THE ADVOCATE

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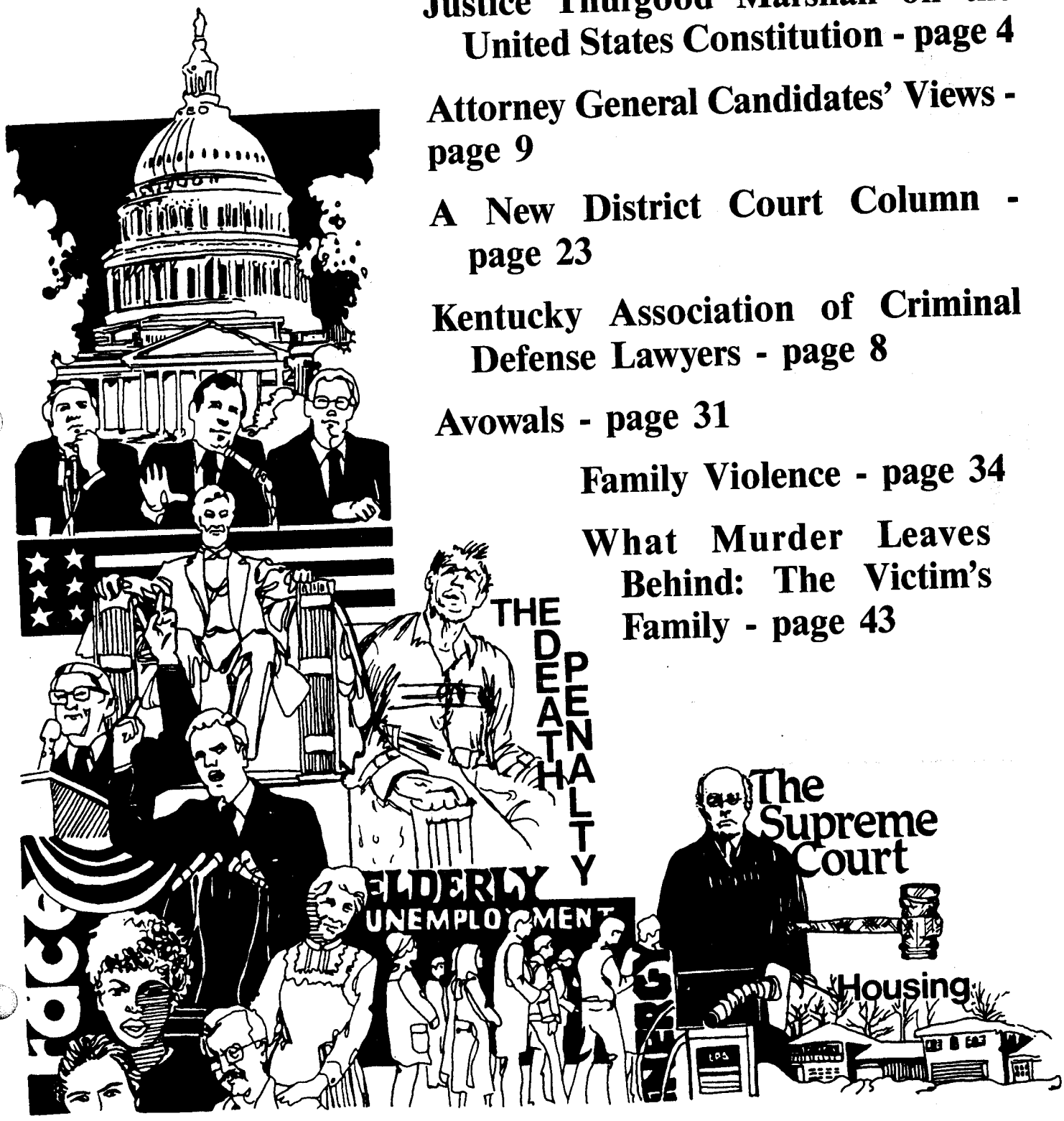

Illustration Courtesy of NLADA

The Advocate Features

STEVE DURHAM

Steve Durham is an "of counsel" attorney at Gittleman & Barber in Louisville, and the public advocate for Shelby County. A 1983 graduate of the University of Louisville School of Law, Steve is married to Ruth Terry Durham. Steve is the proud recipient of the 1986 Martin Luther King Award given by a Shelby County church. It is awarded to individuals who most exemplify Reverend King's philosophy of dealing with adversities. He feels the award was presented to him primarily for his involvement in the defense of juveniles who were arrested en masse while attending a Shelby County party. Bette Niemi, the Director of the Oldham County public defender's office, said "Steve's natural abilities and skills as a criminal defense lawyer make you notice him... his compassion for his clients and their causes, makes you remember him."

What kind of cases do you handle in private practice?

I like criminal defense best. There is a quick resolution to the issues. Civil cases are going to be put on a court calendar that floats, the definite dates really are so far down the line.

I've always wanted to practice criminal defense since early days. Growing up with 11 brothers and sisters, I was always able to feel and see that there was some motivation, some reason for the trouble, other than them just being out to be mischievous. That there was something behind that that needed to be explained. When I'm trying to convince my family of 12 I've been looking at them like jurors and I'm comfortable in that situation.

What trends in law do you see developing?

I see some detrimental trends in legal development for the defendant, especially in the area of fourth amendment suppression issues. I think the courts are really trying to find methods to work around suppressing the evidence. They're still saying, yes I think there was a violation of the individual's constitutional rights, but this evidence is important and needs to be introduced by the prosecutor or the government and they were acting in good faith. That sort of language worries me because it is an erosion of protections that have been so valued and the only methods defendants really have of remaining safe and being left alone is a court suppressing evidence that is seized unconstitutionally.

In my every day trial and appellate practice, I see the trend to allow the introduction of evidence seized when even on its face it's an unconstitutional search and seizure. I think that's very detrimental. Not only to the guilty but to those are not guilty that are going to be randomly stopped or searched. The sanctity of a house is going to lose its specialness. The freedom of going through airports without having your I.d. checked, and to be left alone on the roadway is being eliminated.

What is the most difficult case?

In a criminal case where an individual has suffered a serious physical injury, those are tough. Injuries leave scars both physically and emotionally that end up being displayed in a courtroom. Once those displays are made it's just so hard to focus attention on any other aspect of the case.

I think it's just a human response to someone who has been injured or maimed due to someone else's actions. Juries tend not to focus on words anymore but focus on the irregularity or the infirmity. It's hard to get them to focus on some other aspect. To go past the human

Continued on page 43, See Durham

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IN THIS ISSUE

Justice Thurgood Marshall on the United States Constitution

The following are the remarks of United States Supreme Court Justice Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii on May 6, 1987. It is printed with his permission.

1987 marks the 200th anniversary of the United States Constitution. A Commission has been established to coordinate the celebration. The official meetings, essay contests, and festivities have begun.

The planned commemoration will span three years, and I am told 1987 is "dedicated to the memory of the Founders and the document they drafted in Philadelphia."(Fn.1) We are to "recall the achievements of our Founders and the knowledge and experience that inspired them, the nature of the government they established, its origins, its character, and its ends, and the rights and privileges of citizenship, as well as its attendant responsibilities."(Fn.2)

Like many anniversary celebrations, the plan for 1987 takes particular events and holds them up as the source of all the very best that has followed. Patriotic feelings will surely swell, prompting proud proclamations of the wisdom, foresight, and sense of justice shared by the Framers and reflected in a written document now yellowed with age. This is unfortunate--not the patriotism itself, but the tendency for the celebration to oversimplify, and overlook the many other events that have been instrumental to our achievements as a nation. The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the "more perfect Union" it is said we now enjoy.

I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.

For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the Framers, "the whole

Justice Thurgood Marshall

Number of free Persons."(Fn.3) On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes -- at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.(Fn.4)

These omissions were intentional. The record of the Framers' debates on the slave question is especially clear: The Southern States acceded to the demands of the New England States for giving Congress broad power to regulate commerce, in exchange for the right to continue the slave trade. The economic interests of the regions coalesced: New Englanders engaged in the "carrying trade" would profit from transporting slaves from Africa as well as goods produced in America by slave labor. The perpetuation of slavery ensured the primary

source of wealth in the Southern States.

Despite this clear understanding of the role slavery would play in the new republic, use of the words "slaves" and "slavery" was carefully avoided in the original document. Political representation in the lower House of Congress was to be based on the population of "free Persons" in each State, plus three-fifths of all "other Persons."(Fn.5) Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."(Fn.6)

It was not the first such compromise. Even these ringing phrases from the Declaration of Independence are filled with irony, for an early draft of what became that Declaration assailed the King of England for suppressing legislative attempts to end the slave trade and for encouraging slave rebellions. (Fn.7) The final draft adopted in 1776 did not contain this criticism. And so again at the Constitutional Convention eloquent objections to the institution of slavery went unheeded, and its opponents eventually consented to a document which laid a foundation for the tragic events that were to follow.

Pennsylvania's Gouverneur Morris provides an example. He opposed slavery and the counting of slaves in determining the basis for representation in Congress. At the Convention he objected that

> "the inhabitant of Georgia [or] South Carolina who goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice."(Fn.8)

And yet Gouverneur Morris eventually accepted the three-fifths accommodation. In fact, he wrote the final draft of the Constitution, the very document the bicentennial will commemorate.

As a result of compromise, the right of the Southern States to continue importing slaves was extended, officially, at least until 1808. We know that it actually lasted a good deal longer, as the Framers possessed no monopoly on the ability to trade moral principles for self-interest. But they nevertheless set an unfortunate example. Slaves could be imported, if the commercial interests of the North were protected. To make the compromise even more palatable, customs duties would be imposed at up to ten dollars per

Constitution 'defects' allowed discrimination, conferees say

Associated Press

CAMBRIDGE, Mass. — The Constitution bicentennial should not be a birthday party but instead should spotlight how the nation's governing document allowed discrimination against minorities, said black lawyers and social historians meeting yesterday at Harvard University.

The Constitution must be examined to prevent further injustice and additional amendments must be proposed to protect the rights of minorities, said participants in the three-day conference, "The Constitution and Race."

"It's essential that we critically examine the defects of the Constitution and its devastating consequences," said David Hall, an associate law professor at Northeastern University and forum co-chairman. It was sponsored by the Massachusetts chapter of the National Conference of Black Lawyers.

Looking at the Constitution as an "imperfect" document that might aid racial oppression is vital as Senate hearings on the Supreme Court nomination of Robert H. Bork begin next week, said Adjoa Aiyetoro, co-chairman of the national black lawyers group.

Among the speakers at the conference will be San Francisco attorney Donald Tamaki. He is representing the plaintiff in a landmark Supreme Court case challenging the legality of the internment of 120,000 Japanese-Americans during World War II.

Most of the speakers planned for the conference cited a recent speech given by Supreme Court Justice Thurgood Marshall. In it, he described the original Constitution as "defective," particularly in its treatment of blacks and women.

Lexington - Herald Leader

slave as a means of raising public revenues.(Fn.9)

No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made. But the effects of the Framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.

The original intent of the phrase, "We the People," was far too clear for any ameliorating construction. Writing for the Supreme Court in 1857, Chief Justice Taney penned the following passage in the Dred Scott case,(Fn.10) on the issue whether, in the eyes of the Framers, slaves were "constituent members of the sovereignty," and were to be included among "We the People":

> "We think they are not, and that they are not included, and were not intended to be included.... They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race...; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.... [Ac]cordingly, a negro of the African race was regarded ... as an article of property, and held, and bought and sold as such.... [N]o one seems to have doubted the correctness of the prevailing opinion of the time."

And so, nearly seven decades after the Constitutional Convention, the Supreme Court reaffirmed the prevailing opinion of the Framers regarding the rights of Negroes in America. It took a bloody civil war before the 13th Amendment could be adopted to abolish slavery, though not the consequences slavery would have for future Americans.

While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws. And yet almost another century would pass before any significant recognition was obtained of the rights of black Americans to share equally even in such basic opportunities as education, housing, and employment and to have their vote

Editorials

Marshall vs. the founders

Supreme Court Justice Thurgood Marshall has offered some harsh criticism of the U.S. Constitution. The framers of that document sacrificed "moral principles for self-interest," said Marshall in a recent speech. "Nor do I find the wisdom, foresight and sense of justice exhibited by the framers particularly profound," he added.

Marshall faults the framers for failing to guarantee the same rights for blacks and women as for white males. But the constitutional convention lacked the power to wipe out evils such as slavery at a single stroke. It was not a junta equipped to dictate by force, but a deliberative body empowered only to make proposals that would have to be ratified by states where slavery was deeply entrenched.

Under the circumstances, the convention did extraordinarily well. It avoided locking in slavery, allowing individual states to abolish it within their own borders, as many of them did. And it empowered Congress to outlaw the importation of slaves from other countries, which doomed the institution in the long run.

Black leader Frederick Douglass rightly observed in 1852 that the Constitution provided "neither warrant, license nor sanction" for slavery. Contrary to what one would infer from Marshall's remarks, it did not make any formal distinction between the races or the sexes: It left ample opportunity for the legislative branch to craft later reforms.

Unlike most rulings of today's judicial activists, it was a masterpiece of adaptability—which is why it has proved more enduring than any written constitution in history.

A first-year law student should have enough historical perspective to avoid blaming the framers for institutions that they did not create and that were nearly universal in the 18th century—such as the denial of voting rights for women. Unfortunately, Marshall's comments come not from a student but from an official sworn to uphold the very document that he holds in such low esteem.

Cincinnati Post, May 18, 1987. Reprinted with Permission.

counted, and counted equally. In the meantime, blacks joined America's military to fight its wars and invested untold hours working in its factories and on its farms, contributing to the development of this country's magnificent wealth and waiting to share in its prosperity.

What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.

The men who gathered in Philadelphia in 1787 could not have envisioned these changes. They could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendent of an African slave. "We the People" no longer enslave, but the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of "liberty," "justice," and "equality," and who strived to better them.

And so we must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective. Otherwise, the odds are that for many Americans the bicentennial celebration will be little more than a blind pilgrimage to the shrine of the original document now stored in a vault in the National Archives. If we seek, instead, a sensitive understanding of the Constitution's inherent defects, and its promising evolution through 200 years of history, the celebration of the "Miracle at Philadelphia"(Fn.11) will, in my view, be a far more meaningful and humbling experience. We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.

Thus, in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled. I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights.

Justice Thurgood Marshall
96th Justice of the Supreme Court of the United States. Appointed to that Court by President Johnson in 1967. He is a former Attorney of the NAACP. He argued Brown v. Board of Education in 1954, the decision that ended the segregation of schools.

FOOTNOTES

(Fn.1) Commission on the Bicentennial of the United States Constitution, First Full Year's Report, at 7 (September 1986).

(Fn.2) Commission on the Bicentennial of the United States Constitution, First Report, at 6 (September 17, 1985).

(Fn.3) United States Constitution, Art. 1,§2 (Sept. 17, 1787).

(Fn.4) The 19th Amendment (ratified in 1920).

(Fn.5) United States Constitution, Art. 1, §2 (Sept. 17, 1787

(Fn.6) Declaration of Independence (July 4, 1776).

(Fn.7) See Becker, The Declaration of Independence: A Study in the History of Political Ideas 147 (1942).

(Fn.8) Farrand, ed., The Records of the Federal Convention of 1787, vol. II, 222 (New Haven, Conn., 1911).

(Fn.9) United States Constitution, Art. 1,§9 (Sept. 17, 1787).

(Fn.10) 19 How. (60 U.S.) 393, 405, 407-408 (1857).

(Fn.11) Bowen, Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787 (Boston 1966).

"A young fellow like me is not going to get mad at an old fellow like him."

President Reagan, who is 76, commenting on 79-year old Supreme Court Justice Thurgood Marshall's assessment that Reagan ranks at "the bottom" of American presidents in terms of racial justice.

Kentucky Association of Criminal Defense Lawyers

P.O. Box 674 • Lexington, KY 40586

On behalf of the Kentucky Association of Criminal Defense Lawyers (KACDL), I invite all lawyers in the Commonwealth, who practice criminal defense law, to consider joining the KACDL. The KACDL formed earlier this year, and is affiliated with the National Association of Criminal Defense Lawyers.

The President of the KACDL is Frank E. Haddad, Jr., and our Vice-President is William E. Johnson. These are two of the finest criminal lawyers in the Commonwealth, and our Board of Directors includes attorneys from across the state, including private practitioners as well as those who are part-time or full-time public defenders.

KACDL plans on actively representing the criminal defense bar's views in both legislative and rule-making activities. KACDL will sponsor seminars focusing solely on criminal law, something presently not available outside of the Department of Public Advocacy seminars.

KACDL is offering its first seminar on December 4, 1987, at the Lexington Marriott Resort. The main speaker will be Al Krieger, who is a past President of the NACDL. He will present sessions on cross-examination of both expert witnesses and informants. Senator Michael Moloney, Representative Joe Clarke, and Representative Ernesto Scorsone will also present a session on upcoming legislation in the 1988 session of the Kentucky General Assembly. Those interested in attending this seminar should contact Tom Hectus, Esq., KACDL Education Committee, 635 West Main Street, Fourth Floor, Louisville, Kentucky 40202.

The National Association publishes a first-rate journal, "The Champion," which provides valuable articles and information concerning the defense of criminal cases, written by some of the nation's top criminal law practitioners.

The KACDL offers the criminal defense lawyer the opportunity to meet with other attorneys who concentrate in the same area of practice, and through our combined efforts, we hope to have a significant impact on legislation and rules that affect the criminal practice of law.

For those of you interested in joining, please mail your application to: Burl McCoy, Membership Committee, Kentucky Association of Criminal Defense Lawyers, P.O. Box 674, Lexington, Kentucky 40586.

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Attorney General Candidates Views

Written Interviews with Cowan, Combs

The Advocate asked Attorney General Candidates Fred Cowan and Christopher Combs to express in writing their views on criminal justice issues. Their views follow.

Candidate Combs did not wish to have a photo of himself accompany this article

1. What are your highest priorities to improve the Kentucky criminal justice system?

COWAN: (1) To achieve adequate funding to assure efficient and fair administration of all aspects of the criminal justice system; (2) To improve our corrections and parole system to make sure there is sufficient space in prisons and jails to house those convicted of crimes; and (3) To explore appropriate alternatives to incarceration for felony and misdemeanor offenses to alleviate overcrowding of prisons and jails.

COMBS: Some of my highest priorities are to have training seminars, lectures, and training sessions to keep prosecutors and law enforcement officers up with the newest laws, and the newest investigation and presentation techniques, to create special strike forces, one to deal with drug trafficking and another to handle the more complex aspects of white collar, computer and securities crimes; to provide support for all prosecutors in the state and provide special prosecutors when they are needed, to continue and expand the victim's rights program and to protect people in high crime risk areas, and to continue and strengthen the prevention and prosecution of child abuse and exploitation. Another concern is the new Unified Juvenile Code which my opponent steered through the State House of Representatives which is badly flawed and should be amended in part.

