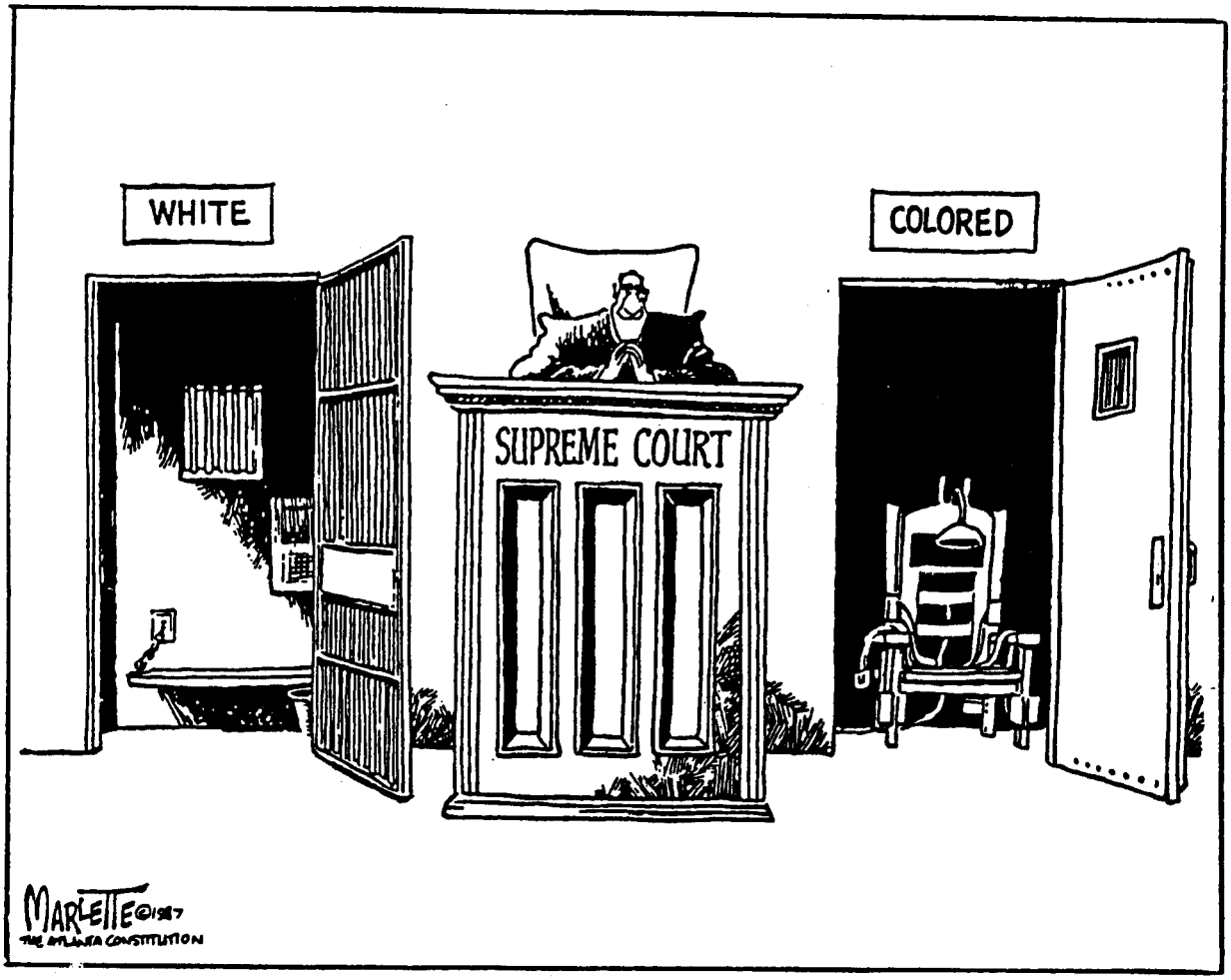
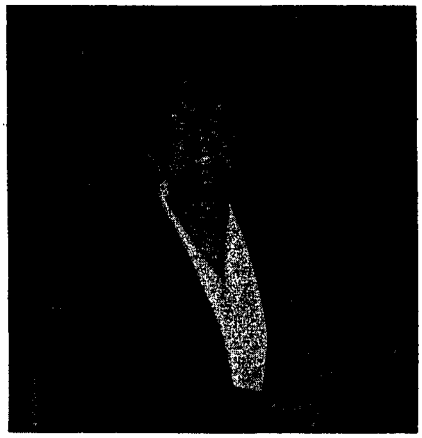
THE ADVOCATE

Vol. 9 No. 5 A DPA Bi-Monthly Publication August, 1987



The Advocate Features



RITA WARD

Rita Ward is an advocate in the truest sense of the word. She believes that vigorous advocacy of her client's position is the most effective means of arriving at the truth and achieving a fair result in a judicial proceeding. As a specialist in the area of law pertaining to juveniles and the mentally ill, Rita does her best to insure that her clients receive all the protections and benefits of due process, despite the constant pressures from social workers, prosecutors, judges, doctors, and family members who seek to circumvent those rights in the name of expediency and administrative convenience.

Rita joined the Jefferson District Public Defender's Office in Louisville in January, 1984. She served as a staff attorney in that office's Juvenile Division for 2 1/2 years. In May of this year, she was assigned to the office's Mental Inquest Division. A native of Loogootee, Indiana, she holds both a Master's Degree in Education and a Bachelor of Science Degree from Indiana State University. She received her Law Degree from the University of Louisville.

Before coming to the Louisville office, Rita taught high school in rural Indiana for over nine years. As a teacher, Rita was known for her innovative approach to instruction, which placed an emphasis on student creativity. Always popular with her students, Rita's teaching accomplishments foreshadowed her client-oriented approach in her legal practice. She continued to teach full time while she was in law school.

Helping a child client can be tremendously rewarding, but like many juvenile defenders, Rita has a love-hate relationship with the juvenile system. She points out that: "If you look at the juvenile court system, it is supposedly designed to help kids, but in the end what often happens is that children suffer because of the system's failures. For example, with status offenders, instead of providing adequate financial resources to deal with complex social and familial problems, the system goes for the quick fix: incarceration in jails, youth camps, or mental hospitals."

"Children have many rights under the Juvenile Code, but the system often ignores those rights and treats children in a punitive way. We have a special court for kids because they need a different approach to treatment than adults, yet when children come to Juvenile Court, they are held to adult standards. If children do not measure up to the Court's often unrealistic expectations, they are often punished for the very behavior which the system is supposed to treat."

During her first months handling civil commitment cases, Rita has found that the treatment of the mentally ill in the justice system is strikingly similar to that of children. "Persons alleged to be mentally ill have a lot of rights on paper, but it is difficult to enforce them. Mental hospitals are the dumping ground for the powerless, especially the elderly and children."

The recent federal court ruling in Doe v. Austin, which provides that the mentally retarded are entitled to the same due process rights as the mentally ill prior to institutionalization, will add approximately 300 cases to her current case load, which exceeds 1,000 cases per year. Rita finds these mental retardation cases to be especially challenging. "In theory, the mentally retarded should almost always be acquitted because the law requires that a jury find that the patient can benefit from treatment before a commitment can take place. Since retardation is usually a fixed, genetic condition, these individuals can rarely improve through treatment, but the jury will usually go ahead and commit because there simply are not many alternative placements outside of institutions available to mentally retarded citizens."

Rita sums up mental inquest advocacy as "frustrating, but worth it." Psychology has been a special interest of hers for many years and her current practice enables her to combine her love for psychology and the law in a very unique way.

Despite her demanding job, Rita manages a very full and active personal life. Sports and music both play a big role. She coaches a girls' basketball team for a local parochial school and still finds time to sponsor a special needs foster child. She is usually the brainchild behind the Louisville office's social events. Both professionally and personally, Rita Ward is truly an asset as a public defender.

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THE ADVOCATE

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

The Advocate welcomes correspondence on subjects treated in its pages.

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IN THIS ISSUE

Former Public Advocate Speaks

Written Interview with Jack Emory Farley

Jack Emory Farley was the second Public Advocate of Kentucky, serving from March 1, 1975 until September 30, 1983. In a profound sense, the Department of Public Advocacy (DPA) bears his personal mark. During his eight years of service, he directed the growth of the office from a small agency with few resources to a state-wide managed system that began to cover the cases with a substantially increased full-time effort. Jack is remembered for his philosophical commitment to serving the needs of indigents, as well as his courageous efforts in dealing with a nearly unyielding legislature.

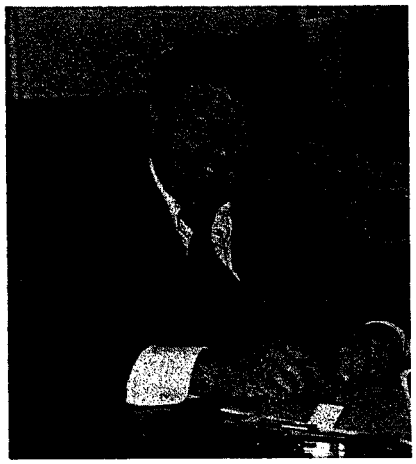
Jack now works in Tampa as a senior staff attorney with Florida's Second District Court of Appeals covering fourteen counties with a population of over three million people. Their appellate caseload averages 3,300 cases per year.

With the passage of time and the breadth of geography, Jack shares his views with The Advocate in this written interview.

From your many years of service as Public Advocate and from your perspective now, what role do you see the Department playing in the criminal justice system in Kentucky?

The Department's role in Kentucky's criminal justice system is the same now as it should have been in the past: it must be an equal partner with the courts and the prosecution. One cannot be enhanced or diminished without affecting the other two. For example, when Kentucky's district courts were created the public advocacy system should have been expanded commensurately to meet the needs of clients in the new forums. Kentucky had a real opportunity to breathe life into the Argersinger requirement that every person accused of even a misdemeanor was entitled to and should be provided with an attorney. When the legislature did respond with funding for a full-time staff, the Brown administration would not allow us to hire them. Thus Kentucky missed these opportunities to close the gap between constitutional principle and reality.

Nevertheless, the Department must continue to push hard to create such future opportunities to serve its clients and then see, through all available legal means, that the opportunities are perceived and acted upon by the General Assembly. Of course this cannot happen without



JACK E. FARLEY

continued efforts to educate the electorate about the services to which they are constitutionally entitled.

Looking at the structure of the DPA in Kentucky and comparing it to other public defender structures in states across the country, how do you view Kentucky's DPA structure?

The DPA's organizational structure is sound. It is premised on a strong central office which furnishes supervision, training, resources, support functions and funding, along with a hierarchic field organization which directly provides or coordinates the delivery of advocacy services on a county and regional basis. This provides a much better framework for expanding and improving the delivery of advocacy services to the client than does a fragmented system such as Florida's which is purely county oriented. The very strength of the system, however, may also be a weakness in one respect. It is not conducive to the development of local citizens' groups aware of and vocal about the need for more and better services, and these groups are

much needed if the quest for additional funding is to be satisfied.

The death penalty has been a viable sentence in the state of Kentucky for more than 10 years now. How do you see it affecting the ability of the Department to deliver services at all levels as compared to other states with public defender programs and active death penalty sentencing?

Interesting that you should say the death penalty is viable. Regretfully, it has been in effect these past ten years. In addition to the moral poverty of the death penalty it soaks up an inordinate amount of personnel and money resources. It truly cripples the Department in its efforts to provide advocacy services to *all* persons who are eligible. Kentucky's citizens, and particularly its legislature, must be made to realize that if they persist in demanding the death penalty as a punishment for crime then they must provide the resources to achieve the proper constitutional balance between prosecution and defense of persons accused of capital crimes, or else the quality of life which we have taken so long to build and paid so dearly to maintain will be substantially diminished or even lost altogether. Of course, I believe the very existence and use of the death penalty detracts immensely from our quality of life. But what I am saying is that if the majority persists in having it they must be fair about it and make available the resources to provide competent legal representation to all accused persons who face such an awful fate. Like some other states, Florida has chosen to establish a separate agency, with full-time staff attorneys and an elaborate system of paid volunteer counsel, to provide legal services to death clients, but the costs are very high and many informed observers believe even these measures are too meager. Too many clients are forced to face the possibility of a death sentence with inadequate lawyers who are often poorly trained, badly motivated, shabbily paid, or all three.

How do you view the role of the Public Advocacy Commission as compared to structures in other states with public defender programs?

The Public Advocacy Commission was not conceived as the answer to all the problems of providing competent advocacy services to all eligible Kentuckians, but we thought it would help. Then Secretary of Justice, Neil J. Welch, thought it would bridle the DPA and provide needed administrative oversight and review. (For myself, I thought he exercised about as much oversight and review as we could stand.) I hoped the Commission would act as a sounding board and advocacy group to support

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and extol the mission of the public advocacy system with the General Assembly, the Kentucky criminal justice system, and the public. And this idea was much touted by the experts in the National Legal Aid and Defender Association and the American Bar Association. Some of my most trenchant critics, however, opined there were not twelve persons in Kentucky who cared enough about the DPA's mission to serve on the Commission, but I believed such persons did exist and I still do. Whether they all serve on the Commission, I don't know, but certainly the notion of having such a Commission seemed like a good idea at the time, and it still is. It seems to me our original concept was and is the most appropriate and useful role for the commission, namely, to be proactive on behalf of the public advocacy system and its mission. It must be both sword and shield to insure that competent advocacy services are provided to all eligible Kentuckians. To the extent that the DPA remains underfunded and understaffed, and clients remain unserved or underserved, the Commission has failed to realize its full potential.

The DPA has been consistently underfunded at all levels. How do you view this underfunding now that you stand at a distance and have the perspective of other programs in other states?

From my thousand mile vantage point it is probably safe (and cowardly) to say that the DPA may never be fully funded, certainly not to the levels that I or most readers would consider adequate. But we cannot cease to cajole and persuade all those who will listen that the public advocacy system not only needs, but is worthy of much greater public support. Inadequate funding for public advocacy systems is a universal problem. Even Florida, which is so widely perceived as a bountiful land, is plagued with the problems of too few defenders for too many cases, and too little money allocated to make much improvement. Our regional appellate defender recently moved to withdraw as counsel in 276 pending appeals because he simply had nobody to write the briefs. Each county's chief public defender, even though elected, complains about inadequate funding, small staffs, not enough office space, and the like, and the legislature is not doing much to help. Each Florida county shares a much bigger burden for funding its local public defender system than in Kentucky but no county makes it a high priority. Thus, the problems multiply.

How do you think the public defender system in Kentucky can better utilize attorneys?

I am still convinced that the approach we used in Southeast Kentucky, the SEPAR project, is the most effective and efficient way to use the DPA's human resources, that is, group the counties into regions sized according

to caseload, and provide regional and satellite offices with full-time staff attorneys, investigators, paralegals, secretaries and social workers, assisted by a regional panel of private practitioners to be appointed in multiple defendant and conflict cases. Because of funding limitations, Paul Isaacs has apparently emphasized the local contract systems approach which we started with but at best this is only a stopgap measure. I agree that more lawyers in private practice must be encouraged and excited to participate in the public advocacy system but the major service delivery mechanism should be the full-time staff.

From your view, what are the strengths and weaknesses of the Department and how can the strengths be increased and the weaknesses decreased?

The greatest strength of the Kentucky public advocacy system is the loyalty, experience, and commitment of the DPA's employees, many of whom have been with the DPA for more than ten years, and their devotion to the ideal of providing superior advocacy services to all eligible Kentuckians. And I would also commend the many lawyers in private practice who have labored over the years to provide high quality representation to their indigent clients. These lawyers have endured long hours, with low pay, and have persevered to see that justice is done. The greatest weakness, if it can be called that, is the Department's lack of understanding and support from the general public and the justice system.

Continued education is the key to enhancing these strengths and diminishing this weakness. By this I mean education in the broadest sense as well as the technical sense. Elementary school children should be more thoroughly taught about our democracy and its Constitution as early as the fourth grade. Civics courses in high school must not be the dull, lifeless, and boring waste of time they have so often been. We must teach and test for cognition of constitutional awareness and responsibility at both elementary and secondary levels. If we continue to insist that students be taught and learn more about our freedoms and privileges as Americans perhaps a future state public defender will not have to be asked, as I was, by a disbelieving member of a county fiscal court: "Do you mean our county must provide money to defend the man who stole my chickens?"

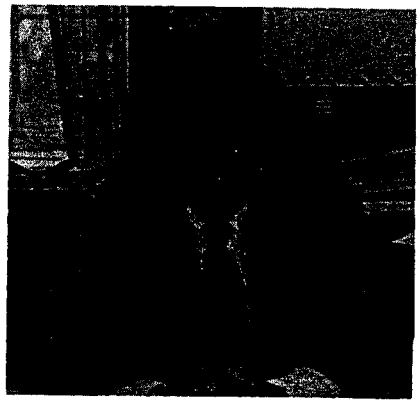
Any other thoughts that you might have?

Someone has said that history will judge our time by the way we have treated children and others who cannot help themselves. Let us resolve that history will not judge us harshly because we have perceived the problems and have brought all our energies to bear in solving them. Let us all continue to work without ceasing to provide and demand the highest quality public advocacy services for all eligible persons where they are and when they need them.

Jack Emory Farley

On May 7, 1987, Colorado Governor Romer granted an unconditional pardon to Jim Bresnahan. Bresnahan stabbed his parents to death when he was 16, pleaded guilty, and received concurrent life sentences. A poor student before his conviction, he began studying while in prison, and after he was paroled in 1977 finished college and then medical school. As a doctor he now treats migrant workers at the Earlimart Clinic near Visalia. United States District Court Judge John Kane, his former attorney, said of him, "I knew he had the intellectual capacity to be a doctor. My concern was that society would never let him. That's why I say it's inspiring. To think that a 16-year-old convict with two life sentences could end up as a physician practicing internal medicine is a severe blow to anyone's cynicism." - Article from the May 4, 1987, Los Angeles Daily Journal.

DPA Responsibilities Under New Juvenile Code



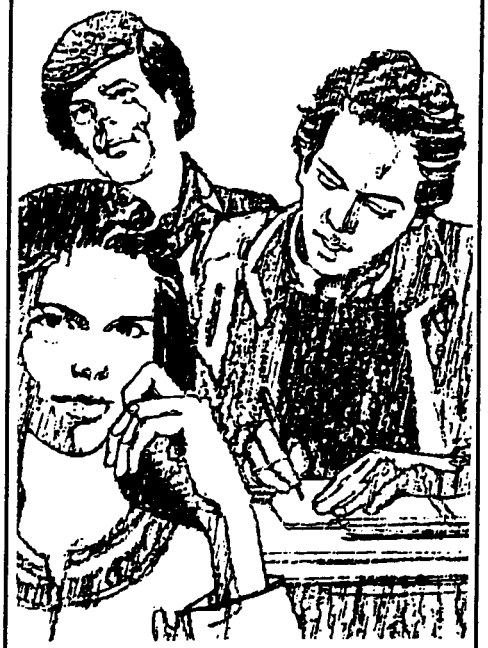
PAUL F. ISAACS

On July 1, 1987, Kentucky's new unified Juvenile Code became law and clearly established the responsibilities for providing counsel to those persons, adults and minors, involved in the Juvenile Justice system. The new code further delineates the responsibilities of the Department of Public Advocacy to provide counsel to indigent parties in Juvenile Court proceedings.

KRS 610.010 (1) specifically states that the Juvenile Court must "[e]xplain to the child, parent, guardian, or person exercising custody control" over the child "their respective rights to counsel" and to appointed counsel if unable to obtain counsel for the child. This section of the code also provides that unless specified under other provisions of the code, the court may appoint counsel for the parent, guardian, or person exercising custodial control. KRS 610.010(7) further states that the court may order parents to pay for the child's counsel if the court determines the parents are able to pay for the attorney.

The Department of Public Advocacy has the responsibility to provide counsel to all indigent parties in juvenile court unless the code specifically provides otherwise, which it does in two statutes which will be discussed later. The Department is responsible for providing counsel in cases involving allegations that the child is: a status offender (Chapter 630), a public offender (Chapter 635), a youthful offender (Chapter 640), or in need of involuntary hospitalization in a mental health hospital (Chapter 645).

