THE ADVOCATE

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THE ADVOCATE FEATURES

Gail, Jesse, Kevin, Sean

Few people epitomize dedicated service to others as does Gail Robinson. For over 10 years she has fought with boundless zeal on behalf of indigents accused and convicted of crimes. She brings to every activity in her life a committed purpose.

Gail originates from Cincinnati, Ohio; grew up in Dalton, Georgia, and is a graduate of the University of Louisville Law School. Prior to her legal career she was a social worker with DHR and taught math at Louisville's inner-city Central High School. In both jobs she struggled to survive the meaningless bureaucracy and insure better education and social well-being for those with big needs. Typical of her values, she fought the Central High School administration over the inane rule of requiring teachers to prevent students from wearing hats in class. Instead of spending time on the

(Continued, See Robinson, P. 52)

Future Seminars

EXPERTS SEMINAR

On Thursday and Friday, April 3 and 4, 1986, the Department of Public Advocacy (DPA) will conduct a two day seminar on **Experts with an Emphasis on Mental Health Experts** at Natural Bridge State Park in Slade, Kentucky (about 1 hour east of Lexington off the Mountain Parkway).

The topics include the methodologies of psychiatrists and psychologists; DSM-III; psychological testing; family dynamics; obtaining experts for indigents; evidentiary issues; discovery; preparation of yourself, the defendant and the defense expert; direct of the defense expert; cross of the Commonwealth expert; and integrating the expert into the case. Larry Pozner from Denver, Colorado will be a featured presenter.

ANNUAL SEMINAR

DPA's Fourteenth Annual Public Defender Seminar will be held June 8, 9 and 10, 1986 at the Capital Plaza Hotel in Frankfort, Kentucky.

FURTHER INFORMATION

Further information will appear in separate mailings, or you can contact Ed Monahan at (502) 564-5258.

If you have suggestions about our training, please let us know.

THE ADVOCATE

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The Advocate welcomes correspondence on subject treated in its pages.

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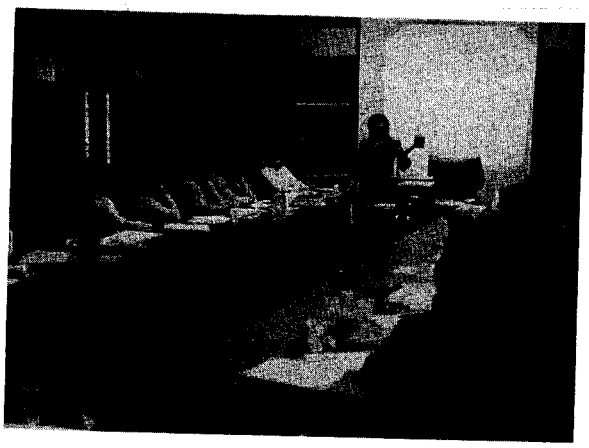
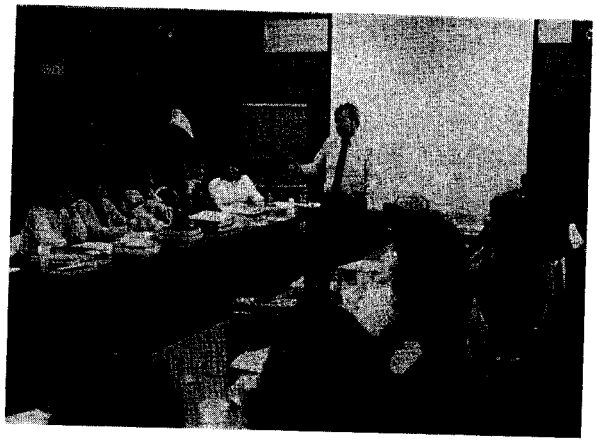
IN THIS ISSUE

TRAINING FOR LEGAL SECRETARIES AND CLERKS

Over 25 secretaries and clerks from public defender offices around the state met on December 5 and 6, 1985 for a seminar that included presentations on stress, using the law library, writing, organization and time management, and confidentiality.



KATHY POWER TALKS ABOUT WRITING



DOUG JONES ON STRESS

JAY BARRETT ON
CONFIDENTIALITY AND THE LAW LIBRARY

PAUL ISAACS, DEANNA NANNEY

MEESE REMARK DRAWS FIRE OF LEGAL SCHOLARS

WASHINGTON--Legal scholars and civil libertarians are reacting with bewilderment and outrage to a published statement by Attorney General Edwin Meese that criminal suspects are not innocent and therefore should not have the right to an attorney when the police question them.

Meese made the statement in an interview appearing in the current issue of U.S. News & World Report. It included this dialogue:

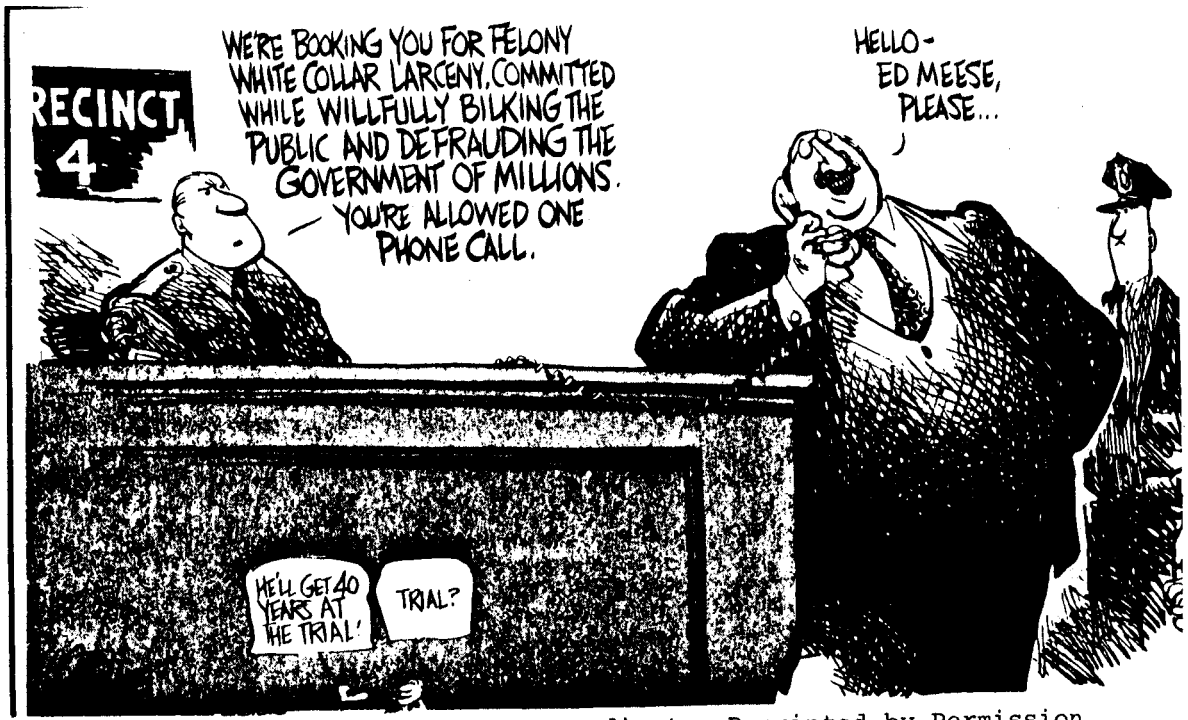
"Question: You criticize the Miranda ruling, which gives suspects the right to have a lawyer present before police questioning. Shouldn't people, who may be innocent, have such protection?

"Answer: Suspects who are innocent of a crime should. But the thing is, you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of a crime, then he is not a suspect."

Harvard law professor Laurence H. Tribe, an expert in constitutional law, said yesterday that Meese "obviously does not believe in the presumption of innocence....Mere accusation does not transform one into a criminal. Civilized society could not long survive if Mr. Meese's views became prevalent."

"It's dangerous to have the Attorney General spouting such nonsense," said Paul Hoeber, a professor of criminal law at the University of California's Boalt School of Law. "Obviously, many people are suspected who turn out to be innocent of a crime. The fact of suspicion is not the equivalent of guilt."

Arthur Spitzer, legal director of the American Civil Liberties Union office in Washington, said, "For an Attorney General of the United States to be speaking that way shows an unbelievable lack of understanding of the



Bill of Rights, and he should be ashamed of himself."

"Not everyone who is arrested is guilty. Innocent people are arrested every day, mostly by mistake and occasionally by frame-up. The Bill of Rights is meant to protect those innocent people who become suspects," Spitzer said.

Terry Eastland, the chief spokesman for Meese, said that U.S. News had permitted Meese to examine his answers before they were published. Eastland said Meese thought that the first part of his response to the Miranda question, though accurate, "was not very clear." Meese asked the magazine editors to omit it, but they declined, Eastland said.

Actually, he said, the Attorney General "believes that a person is innocent until proven guilty... What he's trying to say is that there are suspects who turn out to be criminals but that Miranda is used in a way as to release them... on a technicality."

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What we need in the United States is not division. What we need in the United States is not hatred. What we need in the United States is not violence or lawlessness, but love and wisdom and compassion toward one another, and feeling of justice toward those who still suffer within our country whether they be white or they be black. Let us dedicate ourselves to what the Greeks wrote so many years ago: To tame the savageness of man and make gentle the life of this world. Let us dedicate ourselves to that and say a prayer for our country and our people.

- ROBERT F. KENNEDY
Indianapolis, 1968

Drunk Driving Law

OLD LAW	NEW LAW
1st Offense • $100-$500 fine* • No jail time • License suspended 6 months* • No community service provision • $25 cost of school • If driving on license suspended for DUI, $12-$500 fine,* maximum of 6 months in jail*	**1st Offense** • $200-$500 fine* • 48 hours-30 days in jail* • 2-30 days community service in lieu of fine/jail if no injury • License suspended 6 months* (30 days if education program completed*) • $150 service fee* • If driving on license suspended for DUI, $250 fine,* 90 days in jail*
2nd Offense • $100-$500 fine* • 3 days-6 months in jail* • License suspended 12 months* • If driving on license suspended for DUI, $12-$500 fine,* maximum of 6 months in jail*	**2nd Offense** • $350-500 fine* • 7 days-6 months in jail* • License suspended 1 year* • $150 service fee* • If driving on license suspended for DUI, $500 fine,* 1 year in jail*
3rd Offense • $100-$500 fine* • 30 days-1 year in jail* • License suspended at least 2 years* • If driving on license suspended for DUI, $12-$500 fine,* maximum of 6 months in jail*	**3rd Offense** • $500-$1,000 fine* • 30 days-1 year in jail* • License suspended 2 years* • $150 service fee* • If driving on license suspended for DUI, $10,000 fine,* 1-5 years in jail*
* Can be probated	*Cannot be probated

TABLE BY MARK BETCHER

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PAROLE BOARD TO EXPAND

FRANKFORT - Citing a backlog of state Parole Board hearings. Gov. Martha Layne Collins has announced plans to add two members to the board and hire additional staff.

The move was recommended by state Corrections Cabinet officials, who pointed to a doubling in the felon inmate population - from 3,100 to 6,200 - since 1972.

In an executive order, Gov. Collins increased the board from five to seven members. The new members, who will be full-time state employees, have not been named.

West's Review

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

Linda K. West

Kentucky Court of Appeals

PHOTOGRAPHS OF VICTIM
Kennedy v. Commonwealth
32 K.L.S. 16 at 1 (November 1, 1985)

Kennedy provides a rare instance of more than passing attention to a claim that the jury was prejudiced by the introduction of photos of the victim.

The defendant admitted that he had struck the victim in the head with a large piece of wood. The Commonwealth argued that the autopsy pictures, showing the extent of the victim's skull fracture, were admissible to controvert the defendant's testimony that he held the wood in only one hand and struck a light blow. The defendant was ultimately convicted of reckless homicide and sentenced to three years imprisonment.

The Court of Appeals noted that "[h]ad the punishment meted out by the jury been more severe it would have added some weight to appellant's argument as to the prejudicial effect the introduction of the photographs and slides had upon the jury." Weighing the moderate sentence imposed against the argued relevance of the photos, the Court concluded that "we cannot say that the prejudicial effect of the introduction of the photographs and slides outweighed their evidentiary value."

DUI
Willis v. Commonwealth
32 K.L.S. 16 at 1 (November 1, 1985)

The defendant was convicted of DUI, third offense. The only evidence of the defendant's prior offenses were duly certified copies of Department of Transportation, Division of Driver Licensing, records. Certified copies of the prior judgments of conviction were not introduced.

The Court of Appeals held that this was insufficient evidence of prior convictions: "[w]e find it hard to understand how a simple notation of the date of a supposed conviction can suffice to prove the elements of a criminal charge...when no other evidence of prior convictions is offered or filed." The Court cited the holding of Garner v. Commonwealth, Ky., 645 S.W.2d 705 (1983) that Department of Corrections records may be introduced as proof of age and parole status in PFO proceedings but cannot be used to prove prior convictions.

CR 60.02(f) RELIEF
Wine v. Commonwealth
32 K.L.S. 17 at 1 (November 11, 1985)

The defendant filed a motion under CR 60.02(f), which permits the court to relieve a party from its final judgment for any "reason of an extraordinary nature justifying relief." The defendant sought a reduction of his sentence for the "extraordinary reason" that his incarceration was having an adverse effect on his family, especially his son.

The Court of Appeals affirmed the trial court's denial of the motion, citing the holding in Wilson v. Commonwealth, KY., 403 S.W.2d 710 (1966) that a "substantial miscarriage of justice" must be shown in order to warrant CR 60.02 relief. "Although the hardships on the appellant's family may be greater than the average, we simply fail to see how family hardships of any severity are so extraordinary that a 'substantial miscarriage of justice' will result and relief under CR 60.02(f) would be justified."

USE OF A MINOR IN A SEXUAL PERFORMANCE
Bach v. Commonwealth
32 K.L.S. 17 at 2 (November 22, 1985)

In this case the Court overturned the defendant's conviction of using a minor in a sexual performance. The defendant was convicted under KRS 531.300(4)(b) and (d) which require that the depiction be "obscene" or "in an obscene manner." The defendant contended that the term "obscene" must be construed in keeping with the view of "obscenity" found in Miller v. California, 413 U.S. 15 (1973). The Court of Appeals agreed.

The Miller Court did not define obscenity. However, it stated that "[u]nder the holdings announced today no one will be subject to prosecution for the sale or exposure of obscene materials unless those materials depict or describe patently offensive 'hard core' sexual conduct...." Id. at 27. The photographs taken by Bach were of a 13 year old girl posing in lingerie through which her breasts and pubic hair were at times visible. In deference to the above-quoted language in Miller, the Court of Appeals held that this "soft core" pornography was not "obscene" and thus could not subject Bach to criminal prosecution.

PROBATION REVOCATION/FINE/INDIGENCY
Mauk v. Commonwealth
32 K.L.S. 17 at 5 (December 6, 1985)

The Court of Appeals reversed the revocation of Mauk's probation. As a condition of her probation, Mauk was required to pay a fine and court costs. When Mauk failed to make the payment her probation was revoked despite her claim of indigency.

The Court of Appeals held that Bearden v. Georgia, 461 U.S. 660 (1983) was controlling. The Court held in Bearden that, before probation may be revoked because of a probationer's failure to pay a fine or make restitution, a determination must be made as to whether the failure to pay was willful or the result of indigency. If the failure results from indigency then "[o]nly if alternative measures are not adequate to meet the State's interest in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." The sentencing Court was required to make the inquiry mandated by Bearden before it revoked Mauk's probation.