2. What is the proper role of the victim in the criminal justice process?

COWAN: The victim's role must be considered in the criminal justice process and the victim must have a say in that process consistent with the defendant's due process rights.

COMBS: The successful prosecution of a case is the main job of any prosecutor. The victim has often been overlooked in the process, but this has begun to change. The victim should be given psychological and financial support and safety and care from the time of the crime up to and after the trial of the case.

3. What, from your vantage, should be the primary goals of Kentucky's Correction system? Is the Kentucky Corrections Cabinet properly funded?

COWAN: The primary goals of the correction system is to provide punishment for crimes, incapacitation of those who are dangerous to society and, in appropriate cases, rehabilitation of offenders.

Fred Cowan

The Kentucky Corrections Cabinet needs additional funding and additional capacity to house prisoners. Finding ways to provide that funding and increase that capacity will be a major emphasis during my tenure as attorney general.

COMBS: Kentucky's Correction system is run by the Corrections Cabinet, a separate, independent state agency. The Attorney General's office has no connection with or responsibility for the Corrections Cabinet. As Attorney General I would work with and cooperate with the Corrections Cabinet in any way that I could to find solutions to the serious jail and prison problems that Kentucky faces.

4. How are the rapidly increasing number of prisoners in Kentucky going to be handled in coming years?

COWAN: Handling the increasing number of prisoners will be accomplished by enlarging the capacity of our prison system, giving greater emphasis to alternatives to incarceration in appropriate cases and paying special attention to efforts to reduce recidivism.

COMBS: This is a problem for the Corrections Cabinet but I as Attorney General will work with the Corrections Cabinet in any way that I can to find a solution to the jail and prison problems that Kentucky faces.

5. In your view, what are the possibilities for alternate sentencing? Why is alternate sentencing not used more in Kentucky?

COWAN: We need to continue to explore alternate sentencing ideas such as home incarceration and other innovative programs that are consistent with the goals of providing public safety, accountability and appropriate punishment for those who commit crimes.

We need more proven alternate sentencing programs so the General Assembly, judges and juries can feel comfortable in imposing such sentences.

COMBS: On June 12, 1987, I was at a panel discussion put on by the Kentucky Bar Association at its meeting in Louisville. Paul F. Isaacs, Public Advocate for Kentucky was one of the panel members. The consensus of the panel of prosecutors, defense attorneys, circuit and district judges was that the defense bar should develop and present their recommendations for alternate sentencing to the judge and the prosecutor would give his recommendations and the judge would decide.

6. What is your view of the parole system in Kentucky?

COWAN: I believe that parole boards now operate under too much pressure to release prisoners at an early date because of the overcrowding of our prisons.

Parole officers currently have too high a caseload to adequately supervise parolees. We need to reduce that caseload and initiate stronger programs to ensure that parolees do not recidivate.

COMBS: Based on my present understanding, the parole system in Kentucky is sufficient.

7. Do you think any changes are needed in Kentucky's PFO laws?

COWAN: I support the basic concept of Kentucky's PFO laws, but recognize that valid questions have been raised about some of its aspects. In particular, any changes in the law should be designed to assure equitable, firm and consistent sentencing under the law throughout the state.

COMBS: Based on my present understanding, no changes are needed in the present Kentucky's PFO laws.

8. Now that the so called "Truth in Sentencing" Bill has been in effect for a period of time, are you in favor of it or against it? Why?

COWAN: I strongly support the truth-in-sentencing bill, although there may be some areas that need to be modified.

COMBS: Apparently on or about August 7, 1987, the "truth-in-sentencing law", KRS 532.055 was held to be constitutional by the Kentucky Supreme Court in Commonwealth v. Keneer. I agree with the Court that there is need for "a better informed sentencing process."

9. What efforts do you support to protect and further the individual protections of Kentucky citizens accused of crimes?

COWAN: To protect individuals accused of crimes, I support adequate funding of the Department of Public Advocacy. I believe public defenders play an important role in protecting the rights of individuals and I support the due process rights afforded all citizens accused of crimes.

COMBS: The prosecutor, and I was a prosecutor, I was the County Attorney in Estill County, Kentucky, has a dual responsibility in a criminal trial, he represents the Commonwealth as a prosecutor but at the same time he must protect the interests of the defendants. If the prosecutor, in his investigation of a case, finds exculpatory evidence, he must make this evidence available to the defense counsel.

It will be important for me as Attorney General to make the prosecutors the best that they can be so that they will best be able to discover and present all relevant evidence in a case.

* * * *

'From Washington on down, they've known since the 1930s that vote-buying was widespread, not only in Magoffin County, but in all of Kentucky.'

— Rodney Tressler
Magoffin grand jury foreman

From the Lexington Herald-Leader September 1, 1987

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

KY COURT OF APPEALS

CONFESSIONS/JURY SELECTION
Williams v. Commonwealth
34 K.L.S. 9 at 2
(June 12, 1987; ordered published July 10, 1987)

The Court held in this case that Williams' confession was voluntary. When police entered Williams' house to execute an arrest warrant for robbery they found one person hiding under a pile of clothes and heard noises coming from a closet. The police then pulled their guns and ordered the person in the closet to come out. Williams came out and was told to lie on the floor and give his name. Williams then said "Tommy Lee Williams, I robbed the store." The Court held that Williams' statement was voluntary because the actions of the police were reasonable under the circumstances and "[n]othing they said or did was an invitation to appellant to blurt out a confession."

The Court also held that the trial court did not commit reversible error when it called 38 venireman and then randomly selected 28 of those called for the jury selection process. "The central principle in any jury selection is the preservation of randomness all through voir dire and peremptory challenges." While the procedure followed may have deviated from the statute and rules (KRS 29A.060(2); RCr 9.30; RCr 9.36) it did not deviate from the randomness requirement.

PERJURY - RETRACTION
Price v. Commonwealth
34 K.L.S. 9 at 4
(July 17, 1987)

Price testified before a Fayette County Grand Jury that her stepfather had raped her. The stepfather ultimately pled guilty to the offense. Later, in response to family pressure, Price testified at 11.42 proceedings that she had not, in fact, been raped. Price was then indicted for perjury. At her trial, Price admitted that she had lied at the 11.42 hearing. Price contended, however, that she had retracted her perjury when, following her arrest she called a police detective and recanted the 11.42 testimony.

The Court of Appeals held that Price's action did not retract her perjury. The defense of retraction is available when a person retracts "the falsification in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed." KRS 523.090. Price's attempted retraction was untimely since she had already been indicted for perjury.

RECONVENING DISMISSED JURY - DOUBLE JEOPARDY
Burchett v. Commonwealth
34 K.L.S. 9 at 18
(July 24, 1987)

In this case, the jury returned an ambiguous verdict. The verdict form permitted the jury to impose an enhanced sentence without stating whether the jury had convicted the defendants as a first or second degree PFO. After the jury fixed a sentence within the range permissible for either first or second degree PFO the jury was dismissed. Only then did the trial court realize that the verdict did not make clear what the defendants had been convicted of. The jury was recalled and following new deliberations found the defendants guilty as first degree PFOs.

The Court of Appeals reversed the convictions of first degree PFO stating, "[i]t is axiomatic that an ambiguous or incorrect verdict must be corrected prior to the time the jury is discharged." The Court further held that the jury's verdict after being reconvened violated the defendant's rights against double jeopardy. The Court reversed and remanded with directions to enter judgments of conviction for PFO II.

KY SUPREME COURT

THEFT - "CLAIM OF RIGHT"
Ullendorf v. Commonwealth
34 K.L.S. 10 at 17
(August 28, 1987)

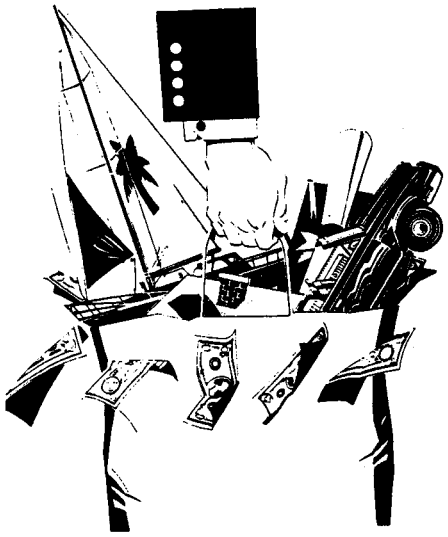
In this case the Court reversed the defendant's conviction of theft because of the trial court's failure to instruct the jury on the defense of "claim of right." Following a dispute over family heirlooms left by his deceased mother, the defendant went to his mother's home and took the disputed items. The Court considered it irrelevant that the defendant's claim was apparently not legitimate. "...KRS 514.020 does not mention that the claim of right must be legitimate or a legal claim." The Court also held that the defendant was entitled to an instruction on his proffered defense so long as there was support for it in either the defense's or commonwealth's proof.

RECKLESSNESS - LACK OF MENTAL CAPACITY
Wyatt v. Commonwealth
34 K.L.S. 10 at 17
(August 28, 1987)

Wyatt was convicted of, inter alia, third degree assault, which has as its culpable mental state recklessness. Wyatt's defense was that at the time the assault occurred he was unconscious of his actions. Wyatt's tendered instruction submitting his defense of mental incapacity to the jury was refused. The Court of Appeals reversed and held that Wyatt was entitled to such an instruction. The Court reasoned that: "Under the instructions given by the court, the jury would have had to have found Wyatt guilty of the charges without regard to whether he was conscious of his acts. We find this unconscionable."

INSTRUCTIONS/MIRANDA
Campbell v. Commonwealth
Jones v. Commonwealth
34 K.L.S. 8 at 24 (July 2, 1987)

In this case, the Court held that the jury was properly instructed on both principal and accomplice liability where the codefendants were seen carrying property from the scene together. The Court also reaffirmed that burglary and theft are separate offenses and a conviction of both does not constitute double jeopardy.



Reviewing the admissibility of Jones' confession, the Court found it admissible. When Jones was read his Miranda rights he advised the police that he was groggy from medication and asked if he could give a statement later. The officer answered that he would prefer an immediate statement. Jones then incriminated himself. Thirty minutes later, on his own initiative, Jones gave a second statement. No Miranda rights were given.

The majority held there was insufficient evidence of drug intoxication to render Jones' statements involuntary. Neither did the police officer's statements amount to coercion. Finally, because the second statement was volunteered, giving Miranda rights was not required. Justice Liebson dissented from that portion of the Court's opinion holding that convictions of burglary and theft are not double jeopardy.

APPELLATE RELIEF/DETAINERS LOSS OF JURISDICTION
Commonwealth v. Hayes
34 K.L.S. 8 at 25
(July 2, 1987)

In this discretionary review of a Court of Appeals decision, the Court held that the Court of Appeals had granted relief beyond that which could be granted on direct appeal from a judgment of conviction. Based on events which took place after entry of the final judgment, the Court of Appeals had set aside judgment imposing a fine on Hayes. The Supreme Court pointed out that the avenues for relief based on post-judgment events are under CR 60.02 or habeas corpus.

The Court also held that the trial court usurped executive authority when it sought to lodge a "Detainer Warrant" against Hayes with federal authorities to whose custody he had been released. The Court noted that unauthorized release of a prisoner to a foreign jurisdiction may bar further enforcement of the Kentucky sentence under which the prisoner was being held. However, any irregularities in Hayes' release to federal authorities would not bar subsequent enforcement of a fine.

After issuance of the Court of Appeals' opinion but before that opinion became final the trial court entered an order vacating the

fine and conviction. This order was a nullity since the trial court had no jurisdiction of the case while it was still before an appellate court.

The Kentucky Supreme Court ultimately upheld the conviction and fine.

LESSER INCLUDED OFFENSES
Commonwealth v. Presley
34 K.L.S. 8 at 27 (July 2, 1987)

Presley was charged with rape. In his defense he testified that the victim propositioned him. They had consensual intercourse, but when Presley felt the victim trying to remove his wallet from his pocket he struck her several times in the face. Presley then argued that if the jury believed his testimony they would acquit him of rape but convict him of fourth degree assault. However, the trial court refused to instruct on fourth degree assault.

The Supreme Court held that Presley was entitled to such an instruction. The assault upon the victim was relied upon by the commonwealth to prove the "forcible compulsion" element of the rape charge. Under these circumstances the assault was a lesser included offen se to the alleged rape. Because the jury could believe the assault occurred, but not the rape, the jury should have been instructed on assault as an alternative verdict. Justices Stephenson and Wintersheimer dissented.

COMPLICITY-DUTY OF MOTHER TO PREVENT RAPE
Knox v. Commonwealth
34 K.L.S. 8 at 28 (July 2, 1987)

Knox was convicted of complicity in the rape of her daughter by the child's stepfather. The evidence established that Knox was aware of the rape and although she did not encourage or aid the stepfather she did nothing to prevent the rape.

Knox was convicted of complicity under KRS 502.020(1)(c) for failing to make an effort to prevent the offense while "[h]aving a legal duty to prevent the commission of the offense." Knox asserted on appeal that she had no such legal duty. The Court agreed. The Court rejected the commonwealth's argument that a legal duty arose under KRS 199.335, which requires the reporting of child abuse. The Court opined that a "reporting" requirement falls short of creating a legal duty to "prevent" the commission of an offense. The Court refused to consider whether KRS 508.100 through 508.120 create such a legal duty since those statutes became effective after the charged offense was committed.

CONSTITUTIONALITY OF TRUTH IN SENTENCING ACT
Commonwealth v. Reneer
34 K.L.S. 9 at 28 (August 6, 1987)

This certification of the law upholds the constitutionality of the Truth in Sentencing Act (KRS 532.055) against a claim that the Act constitutes a legislative invasion of the power of the judiciary in violation of the separation of powers. Reneer specifically claimed that the statute encroached upon the rule-making authority of the Supreme Court. The Court agreed that it did, but held that since the encroachment was not "unreasonable" it could be accepted under the principles of comity. The Court noted, however, that "[w]e reserve the right to consider any abuses or injustices alleged to be caused by KRS 532.055 when presented by a proper case..."

The Court additionally held that the Act did not violate the prohibition against ex post facto laws when applied retroactively because the Act merely altered "the mode in which the facts constituting guilt may be placed before the jury..." Although the statute makes admissible evidence which could not previously be introduced the evidence "does not go to the issue of guilt or innocence."

Justices Leibson and Lambert dissented and would have refused to extend comity to the Act as being "poorly conceived." The dissent provides a discussion of the more obvious flaws in the Act. The dissenting justices would also have held the Act invalid as an ex post facto law when applied retroactively.

BELATED APPEALS
Thompson v. Commonwealth
34 K.L.S. 9 at 30 (August 6, 1987)

This case presents the Court's latest position on belated and reinstated appeals. The Court reaffirmed its holding in Commonwealth v. Wine, Ky., 694 S.W.2d 689 (1985) that a trial court has no authority under RCR 11.42 to grant a belated appeal or to reinstate an appeal. Instead, the proper avenue for such relief is a petition to the appellate court. Following Wine, the Court contradicted itself in dicta in Commonwealth v. Jones, Ky., 704 S.W.2d 203 (1986) by indicating that a trial court could vacate a judgment and enter a new judgment in order to permit an appeal. The Court's decision in Thompson specifically overrules this conflicting dicta in Jones.

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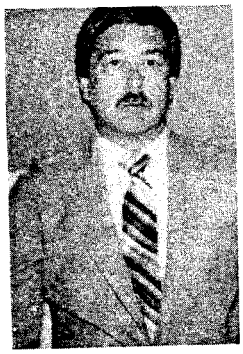
Post-Conviction

Law and Comment



Steve Berry

ENTERING THE CORRECTIONS SYSTEM

Practicing criminal defense lawyers often are not aware of what happens to their clients when they are incarcerated in the state system. Protective custody and guilty but mentally ill commitments are treated by Corrections in ways defense lawyers are unaware of or in ways that are contrary to what defense lawyers think. Below are explanations by Corrections of their policy and practices in these areas.

I. CUSTODY AND INSTITUTIONAL ASSIGNMENT

One of the questions most often asked Corrections professionals is "What determines an inmate's custody level and assignment to a specific institution?"

Historically custody and facility assignments were made subjectively by institutional officials. Experience taught institutional staff what characteristics to look for and what types of inmates functioned well in situations where supervision was reduced or where the opportunity for escape was great. Each correctional professional had his or her own 'theory' as to what characteristics made an inmate a 'good risk.' Often, widely varying decisions where reached by different groups reviewing the same inmate.

Over the past several years great improvements have been made in

The following form is used by the Corrections Cabinet in their classification process.

CC-1021 RECLASSIFICATION CUSTODY FORM

NAME_____ AGE_____ NUMBER_____

CLASSIFICATION OFFICER_____ CODE_____ DATE_____

1. HISTORY OF INSTITUTIONAL VIOLENCE
   None....0
   Fighting (Category III-12) -Score last 1yr of incarceration....1
   Assaulting another inmate/no serious injury (Category IV-1) -Score the last 2yr of incarceration....3
   Any category VII incident report - Score the last 5y of incarceration....7
   Score

2. DID THE ABOVE VIOLENCE OCCUR WITHIN THE LAST 6 MONTHS ?
   No or no violence....0
   Yes....3
   Score

3. SEVERITY OF CURRENT OFFENSE
   Class D Felony....1
   Class C Felony....2
   Class B Felony....3
   Class A Felony....6
   Highest....14
   Score

4. PRIOR FELONY INCARCERATIONS
   A. Non-violent incarcerations X (1) = _____
   B. Violent incarcerations X (3) = _____
   A + B = _____
   Score

5. ESCAPE HISTORY
   No Escapes or Attempted Escapes....0
   Escape or attempted escape from a non-secure institution or furlough....4
   Escape or attempted escape from a secure institution not involving violence....6
   Escape or attempted escape from any institution involving violence or an additional felony....9
   Score

6. NUMBER OF DISCIPLINARY REPORTS
   None in the past 12 months....-3
   None in the past 6 months....-1
   One in the last 6 months....0
   Two in the last 6 months....2
   Three in the last 6 months....4
   Four in the last 6 months....6
   Five in the last 6 months....8
   Six or more in the last 6 months....10
   Score

7. MOST SEVERE DISCIPLINARY REPORT RECEIVED
   None....0
   Category 3 Incident Report....3
   Category 4 Incident Report....5
   Category 5 Incident Report....7
   Catefory 5 Incident Report....9
   Category 6 Incident Report....11
   Category 7 Incident Report....
   Score

8. CURRENT DETAINER / PENDING CHARGE
   None....0
   Class C or Class D felony....1
   Class A or B felony; 3 or more class C or D felonies; or detainer for statutorily ineligible crime....6
   Score
   TOTAL SCORE ____

TOTAL SCORE (Add items 1 - 8)

STOP

9. ADMINISTRATIVE FACTORS TO BE APPLIED ONLY IF THE INMATE SCORES 10 POINTS OR LESS ON QUESTIONS 1 - 8.
   (NOTE: Only 1 of these factors may be applied to each inmate for a maximum of 9 points.)
   None apply....0
   Inmate has more than 90 days statutory good time loss....9
   Inmate has more than 48 months remaining to parole elig. or release....9
   Inmate returned from level 1 or 2 facility within last 90 days for disciplinary reasons....9
   Inmate is convicted of Sodomy or Sexual Abuse and has not completed Sex Offender Treatment....9
   Score
   FINAL SCORE ____

FINAL SCORE

(Revised 1-87)

establishing uniform correctional standards which are generally accepted by most practitioners in the field. The American Correctional Association (ACA) developed a specific set of standards covering all areas of institutional operation and instituted a process of inspection and review whereby institutions may become accredited under ACA standards. This movement has led to the development of specific written procedures in most areas, including inmate classification and assignment.

