THE ADVOCATE

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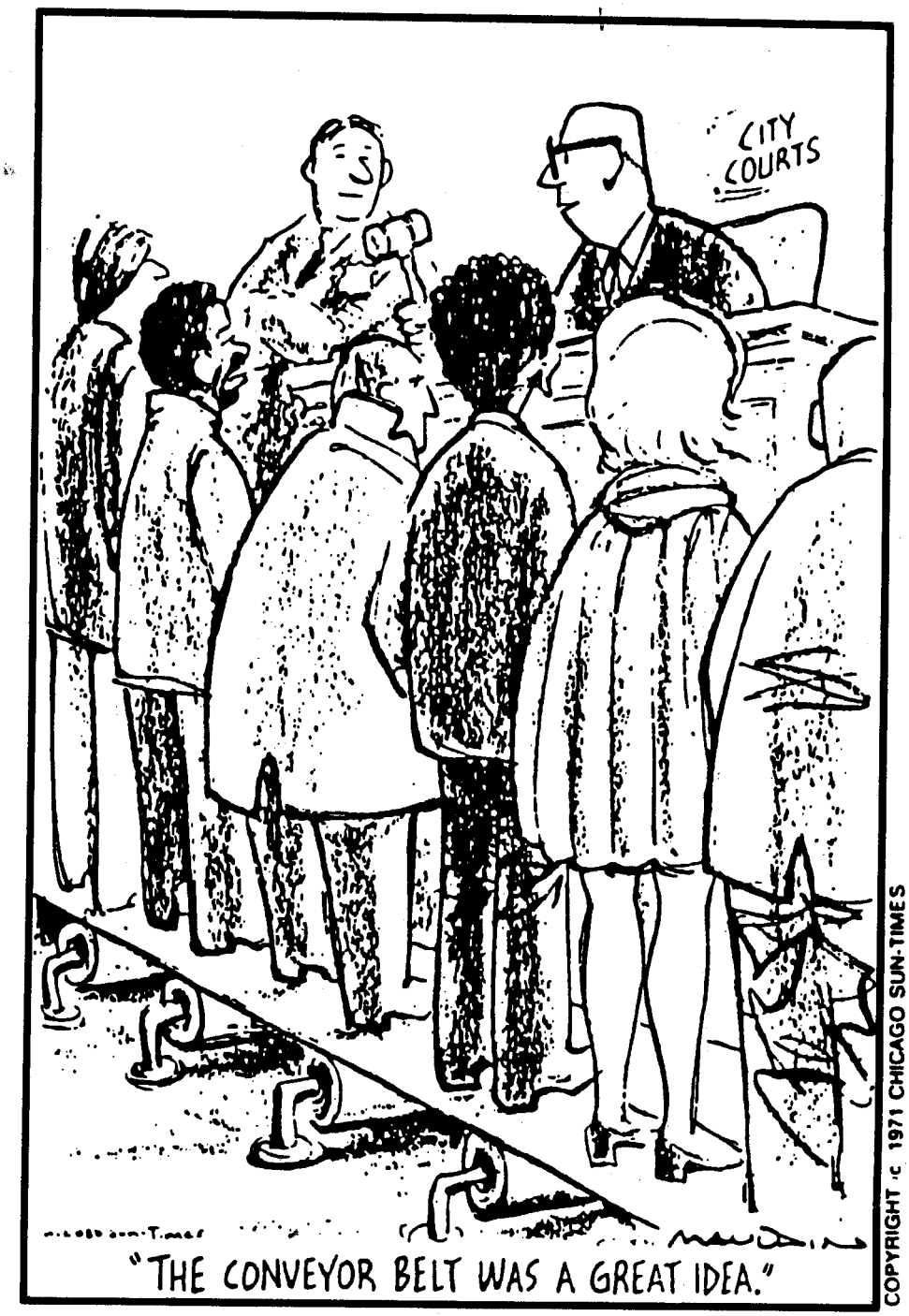
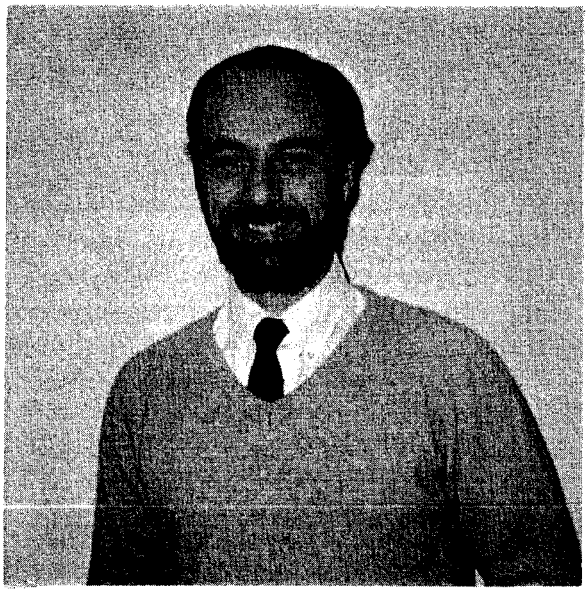


Judge Richard Fitzgerald on District Court Practice

(See Page 19)



PATRICK MCNALLY

Pat McNally, Director of our Hazard Office, which serves Perry, Leslie and Letcher Counties, says that trial practice in Eastern Kentucky provides powerful and tense courtrooms where one learns to be assertive or get "devoured" in the process.

Pat came to the Department as a graduate (May '82) from the University of Tennessee, George C. Taylor School of Law. He has been with the Hazard office for the past four years. His work there has been described as "extremely conscientious and enthusiastic" by Gail Robinson, who was the Eastern District Supervisor. "Pat works extremely hard for our office, not just covering the bases but really interested in unexplored legal issues and avenues. He calls often to discuss his ideas and questions. And he cares about what happens to his clients. He's great!"

Pat's favorite part of his job is the trial work. He likes the "nervous sensation" when he's in front of a jury. He paraphrases the Credo of Jim Doherty as his guiding rod as a pulic defender. "Answer all doubts in favor of your client and agressively argue and present that person's case." Last year Pat had plenty of chances to put that philosophy into effect as he opened 246 cases, 57% of which were felony cases.

He and his wife, Carla, like Hazard and the Appalachian Mountains. Carla is a nursing student at Hazard Community College. Not surprisingly, Pat lists his interests as fishing, hiking and camping in the Smokie Mountains and the Cherokee National Forest.

Pat usually begins his day with a morning run in the hills, with Hogan, the family pet dog.

Aside from outdoor activities, Pat mentioned his love of travel (perhaps sparked by his birth in Germany where his father was stationed while in the service). Pat spent a summer traveling in Europe. He became fluent in Italian when he spent his junior year of college at Wake-Forest University abroad, studying history and art at the University of Venice.

Pat's parents are Hank and Hareth McNally. They live in St. Louis, Missouri. Pat says his parents instilled in him the trait to carefully examine the obvious and not to quickly jump to conclusions. Perhaps, this would explain his mom's occasional reference to Pat's contentious nature as a child.

Scott Buchanan has said that "Every human being has a responsibility for injustice anywhere in the community." Pat's meeting his responsibility and then some.

THE ADVOCATE

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IN THIS ISSUE

Protection and Advocacy

for the Developmentally Disabled

THE TENTH ANNIVERSARY OF P.L. 94-142

The following is an excerpt of an address made by Sen. Lowell Weicker commemorating the tenth anniversary of The Education for All Handicapped Children Act.

In 1954, when the U.S. Supreme Court decided Brown v. Board of Education of Topeka, the Court held that education "is a right which must be made available to all on equal terms." It was 20 years after the decision that Congress extended equal educational access to the handicapped children of our nation. With the passage of 94-142 all handicapped children were assured a free appropriate public education, no matter what their disability, no matter how severe their disability. With its passage, access to public education in this nation became truly universal.

Just 10 years ago, many of the nation's handicapped children had the doors of the schoolhouse closed to them. Thousands were shut away in institutions with no schooling. Those who did manage to enter the schoolhouse often found inadequate programs waiting for them. P.L. 94-142 opened those doors and today all handicapped children are entitled to a free appropriate public education. Today it is illegal for a school district to say "no" to a handicapped child. Today, parents are fully enfranchised partners with educational professionals in determining their child's program. As a parent of a handicapped child in special education, I can personally testify to the effectiveness of this partnership. The impact of this legislation is impressive; 4,128,099 handicapped children were served under 94-142 last year; 465,763 education professionals were trained to work with handicapped students; and over 7.5 billion federal dollars were appropriated in the last 10 years.

What will the accomplishments be in the next 10 years of P.L. 94-142? Let us hope we can report that all handicapped children are being served beginning at birth, rather than beginning at age 3. Let us be able to report that all handicapped youngsters who turn 21 and move into the adult world are working and living in their communities along with their non-handicapped peers. Let us be able to report that the Federal Government has fulfilled its promise and is funding 40%--rather than the current 7 1/2%--of the cost of special education.

One aspect of 94-142 has been the early intervention program. In effect what this does is send youngsters to school in their first 6 months, it being found that education at that age takes hold and clearly influences the future life path of these individuals. That has been a small program with only a few million dollars, but it has been amazingly successful. Youngsters who in the past have been uneducable or have suffered from the lack of education are taking their place in the mainstream of our society because of early intervention.

Now, for whatever pride one takes in having afforded this opportunity to the handicapped, we now know that early education for all of our children is better. So that which was discovered on behalf of the handicapped will soon probably become the norm, maybe not as early as 6 months but certainly much earlier than children now go to school, so that the handicapped child in the United States will benefit from this particular outreach to the handicapped children.

It is also true that in the United States of America when we move together we move well and when we try to move ahead at the expense of each other, we falter. P.L. 94-142 is a very bright chapter in the history of the U.S. Senate, the House of Representatives, and the executive branch. It was great legislation but even greater is what it has produced for our children. So I hope that we no longer doubt its success or seek to hobble it in pursuit of success but, rather, conceptually and monetarily, continue to keep this one of the brightest stars in our galaxy of achievements as a nation.

For a complete copy of the address or a copy of the Resolution, contact South Dakota Advocacy Project, Inc., 221 South Central, Pierre, SD 57501.

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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

PROBATION REVOCATION
Rasdon v. Commonwealth
32 K.L.S. 1 at 10 (Jan. 3, 1986)

In this case the Court held that Rasdon's probation could not be revoked on grounds not stated in the Commonwealth's motion to revoke and as to which Rasdon had no prior notice. KRS 533.050(2) provides that probation may only be revoked "following a written notice of the grounds for revocation or modification." "A written notice of the grounds for the proposed revocation is an absolute essential for this type of proceeding."

CRIMINAL SOLICITATION
Landrith v. Commonwealth
33 K.L.S. 3 at 5 (Feb. 14, 1986)

The Court of Appeals in Landrith disagreed with the defendant's contention that conviction of criminal solicitation requires proof of "immediate rejection" of the solicitation by the solicitee. Proof of such rejection would serve to distinquish criminal solicitation from the offense of conspiracy. The Court of Appeals held, however, that such rejection is not an element of criminal solicitation. It is not an element contained in the statute. The Court expressed its view that "we are unable to perceive how the absence of proof that the solicitee immediately rejected the solicitation to commit the crime somehow renders the actor's conduct noncriminal."

PUBLIC OFFENSE
Johnson v. Commonwealth
33 K.L.S. 4 at __ (Feb. 28, 1986)

Johnson, an attorney, plead guilty to possession of a forged instrument. Johnson appealed, asserting that the indictment failed to state a public offense. The facts showed that Johnson, acting on behalf of a client, accepted a check made out to the client. However, instead of turning the check over to the client, Johnson retained it and forged the client's endorsement on it. Johnson argued that the indictment was insufficient because it failed to allege that Johnson knew the endorsement was a forgery and lacked authority to make the endorsement. The Court of Appeals rejected this argument. "As to Johnson's allegations that the indictment fails because it did not charge him with knowledge that the endorsement was a forgery and that it failed to rebut the issue of Johnson being Robinson's agent, we determine that while the allegations possibly present a question of defects in the indictment, the indictment fails to state an offense."

Kentucky Supreme Court

IMPEACHMENT/OPINION EVIDENCE/ OTHER CRIMES/RECKLESS HOMICIDE/ REPUTATION EVIDENCE
Adcock v. Commonwealth
33 K.L.S. 1 at 12 (Jan. 16, 1986)

The Court held that it was reversible error to exclude evidence that a principal prosecution witness was under active parole supervision at the time he testified. "[A] defendant has a right to put in evidence any fact which might show bias on the part of a witness who has testified against him." The Court cited Davis v. Alaska, 415 U.S. 308 (1974), in which the U.S. Supreme Court held that exclusion of evidence of a witness' probationary status was a denial of confrontation.

The Court also found error in the trial court's action in permitting a prosecution witness to testify as to his interpretation of the meaning of ambiguous comments by the defendant following the offense. "It was the prerogative of the jury to make its own independent determination of what appellant meant by his statement...."

The Court held that evidence that six months prior to the charged offense the defendant had broken into the home of the same victim,

and similarly robbed and beaten her, was admissible to establish identity. The Court noted that the defendant had admitted his guilt of the prior offenses. The Court concluded that the prior offenses "were so similar and were near enough in time as to constitute a signature of sorts of the appellant...."

The defendant was not entitled to an instruction on reckless homicide. "A person acts recklessly with respect to a result...when he fails to perceive a substantial and unjustifiable risk that the result will occur...." KRS 501.020(4). There was no evidence that the defendant was unaware of the risk that beating the eighty-year-old victim would result in her death. The Court also approved an instruction which permitted the jury to convict the defendant of murder if it found that the victim's injuries caused or "hastened" her death.

Finally, the Court held that evidence of a witness' reputation for truthfulness among his family, rather than in the community, was inadmissible.

RIGHT TO ENFORCE PLEA BARGAIN
Bush v. Commonwealth
33 K.L.S. 1 at 15 (Jan. 16, 1986)

In this case, the Court declined to order specific enforcement of a plea bargain which was not accepted by the trial judge. As his part of the agreement, the defendant allowed himself to be wired for sound and elicited incriminating admissions from a jail cellmate. In exchange, the Commonwealth Attorney represented that he had discussed the defendant's case with the trial judge who was "agreeable" to a probated term following the defendant's guilty plea. However, during the plea proceedings, the trial judge stated he had never discussed the defendant's case and declined to sentence according to the plea bargain. The defendant nevertheless plead guilty and accepted a twenty year term.