PROBATION REVOCATION/RESTITUTION
Clayborn v. Commonwealth
32 K.L.S. 17 at 6 (December 13, 1985)

Like Mauk, supra, the issue in Clayborn was the circumstances under which a probationer may be imprisoned for failure to make required restitution.

The Court found numerous points of error in the revocation of Clayborn's probation. The trial court erred when it considered income received by Clayborn after June 26, 1984, although the failure to make restitution occurred prior to that date. The trial court also erred by not determining "whether appellant made bona fide efforts to pay..., or whether appellant was capable of paying..., or whether alternative forms of pun-

ishment would be adequate to meet the state's interest in punishment and deterrence...." See Bearden v. Georgia, supra. The Court of Appeals noted that KRS 533.030(3) provides for specific alternative punishments. Finally, the trial court erred by refusing to provide Clayborn an itemization of the victim's expenses. KRS 533.030(3) "limits restitution to the victim's actual out-of-pocket expenses which are paid by the victim, the Department For Human Resources, the crime victim compensation board, or other governmental entity." In the case before it, $22,000 of the victim's expenses were reimbursed by insurance. The Court observed that "if the victim's injuries were fully compensated by the $22,000 insurance payment, then he is not entitled to restitution." Neither was the insurer entitled to restitution since it "is not a reimbursable entity under the statute."

PSYCHIATRIC HISTORY OF WITNESS
Huber v. Commonwealth
32 K.L.S. 17 at 8 (December 13, 1985)

In this case the Court of Appeals reversed the defendant's burglary conviction because of trial court error in disallowing cross-examination of a principal Commonwealth witness regarding her history of psychiatric problems. The testimony was placed in the record by avowal, thereby preserving the issue.

The Court relied on Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979), which held that failing to allow an accused to challenge a witness' credibility by questioning his mental stability is reversible error.

DRUG PARAPHERNALIA
McKinney v. Commonwealth
32 K.L.S. 17 at 8 (December 13, 1985)

In this factually interesting case the Court of Appeals held that KRS 218A.500(3), which prohibits the possession of drug paraphernalia for sale, was unconstitutionally vague as applied to the defendant.

McKinney owned and operated a Bowling Green record store. He became concerned that some of the items in the store might qualify as drug paraphernalia and requested that the Commonwealth inspect the store's inventory. A police officer did so at the Commonwealth Attorney's direction and advised McKinney that none of the items were paraphernalia. Some months later, McKinney announced his candidacy for the Bowling Green City Commission. Shortly thereafter McKinney was charged with drug paraphernalia violations.

The Court of Appeals declined to hold KRS 218A.500(3) unconstitutionally vague on its face, while observing that "[t]he facts in this case demonstrate that Kentucky's drug paraphernalia statute is not as clear as one might think." However, the statute was unconstitutionally vague as applied to McKinney. This was manifest from the fact that ["a]ppellant's business activities were perfectly acceptable to enforcing officials during 1982, yet those very same activities qualified as criminal

conduct after he became politically active in 1983." The unfettered discretion allowed the police in defining the crime was impermissible.

JUSTIFICATION UNDER KRS 503.040
Poteete v. Commonwealth
32 K.L.S. 18 at ___
(December 20, 1985)

The Court reversed Poteete's conviction of promoting contraband because of the trial court's failure to instruct the jury on the defense of justification as set out in KRS 503.040(2)(a) and (b). Poteete testified that he purchased the contraband from another inmate with the intention of turning it over to prison authorities. In fact, Poteete informed authorities of the presence of the contraband - a "zip gun" - in the prison before he obtained it.

The Court of Appeals held that Poteete was entitled to an instruction to the jury on the defense of justification. KRS 503.030 provides that: "...conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged...." KRS 503.040(2)(b) states that "...conduct which would otherwise constitute an offense is justifiable when...[t]he defendant believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority." Poteete "presented sufficient evidence at trial to allow reasonable minds to conclude that he was justified in his actions under either of these statutory sections." Poteete was also entitled to introduce the testimony of other inmates to show that prison officials had previously made deals with inmates to recover contraband from "the yard," and to show Poteete's state of mind with respect to the contraband.

Kentucky Supreme Court

KRS 533.060(1)
APPLIES TO CO-COMPLICITOR
Pruitt v. Commonwealth
32 K.L.S. 16 at 22
(November 21, 1985)

KRS 533.060(1) provides that a person shall not be eligible for probation when he has been convicted of a Class A, B, or C felony, the commission of which involved the use of a gun. Pruitt, who was convicted of complicity in the murder of her husband, contended that, since she did not personally use the gun, the statute should not apply to her. The Court rejected this argument holding that "the plain reading of the statute does not indicate any basis for a distinction based upon the identity of the person who uses the weapon." The Court's holding overturns Commonwealth v. Reed, Ky.App., 680 S.W.2d 134 (1984), which held that vicarious application of the statute was impermissible since the statute was ambiguous as to whether it denied probation to a person who did not personally use a gun.

MISDEMEANOR REFERRED TO GRAND JURY
Commonwealth v. Arnette
32 K.L.S. 17 at 13
(December 19, 1985)

In this case the Court approved "[t]he joinder of misdemeanor and felony cases and the preliminary hearing of such cases by the district court prior to a reference to the grand jury on a finding of probable cause." The Court found no double jeopardy violation in such a procedure, and held that neither was it prohibited by rules or statute.

DISQUALIFICATION OF TRIAL JUDGE
Commonwealth v. Carter
32 K.L.S. 17 at 13
(December 19, 1985)

This decision reverses a decision of the Court of Appeals which had held that the judge at the defendant's guilty plea proceedings should have disqualified himself. Carter sought to disqualify the sentencing judge under KRS 26A.015, on the grounds that the judge was the County Attorney at the time Carter was sentenced on two previous convictions used to obtain Carters instant guilty plea to PFO. Disqualification is required if a judge has previously "served as a lawyer or rendered a legal opinion in the matter in controversy...." The Kentucky Supreme Court held that the statute did not require the judge's disqualification since the prior convictions were not "the matter in controversy." The matter in controversy consisted only of the current charges.

The Court in Carter additionally held that "in those cases in which the party relies upon any failure of any justice or judge of the Court of Justice to disqualify himself ...it must appear from the record, either by motion or otherwise, that he was apprised of his connection with the matter in controversy." This holding shifts to the accused the burden of preserving a disqualification issue and essentially overrules Small v. Commonwealth, Ky.App., 617 S.W.2d 61 (1981), in which the Court of Appeals held that a waiver of the statutory right to disqualification "will not be presumed from silence."

PFO - VALIDITY OF PRIOR CONVICTIONS
Dunn v. Commonwealth
32 K.L.S. 17 at 14
(December 19, 1985)

Pursuant to Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984) Dunn challenged the validity of prior convictions which served as the basis for his PFO indictment. The resulting Kentucky Supreme Court opinion precisely delineates the procedure triggered by such a challenge. "In those cases in which the defendant is indicted as a persistent felony offender and files a proper motion to suppress any evidence of his prior offenses, the burden is on the Commonwealth to prove the judgments of conviction in each of the underlying offenses upon which it intends to rely. The presumption of regularity of judgment shall be sufficient to meet the original

burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies. If the defendant presents evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice."

FELONY MURDER/DOUBLE JEOPARDY
Kruse v. Commonwealth
32 K.L.S. 17 at 18
(December 19, 1985)

The Court, reversing itself by granting the petition for rehearing, rejected Kruse's contention that his conviction of wanton murder was supported by insufficient evidence. Kruse and an accomplice entered a Western Auto Store. While Kruse stole merchandise the accomplice shot two store employees killing one and wounding the other. At trial, the jury was instructed that it could convict Kruse of wanton murder if it found that "by so conspiring to commit this robbery, Michael Kruse was wantonly engaging in conduct which created a grave risk of death to another and that he thereby caused [the victim's] death...." This erroneous instruction submitted to the jury a felony murder theory of culpability. In a lengthy discussion the Court makes clear that the felony-murder doctrine, which imputed the intent to commit the underlying felony to the homicide, has been replaced by KRS 502.020, the complicity statute. Consequently, "the culpability of Michael Kruse for the killing of the deceased must now be measured by the degree of wantonness or recklessness reflected by the extent of his participation in the underlying robbery rather than by the implication of intent to murder from the intent to participate in the robbery." Under existing complicity law Kruse's conviction was sustained by sufficient evidence.

Kruse also contended that his conviction of murder under the trial court's instruction and following his guilty plea to the robbery was double jeopardy. Under the erroneous instruction, commission of the robbery was incorporated as an element of the murder. The Court rejected this argument by reference to the statutorily distinct offenses of robbery and murder, each of which contain an element not found in the other, without examination of the actual instruction given the jury. Justice Leibson dissented.

JURY NULLIFICATION
Medley V. Commonwealth
32 K.L.S. 17 at 20
(December 19, 1985)

In this case the Court held that it was not error for the trial court to disallow defense argument that if the jury believed the sentence received by the defendant for the principal offense was sufficient punishment then the jury could acquit him of PFO. The Court opined that jury nullification stands for the principle that the jury has the right to disbelieve the evidence, not to disregard the law. "Thus it is improper to instruct the jury that it has the right to find the defendant not guilty even though the evidence proves his guilt beyond a reasonable doubt...." It followed that defense counsel could not argue such a proposition in his closing.

United States Supreme Court

EFFECTIVE ASSISTANCE OF COUNSEL
Hill v. Lockhart
38 CrL 3014 (November 18, 1985)

Applying Strickland v. Washington, 466 U.S. 668 (1984), the Court unanimously held that Hill was not entitled to a hearing on his habeas petition alleging ineffective assistance of counsel. Hill asserted that counsel failed to advise him of the parole consequences of his guilty plea to a "second offender" status charge. The Court did not reach the issue of whether counsel's failure to advise his client of special parole provisions affecting persistent offenders could constitute ineffective assistance of counsel, because Hill

made no claim of "prejudice." The Court held that, when challenging his guilty plea on ineffective assistance grounds "in order to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty...."

HABEAS - ISSUES OF LAW
Miller v. Fenton
38 CrL 3025 (December 3, 1985)

In this case the Court held that a state court's determination that a confession is voluntary is a conclusion of law, not a finding of fact, and thus not entitled to the presumption of correctness in habeas proceedings provided by 28 U.S.C. §2254(d). The Court reaffirmed the rule that "the issue of voluntariness is a legal question requiring independent determination."

The Court's holding is consistent with its prior decisions, most recently exemplified by Mincey v. Arizona, 437 U.S. 385 (1978), which have treated the question of voluntariness of a confession as one of law. Justice Rehnquist dissented.

RIGHT TO COUNSEL
Maine v. Moulton
38 CrL 3037 (December 10, 1985)

A co-indictee, wired for sound by the police, met with Moulton. The police' purpose was to gain information about threats directed at prospective witnesses. Although the co-indictee was instructed not to question Moulton about the pending charges, his remarks caused Moulton to make incriminating statements.

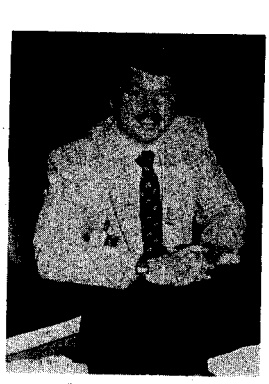
The Supreme Court held that this investigative strategy violated Moulton's Sixth Amendment right to counsel. See Massiah v. United States, 377 U.S. 201 (1964) and United States v. Henry, 447 U.S. 264 (1980). The Court rejected the state's argument that Massiah and Henry were distinquishable in that, in those cases, the police arranged the meeting between the accused and the informant, while Moulton himself arranged the meeting with his co-indictee. The decisive factor was not who initiated the meeting, but the "knowing exploitation by the State of an opportunity to confront the accused without counsel being present...." Likewise, the fact that the police investigation was centered on as yet uncharged crimes did not render Moulton's admissions regarding pending charges exempt from the Sixth Amendment's protection. Chief Justice Berger and Justices White, Rehnquist, and O'Connor dissented.

LINDA WEST

What so ever is almost true is quite false, and among the most dangerous of errors, because being so near truth, it is more likely to lead astray.

Henry Ward Beecher

Post-Conviction
Law and Comment



Ed Gafford

WHAT HAPPENS TO YOUR CLIENT WHEN HE LEAVES THE COUNTY JAIL

What happens to your client after he is transferred from the county jail to the Kentucky prison system? How do you contact him?

EVALUATION AND ASSIGNMENT

Under current Corrections procedures, each convicted person is first sent to the Kentucky State Reformatory at LaGrange, Kentucky where he will be assigned to the A & C Center. He will call this the "Fish Tank"; the official name is the Admissions and Classifications Center. Here an A & C Classification Committee will make important assignment decisions that will determine where your client will actually serve his prison sentence.

First, the new inmate will be tested and observed for about 30 days. Activities include physical and medical examinations, psychological and aptitude testing, various interviews, and attempts to determine individual problems and needs.

Following the evaluation, the A & C Classification Committee will decide where your client goes. Individual needs and institutional operation are factors that are taken into consideration on classification decisions. See KRS 197.065 and Corrections Policies and Procedures, Chapter 18.

Once initially assigned to an institution, the inmate may "earn" a transfer to a minimum security facility or he may be transferred for other reasons, such as a short time period before parole eligibility consideration. Conversely, discipline problems, escape attempts, or other factors may result in a transfer to a more secure institution or to a less desirable facility from an inmate's point of view.

DIFFERENCES IN PRISONS

The differences between the various prison facilities operated by the Corrections Cabinet are quite significant. Blackburn Correctional Complex in Lexington, for example, permits community activities and academic programs. At the Western Kentucky Farm Center, Route 2, Fredonia, Kentucky, inmates reside in open dormitories, work on the farm, and live in a relatively informal atmosphere. If an inmate runs afoul of institutional rules, he may be sent immediately to the nearby Kentucky State Penitentiary at Eddyville, Kentucky, where he will be confined, at least temporarily, in a solitary cell in Administrative Segregation with few privileges until such time as an Adjustment or Classification Committee review his case.

Individual assignments vary at each institution. Thus, the inmate at the Eddyville Penitentiary who works and lives in the outside boiler room may have a much better "deal" than the inmate at Blackburn.

KRS 197.140

When considering a plea bargain with your client, do not overlook the provisions of KRS 197.140 which prohibit inmates convicted of certain crimes from working outside the prison confines. This statute may not only drastically affect your client's

life in prison, but may have a pronounced effect on his parole. He may be approved for parole but because he is denied a furlough under KRS 197.140, he may be unable to secure a job or home placement that would trigger the parole.

CONTACTING PRISONER

If you know which institution your client has been assigned to and wish to contact him, the person to notify within the Corrections system is the casework supervisor. The switchboard operator at each correctional facility will transfer your call to the casework supervisor. You may also work through the Department of Public Advocacy which has full time representatives at the Kentucky State Reformatory at LaGrange, the Northpoint Training Center at Burgin, and near the Kentucky State Penitentiary in Eddyville. The Department of Public Advocacy Post-Conviction Services Branch covers all other Bureau facilities from the Frankfort office.