In cases involving allegations that a child is dependent, neglected, or



abused, the child and his parent or person exercising custodial control have the right to separate counsel and to appointed counsel if they cannot afford counsel. The code provides that "local private counsel" shall be appointed by the court and that the Cabinet for Finance and Administration shall pay the fee. The maximum fee is $500 unless the case is finally disposed of in district court in which case the maximum fee is $250. (KRS 620.100)

Cases relating to the termination of parental rights are heard in Circuit Court, and in any involuntary action, a *guardian ad litem* must be appointed for the child and the fee shall be paid for by the Cabinet for Finance and Administration. Indigent parents are also entitled to counsel in the same cases and the fees are to be paid in the same manner. In both situations the maximum fee is $500. (KRS 625.080)

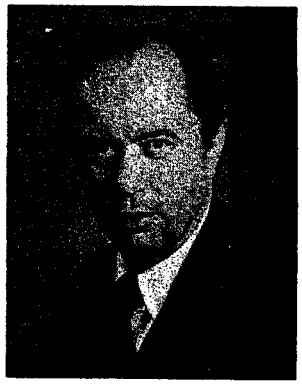
Nothing in the statutes prevents private attorneys who are participating in local public advocacy programs from participating in dependent, neglected, or abused cases or involuntary termination of parental rights cases, except that the Cabinet for Finance and Administration will be the agency responsible for the fees in these cases. The full-time offices of the Department of Public Advocacy will not be involved in dependency, neglect, or abuse and termination of parental rights cases since the statute clearly refers to "local private counsel" except in very limited cases where the court cannot secure the assistance of "local private counsel."

Paul F. Isaacs
Public Advocate
(502) 564-5213

The means may be likened to a seed, the end to a tree, and there is as the same inviolable connection between the means and the end as there is between the seed and the tree.

Mohandas K. Gandhi

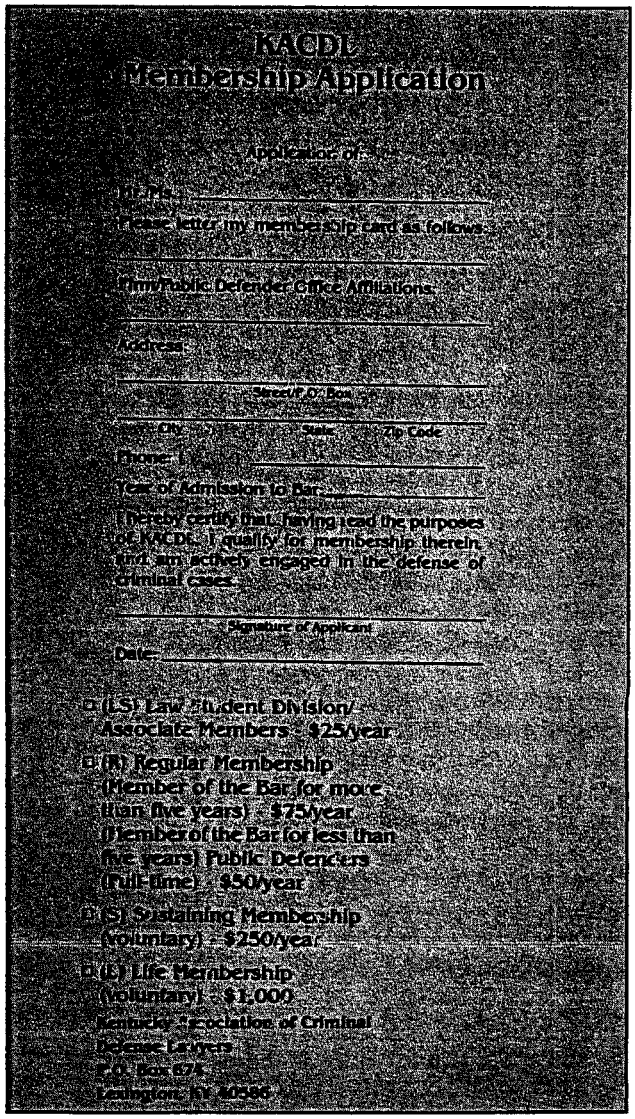
Kentucky Association of Criminal Defense Lawyers



BURL McCOY

KENTUCKY LAWYERS FORM CRIMINAL DEFENSE ASSOCIATION AND OFFER CRIMINAL DEFENSE TRAINING

The Kentucky Association of Criminal Defense Lawyers organizational meeting, chaired by Ernie Lewis was held on a cold evening on January 19, 1987. This meeting was based on a meeting of the National Association of Criminal Defense Lawyers in Chicago, Illinois, attended by Gail Robinson. At this first meeting, goals and priorities were discussed and various committees established. This organization is needed so the public, local community and the legislature can be well informed about criminal laws as viewed from the vantage of the criminal defense bar. After numerous organizational meetings throughout this year, KACDL is ready for you, the Kentucky criminal defense lawyer, to join. Its purpose is to foster, maintain and encourage a high standard of integrity, independence and expertise for the criminal defense lawyer. KACDL strives for justice, respect and dignity for criminal defense lawyers, defendants and the entire criminal justice system. KACDL's officers, all outstanding trial lawyers, are: President Frank Haddad, President Elect Bill Johnson, Vice-President Maria Ransdell, Secretary Allen Holbrook and Treasurer Ed Monahan.



KACDL
Membership Application

Application of

Mr./Ms.

Please letter my membership card as follows:

Firm/Public Defender Office Affiliations:

Address:

Street/P.O. Box #

City State Zip Code

Phone:

Year of Admission to Bar:

I hereby certify that, having read the purposes of KACDL, I qualify for membership therein, and am actively engaged in the defense of criminal cases.

Signature of Applicant

Date:

☐ (LS) Law Student Division/ Associate Members - $25/year

☐ (R) Regular Membership (Member of the Bar for more than five years) - $75/year

☐ (M) Member of the Bar for less than five years) Public Defenders (Full-time) - $50/year

☐ (S) Sustaining Membership (Voluntary) - $250/year

☐ (L) Life Membership (Voluntary) - $1,000

Kentucky Association of Criminal Defense Lawyers
P.O. Box 674
Lexington, KY 40586

A KACDL one day seminar is planned for Friday, December 4, 1987 at the Marriott in Lexington, Kentucky. The seminar will feature Al Kreiger, a nationally renowned criminal defense lawyer, along with Representative Joe Clark, Big Bill Johnson, Senator Mike Moloney and Representative Ernesto Scorsone, all prominent Kentucky criminal defense lawyers. Mr. Krieger will speak on cross-examination and expert witnesses. KACDL is also developing committees on Amicus briefs, establishing a brief bank and practical publications.

Join now! Make a commitment to be in the forefront of this organization, so you will be able to influence the future development of criminal law in the Commonwealth of Kentucky. Participate in an association to work to solve problems common to all those who practice criminal defense law, whether they be public defenders or private practitioners. It is time that criminal lawyers in Kentucky had a feeling of camaraderie. Only through a strong voice and large number can we force the system to recognize the rights

of our clients and our own right to defend those clients. A strong and vigorous criminal defense bar is essential to a free society. You will soon be receiving applications in the mail, or you may write to:

Membership Committee, Kentucky Association of Criminal Defense Lawyers P.O.Box 674 Lexington, Kentucky 40586

Join now, we will have strength in numbers.

R. Burl McCoy Chairman, KACDL Membership Committee McCoy, Baker & Newcomer 322 West Second Street Lexington, Kentucky 40502-1114 (606) 254-6363

KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
SEMINAR FOR CRIMINAL DEFENSE ADVOCATES ON
CRIMINAL DEFENSE LAW
DECEMBER 4, 1987
LEXINGTON MARRIOTT RESORT
1800 NEWTOWN PIKE
Lexington, Kentucky

8:00 a.m. - 9:00 a.m.	Registration, Coffee & Pastries
9:00 a.m. - 9:10 a.m.	Welcome - Frank E. Haddad, Jr. President, Kentucky Association of Criminal Defense Lawyers, and Moderator of Seminar
9:10 a.m. - 10:10 a.m.	Kentucky Criminal Law Legislation - Senator Michael R. Moloney - Senator Joe Clarke, Jr. - Representative Ernesto Scorsone
10:10 a.m. - 10:30 a.m.	Break
10:30 a.m. - 12:00 noon	Cross-Examination of State Expert with Demonstrations - Al Krieger
12:00 noon - 1:00 p.m.	Lunch with Luncheon talk on: Importance of State and National Associations of Criminal Defense Lawyers - Al Krieger and Frank E. Haddad, Jr.
1:00 p.m. - 2:00 p.m.	Preparation and Direct of Defense Expert - Al Krieger
2:00 p.m. - 2:15 p.m.	Break
2:15 p.m. - 3:00 p.m.	Integrating Experts into your Case: Voir Dire, Opening, Closing - Al Krieger
3:00 p.m. - 4:00 p.m.	Cross-Examining an Informant - William E. Johnson

For a brochure or more information about the seminar, contact:
C. Thomas Hectus
KACDL Education Committee
635 West Main Street - 4th Floor
Louisville, Kentucky 40202
(502) 585-2100

Protection and Advocacy

REPRESENTING THE DEVELOPMENTALLY DISABLED OFFENDER

While the term developmental disability encompasses many disabilities, this article will focus primarily on the person with mental retardation who becomes involved in the criminal justice system. In comparison to the general population studies have shown a disproportionality high percentage of prison inmates with mental retardation. The percentage of inmate populations with mental retardation varies from 3.6% to 30%. This is significant in that estimates of people with mental retardation in the general population range from less than 1.5% to 3%.

These figures should by no means be interpreted as indicating a connection between mental retardation and criminality. Rather, they indicate there is a problem with the assistance available to people with mental retardation. There is a breakdown in services available for developing employment skills, basic living skills, and judgment. Research has demonstrated that the majority of offenders with mental retardation have only a limited education, are either unemployed or underemployed, live on welfare or minimum incomes and are typically members of minority groups.

People with mental retardation are frequently at a disadvantage, especially once they enter the criminal justice system. It may be enlightening to consider the following indications of differential treatment:

- People with retardation may not understand the implications of Miranda rights.

- They often confess quickly, reacting to friendly questions or saying what they think a person wants to hear.
- Preparation of the case may be hampered by communication difficulties.

- The condition of mental retardation might not be obvious to the court, prosecutor or defense attorney.

- People with retardation often plead guilty more readily than non-retarded people.

- Plea bargains do not usually result in reduced charges for the retarded offender.

- Appeals of conviction and post-conviction relief are rarely requested.

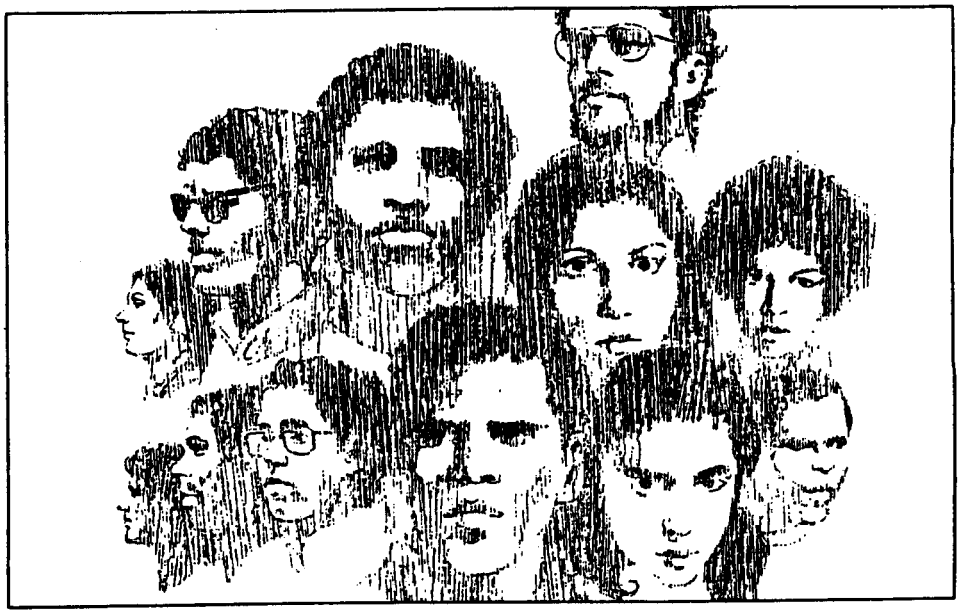
- Pretrial psychological examinations and presentence testing are requested only 25% and 20% of the time respectively.

- Probation and other diversionary, non-institutional programs are used less frequently with offenders with retardation.

- In prison, the offender with retardation has limited parole opportunities, resulting from slower adjustment and learning of regulations.

- Rehabilitation programs are rarely utilized by offenders with retardation because of their fear of exposing their limitations.

- Offenders with retardation serve, on the average, two to three years longer than other prisoners for the same offense.



Recognizing the difficulties people with developmental disabilities have with the criminal justice system, a program was developed in Nebraska. Crime and Community, Inc., an organization designed to address the needs of developmentally disabled offenders, developed a program which is designed to address their unique needs. Crime and Community focuses on people with developmental disabilities who do not have violent behavior and are incarcerated or are at risk of contact with the criminal justice system. The program is called the Individual Justice Plan (IJP).

The IJP model requires: holding the individual accountable for his/her behavior; utilizing agency expertise and services; cost effectiveness; needs assessment of the perpetrator; placing responsibility for habilitation and rehabilitation with the local community; promoting citizen awareness; and avoiding incarceration.

The IJP concept is based upon the belief that an individual can change, grow and realize his/her potential. The plan is designed to require that the offender has an active role in developing the plan. The plan in essence is an alternative to incarceration, but if the person is incarcerated, it is intended to assist in correcting behavior and preventing recidivism.

When developing an IJP, there are six themes that must be considered: accountability for illegal behavior; competency of the individual to control behavior; due process; least restrictive alternative; normalization (helping the individual to obtain an existence as close to normal as possible); and control versus incarceration. Further, in developing the plan, specific areas of a person's life must be evaluated. These include: residential setting, vocational, education, social/recreational, money management, family, medical psychological/psychiatric advocate, transportation, and restitution.

The purpose of the review is to determine if there are any deficiencies in services or in the person's adaptive skills. After this review, the team develops a plan which addresses areas of need in light of the central themes. In order to evaluate the myriad needs and programs, it is necessary that the team consist of professionals and volunteers who are knowledgeable about both the offender and the services in the community.

Nebraska is not the only state which has developed a model for meeting the needs of offenders with developmental disabilities. But the practitioner in Michigan should be aware that there is no similar system in this state. It is possible, however, to develop an equivalent plan for the individual client. For example, if counsel learns that professionals and volunteers are involved in a specific area of the offender's life, these people could be contacted to assist in preparation of an individualized plan to submit to the court.

Sample Case

Ron is 23-years-old with mental retardation. When he was a juvenile, he allegedly started his family's house on fire and molested two of his nieces.

Ron's family placed him in a boy's academy for high school. When he turned 18 he moved home, living with his father, sister and her four children (two of who he had allegedly molested).

Upon his return home, Ron began special education classes. Shortly, thereafter, he was found in the bathroom molesting another student. Ron was charged with third degree criminal sexual conduct. His attorney requested a forensic examination, as he questioned Ron's competency to stand trial. Ron's attorney requested an independent evaluation by a specialist in mental retardation, with expertise in evaluating comprehension of appropriate sexual behavior.

The forensic center psychiatrist found Ron capable of understanding the proceedings and assisting counsel. Ron pled guilty and was sentenced to one year probation. Special conditions of probation required counseling and placement in a group home to provide the type of environment recommended by the specialist.

The purpose of this case illustration is to examine the possibilities available for a developmentally disabled offender with a model equivalent to the IJP. Ron could have been receiving a host of services prior to the time of the offense. His juvenile history indicated that he was at risk of being involved with the criminal justice system. A plan could have been developed prior to the actual involvement.

Instead, Ron had no contact with community mental health until after the offense. The only programming he received was special education at a school 40 miles from his home, yet full evaluation of his past history pointed out obvious concerns. Professionals, from community mental health, special education, and the juvenile court diversion program would have met with Ron's family while he was a juvenile to review factors in his life to guarantee appropriately designed services. However, the lack of a program prior to the commission of the offense does not prevent the development of a plan after the crime.

With an IJP-like program, providers could agree on the assistance necessary to alleviate Ron's maladaptive behavior. A review of available services in his community would lead to a possible plan developed by special education staff, community mental health, his parole officer and the specialist who evaluated Ron for the court. In reviewing areas of deficiency, the group could develop an appropriate group home placement, special education or vocational program, and a behavioral management program. All of the services would be coordinated to achieve the same goal, while each provider assisting Ron would be specializing in development of skills relevant to their area of expertise.

Without an IJP model in Michigan, it is still possible for an attorney to

develop a plan to submit to the court. The overriding force in the court's decision to order counseling and a group home placement for Ron was that his attorney provided the court with pertinent information concerning his disability. A creative attorney can educate him/herself about the services the client is receiving (or services that are available). After finding out about these services, the attorney should request that the professionals develop a plan similar to the IJP. After the development of such a plan, the attorney can then present it to the court at any stage of the proceeding from the bail request to the sentencing brief.

In representing the developmentally disabled offender, the defense attorney shouldn't overlook available defense strategies. Some strategies are obvious and others are only apparent to people who work with the developmentally disabled population.

At the onset the attorney should consider issues of competence to stand trial and criminal responsibility. Further, it is necessary to determine the offender's ability to form the specific intent necessary for the commission of the alleged offense.

While an attorney has no control over the client's initial contact with the police, particular concern should be paid to that contact. Of particular importance are issues dealing with confessions, search and seizure, and voluntary waiver of fifth and sixth amendment protections. A case study is illustrative:

Barry, a client with mental retardation was charged with calling his ex-employer with a bomb threat. Prior to his arrest the police interrogated Barry. After being questioned for a long period of time, he finally confessed.

Barry's court-appointed attorney was someone who was representing him in an unrelated matter. The attorney soon discovered that during interrogation, Barry had handed the attorney's business card to the police. The attorney also talked to Barry's community mental health case manager. She told him that Barry would confess to anything if he thought it would please an authority figure. The case manager offered to have the staff psychologist evaluate Barry.

At a motion to quash the confession, the psychologist testified that while Barry has a relatively high IQ, he has deficiencies in adaptive skills. Two of his major problems were his eagerness to please people and his attempts to act like he understands concepts which are beyond his cognitive level. In her opinion, Barry could not have understood any of the rights he waived. Further, he would have confessed to anything if he thought it would please the officer. The motion to suppress was granted. Without the confession, the prosecutor dropped the charges.

The above case is illustrative of options available to every defense attorney. Counsel should doubt the voluntariness of any confession made by a developmentally disabled client prior to the appointment of an attorney.

The attorney representing a client with a developmental disability must be creative in his/her advocacy and must never take for granted that procedural defenses are not available based on a reading of initial facts. The state of the law regarding the developmentally disabled becomes more intricate on almost a daily basis. The practitioner must never overlook other professionals involved with his/her client.

Mary Swift is a graduate of Thomas Cooley Law School. She has served as area supervisor and staff attorney for the Michigan Protection and Advocacy Service in the Upper Peninsula for more than four years. Her address is 220 W. Washington, Suite 520 D-f, Marquette, MI 49855 (906) 228-5910.

