THE ADVOCATE

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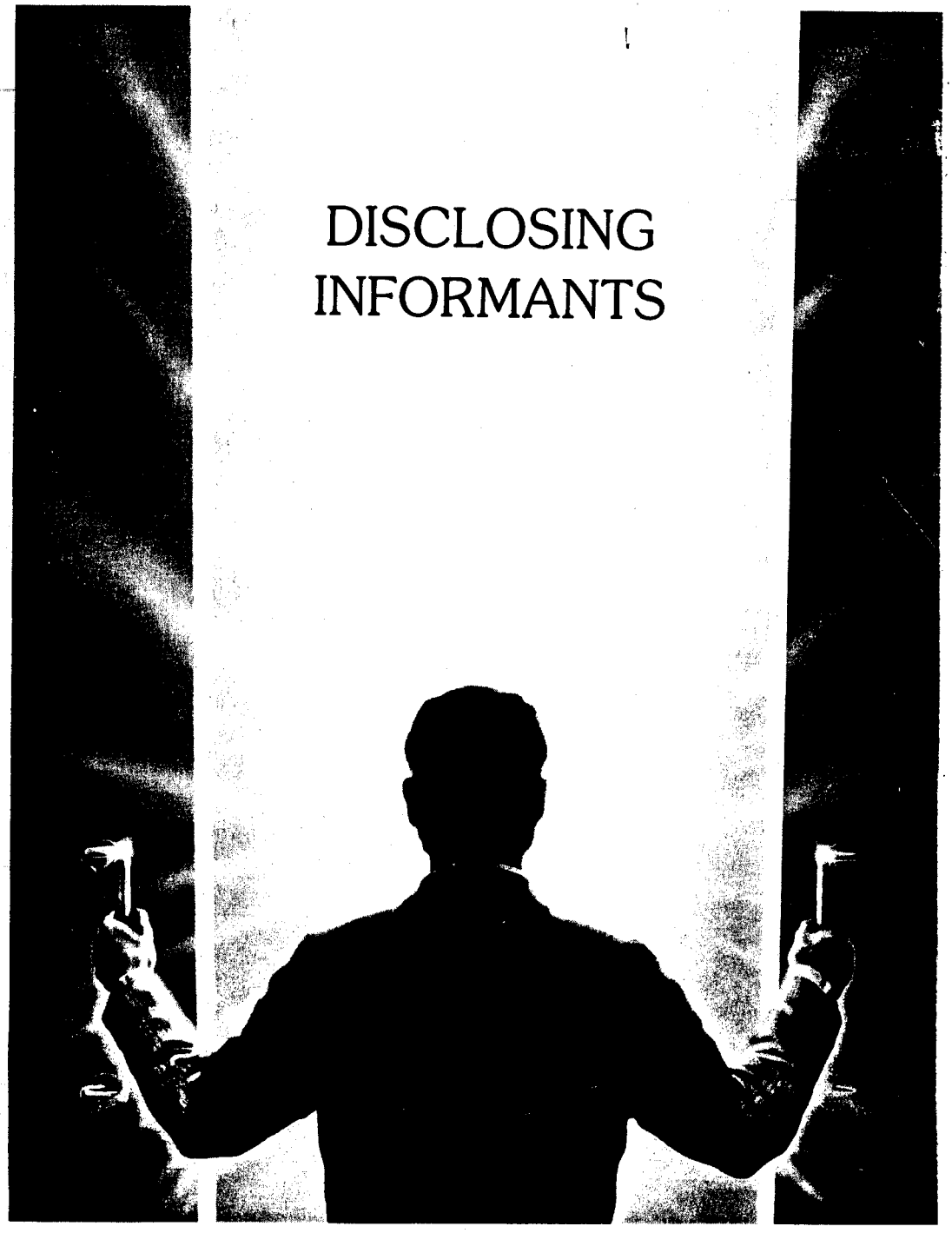
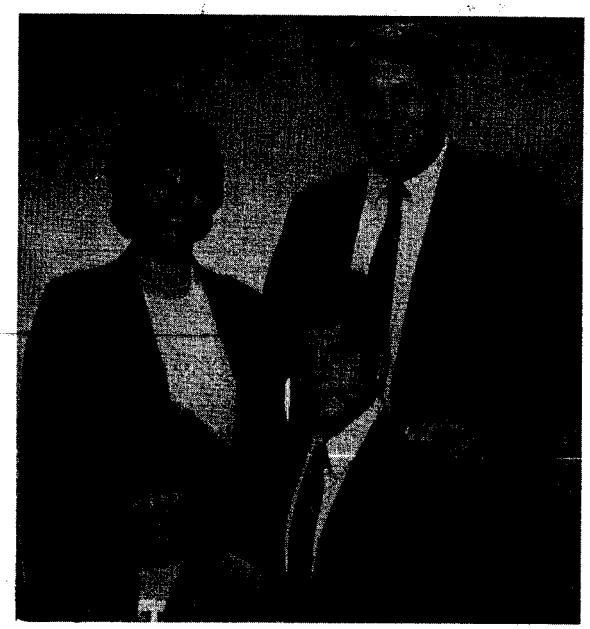


Lane Veltkamp on dysfunctional families, Part II

The Advocate Features



PATRICIA, JACK M. SMITH, JENNIFER AND ROBERT

Jack Smith practices law in Danville, Kentucky with the firm of Hensley and Smith. Jacks's partner, Thomas Hensley, said, "Jack does criminal defense work because it is important and is neglected by other attorneys and the system as a whole. He feels, as I do, a criminal defendant who can or cannot afford an attorney gets the best representation from our office because we recognize that the force of the state is being directed against that defendant and their freedom is going to be affected."

Jack established a practice in Danville in 1971 after he graduated from the University of Kentucky and he has dedicated himself to criminal defense work for the past 15 years.

How do you find practicing defense work in Boyle County?

We seem to have our share of the large murder cases and a ton of the other stuff. I think that we have a fairly decent prosecution office that doesn't, although it's adversarial, enjoy simply winning for the sake of winning and I think that probably makes the practice of criminal law work here maybe better than in some places.

Sometimes your survival as an attorney in a county really depends on your relationship with judges. Do you ever have times when being an effective advocate creates conflict with a judge that doesn't want to address certain issues within their court?

Yes. I believe that all judges after they've been on the bench awhile become prosecution oriented and that's a major problem for defense attorneys. I guess the judges just see so much that after awhile they're hardened to the possibility of anyone being innocent.

We had a long-time circuit judge here who died several years ago. Practicing before him was distinct. His opinions were formulated and he was a stickler for certain things. He often chewed me out for being 5 minutes late. Now, we have a circuit judge who is young and new and that's a learning experience.

How do you, as an advocate, find ways to bring up matters that judges don't particularly want to deal with?

You have to force it. You just have to make the motions and chew with

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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 subjects treated in its pages.

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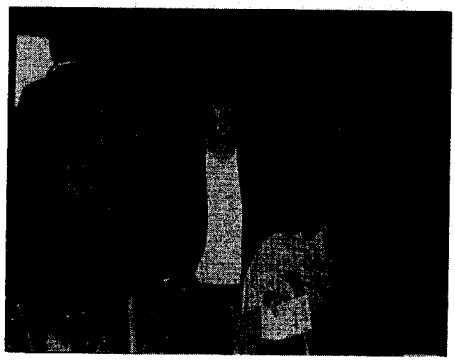
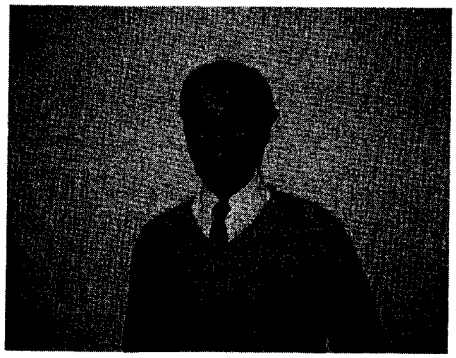
IN THIS ISSUE

Staff Changes

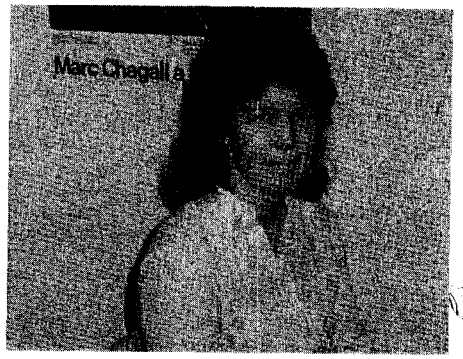
Eloise Simpson, Investigative Branch Legal Secretary, retired on January 31, 1987. Eloise was the first employee hired by the office on October 23, 1972 and remembers when the Department was two rooms in the basement of the Capitol Building. Eloise had worked 26 years with the State altogether. A retirement luncheon was held in her honor on January 16, 1987 in Frankfort. She thanked Dave Stewart, the Investigative Branch Chief, and the many attendees and said it was a "day she would remember always."



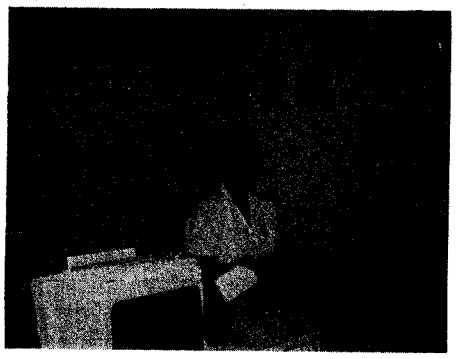
Gladys Aldridge, Accountant, Administrative Division, Frankfort retired on September 30, 1986 after 6 years of service with DPA and a total of 19 years with the state.



Patrick McNally resigned as Directing Attorney of the Hazard Office on November 15, 1986. He is now with the Nashville Public Defender Office.



Marguerite Thomas, Assistant Public Advocate, formerly worked for the Department at the Kentucky State Reformatory as a Paralegal. She has now joined the Frankfort Post-Conviction Branch as an attorney.



Jo McAdams, Legal Secretary, Post-Conviction Branch, Frankfort retired on December 31, 1986 after 6 years of service.

Penny Richardson, Data Entry Operator with the Administrative Division, resigned on January 6, 1987.

LouAnna Darling, Assistant Public Advocate with our Stanton Office, resigned on February 18, 1987.

Protection and Advocacy

for the Developmentally Disabled

NEW PROGRAM:
ADVOCATES FOR THE MENTALLY ILL

In May, 1986, President Reagan signed into law the first significant new social legislation of his term, the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (Public Law 99-319). The Act requires the developmental disabilities protection and advocacy system in every state to establish and operate a similar system for mentally ill individuals.

The Act was developed as a response to Congressional hearings and U.S. Department of Health and Human Services investigations into allegations of abuse and neglect in institutions providing care and treatment to people diagnosed as mentally ill. The major proponent has been Senator Lowell Weicker (R. Conn.) with assistance from Congressman Henry Waxman (D. Los Angeles).

A "mentally ill individual," as defined by the Act, is a person "who has a significant mental illness or emotional impairment" as determined by a qualified mental health professional and who either is an inpatient or resident in a facility providing care or treatment, or has been in such a facility and who requests assistance for problems occurring within 90 days of discharge.

The legislative history indicates that "facility" is to be defined broadly to include hospitals, nursing homes, community facilities, and board and care homes, or any other facility established to provide care or treatment.

The purposes of the Act are twofold. First, to ensure that the rights of the mentally ill are protected; second, to assure that there is a system to protect and advocate for the rights of such individuals through enforcement of the Constitution and federal and state law, and to investigate incidents of abuse and neglect. The rights of mentally ill individuals to be protected through administrative, legal, and other appropriate remedies are not defined. However, the Congressional findings that people with mental illness problems are subject to abuse and neglect indicates that these are core issues to be addressed through enforcement of constitutional and statutory entitlements.

The bill of rights recommended by the President's Commission on Mental Health is restated in the Act and provides a key to these core issues. These rights of a facility resident include the right to: appropriate treatment and services in the least restrictive environment most supportive of the person's personal liberty; a written individualized treatment plan; participate in planning one's own mental health services; be free of involuntary treatment except in emergencies, or as allowed by law; be free from restraint or seclusion except in restricted circumstances; the right to a humane treatment environment; have visitors, telephone and mail access; and to know one's rights, to have grievances heard when rights are violated, and to have access to rights protection services.

The Kentucky Protection and Advocacy Division will implement P.L. 99-319 by creating a Mental Health Advocacy Project as part of the agency. An Advisory Council consisting of an attorney, a service provider, a person knowledgeable about mental health, mental health professional, and primary and secondary consumers of mental health services has been formed. More than half that group are consumers of mental health services.

Bill Stewart, Mental Health Advocacy Supervisor with the Department of Public Advocacy's Protection and Advocacy Division, will supervise the new Project. **Jacque McAllister, Rick Cain,** and **Paul Phillips** will provide mental health advocacy services, with Mr. Phillips working primarily with persons having "dual diagnoses." Staff attorney **Pam Clay** will be working primarily with the new Project. Project employees have a wide range of experience in advocacy and/or service delivery systems. Persons desiring services or information from the new Project should call **1-800-372-2988** or write Bill Stewart at Protection and Advocacy Division, 151 Elkhorn Court, Frankfort, Kentucky, 40601.

Bill Stewart
Protection and Advocacy

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

MUGSHOTS/EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION/NEW EVIDENCE - POLYGRAPH
Gibbs v. Commonwealth
33 K.L.S. 15 at 1
(November 7, 1986)

In this case, the Court held that Gibbs was not denied a fair trial by the introduction of a mugshot of Gibbs selected by the victim from a photo lineup. The defense opened the door to introduction of the lineup photographs by introducing a lineup mugshot of a man whom the victim had identified as standing outside her home on the day of the burglary. The victim had gone on to select Gibbs' mugshot as that of the actual burglar. The Court held that introduction of the entire lineup was necessary to controvert any inference that the victim had misidentified Gibbs. The mugshot of Gibbs was relevant and any prejudice was minimized by cropping it to delete police references. See Redd v. Commonwealth, Ky.App., 591 S.W.2d 704 (1979).

The Court held that the trial court properly excluded expert testimony regarding factors which may affect the reliability of eyewitness identification. In the Court's view, such evidence would have invaded the province of the jury. The trial court also correctly refused to hear the evidence at a suppression hearing.

Finally, the Court held that Gibbs was not entitled to a new trial on the basis of newly discovered evidence where the evidence was ambiguous and not " of such a decisive nature that it would with reasonable certainty have changed the verdict...." The Court refused to weigh a polygraph report introduced solely to bolster testimony introduced in support of the motion for new trial. "The same considerations which would exclude admission of such hearsay evidence at trial would act to prohibit its considerations at a post-judgment proceeding."

INEFFECTIVE ASSISTANCE OF COUNSEL
Taylor v. Commonwealth
33 K.L.S. 15 at 5
(November 7, 1986)

In this case, the Court held that Taylor was not denied effective assistance of counsel when his attorney permitted him to plead guilty to a PFO charge when the prior felony "conviction" relied upon by the Commonwealth did not support the charge. The Court stated "While we conclude that the failure of trial counsel to properly investigate and discover the dismissal of the [prior] burglary charge was a deficient performance under Strickland v. Washington, 446 U.S. 668 (1984), it is readily apparent that no prejudice resulted from the deficiency sufficient to meet the test enunciated in Hill v. Lockhart, 474 U.S. ____, 106 S.Ct. 366 (1985). The Court noted that, while the Commonwealth erroneously relied on a dismissed charge to support the PFO charge, other convictions, admitted by Taylor, could have been used to support the PFO charge.

