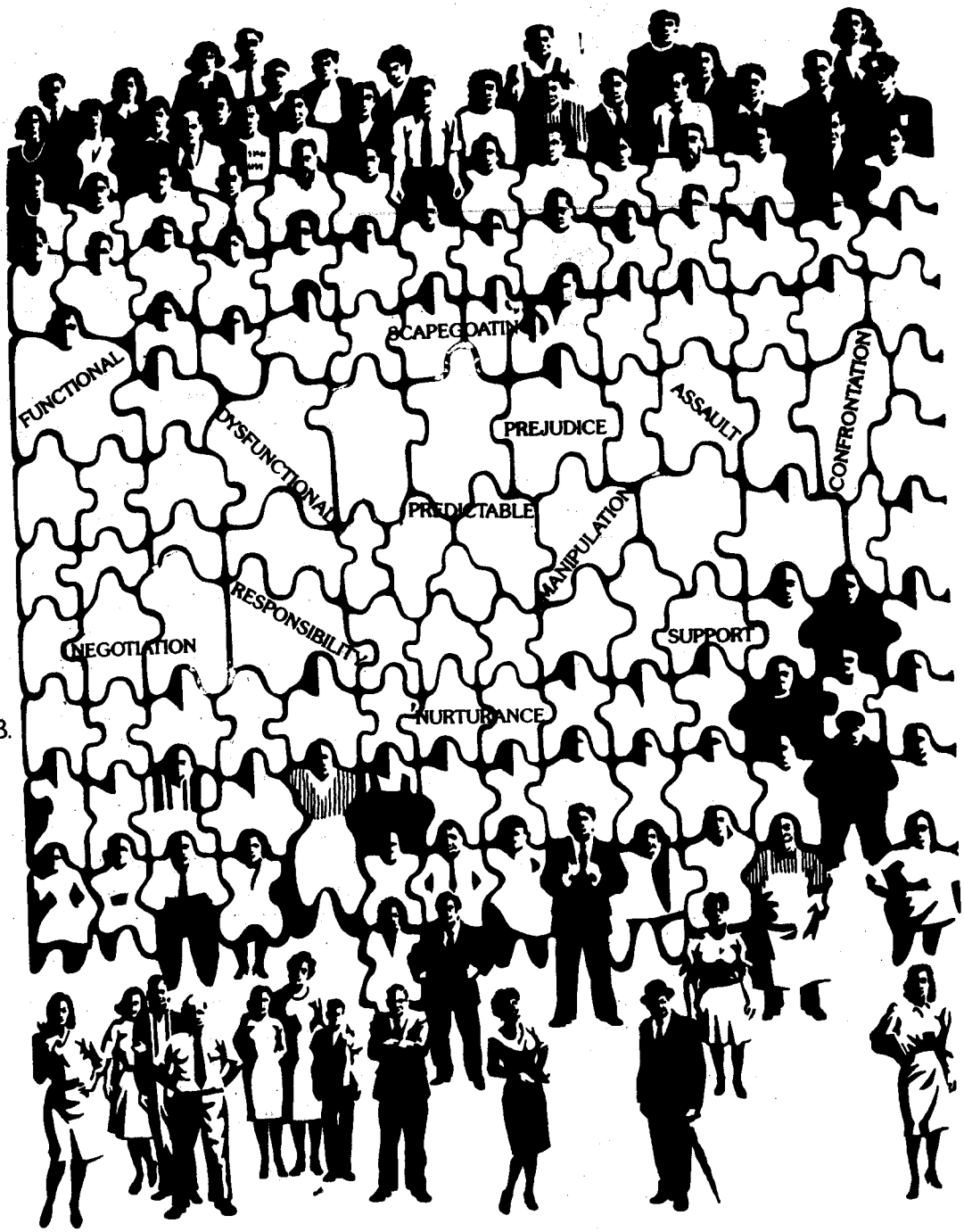
# THE ADVOCATE

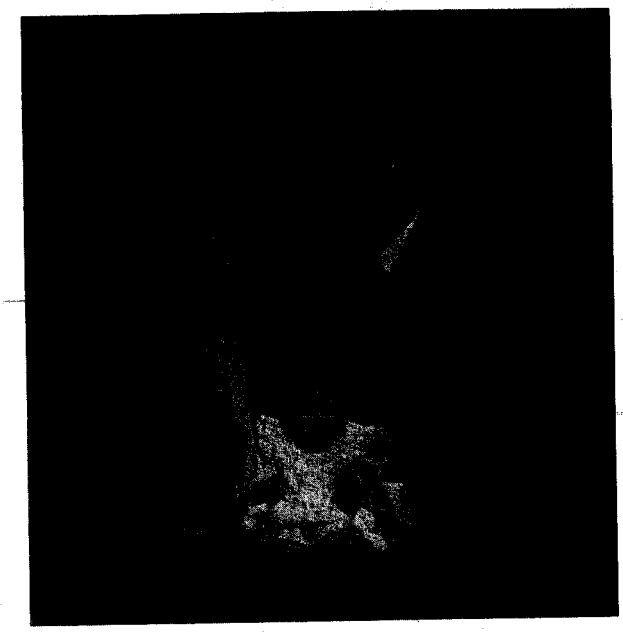
Vol. 9 No. 1 A Bi-Monthly Publication of the DPA December, 1986




Judge Charles B. Lester on Videotaping on page 30.

**Lane Veltkamp on dysfunctional families**
***on page 26***

# The Advocate Features



Christie, Ernie, Rachel and Ben Lewis

Born in Bonneterre, Missouri in 1947; the son of a Southern Baptist minister and his school teacher wife; husband to Dr. Christie Carter Lewis, and father of four year old Benjamin and 6 month old Rachel, Ernie Lewis graduated cum laude from Baylor University in 1969 with a B.A. in English.

From 1969-70 Ernie served with VISTA as a planner in a rural Community Action Program in Minnesota. As a juvenile offender counselor, he ran the night program from 1970-73 for a YMCA sponsored alternative treatment center for juvenile offenders in Nashville, Tennessee. In 1973 Ernie received a Masters of Divinity degree from Vanderbilt. He graduated in 1976 from St. Louis' Washington University Law School where he was a member of Order of the Coif.

Ernie has worked for the Department of Public Advocacy since 1976 in every major legal area. He began in the post-conviction section as a law clerk. As a lawyer, he has been an appellate attorney; a trial services branch supervisor; and the chief of the trial services branch, where he headed up all DPA trial services in the state. Now Ernie is the Director of DPA's Madison County trial office.

In 1978, Ernie rejuvenated DPA's newsletter, The Advocate, and served as its Editor until 1984. He continues with The Advocate as a contributing editor for the search and seizure column.

Ernie has been a presenter at many of the Department's seminars on varied topics. Vince Aprile and Ernie are the only members in the Department's history to be faculty for the National Criminal Defense College, the nation's premier criminal trial practice college.

His civic activities include membership on the Board of Directors of the Telford Board, which has recently been instrumental in bringing a YMCA to Richmond. He is a deacon in the First Presbyterian Church; teaches an adult Sunday School class; is involved in preparing the church budget, and projects such as building a playground for underprivileged children.

Ernie's wife, Christie, is a 1980 graduate of U.K.'s medical school. She did her residency at U.K., and in 1983 began her practice in pediatrics in Richmond.

(Continued on back page)

# THE ADVOCATE

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The Advocate is a bi-monthly publication of the Department of Public Advocacy. Opinions expressed in articles are those of the authors and do not necessarily represent the views of the Department.

The Advocate welcomes correspondence on subject treated in its pages.



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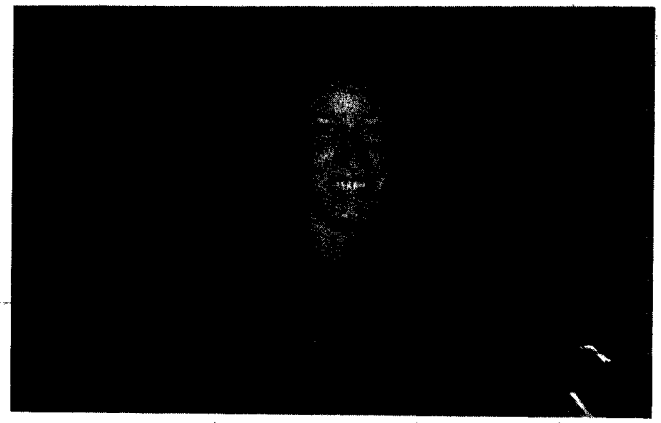
# Seminars Completed

## APPELLATE



Kathleen Kallaher

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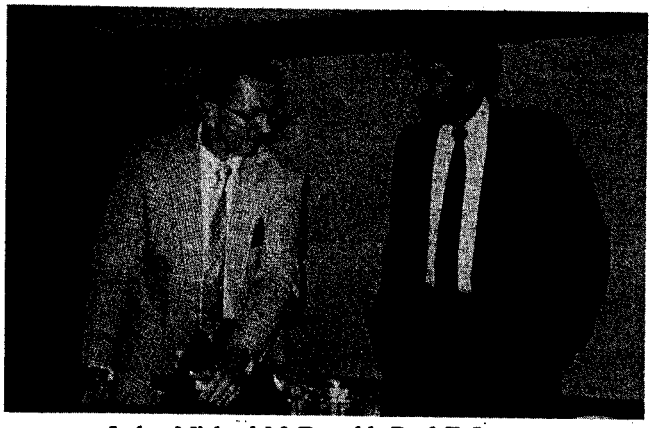
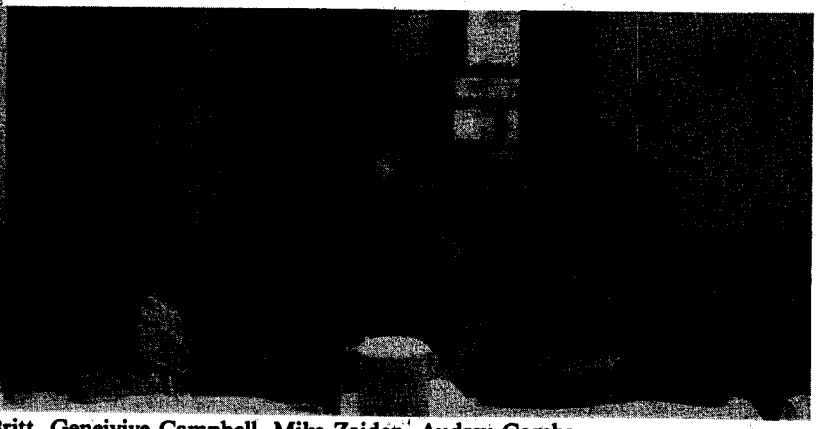


Judge Michael McDonald, Paul F. Isaacs

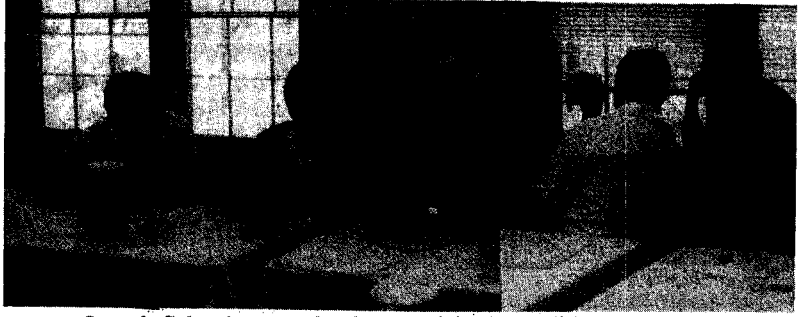
Justice Charles M. Leibson, Judge Dan Jack Combs

## INVESTIGATOR



Gary Johnson, Bob Rehburg, H.D. Britt, Geneivive Campbell, Mike Zaiden, Audrey Combs

F.B.I. Instructors, Michael Graham, Charles Lewis



Joseph Schweizer, Rosie Nunn, Wilford Caudill, Joe Howard, Lowell Humphrey

# Protection and Advocacy

## for the Developmentally Disabled

**MY SON JON AND 'CRACKPOT CONSERVATISM'**

WASHINGTON - In 1972 Jonathan Will, with a nice sense of family tradition, was born on May 4, his father's birthday. So in a few days he will attain the status of teen-ager, with all the prerogatives pertaining thereto. A wit has written that adolescence was first considered a phase, then a profession and now is a nationality. John's acquisition of citizenship in that nation comes on the heels of a recent ruckus here about people like him.

He has Down's syndrome, a genetic defect involving varying degrees of mental retardation and, sometimes serious physical defects. When he was born we were bombarded with advice and information, much of it mistaken. Even 13 years ago there was more certitude than certainty in the prognoses, most of which were too pessimistic.

It is said we are all born brave, trusting and greedy, and remain greedy. I am pleased that Jon has been like that - like the rest of us, because it was depressing to be told, repeatedly, that children with Down's syndrome "are such happy children." That implied subhuman simplicity, a mindless cheerfulness of the sort racists once ascribed to blacks. Jon, like the rest of us, is not always nice or happy. Indeed, he has the special unhappiness of having more complicated feelings than he has the capacity to express. He certainly has enough problems without being badgered by bureaucrats telling him to quit avoiding the central issues of his life.

Recently two officials of the U.S. Department of Education resigned after stirring a storm with interesting metaphysical and political thoughts. One official was a woman who readers of this column met in 1983 when she was saying that a "key reason" for declining academic achievements is that the government has been catering to groups such as the handicapped "at the expense of those who have the highest potential to contribute positively to society." This struck me as a frivolous analysis of a complex phenomenon and a dangerous subordination of individual rights to calculations of social utility.

She wrote a response, just now circulating, which she said (as the sympathetic Wall Street Journal phrased it) that, "We are on Earth not mainly to promote our secular equality but to use our varying Earthly circumstances to perfect ourselves morally."

Nice try, Journal. But what she really was was: "They (the handicapped) falsely assume that the lottery of life has penalized them at random. This is not so. Nothing comes to an individual that he has not, at some point in his development, summoned. Each of us is responsible for his life situation." And, "There is no injustice in the universe. As unfair as it may seem a person's external circumstances to fit his level of inner spiritual development.... Those of the handicapped constituency who seek to have others bear their burdens and eliminate their challenges are seeking to void the central issues of their lives."

Jon avoids making his bed, but is not to confront central issues of his life, such as why the Baltimore Orioles start slowly. His father is trying to fathom how Jon "summoned" chromosomal problems.

Sen. Lowell Weicker, chairman of the appropriations committee that deals with education, got very exercised about what the woman wrote, but Weicker probably gets exercised about oatmeal, "Gilligan's Island" re-runs and rainy Tuesdays. Everything gets Weicker wrought up, and this issue would have done so even if he did not have a son with Down's syndrome.

The woman resigned as did another education department official, who favors repeal of, among other things, PL 94-142. That law guarantees handicapped children a free, appropriate public education. To millions of handicapped persons and their parents, it is as important, substantively and symbolically, as the Voting Rights Act is to black Americans. The official who advocated repeal was betraying a president who supports it.

The two resignations detonated the Wall Street Journal's editorialists. They issued another denunciation of us sinners who live within

the Washington Beltway. The Journal said the two officials were victims of "the usual crazed antibodies," meaning "the Beltway white cells" in a "feeding frenzy" to destroy Ronald Reagan and red-blooded conservatism.

The strain of manning the ramparts of right-wing purity may be getting to the Journal. We inside the Beltway no doubt have shortcomings unknown in sour Manhattan, which the Journal considers the perfect place to take America's pulse. But we know some things, including these: Reagan opposes weakening PL 94-142. He has enough problems without being saddled with supporters who define conservatism in terms of dismantling such protections and who associate conservatism with crackpot metaphysics about (hey, cheer up, Ethiopians) the perfect justice of the universe.