DPA CONTACTS IN PRISONS

For information about the Kentucky State Reformatory, Roederer Farm Center, Luther Luckett Correctional Complex, Kentucky Correctional Psychiatric Center, and Kentucky Correctional Institute for Women in PeWee Valley, contact:

Ed Gafford, APA
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LaGrange, Kentucky 40032
(502) 222-9441, Ext. 356

For information about the Kentucky State Penitentiary and Western Kentucky Farm Center, contact:

Hank Eddy, APA
260 Commerce Street, P.O. Box 50
Eddyville, Kentucky 42038-0050
(502) 388-9755

For information about the Northpoint Training Center, contact:

Ken Taylor, APA
Northpoint Training Center
P.O. Box 479
Burgin, Kentucky 40310
(606) 236-1300, Ext. 219

For information about all other institutions, contact:

McGehee Isaacs, APA
Chief, Post Conviction
Services Branch
151 Elkhorn Court
Frankfort, Kentucky 40601
(502) 564-5218

VISITING CLIENT

If you plan to visit your client, be aware that Corrections Policies and Procedures, Policy No. 16.1, requires that "Attorneys and clergymen who desire private or special meetings are required to give twenty-four (24) hour notice." Otherwise, you will visit under normal procedures. If you disregard this provision, you will have no problem entering a facility such as the Western Kentucky Farm Center. You merely walk in, sign a visitor's book, and announce your intentions to a friendly guard. However, your client may be a mile or so away plowing a field and you may not have an opportunity to see him until he comes in for lunch or after the day's work schedule.

At a institution such as the Kentucky State Penitentiary, if you arrive without notice, you will be met by a guard. However, you will not be admitted until he secures approval from busy supervisors. After entering the institution, there probably will be delays before you actually see your client. Therefore, it is good practice to notify the institution or the appropriate Public Advocate's office at least 24 hours in advance of your visit. Contact the Deputy

Warden of Custody at the Kentucky State Penitentiary, the Kentucky State Reformatory, and the Northpoint Training Center and the Chief Caseworker at minimum security facilities.

Keep in mind that there are several different facilities within the maximum security Penitentiary at Eddyville. Besides the general population, No. 3 Cellhouse contains the Disciplinary, Administrative Segregation, and Administrative Control Units and the Maximum Protective Custody Unit. No. 4 Cellhouse is the Meritorious Housing Unit. No. 1 and No. 2 Cellhouses are currently closed for renovation and will reopen later as administrative offices and inmate recreational areas. If your client is at the Penitentiary, contact Penitentiary officials in order to determine where your client is housed.

At facilities such as the Western Kentucky Farm Center, or Roederer Farm Center, most inmates have farm work assignments or work away from the institution and you will have difficulty contacting your client during regular working hours without prearrangements. At Kentucky's correctional institutions, most inmates are locked in their cells at 3:30 p.m. for an "institutional count" and you may have to convince prison authorities that you have a real emergency before you can see your client. Visits to inmates should be scheduled before 3:30 p.m., if possible.

PHONE CALLS FROM INMATES

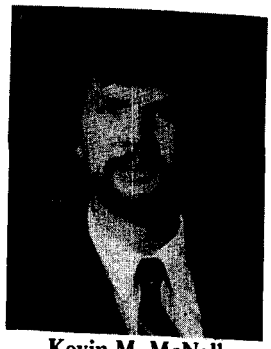
Inmates at the Penitentiary and the Reformatory do have access to public telephones on the yard during free time periods when your client can call you collect at your direction. However, free time is limited to most inmates and the phones are crowded, so setting up a specific time for a call may be impossible.

ENTERING INSTITUTION

Finally, when visiting your client, remember the Corrections Policies and Procedures and Kentucky statutes prohibit you from carrying anything outside the attorney-client relationship into or out of prison. Once a professional was persuaded by his client's wife to take her husband some packets of instant coffee since the husband could not afford to purchase coffee within the prison. Prison officials discovered that the coffee packets contained controlled substances. KRS 520.050 and KRS 520.060 make it unlawful to introduce contraband into a detention facility.

ED GAFFORD

The Death Penalty



Kevin M. McNally

KENTUCKY'S DEATH ROW POPULATION - 26
PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 110

I. COURT REVERSES DEATH SENTENCES AND CONVICTIONS OF JACK JOE HOLLAND AND LARRY JAMES

On December 19, 1985, the Kentucky Supreme Court reversed the 1981 convictions and death sentences of Jack Joe Holland and Larry James from Oldham Circuit Court. The court, Justice Wintersheimer dissenting as usual, found numerous reversible errors.

"On January 20, 1980, Barbara Helm disappeared after punching out from work at the Blue Boar Cafeteria, Louisville...." Holland and James v. Commonwealth, Ky., ___ S.W.2d ___ (1985) [HJ at 2]. Jack Joe worked there and was questioned the next day. He stated he was with Larry James at the Dew Drop Inn. Both were repeatedly questioned over the next few months. They either declined to discuss the case or repeated their alibi.

In May of 1981, George Waldridge agreed to be wired "in exchange for leniency" on a pending charge. Two conversations with Holland about a possible robbery plan were taped on May 28, 1981. Police arrested Holland and James that night [HJ at 2]. "[I]n certain portions of the tapes Holland stated that he passed and Larry James failed the polygraph tests" on the Helm killing [HJ at 5]. Even considering the tapes, the evidence against the two was not strong.

A. CARTER V. KENTUCKY RETROACTIVE

At the time of trial, certiorari had been granted in Carter v. Kentucky, 450 U.S. 288 (1981). Shortly after the trial, the Supreme Court announced that Kentucky's rule, forbidding a "no adverse inference" instruction on the defendant's right not to testify, was unconstitutional.

James testified but Holland didn't. Holland's tendered instruction on the right not to testify was refused. On appeal, the Attorney General could only argue that Carter not be applied retroactively. Citing United States v. Johnson, 457 U.S. 537 (1982), the court stated it was clear that the U.S. Supreme Court disagreed. The opinion points to the remand in Mack v. Oklahoma, 459 U.S. 900 (1982) of an Oklahoma decision holding Carter not retroactive.

B. SURVEILLANCE TAPES/ OTHER CRIMES EVIDENCE

The court listened to the surveillance tapes and found "that they have little probitive value, and served only to put before the jury evidence of other crimes...and to portray... [the] criminal propensity" of Holland and James. This was reversible error. "With proper editing, certain isolated references during the taped conversation, which may tend to show knowledge by Holland of certain unpublicized facts surrounding the crime, may be admissible." The Attorney General claimed that the tapes "revealed 31 direct references by Holland to his involvement.. ." This was obviously untrue. "[T]he entirety of the tapes is inadmissible except for the previously mentioned specific exceptions as they relate to Holland" [HJ at 5]. The prejudice,

the court said, outweighed any minimal probative value.

C. GORY PHOTOGRAPHS

Slowing a trend permitting the introduction of any and all photographs in murder cases, see Brown v. Commonwealth, Ky., 558 S.W.2d 599, 605 (1977), the court found reversible error in the introduction of "color photographs of the deceased demonstrating that the body had been subjected to extensive animal mutilation...." Any probative value was outweighed by the prejudicial effect. The opinion breathes a bit of life into Poe v. Commonwealth, Ky., 301 S.W.2d 900 (1957), where defense counsel attempted to stipulate away any probative value of the photographs.

D. IMPEACHMENT OF DEFENSE WITNESS

A pending indictment was introduced against the defense witness Wakefield, allegedly as "evidence of motive and bias...While normally this is permissible as against a prosecution witness, we can think of no way it demonstrates motive and bias as to this defense witness...." [HJ at 6]. Neither can we.

E. COMMENT ON SILENCE

The court, citing Romans v. Commonwealth, 547 S.W.2d 128, 130 (1977), found another error in the "deliberate and undue reference to [the defendant's] failure to make a statement upon questioning after they were given their 'Miranda rights'" [HJ at 7].

F. RECOMMENDATION

As in Ward v. Commonwealth, Ky., 695 S.W.2d 404, 407 (1985), it was reverible error for the judge to tell the jury that the court "can change" the punishment [HJ at 7]. See Caldwell v. Mississippi, 105 S.Ct. 2633 (1985).

G. DISSENT

Justice Wintersheimer is the sole dissenter, complaining that the law does not require "that a defendant receive a textbook perfect trial...." [W at 1]. Ignoring the polygraph, surveillance tape and Carter issues, Justice Wintersheimer finds the introduction of the photographs, the comment on silence at the time of arrest and the reference to the jury's recommendation as non-prejudicial. "I do not believe the trial errors were significant enough to require reversal" [W at 2]. Justice Wintersheimer has sat on 10 death penalty appeals since ascending to the Supreme Court. He is the only member to have voted to deny relief to the condemned in every case. A majority of the court has voted to reverse three of those cases.

Justice Stephenson, who has sat on every death penalty decision since the effective date of the statute, voted to reverse for only the second time in 14 appeals. Justice Stephenson also voted to reverse the conviction and death sentence of Laverne O'Bryan. O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153 (1982).

II. DAVID MATTHEWS' SENTENCE UPHELD

On September 26, 1985, the court affirmed the conviction and death sentence of David Matthews for the murder "of his estranged wife...[and] of his mother-in-law..." as well as a sentence of twenty years for burglary of his wife's residence [M at 1]. Matthews and his wife, Marlene, had been married for "about 2-1/2 years before the murders." During the last year they were often separated and "extremely hostile" to one another. Marlene "often swore out criminal warrants against her husband for harrassment" [M at 1]. She also

charged him with "sexual abuse of his step-daughter" and with burglary [M at 2].

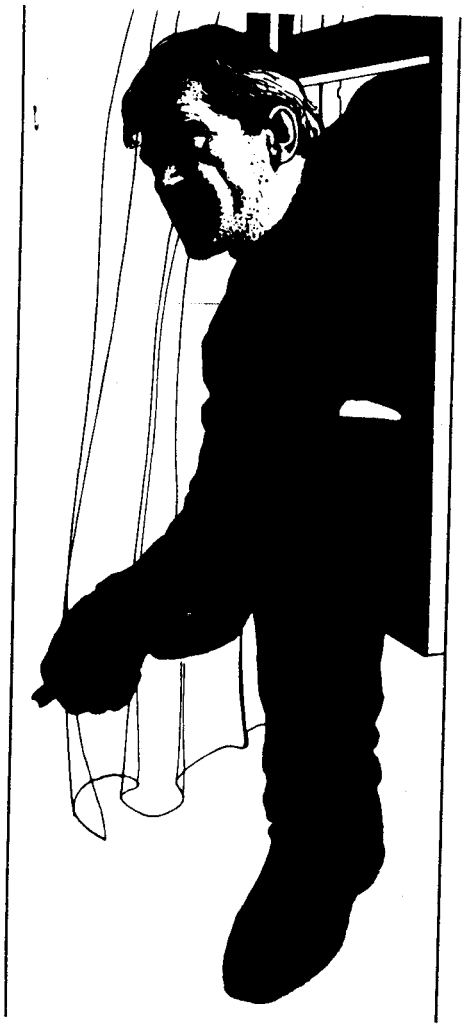
According to statements to a court appointed psychiatrist, Matthews said he broke into his wife's home about 1:00 or 2:00 a.m. and shot his mother-in-law. Marlene's mother was discovered alive, but mortally wounded, the next day. David "then went into the next room, had sexual relations one or two times with his wife, stayed with her until about 6:00 a.m. and shot and killed her" [M at 3]. She died instantly.

Describing the evidence as "overwhelming and uncontradicted," the court affirmed. Matthews' defense was that he acted under the influence of extreme emotional disturbance. There was evidence of a "long history of significant marital strife." The psychiatrist testified that David was "suffering from an adjustment disorder, designated as a 'temporary emotional and behavioral disturbance' causing the temporary impairment of judgment, poor self-control and diminished awareness" [M at 3].

A. OTHER CRIMES/ CONTEMPORANEOUS OBJECTION

The warrants for sexual abuse and burglary were "relevant not only as evidence of motive or state of mind, but as part of the immediate circumstances bearing on the crimes...." [M at 5]. Prior to trial, the judge had indicated he would admonish the jury that the warrants were admissible only as "bearing on the accused state of mind and not as proof of guilt..." At trial, no admonition was requested. The court found no error. This evidences the type of "tactical decision" which constitutes a new exception to the usual rule that issues need not be preserved in death penalty cases. See Ice v. Commonwealth, Ky., 667 S.W.2d 671, 674 (1984).

While "standing alone, the prior burglary warrant may have had little evidentiary value...there were striking similarities between the vandalism on the previous occasion...." [M at 6].



B. MULTIPLE MURDER

"The fact that the killings were intentional and multiple is not in dispute. What causes the dispute is the hiatus in time..." [M at 9]. The court finds this argument "hypertechnical."

Additionally, on the verdict form, the jury filled in a finding as to both victims, but listed only one name, not both, each time. The court found that it was clear that "the

finding was one of intentional murder as to both victims...." [M at 10]. Anyway, defense counsel didn't complain that the verdict was unclear and ask for clarification. Justice Liebson, writing for the court, does not explain how one asks for clarification of a jury verdict or in what way this is a "tactical" waiver by counsel, so as to fit within the new Ice exception.

C. EXTREME EMOTIONAL DISTURBANCE

The court also rejects Matthews' claim that the evidence was insufficient to prove absence of extreme emotional disturbance. Reaffirming Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985), the court held that it is "not necessary for the Commonwealth to produce direct evidence" on this issue since the absence of extreme emotional disturbance "is not an element of the crime of murder...." [M at 11]. Anyway, Matthews "took steps to hide the gun and clean his clothes... [and] give a false statement to the police" [M at 11].

D. RECOMMENDATION

Justice Liebson writes that it is not error to include the word "recommend" in the instructions, since this does no more than "follow the language of the statute..." [M at 12]. Nor does Caldwell v. Mississippi require a different result. In Matthews, the prosecutor actually used language enhancing the jury's "awesome" responsibility, rather than diminishing it. The court again cautioned prosecutors to "avoid any remarks which could mislead the jury as to its role in the sentencing process..." [M at 14].

E. JUDGE SENTENCING- CONSIDERATION OF LACK OF REMORSE

In the trial judge's report, Judge Shobe noted that Matthews "feels no remorse." Apparently, the psychiatrist testified to this effect. The court finds this acceptable since "the trial court's function in imposing the death penalty following a jury verdict is different from its function where no jury is involved" [M at 16]. "[T]he trial court is not limited to statutory aggravating circumstances" [M at 17]. "[T]he statutory scheme not only permits, but anticipates, that the trial court will play a separate and different role in sentencing in capital cases after the jury's verdict. ." [M at 18].

F. PAROLE

We have examined 23 records in death penalty prosecutions. Of these, there are references to parole, at some point, in 18 of them. (None of these cases involve the new penalty of life, 25 years without parole). In 8 of these trials, the jury asked a specific question about parole. In 4 the judge relied upon parole eligibility in sentencing. Therefore, in Kentucky capital cases, jury consideration of parole is a major concern.

In Matthews at 14, the court specifically addresses, for the first time, the argument that when a jury asks a question regarding parole they should be instructed to "presume the defendant would serve whatever sentence is given by the court." Instead, Judge Shobe instructed the jury that these "are questions which the court cannot instruct you upon." The court approved this response, stating that the "presumption of life" instruction would have been "substantively incorrect" [M at 14].