At present the Kentucky Corrections Cabinet uses an inmate classification system developed by the National Institute of Corrections and adapted to operate under Kentucky statutes. This system provides a uniform and objective rating for each inmate based on a number of factors determined by the National Institute of Corrections to be statistically valid in determining the level of control required by an individual inmate. The factors considered include: severity of current offense; number and severity of prior felony incarcerations; history of escape; number and severity of institutional disciplinary violations; and number and severity of pending charges.

By completing a form scoring the inmate on the factors listed above, the institutional classification team arrives at a numerical score for each inmate. This score places the inmate in a specific custody level. The team may then review any additional factors present; such as medical or psychiatric condition, need for protective custody, length of sentence, prior adjustment at a reduced custody level, etc.; to determine if the custody level obtained from the form is appropriate or if that custody level should be increased or decreased.

To insure that an inmate's custody accurately reflects his or her current behavior, each inmate undergoes a custody reclassification and update at least every six months. This permits the inmate's custody level to increase or decrease as a result of institutional behavior, changes in pending charges or actions effecting the inmates current sentence.

Facility assignment is governed by custody level, program need and available resources. At present the Cabinet operates one high security institution, three medium security institutions, and five minimum security institutions for males. In addition, the Cabinet operates one institution for female inmates which includes a minimum security unit for women who score in the minimum custody range.

The Kentucky State Penitentiary is considered as the high security institution and houses inmates with high custody scores. Since this is the only state institution which consists of individual cells, this facility also houses inmates in need of protection and inmates who have proven to be disruptive or assaultive at medium security institutions.

The three medium security institutions are Kentucky State Reformatory, Luther Luckett Correctional Complex and Northpoint Training Center. Since Luther Luckett Correctional Complex also contains the Kentucky Correctional Psychiatric Center, operated by the Cabinet for Human Resources, this institution serves as a center for medium custody inmates who have psychiatric problems or who are undergoing psychiatric evaluation. Many of the weaker medium custody inmates are also housed at the Luckett Complex as the majority of this facility consist of individual rooms which provide a greater degree on control than is available in dormitory housing.

Both Northpoint Training Center and Kentucky State Reformatory house general medium security inmates. Northpoint Training Center houses inmates in open dormitories while Kentucky State Reformatory is split about equally between dormitory housing and individual rooms. Because of the size of the Reformatory and the experience of Reformatory staff the stronger medium custody inmates and those with marginal behavior records are usually housed at that facility. The Reformatory also serves as the major medical facility for the Cabinet and contains the geriatrics facility for older inmates.

Assignment of minimum custody inmates to the various minimum security facilities is usually made on the basis of available bed space. With over 1200 inmates in the various county jails awaiting entry into the correctional system, the Cabinet can not maintain long waiting lists for inmates who desire assignment to specific institutions. In general, an inmate who is assigned to minimum custody status is transferred to the first available minimum security bed which is open. While factors such as availability of visits, academic and vocational needs, etc. are considered; the location of the various minimum security institutions often dictates that minimum custody inmates be housed in facilities some distance from their homes.

II. INMATES REQUIRING PROTECTIVE CUSTODY ASSIGNMENTS

Conflicts within prisons have always presented major problems for both correctional administrators and prison inmates. As with any closed system, conflicts within the prison environment are difficult to resolve by separation of the individuals involved and other strategies must be employed.

Inmates who seek protective custody within the prison system fall into several categories. First are those individuals who have testified or offered information leading to the arrest or conviction of other inmates. Second are those inmates who may have committed crimes against the friends or family of inmates also in the prison system. Third are inmates whose activities within the prison system (such as a homosexual lifestyle or inability to pay debts) create problems which endanger their safety. Finally, there are a number of inmates whose physical and/or emotional weakness causes them to become the target of abuse in the harsh prison environment.

In order to provide adequate security for inmates requesting protection, the Corrections Cabinet must place the individual in an environment providing an appropriate degree of security. For inmates requiring medium, close or maximum security housing this means an individual cell. Minimum custody inmates may sometimes be shifted between minimum security institutions to eliminate conflicts which result in protective custody request.

At one time inmates requesting protection were maintained at their institution of residence, transferred to a small (96 bed) protective custody at the Luckett Complex, or transferred to the main protective custody unit at the Penitentiary. This method of meeting protective custody was possible as long as the number of request and the system population remained relatively low. With the growth of the prison population in recent years, the Cabinet has been forced to concentrate all protective custody inmates at one institution. Since Kentucky State Penitentiary is the only institution which contains individual one man cells, that institution was chosen to house the protective custody unit.

The centralizing of all protective custody inmates at KSP has freed one dormitory at the Luckett Complex for other uses. The Cabinet is now attempting to concentrate inmates with specific mental health needs at the Luckett Complex due to the proximity of that facility to the Kentucky Correctional Psychiatric Center.

Centralizing all protective custody inmates at KSP has also permitted a broader range of services to be offered to inmates requesting protection. During certain periods general population inmates at KSP are locked in their cells so that protective custody inmates may move about the institution. The protective custody inmates wear distinctive uniforms so that correctional

Prosecutors want magistrate out for remarks in jail-beating case

The Associated Press

LOUISVILLE — Federal prosecutors want a U.S. magistrate removed from the case of five jail guards accused of beating a prisoner because the magistrate said he might have hit the inmate, too, under the circumstances.

The prosecutors' motion said U.S. Magistrate George Long told an attorney from the U.S. Justice Department, "It would be hard for me not to bop him upside the head if he did what he did to those people."

They want Long replaced with a U.S. district judge on the case.

Five former and current corrections officers at the Jefferson County Jail are charged with violating the civil rights of inmate James Silver when they beat him in 1983.

Prosecutors Isabelle Thabault, of the Justice Department's civil rights division, and Assistant U.S. Attorney Cleve Gambill said Long has very little experience with criminal jury trials.

They also said this is the first trial involving alleged civil rights violations in Kentucky's western district in at least 10 years.

Prosecutors contend the case involves the principle that "certain classes of persons should be protected against abuse by persons acting under the power of the state."

The law prohibits jail guards from using excessive force against an inmate even if that inmate is a troublemaker, the prosecutors said in their recently filed motion.

Silver was an unruly prisoner who allegedly had thrown urine and excrement on corrections officers.

The Kentucky Post, August 29, 1987. Reprinted with Permission.

staff will be aware of their status at all times.

At present, the Cabinet houses approximately 250 protective custody inmates out of a institutional population of 5300.

III. ASSIGNMENT OF GUILTY BUT MENTALLY ILL INMATES

Each year the Department of Adult Institutions receives a number of inmates who are sentenced under the provisions of KRS 504.130. Many of these inmates convicted under GBMI statutes indicate that their attorney informed them they would be confined in a hospital setting throughout their incarceration and would not be placed in the general prison population.

In many cases these inmates were sentenced under a plea bargain agreement and state to correctional staff that they would not have entered a plea had they been informed they would, in all probability, be assigned to the general population of a correctional institution rather than a mental health facility. A step by step description of the assessment, assignment and treatment of GBMI commitments may eliminate some of the confusion which apparently exists.

All inmates, including those found guilty but mentally ill, are received at the Assessment Center at the Kentucky State Reformatory or at the Assessment Center at Kentucky Correctional Institution for Women if female. Upon entry into the institution inmates convicted as GBMI are evaluated by institutional staff including a psychologist. If the individual appears to be an immediate danger to himself or others he may be placed at Kentucky Correctional Psychiatric Center by emergency transfer for a period of evaluation. If the individual does not appear to be an immediate danger, he will be scheduled for evaluation by the Psychiatric Center staff.

After the evaluation is completed the psychiatric staff at KCPC will make a decision as to need for treatment and what course the treatment will take. If found to be in need of in-patient treatment, the inmate will be admitted to KCPC until such time as the medical staff indicates they are ready for discharge. When discharged from KCPC the inmate will enter the general prison population or a special housing unit and may continue to be seen as an out-patient.

KCPC staff may also find that the inmate is in need of treatment, but can be treated on an outpatient basis through medication and counseling. These inmates are usually assigned to the Luther Luckett Correctional Complex which is adjacent to the Psychiatric Center. In some cases, these inmates may be housed at Kentucky State Reformatory or Kentucky State Penitentiary as their custody level dictates. Inmates may receive out patient treatment at both the Reformatory and Penitentiary.

Only those inmates in need of psychiatric services, and who can not be treated in a less restrictive environment, are retained at the Psychiatric Center for treatment. As of May 14, 1987 fifty seven (57) inmates were incarcerated under GBMI status. Only eight (8) of these inmates are currently housed in KCPC receiving active treatment. The remaining 49 were housed in the general population of other correctional facilities.

Steve Berry
Classification Manager
Corrections Cabinet
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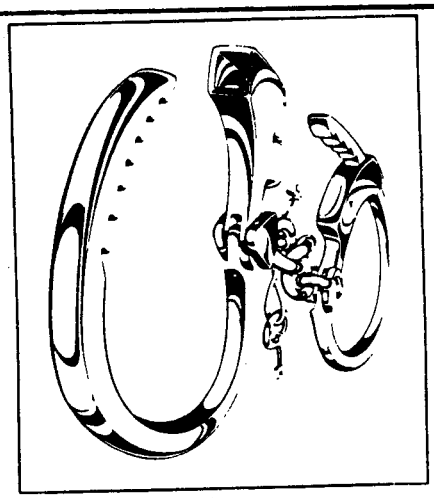
Steve holds a masters from the University of Louisville in Criminal Justice Administration. He has been with the Department of Corrections for 13 years and Classification Manager since 1982.



Campbell County Jail Lawsuit Settled

A federal lawsuit filed by a Cincinnati man against Campbell County jail officials has been settled out of court.

Roy Cabanas sued former Jailer Richard Lackey, jail officials and Campbell County, saying that he became ill on May 4, 1985, when jail officials neglected to give him insulin for his diabetic condition.

Campbell County Attorney Paul Twehues could not be reached for comment. But Robert Schroder, lawyer for Cabanas, said his client got some money from two insurance companies representing the defendants.

Schroder declined to reveal the amount of the settlement, but said "it was substantial enough that he (Cabanas) was satisfied with it."

Kentucky Post
July 29, 1987
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More Rooms for The Big House

Alternative prisons spring up

In Connecticut, the department of correction is experimentally using two National Guard barracks as a temporary jail for drunken drivers. In Missouri and Oregon, prison authorities have renovated mental hospitals to house convicted felons. In New Jersey, where inmates have been sleeping in gymnasiums, classrooms and a chapel, officials are considering buying a World War II Navy troopship to use as a prison. Meanwhile, New York City is readying a second decommissioned Staten Island ferryboat to moor alongside the *Vernon C. Bain*, which has housed up to 162 prisoners on the East River since March.

Across the nation, law-enforcement officials are considering all sorts of imaginative and even outlandish ideas as they struggle with an endemic problem: the exploding U.S. prison population. Between 1980 and 1986, the inmate total shot up 78%, to nearly 550,000. In a dramatic protest against the incarceration crisis, the sheriff of Pulaski County, Ark., last week chained 50 prisoners, including 13 women, to trees outside the state prison at Pine Bluff because authorities said there was no room inside. Embarrassed officials quickly found space in the 696-bed complex, which is now officially operating at full capacity.

Budget constraints and long lead times for the construction of additional penitentiary space have helped spur the hunt for alternative prison sites. Corrections officials are also being prodded by judges: in 1986, at least 32 states were operating under court orders to reduce overcrowding in facilities. But an even bigger cause is the space crunch resulting from tougher sentences. "Until the public changes its mind on putting people away for long years, we're going to have a serious problem," predicts C. Paul Phelps, head of Louisiana's corrections department, which has 3,500 prisoners backed up in local jails awaiting space in state prisons.

Some of the solutions under consideration are vaguely reminiscent of the 18th century, when the English crowded thousands of prisoners into the hulks of abandoned ships. New York State, for example, hopes to be the successful bidder this month on the 870-passenger *F.A.B. Pursuivant*, a British troop barge. State officials want to use the vessel as a prison for 700 minimum-security offenders. The potential savings are considerable: as much as 70% over a comparable building, which would cost $50 million to construct. New York City's floating detention centers, says Ruby Ryles, a city corrections department official, are a "quick fix" to a prisoner glut that has swelled the local jail population to 102% of capacity.

Nowhere is the problem more acute than in depressed Texas, where a revenue squeeze has forced lawmakers to limit the rate of prison expansion. The prison system, with a theoretical maximum capacity of 40,476, has been closed to new arrivals 17 times in 1987, most recently last week. Last spring authorities were forced to release some 1,000 inmates ahead of schedule. Even with quarters for 5,500 more prisoners in the planning stage, the state is still on the hunt for additional rooms at low-budget costs. Says Andy Collins, deputy director of operations for the prison system: "We're looking at everything seriously. The wilder ideas are looking better and better every day."

Many of those ideas are too bizarre to meet strict operating standards imposed on the Texas system in 1980 by Federal Judge William Wayne Justice. Nonetheless, entrepreneurs keep trying. Hard times in the oil patch have spurred hucksters to offer up abandoned office buildings, foreclosed motels and warehouses to the corrections department as makeshift pens. A few down-and-out Houstonians are even trying to foist off their homes as mini-detention centers.

Dallas Real Estate Man Anthony Gange is trying to coax the corrections department into buying an unfinished 108-room mansion owned by followers of the Maharishi Mahesh Yogi, onetime spiritual mentor of the Beatles. Asking price: $2.9 million. Houston Salvage Operator George Walsh is hawking one of Britain's Falkland Islands barges, currently in the South Atlantic, for $6 million. The U.S. Government has offered to stash miscreants on offshore oil-drilling platforms.

Texas will have to make some decisions quickly. Despite its construction plans, the state faces a predicted 15,000-bed shortage by 1991. "What we've been doing hasn't been working," concedes Corrections Information Director Charles L. Brown. "We've got to try everything."

—By Richard Woodbury/ Huntsville

Rights Show Their Roots

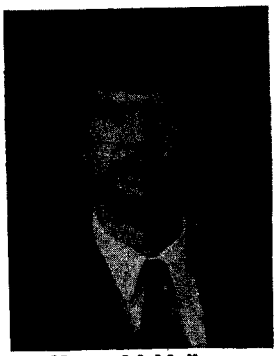
If Roger Sherman had had his way, warrantless searches of homes might be routine today and girlie magazines could be banned from U.S. newsstands. Those and other speculative conclusions can be drawn from a four-page, handwritten draft of the Bill of Rights, penned in 1789, that came to light last week in the Library of Congress. The version of the Bill of Rights composed by Sherman, a signer of the Declaration of Independence as well as the Constitution who was then a Congressman from Connecticut, contains eleven amendments. "Liberty of the press" is protected by Sherman's eighth amendment, but his second can be construed as sharply limiting free speech by requiring that it be expressed "with decency."

Illustration by Leigh Ann Smith

James Hutson, chief of the library's manuscript division, discovered the Sherman draft two years ago, while rifling through the papers of James Madison. Only recently did he authenticate the text. The document is the sole original draft of the Bill of Rights known to exist.

The illustrations are The Advocate's

The Death Penalty



Kevin McNally

A) KENTUCKY JURIES: UNFAIR CROSS-SECTION?

i) A History of Racism and Sexism

After the 14th Amendment was passed, Kentucky had to repeal its "statute...excludi[ng] from jury service persons of the negro race." Miller v. Commonwealth, Ky., 105 S.W. 899, 900 (1907). The exclusion of blacks, of course, continued. (Women weren't even an issue yet.) This was accomplished in a variety of ways. Principle among them was the acquiescence of the Kentucky Supreme Court...and the legislature ...which passed a law barring appeals from grand jury challenges. "Section 281 was enacted after the repeal of the...statute disqualifying persons of the colored race for jury service. It does not in meaning or effect discriminate..." claimed the court. Miller at 901. A long line of cases alleging total exclusion of blacks from juries upheld this statute. The Court meekly stated: "We are without jurisdiction..." Owens v. Commonwealth, Ky., 222 S.W. 524, 525 (1920).

Historically, Kentucky courts have been consistently antagonistic towards challenges to jury pools. Simply put, our Court has never granted relief due to underrepresentation of a cognizable group, although when specifically required by the Supreme Court, total exclusion of blacks was barred. In Hale v. Commonwealth, Ky., 108 S.W.2d 716 (1937), "uncontradicted affidavits... [showed] that 8,000 [14%] of [McCracken] county's population of 48,000 were Negroes, that assessor's books contained the names of about 700 Negroes qualified for jury service, that jury commissioners" choose 500-600 "exclusively...white citizens, that no Negroes had been summoned from 1906-1936 and that for many years ... Negroes had served on juries in federal court..." Gilchrist v. Commonwealth, Ky., 223 S.W.2d 880, 881 (1949) [Gilchrist I].

ii) The Case of Joe Hale

Joe Hale was a black man charged with the murder of a white, W.R. Toon, who was "stopping colored women [including the sister of Joe Hale's girlfriend] and asking them to get in his car..." Tried by an all-white jury, Hale received the death penalty for stabbing Toon while Toon sat in his car. "I gigged him a time or two and told him to quit stopping these colored women." Hale at 719. With 3 justices dissenting, the Court, at 720, found: "No excuse for the crime...shown." Hale was sent towards the electric chair on the transparent technicality that his lawyer forgot to specifically state in his motion that blacks weren't seated as jurors in Paducah "solely because they were members" of the "African race." Hale at 718.

Fortunately for Hale, the U.S. Supreme Court intervened and Hale escaped the death penalty at his retrial. The position of the majority of the Kentucky Supreme Court was so frivolous that the Attorney General had to concede error when he reached Washington. Hale v. Kentucky, 303 U.S. 753 (1938). As a result, eleven years later our Court felt required by the "construction of the Supreme Court" in Hale to reverse a manslaughter conviction of a black woman since "no colored person within 'the memory of any living man in Union County' has been drawn or selected as a juror..." Gilchrist I at 880. Since that time, challenges to the underrepresentation of blacks have failed miserably, including Ms. Gilchrist's second appeal. Gilchrist v. Commonwealth, Ky., 246 S.W.2d 435 (1952) [Gilchrist II].

iii) The Case of Berthenia Gilchrist

On retrial, instead of a five year sentence, Berthenia Gilchrist was convicted of murder and sentenced to life in prison. The Court affirmed [double jeopardy principles not having evolved to the point of Hemphill v. Commonwealth, Ky., 448 S.W.2d 60 (1969) and Price v. Georgia, 398 U.S. 323 (1970)], rejecting another jury challenge.