If the Journal can believe that America does or should want such conservatism, then the Journal can believe anything - for example, that budget cuts and economic growth are going to balance the budget. The Journal believes that, too.

George F. Will - a former teacher whose Washington Post column is nationally syndicated, won the 1977 Pulitzer Prize for commentary.
Reprinted with Permission from the Washington Post

"Man often becomes what he believes himself to be, if I keep on saying to myself that I cannot do a certain thing, it is possible that I may end by really becoming incapable of doing it. On the contrary, if I have the belief that I can do it, I shall surely acquire the capacity to do it even if I may not have it at the beginning."
- Mohatma Gandi

**MAN JAILED IN MIX-UP TO GET $99,999.99**

The federal government has agreed to pay $99,999.99 to a 31-year-old drifter who in 1984 was held for six weeks in the D.C. Jail after prosecutors insisted, despite the man's protestations, that he was someone else and they had the fingerprints to prove it.

Winfred E. Brown, who now sells jewelry for a living, was eventually released after his attorney proved that Brown's fingerprints weren't the same as the man for whom a D.C. Superior Court bench warrant had been issued. An investigation of the incident, begun after questions were raised by The Washington Post, showed that because of a clerical error the other man's police identification number was put on Brown's police file. Brown was arrested on a bench warrant for the other man, Johnny T. Jones of Southeast Washington.

But, according to documents filed in the case, the wrong identification number also kept Brown in jail. Each time prosecutors tried to check Brown's fingerprints against those of Jones, they ended up with two sets of Jones' prints rather than one of each man.

The settlement was approved late Wednesday by U.S. District Judge Gerhard A. Gesell, who dismissed the District government in July as a defendant. But Gesell refused to dismiss the federal government and the three prosecutors involved in the case, saying their immunity argument was "wholly untenable."

"We are very happy with the settlement," said Brown's lawyer, E. John Domingues. Brown had sought $7 million. "We believe it's the largest per diem amount ever paid here for someone who was held on a false arrest."

Brown, whose last known address was a Phoenix motel, could not be reached for comment yesterday. Domingues said Brown was aware that the case was to be settled and brown had said he planned to leave Phoenix. "I told him to keep in touch and to call when he had a new number," Domingues said. Asked about the unusual figure, Domingues said, "I think the government wanted to say they settled for less than $100,000." Government attorneys said they had no comment on the case.

Domingues' law partner, Steven A. Spiegelman, was Brown's lawyer in the criminal case and the man who finally succeeded in proving Brown was not Jones.

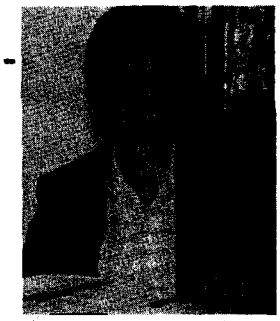
Coincidentally, Brown, who was arrested here on minor charges in 1977 and 1978, was listed in police files as having an alias of John B. Jones and he and Johnny Jones were born on December 24 two years apart.

Brown was arrested by D.C. police officers early on the morning of September 4, 1984, as he left a Thomas Circle drug store. He spent the next six weeks, until October 17, in the D.C. Jail, an experience he later described as "despicable, awful and disgusting."

Washington Post, November 14, 1986

# West's Review

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



Linda K. West

## KENTUCKY COURT OF APPEALS

### RESTITUTION

**Lane v. Commonwealth**
**33 K.L.S. 12 at 1**
**(September 5, 1986)**

The appellant in this case pled guilty to a theft charge. The trial court later entered a post-judgment order directing the appellant to make restitution. The appellant appealed from the order, asserting that restitution was not included in the plea bargain agreement.

The Court of Appeals remanded the case to the trial court for an evidentiary hearing to determine whether restitution was part of the plea bargain agreement.

### INEFFECTIVE ASSISTANCE OF COUNSEL

**McLaughlin v. Commonwealth**
**33 K.L.S. 12 at 4**
**(September 5, 1986)**

In this case the Court considered a claim that McLaughlin received ineffective assistance of counsel at his probation revocation hearing. McLaughlin asserted that counsel could have collaterally attacked the misdemeanor convictions which were the basis for revoking his probation. The Court of Appeals disagreed and stated "we concur with the trial court that counsel could not have countered the fact that appellant was convicted of the misdemeanor charges subsequent to his probation and furthermore any attack on the misdemeanor convictions should have been made in the Fayette District Court."

### JAIL CREDIT

**Mills v. Commonwealth**
**33 K.L.S. 12 at 9**
**(September 12, 1986)**

On February 27, 1985, Mills was placed in the Jefferson County Jail on a charge of possession of a forged instrument. His parole was subsequently revoked and on March 23, 1985, Mills was moved to the state reformatory. Mills was ultimately convicted and sentenced on the forged instrument offense on June 28, 1985. Following conviction, Mills was given jail credit for the days spent in the Jefferson County Jail between February 27 and March 23. Mills contended that jail credit should have been given for days up to June 28.

The Court of Appeals rejected Mills' argument, citing KRS 532.120(3) since the time spent in custody following the parole revocation was not due solely to the charge for which Mills was ultimately convicted, but was attributable in part to Mills' prior conviction.

### OTHER CRIMES

**Harrison v. Commonwealth**
**33 K.L.S. 12 at 14**
**(September 19, 1986)**

In order to show motive for the burning of a general store, the Commonwealth introduced proof that two weeks before the fire, the store owner had sworn out an arrest warrant against the appellant for an alleged burglary of the same store. The Commonwealth then proceeded to introduce evidence relating to the store owner's allegation of burglary, including the fact that items of stolen property were found in the appellant's car and that he had confessed to the burglary. On appeal, the appellant contended that while evidence of the warrants themselves was admissible to show motive, admission of the facts underlying the warrants was prejudicial error.

The Court of Appeals agreed. "While testimony of the existence of the arrest warrant..., of itself, is relevant and admissible for the limited purpose of showing motive... no such exception applies to the underlying facts supporting issuance of the warrants." The Court further found that in view of the weakness of the Commonwealth's case an admonition given by the trial court was unable to cure the prejudice.

### CONDITIONAL DISCHARGE

**McMillen v. Commonwealth**
**33 K.L.S. 12 at 17**
**(September 19, 1986)**

In this case, the Court of Appeals held that a sentencing court acted properly when it modified the terms of McMillen's conditional discharge after a hearing, based on *ex parte* information that McMillen had violated a condition of his discharge

by refusing psychiatric treatment. KRS 533.050(2) requires that prior to such modification, the defendant must receive written notice of the grounds for modification and a hearing must be held with the defendant represented by counsel. The Court of Appeals held that "there is no case law requiring the hearing to include, in addition, the confrontation and cross-examination of witnesses."

**SELF-DEFENSE AND WANTON MENTAL STATE**
**Roston v. Commonwealth**
**33 K.L.S. 12 at 18**
**(September 19, 1986)**

In this case, the Court held that Roston, who testified that he intentionally shot at the victim in self-defense but without intending to kill her, could be convicted of second degree manslaughter. The Court's holding was based on KRS 503.120(1), which provides that a claim of self-defense is not available to a defendant who unreasonably believes that force, or the degree of force used, was necessary, when wantonness or recklessness are the mental states required to establish culpability.

In Baker v. Commonwealth, Ky., 677 S.W.2d 816 (1984) and Gray v. Commonwealth, Ky., 695 S.W.2d 860 (1985) the Kentucky Supreme Court held that a defendant who claimed self-defense could not be convicted of either reckless homicide or second degree manslaughter since an act of self-defense is necessarily intentional. The Court of Appeals' holding in Roston is contrary to the holdings of Baker and Gray. The Court of Appeals reasoned that instructions including wanton and reckless mental states were justified because "The evidence showed that the appellant intentionally shot McCray, but it does not show that his conscious objective was to kill her."

**DANGEROUS INSTRUMENT**
**Johnson v. Commonwealth**
**33 K.L.S. 13 at 1**
**(September 16, 1986)**

The Court found in this case that Johnson's conviction of attempted first degree robbery was supported by sufficient evidence. Specifically, Johnson threatened the use of a "dangerous instrument" when he stood with a bumper jack raised over the victim's head. Johnson was not entitled under this evidence to an instruction on attempted second degree robbery.

**INEFFECTIVE ASSISTANCE-PREJUDICE**
**Brewster v. Commonwealth**
**33 K.L.S. 13 at 3**
**(October 3, 1986)**

In this case the Court held that Brewster was not denied effective assistance of counsel. The Court did not consider it necessary to determine whether trial counsel's performance was deficient. The Court instead affirmed the denial of relief based on the absence of prejudice. The Court explained that: "The trial court is permitted to examine the question of prejudice before it determines whether there have been errors in counsel's performance. In making its decision on actual prejudice, the trial court obviously may and should consider the totality of the evidence presented to the trier of fact."

**COMMENT ON REFUSAL TO TESTIFY**
**McKee v. Commonwealth**
**33 K.L.S. 13 at 6**
**(October 3, 1986)**

McKee was tried for robbery and theft and later tried on a severed charge of possession of a handgun by a convicted felony. At the trial of the robbery and theft charges McKee did not testify, but his attorney argued to the jury in closing that McKee's brother had actually committed the offense. At trial of the handgun charge McKee did take the stand and testify that one Robert Barker had committed the robbery and been in possession of the handgun. The prosecutor then questioned McKee regarding his silence at his first trial. The Court rejected McKee's argument that this penalized his exercise of his right not to testify. The Court stated that "we hold that the grossly inconsistent defenses presented on McKee's behalf permitted... the cross-examination objected to."

**DOUBLE JEOPARDY/ADVERSE INFERENCE INSTRUCTION**
**McKee v. Commonwealth**
**33 K.L.S. 13 at 6**
**(October 3, 1986)**

In this separate case, McKee was convicted of both robbery and theft of the property taken in the robbery. The Court of Appeals reversed the theft conviction as violative of the prohibition against double jeopardy since all of the elements of theft as set out in KRS 514.030 are contained within the offense of robbery.

The Court additionally held that the trial court's refusal to instruct the jury on the effect of McKee's decision not to testify was nonprejudicial since the evidence was "overwhelming."

**COMMENT ON POST-ARREST SILENCE**
**Jackson v. Commonwealth**
**33 K.L.S. 13 at 7**
**(October 3, 1986)**

In this case, the Court held that Jackson's Fifth Amendment privilege was infringed by the prosecutor's questions regarding his silence at

arrest. However, the error was unpreserved since counsel's general objection was sustained and no further relief was requested. In the Court's words "The crucial question then becomes whether the unpreserved error is of such a magnitude that to leave it unaddressed would work a manifest injustice.." Weighing the totality of the evidence, the Court concluded that it did not.

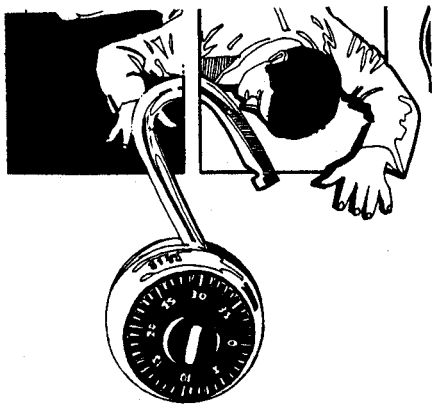
**WITHDRAWAL OF GUILTY PLEA**
**Weist v. Commonwealth**
**33 K.L.S. 13 at 13**
**(October 10, 1986)**

Weist sought to withdraw his guilty plea on the grounds that it was rendered involuntary by the failure of the Commonwealth to fulfill a signed plea agreement. The Commonwealth agreed to recommend imposition of a $10,000 fine as sole penalty in exchange for Weist's plea of guilty to drug charges. However, at the guilty plea proceedings the investigating police officer told the court that he did not agree with the recommendation. The Commonwealth Attorney stated that he stood by the recommendation. However, the trial court overruled Weist's motion to withdraw his plea and expressed an intent to impose a sentence of imprisonment.

The Court of Appeals held that Weist was not entitled to withdraw his plea since "the comments Weist complains of were not made by the Commonwealth Attorney, but instead originated from an obviously frustrated local police officer acting on his own initiative" and since "the Commonwealth continued to stand solidly behind its written agreement..."

**SELF-PROTECTION-WANTON ASSAULT**
**Russell v. Commonwealth**
**33 K.L.S. 13 at 12**
**(October 10, 1986)**

In this case, the Court held that it was error to qualify the defendant's defense of self-justification by instructing the jury under KRS 503.050 that the defense of self-protection was unavailable for a wanton assault if the defendant "was wanton or reckless in believing the use of force, or the degree of force used, to be necessary..." The giving of this instruction was error since the evidence in the case pointed solely to an intentional assault.



**RCr 9.70 ADMONITION**
**CRUEL AND UNUSUAL PUNISHMENT**
**Messex v. Commonwealth**
**33 K.L.S. 14 at 2**
**(October 17, 1986)**

The Court reversed Messex's theft and first degree PFO convictions because of the failure of the trial court to admonish the jury pursuant to RCr 9.70 when they separated over night. The Court held that the rule imposes a mandatory duty on trial courts since it provides that jurors "must be admonished by the court that it is their duty not to permit anyone to speak to them..." (Emphasis added). Although the error was unpreserved the Court reversed based on its holding that such error was palpable.

The Court also held that Messex's sentence to fifteen years imprisonment as a first degree persistent felony offender premised on an underlying offense of theft of six shirts and a pair of socks was not so disproportionate as to constitute cruel and unusual punishment. Judge Miller dissented from this portion of the opinion and would have found cruel and unusual punishment.

**WITNESSES-COMPULSORY PROCESS**
**Calloway v. Commonwealth**
**33 K.L.S. 14 at 11**
**(October 31, 1986)**

The Court of Appeals reversed Calloway's convictions because of the Commonwealth's failure to produce the witness informant whose information led to the charges. In response to a motion for a Bill of Particulars, the Commonwealth advised the defense that the witness would be "made available at trial by the Commonwealth." However, the witness did not appear at trial and it developed that the Commonwealth had made no effort to obtain his presence. A continuance was granted. At a second trial date some ten months later the defendant moved to dismiss the charges because the Commonwealth had still made no effort to locate the witness and had given the defense no information as to his whereabouts. The motion was denied.

The Court of Appeals held that the Commonwealth's actions had frustrated the defendant's Sixth Amendment right to compulsory process to obtain witnesses in his favor. The Court reversed and remanded for a new trial following a good faith effort by the Commonwealth to locate the witness.

**DOUBLE JEOPARDY - LESSER INCLUDED OFFENSE**
**Keller v. Commonwealth**
**33 K.L.S. 13 at 9**
**(October 10, 1986)**

In this case the Court held that Keller's convictions of both second degree manslaughter and DUI did not constitute double jeopardy because, contrary to Keller's argument, DUI is not a lesser included offense to second degree manslaughter. The Court explained that: "While we agree that driving under the influence of intoxicants would almost always be wanton, as we interpret KRS 507.040(1) the state need not prove the element of intoxication needed to support the DUI charge [in order to prove second degree manslaughter]."

# KENTUCKY SUPREME COURT

**WAIVER OF DEFENSES/PFO - PROOF OF PRIOR CONVICTIONS/ BOYKIN**
**Corbett v. Commonwealth**
**33 K.L.S. 11 at 21**
**(September 4, 1986)**

The Court held that the appellant's guilty plea waived all available defenses, including a claim of improper venue. Moreover, the appellant's designation of his plea as an "Alford plea" did not preserve a right of appeal with respect to the venue issue.