Matthews went so far as to say that an instruction that the jury not consider parole, as authorized in Brown v. Commonwealth, Ky., 445 S.W.2d 845, 848 (1969), is discretionary. Thus, the court decides to

do little to address this powerful, often but not always subliminal, issue in capital jury trials.

G. PROPORTIONALITY REVIEW

In Skaggs v. Commonwealth, Ky., ___ S.W.2d __ (1985), the court referred to specific, allegedly similar, cases, for the first time in conducting its proportionality review. In Matthews at 18-19, the court returns to a more general proportionality review, appending the usual list of 21 prior death penalty appeals, both under our new statute and under the old law. However, once again, there appears to be no rhyme or reason which cases are listed and which cases are omitted. For example, the decisions in Moore v. Commonwealth, 634 S.W.2d 426 (1982) and O'Bryan are omitted. Perhaps, one speculates, because they are reversals. On the other hand, the list includes Ice, which was also reversed.

Nevertheless, Matthews does include some explanation of how the court perceives proportionality review. Justice Liebson ruminates that it is "obviously difficult to compare circumstances in one murder case with cirumstances in another and arrive at a minmum standard of heinousness...." It is sufficient for the court that David Matthews' acts, "far exceed any minimum threshhold justifying capital punishment" [M at 19]. Obviously, if a case didn't exceed the "minimum threshold," it wouldn't be a capital case anyway. This is not proportionality review.

H. MISCELLANEOUS ISSUES

The court also holds that exclusion of some "remote transactions between third parties and the deceased wife" was not error since "greater latitude than was reasonable" had already been permitted regarding testimony about problems other persons had "with Marlene" [M at 7]. Additionally, there was no violation of the psychiatrist/patient privilege of KRS 421.215(2) in the cross-examination of the psychiatrist. "The privilege was intentionally disregarded as a matter of trial tactics" [M at 8]. Finally, the mere fact that Matthews was married to one of the victims gave him no legal right to be on the premises. Therefore, the burglary charge stands.

III. HEATH V. ALABAMA: STATE SOVEREIGNTY OR THE SECOND BITE AT THE APPLE

Larry Heath hired two men to kill his wife, who was nine months pregnant, for the sum of $2,000. Upon arrest, Heath confessed. Mrs. Heath was kidnapped by the two from her home in Alabama and taken to Georgia and murdered. Heath pled guilty to the Georgia murder in exchange for a life sentence. (Perhaps evidencing her attitude towards the case, Justice O'Connor gratuitously adds: "which [Heath] understood could involve his serving as few as seven years in

prison." Heath v. Alabama, 106 S.Ct. 433, 435 (1985).)

Shortly thereafter, Alabama indicted Heath for kidnapping, a capital offense since the victim was killed. 82 prospective jurors were questioned. All but 7 stated they were aware that Heath had pled guilty. In a "remarkable" rehabilitation, the trial judge got the jurors to agree they could put that out of their minds. 106 S.Ct. at 441 (Marshall, J., dissenting). "With such a well-informed jury, the outcome of the trial was surely a foregone conclusion. Defense counsel could do little but attempt to elicit information from prosecution witnesses tending to show that the crime was committed exclusively in Georgia." 106 S.Ct. at 442 (dissent). Heath was convicted and given the death sentence.

Carefully refusing to consider any "due process" or "jurisdictional" questions raised by this scenario, the United States Supreme Court granted certiorari and affirmed the death sentence. The court's decision was narrowly based on the principle of dual sovereignty. "The dual sovereignty doctrine...compels the conclusion that successive prosecutions by two states for the same conduct are not barred by the Double Jeopardy Clause." 106 S.Ct. at 437. The majority refuses to deny a state its power to enforce its criminal laws because another state has "won the race to the courthouse...." 106 S.Ct. at 440.

Justices Brennan and Marshall dissent separately attacking the doctrine of dual sovereignty as applied to produce this result. Justice Marshall candidly admits that: "I must confess that my quarrel with the court's disposition of this case is based less upon how this question was resolved than upon the fact that it was considered at all... I believe the court errs in refusing to consider the fundamental unfairness of the process by the which petitioner stands condemned to die." 106 S.Ct. at 444 (dissent). Marshall would focus on the way this was done rather than on whether it can be done.

IV. KILLING KIDS

As previewed in the last issue of The Advocate (Vol. 8, No. 1 at 21 (1985)), this country has embarked once again on the execution of juveniles. James Terry Roach was electrocuted in South Carolina on January 10, 1986, "despite pleas for clemency by Mother Teresa, Jimmy Carter" and the Secretary General of the United Nations. Lexington Herald-Leader at 3 (January 11, 1986). Roach, 17 at the time of the offense, was the first juvenile executed against his will since the moritorium on executions ended. (Charles Rumbaugh, also 17 at the time of the offense, agreed to his execution on September 11, 1985.)

The jury was never heard from in Roach's case as he pled guilty at trial. Roach's co-defendant, and former Kentuckian, J.C. Shaw, was executed last January 11. It was disputed who murdered the two teenagers in Columbia, South Carolina. However, there is no dispute that Roach was under the influence of the older Shaw, a former military policeman.

Dr. William Olsen, Chairman of the Department of Neurology at the University of Louisville, examined Roach and testified before the clemency board. He diagnosed Roach as suffering from Huntington's chorea, a death sentence of another sort. Governor Riley was not moved. One of Roach's attorneys was David Bruck, the keynote speaker at Kentucky's last Death Penalty Seminar.

In Kentucky, children as young as 14 are presently facing capital charges.

The Attorney General recently agreed to a guilty plea in the midst of a trial where he was seeking the death penalty against a 14 year old girl. As of January 1, 1986, there were sixteen children facing the death penalty (pre-trial) in this state. The percentage of juvenile defendants facing capital charges runs between 10% and 20% of the total pending capital indictments.

It is not clear where the line will be drawn by the courts, if they ever set a minimum age. "A 12 year old Logansport boy will be tried as an adult in the shooting death of his grandmother...[He] could be sentenced to death if convicted." Louisville Times, B3 (December 28, 1985). The United States Supreme Court has twice had before it the question of whether the execution of juveniles is constitutional. Bell v. Ohio, 438 U.S. 637 (1978) [decided on other grounds]; Eddings v. Oklahoma, 455 U.S. 104 (1982) [decided on other grounds]. It appears that for now the issue will be decided by inaction. One Justice, it seems, is more interested in the financial, rather than moral, ramifications of any decision, as this excerpt from the Eddings argument indicates:

[Justice Rehnquist wondered what counsel would have the state do with the defendant if it is unable to execute him. Should he be confined for life under a psychiatrist's care, the Justice asked.]

BAKER [Eddings' lawyer]: Yes.

JUSTICE REHNQUIST: Why should the taxpayers have to foot the bill?

BAKER: It would be cheaper than executing him.

JUSTICE REHNQUIST: From the taxpayers' point of view?

BAKER: More will have been spent on the defendant's case than would have been spent had he received some other sentence.

JUSTICE REHNQUIST: Only because of the protracted litigation.

JUSTICE MARSHALL: It would have been cheaper still to have shot the defendant at the time of his arrest.

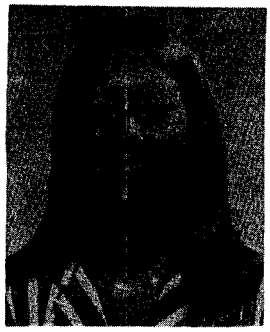
BAKER: That's correct.
30 CRIM.L.REP. (BNA) 4086-87 (Nov. 11, 1981)

RECENT EXECUTIONS

Since the listing in The Advocate, Vol. 7, No. 6 at 19 (1985), the following have been executed: 49) **William Vandiver** (Ind.) 10/16/85, W/W; 50) **Carroll Cole** (Nev.) 12/6/85, W/W; 51) **Terry Roach** (S.C.) 1/10/86, W/W.

KEVIN MCNALLY

Sixth Circuit Highlights



Donna Boyce

In **Booker v. Jabe**, 14 SCR 22, 7; 38 CrL 2125 (October 29, 1985), the Sixth Circuit Court of Appeals recently held that under the Sixth Amendment neither prosecutors nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a criminal petit jury. Noting that it wished it were within its power to right the manifest error it believes Swain v. Alabama, 380 U.S. 202 (1965) represents, the Court held that Swain still foreclosed Booker's claim that the prosecutor's racially discriminatory use of peremptories violated the equal protection clause of the Fourteenth Amendment.

However, the Court stated that Swain did not insulate the use of peremptory challenges from all scrutiny, even under the equal protection clause, and did not exempt review under the Sixth Amendment.

The Sixth Circuit goes on to establish the procedures by which a Sixth Amendment violation arising out of an abuse of peremptory challenges should be demonstrated and remedied. There is, of course, an initial presumption that both sides are exercising their peremptory challenges in a non-discriminatory manner. To invoke the trial court's authority to review the use of peremptories, a party must make a timely motion for mistrial before the completion of the jury selection process. A prima facie case of a Sixth Amendment violation is established when the moving party demonstrates that the excluded group of prospective jurors is a cognizable group in the community and that there is a substantial likelihood that the challenges leading to this exclusion were made on the basis of the individual juror's group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.

Once this prima facie showing has been made, the burden shifts to the non-moving party to respond to the inquiry concerning its exercise of peremptory challenges. If the trial court finds that the non-moving party's explanation of its use of peremptory challenges does not rebut the moving party's prima facie case of a Sixth Amendment violation, the judge will declare a mistrial and a new jury will be selected from prospective jurors who were not previously associated with the case.

The United States Supreme Court heard oral arguments in mid-December in Batson v. Kentucky, a case in which the Kentucky Supreme Court relied on Swain to reject the defendant's Sixth and Fourteenth Amendment challenges to the prosecutor's racially discriminatory use of peremptories in his individual trial. A decision in Batson is expected this spring.

DONNA BOYCE

TRAINING FOR DPA INVESTIGATORS

Public defender investigators from Louisville, Ashland and DPA offices around the state met for training on capital case investigation on December 6, 1985 at Lake Cumberland State Park. They heard presentations on obtaining records, testifying, report writing, interviewing witnesses, jury selection information and "Needles in the Haystack."

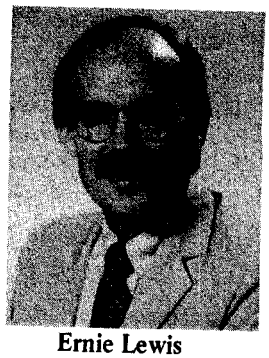
GARY JOHNSON

KEVIN MCNALLY

GAIL ROBINSON, BILL CAUDILL

Plain View

Search and Seizure Law and Comment



Ernie Lewis

I. SEARCH AND SEIZURE THEMES

Judicial activity in the Fourth Amendment arena has been quite minimal over the past two months, giving us all an opportunity to catch our breath and digest the many changes which have occurred over the past couple of years. I was given the opportunity to do just that at a recent Louisville Bar Association seminar on the 19th of December, 1985, where once again the Honorable Charles E. Moylan, Justice of the Court of Special Appeals of Maryland and lecturer on the Fourth Amendment, synopsized the previous term's search and seizure decisions and gave his perspective on this area of the law.

I will not attempt to summarize Judge Moylan's entire four-hour lecture for The Advocate. I would, however, like to share with our readers some of the conclusions that he reached.

A. Return to Old 4th

Perhaps his basic theme is that persons practicing from the defense perspective should not engage in too much chest beating about the changes in search and seizure law over the past few years. Rather than constructing a new Fourth Amendment, the Burger Court is in reality returning to the old Fourth Amendment, points out Judge Moylan. From his perspective, the Warren Court put government and the judiciary in places where it had not been before. The Warren Court, according to Moylan, greatly expanded the reach of the Fourth Amendment during the twenty years of that Court's dominance. It was an aberration from the previous century. The Court we have now is a return to the Courts of the previous 170 years, and United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) and Massachusetts v. Sheppard, 468 U.S. ___, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) are squarely within that tradition.

Judge Moylan seems to enjoy and agree with the Burger Court, and in some ways gleefully "rubs it in" when he makes these points. However, in fairness to Judge Moylan, he also goes out of his way to say that we who practice law and use the Fourth Amendment every day in fact need to know what the Court is saying and where the Court is likely to go.

Perhaps one of the most informative parts of the lecture was his summarizing of some of the Court's themes over the past two or three years:

B. Reasonable Expectation of Privacy

The Warren Court used Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) to expand the reach of the Fourth Amendment. The reasonable expectation of privacy, wherein the Fourth Amendment protects persons and not places, is now being used by the Burger Court to reduce or diminish the reach of the Fourth Amendment. This was seen particularly in the case of Oliver v. United States, ___ U.S. ___, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) wherein the Court held that we are simply not prepared to recognize the privacy interests of a person in the open fields surrounding their house outside of the so-called curtilage;

C. Original Intent

A second major theme of this Court is to interpret the Fourth Amendment based upon the so-called original intent of the founding fathers. This is perhaps a frightening theme in today's political climate, particularly given some of Attorney General Meese's recent comments and his emphasis on the founding fathers' intent.

D. Reasonableness of Police Action

The Burger Court is focusing on the reasonableness of the police action. Judge Moylan looks at the Fourth Amendment's explicit language, breaking it into its two clauses. The Burger Court, he says, emphasizes that what the Fourth Amendment is really about is prohibiting "unreasonable searches and seizures." The Warren Court, on the other hand, emphasized the warrant clause or the second part of the Fourth Amendment, starting all analyses from the proposition that a warrant should have been present and a warrantless seizure is presumptively bad. This Court, on the other hand, appears to be viewing warrantless searches and seizures as not presumptively anything. Rather, the Court is more interested in looking at the issue of the reasonableness of the police conduct.

E. Protecting the Home

The Court continues to view the "core value" of the Fourth Amendment as being the protection of the home. Many cases in the past few years can be understood by accepting the Court's continued desire to protect the home.

F. Law and Economics Approach

The Fourth Amendment analysis of this Court is now and will in the future be dominated by the so-called "law and economics" approach, which is characterized by looking at search and seizure questions from a cost-benefit perspective.

G. Changes at an End

Judge Moylan believes that the important changes by the Court in search and seizure law are probably at an end. He does not expect large and radical changes in search and seizure law in the future; rather, he expects future decisions to continue to "mop up" the changes made by the Court mainly through Illinois v. Gates, 462 U.S. 213 (1983) and United States v. Leon, supra, and their progeny.

II. KENTUCKY COURT OF APPEALS DECISION

There was one decision out of the Kentucky Court of Appeals of which you should be aware. In **Walker v. Commonwealth** (December 28, 1985) (unpublished), one agent Starnes stated in an affidavit that he saw a drug carrier enter a defendant's house. At the suppression hearing, Agent Starnes admitted that he had not in fact seen the carrier enter the defendant's house but rather presumed that he had. This misstatement was a vital piece of information in the judge's decision to issue a warrant. As a result, the Court of Appeals held that the evidence taken from the house should have been suppressed and reversed the conviction. The Court went right to one of the exceptions in United States v. Leon, supra, where a warrant is issued by a magistrate who is misled by information that the police officer knew or should have known was false. Counsel should always be alert to statements in the affidavits and should compare them to the police reports or to what they know to be the nature of the evidence to police reports, to statements at the pre-

liminary hearing, or to what counsel knows to be in fact the state of the evidence. It would appear that this will prove one of the more fruitful areas for suppression, since where a magistrate is misled by a police (misstatement), the exclusionary rule's use will in fact deter police misconduct.

