THE ADVOCATE

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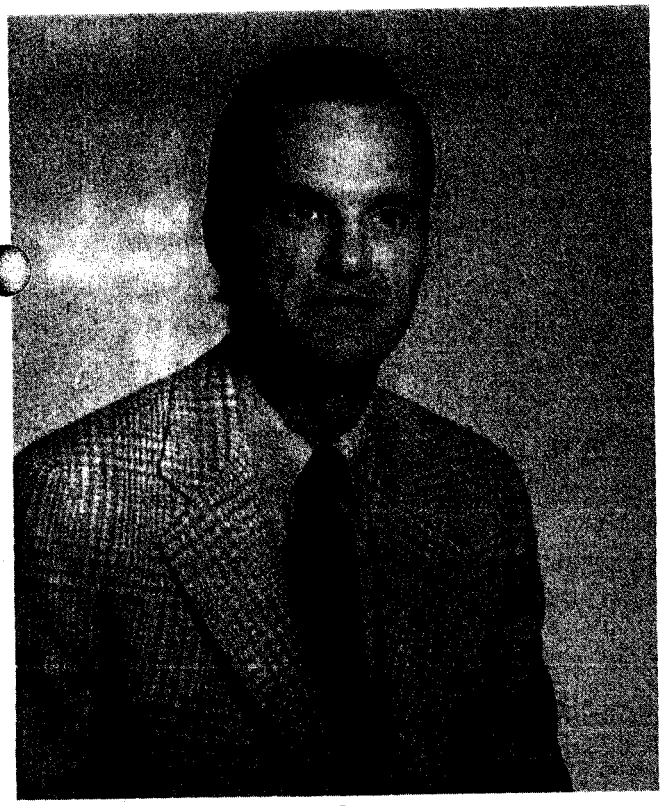
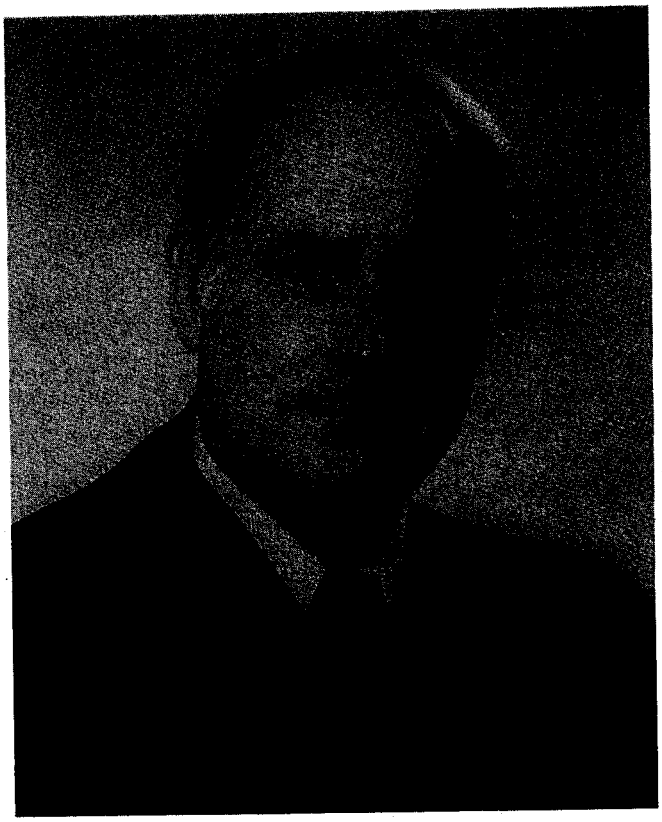
Do the Guilty Go Free? - not in Russia, South Africa or America



Bob Carran



Justice Wintersheimer

Justice Wintersheimer on the Criminal Justice System

Also in this issue

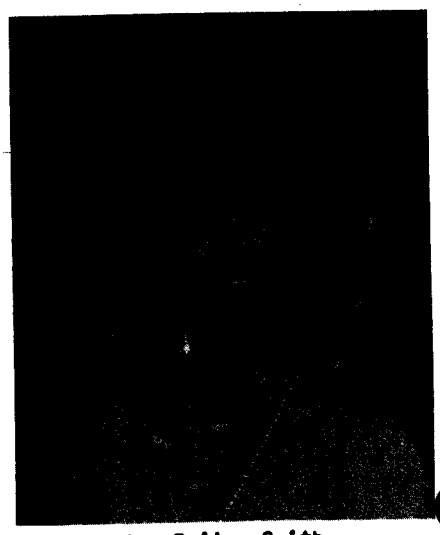
Money for Commonwealth Experts
The Court Designated Worker
Alternative Sentencing

The Advocate Features

Ann Bailey Smith does not fit the stereotype of a public defender. She is calm, soft-spoken, unassuming and even-tempered. She does not come across as argumentative, confrontational or overly aggressive, qualities that are often associated with successful criminal defense practice. However, her quiet manner disguises a real talent for trial work and a strong commitment to the advocacy of her clients' rights.

This should come as no great surprise considering her background and legal training. Ann is a Louisville native who attended Portland Christian School, Morehead College, the University of Louisville and its Law School where she graduated near the top of her class and won the Pirtle-Washer moot court competition. She worked as a law clerk for the Public Defender during law school and was hired as a staff attorney following graduation. She continued to rise through the ranks, handling virtually every kind of case the Public Defender is appointed to represent. Her reputation grew among judges, lawyers and especially the Jefferson County jail population, the majority of which wanted "the lady lawyer" on their case, it seemed. Of course, many prosecutors had to learn the hard way to respect Ann's exceptional advocacy ability. Once, a particular prosecutor was so certain of his case, which involved multiple counts of sexual offenses allegedly committed against children, that he suggested to several of Ann's colleagues that she would be well-advised to plead her client guilty in accordance with his recommendation. She declined and went to trial, winning acquittal on all charges. Similarly, she prevailed in numerous other cases, including a capital case in which the charges were dismissed after two trials resulted in hung juries in favor of acquittal. She also served as co-counsel in the case of Commonwealth v. Major Crane. Although unsuccessful in persuading the trial court that a judicial finding that the defendant's confession is voluntary does not preclude defense counsel from introducing evidence about the circumstances surrounding procurement of the confession to demonstrate its lack of credibility, the groundwork laid at the trial level was instrumental in having the U.S. Supreme Court ultimately reverse the Kentucky Supreme Court on that issue in an unanimous decision. Crane v. Kentucky, 106 S.Ct. 2142 (1986).

In 1986, despite having worked with him for several years, Ann nevertheless married Leo Smith, also an Assistant Public Defender in the Jefferson County office. Perhaps because her judgment was thereby called into question, she accepted a position shortly thereafter with the firm of Goldberg and Simpson. However, after a year of civil practice, she decided to return to the Public Defender and almost immediately picked up where she left off by winning a jury trial acquittal in circuit court. Her thorough preparation and savvy trial skills continue to benefit the clients she is assigned to represent.



Ann Bailey Smith

Ann and Leo are expecting their first child this spring, and Ann will be leaving the hallowed halls of the Public Defender's Office, hopefully to return again. In any event, her many accomplishments and significant contributions to the public defender program will not soon be forgotten. We wish her and her family all the best.

THE ADVOCATE

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

The Advocate welcomes correspondence on subjects treated in its pages.

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IN THIS ISSUE

An Interview With Justice Wintersheimer

1. What are the most critical issues facing Kentucky's criminal justice system?

Unnecessary delay in both criminal and civil matters.

2. What is necessary for these problems to be solved?

The Court continues to make progress in reducing delay and increasing efficiency. The voice activated video camera experimental project has been expanded in order to provide transcripts more quickly. In order to eliminate unnecessary delays, the Court has been strict with disciplinary sanctions on attorneys who persist in frivolous briefing as well as with delinquent court reporters.

3. What is the most enjoyable aspect of being a Justice of the Supreme Court of Kentucky?

The opportunity to decide issues and questions of law from every area of the legal discipline both civil and criminal. Cases that are brought before the Supreme Court of Kentucky involve a great impact upon the lives of each and every person within this Commonwealth. It is refreshing to realize that for the most part the system does provide adequate relief for litigants. In the area of criminal law, the system also provides defendants with an unparalleled opportunity to receive the very best legal assistance in the defense of their position.

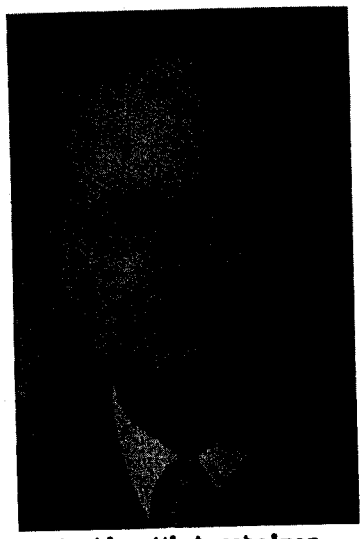
4. What is the most frustrating aspect?

The most frustrating aspect remains unnecessary delay.

5. In this year of celebrating our Constitution and its protections of individual liberties, what are you most proud of the Kentucky Supreme Court doing to further individual rights of citizens accused of crimes?

Anyone who considers in any detail the administration of justice in the country and in this Commonwealth, must admit there is no greater apparatus to determine justice.

For example, an indigent person accused of a crime can be eligible for free legal assistance. Legal counsel for the accused is paid by the state. The Court is likewise maintained by the state as is the prosecutor's office. Therefore, you have two state agencies meeting under the auspices of another state agency to advocate a just solution to the allegation that a citizen of this Commonwealth has committed a crime. Even more admirable is the Commonwealth's efforts to protect and restore the individual liberties of persons who are victims of crime.



Justice Wintersheimer

This Court is the final arbiter on issues of state law. As such it sits at the fulcrum of the apparatus that weighs and measures justice. This alone is a justifiable source of pride.

6. How would you characterize what the present Supreme Court of Kentucky has done through its decisions in the criminal law area in the years since you've been a Justice in terms of trends and directions?

Attempting to define and identify a "trend" infers a direction or agenda on the part of the Court. Each case before the court must rise or fall on its own merit and not be decided in accordance with some trend or direction.

Therefore, fair dealing on a case-by-case basis should be the only "trend" followed by any Court.

7. How is the practice by attorneys before the Supreme Court of Kentucky?

Generally the practice by attorneys before the Supreme Court is excellent. Attorneys reaching the Supreme Court via Motion for Discretionary Review have had two previous courts in which to hone their strategy and narrow the issues. Attorneys before the Court on Criminal Matter of Right appeals are mostly employed by the Department of Public Advocacy and the Attorney General, all of whom specialize in criminal appeals. These attorneys are by far the "duty experts" in criminal appellate practice. The Court expects, and most often receives, expert argument from these attorneys. In many respects they are far superior to some civil appellate practitioners.

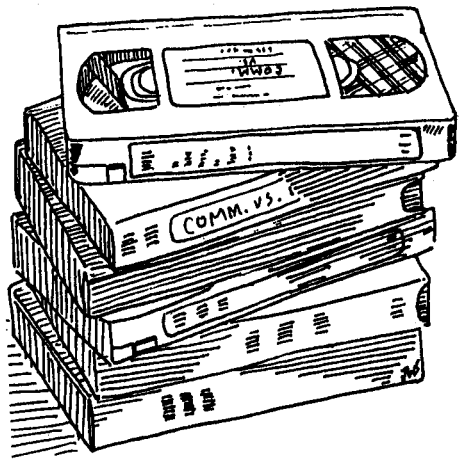
8. How can that practice best be improved?

Like everything else in our profession, education and experience are the best methods. Diligent preparation is self-evident, as is less than adequate preparation. An absolute essential element to successful practice before the Court is a detailed knowledge of the facts. I do not mean that an attorney should necessarily include a long factual history of the case. However, if questioned by the Court, a detailed knowledge of the facts implies a precise legal argument and careful preparation.

Any attorney must know the applicable rules of procedure and practice.

9. What is the caseload of the Kentucky Supreme Court per Justice?

Each justice of the Kentucky Supreme Court votes on <u>every</u> case and upon <u>every</u> motion for discretionary review. In addition, four associate Justices are required to hear and decide the motions pending before the court. Service on the Motions Panel is rotated among six Justices with the Chief Justice excepted. Similarly, Justices are assigned Matter of Right appeals on a rotation basis and a Justice's recommendation in the nonoral "Matter of Right" cases must be circulated to all members of the Court in order that they may be able to fully discuss the matter.



In the past year a total of 917 opinions and discretionary reviews have been considered by the full court. 674 discretionary reviews have been completed. 243 opinions were rendered. I wrote a total of 40 opinions, 19 to be published and 21 memorandum opinions. Approximately 66 percent of the cases were criminal while 34 percent were civil.

10. How does this compare to other judges in the criminal justice system?

There is no appropriate standard by which the workload in the Supreme Court can be measured against other judges in the system because of the collegial nature of the Supreme Court. The Court of Appeals is a court which is involved with much greater volume but is divided into panels of three so that the workload is distributed.

In the Supreme Court it is my opinion that one of our principal functions is as a court of last resort. That is not entirely true in many criminal matters because there is frequently utilized the parallel jurisdiction of the federal court. That does not affect the workload of our court but does impact the time of the appellate lawyers.

11. Besides deciding cases, what does a Supreme Court Justice do?

The full Supreme Court must supervise the activities of the Kentucky Bar Association, consider all disciplinary matters, develop rules of practice which include civil and criminal rules committees, and participate as committee members in the continuing legal education and continuing judicial education areas as well as review decisions of the ethics committee as the occasion may require. The Chief Justice has a extensive variety of administrative duties, a few of which are by statute or rule shared with the court.

12. How do you see the death penalty cases affecting the criminal justice system in Kentucky: the judiciary, the prosecutors, the Department of Public Advocacy, criminal defense lawyers?

Death penalty cases are unique because the imposition of the penalty is very final. Application of harmless error principles in death penalty cases is almost nil. The justices considering these cases must carefully review in the very greatest detail every aspect of the record and the briefs and oral arguments as presented by counsel. This involves necessarily a great

deal of time. The same is true of the counsel for appellants because it is their responsibility to cover every aspect of the trial. Consequently, the resources of the Public Advocate must be very thinly spread in other areas of their defense posture because of the great use of legal talent and time and resources on the death penalty cases. This may diminish the time which the DPA has to devote to other worthwhile projects. Yet one cannot criticize the DPA for utilizing as much time as necessary because not only do they insure that every aspect of the case has been carefully reviewed in a capital matter but also they purify the system by making sure that both prosecutors and defense lawyers use the very best methods in trying the case. All of this is as it should be in every case but it is of monumental importance in a capital case.

I view one of the purposes of the DPA as improving the system of justice by making sure that the law is properly applied.

13. What do you see the future holding for the criminal justice system in terms of death penalty cases?

One alternative is the "long term" sentences provided for by life without eligibility for parole in 25 years which may reduce the number of death penalty cases in the future.

14. Representing capital defendants is the toughest calling for any lawyer. What is the Supreme Court of Kentucky doing to insure that no person is sentenced to death or dies without the very best defense representation possible?

A person accused of a capital crime cannot receive more expert legal assistance than he can receive now, thanks in large part to the Department of Public Advocacy's Death Penalty Task Force. It has been my experience that DPA attorneys assigned to try or appeal a capital conviction leave no stone unturned in defense of the accused. I have noticed, however, a reluctance on the part of the private criminal defense bar to become involved in capital cases. I am sure that this reluctance is due to the brutal economic realities and burdensome time restrictions a private criminal defense attorney faces in respect of a case that is likely to last several years. I suspect that the specter of having one's performance assailed in the inevitable collateral attack also adds to that reluctance.

Be that as it may, those attorneys who regularly practice in this area are, without doubt, able to render the best possible defense, and these attorneys are available to the accused free of charge.

15. You are notorious for seldom reversing a criminal conviction. Why do you vote to reverse so few?

I have never kept individual statistics as to pattern voting on any particular question or area of the law. I believe that the only fair way is to approach each case on an individual basis.

Over the past five years in criminal cases an analysis of the vote indicates that 89 percent of the cases were affirmed unanimously. Less than 1 percent were reversed unanimously; 5 percent were affirmed on split votes; 4 percent were reversed on split votes. Just more than 1 percent were mixed or miscellaneous.

The specific reason I may vote to affirm any particular criminal conviction is because the defendant is guilty and received a fair trial in any given case based on the law and facts in the record.

16. In how many of the cases you have decided have you cast your vote to reverse a criminal conviction?

Because of the volume of court records involved, I have not researched the last five years. Instead, let me confine my answer to 1987. In 1987, I voted to affirm criminal convictions 161 times and voted to reverse five.

17. You seem to have written many opinions reversing the Court of Appeals when they have reversed a criminal conviction? Why have you been so prominent in this regard?

Cases are assigned to the Justices by the Chief Justice. In cases involving a Court of Appeals reversal of a criminal conviction, the case comes before the Supreme Court on a Motion for Discretionary Review. After briefing and argument, the case is assigned to a Justice whose vote is in the majority. A Justice therefore cannot control the types of cases he is assigned and the opinion he authors must reflect the votes and views of the remaining Justices in the majority. There were approximately 29 criminal cases coming before the Court on discretionary review last year. My unofficial count shows I voted to reverse the Court of Appeals in 20 cases. Of those 20 cases, 16 were unanimous votes to reverse the Court of Appeals.

18. How many times have you voted to reverse the Court of Appeals when they have reversed a criminal conviction?

In 1987, I voted to reverse 20 cases of the Court of Appeals. I

wrote seven of those reversals. Sixteen of the reversals were unanimous. I would like to point out that it is my philosophy that each dissent should be signed with a reason given for the dissent. Perhaps that brings my views to the attention of the lawyers more directly than other judges, but I believe that is the right method of approaching any decision of the Court.