The appellant was tried on PFO charges following his guilty plea. The appellant then made a motion to suppress evidence of his prior convictions on the grounds that he had received ineffective assistance of counsel. The Court held that such a motion "does not furnish a forum to litigate the issue of ineffective assistance of counsel." "Our rules provide that the collateral attack on a prior judgment shall be made in the court in which they were obtained, under circumstances prescribed in the rules, such as the requirement that the sentence attacked must be presently in effect or the defendant must be on probation, parole or conditional discharge at the time of the motion."

The Court considered but rejected Corbett's claim that his prior convictions should have been suppressed since they were based on guilty pleas not entered in compliance with Boykin. The Court held that the convictions were correctly admitted since Corbett made "no claim that he was in ignorance of [his Boykin rights] and makes no claim that his attorney did not inform him of those rights."

**INDEPENDENT PSYCHIATRIST/PRIOR INCONSISTENT STATEMENTS/OTHER CRIMES**
**Todd v. Commonwealth**
**33 K.L.S. 11 at 23**
**(September 4, 1986)**

Todd asserted that he was denied due process when the trial court denied his request for appointment of an independent psychiatrist to help him in developing defenses of insanity, intoxication and extreme emotional disturbance to a charge of wanton murder. The Court initially noted that intoxication and extreme emotional disturbance are not defenses to wanton murder. The Court then observed that Todd was evaluated at the Kentucky Correctional Psychiatric Center but did not receive an evaluation favorable to an insanity defense. The Court held that under the circumstances the trial court did not abuse its discretion by denying funds for an independent expert.

Todd also challenged the Commonwealth's questioning of a witness regarding an alleged prior inconsistent statement without offering proof. The defense did not object to the questioning but submitted an admonition with the instructions which would have limited the prior statement to its impeachment value. The Court held that this did not preserve the error and, since the error had been waived, evidence of the statement was admissible both for impeachment and substantive use under Jett.

The Court found reversible error in the admission of evidence of other crimes. Testimony was introduced that the victim had been found beaten and with gunshot holes in her room on a prior occasion. Evidence of this incident was inadmissible since it was not linked to the appellant. Evidence was also introduced that a shotgun was found in the home following the victim's death although the shotgun was unconnected to her death. Error was also committed when evidence was introduced that the appellant was required to take a "perk" or rape test, and when a photograph of the victim suggesting the possibility of rape was introduced even though a charge of rape was not before the jury. Justice Wintersheimer dissented.

**CONTEMPT/DOUBLE JEOPARDY**
**Leibson v. Taylor**
**33 K.L.S. 12 at 3**
**(September 25, 1986)**

Earl Oliver and his brother Victor were both indicted for murder. Based on an erroneous belief that Victor had agreed to testify against Earl, the trial court dismissed the indictment against Victor "with prejudice." However, at Earl's trial Victor refused to testify. The trial court then set aside the order dismissing the indictment as to Victor, declared a mistrial as to Earl, and set a new trial date for both men. The trial

court also held trial defense counsel in contempt for refusing to provide the trial court a list of defense witnesses for the court's use in voir dire of prospective jurors.

The Court of Appeals granted a writ of prohibition as to the defendant's retrial and overturned defense counsel's contempt [Taylor v. Leibson, 32 K.L.S. 5 at 2 (March 22, 1985)], and the Kentucky Supreme Court affirmed on discretionary review. The Supreme Court held that defense counsel could be held in criminal contempt for denying the trial court's order even though the order was in error. However, counsel could not be punished for the contempt inasmuch as the trial court had prohibited him from taking an immediate appeal of its contempt ruling. With respect to Earl Oliver, the Court held that his retrial was barred by double jeopardy, since declaration of a mistrial when Victor refused to testify was not compelled by "manifest necessity" and was objected to by the defense. The Court did not review the Court of Appeals' decision with respect to Victor. Special Justices Bruton and House, and Justice Wintersheimer, dissented.

**INEFFECTIVE ASSISTANCE OF COUNSEL**
**McQueen v. Commonwealth**
**33 K.L.S. 12 at 25**
**(September 25, 1986)**

In this case, the Court rejected the appellant's claim of ineffective assistance at his death penalty trial and held that RCr 11.42 relief was correctly denied. The Court held that McQueen was not denied effective assistance when counsel did not advise him of his right to testify at the penalty phase. McQueen testified that he was not advised of his right to so testify and would have testified had he known he could. Trial defense counsel testified at the 11.42 hearing but was never asked by McQueen or the Commonwealth if he had told McQueen he could testify at the penalty phase. The Supreme Court held that "Under the circumstances the failure to specifically advise McQueen of his right to testify at the penalty-phase did not constitute ineffective assistance of counsel."

The Court also held that counsel did not abdicate his duty to act as McQueen's personal advocate when he relied on counsel for a codefendant, whose interests were conflicting, to take care of pretrial motion practice. The Court found that counsel did not "defer to [the co-defendant's counsels] judgment to the detriment of McQueen." Neither was counsel ineffective for failing to seek a separate trial from the codefendant, whose trial strategy was to depict McQueen as the triggerman and mastermind of the offense.

The Court held that counsel was not ineffective for failing to investigate McQueen's family as potential penalty phase witnesses. The Court stated, somewhat contradictorily, that counsel knew the family and did not believe they would be beneficial, and that McQueen "did not mention any family...who could appear...." The Court also noted that other penalty phase witnesses were called.

Finally, the Court rejected McQueen's claims of ineffective assistance predicated on failure to seek a change of venue, failure to challenge the composition of the grand and petit juries, and failure to object to extrajudicial communications to the trial court regarding a juror's views on the death penalty.

**FAILURE TO FILE TIMELY BRIEF**
**Moore v. Commonwealth**
**33 K.L.S. 12 at 28**
**(September 25, 1986)**

The Court has again held appellate attorneys in contempt for failing to file a brief in a death penalty case in a "timely" manner. See Sanborn v. Commonwealth, 33 K.L.S. 10 at 23 (August 7, 1986). The facts were similar to those in Sanborn: the attorneys obtained an initial extension of time of ten months, on the day before the brief was due the attorneys requested a second extension of time of six months. At a subsequent show cause hearing the attorneys cited the length of the record and caseload considerations as necessitating a further extension. The Court rejected the offered justification, noting that the attorneys had some familiarity with the case since they had represented their client at trial, and that one of the attorneys was private counsel who could control his own caseload. The Court also noted that the attorneys had not completed reading the record, or begun writing the brief, during the initial extension of time. Finally, as in Sanborn, the Court condemned the practice of seeking an additional extension of time on the last day of the filing period. Justices Gant and White dissented.

**DISMISSAL OF JUROR**
**Randolph v. Commonwealth**
**33 K.L.S. 12 at 29**
**(September 25, 1986)**

The Court reversed Randolph's murder conviction based on the failure of a juror to reveal that she was an employee of the Commonwealth Attorney's office. On the second day of trial, defense counsel moved for a mistrial on the grounds that he had discovered the juror's employment. This was

denied, as was a request to dismiss the juror. The Supreme Court reversing, stated that "it is obvious that an implied bias challenge lies against juror Miller because her position as secretary for the Commonwealth Attorney gives rise to a loyalty to her employer that would imply bias."

**OATH/WITNESS LIST/**
**BOLSTERING CHILD WITNESS**
**Hardy v. Commonwealth**
**33 K.L.S. 13 at 17**
**(October 16, 1986)**

The appellant sought reversal on the grounds that a child witness, whose videotaped deposition was introduced at trial, was not placed under oath. However, no objection was made until the deposition was concluded. RCr 7.20(2)(b) requires such objection to be made promptly. In rejecting this claim of error, the Supreme Court also noted that a competency hearing had demonstrated that the child "recognized her moral obligations to tell the truth."

The Court also held that Hardy's rights were not violated when the trial court required him to produce a list of defense witnesses for its use in voir dire. The Court held King v. Venters, Ky., 596 S.W.2d 721 (1980), which holds that the defense may not be required to provide a witness list to the prosecution during pre-trial discovery, inapposite.

Finally, the Court held that the testimony of the child sodomy victim was improperly bolstered by the testimony of a psychologist that the victim could be psychologically damaged if people treated her as if she were lying. However, the error was not reversible since an admonition which "would have cured any error" was not requested.

**SODOMY - PROOF**
**/SERIOUS PHYSICAL INJURY/HEARSAY**
**Souder v. Commonwealth**
**33 K.L.S. 13 at 18**
**(October 16, 1986)**

In this case the Court held that there was insufficient proof that the appellant had sodomized the two and one half year old victim. The victim did not testify as to what had happened and the physical evidence suggested that a hard object other than a male sex organ could have caused the victim's injuries. The Court also reversed the appellant's conviction of first degree assault because of insufficient proof of "serious physical injury." The child had burns around the mouth, possibly from a cigarette. The Court held that this injury did not meet the KRS 500.080(15) definition of serious physical injury.

Finally, the Court found reversible error in the admission of various out-of-court statements of the nontestifying victim. The statements were made to family members and a social worker hours to days after the offenses and in response to questioning. Thus, the statements did not fall within the "spontaneous statements and excited utterances" exception to the hearsay rule. Justice Wintersheimer dissented.

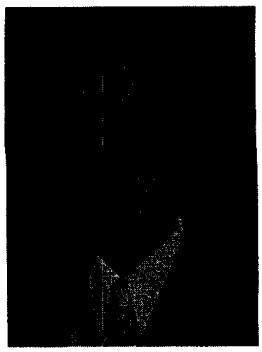
Linda K. West
Appellate Branch


ON THE EVENING OF AUGUST SIXTH, I WAS HOME, ALONE, IN MY KITCHEN, PREPARING A HOLLANDAISE SAUCE. I REMEMBER THE EVENING WELL BECAUSE I HAD NEVER PREPARED A HOLLANDAISE SAUCE BEFORE."

Drawing by Michael Maslin. Reprinted with Permission

# Post-Conviction

## Law and Comment



Bob Hubbard

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

### PART TWO

With certain exceptions discussed later in this article, whether the case you handle is juvenile, misdemeanor or felony you have the opportunity to effectuate your client's release from incarceration by utilization of the "Motion to Suspend Further Execution of Sentence," A.K.A. "Motion for Shock Probation." The provisions under which such a motion is made are codified in KRS 208.194 (juvenile offenders), KRS 439.267 (misdemeanor offenders) and KRS 439.265 (felony offenders).

### I. JUVENILES

Under KRS 208.194, the applicability of such a motion extends to: 1) a child sixteen years of age or older, adjudicated delinquent for the commission of a capital offense, or Class A or B felony or, 2) a child sixteen years of age or older, adjudicated delinquent for the commission of any felony offense after having previously been adjudicated delinquent of a felony offense in two or more separate adjudications. See, KRS 208.194 (1)(2). Based upon either one of these adjudications, the court may commit the child for an indeterminate period of time of not less than six months. Notwithstanding the commitment, KRS 208.194(5) provides that "[t]he committing court may, with the consent of the department and upon motion of the child, grant shock probation to any child committed under this section after the child has been committed for a minimum of thirty days."

Effective July 1, 1987, as a result of the 1986 Legislative enactment of the "Unified Juvenile Code," Senate Bill 311 (Acts Chapter 423), the foregoing provisions will be repealed and replaced by Section 132 of the Act (KRS 635.090). The New Code changes shock probation procedures:

(1) The age requirement of the child will be reduced from sixteen to fourteen years of age,

(2) The child may be committed for an indeterminate period of time not exceeding twelve months and,

(3) Consent of the [department] cabinet is no longer required before the court may grant the motion for shock probation.

### II. MISDEMEANORS

Under KRS 439.267, the shock probation motion may not be made earlier than thirty days after the defendant has been delivered to the keeper of the institution to which he is sentenced. The motion itself may be filed with the District Court, or the Circuit Court, in cases where a misdemeanor offense was joined with a felony. However, unlike the codified provisions relevant to convicted felons, there is no outer time limitation imposed for the filing of the motion. In all other respects, KRS 439.267 parrots its felony counterpart, KRS 439.265.

### III. FELONIES

A defendant will not be considered eligible for shock if:

(a) he has been convicted of a class A, B or C felony which "...involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury," KRS 533.060(1); See, Pruitt v. Commonwealth, Ky.App., 700 S.W.2d 69 (1985);

(b) while on parole, probation, shock probation, or conditional discharge from a previously felony offense he is convicted or enters a plea of guilty to a felony offense committed during such period of release, KRS 533.060(2);

(c) he is convicted as a persistent felony offender, KRS 532.080(5)(7);

(d) he is convicted of a capital offense and sentenced to death, KRS 439.265(4), KRS 533.010(1);

(e) he is convicted of an offense in a manner delineated in KRS 532.045(1), (a-i).

If eligible, the statute either requires or provides for:

(a) the motion to be made by the defendant in writing, KRS 439.265(1)(2); Commonwealth ex rel. Hancock v. Melton, Ky., 510 S.W.2d 250 (1974);

(b) the motion to be filed "not earlier than thirty days nor later than ninety days after the defendant has been incarcerated in a county jail following his conviction and sentencing pending delivery to the institution..., or delivered to the keeper of the institution.... Time spent on any form of release following conviction shall not count toward time required under this section." KRS 439.265(1);

(c) the court being required to consider the motion within sixty days of the filing date and enter its ruling within ten days following such consideration, KRS 439.265(2);

(d) the trial court, in its discretion, to provide the defendant with a hearing upon the motion, Id.;

(e) a court order granting or denying the motion is not reviewable [on the merits] but, jurisdiction of the trial court and the procedural aspects of the courts' actions may be considered, KRS 439.265(2), Commonwealth ex rel. Hancock v. Melton, supra;

(f) the motion to be considered by the sentencing judge unless he is unable to act and it appears that such inability will continue beyond the expiration of the court term, in which case the motion should be considered by the judge designated by the sentencing judge if he is able to so designate a judge. If not, the motion may be considered by any judge qualified to act in the sentencing judge's absence, KRS 439.265(3); RCr 11.32.

Further, if no ruling by the court is made within the time limitations, the court should be required to rule by the filing of a mandamus.

## IV. THE MOTION

When filing for shock probation on behalf of your client, the application should include the motion itself, an accompanying memorandum and supportive statements. Within the body of the motion trial counsel need only set forth the following:

(a) the name of the defendant bringing the action, that he seeks an order suspending further execution of sentence, the sentence length, the date the sentence was imposed and the offense upon which the sentence is predicated;

(b) the provisions under which the motion is sought and the fact that it is timely, e. g., not earlier than 30, nor later than 90 days in the case of a felony offense, since his commitment to jail, the institution, etc...;

(c) that the defendant submits the motion for the reasons set forth in the accompanying memorandum,

(d) the relief sought.

The memorandum should be thought of as an opportunity to mitigate the punishment imposed. Thus, any factor which adopts such a position should be submitted for consideration. The trial attorney should plan to incorporate, but not be limited by the following:

(a) the place of defendant's incarceration/detention, the judgment predicating his custody and the date the judgment was entered;

(b) the date the incarceration/detention began;

(c) the conduct of the defendant since his incarceration/detention began;

(d) any work, academic or vocational classes attended, any self-help groups or organizations, etc... which the defendant participates in;

(e) the prior record of the defendant'

(f) if the defendant was on bail (pending trial or appeal) what his conduct was;

(g) the past work record (including military service) of the defendant and the offer of future employment if released;

(h) family ties which the defendant maintains and the promise of home placement if released.

In formation of the legal arguments made in support, reference should initially be made to the provisions of KRS 533.010(2) which provide that "probation or conditional discharge should be granted unless...

