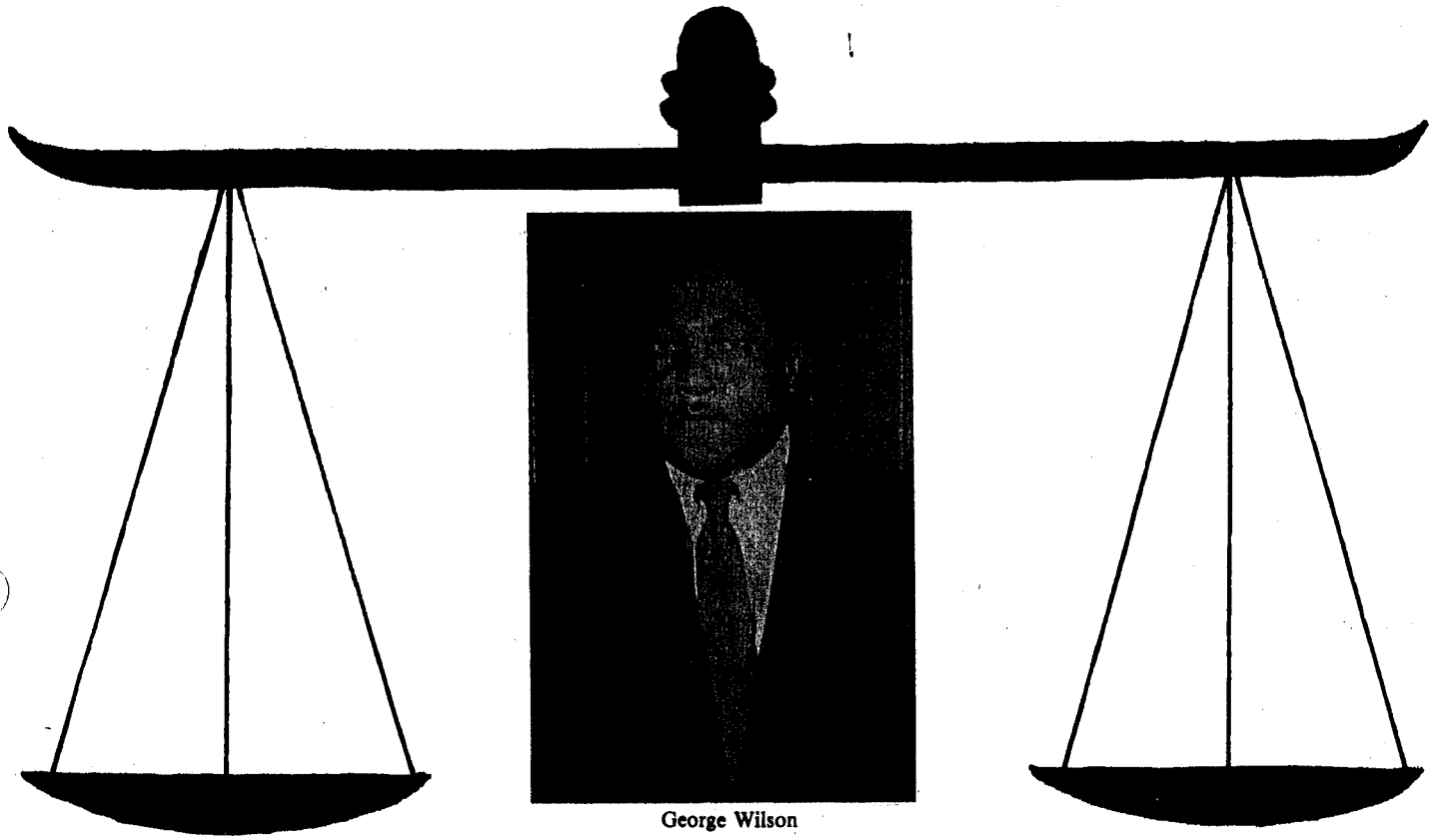
THE ADVOCATE

Vol. 8 No. 6 A Bi-Monthly Publication of the DPA October, 1986



George Wilson

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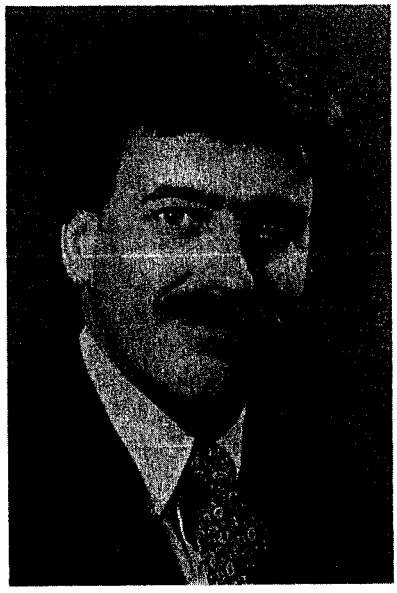
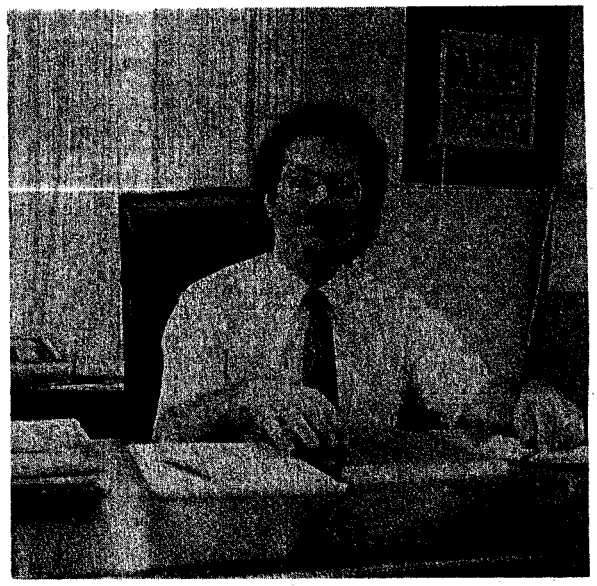
Written Interview with Paul F. Isaacs on page 10.

Judge James E. Keller on video taped proceedings on page 29.



Paul F. Isaacs

The Advocate Features



Steve Megerle

Steve Megerle worked for four years as a street patrolman in Covington. That experience has helped a lot in his practice. He is an active member of the Fraternal Order of Police.

Steve's practice in Covington, Kentucky, consists of personal injury, civil law and criminal defense. Steve likes the balance of his practice, but criminal law is by far the most challenging and exciting. He says that he really can't afford to do public defender work alone, but the Northern Kentucky roster system allows him to try or assist in criminal cases. He handles 50-60 felony cases a year.

Steve clerked for Dick Slukich and Bob Carran during law school and said that he learned a great deal about the actual practice of law from those two criminal defense lawyers. He feels it's essential to clerk to gain some practical experience before you actually try criminal cases.

Steve says it's a matter of persuasion to try to present an understandable case, and it's important to draw on your life experience. In cases he takes a common sense approach that he hopes the jury will understand. "As most technical issues are taken up before trial," he gears ... "the trial to the understanding of the jurors." He gets his theory of the case before the jurors as early as voir dire. He prefers to argue the case rather than get into the background of the prospective jurors, once he has explored whether there are any inherent prejudices.

"Also, it is very important to spend time with the client." Trust is a hurdle to get through because I'm appointed rather than chosen. He says since the Judge determines whether the client is entitled and is in need of a public defender, the client becomes confused for whom the public defender works. As a public defender he evaluates the case and give the client a basis for a decision to go to trial or to enter a plea.

Bob Carran said of Steve, "In a short period of time Steve Megerle has established himself as one of the best lawyers in Northern Kentucky to take a hard case and try it hard. His results have been excellent."

A 1979 graduate of Salmon P. Chase School of Law, Steve is on the Kenton County civil pro bono roster and the Federal Public Defender in the Eastern District.

THE ADVOCATE

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Secretary George Wilson On The Corrections Cabinet: A Written Interview

Q. What are you most proud of as Secretary of the Corrections Cabinet?

A. As Secretary of the Corrections Cabinet I take a great deal of pride in this Cabinet's ability to operate Kentucky Corrections within state and federal guidelines, without repeated serious problems and within the current financial limitations posed by the economy. This is due to the work of dedicated and resourceful staff.

Q. What are the biggest problems facing your Cabinet?

A. Our biggest problem is similar to that of most public agencies, it is a financial problem. Our current budgetary allotments have not kept pace with the needs created by the continual growth of the felon population.

Q. What are the fundamental goals of the Corrections Cabinet?

A. The Cabinet attempts to seek a balance between a number of goal related areas. First, the Cabinet attempts to seek a balance between the goals of: incapacitation and deterrence for public safety, offender behavioral change to minimize recidivism which enhances public safety, and the need to provide our inmates and community services offenders with fair and humane treatment.

Q. If money and human limitations were no object, what one thing would significantly improve your Cabinet's chances of reaching your goals?

A. Additional resources are a real key to reaching our goals. The additional funds are the answer to retaining and obtaining qualified, professional and motivated staff. Funds for salaries, training, supplies and adequate facilities, all impact the quality of staff and quality of staff performance. The heart of any correctional system is its staff. If the staff is professional, motivated and supported, public safety, behavior change of inmates, maintenance of facilities, efficiency of resource usage, and fair and humane treatment of inmates are all enhanced.

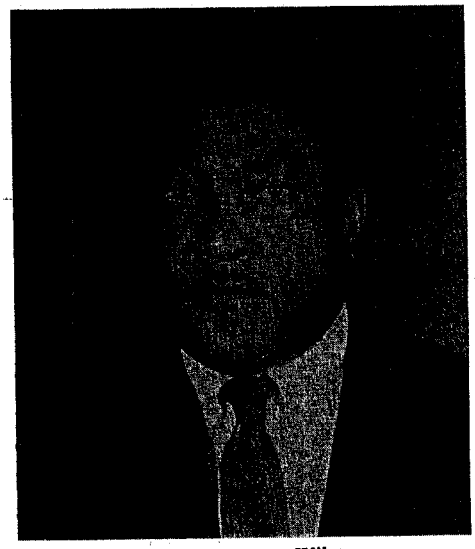
Q. How many "beds" does the state prison system have at the present time?

A. As of September 19, 1986 the Kentucky Corrections System had 4808 institutional beds and 519 community center beds.

Q. How many additional "beds" will the state prison system have available within the next one to two years?

A. The state will have several hundred additional "beds" available over the next three years. Most of these are minimum custody, community servies, or regional jail beds.

Q. What is the number of prisoners presently in state prisons?



Secretary George Wilson

A. On September 19, 1986 there were 4715 individuals incarcerated in state institutions.

Q. What is the number of state prisoners presently in county jails?

A. On that same date there were 715 state inmates in Kentucky county jails.

Q. What is the average cost of maintaining one Kentucky prisoner for one year?

A. The cost per day for FY 84-85 was $30.54 or $11,148.90 per year per inmate.

Q. What is the average cost for maintaining a prisoner at: A) Eddyville; B) LaGrange; C) Blackburn; D) Frankfort Career and Development Center; E) Roederer Farm Center; F) Bell County Fores-

try Camp; G) Kentucky Correctional Institute for Women H) Luther Luckett; and I) Northpoint?

A.	Annum	Diem
KCIW	$13,611.94	$37.29
Eddyville	13,112.44	35.29
LaGrange	11,685.42	32.01
LLCC	11,165.95	30.59
NTC	10,711.16	29.35
Blackburn	8,787.16	24.07
FCDC	9,856.94	27.01
BCFC	5,983.99	16.39
Roederer	5,814.48	15.93

Q. What is the most difficult type of prisoner to house? What is the easiest type of prisoner to house?

A. The mentally ill or retarded are probably the most difficult to house. While actively psychotic inmates are treated at the Kentucky Correctional Psychiatric Center, those that are otherwise emotionally disturbed or mentally deficient must be housed in the institutions.

"White collar" offenders are probably the easiest to house. They come to the system with fewer deficiencies and thus require fewer services. The second easiest would probably be non-violent minimum security inmates.

Q. How many Corrections Cabinet staff persons are invovled in rehabilitation programs?

A. Academics (including OJT) - 120
Treatment - 98
Total - 218

NOTE: All vocational education employees are Cabinet employees. We also have some counselors on contract. However, Personnel does not have an exact count.

Q. How many prisoners are doing work during their confinement?

A. Other than those physically or mentally unable, less than 1% of the inmate population do not have work assignments. This may be full time or part-time for those involved in other programs. Inmates can be assigned work with or without their consent.

Q. What kind of work do the prisoners do?

A. 1. Food Services;
2. Farm work;
3. Janitorial and Maintenance;
4. Correctional Industries:

print shop, upholstery, wood working, license plates, data entry, soap products, metal fabrication, furniture refinishing, auto body, clothing (institutional), furniture.

Q. How much do they get paid for their work?

A. Industries - .25 to .50 per hour
Non-industry - .25 per day to $1.20 per day
Food Services - .30 per day to $1.40 per day

Q. What is the biggest reason why more prisoners are not working in the institutions?

A. Mental or physical problems which render them incapable of work.

Q. What kinds of treatment are available for persons with mental difficulties?

A. Kentucky Correctional Psychiatric Center has 60 beds for seriously disturbed inmates. They also offer out-patient treatment.

Q. What types of treatment are available for persons with sexual difficulties?

A. We have counseling programs at Kentucky State Reformatory and Luther Luckett Correctional Complex. There are presently 50 to 60 offenders in these programs. This treatment program will be expanded using monies appropriated by the General Assembly. We have approximately $650,000 each year of the biennium to fund an institutional and after care program for these offenders. We hope to address the needs of 400-500 offenders.

Q. What other kinds of treatment are available for prisoners?

A. We offer various alcohol and substance abuse programs, living skills courses, groups for violent offenders, and various individual psychological and counseling services.

Q. What alternate sentences does the Corrections Cabinet encourage?

A. The Cabinet supports the use of community servies placement whenever possible and appropriate. When everything else is equal, and the need for public safety can be met, probation and parole is preferable to incarceration. Incarceration is for the serious, repeat, high-risk offender.

Q. Why are alternate sentences not used more by trial judges?

A. They are used frequently, for example, in Kentucky we supervised almost 11,000 people on probation and parole while we have only approximately 5,300 in our state institutions and halfway houses. If judges do not use alternate sentencing, it may be due to a lack of accurate information about the alternatives and/or public opinion.

Q. What role do you see public defenders playing in the Kentucky criminal justice system?

A. Public defenders play an extremely important role in the criminal justice system -- they safeguard the legitimacy and fairness of the system. Public defenders function to make sure the defendant is not overwhelmed by the State, to keep the State honest. Without public defenders to safeguard the system it could become unfair and/or corrupt.

Q. What is the projected growth in Kentucky's prison population over the next five years?

A.