The Short View

1) **People v. Shabaz**, Mich. S.Ct. 38 Cr.L. 2239 (12-4-85). The Court held that where the police see a person leave an apartment building where narcotics trafficking had taken place, and where arrests as a result had occurred, and where the person stuffed a bag into his coat and then began to run after seeing the police, the police did not have a reasonable suspicion to stop and frisk under Terry v. Ohio, 392 U.S. 1 (1968). The Court emphasizes that flight does not give the police cause to stop and frisk;

2) **Harrington v. State**, Ark. S.Ct., 38 Cr.L. 2138 (10-28-85). In this case, the police officers failed to specify when they observed the incriminating evidence. The Court held that the failure to specify time of observation was fatal to the search pursuant to that warrant;

3) **People v. Trudell**, Calif. Ct.App., 38 Cr.L. 2188 (12-4-85). The Court looked at a situation where the police ordered a suspect out of his home in order to arrest him without a warrant. Analogizing this to the use of trickery, the Court held that this was not a violation of Payton v. New York, 445 U.S. 573 (1980), and thus the arrest was legal;

4) **In re Bobby Ramon**, Calif. Ct.App., 38 Cr.L. 2066 (10-23-85). In this case, New Jersey v. T.L.O, 469 U.S. ___, 105 S.Ct. 733 83 L.Ed.2d 720 (1985) appears to be coming home to roost. Here a student was present in a restroom without a pass. He hesitated when he answered the school administrator's questions. Finally, the administrator knew that the restroom was used for drug related activity. As a result, the Court said that it was reasonable under these circumstances to search the student, and to use what was found in that search against the student;

5) **Kreijanovsky v. State**, 706 P.2d 541 (Okla. Ct.Crim.App. 1985). Here, a defendant asked for counsel. Following this, the police requested the defendant to consent to a search of his house. The defendant allowed that search. The Court held that this was a violation of his Miranda rights due to the fact that requesting the suspect to search his house was an interrogation following the invocation of counsel;

6) **People v. Johnson**, N.Y. Ct.App., 38 Cr.L. 2201 (12-11-85). The New York Court of Appeals held that Illinois v. Gates, 462 U.S. 213 (1983) would not apply in New York to warrantless arrests or searches under the state's search and seizure clause. The Court went on to say that the Gates standard would be used only where a neutral and detached magistrate weighs probable cause pursuant to a warrant;

7) **People v. Bigelow**, N.Y. Ct.App., 38 Cr.L. 2202 (11-26-85). In addition to its stance on Gates, the Court also rejects the Leon good faith exception under state law, joining a growing number of states utilizing their own search and seizure law. The Court notes that the exclusionary rule's purpose is frustrated by Leon's good faith exception, since using the exception allows a premium to be placed on illegal police action, and provides a positive incentive to others to engage in similar lawless acts in the future.

ERNIE LEWIS

Trial Tips

For the Criminal Defense Attorney

WOMEN'S SELF DEFENSE

REPRESENTING ABUSED WOMEN WHO DEFEND THEMSELVES: THE "BATTERED WOMAN SYNDROME" AS A DEFENSE TO HOMICIDE

We have had the morality of submission, and the morality of chivalry and generosity; the time is now come for the morality of justice.

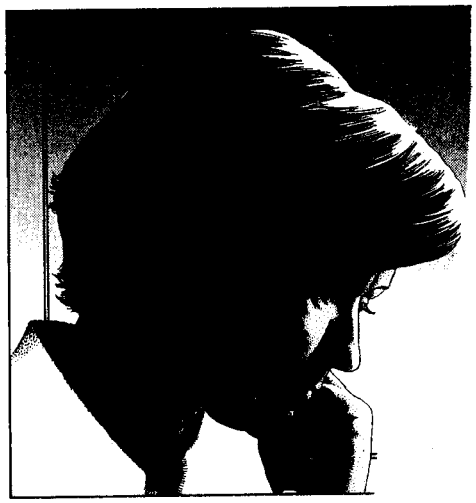
John Stuart Mill, 1869

Kathy Phillips shot and killed her husband in front of several of his drinking buddies as he jumped up and down on their front porch, taunting her and screaming obscenities. Cynthia Hutto's husband handed her the shotgun that she used to kill him. Francine Hughes waited until her intoxicated husband had fallen asleep, poured gasoline around his bed and set the house on fire. He perished in the blaze as Francine and her children drove away.

All three women were indicted and tried for intentional murder. Kathy Phillips (who was tried in Floyd Circuit Court) and Cynthia Hutto contended that they were acting in self-defense when they shot their husbands. They were acquitted. Francine Hughes, whose experience was recently the subject of a book and TV movie, The Burning Bed, was also found not guilty by a jury.

All three women had endured years of brutal physical and sexual assaults at the hands of their husbands, who were all greatly superior in size and strength. At the time they killed their mates, however, the men were neither armed nor assaultive. The key to acquittals in these cases was explaining how the defendants' perceptions that they were in danger of death or serious injury when they killed their spouses were reasonable reactions in view of their experiences as battered women.

This is the first in a series of articles about defending battered women in homicide cases. This installment will focus on the psychology of battered women, including a discussion of the "battered woman syndrome." Future columns will discuss the relationship between the battered woman syndrome and the defense of self protection. Related topics will include the admissibility and presentation of expert testimony on the behavior patterns of battered women. This installment is followed by a bibliography of articles and books on the battered woman syndrome and related issues available at the DPA library in Frankfort.



I. SPOUSE ABUSE IN KENTUCKY

Spouse abuse is a serious problem in Kentucky. A survey conducted by Louis Harris and Associates in 1979 indicates that 21%, or over 169,000 married Kentucky women have been abused. This survey found that 10%,

or more than 80,000 Kentucky women were victimized by their spouses in the 12 months prior to the survey. Of the women surveyed, 4.1%, an estimated 70,000, had been severely abused. "A Survey of Spousal Violence Against Women in Kentucky", Louis Harris and Associates, Inc., (June, 1979).

Not surprisingly, some victimized women eventually strike back, killing their aggressors. We aren't concerned here with battered women who kill their mates during violent batterings or when the batterer is armed. In such circumstances the immediacy of the aggressor's violence clearly justifies lethal protective action by the woman under traditional self-defense principles.

In some cases, however, the particular events leading up to the death do not indicate self defense quite so clearly.

In such cases, evidence concerning the psychology of abused women can explain why they continue to live with their abusers even though the beatings continue and why they often perceive suicide or homicide to be the only solution to the ever-escalating violence. Expert testimony on the battered woman syndrome becomes imperative in these cases.

II. THE BATTERED WOMAN SYNDROME

Psychologists can now provide us with invaluable insight into the psychology of battered women and the behavioral patterns of battering relationships. Dr. Lenore Walker, perhaps the most knowledgeable on the subject, has interviewed over 400 battered women. She identifies two psychological theories which explain the battered woman syndrome. Walker, Thyfault and Browne, Beyond the Juror's Ken: Battered Women, 7 Vermont L.Rev. 1 (1982)

A. LEARNED HELPLESSNESS

And when you're trying so hard and you think you've done everything right, it turns out something's wrong and you get beaten anyway.

Kathy Phillips, Louisville Courier Journal, 7/11/82, (Accent), p. 1 (interview with Kathy Phillips by Joe Ward)

Learned helplessness describes a psychological condition that develops when a woman perceives that the beatings she suffers have no causal connection with her behavior. Severe perceptual distortions result from a women's awareness that her behavior bears no relationship to beatings and other forms of abuse. A woman who is beaten over an extended period of time for reasons she cannot fathom becomes psychologically incapable of escape.

You just think about living through it. You don't say anything. You don't do anything. You shut up. You do what you're told. It's like living in someone else's body.

Kathy Phillips, Id.

Battered women commonly believe that the batterer is omnipotent, and that no one can help them. Consequently, they limit their responses to those they feel are possible or safe to make. Rather than developing escape responses, an abused woman develops coping responses to survive the relationship. The battered woman exists in a state of constant fear and extreme confusion.

Childhood events such as physical abuse, sexual molestation and parents' traditional attitudes toward women's role in society may contribute to this psychological condition.

B. THE CYCLE OF VIOLENCE

The second theory indicates that the violence in battering relationships

occurs neither constantly nor randomly. Rather, there are three predictable phases of violence. First is the tension building phase. During this phase, "minor" battering incidents occur. The escalating tension leads to phase two, an acute battering incident where the woman is brutally beaten. Just as brutality is associated with phase two, the third phase is characterized by loving, kind and contrite behavior by the batterer or, at least, a cessation of the violence.

The third phase provides most of the positive reinforcement for women to remain in the relationship. To some battered women, the absence of violent behavior is just as reinforcing as overtly loving behavior is for others. The intermittent, variable reinforcement provides a powerful incentive to remain in a battering relationship. Walker, supra. The husband is remorseful and wants to be forgiven. The woman hopes that the undesirable behavior seen in phases one and two will not recur and that the phase three behavior will become more frequent.

I remember during the first few years we were married thinking, when it would happen, when he would explode and do these things, I would hope that it would get better. He'd say he was sorry and I'd hope and I'd pray....

Francine Hughes,
Phil Donahue Show,
Multimedia Program Productions,
p. 8, transcript, 9/23/80
(interview with Francine Hughes)

Unfortunately, the violence does not cease. Instead, it increases in frequency and severity. The tension building phase actually becomes more pronounced, and periods of loving contrition decrease and, over time, become less reinforcing.

Some battered women terminate the relationship when the ratio between violent and loving behavior changes in this manner. Often, though, the batterer will not allow the woman to leave him and will become more violent at any indication of separation. Even divorced women report that batterers follow them when they leave, continuing to harass and beat them. Many battered women's perceptions that escape is impossible may indeed be accurate.

Other common features of abusive relationships include extreme jealousy and possessiveness on the part of the batterer, social isolation of the couple, frequent threats made by the batterer, sexual abuse of the woman, and physical or sexual abuse of the children by the batterer. Walker, supra.

III. THE BATTERED WOMAN SYNDROME AND SELF-DEFENSE

The relationship between the battered woman syndrome and the defense of self-protection under Kentucky law will be explored in detail in the next column. A few preliminary observations are, however, in order.

Evidence about the battered woman syndrome should not be considered as a new defense. Nor should such evidence be offered to justify an act

of revenge or retaliation. Rather, the evidence should be offered within the framework of existing self-defense principles to assist the jury in evaluating the reasonableness of a woman's belief that she was in danger of death or serious physical injury when she killed her husband.

Here is where the research on battered women becomes important. Since the cycle theory of violence indicates that battering follows a repetitive pattern, worsening over time, it is reasonable for a battered woman to expect that the tension building behavior in the first phase will rapidly escalate to the seriously dangerous violence in the next phase. A woman who has experienced this pattern of violence is particularly aware of when the escalating tensions of phase one are about to explode into the dangerously violent acts of phase two.

An aggressive act which might not seem seriously dangerous to an uninitiated observer can reasonably be interpreted by a battered woman as a signal that the life threatening violence of phase two is imminent. Many battered women kill right before the violence would escalate to dangerous proportions in an acute battering incident. The cycle theory of violence indicates a predictable pattern to the abuse, and demonstrates the reasonableness of the battered woman's perception that she is in imminent danger. Walker, supra.

IV. CHOICE OF DEFENSES

The threshold issue in representing abused women charged with homicide is developing a theory of defense. A myriad of legal and factual defenses may, of course, be presented in any given case. Generally, though, only two defenses are likely to be plausible: self-defense and insanity.

Insanity may in fact be indicated upon an initial review of the circumstances. For instance, the woman is often emotionally unstable at the time of the killing. Also, selective memory loss is very frequently associated with the trauma. The abused woman commonly does not remember all of the details of the killing. Indeed, some women, like Kathy Phillips, do not remember firing the gun or causing the death. Such memory loss can indicate the presence of a disassociative reaction. Traditional sex-role stereotypes, such as the belief that women are more prone to hysteria than men, reinforce the conventional view that women who kill are insane.

Typically, though, a thorough review and analysis of the circumstances of the homicide will demonstrate that the abused woman has reacted to what she reasonably perceived to be a life threatening situation. Accordingly, self-protection is generally the appropriate defense in cases of abused women who kill their spouses.

NEAL WALKER

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* * * * *

CORRECTIONS IN CONTEMPT

The January 14, 1986 Kentucky Post reported that Campbell County Circuit Judge Leonard L. Kopowski and Kenton County Circuit Judge Raymond Lape, Jr. refused on January 13 to withdraw contempt of court orders against the Corrections Cabinet for its failure to take state prisoners from the Kenton and Campbell County jails.

Kopowski fined Corrections $100 per day retroactive to December 25, to be collected immediately. Lape ordered collection of the fines to take place when the General Assembly adjourns on April 15.

As of January 13, the Kenton County Jail housed 6 state prisoners and the Campbell County Jail housed 9.

Trial Tip

SCHEDULING OF DRUGS UNDER KRS CHAPTER 218A

Editor's Note: The following information was provided by Helen Danser, R.Ph.

KRS Chapter 218A defines various schedules of drugs. KRS 218A.020 requires the Cabinet for Human Resources (CHR) to place substances which are not listed in the statute into schedules based on the statutory criteria for each schedule.

Below is my compilation of CHR's listing of drugs that fall into various schedules. The list is not guaranteed to be all-inclusive.

The drugs placed in a particular schedule may be changed by either the DEA or CHR. The change may be a movement from one schedule to another or removal from the controlled schedule.

New drugs marketed are screened for abuse potential and may be placed into a schedule at the time of marketing or later depending on experience once the drug is in use.

Therefore, one must check the validity of the scheduling of any drug at periodic intervals.

In addition to the KRS 218A, 902 KAR 55:010 - 55:060 will list drugs in the various schedules.

Inquiries may be addressed to Mr. Edward Crews, R.Ph., Pharmacy Services Program Manager, Drug Control, Department of Health Services - (502) 564-7985; or to

Helen Danser, R.Ph. Pharmacy Services Program Manager, Department for Mental Health and Mental Retardation Services, Cabinet for Human Resources, Frankfort, Kentucky 40601, (502) 564-4448.