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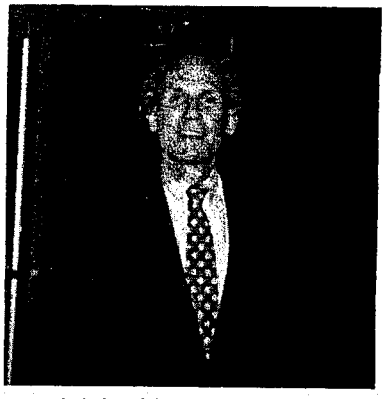
1987 DEATH PENALTY SEMINAR



Millard Farmer

(Left to Right)

Dave Norat

Neal Walker

Ron Dillehay

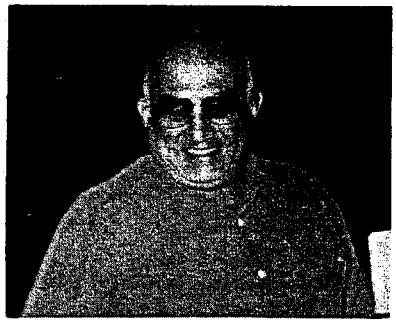
Donna Boyce

David Bruck

Ken Dupree, Ed Monahan
Paul Isaacs

Billie Brown

Deana Logan



Mike Zaiden, Investigator

Tim Ford and Cessie Alphonso

Ernie Lewis

West's Review

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

Linda K. West

KENTUCKY SUPREME COURT

WANTON ENDANGERMENT
Commonwealth v. Clemons
34 K.L.S. 7 at 17 (June 11, 1987)

Two KSP officer went to Clemons' home to serve a juvenile petition and take Clemons' son into custody. Clemons, however, pointed a loaded rifle at the officers and made various threatening remarks. Clemons was subsequently charged and convicted of two counts of first degree wanton endangerment.

On appeal, the Court of Appeals reversed Clemons' convictions, holding that some act other than the mere pointing of a loaded firearm was necessary to constitute 1st degree wanton endangerment. The Kentucky Supreme Court reversed the Court of Appeals. The Court reasoned that such an act may demonstrate the statutory elements of "extreme indifference to the value of human life" and "a substantial danger of serious physical injury to another person" since "[p]ointing a firearm at a police officer who is in the performance of his duties will result in a confrontation in which gunfire is distinctly possible." The Court's reasoning leaves open the possibility that pointing a loaded gun under other circumstances may not be wanton endangerment. Justice Vance dissented.

EXPERT OPINION ON ULTIMATE ISSUE
Hester v. Commonwealth
34 K.L.S. 7 at 21 (June 11, 1987)

The Court reversed Hester's convictions of multiple counts of first degree sodomy and first degree sexual abuse. At trial the Commonwealth introduced videotaped statements of the child victims detailing the alleged acts of sodomy and abuse. The children then took the stand and recanted their out-of-court statements.

The Commonwealth then called a sociologist, who testified that generally children cannot provide details of an alleged sex act "unless it has actually happened...." The sociologist further testified that children often recant allegations of abuse "because the family has put pressure on them...."

The Kentucky Supreme Court reversed because "The admission of the expert opinion was improper as it, in effect, told the jury to believe the story the children had initially told and disbelieve the testimony given in open court."

As such, the expert opinion reached the ultimate issue in the case. The Court found no basis for distinguishing the facts before it from those in Lantrip v. Commonwealth, Ky., 713 S.W.2d 816 (1986), which held that expert testimony that the victim suffered from "sexual abuse accommodation syndrome" was inadmissible.

The Court additionally held that the videotape of the children's prior inconsistent statements was admissible under Jett only after a proper foundation was laid. See Gaines v. Commonwealth, 34 K.L.S. 3 at 28 (March 12, 1987).

KENTUCKY COURT OF APPEALS

TRAFFICKING BY PHYSICIAN
Coleman v. Commonwealth
34 K.L.S. 6 at 2 (May 1, 1987)

Coleman, a physician, was convicted of trafficking based on his prescription of Demerol for a "patient" who told him she wanted to "get high." On appeal, Coleman argued that his conviction was barred under KRS 218A.180, which permits a practitioner to distribute controlled substances directly to an ultimate user. The Court disagreed, citing the KRS 218.A.010 definition of a practitioner as a "physician...licensed, registered or otherwise permitted to distribute...or to administer controlled

substances *in the course of professional practice.*" (Emphasis added). In the Court's words "if a distribution of controlled substances from a medical doctor to an ultimate user is not in the course of professional practice, then it is not authorized and is in violation of KRS 218A.140." The Commonwealth's proof established a jury issue as to whether the Demerol was prescribed by Coleman in the course of his professional practice.

STATUTES-VAGUENESS
Raines v. Commonwealth
34 K.L.S. 6 at 5 (May 1, 1987)

In this case, the Court rejected a void for vagueness challenge to KRS 237.040, which delineates the offense of criminal possession of a booby trap. The Court noted that a statute is void for vagueness when its terms are "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application" or when the statute fails "to provide explicit standards for those who enforce [it], thus permitting discriminatory and arbitrary enforcement." The use of the words "surreptitiously" and "covertly" in the statute did not invalidate it.

PFO - "PRIOR FELONY"
Jones v. Commonwealth
34 K.L.S. 6 at 9 (May 8, 1987)

Jones was convicted of PFO based on a prior federal sentence to treatment under the Federal Youth Corrections Act. Pursuant to the Act, Jones was not sentenced to a definite term of confinement but to a period of "treatment" whose duration was to be determined solely by the U.S. Parole Commission. The Court of Appeals held that this did not constitute a prior felony conviction, i.e., a conviction for which a term of imprisonment of one year or more was imposed. The Court further found "no merit to the Commonwealth's contention that because appellant actually served three years before being paroled, the persistent felon statute was satisfied." The Court viewed as important the fact that Jones' confinement was for the purpose of treatment.

SPEEDY TRIAL
Commonwealth v. Cade
34 K.L.S. 7 at 2 (May 22, 1987)

In this appeal by the Commonwealth, the Court upheld the dismissal of an indictment based on the Kentucky Constitution 11 speedy trial provision. Cade was arrested in January, 1986, and indicted in February, 1986. When the Commonwealth requested a continuance in July, 1986, the trial court dismissed the indictment. In affirming the dismissal, the Court of Appeals emphasized that the case was not a complex one requiring lengthy preparation, and that the prosecutor's grounds for seeking the continuance - that he had been assigned to the case one week before the trial date - was inadequate. The Court also found prejudice, quoting the ruling of the trial court that Cade "should not be required to live under the stigma of this indictment until such time as the prosecutor finds it convenient to proceed to trial." However, the Court held that the Commonwealth was free to reindict Cade since "jeopardy does not attach until a jury has been sworn."

BRUTON-REDACTED STATEMENT/ DUAL REPRESENTATION
Hayes v. Commonwealth
Graham v. Commonwealth
34 K.L.S. 7 at 6 (May 19, 1987)

In these related appeals, the Court held that the trial court denied Hayes his right of confrontation when it permitted the introduction of his nontestifying codefendant's out-of-court statement incriminating Hayes. The trial court erred in refusing to sanitize the statement by deleting references to Hayes. The Court of Appeals noted that Hayes' own confession to the single theft of two pairs of blue jeans did not interlock with the codefendant's statement to the extent that the statement implicated Hayes in an ongoing series of thefts. As to the codefendant, Graham, the Court held that she was not denied effective assistance of counsel when she and Hayes were represented by members of a single law firm. The Court relied on the fact that Graham had executed a waiver of dual representation pursuant to RCr 8.30 and had been advised by the trial court of the possibility of a conflict of interest. The Court also noted that Graham's trial attorney did not object to the dual representation.

COMMONWEALTH'S NONCOMPLIANCE WITH PLEA BARGAIN AGREEMENT
Shanklin v. Commonwealth
37 KLS 7 AT 8 (June 12, 1987)

In this case the appellant sought specific performance of a plea bargain agreement pursuant to which the Commonwealth was to recommend probation. At sentencing, the Commonwealth announced that it could not recommend probation and suggested that the appellant be allowed to withdraw his plea. The appellant refused and demanded specific performance of the plea bargain agreement. The Court of Appeals agreed that the appellant was entitled to specific performance. The Court cited Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), for the principle that the state should not be allowed to "welsh on its bargain." The case was remanded for resentencing before another judge.

UNITED STATES SUPREME COURT

CONFESSION
Arizona v. Mauro
41 CrL 3081 (May 4, 1987)

While in custody, Mauro was advised of his Miranda rights and declined to answer questions until a lawyer was present. However, a request by Mauro's wife that she be allowed to speak to him was granted on the condition that an officer be present. The officer observed their conversation and taped it with a tape recorder used in plain view. The tape was ultimately used at trial to rebut Mauro's insanity defense.

The Court held that the police's actions did not constitute interrogation or its functional equivalent. The police conduct did not fall within the Rhode Island v. Innis, 446 U.S. 291 (1980), definition of interrogation as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Justices Stevens, Brennan, Marshall, and Blackmun dissented.

RIGHT TO COUNSEL
Pennsylvania v. Finley
41 CrL 3191 (May 18, 1987)

Finley's conviction was affirmed on direct appeal. Finley then sought to bring a state post-conviction action, and, in compliance with state law, post-conviction counsel was appointed. Counsel determined that there were no meritorious grounds for collateral review. Counsel stated his conclusion to the court in writing and requested permission to withdraw.

Finley contended that counsel could be permitted to withdraw only after he complied with Anders v. California, 386 U.S. 738 (1967). The Supreme Court disagreed. The Court held that Anders applies only when a litigant has a federal constitutional right to counsel. The Court held the Sixth Amendment right to counsel does not apply to state post-conviction proceedings. The Court additionally held that the procedure followed by Finley's post-conviction counsel complied with the fundamental fairness requirement of due process. Justices Brennan, Marshall, and Stevens dissented.

EX POST FACTO LAWS
Miller v. Florida
41 CrL 3269 (June 9, 1987)

Florida law provides presumptive sentencing ranges for individual offenses. At the time of Miller's offense, the presumptive sentence for sexual battery was three and a half to four and one half years imprisonment. At the time of trial, the range has been revised upward to five and a half to seven years imprisonment. The increased range was applied to Miller. A unanimous court held that application of the new sentencing scheme to Miller violated the prohibition against ex post facto laws.

STATUTES-OVERBREADTH
Houston, Texas v. Hill
41 CrL 3273 (June 15, 1987)

In this case the Court held that a municipal ordinance which made it unlawful to "in any manner...interrupt any policeman in the execution of his duty" was facially overbroad in that it impinged upon constitutionally protected speech. The ordinance infringed the "constitutionally protected freedom of individuals verbally to oppose or challenge police action." Chief Justice Rehnquist dissented.

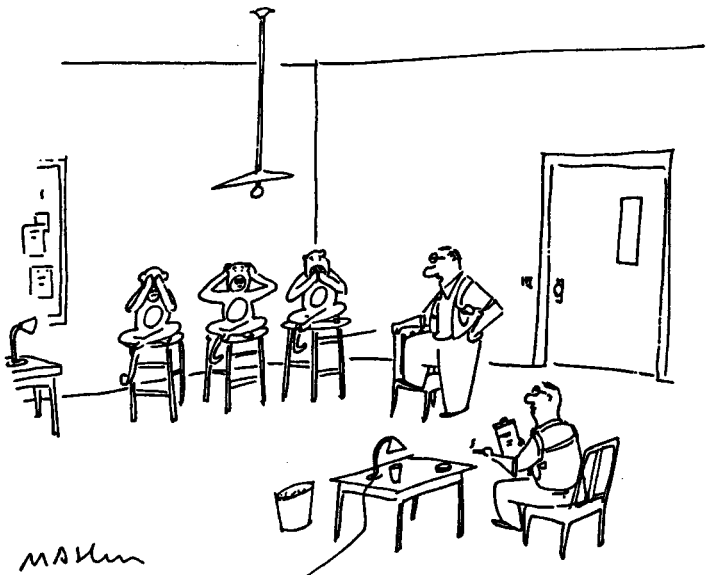
CONFRONTATION
Kentucky v. Stincer
41 CrL 3289 (June 19, 1987)

In this case, the Court held that the exclusion of a defendant from a hearing to establish the competency of child sex abuse victims does not violate the defendant's right of confrontation. The decision overturns the decision of the Kentucky Supreme Court in Stincer v. Commonwealth, Ky., 712 S.W.2d 939 (1986), that Stincer was denied confrontation. The U.S. Supreme Court noted that the testimony elicited at the hearing related only to the issue of witness competency, not to any substantive matter, and that any questions asked at the competency hearing could be asked of the witnesses at trial in the defendant's presence. Justices Marshall, Brennan, and Stevens dissented.

DOUBLE JEOPARDY
Ricketts v. Adamson
41 CrL 3322 (June 22, 1987)

Adamson plead guilty pursuant to a plea bargain agreement under which Adamson was to testify against his coindictees. Adamson complied with the agreement but refused to again testify against the coindictees at their retrial following reversal of their convictions. The state then sought to reindict Adamson, citing language in the plea agreement that if Ricketts refused to testify "this entire agreement is null and void and the original charge will be automatically reinstated...."

The Court held that under the terms of the plea agreement, he had waived



Drawing by Michael Maslin.
Reprinted with Permission.

any claim of double jeopardy. The Court rejected argument that because there was a good faith dispute as to Adamson's obligations under the agreement there was no knowing and intelligent waiver of the double jeopardy claim. Justices Brennan, Marshall, Blackmun, and Stevens dissented, reasoning that Adamson had not waived his double jeopardy protection because he had not wilfully breached the agreement.

HYPNOTICALLY REFRESHED TESTIMONY OF DEFENDANT
Rock v. Arkansas
41 CrL 3329 (June 22, 1987)

At issue in this case was whether an accused's right to testify may be abrogated under a state rule excluding hypnotically refreshed testimony. Under hypnosis, Rock recalled that when a gun discharged killing her husband she did not have her finger on the trigger and that her husband had grabbed her arm. The trial court excluded this testimony as unreliable. However, a firearms expert testified that the gun was defective and prone to fire without the trigger being pulled.

The Court held that Arkansas' per se exclusion of hypnotically refreshed testimony violated Rock's right to testify. The Court suggested that a proper exclusion would rest upon a showing by the State that "testimony in a particular case is so unreliable that exclusion is justified." Chief Justice Rehnquist, and Justices White, O'Connor and Scalia dissented.

POST-ARREST SILENCE
Greer v. Miller
41 CrL 3405 (June 26, 1987)

In this case the Court held that no violation of Doyle v. Ohio, 426 U.S. 619 (1976) occurred where a defense objection to prosecution cross-examination of the defendant regarding his post-arrest silence was immediately sustained. The jury was also given a curative admonition. The Court reasoned that a Doyle violation did not occur because the single instance of misconduct, to which objection was sustained, "did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." Justices Brennan, Marshall, and Blackmun dissented.

CONFLICT OF INTEREST/ INEFFECTIVE ASSISTANCE OF COUNSEL
Burger v. Kemp
41 CrL 3411 (June 26, 1987)

Burger and a coindictee were represented by law partners who assisted in preparing both cases for trial. At their separate trials, each defendant emphasized the greater culpability of the other. The Supreme Court rejected Burger's claim that this conflict affected his attorney's representation. The Court reaffirmed the holding of Cuyler v. Sullivan, 446 U.S. 335 (1980) that prejudice will be presumed only where an actual conflict affected counsel's representation. The Court found that the separate trials of the defendants undermined the claim of conflict.

The Court also rejected a claim of ineffective assistance of counsel premised on counsel's failure to offer mitigating evidence at the defendant's capital sentencing hearing. The Court found no fault with counsel's limited investigation of mitigating evidence based on the principle that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." *See* Strickland v. Washington, 466 U.S. 668, 690-691 (1984). Justices Blackmun, Brennan, Marshall, and Powell dissented.

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Majority Favor Alternatives To Death Penalty

In a study released by the Southern Coalition on Jails and Prisons' Georgia project, Georgia State University researchers report that a majority of residents in Georgia voice support for an alternative to the death penalty. Fifty-two percent of repondents participating in this cross section study state that, instead of the death penalty, they prefer a mandatory 25 year sentence with restitution to the victims' family. Additionally, 66 percent say that juvenile offenders should not be executed and 67 percent oppose executing the mentally retarded.

This is the first study since the reinstatement of the death penalty in this country to show opposition of a majority of Americans to the death penalty. It is also one of the first studies to gauge this with questions relating to alternatives to the death penalty. Most polls report only respondents' support or opposition to the death penalty. Given that question, even those polled in Georgia favor the use of capital punishment by a large majority. It is only when given the option of alternative sentencing that people begin to back off their support of the death penalty and show their reluctance to engage in this act of final retribution. And when the offender proves to be a juvenile or mentally retarded, the support for alternative sentencing jumps from a slight majority to an overwhelming one.

Legislation will be introduced to the Georgia General Assembly to abolish the death penalty for juveniles. Prominent legislators in both houses of the Georgia legislature have announced support for such legislation.

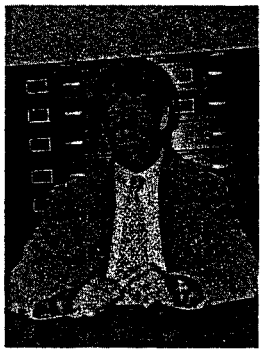
The Southern Coalition on Jails and Prisons is heartened by this indication of public support for alternatives to the death penalty. It is significant that such support comes in a conservative Southern state which has executed more people than any state in the nation.

(The Southern Coalition on Jails and Prisons wishes to express its gratitude to the Veatch Program for the financial support in this polling effort. Copies of the poll are available for $10.00 each through the office of the Southern Coalition on Jails and Prisons, P.O. Box 120044, Nashville, TN 37212)

SOURCE - Life Lines #33
March/April 1987

Post-Conviction

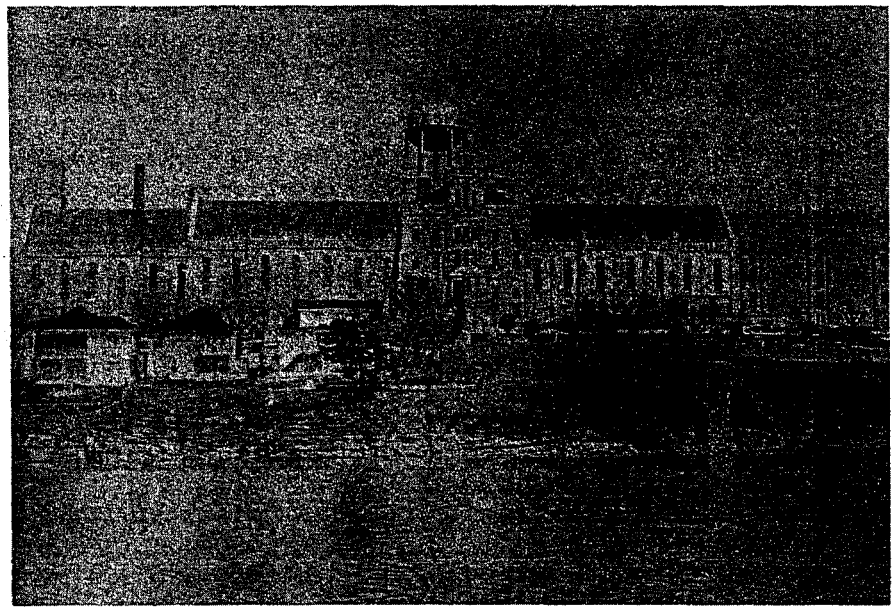
Law and Comment



HANK EDDY

KENTUCKY STATE PENITENTIARY

The Kentucky State Penitentiary at Eddyville, Kentucky opened its doors in 1890 with a sign above them which read, "Abandon hope all ye that enter here." Today the only maximum security prison in the state sits on a hill overlooking Lake Barkley. The original building, which is still used, was built by thirty Italian stone masons and one hundred and twenty-two inmates. It cost $420,000. It is an impressive sight due to its Gothic architecture which gives it the appearance of a castle.



Log entries from former wardens reflect that discipline was strict and harsh. For example, an entry written in the 1890's reads, "I had Prisoner Berry, #289, brought to the mid-yard post and shackled. After assembling the prison population, I supervised the administration of twenty-five lashes. Keeper Gray wielded the braided whip. Upon completion of this punishment, I inquired of Berry whether he was not ready to resume hauling stone."