(a) There is substantial risk... the defendant will commit another crime...;

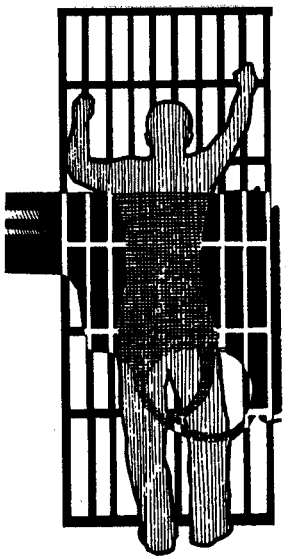
(b) [he] is in need of... treatment...provided most effectively by his commitment...;

(c) [this release would]...unduly depreciate the seriousness of the ...crime." (Emphasis supplied).

According to the statute's commentary, KRS 533.010 "seeks to establish a policy in favor of rehabilitation of offenders with the community and free of incarceration." See, 1974 commentary, KRS 533.010; Brickey, Kentucky Criminal Law (1974), Subsection 29.07; American Bar Association's Standards Relating to Probation, Subsection 1.2. While these authorities support the general worth of probation, it necessarily follows that all candidates for are not worthy of such release. Thus, as trial attorney, you should be prepared to meet headon and overcome the "unless" provisions of KRS 533.010(2), supra. By utilizing the mitigating factors these preclusionary considerations can be specifically addressed and countered. After distinguishing your client in this manner, summarize the mitigating factors involved. Request a hearing on the motion. Such a motion is in the Kentucky Department of Public Advocacy, Motion File, Criminal Law Motions and Memorandums, May, 1984 and Supplement No. 1, May, 1985. Id. at S-12 and S-13 and in the supplement Id. at S-25.

The defendant should personally write a brief statement to the judge explaining why he/she should be considered a good candidate for shock. The attorney should highlight those mitigating factors which the judge may consider and impress upon the client the importance of not attempting to relitigate his case.

Aside from the client's statement other supportive statements should be obtained from such people as officials in the defendant's community, friends, a minister, business leaders of the community, officials and supervisors at the place of confinement, family and neighbors. Support of the neighbors will probably prove most effective if submitted in petition form, i.e., one statement signed by all. Additionally, statements from the person or persons who are to provide home placement and employment of your client upon his release are probably the most important. The relevant statements should be addressed to the trial judge but delivered to the attorney for submission to the court. A family member, friend or other concerned party can undertake this process at the attorney's request and direction.



In substance, the statements should at a minimum, include that the supporting party knows the defendant; how and for how long they have known him/her, they are aware that he/she has been found guilty of the particular offense but, they nevertheless feel the person is worthy of release and support such action on the part of the judge.

Every defendant should be made aware of the "shock probation" procedure since a successful "shock" motion may significantly reduce the amount of time that he may have to remain in custody. Whether the client's commitment is for the commission of a juvenile, misdemeanor or felony offense, trial counsel's obligation to file the appropriate pleading is evident.

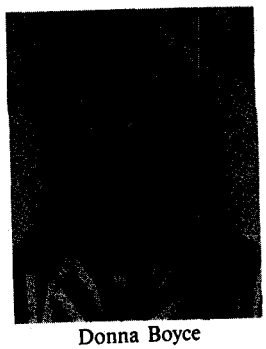
As relevant to the convicted felon, such obligation continues even though the client may have already been transferred to an institution for service of the sentence imposed. Due to the trial attorney's volume of work there may be instances in which counsel will find himself unable to prepare a detailed motion. In such a case, counsel should advise his client of such available recourse and the appropriate steps to take in submitting the matter to the court for consideration. The Post-Conviction Services Branch of the Department of Public Advocacy in each of the correctional institutions is available to provide further guidance should questions of law or procedure arise.

Bob Hubbard
Paralegal
Department of Public Advocacy
Post-Conviction Office
LaGrange, Kentucky

The ultimate weakness of violence is that it is a descending spiral, begetting the very thing it seeks to destroy. Instead of diminishing evil, it multiplies it. Through violence you murder the hater, but you do not murder hate. In fact, violence merely increases hate.... Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars. Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that.

Martin Luther King, Jr.

# 6th Circuit Highlights



Donna Boyce

### WITNESS COACHING

In United States v. Ebens, 15 S.C.R. 19, 11, 40 CrL. 2028 (9/11/86), the Sixth Circuit held that the trial court's erroneous hearsay ruling required reversal. Ebens, an unemployed Detroit auto worker, was prosecuted in state court and pled guilty to manslaughter in the killing of Vincent Chin, a U.S. citizen of Chinese descent. Public outrage over Ebens' light sentence (probation and a $3,720 fine) led to his federal prosecution and conviction under the Civil Rights Act.

It was the government's theory that the killing of Chin was racially motivated. Chin's friends who witnessed the incident testified about racial slurs allegedly made by Ebens to Chin as well as alleged remarks tying Detroit unemployment to Japanese car imports. The defense sought to introduce tape recordings of interviews of these prosecution witnesses with Lisa Chan, a Detroit attorney who formed a group known as American Citizens for Justice and was instrumental in convincing the federal government to prosecute. Through these tapes, the defense intended to show that the witnesses' testimony concerning Ebens' racist statements was false and the result of improper coaching by Chan. The defense argued the tapes were admissible to show collusion, witness influence and prior inconsistent statements. Following hearsay objections by the prosecution, the trial court ruled that the defense could confront each of the three witnesses with their own words on the tape but that the statements of Lisa Chan to the witnesses which elicited their statements could only be introduced through her in the unlikely event the prosecution called her as a witness.

On appeal, the Sixth Circuit stated, and the government conceded, that it was obvious that Chan's out-of-court utterances were admissible not to show the truth of what she said, but the effect on the three witnesses as bearing on whether their subsequent trial testimony was coached and, therefore, inaccurate. The Court held that the erroneous hearsay ruling required reversal because it resulted in the exclusion of testimony favorable to the defendant.

### INSTRUCTIONS AND JUDICIAL ATTEMPTS TO LEGISLATE

In Hoover v. Municipal Court, 15 S.C.R. 19, 23, 40 CrL 2080 (9/25/86), a resisting arrest case, the Sixth Circuit held that the trial court's failure to instruct on an essential element of the crime charged prevented the jury from considering that element and constituted a directed verdict on the element. A failure to instruct on an essential element was found by the Sixth Circuit to be one of the exceptional constitutional errors to which the harmless error analysis does not apply.

Before it could reach this issue the Sixth Circuit had to deal with the state court's judicial attempt to legislate away an element of the charged offense. The Ohio statutes make resisting arrest a crime only when it is a lawful arrest that is resisted. However, the trial court, relying on a 1975 Ohio Supreme Court decision, held that the lawfulness of the arrest was not an element and refused to instruct that the prosecution had to prove that the arrest that was resisted was lawful. The Sixth Circuit stated that this type of judicial legislation was not proper: "As shown by the plain language of the statute, the Ohio legislature decided to make lawful arrest an element of resisting arrest. The courts are not in a position to alter or amend that decision." This aspect of the decision is significant to Kentucky murder cases. Until Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985), the absence of extreme emotional disturbance was an essential element of murder under 507.020(1)(a) which the prosecution must prove and the court must include in its instructions. It was eliminated as an element of the offense by judicial fiat in the Wellman case. The Hoover case indicates that elements of crimes cannot be judicially erased from the statutes. Defense counsel should keep this in mind and include 'absence of extreme emotional disturbance' as an element when making directed verdict motions and tendering instructions in murder cases.

DONNA BOYCE
APA, Major Litigation Section

# Search and Seizure Analysis: A Flow-Chart Approach

**The following article by Peter Goldberg is a reprint from the Champion, and is the first part of a two part series. The article is reprinted with the permission of Clark Boardman Company, Ltd., 435 Hudson Street, New York, NY 10014.**

## INTRODUCTION

Lawyers, law students and police commonly view the law of the Fourth Amendment as if it consisted entirely of a large collection of unrelated technical rules, complemented by an even larger collection of exceptions to those rules. This attitude is encouraged by the leading texts, casebooks and treatises in the field. As a result, many people who have to deal with these cases lack a systematic, orderly approach to search and seizure problems. This situation leads, in turn, to frequent missing or misidentifying of issues and thus to bungled cases.

This confusion about how to approach a Fourth Amendment problem is unnecessary. While the application of legal rules to particular cases is no simpler in this area than in any other aspect of the law that deals with the interaction of human beings in conflict, the rules themselves are far fewer in number and far more logically related than is commonly supposed. Indeed, it is possible to demonstrate a conceptual approach to Fourth Amendment cases that is relatively easy to learn, intuitively satisfying, and that avoids missing issues. This approach underlies a system of analysis that should be of equal value to the prosecutor preparing to defend police action in court, to the defense attorney planning pretrial motions, and to the law student studying for an exam. This article presents and explains that system. Two flow charts offer a visual presentation of the same analytical approach.

The system presented here is intended to reach all possible Fourth Amendment issues, but it does not allow for the complete analysis of a search and seizure problem. That is because not all the law of search and seizure arises under this one particular part of the federal Constitution. State or federal statutes, a state constitution, other provisions of the Bill of Rights, rules of criminal procedure, agency regulations, and even common law doctrines may apply. Still, the Fourth Amendment is the heart of the law of search and seizure, as well as being its most misunderstood component.

## METHODOLOGY

Systematic analysis of a Fourth Amendment problem begins with the careful identification of each piece of physical or testimonial evidence at issue, as well as of each event of police-citizen interaction leading to the seizure of that item. The analysis may be different even for two items seized at the same time in the same police operation, depending, for example, upon the scope of a consent or a question of plain view. Likewise, a given item may derive from an initial stop, followed by a detention, a search and finally the seizure itself. Each of these events requires separate examination. The well-known case of Rakas v. Illinois, 439 U.S. 128 (1978), for example, was litigated and lost solely on standing/privacy expectation grounds; counsel focused upon the search of the interior of the automobile. By neglecting to ask whether the initial stop of the car and its passengers was a proper seizure of their persons, an alternative basis for suppression was overlooked. The latter issue was brought up later as an instance of ineffective assistance of counsel. (fn. 1)

There are two reasons for approaching the analysis on the basis for specific items of evidence. The first is simply that experience shows it to be an effective technique for avoiding neglect of potential issues. The other, of course, is that the usual method of enforcing the Fourth Amendment is the exclusionary rule, so that there is often no point in examining a potential search and seizure issue unless it led to official acquisition of an item of physical, verbal (such as a confession), or informational evidence or the name of a witness). This article does not explore issues concerning the scope or administration of the exclusionary rule (such as the fruit-of-the poisonous tree doctrine, "inevitable discovery" or the "good faith"

exception), except to note occasionally where such issues may arise.

Once a given instance of police-citizen interaction has been identified leading to the seizure of a particular item of evidence (or injury, in the case of a civil action based on an alleged Fourth Amendment violation), existing Supreme Court doctrine permits a flow-chart style of analysis. There are two different series of questions to be followed, one for seizures of persons, the other for all searches (whether of persons, places or things) and for seizures of things. **Bold face** type indicates a question asked at the applicable stage in the flow chart.

## ANALYSIS-SEIZURE OF PERSON

Where one of the events of police-citizen interaction to be analyzed is the possible "seizure" of a person, whether labeled an arrest, a stop, or an investigatory detention, the first question to be asked is: **"Would a reasonable person have felt free to walk away?"** In practice, the Supreme Court seems to be asking whether the police action imposed no more pressure than that normally implicit in any encounter with law enforcement authorities. If the answer is "Yes," there has been no seizure of the person in the Fourth Amendment sense, as currently defined by the Supreme Court (fn. 2). As the Amendment has not been implicated by such action, it cannot have been violated.

If, on the other hand, the answer to the first question is "No," then there has been a "seizure" of the person. In that case, further analysis is required. Since Fourth Amendment doctrine requires special treatment for arrests and their functional equivalents, the first question to ask is: **"Was the seizure significantly less intrusive than a traditional arrest?"** For Fourth Amendment purposes, the question must be asked this way, because "arrest," as such, is not a constitutional concept; what counts as an "arrest" may vary from place to place. (Thus, the legality of an arrest, especially a warrantless arrest for a misdemeanor, often depends upon the applicable statute, rule of court, or common law doctrine.)

## TERRY ANALYSIS

If the answer is "Yes," that is, the court views the seizure as significantly less intrusive than a traditional arrest, then **Terry** analysis applies, and the decisive question is: **"Did applicable law enforcement interests outweigh the degree of personal intrusion?"** For example, individualized, articulable suspicion that criminal activity is afoot is required for an investigatory stop (fn. 3). If the answer to this balancing question is "Yes," the seizure is valid; if "No," then invalid.

## ARREST-TYPE ANALYSIS

On the other hand, if the seizure of the person was not substantially less intrusive than a traditional arrest, such as an "investigative station-house detention," then the next question to ask is: **"Was there a warrant purporting to authorize this person's arrest?"** If so, the seizure is valid if the **warrant satisfied the requirements of the warrant clause.** (This is also the point at which the "good faith exception" to the exclusionary rule may come into play. See discussion below.) An arrest warrant is valid if it is issued upon oath, by a neutral and detached magistrate, based upon probable cause to believe an offense had been or was being committed and that this person had committed it (fn. 4). Note that the definition of probable cause to arrest, as just recited, is different from what is meant by probable cause to search (given below), which in turn is different from probable cause to seize (given below).

If there was no arrest warrant, or there was an invalid warrant, the seizure of a person may still be lawful, depending upon: **Was there probable cause?"** In the absence of probable cause, an arrest-like seizure is invalid (fn.5). If there was probable cause, however, the seizure will be valid under the Fourth Amendment (fn. 6).

In general, no warrant is necessary for a felony arrest (fn. 7). The only exception is for a **routine felony arrest in the suspect's home,** in which case a warrant is required in the absence of exigent circumstances (fn. 8). However, following a warrantless arrest, the Fourth Amendment requires a judicial determination of probable cause to justify anything more than a brief detention (fn. 9).

## ANALYSIS--SEARCH OF PERSON, PLACE OR THING AND/OR SEIZURE OF THING

The systematic approach to analysis of police-citizen interaction leading to the seizure of a thing or involving the search of a person, place, or thing follows a different path from that presented for examining the seizure of a person.

## DOES THE FOURTH AMENDMENT APPLY?

In analyzing a Fourth Amendment issue other than seizure of a person, the first question is: **"Did official action disturb a legitimate expectation of privacy?"** If the intrusion came at the hands of

a private party, the Fourth Amendment does not apply (fn. 10). Only if the answer to this question is "Yes" has there been a "search (fn. 11)."

The Supreme Court has never decided a case on the basis that an actual, subjective expectation of privacy was not shown (fn. 12). It is clear, how-ever, that a subjective expectation is not sufficient; without an expectation of privacy the Court is willing to consider "legitimate," the intrusion is not considered a "search" within the meaning of the Fourth Amendment and the amendment thus cannot have been violated (fn. 13).

Particular applications of this principle include the concepts of "plain view" sighting (fn. 14), abandonment (fn. 15), "open fields (fn. 16)," and private premises open to the public (fn. 17).