INEFFECTIVE ASSISTANCE OF COUNSEL
Robbins v. Commonwealth
33 K.L.S. 15 at 16
(November 21, 1986)

The Court held in this case that the trial court did not abuse its discretion when it denied Robbins' 11.42 motion without a hearing. Counsel could not have been ineffective for failing to move to suppress an incriminating statement which the Kentucky Supreme Court had held admissible on Robbins' direct appeal. Neither was counsel ineffective for failing to call witnesses whose testimony would not have "compelled an acquittal," or for failing to investigate Robbins' prior felonies where the same counsel had represented him on the prior felonies. Finally, counsel was not ineffective for failing to move for a speedy trial where there was no showing of prejudice.

GUILTY PLEA/
INEFFECTIVE ASSISTANCE OF COUNSEL
Sparks v. Commonwealth
33 K.L.S. 15 at 17
(November 21, 1986)

The Court held that Sparks' guilty plea, entered during his murder trial, was not involuntary where it was based on hearing the Commonwealth's case against him, and on a consideration of the likelihood of conviction and of the maximum penalty. The Court also found that

counsel's advice to plead guilty in exchange for a recommendation of a thirty-five year term was "not unreasonable under the circumstances" and thus was not ineffective.

CHILD SEX ABUSE/ VIDEOTAPED TESTIMONY/LEADING QUESTIONS/ ACCOMMODATION SYNDROME
Eastman v. Commonwealth
33 K.L.S. 15 at 7
(November 14, 1986)

In this case the Court held that KRS 421.350(2), which permits introduction of videotaped testimony of a child sex abuse victim, does not deny the accused's right of confrontation. The same holding had been previously reached by the Kentucky Supreme Court in Commonwealth v. Willis, Ky., 716 S.W.2d 224 (1986). The Court also held that during the videotaped examination of the victim "a certain amount of leading questions" was permissible.

The Court held that the introduction of testimony regarding child sexual abuse accommodation syndrome was harmless error. The Court distinquished Lantrip v. Commonwealth, Ky., 713 S.W.2d 816 (1986), which reversed based on the introduction of such evidence, in that the expert witness in Eastman, unlike the expert in Lantrip, did not testify that the victim displayed the syndrome.

ADMISSIBILITY OF EXPERT OPINION
McConnell v. Commonwealth
33 K.L.S. 15 at 9
(November 14, 1986)

The Court held that it was not error to permit the introduction of testimony that the child victim appeared to have sustained his injuries by being immersed or held in scalding water. The expert witnesses testified that the absence of splash burns on the child suggested that he was unable to make an effort to get out of the bathtub. This conflicted with McConnell's testimony that he left the child in the tub and returned to find him scalded. The Court noted that Kentucky does not prohibit testimony regarding ultimate issues of fact so long as the testimony "assisted rather than impeded the solution of the ultimate problem."

CHANGE OF VENUE/POSSESSION OF FORGED INSTRUMENT AND THEFT BY DECEPTION
Caudill v. Commonwealth
33 K.L.S. 16 at 3
(November 16, 1986)

Caudill, a Floyd County elected official, argued that a change of venue to a county in another state judicial district, on motion of the Commonwealth, violated his Sixth Amendment right to trial by a "jury of the state and district wherein the crime shall have been committed...." The Court disagreed, stating: "We hold that inasmuch as the limitation as to district is part of the U.S. Constitution, the term "district" applies only to federal judicial districts and that Caudill's argument to the contrary has no merit."

The Court additionally held that Caudill's convictions of possession of a forged instrument and theft by deception based on a single course of conduct did not constitute double jeopardy. The Court noted that each offense contains elements not included in the other.

SERIOUS PHYSICAL INJURY/ CONFESSION MADE WHILE INTOXICATED
Giannini v. Commonwealth
33 K.L.S. 16 at 4
(November 26, 1986)

In this case the Court held that a gunshot wound inflicted with a .357 magnum, which penetrated the lower neck and exited below the shoulder blade, passing one quarter inch from the spinal cord and jugular vein, was a serious physical injury.

"This comports with the statutory definition of a serious physical injury as an injury which creates a substantial risk of death. KRS 500.080(15)."

The Court also held that Giannini's post-arrest statement was not involuntary by reason of his intoxication. "An otherwise voluntary confession is not to be excluded by reason of self-induced intoxication unless the confessor was intoxicated to a degree of being unable to understand the meaning of his statements."

SELF-DEFENSE AND WANTON MENTAL STATE
Ford v. Commonwealth
33 K.L.S. 16 at 6
(December 5, 1986)

The Court reversed Ford's second degree manslaughter conviction since Fords' reliance on the defense of self-protection precluded her conviction of an offense requiring wantonness as a mental state. The Court cited Gray v. Commonwealth, Ky., 695 S.W.2d 860 (1985) in which the Kentucky Supreme Court held that inasmuch as the defendant's act of killing the victim was, by his own admission, intentional, the trial court's instructions should have been limited to intentional crimes.

ENTRAPMENT
Fuston v. Commonwealth
33 K.L.S. 17 at __
(December 19, 1986).

The issue in this case was whether Fuston was entitled to an instruction to the jury on entrapment. The evidence showed that Fuston was induced by an informant's persistent persuasion to procure and sell ten pounds of marijuana to an undercover agent. The Court held that "this evidence was certainly sufficient to create a jury question as to whether the appellant was induced or encouraged by the informant to sell the ten pounds of marijuana." However, Fuston admitted that he had previously sold small quantities of marijuana. This admission destroyed Fuston's entrapment claim since entrapment requires a showing that "[a]t the time of the inducement or encouragement, [the defendant] was not otherwise disposed to engage in such conduct." KRS 505.010(1)(b).

ESCAPE-JUVENILE'S UNAUTHORIZED ABSENCE FROM GROUP HOME

L.A.S. v. Commonwealth
33 K.L.S. 17 at __
(December 19, 1985)

In this case, the Court held that a juvenile could be charged with third degree escape under KRS 520.040 as a result of the juvenile's unauthorized absence from a group home to which she had been committed as a habitual truant. The defense argued that the juvenile could not be convicted of escape because she was not "in custody" at the group home. The Court disagreed and held that the juvenile was in custody at the group home since she was placed there pursuant to "an order of court for law enforcement purposes." KRS 520.010(2). The Court noted that its decision was at variance with similar decisions in other states but considered its decision justified by the KRS 520.010(2) definition of "custody."

BURGLARY-"BUILDING"/ INCONSISTENT VERDICTS

Payne v. Commonwealth
33 K.L.S. 17 at __
(December 24, 1986)

This decision reversed Payne's conviction of third degree burglary since Payne had not knowingly entered or remained unlawfully in a "building." Payne, an inmate at the Jefferson County Jail, was convicted of burglary based on his theft of property from the "property room" of the jail. The Commonwealth argued that Payne's entry into the property room constituted a burglary based on the KRS 511.010(1) provision that: "Each unit of a building consisting of two (2) or more units separately secured or occupied is a separate building.

The Court rejected the Commonwealth's argument, reasoning that the statute was meant to apply to units in an apartment building. The Court noted that under the statute a "building" must consist of two or more units, not a single room such as the jail property room.

The Court also held that the jury had returned inconsistent verdicts. The jury acquitted Payne of theft but convicted him of burglary which required a finding that he intended to commit a theft. However, there was no evidence of an intent to commit a theft separate from evidence of the theft itself. Under these circumstances the Court held that there was insufficient evidence of an intent to commit theft to support the burglary conviction.

Kentucky Supreme Court

RESTITUTION

Commonwealth v. Bailey
33 K.L.S. 14 at 12
(November 6, 1986)

This case reverses a decision of the Court of Appeals which had overturned an order directing Bailey to make restitution. The order granted restitution and specifically directed the Corrections Cabinet to notify the trial court of the date of Bailey's release and directed Bailey to report to the trial court upon his release for establishment of a restitution payment schedule. The Kentucky Supreme Court held that these portions of the trial court's order were implicitly authorized by the court's power to order restitution under KRS 431.200. The Court rejected the conclusion of the Court of Appeals that the trial court acted outside its authority under the statute when it sought to affect Bailey after his release from imprisonment. The Supreme Court held that the order of restitution was "enforceable just as any other judgment is enforceable, by use of 'execution or other process' as set out in the statute." Justices Stephenson, Leibson, and Vance dissented.

DUI-PROOF OF PRIOR CONVICTION
Commonwealth v. Willis
Goins v. Commonwealth
33 K.L.S. 14 at 13
(November 6, 1986)

In these cases, the Court affirmed decisions of the Court of Appeals holding that a "Driving History Record," maintained by the state Transportation Cabinet, may not be introduced as proof of prior conviction at trial of a subsequent DUI offense. The Supreme Court faulted the introduction of such records as falling under the best evidence rule and as being hearsay. The Court held that, as in PFO cases, a "judgment of conviction is still necessary to prove either the date of previous offenses, or the fact of previous offenses."

FIRST DEGREE ROBBERY-
"DANGEROUS INSTRUMENT"
Williams v. Commonwealth
33 K.L.S. 14 at 16
(November 16, 1986)

While robbing a Seven-Eleven store Williams threatened the clerk by reaching toward his back pocket and saying "Do you want your life?" No weapon or instrument was displayed nor was any found when Williams was arrested as he fled the scene. The trial court nevertheless instructed the jury that they could convict Williams of first degree robbery if they found that Williams had used or threatened the immediate use of a dangerous instrument. The Kentucky Supreme Court reversed. "Herein the fact is that although force was threatened, the presence of a weapon or instrument was illusory at best. Without any instruments ever being seen, an intimidating threat albeit coupled with a menacing gesture cannot suffice to meet the standard necessary for a first degree robbery conviction." Justice Wintersheimer and Stephenson, and Chief Justice Stephens dissented.

INFORMANT AS WITNESS/
DEFECTS IN VERDICT
Hargrave v. Commonwealth
33 K.L.S. 15 at 19
(November 26, 1986)

In this case, the Court held that Hargrave was not entitled to disclosure of the identity of a confidential informant who had informed police that he had seen drugs in Hargrave's apartment. Hargrave argued that the informant was a material witness, and cited Burks v. Commonwealth, Ky., 471 S.W.2d 298 (1971), which required disclosure of the name of an informant who had witnessed the sale of drugs. The Court rejected this argument based on the distinction that "the informant is never said to have told the detective that he witnessed Mr. Hargrave personally possessing drugs, only that he observed a large quantity of drugs at Appellant's home."

The jury mistakenly convicted Hargrave of both possession of and trafficking in drugs. The trial court ruled that the possession charge merged into the trafficking and rejected erroneous defense argument that the trafficking conviction merged into the possession. On appeal, Hargrave argued that the trial court erred by selecting a verdict for the jury. The Court held that this contention was not preserved by trial defense counsel's erroneous argument, and stated that defects in a verdict are waived without an objection.

As regarded Hargrave's first degree PFO conviction, the Court held that it was permissible for a judgment of a previous conviction to be signed nunc pro tunc in order to be used at the PFO proceeding. The Court additionally held that the trial court had correctly found that Hargrave voluntarily plead guilty to a prior offense, and that the jury could infer that Hargrave's previous terms of imprisonment were not concurrent or uninterrupted consecutive terms where Hargrave was convicted of burglary in Ohio in 1967 and later convicted of a robbery committed in Michigan in 1975.

POST-ARREST SILENCE
Wade v. Commonwealth
33 K.L.S. 15 at 25
(November 26, 1986)

Wade voluntarily turned himself in to the police and gave them a statement meant to establish an alibi for the night of the offense. In his trial testimony Wade repeated the alibi and embellished it. The prosecutor then cross-examined Wade regarding those details not included in the original statement. The Court held that the prosecutor's cross-examination did not constitute an impermissible comment on post-arrest silence. "Even though it is self-serving, to the extent that the defendant on trial later embellishes his testimony in court with additional details to bolster his alibi or explanation, cross-examination bringing out the difference between the two statements should be classified as impeachment, not comment on the accused's right to remain silent."

APPEAL BY COMMONWEALTH
FROM JUDGMENT N.O.V.
Commonwealth v. Brindley
33 K.L.S. 16 at 13
(December 18, 1986)

Following Brindley's conviction of reckless homicide, the trial court granted a defense motion for judg-

ment n.o.v. and set aside the judgment. The Commonwealth appealed.

Brindley contended that the Commonwealth could not appeal granting of a motion for judgment n.o.v. since such is the functional equivalent of a verdict of acquittal. The Court disagreed. "It is our opinion that Section 115 of the Kentucky Constitution, founded in the prohibition against double jeopardy, does not prevent an appeal by the Commonwealth when a jury has returned a verdict of guilty which has been set aside by a ruling of law to a post verdict motion. If error was made in such ruling as determined on appeal, the verdict is simply reinstated." The Court's holding overrules Commonwealth v. Burris, Ky., 590 S.W.2d 878 (1979). Following an examination of the evidence, the Court held that it was sufficient to take the case to the jury. Based on this finding, the judgment n.o.v. was reversed.

DOUBLE JEOPARDY
Commonwealth v. Mattingly
33 K.L.S. 16 at 14
(December 12, 1986)

Mattingly was granted a new trial following his conviction of PFO because the sole evidence of one of his prior convictions was hearsay. Mattingly was retried and again convicted.

On appeal, Mattingly contended that his retrial was barred by double jeopardy, reasoning that his initial conviction was sustained by insufficient evidence. The Court, citing Hobbs v. Commonwealth, Ky., 655 S.W.2d 472 (1983), held that the admission of the hearsay was merely a trial error, so that granting of a new trial or a reversal on that grounds did not bar a retrial.

EXTREME EMOTIONAL DISTURBANCE
Hale v. Commonwealth
33 K.L.S. 16 at 15
(December 18, 1986)

In this case the Court rejected argument that the trial court should have instructed the jury that the Commonwealth bore the burden of proving that the defendant did not act under extreme emotional disturbance. The Court's holding is consistent with its decision in Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985), that the absence of extreme emotional disturbance is not an element of the offense of murder.

The Court also held that a homicide conviction obtained before its decision defining extreme emotional disturbance in McClellan v. Commonwealth, Ky., 715 S.W.2d 464 (1986) is not defective because the murder statute is void for vagueness. The Court specifically held that McClellan was prospective in effect only.

United States Supreme Court

CONFESSIONS
Colorado v. Connelly
40 CrL 3159
(December 10, 1986)

Acting on his own initiative, Connelly approached a police officer and stated that he wished to confess a murder. Connelly was read Miranda warnings and then gave a detailed confession. It subsequently developed that Connelly was psychotic and was told to confess by the "voice of God." Based on these circumstances, the trial court suppressed the confession. The Colorado Supreme Court affirmed, reasoning that Connelly's confession was involuntary and that the state had failed in its burden to prove a valid waiver of Miranda rights by "clear and convincing evidence."

The United States Supreme Court reversed. The Court held that, in the absence of any coercive police activity federal due process does not come into play. The Court noted that "while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry."

The Court additionally held that the Colorado Supreme Court erred in requiring proof of a valid waiver of Miranda rights by "clear and convincing evidence." The Court stated that such waiver need be shown only by a "preponderance of the evidence." Justices Marshall and Brennan dissented.

Linda West
APA, Appellate Branch
(502) 564-5234

Melissa McCreary, 18, of Baxter, KY, jailed on a DUI charge was found hanging from bed sheets apparently tied to a pipe in her cell, said Howard Helton, the Harlan County Detention Center jailer. Her body was discovered less than two hours after her arrest.