Prison discipline has been and remains strict. Practices such as corporal punishment and chaining inmates to dungeon walls have vanished. Now an inmate can be punished by disciplinary segregation and loss of good time for prison rule infractions, but only after advance notice of the charges and a hearing. Disciplinary segregation means being confined to three cellhouse which is sometimes referred to as a jail within the prison. It generally consists of confining an inmate to an individual cell separate from the general population. Each inmate in disciplinary segregation is entitled to exercise outside of his cell at least one hour per day five days a week. Other privileges such as radios and television may also be curtailed.

Other types of restrictive confinement include administrative segregation and the administrative control unit. Assignment to administrative segregation may occur when an investigation is pending against an inmate for a serious rule infraction. An inmate may be confined in the administrative control unit if he repeatedly violates institutional rules. All inmates assigned to a segregated unit have their status periodically reviewed from anywhere between seven and thirty days by a classification committee.

If there is a significant risk to an inmate's physical safety by being housed among the general population inmates, he can request or may be placed in protective custody. Such requests are usually granted, but do result in a curtailment of privileges. Inmates in disciplinary segregation, administrative segregation, or some other type of special security status also have their privileges reduced.

On an average day the Penitentiary will house about 775 prisoners. Each inmate has his own cell. The smallest cells are in three cellhouse. They are 55 square feet. The largest cells are in the newest cellhouse which is number six. They are 85 square feet. There are presently four cell houses in operation. One and two cellhouses are being renovated.

An inmate's out-of-cell time varies according to the season. During this time he may choose from a variety of programs in which to participate. A general population inmate may spend fourteen hours a day in work and program areas on the yard during the summer months. Recreational activities include swimming, basketball, weight lifting, handball, jogging, softball and other types of activities.

Approximately forty percent of the population takes advantage of the job and educational opportunities available. The majority of the jobs are in prison industries which consists of the furniture plant, fiberson shop, garment factory and upholstery shop. These jobs pay anywhere from .25 to .65 an hour. Other jobs available include janitors, clerks, laundry workers, kitchen workers, legal aides, plumbers, electricians, welders, laborers, jobs in recreation and other program areas. These jobs pay anywhere from .25 to $2.00 per day. Additionally inmates receive pay if they are participating in an academic program or vocational school. The pay for these programs varies from .40 to $1.20 per day. Vocational school programs offered are: heating and air conditioning; small engines; auto body; masonry; and welding. It takes from one to two years to complete these programs.

Students in the general academic program are classified according to their academic ability which ranges from non-readers to the twelfth grade level. Inmates in the highest classification can obtain a GED. Twenty inmates can participate in the college program. Classes are taught by faculty from Murray State University. Successful completion earns an associate degree in general studies.

The purpose of offering academic programs is to enhance the chances of the inmate to successfully integrate into his community upon release.

Inmates can also participate in the following clubs or programs: AA; substance abuse; Jaycees and NAACP. A new program for sex offenders has just begun. Additionally prisoners are guaranteed the right to religious freedom, medical help, legal access, correspondence and visitation. These rights can be restricted for security reasons.

The staff consists of 310 employees, 208 of whom are involved in security. Since 1890 seven employees have been killed. Each inmate is assigned a caseworker who is available to assist with problems regarding either prison life or with their families. A caseworker can also help the inmate to take advantage of the available programs at the institution which was accredited by the National Correction's Commission in 1983.

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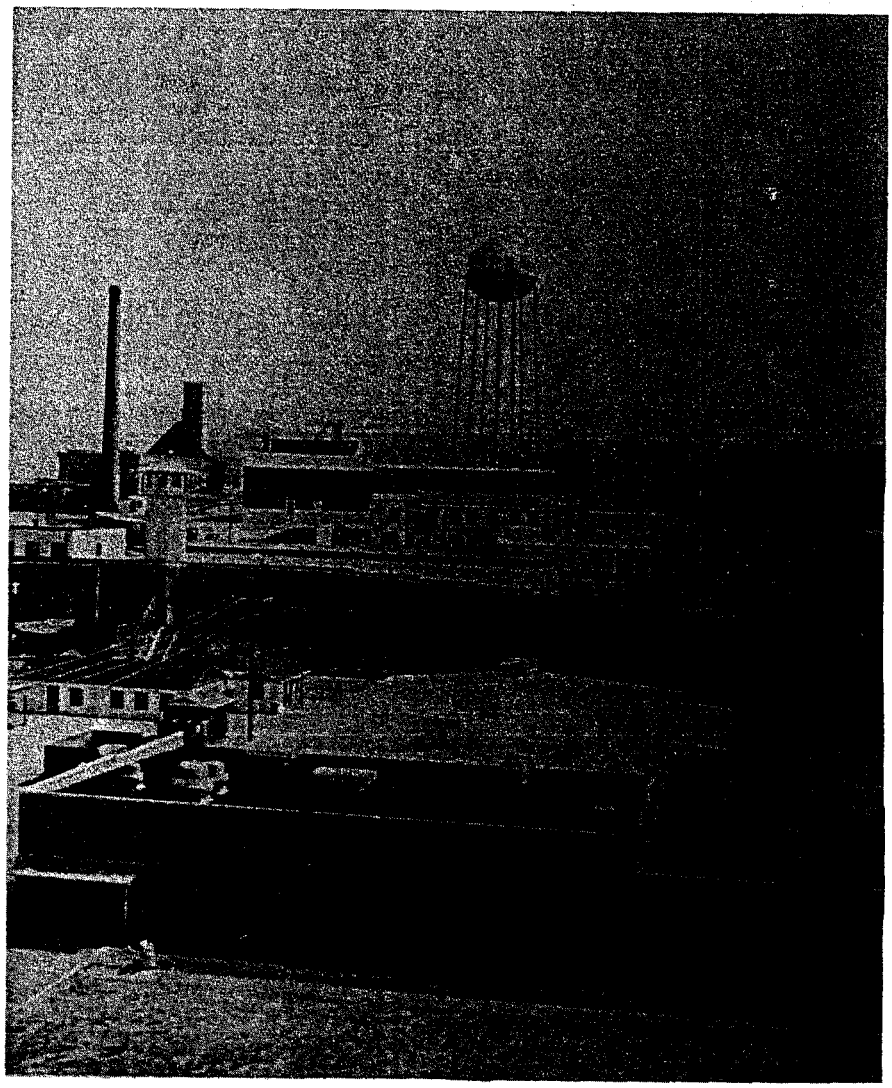
Most of the factual information for this article was furnished by Tom Simpson and Patti Webb both of whom work at KSP.



KENTUCKY STATE PENITENTIARY

The Death Penalty

Kevin McNally

DEATH ROW = 31
PENDING = 75

THE YEAR IN REVIEW: PART II

IV. RAY MCCLELLAN'S CONVICTION AND SENTENCE REVERSED

In the only death sentence reversed in 1986, Ray McClellan's case was returned to Jefferson County. (Reversals in previous years were James/Holland and Ward in 1985; Ice in 1984; Moore and O'Bryan in 1982; Smith and Hudson in 1980.) The Court's June 12, 1986 decision found fault with the failure to instruct on lesser included offenses, the prosecutor's conduct and, importantly, the failure to define "extreme emotional disturbance" [EED].

a) The Disgruntled Lover and The Heat of Passion

The Kentucky State Police Uniform Crime Reports tell us that spouse, lover or ex-spouse related murders constitute approximately 15% of all Kentucky killings. Extrapolating, it appears that there have been 500 or so non-negligent homicides of this type during the first 10 years of the life of our death penalty statute. Yet, Ray McClellan alone was given the death penalty for this category of killing - although three others stand guilty of multiple murder involving a girlfriend and 3 others in one case, the husband of a girlfriend and 4 others in another, and an estranged wife and her mother in a third. But absent an aggravating circumstance with independent weight (such as multiple murder), these cases are never treated by prosecutors, juries or judges as death penalty cases. This is true despite the arguable existence of a "profit motive" in most such situations. See KRS 532.025(2) (a)(4).

Ray McClellan was convicted of killing his wife's third husband, Gary Stutzenberger. McClellan was Bernadette McClellan's fifth husband. They argued, with Ray allegedly threatening her. She left and shortly thereafter moved in with Gary. Ray bought a rifle and followed them, his automobile colliding with a van driven by Gary. A warrant was taken on Ray. That night Ray waited until the early morning hours for Gary and Bernadette to return to their apartment. He knocked on the door and said he was a police officer. Gary opened, then shut the door. Ray blasted the lock off. When Bernadette "emerged unclothed from beneath the bed," Ray "shot and killed Gary, kidnapped Bernadette" and fled to Indiana where he eventually surrendered. McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 466 (1986).

b) First Degree Burglary

The arbitrariness in singling out Ray McClellan for the death penalty from hundreds of similar cases was possible only because of a fluke. Had McClellan shot Stutzenberger in the hall, the prosecutor couldn't have even asked for the death penalty. While a murder during a burglary (say a night entry into a home to steal) may well be a rational and constitutional aggravating circumstance, a serious problem arises when the "intent to commit a crime" is the intent to kill. In order to pass constitutional muster, an aggravating circumstance [AC] must 1) "generally narrow the class of persons eligible for the death penalty *and* 2)...reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 103 S.Ct. 2733, 2742-43 (1983). When burglary is used as an AC and the only crime intended (if any) is to kill the victim, the aggravating circumstance may fail both tests, certainly the second.

c) Sufficiency of Burglary Evidence - Lesser Included Instructions in Death Penalty Cases

The Court rejected McClellan's claim (and testimony) that he entered Stutzenberger's apartment with intent to commit no crime. The evidence was sufficient. However, the jury could have believed his testimony and, therefore, an instruction should have been given on the lesser included offense of criminal trespass, "knowingly enters or remains unlawfully." KRS 511.060(1). This error was "crucial" because conviction of the lesser offense would have barred the death penalty.

Justices Stephenson and Wintersheimer dissent, with this unclear remark: "Had McClellan testified that he blacked out and remembered nothing, that would be the defendant's theory of the case and require an appropriate instruction. This theory is entirely subjective."

The failure to give lesser-included instructions seems to be a prevalent problem in death penalty cases. See, e.g., Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985). In fact, historically the failure to give lesser-included instructions in murder cases was the single most commonly raised, and most successful, issue in death

penalty appeals. See, e.g., Montgomery v. Commonwealth, Ky., 63 S.W. 747 (1901); Trabue v. Commonwealth, Ky., 66 S.W. 718 (1902); Thomas v. Commonwealth, Ky., 86 S.W. 694 (1905); Taylor v. Commonwealth, Ky., 90 S.W. 581 (1906); Smith v. Commonwealth, Ky., 118 S.W. 368 (1909); Hawkins v. Commonwealth, Ky., 113 S.W. 1151 (1911).

d) Narrowing Function - Double Use of Element

The Court held that under McClellan's circumstances, burglary could be a valid AC consistent with Zant. However, the Court sidestepped one aspect of the constitutional question by speculating that McClellan may have entered with the intent to commit a crime *other* than murder (i.e., "kidnap or unlawfully restrain his wife"). 715 S.W.2d at 472. By blurring this issue, the meaning of the Court's decision is not clear.

Concurring, Justice Leibson tackles the issue directly. "Burglary I should not be utilized as an aggravating factor if the jury believes that the crime that the defendant intended to commit...was to shoot the victim... Otherwise the same criminal intent, the intent to [kill]...is being utilized twice." 715 S.W.2d at 474. Cf. Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980); Polk v. Commonwealth, Ky., 679 S.W.2d 231 (1984).

This "double use" of an element of the crime has given rise to a line of cases which ultimately will result in a decision by the U.S. Supreme Court. In Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), the Court dealt with double counting of "one aspect of the evidence..." The 8th Circuit granted habeas relief in a death case "because the pecuniary gain aggravating circumstance fails to narrow the class of persons already guilty of robbery and murder..." 754 F.2d at 259.

Unlike Kentucky, in Arkansas the underlying capital offense is felony murder, not just murder. In Collins's case it was robbery/ murder. One of the aggravating circumstances was "the capital felony was committed for pecuniary gain."

The question...is whether the use of an aggravating circumstance that duplicates an element of the crime itself is a violation of the 8th amendment... 754 F.2d at 263.

Justice Leibson relied on Collins in support of an apparent 8th Amendment theory. "We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function." 754 F.2d at 264. Assuming, as in McClellan, that no additional AC is present, the jury can't impose the death penalty for an indoor killing without any additional "finding that narrows the class of those who have committed this death-eligible crime" (i.e., indoor killing). 754 F.2d at 264. See also Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986); Ruiz v. Lockhart, 806 F.2d 158 (8th Cir. 1986). Three justices of the U.S. Supreme Court (White, Brennan and Marshall) have indicated the issue warrants review. See Wiley v. Mississippi, 107 S.Ct. 304 (1986) and Williams v. Ohio, 107 S.Ct. 1385 (1987) (dissents from denial of certiorari). [In fact, a fourth justice has apparently joined them as certiorari has been granted in Lowenfield v. Butler, 41 Cr.L. 4086 (1987) as we go to press.

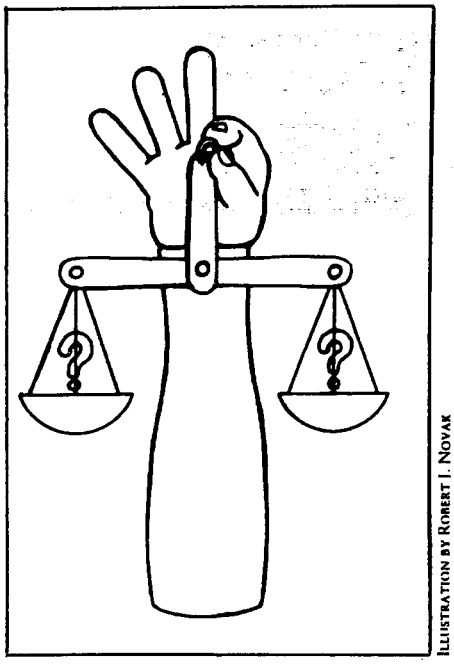


ILLUSTRATION BY ROBERT J. NOVAK

"Does sentencing scheme by which petitioner faces death, based upon sole statutory aggravating circumstances that merely repeats element of crime, violate Eighth Amendment requirement that sentencer's discretion be directed and limited so as to minimize risk of arbitrary and capricious execution?" See also, Parker v. State, 41 CrL 2282 (715/87), burglary AC doesn't apply when a defendant enters a dwelling to kill.]

e) Enhancing Function - Are "Inside Killings" Rationally More Serious?

Justice Leibson also argued a second theory, not in issue in Collins but articulated in the second prong of Stephens. The burglary AC "should not be construed as qualifying murders for the death penalty on the basis of 'situs.' Murder...on one side of a door should not qualify for the death penalty where the same murder on the other side would not. Death is not an appropriate penalty simply by reason of location... This is an arbitrary classification in violation of the...[8th] Amendment..." 715 S.W.2d at 475 (concurring).

The "homicide data" kept by DPA contains scores of similar cases where the death penalty was not even sought, let alone returned, yet where murders took place indoors and where the defendant arguably either entered or "remained unlawfully in a building" with the intent to kill. KRS 511.020(1). There simply is no "meaningful basis for distinguishing the few cases in which [the death penalty is]... imposed from the many cases which it [was]...not." Furman v. Georgia, 408 U.S. 236, 313 (1972) (White, J., concurring).

The Court didn't, of course, conduct a "proportionality review" here. But the fact that there is simply "no *principaled* way to distinguish" McClellan's case from the "many cases in which" the prosecutor did not seek the death penalty, Furman, 408 U.S. at 313 (White, J.), goes a long way towards explaining the reversal and why this case was chosen

from many as the vehicle for the long-awaited explanation of what "extreme emotional disturbance" is.

f) Definition of Extreme Emotional Disturbance

After many invitations, over the course of years, the Court finally observed:

Without some standard or definition a jury is left to speculate in a vacuum as to what circumstances might or might not constitute extreme emotional disturbance. 715 S.W.2d at 467

Agreeing with the Commentary (1974) that EED represents "an abandonment of the common law requirement... [of] 'sudden heat of passion' upon 'adequate provocation,'" the Court, albeit grudgingly, finds EED "somewhat less limited in its application." 715 S.W.2d at 468. See KRS 507.030.

Although its onset may be more gradual than the "flash point" normally associated with sudden heat of passion, nevertheless, the condition must be a temporary disturbance of the emotions as opposed to mental derangement per se.

Extreme emotional disturbance may reasonably be defined as follows: "Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be."715 S.W.2d at 468-69.

Having said that, the Court's specific holdings are important: 1) in this case, the evidence presented a jury question. 2) The jury *should be instructed as to the definition* on retrial. And 3) the prosecutor's argument equating EED with "sudden heat of passion" and demanding "specific acts of provocation" by the victim, should not be repeated.

Justice Leibson "disagree[d] with including the word 'uncontrollably'" in the definition, a word which is "more suitably" applied to "temporary insanity..." 715 S.W.2d at 474. "Wherever the evidence shows that the defendant's emotionally disturbed state was a contributing factor causing him to commit the criminal act, he should be entitled to mitigation of the degree of the offense to the lesser degree." Id.

Apparently, the Attorney General agreed with Justice Leibson's analysis as they petitioned for modification urging the Court to delete the word "uncontrollably" from the EED definition. The Court declined and denied rehearing on September 25, 1986

g) Kidnapping -Lesser Included Error Again

The evidence is found sufficient to permit a jury finding that McClellan "intended at the time of the abduction both to terrorize Bernadette and to hold her as a hostage." KRS 509.040. 715 S.W.2d at 469. However, the refusal to instruct on unlawful imprisonment in the second degree, KRS 509.030(1) ["under circumstances which (*do not*) expose that person to a risk of serious physical injury"], was error since McClellan "maintained throughout...his acts were motivated out of love and concern for his wife." 715 S.W.2d at 469. Justices Wintersheimer and Stephenson disagree.

Since no "incident...is claimed" supporting a "risk of serious physical injury [to Bernadette] in Kentucky", rather than Indiana, no instruction on unlawful imprisonment in the first degree should be given on retrial -- absent new evidence of something that happened south of the border.

h) Unlawful Search

McClellan rented an apartment in the same building as Gary and Bernadette the day of killing. After the shooting, an officer entered when he saw a door ajar and observed a cup, a hamburger wrapper and a rifle box. These items were seized in a subsequent warrantless entry and the prosecutor based his "laying in wait" closing argument on this evidence. The Court finds any error harmless since the same argument could have been made based on the plain view observation of the first officer who had exigent circumstances. 715 S.W.2d at 470-471.

i) Prosecution Misconduct - Improper Cross-Examination

Ernie Jasmin, possibly the next Commonwealth's Attorney in Jefferson County, asked the Dean of Christ Church Cathedral if he would change his opinion that Ray was "sincere and sorry for his acts" if he knew McClellan had recently said: "I killed the wrong person." No evidence was introduced to back this up and counsel's mistrial motion should have been granted. This is a common error in death penalty and other cases. See, e.g., Spencer v. Commonwealth, Ky., 107 S.W. 342 (1908) [prior attempt to cut victim's throat]; Rowe v. Commonwealth, Ky., 269 S.W.2d 247 (1954) [unexplained knife used by prosecutor]; Woodford v. Commonwealth, Ky., 376 S.W.2d 526 (1964) [alleged police chase]; Coates v. Commonwealth, Ky., 469 S.W.2d 346 (1971) [rumors of drug trafficking]. Interestingly, the two dissenters think, and said so, that a capital defendant's sincerity and remorse "is incompetent and irrelevant", therefore there was no error. 715 S.W.2d at 475.

j) Recommendation

The Court again faced the "troublesome" question of instructing the jury "to recommend rather than fix the penalty..." Use of the term "is not a sufficient ground to require reversal of a death sentence unless the idea of a jury recommendation is so prevalent that it conveys the mes-

sage that the jurors awesome responsibility is lessened..." 715 S.W.2d at 472.

k) Trial Judge Proportionality

The trial judge refused, except by avowal, to hear evidence comparing McClellan's case with "the nature of the acts...committed by others who escaped the death penalty by negotiated pleas...or by jury verdicts..." The Court stated "[w]e have held...a trial judge is authorized to reduce the sentence... We have not held that a trial judge must conduct a proportionality review... That review will be conducted by the Supreme Court..." Contra People v. Gordan, 42 Cal.3d 308, 318 (1986) [trial judge can strike aggravating circumstance even when aggravating circumstance out weighs mitigating circumstance in interests of "proportionality and justice"]. Finally, the Court held the record "does not support a contention that the trial court refused to consider...a reduction of the sentence." 715 S.W.2d at 473.