- Peter Goldberg

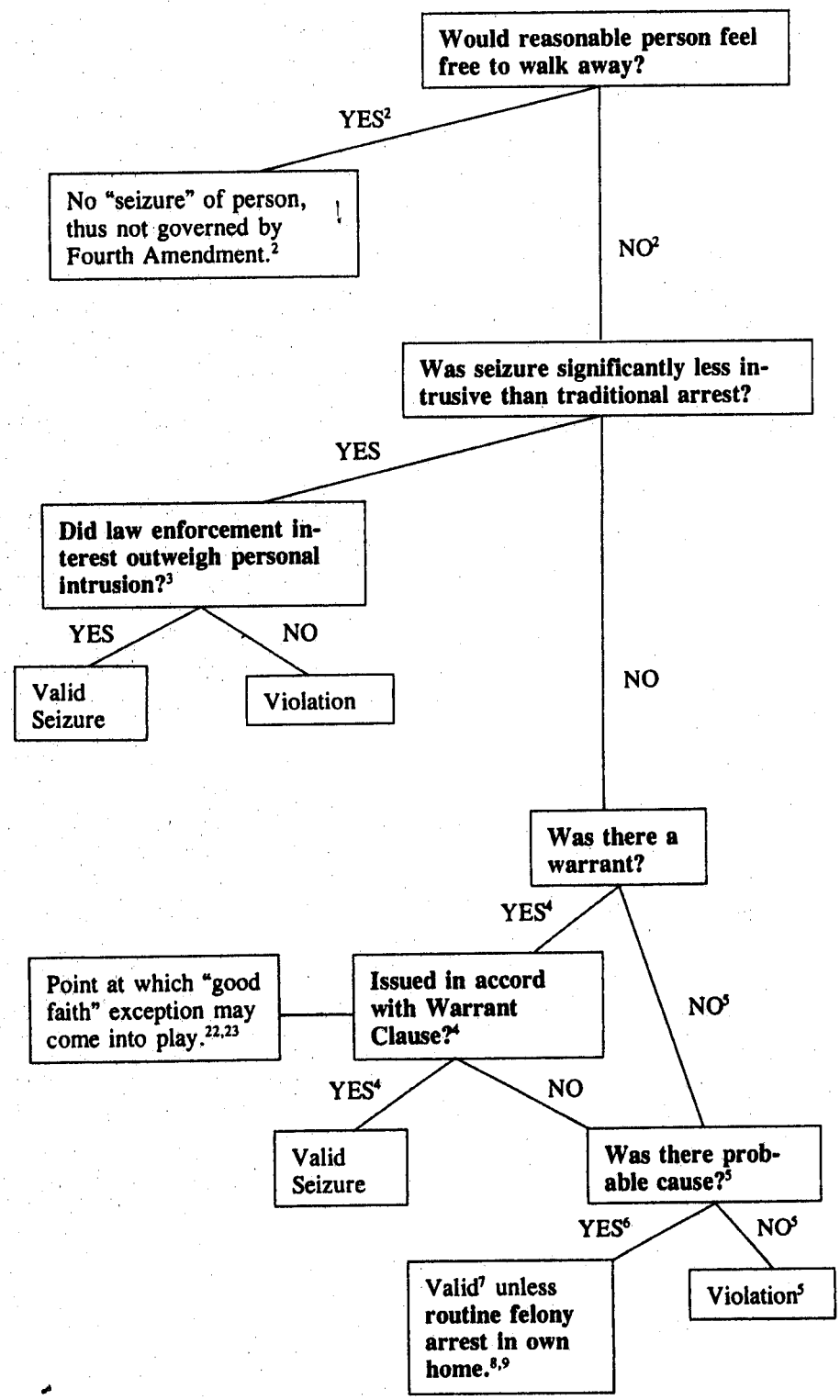
**'RIGHT TO BE LET ALONE' TAKES A BEATING FROM COURT**

"...The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

1928, U.S. Supreme Court Justice Louis D. Brandeis

## Seizure of Person

Bold type indicates a question asked in the textual analysis.
Raised numerals refer to footnotes relating to textual discussion.



## FOOTNOTES

1. This tactic may not always be possible, given the restrictions on raising suppression issues on habeas corpus. See Kimmelman v. Morrison, No. 84-1661 (U.S.S.Ct., decided June 26, 1986).
2. E.G., U.S. v. Jacobsen, 466 U.S. 109, 113 & n.5 (1984); Reid v. Georgia, 448 U.S. 438, 440 n.* (1980) (per curiam); U.S. v. Mendenhall, 446 U.S. 544, 551-54 (1980); Brown v. Texas, 443 U.S. 47, 50 (1979).
3. Terry v. Ohio, 392 U.S. 1 (1968). See e.g., U.S. v. Sharpe, 470 U.S. ____, 105 S.Ct. 1568 (1985) (20-minute stop of vehicle and occupants valid); U.S. v. Hensley, 469 U.S. ____, 105 S.Ct. 675 (1985) (brief detention based on "wanted" flyer valid); Florida v. Royer, 460 U.S. 491, 497-507 (1983) (airport detention exceeded Terry limits); Michigan v. Summers, 452 U.S. 692 (1981) (resident of house may be detained during execution of search warrant for drugs); Adams v. Williams, 407 U.S. 143 (1972).
4. Malley v. Briggs, 89 L.Ed.2d 271 (1986); Hill v. California, 401 U.S. 797 (1971); Whitley v. Warden, 401 U.S. 560 (1971); Jaben v. U.S., 381 U.S. 214 (1965)(all relating to probable cause to arrest); Shadwick v. City of Tampa, 407 U.S. 345 (1972)(neutrality).
5. E.g., Hayes v. Florida, 470 U.S. ____, 105 S.Ct. 1643 (1985)(station-house detention for fingerprinting); Dunaway v. New York, 442 U.S. 200 (1979)(for questioning).
6. Compare Beck v. Ohio, 379 U.S. 89 (1964)(no probable cause for warrantless arrest), with Draper v. U.S., 358 U.S. 307 (1959)(probable cause established).
7. U.S. v. Watson, 423 U.S. 411 (1976).
8. Payton v. New York, 445 U.S. 573 (1980); cf. Steagald v. U.S., 451 U.S. 204 (1981)(search warrant necessary to enter third party's house to arrest someone).
9. Gerstein v. Pugh, 420 U.S. 103 (1975).
10. U.S. v. Jacobsen, 466 U.S. 109, 113 (1984); Coolidge v. New Hampshire, 403 U.S. 443, 487-90 (1971).
11. Katz v. U.S., 389 U.S. 347 (1967). The majority in Katz actually used the term "justifiable[" rather than "legitimate." Id. at 353. In his now-standard concurring opinion in Katz, Justice Harlan coined the expression "reasonable expectation of privacy." Id., at 361. Justice Powell originated the use of the term "legitimate expectation." See U.S. v. Miller, 425 U.S. 435, 442 (1976); Couch v. U.S., 409 U.S. 322, 326 (1973). For a critique of this definition and the doctrine it has engendered, see Goldberger, Consent, Expectations of Privacy, and the Meaning of 'Searches,' in the Fourth Amendment, 75 J.Crim.L. & Crimin. 319 (1984).
12. Cf. Rawlings v. Kentucky, 448 U.S. 98 (1980) (Court upholds finding of no actual expectation, but does not rest decision on that ground).
13. See California v. Ciraolo, 476 U.S. ____, 90 L.Ed.2d 210 (May 19, 1986) (aerial surveillance of fenced back yard no "search"); U.S. v. Karo, 468 U.S. ___, 104 S.Ct. 3296 (1984) (monitoring of "beeper" installed in private place is "search"); Hudson v. Palmer, 468 U.S. ___, 104 S.Ct. 3194 (1984)(no legitimate expectation in jail cell); U.S. v. Jacobsen, supra, 466 U.S. at 115-18 ("search" occurs only to extent officials disturb expectation not already frustrated by private action); U.S. v. Knotts, 460 U.S. 276 (1983) (following of "beeper" signal along public highway no "search"); Smith v. Maryland, 442 U.S. 735 (1979) (no expectation in numbers dialed from telephone); U.S. v. Miller, 425 U.S. 435 (1976) (none in bank records); U.S. v. Dionisio, 410 U.S. 1, 15-16 (1973) (none in handwriting or voice); Couch v. U.S., 409 U.S. 322, 326 (1973) (none in papers entrusted to another in unprivileged setting; first use of "legitimate expectation of privacy" formulation); U.S. v. White, 401 U.S. 745 (1971) (no "search" in recording of conversation by participant).
14. E.g., Texas v. Brown, 460 U.S. 730, 739-40 (1983).
15. Compare Rios v. U.S., 364 U.S. 253, 262 (1960), with Abel v. U.S., 362 U.S. 217, 240-41 (1960).
16. Ciraolo, supra; Dow Chemical Co. v. U.S., 476 U.S. ___, 90 L.Ed.2d 226 (May 19, 1986); Oliver v. U.S., 466 U.S. 170 (1984).
17. Compare Maryland v. Macon, 472 U.S. ____, 105 S.Ct. 2778 (1985); Donovan v. Lone Steer, Inc., 464 U.S. 408, 411-412 (1984); Lewis v. U.S., 385 U.S. 206 (1966), with Donovan v. Dewey, 452 U.S. 594, 598 & n.6 (1981); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979).

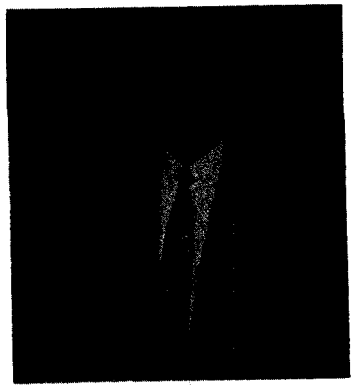
THE ADVOCATE

VOLUME 8

**Key: (8/4)10 means (Volume 8/Issue 4) page 10**

# Trial Tips

## For the Criminal Defense Attorney



Lane Veltkamp

### PSYCHOLOGICAL IMPACT OF THE FAMILY ON ITS MEMBERS

**This is an edited version of Lane Veltkamp's presentation at the DPA seminar on "Experts with an Emphasis on Mental Health Experts." A presentation on psychiatry was also done by Dr. William Weltzel and one on psychology was done by Dr. Robert Noelker. This series will be run in two parts.**

I think the work I do is a bit different than what Dr. Noelker and Dr. Weltzel do. I've been at the Child Psychiatry Division at the U.K. Medical Center twenty years and my training was in a Psychoanalytic School at Michigan State University where I received my Masters Degree. I did a one-year internship in a psychoanalytic agency in Michigan, namely an agency that was involved in therapy of children and institutional placement of children. I worked in Michigan about two years and then joined the faculty in the Department of Psychiatry and had been in the Child Psychiatry Outpatient Client since that time.

Over the first five or six years, my interests gradually shifted and I moved more into the area of family evaluation and family treatment, so by 1970 I had had a good deal of training in family therapy at different places of the country and was primarily a family therapist working mainly with families of pre-school children latency aged children and adolescents.

During the first ten years of my practice I tried to do everything I could to stay away from attorneys and did a real good job of that because I never went to court prior to 1974.

In 1974 I took on a child litigation case somewhat by accident. Actually, an attorney had called the clinic and I happened to be standing by the front desk. It turned out to be a case involving a three year old child who had been in a foster home for nearly three years. In fact, she was placed in this particular foster home when she was three days old when she left the hospital and went into this foster home and had been there her entire life. The Department of Social Services had felt that the best placement for this child was with a maternal aunt because they were, at that point in time, very interested in relative placements. So this attorney was representing the foster parents who were very upset about this plan to take this child out of the home and had gone down and hired a private attorney.

I decided to take that case because about that same time we had been studying a particular book by Solnit, Freud and Goldstein, called "Beyond The Best Interest of the Child" and Solnit had been a speaker at our department. He's from Boston, he had been a speaker in our department and had done a couple of seminars for us, so I was very interested in the sole issue of child litigation the issue of psychological attachment to the parent, the importance of preserving the attachment and continuity. So I decided to take this case and ended up seeing the parents and the child and testifying that in no way should the psychological attachment that this child had with the foster parents be broken because by that point in time not only was a strong bond developed between the parents and the child but also between the siblings in the family and this child. Well, that was my first case and the court agreed that the preservation of this bond, the preservation of the continuity, maintaining not only psychological attachments with the parents but also with the sib group was vitally important for the mental health and emotional well-being of the child.

From that point on, I found that once you testify in court you get more and more calls. So, at the present time my practice really involves two things. About fifty percent of my practice involves child litigation cases, and this includes custody, visitation, termination of parental rights and issues pertaining to visitation problems and problems with placement. About thirty percent of my practice involves family violence. Of that thirty percent I would say about 80 percent involves sexual abuse of children where I

evaluate perpetrators of sexual abuse, evaluate victims and also work with incestuous families treating the incestuous families to see if a reunion of parents and child is possible.

Being in a child psychiatry clinic, we are advocates for the child. In all child litigation cases, for example, we refuse to accept any case where we do not have access to both sides. I would never see a child litigation case with possibly one or two exceptions where I would not have access to all records and all significant family members including child, siblings, parents, grandparents, babysitters, anybody else that might be significant in trying to offer an opinion to the court.

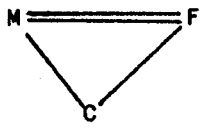
We've probably evaluated 300 cases of sexual abuse, including perpetrators and victims and also adult victims of child sexual abuse. The remaining twenty percent of my practice involves individual therapy, family therapy and couple therapy where generally family therapy strategies are used.

FAMILY THEORY, ASSESSMENT, AND TREATMENT

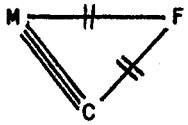
SEVERAL ASSUMPTIONS

1. THE FAMILY IS THE PATIENT AND THE UNIT OF TREATMENT.

2. THE PROBLEMS MAY BE PRESENTED OR VIEWED IN TERMS OF 1, 2, or 3 PERSONS:

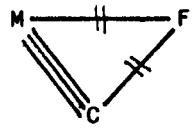



FUNCTIONAL FAMILY




DYSFUNCTIONAL FAMILY

3. THE SYMPTOM BEARER - THE SCAPEGOATED PERSON, THE BEARER OF FAMILY PATHOLOGY, PROJECTION OR DISPLACEMENT OF INTENSE, NEGATIVE FEELINGS ON ONE PERSON IN THE FAMILY. TAKES PRESSURE OFF THE DYSFUNCTIONAL MARITAL DYAD.




ONE PARENT IS OVERLY INVOLVED WITH THE CHILD (COVERT MESSAGE - "YOU NEED ALL THE HELP YOU CAN GET") WHILE OTHER PARENT IS DISTANT (COVERT MESSAGE - "YOU'RE NOT OK")

4. ALL BEHAVIOR IS PURPOSEFUL - A FORM OF COMMUNICATION, A WAY OF MAINTAINING DISTANCE, A WAY OF GETTING INVOLVED.

5. THE PROBLEM IS THE SOLUTION.

## I. WHAT IS A CLINICAL SOCIAL WORKER?

One of the questions that I am supposed to address, I guess, is what is a clinical social worker. A clinical social worker, first of all, has a masters degree from an accredited school of social work. After that the person must have at least two years of clinical experience and 200 hours of clinical supervision in order to be licensed and supervised. This generally takes approximately 2 to 5 years, I would say, the average is probably three years. So, to be a clinical social worker requires about five years of training after a bachelor's degree. I'm not sure just how many there are in the state. There's probably 10 or 14 in private practice in Lexington and other clinical social workers are usually found in Mental Health settings. We have four in the Department of Psychiatry in the Medical School and places like Charter Ridge Hospital, Comprehensive Care Center and other Mental Health psychiatric facilities employ clinical social workers.

Clinical social workers are specifically trained in any one of a number of psychotherapeutic techniques. When I went to Michigan State University, our big rival was the University of Michigan and Michigan State was a psychoanalytic school of and the University of Michigan taught the use of behavioral modification school and others are very family therapy oriented. So, schools of social work like departments of psychiatry may have an eclectic focus or they may have a very

specific therapeutic focus, for example, psychoanalytic therapy, behavioral modification or family theory.

