THE ADVOCATE

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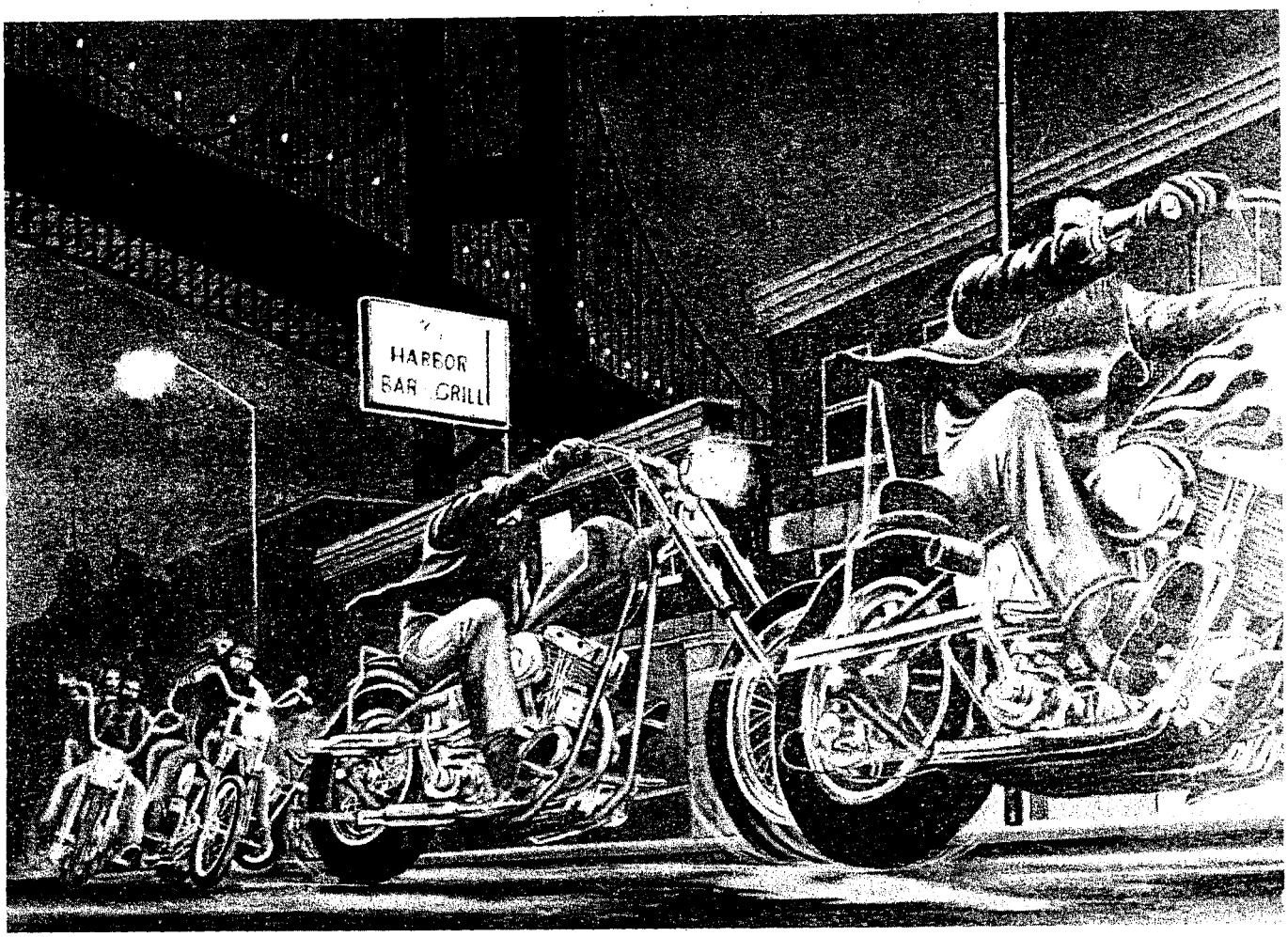

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The Advocate Features

ROB EGGERT

"FROM THE MAIN LINE
TO THE CHEESE LINE"

Coming from a northeastern Brahmin background, Joseph "Rob" Eggert might be considered an unlikely candidate to find happiness as a public defender in Louisville, Kentucky. However, Rob, as he likes to be called, has indeed found happiness here and established himself as one of the most successful and highly respected public defenders anywhere. He is presently Deputy Chief Trial Attorney for the Jefferson District Public Defender. Rob's background is nearly as interesting as the man himself.

After attending The Groton School, Rob received his undergraduate degree cum laude from Harvard College. Before entering law school, Rob worked as a newspaper reporter both in Connecticut and on Long Island. His strong academic background, coupled with his overwhelming desire to uncover the truth, led Rob to pursue a legal career. He attended the School of Law at Catholic University where he received his law degree in 1980. While in law school, Rob developed an interest in criminal law and worked with prisoners and defense attorneys in Washington D.C. Rob became a public defender with the Office of the Jefferson District Public Defender in September, 1981. Rob's decision to relocate in Louisville was a surprise to many people, but his success at his work and his dedication to his clients surprises no one.

Rob is well-known not only for his knowledge of the law but also for his aggressive style of advocacy. When Rob is assigned to a case, he approaches it with such intensity and commitment to his client that it is difficult not to believe in the absolute innocence of the defendant regardless of the facts. Such dedication and persistence have earned him the nick-name "Bulldog". During his time with the Jefferson District Public Defender, Rob has served in the juvenile division and has also represented clients facing involuntary hospitalization before being appointed to his present position in the adult division. Rob's cases have involved an unusual cast of characters including an award-winning Rod Stewart impersonator, "the alligator and the shark" client, "the plunger", and the client who suffered "every man's nightmare" - waking up and finding himself in a high-speed chase and shoot-out with the police on the expressway. One of Rob's more celebrated cases was the "cheese line" case in which Rob's client was accused of drunkenly driving into a line of people waiting for the distribution of government cheese, injuring several and killing one. Rob's successful defense in this case was a surprise to the public but no surprise to those who witnessed his efforts on behalf of his client.

By virtue of his prior success, Rob has become invaluable in the training of new public defenders. Rob is willing to work with a new lawyer whether it be providing tips on trial strategy or offering advice on how to dress for success in the courtroom. Rob's organizational skills and interest in travel, geography and world affairs are reflected in his office decor which features a large globe, a detailed map of the world, a relief map of death valley, and a glow-in-the-dark map of the universe. Rob feels it is important to be comfortable in his office since he spends well over 60 hours a week at his job.

When Rob is not working, he leads an active life and involves his colleagues in social activities as much as possible. Rob is married to Nancy Sparrow, also an attorney. Music and dancing are high on Rob's list of enjoyable extracurriculars.

(See Eggert, p. 56)

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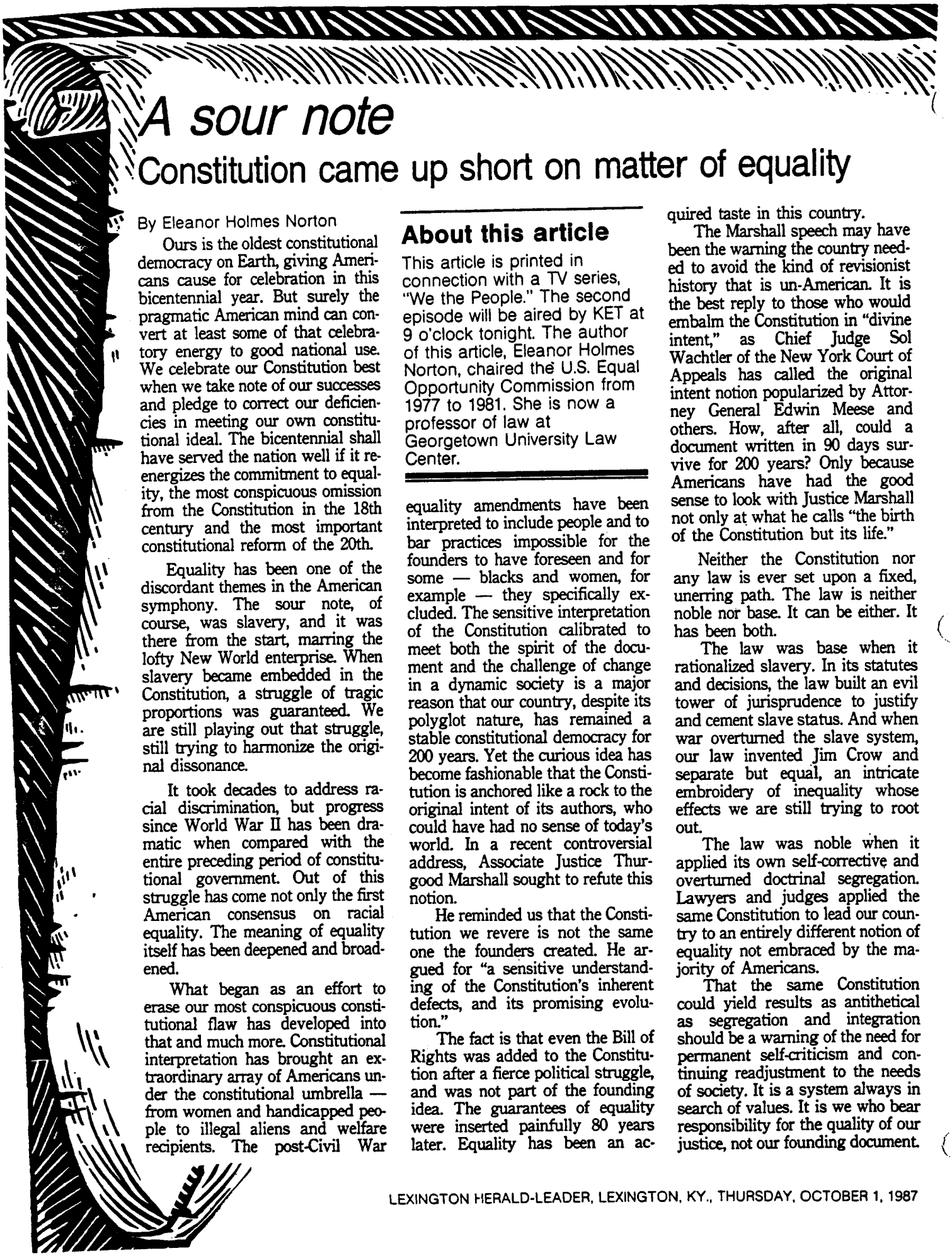


A sour note

Constitution came up short on matter of equality

By Eleanor Holmes Norton

Ours is the oldest constitutional democracy on Earth, giving Americans cause for celebration in this bicentennial year. But surely the pragmatic American mind can convert at least some of that celebratory energy to good national use. We celebrate our Constitution best when we take note of our successes and pledge to correct our deficiencies in meeting our own constitutional ideal. The bicentennial shall have served the nation well if it re-energizes the commitment to equality, the most conspicuous omission from the Constitution in the 18th century and the most important constitutional reform of the 20th.

Equality has been one of the discordant themes in the American symphony. The sour note, of course, was slavery, and it was there from the start, marring the lofty New World enterprise. When slavery became embedded in the Constitution, a struggle of tragic proportions was guaranteed. We are still playing out that struggle, still trying to harmonize the original dissonance.

It took decades to address racial discrimination, but progress since World War II has been dramatic when compared with the entire preceding period of constitutional government. Out of this struggle has come not only the first American consensus on racial equality. The meaning of equality itself has been deepened and broadened.

What began as an effort to erase our most conspicuous constitutional flaw has developed into that and much more. Constitutional interpretation has brought an extraordinary array of Americans under the constitutional umbrella — from women and handicapped people to illegal aliens and welfare recipients. The post-Civil War equality amendments have been interpreted to include people and to bar practices impossible for the founders to have foreseen and for some — blacks and women, for example — they specifically excluded. The sensitive interpretation of the Constitution calibrated to meet both the spirit of the document and the challenge of change in a dynamic society is a major reason that our country, despite its polyglot nature, has remained a stable constitutional democracy for 200 years. Yet the curious idea has become fashionable that the Constitution is anchored like a rock to the original intent of its authors, who could have had no sense of today's world. In a recent controversial address, Associate Justice Thurgood Marshall sought to refute this notion.

He reminded us that the Constitution we revere is not the same one the founders created. He argued for "a sensitive understanding of the Constitution's inherent defects, and its promising evolution."

The fact is that even the Bill of Rights was added to the Constitution after a fierce political struggle, and was not part of the founding idea. The guarantees of equality were inserted painfully 80 years later. Equality has been an acquired taste in this country.

The Marshall speech may have been the warning the country needed to avoid the kind of revisionist history that is un-American. It is the best reply to those who would embalm the Constitution in "divine intent," as Chief Judge Sol Wachtler of the New York Court of Appeals has called the original intent notion popularized by Attorney General Edwin Meese and others. How, after all, could a document written in 90 days survive for 200 years? Only because Americans have had the good sense to look with Justice Marshall not only at what he calls "the birth of the Constitution but its life."

Neither the Constitution nor any law is ever set upon a fixed, unerring path. The law is neither noble nor base. It can be either. It has been both.

The law was base when it rationalized slavery. In its statutes and decisions, the law built an evil tower of jurisprudence to justify and cement slave status. And when war overturned the slave system, our law invented Jim Crow and separate but equal, an intricate embroidery of inequality whose effects we are still trying to root out.

The law was noble when it applied its own self-corrective and overturned doctrinal segregation. Lawyers and judges applied the same Constitution to lead our country to an entirely different notion of equality not embraced by the majority of Americans.

That the same Constitution could yield results as antithetical as segregation and integration should be a warning of the need for permanent self-criticism and continuing readjustment to the needs of society. It is a system always in search of values. It is we who bear responsibility for the quality of our justice, not our founding document.

About this article

This article is printed in connection with a TV series, "We the People." The second episode will be aired by KET at 9 o'clock tonight. The author of this article, Eleanor Holmes Norton, chaired the U.S. Equal Opportunity Commission from 1977 to 1981. She is now a professor of law at Georgetown University Law Center.

LEXINGTON HERALD-LEADER, LEXINGTON, KY., THURSDAY, OCTOBER 1, 1987

Art Behind Bars

An unusual art exhibit, entitled "Art Behind Bars," was held September 2-26, 1986, at the Old Capitol Building in Frankfort. Sponsored jointly by the Kentucky Historical Society, the Kentucky Humanities Council, and the Kentucky Corrections Cabinet, the exhibit featured arts and crafts created by inmates from every major correctional facility in Kentucky. In conjunction with the exhibit a panel discussion of prison arts and crafts activities was presented on Sunday, September 7; panel members included moderator Bob Komer, Recreation Director at Kentucky State Reformatory; Dr. Bill Booth, Art Professor, Morehead State University; Ellsworth Taylor, Art Director, Kentucky Educational Television; Don Webb, artist and former inmate of Kentucky State Reformatory; and the writer of this article. Not only did the exhibit and panel discussion represent the first official public recognition of Kentucky inmates' arts and crafts, but they also revealed several important considerations concerning prison arts and crafts activities of interest to those involved with Kentucky prisoners.

Most Kentucky Correctional Institutions provide some sort of formal art/crafts program, the most extensive being at Kentucky State Reformatory (KSR) under the direction (as are all such programs) of the Recreation Supervisor. Such formal programs are usually popular, and often maintain a continual waiting list of inmates who want to participate but must wait for a vacancy, as safety concerns and limited space and facilities will permit only a limited number of inmates to work in the art/crafts area. These programs provide material and equipment otherwise unavailable to inmates. For example, at KSR inmates are allowed to buy wood (with their own funds) from a nearby lumber yard, which delivers orders on a regular schedule. There is no other way inmates can obtain wood of sufficient size, quality, and quantity to use in the creation of art and/or crafts objects. In addition, the KSR art/crafts room has a number of power tools, hand tools, nails, glue, and some paint and other finishing substances available to the men.

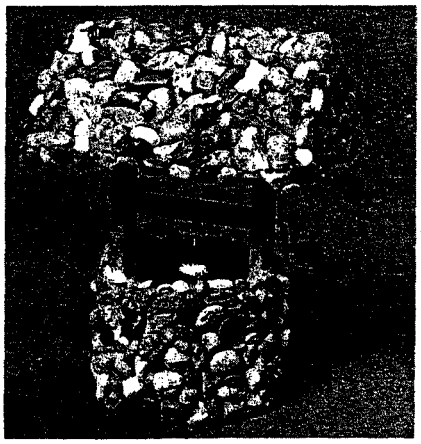
As in all the State's prisons, most inmates usually make their art/craft objects to send home as gifts; however, a considerable number of objects are sold to other inmates who either have no artistic/craft talents, or have no time or inclination to create something themselves, but who, nonetheless, wish to send to their families or friends a handmade, often beautiful, art or craft object. At KSR the objects are often picked up by family or friends from the visitor's room, which nearly always has 50-75 objects on display either waiting to be picked up, or offered for sale to anyone who wishes to buy them; if an inmate sells an art/craft object from the visitor's room, 15% (this percentage differs in other institutions that have similar programs) of the selling price goes back into the art/crafts program to help maintain equipment, purchase supplies, etc; the remainder, 85% of the selling price, is put on the inmate's account.

The objects created, especially in such formal programs as that at KSR, tend to be somewhat redundant. For example, paintings often reflect similar motifs or subject matter, such as unicorns or Pegasus (or a combination thereof); wild animals; monsters of all sorts, such as depicted in science fiction comics or movies; cars, and particularly motorcycles and "biker" motifs (see cover photo); some nature scenes and/or landscapes; and finally, a large category, portraits of family, friends, relatives, lovers, etc.

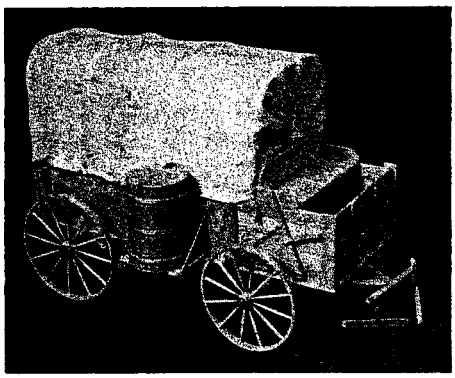
Much of the fine art at KSR tends to be of relatively high quality--probably because Bob Komer, the Recreation Director, holds a master's degree in art and has instructed several of the inmates, helping them to perfect their artistic expertise; some of those inmates have, in turn, aided other inmates with their artistic efforts. Often one inmate will perfect his expertise in one or more categories or styles until he becomes recognized as the "best." Usually he will then have more orders for work than he has time or

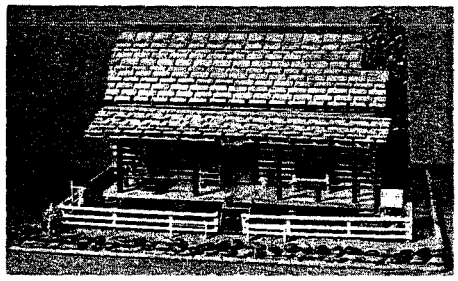
materials to complete before his customers' various deadlines.

A similar situation exists concerning craft objects created in the institution's formal program. An inmate who can make, say, clocks better than anyone else will likely receive more requests to make clocks for other inmates' families, friends, etc. than he can possibly accommodate. Too, like the fine artists, inmate-craftsmen in the formal program tend to create objects in the same categories. At KSR, for instance, common categories of crafts include, but are not limited to: clocks (of wood, and often rocks and pebbles); wishing wells (sometimes as a jewelry box) (see photo #2); jewelry boxes;

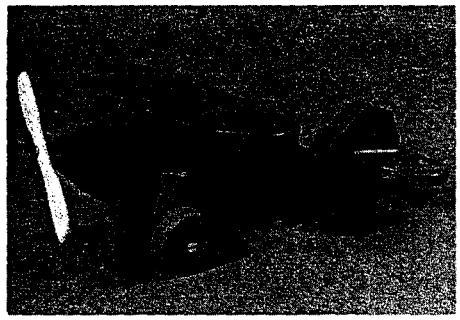


miniature fireplaces (also sometimes as a jewelry box); miniature stagecoaches and covered wagons (see photo #3); miniature churches and houses (some to actual scale) (see photo #4); wall hangings, such





as large wooden butterflies; miniature ships, cars, and motorcycles; cassette tape holders; wooden name plates for desks; and toys. At Christmas, toys for disadvantaged children are frequently built in large numbers by most of the inmates in the formal art/crafts program; small wooden cars and airplanes, or dolls are favorite items (see photo #5).



However, as earlier indicated, not all of the State's correctional facilities have the extensive formal art/crafts program found at KSR. Only ceramic programs are available at both Luther Luckett Correctional Complex (LLCC) and the Kentucky Correctional Institution for Women (KCIW), and while the KCIW program is rather elaborate, the LLCC program is quite limited in scope; too, only a few inmates at each of these institutions participate in the formal activities. Creating ceramics does not seem to be nearly as popular, especially among male inmates, as woodworking and fine art. Because it is a relatively new facility, Northpoint Training Center (NTC) has an even more limited formal art/crafts program, providing inmates the opportunity to construct only model airplanes, etc. from kits; and, again, few inmates participate in that activity.

Because it is a maximum security prison, the Kentucky State Penitentiary (KSP) must maintain more rigorous control over all inmate activities, so while there is no formal art/crafts program per se, there is a leather shop where a few (a very few) inmates tool beautiful leather goods. A number of years ago, KSP's leather shop was operated entirely by inmates, who were allowed to keep most of the proceeds from the sale of their leather goods; but today the State operates the leather shop much like any other prison industry, and inmates merely fill orders received by the state, for which they are paid the prevailing "state pay." A small building directly in front of KSP is used exclusively to house and display the various leather objects, and it is manned by a "trusty" who takes orders from visitors and/or sells leather goods on display. The only formal art/crafts program approaching KSR's is found at Blackburn Correctional Complex (BCC), a minimum security facility near Lexington. Arts and crafts are created there in the same varieties and media as at KSR, but because BCC is small and space is limited and because there are fewer staff, a much smaller inmate population, and is less equipment, the number of art/crafts objects produced are necessarily smaller than at KSR.

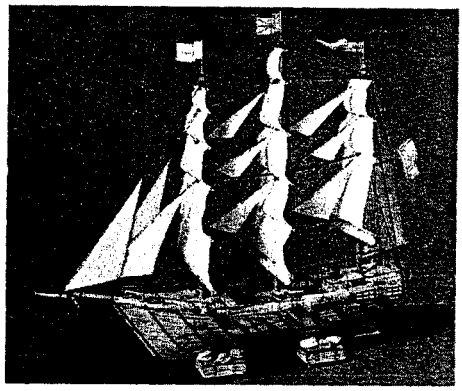
While the formal arts/crafts programs range from extensive and innovative to practically nonexistent, the informal creative activities of inmates in Kentucky's prisons are widespread, prolific,

and varied, and exhibit ingenuity, beauty, and remarkable talent. Not only are these informal activities often more interesting than the formal art/crafts programs--they usually utilize more varied media and technique--but I believe they also reveal more about inmates, from various perspectives.

The tradition of informal inmate art and crafts in prisons is perhaps known throughout prison populations the world over and has probably existed for as long as humans have been incarcerating one another. For example, many art/craft objects made by prisoners-of-war are still extant and/or remembered by former prisoners or guards; but while prisoner-of-war situations have been sufficiently documented so that the public is familiar with that tradition, scarcely anyone not connected in some way with our penal system is familiar with convict art/crafts. (I hope that my forthcoming book, based on four years research, primarily in Kentucky prisons, will remedy that situation.)

Inmates are confronted with an array of difficulties in creating their various informal arts and crafts--space, materials, and tools and implements are all in short supply, and legal prohibitions concerning some type of art/craft activities often exist. The only things not in short supply are creativity and time; in fact, most inmates have such an abundance of time on their hands that they frequently refer to their informal art/crafts activities as "just killin' time," a view I consider highly ironic, as many of their art/crafts creations are indeed beautiful, innovative, and functional.

