THE ADVOCATE

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JOHN ROGERS (shown here with his wife, Edna) RETIRES AS DPA INVESTIGATOR

"Those of us who worked closely with John in the investigation and preparation of trial cases relied on his expertise in investigation as well as his insight into how to deal with people in this area particularly. The Paducah Office was enriched by John's presence because, in addition to his competence and professionalism, John Rogers was, and is, a gentleman. I think John T. Rogers is a sterling example of the spirit of zealous and effective advocacy because he consistently went that extra step if to do so would be of benefit to the client or to that client's attorney."

Charlotte Scott
Assistant Public Advocate
Paducah

Imprisonment
Preliminary Parole Revocation Hearings
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Using Kentucky's Constitution
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The Advocate Features

John T. Rogers

The Department of Public Advocacy lost a most valued employee when John T. Rogers, Western Region Investigation Coordinator, retired on July 31, 1987.

John came to the Department in 1974, serving as one of only five investigators for the whole state, after having worked with the Paducah Police Auxiliary and the McCracken County Sheriff's Office. He was sheriff from 1970 to 1974.

At first, John covered an investigative district of nearly one-third of the state. He prepared literally hundreds of cases for trial in McCracken and neighboring counties. From 1979 until his retirement, he served as Western Regional Coordinator and supervised three other investigators, while maintaining a large investigative district. John helped define DPA investigators as creative and persistent professionals. DPA investigators are respected today, in part due to the many successes John had.

Those who worked with John knew him to be a persistent investigator, who always had his cases ready for court, while finding time to supervise other investigators, and ready to make suggestions to speed up or improve casework. Despite the pressure of too many cases and too little time, John was always a gentleman -- polite, quick to notice details, intelligent, and persistent.

Paul Isaacs in response to John's letter of resignation, by letter dated July 17, 1987 said, "The services that you have provided to our clients, the poor and disadvantaged, has been immeasurable. The quality and dedication of your work insured that our clients got the best possible investigative services available. The Department of Public Advocacy can never adequately compensate you for the long hours that you have provided to the Department. We will miss you. We will miss your dedication. We will miss your enthusiasm and our clients will miss your services. However, we want to wish you a relaxed and pleasant retirement that allows you to spend more time with your family and to collect as many trophy size fish as the waters you fish will yield."

Other than Edna, his wife of many years, John's great love was fishing. He even scouted good fishing spots by diagraming channels, stumps, and ledges when lake waters were at low winter pool.

During the November 1987 investigator's training seminar, Dave Stewart, Investigative Branch Coordinator, presented John a plaque containing his I.D. Badge and the inscription, "May the fish bite each day of your retirement and may you and Edna have nothing but the best." We truly hope John and Edna enjoy many golden years. Keep smiling, John!

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When I started to work for DPA in 1974, it took but one meeting with John for me to realize that he was dedicated to his work. Thirteen years and many meetings later the dedication was even stronger. John was an inspiration to those of us that were fortunate enough to work with him, not that standing 6'5" had anything to do with it but John was one that we looked up to. He worked long, hard hours. He worked weekends and holidays yet he never complained. He worked these long hours because he believed in the system. His case load was tremendous and driving 200 miles to get home after a hard days work was not unusual.

John has also been a very close and loyal friend. We have fished together on numerous occasions and even though John could never beat me catching fish, once again he never complained because he was dedicated. Well, maybe I would let him win occasionally, just so he would invite me back.

Our families also became close. Visits were not often enough but when they were possible, they were rememberd affectionately.

Though John has now retired, his contribution to the Department will long be remembered, and his friendship everlasting.

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The Advocate welcomes correspondence on subjects treated in its pages.

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

Linda K. West

Kentucky Court of Appeal

CONTINUANCE BASED ON WITHHOLDING DISCOVERY
Stump v. Commonwealth
34 K.L.S. 14 at 8
(November 20, 1987)

Stump was convicted of sexual abuse. Prior to trial, his motion for discovery of exculpatory evidence, including evidence which would reflect on the child witness' credibility, was sustained. After some months passed without compliance, the defense obtained an order directing the commonwealth to respond in 14 days under pain of dismissal. Two months later the trial court again ordered the commonwealth to respond on pain of contempt. At this point the commonwealth advised the defense that the complaining witness had seen a therapist and that the therapist's records had been subpoenaed. Three months later, on the day of trial, the commonwealth sent for the records and admitted that the records had, in fact, never been subpoenaed. The records disclosed that the victim had experienced an epileptic seizure four months before the alleged abuse, which could affect her memory, and that the victim denied that the alleged abuse had affected her, which, the defense argued, suggested that abuse never occurred. Defense motion for a one-day continuance to evaluate this evidence was denied.

The Court of Appeals held that the trial court abused its discretion in view of "the pattern of behavior of the commonwealth's attorney calculated to mislead the appellant and deprive him of access to material containing potentially exculpatory material." The Court was unpersuaded by the commonwealth's argument that appellant could himself have subpoenaed the records: "We believe appellant's counsel could reasonably expect the court to enforce its orders and should not be faulted for not attempting to secure the records himself."

DEFENDANT'S PRESENCE
Marshall v. Commonwealth
34 K.L.S. 15 at 4
(December 4, 1987)

In this case, the Court held that the defendant was denied a fair trial when the trial court gave the jury an Allen charge out of the defendant's presence. The Court held that reversal was required under RCr 8.28(1) which provides that "[t]he defendant shall be present at every critical stage of the trial..." Judge Wilhoit dissented.

Kentucky Supreme Court

JURISDICTION OF COURT OF APPEALS
Shepherd v. Commonwealth
Commonwealth v. Shepherd
Jones v. Commonwealth
34 K.L.S. 13 at 13
(November 5, 1987)

The Court announced its intention to no longer transfer from the Court of Appeals to the Supreme Court appeals involving a sentence of 20 years or more which are erroneously perfected to the Court of Appeals. Under Kentucky Constitution Section 110(2)(b) the Kentucky Supreme Court has exclusive jurisdiction of such appeals. The Court stated that in the future it might refuse to grant a transfer which would leave the Court of Appeals no option but to dismiss for lack of jurisdiction. A motion for belated appeal to the Kentucky Supreme Court would then be necessary before the appeal could be properly perfected. The Court also noted that in such a situation sanctions against the "offending counsel" might be in order.

DOUBLE JEOPARDY-SECOND DEGREE ASSAULT AND FIRST DEGREE RIOT
Commonwealth v. Cook
34 K.L.S. 13 at 10
(November 5, 1987)

The Court of Appeals reversed Cook's conviction of first degree riot on the grounds that the same physical injury was used to sustain the riot conviction as the assault conviction. The Kentucky Supreme Court reversed the Court of Appeals.

Cook participated in a disorg
while an inmate at Northpoint

Training Center. Cook's assault conviction was based on his act of striking a guard during the disorder, resulting in physical injury. Injuries were also sustained by other inmates and guards during the disorder. The Court held that these other injuries were sufficient proof of the element of first degree riot which requires injury to a nonparticipant. Thus, Cook's riot conviction did not depend on the specific injury directly caused by him. The Court concluded that there was no double jeopardy violation.

DOUBLE JEOPARDY - MISTRIAL JUSTIFIED BY MANIFEST NECESSITY
Chapman v. Richardson
34 K.L.S. 14 at 10
(November 25, 1987)

The trial court declared a mistrial at Chapman's assault trial when defense counsel asked a prosecution witness if he had not been indicted on drug charges. Chapman subsequently sought a writ of prohibition against further prosecution on the grounds that the mistrial was not manifestly necessary and thus further prosecution was barred. See KRS 505.030(4)(b).

The Court first noted that Chapman's cross-examination was "an attempt to unfairly prejudice the jury" since the same prosecution witness had given identical testimony at earlier proceedings prior to being indicated for drug offenses. The Court then held that the trial court did not abuse its discretion in declaring a mistrial inasmuch as "[t]he trial court is on the scene observing the witnesses and the jury and is aware of the mores of the community."

DEFENSE RIGHT TO PSI REPORT
Commonwealth v. Bush
34 K.L.S. 14 at 10
(November 25, 1987)

In Bush v. Commonwealth, 34 K.L.S. 2 at 6 (January 30, 1987) the Court of Appeals held that a defendant is entitled to an actual copy of a presentence investigation report prepared in his case. The Kentucky Supreme Court reversed this decision. The Court reasoned that KRS 532.050(4) requires the defendant to be advised of the contents of the report but does not require that he be provided with the report because of the need to protect confidential sources of information. However, the Court did hold that pursuant to the provision of KRS 532.050(4) guaranteeing the defendant a "fair opportunity" to controvert the report, Bush was entitled to the benefit of the statute where he had waived the PSI at sentencing but a PSI was nevertheless performed and a report provided to Corrections.

CONSPIRACY TO PROMOTE GAMBLING-OVERT ACT/MERGER
Commonwealth v. Speakes
34 K.L.S. 14 at 11
(November 25, 1987)

In this case, the Court held that the "overt act" necessary to support Speakes conspiracy conviction could be established by conduct constituting commission of the substantive offense. The Court also held that the offenses of conspiracy to promote gambling (a felony) and promoting gambling in the second degree (a misdemeanor) do not merge. The Court cited KRS 506.110(2) as the basis for its decision and also relied on language in the Commentary to KRS 528.040 suggesting that conspiracy to promote gambling may be punished more severely than the actual substantive offense in recognition of its purpose of "reaching organized gamblers of the syndicate" who "hire others to conduct their bookmaking activities."

DUI - SUBSEQUENT CONVICTIONS
Division of Driver Licensing v. Bergmann
34 K.L.S. 14 at 14
(November 25, 1987)

In this case, the Court held that an individual convicted of DUI is not entitled to an evidentiary hearing prior to revocation of his driver's license by the Transportation Cabinet. KRS 189A.010 provides for a single offense of DUI and sets out criminal penalties consisting of jail time and/or fines which increase in severity based on a record of previous convictions. KRS 289A.070 additionally provides mandatory periods of license revocation for each offense. However, "license revocation is not a punishment but a cautionary measure to protect the safety of the public." Revocation is effected by the Transportation Cabinet following its receipt of the record of conviction. At that point, in the Court's view "there would be no issue of fact to be determined in revoking the license" and thus no right to a hearing. The driver is entitled only to an opportunity to correct any clerical errors.

SENTENCING-JURY RECOMMENDATION
Dotson v. Commonwealth
34 K.L.S. 14 at 16
(November 25, 1987)

The Court upheld the action of a trial judge who rejected a jury recommendation that Dotson be sentenced to concurrent terms for his convictions of robbery and kidnapping. The Court held that although KRS 532.055(2) provides that the jury shall determine penalty and "shall recommend whether the sentences shall be served concurrently or consecutively" the trial court is not bound by the recommendation. Justices Leibson and Lambert dissented.

MARITAL PRIVILEGE/
HEARSAY/CLOSING ARGUMENT
Estes v. Commonwealth
34 K.L.S. 15 at 13
(December 17, 1987)

The Court in this case held that Estes' conviction must be reversed based on the erroneous admission into evidence of his wife's out-of-court statement to a police officer regarding Estes' conduct on the night of the offense. The wife herself avoiding testifying by invoking her privilege under KRS 421.210(1) to refuse to testify against her husband. The unavailability of the wife's testimony due to her invocation of the privilege did not permit introduction of her statement under Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969). See Commonwealth v. Brown, Ky., 619 S.W.2d 699 (1981). The Court additionally held that the officer's testimony as to the wife's out-of-court statement was hearsay. The Court declined to approve admission of the hearsay by application of the federal "residual hearsay" exception to the hearsay rule. See Federal Rule of Evidence 840(b)(5).

The Court held that it was proper to introduce the dying victim's statement to Estes' wife and her response under the dying declaration and excited utterance exceptions to the hearsay rule.

Finally, the Court held that the prosecutor's closing argument demanding a conviction based on Biblical references, and urging the jury to put themselves in the shoes of the victim's family, was improper.

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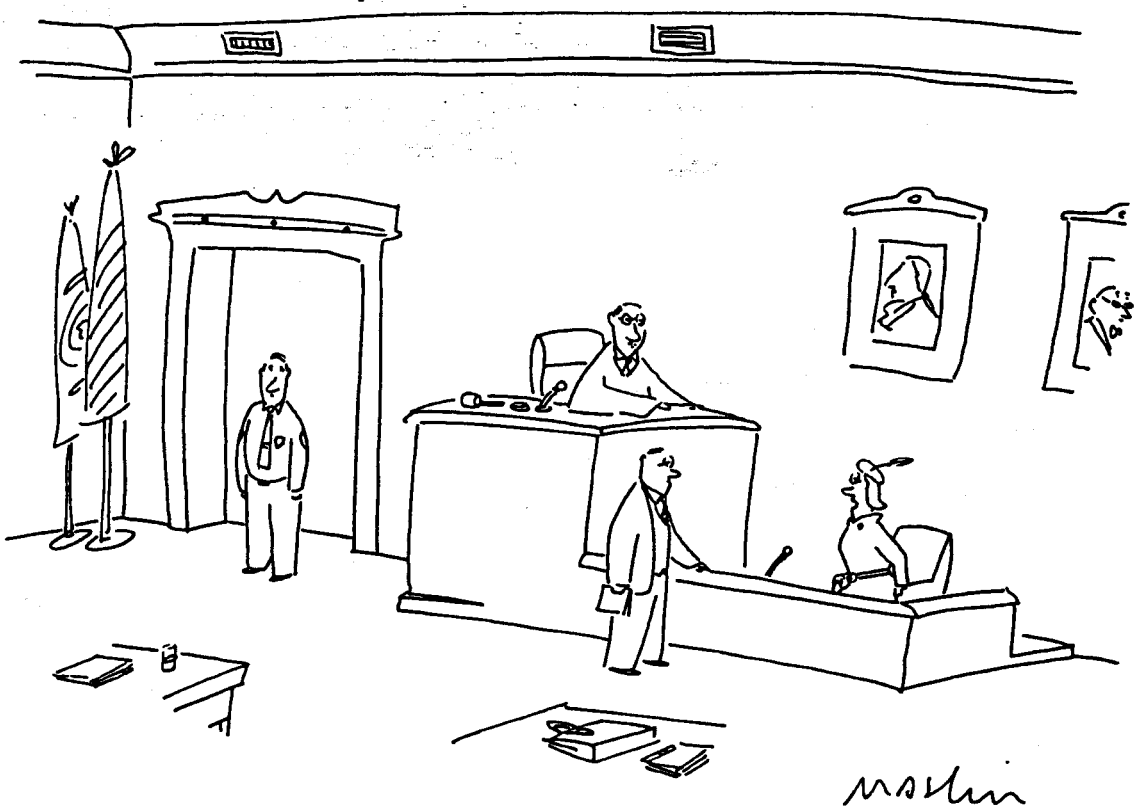

"SURE, I ASKED HIM — HE DARED ME TO, BUT I SWEAR I DIDN'T KNOW THE QUESTION WAS LOADED."

Drawing by Michael Maslin. Reprinted with Permission.

Post-Conviction

Law and Comment

Keith Hardison

PRELIMINARY PAROLE REVOCATION HEARINGS

HISTORY OF THE PROCESS

In order to fully understand the nature and purpose of the Preliminary Parole Revocation Hearing it is first necessary to take a historical look at the parole revocation process. Prior to 1972 that process was quite summary in nature. A parole officer who felt that a parolee had violated his or her parole could take that parolee into custody and submit a written report to the Kentucky Parole Board, which would then, on the basis of that report, decide whether to return the parolee to the institution as a parole violator. If the parolee was returned (and a great majority were) he then appeared before the Board for an interview on the propriety of his re-release.

The parolee did not have the opportunity to challenge the factual basis upon which revocation was being based and might not even been aware of the reasons for such action. The only opportunity to challenge the factual or legal basis upon which revocation was based, to offer any explanation of his or her conduct or attempt to show why their parole should not be revoked came when they appeared before the Parole Board after being returned many miles to a state correctional facility and after a period of incarceration awaiting the Board's decision and return.

MORRISSEY V. BREWER

Not surprisingly, the United States Supreme Court in the landmark case of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) determined that this situation was untenable and held that parole could not be revoked without certain procedural safeguards. The Court rejected the outdated distinction between "privileges" and "rights" and relied on precedent which held that "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss'" Morrissey, Id. at 481 citing Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951). The Court further found that while parole revocation does not deprive an individual of the absolute liberty to which every citizen is entitled it does deprive him or her of the "conditional liberty" a parolee enjoys dependent upon the observance of the parole restrictions.

The Court in Morrissey went on to recognize the discretionary aspect of parole revocation and the state's overwhelming interest in being able to return parole violators to prison without the burden of an adversary criminal trial. The Court further noted that the state however has no interest in inadequately informed decisions. Balancing and accommodating these two interests in Court held that parole could not be revoked without a hearing process at which certain procedural safeguards were observed, but also held that by no means was the parolee entitled to the "full panoply of rights" due a criminal defendant in a criminal trial. The Court mandated "an informal hearing structured to assure that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Morrissey, supra at 484.