## II. FAMILY THEORY

### A. THE FAMILY IS THE PATIENT

We just want to talk briefly about the theories or assumptions of family therapy. The primary assumption is that the family is the patient and the family therapist looks at the relationships and the interactions between family members. The therapist tends not to look intrapsychically at what might be going on within one specific individual but pays more attention to what goes on between individuals in the family.

The problems, whether it's in a mental health clinic or in a hospital or in a community setting such as a school or court could be presented or viewed in terms of one or two or three individuals. For example, if I am having a problem with my child, I can go to a therapist and state, "he is having some problems. He's acting out, he's using drugs. My child is the problem, you treat my child." The kind of therapist that might pick up on a case like that would be one who uses behavioral modification techniques or someone who uses psychoanalytic, psychotherapeutic in treating individuals. That same problem can also be presented in terms of two people. "My child is having problems, we argue all the time, we fight all the time, we haven't had any fun for the last six months. He attacks me, I attack him. We need some help." The problem can also be presented in terms of three individuals. For example, a father, a mother and child might present the problems in terms of, "my wife and I are having problems, our child is acting out, we don't know how to deal with him. He's ruining our lives, we're arguing and fighting all the time," there are problems in the marriage, problems between the parents and children.

In most child psychiatry clinics, a family therapy approach is used. Family theory and methods of family therapy came out of the Child Guidance Clinic movement which began in the 1930's. When child psychiatry departments developed within the psychiatry divisions, many of those divisions took on family therapy as one of the theories that they wanted to not only teach but also practice clinically.

In family therapy we are interested in looking at the problem in terms of two or three individuals. The problem is not that this one person is the problem but that the problem is due to the interaction, the causes of the problems lie in the family interactions and the treatment to the problems lie in what can be done to help the family unit interact more constructively. What I have here are two diagrams depicting a functional family and a dysfunctional family. We'll talk about the functional family first. Here we have a strong dyad between the parents, the mother and father. What that represents is that the marital relationship is very solid. The source of nurture and support should come from the family unit. That's where people in our society should be able to give the support, nurture and the emotional vitamins that they need. Where there is a strong marital dyad, parents are able to offer the child a supportive relationship, encourage the relationship, are able to show the child how to express love, how to get close to people, how to trust people, how to feel positive about himself, how to handle his/her own sexuality as she grows up, and how to express feelings in constructive ways rather than destructive ways.

Now, what about the dysfunctional family.

Here we have the broken relationships between the parents. We might call it martial discord, for example, and what that means is that the parents are not getting their psychological or emotional needs met within the context of their martial relationship.

### B. THE SYMPTOM BEARER

So what happens then? One thing that frequently happens, is that one parent will get overly involved with the child. This is a way of getting needs for closeness and needs for involvement met within the family. Now what happens when this occurs? The child, because of this enmeshment, which is the family therapy term may develop reservoirs of anger. Because of this enmeshment the child, may not have much confidence in himself. He may have sexual identity confusion or sexual orientation problems, he has not learned to feel comfortable with members of the opposite sex.

Another thing that happens in a typically dysfunctional family, is that the same sex parent usually looks outside the family for some type of comfort or reassurance or ways to feel better. One way to do that is to work all the time. The relationship between the father and son in this particular example, is dysfunctional.

What happens in that relationship is that it takes its toll on the child's self-esteem which is one of the key building blocks in personality development and good

mental health. In addition, the child who has trouble identifying with that parent of the same sex sometimes will identify with that parent in dysfunctional ways and at other times will totally withdraw from that parent and have problems with reservoirs of anger that build up because of a lack of closeness. The individual may have problems with suspiciousness and distrust which someone like Dr. Weitzel calls paranoia or problems of not knowing how to get close to people in a comfortable way.

One major function of the family is learning how to deal with intense feelings in a constructive way. There are more intense feelings within family units than any place else in our society. If you think of the people who we are most angry toward, they are people in our own families. The reason for that is they mean the most to us. The people that have the strongest guilt feelings or the strongest feelings of hurt or sadness or anger are within families. Now, the question is how are those feelings handled? Feelings can be handled in destructive ways or feelings can be handled in constructive ways.

One of the problems with dysfunctional families is that they don't teach constructive handling of these types of intense feelings. There is a high level, for example, of assault in dysfunctional families. Both physical assault and psychological assault. So, one of the ways that anger is handled is by assaulting someone either verbally or physically. That's one example of handling feelings in destructive ways. As the child is growing up, he learns that way of handling anger, you get control of the situation, you intimidate people, you manipulate people, you physically attack people. Another way of learning how to deal with some of these feelings is to deny the feelings. You deny guilt, you deny sadness, you deny hurts and you go through life like nobody's hurt you. By going through life likes nobody's hurt you means that you have to maintain distance from other people.

Each individual should learn how to get close in an intimate way and I'm not just talking about sex now, but include emotional closeness. Dysfunctional families do not really allow its members to get close in a meaningful, intimate way.

**Lane Veltkamp**

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## VIOLENCE AND DIVORCE

Although divorced and separated people make up only 7% of the population age 12 and over, about 75% of the spousal violence reported in the survey involved persons who were divorced or separated. Because limitations in the data make it impossible to determine whether the incidents occurred before or after a marital separation, this finding is open to several interpretations. It is possible that women who were still married at the time of the interview were either much more reluctant than divorced or separated women to report violence committed by their spouses or else less likely to consider such violence a criminal act. A related theory is that divorced or separated women feel more free than married women living with their spouses to discuss violence by their ex-spouses that preceded their separation or divorce. Alternatively, it may be that after a separation or divorce, men commit more violence against their ex-spouses than they did while still married. Another possibility is that divorced or separated women perceive actions to be criminal what they did not view in that way while living with their husbands.

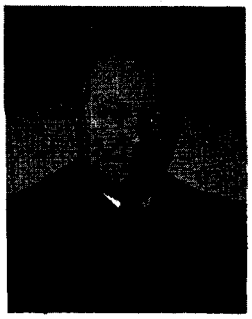
**Table 5. Family violence by spouse or ex-spouse, by victim characteristics, 1973-81**

| Characteristic | 1973-81 total | Average yearly rate per 1,000 population |
|---|---|---|
| **Total** | **2,333,000** | **1.5** |
| **Sex** | | |
| Male | 155,000 | 0.2 |
| Female | 2,177,000 | 2.7 |
| **Income** | | |
| Less than $7,500 | 988,000 | 2.6 |
| $7,500-14,999 | 650,000 | 1.4 |
| $15,000-24,999 | 335,000 | 0.9 |
| $25,000 or more | 155,000 | 0.7 |
| **Age** | | |
| Under 16 | * | * |
| 16-19 | 165,000 | 1.1 |
| 20-34 | 1,528,000 | 3.2 |
| 35-49 | 496,000 | 1.6 |
| 50-64 | 110,000 | 0.4 |
| 65 and over | 28,000 | 0.1 |
| **Marital status** | | |
| Married | 554,000 | 0.6 |
| Widowed | * | * |
| Divorced /separated | 1,746,000 | 16.8 |
| **Race** | | |
| White | 2,030,000 | 1.5 |
| Black | 277,000 | 1.6 |
| Other | 26,000 | 1.1 |

Note: Detail does not add to total shown because of rounding and/or missing data. Estimates are rounded to nearest thousand.
*Estimate based on about 10 or fewer sample cases, too few cases to obtain statistically reliable data.

Bureau of Justice Statistics on Family Violence, April, 1984

# Video Tape Records



Charles B. Lester

Over the past several years, the Kentucky judiciary has been inundated with articles and informational material extolling the virtues of video taped records of trials as opposed to the transcribed printed word. The prime exponents of the latest technology are a few trial judges whose primary argument, and justifiably so, is the savings in costs to the litigants. To date, no member of the appellate judiciary of the Commonwealth had addressed the subject.

Before examining some of the problems of the video concept from the standpoint of appeal, the basic differences between the trial and appellate tribunals should be recalled. In the trial forum, the litigants, their lawyers, the witnesses and the jury are all usually physically in attendance with the primary function of all present to resolve issues of fact under proper instructions on the law and render a verdict. One of the most important factors in reaching a result is the judging of the credibility of witnesses, a function particularly reserved to the trial court by virtue of the civil rules and numerous opinions of our court of last result. Jury members and judges alike can be swayed by such elements as demeanor, courtesy or lack thereof, facial expressions, mode of dress, or articulation of counsel.

The appellate level is concerned with whether there has been any error of law committed at the trial. In many cases, it is necessary that the transcript of evidence be reviewed at least at those points therein where a factual understanding is necessary to a resolution of a legal point. It should be remembered that the appellate court never hears evidence from the litigants or witnesses. Until recently, only the printed or typed evidence was before the court reflecting neither emotions, facial expressions, physical motions or even, on occasion, hysterics. Enter the video record.

Until this time, appellate courts reviewed a cold record looking for what was testified to by witnesses and said by counsel and the court, not how it was said. This means that an individual with a flair for theatrics might more readily impress the reviewer in the manner in which he addressed the issue as opposed to what the evidentiary value might be on the legal issue. Contrary to what some may think appellate judges are not beyond the human influences to which the laymen are subject. The actors on the video tape in some instances may have a bearing upon the impartiality expected of the appeals personnel.

The criminal case presents additional problems. The average person accused of a criminal offense is normally not the type of individual who can express himself well in a live setting and very often gives the impression that he is either not telling the truth or is at least being evasive, when actually he is being very candid in his testimony. It is much fairer to look at his appeal through the "cold" printed word as compared to his often times faulty live presentation. On the other side of the coin, prosecutors are frequently charged with remarks considered by criminal appellants as being highly inflammatory. What interests the reviewing court is what was said from the standpoint of its bearing upon the rights of the defendant and not particularly in the way it was said. If the latter should be the case, there would be many more reversals based upon the manner in which a remark is made rather than its content.

Another consideration in criminal appeals is worth mentioning. In various parts of the nation surveys are being made which demonstrate that black defendants in criminal actions receive more severe sentences than their white counterparts. In the bulk of the records presented to the Kentucky Court of Appeals, there is nothing contained therein indicating the color of a man's skin. The video tape would eliminate this concept.

As to the time involved in reviewing a record, it can be said without reservation that the video tape utilizes more of the judges' hours than the conventional transcript. In part, this is attributable to lack of synchronization between the machine making the tape and the one upon which the

playback is attempted. In a nutshell, this means the counters are not compatible so the reviewer expends a great deal of time searching for specific testimony. Also to be taken into account is whether the briefs contain specific references to given places on the tapes and whether those are accurate. It has been suggested that the courts acquire yet another piece of equipment which will render the capability of going directly to that point on the tape that a party wishes to be particularly examined but whether this will be able to solve the problem remains to be seen in light of the technology and the potential of human error in making the citation if the briefs contain any citations whatsoever.

Many appellate judges circulate portions of a record, which are easily photocopied and mailed to other panel members. This can be accomplished usually by a secretary. With the video system, this could only be done by the acquisition of fourteen or fifteen more video records, making the tapes or portions thereof, packaging them and mailing them to the other judges. There can be little doubt that this is more time consuming than the photocopy method.

As to the quality of tapes, it can be reported that some are forwarded with blank video while others are of such poor quality that the reviewer is unable to discern the characters. Typical of this problem was a motion to file a transcript to supplement a video tape record which was presented to a motion panel in August, 1986. On part, the appellate pointed out that the Commonwealth stated in its brief: "much of what Ms. Smith said to the judge and trial counsel is unintelligible due to the poor quality of the recording." He further argues that because the record does not reveal what Ms. Smith said to the trial judge, the record is in effect incomplete and since it is appellate's duty to produce an adequate record on appeal, this Court should assume in this case that the record supported the actions of the trial judge.

The appellee-respondent opposed the motion. Motions are being submitted frequently to the Court of Appeals to correct video inaccuracies. It should be noted that over a year ago the video concept of appeals was presented to the Court and it was soundly rejected. At the present time, the members of the Court maintain that position.

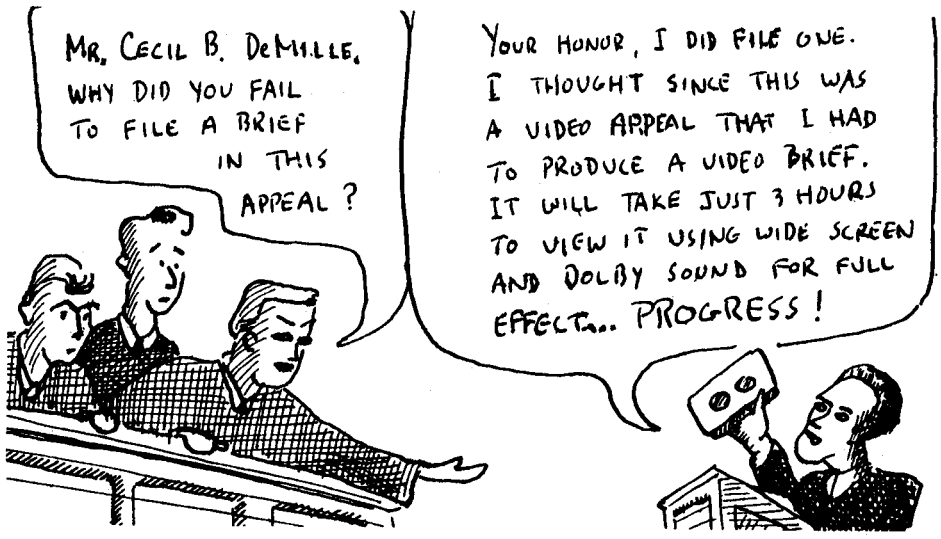
One of the abuses of the video taped trial can be found in a case presented for review. A good portion of the tape was consumed with the picture of the trial judge, and when not so utilized the screen always had in one of the four corners the court while on the balance of the screen appeared one or more lawyers but at all points, there were always two or more individuals (i.e., judge and one lawyer, judge and two lawyers, judge, lawyer(s) and witness) talking at the same time. That record could best be described as a disaster.

There is some conjecture about the political implications of the video trial. With one court already broadcasting the day's criminal trials over a public access outlet at the beginning of prime time, there is cause to wonder if this could be construed as a continuing campaign for political advantage at some future time.

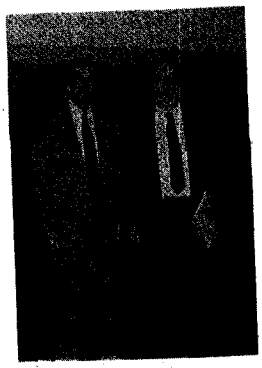
When the court of justice moves to replace the human element in the courtroom, it should do so cautiously. We are not in he business of movie production but, if we were, then at future judicial seminars and bar association meetings we could have awards for best video trial judge, best lead male lawyer-actor, best lead female lawyer-actress, best supporting male lawyer actor, best supporting female lawyer actress, best judge video technician, best dressed litigants, most intelligent jury and on ad infinitum.

Charles B. Lester, Judge
Kentucky Court of Appeals
6th Appellate District, Division I

**Judge Lester was appointed August 16, 1976 to date. He maintains his chamber in Fort. Thomas, Kentucky**



# Forensic Science News



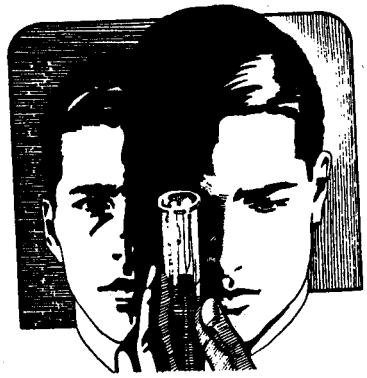
Jack Benton,
Pat Donley

## FORENSIC APPLICATIONS FOR CRIMINAL DEFENSE: A NEGLECTED ASPECT OF CRIMINAL TRIALS

**FORENSICS: A unique scientific discipline which combines sound scientific principles with an investigative attitude, ultimately aimed at the eventual presentation of facts to a lay jury.**

Forensic science is a relatively young discipline which, until only recently, has been employed almost exclusively by prosecuting attorneys and police investigators. The youth of the science combined with much misinformation and ignorance has retarded its growth beyond the narrow confines of the police community. Generally, even prosecutors and police investigators are only superficially aware of the tremendous potential of the science. These prosecutors and investigators have a tendency to call upon forensic techniques only when a case is deemed important enough by virtue of either political or media influence.