19. What is your biggest criticism of the Department of Public Advocacy?

I have nothing but admiration for the attorneys who forego more lucrative fields in favor of sincere legal altruism. Furthermore, without the Public Advocate, it would be extremely difficult to decipher many of the cases before the Court.

I will take this opportunity, however, to repeat a criticism originally made by a DPA trial attorney. It was his opinion that the Department of Public Advocacy was the only organization that "regularly eats its young." More specifically, there seems to be two tiers of attorneys; the "foot soldier" trial attorneys and the "commander" appellate attorneys. This seems most readily apparent when the appellate attorney with the luxury of time, reflection and additional research points out how grievously ineffective trial counsel was. Actually, this is more of an internal concern for the Public Advocate, but the morale and long term retention of competent attorneys is in the best interest of the Court and all concerned.

20. Kentucky appellate courts are notorious for seldom, if ever, reviewing an unpreserved error, and often for going out of their way to find an error unpreserved. Why is that so? Appellate courts exist in recognition that judges err. Petitions for rehearings exist in recognition that appellate courts err. Why is it that there are meaningful ways to insure proper results except in the instance when defense lawyers fail to preserve an issue to the satisfaction of an appellate court?

An appellate court's jurisdiction is affected by finality of the case below and preservation of the issue. The trial court is the arena in which the fact finding function must take place. It does not serve the ends of justice to allow new arguments to be made on appeal.

Furthermore, when an objection is not raised at trial, an appellate court has no way of knowing if counsel erred or if his strategy called for silence. If new arguments were regularly allowed on appeal, trial counsel could remain mute, (in fact, trial counsel could be just a warm body with a briefcase) and the appellate court would become the "super" factfinder. This would abrogate the entire function of the trial by jury as we know it.

"No matter how powerful the executive department of the legislature becomes, or even the judiciary itself, if we still have the jury system, they cannot interfere too much. Therefore movements afoot right now to try to do that: cutting down on the number of jurors, cutting back on that concept of "reasonable doubt", trying to set up arbitration systems in order to avoid the jury system, all sorts of attacks, the more it indicates to me that there is a greater trend towards fascism in this country. Democracy and due process are in a very tenuous position. In order for us to continue to rely on due process, the Constitution and the Bill of Rights, lawyers must continue to carry on the struggle in the courts. This is the only thing that animates Civil Rights lawyers bringing writs of habeas corpus, getting their clients out of jail and attacking unconstitutional statutes. Attacking the legislations of the executive departments from the President on down."
-Walter Gorash - Denver, Colorado

The question presupposes that an attorney will commit reversible error by failure to object, but what if it is not an error? Couldn't the attorney "sandbag" a trial court by intentionally not objecting?

At any rate, several avenues are available for defendants. First, the trial is the best way to insure a proper result. Second, unpreserved errors are reviewed if manifest injustice would result otherwise. Third, the conviction can be collaterally attacked by claiming that trial counsel was ineffective. Fourth, the contemporaneous objection rule does not even apply any longer to capital cases, and these are to mention just a few.

21. What is your biggest hope for the future in the criminal justice system?

I would hope that greater emphasis could be placed on a proper balance between the legitimate rights of society as a whole and the specific rights of the individuals. In the criminal field continued effort is needed in a vigorous testing of the system in order to produce justice. A proper husbanding of resources is required to achieve the elusive goal of justice for all.

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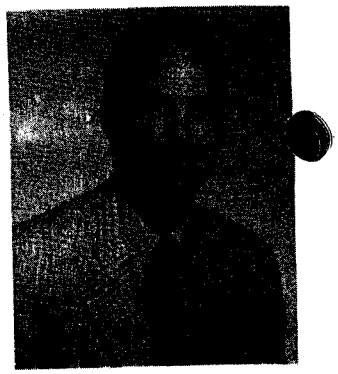
Do The Guilty Go Free?



Bob Carran

This article was written at the request of the Kentucky Post. It has yet to be published in that paper. Bob Carran has graciously permitted The Advocate to publish it.

When I was invited to participate in the Kentucky Post's discussion of this topic, I was initially struck by what I considered to be another example of the media's obsessive attention to crime and the criminal. Why, I asked, wasn't the title "Are We Losing Our Freedoms?", or "Is Our Gigantic Prison Population Necessary?". However, I am realistic and I know that putting people in prison sells newspapers, and politicians who publicly call for putting more people in prisons get elected (almost a perpetual food chain, one feeding upon the other).

The question, as I perceive it, is does America have a disproportionately high percentage of criminals running the streets?

Since the "Guilty Free" do not wear scarlet letters "G.F." around their necks, we can't really deal in a specific, concrete manner with identifying their numbers. What we can do, however, is review the statistics and studies of reported crime, apprehension, and incarceration for America and other Western democracies.

The United States Department of Justice, in a series of Special Reports released since 1986, reported that the United States has consistently had a higher proportion of its population incarcerated for criminal offenses than the other Western democracies. Other studies have shown that only two countries of the industrialized world have a higher percentage of their population in prison -- Russia and South Africa -- and only one country has a higher percentage of its population on death row -- South Africa.

The United States Department of Justice also reports that the average annual growth rate for the prison population during 1925-85 was 2.8% while the residential population of the United States grew at a rate of only 1.2%. The number of prisoners under the jurisdiction of Federal and State correctional authorities at year-end 1985 reached a record 503,601. The increase for 1985 brings total growth in the prison population since 1977 to more than 203,000 inmates -- an increase of 68% in the 8 year period. Since 1980, the number of sentenced inmates per 100,000 residents has risen by nearly 45%, from 139 to 201 (a new record high).

The result of this tremendous increase in Americans sent to prison has been the stretching of our prison and jail systems to the point of bursting at the seams. At the end of 1985, few states had any reserve prison capacity. Only 9 states were operating below 95% of their highest capacity, and 3 states exceeded their highest capacity by more than 50%. Overall, the Justice Department reports that state prisons are now estimated to be operating at approximately 105% of their highest reported capacities. All of this overcrowding is occurring despite the fact that since 1978 state prison systems have added approximately 165,000 beds, producing an increase in capacity of nearly two-thirds over the 7 year period.

While the above facts show that America is definitely doing a bang-up job of putting a high percentage of its citizens in prison, in and of themselves these facts don't answer the questions raised by the Post's topic. One need merely assert that "Of course we have a tremendous percent of our people in prison and the percent is steadily rising. We have an unlawful populace that is growing increasingly unlawful." However, this is not the case.

The Federal Bureau of Investigation Uniform Crime Reports for the United States disclose that the number of homicide, rape, robbery, assault and burglary offenses reported to the police decreased significantly from 1980 through 1984. The Uniform Crime Reports of the Commonwealth of Kentucky also show a significant decrease in the total number of reported crimes for the same period. Overall, between

1980 and 1984, commitments to prison relative to crime increased more than 2 1/2 times as fast as commitments to population (56% vs. 18.5%).

The final conclusion is inescapable -- America is certainly not lax about imprisoning Americans, and has been consistently doing so at a rate that far exceeds its population increase, and despite crime rate decreases.

Why then, is there the misperception by the public that America isn't doing enough to imprison people, and what is this misperception costing us?

America has passed through a period where its population contained an unusually high percent of people in the high crime rate age group. During this period the crime rate went up (as it must), the population reacted to the crime rate increase, and now, years later and well after the problem has materially passed, government and the courts are responding.

Studies dating as far back as 1842-1844 in England and Wales, and consistently through the present in the United States, have always shown that rates of crime rise during the teenage years, then decline after reaching a peak at about 18 to 20. The shape or form of the distribution/age curve in crime has remained virtually unchanged for about 150 years. Therefore, during the 1970s the United States was going to have an increase in the rate of crime no matter what we did (short of starting a major war -- the two longest and deepest drops in the prison population increase occurred during World War II and Vietnam, when a significant proportion of our young population was sent out of the country).

Now that our population is growing older and the disproportionate number of teenagers has grown into the disproportionate number of Yuppies, Guppies and Uppies of the mid-1980s, we are seeing exactly what we should expect -- a decrease in the rate of crime. But all the apparatus prepared in the '70s to increase imprisonment is now finally in place. So what happens? We put ourselves in the company of Russia and South Africa.

Not only is America challenging all other countries for supremacy in imprisonment, but it is also experiencing an erosion of the rights of its free citizens. As long as the populace reacts, politicians will jump on the band wagon. The result has been a judiciary more eager to incarcerate than ever before, and a political body more eager to pass laws and appoint "hanging judges" than ever before.

The floodgates will open soon, and when they do we will quickly reach the 1940s pace of executions -- averaging one every other day. We may even be able to pass South Africa. Ironically, another spin-off of America's eagerness is a Supreme Court that can accept in the imposition of the death penalty a discrepancy that correlates with race, and can accept such judicially approved racism by merely accepting that apparent disparities in sentencing are an inevitable part of our criminal justice system. Not surprisingly, this is the same court that has eaten away vast hunks of our Bill of Rights.

But the good news is the politicians have a platform issue and the media has a quick sale. Just yesterday another candidate called for the creation of a task force to run the criminal out of town -- and received front page headlines. However, nothing was said in the article about addressing the problems teenagers face and lead them to crime, nor about our mental health treatment, nor about the truly incredible number of Saturday Night Specials available in our town. And no one from the media asked.

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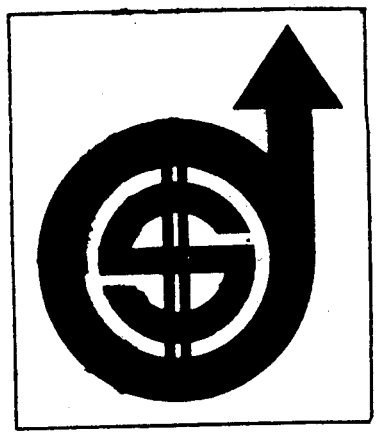
Bob is the public defender administrator for Kenton, Boone and Gallatin counties, and a member of the Public Advocacy Commission. He is also in private practice in Covington, and a member of the Kentucky Association of Criminal Defense Lawyers.

Prosecutors Obtain Money To Hire Psychiatrists



In several significant cases in the state, prosecutors have recently obtained money to hire psychiatrists to testify for the Commonwealth in criminal prosecutions.

COMMONWEALTH V. DAVIS

On July 8, 1987, then Attorney General David Armstrong wrote to the Secretary of Finance and Administration asking approval of a personal services contract with Dr. William Weltzel, a Lexington forensic psychiatrist. Armstrong asked for "an emergency waiver of the provision regarding the effective date of the contract...."

The Attorney General represented in that "standard contract for personnal services" that the contract was between Dr. Weltzel and the Unified Prosecutorial System in the Fayette County case of Commonwealth v. Ulysses Davis, III, who was charged with attempted murder, first degree assault and first degree wanton endangerment.

The contract was for a psychiatric evaluation that would "entail a review of all the facts, witness statements and defendant statements and examination of the defendant and any psychiatric history available, preparation of a report on the findings and courtroom appearances."

Payment was to be at $200.00 per hour up to a maximum of $5,000.00.

In the section of the contract requiring "justification for contracting with an outside provider to perform the services," the contract stated:

> **Mr. Davis was evaluated at KCPC who filed a report supporting a defense of insanity. The Commonwealth finds this opinion to be highly questionable and cannot rely on it as it would likely result in the release of the defendant.**

The contract further stated:

> **Whereas, the State Agency has concluded that either state personnel are not available to perform said function, or it would not be feasible to utilize state personnel to perform said function.**

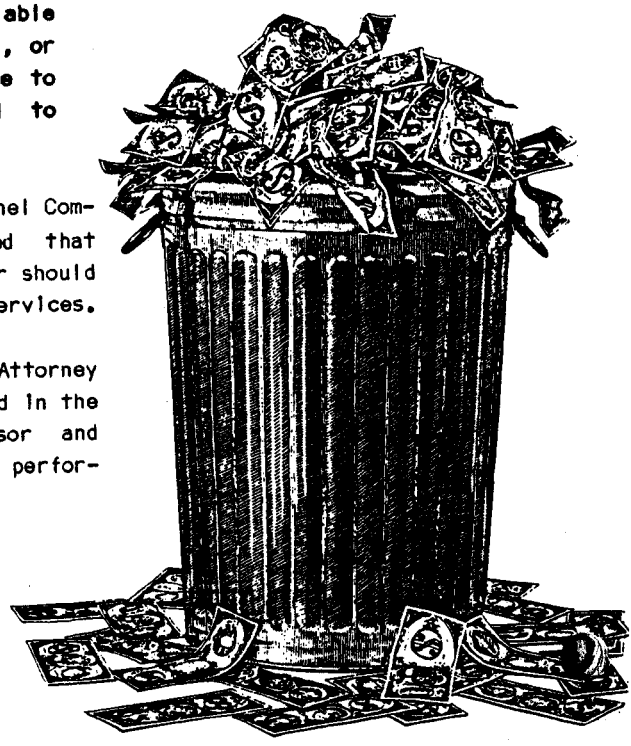
Without explanation, Personnel Commissioner Greenwell stated that state personnel could not or should not perform the requested services.

Ray Larson, Commonwealth Attorney in Fayette County, was named in the contract as the supervisor and monitor of the contractor's performance.

COMMONWEALTH V. HARVEY

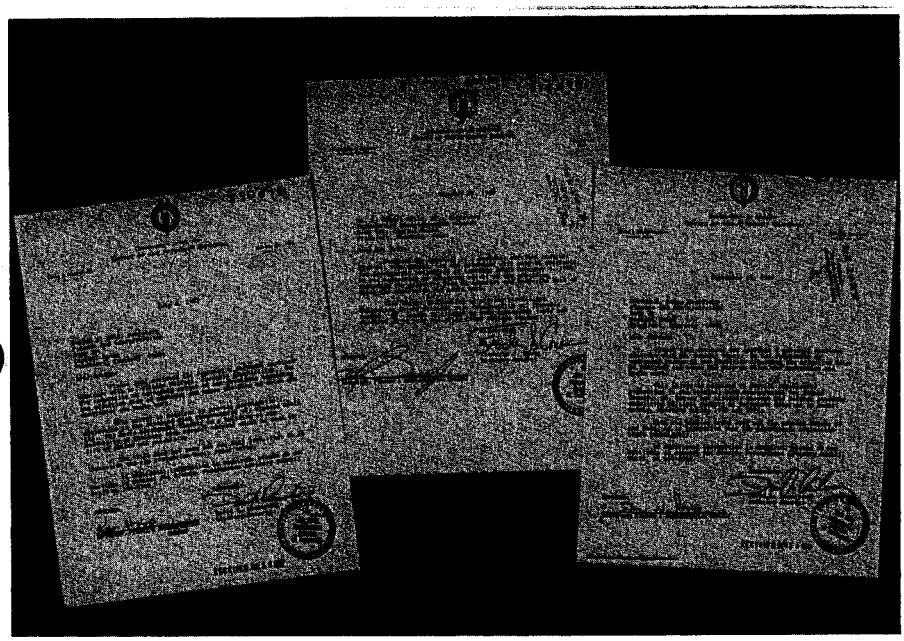
In a September 14, 1987 letter to the Secretary of Finance and Administration, then Attorney General Armstrong again requested approval of a personal services contract with Dr. Emanuel Tanay, a Detroit psychiatrist, in the case of Commonwealth v. Donald Harvey in Laurel county.

Again, the contract was between the Detroit psychiatrist and the Unified Prosecutorial System. Again Armstrong asked for an "emergency waiver of the provision regarding the effective date of the contract...."



In his letter, Armstrong stated:

> **Mr. Harvey has alleged, through his defense attorney, committing multiple murders at Marymount Hospital in Laurel County, Kentucky during 1970 and 1971.**
>
> **With the pending Grand Jury and the general nature of the case, it is imperative that the psychiatric evaluation begin immediately.**



The need for the Detroit psychiatrist's services were represented in the contract to be:

> **Psychiatric evaluation of defendant in case Comm. vs. Donald Harvey for investigative purposes to determine competence to stand trial and to determine criminal responsibility at time of crime. Donald Harvey has alleged through the defense attorney to committing eight murders at Marymount Hospital in Laurel County, Kentucky during 1970 and 1971.**

The contract set out the Commonwealth's "justification for contracting with an outside provider to perform the service":

> **Dr. Tanay is recognized as an expert in forensic psychiatrist [sic] and as one of the foremost experts in the study of serial murderers. Dr. Tanay has done extensive work across the United States on related cases and has conducted a similar examination of Donald Harvey. The cost for Dr. Tanay's services are less than the cost to contract with an equally qualified expert who has no knowledge of the Donald Harvey case.**

The Commonwealth represented in the contract that they did not consider other providers to perform the requested services "due to cost and time limitations."

The Detroit psychiatrist's fee was to be $200.00 per hour, not to exceed $3,000.00. Additionally, he was to be reimbursed for "air and ground transportation (taxi and/or .18 cents per mile for private vehicle) lodging, meals, tips, parking, (rental car if required)." The fee and travel expenses were not to exceed $4,500.00 according to the contract.

The contract further represented:

> **Whereas, the State Agency has concluded that either state personnel are not available to perform said function, or it would not be feasible to utilize state personnel to perform said function.**

The Commissioner of Personnel indicated that the services requested in the contract could not or should not be performed by state personnel.

The monitor and supervisor of the Detroit psychiatrist was Thomas Handy, Laurel Commonwealth Attorney.

At no place in the contract or the letter did Armstrong explain why KCPC was inadequate or unable to do the examination.