Ms. McCreary had been charged with driving under the influence of alcohol and possession of marijuana. At the time of her arrest, she had a reading of 0.12% on the blood alcohol test. A reading of 0.10 is regarded as legally drunk. Because the offenses were relatively minor, "she would've probably gotten out at 8 a.m.," Helton said.

October 27, 1986, Herald Leader

Post-Conviction
Law and Comment

McGehee Isaacs

FEDERAL HABEAS PROCEDURAL DEFAULT

In deciding to take a finally appealed criminal conviction to federal court under 28 U.S.C. 2254 or back to the state court of origin on a post-conviction action, several fundamental decisions must be made. A major decision concerns the status of the issues in their posture vis-a-vis the state's procedural rules such as contemporaneous objection and motion for directed verdict. This column surveys recent Sixth Circuit decisions on procedural defaults and federal habeas corpus actions under the principals of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

In Wainwright, the Court held that if a habeas claimant has not complied with his state's procedural rules such as contemporaneous objection or a motion for a directed verdict on an issue, then the federal court may not entertain it unless cause for the default is shown and there is some demonstrable prejudice to the claimant. By not obeying these state procedural rules, the issue has not been fairly presented to the state court system and is not exhausted for federal habeas corpus purposes. See Strickland v. Marshall, 632 F.Supp. 590 (S.D. Ohio 1986).

Recently, the Sixth Circuit rendered a decision that is basically a clinic for practitioners in determining if they have a procedural problem which bars them from habeas relief. In Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986), the Court held:

When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated analysis. First, the Court must determine if there is a state procedural rule that is applicable to the petitioner's claim and the petitioner failed to comply with the rule. Secondly, the Court must decide whether the state court actually enforced the state procedural sanction. Third, the Court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can be allowed to foreclose review of the federal constitutional claim." Maupin, 785 F.2d at 138.

When this test is met, the issue is thrown back under the principals of Wainwright v. Sykes, and the claimant must show cause and prejudice to continue in the federal setting.

If you are under the cause and prejudice standard, then Maupin sets out the formula for meeting this test. Obviously, it's a fairly simple matter to show that counsel did not do something that he should have done or did something that he should not have done in a trial setting. All practitioners know errors are made in every case by trial counsel. It is more difficult to determine if in fact the error claimed prejudiced the claimant in some way. Maupin is instructive. There the Court said: "First, it is clear that the prejudice that must be shown must be a result of the alleged constitutional violation and not a result of trial counsel's failure to meet state procedural guidelines. Secondly, the burden is on the petitioner to show that he was prejudiced by the alleged constitutional error. Moreover, he must show that there was actual prejudice, not merely a possibility of prejudice. Third, in analyzing a petitioner's contention of prejudice, the Court should assume that the petitioner has stated a meritorious constitutional claim."

An example, applying Maupin, would be a defendant convicted of rape and incest where counsel failed to make a motion to dismiss under Hamilton v. Commonwealth, 659 S.W.2d 201 (Ky. 1983). Not knowing to make the motion or forgetting to is cause and the obvious prejudice is the double jeopardy conviction. This of course is where you are raising ineffective assistance as the issue.

These principals of procedural default in causing prejudice have taken unusual turns in the Court's determination to set guidelines for practitioners in bringing federal cases to the Sixth Circuit. In Cohen v. Tate, 779 F.2d 1181 (6th Cir. 1985) the claimant had failed to pursue a direct appeal to the Supreme Court of Ohio upon his post-conviction issues of involuntary guilty plea and ineffective

assistance of counsel. The Federal habeas case was the result of a successive petition in the Ohio state court and the court held that the cause and prejudice standard did not come into play in the case because in the claimant's first petition the Ohio courts had actually reached the merits of the two claims, and did not take claimant's failure to appeal as dispositive. See Cohen, 779 F.2d at 1185. Therefore, if the state court in its appellate determinations glosses over the procedural defect and reaches the merits of the issue you may proceed. However, the issue is seldom that simple.

In Gilbert v. Park, 763 F.2d 821 (1985), the Court was faced with a situation where on state appeal the prosecutor had argued both a procedural default of the issue as well as its merits if the procedural default was overruled. In its opinion the Kentucky Supreme Court did not indicate whether it was affirming the conviction on the procedural grounds by failing to object or the merits of the claim. There the Court stated: "Since the state argued both the merits and the failure to object in its state court brief and since the Kentucky State Supreme Court's opinion in Gilbert does not indicate whether it relied upon the procedural default in rejecting this claim, the failure to object must be regarded as a substantial basis of the Kentucky Supreme Court's decision." Therefore, when there is argument on both the procedural ground and meritorious ground of an issue and the state appellate opinion fails to delineate between the two the Sixth Circuit will presume that the procedural ground was the one relied upon by the state appellate court. This puts the issue into cause and prejudice. When in this situation it is conservative practice to argue all the grounds, i.e., procedural and meritorious, in addition to attempting to meet the cause and prejudice standard. This insures the claimant is covered.

In an attempt to clarify and enhance the principal of Gilbert v. Park, the Court rendered the opinion of Shephard v. Foltz, 771 F.2d 962 (6th Cir. 1985) two months after Gilbert. There the Court stated:

"When it is unclear from the face of the state court opinion whether the state court relied upon a procedural bar as a basis for rejecting a claim, the appropriate procedure for the district court is to examine the arguments presented at the state courts; (1) if the state prosecutor only argued the merits of the petitioner's claim before the state court and failed to raise the procedural default issue, the federal court may assume that the state court ruled only on the merits; (2) if the prosecutor relied solely on the procedural default, the federal court may assume that that was the only basis for the state court's decision; and (3) if the prosecutor argued in the alternative the federal court may assume that the state court did not rely solely on the merits unless it says so." See Shephard, 771 F.2d at 965. When a state appellate opinion is unclear you must back track in this fashion.

The procedural default of an issue in a case creates a mine field that a practitioner may be able to successfully navigate if he wishes to litigate the matter in a federal setting. As the reader can see from the cases cited which are merely those rendered in the Sixth Circuit, the rules regarding the overriding of a procedural default are becoming tighter and tighter as the formulas for throwing cases out become more complex. It is incumbent upon counsel to be prepared to meet these arguments or run the risk of failing to get a decision on the merits in the federal system.

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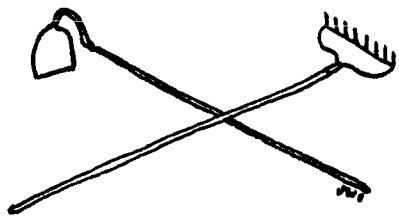
* * * * *



PRISON FARMS

Prison farms not going private: A legislative group assured Corrections Cabinet officials that no plans were afoot to hand over Kentucky's prison farms to private contractors.

Its chairman, Rep. Lloyd Clapp, said the prison-farmers' subcommittee of the interim join State Government Committee had no preconception about whether the farms should be taken from the cabinet.

The subcommittee was created to referee a debate about whether the farms should primarily turn a profit or serve as punishment and rehabilitation while coincidentally supplying part of the upkeep of 4,800 state prisoners.

The four farms, encompassing 5,000 acres, lost $550,504 last fiscal year, according to figures released at the meeting by Kenneth L. Dressman, the cabinet's director of administrative services.

October 23, 1986, Herald-Leader

6th Circuit Highlights

Donna Boyce

IDENTIFICATION

In Thigpen v. Cory, 804 F.2d 893, 15 SCR 22, 12 (6th Cir. 1986), the Sixth Circuit Court of Appeals reversed the district court's denial of Thigpen's habeas corpus petition because it found pre-trial identification procedures to be so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. The state appellate court and federal district court had concluded the pre-identification encounters were not unduly suggestive because police machinations did not cause the confrontations between the witness and the defendant. The Sixth Circuit, however, stated that deterrence of police misconduct was not the basic purpose for excluding identification evidence. Rather, the Sixth Circuit found that because it is the likelihood of misidentification that violates a defendant's due process rights, only the effects of (and not the causes of) pre-identification encounters are determinative of whether confrontations were unduly suggestive.

In this case, the witness encountered the defendant three times prior to identifying him: at a lineup, at the co-defendant's preliminary hearing and at the co-defendant's trial. The Court stated that an individual's appearance in a lineup suggests to a witness that the person is in police custody for some reason and that even if the police do not indicate that the people in the lineup are suspects, seeing a man in a lineup for a crime is likely to associate that person with the crime to some degree in the witness' mind. The suspicion planted in the witness' mind by the defendant's presence in the lineup was then significantly reinforced by seeing him at two court proceedings involving the other man the witness had identified at the lineup as one of two robbers. Having found these encounters to be unduly suggestive, the Court went on to find nothing in the totality of the circumstances to indicate that the identification was otherwise reliable. Finally, the Court held that the state could not possibly prove beyond a reasonable doubt that the identification testimony did not influence the defendant's conviction.

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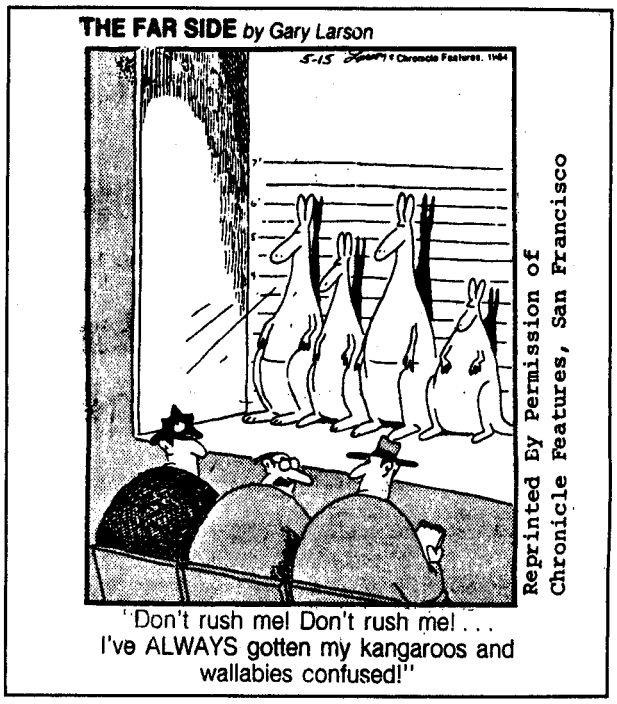


"Don't rush me! Don't rush me! . . . I've ALWAYS gotten my kangaroos and wallabies confused!"

Search and Seizure Analysis: A Flow-Chart Approach

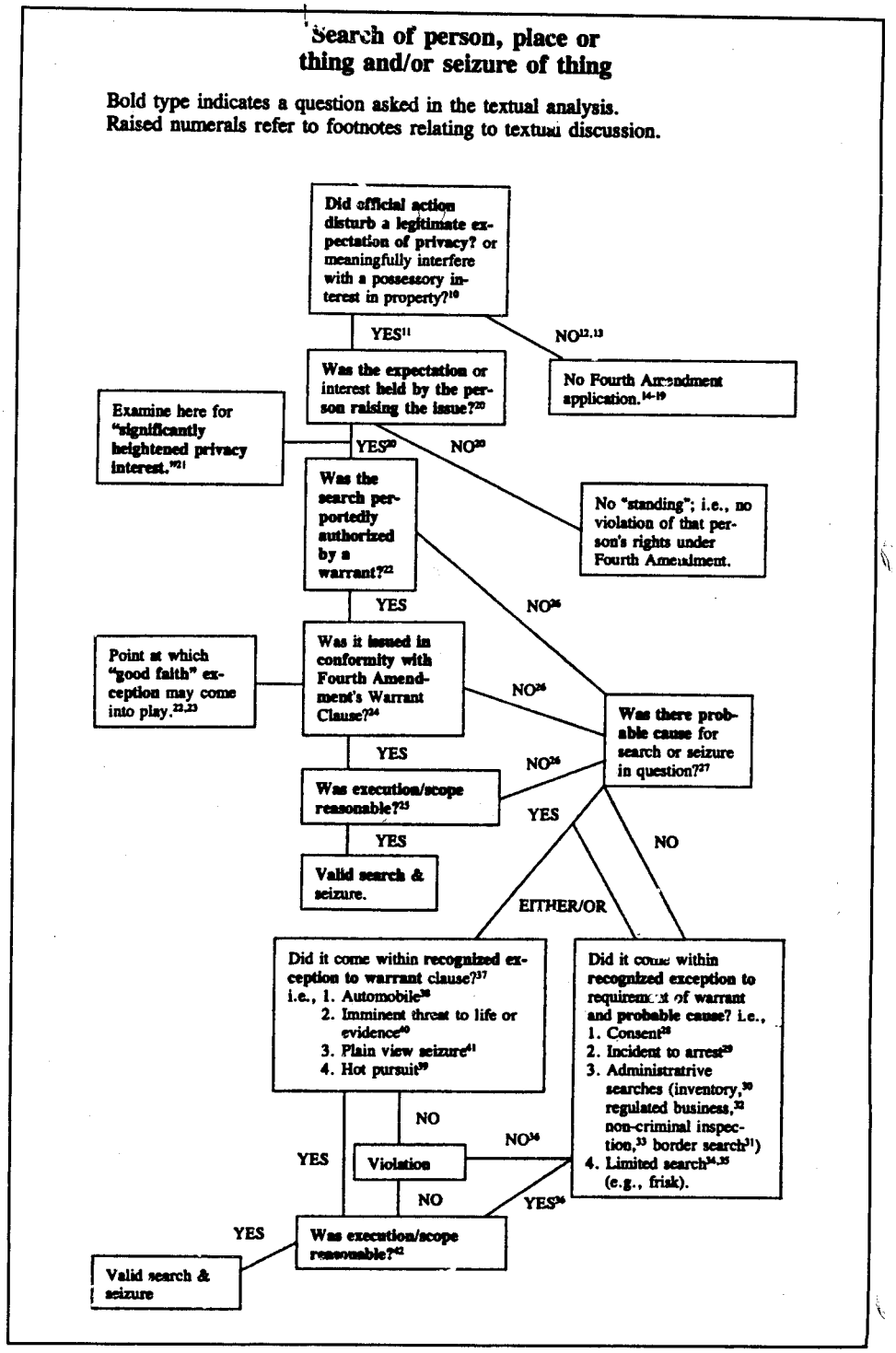
The following is reprinted from the Champion, the National Association of Criminal Defense Lawyers Magazine, and is the final part of a two-part series. It is reprinted with the permission of Clark Boardman Company, Ltd., 435 Hudson Street, New York, NY 10014.

DEFINITION OF "SEIZURE"

A "seizure" of property technically occurs "when there is some meaningful [official] interference with an individual's possessory interests in that property" (fn. 18). However, analysis of a "seizure" of property apart from any antecedent "search" will rarely give rise to a useful Fourth Amendment issue. This is because if the search was unlawful, the evidence will be the suppressible "fruit" of that search. On the other hand, if the search was valid, the evidence will likely have been in "plain view" at the moment of seizure and therefore properly seized (fn. 19).

STANDING

Assuming the police action leading to the evidence did disturb a "legitimate expectation of privacy," the next question is **"Was that expectation held by the person making the Fourth Amendment claim?"** This is the issue commonly called "standing." Since the Supreme Court holds Fourth Amendment rights to be essentially personal in nature, there is no pertinent violation unless that person's expectations of privacy were the ones invaded (fn. 20).



If these criteria are met, then the evidence stems from a Fourth Amendment "search" of which that person may complain; all remaining questions bear upon whether the search was "unreasonable" under the amendment.