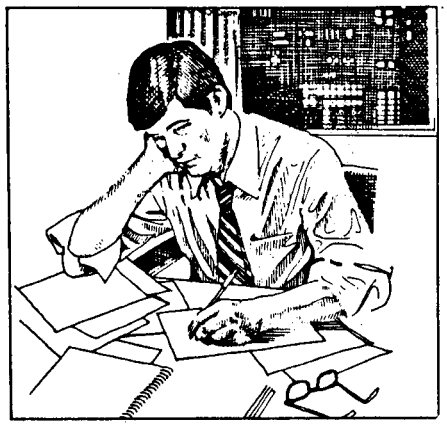
On appeal the defendant relied on Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979) as requiring enforcement of the plea bargain. In Workman, the defendant was tried after the Commonwealth reneged on a plea bargain. The appellate court ordered enforcement of the plea bargain. The Supreme Court considered Workman distinguishable from the circumstances in Bush. First, Bush's appeal was from a guilty plea, not a jury conviction. "A plea of guilty waives all defenses except that the indictment does not charge a public offense." Secondly, Bush "entered his plea of guilty in reliance upon the new plea bargain and without any reliance whatever upon the original plea bargain."

BREATHALYZER TEST
Commonwealth v. Hager
33 K.L.S. 1 at 17 (Jan. 16, 1986)

In Hovious v. Riley, Ky., 403 S.W.2d 17 (1966), the Court held that a statute authorizing comment on a defendant's refusal to take a breathalyzer test violated Section 11 of the Kentucky Constitution and the Fifth Amendment. Hager overrules Hovious in light of the U.S. Supreme Court's holding in South Dakota v. Neville, 459 U.S. 553 (1983). Neville established that the refusal to take a breathalyzer test may be commented on without violating the Fifth Amendment. The Kentucky Supreme Court declined to adopt a stricter rule under Kentucky's Constitution.

MULTIPLE REPRESENTATION
Commonwealth v. Holder
33 K.L.S. 1 at 17 (Jan. 16, 1986)

In this case, the Court reversed the defendant's convictions based on their representation by a single attorney.



RCr 8.30 provides that, in instances of joint representation, the trial judge must explain to the defendants the possibility of a conflict of interest and each defendant must enter into the record a written waiver of any conflict. The trial court in Holder failed to comply with the rule. In an earlier decision in Smith v. Commonwealth, Ky., 669 S.W.2d 527 (1984), the Court refused to reverse because of noncompliance with RCr 8.30 where there was no possibility of prejudice from the joint representation. In Holder, a possibility of prejudice existed. It developed at trial that one defendant had made out-of-court statements implicating the other defendants. Objection to the joint representation was voiced by defense counsel at the close of all the evidence. The Commonwealth contended that the objection was not timely. The Supreme Court rejected this argument: "The rule does not require an attorney to notify the judge of any possibility of a conflict of interest..." "Where, as here, the trial court

failed to comply with the simple requirements of RCr 8.30 and when, as here, the record demonstrates a conflict of interest between the respondents which could well have prejudiced the disposition of their cases, the judgment of conviction must be set aside." Justice Wintersheimer dissented.

EYEWITNESS IDENTIFICATION INSTRUCTION/PRESERVATION
Evans v. Commonwealth
33 K.L.S. 1 at 19 (Jan. 16, 1986)

In this case, the Court held that an error in the failure to give an instruction is not preserved by tender of the omitted instruction and argument in its behalf. "Any party may tender instructions, but no party may assign as error the failure to give an instruction unless he makes specific objection to the failure to give the instruction before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objections."

The Court also held that "an instruction on eyewitness identification is not required in Kentucky."

PFO-INVALIDITY OF PRIOR CONVICTION
Commonwealth v. Jones
33 K.L.S. 2 at 15 (Feb. 6, 1986)

Jones was convicted of robbery in 1975. An appeal taken from the conviction was dismissed for failure of appellate counsel to obtain timely certification of the record. No further action was taken.

In 1982, Jones was convicted as a PFO based on the 1975 robbery conviction. No challenge was made to the use of the prior conviction. However, subsequent to trial, Jones filed an RCr 11.42 motion attacking the prior conviction on the grounds that his appellate counsel rendered ineffective assistance of counsel. The motion was denied without a hearing. The Court of Appeals reversed and remanded for a hearing.

On review of the Court of Appeals' decision, the Supreme Court reaffirmed its holdings in Alvey v. Commonwealth, Ky., 648 S.W.2d 858 (1983) and Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984) that a defendant who fails to attack the validity of a previous conviction at the time he is tried as a persistent felon waives his right to undermine the PFO conviction by later post-conviction attack on the previous conviction. The Court noted, however, that "Jones' efforts to reinstate his appeal from the 1975 judgment of conviction is entirely distinct from attack, or absence of attack, on that judgment in the 1982 PFO proceeding." Consequently, "if it is determined that his earlier attempt to appeal...was frustrated by ineffective assistance of counsel, Jones is entitled to an appeal as a matter of right from the 1975 conviction." The Court affirmed the decision of the Court of Appeals and remanded the case for an evidentiary hearing on the issue of ineffective counsel.

RIGHT TO CONTINUANCE
Jackson v. Commonwealth
33 K.L.S. 2 at 17 (Feb. 6, 1986)

Jackson was appointed counsel twenty-one days before trial. Nine days before trial, counsel filed notice of intent to rely on the defense of insanity and moved for a continuance. The Kentucky Supreme Court upheld the trial court's denial of the continuance.

The Court noted that "under the time circumstances of this case, it would have been virtually impossible for appellant's trial counsel to comply with the notice provision [KRS 504.070]; and if this had been a bona fide defense, asserted in good faith and upon showing of sufficient cause, a postponement should have been granted." However, a continuance was not warranted since counsel made no showing of his basis for believing that an insanity defense might be viable. The Court held that a motion for continuance predicated on notice of an insanity defense is subject to RCr 9.04's requirement of a showing of "sufficient cause" and "affidavit showing the materiality of the evidence expected to be obtained...."

USE OF "DEADLY PHYSICAL FORCE" TO RESIST "DEVIATE SEXUAL INTERCOURSE"
Rasmussen v. Commonwealth
33 K.L.S. 2 at 18 (Feb. 6, 1986)

In this case, the Court construed KRS 503.050(2) as permitting the use of "deadly physical force" to resist "deviate sexual intercourse." The statute provides that:

> 'The use of deadly physical force by a defendant upon another person is justifiable... only when the defendant believes

that such force is necessary to protect himself against...sexual intercourse compelled by force or threat.'

The Commonwealth argued that the statute did not excuse the use of deadly physical force to repel deviate sexual intercourse. The Court disagreed: "We cannot ascribe such illogical intent to the legislature." Justices Stephenson and Wintersheimer dissented.

PLEA BARGAIN-WAIVER OF RIGHT TO APPEAL
Weatherford v. Commonwealth
33 K.L.S. 2 at 20 (Feb. 6, 1986)

In this case, the Court held that the defendant had voluntarily waived his right to appeal as his part of a plea bargain. The defendant was tried and convicted of a felony. Prior to proceedings on the first degree PFO portion of the indictment, the defendant agreed to waive his right to appeal and to plead guilty to an amended charge of second degree PFO. The Court found that the defendant had voluntarily waived the right to appeal in exchange for the "material advantage" of being sentenced pursuant to a conviction of second degree, rather than first degree, PFO.

HARASSMENT STATUTE OVERBROAD
Musselman v. Commonwealth
33 K.L.S. 3 at 23 (Feb. 27, 1986)

In this case, the Court held that the Penal Code's harassment provision, KRS 525.070(1)(b) is unconstitutionally overbroad. The statute penalizes an "offensively coarse utterance" or "abusive language." The Court held that the permissible scope of the statute was limited, under Gooding v. Wilson, 405 U.S. 518 (1972), to "fighting words." Because the statute was not so limited, it was overbroad.

The Court's opinion reverses a decision of the Court of Appeals which had attempted to save the statute by construing it as limited to fighting words. The Kentucky Supreme Court found this approach unacceptable. "While we agree that if the words of a statute are ambiguous, the court can and should so construe it as to render it constitutional, clearly the judiciary lacks power to add new phrases to a statute to provide a new meaning necessary to render the statute constitutional."

United States Supreme Court

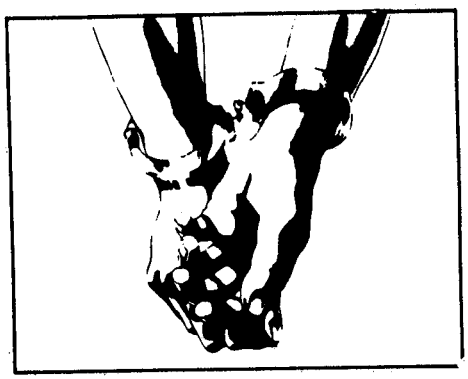
GRAND JURY COMPOSITION
Vasquez v. Hillery
38 Cr.L. 3060 (Jan. 14, 1986)

The Court in Vasquez reaffirmed the long-standing rule requiring reversal of the conviction of a defendant indicted by a grand jury from which members of his own race were excluded. See Castaneda v. Partida, 430 U.S. 482 (1977); Rose v. Mitchell, 443 U.S. 545 (1979). Indictment by a grand jury so constituted violates the accused's right to equal protection of the law.

The Court rejected argument that any impropriety in the selection of the grand jury was harmless error in view of the defendant's subsequent conviction by a duly selected petit jury. "[E]ven if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." Chief Justice Burger and Justices Powell and Rehnquist dissented.

POST-ARREST SILENCE
Wainwright v. Commonwealth
38 Cr.L. 3069 (Jan. 14,1986)

The Court held that prosecution use of a defendant's post-arrest, post-Miranda warnings silence as evidence of sanity violates due process.



In Doyle v. Ohio, 426 U.S. 610 (1976), the Court held that a prosecutor's impeachment of the defendants' exculpatory testimony by cross-examining them as to why they had not explained their conduct at the time of their arrest offended due process. The Court found that this prosecution tactic unfairly exploited the implicit assurance contained in Miranda warnings that silence will carry no penalty. The Court held in Greenfield that it was equally unfair to breach the implicit promise of the Miranda warnings by using silence as evidence of the defendant's comprehension of the warnings and thus of his sanity. "[T]he State's legitimate interest in proving that the defendant's behavior appeared to be

rational at the time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel. What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized."

SPEEDY TRIAL
United States v. Loudhawk
38 Cr.L. 3075 (Jan. 21, 1986)

In this case, interlocutory appeals by the government resulted in almost eight years' delay in bringing the defendants to trial. During much of this time, the defendants were not under indictment nor subject to any restraint on their liberty. The U.S. Supreme Court held that time during which the defendants were not under indictment should be excluded from the period of delay for speedy trial purposes.

The Court also examined the issue of how to weigh delay occasioned by an interlocutory appeal when the defendant remains subject to indictment or restraint. In this situation, the court held the relevant factors identified in Barker v. Wingo, 407 U.S. 514 (1972)--reason for the delay, length of the delay, the defendants' continued assertion of their speedy trial rights, and prejudice--to be controlling. Assessment of the reason for the delay requires consideration of the need for the interlocutory appeal by the government and the strength of the government's case on appeal.

Justices Marshall, Brennan, Blackmun, and Stevens dissented.

JUDICIAL VINDICTIVENESS
Texas v. McCullough
38 Cr.L. 3137 (Feb. 26, 1986)

The defendant was convicted by a jury and sentenced to twenty years. The trial judge, however, granted a new trial on the basis of prosecutorial misconduct. The defendant was again convicted but elected to have the trial judge fix his sentence. The trial judge imposed a fifty year sentence, and cited as grounds for the harsher penalty specific additional evidence of the defendant's guilt not introduced at the first trial.

The Supreme Court held that under these facts the presumption of vindictiveness provided by North Carolina v. Pearce, 395 U.S. 711 (1969), was inapplicable. Unlike a judge who has been reversed on appeal, the trial judge in McCullough had no apparent reason to be vindictive. The trial judge also supplied an on-the-record, logical reason for the stiffer penalty. Justices Marshall, Blackmun, and Stevens dissented.

RIGHT TO COUNSEL
Nix v. Whiteside
38 Cr.L. 3143 (Feb. 26, 1986)

During preparation for trial, the defendant informed counsel that he intended to perjure himself. Counsel informed him that if he did so counsel would advise the court that he believed the defendant was testifying falsely and would seek to withdraw from representing the defendant. The defendant ultimately testified honestly but challenged his subsequent conviction by alleging ineffective assistance of counsel in his attorney's refusal to allow him to testify as he desired.

The Court held that both counsel's assertion that he would disclose any perjury to the trial court and that he would seek to withdraw were appropriate responses to the threatened perjury. Moreover, the defendant was not denied the effective assistance of counsel since counsel's action in limiting the defendant's testimony to the truth was not, as a matter of law, prejudicial.

DOUBLE JEOPARDY
Morris v. Matthews
38 Cr.L. 3153 (Feb. 26, 1986)

Following his guilty plea to robbery, the defendant was indicted and convicted of "aggravated murder." The defendant successfully argued on appeal that the conviction of aggravated murder, which incorporated the robbery offense as an element, was barred by his earlier guilty plea to the robbery. The Ohio appellate court granted relief in the form of modifying the aggravated murder conviction to that of the lesser included offense of murder.

The defendant asserted before the U.S. Supreme Court that the above double jeopardy violation entitled him to a new trial. The Court held that the defendant was entitled to a new trial only if he could demonstrate a "reasonable probability" that he would not have been convicted of the lesser offense but for the presence of the jeopardy barred offense. The Court held it was not sufficient that the defendant "may have been prejudiced" by evidence admitted at his trial for aggravated murder which would not have been admissible at a trial for simple murder. Justices Brennan and Marshall dissented.

LINDA WEST

Post-Conviction
Law and Comment

Allison Connelly

SILENCING GIDEON'S TRUMPET: THE PLIGHT OF THE INDIGENT PRISONER

Every prisoner dreams the dream of Gideon;[1] a two page pro se handwritten petition filed in the United States Supreme Court is read, believed, and the unjust conviction is reversed. A new trial is had, counsel is appointed, and when brought before the jury once again, there is an acquittal. Then again, in most instances Gideon's dream is just that, a dream. We are taught to believe that the measure of justice received is not dependent upon the amount of money one possesses. As long as we adopt the notion that the practice of criminal law is a form of free enterprise, the quality of justice will always be strained by money. Nowhere is this fact so evident as in our own prison system. Where even after conviction, money talks. The bright line rule delineating the right to counsel--that the state must provide an attorney to any defendant, too poor to hire one, who faces a prison sentence--stops at the penitentiary gate when one's appeal as a matter of right has been exhausted. It is as though finally, society says enough, and throws away the key. But it is hard to forget.

Slowly but surely the prison walls have been eroded by the public's increasing awareness of the sordid conditions which often characterize prison life. And, in a sense, Gideon's dream did come true when a federal court found Kentucky's prisons unconstitutional due to an inmate initiated class action suit that indicted the entire prison system. Finally, the judiciary abandoned its traditional hands-off policy. Still, to suggest that the system treats the poor and indigent, the uneducated and illiterate, equally, is ludicrous. Money still talks, and for those fortunate few with a modicum of education, at least if money can't, they can.

