THE ADVOCATE

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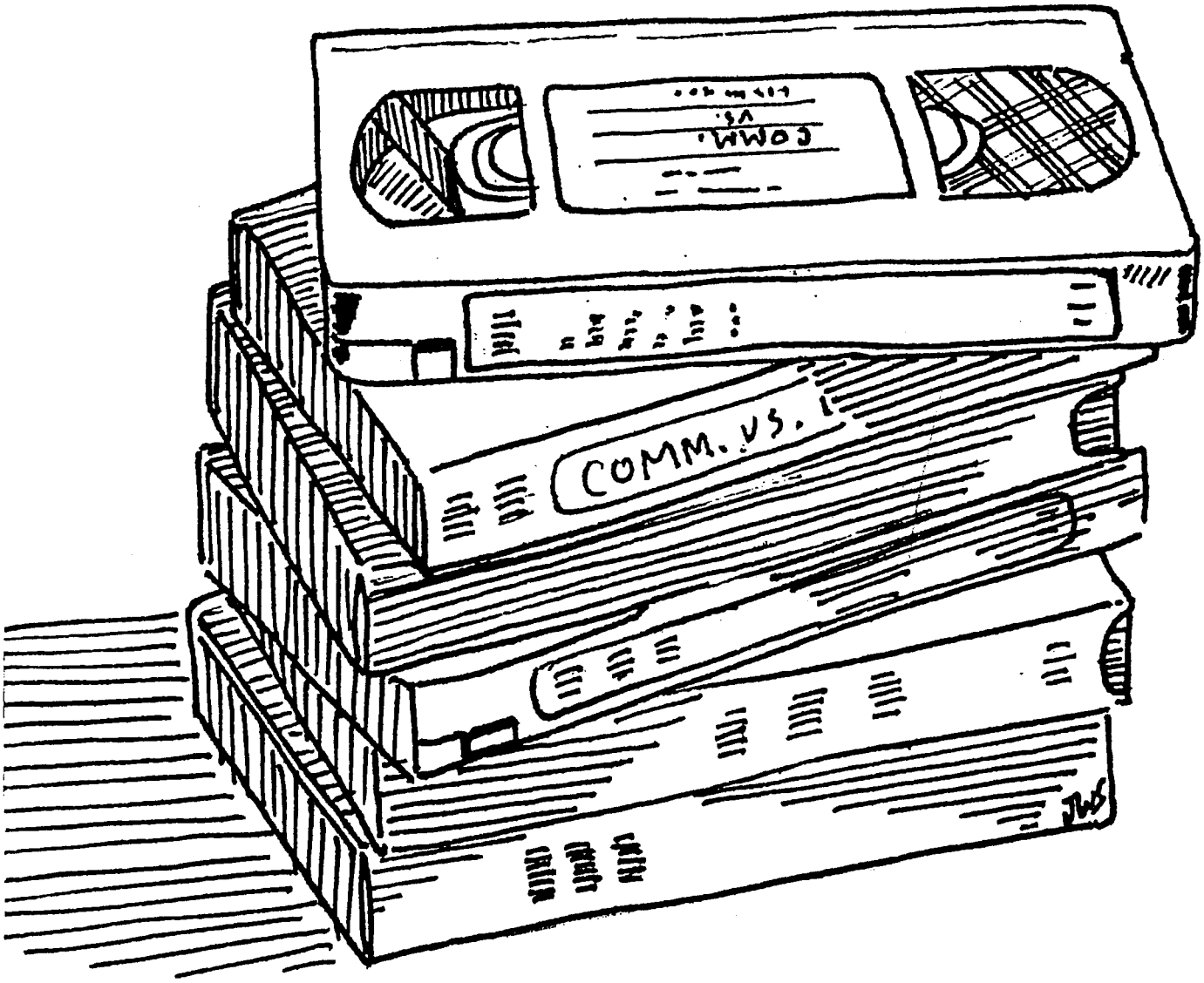

The Video Debate Rages:

Chief Justice Stephens responds to Judge Lester

Also In This Issue: Schizophrenia

The Advocate Features

(L.to R.) Justin, Shirley, Bob, Maria, Robbie (Sanders)

Robert E. Sander's law office is on Greenup Street in Covington, Kentucky. He is a 1972 graduate of the University of Cincinnati Law School. He has been a criminal defense attorney since he left the Kenton County Commonwealth Attorney's Office in 1980. He made the decision to become a defense lawyer because in his own words ". . . it was more socially acceptable than becoming an 'urban gorilla.' I truly believe in 'Truth, Justice, and the American Way.' I enjoy litigating ultimate moral issues and having a hand, however slight, in facilitating justice."

How many persons assist you at trial?

I sometimes get giggles out of Judges over that because I'll come in with a crew of 8 or 10 people. I make very heavy use of paralegals, litigation assistants and law student clerks. Generally I'll have a litigation assistant, an individual who is part of my regular office staff, at trial so that when it comes time to display X - they're putting it in my hand. They help manage physical and documentary evidence and in between times, keep notes, so I can concentrate my attention on what I have to be doing at that moment. I use a psychologist at jury selection and if he's available he'll often sit through the entire trial and make notes and give me feedback on juror reaction either generally or how it relates to specific jurors regarding how they are perceiving the proof.

I'll typically have two senior law student interns at trial with me for doing legal research and writing chores as necessary, and depending on the magnitude of the case I may have secretaries available. Especially in criminal cases, either pro bono or as public defender, I will always have one or two younger lawyers participate in the case with me, not so much for my benefit, but I utilize trials as an opportunity to pass on whatever skills I can pass on to a less experienced litigator.

As Bob's "graduates" develop experience he says he "feels good about them and takes vicarious pride in their accomplishments."

Does DPA provide resources to you that are helpful?

I suppose the most valuable resource DPA provides me is the CLE programs. I think the Death Penalty Seminars DPA has put on, that I've attended and I've attended all of them,

THE ADVOCATE

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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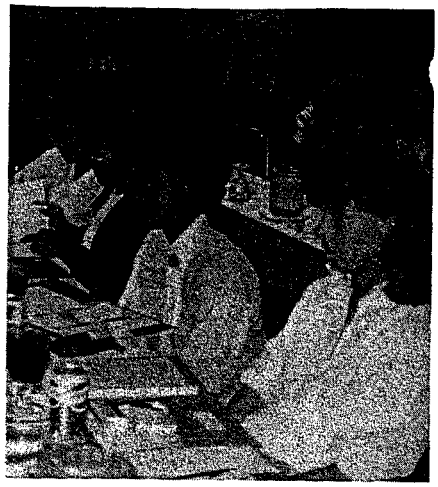
IN THIS ISSUE

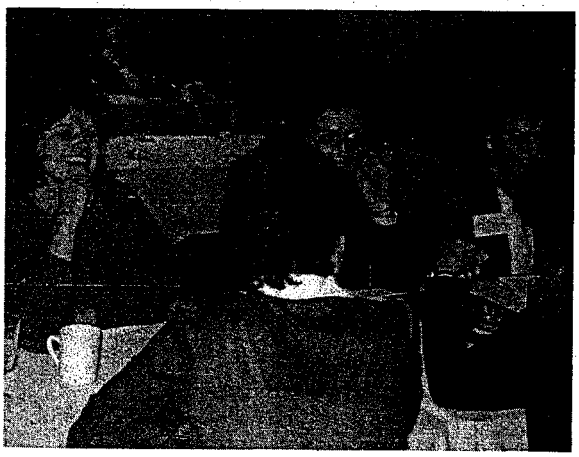
Patricia Thurman and Mike King

65 persons from the Department of Public Advocacy attended the 1987 Secretaries/Clerk/Managers training held February 26 & 27, 1987 at the Holiday Inn in Louisville.

Mike King and Patricia Thurman of Governmental Services Center spoke on the relationship between Managers and Secretaries/Clerks. Supervisors and Secrtaries/Clerks then had an opportunity for team building along with an opportunity to discuss job problems and concerns in a healthy way. The sessions were productive and beneficial due to the good skills of Patricia Thurman and Mike King.



Madeline Jones, Joyce Hudspeth
Fred Caldwell, Tina Ricketts



Debbie Shearer, Brenda Kramer
Kathy Collins, Marion Brewer

Joy Holland, Marie Wasson, Cheree Goodrich
Sheila Morris, Warren Taylor

Peggy Redmon, Melodye Dunavent, Jane Hosley
Dave Stewart, Lynn Aldridge

Belinda Hollon, Beverly Thompson, Angie
Casebolt, Cathi Martinson, Lisa Davis

Protection and Advocacy

for the Developmentally Disabled

NEW CLIENT POPULATION TO RECEIVE PUBLIC DEFENDER SERVICES

A summary judgment order in a civil rights class action, Doe v. Austin, C 82-0738-L(A), Western District of Kentucky, has established the right of mentally retarded adults to involuntary commitment hearings before being institutionalized. Eligible class members will be represented at their hearings by public defenders.

In 1982, Samuel Doe, a resident of Outwood (a mental retardation facility owned by the state), and his mother, through their counsel, Louisville Legal Aid, initiated a class action in federal district court challenging Kentucky's commitment process for mentally retarded adults. The action was filed against appropriate Cabinet for Human Resources (CHR) personnel, and the Public Advocate.

At the time the action was filed, CHR allowed parents and legally appointed guardians to sign adults into state mental retardation facilities for indefinite periods of time. These admissions were treated by CHR as "voluntary" and not subject to the commitment procedures of KRS 202B. At the same time, adult admissions to state mental health facilities required the knowing consent of the individual or an involuntary commitment hearing under KRS 202A. The challenge to the practices utilized with mentally retarded individuals was premised on federal equal protection and due process provisions.

On January 9, 1986, the court, through Judge Allen, entered a partial summary judgment decision and order finding Kentucky's commitment practices of mentally retarded people to be unconstitutional. This holding appearing to be based in part on the fact that KRS 202A and B provided substantially the same protections and process for both mentally ill and mentally retarded persons. The Kentucky legislature promptly amended KRS 202B to essentially conform to the "voluntary" procedure discussed above. See, KRS 202B.040(5); 202B.045 (1986). Doe challenged these statutory amendments as unconstitutional in a new Motion for Partial Summary Judgment and sought a preliminary injunction. On November 20, 1986, the court entered a partial summary judgment finding the 1986 amendments unconstitutional and a preliminary injunction was issued requiring that a compliance plan be developed by the parties to provide involuntary commitment hearings for all new adult admissions and for all those currently being held without having previously received a hearing. By agreement of the Plaintiffs and the Public Advocate, DPA will provide representation for eligible persons with mental retardation who are subject to these hearings.

As drafted, the compliance plan (which has not yet been signed by the court) provides that "CHR, the probate courts, and the public defenders (will) begin using similar procedures for mentally retarded adults as are already used for mentally ill persons." Approximately 600-900 potentially eligible persons are currently confined in Dawson Springs, Louisville, and Somerset. The compliance plan provides these persons will receive hearings over the next five years, with at least 20% of the hearings held each year. A priority system is established to determine the order in which residents are to be referred for hearings. All new admissions to state-owned mental retardation facilities are to receive hearings before or "as soon as practicable after" admission unless they are functionally competent to sign themselves in and are willing to do so.

All hearings are to be conducted pursuant to the KRS 202A and B, and 210.270 (related to changing the level of care of a mentally retarded person). The compliance plan provides inter alia that, at minimum, clients are entitled to the right not to be committed unless immediately dangerous to themselves or others and the right to a "clear and convincing" standard (it is to be noted that although this standard is minimally constitutionally acceptable, Kentucky statutes require the "reasonable doubt" standard. KRS 202B.050; 202A.076(2)).

The compliance plan provides that the hearings are to begin no later than June 1, 1987. Although the compliance plan appears to allow commitments for an indefinite period of time (a review is neces-

sary only when one is requested by the individual or an appropriate re- presentative or the facility deems the person can be served in a less restrictive environment, it would appear Kentucky's statute does not contemplate commitments exceeding one year. KRS 202B.050; 202A.051. Although the trial courts' decision is currently under appeal, no stay has been entered.

It is expected that amendments to KRS 202B will be filed in the next legislative session. Additionally, supplemental funds will be sought to assist DPA in providing representation in these hearings.

For additional information, please contact Ava Crow, Protection and Advocacy Division. Also, Protection and Advocacy is interested in knowing of any hearings being held pursuant to KRS 202B. Please contact us at (502) 564-2967 if you have been appointed on any of these cases.

Ava Crow
Assistant Public Advocate
Protection & Advocacy
(502) 564-2967

New P & A Staff

(Left to Right)
Beverly Gravitt, Legal Secretary
Cathi Martinson, Paralegal
Lisa Davis, Paralegal
Linda Fields, Attorney, Education
Ginny Brennaman, Legal Secretary
Yvonne Dunaway, Legal Secretary

Liz Toohey, Investigator Senior
Rick Cain, Advocatorial Specialist - Mental Health Advocacy Project

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

DUI - MINOR AS SUSPECT CLASSIFICATION
Praete v. Commonwealth
Emnett v. Commonwealth
34 K.L.S. 1 at 11 (January 9, 1987)

In this case, the appellants contended that KRS 189A.070 denies equal protection of the law by its "suspect classification" of minor drivers. Section (1) of KRS 189A.070 provides that if a person eighteen years of age or older is convicted of D.U.I. his driver's license shall be revoked for 6 months for the first offense, 12 months for the second, and 24 months for subsequent offenses. However, Section (2) of the statute provides that if the driver is under the age of eighteen his license shall be revoked until he reaches the age of eighteen or for the minimum period provided in Section (1), whichever is longer.

The Court rejected the appellants' argument to hold that drivers under the age of eighteen are not a suspect class for purposes of equal protection analysis. The Court additionally held that the statute was not invalid as providing for disparate treatment unrelated to any legitimate legislative purpose. The Court found that "there are distinctive and natural reasons, based upon a consideration of maturity, or rather a lack thereof, for making such a classification."

FORFEITURE OF PROPERTY
Williams v. Commonwealth
34 K.L.S. 1 at 15
(January 16, 1987)

In this case, the Court held that Williams' due process rights were not violated when the trial court ordered forfeiture of pornographic materials and photographic equipment introduced at his trial on charges of using a minor in a sexual performance. The forfeiture was authorized by KRS 531.080(3) which allows for the destruction of "any matter or advertisement, in respect whereof the accused stands convicted." The Court upheld the statute, citing its purpose, as stated in the commentary, of giving "the prosecution an effective, practical weapon to combat the dissemination of obscene material."

PROMOTING CONTRABAND - "DETENTION FACILITY"
Commonwealth v. Tyrell
34 K.L.S. 2 at 1
(January 23, 1987)

Tyrell, during a visit to Luther Luckett Correctional Complex, left her purse, containing a pistol, in the locked trunk of her car. The car was parked in the detention facility's parking lot. The presence of this gun on detention facility grounds later became the basis for a charge of promoting contraband against Tyrell. However, the charge was dismissed by the circuit court which held that these facts failed to show the commission of an offense. The Commonwealth appealed.

The Court of Appeals reversed. The Court held that when Tyrell brought contraband onto detention facility grounds she had introduced contraband into the detention facility. The Court cited the KRS 520.010(4) definition of detention facility as "any place used for the confinement of a person charged with or convicted of an offense ..." The Court then noted that correctional officers had testified that "prison inmates are routinely present in the parking lot in which appellee's car was parked..." The Court concluded that "it defies common sense to hold that a individual who knowingly brings a loaded firearm into an area on the grounds of a correctional facility to which prison inmates have ready access cannot be charged with promoting contraband..."