July 1, 1987	6,698
July 1, 1988	7,253
July 1, 1989	7,854
July 1, 1990	8,482
July 1, 1991	9,571

These are conservative estimates or our institutional population based on some tentative calculations. We are currently gearing up for more sophisticated population projection techniques.

Q. How does the new "truth in sentencing" law expect to affect your Cabinet and prison populations?

A. The impact of the "truth in sentencing" section of House Bill 76 is difficult to assess. I believe the information on an offender's prior history will result in longthier sentences from juries. However, it may also promote more plea bargaining and so reduce the number of jury trials.

Q. What was the most significant Legislation passed in your opinion, by the last General Assembly?

A. House Bill 76 and House Bill 535 were the two most significant pieces of legislation. House Bill 76 will dramatically impact our population. However, it is significant in another way. This bill was the product of a series of meetings and negotiations between the Cabinet, the bill's sponsors, and the victim's advocates group. It is a good example of the political process through which the state attempts to meet public needs without seriously overtaxing state resources.

House Bill 535 is significant because a comprehensive treatment program was established for sex offenders. These are serious offenders who need treatment for the sake of public safety. This again, is an example of the state's responsiveness to public concerns.

STATE PRISONS BURST AT SEAMS

The Kentucky Post carried a story on July 21, 1986, on prison backlog in Kentucky. In that article, Deputy Corrections Secretary, Jack C. Lewis, indicated that if overcrowding in the state's prisons is not alleviated soon, at least by stopgap measures, critical prison problems could arise by winter.

Campbell and Kenton counties are 2 of 12 counties in which the Corrections Cabinet is under court order to take state prisoners within 30 days.

On July 21 Kenton county had 8 state inmates awaiting transfer and Campbell county had 14. Campbell county Jailer, Earl Ping said, "Past experience has taught us there that when our state inmates start backing up, that's when we start having our problems. If they don't start moving them out of here, we're definitely going to start having problems here.

The Corrections Cabinet is drawing up proposals for temporary solutions. They planned to submit them to the Governor within six weeks.

"We consider ourselves in an emergency situation with the backlog, particularly with the ever-increasing number who require minimum security," Lewis said.

The backlog is unfortunate but necessary, Lewis said. The proposals to be submitted to the Governor will include converting some minimum-security beds to medium-security beds and seeking more space at regional jails.

As of July 21, the state had 777 inmates in county jails awaiting transfer to state prisons, said Steve Berry, the cabinet's classification manager. The backlog totaled 700 at the first of the year, he said.

About 200 minimum security beds are expected to be ready by the first of the year -- 100 each at prisons in Frankfort and Bell County.

The state prison population was 6,434 as of July 1.

The Lexington-Herald reported July 25, 1986 that Judge James Keller found the Corrections Cabinet in contempt of court on July 24 for failing to take custody of state prisoners who are left in the county jails longer than the 30 day limit Keller ordered two years previously.

The article noted that the state pays $12.50 per day per prisoner to the county to keep the state

prisoners but it costs Lexington more than that to house them. Sabbatine said that Lexington had been burdened unfairly with the cost of keeping state prisoners and that the fines would help compensate the Urban County Government for the prisoners' keep. Keller ordered that 85 percent of the fines collected go to the local government, with the Fayette County public defender office getting the rest.

According to a September 10, 1986 Cincinnati Post article, Hamilton County (Cincinnati) Sheriff, Lincoln Stokes, asked the county commissioners to raise the reimbursement for housing prisoners in the county jail from $45 to $50 per day, an 11% increase, beginning in 1987 to cover increased operating costs.

The Kentucky Post reported in its July 26, 1986 paper that Jack Lewis said, "We're at a critical point, there's no doubt about it."

The cabinet operates three medium-security facilities -- LaGrange State Reformatory, the Luther Luckett Correctional Complex and the Northpoint Training Center. All three are full.

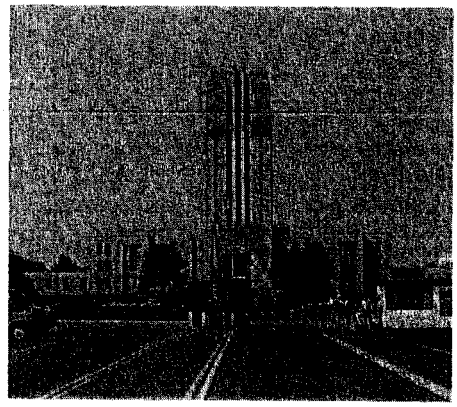
The problem is particularly acute at Northpoint where workers are removing asbestos from the dormitories. The work creates a temporary loss of about 50 beds.

"The legislature is passing more and more tougher laws and more and more crimes are being committed," Lewis said. "Two years ago we predicted that the population would double in 10 years from today and we haven't made the proper provisions.

Construction of a 500-bed medium-security facility in Morgan County was approved by the 1986 General Assembly.

"We could fill it today," Lewis said.

The August 11, 1986 edition of the Lexington-Herald reported that Corrections had amassed $2,728 in fines for failing to remove state prisoners from the Lexington jail.



Kentucky State Reformatory

The Kentucky Post in its August 16, 1986 edition indicated that Kenton County sent 7 prisoners to the Pulaski County jail due to lack of space caused by state inmates.

The Kenton County Jail is being expanded from 104 beds to more than 200. Judge-Executive Bob Aldemeyer gave Knauf permission yesterday to negotiate an agreement with Pulaski County after learning the jail overcrowding had worsened.

"We're bulging at the seams and can't do anything," Aldemeyer said.

Aldemeyer said the jail overcrowding grew worse this week when Covington police mounted an intensive crackdown on prostitution.

Police spokesman Sgt. Hank Warden said authorities held off executing several arrest warrants for prostitution-related offenses after learning there was no room in the jail.

"That puts a cramp in police operation in trying to control street crime if you don't have a place to put them." Warden said.

Two women charged Wednesday night during the city's crackdown on prostitution spent the night in the Campbell County Jail because there was no room in Kenton County, Warden said. They were transferred to Kenton County the next morning. Many other counties across the state are backlogged with state inmates. Steve Berry, who is in charge of intake for the state, said yesterday 828 inmates are awaiting transportation to a state facility.

The September 10, 1986 Lexington-Herald reported that an attorney for inmates at two Kentucky prisons predicted yesterday that a federal judge would continue overseeing the Corrections Cabinet instead of dismissing a lawsuit over prison conditions.

The cabinet's attorney predictably disagreed when the issue was raised before the General Assembly's interim joint Judiciary-Criminal Committee.

The subject of the speculation was U.S. District Judge Edward Johnstone, who must decide whether the state has complied with a 1980 consent decree that set limits on prison population and ordered numerous institutional improvements.

Johnstone presided this summer over a three-week trial on the cabinet's request to dismiss the suit and to be released from the consent decree.

"As a practical matter, the judge will find they are in compliance with 90 percent of the consent decree," said Oliver H. Barber Jr.,

a Louisville attorney who represents inmates at the state penitentiary in Eddyville and the state reformatory in LaGrange.

But he said he thought Johnstone would keep the consent decree in effect because the cabinet admits it could not accommodate a sudden influx of prisoners if ordered to do so by the legislature or the governor.

"The judge ought to maintain this case on his docket a sufficient period of time to make sure there's no backslide," Barber said.

The cabinet's daily prisoner report showed that 856 convicted, sentenced felons remained in county jails yesterday, awaiting transfer to a state institution.

Barbara Jones, general counsel for the cabinet, said Johnstone might retain limited jurisdiction and dismiss the rest of the case.

"We have clearly demonstrated to the court there's no reason to believe we will violate the rights of any prisoner," she said.

Barber conceded that the legislature "should be pleased" by progress that has been made to relieve prison crowding and by the cooperation of both sides in the lawsuit.

The state has about 4,800 prison beds, plus about 500 beds in community centers, said Al Parke, the cabinet's commissioner of adult institutions.

CORRECTIONS TURNS TO PRIVATE SECTOR

The August 22, 1986 Kentucky Post reported that the state is expected to decide by October 1 which private corporation should receive a contract to operate Kentucky's five prison farms.

Jim Clark, a spokesman for the Finance Cabinet, said negotiations between the state and those with an interest in the project are expected to conclude by mid-September.

The move to surrender authority over the operation of prison farms represents the state's latest move toward private operation of prisons. Last year the cabinet awarded a contract to the U.S. Corrections Corp. to operate a private, minimum-security prison in St. Mary.

According to the letter sent to the companies, the Corrections Cabinet has determined it would be more efficient for the state to contract with a private vendor than continue to run the prison farms.

The Corrections Cabinet will continue to provide security at the facilities.

The state facilities involved in the negotiations are the Western Kentucky Farm Center in Fredonia, the Northpoint Training Center in Burgin, the Blackburn Correctional Complex in Lexington, the Roederer Farm Center in LaGrange, and the Kentucky Correctional Institute for Women in Pewee Valley, which operates in conjunction with Roederer.

The combined size of the five institutions is 5,625 acres. Of that, 4,925 acres are pasture and crop-producing. The total number of employees - outside of inmate labor - is 48.

According to the cabinet, 290 inmates work on the farms, and their skills range from no farming skills to highly experienced. The average inmate stays at a facility for three to four months.

From July 1, 1984, to June 30, 1985, more than $3 million in income was generated through the sale of food to 10 prisons. The income between July 1, 1985, and June 30, 1986, was about $3.8 million.

A cannery is operated at Roederer, where about 40 inmates are employed on a seasonal basis. A modern cannery was opened at the Western Kentucky Farm Center last year. About 25 garden and orchard products are canned at each facility.

* * * * *

DEATH ROW DIDN'T INSULT COLLINS, WARDEN SAYS

The warden of the Kentucky State Penitentiary disputed news reports that Death Row inmates joined in shouting obscenities at Gov. Martha Layne Collins.

Gene Scroggy, through spokesman Dan Huck at the Corrections Cabinet in Frankfort, said Death Row inmates are among the best behaved at the Eddyville prison.

Huck said Scroggy thought the shouting heard by Collins during a tour of the prison came from the three levels of cells above Death Row.

News reports said Death Row inmates had joined in the shouting. Collins said before leaving the prison that she thought much of the noise came from Death Row.

Herald Leader
August 1, 1986

NO ROOM IN THE INN

Few issues have been studied by state government as frequently over the past few years as the crisis in corrections.

In 1984, with the prison population bulging at the seams, Gov. Martha Layne Collins appointed a blue ribbon task force to determine how to address the situation. When that panel determined that a medium-security prison should be built, a legislative committee was formed to determine where it should be established and how much should be spent.

And then there was the seemingly endless series of committee meetings during the 1986 General Assembly, where lawmakers hemmed and hawed over proposals to bring prisons up to some level of decency.

Now, at a time when the smoke should be clear, comes word that the Corrections Cabinet is facing yet another crisis. As of last week, 777 state prisoners were backed up in county jails. That number is probably above 800 now and if steps aren't taken immediately, the state will find itself with a house full of guests and nowhere to put them.

It's been more than four years since a consent decree was signed limiting the number of prisoners in Eddyville State Penitentiary and LaGrange State Reformatory. Since then, the Northpoint Training Center near Danville has opened and additional beds have become available at the Luther Luckett Correctional Complex.

Despite all that, the system is not large enough to handle the population. Corrections Deputy Secretary Jack Lewis said last week if the planned 500-bed medium-security prison in West Liberty were opened today, the state could immediately fill it and still have inmates left over.

The problem obviously is not the fault of Corrections Secretary George Wilson, who time and again has warned the legislature and the public-at-large that more needed to be done to handle the ever-burgeoning prison population.

When it had the opportunity to move on the situation several months ago, the 1986 General Assembly indeed did - in the wrong direction. It increased the required prison time for some convicted felons without first determining how prisoners would be housed for a longer period of time. It adopted a mistake-ridden truth-in-sentencing law, but failed to properly consider certain types of alternate sentencing that would affect the population problem to at least some degree.

The time is fast approaching when lawmakers simply are going to have to face up to their sworn duties. The federal court has limited the number of inmates within the system while state circuit courts are fining the Corrections Cabinet for keeping state prisoners too long in local jails.

The choice is simple: The state must either adopt some more methods of alternative sentencing or start building.

The proper solution probably is somewhere midway between the two.

Kentucky Post Editorial
August 2, 1986
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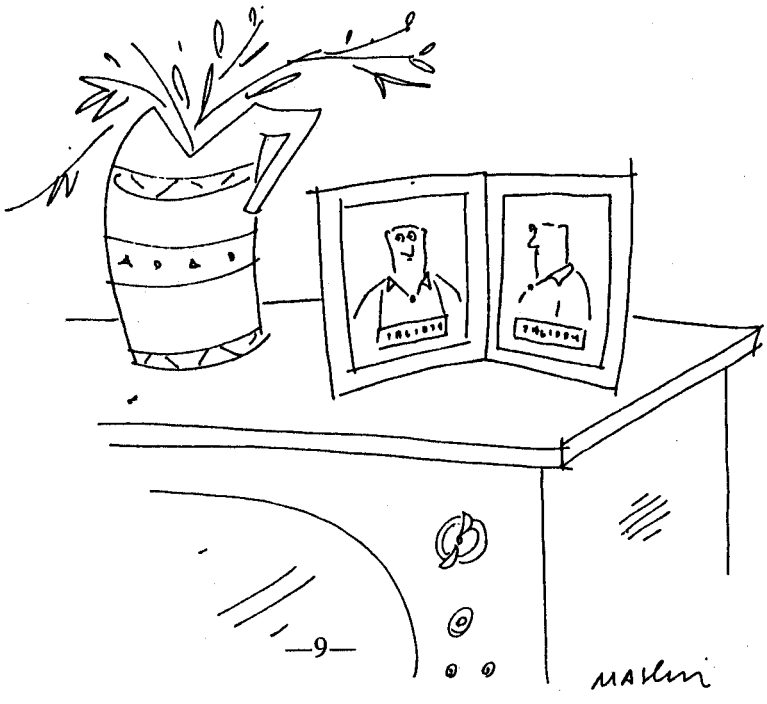

Drawing by Michael Maslin
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Public Advocate, Paul F. Isaacs On The Department of Public Advocacy: A Written Interview

Q) You have been Public Advocate for three years. What do you feel is your greatest accomplishment in those three years?

A) I do not believe that there are any particular accomplishments that I could adopt as being mine, but I do believe that several positive events have occurred during the last three years as a result of a lot of hard work by all parts of the department.