However, even convicted felons retain many constitutional rights. Those rights, such as their first amendment rights, the prohibition against cruel and unusual punishment, due process in prison proceedings, and protection against discrimination, would be hollow without access to the courts to enforce them. Rights without remedies are meaningless and access to the judicial process is the constitutional key upon which all other prisoner rights rest. It is for this very reason that court access, grounded in the Fourteenth Amendment and buttressed by the First, is a right of constitutional dimension. Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 312 U.S. 546 (1941). Yet, in exercising the right of access to the courts, it is the indigent and uneducated that suffer. They face almost insurmountable obstacles and handicaps not shared by their moneyed counterparts. One need only examine those areas that are prerequisites to meaningful court access, to reach the conclusion that wealth makes a difference.

Indigents and illiterates are unable to buy or obtain valuable sources of information, such as court documents, that could be evidence before litigation is even begun. Although the financially able can buy a trial transcript to search for potential error, the indigent prisoner has no right in the preparation of his petition. Even in forma pauperis standing is discretionary, and that's assuming that the pro se petition has not been dismissed on a procedural error. Moreover, as one proceeds through the judicial process into the post-conviction realm, the term indigency is increasingly scrutinized and more strictly defined. This is complicated by the nonexistent opportunity to cure the indigency through legitimate employment, given the state pay wage scheme. Many times the uneducated and illiterate are unable to adequately communicate their grievance to anyone, are incapable of drafting an understandable complaint without some kind of legal assistance, and since they can not read, access to a law library is pointless. Therefore, the question becomes what assistance must be provided to prisoners to make the right of access mandated by Bounds v. Smith, 430 U.S. 817, 824 (1977), "meaningful." The obvious discrim-

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[1]Gideon v. Wainwright, 372 U.S. 335 (1963), (extended the Sixth Amendment right to counsel to the states through the Fourteenth Amendment. Held, there is an absolute right to appointment of counsel, even when indigent, felony cases).

ination between those with resources and those without, between those who can buy court access and those who can't, can only be remedied by recognizing a coextensive constitutional right of "meaningful" court access.

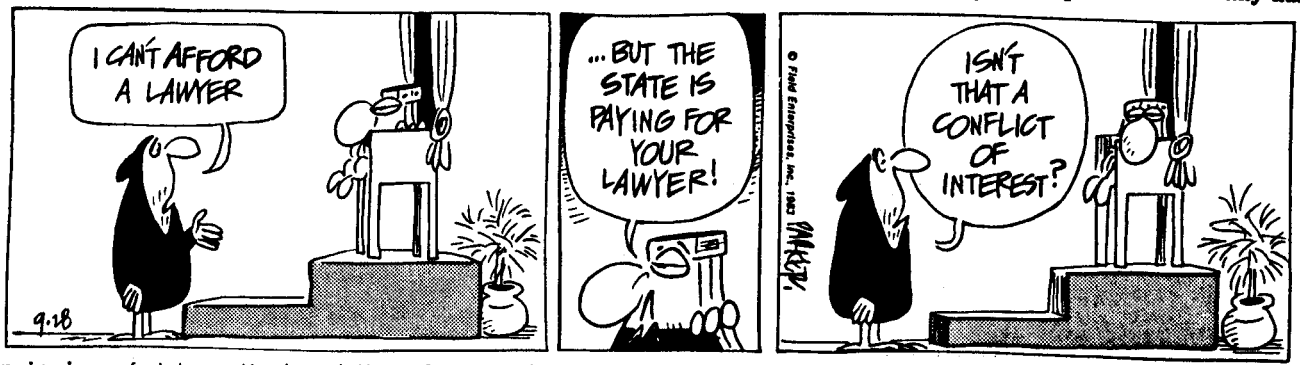
The constitutional right to assistance of counsel in a post-conviction setting is separate and distinct from the right to counsel found in the Sixth Amendment. In this context, attorney assistance means that each prisoner has access to an attorney in the institution to advise, aid, review pro se pleadings, and/or help the inmate draft initial pleadings and motions to gain the court's hearing. It means that all prisoners have at least one avenue available for discussing the merits of their case and for obtaining advice in overcoming procedural problems. Moreover, where a meritorious issue is presented, the attorney may undertake full representation of the prisoner to insure those claims are properly presented to the court. Surprisingly, the Kentucky legislature and the United States District Court joined forces to provide for attorney assistance in Kentucky's penal institutions. In this respect, Kentucky is a leader in its recognition that meaningful access to the courts can only be had through attorney assistance. It is through such assistance that the inherent unfairness and invidious discrimination faced by indigents and illiterates confined in penal institutions is redressed.

The greatest difficulty facing an indigent or illiterate prisoner lies in the collection of evidence before a pleading is even filed. Most prisoners do not have copies of their court dockets, trial motions, indictments, or final judgments; nor do they have funds and/or the necessary education to obtain them. Many times, their inartful requests to the clerks and courts are ignored or misunderstood. Perhaps the most critical source of information is the trial transcript. While a financially solvent prisoner can purchase the transcript, such is far beyond the means of the indigent. How then can they properly present their claims and avoid a finding of "frivolousness" or summary dismissal without a transcript? Do they even possess the knowledge to identify a legal error, and should they be expected to?

The United States Supreme Court has stated that there is no general or constitutional right to obtain a trial transcript to search for errors that might be presented in a post-conviction proceeding, to aid in the preparation of a federal habeas petition. Mayer v. Chicago, 404 U.S. 189 (1971). Rather, prisoners must first specifically state their claims and legal issues in a collateral petition and then show a particularized need for the transcript to prove entitlement. Draper v. Washington, 372 U.S. 487 (1963). The Kentucky courts have fully adopted the decisions of their federal counterparts. See, Coles v. Commonwealth, Ky., 386 S.W.2d 465 (1965); Stinnett v. Commonwealth, Ky., 452 S.W.2d 613 (1970); Gillium v. Commonwealth, Ky., 652 S.W.2d 856 (1983). Equal protection arguments based on Griffin v. Illinois, 351 U.S. 12 (1956), have largely been unsuccessful, even though such "tools" are available "for a price to others?" Id. at 19. The United States Supreme Court answered such arguments by noting all that justice requires is an adequate opportunity to fairly present one's claim, and not an absolute equal opportunity to present that same claim. United States v. MacCollom, 426 U.S. 317 (1976). See also, Gillium v. Commonwealth, supra, at 858. Only one federal circuit court has found an equal protection violation when the trial court refused to provide the prisoner with a transcript. The Seventh Circuit held in Rush v. United States, 559 F.2d 455, 459-60 (7th Cir. 1977), the a preexisting transcript must be provided free of cost to an indigent federal prisoner for use in a collateral proceeding because

THE WIZARD OF ID

by Brant parker and Johnny hart



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wealthy prisoners could hire attorneys to search the transcript for errors, while poor prisoners couldn't. Such a holding is applicable to all records available to the public but not the prisoner.

In such a situation, the prejudice to the indigent and/or illiterate prisoner is obvious. The inmate must rely on memory, recognize the legal wrong, and then weave the wrong into the facts in a sensible manner. Failure to do so can lead to dismissal and even the loss of a meritorious claim. Of course, this doesn't happen to a person of means. Moreover, even if the claim survives the pleading stage, in the federal system, appointment of counsel is discretionary, 28 U.S.C. § 1915(d), while in Kentucky the issue is controlled by the Public Advocacy statute, court rules, and case law.

In Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980), the Kentucky Supreme Court reconciled the conflicting provisions of KRS 31.110(2) and RCr 11.42. Although RCr 11.42(5) provides for the appointment of counsel if an evidentiary hearing is required, the statutory requirements of KRS 31.110(1) and (2) entitle a convicted indigent representation by an attorney in any post-conviction proceedings to the same extent as a person having his own counsel is so entitled. The Court concluded that RCr 11.42 set the minimum standard for appointment of counsel, while the statutory language evidenced a legislative decision to carefully consider indigents pro se pleadings to avoid the preclusion of a potentially meritorious claim.

However, the expansive reading given by the Ivey Court has been eroded by subsequent case law. In Ray v. Commonwealth, Ky.App., 633 S.W.2d 71 (1982), Ray sought to attack the underpinnings of his first degree PFO conviction with a CR 60.02 motion. He tendered a motion requesting the assistance of counsel. This request was denied. On appeal, the Court of Appeals held that KRS 31.110(1) does not provide for the appointment of counsel for one who isn't in detention and not under formal charges. The Court reasoned that Ray was not entitled to counsel at state expense because he wasn't being detained on the enhancing convictions but on the 1980 PFO conviction. Thus, an indigent prisoner is not entitled to the appointment of counsel in preparing a post-conviction petition if he is not in "detention," but he is entitled to counsel if the court schedules an evidentiary hearing on the motion. This result is clearly inconsistent with Ivey where the Supreme Court emphatically stated that assistance of counsel was necessary to prevent an erroneous deprivation of valid grounds for voiding a conviction.

Subsequent Kentucky cases have given even a more technical reading to the right of appointed counsel in post-conviction proceedings. Allen v. Commonwealth, Ky., App., 668 S.W.2d 556 (1984), held that a written request for the assistance of counsel "at" or "in" the evidentiary hearing did not invoke the Ivey right to counsel. Finally, in Beecham v. Commonwealth, Ky., 657 S.W.2d 234 (1983), counsel was denied an indigent prisoner merely because the language of the mimeographed form affidavit of indigency was insufficient to constitute a specific request for counsel.

Whether the appointment of counsel in post-conviction proceedings is discretionary, as in the federal courts, or an obstacle course of technicalities as in Kentucky, both pose for the indigent and/or uneducated an unconstitutional barrier to relief. Both approaches invidiously discriminate between rich and poor, the illiterate and educated. This glaring unfairness is perhaps the most persuasive argument for the assistance of counsel in the prison setting.

The Bounds right of access to the courts, obviously requires access to implements, materials and the mails for its exercise. Early on, the United States Supreme Court recognized that due process and equal protection prevented the raising of financial obstacles to an indigent inmate's assertion of post-conviction remedies. In Smith v. Bennett, 365 U.S. 708 (1961), the court concluded that requiring an indigent prisoner to pay a four dollar statutory filing fee, before being allowed to pursue a petition for habeas corpus in state court, denied the prisoner equal protection of the law. But financial obstacles still face the indigent prisoner that can dangerously limit the opportunity for them to present their claims in court. While indigency is defined by federal and state statutes and interpreted on case-by-case basis upon the prisoners entire financial picture, correctional officials have opted for a clear-cut rule.

The federal standard is found in Adkins v. E.I. Dupont de Nemours and Company, 335 U.S. 331, 339 (1948). There the Supreme Court defined indigency as "persons who cannot pay or give security for court costs without depriving themselves or their dependents of the necessities of life." Kentucky's definition, for the purpose of alleviating costs, is similar. See, KRS 435.190; Braden v. Commonwealth, Ky., 277 S.W.2d 7 (1955); Gabbard v. Lair, Ky., 528 S.W.2d 675 (1975). Moreover, as Sowder v. McGuire, 516 F.2d 820,

824 (3rd Cir. 1975) compassionately recognized:

> [W]e do not think that prisoners must totally deprive themselves of those small amenities of life which they are permitted to acquire in prison. . .beyond the food, clothing, and lodging already furnished by the state. An account of $50.07 would not purchase many such amenities; perhaps cigarettes and some occasional reading material. These need not be surrendered in order for a prisoner. . .to litigate in forma pauperis in the district court.

Kentucky correctional officials have established a much more stringent definition of indigency to insure that access to implements such as copying machines, postage, and other materials is not abused by the "indigent" inmate. For the purpose of judicial access, Corrections' Policy and Procedure 14.4 defines indigent as "inmates who have maintained a balance in their inmate account of five dollars or less for thirty days prior to requesting indigency status." Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978), supports this policy. Clearly, this definition requires complete destitution, deprives the inmate of even the simple and most basic amenities and fails to consider the complete financial status, as for example, one's need to support dependents. Surely, this does not comport with the due process requirements of access to the courts. Certainly, it does discourage prisoner litigation by forcing the indigent inmate into a "Hobson's choice." Still, many courts have held that "prisoners do not have an unlimited right to free postage in connection with the right of access to the courts." Id. at 359.

It is clear that a prisoner who is categorized by Corrections as indigent, cannot hope to compete with a wealthier cellmate. The inmates legal correspondence to the courts, legislators, and attorneys is severely restricted, while the ability to photocopy pleadings, motions and letters is almost nonexistent, unless one can pay the price. Yet, when compared with other systems across the country, the Kentucky prisoner's right of access to the judicial machinery is far more protected due to the availability of counsel at the penal institutions, federal court rulings, and Kentucky law.

Johnson v. Avery, supra, at 487, pointed out that in 1967 82 percent of all prisoners had not completed high school, while 55 percent had not finished the eighth grade. In a more recent case, Hooks v. Wainwright, 536 F.Supp. 1330 (M.D. Fla. 1982), rev'd., No. 84-2756 (11th Cir. 1985), reh'g pending, the District Court held that the state was constitutionally required to provide for attorney assistance to prisoners for the filing of collateral actions. Basing its decision on Bounds v. Smith, supra, Hooks expanded Bounds by criticizing the Supreme Court's notion that mere access to law libraries is a sufficient method to assure meaningful access to the courts. After three lengthy evidentiary hearings, the Hooks court found that prisoners were generally unable to understand legal materials, Id. 1343; were largely illiterate, Id. 1337-38; that most legal reporters required a college level reading ability, Id.; and, most "jailhouse lawyers" were ineffective. Id. The Court concluded that no adequate means existed to insure effective access to all prisoners without attorney assistance. The Eleventh Circuit reversed holding that there is no automatic constitutional right to legal representation in federal habeas corpus proceedings. Although a motion for rehearing is pending, sooner or later the Supreme Court will have to face this issue and decide the parameters of meaningful court access.

Any attorney that assists prisoners is frustrated by the procedural nightmares of pro se filings; by inmates who insist on pursuing frivolous claims; and, by the mishandling of meritorious applications for relief, some of which are permanently lost. It is the loss of a meritorious claim, that erroneous deprivation, that best demonstrates the constitutional right of attorney assistance. When one examines the constitutional contours of the Bounds right of access, it is easy to see why meaningful access requires attorney assistance.