UNREASONABLENESS

One unusual class of Fourth Amendment cases must be considered first. The Supreme Court has held that in special situations where "society recognizes a **significantly heightened privacy interest,** a more substantial justification [even than the usual rules of probable cause assessed through the warrant process] is required to make the search 'reasonable.'" (fn. 21). In Lee, the proposed surgical removal of a bullet from the suspect's body was unanimously held "unreasonable," notwithstanding undoubted probable cause and an extraordinary, prior adversarial hearing affording more procedural protection than the issuance of a warrant. Such cases, however, will surely be rare, although lie detectors, strip and body cavity searches, pulling (but not mere cutting) of hair, etc., may qualify. Assuming no such issue is presented, or that the search in question passes this heightened scrutiny, the next step is to look at the rules for warrants and warrantless searches.

WITH A WARRANT

The simplest way for a search to be rendered reasonably within the meaning of the Fourth Amendment is for it to be authorized by a warrant. In assessing the reasonableness of a search or seizure, then, the first question to ask is: **"Was the search purportedly authorized by a warrant?"** If the answer to this question is "Yes," the next question is whether the warrant was valid, that is: **"Was it issued in conformity with the requirements of the warrant clause?"** At the same time, if the Fourth Amendment issue has arisen in a context where enforcement through the exclusionary rule is necessary, as is usually the case with criminal pretrial motions, this is **the point at which the "good faith exception" may come into play** to moot further analysis (fn. 22).

Even under the "good faith exception" to the exclusionary rule, some aspects of the validity of the warrant may still be fully considered and others may be looked at to a limited extent (fn. 23). And the validity of the warrant may always be scrutinized when that exception does not apply. In other words, was the search warrant (a) issued upon oath, (b) by a neutral and detached magistrate, (c) particularly describing the thing(s) to be seized and the place to be searched, and (d) based upon probable cause to believe that the thing to be seized will be found in the place to be searched at the time of the search (fn. 24).

A negative determination on the validity of the warrant does not necessarily invalidate the search, but only requires that it be treated as warrantless. (The rationale for this doctine is obvious: it encourages police to get a warrant whenever possible, by leaving their case no worse off if the warrant proves invalid. A positive answer leaves only one question: **"Was the execution of the warrant, including the scope of the search, reasonable?"** If so, then the **search is valid** under the Fourth Amendment. If not, then to the extent the search exceeded the scope of the warrant or was otherwise unreasonable, it is invalid unless (as in the case of the invalid warrant) it can be justified under some rule for warrantless searches and seizures (fn. 25).

WARRANT EXCEPTIONS

If there is no warrant, or the warrant is invalid in issuance or execution, the search is "per se unreasonable...subject only to a few specifically established and well-delineated exceptions." (fn. 26). Even in this most feared part of the Fourth Amendment forest, however, the path is clearer than commonly supposed, for the exceptions can be logically grouped on the basis of whether the requirement of probable cause is dispensed with, along with the warrant. And each group - searches without warrant or probable cause, and searches without warrant but upon probable cause - really contains only four exceptions, which in each case share certain characteristics.

Thus, at the point when a warrantless search or seizure must be justified, the most useful initial question is: **"Was there probable cause for the search or seizure in question?"** (Probable cause to search is defined above in connection with the validity of a search warrant. Probable cause to seize simply means adequate ground for belief that the thing is subject to seizure, i.e., contraband, fruits and instrumentalities of crime, or evidence (fn. 27).

SEARCH WITHOUT WARRANT OR PROBABLE CAUSE

If probable cause was lacking, the warrantless search is unreasonable and therefore invalid unless it **comes within one of four rules that dispense with both warrant and probable cause:** consent, incident to arrest, administrative search (and here, an administrative warrant is sometimes required), and limited search. These exceptions

have in common a sharply reduced legitimate expectation of privacy, a limited degree of intrusion, and/or a noncriminal investigative purpose.

The first of these - the only rule that allows a full search for an investigative purpose without any kind of probable cause - is for cases of authorized and voluntary consent (fn. 28).

The second rule allowing a search without warrant or probable cause is the doctrine of search incident to arrest (fn. 29). Of course, while no probable cause to search is necessary, the arrest itself must be valid, i.e. probable cause to arrest is required.

The third kind of search allowed without probable cause as well as without warrant is the administrative search. These include post-arrest inventories pursuant to a uniform policy (fn. 30), searches at the border or its functional equivalent and on the high seas (fn. 31), inspection of a pervasively regulated business (fn. 32), and the non-criminal safety or welfare investigation (fn. 33).

Fourth, the Supreme Court has approved certain limited searches without a warrant, although upon suspicion not rising to the level of probable cause, on a rationale that balances the lesser invasion of privacy against the law enforcement need for the intrusion. The classic examples is a Terry frisk (fn. 34). This category also includes brief seizures of objects (fn. 35).

In the absence of both warrant and probable cause, if the case does not come without one of these four "exceptions," the Fourth Amendment has been violated. If one of the four categories applies, then there is no violation so long as **the execution, including the scope and duration of the search or seizure, is deemed reasonable** (fn. 36).

SEARCH WITHOUT WARRANT, BUT WITH PROBABLE CAUSE

When there is probable cause, a warrantless search may be reasonable if it fits either within any of the four rules described above (in which event the probable cause is superfluous) or within any of **the four search warrant exceptions that do require probable cause.** These are: automobile searches, hot pursuit, imminent danger to life or evidence, and plain view

seizure. What these rules have in common is a factor of real or presumed exigency (unlike the four exceptions to the probable cause standard, which depend upon a reduced expectation of privacy). Perhaps because of this shared characteristic, the lower courts have typically ruled that there is a general exception to the warrant requirement for "exigent circumstances." The Supreme Court, however, has never approved such a broad formulation in a holding (fn. 37). Thus, "exigent circumstances" may be the defining characteristic of the exceptions that dispense with a warrant (although not with probable cause), but such circumstances do not necessarily give rise, in and of themselves, to a valid warrantless search.

The first of the four specific rules allowing warrantless searches upon probable cause is the automobile exception. This authorizes a warrantless search of as much of a vehicle and containers found in it as there is probable cause to believe may contain seizable items (fn. 38).

Second, the "hot pursuit" rule authorizes the police to enter and search a private place while they are immediately and continuously chasing a fleeing criminal (fn. 39).

The third exception that does not dispense with the requirement of probable cause allows a search and/or seizure to prevent imminent danger to life or evidence. While the Supreme Court has never decided a danger-to-life exigency case, there can be little doubt that such a warrantless search would be allowed as following a fortiori from cases involving the imminent destruction of evidence (fn. 40).

Fourth is "plain view seizures," that is, property may be seized without a warrant if there is probable cause to believe the item is contraband or evidence of criminal activity, and the item is inadvertently found within plain view in a place where the officer has authority to be (fn. 41).

FINAL STEP: EXECUTION/SCOPE

If a search without a warrant or with an invalid warrant, or a seizure of anything other than a person, comes within none of the pertinent search warrant exceptions outlined above, then it is unreasonable and violates the Fourth

Amendment. If, on the other hand, the search or seizure is authorized under one of those rules, there remains only one question to determine its lawfulness: **"Was the execution of the search, including its scope, reasonable?"** (fn. 42). In the case of one of the exceptions that contemplates the existence of probable cause, this often requires asking whether the search, as actually conducted, exceeded the bounds of that cause. Where the pertinent exception is one requiring neither warrant nor probable cause, the scope/execution question looks at whether the precise limits of the exception, as defined, were adhered to. If they were exceeded, then the search is unreasonable and the seizure invalid. If, however, the execution was within permissible bounds, then the search and seizure are valid.

CONCLUSION

By following the logical analysis outlined in this article (summarized graphically in the accompanying flow charts) with respect to each separate stage of police-citizen interaction leading to the seizure of each separate item of questioned evidence, one can be assured that no potentially important Fourth Amendment issue is missed. Although following the analysis through each step may seem tedious or unnecessary, oversights can be eliminated only by proceeding carefully. Nevertheless, for any given issue, the analysis can be quite rapid, especially when initial familiarity with the system has been achieved. When the user reaches this point of being comfortable with the logical relationship and flow of the questions, analysis of Fourth Amendment problems can change from being a hit-or-miss proposition to being part of an effective and efficient system.

- Peter Goldberg

FOOTNOTES

18. U.S. v. Jacobsen, supra, 466 U.S. at 113.
19. See Texas v. Brown, supra, 460 U.S. at 737-39; Rawlings v. Kentucky, 448 U.S. 98, 106 (1980).
20. U.S. v. Salvucci, 448 U.S. 83 (1980) (no "automatic standing" for one charged with possession); U.S. v. Payner, 447 U.S. 727 (1980) (lack of standing bars claim even of flagrant, bad faith violation, targeted at claimant); Rakas v. Illinois, 439 U.S. 128 (1978) (legitimate presence in place searched not enough); Alderman v. U.S., 394 U.S. 165, 178-80 (1969) (absent homeowner had standing); Mancusi v. DeForte, 392 U.S. 364, 367-68 (suspect had legitimate privacy expectation in his desk at work).
21. Winston v. Lee, 470 U.S. ___, 105, S.Ct. 1611, 1620 (1985).
22. See U.S. v. Leon, 468 U.S. ___, 104 S.Ct. 3405 (1984).
23. Id. at 3421-22 Cf. Malley v. Briggs, supra note 4 (similar standard for overcoming immunity of police in Fourth Amendment damage suit). See Hall, The Reasonable Good Faith Exception to the Exclusionary Rule: Recent Developments, 13 SEARCH AND SEIZ.L.REP. 1 (Jan. 1986).
24. See Gates v. Illinois, 462 U.S. 213 (1983) (probable cause); Franks v. Delaware, 438 U.S. 154 (1978) (effect of false affidavit); Andresen v. Maryland, 427 U.S. 463, 478-82 (1976) (particularity); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Connally v. Georgia, 429 U.S. 245 (1977); Coolidge v. New Hampshire, 403 U.S. 433, 449-53 (1971) (neutrality).
25. See also discussion infra text accompanying note 42.
26. Thompson v. Louisiana, 469 U.S. ___, 105 S.Ct. 409, 410 (1984) (per curiam), and Mincey v. Arizona, 437 U.S. 385, 394-95 (1978), both quoting Katz, supra, 389 U.S. at 357; cf. Texas v. Brown, 460 U.S. 730, 735 (1983) (plurality).
27. See Warden v. Hayden, 387 U.S. 294, 300-10 (1967).
28. See Florida v. Royer, 460 U.S. 491 (1983); Washington v. Chrisman, 455 U.S. 1, 9-10 (1982); U.S. V. Mendenhall, 446 U.S. 544, 557 (1980); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543, 548-50 (1968) (voluntariness); and U.S. v. Matlock, 415 U.S. 164 (1974); Frazier v. Cupp, 394 U.S. 731, 740 (1969); Stoner v. California, 376 U.S. 483 (1964); Chapman v. U.S., 365 U.S. 610 (1961) (authority).
29. See New York v. Belton, 453 U.S. 454 (1981) (search of passenger compartment of automobile, including closed containers found there, validly made incident to arrest of person in or near car); Rawlings v. Kentucky, supra, 448 U.S. at 110-11 (once probable cause to arrest arises, search incident may precede formal arrest); U.S. v. Edwards, 415 U.S. 800 (1974) (delayed, station-house search incident to arrest; unclear if probable cause then required also); U.S. v. Robinson, 414 U.S. 218 (1973) ("search incident"

does not depend upon nature of offense or facts of particular case); Chimel v. California, 395 U.S. 752 (1969) (scope of "search incident" limited to person and area of immediate control).

30. Compare Illinois v. Lafayette, 462 U.S. 640 (1983); and South Dakota v. Opperman, 428 U.S. 364 (1976), with Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) (impoundment and search of auto improper while arrested driver simply arranging for release on bail).

31. U.S. v. Montoya de Hernandez, 473 U.S. ___, 105 S.Ct. 3304 (1985) (27-hour detention and rectal search); U.S. v. Villamonte-Marquez, 462 U.S. 579 (1983) (vessel); U.S. v. Ramsey, 431 U.S. 606 (1977) (international mail); U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976); Cf. New Jersey v. T.L.O., 469 U.S. ___, 105 S.Ct. 733 (1985) (search of public school student).

32. Compare cases allowing such searches without warrant: Donovan v. Dewey, 452 U.S. 594 (1981) (mine); U.S. v. Biswell, 406 U.S. 311 (1972) (gun dealer); and Colonnade Catering Corp. v. U.S., 406 U.S. 311 (1972) (liquor licensee), with those disallowing them: Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (OSHA inspection potentially applicable to wide range of ordinary businesses); G.M. Leasing Corp. v. U.S., 429 U.S. 338 (1977) (IRS levy); See v. City of Seattle, 387 U.S. 541 (1967) (fire inspection of warehouse); and Camara v. Municipal Court, 392 U.S. 1 (1968) (inspection under housing code). Even where an administrative search does require a warrant, however, the standards of probable cause and particularity may be significantly diminished.

33. Compare Michigan v. Tyler, 436 U.S. 499 (1978) (immediate post-fire arson investigation), with Michigan v. Clifford, 464 U.S. 287 (1984) (warrantless search of fire scene exceeded allowable limits); see also Wyman v. James, 400 U.S. 309 (1971) (welfare worker "home visit").

34. Compare Terry v. Ohio, 392 U.S. 1 (1968) (requiring articulable suspicion that suspect is armed and presently dangerous), with Ybarra v. Illinois, 444 U.S. 85 (1979) (suspicion must be individualized) and Sibron v. New York, 392 U.S. 40 (1968) (officer put hand into suspect's pocket wihtout first patting exterior).

35. E.g., U.S. v. Place, 462 U.S. 696 (1983) (luggage detained at airport for drug sniff by dog); U.S. v. VanLeeuwen, 397 U.S. 249 (1970) (one-day detention of package at post office); and a "protective search" of the interior of an automobile, during a Terry detention of person not yet under custodial arrest, Michigan v. Long, 463 U.S. 1032 (1983). See also New York v. Class, ___ U.S. ___, 106 S.Ct. 960 (1986) (intrusion into automobile, to extent necessary to view vehicle identification number obscured from outside view, is reasonable).

36. E.g., Place, supra, 462 U.S. at 707-10.

37. See, e.g., Thompson v. Louisiana, supra; Mincey v. Arizona, supra (no exception for search of murder scene); Vale v. Louisiana, 399 U.S. 30 (1970) (no exception for immediate search of arrestee's home).

38. See California v. Carney, 471 U.S. ___, 105 S.Ct. 2066 (1985) (mobile home); U.S. v. Johns, 469 U.S. ___, 105 S.Ct. 881 (1985) (delayed search of containers); U.S. v. Ross, 456 U.S. 798 (1982).

39. Compare Warden v. Hayden, 387 U.S. 294, 298-300 (1967), with Welsh v. Wisconsin, 466 U.S. 740 (1984) (no "immediate or continuous pursuit...from the scene of a crime").

40. See, e.g., Cupp v. Murphy, 412 U.S. 291 (1973) (bits of flesh from under fingernails of suspected strangler); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (blood alcohol).

41. E.g., Texas v. Brown, supra, Coolidge v. New Hampshire, supra, 403 U.S. at 464-73 (plurality); cf. G.M. Leasing Corp. v. U.S., supra, 429 U.S. at 351-52 (cars seized from public street to satisfy IRS levy).