TWO-STEP HEARING PROCESS

The Court in Morrissey mandated that before parole could be revoked a two step hearing process must be followed. A preliminary hearing must be conducted at or reasonably near the place of the alleged violations as promptly as convenient after arrest. A final hearing, which can be conducted after the parolee's return to a state correctional facility must be conducted to determine what final action is to be taken.

MINIMAL SAFEGUARDS

The Court in Morrissey, supra at 489, further set forth "a laundry list" of minimal procedural safeguards which must be provided to the parolee at his hearing. The safeguards are as follows:

(a) written notice of the claimed violations of parole;

(b) disclosure to the parolee of evidence against him;

(c) the opportunity to be heard in person and to present witnesses and documentary evidence;

(d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation;

(e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and

(f) a written statement by the fact finders as to the evidence relied on and the reasons for revoking parole.

The Court went on to point out that while these procedural rights must be safeguarded, the parole revocation hearing is a "narrow inquiry" and "should be flexible enough to consider evidence including letters, affidavits and other material that would not be admissible in an adversary criminal trial." Morrissey, supra at 489. Most of these safeguards are self-explanatory, however some require further explanation.

GAGNON V. SCARPELLI

It should also be noted at this point that the Supreme Court, shortly after deciding Morrissey, decided Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) which involved the issue of what due process requirements must be met prior to the revocation of probation. The Court held that the due process requirements for probation revocation are identical to the due process requirements for parole revocation (cf. Murphy v. Commonwealth., 551 S.W.2d 838 [Ct.App.Ky. 1977] holding that two separate hearings are not required.) Therefore parole revocation and probation revocation cases are used interchangeably in this survey of the law applicable to parole revocation.

DISCLOSURE OF EVIDENCE

While Morrissey requires "disclosure to the parolee of evidence against him" it is quite clear that the Court was referring to the disclosure of such evidence during the course of the preliminary hearing and not before. There is no known authority for the discovery of evidence prior to a preliminary revocation hearing. It is apparent that the Court in requiring disclosure was attempting to remedy the situation of a parolee's parole being revoked based upon confidential reports which he was never allowed to see or refute. One of the main purposes of the hearing process is to advise the parolee of why revocation is being sought and the preliminary parole revocation hearing is itself somewhat of a discovery phase for latter proceedings.

CONFRONTATION AND CROSS-EXAMINATION

Morrissey also requires "the right to confront and cross-examine adverse witnesses." The Court also pointed out that the right was not absolute and could be disallowed for "good cause." The scenario that the Court in Morrissey envisioned was where adverse information was received from an informant who would be subjected to a "risk of harm if his identity was disclosed." In such cases the Court provided that such evidence could be used for revocation without the informant being made available for confrontation, and apparently without even his identity being disclosed. It must be noted that I the several years this writer has been conducting preliminary parole revocation hearings this exact situation has never arisen and therefore the need for a ruling in such a situation has never arisen.

There are however various other contexts in which a confrontation issue will arise. Subsequent cases have set forth the factors which need to be considered in determining whether "good cause" exists to deny confrontation. The courts recognize two factors which must be given consideration in this regard. They are the unavailability of the witness for live testimony, or the practical inconvenience of obtaining the presence of the witness and the reliability of the evidence proposed.

Taking these two factors into consideration the Supreme Court o Washington in State v. Nelson, 69 P.2d 579 (1985) found that revocation could be based upon the written reports of a mental health facility without the preparers of those reports being present for live testimony since the reports were "demonstrably reliable" and a great deal of expense and difficulty would be encountered to make such mental health professionals available for testimony. Likewise the results of drug tests have been found to be admissible without live testimony. United States v. Penn., 721 F.2d 762 (11th Cir. 1983). Other cases in which a finding of "good cause" to deny confrontation has been upheld include United States v. Burkhalter, 588 F.2d 604 (8th Cir. 1978)(letters from vocational school instructors and case workers); United States v. Miller, 514 F.2d 41 (9th Cir. 1975) (state probation reports and court files) and State v. Belcher, 535 P.2d 12 (Ariz. 1975) (letter from drug

treatment staff). In addition, the Kentucky Court of Appeals in Marshall v. Commonwealth, Ky.App., 638 S.W.2d 288 (1982) held that a letter from the staff of a drug treatment program, which the Court found to be inherently reliable, was admissible in a probation hearing where the author of the letter was out-of-state and therefore obviously outside the Court's jurisdiction.

NEUTRAL DECIDER

Another right guaranteed in Morrissey is the right to have the revocation hearing conducted by a "neutral and detached hearing body." The minimum constitutional requirement is that the hearing be conducted by someone other than the Parole Officer supervising the parolee or investigating the alleged violations. And in fact for many years preliminary parole revocation hearings in Kentucky were conducted by other Parole Officers (usually a more senior officer) with little or no legal training. Some states still use this system and those that do have specifically designated hearing officers generally do not require them to be attorneys.

In 1978 the General Assembly enacted KRS 439.341 requiring that the preliminary revocation hearing be conducted by persons who are attorneys admitted to practice in Kentucky. (The working title of those persons has since been changed to Administrative Law Judge). The most significant part of that statute is that it shifted the hearing from the control of the Corrections Cabinet, which is responsible for the enforcement aspects of parole supervision, to the Parole Board, which under KRS 439.320 is a part of the Corrections Cabinet for administrative purposes only. Hence the Corrections Cabinet exerts no supervisory control over the decisions made by the Board or its Administrative Law Judges. This is a tremendous improvement over and above the minimal constitutional requirement set forth in Morrissey.

REVOCATION HEARING VS. TRIAL

Due to the distinct differences between the parole revocation hearing and a criminal proceeding, the strategy decisions made by defense counsel in the former will differ significantly from those with which counsel is accustomed to dealing. In approaching a parole revocation proceeding it must be remembered that evidence generally excluded from a criminal jury trial may be admitted and utilized in a preliminary parole revocation hearing. See, e.g., Marshall, supra. The exclusionary rule generally will not be applicable in the parole revocation hearing. Tiryung v. Commonwealth, Ky.App., 717 S.W.2d 503 (1986) and United States v. Farmer, 512 F.2d 160 (6th Cir. 1975). Additionally, the insanity defense is not available to the alleged parole violator. Steinberg v. Police Court of Albany, New York, 610 F.2d 449 (6th Cir. 1979) (The law on incompetency is however not so well defined.) The parolee cannot relitigate matters already adjudicated in other forums (i.e. new criminal convictions) or collaterally attack new convictions in the revocation hearing. MacLaughlin v. Commonwealth, Ky.App., 717 S.W.2d 506 (1986) and Moss v. Patterson, 555 F.2d 137 (6th Cir. 1977). It is also fairly well settled that the giving of Miranda warnings is not a prerequisite to the admission of statements made by a parolee. Childers v. Commonwealth, Ky.App., 593 S.W.2d 80 (1980).

Another aspect in which the revocation hearing significantly differs from the criminal trial is that no specific mental state is generally required to prove a parole violation. Hawkins v. Penn. Board of Probation and Parole, 490 A.2d 942 (Commonw. Ct. Pa. 1985) and People v. Allegri, 487 N.E.2d 606 (Ill. 1985). Hence the possibility of gaining a dismissal or a "lesser included offense" by showing a less culpable mental state is not a viable strategy. However this should in no way suggest that arguing in support of a finding of a lesser or non-existent culpable mental state should not be undertaken since such a finding certainly is a mitigating factor which should be given considerable weight in the decision concerning the disposition of a parole violation case. Steinberg, supra.

NEW CRIMINAL CONDUCT

There are a couple of further points that must be considered in approaching a parole revocation case. Firstly, the Parole Board presently adheres to a policy of not considering revocation of parole based solely upon new criminal conduct unless and until the parolee is convicted of an offense in a Court of Law. The one exception to this policy is that the Board will consider revocation for new criminal conduct if the offense is personally witnessed by the Probation and Parole Officer. Instances of this are rare, but do occur. It must be recognized that this policy does not prevent the

Parole Officer from proceeding with a revocation action based upon an allegation of a technical violation (i.e. based upon one of the Conditions of Parole or Supervisor) merely because that violation was detected during the course of the investigation of new criminal conduct. Therefore a parolee arrested, but not convicted, of DUI or Alcohol Intoxication may have his parole revoked for the technical violation of using alcoholic beverages or a parolee discovered to be in possession of a deadly weapon and so charged by police, might still be held in violation of his parole for violating the Condition of Parole which prohibits the possession of a weapon. Obviously however, the mere fact that the arrest occurred is not sufficient to prove the violation.

MITIGATION

Additionally, the parolee has the right to submit mitigation evidence and have such evidence considered by the final decision making authority. Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974). Mitigation type evidence generally is evidence concerning why and under what circumstances the parolee committed the alleged violation and/or other evidence tending to show why the parolee's parole should not be revoked. Examples of such evidence would be the availability of a suitable and stable home placement, a good work history, and/or a potential for continued employment, the completion or availability of suitable treatment program and/or the availability of an increased level of supervision. A past history of compliance with parole conditions, if sustained for a period of time, would also be an important piece of mitigation evidence.

While defense counsel certainly owes a duty to his or her client to see that the procedural safeguards of Morrissey and its progeny are adhered to and to see that the client's side of any factual disputes is fully and completely articulated, the right to present mitigation evidence is certainly a right which should not be overlooked in planning a defense strategy particular in those cases where all procedural safeguards are followed and the violation is clearly provable and factually undisputed.

NONWARRANT CASE

In the "non-warrant" type of case a Parole Officer who feels that a parolee is in violation of his parole begins the process by arresting the parolee (see KRS 439.430 which provides for the arrest of suspected parole violators, but certainly does not require an arrest to be made) and scheduling a preliminary hearing by the service of a document entitled "Notice of Preliminary Hearing" which sets forth the charges against the parolee. The preliminary hearing is conducted as scheduled by the Notice. The main purpose of this hearing is to determine whether there is "probable cause" to believe that the parolee has committed an act or omission which is in violation of the conditions of his or her release. This hearing is retrospective in nature, i.e. this hearing is to determine what the parolee has done (or failed to do) and whether, as a matter of law (or more accurately as a matter of "condition") this is a violation of parole. (See Steinberg, supra at 452 for an excellent discussion of the relative functions of the preliminary and final revocation hearings). If a finding of probable cause is made as to any of the violations contained in the Notice of Preliminary Hearing then the case will be referred on to the Kentucky Parole Board for further consideration and the Board's decision (made by majority vote) as to what should be done about any violations found to have been committed. If the Board feels that the violations are serious enough for further consideration, they will issue a Parole Violation Warrant for the return of the parolee to a state correctional facility, where he will be provided with a final revocation hearing, conducted by the Board.

WARRANT CASES

The second type of case is the "warrant" case which involves a situation where the Board's Parole Violation Warrant has been issued prior to the Preliminary Hearing being conducted. This procedure is authorized by KRS 439.430 and 501 KAR 1:020 (1)(1) and is utilized in those cases where it appears that the parolee has violated his parole by absconding from Parole Supervision (i.e. concealing their whereabouts such that the Parole Officers is unable to locate and supervise them). The warrant is issued by majority vote based upon an affidavit from the Parole Officer setting forth his or her belief that the parolee has so violated their parole. That warrant is then put on file with NCIC and when the parolee is apprehended he or she is returned to Kentucky for his or her preliminary revocation hearing. The preliminary hearing will be conducted in the same manner as in the "non-warrant" case except that, upon a finding of probable cause, an additional determination will be made by the Administrative Law Judge as to whether that probable cause existed when the Board issued the Parole Violation Warrant, if it did, then the parolee will be

returned to a state correctional facility for further proceedings without any intervening Board review.

FINDINGS & CONCLUSIONS

In either type case the Administrative Law Judge will write a decision which includes a "Findings of Facts" and "Conclusions of Law" for submission to the Parole Board. In the non-warrant case this document (along with other records in the parolee's Correction Cabinet file) will be utilized to determine whether the parolee should be returned to the institution for a final revocation hearing.

MITIGATION FINDINGS

The written decision of the Administrative Law Judge will also contain a section entitled "Mitigation" which, surprisingly enough, contains findings on the evidence produced tending to mitigate the parolee's conduct. In the non-warrant case the findings contained in this section of the Administrative Law Judge's written decision may be instrumental in persuading the Board not to return the alleged parole violator to prison.

Even though in the "warrant" case, the parolee must be returned to prison for a final hearing if probable cause is found, the Mitigation section of the written decision may be extremely helpful in persuading the Board to reinstate the parolee to parole or give a shorter deferment that might otherwise be given. Even in, "warrant" type cases producing this evidence at the preliminary hearing, as opposed to waiting until the final revocation hearing, may be advisable in that the parolee has the opportunity to gather and present this evidence while it is fresh and still available and with the help of local counsel. Additionally, the fact that findings in mitigation are made in an adversarial setting (rather than the non-adversarial setting of the final revocation hearing) may tend to add credibility to this information.

NONREFERRAL TO BOARD

Defense counsel must also be aware that there is one instance in which the parole revocation case will not be referred to the Parole Board even though probable cause is established to believe that the alleged violation has been committed. This arises when the Parole Officer requests that leniency be given the parolee. In such cases, if sufficient supporting evidence for that motion is presented, the Administrative Law Judge has been empowered by the Parole Board to grant the officer's request and return the parolee to supervision, possibly with the addition of parole conditions designed to correct whatever problems the parolee has encountered. This procedure has been authorized by the Board obviously due to the fact that parole officers have, as far as the Board is concerned, complete discretion in deciding whether to charge a parolee with any violations he may have committed. If that officer is willing to continue supervising a parolee then the Board has no real interest in seeing that person returned as a violator. For this same reason, motions for leniency made by a Parole Officer and supported by adequate justification are granted by the Administrative Law Judges in a majority of cases in which they are made. For this reason, defense counsel should explore with the Parole Officer the possibility of such a motion being made.

FINAL HEARING

While the final revocation hearing is outside the scope of this article, brief mention will be made of it. That hearing's purpose is to determine what action is to be taken concerning any parole violations committed by the parolee, i.e. whether the parolee remains a good parole risk or whether further incarceration is needed. The final hearing is generally conducted more as an interview than as an adversarial hearing. However, the parolee has the right to request that the final hearing be conducted as a "special hearing." (See 501 KAR 1:020 [1][3] and 501 KAR 1:020 [2]). At this type of hearing, which is, for all practical purposes, a de novo hearing, the parolee will be provided the opportunity to question and call witnesses and be represented by counsel. The strategy decision of whether to ask for such a hearing will not be dealt with here. However, the procedure for requesting such a hearing is that the parolee themselves must make the request when first called before the Board for the final hearing.

CONCLUSION

In conclusion, it must be recognized that a parole revocation hearing differs significantly from the criminal proceedings with which defense counsel is accustomed to dealing, and strategy decisions must be adjusted accordingly. Keeping this in mind should certainly assist defense counsel in providing effective representation to their client.

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DEATH WATCH

As California moves closer to its first execution in 20 years, attorneys are getting ready or getting out

by Michael A. Kroll

MARK L. CHRISTIANSEN is an 11-year veteran of the state public defender's office who served four years as chief counsel for the Department of Corrections, and for seven years before that was a deputy attorney general in San Diego. He is not afraid of tough assignments.

In September, however, Christiansen quit rather than accept an order that he take a capital case—the first time such an order was given to a state public defender. In the past, volunteers from the office tried the capital cases. But the glut of death penalty appeals has forced supervisors to assign as many as three capital cases to attorneys with enough experience to handle them.

"The new approach reflects a lack of appreciation for the responsibility of having another human being's life in your hands," Christiansen says. "I'm not afraid of major, serious cases. But I think a person who takes a death penalty case must be ready to see his client executed."

Christiansen was not ready. Neither were Cheryl A. Lutz or Nancy Stoner, who also recently resigned after serving in the state public defender's office since its inception in 1976. "I'm leaving primarily because I don't want to do capital cases," Lutz says. "I worked on one once. Every night I'd spend three hours lying awake in bed thinking about the awful crime, the horror of the state compounding it by trying to kill the man, and whether I was a good enough lawyer to stop it. I can't take the emotional burn-out."

Stoner says, "I've talked to lawyers who've lost clients to the gas chamber, and they say it can take a year or more to recover from the experience. If it happened to me, I'd always be haunted by the nagging doubt that I'd overlooked something, that I had failed to do something that might have kept him alive."

This ill-defined foreboding might be called the cancer ward effect—the shunning of clients who are likely to die soon. Several recent U.S. Supreme Court decisions, a new state Supreme Court majority and the general pro-death penalty mood of the California electorate make that foreboding almost palpable.