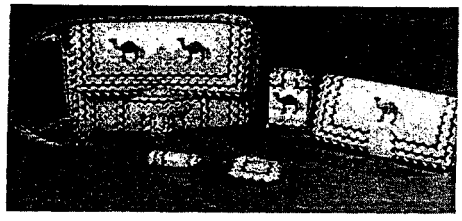
Inmates' efforts to overcome the many obstacles to their art and craft activities are nothing short of ingenious. For example, excellent paintings are often accomplished with ball point pens, color pencils, or pastels, as oils are usually not permitted because of institutional prohibitions of first hazardous materials, and because they are toxic. Also toxic and consequently prohibited are most glues, and those that are allowed usually will not stick to surfaces such as plastic or metal; too, the



available nontoxic glues are vulnerable to water and humidity, so some objects, for instance functional model boats, cannot be made. In all of the prisons fire safety is an abiding concern, so inmates are not permitted to have flammable materials, such as wood shavings, etc., in their cells. Consequently inmates create a great number of objects from toothpicks and Popsicle sticks, both of which they are permitted to have in limited numbers in most prisons. Toothpicks can be purchased by the box at most prison inmate canteens, but Popsicle sticks must be ordered from outside or provided by the institution's recreation program, if there is one. On death row at KSP, for instance, prohibitions and restrictions are quite stringent concerning what materials death row inmates may have; they, therefore, usually make more objects from toothpicks than do inmates with different custody status. (See, for example, photo #6 of an astounding and delicately accurate model ship made from toothpicks by a death row inmate which won first prize in its category during the "Art Behind Bars" exhibit at Frankfort.)

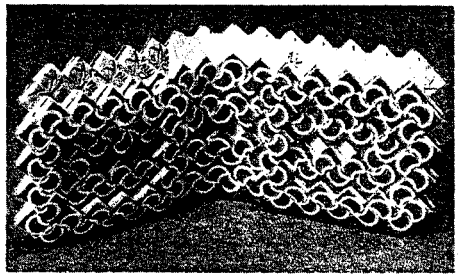
Especially at the prisons where recreation programs are limited, but in general at all prisons, wood is at a premium. Consequently, inmates are seen constantly foraging not only for scraps of wood, but also for cloth, metal, plastic, etc. throughout the prisons. They recycle everything; nothing is wasted; indeed, in that respect inmates are good environmentalists, and most prison yards are perpetually scavenged clean. Inmates display great ingenuity in transforming these salvaged, found, thrown-away materials into useful, functional, even aesthetically pleasing and beautiful objects

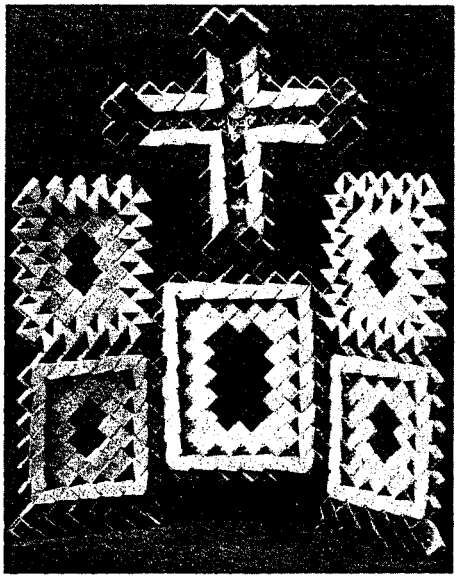
Perhaps the most widespread, and the most traditional, of informal prison art/crafts are the various objects--nearly all functional and aesthetically beautiful--made from discarded cigarette packs. Using a process of paper folding probably derived from the similar Japanese tradition called Origami, inmates cut out the most decorative designs found on cigarette packs, then fold the cut parts together so that they form a new pattern, and then fold and sew these together to create various useful objects, the most typical being ladies' purses or purse sets. The purse set in photo #7 required over 880 cigarette packs and 150 hours to create, and a replica of it was purchased by the R. J. Reynolds Tobacco Co. museum for $500.00.

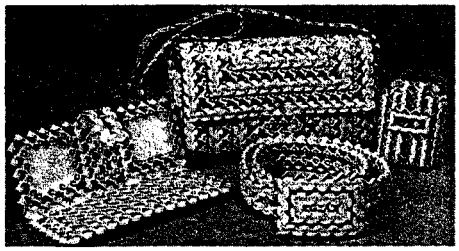


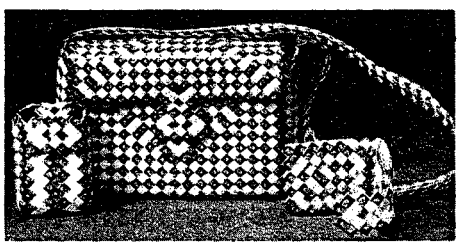
Other frequently seen cigarette wrapper objects are picture frames and men's billfolds and belts (see photos #8-12), but nearly any sort of object could be made given sufficient cigarette packs, time, patience, and ingenious creativity on the inmate's part. Because they require so many packs, long hours, etc. to create, cigarette wrapper objects usually command relatively high "yard" prices, and their makers are keenly aware that potential buyers appreciate the value of such objects and thus will accept the price their makers have to charge. However, although the purse set purchased by Reynolds has become nearly a legendary sale among all inmates--<u>everybody</u> in Kentucky's prisons has heard about it--the $500.00 Reynolds paid is exorbitant; usually such a set will sell for $60-$100 on the yard; and one may buy a single lady's purse for $20-$50, depending upon the ingenuity exhibited in creating its design, the expertise with which it was put together, and the kind of cigarette packs used.

Both the inmates who make cigarette wrapper objects, and those who buy them, insist that Camel packs make the most attractive objects. Consequently the majority of inmates who smoke prefer Camels, for they can easily sell a supply of empty Camel packs to a cigarette wrapper artist/craftsman, usually for 1 cent per pack. Because they are in such demand cigarette packs are never seen lying on the yard; indeed, I have seen three men almost dive for a discarded Camel pack. A similar, though not as pronounced, motivation leads inmates to scour the yard constantly for <u>any</u> object having a potential art/craft utility, but nearly everyone watches for Camel packs, if not for themselves, then to sell or give to a cigarette wrapper artist/craftsman inmate or buddy.

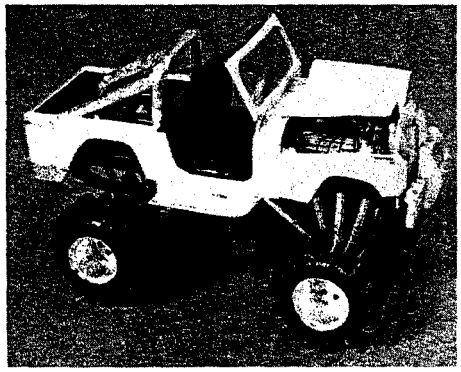








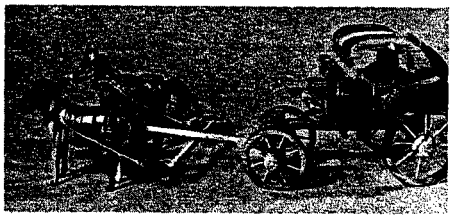
Brands other than Camel can be used, such as Kool, Pall Mall, and Marlboro (listed in makers' preferential order), and I have seen the art done using other types of paper, <u>e.g.</u>, newspaper, construction paper,); in fact, objects are often made by cutting specific body parts (<u>e.g.</u> breasts, buttocks, genitals) out of so-called men's magazines and creating a pornographic display for the cover of a photo album, or a desktop pad, for example. These pornographic objects are usually not sold, rather are made for personal, private use by their makers.



Other popular objects among the traditional informal prison art/crafts are models of vehicles of all sorts: cars, trucks, jeeps, and especially motorcycles. These are also crafted primarily from a variety of found, scavenged, or thrown-away materials, though wood and cardboard are preferred. However, perhaps the finest, most intricate, most beautiful examples of model vehicles I have ever seen were cars (a VW and a 1957 Chevy), a jeep (see photo #13), and two scale model motorcycles, all constructed entirely from Styrofoam cups! While in a county jail awaiting transfer to KSR, the maker of these objects got the idea to cut and shape his and his fellow prisoners' used Styrofoam cups which they were given at meals. By the time he was released from KSR several years later he had perfect-

ed his Styrofoam cup art, and his creations won the admiration of all who saw them; everyone, including guards and other prison officials (and I) wanted them. He could not obtain sufficient quantity of used Styrofoam cups to make enough objects to satisfy the demand so I brought him some during visits. While he was at KSR he helped others learn how to make Styrofoam objects (such sharing of knowledge and skill is usually a common practice among inmates who make any prison art/crafts) and the Styrofoam cup medium is now becoming an established tradition. Still, it is a new and nearly unique medium, and wood remains the most widespread traditional medium.

Wood is used to make all sorts of objects in both the formal and informal art/crafts activities, but perhaps the most unusual uses of



wood I have seen concerned jewelry. I know an inmate at KSR who is particularly versatile--he can work in nearly any medium and create nearly anything, varying from fine art to furniture--and talented--every one of his objects is exquisite; for example, see photo #14 of his horse and buggy, a winner in its class at the Frankfort exhibit. He hand-carved a series of various miniature designs from bits and scraps of wood found around the prison and then fastened them together with bent paper clips to make necklaces (see photo #15).

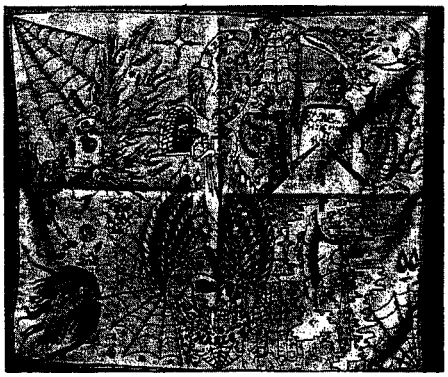
Most inmates like jewelry; thus it is not surprising that some enterprising artist/craftsmen devise methods for supplying the demand. For example, on the yard one day an intelligent, ingenious inmate at Eddyville found a small piece of plastic from a broken plastic drinking glass; it was a pretty color and he liked the way it refracted sunlight. In turning it in his hand and admiring it, he got the idea to heat the plastic with a match so that it would become sufficiently pliable to shape into a piece of jewelry. From that beginning several years ago he has made literally hundreds, perhaps thousands, of pieces of plastic "jewelry." He strings them together with leather, metal (usually bent paper clips), string, etc. He uses plastic spoons, cups, etc. of various colors, and sometimes melds two or more colors together. He has constant problems in obtaining enough varied plastic and sufficient matches--dozens of books are required to make just one necklace. He shapes the hot melting plastic with his bare fingers (which have become slick and apparently impervious to the heat and pain) into the desired shapes, which often resemble jewelry or shells of exotic cultures. Over the years he has learned how to allow the carbon smoke from the burning match and plastic to become incorporated into the melting colored plastic so that it makes a design. He also uses white plastic to make small pieces

that startlingly resemble small human bones. These have proven to be especially popular, perhaps because many inmates seemingly prefer what society would consider exotic, primitive, or otherwise esoteric designs, styles, and motifs in their art/crafts.

Two other KSR inmates collaborated to make a unique, and some would say grotesque, sort of jewelry. First they had to obtain "materials"; they crawled up into the open rafter-beam roof area of a large building on the prison grounds and, using brooms or sections of pipe, killed the pigeons that roosted there. Parts of the pigeons--usually the feet or claws--were cut off and fashioned into earrings and necklaces; also, a back scratcher was made by attaching a pigeon's claw to a long piece of wood.

Inmates' preferences for what most other people would call the unusual, the esoteric, the bizarre or even shocking and grotesque in their art is perhaps best seen in prison tattoos. Compared to the free population an extraordinarily high percentage of inmates have (and do) tattoos. For many, tattoos constitute a badge of identification, marking them literally as outside the normal strata of social respectability (what one inmate calls the society of the "white collars") to which most have no access. Not only does the fact that they have tattoos so mark them but the sort of tattoo they prefer serves to embellish, emphasize, and advertise their separateness, their different way of life, their esoteric world view. Common tattoo motifs include: skulls (the most frequently seen); the grim reaper; dragons and serpents and a whole array of other fantastic, mythical

beasts; women; Nazi emblems; guns and knives; names, and motorcycle emblems and depictions (the second most frequent category). (See photo #16 for examples.) Such



tattoos are intended to invoke the well-known traditions and aura of the motorcycle gang, whose members' life style is emulated (including all the above tattoos) in an effort to capture some of the gang's macho identification. While there are a comparatively small number of motorcycle gang members and other bikers in prisons, there are a great many more "'wanna' be's" and others who try to assume the biker's role and image as a defensive posture to ward off possible rape or other affronts. All of that notwithstanding, prison tattoos constitute perhaps the most traditional, the most elaborate, and the most prolific of prison informal art forms, and indeed the most aesthetic, for many tattoos are absolutely exquisite works of art.

However, tattooing in most United States' prisons is not merely prohibited, it is illegal (the one exception is California which, I understand, allows tattooing in a rigidly controlled, sterilized environment). Tattooing is viewed as a potential health hazard (hepatitis occurs regularly from unsanitary conditions and unsterilized needles), and now that AIDS is a serious threat in prisons, the crack-down on tattooing has become increasingly rigorous. Strangely, though, most inmates I have interviewed seem unconcerned about either hepatitis or AIDS; they continue to tattoo and be tattooed, even though to do so poses many difficulties. After selecting a site that is as obscure as possible, tattooers then must recruit other inmates to serve as lookouts for guards. Most tattoers use patterns drawn by other inmates who have artistic ability and who charge for their art (and are paid either in cigarettes or by receiving tattoos themselves); the patterns are put on carbon or ditto paper, both of which are also prohibited and therefore must either be smuggled in or stolen from prison supplies.

Previously, inmates used a needle or pin (straight or safety) to "pick" the tattoo into the skin, but now an ingenious "gun" is used. Several years ago, as the story goes, an inmate at Eddyville invented a tattoo "gun," and today his invention has become traditional--apparently every prison tattooer knows how to make such a tattoo gun, and most have them, at least until they are discovered and confiscated by guards. The "gun" is made from a cassette tape recorder motor, Bic pen parts, a tooth brush, electrician's tape, and a guitar string; the wires from the recorder motor are attached to a radio or other appliance and the motor turns and moves the guitar string through the Bic pen sleeve, which is taped onto the bent toothbrush for stability, and the "gun" is ready to tattoo. Ink is also difficult to obtain, and when India ink or tattoo ink cannot be smuggled in, tattooers use any ink substitute they can obtain, which often produces additional problems; for example, acrylic paints are sometimes used, and with the summer heat and humidity the acrylic under the skin tends to swell, creating a sometimes painful and obviously distorted skin condition around the tattoo.

I could describe numerous other examples of inmates' ingenious and novel endeavors to overcome difficulties and prohibitions in order to create their art/crafts, but space here is limited, so two further examples will serve to illustrate the general situation. For apparent reasons inmates are not permitted to have sandpaper. So, several inmates decided to create their own sandpaper. They simply collected gravel from the prison yard, sifted it through screen wire to its smallest consistency, and poured it on heavily glued paper; it worked, and with it they were able to achieve a finer finish on their wooden craft objects.

Also, inmates are not allowed knives--again, for obvious reasons. So, most informal woodwork art/craft is accomplished with razor blades (also, technically, an illegal application), or, for small wooden objects, a fingernail clipper. Because each institution strictly rations razor blades, the inmate artist/craftsman must either buy the numerous blades required or persuade other inmates to give him their used institutional blades. Fingernail clippers are available at the canteen but, like other canteen objects, are relatively expensive--at least for the typical inmate artist/craftsman; too, clippers do not last very long, hence are economically prohibitive for the prolific, but poor, inmate artist/craftsman.

Considering the difficulties inmates face in creating informal

prison art and crafts, the question arises: why do they do it? Certainly, the economic motivation for prison art and crafts cannot be denied, indeed it is sometimes paramount. Many inmates are alone, as often family and friends will disown and abandon them once they are incarcerated. Thus many have no source of outside financial support, and "state pay" is not sufficient even to keep an inmate in cigarettes and coffee; hence, they call upon their art/craft skills as a means to make enough money to buy cigarettes and coffee, and other items from the canteen, or items they might want to order from a store "on the streets" (T.V., radio, clothing, etc.). Too, those inmates who have no artistic ability, and no access to stores outside the prison, make eager customers for other inmate art and crafts, which they buy to send to family and friends for birthdays, Christmas, and other occasions.

Functioning in tandem with the economic motivation, however, is perhaps the equally important psychological benefit of ego-enhancement. Many prisoners have abysmally low self-esteem. They often tend to view themselves as they believe the majority of society views them as social rejects, worthless beings who have been discarded in society's human dumping ground--the prisons. So, when an inmate creates art and/or crafts that are often indeed aesthetically pleasing, even beautiful, and is praised for his creations not only by other inmates but also by guards and other prison officials, and particularly by his own and others' families and friends on the outside, then his image of himself is enhanced and improved immensely. Moreover, if the art/craft object is not only aesthetically pleasing but functional as well (purses, billfolds, picture frames, jewelry boxes, etc.) then its maker is also seen as a provider of useful objects, a contributor to society and its needs. To a large degree the making of art/craft objects by inmates can be seen as a therapeutic activity. If the inmate transforms society's thrown-away objects into ingenious, functional, even beautiful objects, then I believe in the process he, as society's thrown-away "object," is transforming himself and by so doing is pronouncing that while on the surface, like the material with which he works, he may too appear to be worthless, but like his created objects he may surprisingly still be socially productive, useful, and functional, and indeed perhaps even beautiful in some way.

In sum, I believe prisons would do well to look more closely at inmate art/craft activities and to seek to find ways to encourage and foster such activity by providing more institutional support, creating fewer restrictions, and generally recognizing the value of such activity.

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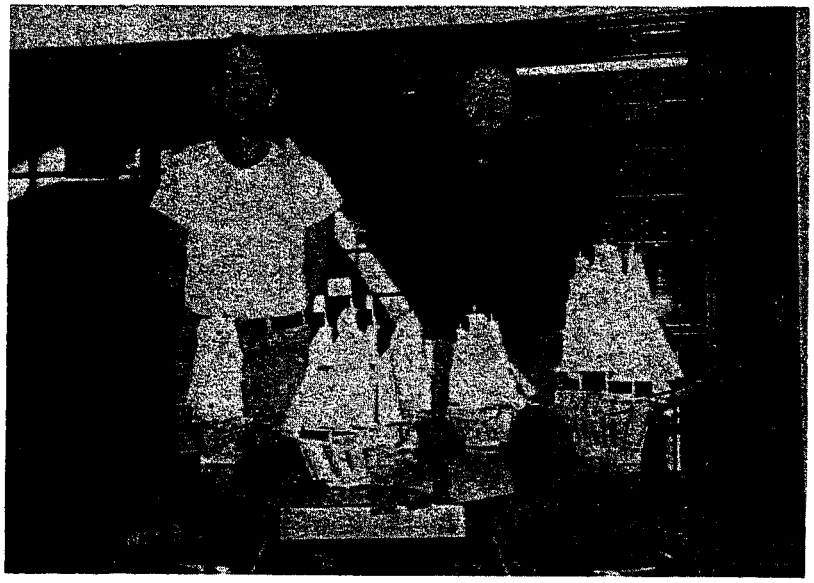

In this photo, Pat Sanborn (L) and Mitchell Willoughby (R) appear with their prize winning ships. The prize winning ship also appears in photo Number 6.

Upcoming Legislation

Fred Cowan

The interim joint committee on judiciary-criminal and the subcommittee on selected criminal matters addressed a number of criminal justice issues. The major topic before the joint committee was the Unified Juvenile Code. The subcommittee concentrated on prison and jail overcrowding and related issues.

The Unified Juvenile Code enacted by the 1986 legislature is a comprehensive and detailed piece of legislation. It has had a widespread impact on a number of public and private organizations. The interim joint committee heard testimony from representatives of a number of agencies and constituencies affected by the code. The major problems identified in the implementation of the code were:

1) the restrictive conditions for transfer of a child to circuit court as a youthful offender;

2) the absence of court designated workers in some counties;

3) the "separate facility" requirement for juvenile detention which placed a burden or counties without separate facilities for juveniles; and

4) the emphasis on the use of approved detention facilities when only six exist.

State-run jails? Yes, and soon

An Arkansas sheriff, fed up with having his jail overcrowded by prisoners awaiting transfer to state custody, took 50 of those inmates to a state prison Monday and left them chained outside to trees. No doubt, Kentucky county officials can empathize with Pulaski County (Ark.) Sheriff Carroll Gravett.

A similar sense of frustration over jail conditions led Kentucky's county judge-executives last week to send the General Assembly a politically explosive proposal that the state take over operation of county jails in this state.

Legislators probably won't greet the suggestion with much enthusiasm, for a variety of reasons. One is the extra state expense involved. Another is that a necessary facet of state-maintained jails should be the elimination of elective county jailers by constitutional amendment, and that would produce a real political dogfight.

Still, a state takeover is desirable. At the time of the judge-executives' vote last week, 20 substandard county jails had been closed and 13 more had been downgraded to temporary lock-ups.

Some of the jails that are in operation are overcrowded, largely because 1,100 state prisoners are housed in them as one means of reducing prison overcrowding. Other jails have become notorious for the ease with which prisoners walk away from them.

What is needed is a single, well-managed corrections system (including prisons, regional jails and local lock-ups) staffed by professionals and maintained with adequate support from the legislature. That means a lot more money than the General Assembly has been willing to spend on prisons and jails in the past. It also means an end to elective jailers.

Making these decisions is going to take some political courage on the part of legislators. But the longer they ignore the situation, the more intolerable it is going to get — and the more difficult and costly it will be to correct.

Besides, if legislators don't act, some Kentucky jailer might get just as fed up as the Arkansas sheriff. If the jailer understands the reality of Kentucky's situation, he won't vent his anger on the state's prisons. By and large, the Corrections Cabinet is doing the best it can with what the legislature has given it.

But an enterprising jailer might decide state legislators need their own personal prison trusties in the front yard. About eight per legislator would just about solve the jails' overcrowding problem.

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In response to concerns over the juvenile code, Senator Moloney coordinated the effort of representation from a number of organizations involved in the implementation and operation of the juvenile code. This effort has resulted in 100+ proposed revisions to the juvenile code. Many of these changes are minor technical changes to enhance the clarity and consistency of provisions of the code. Among the major revisions are:

1) the specification of a category of detention facilities for juveniles - "juvenile hold facility" - which permit

the holding of juveniles in an entirely separate portion or wing of a jail containing adult prisoners. For juveniles to be held in a facility which also holds adults, access from the adult to the juvenile section must not be possible and the facility must be staffed by sufficient numbers of certified staff to provide 24 hour a day supervision.

2) the provisions for transfer of a juvenile as a youthful offender to circuit court have been altered to expand the discretion of county attorneys and judges in these proceedings. If a juvenile is alleged to be a youthful offender the County Attorney is given the discretion to move the child be tried as an adult. If the court determines probable cause exists, the court considers a number of factors related to type and severity of the offense as well as public safety and likelihood of reasonable rehabilitation prior to a determination of whether the case will be transferred.

Representative Morris, in response to the situation which arose in Hopkinsville, brought to the attention of the committee a bill which proposed similar visions relating to the detention of juveniles and the transfer of youthful offenders.

The subcommittee on selected criminal matters heard lengthy testimony on overcrowding in prisons and jails. Much of this testimony concentrated on the causes and consequences of overcrowding. The general theme of much of this testimony was that despite the existence of a number of diversionary programs: intensive supervision, intensive probation, home incarceration for misdemeanants, restitution, early release, and others, the jail and prison populations continue to grow. Secretary of Corrections, George Wilson, identified public attitudes and legislation in response to public sentiment as the primary causes rather than an increase in crime or changes in demographic factors. Secretary Wilson identified legislation relating to persistent felony offenders; prohibiting probation for certain classes of offenders such as those who use firearms and child molesters; the creation of new crimes; and the passage of violent offender legislation as contributing to overcrowding.

The conditions of confinement lawsuit filed by prisoners at the Kentucky State Penitentiary and Kentucky State Reformatory which resulted in a federal consent decree has also exacerbated overcrowding. The consent decree called for an improvement of conditions in these two facilities through a reduction in the operational capacity of the State Reformatory and alterations at the State Penitentiary such as conversion from double or larger capacity cells to single cells. These requirements of the consent decree reduced available bed space in the state system. The state has spent $250 million dollars on these two facilities, opened two additional facilities and approved the construction of a new $43 million 500 bed institution. These increases in system capacity have not been adequate and there are currently 1,300 state prisoners housed in county jails awaiting transfer to state facilities.

While a number of factors operated to create a deficit of state institutional bed space, similar factors were functioning to create additional pressures on jail space. The creation of new misdemeanor offenses, the "slammer bill" requiring the incarceration of drunk drives, litigation filed by prisoners in county jails challenging the conditions of confinement, court ordered remodelling and population caps at some jails, the passage of state jail standards and the resultant remodelling of many jails and the closing of jails in approximately 20 counties have greatly compounded and complicated the overcrowded problem.

