THE ADVOCATE

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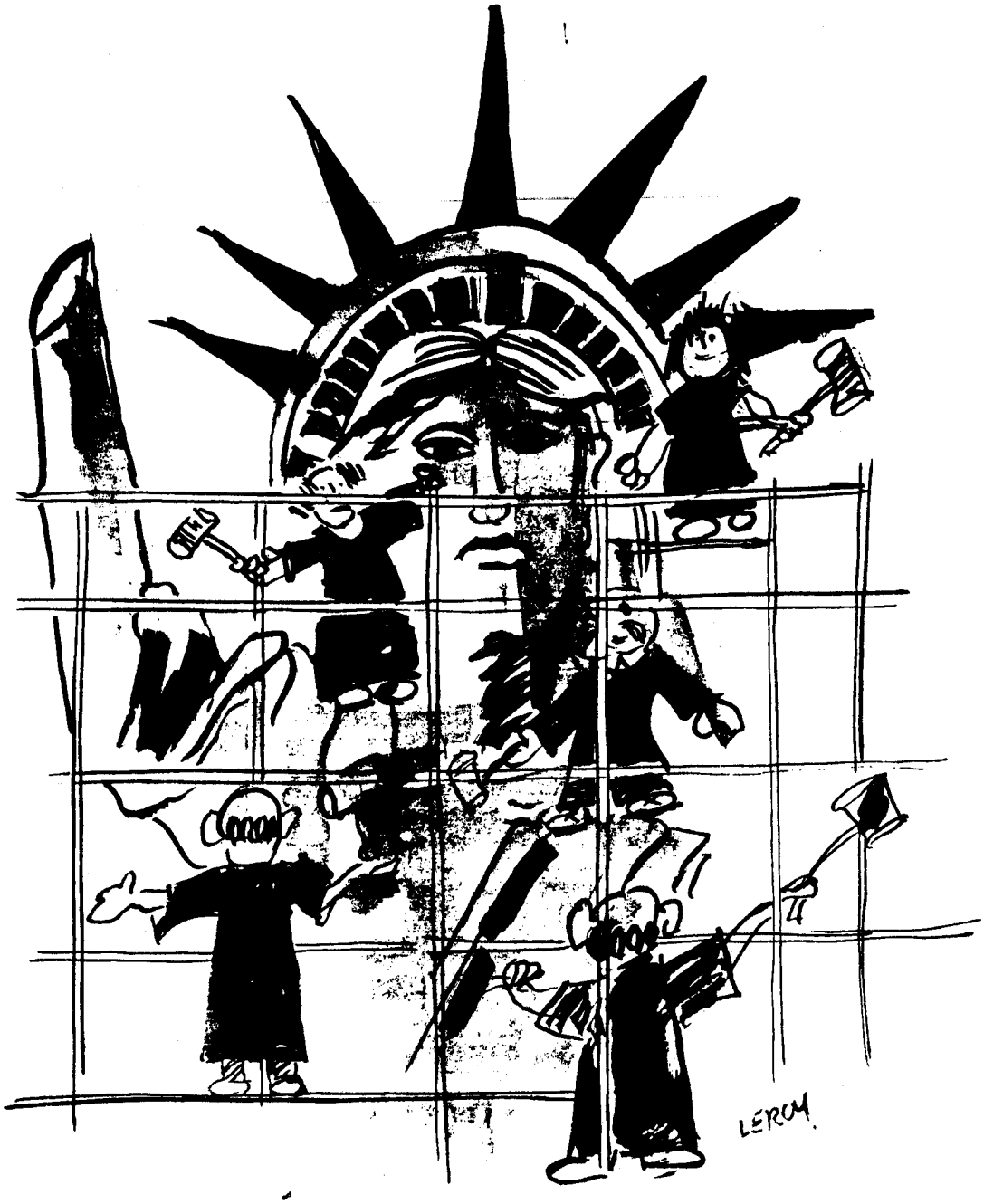

"OFF WITH HER HEAD"

Rep. Ernesto Scorsone on New Criminal Law Legislation

(On Page 26)

THE ADVOCATE FEATURES

ED, CATHY & CHRISTIAN DRENNAN

Simply put, Edward G. Drennan, advocates community involvement. Ed has served on the Board of Directors for three years as Chairman of the Northern Kentucky Community Action Commission which provides services to low income persons in eight Northern Kentucky counties in the form of day care centers, summer growth programs, headstart projects and aid to handicapped children and senior citizen groups.

A second lieutenant in the United States Army, Ed now counsels other veterans and is actively advocating recognition of Vietnam veterans. His involvement in the Boone County Jaycees, Council on Ministries and Boone County Democratic Club has also focused his attention on the needs of his community.

A 1976 graduate of the Salmon P. Chase College of Law, Ed began private practice in Florence, Kentucky in addition to working part-time for the Commonwealth Attorney's office in Kenton County.

When the public defender system expanded to Kenton, Gallatin and Boone Counties, Ed was asked to join the system. He serves not only as a public defender, but is a trustee on the Board of Directors of the tri-county defender office.

For your service and continued efforts on the behalf of indigent clients Ed, we recognize and thank you.

Bill Mucci, Public Advocacy Investigator, retired effective May 1, 1986 after eleven and a half years of service to the Department. He is shown here at a luncheon that was held in his honor at Cliff Hagan's in Frankfort. He said he felt like "King for the Day." Dave Stewart presented a plaque to him commemorating his service.

Sandra Simmons, formerly with the Pikeville Office, resigned effective December 31, 1985.

THE ADVOCATE

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IN THIS ISSUE

Protection and Advocacy

for the Developmentally Disabled

In a recent decision entered by the U.S. District Court for the Western District of Kentucky at Paducah, the court noted that "state and local educational agencies are required under the Education for Handicapped Children Act (EHA) (20 U.S.C. §1400 et seq.) to provide all services necessary to a free appropriate public education including summer school." (emphasis in original). The court also awarded the parent plaintiffs $11,000 reimbursement for their expenses incurred in arranging for an appropriate school placement for their child when the local school district failed to do so.

The case of Mabry v. McDonald, Civil Action #83-0156-P(J), involved an eight-year-old child with a behavior disorder who needed a self-contained classroom and summer school in 1982-83. The local school district did not make the classroom or summer program available, and the parents placed the child at the Vanderbilt Child Psychiatry unit in February, 1983 where he remained until mid-June, 1983 in an educational program.

The action was filed in May, 1983 in an effort to obtain a preliminary injunction requiring the provision of summer school. The motion for an injunction was denied and the final judgment was entered April 2, 1986.

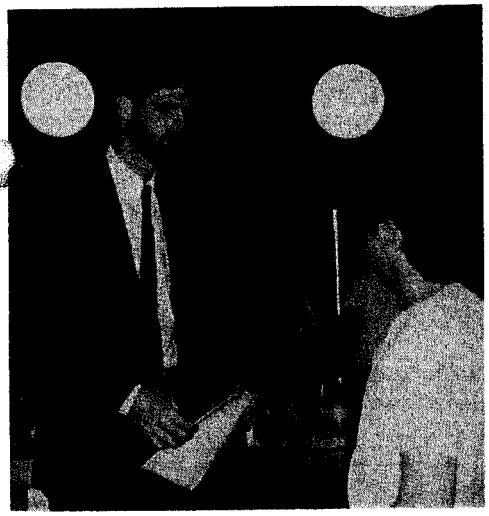
The court rejected the defendants' position that a child must show "irreparable regression" to be entitled to summer school and held that the standard that must be met is "substantial regression." The court noted that policies that are "express or implied from the actions of local agencies and the state" prohibiting or inhibiting consideration of a child's need for a summer program violated the EHA. The opinion stated: "In the future, the court would expect the County defendants to provide and the state defendants to fund summer school programs as needed."

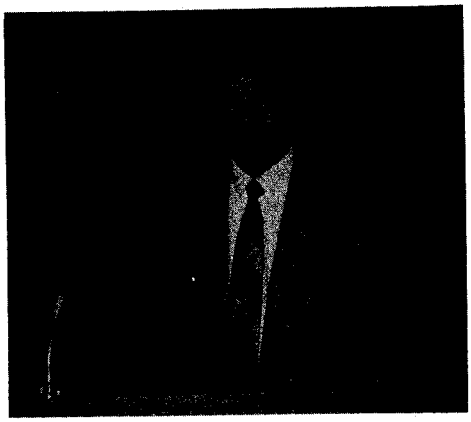
The parents were satisfied with the child's program at the time of the final hearing and thus the court did not order a summer program, even though the court held that the child had established a need for such a program for the summer of 1983.

The court also found that the school did not provide an appropriate placement for the child and that there were numerous procedural errors committed. Relying on Burlington School Committee v. Department of Education, ___ U.S. ___, 105 S. Ct. 1996, ___ L.Ed.2d ___ (1985) and Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), the court ordered reimbursement to plaintiffs.

The Protection and Advocacy Division of the Department of Public Advocacy represented the parent plaintiffs. For further information, call Ava Crow or Sammie Lambert at (502) 564-2967.

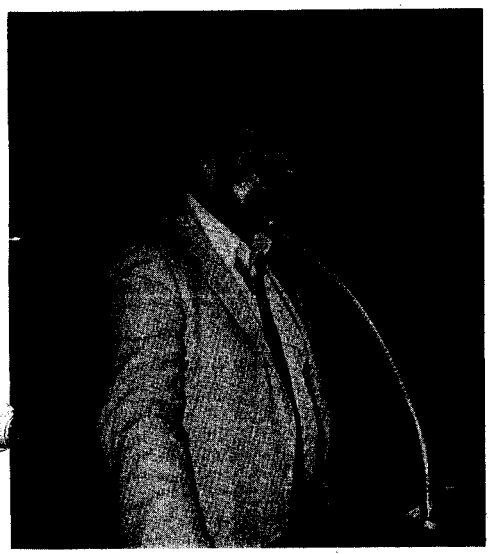
> I have assumed that the duty of an educator is to try to change things from the way they are to the way they ought to be."
>
> Robert M. Hutchin, 1969

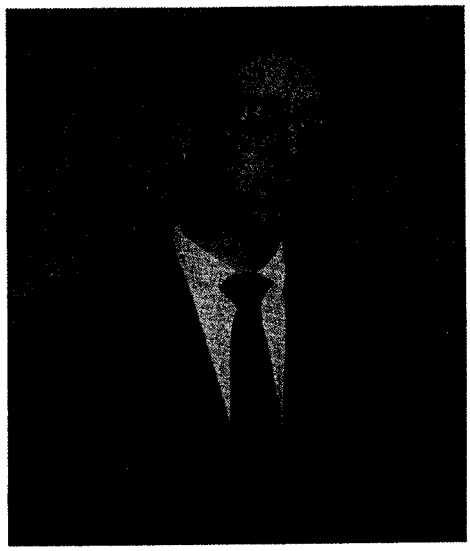


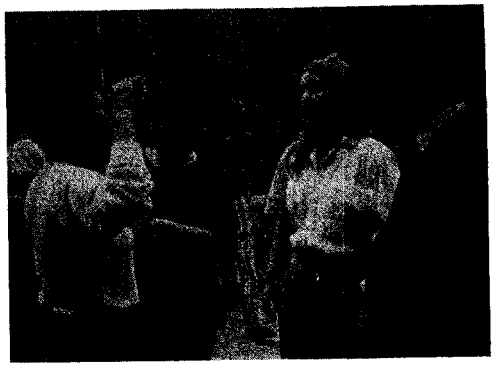


Over 80 persons attended the two-day DPA program at Natural Bridge State Park on Experts. Psychiatry, Psychology and the Family were discussed by Dr. William Weitzel, M.D., Dr. Robert Noelker, Ph.D. and Lane Veltkamp, M.S.W.

Vince Aprile talked about evidentiary aspects of expert testimony. Neal Walker lectured on Discovery and information was presented on obtaining money for experts by Bill Chambliss, Gary Hudson, Pat McNally and Ed Monahan. The temperature soared into the 80's with walking on the trails a misdemeanor due to the severe threat of forest fires. All the while Larry Pozner was snowed in at the Denver Airport. Larry will return for a future DPA Seminar.







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 SUPREME COURT

CONTROLLED SUBSTANCE
SECOND OFFENSE/PFO
Smith v. Commonwealth
33 K.L.S. 4 at 21 (March 20, 1986)

The defendant in Smith was convicted of possession of a controlled substance, second offense, resulting in an enhanced sentence. The defendant was then convicted of PFO and his sentence was again enhanced. The defendant argued that this constituted impermissible double enhancement under Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980). Boulder disapproved the use of a prior offense to obtain a conviction (possession of a handgun by a convicted felon) and the subsequent use of the same prior offense in PFO proceedings.

The Court held that Boulder was inapplicable and instead cited Grimes v. Commonwealth, Ky., 698 S.W.2d 836 (1985) as controlling. Grimes held that "a conviction of a second offense of trafficking...may be further enhanced by a persistent felony offender second degree charge...where the PFO charge is grounded on a prior, unrelated conviction."

The Court also held that the defendant was not entitled to bifurcation of the trafficking, second offense, charge into separate guilt and penalty determination.

IMPEACHMENT WITH PRIOR
FELONY/MISTRIAL
Stacy v. Manis
33 K.L.S. 4 at 22 (March 20, 1986)

In this case the Court held that a mistrial was properly declared when defense counsel asked a prosecution witness if he had been previously convicted of burglary. Under Commonwealth v. Richardson, Ky., 674 S.W.2d 515 (1984), "[a] witness can be impeached by showing that he has previously been convicted of a felony, but the particular felony cannot be identified if the witness admits the prior conviction." Significantly, the improperly impeached witness was an accomplice whom the defendant contended was solely responsible for the charged burglary. Under these circumstances the Court found "manifest necessity" justified granting the mistrial.

DIRECTED VERDICT
Commonwealth v. Burnley
33 K.L.S. 5 at 34 (April 10, 1986)

In this certification of the law the Court held that the trial court erred when it granted the defense's motion for directed verdict. A drug analyst testified that he had received an envelope, opened the envelope and tested its contents which he identified as cocaine, and had then resealed the envelope with red tape. The envelope was introduced as an exhibit. The trial judge subsequently directed a verdict of acquittal based on his determination that the envelope did not, in fact, appear to have been opened. Later examination by F.B.I. laboratories showed that the envelope had been opened as testified to at trial.

The Kentucky Supreme Court stated its holding as follows: "The trial judge could as easily have discovered the true state of the physical evidence as did the Federal Bureau of Investigation laboratories. We certify that the dismissal of this indictment under the circumstances of this case was error."