Despite this tendency, forensic experts are becoming an ever increasing necessity and therefore an integral part of modern criminal prosecution. Judges and particularly juries have come to expect the introduction of scientific evidence as eyewitnesses and lay testimony have begun to lose their credibility. As prosecutors find themselves in a situation whereby they are using scientific support more frequently, the defense community has more or less resigned themselves to accepting the fact that they cannot or should not attempt to refute or question this type of testimony. This shift of trial emphasis places a tremendous responsibility on the state's experts not only in terms of increased workload but also in terms of their remaining unbiased and unaffected by prosecution pressures. Aside from the problems encountered by the state's experts, the defense attorney, because of



the growth in scientific presentations, finds himself faced with scientists which he probably accepts without question.

Therefore, a situation presently exists in our legal community whereby forensic techniques are being used reluctantly by prosecutors and rarely at all by defense attorneys. With increased communication and coordination between prosecutors, investigators and forensic personnel, a powerful tool against criminals could be conceived. It is however; my opinion, that this situation will never totally exist because of the problems that exist between bureaucratic political entities.

By the same token, with increased communication and awareness of the defense community in regard to forensic techniques, a formidable approach to modern criminal defense could be devised. This second situation is one which could easily become reality because defense attorneys operate in the private sector and are not bound by the strangling influences of bureaucratic limitations. Defense attorneys are concerned, or should be, with providing the best possible defense for their client. This situation is promulgated by the simple fact that a defense attorney who continually loses cases soon has no clients. In this regard, forensic techniques offer an aid not only to the attorney's clients, but have continued to win cases for years without the help of forensic scientists and will continue to win many without them. However, as forensic applications continue to grow that situation will surely shift and while the attorney may be able to successfully defend his client without it, forensic techniques will save him time and energy.

Without the proper and aggressive usage of the experts at hand by the state and because of the virtual non-existence of qualified independent experts, (don't be fooled by someone who arbitrarily

assumes the title of forensic this or that without extensive previous experience) essential information is being needlessly wasted. This information could conceivably mean the difference between freedom and imprisonment for your client.

To establish the scope of the growing influence of this science it should be noted that the twelve Texas Department of Public Safety field crime laboratories examined evidence in over thirteen thousand individual cases between the period of January through November of 1982. These cases are in addition to any cases handled by other federal, state, county or city crime laboratories across the state. When one considers the probability that many of these cases have resulted in a substantiated charge the total impact to defense attorneys becomes clear. The information developed by these laboratories on which these charges are substantiated are rarely questioned or challenged. Typically, when these cases go to court defense attorneys concentrate on chain of custody and search and seizure rather than the issue of what the evidence means.

Jack L. Benton and Pat H. Donley
FORENSIC ASSOCIATES
Lubbock, Texas



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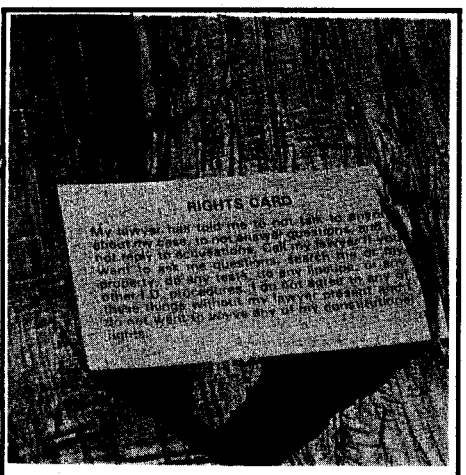


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**MARYLAND COURT ALLOWS PRIVATE BREATH TESTS**

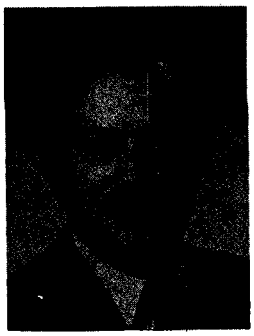
ANNAPOLIS, Nov. 10 - Suspected drunk drivers can take their own breath tests and consult with their lawyers before deciding whether to take a test given by police, the Maryland Court of Appeals ruled today. The private test cannot be used where it would unreasonably delay testing by police to determine whether a driver is drunk.

The appeals court did not specify what would constitute an unreasonable delay. But the judges noted that the law requires a test to be given within two hours of arrest. They said that "under no circumstances may the time period exceed the two-hour limit imposed by statute." The opinion stressed that there is no right to a private test if it would interfere with the ability of police to determine a driver's degree of intoxication.

The ruling came in a suit filed by Annapolis lawyer Gill Cochran challenging a State Police policy that drivers suspected of being drunk were allowed only to talk briefly with their lawyers by telephone before deciding whether to take a breath test. That policy prohibited face-to-face meetings and private tests administered by a lawyer until after the police test was given or the driver refused to take the police test.

In Maryland, drivers who refuse to take tests have their licenses suspended. Refusal to take a test also is admissible as evidence in a criminal trial on drunk driving charges. "Therefore, the decision whether to submit to the state test is of the most fundamental importance in determining the ultimate resolution of the suspect's case." "While we recognize the significant danger that drunk drivers pose to the safety of others, the state's generalized interest in convicting such individuals cannot override their constitutional right to communicate with counsel before deciding whether to submit to the state's sobriety test," the opinion, written by Chief Judge Robert Murphy, said.

# Kentucky Supreme Court Rule Changes



Ed Monahan

**The following is a summary of the important rules changes announced by the Supreme Court of Kentucky on June 30, 1986 which relate to the practice of criminal law. The rules changes are effective January 1, 1987 unless otherwise noted.**

**All Justices concurred in all rule changes except Justice Vance, without giving any reasons, did not concur with the amendment to SCR 3.830(1).**

## I. SUPREME COURT RULES

### 1. SCR 3.830(1) IOLTA FUND

Creates rules for administration of the Interest on Lawyers Trust Account Fund (IOLTA). The funds must be used:

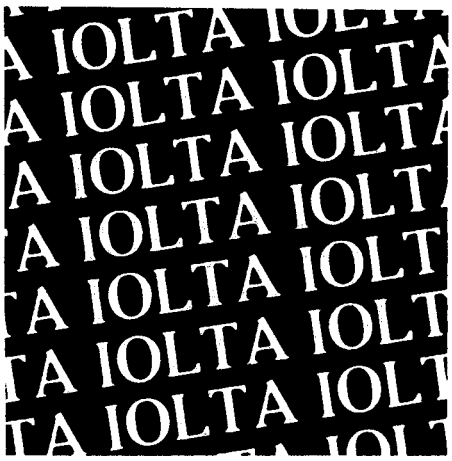
a) to provide legal aid to the poor;
b) to provide student loans;
c) to improve the administration of justice; and
d) for other programs for the benefit of the public.

The Supreme Court of Kentucky has confirmed the appointment of the first Board of Trustees to administer the IOLTA Fund. The seven trustees, one from each Supreme Court district, are:

Richard C. Roberts, Paducah
Reginald L. Ayers, Bowling Green
George B. Bertram, Campbellsville
Joseph L. Lenihan, Louisville
Leslie P. Patterson, Lexington
Wm. T. Robinson III, Covington
Robert L. Caummisar, Grayson

These seven trustees, along with Justice Donald Wintershelmer, Covington, and the current President of the Bar Association, Charles English, Bowling Green, have the responsibility for implementing and administering the IOLTA Fund.

Bill Robinson was named chairman of this Board, and Gregory C. Fuchs of the Kentucky Bar Association (502) 564-3795 has been appointed as IOLTA Administrator.




Greg has indicated a willingness to provide further information to any interested person. At this point, Greg indicates that 400 lawyers and 20 banks have signed up. The program hopes to know by June, 1987 if there will be enough money at that time to distribute the first grants.

North Carolina is receiving $80,000 per month with 8,000 active lawyers. With 6,000 active lawyers in Kentucky, the projection is that $60,000 per month will be eventually coming into the fund.

This important fund will obvioulsy be a source that public defender programs can turn to for grants to provide necessary and adequate funding for public defender services.

It's up to us to make sure we seek the funds necessary to do our jobs adequately. Surely assisting the direct delivery of legal services to indigents accused of crimes will be a priority with the Fund.

This rule was effective July 1, 1986.

## II. CIVIL RULES

### 1. CR 30.02(4) Depositions

Previously, the testimony at a deposition could be recorded by other than stenographic means only at the discretion of and upon order of the court. The amendment allows the parties to stipulate in writing to this method of deposing.

### 2. CR 73.02(4) Appellate Sanctions

This rule provided for sanctions for a frivolous appeal or a frivolous motion for discretionary review that "is so totally lacking in merit that it appears to have been taken in bad faith." The amendment changes "motions for discretionary reviews to "motions"

This rule contradicts ethical obligations and reality since it is necessary in Kentucky to file a motion for discretionary review before state remedies have been exhausted to allow for federal habeas corpus review on the merits. Two very recent federal cases indicate that a defendant must seek discretionary review in the highest state court before state remedies have been exhausted. Richardson v. Procunier, 762 F.2d 429 (5th Cir. 1985); Nutall v. Greer, 764 F.2d 462 (7th Cir. 1985).

### 3. CR 76.14(14) Notice of Appeal Suspending Time

The present rule provides that the Notice of Appeal suspends the running of time for further steps in the appeal except for 1) the filing of a Notice of Cross-Appeal, and 2) the filing of a prehearing statement. The amended rule adds to the exception clause a third exception: "except for the filing of a motion for transfer."

### 4. CR 76.18(1) Transfer of Appeal

This rule provides the procedures for the Motion to Transfer an appeal from the Court of Appeals to the Supreme Court. The amendment adds the requirement to attach a copy of the Notice of Appeal to the Motion for Transfer.

### 5. CR 76.21(2) Cross Motion for Discretionary Review

Adds the following procedures and rules to cross motion practice:

"Each cross respondent may file a response to the cross motion within 10 days after the cross motion is filed. No reply to a cross response shall be filed unless requested by the court. Ten copies of any cross motion or cross response shall be filed in the Supreme Court, and five in the Court of Appeals.

### 6. CR 76.21(3) Cross Motion for Discretionary Review

Makes the change that any cross motion suspends the briefing time with the full briefing time computed from the date of the order granting or denying the cross motion.

### 7. 76.33(1) Intermediate Relief in Appellate Court

The present rule provides for ex parte intermediate relief any time after 1) Notice of Appeal or Motion for Introductory Relief has been filed. The amended rule adds a third case when intermediate relief is available: any time after a Motion for Discretionary Review has been filed.

## III. CRIMINAL RULES

### 1. RCr 4.04(2) Methods of Pretrial Release

Presently provides that "non-financial conditions may be imposed upon any bail bond." The amendment requires the imposition of these conditions must be done under the procedures in RCr 4.14 which requires:

"The court shall cause the issuance of an order containing a statement of any conditions imposed upon the defendant for his release. The defendant shall sign the statement of conditions and receive a copy thereof. The order shall inform the defendant of penalties applicable to violation of conditions and advise that a warrant for his arrest will be issued if conditions are violated. The court shall also inform the local pretrial services agency of the conditions of release."

### 2. RCr 7.24(1) Discovery

The old rule required the Commonwealth Attorney to disclose "any oral incriminating statement made by a defense attorney to any witness."

The new rule requires disclosure of "the substance of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness."

This change will surely result in many problems, disputes, and unfair results.

### 3. RCr 8.06 Incompetency

The present rule requires postponement to the proceedings whenever there are reasonable grounds to believe the defendant is incompetent and requires the issue of incapacity to be determined as provided by KRS 504.040, a statute repealed in 1982.

The new rule requires the issue be determined as provided by KRS 504.100, a statute in existence since July 15, 1982. That statute requires, among other things, appointment of a psychiatrist or psychologist to examine, treat and report on the defendant's mental condition, and requires a hearing to determine whether the defendant is competent.

While there is a strict and oppressive contemporaneous objection rule in Kentucky, there is obviously no contemporary-change-of-the- rules-to-conform- to-the-statute rules.

### 4. RCr 8.09 Conditional Plea

A brand new rule to permit conditional guilty pleas has been enacted:

With the approval of the court and the consent of the Commonwealth, a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea."

As stated by Allen W. Holbrook in the April, 1986 issue of The Advocate (Vol. 8 No. 3), the rationale for the rule is sound:

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

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

This progressive change in plea arrangements was inevitable in view of the overwhelming disposition of cases by pleas of guilty and because of the enormous timesaving nature of guilty pleas. This progressive advancement will undoubtedly be followed by a change in the present Kentucky rule that withdrawals of a guilty plea is not a matter of right. This change is likely to be modeled on a simple right to withdrawal rule, or on the present Federal Rule of Criminal Procedure 11(e)(4):

**Rejection of a Plea Agreement.** If the Court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

The present Kentucky Rule that rarely allows withdrawal ignores logic and reason.

Ed Monahan
Director of Training

## POLL ON DRUG USE

BOSTON - Nearly 40% of doctors under age 40 acknowledged that they used marijuana or cocaine to get high with friends, and 1/4 of doctors of all ages said they treated themselves with mind-affecting drugs. Overall, more than half said they used drugs at least once for self-treatment, to get high or to help them stay awake.

"When drug use becomes a fad and is approved by the broad spectrum of society, almost all groups get involved," said Dr. William E. McAuliffe, the study's director.

## ABUSE OF ELDERLY AFFECTS FAMILIES

People who abuse older relatives are usually women caregivers who are high strung, have a history of alcoholism or drug abuse, and were victims of mistreatment as children, according to Sister Rose Therese Bahr, a Catholic University of America nursing professor.

Even though men are thought to be more aggressive, much of the physical and psychological damage to elderly relatives is inflicted by women who cannot handle stress, says Sister Bahr. "When the pressures of raising a family are compounded by the responsibility of caring for an aging person, the women blame the older individual for the added stress and lash out at the elderly relative," she explained.

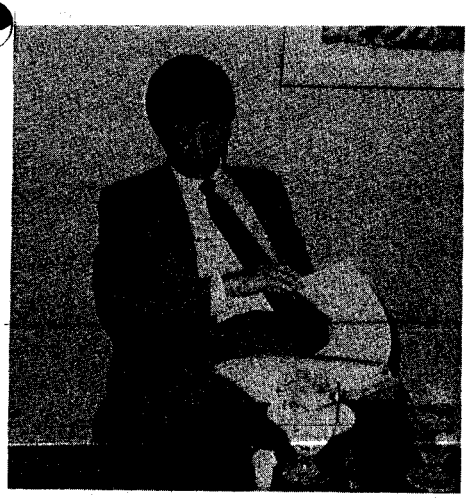
And the women are secretive about their behavior. They may hide the mistreatment from their husbands, "forcing the elderly person to remain silent by threatening the relative with further harm," Sister Bahr says.

Some husbands collaborate with their wives in the abuse or tolerate the behavior rather than intervene, finds Sister Bahr. She also notes that children are likely to imitate mothers' mistreatment of grandparents or other older relatives under their care. The mothers often abuse the children as well, and the children take out frustrations on the aging person.