DEFENSE RIGHT TO PSI REPORT
Bush v. Commonwealth
34 K.L.S. 2 at 6 (January 30, 1987)

The issue before the Court in Bush was whether a defendant is entitled to receive an actual copy of a presentence investigation report (p.s.i.) prepared in his case.

KRS 532.050(4) provides that:

> Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to contro-

vert them. The sources of confidential information need not, however, be disclosed.

KRS 439.510 provides that information obtained by a probation or parole officer is privileged and "shall not be disclosed directly or indirectly to any person other than the court..." The Attorney General in opinion No. 84-285 deduced that these provisions precluded supplying a copy of the report to the defense.

The Court of Appeals disagreed: "[T]here is no compelling reason why a defendant should not be given an actual copy of the report, from which is to be deleted the names of confidential informational sources..." The Court also held that the defendant's right of access continues post-sentencing if the p.s.i. is used by correctional officials in granting and denying privileges.

CONSECUTIVE V. CONCURRENT SENTENCES
Webb v. Ky. Corrections Cabinet
34 K.L.S. 2 at 14
(February 6, 1987)

Webb was convicted of offenses committed while released on parole. The Judgment sentencing him was silent as to whether the sentence imposed was to run concurrently or consecutively. Webb therefore argued that KRS 532.110(2) controlled. That statute provides that "If a court does not specify the manner in which a sentence imposed is to run, the sentence shall run concurrently with any other sentence which the defendant must serve." The Court of Appeals, however, held that KRS 533.060(2) controlled. This later enactment denies the benefit of concurrent sentencing for offenses committed while released on probation or parole.

ABILITY TO EXERCISE PEREMPTORY CHALLENGES/EXCUSAL OF JUROR FOR HARDSHIP
Mattingly v. Commonwealth
34 K.L.S. 3 at 5
(February 20, 1987)

In this case, the Court reversed the appellant's conviction because of an abuse of discretion by the trial court in permitting witnesses to testify who were not named as witnesses in voir dire. The Court held that "The Commonwealth's failure to list these five witnesses, when called upon to do so, damaged appellant's ability to exercise his peremptory challenges..."

The Court also found error in the trial court's action in excusing a prospective juror because she was having out-of-town guests.

SEPARATE TRIALS OF COUNTS
Sieg v. Commonwealth
34 K.L.S. 3 at 9
(February 27, 1987)

Sieg, a University of Kentucky pharmacy professor, was convicted at a single trial of receiving stolen property (progesterone owned by the University) and multiple counts of theft by failure to make required disposition (controlled substances owned by the University). The jury acquitted Sieg of charges involving the theft of a typewriter. The acts resulting in the various charges were spread over a period from 1981 to 1985.

On appeal, Sieg argued that the offenses should have been severed for trial. The Court of Appeals agreed. "There is no suggestion that these various crimes were dependent upon or in any way connected with the others." The Court rejected the Commonwealth's argument that joinder was proper because the offenses constituted "parts of a common scheme or plan." RCr 6.18 and RCr 9.12. "The test for determining whether there is a common scheme or plan is whether the proof of one crime tends to prove or establish the other." Since there was "no link or overlap of proof of one crime that would tend to prove any of the others" joinder was improper.

Kentucky Supreme Court

CRIMINAL ABUSE
Commonwealth v. Chandler
34 K.L.S. 1 at 16
(January 22, 1987)

The issue in this case was whether Chandler was entitled to an instruction on criminal abuse at his trial for wanton assault. The Court held that Chandler was not since criminal abuse is not a lesser included offense of assault:

> Criminal abuse is not a lesser-included offense of first or second degree assault. It covers situations where a person is in the custody of another and is injured by an abusive act of that person. Where the injury is the

result of the use of a deadly weapon or a dangerous instrument, the proper charge is first or second-degree assault regardless of whether the victim is related to the assailant.

BATTERED WIFE SYNDROME/WANTON SELF-PROTECTION
Commonwealth v. Rose
34 K.L.S. 1 at 17
(January 22, 1987)

The trial court at Rose's trial for killing her husband permitted a registered nurse to testify as an expert about battered wife syndrome in general. However, the witness was not allowed to testify that Rose was suffering from the syndrome or that Rose believed it was necessary to kill her husband when she pulled the trigger. The Kentucky Supreme Court noted the admissibility of evidence of battered wife syndrome but upheld the limitations placed on the witness' testimony. "[T]his registered nurse, however experienced, was not qualified to diagnose the mental condition of the accused." The trial court also properly excluded opinion testimony as to the ultimate issue of Rose's state of mind at the time of the act.

The Court also upheld a wanton belief limitation placed on Rose's defense of self-protection. The trial court instructed the jury that, even if they believed Rose acted out in self-protection, they might still convict her of second degree manslaughter if they found she was wanton in believing that force, or the degree of force used, was necessary. The Court stated its reasoning as follows:

> A person who perceives a need to kill in self-defense when this perception is 'a gross deviation from the standard of conduct that a reasonable person would observe in the situation' kills intentionally but also should be classified under KRS 501.020(3) as one who is 'aware of and consciously disregards a substantial and unjustifiable risk that the result will occur.' The Commentary states 'wanton conduct involves conscious risk taking.' Thus the same act should be classified as both intentional and wanton in that situation.

The Court's holding is in contrast to its earlier holding in Gray v. Commonwealth, Ky., 695 S.W.2d 860 (1985) that an act of self-protection is necessarily intentional, and thus cannot be wanton. Without overruling Gray, the Court in Rose stated "To the extent that Gray is in conflict with this decision, it is limited to it facts."

RAPE-DEAD BODY/PLEA BARGAIN/ PRESERVATION OF EVIDENCE
Smith v. Commonwealth
34 K.L.S. 1 at 21
(January 22, 1987)

Smith argued on appeal that the prosecution failed to prove that the victim was still alive at the time she was raped. If the victim was dead, then Smith could only be convicted of abuse of a corpse under KRS 525.120. The Court initially held that this issue was unpreserved by Smith's general motion for directed verdict. The Court also held that "The Commonwealth does not bear the burden of proving that a rape victim was alive when penetration occurred." The Court further noted that the evidence was sufficient to show that the victim was alive when forcible compulsion was directed at her.

The Court also rejected argument that the charges against Smith should have been dropped because the prosecutor had granted him immunity in exchange for his statement implicating a second culprit. The prosecution agreed that Smith had immunity to charges of "criminal facilitation after the fact." The Court interpreted this as limited to charges involving accessory culpability and as not extending to the rape-murder charges Smith was convicted of.

Finally, the Court held that Smith was not prejudiced by the State Police action in losing tangible items of evidence consisting of clothing, towels, and a steam iron taken from the victim's home. Neither was he prejudiced by the loss of body fluid evidence consumed in testing where microscopic slides of the evidence were prepared but never requested by the defense.

United States Supreme Court

RETROACTIVITY OF DECISIONAL LAW
Griffith v. Kentucky
40 CrL 3169 (January 13, 1987)

In this case, the Court held that its decision in Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (April 30, 1986), prohibiting the racially discriminatory use of peremptory challenges, has retroactive application to "cases pending on direct review or not yet final" when Batson was decided. The Court rejected prosecution argument that retroactive effect should not be given to a rule which constitutes a "clear break" with past precedents: "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." The Court squarely refused the invitation to create a "clear break" exception to its

retroactivity rules. Chief Justice Rehnquist and Justices White and O'Connor dissented.

DEATH PENALTY-MITIGATING CIRCUMSTANCES
Brown v. California
40 CrL 3187 (January 27, 1987)

At the death penalty phase of Brown's capital trial, the court instructed the jury that in reaching a sentence the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The defense contended that this instruction denied the defendant the right to have the jury consider "sympathy factors" raised by the mitigating evidence. The California Supreme Court agreed, but on a grant of certiorari to the state the U.S. Supreme Court reversed. The majority reasoned that a jury would "most likely" interpret the instruction as a directive "to ignore only the sort of sympathy that was not rooted in the aggravating and mitigating evidence introduced during the penalty phase." The majority further reasoned that by limiting the jury's consideration to record evidence, the instruction fostered the Eighth Amendment goal of reliability in capital sentencing. Justices Brennan, Marshall, Stevens, and Blackmun dissented since "Experience with the antisympathy instruction ...reveals that it is often construed as precluding consideration of precisely those factors of character and background this Court has decreed must be considered by the sentencer."

CONFESSION-RIGHT TO COUNSEL
Connecticut v. Barrett
40 CrL 3183 (January 27, 1987)

Barrett, while in custody for sexual assault, was advised three times of his Miranda rights. On the second and third occasions, Barrett stated that he would not give a written statement without the presence of counsel, but then orally admitted the assault. Barrett argued to the U.S. Supreme Court that this expressed desire for counsel invoked his right to counsel for all purposes and thus required suppression of his uncounseled oral confession.

The Court disagreed, and found that Barrett's invocation of the right to counsel was limited by its terms to the making of written statements. Because Barrett's statement regarding counsel was unambiguous, it was not necessary to give it a broader interpretation. Justices Marshall and Stevens dissented.

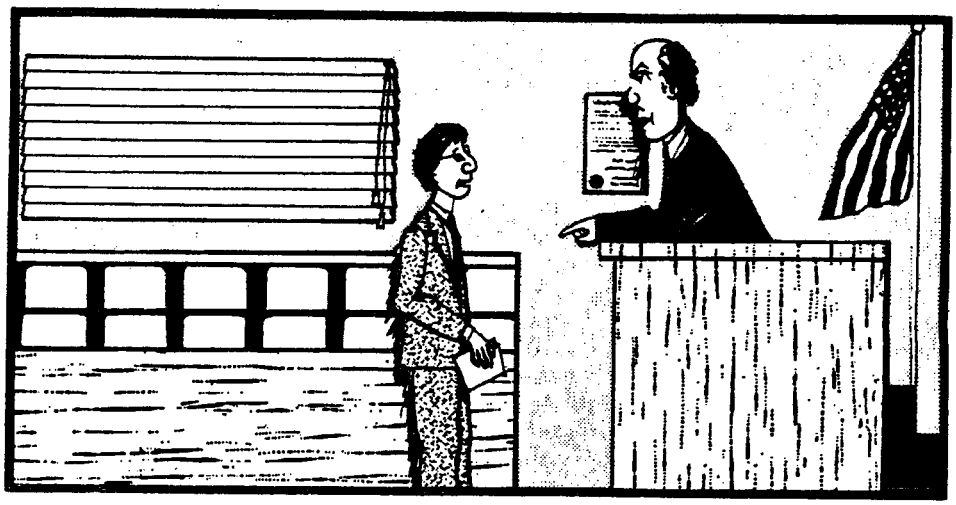
DISCOVERY-PRIOR INCONSISTENT STATEMENTS
Pennsylvania v. Ritchie
40 CrL 3277 (February 24, 1987)

At his trial for sexual abuse of his daughter Ritchie tried to gain records about her maintained by a state child welfare agency. The trial court denied disclosure, without first examining the records, under a state law which made the records confidential.

The U.S. Supreme Court held that Ritchie was entitled to disclosure of state records containing evidence that is both favorable to the accused and material to guilt or punishment. However, the Court found that it did not follow that defense counsel must be allowed to personally examine the records. "A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search the state's files and make the determination as to the materiality of the information." Rather, the trial court was required to examine the records *in camera* and make the necessary determination. Justices Stevens, Brennan, Marshall, and Scalia dissent.

CONFESSIONS-VOLUNTARINESS
Colorado v. Spring
40 CrL 3194
(January 27, 1987)

Spring was arrested on weapons charges and given Miranda warnings. After agreeing to answer questions, Spring was questioned about the weapons charge and about an unrelated murder. Spring incriminated himself in the murder, and two months later gave a full confession



"The only person to ever get *Brady* material in my court was a guy named Brady!"

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after again receiving and waiving Miranda rights.

The issue before the Court was whether Springs' waiver of his Fifth Amendment rights was invalid since the police refrained from telling him at his initial interrogation that they intended to question him about the murder. The Court held that it was not. "[W]e hold that a suspect's awareness of all possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect, voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege. Justices Marshall and Brennan dissented based on their view that "a suspect's decision to waive [his Fifth Amendment] privilege will necessarily be influenced by his awareness of the scope and seriousness of the matters under investigation."

BURDEN OF PROOF
Martin v. Ohio
40 CrL 3297
(February 25, 1987)

The issue before the Court in Martin was whether Ohio could place on the defendant the burden of proving her defense of self-protection at her trial for "aggravated murder." The issue arose because of an apparent "overlap" in Ohio's definitions of aggravated murder and self-protection. A conviction of aggravated murder required that the accused have acted "purposely, and with prior calculation and design," while a finding of self-protection required that the accused not have created the situation resulting in the death and that she believed she was in "imminent danger of death or great bodily harm." Proof of the self-protection defense would thus effectively negate a finding of the mental element of the aggravated murder charge. In Patterson v. New York, 432 U.S. 197 (1977), the Court held that a defendant may be required to prove an affirmative defense if the affirmative defense does "not serve to negative any facts of the crime which the state is to prove in order to convict of murder." The majority in Martin concluded that the above language in Patterson did not benefit Martin because the state court's instructions "did not require Mrs. Martin to disprove any element of the offense with which she was charged." Justices Powell, Brennan, Marshall, and Blackmun dissented.

Linda West
Assistant Public Advocate
Appellate Branch
(502) 564-5234

LEXINGTON HERALD-LEADER
Saturday, January 24, 1987 A6

6th Amendment outweighs desire to protect children

Kentucky Attorney General David Armstrong has gone all the way to the U.S. Supreme Court with his contention that defendants in child abuse cases do not have the right to confront their accusers in some pretrial hearings. While Armstrong's motive — protecting allegedly abused children from intimidation — is commendable, his legal reasoning doesn't seem sound.

The case Armstrong is pursuing involves a 1984 conviction of a man accused of sexually abusing two girls. The Kentucky Supreme Court overturned the conviction because the defendant was barred from attending a hearing to determine if the two girls, ages 7 and 8, were competent to testify.

Armstrong contends that since the defendant was able to confront his accusers at the trial itself, he was not denied his constitutional rights. More than 20 states have filed briefs with the U.S. Supreme Court in support of this argument, which Armstrong says shows the nationwide support for protecting victims of child abuse.

That may be true, and we would not question the argument that these victims need to be protected to the fullest extent possible. But neither the weight of public opinion nor the need to protect victims can override the rights afforded to every American citizen under the U.S. Constitution.

One of those rights is outlined in the Sixth Amendment, which says, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..." The Sixth Amendment, as we read it (and apparently as the Kentucky Supreme Court read it), makes no distinction between preliminary hearings and trials. The rights of the accused extend to the hearings. And they should, since many crucial decisions are made in such hearings.

The Sixth Amendment was added to the Constitution to provide Americans with some protection against false accusations and malicious prosecution. It was a wise addition that is now an integral part of the American system of justice. If an accuser, even an accuser who is a child, is protected from confronting the accused, the judicial system can be used to generate no end of mischief for an individual for no other reason than that someone else dislikes him.

The Constitution is a living document and therefore subject to interpretation. But such interpretation should be exercised with the utmost caution, lest we render the document meaningless. If we start making exceptions to the civil liberties guaranteed by the Constitution, exceptions dictated by nothing more substantial than the prevailing public mood, where do we stop?