This fall, the state Supreme Court increased the likelihood of executions when it overturned the 1983 intent-to-kill ruling, *Carlos v Superior Court*, 35 CA3d 131. By a 6-1 majority, the court held that a felon who kills someone in the course of a crime can be sentenced to death even if the murder was unintentional. *People v Anderson* (Crim. No. 21287) 87 LADJ DAR 7740. Up to 64 pending capital appeals involve a felony-murder conviction and could be affected by the decision.

The change in mood is by no means limited to the state public defender's office. Edward L. Lascher of Ventura, one of the most experienced appellate attorneys in the state, has withstood the pressures of many legal battles over his 30 years of practice. "I'm used to facing miserable odds," he says. "But this got to me. It really got to me."

Lascher was referring to his opening brief in an appeal on behalf of William Proctor, one of the 201 men currently on death row. Lascher says it's a struggle to meet court-imposed filing deadlines and digest "ungodly difficult" case law. "You've got to keep prodding here, turning over rocks there," he says. "You can't stop."

Sanford J. Rosen, a partner in the San Francisco firm of Rosen & Phillips who is handling his third capital appeal, says,

California Lawyer
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"There's a certain dread that transcends professional ability. You have a commitment to saving a human life and a dread that you'll fail."

ONE OF THE first to hear the executioner's song was Michael G. Millman, director of the California Appellate Project. The State Bar established CAP in 1983 to recruit members of the private bar to accept appointments in death penalty appeals and then to assist private counsel in providing representation.

"No lawyers in California have had the experience of seeing clients killed in more than 20 years," says Millman. "So it's impossible to assess the impact. Still, there is reason to be apprehensive about how this might affect capital appellate attorneys—especially those who have carried the burden so far."

The unofficial avoidance Millman fears is already apparent in some states. A report based on a special study by the American Bar Association's Postconviction Death Penalty Representation Project in Washington, D.C., found that more than 150 of the approximately 1,900 people on death row across the country are without counsel. The report predicts that some inmates will remain unrepresented throughout the appeals process. Another study revealed that as many as 80 percent of the nearly 250 condemned inmates in Texas are not represented.

Early signs of the cancer ward effect are showing up in California as well. The state public defender's office, currently handling 39 of the more than 190 death penalty appeals in the state, has 15 staff vacancies out of 65 budgeted positions. And private lawyers with capital appeals experience are having second thoughts about taking other death penalty cases.

"It's a close question," Rosen says. "As the possibility of real executions gets closer, I'm not sure I'll have the emotional resources—much less the financial ones—to undertake another, or to own up to a failure of that magnitude: losing a client to the gas chamber."

Millman is clearly worried about CAP's ability to recruit death penalty defense counsel. "It's possible," he says,

Kentucky Electric Chair

"that we're entering an era when the number of death judgments will increase at precisely the same time the reservoir of qualified appellate lawyers available to take such cases is declining."

AFTER PASSAGE OF then-state senator George Deukmejian's death penalty bill in 1977 and voter approval a year later of the Briggs initiative expanding its application (Pen C §190 et seq), the task of handling capital appeals was divided between the state public defender and appointed private counsel. Based on past practice, appellate attorneys at the time could expect compensation limited to $1,400, including expenses. In 1981, the Supreme Court raised the billing rate to $40 per hour, plus expenses. Finally, in 1984, the rate was raised to its current level of $60 an hour, or about half what experienced criminal appellate attorneys can command in other cases.

During this period, the state public defender's office improved the quality of capital appeals by providing model pleadings, brief banks and other resources to help private counsel handle the appeals it did not take directly. In 1983, however, two new factors threatened the system with breakdown.

First, the Briggs initiative caused a dramatic increase in death judgments at the trial court level—from 20 and 24 in 1979 and 1980 to 40, 39 and 37 in the subsequent three years. And second, just when the demand for qualified appellate attorneys was greatest, newly elected Governor Deukmejian cut the public defender's office budget in half.

This prompted creation of the California Appellate Project in 1983 by the State Bar with contract funding from the Administrative Office of the Courts. Once the state Supreme Court makes a death penalty appeal appointment, CAP works closely with private counsel to provide ongoing consultation, resources, review of draft pleadings, preparation for oral arguments and whatever other assistance might be required.

In the months before CAP was established, 24 men on death row had no attorneys. Within two years, the backlog was eliminated, and it appeared to many that the critical shortage of qualified capital appeals lawyers had been solved. That judgment may have been premature.

One major contributor to change is the U.S. Supreme Court, which has rejected most of the recent death penalty challenges that have come before it. In April, for example, the court narrowly ruled that general statistical evidence of the impact of race on the likelihood of death judgments does not unconstitutionally taint the entire process. *McCleskey v Kemp*, 107 S Ct 1756.

Stories of lawyer burnout, especially in those states where executions have already occurred, have also made it more difficult to recruit new lawyers for the condemned. "The word is out," says Scharlette Holdman, whose eight-year effort to recruit lawyers for Florida's burgeoning death row population finally resulted last year in a state-sponsored program providing direct representation in post-appeal cases. "We now know just how demanding capital representation is," Holdman says. "It entails great sacrifices in time and money, both of which pale in comparison to the emotional investment."

THE SPREAD OF the cancer ward effect in California may be furthered by several factors peculiar to the state, including the Trial Court Delay Reduction Act of 1986 (Gov C §68600 et seq). "It might take three to five years to assess [the bill's] impact," says CAP director Millman, "but to the extent that it telescopes the time between arrest and disposition, it could increase the number of death judgments."

Another cause of apprehension is the rate at which the state Supreme Court

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'I'm leaving primarily because I don't want to do capital cases. I can't take the emotional burnout.'

may affirm death penalty judgments in the future. Since 1977, the court has affirmed only five of the 70 cases that have come before it on direct appeal. Petitions for rehearing were granted in five others, and 60 were reversed for a variety of reasons, both procedural and substantive. By guiding trial courts and clarifying ambiguities, the court has increased the likelihood that judges and prosecutors will avoid past mistakes.

Currently, about half of the cases in which district attorneys seek the death penalty are plea-bargained before trial. Of those that go to trial, about 20 percent result in death judgments. But if the court begins to clear its docket by affirming more cases, it could have the indirect effect of spurring district attorneys to seek death in more cases. Even a small change in prosecutorial willingness to plea bargain could increase the number of death judgments, and thus the need for more appellate lawyers.

"A system that has accommodated an average of two death judgments a month for the past three years will be hard pressed to accommodate even one or two more a month," says Millman. "Since we've only just kept up with demand so far, any shift in this direction may have particularly serious consequences."

Uncertainty about how the court will decide capital cases adds another unknown element. In 1986, the voters refused to retain Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Grodin, primarily because their decisions in capital cases frustrated the overwhelming public sentiment in favor of executions.

Newly appointed Chief Justice Malcolm M. Lucas and new Associate Justices John Arguelles, David Eagleson and Marcus Kaufman are widely believed to be less willing to overturn death judgments. If that speculation proves true—if the new court affirms a significant number of cases in the near future—CAP will face some challenging new problems.

First, appellate counsel must be provided for the post-affirmance process: certiorari review before the U.S. Supreme Court, state habeas corpus petitions, federal habeas corpus review and, as the last resort, clemency. To the degree an assigned appellate lawyer is available and qualified to continue this representation, he will be unavailable to take new cases.

Second, and potentially far more serious, if the U.S. Supreme Court denies certiorari review, the original trial court will set an execution date—a process akin to wiring an alarm clock to a time bomb. If the defendant's appellate lawyer is either unable or unavailable to provide post-affirmance representation, new counsel must be found while the hands of the clock continue to move.

What precipitates the cancer ward effect most dramatically, however, is the fear that executions are imminent. Former public defender Nancy Stoner says simply, "I'm not really good at handling death."

SO FAR, PROSECUTORS seem to be unaffected by the new reality. One assistant DA who asked not to be identified says that until now there has been a feeling that going after death judgments is just play acting. "There's been no sense among DAs that the blood is on their hands," he says. "But now we're getting evidence that this court will let cases get through that might not have gotten through before. I have seen the emotional escalation this has produced among defense counsel," he adds. "I'm still waiting to see its effect on prosecutors."

The emotional distancing evident among defense attorneys does have a parallel among death row officers at San Quentin. Until recently, death row was among the least stressful and most desirable work assignments in the institution. Officer Don Mudloff, a seven-year veteran on death row, has described it as "the best job at San Quentin. They're the nicest guys in the prison to deal with."

San Quentin Public Information Officer Lt. David R. Langerman also has worked death row. "I actually enjoyed it," he says. "You know what to expect, and that lowers tension. Whereas in the general population you're much more likely to be threatened with violence, on death row you're more likely to be threatened with lawsuits. The condemned live in the legal world."

Though there has been no suggestion of violence or other serious problems, a pilot work program for death row inmates has been canceled and a more sinister atmosphere is filtering into the row. For example, on the way to visiting, a prisoner is now cuffed tightly behind his back and pulled backwards from his cell. He is then made to stand with his nose in the corner of the elevator taking him downstairs while one officer holds tightly to the cuffs and another rides along for protection. Until recently, the men were escorted uncuffed to visits.

At the same time, some of the best liked and most trusted of the death row staff have been replaced by officers who seem to be spoiling for a fight. According to inmates, these guards are less willing to settle problems by talking them out and more inclined to resort to disciplinary write-ups that can lead to

loss of privileges, lock-up, and transfer to the Adjustment Center—San Quentin's most secure unit.

One officer, Sgt. J.G. Lane, the recently assigned first-line supervisor for death row, so disturbed the condemned prisoners that they took the highly unusual step of jointly filing a 602, an official inmate complaint. Signed by more than 80 percent of the inmates in the unit, the complaint concludes:

> Sgt. Lane . . . demonstrates an unprofessional, antagonistic, paranoid and confrontational personality, if not a desire to foment a disturbance. As a result, the normally relaxed atmosphere . . . has deteriorated, to the detriment of both staff and inmates.

Although inmates have since dropped the complaint against Lane, alleged unprofessional behavior by prison staff fits the cancer ward theory. "Burned-out medical staff hold the patients responsible; the prison guards blame the inmates," wrote Christina Maslach in her 1982 book, *Burnout—The Cost of Caring* (Prentice-Hall). "Once such prejudiced attitudes are translated into negative actions, it becomes easier to justify treating 'those people' in less than humane ways."

FOR THE GUARDS and prison administrators, the cancer ward effect is prompted by a visceral belief that the ouster of Chief Justice Rose Bird has made executions likely, which in turn has made the condemned less predictable, more volatile, more dangerous. "They have lost their patron saint," says Langerman. "They are starting to see the handwriting on the wall with the new court."

Prison administrators hope to tighten security procedures by seeking modification of a consent decree between inmates and the Department of Corrections that has governed conditions on death row since 1980. See *Thompson v Enomoto* (ND Cal 1982) 542 F Supp 768.

Special Master Robert Riggs, appointed by U.S. District Judge Stanley A. Weigel to monitor compliance with the consent decree, held hearings in March on the proposed changes. Department of Corrections attorney Michael D. O'Reilley said, "What we're talking about here is a considered judgment by prison officials . . . [that] things are more dangerous for staff and other inmates now than they were a year ago."

San Quentin staff psychiatrist Dr. John Gieger testified that a new level of stress was evident on death row, "predominantly the result of California elections which have established a new Supreme Court." In his opinion, "The condemned inmates are now significantly more dangerous."

Staff psychologist Dr. Maurice Lyons, whose ongoing evaluations of the work program for the condemned revealed no incidents of violence among its participants, testified that he nevertheless had recommended termination of the program. "With the expected changes in the Supreme Court," he wrote, "I believe the situation is now dangerously unpredictable."

This ill-defined foreboding is the cancer ward effect—the avoidance of clients who may die soon.

Death row officer Matthew Nimrod testified that the condemned "were a lot more jovial, more joking and laughing . . . prior to Rose Bird leaving office," and correctional counselor Henry Watkins testified that "a definite initial mood of depression set in immediately after the election."

After interviewing inmates on death row last February, psychology professor Craig Haney of the University of California at Santa Cruz said inmates were "quite well aware . . . that the impact of the elections . . . would be years in the offing." But far more important for predicting behavior, he said, are the "immediate kinds of changes in the way in which they're treated and their living conditions. Procedures used with them have much more impact on their present attitudes, moods, feelings and anxieties."

In the "Second Report of the Monitor," filed in July, Riggs recommended to Judge Weigel that he deny the Department of Corrections' motion to modify the consent decree:

> Defendants ask the Court to deprive well-behaved condemned inmates of a right guaranteed by defendants themselves in entering the Decree, in the absence of any evidence whatsoever that this right has been abused by a single condemned inmate, much less the class as a whole.

The negative treatment by staff, however, may be an unconscious effort to produce the very behavior it purports to control, a self-fulfilling prophesy designed to make it easier to put the condemned to death. The 1956 execution of Robert Pierce was made easier for the executioners by the stream of verbal abuse Pierce hurled at the warden, the guards and the assembled witnesses before cyanide cut short his outburst. Louis S. Nelson, former warden of San Quentin, remembers, "That kind of behavior made it easier. You could tell yourself the s.o.b. deserved it."

SOME LAWYERS, LIKE some death row guards, need to justify distancing themselves from the condemned by creating reasons for essentially emotional behavior.

"In the present climate, with the current state and federal courts, one wonders if taking part in the system isn't just wrong," says Sanford Rosen. Mark Christiansen worries that representing the condemned would be contributing to this system and asks, "Does anyone have the right to that much ego?" And Cheryl Lutz, acknowledging a sense of guilt about leaving capital appeals to others who may be less qualified or less well motivated, suggests, "If no one did it, maybe the system wouldn't work, and they'd have to rethink it."

The dilemma is real. As the perception spreads that California is about to reenter the killing fields, qualified appellate lawyers are withdrawing just as the condemned need them most. "At the rate we're going," says Rosen, "there will come a time when it is hard to know who will represent these people."

Perhaps. But CAP's Michael Millman

is far from conceding the point. "The general fear that death judgments are about to increase may also have the potential to draw new people who are committed to providing representation," he says.

San Francisco attorney Robert R. Bryan adds, "For some, the reality of executions promotes a resolve to resist." Bryan has three capital appeals before the Supreme Court, and another three cases where his client could receive the death penalty. "It's like a surgeon called on to save a patient bleeding to death, without being called on to judge the patient's life," he says. "These people are legally bleeding to death."

'On death row you're more likely to be threatened with lawsuits than with violence. The condemned live in the legal world.'

For attorneys, due process of law obviously is a prime consideration in the death penalty debate. "The right to counsel is not a liberal or conservative issue, or one that divides people along party lines," says San Francisco attorney Robert Raven, president-elect of the American Bar Association. "It's a fundamental issue of justice. Yet no state in this country provides enough money to ensure that those on death row have lawyers through the post-conviction process. This situation demands our immediate attention and action."

The difficulty, however, remains the impossibility of neatly separating law from morality in the convoluted death penalty debate. Nobel Peace Prize winner Mother Teresa recently toured San Quentin's death row and, with characteristic simplicity, pierced the state's veil of neutrality on capital punishment. Turning to her escort, she poked a bony finger into Sgt. Lane's chest and warned, "Remember, what you do to these men, you do to God." □

JOSEPH STARVAGGI, 34, was executed by lethal injection in Texas, Sept. 10.

Ninety-two people have been put to death since the Supreme Court reinstated the death penalty in 1976.

1987: William Mitchell, GA, 9/1; Wayne Ritter, AL, 8/28; Beauford White, FL, 8/28; Pierre Dale Selby, UT, 8/28; Sterling Rault, LA, 8/24; John Brogdon, LA, 7/30; Willie Watson, LA,7/24; Willie Celestine, LA, 7/20; Connie Ray Evans, MS, 7/8; John Thompson, TX, 7/8; Richard Whitley, VA, 7/7; Elliott Johnson, TX, 6/24; Jimmy Wingo, LA, 6/16; Jimmy Glass, LA, 6/12; Alvin Moore, LA, 6/9; Benjamin Berry, LA, 6/7; William Boyd Tucker, GA, 5/29; Anthony Williams, TX, 5/28; Richard Tucker, GA, 5/22; Earl Johnson, MS, 5/20; Joseph Mulligan, GA, 5/15; Eliseo Moreno, TX, 3/4; Ramon Hernandez, TX, 1/30;

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

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

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

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

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

1981: Steven Judy, IN, 3/9.

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

1977: Gary Gilmore, UT, 1/17.

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

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Slaying of AIDS victim self-defense, court rules

Staff, wire reports

WHITESBURG — A Letcher County judge ruled yesterday that there was insufficient evidence to submit the case of a man accused of killing an AIDS victim to a grand jury, the prosecutor said.

District Judge Larry D. Collins "ruled basically it was a self-defense situation," Commonwealth's Attorney James Wiley Craft said.

Donnie Mullins, 32, of Sergent was charged with manslaughter after the Aug. 5 shooting of Rocky Lynn Sergent, 32, of Ermine.

"Sergent had a loaded .38 cocked in his right hip pocket when we found him," Craft said.