A prisoner has two interests when seeking to collaterally attack a judgment. There is an underlying grievance that s/he wishes to remedy, and a separate, but related interest in being able to use the courts. It is this latter interest that serves as the foundation for the right of access. Access

requires not only that the prisoner have an opportunity to present the claim to the Court, but that the claim receive fair judicial consideration. See Bonner v. City of Prichard, 661 F.2d 1206, 1212-13 (11th Cir. 1981). This does not mean that every claim must be heard on the merits. Rather, it means that the claim must be fairly considered by the courts in its substantive and/or procedural posture. So, if due process requires some degree of judicial consideration of all claims properly presented, that the prisoner has a correlative right to present those facts and issues necessary to obtain fair consideration of his or her claim. A prisoner will be deprived of the right to fair consideration, and thus access, when due to indigency, illiteracy or lack of education, s/he is unable to present the grievance adequately to the court, so the court can not fully consider the claim. In other words, the right to receive a fair consideration in court, derived from the right of access to petition the courts, generates the right to attorney assistance. When one balances the risk of erroneously depriving the prisoner-/petitioner of a fair consideration of the claim if attorney assistance is denied, against the government's interest in security, punishment, rehabilitation, and fiscal objectives, it is clear that without attorney assistance, the court is unable to make a fair determination whether a claim is meritorious. Such an argument is bolstered by a study of pro se inmate filings which found that the empirical data indicated that most prisoners pleadings are summarily dismissed. Turner, When Prisoners Sue: A Study of Prisoner § 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, n. 149, at 617-21 (1979). Only 4.2 percent of the claims proceeded to trial. Id. at 618. Moreover, the major factor affecting a petition's potential to survive summary dismissal has been whether an attorney prepared the prisoner's pleading. Id. Another study shows that the dismissal rate of habeas corpus petitions for procedural defects was a sizeable fifty-five percent. See, L. Yackle, Post-Conviction Remedies, 433 n. 16 (1981), suggesting that meritorious as well as frivolous claims are lost. For a general discussion, See, Lin, A Prisoner's Constitutional Right to Attorney Assistance, 83 Columbia Law Review, 1279 (1983).

Providing attorney assistance in the initial stages of collateral review would benefit not only the indigent and uneducated but the courts. Counsel can distinguish good cases from bad and prevent procedural messes and piecemeal litigation. Despite this rationale, under present law there is no blanket constitutional right to assistance of counsel in collateral proceedings. Rather, counsel is not appointed until a prisoner has made a colorable claim for relief. Johnson v. Avery, supra; Commonwealth v. Ivey, supra. Because uneducated prisoners cannot effectively use sophisticated legal materials, and because it is obvious that indigent prisoners do not have the same access to attorneys as their moneyed counterparts, only a few states have established prison legal services to provide attorney assistance to inmates at the preparation stage of their pleadings. Kentucky is such a state.

The Bounds decision established a constitutional right entitling prisoners to be provided with either "access to law libraries or help from persons trained in the law." Bounds v. Smith, supra at 817, 821. The United States District Court for the Western District of Kentucky broadly interpreted Bounds and initiated a program of attorney assistance for all state penal institutions. In Canterino v. Wilson, 562 F.Supp. 106 (W.D. Ky. 1983), the Court found that the inadequacy of available jailhouse lawyers mandated that prison officials provide access to attorneys. The Court stated that the right of access to the Court includes:

> For those inmates who possess insufficient intellectual or educational abilities to permit reasonable comprehension of their legal claims, a provision...to allow them to communicate with someone who ...is capable of translating their complaints into an understandable presentation. Id. at 111.

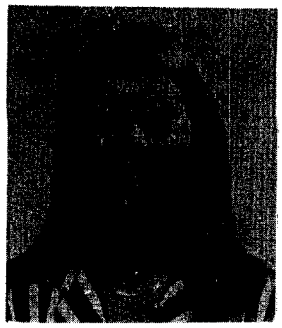
The same inadequacy was found in Kendrick v. Bland, 586 F.Supp. 1536 (1984).

When the prison door shuts, the doors to the courthouse must remain open to all on an equal footing. All prisoners rich or poor, educated or illiterate, must have the constitutional right to effectively air their grievances by petitioning the courts. Otherwise, "meaningful access" is meaningless. We cannot allow our society to silence Gideon's trumpet. Access to attorney assistance in our prisons will, at the very least, insure that the courthouse doors are never closed to Gideon's dream.

ALLISON CONNELLY

Allison is a 1983 graduate of U.K. Law School. For the past 2 years she has been an Assistant Public Advocate at Northpoint Training Center doing post-conviction and trial work.

Sixth Circuit Highlights



Donna Boyce

Confessions of
Non-Testifying Co-Defendants

In Marsh v. Richardson, ___ F.2d ___, 15 SCR 3 at 9 (January 23, 1986), the Sixth Circuit Court of Appeals reversed the District Court's denial of habeas corpus relief due to the improper admission of an out-of-court statement made by a non-testifying co-defendant. This reversal was ordered even though the co-defendant's statement on its face did not incriminate Marsh and the trial court admonished the jury to consider the co-defendant's statement only against him and not against Marsh.

The Sixth Circuit noted that under Bruton v. United States, 391 U.S. 123 (1968), the critical factor in determining if a Confrontation Clause violation occurred when a confession of a non-testifying co-defendant was introduced at a joint trial was whether there was a substantial risk that the jury looked to the statement in question in determining the defendant/petitioner's guilt. In assessing whether such a substantial likelihood exists, the contested statement, its incriminatory nature and its role in the case figure prominently. The Court stated that in determining the incriminatory effect of the co-defendant's statement, it is proper to consider the other evidence beyond the statement itself. The Court cautioned, however, that consideration of the importance of the contested evidence to the prosecution is both improper and unnecessary.

Thus, in this case, the circumstantial nature of the other evidence and the prosecutor's closing argument use of the co-defendant's statement against the defendant created a substantial risk that the jury would consider that statement against the defendant. The Court stated that permitting the admission of a non-testifying defendant's out-of-court statement in circumstances in which a substantial risk exists that it will be used against the defendant not only denies the Sixth Amendment right to confrontation, but raises serious due process concerns regarding the validity of the conviction and the fundamental fairness of the trial process.

DONNA BOYCE

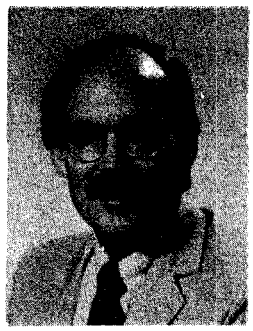
POLICE CHIEF ORDERS LUNCH IN RESTAURANT, NOT CHURCH

A Nashua, New Hampshire, police officer may not attend church while on his lunch break, because the time off "is for the express purpose of eating lunch," his police chief ruled earlier this year.

Officer Fred Williams, a member of the First Church Congregational in Nashua, had stood in the back of church during his break until the ban, which he has appealed to the state's Public Employee Labor Relations Board. The board has not yet set a hearing date for Williams' complaint. Nashua's city attorney, Steven Bolton, said police regulations prohibit officers "from entering a public place while on duty and in uniform, except to perform a police function." The only exception is the lunch break, he said.

Plain View

Search and Seizure Law and Comment



Ernie Lewis

The Supreme Court of the United States has once again been active in the Fourth Amendment area. On February 25, 1986 they decided the case of **New York v. Class, 38 Cr.L. 3128 (1986).** In a decision by Justice O'Connor, the Court held that a police officer could get into a car and brush aside some papers in looking for the vehicle identification number (VIN) and in so doing seize a weapon from underneath the seat of the car without probable cause and without a warrant.

The facts of the case are relatively simple. Benigno Class was driving with a cracked windshield and over the speed limit. The police pulled him over and he got out to talk to the police. While he was speaking with one of the police officers, the other police officer went to the car and reached in to move papers which were obscuring the VIN on the dashboard. While he was so doing, he saw a gun under the seat. He then seized the gun and Class was arrested and subsequently convicted of criminal possession of a weapon in the third degree.

In the now familiar balancing test, Justice O'Connor held that the government's interest in the VIN outweighed any interest that Class had. Justice O'Connor placed a tremendous emphasis on the government interest in the VIN and stated that the interest of the government in highway safety was strong. On the other hand, the Court stated that there was "no reasonable expectation of privacy in the VIN" on the part of Class. Placing papers over the VIN did not transform the interest into a reasonable expectation of privacy.

The Court then noted that the police had a right to detain Class once he got out of the car under Pennsylvania v. Mims, 434 U.S. 106 (1977). While Class was detained, the Court questioned whether the other officer could go into Class' car to find the VIN.

In order to answer that question, the Court balanced the nature and quality of the intrusion by the officer against the importance of the governmental interest in the VIN. "We hold that this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations." The Court was careful to note that their holding "does not authorize police officers to enter a vehicle to obtain a dashboard mounted VIN when the VIN is visible from outside the automobile."

Justice Brennan dissented from the opinion, joined by Marshall and Stevens. Interestingly, Justice White also wrote a separate dissenting opinion which was joined by Justice Stevens. Thus, there were four justices dissenting against the opinion of the majority. The dissent focused upon the fact that there simply was no rationale for the search which occurred in this case. Justice Brennan noted that this was not a case where there was probable cause to believe contraband was contained in the car pursuant to Carroll v. United States, 267 U.S. 132 (1925). Because there was no probable cause, in Justice Brennan's view the search violated the Fourth Amendment.

The dissent had a number of concerns about the majority's opinion. First of all, they noted that the majority's analysis of Class' expectation of privacy in the VIN was irrelevant, since Class was complaining about the search of the interior of his car. The Court noted that Class had a reasonable expectation of privacy in the interior of his car which he did not give up in any way. The dissent was further concerned by the use of Terry to justify the officer's looking for the VIN while Class was detained. Justice Brennan summed up when he said that the Court's decision "today is still another of

its steps on the road to the evisceration of the protections of the Fourth Amendment. The Court's willingness to sanction a car search that the police had no probable cause to conduct highlights this trend. However, I find the Court's holding particularly disturbing because none of the factors the Court relies upon--the lack of reasonable expectation of privacy in the VIN, the officer's observing respondent commit minor traffic violations, the government's interest both in promoting highway safety and in shielding officers from danger, and the allegedly limited nature of the search that took place--gave the police any reason to search for the VIN."

The application of this case to public defenders' practice in Kentucky is easy to see. Searches of cars can now take place without probable cause or without a reasonable articulation so long as the officer conducts his search under the pretext of looking for the VIN. This could only take place obviously where the VIN was not visible from the outside of the car. The majority was careful to set out that an officer could not go into the interior of the car where the VIN was visible from the outside. However, where it is not visible, one can easily see that it could be used as yet another pretext for a search without probable cause or without a warrant. Further, one wonders what the Court would do in a situation where the defendant was asked to produce other types of papers regarding title, vehicle registration, etc. which could be justified by the highway safety rationale. Could a police officer place a driver into detention while the other officers searched through the glove compartment, for example, for such "highway safety" papers? We will have to wait and see.

The Court also has granted certiorari in two cases of interest to all criminal practitioners. Both grants of cert. came from rulings against the state in the Court's below, and thus is troublesome for all of us.

In **Maryland v. Garrison**, 38 Cr.L. 4179 (1986), the Court granted cert. to consider the question of whether the exclusionary rule requires suppression of heroin seized from the defendant's apartment pursuant to a warrant which authorizes search of another apartment on the same floor, when police reasonably believed there was only one apartment on the third floor. Defenders should watch to see whether the Court uses Maryland v. Garrison to further extend the good faith exception rule of United States v. Leon, 468 U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Further, the Court also granted certiorari in **Missouri v. Blair**, 38 Cr.L. 4135 (1986). In this case, the defendant was suspected of a homicide by the police who had no probable cause to arrest the accused. Rather, the accused was arrested on a traffic violation. Booking procedures were used for that of a homicide as opposed to a traffic violation. Fingerprints were taken and the defendant was confronted with matching fingerprints. Upon this confrontation, the defendant gave incriminating statements. The Missouri Court reversed the conviction holding that the arrest was pretextual and that the fingerprinting was thus not a search incident to lawful arrest, thereby tainting the incriminating statement. The Court granted certiorari from the Missouri Court and will be examining the many questions involved under these factual circumstances. What will be interesting about this case is that apparently the pretextual nature of the arrest for the traffic violation is clear, and the Court could take this opportunity to explore the exclusionary rule and its application to a pretextual arrest which results in the seizure of incriminating evidence.

The Short View

1) United States v. Whaley,
781 F.2d 417 (5th Cir. 1986)

In this case, a sheriff observed marijuana growing in the curtilage of a house and without a warrant went into the curtilage and seized the marijuana. The Court held that a plain view observance of contraband does not justify a warrantless intrusion into the privacy of the home or its curtilage.

2) State v. Gallegos,
712 P.2d 207 (Utah 1985)

A VCR not "clearly incriminating" cannot be seized during a search pursuant to a warrant in Utah, where the VCR is not named in the warrant, and where its illegality is discovered as a result of an independent investigation. Note that the Utah Court was using its own state rules. However, counsel should be alert to a situation

where items are seized during a warrant which are not named and whose illegality is not apparent from the face of them;

3) State v. Jones,
N.H., 38 Cr.L. 2300
(January 22, 1986)

In this case, as a matter of state common law, the Court created a "knock and announce" law for New Hampshire. Thus, in future searches pursuant to a warrant, police officers will have to knock and announce before entering into a home. In the future, in New Hampshire, the Court will view the failure to knock and announce as one factor in deciding whether the state search and seizure violation has occurred;

4) Garcia v. State,
N.M. 38 Cr.L. 2370
(February 19, 1986)

A companion of the defendant stole money from a hospital and proceeded to drive off with the defendant. The car driven by the defendant is subsequently stopped. Both the occupant and the defendant consent to a search of their persons. However, the defendant refused to allow a search of his car. The Court held that allowing comment upon the refusal to consent to search was reversible error. The Court noted that refusal to consent is an ambiguous indication of a right similar to invocation of the right to remain silent and thus could not be commented upon or proven in the case in chief;

5) State v. Lambert,
710 P.2d 693 (Kan. 1985)

The Court held that a guest's purse could not be searched under a warrant to search an apartment. The Court analyzed this case under Ybarra v. Illinois, 444 U.S. 85 (1979) and applied Ybarra's holding to a private home.

ERNIE LEWIS

MOREHEAD, KY.--The once bare walls of the Department of Public Advocacy for Rowan, Elliott and Morgan counties have become an exciting exhibit of art by Morehead State University students.

"We are very pleased with the quality of work made available to us by the Art Department for display," said Patricia Van Houten, advocacy department director. "The exhibit is not only a pleasant diversion for our clients, but also for our office staff."

The unusual display of art was the joint concept of Van Houten and Robert Franzini, MSU associate professor of art. "Patricia has always been a great supporter of the local art scene," Franzini explained. "During a discussion recently, she happened to mention how drab her office was and I told her about the great amount of exceptional art we had at the University. The idea for the exhibition sprang from this discussion."

Franzini said he selected 30 works for Van Houten's appraisal. The pieces include landscapes, still lifes and abstracts. "We wanted regional subject matter," Van Houten said. "That had a great influence on our selections. We are happy to have the opportunity to help expose some fine art works to people who would not normally get a chance to view them".

Both Franzini and Van Houten are enthusiastic about the possibility of similar exhibits at other businesses and government offices. The exhibition will continue for at least six months on a long-term loan from the University. Pieces represented include woodcuts, stone lithographs, etchings, aquatints and examples of color print making. The works were done by current and former MSU students.

"I really hope people take advantage of these student works," Van Houten said. It is a good way for the community to benefit from the University art program."

