine years of experience used a form affidavit with which to apply for a search warrant. In that affidavit, he simply stated that there was probable cause to believe that the property he wanted to seize had been "used as the means of committing a crime." Armed with that warrant, the Kentucky State Police searched and seized scales, paraphernalia, marijuana, and other incriminating matters. The Court reviewed the warrant, which parroted the affidavit and allowed for the seizure of "any and all personal property," and held that it was a bad warrant due to there being insufficient particularity, resembling a general warrant.

After holding that the warrant was a violation of Section 10 of the Kentucky Constitution and the Fourth Amendment, the Court considered the Commonwealth's position that the evidence still could be admissible due to the fact that the Kentucky State Police officer had seized the evidence in good faith, citing Massachusetts v. Sheppard, 468 U.S. ___, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). The Court of Appeals distinguished the Sheppard case, saying that in Sheppard the fault was with the magistrate, and thus suppressing the evidence would have no deterrent effect on the police. Here the Court noted that the fault was with the trooper himself. "An experienced police officer should have known that a warrant issued on such an affidavit was invalid, and there-

fore, his conduct was not 'objectively reasonable' as was the officer's conduct in Sheppard." Page 5, Master Slip Opinion.

2) The Sixth Circuit has also delivered a Fourth Amendment opinion in **United States v. Lambert, 14 6th SCR 16 (Vt. 8-16, 1985).** There, the Court in a celebrated Kentucky case looked at the situation where Jimmy Lambert's housekeeper saw illegal drug activities and decided to inform the FBI of that fact. In doing so, she took particular contraband to the FBI to help prove her point. A grateful FBI paid her for her information. Based upon that information, the FBI secured a warrant, searched Lambert's house and seized a great deal of evidence.

The Court held, following Lambert's guilty plea, that the housekeeper was a private person, and this was a private search. The Court examined the issue of whether she was acting as an agent of the police. They held that in order for her to be an agent of the police, it had to be shown that the police had instigated, encouraged or participated in the search and that the individual was acting with the intent to assist the police. The Court held that in the instant case, all of the instigation had been by the housekeeper herself and thus the state had done nothing to initiate the search.

3) **State v. Kimbro, 37 Cr.L. 2462 (Conn. 1985).** Yet, another state has rejected the probable cause standard of Illinois v. Gates, 462 U.S. 213 (1983). Connecticut had done so under their own state constitution, calling the Gates standard, "too amorphous." As all of the other states have done who have similarily rejected Gates, the Court retains the Aguilar/Spinelli test saying that this test "protects individual rights without disadvantaging law enforcement." The Connecticut Court was joined in its actions by the Alaska Supreme Court, which similarily rejected Gates in State v. Jones, 38 Cr.L. 2042 (Ala. 1985).

4) **Crittenden v. State, 38 Cr.L. 2035 (Ala. 1985).** The Court reviewed an affidavit which stated that the accused had had illegal sexual contact with the affiant's daughter. The Court, calling the affidavit barebones, stated that this was insufficient upon which to issue an arrest warrant. The Court, interestingly rejected the good faith exception claim by the state, saying that United States v. Leon did not apply to barebones affidavits.

5) **Commonwealth v. Borges, 37 Cr.L. 2464 (Mass. 1985)** and Commonwealth v. Bottari, 37 Cr.L. 2465 (Mass. 1985). In two cases, the Massachusetts Supreme Court has held that what the state called a stop and frisk was in reality an arrest, thereby requiring probable cause. In both cases, the Court held that because there was no probable cause, that the arrest was

illegal and evidence seized following the arrest could not be admitted into evidence. In Commonwealth v. Borges, the police required the defendant to take off his shoes in order to keep him from running. The Court held that this turned a stop into an arrest. The Court went on to analyze probable cause under the Aguilar/Spinelli test, holding that the state did not have probable cause. Similarly, in Commonwealth v. Bottari, the Court stated that blocking a person's car and approaching with guns drawn is an arrest rather than a stop. The Court concentrated on the degree of restraint in order to evaluate whether a stop was an arrest or merely a seizure.

6) **People v. Bertine, 38 Cr.L. 2041 (Col. 1985).** The Colorado Court considered an issue which appears to be ripe for United States Supreme Court review. In the Bertine case, a vehicle was seized and impounded lawfully. The police thereupon took a backpack from the car and searched in the backpack finding incriminating evidence. The Court looked at South Dakota v. Opperman, 428 U.S. 364 (1976), Arkansas v. Sanders, 442 U.S. 753 (1979), and United States v. Chadwick, 433 U.S. 1 (1977) in reaching its decision. The Court held that the backpack could not be searched without a warrant saying that this was much different from the situation in a jail where a more complete inventory search is necessary due to security considerations, distinguishing Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). Note that this is not a United States v. Carroll, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925) situation where there was probable cause to believe there was contraband in the car.

7) **In Re Bobby Raymond B.**, 2d Dist. 38 Cr.L. 2066 (Cal.Ct.App. 1985). In one of the first cases interpreting the New Jersey v. T.L.O., 469 U.S. ___, 83 L.Ed.2d 720, 105 S.Ct. 733 (1985) decision, the California Court of Appeals demonstrates how little suspicion there need be present in order to justify a search of a student in a school setting. In that case, the student was in a restroom without a pass and was hesitant upon questioning by the administrator. The Court held that this justified the subsequent search of the student.