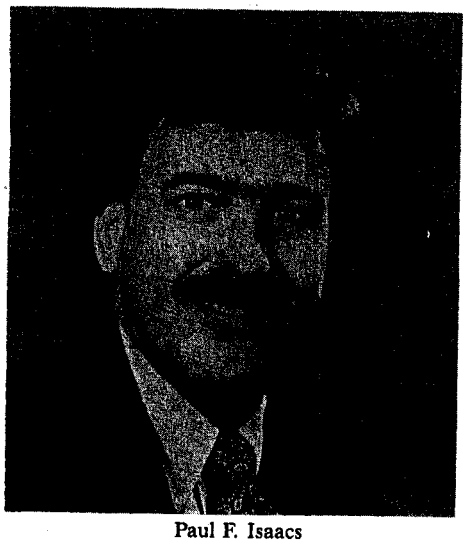
The efforts of our private contract attorneys, the Public Advocacy Commission, our Cabinet Secretary, and concerned legislators resulted in the last session of the General Assembly increasing the funding for the contract attorneys in the public advocacy system. This is the first significant increase in funding this segment of the system has received in recent times. Also, the General Assembly passed the new Juvenile Code and provided the department sufficient funding in the second year of the biennial budget to fully implement the department's responsibilities under the new code.

Another accomplishment of the department, for which the Public Advocacy Commission deserves credit, is the recoupment program instituted by the department. In FY83, the department recouped from clients $73,930 which has more than doubled to a total of $154,948 for FY86. Since these funds must be returned to the local programs for public advocacy services in that county, these funds constitute new funds for the local programs.

In the area of Protection and Advocacy, several important accomplishments have occurred during the last three years as a result of a lot of dedicated effort by the staff of that division. The legislature passed a bill of rights for individuals with developmental disabilities in order to provide a complete, effective system of services. Another very exciting development is the growing concept of self advocacy, which emphasizes the concept that those with developmental disabilities are their own best advocates. With the assistance of our staff, Kentuckians Together, Inc., a statewide network of self advocacy groups, has been formed and has held three conferences for individuals interested in being or working with self advocates.

This year Congress passed new legislation which designated Protection and Advocacy agencies as the advocacy program for individuals in mental institutions or who have been released within ninety days. Governor Collins has signed the necessary assurances for the department to receive the federal funds to implement this program and the Protection and Advocacy Division is currently expanding its staff to provide these services.

Q What do you feel is your greatest disappointment in those three years?



Paul F. Isaacs

A) A lingering problem in the department is the caseload that both our full-time staff and our contract attorneys have to handle. The department's caseload has increased over nine per cent (9%) over the last year. In many of our full time offices, with our appellate attorneys, and with Protection and Advocacy staff, overtime is the rule and many of our staff are carrying the maximum amount of compensatory time with little prospect of using the excess time. Staff burnout is becoming more and more of a problem and has led to increased staff turnover. Replacing experienced staff with inexperienced lawyers adds more work to the remaining staff. Of course, increased caseloads for our part time attorneys requires them to do more work for the same money. The increased funds for the contract attorney has helped some, although the level of funding is still quite

low. Not alleviating this problem has been very disappointing to me.

Q) What are the fundamental goals of the Department of Public Advocacy?

A) There is only one fundamental goal of the Department of Public Advocacy. That goal is to assure all of our clients the same effective assistance of counsel that a person who can obtain counsel privately would receive. Equal protection of law for the citizen accused, individual with a developmental disability, and individual whose mental state could result in that individual being incarcerated is our statutory and highest duty. Meeting that duty must be the Department's goal.

Q) What is the state of the Public Advocacy System in Kentucky?

A) Obviously there continue to be some problems in the Public Advocacy System, but overall I am very pleased with the services provided our clients.

In the last fiscal year, our trial attorneys, both full time and part time, have been able to secure some relief for their clients in 45.5% of their cases in district court and in 47.8% of their cases in circuit court. This relief includes everything from an acquittal to a plea or conviction on a charge less than that which the client was originally charged. At the appellate level for the last year we have computed the reversal rate, FY84, the reversal rate on appeal was 19%. These figures indicate that our attorneys are providing our clients with a very high level of services.

The Protection and Advocacy Division continues to provide a high level of advocacy services to their clients with the same level of staff at a time when their caseload has almost doubled. The division has successfully litigated a federal district court lawsuit which restored the SSI benefits to a Down's syndrome client and a case involving the right of a special education student to a summer school program. Recently, the division was commended by the regional office of the United States Department of Health and Human Services as a model protection and advocacy program.

Q) What are the biggest continuing problems faced by the Department of Public Advocacy?

A) Although the legislature made significant progress in addressing the historic underfunding of the department, caseload demands continue to increase. The caseload information is not complete for this fiscal year, but all indications are that the department's caseload will increase by approximately nine per cent (9%) over last year in the Defense Services Division and double in the Protection and Advocacy Division. The increased caseload is further exacerbated by the so called "Truth and Sentencing" statute passed in the last legislature which requires a separate sentencing hearing in every felony case which goes to a jury. Continuing to meet our statutory responsibilities with our current resources is the ultimate problem for the department.

Q) What solutions are you pursuing for these continuing problems?

A) As Public Advocate I am always searching for more efficient methods to meet our statutory duties, but I certainly have no magical solution to this ever present problem. In the last year, the department has initiated some changes which we hope will provide more direct services and reduce administrative costs. The department was reorganized and supervision of our field offices was moved to three of our regional offices. This allowed us to establish a training section and a major litigation section in order to coordinate all defense services training and to provide assistance to local attorneys, part-time and full-time, in the most complex cases, including capital cases.

I am currently working with two circuit judges to develop a public advocacy plan for their multi-county judicial district which will utilize both state and local funding in order to provide a more efficient operation in that district. If this plan works, it could become a model for those areas.

I believe that this is the only method by which a solution can be found. There must be a good working partnership between all parts of the criminal justice system with the understanding that this is not a public advocacy problem but a systemic problem which all of us must address. Permanent solutions will come when the courts, prosecutors, the private defense bar, and public advocates begin to discuss how to insure that all of the needs of the criminal justice system are met and quit fighting like feudal lords over limited resources.

Q) How do you feel about the criminal law legislation passed by the recent General Assembly?

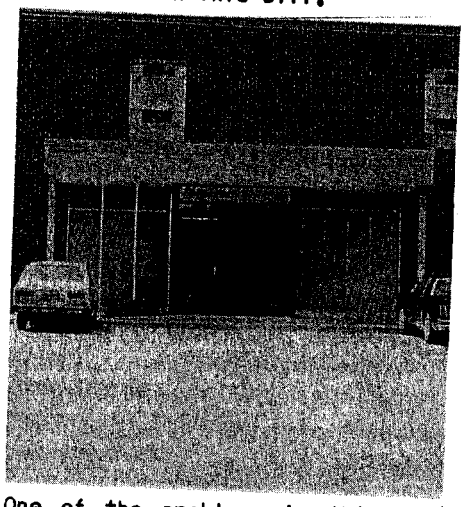
A) Dickens best summed up my reaction to the criminal law legislation adopted in the last session: "It was the best of times, it was the worst of times."

The new juvenile code which finally passed is the most progressive treatment of juvenile law ever adopted in Kentucky. This code provides a comprehensive approach to children and their problems in the context of the family and emphasizes services without court intervention as the preferred solution to children's problems. Also the legislature clarified the duty of parents to provide counsel for their children in juvenile court in a manner that assures counsel for the child.

There was other progressive legislation passed in the area of criminal law such as the following enactments: the Parole Board must see all sentenced felons confined in county jails within thirty days of their parole eligibility, public intoxicants must have two prior offenses within a twelve month period before they can receive a jail sentence, the Corrections Cabinet is required to establish a special program for sex offenders, a program for home incarceration for misdemeanors and Class D felons was established. Another bill shifts the responsibility for providing psychiatric or sociological services and evaluations for criminal defendants from local government to the state, which could result in judges being more willing to order these tests.

Much of the criminal law legislation during this last session related to the broad area of victim's rights. The legislature passed a victim's bill of rights which to a large extent is a reminder to prosecutors that they should treat their witnesses with courtesy and respect. Also the legislature gave the victim the right to attend parole hearings or to submit written comments prior to the parole hearing.

In the closing weeks of the session, the legislature passed a hastily drafted bill which is one of the poorest bills I have seen enacted in recent times. The infamous, so called "Truth in Sentencing" statute radically changes the practice of criminal law in Kentucky and is going to tax the resources of the criminal justice system with a complicated sentencing procedure of very dubious value. The next General assembly will be faced with unravelling a tangled web spun by the provisions in this bill.



One of the problems in this last session was the absence of criminal defense lawyers to point out the deficiencies in many of these bills. The Commonwealth Attorneys were present at many of the hearings and defense attorneys are going to have to get organized if they expect to have any impact on criminal justice legislation in the future. The Department of Public Advocacy cannot be successful as the lone voice in opposition to these bills.

Q) What is the Department of Public Advocacy doing in light of this new legislation?

A) The Department has established a Juvenile Code Task Force to plan for the implementation of the Department's role under the code. The Task Force is currently planning training programs and practice manuals that will be available prior to the effective date of the code.

At the recent Annual Seminar, a session was devoted to the so called "Truth in Sentencing" statute which covered several challenges to this statute as well as some strategies to cope with its provisions. Our training programs and this publication will continue to develop more information that is useful for attorneys faced with representing clients under these new statutes.

Q) What will the Department's goals be in the next legislative session?

A) During the next two years the Department will be surveying all of its attorneys for legislative proposals and our legislative agenda will come from those suggestions. Based on past experience, the major concern expressed in the survey will be increased funding but the Department is interested in statutory recommendations also. Anyone who has a suggestion concerning legislation should send it to my attention so we can include it in our legislation file which we are constantly revising based on your ideas.

Q) How are the death penalty cases affecting the Department of Public Advocacy, and what do you see the future holding in that area for public advocates across the state and for the criminal justice system?

A) Death penalty cases consume a major portion of the resources of our private contract attorneys, our full time trial offices, and our appellate attorneys. One death penalty case can absorb the entire resources of a local county system,

completely disrupt a regional office, and demand most of an appellate attorney's time. The Department created the major litigation section in order to coordinate the services required in these cases but this section certainly does not have the resources to handle all of the death penalty cases statewide. The attorneys in that section provide direct services at the trial and appellate level and also serve as consultants to local attorneys handling capital cases. However, this section is very small with only four attorneys and cannot meet the demands statewide.

I do not see any relief in sight for these cases because there is no indication that the number of cases is going to diminish. Society, at this point, seems to be willing to pay the enormous economic price these cases demand and as long as that is true, capital cases will continue to demand more and more of the criminal justice system's resources for all facets of the system.

Q) How has the prison crisis in Kentucky affected the Department of Public Advocacy?

A) Obviously the more prisoners in Kentucky's prison system, the demand for the services of the Department's post conviction attorneys grows. The present overcrowding conditions, with the resulting back up of state prisoners in local jails, have placed greater demands on local public advocates who must continue to provide legal services to these prisoners who have a myriad of legal problems from parole eligibility to detainers from other jurisdictions and many other post conviction problems.

As the local jails get more and more crowded, the crime rate inside the jail from assaults, escapes, and other criminal activity rises and increases the caseload. Local jails do not have the formal adjustment proceedings prevalent in state correctional facilities to control inmate behavior outside the formal court proceedings so there is no mechanism for controlling behavior in the jail except taking the inmate to court. The combination of these two factors create more work for the Department.

Q) The Corrections Cabinet has and will be putting on line new prisons. How will the Department of Public Advocacy serve the inmates in those prisons?

A) The United States Supreme Court requires the Correction Cabinet to provide access to the courts to all of its prisoners. That function has been delegated Department so any new prison will require expansion of our to the staff in order to provide those services at the new facility. One new facility is due to be opened in the next biennial budget period so I anticipate asking for the staff necessary to service that facility. I expect to have the support of the Correction Cabinet for the request for expansion of our staff for that facility.

Q) What can the other members of the criminal justice system do to assist the Department of Public Advocacy serve its mission better?

A) With the demise of the Kentucky Crime Commission, there has been no coordinated planning group for the criminal justice system and each component has pursued its own interests with little regard for the entire system. The Justice cabinet has recently created a Criminal Justice Planning Commission and I hope that this group will begin to look and plan for the needs of the entire criminal justice system. The resource problems of the Public Advocacy system are problems for the entire criminal justice system just as any problems of the courts, prosecutors, or other components of the system directly affect whether the system functions. It is essential that each of us in the criminal justice system abandon our parochialism and begin working together.

Q) How have your views changed since becoming Public Advocate in these last three years?

A) I don't know that my views have changed over the last three years. I began my tenure with state government as a public defender and when I was with the Justice Cabinet I continued to be involved with the Department at different times on particular problems so I was generally aware of the strengths and weaknesses of the Department when I became Public Advocate.

In the last three years I have learned that my first impression of a very dedicated staff and contract attorneys is more accurate than I could have anticipated. This is very remarkable since in the present political environment there is little public support for our work. I have come to the realization that Kentucky should be extremely proud of its public advocacy system and the dedicated individuals who work in the system. I cannot fully express my admiration to my collegues who continue to fight their client's battles however unpopular the fight is. My views have not changed, only the intensity of my respect for the individuals who make up the public advocacy system.

Q) If money and human limitations were no object, what one thing would significantly improve your Department's chances of reaching your goals?

A) The Department of Public Advocacy is no more nor less than the individuals who participate in the Department's programs. Almost without exception, these individuals are extremely committed to serving their clients and the only limitations they confront are the limitations of resources. I cannot see any limitation on the Department's goal of providing the highest quality service to our clients if there were no monetary limitations on the Department.

Q) Recently, attorneys within your Department were found in contempt of the Supreme Court of Kentucky in a capital case and in a discretionary review case. How do you feel about this?

A) I do not think it is appropriate for me to comment on these particular cases because they are still in litigation. I am concerned about the long range affect these cases could have on the Department's ability to recruit and retain staff who are carrying tremendous caseloads over which they have no control. There is little public support for the need to have public advocates and it takes a deep personal commitment for an attorney to do this work. I am afraid that some who might consider public defender work may be very hesitant about entering a field which is not only unpopular but carries the threat of public censure because of the working conditions. I am concerned about the ability of our attorneys to meet court deadlines when their caseloads continue to grow and when the Department has no funds to hire more staff. I hope that the Court will give us some direction in the future.

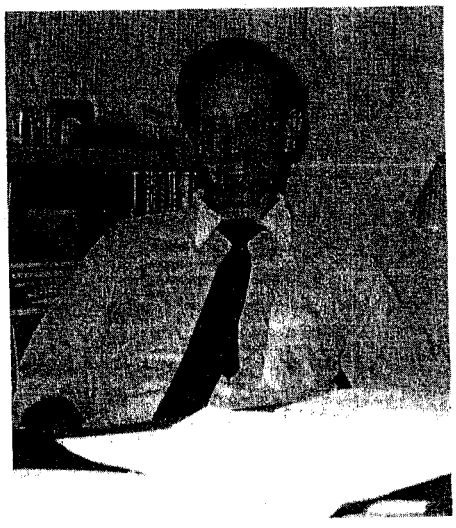
Q) Any other thoughts you have?