42. See also supra text accompanying note 25.

JUDGE FINES HIMSELF FOR GETTING LATE START

(Kentucky Post, January 7, 1987)

The 25 members of the jury sat patiently in the Grant Co. Courtroom. The defendant, his public defender, and the county attorney were at their respective tables. But the judge, Stan Billingsley, was in his Carrollton home, "I was shocked when I answered the phone and was told by the court clerk that I had a trial scheduled." He quickly changed clothes and arrived in Grant Co. a little more than an hour late. "I apologized to all concerned," Billingsley said. "Then I found myself in contempt of court and sentenced myself to pay $50 to the KSP Post 6 Ladies Auxiliary to use in their charity work. Billingsley thoguht the charge and sentence were fair. "We judges expect defendants and court people to be on time. So why shouldn't I?"

Trial Tips

For the Criminal Defense Attorney

DISCLOSURE OF CONFIDENTIAL INFORMANTS

The court-ordered disclosure of a confidential informant can often be essential to the preparation and trial of a criminal case as the informant may have been involved in entrapping the defendant; may have framed the defendant, or may have seen evidence which may prove exculpatory to the defendant. The case law has not always been clear on when disclosure must be ordered, or what showing a defendant must make in order to require a court to order disclosure. This article will attempt to examine the problem and demonstrate possible solutions.

GENERAL PRINCIPLES

The leading case on the law of disclosure of confidential informants is Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). The Roviaro Court defined the informer's privilege as "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." 353 U.S. at 59, 77 S.Ct. at 627, 1 L.Ed.2d at 644.

The privilege against disclosure does have certain limitations. First, the contents of an informer's communication are not privileged if disclosure will not reveal the informant. Id. 353 U.S. at 60, 77 S.Ct. at 627, 1 L.Ed.2d at 644. Secondly, "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." Id. 353 U.S. at 60, 77 S.Ct. at 627, 1 L.Ed.2d at 644-645. The final limitation is the one most important to this article. The Roviaro Court said, "(A) further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a

fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." Id. 353 U.S. at 60-61, 77 S.Ct. at 628, 1 L.Ed.2d at 644.

Kentucky case law also recognizes the informant privilege and the fundamental fairness exception. See Burks v. Commonwealth, Ky., 471 S.W.2d 298 (1971); Schooley v. Commonwealth, Ky., 627 S.W.2d 576 (1982); see also Thompson v. Commonwealth, 648 S.W.2d 538 (Ky. App. 1983); K.R.S. 218A.260. The Burks Court first recognized Roviaro as being "based upon the constitutional principle of fundamental fairness as an indispensable element of due process." Burks, 471 S.W.2d at 300. The Court then ordered disclosure of the informant saying, "(T)he significant point is that when an informer participates in or places himself in the position of observing a criminal transaction he ceases to be merely a source of information and becomes a witness. We have no quarrel with the general proposition that the state should not be required to disclose its sources of information, including the identity of informers, but there simply can be no valid principle under which the identity of a known witness may be concealed from adversary parties in any kind of a judicial proceeding, criminal or civil." Id. at 300-301.

THE LEGAL STANDARD FOR DISCLOSURE

The defendant shoulders the burden of demonstrating that disclosure of the confidential informant is required. Rugendorf v. United States, 376 U.S. 528, 534-535, 84 S.Ct. 825 (1964), 11 L.Ed.2d 887, 892-893, reh. den. 377 U.S. 940, 84 S.Ct. 1330, 12 L.Ed.2d 303; Schooley, 627 S.W.2d at 578. The question becomes what type of showing must t he defendant make to require disclosure. The Roviaro

Court refused to set a fixed rule of when disclosure should be ordered. Roviaro, 353 U.S. at 62, 77 S.Ct. at 628, 1 L.Ed.2d at 646. The defendant must make "some plausible showing from the circumstances in the case that the informant's testimony would be relevant and aid in the defense." Schooley, 627 S.W.2d at 578-579. The Roviaro Court listed factors to be used in determining when disclosure should be ordered. Roviaro, 353 U.S. at 62, 77 S.Ct. at 629, 1 L.Ed.2d at 646. The factors the Court listed are "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id.

It is important at this point to analyze Roviaro and the factors it lists. Roviaro is based on fundamental fairness as an essential element of due process. Burks, 471 S.W.2d at 300; see also United States v. Valenzuela-Bernal, 458 U.S. 858, 870, 102 S.Ct. 3440, 73 L.Ed.2d 1193, 1204 (1982). Therefore, Roviaro is effectively dealing with the defendant's rights to a fair trial and to present a defense against the state's interest in the administration of justice. The use of the word "possible" in the Roviaro factors, and Schooley's requirement of "some plausible showing" that disclosure would aid in the defense, can better be understood in this constitutional light.

Where there is no showing that the disclosure can aid in the accused's defense, the constitutional protection is not triggered and disclosure is not required. However, once the defendant makes a plausible showing that the informant's testimony can aid in the defense, by showing, for example, how the informant's testimony could help with possible defenses, then disclosure is to be ordered. The government's informer privilege cannot override the defendant's rights to a fair trial and to present a defense.

The use of the broad words "possible" and "plausible" demonstrate that disclosure is to be preferred over nondisclosure where the defendant makes the necessary showing that he can be aided by the disclosure.

Analyzing the facts of Roviaro and Schooley will help us understand the significance of the Roviaro factors. It will also show that, once the defendant's due process rights are triggered, then disclosure of the confidential informant is preferred. In Roviaro the defendant was alleged to have sold heroin to "John Doe," the confidential informant. Roviaro, 353 U.S. at 55, 77 S.Ct. at 626, 1 L.Ed.2d at 642. The defendant was observed by two government agents walking to a tree, picking up a package, and delivering it to John Doe, who was in a car. Id. 353 U.S. at 56-57, 77 S.Ct. at 626, 1 L.Ed.2d at 643. Another agent was in the trunk of the informant's automobile, and was able to overhear the conversation in the car. Id., 353 U.S. at 57, 77 S.Ct. at 626, 1 L.Ed.2d at 643. The defendant was convicted of two counts relating to the heroin, one for the sale of the heroin to "John Doe," and the other charging the illegal transportation of narcotics. Id., 353 U.S. at 55-56, 77 S.Ct. at 627, 1 L.Ed.2d at 642.

The Roviaro Court held that disclosure was required. Id., 353 U.S. at 65, 77 S.Ct. at 630, 1 L.Ed.2d at 647. The Court first said that the informant's testimony would have been material, since the sale was supposedly made to the informant. Id., 353 U.S. at 63, 77 S.Ct. at 629, 1 L.Ed.2d at 646. Secondly, it was material because the statute the defendant was being prosecuted under shifted the burden to justify the alleged possession to the defendant. Id. This, according to the Court, emphasized the defendant's vital need for access to any material witness. Id.

The Court next considered whether the informer's testimony would be relevant and helpful to the defense. Id., 353 U.S. at 63-64, 77 S.Ct. at 629, 230, 1 L.Ed.2d at 647. The Court listed four ways the testimony could be relevant and helpful. Id. First, the defendant thought he was alone at the time of the transaction, and therefore John Doe was his one material witness. Id., 353 U.S. at 64, 777 S.Ct. at 629, 1 L.Ed.2d at 64. Secondly, the informant's "testimony might have disclosed an entrapment." Id. Third, the informant may have thrown doubt upon the defendant's identity or the identity of the package. Id. Fourth, the informant was the only person who could say that the defendant did not know what was in the package. Id.

The defendant in Roviaro never stated as his defense any of the four areas where the Court said the informant's testimony could be relevant and helpful. Additionally, some of the possible defenses the Court listed did not appear, without any more facts shown, to be very strong. For example, the package was recovered at the scene and found to contain heroin, and the defendant was known by sight to the officers. Id., 353 U.S. at 56, 58, 77 S.Ct. at 625, 1 L.Ed.2d at 643. The key is that the Court did not attempt its own analysis of whether the defendant could prevail on any of those defenses. The Court simply found that under the facts and circumstances of the informant's involvement in the

case, "John Doe's possible testimony was highly relevant and might have been helpful to the defense." Id., 353 U.S. at 63-64, 77 S.Ct. at 629, 1 L.Ed.2d at 647. Once the possible defenses were raised by the informer's involvement in the facts and circumstances of the case, the defendant's constitutional due process rights were triggered and disclosure was required. Again, disclosure is preferred once it is shown that it can aid the defense.

Roviaro should be contrasted with the fact pattern in Schooley, supra. In Schooley the sheriff's wife received a telephone call that someone had just broken into a store and was leaving in a maroon car. Id. The police immediately went out and stopped a maroon car near the store. Id. Evidence of the crime was in the car. Id. The defense requested disclosure of the person who made the call, but did not give any reasons why they expected the informer's testimony to be material and helpful. Id., 627 S.W.2d at 578.

In Schooley the Court held that disclosure was not required, distinguishing between Roviaro, where the informant participated in the criminal activity, and Schooley's case where the informer is a mere tipster. Id. The Court said "(T)ips or 'leads' furnished in the fashion employed here might in some extraordinary circumstances require disclosure to assure a fair trial, but not ordinarily, and not in this case." Id. The Schooley Court said the defendant must make "some plausible showing from the circumstances in the case that the informant's testimony would be relevant and would aid in the defense." Id. at 578-579. The Court concluded by saying that the required showing would be "much easier in a case where the informer participated in the criminal transaction, etc., than the 'tip' or 'lead' type information where the information is not used at trial in any respect." Id. at 579.

An essential lesson to be learned from the Court in Schooley is that disclosure will not be ordered when the defendant's due process rights have not been triggered. Additionally, the facts and circumstances of the case did not immediately point to what help the informant would have provided. If the informant is important to your case in a fact pattern like Schooley, then you must be prepared to demonstrate that need to the Court. You must thoroughly analyze your case and come up with reasons why, using the Roviaro factors, the informant's testimony would be relevant and aid in the defense.

To make the required showing demands an understanding of the law and your case. Roviaro teaches that where the informant's testimony is relevant and can aid in the defense, disclosure should be ordered.

HOW MUST THE SHOWING BE MADE

The question now becomes how is that showing to be made. The Supreme Court in United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) offers guidance on this point.

The Court in Valenzuela-Bernal set the legal standard for disclosure and demonstrated how the burden is to be met. Id. The Valenzuela-Bernal Court, although dealing with a different area, relied heavily on Roviaro. Id. 458 U.S. at 870-871, 102 S.Ct. at 3448, 73 L.Ed.2d at 1204-1205. In Valenzuela-Bernal the defendant was arrested for transporting three illegal aliens within the United States. Id. 458 U.S. at 860, 102 S.Ct. at 3442, 3443, 73 L.Ed.2d at 1198. Two of the illegal aliens were deported within three days of their arrest, and one was kept for trial. Id. 458 U.S. at 861, 102 S.Ct. at 3443, 73 L.Ed.2d at 1198-1199. The defendant moved to dismiss the charges against him on the grounds that two possible defense witnesses were deported by the government, and now he has no access to them. Id. 458 U.S. at 861, 102 S.Ct. at 3443, 73 L.Ed.2d at 1199. The defendant made no showing of how the witnesses would be material and favorable to his case. Id.

The Supreme Court in Valenzuela-Bernal held that the failure to grant the dismissal was proper. Id. 458 U.S. at 874, 102 S.Ct. at 3450, 73 L.Ed.2d at 1207. The Court said that the defendant "...must make at least some plausible showing of how (the deported witnesses) testimony would have been both material and favorable to his defense." Id. 458 U.S. at 867, 102 S.Ct. at 3446, 73 L.Ed.2d at 1202. The Court did acknowledge the difficulty in this, by saying

"(T)he principle difference in these cases in related areas of the law and the present case is that respondent simply had no access to the witnesses who were deported after he was criminally charged. Respondent contends that requiring him to show materiality is unreasonable in light of the fact that neither he nor his attorney was afforded an opportunity to interview the deported witnesses to determine what favorable information they possessed. But while this difference may well support a relaxation of the specificity required in showing materiality, we do not think that it affords the basis for wholly dispensing with such a showing." Id. 458 U.S. at 870, 102 S.Ct. at 3448, 73 L.Ed.2d at 1204.

The Court in Valenzuela-Bernal then discussed what it called "the closest case in point," Roviaro. Id. The Court said "Roviaro supports the conclusion that while a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one. In such circumstances it is of course not possible to make any avowal of how a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality." Id. 458 U.S. at 871, 102 S.Ct. at 3448, 73 L.Ed.2d at 1205. The Court finished its discussion by further detailing how the factual showing is to be made. Id. 458 U.S. at 873, 102 S.Ct. at 3449, 3450, 73 L.Ed.2d at 1206-1207. The Court said "(I)n some cases such a showing may be based upon agreed facts, and will be in the nature of a legal argument rather than a submission of additional facts. In other cases the criminal defendant may advance additional facts, either consistent with facts already known to the Court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the Court that the testimony of a deported witness would have been material and favorable to his defense. Because in the latter situation the explanation of materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney."

The Court's language in Valenzuela-Bernal can be beneficial in trying to gain disclosure of a confidential informant. In cases where, for example, your defense may be that the drugs were placed in your client's car by a confidential tipster trying to frame your client, you will have no idea of who the informant is or what the informant may say. Fortunately, Valenzuela-Bernal forces a Court to recognize this impossibility and to not consider it against the defendant, but to rely on other factors in determining if disclosure should be required. Valenzuela-Bernal should be used in making Courts realize the difficulty the defense has in making this showing, and therefore require disclosure when the broad standard of "some plausible showing" is met.

The Court's requirements and methods of demonstrating the need for disclosure in Valenzuela-Bernal can be understood by looking at three separate case fact patterns. The first is Roviaro, where the facts were apparently undisputed. What remained was the legal argument, based on those facts and circumstances, of how the informant could possibly give testimony which would aid in the accused's case. While Roviaro and Burks were cases where disclosure was ordered with little or no pretrial demonstration of need, it should not be assumed that disclosure will ever be ordered without a showing of need. Cf. United States v. Davis 487 F.2d 1249 (5th Cir. 1973) (In Davis the informant was present during the transaction for which the defendant was convicted. Disclosure was denied because it did not appear that the informant's testimony would have been helpful to the accused's defense of misidentification or essential to a fair determination of his guilt. Id.) The legal arguments that were made by the Court in Roviaro should be made pretrial by counsel, along with any relevant factual showing which is necessary. Counsel should always attempt to make the most complete demonstration of need possible in order to obtain disclosure.

A second fact pattern to look at is the case of McLawhorn v. State of North Carolina 484 F.2d 1 (4th Cir., 1973). In McLawhorn the defendant was charged with the illegal transportation, possession and sale of a narcotic drug. Id. at 3. The case facts revealed that the police were working with a confidential informant in an extensive investigation of illegal drug trafficking. Id. The informant told the police that the defendant was involved in dealing in drugs. Id. The informant made several calls to the defendant to arrange a drug buy. Id. The informant finally searched for the defendant on the street, and made a drug deal with the defendant when he found him. Id. The defendant requested that the informant be disclosed in order to aid him in his defense of entrapment. Id. The trial court denied the motion for disclosure, and the Court of Appeals reversed,

holding that disclosure of the confidential informant should have been ordered. Id. at 3, 7. The Court said that the Government's privilege of nondisclosure "must be balanced against the individual's right to prepare a defense. The privilege of nondisclosure must give way where disclosure is essential or relevant and helpful to the defense of the accused, lessens the risk of false testimony, is necessary to secure useful testimony, or is essential to a fair determination of the case." Id. at 4-5.