The shooting caused uncertainty among Letcher County officials about how to deal with situations involving victims of acquired immune deficiency syndrome. Letcher County Sheriff Ben Taylor said at the time that authorities considered seeking an order to burn the van in which Sergent died because of the blood on it, but the vehicle later was turned over to its owner.

Officials poured gasoline on blood on the ground and burned it.

6th Circuit Highlights

Donna Boyce

In Thompson v. Kentucky, 833 F.2d. 614, 16 S.C.R. 23, 17, 42 CrL. 2174 (6th Cir. 1987), the Sixth Circuit Court of Appeals held that a consent decree and prison policy statements created a liberty interest in visitation privileges such that due process requires some procedure before visitation can be denied. The Court noted that while prison inmates have no absolute constitutional right to visitation, a liberty interest may be created by a state's statute or regulations or by prison officials' policy statements.

An entitlement and protected interest exist if statutes or prison policy statements have limited prison officials' discretion by imposing a specific prerequisite to the forfeiture of benefits. Procedural guidelines alone do not establish a liberty interest, but the repeated use of explicit mandatory language in connection with requiring specific substantive predicates creates a liberty interest.

In this case, the Court found mandatory language in both the consent decree and the policy statements at issue. More importantly, the Court found that each of the three sets of prison policies in effect since the signing of the consent decree placed substantive limitations on official discretion by enumerating particularized standards or criteria to constrain the discretion of state decisionmakers.

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New judge's move to Kentucky on hold

Associated Press

LOUISVILLE — Danny J. Boggs cannot seem to make it back to Kentucky despite being sworn in sixteen months ago as a judge on the 6th U.S. Circuit Court of Appeals in Cincinnati.

It is an unusual situation.

Federal law requires an appeals court judge to be a resident of the circuit to which he or she is appointed. The 6th Circuit covers Kentucky, Tennessee, Ohio and Michigan. The circuit's other 14 judges all live and work in one of those four states, traveling to Cincinnati for court sessions.

Boggs also goes to Cincinnati to hear cases, but he continues to live and do most of his work in the Washington, D.C., area. His wife, Judith, also an attorney, still has a high-level job with the U.S. Department of Health and Human Services.

And with President Reagan's recent nomination of Robert Bork to the Supreme Court, reports have circulated that Boggs might be hoping to take Bork's current seat on the U.S. Court of Appeals for the District of Columbia, generally considered the most influential of the nation's 13 federal appellate courts.

Boggs' decision to remain in Washington the rest of this year became generally known about the time Supreme Court Justice Lewis Powell Jr. resigned and Bork emerged as Powell's likely successor.

In an interview, however, Boggs denied that he wanted to succeed Bork and insisted he does want to move to Louisville, the city he has selected as his home base.

Boggs said he made his decision the week before Powell's June 26 announcement.

The problem, Boggs said, is that there is not adequate space for him and his staff in the federal courthouse there. "As soon as the office is there, I'll be there," he said.

James Higgins, circuit executive for the 6th Circuit court, agreed, saying, "There really isn't a place to put him in Louisville."

The General Services Administration, the federal landlord agency, is preparing to build new judicial offices in the courthouse.

It expects to let a contract for the work in September, with completion scheduled for February.

"I don't want to point any fingers, but we (court officials) don't have any control," Higgins said.

As for the residence requirement for circuit court judges, Boggs said he has always maintained his legal residence in Kentucky by voting in Bowling Green by absentee ballot and paying property taxes on a house there.

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

Plain View

Search and Seizure Law and Comment


Ernie Lewis

Jerry Ramsey was driving in McCreary County and was arrested for DUI. He was placed in a state police cruiser. Despite the fact that Ramsey could not reach from the cruiser into the car, the trooper saw fit to search the inside of Ramsey's car. A chain saw was uncovered, and several serial numbers copied. When the saw was later reported stolen, Ramsey was charged with and convicted of receiving stolen property.

The Court of Appeals reversed, stating that the search was illegal because the police officer had no probable cause (or even an inkling) that the chain saw was contraband. Continuing a disturbing trend of reversing Court of Appeals opinions in favor of defendants, on November 5, 1987, the Kentucky Supreme Court reversed Commonwealth v. Ramsey, Ky., ___ S.W.2d ___ (Nov. 5, 1987).

The Court, in an unanimous opinion written by Justice Wintersheimer, held that because the DUI arrest was legal, under New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) the officer had a right to search the passenger compartment incident to that arrest.

The Ramsey decision is troublesome in a number of ways. First, it demonstrates the misuse of the Belton rule. The search incident to a lawful arrest exception to the warrant requirement was crafted as a device to protect police officers. Officers should not have to guess what an arrestee will do during the arrest procedure. Rather, the argument goes, if an arrestee can reach into an area while being arrested, in order to protect himself it is reasonable to allow the officer to search all areas into which the arrestee can reach. However, Belton should not be extended as a carte blanche to search anything in a car, even where the officer is clearly in no danger whatsoever.

Secondly, this decision goes contrary to the recent decision of Arizona v. Hicks, 480 U.S. ___, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). There, the Court held that officers who copied serial numbers of stereo equipment during a warrantless but otherwise legal search of an apartment were in violation of the Fourth Amendment where the evidence searched was not obviously contraband. Ramsey is little different from Hicks, other than the fact that Ramsey took place in a car, while Hicks occurred in an apartment. That fact should not be dispositive, however, where, in Ramsey no less than in Hicks, the officer takes advantage of an otherwise legal search in order to rummage around to see what he can find.

Finally, it is distressing to see the Court knee-jerk to a U.S. Supreme Court case as broad as Belton and to ignore our own Kentucky Section Ten privacy rights the Court once held so dear.

The Court of Appeals issued two opinions related to search and seizure over the past two months. In Commonwealth v. Balsley, Ky. App., ___S.W.2d___ (Oct. 30, 1987), a Jefferson County police officer obtained a search warrant by stating that an informant had seen the defendant possessing cocaine. The affidavit, unfortun-ately for the Commonwealth, was "substantially similar or exactly the same as the 35 previous affi-davits submitted by this officer in search warrant applications." The trial court sustained the defendant's motion for disclosure of the identity of the informant, stating that under KRS 218A.260 the informant was a material witness to the crime and that the Court "'is not satisfied that such information was received from a reliable informant.'" The Commonwealth appealed.

The Court of Appeals held that the trial court's findings were "well supported by the record," and affirmed the trial court's decision.

In a most significant decision, the Court of Appeals has announced a bright-line rule against executing search warrants at night. In a 2-1 decision that is now before the Supreme Court on the Attorney General's motion for discretionary review, Judge Clayton held that a criminal conviction of wanton endangerment had to be reversed be-

cause the crime had occurred during the unreasonable execution of a search warrant. Gross v. Commonwealth, Ky.App., ___ S.W.2d ___ (11/13/87).

The facts of the case are appalling. The Metro Police in Lexington received information that one William Gross had cocaine in his apartment. A warrant was issued at 10:30 one Sunday evening. A SWAT team went immediately to the house and found a girl and her boyfriend watching television in an otherwise darkened house. The SWAT team proceeded to knock a hole in the door with a sledge hammer, with the hammer flying into the house. The officers continued to try to kick in the door. Gross awoke from his sleep and shot through the front door, injuring one of the officers. Parenthetically, no cocaine was found in Gross' house. Tried for an assault second, Gross was convicted of wanton endangerment first.

The Court of Appeals held that the execution of the search warrant at night was unreasonable. Quoting from Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514, 1519 (1958), the Court stated that "'It is difficult to imagine a more severe invasion of privacy than a nighttime intrusion into a private home.' There is and should be a fundamental aversion that our society holds toward such intrusions. The idea of the police unnecessarily forcing their way into a home in the middle of the night, without knocking and announcing their purpose, rousing residents out of their beds, and forcing them to stand by in indignity in their night clothes while the police rummage through their belongings, smacks of a police state lacking in respect for the right of privacy dictated by the U. S. Constitution."

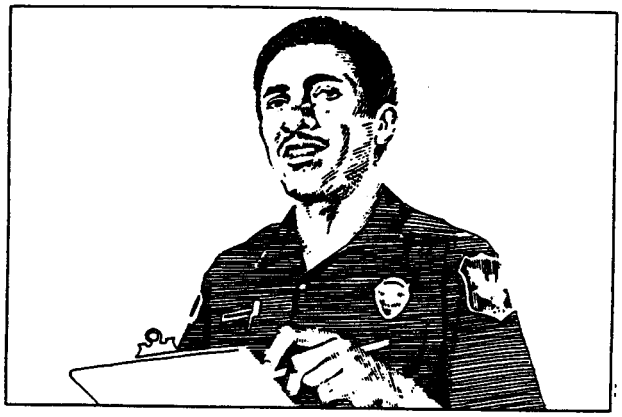
Because of the significance of this case, and further because of the fact that it is a case of first impression in Kentucky, one can expect discretionary review by the Kentucky Supreme Court. It is hoped that the fundamental privacy rights long held by Kentucklans and strongly affirmed by the Court of Appeals will be strengthened by the Supreme Court's decision.

The Short View

1) In re D.J., D.C.App., 532 A.2d. 138 (1987). The Court held that the police may not stop a person who walks away from them in a high crime area with his hands in his pocket. This kind of flight, without more, simply does not justify a Terry stop. This issue is presently before the U.S. Supreme Court in Michigan v. Chesternut, cert. granted 42 Cr.L. 4035;

2) State v. Schweich, Minn. Ct. App., 414 N.W. 227 (1987). The defendant's consent to search his residence for guns was limited to that, and drugs discovered during a more complete search had to be suppressed, according to the Minnesota Court of Appeals. The Court held the police misrepresented the purpose of the search, the defendant's consent was obtained by deception, and was thus involuntary;

3) U.S. v. Steeprow, 42 Cr.L. 2200 (9th Cir. 11/30/87). Connie Steeprow was stopped by 7-10 police officers who were executing an arrest warrant at one Johnson's house from which she was leaving. The officers pointed guns at her (including one in her nose), and held her for 5-15 minutes before telling her she could leave if she'd leave her backpack. A warrant for the premises was obtained, and her backpack was searched. The Ninth Circuit held the detention was a full arrest requiring probable cause rather than a Terry stop, requiring only an articulable suspicion, due to the force used and the length of the detention, and that an amphetamine formula found in her backpack had to be suppressed;



County to offer policemen counseling

A Ft. Thomas doctor will offer stress counseling sessions for Campbell County police officers.

The fiscal court voted unanimously yesterday to hire Dr. M. Taylor Bach. Bach will counsel individual officers who request the service, County Commissioner Dave Otto said. No officers will be forced to undergo counseling, he said.

The Fraternal Order of Police requested the service during contract negotiations with the county, Otto said.

"They felt the need for it," Otto said. "This is the first time the county has more or less looked into it."

The contract with Bach stipulates that the county will pay him no more than $3,500 during the fiscal year that begins July 1.

The Kentucky Post, Saturday, June 13, 1987

4) People v. Daugherty, Ill.App., 514 N.E.2d 228 (1987). A policeman obtained consent to search by telling a woman he wanted to investigate the theft of cash from her house. The Court ruled the officer used "unfair and coercive" deception (as opposed to what?) thereby rendering the consent unfair;

5) Myron W. Orfield, Jr. recently published his study entitled "The Exclusionary Rule and Deterrence: A Empirical Study of Chicago Narcotics Officers", 54 University Chicago Law Review 1016. His conclusions demonstrate the wisdom of the Kentucky Supreme Court's avoiding Leon's good faith exception, and further support the continued viability of the exclusionary rule. His study shows that the exclusionary rule has "changed police, prosecutorial, and judicial procedures; on an individual level, it has educated police officers in the requirements of the fourth amendment and has punished them when they have violated those requirements." Id. at 1017. "In summary, Chicago's narcotics officers are virtually always in court when evidence is suppressed in their cases; they always eventually understand why the evidence was suppressed; and this experience has caused them to use warrants more often and to exercise more care when conducting warrantless searches. The study also demonstrates that judicial suppression, and the actions that police officials take in response to suppression, 'punish' officers for conducting illegal searches. And although in-court perjury clearly exists in Chicago and impedes the deterrent effect of the exclusionary rule, strong institutional responses to perjury by the courts and the police departments have significantly reduced the impact of perjury on the practical operation of the rule... this study suggests that the Supreme Court's skepticism concerning the deterrence rationale is unfounded... the Court's decision in Leon threatens to undermine the institutional responses to the exclusionary rule and the consistently correct search behavior they have fostered. These reforms were created to make certain that a search warrant was sufficiently grounded in probable cause. Leon may make this elaborate apparatus unnecessary. Some police officers believe that during the next 'era of declining resources,' the institutional reforms created in response to the exclusionary rule may be in danger." Id., 1017-1018, 1054.

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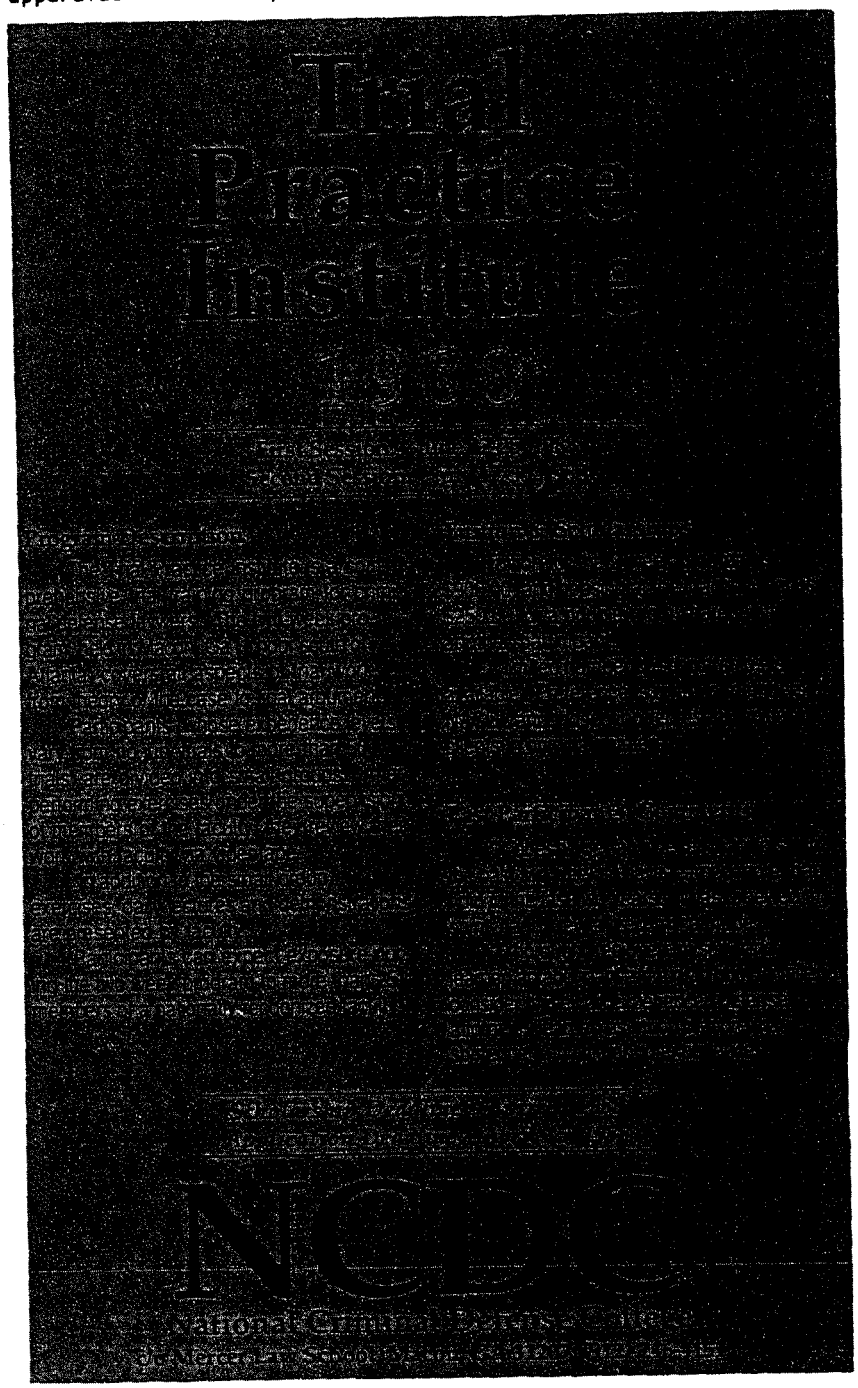


Trial Tips

For the Criminal Defense Attorney

NEW ORGANIZATION TO ASSIST BATTERED WOMAN DEFENDANTS SEEKS INFORMATION

Ironically, despite heightened public awareness about domesitc violence and its victims, many battered women, particularly women of color and low-income, who have acted in self-defense are being convicted and sentenced to harsh jail terms. Studies suggest that as many as 8 out of 10 battered women charged with killing their abusers are convicted. As defendants in murder or assault cases, any understanding of battered women's victimization often disappears.