Trial Tips

For the Criminal Defense Attorney

DISTRICT COURT PRACTICE

The following is an edited version of the luncheon presentation by District Judge Richard FitzGerald given on February 28, 1985, at the DPA District Court Practice Seminar. Judge FitzGerald is a district court judge in Louisville.

A Supreme Court Justice, a law professor, and a district court judge went duck hunting not too long ago down in Western Kentucky and the idea was, being wagering individuals, that the first one who kills a duck gets $100, but if someone shoots a bird that is not a duck he had to pay the others $200. They let the Supreme Court Justice go first. A bird went flying overhead, he examined his shotgun and studied the bird for awhile and was looking to see if it had webbed feet and a flat bill and finally got around to pulling the trigger and missed the bird. Then the law professor went next, and the law professor also examined the weapon and looked up into the sky and a bird came flying overhead and he started talking to himself about whether it was a heron, a goose or a large crow and he missed also. The district judge got up next; he shot him; it fell and he turned to his companion and said, "I hope to God it was a duck."

I think at times that is a statement about the way we practice law in district court. We, like public defenders, don't have an opportunity to sit there and examine each issue at length. So it's important that district court, especially district court judges who have been historically operating out of instinct, are trained to operate out of good habits in application of law and due process.

The process in district court becomes a reflection of how we as a people look to conflict resolution in the most common, non-violent forum available to our society. It is a court of Everyman - it has evolved into a poor man's divorce court, where parties living together without institutionalized marriage take warrants out against each other; go to small claims to evict their roommate; if they can't decide who owns the crock pot; go to small claims for resolution of domestic matters.

It has become an arena of tremendous action taken in terms of social intervention not only in a whole field of juvenile intervention, but in the area of adult protective services, guardianship, civil commitment and emergency protective orders. In the criminal justice process, it is the way that we as a society are addressing not just crime but the aesthetic of crime. When a society doesn't want to deal with having a town drunk in their street, they criminalize that behavior to make that individual invisible.

As long as a court system tolerates the invisibility of that citizen by allowing him to be incarcerated, what we are doing is stamping our system of justice's approval on the criminalization of a social condition. It is used in your community and in my community that way.

It was brought to my attention by a fellow by the name of Carl. Now just about every one of your counties has a Carl in it. He's got lines in his face and kind of leather beaten ears from many whiskey bottles. Now he's down in class to Wild Irish Rose and the whiskey bottles are gone. He's serving a life sentence. The last time you all had a client with a potential life sentence, you probably spent extensive time in preparation and presentation of his case. Carl doesn't want a public defender, because he's serving his life sentence a different way. He serves it ten days at a time. He comes in at least twice a week and when it's cold the judges go out of their way to keep Carl in jail, and when it's not cold and Carl's not looking too bad it's about three days. But Carl is generally not afforded much of the process of justice, and justice is not just a result or not just a process, it is both. A day in each citizen's citizen's life is equally as important. When the process of justice is not afforded for particular violations of the law then the system falls away from the habit of affording that process.

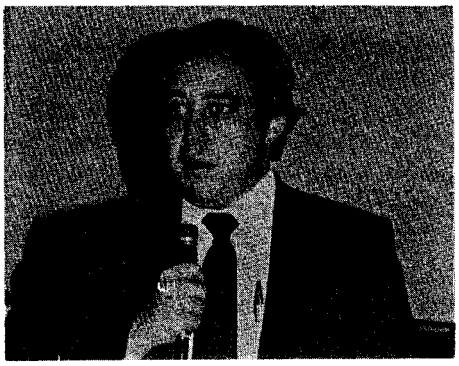
About four or five years ago a judge was sitting right in court in Jefferson County on a Saturday morning. Two hundred people came for arraignment and at the end of it they could clean out the hold over for the revolving door drunks (hopefully not too many people who were in diabetic coma). Carl came up early that morning, for some reason he came up with the felons because they do the felons first, it was like, "Carl you understand," and the judge went through all those great rights that we all give in the front of the bench book, Carl nodded and he said "yes, I was drunk" and the judge said "how you doing" he said "pretty good" and

the judge said "you got some place to go," he said "yea." "They haven't kicked me out of a mission house yet." It was one day credit time served and Carl staggered off out towards Jefferson Street.

Well the morning went on, it was 12:30, the end of their break and all the drunks out from the hold over. The judge looked up and there was Carl. Wondering why Carl was back, he asked the bailiff to bring him the arrest slip. The judge said, Carl, it says here that you were staggering down Jefferson Street at 9:45 this morning and you were arrested for public intoxication, how do you plead." And he said, "Judge, you can't try me twice on that offense, it's double jeopardy, you can't try me twice for the same drunk."

It's humorous, but it brings out a certain point as to what we are doing as a process at our level of justice, we are sending out to the community and out to the people certain information as to what's available or acceptable in terms of the burden the state has to prove in each and every criminal case. If the system gets in the habit of affording minor offenders, the traffic offenders, the misdemeanor offenders, a full process of justice then it becomes more acceptable in the community at large when a serious offense is tried to afford each individual that process of justice.

We all go to cocktail parties, where someone asks, "how can you represent somebody that is guilty" or "why did they get off on that technicality?" or someone comes in quoting Shakespeare saying, "Let's kill the lawyers." And I don't know how many of you have those t-shirts, but if you read the Henry IV play, what the actors were doing when they spoke those lines was



RICHARD FITZGERALD

plotting the overthrow of government. They realized essentially that the way to change that system was first, "let's kill the lawyers."

We all know there are no technicalities in the law, there's certain power that we give to the state and certain reserved to the the people. To eliminate the perception of technicalities we must make sure that those rights reserved to the people are not atrophied. Muscles atrophy from lack of use. Rights atrophy from lack of use. Unless in the most common forum viewed by the community the rights and forms of justice are practiced and applied, the application in other forums will not be understood or tolerated by the people. It is your duty as defense attorneys not to acquiesce in the diminution of individual rights. When a client is giving a pleading make sure that your judge asks the right questions. When you are with your defendant at the bench, ask the judge to make sure that that is a knowing plea. Make sure at the early level of involvement with the system in front of that whole theatre of the individuals in the courtroom that everyone in that courtroom understands what is going on in terms of the rights of the individual defendant especially when rights are being waived. Otherwise you are setting up your clients and the system for failure.

I had a young man in front of me not too long ago on a serious felony charge and the issue that was raised in front of me was his competency. Someone finally got Robert some testing done and he was shown to have a verbal IQ of 46 and performance IQ of 50. Obviously, the competency issue was well raised. In examining his prior record, he has 4 prior pleas of guilty to misdemeanors with incarceration. Every time he had been represented by counsel, every time with a signed Boykin agreement where no one had raised the issues of his competency. Whether that was because another deal was right, or if there was credit time served, so it wasn't going to hurt him, makes no difference. Now the state has the additional ammunition of saying, "he's been through this system a number of times and none of those prior attorneys thought he was incompetent, they all stood there and said to the court, 'he understands what is going on, I've discussed it with the client and he understands what the waiver of trial is.'"

When I, in my practice, take a Boykin plea, one of the things I ask is, "Do you understand you are giving up your right to trial" and the defendant says "yes." I ask, "what's a trial." I get some great definitions; "That's where we all go into a room and they find you guilty." When I ask, "Who has to prove what, do they have to prove you did it or do you have to prove you're innocent?" Invariably the defendants state they have to prove innocence. It is an embarrassing point for lawyers at the Bar but when I send them out to confer with their client and give a civic lesson to your client before they

proceed, it brings the point to everybody sitting in that courtroom that when they are giving up rights, they are giving up something that is important. When someone sitting in that courtroom, a defendant, or a victim or a potential juror, is then called upon to understand the balancing on the issue of rights, they are more receptive to that issue. It is the habit of the process of justice which must start in district court, it is the habit of the process of your justice which is your duty to bring to district court when it is absent.

I heard a priest giving a sermon about three devils who went up to Satan and wanted to go back up to earth. He said, "Well, what is your story, why should I let you go back up there?" The first one said, "well, I'll go back up there and tell the people there is no God." The devil says, "ah, that's not good enough, people aren't going to believe that." The second came up and he asked, "what do you have to tell the people?" "I'll just tell the people that there is no salvation." Satan said, "That's not bad, but let's see what this third one has to say." The third devil came up, "what are you going to tell the people when you get back up there?" "I can tell the people that there is no hurry."

Well, ladies and gentlemen there is a hurry to implement the process of the justice that we deal with in district court. It is extremely important that you not be caught up into the informality of the process of justice that goes on so often in the district court, because it does have long term effects, not only on your individual client, but the total perception of this community and of this state as to what is happening in a court of original jurisdiction.

We on the district bench are constantly referred to as being on some lower rung on an imaginary judicial ladder or as an inferior court. That perception needs to end because the vast majority of the people form their perception of the justice system through the actions of the district court.

When you have a child on a possession of alcohol charge, when was the last time you asked the officer to produce the physical evidence, the alcohol? There is a lot of Kentucky case law that says that they have to chemically test the contents of that beer can. Yet, I can't think of a possession of alcohol case they would actually make with physical evidence, yet there are hundreds of pleas on that charge every year in this state.

In traffic court, how many of you will allow a client to, in fact, plead guilty to reckless driving where the offense is actually not provable. What happened was where there was no one else present. There are elements to each and every offense. How often do we research cases by examining the statutes prior to trial to see if a case is provable beyond a reasonable doubt? How often do we allow a client to plead guilty to terroristic threatening and accept time conditionally discharged for a conditional threat for which there could not have been any conviction?

The quality of your advocacy in the district court must be with the same vigor that you apply to circuit court practice. If you acquiesce to the social milieu which does not stress the importance of the balance of powers between the state and the individual, you will not be able to convince your community of the importance of that balance of powers. I understand that there is an element of reality to this implementary charge. Some prosecutors and judges will not want you to work too hard for it makes them work harder. And you must realistically deal with the needs of your individual clients and their wishes.

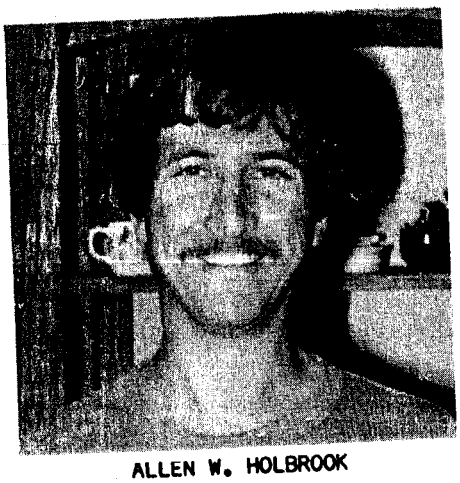
What I call for you to do is examine in each and every case the quality of what goes in your system of justice because it is up to you as Advocates to make that system work.

THANK YOU VERY MUCH!

ZIGGY *by Tom Wilson*

Trial Tip

CONDITIONAL GUILTY PLEAS IN STATE AND FEDERAL COURT



ALLEN W. HOLBROOK

Allen is in private practice with Holbrook, Gary, Wible & Sullivan in Owensboro. He is a former state and federal public defender in Frankfort, Morehead and Lexington.

A constant problem presented to criminal defense lawyers is whether to risk a trial in order to preserve a particular pretrial issue on appeal. A plea of guilty waives all pretrial issues, and the plea bars any direct appeal of the judgment.

In Kentucky, there are three general exceptions to the rule that a plea of guilty bars further direct appeal.

First, the Defendant can appeal the denial of a motion to withdraw a guilty plea. RCr 8.10 provides that a plea may be withdrawn at any time prior to judgment. The denial of the motion is subject to direct appeal from the judgment. See Maxwell v. Commonwealth, Ky., 602 S.W.2d 169 (1980); Couch v. Commonwealth, Ky., 528 S.W.2d 712 (1975).

Second, a plea of guilty may be attacked on direct appeal if there is evidence presented at the trial level that the plea was involuntarily given, or was not given with an understanding of its consequences. This could be presented in a motion under RCr 8.10 for failure to comply with RCr 8.08. Raymer v. Commonwealth, Ky., 489 S.W.2d 831 (1980). A motion for new trial could also raise these grounds. Gibson v. Commonwealth, Ky., 502 S.W.2d 519 (1973).

In Shannon v. Commonwealth, Ky., 462 S.W.2d 301 (1978), the Court held that a claim of an invalid guilty plea, due to involuntariness or lack of understanding, could not be raised on direct appeal if not raised in the trial court.

Third, in Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985), the Shannon case was overruled to the extent that an illegal sentence could be directly appealed, even if no objection was raised in the trial court. Sentencing was deemed jurisdictional, and not subject to waiver.

Closely connected with Wellman, if the indictment does not charge an offense, it should be subject to direct attack even after a guilty plea since this would be jurisdictional. Bush v. Commonwealth, Ky., 702 S.W.2d 46 (1986).

Although certain constitutional objections may be appealed even after a guilty plea, Menna v. New York, 423 U.S. 61 (1975) (double jeopardy violation), Blackledge v. Perry, 417 U.S. 21 (1974) (due process based on vindictive prosecution), and Haynes v. United States, 390 U.S. 85 (1968) (challenge to constitutionality of criminal statute), there is no state procedure, or constitutional requirement, allowing a defendant to appeal an adverse pretrial ruling if the defendant pleads guilty to the offense.

Until 1983, federal law also barred the litigation of pretrial issues once a guilty plea was entered. Tollett v. Henderson, 411 U.S. 258 (1973). However, such pleas were allowed in four states by rule or statute (California, New York, Vermont, Wisconsin), and in three other states by judicial decision. (Alaska, Louisiana, Oregon). In Lefkowitz v. Newsome, 420 U.S. 283 (1975), the Court commended New York's conditional plea procedure.

In 1983, Federal Rule of Criminal Procedure 11 was amended to allow a "conditional" guilty plea. Under Rule 11(a)(2) a defendant, with the approval of the Court and consent of the government, can plead guilty yet reserve appeal rights "to review the adverse determination of any specified pretrial motion."

If the appeal is successful, then the defendant is allowed to withdraw the guilty plea. Since the plea is probably the result of a plea agreement, then the agreement is no longer binding and the indictment is reinstated. However, if the defendant prevails on appeal, then it is unlikely the government would have any case left for trial. Issues litigated via this procedure should be limited to case-dispositive questions. Otherwise, the purpose of the procedure to provide judicial economy is thwarted. See United States v. Dunn, 684 F.2d 1066 (2nd Cir. 1982).

Absent a change in the Rules of Criminal Procedure by the Kentucky Supreme Court, the only other procedure for a conditional guilty plea would be in a plea agreement. Brock v. Sowders, Ky., 610 S.W.2d

591 (1981) suggests that a conditional plea agreement, even though not authorized by rule or statute, is enforceable against the Commonwealth. In United States v. Cox, 464 F.2d 937 (6th Cir. 1972), the Court refused to adopt conditional pleas as a matter of policy but nonetheless reviewed an issue on appeal because the parties had incorporated it as part of a conditional plea agreement.