8) **DeMassa v. Nunez, 38 Cr.L. 2002 (9th Cir. 1985).** The Court held that the client, apart from the attorney, has an expectation of privacy interest in his file.

9) **State v. Superior Court (Blake), 37 Cr.L. 2414 (Sept. 1985).** The Court here held that the HGN or "horizontal gaze nystagmus" field sobriety tests is of sufficient reliability to support a finding of probable cause. The reason this case is important is to demonstrate that counsel should be alert to the different field sobriety tests and their requisite reliability, due to the fact that if a test is not reliable, then "failure to pass" a field sobriety test cannot be used to constitute probable cause to arrest or to require a breathalyzer.

10) **United States v. Miller, 37 Cr.L. 2443 (9th Cir. 1985).** The Court held that while a warrantless seizure of a clear plastic bag falling out of a traveler's suitcase is lawful, the search of the bag without a warrant is not. The Court stated that plain view seizures must be confined to the seizure of the article, as opposed to a search of that article.

11) **Blackburn v. Snow, 37 Cr.L. 2445 (First Cir. 1985).** The Court held that a general policy of body cavity strip searches of all visitors without some individualized suspicion is violative of the Fourth Amendment.

Ernie Lewis

Trial Tips

For the Criminal Defense Attorney

GOVERNMENT ACTIONS AGAINST LAWYERS
"ALL THINGS CONSIDERED"
National Public Radio

NINA TOTENBERG: For more than a year now there have been quiet rumblings among this nation's criminal defense attorneys about what they see as mounting attacks on lawyers by the Department of Justice. They claim that they have been subjected to unwarranted raids on their offices, to invasive subpoenas of their files, and even indictments for giving normal, proper, legal advice. Some even warn of witch hunts and assaults on the citizen's ability to hire attorneys. The Justice Department dismisses these complaints charging that too many lawyers, especially drug lawyers, play fast and loose with the nation's most vicious criminals. They say the prosecutors are only balancing the score. We begin a two part series this evening with this story prepared by NPR's Frank Browning.

HARVEY SILVERGLATE: There has been a definite trend around the country to go after, for prosecutors, particularly federal prosecutors, to go after criminal defense lawyers and I say go after them, not because of any crimes they have committed, but they are going after criminal defense lawyers simply because these lawyers are defending unpopular people, in some cases very vigorously.

FRANK BROWNING: That is Harvey Silverglate, one of America's most prominent and most successful defense attorneys. A man who has long held the respect, if not the love, of state and federal prosecutors across the land. Silverglate is deeply distressed as are prominent attorneys we interviewed in San Francisco, Los Angeles, Atlanta, Boston, Philadelphia and Miami. In all these places, and more, they say, defense attorneys are fighting not only for their client's causes, but all too often, for their own right to represent citizens accused of crime. One case that has drawn attention from some twenty state and national lawyers' groups is the indictment of San Diego attorney, James Warner. A ten year practitioner known for successfully representing drug defendants.

JAMES WARNER: The government sent in an individual to talk to me on numerous occasions who was asking for legal advice. The individual was wired by the government. The individual had been given immunity by the government. The individual was sent to me with the express purpose of trying to set me up to say something which the government could then indict me on. I didn't say anything that was contrary to the Constitution, but the government went for it regardless on the indictment.

FRANK BROWNING: The indictment against Warner for obstruction of justice came after he met with witnesses. One of them, an undercover government informant, and advised them of their rights in testifying before the grand jury.

JAMES WARNER: I advised certain people to take the Fifth Amendment. They had a right not to incriminate themselves and when that information got back to the government, I was indicted for it.

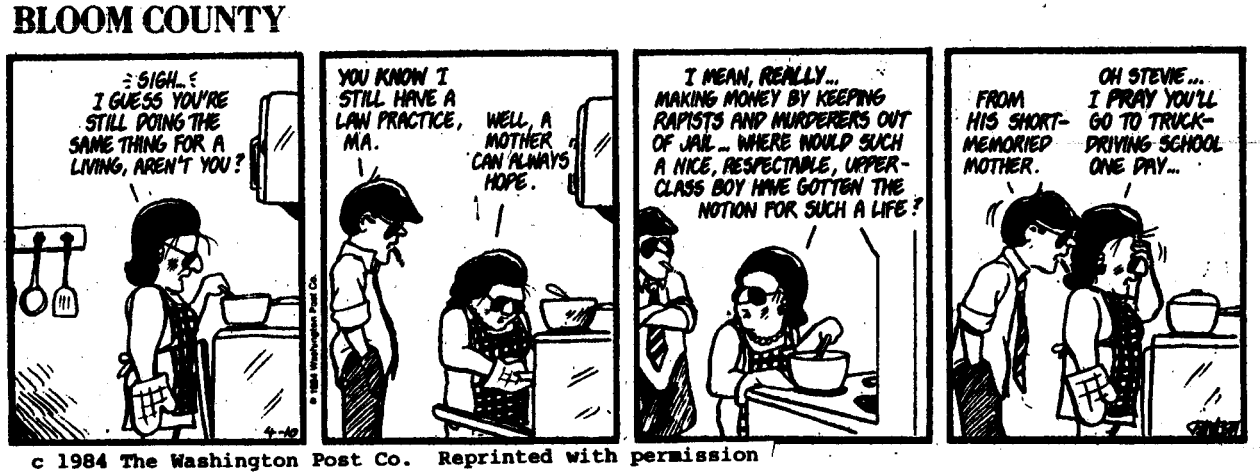
PROSECUTOR EDWARD WINER: I suppose it's standard for a defense attorney to advise his client to assert the fifth amendment privilege. It's not standard, at least I don't know about defense attorneys who do not represent individuals who are in fact represented by other lawyers, the statutes and the case law with regard to these statutes say that a defense attorney who, with corrupt motive and corrupt intent, advises someone to assert their fifth amendment privilege against self-incrimination, can be found guilty of obstruction of justice.