The National Clearinghouse on Battered Women's Self-Defense opened it's doors in September 1987. It is designed to offer assistance to: (a) attorneys, by teaching them to incorporate life experiences into the legal defense; (b) expert witnesses, to help them apply the syndrome in the context of a legal defense; and (c) advocates, who have long acted in a prosecutorial role must relearn their work in order to act on the behalf of battered woman defendants.

The three main components of the Project include:

(1) The production of a **Resource Manual** compiling and analyzing the extensive body of knowledge developed in recent years on battered women's self-defense cases.

(2) **A Technical Assistance Unit** to provide direct technical assistance to advocates, expert witnesses and attorneys nationally.

(3) **An Organizing Unit** which will help defense teams create broad-based community support for battered woman defendants, while ever building the constituency of people committed to ending violence against women.

The Self-Defense Advocacy Project will be completed at the end of 1989. At that time The Clearinghouse will be fully operational and will continue to collect, compile and disseminate resources to assist defense teams.

NATIONAL STUDY

During the next two years the Clearinghouse will conduct a national study exploring legal, service and organizing strategies that have contributed to successful outcomes in cases where battered women have been charged with killing or assaulting their abuser. In addition, the Clearinghouse will provide defense team members with direct consultation and assistance with their battered women clients who have acted in self-defense. The Clearinghouse will collect, organize and disseminate resource materials on all aspects of work with battered women defendants.

The Clearinghouse needs your help. At this time, the Clearinghouse is identifying cases across the country that we should include in their national study. When pos-sible, we will interview the battered woman herself, the defense attorney, the judge, the district attorney, the expert and advocate if there was one involved in the case, jurors, media personnel and other community people with knowledge of the case. We are seeking information about battered women defendants from a variety of backgrounds and jurisdictions. We are very interested in information about women who were not charged or whose cases were dismissed at the grand jury. However, we are interested in <u>all</u> cases involving battered women defendants, including those who were acquitted, convicted, sentenced to community time or probation, given stiff sentences, and/or those who received pardons or had their sentences commuted.

At this time we only require a small amount of information about the case. Of primary importance is the name of the defense attorney.

If you have defended a battered woman charged with homicide or assault, please take a few minutes to fill out the questionnaire and return it to the Clearinghouse. Please pass this questionnaire to others who may have worked with battered women defendants. Contact:

SUE OSTHOFF
THE NATIONAL CLEARINGHOUSE ON BATTERED WOMEN'S SELF-DEFENSE
910 S. 49th Street
Philadelphia, PA 19143
(215) 724-3270

NATIONAL CLEARINGHOUSE ON BATTERED WOMEN'S SELF-DEFENSE

Preliminary Case Identification Form

If you have information about more than one case where a battered women was charged with killing or assaulting her abuser, PLEASE make copies of this form **before** you begin filling it out. Please use one form per case. Fill out as much information as you can. Please return form(s) as soon as possible to the address on second page. Thank you for your assistance.

NAME OF PERSON COMPLETING FORM:_____

ADDRESS:_____

_____

TELEPHONE(S):_____

NAME OF BATTERED WOMAN WHO KILLED OR ASSAULTED HER ABUSER:_____

DATE OF INCIDENT_____

WOMAN CHARGED? WITH WHAT?_____

WEAPON USED? NUMBER OF WOUNDS?_____

ATTACK ON-GOING? OR MAN ASLEEP?_____

CASE WENT TO TRIAL? (DATE?)_____

WOMAN'S DEFENSE_____

DISPOSITION_____

SENTENCE_____

AMOUNT OF TIME SERVED?_____

CURRENT STATUS OF CASE_____

_____

NAME OF DEFENSE ATTORNEY_____

PRIVATE? PUBLIC DEFENDER? COURT APPOINTED?_____

ADDRESS:_____

_____

TELEPHONE(S):_____

NAME OF EXPERT WITNESS (if appropriate)_____

ADDRESS:_____

_____

TELEPHONE(S):_____

NAME OF BATTERED WOMEN ADVOCATE OR PROGRAM, IF ANY_____

ADDRESS:_____

_____

TELEPHONE(S):_____

OTHER RELEVANT PEOPLE (Defense or bail fund people, media people, family members, D.A.'s, Judges, etc.): (Please include as much information as you can; use back if necessary):

OTHER RELEVANT INFORMATION Is there something else we should know? Feel free to use the back if there is other information you believe would be useful.

Thank you very much for your time and help. Please mail completed forms to:
Sue Osthoff, NCBWSD, 910 S. 49th Street, Philadelphia, PA 19143

Batson Update

JoAnne Yanish

"BATSON" DOWN THE HATCHES
Part II

This second installment will review recent post-Batson cases which address prosecutorial rebuttal of a claim of discrimination and defense surrebuttal.

In two recent comprehensive cases which examine reasons given in rebuttal by prosecutors who peremptorily struck black prospective jurors both the Alabama and Missouri Supreme Courts have established guidelines for lower courts examining prosecutors' reasons. In Ex Parte Branch, ___ So.2d ___, 42 CrL 2079, 2108 (October 9, 1987), the Alabama court described the following guidelines as "illustrative of the types of evidence that can be used to raise the inference of discrimination":

1. Evidence challenged jurors shared only the characteristic of their group membership;

2. A pattern of strikes against blacks on a particular venire;

3. The past conduct of the offending attorney;

4. The type and manner of attorney's questions and statements including "nothing more than desultory voir dire";

5. The type and manner of questions to the challenged juror, including a lack of questions or lack of meaningful questions;

6. Disparate treatment of prospective jurors with the same characteristics or who answer a question in the same or similar manner;

7. Disparate examination of panel members such as asking a question of black juror designed to provoke a response likely to disqualify a juror but not asking that question of white jurors;

8. Disparate impact where most or all of strikes used against blacks;

9. Use of peremptories against all or most of black jurors accompanied by failure to use all of peremptories.

The Alabama Court further stated that intuitive judgment or suspicion by the prosecutor is insufficient rebuttal.

In State v. Antwine, ___ S.W.2d ___, 42 CrL 2233 (Dec. 15, 1987), the Missouri Supreme Court adopted the factors originally set out in State v. Butler, Mo.Ct.App., 731 S.W.2d 265 (1987) for evaluation by the trial judge when examining the prosecutor's reasons. These factors include: 1) the susceptibility of a particular case to racial discrimination, 2) the prosecutor's demeanor, and 3) the explanation given for the peremptory challenges. The court held that objective criteria are available to evaluate the explanation but that Batson also left room for the state to exercise its peremptory challenges on the basis of the prosecutor's legitimate hunches and past experience. The court concluded that the trial judge must assess the entire milieu of the voir dire objectively and subjectively, considering the trial judge's personal, lifetime experiences with voir dire and comparing his observations and assessments of veniremen with those explanations offered by the state.

Several courts have evaluated reasons given by prosecutors for strikes against jurors where claims of discrimination have been raised and have found the reasons lacking. In many cases prosecutors have been unable to give explanations which successfully rebut prima facie cases of discriminatory intent.

In Butler, the court found the prosecutor had failed to articulate legitimate nondiscriminatory reasons for striking 6 blacks. The court rejected the explanation that one juror was elderly and seemed intimidated. The court described the prosecutor's prior experiences with an elderly juror as not probative of the challenged juror's ability to sit and found the link between age and disposition to intimidation to be highly questionable. Described as "most damning" was the prosecutor's failure to strike an elderly white man of whom no questions had been asked. Id. at 271.

The Butler Court also found two prosecutorial explanations to be conflicting. The prosecutor had challenged two jurors for laughing while looking at each other and then at the prosecutor. However one of the two was also struck because she looked at the floor throughout voir dire and failed to make eye contact with the prosecutor. The court found the juror could not have done both and further mentioned that neither juror had been questioned. The court described as questionable the premise that a juror who looks at the floor is unfit.

Another juror was struck because she was a nurse and prior experience had taught the prosecutor that nurses were compassionate and tended to feel sorry for defendants. The reason was found not "related to case to be tried." The court also found the prosecutor had not removed a white juror who worked for American Nurses' Association. That white juror had not been questioned.

In Slappy v. State, Fla.App., 503 So.2d 350 (1987), a case based on the state constitutional guarantee of the right to an impartial jury, the Florida Court of Appeals listed similar factors which it found weighed heavily against the legitimacy of any race-neutral explanation. These include an explanation based on a group bias where the trait is not shown to apply to stricken juror; a perfunctory examination of a challenged juror; a reason for the strike unrelated to facts of case; disparate treatment where there's no difference between the responses of challenged and unchallenged venire persons.

In Slappy the Florida court rejected the reasons given by the prosecution for strikes. One juror was allegedly stricken because she didn't seem to be secure about sitting on a jury. According to the prosecutor, she had asked questions about whether she needed to know anything about the law or the criminal justice system. The prosecutor also indicated her health did not seem to be very good. The court held that the explanation was not the subject of any voir dire examination by the prosecutor and that the reasons given for the challenge were not specific or legitimate. The court also noted the prosecutor's failure to inquire either about the juror's understanding of the proceedings or her health.

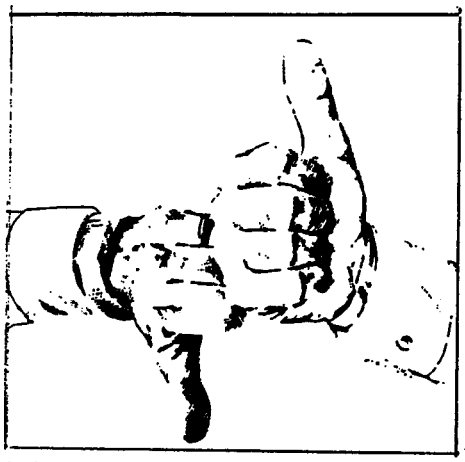
Two other explanations for strikes had been based on the fact that two jurors were teacher's assistants at elementary schools which, according to the prosecutor, indicated a degree of liberalism he preferred not to have on the jury. The Slappy court found that explanation to be based on an assumed employment group bias which was not shown to apply to either juror or to the facts of the particular case. The court went on to state, "that the prosecutor intended, unlawfully, to exclude the teacher aides on the basis of race alone is strongly inferred from the fact that they were challenged without being examined on voir dire and that a nonblack school teacher was not challenged." Slappy at 355. The court also held that it was not shown by the record what liberalism was in this context or how it affected a juror's ability to follow the law.

In another Florida case, the Court of Appeals also found that the state had failed to give legitimate explanations for its challenges to five black prospective jurors. In Floyd v. State, Fla.App., 511 S.2d 762 1987), the Court rejected the prosecutor's explanation that he "did not as a general rule like having young students on his jur for superstitious reasons." The court held that superstition against young students generally does not satisfy the constitutional requirement that the removal of black jurors be for legitimate reasons. Id. at 764. Nor did the court find the juror's failure to react emotionally one way or another to questioning on voir dire to be a reasonably clear and specific explanation. More significant was the fact that a white student was not challenged by the state. The Court held this to be strong evidence that the state attorney's explanation was subterfuge to avoid admitting discriminatory use of peremptory challenges.

In People v. Turner, Cal., 726 P.2d 102 (1986), a California case based on the state constitution, the California Supreme Court rejected the prosecutor's explanation that a black juror was a truck driver who had a great deal of difficulty in understanding any of the questions that were being given. The Court found that California cases cited refuted any implication that truck drivers as a class were not intelligent enough to be jurors and that the record specifically refuted any implication as to the juror in question. Specifically, the Court noted that the juror had no difficulty in understanding and answering the questions put to him by either the defense counsel or the prosecutor. Concerning the prosecutor's rationale that he found something in another black juror's work and background objectionable the Court noted that that juror was a supervising hospital unit coordinator and that the prosecutor had asked her no questions about her job.

In another recent case, the Missouri Court of Appeals described

the prosecutor's explanations as misquotation and patent exaggeration. The juror in question had stated on voir dire that about five years earlier his home had been burglarized by "kids" on his block and that he had retrieved his stolen property from them without calling the police. The prosecutor claimed to have challenged the juror because "he took the law into his own hands and personally went and apprehended the suspect" and "stated it was his opinion, generally, that he had the right to take the law into his own hands." The court stated the prosecutor had puffed the veniremen's meaning and had gone on to "gild those unwanted



inferences with factual allegations" unsupported in the entire trial record. State v. Brinkley, ___ S.W.2d ___, 42 CrL 2145 (Nov. 3, 1987). The court noted that in evaluating an explanation, a trial court should consider whether the prosecutor has stated reasons which accurately reflect what happened and what was said during voir dire. "Puffing, which may be harmless exaggeration in some situations, can deprive a person of constitutional rights if allowed to legitimize discriminatory peremptory challenges." 42 CrL at 2146.

The Court of Appeals for the Tenth Circuit held that the government's peremptory challenges of two black jurors because of the prosecutor's presumption from his previous experience that all black people would be influenced to acquit because of the mere presence of black defense counsel violated equal protection in United States v. Brown, 817 F.2d 674 (10th Cir. 1987). The Court noted that the prosecutor had made no effort to determine whether his concerns were real in that case. Id. at 676.

In United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987), since reasons had been volunteered by the prosecutor, the Court examined one of the reasons given by the prosecutor for striking a juror and found it inadequate, although the case was remanded for a Batson hearing. The prosecutor had stated that, "based on [the juror's] background and other things in his questionnaire, I just elected to strike him." Finding the reason clearly inadequate the Court noted that the record indicated nothing about the contents of the juror's questionnaire and nothing about his background except that he was American Indian.

A great case in which reasons were rejected by the California Court of Appeals is People v. Mora, Cal.App., 235 Cal.Rptr. 340 (1987). One reason for a strike given by the prosecutor was the fact that a juror did not like people who have or own guns. The prosecutor continued that "some of the People's own witnesses have and own guns" and that they would be calling police officers who were armed and wearing guns when they were on the stand. The Court described the reasons as hollow and suggested that they "sometimes bordered on the laughable." Id. at 345. "The remarkable suggestion that a former burglary victim who was not fond of guns might be prejudiced against police officers because they generally carry them should have alerted the trial court to the bankruptcy of the prosecutor's justification for her challenges." In conclusion, the Court found the prosecutor's explanations for the exclusion of all five Hispanic jurors unpersuasive and highly suspect. In passing, the Court also noted that the prosecutor's admitted attempt to systematically exclude young people from the jury found no favor with the majority of the court. The case contains a detailed discussion of the concept of young people as a cognizable class.

Several cases have also specifically recognized a right to defense rebuttal, or surrebuttal. In State v. Antwine, for instance, the Missouri Supreme Court recognized that if rebuttal by the prosecutor was successful the defendant was obliged to demonstrate that the state's explanations were merely pretextual. 42 CrL 2233. Similarly in the Eleventh Circuit, the Court of Appeals has recognized that the lower court erred in failing to allow the opportunity to offer rebuttal concerning the prosecutor's reasons. United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987). The Court of Appeals for the Eighth Circuit has also recognized that the defense must be given a chance to rebut the prosecutor's explanations as a pretext in United States v. Wilson, 816 F.2d 421, 423 (8th Cir. 1987).

The Court of Appeals for the Ninth Circuit in a detailed opinion, has also recently held that the district court abused its discretion by conducting an in-camera, ex parte examination of a prosecutor's motives for excluding blacks from the jury in the case of United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987). In so holding, the court reconciled two fundamental principles of the criminal justice system. The first was that

a district judge had broad discretion to fashion and guide the procedures to be followed in cases before him. The second was that adversary proceedings are the norm in our system of criminal justice and ex parte proceedings the disfavored exception. Id. at 1257. The Court held that the right of a criminal defendant to an adversary proceeding was fundamental to the system of justice citing Nix v. Williams, 467 U.S. 431 (1984). The court recognized that the right included the rights to be personally present and to be represented by counsel at critical stages during the course of the prosecution, citing United States v. Wade, 388 U.S. 218 (1967). "Our system is grounded on the notion the truth will most likely be served if the decisionmaker - judge or jury - has the benefit of forceful argument from both sides. Herring v. New York, 422 U.S. 853, 862 (1975). Inquisitorial proceedings, where the judge takes an active role in ferreting out the truth, may be the rule elsewhere in the world, but they are decidedly alien to our way of thinking. Our judges usually have neither the time, nor the means, nor the training to investigate facts pertaining to the cases before them. Even on matters of law, our judges must rely heavily on counsel to come up with the arguments and citations supporting their respective positions." Id. at 1258.

Postscript on cognizable groups: The United States District Court for the Eastern District of New York has recognized Italian-Americans as a cognizable racial group recently in United States v. Biaggi, 42 CrL 2210 (D.C.E.N.Y., 11/6/87). The Court cited to the common experience and background Italian-Americans share in links to families, culture and group loyalties, often sharing the same religious and culinary practices. 42 CrL at 2210. The Court also took judicial notice that "Italians have been subject to sterotyping, invidious ethnic humor and discrimination." 42 CrL at 2210.