Blacks made up 17% of the population of Union County, "but there was no statement as to the ratio of negro housekeepers...to white names on the tax lists... One negro was drawn from the wheel...and was

excused..." No black had been "named as a jury commissioner or had ever served as a grand juror...in the last 50 years." Gilchrist II at 436.

iv) Subsequent Jury Challenges

Racial discrimination challenges have fared no better since - even when the appellant was condemned to death. See Martin v. Commonwealth, Ky., 361 S.W.2d 654 (1962) [Fayette Co.]; Splunge v. Commonwealth, Ky., 487 S.W.2d 925 (1972) [source list challenge in Jefferson County; blacks 13.8% of population but only 9.6% of property owners]; Blakemore v. Commonwealth, Ky., 497 S.W.2d 231 (1973) [jury challenge hearing denied]; Ford v. Commonwealth, Ky., 665 S.W.2d 304 (1983) [total exclusion of resident KSU black college students in Franklin Co.]. Recent challenges to underrepresentation of women and young people have also been rejected. Ford [Franklin and Scott Cos.]; McQueen v. Commonwealth, Ky., 669 S.W.2d 519 (1984) [Madison Co.].

v) The Same Old Song

The Gilchrist II Court reasoned that underrepresentation is not the same as total exclusion. Affidavits by the jury commissioners stated "several negroes were selected... and placed in the wheel... The fact that one-sixth of the people...are negroes does not mean that the...commissioners...must place... negroes in the wheel in the [same] proportion..." Second, "the percentage of negro housekeepers ...would need to be established" since that was the "source list" by statute at the time. Third, "a disproportionate percentage among the first jury panel...would not conclusively establish [the claim]...since the drawing depends on chance... The mere fact that only one of the 96...was a negro...is not sufficient to show ...evasion." Gilchrist II at 436-37.

We see the same basic rationale used to reject a jury challenge to underrepresentation of blacks in 1951 (and before) as used for similar claims as to women and young people in the mid-1980s in Ford: 1) insistence that the source list, not the actual population, is the only relevant comparison pool; 2) skepticism of "statistics and/or samples and thus insistence on identifying every juror in the pool (an impossible task); and 3) a tremendous tolerance for underrepresentation of cognizable groups. "[A]ppellant relies totally on statistical data and again he utilizes random sampling of the jury pool over a two year period, comparing that sample with the 1970 census of the county, which he mistakenly categorizes as the 'eligible population.'" Ford at 308.

B) DAVID SMITH'S JURY CHALLENGE

On April 2, 1987 the Kentucky Supreme Court affirmed David Smith's death sentence. We will review other aspects of the decision later. For now, let's look at the Court's treatment of his jury challenge...in light of history.

i) Women

The Court rejected the most thoroughly documented challenge to the underrepresentation of women in a jury pool ever presented in a Kentucky court. Smith complained of startling underrepresentation of females as: 1) jury commissioners, 2) grand jurors, 3) grand jury foremen and 4) petit jurors. For example, based on random statistical samples, women constituted **36%, 23%, 23%, 39% and 29%** of the Pike County jury pools in the five years before trial (1978-1982). Of course, the 1980 Census data indicates that women constitute **51%** of the potential Pike County jurors.

In examining who the decisionmakers were in Pike County, we see why women were relegated to second-class status as jurors. During the 29 years (1954-1983) before trial, there were 114 jury commissioners. Only 10 (or **less than 9%**) were female. (Only 1 could be found under 30.) From 1952 through early 1980 there were 104 grand jury foremen. Only 7 (**less than 7%**) were female. (None were found under 30.)

Faced with this evidence, Justice Wintersheimer divides and conquers Smith's contentions. First, "Smith, a 32-year-old white male, lacks standing under the equal protection clause to challenge" the underrepresentation of women and young people in the grand jury pool. Second, no challenge can be made to jury forepersons (now elected, RCr 5.04, instead of appointed by the judge) because, as in Hobby v. United States, 468 U.S. 339 (1984), "the ministerial trappings of the post carry with them no special powers or duties..." Smith at 6. Third, without discussion (as in previous cases), Smith rejects the claim of discrimination as to the jury commissioners. The Court, at 6, doesn't say why discrimination in the appointment of jury commissioners is acceptable.

Finally, on the crucial issue of the dismal representation of women in the petit jury pools, the Court could not avail itself of the questionable standing theory used in reference to the grand jury. See Ford v. Kentucky, 105 S.Ct. 392 (1984) (cert. denied) (Marshall, J. dissenting). Obviously, men can challenge the absence of women under the due process clause -- as Billy Taylor did in Louisiana and

Billy Duren did in Missouri. Taylor v. Louisiana, 419 U.S. 522 (1975) and Duren v. Missouri, 439 U.S. 359 (1979). Sloughing off 5 years of statistical samples, the Court quotes the A.G.'s brief that the "most revealing statistics...are that the petit jury (after wholesale excusals for alleged hardship)... was selected from 51 people, 29 of whom were women..." and ultimately, (after the parties largely used peremptory challenges against men), "the final jury...consisted of 3 men and 9 women." Smith at 8. Yet, this is apparently not the core of the Court's decision. The reason is that jury challenges can not be based on the composition of a particular jury. Cf. Lockhart v. McCree, 106 S.Ct. 1758, 65 (1986); Hoyt v. Florida, 368 U.S. 57 (1961) [all male jury ok].

The articulated holding of Smith is: first, there is no "systematic exclusion" since Kentucky doesn't have an "automatic and/or statutory exemption for women." Second, Smith is said to be in error in comparing the jury pools to census data -- a position specifically rejected in Duren v. Missouri, 439 U.S. 362, 365 (1979). Beyond that, the opinion fails to mention that Smith requested and was denied funds to pull a random sample of the voter registration list (which does not break down the voters by age, 18-29) and that the percentage of women on the source list is known to the Court and differed little from the census: 1982 = **49.1%** and 1983 = **49.2%**. Finally, the Court theorizes (in the absence of any proof or a chance to litigate in the trial court) that in Pike County "the relevant population eligible to serve as jurors is significantly distorted by the presence of Pikeville College whose students are counted for census data but remain ineligible to serve as jurors." Smith at 9. In fact, resident college students are eligible jurors. Anyway, Pikeville College had only 72 male and 68 female resident students in 1980 and 67 male and 70 female residents in 1981.

ii) Young People (18-29)

Smith also complained of the gross underrepresentation (**7%, 6%, 6%, 24% and 16%**) of young people, 18-29 (who make up **32%** of the Pike County population); but, as in Ford [to be argued on various jury challenge grounds in the 6th Circuit on October 8, 1987] and McQueen the Court refused to view young people as a cognizable group. See also Kordenbrock v. Commonwealth, Ky., 700 S.W.2d 384 (1985) (sub silentio) [an evidentiary hearing was held on September 23, 1987 in federal district court on the cognizability of the young. Dr. John McConahay, an expert witness on this issue, was appointed by Judge Bertlesman].

iii) Jury Commissioners

Putting aside the Court's description of grand jury forepersons as unimportant, jury commissioners have real power. Indeed, they control our ability as a society to dispense justice because they decide who will be called for jury duty. The U.S. Supreme Court has "assumed" that "the State may no more exclude Negroes from service on the jury commission...than from juries themselves." Carter v. Jury Commission of Greene County, 396 U.S. 320, 338 (1970).

KRS 29.055(1), now repealed, required annual appointment by the circuit judge of three (four in counties with more than 1 division) jury commissioners who were **"intelligent and discreet persons...at least twenty-one years of age, resident in different portions of the county..."**, who haven't served in the last year and who don't have cases pending. "The commissioners shall...select the names of the prospective jurors for ...the year..." and while they do so "no person shall be with them..." KRS 29.055(2) (repealed). On September 1, 1977, KRS Chapter 29A was revised to lower the age to 18, omit reference to geographical distribution and require appointment of three commissioners "no later than the first week of October...to prepare a list of prospective jurors for the following year." KRS 29A.030.

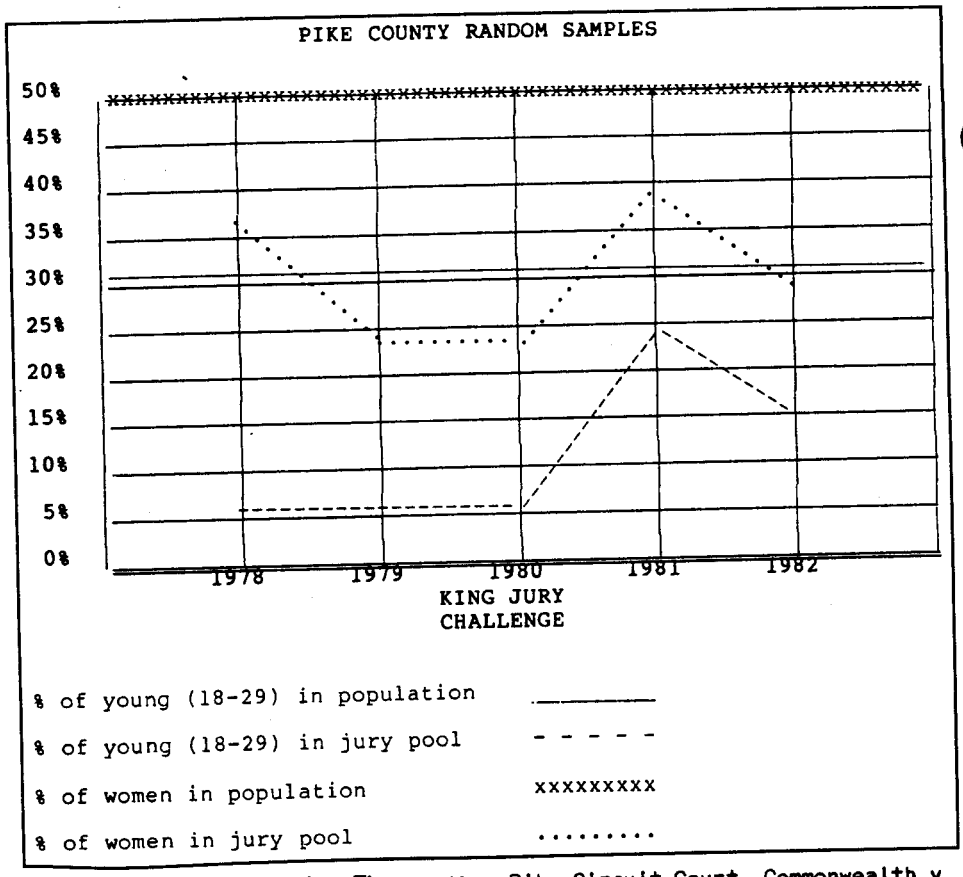
In Gilchrist II at 438, thirty-six years ago, the Court used similar language to that in Smith in excusing Union County's failure to have a black jury commissioner for 50 years. "The rule concerning systematic exclusion cannot be extended to the selection of public officers."

iv) Computer Juries

II ADMINISTRATIVE PROCEDURES OF THE COURT OF JUSTICE §5(1), Use of Computers, permits, indeed encourages, "the selection of names of prospective jurors...by computer" random samples of the source list--the voter registration list. (Ironically, random samples of the voter registration list were implicitly ridiculed by the same Court in Ford, 665 S.W.2d at 308, when the "convict" relied "totally on statistical data...utilizing] random sampling...")

The Comment to §5 states: "[s]ince a computer list is the best way to obtain a truly random list of names...its use should be encouraged." Obviously, when a county employes this "randomized list" option, "jury commissioners shall not be appointed." II APCJ §5(3).

Statistical random juries, then, are easily available to Kentucky counties and many use them -- especially after jury investigations are launched: i.e. McCracken, Whitley, Lyon and Fayette Counties. In Whitley County, the Attorney General investigated allegations of jury tampering, Lexington Herald at A3 (August 24, 1979), and the county switched to a computer list to join "at least 10 [other] counties..." Fayette County recently switched to random juries, in part, to avoid jury challenges. On the other hand, some counties, such as Rowan and Lyon, have reverted to commissioners after using computer lists. Complaints about the underrepresentation of women, blacks and young people are, as Fayette County recently found, easy and inexpensive to avoid.



v) The Dr. Spock Effect

When Dr. Benjamin Spock was tried in 1969 before Judge Ford in federal district court in Boston for draft resistance, women were grossly underrepresented in the pool. Thanks to this and the prosecutor's peremptory challenges, Spock, who had counseled millions, primarily women, on childrearing, ended up convicted by an all male jury. United States v. Spock, 416 F.2d 165 (1st Cir. 1969). Prof. Hans Zeisel, of the University of Chicago, launched an investigation into the jury selection procedures. See Zeisel, Dr. Spock and the Case of the Vanishing Women Jurors, 37 U.CHI.L.REV. 1-18 (1969). "After Judge Ford learned of my investigation, he selected a venire for his next trial...the first... within the normal range... From that time on, Judge Ford's selections of jury venires lost their peculiarity. **By mending his ways, he completed the proof that the drawing of prospective jurors ...had been improper. First, there was the highly improbable statistical anomaly. Then came the removal of the anomaly once it was known to be under critical scrutiny - a plain admission of impropriety. This two-step proof - we call it the Dr. Spock effect - might deserve a place in the law of evidence."** Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 HARV.L.REV. 456, 463-64 (1981).

A "Dr. Spock effect" is evident from even a cursory glance at the Pike County random samples. A jury challenge was filed and litigated, raising the same claims, in 1980 in Pike Circuit Court. Commonwealth v. King (Pike Co. Ind. No. 79-CR-190). The percentage of both women and young people jumped the following year, but then fell off again prior to David Smith's trial.

Gross underrepresentation of cognizable groups is no statistical fluke -- nor is it accidental or unavoidable.

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Warden won't let inmate give organs

Associated Press

MOUNDSVILLE, W.Va. — The warden of the West Virginia Penitentiary said yesterday he wouldn't give a "permit to commit suicide" to a convict who wanted to donate all of his organs in one operation.

John E. Wood, sentenced to life without possibility of parole for the July 1984 shooting of his wife, said he wanted to assemble all the prospective recipients in one hospital and give up his organs to "give back what I've taken."

"When I first found out about it, I reacted quite shocked," Warden Jerry Hedrick said.

Wood said he got the idea for the mass donation after seeing a national television appeal for a liver donor last year. Before the program, he said, he had prayed that God would kill him because of his actions.

"I just want to give my life to save or extend at least two or three others," Wood said. "I have nothing to live for and look forward to."

Lexington Herald Leader - Reprinted with Permission

In the Trenches

District Court Practice

Gary Johnson

THE IMPORTANCE OF EARLY ADVOCACY IN MAJOR CASES

It is axiomatic that indigent clients are entitled to be ". . . counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney. . . ." KRS 31.110(2)(a). This means that a "needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed. . . a serious crime . . ." is entitled to be represented by a public advocate. KRS 31.110(1) (a) (emphasis added).

The problem is how we, as public advocates with rising caseloads and limited personnel, can breathe life into these statutory provisions. It is an issue of priorities, and while this article does not suggest that public advocates need fly to the jail upon every arrest, we need to develop increased sensitivity to the unique and fleeting opportunities occasioned by the earliest possible representation of an accused, and we need to develop strategies to utilize those opportunities.

MAJOR CASES ARE. . .

Just like obscenity, I know them when I see them.

Obviously, the more serious the potential penalty, the more major the case, and any capital case is a major case. There are, however, other criteria for justifying the upgrading of lesser offenses to a higher status.

Where the case offers an opportunity to make a broad-based attack on a faulty or a questionable legal premise that affects many other defendants, even a Class B Misdemeanor can be a major case. If the district judge in your jurisdiction refuses to set any property bonds because "We can't ever collect those," the first simple possession of marijuana charge on an indigent client whose bond is set at five thousand dollars case presents you with a major case.

An ordinary Class D Felony is a major case if it is winnable, especially on evidence that may later become unavailable, such as alibi witnesses who may be transients or close family members with whom the accused may have a "falling-out" before trial. If the difference between winning and losing any case involving incarceration rests exclusively upon the recovery of evidence that may disappear, the case deserves a high priority.

Where a particular client presents palpable mental illness, or a reasonable threat of self-harm, the case is a major case by any organization of priorities. Those of us who have experienced the loss of clients through suicide or their harm by attempted suicide while awaiting trial in county jails rightfully place these cases high on our list of things to do today.

If evidence exists but may disappear without immediate intervention, even though the evidence is not overwhelmingly exculpatory, the case is a major case for obvious reasons. If you are called to the jail to counsel a homicide defense within hours of his arrest, and the defendant seems intoxicated on either drugs or alcohol, acquisition of body fluids may be crucial to an instruction twelve months later when you face a jury trial. Counsel should be careful in major cases to ensure that the defendant does not p_ _s away the best evidence in mitigation.

A particular case may present you with unique opportunities to educate police officers, judges, jailers, and others in the criminal justice system about the rights of other criminally accused indigent citizens. As in the earlier example regarding pretrial release, a case is a major case if it presents you with an opportunity to educate that district judge as to the requirements of Rule 4 of the Rules of Criminal Procedure and KRS 431.510, et. seq.

Finally, any given case may simply present an issue that demands immediate attention for personal or

professional reasons of the particular counsel. A case can be a major case for no other reason but that counsel and his supervisors perceive a need for early advocacy. The telephone call from the jail at midnight asking you to act as attorney for the battered woman who has been accused of shooting her husband and who has no prior criminal record, or the Viet Nam Veteran who appears to have been charged with an offense while suffering from a "flashback," or the homeless "street-person" who has been arrested for "disorderly" because he has no job, no money, and no place to live, all present justifiable instances of early advocacy.

EARLY ADVOCACY IS . . .

Our criminal justice and law enforcement system of government does not encourage our early intervention and advocacy on behalf of our clients. Without question, most public advocates in Kentucky are tremendously overworked, with overwhelming caseloads, as are our judges, jailers, police officers, and other workers within the system. In fact, the major impediment to early advocacy on behalf of the indigent criminally accused is the need to respond to what appears to be more pressing business at the office or in courts. Many public advocates, unfortunately, never meet the indigent client, even in major cases, until the initial court appearance. Consider that, for most defendants, the case is, for all intents and purposes, over at that point. Most often, a confession, true and untrue, has already been obtained, most prosecution witnesses have already been interviewed by police officers, the seizure of evidence is completed, and has been "sent for testing," and the major elements of the prosecution case have been carved in stone before arraignment. Beginning defense preparation then is already too late.