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Macmillan Publishing Co., Inc., NY 1980

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SCHEDULE I

Opiates

Acetylmethadol
Alfentanil
AllyIprodine
Alphacetylmethadol
Alphameprodine
Alphamethadol
Alpha-Methylfentanyl
Benzethidine
Betacetylmethadol
Betameprodine
Betamethadol
Betaprodine
Clonitazene
Dextrommoramide
Dextrorphan
Diampromide
Diethylthiambutene
Difenoxin
Dimenoxadol
Dimepheptanol
Dimethylthiambutene
Dioxaphetylebutyrate
Dipipanone
Ethylmethylthiambutene
Etonitazene
Etoxeridine
Furethidine
Hydroxpethidine
Ketobemidone
Levomoramide
Levophenacylmorphan
Morpheridine
Noracymethadol
Norlevorphanol
Normethadone
Norpipanone
Phenadoxone
Phenampromide
Phenmorphan
Phenoperidine
Piritramide
Propheptazine
Properidine
Propiram
Racemoramide
Tilidine
Trimeperidine

Opium Derivatives

Acetorphine
Acetyldihydrocodeine
Benzylmorphine
Codeine Methylbromide
Codeine-N-Oxide
Cyprenorphine
Desomorphine
Dihydromorphine
Drotebanol
Etorphine
Heroin
Hydromorphinol
Methyldesorphine
Methyldihydromorphine
Morphine Methylbromide
Morphine Methylsulfonate
Morphine-N-Oxide
Myrophine
Nicocodeine
Nicomorphine
Normorphine
Phoclodine
Thebacon

Hallucinogenic Substances

3,4 Methylenedioxy amphetamine
5, Methoxy - 3,4 Methylenedioxy Amphetamine
3,4,5 - Trimethoxy Amphetamine
Bufotenine
Diethyltryptamine
Dimethyltryptamine
4-Methyl-2,5-dimethoxy amphetamine
Ibogaine
Lysegic acid diethylamide - LSD
Marihuana
Mescaline
Peyote
N-ethyl-3-piperidyl benzilate
N-Methyl-3-piperidyl benzilate
Psilocybin
Psilocyn
Tetrahydracannabinols
Hashish
Phencyclidine
4 - Bromo-2,5 - Dimethoxy-Amphetamine
2,5 - Dimethoxyamphetamine (2,5 DMA)
Ethylamine Analog of Phencyclidine (N-ethyl-1-phenylcyclohexylamine, cyclohexamine, PCE)
4 - Methoxyamphetamine (PMA)

Hallucinogenic Substances (Cont.)

Parahexyl (Synhexy 1)
Pyrrolidine Analog of Phencyclidine (1-(1-Phenylcyclohexyl) - Pyrrolidine, PCPy, PHP)
Thiophene Analog of Phencyclidine (1- (1-(1-(2-Thienyl)Cyclohexyl) Piperidine, TCP, TPCP)

Depressants

Mecloqualone
Methaqualone (2-methyl-3-otolyl-4(3H) -quinazolinone) Quaalude

Stiumlants

Fenethylline
N-ethylamphetamine

SCHEDULE II

Opioid Narcotics

Pantopon - Hydrochlorides of opium alkaloids
Opium Tincture Deodorized
Morphine Sulfate - Roxanol, RMS Uniserts (rectal suppositories)
Hydromorphone - Dilaudid
Oxymorphone - Numorphan
Levorphanol - Levo-Dromoran
Methadone - Dolophine
Meperidine - Demeral, Pethadol
Fentanyle - Sublimaze
Alphaprodine HCL - Nisentel
Sufentanil - Sufenta
Codeine
Oxycodone HCL

Combinations of Opioids

B & O Supprettes No. 15A
B & O Supprettes No. 16A
Opium & Belladonna Suppositories
Oxycodone & Acetominophen tablets
Tylox Capsules
SK - Oxycodone with Acetamenophine
Oxycodone HCL, Oxycodone Terephthalate & Aspirin tablets
Codoxy Tablets
Percodan Tablets
SK - Oxycodone with aspirin tablets

Combinations of Opioids (Cont.)

Oxycodone HCL/Oxycodone Terephthalate & aspirin half strength
Percodan - Demi tablets
Demerol APAP
Mepergan Fortis Capsules
Mepergan Injection

SCHEDULE II - NON-NARCOTIC

Amobarbital + Secobarbital - Tuinal
Amobarbital - Amytal
Cocaine
Biphetamine - Resin Complex of amphetamine with dextroamphetamine
Dextroamphetamine - Dexamex, Ferndex, Oxydess II, Spancap No. 1
Methamphetamine - Desoxyn
Methylphenidate - Ritalin
Obetrol - various salts of amphetamine and dextroamphetamine
Pentobarbital - Nembutal
Phenmetrazine - Preludin
Secobarbital - Seconal

Immediate Precursors

1 - Piperidinocyclohexanecarbonitrile and 1 - Phenylcyclohexylamine, immediate precursor to Phencyclidine

Phenylacetone - other names include phenyl-2-propanone, P2P, benzyl methyl ketone and methylbenzylketone - immediate precursor to amphetamine and methamphetamine

SCHEDULE III - OPIOID NARCOTICS

Products Containing Codeine

Aspirin with Codeine
Anatuss with Codeine tablets
Colrex compound capsules
Copavin Pulvules
Hycodan tablets
Empirin with Codeine
Fiorinal with Codeine
Nucofed
Nucofed Expectorant Syrup with Codeine

Products Containing Codeine (Cont.)

Phenaphen with Codeine
Tylenol with Codeine

Products Containing Hydrocodone

Adatuss D.C. Expectorant
Bacomine
Bacodan
Bay Cotussend
Baycomine Pediatric Syrup
Codiclear DH Syrup
Codimal DH Syrup
Codamine
De-tuss
Detussin
Detussin Expectorant
Donatussin DC Syrup
Entuss Expectorant Syrup
Hycodan
Hycotuss Expectorant
Hycomine
Hycomine Pediatric Syrup
Hydropane
Hydrophen
Hydro-Propanolamine
Promist HD Syrup
Promist Expectorant
Psuedo - Hist Expectorant
P.V. Tussin Syrup and tablets
Ru-Tuss - with Hydrocodone
SRC Expectorant
S.T. Forte Liquid
Triaminic Expectorant DH
Tussanil DH Tablets
Tussanil DH Syrup
Tussend Expectorant
Tussionex

Products Containing Opium

B.P.P
Corrective Mixture with Paregoric - Kentucky only
Diabismule Tablets
Diabismule Syrup - Kentucky only
Diaquel
Donnagel P.G.
Hista - Derfule caps
Kadonna P.G.
Kaopectolin P.G. _ Kentucky only
Kaodene with Paregoric
KBP/O

Products Containing Opium (Cont.)

Paregoric - Kentucky only
Parelixir - Kentucky only
Parepectolin - Kentucky only
Nalline - Nalorphine
Talwin - Pentazoicine - all forms

SCHEDULE III - NON-NARCOTICS

Amphetamine sulfate 2.5 mgm; aspirin 162 mgm, Phenacetin 162 mgm - Edrisal
Benzphetamine
Butabarbital - Butisol
Chlorhexadol - Lora, Mecoral, Medodorm
Chlorphentermine
Chlortermine
D Amphetaminesulfate 2.5 mgm, mephenesin 500 mgm; Salicylamine 2 mgm; chlorpromazine HC1 10 mgm - Special Formula 711 Tablet
Dextroamphetamine sulfate 5 mgm; chlorpromazine HC1 25 mgm - Thora-Dex No. 2 Tablet
Glutethimide - Doriden
Lysergic Acid
Lysergic Acid Amide
Mazindol
Mephobarbitol - Mebaral
Methamphetamine HC1 1.2 mgm, chlorpheniramine maleate 3.8 mgm; phenacetin 120.0 mgm; salicylamide 180.0 mgm; Caffeine 30.0 mgm; Ascorbic acid 50.0 mgm - Genegesic Capsules
Methamphetamine HC1; conjugated estrogens - equine'0.125 mgm Methyl testosterone 1.25 mgm amylase 10.0 mgm protease 5.0 mgm, aullulase 2.0 mgm nicotinyl alcohol tartrate 7.5 mgm; dehydrochloric acid 50.0 mgm; ferrous fumerate 6.0 mgm - Hovizyme Tablet
Methamphetamine HC1 1mgm; conjugated estrogen - equine 0.25 mgm; methyl testosterone 2.5 mgm - Mediatric Tablet or Capsule or Solution (above ingredients in 15 cc's of solution)
Methyprylon - Noludor
Mephobarbital Gemonil

Schedule III - Non-Narcotics (Cont.)

Phendimetrazine
Phenobarbital
Sulfondiethylmethane
Sulfonethylmethane
Sulfonmethane
Talbutal - Lotusate

The following combination products are located in Schedule III: "any material, compound, mixture or preparation containing amobarbital, secobarbital, pentobarbital or any salt thereof and one or more other active medicinal ingredients which is not a controlled substance."

"Any suppository dosage form containing amobarbital, secobarbital, pentobarbital or salt thereof whcih has been approved by the U.S. Food and Drug Adminstraton for marketing only as a suppository."

SCHEDULE IV

Chloral Betaine - Beta-Chlor, Somilan
Chloral Hydrate - Noctec, Somnos, Nycton, Lorinal, Chloraldurat
Ethchlorvynol - Placidyl
Ethinamate - Valmid
Meprobamate - Equanil, Miltown, Meprospan
Paraldehyde
Pentaerythritol Chloral - Petrichloral, Periclor

Stimulants

Fenfluramine HCL - Pondimin
Diethylpropion HCL - Depletite - 25; Tenuate; Tepanil; Tenuate Dospan; Tepanil Ten-Tab
Phentarmine HCL - Phentrol; Tora; Fastin; Obe-Nix; Obephen; Obrmine; Obestin-30; Phentrol 2; Unifast Unicells; Wilpowr; Adipex-P; Dapex-37.5 Ionamin; Parmine; Phentrol 4; Phentrol 5
Pipradrol - Detaril; Gerodyl; Meratran; Pipradol
SPA-1(-)-1-Dimethylamino-1, 2-Diphenylathane

Depressants

Alprazolam - Xanax
Bramazepam
Camazepam
Chlordiazepoxide - Librium; Libritabs; A-Poxide; Lipoxide; SK-Lygen; Murcil; Reposans-10; Sereen
Clobazam
Clonazepam - Clonopin
Clorazepate - Tranxene
Clothiazepam
Cloxazolam - Enadel; Sepazon
Delorazepam
Diazepam - Valium
Estazolam - Eurodin; Julodin
Ethyl loflazopate
Fludiazeoam
Flunitrazepam - Rohypnol
Flurazepam - Dalmane
Halazepam - Paxipam
Haloxazolam
Ketozolam
Loprazolam
Lormetazepam
Lorazepam - Ativan; Emotival; Lorax; Psicopax; Tavor; Temesta
Mebutamate - W-583; Capla; Butatensin; Carbuten; Mebutina; Prean; Sigmafon; Vallene; Mega; No-Press; Axiten; Ipotensivo
Medazepam - Ansilan; Diepin; Elbrus; Esmail; Medazepol; Mezepan; Megasedan; Nobrium; Pazital; Psiquium; Resmit; Rudotel; Serenium; Siman
Methohexital - Brevital; Brevital Sodium; Brevimytal Sodium; Brietal Sodium
Nimetazepam
Nitrazepam - Benozalin; Calsmin; Eunoctin; Mosadan; Mogadon; Nelbon; Nitrenpax; Paxisyn; Pelson; Radedorm; Relact; Sonebon; Sonnolin
Nordiazepam
Oxazepam - Serax; Aplakil; Bonare; Enidrel; Hilong; Isodin; Limbial; Nesontil; Praxiten; Propax; Quilitrex; Rondar; Serenal; Serenid; Serepax; Seresta; Sobril; Tazepam
Oxazolam - Serenal

Depressants (Cont.)

Pemoline - Cylert; Azoksodon; Dantromin; Deltamine; Endolin; Hyton; Kethamed; Nitar; Notair; Pioxol; Pondex; Ronyl; Sigmadyn; Sistral; Sofro; Tradon; Volital
Pinazepam
Prazepam - Demetrin; Verstran; Centrax
Temazepam - Myolastin, Restoril
Tetrazepam
Triazolam - Halcion

Analgesics

Dextropropoxyphene - Darvon

SCHEDULE V

Tricodene #1 Syrup
Tricodene #2 Syrup
Phenergan with Codeine Syrup
Phenergan VC with Codeine Syrup
Cophene - 5 Syrup
T-Koff Syrup
Alamine - C Liquid
Codehist DH Elixir
Phenhist DH with Codeine Liquid
Novahistine DH Liquid
Actifed with Codeine Cough Syrup
Midahist DH Liquid
Dimetane DC Cough Syrup
Colrex Compound Elixir
Kolephrin with Codeine Liquid
Codimal PH Syrup
Baytussin AC Expectorant
Cherocol Syrup
Clydeine Cough Syrup
Guiamid A.C. Liquid
Guiatuss A.C. Liquid
Guiatussin with Codeine Liquid
Halotussin with Codeine Phosphate Liquid
Nortussin with Codeine Liquid
Robitussin A.C. Syrup
Tolu-Sed Cough Syrup
Tussi-Organdin Liquid
Prunicodeine Liquid
Terpine Hydrate with Codeine Elixir
SK-Terpin Hydrate and Codeine Elixir
Calcidrine Syrup
Cetro-Cirose Liquid
Alamine Expectorant

Schedule V (Cont)

Deprosit Expectorant with Codeine
Isoclor Expectorant
Novahistine Expectorant
Nucofed Pediatric Expectorant
Phenhist Expectorant
Robitussin - DAC syrup
Ryna - CX Liquid
Dihistine Expectorant
C-Tussin Expectorant
Midahist Expectorant
Naldecon - CX Suspension
Triaminic Expectorant with Codeine
Histadyle EC Syrup
Promethazine HCL Expectorant with Codeine
Phenergan Expectorant with Codeine Syrup
Prothazine with Codeine Expectorant Syrup
Tussar 2 Cough Syrup
Tussar SF Cough Syrup
Iophen - C Liquid
Ambay Expectorant Liquid
Ambophen Expectorant
A-Nil Expectorant
Bromanyl Expectorant
Ambenyl Cough Syrup
Ru-Tuss Expectorant
Conex with Codeine Syrup
Tussirex with Codeine Liquid
Promethazine HCL VC Expectorant with Codeine
Mallergan - VC Expectorant with Codeine syrup
Phenergan VC Expectorant with Codeine Syrup
Anatuss with Codeine Syrup
Actacin C Liquid
Actamine C Expectorant
Actifed C Expectorant
Tracin C Syrup
Triafed C Expectorant
Triafed C Expectorant Syrup
Poly Histine Expectorant with Codeine
Bromphen DC Expectorant with Codeine
Midatane DC Expectorant
Normatane DC Expectorant with Codeine
Tamine Expectorant DC Syrup
Pediacof Cough Syrup
Lomotil
Buprenorphine

Phendimetrazine Products

Adaphen
Bacarate
Bontril PDM
DI-AP-trol
Melfial
Metra
Obalan
Obeval
Phenzine
Plegine
Sprx-1
Statobex
Statobex G
Trimstat
Trimtabs
Weightrol
Anorex
Sprix 3
Weh-Less
Adipost
Bontril Slow-Release
Dyrexan - OD
Hyrex 105
Melfiat - 105 Unicells
Prelu - 2
Slyn II
Sprx - 105
Trimcaps
Wehless 105 Timecells

HELEN DANSER

CHALLENGING THE CATEGORY OF A DRUG AND THE DELEGATION OF THE DUTY TO CATEGORIZE

A. Challenging Category

The previous article sets out a listing by the Cabinet for Human Resources of what categories it has placed certain drugs. As with all matters in a criminal case, the defense may have the duty to challenge determinations made by the state's witnesses.

In Hohnke v. Commonwealth, Ky., 451 S.W.2d 162 (1970) the Court held that a defendant had the right to challenge the schedule assigned to a drug by the state agency. Id. at 166. The statutes set out certain criteria for the classification of drugs by the administrative authority. The defense can challenge the correctness of the classification made pursuant to KRS 218A.020: "It may not be doubted that a judicial review to test the validity of an administrative regulation must be afforded to satisfy the demands of due process." Id.