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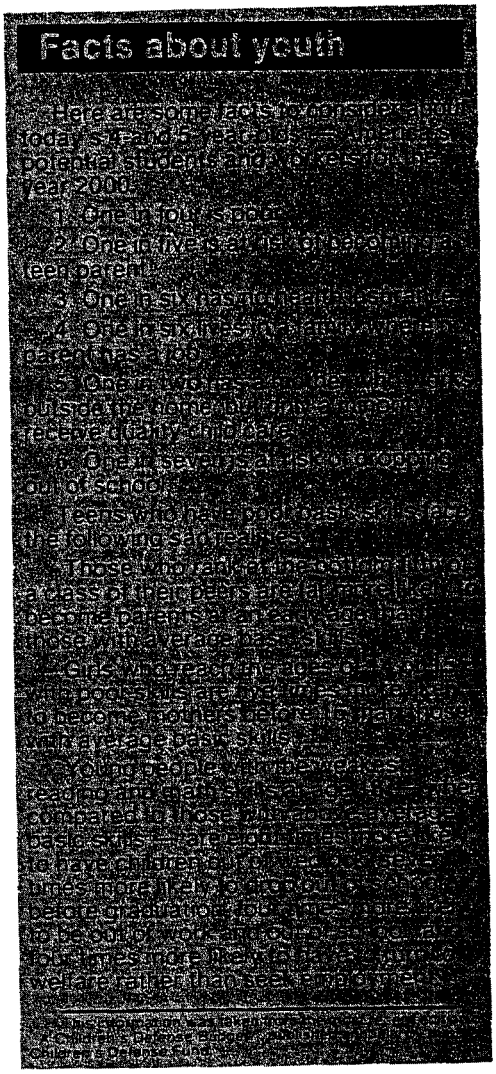
Staff Changes

In September, ten law clerks were hired to fill juvenile services vacancies in our field offices in keeping with the New Juvenile Code. After receiving bar results, they were reclassified on November 2, 1987 as Assistant Public Advocacy (2 have yet to receive their out-of-state bar results). Those persons are:

1. **Andy Markelonis**
   joined the Hazard Office
2. **Tom Ransdell**
   joined the Pikeville Office
3. **Katherine Burton**
   joined the Paducah Office
4. **Lewis Kuhl**
   joined the LaGrange P.C. Office
5. **Patricia Byrn**
   joined the Paducah Office
6. **David Eucher**
   joined the Richmond Office
7. **Steve Geurin**
   joined the Morehead Office
8. **Jim Norris** (Law Clerk)
   joined the London Office
9. **John Burrell**
   joined the Stanton Office
10. **Jeff Kelly** (Law Clerk)
    joined the Hopkinsville Office



Using Kentucky's Constitution

Rebecca DiLoreto

Though many of us have been trained to "federalize" the issues we raise in our appellate briefs and pretrial motions, sometimes we fail to fully develop state constitutional arguments. Since the latter part of the 1950's, state courts in criminal cases have spent most of their energy on the interpretation and application of federal constitutional decisions to the state cases before them. However, our state courts have, at times, encouraged counsel to turn first to our Kentucky Constitution and the legal tradition which accompanies it. See Shull v. Commonwealth, Ky., 475 S.W.2d 469 (1971). United States Supreme Court Justices also remind state courts that they are free to interpret their own constitutions as more protective of individual liberties than the United States Constitution. See Prune Yard Shopping Center v. Robias, 447 U.S. 74, 81 (1980) (Rehnquist) (unanimous Court). Lego v. Twomey, 404 U.S. 477, 489 (1972) (White joined by Burger, Stewart, and Blackmun). As advocates and Kentucky lawyers we need to respond to that call.

What restrictions are placed on state constitutional interpretation by federal constitutional law? The generally held view is that state constitutions can provide greater individual liberties to citizens but that they cannot be interpreted to be more restrictive of individual freedom. However, some constitutional scholars suggest that state courts can interpret state constitutions to fall short of the federal floor as long as federal constitutional rights are still honored. See Collins, "Reliance on State Constitutions - Away From a Reactionary Approach," 9 Hastings Const. L.Q. 1, 15 (1981); Linde, "First Things First: Rediscovering the State's Bill of Rights," 9 U. Balt L. Rev. 379, 383-84 (1980). The holdings in such cases would then have to be based on federal constitutional grounds.

At least one former justice of the United States Supreme Court has stated his view that it is irrational law enforcement for a state court to interpret the state constitution as more protective of individual liberties than its federal counterpart. See Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger concurring).

There are many reasons why Kentucky Courts might view our state constitution differently from that of the United States Constitution. First and foremost, out state constitution was written to protect the citizens in our Commonwealth from oppressive government. State courts relying on state constitutions not only have long been recognized as an adjunct source of protection but in fact the primary protectors of individual liberties. See Wright, In Praise of State Courts: Confessions of a Federal Judge, 11 Hastings Const. L.Q. 165, 188 (1984). Federalism carries little meaning for the judiciary if it does not mandate that state courts are entitled to interpret their own constitutions, relying on the legal tradition unique to their state.

Obviously, state courts can distinguish their decisions from those of the United States Supreme Court by contrasting the language of the state and federal constitutional provisions. Yet state courts are also generally considered free to create theory, analysis, and reasoning to interpret identical, provisions differently. In interpreting constitutional provisions, Kentucky courts have a wealth of legal resources. They review the case law of the Commonwealth, analyze federal decisions and compare the case law of other states. See Commonwealth v. Brown, Ky., 619 S.W.2d 699 (1981). In their constitutional analysis, Kentucky Courts also recognize that the manner in which this Commonwealth and its Constitution were formed shape constitutional law. Section 233 of our Constitution provides:

> All laws which, on the first day of June [1,792] were in force in the State of Virginia, and which are in of general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been

enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly.

Should the appropriate case arise, attorneys might examine the relevancy of pre-1792 statutory and decisional law of the Old Dominion as was done in Brown, supra at 703.

Existing legislation may also be helpful in determining the proper balance between governmental and individual interests in Kentucky.

The concerns of the state are different from the problems facing a national government. For example, espionage or other threats to national security are not at issue on the state level. In addition, the citizens who "wrote" and who are protected by the state and federal constitutions are different. Where the federal government must concern itself with how its decisions will affect an amorophous nation of people, Kentucky courts may still perceive some uniformity among those subject to and protected by the law of the Commonwealth.

Decisions can be found both in Kentucky and elsewhere which support a more expansive reading of state constitutional rights than is recognized on the federal level. A review of a few of these cases might encourage us to go the one step further in "state constitutionalizing" our legal arguments.

SEARCH AND SEIZURE

In Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979), the Kentucky Supreme Court went beyond the bounds set by South Dakota v. Opperman, 428 U.S. 364 (1976) and limited the circumstances wherein a vehicle could be impounded and searched by law enforcement personnel: A vehicle may be impounded without a warrant in only four situations:

> 1. The owner or permissive user consents to the impoundment;
>
> 2. The vehicle, if not removed, constitutes a danger to other persons or property or the public safety (footnote ommitted) and the owner or permissive user cannot reasonably arrange for alternate means of removal;
>
> 3. The police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent immediate impoundment the vehicle will be removed by a third party; (footnote omitted) or
>
> 4. The police have probable cause to believe both that the vehicle contains evidence of a crime and that absent immediate impoundment the evidence will be lost or destroyed. (footnote omitted).
>
> Wagner, at 356.

The Court, in Wagner, also held that any search of the vehicle, once impounded, would constitute an additional intrusion upon the constitutionally protected privacy interests of the owner, and therefore requires either permission or a search warrant. Without justifying its divergence from federal law the Kentucky Supreme Court explicitly rested its lengthy holding upon Section 10 of the Kentucky Constitution. Kentucky was not the only court to disagree with the United States Supreme Court in South Dakota v. Opperman. On remand, the South Dakota Supreme Court reaffirmed its origina decision but used state rather than federal constitutional law and limited the scope of a warrantless inventory search to articles in the officer's plain view. See State v. Opperman, S.D., 247 N.W.2d 673, 675 (1976).

At least three states have used their state constitutions to oppose the holding in United States v. Robinson, 414 U.S. 218 (1973) making a full body search incident to a lawful custodial arrest reasonable per se under the fourth amendment. See State v. Kaluna, Haw., 520 P2d 51 (1974); Zehrung v. State, Al., 569 P2d 189, 195-200 (1977); People v. Brisendine, Cal., 531 P2d 1099 (1975). Each of these three state courts, Alaska, Hawaii and California began their analysis with the premise that the principles of Terry and Chimel should be used as touchstones for defining reasonable arrestee searches. Each Court noted that state and federal constitutional law had long held that governmental intrusions should be no greater than absolutely necessary under the circumstances. Thus, with surprise over the lack of precedent for the Supreme Court's decision, the three state courts maintained the primacy of their warrant clause analyses and chose not to follow Robinson.

The Oregon Supreme Court has held roadblocks unconstitutional under its state constitution unless the legislature grants explicit authorization to state agencies to conduct the roadblocks. The roadblocks must then be intended to facilitate non-criminal sanctions. See Nelson v. Lane County, Ore., 743 P.2d 692 (1987)

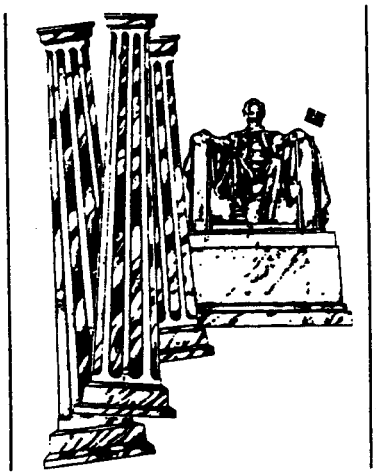
There are many other fertile search and seizure areas to explore. Back in 1959, in Benge v. Commmonwealth,

Ky., 321 S.W.2d 247 (1959), the Kentucky Court of Appeals declined to follow United States v. Rabinowitz, 339 U.S. 56 (1950) and held, instead, that police officers serving a bench warrant had no authority to search the arrestee's residence without a search warrant. The Court of Appeals admitted that there is no real difference between Section 10 and the Fourth Amendment. Only the Kentucky court's analysis differs from that of the Supreme Court. Refusing to make a "serious blunder," the Court of Appeals stated "In forbidding unreasonable searches and seizures, Section 10 of the Constitution of Kentucky made certain procedural requirements indispensable for lawful searches and seizures, as has been pointed out. It did not mean to substitute the good intentions of the police for judicial authorization except in narrowly confined situations." Benge, at 250.

SELF INCRIMINATION

In North Carolina v. Butler, 441 U.S. 369 (1979), the Supreme Court held that a suspect could waive his Miranda rights merely by expressing an understanding of them before giving a statement. The Pennsylvania Supreme Court rejected Butler, requiring an explicit waiver in Commonwealth v. Bussey, Pa., 404 A.2d 1309 (1979). Though the Supreme Court has held that a statement infirm under Miranda could be used to impeach the credibility of a testifying defendant, at least three states, California, Hawaii, and Pennsylvania, have chosen not to incorporate this holding into their state constitutional analysis. See Harris v. New York, 401 U.S. 222 (1971), People v. Disbrow, Cal., 545 P.2d 272 (1976); State v. Santiago, Haw., 492 P.2d 657, 664-65 (1971); Commonwealth v. Triplett, Pa., 341 A.2d 62 (1975).

The privilege against self-incrimination may also be defined or limited by the prosecution's power to grant immunity. In Commonwealth v. Brown, at 702-703, the Kentucky Supreme Court went into extensive constitutional analysis to hold that a prosecutor has no inherent power to grant immunity to a witness in order to compel his testimony. As noted earlier, this case cites to a wealth of legal resources which might assist the development of state recognized civil liberties.



RIGHT TO COUNSEL

Though the Kentucky Supreme Court has affirmed a defendant's right to counsel in cases such as Wilcher v. Commonwealth, Ky., 178 S.W.2d 949 (1944), where the case was reversed because counsel was not present in the courtroom when the jury returned with its verdict, there have been no great variances between state and federal law. As the right to counsel and to effective representation is a concern peculiarly suited to supervision by the state Supreme Court, counsel has good grounds to argue that this is an area where indigenous constitutional law should be developed.

California has held that there is a right to counsel at pre-indictment line-ups in People v. Bustamante, Cal., 634 P.2d 1927 (1981). In People v. Jackson, Mich., 217 N.W.2d 22 (1974), the Michigan Supreme Court extended the right to counsel to photographic identification proceedings despite the Supreme Court's direct ruling against the finding of such a right. See United States v. Ash, 413 U.S. 300, 321 (1973).

OTHER RIGHTS

In Moran v. Burbine, ___ U.S. ___ 106 S.Ct. 1135 89 L.Ed.2d 40 (1986) the United States Supreme Court held that the defendant's ignorance of a lawyer's efforts to reach him did not undermine his waiver of his Fifth Amendment rights nor did the police officer's willful failure to notify the defendant rise to the level of a due process violation. The Florida Supreme Court rejected this reasoning in Haliburton v. State, Fla., 514 So.2d 1088 (1987). In a similar fact situation, the Florida court found a violation of due process under its constitution. Hopefully other states, including Kentucky will follow Florida's lead.

In Stincer v. Commonwealth, Ky., unpublished (Oct. 15, 1987), Justice Leibson joined by Cheif Justice Stephens objects to the majority's holding that it is not unconstitutional to exclude the defendant from an in-chamber hearing to determine whether a child is competent to testify at trial.

The Stincer majority stated that it was bound by the United States Supreme Court and could not contravene its directions. Justice Leibson and Chief Justice Stephens in contrast, state that their earlier opinion in the Stincer case primarily hinged on Section 11 of the Kentucky Constitution and therefore was not subject to reversal. See Stincer v. Commonwealth, Ky., 712 S.W.2d 939 (1986).

Perhaps in the future, faced with such an issue, counsel should base her argument strictly on State constitutional grounds. Yet the original Stincer opinion follows the accepted format of indicating an independent and adequate state ground while also citing federal provisions. Stincer, at 943.

In sum, we have a constitution, we should make use of it especially in the face of potentially more conservative federal review. Developments in constitutional law in other states and opinions in our own cases indicate that we need to revitalize our use of our state constitution and state constitutional history. By our contributions we can help to preserve a create a unique Kentucky legal tradition.

Rebecca DiLoreto
Assistant Public Advocate
Richmond Office
(606) 623-8413

Staff Changes

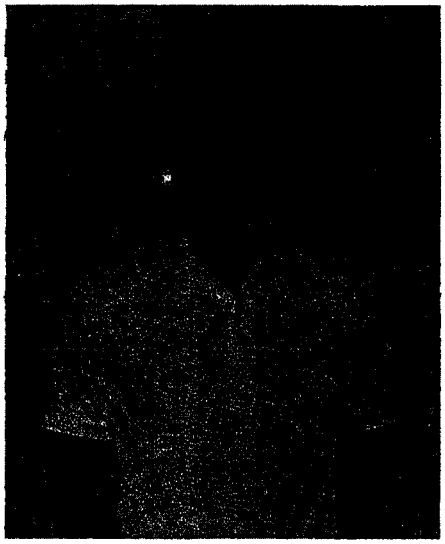
PADUCAH OFFICE

Tena Sexton, investigator, joined the office on October 16, 1987.

Cheery Hunerkoch joined the office on November 1, 1987 as a part-time secretary.

Lynn Aldridge, formerly a paralegal at the Eddyville Office, joined the Paducah Office as an Assistant Placement Worker on December 1, 1987.

PIKEVILLE OFFICE



Danny Martin, investigator, joined the Pikeville office on April 16, 1987.

Thomas Kimball, Assistant Public Advocate, became the Supervising Attorney of the Pikeville Office on November 16, 1987.

Robert Bishop, formerly the Director of the office, resigned effective January 31, 1988.

FRANKFORT OFFICE

Ellen Raine, principal typist, joined the Administrative Services Division on December 1, 1987.

RICHMOND OFFICE

Tina Thompson, part-time secretary, joined the Richmond Office on December 1, 1987.

RESIGNATIONS

Yvonne Dunaway, P & A principal typist, resigned on September 15 1987.

Kevin Francke, formerly with the Hopkinsville Office resigned on October 15, 1987. He is now with the law firm of Gerling Law Office.

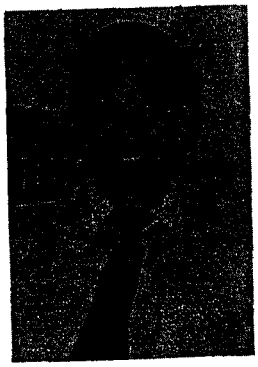
TRANSFERRED

Lynda Campbell, Assistant Public Advocate formerly of the London Office, transferred to the Richmond Office on October 16, 1987.

Bill Spicer, formerly the Directing Attorney of the London Office, joined the Stanton Office on December 3, 1987.