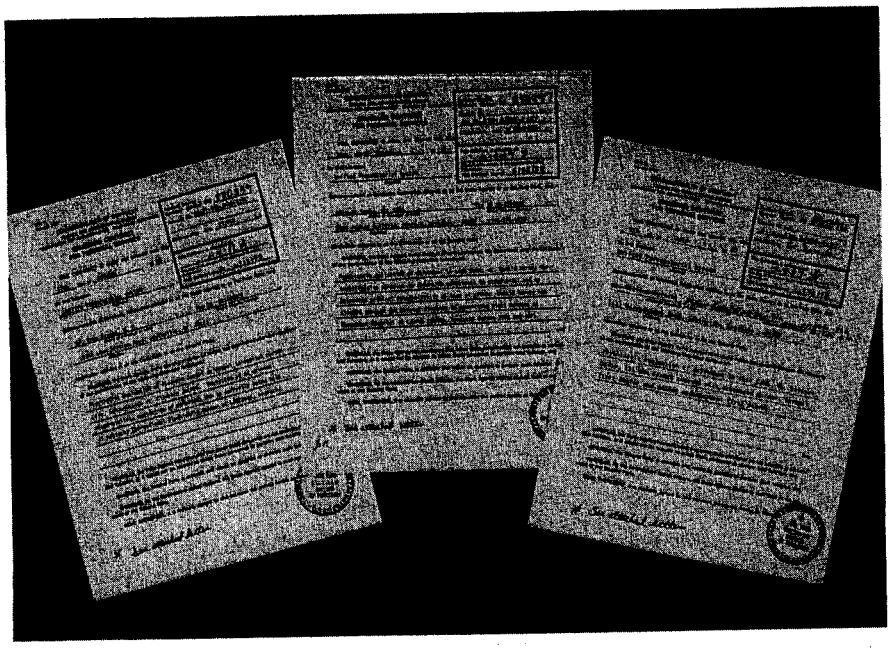
COMMONWEALTH V. JACOBS

On January 21, 1988, Attorney General Fred Cowan asked the Secretary of Finance for approval of a personal services contract with Dr. Pran Ravani, a psychiatrist former-

WHEREAS, the State Agency has concluded that either State personnel are not available to perform said function, or it would not be feasible to utilize State personnel to perform said function; and

ly employed at Grauman and KCPC. Cowan, too, requested emergency waiver of the provision regarding the effective date of the contract. The contract was between the Unified Prosecutorial System and Dr. Ravani of Louisville for the Knox County case.

The services requested in the contract were:



Psychiatric evaluation of Clawvern Jacobs, defendant in capital murder case, Commonwealth vs. Clawvern Jacobs. Physician to do criminal responsibility evaluation of defendant who is currently being held at Kentucky Correctional Psychiatric Center in LaGrange, Kentucky.

Dr. Ravani was paid at the rate of $150.00 per hour up to $3,450.00. No travel expenses were to be paid.

Again, the contract represented:

WHEREAS, the State Agency has concluded that either State personnel are not available to perform said function, or it would not be feasible to utilize State personnel to perform said function;

The justification for going to an outside provider was:

Dr. Ravani has extensive and unique experience in the psychiatric evaluation of criminal defendants. The state prison's personnel lack such expertise.

Conveniently, the Commonwealth did not indicate why KCPC psychiatrists lacked Ravani's expertise. Peculiarly, the Commonwealth did not indicate in the contract that the defendant had been examined at KCPC at their request. Perhaps they left this out since they did not like the opinion rendered by the KCPC experts.

In the section of the contract for listing of other providers considered to perform the services, the Commonwealth stated:

Dr. Granacher, Lexington, whose fee was higher, and was located further from the interview and trial sites.

Barbara Whaley of the Attorney General's Office was listed as the monitor and supervisor of Dr. Ravani's work.

PROSECUTION EXPERTS IN OTHER CASES

These 3 cases only represent those cases where the Commonwealth obtained personal services contracts to obtain the services of experts.

Charles Horton, director of the Prosecutorial Advisory Counsel Division of the Unified Prosecutorial System, has related to The Advocate that the Unified Prosecutorial System has a fund of $20,000.00 per year for prosecutors to use to hire experts in criminal cases in district and circuit courts. In order to obtain the money, a prosecutor makes a request to the Unified Prosecutorial System for the funds and if appropriate and there are funds remaining, the funds are given to the prosecutor. If the request is for money in excess of $1,000.00 then a personal services contract is required. Mr. Horton indicated that the Attorney General has their own separate funding system for experts in appellate/federal cases beyond what is provided through the Unified Prosecutorial System. **At the end of this article is a listing of the experts hired via money of the Unified Prosecutorial System, the case name, and the amount paid to the expert for FY 1986-87 and FY 87-88 excluding personal services contracts.**

Also in prior years experts have been hired. For instance, in Commonwealth v. Chaney, (Indictment No. 80-CR-219) and Commonwealth v. Smith, (Ind. No. 80-CR-166) the Pike County Commonwealth Attorney,

John Runyon, hired Dr. John Gergen, a Frankfort psychiatrist as a prosecution expert.

In Commonwealth v. Bevins, (Ind. Nos. 82-CR-16-23) the Commonwealth Attorney hired Dr. Gergen as his prosecution psychiatrist.

FUNDS FOR DEFENSE EXPERTS

In the capital case of Commonwealth v. Kordenbrock and Commonwealth v. Simmons and many, many others, the Commonwealth has contended quite successfully that the defendant should not receive funds for psychiatric experts or other experts because state facilities (K.C.P.C) were adequate - those same state facilities that they represented in their contracts were not adequate for their purposes.

Which way is it, Commonwealth?

After all, it's just the freedom of an individual accused at stake - or the life of an accused.

The reality is that money to hire experts in criminal cases is available to the Commonwealth virtually at will, whereas it is rarely available to indigent defendants for expert assistance. This grossly unequal treatment of significant resources and the Commonwealth's conveniently inconsistent positions on funds for experts (depending on whether they want them or an indigent defendant wants them) perverts the criminal justice system and renders it a farce.

Edward C. Monahan
Assistant Public Advocate
(502) 564-8006

UNIFIED PROSECUTORIAL SYSTEM
STATE-WIDE EXPERT WITNESS USE
FY 1986-1987

WITNESS	CASE	AMOUNT
Arthur T. Daus, Jr. PSC	Comm. vs. Samuel Hall	720.00
Barrett, Curtis L.	Comm. vs. Alice Ann Jaggers	659.58
Berstein, Mark DDS	Comm. vs. Henry C. Little	375.00
Big Stone Gap Clinic	Comm. vs. Sharon Nipper	300.00
Colley, Thomas E.	Comm. vs. Ronald Thompson	185.00
Dickinson, MD Lewis G.	Comm. vs. Tracy R. Rowe	325.00
Dixie Appliance	Comm. vs. Michael McCloud	45.00
Ellis, Jenkins, Nunnelley	Comm. vs.	260.00
Flannery, Md, Anthony W.	Comm. vs. Billy Meadows	30.00
Gergen, John A. MD	Comm. vs. John Walter Casey	70.00
Gergen, John A. MD	Comm. vs. Darrell Showalter	160.00
Graham Smith Motoring Acc.	Comm. vs. Michael McCloud	100.65
Granacher, Robert	Comm. vs. William Phelps Cobb, III	685.00
Graves Gilbert Clinic	Comm. vs. Patricia Posey	50.00
Graves Gilbert Clinic	Comm. vs. Patricia Posey	50.00
Harpenau and Assc.	Comm. vs. Terrica Reese	480.00
Hasting, DMD Robert L.	Comm. vs. Lisa Glover	150.00
Hisie and Company	Comm. vs. Abboud	136.50
Johnson, Phillip PhD	Comm. vs. Donald Buckman	700.00
Johnson, Phillip PhD	Comm. vs. James E. Sexton	457.50
KY Medical Services	Comm. vs. Jessica Rae Parnell	350.00
LeVay, Timothy E.	Comm. vs.	55.00
Kendrick, Merkley	Comm. vs. William E. Ryan, III	94.00
Kendrick, Merkley	Comm. vs. Henry DeWayne Pruitt	75.00
Meyer, Robert PhD	Comm. vs. Samuel Hall	730.00
Neuropsychological Systems	Comm. vs. William Phelps Cobb III	100.00
Orrahood, Wilson, and Clark	Comm. vs. Clinton E. Main	150.00
Pastoral Counseling	Comm. vs. Crosby Dean Bright	240.00
Pastoral Counseling	Comm. vs. John Mitchell	180.00
Pitzer, MD, Frank	Comm. vs. Ronnie Greenfield	200.00
Pride Engineering	Comm. vs. Charles Oller	400.00

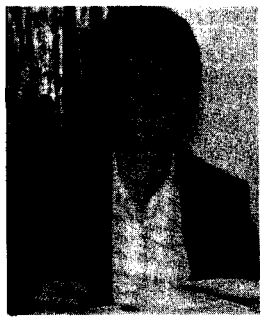
Professional Services Mgmnt.	Comm. vs. Nathan Corsi	70.00
Rideout Sunoco	Comm. vs. John West Shipman	84.00
Schaad, Phillp III	Comm. vs. Robert Kays	60.00
Schaad, Phillp III	Comm. vs. John W. Shipman	727.50
Schaad, Phillp III	Comm. vs. Paul J. Willenbrink, III	159.01
Schaad, Phillp III	Comm. vs. John W. Shipman	850.06
Schaad, Phillp III	Comm. vs. Kell, Bennett	250.47
Schaad, Phillp III	Comm. vs. Robert Kays	75.00
Transp. Engineering Cons.	David Thomas-Jason Cox	637.00
Tucker, Daniel MD	Comm. vs. James Scott Dennison	640.00
Veltschegger, Rodney D.	Comm. vs. Jerry/Carol Savage	125.00
Villaflor, Osias M. MD	Comm. vs. Danny Dixon	30.00
Waldridge, Powers MD	Comm. vs. Opal Doyle	60.00
Willard Daugherty	Comm. vs. Earl Young, Jr.	1,150.00
Total		**13,431.27**

UNIFIED PROSECUTORIAL SYSTEM
STATE-WIDE EXPERT WITNESS USE
FY 1987-1988

WITNESS	CASE	AMOUNT
Associates In Psychology	Comm. vs. Drumm	180.00
Bluegrass West Comp Care	Comm. vs. Landreth	150.00
Bradley, Helle	Comm. vs. James Johnson	700.00
Bushey, Harold	Comm. vs. Kenneth R. Foley	150.00
Bushey, Harold L. MD	Comm. vs. Foley	150.00
Calico Cat Child Dev. Ctr	Comm. vs. Drumm	225.00
Chain Saw World	Comm. vs. Anthony Herron	30.00
Daus, Arthur T., Jr. PSC	Comm. vs. Sam P. Hall, III	180.00
DePenning, Donna C.	Comm. vs.	50.00
Flaget Memorial Hosp.	Comm. vs. Melson, Crum	337.50
Gates, Lynne A.	Comm. vs. Anthony Scott Mangum	148.75
George C. Rodgers, MD	Comm. vs. Brown, Cook, Messer	700.00
Hamilton County Coroner	Comm. vs. Edward Hofstetter	150.00
Haugh, Morgan	Comm. vs.	117.00
Jarboe, Charles H.	Comm. vs. Jennifer Risinger	200.00
Johnson Mathers Hlth Care	Comm. vs. James Terrell	25.87
Jolly, Paul N.	Comm. vs. Singler/Simpson	329.70
Kramer, Paul H.	Comm. vs. Gregory Wilson/Brenda Humphrey	350.00
Lifecodes Corp.	Comm. vs.	300.00
Litzenberger, Drew MD	Comm. vs. Bridgett Foley	760.00
Meyer, Robert G. PhD	Comm. vs. Harrison Elmore	120.00
Mulhern, Edward MD	Comm. vs. Melson, Crum	30.00
Orthopedic Clinic of Berea	Comm. vs.	180.00
Pediatric Surgical Assc.	Comm. vs. Lowe	250.00
Physicians for Women	Comm. vs.	300.00
Physicians for Women	Comm. vs.	300.00
Pitzer, Frank	Comm. vs. James Nourse	200.00
Sheikh, Hamid MD	Comm. vs. John Doss	798.00
Smock, William	Comm. vs. James Maxfield	780.00
Transportation Engineering	Comm. vs. Baker/Michalko	775.00
Tucker, Daniel M. MD	Comm. vs. Christopher Borders	85.00
Total		**9,055.85**

West's Review

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



Linda K. West

Kentucky Court of Appeals

BURGLARY - "DWELLING"
Shackleford v. Commonwealth
35 K.L.S. 1 at 11
(January 8, 1988)

On appeal of his second degree burglary conviction Shackleford argued that the evidence did not support a finding that he had entered a dwelling house. The house which Shackleford entered was an unoccupied house which had been condemned as a result of tornado damage. City ordinances prohibited anyone, including the owner, from being in the house except between 6:00 a.m. and 6:00 p.m. KRS 511.010 defines a "dwelling" as "a building which is usually occupied by a person lodging therein." The Court held that because the house was abandoned it was not a "dwelling" at the time of the burglary.

HEARSAY
Chaney v. Commonwealth
35 K.L.S. 2 at 2
(January 22, 1988)

The sole evidence connecting Chaney with the charged offense was a fingerprint found at the crime scene. This print was compared to a print already on file with the state police. The print on file was taken in 1983 and allegedly was Chaney's, but neither the custodian of the print nor the officer who took the print could identify it as Chaney's from personal knowledge. The Commonwealth, however, argued that records indicating the print was Chaney's were admissible under the business records exception to the hearsay rule.

The Court of Appeals rejected the Commonwealth's argument since there was no necessity for the introduction of this hearsay. A current print could have been taken for comparison with the print found at the scene. No explanation was given for why such a print was not obtained. There being no other evidence to connect Chaney with the offense, his conviction was reversed.

DUI - REASONABLE GROUNDS FOR BREATHALYZER
Owen v. Commonwealth
35 K.L.S. 2 at 4
(January 22, 1988)

KRS 186.565 provides that a driver may be required to take a breathalyzer test based on "reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle in this state while under the influence of intoxicating beverages or other substance which may impair one's driving ability." Refusal to take the test may result in revocation of the individual's driver's license by the Transportation Cabinet for up to six months.

Owen appealed from the revocation of his license asserting that he refused a request to take a breathalyzer with impunity since the request was not based on reasonable grounds. Owen was found in a bar parking lot, asleep behind the wheel of a vehicle with the motor running and the lights on. In Wells v. Commonwealth, Ky.App., 709 S.W.2d 847 (1986) the Court held that similar facts were insufficient to support a criminal conviction of d.u.i. However, the Court refused to extend the reasoning of Wells to review of the administrative decision to revoke a license. Judicial review of the decision to revoke is limited under KRS 186.565(5) to the determination whether the Transportation Cabinet's action is "arbitrary or capricious."

Kentucky Supreme Court

RCr 9.48/VIDEOTAPE OF CHILD WITNESS/EXCULPATORY EVIDENCE
Ballard v. Commonwealth
35 K.L.S. 1 at 17
(January 21, 1988)

The Court reversed Ballard's convictions of multiple sexual offenses based on error by the trial court in excluding the testimony of a defense witness who was present in the courtroom during another witness' testimony in violation of RCr 9.48. The trial court erred in excluding the witness without first conducting a hearing to assess prejudice. See Jones v. Commonwealth, Ky., 623 S.W.2d 226 (1981).

The Court also found reversible error in the admission into evidence of videotaped testimony of a child witness pursuant to KRS 421.350(2). The witness was not sworn nor was any determination made as to her competency before taking her testimony. Reversal was required under Gaines v. Commonwealth, Ky., 728 S.W.2d 525 (1987).

Finally, the Court held that Ballard's motion for new trial should have been granted based on the commonwealth's failure to disclose exculpatory evidence. The commonwealth withheld a doctor's report that he found no evidence of sexual abuse.

United States Supreme Court

BURDEN OF PROOF - RETROACTIVITY OF
FRANCIS V. FRANKLIN
Yates v. Aiken
42 CrL 3026 (January 12, 1988)

Yates was convicted of murder after a robbery to which he was an accomplice resulted in a death. The jury found the mental element required for the murder conviction pursuant to an instruction "that malice is implied or presumed from the use of a deadly weapon."

Yates contended that his conviction must be vacated under Francis v. Franklin, 471 U.S. 307 (1985). In Francis, the U.S. Supreme Court held that due process prohibits the use of "evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." Yates' case was under collateral review when Francis was decided. The state court therefore declined to apply Francis "retroactively" to Yates' case.

Feminists applaud ruling on immunity

Associated Press

WASHINGTON — Women's rights groups believe the Supreme Court's decision to allow a judge to be sued for sex discrimination will help curtail gender bias in the judicial system.

"Obviously, we're very pleased by the decision," said Marsha Levick of the National Organization for Women's Legal Defense Fund. She said the ruling could help put a check on a judicial system "rife with gender bias."

The court, by an 8-0 vote Tuesday, ruled an Illinois state judge may be sued for sex discrimination by a woman fired from her job as a probation officer. The justices said the judge is not entitled to absolute legal immunity for administrative decisions.

While the case specifically dealt with a state judge, it also may apply to federal judges.

Justice Sandra Day O'Connor, writing for the court, said absolute immunity is intended to protect judges from suits challenging their judicial decisions.

"Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts," she said.

State and federal judges generally are immune from lawsuits stemming from their judicial activities.

In Tuesday's ruling, the high court overturned a decision by the 7th U.S. Circuit Court of Appeals, which said in 1986 that

Howard Lee White, presiding judge of Illinois' 7th Judicial Circuit, was immune from sex discrimination charges.