Post-Conviction

Law and Comment

Allison Connelly

Confronting Rape Shield

I. Introduction

As a woman I applaud Kentucky's passage of a rape shield law; as a criminal defense attorney I deplore its weaknesses. What was once a humiliating experience for the victim in a sex offense is now an unnecessary denial of a defendant's right to present an effective defense.

Rape shield was born of Victorian morality and an abusive criminal justice system that put the victim on trial instead of the defendant. Often, the complaining witness was forced to defend attacks on her chastity as her sex life was paraded before the jury by a defendant attempting to prove she consented. Such evidence was deemed relevant by the specious logic that if she consented once, she'd consent again, and if she didn't consent, she must have been asking for it. Historically, in Kentucky as in most states, evidence of a rape victim's prior sexual history was automatically admissible at trial on the issue of consent. Moreover, such evidence could be proved by either reputation or specific acts. On the other hand, in the past the stakes were also higher for those accused of rape. Not only was there a danger of false accusations, but in many instances the death penalty could be imposed.

Obviously, in our sexually active society the old rationale can no longer be justified; consent to sexual relations with partners of one's choice is not an indication of whether the complaining witness would consent to sex with the defendant. In response to this need for reform and our changing society, most states passed rape shield laws that limit or prohibit a defendant's ability to present to the jury, evidence of the victim's past sexual history with third parties. Now under Kentucky law, such evidence is automatically inadmissible solely because it involves a sex offense instead of some other crime. Instead of dealing with the abuses engendered by unbridled judicial discretion, we are faced with an inflexible legislative mandate that deprives the trial judge of all discretion.

The Kentucky legislature, in its zeal to protect the victims of sex offenses, enacted a statute that absolutely excludes all evidence of "sexual conduct and habits" between the complaining witness and any person, other than the defendant. KRS 510.145; Smith v. Commonwealth, Ky. App., 566 S.W.2d 181 (1978). Indeed, Kentucky's rape shield statute excludes the complaining witness' prior sexual history with third parties whether relevant or not, and disallows evidence of either reputation or specific acts at a trial involving a sex offense.

The Kentucky legislature has seen fit to violate a fundamental rule of statutory drafting; never say never. In doing so, the statute is more than a shield that protects the victim, it is an impenetrable wall that denies one accused of such a crime from presenting even critical evidence.

Unlike the federal rule, Fed. R. Evid. 412, which requires the admission of chastity evidence, if "constitutionally required," Kentucky's law does not contain such a judicial safeguard. Surely, such a blanket exclusion that fails to afford the defendant even the opportunity to establish the relevance of the evidence, despite the fact it may be more probative than prejudicial in its impact, cannot be reconciled with the sixth amendment. Surely, such a blanket exclusion will sooner or later prohibit the introduction of a compelling set of facts that demand the jury's hearing. To say that sexual history is irrelevant begs the question. The question is whether such evidence is relevant in any instance; whether the shield law prevents the defendant from introducing such evidence; and, whether that exclusion is constitutional.

The legislature simply cannot foresee or list all of the circumstances that may arise in the courtroom given the possibilities of human conduct. The legislature cannot predetermine by statute, the fact specific question of what evidence is relevant and admissible. Eventually, the statute will violate a defendant's due process right to confront witnesses and to compel testimony, and in doing so, present evidence vital to his defense.

The boundaries of Kentucky's rape shield law must be challenged. The constitutional lines need to be drawn and defined. While the statute may be facially constitutional, Smith, supra, there will come a time when it is unconstitutional in its application. See State v. Howard, N.H., 426 A.2d 457 (1981). There will come a time when the law fails to correctly balance the competing interests of the rape victim and the accused.

This article will attempt to provide a format for analyzing and evaluating the constitutional dimensions that inevitably will arise under the rape shield statute. By examining the constitutional requirements of the sixth amendment and focusing on the purpose for which prior sexual history is offered by the defendant, one can anticipate those instances where the statute must yield to the constitution.

II. Statutory Mechanics

To date, over 46 jurisdictions have enacted rape shield laws that eliminate the traditional rule of automatic admissibility. However, the laws vary in their substantive and procedural provisions. Of these, approximately 30 jurisdictions allow the defendant to show in a specific case, at an in camera hearing before the trial judge, that such evidence is relevant and should be admitted. See, Tanford and Bocchino, Rape Victims Shield Laws in the Sixth Amendment, 128 U.Pa.L.Rev. 544 (1980). Nevertheless, the Kentucky legislature has enacted the most restrictive type of shield statute. Id.

The Kentucky statute applies to all sex offenses, including attempts and conspiracies, except for incest. It absolutely prohibits the introduction of the prior "sexual conduct or habits" of the complaining witness in the form of reputation or specific acts with parties other than the defendant. KRS 510.145; Smith, supra.

The only two exceptions to this rule of general inadmissibility are: "evidence of the complaining witness' prior sexual conduct or habits with the defendant"; and, "evidence directly pertaining to the act on which the prosecution is based." KRS 510.145(3). Even in this situation, an offer of such proof requires the trial judge to determine the relevancy of the evidence before its admission. Accordingly, at least two days prior to trial, the defendant must alert the court, by a written motion, that there will be an offer of evidence of the prosecuting witness' prior sexual history. Then, in order to ascertain the admissibility of the evidence, the court must hold an in camera hearing to determine that "the offered proof is relevant and that its probative value outweighs its inflammatory or prejudicial nature." KRS 510.145(3)(b).

While it is clear that relevant evidence of a prior sexual relationship between the defendant and the complaining witness is admissible on the issue of consent, Bixler v. Commonwealth, Ky. App., 712 S.W.2d 366 (1986), Kentucky also allows the admission of relevant evidence "directly pertaining to the act on which the prosecution is based." The exact meaning of this broad language is unclear, and it is an untested area of the law that must be creatively challenged. Under this exception, the defendant can produce evidence that another person committed the crime or that as the result of the act with another, the complaining witness suffered trauma, is diseased or pregnant. In other words, the defendant can introduce relevant evidence which explains a physical fact which is in evidence at the trial. Unfortunately, these two exceptions do not cure the constitutional deficiencies that may arise in any given factual situation on the admissibility of prior sexual acts of the prosecuting witness.

III. A Defendant's Sixth Amendment Right to Present Relevant, Non-Prejudicial Evidence.

The right of a defendant to present evidence of the prior sexual history of the complaining witness is grounded in the sixth amendment. The constitutional mechanisms available to the defendant to present such evidence are cross-examination of the witnesses against him, Pointer v. Texas, 380 U.S. 400, 404 (1965), and the right to call witnesses in his own behalf. This right to compel testimony encompasses not only the subpoena power but the right to present defense testimony. Washington v. Texas, 388 U.S. 14, 23 (1967). The underlying aim of these protections is to insure the "integrity of the fact-finding process." Burger v. California, 393 U.S. 314, 315 (1969). Thus,

together the two clauses guarantee the defendant the right to present not only a defense but a full and effective defense.

These constitutional rights are not absolute. Chambers v. Mississippi, 410 U.S. 284 (1973). It is a fundamental concept of law that states may legislatively establish their own rules of evidence, and even exclude relevant evidence to insure fairness and reliability in the fact-finding process when ascertaining guilt or innocence. Id., at 302.

However, regardless of the general legislative power, the state may not infringe upon the constitutional rights of a defendant. Kentucky's rape shield law, in its absolute exclusion of the complaining witness' prior sexual history with third parties, directly implicates a defendant's sixth amendment rights to offer evidence that is logically relevant and necessary to the defense. By denying the defendant the ability to pursue a certain line of questioning on cross examination, or to elicit certain testimony from his own witnesses, the Kentucky rape shield law casts a dark shadow over these constitutional protections. In fact, two state courts noted that such blanket exclusions conflict with a defendant's constitutional right to present a defense if the defendant isn't afforded an opportunity to establish the relevance of the proffered evidence at trial. State v. Howard, supra; State v. Delawder, Md. App., 344 A.2d 446 (1975).

Since the ability of the accused to present relevant evidence is grounded in a constitutional right, a federal constitutional standard must be applied to resolve the inevitable conflict between the evidentiary rules and state policies that exclude such evidence and the defendant's right to present a defense. The United States Supreme Court developed such a due process balancing test in Chambers v. Mississippi, supra, and expanded it in Davis v. Alaska, 415 U.S. 308 (1974), and United States v. Nixon, 418 U.S. 683 (1984). This test balances the state interest in excluding the evidence against a defendant's constitutional right to introduce such evidence. If the state interest supporting the evidentiary exclusion does not outweigh the defendant's need for the evidence or the probative value of the evidence excluded, it cannot be reconciled with the constitutional requirements of the sixth amendment and a fair trial. Therefore, the state policy excluding the evidence must give way to the defendant's right to introduce it.

In Chambers v. Mississippi, supra, the Supreme Court held that Mississippi's "voucher" and hearsay rules must yield to a defendant's due process rights where the defendant has demonstrated that the evidence is both critical and reliable. Chambers was convicted of murdering a police officer. However, another person had confessed this murder to the police. At trial, the prosecutor refused to call the confessor to the stand forcing Chambers to call him in defense. On direct examination, the witness admitted confessing the crime to the police, but on cross-examination by the prosecutor, he denied the killing. Chambers was prohibited from cross-examining the confessor further, because of the common law rule that "one may not impeach his own witness." Moreover, the Mississippi hearsay rule prohibited Chambers from introducing the testimony of three civilian witnesses who had heard the confessor orally admit to the killing.

The United States Supreme Court reversed Chambers' conviction finding a sixth amendment violation. The Court held that the state had placed the "integrity of the fact-finding process in jeopardy." Id. at 295. The Court added that although sixth amendment rights are "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," the Constitution mandates the state interests be closely scrutinized. Id. Therefore, the Court concluded that the state's interest in reliable evidence could not prevail over the defendant's need for the evidence.

In Davis v. Alaska, supra, the Supreme Court held that the right of confrontation was paramount to the state's policy of shielding and protecting a juvenile offender. Alaska had enacted a juvenile shield statute that excluded evidence of a juvenile's criminal record in any proceeding. In Davis, the state's only identification witness was a juvenile who was on probation at the time the defendant was accused of committing certain crimes. Even though some of the stolen property was recovered near the juvenile's house, the defendant was prevented from cross-examining the juvenile in relation to his probationary status by the statutory juvenile shield law. The Court found that the evidence was relevant "for the purpose of suggesting that [the juvenile] was biased,"and had a motive to lie. Id. at 311. Although the court acknowledged the state's "legitimate and important interests" in juvenile rehabilitation, the Court held that the defendant's sixth amendment right of confrontation was greater than the identified state interests. Id. In striking this balance the Court declared:

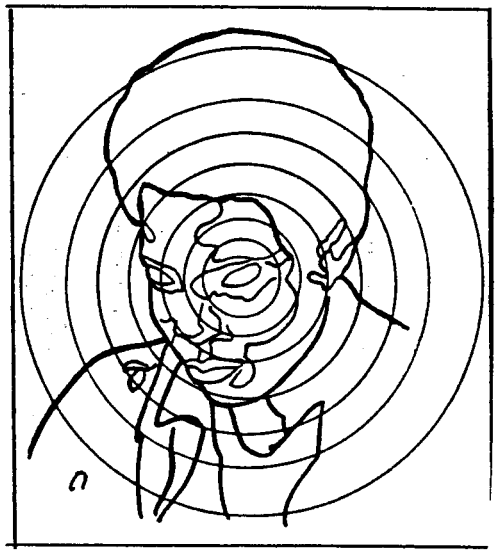
> [W]e conclude that the state's desire that [the juvenile] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of the petitioner to seek out the truth in the process of defending himself.
> Id. at 320.

Thus, Davis stands for the general proposition that a defendant has a right under the confrontation clause to expose the bias and interests of a witness, and that a state can't constitutionally restrict that effort.

While in Chambers the state interests were advanced by a common law rule of evidence, and in Davis a statutory rule, in United States v. Nixon, supra., the interest was constitutionally based.

In United States v. Nixon, the President refused to deliver tapes sought by the Watergate prosecutor by asserting that they were privileged presidential communications. The Supreme Court, in resolving this constitutional showdown, weighed the presidential privilege of confidentiality against the Watergate defendants' sixth amendment rights to confrontation and compulsory process. Id. at 711. The Supreme Court held that the President's "weighty" interests in confidentiality "must yield" to the rights of the Watergate defendants. Id. The Court stated that the President's interest was merely "general in nature," while the defendants interests were "specific and central to the fair adjudication of a particular. .case in the administration of justice." Id.

With these cases as constitutional foundation, one must question whether or not the Kentucky rape shield statute violates a defendant's right to cross-examine witnesses and compel testimony. Such an analysis requires first, the threshold determination of whether the evidence offered by the defendant is relevant, and second, a balancing of the defendant's need for the evidence in a specific fact situation versus the state interest in excluding the evidence.



Clearly, in most cases, evidence of a complaining witness' prior sexual history with third parties will be irrelevant, but not in every case. Professor Lawson states that "an item of evidence--an evidentiary fact--is relevant when it renders a material ultimate fact more probable or less probable than it would be without the item." R. Lawson, The Kentucky Evidence Law Handbook, § 2.00 (1984). See also O'Brien v. Massey Fergerson, Inc., Ky., 413 S.W.2d 891, 893 (1967). It is impossible to determine statutorily, the thousands of circumstances that may arise where the prior sexual history of a complaining witness may be relevant, and where the probative value of the evidence outweighs its prejudicial effect on the jury and the prosecuting witness. This is the major constitutional flaw in Kentucky's rape shield law. While such a situation will arise only in the unusual case, the legislature can not establish a bright line rule that paints relevance in blacks and whites. By definition, the concept of relevance must be viewed on a continuum. At one end of the scale the evidence is clearly irrelevant, at the other, clearly relevant. It is the function of the trial judge to determine this relevance on a case-by-case basis, excluding even relevant evidence for policy reasons where its probative value is outweighed by its prejudicial effect, and admitting such evidence where its probative value outweighs the prejudicial impact. Yet, Kentucky's law does not contain this judicial mechanism.

IV. Due Process Balancing and Rape Shield

Framed in the context of the Chambers line of cases, the question becomes whether or not the prior sexual history of the complaining witness may ever be probative of an issue that is material to determining the guilt of a defendant charged with a sex crime. Certainly, there will be some cases where chastity evidence is directly related to whether the complaining witness consented to a sex act with the accused. After determining that such evidence is relevant and would aid in the fact-finding process, one must look to the reason for which the evidence is offered to determine whether the defendant's right to present a full defense overrides the state's policy of excluding such evidence.

The articulated policies that support the rape shield law are many. The law protects the dignity of rape victims, and thus, encourages the reporting and prosecution of sex crimes. Furthermore, the

shield law protects victims from embarrassment and humiliation. In other words, the rape shield law protects the victim's right to personal privacy in the area of consensual sexual activity. Similarly, the statute aids in the truth finding process by excluding evidence that is unduly inflammatory and prejudicial. It has been stated that jurors react emotionally to evidence of a complaining witness' past sexual history. Such evidence distracts the jury from determining whether the prosecution has proved the crime because the evidence prejudices the jurors toward the prosecuting witness, and so, affects the outcome of the trial. However, the state also has an interest in protecting the defendant from false accusations by untruthful witnesses. In its about-face concern for the complaining witness, Kentucky has failed to sufficiently protect, as the Constitution requires, the one accused of the crime.