V. HALVORSEN AND WILLOUGHBY DEATH SENTENCES AFFIRMED

On December 18, 1986, a pair of death sentences were affirmed by the Kentucky Supreme Court (Justice Stephenson writing) for Leif Halvorsen and Mitchell Willoughby [HW] of Lexington. Each was given two death sentences and life imprisonment for the January 1983 drug-related slaying of two men and a woman. The bodies were discovered on or near the Brooklyn Bridge on the Jessamine-Mercer County line.

a) Recommendation

After distinguishing Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), Ice v. Commonwealth, Ky., 667 S.W.2d 671 (1984) and Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985), the Court held: "No such minimizing of the jury's sense of responsibility occurred in this case... We note that no objections were made... This drumbeat of complaint...seems to arise in every case... We suggest that the trial court or prosecutor, or both, emphasize to the jurors that the use of the term 'recommendation' in a death penalty case does not, in any fashion, diminish or lessen the responsibility of the jury in imposing the death penalty" [HW at 9]. Justice Vance dissented [HWD] on this issue. "Jurors should not be led to believe...that they should keep the option of the imposition of the death penalty open by recommending it because the judge can reduce the sentence if he feels it is not warranted" [HWD at 1-2]. In fact, the prosecutor specifically argued in voir dire and closing: "You don't set the sentence..." [HWD at 2]. Interestingly, Justice Leibson, who has written forcefully on this problem, did not dissent. See Ward, 695 S.W.2d at 408 (Leibson, J., concurring); Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 682 (1985) (Leibson, J., dissenting).

b) Combination Instruction

Approved is a "combination" murder instruction "that stipulated...if the jury was unable to determine in which capacity each defendant had actually participated [accomplice or principal], the jury could [still] find guilt under this instruction [HW at 9-10]. First, the "combination" instruction referred to the elements listed elsewhere explaining principal/ accomplice liability. Second, "a verdict cannot be attacked as... non-unanimous where both theories are supported by sufficient evidence. Wells v. Commonwealth, Ky., 561 S.W.2d 85 (1978)..." [HW at 10].

c) Wanton Murder

"[T]here was no evidence supporting such an instruction... In view of the

CONNIE RAY EVANS, 27, was executed July 8 in Mississippi's gas chamber.

JOHN THOMPSON, 31, was executed July 8 by lethal injection in Texas.

RICHARD LEE WHITLEY, 41, was executed July 6 in Virginia's electric chair.

Eighty-three persons have been put to death since the Supreme Court reinstated the death penalty in 1976.

1987: Elliott Johnson, TX, 6/24; Jimmy Wingo, LA, 6/16; Jimmy Glass, LA, 6/12; Alvin Moore, LA, 6/9; Benjamin Berry, LA, 6/7; William Boyd Tucker, GA, 5/29; Anthony Williams, TX, 5/28; Richard Tucker, GA, 5/22; Earl Johnson, MS, 5/20; Joseph Mulligan, GA, 5/15; Eliseo Moreno, TX, 3/4; Ramon Hernandez, TX, 1/30.

1986: Richard Andrade, TX, 12/18; Michael Wayne Evans, TX, 12/4; John William Rook, NC, 9/19; Chester Lee Wicker, TX, 8/26; Larry Smith, TX, 8/22; Randy Lynn Woolls, TX, 8/20; Michael Marnell Smith, VA, 7/31; Jerome Bowden, GA, 6/24; Kenneth Brock, TX, 6/19; Rudy Ramos Esquivel, TX, 6/9; Ronald J. Straight, FL, 5/20; Jay Kelly Pinkerton, TX, 5/15; David Livingston Funchess, FL, 4/22; Jeffery Allen Barney, TX, 4/16; Daniel Morris Thomas, FL, 4/15; Arthur Lee Jones Jr., AL, 3/21; Charles Bass, TX, 3/12; James Terry Roach, SC, 1/10.

1985: Carroll Edward Cole, UT, 12/5; William Vandiver, IN, 10/16; Charles Rumbaugh, TX, 9/11; Henry Martinez Porter, TX, 7/8; Morris Mason, VA, 6/25; Charles Milton, TX, 6/25; Marvin Francois, FL, 5/29; Jesse de la Rosa, TX, 5/15; James Briley, VA, 4/18; John Young, GA, 3/20; Stephen Peter Morin, TX, 3/13; John Paul Witt, FL, 3/6; Van Roosevelt Solomon, GA, 2/20; James Raulerson, FL, 1/30; Doyle Skillern, TX, 1/16; Joseph Carl Shaw, SC, 1/11; Roosevelt Green, GA, 1/9; David Dene Martin, LA, 1/4.

1984: Robert Lee Willey, LA, 12/28; Alpha Otis Stephens, GA, 12/12; Timothy Palmes, FL, 11/8; Velma Barfield, NC, 11/2; Ernest Knighton, LA, 10/30; Thomas Barefoot, TX, 10/30; Linwood Briley, VA, 10/12; James Henry, FL, 9/20; Timothy Baldwin, LA, 9/10; Ernest Dobbert Jr., FL, 9/7; David Washington, FL, 7/13; Ivon Stanley, GA, 7/12; Carl Elson Shriner, FL, 6/20; James Adams, FL, 5/10; Elmo Patrick Sonnier, LA, 5/5; Arthur Frederick Goode, FL, 4/5; Ronald Clarke O'Bryan, TX, 3/31; James Hutchins, NC, 3/16; James D. Autrey, TX, 3/14; John Taylor, LA, 2/29; Anthony Antone, FL, 1/26.

1983: John Eldon Smith, GA, 12/15; Robert Wayne Williams, LA, 12/14; Robert Sullivan, FL, 11/30; Jimmy Lee Gray, MS, 9/2; John Evans, AL, 4/22.

1982: Charles Brooks, TX, 12/7; Frank Coppola, VA, 8/10.

1981: Steven Judy, IN, 3/9.

1979: Jesse Bishop, NV, 10/22; John Spenkelink, FL, 5/25.

1977: Gary Gilmore, UT, 1/17.

We ask prayers for the victims of crimes committed by those listed here, for those executed and for those participating in executions done in our names.

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number, location, and lethal magnitude of the gunshots, it would have been unreasonable to give a wanton murder instruction" [HW at 11].

d) Other Crimes/Bad Acts

Halvorsen complained that after-the-crime evidence that he 1) "stomped on a kitten...", 2) said he would "kill his mother", and 3) attempted to sell drugs and buy guns was unfair and error. The Court found this evidence "incidental to relevant testimony" and therefore tolerable [HW at 12-13].

e) Intoxication Instruction

There was no specific reference to which offenses (i.e., intentional) permitted a defense of intoxication and which (i.e., wanton) did not. But the Court points out that when an intoxication defense was available, it was "clearly set out" as an "element... It is a reasonable inference that the instructions which excluded such specific language also excluded the defense" [HW at 13].

f) Mitigation Instructions

Halvorsen had no right to an instruction that his participation was "'relatively minor.' Emptying a revolver into the bodies of two helpless victims, in our opinion, is not 'relatively minor' participation" [HW at 14]. Willoughby had no right to an instruction on "lack of a significant history of prior criminal conduct" because of his "criminal repertoire", including robbery, burglary and theft [HW at 16].

The Court also refused Halvorsen a *sua sponte* instruction "on non-statutory mitigating factors, such as his "stable upbringing in an obviously healthy, caring home" [HW at 14], and refused Willoughby *sua sponte* instructions "on some twenty-odd factors as mitigating circumstances, such as his not being a mean person, his trouble coping as a young child, and his having been shot in the face accidently as a young man. The trial court did not preclude the jury from considering these factors, since...the jury was encouraged to consider *any evidence it pleased* in mitigation... See White v. Commonwealth, Ky., 671 S.W.2d 241 (1983)" [HW at 17] (emphasis added). However, what if the evidence doesn't "please" the jury. Is it mitigation under law or isn't it?

g) Separate Trials/ Conflict-of-Interest

Co-defendant Susan Hutchens was represented by a Fayette County Legal Aid lawyer, the same person as Halvorsen and Willoughby at arraignment. Halvorsen later employed counsel and testified in the penalty phase that he participated in the killings because he feared Willoughby. Hutchins pled guilty and testified against both. Willoughby executed a waiver and was represented by a second Legal Aid lawyer at trial. The Court could "not discern any conflict of interest during the trial" and held it was "not [an] abuse of discretion [to deny] separate trials."

h) Miscellaneous

The Court also rejected claims involving prosecutorial misconduct, "oblique references' to Halvorsen's failure to testify, an involuntary confession by Willoughby due to drug and alcohol intoxication, and an instruction for Halvorsen on extreme emotional disturbance (there being no such evidence). The usual superficial proportionality review was done. *See* The Advocate (Vol. 8, No. 2) at 20 (Feb. 1986).

i) Rehearing/Proportionality

On July 2, 1987, the Court denied rehearing and modified the opinion. Responding to previous complaints, as noted here, the Court purported to correct its list of cases constituting its "pool" for proportionality review: "all cases... in which the death penalty was imposed [and *affirmed* on appeal] after January 1, 1970..." Unfortunately, the Court continues to list reversals...or at least one. Hudson v. Commonwealth, Ky., 597 S.W.2d 610 (1980).

Justice Leibson concurs, objecting to a "proportionality review limited to prior cases wherein the death penalty was both imposed and affirmed." However, Justice Leibson's approach is not much more expansive. "It is my opinion that the review of 'similar' cases, as called for by the statute, requires us to consider all cases where the death penalty was imposed, regardless of whether the sentence was affirmed or reversed on appeal."

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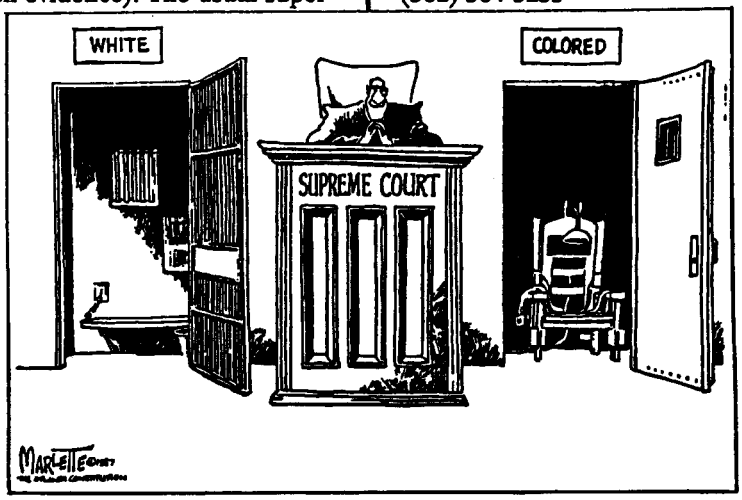

Copies of a 17" X 22" black and white poster of the above McCleskey cartoon copy righted by Atlanta Journal Constitution cartoonist Doug Marlette are available for $4 by contacting Pat Delahanty, 2704 West Chestnut, Louisville, Kentucky 40211, (502) 772-2348. All proceeds will be used by the Kentucky Coalition Against the Death Penalty to provide public information on the death penalty in Kentucky. Please make your checks payable to the Kentucky Coalition Against the Death Penalty.

6th Circuit Highlights


Donna Boyce

CONFLICT OF INTEREST

In Thomas v. Foltz, ___ F.2d ___, 16 SCR 11, 10, 41 Cr.L. 2152 (6th Cir. 1987), the Sixth Circuit Court of Appeals held that Thomas was denied effective assistance of counsel due to a conflict of interest where the attorney jointly represented three co-defendants in a murder-robbery case and persuaded all three, including non-triggerman Thomas, to accept the prosecutor's "all or nothing" package plea bargain.

The Court stated that in order to successfully assert a claim of ineffective counsel based on a conflict of interest, a defendant who entered a guilty plea must establish that there was an actual conflict of interest and that the conflict adversely affected the voluntary nature of his guilty plea.

In the case at bar, the Court found an actual conflict of interest since there were competing interests at stake which the attorney could not pursue due to his joint representation and the "all or nothing" nature of the plea offer. Counsel was effectively precluded from engaging in any separate plea negotiations on behalf of the less-culpable Thomas which may have been detrimental to the interests of the other co-defendants, and was in a position where he needed to pressure Thomas to accept the plea bargain. Because independent counsel would not have had these concerns, the Court found that the attorney's conflict had an adverse impact on his representation of Thomas and that the attorney's pressure, tainted by the conflict of interest, had an adverse impact on Thomas' decision to enter a guilty plea.

PRIVACY INTERESTS OF MALE INMATES

In Kent v. Johnson, ___ F.2d ___, 16 SCR 11, 5, 41 Cr.L. 2203 (6th Cir. 1987), the Sixth Circuit ruled that a Michigan inmate's 42 U.S.C. 1983 suit against prison officials for their policy and practice of according female guards unrestricted access to all areas of the prison, thereby allowing female guards to view him performing necessary bodily functions and his naked body in the shower, stated a viable claim and should not have been dismissed. The lower court had dismissed the inmate's constitutional claims as inconsistent with a Title VII decision concerning the rights of female prison guards. However, a majority of the Sixth Circuit found that the inmate's suit stated constitutional claims upon which relief could be granted under the First (fundamental Christian tenet of modesty), Fourth (right of privacy as it encompasses right to shield one's naked body from view by members of the opposite sex) and Eighth (retaliation by female guards due to inmate's assertion of right to privacy) Amendments. The Court noted that the defendants had offered no evidence or argued that they had taken any measures whatsoever to accommodate the competing interests of the male inmates and the female guards.

ABUSE OF GOVERNMENTAL POWER

In Vinson v Campbell Co. Fiscal Court, ___ F.2d ___, 16 SCR 12, 10 (6th Cir. 1987), the Sixth Circuit ruled that a Cincinnati woman has the right to sue the Campbell County Fiscal Court and a county juvenile services probation officer who crossed the Ohio state line to take custody of the woman's children. A Campbell County juvenile services probation officer went to an apartment where Vinson and her children lived with a friend to investigate a truancy complaint and removed the two children. Vinson later reclaimed the children. The juvenile officer told Vinson that she needed to appear at an upcoming hearing on the truancy complaint. Vinson informed the officer she could not attend the hearing because she was being evicted and was moving back to Ohio. The officer then procured a summons requiring Vinson's appearance, despite a warning from the juvenile court clerk that she needed to file a petition first. When Vinson failed to appear at the hearing, the judge issued a bench warrant for her arrest and entered an Emergency Custody Order. The juvenile officer requested a copy of the order and informed the court clerk that she intended to retrieve the children from Ohio. The juvenile officer went to Ohio and returned with the two children, disregarding the clerk's advice that she could not go directly to any out-of-state police department but had to proceed through the Interstate Compact. The Sixth Circuit found that the juvenile officer's alleged unlawful deprivation of Vinson's liberty interest in the custody of her children was an egregious abuse of governmental power sufficient to state a substantive due process violation. The Court further found that the Fiscal Court could be held liable if its training and supervision regarding interstate custody jurisdiction were so recklessly or grossly negligent that Vinson's misconduct was almost inevitable.

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Plain View

Ernie Lewis

The end of the October 1986 term of the United States Supreme Court featured four cases with Fourth Amendment implications. With Justice Powell announcing his retirement, perhaps the Court will pause for a period of readjustment prior to its next phase, whatever that will be.

His last term featured a continued dismantling of Fourth Amendment protections, with the major exception of Arizona v. Hicks, penned by Justice Scalia. The end of the term was similar, with three cases "won" by the government and one case rained out. New York v. Burger, ___U.S.___, 41 Cr.L. 3299 (June 19, 1987) was a clear victory for the government. In a decision by Justice Blackmun and joined by five others, the Court held that a New York statute allowing for warrantless searches of automobile junkyards was constitutional, even where the statute had as its major purpose the deterrence of criminal behavior.

While the Fourth Amendment applies to commercial premises, Lee v. City of Seattle, 387 U.S. 541 (1967), an exception exists in"closely regulated" businesses. The Court found that the automobile junkyard was a "closely regulated" industry. Further, because there was a "substantial governmental interest," because the warrantless search was "'necessary to further [the] regulatory scheme,'" and finally because the statute both advised the owner that his property would be regularly searched and sufficiently limited the discretion of the officers conducting the search, the New York scheme passed constitutional muster.

Justice Brennan was joined fully by Justice Marshall and in part by Justice O'Connor in dissent. To the dissenters, the majority's opinion, "if realized, will virtually eliminate Fourth Amendment protection of commercial entities in the context of administrative searches." The dissenters major complaint was that the statute was in reality a criminal statute in regulatory clothing, and thus was a pretext to allowing warrantless searches in order to discover evidence of crime.

Anderson v. Creighton, ___U.S.___, 41 Cr.L. 3396 (June 25, 1987), was a suit by a family whose home was searched against an officer who searched their house without a warrant. Justice Scalia, writing for a six member majority, stated that the question presented by the case was "whether a federal law enforcement officer who participates in a search that violates the Fourth Amendment may be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment." The answer, according to the Court, is no, due to the qualified immunity wrapped around the officer.

Justice Stevens dissented, joined by Marshall and Brennan, saying that the majority had written "a new rule of law that protects federal agents who make forcible nighttime entries into the homes of innocent citizens without probable cause, without a warrant, and without any valid emergency justification for their warrantless search."

In a per curiam opinion, the Court dismissed a writ of certiorari as improvidently granted. California v. Rooney, __U.S.__, 41 Cr.L. 3362 (June 24, 1987). The issue to have been decided was whether a citizen has an expectation of privacy in a garbage bin outside of an apartment building. The Court had granted certiorari from a California Court of Appeals decision which had found the warrantless search of the garbage bin to have been unreasonable, but dismissed once it became apparent that the issue was not justiciable. Justice White, joined by Rehnquist and Powell, dissented, saying the decision of the lower Court should have been

reversed due to their view that one has no expectation of privacy in one's garbage.

In the other cases, the Court visited a junkyard and a garbage bin. That should prepare one for their last decision, one which is aromatic in many ways.

The decision is Griffin v. Wisconsin, __U.S. __, 41 Cr.L. 3424 (June 26, 1987), penned by Justice Scalia. It started when someone called Griffin's probation office and told Griffin's probation officer's supervisor that there might be guns at his apartment. Wisconsin regulations allowed for a search based upon "reasonable grounds." The supervisor and another probation officer, along with three police officers, proceeded to Griffin's apartment, which they searched without a warrant and seized a handgun. Griffin was then charged with possession of a handgun by a convicted felon and sentenced to two additional years in prison.

The Court approved the search, saying that so long as it was carried out pursuant to administrative regulations which themselves satisfied the Fourth Amendment's reasonableness requirement, that a warrantless probationer search is valid. In doing so, they did not reach the Wisconsin Supreme Court's more sweeping decision, which had carved out a new exception to the warrant requirement for persons on probation. However, the decision is not inconsistent with that exception.

Justice Scalia first places a probation search into that burgeoning category of searches, the "special need" search, where no warrant and and no probable cause are required. See New York v. Burger, *supra*, New Jersey v. T.L.O. 469 U.S. 325 (1985), and O'Connor v. Ortego, 480 U.S. ___, (1987).

Secondly, the Court rejected the dissenter's call for a warrant requirement, based upon a standard less than probable cause, in probationer cases. Justice Scalia stated that to require a warrant would interfere with the probation system, would make it more difficult to respond quickly when receiving evidence of misconduct, and would "reduce the deterrent effect that the possibility of expeditious searches would otherwise create."

Interestingly, the Court seems to treat the "reasonable ground" standard contained in the regulation as a matter of state law, and does virtually no review regarding whether the grounds were "reasonable" or not. Further, the fact that virtually all of the Wisconsin probationer search regulations were not followed in this particular search were of no concern to the Court.