KENTUCKY COURT OF APPEALS

CONTINUANCE
Rosenzweig v. Commonwealth
33 K.L.S. 4 at 8 (March 7, 1986)

In this case, the Court of Appeals held that the trial court properly denied a defense request for continuance where the request was based on the hospitalization of the defendant's wife. The Court noted that "appellant did not request a continuance due to the illness of a party, counsel or a witness." Moreover, the defendant had already been granted one continuance and the wife's physician stated that the defendant's presence would not aid his wife's recovery.

DUI-STATUTORY CONSTRUCTION OF "OPERATE"

Wells v. Commonwealth

33 K.L.S. 5 at 11 (March 21, 1986)

The defendant was convicted of DUI after police found him intoxicated but asleep behind the wheel of his van in the parking lot of the "Continental Inn" in Lexington. The van's motor was running, but the transmission was in neutral and the safety brake was on.

Wells challenged his conviction on the grounds that he was not "operating" the vehicle within the meaning of KRS 189A.010(1). The statute provides that "[n]o person shall operate a motor vehicle anywhere in this state while under the influence of alcohol or any other substance which may impair one's driving ability."

To resolve the question of whether the defendant was "operating" the vehicle, the Court of Appeals looked to the following factors "(1) whether or not the person in the vehicle was asleep or awake, (2) whether or not the motor was running, (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location, and (4) the intent of the person behind the wheel." The Court noted that the location of the vehicle in a parking space, instead of on the road, failed to support an inference that the defendant was intoxicated when the van was brought to its location.

The Court also gave great weight to the fact that the defendant was asleep. The Court concluded that the proof failed to show that the defendant was "operating" the van.

DUI-STATUTORY CONSTRUCTION OF "OPERATE"

Harris v. Commonwealth

33 K.L.S. 5 at 15 (March 28, 1986)

Harris was arrested in a McDonald's parking lot, asleep in his truck, with the key in the ignition but the motor off. He had been there for two hours and, according to the testimony of restaurant employees, was sober when he arrived. Applying the analysis adopted by it in Wells, supra, the Court stated "we do not find that the appellant was 'operating' his truck for purposes of KRS 189A.010(1)."

SEPARATE TRIALS/TRAFFICKING SECOND OFFENSE

Byrd v. Commonwealth

33 K.L.S. 5 at 3 (March 21, 1986)

The Court of Appeals held that the defendant was entitled to separate trials of charges of trafficking in marijuana and trafficking in a Schedule II controlled substance, second offense, where as proof of the "second offense" charge it was shown that the defendant had been previously convicted of trafficking in marijuana. As regarded the marijuana charge, the Court was "unable to state that the jury's knowledge of his previous conviction was not that which tilted the balance against him." The Court's holding is consistent with that in Hubbard v. Commonwealth, Ky., 633 S.W.2d 67 (1982) which held that a charge of possession of a handgun by a convicted felon could not be joined with other offenses for trial.

The Court in Byrd also held that for purposes of KRS 218A.990(8)(i) "one may become a subsequent offender based upon any prior conviction under KRS 218A." See Rudolph v. Commonwealth, Ky., 564 S.W.2d 1 (1977).

REFUSAL TO STRIKE JUROR/ INDEPENDENT DEFENSE TESTING/ CHAIN OF CUSTODY

Calvert v. Commonwealth

33 K.L.S. 5 at 13 (March 28, 1986)

The Court of Appeals found prejudicial error in the trial court's refusal to strike for cause a juror who was the wife of the arresting officer. The defendant's peremptory challenges were exhausted in striking other prospective jurors, with the result that the juror in question was never struck. The Court held that the trial court had abused its discretion when it refused to strike the juror. "[I]n a criminal case, the trial court should resolve all doubts as to the competency of the juror in favor of the defendant."

The Court also held that destruction of a blood sample denied the defendant the right to have the sample examined by his own expert pursuant to RCr 7.24. However, the error could be cured on retrial if the defendant was provided with any notes or other information incidental to the testing "sufficient

to enable him to obtain his own expert evaluation." The Court also noted that a strict chain of custody is required as to blood samples.

INTOXICATION DEFENSE/
PROOF OF PFO
Callison v. Commonwealth
33 K.L.S. 5 at 5 (March 21, 1986)

In this case the Court of Appeals held that the trial court at Callison's burglary trial erroneously refused to instruct the jury on the defense of intoxication and on the lesser included offense of criminal trespass. The Court found substantial evidence that Callison was intoxicated on the night of the offense and held that his intoxication was such that it could have negated the intent element of burglary.

The Court also addressed various issues concerning the proof of Callison's PFO status. The Court held that: 1) probation and parole records are admissible under the business entries exception to the hearsay rule, 2) that it was error to admit testimony of a parole officer concerning a prior conviction which did not constitute part of the proof at the PFO phase, and 3) that closing argument comments on the absence or availability of drug rehabilitation programs in prison amount to impermissible comment on the consequences of a particular verdict.

CO-INDICTEE'S GUILTY PLEA
Williams v. Commonwealth
33 K.L.S. 5 at 18 (March 28, 1986)

Williams complained of the action of counsel for a codefendant in cross-examining a coindictee concerning his guilty plea. The coindictee testified for the commonwealth. The Court of Appeals found no error since no objection was raised at trial, since evidence of the guilty plea was not utilized by the commonwealth, and since Williams also participated in the strategy of discrediting the coindictee's testimony as the result of a "deal." Compare Tipton v. Commonwealth, Ky., 640 S.W.2d 818 (1982).

RESTITUTION
Bailey v. Commonwealth
33 K.L.S. 5 at 23 (April 4, 1986)

Subsequent to Bailey's conviction and sentencing for theft, the trial court entered an order directing the Corrections Cabinet to notify it of Bailey's release from prison and that Bailey appear before it upon his release for purposes of establishing a schedule of restitution. The order specified that failure to appear would result in a bench warrant for Bailey's arrest.

The Court of Appeals held that the methods of enforcement set out in the trial court's order exceeded those authorized by KRS 431.200. "[T]he statute clearly indicates that the granting of a petition for restitution or reparation is the equivation of the obtaining of a civil judgment. As such, logic dictates that only those remedies allowable for the collection of a civil judgment, such as execution upon property and other related procedures, should also be available to enforce orders entered pursuant to KRS 431.200."

The Court additionally held that "any orders [of restitution] by the trial court which purport to affect appellant after his release from imprisonment are outside the scope of the statute and therefore invalid."

JUSTIFICATION
Baird v. Commonwealth
33 K.L.S. 5 at 24 (April 4, 1986)

The Court of Appeals reversed Baird's conviction of possession of a handgun by a convicted felon based on the trial court's refusal to instruct the jury on the defense of justification. KRS 503.040(2)(b) makes the defense of justification available when "The defendant believes his conduct to be required or authorized to assist a public officer in the performance of his duties...."

Williams testified that while aiding police in an undercover operation he was asked by an Officer Thompson to obtain a reportedly stolen gun. Williams obtained the gun and retained it while awaiting Thompson's return from a fishing trip. During this hiatus, Williams was arrested. Under this state of the evidence an instruction on justification should have been given.

JOINDER OF OFFENSES
Johnson v. Commonwealth
33 K.L.S. 5 at 30 (April 4, 1986)

Johnson was released on bail pending his trial for robbery. When Johnson failed to make a court appearance he was arrested and charged with bail jumping. The robbery and bail jumping charges were ultimately joined for trial. The Court of Appeals held that the joinder was prejudicial error since the two offenses were not similar or parts of a common scheme. The Court additionally noted that "evidence of the bail jump would not have been admissible at a separate trial for the robbery, nor would the facts and circumstances of the robbery be admissible at a separate trial for the bail jump."

DOUBLE JEOPARDY
Mattingly v. Commonwealth
33 K.L.S. 5 at 31 (April 4, 1986)

Mattingly's motion for directed verdict made at the close of his PFO trial was denied. However, a motion for new trial on the grounds of insufficient evidence was sustained. Mattingly thereafter objected to his retrial as constituting double jeopardy. Mattingly reasoned that a retrial would have been barred had his motion for directed verdict been granted as it should have been. The Court of Appeals agreed, citing Burks v. United States, 437 U.S. 1 (1978).

KRS 514.030-STATUTORY CONSTRUCTION OF "EXERCISED CONTROL"
Dehner v. Commonwealth
33 K.L.S. 6 at (April 18, 1986)

Dehner was convicted of theft on the theory that she served as a "lookout" for accomplices who intended to shoplift from a supermarket. The accomplices placed various articles in shopping carts but abandoned them inside the store when Dehner indicated they were being watched.

On appeal, Dehner contended that she could not be convicted inasmuch as there was no proof that she or her cohorts unlawfully "exercised control" over the merchandise as required by KRS 514.030. The Court of Appeals disagreed, noting that the accomplices had filled their carts with expensive cuts of meat in a hasty manner and had no means of paying for the meat at the time of their arrest. The Court did not consider it necessary that the merchandise have been removed from the store or concealed on the persons of the accomplices.

COMMUNICATIONS WITH JURY/ COERCED VERDICT
Gumer v. Commonwealth
33 K.L.S. 6 at (April 25, 1986)

During its deliberations, the jury at Gumer's trial informed the trial court that it was in disagreement as to certain critical testimony and wished to review that testimony. The trial court informed the jury that a mechanical failure had resulted in the needed testimony not being recorded. The jury subsequently advised the trial court that it was hung but was told by the court to continue deliberations. This was repeated a total of five times over the next six hours. On one occasion the trial court asked the jury how it was divided, and on another occasion the trial judge entered the juryroom. Finally, the trial judge informed the jury that he intended to sequester them overnight until they reached a verdict. Shortly afterwards, the jury convicted Gumer.

The Court of Appeals identified numerous reversible errors in the trial court's conduct. The trial court erred when it entered the juryroom during deliberations. See Johnson v. Commonwealth, Ky., 497 S.W.2d 699 (1973). The trial court further erred when it communicated with the jury outside the presence of the parties in violation of RCr 9.74. By threatening to retain the jury overnight when it was clear that they were hung, the trial court coerced their verdict. Finally, the trial court acted improperly when it inquired how the jury was divided.

UNITED STATES SUPREME COURT

RIGHT OF CONFRONTATION
United States V. Inadi
38 CrL 3175 (March 10, 1986)

In this case the Court held that the confrontation clause does not require a showing of unavailability as a condition to the admission of the out-of-court statements of a non-testifying co-conspirator. The Court refused to read Ohio v. Roberts, 448 U.S. 56 (1980), which reaffirmed an unavailability requirement for the trial use of prior testimony, as applying to the introduction of a co-conspirator's statements. The Court's decision does not diminish the broad holding in Roberts that to be admissible any out-of-court statement must bear adequate "indicia of reliability." Justices Marshall and Brennan dissent.

RIGHT TO COUNSEL AT INTERROGATION
Moran v. Burbine
38 CrL 3182 (March 10, 1986)

After the defendant was arrested on a burglary charge, the police obtained evidence implicating the defendant in an unrelated murder. Meanwhile, counsel was obtained for the defendant for purposes of any questioning on the burglary charge. However, when counsel called the police station she was advised that there would be no questioning concerning the burglary. The police then advised the defendant of his Miranda rights and obtained his

statement regarding the murder. At no time did the defendant request counsel.

The Supreme Court held that the police's failure to tell the defendant of his attorney's phone call did not vitiate his voluntary waiver of his Fifth Amendment rights. "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to obtain a conviction, the analysis is complete and the waiver is valid as a matter of law." Neither did the police interference in the attorney-client relationship violate the defendant's Sixth Amendment right to counsel since that right "attaches only after the first formal charging procedure." Justices Stevens, Brennan, and Marshall dissented on both the Fifth and Sixth Amendment grounds and on the grounds that the police deception rose to the level of a due process violation.

FAIR TRIAL
Holbrook v. Flynn
38 CrL 3217 (March 26, 1986)

A unanimous Court held that the presence of uniformed law enforcement officers in a courtroom during trial was not so inherently prejudicial as to deny a fair trial. The Court reasoned that jurors might just as readily conclude that the officers are present to prevent outside disruptions as that the defendant is especially dangerous. Moreover, the state demonstrated a sufficient need for the officers' presence since it needed to maintain custody of the defendant. This circumstance did not work a denial of equal protection to those accused who have been unable to post bail.

RIGHT TO COUNSEL
Michigan v. Jackson
39 CrL 3001 (April 1, 1986)

At his arraignment, Jackson requested appointment of counsel. But before he could consult with counsel, the police advised him of his Miranda rights and obtained his confession. The Supreme Court held that the confession should have been suppressed under its holding in Edwards v. Arizona, 451 U.S. 477 (1981). Edwards held that, under the Fifth Amendment, once a suspect has requested counsel, all interrogation must cease until counsel is made available, and the fact that a later resumption of questioning yields a confession goes not signify a waiver of the right. The Jackson Court held that a similar rule applies when the accused has been arraigned and asserts his right to counsel under the Sixth Amendment: "[I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." Justices Rehnquist, Powell, and O'Connor dissented.

CONFRONTATION
Delaware v. Arsdall
39 CrL 3007 (April 7, 1986)

In this case the Court held that denials of confrontation are subject to harmless error analysis under Chapman v. California, 386 U.S. 18 (1986). Whether such an error is harmless depends upon an analysis of the importance of the witness' testimony, whether the testimony was cumulative, whether the testimony was corroborated or contradicted, the extent of cross-examinatim permitted, and the strength of the prosecution's case. The Court declined to adopt an "outcome determinative" test, which would require that the error have more likely than not affected the outcome of the trial. Justices Marshall and Stevens dissented.

RACIALLY DISCRIMINATORY USE OF PEREMPTORIES
Batson v. Kentucky[1]
39 CrL 3047 (April 30, 1986)

The Court held that a prosecutor's use of peremptory challenges to exclude members of the defendant's race from a jury solely on racial grounds violates the equal protection rights of both the defendant and the excluded jurors. The decision overrules Swain v. Alabama, 380 U.S. 202 (1965) to the extent that Swain held that a prima facie case of discrimination required a showing that peremptories were used to exclude blacks in "case after case." Batson permits a prima facie case of discrimination to rest on a showing that the defendant is a member of the excluded racial group, that members of the racial group were excluded from the jury in his case, and that the facts and circumstances of the case support an inference that the exclusion was based on race. Once a prima facie case is made out the burden shifts to the prosecution to offer a racially neutral explanation for the exclusions. Chief Justice Burger and Justice Rehnquist dissent.

Linda West

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[1]David Niehaus, a deputy appellate defender of the Jefferson County District Public Defender's Office argued the case before the Supreme Court with Appellate Defender Frank Heft, also of that office, on the brief.