The overcrowding in state and county facilities has created an interesting set of circumstances. The operational imperatives of the Corrections Cabinet call for the expedient transfer of convicted felons from county jails to state facilities while simultaneously requiring that population capacities be met. This results in a backlog of convicted felons in county jails. These same operational functions require the Cabinet to ensure adherence to state jail standards which has resulted in a reduction of available jail beds through jail closures. Simultaneously, the General Assembly has been compelled to alter parole statutes to permit the parole of convicted felons directly from county jails. This measure was necessary because the unavailability of bed space in state facilities resulted in stays in county jails awaiting transfer that were so lengthy that felons were eligible for parole consideration before they could be admitted to a state facility. Secretary Wilson views this as a "no-win" situation which requires a re-evaluation of the goals of incarceration and who should be incarcerated. He argued that prison space is a valuable commodity costing $50,000 per bed to build and up to $20,000 per

inmate per year to fill. Consequently, if an individual is incarcerated for 20 years we are occupying a $50,000 cell at a maximum cost of $400,000 for the total duration of confinement. Secretary Wilson also stated that we could not "build our way out of the situation", instead, a reanalysis of available strategies is necessary.

In reaction to the population pressures created for county jails and the increasing costs of maintaining these jails, the subcommittee also heard discussions of a state-run jail system. Testimony on this issue centered around the budgetary problems some counties are facing in attempting to maintain jails that meet state and federal standards. The presentations on this issue suggested that it is a complex problem which will require careful review and deliberation.

The issues considered by the interim joint committee and subcommittee attest to the complex and critical nature of these criminal justice issues in Kentucky. During the upcoming session of the General Assembly a number of these issues will be addressed in greater detail as the state grapples with the need to meet the demands for public safety and punishment within a system that is already overcrowded and placing extreme burdens on state and county government operations.

Hon. Fred Cowan
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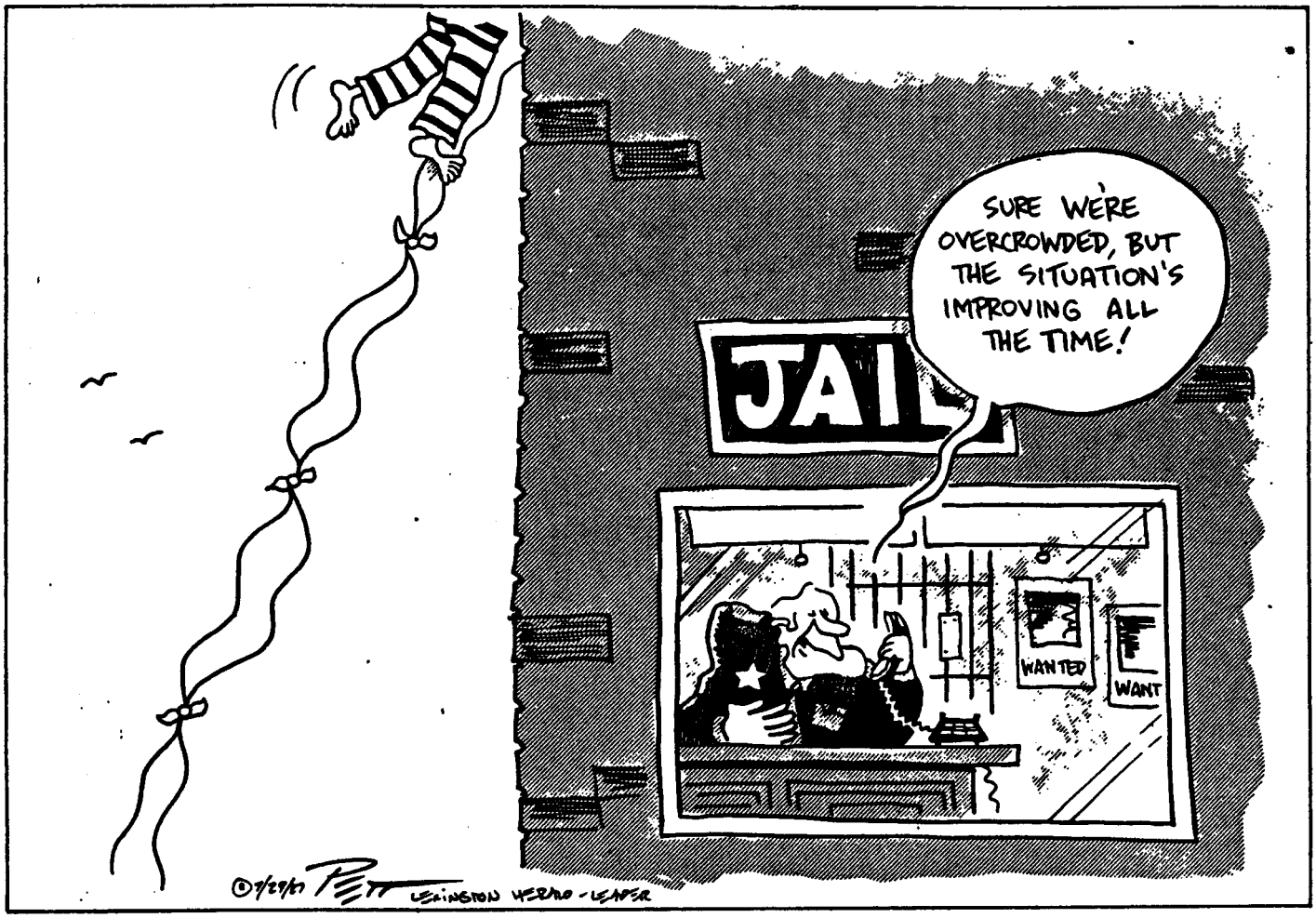
State Representative Fred Cowan, 41, has represented the eastern Louisville district since 1982, when he defeated veteran Republican Bruce Blythe. His current term, his third, would have expired in 1988.



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Bill Straub Kentucky-Post, Reprinted with Permission.

Why the juvenile code is under fire

FRANKFORT — For some reason, the Unified Juvenile Code which finally became law on July 1 is being used as a whipping boy by just about everyone who has a half-baked notion about Kentucky's system of justice.

Keep in mind that the guts of the code, championed by state Sen. Mike Moloney, D-Lexington, have only been around for about seven years and have undergone more scrutiny than Ollie North's bank account. Now that it's here, a sizeable number of breast-beaters are wailing that it's sure to end civilization as we know it.

What a bunch of malarkey. Foes have seized on some of the acknowledged shortcomings in the code to issue an indictment against the entire concept. It's becoming quite clear that those seeking the highest rooftop to shout from are doing so because they fear they have the most to lose.

A problem in the code arose out of a murder in Christian County. The accused, a 17-year-old, had not been convicted of another felony in the year prior to her arrest. Therefore, under the code, she could not be tried as an adult, meaning the harshest sentence she could face was a year in the custody of the Cabinet for Human Resources.

Almost everyone agrees that some change is necessary to provide a more severe penalty under those circumstances. If the criticism ended there, few would have room for argument.

But there's a lot of nit-picking going on that has little to do with the code itself. In Covington, for instance, police no longer are enforcing the juvenile curfew because offenders can't be held in detention for more than two hours without a court order.

Youths who break laws that don't apply to adults are referred to as status offenders. And, indeed, the code says no status offender shall be detained in any jail, police station, lockup, internment facility or just about anyplace else.

It's becoming quite clear that those seeking the highest rooftop to shout from are doing so because they fear they have the most to lose.

But, according to Moloney, that has been the law since 1974. It in fact is a federal law. Failure to comply endangers the state's ability to receive federal funds.

"We have broken that law consistently and we can't do that," Moloney said.

And then there are those counties that maintain the county jail in the county courthouse. They complain that under the code the juvenile detention facility can't be maintained in the same building as the jail. Therefore, juvenile detention facilities in the courthouse no longer can be used.

That goes against legislative intent, as Moloney noted, and the way the wording in the law can be defined. It says a secure detention facility for juveniles can't be located in any building that is "part of or attached to any facility in which adult prisoners are confined or which shares staff and facilities in which adult prisoners are confined."

Obviously, that section is intended to keep counties from locating juvenile detention facilities in the same building as the jail when the jail is an independent structure — like in Campbell County.

As Moloney noted, the philosophy behind that section comes from the Youth Authority Act. It was passed in 1952.

"It requires separate facilities for housing juveniles," Moloney said. "Most counties haven't done that in the 35 years since it was passed."

And there, friends, is the rub. A lot of counties and officials over the years have treated laws relating to juveniles with a wink and a nod. Instead of insisting that counties spend the money necessary to assure humane treatment for youths, police, prosecutors and judges simply have ignored the law.

The Unified Juvenile Code addresses that. Violation of the law now can result in a misdemeanor charge — a criminal offense.

Hence, the wailing. Those sworn to uphold the law, who have scoffed at those very same laws over the years, now are forced to recognize them.

Isn't that terrible?

Bill Straub is chief of The Kentucky Post's Frankfort bureau.

Crime rate continues 5-year downward trend

Associated Press

WASHINGTON — Americans were victimized by an estimated 34.1 million crimes last year, a decline of more than three-quarters of a million from 1985 and down more than 7 million from the peak year of 1981, the government reported yesterday.

The survey of about 100,000 people in 50,000 households by the Bureau of Justice Statistics found that the rate of violent crime dropped 6.3 percent last year compared with 1985 and has fallen 20 percent since 1981. The survey counted crimes whether or not they were reported to police and used the results to estimate the number of criminal incidents nationwide.

Criminologists say the 5-year downward trend is a result of the aging of the baby-boom generation, as people born after World War II move out of the age group most prone to commit crimes, those from 15 to 24.

Last year's figures may represent a bottoming out of the decline, which showed some signs of slowing down in 1986, said Alfred Blumstein, dean of the school of urban and public affairs at Carnegie-Mellon University in Pittsburgh.

The number of assaults per 1,000 people fell 7.9 percent last year, while there were smaller declines in the rates of rape, theft, burglary and household larceny, according to the survey.

However, motor vehicle theft rates rose 5.4 percent in 1986, and robbery rates went up 1.4 percent.

The total number of criminal victimizations was 34.1 million in 1986, compared with 34.87 million in 1985 and 41.5 million in 1981.

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10-5-1987

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

KENTUCKY SUPREME COURT

COMMONWEALTH'S FAILURE TO PRODUCE WITNESSES
Commonwealth v. Calloway
34 K.L.S. 10 at 19
(September 3, 1987)

During pretrial discovery, the Commonwealth indicated to Calloway that one James Morris was an eyewitness who would be made available at trial but whose current address was unknown. However, when the case was called for trial Morris' whereabouts remained unknown. A continuance was granted on defense motion. Ten months later, when the case again went to trial, Morris remained unfound. The trial court denied a defense motion to dismiss. The Court of Appeals reversed. The Supreme Court granted discretionary review and reversed.

The Court observed that "Ordinarily it is not the duty of the Commonwealth to locate and produce at trial witnesses for a defendant." The Court found no denial of the right to compulsory process since Calloway never sought process to secure Morris trial attendance.

DOUBLE JEOPARDY/
OPENING STATEMENT/OPINION
Kroth v. Commonwealth
34 K.L.S. 10 at 22
(September 3, 1987)

The Court rejected a double jeopardy challenge to Kroth's conviction of two counts of trafficking in a controlled substance based on his possession of drugs stolen in a single burglary. The Court held that because the drugs consisted of both Schedule III and Schedule IV controlled substances two distinct offenses were committed. Justice Leibson dissented on the basis of this issue.

The Court found no harm in the prosecutor's opening statement reference to hearsay and judged the evidence of guilt to be overwhelming and noted the trial court's admonition to the jury that opening statements are not evidence.

The Court also approved the "expert" testimony of a police officer that the large quantity of drugs in Kroth's possession indicated they were for sale, not personal use. The Court emphasized the witness' ten years experience as a narcotics officer. Chief Justice Stephens and Justice Gant dissented on this issue.

WANTON MURDER
Smith v. Commonwealth
34 K.L.S. 10 at 23
(September 3, 1987)

The principal issue in this appeal was whether the trial court erred by instructing the jury on wanton murder. Smith contended that his conviction of wanton murder could not stand because all the evidence indicated his actions were intentional. The Court disagreed and held that "we have concluded that the instruction on wanton murder, even if erroneously given, was a harmless error and resulted in no prejudice to appellant." The Court reasoned that, unlike giving an unsupported instruction on a lesser included offense, the unjustified instruction on wanton murder did not create the risk of a compromise verdict by the jury. A conviction of wanton murder does not represent an intermediate position between an acquittal and a conviction of intentional murder. According to the Court the error was thus harmless. Justice Leibson dissented.

RCr 9.70 ADMONITION
Commonwealth v. Messex
34 K.L.S. 11 at 20
(September 24, 1987)

An issue in this case was whether the trial court's failure to admonish the jury pursuant to RCr 9.70 is reversible error despite a defense failure to object. The error occurred on a single occasion during PFO proceedings. The trial court had already correctly admonished the jury on four previous occasions. However, the admonition was omitted when the jury was discharged for the evening. The Court of Appeals reversed the PFO conviction based on this error. The Kentucky Supreme Court reversed the Court of Appeals. "In light of the four admonitions, . . .and the

failure to object, we find no reversible error."

ENTRAPMENT/"DEADLY WEAPON"
Commonwealth v. Sanders
34 K.L.S. 11 at 21
(September 24, 1987)

In this case, the Court held that Sanders was not entitled to a directed verdict on his defense of entrapment. The Court's holding reverses a Court of Appeals' decision which held to the contrary. The Court cited the KRS 505.010 requirement that "At the time of the inducement or encouragement, [the defendant] was not otherwise disposed to engage in such conduct." The Court held that testimony by the entrapping officer that the idea for the charged offense originated with Sanders created a jury question as to this issue.

Sanders also argued that he could not be convicted of first degree robbery because he did not use a "deadly weapon." The weapon provided Sanders by the entrapping officer was, unbeknownst to Sanders, disabled. The "victim," also an undercover officer, was aware that the pistol was inoperative. The Supreme Court concluded that it was sufficient that Sanders believed that the pistol was capable of firing.

JURY SELECTION
Marsch v. Commonwealth
34 K.L.S. 11 at 24
(September 24, 1987)

At trial, Marsch moved to strike ten jurors for various reasons, each motion to strike being denied. Marsch utilized all of his peremptories to remove eight of the jurors. The Supreme Court concluded that some of the eight jurors peremptorily struck, and one of the remaining two, should have been struck for cause based on relationship to the victim, previous opinions as to Marsch's guilt, or by reason of prosecutorial misconduct in defining reasonable doubt to the jurors in voir dire. The jurors' statements "given in response to leading questions, that they would disregard all previous information, opinions and relationships should not have been taken at face value." Because of the trial court's refusal to strike the jurors Marsch's "right to exercise truly peremptory challenges was infringed." Justices Stephenson and Wintersheimer dissented.

BIFURCATED TRIAL/VOLUNTARINESS OF CONFESSION/ BRUTON
Kinser v. Commonwealth
Johnson v. Commonwealth
Vincent v. Commonwealth
34 K.L.S. 12 at 18
(October 15, 1987)

The three defendants were tried jointly. Because the Commonwealth desired to introduce Kinser's out-of-court statement, which incriminated all three defendants, and since Kinser would not take the stand, a bifurcated trial procedure was adopted. All evidence, exclusive of Kinser's statement, was to be presented. Following jury verdicts as to the guilt or innocence of Vincent and Johnson, Kinser's statement was to be introduced. Then the issue of Kinser's guilt would be submitted to the jury. This procedure was in fact followed but broke down to the extent that a statement of Kinser was actually introduced prior to a jury determination of Vincent's and Johnson's guilt.

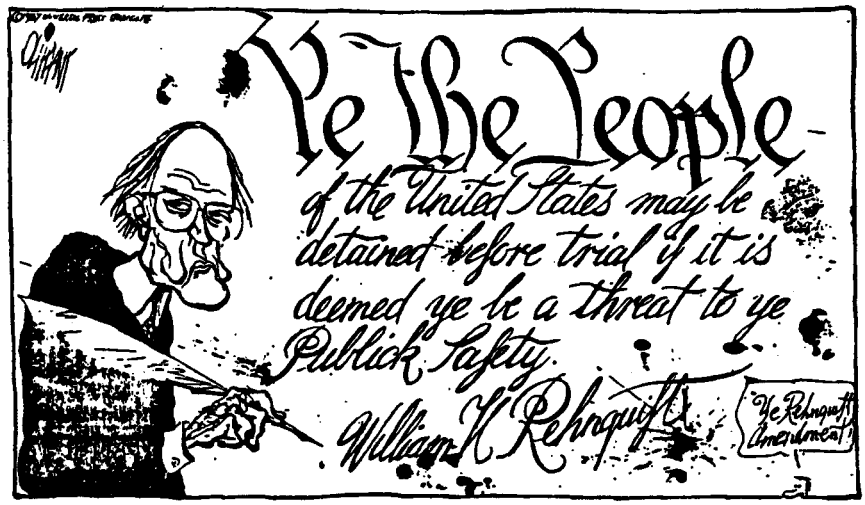
The Court held that this bifurcated procedure did not prejudice the defendants. With respect to Kinser, the Court held that the bifurcated procedure did not constitute double jeopardy and that the prior determination of his codefendants' guilt did not prejudice him.

The Court also held that Kinser's confession was not rendered involuntary by the fact that his attorney, who was present at the making of the confession, had represented a prosecution witness. The attorney's representation of Kinser and the witness was not concurrent. Thus there was no conflict of interest.

The Court found no error in the admission of Kinser's alleged out-of-court statement to his sister that he watched while Johnson and Vincent robbed and murdered the victim. Since Kinser did not testify, Johnson and Vincent argued that introduction of the statement violated their right of confrontation. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The Court held that the defendants could not claim the benefit of Bruton because they had objected to sanitizing the statement by exercising their names. Chief Justice Stephens and Justice Gant dissented as to this portion of the Court's opinion.

DELAY IN INDICTMENT/ HEARSAY/INSTRUCTIONS
Reed v. Commonwealth
34 K.L.S. 12 at 22
(October 15, 1987)

In this case, the Court held that an eight year delay between the commission of the crime (first degree rape) and indictment did not require dismissal of the indictment. The Court acknowledged that such delay may constitute a due process violation if it is "intentional delay to gain tactical advantage" and gives rise to "substantial prejudice." However, the Court held that delay attributable to "the age of the child and the lack of cooperation from her fami-



ly" was not for tactical advantage. The Court also concluded that substantial prejudice was not shown by the "mere possibility that some evidence which was unavailable at trial would have been available at an earlier time..."

Reed complained of hearsay in the admission of a 1978 DHR conference report which stated that the victim had told a social worker that the defendant had sexually abused her. However, the Court held that this evidence was legitimated by Reed's subsequent testimony that the victim's story was a recent fabrication. The DHR report was relevant to rebut Reed's theory.

Finally, the Court found reversible error in the trial court's refusal to instruct the jury on second degree sexual abuse. The Court first held that the defense was not required under RCr 9.55(2) to tender a written instruction in order to preserve the issue. The Court held that the instruction should have been given based on the totality of the evidence, which included initial social worker reports that the victim had alleged sexual contact not involving penetration. Justices Stephenson and Wintersheimer dissented.

KENTUCKY COURT OF APPEALS

CREDIT FOR TIME SERVED
Rose v. Commonwealth
34 K.L.S. 11 at 2
(September 4, 1987)

Rose was released on bail while awaiting trial on felony charges. Meanwhile Rose was convicted of unrelated misdemeanors and served out the jail terms imposed for those convictions. Rose was ultimately convicted of the charged felony. Rose then requested and was denied jail credit for the time served for the misdemeanors. The Court of Appeals, citing KRS 533.060(3), affirmed the denial of jail credit.

OTHER CRIMES
Hopkins v. Commonwealth
34 K.L.S. 11 at 6
(September 11, 1987)

At Hopkins' manslaughter trial the prosecutor cross-examined Hopkins regarding his livelihood as a bootlegger. The Court of Appeals denounced this evidence as irrelevant evidence of other crimes since it did not prove motive, identity, intent, knowledge or common scheme or plan. However, the Court held the error to be harmless.

The Court also held that Hopkins was not entitled to an instruction on reckless homicide where he testified that he intended to shoot the victim and there was no evidence that he failed to see the risk involved in the shooting.

DOUBLE JEOPARDY/EED
Thompson v. Commonwealth
34 K.L.S. 11 at 9
(September 11, 1987)

In this case the appellant was convicted of assault and wanton endangerment based on his act of firing two shots at the victim in immediate succession. One shot hit the victim; the other did not. The Court of Appeals vacated the wanton endangerment conviction as violative of the protection against double jeopardy. "[W]e hold that an assault is a single course of conduct under KRS 505.020 when the act or acts defined by statute stem from one impulse and are continuous, proximate in time, and inflicted upon the same victim."

The Court rejected argument that Thompson was entitled to an instruction on assault under extreme emotional disturbance. "There is no evidence that appellant was 'so enraged, inflamed or disturbed' that he acted uncontrollably at the time of the shooting." Citing McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468 (1986).

VENIREMAN A WITNESS/
LESSER INCLUDED OFFENSES
Jones v. Commonwealth
34 K.L.S. 12 at 8
(October 2, 1987)

A prosecution witness was called as a member of the jury pool at Jones' assault trial. The trial court questioned the witness and determined that she had told some members of the panel that she was a witness and that she was related to the victim, but had not otherwise discussed the case. The jury panel indicated on voir dire that it would give no extra weight to the witness' testimony. The trial court then refused to dismiss the jury panel. The Court of Appeals agreed. "Despite the fact that they may have acquaintance with or knowledge about participants or possible testimony in a pending case, prospective jurors can still qualify to sit on the case so long as reasonable grounds exist to believe they can render a fair and impartial verdict..."

The Court also rejected Jones' argument that he was entitled to an instruction on fourth degree assault on the theory that the injury caused by him - loss of an eye - was not a serious physical injury.

VEHICLE SEARCH/
COMMENT ON REQUEST FOR ATTORNEY/
INSTRUCTIONS
Blankenship v. Commonwealth
34 K.L.S. 13 at
(October 23, 1987)

In this case, the Court upheld the warrantless search of the defendant's impounded car. The defendant was unconscious, having been shot in the head during the charged robbery. The vehicle search was ostensibly for purposes of determining the defendant's identity since no I.d. was found on the defendant. In plain view on the dash was a note stating "give me all the money." The Court of Appeals concluded that the warrantless entry into the car was justified because of the exigent circumstances presented.

The Court also held that it was permissible for a police officer to testify that when advised of his Miranda rights the defendant requested an attorney. The Court held that this was not an indirect comment on silence in violation of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 48 L.Ed.2d 91 (1976).

Finally, the Court held that the defendant was not entitled to an instruction on terroristic threatening on the evidence before it. Blankenship claimed that the robbery victim - a gas station attendant - was an acquaintance who owed him money but had refused to pay. Blankenship approached the victim armed and intending to demand his money, but before he cold do so the victim shot him. Under this evidence an instruction on terroristic threatening was unjustified since, according to Blankenship, he never actually threatened the victim.

CONSTITUTIONALITY/CREDIBILITY
OF KRS 532.045/CREDIBILITY
Owsley v. Commonwealth
34 K.L.S. 12 at
(October 30, 1987)

In this case the Court rejected various challenges to the constitutionality of KRS 532.045 which denies probation to any person convicted of a violation of, inter alia, KRS 510.040 through KRS 510.150. The statute was enacted by Chapter 382, §23 of the Kentucky Acts and was titled "AN ACT relating to sexually abused, missing and exploited children, including those persons who commit offenses relating thereto." The statute, however, denies probation eligibility for offenses not involving minors. Based on this anomaly, Owsley argued that the statute violated §51 of the Kentucky Constitution which states "No law...shall relate to more than one subject, and that shall be expressed in the title..." The Court declined to consider this challenge since the statute clearly applied to the offense of which Owsley was convicted - sexual abuse of a ten year old child.

The Court also rejected an equal protection challenge to the statute based on its holding that the statute's further denial of probation to anyone who engages in substantial sexual conduct with a minor under fourteen years old applies to women as well as men. The Court additionally held that the statute did not constitute impermissible "class legislation" by denying probation to persons who commit acts of "substantial sexual conduct" upon a minor while in "a position of special trust," i.e. relatives, teachers, counsellors.

Owsley also claimed that the testimony of the complaining witness was so inconsistent as to require a directed verdict. The Court of Appeals held "[g]ranted, there are inconsistencies in the child's testimony, but not of a number or to a degree that would warrant taking the case from the jury."

IDENTITY OF INFORMANT
Commonwealth v. Baisley
34 K.L.S. 12, (Oct. 30, 1987)

Based on the information of a confidential informant a search warrant was obtained which led to Baisley's indictment on drug charges. Baisley sought and obtained an order requiring disclosure of the informant's identity. The Commonwealth appealed.