A) Our legal system is founded on the principle that freedom is our most precious commodity. The Department of Public Advocacy is dedicated to preserving that freedom for our public defender clients unless the government can establish its right under the law to deprive them of that freedom and to insuring our protection and advocacy clients full participation in our society. I can think of no higher vocation and I am proud of the opportunity I have had to share that vocation with an extremely dedicated and professional staff and part time attorneys.

D.P.A. Caseload Data

The process of collecting defender caseload data began with the inception of the public defender program in 1972. From 1972 until 1978 local public defenders were required to send an annual report to the central office at the end of each fiscal year. A portion of the annual report was to include caseload information on all cases in which representation was provided for the indigent-accused. This method of collecting caseload data proved unsuccessful. Many local defenders neglected to file their annual reports and some filed annual reports with only partial case counts. As a result, the central office could not obtain an accurate statewide annual defender caseload. And, without accurate caseload information, any type of caseload analysis was impossible.

In 1978 the DPA implemented a new method in its quest to obtain accurate caseload data. Sending caseload data to the central office on an annual basis was dispensed with. With the cooperation of the Administrative Office of the Courts, court clerks and local defenders were asked to commence using AOC Form 77-204. As is well



Bill Curtis

known by court clerks and defenders, this is a six part snap-out form used by judges to appoint local defenders to provide representation to the indigent-accused on a case by case basis. The form also serves as a caseload data collection instrument. In 1978 court clerks began sending the DPA's central office the "snapped-out" copy number two of AOC Form 77-204 to provide caseload data on each newly opened defender case. By the same token, defender attorneys began to send the central office the "snapped-out" copy number four of the form at the time of the case closing to provide case closing information on a case by case basis. From 1978 to 1980 all of these AOC Forms 77-204 were tabulated by hand in an attempt to obtain an accurate statewide defender case count.

In 1980 the DPA began the process of developing a computerized management information system. Computer programs were written to store basic information on each case upon its opening and its closing.

1980 was also the year in which a new four part snap-out form, the AMICUS (Attorney Management Information and Casefile User Support) case opening form, was installed in all of the DPA's regional offices. In addition to its function as a case management tool, the AMICUS form is used to provide the central office the same case opening and case closing information as does AOC Form 77-204.

In 1982 computer programs were written to generate a series of caseload reports which provide fairly detailed caseload information quarterly and annually at several different organizational levels. Some of the caseload reports which the DPA's management information system generates are as follows:

a. Cases opened by case type, by attorney, by county, by regional office, and statewide totals.

b. Cases opened by type court (district or circuit), by attorney, by county, by regional office, and statewide totals.

c. Cases closed by case type, by attorney, by county, by regional office, and statewide totals.

d. Cases closed by type of court, by attorney, by county, by regional office, and statewide totals.

e. Circuit court dispositions by attorney, by county, by regional office, and statewide totals.

f. District court, dispositions by attorney, by county, by regional office, and statewide totals.

g. Casetime by case type, by attorney, by county, by regional office, and statewide totals.

h. Casetime by type court, by attorney, by county, by regional office, and statewide totals.

i. Contract administrator's report listing closed cases by attorney, casetime and case costs.

The process of obtaining accurate caseload data from defender attorneys in 120 counties is not a small task. The process has taken several years. Listed in the table below are the DPA's statewide caseload totals for cases opened by type of cases for the last five fiscal years.

Cases Opened Statewide

Fiscal Year	Felonies	Misdemeanors	Invol. Comm.	Total
FY82	14,663	15,048	1,116	30,827
FY83	18,936	19,397	1,515	39,848
FY84	23,805	28,216	1,698	53,719
FY85	21,492	31,689	1,698	54,879
FY86	22,633	34,751	1,673	59,057

The data reflect substantial increases in the caseload from FY82 to FY83 and from FY83 to FY84. During FY 82 and FY 83 we were still struggling to elicit a serious effort in reporting caseload information from the 120 counties. The large increases during these years, we believe, were primarily the result of better reporting. In FY84 we finally reached the point where we were receiving excellent cooperation from local defenders in all 120 counties, and we had an accurate statewide case count for the first time. The table shows a two percent increase from FY 84 to FY 85. The preliminary FY 86 totals are showing an 8% increase over they FY 85 totals. The trend is toward an ever increasing need for representation of the indigent-accused.

Anyone desiring more information concerning DPA caseload statistics may contact Bill Curtis at the Frankfort Office at (502) 564-5216.

Bill Curtis
Administrative Branch

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

CONFRONTATION-VIDEOTAPED TESTIMONY
Commonwealth v. Willis
33 K.L.S. 9 at 15 (July 3, 1986)

This case addressed the issue of whether KRS 421.350(3) and (4), which permits the use of videotaped testimony of a sex abuse victim under the age of twelve so that the child need not be aware of the defendant's presence, denies the defendant confrontation and violates the separation of powers doctrine.

The Court found no denial of confrontation. The Court held that confrontation does not require visual contact between the defendant and witness. Instead, the right of confrontation is preserved where the procedure "permits the defendant to fully participate in cross-examination and to adequately see and hear the witness." The Court cautioned that the reproduced testimony "must be of adequate quality for the jurors to assess the demeanor of the witness and to evaluate credibility."

The Court additionally held that the statute was not a legislative incursion into judicial power inasmuch as application of the statute is discretionary with the trial judge. Chief Justice Stephens and Justices White and Stephenson dissented.

PFO-DOUBLE ENHANCEMENT
Dale v. Commonwealth
33 K.L.S. 9 at 18 (July 3, 1986)

In this case the Court further circumscribed its decision in Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980). Dale was convicted of robbery and possession of a handgun by a convicted felon. The prior felonies which established the handgun offense were then used to obtain an enhanced PFO sentence for the robbery conviction. The Court held that this did not constitute impermissible double enhancement. The Court distinquished Boulder in that in Boulder the same prior felony was used to obtain conviction of the handgun charge and then to enhance the sentence for the handgun conviction under the PFO statute. Boulder also found double enhancement in the use of the same prior felony to obtain an enhanced sentence for an assault conviction. The Dale Court held that this was error and overruled Boulder to that extent.

DISCOVERY - WITNESSES
Lowe v. Commonwealth
712 S.W.2d 944 (July 3, 1986)

The Commonwealth sought a writ of prohibition against an order of the trial court directing it to provide the defense with a list of those persons "present at the time the acts charged in the indictment allegedly transpired." The Court affirmed a decision of the Court of Appeals granting the writ of prohibition.

The Court held that its decision in King v. Venters, Ky., 596 S.W.2d 721 (1980), that RCr 7.24 does not require defense disclosure of a witness list as a part of reciprocal discovery, extends to the Commonwealth. "Under RCr 7.24, the Commonwealth is not required to disclose and the defendant is not entitled to obtain a list of 'all persons present' at the time [the alleged crime occurred]."

The Court also held that the defense was not entitled to this discovery under Burks v. Commonwealth, Ky., 471 S.W.2d 298 (1971). The Court narrowly distinquished Burks as requiring discovery only of "known witnesses." Consequently, the discovery as ordered by the trial court was "overbroad." Justice Leibson dissented.

ATTORNEYS - EXTENSION OF TIME
Sanborn v. Commonwealth
33 K.L.S. 10 at 23 (August 7, 1986)

In this disturbing decision the Court held attorneys representing Sanborn in his appeal of his conviction and death sentence in contempt for failing to file a brief within an initial extension of time of ten months. On the day the brief was to be filed the attorneys requested a second extension of time of ten months.

The attorneys cited the length of the record (almost 10,000 pages), the large number of errors, and caseload considerations.

At a show cause hearing the attorneys stated that one of them had completed reading the record and that writing of the brief had not begun. The Court found "no acceptable excuse" for the failure to begin writing the brief during the initial extension. The Court also condemned the practice of filing motions for extension on the date a brief is due, and stated: "When counsel is granted a lengthy extension of time in which to file a brief and it becomes impossible for counsel to file that brief, counsel shall inform this Court and request an additional extension at the earliest practicable date...."

In a well-written dissent Justice Gant, joined by Justice White, stated that "there was more than an adequate showing of cause for failure to file the briefs herein in the allotted time period." The dissent emphasized that, unlike private practitioners, public defenders do not have control of their caseload. The dissent also considered it unfair to limit attorneys in a death penalty appeal to a single extension of time: "To expect absolute accuracy in estimating the preparation time for a case of this magnitude upon a 30-day examination of thousands of pages of transcript is patently unfair when the circumstances of underpaid, highly motivated public attorneys are considered."

ATTORNEYS - FRIVOLOUS PLEADINGS
Walker v. Commonwealth
33 K.L.S. 10 at 25 (August 7, 1986)

In this case, the Court again imposed sanctions against an appellate attorney, this time for filing a frivolous motion for discretionary review. The Court variously described the motion as "uncommonly weak," "devoid of merit," and "frivolous." Justifications offered - that the motion was filed in good faith and was not clearly frivolous - were rejected. The Court's action burdens appellate attorneys with the necessity of deciding in every instance whether a "close case" crosses the line into the "frivolous," and imposes on them the risk of a sanction if their judgment call should differ from the Court's.

Kentucky Court Of Appeals

EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL
Commonwealth v. Jones
33 K.L.S. 10 at 3 (July 4, 1986)

In this case, the Court of Appeals held that additional findings of fact were needed before it could determine whether Jones was denied effective assistance of counsel when his attorney failed to appeal his conviction. The Court remanded the case to the trial court for findings as to whether the failure to pursue an appeal was attributable to Jones.

The Court cited the U.S. Supreme Court holding in Evitts v. Lucey, 469 U.S. ____ 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), that due process guarantees effective assistance of counsel on an appeal taken as a matter of right. The Court also cited the Kentucky Supreme Court's decision in Commonwealth v. Wine, Ky., 694 S.W.2d 689 (1985) holding that relief from ineffective counsel's failure to take an appeal must be sought from the court having jurisdiction to hear the appeal. In complying with p ure dictated by Wine, the Court of Appeals stated that in future cases it would not hear evidence. Instead, as in Jones, it would remand such cases to the circuit court with directions to make findings of fact and to report those findings to the Court of Appeals.

ADMISSIBILITY OF TAPE RECORDING
Commonwealth v. Prater
33 K.L.S. 10 at 6 (July 18, 1986)

The Commonwealth appealed from a pretrial order suppressing a tape recording. The tape recording of the victim's rape was inadvertently made by the defendant and left in the victim's possession.

The trial court ruled that the tape was inadmissible because the Commonwealth failed to lay a proper foundation as required by Commonwealth v. Brinkley, Ky., 362 S.W.2d 494 (1962). The Court of Appeals held that Brinkley was limited to "evidence gathering by the state or any of its agents," and did not apply to the recording before it. The Court held that the only test for admissibility was similar to that applied to photographs. "[T]estimony sufficient to support a finding that tape recordings are what they are purported to be is sufficient evidence of authenticity...."

EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL
Greer v. Commonwealth
33 K.L.S. 10 at 10 (July 25, 1986)

The Court of Appeals held that Greer was not denied effective assistance of counsel when his attorney did not file a notice of appeal following Greer's guilty plea. "It cannot be said to be ineffectiveness for counsel to fail to file a notice of appeal where the defendant has voluntarily

waived his right to appeal by pleading guilty."

SHOWUP/DEFINING REASONABLE DOUBT/COMMUNICATION WITH JUROR
Lamb v. Commonwealth
33 K.L.S. 10 at 10 (July 25, 1986)

Although the Court agreed that a showup at the victim's home the day after the alleged offense was unnecessarily suggestive, the Court held that under the totality of the circumstances the victim's in-court identification was reliable.

The Court also declined to find that the prosecutor had impermissibly defined reasonable doubt to the jury. The prosecutor stated to the jury during voir dire:

> Do you understand that the burden of reasonable doubt is not the burden that the Commonwealth must bear of proving their guilt beyond all doubt or beyond a shadow of a doubt or to a moral certainty, but only as the law says beyond a reasonable doubt. Does everyone fully understand what that means?

The Court held that "the Commonwealth Attorney merely informed the jury of the standard by which it was to determine the case."

Finally, the Court held that a conversation between a juror and the prosecuting witness concerning an unrelated matter did not require reversal.

PFO - IRRELEVANT EVIDENCE
Burton v. Commonwealth
33 K.L.S. 10 at 6 (July 25, 1986)

The Court reversed Burton's PFO conviction based on the introduction of evidence immaterial to the PFO charge. The Commonwealth introduced proof of the date Burton had been discharged from parole on his most recent conviction and of the beginning date of his parole. The Court held that the beginning date of Burton's parole status was unnecessary to prove his status as a PFO. In view of the fifteen year sentence imposed the error was prejudicial. The Court found support for its decision in the holding of Pace v. Commonwealth, Ky., 636 S.W.2d 887 (1982) that "the Commonwealth merely needs to establish a simple check list of technical statutory requirements."

ADMISSIBILITY OF TAPE/DOUBLE JEOPARDY/KRS 514.120-SUFFICIENCY/ PFO
Ringo v. Commonwealth
33 K.L.S. 11 at 7
(August 15, 1986)

Ringo challenged the admissibility of his tape recorded confession on the grounds that a proper foundation had not been laid in compliance with Brinkley v. Commonwealth, Ky., 362 S.W.2d 494 (1962). Specifically, Ringo complained that there was no showing that the tape recorder was capable of recording, that the operator was competent to operate it, and that no additions or deletions had been made. The Court disagreed: "The foundation laid, though perhaps not of textbook quality, was amply sufficient to establish the authenticity of the tape...."

The Court also held that Ringo's convictions of receiving stolen property and obscuring the identity of a machine did not constitute double jeopardy, since each offense contained an element which the other did not.

The Court rejected argument that Ringo's conviction of obscuring the identity of a machine was supported by insufficient evidence. Ringo contended that so long as the possibility exists that some identification number remains on the vehicle KRS 514.120 is not violated. The Court held that "removal of any distinguishing identification number with intent to render the property unidentifiable is sufficient to support conviction."

Finally, the Court held that a conviction of first degree PFO does not require proof that the date of commission of the second, i.e., most recent, prior felony followed the date of conviction of the first prior felony. The statute does not require such proof and the Court refused to read it into the statute. The Court acknowledged that this omission in the statute gives rise to an anomaly: an individual who commits two separate offenses within a brief time but whose convictions of the two offenses are separated by so wide an interval of time that the penalties are not concurrent or consecutive may be convicted of first degree PFO. This is true even though at the time of commission of both priors the defendant had never been conviction of an offense.

For a discussion of search and seizure issues in Ringo see the Plain View column.

DUI

Ratliff v. Commonwealth
Carter v. Commonwealth
33 K.L.S. 11 at 13 (August 22, 1986)

The Court reversed the appellant's convictions of all DUI, second offense, because the appellant's prior convictions were inadequately proven. The Court held that certified copies of Department of Transportation driving records were inadequate proof of the prior convictions. Because proof of the prior convictions was inadequate the trial court should also have granted a defense motion to suppress evidence of the prior convictions on the grounds that they were based on invalid guilty pleas.