Post-Conviction
Law and Comment

McGehee Isaacs

THE INMATE AS CRIMINAL DEFENDANT

Throughout the course of time in penal institutions, prisoners have been prosecuted for crimes committed while incarcerated. In these situations counsel faces unusual problems in representing an inmate. The accused cannot be committed to bail and the logistics of incarceration, hamper communication. Also, right to discovery and other pretrial procedures as well as the freedom from unreasonable searches and seizures are problem areas and things that counsel must insist on.

In Kentucky, as is most of the states, when an inmate is accused of a crime, he faces two sets of proceedings. First, there is the administrative adjustment committee proceeding. This is conducted by the Corrections Cabinet normally at the institution where the crime was committed. Unlike a full-blown adversary proceeding such as a criminal prosecution, this Adjustment Committee Proceeding is conducted with administrative considerations in mind. In Wolff v. McDonnell, 418 U.S. 94 S.Ct. 2963, 41 L.Ed.2d 935, 539 (1974) the Court held that "prison disciplinary proceedings must be governed by accommodation between the needs of the institution and the guarantees of the Constitution." "Prison inmates retain certain constitutional rights in adjustment committee proceedings, however, because they are incarcerated, these rights are subject to certain restrictions." This is in line with the institution's need to maintain security. In Bell v. Wolfish, 441 U.S. 520 (1979) the Court amplified this and said:

> Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." Id. at 546.

Based on this, Courts have determined that inmates do not possess a right to either retained or appointed counsel at disciplinary hearings. See Wolff v. McDonnell, supra, at 556. On this Wolff states:

> "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings do not apply." See also Baxter v. Palmigiano, 425 U.S. 308, 47 L.Ed. 2d. 810, 96 S.Ct. 1551 (1976).

This provides a dilemma for defense counsel. The Supreme Court has stated there is no Sixth Amendment right to counsel until adversarial proceedings have been commenced. In prison cases this normally means indictment. In United States v. Gouveia, ___ U.S. ___, 81 L.Ed.2d 146, 104 S.Ct. 2292 (1984), four inmates at a federal prison were held for nineteen months in administrative detention pending a murder investigation. Two other inmates were held for eight months in administrative detention in the investigation of another murder. Counsel was not appointed in either case until indictment and arraignment in the Federal Court. Before trial defense counsel in both cases filed motions to dismiss on grounds that the lengthy administrative confinement without appointment of counsel violated their client's Sixth Amendment rights. All six inmates were ultimately convicted of murder. On appeal, the United States Court of Appeals for the Ninth Circuit, proceeding en banc, consolidated the two cases reversed, and held the inmates had a Sixth Amendment right to counsel during the period in which they were held in administrative detention prior to the rendering of indictments against them. On certiorari, the United States Supreme Court reversed and remanded. Justice Rehnquist, speaking for the majority, held the inmates were not constitutionally entitled to the appointment of counsel while they were in administrative segregation before any adversary judicial proceedings were initiated against them. Justice Rehnquist stated the Sixth Amendment right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant.

Counsel, then is not technically involved in the prison disciplinary proceeding. This creates a dilemma on what to advise the potential defendant in representing himself or with the help of a prison legal aide during the Corrections Pro-

ceeding. Admissions by the accused made during the proceeding can be used in the ultimate prosecution of the case. However, if the accused stands moot in asserting his Fifth Amendment right to remain silent and not prejudice his ultimate criminal case, then in Kentucky, he stands to lose as much as two years good time(1) which unlike parole eligibility is a day-for-day loss on the inmate's serve out calculation.

One possible solution to this problem is to assert the right to counsel under the Kentucky Criminal Rules specifically RCr 2.14 and Kentucky Revised Statutes §31.110 (2)(a). Although Kentucky has not ruled in the prison setting on the right to counsel, it is possible that the Kentucky courts would view RCr 2.14 as guaranteeing a right to counsel prior to the commencement of adversarial proceedings for purposes other than the U.S. Supreme Court mandated right to counsel for custodial interrogations. See Rhode Island v. Innis, 446 U.S. 291 (1980) (right to counsel attaches for police custodial interrogation).

RCr 2.14 states:

RIGHT TO CONTACT ATTORNEY

A person in custody shall have the right to communications as soon as practicable for the purposes of securing the services of an attorney.

Kentucky Revised Statute 31.110 (Public Advocate Chapter) provides even more ammunition for the intervention of counsel at the prison adjustment committee proceeding. It states:

1. A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under conviction of, a serious crime, is entitled: [Emphasis added]

a. To be represented by an attorney to the same extent as a person having his own counsel is so entitled;

When an inmate has been written up(2) for an offense that will ultimately lead to an indictment by a local grand jury, he obviously is under suspicion of having committed a crime.

Logically this extends the right to counsel beyond that mandated in United States v. Gouveia, supra, because an inmate must be under some suspicion of having committed a crime if he is being administratively detained on a prison writeup.

Subsection 2(a) of KRS 31.110 states:

> A needy person who is entitled to be represented by an attorney under Subsection (1) is entitled:
>
> a. To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole.

Under Subsection (1), pursuant to Kentucky law a person is entitled to an attorney if he is under suspicion of having committed a crime. In Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) the Court held that a state constitution may impose a more stringent standard than the Federal Constitution. The Kentucky Supreme Court recognized this principle in Wagner v. Commonwealth, 581 S.W. 2d.. 352 (Ky. 1979). Therefore even though Baxter v. Palmigiano, supra, says that an inmate is not entitled to either retained or appointed counsel in the administrative disciplinary proceeding, counsel can argue to represent an accused under the more stringent Kentucky standard on right to counsel. Another argument is the fact that irreparable damage may be done to the defense in an uncounseled disciplinary hearing setting.

At trial, counsel must be sensitive to the unique position his inmate client is in. One important strategy is to obtain a court order for the inmate to appear in civilian clothing whenever he is in court and without shackles or chains so that his status in front of the jury will not be emphasized. Counsel should also seek a motion in limine to stop the prosecutor from emphasizing the inmate's

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1 KRS 197.045(1) states: (1) Any person conviced and sentenced to a state penal institution may receive a credit on his sentence of not exceeding ten (10) days for each month served, except as outlined in subsection (3) of this section, to be determined by the cabinet from the conduct of the prisoner. The cabinet shall have the authority to forfeit any good time previously earned by the prisoner, or to deny the prisoner the right to earn good time in any amount, if during the term of imprisonment a prisoner commits any offense or violates the rules of the institution.

2 A "write up" is the prison setting equivalent of a warrant and is the precursor to an adjustment committee hearing.

record or where the crime took place. During voir dire, counsel should take particular pains to select a jury that is as free of bias against prison defendants as possible. In major cases where the prison may be a large source of employment to the county where the case is being tried, counsel should consider a change of venue to a more neutral setting.

All in all, defending crimes committed in a prison setting is a difficult task for defense counsel. Special considerations such as those outlined in this article highlight the problems that counsel faces. Hopefully this writer has suggested possible strategies in those areas where the law is ambiguous or against the accused as well as possible trial strategies that encompass due process considerations.

C. MCGEHEE ISAACS

A THIN LINE: Judicial and law enforcement personnel are making headlines for extra-curricular activities. A sampling follows: On December 20, 1985, a local traffic judge was sentenced to four years in federal prison after pleading guilty to charges of accepting bribes while a traffic judge and accepting kickbacks in 1984 while a Little Rock (Arkansas) city attorney (National Law Journal, 1/27/86, p. 8); in January, a former federal prosecutor, who had previously admitted stealing large amounts of cocaine, heroin and cash from the evidence safe of the U.S. Attorney's office in Manhattan, was sentenced to a three year prison term (National Law Journal, 1/27/86, p. 11); on February 3, 1986, a former Queens New York trial judge was sentenced to five years in prison and fined $210,300 for taking or agreeing to accept $50,000 in bribes to fix four criminal cases from 1973 to 1985 (National Law Journal, 2/17/86, p. 21); also in February, a Cook County (Illinois) circuit judge became the fifth sitting or former judge to be convicted in Chicago's ongoing probe of judicial corruption. The jury convicted the judge of 27 counts of mail fraud, extortion and racketeering. (National Law Journal, 3/3/86, p. 12).

"WE'VE GROWN ACCUSTOMED TO YOUR FACE..."

The Death Penalty

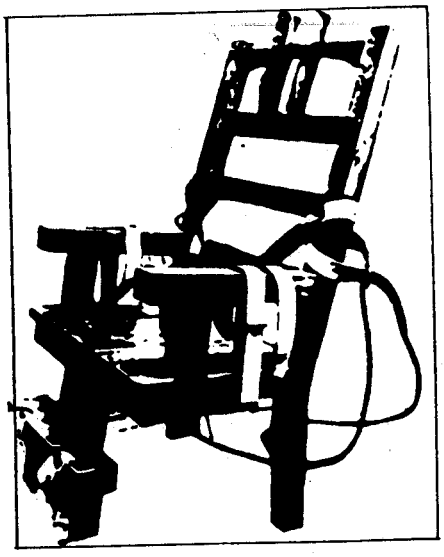
KENTUCKY'S DEATH ROW POPULATION - 26
PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 93

Kevin M. McNally

ACTION UNDER THE BIG TENT:
BAD NEWS AND GOOD NEWS

1. DEATH-QUALIFICATION CONSTITUTIONAL: LOCKHART V. MCCREE, 39 Cr.L. 3085 (May 5, 1986)

In Lockhart, Justice Rehnquist has, (temporarily?) laid to rest the second to last "system-wide" challenge to capital punishment in America -- ten years after Gregg v. Georgia, 428 U.S. 153 (1976). The Court rejects constitutional challenges to excluding jurors based solely on philosophical or moral views on the death penalty: "Witherspoon-excludables" [WE's].[1] Lockhart comes eighteen years after the question of death-qualification was left open in Witherspoon v. Illinois, 391 U.S. 510 (1968). See also Bumper v. North Carolina, 391 U.S. 543, 545 (1968). Unlike Batson v. Kentucky, 39 Cr.L. 3061 (April 30, 1986), which reversed a disastrous, 21 year old, 6th Amendment/jury decision, Lockhart turned the clock back to pre-Witherspoon days, ignoring a growing body of scientific literature demonstrating the profound negative impact death qualification has on the criminal justice system.



Three justices (Marshall, Brennan and Stevens) dissent, suggesting that to truly understand the Court's decision in Lockhart, one must recognize that any other decision might have taken some of the wind out of the sails of the death penalty in this country. "I cannot help thinking that [Lockhart] would have stood a far better chance of prevailing on his constitutional claims had he not been challenging a procedure peculiar to the administration of the death penalty. For in no other context would a majority of this court refuse to find any constitutional violation in a state practice that systematically operates to render juries more likely to convict, and to convict on the more serious charges." 39 Cr.L. at 3097.

A. SOCIAL SCIENCE STUDIES

After considering "numerous [15] social science studies" the district court found that death-qualified juries were "more prone to convict" capital defendants. Grigsby v. Mabry, 569 F.Supp. 1273, 1323 (1983). The court ruled that death-qualification violated both the "fair cross-section and impartiality requirements" of the 6th and 14th Amendments. Lockhart, 39 Cr.L. at 3086. The 8th Circuit agreed, finding "substantial evidentiary support" and a violation of Lockhart's constitutional right to a jury selected from a "fair cross-section of the community." Grigsby v. Mabry, 758 F.2d 226 (1985) (en banc); Lockhart at 3086-3087.

The Supreme Court assumed, for purposes of decision, that death qualification "in fact produces juries somewhat more 'conviction prone' than 'non-death-qualified' juries." 39 Cr.L. at 3088. Nevertheless, the court attacked "several serious flaws in the evidence..." 39 Cr.L. at 3087. "Faced with the near unanimity of authority" the court, according to the dissent, makes a "weak effort" at criticism. 39 Cr.L. at 3093 (dissent).

[1] A massive evidentiary claim that the Georgia system is permeated by racism is, after an unusually long time, still pending before the court on certiorari, holding up some executions. McCleskey v. Zant, 580 F.Supp. 338 (N.D. Ga. 1984), aff'd, 753 F.2d 877 (11th Cir. 1985) [7-2-3], cert. pending (1985).

First, actual jurors were not studied. "We have serious doubts about the value of these studies in predicting the behavior of actual jurors." 39 Cr.L. at 3087. Somewhat sarcastically, the dissent notes that "until the state permits two separate juries to deliberate on the same capital case and return simultaneous verdicts..." Lockhart has presented the best evidence available. 39 Cr.L. at 3092. The disturbing implication from the Court's opinion is that social science apparently has nothing to offer the Court in terms of understanding juror attitudes and behavior. This is a startling and disturbing suggestion.

Second, only "one new post-Witherspoon study attempt[ed] to simulate the process of jury deliberation, and none...was able to predict to what extent, if any, the presence of one or more 'Witherspoon - excludables' on a guilt phase jury would have altered the outcome of the guilt determination." 39 Cr.L. at 3087. See Cowan, Thompson and Elsworth, The Effects of Death-Qualification on Jurors Predisposition to Convict and on the Quality of Deliberation, 8 LAW & HUM. BEHAV. 53 (1984)(Cowan - Deliberation).

"Finally, and most importantly, only one of the..."death-qualification" studies introduced by [Lockhart] even attempted to identify and account for the presence of so-called 'nullifiers...'" or WE's who can't even be fair on the question of guilt (as opposed to just punishment). See Cowan - Deliberation.

In reply, the dissent states that "the Court's haphazard jabs cannot obscure the power of the array" of studies. As they became more sophisticated over the passing years, each confirmed the previous results. "There are no studies which contradict [Lockhart's]; in other words, all the documented studies support the district court's findings." Grigsby, 758 F.2d at 238; 39 Cr.L. at 3092-93. As all of us who have done this work know, science "confirms, and is itself corroborated by" common sense and experience. 39 Cr.L. at 3092.

B. FAIR CROSS-SECTION

The court flatly rejects the 8th Circuit's fair cross-section analysis. "We have never invoked the fair cross-section principle to invalidate the use of either for - cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large...We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound..." 39 Cr.L. at 3088. As an example, the court cited Batson v. Kentucky, 39 Cr.L. at 3062 n.4, where the Court refused to address Batson's "fair cross-section" challenge to discriminatory use of peremptory challenges. Simply put, the Court claims to fear a "Doomsday-scenario": fair cross-section challenges every time a petit jury panel does not accurately reflect the census data.