The Court of Appeals upheld the trial court's order. KRS 218A.260 provides that the information received from such an informant is admissible on the issue of probable cause, without identification of the informant, so long as the informant is not a material witness to the offense and the judge is satisfied "that such information was received from a reliable informant and in his discretion does not require disclosure." Thus, disclosure may be required if (1) the informant is a material witness, or if (2) the trial court is not satisfied as to the reliability of the informant. Disclosure in Baisley was ordered under this second part of the statute. As such the ordered disclosure was within the trial judges' sound discretion.

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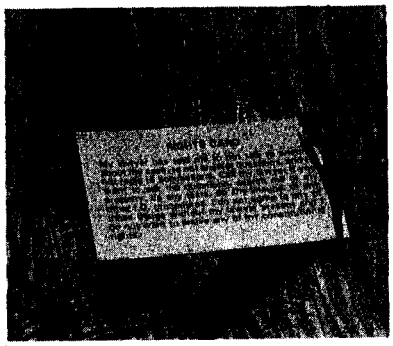

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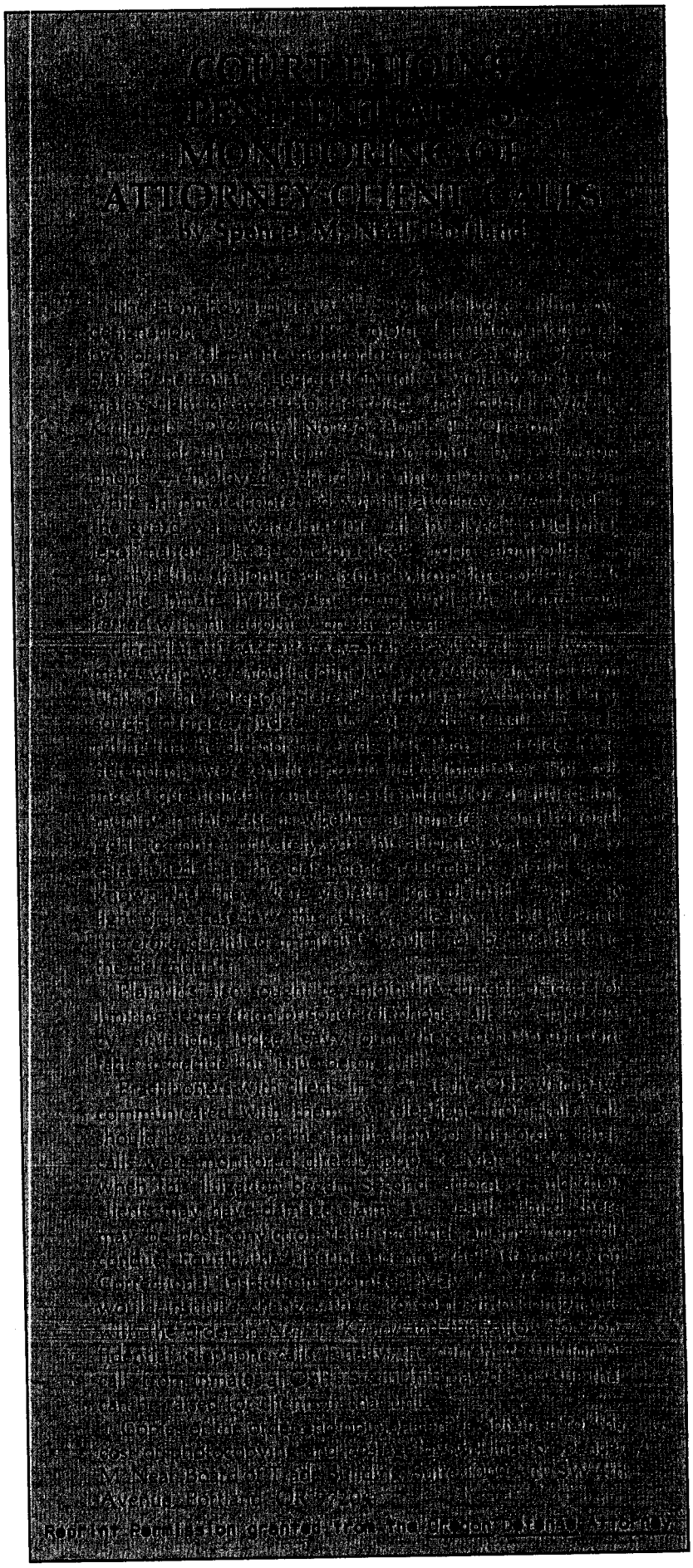
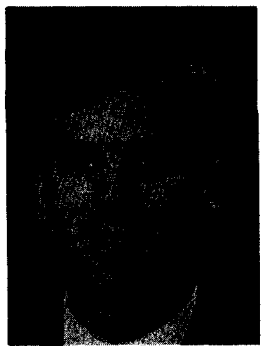


Post-Conviction

Law and Comment



McGehee Isaacs

REVISED TECHNICAL PAROLE VIOLATOR POLICY

As head of DPA's Post-Conviction, one of the complaints I routinely hear from field attorneys involves the petty nature of technical parole violation. It appalls many attorneys that an individual who misses a curfew or is late for an appointment with his probation and parole officer can have these infractions used against him to be sent back to prison. Many attorneys that I have spoken with feel that, as a general rule, it takes much more of an infraction of probation terms (those imposed by the court) before an individual is revoked than it does to have one's parole (Parole Board) revoked.

In response to this, recently, Corrections revised its technical parole violator policy to tighten the guidelines under which an individual's parole may be revoked for a technical violation. When a parolee is accused of a technical parole infraction this procedure must be followed before advancing the matter to a preliminary hearing. The new guidelines are:

VI. PROCEDURES

A. The supervising officer and the District Supervisor will consider all, but are not limited to, the following areas as an alternative to holding the preliminary hearing:

1. The danger to the community by remaining on supervision.

2. The length of time the offender has been under supervision.

3. The seriousness of the violation.

4. The past referrals the officer has made (if available).

5. The employment status and support of his/her dependents

6. The reporting history.

7. The level of supervision, i.e., would a higher level of supervision be a viable alternative?

8. Possible placement into the Intensive Supervision Program or Advanced Supervision Project.

Corrections Policy and Procedure Manual, Section 27.19, issued July 31, 1987.

It is readily apparent, both the supervising probation and parole officer and the district supervisor now must be involved in the decision on whether a technical parole violation will move forward. This should be developed at the preliminary hearing. As a practical matter, counsel who is representing a parolee accused of a technical violation should have both the supervising officer and the district supervisor available for testifying in front of the hearing officer at the preliminary hearing. Both the supervising officer and district supervisor should be able to testify that their review fully complied with all elements of the procedure. Although not stated, I feel it only proper that the 8 point procedure should be set out in writing as it is Correction's procedure that a report must be made when a parolee is written up for a technical violation.

Subsection B of the new section states:

> "Only after the supervising officer and district supervisor have determined that none of the above factors are relevant in that particular case should the case be presented for a preliminary hearing. See Corrections Policy and Procedure Manual, 27.19(6)(b)

By couching this part of the regulation in the negative, Corrections puts the onus of insuring the procedure is adequately followed on the backs of the supervising probation and parole officer and the district supervisor. This should provide a fertile field to defense counsel to exploit limitations in the probation and parole officer's case against his parolee. Unless each of the 8 factors listed above are achieved in some form or fashion, then an individual cannot be technically violated. Even if the hearing officer finds probable cause, an

accurate record involving the 8 factors should be made because the Department of Public Advocacy also represents individuals when requested in their final revocation hearings at LaGrange.

By promulgating this new regulation, Corrections is attempting to correct a situation brought on by the use of petty technical violations to send individuals back to prison. This procedure does not in any way affect a parole officer's ability to deal with a serious parole violation. In substance, the regulation injects more due process into what has previously been thought to be an arbitrary proceeding and gives defense counsel representing the technical violator a better chance to beat the violation and have his client go free.

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Women convicted of welfare fraud ordered to use contraceptives

Associated Press

MADISONVILLE — Two women who have 10 children between them have been ordered by a judge to abstain from sex or use contraceptives as part of their sentence for convictions on welfare fraud.

JoAnn Van Buren, 30, and Glenda Sullivan, 28, both of Madisonville, had pleaded guilty to single counts of failing to report a change in factors affecting their eligibility for food stamps and their eligibility for Aid for Families with Dependent Children. Both charges are felonies.

Both women told Hopkins Circuit Judge Thomas B. Spain that their only income was AFDC checks and food stamps, about $7,000 to $8,000 a year.

"It's none of my business who has babies until it gets to be a matter of balancing interests between the public and a defendant in a criminal case," Spain said Thursday in explaining his Wednesday decision.

Ms. Van Buren has six children, two of whom were born after she was divorced, Spain said.

Ms. Sullivan has four children. She and her husband are separated; Spain stipulated in her case that if the couple reconciled, the order involving births no longer would apply, but she still would be on probation.

Both women were put on probation for five years and required to repay the state. Ms. Van Buren owes $2,974 and Ms. Sullivan owes $1,851.

Spain said he had not considered imposing the order until he heard the women's testimony. It occurred to him then that such a condition of probation, like banning drinking in cases involving alcoholic defendants, would be best for all concerned.

"This is a far less onerous alternative than if I sent them to prison," he said.

Spain said he would consider setting the same conditions in similar cases and would not be surprised if other judges did the same.

The women's attorney, Robert F. Soder, acknowledged that enforcement of the order "is where we'll have the problem."

The only real proof of a violation would be if the women became pregnant, Spain said. Then he would have to reconsider probation, he said, although he agreed with Soder that pregnancy would not be proof that the women had not used contraceptives.

Clifford Turner of the Louisville chapter of the National Association for the Advancement of Colored People said the group would check the order, which bothered him on moral and civil grounds.

Spain maintained he had not violated the women's civil rights but simply was keeping others' rights from being restricted. If circumstances change — if the women, for instance, got jobs that pay enough to support their families — he probably would reconsider the order.

Lexington Herald-Leader
Oct. 10, 1987
Reprinted with Permission

Facing death without appeal

1 of 3 inmates stares at capital punishment without counsel

THE ASSOCIATED PRESS

Attorney Jim Rebholz was startled last month when he talked an inmate on death row in Texas about his impending execution.

"The guy didn't want to believe me," Rebholz said. "His execution date was only three weeks away, but he had no attorney and nobody had even bothered to tell him he was about to die."

Thirty prisoners in the "Death Belt," nine Southern states where 90% of U.S. executions occur, are scheduled to die within six weeks, and court officials and civil rights activists say at least 10 of these prisoners have no attorneys or have grossly inadequate legal representation.

Prisoner advocates are racing against the clock, recruiting attorneys from around the country to take these bleak cases in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas and Virginia.

"I know that as of today three of the 15 Texas inmates with execution dates have no attorneys," Rebholz said. "But I really don't concentrate on how many don't have attorneys. ... The real question is how many have experienced, committed attorneys who are actively working on their cases."

Rebholz, an attorney for the American Civil Liberties Union, said 80% of Texas death row inmates are never visited by their attorney in the appeal period after conviction.

"Just last week the 5th U.S. Circuit Court of Appeals cited an attorney for abuse of his client. The prisoner was executed because his attorney never got around to filing during the appeal period."

> **"Just last week the 5th U.S. Circuit Court of Appeals cited an attorney for abuse of his client. The prisoner was executed because his attorney never got around to filing during the appeal period."**
>
> — Attorney Jim Rebholz

Rebholz says the situation is especially critical in Alabama and Texas, where death penalty opponents are scouring the nation for volunteer attorneys.

In Texas, as in most capital punishment states, the Appeals Court Judge Rusty Duncan said the attorney for a condemned inmate usually quits the case soon after his client has been convicted and turned down for appeal.

"The majority don't notify us when they've dropped off the case," Duncan said. "Often they don't even tell the inmate."

Wanted:
Pro Bono Counsel for Indigent Death Row Inmates

The national death row population is now more than 1,900 and increasing rapidly. Most states refuse to provide counsel for collateral appeals by death row inmates. There is a desperate need for legal representation of these capital defendants.

Federal courts have granted relief in nearly half of the capital appeals that have come before them since 1976. Capital cases thus continue to present important, winnable constitutional issues.

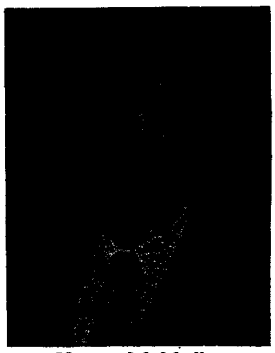
Volunteer attorneys need not have extensive criminal law or post-conviction experience. What these cases truly need are dedicated lawyers willing to represent the most helpless of defendants.

Without increased volunteer representation, it is likely that many capital defendants with meritorious claims will be executed in the near future.

If you would be willing to volunteer to represent a death row inmate or would like further information, contact Deborah Fins, ABA Post-Conviction Death Penalty Representation Project, 619 West 113th Street #11D, New York, NY 10025.

The Death Penalty

KENTUCKY'S DEATH ROW POPULATION - 32
PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 78



Kevin McNally

WINNING THE BATTLE OR THE WAR?

No doubt Booth v. Maryland, 107 S.Ct. 2529 (1987) will result in reversals of some Kentucky death sentences, especially where prosecutors placed emphasis on the deceased's character in argument or evidence. The decision may well save the life of two or more of my clients. In the long run, however, Booth will be used as snake oil to "cure" the malignant societal disease of capital punishment. It is yet one more desperate but futile attempt to make rational an irrational process -- choosing a handful of killers to kill. The following article was written for, and published by, Parents of Murdered Children, Vol. 2, No. 11 (Nov. 1987), in their newsletter. POMC were DPA's guests at our last Death Penalty Seminar. Needless to say, these views are mine alone:

SURVIVORS, THE COURTROOM AND THE DEATH PENALTY: ONE DEFENSE LAWYER'S VIEW

On June 15, in a narrow 5-4 vote, the Supreme Court threw out John Booth's death sentence (but not his conviction) because a "victim's impact statement" [VIS] was used by the prosecutor. Justice Powell wrote the opinion shortly before resigning from the Court. "Irvin Bronstein, 78, and his wife Rose, 75, were robbed and murdered in their West Baltimore home...bound and gagged, then stabbed repeatedly... The bodies were discovered two days later by [their] son."

The VIS emphasized the Bronstein's "outstanding personal qualities... described the emotional and personal problems the family members faced as a result...[such as] lack of sleep and depression ...[being] 'fearful for the first time'...." The murders ruined the wedding of a granddaughter who cancelled her honeymoon in order to attend the funeral. The VIS noted the family felt Booth was lower than an "animal" and could never "be rehabilitated" but it stopped short of specifically calling for the death penalty.

For those of us who are asked to defend the John Booth's of the world, the decision was quite a surprise. In case after case, the Rehnquist Court was hostile to claims of injustice by convicted killers. Why then this sudden, if temporary, turn-around? The answer lies in another 5-4 opinion Justice Powell wrote earlier in the year... on April 22. McClesky v. Kemp, 107 S.Ct. 1756 (1987), dealt with the disturbing question of race and the death penalty. The Court had before it a massive and very expensive study of all Georgia murder prosecutions from 1973-79. After testing and retesting 253 variables, researchers came again and again to the shocking conclusion that the race of the defendant, and more importantly, **the race of the victim**, determined who went to the electric chair and who went to a prison cell. Killers of whites were **11 times more likely** to get the death penalty than killers of blacks. **22%** (50/228) of blacks who killed whites, **8%** (58/745) of whites who killed whites, **1%** (18/1438) of blacks who killed blacks; and **3%** (2/4) of whites who killed blacks were sentenced to death. Every other study (FL, IL, OK, NC, SC, MS, VA and AR) has shown the same: **A killer's punishment depends on who he kills.**

Justice Powell's crucial fifth vote in McClesky rejected the last broad-based legal challenge to capital punishment in this country. Powell conceded the researchers' findings, but said that there was little that could be done about it -- the Court wasn't about to overturn the death penalty in 36 states. It is in this light that we must look at Powell's approach to the Booth case.

The Court was "troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy...." A decision to execute someone, anguished Powell, can't "under our system of justice...turn on the perception that the victim was a sterling member of the community rather than someone of questionable character...." (These are all code words for "race.") Actually, when it comes to the

death penalty, cases inevitably turn on the jury's perception of the victim. Eliminating VIS, instead of the death penalty, does nothing to change that. The jury still sees the survivors, their race, economic standing, courtroom presence, etc. In the end, Booth only victimizes the survivors again - while offering little solace to the accused killer.

It might seem unusual for a defense lawyer to criticize a supposedly pro-defendant ruling by the Supreme Court. But the death penalty is full of contradictions. Many assume that survivors want the killer(s) executed. That simply isn't so and, from all we can tell from the VIS, may not necessarily be true of the Bronstein family. Before the Booth decision, in talking with fellow "death penalty lawyers," I speculated that a decision against survivor impact testimony might, in the long run, hurt, not help, capital defendants. Example? One judge refused to permit the jury to hear that the widow, mother of three children, opposed the death penalty on religious grounds for the killer of her husband. The defendant, William Thompson, is now on death row. "Widow in Turmoil Over Death Sentence," Kentucky Post (10/23/86). A condemned cellmate of Thompson's lost his appeal when the Kentucky Supreme Court said it was okay for the trial judge to "refuse to allow testimony [about] the impact of the death penalty on... the victim's families...." Smith v. Commonwealth, Ky., 734 S.W.2d 437, 451-452 (1987). Sure enough, on September 25, a federal appeals court, specifically because of Booth, declined to block an execution although a trial judge had refused to let the jury "hear relatives of the victims testify that the death penalty should not be imposed." Robison v. Maynard, 42 Cr.L. 2008 (10th Cir. 10-7-87).

As a human being, I am moved by the survivors outrage, as stated by Susan Asquith of POMC, that they can't "tell the judge and jury what the loss" of a family member to homicide means. As a lawyer, I can understand Justice Powell's concern that the death penalty not be the exclusive punishment for killing prominent (too often white) community members who have articulate friends and family. After all, how should the survivors feel who are denied the ultimate penalty? Is the life of their husband, wife or child somehow worth less in the eyes of society?

I also understand Justice Powell's fear that the victim would be put on trial - if the deceased's character becomes the issue in court. And I can understand his concern that VIS would only "inflame" and "divert" the jury. But who doubts "the grief and anger of the family caused by brutal murders...?" As Justice Powell admits: "[T]here is no doubt that jurors generally are aware of these feelings." Absent some unfortunate tactic designed to exclude the survivors from court, a defense strategy I find improper and pointless, the jury sees and feels the tears of the loved ones.

Permitting the survivors to be heard (as well as seen) in some manner is emotionally/psychologically important for them. Why can't the criminal justice system give them this, at least? All Booth does is keep survivors from saying what they feel. Family members will testify anyway. The Bronstein's son, who first found his murdered parents, is but one example. Booth's jury could see Mr. Bronstein's pain even if he never opened his mouth. As it stands now the jury, judge and public assume survivors only and always demand blood for blood. Let them speak for themselves.

The problem, Justice Powell, is not victim's impact statements. The problem is the death penalty.

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PER CAPITA USE OF DEATH PENALTY
1980 CENSUS AND
LDF DATA BOOK USA
(OCTOBER 22, 1987)

STATE	POPULATION	DEATH ROW POPULATION	EXECUTIONS	PER 100,000
CONNECTICUT	3,114,000	1		.03
COLORADO	2,889,964	2		.06
NEW MEXICO	1,302,894	1		.07
WASHINGTON	4,132,156	7		.16
OREGON	2,633,000	4		.20
NEW JERSEY	7,364,823	27		.36
MARYLAND	4,216,975	19		.50
UTAH	1,461,037	7		.61
WYOMING	469,557	3		.63
OHIO	10,797,630	78		.69
VIRGINIA	5,346,818	33	6	.72
PENNSYLVANIA	11,863,895	86		.72
INDIANA	5,490,224	43	2	.81
CALIFORNIA	23,667,902	200		.84
MONTANA	786,690	7		.89
NEBRASKA	1,569,825	14		.89
KENTUCKY	3,660,777	32	4	.98
ILLINOIS	11,426,518	109		.95
DELAWARE	594,338	6	2	1.00
MISSOURI	4,916,686	50		1.01
NORTH CAROLINA	5,881,766	65	2	1.15
TENNESSEE	4,591,120	68		1.50
ARKANSAS	2,285,435	31		1.40
LOUISIANA	4,204,900	45	15	1.42
IDAHO	943,935	14		1.50
SOUTH CAROLINA	3,121,820	49	2	1.60
TEXAS	14,229,191	241	26	1.92
MISSISSIPPI	2,520,638	46	3	1.94
GEORGIA	5,463,105	108	12	2.19
ARIZONA	2,718,215	64		2.40
ALABAMA	3,893,888	91	3	2.41
OKLAHOMA	3,025,290	75	8	2.50
FLORIDA	9,746,324	267	17	2.91
NEVADA	800,493	37	2	4.87

In the Trenches

District Court Practice

Gary Johnson

THE IMPORTANCE OF EARLY ADVOCACY IN MAJOR CASES, PART II

(Part I of this article was published in the October edition of THE ADVOCATE, and discussed what a major case is, how counsel can receive early notification, and contained some general comments on pre-arraignment advocacy in those cases. Part II considers early advocacy through arraignment, the pre-trial release hearing, and the preliminary hearing in a major case.)

At arraignment, the appearance of early advocacy is often as important, if not more, than the substance. To the client, arraignment is not just a formality; that first court appearance for him/her will set the tone for the attorney/client relationship in the weeks and months to come. To the prosecutor, early advocacy here telegraphs that this case will be litigated aggressively by counsel. To the community-at-large, advocacy now can communicate real doubt about the defendant's guilt.

The substance of early advocacy at arraignment may take many forms, and is to be governed by the dictates of the particular case. It may include nothing more than a strong, well-presented case for pre-trial release, or motions to preserve evidence for later testing, or simply a successful argument for an early preliminary hearing. The point is to demonstrate that you intend to aggressively and competently represent the defendant, and counsel should work hard to see that the point is made convincingly to all involved.

THE MEDIA AT ARRAIGNMENT

Hard cases not only make bad law, they make bad press about the case. The choice for defense counsel is not between a bad story or a good story for the client, but often is a choice between a bad story or a worse story, one that is sensationalized, gory, inaccurate, and devoid of anything good about the defendant. If the media is present at arraignment, and counsel knows that this means there will be television, newspaper, or radio coverage the next day, early effective advocacy requires some action to put the best foot forward.

This article does not suggest that counsel should abandon efforts to exclude the press from pre-trial hearings where prejudicial and perhaps inadmissible testimony may be elicited. This principle, however, has come under increased attack by media lawyers, and they have been largely successful in getting judges to deny the request. See Ashland Publishing Company v. Asbury, Ky. App., 612 S.W.2d 749 (1982); Lexington Herald-Leader Co., Inc. v. Meigs, Ky., 639 S.W. 2d 85 (1982), appeal after remand 660 S.W.2d 658 (Ky., 1983), their progeny, and related cases. The efficacy of the motion to exclude the press is in doubt.

Major cases can present good opportunities to focus the spotlight of public attention on important aspects of the case that might otherwise go unnoticed by the media. Ambitious prosecutors who extend their "jurisdiction" to enter a major case in district court to further their political fortunes (the jump-on-the-bandwagon syndrome) are fair game for comment, especially where that prosecutor doesn't actually ply his/her trade at this level, or in this court. Where strong mitigating evidence is presented at the pre-trial release phase of arraignment, counsel can direct the media's attention to the defendant's community contacts, lack of criminal record, and general likelihood that the defendant won't flee. If the case offers uncontroverted evidence of mutual affray or aggressive, violent behavior of the victim, and this evidence is presented at arraignment, counsel can cooperate with the media in emphasizing that aspect. Because major cases usually garner public focus through the media, they gain huge momentum for the prosecution, especially if counsel ignores this aspect of early advocacy; an opportunity to slow or derail the runaway train of conviction can be lost.

Counsel must use extreme caution to avoid ethical problems when dealing with the media as a part of early advocacy; however, this does not mean that counsel can afford to or should adopt a head-in-the-sand

attitude While the Code of Professional Responsibility sets some limits on counsels' actions, it should be noticed that the Disciplinary Rules specifically authorize many areas of comment, including "[q]uotations from or references to public records of the court in the case". (Disciplinary Rule 7-107(C)(9)). If it's been said in open court, you can repeat it and comment on it in the press. (See ABA Standards for Criminal Justice, Chapter 8, Fair Trial and Free Press, 1982). The Code has not and cannot repeal the First Amendment.