The Court also considered but rejected argument that the appellants were entitled to a bifurcated trial which would exclude evidence of their prior convictions until a determination of guilt on the underlying charge. The Court cited Carver v. Commonwealth, Ky., 634 S.W.2d 418 (1982), which rejected the same argument with respect to a charge of violating a local option law, second offense.

RECEIVING STOLEN PROPERTY - SUFFICIENCY/DEFINITIONS
Scott v. Commonwealth
33 K.L.S. 11 at 19

In this case the Court of Appeals held that the appellant's conviction of receiving stolen property was supported by sufficient evidence where he was found lying under a partially disassembled stolen car with a tire iron in his hand. However, the Court found reversible error in the refusal of the trial court to instruct the jury on the statutory definitions of "receiving," "possession," and "knowingly." The Court explained that: "Appellant is not guilty of receiving stolen property unless his conduct fell within the perimeters of KRS 514.110, in light of the statutory definitions of those various elements."

Linda West
Assistant Public Advocate
Appellate Branch

KENTON COUNTY JUVENILE COMMITS SUICIDE IN JAIL

A 16 year old juvenile hanged himself in the Kenton County Juvenile Detention Center with a sheet. Jailer Jim Knauf said the teen-ager was found hanging in the bathroom of a dormitory shortly after 9 p.m. by deputy jailer Art Bailey. Bailey administered mouth-to-mouth resuscitation, but the youth did not respond.

The boy had been sentenced for criminal trespassing in connection with thefts and vandalism at the Villages of Beech Grove subdivision. "He was a little belligerent when he first came in," Knauf said. "Just a little uncooperative, no big deal." The teenager was the only boy in the dormitory when the incident occurred. Knauf said the incident is the first suicide in the juvenile center, which is on the sixth floor of the Covington-Kenton County Municipal Building at Court and Fourth Streets.

State law requires a dormitory check every 30 minutes. Knauf said Bailey talked to the teen-ager between 8:30 and 8:40 p.m. "If we had thought he was suicidal, we would have put him in a different place and watched him more closely," Knauf said. Knauf said the detention center will follow the same procedures in monitoring juveniles. "I don't know what we can change," Knauf said. "Unless we hire more people, and that still wouldn't be a guarantee that someone wouldn't commit suicide. Suicide can happen any place, any time very easily. If a person wants to commit suicide, it only takes two or three minutes."

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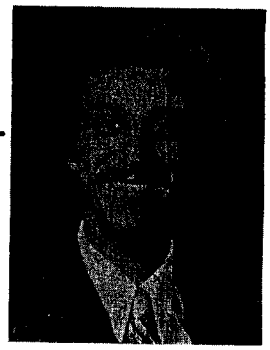
Post-Conviction

Law and Comment



Bob Hubbard

THE TRIAL ATTORNEY AND THE MOTION TO SUSPEND FURTHER EXECUTION OF SENTENCE

PART I

WARNING!! The contents of these articles may cause someone you know to be "shocked."

As trial attorney, your client's day in court has finally arrived. The discovery materials, investigative findings, and legal authorities can now be put to use. You know your client and his case inside out. You perform at your highest level, always conscious of making a record should an appeal be necessary. The jury returns, your fears are realized - "Guilty as charged!" Thereafter, sentence is imposed. At your client's request, you begin perfection of the appeal and, overburdened with a heavy caseload, you close your file knowing you performed at, or above, the level of competence required.

However, whether in a jury trial setting or guilty plea situation, you should question if you have done all you could under the facts of the case. Sometimes the case file is prematurely closed.

Following conviction and sentencing, one of the most important remedies available to a defendant is the "Motion to Suspend Further Execution of Sentence." See, KRS 208.194(5) (juvenile); KRS 439.267 (misdemeanor); KRS 439.265 (felony). Under these authorities, the trial attorney has the opportunity to effectuate his client's release from further incarceration. All too often that opportunity is bypassed.

Since the criminal rules generally do not provide for post judgment trial court control in criminal cases, the civil rule providing that the trial court loses jurisdiction ten (10) days after entry thereof applies as a general rule. See, CR 59.05; RCr 1.10, 13.04; Silverburg v. Commonwealth, Ky., 587 S.W.2d 241 (1979); McMurray v. Commonwealth, Ky.App., 682 S.W.2d 794 (1985). However, under certain circumstances by virtue of statutory authority, the trial court retains limited jurisdiction past that point. See, Commonwealth v. Williamson, Ky., 492 S.W.2d 874 (1973); Commonwealth ex rel. Molly v. Meade, Ky.App., 554 S.W.2d 399 (1977).

In every case, justification for the trial attorney to undertake the filing of the "Motion to Suspend Further Execution of Sentence" is compelling. The question remains as to what obligation vests with the trial attorney to perform this function. Armed with all the pretrial information you've gathered concerning your client and his case, who better to do the job?

In the case of retained counsel the obligation to represent a client ends when the terms of the contractual agreement have been satisfied. The duty of appointed counsel is less certain. Since statutes and case law fail to draw a clear line, trial counsel's duty to file the motion for shock probation hinges on the attorney's perception of his or her professional and ethical responsibilities.

The Sixth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution provide generally for a defendant's right to counsel. This right attaches at the time of arrest, Escobedo v. Illinois, 378 U.S. 478 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), and continues through all future stages of the criminal proceeding, including appeal. RCr 3.05(2).

In the case of United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) the Supreme Court observed that the "Sixth Amendment guarantee [applies] to 'critical' stages of the proceedings." Id., 388 U.S. 218, 224 (emphasis supplied). The Court held that while "the defendant has no substantive right to a particular sentence...sentencing is a critical stage of the criminal proceeding...." Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197 51 L.Ed.2d 393 (1977) (emphasis supplied).

During all proceedings counsel should zealously represent the client within the bounds of the law. In doing so, counsel should "seek any lawful objective through legally permissible means; and...present for adjudication any lawful claim, issue, or defense." Id., EC 7-1. As applied to the sentencing process in general, the

American Bar Association Standards for Criminal Justice, Second Edition, 1980, [hereinafter, ABA Standards] state that, "[t]he attorney should familiarize [him/herself] with all of the sentencing alternatives that are available ...." Id., 18-6.3(f)(i); See also, ABA Standards 4-8.1(a), and "[t]he consequences of the various dispositions available should be explained fully...to the accused." Id. at 4-8.1(a). One such dispositional alternative is for the trial court to initially commit the defendant to a term of incarceration subject to possible "shock probation."

Since "[c]ounsel initially provided should continue to represent the defendant throughout the trial court proceedings," ABA Standards Canons, 5-5.2 it is incumbent upon trial counsel to perfect the "Motion to Suspend Further Execution of Sentence" on his client's behalf. "If post trial motions are necessary, these should be filed by trial counsel." ABA Standards, Section 5-5.2.

In Mempha v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) the Supreme Court applied the right to counsel to deferred sentencing situations and held that the "appointment of counsel...is required at every stage of a criminal proceeding where substantial rights... may be affected." Id., 389 U.S. 128, 134 (emphasis supplied). The Court found that the recommendation of the judge and prosecutor, coupled with information about the circumstances of the crime and the character of the individual was of such importance that "the necessity for the aid of counsel in marshalling the facts, introducing evidence of mitigating circumstances and...aiding and assisting the defendant to present his case as to sentence is apparent." Id., at 135. Counsel should apply this same rationale when representing an eligible candidate for "shock probation."

Addressing the scope of responsibilities which the trial attorney has to the indigent client in the criminal context, the Department of Public Advocacy Policy and Procedure Manual states that the attorney must provide "[r]epresentation from the suspicion stage to the final disposition of the case by dismissal of charges or entry of final judgment and...filing of appropriate post-trial pleadings (e.g. ...motion for shock probation)." Policy and Procedures supra, 37.7.1(1); See also, Procedures and Guidelines, 2.3, 4.3.1(1).

The sentencing decision of the court is certainly of enormous consequence. Its social impact is equaled only by its import to the defendant whose life and liberty are at stake. By virtue of statutory authority, the legislature has provided the trial court with limited control of its judgment. Upon proper motion, the court may exercise its discretion and modify its judgment to such an extent that the defendant may be relieved from further incarceration. Unless the procedure is utilized however, it is of little worth. The trial attorney is the means to this end.

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EARLY-RELEASE PROGRAM REINSTATED AT CAMPBELL JAIL

Campbell County will again use early-release and earned-time programs to help ease the crowded conditions at the county jail.

The fiscal court adopted policies that give the judge-executive the authority to release prisoners upon the recommendation of the jailer and jail counselor.

The county had similar programs until a couple years ago, when former judge-executive Lloyd K. Rogers decided only the judicial branch could release prisoners. The policy was discontinued. Under the new law policy, inmates convicted of non-violent, misdemeanor crimes with less than seven days left on the sentence can be released when the jail population reaches 57.

Priority will be given to the inmates who have been in custody the longest. The purpose of the earned-time program is to motivate inmates to behave and provide labor and manpower for county maintenance.

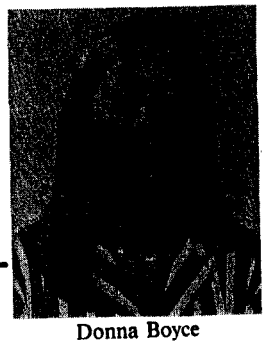
Inmates convicted of a non-violent misdemeanor with a sentence of 20 days or less will be eligible for earned time. An inmate can reduce his time by 10 percent if he is not subject to any disciplinary action and keeps his cell area clean. He can reduce the time by 20 percent if he works supervised community jobs. He is eligible for the work if he has had no prior escape charges or felony convictions.

District Judges Lambert Hehl and Neil Lewis agreed with the county's decision to reinstate the program.

Lewis said early release is an administrative decision to be made by the fiscal court and judge-executive. "The theory behind it is to give incentive to control their behavior during the time of incarceration," Lewis said. "At that point, it is not a judicial matter."

The Kentucky Post, May 8, 1986

Sixth Circuit Highlights



Donna Boyce

COMMENT ON FAILURE TO TESTIFY

The United States Court of Appeals for the Sixth Circuit, in **United States v. Robinson, 15 S.C.R. 14, 2; 39 Cr.L. 2352 (July 9, 1986)**, held that the prosecutor went too far in rebutting the defense's closing argument claims that the government had unfairly denied the defendant an opportunity to "explain" his actions. After the defense closing, the prosecutor objected to this contention and asked leave to rebut the claim on the ground that the defense had "opened the door." Defense counsel remained silent, failing to defend his closing argument claim or to object to the prosecutor's proposed rebuttal. During his closing, the prosecutor argued that the defense had had numerous opportunities to explain his conduct during the government's investigation and that he could have taken the stand to explain if he wanted. Defense counsel failed to object to these remarks or request any admonition. The Sixth Circuit stated that the prosecutor's comment on the defendant's failure to testify was a clear constitutional violation under Griffin v. California, 380 U.S. 609 (1965), but, because of defense counsel's failure to object, would require reversal only if it constituted plain error. To be plain error, a claimed error must not only seriously affect substantial rights but it also must have an unfair prejudicial impact on the jury's deliberations. In this case, despite the lack of defense objection and even though the prosecutor's comments were a partially "invited response," the Sixth Circuit reversed because the prosecutor's comments were not limited to responding that the defendant was given an opportunity to explain his position throughout the investigation but went further to argue that he had made no explanation before the jury. The prosecutor's comments directly placed the defendant's credibility into issue by focusing on his failure to testify. With the trial court's approval, the prosecutor encouraged jurors to make unfavorable inferences based on the defendant's failure to take the stand. The Sixth Circuit further noted that the fact that the jury found the defendant guilty of only two of four counts indicated that the evidence, though substantial, was not overwhelming. Nor did the Sixth Circuit consider the trial court's general instruction not to consider the defendant's silence an adequate cure of the harm to the defendant's substantial constitutional right.

CONTINUANCE

In **Bennett v. Scroggy, 15 S.C.R. 13, 10 (June 19, 1986)**, the Sixth Circuit found the trial court's refusal to grant the defendant an overnight continuance to be a denial of the defendant's right to present a defense in violation of his sixth and fourteenth amendment rights. Bennett asked for an overnight continuance of his homicide trial to enable him to secure the attendance of a subpoenaed witness who would testify in support of the defense of self-protection that the victim had a reputation for violence and would be likely to attack a man with her knife. In deciding whether the trial court erred in refusing the defense request, the Sixth Circuit reviewed five factors it found relevant to a determination of whether an accused was deprived of his rights to compulsory process and due process. The Sixth Circuit found that the defense was diligent in interviewing the prospective witness and attempting to procure his attendance by serving him with a subpoena and giving him directions to the courthouse. The Court stated that the defense request was for a reasonable amount of time and that it was likely the witness could be located within that period. The defense had specifically described the expected testimony of the witness in an affidavit by counsel. It was clear that the expected testimony was highly favorable to the defendant. Finally, the Court found that the testimony of the witness was noncumulative, even though the defendant himself had testified as to the victim's reputation for violence. The Court so found because the testimony of an independent witness about the victim's reputation was critical where the defendant's own testimony about the matter could be viewed as self-serving.

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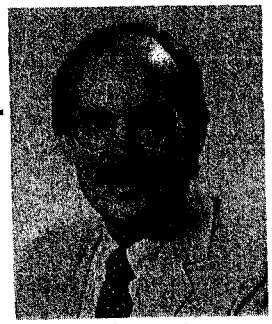
Plain View

Search and Seizure Law and Comment



Ernie Lewis

Significant Kentucky search and seizure decisions have been few and far between over the past few years. However, recently, both of our appellate courts have written in this area. On the other hand, usually the United States Supreme Court in the months of May, June, and July change the law in a major way. That hardly occurred this year. As a result, the great majority of this article will be devoted to six Kentucky decisions, with a cursory review of three United States Supreme Court cases.

KENTUCKY SUPREME COURT

There were two decisions by the Kentucky Supreme Court during this time period. One was **Brown v. Commonwealth,** Ky., ___ S.W.2d ___ (June 12, 1986). In this case, the police received an anonymous call telling them the defendant was dealing drugs from his house, and that his house had stolen property in it, including a wide screen television set and a cassette player. The police did not act on the initial tip. Two months later, the informant called again, this time stating that the stolen property originated from the Two Keys Tavern which had recently been burglarized. A subsequent call told the police where in the house the property was. Finally, in response the police obtained a search warrant, during which they verified the information which they had received.

The Court affirmed the legality of the search, analyzing the case under the "less stringent 'totality of the circumstances' evaluation" standard of Illinois v. Gates, 462 U.S. 213, 103 S.C. 2317, 76 L.Ed.2d 527, reh. den. 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983). The Court acknowledged that the informant was anonymous and that there was no indication of her reliability or the source of her information. Clearly, under Aguilar/Spinelli, this search would have fallen. However, under the more relaxed Gates test, the Court stated that the circumstances "reached beyond mere coincidence and gave the district court a substantial basis for concluding that probable cause for the search existed in conformity with Gates and Beemer." Master Slip Opinion 5,6. (You will recall that the Kentucky Supreme Court adopted the Gates standard in Commonwealth v. Beemer, Ky., 665 S.W.2d 912 (1984).