The appeals court threw out a jury award of nearly $82,000 to Cynthia A. Forrester, who first was demoted and then fired by White in 1980, three years after he hired her.

The Cincinnati Post - January 13, 1988
Reprinted with Permission

The U.S. Supreme Court reversed. The Court held that Francis did not represent a new rule but rather the application of already recognized legal principles (see Sandstrom v. Montana, 442 U.S. 510 (1979)) to new facts. Thus, retroactivity was not a consideration.

COMPULSORY PROCESS
Taylor v. Illinois
42 CrL 3042 (January 25, 1988)

In this case, the Court held that a defense witness could be precluded from testifying as a sanction for defense counsel's failure to provide discovery of the witness. Pursuant to Illinois' rules, Taylor was required to furnish the state a list of defense witnesses. One Wormley was omitted from the list, including an amended list provided on the day of trial. However, voir dire of Wormley revealed that he had been interviewed by defense counsel during the week before trial.

The Court recognized that the imposition of discovery sanctions may violate the Compulsory Process Clause. However, the Court held that exclusion of a witness' testimony is a constitutionally permissible sanction when discovery violations are "willful and motivated by a desire to obtain a tactical advantage." Under this standard Wormley's exclusion was justified.

Justices Brennan, Marshall, and Blackmun dissented on the grounds that the availability of less drastic sanctions, such as the granting of a continuance to the prosecution, render the exclusion of otherwise admissible defense evidence offensive to the Compulsory Process Clause.

COMMENT ON FAILURE TO TESTIFY
U.S. V. Robinson
42 CrL 3063 (February 24, 1988)

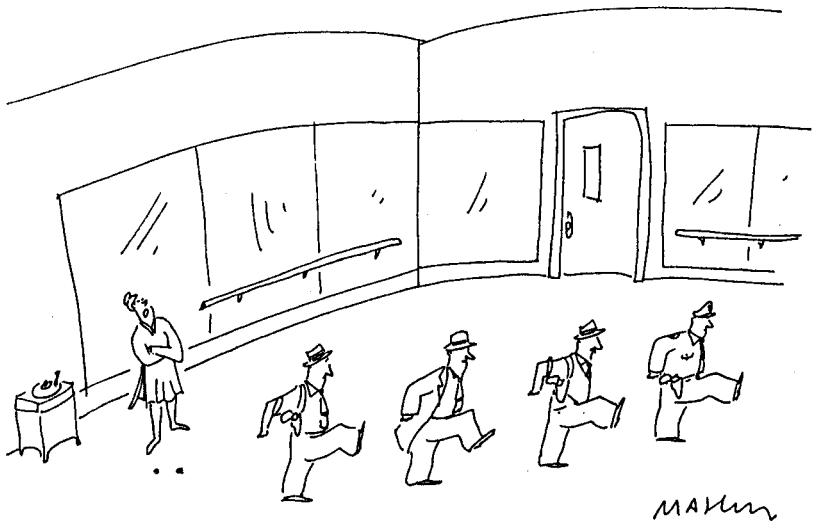
At Robinson's trial, defense counsel several times stated in closing argument that the government had not allowed Robinson (who did not testify) to explain his side of the story. The prosecutor then stated in his summation that Robinson "could have taken the stand and explained it to you." The jury was subsequently instructed to draw no adverse inference from Robinson's election not to testify.

The Court held that the prosecutor's comment did not infringe on Robinson's right to remain silent. Defense counsel's argument, which implied that Robinson had not been permitted to present his case at trial, opened the door to the prosecutor's comments. Justices Marshall and Brennan dissented.

CONFRONTATION
U.S. V. Owens
42 CrL 3057
(February 23, 1988)

In this case, the Court held that the Confrontation Clause was not violated by the admission of a witness' out-of-court identification of the defendant where the witness was unable, due to memory loss, to identify the defendant at trial or testify as to the basis for the out-of-court identification. The witness was able to remember and testify that he had previously identified the defendant. The witness' availability for cross-examination met the requirements of confrontation even though the out-of-court identification was hearsay. Justices Brennan and Marshall dissented on the grounds that the witness' amnesia denied the defendant effective cross-examination.

Linda West
Appellate Branch
Frankfort Office
(502) 564-8006

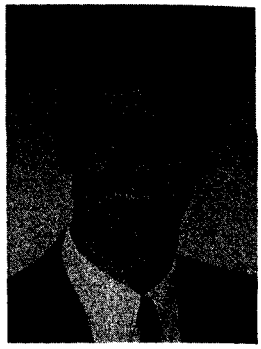


" ONE, TWO, THREE - KICK. ONE, TWO, THREE - KICK."

Drawing by Michael Maslin. Reprinted with Permission.

Post-Conviction

Law and Comment



Lewis Kuhl

OBTAINING RECORDS FROM CORRECTIONS

In many instances, it is necessary for the practicing criminal defense attorney to obtain information about their client from documents within the control of the Corrections Cabinet. The inmate file maintained by Corrections contains documents which record every action taken by or against that particular inmate. This documentation begins with the judgment of conviction and continues to the time the inmate is released from Corrections' control. What records Corrections will release to the attorney and what we must go through to obtain them vary from institution to institution and record to record. Some records may be obtained by asking, some with a release from your client, and others only through a court order.

CLOSED AND OPEN RECORDS

Although the Kentucky Open Records Law, KRS 61.872, requires that all state agencies provide the public with access to state government records, because of the confidential nature of inmate records, exceptions have arisen. These exceptions have resulted in the various procedures necessary to obtain the many different records controlled by Corrections. The procedure necessary to obtain a specific record depends upon the assigned access code of the record. Each Corrections record has been reviewed by the General Counsel of the Department of Justice and an access code is assigned based upon the records content. This access code controls whether the record is open to the public, open to the subject, or closed. This procedure is intended to control the privacy, protection, and release of information from inmate files.

FORM B-010-1
Finance and Administration Cabinet
Rev. 5-82

COMMONWEALTH OF KENTUCKY
REQUEST TO INSPECT PUBLIC RECORDS
RE KRS CH. 61
REQUEST

DATE _____

TO: _____
Name of State Agency

I request to inspect the following document(s): _____

Number of copies of each document requested @ 10¢ a page: _____

Enclosed $_____ Check ☐ Money Order ☐ Cash ☐

_____
Signature

_____
Company

_____
Address Phone

DISPOSITION

The following disposition was made of the above request: _____

_____
Signature of Custodian

_____
Agency

_____
Amount Received

_____
Date

RECORDS OPEN TO ANYONE

Records designated as open must be given to anyone who requests them and no explanation by the person making the request is necessary. The person making the records request is entitled to view the original and make notes, or request copies. To obtain open records, a "Request to Inspect Public Record" form must be submitted to the person in control of the records. Examples of open records include:

1. Judgment of conviction
2. Resident Record Card (Time Sheet)
3. Revocation of Parole Hearing
4. Parole Violation Warrant, and
5. Incident Reports (Write-ups).

RECORDS OPEN TO THE PERSON

Records open to the subject can be obtained by the inmate or someone authorized by the inmate to obtain his records. This is accomplished by the inmate executing an "Authorization for Release of Information" form. Records open to the subject include:

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF PUBLIC ADVOCACY
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601

GENERAL RELEASE AUTHORIZATION

I, _____, the undersigned, do hereby authorize any person, organization, or institution to release any and all records, reports, or other information pertaining to me to the Department of Public Advocacy, 151 Elkhorn Court, Frankfort, Kentucky 40601.

_____

Subscribed and sworn to before me by _____, _____on this _____day of _____, 198____.

_____
NOTARY PUBLIC

_____

My Commission Expires_____

1. FBI Sheet
2. Parole Progress Report
3. Furlough Application
4. Client Profile, and
5. Academic and Vocational Test Scores.

CLOSED RECORDS

Closed records, absent a court order, may be reviewed only by Corrections Cabinet personnel or other related criminal justice agencies. This includes the State Police, Governor's Office, Attorney General's Office, Federal Law Enforcement Agencies and Federal Probation and Parole Officers.

Peculiarly, this excludes the Department of Public Advocacy, the person who the records pertain to, and that person's lawyer.

The closed record category includes:

1. Psychological reports that contain suggestions and recommendations
2. Memoranda expressing opinions or recommendations
3. Documents prepared by a probation and parole officer
4. Inmate medical records, and
5. Pre-Sentence Investigation Report (P.S.I.).

The PSI has been a source of recent litigation, in Commonwealth v. Bush, Ky., 740 S.W.2d 943 (1987) the court held that the inmate could not obtain a copy of his P.S.I., but could be "advised by the prison official who has custody of the P.S.I. of the factual contents and conclusions therein...." Id. at 943.

OBTAINING THE RECORDS

The availability of a specific record can be determined by contacting either the records officer at the institution, the Offender Records Office in Frankfort, or by looking in the Corrections Policy and Procedure Manual, Chapter 6. The request itself should be made in writing to the institution record officer or the Corrections Cabinet Offender Records Office in Frankfort. The records can be obtained from either of these 2 sources since both the Records Office in Frankfort and the institution Records Office maintain separate identical files for each inmate.

INACCURATE FILES

To insure that inmate files are accurate and properly maintained, 20 inmate files are randomly reviewed each month. If any information is found to be inaccurate a change is made. If an inaccuracy is brought to Corrections attention by the inmate and can be proven, the file will also be corrected. Accuracy is important because the information contained in these files is used by the institutions in determining classifications and the parole board to determine parole eligibility. Therefore, if information is incorrect an inmate may wrongfully be denied access to certain programs.

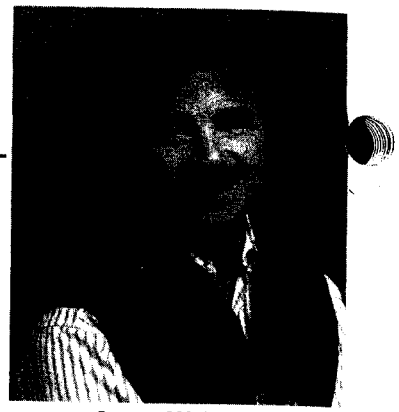
COSTS

The cost of obtaining copies of these documents is minimal; 10 cents per page. But this fee is waived if the records are requested by another state administrative agency.

Lewis Kuhl
Assistant Public Advocate
Post-Conviction Branch, LaGrange
(502) 222-9441 (ext. 313)

In the Trenches

District Court Practice



Larry Webster

**CHEAP DEFENSE of
DRUNK DRIVING CASES in
KENTUCKY
by LARRY WEBSTER
who has been drunk
and got others drunk**

Editor's Note: Larry prepared this article as part of a lecture delivered at a Bar Association Meeting in Ashland, Kentucky in 1985; it has been circulated "underground" amongst defense lawyers, but appears here for the first time in other than photocopy form. Thanks to Danny Rose and Steve Geurin of the Morehead Office for the updated citations. The second part of this article will appear in the next issue.

Victims of crime probably make no better recommenders of public law than perpetrators of crime. Yet a legislature speckled with lawyers yielded up that function to Mothers Against Drunk Drivers, who were delivered of KRS 189A.010, the "slammer bill," effective July 13, 1984.

THE "NEW LAW"

The new law made the defense of DUI cases newly necessary; the June 13, 1985 declaration by the Supreme Court in Commonwealth v. Ball, Ky., 691 S.W.2d. 207, (1985), that convictions under the old law could be used to enhance (jail) the penalty for a conviction under the new law made the defense of DUIs in Kentucky a matter of some urgency.

For two or three thousand dollars a client can mount an impressive DUI defense featuring a pharmacologist, toxicologist or combination, or Mr. Wizard will come to town and demonstrate the technical invalidity of the Breathalyzer. Most of our clients cannot afford such a defense and, in some areas, such an overblown effort against the local county attorney will become the kind of battle that you want to avoid to win a DUI case. And the bottom line is that under the new law you either win or lose. There is not much of a draw possible.

This article will attempt to demonstrate a typical sort of defense of a DUI case on a more realistic scale: you, the client, the particular policeman involved and your usual lay witnesses.

YOU GET THE CALL

You get the call from the county jail. Your thick-tongued friend has just been brought in by Officer Smiley of the KSP and wants two things. He wants to know whether or not to take the Breathalyzer test and he wants you to get him out of jail.

SHOULD YOUR CLIENT TAKE THE TEST?

You should try to get him to make some sort of preliminary assessment of whether or not he is in fact drunk. If his problem comes from a non-alcoholic substance which has been ingested and you can get him to let you know this without blurting it out to the deputy jailer and the cop who is listening close, then take the test.

If he is zonked and you can soon tell it, find out if the officer has other evidence that he was drunk other than the breath test. For instance, did he do field sobriety tests? Is there another officer or potential witnesses for the Commonwealth? If there is no other proof of drunkenness than the breath test, then the next question is whether or not to supply, by the test, the other side's case. Here are the keys: KRS 186.565 revokes for six months the license of one refusing to submit to a chemical test of blood, breath, urine, or saliva. This comes after an administrative hearing, but it usually comes. The first time the officer merely requests that the subject submit to the test; if the subject refuses, the officer shall warn the person of the effect of his refusal to submit to the test. Mere failure of the subject to reply is not refusal. Commonwealth v. Hanson, Ky., 484 S.W.2d. 865, (1972). Unfortunately, the client's refusal to submit to blood analysis may be used in evidence against him on a charge of DUI. Commonwealth v. Hager, Ky., 702 S.W.2d 431 (1986).

The question becomes: at what point is it easier on a person to refuse the test than to take it and prove himself a hopeless .25%? If this will be his first conviction, he should take the test. His loss of license will be less from a conviction than an administrative revocation. If this is his second or

more conviction, he should take the test unless it is likely to show him to be so rip-roaring drunk that he is considered beyond the tolerance of a jury or the plentiful, yet not total, unreliability of the Breathalyzer.

If it is immediately apparent that your defense will be non-chemical, that is, your client was in fact not operating a vehicle, though admittedly drunk, then take the test.

A defendant neither has the right to consult counsel before deciding whether or not to submit to a Breathalyzer test, Elkin v. Commonwealth, Ky.App., 646 S.W.2d 45, (1982), nor does he have the right to have a lawyer present during the taking of breath or blood samples, Newman v. Hacker Ky., 530 S.W.2d 376 (1975), since such stages of a proceeding are not critical stages for purposes of Sixth Amendment right to counsel. You can present some good constitutional arguments if the officer has refused to permit your client to call you until after the test. RCr. 2.14 says that a person arrested and in jail shall have the right to make immediate communications for the purposes of securing the services of an attorney. At the least, you can argue that the denial of the right to counsel is a defense to the administrative proceeding to suspend an operator's license, but see Nyflot v. Minnesota Commissioner of Public Safety, ___U.S.___, 106 S.Ct. 586, 88 L.Ed. 2d 567 (1985).

WHEN WILL YOUR CLIENT GET OUT OF JAIL?

If the B.A. reads about .15% KRS 189A.110 requires that he be kept in custody at least four hours. If he passes the test, many jailers will still hold him as a matter of policy. You should make sure that the pretrial release officer will interview your client soon, before calling the judge in the middle of the night.

PLANNING A STRATEGY

If your defense is going to be that your client's driving ability was not impaired by anything, as opposed to the technical aspects of whether or not he was operating a vehicle, then you should first identify all people who are able to verify your client's remarkable sobriety at or near the time of the arrest. Speak to the turnkey, the nighttime jail loafers, and to the other people at the party. It is important to identify the last time your client had a drink before his arrest, and naturally to know how much (little) he consumed at the party. You need to decide whether to attack the Breathalyzer with experts, or to wing it alone.

PRETRIAL MOTIONS

If your client is facing his second offense within a five-year period, he faces $350 to $500, no less than 7 days in jail, and the possibility of community labor (road gang) for 10 days to 6 months. You must act to set aside the prior convictions, or to otherwise head off what is coming.

First file a discovery motion under RCr. 7.24 and when the Commonwealth doesn't send you a copy of the earlier conviction(s), lay low. If your later suppression motions fail, you can object at trial to the admission of earlier conviction documents on the basis that they were not provided in discovery. You can further argue that punishment cannot be enhanced without specific notice to the defendant. Frost v. State, In., 330 S.W.2d 303 (1959).

Do not ask for anything in discovery which will cause the sheriff to go clean up and tune up the Breathalyzer. Instead, get yourself a copy of a good DUI seminar booklet such as "Defending the Drunk Driving Charge in Kentucky" sold by Professional Education Systems, Inc., P.O. Box 1208, 3410 Sky Park Blvd., Eau Claire, Wisconsin 54701 (715-836-9700). In it, you will find technical articles which catalog the medical and engineering uncertainties which plague Breathalyzers. Select and underline a few key points and mail the article to the police officer with a nice letter saying that since you expect he will be testifying in behalf of a Breathalyzer, you don't want to unduly surprise him when you cross-examine him on the deficiencies in the machine. You may end up with his surprising cooperation and get some admissions on key points. Tell him before trial what you want him to answer about the machine and supply him the answers. That is a cheap way of getting before a jury some new information about B.A.'s. If you can, turn the trial away from a contest between two witnesses, one of whom is a police person, into a contest between your "good old boy" and the machine their "good old boy" cannot control. If you turn the trial into a contest between your client and the police person, hello road gang.

Find out what kind of Breathalyzer machine you use. Most everybody uses the Breathalyzer Model 2000, but there are others.

ATTACKING THE EARLIER CONVICTION(S)

Bear in mind: the Commonwealth need only prove the prior conviction(s). The prosecutor need not prove both the fact of conviction and that the previous conviction was obtained by constitutionally permissible means. The burden of demonstrating the constitutional invalidity of prior convictions is squarely on the shoulders of the defense and must be done pre-trial, with verified allegations of fact. Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984) holds that a challenge to a prior conviction should be made and decided before the trial.