Thus, it is fair to say that all a state has to do in order to conduct warrantless searches of the private dwellings of persons on probation is to write regulations which pass Fourth Amendment scrutiny, and then to enforce those regulations in any manner in which they see fit, if at all. Once again, the Court reduces the protections of the Fourth Amendment and tries to make us like it by calling it "federalism."

Four members of the Court dissented. Justice Blackmun, joined by Marshall and in part by Brennan and Stevens, agreed that a standard less than probable cause was appropriate, but would have required the intervention of a neutral magistrate by insisting upon a warrant. Blackmun was further highly critical of the majority's failure to review the reasonable grounds present in this case, saying that the "conclusion that the existence of a facial requirement for 'reasonable grounds' automatically satisfies the constitutional protection that a search be reasonable can only be termed tautological."

Justice Stevens also wrote a succinct dissent, also joined by Justice Marshall. "Mere speculation by a police officer that a probationer 'may have had' contraband in his possession is not a constitutionally sufficient basis for a warrantless, nonconsensual search of a private home. I simply do not understand how five Members of this Court can reach a contrary conclusion."

The harmfulness of this opinion is extraordinary. By eliminating probable cause and the warrant requirements from probation search cases, the Court has virtually abandoned judicial review of these searches. While the Court places faith in the "beneficial" relationship between the probation officer and his probationer, one must question the foundation for that faith. Indeed, the Court analogizes the relationship to that of parent and child. "[O]ne might contemplate how parental custodial authority would be impaired by requiring judicial approval for a search of a minor child's room." Such an analogy is highly revealing in gauging how the Court really feels, diminishing the rights of adult probationers by placing them in the role of children, and inflating the worth of the probation officer by making him the parent.

One wonders whether the Court was using the theoretical ideal of probation to justify the search while ignoring reality. The reality is that probation and parole officers are much more like police officers and much less like human services workers than the Court might wish. The reality is that relationship between probation officer and probationer is often quite adversarial. The reality is that probationers expect to be granted privacy and basic human rights just like the rest of us. And unfortunately, the reality is that law enforcement probation officers will use this opinion to conduct searches at will, increasing the arbitrariness already extant in our probation and parole system, exacerbating the bitterness felt by our clients towards the "system," and ultimately reducing the rights of us all. This decision was truly a bad one.

There was one decision by the Court of Appeals of Kentucky of interest. In Commonwealth v. Hubble and Lofton, Ky. App., __S.W.2d __, (May 22, 1987), Detective Hill received information regarding Hubble's possession of drugs and stolen property

at his house. This information was presented to the County Attorney, who wrote the affidavit and search warrant and swore Officer Hill. Detective Hill then took the affidavit to the district judge, who wrote in additional information regarding Hubble's reputation as a trafficker in drugs and stolen property. The additional information was not sworn to, nor were copies of the affidavit and warrant retained by the Judge and filed in the clerk's office, in violation of RCr 13.10. Copies were filed once the warrant was executed. The trial court granted the motion to suppress. The Court of Appeals reversed the trial court, saying that RCr 13.10 is procedural in nature and that the failure to follow its requirements will not result in suppression unless it was prejudicial in some manner. The Court further relied on the "good faith" of the police in obtaining the warrant, citing United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and noting that the errors here were made by the district judge.

The Court then found that the warrant had been based upon probable cause, even without the unsworn to surplusage written in by the district judge.

The Sixth Circuit Court of Appeals, in United States v. Clardy, 16 S.C.R. 12, __F.2d.__, (6th Cir. 1987), found against the government in its one opinion over the past two months. In an opinion by Judge Martin, the Court held that where an accused barely met some of the characteristics of the drug-courier profile, that his seizure and subsequent search by officers was illegal, and all evidence should have been suppressed.

The Short View

1) United States v. Moore, 41 CR.L. 2139 (4th Cir. 5/7/87).

Explaining the procedure for searching the house where the defendant's aunt and grandmother lived, after the defendant, had invoked his right to counsel, was "interrogation" under Rhode Island v. Innis, 446 U.S. 291 (1980). Thus, the defendant's taking the officers to a gun was accomplished by the officers in violation of his Fifth Amendment right to counsel, and the gun had to be suppressed;

2) People v. Washington, Calif. Court of Appeals, lst Dist., 41 Cr.L. 2175 (5/8/87).

Police saw men talking with one another in a courtyard. When they approached, the men dispersed. The police followed the defendant, and he ran, eventually tossing cocaine aside. The Court held that the officers had no reasonable or articulable suspicion, that when they chased the defendant that constituted a seizure, and that the defendant's abandonment of the cocaine was tainted by the illegality of the seizure, and thus the cocaine had to be suppressed at the defendant's trial;
3) United States v. Causey, 818 F.2d 355 (5th Cir. 1987).

The police had a tip that Causey had committed a bank robbery, although they had no probable cause. When they discovered a valid seven year old failure to appear warrant on a misdemeanor theft, they arrested Causey and procured a confession to the robbery. The Fifth Circuit, however, held that the confession had to be suppressed due to the illegal pretextual arrest.

* * * * * * * * * * * *

Have you had evidence suppressed due to a violation of the Fourth Amendment or Section 10? Let us know about it! Write us, along with a brief description of the facts, the legal challenge, and the ruling of the Court. Toot your horn! Share your success with others.

Ernie Lewis
Assistant Public Advocate
Director, Richmond DPA Office
(606) 623-8413

Puerto Rican official will seek to have IU's Knight extradited

Puerto Rico may attempt to extradite Indiana University basketball coach **Bob Knight** to serve a six-month jail sentence for slugging a policeman during the 1979 Pan American Games, an official said Wednesday.

Acting Justice Secretary **Guillermo Mojica Maldonado** said, "I will recommend that Knight be extradited" after a U.S. Supreme Court decision Tuesday that overturned a 126-year-old ruling to allow federal courts to force states to extradite fugitives to other states.

Knight, who coached the U.S. team to the gold medal at the 1979 Pan Am Games, was convicted of slugging a Puerto Rican policeman in San Juan District Court.

Mojica Maldonado said he would make the recommendation Monday to Puerto Rico's Justice Secretary Hector Rivera Cruz when he returns to the island, a U.S. Commonwealth. Rivera Cruz is currently in Argentina.

Gov. Rafael Hernandez Colon would have to start the extradition process, according to the official. But Mojica Maldonado wants the justice secretary to make the recommendation.

R. Mark Lubbers, executive assistant to Indiana Gov. Robert D. Orr, called the development "silly."

Neither Knight, who has an unlisted telephone number, nor university counsel Albert J. Velasquez could be reached for comment.

Mojica Maldonado said Knight, who was not present at the trial, was found guilty of aggravated assault, a misdemeanor. The government official said Knight was sentenced to a six-month jail term without a fine.

Trial Tips

For the Criminal Defense Attorney

MIKE WRIGHT

An Analysis of the New Juvenile Transfer Statute

On July 1, 1987, the Uniform Juvenile Code (U.J.C.) became effective in Kentucky. Among other things (to be discussed in subsequent articles in The Advocate), the circumstances under which and the procedures for transferring jurisdiction of a juvenile case from the district court to the circuit court have changed. Many of those changes suggest a need for constitutional challenges to the new statute.

Under former KRS 208.170(1) the district court *could* have decided to transfer a child 16 or older for any felony offense or one under 16 for a Class A felony or a capital offense. Under KRS 635.020(2) and (3), a child over 16 charged with a Class C or D felony who has also been adjudicated delinquent of a felony on two (2) prior occasions, a child over 14 charged with a capital offense or a Class A or B felony, or a child previously convicted of being a Youthful Offender (Y.O.) *must* be dealt with in accordance with the Y.O. Chapter. That Chapter, KRS 640, provides that for such children described above, a preliminary hearing *shall* be held to determine probable cause to believe the child committed the offense *and* either that the child was found guilty of a felony within one (1) year of the commission of the present offense or that within the year preceding the current charge the child has failed to comply with a dispositional order of the court on a felony adjudication. KRS 640.010(1)(a) and (b). If the Commonwealth meets its burden in establishing those factors, the child *shall* be transferred to circuit court as a Y.O., "except that the child may present to the court *reasons* why he should not be transferred to the circuit court." KRS 640.010(2) (emphasis added).

So, not only have the qualifications for transfer changed under the U.J.C., but the procedure has too. A closer examination of those procedural changes raises questions regarding the constitutionality of the U.J.C.'s transfer provisions.

First, the attorney for the child should argue that KRS 640.010 constitutes an unauthorized legislative infringement upon the powers of the judiciary. Section 109 of the Kentucky Constitution provides:

The judicial power of the commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court. The court shall constitute a unified judicial system for operation and administration.... (Emphasis added).

Further, Section 116 states that:

The Supreme Court shall have the power to prescribe...rules of practice and procedure for the Court of Justice.

It has been observed that the "Legislature cannot constitutionally establish procedural rules on its own, since under this section the rules of practice and procedure for the Court of Justice are left exclusively to the Supreme Court of Kentucky...." OAG 78-136. Thus, KRS 640.010's efforts to establish a procedural scheme for the judicial disposition of Y.O.'s may be constitutionally infirm.

Secondly, unlike under former KRS 208.170, the U.J.C. sets forth absolutely no objective, measurable standards to be employed by the district court judge in exercising his or her discretion to transfer a child's case to the circuit court. The district court is not required to set forth any reasons for a transfer decision, thus creating a situation in which an appellate court will find review of the transfer order difficult.

Under former KRS 208.170(3) there were a number of specified considerations which the court was required to look at before determining to waive jurisdiction to the circuit court. Among those was the seriousness of the offense, whether the offense was against person or property, maturity of the child as determined by his environment, the child's prior record, and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child if the case remained in the juvenile justice system. Kentucky caselaw construing that statute held that a transfer order must set forth specific statements of reasons for the transfer, in order that a reviewing court could determine whether discretion had been abused in relinquishing juvenile court jurisdiction. Hopson v. Commonwealth, Ky., 500 S.W.2d 792 (1973). So long as specific reasons were contained in the transfer order the child could know what factors went into the

decision to transfer him and, thus, the likelihood of a successful challenge to transfer based on a denial of due process of law under the Fourteenth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution would be minimized. See Kent v. United States, 383 U.S. 541 (1966); Bingham v. Commonwealth, Ky., 550 S.W.2d 35 (1977).

Some persons have suggested that the omission of the list of factors to be considered by the district court in determining whether to exercise its discretion in transferring jurisdiction to the circuit court means that under the U.J.C., Kent, no longer has any application. However, the United States Supreme Court made it clear that due process of law and fundamental fairness prohibit arbitrariness in the decision to transfer. Kent, *supra*, at 553.

It is important to note that KRS 640.010(2) states that the child may present "reasons" why he should not be transferred to the circuit court. By not specifying what these reasons are, no notice is given the child as to the minimal levels of proof required to defeat the Commonwealth's effort to transfer the case. Accordingly, it will be difficult for a reviewing court to determine whether the court has acted arbitrarily in refusing to maintain jurisdiction within the juvenile court system. In Peylor v. Commonwealth, Ky., 638 S.W.2d 272 (1982), the court noted that the decision to waive a juvenile from the juvenile court to the circuit court system was left to the sound discretion of the juvenile court judge. However, the court reasoned that that discretion was not unbridled and that KRS 208.170 gave the reviewing court certain standards to consider in determining whether the exercise of discretion had been sound. Though the standards delineated in KRS 208.170 no longer appear in the U.J.C., the rationale behind the Peylor decision still applies. Until and unless the "reasons" contemplated in KRS 640.010(2) are set forth in the transfer statute, there can be no way for a circuit court to review the transfer decision and determine whether arbitrariness played a role in the transfer of jurisdiction.

Meaningful review requires that the reviewing court review. It should not be remitted to assumption. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of relevant facts. It may not "assume" that there are adequate reasons... and it must set forth the basis for the order with sufficient specificity to permit meaningful review. Kent, supra, at 561.

So, in the final analysis, perhaps it may be said that the argument concerning transfer has now shifted. In KRS 208.170 the focus was on whether the court had before it adequate evidence to support some of the delineated factors justifying a decision to transfer. The focus is now on the vagueness of the language which permits the child to present "reasons" to defeat transfer, while making no effort to suggest what "reasons" are adequate. The language in Kent, Peylor, Bingham, and Richardson v. Commonwealth, Ky., 550 S.W.2d 538 (1977), concerning the constitutional necessity of standards by which appellate review can determine whether discretion has or has not been arbitrary, applies with equal force under KRS 640.010. Until and unless the U.J.C. is amended to give both the child and a reviewing court guidance as to what reasons may be demonstrated to defeat transfer, counsel must continue to urge that the statute is void for vagueness.

Constitutional attacks on the transfer hearings must be made in both the juvenile session of district court and the circuit court in order to preserve the question for appeal. Commonwealth v. Thompson, Ky., 697 S.W.2d 143 (1985). It is a little less clear when an appeal from a transfer order may be had. In Buchanan v. Commonwealth, Ky., 652 S.W.2d 87 (1983) the Supreme Court of Kentucky held that a direct appeal from an order waiving jurisdiction and transferring a juvenile case to circuit court was not authorized by the then existing juvenile statute. Basing its reasoning in part on C.E.H. v. Commonwealth, Ky.App., 619 S.W.2d 725 (1981), the Supreme Court observed that there was an availability of effective means of challenging an improper waiver in the circuit court, and that existing statutes permitted the circuit court to remand the case

Few requests to house juveniles follow change in code

Associated Press

LOUISVILLE — There has been no flood of requests to accept out-of-county youths at the state's three free-standing juvenile detention centers since the new juvenile code took effect earlier this month.

"We've had inquiries, but no flood of juveniles," said Greg Mathews, superintendent of the 56-bed Jefferson County Youth Center.

Fayette County, Jefferson County and Floyd County have free-standing juvenile facilities, which many judges think are required by the new code.

Although Fayette County has some empty beds, Greg Powell, director of Fayette County juvenile court, said the Urban County Government adopted a policy when the facility opened in 1972 to house only juveniles sent by Fayette courts.

The policy was adopted to ensure Fayette children would be taken care of and before it could be known that the average daily population would be less than 25, Powell said.

There are usually about 15 youths in the facility, but Powell said he hadn't received a single request from another county to house a juvenile.

"I think it's because of the longstanding policy," he said. "Most neighboring counties are aware of that."

Youths from other counties have been accepted for some time by Jefferson and Floyd counties, which provide space when it is available and charge a fee.

There are about 14 empty beds in Jefferson County, while Floyd County is near capacity, officials said.

Lewis Paisley, a Fayette County district judge and president of the state District Judges Association, says there are some possible reasons that officials from other counties are not making runs on the free-standing facilities.

Paisley said he had heard that some judges were housing juveniles charged with crimes in separate facilities at adult jails.

He also said that since the new code, which took effect July 1, required judges to try to find alternatives to detention for status offenders, there should be more space for juveniles charged with crimes. Status offenders are children who are runaways or truants.

It is difficult to determine whether the few children Jefferson County has accepted since the new code went into effect were sent there because of the changes in the law, Mathews said.

The center generally has 30 to 45 juveniles, he added. There are 42 in it now, currently in the facility.

Last year we accepted 45 children from other counties outside of Jefferson County," he said. "By far, the majority (of inmates) would be from Jefferson County."

A spokesman for the Big Sandy Area Juvenile Detention center in Floyd County said the 15-bed facility was generally filled.

Lexington Herald Leader, July 12, 1987
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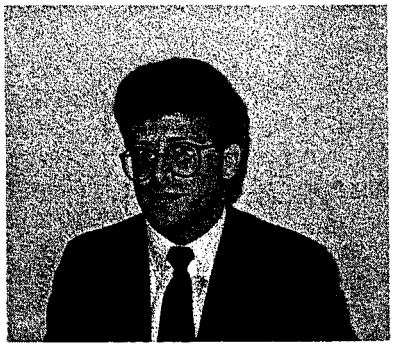
to the juvenile court for final determination. Buchanan, at 88. The U.J.C. in Chapter 640 does not incorporate the provisions of KRS Chapter 208 which permit the circuit court to review a transfer order and remand the case to district court. Accordingly, at least part of the reasoning for the decision in Buchanan, *supra*, can no longer be supported. Therefore, it is suggested that counsel attempt to challenge a transfer order by means of direct appeal. As this question is litigated readers will be apprised.

Much has changed with implementation of the U.J.C. as it relates to transfer of jurisdiction to the circuit court. As has been pointed out, the circumstances under which transfer may occur have changed dramatically. Further, the procedures for transfer, void of any meaningful guidelines, raise serious constitutional questions. Coupled with the apparent legislative usurpation of judicial power, KRS 640.010 appears ripe for constitutional challenge under both the Kentucky and federal constitutions. Counsel are urged to vigorously raise these issues (which are not meant to be an exhaustive list) in your efforts to defeat transfer of jurisdiction to circuit court and maintain your client's case before the juvenile session of district court.

Mike Wright
Assistant Public Advocate
Appellate Branch
(502) 564-5219

Becky Henry, Paralegal, joined the Lagrange Post-conviction. Office on June 1, 1987. She is a 1986 graduate of EKU's. paralegal program. [B.A.]

Cynthia Russell, Assistant Public Advocate, joined the Stanton Office on February 19, 1987. She is a graduate of Indiana University School of Law.



Kevin Francke, Assistant Public Advocate, joined the Hopkinsville Office on May 16, 1987. He is a graduate of UK Law School.

George Sornberger, formerly the Directing Attorney of the Somerset Office, has returned to that office from private practice in Pulsaki County on July 1, 1987.

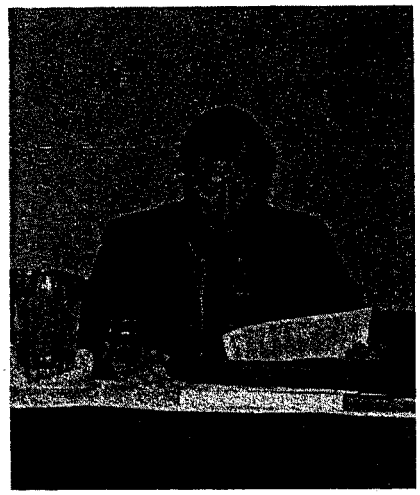
In Memoriam

Bell's Public Defender Dies at 37

PINEVILLE - Bell County public defender Beecher Wayne Rowlette was pronounced dead July 22 at Pineville Community Hospital after he collapsed at his home at 130 Walnut Street. He was 37.

He had been the public defender for several years. Rowlette also maintained a private law practice in the county and had an office in Knox County at one time. - Lexington Herald Leader, July 24, 1987

Videotape Appeals - An Update



Frank Heft

Tim Riddell

On October 11, 1985, the Supreme Court of Kentucky issued an order establishing procedures for videotape appeals. At the present time 11 of the 16 judges in Jefferson Circuit Court are utilizing videotapes. Seven other circuit court judges throughout the state videotape their court proceedings (3 in Fayette, 2 in Clark and Madison and 2 in Warren Circuit Courts).

Section 2 of the Supreme Court order provides that CR 73.08, insofar as it pertains to certification of the record on appeal, does not apply to appeals taken from orders or judgments entered by courts which utilize videotape as a method of recording court proceedings. Similarly, those sections of CR 75 and CR 76 which pertain to the record on appeal are inapplicable to cases involving videotape appeals. Although it appears that the need to file a designation of evidence, pursuant to CR 75.01, has been obviated by the videotape order, attorneys may find it useful to take the precaution of filing a statement in the record indicating what videotaped proceedings should be included in the record on appeal.

As provided by Section 2(c) of the videotape order, the record on appeal shall be prepared and certified by the clerk within thirty (30) days after the date of filing the notice of appeal. (This differs from the sixty (60) day certification period in every other criminal appeal - CR 73.08). The clerk shall then provide written notice of the certification to the clerk of the appellate court and to all parties to the appeal. See Section 2(d) of the videotape order. Section 2(f) provides that the appeal is to be perfected within thirty (30) days after the date that the circuit court clerk serves notice that the record on appeal has been certified. (If the appeal is to be handled through the central office of the Department of Public Advocacy, the appeal is to be perfected thirty (30) days after the record is received by the appellate court -- CR 76.12(2)(b)).