FRANK BROWNING: Because the witnesses had not formally retained Warner, and because another of Warner's clients was under investigation, the government argues that he had no right to advise witnesses of their legal and constitutional rights. Warner claims the government charged him out of frustration with its failure to convict actual criminal defendants. Defense attorneys in San Diego are especially upset these days and not just about Jim Warner. More than twenty lawyers have been indicted in the last four years, which is more than had even been charged in the previous two decades.

U.S. Attorney Peter Nunius says those prosecutions are not the result of government targeting. More than anything, he says, they are the result of greed in the illegal drug industry.

PETER NUNIUS: There is so much money to be made in the narcotics business, overwhelming numbers, more money than anybody ever dreamed of, I guess, that handling the money and figuring out how to hide it, what to do with it, how to spend it without being caught, becomes a problem. Therefore, more and more professional people have been enlisted in the cause, so to speak, to help narcotics dealers to launder money.

FRANK BROWNING: It is the federal government's honest determination to track the money trail of big time drug rings that has both won praise from the public and raised constitutional questions over prosecutorial behavior. For example, Boston lawyer, Harvey Silverglate, discovered last year in one such case that a witness who participated in a defense strategy meeting was really an undercover government informant. The informant justified going into the meeting on the grounds that money laundering would be discussed. Although the information he provided to the drug enforcement administration did not affect the case, Silverglate regards the incident as a grave threat to the attorney/client privilege.



HARVEY SILVERGLATE: There is such a thing as the sixth amendment right to assistance of counsel that includes the confidentiality, protects the confidentiality of attorney/client meetings. If the government starts sending spies in to attorney/client meetings, then there is no sixth amendment left, there is no right to counsel left. Could you imagine what would happen to me if I had sent a spy to sit in on meetings between him and the drug enforcement people plotting their case? I'd be indicted for obstruction of justice. Can you give me one good reason why the reverse shouldn't apply?

FRANK BROWNING: Government efforts to track drug money have led to another tactic that has brought cries of outrage from defense attorneys. That is the subpoenaing of lawyers' financial records. Last year, Silverglate's partner, Nancy Gertner, was subpoenaed by a federal grand jury in New Hampshire to appear and supply all financial records concerning a client she was, at that moment, defending on drug charges in state court. Similar federal subpoenas were sent to four other lawyers defending clients in the case.

NANCY GERTNER: They subpoenaed me before a grand jury presumably to talk about what the source of my fees were and the amount of my fees.

FRANK BROWNING: Prosecution reasoning in such subpoenas is that drug operators often offer legal representation as a fringe benefit to their employees, and, therefore, such legal services are actually part of the ongoing criminal conspiracy. By identifying who pays the lawyer, the government can, in the process, learn who higher level members of the conspiracy are and bring indictments against them. Again, attorney Nancy Gertner.

NANCY GERTNER: The net effect of that is to put a lawyer before a confidential body and ask questions which then can't be disclosed and fundamentally break apart the lawyer/client relationship. That's the first result of it. The second result is that having become a witness in the case, which I plainly would be, I can no longer function as his lawyer. And that means that the government, by targeting who they are going to subpoena, can pick who will ultimately be trial counsel.

FRANK BROWNING: The question of how far the government may go in subpoenaing an attorney's files is one of the most sensitive areas in American law. Nothing is more sacrosanct historically than the privacy of the citizen's relationship with a lawyer. Yet the government now argues that information about financial agreements between lawyer and client are not privileged, even if evidence gained from them may lead to further indictments. Harvard law professor, Charles Nessan, has paid particular attention to the issue and has advised Gertner on her subpoena.

CHARLES NESSAN: The thought that motivates the prosecutors is the basic prosecutorial strategy of "follow the money." So their idea is one of the people who get money as the result of a criminal enterprise is the criminal defense lawyer and if we can track down where the criminal defense lawyer is getting his money from, maybe we can learn something about the organization. It's a perfectly understandable strategy if you are not terribly concerned with how people go about getting defended.