The pursuit of early advocacy in a major case through media cooperation is not suggested so as to influence potential jurors. Indeed, most jurors who bring prior knowledge of the case to the jury box should and will be excluded from service if that knowledge can affect their consideration of the case. Major cases are not, however, litigated in a vacuum, and public opinion invades all aspects of criminal justice. It influences your client's custodians, who are elected, the judge, who is elected, and the prosecutor, who is elected. Public opinion will influence the treatment your client will receive throughout the process, even if jurors are totally isolated from community sentiment. Public opinion is largely shaped by media. To be an effective early advocate in a major case, counsel must give careful thought to media coverage, and must seize the opportunity for what it's worth.

PRE-TRIAL RELEASE AT ARRAIGNMENT

The question most clients ask first, and properly so, in either a major or minor case, is "When can I get out of jail?" The answer will be determined largely by your actions as an advocate at arraignment. If the major case is a misdemeanor, pre-trial release may be the whole ballgame. In those cases, the fact that the defendant has remained free pending trial will later be a valuable plea-bargaining advantage. In felonies and misdemeanors alike, a client in jail is harder to defend than one released pre-trial, and is more likely to be eventually convicted of something. The momentum of an incarcerated defendant or the released defendant presents an obstacle to the opposing party.

If the case is capital, special strategic planning should be used. A capital defendant can be held without bond if the proof is evident or the presumption great. (Ky. Constitution, Sec. 16; RCr. 4.02). Because of the discovery potential, counsel may decide to postpone the pre-trial release hearing in a capital case until after the preliminary hearing, or even until after indictment. Counsel should remember, however, that this standard of pre-trial release is much higher than mere probable cause, and the proof offered at the preliminary hearing is not necessarily sufficient to meet it, nor should the fact that a preliminary hearing has been held serve to deny the capital defendant a separate hearing later on this issue, especially if the issue is then before a judge who did not hear or see the preliminary hearing.

The pre-trial release hearing in a major case must be researched, investigated, and presented vigorously as in any other fact-based inquiry in a criminal proceeding.

Counsel should contact the pre-trial release officer and interview them with an eye toward testimony. Submitting the report or telling the judge the number of eligibility points is not enough. Many of these professionals are familiar with the statistics regarding the low number of "FTA's" in Kentucky since the Bail Reform Act of 1976 (KRS 431.510-550; RCr.4). This personal testimony is valuable and can be persuasive.

The client's family, friends, contacts from work or the community, and social or religious contacts should be interviewed and subpoenaed. A large, visible support group from the defendant's life is visually and factually persuasive to many judges in the pre-trial release hearing.

Most importantly, counsel in a major case must develop a PLAN that will assuage the judge's fears if s/he grants favorable pre-trial release conditions. RCr. 4.12 authorizes the imposition of any conditions necessary to further insure a defendant's return for trial, and counsel can be creative with alternatives to increased cash or property. Regardless of the standards, judges keep defendants in jail if they think clients are likely to commit another offense while released, won't return for trial, or might be harmed by others if released. A plan of pre-trial release conditions, often a hodge-podge of money, property, sureties, and conditions, is necessary to answer these legitimate concerns.

If counsel knows or senses that pre-trial release is unlikely to be agreed upon informally, then counsel should insist on a full, formal due process hearing on the issue. Since the statutes and rules provide that the judge must impose the least onerous conditions to insure the defendant's return (RCr. 4.12), counsel can require the court to make definitive findings and conclusions as to why the least onerous form of pre-trial release, personal recognizance, is not used, and findings and conclusions on why

each of the other less onerous conditions is being rejected. Put the defendant's evidence on anyway. You can humanize your client in the process, and will slow the Commonwealth's momentum by your advocacy.

Finally, counsel gets a second bite at the apple by virtue of RCr. 4.38, if the defendant is unable to meet the conditions of pre-trial release within twenty-four (24) hours. This hearing should likewise be a formal hearing in a major case, and shouldn't be a re-hash of the evidence at the first hearing. Counsel should strive to come up with new evidence and strategies to meet the trial court's findings and conclusions that were used to impose the first set of conditions.

TIMING AND CONDUCT OF PRELIMINARY HEARINGS

Never waive!!

Having said that, I must confess to having waived a preliminary hearing in a major case, but only once, and that may have been a mistake. It is difficult to imagine any advantage to a straight and quicker route to indictment. Some attorneys will trade off the preliminary hearing for "open-file" discovery, in the hopes of getting witness' statements earlier; that argument, however, is erroneous because you get the same information and more by issuing a subpoena for the witness and having them testify. Although counsel may obtain a police officer's report early by this trade-off, don't bet your client's freedom on the belief that police officers put all inculpatory or exculpatory evidence in their reports. Finally, there is continuing life and vitality in the principle that advocacy hearings are the most efficient search for truth, and counsel should not easily abandon this opportunity.

Judge overturns guilty DUI verdict

By Omer W. Johnson
Kentucky Post staff reporter

WILLIAMSTOWN – Grant County District Court Judge Stan Billingsley has overturned the guilty verdict rendered by a jury in a driving while under the influence case, ruling that "reasonable minds could not find guilt beyond a reasonable doubt."

Billingsley overturned the decision against John Wood of Paris, who was found guilty last month and sentenced to 180 days in the Grant County Jail.

The case is one in which Billingsley threatened to cite officials of University Hospital in Cincinnati for contempt of court if they did not furnish the Grant County District Court with results of blood alcohol tests performed on Wood.

At trial, Henry Stanfield testified that it was he, not Wood, who was driving when their pickup truck overturned on Ky. 330.

At the time of the accident, however, Stanfield had told a state trooper that Wood was driving.

Stanfield testified that at the time of the accident, he had been told that Wood would not survive and that he was fearful of the consequences if he were listed as the driver.

Billingsley's order says "Stanfield admitted he had no driver's license and had himself been drinking. He testified that he often drove, but never had a license."

Wood testified that he could not recall who was driving because his injuries blocked his recollection of the entire day, Billingsley wrote.

Billingsley's order centers around CR—Civil Rule—43.08.

Under that rule, the arresting officer should have testified first and then the witness. Instead, the witness testified and then the officer over the objection of the defense.

Billingsley's order said the testimony of the officer should have been stricken as well as the subsequent testimony of Stanfield.

Billingsley wrote that 'with or without the exclusion of the arresting officer's testimony and the testimony of Stanfield, the Commonwealth still has not met the burdens (of proof).

The judge said that other circumstantial points (presented) "do not in themselves ... do more than add speculation upon speculation."

County Attorney Jim Purcell said the judge's decision is being appealed.

"In this case, Wood is free. He cannot be punished now. But for future reference we seek to determine if the correct ruling was made."

The Kentucky Post, Nov. 6, 1987
Reprinted With Permission

In a major case, counsel must seek an early date for the preliminary hearing, since many prosecutors will rush to obtain an indictment to circumvent the clear intent of the Rules of Criminal Procedure. If the indictment is returned, there is no right to a preliminary (RCr. 3.10). The ten (10) day and twenty (20) day time limits are maximum limits, and counsel should seek the earliest time possible to avoid the risk of being cut off before the pass.

Counsel should subpoena every eyewitness to an alleged criminal event to appear at the preliminary hearing in a major case, should subpoena any other Commonwealth's

witness who is not an eye-witness, and should strategically subpoena defense witnesses. In addition to serving the other defense interests outlined above, counsel secures testimony here that may never occur again. Witnesses' memories are better closer to the event, and locking that witness into a particular version of the story will be invaluable at the trial in a major case. Caution must be exercised, however, because if it later develops that the witness is unavailable at trial, the evidence from the preliminary hearing may be used in some circumstances.

Prosecutors have a variety of arguments to make in opposition to this form of aggressive advocacy by defense counsel in a major case, the most frequent being that "defense is on a fishing expedition." So what? As Professor Fitzgerald has discussed, the preliminary hearing is a valuable screening tool for the prosecution, and both the defendant's and the prosecutor's function is enhanced by a more thorough hearing. Fitzgerald, Kentucky Practice, Vol. 8., Sec. 335, (1986).

Prosecutors often argue that the district judge has the authority to conclude the hearing at any time s/he decides that probable cause is met. This is hogwash. This principle violates due process, and is in direct violation of RCr. 3.14(2), which provides that the defendant may cross-examine witnesses and introduce evidence in his/her own behalf at the preliminary hearing.

Objections are often made because defense counsel will question the constitutional validity of a search or statement. While it is true that RCr. 3.14(3) states that these issues are not properly raised at this point, the rule does not prohibit defense counsel from legitimately questioning the factual basis for the warrant or circumstances leading to the statement on the issue of that evidences' weight and credibility.

Counsel should consider putting on some defense in a preliminary hearing if the case presents an opportunity. Although it is unlikely that a major case can be won at this stage, it is a mistake to conclude that an early public defense has no advantages for a defendant at a preliminary hearing. Weigh the cost of early disclosure against a possibility of a more favorable pre-trial release condition, better public perception of your client's innocence, and the possibility that an early defense may take the wind out of the prosecution's sails. There are points to be gained by this tactic, especially since hearsay is clearly admissible (RCr. 3.14(2)). The decision must be made on a case-by-case basis.

CLOSING DISTRICT COURT PROCEEDINGS

Whether you will be handling the tactics of grand jury litigation or whether the case is to be transferred to another attorney in the office at the end of a preliminary hearing, your responsibility has not ended in a major case. Counsel should dictate a detailed, in-depth report for the file, outlining in a step-by-step chronology every action taken for a defendant. Memorializing your early efforts will be helpful as later proceedings develop. Counsel should arrange for the earliest possible transcript of all district court proceedings, since even attorneys' memories fade, and since another attorney may later handle the case. Lastly, counsel should work hard to maintain the close relationships formed with the defendant and family in early advocacy, even if you are no longer on the case. If counsel has approached early advocacy with the proper perspective and attitude, bonding has occurred, and just as with other relationships in our lives, should not be quickly or completely severed. That relationship with the defendant and family should continue, albeit to a lesser degree, even if counsel is replaced.

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Student returned to jail in Kenton for missing school

Associated Press

COVINGTON — A 14-year-old girl, who is married and five months pregnant, was back in jail yesterday because she did not attend an alternative school as ordered by a judge.

Kenton Circuit Judge Douglas Stephens sent Rachel Partin to the juvenile section of the county jail Monday to complete a 22-day sentence for contempt of court. He said an official of the alternative school testified that Rachel showed up for classes three times.

Stephens conceded his decision might conflict with the state's new juvenile code, which some judges think blocks them from using contempt of court as a form of punishment.

Kenton District Judge Wil Schroder had sentenced Rachel to 22 days for contempt April 15 because she failed to obey his order to attend Conner Junior High School in Hebron.

Lexington Herald Leader
October 3, 1987

6th Circuit Highlights


Donna Boyce

GAG ORDER ON DEFENDANT

In United States v. Ford, ___ F.2d. ___, 42 Cr.L. 2010 (6th Cir. 1987), the Sixth Circuit Court of Appeals vacated a "gag" order that barred the defendant from discussing any aspect of the charges or case against him except for stating he was not guilty. The Court held that to be proper a "gag" order must be narrowly drawn and entered only when there is a clear and present danger that an exercise of the defendant's free speech will interfere with the rights of the parties to a fair trial. Such a threat must be specific, not general, and it must be much more than a possibility or reasonable likelihood in the future.

The Court noted that while permitting a defendant to defend himself publicly may result in overall publicity that is more favorable to the defense than would occur if all parties were silenced, this does not result in an "unfair" trial for the government. It is the individual defendant to whom the 6th Amendment guarantees a fair trial and the public to whom the 1st Amendment guarantees reasonable access to criminal proceedings. Whatever disadvantage this causes the government must simply be tolerated.

The Court also stressed the availability of other, less restrictive, remedies such as change of venue, sequestration or a searching voir dire of prospective jurors that could sufficiently preserve a fair trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Circuit Court of Appeals vacated a defendant's armed robbery conviction because of a denial of effective assistance of counsel at the defendant's retrial after the first trial ended with a hung jury in Blackburn v. Foltz, ___ F.2d. ___, 16 S.C.R. 19, 11 (6th Cir. 1987).

The Court found that three errors by counsel combined to effectively deny the defendant a meaningful defense. First, counsel failed to move to suppress the defendant's three prior convictions (two of which were uncounseled) and gave the defendant erroneous legal advice concerning the possible use of those convictions if he testified. The Court soundly rejected the district court finding that counsel's actions were part of a deliberate and reasonable trial strategy, holding that counsel's failure to move for suppression and his legal advice to the defendant were based, not on strategy, but on mistaken beliefs and a startling ignorance of the law.

Secondly, counsel made no effort to investigate three potential alibi witnesses, nor did he make a reasoned professional judgment that for some reason investigation was not necessary. Lastly, counsel failed to obtain the transcript from the first trial in order to impeach the victim who was the sole identifying witness. The Court found that with no other defense available in counsel's view, the failure to prepare for effective impeachment of the sole eyewitness based on a hunch that her testimony would not differ from the first trial was unreasonable under prevailing professional norms and was not sound strategy.

The Court held that counsel's errors, in combination, rendered the adversarial process and resulting conviction unreliable.

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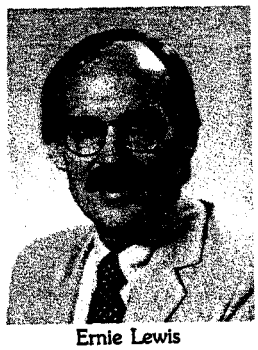
Plain View

Search and Seizure Law and Comment


Ernie Lewis

While the Supreme Court is sitting, for now, without its "pivot," our state courts have been somewhat busy in reviewing search and seizures issues.

In **Leavell v. Commonwealth**, Ky., __S.W.2d __ (1987) on October 15, 1987, the Court reviewed a situation where two "shabbily dressed" men walked into the Lexington Hilton with "an expensive-looking briefcase." An off-duty officer serving as a security guard listened outside the men's room and heard them talk about "cocaine," "$50,000," "the suitcase," and "this is the only way to make money." Once the men left the room, they were stopped and frisked, and a car key and a packet of marijuana were seized from Leavell. The police opened the brief case and found bank money wrappers, and another car key. The officers entered the hotel room and found another car key. They obtained a warrant for the room and the car. Ninety pounds of marijuana were found in the car. Ultimately, Leavell was given 20 years for trafficking in marijuana enhanced by PFO 2nd degree.

Justice Wintersheimer, writing for the majority, upholds the search as incident to a lawful arrest. He finds that there was probable cause to stop Leavell, and that the resulting search was therefore lawful as incident to a legal arrest. The search of the briefcase was based upon consent. The Court did not discuss the search of the car.

Justice Lambert concurred on the basis of the defendant's consent to search. However, he disagreed with the majority that there was probable cause to stop Leavell, saying that only a Terry stop could be justified under the facts. Further, he stated that the scope of Terry was exceeded when the officers pulled out the bag of marijuana from Leavell's person. However, once Leavell consented to the search of the briefcase, that which was found there created probable cause to issue the warrant to search the car.

Justice Leibson also concurred, stating that the stop was a Terry stop, and that the Supreme Court of the United States should be "challenged" to allow not only the seizure of weapons but also any contraband when conducting a Terry stop and frisk.

Justice Stephens dissented, stating that there was no probable cause to arrest, that thus there was no legal search incident to a lawful arrest, and thus the entire search was unconstitutional.

This case is indeed frightening. Not only are the Fourth Amendment and Section 10 rife with exceptions to the warrant requirement, but this Court demonstrates that in Kentucky there is an unjustifiably low threshhold required for probable cause. When one's shabby dress in an "expensive hotel" combined with saying "cocaine" and "$50,000" establish probable cause for an arrest and search, our privacy rights are slender indeed.

Two opinions of the Court of Appeals were also written during the past two months. In **Shelton v. Commonwealth**, Ky., App., ___ S.W.2d ___ (Oct. 16, 1987), a trial commissioner for Fulton County issued a search warrant in Hickman County authorizing the seizure of marijuana and paraphenalia. The officer, however, forced the defendant to open a locked suitcase during the search, whereupon a small amount of cocaine was found on a dollar bill. The officer then failed to file his return on the warrant for 52 days following the search.

The Court reversed, holding that under Section 10 of the Kentucky Constitution a warrant has to describe with particularity the thing to be seized, that there was no probable cause to believe the locked briefcase contained cocaine, and thus the forced opening of the briefcase during the execution of the warrant violated the Kentucky Constitution primarily and also the Fourth Amendment to the United States Constitution. The Court declined to rule on the propriety of a Fulton County trial commissioner issuing a search warrant for Hickman County, and the violation

of RCr 13.10(2) and (3), when the police officer failed to file a return on the warrant for 52 days.

In Blankenship v. Commonwealth, Ky., App., __S.W.2d. __ (Oct. 23, 1987), the defendant was wounded either during a robbery at a gas station or an incident with an acquaintance. When the police arrived, they went into the defendant's car, without a warrant, where a note was found supportive of the Commonwealth's theory that a robbery had occurred. The Court of Appeals approved the warrantless search, saying that the officer entered the car in order to discover the defendant's identity, and that the search was not necessarily unreasonable. Due to the presence of exigent circumstances, the entry into the car was not a Fourth Amendment violation, citing Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), and thus the note was seized while in plain view while the officer was where he had a right to be.

The Sixth Circuit Court of Appeals was also active during the past two months. In United States v. Bowers, __F.2d.__, 16 S.C.R. 19 (6th Cir. 1987), the Court held that the district judge did not err when he authorized electronic surveillance of the defendant's phones in connection with the Detroit Water and Sewerage Department. The judge at the time was supervising the Department pursuant to a consent judgment. The Sixth Circuit held that this fact did not disqualify him from being a neutral and detached magistrate who could not authorize searches.

The Court noted that the district judge had no personal financial interest in the Department, nor was he involved in any way as a "prosecutor" in the case.

In a second case, United States v. Wiggins, __F.2d.__, 16 S.C.R. 19 (Sept. 21, 1987), the Court revisited Florida v. Royer, 460 U.S. 491 (1983). Here, Wiggins consented to accompany police officers to an airport police room where a dog sniffed out drugs in his suitcase. The Court held that the initial seizure was an investigative detention which ripened into probable cause when the dog sniffed the luggage.

THE SHORT VIEW

1) Smith v. State, Md.Ct. Spec.App., 42 Cr.L. 2038 (10/6/87). The police had probable cause to believe the defendant had committed a robbery/murder, went to his house, knocked on the door, and upon his answering the door proceeded to arrest him and seize incriminating evidence. The Maryland Court held the arrest to be illegal under Payton v. New York, 445 U.S. 573 (1980), which had held an arrest warrant to be required to enter a person's home to effectuate an arrest. United States v. Santana, 427 U.S. 38 (1976 was distinguished on the basis that in Santana the defendant was seen outside the door by the police and proceeded to enter the house, creating exigent circumstances;

2) State v. Kerwick, Fla. Ct. App., 4th Dist., 42 Cr.L. 2030 (9/16/87). In strong language, the Court condemns the police practice here of obtaining permission to search luggage on an Amtrak train of persons under no suspicion. The Court further threw out the search in this case, where the defendant consented to a check of her luggage whereupon the police cut open a smaller bag inside the suitcase. "This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet, in Broward County, Florida, these police officers approach every person on board buses and trains . . . and check identification . . . In the Court's opinion, the founders of the Republic would be thunderstruck."

3) United States v. Nezaj, 41 Cr.L. 2383 (USDC SNY 7/27/87). Where a person named in an arrest warrant is not present at the address named in the warrant, the police may not go to another house to execute the warrant once they learn of the person's whereabouts; rather, the police must go back to the magistrate and obtain a modification of the warrant.

4) State v. Muegge, W.Va. 41 Cr.L. 2393 (7/15/87). The Court held that under a state constitutional provision a security guard acting pursuant to statutory authority must follow the law of search and seizure.

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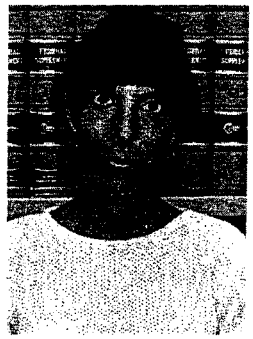
Polis' Attorney's Law:
Any law enacted with more than fifty words contains at least one loophole.

Jaquin's Postulate on Democratic Governments:
No man's life, liberty, or property are safe while the legislature is in session.

Trial Tips

For the Criminal Defense Attorney



Julie Namkin

Sanctions: New Pitfalls in Appellate Practice

This article deals with the imposition of sanctions (both monetary and in the form of contempt) upon court personnel for failure to comply with the rules of court relating to appeals.

CR 73.02(2) provides the appellate courts of this Commonwealth with the authority to sanction a party who fails to comply with the procedural rules relating to appeals. CR 73.02(4) gives the appellate courts the authority to award damages and costs to an appellee or respondent where the appellant or movant has filed a frivolous appeal or motion.

CR 73.02(2) and (4) specifically state:

> (2) ...The failure of any party to comply with other rules relating to appeals or motions for discretionary review (except Rule 76.20(2)(a)) does not affect the validity of the appeal or motion, but is ground only for such action as the appellate court deems appropriate, which may include:
>
> ...
>
> (c) Imposition of fines on counsel for failing to comply with these rules of not less than $250 nor more than $500, and
>
> ...
>
> (4) If an appellate court shall determine that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that the appeal or motion is so totally lacking in merit that it appears to have been taken in bad faith.

CONTEMPT

CR 73.02 makes no mention of the sanction of contempt. However, appellate courts may rely on their "inherent powers" to control certain actions affecting them and their ability to carry out the orderly administration of justice. See Michaelson v. United States, 45 S.Ct. 18, 20 (1924) ("power to punish for contempts is inherent in all courts"); Roadway Express, Inc. v. Piper, 100 S.Ct. 2455, 2464 (1980) (affirming courts' inherent powers to use monetary sanctions against attorneys for abusive litigation practices).

The Kentucky appellate courts utilize the "show cause" order to institute a contempt proceeding against court personnel. However, where a person is found to be in contempt after a hearing pursuant to the "show cause order," it is not clear from the case law whether the contempt is civil or criminal. See In re Conner, Ky., 722 S.W.2d 888 (1987); Moore v. Commonwealth, Ky., 720 S.W.2d 932 (1986); Sanborn v. Commonwealth, Ky., 715 S.W.2d 475 (1986); In re Hale, Ky., 675 S.W.2d 384 (1984); In re Radigan, Ky., 660 S.W.2d 673 (1983).

The Kentucky Supreme Court recognizes that it must comport with the requirements of due process of law under the Fourteenth Amendment to the federal Constitution and Section Two of the Kentucky Constitution before holding a party in contempt. The issuance of a "show cause" order, providing the alleged contemnor with reasonable notice of the charge against him and an opportunity to be heard in his defense, satisfies this requirement of due process. In re Oliver, 68 S.Ct. 499, 507-508 (1948). However, Kentucky caselaw provides little guidance to court personnel as to the culpability standard used by the courts in determining what specific conduct constitutes contempt. In Roadway, the United States Supreme Court stated that courts have inherent power to impose sanctions on counsel who "willfully abuse judicial processes." This uncertainty is compounded by the fact that the courts have failed to specifically indicate whether the contempt is civil or criminal.

A person found in contempt may have failed to meet a filing deadline of the court, a violation of CR 73.02(2). In Moore, Sanborn, and Radigan, the individual was the Appellant's attorney who failed to

timely file the Appellant's brief. In Conner, and Hale, the individual was the court reporter who failed to timely certify the record for purposes of appeal. In each of the aforementioned cases, the Kentucky Supreme Court granted the party's request for an extension of time, but included in its order granting said extension the order to show cause why the party should not be held in contempt or sanctioned for failing to meet the Court's deadline.

In Radigan, the attorney admitted at the show cause hearing that he did not look at the record in the case until the very day the third extension motion expired, despite the Court's pending show cause order. The Court found the attorney's "explanations as to other work and projects...grossly inadequate" especially since the case was a relatively simple one with few issues, all of a routine nature." Id. at 674. The Court characterized it as "a brief that should have taken ten days to prepare." Id. The Court was particularly concerned that counsel had failed to notify the Court "immediately if there were considerations that would legitimately have prevented" counsel from complying with the Court's order "when notified thereof." Id.

Unlike the garden variety felony appeal presented in Radigan, both Sanborn, and Moore, were appeals from capital convictions which involved a multitude of complex legal issues. In each case the Appellant's initial motion for an extension of time in which to file the brief was granted, but the Court included a show cause order as part of its order granting the ten month extensions. Justices Gant and White, dissenting, pointed out that the Public Advocate had never previously been "informed that the initial extension motion would be a final one" and stated that the show cause order should not have been made part of the original extension. Sanborn, at 478. When the attorneys failed to file the brief and filed a second extension motion on the day the brief was due, they were required to appear at a show cause hearing. The Court's opinions indicate it was deeply disturbed by counsel's waiting until the date the brief was due to make an additional request for more time. Id. at 476-477. The Court stated that from now on it wanted counsel to "request an additional extension at the earliest practicable date." Id. at 477.