Additionally, Lockhart refused to find WE's to be a "distinctive group" for fair cross-section purposes. Previous "distinctive groups" have been blacks, see Peters v. Kiff, 407 U.S. 493 (1972) (plurality opinion); women, see Duren v. Missouri, 439 U.S. 357 (1979) and Taylor v. Louisiana, 419 U.S. 522 (1975); and Mexican - Americans, see Castaneda v. Partida, 430 U.S. 482 (1977). These groups were excluded "on the basis of some immutable characteristic such as race, gender or ethnic background..." They were "often historically disadvantaged groups..." 39 Cr.L. at 3088. Unlike these groups, WE's are excluded on the basis of "an attribute that is within the individuals control" -- their philosophical or moral opposition to the death penalty. 39 Cr.L. at 3089.

Probably in deference to Justice Stevens joining them, Brennan and Marshall do not reach the fair cross-section issue, although a footnote is dropped suggesting approval of Lockhart's argument under certain circumstances. 39 Cr.L. at 3093 n.6. Nevertheless, the dissent points out that death-qualification excludes 11-17% of potential jurors who could be impartial during the guilt phase. 39 Cr.L. at 3092. The combined effect of Wainwright v. Witt, 469 U.S. ___ (1985)[2] (encouraging more "liberal" exclusion of potential jurors) and peremptory challenges (used to mop up the few "bleeding hearts" left on the panel) greatly increases the percentage of potential jurors who will be eliminated by the death-qualification process.

These people (WE's) are different in their views of the criminal justice system from those jurors left after death-qualification. For example, WE's are less likely to hold a defendant's failure to testify against him, less mistrustful of defense attorneys, less hostile to the insanity defense and

[2]Justice Rehnquist actually objects to the use of the term "Witherspoon - excludables" since, he implies, his opinion in Witt thoroughly trashed the import of that decision. 39 Cr.L. at 3086 n.1. Presumably, the term should be now "Witt - excludables". At least the initials are the same -- WE's.

more concerned about the danger of erroneous convictions. The jurors left after death-qualification have a distinctive "pro-prosecution bias..." 39 Cr.L. at 3092. Finally, death-qualified juries tend to underrepresent women and "minority groups in the community" - a true cross-section claim. 39 Cr.L. at 3095.

C. IMPARTIAL JURY

Justice Rehnquist's opinions are noted for their tight reasoning and surface appeal. Lockhart is no exception. However, Rehnquist often tends to ignore the most powerful arguments by those with an opposing view. Thus, he is accused by the Lockhart dissenters of "glib nonchalance". 39 Cr.L. at 3091.

On the all-important question of the impartiality of Lockhart's jury, the Court posits a new definition of impartiality, suggesting that an erroneous exclusion of jurors can only be cognizable under the 6th Amendment if the substitute jurors actually seated were themselves demonstrably partial. Lockhart "admits that exactly the same twelve individuals could have ended up on his jury through the 'luck of the draw,' without in any way violating the constitutional guarantee of impartiality." 39 Cr.L. at 3089. The Court repeats its exaggerated view of Lockhart's position: "[I]t is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints." 39 Cr.L. at 3091.

The majority's facile analysis is easily exposed by applying the Witherspoon, 391 U.S. at 523, analogy of "stack[ing] the deck". Under Lockhart, it is fair in the "poker game" of death, even if the deck is stacked towards the prosecution, as long as all the cards the defendant receives are dealt from the deck.

Both Witherspoon and Adams v. Texas, 448 U.S. 38 (1980), stating the contrary, are distinguished as applying only to the penalty phase.[3] Second, the Court implies that a violation of the 6th Amendment only occurs when the jury selection system is "deliberately slanted..." for no legitimate purpose. 39 Cr.L. at 3089. Since the state has a valid interest in obtaining one jury for both guilt and penalty, this legitimizes the procedure even if the jury selection system is deliberately slanted. Anyway, the majority claims, in some cases, "the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase." 39 Cr.L. at 3090. True to form, Justice Rehnquist doesn't explain why the distinction between guilt and penalty phases is dispositive, other than to say that in the guilt phase "jury discretion is more channeled." 39 Cr.L. at 3091.

ILLUSTRATION BY ROBERT J. NOVAK

The dissent responds that excluding jurors "particularly likely to look askance at the prosecution's case" in a systematic fashion can't be justified by the state's interest in a single trial. 39 Cr.L. at 3096. (The majority confuses the issue. The first question is whether the system is fair. The second is whether it can be justified if unfair. Rehnquist argues that because the single jury system is justified it is fair.)

Second, the purported distinction of Witherspoon and Adams is revisionist and ignores Ballew v. Georgia, 435 U.S. 223 (1978), holding that a 5 person jury violates the impartiality requirement of the 6th Amendment. As in Ballew, which was only a misdemeanor case, death-qualified juries "are likely to be deficient in the quality of their deliberations, the accuracy of their results, the degree to which they are prone to favor the prosecution, and the extent to which they adequately represent minority groups...." 39 Cr.L. at 3095.

The dissent ridicules the majority's "suggestion that capital defendants will benefit from a single jury...", noting that the Court has refused to grant certiorari on this issue since many states refuse to permit the jury to consider "residual doubt" during the penalty phase. Rehnquist's argument, in this regard, it is said, is "more than disingenuous. It is cruel." 39 Cr.L. at 3097.

D. MAKING THE BEST OF A BAD CASE

1) Trial Tactics

Even the worst decisions by the current Court provide interesting ammunition for use by attorneys defending capital indictments. See Rehnquist's Revenge! Wainwright v. Witt, THE ADVOCATE, Vol. 7, No. 3 at 14 (April 1985). Lockhart sug-

3 Justice Rehnquist argued just the opposite in his dissent in Adams, 448 U.S. at 54.

gests an approach that should be used in every capital jury selection:

"It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law... [T]he group of 'Witherspoon-excludables' includes only those who can not and will not conscientiously obey the law... 39 Cr.L. at 3089; (emphasis added).

Potential WE's should be asked point-blank whether they "can not and will not conscientiously obey the law..." to separate out those who can lay aside their feelings or beliefs temporarily.

Second, as Batson v. Kentucky suggests, prosecution use of peremptory challenges is an area to watch. Justice Marshall's concurrence in Batson went so far as to advocate the elimination of "peremptory challenges entirely... [so as to] end the racial discrimination that peremptories inject into the jury-selection process." 39 Cr.L. at 3067. Although clearly setting up a straw man, the Lockhart majority argued that adopting the defense "concept of jury impartiality would also likely require the elimination of peremptory challenges..." 39 Cr.L. at 3089.

Prosecution strikes on "almost WE's" jurors, who are "uncommonly aware of an accused constitutional rights but quite capable of determining his culpability without favor or bias", (but who just squeak by on death-qualification) have a devastating effect on a jury in a death case. See Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 MICH.L.REV. 1, 57 (1982). Notwithstanding the prevailing view, objections to the prosecution's use of peremptories in this way should continue to be raised - especially when blacks, women and young people are the targets.

Likewise, counsel should continue to attack the death-qualification processing effects themselves and make requests of the trial judge to minimize them such as a tendered curative instruction to jurors before death-qualification starts. "There is considerable evidence that the very process [of death-qualification] predisposes jurors to convict." 39 Cr.L. at 3096. See Hovey v. Superior Court, 616 P.2d 1301 (1980); Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 L. & HUM. BEHAV. 121 (1984); Haney, Examining Death-Qualification: Further Analysis of the Process Effect, 8 L. & HUM. BEHAV. 133 (1984).

ii) Residual Doubt

The majority's reference to "residual doubts or 'whimsical' doubts" as effecting the outcome of the penalty phase, significantly enhances the status of issues relating to voir dire, evidence, argument and instructions on this phenomena. Trial counsel should be sensitive to this in appropriate cases.

iii) Lockhart II

Lockhart may not apply in a case where the prosecutor uses death-qualification as a ruse to purge the jury of "bleeding hearts" and decides not to ask for the death penalty. 39 Cr.L. at 3089 n.16; 39 Cr.L. at 3092 n.4 (dissent). There are at least 3 Kentucky cases active in the courts containing this or analogous claims.

Finally, since much of the court's opinion is premised on the state interest in a unitary jury system in capital cases, Lockhart's precedential effect in Kentucky may be limited by presenting creative alternatives to the trial judge. The dissent refers to other, less costly, remedies which may be available. For example, "it may be possible to have alternate jurors replace any 'automatic life imprisonment' jurors who serve at the guilt determination trial." Winick, 81 MICH.L.REV. at 57.

If a Kentucky capital defendant were to waive a twelve person jury on punishment, would this not obviate the state's interest in death-qualification? Why couldn't the penalty phase be tried before 10 jurors -- with WE's excused at that point? Additionally, in light of the role the jury plays in Kentucky - recommending a penalty - counsel should consider waiving jury unanimity on punishment. This would permit WE's to participate in jury deliberations on punishment (a positive contribution to be sure) without denying the state any legitimate interest. For example, the judge may be presented with a 9-3 recommendation for death. This is exactly the situation presently employed in Florida.

Lockhart is the law. But it hopefully won't last as long as Swain v. Alabama, 380 U.S. 202 (1965). All law-abiding, tax-paying citizens have a right to participate in community decisions involving which murderers we kill and which we don't.

2. DOUBLE JEOPARDY AND DEATH AGAIN; BULLINGTON APPLIES TO LIFE VERDICTS AND NOT AGGRAVATING CIRCUMSTANCES: POLAND V. ARIZONA, 39 Cr.L. 3081 (May 5, 1986)

Poland is the second Arizona double jeopardy/death penalty case in two years to reach the court. The latest Bullington v. Missouri, 451 U.S. 430 (1981) A/K/A Arizona v. Rumsey, 467 U.S. 203 (1984) wrinkle was caused by the fact that the trial judge in Poland sentenced the defendant to death instead of life. On appeal, the Arizona Supreme Court found insufficient evidence to support the only aggravating circumstance found by the trial judge. On the other hand, that court held that the trial judge was in error in not considering another aggravating circumstance. On remand, the two defendants again received death sentences, this time on the basis of the aggravating circumstance the trial judge failed to consider the first time. The United States Supreme Court found no double jeopardy bar.

The Court held that Bullington didn't apply to a "series of mini-verdicts on each aggravating circumstance." 39 Cr.L. at 3083 n.3. "We are not prepared to extend Bullington further and view the capital sentencing hearing as a set of mini-trials on the existence of each aggravating circumstance." 39 Cr.L. at 3083.

Previously, there has been some discussion in Kentucky whether a capital defendant who receives a life sentence could receive the death sentence on retrial if he appeals when the jury specifically found an aggravating circumstance. Now it is clear that it matters not to the Poland Court whether the jury found, could have found, or didn't find aggravating circumstances. Nor does it apparently matter that there might be evidence of other aggravating circumstances somewhere in the universe but not presented to the first jury. Once a Kentucky defendant "escapes" the death penalty, that is it. Death is no longer a possible punishment at a retrial.

Ironically, a favorable decision for the Arizona defendants would have destroyed the double jeopardy protection Bullington provides to many Kentucky defendants. In this case, the Burger Court's bad news is good news for us.

3. SECOND GENERATION ENMUND: CABANA V. BULLOCK, 38 Cr.L. 3093 (Jan. 22, 1986)

Bullock contains both bad news and good news. In Enmund v. Florida, 458 U.S. 782, 787 (1982), the Supreme Court ruled that the 8th Amendment forbids the execution of "one...who aids and abetts a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill or intend that the killing take place or that lethal force be employed." Bullock deals with the complex question of who makes this decision and what role the federal courts play regarding Enmund issues.

After Enmund, a new line of cases developed dealing with whether a death sentence can stand after the jury has been instructed on a complicity - murder theory and no clear jury finding is made covering Enmund. These so-called "second generation-Enmund" cases were typified by the 5th Circuit decision in Bullock v. Lucas, 743 F.2d 244 (1984), holding that ambiguous jury instructions, permitting a death sentence without meeting the Enmund criteria, violated due process. Compare Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984) with Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985).

The bad news is that on certiorari, the U.S. Supreme Court said it "ain't necessarily so." The good news is that in some cases it might be so.

a) CONFUSING INSTRUCTIONS

Although Bullock's instructions told the jury that they must find he "did in fact kill", viewed as a whole they were "confusing." 38 Cr.L. at 3095 n.2. "[T]hey do not lend themselves easily to any particular interpretation. A fair minded juror, however, could have understood them to mean that the jury could find Bullock guilty of capital murder without regard to his intent and solely by virtue of his having aided his accomplice at some point in the assault that led to the killing." 38 Cr.L. at 3095. The good news is that Bullock tends to view ambiguous instructions as troublesome. Even if the instructions in a particular case are somewhat contradictory, a concern under Enmund is raised.

b) A JURY FINDING UNDER ENMUND

The question of whether the jury must make the Enmund determination is a matter of state law. The majority holds that Spaziano v. Florida, 468 U.S. ____ (1984),[4]

[4] In Presnell v. Georgia, 439 U.S. 14 (1978), the Supreme Court set aside a conviction and death sentence where the Georgia jury was improperly instructed on the underlying offense of kidnapping -- which also constituted the aggravating circumstance. In Bullock, Presnell's holding, (footnote continued)

obviates the necessity for a jury determination of the Enmund issue in all cases. It is possible, therefore, in some cases and in some states for the appellate court to make that determination. A federal court's inquiry "cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state court - court proceedings...in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made." Under certain circumstances, the Enmund finding "must be presumed correct by virtue of 25 U.S.C. §2254(d),..." 38 Cr.L. at 3096. See Sumner v. Mata, 449 U.S. 539 (1981).

c) APPELLATE COURT FINDINGS

It can be argued that Kentucky defendants have a "state-law entitlement...to have the jury...make the Enmund findings." 38 Cr.L. at 3096 n.4. Cf. Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902, 905 (1981). Even assuming Kentucky were to permit an appellate court to do the jury's job, Bullock sets limitations on the constitutionality of this practice. Sumner "establishes that the presumption [of correctness] applies to facts found by appellate as well as trial courts. 449 U.S. at 545-547." However, Bullock makes clear that there "might be instances...in which the presumption would not apply to appellate fact-finding regarding the Enmund criteria because appellate fact-finding procedures were not 'adequate', see 28 U.S.C. §2254(d)(2). For example, the [Enmund] question...might in a given case turn on credibility determinations that could not accurately be made by an appellate court on the basis of a paper record, cf. Anderson v. Bessermer City, 470 U.S. ___, ___ (1985); Wainwright v. Witt, 469 U.S. ___, ___ (1985)." 38 Cr.L. at 3096.

Thus, under Bullock, some states will be permitted to make appellate fact-findings on Enmund issues some of the time. The best the majority can state is that "it is by no means apparent that fact-finding will always be in adequate." 38 Cr.L. at 3096.