In Davis v. Alaska, supra, the Supreme Court recognized that the juvenile shield law was a valid legislative statement of public policy. However, this policy was forced to yield in the face of a more compelling policy; the defendant's right of cross-examination to show possible biases, prejudices, or ulterior motives. Indeed, under Davis, the state's interest in exclusion must be sufficiently compelling and probative, and the value of the offered evidence slight, to justify the exclusion.

One can imagine several fact patterns where the prior sexual history of the complaining witness with third parties would be crucial at trial. One can easily construct scenarios that would require the admission of such evidence on constitutional grounds. A couple of examples illustrate this point. For instance, constitutional questions arise where there is evidence of a pattern of promiscuous sexual conduct or prostitution under similar circumstances to the case at hand. Other constitutional questions arise when the defendant seeks to admit the witness' prior sexual history to show bias, prejudice, or undue motive that would affect the credibility of the witness' testimony that she did not consent. See State v. Delauder, supra.

Several rape shield statutes in other states recognize as relevant, evidence of prostitution or indiscriminate sexual conduct. These statutes admit such testimony following an in camera hearing to assess the probative value of the evidence versus its prejudicial effect. See Minn. Stat. Ann., § 609.347; Neb. Rev. Stat. §§ 28-321 to 323; and Fla. Stat. Ann., § 794.001(2). Indeed, a Minnesota case applied the common evidentiary standard of "common scheme or plan" in a sex case. State v. Hill, Minn., 244 N.W.2d 731 (1977).

If rules of evidence are to be uniformly applied, what distinguishes a pattern of promiscuous sexual conduct on the part of the prosecuting witness, from the common law doctrine that allows the introduction, against the defendant, of prior bad acts or crimes to show a common scheme or plan, motive, or intent. Indeed, this is the evidentiary rule in Kentucky. Evidence law is premised on the notion that rules of admissibility do not develop differently for each substantive crime, but rather focus on issues common to all trials. Yet, Kentucky's rape shield law sets a stricter standard of admissibility of evidence on the consent issue than it does on the issue of forced intercourse.

While evidence regarding the past sexual misconduct by the accused with third parties is admissible in some instances, Kentucky's rape shield law absolutely bars the admission of such evidence as to the victim and third parties. Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985) held:

> Evidence of independent sexual acts between the accused and persons other than the victim are admissible if such acts are similar to that charged and not too remote in time provided the acts are relevant to prove intent, motive or a common plan or pattern of activities.
> Id. at 552.

Indeed, under Kentucky's statute, the defendant is prohibited from introducing evidence of prostitution by the complaining witness, or other testimony to show the witness had engaged in sexual practices with persons similar to the defendant under similar circumstances. This distinction cannot be constitutionally justified. Even when one examines the state's interest in protecting a sex victim by keeping potentially prejudicial information from the jury, the state's general interest cannot prevail where the defendant's need in the evidence is specific and legitimate. Davis v. Alaska, supra; U.S. v. Nixon, supra.

Another example where the rape shield law clearly effects a defendant's right to present probative evidence to the jury is premised upon the holding in Davis v. Alaska, supra. Davis held that the confrontation clause was violated by Alaska's refusal to permit the defense in cross-examining a crucial witness "to show the existence of possible bias and prejudice."

Id., at 317. In a later case, State v. Howard, N.H., 426 A.2d 457 (1981), the New Hampshire Supreme Court held that a defendant accused of statutory rape must be given the opportunity to demonstrate that due process requires the introduction of a victim's prior sexual history in a particular case, where the probative value outweighs the prejudicial effect on the complaining witness. Relying on Davis v. Alaska, supra., the Howard court stated:

> In seeking out the truth in defending himself, the defendant must be afforded the right to present evidence and cross-examine witnesses in an effort to impeach or discredit their credibility, and to reveal possible 'biases, prejudices, or ulterior motives of the witnesses as they may relate directly to issues or personalities in the case at hand. ...Strictly construed, our state rape shield statute precludes an accused from making any showing that the victim's prior sexual activity has a bearing on any of these factors.
> Id. at 460.

The Howard court found the statute constitutional on its face, but unconstitutional in its application.

Kentucky courts have also demonstrated a sensitivity to evidence which tends to establish bias, prejudice or motive to lie. In Parsley v. Commonwealth, Ky., 306 S.W.2d 284 (1957), the court observed:

> The interests of a witness, either friendly or unfriendly, in the prosecution or in a party is not collateral and may always be proved to enable the jury to estimate credibility. It may be proved by the witness' own testimony upon cross-examination or by independent evidence.
> Id.at 285

See also Clark v. Commonwealth, Ky., 386 S.W.2d 458 (1965).

These are only two examples where the constitutionality of Kentucky's rape shield law is subject to challenge. By focusing on the purpose for which the evidence is offered, one establishes the relevance of the testimony as well as probative value or potential prejudice to the truth finding process itself. Moreover, by demanding an in camera hearing before the trial court, on evidence automatically excluded by the shield statute, one can set the stage for appellate review on issues with great constitutional implications.

V. Conclusion

As a general proposition, the frequency of the complaining witness' prior sexual experience does not normally show a tendency to consent or an inability to be truthful. Nevertheless, the Kentucky rape shield law must be constitutionally challenged in its absolute prohibition of evidence of the prosecuting witness' sexual relations with third parties. The Kentucky courts must be given the opportunity to construe the statute so as to uphold the constitutional rights of the defendant while creating the least possible interference with the legislative purpose reflected in it. This can be done by utilizing traditional relevancy analysis, i.e., whether the offered evidence makes the truth or falsity of the disputed fact more or less likely. If the evidence is relevant, the Davis v. Alaska, supra, balancing test must be employed to weigh the state's interest that rape shield was designed to protect against the probative value of the excluded evidence. We must continually question the statute's failure to provide the defendant with a procedural mechanism or opportunity to demonstrate before the trial judge that due process requires the admission of prior sexual history evidence because the probative value in this case outweighs its prejudicial impact on the complaining witness and the jury. Unless and until such a procedure is established by the Kentucky courts, the sixth amendment rights of a criminal defendant accused of a sex crime will always be at risk. In narrowly framing the issue to the trial judge, through a written motion, and requesting an in camera hearing on the relevance of such evidence, we can preserve for appellate review the automatic exclusion of evidence that could change the outcome of the fact-finding process.

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6th Circuit Highlights


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BATSON HEARINGS

In United States v. Davis, ___ F.2d ___. 40 Cr.L. 2358, 16 S.C.R. 3,8 (1987), the 6th Circuit reviewed the procedure one federal trial court followed in dealing with a Batson challenge. During voir dire, defense counsel objected to the government's use of peremptory challenges to remove black jurors. When the defense established a prima facie case of racially motivated exclusion of blacks from the jury panel, the trial court allowed the prosecution to explain the reasons for its exercise of the challenges in an in camera hearing. After the hearing, the court concluded that the prosecution was justified in exercising its challenges but would not disclose on the record what transpired during the hearing.

The Sixth Circuit held that the right to be present at trial, under the Constitution and federal rules, was not violated by the exclusion of the defendants and their counsel from the in camera hearing in which the prosecution explained its peremptory challenges. The Court stated that once the defense had established a prima facie case of racial motivation sufficient for the trial court to make inquiry of the prosecution, there was nothing more for the defense to do and their participation was no longer necessary for the trial court to make its determination.

The Sixth Circuit limited its decision to this case alone and expressly declined to establish general procedures to be followed when a Batson challenge arises.

BLIND STRIKE PEREMPTORIES

The 6th Circuit found no Sixth Amendment violation in the blind strike method of exercising peremptory challenge in United States v. Mosely, ___ F.2d ___, 40 Cr.L. 2364, 16 S.C.R. 3, 11 (1987). Under the blind strike method, both the defense and prosecution exercise their peremptories simultaneously without benefit of knowing who the other side is striking. The Court noted that since the true nature of the peremptory challenge right is to reject rather than select potential jurors, the mere simultaneous exercise of challenges does not impair the accused's rights under the Sixth Amendment.

ABSENCE OF COUNSEL

Counsel for one of three jointly tried co-defendants experienced an unexpected scheduling conflict during the presentation of the prosecution's case. As a result of the conflict, counsel was unable to cross-examine the prosecution's first witness (the victim) but informed the trial court he would be satisfied with any cross-examination conducted by co-defendant's counsel. The client's objection to proceeding in her counsel's absence and her request for a new attorney were denied. The Sixth Circuit held that defense counsel's absence from the trial proceedings was per se prejudicial and not subject to a harmless error analysis.

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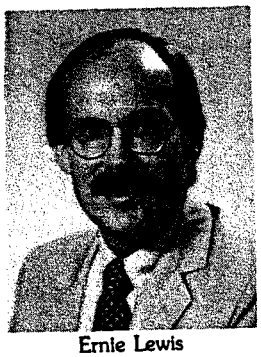
Plain View


Ernie Lewis

In this month's Advocate, the article is devoted to a summary of the law on search warrants. Recently, the courts have been quite active in search and seizure cases. These cases will be analyzed in detail in the June issue of The Advocate. Counsel with search issues should be aware of the existence of the recent decisions in case counsel has a search issue come up in an existing case. Those cases are as follows:

1) Colorado v. Bertine, 479 U.S. __, 93 L.Ed.2d 739, 107 S.Ct. 738, (Jan. 14 1987). Here, the Court approved of the warrantless search of a closed container found in an impounded car where the search was accomplished pursuant to standard police procedures;

2) Maryland v. Garrison, ___ U.S. ___, 107 S.Ct. 1013, ___ L.Ed.2d ___ (Feb. 24, 1987). Here, the Court approved a search conducted pursuant to a warrant authorizing the search of a "third floor apartment," when, unknown to the police, there were two apartments on the third floor;

3) United States v. Dunn, __U.S. __, 40 Cr.L. 3313 (Mar. 4, 1987). The Court revisited the "curtilage" doctrine, holding that police could look from an open field into a barn sixty yards from a house without violating the Fourth Amendment;

4) Arizona v. Hicks, __U.S.__, 40 Cr.L. 3320 (Mar. 3, 1987). The Court ruled against the state in a rare fourth amendment victory for criminal defendants. The Court held a search was unreasonable where an officer, admittedly on the premises legally, without probable cause moved stereo equipment in order to record identification numbers;

5) Todd v. Commonwealth, Ky., 716 S.W.2d 242, (Sept. 4, 1986). The Kentucky Supreme Court discusses preservation of search and seizure issues;

6) Hargrave v. Commonwealth, Ky., __S.W.2d __, (Nov. 26, 1986). Here, the Court looks at a Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) issue with little elucidation.

Search Warrants

". . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
Fourth Amendment to the United States Constitution.

". . . no warrants shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."
Section 10 of the Kentucky Constitution.

These brief passages from our Constitutions guarantee some of the most precious rights of our citizens. They have also provoked mountains of pleadings, orders, decisions, all trying to explain precisely what the law is when a warrant is involved. From these mountains come the following checklist which will hopefully be of use to defenders when warrants arise. This checklist of questions is intended to be a starting point and not a comprehensive guide to warrants.

1) Is the warrant signed by a neutral and detached magistrate? At a minimum level, this means a warrant may not be issued by a prosecutor or other law enforcement official. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The magistrate cannot be partial in any way. For example, a system whereby the magistrate receives money for each warrant obviously calls into question the neutrality of the issuer of the warrant. Connally v. Georgia, 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed.2d 444 (1977).

RCr 13.10 establishes only that "a search warrant may be issued by a judge or other officer authorized by statute to issue search warrants." Obviously a judge may issue a warrant. He cannot, however, give another person the authority to issue warrants. Turner v. Commonwealth, Ky., 328 S.W.2d 413 (1959).

2) Has the magistrate abandoned his neutrality and become a law enforcement official? Obviously, the Coolidge rule above would have little meaning if judges start

acting like prosecutors. It doesn't matter if they know little about search and seizure law, Stephens v. Commonwealth, Ky., 522 S.W.2d 181 (1975), just that they are neutral. Where a judge helps execute search warrants, decides what can be seized, rides with police officers and helps them exercise their discretion, then she has abandoned her neutral role, and the warrant will not be upheld by a reviewing court. Lo-Ji Sales Inc v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979). Nor will the officer be able to rely in good faith on such a warrant. U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). (It should again be emphasized that Kentucky has not affirmed the good faith exception as of the date of this writing, and that under Section 10 it is hoped that the Courts will affirm that our tradition does not allow for such an exception. Nor can it be said, based upon the numbers of cases kicked out in Kentucky based upon faulty warrants, that such an exception is needed anyway. Little reference, therefore, will be made to the effect of the Leon or Massachusetts v. Sheppard, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) upon these rules).

The Lo-Ji Sales rule should also apply where a judge always issues search warrants upon request. It is submitted that where a judge has become nothing more than a rubber stamp for warrants, that under Lo-Ji Sales she has abandoned her neutral role, and warrants by such a magistrate should not be upheld.

3) Is the affidavit sworn to? The requirement of an oath or affirmation is contained in both constitutional provisions. It simply means that the affidavit in support of the petition for a warrant must be sworn to by the affiant. But see Clark v. Commonwealth, Ky., 418 S.W.2d 241 (1967). That which is sworn to then becomes that which is reviewable. Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). The affidavit should be sworn to in front of the magistrate, although swearing before a notary will do. Owsley v. Commonwealth, Ky., 428 S.W.2d 199 (1968).

There is no requirement of a written affidavit. A Court may simply receive a sworn, oral statement prior to issuing the warrant. These do not have to be recorded.

4) Does the affidavit supply enough facts to demonstrate probable cause? A magistrate must be given more than mere conclusions. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Facts supporting affiant's belief must be contained in the affidavit or the warrant will be void. Smallwood v. Commonwealth, 305 Ky. 520, 204 S.W. 2d 945 (1949); Johnson v. Commonwealth, Ky., 443 S.W.2d 20 (1968).

Another way probable cause may be established is for the officer to attach supporting documents to the affidavit, and then to incorporate the attachment into the affidavit.

5) Does the warrant appear sufficient when measured by the four-corners of the affidavit? If not, then the warrant will be void. Ruth v. Commonwealth, Ky., 298 S.W.2d 300 (1957).

6) Is probable cause in the affidavit established by the use of

AOC-79-340
Commonwealth of Kentucky
Court of Justice
Ky. Const. §10; RCr 13.10

SEARCH WARRANT

Case No. _____
Court _____
County _____

TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY:

Proof by affidavit having this day been made before me by _____

a peace officer of _____
that there is probable and reasonable cause for the issuance of this Search Warrant as set out in the affidavit attached hereto and made a part hereof as if fully set forth herein; you are commanded to make immediate search of the premises known and numbered as

and more particularly described as follows:

and/or in a vehicle or vehicles described as:

and/or on the person or persons of:

the following described personal property:

and if you find the above described property or any part thereof you will seize the property and deliver it forthwith to me or any other court in which the offense in respect to which the property or things taken is triable, or retain it in your custody subject to order of said court.