Since counsel in Moore, were the trial counsel, while the attorneys in Sanborn, were not, the Court indicated the former should be familiar with the record and the meritorious issues and thus not need as much time as an attorney unfamiliar with the case. Moore, at 933. The Court also indicated in Moore, that it might look more favorably upon a public attorney's request for more time as opposed to the request of a private attorney. Id. In neither case had counsel actually begun writing the Appellant's brief. Id.; Sanborn.

The commencement of writing the brief appears to be a significant step to the Court in determining whether counsel has behaved contumaciously. In Simmons v. Commonwealth, Ky., 719 S.W.2d 736 (1986), a fact situation similar to Moore and Sanborn, and a capital case, the attorneys' were not held in contempt since they had read the record, researched issues, and committed portions of the brief to paper. Id. at 737. The Court was critical, however, of the attorneys for waiting until the day the brief was due to file an additional request for more time. Id. It should be noted that the Court failed to mention that 2 of the 3 attorneys were retained and were trial counsel (as in Moore) and thus should have been familiar with the record and the issues.

The lessons to be learned for the practicing appellate attorney from the aforementioned cases are to request an additional extension of time immediately upon realizing that you will not be able to comply with the court's deadline and be able to show that you have actually commenced writing the brief. Counsel's workload or the complex nature of the case do not seem to be valid defenses which will persuade the Court not to find you in contempt or impose a fine upon you.

In Hale, supra at 835, the court reporter relied upon her workload and a second job with a private attorney as reasons for not complying with the court's deadline. The Court found these reasons not sufficient to avoid a finding of contempt. Id. In Conner, at 889, the court reporter not only failed to timely certify a supplemental record, but failed to appear at the show cause hearing. At a second hearing, she offered no explanation or excuse for any of her previous behavior. Id. The Court found her in contempt and fined her $300. Id. Since it was her first conviction, the Court suspended half ($150) the fine. Id. By comparison, the reporter in Hale, was fined $250, but the fine was not suspended. The Court gave Conner and Hale five and six days, respectively, to certify the records, and stated that failure to meet these deadlines would result in a per diem fine of $150 and $25 respectively. Id.; Conner.

The Kentucky Supreme Court has recognized that before an officer

of the court is subjected to a monetary fine and/or a charge of contempt for a violation of either subsection (2) or (4) of CR 73.02, the individual is entitled to reasonable notice of the specific charges and an opportunity to be heard in his own behalf in accordance with the provisions of due process.[1] See Walker v. Commonwealth, Ky., 714 S.W.2d 155 (1986) (appointed attorney required to show cause why a motion for discretionary review in a direct appeal was not frivolous - in violation of CR 73.02(4) - and why sanctions should not be imposed); Freeman v. Commonwealth, Ky., 697 S.W.2d 133 (1985) (appointed attorney required to show cause why a motion for discretionary review in a post-conviction action was not frivolous - in violation of CR 73.02(4) - and why sanctions should not be imposed); Roark v. King, Ky., 696 S.W.2d 787 (1985) (retained attorney required to show cause why he should not be held in contempt for the content of the Appellant's brief).

SANCTIONS

The Kentucky Court of Appeals, unlike the Kentucky Supreme Court, was not of the belief that the requirements of procedural due process must be accorded to court personnel prior to imposing sanctions upon them. In In re Marshall, Ky., 734 S.W.2d 472 (1987), a single judge of the Court of Appeals granted counsel's motion for an additional 45-day extension of time in which to file the Appellant's brief and, in the same order, imposed a $250 fine (pursuant to CR 73.02(2)(c)) on counsel for failing to comply with the Court's prior order stating that no further extensions would be granted. Id. The Kentucky Supreme Court granted counsel's motion for discretionary review and held that before imposing a fine "fairness dictates" that the party be given "notice of the proposed action against him and have an opportunity to present to the court [at an oral hearing] extenuating circumstances which might excuse his delinquency or lessen the amount of the penalty." Id. at 473. The Court also held "that a fine in a case of this nature cannot be imposed by one judge of the Court of Appeals." Id.

Despite the specific holdings enunciated in Marshall, the Court of Appeals has failed to follow in the precedential footsteps of the Kentucky Supreme Court when it comes to guaranteeing an officer of the court the protections of procedural due process.

In response to in Marshall, the Court of Appeals has begun to utilize its own form of "show cause" order as set out in PB&S Chemical Company v. Eastwood, Ky. App., 736 S.W.2d 359 (1987).[2] See also Prather v. Commonwealth, File No. 86-CA-2672-MR (Order of the Court of Appeals entered September 3, 1987) and Brooks v. Commonwealth, File No. 87-CA-333-MR (Order of Court of Appeals entered August 24, 1987) utilizing the same language as in PB&S Chemical Company.

This summary procedure of the Court of Appeals finding sanctions to be appropriate after the occurrence of the alleged violation without giving counsel prior notice that failure to timely perform a required step in the appellate process would subject him to possible sanctions would appear to be a due process violation. See Taylor v. Hayes, 94 S.Ct. 2697, 2703 (1974); Marshall, Moore. Moreover, the Court of Appeals' order indicates it has already prejudged the individual prior to giving said individual his due process right to be heard in his own behalf. By comparison, the "show cause" order

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[1] The exact language utilized by the Kentucky Supreme Court in its orders is as follows: "[the officer of the court] shall appear before this Court [on a named date] to show cause why [him/her] should not be held in contempt of this Court or have sanctions levied against [he/she] for failure to [comply with the court's rules]."

[2] "This Court believes that imposition of a sanction against appellants' attorney pursuant to CR 73.02(2)(c) is appropriate. [Appellants' attorney] is hereby given fifteen (15) days from the date of entry of this order to SHOW CAUSE why sanctions should not be imposed for failure to timely perform a required step in appellate practice." Id. at 361.

utilized by the Kentucky Supreme Court makes no such prejudgment. Also, unlike the Supreme Court's "show cause" order, the order of the Court of Appeals' does not specifically provide the individual with the opportunity to be heard at an oral hearing as required by due process of law. Marshall.

Although the belief that sanctions were appropriate in PB&S, was that of a three-judge panel, in Prather, and Brooks, the belief was that of a single judge. Clearly, the orders in the later two cases violated the holding in Marshall.

WHAT STANDARD?

A major problem with all of the aforementioned Kentucky cases is that they fail to articulate what standard is being used to determine whether the individual should be sanctioned (either by fine and/or contempt). Without any definite standards, the decision whether to sanction and who to sanction is infested with discretionary elements. That an appellate court has discretion in deciding whether or who to sanction does not justify exercising that discretion arbitrarily, capriciously, unreasonably, or without regard to the particular circumstances of the individual case and the individual officer of the court. As the Kentucky Supreme Court stated in Ready v. Jamison, Ky., 705 S.W.2d 479, 482 (1986), "the sanction imposed should bear some reasonable relationship to the seriousness of the defect." The Court recognized in Marshall, that "[t]he imposition of a fine is not automatic in all cases of failure to comply with a rule. It is discretionary with the court, and ... must be considered upon a case-by-case basis." See Ready. However, without specific standards, there will be "problems with the consistency of" applying sanctions as there will always "be differences of opinion as to when and when not to apply sanctions." Raley v. Raley, Ky.App., 730 S.W.2d 531, 532 (1987) (Reynolds, Judge, dissenting).

Several courts have construed the standard necessary to evoke a sanction's determination. See Overnite Transp. Co. v. Chicago Indus. Tire Co., 697 F.2d 789, 795 (7th Cir. 1983) ("a serious and studied disregard for the orderly process of justice...intentional acts of misconduct involving serious breaches of the Canons of Ethics"); United States v. Ross, 535 F.2d 346, 349 (6th Cir. 1976) ("an intentional departure from proper conduct or at a minimum...a reckless disregard of the duty owed by counsel to court").

In contrast to CR 73.02(2), which contains no standard for determining when a fine may be imposed, CR 73.02(4) contains a specific standard for determining when an appeal or motion is frivolous: "so totally lacking in merit that it appears to have been taken in bad faith." In Marshall, the Court indicated that the mere failure to comply with a court rule "is sufficient, in itself, to justify the imposition of a fine for the violation." Since the Court believes an individual is subject to strict liability for violation of a court rule, what standard does the Court use when exercising its discretion as to when and whom to sanction. Present case law provides little guidance for court personnel, and the language in Marshall, indicates the Court does not believe a specific standard is necessary.

When it comes to finding an individual in contempt for violation of a rule of court, the Kentucky Supreme Court has not articulated any specific standards either. However, language in Marshall, by implication indicates that the Court would consider whether the individual acted in bad faith or "maliciously or deliberately refused to comply with the rule." In Roark v. King, supra at 788, the Court found Appellant's counsel in contempt due to the "instances of accusatory, intemperate and unfounded statements in the brief [for Appellant]." The Court's opinion contains numerous examples of these accusatory and intemperate statements, thus providing some guidance to members of the bar as to what constitutes contemptuous conduct. The court also indicated that counsel's "lack of sensitivity to our judiciary" and his lack of understanding of "his role as an advocate and the role of the court as arbiter" were factors it considered in finding contumacious conduct. Id.

Pursuant to CR 73.02(4), the Kentucky Supreme Court has directed attorneys to appear at a hearing and show cause why a particular appeal or motion "should not be considered frivolous, and why an appropriate sanction should not be imposed." Freeman. In the cited case, the Court found that the two issues argued in movant's motion for discretionary review "were not close" and "were patently groundless." Id. at 134. As to the attorney's defense of the claim of frivolity (to preserve the accused's "right to pursue a writ of habeas corpus in Federal Court after state remedies had been exhausted"), the Court stated that "[t]he decision of the Court of Appeals was final state action, without a useless motion for discretionary review." Id. (Emphasis added). Finding the motion frivolous, the attorney was fined $100.00. See also Walker v. Commonwealth, where the Court found

counsel's argument in a motion for discretionary review on behalf of her client "uncommonly weak." Id. at 156. The Court was unpersuaded that the motion was filed in good faith and believed it was devoid of merit. Id. Counsel was fined $100, but it was suspended as it was the first sanction against counsel. Id.

Court personnel should be aware that just because the fine imposed is the party's first sanction, she/he is not entitled to automatic suspension of the fine. See Marshall, finding no merit to the argument that counsel's fine should be suspended because it was the first sanction imposed upon him.

In three civil cases, the appellee moved for an award of damages and costs pursuant to CR 73.02(4) after the appellant was unsuccessful on appeal. Leasor v. Redmon, Ky., 734 S.W.2d 462 (1987); Raley, supra; Martuscelli v. Planters Bank and Trust Company, Ky.App., 705 S.W.2d 938 (1986).

In Leasor, supra at 463, sanctions were awarded against Appellants' and their attorney. The Appellants argued that sanctions are not warranted "where counsel, in good faith, believes in the position he advocates and presents a rational argument to the appellate court," and "when a court of the Commonwealth has found merit in its position." Id. at 464. The Kentucky Supreme Court opined "that the belief in counsel, which is subjective, cannot enter into the determination of whether the appeal is frivolous. The factors to be considered must necessarily be in the record which can be reviewed objectively." Id. The Court recognized that a lawyer's duty "is to represent his client zealously within the bounds of the law." Id., citing ABA Code of Conduct, Canon 7. Counsel may advocate any position as long as it "is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law." Id.

Because Appellants' argument was not supported by law, and did not argue for an extension, modification, or reversal of the law, the Court opined it was not taken in good faith. Id. at 465. Thus, Appellants' position that they had asserted a rational argument to the Court of Appeals was without merit. Id. at 466. The Court upheld the Court of Appeals' award of damages to Appellee against Appellants and their attorney.

Three Justices dissented because they did not believe that Appellants' "appeal from the summary judgment in favor of [Appellee] was inconsistent with sound professional judgment." Id. at 467. Although the dissent did not argue that the Leasor's "should have prevailed in their action against Redmon," it did not believe the appeal was frivolous. Id.

The dissent expressed fear that the majority opinion would "have a chilling effect upon the practice of law and provoke timidity and excessive caution, contrary to the best interest of the public and the development of the law." Id.

In Raley, Appellee moved, pursuant to CR 11 and CR 73.02(4), that sanctions (in the amount of $500 in attorney's fines and $19 in court costs) be imposed upon Appellant and/or his counsel due to the frivolous nature of the appeal. The Court of Appeals granted Appellee's motion and ordered one half of the amount to be paid by Appellant and one half to be paid by Appellant's counsel. Id. at 532. Unfortunately, the opinion makes no mention of the facts of the case or the legal principles involved. Hence, it provides virtually no guidance to members of the bar as to why the appeal was considered to be "taken in bad faith"; "not well grounded in fact"; and "not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Id. at 531. However, it is clear that the Court utilized the standard in the ABA Code of Conduct, Canon 7. See Leasor, at 464.

In Martuscelli v. Planters Bank and Trust Company, Ky.App., 705 S.W.2d 938 (1986), Appellants appealed from the trial court's order entering summary judgment against them. The Court of Appeals affirmed the summary judgment ruling, but held that Appellants' appeal was "not so totally lacking in merit that it appears to have been taken in bad faith." Id. at 940. Thus, the Court of Appeals denied Appellee's request "for damages and double costs pursuant to CR 73.02(4).

Since the appellate courts of this Commonwealth have chosen to act in a field where their actions are discretionary - the imposition of sanctions - these courts "must nonetheless act in accord with the dictates of the Constitution - and in particular, in accord with the Due Process Clause." Evitts v. Lucey, 105 S.Ct. 830, 839 (1985).

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Batson Update:

Striking Out The Prosecutor's Strikes

JoAnne Yanish

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and Griffith v. Kentucky, 479 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) have generated a barrage of cases and issues involving the use of peremptories to exclude prospective jurors on the basis of race or other group identification. Issues that are being litigated include establishing a prima facie case of discrimination, what constitutes a cognizable group, prosecutorial rebuttal, and defense surrebuttal. The first installment of this article will address establishing a prima facie case of racial discrimination and recognized cognizable groups. The second will concern prosecutorial rebuttal and defense surrebuttal.

Batson overruled Swain v. Alabama, 380 U.S. 202 (1965) on the evidentiary burden of a defendant who claims he's been denied equal protection through the state's use of peremptory challenges to exclude members of his race from the jury. Batson held a defendant could establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's use of peremptories in that defendant's trial. Batson spelled out the way in which a defendant could establish a prima facie case of purposeful discrimination:

a) Show that the defendant is a member of a cognizable racial group;

b) show that the prosecutor has used peremptory challenges to remove persons of the defendant's race from the venire;

c) show that these facts and other circumstances raise an inference that the prosecutor used his or her peremptories to exclude veniremen on account of race.

Batson also held that a defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.

Blacks, have, of course, been recognized as members of a cognizable group in numerous cases many of which rely on Batson. American Indians have also been so recognized. United States v. Chalan, 812 F.2d 1302, 1314 (1987). While rejecting young persons as a cognizable group, the Massachusetts Supreme Court in Commonwealth v. Samuel, 495 N.E.2d 279, 281 (1986), recognized women as such a group but then held that the prosecution had not used its peremptories to exclude women.

Four justices of the Supreme Court have also recognized the possibility that persons opposed to the death penalty may constitute a cognizable group and be the subject of a Batson claim. Gray v. Mississippi, ___ U.S. ___, 95 S.Ct. 622, 639, n.18 (1987). In State v. Peery, 391 N.E.2d 566, 572 (1986) the Nebraska Supreme Court also recognized this possibility under an analysis of a defendant's right to impartial jury but refused to find a constitutional violation where the state used one peremptory challenge to prevent one person with some concern about the death penalty from sitting as an alternate juror. Fields v. People, 732 P.2d 1145 (Colo. 1987) held Spanish-surnamed jurors to be a cognizable group under both 6th Amendment and equal protection analyses.

In a case in which blacks were struck, the California Supreme Court, in response to a prosecutor's explanation that he struck one juror because he was a truck driver, stated that "the remark suggests yet another impermissible group bias behind this challenge...." The court noted that "trial by a jury from which working-class people are systematically excluded is also a violation of the representative cross-section rule." People v. Turner, 726 P.2d 102, 108 (Cal. 1986). Curiously, the second circuit has also recognized white people as a cognizable group under a 6th Amendment analysis in Romans v. Abrams, ___ F.2d ___, 41 Cr.L. 2245, 2246 (6/9/87) although relief was denied since the court found no problems with the jury in question. Other cases have rejected the notion of whites as a cognizable group, however.

Many cases have found a prima facie case even though the prosecutor challenged fewer than all prospective jurors on the venire who were members of the cognizable group. In United States v. David, 803 F.2d 1567 (11th Cir. 1986) the prosecutor struck two of three black jurors on the panel and one of two from the alternate pool. The Court of Appeals for the 11th Circuit found the defense had established a prima facie case, noting that under Batson, "the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown." Id., at 1571, citing Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986). In accordance is United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987).

Griffith v. Kentucky, ___ U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) which held that new constitutional rules for the conduct of criminal prosecutions, including Batson, were retroactive to cases pending on direct appeal, was remanded by the United States Supreme Court in light of Batson. In Griffith, 4 of 5 blacks had been struck. Nine of twelve blacks were challenged by the prosecutor with peremptories in Powell v. State, 355 S.E.2d 72 (6a. App. 1987). The Powell court remanded the case for a Batson hearing on the sufficiency of the prosecutor's reasons. In United States v. Love, 815 F.2d 53 (8th Cir. 1987) the striking of a sole black venireman was found to establish a prima facie case of discrimination but the government's rebuttal was upheld. In United States v. Chalan, 812 F.2d 1301 (10th Cir. 1987) where 3 of 4 American Indian jurors were challenged for cause and the sole Indian panel member struck with a peremptory, the Court found a prima facie case saying, "If all of the jurors of a defendant's race are excluded from the jury, we believe that there is a substantial risk that the Government excluded the jurors because of their race. Our holding helps to avert that risk by requiring the Government to explain the reasons for its challenges when no members of a defendant's race are left on the jury." Id. at 1314.

Some Courts have attempted to establish guidelines in their jurisdictions for analysis of the prima facie case. In Ex Parte Branch, ____ S.E.2d ____, 42 Cr.L. 2079, 2080 (10/9/87) the Alabama Supreme court set out the following as "illustrative of the types of evidence that can be used to raise the inference of discrimination":

1. Evidence that the jurors in question shared only the one characteristic of group membership, and were in all other respects (i.e., jobs, age, social or economic conditions, etc.), as heterogeneous as the community as a whole.

2. A pattern of strikes against black jurors on a particular venire.

3. The past conduct of the offending attorney.

4. The type and manner of the offending attorney's questions and statements during voir dire, including a merely desultory voir dire.

5. Type and manner of questions directed to the challenged juror, including a lack of questions or lack of meaningful questions.

6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or simlar manner.

7. Disparate examination of members of the venire, e.g., a question designed to provoke a certain response that is likely to disqualify a juror was asked of black jurors, but not of white jurors.

8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury.

9. The offending party used peremptory challenges to dismiss all or most black jurors, but did not use all his peremptory challenges.

Once a prima facie case has been established Batson held that the burden shifts to the prosecutor to provide a "neutral explanation related to the particular case to be tried." 106 S.Ct. at 1723. The explanation for the strikes must be "clear and reasonably specific" and contain "legitimate reasons" for the challenges. 106 S.Ct. at 1723, n.20.

Part II in the February 1988 issue will examine the evaluation of prosecutorial rebuttal by various courts.

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Doe v. Austin

Doe v. Austin (cite not available yet) is an action that was filed in 1982 seeking to require the Cabinet for Human Resources to make available judicial procedures to mentally retarded individuals committed or facing commitment to state facilities. The original defendants were the Secretary for the Cabinet for Human Resources and the Public Advocate for the Commonwealth of Kentucky. In 1983, the United States District Court certified this proceeding as a class action. Soon thereafter, Judge Allen entered an agreed order dismissing defendant Public Advocate upon his agreement to provide legal representation to indigent persons confined to state mental retardation treatment centers. After the completion of discovery, the case was submitted to the District Court on plaintiff's motion for summary judgment. The District Court entered its first memorandum opinion on March 28th, 1984. The court held that the Cabinet's admission policies did not violate either the equal protection or due process clause. However, the court did find that the defendant had a practice of permitting the parents of persons in mental retardation residential treatment centers to veto the facility's decision to seek community placement of their sons or daughters and that such a practice violated due process guarantees. On a motion to reconsider its decision, the District Court entered its second memorandum opinion on January 9th, 1986. Judge Allen reaffirmed his initial holding that the defendant's admission procedures did not violate due process but held that such procedures violated plaintiff's right to equal protection. The District Court ordered the defendant not to admit any profoundly or severely retarded persons over the age of 18 to any mental retardation residential treatment center without a judicial determination of the appropriateness of such admission.

After the District Court's second memorandum opinion, the Kentucky General Assembly amended KRS 202B to delete certain sections used by the District Court as the basis for its January 9th, 1986 memorandum opinion. Plaintiffs moved the District Court to enter a summary judgment declaring the new legislation unconstitutional.

On November 20th, 1986, the District Court entered its third and final memorandum opinion. The court expanded its previous holding and held that the defendant's admission procedures violated both the due process clause and the equal protection clause. Judge Allen found the new legislation to be unconstitutional and issued a preliminary injunction enjoining the defendant from continuing to confine any mentally retarded person in any institution who is over 18 years of age without first granting him or her a judicial hearing to determine whether or not he or she should be committed under the standards set out in KRS 202B.040(1-4). The Cabinet appealed the case to the Sixth Circuit in December of 1986. Briefs have been filed and oral arguments were heard in September 1987. We are currently awaiting a decision from the Sixth Circuit.

Factual Account of Case

Nearly all mentally retarded individuals in Kentucky state facilities have been placed by CHR without benefit of judicial process. The record from the district court is clear. Only one judicial hearing occurred prior to the commitment of a mentally retarded individual to a state facility during the years 1982 through 1985.

When the case was initially filed in 1982, there was a statutory scheme covering the voluntary and involuntary commitment of the mentally ill and the mentally retarded. KRS 202A and 202B. The statute was designed to meet constitutional minimums. Prompt hearings with a judicial finding of danger to self or others was a prerequisite to involuntary commitment of both the mentally ill and the mentally retarded. At any time, if the court reviewed the commitment and found that the resident no longer met the standards of commitment, he or she was entitled to release. This commitment statute has been employed for the mentally ill in Kentucky, but

not the mentally retarded.

Rather than employ the statutory framework, CHR established the Record Review Committee to govern admissions of the mentally retarded to state facilities. This committee established admissions criteria that are neither published nor promulgated. They bear no resemblance to the statutory and constitutional requirement of danger to self or others. The Record Review Committee used the following admissions criteria: 1) The availability of community programs, 2) the availability of space in the recommended facility, 3) the degree of handicap of the individual and 4) the status of the family situation. Using these informal and unpublished admission standards, the Record Review Committee labels commitments under their criteria as voluntary, thus avoiding the involuntary commitment procedures found in the statute.

The case was initially filed to challenge the informal commitment procedures used by the Cabinet. After the successful opinion in January of 1986, the legislature reacted by codifying the informal procedures into the statute. The District Court ruled that the amendments effectively eliminated the rights of the mentally retarded person to a judicial hearing prior to an involuntary commitment. Plaintiffs successfully challenged the amendments, obtaining a preliminary injunction again requiring the Cabinet to provide basic procedural protections to the class.

Legal Arguments

The facts of this case present substantial due process and equal protection arguments. The indeterminate placement of a mentally retarded individual over the age of 18 without any judicial review is a deprivation of liberty without due process of law. The Supreme Court is clear that there is a liberty interest at stake and that it cannot be deprived without constitutionally adequate procedures. O'Conner v. Donaldson, 422 U.S. 563 (1975). The Cabinet relied on the holding in Parham v. J.R., 442 U.S. 584 (1979). The defendant submitted that the statutory amendments in Kentucky were similar to the criteria used in the commitment of minors in Parham. However, no court has ever held Parham to have been extended to apply to the commitment of adults. The plaintiff cited Clark v. Cohen, 613 F. Supp. 684 (M.D. Pa., 1985), aff'd, 794 F. 2d 79 (3rd Cir., 1986), for a detailed review of Parham and how due process requires a judicial hearing prior to commitment to a state facility. In Clark, the court found that a judicial mechanism is needed to implement the professional recommendations.

Additionally, the informal commitment procedures used by the Cabinet do not offer any of the safeguards held by the courts to be mandated by due process, such as a judicial determination of dangerousness, the right to counsel, the right to confrontation and cross-examination of witnesses, and the right to least restrictive placement and periodic review.