Turning to the case at hand, the Supreme Court said it was "very doubtful" that the Mississippi Supreme Court made an Enmund finding in Bullock's case. Given this doubt, the presumption of correctness did not apply.

d) REMEDY FOR SECOND GENERATION ENMUND ERRORS

"There remains the question of the appropriate course of action for a federal court faced with...an Enmund claim when the state courts have failed to make any finding regarding the Enmund criteria." 38 Cr.L. at 3097. Either the federal court could make the inquiry itself or the case could be returned to state court for a finding. The Supreme Court choose to send such cases back to state court for a "reliable determination as to whether [the defendant] killed, attempted to kill or intended that a killing take place or that lethal force be used." 38 Cr.L. at 3097.

Bullock also indicates that it is possible to find "the state court's failure to make explicit Enmund findings harmless beyond a reasonable doubt" in cases which "leave no doubt that the jury's verdict rested on a finding that the defendant killed or intended to kill. For example, where a defendant...defended...only by claiming self-defense..." 38 Cr.L. at 3097 n.6. Otherwise, a death sentence may stand only when an Enmund finding is made "in an adequate proceeding before some appropriate tribunal - be it an appellate court, trial judge or jury..." in a "reliable" fashion. 38 Cr.L. at 3097.

4. LOCKETT AND EDDINGS AGAIN; GOOD JAIL BEHAVIOR: SKIPPER V. SOUTH CAROLINA, 39 Cr.L. 3041 (April 29, 1986)

In mitigation, Ronald Skipper presented evidence of "the difficult circumstances of his upbringing" and that he had "conducted himself well during the seven and one half months he spent in jail between his arrest and trial." 39 Cr.L. at 3041. Skipper earned a high school equivalency diploma while in jail and testified he would behave himself in prison and contribute money to the support of his family.

The testimony of two jailers and "one regular visitor" to the jail was offered to show that Skipper had "made a good adjustment". The South Carolina trial court excluded the evidence. Finding "future" adaptability to prison life inadmissible, the South Carolina

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insofar as it reached the sentencing phase issue, "is no longer tenable in light of our holding in Spaziano." 38 Cr.L. at 3096 n.4. Likewise, Hicks v. Oklahoma, 447 U.S. 343 (1980) was distinguished as applying only to a non-capital guilt phase.

Supreme Court affirmed. The United States Supreme Court reversed on the basis of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

Three Justices (Powell, Burger and Rehnquist) concurred on the basis that Skipper "was not allowed to rebut evidence and arguments used against him. See Gardner v. Florida, 430 U.S. 349 (1977)." 39 Cr.L. at 3043 (concurring opinion). It turns out that Skipper had "kicked the bars of his cell following his arrest." The prosecutor asked him about it and argued in closing that Skipper might be violent in prison. 39 Cr.L. at 3043. The concurrence found no Lockett error but did find a violation of Gardner v. Florida, 430 U.S. 349 (1977). Skipper was not permitted to "deny or explain" evidence (bad jail conduct) on which his death sentence might have rested. 39 Cr.L. at 3044.

Justice Powell emphasized that the evidence in question was not the type the judge refused to consider in Eddings regarding "the defendant's youth and history of 'beatings by a harsh father, and of severe emotional disturbance'" 455 U.S. at 115; 39 Cr.L. at 3044. While evidence of a defendant's "emotional history... bear[s] directly on the fundamental justice of imposing capital punishment", Skipper's evidence did not. 39 Cr.L. at 3044. The majority disagreed.

Justice Powell, in an almost comical passage, fears that "[a]fter todays decision competent defense counsel in capital cases will instruct their clients to behave like eagle scouts while awaiting trial..." (is he opposed to such advice?) Powell feels that it shouldn't be a mitigating circumstance that a defendant follows "his counsel's advice to behave himself..." 39 Cr.L. at 3045 n.3. Interestingly, the concurrence expresses the fear that "when some defendants are able to avoid execution based on irrelevant criteria, there is a far greater risk of injustice in executing others. See Furman v. Georgia, 408 U.S. 238, 311-314 (1972)(White, J., concurring)." 39 Cr.L. at 3045 n.2.

All nine Justices apparently agree that "credible evidence that the petitioner was a good prisoner [might] have had [an] effect upon the jury's deliberation." 39 Cr.L. at 3043.

5. VOIR DIRE ON RACE. DEATH IS DIFFERENT. TURNER V. MURRAY, 39 Cr.L. at 3047 (April 30, 1986)

In Turner the trial judge refused a "request to question perspective jurors on racial prejudice." Because this was a capital case involving a black defendant and a white victim, the United States Supreme Court held that this required a retrial on the issue of punishment, but not guilt. "We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." 39 Cr.L. at 3050.

The reason the majority refused to reverse the murder conviction is that the court adheres to Ristaino v. Ross, 424 U.S. 589 (1976), which held that inquiry into racial prejudice at voir dire was not constitutionally required where the facts do not "suggest a significant likelihood that racial prejudice might infect [the defendant's] trial." Ristaino, 424 U.S. at 598. In a non-capital case, unless "racial issues [are]...inextricably bound up with the facts at trial", there is no absolute right to voir dire on this subject. 39 Cr.L. at 3049. An example of such a case was Hamm v. South Carolina, 409 U.S. 524 (1973), where the defendant was a well known civil rights activist in a small home town.

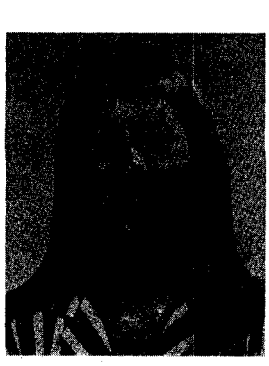
Justices Brennan and Marshall continue to adhere to their view as expressed in Ross v. Massachusetts, 414 U.S. 1080 (1973)(Marshall, J., dissenting from denial of certiorari), that the right to "venire questions concerning possible racial bias is triggered whenever a violent interracial crime has been committed." 39 Cr.L. at 3050 (concurring). Justices Powell and Rehnquist dissent.

KEVIN MCNALLY

AKE RETRIED

The Supreme Court's decision in Ake v. Oklahoma, ordered a new trial for a poor defendant who failed to receive critical psychiatric assistance in preparing an insanity defense. The Court, in an 8-1 decision, ruled that the defendant, Glen Burton Ake, was denied a fair trial in 1980 because he had not been provided with such psychiatric assistance. On February 12, 1986, Mr. Ake was again found guilty of, among other things, a dual homicide. After hearing further testimony, Canadian County (Oklahoma) jurors returned a sentence of life imprisonment for the 30-year-old defendant. The jury could have called for the death penalty as did the jury in the earlier trial. Formal sentencing was scheduled for February 21st. (The New York Times, 2/14/86.)

Sixth Circuit Highlights



Donna Boyce

In Mitchell v. Cody, ___ F.2d ___, 15 SCR 5, 13 (6th Cir. 1986), the Sixth Circuit Court of Appeals denied the pre-trial petition for writ of habeas corpus filed by Mitchell who was facing vehicular homicide charges in state court. Having already pled guilty to lesser charges of driving while intoxicated, possession of a controlled substance and disregarding a stop sign, Mitchell argued that if the state were permitted to subsequently try him for vehicular homicide it would violate the constitutional prohibition against double jeopardy.

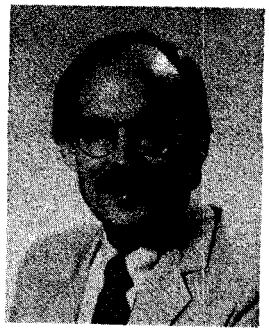
Two days after the drunk driving accident in which the other driver had been badly injured, Mitchell entered guilty pleas to the three lesser charges, was fined and given a suspended jail sentence. Ten days later the injured driver died and Mitchell was indicted for vehicular homicide. The trial court denied Mitchell's motion to quash the indictment on the ground that it would be a double jeopardy violation to try him again. Mitchell then took an interlocutory appeal to the state court of appeals and won. The prosecution appealed its loss to the state supreme court which reversed the court of appeals' decision. Mitchell next sought and was denied federal habeas corpus relief and then appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit noted that Mitchell's plea of double jeopardy would have been well taken if the injured driver had died before Mitchell entered his guilty pleas to the three misdemeanor offenses. The Court held, however, that this case comes within the "necessary facts" exception to the general rule prohibiting prosecution for a greater offense after the accused has already been tried for a lesser included offense. That exception applies when an element of the greater offense has not occurred at the time of the prosecution for the lesser offense. The Court observed that while the record did not indicate what, if anything, required the hasty disposition of this case within 48 hours of the accident while the victim was still hospitalized, that at least in the context of this case there was no constitutional requirement that trial on the pending charges be delayed for an indeterminate period while the prosecution conducted a deathwatch at the bedside of the victim.

DONNA BOYCE

Plain View

Search and Seizure Law and Comment



Ernie Lewis

This is the time of the year when the Supreme Court makes significant search and seizure decisions and defense attorneys hunker down hoping that the Fourth Amendment will still be alive following the end of the term. Rest easy. While the Supreme Court did render a number of decisions which are of interest, nothing over the past two months has significantly affected Fourth Amendment rights.

UNITED STATES SUPREME COURT DECISIONS

The Court decided two 42 U.S.C. 1983 cases which had the Fourth Amendment as a side issue. In **Malley v. Briggs**, 38 Cr.L. 3169 (3-5-86), the Court held that police officers would not have absolute immunity from a law suit complaining about the obtaining of an illegal arrest warrant. Rather, the Court held that a police officer would be entitled only to qualified immunity.

The case arose over the obtaining of a warrant based upon a wire tap which was only slightly incriminatory. When the grand jury did not indict, following the defendant's arrest, the defendant sued the police officer for money damages. The Court stated that "we hold that the standard of objective reasonableness that we applied in the context of the suppression hearing in United States v. Leon, 468 U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), defines the qualified immunity afforded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, Leon, supra, at 3422, will a shield of immunity be lost." The Court went on to reject the police officer's argument that he should be not held liable because obtaining a warrant is a per se objectively reasonable act. "It is true that in an ideal system, an unreasonable request for a warrant would be harmless because no judge would approve it. But ours is not an ideal system and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should."

Justice Powell joined by Justice Rehnquist dissented, concurring only on the holding regarding absolute immunity. Interestingly, the dissent wanted to place greater reliance upon the magistrate's determination that an arrest warrant should issue. Recall that the dissent was part of the majority in the landmark case of Leon, supra, where great reliance was placed upon the damage suit as a potential deterring factor to the obtaining of constitutional warrants. Now, when such a case arises, those same justices want to shield the police officer from damages for their unconstitutional actions, saying that again their reliance upon the magistrate's determination should be given great weight.

The Court also looked at the question of a prosecutor's liability in the case of **Penbaur v. City of Cincinnati**, 38 Cr.L. 3207 (3-26-86). In that case, the Court held that the Cincinnati District Attorney may be liable for telling police officers to break into a doctor's office in order to arrest a recalcitrant witness, which was not in violation of any case law at the time but was in violation of a future case, Steagald v. United States, 451 U.S. 204 (1981). Justice Powell, Burger and Rehnquist dissented from the majority opinion, which was written by Justice Brennan.

In a case important for the practice of First Amendment law, the Court held that the seizure of allegedly obscene materials did not warrant a different standard of review than the seizure of other materials. In a seven to two decision, in **New York v. P.J. Video, Inc.,** 39 Cr.L. 3034 (4-22-86), in a decision written by Justice Rehnquist, the Court held that the magistrate was to use the same probable cause standard of Illinois v. Gates, 462 U.S. 213 (1983) as it does in any other case. In so doing, the Court overruled the New York Court of Appeals decision which had held that "'there is a higher standard for evaluation of warrant application seeking to seize such things as books and film, as distinguished from one seeking to seize weapons or drugs, for example.'" Justices Marshall, Brennan and Stephens dissented, complaining that the majority decision did not sufficiently respect the decisions of the three state

courts who had previously reviewed the matter and further complaining that the affidavit involved in the case does little more than catalog sex scenes from video cassettes reviewed by the police from which no magistrate could have possibly found probable cause.

CERTIORARI GRANTED

The Supreme Court has granted certiorari in three cases which will be of interest to defenders. In **Arizona v. Hicks**, 39 Cr.L. 4009 (4-7-86), the Court granted certiorari to review the lower court's opinion, at 707 P.2d 331 (1985), which had held that officers violated the Fourth Amendment when they went to an apartment and entered it pursuant to an emergency, thereafter moving stereo components in order to record serial numbers upon which a warrant was later based. One could expect the Court to review the plain view exception to the warrant requirement and the good faith exception of Leon.

The Court also granted certiorari in the case of **Illinois v. Krull**, 38 Cr.L. 4211 (3-24-86). In this case, the Illinois court had held against the state on a search and seizure question. There, it was held that a state statute allowing for warrantless administrative searches of auto parts dealers "at any reasonable time during the night or day" was unconstitutional in that it left state officials with altogether too much discretion on the search question. The question to be considered by the Court is whether a search conducted under an unconstitutional statute is a valid search if it is undertaken on good faith reliance upon that statute. Again, one can expect the Court to look at extending the good faith exception of Leon into these particular circumstances.

Finally, the Court also granted certiorari in the case of **Colorado v. Bertine**, 38 Cr.L. 4211 (3-24-86). The Court below had held that a warrantless search of a closed container found in an impounded car violated the Fourth Amendment. This is expected to be a very important decision and will explore a number of the car cases in the past, including United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); Illinois v. Lafayette, 462 U.S. 640 (1983), and United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

SIXTH CIRCUIT DECISIONS

The Sixth Circuit Court of Appeals has also decided two cases touching upon the Fourth Amendment in the past couple of months. In **United States v. Oswald**, 15 SCR 8 (2-18-86), the Court looked at the question of the abandonment of a car and a subsequent search. In this particular case, the defendant abandoned his car on the side of the road and it was subsequently burned out. Police officers came upon the car and searched it without a warrant, finding the defendant's suitcase with $300,000 worth of cocaine in it. The Court held that the defendant could not complain about the search under these circumstances due to the fact that he had abandoned his car.

In **United States v. Smith and Helton**, 15 SCR 9 (2-14-86), in a decision by Justice Lively, the police visited the same grounds as **Cloar v. Commonwealth**, Ky.App., 679 S.W.2d 827 (1984). In the Smith case, the police received an anonymous tip that the defendant was growing marijuana in his house and that there was one marijuana plant near the door. The police investigated by driving up the 75 to 100 yard driveway, thereupon finding the plant, and radioing information regarding the observation back to other officers. The Court held that the defendant had no reasonable expectation of privacy in the marijuana plant near the front door, due to the fact that anyone could obtain an unobstructed view of it. It further held that the evidence taken from the house pursuant to the warrant issued following the police officer's observation was not a Fourth Amendment violation, despite the fact that there was a "sketchy affidavit," and no time frame in the affidavit indicating from the informant when the marijuana was observed. The Court relied upon the verification found by the police upon their arriving at the house.