Brown, however, is noteworthy for another reason. While the case was reviewed under Gates and Beemer, that is whether there was a substantial basis for the magistrate concluding that there was probable cause, the Court omitted any discussion of the good faith standard established in 1984 in United States v. Leon, 468 U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The Court clearly could have used the good faith of the police in executing the warrant, as opposed to analyzing whether there was probable cause or not. It would make good sense for the Court to recognize the significant relaxation of the probable cause standard represented by Gates and Beemer and accordingly to avoid adopting the good faith standard for Kentucky.

The Kentucky Supreme Court on the same day wrote **McClellan v. Commonwealth,** Ky., ___ S.W.2d. ___ (June 12, 1986). In McClellan, which was a death penalty case reversed on other grounds, police officers came upon a murder scene. Upon entry they saw a cup, a hamburger box and a rifle box which they seized later upon subsequent reentry. This seizure allowed the prosecutor in closing argument to argue that the defendant had laid in wait for his victims. The Court held that because the officer saw the items in plain view upon initial entry he could testify about that and thus any error in admitting the physical evidence was harmless beyond a reasonable doubt. The Court in this case does not particularly analyze murder scene exception case law; instead, the Court immediately resolved the case as harmless error.

KENTUCKY COURT OF APPEALS

The most significant Court of Appeals decision of this time period is **Commonwealth v. Elliott,** Ky. App., ___ S.W.2d ___ (August 1, 1986). In Elliott, the defendant's parole officer heard from an informant that he had been going out of state to obtain drugs for resale, that he was presently in possession of illegal drugs, and that while on one of his trips to obtain drugs he was cited for a

traffic violation which the parole officer confirmed.

Based upon this information, the parole officer accompanied by police officers went to the defendant's home which he shared with his sister. After being admitted by his sister, the police and parole officer arrested the defendant. Following the arrest, and "on the basis of information that Elliott might have an accomplice," they proceeded to search the entire house, finding scales, razor blades, white powder, and further drugs. The trial court, however, suppressed the evidence obtained from the search and the Commonwealth appealed.

The Court affirmed the trial court's suppression of the evidence. First of all, they rejected the "protective sweep exception," see United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984), which allows the police to search the premises beyond the reach of a defendant, see Chimel v. California, 395 U.S. 757, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), under circumstances where there is "a serious and demonstrable potentiality for danger." The Court held that the trial court was correct in finding no such evidence. More importantly, the Court noted that the parole officer and the police had several days to obtain a warrant to search the house. Given the time lapse between the receipt of the information and the use of that information, the Court held against the state for failure to obtain a warrant.

The Court also rejected the inevitable discovery exception of Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). The Court held that the Commonwealth had not proven by a preponderance of the evidence that the drugs would ultimately have been discovered by lawful means.

Thirdly, the Court rejected the Commonwealth's plain view exception consent arguments, saying that the officers were not where they had a right to be when the observation was made and that the consent of the sister toward the end of the search came too late and was a fruit of a poisonous tree.

Finally, the Court rejected the argument of the Commonwealth that the officers had acted in good faith saying "we cannot justify application of that exception to the warrantless search conducted in this case." (Master Slip Opinion at Page 7). They went on to say "the Courts have adhered to a strong preference for warrants absent some exigency which makes it unreasonable to delay. Leon, supra at 693. Officers are required to have a reasonable knowledge of what the law prohibits and we believe the value of the exclusionary rule as an incentive for the law enforcement profession to conduct themselves in accord with the Fourth Amendment still remains, at least in regard to warrantless seizures of a private residence."

On that same day, the Court decided **Collier v. Commonwealth**, Ky. App., __S.W.2d __ (August 1, 1986). In Collier, following an assault of a woman in a bar and a subsequent broadcast of the description of the assailant, policemen went to a biker bar believing that the description fit that of a biker. There, they saw the defendant who was approached by the police. While his description differed significantly from that broadcast over the radio, he was nevertheless asked to step outside whereupon the police discovered a handgun during a pat down search. He was subsequently convicted of being a felon in possession of a handgun. He was never charged nor was there any proof that he was involved in the initial assault of the woman in the bar.

While admitting that the facts were close, the Court ultimately affirmed the legality of the search.

The major analysis by the Court was under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and United States v. Hensley, __U.S.__, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). The Court held that under Terry, the seizure was based upon the defendant's "roughly" matching the description of the assailant, in addition to his having been a member of the motorcycle gang and having carried weapons in the past and having been involved in violent behavior in the past. Based upon these factors, the Court held that the police had a right to seize the defendant, take him outside and conduct a pat down search for weapons.

An analysis of this however will demonstrate the danger of using stop and frisk law under these circumstances. First, the assailant was described as being "extremely big." The defendant, on the other hand, was 5'8". While the assailant had shoulder length hair, the defendant's hair was much shorter. While the assailant had reddish blond hair, the defendant's hair was light brown. While the assailant had on black pants, the defendant had on blue jeans. While the assailant was described as having a "Harley Davidson" tattoo, the defendant had a tattoo which read "Marine Corps." It appears that the defendant could have been stopped under Terry based upon his "roughly meeting this description." It is also the case that virtually any gang member could also have

been stopped under Terry. I have noted over the past few years how increasingly the United States Supreme Court has used Terry and to get at street crime, thereupon relaxing Fourth Amendment standards in a significant and harmful way. This case, in my opinion demonstrates that relaxation.

The Court also relied in their Terry stop upon the defendant's reputation for carrying a weapon. Upon closer scrutiny, however, one would realize that such a rationale would justify a Terry stop of any convicted felon or at least any convicted felon with a history of carrying a weapon. It appears to me that a person's reputation for carrying a weapon should only be the basis for a close pat down search once the initial seizure is justified. The Court did acknowledge in the opinion that the prior record of a suspect standing alone would never justify a Terry stop. The Court bases the stop upon the reputation in combination with the defendant's having loosely fitted the description of the suspect.

In interesting language, never seen in eyewitness identification cases, the Court acknowledges that "crime victims often are in error as to some points of description," in attempting to justify the difference between the defendant and the description of the assailant. Counsel should put down that language somewhere for their eyewitness identification cases.

In **Tiryung v. Commonwealth**, Ky. App., __S.W.2d __ (August 15, 1986), the Court looked at the question of the applicability of the Fourth Amendment law in revocation hearings. However, the Court was not able to arrive at a majority opinion. The author, Judge McDonald, held that "one is not entitled to object to the admission of illegally seized evidence at his or her revocation hearing." The author used Childers v. Commonwealth, Ky App., 593 S.W.2d 80 (1981) for the proposition that a statement in violation of Miranda was admissible at a revocation hearing, and that hearsay had also been approved in such hearings in Marshall v. Commonwealth, Ky. App., 638 S.W.2d 288 (198). Judge Wilhoit concurred with Judge McDonald on the ground that the defendant had no reasonable expectation of privacy in his motel room, being unwilling to state that illegally seized evidence could be admitted into evidence at a probation revocation hearing. Judge Combs dissented.

Lastly, the Court in Ringo v. Commonwealth, Ky. App., __S.W.2d__ (August 15, 1986) looked at a situation where the police officer had gone onto private property in order to talk with the owner regarding information that they had received. In this case, the police received an anonymous tip that a stolen truck was on the defendant's property. They went to the property, parked, and walked across the yard toward the front door. On their way, they fortuitously saw a truck with no front door hidden by tin roofing with its vehicle identification number obscured. When the officers found no one at home, they obtained a search warrant for the car. The Court held that under Cloar v. Commonwealth, Ky. App., 679 S.W.2d 827 (1984), the officers had a right to walk up to the door and that anything they saw in plain view on the way was not a violation of the Fourth Amendment.

UNITED STATES SUPREME COURT

The United States Supreme Court at the end of their October 1986 term rendered three Fourth Amendment decisions. Probably the most significant of those was **California v. Ciraolo,** 476 U.S. ___, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986). In this case, the Court looked at the question of Fourth Amendment ramifications of police overflights. Here, the police had received an anonymous tip that marijuana was growing in the defendant's back yard. Upon further investigation, however, they realized that they could not see into the defendant's back yard due to its enclosure by two fence. Not to be thwarted in such manner by the defendant's expectation of privacy, the officers proceeded to fly over the defendant's property at 1000 feet and identified it as marijuana. Based upon this information, a warrant was obtained and executed and marijuana plants were seized. The Court in a decision by the former Chief Justice reversed an opinion by the California Court of Appeals suppressing the evidence. The Court revisited Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The Court noted that under Katz one must look first of all at whether the individual has "manifested a subjective expectation of privacy the object of the challenged search", and then must judge whether "society is willing to recognize that expectation as reasonable." Burger admitted that Ciraolo had manifested a reasonable expectation of privacy by building

the fences, the action which brought about the overflight. However, the Court went on to say that that expectation of privacy was not reasonable. Interestingly, the Court admitted that Ciraolo was growing marijuana in the curtilage of the house, a doctrine which they had recently affirmed in Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). Despite the fact that it was growing in the curtilage, the Court denied that the expectation of privacy by Ciraolo was one that society could recognize as reasonable.

In an interesting dissent joined by Brennan, Marshall and Blackman, Justice Powell criticized the Court's apparent abandoning of the curtilage doctrine. "We have consistently afforded weight and protection to a person's right to be left alone in the privacy of his house. The Court fails to enforce that right or to give any weight to the longstanding presumption that warrantless intrusions into the home are unreasonable."

In combination with Oliver, Ciraolo means that counsel should assume the skies will be full of Kentucky State Police helicopters most every Fall.

The business community should not get particularly smug about the Ciraolo decision thinking that it only applies to marijuana growers who should probably have no expectation of privacy anyway. That is because in **Dow Chemical Company v. United States,** 476 U.S. ___ 90 L.Ed.2d 226, 106 S.Ct. 1819 (1986), the Court again with Justice Burger in the saddle held that EPA's taking aerial photographs of Dow Chemicals' chemical plant buildings, piping, etc. from an aircraft was not a search prohibited by the Fourth Amendment.

In contradistinction to Ciraolo, this case was not considered from the prospective of the curtilage doctrine but rather as something between curtilage and an open field. Specifically, the Court was looking at a 2000 acre business complex with buildings and structures in between those buildings. The Court stated that this structure was more like an open field and less like a curtilage and thus was open to public view and observation. Because it was more like an open field, taking pictures was not a search.

The same dissenters again disagreed. Indeed, Justice Powell wrote of the Dow Chemical Company that the case "may signal a significant retreat from the rationale of prior Fourth Amendment decisions." The dissent noted that "Dow has a reasonable expectation of privacy in its commercial facility in the sense required by the Fourth Amendment. EPA's conduct in this case intruded in that expectation because the aerial photography captured information that Dow had taken reasonable steps to preserve as private." Thus, the dissent accused the majority opinion of repudiating Katz v. United States, supra, where the Court had significantly declined to hold that the Fourth Amendment was reserved for actual physical intrusions.

In combination with Ciraolo, one can only wonder what further relaxation of Katz this Court might have in mind.

Finally, the good guys finally won one in the high court in **Kimmelman v. Morrison,** 477 U.S. ___ 91, L.Ed.2d 305, 106 S.Ct. 2574 (1986). They even let Justice Brennan write an opinion.

In this particular case, trial counsel had failed to comply with the state rule mandating pretrial motions in order to challenge the admission of evidence. Rather, he waited until the evidence was about to be admitted in trial. The defendant eventually challenged trial counsel's actions pursuant to a federal habeas corpus. The state, on the other hand, argued that Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) prohibited the raising of a claim of ineffective assistance of counsel based directly upon the failure to raise the Fourth Amendment claim. The Court rejected the state's argument holding that Stone v. Powell does not prohibit the raising of a claim of ineffective assistance of counsel despite the fact that the alleged error pertained to the Fourth Amendment. The Court further held that under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), counsel was ineffective.

In cases such as these, the following must be done according to the majority opinion: "where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice."

Justices Powell, Burger, and Rehnquist concurred in the majority opinion declining to join what they viewed as the broad language of Justice Brennan's opinion. The concurrence is interesting due to their analysis of the case involving the admission of illegally seized evidence, and perhaps in giving us further insight into why it is that the exclusionary rule is under such attack in the Court.

Justice Powell states "it has long been clear that exclusion of illegally seized but wholly reliable evidence renders verdicts less fair and just, because it 'deflects the truth finding process and often frees the guilty.'" The concurrence goes onto state that because "the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt but rather the absence of a windfall . . . our reasoning in Strickland strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment." One can only wonder how long the exclusionary rule can continue to live with Chief Justice Rehnquist at the helm.

However, we must be grateful for small favors. The Court did not shake up the Fourth Amendment significantly either during the last few months of the term or even during the entire term. As predicted by Judge Moylan, the Court continues in its period of retrenchment following Illinois v. Gates and United States v. Leon. Under his reasoning we can expect significant changes in the October 1987 term.

The Short View

1) **United States v. Cohen, __F.2d __, 39 Cr.L. 2313 (2nd Cir. 6-30-86).** In this particular case, the United States Attorney initiated a jail cell search of a pretrial detainee cell. The Court held the warrantless search to be illegal distinguishing Hudson v. Palmer, 468 U.S. 517 (1984) because the search was not done for institutional security reasons. Thus, contrary to the implications of Hudson, the Fourth Amendment continues to apply to persons incarcerated. "An individual's mere presence in a prison cell does not totally strip away every garment of cloaking his Fourth Amendment rights, even though the covering that remains is but a small remnant."

2) In a recent story reported by the New York Times News Service, it was revealed that Attorney General Ed Meece has authorized the government to reimburse Justice Department employees who are successfully sued for civil rights violations. In the context of the exclusionary rule, United States v. Leon, and the so-called alternatives to the exclusionary rule, one must wonder about the much lauded deterrent effect of civil rights lawsuits. One can assume that ultimately Ed Meece would desire the exclusionary rule to be abolished on the one hand, and for police officers and other law enforcement officials to be immune on the other, thereby insulating all law enforcement officials from any retribution for their violations of citizens' Fourth Amendment rights.

3) **State v. Huft, 720 P.2d 838 (Wash. 1986).** In this case, two informers tipped off the police that marijuana was on the defendant's premises. The police also noted that electrical consumption had increased at the premises. The Court held that a warrant should not have been issued under these facts where the indicia of reliability of the informant was not made out in the affidavit.

4) **Stewart v. State, Ark. S.Ct. 39 Cr.L. 2279 (7-16-86).** In this case, the complainant did not make her accusation under oath. Rather, the complaint was taken to a law clerk who then issued a warrant which had been presigned by the magistrate. The Court held that the unsworn affidavit was insufficient, that the magistrate had abandoned his judicial role by presigning warrants, and that the officer under these circumstances could not have relied in good faith on the resulting warrant.