How can you do it? The decision of the United States Court in Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 10 L.Ed, 2d 319 (1967), clearly provides that where a previous conviction is an element of the offense charged, the fact of conviction is not conclusive and previous conviction is subject to challenge as to constitutional validity at the trial of the new offense.

What do you challenge as being constitutionally infirm about the earlier convictions? Boykin v. Alabama, 395 U.S. U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969) and Baldasar v. Illinois, 446 U.S. 222, 64 L.Ed. 2d 169, 100 S.Ct. 1585 (1980), held that you can't use a prior conviction for enhancement of a present penalty unless the court record (in Kentucky the case envelope and docket sheet) clearly shows that the defendant was represented by counsel or waived same after advice as to his right to counsel even if he could not have afforded one. Sizemore v. District Court, 735 F.2d 204, (6th Cir. 1984) applies Boykin protections to the offense of DUI. Boykin requires that the record must establish the voluntariness of a guilty plea and that it was entered knowingly and intelligently.

If the docket of the earlier case shows a lawyer, there is a rebuttable presumption that the proceedings were regular. If the record shows any indication of the reliability of a plea, but doesn't show all that Boykin requires, then Kentucky has taken the position that a subsequent evidentiary hearing could be held on the issue of the voluntariness of the plea or waiver of counsel. If the record is silent, then a new trial is the proper recourse (assuming here a challenge being made directly to the action which was infirm.)

Ratliff v. Commonwealth, Ky.App., 719 S.W.2d. 445 (1981) applies the above principles to Kentucky DUI law, and contains a good discussion of the procedural hoops.

If the court record on the prior convictions shows no indication of compliance with the Boykin rights, then you should file a pretrial motion to suppress evidence of prior convictions and it would appear that no verification of facts is necessary. If there are indications of compliance, your proof must show those things that make the earlier plea or conviction invalid, such as lack of counsel.

You can also file motions in the earlier case itself. You can file a CR 60.02 motion in the court of the first conviction. CR 60.02 is made applicable to criminal cases by RCr. 13.04; the grounds are varied and challenging, such as newly discovered evidence, which might permit new proof as to old breath testing machines. Under Gross v. Commonwealth, Ky., 648 S.W.2d 953 (1983), CR 60.02 is for relief that is not available by direct appeal and not available under RCr. 11.42 (designed for prisoners). To get an evidentiary hearing, the movant must demonstrate and affirmatively allege facts which, if true, would justify vacating the judgment, and must further allege the special circumstance that justify CR 60.02 relief.

Remember, these issues are becoming increasingly important because KRS 189A.090 enhances a "third-time no op. following DUI suspension" to a felony charge, and a felony conviction on this count raises a specter of a future PFO charge. Bizarre as it may seem, at least one defendant in Kentucky now faces an enhanced sentence under PFO I on this charge (Commonwealth v. Skaggs, Rowan Circuit Court, Indictment Number 87-CR-046).

ARE ROADBLOCKS LEGAL?

Only if indiscreet. In Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 660 (1979) the United States Supreme Court ruled that as long as officers did not exercise "discretion" that a roadblock would be legal. When all vehicles are stopped, the roadblock is clearly constitutional. Kinslow v. Commonwealth, Ky.App., 660 S.W.2d 677 (1983). Look for situations in which the police person makes up his mind whom to stop. Also throw motorist inconvenience, danger from bad lighting, danger to and from approaching motorists, and all such at them.

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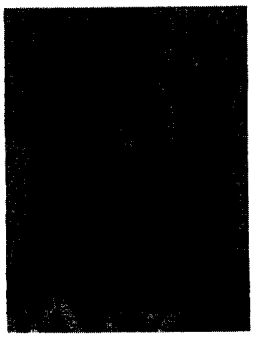
6th Circuit Highlights



Donna Boyce

Cooper v. Sowders

While errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding, the Sixth Circuit Court of Appeals recently reversed a case where the cumulative effect of such errors resulted in a denial of fundamental fairness. Cooper v. Sowders, ___ F.2d ___, 17 SCR 3, 13 (January 21, 1988).

The Court found that the admission of a police officer's opinion-testimony was fundamentally unfair because it had a direct influence on the jury's consideration of Cooper's guilt or innocence. The officer was permitted to testify that in his opinion all of the evidence pointed to Cooper as perpetrator of the crime and such evidence as there was against other suspects was insufficient to justify their arrest. This opinion improperly suggested to the jury the guilt of Cooper and the innocence of other suspects. The Court also found the trial judge's comments to the jury concerning the competency of this officer's opinion and his description of the officer's opinion as "expert" to be clearly impermissible and highly prejudicial.

Finally, the Court ruled that Cooper was denied a fair trial when the trial court allowed a police informant to bolster his credibility by answering questions concerning his testimony and his "reliability" in other cases. The Sixth Circuit rejected the Kentucky Supreme Court's and the district court's conclusion that this error was non-prejudicial in view of the other evidence of guilt. The Court found this to be a close case in which much of the evidence appeared to be questionable.

The Sixth Circuit concluded that when considered cumulatively, these errors produced a trial setting that was fundamentally unfair.

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LEXINGTON HERALD-LEADER, LEXINGTON, KY., SUNDAY, MARCH 6, 1988 ★

Man to be retried in 1981 slaying

Herald-Leader staff report

A Lexington man whose murder conviction in the 1981 stabbing of a Lexington cabdriver was overturned will be retried, a Fayette County prosecutor said yesterday.

Joseph Cooper, 31, on Friday asked Fayette Circuit Court Judge L.T. Grant to release him from prison on his own recognizance. Grant denied the request.

Cooper was sentenced to life in prison after being convicted of the murder Nov. 11, 1981, of Amon Joseph. A driver for Holiday Cab, Joseph was stabbed to death on Della Drive by a passenger he had picked up moments earlier at the Hyatt Regency Hotel.

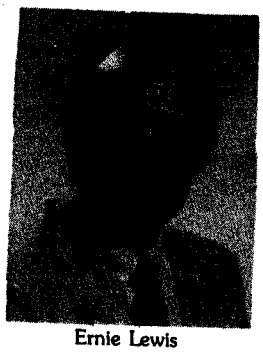
Cooper appealed on the ground that he had not received a fair trial. In January, after two other courts had upheld the conviction, a three-judge panel of the 6th U.S. Circuit Court of Appeals overturned it.

The federal appeals court said the state had to retry Cooper within 90 days or release him. Assistant Fayette Commonwealth's Attorney Mike Malone said yesterday that every effort would be made to retry Cooper before the deadline.

Malone said three witnesses were crucial for the trial. "Two of those, we know where they are," Malone told Grant. "The third, I think we can find."

Plain View

Search and Seizure Law and Comment



Ernie Lewis

The shakedown. The mail search. Body cavity searches of visitors. Contraband found in the middle of Oreo cookies. Pat-downs during a home inspection by a parole officer. These words are common parlance to the criminal defense lawyer. To the Corrections expert, they represent necessary tools in the effort to maintain secure institutions. To many men and women convicted of crimes, however, they represent the extent to which their very privacy has been invaded and virtually obliterated.

Does the 4th Amendment and Section 10 apply to people once they have been convicted of crimes? Or does a criminal conviction mean that so long as a person is either incarcerated or even on probation or parole, they have no 4th Amendment rights?

Federal law is virtually all there is on the privacy rights of inmates and parolees. No Kentucky case law could be found in this area, other than one recent parolee search case. That does not mean, however, that practitioners should press only 4th Amendment claims. Indeed, because the law in this area is so bad, Section 10 should be used at every opportunity.

Historically, the 4th Amendment has rarely been applied to jails and prisons, with Courts taking a "hands-off" attitude. Lanza v. New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed. 384 (1962) expresses the most common view of the courts: "It is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an officer, or a hotel room. In prison, official surveillance has traditionally been the order of the day." Id., 8 L.Ed. 384 at 388.

Yet, for a time following Lanza, there were some Courts that recognized the rights of privacy of prisoners. "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Wolff signified to many that the hands-off approach would no longer keep jails and prisons off limits to the demands of the 4th Amendment. Courts began to hold that inmates did have at least a limited expectation of privacy even though they were incarcerated. See, for example, Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975).

However, the promise of Wolff has never been realized. Instead, in case after case over the past decade, the Court gives all indications of returning to the hands-off approach of by-gone days. In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Court held that room searches and body cavity searches of pretrial detainees was reasonable. The Court implied that a pretrial detainee may have no rights under the 4th Amendment. "[I]t may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the 4th Amendment provides no protection for such a person." Id., 60 L.Ed.2d at 480. Body cavity searches of pretrial detainees "gives us the most pause," Id. but were nevertheless termed reasonable. Such searches, on the other hand, shocked the conscience of Justice Marshall in dissent.

In 1984, the Court reaffirmed Bell v. Wolfish, supra, this time holding that pretrial detainees have no right to observe shakedown searches of their cells by guards. Block v. Rutherford, 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984).

It was not until Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), that the Court fully evaluated the 4th Amendment rights of inmates and detainees. There, the Court, in the context of a civil rights suit, in essence held that inmates have no 4th Amendment privacy or possessory rights. In an opinion by Chief Justice Burger, joined by four others, the Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the 4th Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." Id. 82 L.Ed.2d at 403. Despite

articulating a balancing between the interests of the inmates and prison, the Court establishes a bright line rule favoring prison administrators. "[I]t would be literally impossible to accomplish the prison objectives identified above if inmates retained a right to privacy in their cells." Id.

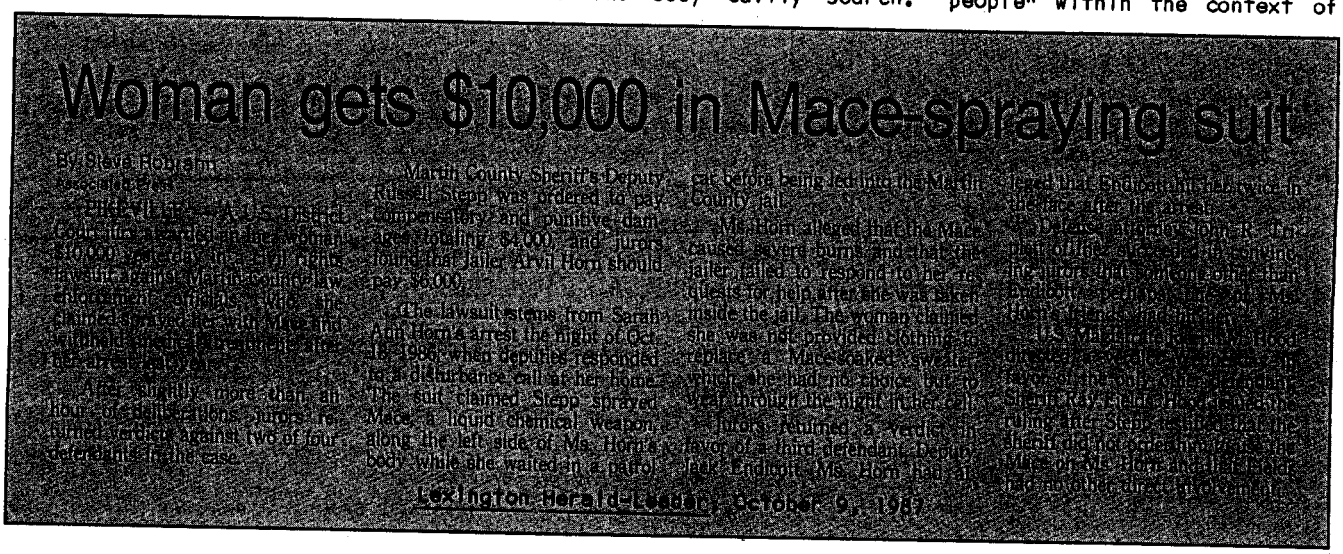
The key to understanding Hudson is that the case was before the Court on the pleadings. The inmate was alleging searches and seizures conducted in order to harass. The Court assumed that the searches involved were conducted for the purpose of harassment. Such harassment searches in a prison context comported at least with the 4th Amendment. In concurrence, Justice O'Connor wrote that because "the exigencies of prison life authorize officials indefinitely to dispossess inmates of their possessions without specific reason, any losses that occur while the property is in official custody are simply not redressable by 4th Amendment litigation." Id. at 411. (Emphasis Added)

Justice Stevens authored the four-justice dissent. He went to the heart of the majority opinion when he noted that according to the majority, "no matter how malicious, destructive, or arbitrary a cell search may be, it cannot constitute an unreasonable invasion of any privacy or possessory interest society is prepared to recognize as reasonable." Id. at 413. The dissent would have carved out a "residuum of privacy" whereby inmates' cells could contain small possessions, such as pictures or letters, outside the arbitrary reaches of the administration. These possessions, Stevens notes, "may mark the difference between slavery and humanity" in the context of a prison. Stevens also predicts the self defeating nature of the Court's rule. "Sociologists recognize that prisoners deprived of any sense of individuality devalue themselves to others and therefore are more prone to violence towards themselves or others." Id. at 420.

Criticism of the Court's "bright-line" rule in Hudson v. Palmer, supra, has been strong. Some commentators have criticized the Court for engaging in a balancing test with one thumb firmly planted on the side of the executive branch. "[I]f there is any prison security interest in conducting the search, then the search is reasonable. The result is a low standard of review." 56 Cincinnati Law Review 740 (1987). That same commentator called for the use of some standard of review of at least the most egregious of searches, such as the body cavity search. There, if any other reasonable alternatives to such searches exist, such as using metal detectors, then the more intrusive search would not be allowed.

A second criticism of the decision has been that Hudson v. Palmer, in establishing a bright line rule, "rejected the clear consensus among the courts of appeals that the 4th amendment provides some limited protection against search of prison cells." 98 Harvard Law Review 151 (1984).

Most of the criticism of Hudson v. Palmer has been that it has reduced the dignity of all persons incarcerated. Borrowing from Steven's dissent, one critic noted that the decision would "undercut any constructive value that our prisons may have, for '[I]t is anomalous to provide a prisoner with rehabilitative programs and services in an effort to build self-respect, while simultaneously subjecting him to unjustified and degrading searches and seizures.'" 38 Rutgers Law Review 287 (1986). Another states that the net effect of the opinion is "to destroy any remnant of dignity that the individual prisoner might hope to retain." 32 Houston Law Review 1065 (1985). One critic wondered whether prisoners had been removed from "the people" within the context of the



Woman gets $10,000 in Mace-spraying suit

Lexington Herald-Leader, October 6, 1987

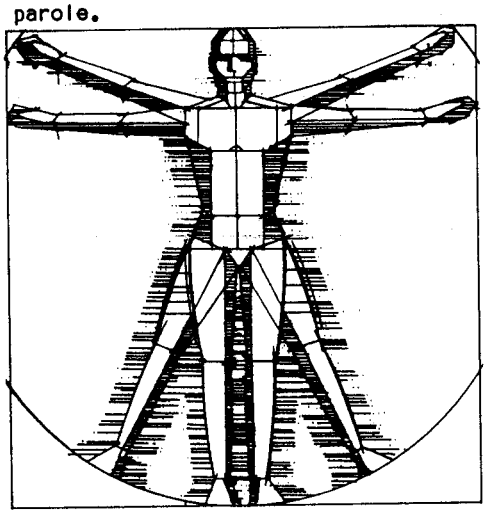
4th Amendment. 38 Rutgers Law Review at 287.

Taking the 4th Amendment out our prisons and jails is chilling enough, particularly in the context of the abusive or harassment search. Even more disturbing is the implication for further development of 4th Amendment law. "Hudson is significant not as a prisoner's rights case, but as an articulation of an important 4th Amendment principle of broad applicability: namely, that the 4th Amendment does not apply whenever it would be 'literally impossible' to reconcile individual privacy with legitimate governmental objectives." Id. at 338.

It is clear, then, following Hudson v. Palmer, that inmates in our jails and prisons have little or no rights under the 4th Amendment while they are incarcerated. Egregious searches may not be redressed, other than perhaps in state court. More significant perhaps for the defense lawyer is that evidence recovered from such searches leading to additional charges will usually be admissible during later administrative or criminal proceedings.

Another large segment of the inmate population are those who have been released from jail or prison under probation and parole, and are under supervision by a probation or parole officer. Their rights to be free from unreasonable search and seizure have taken a parallel course over the past 25 years.

Traditionally, courts took a hands-off approach to persons searched by their parole or probation officer. Persons on probation or parole have been viewed as being constructively still under custody, and thus without any privacy rights. Others viewed probation or parole as an act of grace; under this theory, a parolee had no room to gripe if unreasonably searched because he had no right to be free in the first place. Still other courts focused on the parolee's having waived all rights as a condition precedent of probation or parole.



In the mid-1970s, as indicated above, the Courts appeared to be prepared to liberalize the rights of prisoners and parolees. The theories above justifying a lesser treatment of parolees were discredited in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). "Although the parolee is often formally described as being 'in custody' the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody." In response, some Courts required warrants prior to parole officers being allowed to search parolees' homes and persons, United States v. Bradley, 571 F.2d 787 (4th Cir. 1978), although under a less vigorous standard. The government's interest was viewed there as only "diminishing the vigorousness of the standard of cause which the parole officer must satisfy to obtain a warrant, not of removing the judicial protection which the warrant requirement interposes between the parole officer and the search." Id. at 790. Other courts have adopted a similar reasonableness level of suspicion while eliminating the requirement for a warrant. United States v. Scott, 678 F.2d 32 (5th Cir. 1982).