Also, prior to the adoption of the Amended Rule 11, some federal courts allowed conditional guilty pleas notwithstanding the absence of a statute or a rule allowing such a procedure. United States v. Burke, 517 F.2d 377 (2nd Cir. 1975); United States v. Clark, 459 F.2d 977 (8th Cir. 1972); and Coleman v. Burnett, 477 So.2d 1187 (D.C. 1973). Some state courts followed this same procedure. State v. Lain, 347 F.2d 167 (La. 1977); Dorsey v. Cupp, 508 P.2d 445 (Or. 1973).

The advantages of conditional guilty pleas to both the defense and the Commonwealth are apparent. The defendant can litigate adverse pretrial rulings without the costs of trial, or the risks of multiple verdicts and sentences. The Commonwealth obtains a guilty plea without a trial, and is in no different position than if the defendant had been found guilty at trial yet appealed. The issues on appeal would be substantially narrower than those likely to arise during a trial.

Finally, judicial resources would be better utilized at both the trial and appellate levels. There would be fewer trials. The issues on appeal would be narrower and fewer than if the case was on appeal from a trial. The record on appeal would be less voluminous, which should substantially lessen the delays ordinarily associated with preparing trial records for appellate review.

ALLEN W. HOLBROOK

Trial Tip

JOANNE YANISH

BELATED APPEALS, AN UPDATE

In Commonwealth v. Wine, Ky., 694 S.W.2d 689 (1985), the Kentucky Supreme Court established a new procedure for obtaining a belated appeal following dismissal of an appeal by an appellate court. In so doing the Court specifically overruled Stahl v. Commonwealth, Ky., 613 S.W.2d 617 (1981) and Hammershoy v. Commonwealth, Ky., 398 S.W.2d 883, 884 (1966).

Prior to Wine, the Kentucky appellate courts had vacillated concerning the appropriate procedure for obtaining a belated appeal. In 1963, in McIntosh v. Commonwealth, Ky., 368 S.W.2d 331 (1963), the Kentucky Supreme Court held RCr 11.42 was not the appropriate remedy for seeking an appeal following the denial of one's right to appeal. The Supreme Court then blew hot and cold concerning the appropriate remedy from 1963 until 1981 when Stahl was decided.

In Stahl, the Court held that a trial court could not grant a belated appeal or reinstate a lapsed appeal but that "an attack on the trial judgment is the appropriate remedy for a frustrated right of appeal." Stahl at 618. In Stahl, the defendant's attorney had filed a timely notice of appeal but the appeal was dismissed because a timely brief had not been filed. The Court in Stahl held that the proper procedure was for the trial court to vacate the judgment and enter a new one from which an appeal could be taken.

In Wine, the Court of Appeals had dismissed Wine's appeal following counsel's request for a fourth extension. In ordering Wine's appeal reinstated, the Supreme Court relied upon the recent United States Supreme Court case of Evitts v. Lucey, ____ U.S. ____, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) which held that due process requires an appellant in a criminal case to be provided effective assistance of counsel.

In granting relief, the Kentucky Supreme Court held that from that time on an attack on the judgment in the trial court was no longer the appropriate procedure for obtaining belated appeal, specifically overruling Stahl. The Court held that in a case in which an appeal has been dismissed by an appellate court, the claim of ineffective assistance should be made

in the appellate court in response to the motion to dismiss or on a motion to reconsider an order of dismissal. Wine means, according to the Court, that relief must be sought from the court which has jurisdiction to hear the appeal.

When issues of facts are raised by the motion (e.g. concerning whether counsel's actions amounted to ineffective assistance, whether the client consented to counsel's actions or whether trial strategy was involved), Wine states the appellate court to which the request for reinstatement is directed may determine the issues and may hold hearings. The appellate court is also free to refer the matter to the trial court for findings of fact and conclusions of law concerning ineffectiveness of counsel.

One matter left open by Wine is what procedure a defendant or counsel should follow in seeking to reinstate an appeal where no timely notice of appeal has been filed. While the Court did not specifically address questions of late or defective notices of appeal or absence of a notice of appeal, the discussion in Wine seems to indicate that one should address requests for appeals or for reinstatement to the appropriate appellate court in those circumstances. The court did state in Wine that RCr 11.42 is designed to permit a trial court to review a sentence and judgment after entry for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself. Also the court stated RCr 11.42 was not an appropriate remedy for a frustrated appeal.

However, there is an argument to be made that if an appeal is dismissed by a trial court (for instance, for failure to file a notice of appeal, a Stahl-type motion to vacate should be filed in that trial court. The rationale for this position is that the Wine ruling is based in part upon Cleaver v. Commonwealth, Ky., 569 S.W.2d 166 (1978) which held that a trial court could not reinstate an appeal after its dismissal by an appellate court.

There is one important remedy still available in the trial court for obtaining a belated appeal which should not be overlooked. RCr 12.06 requires the clerk to serve written notice of the entry of judgment upon counsel of record or upon a defendant who is without counsel by mail or personal delivery immediately upon entry of the judgment.

A written notation of the manner and date of service must be made on the docket sheet. The time for taking an appeal does not officially begin to run until such a notation is made.

In situations where the clerk has failed to serve notice of entry or has done so improperly under the rule such as by failing to indicate the manner of service, the time for taking the appeal has technically not begun to run. Thus, counsel or a defendant has the opportunity to require the clerk to comply with RCr 12.06. Once the clerk has complied with that notice of entry requirement, the notice of appeal can then be timely filed, without a time-consuming trip to the appellate court.

JOANNE YANISH

JoAnne is a 1978 graduate of Notre Dame Law School. She has been an Assistant Public Advocate in the Appellate Branch since 1981.

Trial Tip

APPELLATE PROCEDURE: IN FORMA PAUPERIS ORDERS

Because the Court of Appeals of Kentucky has recently entered the computer age, it will now be necessary to have the Department of Public Advocacy specifically appointed to represent the defendant on appeal through the in forma pauperis order.

Until recently, the Court of Appeals did not assign a case a file number nor designate an attorney of record on appeal until the first pleading was filed by an appellate attorney in that Court. Now, as soon as the Court of Appeals receives a copy of the Notice of Appeal from the clerk of the circuit court, it will give that case a Court of Appeals File Number. It also will designate as counsel of record on appeal the attorney who signed the Notice of Appeal unless the order allowing the defendant to proceed in forma pauperis on appeal specifically appoints our office to represent the defendant on appeal.

In order to ensure that indigent appeals are perfected with the minimum of administrative trouble, it will be necessary to have the order allowing the defendant to proceed on appeal in forma pauperis specifically designate the Department of Public Advocacy as counsel on appeal. The following is a proposed order which should be used in all appeals which will be forwarded to the Department of Public Advocacy for processing:

The Defendant having moved the Court for an order to prosecute the appeal of his criminal conviction in forma pauperis, and it appearing to the court that the Defendant is a pauper within the meaning of KRS 453.190 and KRS 31.110(2)(b), and the court being sufficiently advised;

TIM RIDDELL

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant is hereby granted leave to prosecute his appeal without payment of costs and that the Department of Public Advocacy is appointed to represent the Defendant on appeal.

IT IS FURTHER ORDERED that the court reporter is directed to prepare the transcript of evidence of the entire proceedings including the voir dire, the opening statements and the closing arguments by counsel. The court reporter shall be compensated for the preparation of the transcript of evidence by the Administrative Office of the Courts at the prevailing rates.

Under my hand this _____ day of

_____, 19__.

_____

JUDGE

TIM RIDDELL

Tim is a 1973 graduate of the University of Kentucky Law School. He is Chief of the Appellate Branch.

APPELLATE PROCEDURE: GOOD NEWS

The good news is that the Supreme Court of Kentucky has abandoned the policy of strict compliance with rules of procedure regarding appeals and has now adopted a new policy of substantial compliance. In Ready v. Jamison, Ky., ____ S.W.2d ____, 33 K.L.S. 3, 24-25 (Feb. 27, 1986), the Kentucky Supreme Court ruled that the failure of a party's counsel to comply with rules of appellate procedure will not result in a dismissal of the appeal if there has been substantial compliance with those rules. (This policy change does not apply to the failure to file a Notice of Appeal within the times required by the rules.)

In Ready the Court had before it three clearly defective notices of appeal in that they failed to designate the judgment being appealed from. After adopting the substantial compliance rule (and after observing that the notices were filed in a timely manner) the Court concluded that dismissal of those appeals was not an appropriate remedy "so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent." The Court was quick to point out that while dismissal might not be the appropriate remedy, other sanctions such as imposing a fine on counsel, might be exacted instead.

APPELLATE PROCEDURE: BAD NEWS

Therein lies the bad news. It is clear now that the appellate courts of this jurisdiction will be most reluctant to dismiss appeals because of procedural foul ups. Beware if some action or omission on your part places a litigant in jeopardy of suffering the loss of his right to appeal, the courts seem more willing at this stage to fine you and let the appeal progress. This seems to be the only route left to the court in criminal appeals where the defendant's counsel has placed an appeal in jeopardy by failing to follow the appropriate rules of procedure. See Evitts v. Lucey, ____ U.S. ____, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

TIM RIDDELL

A LEXICON OF ORAL ADVOCACY

By Frank M. Coffin

LEX: law
ICON: portrait, illustration

HENCE
An impressionistic portrait, drawn from concrete experiences, of advocacy before appellate courts;

ALSO
A dictionary of terms and types;

AND OCCASIONALLY
A bestiary.

Illustrated by Douglas M. Coffin

NATIONAL INSTITUTE FOR TRIAL ADVOCACY

JUDGES

Lawyers who were once advocates, whose job now is to decide among advocates, and who, in the process of deciding, will advocate their positions to their colleagues. Judges have the power to make oral presentations a shambles or a stimulating aid to expeditious and sound decisions.

In addition to the substance of their cases, counsel must consider the personalities, quiddities, abilities, predilections, habits and ways of the judges. I am sure that an experienced appellate advocate could catalogue a long list of judges and their idiosyncrasies that would make a literary complement to Daumier's ruthlessly revealing drawings. I am not about to attempt such an unveiling. What I can do is to indicate the kinds of ways in which all of us fall short of the mark of the ideal appellate audience or occasionally live up to it.

First, the foibles which fairly characterize us from time to time. Being human, we are subject to all of them. The saving grace is that on a multi-judge court, each judge will not have the same foible at the same time; indeed, foibles of different judges often offset each other.

Un- or Underprepared - Sometimes a judge has not read a brief or memo, or his reading has been too hasty to be illuminating. In such a predicament, if he is silent, he makes no contribution to anyone's understanding. But if he asks questions, he actively prevents the oral argument from being the aid to decision that it could be. Long, agonizing minutes will be wasted supplying information that everybody else knows.

Overprepared - Occasionally a judge will be so intrigued by a case in advance of argument that he will read everything very thoroughly, may even do independent research, and will have developed his views very strongly. When this happens, it is a judge of rare restraint who will not allow himself to parade his knowledge just a little bit, and perhaps a little bit more. The result is not necessarily to advance understanding of the particular case. Questions are likely to be ultra-sophisticated, the answers not being relevant to decision.

Clever -A judge may be supremely pleased with himself for coming upon a point that is important. He brings the matter up, and receives a concise answer. Having nothing more to ask, he is likely to ask the same question in different words. And so time runs. I call this the terrier syndrome and dealing with it is one of the meatiest challenges to the lawyer.

Stupid - Judges have blind spots. Being otherwise sophisticated about an awesome range of issues, they will occasionally draw a blank in a particular case. Or it may just be a bad day, when comprehension comes slowly. Or the judge may have some tormenting problem on his mind and his inner turmoil is believed by his outward visage of wisdom and serenity. Therefore, absolutely stupid questions can be asked. I have, for example, asked what I thought was a shrewd question; my only problem was that I had the parties entirely mixed up in my

Shoe

mind. The question made no sense at all. The problem for counsel in such straits is to give a sufficient answer, somehow suggesting the question's stupidity while at the same time avoiding too blatant a disrobing of the judge.

Biting -Judges occasionally erupt in biting criticism that digs, deeper than mere debate on issues. Often it is perfectly justified criticism. Perhaps very new, or very old, or disadvantaged counsel may be forgiven gross errors of judgment or breaches of etiquette, but professionals of any stature, earning more than a good living, must not be surprised when judges make an effort to prevent the standards of oral presentation in their courtroom from eroding. Sometimes, however, the criticism stems from a partial view taken by a judge. He may be affronted by what he considers an entirely frivolous argument from reputable counsel. He may make some cutting remark, only to discover some perfectly rational justification for the argument. The criticism was unjustified and, unless the judge confesses error, an impression of unfairness remains.

Partisan -Once in a while a judge comes to argument with his slip - his bias - showing. I am not referring to questions that indicate that a judge feels one side is stronger than the other; such an indication, indeed, ought to be of assistance to counsel and to the other judges, showing what argument must be met if he is to be argued out of his position. No, I am referring to comments indicating that the judge feels that the case before him is to be decided a certain way because of its genre (civil rights, prisoner, environmental, labor, etc.) or the nature of the party (youth, conscientious objector, militant, alien, etc.) or its magnitude (trivial amount of money, a petty privilege).

Because competent counsel who take the trouble to see how their cases might look to an objective or even a hostile decider can easily predict these reactions, I think it is generally the path of wisdom to challenge the judge to overcome their biases. That is, if a judge comes to argument incensed at the plaintiffs, who he deems a scruffy group of irresponsible youth trying to make trouble in an otherwise peaceful town, counsel would do well to begin, "Your Honors, this case is important just because it looks so trivial. I suspect that none of you would subscribe to the view that the plaintiffs are trying to disseminate in their town. You might deem them immature, shallow, and troublesome without any redeeming merit. That, of course, is exactly how the town authorities felt. And that is precisely why we have a First Amendment, not to permit people to talk about popular ideas - no amendment is needed for that - but for just such ideas as those of plaintiffs here." With such a beginning, the wind is out of the judge's sail; counsel has put the case the way the judge sees it - as an irresponsible group merchandising some petty or wrong-headed ideas; all this conceded, however, the legal issue remains and it is an important one.

Just as all judges at times exhibit one or more of the above foibles, so do they reach excellence on occasion, the finest judges reaching it quite often. The profile of the appellate judge at his best would look like this:

He is well prepared. He has read not only the briefs but the opinion of the judge or agency whose action is being appealed. He has also read a few critical parts of the record - the colloquy between court and counsel when a question was objected to, the entire charge to the jury, a series of intertwining statutes, or the fine print in a construction contract or insurance policy. He has thought out one or more useful hypothetical questions. He presses both sides with a few well chosen questions. He often obtains concessions from counsel that narrow the issues to be decided.

Not infrequently his questioning reveals that there is some issue which exists but which neither side has treated.