_____, 19___ _____ Judge
_____ Court

Executed on this the _____ day of _____, 19_____, by Officer _____, of the _____, badge number _____, by searching said premises/vehicle/persons described herein and by seizing the following:

unreliable hearsay? Aguilar-/Spinelli is no longer the complete statement of the law following Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and adopted in Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984). Yet, the factual basis of the informant's information, and the reliability of the informant, remain important factors even after Gates/Beemer. Now, the probable cause evaluation involves these factors as well as any other factors pertinent to the "totality of the circumstances."

7) Does the affidavit contain a knowing misstatement? If so, then the warrant is ripe to be challenged. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). This presumably overrules Caslin v. Commonwealth, Ky., 491 S.W.2d 832 (1973).

Counsel first establishes the knowing or intentional misstatement or reckless disregard for the truth.

Once the defendant makes a sufficient showing, a hearing is held where the defendant has the burden of proof by a preponderance of the evidence. At the hearing, a warrant will be voided where counsel can show the misstatements were necessary to the probable cause finding.

7) Is the affidavit missing something material that would effect the finding of probable cause? Deliberate, material omissions are grounds to challenge the search warrant. People v. Kirkland, Ca. 618 P.2d 213 (1980).

Note that the misstatements and omissions are those made by the affiant and not the informant. Only where the officer knows of the informant's misstatements can the informant's misstatement be part of a Franks challenge.

Counsel should be alert in the Franks situation to the attempt by the police to continue to hide the identity of the informant. There is a good argument that where the defendant makes his threshold showing that a material misstatement has been made by an affidavit, that the prosecution must produce the informant at the Franks hearing.

8) Was the affiant posing as someone else? Obviously, there the warrant will be void. Hay v. Commonwealth, Ky., 432 S.W.2d 641 (1968).

9) Does the affidavit show the time of the occurence of facts which were observed and which establish probable cause? If not, the warrant can be challenged. Bentley v. Commonwealth, 239 Ky. 122, 38 S.W.2d 963 (1931); Bruce v. Commonwealth, Ky., 418 S.W.2d 645 (1967).

10) Did the magistrate even review the affidavit? If you can prove the magistrate did not even read the affidavit, even where it establishes probable cause, the warrant may be bad. Rooker v. Commonwealth, Ky., 508 S.W.2d 570 (1974).

11) Is the place to be searched described with sufficient particularity? The warrant must describe the place to be searched so that a reasonable police officer could find the place. Steele v. United States, 267 U.S. 498, 455 S.Ct. 414, 69 L.Ed.2d 757 (1925); Commonwealth v. Appleby, Ky. App., 586 S.W.2d 266 (1978). In a city, this means that a street name and number will usually be enough. In rural areas, a general description of the house and area is all that is required. Commonwealth v. Martin, Ky., 280 S.W.2d 501 (1955). It does not have to have the specificity of a deed. McMahan's Adm'x v. Draffey, 242 Ky. 785, 47 S.W.2d 716 (1932).

12) Does the place to be searched contain a number of units? If the warrant names a place to be searched, such as an apartment building or motel, then to meet the particularity requirement the specific unit must also be named. But see Maryland v. Garrison, __U.S.__, 40 Cr.L. 3288 (1987) where the police search of a second unit on the third floor pursuant to a warrant authorizing a search of a specific unit on the third floor was upheld. On the other hand, if more than one person occupies the same unit, a single warrant describing the unit will meet this requirement. If a number of buildings are involved, the warrant must name them, and obviously there must be probable cause as to each of the buildings.

13) Does the warrant particularize a place, and then authorize a search for all persons or automobiles? Unless these are unique circumstances, such a warrant will be overbroad.

The idea is for the magistrate to exercise discretion regarding the place to be searched. Ideally nothing should be left to the discretion of the police officer executing the warrant. Commonwealth v. Chaplin, 307 Ky., 630, 211 S.W.2d 841 (1948).

14) Is the thing to be seized described with as much particularity as is reasonable under the circumstances? The black-letter rule is that the warrant must describe the thing to be seized with particularity so that nothing is left to the discretion of the executing officer. Marron v. United

States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed.2d 231 (1927); Wilson v. Commonwealth, Ky., 621 S.W.2d 894 (1981).

Calling for a seizure of the "weapon used in the robbery" is usually not descriptive enough. Allowing for a seizure of "all burglary tools" or "instrumentalities used in the crime" also suffer from the lack of particularity.

There must obviously be probable cause to believe that the particular item to be seized is at the particular place to be searched. There must also be probable cause to believe that the item is presently at that place. The warrant itself cannot be broader in terms of the items to be seized than the probable cause upon which it is based.

15) Does the thing to be seized have any unique characteristics? Contraband such as controlled substances do not have to be described with as much particularity as do other items. This rule does not apply, however, to stolen property, because usually such property has no unique characteristic telling the executing officer that it by its very nature should be seized. If the item is generally in lawful use in substantial quantities, then the description in the warrant should be drawn with greater care. If other similar items are to be found at the place to be searched a carefully written warrant is required.

Where the item to be seized has First Amendment consequences, greater particularity is often required. But see New York v. P.J. Video, Inc., 475 U.S. __, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986). Documents must also be described with a great deal of particularity, because of the serious privacy interests. Andressen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

16) Can the defective warrant be saved by severance or an attached affidavit? Where the warrant is particular in its description of numerous items, but too general with one item, that warrant may be severed, and the items lawfully seized may be admitted into evidence, so long as the items seized were not obtained during the search for the poorly described item. U.S. v. Cook, 657 F.2d. 730 (5th Cir. 1981). Likewise, where a warrant has attached to it an affidavit specifically describing the item to be seized and where the warrant refers to the attached item, the defect in the warrant may not be fatal.

17) Was the warrant executed while there was still probable cause? Probable cause is a fluid concept, and as such can turn stale. Once it is stale, the warrant may no longer be executed.

18) Was the warrant executed at night? Kentucky has no specific rule regarding the execution of warrants during the nighttime, nor does there appear to be a specific constitutional prohibition of such executions. Gooding v. United States, 416 U.S. 430, 94 S.Ct. 1780, 40 L.Ed.2d 250 (1974). Professor LeFave argues that there should be special justification shown for executing a warrant during the night, and that suppression should be granted when no such justification exists.

Rule 41(c) of the Federal Rules places strict limits on the nighttime execution of the warrant. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) also lends support to the challenge to a nighttime execution. See also U.S. ex rel Boyance v. Myers, 398 F.2d 896 (3rd Cir. 1968).

19) Was the occupant there at the time of the warrant's execution? Again, there is no rule requiring the warrant to be executed before the occupant of the premises. Where this is done, counsel should challenge the practice and demand a special justification.

20) Was notice given to the occupant prior to entry? Indirect support for notice prior to entry can be found in Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). No Kentucky statute or case requires such notice, however.

Notice is especially required prior to entry by the use of force. However, where the police pass through an open door without notice, courts have divided on the question of whether this invalidates the search.

The police should tell the occupants that they are the police and that they are there in order to execute a search warrant. Then they must wait a reasonable period of time prior to breaking into the place to be searched.

21) Are there special circumstances militating against the notice requirement? Where the police reasonably fear that giving notice will result in the destruction of the items to be seized, no notice is required. Likewise, notice is not required if to give such notice would likely increase the possibility of a violent response from the occupants.

22) Were persons detained, searched, or arrested during the execution of the search warrant? A

person named in the warrant may obviously be searched. A warrant, however, cannot simply allow a search of "all persons found" in a specific place.

A search of a person not named in the warrant to search a place is not allowed. Ybarra v. Illinois, 444 U.S.85. 100 S.Ct. 338, 62 L.Ed.2d 238 (1979).

A frisk of persons found at the scene of the place to be searched by a warant is allowed where there is the requisite articulable suspicion. U.S. v. Ward, 682 F.2d 876 (10th Cir. 1982).

A person may be searched if there is probable cause to believe that he is concealing the thing named in the warrant.

Obviously, under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), a person may be searched at the scene of the warrant execution where there is an articulable reason to believe the person is armed and a threat to the officer.

A person may be detained while the warrant to search for contraband is being executed. Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

23) Was more of the place searched than was authorized in the warrant? The warrant itself governs how much of an area may be searched. Johnson v. Commonwealth, Ky., 296 S.W.2d 210 (1957); McMahon's Adm's v. Draffen, 242 Ky., 785, 47 S.W.2d 716 (1932);

24) Was the search more intense than appears reasonable under the circumstances? The intensity of the search is governed by the description of the things to be seized. The police may only search places where the named item can reasonably be expected to be located. See Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947).

If the warrant names only premises and not cars, the cars probably should not be searched, unless they are in the garage or perhaps in the curtilage. Perkins v. Commonwealth, Ky., 383 S.W.2d 916 (1964).

25) Did the officers stay for an unreasonably long time? If so, then the search can be challenged on that basis. Once the purpose of the search is accomplished, the officers cannot remain and continue their search. Nor may the officers return and re-execute the warrant once its purpose has been accomplished.

26) Were items seized that were not named in the warrant? Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) holds that items not named in the warrant may be seized when they are inadvertently discovered in plain view while executing the warrant. Only those items that are obviously incriminating may be seized, however. See Basham v. Commonwealth, Ky., 675 S.W.2d 376 (1984); Jones v. Commonwealth, Ky., 416 S.W.2d 342 (1967).

27) Was the warrant returned as executed? RCr 13.10(3) requires a return "within a reasonable time of its execution" showing the "date and hour of service."

28) Was the search a pretext or bad faith search? See Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); Scott v. United States,436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978).

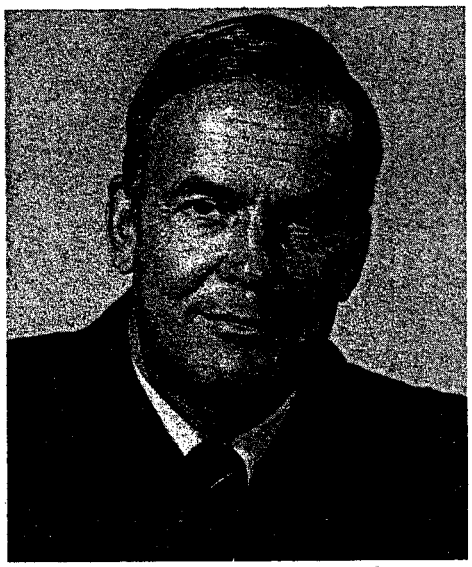
29) Are there any applicable state statutes pertaining to warrants? Obviously there are and counsel needs to be aware of them. RCr 13.10 has been mentioned above. Counsel should also be aware of other highly specific sections pertaining to warrants. KRS 242.370 establishes special search and seizure rules in alcoholic beverage cases. KRS 218A.260 provides rules pertaining to informants under KRS Chapter 218A. KRS 70.078 and 70.180 establish rules for sheriffs for use in breaking into buildings to effect an arrest. KRS 431.005 and 431.025 establish the rules for arresting persons both with and without a warrant. KRS 15.725 sets out the rules for circuit clerks to use in issuing criminal warrants.

It must be stressed that this checklist is for perusal use only. More thorough work is needed whenever a search warrant issue arises in your cases.

Ernie Lewis
Assistant Public Advocate
Director
Madison Co. Public Defender Office
(606) 623-8413

Trial Tips

For the Criminal Defense Attorney



Justice Stephens

VIDEO RECORDING HAS A BRIGHT FUTURE

I read with considerable interest The Advocate's recent article authored by Judge Charles B. Lester of the Court of Appeals in which he explains his misgivings about our program of substituting video recording for conventional court reporting.

I can't blame any judge or lawyer who says that he is more comfortable working with the traditional transcript than a video tape. We are, after all, accustomed to transcripts. They have been a part of the judicial process for about 100 years. While it is true that most of us have video recorders in our own homes and use them daily, we are not accustomed to courts taking advantage of technological change.

My disagreement is with the attitude so vividly portrayed in Judge Lester's article: change, no matter how great the ultimate benefit, is fine so long as it works perfectly the first time and no effort or inconvenience is occasioned in the process.

We have more than five years of experience with video recorders. Beginning with the manually operated system installed for Judge James Chenault in Madison County and culminating with the fully automatic audio/video court recording system installed to date in seventeen courtrooms we have proven that the system is a highly accurate and reliable method of recording court proceedings.

Is the system problem free? No. Does it require some effort on the part of judges and lawyers? Yes. Can it be improved with some effort to meet all of our needs? Definitely. Nothing worthwhile is achieved without hard work. If this system is to be as successful as it can be then those of us who have chosen the judiciary as our career must look at this and other innovations with the attitude of how can I make this work better, rather than what imperfections can I find.

Why bother? Because the people who pay the freight, the taxpayer and litigant, are entitled to the great benefits of economy and efficiency which are achievable. Videotapes for a one week trial cost the litigant about $75 and are available almost instantly. They can be reviewed on the standard one-half-inch VHS video recorder so prevalent in the consumer and commercial markets. A traditional transcript would cost about $2,500 and may take weeks or months to prepare.

Moreover, I am delighted with the further step which has been taken by Judges James Chenault and William Jennings of providing public access to court proceedings by allowing the local cable television to transmit the official pictures and sound of the court recording system over a cable channel. There has been a tremendous and favorable public reaction. People are seeing what their courts are really like. People are finding out that the negative stereotypes of judges, lawyers, and the courts and legal profession generally, are not true. People are discovering that their courts are something of which they can be proud.

Is that worth some effort, some inconvenience, some flexibility on the part of the profession? My answer is yes.

In my experience of more than four years as Chief Justice participating in the National Conference of Chief Justices, I know of no program in any court in the United States which holds more long term promise for public value than our audio/video court recording program.

Robert F. Stephens
Chief Justice
Kentucky Supreme Court
Capitol Building
Frankfort, Kentucky 40601
(502) 564-6753

Schizophrenia

ANNOUNCER: Today there are more than two million people in this country who are victims of schizophrenia. Schizophrenia is a disorder that shatters thought and emotion and it fractures a person's sense of reality. It is not, as commonly thought, a disorder of split or multiple personalities. The symptoms of schizophrenia usually appear quickly, often in late adolescence, often within a few months or a year. And the life of a young person is changed forever.

It is a process that devastates the families as well as the victims.

In the first of two stories on schizophrenia, reporter Michelle Trudeau introduces us to the parents of one young schizophrenic. They have asked us not to use their family name to protect their son because they know a stigma still surrounds severe mental illness.

MOTHER: It began his second year at Harvard when he checked himself into the hospital because he was scared. He was hallucinating and he was hearing voices and he had the good sense to seek help. Shortly after, we managed to get him home.

FATHER: He came home, took me up to a television set the first day he was home and said, "look, don't you see they all want me dead." There was some quiz show on, but he was hearing from the television set that the world wanted him dead and they were all laughing at him. And that afternoon he stood, oh, maybe ten feet from where we are here, and ran toward those thick front doors, using his head as a battering ram, and I've never heard a baseball hitting a bat with the sound that I heard as David's head went slamming into the front door and he picked himself up from where he had fallen, and backed up and was going to do it again. And I restrained him and had Elaine call out for emergency help. And that's when we hospitalized him at a psychiatric hospital for the first time.

REPORTER: Four years ago Dan and Elaine discovered that their son David had been stricken with mental illness. Up to that time, their family life had been stable and happy. They had had little experience with mental illness and they had never had any problems with David.

FATHER: David, as an infant did all the right things very quickly. His pediatrician used to fell (sic) over him saying he's perfect in every way. He did all the developmental things either on time or ahead of time. He was beautiful to look at. You would walk into a room with him even as a tiny one and people would react.