THE SHORT VIEW

1) People v. Santistevan, Col., 39 Cr.L. 2001 (3-17-86)

The Court held that a person has a reasonable expectation of privacy in the substances that are contained upon his hands, and thus

looking at the hands under an ultraviolet light is in fact a search. Accordingly, a person cannot be required to place his hands under an ultraviolet light by the police without a warrant or without some sort of consent. The Court utilized Cupp v. Murphy, 412 U.S. 291 (1973), where the Court had looked at the question of whether taking a fingernail scraping was a search.

2) People v. Gonzalez, N.Y. S.Ct., App. Div., 1st Dept., 39 Cr.L. 2002 (4-2-86)

In this particular case, the police came upon a car which had been parked illegally. The officers asked the occupant in the driver's seat to move the car but she said it wasn't her car and that she had no license. They asked then for an identification from her and again for her license. She was unable to state who owned the car to the police to their satisfaction. The officers then shined a light into the car to reveal a brown bag between the woman and the defendant Gonzalez. The officers asked about the brown bag. The defendant said that it contained envelopes. The woman responded then to additional questioning by handing the officer the bag. The officer then shook the bag hearing a metallic sound, opened the bag and thereupon saw two boxes. The officer then asked the defendant to exit the car, patted him down, and felt tin foil on his person. He seized it and found cocaine.

The Court held first of all that the relinquishment of the bag by the woman was not consent but was rather an acquiescence to authority, and thus the state could not rely upon the consent theory for the seizure of the bag. The Court further held that while the officers were justified in approaching the car, and justified in taking the bag when offered to them, they were not justified in examining the contents of the bag nor in taking the tin foil from the defendant after the pat down revealed he was armed.

The analysis in this case is quite useful in that it represents the most typical confrontation between police and citizen and applies in a cogent way the requirements of the Fourth Amendment.

3) State v. Johnson, Idaho, 39 Cr.L. 2026 (4-9-86)

This case shows that we ought to get along with our landlords. Here, a landlord called a police officer to report that he saw "suspicious plants" in his tenant's apartment. He also reported that the tenant had moved out. The officer went to the apartment and entered the apartment thereupon seeing the tenant's personal effects. Rather than leaving however, the officer's curiosity drove him further into the apartment where he saw the suspicious plants. He then went to a magistrate to obtain a warrant for a complete search of the apartment.

The Court held that the police officer's curiosity got the best of him, saying that he should have stopped and left the apartment once he saw the tenant's personal effects, indicating that he had not moved out but that he continued to exhibit an expectation of privacy in his apartment. The Court further held that the landlord was without authority to consent to the search, because there was no mutual use of the property. Finally, the Court held that the affidavit in support of the petition for the search warrant was to be analyzed without the observations of the police officers included. When viewed without those observations, there was no probable cause to have issued the search warrant. The Court then stated that the good faith exception of Leon is inapplicable because but for the illegal search the officer would not have been in a position to execute the affidavit. Accordingly, using the exclusionary rule under these circumstances would in fact serve a deterrent effect.

4) State v. Murphy, Conn.Ct.App., 39 Cr.L. 2031 (3-11-86)

A person was charged with having expired registration. He offered to have his car towed to his house but the police officer would not allow that. The officer preferred an impoundment, and searched the car preliminary to that impoundment. The Court held that the search preliminary to the impoundment was illegal and the evidence discovered thereby had to be suppressed.

5) Rand v. State, Fla.Ct.App., 39 Cr.L. 2031 (3-14-86)

In this case featured by a truth telling police officer, the Florida Court of Appeals examined the application of the good faith exception doctrine and one of its exceptions. Here, the officer was informed that marijuana was growing in a particular place. The officer filed an affidavit stating that the informant had told him that they had seen marijuana growing but failed to state when the observation was made. When the officer took the stand at the suppression hearing, he conceded that the time of the observation was important to include in the affidavit, in order to apprise the magistrate whether the contraband could be expected to be still at that location.

The Court held that the officer could not have objectively relied

upon the facially deficient search warrant, and thus the good faith doctrine did not apply. Note however that had the police officer not testified as to his knowledge of search and seizure law, that could have tipped the scales allowing for the good faith doctrine to apply.

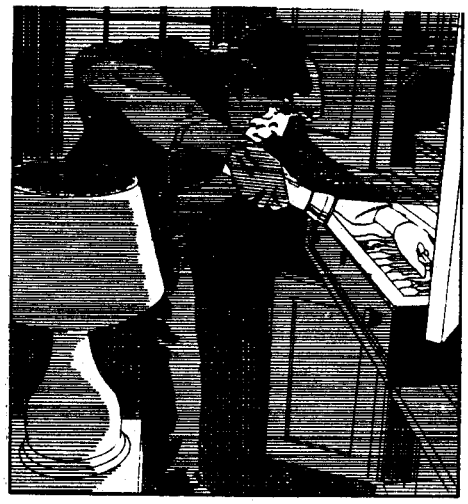
6) State v. Biggar, Haw., 39 Cr.L. 2076 (4-30-86)

This case is notable more for its peculiar facts than for the search and seizure analysis contained therein. Here a man was detained in an airport on suspicion of an immigration violation. He asked to go to the restroom and he was followed into that restroom by a police officer. The police officer told the man "not to flush" which made the defendant understandably nervous and perhaps concerned about the tidiness of the whole situation. He nevertheless went into a stall and shut the door. Our curious police officer than decided to watch the defendant go to the bathroom and peeked through the crack of the door and saw him standing there not going to the bathroom. Not content with the crack, the police officer then went into the next stall and stood on the adjacent toilet and peered down upon the defendant. Upon doing so, he saw the defendant remove his hand from a dispenser. Thereupon the police officer searched the dispenser and found cocaine. A subsequent search of the defendant produced more cocaine.

The Court held that the defendant has a reasonable expectation of privacy in his stall. This right to privacy was violated by the officer's curiosity and the search was tainted by the illegal surveillance and thus the cocaine should have been suppressed at the defendant's trial.

7) People v. Burgener, Cal.S.Ct., 39 Cr.L. 2033 (3-27-86)

The Court looked at the question of what standard would apply to the search of parolees. The Court decided that a warrantless search condition agreed upon by the parolee and enforced by parole officers is not an unreasonable condition. However, any search "must be based on information that leads the parole agent who conducts or authorizes a search to believe that the parolee has violated the law or another condition of parole or is planning to do so." Thus, the California Court adopts the reasonable suspicion standard as the appropriate one to apply similar to what the United States did in New Jersey v. T.L.O., 469 ___ U.S., 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) in school searches.



8) Richardson v. State, Ark., 39 Cr.L. 2036 (3-24-86)

The defendant, nephew of a murder victim, was at the police station and was suspected in his uncle's murder. However, the police did not have probable cause. Due to the fact, however, that he smelled of alcohol, the police arrested him for public intoxication thereupon searching his person and seizing his clothes to be sent to the laboratory. Incriminating evidence resulted. The Court held that the arrest of the defendant on public intoxication was a pretextual arrest, and that any inventory search following such an illegal arrest is also an invalid inventory search and evidence taken had to be suppressed.

9) United States v. Breckinridge, 38 Cr.L. 2449 (2-18-86)

How far afield can the good faith doctrine go? Well, in this case, the magistrate did not even read the affidavit in support of petition for a search warrant. However, because the police "thought" that the judge had read the affidavit, that police officer acted in good faith in executing the search warrant. Thus, no suppression of the evidence had to occur. Interestingly, the Court did not look at whether the magistrate had abandoned his neutral magistrate's role, thereupon disallowing the good faith exception. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

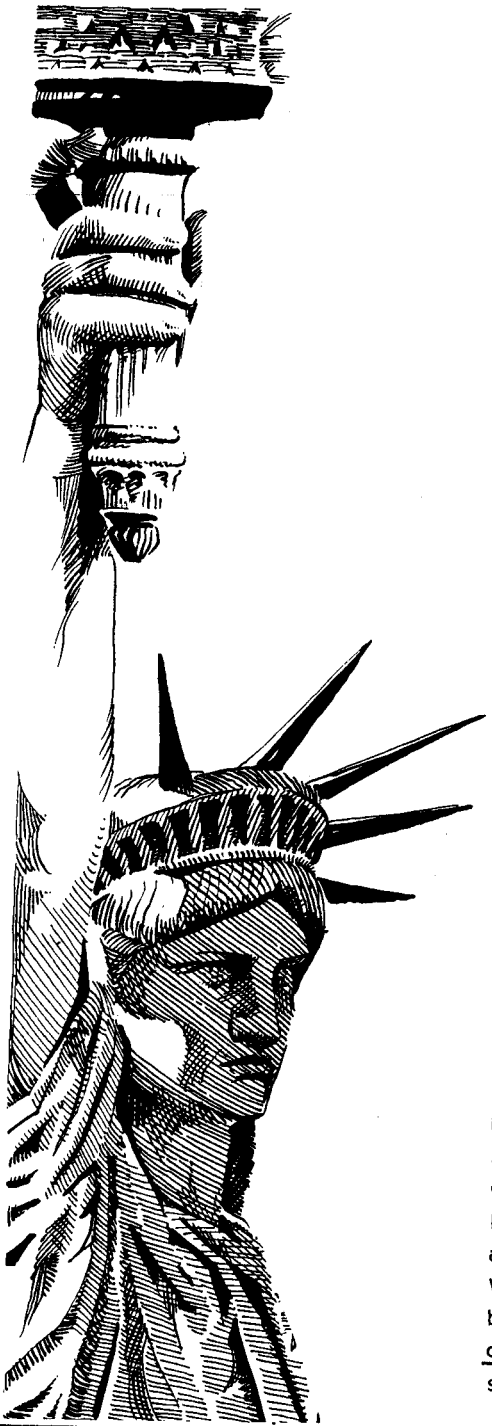
10) VanPatten v. Arkansas, App., 697 S.W.2d 919 (1985)

A wild party resulted in a complaint. A police officer answering that complaint heard on his way to the party that the disturbance was being caused by a person in a brown jeep. Still on his way to that party, the police officer saw a brown jeep and pulled it over. The defendant was required to take a breathalyzer and he blew a .15%. The Court held that the stop was unreasonable, due to there being not specific articulable reason to believe that a crime had been committed, and thereupon the breathalyzer results had to be suppressed as a fruit of the illegal stop.

Ernie Lewis

Trial Tips

For the Criminal Defense Attorney



A wise statesman once said: There are two things people shouldn't watch being made--sausages and laws.

LEGISLATIVE HIGHLIGHTS

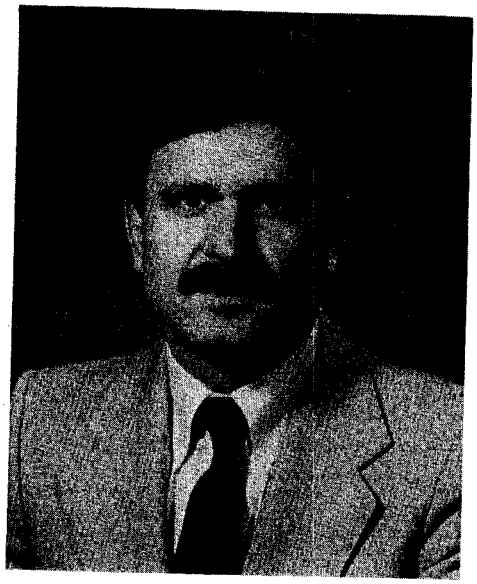
The 1986 General Assembly has made some dramatic changes in Kentucky's criminal laws. The following is a brief description of some of the major pieces of legislation that were enacted into law.

July 15th is the effective date for legislation enacted during the '86 General Assembly unless a different date is specified in the bill. The following measures all have an effective date of July 15th with the exception of the Juvenile Code, which has the effective date of July 1, 1987.

If you are interested in getting additional information as to any of these measures, you could request a copy of the final version of a particular bill by contacting the Legislative Research Commission, Third Floor, Capitol Building, Frankfort, Kentucky 40601; telephone (502) 564-8100.

HB 8: Prior to granting parole for individuals convicted of Class A, B, or C felonies, the Parole Board shall conduct a hearing where the victims of crime or their next of kin shall have an opportunity to appear or submit written comments. Victims or their next of kin shall be able to make their presentations outside the presence of the prisoner.

HB 17: Clarifies in statute what the Kentucky Supreme Court has done by case law: DUI offenses prior to 1984 do count as prior convictions for offenses committed after July 13, 1984.



Rep. Ernesto Scorsone

HB 75: Makes it clear that when a criminal defendant requires psychiatric, sociological or similar evaluations in connection with criminal proceedings, the state will pay the cost of such evaluations and/or treatment, not the local Fiscal Court.

HB 76: This measure is by far the most significant and pervasive change in criminal law practice in Kentucky. HB 76 calls for a bifurcated trial in all felony cases. After an initial determination of guilt, the jury would be deciding a sentence for the defendant after being informed as to all prior convictions of the defendant, including misdemeanors, minimum parole eligibility for the offenses he is facing, the nature of prior offenses for which he was convicted, and the maximum expiration date of sentences in light of parole guidelines.

The jury will now be deciding whether multiple sentences shall be served concurrently or consecutively. Amazingly, the defendant appears to be limited in what mitigation evidence he can introduce. The evidence that he will be allowed to introduce can only go to the issue of whether he has a significant history of criminal activity or not.

In addition, the bill requires that "violent offenders" who receive a life sentence not be paroled until they have served twelve years (unless they are sentenced to twenty-five years without parole). Violent offenders who are given a term of years for either an A or B felony shall not be paroled until they have served at least fifty percent of the sentence imposed by the Court. This bill, which appears to be begging for a number of constitutional challenges, applies to individuals who commit crimes after the effective date of this act.

HB 105: Expands the Parole Board and gives the Chairman of the Board chief administrative responsibilities for its operation. This measure will allow the governor to influence, even further, the direction of the Parole Board.

HB 263: Creates a privilege between a sexual assault counselor and the victim. This privilege is limited and shall not apply to matters of proof concerning chain of custody, proof as to the appearance of the victim at the time of injury, any information relating to the identity of the victim's assailant, and would not apply when a counselor has knowledge that the victim has given perjured testimony.