The Cabinet attempts to bolster its due process argument by stating that the guardianship process found in KRS 387, along with the Record Review Committee process, would constitute a voluntary commitment. This arguments fails both factually and legally. The record clearly showed that the guardianship procedure had not been a prerequisite for admission to a state facility. Additionally, the focus is entirely different in an involuntary commitment hearing as opposed to a guardianship hearing.

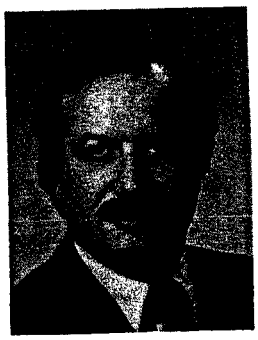
Finally, the practice of excluding minimally retarded adults from the judicial procedures found in the statute by characterizing admissions as voluntary violates the equal protection clause of the 14th Amendment which guarantees a person similarly situated shall be treated in a similar manner. For purposes of commitment, the mentally retarded and the mentally ill are similarly situated. There is no rational basis for utilizing the statute for the mentally ill and not the mentally retarded. Both have a fundamental constitutional right not to be placed without a judicial hearing to determine dangerousness to self or others.

While the case is pending before the U.S. Court of Appeals for the 6th Circuit, any mentally retarded adult over the age of 18 committed after November of 1986 is entitled to the involuntary commitment procedures found in KRS 202A and 202B. While there is currently a statutory scheme covering the involuntary commitment of the mentally retarded, there is also a movement to abolish the statute. Therefore, if the plaintiffs are successful in the 6th Circuit, the drafting of a final compliance plan governing the commitment procedures prior to an indeterminate commitment to a state facility will be especially important. Any suggestions or insights from anyone involved in the commitment process are encouraged to contact Kelly Miller, Commonwealth Attorney's Office, 514 West Liberty Street, Louisville, KY 40202, (502) 588-2340.

Kelly Miller has recently left the Legal Aid Society, Inc. and joined the Domestic Violence section of the Louisville Commonwealth Attorney's Office. She continues to handle the Doe v. Austin case.

Neal Walker

Kentucky Supreme Court Rule Changes



Ed Monahan

The following is a summary of the important rules change announced by the Supreme Court of Kentucky on July 1, 1987 and the amendments to those changes announced on September 24, 1987 which relate to the practice of criminal law. The rules changes discussed below are effective January 1, 1988.

I. CIVIL RULES

1. CR 65.09(1): Interlocutory Relief in Supreme Court

This rule provides that a party adversely affected by an order of the Court of Appeals in a habeas corpus or in a matter involving interlocutory relief prior to final judgment or pending appeal from a final judgment may move the Supreme Court to vacate or modify.

The addition to the rule merely sets out the required number of copies of the pleadings: "Ten copies of the motion and the response, if any, shall be filed."

2. CR 75.02(1): Transcript of Evidence and Proceedings

Makes clear that "initially the cost of a transcript will be borne by the party designating it."

3. CR 76.28(2): Opinions; Time of Announcement

Changes the time for releasing Supreme Court opinions from Wednesday to Thursday.

This change was made so that the rule would conform to what the court has been doing absent the rule change. Apparently rulemakers can act contrary to rules they make themselves until they get around to changing the rules.

4. CR 76.30(2)(e): Effective Date of Opinions; Finality

Adds an additional requirement for the clerk of the trial court, without further order of the trial court, to forward a copy of the appellate opinion to any administrative agency, board, or commissioner which is directed to conduct further proceedings with respect to the opinion.

II. RULES OF CRIMINAL PROCEDURE

1. RCr 7.24(3) Discovery & Inspection

This rule presently reads:

"(3) If the court grants relief sought by the defendant under this rule it may condition its order by requiring that the defendant permit the commonwealth to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects which the defendant intends to produce at the trial and are in his possession, custody or control."

In June, 1987 in the Kentucky Bench and Bar (Vol. 51, No. 2) Justice Roy Vance, chairperson of the Kentucky Supreme Court Criminal Rules Committee, proposed that this rule be drastically changed to read:

"(3)(A) If the defendant requests disclosure under rule 7.24, upon compliance to such request by the commonwealth, and upon motion of the commonwealth, the court shall order that the defendant permit the commonwealth to inspect, copy or photograph:

(i) books, papers, documents or tangible objects which the defendant intends to introduce into evidence or which are in the defendant's possession, custody or control;

(ii) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony.

(B)(i) If a defendant intends to introduce expert testimony relating

to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, at least 20 days prior to trial, or at such later time as the court may direct, notify the attorney for the commonwealth in writing of such intention and file a copy of such notice with the clerk. The Court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate;

(ii) when a defendant has filed the notice required by paragraph (B)(i) of this rule, the court may upon motion of the attorney for the commonwealth, order the defendant to submit to a mental examination. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no fruits of the statement shall be admissible into evidence against the defendant in any criminal proceeding except upon an issue regarding mental condition on which the defendant has introduced testimony.

(C) If there is a failure to give notice when required by this rule or to submit to an examination ordered by the court under this rule, the court may exclude such evidence or the testimony of any expert witness offered by the defendant on the issue of his guilt.

(D) Evidence of an intention as to which notice was given pursuant to this rule, but later withdrawn, shall not be admissible, in any civil or criminal proceeding, against the person who gave said notice."

On July 1, 1987 the Supreme Court of Kentucky decided, after limited but spirited bar comment, to change the rule to read:

"(3)(A) If the defendant requests disclosure under rule 7.24, upon compliance to such request by the commonwealth, and upon motion of the commonwealth, the court may order that the defendant permit the commonwealth to inspect, copy or photograph:

(i) books, papers, documents or tangible objects which the defendant intends to introduce into evidence and which are in his possession, custody or control;

(ii) any results or reports of physical or mental examinations and of scientific test or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony.

(B)(i) If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, at least 20 days prior to trial, or at such later time as the court may direct, notify the attorney for the commonwealth in writing of such intention and file a copy of such notice with the clerk. The Court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate;

(ii) when a defendant has filed the notice required by paragraph (B)(i) of this rule, the court may upon motion of the attorney for the commonwealth, order the defendant to submit to a mental examination. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no fruits of the statement shall be admissible into evidence against the defendant in any criminal proceeding.

(C) If there is a failure to give notice when required by this rule or to submit to an examination ordered by the court under this rule, the court may exclude such evidence or the testimony of any expert witness offered by the defendant on the issue of his guilt. (D) Evidence of an intention as to which notice was given pursuant to this rule, but later withdrawn, shall not be admissible, in any civil or criminal proceeding, against the person who gave said notice."

Surprisingly and without any explanation, the Supreme Court entered an order on September 24, 1987 amending their July 1 change to 3(B)(ii) of this rule. It now reads:

"(ii) When a defendant has filed the notice required by paragraph (B)(i) of this rule, the court may, upon motion of the attorney for the commonwealth, order the defendant to submit to a mental examination. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, shall be admissible into evidence against the defendant in any criminal proceeding. No testimony by the expert based upon such statement, and no fruits of the statement

shall be admissible into evidence against the defendant in any criminal proceeding except upon an issue regarding mental condition on which the defendant has introduced testimony."

Analysis

As amended, RCr 7.24(3) significantly expands the prosecution's right to pretrial discovery of defense materials. Except as described infra, though, the prosecution's reciprocal discovery rights are conditioned upon the defendant seeking, and obtaining, pretrial discovery of the prosecution under the provisions of RCr 7.24(1) & (2) (to this extent the amendment does not change existing law). 7.24(3)(A) extends reciprocal discovery rights to the prosecution only after the defendant "requests disclosure under Rule 7.24," and after the state complies and moves for reciprocal discovery. As a tactical matter, then, counsel should consider the advantages of not formally seeking discovery under 7.24 so that the prosecution has no right to pretrial discovery of defense materials under 7.24(3)(A). Such an approach is potentially very dangerous and should only be undertaken in limited situations. For instance, counsel may have already obtained all discoverable evidence through independent sources. Or perhaps counsel is positive that no 7.24 material exists.

Such an approach would not preclude a defense motion for production of witness statements under RCr 7.26 or for pretrial discovery of evidence under provisions of the federal constitution, such as a request for disclosure of exculpatory evidence under the due process clause, see Brady v. Maryland, 83 S.Ct. 1194 (1963), or a request for production of psychiatric records of prosecution witnesses under the confrontation clause, see Pennsylvania v. Ritchie, 107 S.Ct. 989 (1987). To reiterate, it is only when the defendant seeks and obtains discovery under the provisions of RCr 7.24 (and not under other theories of discovery) that the prosecution may compel reciprocal discovery.

Subsections (i) and (ii) of 7.24 (3)(A) identify what types of defense materials are discoverable once the prosecution's right of reciprocal discovery has been triggered. Under subsection ii) "books, papers, documents or tangible objects which the defendant intends to introduce into evidence" are discoverable. So far we see no expansion of the prosecution's discovery rights. In fact, the amended rule no longer lists "statements" as being among the items which the prosecutor can discover.[1]

The greatest changes wrought by the amendment concern the prosecution's right to discover defense scientific or expert materials. Subsection (ii) radically expands reciprocal prosecution discovery in this area. Prior to the amendment, prosecution discovery was limited to "scientific or medical reports" which the defendant intended to introduce at trial. Now, though, the prosecution can compel production not only of "reports" of "physical or mental examinations and of scientific tests or experiments" but also of "results" of such exams, tests, or experiments. And no longer is prosecution discovery of these materials limited to that which the defendant intends to introduce at trial. Now the state can compel production of results/reports which the defendant intends to introduce "or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony."

The only limitation in the amendment is that the tests or experiments must have been "made in connection with the particular case." 7.24(3)(A)(iii).

This provision is replete with ambiguity and not without constitutional problems. First, what are "any results" of the tests or experiments which the amendment refers to? Must defense counsel produce the performance charts calibrating the defendant's responses to a standardized personality inventory or the test scores of the Wechsler Adult Intelligence Scale? Must defense counsel produce the worksheet of the defense ballistics expert? What about the working notes and raw data of the defense serologist? These questions will have to be resolved through litigation.

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[1] RCr 7.26, which requires the prosecutor to produce witness statements prior to the time the witness testifies, is limited to prosecution witnesses. There is no requirement under 7.26 or 7.24, as amended, of the defendant's production of statements of defense witnesses or, of statements which the defense has obtained from prosecution witnesses.

The constitutionality of any state reciprocal discovery provision must be evaluated under the due process clause and the principles announced in Wardius v. Oregon, 93 S.Ct. 2208 (1973). Holding that "discovery must be a two way street," Wardius struck down an Oregon discovery statute which required a defendant to file a list of alibi witnesses but did not by its terms provide for discovery of rebuttal witnesses. Wardius at 2212. "The state may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." Id.

Kentucky's amended reciprocal discovery rules are vulnerable to a Wardius due process challenge, particularly in the context of insanity defense cases. Under 7.24(3)(B)(i), discussed in greater detail infra, the defense must file notice of its intention to introduce evidence of mental illness, etc., within 20 days of trial.

Subsection (ii) provides that, upon filing such notice, the court, upon the prosecution's motion, may order the defendant to submit to a mental examination. KRS 504.070(4) provides that, within 20 days of trial, the prosecution must file a list of witnesses in rebuttal to the insanity defense "along with reports prepared by its witnesses."

The statutory provision does not provide for discovery of "results" of psychiatric tests. If the defendant has been forced to produce psychometric test data under the theory that such constitute "results...of...mental examinations" under RCr 7.24(3)(A)(ii), but is denied access to such evidence generated by a prosecution psychiatric exam under KRS 504.070(4) a clear due process violation is presented under Wardius.[2]

As indicated, 7.24 has been amended to require the defense to give notice of the intention to introduce certain types of expert testimony. There would seem to be little need for such an amendment since KRS 504.070(1) already requires notice of intention to introduce "evidence of his mental illness or insanity." The amendment expands the notice requirement to include "expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt." This provision is broad enough, and is no doubt designed to embrace, expert opinion on topics such as the battered woman syndrome, post-traumatic stress disorder, and the presence of extreme emotional disturbance. If counsel intends to introduce such evidence and believes s/he is required to give notice under 7.24(3)(B), remember that you cannot be compelled to reveal your theory of defense.

Note that by its terms, the defense need only give notice of expert testimony "bearing upon the issue of his guilt." Thus, expert testimony directed only to the issue of mitigation need not be preceded by notice.

Finally, 7.24(3)(C) provides that failure to provide notice under the rule may justify the sanction of exclusion of defense expert testimony. Such a draconian sanction presents serious constitutional problems. Counsel in such a situation should argue that the exclusion relevant evidence would violate the 6th and 14th amendments and that other sanctions should be imposed, or that the case should simply be delayed. United States v. Davis, 639 F.2d 239 (5th Cir. 1981).

Recently, the Supreme Court granted certiorari to decide "when, if ever, will the Sixth Amendment allow a state to exclude a material defense witness as a sanction for a statutory discovery violation. Taylor v. Illinois, ___ S.Ct. ___, 42 Cr.L. 4027 (cert. granted _____, 1987).

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INTERNATIONAL DEVELOPMENTS

CHINA. A Shanghai man has been sentenced to death for buying and showing pornographic videotapes. San Francisco Banner Daily Journal, September 3, 1987.

[2]Of course, the defendant is entitled to discovery of "results or reports" of mental/scientific exams/tests, etc. under RCr 7.24(1). In general, though, discovery of prosecution expert materials under this provision has been limited to the expert's formal written report. Underlying test data, etc., has been held discoverable only in limited situations, such as where a lab technician destroys all of the physical evidence during the course of testing it. Green v. Commonwealth, 684 S.W.2d 13 (Ky.Ct.App. 1984). The point is that any construction or application of the reciprocal discovery rules which affords greater rights to the prosecution than the defense is a violation of due process.

Hospitalization of Children

Mike Wright

The Unified Juvenile Code provides for 3 types of hospitalization of mentally ill children in Kentucky: 1) voluntary admission (KRS 645.030), 2) involuntary admission (KRS 645.040) and 3) emergency hospitalization (KRS 645.120). According to statute, a child is regarded as "voluntarily" seeking observation, diagnosis and treatment of his or her mental illness if presented to a hospital upon:

1) his or her own written application where the child is at least 16 years of age;

2) the written application of parent or custodian and child who is at least 16 years of age; or

3) upon the written application of the parent or custodian alone where the child is under 16 years of age.

It is with this last method of defining voluntary admission that 2 distinct and recurring questions have arisen in the few months since enactment of KRS 645.

First, it has been reported that some hospitals are "converting" emergency hospitalization orders for children under 16 years of age to "parental voluntary" admissions, i.e., admissions defined as "voluntary" under KRS 645.030(1) based solely upon the written application of the parent or custodian. The process is simply: a parent is presented with a voluntary admission form and asked to sign it, after which the emergency order is discarded and the court is notified that the child is now being held pursuant to KRS 645.030(1). The effect of such action should be readily apparent. KRS 645.120(4) states that an emergency hospitalization of a child "may not exceed 7 days, exclusive of weekends and holidays, unless a certification petition is filed before 7 days expire." Of course, there are no statutory time restraints on a "parental voluntary" admission under KRS 645.030(1). The hospital is now under a much more relaxed atmosphere in terms of treatment deadlines and, since the duration of hospitalization will in all likelihood exceed the 7 days contemplated by the original emergency order, the hospital stands to make more money off of the child's stay in the facility.

Is this process contemplated or supported by statute or general theory of juvenile justice? An analysis of the statutes in KRS Chapter 645 and the statements of intent in KRS Chapter 600 suggest that the answer must be no.

KRS 645.120(4) plainly states that the emergency hospitalization of a child will cease in 7 days, unless a certification (involuntary) petition is filed before the seventh day. This statute contemplates, therefore, that once the power of the court has been invoked to require an examination of a child, there are only 2 permitted responses: institute formal proceedings to involuntarily hospitalize the child or release the child. No express statutory authority exists within the emergency hospitalization statute, permitting "extending" the child's stay by converting the original emergency admission to a long-term "parental voluntary" admission. KRS 645.120(5)), authorizing the observation of CHR - committed children in state mental hospital facilities, specifically states that at the end of the observation period a certification petition shall be filed or "the child shall be removed" (emphasis added). If such a specific limitation exists on the duration of hospitalization under an emergency order for children to whom the state already has control under an in loco parentis theory, children not under commitment cannot be provided less protection.

Another argument supports the conclusion that conversion of emergency hospitalization orders into "parental voluntary" hospitalization is not permitted. There does not appear to be any statute within the Unified Juvenile Code which requires parents to utilize the least restrictive alternative in the treatment or discipline of their children. Obviously, absent abuse or neglect the parent can pretty much do as he or she pleases. However, the Code does

impose a requirement of least restrictive alternative on the courts. KRS 600.010(2)(c) states that "[t]he court shall show that other less restrictive alternatives have been attempted or are not feasible in order to insure that children are not removed from families except when absolutely necessary." Therefore, more restraint is placed on the courts than on the parent who has not employed the court system to aid an attempt to hospitalize his or her child. Once the court processes have been invoked through the emergency hospitalization statutes, the parent has abdicated his/her power to file an application for a voluntary hospitalization of a child under age 16, since such admissions involve potentially (and usually in fact) more restrictive conditions (i.e. longer hospitalization) than the 7 day hospitalization under KRS 645.120. While the parent can arguably "choose" initially whether to "voluntarily" admit the child who is less than 16 under KRS 645.030(1), to seek emergency hospitalization under KRS 645.120 or to seek certification under KRS 645.040, once the decision is made to proceed under KRS 645.120, that process cannot be short-circuited by signing a "voluntary" admission. Why? Because now the court - bound to employ the least restrictive alternative - and not the parent is the operative factor in the hospitalization process.

The second question regarding the "parental voluntary" admissions does not involve the exercise of the procedure in relation to other procedures in the Code, but rather concerns the constitutionality of the statute itself. Before the constitutionality of KRS 645.030(1), "parental voluntary" admissions can be discussed, one needs to look at just how differently children hospitalized under that statute are treated from children hospitalized by some other procedure.

When someone seeks to involuntarily hospitalize a child, the child is granted certain procedural due process rights, including the right to counsel and to a full hearing. KRS 645.060 and KRS 645.070. Furthermore, KRS 645.130 provides that all children involuntarily hospitalized have the right to "maintain contact" with a court designated worker (CDW) who can help the child with access to the courts.

Finally, a child who is involuntarily hospitalized can not remain in a mental health hospital unless 2 qualified mental health professionals (one of whom must be a physician) believe the child meets the 4 statutory criteria for involuntary hospitalization. KRS 645.190(2). Those 4 criteria are that:

1) The child is mentally ill or has symptoms of mental illness;

2) The child is dangerous to himself or others;

3) The child can benefit from treatment available only at a hospital; and

4) No less restrictive alternative is available which will be effective in treating the child. KRS 645.090.

Children hospitalized under KRS 645.030(1) are not entitled to a hearing, to counsel, and perhaps not even to consult with a CDW. (Some have argued that since KRS 645.160(3) gives any child who believes his or her rights under Chapter 645 have been violated the "right to contact the court designated worker", the "parental voluntary" can contact the CDW for assistance. But, since there is no statutory right to counsel and no statutory right to request release for these "parental voluntaries", it is counter-argued that no right under Chapter 645 is violated by holding them against their will).

What of the other 2 types of voluntary patients: those children over 16 who admit themselves and those children over 16 who admit themselves along with parental support? Those children, admitted under KRS 645.030(2) and (3) have a statutory right to announce an intent to leave the hospital. KRS 645.190. Once that is done the hospital must release them within 5 days or contest the intent to leave in a full due process hearing. KRS 645.200; KRS 645.210. By exclusion, "parental voluntary" hospitalizations have no statutory right to contest hospitalization. Thus, they are voluntary patients by statutory definition only, not in fact.

Clearly then, all other children hospitalized through the operations of KRS Chapter 645 have certain procedural due process rights conferred by statute on them which the "parental voluntary" does not. Federal due process motions would seem to demand much more for this class of patient. Some reviewers of KRS Chapter 645 have argued that Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 1010 (1979), operates to authorize the Kentucky "parental voluntary" hospitalization process, concluding that federal due process of law is not violated by the existing statutory scheme. An analysis of Parham leads this writer to exactly the opposite conclusion.

In the cited case minor children brought a class action alleging that they had been deprived of their liberty without procedural

due process of law by virtue of the Georgia mental health laws which permitted voluntary addmission of minors to mental health hospitals by parents. Mr. Chief Justice Burger, writing for the majority, concluded that the Georgia statutes were reasonable and consistent with constitutional guarantees. However, much of what he said supports the conclusion that a similar result could not be reached regarding KRS 645.030(1).

Parham acknowledged that a child has "a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment." Id. at 99 S.Ct. 2503; see also Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

Furthermore, it held that the power of the parent in decisions regarding institutionalization was great but could not be "absolute and unreviewable." Parham, supra at 99 S.Ct. 2505.

The Georgia statutory scheme analyzed in Parham permitted each regional hospital superintendent to establish admission criteria at his or her facility for children under 18. Every regional superintendent required prior treatment on an outpatient basis at a community-based mental health facility prior to "parental voluntary" admission and/or a finding that there was no "more appropriate" alternative to hospitalization before the child could be admitted. Id. at 99 S.Ct. 2499-2500. Furthermore, Georgia statutes required periodic reviews of the decision to hospitalize and conferred upon the hospitals the power to terminate the "voluntary" admission if the criteria for admission was no longer met. Id. at 99 S.Ct. 2506.

The Kentucky hospitalization scheme in KRS 645 does not require review of the hospitalization decision by the hospital or the courts for children who are "parental voluntaries." Thus, one of the determining factors which "saved" the Georgia statutory scheme - an inquiry by a "neutral factfinder" of the appropriateness of hospitalization - is absent from KRS Chapter 645. The potential of parental "dumping" of unwanted children in mental health hospitals is, thus, heightened in Kentucky.

Illustration by Leigh Ann Smith

Finally, in Georgia there appeared to be a necessity to establish the need for hospitalization of these "parental voluntaries." Such is not true under our statutes. KRS 645.030 requires only a finding that such children are mentally ill or have symptoms of mental illness. Only in KRS 645.090, outlining criteria for involuntary hospitalization, is there a requirement of a finding that the child can benefit "from treatment available only at a hospital" and that hospitalization is the least restrictive alternative.

Fundamentally, there are distinctions between the scheme found consistent with due process of law in Parham and KRS Chapter 645. Because Kentucky does not require a review of the "parental voluntary" hospitalization procedure, and because there is no practice by which such admissions can occur only after less restrictive alternatives have been explored, the constitutionality of KRS 645.030(1) may well be questioned.

In summary, the existence of the "parental voluntary" hospitalization process in KRS 645.030(1) creates some very real problems. It appears to be being misused to subvert the emergency hospitalization procedures established in KRS 645.120. It also may be that its very existence - absent some statutory safeguards to insure against abuse - violates constitutional due process guarantees.

NOTE: If anything is as certain as death and taxes, it is that the UJC will undergo substantial amendment during the next session of the General Assembly. Should anybody have proposed amendments they would like to discuss, please contact Michael Wright at the Department of Public Advocacy. I would be happy to hear your thoughts and to offer my own suggestions and observations regarding your proposals and to discuss whether this department can or will support your efforts.

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Sentencing Alternatives in Kentucky

COURT: IS THERE AN ALTERNATIVE TO PRISON?

COUNSEL: YES, YOUR HONOR, THERE IS!

May I present to the Court an Alternative Sentencing Plan (ASP) designed to meet the individual needs of my client who stands before you convicted of a felony. This plan also addresses the public and judicial interests in punishment and community safety.

The Department of Public Advocacy, in a joint effort involving state and private funds, is the recipient of two grants. These grants are the bases for the Public Advocacy Alternative Sentencing Program (PAASP). The first grant is from the Developmental Disabilities Planning Council, Cabinet for Human Resources, with a significant contribution from the Corrections Cabinet and a pledge of support from the Department for Mental Health and Mental Retardation Services, Cabinet for Human Resources. The Planning Council grant was the basis for the second grant from the Public Welfare Foundation (a private, charitable nonprofit organization). The two grants enabled the Department to hire four Alternative Placement Workers (APW) to work in the Department's Paducah, London, Somerset, and Stanton offices. The worker is part of the defense team charged with representing developmentally disabled and non-developmentally disabled indigent citizens accused of crimes who are prison bound upon conviction unless an alternative is presented.

As you are aware, your Honor, jails and prisons in the Commonwealth of Kentucky are overcrowded and administratively overburdened. More than 1,000 of Kentucky's sentenced prison population of approximately 5,667 are housed in local county jails while waiting for space in state correctional facilities.