B. Challenging Delegation

Further, Courts have held that a legislature's requiring an administrative agency to place drugs within certain categories is an unconstitutional delegation of legislative authority. See Kentucky Constitution § 27 and 28; State v. Rodriguez, 379 So.2d 1084 (La. 1980); Utah v. Gallion, 572 P.2d 683 (Utah 1977). But see Hohnke, supra, at 165; Commonwealth v. Hollingsworth, Ky., 685 S.W.2d 546 (1985) (Vance, J., dissenting).

ED MONAHAN

KRS CHAPTER 218A DRUG CHART

The drug chart that appears on the next two pages is an attempt to simplify the penalty provisions of KRS Chapter 218A, a most awkward drug statute.

This drug chart is not designed to replace the statute, but to act as a quick-reference research tool. In this regard, each statutory penalty provision has been inserted at the bottom of the section labelled "Conduct."

Only those provisions that dealt with sanctions have been included.

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
KRS 218A.140(3-5) violation [False prescriptions, etc.] KRS 218A.990(10)	I, II, or III	1-5 years	$ 3,000-$5,000
KRS 218A.140(3-5) violation [False prescriptions, etc.] KRS 218A.990(11)	IV or V	1-3 years	$ 1,000-$3,000
KRS 218A.140(6) violation [Advertising], Catch All KRS 218A.990(12)		Up to 90 days - jail	Up to $500
KRS 218A.330 violation [Simulation] KRS 218A.990(13)		Up to 12 mos. - jail 1-5 years*	
KRS 218A.500(2-4) violation [paraphernalia] KRS 218A.990(14)		Up to 12 mos. - jail	
D between 14-17; and convicted of any offense under Chapter 218A; or adjudged delinquent for an act which would be offense under Chapter 218A Has motor vehicle KRS 218A.991(1)(a-b)		May recommend revocation of license for 1 year May recommend revocation of license for 2 years so long as suggested period of revocation does not extend past D's 18th birthday*	
Has no motor vehicle KRS 218A.991(1)(c)		May recommend no license be issued for 1 year May recommend no license be issued for 2 years so long as suggested period does not extend past D's 18th birthday*	

* Denotes Subsequent Offense
\+ Denotes Optional Commitment Treatment
D Denotes Defendant
V Denotes Victim

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
Traffics or transfers KRS 218A.990(1)	I or II NARCOTIC or Included in KRS 218A.070(1)(d)	5-10 years 10-20 years*	$ 5,000-$10,000 $10,000-$20,000*
Traffics KRS 218A.990(2)(a)	I or II [non-narcotics; not included in KRS 218A.070(1)(d); not marijuana; not hashish - 1st offense only; not LSD; not PCP] III	1-5 years 5-10 years*	$ 3,000-$5,000 $ 5,000-$10,000*
Manufactures, sells or possesses with intent to sell KRS 218A.990(2)(b)	I LSD, PCP	5-10 years 10-20 years*	$ 5,000-$10,000 $10,000-$20,000*
Traffics Transfers KRS 218A.990(3)	IV or V I, II, III [non-narcotics; not included in KRS 218A.070(1)(d); not marijuana]	Up to 12 mos. - jail 1-5 years*	Up to $500 $3,000-$5,000*
Manufactures, sells or possesses with intent to sell a. less than 8 oz. b. 8 oz. or more but less than 5 lbs. c. 5 lbs. or more KRS 218A.990(4)	MARIJUANA	Up to 12 mos. - jail 1-5 years 5-10 years	Up to $500 $5,000-$10,000
Sells or transfers [D18 or over - V under 18] KRS 218A.990(5)	MARIJUANA [Any Amount]	1-5 years 5-10 years*	
Plants, cultivates, or harvests for purposes of sale KRS 218A.990(6)(a)	MARIJUANA	1-5 years	$ 3,000-$5,000
Possession KRS 218A.990(7)	I or II narcotic or included in KRS 218A.070(1)(d)	1-5 years 5-10 years*	$ 3,000-$5,000 $ 5,000-$10,000*
Possession KRS 218A.990(8)-(g)	I, II, or III [non-narcotics; not included in KRS 218A.070(1)(d); not marijuana] IV or V	Up to 12 mos. - jail+ Same for subsequent offense	Up to $500 Same for subsequent offense
Possession for own use; Transfers less than 8 oz. KRS 218A.990(9)	MARIJUANA	Up to 90 days - jail+	Up to $250

Forensic Science

HAIR AS EVIDENCE - CONFUSION AT BEST

The search for a valid and definitive means of characterizing hair as originating from one individual has taken a long and as yet non-productive path. Years of endeavor and painstaking work have come full circle back to the original and subjective examination of hair by means of comparison microscopy.

Supposed advances such as neutron activation analysis and other methods provided complex methods of hair analysis, but also produced non-definitive results. Natural variations in the hair of a single individual, variants in chemical composition and other factors combine to produce an inability of any method to definitively correlate an unknown hair at a crime scene to that of an accused. Although hair examination may be valuable in eliminating a suspect due to gross discrepancies, such as pigmentation, disease, and other distinguishing factors, these same factors cannot be applied conversely.

Limitations of current hair examination methodology require an examiner to come to one of three conclusions in reference to his examination of unknown versus known hair samples:

1. The hair in question definitely did not originate from the accused; or
2. He does not know, i.e. he cannot determine; or
3. The unknown and the known hairs exhibit the same characteristics and could have originated from the same individual. (Please note the "could have;" maybe they didn't.)

As a prosecution tool the examination of hair therefore has limited, if any, proper scientific value. Its primary value should of course be to exonerate a suspect of a crime. Unfortunately, more often than not, its primary usage is to cloud the issue. Prosecutors and juries tend to attach greater importance to a seemingly positive identification of hair than is scientifically possible.

The assumption is that a laboratory would not report the two hairs as similar and possibly having a common origin unless the identification was beyond reproach.

Hair identification therefore offers little or no significant value and simply creates an illusion of scientific proof where none exists. This, in this writer's opinion, creates a very real potential for scientific abuse by those charged with enforcing our laws.

JACK BENTON AND PAT H. DONLEY

You will never succeed in getting at the truth if you think you know ahead of time, what the truth ought to be.

MARCHETTA CHUTE

TRIAL PRACTICE INSTITUTE COMPLETED

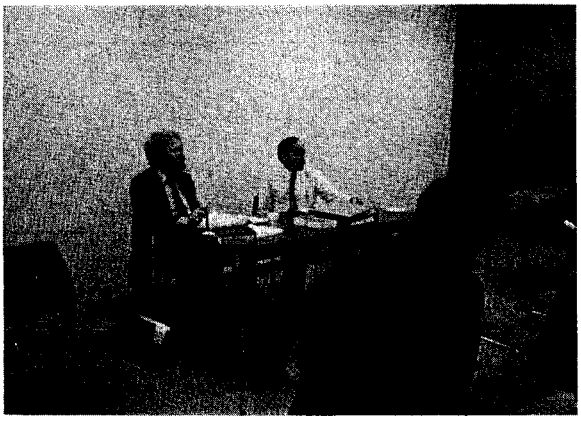
This Department's fourth Trial Practice Institute was held in November in Richmond. Over 45 attorneys from around the state were trained in trial skills.

In addition to DPA attorneys, the faculty included Bob Carran from Covington, Larry Pozner from Colorado, Roberta Illg from Atlanta, Greg Weeks from North Carolina and Joy Goodwin from South Carolina.

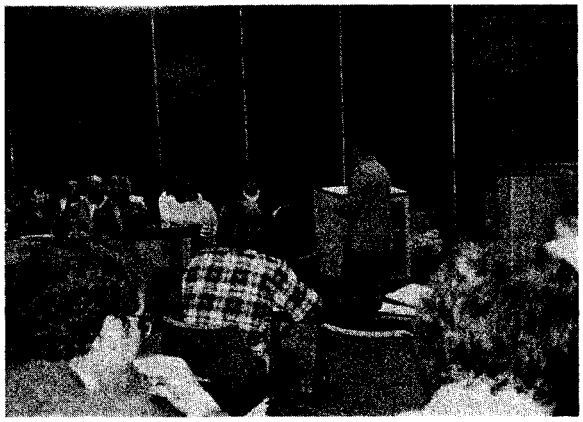
During the 4 days of training, the participants practiced each aspect of a criminal trial. Each exercise was preceded by a lecture on the topic and followed with a demonstration by a faculty member. Through the help of Professor Mike Nietzel of the University of Kentucky, Psychology Department, we had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

**OUT OF STATE FACULTY:
LARRY POZNER, ROBERTA ILLG,
JOY GOODWIN, GREG WEEKS**

**Top Row: ERNIE LEWIS, ED MONAHAN,
(l to r) GEORGE SORNBERGER,
Second Row: BETTE NIEMI, GARY JOHNSON
Front Row: VINCE APRILE, JAY BARRETT**

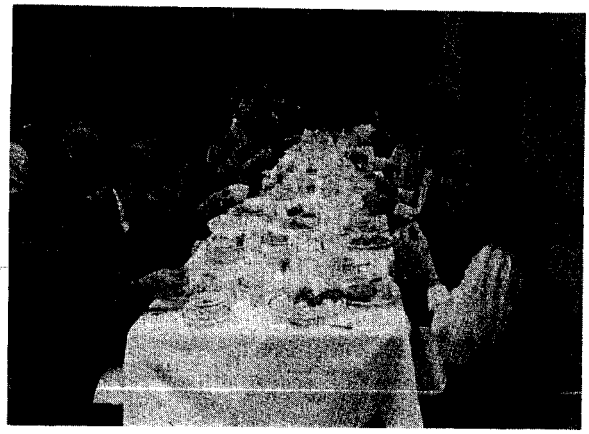


**GEORGE SORNBERGER OF SOMERSET AND
ERNIE LEWIS OF RICHMOND CRITIQUE**



**BETTE NIEMI OF LAGRANGE
VOIR DIRES**

WORDS OF WISDOM FROM WEEKS



The 1985 Trial Practice Institute banquet talk was presented by Greg Weeks. His good thoughts about what we do were as follows:

I would like to speak to you from the heart and I would like to say some things to you that I think are especially appropriate during something like this.

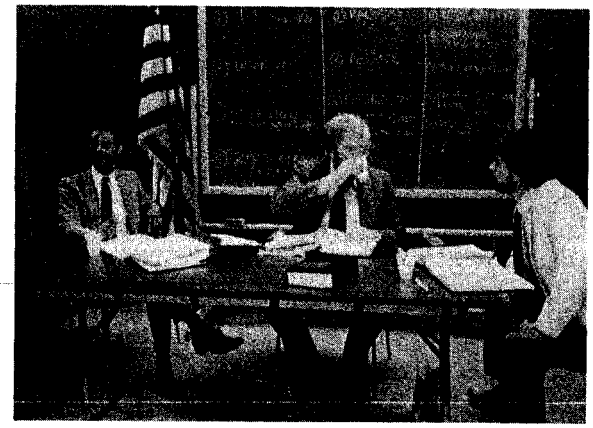
When Ed called me and said I would like for you to say something brief and inspiring I said, "damn, what am I going to say to the folks in Kentucky about public defender work or about practicing criminal law." And the more I thought about it, the more esoteric my ideas became and the more things I added and I decided to come down here; meet folks; participate in the program, and say those things which occurred to me during that participation.

What we do and why we do it are two thoughts that keep recurring to me in my professional life. What we do is we represent poor people for the most part. We represent minorities, ethnic and economic. We represent rogues, cut throats, liars. We represent people who are likable. We represent people who are sad and pathetic. We represent people who can be real pains in the butt.

Consider this, "I ain't taking that plea, I ain't guilty of nothing," pause, "three years, that doesn't sound, too bad." Consider this, "what do you mean, you can't get me probation, my last three public defenders got me probation." This is all too typical of the people we represent, the forgotten, the voiceless. We speak for them. We are their voices.

Lynda Campbell Prepares a Witness

The folks that we represent cost us in terms of pain, they cost us in terms of a personal involvement and what that means to our families. But when it's all said and done, it's really worth it. It's worth it because at bottom, what we do is right. What you folks in this room, along with public defenders in my state, with other folks who do public defender work and criminal defense work, do is so meaningful and so neglected in terms of how it is appreciated or not appreciated by those who don't share our views,



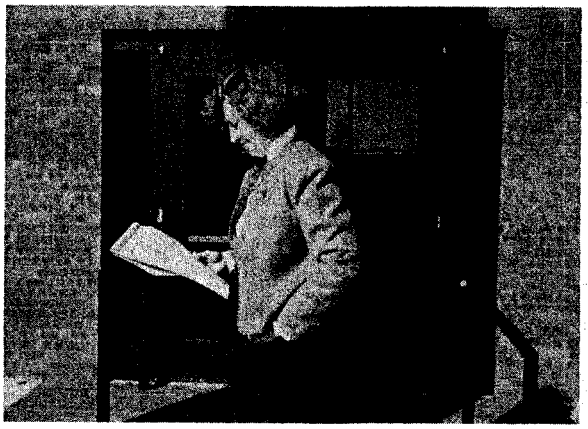
PANEL ON THEORY OF THE CASE WITH GREG WEEKS, GEORGE SORNBERGER AND KEVIN MCNALLY

those who don't share our philosophy. Because, for the most part, we fight an up-hill battle.

We go into a courtroom which is largely hostile. All of us hear, "how can you do that work, how can you represent those people?" Judges see us as fulfilling the constitutional mandate of standing there beside our client while they jack them around. They don't understand effective, meaningful representation, and they see you as an impediment to the justice system. And that is very frustrating and very depressing. And during those periods of depression that we all go through, the one thing that sustains us, the one thing that sustains me, is the knowledge that I'm working with people who share the same sense of commitment, who feel that same feeling, bond. Folks who truly understand the words which other folks say are corny and trite, words meaning everything in the world, "Liberty's Last Champion."

It's been a pleasure to be here with you, it's been a pleasure to know that there are folks in Kentucky who feel and think the way I do. It is a pleasure to me to look out across this room and see Charlie Coy, who has spent a lifetime serving those commitments and to have talked to young folks who have just come out of law school who feel that same sense of commitment, and to understand and realize and to have comfort in the knowledge that the continuity is there.

Thank you.



JOANNE LINN OF LOUISVILLE PREPARES FOR CLOSING ARGUMENT

To understand any living thing, you must, so to say, creep within and feel the beating of its heart.

- W. MacNeile Dixon,
The Human Situation

ORAL ADVOCACY

ARROGANCE

An inescapable odor permeating the argument of the lawyer who senses the superiority of his own mind to the more modest attainments of the judges. Synonyms: condescension, impatience, patronizing. See also "Unctuousness," infra.

Arrogance in advocacy as elsewhere in life wears many disguises. Sometimes, though rarely, it is undisguised. A lawyer will occasionally be so infuriated at being enmeshed in hideously protracted litigation, so angry with his adversary counsel or the opposing party, or so skeptical of the court's ability to act responsibly that his strident tone of voice, haughty bearing, apoplectic look, and choice of language bespeak arrogance in the clearest of terms. On such occasions the lawyer (who has of course ceased being much of an advocate...except for the other side) may deign to let the court know how many cases in this precise field he has tried and how often eminent judges have held in his favor.

Sometimes arrogance lies in a look. I interrupt a senior partner from a big firm, an expert in his field. He looks at me incredulously, pityingly. On another occasion, counsel is obviously completely at home in court (perhaps feeling more at home than we do); with hands in his pockets, he swivels from side to side and shares his perceptions with his equals behind the bench. So long as he is allowed to pursue his thought, all is well. But if a judge exhibits a slowness to comprehend, counsel raises his voice and looks at his watch to convey the message that time's a-wasting.