REPORTER: Dan and Elaine raised David and their other two children in an upper class neighborhood in Los Angeles. Dan is a documentary film maker, Elaine a musician. David is the oldest of the children, just 24. And it was always David who stood out.

MOTHER: All through his life he was just an extraordinary youngster, very positive. Brilliant student, very handsome, social, athletic, high achiever. Certainly no personality disturbances or social problems or behavior problems.

REPORTER: In 1978 David went off to Harvard. He did well his first year. But soon he began to telephone his parents complaining that people were trying to hurt him. David was so terrified by his suspicions that he checked himself into the college psychiatric clinic. Soon after, he was sent home to his parents.

MOTHER: And at the time we thought that it was something that he could get over. We weren't thinking schizophrenia right at the beginning. The word was sort of even

difficult to deal with, but his first psychiatrist when we would say, what is it? would say, well, it's probably this. Meaning a thought disorder that he will pull out of. And I said, but what if it isn't that, and he said, well, we don't even want to talk about it. But what if it isn't that, and he said well then it will be schizophrenia, bad news.

REPORTER: David continued to have all the signs. He was hallucinating, hearing voices, he was frightened that people were trying to kill him. After several months, he was diagnosed as schizophrenic. The disease, schizophrenia, condemns its victims to a life of pain, confusion and terror. It is a disease that causes the very fabric of one's mind and personality to disintegrate Perhaps the cruelest of the mentally illnesses and the least understood. We do know that throughout the world one out of every 100 people is afflicted with schizophrenia. It's a disease that can strike any family, any of our children, usually as they are about to enter adulthood. David was just 20. For the first three years Dan and Elaine tried to keep their son at home to live with his madness, but during this time, whenever his condition became especially severe David would have to be hospitalized.

FATHER: One hospitalization was caused when he came into his brother's room and he stood over his brother who was lying in bed and said, "I'm going to kill you." And Steve, who loves Dave, said, "Oh, come on Dave, please I'm sleepy, go away." And he said, "No, I'm going to kill you. Hit me Steve, hurt me," and Steve said, "Dave I love you, I don't want to hit you." And David hit Steve and said, "Hit me, like that, hit me." And kept hitting Steve and hitting Steve and hitting Steve and I heard Steve cry out and I went in there and I pulled David away. Well, David went to the hospital, he was out of control and he had attacked his brother.

MOTHER: And it's a terrible thing, it's such a demeaning, dehumanizing thing to call the police on your own child. To see the police take him out in hand cuffs, but you get hardened to the reality of this illness. You get hardened into what you have to do to get your child help.

REPORTER: Living with a schizophrenic is in many ways living with a stranger. The schizophrenic's world is full of confusion and distorted perceptions. Often wild ideas make the schizophrenic behave in a bizarre way to protect himself against what he perceives as a life threatening world around him.

FATHER: So we had a whole sequence of things start to happen there where he would go down the street and perceive people making obscene gestures at him or spitting at him or bumping into him or all kinds of assaults and abuses that he would perceive. And quite often, he was the one who was doing those kinds of behaviors to people. He would rage on street corners, he would reach out and make untoward physical contact especially with women.

MOTHER: Or his perception is so off he will think when he's walking down the street that somebody is coming right for him to hurt him because his spacial perception is off.

FATHER: David was explosive. Everybody pussy-footed around him. Nobody wanted to incur his wrath. The difficulty with a person that ill in the home is that they seem to get to do anything with impunity. There are no consequences for their actions, because you say, well he's so sick. Try not to get him upset. Try to say things softer or he will perceive that you are looking at him in a strange way and get upset about it.

MOTHER: He may be threatening, he may be verbally abusive, he may lock himself in his room and not want to come out for dinner, so I never know. One of the things about the illness is the unpredictability of it.

REPORTER: Unpredictability is a hallmark of schizophrenia. The nature of the disease changes, develops, expands. Dan says just as he starts to see a certain logic to his son's illness, it moves off in another direction.

FATHER: In the last year he has become obsessed with voices. He speaks for the voices and answers them. He is often hoarse, because he is just constantly babbling.

MOTHER: Right now he openly converses with, what he says, are a hundred voices that are in line to talk to him. Coming at him fast and furiously all the time and they keep him very busy.

FATHER: He has created whole cultures. He has one culture called the Spores who have no bodily form, they are just disembodied voices.

MOTHER: And I found the choice of name very intriguing because David insists that they are outside of him, sort of in the atmosphere, and Spores are invisible to us and they are in the atmosphere. But none the less, these Spores are very nasty and perverse. And they needle him and goad him and laugh at him and tell him bad things.

REPORTER: David has been ill now for four years. In and out of private and public institutions and jails. His parents have taken him to dozens of doctors and specialists. They have spent all of their savings. Have tried every therapy, every hope to get their son healthy, but David does not get better.

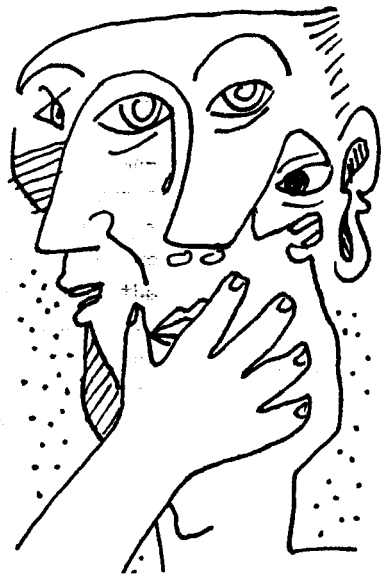
FATHER: So, you learn, you stumble and you try to decode and you look for help, and you blame and you do all those classic things. You deny that it's as bad as it is.

MOTHER: I can hate him in one of the forms of the illness when he is ragingly psychotic and abusive, but then I pull myself together and realize that it is the illness and not be angry at him.

FATHER: The person often gets treated as if he were the illness, as if he were some kind of thing. And we know the whole person so we are still in love with that person and that's the monstrous frustration for a family trying to revive the person that they have loved over these years and not allow the person to expire with that illness.

MOTHER: So I always think of him as a whole total one. The same little boy, the same adolescent, the same brilliant this, the same handsome that, the same star athlete, the same Harvard freshman, the same psychiatric patient, the same kid I had to call the cops on to have him dragged to Camerio, the same person who threw me down in the driveway, the same person who told me I'm not fit to walk the face of the earth, I'm scum. This is all the same person. And I see glimpses of the old David through the craziness, I see the same character traits and qualities that made him an extraordinary person when he was sane. He is an extraordinary person, but he's insane.

REPORTER: Dan and Elaine have recently decided that their son is too ill, too destructive to the family to continue living at home. So now David lives in a board and care facility for the mentally ill. A half hour from his parents. They bring him home to visit once a week.



MOTHER: I will give you a description of last Sunday. My husband picked him up at the place where he lives and David is a jazz musician and quite a jazz buff and on the radio coming home was a very beautiful rendition of "Over the Rainbow."

FATHER: And we were driving with the top pulled back on the car and it was a sunny day and David started to cry uncontrollably and reached over and took my hand and said, after the lyric line, said, Somewhere over the rainbow there must be a place for me or some such line, I forget the exact words, but he said, "God, I wish I could go there too." And he started to cry and I said, "Should I change it?" and he said, "No, no, it's such a beautiful feeling, I'm enjoying it, I just have to cry because I want to go."

MOTHER: You know what my real waking up in a cold sweat at 3:00 in the morning is, my fear is I'm an old lady, 75 or 80 years old, living in a cold water flat, taking care of Crazy David, who is an old man, the two of us are living there and he's still Crazy David, and he's still abusive to me and he still tells me I'm not fit to walk the face of the earth and I'm 80 and poor and alone and I've still got him. That's my worst nightmare.

FATHER: It's interesting, I don't have middle of the night wakeups and fears for David. I have very clear headed waking fears for David that it's almost too late to help him. My fear for him is that this marvelous person, who I watched develop with such awe, has been abandoned because nobody knows what to do. That's my fear for him. That as a thing he will be discarded and he's a person.

MOTHER: It is such a catastrophic illness. Its almost worse than losing a child to a physical illness, because then you can at least go through a normal grieving pattern and get over it and kind of pick up the pieces and let it go. But dealing with it daily, dealing with the tragedy of this daily is almost worse.

FATHER: The beauty I saw evidenced in David as a child came from marvelous intuitive leaps into the unknown. I honestly feel down deep inside me that the person that might be able to find the path way out of the morass for David, is David. Maybe through that same window through which he departed into his schizophrenia he'll come back having found something ou

there that he might be able to share.

MOTHER: I have been changed forever by my son's illness. I see things that I didn't see, I always see the others like David. And they've always been there, but I didn't see them. I was on a metro in Paris a few months ago with my husband and there it was. He looked like David, he could have been David. The same look in the eyes, same dress, same demeanor, and we looked at each other and we knew and I almost wanted to go up to him and talk with him. And he didn't scare me, I smiled at him. I saw other people move away from him on the metro. Everyone knew that this was a crazy kid. I see them on the street all the time and we have a, my husband and I look at each other and we say, there's one of ours, there's one of ours, one of ours.

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by Michelle Trudeau. This report on Schizophrenia aired on January 6, 1986 on National Public Radio's series All Things Considered. It was made possible in part by funds from the John D. and Catherine T. McArthur Foundation Copyright 1956 National Public Radio. Reprinted with permission.

New evidence sheds light on schizophrenia

Knight-Ridder News Service

Schizophrenics, whose hallucinations and bizarre behavior make them virtual outcasts from society, and their families can take heart from new evidence that schizophrenia is a brain disease caused by organic disorders, a nationally recognized psychiatric expert says.

"It has become abundantly clear that we're dealing with a brain disease like Alzheimer's or Parkinson's. No one is seriously proposing any more that schizophrenia is caused by adverse childhood experiences," said Dr. E. Fuller Torrey, author of *Surviving Schizophrenia* (Harper and Row, 1983, $19.23) and a study last year of the nation's mental-health care system.

According to some estimates, schizophrenia afflicts as many as one person out of every 100. "It's the most neglected disease in the United States," Torrey contended.

"We as a psychiatric profession have really neglected the disease and have not really made the attempt to treat it. Most cases were sent to a state hospital and never seen again."

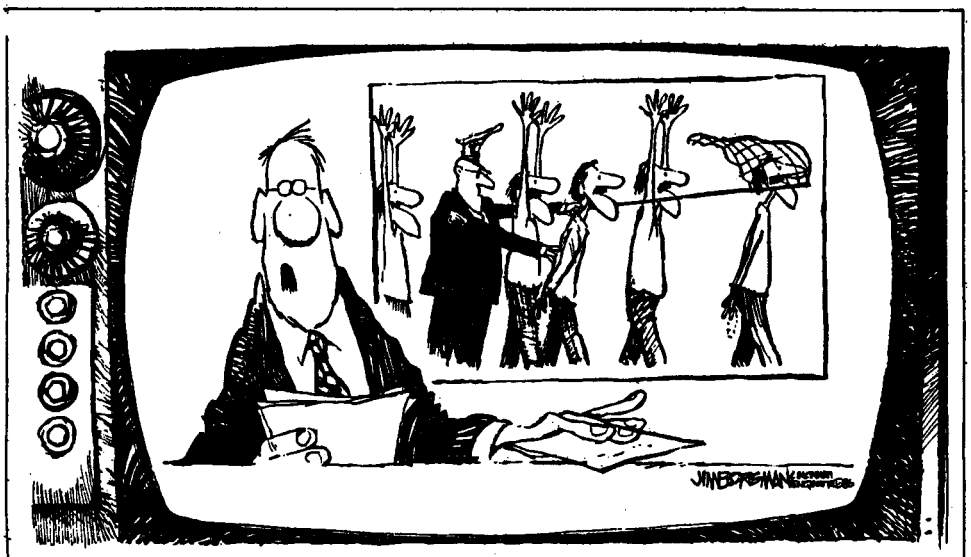
Torrey said modern drugs and professional treatment could restore many schizophrenics to "a reasonably normal life."

Torrey, a staff psychiatrist and researcher at St. Elizabeth's Hospital in Washington, D.C., is the author of five books. He is a co-author of last year's state-by-state ranking of mental-health systems published by the Public Citizen Health Research Group, a Washington-based watchdog organization.

The study was highly critical of public treatment programs for the seriously mentally ill, such as schizophrenics, who are often released from state hospitals with no place to go and no further treatment offered, according to Torrey.

"They are tossed back to the resources of their families or to the resources of the street," he said. "Families have become the primary care givers for the mentally ill throughout the United States."

LEXINGTON HERALD-LEADER, LEXINGTON, KENTUCKY, MONDAY, FEBRUARY 9, 1987



"THE OHIO HIGHWAY PATROL REPORTED TODAY THE RECOVERY OF EIGHT MORE OF WILLIAM MILLIGAN'S PERSONALITIES, BRINGING THE TOTAL TO THIRTEEN.... ELEVEN PERSONALITIES REMAIN AT LARGE."

Cincinnati Enquirer, June 21, 1986

Ask Corrections

ASK CORRECTIONS will be a regular feature of The Advocate. The column will be in a question/answer format responding to questions about sentence calculations sent in by readers. Betty Lou Vaughn, Administrator of Offender Records, Corrections Cabinet, will provide the answers. Ms. Vaughn has been a Corrections employee since August of 1969 and has worked as the Administrator of the Offender Records Section since 1975. If you have questions not yet addressed in this column, feel free to call either Betty Lou Vaughn at (502) 564-2433 or David Norat at (502) 564-5223.

All questions for this column should be sent to David E. Norat, Department of Public Advocacy, 151 Elkhorn Court, Frankfort, Kentucky 40601.

TO CORRECTIONS:

My client is on parole from a robbery first degree conviction for which he received ten years. As a result of a parole violation he was arrested and lodged in the county jail. Pending disposition he escaped from the county jail, was apprehended and convicted as a persistent felony offender in the first degree receiving a ten year sentence. I have two questions: a) What is his new total time to serve, and b) what is his new parole eligibility date?

TO READER:

The answer to question a) is that your client has a new total year sentence of 20 years, which for sentence calculations, commenced on the date of his commitment to Corrections Cabinet on the robbery first degree conviction. The time he will serve is 20 years less any time previously served on the robbery first degree conviction, less any jail time accrued on both convictions [KRS 532.120(3)], less any statutory good time [KRS 197.045(1)(2)] he will earn on both convictions and less any merit time he may be awarded [KRS 197.045(3)]. As to question b) his parole eligibility date is ten years from the date that he was received by Corrections on the persistent felony offender first degree conviction [KRS 532.080(7)] minus any jail time [KRS 532.120(3)] he received on this conviction.

TO CORRECTIONS:

My client has received three persistent felony offender first degree convictions on three separate indictments from the same county. He received twenty years on two of the convictions and ten years on one of the convictions all of which are to run consecutively. What is his total time to serve and what is his parole eligibility date.

TO READER:

His total time to serve is fifty years [KRS 532.120(2)(b)] minus jail time [KRS 532.120(3)], minus statutory good time [KRS 197.045(1)(2)] and minus any merit time he may be awarded [KRS 197.045(3)]. His parole eligibility date is ten years [KRS 532.080(7)] minus jail time [KRS 532.120(3)].

TO CORRECTIONS:

When does a parolee start earning time on his sentence when he has been picked up as a technical parole violator.