To deal with this problem, counsel must design and implement an early warning system to alert him/her to the need for immediate action. A variety of techniques exist to establish these early warning systems.

A good working relationship with jailers, deputy jailers, trustees, local and state police offices, judges, pretrial release officers, and others is essential for early notification, and is the best method for notice of the need for early advocacy. Counsel should stress with each of these individuals his/her easy availability if those parties perceive the need for the services of a public advocate in a particular case. Traditionally, many public advocates have only offered their services during normal business hours. If you inform other workers in the system of your availability, you'll find that they will contact you in major cases.

Counsel must decide for him/herself whether to make his/her home phone number available to inmates at the jail on a general basis, but a less intrusive technique is to make that home telephone number available to the parties named above with instructions that you are available on a twenty-four hour basis when major cases result in an arrest.

Some of the best and quickest referrals I have received in major cases have come from inmates themselves who are already incarcerated in jail at the time of another indigent's arrest.

Local news reports will usually provide notice within twelve hours of an arrest in an important case, and sometimes earlier. These media contacts, television reporters, local radio reporters, and local newspaper reporters, should be sought out, since they are often the first individuals outside of law enforcement to gain actual knowledge of an arrest; they can sometimes be persuaded to telephone you in that event. If not, simply scanning the media on a daily basis is a fair last resort for early notice of the arrest in a major case.

Of course, your first action after notice of such an arrest in your jurisdiction is not to solicit the case, but simply to conduct a preliminary inquiry as to whether the defendant or his/her family have contacted a private lawyer, or intend to, or even just to determine whether the defendant appears to be indigent. You are not soliciting the case, but you are instead simply seeking to inform the accused of his/her rights to free counsel if she/he is too poor to hire one, and of your immediate availability if she/he is indigent. If that preliminary inquiry gives you reason to believe that the accused is indigent, full-speed ahead. Note that KRS 31.110(1)(b) states that the indigent accused is entitled "[t]o be provided with the necessary services and facilities of representation including investigation and other preparation." (Emphasis added).

After determining that the accused will need your services, you must physically go to the jail on a major case. A telephone call is simply not a sufficient substitute, although an early telephone conversation to determine indigency can also be used to warn the accused to say nothing to officers, jailers, other inmates, or family members, until you arrive at the jail. Instruct the client at the earliest possible stage to answer no ques-

tions without a lawyer being present. It is also advisable to talk specifically to the jailer and the arresting officer or their supervisors with instructions that no person should question the accused outside of your presence.

Again, there is no substitute for a one-on-one meeting with the accused. If time constraints or court appearances interfere with a rendezvous, you should arrange for someone else from your office or perhaps from the private bar to actually go physically to see the client as quickly as possible. Ideally, you should try to be at the actual booking of your client, and any delay in your arrival from that point forward works only to the client's detriment. On a major case, your goal should not be physical arrival at the jail within twenty-four hours after the arrest, nor twelve hours after the arrest, nor even two hours after the arrest; your goal, however, unattainable, should be lawyer/client personal contact immediately upon arrest, but no later than the time it takes you or your agent to physically drive or walk to the jail.

PRE-ARRAIGNMENT ADVOCACY

The only constraints upon counsel at this most critical of the stages of the proceedings are the lawyer's own limitations. You must be bold, creative, and innovative now in a major case, or you will certainly miss opportunities to protect evidence, your client's rights, and affect the ultimate outcome of the case at trial in the months to come.

Initially, your particular actions will be determined by your client interview, and more detailed discussion of the techniques to be used there will be addressed in later articles in this column. What follows are general suggestions that apply to a broad spectrum of major cases.

The conclusion of your client interview should always contain an agreement between the client and counsel that the accused will talk to no person about themselves or the case until the lawyer is present. Additionally, the client should understand, in a major case, that she/he should telephone you at any time an attempt is made to talk to him/her by any law enforcement officer or other official.

You should immediately contact the defendant's family, not only for additional information, but to assure them of the condition of the accused, your availability, and of your concern. In rural counties, it is not uncommon that extended

"THE WORSE THING FOR YOU TO DO IS TRY TO TAKE THE LAW INTO YOUR OWN HANDS. WE'LL FIND THIS GUY, AND, IF WE'RE REAL LUCKY, WE'LL ALSO FIND YOUR GOOSE."

Drawing by Michael Maslin. Reprinted with Permission.

families will learn of the existence of witnesses and of evidence before you do, and they can be a fruitful resource group. Pretrial release will, of course, be of importance, but in many cases your earliest efforts can be best directed toward the collection and preservation of evidence that might become lost or tainted. The accused and his/her family need to have this explained. Additionally, if the accused has a history of mental illness or suicide attempts, the family is often a better source of this information than the clients themselves.

As soon after the interview, and to the extent that is practicable, counsel should view the scene of the alleged incident. You can often arrange this informally with the investigating officer or the county attorney's office without a court order, but don't hesitate to file a motion for this relief if you encounter interference. Many district judges will routinely authorize this visit as a matter of fundamental fairness to both sides of the litigation.

If you personally find physical evidence, you should have that evidence recovered and secured by another to prevent your being the witness rather than the counsel at the trial. If you are not accompanied by your investigator, you should have an unbiased, trustworthy, and credible third person to recover and preserve the evidence on your behalf.

If, for some reason, you are unable to have the evidence recovered privately, prior to arraignment, counsel should consider filing a written motion, or moving orally at the time of arraignment, for an order directing the law enforcement officers to seize any additional evidence that may be exculpatory. This evidence may be physical items you find at the scene, serological evidence from your client or others that may become tainted or lost if not immediately recovered, or the recovery of additional photographic evidence. KRS 31.185 authorizes the use of state facilities for the evaluation of evidence, which, of course, means the evidence must first be recovered; use this statute to argue that your client is entitled to use law-enforcement personnel to recover evidence, even by search warrant, if necessary.

Any order authorizing the recovery of evidence on behalf of an accused by law enforcement personnel should prohibit the Commonwealth from doing anything other than collecting that evidence and preserving it, and should not authorize any testing. If private counsel had obtained exculpatory physical evidence at the scene of an alleged crime through a private investigator, it is clear that private counsel could refuse the Commonwealth's testing of that evidence until its relevance and admissibility has been determined. Indigent clients cannot constitutionally be foreclosed that right simply because their indigency requires, through KRS 31.185, that they use state personnel and facilities to recover the evidence. Recovery of evidence by this method cannot equal disclosure of evidence and comport with the equal protection clause of the Fourteenth Amendment of the United States Constitution.

At arraignment, counsel should file a written motion seeking the preservation of all physical evidence. Who would object? Can the Commonwealth argue that they should be allowed to destroy any evidence? If the Commonwealth does object, it is usually because some scientific testing necessitates the consumption and destruction of some evidence. In that case, counsel should propose that, prior to any testing that would consume evidence and thus prevent its retesting by defense experts, counsel be notified in advance, so that arrangements can be made to have defense experts or the counsel himself present at the actual time of the testing to observe the results.

In this age of scientific miracles and wonders, it is fundamental that defense counsel not acquiesce by inaction to the destruction of any evidence that might benefit from more thorough or technologically superior testing or observation at a later time.

Finally, prior to arraignment, counsel should attempt to conduct an interview with the chief investigating officer in the case. Many reputable police officers in the Commonwealth do not ascribe to the cat-and-mouse-gamesmanship of our current discovery rules, and sincerely believe that criminal litigation should be on an open-file basis. The same may be said for those prosecutors throughout Kentucky whose dedication to fair trials for all citizens mandates that evidence not be withheld from defense counsel until the last possible moment. At least, creative advocacy requires that counsel, prior to arraignment, seek this relief and make those agents of the Commonwealth that are inclined to conceal evidence say no.

[Part II of this article, dealing with early advocacy at arraignment, the pretrial release hearing, and the preliminary hearing will follow in the next issue of The Advocate.]

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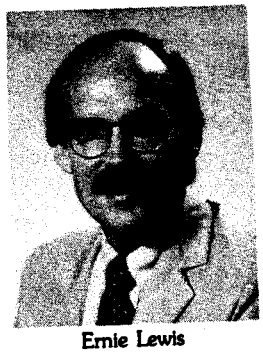
Plain View



Ernie Lewis

It is time to catch our breath on search and seizure issues. The October 1986 term of the United States Supreme Court ended, like most others in recent years, with the continued deterioration of Fourth Amendment protections. On the whole, however, there were no major decisions. Maryland v. Garrison expanded the good faith exception a bit to cover situations where officers make reasonable mistakes. Colorado v. Bertine addressed the container in the car issue from the perspective of the inventory search, which considerably narrowed the application of the decision. Then there was the surprise decision of the term, Arizona v. Hicks, in which the Court held that a plain view search conducted during a crime scene search had to be based upon probable cause.

The big news of course is the resignation of Justice Powell, and the nomination of Robert Bork to replace him. Powell, who dissented in the Hicks case, was no friend of the Fourth Amendment. It is fair to say that a new period of uncertainty has begun with this change in the Court's personnel.

* * * * * * * * * * *

No decisions have been written by either the United States Supreme Court or the Kentucky appellate courts since the last column. The Sixth Circuit in Dobrowolskyj v. Jefferson County, 16 S.C.R. 15 (July 13, 1987), considered the issue of strip searches for misdemeanants. One Dobrowolskyj had been arrested on the Class B misdemeanor of menacing. When he was about to be moved into the general jail population, he was strip searched. He filed suit, and a jury found against him. The Sixth Circuit affirmed, holding that under Bell v. Wolfish, 441 U.S. 520 (1979), that the nature of the menacing charge when combined with the fact that Dobrowolskyj was to be moved into the general population resulted in a reasonable search.

* * * * * * * * * * *

I have received copies of a well written motion and memorandum of law written by W. Howell Hopson, III, a Cadiz lawyer. He recently challenged a search in Trigg Circuit Court where the affidavit presented to the magistrate related that a particular defendant had told an informant that he was growing marijuana. Mr. Hopson challenged this on the basis that the affidavit failed to tell the magistrate when the alleged conversation occurred. Obviously, a statement that a person had at one time in his life grown marijuana does not constitute probable cause for believing that he is presently growing marijuana. Hopson cites such good Kentucky cases as Henson v. Comonwealth, Ky., 347 S.W.2d 546 (1961), Williams v. Commonwealth, Ky., 3355 S.W.2d 302 (1962), and Messer v. Commonwealth, Ky., 350 S.W.2d 486 (1961). We appreciate his sharing this with us, and encourage others to do the same.

The Short View

1) State v. Pecha, Neb., 407 N.W.2d 760 (1987). The police had probable cause to believe Steve X. possessed methamphetamine. They procured a warrant against Steve and Edna Mohr's house and persons. They threw a catch-all phrase into the warrant which read that the search also applied to "John and/or Jane Doe, who resides or is in control of the afore described premises." During the execution of the warrant, the police searched a person not named. The court overruled the trial court, saying the "John Doe" language turned the warrant into a general warrant without probable cause as to the accused. Good faith was rejected because the defect in the warrant was apparent on its face.

2) The case of South Dakota v. Peterson, S.D. 407 S.W.2d 221 (1987), demonstrates how out of hand an automobile search can get. There, the police stopped a driver who was "fishtailing" and throwing up dust. The officer smelled alcohol coming from the car. The driver passed field sobriety tests, but the officer required all occupants to get out so he could

search. The source of the odor, an open beer can, did not stop the search. Ultimately, a roach clip was found, as was marijuana in the glove compartment. The majority held this search to be reasonable. The dissent pointed out that this was a clear pretextual search for drugs.

3) United States v. Williams, 822 F.2d 1174 (D.C. Cir., 1987). Are you ready for this? First, there was plain view, followed by "plain hearing" and "plain smell." Now there's "plain touch." According to the D.C. Circuit, where an officer is authorized to touch a container, and that touching convinces the officer "to a reasonable certainty" that the container is filled with contraband evidence, he can open the container and seize its contents. This view is shared by three other circuits, the 2nd, 4th, and 9th.

4) United States v. Miller, 821 F.2d 546 (11th Cir. 1987). An accused who borrowed his friend's car and is stopped by the police has standing to challenge the legality of the stopping.

5) People v. Bravo, Calif., 738 P.2d 336 (Cal.Sup. 1987). The California Court holds that a probationer who consents to warrantless searches as a term of his probation may in fact be searched without probable cause or even a reasonable suspicion. The Court notes that a parolee, who has no choice but to consent to warrantless searches, may be searched only upon a reasonable suspicion standard. The Court further notes that the probationer's waiver "does not permit searches undertaken for harassment or searches for arbitrary or capricious reasons."

6) United States v. Boatwright, 822 F.2d 862 (9th Cir. 1987). The police and a probation officer were about to search a probationer's home when they saw the probationer come out of his garage reeking of chemicals. Rather than search his house, they searched the garage, which they were not authorized to do under the terms of the probation order. The Court held that this search was improper and thus the discovery of the probationer's brother, the defendant, trying to hide a shotgun, had to be suppressed. The Court rejected the State's inevitable discovery claim, saying that "the doctrine requires that the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself."

7) Riley v. State, Fla. Sup. Ct., 41 Cr.L. 2358 (7/9/87). Distinguishing California v. Ciraolo, 476 U.S. __, 106 S.Ct. 1809, 90 L.Ed.2d 210, (1986) and Dow Chemical Co. v. United States, 476 U.S. ___, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986), the Florida Supreme Court holds that a police helicopter hovering 400 feet above the defendant's greenhouse in order to peer into the roof did so illegally, and thus a warrant based upon those observations had to be suppressed. The Court found that the defendant's expectation of privacy in his fenced-in greenhouse was reasonable and that hovering 400 feet above it intruded into that privacy. "Surveillance by helicopter is particularly likely to unreasonably intrude upon private activities. . . we cannot believe that society is prepared to say that individuals relinquish all expectations of privacy in their residential yards merely because they have not taken extraordinary steps required to protect against all types of aerial surveillance."

8) State v. Tarantino, N.C., 358 S.E.2d 131 (1987). The Court here distinguished United States v. Dunn, 40 Cr.L. 3313 (1987), holding that a search of a locked building conducted by shining a flashlight through a quarter-inch crack was done in violation of the Fourth Amendment. The Court was particularly concerned that the police here made his observation from a roofed porch of the building, that the windows and doors had been boarded, that their observation was made through a tiny crack, and that the inside of the building was not visible during the day to anyone using just a naked eye.

9) State v. Waldschmidt, Kan. Ct. App., 41 Cr.L. 2372 (7/30/87). A police officer violates the defendant's privacy rights by climbing onto his fence and looking into his backyard. It appears that California v. Ciraolo, has had the effect of emboldening our nations's police officers.

10) Commonwealth v. Lemanshi, Pa. Super. Ct., 41 Cr.L. 2373 (7/20/87). Nor could this police officer take binoculars with a zoom lens and look into a greenhouse located 200 feet from the end of a dirt road in the country.

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What there was,
from the start, was the great silence,
which appears in every civilized country
that passively accepts the inevitability of violence . . .

it could have been prevented . .

Jacobo Timerman

NEED QUICK ANSWERS OR ADVICE?

The attorneys in the Central Office will provide quick answers and immediate advice about any legal issues which may arise in your criminal defense practice. Due to time restraints this will not be a research service. It is merely intended to allow you quick access to the wealth or knowledge that the Central Office attorneys have acquired over the years. If your specific issue is not delineated below, please find the nearest relevant issue and contact the attorney listed. An answer to almost any question is just a phone call away.

A.

Access to courts - Mike
Appellate procedure - Mark, Larry, Tim
Arrest, general - Tim
Arrest, at home - Tim
Arrest, probable cause - Linda

B.

Battered Women Syndrome - Neal
Belated appeals - JoAnne, McGehee, Tim

C.

Caselaw, recent - Linda
Collateral attacks (11.42/60.02) - Randy
Comment on silence (Doyle) - Larry
Competency to stand trial - Neal
Confessions, Anti-Sweating Act - Marie
Confessions, involuntary - Tim
Confessions, juveniles - Kathleen
Confessions, Miranda - Tim
Confessions, right to counsel - Oleh
Conspiracy - Randy
Contempt of Court - Mike
Controlled substances - Tim
Counsel, conflict of interest - Linda, Mike
Counsel, right to - Linda
Criminal Facilitation - Mike
Criminal Syndicate - Linda

D.

Death Penalty - Kevin, Donna, Rodney, Ed, Oleh, Neal
Defense, right to present - JoAnne, Mike
Detainers/IAD - Dave, McGehee, Randy
Double Jeopardy - Larry, Rodney, Randy
Dying Declarations - JoAnne

E.

Entrapment - Randy
Ethics - Vince
Evidence, admissibility - Rodney
Evidence, character - Linda
Evidence, co-defendant's guilt - Larry, Mark
Evidence, flight/escape - Linda
Evidence, hearsay - Linda
Evidence, other crimes/prior misconduct - Randy
Evidence, prior sexual conduct - Mike, Marie
Evidence, relevancy - Linda, Mark
Evidence, sufficiency - Linda, Randy
Evidence, tampering with - Mike
Ex Post Facto - Linda
Expert witnesses, funds for - Donna, Mike, Ed, Kevin, Neal, Oleh
Extradition - McGehee
Extraordinary Writs - McGehee, Tim
Extreme Emotional Disturbance - Rodney, Mike, Ed, Oleh, Kathleen
Eyewitness Identification - Rodney, Kevin, Neal

F.

Federal Habeas Corpus - Kevin, Neal, McGehee, Randy, Rodney

Federal Habeas Corpus, Exhaustion - Tim, Randy
Federal Habeas Corpus, Hearings - Tim
Fiber evidence - Neal
Forensic evidence - Ed, Oleh, Donna, Neal, Kevin

G.

Guilty pleas, constitutional validity - Ed, McGehee

H.

Habeas corpus, cause/prejudice - JoAnne, McGehee
Habeas corpus, state - Randy, McGehee

I.

Impeachment-Bias/Interest/Hostility - Ed, McGehee, Mark
In forma pauperis, denial review - Mark, Tim, Ed
Involuntary Commitments - JoAnne, Marie

J.

Jail credits - McGehee
Juror, challenges for cause - Oleh
Juror misconduct - Tim, Mike
Juror testimony re verdict - Mike
Juvenile rights and procedure - Mike, Oleh
Juvenile waivers - Mike, Oleh
Jury panel panel challenges - Donna, Oleh, Neal, Kevin

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L.

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M.

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N.

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O.

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P.

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Parole - Dave, McGehee
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PFO proceedings - Rodney, Mike, Ed, McGehee
Polygraph - Ed
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Post Traumatic Stress Disorders - Neal
Prisons - Dave, McGehee
Privilege, psychiatrist/patient - JoAnne
Prosecutorial misconduct, arguments to jury - Mike, Oleh
Prosecutorial vindictiveness - Mike
Psychiatrist - Ed

R.

Rape Shield Law - Randy
Rioting - Randy

S.