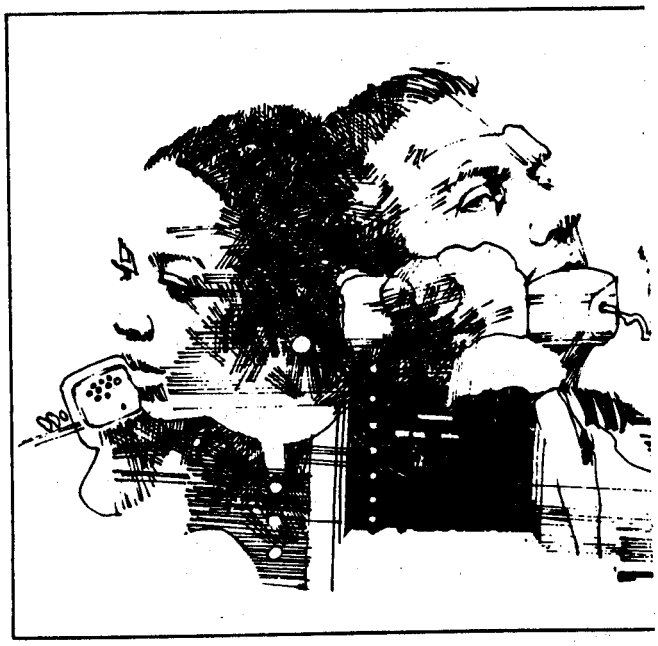
RUDOLPH JULIANTE: From my interpretation of the Constitution, I rely not on law professors, but on judges.

FRANK BROWNING: That is Rudolph Juliante, United States Attorney for

the Southern District of New York. As associate attorney general during the first two years of the Reagan administration, he pressed hard for tougher drug and organized crime prosecutions. He dismisses the concerns of lawyers like Nessan and Gertner as the complaints of the self-interested.

RUDOLPH JULIANTE: Judges have ruled on the sixth amendment from time immemorial that it protects communications with the lawyer, not financial dealings so that it is perfectly proper for the government to inquire as to the amount of fees that people pay, and the money transactions that go on between a lawyer and a client or between a client and a lawyer. That is not privileged; it has never been privileged, and a lot of these so called professors that expound on this subject, yes, they teach, but their real income comes from lending themselves out as hired guns for people that have been accused or convicted of crimes.

FRANK BROWNING: In fact, judges are highly divided on the matter of subpoenaing lawyers' financial files. U.S. District Judge, Martin Lockland, rebukes the government for going after Gertner and other lawyers in the New Hampshire case and accused the government of direct harassment. Use of such subpoenas he scolded, would not merely be chilling, but would have an arctic affect on the lawyer's ability to represent their clients, and would have left them bereft of constitutional safeguards. According to Allan Ellis of the National Association of Criminal Defense Lawyers, there has been an explosion in what he calls active government harassment of defense lawyers, up from 5 recorded incidents in 1982 to more than 50 in 1983. Closely allied with the use of subpoenas are government motions to have lawyers disqualified from representing their clients. Prosecutors have argued increasingly in recent years that court should not permit attorneys to represent more than one client in a case, thereby avoiding possible conflicts of interest between the clients. But Ellis claims there is another motive in the government strategy.



ALLAN ELLIS: To get the good attorneys off the cases. It's kind of akin to an opposing coach requiring head coach of the Philadelphia 76ers not to use Moses Malone on a case. The government is, in effect, picking and choosing who they're going all out to defend people accused of crime in this country.

FRANK BROWNING: Taken all together, Ellis warns that these measures will have a far greater impact than simply hobbling relations between drug dealers and rich lawyers. That, in fact, they disarm the citizen before the government.

ALLAN ELLIS: If you are going to go after the attorney and turn them into a witness against his client, you are going to destroy the attorney/client relationship. But it's not just crim-

inals who are going to be fearful of confiding in counsel; it's everybody who's not going to want to speak to their attorney and not want to divulge secrets to the attorney for fear that the attorney is going to be subpoenaed at some time and ask what did your client tell you.

FRANK BROWNING: All of which prosecutors say is simply defense hysteria. If a U.S. attorney moves to have a lawyer disqualified or subpoenaed or indicted, it is only done on the merits of each case. But in interviews with NPR across the country, Justice Department officials did acknowledge that lawyers are being watched far more closely than in the past. Knowledgeable congressional staff members also say there began to be a change in Justice Department's behavior in the early 80's. Specifically after the fall of 1982 when President Reagan announced his campaign against drug dealers and organized crime. The staffers say that, then Deputy Attorney General, Rudolph Juliante, told them that the government would intensify its campaign by going after bankers, accountants and lawyers.

RUDOLPH JULIANTE: That's absolutely true and I think whenever you say anything or try to do anything in government, there are always a large group of skeptics who can find 50 reasons why it can't work; won't work; or it's going to break and fall down. In fact, this is one of those programs, the Organized Crime Program, that has worked dramatically better than I even thought it would when we first initiated it. The numbers of people indicted at the highest levels of organized crime nationwide exceeds any time in our history.

FRANK BROWNING: And that, Juliante says, is the only true measure of the government's actions. Lawyers who have nothing to hide, have nothing to fear. At a time when public anxiety over crime seems to encourage prosecutors to use whatever tools they need, the cries and alarms of the criminal defense bar have found little support.