The factual showing for an entrapment case like McLawhorn would require the presentation of facts not agreed on, including an affidavit of what the informant would say if he told the truth. The affidavit could detail the informant's telephone contacts with the defendant, including what the informant was saying to encourage illegal activity. Additional evidence might come from other witnesses who could verify the informant's contacts with the defendant. Further evidence could be in line with the law of entrapment; your client's lack of a prior record could be demonstrated to show he had no predisposition to commit the crime. The showing to be made depends on the facts of your case, and requires a thorough understanding of those facts.

A third case to look at is Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887, Reh. den. 377 U.S. 940, 84 S.Ct. 1330, 12 L.Ed.2d 303 (1964). The majority in Rugendorf found that the disclosure issue was not properly raised in the trial court, and therefore disclosure of the informant was denied. Id. 376 U.S. at 534-535, 84 S.Ct. at 829, 11 L.Ed.2d 892-893. The Rugendorf majority did not consider the facts of the disclosure issue. Id. The dissent felt that the issue was properly preserved, and that the facts and circumstances of the case required disclosure. Id. 376 U.S. at 537-541, 84 S.Ct. at 830-832, 11 L.Ed.2d at 894-896. In Rugendorf the defendant was convicted of receiving stolen property by having in his possession stolen furs. Id. 376 U.S. at 529, 84 S.Ct. at 826, 11 L.Ed.2d at 889. The defendant was arrested after 81 fur pieces were found in his basement on March 22, 1962. Id. 376 U.S. at 529-531, 84 S.Ct. at 826, 827, 11 L.Ed.2d at 889-890. The police had received a tip from a confidential informant who claimed to have seen 75 to 80 furs in the defendant's basement, and he claimed to have been told that the furs were stolen. Id. 376 U.S. at 529, 84 S.Ct. at 826, 11 L.Ed.2d at 889-890.

The dissenting opinion in Rugendorf represents the type of case where the defendant does not know who the tipster is or what he will say, but the defendant can still develop a strong case for disclosure. The dissent felt that disclosure was required because of the following facts. The defendant alleged that he did not know that the furs were in his basement. Id. 376 U.S. at

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538-541, 84 S.Ct. at 831, 833, 11 L.Ed.2d at 895-896. The defendant was away from his home on vacation from February 17, 1962, until March 4, 1962, during which time four other persons had access to the house. Id. 376 U.S. at 540, 84 S.Ct. at 832, 11 L.Ed.2d at 895-896. One of the people with access to the house was the defendant's brother, "an admitted 'fence' for stolen goods." Id. Looking at these facts the dissent said "(I)t is difficult to imagine a clearer case than the present one for application of" the Roviaro exception. Id. 376 U.S. at 541, 84 S.Ct. at 832, 11 L.Ed.2d at 896. The Court went on to say that "(T)he Solicitor General also argues that it is highly conjectural that identification of the person who admitted the informant to the basement would materially illuminate the question of petitioner's knowledge. We have, however, a case where the only proof implicating defendant was the discovery of the stolen furs in his basement. Four keys to the house were in the hands of outsiders, one of whom had a criminal record for trafficking in stolen goods; the stolen furs may have reached the defendant's basement during his absence and remained there without his knowledge. His only defense would be proof that someone without his knowledge put them there. Who that person was, when he placed the furs in the basement, what his motivations were in placing the furs there, what his relations with the defendant were, what connections he had with the stolen articles - these questions go to the very heart of the defense. Roviaro would, therefore, require in the exercise of sound discretion disclosure of the informant. Unless we allow that amount of leeway, we can only rest uneasy in the thought that we are helping send an innocent man to prison." Id. See also United States v. Partyka 544 F.2d 345 (8th Cir. 1976).

The important lesson from Rugendorf's fact pattern is that a strong case for disclosure can be made without knowing who the informant is or what he might say. Additionally, had the facts the dissent relied on been presented pretrial in a motion for disclosure, the issue would have been preserved and the informant could have been disclosed.

EX PARTE HEARING

A dilemma the attorney faces when presenting a Roviaro motion is the Commonwealth's pretrial discovery of your defense. The Roviaro and Schooley court's requirements of a pretrial showing of need for disclosure of the informant forces the defendant to tip his hand about his defense. This article acknowledges that the showing of need should be as complete as possible in order to assure disclosure. To avoid the pretrial discovery of your defenses you should request that the Roviaro motion be conducted ex parte.

A Kentucky statute is helpful in building the argument for an ex parte hearing. KRS 500.070(2) says "(n)o court can require notice of a defense prior to trial time." However, this is what effectively occurs when the defendant must make "some plausible showing" that disclosure of the informant will aid in the defense. The method for avoiding this problem is an ex parte motion. As one court has said "(T)he use of ex parte hearings is a well recognized technique available to any party who is faced with the dilemma of being forced to reveal secrets in order to support a defense motion." State v. Smart, S.C., 299 S.E.2d 686 (1982).

THE GOVERNMENT'S DUTY TO PRODUCE THE INFORMANT

Once disclosure of the informant's identity is ordered, the question becomes what is the government's duty to produce the informant for trial. The government's responsibility to produce the informant depends on the facts and circumstances of the particular case. United states vs. DeJesus-Borla, 518 F.2d 368, 372 (1st Cir., 1975). The government must, generally, "use reasonable efforts to produce a government informant whose presence has been properly requested by the defendant." United States v. Hart, 546 F.2d 798,, 799 (9th Cir. 1976). Additionally, the government must furnish the defendant with all known information about the informant's location. DeJesus-Borla, 518 F.2d at 372.

There are several factors involved in determining what efforts the government must make to produce the informant. The first factor is the timing of the defendant's request to the government for disclosure of the informant. Hart, 546 F.2d at 801. Informing the government early that a disclosure motion will be made should force the government, from that point on, to keep track of the informant. A second factor is how deeply the informant was involved in the case. See Hart, 546 F.2d at 801. The greater the informant's involvement with the police, the heavier the government's burden should be to produce the informant. The importance of the informant's testimony to the defense is an important factor. DeJesus-Borla, 518 F.2d at 372. A final factor is whether the police agency had any involvement in the informant's disappearance. Id. at 373; see also Velarde-Villarreal vs. United States, 354 F.2d 9, 12 (9th Cir. 1965). If the government has any role in the informant's

disappearance, their duty becomes greater in the informant's production.

CONCLUSION

Although the Court in Roviaro refused to set a fixed standard, it appears that once "some plausible showing" has been made that the informant's testimony can aid in the defense, disclosure should be required. This does not mean that the defendant must show that he will prevail on the defense, or even that he will rely on that defense at trial. The defendant's constitutional due process rights to present a defense and receive a fair trial are at stake and require disclosure when the defendant simply makes a plausible showing that he could be aided in his defense. This article encourages as complete of a demonstration of need as possible to insure disclosure at trial or, if necessary, to preserve the issue. At the same time anyone seeking disclosure should remember that the legal standard is "some plausible showing" that disclosure can aid in the defense.

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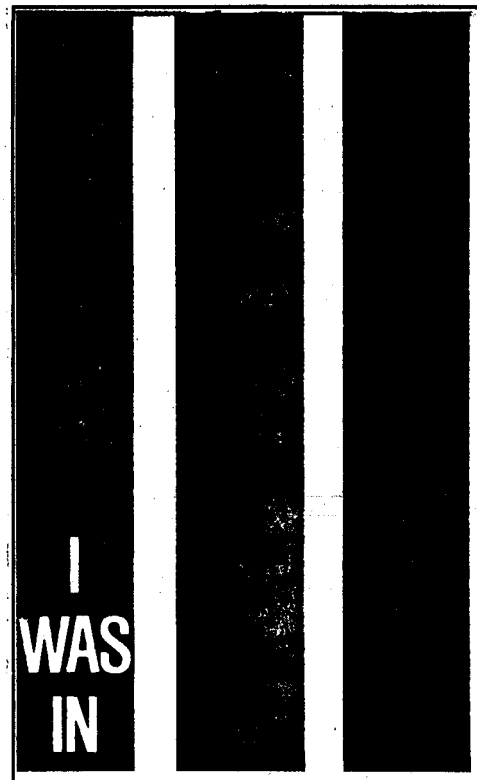
* * * * *

"Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has."

- Margaret Mead



Be as mindful
of prisoners
as if you were sharing
their imprisonment.

(Heb. 13:3)

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THE COST OF CRIMINAL JUSTICE

Federal, State, and local spending for all civil and criminal justice activities during fiscal 1982 was $34.7 billion, less than 3% of all government spending in this country:

PERCENTAGE OF GOVERNMENT SPENDING

Social insurance payments	21.7%
National defense and international relations	16.6
Education	13.4
Housing and the Environment	7.0
Public welfare	6.4
Hospitals and health	4.3
Transportation	3.6
Justice	2.8
Space research and technology	0.5

Local governments spent $21 billion, State governments $11.6 billion, and the Federal Government $3.3 billion, including both direct and intergovernmental expenditures in 1982.

Of every justice dollar, 54 cents was spent on police protection, 21 cents on the courts and other legal activities, and 26 cents on prisons and other correctional costs.

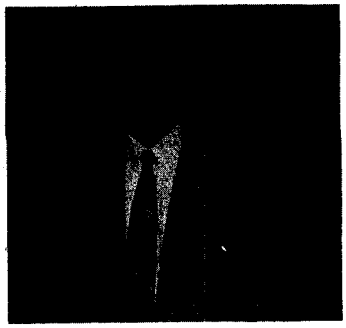
Less than one penny of every dollar of total spending by Federal, State and local governments went into the operation of the Nation's correctional system, including jails, prisons, probation, and parole.

Total government spending on civil and criminal justice was $150 per person in 1982.

State spending on criminal justice varies greatly: W.Va. and Ar. spend the least (less than $70 per person); N.Y. ($200), Nev. ($254), D.C. ($512), and Ak. ($546) spend the most.

Crime and Justice Facts, 1985

Psychological Impact of The Family On Its Members



Lane Veltkamp

This is the second of a two part series.

This family diagram (see diagram in December, 1986 issue of The Advocate, page 27) could represent Elzie Morton's[1] family--a very distant and detached hostile father and a mother who was enmeshed, very closely. The message that over enmeshment gives the child is "you need all of my help." "I have to stay close to you because you need all of my help." And the message given by competitiveness or too much distance between the father and the son is you're not worth spending time with and you're not okay. So, how does the child grow up feeling about himself, not okay, not knowing how to deal with feelings constructively, not knowing how to handle intimacy very well. There are reservoirs of anger, reservoirs of hurt which often are covered up by the anger and then what does he do later on? In adolescence he basically stays away from people, he seldom dates, and in sexual relationships or intimate relationships, he is terrified. He doesn't know how to handle it, he's afraid, he feels threatened and strikes out by using violence.

---

[1]Elzie Morton was prosecuted by the Commonwealth in Fayette County for capital murder and was sentenced to life imprisonment without the possibility of parole for at least 25 years. Lane Veltkamp testified in the penalty phase of that case as to the psychological impact of Elzie's family on Elzie.

Another one of the assumptions here is that in dysfunctional families there is a symptom-bearer, or the bearer of the family pathology. Now, that could be different people at different times. It's not always the child. Sometimes it's an adult. This scapegoating process or this displacement or projection of family pathology on certain individuals, sometimes is very subtle.

Dysfunctional families are not always readily observed in our society and they may be well respected citizens. Families' dysfunction in that sense crosses all social economic lines. You see it in poor neighborhoods and you see in very good neighborhoods. So feelings that are projected on a child in the family takes the pressure off the marital dyad and then we see symptoms in the child. One parent is overly involved. In some cases it's the mother and in father/daughter incest cases, it's the father. In dysfunctional families you get a blurring of generational boundaries. Here the boundaries are not very clear. The parents look to the children for nurturance and support. Rather than looking toward each other.

C. ALL BEHAVIOR IS PURPOSEFUL

Another assumption in family theory is that all behavior is purposeful and goal oriented. Our goal as clinicians is to try to understand what the purpose of the behavior is. Now what we mean by purpose is not necessarily that the purpose is socially acceptable. Not necessarily that the purpose is within the scope of the law but that the person's behavior has specific purpose or goal.

For example, alcoholism could be used as a way of maintaining distance. Alcohol could be described as a way of attempting to feel better. Sexual abuse of the child could be a way of attempting to feel comfortable with ones own sexuality or a way to solve some other problem. The fixated pedophile does not feel comfortable with age mates. He is, in fact, totally threatened by age appropriate sexuality. So what is a person going to do when threatened by age-appropriate sexuality? One thing is to drop down a generation and get involved with the child. It's more comfortable, it's less threatening.

Some other reasons for sexually abusing a child are men who have run into problems with impotence and the impotence scares them. And they are afraid to talk to their spouse about it. They don't want to go to their doctors or they don't want to go their minister, they're afraid to let anybody know. They avoid sexual activity for a period of time. Some of the perpetrators abuse children as a way of attempting to restore their potency.

D. THE PROBLEM IS THE SOLUTION: ATTEMPT TO MAINTAIN CONTROL

Another one of the basic assumptions in family theory is that the

problem is a solution. The problem is basically the person's attempt to reach a solution. Like the example I just gave, the impotent male may get sexually involved with a child as a way of hoping to somehow recover his potency.

I work with a great many spouse abusers. I've ran groups for violent men and now I supervise some therapists who run a group for violent men, and I see many in my practice at the Medical Center. In almost every case the violence is a way of trying to maintain control. And the reasons someone maintains control is because they feel out of control, they feel threatened and they feel that they're losing a grip on their marriage and the relationship with their wife. When something is going on with a relationship that scares and threatens them, then violence is their solution to the problem, their way of trying to gain control of the situation.

III. TREATMENT

Now, what we do in family therapy is we try to help people develop more appropriate solutions to their problems. For example, having sex with your child is a very bad solution for a lot of reasons. It's against the law and it messes up your child, probably for life, because there have been studies that show that the long term impact of incest on a child is devastating. We look for other ways to solve the problem. The problem of family violence, the problem of sexual abuse, the problem of excessive drinking, whatever the problem may be.

Just briefly to run through a few instances. I think I mentioned before that in dysfunctional families, assault is very high. Assault can take the form of psychological assault or physical assault. If you read some of the statistics, it is incredible. In one out of seven marriages there is frequent and recurring spouse abuse. One out of seven marriages! You've probably read about dating violence. A couple of different studies indicate that one out five dating situations involve physical violence. In eighty percent of American families, parents hit their children. Three or four different studies show that twenty-five percent of all girls under the age of eighteen have been sexually misused or abused. Twenty-five percent! Another study indicates that ten percent of men were sexually approached or abused as children. So this is a massive problem of epidemic proportions.

We give a lot of workshops like this on family violence and we have a little questionnaire that we hand out to people. I do this in my graduate school classes, we've done this around the state. The incidents of sexual abuse among professional groups that we've talked to has ranged from 8 to 44 percent. This is an audience of professional people. They are health care or mental health care providers. So the incidents of assault, either sexual, or psychological or physical is extremely high.