TO READER:

A parolee starts earning time on his sentence starting from the date he is held on a parole violation charge. That date may be one of the following:

1. The date a parole violatio. detainer, issued by a Kentucky parole officer is lodged against a parolee.

2. The date a parole violation warrant is issued by the Parole Board against a parolee who is serving a sentence as a result of a misdemeanor conviction. (Note that it is the date of issuance and not the date of service).

3. The date a parolee is discharged from an out-of-state institution (serving on a felony conviction), to a Kentucky parole violation warrant.

Betty Lou Vaughn
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Department of Corrections
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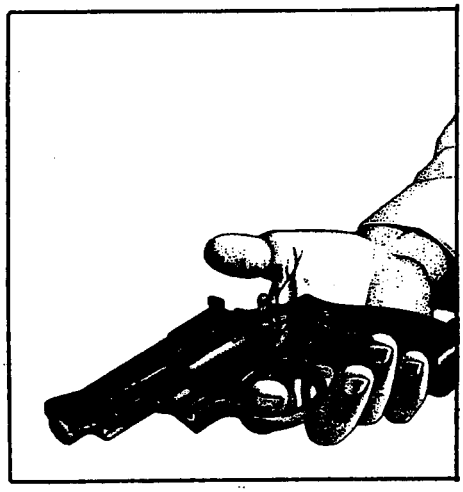
Forensic Science News

HOW EXPERT IS THE EXPERT WITNESS?

NARRATOR: Crime detection has become increasingly sophisticated. And the "expert witness" is quite common in today's courtroom. Often, it's the job of that witness to interpret extremely technical data, such as chemical analyses done in a forensic laboratory. Frequently, that person's testimony is what helps a jury determine the guilt or innocence of the accused. I'm Alan Smith for the American Chemical Society. When a person's fate relies upon the testimony of an expert witness, it's vitally important that the information presented by that witness be absolutely correct. Any opinions the expert may offer should be based strictly on facts, not speculation. Charles Midkiff often is called into courtrooms as an expert witness. He's a senior research chemist in the Special Projects Laboratory of the Bureau of Alcohol, Tobacco and Firearms in Rockville, Maryland.

MIDKIFF: I think in a very large number of forensic cases the results are couched in terms of "consistent with" or "indicative of" simply because the constraints of the examination are such that the expert really can make no definite yes or no statement. While you could analyze a sample and you could conclude that you did not detect any cocaine in this sample, it's possible that there might have been very, very small traces of cocaine present. So, it would be prudent for the expert to say, no cocaine was detected in the sample, rather than to say that no cocaine was present in the sample. These are kinds of things that experts deal with on a regular basis.

NARRATOR: One thing that has a big impact on forensic science is instrumentation. Today's equipment



is capable of detecting extremely minute traces of almost anything in very small samples. And Midkiff sees that detection capability increasing even more.

MIDKIFF: I don't think that we're nearly at the limit of detection of useful information. I think the problem arises in interpreting the information once we've made these detections at lower levels. There is one difficulty, I think, in deciding just how significant these very low values may be. But certainly, we're going to develop instrumentation that will allow us to detect, for example, a drug or drug metabolite in blood or body fluid. We'll be able to go down steadily and detect less and less of this as time goes on.

NARRATOR: Of course, it's laudable that designers and engineers are able to expand the limits of detection technology. But you can't help wondering, just how necessary is it from a legal point of view?

MIDKIFF: I think that's the key question. And, I think that's what forensic scientists and perhaps the legal profession need to address to determine at what point is it no longer useful to determine an extra decimal place, to be able to go down to a lower and lower level. Because at some point it's true that there is no real significance to this extra detection. I think that's something that needs to be openly discussed. For example, in the blood alcohol situation we have set levels of let's say .10 percent as being evidence of legal intoxication. Now, levels below that really have very little legal significance and so the ability to detect a thousandth of a percent alcohol really doesn't improve our situation very much.

NARRATOR: Even if lower limits may not mean much to the legal profession, they certainly have a beneficial impact for the scientific community.

MIDKIFF: Lowering the limits may give us the ability to work with much smaller samples. In other words, we may be able to do useful analyses on samples that we cannot presently work with. It may give us improved accuracy and precision on the samples that we're working on now. The very fact that we have better sensitivity in our instruments may mean that we can do a better job on current samples. The ability to work with a smaller sample also has another advantage. It allows us to preserve part of an often very limited sample so that it's available either for subsequent examinations if questions arise or, as more often is the case, if the defense let's say in a criminal case wants the opportunity to examine the evidence. With more sensitive instrumentation we'll be able to do a reasonable analysis and at the same time provide a sample for defense examination if they would like to check our results.

NARRATOR: Like anything else, forensic science isn't infallible. Sometimes mistakes are made. But a group of concerned directors of forensic laboratories have taken it upon themselves to set up a certification program which they hope will reduce the number of mistakes. Additionally, many labs voluntarily have undergone proficiency testing. While Midkiff thinks these two initiatives are steps in the right direction, he feels the testing could be more realistic.

MIDKIFF: The collaborative testing probably could be taken as indicative of the best work the laboratory is capable of doing. They know when these samples are received that these are test samples. So, consciously or otherwise, they're going to get a little extra effort. What is needed is a program of blind testing where it is not apparent to the laboratory that these are tests samples; where a sample is received, it looks no different from any other routine workaday sample. This, I think, would be indicative of the kind of work the laboratory is doing on a day-to-day basis.

NARRATOR: Midkiff says most crime labs do a pretty good job of chemical detection. But it's not as easy as one popular TV series would lead you to believe.

MIDKIFF: Television certainly has done a lot in recent years to popularize forensic science. Sometimes television has been very liberal with what forensic science is able to do. I used to use "Hawaii Five-O" as an example of a television show that constantly was doing with forensic science more than anyone I was familiar with could do. McGarrett used to consistently ask the gentleman to go to the computer and give him not only an identification of the material but a list of all the places where it was sold in Hawaii and on the mainland. And, of course, in ten seconds he had such a list. To my knowledge most of that kind of information doesn't exist anywhere.

NARRATOR: According to Midkiff, most forensic labs are government operated at the federal, state or local level. He says the number of private laboratories is quite small and fairly specialized. They tend to concentrate in such areas as arson, insurance fraud, mechanical failures and so on. But, regardless of which type of lab is doing the work, there's usually a great deal riding on it's findings. With so much at stake, the potential for overzealousness is always present, particularly when it's time for the expert witness to take the stand.

MIDKIFF: I think I can say quite honestly that I have never felt, in my organization, any pressure of any kind that in any way would bias me toward my testimony. I think there may be situations, particularly in the smaller laboratories, where there would be somewhat more pressure. Simply because pressure, simply because of close personal working relationship. I think at the state and federal laboratory level, most of the time the expert probably is coming into the case to testify. His only or her only contact with the case is the examination of evidence. They may not know any of the parties involved, any investigating officers or anything else. And, I think that helps considerably. So, I think it's probably fair to say that most laboratories and most experts are pretty unbiased, at least on the prosecution side.

NARRATOR: Midkiff says defense attorneys should look carefully at an expert's qualifications. If necessary, he says, lawyers should consult an expert of their own choosing for assistance in formulating questions that could help in verifying the witness' credentials.

MIDKIFF: Defense attorneys generally could do a better job at this than they're currently doing. I think that there are a number of questions, fundamental questions that could be asked of the expert. If these were carefully selected, you could screen out some experts whose qualifications look a lot more impressive than they really should be. For example, you might ask an expert "Are you an analytical chemist?" Depending on his answer you would ask, "The wor(

that you do requires a knowledge of analytical principles and practices, does it not?" And you might ask him or essentially state for him, "You testified that you detected, let's say, barium and antimony in gunshot residue samples using atomic absorption spectrography, or some general method, at very low levels." And after he allowed as to how that was correct, you could ask him, "Were these levels close to the detection limit for barium or antimony using atomic absorption?" You might then ask, "What is the detection limit?" And follow up by "How is it established?" You could then ask him "Are we talking about establishing it using a nice, clean solution of barium and antimony as your standard, or are we talking about using dirty old swabs like the ones that you examined in this case, because it does make a difference." You could ask the expert to define some terms for you like sensitivity, selectivity, backgound correction; ask him to define detection limit. If the expert handles these kinds of questions comfortably, it would seem to me that the attorney may be fairly comfortable in saying I don't have any serious questions. But if the expert fumbles and has difficulty with these questions, I think that the attorney at least should consider the possibility of careful scrutiny of the results.

NARRATOR: Despite the fact that some of the aspects of analytical chemistry are highly sophisticated and technical, Midkiff feels it isn't necessary to try and explain all of it to the members of the jury.

MIDKIFF: I think you have situations where experts present testimony at a higly sophisticated, higly technical level, and in my opinion probably are wasting only their own time and the jury's time. It's totally incomprehensible to the jury. I think there are other experts who have mastered the idea of getting across to a jury, in simple terms that they can understand, what they did with complex technology. I don't know that there's any real need on the part of the expert to attempt to explain the technology itself to the jury. I think what is needed is to inform the jury that we have this technology available. We have established that this particular technology is reliable. We used it in this case and these are the results that we obtained. And from these results, these are my conclusions, or this is my opinion.

NARRATOR: Forensic science isn't always as exact as it might seem. Sometimes it's hard to differentiate between totally different substances that have the same starting materials. A good example would be plastic and gasoline. Both are made from petroleum. But a forensic chemist analyzing evidence from the scene of a fire might find it difficult to distinguish between melted plastic and gasoline residues. This could have quite an impact when trying to determine if the fire was set by arsonists. Another problem which forensic chemists often face when analyzing material is accounting for substances which are naturally occurring.

MIDKIFF: In many forensic type examinations, we work with what we refer to as pre-set criteria. Any values for the other materials we're analyzing for that's found below certain levels we simply attribute to natural background, natural contamination, recognizing full well that this may not be the the case. This may have evidentiary value. But in order to prevent the possibility of misinterpretation of natural contamination or environmental or activity contamination, we use pre-set criteria fairly frequently.

NARRATOR: Modern technology already permits forensic scientists to examine things at very low levels. And Midkiff says it's possible to go even further with the same equipment although he doesn't recommend doing so.

MIDKIFF: The question, I guess, really that must be asked; is the possibility of error and the difficulty of doing this determination really worth the effort: Are the conclusions we're going to be able to draw sufficiently more binding than what we had before we went the next step down? Sometimes pushing too hard probably brings us into some rather treacherous ground. We may be looking at background problems. We may have real difficulties in interpretation simply because we don't have adequate data on which to base a conclusion on the new lower levels.

NARRATOR: Our guest today on "Dimensions In Science" has been forensic chemist Charles Midkiff of the Bureau of Alcohol, Tobacco and Firearms in Rockville, Maryland.

DIMENSIONS IN SCIENCE
Released July 1986
Written By Marvin Coyner
SCRIPT #1323

AMERICAN CHEMICAL SOCIETY
Radio/Television
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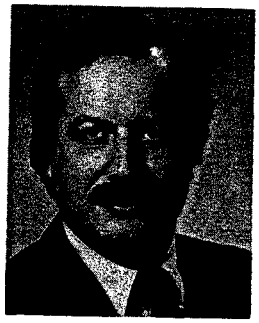
Washington, D.C. 20036

ON WORK

American philosopher Henry David Thoreau (1817-1862): It is not enough to be busy....The question is: what are we busy about?

Cases of Note...In Brief



Ed Monahan

NICKNAMES/DEFENSIVE WOUNDS
West v. State
485 So.2d 681 (Miss. 1985)

The defendant had a nickname of "sexy frog." As to its use by the prosecution, the Court said, "Where a party or a witness has a nickname which trial counsel deems could possibly prejudice his case, he is under a duty to call it to the attention of the circuit judge prior to trial so that the witness may be instructed to refrain from its use." Id. at 686.

Also, over defense objection, the pathologist improperly gave the opinion that the victim had "defensive wounds" which resulted from an attack, describing them as follows:

> What happened [sic] when we are being assaulted or attacked by somebody else, we try to protect ourselves with our hands and she had two cuts; one in the right thumb and then one in the right middle finger.

The Court held that this testimony is impermissible since an "expert witness should not give opinions which can be reached by the average layman." Id. at 686.

SLEEPING JUROR
United States v. Barrett
703 F.2d 1076 (9th Cir. 1983)

After the trial had progressed, a juror asked to be struck and replaced by one of the alternates because he had been sleeping during trial. The prosecution failed to agree to the excusal. The defense asked, after the conclusion of the trial, for the right to interview the juror. The judge denied the request, saying that he watched the jurors and none were sleeping.

The Court of Appeals determined that a hearing on whether the juror was sleeping is required. "In view of the juror's own statement, we have no basis for accepting the trial judge's bare assertion that no juror had been asleep during trial." Id. at 1083.

PREJUDICIAL CLOSING
State v. Wheeler
468 So.2d 978 (Fla. 1985)

The defendant was convicted of trafficking in methaqualone, three counts of sale or delivery of cannabis and possession of a firearm. The prosecutor stated in his closing:

> Ladies and gentlemen, these officers were acting in nothing but good faith. They know there are drugs out there. It's all over the place. It's in the school yard, it's in the playground, it's in the homes--it doesn't matter whether you are rich or poor, the drugs are out there. These officers know there is only one way to stop it and that is to go after the dealer. Ladies and gentlemen, Mr. Dale Wheeler is one of these people. He is one of these dealers. He is supplying the drugs that eventually get to the school yards and eventually get to the school grounds and eventually get into your own homes. He is one of the people who is supplying this. For him and people just like him--[at this point defense counsel objected, asked for a curative instruction, and moved for mistrial, all of which was denied by the judge.]

Id. at 981.

The Court found these comments to be error:

> We agree with the district court that these comments violate the "golden rule" of prosecutorial argument, that the prosecutor cannot argue to the jury that they may well be victims of the defendant's criminal behavior if they fail to convict him. No evidence in the record supports a finding that the defendant ever sold any drugs which ended up on a school yard, or in the juror's homes, nor was there any evidence the defendant intended the drugs involved in the instant case to end up in juror's homes. Such an argument is highly prejudicial and an independent basis for reversing the convictions.

Id. at 981.

DESTRUCTION OF EVIDENCE

People v. Sheppard

701 P.2d 49 (Colo. 1985)

The defendant was charged with a September 6, 1982 vehicular homicide. He was indicted on October 15, 1982. Since the defense was that the death occured because there was a mechanical defect in the car and not by illegal driving, on January 20, 1983, the defendant requested the right for his expert to examine the car, which was in the custody of the state police. The trial judge granted this request on April 1, 1983. However, the car was destroyed on February 11, 1983.

The Colorado Supreme Court held that it was proper for the trial court to dismiss the charge under the following rationale:

> In order to satisfy the requirement that the evidence was favorable to the defendant--or, as we have sometimes characterized it, that it was exculpatory--a defendant need only show that it was not merely incidental to the prosecution's case or the defendant's defense. To accomplish this, the defendant must establish "the reasonable possibility that the evidence could have been of assistance to the defense."
>
> . . . .
>
> The state must employ regular procedures to preserve evidence that a state agent, in performing his duties, could reasonably foresee might be favorable to the accused.... When such evidence can be collected and preserved in the performance of routine procedures by state agents, failure to do so is tantamount to suppression of the evidence. This is true even though the loss of the evidence is inadvertent and not the result of bad faith.

Id. at 52.