The overcrowding crisis has forced the Corrections Cabinet to examine its inmate population. The Cabinet's Annual Report for Fiscal 1985-1986 relates that only half of all institutional inmates were convicted of a violent crime, while 41% of the same population was convicted principally of a property offense. Approximately 21% of Kentucky's prison inmates are serving sentences of between 1-5 years. This portion of the population represents a pool of incoming inmates who may have been appropriate for community sanctions which might more effectively punish and rehabilitate than does incarceration.

Your Honor will agree that before this Alternative Sentencing Plan your only options were prison or conventional probation. With the PAASP I can now offer you this Alternative Sentencing Plan which will have a double impact: it will avoid the risk and dehabilitating effects of imprisonment for developmentally disabled offenders and other felony offenders, and it will provide my client with a constructive, individualized sentencing plan allowing treatment, employment, residential placement and greater supervision and control within his own community. This plan offers the Court both punitive and restorative sanctions, such as restitution, as well as the treatment and rehabilitative services arranged through the Cabinet for Human Resources and the private sector.

Your Honor, this program is unique in the nation. Unique because it targets developmentally disabled offenders as well as other prison bound offenders, it involves multiple governmental agencies, it involves the private sector, and it is part of an organized statewide public defender system.

My primary goal, your Honor, is to prevent the inappropriate incarceration of my client in Kentucky's overcrowded prisons. **My secondary goal,** is to increase the awareness of sentencing options for use at the circuit and district court levels. As you can see, your Honor, my plan incorporates elements such as, but not limited to in future plans, supervision, employment, home incarceration, community services, medical or other treatment components, and payments of restitution. This plan and future plans are intended to be both punitive and rehabilitative and to provide the Court with constructive control over sentenced offenders. I am offering the Court a meaningful option between prison and conventional probation.

·ly in these criminal proceedings my client, the APW and I agreed that if he were convicted my client would be a good candidate for an alternative sentencing placement. Our decision was based on a review of my client's current charges and history. We then prepared a sentencing plan modeled after the Client's Specific Planning approach developed by the National Center on Institutions and Alternatives in Alexandria, Virginia.

My APW will also be developing a third party support system to work with my client if probated pursuant to the alternative plan. This support system will rely on trained church and community volunteers to supplement the services provided by the probation officers. I believe this third party support system offers assurances that an offender placed on probation will have a ·ommunity sponsor who can provide aquent contact, assistance in complying with the elements of the Alternative Sentencing Plan and serve as a liaison to the probation officer. The Department's APW and the third party support person are not responsible for the enforcement or monitoring of the plan. That lies with the probation officer as it always has.

My use of an APW professional in developing and presenting this sentencing alternative to you has been undertaken in more than 20 jurisdictions across the country with considerable success. Similar programs have demonstrated a sentencing plan acceptance rate by courts of 60-70 percent. Of the nine or more evaluations of these programs, the most rigorous evaluation was conducted by the Institute of Government in North Carolina of two Community Penalty ograms in that state. Both evaluations found those defense sentencing programs succeeded in identifying and serving prison bound offenders for whom prison was not deemed necessary once alternative resources were offered to the Court. The Department through the PAASP will attempt to replicate these innovative yet successful programs.

The Administrative Office of the Courts, Division of Probation and Parole, and the Department have planned a joint conference with judges, prosecutors, department attorneys and probation officers on alternative sentencing for you and the other court officials in the counties covered by the four pilot offices. The Conference is scheduled for January 29, 1988.

Unfortunately, your Honor, the PAASP is funded for only a 12 month period. To ensure the PAASP's continuation and to expand the program to other judges throughout the Commonwealth, the Department will request program funding from the upcoming General Assembly. The Corrections Cabinet has reviewed our funding proposal and endorses it. The Cabinet believes the PAASP is one of a number of ways to lessen the prison overcrowding crisis which is facing the Commonwealth.

In conclusion, your Honor, I respectfully request that you place my client on probation incorporating the Alternative Sentencing Plan as a condition of his probation.

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Foundations giving alternative-sentencing programs more help

New York Times News Service

NEW YORK — Seven days a week, Charles Marston loads his newly bought van with carpentry tools and heads out to do home improvements. The hours are long, he says, but: "I'm scratching by. Life has never looked so good, and it sure beats jail."

He was in a Massachusetts jail until a few months ago; he is a 33-year-old convicted felon with a crime record in several states. Then he was paroled into a work program started by the International Union of Electronic Workers of the AFL-CIO, with major financial support from the Edna McConnell Clark Foundation in New York.

At a time when federal and state prisons are bulging with inmates, the program in Saugus, Mass., is an example of the growing involvement among foundations and other private groups in supporting programs for dealing with offenders outside , prison walls.

In addition to the type of program Marston is in, these include alternative sentences, such as community service, detention at home and supervised detention in a halfway house.

This is a significant change from the past when most foundations "wouldn't touch criminal justice programs with a 10-foot pole," said Kenneth Schoen, a former Minnesota corrections commissioner who oversees a variety of such programs for the Clark Foundation. Until two years ago, less than 1 percent of all foundation money went to criminal justice programs.

"And even with growing approval for new approaches, it is hard to kindle interest," Schoen said. "You're asking help for an unsavory clientele and one that does not arouse compassion like assisting the blind or disabled or children. And then, too, many organizations shy away because the subject is politically controversial and makes waves."

The involvement of foundations is a direct reflection of the rising costs of imprisonment: It costs an average of $14,591 each year to maintain an inmate in a federal or state prison. In New York City the cost is as high as $43,000.

Another argument for alternative sentencing programs for all but dangerous inmates is that offenders need to gain skills that will lead to crime-free lives. Enthusiasm for such rehabilitation programs flourished in the 1960s and 1970s but then died out as public sentiment shifted toward get-tough policies.

"We should be mindful," Schoen said, "that all but a few of the three-quarters of a million inmates now incarcerated will be back among us within five years."

The Clark Foundation is the country's biggest provider of private financing in the criminal justice area, with $4.3 million in programs this year. Philanthropic experts say that the total amount contributed has been growing, with more than 40 foundations now taking part.

The Clark Foundation established the National Institute for Sentencing Alternatives at Brandeis University at Waltham, Mass., in 1977.

The institute is the country's only graduate school of social welfare that is focused on prison populations. Under the direction of Mark C. Corrigan, the institute sponsors seminars that bring together judges, criminologists, prosecutors and legislators and others who can have an effect on the criminal justice system.

LEXINGTON HERALD-LEADER, JULY 19, 1987

Ask Corrections

Betty Lou Vaughn

TO CORRECTIONS:

My client is in prison and has requested that I obtain for him a copy of his RESIDENT RECORD CARD. What is a RESIDENT RECORD CARD and how do I go about obtaining a copy for him:

TO READER:

The RESIDENT RECORD CARD is the official record of incarceration of an individual in an adult penal institution in the Commonwealth of Kentucky. This document reflects the following information: Felony offense(s) for which convicted, county of conviction, date of conviction, date crime committed, indictment number, jail credit, sentence length (concurrent or consecutive), date of birth, FBI No., Social Security No., institutional inmate number, institution admitted to, discharged from and all transfers between institutions. The card further indicates original or new parole eligibility dates, sentence calculations, dates and methods of discharge, all returns from escape, parole or court order. The card further indicates physical characteristics for identifying purposes.

The inmate or individual may obtain a copy of any RESIDENT RECORD CARD by requesting it in writing, either to the records officer of the institution where he is incarcerated or to the Offender Records Office, Corrections Cabinet, State Office Building in Frankfort.

TO CORRECTIONS:

Do inmates automatically receive copies of their RESIDENT RECORD CARDS upon admission to prison?

TO READER:

Yes, as soon as administratively possible the RESIDENT RECORD CARD is prepared upon all new admissions to the institution, and a copy forwarded to the inmate. The inmate also receives a copy of his card when any change is made on the card, such as, sentence length, jail credit, parole eligibility, good time forfeiture or restoration, meritorious good time award, etc.

TO CORRECTIONS:

My client is housed in the county jail, having been convicted of a felony, when can he obtain a copy of his RESIDENT RECORD CARD?

TO READER:

He can obtain a copy of his RESIDENT RECORD CARD from the institutional records officer within a few days after being admitted to the Kentucky State Reformatory. However, if he becomes eligible for parole consideration while still housed in a local jail, the offender record file is not completed and the sentence and parole eligibility date calculated until immediately before the parole hearing date. After his parole hearing, he can then request, in writing, a copy of his RESIDENT RECORD CARD from Offender Records, Corrections Cabinet, State Office Building, Frankfort, Kentucky 40601.

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All questions for this column should be sent to:

David E. Norat, Director
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Department of Public Advocacy
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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.

"Cynicism" was once defined by Ambrose Bierce as "that blackguard defect of vision which compels us to see the world as it is instead of as it should be."

Cases of Note...In Brief

Ed Monahan

DUI - MARGIN OF ERROR FACTOR IN BREATH TESTS
State v. Byrling
400 N.W.2d 872 (Neb. 1987)

While the court upheld the defendant's DUI conviction due to other evidence, it did determine that the findings of the mechanical breath tests were not enough to show the .10 presumption.

At trial, the defendant introduced testimony from a professor of pharmacology that the Intoxilyzer assumed the alcohol in any human's breath will be distributed and reflected in his blood in a ratio of 1 breath unit to 2100 blood counts. However, the pharmacologist testified that recent research has proven that the ratio in fact varies from one person to another and ranges from a low of 1:1100 to a high of 1:3400. Additionally, the expert stated that the machine can react to substances other than alcohol. The expert concluded that the Intoxilyzer was unreliable.

In light of this opinion, the Court concluded that "a test result which was subject to a margin of error had to be adjusted so as to give the defendant the benefit of that margin." Taking into account the margin of error for this machine, at most only 52.38 percent of the actual result could reliably be reported.

DUI - CUSTODIAL INTERROGATION WITHOUT MIRANDA WARNING
Commonwealth v. Bruder
528 A.2d 1385 (Pa.Super 1987)

A policeman stopped the defendant's car after he saw his erratic driving and his passing through a red light. The policeman stated that the defendant stepped out of his car. The policeman asked for his driver's license and insurance card. When asked by the policeman, the defendant said he'd been drinking. As testified to by the policeman, the defendant was "unable to walk in a straight line, heel to toe, or recite a complete alphabet." Then the defendant was arrested and given his Miranda rights.

Analyzing the Supreme Court's ruling in Berkemer v. McCarty, 468 U.S. 420 (1984), the court found that the policeman's questions were intended to obtain incriminating statements and the defendant was effectively in custody when they were asked. Therefore the defendant's statements that he had been drinking had to be excluded since given during custodial interrogation without the benefit of Miranda warnings. Additionally, since the recitation of the alphabet was testimonial evidence, it too had to be excluded since given after being in custody and before the giving of Miranda warnings.

DUI - MEANINGFUL ACCESS TO INDEPENDENT TEST
People v. Craun
406 N.W.2d 884 (Mich.App. 1987)

The trial judge dismissed the charge of driving while intoxicated, and the appellate court affirmed the dismissal.

The defendant was given a Breathalyzer test and requested his own independent blood test. The police officer handed the defendant the phone book and allowed him to call around. Six doctors refused to administer him a test. The police officer told him there was nothing he could do about it.

The appellate court found that merely handing an arrestee a phone book and giving that person access to a phone was not good enough. When a policeman is aware of an available testing location, e.g. hospital, they must tell a suspect of its existence.

DUI - POLYGRAPH
Commonwealth v. Wick
506 N.E.2d 857 (Mass. 1987)

The defendant was charged with driving under the influence. He requested funds for a polygraph to show that he was only an occupant and not operator of the car. The trial court denied the request for funds since the prosecutor refused to agree to the polygraph exam.

The appellate court reversed, finding that the defendant was entitled to make a showing that he was entitled to funds for the test.

DAMAGES UNDER §1983
Cooper v. Dyke
814 F.2d 941 (4th Cir. 1987)

The plaintiff received a gunshot wound during an altercation and then fled. He was stopped by police, and examined by paramedics under poor lighting conditions and people threatening them. The exam was not thorough. They did not find out that the plaintiff had been shot. In fact, they told police that there was no injury. The plaintiff was taken to the police station and complained that he was shot. Eventually, the officers "discovered" the wounds and the plaintiff was taken to the hospital and operated on.

Under 42 U.S.C. §1983, the Court found that it was not reasonable for the officers to rely on the paramedics' judgments, and that there was sufficient evidence of deliberate indifference to submit the case to a jury.

The court also found enough evidence to support a claim of false arrest being taken to the jury.

The jury's award of $75,300 ($25,200 in compensatory damages and $50,100 in punitive damages) was upheld.

UNAVAILABILITY OF TOXICOLOGY TEST REPORTS
Con. Res. of Am v. Commonwealth
Ky.App., Sept. 11, 1987
(unpublished)

The defendant corporation was found guilty of reckless homicide and fined $10,000 due to it's employees administering a drug overdose to a nursing home patient.

The Commonwealth failed to make available until the day of trial the toxicology test reports of the victim's blood sample. "The Commonwealth was ordered under RCr 7.24 to produce all such reports during discovery, but appellant was furnished only with the bare results of the testing procedures. On the day of trial, after destruction of the blood sample, appellant was allowed to review the full reports." This prevented the defendant from having its own expert inspection of the blood sample or reports. Reversing, the Court determined that at least a continuance should have been granted.

MEANING OF DETENTION FACILITY
Tyrell v. Commonwealth,
Ky., Sept. 24, 1987
(unpublished)

In this 5-2 reversal of the Court of Appeals, the Kentucky Supreme Court affirmed the order of the Oldham Circuit Court dismissing the indictment of first degree promoting contraband for "knowingly introducing dangerous contraband into a detention facility."

The charge was based on the discovery of a gun in the defendant's car parked in the visitor's parking lot at the Luther Luckett Correctional Complex in Oldham County.

The Supreme Court determined that the unfenced visitor's parking lot is not within KRS 520.010(4)'s definition of a detention facility.

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2 Jefferson jail officials said inmate was beaten

Associated Press

LOUISVILLE — A shackled prisoner was beaten in 1983 by a Jefferson County corrections officer, a former officer and four other jail guards, according to a report made to the FBI.

"All six of us went to the holding cell and beat up" inmate James Silver, said former jail officer William H. Ballard in a statement given to the FBI last fall and filed in U.S. District Court.

After restraints were placed on Silver, Ballard said, "I picked him up and then dropped him on the floor."

Corrections officer Barry A. Shaffer said in his statement, also filed in court, that after the beating, "I went back to the control room bathroom and inflicted a wound to my right eye . . . to make it appear as though Silver had hit me, when in fact he had not."

Ballard said the officers later falsified reports concerning Silver.

Shaffer also said that the officers' supervisor, Sgt. Kim Emmons, though not present during the beating, had told the officers, "Take care of Silver and call me afterwards."

Statements indicated the beating occurred after Silver allegedly harassed the guards, in part by throwing excrement at them.

Silver, who was not seriously injured and did not require hospital treatment, is now at the Kentucky State Reformatory at La Grange serving time for being a persistent felony offender.

The six guards were charged in March by the U.S. Justice Department with depriving Silver of his civil rights and with conspiring to violate his civil rights.

U.S. Magistrate George Long ruled June 30 that the statements could not be heard by a jury, but U.S. District Judge Thomas A. Ballantine Jr. reversed Long on Tuesday and said they could be admitted as evidence.

Herald-Leader, July 19, 1987

Book Review

Donna Boyce

Crime and Human Nature
James Q. Wilson
and
Richard J. Herrnstein
Simon and Schuster, New York
$22.95
639 pages

Written by a political scientist and experimental psychologist, this book surveys the latest research findings from every possible field on the causes of crime and offers a comprehensive explanation of why some individuals are more likely than others to commit crimes. The authors' general theory explaining individual differences in criminality is that the larger the ratio of the rewards of noncrime to the rewards of crime, the weaker the tendency to commit crime. The book then examines the connection between elements of the authors' theory and the observed characteristics of crime and criminals. Believing that criminal behavior results from a complex interaction of genetic and environmental factors, the authors' survey research findings on the effects of constitutional factors, gender, age, intelligence, personality, family, schools, the community, the labor market, the media, alcohol and drugs, reward and punishment, and race.

Of particular interest to defense attorneys faced with preparing for penalty phase hearings in capital cases or "half-truth" in sentencing hearings in felony cases, are the fourteen or fifteen chapters on how various factors correlate to crime. The book describes research findings on bizarre studies indicating that a certain type of physique (mesomorphs deficient in ectomorphy) is related to criminality. Equally interesting but of more practical use are the various studies that indicate, among other things, that adoptee crime was predicted by biological-parent crime, that "sociopathic" personalities are usually evident by age eight, that boys from quarrelsome families with erratic discipline are more likely to end up with criminal records than those from cohesive families with consistent discipline and that there is a clear and consistent link between criminality and low intelligence. The authors make a strong case showing the powerful effect that constitutional and familial factors have on later misconduct, especially physical agression.

Crime and Human Nature may provide the defense attorney with some valuable insights to offer juries in explanation or mitigation in serious cases.

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Appeals court dismisses gag order

By Al Salvato
Post staff reporter

A federal judge cannot restrain a Tennessee congressman from making public comments, even though the official is awaiting trial on bank fraud charges, the 6th U.S. Circuit Court of Appeals in Cincinnati has ruled.

"The defendant's interest in replying to the charges and to the associated adverse publicity, thus, is at a peak," said Judges Gilbert F. Merritt and Robert B. Krupansky.

That decision—which came just two days after oral arguments before the three-judge appeals panel—means the gag order against U.S. Rep. Harold E. Ford, D-Memphis, must be withdrawn.

U.S. District Judge James Jarvis of Knoxville, Tenn., ordered Ford not to make public comments about his criminal case after he was indicted in April on charges of selling political influence for financial support.

The indictment charged Ford received $1.5 million worth of phony loans from the failed banking empire of C.H. Butcher Jr.

Before the gag order, Ford, Tennessee's only black congressman, had contended that the indictments were racially motivated and were a personal attack on him by the U.S. attorney in Knoxville. Ford's trial is set for Nov. 9 in Knoxville.

Cincinnati Post, September 28, 1987. Reprinted with Permission

5th Trial Practice Institute

5TH DPA TRIAL PRACTICE INSTITUTE COMPLETED

DPA's 5th Trial Practice Institute was held in November in Richmond. Over 50 part-time public defenders, private criminal defense lawyers and full-time public advocates from our regional offices and from the Louisville and Lexington offices and from around the state were intensively trained in trial skills.

A faculty of 14 included **Bob Carran**, long-time public defender administrator for Kenton County, **Charlie Coy**, a Richmond criminal defense lawyer and past president of the KBA, **Deryl Dantzler**, Dean of the National Criminal Defense College, **Zeke Cortez**, San Diego federal public defender, **Rick Kammen**, an Indianapolis criminal defense lawyer, **Andrea Lyon**, a Cook county public defender, **Joe Guastaferro**, a Chicago actor and director, and public advocates from across the state.

During the 4 days of training, the participants practiced each aspect of a criminal trial. Each exercise was preceded by a lecture on the topic and followed with a demonstration by a faculty member. Through the help of Professor Bob Fraas of EKU we had students in the Forensic Science Program play the role of our expert hair analysts. Actors from EKU and Berea College and people from the Richmond community played the roles of jurors, the defendant, the victims, and police officers.

Charlie Coy, a founding board member of the Kentucky Association of Criminal Defense Lawyers, spoke at the banquet on the work we do. His words follow:

Some of the things that I've thought about through the last 3 days is that how wonderful it would have been had I had the opportunity that many of you are getting that have just been admitted to practice law. When I got out of law school I didn't think anybody cared but my wife and I wasn't sure about her because she had a job. And so I think that if you don't accomplish anything else by being here, you'll know that there are some other people who appreciate the fact that you are a lawyer.

Of course, being a lawyer isn't too great. We've got our Chicago guest and the great Chicago poet had this to say: "Why does a hearse horse snicker when they're carrying a lawyer out?" And then Ben Franklin said in Poor Richard's Almanac, "necessity knows no laws. Some attorneys know the same." I think that is probably what this whole program is about. Knowing rather than being like those who, like I said, didn't know no law.

There are those people who look down on people who do criminal defense work. Everybody in this room knows that. Let me tell you, there is great merit in this idea of liberty's last champion. And if you think that you are not doing something important then you ought not to be here.

Joe Guastaferro said the other day in talking about commitment, if you're not committed to what you're doing, if this is just a job with you, quit now because you're in the wrong career, you ought to be doing something else.

Everybody here has talked the last 3 days about how their part is the most important part of a trial. Well you know the truth of the matter is that everyone of them recognize that the most important part of any trial is that defendant that you represent. Everybody talks about how you are going to humanize him. Well he or she better be human to you from the outset because you're all that stands between him or her and the penitentiary.

Those people in our society who think that there's no chance we could ever be a country like Russia are just crazy. Because the only difference, I submit to you, between us and them is us. That's important! And that's something that necessitates or requires and mandates commitment on our part. If you think that this wouldn't be a police state if the police could call the shots the accused's attorney's is all that stands between him and a police state. My god, there's nothing in the world that they like as well as being god and some of them think they are now. So it is important what we do.

Something else has been said here. Jay Barrett and Andrea Lyon talked about the importance of preparing the witness. Everybody talks about preparations and it can not be said too many times. When I think back to and harken back to New Testament times when the apostle Paul wrote to the young gospel preacher Timothy: "study to show thyself approved unto God. A workman that needth not to be ashamed, rightly dividing the word of truth." It's just a very simple thing what Paul was saying to Timothy: Study; get yourself ready; be prepared. I remember when I was 12 years old I was in the Boy Scouts. The old motto, be prepared. And we're told that all through our lives. Yet, there's times when we miss that point. And I think that we make a bad mistake when we do miss this point because after all a trial is preparation and use of techniques. That's all it is.

Sure we've all got different personalities. One of the things that you're being encouraged here to do is to learn your own style. Everybody has to seek his own style. Someone else said though, I think very appropriately and very properly, that we need to learn to make our personalities fit sometimes the witnesses we're dealing with in order to talk in their language. Become a chameleon, if you will, with respect to our being able to communicate with them and seeing them in terms of a jury.

C.K. Chesterton said, "the horrible thing about all legal officials, even the best, about all the judges, magistrates, detectives and policemen, is not that they are wicked, some are good, not that they are stupid, several of them are quite intelligent, it's simply that they've gotten used to it." **it's simply that they've gotten used to it!** And you know if you all aren't careful, we get used to it too. Getting used to it is when we lose that commitment that we need in order to effectively represent a client. Because the law is but words and paper without the hands and souls of man.

I want also to talk about the Kentucky Association of Criminal Defense Lawyers. We want you to be a member of the Kentucky Association of Criminal Defense Lawyers. It's very important to us that you be associated in that work.

Let me tell you, you've got the finest program in the world. What I said at the outset with respect to what I feel about beginning is absolutely true. Those of you who are launching yourselves on a career are making a great beginning here because you're being exposed to some very outstanding people. And so I say to you, the law, it has honored us, now let us honor it. Thank you.

Charlie Coy
Coy, Coy, Gilbert
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Charlie has expressed it well, criminal defense lawyers are indeed liberty's last champion. Hopefully, armed with the best skills, knowledge and attitude, we will be up to the immense challenge.

Thanks to those who made this training effort a success.

Ed Monahan
Director of Training

Deaver can cite alcohol battles as legal defense

Associated Press

Former presidential aide Michael K. Deaver's repeated treatment for alcoholism can be raised as a defense to charges he lied in sworn testimony about his lobbying business, a judge ruled yesterday in Washington.

At a pretrial hearing, U.S. District Judge Thomas Penfield Jackson rejected a prosecution motion to exclude expert testimony that Deaver's mental condition and memory were impaired when he was questioned last year by a federal grand jury and a House subcommittee.

Deaver is charged with lying when questioned about allegations that he violated ethics laws by contacting former administration colleagues for his lobbying clients.

Lexington Herald Leader, 8/12/87

(Eggert cont. from p. 2)

but Rob's real interest outside ofthe law is the Los Angeles Dodgers. Rob is an avid Dodger fan who not only sports a Dodger jacket most of the time but travels to Vero Beach every year to watch the Dodgers in spring training. It is believed that Rob's secret ambition is to replace Tommy Lassorda as Dodger manager. Rob, himself, is a fine athlete as evidenced by the fact that he is considered to be one of the better amateur tennis players in Louisville. To really get away from it all, however, for the past few years Rob has vacationed in the woods of Minnesota and Canada where he is reported to practice both bird and moose calls and study the habits of bears.

It is hard to sum up such a different and complex man as Rob Eggert in a few words. However, he is probably best described as a "Public Defender's idea of a true Public Defender."

Frank Jewell
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