At the conclusion of the oral presentation and his colloquies with counsel, all the judges of the panel are likely to see that their own views have changed; the case now appears much more simple than they had thought...or much more difficult.

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Trial Tip

WOMEN'S SELF-DEFENSE, PART II

THE ADMISSIBILITY OF EXPERT TESTIMONY CONCERNING THE BATTERED WOMAN SYNDROME

* * *

The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight. Thomas v. Arn, 728 F.2d 813, 815, (6th Cir. 1984) (Jones, J. concurring).

For over a decade, psychologists have been studying the vexing question of why abused women remain in battering relationships. By examining information from interviews with hundreds of victimized women, psychologists have formulated theories concerning the psychological make-up of battered women. Theories such as "learned helplessness" explain why battered women are psychologically incapable of leaving their violent relationships and why they develop survival responses rather than escaping. The cycle theory of violence indicates that the abuse follows a predictable pattern and can demonstrate the reasonableness of an abused woman's perception that she is in imminent danger.

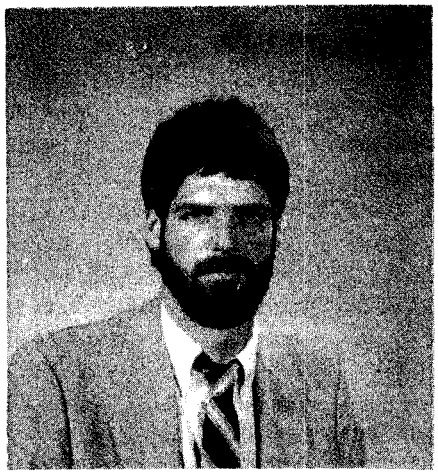
These important findings debunk many myths about battered women, such as the general belief that battered women don't leave battering relationships because they are masochistic. And just as these findings educate the public, they can also be used to educate juries called upon to evaluate the reasonableness of a battered woman's belief in the need to act in self-defense. Recognizing this, appellate courts across the country have ruled that expert testimony about the battered woman syndrome is admissible in assault and homicide prosecutions where self-defense is raised.

A. IBN-TAMAS V. UNITED STATES

The seminal decision concerning the admissibility of such testimony is a case from the D. C. Court of Appeals. Ibn-Tamas v. United States, 407 A.2d 626 (D.C.App. 1979).

Beverly Ibn-Tamas was convicted of second degree murder in the shooting death of her husband of three and one-half years, Dr. Yusef Ibn-Tamas. Their marriage was plagued with recurring violent episodes separated by periods of relative harmony.

For example, the doctor once struck the defendant with his fist, a shoe and another object before dragging her and her six-month old baby off a bed and onto the floor. The doctor had accused one of his wife's visiting friends of being a lesbian. The beating followed Beverly's protest of the doctor's rudeness. On another occasion, the husband forced the defendant out of the car along an interstate highway, driving off with their infant daughter. The violence increased in the months preceding the doctor's death. On more than one occasion during this period Beverly was severely beaten even though she was several months pregnant with their second child. The beatings were corroborated at trial by medical evidence and by the doctor's mother.



NEAL WALKER

After their marriage, the defendant found out that her husband had a history of violence toward women.

On the morning of the shooting, a dispute arose at the breakfast table. Despite his wife's protests that she was pregnant and that he had promised not to hit her again, Dr. Ibn-Tamas hit her over the head, first with a magazine and then with his fist. He then dragged her upstairs, pulled out a suitcase and told her to pack and leave the house by 10:00 a.m. He continued to beat her, first with his fists and, later, with a wooden hairbrush. Finally, he pointed a loaded pistol in her face and told her that she was going to leave "one way or the other." Id. at 630. Thereafter, the doctor went downstairs to his office adjoining the house.

Ultimately, the defendant shot her husband three times with the gun he had threatened her with.

A medical examination after the defendant's arrest revealed bruises on her arms, thighs, and buttocks.

At trial, the defense proffered the testimony of Dr. Lenore Walker, a clinical psychologist and expert on the subject of battered women, to describe the phenomenon of wife battering and to give her opinion of the extent to which Beverly's personality and behavior corresponded to the 110 battered women that Dr. Walker had studied. The defense claimed the testimony was relevant because it would help the jury appraise the credibility of the defendant's contentions that she had perceived herself in such imminent danger from her husband that she shot him in self-defense.

The trial court refused to permit the testimony on the basis, inter alia, that the evidence would invade the province of the jury. The appellate court reversed, citing three criteria to consider in determining whether expert testimony is admissible in the District of Columbia. First, the subject must be beyond the "ken" of the average layperson. Second, the expert must be qualified in the field. Finally, the state of the scientific knowledge must permit an expert to assert a reasonable opinion.

1. BEYOND THE KEN OF THE LAYPERSON

The appellate court recognized that an expert can invade the province of the jury either by speaking too directly to the ultimate issue, or by addressing matters which are within the common understanding of the ordinary layperson. However, the court found that the psychologist did not plan to testify about the ultimate issue of whether the defendant "actually and reasonably believed she was in danger." Id. at 632. Rather, the purpose of the testimony was to supply background information to aid the jury in deciding that issue.

Specifically, the psychologist would have informed the jury that there is an identifiable class of persons who can be characterized as battered women and would have discussed why "the mentality and behavior of battered women are at variance with the ordinary lay perception of how someone would be likely to react to a spouse who is a batterer." Id. at 634. The expert would have also told the trier of fact that Beverly Ibn-Tamas presented a "classic case" of a battered woman. Id.

The appellate court noted that the prosecutor had suggested that Mrs. Ibn-Tamas' account of the violence in her marriage was greatly exaggerated and that her testimony about perceiving herself in imminent danger when she shot her husband was therefore implausible. The prosecutor implied that the logical reaction of a woman who was truly frightened by her husband, let alone regularly brutalized by him, would have been to call the police from time to time or to leave him.

The reviewing court held that the expert testimony would have supplied an interpretation of the facts which differed from the ordinary lay perception advocated by the prosecutor, and would have aided the jury in understanding the defendant's relationship with her husband and provided a basis on which the jury could evaluate the defendant's claim that she believed herself to be in imminent danger when she shot her husband. Accordingly, the Ibn-Tamas court concluded that expert testimony on the battered woman syndrome met the requirement of being beyond the comprehension of the average juror.

2. QUALIFIED EXPERT

On this point - Dr. Walker's qualifications as an expert in the field - the Ibn-Tamas court concluded that the record was not sufficiently developed and remanded the matter for trial court to consider. However, the appellate court noted that the record did not show as a matter of law that the clinical psychologist was not a qualified expert on the matter in question.

3. STATE OF SCIENTIFIC KNOWLEDGE MUST PERMIT AN EXPERT OPINION

Addressing the third criterion with respect to the admissibility of expert testimony, the court rejected the government's contention that the concept of the battered woman syndrome has not gained general acceptance. To meet this criterion, it is the methodology employed by the expert, as opposed to the results or conclusions, that must be generally accepted within the relevant scientific community. This issue was also remanded to the trial court. On remand, the defense would have to show that Dr. Walker's method of studying battered women - through interviews and compilations of the interviewees' responses - conforms with generally accepted clinical psychological study.

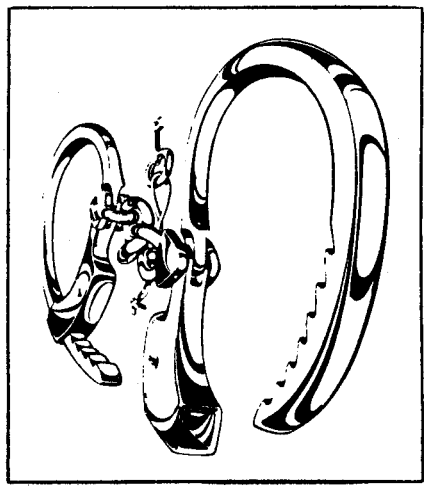
4. PROBATIVE VERSUS PREJUDICIAL

After concluding that the expert testimony could be admissible, the court inquired whether the probative value of the testimony out-

weighed its prejudicial impact. The probative value of the expert testimony was formidable, bearing, as it did, on the defendant's perception and behavior at the time of the killing. Consequently, whatever prejudicial impact the evidence carried, it was clearly outweighed by the countervailing probative quality of the testimony, especially considering the fact that the judge had already allowed substantial evidence of prior beatings.

B. IBN-TAMAS II

In 1983, the D. C. Court of Appeals issued a short decision upholding the trial court's ruling, on remand, that the defendant had failed to establish a general acceptance by the expert's colleagues of the methodology used in the expert's study of battered women. Ibn-Tamas v. United States, 455 A.2d 893 (D.C. App. 1983). Noting that its holding was a narrow one, the reviewing court held that it "should not substitute its judgment in [such] a discretionary ruling." Id. at 894.



This holding is somewhat of a disappointment to advocates of the admissibility of expert testimony on the battered woman syndrome. However, as more research is completed, even those who would require "a showing of substantial support from the appropriate field of science showing the dependability of the new scientific theory" can be satisfied. Id. at 895 (Gallagher Assoc. J, Retired, concurring).

C. OTHER JURISDICTIONS

Since the Ibn-Tamas decision, eight additional jurisdictions have ruled that expert testimony on the battered women syndrome is admissible, under appropriate circumstances, in a self-defense case. The cases are: Hawthorne v. State 408 So.2d 801 (Fla. 1982); Smith v. State 277 S.E.2d 678 (Ga. 1981); People v. Minnis, 455 N.E. 2d 209 (Ill. 1983); State v. Anaya, 438 A.2d 892 (Maine 1981); State v. Kelly, 478 A. 2d 364 (N.J. 1984); People v. Torres, 128 Misc. 2d 129, 488 N.Y.S. 2d 351 (N.Y. Sup.Ct. 1985); State v. Hill, 339 S.E. 2d 121 (S.C. 1986); State v. Allery, 682 P.2d 312 (Wash. 1984).

As the case law has developed, the admissibility of expert testimony on the battered woman syndrome has evolved from an emerging trend to the majority position. Indeed, in only two jurisdictions has the testimony been ruled inadmissible.

In Buhrle v. State, 627 P.2d 1374 (Wyo. 1981), the Wyoming Supreme Court held that the trial judge properly excluded expert testimony on the battered woman syndrome. However, the decision turned on the tentative nature of the expert's research, rather than a rejection of the relevance of the evidence. "In our holding here we are not saying that this type of expert testimony is not admissible; we are merely holding that the state of the art was not adequately demonstrated to the court, and because of inadequate foundation the proposed opinions would not aid the jury." Id. at 1378.

Ohio appears to be the only jurisdiction thus far to hold categorically that expert testimony on the battered woman syndrome is never admissible. In State v. Thomas, 66 Ohio St 2d 518, 20 Ohio Ops 3d 424, 423 N.E.2d 137 (1981), the Ohio Supreme Court reversed the Ohio Court of Appeals, which had held that the trial judge erred in excluding such testimony, and reinstated Kathy Thomas' conviction for killing her husband.

D. THE SIXTH CIRCUIT

Kathy Thomas pursued her case and filed a habeas corpus petition in Federal District Court in Ohio. Ultimately, the Sixth Circuit ordered her petition dismissed on procedural grounds. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984); aff'd on other grounds, ___ U.S. ___; 106 S.Ct. 466 (1985). However, Judge Jones, while concurring in the dismissal, wrote separately to explain that he would have granted the writ of habeas corpus if he had reached the merits of the case. "In my view, the trial court's exclusion of expert testimony on the battered woman syndrome impugned the fundamental fairness of the trial process thereby depriving Thomas of her constitutional right to a fair trial." Id. at 813 (Jones, J. concurring).

Judge Jones' opinion marks the first time a federal judge has written on a battered woman's right, under the Due Process clause of the Fourteenth Amendment, to introduce expert testimony on the battered woman syndrome in a self-defense case.

E. KENTUCKY LAW

While the admissibility of expert testimony on the battered woman syndrome has yet to be addressed by the appellate courts in Kentucky, such testimony has been admitted by trial courts in self-defense cases in several circuits throughout the Commonwealth. See, e.g., Commonwealth of Kentucky v. Kathy Phillips (Floyd Ind. No. 78-CR-107); Commonwealth of Kentucky v. Margaret R. Ford (Fayette Ind. No. 85-CR-72).

The criteria for admission of expert testimony under Kentucky law are set forth in Lawson's Kentucky Evidence Law Handbook, §6.10 (2ed. 1984):

(A) Proper Subject Matter: Expert opinion testimony is admissible only if (i) it involves a matter that is scientific, technical, or specialized in character and is outside the scope of common knowledge and experience, and (ii) it will aid the jury in understanding the evidence or resolving the issues.

(B) Expert Qualifications: An expert witness is one who possesses specialized knowledge about a subject matter that is appropriate for expert opinion testimony.

1. QUALIFIED EXPERT

The requirement of expert qualifications in this field has rarely posed problems. See Hawthorne v. State, supra, and Smith v. State, supra. Under Kentucky law, "[a] witness may become qualified by practice or an acquaintance with the subject." Kentucky Power Company v. Kilbourn, Ky., 307 S.W.2d (1957). More specifically, an expert's qualifications can be based on a study of relevant literature rather than personal experience. Lee v. Butler, 605 S.W.2d 20, 21 (Ky.App. 1979).

2. OUTSIDE THE SCOPE OF COMMON KNOWLEDGE/AID TO THE JURY

Similarly, the majority position is that the battered woman syndrome is a subject which is outside the scope of common knowledge and experience and that expert testimony on the subject would assist the jury in evaluating the reasonableness of a battered woman's belief in the need to use self-defense. "[E]xpert testimony explaining why a person suffering from the battered woman syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself would be helpful to a jury in understanding a phenomenon not within the competence of an ordinary lay person." State v. Allery, supra, at 312, citing Smith v. State, supra.

3. GENERAL ACCEPTANCE

A recent Kentucky case, Bussey v. Commonwealth, Ky. 697 S.W. 2d 139 (1985), suggests that the "general acceptance" criteria should also be satisfied before expert testimony is admitted. In the cited case, the trial court admitted the testimony of a prosecution psychiatrist concerning the "child sexual abuse accommodation syndrome" in a prosecution for attempted sodomy of the defendant's daughter. The Supreme Court reversed since the syndrome's manifestations could have been caused by the child victim's uncles who were known to molest her, rather than the defendant. The Court "noteld] also that the record does not reveal any attempt by the prosecution to establish the credibility of the child sexual abuse accommodation syndrome as a concept generally accepted in the medical community." Id. at 141.

The "general acceptance" standard referred to in Ibn-Tamas and Bussey comes from what is perhaps the leading case on the admissibility of novel scientific evidence by means of expert testimony, Frye v. United States, 293 F.1013 (D.C. Cir. 1923). A number of commentators have criticized the general acceptance standard, see e.g., C. McCormick, Evidence, 489-90 (2d ed.1972), and some courts have rejected it. E.g. United States v. Baller, 519 F.2d 463 (4th Cir.), cert. denied, 423 U.S. 1019 (1975).