This past summer, the Court addressed the parolee search question in Griffin v. Wisconsin, 483 U.S. ___, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). The Court did not go as far as the Hudson Court had thereby recognizing the difference between prisoners and parolees. On the other hand, the Court recognizes that persons on probation and parole are different from ordinary citizens and that because of that, the warrant requirement with the attendant probable cause standard would not be used in parolee searches.

Instead, the Court held that parolees and probationers could be searched without a warrant so long as such searches were conducted pursuant to a written state search policy under a reasonableness standard. The Court analyzed these searches under the burgeoning category of "special needs" searches such as schools and government offices.

The dissenters were splintered. Justice Blackman and Marshall would have required searches to be done with a warrant using a standard less than probable cause. Justice Brennan joined the other two in chiding the majority for pretending that parolee searches were of assistance to the parolee. "If anything the power to decide to search will prove a barrier to establishing any degree of trust between agent and 'client.'" Id. at 726.

The Court has spoken definitively on these areas of prisoner and

parolee searches. Counsel should be aware of the bright line rule established in Hudson v. Palmer, and further aware of the Griffin v. Wisconsin holding. Counsel should not, however, assume there is nothing to be done when confronted with an inmate or parolee search.

Counsel should look to Kentucky law to take cases out of Palmer and Griffin. Section 10 is unique, and has often in the past provided greater protections than the 4th Amendment. Further, there are at present at least no written policies governing parolee searches, and thus arguably Griffin at least is inapplicable.

Commonwealth v. Elliott, Ky. App., 714 S.W.2d 494 (1986), a parolee search case, was analyzed from a traditional 4th Amendment/Section 10 basis. No special parolee search rules were allowed. Indeed, Griffin is not even cited. Thus, counsel should always look to Kentucky law first.

Counsel should be aware that there are written policies and procedures governing prison searches, Corrections Policy No. 9.8, promulgated June 1, 1986, among other things, establishes that all "inmate areas are subject to a search at any time," and that all "inmates are subject to searches by any officer at any time." Strip searches are authorized upon "reasonable suspicion that the inmate to be strip searched is carrying contraband." Body cavity searches can only be conducted "when there is reasonable, specific and articulateable suspicion that the inmate is carrying contraband in the cavity." "Repeated searches" of inmates or their cells "as a method of harassing the particular inmate" are prohibited. Pat-down and frisk searches may be conducted at almost any time. Counsel with a prison or jail search should seek to obtain copies of the applicable rule.

Secondly, counsel should watch for any search involving egregious or harassing behavior on the part of guards or parole officers. While Palmer seems to take the Court out of prison and jail searches, it is at the point where the institution is most oppressive that Palmer is most vulnerable. See Bonity v. Fair, 804 F.2d 164 (1st Cir. 1986). In this context, the 8th Amendment cruel and unusual punishment clause should be used to fight the most oppressive of prison and jail searches.

Counsel should also be alert to any search which singles out a particular inmate, where regular procedures or randomness are abandoned. Further, Professor LaFave calls for a substantial showing of necessity for any search which involves a bodily intrusion or stripping.

If the parolee search is conducted with no grounds of suspicion, counsel should look past whether it was done according to written parole conditions. United States v. Johnson, 722 F.2d 525 (9th Cir. 1983). Further, if it is clear the parole officer is no more than a stalking horse for the police who report or direct the search. Smith v. Rhay, 419 F.2d 160 (9th Cir. 1969), then the search again is vulnerable to attack.

Counsel should further try to use the model criminal justice standards for searches of inmates and parolees. For example, those standards in the context of inmate searches would require for more than that contained in Palmer. These standards are listed in 14 Amer. Crim. L. Rev. 377 (1977), and in LeFave, Search and Seizure: A Treatise on the 4th Amendment. (1987). Also, don't overlook using other grounds to challenge the seizure of material, for instance, the attorney-client privilege.

Above all, defense attorneys need to adopt a "hands-on" policy towards prison and parolee searches. Some of the greatest invasions of privacy can occur in the context of these searches. Much evidence can be obtained which can be extremely harmful to our clients. All this calls for us to handle these searches much as we do other search cases, and use existing law and our imaginations to try and limit the power of the state to invade our client's privacy.

The Short View

1) Update on the attack on the exclusionary rule. A majority of the Supreme Court has supported, if not the abolition, a significant diminution of the exclusionary rule. That majority has decried the exclusion of evidence as too harsh a sanction for the errors of police and magistrate. The irony of this has been pointed out by Justice Brennan in his dissent to **Taylor v. Illinois**, 42 Cr.L. 3042 (1/25/88). There, the Court held that excluding defense proferred evidence was a proper sanction for a lawyer's failure to comply with discovery rules. Justice Brennan noted that "[i]t seems particularly ironic that the Court should approve the exclusion of evidence in this case at a time when several of its members have expressed serious misgivings about the evidentiary costs of exclusionary rules in other contexts. Surely the deterrence of constitutional violations cannot be less important than the deterrence of discovery violations. Nor can it be said that the evidentiary costs are more significant when they are imposed on the prosecution. For that would turn on its

head what Justice Harlan termed the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" Id. at 3052.

2) **Ramirez v. Webb**, 835 F.2d 1153 (1987). Here, INS agents searched pursuant to a warrant for aliens in a barn owned by the plaintiffs. The district court ruled for the plaintiffs in a Bivens action for damages, saying the INS agents should have been aware the warrant was insufficiently particular in describing the place and the persons to be searched. The 6th Circuit reversed saying there was probable cause to search the entire barn and not just that portion of the barn where aliens were living. The Court further held the INS did not have to be specific about the persons to be searched, because of the special needs of the INS;

3) **State v. Ramirez**, Wash., 746 P.2d 344 (1987). Because the use or possession of marijuana is a misdemeanor, police officers may not break into a hotel room without a warrant despite their smelling marijuana emanating from the room;

4) **United States v. Vasey**, 834 F.2d 782 (1987). Vasey is picked up for speeding. After finding a pending arrest warrant, Vasey was placed in the car under arrest. 30-45 minutes later, the police searched the car and found 3 kilograms of cocaine. Despite the so-called "bright line" rule of New York v. Belton, 453 U.S. 454 (1981), which allows for warrantless car searches incident to a lawful arrest, the Court found the search to be in violation of the 4th Amendment. The Court held that a search of a car 30-45 minutes after arrest, when the arrestee is handcuffed and no longer a risk, cannot be justified by the rule in Belton and Chimel v. California, 395 U.S. 752 (1969). This case represents a common sense limitation on the fiction represented by Belton;

5) **Zimmerman v. Commonwealth**, Va., 364 S.E.2d 708 (1988). Where the police learn the identify of a defendant following an illegal arrest, leading to other charges, the identity must be suppressed as fruit of the poisonous tree;

6) **Mitchell v. State**, Ark., 742 S.W.2d 895 (1988). An anonymous person called the police and told them that a body could be found in a house. The police, unable to find the house, went to a similarly named street. Despite a neighbor telling them nothing unusual had occurred, the police entered the house without a warrant, finding the defendant and a body. Because of the anonymity of the caller and the non-existence of the address given by the caller, there was no probable cause. Thus, evidence discovered as a result of the illegal entry and search, and the defendant's arrest, had to be suppressed;

7) **State v. Milligan**, Ore., 748 P.2d 130 (1988). Taking blood from a person, against whom probable cause exists to believe he has been driving under the influence, does not require an arrest prior to taking a blood sample. This rejects the contrary position taken by United States v. Harvey, 701 F.2d 800 (9th Cir. 1983).

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16TH ANNUAL PUBLIC DEFENDER TRAINING SEMINAR

The 16th Annual Public Defender Training Seminar will be held June 6 and 7, 1988 at the Quality Inn - Riverview Hotel in Covington, Kentucky. On Sunday, June 5th there will be the Supreme Court Review, a variety of simultaneous presentations, and dinner and fun at the Oldenburg. Topics for the seminar include:

- The Parole Board
- Half Truth in Sentencing
- Alternative Sentencing
- Attorney Sanctions in Criminal Cases
- Interviewing
- Theory of the Case
- Recusal of Trial Judges
- Defending in Sexual Abuse Cases
- Ethics
- DUI
- Juvenile Law
- Death Penalty
- Self Defense

The faculty for the seminar includes:

Dr. John C. Ruhnka — Frank Llewellyn
Chief Justice Robert Stephens — Vince Aprile
Tony Natale — Frank Heft, Jr.
Dr. Ralph Underwager — Tim Riddell
Hollida Wakefield

For further information, contact Ed Monahan (502) 564-8006

Trial Tips

For the Criminal Defense Attorney

Getting another chance

Alternative sentencing can give a break to both the defendant and society

by Michael A. Kroll

The defendant stood nervously before U.S. Northern District Judge Marilyn Hall Patel. He was being sentenced for a string of unarmed bank robberies that netted him $5,000 in five days.

With two prior convictions, a stretch at the federal prison on Terminal Island in Southern California, two years in a drug diversion program and a 15-year heroin habit, the 36-year-old defendant was a prime candidate for prison.

"I reviewed both reports, the bound one and the unbound one," Patel said in court with a wry smile. The unbound copy—a probation report—is what routinely guides judges in setting sentences for criminals. The bound volume was prepared by a private alternative sentencing group, the San Francisco office of the National Center for Institutions and Alternatives (NCIA).

Although both reports reached similar conclusions, the alternative sentencing report was more comprehensive, and Patel adopted its recommendations. The defendant was ordered to stay at a long-term drug treatment facility, make full restitution, donate his services as a chef, speak before young adults about the dangers of drugs, submit to random urinalysis testing after completing the treatment program and find employment.

Patel hung a 10-year suspended sentence over his head. "I don't get any pleasure in sending someone to prison," Patel said to the defendant. "But if you fail this time, I'll do it. I want you to succeed on this, but I also mean business."

Alternative sentencing reports like the one used by Patel are showing up with greater frequency in criminal courts in California and around the country. The current and unprecedented prison crowding and an overburdened probation system have spawned a growth industry in private organizations appearing under the general rubric of alternative sentencing advocates. These organizations, which range from one-man operations to nationwide services, work directly with defense attorneys to develop individualized, highly structured sentencing plans for convicted criminals.

Robert James Birle

Casey at bat

Casey Cohen is an example of the one-man operation that goes to bat for defendants and their attorneys. In 1977, Cohen became California's first "sentencing consultant." A Los Angeles County probation officer for 13 years, Cohen has now established a reputation for thoroughness and independence. Perhaps because he has been in it longer than anyone else, he views with skepticism some of the later entrants to the field. "Some people who come into the business can't discriminate between cases that deserve an alternative sentence and those they should reject. If you take every case that comes along, it will discredit you."

Former San Diego Mayor Roger Allan Hedgecock, convicted of perjury and failure to disclose campaign contributions, was well-suited for an alternative sentencing proposal. The recommendation for his sentence—consisting mostly of community service—was prepared by Alternative Sentencing Resources, Inc. (ASR) of San Diego.

Michael A. Kroll is a free-lance writer based in Oakland.

Court Perspective

About 85 percent of ASR's work consists of preparing sentencing proposals; the remainder involves bail hearings and other pre-plea investigations. Alternative Sentencing Resources handles between 100 and 120 cases a year, mostly felonies. Like Cohen, ASR Director Michael R. McNew started out as a probation officer. "Most probation officers do a good job," he says, "but there is a lot of burn-out. And, in the 10 years I worked as a PO, I also saw my share of bad probation officers."

While most of the new organizations are for-profit, the NCIA is not. Founded in 1979 in Alexandria, Virginia, by Jerome Miller, former juvenile corrections commissioner of Massachusetts, the NCIA is a national organization and the largest alternative sentencing service operating in California. As a research and advocacy group, NCIA's principal function is preparing alternative sentencing reports. Its service is based on three principles: numerous and effective controls on a defendant, significant restitution and punishment.

There is also an acknowledged prejudice that guides NCIA: Prisons do not and cannot meet society's legitimate demands for public safety nor the desperate needs of offenders for education, treatment and feelings of self-worth.

This anti-prison bias is the source of some criticism. Cohen, for example, finds this "political point of view unrealistic in these times." But Joel Sickler, NCIA's western regional administrator, says having a bias is not the same as having blinders.

"When we determine that a client is either ineligible for probation or for a local-based program," he says, "we make no recommendation at all. Instead, we present mitigating circumstances to lessen the prison time meted out. We'd consider anyone who is a danger to the community ineligible—if the propensity is there to continue to commit violent crimes."

Alternative sentencing groups may differ in size and point of view, but their methods are similar. After an attorney contacts the sentencing organization, a case developer interviews the client, consults the attorney, and gathers pertinent information from the family of the defendant, the victims of the crime, the probation officer—indeed, anyone with knowledge of the defendant. In addition to a summary of a client's employment history and education, the report provides a full criminal record; identifies emotional, behavioral, medical or other problems; and defines the client's skills and abilities.

Tailored plans

Plans prepared by alternative sentencing services are tailored to

Sentencing Alternatives in Kentucky

The Division of Probation and Parole within the Corrections Cabinet has initiated many programs during the past four years in response to the ever-increasing prison population problem. While public reaction to the crime rate has influenced stiffer penalties for criminal offenders, prison bed space has not been expanded to meet the demand.

One of the major problems which face community corrections has been our inability to educate the public that it is punitive to the offender and many restrictions are placed on them. Community supervision of selected offenders allows, in many cases, restitution to the victims of crime, fines, and supervision fees that are paid into the state treasury. In 1987 clients under supervision by this division paid $793,646.84 in restitution, $280,213.22 in supervision fees, and performed 109,451.81 hours of court imposed community service work valued at $366,663.56.

One of our most successful efforts has been the intensive supervision program. This program is located in 21 sites with a staff of 32 officers. Inmates within twelve months of their parole eligibility who meet the program criteria are eligible for early release to the program. Defendants who have been sentenced to an institution who meet the program criteria are eli

(Continued on Page 31)

fit the individual. Beyond identifying problems—as probation officers do—the sentencing services focus on detailed solutions. The NCIA, for example, will contact a therapy center and reserve a slot for the client in case the court accepts the plan. Plans generally include some or all the following: residential or out-patient treatment for medical or psychological problems, community service, financial restitution, employment, education, supervision and third-party monitoring.

To be effective, the alternative sentencing groups say they should be involved at the start of a criminal proceeding. "We get our best results when we get a client right after arrest," says Sickler. "We'll start digging up background for the bail hearing. We'll structure a release plan for when he's out on bail that addresses his criminal behavior, like getting him into Alcoholics Anonymous or Gamblers Anonymous. We'll get him back on the job working, so by the time of sentencing eight or 10 months down the line, not only can the client begin to pay restitution, but we've established a track record for the court."

'The case loads make probation like a cafeteria service.'

Many criminal lawyers have been impressed by sentencing advocacy groups. When Patel adopted the NCIA's recommendations, for example, the defendant's attorney, Dennis Roberts of Oakland, stood up and said, "I want to thank [NCIA's Vincent] Schiraldi, Your Honor. I consider myself good at sentencing, but he put me to shame. He put in incredible hours." Later, after leaving the courtroom, Roberts said Schiraldi, who charged $50 an hour, put in four times as many hours as he billed.

California Attorney General John Van de Kamp believes the private providers can operate in ways the probation department cannot. "The case loads make probation like a cafeteria service," he says. "There's very little personal contact on a direct basis."

Los Angeles attorney Mark Overland, author of *The Complete Sentencing Handbook* (California Attorneys for Criminal Justice, 1979), agrees. "These groups are a lot more thorough than probation, which is not only limited by a huge case load, but also by rules and regulations."

But Overland faults lawyers as much as the probation system. "There's nothing magical about these groups," he says. "If lawyers were doing their jobs, there'd be no need for them. In 75 percent of the cases you handle, sentencing

(Continued from Page 30)

gible for the program via shock probation if the circuit judge grants release to the program. Officer caseloads are limited to 25 clients.

The offender has strict reporting guidelines and a 10 p.m. to 6 a.m. curfew which is vigorously enforced. Unlike other states' intensive programs, Kentucky's allows probation and parole officers to administratively transfer technical violators to intensive supervision in lieu of revocation.

Through the first two years of this program the failure rate has been only 17 percent (15 percent technical violations, 2 percent new convictions). This is one of the highest success rates of any intensive program in the country.

As a result of the success of the intensive supervision program, the 1986 General Assembly funded the Advanced Supervision Project. This project offers a level of supervision between intensive and maximum. Circuit judges can probate directly to advanced supervision, and officers may also transfer technical violators to this level in lieu of revocation.

Advanced Supervision officer's caseloads are limited to 50 clients. There are currently 20 officers in 16 sites involved in this project. While the first year's evaluation is not complete, preliminary figures indicate a failure rate of only approximately 8 percent.

The Division of Probation and Parole is involved in a new program initiated by Mr. Dave Norat of the Department of Public Advocacy. This program will be a cooperative effort between the commonwealth's attorneys, circuit judges, Corrections Cabinet, defense attorneys, and the Department of Public Advocacy. This new program will offer alternatives to incarceration for developmentally disabled offenders in 18 counties in its initial stages. This new program will identify developmentally disabled offenders early in criminal proceedings for whom the Cabinet for Human Resources' services, other provider services, or services that can be developed are appropriate and for whom these services will serve as an alternative to incarceration.

Over the past two years we have begun in-house programming for sex offenders and substance abusers in Lexington, Louisville, and Covington, our three largest offices. Through a third party vendor, Kentucky Substance Abuse Program, Inc., we have provided services for 1,243 clients to date who are substance abusers.

(Continued on Page 33)

EDITORIAL - The "Quick Fix" Solution To Crime

As prison and jail populations continue to climb to new record highs–currently over 800,000 nationally–we see little impact on crime rates. Responses to crime other than prison need to be developed to cope with this serious problem. Unfortunately, too often the search for new options is based on the same type of thinking that led us to where we are today.