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Self-protection - Tim, Mike
Sentencing, delay in - Tim
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Separate trials, counts - Tim, Linda
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Sexual Abuse Syndrome - Larry
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Witness, confrontation in sex cases - Mark
Witness, improper intimidation - Mike
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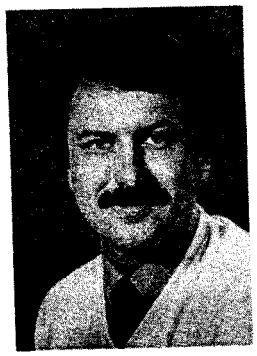
Writs, mandamus/prohibition - Donna, Ed, Neal, Kevin

Marie Allison	*564-5228
Donna Boyce	564-7693
McGehee Isaacs	564-2677
Kathleen Kallaher	564-5228
Larry Marshall	564-5231
Rodney McDaniel	564-5231
Kevin McNally	564-5255
Ed Monahan	564-5258
Dave Norat	564-5223
Mark Posnansky	564-5254
Tim Riddell	564-5212
Oleh Tustaniwksy	564-5229
Neal Walker	564-5226
Linda West	564-5234
Randy Wheeler	564-5234
Mike Wright	564-5219
JoAnne Yanish	564-5219

*All Nubmers 502 Area Code.

Trial Tips

For the Criminal Defense Attorney



Randy Wheeler

"VOW TO MAKE AVOWALS"

Obviously, the primary responsibility of any appellate court in a criminal case is to review the evidence presented at trial to determine whether any error has been committed which is prejudicial enough to warrant a reversal. But the preservation of those errors at trial is always a hurdle which must be crossed or by-passed through some exception before any error can be considered by the court. Even though the preservation of an error, if recognized, may at first blush seem like a simple task this is not always so. Indeed, there is one recurring scenario which often frustrates the presentation or determination of issues.

Typically, an attorney at trial will attempt to introduce evidence through particular questions or the presentation of specific witnesses. The opposing attorney, concerned with the impact or propriety of this evidence, will object to its admission and a discussion concerning the admissibility of the information will occur at the bench. The proponent will explain the purpose and nature of the evidence and give arguments why that evidence is relevant and the opponent will state reasons why that opinion is incorrect. Thereafter, the judge will rule against the offering counsel prohibiting the jury from hearing the desired evidence. A cursory review of this situation would make it appear that the issue concerning the admissibility of the evidence has been preserved, but, unfortunately, this is simply not enough.

For well over 100 years, opinions or rules by Kentucky's appellate courts have required that in such situations the party attempting to introduce the evidence must inform the court of the substance of the evidence proposed. See, e.g., Tipper v. Commonwealth, 58 Ky. 6, 1 Metc. 6 (1858). Furthermore, most of the cases on point clearly require that the actual evidence be placed in the record. Time after time our appellate courts have emphasized the need for including this avowal of evidence in the record if the error is to be preserved.

Kentucky appears to be one of only a few (if not the only) jurisdictions to use the term "avowal" to describe the presentation of the substance of evidence excluded by the Court for purposes of preserving it in the record. See 7A C.J.S. Avowal (1980). More commonly, this is simply known as an "offer of proof" or "offer of evidence," although Dean Wigmore has stated that an offer of proof is the presentation of evidence which has been excluded to preserve that evidence for appellate review while an offer of evidence is made to more adequately apprise the trial court of the nature of the evidence to allow a proper ruling on its admissibility. 1 Wigmore, Evidence §20a (Tillers rev. 1983). Kentucky's appellate courts have used the term avowal for both of these concepts at least on a few occasions. Baker v. Commonwealth, Ky., 482 S.W.2d 766, 769 (1972); Gibson v. Commonwealth, 248 Ky. 601, 59 S.W.2d 573, 575 (1933). But, the scope of this article is addressed to the need for the presentation of evidence only in the context of an offer of proof to allow appellate scrutiny of an alleged error.

The purpose of any offer of proof is to benefit the appellate court by informing it of the nature of the evidence that the trial court has refused to receive so that it can determine if error has occurred and if so whether that error is prejudicial. Jones v. Commonwealth, Ky., 623 S.W.2d 226, 227 (1981). Although the offer of proof will never eliminate the uncertainty and guesswork by the appellate court it will at least reduce the uncertainty to a "tolerable and acceptable level" Wigmore, supra. The avowal therefore "serves to promote justice and conserve resources because it tends to reduce the frequency of unnecessary reversals and retrials." Id. It also prevents the offer of nonexistent evidence in an attempt to establish an error when it is expected that the court will exclude that "evidence" through an erroneous ruling. Id. Furthermore, the use of an avowal removes any ambiguity from the situation which would allow the appellate court to

by-pass the error for whatever reason. Id.

The Kentucky Supreme Court has recognized the expedience of the offer of proof by making it essentially an absolute requirement. The Court's rules and opinions make it abundantly clear that an appellate court in this state cannot determine whether the exclusion of evidence is prejudicial or even whether it is an error without compliance with this procedure. See Queen v. Commonwealth, Ky., 551 S.W.2d 239, 241 (1977); Roy v. Commonwealth, Ky., 500 S.W.2d 921, 922 (1973); See generally, Lawson, Kentucky Evidence Law Handbook §1.15 (2d.ed 1984).

RCr 9.52 states:

> In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the Court, upon request of the examining attorney the witness may make a specific offer of his answer to the question. The Court shall require the offer to be made out of the hearing of the jury. The Court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the Court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

RCr 9.52 was promulgated by the Supreme Court in addition to an identical rule in the Rules of Civil Procedure, CR 43.10. Since RCr 13.04 applies the civil rules to criminal proceedings the adoption of both rules only underscores the significance with which our Supreme Court views the making of an avowal. In this regard it should also be noted that no distinctions have been made in the necessity of making an avowal between criminal and civil cases. Herbert v. Commonwealth, Ky., 566 S.W.2d 798, 803 (1978). Ultimately, an avowal in any proceeding, whether criminal or civil, must be made in the manner prescribed by the civil rules. Id.; 8 Fitzgerald, Kentucky Practice §824 (1978).

However, it is extremely important to recognize that there is a distinction between Kentucky's avowal procedure and the procedure for the offers of proof in other jurisdictions including federal court. In many jurisdictions it is acceptable for an offer of proof to be made by the trial attorney through a statement of the evidence a propounded question would elicit or the intended witness would give. Federal Rule of Evidence, 103(a)(2) allows an offer of proof to be made simply by stating the "substance of the evidence." It is discretionary with the federal court to require the making of the offer in "question and answer form." FRE 103(b). In Kentucky such an "informal" offer of proof in virtually all circumstances is unacceptable. (See generally, Wigmore, supra, for a thorough discussion of "informal" and "formal" offers). To preserve an error concerning the exclusion of evidence the Kentucky appellate courts require, with few exceptions, that the witness actually testify outside the hearing of the jury to the same extent as if the witness had been allowed to testify in open court. It has been held specifically that a statement by the attorney of what the evidence would be is insufficient. Herbert, supra. Moreover, the Court has indicated that all of witnesses offered on a particular issue should testify on avowal. Baker, supra, at 769. Even if the trial court has ruled that testimony would be cumulative, all of the witnesses should testify since the appellate court will have to review this determination, too. Davis Ex'r v. Laughlin, 280 Ky. 422, 133 S.W.2d 544 (1939).

Basically, anytime the trial court prevents the attorney from obtaining answers to particular questions, including hypotheticals, or prevents a witness from testifying at all, an avowal should be made. Grant v. Commonwealth, 302 Ky. 836, 196 S.W.2d 601, 602 (1946); Robertson v. Commonwealth, 269 Ky. 317, 107 S.W.2d 292, 296 (1937); See also Zogg v. O'Bryan, Ky., 237 S.W.2d 511, 515 (1951); Kentucky Stone Company v. Gaddie, Ky., 396 S.W.2d 337, 339 (1965). Additionally, any error of the trial court excluding tangible evidence must be preserved similarly by introducing that evidence through an offer of proof. Caine v. Commonwealth, Ky., 491 S.W.2d 824, cert. den., 94 S.Ct. 80, 414 U.S. 876, 38 L.Ed.2d 121 (1973). It is also very important to note that even the avowal may not be sufficient to preserve the issue unless counsel has also objected to the exclusion of the evidence. Transit Authority of River City v. Vinson, Ky.App., 703 S.W.2d 482 (1985).

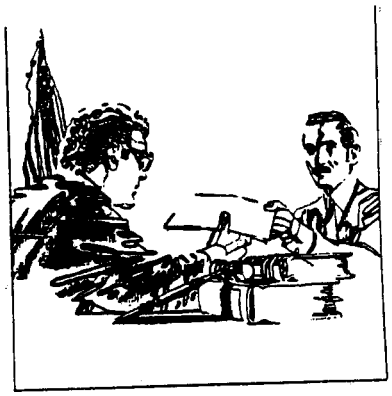
The primary exception to the requirement of an avowal occurs when the evidence that was excluded, as well as its significance to the case, is clearly indicated in the record without the avowal. United Fuel Gas Co. v. Mante, Ky., 272 S.W.2d 810 (1954); See also FRE 103(a)(2). But this exception has been rarely applied and should not be relied upon by counsel except in the most obvious of cases. As Dean

Wigmore has noted, "[D]ecisions are full of examples in which lawyers seem to have mistakenly assumed that the context made the answer sufficiently plain." Wigmore, supra.

An avowal may also not be necessary if the trial court has previously excluded an entire class of evidence. Wallace, Lambeth, & Pope v. Bradshaw and Taylor, 36 Ky. 382 (1838). But once again, to be sure of preservation an avowal should probably still be made.

When objectionable questions are propounded during cross-examination a different situation is obviously presented due to the constitutional right of confrontation. Whether the evidence to be elicited through cross-examination is favorable or not may in some situations be less important than the demeanor of the witness before the jury while answering. See Wigmore, supra. "The failure to affirmatively establish a fact sought does not prevent the cross-examination from having probative value in regard to the witness' credibility. An unbelievable denial of the existence of a fact can be even more probative as to the lack of credibility that an affirmative admission of that fact." Spain v. State, Tex.Crim., 585 S.W.2d 705, 710 (1979).

Accordingly, the denial of the right to cross-examine on a particular topic may be prejudicial error because of the denial of the right to confrontation regardless of the substance of the answer therefore abrogating the need for an avowal to preserve the constitutional question. Cf. Alford v. United States, 282 U.S. 487, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931). But even in this area counsel should be aware that the Kentucky Supreme Court has stated that an avowal is appropriate and a requirement for preservation at least as to the admissibility of the substance of the evidence. Cain v. Commonwealth, Ky., 554 S.W.2d 369, 375 (1977); Maxey v. Commonwealth, 255 Ky. 330, 74 S.W.2d 336, 339 (1934).



Whatever the circumstances, in virtually every situation in which evidence is excluded the trial court will be required to allow the making of an avowal although it is a requirement that an attempt to introduce the evidence be made first even if the evidence is apparent from some other portion of the trial. Wooten v. Commonwealth, Ky., 478 S.W.2d 701, 703 (1972). A denial of due process may result if the trial court refuses. Hohnke v. Commonwealth, Ky., 451 S.W.2d 162, 166 (1970). In Powell v. Commonwealth, Ky., 554 S.W.2d 386, 390 (1977), the Kentucky Supreme Court stated that an avowal "is essential to the right of appeal. If a party is forbidden the opportunity of making an avowal he is to that extent deprived of the remedy of appeal, to which he is entitled as a matter of right." Accordingly, the Court concluded in Powell that the trial court's refusal to permit an avowal was prejudicial error in and of itself "because the testimony of the witness himself, under oath and subject to examination and cross-examination, is the only clear indication of what would have been said in the presence of the jury." Id. Powell also makes clear that neither an affidavit of the intended testimony filed with a motion for new trial nor stipulations as to the testimony will be sufficient to cure the trial court's error. Id. It appears that the only exception to the right to make an avowal will occur in actions tried by the court without a jury when "it clearly appears that the evidence is not admissible on any ground or that the witness is privileged. RCr 9.52; See Eilers v. Eilers, Ky., 412 S.W.2d 871, 872 (1967).

Although the requirement of an avowal may seem at first to be simply a procedural barrier to the review of an issue on appeal the positive aspects of the rules and the decisions in relation to them are significant. The requirement of the avowal for preservation in almost every case certainly makes the applicability of the rules easy to determine and procedurally easy to implement. Also, since, generally, counsel has the right pursuant to these rules to present every item of evidence at trial, although the jury may not hear all that evidence due to the court's exclusions, the trial court itself, in most instances, will hear it and the court's decision concerning admissibility, among other things, could be affected. Finally, if this evidence must be placed in the record the appellate court cannot avoid review of the error, will be compelled to scrutinize the substance of the evidence and, hopefully, recognize the prejudice of the trial court's exclusion. Counsel should, therefore, with few exceptions, always demand that the trial court accept the prohibited evidence by avowal.

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Family Violence

There are many definitions of family. For our purposes, the "family" is used here to describe close relationships.

A man and woman who have been married for nearly a decade live and work in faraway cities. They meet every few months and spend summer vacations together. For our purposes, they are not family.

Another man and woman have been having an affair for 18 years. They have sexual relationships a few times a week and speak to each other on the telephone at least three times a day. Both are married; however, their relationships with their spouses are not meaningful.

Nonsexual relationships like those between business partners, coworkers, and neighbors sometimes acquire such intensity that these people can be considered family.

Functionally speaking, the term "family" at present denotes a relationship designed to gratify the emotional needs of the family members. The various traditional functions of the family have been taken over by a variety of other institutions.

Perhaps it would be simpler to speak of love relationships instead. When it comes to love, we use that one term to denote a variety of relationships which have in common libidinal attachment. We use it to describe a desire for people, things, and activities--the sexual involvement between a man and a woman, the interest a person has in food, or the attachment a mother has to her child. Love denotes desire and self-sacrificing altruism. Love gratifies the lover and compels him or her to desire the gratification of the object of his love. Love and desire are difficult to distinguish. Aquinas writes:

> For nobody desires anything nor rejoices in anything except as a good that is loved [1].

The use of the term "love" instead of "family" does not convey the fact that we are actually talking about love-and-hate relationships. The critical aspect is that such relationships are of high intensity. For our purposes, the significant operational feature of love and hate is the magnifying effect these emotions exert upon personality features. Under their influence the suspicious become paranoid; the altruistic, self-sacrificing.

Love and the family merely distills into a lethal dose what exists in the culture at large [2].

Individual violence is defined here as the infliction of physical harm by one person upon another. This definition includes a wide range of behavior. Violence may occur in order to achieve a purpose or to express an emotion, or it may be the result of a breakdown of controls.

Another way to classify violence is according to the state of mind of the perpetrator at the time when he or she engaged in violent behavior. For example, a parent may administer physical punishment to a child because he or she believes that this is essential to the child's well-being. On the other hand, a parent can inflict physical punishment upon the child because of a deep-seated need to impose suffering upon the child. In the first instance, we are dealing with discipline; in the second, with child abuse.

Self-harmonious, egosyntonic behavior is conscious, reflective, and subject to reason. Self-dysharmonious, egodystonic behavior is, by and large, outside the control of the actor and is generally resistant to persuasion, punishment, or disapproval. A person who engages in violence for rational reasons can be influenced by rational reasons to restrain from being violent. If an individual robs banks to get money, that person is likely to cease if he or she inherits a million-dollar estate or is likely to get caught and punished. If the thief robs a bank to suffer, neither money nor risk of punishment will be a deterrent.

Some people behave violently because they want to. Some people behave violently because they have to and do so contrary to their wishes. There are three sources of individual violence in our society:

(1) subculture of violence
(2) episodic breakthrough of violent impulses and
(3) psychotic breakdown of personality structure.

There are three causes of violence:

(1) biological
(2) social, and
(3) psychic.

Societal methods of dealing with violence are based upon three fictions:

(1) violence is rational,
(2) punishment prevents violence, and
(3) criminals are responsible for most violence.

Violence and crime are almost synonymous in our collective awareness. And yet most violence is committed by noncriminals, and most crime is nonviolent. Psychiatric doubletalk? No! Just plain facts that none of us like to acknowledge.

Many law enforcement officials regard white-collar crime as the fastest growing sector of crime. Bribes, kickbacks, payoffs, computer-related crimes, consumer fraud, illegal competition and deceptive practices, fraud by credit card and check, embezzlement and pilferage, insurance fraud, receiving stolen property, and security theft and fraud are only a few of the crimes that raise eyebrows but do not inflame passions. So-called white-collar crime is widespread, profitable, but not very exciting. Making money by illegal means is rarely the subject of a best-seller or a Hollywood thriller. Violence, on the other hand, is the backbone of our entertainment industry. Sex and violence play a dominant role in literature, movies, and TV dramas because they gratify universal, deep-seated needs. People watch or read about people killing people because it is fun.

Anything that satisfies a need is fun; people kill people because it is fun. Before you dismiss this statement as psychiatric speculation, reflect for a moment about our entertainment industry, television, literature, theaters, movies, and comic strips. All of these are consumed for fun; they gratify a need. We all have a need to fill. Our daily speech reflects it: "I felt like killing him!" "If you say that again, I'll kill you!"

Yes, there is a force within us that strives toward murder. Fortunately, there are also counterforces, controls and restraints within us. Both killing and not killing are the result of an interplay of dynamic, and social forces. If we wish to control violence, we have to understand it.

Violence is always rewarding in the short run but very often self-defeating in the long run. It is rarely necessary, and often it occurs without reflection.

Violence is exploited for political purposes. The conservatives say: punish violence; make it sufficiently unrewarding, and people will choose peaceful means to secure their goals. The liberals say: improve deplorable conditions, like unemployment, poor housing, poverty, and so on and violence will become necessary. Both points of view legitimize violence in the here and now and promise freedom from violence if we line up behind the respective political goals of our self-proclaimed advisors.

It is true that making certain crimes unrewarding will diminish their occurrence. The death penalty would eliminate such crimes as jaywalking, tax evasion, and embezzlement. Sexual unfaithfulness, spouse killing, child abuse, and similar unreflective offenses are not affected by severity of punishment.

Even if punishment were effective in rehabilitating criminals, there would remain the problem of apprehension. It is generally accepted that 50% of most violent crimes are never reported to the police. The majority of criminal offenses are never solved, and only a small number of criminals arrested are convicted.

In a study conducted in 1965, it was discovered that only 49% of criminal events led to police notification. This constituted 2077 episodes in that survey. Police

responded in 77%, which reduced the number to 1024. Seventy-five percent were considered by the police to be crimes which reduced the number to 787. Out of this number, 593 were arrested, and only 50 were convicted [3].

Our approach to violence is irrational. It defies comprehension, even by a psychiatrist. If a citizen conducted the affairs of daily living with such irrationality, he or she would be declared insane. Because we deal with violence irrationally, we are ineffective in controlling it--proof that we have mixed feelings about its prevention.