5) **United States v. Passarella, 788 F.2d 377 (6th Cir. 1986).** The Court held that an officer legally on the defendant's premises may answer the phone and thereupon allow the caller to believe that he is the defendant. There was no expectation of privacy in the conversation the police officer had with the caller said the Sixth Circuit. "The Fourth Amendment does not protect a wrong doer's misplaced trust. . . nor does it require the police to offer their true identity whenever they answer the telephone."

6) **Jauregui v. Orange County Superior Court, Cal. Ct. App., 39 Cr.L. 2126 (4-16-86).** In this case, officers had a warrant to search the person and residence of the defendant. Once there, they suspected that he had swallowed heroin balloons. They took him to a hospital and their suspicion was verified by x-ray. They then secured a telephone warrant permitting a further search of the defendant's person "per medical advice." An emetic solution was administered resulting in the defendant's vomiting the heroin filled balloons. The Court held, however, that the warrant did not authorize a bodily intrusion and thus the search went beyond the scope of the warrant. The Court rejected further the good faith exception due to the action of the police not being objectively reasonable. Finally, the Court held that there were no exigent circumstances requiring the procedure used.

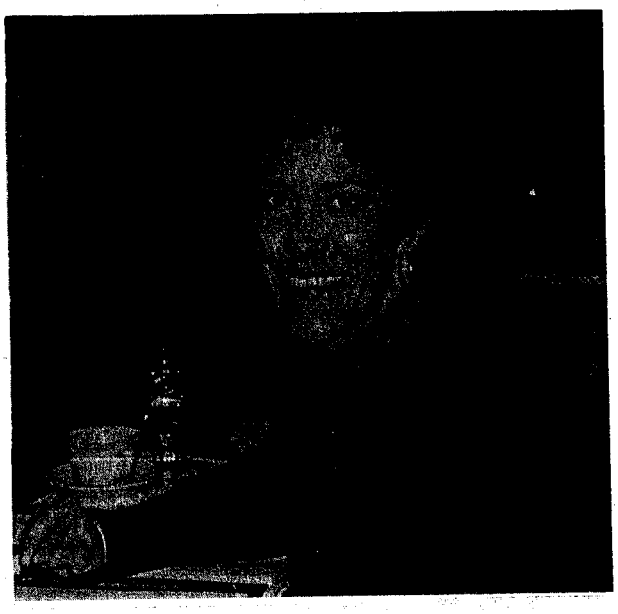
7) **Commonwealth v. Eichelberger, 508 A.2d 589 (Pa.Super. 1986).** Police officers armed with a search warrant authorizing the search of a residence may not search the owner's pants' pockets. Nor was the search a Terry search since there was no indication that the homeowner was dangerous, and further because the search went well beyond a pat-down for weapons, requiring the defendant to empty his pants' pockets.

8) **State v. Isleib, 343 S.E.2d 234 (N.C. App. 1986).** In this particular case, police officers were tipped off to deliveries of marijuana. Twenty hours later they stopped the defendant and searched her car without a warrant. The Court held that while the officers had probable cause to search the car their failure to procure a warrant when they had time to do so was fatal. A car search under United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) requires not only probable cause but also exigent circumstances. Such circumstances do not arise solely due to the involvement of an automobile. According to the Court, neither "the United States Supreme Court or our supreme court has taken the position that when citizens make use of their motor vehicles they waive or forego all Fourth Amendment rights."

9) **United States v. Burnett, 791 F.2d 64 (6th Cir. 1986).** Here, police found small amounts of marijuana on the floorboard of a car and proceeded to search the entire car finding 245 grams of cocaine in the trunk. The Court held that the lawful seizure of the marijuana provided probable cause to search the entire car. "Once the contraband was found, Officer Brady had every right to search the passenger area of the car, the trunk, and any and all containers which might conceal contraband.

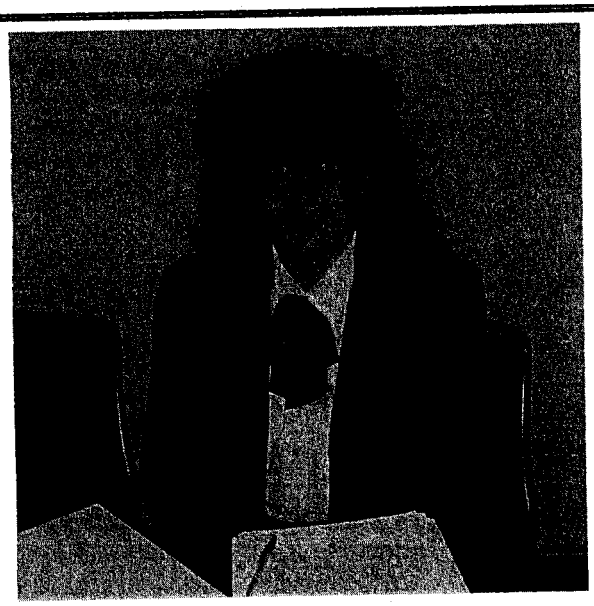
ERNIE LEWIS
Assistant Public Advocate
Director
Madison Co. Public Advocacy Office

Staff Changes



Sandra Simmons

Sandra Simmons, formerly with our Pikeville Office is now an Assistant Public Advocate with our Stanton/ Gorge Office effective October 1, 1986.



Stephanie Bingham

Stephanie Bingham, a graduate of the University of Kentucky School of Law, joined the Morehead Office on October 6, 1986 as an Assistant Public Advocate.

Protection and Advocacy

Betty Hicks, Legal Secretary, an employee of the Protection and Advocacy Division since 1979 retired on September 16, 1986.

Trial Tips

For the Criminal Defense Attorney

Judge James E. Keller

VIDEOTAPED PROCEEDINGS

"DO NOTHING"

For approximately one year now I've been frequently asked by attorneys "What do I need to do differently in trying a case where the proceedings are recorded on videotape?" My standard reply is basically do nothing different than you would do if the proceedings were being recorded stenographically by a court reporter. If you have developed good habits in trying cases, do not change them. If you now must be reminded by the court reporter to speak up, mark your exhibit for identification, introduce the exhibit into evidence, etc., you simply need to develop good trial habits regardless of whether the proceedings are recorded on a videotape or stenographically by a court reporter.

There are however a few suggestions that I would make to attorneys who will try cases in a courtroom using the video system. Because there is no one (the Court Reporter) to tell you whether you or the witnesses are speaking loud enough for every word to be heard, the microphones are very sensitive. For this reason you should be guarded in your conversations near the microphones at the counsel tables. It is possible that your conversation with your co-counsel or your client may be recorded even though the other person in the courtroom would not normally be able to hear your conversation. The attorneys, and their clients, should also be aware that the system (excluding the video recorders) is always turned on and that there is usually a monitor in the Judge's chambers. Thus, another warning to the wise, the Judge is able to hear any conversations near the microphones in the courtroom even though he is in chambers during a recess.

There is a slight delay in starting and stopping the video recorders; therefore, you should be careful with your comments at the bench. Usually an attorney will simply tell the court reporter when a comment is off the record. The court reporter then stops writing. This is not true with the video system. Unless the Court directs the clerk to stop the machines, your comments, which may later prove embarrassing, will be recorded in the videotape record of the proceedings.

There have been incidents where the Judge or the attorneys have requested that an exhibit be held up so that the video camera could focus directly on the exhibit. I feel that this is unnecessary for two reasons: First, when we try a case where the record of the proceedings is made by stenographic means, we do not expect the court reporter to jump up and take a photograph of each exhibit and place that photograph into the record. The exhibit speaks for itself. If the exhibit is not introduced, it should not be considered in any appellate review. Second, the exhibit and everything that happens in that courtroom should be for the benefit of the trier of fact. Such, a record is also made for any possible appeal, but just remember that the exhibit, if introduced, will be included in the record on appeal. Don't let the video system interfere with the trial of the case.

I would suggest that attorneys should note the time of any testimony that they feel will be important for the Judge to consider when ruling upon trial motions. This is not a necessity but will simply save time when the Court is asked later to consider the motions based upon the noted testimony, and the testimony must be re-played. Also, this will assist the attorney in appealing the Court's clearly erroneous rulings on the motions. As first stated, I feel that an attorney with good trial habits should do nothing different in the trial of a case simply because a video record is being made of the trial rather than the traditional stenographic record.

In conclusion, I would note that three Judges of the Fayette Circuit Court have used the video system exclusively for more than one (1) year without any significant problems. The pioneering efforts of Judge James S. Chenault have not only had an impact upon the Courts

of this state, but based upon recent visits from Judges and administrators from other states it appears that the use of video-tape equipment may become the predominant method of recording trial proceedings. It works!

JUDGE JAMES E. KELLER

Judge Keller has been a Fayette Circuit Court Judge since 1976. He graduated from the University of Kentucky School of Law in 1965. He was in private practice from 1965 through 1976. He served as Master Commissioner with the Circuit Court from 1969-1976.

POTENTIAL JUROR FINED FOR RACIST REMARKS

LITTLETON, Colo. - A prospective juror was charged with contempt for making a racial slur against a defendant. Arapahoe County District Judge John P. Gately ruled that Ms. Hufnagel must donate $250 to the Daddy Bruce Randolph Foundation and $250 to the Kempe Center for Prevention of Child Abuse. He also billed her $1,618.70 in court costs.

Andrea Hufnagel, 24, was jailed briefly February 26 after a judge learned of her remark against a black man on trial for first-degree murder. Gately deferred sentencing, meaning the case will be dropped if she stays out of trouble for six months.

Ms. Hufnagel was accused of telling another prospective juror, "If they call me in there, I'm just going to say hang the...because I want out of this." When asked why she didn't tell the court of her prejudice, she reportedly answered, "How are you supposed to say anything like that when the dumb...is sitting in the same room."

When District Judge Charles Friedman learned of her remarks, he declared a mistrial in Joe Willie Hightower's trial.

Herald Leader
August 10, 1986
Reprinted with permission

JUDGE JAILS JURORS WHO MISS COURT

Kenton Circuit Court Judge Douglas Stephens says most citizens summoned for jury duty are conscientious. But Stephens said he found two who weren't and he fined them both and sent one of them to jail, something he hopes never happens again. "I don't wnat to do it again," he said. "I hope this is the last time I have to do it."

Randy Blevins, who was fined $500 and jailed for 30 days by Stephens, says the judge probably won't have to do it again. "I think, from now on anybody who gets a summons for jury duty is going to fill it out and send it in and show up for orientation," Blevins said. Blevins, on a work-release program, was reporting back from his regular, nightly job as a sorter with an overnight air carrier at Greater Cincinnati International Airport.

Stephens said "I think I have a responsibility to the jurors who do come not to ignore those peopel who thumb their noses at the system." "Blevins was very disdainful," the judge said. Blevins made it clear he did not want to participate in the justice system and he does not like to pay taxes. "I'm not going to put anybody in jail because they feel they can't serve on a jury," Stephens said. "Blevins has gone to jail because he absolutely refused to respond."

Blevins said he ignored the questionnaire but eventually responded to the court's inquiries with a letter August 18 saying he didn't want to put people behind bars and that he didn't feel he could serve properly after working all night. Blevins acknowledged he should have responded sooner. He believes the judge misunderstood him. Blevins said he does not want to be around the courthouse, and that he didn't mean for his comments to show disrespect for the judicial system. "I was saying that I didn't care to be here," Blevins said, "not that I didn't care for the justice system."

Stephens said he won't keep Blevins in jail for 30 days. "I just want him to get the message," he said. Stephens released Blevins after he served on day saying, "I think the point was made. We need the space (for prisoners.)"

James Jackson, 29, got a $450 fine for missing three court dates and not explaining why. Jackson, who could not be reached for comment, was fined $150 for each day he failed to show after he received phone calls from Stephens' office.

Kentucky Post, August 26 and 27, 1986, Reprinted with permission

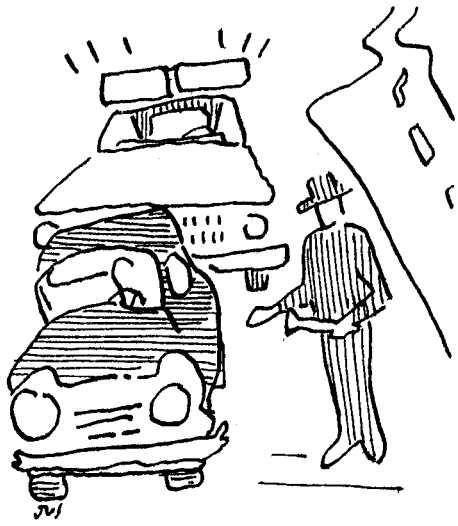
FORENSIC SCIENCE NEWS

DRIVING WHILE INTOXICATED

With the advent of increased enforcement and legislative awareness, DWI has become an ever-increasing judicial issue which must be addressed by the defense attorney. The addition of video documentation presents two scientific aspects of this enhanced DWI effort that should be scrutinized by those charged with defending these subjects.

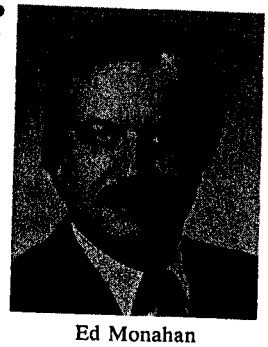
While the video booking procedure provides a valuable tool to the prosecutor in those cases where the subject has a relatively high alcohol percentage, it has been equally valuable as a defense tool in those cases where typical intoxicated symptomology was not observed during the video procedure. Those subjects, however, who fall somewhere between these two extremes occupy a gray area that presents the need and the opportunity for the defense attorney to test the validity of the nonspecific intoxilyzer.

Standard scientific procedures dictate that controls or baseline circumstances be defined in any procedure to evaluate the results of that procedure. Thus, in order to establish the validity of these gray area videos, it would follow that video procedures of that same subject be conducted at a verified zero alcohol level. Without this control video against which to judge the arrest video, natural clumsiness or nervousness and physical or mental deficiencies may be misconstrued as symptoms of intoxication. These false positive indicators, combined with the questionable reliability of current breath testing methods, present a cause for concern.



This technique of secondary video procedures has been applied as a defense tool to demonstrate the discrepancies between the breath test results and the case facts pertaining to the amount of alcohol consumed by the subject. It is necessary to recreate the subject's day in regard to the time and the types and amounts of food and alcohol consumed. Video sobriety testing procedures identical to the State's are administered to the subject during a range of alcohol percentage levels from zero to the level of intoxication alleged by the State. Measured amounts of alcohol are administered over specified time periods conforming to the facts of each particular case and blood is drawn to verify the alcohol level depicted in each video. By comparative viewing of the resulting videos it is possible to observe the subject's symptomology at alcohol levels verified by the preferred direct blood analysis procedure. We are then able to place an alcohol procedure range on the arrest video by virtue of our testing procedures, and discrepancies between the alleged intoxilyzer alcohol percentage and the video percentage can be clearly demonstrated.