I'm Frank Browning reporting.

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Overworked P.D.s Urged to Decline New Cases

The Committee on Professional Ethics for the Wisconsin State Bar has recommended that a staff attorney employed by a state public defenders office should decline for ethical reasons new legal matters when his or her workload makes it impossible to adequately prepare for cases or to represent clients competently. Lawyers were advised to continue representation in pending matters only to the extent that the duty of competent non-neglectful representation can be fulfilled. (NLADA Cornerstone, March /April (1985, p. 2)

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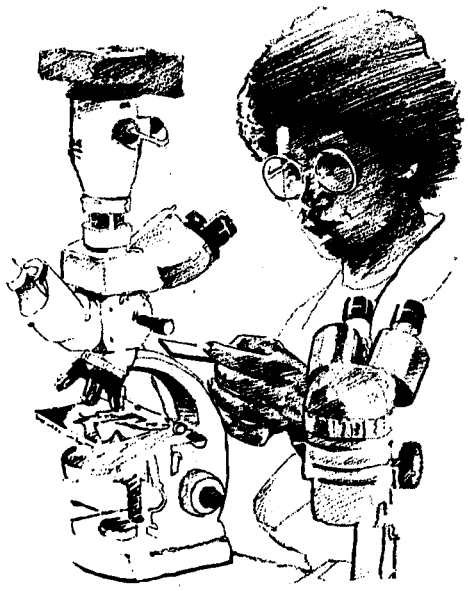
Furthermore, treatment of poor criminals is different from that of the well-to-do. The most egalitarian sentencing judge is likely to find that the affluent are more promising candidates for probation if only because they have the needed friends and family support. Some judges openly refuse to send genteel defendants to prisons full of dangerous, violent inmates, as if the poor are not also victimized.

JOHN P. MacKENZIE

Forensic Science



Editor's Note: *We are delighted to begin a column in each issue of The Advocate on forensic science. If you would like to see particular topics covered please let us know. Thanks to Jack Benton and Pat Donley for this new column.*

Shotgun Patterning Relative To Distance Determinations

Frequently it becomes necessary for a firearms examiner to determine the distance from which the muzzle of a shotgun was discharged into an object and/or person. Based on the spread or size of the resultant pellet pattern, the characteristics of the entry hole and a consideration of the absence or presence of gunpowder-produced particulate matter, as mentioned above. This testing procedure is a combination of gross visual inspections and/or chemical testing. As with all subjective and comparative examinations, however, the attorney faced with these results should require that all such test patterns be made available to him so he can confirm or deny the conclusions drawn from them.

One footnote to this topic that should be addressed is the myth that shotguns create a wall of pellets that does not even necessitate aiming. Like all projectiles, pellets tend to travel in a straight line unless interrupted by gravity, friction or other interferences. As a result, pellet groupings or patterns are much tighter than the average lay person would suspect, even for those shotshells fired from the "sawed-off" versions. Most modern shotshells employ shot protectors which influence the pellet pattern more than the length of the shotgun barrel. In essence the barrel serves only as a launching tube for the pellets encapsulated in the shot protector. Therefore the barrel length and choke designation may have some influence on resultant shotshell patterns; however, the shot protector by far plays the most important role in pellet spread.

Jack Benton and Pat H. Donley

Trial Tip

THE CASE FOR A THERAPEUTIC INTERVIEW IN SITUATIONS OF ALLEGED SEXUAL MOLESTATION

There is a right way and a wrong way to interview children in case of alleged molestation. The right way can result in more information and helps children. The wrong way gives questionable information and can hurt children.

Unfortunately, ways in which children are currently being interviewed in these cases are damaging to them because, quite simply, they aren't being given the opportunity to tell the truth. Typically, it is the interviewer's needs which are taken care of and not the child's. The story that is told is too often the one the interviewer wants to hear and not the actual one.

The purpose of the interview is, after all, investigatory. Therefore, a number of questions need to be asked. However, it can be much more fruitful to ask these questions in ways that don't lead the child to feel that certain sorts of answers are expected. This is the difference between getting accurate information and not getting it.

Typically, the child is interviewed by various agency people, sometimes repeatedly. This might include police, prosecutors, children's service workers, sometimes a grand jury. These interviews are narrow in focus and they are based on the assumption that abuse did occur and that "children don't lie about this sort of thing."

The child is suddenly receiving rapt attention when it says or demonstrates certain things (e.g. pointing at the genital plumbing on the "anatomically correct" dolls or saying things such as "he touched me here... put his mouth on me... made me touch him, etc."). Often this scene is repeated.

Interviewers--verbally and nonverbally through facial expressions and the manner in which they respond to the child--pay more attention to these sorts of communications than to anything else a child might be trying to express. (I know of cases where the interview has congratulated the child for making allegations and became perturbed with it didn't.)

In this setting (which is "high pressure" to the child, especially a young one), a strongly biased interviewer can shape a child's responses by a method called "successive approximation." Simply put, this means reinforcing or rewarding the child (through smiles, hugs, or statements like "good girl... don't you feel better now... that's the way") for statements leading up to and finally including those the interviewer wants to hear.