HB 311: Eliminates marriage as a defense to sex offense cases where spouses have filed a petition for divorce or separation. Unique to this crime, the legislature will allow records to be expunged if such "spousal rape charges" were either dismissed with prejudice or a verdict of not guilty was entered.

HB 390: Creates various new KRS chapters to protect crime victims and witnesses. It defines the elements of crime of intimidating a witness and creates the crime of harrassing a witness, limits liability of those who fail to comply with duties relating to victims and directs the Attorney General to provide informational materials to victims and witnesses.

HB 422: Permits courts to sentence people guilty of public intoxication to an alcohol treatment program for a maximum of six months.

HB 535: Authorizes the creation of a sex offender program within the Corrections Cabinet and a juvenile sex offender program within the Cabinet for Human Resources.

HB 642: Increases the penalty for falsely reporting credit card losses to a Class D felony.

SB 196: Permits home incarceration for misdemeanor and non-violent felony offenses. Building on the Northern Kentucky experience, this measure will offer a very attractive alternative in many criminal cases. However, care will have to be exercised to guarantee that the "approved monitoring devices" used do not include "George Orwell" surveillance devices.

SB 311: This is the much awaited Unified Juvenile Code. Attorneys who practice in Juvenile Court need to read this 220 page bill carefully. Among the many substantive changes: a much easier "waiver" procedure to Circuit Court, lowering the age for transfer cases, greater protection and follow-up on dependency cases, enhanced diversion efforts by the Juvenile Court and exemption of juveniles under 16 from the death penalty.

The legislative action taken in '86 occurred without any significant input from the criminal defense bar. If criminal defense attorneys are disappointed, shocked and/or dismayed at what the legislature has done, perhaps it will encourage greater participation in the future. Prosecutors are omnipresent during a legislative session. To guarantee a fair and a much more balanced process, legislators need to hear from the other side as well. Criminal defense attorneys need to monitor legislation and be willing to offer insight and input. I encourage you to do just that and to enlist fellow attorneys in such an endeavor.

ERNESTO SCORSONE

Trial Tip

WOMEN'S SELF DEFENSE PART III

This is the third and final installment in this series concerning the theory and techniques of representing battered women who defend themselves. This column will examine one of the most critical aspects of defending a battered woman - pretrial investigation and preparation. A short discussion of the admissibility of proof of prior violent acts of the decedent will follow. First, however, an update on the admissibility of expert testimony on the battered woman syndrome.

EXPERT TESTMONY ADMITTED IN KANSAS AND INDIANA

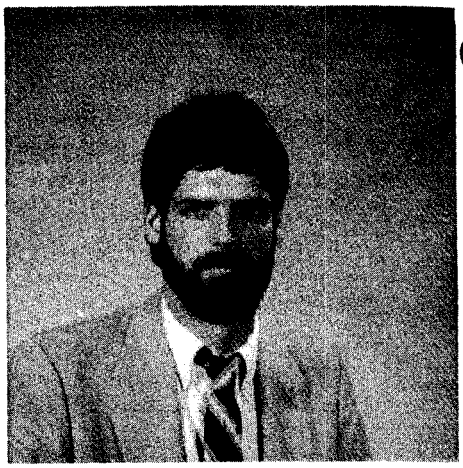
Since the April edition of The Advocate was published, expert testimony about the behavioral characteristics of battered women (the battered woman syndrome) has been ruled admissible in Kansas and Indiana. In State v. Hodges, Kan., No. 52-817, 39 Cr.L. 2046, (March 28, 1986), the Kansas Supreme Court joined the growing list of jurisdictions admitting expert testimony on the battered woman syndrome. The Court held that such expert testimony is admissible in appropriate cases because a battering relationship is a subject beyond the understanding of the average juror. Importantly, the court also recognized that the psychological theory underlying the battered woman syndrome has gained substantial scientific acceptance. In sum, the Kansas court also ruled that when a defendant offers evidence of the battered woman syndrome in support of a claim of self-defense, expert testimony is admissible to prove the reasonableness of her belief that she was in imminent danger from the victim.

Expert testimony about the psychological makeup of battered women was also admitted in a recent Evansville, Indiana manslaughter trial. Martha Shelby was acquitted on April 28 by a Vanderburgh Circuit Court jury in the stabbing death of her husband. Trial testimony established that she was an abused and battered woman who struck out at her spouse in self defense. Ms. Shelby testified that she had moved into a shelter for abused women at one point, but had returned to her husband when he promised to stop hitting her and share living expenses. "I really loved him and I thought I could change him," Ms. Shelby testified. Louisville Courier Journal (April 29, 1986).

PRETRIAL INVESTIGATION AND PREPARATION

Early entry into a battered woman's case is critical. Abundant physical evidence usually exists, but only if you have early access to the crime scene. Aside from evidence of a struggle at the scene (furniture knocked over, etc.), there is frequently evidence of shots fired that could establish that your client fired warning shots before the actual assault or killing.

Often, too, battered women describe less direct violence by their spouses. Episodes of breaking dishes or destroying the woman's clothing are not unusual. Accordingly, the crime scene should be closely checked for evidence of this type of less direct violence. This evidence can be crucial, as violent outbursts of this sort can contribute to your client's perception that she was in a life-threatening situation when she killed her abuser.



NEAL WALKER

Early client contact is important, also. Ideally, your client should be referred to a physician for a complete examination. At a minimum, bruises or other wounds should be photographed. Prior medical records should also be obtained.

As promptly as possible, your client should be referred to a psychologist. This is important not only for purposes of preparing a defense, but for the emotional well-being of the woman as well. Local shelters for abused women should be contacted to determine the availability of counseling services for the accused.

Of course, if your client had contacted the police or crisis intervention agencies in the past, you should obtain thorough documentation for potential use at trial.

Evidence of a history of drug or alcohol abuse by the deceased can be important in an abuse case. Autopsies often disclose excessive blood alcohol levels and may reveal whether the deceased had ingested drugs which would have affected his personality at the time of the shooting.

Witnesses who can testify about your client's agitated emotional

state at the time of the assault should be located. It is imperative to find witnesses to assaults on the accused. Typically, these witnesses will include children, neighbors, co-workers and friends of the accused and the deceased. Don't neglect to interview the decedent's family. Additionally, consideration should be given to former wives and girlfriends who would testify to the violent nature of their relationship with the deceased.

ADMISSIBILITY OF PRIOR VIOLENT ACTS OF THE DECEASED

Evidence of specific violent acts are not competent under Kentucky law to prove, in a self-defense case, that the deceased was the aggressor. Thompson v. Commonwealth, Ky., 652 S.W.2d 78 (1983). The proper method of proving that the deceased had a violent and dangerous character is by reputation evidence, and not by specific acts of misconduct. Parrish v. Commonwealth, Ky., 581 S.W.2d 560 (1979). However, "evidence of the mental attitude of the accused is germane to the issue of self-defense." Carnes v. Commonwealth, Ky., 453 S.W.2d 595, 598 (1970). "[E]vidence of specific acts of violence by the victim could not possibly tend to show the defendant's mental condition unless the defendant knew of those acts." Wooten v. Commonwealth, Ky., 478 S.W.2d 701, 703 (1972)(emphasis in original). Thus, specific previous acts of violence and threats of violence by the victim of which the defendant is aware and particular knowledge held by the defendant about the victim's dangerousness can properly be admitted in order to clarify the defendant's mental state at the time of the homicide and to evaluate the reasonableness of the defendant's belief in the necessity of using deadly force. Wilson v. Commonwealth, Ky., 551 S.W.2d 569, 570 (1977); Faulkner v. Commonwealth, Ky., 423 S.W.2d 245, 247 (1968).

CONCLUSION

Reconstructing the history of verbal, sexual, psychological and physical abuse is the essence of an effective battered woman defense. Such a history will provide the jury with your client's perspective and will help explain her state of mind at the time of the event.

NEAL WALKER

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

CONFIDENCE

A quality which, however manifested by counsel, if it stems from hard analysis, stands a good chance of spreading its benign influence to the court. Synonym: conviction.

As my "if" clause reflects, I place substance--having a good case and knowing it backward and forward, knowing the strengths and how to deal with the weaknesses--as both the necessary and the sufficient ingredient of confidence. Usually this quality is exhibited by a lawyer for an appellee, i.e., a lawyer who has already persuaded a judge, a jury, or a governmental agency of the merits of his case. The victory below is something like a suit of armor worn beneath some less essential outer garments. For example, in many appeals in criminal cases an able lawyer for the appellant will speak with considerable force and will argue several issues vigorously. He is good enough to push the court into a state of discomfort. What looked like an easy affirmance is now vulnerable to several attacks. Then the equally able prosecutor begins cooly, perhaps even boringly, and deals with issue after issue: no objection here, no request for a charge there; several pieces of evidence omitted from appellant's argument add up to sufficient evidence to support the jury's verdict; and, even if the court erred in cutting off the impeaching cross-examination of a key witness, it is harmless error because of a,b,c,d,e, and f. The tight cumulatively overpowering summary of evidence, with page references to the transcript, utterly devastated the key witness and left us in no doubt. The appellee's coat of armor had been resplendently revealed. Once again we had seen the difference in force needed to climb a rope from that needed simply to keep from slipping.

There are also, however, occasions when counsel for an appellant, despite having lost his case at the trial level, comes into court radiating solid confidence and the sweet smell of success. What he has in his arsenal is some egregious error committed by the trial judge. One such example was the hasty action of a trial judge in ruling against a party who had never been brought into the court's jurisdiction.

Another such confident appellant came into court having all the law from a number of courts on his side. For some reason the trial judge, an excellent one, had been persuaded that these cases were not applicable. Viewed with the perspective of time and a complete survey of the law on point, appellant's weapons now look deadly and appellee's armor seems now to have more chinks than links. In such cases the appellant's counsel has the rare opportunity to ask for reversal as one who speaks "more in sorrow than in anger."

Occasionally a case involving two private parties will go to decision before a governmental body realizes that a broad public policy issue is at stake. It will then belatedly ask permission to file a brief as "friend of the court" (amicus curiae). By the time the case reaches the appellate court, its context and scope have changed so much as not to be recognizable. Here, too, a losing party below, armed with the powerful support of the amicus, may often come into court radiating unusual confidence.

Although any lawyer, whether for appellant or appellee, armed with a good case, thoroughly prepared on the law, the facts and policy implications, must inevitably reflect an ineffable but almost palpable sense of confidence, whatever may be his skills in speaking or his "presence," it is also true that substance can be aided by manner. Manner without substance will not do; but manner and substance will do better than substance alone.

By manner I do not mean artificially fabricated mannerisms but rather style in the sense used by Buffon when he wrote, "Le style, c'est l'homme meme." Manner is the composite of language, posture, pace, tone, facial expression, eye contact, gestures...all the ways in which an advocate's thoughts and emotional intensities become conveyed to others.

In my catalogue of counsel I find three profiles illustrating different levels of confidence-stimulating manner. The first is that of a young attorney who, despite a Rip Van Winkle arrival in the courtroom after we had instructed counsel for appellee to begin argument and despite having at best an indifferent case, made a strong and favorable impression. My notes read: "He knew the case, spoke rapidly, was intense. He was persistent, somewhat like a raw primeval force. When he came to difficult precedents, he would not try to distinguish them, but merely said they were wrong. He pitched his argument to an extreme position. He did not try to make decision easy for the court." This young attorney had a presence and personality which, when he would add the judgment gained from experience, would be compelling.

A second character was an older man, an individual practitioner. My notes read: "Speaks slowly, bumblingly, but gives us the feeling he knows the field. Has a cold so his gruff assertions may be more cryptic than usual. When one of us put to him a hypothetical question together with a suggested answer that looked as if it might be damaging, his reply was simply, 'It seems to me to be sensible. I can't say more than that,' and the court accepts." In other words, so impressive were the rough-hewn integrity and judgment of this lawyer that the answer no longer appeared damaging; the testing attempted by one of us judges suddenly appeared to be merely cute. Thus can a manner stemming from inner character, mellowed by judgment, smooth the way for its possessor. In this particular case this lawyer was also aided by the contrasting image of his adversary as to which my notes read: "Lackluster. No sense of conviction. He is like a bean bag; punch him here and he yields only to bulge somewhere else."

Perhaps my third personage reflects the summum bonum of the confidence factor of advocacy. For in this lawyer were combined a controlled passion, the judgment gained from long experience, and a touch of art. This last ingredient took the form of drawing on some of the many cases he had argued before us, making a few salient comparisons, inducing us to feel that we and he had shared many battles, then, without stepping over the line into presumptuousness or unctuousness, conveying to the judges that he was taking them into his confidence. The result of this combination of earnestness, experience, and elegance is that whether the advocate wins his case or not (he won this one), every judge listens with rapt attention and gives the argument his most thorough consideration.

Forensic Science

BULLET IDENTIFICATION, BUT NOT ELIMINATION

The day to day routine and major thrust of most prosecution employed firearm examiners deals with the attempted identification of a fired bullet as having been fired from a particular suspect weapon. If that bullet cannot be identified as having been fired from that weapon, the courtroom value of that work has obviously been reduced to nothing in regard to the prosecution of the owner of that particular weapon. Often such firearm examiners will report that they cannot determine if a fired bullet was fired from a particular suspect weapon with the added statement that the submitted fired bullet exhibits class characteristics consistent with the submitted weapon. This "have your cake and eat it too" reporting technique is, in this writer's opinion, an attempt to salvage a failed attempt to identify the bullet/gun combination. The "between the lines" indication of this reporting format alludes to the probability that this is the correct gun despite an inability of the examiner to prove it.

The basic premise however, on which firearms identification is based dictates that unique microscopic striations are consistently placed on the surface of each bullet fired from an individual rifled barrel. These striations should therefore be reproducible from shot to shot and microscopically comparable and identifiable. It should be noted that some situations may exist which may cause a gun to produce non-reproducible shots.

However, the reproducibility or non-reproducibility of a particular weapon is easily determined by virtue of comparative microscopic examinations of test fired bullets from the subject weapon. Assuming test shot reproducibility, these shots are then microscopically compared to the evidence bullet. Obviously, if the same number and pattern of unique striations are observed and compared between the test shots and the evidence bullet, then the suspect weapon is successfully identified. However, if the striations are not present in sufficient number and/or pattern or do not correlate at all, the results are typically reported as inconclusive. This assumes of course that the class characteristics of the test bullets and the evidence bullet are the same.

It is in these cases where completely dissimilar microscopic striations are observed between the test bullets and the evidence bullet that exception should be taken to an inconclusive report. If these striations are sufficient to effect an identification then should not the converse be true?

"...since justice is indivisible, injustice anywhere is an affront to justice everywhere."