For the purposes of writing briefs, the videotape order requires that references to the videotape be made by the number of the videotape, the month, day, year, hour, minute and second at which the reference *begins*. In addition, the videotape order provides that an evidentiary appendix may be attached to an appellate brief.

The evidentiary appendix is intended to serve a limited purpose insofar as it is to "contain transcriptions of only those parts of the videotape recording that support the specific issues or contentions raised in a brief on appeal or that relate to the question of whether an alleged error was properly preserved for appellate review." The evidentiary appendix is limited to 25 pages if the brief is filed in the Court of Appeals and 50 pages if it is filed in the Supreme Court. The videotape order sets forth the manner in which the evidentiary appendix is to be prepared by counsel. See Section 3(b)(1-3). The order also provides for sanctions against a party who is responsible "for the insertion of unnecessary material into an evidentiary appendix." The appellate court may deny costs to or assess costs against a party who violates this order. An attorney who utilizes the evidentiary appendix in a manner designed to increase delay or costs may be required to personally satisfy the excess costs and may be subject to the imposition of fines set forth in CR 73.02(2)(c). Similarly, if an evidentiary appendix is determined to contain unnecessary material, Section 3(c)(2) provides an appellate court with authority to strike any part or all of the evidentiary appendix *or brief*.

If an appellate court determines that it is necessary to transcribe any portion of the videotape recordings for the purpose of rendering a decision, the Administrative Office of the Courts will undertake the transcription and any costs shall be paid by the parties in such proportion as directed by the appellate court.

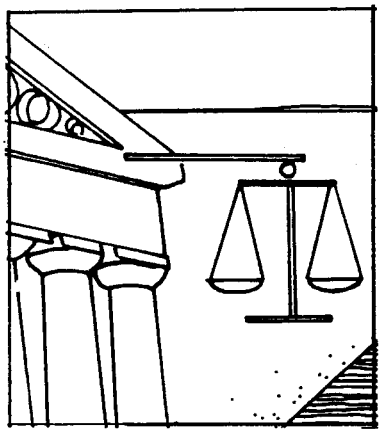
There are, of course, advantages and disadvantages stemming from the use of videotapes as the record on ap-

peal. The most obvious advantage is that they are considerably less expensive than the cost of a transcript. Furthermore, the relative ease with which they are reproduced substantially expedites the preparation of the record on appeal. These benefits in the early stages of the appellate process must, however, be weighed against the substantial increase in the amount of time required for attorneys to review a videotape in preparation for writing an appellate brief.

Appellate attorneys who do not serve as trial counsel must review all of the videotapes depicting the pre-trial and trial proceedings in order to determine the nature of the legal issues to be raised on appeal. Thus, the number of attorney hours spent reviewing the record on appeal is necessarily increased by comparison to the time required to review a transcript of evidence. (It has been estimated by the attorneys in the Central DPA Office in Frankfort that it takes four or five times as long to watch a videotape record as it does to read a transcript). Court reporters, in essence, edit the slow portions of court proceedings, e.g., the time spent marking evidentiary exhibits, pauses between questions and answers, and other numerous, short delays which occur during the course of a trial. An attorney reviewing a videotape is literally at the mercy of the participants. The speed of the reviewing process necessarily hinges on the cadence of the speakers. The same problem is not presented in reviewing a transcript of evidence which can be read as quickly or as slowly as the reader desires.

The primary shortcoming with videotape records is the poor quality of many of the bench conferences. In order to discern the contents of bench conferences it may be necessary to confer with the trial attorney. If the appellate attorney decides that the bench conference is crucial to an issue to be presented on appeal, then the appellate attorney can utilize the procedures set forth in the civil rules for correcting and supplementing the record on appeal. CR 75.08, CR 75.13, CR 75.14, and CR 75.15 provide a variety of means by which an attorney can correct and supplement the record on appeal. These procedures, of course, will increase the amount of attorney hours that must be spent on the preparation of an appeal and will generally result in some delay in the preparation of an appellate brief. Appellate courts have thus far been somewhat tolerant of the delays caused by problems in the quality of videotape records.

Now that the videotape records make it possible for appellate judges to view the demeanor of witnesses, it remains an open question whether parties will reap any advantage. Obviously, this aspect of videotape appeals is a two-edged sword. However, there appear to be several areas of trial practice in which videotape records will substantially aid appellate courts in correctly resolving a legal issue. The most notable examples occur in the jury selection process and in the determination of a witness' competency.



The videotapes in some circuit courts (most notably Jefferson County) are capable of depicting the entire prospective jury panel during the course of voir dire examination. Thus, it becomes much easier to ascertain whether peremptory challenges are being used in a racially discriminatory manner. See Batson v. Kentucky, 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In determining whether a particular juror is constitutionally qualified for service in a death penalty case, the United States Supreme Court has held that because the trial judge has a first-hand ability to view the demeanor of the jurors, great deference should be given to the trial court on the issue. See Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Since appellate judges, through the use of videotape records, have the same opportunity to view a juror's demeanor as the trial judge, the justification for any deference to be paid to the trial court is substantially diminished.

Videotape records should also place appellate courts in a better position to determine the competency of witnesses -- especially children. A videotape would enable the viewer to more accurately determine the witness' level of understanding, intelligence and communicative skills. The demeanor of the witness in a competency situation is obviously critical to a correct resolution to the legal issue. The videotape not only allows the viewer to observe the demeanor of the witness, but also permits a very precise determination to be made as to the witness' comprehension of questions and even the time it takes to answer the questions. The same accuracy is not necessarily assured by the use of the transcript which merely lists the question and answers sequentially without giving any reference to the amount of time it takes the witness to respond. Thus, there appears to be a distinct advantage to the use of videotapes in this situation

However, these limited advantages do not seem to outweigh the obvious disadvantages that are visited upon appellate advocates. Simply too much time is consumed in reviewing "dead time", in attempting to find certain passages on numerous six hour tapes and in trying to discern garbled testimony and inaudible bench conferences.

Before passing it is important to note a recent ruling by the United States District Court for the Eastern District of Kentucky in McQueen v. Scroggy, File No. 87-192. The question presented was whether that Court would be willing to accept a video tape of some state post-conviction hearings in lieu of a transcript of

those proceedings. While the Magistrate acknowledged that the move to videotaped records might be "laudible in its purposes of economy and efficiency", the Magistrate recognized that the lower "federal courts have not made the necessary adjustment in technology to accommodate this system of recording." The Magistrate went on to state that he had been informed by a spokesperson for the Sixth Circuit "without qualification that videotapes are not acceptable as part of an appeal record." Accordingly, the Magistrate ordered the Attorney General's Office to transcribe the entirety of the post-conviction hearings.

It is true that the video age has been ushered in upon the promise of economy and efficiency in the appellate process. However, it has become clear that the savings on the front end are all but negated by the inordinate consumption of attorney hours during the appellate process itself. Furthermore, it is also clear that the federal courts will not accept videotaped records in lieu of transcripts thus ultimately requiring the expenditure of money which was saved on the front end.

Time will be the final arbiter of whether or not the initial economy and efficiency of videotaped records will outweigh the disadvantages of videotape appeals and the inordinate burden placed on appellate advocates by those appeals. Stay tuned.

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Ed Monahan
(502) 564-5258

Has a Child Been Molested?

A psychiatrist argues for reforms in the way child sexual abuse cases are investigated

by Lee Coleman, M.D.

"Innocent until proven guilty." It's a sacred principle of our legal system, and one we have for the most part lived up to. Until recently, that is. In the past few years we have abandoned this principle in cases of alleged child sexual abuse.

Particularly noteworthy in such cases is the cozy relationship between law enforcement and psychiatry. Police and prosecutors have traditionally thumbed their noses at psychiatry, but now these former enemies are dedicated allies in the war on child sexual abuse. The tools of psychiatry may not be worth much when it comes to *mens rea*, but they are reliable (so the argument seems to go) when it comes to determining if a child has been molested and finding out who did it.

Perhaps the most pernicious aspect of our handling of such cases—and the single most important reason the system is doing a terrible job at getting at the truth—is the direct importation into investigations and court proceedings of the idea that "children don't lie about sexual abuse."

Where did investigators get such an idea? From the "experts." In hundreds of workshops for police, protective service workers and prosecutors, the leading lights from psychiatry, psychology and social work are training investigators to believe that when it comes to alleged sexual abuse, the child's statements are unimpeachable.

Ignored at such workshops is the fact that the experts developed their ideas by studying incest in intact families, while the major arena of false allegations is divorce/custody battles. In the former the child may be pressured to drop a true accusation, but in the latter the pressure may go the other way—to "remember" something that never happened. The young child may easily be led to the point of sincerely believing in things that did not take place.

Armed, nonetheless, with the belief that under no circumstances would a child claim to have been molested unless it were true, child protection agencies are ready to send a child for "therapy" before any kind of thorough investigation has been done. Even worse, those interviewing a child allegedly molested (whether investigators or therapists) frequently manipulate the child. They do so because they do not take very seriously the possibility of a false allegation. Let us look at why this is happening.

If "children don't lie" about sexual abuse, then it follows that a child may be asked leading and suggestive questions about possible molestation, urged to pretend with dolls, and rewarded for statements indicating abuse, with no danger that a child may stray from the truth. Any denials of abuse merely indicate that the "yukky secrets" are hard to tell and that the abuser must have threatened the child into silence.

As a result of such thinking, the "sensitive and caring" professional pushes even harder until the child complies and offers up information about sexual exploitation. My own study of audio- and video-taped interviews with children indicates that this is how the claptrap about "satanic cults" and murders has surfaced in places like Jordan, Minnesota, Bakersfield, and the McMartin Pre-School in Manhattan Beach.

Three possibilities

If it is not true that children never "lie" about sexual abuse, it *is* true that such a thing is rather unlikely. But this misses the point. When it comes to a child's statements about sexual victimization, there are not two possibilities—lying or telling the truth—but three. A child may be neither lying nor telling the truth. A child, particularly a very young one, may say what he or she *believes* is true, even though it is not the truth.

Experts developed their ideas by studying incest in intact families.

At first blush, this seems a rather unlikely possibility, to say the least. A child believes in sexual abuse which has not taken place? I would certainly be skeptical of such an idea if I hadn't had a chance to see how children are being manipulated by adult interviewers—sometimes by a police officer or protective service worker, sometimes by a mental health professional—who have been trained to believe that those who really care and are sufficiently skilled at their work will help the child talk about sexual abuse.

Consider what such methodology does to a case in which the child has been manipulated *before* the police or child protection worker arrives. Especially when divorce and child custody disputes are taking place, it is a tragic fact that certain parents either deliberately create false accusations, or interpret a child's problems as "subtle clues" to child sexual abuse. Everything from nightmares to temper tantrums is being listed by the experts as signs that should alert parents to the possibility of sexual abuse.

Has a Child Been Molested? (continued)

Thus, when an investigator first contacts a child, it is crucial that all possibilities be considered. Instead, too often a judgment is reached once the child's statements are heard, however inconsistent they may be. The investigation effectively grinds to a halt, because "children don't lie about sexual abuse." All that is left is for the judge to give the juvenile court's stamp of approval. The possibility that the child may have been manipulated by an adult with an axe to grind is not taken seriously.

By the time the child has been interviewed several times, the statements may become increasingly embellished, and any chance to help the child stick to what he remembers is lost forever. The child now believes he has been molested, because so many adults believe the same thing and seem so pleased with the child for saying so.

The use of dolls and other play materials is a powerful technique for confounding this problem. Consider the difficulties inherent in using play materials to get at the truth. Children use dolls, puppets or drawings to make stories—not to stick to the facts. Why are such techniques nonetheless being used in fact-finding investigations? Because our legal system has naively turned to the child therapists, who have used play therapy for decades. But using play techniques in therapy is one thing; using such techniques in legal investigations is quite another. Even worse is the result when the adult interviewer is already convinced that sexual abuse has taken place and (perhaps unwittingly) uses play methods to coax some "evidence" from the child.

The possibility that the child may have been manipulated by an adult with an axe to grind is not taken seriously.

Four reforms

Awareness of these problems leads directly to the kinds of legal reforms needed to bring some sense of proportion to protecting children from sexual exploitation.

First, *all* contacts with the child must be either video- or audiotaped. Taping preserves a record not only of what the child says, but of the *interviewer's behavior.* Such a record will not only spare the child repeated interviews; it will also give county counsel, district attorneys, defense attorneys, judges, and juries an opportunity to study whether a child's statements seem spontaneous or the product of manipulation.

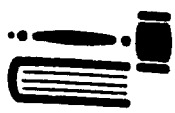
Second, a child's competence to testify must be examined in a more thorough way than it is at present. With few exceptions, children as young as 4 are being found competent if they can tell the difference between the truth and a lie. But such awareness is irrelevant if a child has been so manipulated by adults that he *believes* something happened which did not happen. Judges faced with deciding whether a child is competent to testify must focus on the issue of *independent recall.* Is the child capable of sticking to what he can remember, or has prior training contaminated his ability to do so?

Third, our juvenile court procedures are in urgent need of major review. The vast majority of child sexual abuse allegations are not prosecuted criminally but are handled in juvenile court, where tradition dictates that judges rely heavily on casework evaluations. It is especially here that an accused person may be considered guilty until proven innocent. Judges, acting in good faith, assume that the child protection system is doing a good job of unbiased investigation. This faith is misplaced, given the biases that currently pervade our county child protection agencies.

Fourth, our child protection system will need to alter its current practices. Its primary mistake has been placing so much trust in the experts. By now the mistaken ideas from mental health are rooted in the very foundations of our investigative agencies. While I don't see this reform coming soon or easily, nothing less than a massive retraining will be necessary. Just as in other kinds of investigations, the primary role of unbiased fact-finding must be established, with no reliance on "examinations" from mental health professionals. Whatever psychiatry and related disciplines are good for, they do no good, and much harm, when it comes to getting at the truth.

If psychiatry has no examinations to determine if a child has been molested, and has no examinations to determine if the accused person is a child molester, then our continued reliance on psychiatry will only add a new form of child abuse, one in which we subject the very children we aim to protect to manipulations they are powerless to resist.

Berkeley psychiatrist Lee Coleman, M.D., wrote about the use of psychiatry in the courtroom in his 1984 book The Reign of Error.



Ask Corrections

BETTY LOU VAUGHN

TO CORRECTIONS:

In many conversations that I have had with Corrections staff and with my clients who have been in state correctional facilities I have heard terms like Normal Maximum Expiration Date, Adjusted Maximum Expiration Date and Conditional Release Date. What are these terms and how are they calculated?

TO READER:

These are terms used to describe a resident's release date from Corrections if he was to serve his sentence without parole or court order. Each of the three dates are calculated differently. To determine a resident's **NORMAL MAXIMUM EXPIRATION DATE** take the date he was actually received by the Corrections Cabinet and add to that date his total time to serve. A person received by Corrections on September 1, 1987, with a four-year sentence would have a **NORMAL MAXIMUM EXPIRATION DATE** of September 1, 1991.; To determine a resident's **ADJUSTED MAXIMUM EXPIRATION DATE**, take the date he is received by Corrections, add to this date his total time to serve and then subtract from this date any jail time credited toward his sentence. Using the previous example, the resident received on September 1, 1987 with a four-year sentence had a **NORMAL MAXIMUM EXPIRATION DATE** of September 1, 1991, he had been credited with six months jail credit. Subtract the six months from September 1, 1991 and his **ADJUSTED MAXIMUM EXPIRATION DATE** is March 1, 1991. (Time spent in jail shall count as time in prison. KRS Chapter 532.120(3)). A resident's **CONDITIONAL RELEASE DATE** is his **ADJUSTED MAXIMUM EXPIRATION DATE** less his good time. (KRS Chapter 197.045(1)). A resident upon admission to Corrections is given the maximum amount of good time he can earn on his sentence. This amounts to one-fourth of his total time to serve. Using the example, the resident received by Corrections has a four-year sentence. Upon admission he has subtracted from his **ADJUSTED MAXIMUM EXPIRATION DATE** of March 1, 1991, one year which is his maximum good time he can earn on a four-year sentence. This gives him a **CONDITIONAL RELEASE DATE** of March 1, 1990. A resident's **CONDITIONAL RELEASE DATE** can change due to loss of good time or the award of meritorious good time pursuant to KRS Chapter 197.045(3).

TO CORRECTIONS:

In the last general assembly a law was passed which set out specific parole eligibility dates. Could you please provide me with a short list of those crimes and the parole eligibility date?

TO READER:

For the crimes of murder, manslaughter first-degree, rape first-degree, sodomy first-degree, assault first-degree, kidnapping (where there is serious physical injury or death), arson first-degree (where there is serious physical injury or death), criminal attempt, criminal solicitation, or criminal conspiracy to commit any of the previously listed capital offenses or Class A felonies which involve serious physical injury or death of the victim and were committed after July 15, 1986, parole eligibility is as follows: If your client is sentenced to a number of years, your client must serve one-half of that term of years minus jail time before being eligible to be considered for parole. If your client is sentenced to a sentence of life for one of the above listed crimes, parole eligibility is twelve years minus jail time.

TO CORRECTIONS:

Many times after my client has been in prison for a while he will write me concerning an error in his jail time computation. Sometimes after a review of the jail records, there has been an error. Is there any way to correct this error short of going back before the court requesting an amended judgment?

TO READER:

If the error in jail computation is a pre-judgment error, documentation of such change, in writing, signed by the court is required. If the error in jail computation is a post-judgment error, the error can be corrected by Offender Records, Corrections Cabinet.

All questions for this column should be sent to David E. Norat, Director, Defense Services Division, Department of Public Advocacy, 151 Elkhorn Court, Frankfort, Kentucky 40601. If you have questions not yet addressed in this column, feel free to call either Betty Lou Vaughn at (502) 564-2433 or Dave Norat at (502) 564-5223.

Betty Lou Vaughn
Offender Records Supervisor
Department of Corrections
(502) 564-2433

Forensic Science News

JONATHAN COWAN

A SERIOUS AND COMMON ERROR IN BLOOD ALCOHOL LEVELS?

In my practice as a Consulting Pharmacologist and Toxicologist, I am frequently consulted by attorneys with cases that have a common theme: their client has been involved in a serious automobile accident, and the blood alcohol analysis performed in the hospital is very high, typically above a 0.20%. Yet the attorneys are convinced that the client is telling the truth when he relates that he has had only several drinks. The clients are usually very credible, and support this claim with the testimony of a number of witnesses.

As a result of a particularly striking case in Orlando, Florida, I now understand why this situation can occur and how the false high blood alcohol reading is produced. After putting forward the facts and our explanation in that case, attorney Tom LaGrone and I were able to convince the jury to disregard a 0.234 blood alcohol concentration and award his client a very large verdict for injuries suffered in an automobile-truck accident.

While the explanation is new, it is based on known and accepted scientific principles.

The typical client has suffered major injuries in the accident. As his muscle cells rupture and decompose, they liberate large amounts of an enzyme into the blood stream. These clients are then administered a resuscitation fluid containing a particular chemical compound. When the client's blood is withdrawn and sent to the laboratory for analysis for blood alcohol, there is a reaction between the enzyme, this chemical, and the other ingredients in the blood alcohol analysis test kit to produce the same chemical, NADH, that is produced by alcohol's reaction with the test reagents. A false high alcohol reading results from this interaction.

The enzymatic blood alcohol testing machines that are susceptible to this problem are common in a large number of different hospitals, including Humana University Hospital in Louisville. This particular problem does not occur, however, with the gas chromatography analysis used by the Kentucky State Police and some other toxicology laboratories.

I would be interested in hearing from attorneys who have cases that may fit this fact pattern. By working together, I hope that we will be able to avoid the injustice that could result from the erroneous conclusion that their client was impaired by alcohol.