A. CONFRONTATION, SUPPORT, NURTURANCE

Confrontation and what I'm talking about here is constructive

DIFFERENCES BETWEEN FUNCTIONAL AND DYSFUNCTIONAL FAMILIES

	DYSFUNCTIONAL	FUNCTIONAL
1.	ASSAULT ↑	ASSAULT ↓
2.	CONFRONTATION ↓	CONFRONTATION ↑
3.	SUPPORT ↓	SUPPORT ↑
4.	NURTURANCE ↓	NURTURANCE ↑
5.	MANIPULATION ↑	MANIPULATION ↓
6.	NEGOTIATION ↓	NEGOTIATION ↑
7.	MEMBERS SHOW SYMPTOMS	FEW SYMPTOMS
8.	PREJUDICE, SCAPEGOATING	RESPONSIBILITY
9.	NOT PREDICTABLE	PREDICTABLE
10.	FEELINGS HANDLED DESTRUCTIVELY	CONSTRUCTIVE HANDLING OF FEELINGS
11.	GENERATIONAL BOUNDARIES UNCLEAR	BOUNDARIES CLEAR

↑ Increased rate of occurrence

↓ Decreased rate of occurrence

confrontation. For example, telling you that I am angry with you and furious about what you did or feeling sad or feeling guilty about something. A constructive, genuine, honest communication about your feelings. Communication of what you're feeling.

Confrontation is very high in functional families, is very low in dysfunctional families because in dysfunctional families people don't handle these feelings in constructive ways. Support and nurturance is very low in dysfunctional families. Those are emotional vitamins that parents give to children but adults also need from the family unit. You would expect that confrontations is low that manipulation is going to be very high and negotiation is going to be very low.

People in dysfunctional families never learn to negotiate very well. They don't learn that as children. They don't have role models that do that. Parents in these families do not negotiate with their children. There's a great deal of manipulation and that's where the problem of distrust and suspiciousness develops. When there is destructive confrontation, and little support and nuturance, family members show symptoms. In addition, there's a great deal of prejudice and scapegoating and behavior is not predictable. In dysfunctional families you don't know if your father's going to come home at night. You don't know what people are going to do when they're angry - is someone going to get hurt, is mother going to be sober, is father going to come home, is there going to be a meal on the table? It's a very unpredictable thing to experience and the way children react is that sometimes they withdraw or sometimes they use that as a model for their own behavior later on.

IV. FUNCTION OF THE FAMILY

Probably one of the most important functions is to teach positive self-esteem and confidence. That's one of the major functions of families and one of the major failures of dysfunctional families. Another is to be able to handle intimacy and feel comfortable with intimacy and have the capacity to move toward intimacy. Another is handling feelings in a constructive way. Juvenile delinquent and adult criminals have difficulty in these areas. I might add that all psychological theories, behavior modification, psychoanalytic theory, family theory, transactional analysis or any other theory, all support that the family plays a vital role in the development of the child in terms of how the child views himself and how the child views other people and relationships.

V. THE FAMILY AND THE JUDICIAL SYSTEM

The question here is how this information regarding the family relates to decisions jurors or judges make. I suspect all of y probably know that better than I do. One thing that seems true to me is that people generally understand family theory, the average person on the street understands family theory better than some of the other theories. One of the most important things that a witness needs to do is not talk over the heads of the jury, to not use a great deal of psychological jargon. In training professionals how to testify in court, we strongly encourage them to stay away from psychological jargon. If the expert talks over the jury's head, they are immediately going to get turned off and tuned out. So even though the expert might be saying the right kind of thing, if they're not understood by the jury and it doesn't make sense to them, then the jury is going to tune them out.

In custody work, for example, we have developed a series of eigh criteria, three or four from literature and the others we came up with ourselves. And they are very simple, common sense criteria. The importance of maintaining psychological attachment, the importance of preserving continuity, and where the child feels more comfortable are three of the criteria. That makes much more sense than concepts like the oedipal complex.

One of the things that encourages us about family theory is that it's readily understood by a jury because they all grew up in families and they understand these basic concepts and basic principles.

CHANGING FAMILIES

Based on national data, of every 100 children born today:

1) 12 will be born out of wedlock;
2) 40 will be born to parents who divorce before the child is 18
   5 will be born to parents who separate;
3) 2 will be born to parents of whom one will die before the child reaches 18;
4) 41 will reach age 18 "normally";

(Source: Hodgkinson, Harold L., All One System, The Institute for Educational Leadership, Inc., Washington, D.C., 1985.)

VI. WHAT DOES AN EXPERT WANT TO KNOW?

The first thing I want to know is what kind of case it is. What th situation is and what the attorney

is really interested in. What specific questions need to be answered. I then decide if I can take the case. It is also important to know what the attorney's goals are and how that meshes with what my thoughts are. Clearly, communication is essential both in quality and quantity.

VII. HOW EXPERTS RELATE INFORMATION AND OPINION IN COURT

One of the things we try to teach is to be credible, not only in the kind of cases that one is willing to get involved in, but also whether one feels he can give a legitimate opinion. Some cases we could not accept because we would not feel that we could offer or even develop an opinion that would be relevant for use in court. We teach people to be selective. It is very important to communicate with the attorney. It is important that there are no surprises on the witness stand. It's important that I am not surprised by what the attorney is asking and it's important that you are not surprised by what I am saying. Dr. Noelker referred to the importance of communication because we don't always speak the same language so we need to talk so I can understand what you're looking for and what your questions are, and if I can answer those questions. And you need to know what I am going to say so neither one of us is surprised. We try to teach responsible and adequate preparation and we try to help people deal with cross-examination.

VIII. HOW CAN ATTORNEYS ENLIST ASSISTANCE OF CLINICAL SOCIAL WORKERS

I don't know what kind of luck you have in getting expert witnesses but court cases frighten people in practice. We have twenty faculty members who are psychiatrics, child psychiatrists, psychologists and clinical social workers and I am the only one out of about twenty facutly members who will willingly take a court case. Now a few people might get tricked into taking a court case and sometimes attorneys will present it in terms of some other type of problem, and the person ends up seeing the child or seeing certain parts of the family and might get subpoenaed in court.

The problem is that many clinicians are terrified of the court and they're terrified of what attorneys can do to them and they feel very vulnerable. It's like when you were seven years old and everybody knew the rules of a game except you and you try pretend as though you know the rules and you want to go along and get involved but you don't know what's going on. A person's solution is to go into court and figure that since I don't know how to play this game, the attorneys do know how to play this game they will show me how. Therefore, I will do whatever the attorneys tell me to do. Now, you know as well as I do what is going to happen when an expert does whatever attorneys tell him to do, he's going to end up testifying against himself. And that happens to people one time and they never go back to court. Some clinicians are afraid that if they open up to attorneys it will be used against them in court. In addition, a clinician fears being subpoenaed without sufficient notice because of the impact on their practice.

Experts need to be more knowledgeable about what's going on, they need to feel comfortable about what to do, they need to learn how to handle cross-examination, they need to learn not to be intimidated by personal attacks or professional attacks in the courtroom. Many people feel, why should I spend my time being attacked when I can spend my time seeing patients? All of those are problems that interfere with more experts being available. Getting back to the question, clinical soical workers can be found in the phone book, usually under marriage and family counselors. Clinical social workers tend to be found in private practice, in psychiatric or mental health centers, or in hospitals.

IX. CROSS-EXAMINATION

Now let me just close by saying that basically I attempt to teach clinicians how to handle cross-examination and we try to get them some experience handling hypotheticals, to give them alternatives to doing what the attorneys ask them to do. For example, they do not have to answer questions directly, they can answer those questions any way they want. In short, they have to do what the judge says but they don't have to do what attorneys say. We're trying to help people feel a little more confident and a little more comfortable. Hopefully, in the future more clinicians will feel comfortable. What can help is for the clinician to have confidence in their evaluation, to stick to their evaluation when on the stand, and to avoid the pitfalls of testifying against themselves.

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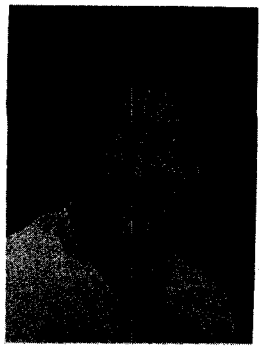
Though a good deal is too strange to be believed, nothing is too strange to have happened.
- Thomas Hardy

Aiding The Alleged Accomplice



Randy Wheeler

At common law distinctions were made among parties to the commission of a crime as principals, aiders and abettors, accessories before the fact, and accessories after the fact. However, "the most prominent aspect of these distinctions...[was]... their insignificance." Commentary, KRS Chapter 502. See also Commonwealth v. Hargis, 124 Ky. 356, 99 S.W. 348 (1907). Accordingly, statutory law has eliminated the differences between these parties except for accessories after the fact which under the Penal Code are viewed as obstructors of justice. KRS 520.010 et seq.

KRS 502.020 now makes one person guilty of an offense committed by another as an accomplice if he has acted or failed to act, having a legal duty to do so, with the intent of promoting or facilitating the offense in an effort to assist the perpetrator. If a person acts with such complicity he is responsible for the offense to the same extent as the perpetrator.

Statutory law has also repudiated the principles that (i) an accessory before the fact cannot be tried, without his consent, before the trial of his principal; (ii) an acquittal of a principal bars a subsequent prosecution of an accessory; (iii) if both a principal and an accessory are convicted, a reversal of the principal's conviction operates as a reversal of the accessory's conviction; (iv) an accessory cannot be convicted of a higher degree of offense than his principal. Commentary, KRS 502.030. The Penal Code now provides that it is no defense for an alleged accomplice to claim that the principal has not been prosecuted for or convicted of any offense based on the conduct in question or was previously acquitted, has been convicted of a different offense, or has immunity from prosecution or conviction. KRS 502.030(1). See also Tucker v. Commonwealth, 145 Ky. 84, 140 S.W. 73 (1911); Steely v. Commonwealth, 132 Ky. 213, 116 S.W. 714 (1909).

Despite statutory changes made to common law apparently eliminating many distinctions between parties and their relative culpability the significance of the relative roles parties play in a crime have not been totally eliminated. The distinction, at least between a principal and an accomplice in KRS 502.020, still has significance.

For instance, KRS 502.030(1) does not apply when a principal and accomplice are tried jointly. Justice Palmore has observed:

> ...[A]lthough an acquittal of the principal actor in a separate trial is no impediment to a subsequent conviction of an accomplice, it should not be so in a joint trial. As observed in the annotation at 24 ALR 603, 'the common law rule that the acquittal of the principal acquitted the accessory, and that the conviction of the principal must precede or accompany that of one charged as an accessory, has been modified...by statutes,' and in Kentucky that modification was effected by KRS 431.160. Cummings v. Commonwealth, 221 Ky. 301, 298 S.W. 943, 948 (1927). Still, however, it is always necessary to prove that the principal, or a principal, is guilty in order to convict an accomplice as such. Sams v. Commonwealth, 294 Ky. 393, 171 S.W.2d 989, 992-993 (1943). Since 'different juries may reach different conclusions as to the guilt of the principal, it is no longer essential to prove the conviction of the principal on the trial of an accessory, though it is essential for the jury trying the latter to believe the principal to be guilty.' Cummings v. Commonwealth, supra. In a joint trial it would be an anomalous result for the same jury to find one defendant guilty under evidence showing only that he had aided a codefendant whom it simultaneously finds to be not guilty. Judging from the Commentary following §315 of the final draft, Kentucky Penal Code (1971), KRS 502.030(1) makes 'little or no change in existing law,' and it does not appear on its face to compel the conclusion that in a joint trial the accomplice may be convicted while the principal is being acquitted.
>
> Palmore, Instructions to Juries, §11.08, Commentary (1975). Cf. Gambrel v. Commonwealth, 283 Ky. 816, 143 S.W.2d 514 (1940); Cristie v. Commonwealth, 193 Ky. 799, 237

S.W. 660 (1922); Reed v. Commonwealth, 125 Ky. 126, 100 S.W. 856 (1907).

According to Justice Palmore's instructions if there is no question in a joint trial concerning the identity of the alleged principal and accomplice a jury must be instructed to find the principal guilty before it can assign guilt to the accomplice. Palmore, supra. If the evidence does not show a distinction between the roles of the parties the jury can be instructed that it can find either party guilty as a "principal." But, the jury must still find that at least one of the parties is guilty as a principal if it is to find the other guilty as an accomplice. Id., at §11.09. Of course, there is no impediment to the acquittal of an accomplice even if the alleged principal is convicted. See Mixon v. Commonwealth, 282 Ky. 25, 137 S.W.2d 710 (1940).

But even if the parties to an offense are not tried jointly, KRS 502.030(1) does not totally eliminate all consideration of whether a culpable principal exists in the trial of an alleged accomplice. A number of pre-Penal Code cases decided under prior statutory law still appear to have validity both legally and logically to require that an alleged accomplice be convicted only after notice, proof, and instructions taking into account not only the accomplice's culpability but also the culpability of the principal.

Although an indictment can delineate the specific roles of the parties this is not required as long as the indictment simply names two or more perpetrators. Tipton v. Commonwealth, Ky., 250 S.W.2d 1015 (1952); Stacy v. Commonwealth, Ky., 192 S.W.2d 94 (1946). Nevertheless, it has been held in a long line of cases that a person may be convicted as an aider and abetter of another person only if that person is identified in the indictment. Broughton v. Commonwealth, 303 Ky. 18, 196 S.W.2d 890 (1946). If the alleged accomplice is indicted alone without even the mention of another's involvement he has received no notice of his alleged complicity. Neal v. Commonwealth, 302 S.W.2d 573 (1957). Cf. Strong v. Commonwealth, Ky., 507 S.W.2d 692 (1974) (in which the court held that if a bill of particulars is not requested the error is waived).

Similarly, an instruction authorizing the conviction of a party as an accomplice of others not identified in the indictment is error. Smith v. Commonwealth, 257 Ky. 669, 79 S.W.2d 20 (1935). This is true even if there is proof of the party's guilt as an accomplice. Deaton v. Commonwealth, 211 Ky. 651, 277 S.W. 1001 (1925). It also makes no difference that the party may not have been surprised by the proof of complicity liability. Bailey v. Commonwealth, 285 Ky. 441, 174 S.W.2d 719 (1943).[1]

This does not mean that the principal must in all cases be identified by name. In Taylor v. Commonwealth, Ky., 90 S.W. 581 (1906) the Court recognized that a defendant can be convicted of aiding and abetting a principal not known by name. However, the Court made clear that the defendant must have notice of who that principal is even if not by name specifically. In other words, the defendant must at least be notified of the existence of a principal with a statement of facts of why that person is the principal and how the defendant aided and abetted him. Id. at 583-584. See also Christian v. Commonwealth, Ky., 255 S.W.2d 998 (1953). The Commonwealth cannot simply assert that the defendant aided and abetted another person or ...persons.

The Court also held in Taylor that an instruction on accomplice liability allowing the defendant to be convicted if he acted in complicity with "another person or ...persons" was similarly flawed since "this instruction was an invitation to the jury to give free rein to their imagination or suspicion, to convict the defendant of a conspiracy with parties whose names the grand jury did not know, and which the evidence failed to disclose to the court." Id. at 583.

It may, in some cases, be impossible for the Commonwealth to identify a specific person, by name or otherwise, as the principal. However, the Court has indicated that in those situations a jury must be instructed that it must find a principal from a limited pool of persons about which the defendant was notified and against whom evidence of culpability for participating in the specific offense has been admitted. In Oldfield v. Commonwealth, Ky., 334 S.W.2d 346 (1960), a homicide case, the evidence was conflicting as to whether certain individuals other than the appellant fired the fatal

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[1] It should be noted that if the evidence shows that the defendant was an accomplice only, an instruction on principal liability is not warranted. Howard v. Commonwealth, 304 Ky. 149, 200 S.W.2d 148 (1947); Lee v. Commonwealth, Ky., 244 S.W.2d 163 (1951). However, if the evidence conflicts an instruction on both theories of responsibility are proper. Broughton v. Commonwealth, 303 Ky. 18, 196 S.W.2d 890 (1946).

shots. It was clear, however, that the appellant did not fire the shots since the victim was killed with a pistol and the appellant possessed a shotgun at the time. The Court held that it was not necessary for the person to be identified specifically since the "principal in this case was identified as being one of the other participants in the affray." Id.