Arrogance is bad, not because it is unmannerly, but because it tempts judges to be unjudicial. It stimulates a devilish - or is it merely human? - desire to rule against the party because of the lawyer's communicated sense of superiority.

I don't wish to fault counsel too much. A good lawyer will have dug far deeper into his case than the judge. Quite often the questions from the bench will be repetitive, irrelevant, unnecessary, or even obtuse. Dealing with these without conveying an impression (whether truly felt or not) of arrogance is not easy.

Ignoring a question as not worthy of attention is the worst approach. A crisp, over-succinct brush-off answer is hardly better, as is the response that begins, "As I said before..." or "Let me repeat..." Nor does it help to be over-didactic and adopt a "back-to-the-drawing-board" tone appropriate for the lower elementary grades.

The antidote for arrogance or its appearance may require an act of will: forcefully saying to oneself, "Now remember, these judges are trying. They have dozens of other cases on their minds. Try to put yourself in their place." With luck counsel might then reply to a less than astute question thusly: "I'm sorry, Your Honor. I've been so close to this case that I may take too many things for granted. What I meant to convey was this...."

Reprinted from the book A Lexicon of Oral Advocacy by Judge Frank M. Coffin and illustrated by Douglas M. Coffin. *Copies available from the National Institute for Trial Advocacy, 1507 Energy Park Dr., St. Paul, MN 55108. Or call toll free, (800) 328-4815, to order by phone.*

Cases of Note... ...in Brief

IMPEACHMENT
State v. Parillo
480 A.2d 1349 (R.I. 1984)

Impeachment By Bias

The defendant was precluded at trial from obtaining and introducing medical records of the state's chief witness. The records could have supported the defendant's claim that the prosecutor's witness was a drug addict undergoing treatment at a hospital and therefore unreliable on communicating what she saw. The hospital refused to release the records since the patient had not consented to their release.

The Court held that denying a defendant "any access to medical records that may have been relevant in impeaching the testimony of the only surviving eyewitness to the crimes for which he was convicted" was "constitutionally violative of his fundamental right of cross-examination." Id. at 1355.

Extent Of Impeachment By Bias

Also, the state's witness was cross-examined on whether her testimony was motivated by a deal made with authorities concerning her husband's pending charges. She denied any deal. Defense counsel was then stopped by the trial judge from exploring whether her denial was true. The defense was not permitted to ask the witness if her husband was a parole violator who had been arrested for a killing and then suddenly released. The Court held:

> the fact that a trial justice has allowed defense counsel some cross-examination on the issue of bias is not dispositive of his allegation of a denial of his right to confront his accusers. Before any discretionary authority arises in the trial justice to curtail the scope of cross-examination, the defendant must be provided, not just some cross-examination, but sufficient cross-examination as a matter of right. State v. DeBarros, 441 A.2d at 552. Since this degree of latitude was not afforded defense counsel in this case, we find a per se violation of the defendant's constitutional right of cross-examination under the Sixth Amendment of the Constitution of the United States and [under the state constitution].
> Id. at 1358-59.

IMPEACHMENT BY MOTIVE
State v. Privitera
476 A.2d 605 (Conn.App. 1984)

The defendant was charged with assaulting a police officer. On cross of that officer the defense tried to question him as to a pending federal civil suit filed by the defendant against the officer for a claim arising out of the arrest of the defendant in this case. The defendant was acquitted of this count but convicted of interfering with another officer. The appellate court reversed the conviction because of the denial of the constitutional right to cross-examination:

> The pendency of civil litigation between a witness and a party against whom he testifies is relevant to bias. 3A Wigmore, Evidence (Chadborn Rev.) § 949. A police officer who has been sued by the defendant for his conduct in arresting the defendant may be sensitive to a claim of misconduct expressed in that suit and eager to see it rejected. He may be

concerned about the imposition of a damages award against him and may harbor animosity toward the defendant for suing him. See United States v. Gambler, 662 F.2d 834, 837 (D.C.Cir. 1981). Thus, such evidence "'would reasonably tend to indicate that his testimony might be influenced by interest, bias or a motive to testify falsely.'" State v. Moynahan, 164 Conn. 560, 601, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S.Ct. 291, 38 L.Ed.2d 219 (1973).
Id at 607.

ED MONAHAN

DPA Staff Changes

NEAL WALKER
Formerly with the Federal Public Defender's Office Joined the Office August 15, 1985

REBECCA BALLARD DILORETO
ASSISTANT PUBLIC ADVOCATE
Joined the Richmond Office November 1, 1985

Book Review

GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN

By Roger Fisher and William Ury
of the Harvard Negotiation Project
Penguin Books, 1983.
Paperback $5.95

On what do public defenders and criminal defense attorneys spend at least half of their efforts and energy? Plea bargaining, or what's referred to fondly as "Let's Make a Deal." That is the fuzzy area of practice where attorneys cajole, beg, advocate, plead, and argue for their clients, generally relying on various personality traits and other unreliable or unidentifiable skills as they march into the prosecutors' offices across the state to get "a good deal." The activities that make up plea bargaining include communications with clients, police officers, victims, social workers, other attorneys, and even judges. They occur in parking lots, halls, bathrooms, judges chambers, courthouses, restaurants, etc.

Wherever it happens, whenever it happens, and with whomever it happens; what really is happening is negotiation. And it really is a learnable skill that can mean a better relationship with fellow negotiators, but more importantly a "better deal" ultimately for clients. It certainly is true that law school does not usually address this area of expertise. But what other skill is as important for any lawyer?

Getting To Yes provides a framework for negotiation. It is very helpful for the plea bargaining activities

that all criminal defense attorneys engage in somewhat haphazardly. (Obviously, it is also very important for matters separate from plea bargaining.)

The principles of negotiation set out in the book are taken from the developments and approach of the Harvard Negotiation Project. One of the authors, Roger Fisher, is the Director of the Project, as well as a Professor of Law at Harvard. The co-author, William Ury; while not a lawyer, is the Associate Director of the Project with background in linguistics and anthropology.

The book is enticingly slim in size and clearly outlined (short and easy to understand). It is available in the Department of Public Advocacy's Frankfort Library for loan (call or write Tezeta Lynes at 564-5252).

The Project's approach is one of Principled Negotiation. Issues are to be decided on their merits as opposed to each side hammering away at their position as in the traditional negotiation stereotype. The method involves being soft on the person and hard on the issues. Whenever possible, similar interests should be identified and the results based on objective criteria.

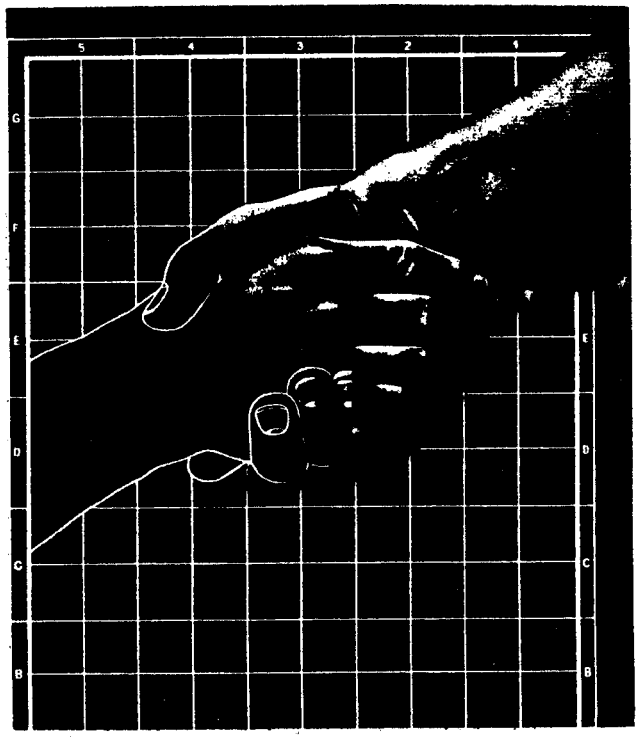
The authors say that there are three criteria by which the process of negotiation should be judged:

1. It should produce a wise agreement, if agreement is possible;
2. It should be efficient; and
3. It should improve (or not damage) the relationship between the parties.

A wise agreement is identified as one that meets the legitimate interests of each side to the extent possible; resolves conflicting interests fairly; is durable, and takes community interest into account.

So how does principled negotiation work?

First, by separating the people involved from the issue to be resolved. The best way to do this is to build and develop an on-going working relationship with the other party. The goal is that the parties see themselves as side by side partners searching for a fair agreement advantageous to each side. Various people problems are identified with suggestions on how to handle them. Tactics include listening actively and carefully; understanding the other's position; helping save face; allowing the party to let off steam; being able to apologize; showing personal interests, and paraphrasing and rephrasing what the party is trying to communicate.



These are valuable suggestions and guidelines as the average attorney must deal with the same people over and over gain. Evidently, it is appropriate and desirable to "good ole boy" it on the people issue while

standing firm on the conflict at hand.

The **second** task for the principled negotiator is to focus on the interests of the parties involved and not on the formal stated positions. For example, this involves looking beyond the prosecutor's stated position, "I always recommend one year on these Class D felonies," to what interests underlie that position. Once the underlying issues are articulated by either party, it is easier to suggest alternatives and options. It will then be easier to refute some of the prosecutor's or the other party's assumptions. In addition, one's own interests need to be fully spelled out to the other side so that a full discussion of the problem may take place.

This process is to be distinguished from traditional position bargaining which the authors speak of very negatively. They feel that by sticking to positions such as, "I want one year on all felonies," or "We'll plead to a misdemeanor only or go to trial," the chance of a wise and fair agreement being reached is generally reduced.

An important tactic is to verbally, or otherwise, acknowledge the other side's interests. People want to feel like they and their positions are understood, regardless of whether they are agreed upon. Understanding the interests of all parties leads to a better grasp of what the process should come to terms.

Always remember that certain basic needs highly motivate people. They include: security, economic well-being, a sense of belonging, recognition and control over one's life. If one of these needs or interests are identified, then a good negotiator will take it into consideration. A good attorney always identifies his or her clients' basic needs. If the interest can be met in the agreement, then the interested party will be more committed to the results. Freedom from incarceration is a big motivator and can lead to alternatives such as restitution, agreements to seek counseling, etc.

The **third** task for the principled negotiator is to develop an abundance of options for the parties to consider. To achieve that, the authors advise against premature judgment; seeking the single answer; assuming a fixed pie, and thinking that "solving their problem is their problem."

By coming up with creative options, a variety of potential agreements can be proposed and lead to the desired "yes." This can be done by brainstorming with colleagues or with the other party in certain situations.

Last, the principled negotiator will insist on relying on an objective criteria to avoid arbitrary and unfair results.

Several chapters are devoted to dirty tricks, power struggles, and parties who resist becoming willing principled players. It is recommended that a BATNA-Best Alternative to a Negotiated Agreement be developed in case the negotiation fails.

This is a very sensible, straightforward book that will be of immense value to all attorneys. The authors rely on concrete examples from the Camp David accords to common landlord-tenant squabbles to the Iranian Hostage Crisis.

Basically Principled Negotiation stands for the proposition that one can get what one wants, or at least close to it, and still be decent.

PATRICIA VAN HOUTEN

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.

POETIC JUSTICE

(JUROR READS NOTE): To Whom it May Concern:
Here today; gone tomorrow.
Sorry [Jailer], I've caused you worry.
The time was right; the charges wrong;
so this will be my farewell song.
I left your county; I've left your state;
please drop the charges and forget the hate.
From here on in I've changed my ways;
yes this is the end of my criminal days.
And if you care to know my plans;
from this day on I'm in God's hands.
So let me rest; please let me be;
So I can live out my life in serenity.
I would rather die than be in jail;
to me it is like a living hell.
That's all that's left in my heart;
I'm off to make a brand new start.
Sincerely, [the defendant]. (Just call me Rhyming Simon.)

YOU DON'T HAVE TO BE SARCASTIC

PROSECUTOR: [Objection leading.]

JUDGE: I don't think that is leading, "did he ask for help."

DEFENSE LAWYER: I don't think so either, Judge. Thank you.

PROSECUTOR: Thank you, [defense attorney], that comforts me greatly that you don't think it is leading.

A REAL DEADLOCKED JURY

("We might have to dynamite her out of there.")

INDIANAPOLIS - A mistrial was declared in a robbery case after a juror locked herself in a restroom and refused to come out because of an argument with another juror.

Nancy Morse, 24 of Indianapolis, said she took the action Wednesday because she had grown frustrated with the deadlock of the jury, which had been deliberating 20 hours.

Ms. Morse refused to respond to jurors who talked to her from the other side of the locked restroom door. She remained in the restroom for more than 15 minutes.

[The Judge declared a mistrial.]
Louisville Times at B2 (4/17/85).

SOME GUYS WILL DO ANYTHING TO STAY ALIVE

(Now this is sandbagging.)

BALTIMORE - A condemned killer used forged character references to persuade a court to overturn his death sentence, prosecutors say.

The court...[criticized the exclusion of] two favorable character references, both written on the stationery of Jail Warden Paul Davis.

Davis learned of the apparent fraud when he read a newspaper account of the court's decision and told prosecutors there was no evidence anybody with those names ever worked at the jail...

Louisville Times at A7 (12/10/85).

Thanks... and a tip o' the hat to Ed Monahan, Jay Barrett and Phaedra Spradlin.

(Robinson, Continued from P. 1)

insignificant, she sought to have the faculty's efforts focused on methods of addressing the school's serious problems with education.

Of late, she has concentrated at the Department of Public Advocacy on death penalty trials and appeals. Her specialty, for which she is nationally known, is jury composition challenges. Gail always has time for sharing her knowledge with other attorneys wherever or whenever.

She and her husband, Kevin McNally, are the proud parents of Sean Fitz and Jesse Dylan with another child on the way in April. Even though an ardent vegetarian, she has been known to crave a "good" hamburger when pregnant. Her free time is spent with her children, "the land" that she lives on in Bald Knob (just Northwest of Frankfort), her food co-op, and the magnificent house she helped construct.

As her life attests, she feels that the most important value she and Kevin teach their children is the service of others in need.

We are in Gail's debt for her personal and professional example. Thanks, Gail, for the unselfish gift of yourself.

ED MONAHAN

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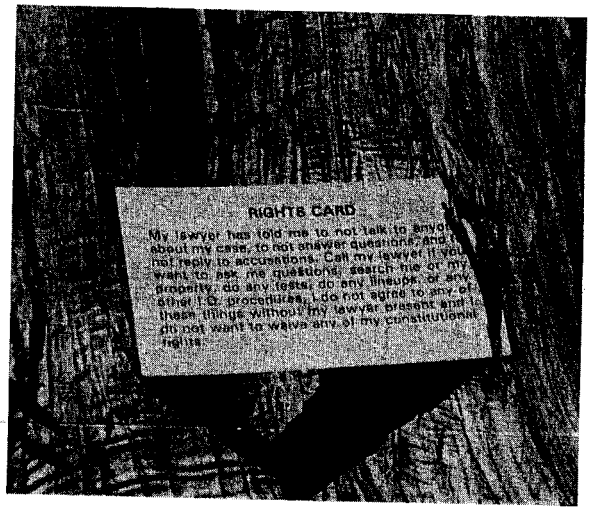

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