Over the past several years, we have witnessed an abundance of "quick fix" solutions to the problem of crime. One was "Scared Straight," designed to shock teenagers into refraining from crime. Now we have "electronic monitoring" or intensive probation receiving attention as the "program of the month" or year. Regardless of any merit that these proposals may have, where they fail is in their being promoted as an immediate or sole solution to a complex problem.

People do not always commit crimes for very obvious reasons. Not all stock brokers engage in insider trading, but for some reason, Ivan Boesky did. Not all poor persons commit burgularies because of their economic circumstances, but some do. Crime, like other human actions, is the result of a complex interplay of social and individual forces. And, like other human behaviors, it needs to be responded to in ways which recognize these factors.

The "solution" to crime is no more electronic monitoring than it is prison. Rather, the solution lies in attitudinal change–changing the way in which policymakers make decisions about social issues and changing the way in which local court systems view crime and punishment.

What our goal should be is a criminal justice system that is capable of responding appropriately to the individuals brought before it who have committed harms against others in their community. What we need is an approach that recognizes the suffering of victims, the needs of offenders, and the concerns of the community at large. Finally, we need a system that understands its own limitations and speaks to us about other, more effective, responses to crime from other segments of our society.

The defense-based sentencing programs for which The Sentencing Project urges consideration are but one approach to this issue. They do not replace the need for sentencing guidelines that result in less incarceration or the establishment of state policies that reward, rather than discourage, true alternatives to incarceration. Sentencing programs have demonstrated that they can reduce the use of prison in many cases. But beyond that, sentencing advocacy on a day-to-day basis is one means by which change can begin to come about in the way we approach this very complex issue. By highlighting the interplay of social and individual factors that come together to result in a criminal action, sentencing advocacy can help us to understand some of the larger questions about the purpose of our criminal justice system.

Court Perspective

is the point where you can have the most significant impact. It galls me to see lawyers come in at sentencing and look at the report for the first time. Organizations like NCIA are filling a void created by the probation departments' inadequacies and the lawyers' failure to investigate and advocate."

Unwelcome intrusions?

Some judges resent the intrusion of these groups. Overland remembers one case in which the judge would not consider anything but the probation department's report. But San Diego County Superior Court Judge Richard D. Huffman, who presided in the Hedgecock case, finds the alternative sentencing reports useful. He praises the groups' "superior training in penology and sophisticated analyses of sentencing. The real value of these groups is in their independence. When they become simply an extension of the adversary process, they lose this value."

Huffman, with 19 years as a prosecutor under his belt, is no soft-on-crime liberal. Yet he believes that probation departments are "awash with work" and that attorneys are not as helpful as they should be.

A common criticism of alternative sentencing reports is that they can be too long, especially when they duplicate the probation report. Los Angeles County's presiding judge of the criminal court, Aurelio Muñoz, complains that "at times, it's just something more to read."

Although Patel found the NCIA report "very reasonable and not doctrinaire," she faults it for overkill. "The one thing I didn't need was the long philosophical passages on the various rationales for sentencing—deterrence, punishment, restitution. I wasn't offended by it, but I didn't need it."

A weightier criticism is that the services of these private organizations, like most services in our society, benefit those who can afford them, leaving jail vacancies for the poor and powerless. "The reports are simply not available in 99 per-

cent of the cases I see because there is no money for them," Huffman complains.

Nevertheless, all the groups do take on pro bono cases. In a significant number of cases—usually those represented by public defenders or court-appointed counsel—either no fee or a substantially reduced fee is charged. For clients represented by private counsel, NCIA bills on a sliding scale, based on ability to pay.

Juvenile project

As a non-profit organization that receives most of its funding from private foundations, NCIA is better situated to reduce fees or take on pro bono work. One of its grants, for example, will allow NCIA to work with indigent juveniles in Los Angeles County for three years, seeking alternative sentencing for them when the probation department has recommended commitment to the California Youth Authority (CYA).

The juvenile project has also generated some of the harshest criticism of NCIA. "The fact is that [NCIA] is attempting to provide alternatives for youngsters our department has already recommended for placement in CYA," says Jane Martin, a bureau director with the probation department. "It means we come into court with very different perspectives." In addition, the probation department gets stuck with the consequence of something it did not recommend —it still must monitor the alternatively placed juvenile.

'There's nothing magical about these groups. If lawyers were doing their jobs, there'd be no need for them.'

Another source of resentment is NCIA's penchant for recommending programs outside the greater Los Angeles area. "I'd love for NCIA to work with the county to provide more suitable placements and to teach providers how to put together a good program here instead of going so far afield," says Judge Gabriel A. Gutierrez, presiding judge of Los Angeles County Juvenile Court.

The NCIA's Sickler can see Gutierrez's point but says the project has to use what's available. "We are trying to increase options in Los Angeles," he says. "But we're only a staff of four."

Gutierrez has an even more fundamental criticism, however. "There are some instances when minors should go to the CYA," he insists, "and some people in NCIA forget this. When their recommendations for alternative placement are not followed, they take it personally, which is an unprofessional attitude."

"I do take it personally," admits Sickler. "That may be the biggest difference between us and probation. We get to know these kids.

(Continued from Page 31)

We have counselor specialists assigned to the probation and parole offices in Lexington (1), Covington (1), and Louisville (2), who hold group and individual sessions with clients who have been convicted of sexual offenses. To date, 295 clients have been referred to this program.

Danny W. Peary
Director

Jefferson County officials have contracted with the Corrections Cabinet for a Misdemeanant Intensive Program in an effort to ease overcrowding at the detention center. Currently, there are five officers supervising caseloads of 30 clients in the program. All misdemeanant offenders sentenced to longer than thirty days in the detention center have their cases reviewed to determine eligibility for the program.

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Danny has served in his present position since February, 1984. He worked as an Assistant Supervisor in the Lexington Probation and Parole office July, 1976 - February, 1984.

Court Perspective

We want them to overcome their backgrounds, to escape the cycle of abuse and neglect that leads to prison and violence. We think of them in very personal terms."

Sickler's point goes to the very heart of the alternative sentencing philosophy. As NCIA founder Jerome Miller says, "We ought to treat offenders the way we would want our friends or family to be treated if they were in the same position—with concern and care and caution."

Peter Greenwood, who is evaluating the juvenile project for the Rand Corporation of Santa Monica, believes it is too early to judge which philosophy—incarceration or alternative sentencing—is better for society. But his study, due out in 1988, should provide some answers.

"I anticipate the Rand study is going to be very beneficial to the court," says Gutierrez. "Maybe we've been doing the wrong thing all along, and I want to know that. On the other hand, maybe it'll show we've been doing the right thing."

Right or wrong, the impact of alternative sentencing advocates on the criminal justice system is a matter of sharp disagreement. Despite the growing number of judges who follow the recommendations of alternative sentencing services or who devise their own creative sentences, the facts show that more Californians are going to more prisons for more time than ever before.

"Ninety-eight percent of all correctional dollars are going into incarceration, which doesn't leave much for anything else," says Suzy Cohen, executive director of California Probation, Parole and Correctional Association. "There ought to be enough resources and enough range in the spectrum of sanctions that every offender can get a sentence likely to serve society's good."

But what "ought to be" seems unlikely to come to pass given today's get-tough attitude. As Jack Corrie, information officer for the state's Department of Corrections, puts it, "The big picture is that people want people in prison for a longer time. We are mandated to serve the will of the people and the will of the Legislature. If they say build more prisons and put more people in longer, then that's what we'll do."

Even Suzy Cohen thinks things will get worse before they get better. "By the time we get all the prisons we say we want, and realize they are not the answer, we'll begin to notice what groups like the NCIA and probation have been saying all along: You don't punish everyone the same way.

"In the great pendulum swing of criminal justice, those advocating alternative sentences will have to stick it out for the long run to make an impact. It could take another 10 years, but when we emerge from this dark tunnel, at least we'll have a model of what could be." ❑

THE ZEALOUS ADVOCATE AS A SENTENCING LAWYER

Defense lawyers love to carry on at length about being a champion of freedom, a buffer between the accused and the accusers, a cog in the constitutional process, and champions for right and justice. With all due respect to this professional rhetoric the criminal defense lawyer in the final analysis is a sentencing lawyer.

You may get evidence suppressed, or charges reduced or some charges dismissed altogether. These things are very important, and you can and should be proud of these victories. You will sometimes win a complete acquittal and you should celebrate this with gusto.

But the bottom line is that you will usually stand beside your client at sentencing. This is not a cause for embarrassment but the reality of criminal practice. It is important that defense lawyers recognize this reality because it influences their ability to zealously represent their client throughout the proceedings.

The difficult thing about sentencing advocacy is the emotional factor - the "psych" factor - which gets in the way. This "psych" factor is the fear that preparing for sentencing, or even thinking about sentencing, reveals a defeatist attitude. Bailey and Rothblatt have written an entire book entitled *Investigation and Preparation of Criminal Cases* (2nd 3d. 1985) which contains no mention of sentencing. It is inconsistent, so the thinking goes, with zealous advocacy on behalf of the client whom you hope will be found not guilty.

Baldcrdash!

Such an attitude is little more than a cover-up for a chronic weakness of defense representation. The ABA Standards commentary notes, "[F]or the concept of the effective assistance of counsel to have meaning for the majority of defendants, sentencing must stand on a par with the trial stage." *Sentencing Alternatives and Procedures*, Chapter 18, p.438 (1986). The commentary later notes that "zealous advocacy is as necessary at sentencing as at trial." *Id.*

Good trial lawyers plan alternative strategies. Some of the alternative strategies deal with negative rulings from the trial judge or negative testimony from a witness. An attorney would be severely criticized for going into trial without a contingency plan for adverse rulings or negative testimony. It would be folly to respond that he or she

assumed that such conflicts would be resolved in the client's favor. It is completely consistent with zealous representation to be prepared for an adverse judgment.

In the best of circumstances you may have little or nothing to say at the time of sentencing. Other times your suggestions for alternative sentences will be well received by the sentencing judge. On some occasions your emotional plea for leniency may even work to produce some advantage at sentencing.

Actually, sentencing advocacy is quite easy. The key - as in so many other areas of trial advocacy - is preparation. A few simple steps applicable to most cases will make the job at sentencing far easier.

1. **Build your sentencing file from the first day.** This can be as simple as affixing a manila envelope to the file jacket and tucking scraps of paper into it as they come across your desk. Whatever physical form it takes, there should be a place for keeping all the factual information which could relate to sentencing. This may involve getting letters from employers, testimonials from the usual sources, receipts, photographs, and the like. The sooner those things are lined up the better.

2. **Remember your plea for pretrial release.** There is a precise parallel between the pretrial release decision and the sentencing decision. Think about the factors the judge weighs in making pretrial release decisions; now the factors for sentencing. Are there any differences? Well, the presumption of innocence has been replaced by a finding of guilt, but little else is changed! Everything which was relevant to the pretrial release argument should automatically go into the sentencing file.

3. **Remember that sentencing is not trial.** The rules of evidence generally do not apply at sentencing. ORS 40.015(40)(d); 137.090. Information which might be ignored or even discarded in planning for trial could be quite useful at sentencing.

4. **Channel information via the presentence report.** Present as much of your information as possible to the judge in the presentence report. *See* "Presentence Investigation Reports Become a Mandatory Part of Non-Jury Sentencing Procedures in Texas Criminal Cases," 17 St. Mary's L.J. 586 (1986). Many times the judges will have made up their minds about the sentence by the time they have completed reading the PSI; this strategy allows the defense to influence the judge during the formative period. Submit written testimonials, employment history, and restitution through the presentence report writer. The judge may discount those things when they come from you but will grant them full weight when they are in the presentence report.

5. **Submit your argument in writing.** Preferably in the same format as the PSI. The judge will review them at the same time, and you have a chance of influencing the decisions at the earlier stage. *See* A. Campbell, *Law of Sentencing*, 352-62 (Lawyers Co-Op 1978). A good sample form is found in sect. 21.41 of the Oregon State Bar CLE *Criminal Trial Procedure*.

6. **What you say in court is usually too late.** Sad though this fact may be, when you stand up next to your client at the time of sentencing to "make your pitch," the die has probably already been cast. This is especially true in cases in which the judge has a presentence report.

7. **Present creative alternatives.** A bare appeal for " leniency" is far less persuasive than a specific plan tailored for the circumstances of the defendant's situation. Judges have been known to bemoan the lack of sentencing alternatives (*see* Beckett, "Criminal Penalties in Oregon," 40 Ore. L. Rev. 1, 2 [1960]). Provide those alternatives. Consider drug or alcohol treatment, mental health or other counseling, and the like. Is there a waiting list for these programs in your community? Then find an alternative program which is immediately available. When arguing for public service as an alternative to incarceration, suggest a specific public service for which your client is especially suited; if possible, obtain an "acceptance" by the agency in advance. *See* "Getting Another Chance," 6 Calif. Lawyer 27 (Sept. 1986); "Homebodies: Sentencing System Gains Favor," ABA J. 28 (May 1986).

8. **Emphasize facts, not law.** Sentencing is generally decided on the basis of facts, not law. Facts about the crime. Facts about your client. There is a considerable body of law relating to proper sentencing. An excellent collection is in the CLE chapter on sentencing by Richard Barton in *Criminal Trial Procedure* (Chapter 21). But the main issues at the time of sentencing will nearly always be factual. That is where the advocate's emphasis must be.

by Wayne T. Westling
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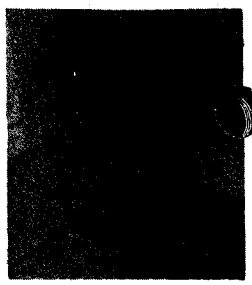
Court Designated Workers



Mike Wright

KRS 605.010 established the requirement that at least 1 court designated worker (CDW) be provided to each judicial district. The need for additional CDWs in a given district is to be determined by the administrative office of the courts (AOC). The establishment of this system of personnel was meant to assist the juvenile courts by providing a mechanism to assure the effective treatment of any child brought within the juvenile court operations. Furthermore, this CDW system was designated to provide a more equitable and efficient delivery of treatment for the child.

The definition of CDW gives one an understanding of just how they are to go about providing this "equitable, efficient delivery" of services to the child in the juvenile justice system. The CDW is defined in KRS 600.020(8) as the person or organization delegated by AOC "for the purposes of placing children in alternative placements prior to arraignment, conducting preliminary investigations, and formulating, entering into and supervising diversion agreements and performing such other functions as authorized by law...." Statutes within KRS Chapters 605, 610, 630, 635 and 645 more fully set out the duties of the CDWs and the procedures they must follow in order to give the definition in 600.020(8) meaning.

Some of the duties of the CDW include:

- receiving complaints;
- investigating all complaints involving children except for those alleging neglect, abuse and dependency;
- recommending dispositions of the complaints;
- administering oaths; and
- issuing summonses and subpoenas.

See KRS 605.030.

CDWs are prohibited from issuing search or arrest warrants, and from supervising a child following his adjudication, where that child has been committed to the cabinet (CHR) or has been placed under cabinet probation. KRS 605.040.

Within the general procedural chapter of the UJC, KRS 610, and within the more specific chapters relating to status offenders, public offenders and mental health, is found a detailed mechanism by which the CDW can perform his or her duties.

KRS 610.030 provides that whenever any person files a complaint alleging that a child falls within the purview of KRS Chapters 600-615 and 630-645, "a preliminary inquiry shall be conducted by the court designated worker...." The purpose of this preliminary inquiry is to determine whether the complaint is valid and, if so, whether "the interests of the child or the public require that further action be taken" Id. Upon determining that the complaint is valid, the CDW may conclude no further action is warranted, refer the child to an individual or social service agency, enter into diversionary agreements, refer the matter to court for informal adjustment or refer the matter for formal court proceedings. KRS 610.030(2). All of the options are available only "with notice to the complainant" and are decisions which are subject to review by the court or the county attorney. Id.

It should be noted that KRS 610.03 does not specify any guidelines which are utilized by the CDW in the performance of his or her duties. However, Susan Clary and her Juvenile Court Services staff at AOC has, and continues to develop guidelines to be used by the CDW in determining which of the statutory options of KRS 610.030(2) is most appropriate in a given case. These guidelines help to formalize the decision making process and "equalize" the treatment of children statewide. Counsel should be aware, however, that an appropriate case may give rise to claims of equal protection denial, where the preliminary inquiry of KRS 610.030 has resulted in harsher treatment for your client than for others with similar histories and offenses.

Also found in KRS Chapter 610, is the authority of the CDW to author ize the release of a child detained by a peace officer in excess of 2

hours or to authorize the continued detention of that child for up to an additional 12 hours. KRS 610.240(4). Again, the cited statute does not set out any guidelines which assist the CDW in determining whether to continue detention or to release the child. And again, Juvenile Court Services' guidelines seek to fill the statutory void, attempting to equalize treatment.

Where a person alleges the commission of a status offense, the CDW is required to conduct a conference with that person before commencing any judicial proceedings. KRS 630.050. The purpose of the conference is to determine whether the child (and his family) is to be referred to a social service agency or whether a formal complaint must be filed. If a formal complaint is issued, the full range of options in KRS 610.030(2), discussed above, are available to the CDW.

Where a complaint alleging a public offense had been made, the CDW must review the complaint to determine whether it is complete. KRS 635.010(1)(b). If it is not complete, the CDW must see that it is completed. Id. If it is complete the CDW must conduct a preliminary intake inquiry to determine whether to proceed formally with court action or whether to resolve it without the initiation of a formal petition. Id.; See also, discussion of KRS 610.30, supra. A formal conference must follow this preliminary intake inquiry, at which time, subject to review by the county attorney, a diversionary agreement may be entered into. KRS 635.010(1)(c). If a diversionary agreement is entered it cannot exceed 6 months and is subject to termination by the CDW if the child fails to honor it. KRS 635.010(1)(f) and (g).