It is unclear that this criterion is a prerequisite to admitting this sort of expert testimony in Kentucky. There is no reference to the general acceptance standard set forth in Lawson's Handbook of Kentucky Evidence, supra, and the cursory recognition of such a requirement in Bussey, supra, appears to be dictum. The only Kentucky case that specifically holds that the Frye general acceptance standard is a prerequisite to admission of expert testimony is a civil case dealing with blood typing. Perry v. Com., Ex Rel. Kessinger, 652 S.W.2d 655 (Ky. 1983).

In any event, the majority position is that there is general recognition and acceptance among clinical psychologists and other mental health experts of the methodology used by experts on the battered woman syndrome to support their findings and conclusions. E.g., State v. Kelly, supra; People v. Torres, supra.

4. ULTIMATE ISSUE

Last year the Kentucky Supreme Court upheld a trial court's exclusion of a psychologist who

would have testified that the defendant's psychological profile was not consistent with that of a sex offender. Pendleton v. Commonwealth, Ky. 685 S.W. 2d 549, 553 (1985). The testimony "should not have been admitted because it went to the ultimate issue of innocence or guilt." Id. at 553. According to the Supreme Court, such evidence "invades the proper province of the jury." Id.

Accordingly, in determining the parameters of expert testimony on the battered woman syndrome, counsel should consider eliciting general information about the psychology of battered women (e.g., the concept of learned helplessness, the cycle theory of violence) instead of whether the defendant truly and reasonably believed she was in danger. Certainly, though, a defendant is entitled to establish her identity as a battered woman without invading the province of the jury, since evidence about the battered woman syndrome would not otherwise be relevant.

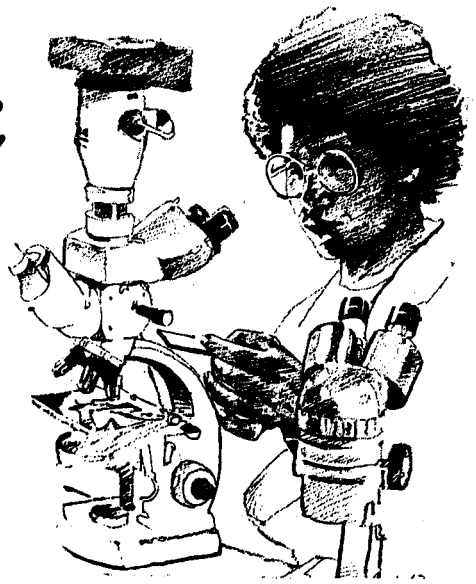
CONCLUSION

The critical issue in a case where a battered woman asserts the defense of self protection is whether or not her belief that she needed to use deadly force was reasonable given her experience as a battered woman. The battered woman syndrome is now an established behavioral phenonenon. Expert testimony is necessary in a self-defense use to refute the many myths that still surround battered women in the average layperson's mind.

NEAL WALKER

Neal is a 1979 graduate of Chase Law School. He has been a trial and appellate assistant public advocate and a federal public defender for the Eastern District. He is now a member of the Department's Major Litigation Section.

Forensic Science



The reported weights of marijuana entered into exhibit by prosecution are often accepted as correct. But when the weight is near or over the critical weight amounts (1/4 oz., 2 oz., 4 oz., 5 lbs. and 50 lbs., etc.), a small error can make a vital difference in the penalty category.

However, case experience has clearly indicated that most, if not all, of these illicitly grown marijuana samples contain other plant matter, dirt and debris. These non-marijuana constituents are invariably considered in the total reported weight because of the assembly-line analysis procedure commonly applied to such low priority cases by most state labs. The labs argue that the percentage or volume of innocuous material is so small as to be negligible. This argument does not, however, consider their impact on the total weight outcome.

Aside from the fact that other matter increases the weight, which becomes apparent in a gross examination of the suspect sample, two hidden factors can contribute a great increase in non-marijuana weight. These factors, moisture and sterile seed content, contribute to gross weighing errors, if they are not considered. Freshly harvested marijuana plants may contain as much as 50% or more water by weight. Additionally, previously harvested and dried plant material may regain some of this moisture content depending on the conditions in which it is stored. The degree of discrepancy attributed to sterile seed content may only be determined by a case-by-case germination study of the seeds contained in every examined case. Neither of these factors is routinely considered by prosecution laboratories.

The removal of one or more of these factors from the apparent weight of the sample being considered allows the "true" weight of the marijuana to be more accurately determined. Although the discrepancies between the apparent and true weights will vary from case to case, it should be a point considered as it could affect the penalty category of that particular offense. It should be noted that the application of this procedure is not intended to circumvent the law; rather it is an attempt to adhere strictly to the law. It is suggested that if those charged with the responsibility of correctly examining and reporting these critical weight amounts of marijuana will not do so, then that responsibility must be assumed by the defense community.

We at FORENSIC ASSOCIATES welcome your comments and questions in regard to this or any other issue appropriate to be discussed in this forum. Write us at P.O. Box 64561, Lubbock, Texas 79464.

JACK BENTON AND PAT H. DOOLEY

* * * * *

Who can wonder that the laws of society should at times be forgotten by those whom the eye of society habitually overlooks, and whom the heart of society often appears to discard?

Dr. John Simon
New York City, 1849

Cases of Note... ...in Brief

ADMISSIBILITY OF COMPUTER REENACTMENT

People v. McHugh

476 N.Y.S.2d 721 (Supp. 1984)

The defendant was charged with four counts of second degree manslaughter and driving while intoxicated. The defense was that the defendant was neither drunk nor speeding; rather, weather conditions explain the path of the car.

The court held that the defendant was entitled to introduce, through an expert in the field of accident investigation and reconstruction, a report that was fed into a computer and the resulting 1 1/2 minute graphic computer reenactment on video since 1) it was relevant to the defense, 2) fairly and accurately reflected the oral testimony offered, and 3) was an aid to the jury's understanding of the issue.

ACCESS TO CONFIDENTIAL RECORDS

Commonwealth v. Ritchie

502 A.2d 148 (Pa. 1985)

George Ritchie was convicted of sexual offenses involving his minor daughter. Prior to trial, the defense was denied full access to Child Welfare Services records on the child-victim. Access to a medical exam of the victim and all other records was sought "to gain information which might impeach or discredit the complainant, or which might reveal potential witnesses." Id. at 149.

Reviewing United States Supreme Court case law, the Pennsylvania Supreme Court determined:

There is, of course, a difference between the types of protection that can be afforded a victim and one accused. The difference in all such considerations is the Sixth Amendment to the Constitution of the United States. There can be no absolute protections that cancel the fundamental mandates of that Amendment; all that can be accomplished is a careful balance between them, the counters always in favor of the Amendment.

Id. at 151.

The Court held that the defendant's constitutional protections required that he be given full access to the entire file so it could be "reviewed with the eyes and the perspective of an advocate." Id. at 153.

FAILURE TO GIVE BREATH SAMPLE

Jamros v. Jensen

377 N.W.2d 119 (Neb. 1985)

The defendant in this case had his motor vehicle operator's license revoked because he failed to take a breath test.

While waiting the required 15 minutes before taking the test, the accused placed a Rolaids in his mouth in spite of the police's direction not to ingest the tablet.

The Nebraska Supreme Court found the license revocation illegal since the defendant had an ulcer and needed the relief from the medicine, and since he was not provided an opportunity to give a breath sample after ingesting the medicine. Therefore, he, legally had not refused to give a sample.

DUI USE OF PRIOR UNCOUNSELED CONVICTION

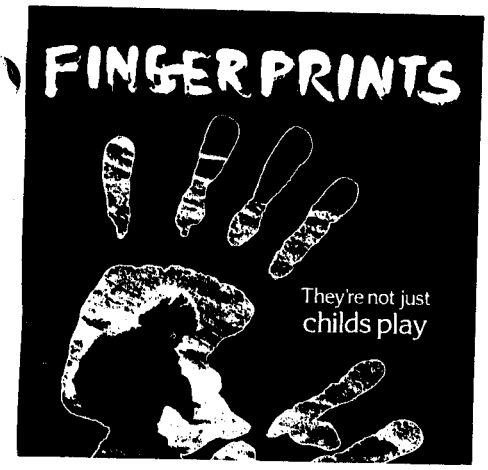
State v. Orr

375 N.W.2d 171 (N.D. 1985)

The defendant was convicted for enhanced DUI, having been previously convicted of DUI. The first conviction was by plea with no representation by counsel. The defendant was not sure if he was advised of his right to counsel. There was no record.

The Court held that the defendant's conviction was improperly enhanced since 1) under the North Dakota Constitution a subsequent conviction cannot be used to enhance a prior uncounseled offense absent a valid waiver; and 2) the state under Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967) had the burden to prove a valid waiver in the face of a silent record.

ED MONAHAN



WHY WE ARE SO AFRAID OF MISSING CHILDREN

In a supermarket in Maine there is a poster of a girl. It says that she is missing. There are other such faces: boys and girls, three years old, eleven years old, eight years old, hanging like "the most wanted" in public places. Some are on the highway toll gates, others on the Chicago subways, or on milk cartons, or on gas bills. All of them are missing.

In New Jersey last winter, they began fingerprinting 44,000 school children. In North Carolina, they put microdots into the molars of some children. At Tufts University, they developed a technique for toothprints. These are in case, just in case, children are ever missing.

Over the past year or more, the alarm about the abduction of children has been raised everywhere. A television special or two, a talk show or a hundred. A hotline: Dial 800-THE-LOST. Congress declared a National Missing Children's Day. The media rounded up the usual statistics: 1.5 million children missing, 50,000 a year abducted.

It has taken all this time for the facts to catch up with our bleakest fears.

Now, just now, we hear that there are not 50,000 children a year abducted by strangers. Child Find in New York has altered their estimate to 600 such kidnappings, and the FBI says 67 were reported in 1984. Nor are there 1.5 million missing children in this country. The FBI estimates, rather, 32,000.

Among the missing, the overwhelming majority - two-thirds, three-quarters, 90 percent (there are different figures from different people) - are runaways and, as they say now, throwaways. Of the rest, perhaps as many as 90 percent have been taken by one parent from another in a disintegrating family.

Are those children all at risk? Absolutely. But this is not the fear that grips most parents who let a child walk to school for the first time, who leave the children alone in the house, who lose a pre-schooler in the shopping center, who wait for a child to come home from school, and wait and wait. It is the strangers that we fear.

It is impossible to exaggerate the pain of those parents who have lost a child. It is incalculable, inconsolable. But it is easy to exaggerate the risk, and in these months, the fear has been fanned out of all proportion to the reality.

I think it's worth asking why. Why, now, is there such a receptive audience for this primal anxiety? It isn't just the misused statistics that causes an epidemic of concern. There must be some particular vulnerability in parents today.

The terror of losing a child is a staple of mythology as well a nightmares. Village folklore was full of stories about strangers who stole children. Gypsies were the vagrants and suspects. In those days, communities were tight enough that the only strangers were rootless outsiders.

Today, more and more of us are outsiders, strangers on our own streets. The cities are bigger, neighborhoods less stable. The ratio of strangers to friends, strangers to families has changed dramatically. This is, I think, at the root of our insecurity.

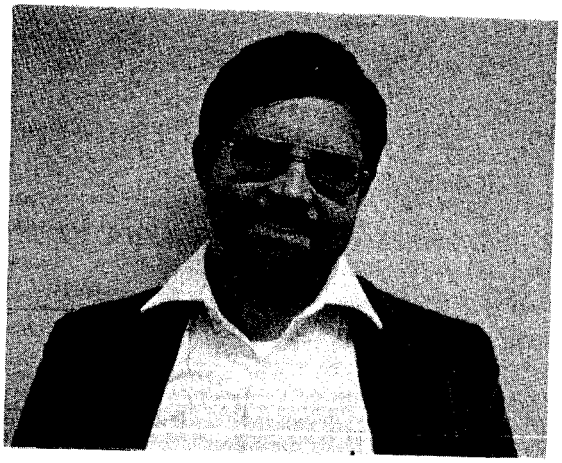
In this same world, we routinely place our children in the hands of people we hardly know. The doctor at the clinic, the teacher at school, the swimming counselor, the bus driver. It is not a coincidence that the fear of child abduction is heightened at a time when more of us leave small children in day care outside their home and family than ever before.

When we tell our children - as we must - to beware of strangers, the number of people wearing that label is much larger than it once was. The more time they spend away from us, the more unknown their world, the more easily our anxiety can be tapped.

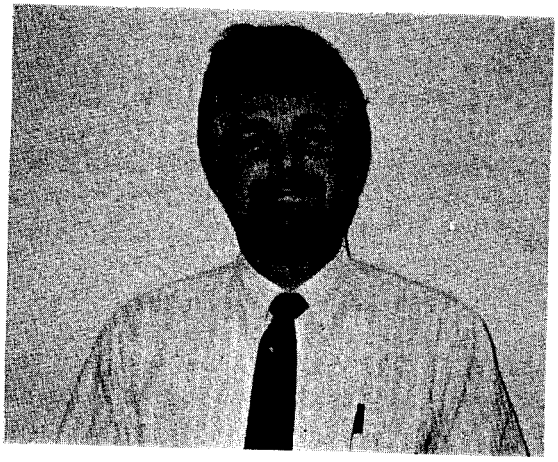
The victims of abduction deserve their priority, deserve all the sophisticated methods of discovery in our arsenal. But the victims of hysteria should wonder about the strangeness of our lives. Fear grows irrationally in a world without communities where we know the names of children only when they appear on a milk carton, on a toll booth, or a poster in a supermarket.

ELLEN GOODMAN

DPA STAFF CHANGES



DANNY ROSE,
ASSISTANT PUBLIC ADVOCATE
Joined the Hazard Office
February, 1986



KURT WALKER,
SELF-ADVOCACY COORDINATOR
Joined the Protection and Advocacy Division, January, 1986

Future Seminars

14TH ANNUAL PUBLIC DEFENDER TRAINING SEMINAR

The 14th Annual Public Defender Training Seminar will be held June 8,9 and 10, 1986 at the Capital Plaza Hotel in Frankfort. On Sunday, June 8, there will be the Supreme Court Review, a movie and evening presentations. Topics for the seminar include:

- **Closing Argument**
- **Motion Practice**
- **Suppression Hearings/Motions**
- **Demonstrative Evidence**
- **Criminal Contempt**
- **Preparing a Witness To Take The Stand and Pleas in Mitigation**
- **Advanced Cross-Examination**
- **Pathology**
- **DUI Law & Tactics**
- **KSP Lab**
- **Parole Board**

The faculty for the seminar includes:

James Jenner
John Delgado
Bill Radigan
Frank Heft
Dan Goyette
Edward Dance
Dr. John Hunsker
Frank Jewell
Ron Simmons

For further information, contact Ed Monahan (502) 564-5258.

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