FAILURE TO PRESERVE EVIDENCE

State v. Havas

601 P.2d 1197 (Nev. 1979)

In a rape case, the prosecution failed to produce the pants and undergarments of the alleged victim for inspection by the defense. The prosecutor offered no explanation for his failure to produce. The clothes were either lost, destroyed or not taken into possession by the police. The defense contended that the garments would have shown the lack of force as claimed by the victim since they were not torn.

The appellate court held it was error for the prosecutor not to preserve the clothing since it was "so related to the commission of the crime and that their preservation has such potential relevance to the guilt or innocence of an accused that a further showing is unnecessary." Id. at 1198. The Court felt this was not an unfair burden on the prosecution in maintaining evidence since the prosecution could petition the court with notice to the defense to dispose of any evidence.

Edward C. Monahan
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Training Section
(502) 564-5258

Sixth Circuit Court of Appeals Sets Up Death Penalty Task Force

ACLU/KY Director Suzanne Post has been asked to serve on a Task Force established for the State of Kentucky to examine a number of issues concerning the availability of resources to provide counsel in federal habeas corpus cases where the petitioner has been sentenced to death by a state court.

The ACLU has historically opposed capital punishment on the grounds that it represents cruel and unusual punishment, prohibited by the Constitution. The organization is currently providing staff to the Kentucky Coalition to Abolish the Death Penalty, the state's only abolitionist advocacy group.

There are currently 30 men facing the death penalty in Kentucky; the Kentucky Department of Public Advocacy provides them lead counsel and appellate counsel.

The Sixth Circuit Task Force was established by Chief Judge Pierce Lively, and convened for the first time on February 4 in Cincinnati.

Other members include the Honorable Edward H. Johnstone, Chief Judge of the U.S. District Court, Western District of Kentucky; the Honorable James F. Cook, U.S. Magistrate, Eastern District of Kentucky; Penny Warren, Director, Criminal Appellate Division, Office of the Kentucky Attorney General; Don Cetrulo, Director, Administrative Office of the Courts; Paul Isaacs, Director, Kentucky Department of Public Advocacy; Charles English, President, Kentucky Bar Association; and Richard Burr with the New York office of the NAACP Legal Defense Fund.

The findings and report of the Task Force will be made available to the district courts, the Court of Appeals, the Sixth Circuit Judicial Council, and the appropriate committees of the Judicial Conference of the United States.

The Sixth Circuit Task Force is the first of its kind to be created by the federal judiciary.

(Reprinted from the KCLU Newsletter)

Staff Changes

MOREHEAD OFFICE

Keith McCormick, formerly a Director of the Morehead Office, resigned on February 28, 1987. He is now Rowan County Assistant Commonwealth Attorney.

Gary Johnson, Assistant Public Advocate, formerly of the Pikeville and Hazard Offices, is now Directing Attorney of the Morehead Office.

Stephanie Bingham, formerly of the Morehead Office, resigned effective April 30, 1987. She joined the Fayette County Legal Aid Office.

FRANKFORT OFFICE

Debbie Foy, formerly Administrative Specialist Principal with Protection and Advocacy is now the Department's Administrative Personnel Administrator replacing Mildred Heltzel

Lisa Campbell, Legal Secretary formerly with the Hazard Office, joined the Frankfort DPA Investigative Branch on February 16, 1987.

Cheree Goodrich, Typist Principal, joined DPA's Administrative Division on Jan. 16, 1987, replacing Dana Kent, who is now employed with the Geography Division at the University of Kentucky.

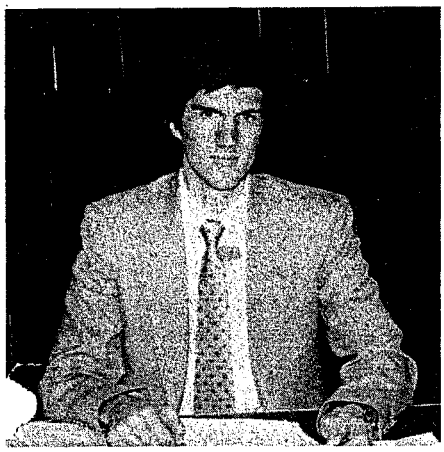
Mildred Heltzel retired from the Department of Public Advocacy on April 1, 1987 after more than 13 years with the Department. Mildred first joined the Department on December 1, 1973 when the Department was just barely one year old. Since that time she has served as a legal secretary and as the secretary to the Public Advocate.

In 1982, she was given the task of creating a personnel section in the Department and became the first administrator of that section. Personnel in the Department of Public Advocacy meant Mildred Heltzel. She was always willing to listen to the problems of her colleagues and try to guide them through any personnel problems.

Mildred was always very concerned that our employees have an opportunity to expand and develop. She organized the first training program for secretaries and is responsible for the annual training for secretaries in the Department. She also was very active in expanding the grades for paralegals and for establishing the first paralegal classification.

All of us in the Department will miss her advice and counsel but wish her a long and happy retirement.

LONDON OFFICE



Gary Stewart, Assistant Public Advocate joined the London Office on November 31, 1986.

Ginny Elza, Legal Secretary Senior, who had been a part-time employee since August, 1983, joined full-time with the London Office in February, 1987.

FRANKFORT OFFICE

Bing Bush is a third year law student at the University of Kentucky. He clerks for the Frankfort Appellate Branch.

Cindy Smith, Legal Secretary, joined the Frankfort Post-Conviction Branch on February 27, 1987.

Marie Wasson, Data Entry Operator, joined the Frankfort Adminstrative Division on January 19, 1987.

Book Review

Woman on Death Row
Velma Barfield
Oliver-Nelson Publishers
New York, $6.95
175 pages

> **"As I look back, I still have no idea why I didn't try to kill myself. I only knew one thing: I didn't want to live."**
> - Velma Barfield

Woman on Death Row is a first person narrative of a citizen's move to death row. The first eleven chapters are a singular journey into her life and thoughts. One gets a terrible sense of events that led to her arrest for poisoning four people: her husband, mother, bed-ridden charge and fiance. Velma's family background and childhood provide many clues to Velma's drug-dependent and isolated state before her arrest.

Institutional failure is touched upon as Velma repeatedly (five times by my count) overdosed and was diagnosed as having drug and suicide problems, but each time Velma's abuse was managed by prescribing other drugs. The sad legacy that Velma has left is an awareness of prescription drug abuse and the relative ease of access to medicines through doctors as a medical and personal solution to real problems.

The remainder of the book mostly develops Velma's relationship with God, the "sustaining grace" and fellowship of her brothers and sisters and those persons Velma "ministers" to in her last days.

The book concludes with a three-page listing of prescription drugs that Velma abused in a ten year period, 1968-1978.

The version of the execution published in Vanity Fair, "Invitation to a Poisoning," (February 1985) p. 82, gives a factual account of Velma's death, the atmosphere outside the Death Chamber and within and the attempt of a medical team to "harvest" her usable organs (at Velma's bequest).

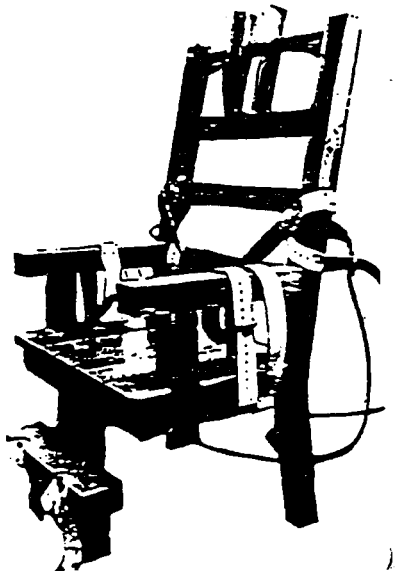
Having asked forgiveness of God and her victim's survivors, Velma found peace with herself, reportedly, as she had never experienced before. What might she have accomplished if she'd been allowed to live? The question will go forever unanswered.

Cris Brown
Paralegal
Major Litigation Section
Training Division
(502) 564-5245

Table 8. Number of women on death row, yearend 1972-84

State	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984
United States	4	3	3	8	7	6	5	7	9	11	14	13	17
California	3			1	2								
Georgia	1	2	1	1	1	1	1	2	3	4	4	3	2
North Carolina		1	2	3			2	1	1	1	1	1	
Ohio				2	3	4						2	2
Oklahoma				1				1	1	1	2	2	1
Florida					1	1	1	1	1				1
Alabama							1	1		1	1	2	2
Texas								1	2	2	2		1
Kentucky									1	1			
Maryland										1	2	1	2
Mississippi											1	1	1
Nevada											1	1	2
New Jersey													1
Arkansas													1
Idaho													1

Capital Punishment 1984
Bureau of Justice Statistics



although I don't know if I'll be able to because of my trial schedule attend the one coming up shortly, have been some of the very best CLE programs that I have found anywhere in the nation and I've attended tons of them. Particularly a couple years ago when Morris Dees and people from the Southern Poverty Law Center were the presenters. That program has had as much influence on my development as a trial lawyer as anything I've done in my entire life. From Morris Dees I learned to humanize trials and to try cases with feeling.

In terms of nuts and bolts I use DPA services to consult with staff attorneys who have been just great in answering any questions.

Is there a public misconception about defense attorneys?

I suppose the biggest public misconception is that criminal lawyers are criminals and they're protecting criminals and that we're bad people. I think mostly practitioners are indeed interested in the truth and they're very interested in justice so the perception is unfortunate. Particularly when you're dealing with confession avoidance type cases, at the finish where the defendant walks out in the fresh air and sunshine at the end of the case. The public thinks we've done something tricky and gotten the guilty person off, when in fact all we've done is exposed the truth, achieved a just outcome, and the defendant walking out the door with us ought to have happened under the law and facts of the case.

What do you think about judge-conducted voir dire?

I think it sucks. I think voir dire is a time for the trial lawyer to get in touch with the jury and get some communication started to get a good feel for what kind of people are on the panel, and their ability to interact. Without lawyer conducted voir dire, I don't think you can make intelligent decisions about how to exercise challenges - peremptory challenges particularly, but you lack the opportunity to develop challenges for cause, it gives you no basis for exercising peremptories.

BOB'S FAVORITE QUOTE:

"And how shall you punish those whose remorse is already greater than their misdeeds? Is not remorse the justice which is administered by that very law which you would fain serve? Yet, you cannot lay remorse upon the innocent nor lift it from the heart of the guilty. Unbidden shall it call in the night, that men way wake and gaze upon themselves. And you who would understand Justice, How shall you unless you look upon all deeds in the fullness of light?
- Kahlil Gibran, The Prophet

Cris Brown

FUTURE SEMINARS

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.

TRIAL PRACTICE INSTITUTE 1987
NATIONAL CRIMINAL DEFENSE COLLEGE

Each two week session has 88 participants divided into small groups according to trial experience. The least experienced groups normally have no jury trials, while the most experienced group often have tried 50 or more jury cases.

Topics covered in the group exercises range from client interview to closing argument. Each participant performs each daily assignment under the supervision of a member of the nationally recognized faculty. Faculty members rotate daily and video-tape is provided in every room. Daily lectures and demonstrations are presented by the faculty.

INSTITUTE DATES

First Session: June 14 through June 27, 1987
Second Session: July 12 through July 25, 1987

TUITION AND SCHOLARSHIPS

Tuition for the two week session is $900.00. A limited number of scholarships are available to cover part or all of the tuition of qualifying applicants. Please indicate any need for assistance on the application. A separate scholarship application will be sent to you. Deadline for scholarship applications is April 1, 1987. The housing fee for the program is $200.

APPLICATION PROCEDURE

Applications will exceed enrollment, so you are encouraged to apply early. If you do not have an application form, please call us at (912)746-4151. Send your completed application (along with a $25.00 non-refundable application fee) to NCDC,c/o Mercer Law School, Macon, GA 31207 as early as possible. Initial acceptances will be made from applications received by April 15, 1987. Late applicants and those not selected in April will be placed on a ranked waiting list.

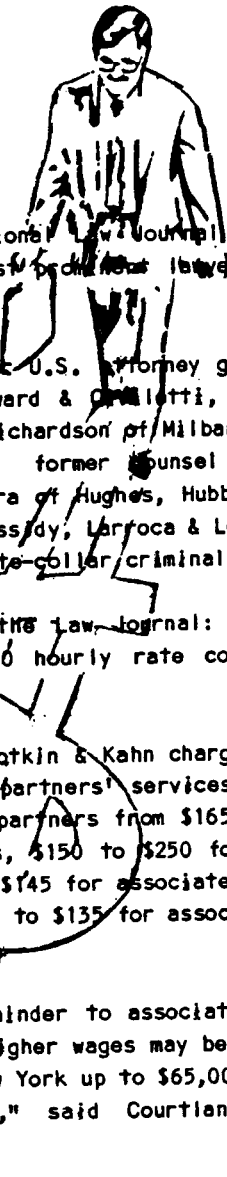
NON-DISCRIMINATION POLICY

The National Criminal Defense College does not discriminate on the basis of race, sex, religion or national origin. An affirmative effort will be made to assure diversity in each session in keeping with the educational goals of the College.

FOR MORE INFORMATION

Please call the National Criminal Defense College at (912)746-4151.

A September 22, 1986 article in the New York Times by Robert Reinhold, entitled "Lawyers, Citing Financial Losses, Shun Death Row Appeals," observed that as the pace of executions in the United States quickens, death row inmates across the country are finding it harder and harder to obtain lawyers willing to handle their final appeals, because many lawyers who used to take such cases are shunning them now, discouraged by the enormous financial and growing public support for capital punishment and by the unpopularity of the clients and the political liability of representing them. Back-up centers are being established in cities like New Orleans and Atlanta in an attempt to persuade private lawyers, in both criminal and corporate practice, to take these cases. Texas Attorney General Jim Mattox agrees that it is difficult for condemned inmates to find lawyers to represent them. Mattox agrees with death penalty opponents that indigent defendants often are not well-represented at their trials.



Check your bank balance: The National Law Journal reports the rates charged by some of the country's most prominent lawyers and largest law firms.

According to the Law Journal, former U.S. attorney general Benjamin R. Civiletti, of Venable, Baetjer, Howard & Civiletti, bills at $300 per hour; former everything Elliot L. Richardson of Milbank, Tweed, Hadley & McCloy sells his servies for $285; former counsel for the Watergate special prosecutor Philip A. Lacovara of Hughes, Hubbard & Reed charges $280, and Nathan Lewin of Miller, Cassidy, Larroca & Lewin sets the meter at $275 per hour to help alleged white-collar criminals beat the rap.

The priciest legal help cited by the Law Journal: New York divorce lawyer Raoul L. Felder, whose $450 hourly rate could help make any divorce even more painful.

Among firms Arent, Fox, Kintner, Plotkin & Kahn charges $80 to $140 for associates' time, $145 to $235 for partners' services; Arnold & Porter bills associates at $85 to $145; partners from $165 to $230; Hogan & Hartson, $80 to $130 for associates, $150 to $250 for partners; Shaw, Pittman, Potts & Trowbridge, $65 to $145 for associates, $150 to $250 for partners, and Steptoe & Johnson, $85 to $135 for associates, $145 to $240 for partners.

Tucked in the report is a grim reminder to associates in New York and elsewhere that the wages of their higher wages may be even longer hours. With starting annual salaries in New York up to $65,000, "associates know they are expected to bill more," said Courtland W. Troutman of Cadwalader, Wickersham & Taft.

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