The major defect in our approach to violence is our failure to recognize that there are varieties of violence. Intrafamilial violence is a distinct variety of violence that requires a different approach than criminal violence. Homicide is the best example of our failure to differentiate family violence from criminal violence. Homicide victims are most commonly people who have had an intense emotional relationship with the perpetrator.

Homicide is truly an affair of the heart. If it were an affair of money, bankers would be the most likely victims. If it were related to property, rich people would be mostly likely to get killed. If it were related to political differences, murder would become an occupational hazard of politicians. None of this is true in significant numbers. Occasionally bankers are killed, and rich people are murdered in robbery attempts. Politicians are, at times, assassinated. However, for every banker murdered, there are thousands of wives killed by their husbands. There are more husbands killed by their wives than rich people killed by robbers. There are more children killed by their mothers than politicians killed by political assassins. Murder is a family affair because family members have a need to be aggressive with each other.

In the city of Tulsa, OK, a mother of two children, ages 7 and 9, was abandoned by her husband, became depressed, and decided to kill herself and her two children. She went to sleep with her children, set the alarm clock to awaken her at midnight, and then shot the two children lying by her side. She then placed two bullets in her heart region and attempted to fire a third one, but a piece of bedding interfered. She was found unconscious 6 days later and lived. The prosecutor charged her with first-degree murder, which in Oklahoma is punishable by death. The first trial ended in a hung jury. A second trial was conducted. I testified as the only expert in support of the insanity defense and was able to prove to the jury that the mother of these two children was not in her right mind when she killed them.

What was the expense of this exercise in futility? If one considers the time of all involved in the two trials, a conservative estimate would be $150,000. Had Mrs. X been convicted of first-degree murder, most likely she would not have been executed but would have served a life sentence instead. Having been acquitted by virtue of insanity, she became a free woman, enrolled in college, and has led a productive life ever since. In the long run, the people of Oklahoma were the winners because they lost the case. Had they won, they would have had to support Mrs. X for the rest of her life in a penitentiary, without any practical or moral gain.

In a small Illinois town, a young father of two children was abandoned by his wife who not only was unfaithful to him, but tormented him with her unfaithfulness. He became depressed and decided to commit suicide with his two children, ages 3 and 5. He went into the garage, started the car, closed all of the windows, and sang religious songs with his children until they all lost consciousness. His children died; he survived and was charged with first-degree murder. Once again, my testimony led to an acquittal by virtue of a so-called insanity plea. Many such cases, however, lead to conviction and incarceration, which serves no useful purpose.

Confronted with such tragedies, our society has only one response: criminal prosecution and punishment. Such a response is not motivated by preventive goals, but by retribution. Punishment and prevention are not closely related; at best, they are cousins. The primary purpose of punishment is "to inflict pain, loss or other suffering upon a person for his sin, crime or fault." [4] The motivation of punishment is to revenge or avenge a wrongdoing. Punishment evens the emotional score between the wrongdoer and the aggrieved.

Prevention, on the other hand, is the act of forestalling an occurrence. The produce of prevention is a nonevent. Punishment can, at best, affect recurrence of wrongdoing. After the evil deed is done and the offender punished, let us assume he never does it again. Does this prove the preventive effectiveness of punishment?

Mr. Jones, after 20 years of marriage, kills Mrs. Jones in a family quarrel. He spends 10 years in jail and never kills anyone again. Did

the 10 years in jail cure him of his wife-killing propensity?

Mr. Smith kills Mrs. Brown in a holdup. He spends 15 years in the penitentiary. Two days after discharge from jail, he kills Mr. Roberts in another holdup. Is this failure of prevention?

I submit that it was an error from the standpoint of violence prevention to keep Mr. Jones in jail for 10 years, and to release Mr. Smith after 15 years. The unique episode in the life of Mr. Jones did not make him a violence risk for the community. The habitual propensity for violence of Mr. Smith was predictably aggravated by the exposure to the brutal environment of a prison. Mr. Jones emerged from jail a broken, useless man. Mr. Smith, on the other hand, made an excellent adjustment in prison and emerged invigorated and full of criminal plans.

Taking the purely behavioristic approach, one could argue a killing is a killing is a killing, or a beating is a beating is a beating. There are, however, important differences between intrafamilial violence and the garden-variety criminal violence. The criminal does not discriminate but bases his criminal activity upon realistic needs of his own. His aim is to gain money, goods, and job satisfaction. The relationship between the criminal and his victim is not essential to the occurrence of violence. A street robber will attack young and old, male and female, black and white, and so forth. His choice of victims is determined by realistic considerations. He may choose old people or women because they are weaker. He may choose men because he derives more satisfaction from robbing men than women. Or he may be entirely nonspecific, robbing whoever happens to be in the wrong place at the wrong time.

Intrafamilial violence, on the other hand, occurs within a love relationship. The perpetrator is usually violent only with this particular person. A husband who beats his wife does not beat his female co-workers or other men. When a wife is beaten by her husband, the participants and observers experience different emotions than those that accompany an assault of a stranger upon another stranger.

What is described here is common knowledge; however, it has not led to appropriate action. Individual violence can never be completely eliminated, but it can be reduced relatively easily. No one can seriously question the capacity of our society to take effective action and produce desired results. We put a man on the moon, eliminated polio, and curtailed airplane hijacking. On the other hand, we have terrible public transportation, increasing cancer rates from cigarette smoking and other chemical carcinogens, and the highest murder rate in the civilized world. We are effective only when we want to be effective.

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[1] Aquinas, St. Thomas, "Great Books, I," Encyclopedia Britannica, p. 105.

[2] Henry, J., Pathways to Madness, Random House, New York, 1971.

[3] "Do Mandatory Prison Sentences for Handgun Offenders Curb Violent Crime?," Technical Report I, The United States Conference of Mayors, 1976, p. 5.

[4] Websters Dictionary of Synonyms, G. & C. Merriam Co., Springfield, MA, 1951, p. 66.

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From the Editor:

Do you have reactions to the thoughts expressed in this article? If so, send them to us and we will share them with our readers.

Female criminals see themselves in traditional roles

Chicago Tribune

Female criminals usually see themselves as "traditional women," oriented toward the roles of wife and mother, sociologist Frances Heidensohn said. They don't consider themselves to be liberated, nor do they think of themselves as criminals, Heidensohn writes in her book *Women and Crime: The Life of the Female Offender.*

Heidensohn directed much of her effort at trying to explain why crime rates for women are so much lower than they are for men. She concludes that in our male-dominated society, there is much more pressure on women to conform.

Beyond that, women's traditional domain — rearing children, caring for sick and elderly family members, keeping house — demands a stricter sense of organization and stability than does men's.

In addition, there are fewer maverick role models for women, even those who don't break the law. Consequently, a woman who breaks with tradition risks her reputation far more than a man who rebels, Heidensohn says.

Society simply magnifies this stigma for women criminals, leaving women much more law-abiding than men.

Lexington Herald Leader
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Ask Corrections

Betty Lou Vaughn

TO CORRECTIONS:

My client is lodged in a local jail, having been sentenced to one year in prison. How can we be assured he will be given credit for his jail time, his good time and be released on the same date as if he were, in fact, housed at the Kentucky State Reformatory?

TO READER:

The process to ensure this starts with the Probation and Parole Officer who sends certified copies of the judgments and any jail credit documents to the Controlled Intake Unit at the Kentucky State Reformatory, which in turn forwards them to Offender Records, Corrections Cabinet, Frankfort, for final calculations. Your client's sentence and parole eligibility dates are credited the same as if he were at the Kentucky State Reformatory. If an individual's conditional release becomes due while still housed in a local jail, he will be physically transferred to the Kentucky State Reformatory and formally discharged from the system on the same date. He will not be released from the local jail.

TO CORRECTIONS:

My client is being held in a local jail on a parole violation warrant and has been given a preliminary violation hearing, which was conducted by an Administrative Law Judge from the Parole Board. Has my client's parole been revoked?

TO READER:

Your client's parole will not be revoked until he has been afforded his **FINAL PAROLE REVOCATION HEARING** by the Parole Board. Until his parole has been revoked, he is still on parole and working toward his maximum expiration date. At the time he is given his final parole revocation hearing, and if his parole is revoked, his sentence will be recalculated to determine his new conditional release and maximum expiration dates.

TO CORRECTIONS:

My client has just been convicted of a felony and sentenced to serve three years in prison. When will he be eligible for parole consideration and since many convicted felons are still housed in local jails due to the backup, how can we be ensured he will be afforded a hearing before the Parole Board in a timely manner?

TO READER:

He will be eligible for parole consideration in seven months, minus jail time. At the time he was sentenced, the local probation and parole officer forwarded certified copies of the final judgment and any jail credit documents to the Control Intake Unit at Kentucky State Reformatory (for both male and female). For those who become eligible for parole consideration while still housed in a local jail, the Parole Board schedules regular hearings at designated places, specifically for the purpose of affording those individuals their parole consideration hearing.

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 David E. Norat at (502) 564-5223.

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

URGENT MESSAGE!

ATTORNEY VACANCIES

The Department of Public Advocacy has attorney vacancies at the trial level in the following field offices: Hazard, Pikeville, Stanton and Somerset. Salary is commensurate with criminal practice experience. For further details contact David E. Norat, Director, Defense Services, (502) 564-5223.

Forensic Audio Tape Analysis and the Defense Lawyer

by Anthony J. Pellicano

Part I

During the past several years I have found that many defense attorneys are not familiar with what Forensic Tape Analysis is. Having knowledge and comprehension of the present technology and the limitations of the state of the art can aid a defense attorney in determining the necessity for evaluating the tape recordings that may be used as evidence against his client.

All but a small percentage of criminal investigations include audio tape recordings. As a result, Forensic Tape Analysis has become essential, not only to evaluate the tape recorded evidence, sometimes crucial to the defense/prosecution, but to determine what is being said and by whom.

Law Enforcement Methods of Producing Tape Recordings

1) Wiretapping telephone lines.
2) Placement of bugging devices and/or recorders in rooms, enclosures or vehicles.
3) Placement of recording devices on informants/law enforcement personnel.
4) Placement of body transmitters on informants/law enforcement personnel to transmit conversations to a listening post where they are recorded.
5) A tape recorded interview.

Questioned tape recordings and the recorders that produced them are what a Forensic Tape Expert examines and analyzes.

Originality

When a tape recording is presented as an Original and that factual basis is disputed, then the questioned recording may be Authenticated for Originality *if* the criterion for the authentication examination is achieved.

To authenticate whether a tape recording is in fact an Original, the tape recorder that produced the questioned recording must *always* be examined. If the Original Tape Recorder cannot be examined, the indicated Original *cannot be scientifically* authenticated for Originality.

Authentication for Originality begins with the creation of Known Exemplar Tape Recordings (test recordings) produced by the indicated Original Recorder.

These known Exemplars must contain all of the recording functions of the purported Original Recorder—i.e. the start record function, the pause function, the stop record function and variations and combinations of all recording functions. The activation of these functions will produce magnetic tracks and signatures on the Known Exemplar which can be observed through a microscope, identified and later compared to the purported Original. This testing procedure will also disclose idiosyncrasies of the record head and erase head of the specific Original Recorder.

A comparison examination can determine if the signatures of the Known Exemplars logically correlate with the signatures contained on the Original Recording. The comparison examination will also determine whether the record head track widths and erase head track widths are the same and if they appear at the same location on the test tape compared to the Original.

If the Authentication examination proves Originality, then further examinations may be performed.

Mr. Pellicano has testified as a forensic audio expert for both the defense and the prosecution on numerous occasions. His offices contain a sophisticated combination of computers, spectrum analyzers and other electronic equipment. He has been a key figure in such well-known cases as those involving John Z. DeLorean and Rosemary Woods, President Nixon's secretary. His name is listed in five national and international research computer systems and in the National Forensic Center publication. He is owner and President of the firm, Forensic Audio Lab, Ltd. in Los Angeles, California.

Authenticity of Content

The authenticity of content examination includes two major procedures. Authenticity of spoken and/or recorded content and authenticity of the magnetic patterns.

Recorded Content Analysis

Critical listening techniques are utilized to insure or verify the spoken content on the questioned recording. These techniques include verification of continuity of the conversation or interview. Many times defendants insist that part of a conversation was deleted or missing on the recording.

The technical procedures involve listening to the recorded content while viewing the waveform of the signal on a frequency spectrum analyzer or some other electronic

device that will graphically display the waveform. If some discontinuity of spoken content, background noise or some other identifying noise is detected and located, this may disclose that some editing may have taken place and further analysis is required.

Inconsistencies may be detected when listening to a recording. An edit may be indicated when the participants are speaking and a song heard in the background suddenly changes to another song or terminates, or the conversation changes abruptly from one subject to another. In addition, incomplete words or sentences that terminate mid-word may also indicate an edit. These findings would indicate anomalies and that a waveform analysis and magnetic pattern examination are now required to resolve these inconsistencies.

Magnetic Patterns

Unless a tape recording is started on the plastic leader, usually found on standard audio cassettes, a start record signature should appear at the commencement of the recording.

No other function signature should appear during the recorded content until the termination of the recording where a stop record signature should appear, unless the tape recording continued through the trailing plastic leader.

If a function signature appears it should be classified and noted. There may be a bonafide reason for the signature. For instance, prior to the signature the recording party might disclose that they are pausing the recorder or stopping the recording operation. They might also advise that the recording has resumed after an event or function. In undercover or some other types of surveillance operations it may not be possible for the undercover agent or operator of the recording device to audibly disclose the reason for his terminating or pausing the recording; however, an explanation should be noted on the surveillance logs or reports. Problems arise when these function events or signatures are present and not explained.

If the recorder was paused, then a pause signature should appear and can be identified. If the recorder was stopped and then restarted, then a stop/start record signature will be present and can be identified.

If the recording was stopped, the tape rewound and played back past the stop record signature and the start record function activated, then a stop record signature will appear. Immediately subsequent to the stop record signature some blank or previously erased tape will be evident, followed by a start record signature and the new recording and then subsequently a termination or stop record signature.

If during playback the recorder was stopped before the location of the stop record signature and the start record function activated then the stop record signature will be erased over when the recording commences, subsequently you would see a start record signature only at the point that the Over-Recording took place.

This type of finding is common and troublesome in that this event must be resolved as to its occurrence. In some cases this event is justified and in others it is not. If part or all of some previously recorded content has been recorded over, it is lost forever. Proving whether or not recorded content was maliciously deleted can be painstaking and sometimes impossible.

Testimony of the Expert

A Forensic Tape Analyst can demonstrate what occurred during a recording.

All of the signatures of record functions on the questioned tape recording can be visually seen through a microscope, subsequently these signatures can be photographed and/or video taped. These photographs and/or video tapes can graphically demonstrate the signatures. Comparing the photographs or video tapes of the Known Exemplars (test recordings) to the Unknown Exemplar (questioned recording) will demonstrate anomalies or establish similarities.

A waveform analysis can be produced in hard copy form by use of a computer and plotter or by some other type of waveform producing instrumentation and printer. The waveforms of the signatures on the questioned tape recording should compare to the waveforms on the Known Exemplars as well.

Subsequently, an expert can demonstrate the signatures preserved on the questioned tape itself and the waveform of the signature processed through waveform analyzing equipment.

A Forensic Tape Analyst must disclose his findings comprehensively so that when reviewed by other persons and experts they could and would reasonably reach the same conclusion.

End of Part One. ■

Cases of Note...In Brief

Ed Monahan

INVOCATION OF ATTORNEY-CLIENT PRIVILEGE

Commonwealth v. Sims
521 A.2d 391 (Pa. 1987)

The defendant was convicted of murder and sentenced to death due in large part to the testimony of a co-defendant granted immunity. The defense was that the immunized co-defendant did the killing. The defense unsuccessfully tried to elicit from the co-defendant what he told his attorney about the crime. Additionally, the trial court prevented the defense from requiring the immunized co-defendant to invoke his "attorney-client" privilege in front of the jury.

The appellate court held that the defense could not inquire into the attorney-client conversation but had the right to require the defendant's principle accuser to claim his attorney-client privilege before the jury since a defendant has the constitutional right to confront his accusers:

> Forcing that witness to invoke the statutory privilege in the presence of the jury in no way undermines the underlying policy supporting that privilege. Once the privileged is recognized and upheld, the privileged communication remains inviolate. However, on the other hand, the invocation of that privilege before the jury could have reasonably provided the basis for that tribunal to question the accusations made by that witness against the accused. The very heart of cross-examination is to provide the opportunity to challenge the credibility and reliability of opposing witnesses. Davis v. Alaska, supra. Particularly in cases where a defendant is exposed to the most extreme penalty, the right of cross-examination must not be curtailed.

Id. at 395-96.

HEARSAY OF INVESTIGATING OFFICER

Duncan v. Commonwealth
(Ky., April 2, 1987 unpublished)

At trial, the investigating police officer testified to the details of the victim's complaint of rape which was made an hour after the incident in response to the questioning of the policeman.

In this unpublished opinion, the Kentucky Supreme Court determined that it was error to allow the police officer to testify to the details of the complaint of rape since the testimony was hearsay and did not fall within a recognized exception.

ATTORNEY CONTEMPT FOR FAILURE TO OBTAIN SUBSTITUTE COUNSEL

United States v. Koblitz
803 F.2d 1523 (11th Cir. 1986)

The trial judge found 2 lawyers in civil contempt and fined them $2,500 since they violated his order to appear and try their client's criminal case or obtain substitute counsel who would try the case on the day it was set, and since they failed to inform the court that they could not appear.

A defense motion for continuance had been made, noting that counsel were involved in an 8 week trial that would continue past the day this case was set for trial. The trial judge overruled the continuance request since the scheduling conflict was of the lawyer's "own making and he has had ample time to protect his client's interests." The trial judge likewise denied the motion to sever the defendants from the case and set their case for a later time.

On the day of trial, the defendants appeared without counsel; informed the court that their attorneys were trying another case; and insisted on being represented by their retained counsel.

At the noon recess, the defense lawyers were required to appear, and they informed the court that they had made no efforts to obtain substitute counsel and that their clients could not afford to obtain another lawyer and neither qualified for appointed counsel.

After conducting a contempt hearing, the defense lawyers were found not guilty of criminal contempt but guilty of civil contempt, and fined the cost of a separate trial for their clients, costs, attorney fees incurred by the Government, and interest.

The 11th Circuit held the contempt invalid "because it required appellants to obtain substitute counsel for their clients in violation of the 6th amendment rights of their clients and because it created an inherent conflict of interest between appellants and their clients, as well as associated ethical problems." Id. at 1530.

INSUFFICIENT EVIDENCE:
LACK OF LAB TEST OF SUBSTANCE
Oldham v. Commonwealth
(Ky. App., August 21, 1987, unpub.)

The accused was convicted of trafficking in LSD. The Commonwealth's evidence consisted of Bobby McKnight testifying that the defendant sold him seven hits of LSD, and the testimony of Detective Agee that she bought 7 tablets of LSD from McKnight the following day. No laboratory results were introduced into evidence.