Cases of Note. . .In Brief



Ed Monahan

I find that unpublished opinions often contain a wealth of good information and good defense law. I hope you find this selective review of them helpful.

Bartley v. Commonwealth
(Ky. 5/22/86 Unpublished)

The defendant was convicted of first degree rape and sentenced to life. The Commonwealth had Dr. Block testify that he examined the prosecutrix and took her medical history, and based on both, he testified that she had been sexually abused. He also testified: 1) prepubertal children like the 11 year old prosecutrix do not and cannot make up stories of sexual abuse; 2) they do not have the experience and the knowledge of what occurs in such incidents; 3) "what it boils down to is that the child must be believed"; 4) his opinion was substantiated by all the books and literature we know of.

The trial court admonished the jury: In considering that opinion by Dr. Block [that Elizabeth Ann had been sexually abused], you are only to consider that opinion by him as it relates to his opinion concerning the truthfulness of the child, and not as to who caused the sexual abuse that he gave his opinion about....

The Kentucky Supreme Court reversed holding:

> Dr. Block testified as an expert. The effect of Dr. Block's testimony was to bolster the credibility of Elizabeth Ann's testimony in the eyes of the jury. The trial court's admonition merely aggravated the situation. The credibility of a witness is for the jury alone to decide. Matherly v. Commonwealth, Ky., 436 S.W.2d 793 (1968). In our opinion, it is highly improper and highly prejudicial for an "expert" to bolster the credibility of a witness as was done here. Such testimony invades the province of the jury.

BATTERED WIFE SYNDROME
Rose v. Commonwealth
(Ky.Ct.App. 6/13/86 Unpublished)

The court concluded that the trial court erred when it refused to let Jane Hall, a registered nurse and counselor with 5 years of extensive experience in counseling abused spouses, testify to whether the defendant was suffering from the "battered wife" syndrome at the time of her husband's death:

> However, we cannot agree with the Commonwealth's argument that the expert testimony of witness Hall was properly excluded as running to the ultimate question of guilt or innocence. The case law cited to support this conclusion, DeVerell v. Commonwealth, Ky., 539 S.W.2d 301 (1976), contains no direct commentary on the evidentiary principle involved and arises out of markedly dissimilar circumstances. Moreover, expert opinion testimony, even as to an ultimate fact, has been held to be admissible, so long as that testimony is helpful to the trier of fact in the solution of the ultimate problem. Department of Highways v. Widner, Ky., 338 S.W.2d 583 (1965). Further, Hall's proffered testimony relates not to an ultimate fact, but only to the applicability of the syndrome to the appellant, which, at best, would tend to establish more clearly the ground of self-defense as justification for her use of force.

GUILTY BUT MENTALLY ILL
Psychiatrist/Sentencing
Sheffer v. Commonwealth
(Ky. 2/6/86 Unpublished)

The defendant was convicted of first degree assault but mentally ill. The trial court failed to appoint a psychiatrist to report on his condition at the time of sentencing as required by KRS 504.140. The Supreme Court remanded for resentencing and compliance with KRS 504.140 which reads:

> If a defendant is found guilty but mentally ill, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition at the time of sentencing.

Edward C. Monahan
Assistant Public Advocate
Training Division

Milwaukee Public Defender

BARRY SLAGLE

He's been hissed at, lunged at, jumped upon, hit with purses, kicked and called names that would make even some seasoned sailors blush. "Then there are the people who <u>really</u> don't like me," sighs Barry C. Slagle, shrugging his large shoulders. What makes this Ivy League-educated, seemingly pleasant man so contemptible? Simple. He's a public defender.

Slagle, 35, makes his living off the taxpayers' money trying to keep people out of jail -- people who may have been accused of murder, rape, molesting children or dealing drugs. For $30,000 a year, he works 12 hours a day -- plus most weekends -- fighting for the rights not only of underdogs but also of some of society's most loathsome creatures. While the rest of the city is crying out for swift and harsh punishment, Slagle is planning ways to free his clients, searching for any technicality that might shave years off a murder sentence or, best of all in Slagle's mind, set the defendant free.

How can he live with himself when he is defending people he believes are guilty? "It's more fun that way," Slagle says smiling. For all Slagle's efforts, district attorneys taunt him, judges merely tolerate him, victims and their families torment him. Even the people he defends don't appreciate him. So why does he do it? "Are you kidding?" he asks, sitting up suddenly. "I love this."

It's 8 a.m. and Slagle is heading for the Safety Building to see if he can get probation for a man who originally was charged with attempted murder in connection with an armed robbery. The charge has been reduced, but the district attorney, Richard Klinkowitz, perhaps one of the most seasoned and respected in the county, is pushing the judge hard. He wants the defendant to go to jail. But Slagle's view is that the crime happened eight years ago and the defendant, who was picked up on a federal warrant in Indiana after being stopped for a traffic ticket, hasn't been in trouble since. "Your honor, he's proven that he can be a productive citizen," Slagle tells the judge. "People deserve another chance." His argument works. The judge orders his client to five years of probation.

CLIENT GETS WARNING

"Don't stay around here," Slagle tells his client sternly as the two walk down the hall to the probation department. "And don't get into trouble again. If you stick around here, there are people who will try and trip you up. They'd like to see you go to jail. Go back to Indiana and do what your probation officer tells you." The defendant nods. "See you later, man," he tells Slagle. That's the defendant's way of thanking him, Slagle says. "Maybe he'll buy me a beer or something," the lawyer says, laughing.

Now it's off to the Courthouse where Slagle will try to get an 18-year-old out of jail on a lower bail. The defendant faces a charge of endangering safety by reckless conduct. He tried to kill two rival gang members by shooting at them through their kitchen window. The $2,500 bail the judge ordered is too high, Slagle says. His client's parents can't come up with that kind of money. Bail, Slagle tells the judge, is meant only to ensure that the defendant will show up for court, not to keep him imprisoned.

BAIL REQUEST DENIED

But this time Slagle isn't as lucky. The judge denies his request. "That's too bad because bail is the most important part of a case," Slagle says later. "If a defendant can get out on bail, he can work and establish himself. It'll help him in court. But if he stays in jail before the trial, the chances of him being sentenced to jail are much greater."

His court business taken care of, Slagle heads back to his office to interview his clients during the lunch hour. On this particular afternoon, they include a man charged with sexual assault, an accused armed robber and a man who was arrested for carrying Mace after he walked into the middle of a drug bust. Slagle will recreate the crimes with them, probing for

any hint that his clients' rights might have been violated. He's hoping that the police had forgotten to read them their rights or maybe that they had detained them unlawfully -- anything to get them off.

SEARCHES FOR FLAW

"Let me get this straight," he says. "When you were lying on the ground and the shotgun was in your face, you had no idea these guys were cops?" he asks his client. "Because, if you didn't, we might have something." How can he morally try to get these people off on technicalities when, in many cases, they most likely committed gruesome crimes?

"MOST OF MY CLIENTS ARE PRETTY NICE PEOPLE, WHO, FOR WHATEVER REASON, WENT MOMENTARILY BERSERK,"

"Most of my clients are pretty nice people, who, for whatever reason, went momentarily berserk," he says, sitting in his office, the walls papered with detailed maps of crime scenes from some of the gorier cases he's defended. "They turn into animals and kill. But for the rest of the time, they are people and people deserve a fair trial, no matter who they are or what they did."

Slagle's passion for fairness is shared by his colleagues in the Milwaukee County public defender's office. "When the rights of even the worst among us are compromised, our system is failing," said Neil McGinn, a six-year veteran of the public defender's office. "If we start denying rights to people, we'll never stop. Pretty soon none of us will be protected. We had a revolution in this country 200 years ago because of just that."

KEEP AUTHORITY IN CHECK

McGinn says he likes to think that his work and that of his 40 colleagues in the Milwaukee office helps to protect the system. By defying authority, they help to keep it in check, to make sure it doesn't grow too big and swallow us all, McGinn says. "There's a little James Dean in all of us," McGinn said. "People tell us to walk a straight line and we ask why." Slagle agrees.

There is a fraternity among these 'troublemakers," They help each other research cases, pick juries and outline a case. When one wins, it's a victory for all of them.

They laugh about the militarism of the Milwaukee Police Department but, in more sober moments in the courtroom it is the fiercest dragon they are out to slay. "You know what a typical Milwaukee police lineup is?" McGinn says. "They get a stove, a refrigerator, a chicken and a big black guy with a long ar a ross his face and then tell you to pick out the criminal." There's a lot of police harassment going on in this city, says Karl Rohlich, affectionately known by his colleagues as "the doctor" for his expertise at winning the dozens of misdemeanor cases he handles for the indigent each day.

SYSTEM FLOUNDERS

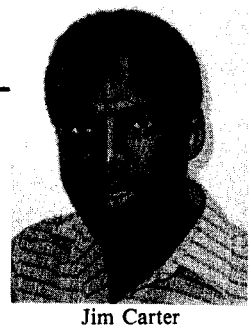
"Cops will stop a carload of black kids because they know they'll find something -- a knife, some pot, a broken taillight," Rohlich says. "But does that do anything to help them? I don't think so." "Our system really doesn't solve anybody's problems. Most of the time, it's just floundering about in a quagmire. Law is a self-perpetuating profession."

So why don't Slagle and the others get out and join a fancy law firm, where they can earn three times as much? "I'll tell you, there's nothing like seeing a guy walk out of jail with his wife and kid at his side and big tear rolling down his cheek," McGinn said. "And to know that I've helped that happen."

For Slagle, the answer is even simpler. "I've had offers from insurance companies to represent them in worker's compensation claims. But I'd feel like a prostitute trying to screw some guy out of the money he deserves," Slagle says, resting his thick leather boots on the desk. "Besides, those kind of firms don't let you wear boots in court, and I don't own any shoes."

- Reprinted from the Milwaukee Journal

Book Review



Jim Carter

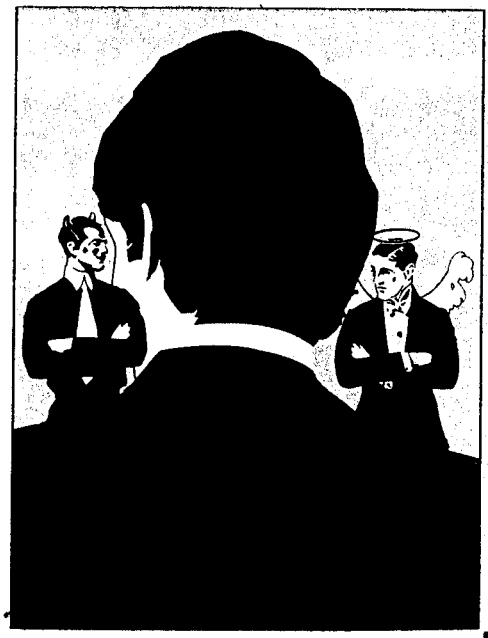
800-COCAINE
MARK S. GOLD, M.D.
Bantam Books, Inc.
666 Fifth Avenue
New York, NY 10103

Why would a professional athlete risk his career and body to the ravishes of cocaine? Why would a degree engineer abandon the logic of his discipline and pursue the use of cocaine to his ruin? Why would a practicing attorney forsake the principle of practice? Why would a doctor violate his allegiance to his oath? Why would an emerging actress allow her life to be viewed in the true life drama of riches to rags? These questions are being asked in every segment of society from the White House to the locker room, from the pinnacle of success to the playground of school children.

A song entitled "Flying High in a Friendly Sky," by the late Marvin Gaye asked: Why do we go to the place where danger awaits us and take self destruction in our hands. In fact, why do any of us do the things that are clearly not in our self-interest? Something is terribly awry when we seek indulgence in a substance, which can raise our blood pressure to the point of stroke level, cause seizures or convulsions, heart palpitations, problems breathing and swallowing, which intensify depression and make suicide appear plausible. Yet, there is an increasing segment of our society pursuing drugs in the name of recreation.

Since recovering from an episode of cocaine abuse myself, I believe that the 800-COCAINE book is an accurate accounting of a hellish nightmare that is rapidly becoming a reality in the lives of people you know... people just like you.

As author Dr. Mark S. Gold stated, the information in the book has been compiled in part by information received by over 1,368,000 callers to the 800-COCAINE hotline. The book tells of the origin of cocaine, profiles of a cocaine user, and (of American cocaine epidemics) that cocaine can kill, treatment for the cocaine abuser, coke in the work place, and the penalties state by state.



The material covered in this book could be of value to the attorney defending a client, whose crimes are connected with cocaine abuse.

The book reflects opinions of medical and psychiatric communities that cocaine addiction is an illness, it also suggests alternative sentencing other than imprisonment, and recommends treatment possibilities.

This book expresses the personal experiences of real people from all segments of society, who for whatever reason have been caught in the cycle of cocaine abuse. In almost all cases their abuse leads them to break the law in order to continue this cycle. How do you satisfy an insatiable desire? As you read the personal accounts of lawyers, doctors, engineers, cor-porate executives, athletes, school children, housewives, pilots, stockbrokers, you will better understand that cocaine abuse is a wide spread problem. Cocaine addiction is a compelling, demanding, thriving obsession which is crippling. It extinguishes the lives of people who touch it.

Dr. Mark S. Gold has done an excellent job to enlighten the readers of the dangers of cocaine abuse, as well as provide valuable information as to how this problem may be recognized, treated and hopefully neutralized.

JIM CARTER
Inmate
Franklin County Detention Center

Everyone has talent; what is rare is the courage to follow the talent to the dark place where it leads. - Erica Jong in Ms

Future Seminars

FORENSIC EXPERTS/ADVANCED CROSS

On November 6-8, 1986 there will be a DPA Seminar on Advanced Cross-Examination and Experts with an Emphasis on Forensic Science at the Fort Mitchell Holiday Inn. It will cover Hair, Fiber, and Drug Analysis, Ballistics, Pharmacology, Blood and Semen Analysis along with direct and cross-examination preparation and skills.

DEATH PENALTY SEMINAR

On April 16-18, 1987, DPA will present a 3 day seminar on the death penalty. It will be held at the Ramada Inn, Hurstborne Lane, in Louisville.

ANNUAL SEMINAR

DPA's 15th Annual Seminar is scheduled for June 7-9, 1987 at the Ramada Inn, Hurstborne Lane, Louisville.

TRIAL PRACTICE INSTITUTE

DPA's Fifth Trial Practice Institute will again be held in Richmond, Kentucky on November 4-7, 1987.

OTHER SEMINARS

DPA is also developing seminars on the New Juvenile Code and the recently enacted "Truth-in-Sentencing" Bill.

FURTHER INFORMATION

Further information on DPA seminars will appear in separate mailings, or you can contact Ed Monahan at (502) 564-5258. If you have suggestions about our training, please let us know.

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