This sort of attention is often quite new for a child, and it is a most

powerful reinforcer. That is, it greatly increases the likelihood that the child will say the same things and demonstrate the same things again. And, the more a child repeats something (and don't we all suffer confusion about one or another story we've told ourselves many times over the years?), the more it becomes believable and the more believable the child becomes on the witness stand.

Thus, two powerful variables which affect learning - reinforcement and repetition - can be allowed to seriously shape a child's memory. (We haven't touched on instances in which a child knowingly lies. This can happen when for its own protection the child assumes the attitude of one parent who is angry with another; or when it has been coerced; or even when it is angry over some real or imagined harm the defendant has done).

A therapeutic interview, on the other hand, is an unbiased attempt to find out what story a child might have to tell, or what conflicts it might need to express and resolve. The setting is unstructured and open-ended to encourage a free narrative. It is encouraged to feel safe and comfortable enough so that it can, if need be, spontaneously act out with dolls, drawings, stuffed animals, or just "play acting," anything it can't or doesn't want to put into words.

Stress distorts and blocks memory. A child who is anxious depends, to a greater degree than one who isn't, on the interviewer to "fill in the blanks" and provide some way to allay this anxiety. A child who is not anxious, but comfortable, is not only able to be more accurate in remembering things but is much less likely to be conditioned by a zealous investigator.

General Comments and Recommendations

So how should we examine children in cases of alleged sexual abuse?

There is a myth propagated by "abuse detectors" that "children don't lie about these things." Yet there is no real evidence to back this up. On the contrary, Jean Piaget in his monumental work on "The Moral Development of Children" showed that, until the time they are five or six years old, a "lie" to a child is whatever an adult says it is. This notwithstanding the often clumsy attempts by prosecutors and child service workers to establish that the child knows the difference between the truth and falsehood.

Additionally, children's responses can be conditioned by what the complaining parent and/or the investigator believes, and what their own responses are, intentional and unintentional, to what the child says or does. And, as previously mentioned, the reinforcement the child typically gets in these interrogations is a powerful factor in shaping its responses and imbedding them in its conscious mind.

These considerations make it basic, then, that the child be examined by an experienced, unbiased professional.

Their interviews should be audio or video taped in their entirety.

Diagnoses and recommendations should rest on clear cut, well-reasoned data, and not on anecdotal material or arcane psychodynamic formulations.

During these interviews one should establish the extent to which the child is in touch with reality; to what extent does it know the difference between "pretend" and "real"?

Does the child seem "programmed" and give rote responses or can it go from general to specific examples?

The setting should be open and non-pressured. Children should be encouraged to express themselves and tell whatever story they might have through use of toys, drawings, stuffed animals, etc. with a minimum of direction by the interviewer. When left to their own devices in a relaxed and even playful setting, children who are stressed (by having been abused, or by having adults incorrectly act as if they were abused) will sometimes spontaneously act out their experiences. It is up to the therapist to find out what this means.

The therapist-investigator should obtain as much information about the child and the alleged incident as possible. This includes police report, children's service reports, medical and school records, and, if possible, observation of the child with the alleged offender.

These evaluators should be "... exquisitely aware of their own biases and presumptions."[1] Sadly enough, most of the "abuse professionals" are not in honest touch with their real motives and are "masquerading tyranny as charity."[2]

-William F. McIver, Ph.D.
Clinical Psychologist
By Permission of the Oregon Criminal Defense Lawyers Association

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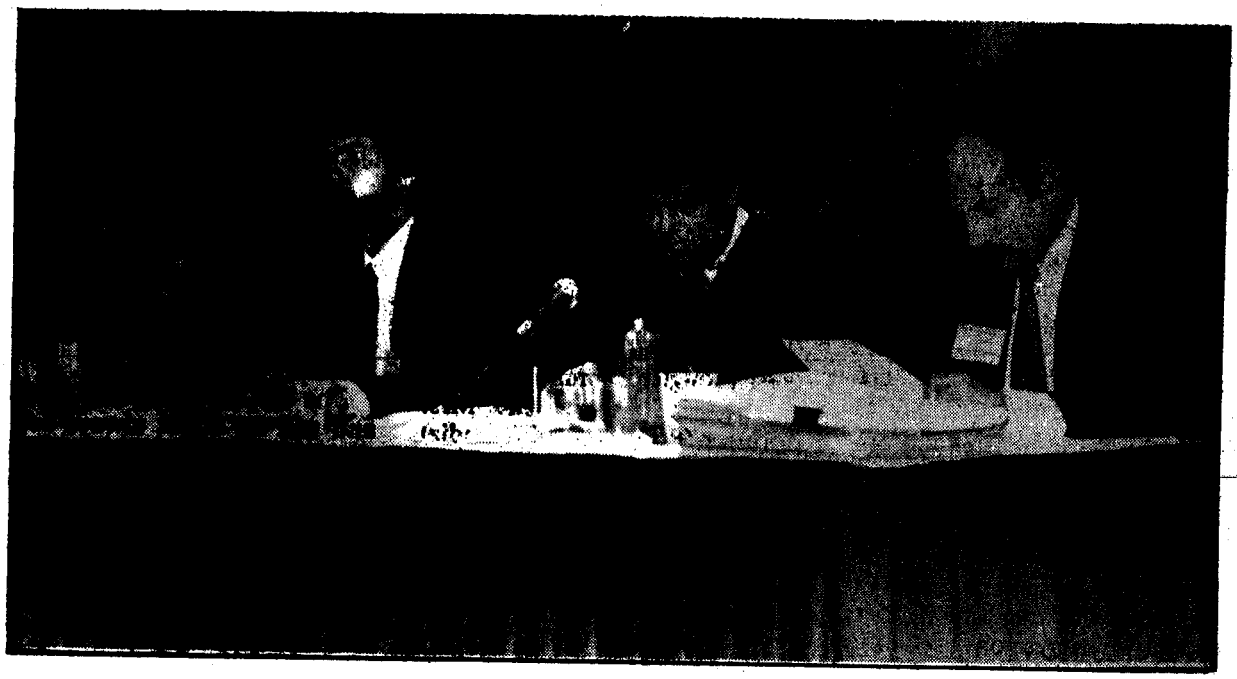
[1]Schuman, Daniel C., M.D. "False Accusations of Physical and Sexual Abuse," presented to the Annual Conference of the American Academy of Psychiatry and the Law, Nassau, Bahama. October 26, 1984.