Danny Rose, Assistant Public Advocate formerly with the Hazard Office transferred, on October 1, 1987 to the Morehead Office.

Imprisonment



Bill Curtis

IMPRISONMENT: SOME HISTORY AND SOME CROSS-NATIONAL COMPARISONS

Americans invented the prison. However, early colonists in America did not have prisons, and prior to the Revolution, Americans were required to follow the British criminal code. Upon conviction of a crime, a person usually received a fine, or corporal or capital punishment. Many colonial punishments were designed to terrorize offenders and hold them up to ridicule, e.g., the ducking stool, the stocks, branding, and public flogging. Convicted felons were rarely incarcerated.

Early jails were used for pretrial detention. Two well known institutions in history, the Bastille and the Tower of London, were used primarily to confine political prisoners, not persons charged with crimes. The closest approximation to a prison was the workhouse of 17th, 18th, 19th century England. The workhouse was a place of hard labor used almost exclusively for minor offenders, derelicts, and vagrants.[1]

In 1789 in Philadelphia the first prison in the world, the Walnut Street Prison, was opened with a great deal of enthusiasm. Initial results seemed promising. Yearly commitments decreased from 131 in 1789 to only 45 in 1793. However, by 1801 the Walnut Street Prison became so overcrowded that its inspector resigned in disgust. From that historic moment to the present day, American's prison system has been in a constant state of crisis.[2] In 1931 the Wickersham Commission spoke to the serious problem of prison overcrowding and despicable conditions existent in many state and federal prisons.[3]

The United States Department of Justice reported that at year end 1986 a record 546,659 persons were confined in Federal and State prisons. The 1986 growth ratio of 8.6 percent was the highest recorded since 1982. In absolute numbers the 43,388 persons added to our prison population was the second highest increase recorded in the 60 year history of the National Prisoner Statistics program.

The number of prisoners per 100,000 population in the United States on December 31, 1986 was 216, a new record. Eighteen states had an incarceration rate higher than the national average. Twelve were in the South (KY at 169 was not one of them), 3 were in the West, 2 in the Midwest, and 1 in the Northeast.

For more persuasive evidence that America's prison population is increasing at an alarming rate. See tables 1 through 6. (Source: Prisoners in 1986, BJS Bulletin, Washington, D.C.: Department of Justice, 1987).

TABLE 1

TEN STATES WITH THE LARGEST 1986 PRISON POPULATION [AND KENTUCKY]

		Number of Inmates
1	California	59,484
2	Texas	38,534
3	New York	38,449
4	Florida	32,228
5	Ohio	22,463
6	Michigan	20,742
7	Illinois	19,456
8	North Carolina	17,762
9	Georgia	17,363
10	Pennsylvania	15,201
26	[Kentucky	6,322]

TABLE 2

TEN STATES WITH THE HIGHEST INCARCERATION RATES, 1986 [AND KENTUCKY]

		Prisoners Per 100,000 Residents
1	Nevada	462
2	Delaware	324
3	South Carolina	324
4	Louisiana	322
5	Alaska	306
6	Oklahoma	288
7	Alabama	283
8	Maryland	280
9	Florida	272
10	Arizona	268
26	[Kentucky	169]

[1]Roger T. Pray, "How Did Our Prisons Get That Way? American Heritage, July/August 1987, 92-101

[2]Joan Mullen, "Prison Crowding and the Evaluation of Public Policy." ANNALS, AAPSS, March 1985, 31-46

[3]"Real and Intangible Costs: Wickersham Report", Commonwealth, March, 1931, 562-63.

TABLE 3

TEN STATES WITH THE LARGEST PERCENT INCREASES IN PRISON POPULATION 1985-86 [AND KENTUCKY]

		Percent Increase
1	Nevada	19.5%
2	California	18.7%
3	Michigan	16.8%
4	New Mexico	16.8%
5	Oklahoma	15.2%
6	Kansas	14.6%
7	New Hampshire	14.5%
8	Wyoming	14.1%
9	Utah	13.0%
10	Florida	12.7%
17	[Kentucky	9.0%]

TABLE 4

TEN STATES WITH THE LARGEST PERCENT INCREASES IN PRISON POPULATION 1980-86 [AND KENTUCKY]

		Percent Increase
1	Alaska	191.9%
2	California	148.1%
3	Nevada	145.0%
4	Hawaii	143.8%
5	New Hampshire	139.9%
6	Kansas	117.5%
7	New Jersey	116.0%
8	New Mexico	112.3%
9	Arizona	107.3%
10	Oklahoma	100.1%
11	[Kentucky	75.2%]

TABLE 5

STATES WITH INCARCERATION RATE OF 200 OR MORE PER 100,000 POPULATION (AS OF 12-31-86) [AND KENTUCKY]

Region	State	Prisoners Per 100,000 Residents
Northeast	New York	216
Midwest	Kansas	220
	Michigan	227
	Missouri	206
	Ohio	209
South	Alabama	283
	Delaware	324
	D.C.	753
	Florida	272
	Georgia	265
	[Kentucky	169]
	Louisiana	322
	Maryland	280
	Mississippi	249
	North Carolina	258
	Oklahoma	288
	South Carolina	324
	Texas	228
	Virginia	215
West	Alaska	306
	Arizona	268
	California	212
	Nevada	462

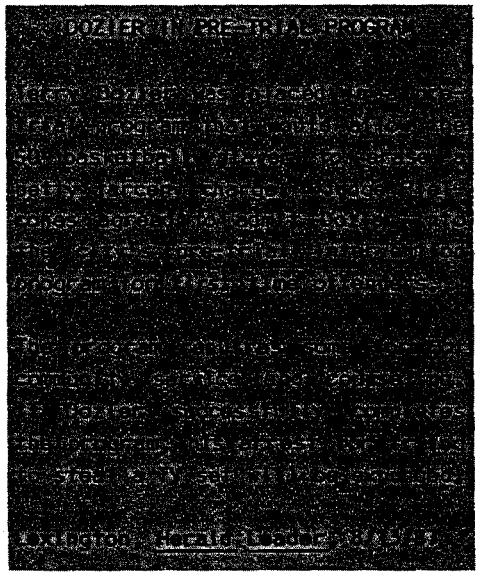


TABLE 6

STATES WITH AT LEAST 10% INCREASE IN PRISONER POPULATION FROM 12-31-85 TO 12-31-86 [AND KENTUCKY]

Region	State	Percent Increase
Northeast	Connecticut	12.3%
	New Hampshire	14.5%
	New York	10.8%
Northwest	Kansas	14.6%
	Michigan	16.8%
South	Delaware	10.8%
	Florida	12.7%
	Oklahoma	15.2%
	South Carolina	11.1%
	[Kentucky	9.0%]
West	Arizona	10.6%
	California	18.7%
	Idaho	12.1%
	Nevada	19.5%
	New Mexico	16.8%
	Utah	13.0%
	Wyoming	14.1%

A casual glance at the tables compiled by the United States Department of Justice convinces most observers that an alarming number of Americans reside behind bars and that number has been steadily increasing since 1980. Cross-national data indicates that the United States imprisons its criminal element at an enormously higher rate than do other western democracies.

In 1987 the United State Department of Justice conducted a study comparing the incarceration rates of the United States with those of England, Canada, and West Germany. Because of variations in the kinds of data available and the different years in which it was collected U.S. - 1982; Canada - 1980; England

- 1983; West Germany - 1984, the imprisonment rates should be considered as estimates of incarceration and not exact rates.[4]

In the cross-national study the following table was presented:

TABLE 7

NUMBER OF PERSONS INCARCERATED PER 100,000 PERSONS IN THE RESIDENT POPULATION FOR THE UNITED STATES, ENGLAND, AND WEST GERMANY.

Incarceration Offense	United States	England	Germany
Robbery	46.1	5.1	9.9
Burglary	37.0	21.0	---
Theft	56.5	24.8	21.0

Table 7 shows that in the United States persons are imprisoned for robbery at a rate almost five times higher than in West Germany and nine times higher than in England. For theft the rate of imprisonment is more than twice as high as in England and West Germany.

In the face of these startling statistics the Department of Justice researchers examined their data in terms of arrest-based imprisonment ratios. The question raised was -- are Americans arrested for robbery, burglary, and theft more likely to be sentenced to a prison term? The data are presented in the following table:

[4] Imprisonment in Four Countries, Bureau of Justice Statistics, Special Report, Washington, D.C.: Department of Justice, BJS, 1987.

TABLE 8

PERCENTAGE OF ARRESTED ADULTS INCARCERATED FOLLOWING CONVICTION IN THE UNITED STATES, CANADA, AND ENGLAND.

Arrest Offense	United States	Canada	England
Robbery	38%	52%	48%
Burglary	27%	23%	30%
Theft	17%	14%	14%

Table 8 shows the United States has the lowest arrest-based imprisonment ratio for persons convicted of robbery and its imprisonment ratio for burglary is near the midpoint of the ratio for Canada and England. And, finally, the United States imprisonment ratio for theft is only three percentage points higher than those of Canada and England.

The Department of Justice study indicates that the United States is not more severe in its sentencing of persons convicted on burglary, robbery, and theft charges. However, the researchers point out some weaknesses in their data. They were not able to control for two important variables which play a major role in sentencing decisions: (1) the seriousness of the offense within broad offense definitions and (2) the prior criminal record of offenders.

There is empirical evidence that robberies in the United States are more serious on the whole than robberies in other countries. For example, about 40% of the robberies reported to the police in the United States involve firearms. In Canada 29% of robberies involve the use of firearms and only 9% in England. This is additional support for the claim that the U.S. is not more severe in its treatment of robbers in the court system.

In sum, the Department of Justice study indicates that there are no significant differences in arrest-based incarceration ratios for the offenses of robbery, burglary, and theft among four western democracies. A logical question which arises is why does the United States have enormously higher population based imprisonment rates. The Department of Justice researchers suggest that part of the answer is that the United States has substantially higher crime rates than Canada, England, and West Germany. Stated simply, the United State has a much higher proportion of its population committing crimes. Other factors involving public policy (too complex to discuss in detail in this article) which affect prison populations are length of sentence, persistent felony offender statutes, legislation creating new felonies, parole revocation rates, probation rates, and parole rates.

Bill Curtis
DPA Research Analyst
Frankfort
(502) 564-5235

Wartime conviction of Japanese-American overturned: A federal appeals court in San Francisco yesterday overturned the wartime conviction of a Japanese-American for resisting curfew and violating a military internment order, saying the government had suppressed crucial evidence.

The ruling in the case of Gordon Hirabayashi came after similar decisions by lower federal courts in his case and another case, which relied on evidence that the imprisonment of 120,000 Japanese-Americans during World War II was done for racial rather than military reasons.

Herald-Leader, September 25, 1987

Ask Corrections

Betty Lou Vaughn

TO CORRECTIONS:

How many members are there on the Kentucky Parole Board and who are they?

TO READER:

There are seven (7) members on the Kentucky Board of Parole and they are: Chairman - John C. Runda
Member - Newton McCravy, Jr.
Member - Helen Howard Hughes
Member - Dennis Langley
Member - Joanie Abramson Mueller
Member - Larry Ball
Member - Lou Karibo

TO CORRECTIONS:

How can my client get copies of materials that are in his offender record file?

TO READER:

Your client should send a written request to Betty Lou Vaughn, Offender Records Administrator, Corrections Cabinet, State Office Building, Frankfort, Kentucky 40601. The written request should specifically identify the document(s) requested. Upon receipt a determination will be made as to the availability of the documents and the client will be notified.

TO CORRECTIONS:

What is the difference between "Release from Supervision" and "Final Discharge from Parole"?

TO READER:

Release from supervision indicates a parolee has been released from active parole supervision and does not have to report to a parole officer but is still on parole. A Final Discharge from Parole is a formal document issued by the Parole Board which terminates all liability under the present sentence.

All questions for this column should be sent to David E. Norat, Director, Defense Services Division, Department of Public Advocacy, Perimeter Park, 1624 Louisville Road, Frankfort, Kentucky 40601. If you have questions not yet addressed in this column, feel free to call either Betty Lou Vaughn at (502) 564-2433 or David E. Norat at (502) 564-5223.

Betty Lou Vaughn
Offender Records Supervisor
Department of Corrections
Frankfort, Kentucky 40601
(502) 564-2433

Administrative News

The Department of Public Advocacy maintains a roster of all public defenders for each of the 120 counties of the Commonwealth of Kentucky. The roster lists the name, address and phone number of the Administrator for each county as well as all public defenders within the county. The list is revise periodically and a copy can be obtained by writing Jane Hosley at the Department of Public Advocacy, Perimeter Park, 1624 Louisville Road, Frankfort, Kentucky 40601 or by calling her at (502) 564-8006.

TRIAL ATTORNEYS

The Department of Public Advocacy has openings statewide. You must be licensed to practice law in Kentucky or eligible under SCR 2.112 (Kentucky Limited Practice Rule). Salary $1384 to $2256; higher salary commensurate with experience; good benefits. Send resume to:

David E. Norat
Department of Public Advocacy
Perimeter Park
1624 Louisville Road
Frankfort, Kentucky 40601
(502) 564-8006

Cases of Note...In Brief

Ed Monahan

FUNDS FOR PRELIMINARY HEARING TRANSCRIPT
McMillion v. State
742 P.2d 1158 (Okl.Cr. 1987)

The defendant was appointed a public defender, who represented him at a preliminary hearing and who asked for a copy of the preliminary hearing transcript at public expense. The Court granted that request.

Subsequently, the defendant's family obtained a bond for his $10,000 bail. The defendant's public defender then moved to withdraw in light of the fact that the defendant's family posted bond. The trial judge refused to allow the withdrawal but did order the defendant to pay the $80-$90 for the preliminary hearing transcript, finding that the defendant had the money to pay for it "but chose to put it on his bail." Id. at 1160.

The appellate court held that it is a "violation of equal protection to deny indigents in a criminal proceeding access to a transcript of a preliminary hearing because of inability to pay." Id. They also determined that the error was not harmless due to the fact that the defendant's counsel at trial was the same as at the preliminary hearing. Id. at 1160-61. According to the Court, the right to the transcript at public expense "is not based on any consideration of whether the transcript of the preliminary hearing is beneficial to the defense." Id. at 1161. The Court further found that the defendant's ability to make bail "has no bearing on his status as an indigent or his ability to retain competent counsel at the time he needs one." Id.

RELEASE TO PREPARE DEFENSE
Kinney v. Lenon
425 F.2d 209 (9th Cir. 1970)

This is an older case but still insightful. The defendant was 17 and was arrested for a schoolyard fight. He argued that he had to be released from custody since there were many potential witnesses to the fight who he could not identify by name but who he knew by sight. The defendant's attorneys were white and he was black, and that created difficulties in interviewing and lining up the witnesses.

Recognizing that the ability to prepare a defense is fundamental to the adversary system, and recognizing that the defendant was the only person who could effectively prepare his defense, the Court held the "failure to permit appellant's release for the purpose of aiding the preparation of his defense unconstitutionally interfered with his due process right to a fair trial." Id. at 210. In so holding, the Court noted:

> We may take notice... of the difficulties often encountered, even by the able and conscientious counsel, in overcoming the apathy and reluctance of potential witnesses to testify. It would require blindness to social reality not to understand that these difficulties may be exacerbated by the barriers of age and race. Id. at 210.

DISTURBING PEACE STATUTE OVERBROAD
State v. Carpenter
736 S.W.2d 406 (Mo. 1987)

The court found that Missouri's disturbing the peace statute was unconstitutionally overbroad in regulating speech. The statute provides:

> 1. A person commits the crime of disturbing the peace if:
>
> (1) He unreasonably and knowingly disturbs or alarms another person or persons by:
>
> * * * *
>
> (c) Threatening to commit a crime against any persons;...

This Missouri statute is similar to Kentucky's terroristic threatening statute, KRS 508.080.

Carpenter found that the government's interest in stopping people from threatening to commit offenses was outweighed by the public's interest in exercising free speech:

> Moreover, there is no guarantee under the statute that a substantial likelihood exists that such

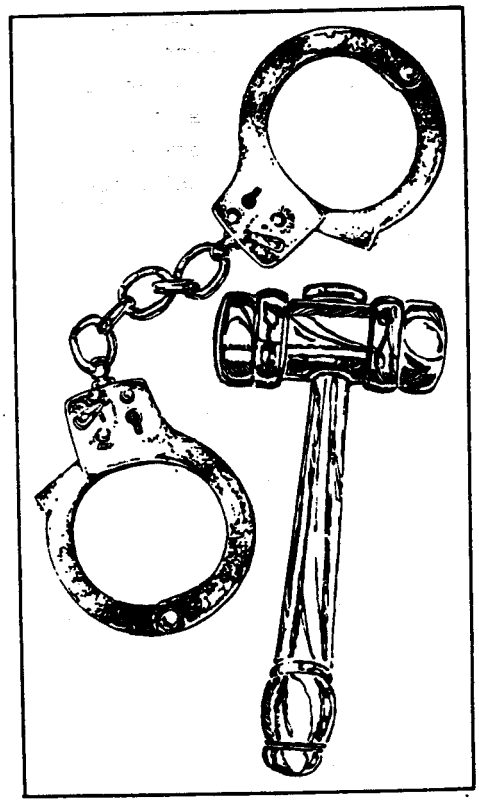
threatened criminal conduct will ever occur. There may be many situations where the threatened activity will neither be imminent nor likely. Consequently, the statute acts to smother speech otherwise protected by the First Amendment in that persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression. Id. at 408.