Jonathan D. Cowan, Ph.D.
Medical Resources
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Prospect, KY 40059
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"If you want something really important to be done, you must not merely cater to the reason you must move the heart also. The appeal to reason is often to the head, but the penetration of the heart comes from suffering. It opens the inner understanding."

Gandhi

Cases of Note...In Brief

ED MONAHAN

DUI IMPROPER STOPPING
State v. Vaughn
448 So.2d 915 (La.App. 1984)

The court held that the following evidence from the police officer failed to establish reasonable cause to stop the defendant for DUI:

1) the driver swayed 6 inches into the other lane for 10 feet;

2)the driver swayed within his own lane. Id. at 916.

HGN TEST INADMISSIBLE/ DESTRUCTION OF EVIDENCE
People v. Loomis
203 Cal.Rptr. 767 (Cal.Super 1984)

The court determined that the opinion of the police officer based on the "horizontal gaze nystagmus" test that the defendant had a particular blood alcohol level was inadmissible in this DUI case. The test testimony was inadmissible since the reliability of this scientific method was not established, and the qualification of the police officer on this test was not sufficiently established, and since there was no indication of general acceptance in the scientific community of the nystagmus test as an indicator of blood alcohol level.

Additionally, the court ordered the prosecutor to disclose the names and addresses of all persons present at the time of arrest and incarceration. The police officer testified that he was accompanied by a citizen "ride-along," and the name of that "ride-along" was destroyed to avoid inconvenience to that citizen and to avoid subpoena of that person. The appellate court ruled that the deliberate destruction of the record of the identity of the citizen-witness deprived the defendant of due process and required dismissal of the complaint.

See also People v. Vega, 496 N.E.2d 501 (Ill.App. 1986) where the court determined there was an inadequate foundation for the admission of the testimony regarding the results of the "HGN" test.

EXCESSIVE SENTENCE
Messex v. Commonwealth
Ky.App. ___ S.W.2d ___ (Oct. 17, 1986)

The defendant was found guilty of the underlying offense of theft by unlawfully taking of 6 shirts and a pair of socks from a department store. The jury sentenced him to 1 year. He was then found guilty of being a 1st degree PFO and sentenced to 15 years.

The Court reversed due to the failure of the judge to admonish the jury prior to separation under RCr 9.70. Judge Miller concurred in a separate opinion and stated: "I concur with the majority opinion. I further observe that I would remand this case for dismissal, as the prosecution of this petty offense, resulting in a minimum sentence of ten years [KRS 532.080(8)], is a gross violation of the Eighth Amendment. Any government which treats its citizens thusly will doubtless suffer calamity."

OBTAINING PSI
Lang v. Commonwealth,
Ky.App. (unpublished 3/13/87)

The court held that once a defendant is permitted to read and inspect his PSI, its confidentiality is waived, and the defendant from that point is entitled to be furnished with a copy of it.

WITHDRAWAL OF PLEA
Courtney v. Commonwealth,
Ky.App. (unpublished 4/10/87)

The court ruled the defendant did not have the right to withdraw his plea of guilty when the trial judge did not follow the plea agreement recommendation.

Judge Dyche concurred in the decision but separately expressed a real practical concern with this result: "Although I find no constitutional violation or abuse of discretion in the trial court's actions, widespread use of such a practice might bring an abrupt halt to *all* 'plea bargaining.' Such a result, though unintended, could not be beneficial to our court system.

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Santobello v. New York, 404 U.S. 257, 260 (1971)."

DISCLOSURE OF INFORMANT
Slemmons v. Commonwealth,
Ky.App. (unpublished 4/10/87)

The Court held that the Commonwealth was required to reveal the informant's identity in this case "since it is undisputed that the informant's testimony was highly relevant and might have confirmed appellant's claim of entrapment...." The

evidence was as follows: "Here, conflicting evidence was adduced. Appellant testified that he was entrapped by the informant, that both he and the informant were present in an undercover officer's car at the time the first transaction occurred, and that the informant was also present in an adjacent car during the second transaction. The commonwealth adduced evidence, by contrast, that the informant was not present at the second transaction and that, although the informant was sitting in an adjacent car at the time of the first transaction, he did not witness that transaction due to the covert manner in which it was conducted. However, we note that it is uncontroverted that the informant at least arranged the first drug transaction, and that the commonwealth adduced no evidence bearing on appellant's defense of entrapment."

Moore v. Commonwealth,
Ky.App. (unpublished 4/24/87)

The defendant was found guilty of 2 counts of theft by deception over $100, and of being a 1st degree PFO. She was sentenced to 1 year on each theft charge, and this sentence was enhanced to 10 years. The Court affirmed on an Anders brief.

Judge Miller dissented, stating: "In view of KRS 532.080(7), I would remand this case for a hearing on the question of disproportionate punishment. See Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); U.S. CONST. amend. VIII; KY CONST. 11."

INEFFECTIVE ASSISTANCE /PFO
Lane v. Commonwealth,
Ky.App. (unpublished 5/1/87)

The defendant was sentenced to 15 years as a 1st degree PFO. The defendant filed an RCr 11.42 motion alleging his trial counsel ineffective for failure to properly preserve the fact that the state filed to prove an essential element of the PFO conviction, the defendant's age on the date of the commission of the prior offense. The Court determined that the defendant's conviction had to be reversed since he did not receive effective assistance of counsel: "The two-prong standard for reviewing effective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984), was adopted in Kentucky in Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153 (1985), where it was stated:

First, there must be a finding of an error in performance by the counsel, and secondly, there must be a finding that prejudice resulted from that error which had an adverse effect on the judgment. (citation omitted). Id. at 154.

It has already been determined that appellant's trial counsel made the error of failing to properly preserve an issue for appeal and that such failure resulted in the conviction being affirmed despite its being unsupported by sufficient evidence. As such, appellant has satisfied both requirements of Hopewell, *supra*.

In overruling appellant's RCr 11.42 motion, the trial court stated that 'objection at the time of trial would have resulted in the court permitting the Commonwealth to provide the missing detail.' This finding is clearly erroneous and must be set aside. CR 52.01. The question is not whether the Commonwealth could have proven its case, but rather, whether it did prove every element beyond a reasonable doubt. KRS 500.070. In this instance the Commonwealth simply failed in its burden of proof, and the charge cannot be retried. See Hobbs v. Commonwealth, Ky., 655 S.W.2d 472, 473 (1983)."

DUI: INSUFFICIENT EVIDENCE
State v. Elmourabit
373 N.W.2d 290 (Minn. 1985)

The police stopped the defendant for exceeding the speed limit by 13 mph. There was nothing erratic about the operation of the jeep. There was the smell of alcohol on the defendant's breath, and behind his tinted glasses the officer observed glassy and bloodshot eyes. The defendnt had an unsteady gait in walking to the police car. At the police station, the defendant performed the dexterity tests normally. The officer testified that in her opinion the defendant was under the influence. The defendant testified to many stresses he was enduring the night he was picked up, and that he had about 1 beer that evening. The appellate court found this evidence insufficient to convict:

These are the kind of issues that this court, with rare exception, has always left to a jury. We conclude, however, that this is one of those rare exceptions. Even with the credence to be given the state's case, the unique facts and circumstances here, particularly in their various combinations, require us to conclude that the state's proof falls short of proof beyond a reaonable doubt.

Id. at 294.

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Training Director
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Book Review

Enemies and How to Love Them

ENEMIES
and How to Love Them
by Gerald A. Vanderhaar
Twenty-Third Publications, 1985,
Mystic, Conn. $5.95.

The reality of our existence is that we live in a very imperfect world of hate and fear, of injustice, crime, war, and death. It is a world in which distrust of neighbor reigns. We have -- out of "practical necessity" -- erected defenses against unwanted intruders: we hide behind walls of nationality, race, status, privacy, pragmatism, and self-righteousness For thousands of years, we have understood this as the only "practical" way of life. Otherwise, the storehouses of our civilization and selfhood would be overrun by *enemies*.

Nearly two millenia ago, a poor young man named Jesus taught, and lived by, an alternate strategy. He urged the practice of loving one's neighbor at all times, even when one's neighbor was an "enemy." This seemingly impractical, and even insane, program has been practiced successfully by visionaries such as St. Francis of Assisi, Peter Waldo, the Quakers, Mohondas Gandhi, and Martin Luther King, Jr. This program may offer the sole alternative to our determined course toward world annihilation.

This is the central message of an excellent book by Gerard Vanderhaar. The author is a professor of religion and peace studies at Christian Brothers College in Memphis, Tennessee, and he is an activist in nonviolence and international peace movements.

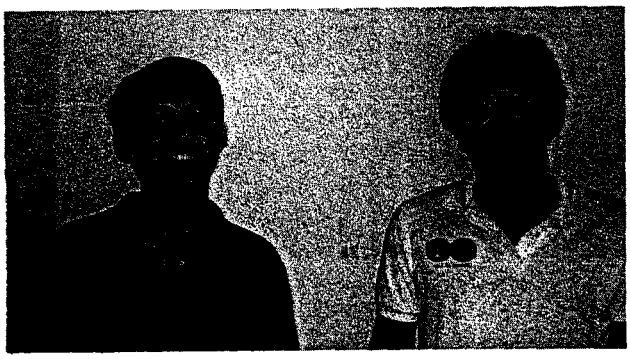
To combat the delusion that the strategy of love of enemies cannot work, Vanderhaar sprinkles his book liberally with anecdotes showing it working in situations where the normal, "safe" course of action failed. For example, 73-year-old Louise Degrafinried met an escaped convict in her home in 1984. He had a shotgun trained on her husband, but she met him with Christian charity and fearlessness, offering him breakfast and a prayer. Afterwards, the convict surrendered peacefully to the police. Meanwhile, two other escapees were met by a 59-year-old man who had taken the precaution of arming himself. They took his gun, killed him, stole his car, and kidnapped his wife.

In Enemies, the lesson is that our habitual practice of creating, nurturing, and opposing enemies only serves to keep us in a state much like that of Nazi Germany, ruled by fear and hatred. The urgency of finding an alternative to nuclear self-destruction impels us to turn from our fear and hatred of "them." We need to develop successful negotiating techniques which involve separating the "opponent" from the issues. By behaving as a loving person, rather than as an enemy, one develops personal power recognized as a peacemaking tool in psychotherapy. By putting oneself in the other's shoes, one is freed to discover the win-win solution to conflicts. By facing conflicts head on with love, instead of with the natural fight-or-flee reaction, the successful negotiator converts himself and the world around him into "the kingdom of heaven."

Vanderhaar dissects -- both psychologically and historically -- the practice of hatred, of foe-making, of placing blame on scapegoats, and of projecting our insecurities upon others -- all to avoid facing the enemy within. Resolving to love ourselves and our world, instead of judging, leads us to re-evaluate all our practices, such as capital punishment, the treatment of accuseds and convicts, competition with our peers, and our manner of dealing with adversaries, such as judges and opposing counsel. There are numerous encouraging examples, insights, and practical suggestions found in Enemies of benefit to everyone with competitive, contentious lives --which means *everyone*.

Michael Friend
Roederer Farm Center
LaGrange, Kentucky

Paducah



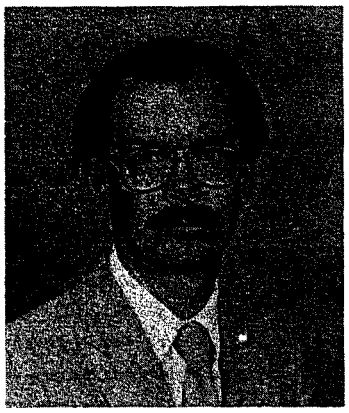
(L to R) Morris Eaton, Rex Duff

Morris Eaton, Assistant Public Advocate, joined the office February 24, 1987. He is a1986 graduate of South Illinois University.

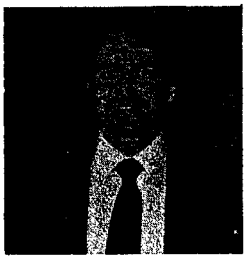
Rex Duff, Assistant Public Advocate, joined the office December 1, 1986. He is a 1985 graduate of Ohio Northern Pettitt College of Law.

Transfers:

John Halstead, on September 1, 1987, will transfer from the Somerset trial office to the Northpoint post-conviction/trial office.



Resignations



Richie Bottoms, formerly of the Northpoint Office, resigned on May 16, 1987 to begin private practice in Harrodsburg.

Steve Owens, formerly Directing Attorney of the Pikeville Office,resigned on May 29, 1987 to go into private practice in Pikeville with Attorney Kelsey E. Friend.

Ken Taylor, formerly Directing Attorney of the Northpoint Office, resigned on June 30, 1987 to go into private practice in Nicholasville with Daugherty, Thomas and Taylor.

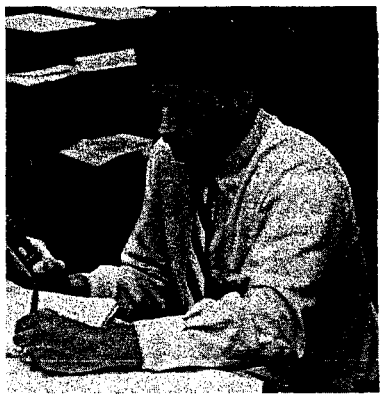
Norman Bennett, formerly of the Pikeville Office, resigned on July 15, 1987 to go into private practice in Johnson County with Attorney Charles K. Belhasen.

Bill Chambliss, formerly of the Stanton Office resigned on May l, 1987 to transfer to the Attorney General's Office, Utility Intervention Section in Frankfort.

Promotions:

Allison Connelly was appointed the Director of the Northpoint trial office on July 16, 1987.

Jim Cox was appointed the Director of the Somerset office on July 1, 1987.



15TH ANNUAL DPA SEMINAR COMPLETED

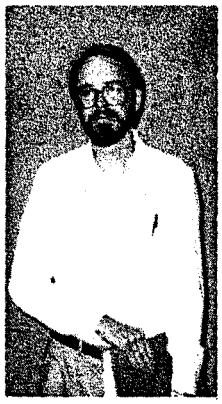
Charlie Coy

Frank Haddad, Jr.

Jonathan Cowan

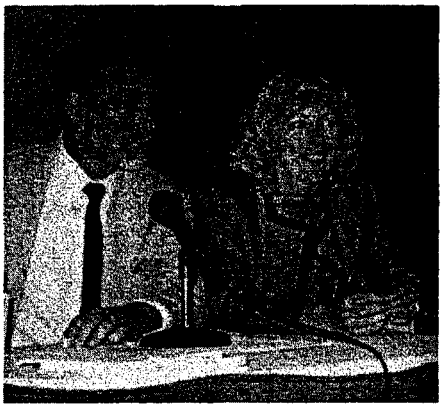
Paul Cramer

Justice Charles M. Leibson



Rick Receveur

Tim McCall

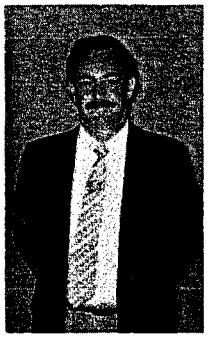


Marc Kurzman Carol Grant

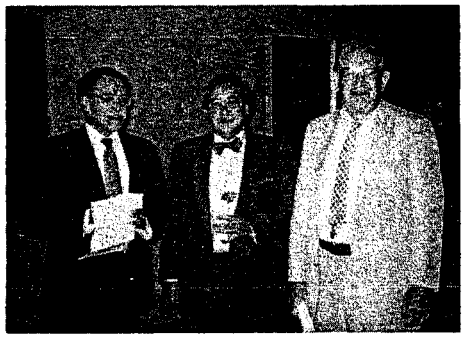
Capt. David Skilton

Scott Doyle

George Nicholas



Richard Miller



Judges Joe Leibson, Richard Fitzgerald, Jack Mudd

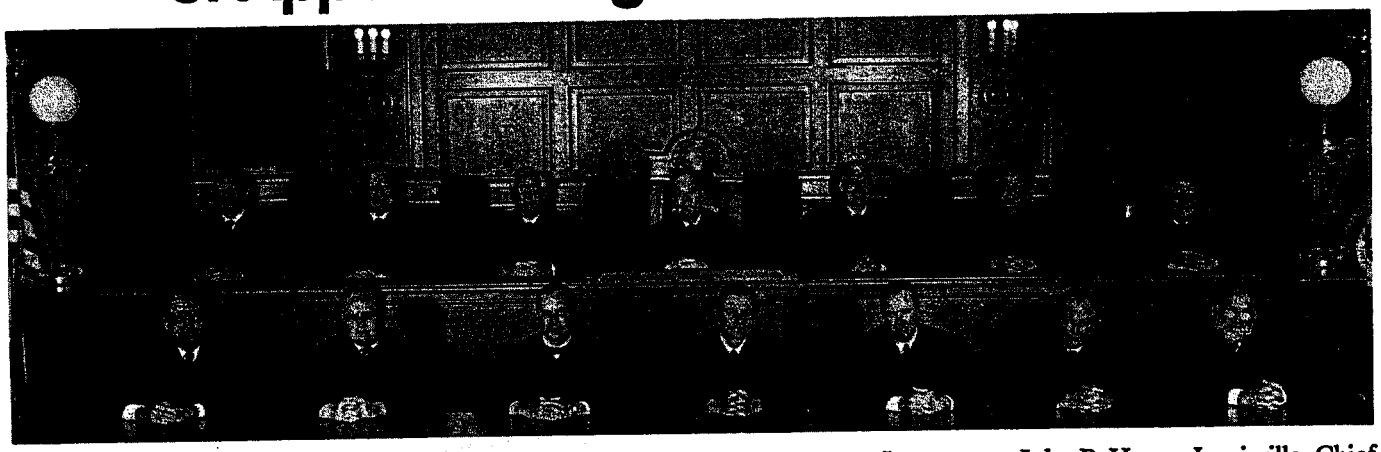
Judge Nathaniel Jones

200 persons attended the 2 1/2 day Annual Public Defender Training Seminar in Louisville. National faculty were Paul Cramer of Conflict Management Inc., Carol Grant and Marc Kurzman of Minnesota. Other faculty included Sixth Circuit Judge Nathaniel R. Jones, Todd Megibow, Scott Doyle of the KSP Lab, Dr. Gennaro Vito of University of Louisville, Mike Wright, Frank Haddad, Jr., Richard Miller of Cabinet of Human Resources, Vince Aprile, Charlie Coy, Rick Receveur, Gary Johnson, Tim McCall, Bette Niemi, Dr. Jonathan Cowan, Dr. George Nichols II, Bill Stewart, Paul Phillips, JoAnne Yanish, Frank Jewell, David Niehaus, Judge Richard Fitzgerald, Joe Leibson, Jack Mudd, Justice Charles Leibson, and David Skilton.

DPA investigators spent a day of training on sex abuse cases and ethics.

Thanks to all those that made the seminar a success. Don't miss next year's seminar to be held June 5-7, 1988 at the Quality Inn Riverview in Covington.

We republish this photograph of the Court of Appeals' Judges with their names.



Top Row (L to R) Charles H. Reynolds, Bowling Green, Kenton J. Cooper, Jamestown, John P. Hayes, Louisville, Chief Judge J. William Howerton, Paducah, Anthony M. Wilhoit, Versailles, Judy M. West, Covington, Harris S. Howard, Prestonsburg
Bottom Row (L to R) Boyce G. Clayton, Benton, John D. Miller, Owensboro, R.W. Dyche, III, London, Michael O. McDonald, Louisville, Paul D. Gudgel, Lexington, Charles B. Lester, Ft. Thomas, Dan Jack Combs, Pikeville

In the June, 1987 publication of The Advocate, there was an interview with Chief Judge William Howerton of Kentucky's Court of Appeals which was followed by an Opinion of the Florida Court of Appeals concerning the need for more appellate judges in Florida. The Florida opinion was included as an example of one court's response to that court's perceptions of its caseload and was not intended to be a comparison of caseloads of Florida's and Kentucky's appellate caseloads. The Department of Public Advocacy regrets any unintentional interpretation caused by these two articles.

Paul F. Isaacs
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