[2]Whitefield, Donna. "Tyranny Masquerades as Charity: Who are the Real Child Abusers? Fidelity, February 1985.



Kevin McNally, Assistant Public Advocate, spoke at the 1985 Circuit Judges Judicial College. He is shown here with Assistant Attorney General, Dave Smith (to his left), Circuit Judge, Edmund Pete Karen, and Assistant Attorney General, Paul W. Richwalsky, Jr.

Cases of Note... ...in Brief

FUNDS/PRIVATE COUNSEL
Arnold v. Higa
600 P.2d 1383 (Hawaii 1979)

The indigent defendant was represented by private counsel retained by the accused's parents. His retained counsel asked the trial court to provide funds to employ an investigator to assist in the presentation of the case. The trial court refused based on the fact that the defendant was represented by retained counsel.

The Supreme Court of Hawaii held that the trial court's conclusion that the defendant was ineligible for funds solely because he was represented by private counsel was improper. The Court remanded the case for an ex parte hearing to allow the defense a particularized showing of why the requested services were essential to an adequate defense and to demonstrate the defendant's indigency.

Recognizing the "magnitude" of this error, the Court held that it was appropriate to be litigated by an extraordinary writ.

POLYGRAPH ADMISSIONS
Hale v. Commonwealth
(Ky.App., October 11, 1985)

A word to the wise.... In this unpublished opinion, the Court of Appeals decided that it was proper to allow Sergeant Gary Godby, a polygraph examiner with the Kentucky State Police, to testify to a statement made to him by the defendant after the examiner administered two polygraphs and told the defendant the results indicated he had been deceptive.

"The reason for excluding from evidence any reference to polygraph tests is the highly prejudicial effect such reference might have on the jury. When all references to polygraphs are deleted, the offending prejudice is removed. In this case, Hale voluntarily presented himself for the examination and prior thereto he was fully advised of his constitutional rights. He must have been aware that the examiner would interpret the results either to indicate that he was being deceptive or that he was being truthful. Upon being informed of the unfavorable results, Hale might have expressed surprise, indignation, or disbelief or he might have kept quiet. Instead, he chose to make a statement. The trial court properly admitted that statement in evidence."

By this ruling, it is clear that the Court had no desire to encourage defendants to subject themselves to state police polygraphs and interrogations.

EXPERT ON EYEWITNESS ID
State v. Chapple
660 P.2d 1208 (Ariz. 1983)

Identification was the critical issue in this case. Defense counsel proffered the testimony of an expert on eyewitness identification to rebut the prosecution's evidence. The trial court excluded the evidence. The Arizona Supreme Court reversed after looking at four criteria for admissibility: 1) qualified expert; 2) proper subject; 3) conformity to a generally accepted explanatory theory; and 4) probative value compared to prejudicial effect.

The Court determined that it cannot be assumed "that the average juror would be aware of the variables concerning identification and memory

about which" the expert was qualified to testify.

"For instance, while most jurors would no doubt realize that memory dims as time passes, Dr. Loftus presented data from experiments which showed that the **'forgetting curve'** is not uniform. Forgetting occurs very rapidly and then tends to level out; immediate identification is much more trustworthy than long-delayed identification."

"Another variable in the case is the **effect of stress upon perception.** Dr. Loftus indicated that research shows that most laymen believe that stressful events cause people to remember 'better' so that what is seen in periods of stress is more accurately related later. However, experimental evidence indicates that stress causes inaccuracy of perception with subsequent distortion of recall."

"Dr. Loftus would also have testified about the problems of **'unconscious transfer,'** a phenomenon which occurs when the witness confuses a person seen in one situation with a person seen in a different situation. Dr. Loftus would have pointed out that a witness who takes part in a photo identification session without identifying any of the photographs and who then later sees a photograph of one of those persons may relate his or her familiarity with the picture to the crime rather than to the previous identification session."