BILL OF PARTICULARS

Alan Morgan v. Commonwealth, Ky., (November 5, 1987) (unpublished)

Indicted for first degree sodomy of a child of the person he was divorcing "on or about 1982," the defendant filed a motion for a bill of particulars. The Commonwealth responded that no more information was available due to the nature of the offense.

The appellate court held, "It is the purpose of a bill of particulars to provide information necessary for the preparation of a defense and a full understanding of the charges. Brown v. Commonwealth, Ky., 378 S.W.2d 608 (1964). While it is within the sound discretion of the trial judge with respect to the granting of a bill of particulars, the trial judge may not arbitrarily refuse to order the state to supply at least some specificity of the time of the charges in order to make possible the preparation of a defense. James v. Commonwealth, Ky., 482 S.W.2d 92 (1973). While cases involving the sexual abuse of minor children may create an exception with respect to the exact time and place, we cannot condone the simple allegation that an act occurred "on or about 1982" or "on or about 1984." The practical effect of this allegation requires a defendant to be prepared to defend himself for every minute of a period of four or five years. On or about 1982 might mean 1981, or it could mean 1983. On or about 1984 could mean 1983, or perhaps 1985. The children at the time of the trial were aged 11 and 15. It is inconceivable that the Commonwealth could not have at least narrowed the time of the alleged incidents, or made an attempt to respond to the motion for a bill of particulars and supplied more information than that alleged in the indictment."



INSUFFICIENT EVIDENCE FOR INVOLUNTARY COMMITMENT

State v. Nance
735 P.2d 1271 (Or.App. 1987)

In this involuntary commitment proceeding, the state argued that the defendant suffered a severe weight loss; had recurring weight and sleep problems, and did not seek medical or psychiatrist help. The trial court found her mentally ill in need of care and custody. Id. at 1272.

The appellate court found that there was insufficient evidence to show that the defendant was unable to care for her basic needs, and the evidence was insufficient to involuntarily commit her. Id.

The court also noted that the experts' conclusions that she might face particular problems was conjecture which was not sufficient to prove a need for mental commitment.

INSUFFICIENT EVIDENCE OF MENTAL ILLNESS

State v. Billingsley
736 P.2d 611 (Or.App. 1987)

The defendant was involuntarily committed. He phoned the 911 number and said he was "wiggin out," and that he wanted to get away from the drug scene. A policeman took the defendant to a hospital where the defendant said he tried to "freak out" in order to stay. At trial, one doctor testified that he was ambivalent as to whether the defendant was mentally ill. Another doctor was "a little bit more persuaded" that he had a mental disorder that left him unable to provide for himself. The trial court found that the defendant was on the verge of an explosion, showed poor judgment, and was out of touch with reality.

The appellate court stated that while the defendant may have shown poor judgment in trying to get rest by claiming to be mentally unbalanced, poor judgment is not a mental disorder. Also, neither doctor stated the nature of the mental disorder that the defendant was supposedly suffering. The Court found that there was insuf-

ficient evidence of mental illness, and that the defendant was improperly committed.

IMPROPER MENTAL RETARDATION COMMITMENT
McClure v. State
737 P.2d 1001 (Utah 1987)

The defendant was involuntarily committed due to his mental retardation. The evidence at trial was that the defendant was emotionally and mentally ill but not mentally retarded.

The appellate court held that there had to be a causal link between his mental retardation and the behavior that requires commitment for a defendant to be committed under the mental retardation procedure. In this case, the Court found that the defendant was wrongly committed under that statute since his behavior was not a product of mental retardation.

TRIAL IN PRISON UNCONSTITUTIONAL
Vescuso v. Commonwealth,
360 S.E.2d 547 (Va.App. 1987)

Over objection of defense counsel, the defendant was tried in a prison courtroom. He was tried for escape from that prison, and convicted of that offense. The trial court overruled the objection, finding that the trial, even though in a prison, was indeed open to the public.

The Virginia Court of Appeals ruled that a trial behind prison walls offended "traditional notions of fairness and basic precepts of our criminal justice system" under the 6th and 14th amendments absent a "showing of overriding public necessity or justification." Id. at 551. Administrative convenience alone is not enough to justify trial behind bars. Id.

The Court readily recognized that the public was effectively excluded from attending the trial in spite of the trial judge's statement to the contrary:

> We cannot think of any location within the Commonwealth that gives less freedom of access than a trial within the confines of a prison. The barrier of a perimeter wall, the varied security precautions inherent in a prison... all tend to discourage public attendance. Furthermore, the character of a prison facility is fundamentally different from that of a courtroom at the public courthouse. Id.

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KSP, FBI TRAIN INVESTIGATORS

(L to R) Danny Martin, Tena Sexton, Danny Dees, Bob Rehberg, Joe Howard, Mike Zaidan, Kathy Power, Lowell Humphrey, Pat Livington, H.D. Britt, Genieveve Campbell, Audry Combs, Larry Rapp, Steve Heffley

Twenty-two DPA and Louisville, Lexington, and Ashland public defender investigators met for their annual training seminar on November 8-9 at Barren River State Park.

They heard Scott Doyle, Kentucky State Police Crime Lab Technician for Louisville, explain firearm, shoe, and tire identification standard tests. He noted their limitations and defined the capabilities of the KSP central and regional crime labs.

FBI Special Agent Joe Smith discussed "rules of thumb" for crime scene photography, then critiqued crime scene photos taken by the attending investigators. Agent Smith gave suggestions for improving "mug shots" and injury photos. He also reviewed film, lenses, types of cameras and flash equipment helpful in taking "true and accurate" crime scene photos. Although the new trend is videotaping crime scenes, he noted that, as yet, there are no standards for the introduction of video tapes at trial.

Several times since 1976 KSP crime lab technicians have taught investigators. This is the second consecutive year that FBI instructors have trained staff investigators, thanks to the work of Ed Monahan, Director of Training, and Dave Stewart, Investigations Coordinator.

Lawrence P. Rapp, Sr.
Investigator, Sr.
Louisville, Kentucky
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Book Review

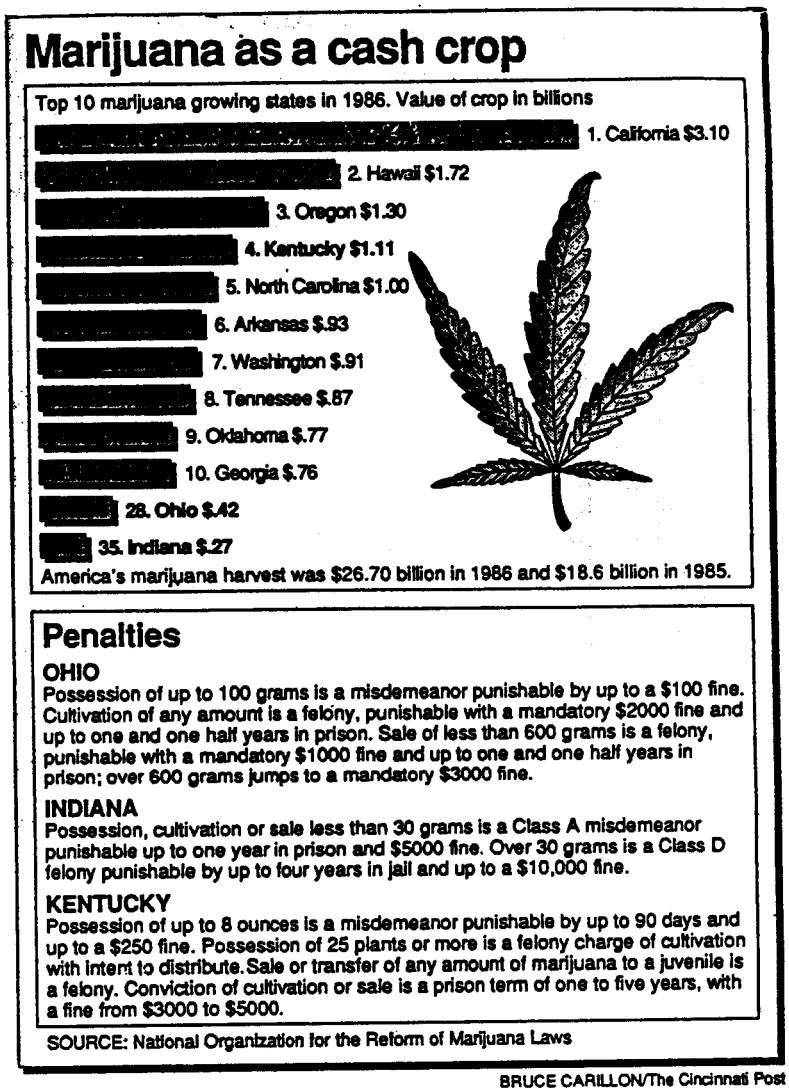
The Facts About Drugs and Alcohol
by Mark S. Gold, M.D.
Fair Oaks Hospital, 1986
Bantam Books, Inc.
666 Fifth Avenue
New York, New York 10103

The author is Director of Research of both Fair Oaks Hospital in Summit, New Jersey, and the Regent Hospital, in New York City. Dr. Gold is the founder and medical director of the National Cocaine Helpline, and was awarded the Public Relations Society's Silver Anvil Award for Public service for 800-COCAINE. He defines drug abuse as repeated use of any drug to the point where it is seriously interfering with your health, economic status, or social functioning. Drug abuse is not a single event, but rather, a series of events that form a pattern. (p. 8)

Drug abuse has always been a subject clouded by myths. The classic image of a "drug addict" used to be that of a miserable, poverty stricken, immoral wretch, who stole, mugged, and murdered to obtain a "fix." Drugs themselves have also been surrounded by myths. Addictive substances used to be drugs like heroin, which grabbed its victims and held their bodies captive. To get the "monkey off their backs," drug addicts had to endure an agonizing withdrawal, going "cold turkey," and sweating it out until they had paid the price for their sins (p. 1).

Today, these images of the addict and of addictive substances are no longer true. New myths have emerged to take their place such as the notion that some drugs are "recreational" in nature, and can be used safely and for "fun." We are in the middle of a nationwide epidemic of addiction to drugs and to alcohol as well, and are just beginning to understand the nature and seriousness of the problem.

Drug and alcohol abuse is now a major health problem in the United States, no longer limited to a



small segment of the population as it was in the past. Today, just about everyone knows someone who drinks too much or uses drugs casually. Marijuana, cocaine, PCP, heroin and "designer drugs," such as "ecstasy," can be purchased readily in virtually every city on street corners and in the workplace.

Drug and alcohol addiction cuts across all geographic, ethnic, and social boundaries. Almost 25 million people have tried cocaine ---that's one out of every ten Americans! Many of these people are well-educated, successful members of the middle class. What is worse, over one million people report that they can't stop using cocaine, no matter how destructive it is to their health, family, and careers.

Each year, more people die from prescription drugs, which they obtain legally, but used improperly, than all illegal substances combined! Over two billion prescriptions are written each year at a cost of over ten billion dollars (p. 2)!

Drunk drivers account for 60% of all traffic deaths. Countless others have had their health ruined by alcohol-related diseases.

A new drug epidemic--"crack" - a highly addictive form of cocaine, is sweeping the country affecting many adolescents as well as adults.

Although heroin is the best known street drug, and also the most addictive of all known drugs, its use has diminished somewhat in recent years. There are still between 400,000 and 700,000 heroin addicts in the U.S. (p. 90)

Alcohol is the most dangerous drug known to mankind, but it is still legal and eight out of every ten people use it. Amazingly, almost 33% of our population are regular drinkers. Ten million are considered "problem drinkers" and another ten million are considered "alcoholics."

We must learn everything we can about drugs and how they work in the body. We need to be aware that drug use is not new. In fact, the use of herbs, potions, and mind-altering substances can be traced back to the dawn of history. Greeks and Romans drank alcohol freely--in fact, one of their gods, Bacchus, celebrated the love of wine. Drugs were given to people by "healers." Medieval magicians mixed potions that were powerful elixirs from poppy seeds and other naturally occurring opiates, to curb pain, and relieve tension. Drugs have been used by native cultures through the years for religious rituals!

Why are so many people so dependent on drugs and alcohol today? Why is drug abuse so prevalent today, and more than in the past?

Here in the U.S. we see drugs glorified by media and billboard advertisements. We see actors and actresses using and selling drugs. We have pharmaceutical companies manufacturing millions of pills, and Doctors prescribing them as fast as they are made. We know that billions of dollars are made from illegal drugs; marijuana is a ten billion dollar industry in the U.S. $250 worth of heroin, nets about $400,000 worth of heroin on the streets. Cocaine and crack are pure, cheaper, and readily available. There are many deaths by O.D.'s, and other drug related incidents.

This well-written and researched book in many ways brings to light the serious problem with drug abuse in the U.S. It dispels the old myths, and introduces some new ones concerning drug abuse and their use. It highlights the physical, emotional, and social dangers these drugs have on us and society.

The author has established an invaluable list of symptoms, signs, and definitions to look for in the drug user. He places special emphasis on the young adolescents and their drug abuse potential and also goes into detail about the role the parents should play. He explains what chemical dependency is, and the different treatment plans and programs available. His book provides us explanations, awareness, insight, education, resources, and a recourse.

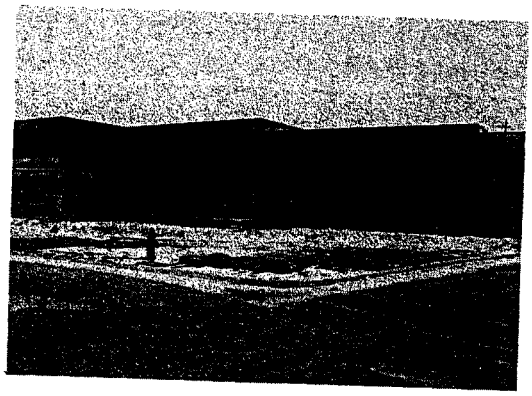
These facts, as well as the new myths about drugs, perpetuate incorrect information about their safety. (p. 2). These are some of the reasons we have a society that has a major problem with drug use and drug abuse.

Carlton Doran
F.C.D.C.
Frankfort, Kentucky

DEATHS

	Kentucky (1986)	United States (1985)
Heart Attacks	12,837	771,169
Cancer	7,590	461,563
Car Accidents	808	45,901
Criminal Homicide	253	20,613('86)

Sources: 1986 Report-KY Traffic Accident Facts, 1986. Crime in KY, 1985 National Center for Health

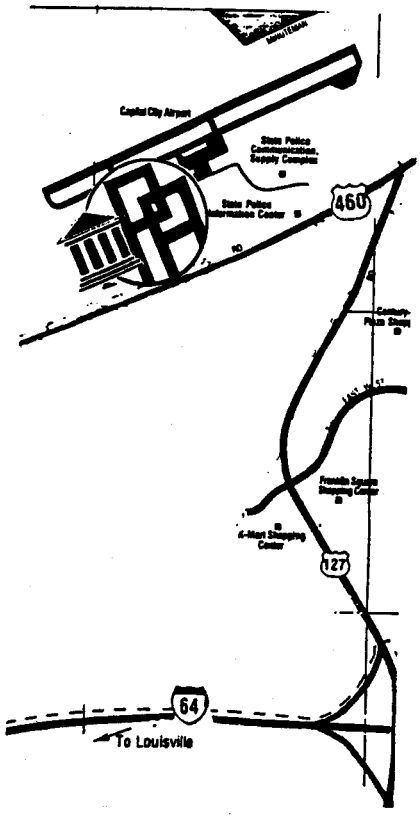


The Department of Public Advocacy has moved from 151 Elkhorn Court, Frankfort. The new address is:

Department of Public Advocacy
1264 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601

The telephone system has changed. All Department personnel can be reached by calling the receptionist at (502) 564-8006.

The direct line to the receptionist of the Protection and Advocacy Division is (502) 564-2967.



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January 29, 1988
Florence Schneider Continuing Education Center
3rd Floor
Western Kentucky University
Bowling Green, Kentucky

Joint training with judges, prosecutors, probation and parole officers, Commonwealth Attorneys, DPA Alternate Placement Workers and DPA attorneys.

16TH ANNUAL DPA SEMINAR
June 5-7, 1988
Quality Inn Riverfront
Covington, Kentucky

CRIMINAL DEFENSE AND MENTAL RETARDATION SEMINAR
Fall, 1988

For more information, contact Ed Monahan, Director of Training, (502) 564-8006.

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