The Court of Appeals ruled that there was insufficient evidence to convict, noting that "whether a given substance is LSD has been held to be beyond the realm of knowledge of laymen of ordinary experience, and the lack of knowledge of the witness renders the evidence insufficient."

EVIDENCE AND COMMENT
IRRELEVANT TO CHARGED OFFENSE
Hall v. Commonwealth
(Ky. App., March 20, 1987 unpublished)

When the defendant was arrested for knowingly receiving stolen property (a gasoline siphoning pump and mining bits), the officer found a sawed-off shotgun.

The prosecutor introduced the shotgun into evidence even though it was totally irrelevant to the charged offense. The prosecutor also told the jury that the defendant planned to use the gun to avoid apprehension. The Court held the introduction of the gun was prejudicially irrelevant, and the prosecutor's comment was an unfair comment on the accused's character and beyond the permissible scope of closing argument.

ATTORNEY FEE BEYOND MAXIMUM
Makemson v. Martin County
491 So.2d 1109 (Fla. 1986)

The indigent defendant's attorney was appointed by the court to represent him on this murder, kidnapping and armed robbery charges. The representation spanned a 9 month period. The case was changed to a venue 150 miles away. The in-court time amounted to 64 hours. The appointed attorney asked for compensation for 248.3 hours in the amount of $9,500, even though expert testimony valued his services at a maximum of $25,000. The Florida statute allowed for a maximum of only $3,500 for attorney compensation in indigent criminal cases.

The appellate court held the statute putting a cap on attorney fees facially valid but "unconstitutional when applied in a manner to curtail the court's inherent power to ensure adequate representation of the criminally accused." Id. at 1112. The court specifically found the sixth amendment right to effective representation violated. The court noted that to safeguard a person's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter." Id. at 1113.

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DUI Seminar

"NEW DUI DEFENSE STRATEGIES" SEMINARS: Learn the latest approaches to discrediting the Breathalyzer, the .10 presumption, field sobriety "tests," and the officer's observations. New demonstrative exhibits and exclusive techniques with a record of success presented by:

Jonathan D. Cowan, Ph.D.: The Hidden Assumptions Behind Breathalyzer Readings, Field Sobriety "Tests," and Determining Driving Impairment.

Thomas Davis: New U.S. Supreme Court Rulings and the .10% Presumption: Is it Constitutional?

Douglas Ragan: Techniques for Discrediting the Arresting Officer's "Tests" and Observations.

Lloyd Thomas: Suppressing the Results of the Breathalyzer 2000.

Gene Osselmeier (Moderator): The Importance of Making a Good Appeal Record of Motions and Jury Instructions.

Two half-day seminars will be offered in Louisville.

October 22nd from 8:30 AM to 12:30 PM (before the KATA Annual Meeting) at the Hyatt Regency.

November 19th from 1:00 PM to 5:00 PM at the Executive Inn.

Advance registration necessary, $40. Closed to prosecutors.

To register or for further information, please contact Medical Resources, P.O. Box 364, Prospect, KY 40059, (502) 228-1552.

Book Review

Kathleen Kallaher

What Murder Leaves Behind: The Victim's Family
Doug Magee
Dodd, Meade & Company
New York
$14.95
237 pages

This book is a collection of real-life horror stories. From the first chapter about a man who returns home on a beautiful summer day to find his 14 month old son crushed in his driveway and his wife missing (found beaten, raped and shot to death two agonizing days later), the stories of 9 families who each had a member murdered are chronicled. It is a quite painful and uncomfortable task to keep reading this book, knowing that each chapter brings another tale of incomprehensible loss, and it would be easy to stop.

But that reaction brings home a central point that Doug Magee makes - that is, that the murder victim's family's suffering includes not only the permanent loss of a loved one but is often compounded by the inability of both society and the criminal justice system to understand their feelings and offer some real assistance in coping with the aftermath of the murder. As is confirmed by many of these survivors, although everyone assumes that these people are receiving comfort and support, in fact in many cases they are receiving neither, sometimes not even from each other.

Part of the problem stems from the presumption that the victim's family will act and feel in stereotypical ways, i.e., they will hate and rage against the person(s) accused of the crime, like the police and the prosecutor, despise the defense attorney, cry openly and be oversensitive about any subject related to the deceased. Such is not always the case.

For example, the McCulloughs, a large white Catholic family living in South Philadelphia, lost Danny, one of their six children, when he was shot by a black teenager who mistook him for part of a gang who had harassed him earlier. They themselves ordered that the word be spread throughout the racially tense neighborhood that there was to be no retaliation. Furthermore, at the funeral, Danny's father, Jim, was actually relieved that he was not in the shoes of the murderer's father, for whom he had no hostility, since he felt it would have been even more horrible to have a son responsible for an innocent boy's death. There is also Camille Bell, who's son, Yusuf, was killed in Atlanta, and who maintains that the convicted killer, Wayne Williams, is an innocent man railroaded by an inept investigation and city officials politically desperate to solve a highly publicized series of murders of children in that area.

Another myth is that the police and prosecutors handling the case are very solicitous of the survivors and keep them involved and informed about the proceedings. In what is the most surprising revelation of the book this is almost universally untrue. From the detective who told Jim McCullough "it was none of his business" when asked about the arrest of a suspect, to the detective investigating the shotgun murder of Sheldon Bess who intentionally refused to discuss the case with Lee and Dorothy Bess to the extent of trying to pass off a cheap fake when they pressed him to return Sheldon's personal property which included a heavy gold chain they gave him as a gift, the police "who are supposed to be on [their] side" are often down right cold to the victim's family.

Additionally, prosecutors routinely fail to explain the nature of the court proceedings to the family or even let them know court dates. This results in grief, anger and frustration that is in large part unnecessary. It is not always the outcome of the criminal proceedings that upset and anger the survivors but the fact that they are shocked and unprepared and simply do not understand why certain things happen the way they do. The harm of this is graphically illustrated by the embitterment of the McCuloughs after a trial which included stares and dirty looks from the accused's family and a third degree murder verdict which they took as a

finding that the defendant did not premeditate the act.

The saddest aspect of the victim's family's reactions is that many survivors want and need to discuss the dead person, the crime and their feelings in general. This overwhelming need to talk occurs not only right after the murder but also extends for months and even years later. They feel not only a profound sense of loss but also great sorrow at what the person they loved had to endure in the last moments of his or her life. Ironically, this behavior is what society, including the survivor's close friends, is most inept at dealing with. Friends with no frame of reference to actually empathize with the survivor's suffering are embarrassed by these discussions and soon become bored when it is apparent the person is continuing to cry and repeat the same feelings after a period of time which friends believe is sufficient to recover but which is often grossly underestimated. This occurs because people literally do not know what to say or how to respond in this situation, which makes them feel uncomfortable, causing their withdrawal. People are also unwilling to discuss the murder with the survivors because it highlights the harsh reality that not only are they mortal but also that their families, their lives and their very happiness is a fragile thing which can be snuffed out at any instant. In short, it scares them.

This isolation is compounded in cases where two close family members react differently, with one withdrawing and refusing to talk at all and the other needing to talk and grieve openly. At a time when one needs the support of a wife or parent the most, he or she is rejected and hurt by that person's own inability to cope with the murder's aftermath. There are two poignant examples: one, the Besses in which Lee finally, slowly began to feel alive again but Dorothy has been unable to stop crying and cannot enjoy any thing in her life, precipitating a crisis in their longstanding marriage; and, two, Betty Jean Spencer, whose son and three stepsons were shotgunned to death in their home in her sight before she also was shot, and whose father, after an initial conversation concerning the details of the murder, refused to come to her home or initiate any contact with her.

Many survivors have found outlets in self-help groups such as Parents of Murdered Children. Some have formed or joined groups that are politically activist in nature such as Concerned Citizens for Correctional Officers. Doug Magee points out that although we should listen to members of such groups because of the unique insight their experiences have given them, these people should not be dehumanized further by treating their ideas and proposals with kid gloves. Other survivors have turned to religion to help them recover.

As participants in the criminal justice system and as fellow human beings, this book teaches us that while we cannot always do anything to ease the suffering of the victim's family, we can certainly act in ways so as not to add to it without compromising our professional responsibilities. Overcoming isolation between ourselves and the survivors by a few words or a simple expression of condolence, offering to let them talk to us, explaining to family members we see in the courtroom hall about what is about to transpire and perhaps offering the names of members of counselling groups to contact are all ways to attempt to keep these people from feeling as if their victimization is still continuing long after the murder itself.

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Kentucky Supreme Court Rule Changes

Criminal Rules Amendment Process in Kentucky

In the June, 1987 (Vol. 9, No. 4) issue of The Advocate William E. Johnson explained the manner in which the Criminal Rules of Kentucky are amended. Since then, Justice Roy Vance, Chairman of the Kentucky Supreme Court's Criminal Rules Committee, has indicated that the practical deadline for receiving suggested rule changes and having them acted on by his Committee, the full Court and the Bar Association is December 1 of the year preceding the Bar's Annual Meeting.

Send your suggested amendments to
Justice Roy Vance
Kentucky Supreme Court Criminal Rules Committee
Capitol Building
Frankfort, Kentucky 40601

No Comment

Send your contributions to The Advocate, c/o Department of Public Advocacy, Frankfort. All dialogue guaranteed verbatim from Kentucky courtroom records or newspapers.

JUROR NOT BIASED, JUST PSYCHIC

"A woman who described herself as a psychic was excused from a jury this week after announcing she already knew the verdict... Lynette Todd correctly predicted the outcome...Todd...said she knew as soon as she saw [the defendant], even before knowing the charges against him, that he was guilty." Louisville Times (July 18, 1986).

"I SAID IT WAS OFF-THE-RECORD"

DEFENSE LAWYER: We subpoenaed you to come here today, didn't we?

WITNESS: That's right.

DEFENSE LAWYER: You did talk to us willingly back in November?

WITNESS: I talked to you, but I said that I didn't want any of this taken down, that we were only going to discuss it. You all said that was all right, that we would just discuss it and you wasn't going to take it down and you wasn't going to record it.

DEFENSE LAWYER: That is correct, and we didn't write anything down and we didn't record it, did we?

WITNESS: No, but evidently you must have remembered it.

A LITTLE LIP FROM THE COURT REPORTER

PROSECUTOR: Show my objection. I think the standard is beyond a reasonable doubt, not beyond all reasonable doubt.

COURT: I will...

REPORTER: Beg your pardon?

COURT: I agree with the Commonwealth.

REPORTER: So did you sustain his objection or just agree?

COURT: Well, the witness has already answered so proceed.

"WELL, HE LOOKED JUST LIKE FROG"

DEFENSE LAWYER: Do you wear glasses?

WITNESS: NO, I don't have my glasses with me. I didn't bring them today because I was going to pick up some more.

DEFENSE LAWYER: Did you have glasses that day?

WITNESS: Yes, but I don't wear glasses. I can see anything without glasses. I can't read without them, but I can see anything as big as a car, as big as somebody. I don't need glasses to see somebody.

DEFENSE LAWYER: So, if I asked you to read what was on that plaque behind the judge, you couldn't read it?

WITNESS: No, I couldn't see that; but I can see anybody and see what they're doing.

DEFENSE LAWYER: But you can't see that plaque up there, can you?

WITNESS: I can't see the letters. I can see the plaque, yeah.

DEFENSE LAWYER: What's on the plaque?

WITNESS: Well, I can't see the letters, I said; but I can see the plaque.

DEFENSE LAWYER: Can you see any pictures on the plaque?

WITNESS: Well, something.

DEFENSE LAWYER: Just something.

WITNESS: Yeah.

DEFENSE LAWYER: You can't tell what?

WITNESS: No.

DEFENSE LAWYER: And that plaque you reckon is about 30 feet from you?

WITNESS: No, I wouldn't say it was that far.

DEFENSE LAWYER: Maybe 15 or 20?

WITNESS: About 10 or 15, I'd say; but the car was about 20 or 25.

DEFENSE LAWYER: When you look at the jurors over here, you see people; but you can't identify them?

WITNESS: Yeah, but I don't know them. I could identify them if I knew them, but I don't know them. I seen enough to tell. It was the car, her car he was beating up. It was him.

DEFENSE LAWYER: The fact is you don't see good?

WITNESS: Well, I don't see -- yeah, I can't see to read without glasses; but I can see anybody that far from me.

DEFENSE LAWYER: If I stand over there by the Judge, you can see the outline of me?

WITNESS: Oh, I can see you plain over there. I can see them. I can tell there's "Frog"...

DEFENSE LAWYER: "Frog"?

WITNESS: Yeah.

DEFENSE LAWYER: You're referring to the man sitting to the left of the Judge?

WITNESS: Yes.

DEFENSE LAWYER: That's all.

WITNESS: Well, that is "Frog," isn't it?

DEFENSE LAWYER: No, ma'm, it's not.

WITNESS: Well, he wasn't sitting there -- he was sitting there before, so I assumed it was him.

Thanks...and a tip o' the hat to Oleh Tustaniwsky, Gail Robinson and Rodney McDaniel.

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Seven jurors in rape trial ask judge to overturn their decision to convict

Associated Press

PRESTONSBURG — Seven of the jurors who convicted two Floyd County men of rape have asked the judge to overturn their decision.

"We felt that our decision . . . after two days of deliberation was in error and that said decision was made under undue pressure to reach a verdict," the jurors said in an affidavit.

The affidavit was included in a motion filed Tuesday by defense attorney Norman Bennett of Paintsville asking Floyd County Circuit Judge Hollie Conley to grant a new trial.

Court officials in Frankfort could not recall a similar request from jurors.

"It's entirely possible that this is a first-ever request," said John C. Scott, clerk of the Kentucky Court of Appeals.

The jurors convicted Michael Clinton, 21, and Mike Woods, 22, both of Allen, of first-degree rape last Thursday.

When the trial's sentencing phase began Friday, however, some of the 12 jurors were upset to learn the minimum prison sentence for first-degree rape is 10 years, said Carolyn Cornett of Prestonsburg, one of the jurors who signed the affidavit.

Under Kentucky law, Clinton and Wood would have to serve at least half their sentence before becoming eligible for parole.

"We really didn't know it was that stiff a penalty until the end," Ms. Cornett said. "I felt they were guilty but that we shouldn't have had to sentence them to that much time in jail."

Some jury members also felt Conley was pressuring them to reach a verdict, said juror Janice Little of Martin, although she and Ms. Cornett said they did not feel any pressure.

Ms. Little said she signed the affidavit because of facts she later learned about the case "that didn't come out in trial."

Conley said Wednesday the jurors' request will be reviewed at an Aug. 28 hearing on the motion for a new trial, he said. Formal sentencing for Clifton and Woods is scheduled for Sept. 11.

The judge declined comment on the affidavit's allegations of "undue pressure," but said that during two days, the jury "didn't deliberate over five hours, if that long."

Told that some jurors thought the minimum sentence was too harsh, Conley said, "I think that's what all of them would say, but that's really not the issue."

The judge also said he thought Bennett had acted improperly by meeting with the jurors after the trial. "He should have come and talked to the court about it," Conley said.

Bennett said one of the jurors, William Greg Friend of Grethel, initiated the contact Monday by calling him at his office. Six other jurors visited his office Tuesday and signed the affidavit, he said.

"These jurors were honestly interested and worried that they'd made a wrong decision," the lawyer said.

The Cincinnati Post, August 21, 1987

Durham

Continued from page 2

suffering to take a look at the individual on trial. Maybe the reasons my client ended up injuring someone else or the emotional causes that makes someone come out of their normal mode of living and do something that does long-term injury.

Is there anything from your personal injury cases you're able to pull into your criminal practice?

Actually, it's the reverse. It's my practice as a litigator, that I'm able to carry into the courtroom in a civil action. You're in the same arena and dealing with jurors and convincing those people in practically the same manner you would in a criminal case.

What do you do when you're tempted to change jobs?

The first thing I do is physically close the pages of my court calendar. Take my tie off and get up and walk out of the office and walk for awhile; just get away from it. Then once I can come to my senses a little bit and start pinpointing where my problems are and why I'm feeling that way, I'll usually call someone in the practice, Tom Hectus or Allen Button, and say these things are distressing, talk to me about that. Doing something like that you're able to find out you're not a lonely soldier backing down the hill. There's a lot of practitioners who are so immersed and they all need time away. That's the key, just take time away from it.

A couple of things really keep me going. By my efforts I am able to keep prosecutors from getting convictions against people who are wrongly accused or over charged. I know through my efforts I can make prosecutors more honest by exposing to the court or to the publicthrough a trial, information that prosecutors have tried to keep hidden. They tend to hear about it again from outside their office. Jurors take a pretty active role after a trial is over. They'll call up a prosecutor after a trial is over and let him know they didn't like what was happening. Or they'll call me and say they're glad I represented this particular individual because what was happening to him was horrible. Jurors are voters and prosecutors are elected. It's going to have an effect.

And another thing, growing up in a large family where you always want of flowing dollars, even if we couldn't afford the best, I always felt that we deserved it. All of us do. And if I can provide someone who can't afford legal assistance, my best efforts to satisfy them and to let those individuals know that you don't have to be wealthy to get good representation then that keeps me going.

Is there anything else you'd like to add?

There is no way in the world that I could be in practice today and trying cases as I do without having had the support of the people like Tom Hectus, Kevin McNally and Ed Monahan. Those people took time to talk to me and to educate me and to let me walk behind them and watch them and assist them so that I can be in the position I am today, I'll be forever thankful.

I wanted to trial practice and I interviewed with many firms and they wanted me to wait. But I didn't want to. I wanted to develop my skills now. My first criminal trial, I tried with Tom Hectus and I felt fortunate to have a virtual criminal expert sitting there nudging me saying, "now's a good time for an objection." He walked me through the proceeding so skillfully that they were not able to introduce but one prior of the original five. That is the sort of hand in hand work that I hope to be able some day to give someone else to pass something along.

Cris Brown

Assault was Sexual Fantasy, Officials Say

Jersey City, N.J. - A woman who claimed she was sexually assaulted after being found naked, slashed and bound in a car is now saying she made up the story to conceal a fantasy she was acting out for her married boyfriend, authorities say.

Marian Snyder, 35, was charged with giving false information under oath. If convicted, she could face 18 months in jail and $7,500 in fines, said Hudson Co. Prosecutor Paul DePascale. The state also intends to bring a civil suit against Ms. Snyder to recover the more than $8,000 it spent to investigate the case. Ms. Snyder and her lawyer, Patricia Costello, were unavailable for comment.

A passing motorist found Ms. Snyder at 9 p.m. on July 30 under the New Jersey Turnpike at a park-and-ride lot. She was nude, her hands and feet bound and body bloodied from 42 slashings, which she later confessed to inflicting upon herself.

Her story fell apart when calls she said came from the suspect did not show up on the phone taps.

Lexington Herald-Leader, 9/7/87
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