Even if a specific or pool of possible principals is identified there must be evidence showing that the principal is connected with the crime that has been committed. Napier v. Commonwealth, 306 Ky. 75, 206 S.W.2d 53 (1947). So, if the instructions do not restrict the jury to the consideration of a specific or limited pool of individuals the jury is free to speculate concerning the identity of the principal and there is no assurance that the jury has found a principal that is so connected. See Mullins v. Commonwealth, Ky., 269 S.W.2d 713, 715 (1954). There is also no assurance that the jury has found a principal for which the evidence has shown a shared intent and purpose with the defendant. See Whitt v. Commonwealth, 221 Ky. 490, 298 S.W. 1101 (1927); Helton v. Commonwealth, Ky., 244 S.W.2d 762 (1951); Moore v. Commonwealth, Ky., 282 S.W.2d 613 (1955).

Ultimately, despite KRS 502.030(1), it should always be necessary for the Commonwealth to prove that someone is guilty of an alleged offense as the principal before a defendant can be found guilty as an accomplice to that offense. Rutland v. Commonwealth, Ky., 590 S.W.2d 682 (1979); Sams v. Commonwealth, 294 Ky. 393, 171 S.W.2d 989, 993 (1943). This requirement is not affected by the previous acquittal of the principal. Commonwealth v. Long, 246 Ky. 809, 56 S.W.2d 524 (1933). Nor is the requirement eliminated if the principal is yet to be tried. Begley v. Commonwealth, 82 S.W. 285 (1904).

Regardless of the fate of the principal an instruction should always be requested when the defendant is facing the possibility of complicity liability requiring the jury to make the determination that a principal exists and that the principal is guilty of the offense before guilt can be assigned to the defendant as an accomplice. The failure to provide such an instruction, at least in a joint trial, has been held to be reversible error. See Bryant v. Commonwealth, Ky., 277 S.W.2d 55, 56 (1955).

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$300,000 settlement reached in police suit: William B. May who was paralyzed when he was arrested by Lexington and state police in 1980 has received $300,000 in a settlement with an insurance company that represented the Urban County Government.

Urban County Law and Public Safety Commissioner Terry Sellars said that although Zurich American Insurance Co., which then represented the government, decided to settle the suit, the government did not concede "any wrongdoing on behalf of the police officer."

May contended that police officers cuffed his hands behind his back during the arrest on June 24, 1980 at the Lions' Bluegrass State Fair, placed him in a police van and drove recklessly to the University of Kentucky Albert B. Chandler Medical Center. May charged that he was left helpless and unable to protect himself and that he repeatedly crashed into the walls and floor of the police van during the trip to the hospital. Upon arrival at the medical center, the officers tried to drag him from the rear of the van before placing him on a stretcher, according to the suit. Later doctors found that May had a broken neck.

No settlement has been reached in a federal civil rights suit filed by May, in which the government was represented by Midland Insurance Co., Sellars said.

March 10, 1986, Herald Leader

Settlement reached in shooting suit: A Lincoln Co. man who was shot in the back during an arrest will be paid more than $75,000 under a settlement in his lawsuit against former Pulaski Co. Sheriff John Adams and two other officers.

Donald Stringer alleged in his federal suit that Pulaski County Constable Donald "Red" King violated Stringer's civil rights by "maliciously" shooting him while trying to arrest him for drunken driving in November, 1983.

Eddie Wesley, a deputy sheriff who was with King the night of the incident, was an accomplice to the shooting, the suit said. The suit also said that Adams' negligence in supervising the officers contributed to the shooting.

August 6, 1986, Herald Leader

Forensic Science News

CHALLENGING SCIENTIFIC ID OF DRUGS

As drugs and drug abuse become an ever increasing problem both socially and legally, the challenge by defense scientific experts has become less frequent. It is apparent that most defense attorneys feel themselves relegated to accepting the opinion of the state's expert without question. While it is true that forensic techniques and instrumentation have continued to improve the ability of these scientists to identify specific drugs, it is also true that these more sophisticated and sensitive methods provide a greater potential for error. Delicate techniques require time and patience, something few prosecution laboratories have the luxury of utilizing.

Additionally, it should be considered that many modern laboratory instrumental methods employ computer or instrumental validations of drug identification without the direct interaction of the potential witness. These results may allow room for individual interpretation, which may or may not agree with the computer's assessment.

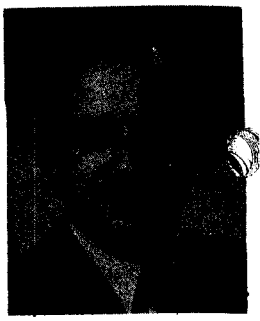
Therefore, inherent methodological errors, non-human interpretation of resultant data and the always present difficulty of differentiating between closely related drugs, offer the defense attorney a world of questions to pose in the defense of these cases. As stated above, the scientific issue of the drug indentification seems to have fallen through the cracks in recent years, with the defense community accepting as gospel the state lab's verdict.

This position, however, can be effectively challenged by an informed attorney armed with sufficient insight into the test routines of these labs.

No way of thinking or doing, however ancient, can be trusted without proof. What everybody echoes or in silence passes by as true today may turn out to be falsehood tomorrow, mere smoke of opinion, which some had trusted for a cloud that would sprinkle fertilizing rain on their fields.

- Henry David Thoreau

Cases of Note...In Brief



Ed Monahan

CLOSING COMMENTS
Jones v. State
449 So.2d 313 (Fla.App. 1984)

The Court reversed the defendant's convictions for carrying a concealed firearm and for culpable negligence because of the improper closing argument comments made by the prosecutor. Without presenting any proof of his contention, the prosecutor in his closing argument offered his view that the victim and other witnesses had not testified due to intimidation from the defendant. The prosecutor also improperly stated that the defendant lied when he took the stand.

REFUSAL TO TAKE BREATH TEST
People v. Naseef
468 N.E.2d 466 (Ill.App. 1984)

The defendant was arrested for DUI. He refused to take a breath test at the time of arrest and at the time he arrived at the police station. After sitting at the police station for awhile, the defendant announced that he would take the test. He did, and his breath alcohol level was above 0.10.

The Court held that if a defendant consents to take a breath test, after previously refusing to do so, the prior refusals cannot be introduced into evidence against the defendant. The court made this decision to promote the relevant statute's intent to encourage persons to take the test.

IMPEACHMENT ON THEORY OF DEFENSE
McIntyre v. State
460 N.E.2d 162 (Ind.App. 1984)

The defendant was convicted of two counts of child molesting. The victim was his granddaughter.

The granddaughter refused to testify. The trial judge told her if she did not testify she would be held in contempt and jailed until she did. She then decided to testify. The trial judge refused to permit cross of the child on the fact that she refused to testify until threatened with contempt.

The appellate court held that the defendant was denied due process when prevented from crossing her to show "her reluctance to testify and the coercive action of the trial court." The Court decided it was necessary to allow the defendant to further his defense theory: "We believe the jury, had those facts been revealed, might have inferred that the reason for the granddaughter's reluctance to testify was that her prior statements were untrue."

PRETRIAL RULING ON ADMISSABILITY OF IMPEACHMENT FELONIES
Apodaca v. People
712 P.2d 467 (Colo. 1985)

The Court held it was error for the trial court to refuse to make a pretrial ruling on whether a defendant's prior conviction can be used to impeach him if he testifies.

According to the Court, a timely pretrial ruling "serves the vital function of providing the defendant with the meaningful opportunity to make the type of informed decision contemplated by the fundamental nature of the right to testify in one's own defense." Id. at 473.

REVELATION OF IMPEACHING EVIDENCE
State v. Lukezic
691 P.2d 1088 (Ariz. 1984)

It was a violation of Brady v. Maryland, 373 U.S. 83 (1963) for the state to fail to disclose to the defense that the following aid was given to its witnesses:

1) pretrial assistance to facilitate state's witness' car payments to avoid its repossession;

2) giving substantial doses of valium and seconal to a state's witness for 7 months while he was in prison;

3) the significant alteration of presentence reports of state witnesses to the point of falsely stating the absence of prior arrests and drug history.

Ed Monahan
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Smith, Continued from page 2

them. Sometimes you just have to beat your head against the wall. It's most often not easy.

It's very difficult in the sense that we don't have enough staffing. It would be nice to have 2 or 3 detectives, the way the prosecution does, to do a lot of the footwork. I think that would make more time for trial attorneys to develop issues for appellate attorneys. But we're simply not in the position of the state. As an attorney, you wind up doing much that you'd just as soon not do because there's no one else available to do it.

Have you ever thought of quitting defense work?

Well, yes, often. It's one of those things that crosses your mind especially when a case is hard and the pay is low. But I don't do criminal defense work full-time. I don't believe I could. I need a break. I need a mix of different kinds of things going on. If I were doing that solely, understaffed and underpaid, it would be extremely difficult. I stand in admiration of many who do it for the principles that are involved, because that's hard.

What can offset attorney burnout in defense work?

I think that's a major problem. I think doing some other things can. The public defender's office gets an awful lot of young attorneys who don't stay; who get burned out or who move on to other things. I think the only solution to that kind of thing is a mixture of practice.

How do you cope with the pressures of practice and balance that against your family's needs?

I try to leave work at the office. That's not always possible, but I try. And I try to maximize nights at home. I have young kids, getting older it seems though. I have a son, Robert, 14, going on 15 and my girl, Jennifer, is 10 going on 11. I think it's quite important. You just have to maximize quality time with your children. I don't pretend to be totally successful with that, but I think you have to try and you'll succeed some and lose some. Hopefully in the balance, you'll come out on top.

Currently there's a call in the state to speed up trials, speed up appeals, and to get sentences carried out. How do you feel about that?

The defendant is entitled to a speedy trial and he need not sit in a jail longer than necessary. On the other hand, a defense attorney needs to prepare for trial. Judges think your only case is the one before them and the defendant suffers because of that. In cases that require development and thought, the attorney needs to have an opportunity to explore every possible defense. I know that's worrisome for the judiciary and the public, but our legal system is based on the premise that as an attorney you go to the nth degree for a defendant because his life and liberty is at stake. Those persons on the sidelines are not the ones in jeopardy.

We seem to be moving away from any rehabilitative scheme and toward almost a vengeance. The "stick them away and keep them there" attitude isn't good for society. You just can't build enough jails for that sort of thinking. We need to rework the penal system's philosophies and goals.

* * * * * *

FUTURE SEMINARS

DEATH PENALTY SEMINAR

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

NEW JUVENILE LAW CODE

May 11, 1987, Radisson Plaza, Lexington.

15TH ANNUAL SEMINAR

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

5TH TRIAL PRACTICE INSTITUTE

November 4-7, 1987, Richmond, Kentucky.

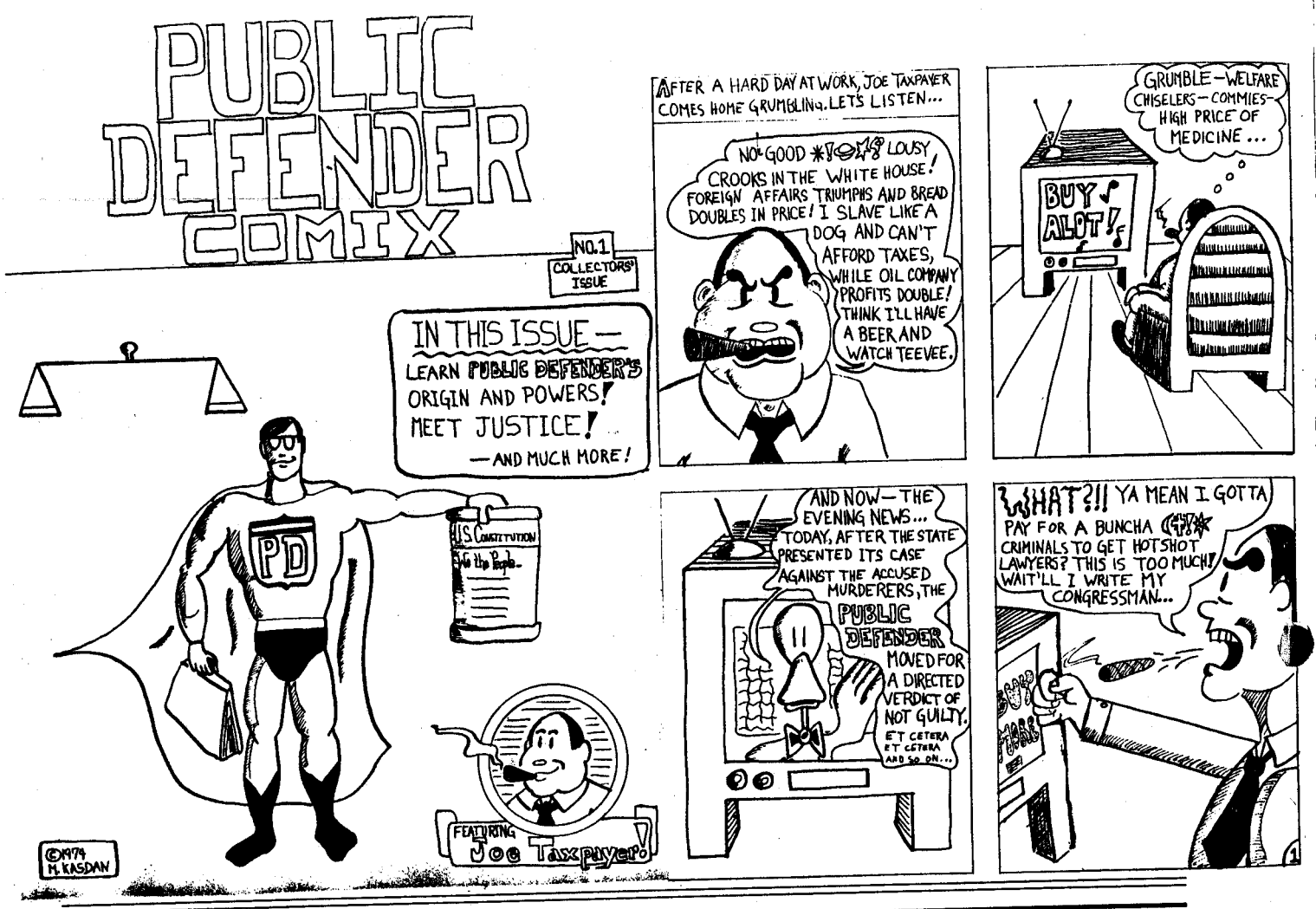
EDUCATION UPDATE

*In 1985, only 68% of Kentucky's twelfth graders graduated from high school.
*We are 50th in the nation in the percentage of our adult population who are high school graduates.
*Our annual expenditures per pupil are $850.00 or 23% below the national average.
*In 1985, only 48.1% of our high school graduates attended college, one of the weakest attendance rates in the country.
*Kentucky's dropout rate is among the highest in the nation.
*Four hundred thousand adult Kentuckians are illiterate.

Clearly our children are failing, and we are failing our children.

1983 National Commission on Excellence in Education

In 1974, this Department, with Tony Wilhoit as its director, was known as the Office of Public Defender. A "comix" was produced to explain its role. In the course of the next 4 issues, we will reprint it to remind ourselves of our important mission.



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