"Another variable **involves assimilation of post-event information.** Experimental evidence, shown by Dr. Loftus, confirms that witnesses frequently incorporate into their identifications inaccurate information gained subsequent to the event and confused with the event."

"The last variable in this case concerns the question of **confidence and its relationship to accuracy.** Dr. Loftus' testimony and some experimental data indicate that there is no relationship between the confidence which a witness has in his or her identification and the actual accuracy of that identification."

RECEIVING STOLEN PROPERTY
House v. Commonwealth
(Ky.App., October 25, 1985)

In this unpublished case, the Court of Appeals held that in receiving stolen property cases that the Commonwealth must "negate any intent to restore the property to the owner." Disproof of the accused's intent to restore the property is thus an essential element of the offense on which the Commonwealth bears the burden.

Ed Monahan

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CITY WILL PAY FAMILY
TO SETTLE BRUTALITY SUIT

MILWAUKEE (AP) - The mayor has approved an out-of-court settlement under which the city will pay $600,000 to the family of a young man who died while being held by police for questioning about a rape he did not commit.

Mayor Henry Maier on Friday signed a resolution, approved earlier by the Common Council, settling a police brutality lawsuit brought by the parents of 22 year-old Ernest Lacy, who died on July 9, 1981.

Witnesses said that Lacy had been forced to the ground by members of the police Tactical Squad, while his handcuffed wrists were behind his back.

The agreement was approved by U.S. Magistrate Robert Bittner.

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.

* * *

REMEMBER TO FORGET

JUDGE: We'll admonish the Jury to disregard the question and answer, if you can remember it, which I don't imagine you do at this stage, but we'll go back and play it for you if you like.

* * *

WAIT! NOT ME, NOT ME! I'M THE LAWYER!

PROSECUTOR: Do you see in the courtroom today the man that you confronted in the hallway who had the bottle of liquor between his legs?

EYEWITNESS: Yes, sir.

PROSECUTOR: Where is he?

EYEWITNESS: That one on the far end.

PROSECUTOR: Okay, that one, you're pointing kind of in general; [the defense attorney] is indicating his client, is that him?

EYEWITNESS: That's him.

* * *

PUTTING IT ANOTHER WAY

JUDGE: Okay, I appreciate the frank and honest answers that you gave, Mrs. [Juror], and I can certainly understand why that could influence you in a close case and in a case of this importance people must be completely free of such influence as that, so we will have to dismiss you from this jury.

JUROR: In other words you've kicked me off.

* * *

INSUFFICIENT EVIDENCE? HELL, THAT'S A TECHNICALITY.

JUDGE: The whole thing...might be circumstantial in a lot of ways but, as I say, with his past record... In my mind, Mr. [Defense Lawyer], it was probably a planned thing and it would take a lot of evidence to get that out of my mind...

I'm not bound by a lot of the niceties, I suppose, that a jury is... If the truth was known, at one time or another he was in control of the car, **yet, of course, it wasn't proven...**

The boy knew that the car was stolen... **even though it probably hadn't been proven...**but by his past record and I mean, my goodness, here he is, promotion of contraband, he's tried to smuggle hacksaws into the jail, he's dealt in marijuana... **He's just a boil on the public that needs to be lanced...** [I find the defendant guilty.]

* * *

Thanks...and a tip o' the hat to Jay Barrett, Mike Wright, Lee Rowland, Donna Boyce and Larry Marshall.

KEVIN MCNALLY

ously violated restraining orders to harass his ex-wife. Apparently, the community was aware of the abuse.

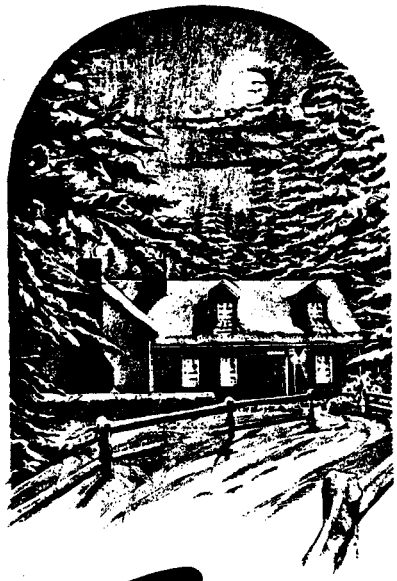
Bob Caummisar is active in the Lyons Club and Jaycees. He is on the Board of Appalachian Research and Defense Fund and the Carter County Public Library. His hobbies include photography, cooking and fishing.

Thanks Bob for your long-standing commitment to the rights of the poor.

* * * * * *

REAL LAWYERS AREN'T SEATED ON A PEDESTAL OF POPULARITY. THEY WERE ADMIRED, REVILED, FEARED, BUT NOT ALWAYS LIKED. REAL LAWYERS FIGHT HARD. THAT'S WHAT THEY ARE HIRED TO DO. THAT WAS TRUE OF ANDREW HAMILTON, JOHN ADAMS, ABRAHAM LINCOLN, CLARENCE DARROW...

Charles Morgan, Jr.



FROM THE EDITOR

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

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

Season's Greetings

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