Martin Luther King

Cases of Note... ...in Brief

I. MONEY FOR EXPERT WITNESS

United States v. Sloan
776 F.2d 926 (10th Cir. 1985)

Defense counsel filed a notice of intent to rely on expert testimony concerning his mental condition, and a request for funds to hire a psychiatrist. He cited the defendant's history of psychiatric treatment, abnormal electroencephalograph and his treatment with anti-psychotic drugs.

One week later the government's request for a psychiatric examination of defendant for competency and sanity was granted. The doctor appointed found the defendant sane and competent. The renewed request for a defense psychiatrist was denied by the trial judge since the request was not justified and since any bias of the appointed doctor could be elicited by the defense on cross.

In reversing the trial court, the Tenth Circuit held:

> Coupling this reasoning [of Ake v. Oklahoma, 105 S.Ct. 1087 (1985)] with the mandatory language of 18 U.S.C. § 3006A(e)(a) [judge shall authorize for an indigent services for a necessary defense], it is evident when an indigent accused makes a clear showing to the trial judge that his mental condition will be a significant factor at trial, the judge has a clear duty upon request to appoint a psychiatric expert to assist in the defense of the case. That duty cannot be satisfied with the appointment of an expert who ultimately testifies contrary to the defense on the issue of competence. The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution. In this case, the benefit sought was not only the testimony of a psychiatrist to present the defendant's side of the case, but also the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination. Without that assistance, the defendant was deprived of the fair trial due process demands. United States v. Bass, 477 F.2d 723 (9th Cir. 1973). Id. at 929.

II. COMMENT ON SILENCE

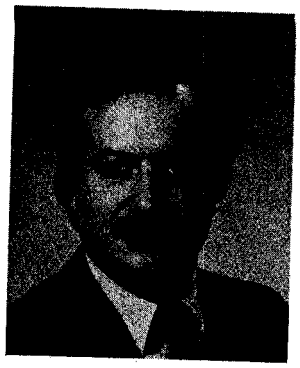
United States v. Elkins
774 F.2d 530 (1st Cir. 1985)

The Government's witness, Lt. McCarthy, testified on direct:

> I placed them under arrest. It did not seem to phase (sic) them or give them any surprise. They were concerned about the things that they would take back to the escape with them....
> Id. at 536.

The First Circuit reversed the conviction because of this improper reference to the defendant's silence in violation of the 5th and 14th amendments:

> In the context of the present trial there can be no doubt that Lt. McCarthy's statement, although arguably evidence of the defendant's demeanor, invited the jury to infer guilty knowledge from the defendant's failure to respond. Id. at 538.



ED MONAHAN

III. CONFESSION

Stafford v. Commonwealth
(Unpublished, Ky.Ct.App., Feb. 21, 1986)

The defendant was convicted of receiving stolen property as the result of a videotaped sting operation by the Louisville police. After offering to sell an officer stolen property on videotape, the defendant was arrested pursuant to a warrant. The following conversation between the officer and the defendant occurred:

> I first of all asked him if he knew what his rights were. He said yes.
>
> He said he knew what his rights were. I said, you know you have the right to remain silent. He said well, he said, I don't know what this is all about. I said, I don't either. I don't know nothing about it. I'm taking you to police headquarters. That's where they told me to deliver you. And that's what I did.
>
> Q. Did you have any further contact with Mr. Stafford after that time?

A. I did not.

When the defendant arrived at the police station, he was shown the video, and then turned to the policeman and said, "Yep, it's me."

"By virtue of the decision of the Supreme Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), law enforcement officers must, prior to any interrogation of persons in custody, inform them of their constitutional rights to remain silent and to have a lawyer. Absent this admonition, any confessions gained as a result of said interrogations are inadmissible in a court of law. Id., 384 U.S. 444, 86 S.Ct. 1612. See also Escobedo v. Illinois, 378 U.S. 478, 491, 84 S.Ct. 1758, 1765 (1964). It is not necessary that the suspect request the services of a lawyer before being entitled to be informed that he has the unqualified right to acquire and have one present. No amount of circumstantial evidence that the suspect was aware of his rights will suffice to overcome the failure on the police officer's part to apprise the suspect properly. Id., 384 U.S. 436, 470, 86 S.Ct. 1602, 1626."

In this unpublished case, the Court held that under this caselaw the officer did not advise the arrested person of his rights, and secondly that the statement of the accused was not a voluntary statement. Rather, the Court held the conduct of the police in showing the videotape to the accused was "the functional equivalent of interrogation."

"As pointed out in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980), the term "interrogation" under Miranda refers not only to express questioning, but also to... actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id., 446 U.S. 291, 301, 100 S.Ct. 1682, 1690."

Because of these gross violations, the confession was ruled inadmissible at the new trial of the defendant.

V. RESENTENCING/VINDICTIVENESS

United States v. Bello

767 F.2d 1065 (4th Cir. 1985)

After conviction and sentencing on multiple counts and after a partial reversal on appeal, the trial judge resentenced the defendant to the same number of years but the new sentencing package had a greater parole eligibility. During the resentencing, the trial judge noted that the intervening imprisonment evidenced rehabilitation of the defendant.

Initially, the Fourth Circuit decided that a new sentence of the same number of years with a longer parole eligibility was "more severe than the original one." Id. at 1068.

Secondly, Fourth Circuit found the increased severity raises a "presumption of vindictiveness" under North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which cannot be overcome unless the trial judge affirmatively identifies relevant conduct or events that occurred subsequent to the original sentencing proceedings." Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 3225, 82 L.Ed.2d 424 (1984).

Since in this case that presumption was not rebutted by any identified factors, the offense to the due process clause must be rectified by a new sentence that is no more severe than the original sentence.

DRUNK DRIVING LAW

VI. CONTACTING ATTORNEY ON ARREST/DUI

State v. Holland

711 P.2d 602 (Ariz.Ct.App. 1985)

Charged with drunk driving offenses, the defendant was arrested then taken to the police station where they began to question him after reading him his Miranda rights. During the questioning, the defendant asked to call his attorney. He called and obtained his attorney's answering service. When the attorney returned the call, a policeman answered and informed him that the defendant was under arrest for DUI. The attorney requested to talk to his client in confidence. However, an officer was within listening distance of the phone conversation, and he refused to move when asked by the defendant.

"Because of this, the attorney could not get any information from Holland as to his condition at that time and, therefore, was unable to advise him how to proceed, whether he should give a blood test, submit to the breathalyzer test or refuse to do anything. He was also unable to advise Holland or assist him in gathering any exculpatory evidence. The conversation ended soon after, and he eventually submitted to the breath test." Id. at 602.

The appellate court held that the defendant "had a right to speak privately with his attorney, once the officer made the call," and that once an accused demands to talk with an attorney, law en-

forcement officials must provide that opportunity." Id. at 604.

In Kentucky, RCr 2.14 seems to guarantee by rule these rights.

VII. LIMITS ON USE OF BAC

State v. Dumont

499 A.2d 787 (Vt. 1985)

The defendant was stopped by the police; taken to the police station, and was given a breath test 1 hour and 10 minutes after the stop. He registered a .13%. No evidence was introduced at his trial of what his blood alcohol content was at the time he was driving.

The court held: "In view of the marginal additional probative value of the numerical result, and the danger of its misuse by the jury, expert testimony concerning the blood alcohol content test in a case charging operation of a vehicle while under the influence should be strictly limited to whether the test demonstrates the defendant did, in fact, consume any intoxicating liquor. The numerical result itself should be excluded unless it related back to the time of operation...."

VIII. USE OF PRIOR DUI CONVICTION

State v. Armstrong

332 S.E.2d 837 (W.Va. 1985)

The defendant was convicted for DUI, enhanced due to his third offense. The record demonstrated that the two prior DUI convictions resulted from uncounseled guilty pleas.

Under this state of facts, the court determined that "the only substantial questions presented is whether the appellant waived his constitutional right to assistance of counsel." Id. at 841.

In this case, 1) the defendant was of limited education and intelligence; and 2) the defendant has signed, one month before pleading, a Rights Certification Form informing him of his right to counsel by writing, "I have counsel to represent me."

While the completion of the rights form is not conclusive proof of a knowing and intelligent waiver, it does constitute prima facie evidence that the waiver which can be rebutted by the defendant by a preponderance of the evidence.

Under the facts and law, the court held that there was not a knowing and intelligent waiver where the defendant had limited mental capacity and the judge failed to determine the accuracy of the one month old rights form.

IX. GUILTY PLEA/DUI

State v. Jackson

371 N.W.2d 679 (Neb. 1985)

The defendant pled no contest to the charge of driving while intoxicated, second offense. There was a form document in the record that indicated he had the possible penalties explained to him. The actual colloquy between the judge and the defendant did not indicate the possible penalties were explained to the defendant.

From the entire record, the court found that since the verbatim transcript was more complete and accurate in its account of what really happened, the judge failed to inform the defendant of possible penalties. The case was remanded for a hearing to determine whether the defendant understood the penal consequences of his plea.

ED MONAHAN

ACLU BIDS FOR JUSTICE

The American Civil Liberties Union has recently offered to buy the United States Justice Department. The "move" came on the heels of President Reagan's proposal to sell the Federal Housing Administration to private interests. Noting the President's penchant for attempting to turn over government programs to the private sector, ACLU Executive Director Ira Glasser issued a tongue-in-cheek statement apprising repoters that ACLU had just sent a letter to Attorney General Edwin Meese telling him it was "prepared to take over the entire Justice Department, including its assets and liabilities, which are many." ACLU spokesman Ari Korpivaara reports that there is "probably about $25" in ACLU cash reserves to launch such a takeover. Glasser said the offer was made because, "those with a long-term investment in justice believe that the Department is now nearly bankrupt. An exam by our auditors of the balance sheet of its key unit, the Civil Rights Division, shows liabilities exceeding assets to an alarming degree."

Book Review

Patricia Van Houten

DOING SOMETHING ABOUT CHILD ABUSE: THE NEED TO NARROW THE GROUNDS FOR STATE INTERVENTION.
18 Harv. J.L. & P.P. 539 (1985).
Review by Patricia Van Houten

There are two problems with society's handling of child abuse and child neglect according to Douglas J. Besharov, the author of this law review article found in the Harvard Journal of Law and Public Policy. On one hand, the legitimate life-threatening cases are too easily lost in the system, and on the other hand the system has been inundated with false or unnecessary complaints overwhelming the social services delivery system causing unwarranted state interference into family matters.

Besharov's main contention is that in an effort to rectify past lack of intervention the states have over-compensated and too broadly defined abuse and neglect. This has lead to overreporting and unnecessary intervention of abuse and neglect cases due to fear of liability on the part of those professionals statutorily required to report, investigate and treat these cases.

Mr. Besharov traces the development of child protective legislation over the past two decades. He places the current situation into a historical context. Since the 1960's, the increasing awareness of this problem has led to the passage of considerable federal and state legislation. The impact of this legislation can be seen in the jump of reported abuse cases over the years. In 1963, approximately 150,000 children were reported to authorities, by 1972, there were 610,000 annual reports. In 1983, there were 1.3 million children reported. The development of child protective services has struggled to keep up with these complaints.

He discusses the problems that arose with this avalanche of reports. Much of the intervention is unwarranted and some of it is actually harmful to the families involved. Evidently 65% of all reports of suspected child abuse turn out to be "unfounded," representing 750,000 children per year. (His authority for this figure is his law review article entitled: The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect, 23 Vill.L.Rev. 458 (1977-78 at 471). An unfounded complaint is a social stigma and can haunt the family for years.

A filing of a complaint and subsequent investigation can lead to interference with family life, a basic protected right considered by the Supreme Court to be "essential", "Basic Civil Rights of Man," and "rights more precious...than property rights." Record numbers of children have been removed from their homes, and placed in foster care often with no more care than received in the original family setting. The professionals, social workers usually, are so afraid of criminal and civil liability for mishandling any case of suspected abuse that their tendency is to err on the side of removal of the child. This disruption makes it difficult to fully reconcile the family at a later date.

Besharov's proposal is that definitions and procedures should be developed to prevent overreporting as well as to provide adequate mechanisms to deal with the serious cases. He wants to do this by narrowing the grounds for intervention.

The first way to do this is by redefining standards for intervention. Current standards, says Besharov, give judges and social workers too much discretion and too much responsibility. The suggestion is to set out laws explicitly acknowledging that neither judges nor other professionals can predict future behavior and that misguided attempts are harmful. Second intervention should only be allowed when the parent has already engaged in abusive or neglectful behavior. These children are in clear danger of future harm.

He proposes intervention only in cases where "serious harmful behavior" is identified. The focus here is on the parent's past behavior. He divides this definition into two categories. The first is "immediately harmful behavior," which is behavior which could have caused an immediately serious injury, but did not do so because of some intervening factor. The second is "cumulatively harmful behavior" behavior which will cause serious harm to the child over a period time.

Besharov believes that while "something must be done," it must be narrowed so as to clearly defined occasions for preventative intervention. He attempts to do this by only authorizing intervention in situations encompassed by the above two definitions. His proposal would oppose intervention when "minor assaults" and "marginally inadequate child care" is involved. Besharov points out that often child protective services are an infringement on parental rights and often do more harm than good. Sometimes all that is involved is a difference in child rearing approaches or a prejudice toward families or cultural differences.

It is not possible to protect children from all possible future maltreatment as society barely has the resources to provide services to those families where serious harmful behavior is identified. By tolerating some degree of not perfect behavior, resources will be focused on those children with the greatest needs.

Patricia Van Houten

"ADOPTED CHILD SYNDROME" USED IN DEFENSE OF ARSON CASE

The arson and murder trial of a 15-year-old defendant in Wayne County (New York) involved a defense known as "the adopted child syndrome." In 1984, the defendant set fire to his house, killing his adoptive parents in the process. An expert witness for the defense testified that the trauma of adoption and the fear of abandonment may have produced a psychotic insane rage in the defendant when he set the fire. According to Dr. David Kirschner, co-director of the South Shore Institute for Advanced Studies in Merrick, Long Island, the filing of a petition by the parents with the Family Court may have thrown the defendant into a psychotic rage during which he lost his sense of reality and set the fire. "He felt they were going to send him away to an institution, and that reacted with his past traumas of rejection," Dr. Kirschner said. Dr. Kirschner emphasized that the adopted child syndrome "does not apply to the vast majority of adopted children who turn out as normal as anyone else.... The 10 to 15 percent of adopted children who display these problems, though, represent a large number in an absolute sense, and present immense difficulties to society." According to the defendant's attorney, NYSDA vic-president Ron Valentine: "The key to the defense is that the kid was psychotic. The adopted child syndrome certainly played a part in getting him to that point, but it was associated with a number of other psychological conditions."

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