"The situation becomes a vicious cycle. The psychotic behaviors are carried by the children to future households," says Sister Bahr.

Envoy
Summer, 1986

# Public Advocacy Commission



ALLEN HOLBROOK

Mr. Holbrook was appointed to represent the Kentucky Bar Association, replacing Max Smith. Allen is associated with the firm of Holbrook, Gary, Wible, and Sullivan, 100 St. Ann Street, Owensboro, Kentucky. He is not only very familiar with our public advocacy system, having worked as both an appellate and trial lawyer with the department, but with the federal public defender programs as an attorney in the Federal Public Defender Office for the Eastern District of Kentucky.

Allen said that he intended to "act as a liason between local people and the central office and general help to the organization whenever possible."

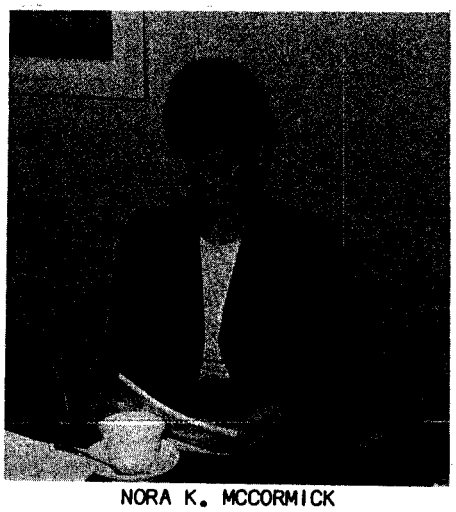
PATSY MCCLURE

Ms. McClure is one of the Governor's discretionary appointments, replacing James Park, Jr. She is very quick to point out to us that she is not an attorney, but serving on the Commission since Mar, 1986, she has provided the department the very important viewpoint of a private citizen. Ms. McClure is a resident of Boyle County, Kentucky.

LEE HUDDLESTON

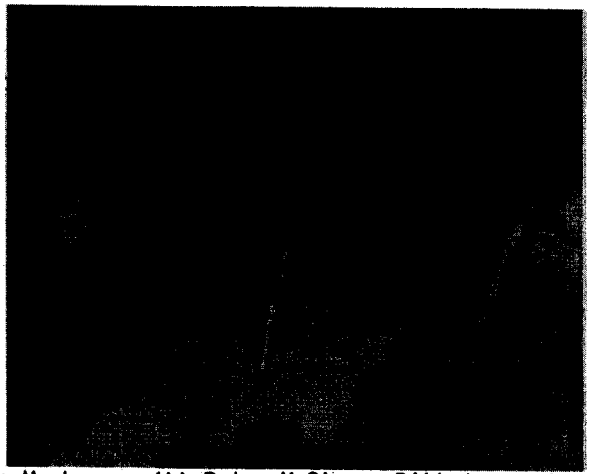
Mr. Huddleston represents one of the Governor's discretionary appointments to the Public Advocacy Commission. He was appointed to replace William E. Rummage, whose term had expired. Mr. Huddleston practices with the firm Huddleston Brothers Attorneys, 1032 College Street, Bowling Green, Kentucky. Prior to joining this firm, Lee served as Executive Director of the Cumberland Trace Legal Services Corporation.

Lee says that he is very pleased to be appointed to the Commission and looks forward to being able to help in any way (he) can "to see that the system continues to run well." He added "the Department seems to be in good shape for the small amount of money the legislature provides."



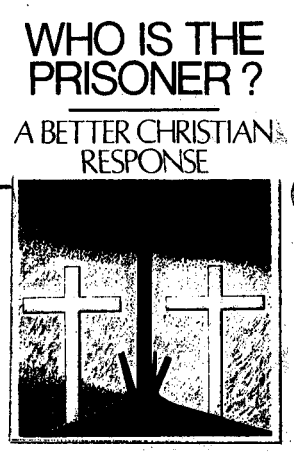
NORA K. MCCORMICK

Ms. McCormick represents the Court of Justice on the Commission and was appointed to replace Paula Raines. Nora Comes to the Commission very knowledgable about the Department. She has worked for the Department as a full-time staff attorney and was administrator for the Bourbon County Public Advocacy system after going into private practice. She is still in private practice at 8 Ardery Place, Suite 7, Paris, Kentucky and does some public advocacy cases as a conflict attorney.



Commission Members: (L) Patsy McClure, Bill Jones, Lambert Hehl
(R) Susan Clary, Addie Stokley, Helen Cleavinger

# Book Review




**WHO IS THE PRISONER?**
**A BETTER CHRISTIAN RESPONSE**
(1985) ($5.00)
The Institute of Human Relations
Box 12, Loyola University
New Orleans, LA 70118

**"When men are merely submerged in a mass of impersonal human beings pushed around by automatic forces, they loose their true humanity, their integrity, their ability to love, their capacity for self-determination." Thomas Merton.**

"Who is the Prisoner" gives its reader a "close up," "hands on" look at the criminal justice or injustice system. Each of its chapters are short, informative, and written by religious persons who have worked ministering to the incarcerated; focusing the concern for people, life, and dignity.

Do conditions of poverty breed crime? Here are offered a couple of thoughts: the first claims that the results of unemployment programs, or other increases in the availability of legitimate income, will not materially reduce crime. Another is that an increase in the education or training level of a person can lead to employment and that the availability of legitimate income will overcome any desire to obtain an income illegally.

Is the judicial system based on the ability to pay? A Philadelphia judge comments: the legal system is divided into two separate and unequal systems of justice: one for the rich, in which the courts take limitless time to examine, ponder, consider and deliberate over hundred of thousands of bits of evidence and days of testimony, and hear elaborate, endless appeals and write countless opinions; the other for the poor, in which hasty guilty pleas and brief hearings are the rule and appeals are the exception.

Are jails and prisons "businesses"? About two dozen major correctional institutions are currently under private ownership or operation. These for-profit companies contend that they can do a better job for less cost because they are free of government bureaucracy, able to act more quickly and not required to pay the high pensions of public employees.

Reconciliation has a part in this fine book also. Here are mentions of how special communities and organizations do their true duties helping in landlord disputes, family quarrels, shoplifting, robbery, burglary, neighborhood gang conflicts, and vandalism. These groups are examples of what life is all about, they reduce and even eliminate hostility between conflicting parties; they promote the good of the community by restoring peace; and they satisfy the demands of justice. Basic Christian living, if only more of the public would open their eyes to it.

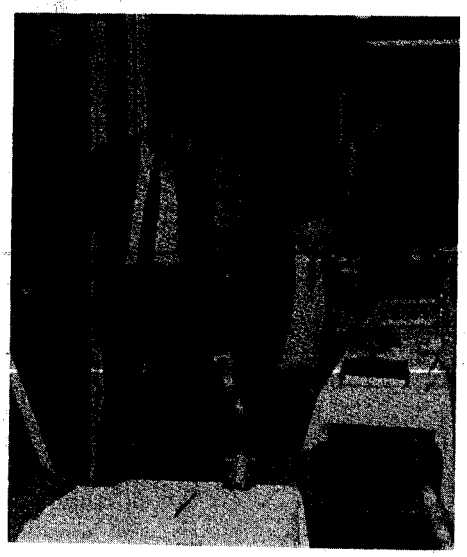
Improvement in almost impossible. "Prison renders self-enhancing choice futile. For most, futility is the core experience of doing time. Choice is bankrupted. There appears to be few logical reasons why a prisoner would want to improve himself. What all too many seem to do is merely to strut their stuff in rounds of braggadocio. It is difficult to realize, but for many prisoners a brag about their crime is their proudest product. The boast is much easier than achievement because the intensity of experience can be cooked up in an instant; but to produce some accomplishment comes hard. Prisoners often are underskilled, uneducated folks. Add to those occupational deficits the futility of choice inside, and the brag is understandable. It momentarily enhances the person."

In a place where fear is the most common emotion, it is very hard to predict what any single word or gesture might bring. Here where hard core criminals thrive and basic men try to survive, it is a giant guessing game. Who is conning, and who's covering their fear trying to con?

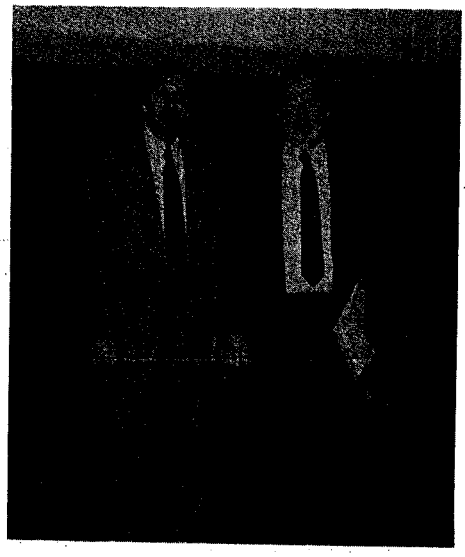
There are many more areas of concern in, "Who is the Prisoner A Better Christian Response;" a project of the Conference of Jesuit Prison Personnel, that weren't covered in this report. I just hope to spark a little concern that some might pick up a copy, read and learn what he/she can do to help make this system into one that works.

Paul Kordenbrock, Death Row
Kentucky State Penitentiary

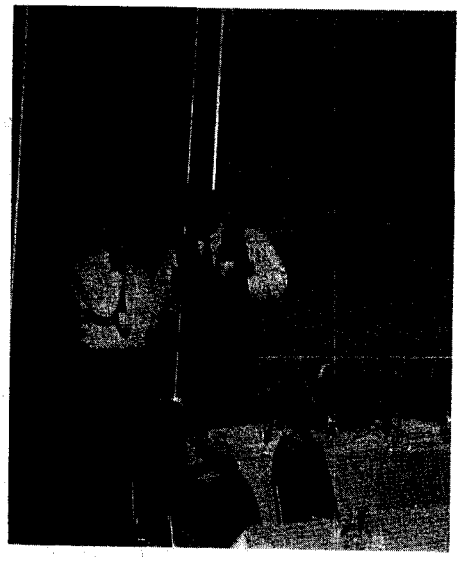
# Advanced Cross-Forensic Experts



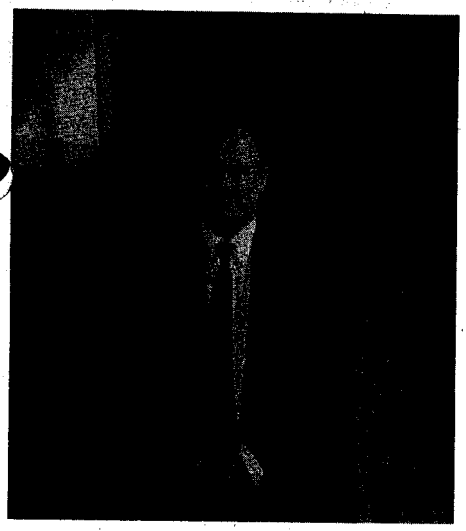
Paul F. Isaacs, Skip Palenik



Jack Benton, Pat Donley

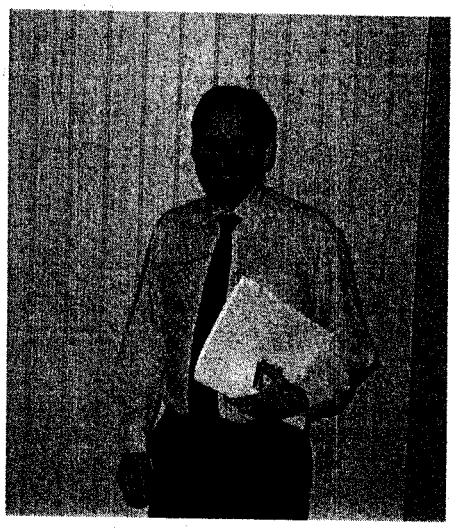


Larry Pozner, Roger Dodd

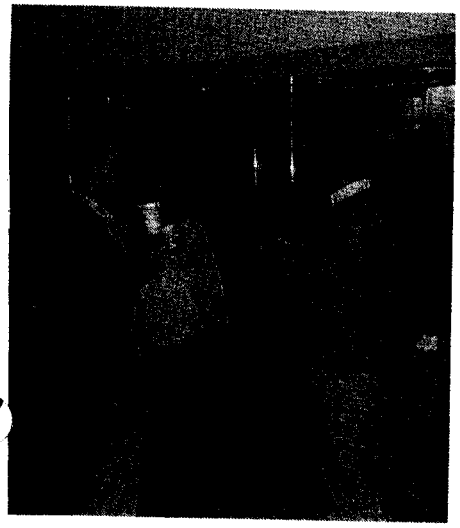


Dr. Eljorn Don Nelson

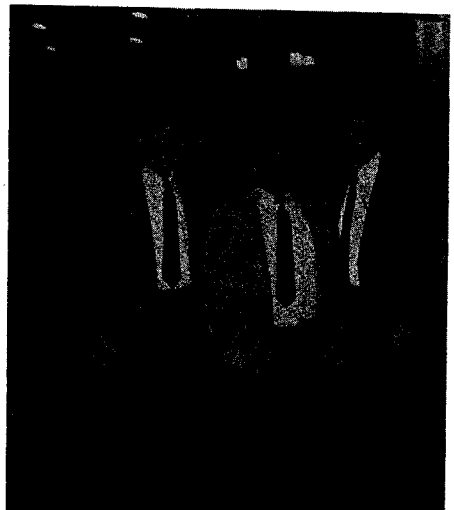
A seminar on Advanced-Cross Examination with an emphasis on Forensic-Science was held November 6 - 8, at Holiday Inn in Fort Mitchell. Eighty attorneys were in attendance to learn pharmacology from Don Nelson, Firearms from Jack Benton, Serology from Brian Wraxall, Hair and Fiber Analysis from Skip Palenik, the Art of Cross-Examination and Using Experts from Larry Pozner and Roger Dodd. Ernie Lewis, Kevin McNally and Vince Aprile also presented.



Brian Wraxall



Donna Boyce, Dave Norat



Ernis Lewis, Vince Aprile, Kevin McNally

(Lewis, Continued from page 2)

Ernie's Divinity degree is the foundation for his work representing indigents accused of crimes. Being a public defender is his ministry. He serves those in most need of a legal representative to plead their cause and to defend them from the loss of their freedom.

Maintaining the respect of the judiciary is often a frustrating and difficult task for public defenders. Ernie is no exception. The cost of litigation enables the civil lawyer to utilize compromise to the benefit of the client and of the judicial system. The criminal lawyer, on the other hand, often does not have the luxury of compromise. When the "stakes are freedom," a good criminal lawyer for white collar clients or indigents must practice his case in accordance with national standards much like the medical profession is learning to do. No doubt, judges with limited court resources are frustrated when caught with no-compromise situations.

The Department of Public Advocacy, with Ernie in the forefront, has been a leading force in advocating that the criminal justice system deal with cases in accord with the highest national standards.

We are fortunate to have people like Ernie on our side of the courtroom. The people of Kentucky, including particularly the judiciary, are learning that the Department of Public Advocacy has dedicated people with a long-term social commitment to make our system the very best it can be. Thanks Ernie for your commitment to our Commonwealth and to its people - we need you and more like you.

Ed Monahan

# FUTURE SEMINARS

**DEATH PENALTY SEMINAR**

April 16-18, 1987, Ramada Inn, Hurstborne Lane, Louisville.

**JUVENILE LAW**

DPA will conduct a Juvenile Law seminar focusing on the New Code. The seminar is expected to be presented in May, 1987.

**15th ANNUAL SEMINAR**

June 7-9, 1987, Ramada Inn, Hurstborne Lane, Louisville.

**5th TRIAL PRACTICE INSTITUTE**

November 4-7, 1987, Richmond, Kentucky.

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