The duties of the CDW under KRS 645, the Mental Health chapter, are limited, but nonetheless important. KRS 645.130(1) requires CDW's to maintain contact with all involuntarily committed children. KRS 645.130(2) provides that children who are involuntarily hospitalized may not be denied access to and consultation with a CDW. Access to a CDW is also statutorily provided for a child who was originally a voluntary admission but who now wishes to be released. KRS 645.030.

This duty of the CDW to keep contact with the child and the corresponding right of the child to have the contact is important because KRS 645.160(3) gives the child the right to have the CDW contact the court with the child's complaint that his or her rights under KRS Chapter 645 have been violated. Additionally, the CDW can file, on the voluntarily committed child's behalf, a notice of intent to leave. KRS 645.190. This sets in motion a process by which the hospital must either release the child or begin involuntary commitment proceedings. KRS 645.200, 645.210.

Has the performance of the statutory duties of the CDW had any measurable impact on the juvenile justice system to date? AOC statistics compiled between July and December 1987 reveal some interesting statistics. In a report dated January 28, 1988, AOC claims that 51% of public offenders taken into custody between July-December of 1987 were released by the peace officer within the first 2 hours. An additional 36% were subsequently released by the CDW under the provisions of KRS 610.240. During this same period 24% of the status offenders taken into custody were released by peace officers, and an additional 59% were released by the CDW.

Of all the preliminary intake inquiries conducted by CDW's during the last half of 1987, 56% of the public offender complaints and 61% of the status offender complaints were informally processed. And, finally during this period, of the CDW-drafted diversion agreements entered into, there was a 64% successful completion rate for status offenders and a 91% successful completion rate for public offenders.

It is difficult to gauge the precise impact active CDW involvement has had on the juvenile court system. This is true primarily because the statistics maintained by AOC before the UJC left much to be desired. However, the above-cited statistics evidence a obvious reduction in the potential caseload, the caseload to be expected if no preliminary screening was attempted.

Bill Morrison, Manager of the Foster Care Review Boards and Assistant Manager of AOC's Juvenile Court Services, says that it is "commonly accepted" across the state that the CDW program has greatly reduced the "burden on the district courts, permitting more time to be spent [in formal court

action] with the serious and repetitive offenders."

The CDW program appears then to be operating smoothly. Fewer children are being stigmatized by formal court proceedings, and more of our judicial resources are able to be directed toward the serious offender. Should the program continue to generate the impressive statistics found to date, there will undoubtedly be more opportunity for the juvenile court system to achieve the statutory goal of effective treatment for Kentucky's children.

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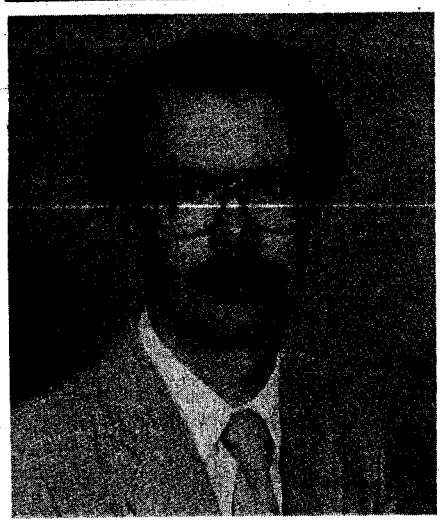
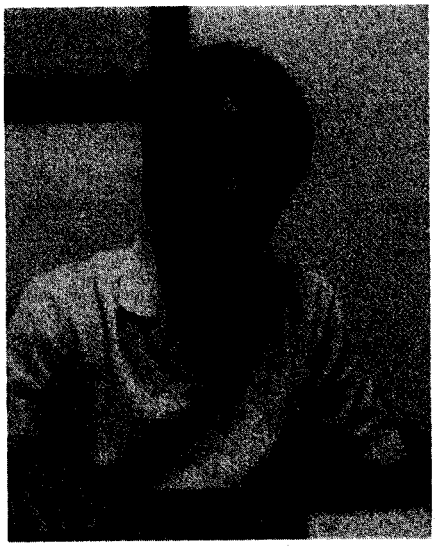
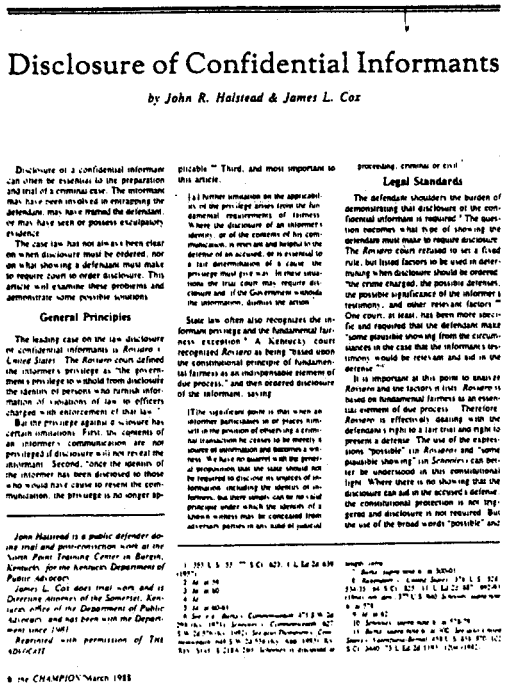


John Halstead



Bette J. Niemi

Bette J. Niemi of our LaGrange Trial Office was appointed to the Louisville Bar Association's Community Relations Committee for the 1988 term.



Disclosure of Confidential Informants

by John R. Halstead & James L. Cox

Disclosure of a confidential informant can often be essential to the preparation and trial of a criminal case. The informant may have been involved in entrapping the defendant, may have framed the defendant, or may have seen or possess exculpatory evidence.

The case law has not always been clear on when disclosure must be ordered, nor on what showing a defendant must make to require court to order disclosure. This article will examine these problems and demonstrate some possible solutions.

General Principles

The leading case on the law disclosure of confidential informants is *Roviaro v. United States*. The *Roviaro* court defined the informer's privilege as "the government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law."

But the privilege against disclosure has certain limitations. First, the contents of an informer's communication are not privileged if disclosure will not reveal the informant. Second, "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." Third, and most important to this article,

> [a] further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and if the Government withholds the information, dismiss the action.

State law often also recognizes the informant privilege and the fundamental fairness exception. A Kentucky court recognized *Roviaro* as being "based upon the constitutional principle of fundamental fairness as an indispensable element of due process," and then ordered disclosure of the informant, saying

> [T]he significant point is that when an informer participates in or draws him with in the possession of others in a criminal transaction he ceases to be merely a source of information and becomes a witness. We have no quarrel with the general proposition that the state should not be required to disclose the sources of information, including the identity of informers, but there simply can be no valid principle under which the identity of a witness to a crime may be concealed from adversary parties in any case of judicial proceeding, criminal or civil.

Legal Standards

The defendant shoulders the burden of demonstrating that disclosure of the confidential informant is required. The question becomes what type of showing the defendant must make to require disclosure. The *Roviaro* court refused to set a fixed rule, but listed factors to be used in determining when disclosure should be ordered: "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." One court, at least, has been more specific and required that the defendant make "some plausible showing from the circumstances in the case that the informant's testimony would be relevant and aid in the defense."

It is important at this point to examine *Roviaro* and the factors it lists. *Roviaro* is based on fundamental fairness as an essential element of due process. Therefore *Roviaro* is effectively dealing with the defendant's right to a fair trial and right to present a defense. The use of the expressions "possible" in *Roviaro* and "some possible showing" in *Schneider* can perhaps be understood in this constitutional light. Where there is no showing that the disclosure can aid in the accused's defense, the constitutional protection is not triggered and disclosure is not required. But the use of the broad words "possible" and

John Halstead is a public defender doing trial and post-conviction work at the Northpoint Training Center in Burgin, Kentucky, for the Kentucky Department of Public Advocacy.

James L. Cox does trial work and is Directing Attorney of the Somerset, Kentucky, office of the Department of Public Advocacy, and has been with the Department since 1981.

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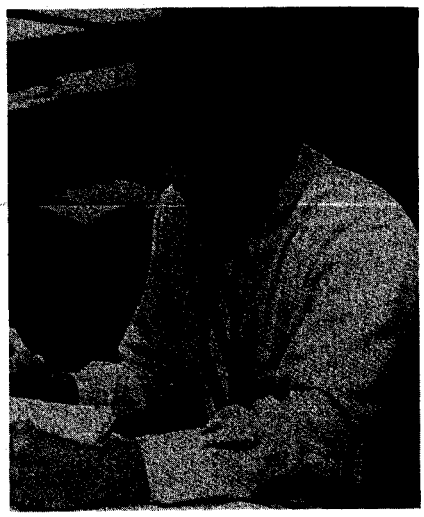


James Cox

John R. Halstead of our Northpoint Post-Conviction Office and James Cox of our Somerset Office recently had an Advocate article (February, 1987) reprinted in the NACDL's publication The Champion (March, 1988 issue). Thanks to both of you for sharing your knowledge.

Payment ordered in drug land seizure

MAYFIELD — A federal judge says the government's efforts to confiscate a Graves County farm after the landowner's husband was acquitted of growing marijuana on it were unreasonable and bordered on bad faith.

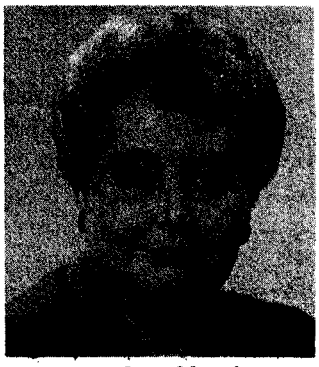
U.S. District Judge Edward H. Johnstone ordered the federal government to pay $9,582.08 in legal fees and other costs to the landowners, Mary Sue Riley of Mayfield and Jessie Riley of Memphis, Tenn.

The 12-acre farm was seized after Eugene Riley, Mary Sue Riley's husband and Jessie Riley's son, was indicted in April 1986 by a federal grand jury on a charge of growing marijuana. The U.S. attorney's office continued the civil forfeiture proceedings despite Eugene Riley's acquittal on July 31, 1986.

This case is a significant victory for all farmers. Since under the government's theory, apparently any land could be confiscated upon the mere presence of marijuana, regardless of the knowledge of the farmers as to how it got there," Allen Holbrook of Owensboro, the Rileys' attorney, said in a letter to the Paducah Sun.

Lexington Herald-Leader, July 22, 1987

Ask Corrections



Betty Lou Vaughn

TO CORRECTIONS:

My client received an eight year deferment by the parole board while serving a life sentence. After the deferment he acquired a new five year sentence which the court ordered to run consecutively to the sentence he was presently serving (which was life). When does my client meet the board again?

TO READER:

A new sentence wipes out the deferment. If the crime was committed prior to the date of his instant commitment, he will meet the board when eligible on all sentences now serving, going back to the date of instant commitment. Since he is still serving sentences totaling life, the time to serve for parole eligibility would not change. Therefore, he would immediately be eligible to meet the board on his new five year sentence. If the crime which resulted in his new five year sentence was committed while confined in the institution, then he would be eligible in one year from the date of final sentencing on the new sentence. Per 501 KAR 1:011.

TO CORRECTIONS:

My client was returned to the Kentucky State Reformatory as a parole violator with a warrant on his ten year sentence and the parole board revoked his parole. Thereafter he acquired a new consecutive sentence of five years. When his parole was revoked, he was deferred by the board for fifteen (15) months. When does he next meet the board?

TO READER:

A new sentence wipes out the deferment and he will meet the board when eligible on his new sentence only, going back to the date returned as a parole violator with a warrant, adding one year, and subtracting the amount of jail credit ordered by the court on the new sentence only.

TO CORRECTIONS:

My client is incarcerated at KSR serving a five year sentence on which he has been given a serve out by the parole board. He has recently received a misdemeanor conviction of twelve months in the Oldham Circuit Court for a crime committed while confined in the institution and which was designated by the court to be served consecutively with the five year sentence he was presently serving. When does my client meet the parole board?

TO READER:

He will not meet the parole board again. The parole board only affords hearings to those individuals serving felony sentences. Your client's sentences will be recalculated, with a new total time to serve of six years, minus statutory good time, minus jail credit on the five year sentence, minus any meritorious good time previously earned, to determine his new conditional release date.

All questions for this column should be sent to David E. Norat, Director, Defense Services Division, Department of Public Advocacy, 1264 Louisville Road, Perimeter Park West, 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) 564-8006.

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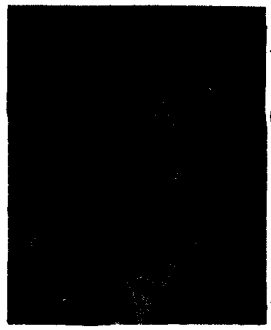
Cases of Note...In Brief



Ed Monahan

Ex Parte Hearing/
Funds for Experts
McGregor v. State,
733 P.2d 416
(Okla.Ct.Crim.App. 1987)

The Court addressed head on whether an ex parte hearing was constitutionally essential when there was a request for funds for experts by an indigent defendant:

> The intention of the majority of the Ake Court that [the threshold showing] hearings be held ex parte is manifest....
> Id.

McGregor noted the reason why ex parte hearings were so critical:

> We are compelled to agree with the petitioner's assertion that there is no need for an adversarial proceeding, that to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants.
> Id.

Kentucky has a statutory recognition of ex parte proceedings, "no court can require notice of a defense prior to trial time." KRS 500.070(2).

Funds for Hypnosis Expert Required
Little v. Armontrout,
835 F.2d 1240 (8th Cir. 1987)

The defendant was convicted of rape and burglary and sentenced to 25 years in prison. His defense was alibi. The victim saw her assailant for between 2 and 60 seconds. Her memory was enhanced by hypnosis administered by a police officer who'd had a 4 day course in the art. An audio tape of the session with the police officer and victim was made, and conveniently destroyed 15 days later.

The state public defender's request for funds to hire an expert in hypnosis was overruled. The Missouri Supreme Court affirmed this denial under peculiar rationale: "...there is a state university in Cape Girardeau with a psychology faculty and library facilities, and we are confident that a resourceful lawyer would not be helpless in obtaining expert information sufficient for a preliminary inquiry, at little or no expense."

The 8th Circuit in an en banc decision determined that the rule of Ake should be applied when the expert is not a psychiatrist and when the case is not capital. It also looked at the "perils of hypnotically enhanced testimony" and concluded that "it is clear that an expert would have aided [the defendant] in his defense":

> **Given these perils of hypnotically enhanced testimony, it is clear that an expert would have aided Little in his defense. The expert could have pointed out questions asked by Officer Lincecum which were suggestive or could have caused confabulation. The expert could have presented the limitations of hypnosis, and explained theories of memory. This would probably have had far more impact on the judge at the suppression hearing and the jury at trial than Little's lawyer's attempts at impeaching the state's expert by reading from one of the psychology textbooks he found at a college library, or using information developed from interviewing a professor of psychology. As Justice (then Chief Judge) Cardozo once stated, a defendant is "at an unfair disadvantage if he is unable because of poverty to parry by his own [expert] witnesses the thrusts of those against him." Reilly v. Berry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929). The State called its own expert on hypnosis to testify at the suppression hearing. It should not have denied Little a similar weapon.**
>
> Id. at 1244-45.

Forced Attorney Representation of Indigents

DeLisio v. Alaska Supreme Court,
740 P.2d 437 (Alaska 1987)

The Court held that a private attorney cannot be compelled to represent an indigent criminal defendant without just compensation since otherwise it would be an unconstitutional taking of property.

The Court went on to determine the measure of the mandated compensation to be the "fair market value of the property appropriated, or the 'price in money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy with a reasonable time allowed to find a purchaser.'"
Id. at 443.

Improper Confession

State v. Nelson,
748 P.2d 365 (Hawaii 1987)

The defendant signed a Miranda waiver form and 2 days later he again signed the form but did not check whether he wanted an attorney or not. The policeman "drew the defendant into a discussion of religion and being born again, prayed with him, read from the Bible, and performed what the trial judge characterized as an act of 'exorcism' on the defendant." Id. at 367. The Bible passage was Romans 10:9 which reads: "That if thou shalt confess with thy mouth the Lord Jesus, and shalt believe in thine heart that God hath raised him from the dead, thou shalt be saved."

The appellate court affirmed the trial judge's finding that the state did not sustain its burden of demonstrating a voluntary and intelligent waiver of counsel due to the circumstances surrounding the execution of the Miranda waiver forms. The appellate court affirmed the trial courts finding that the techniques used by the police "on an individual with defendant's obviously fragile state of mind had the effect of overbearing defendant's will."
Id. at 371.

Testimony of Expert on Confession Before Jury

People v. Hamilton,
415 N.W.2d 653 (Mich.App. 1987)

The Court held that evidence of the defendant's psychological makeup via an expert is admissible to allow the jury to evaluate the voluntariness of his statements to the police. The defendant's defense was that he did not commit the crime. The clinical psychologist's testimony was:

> Well, that he was operating psychologically at the level of a 15 year old at the time that I saw him. That his judgment was extremely poor. He did not appreciate certain consequences. That he had a strong need to impress people and to say what people wanted to hear. And that in general his approach was fantasy approach, where, although he could understand the difference between fantasy and reality, unless you really watched him very closely he said a lot of things that made him look very good but in fact had very little relationship to the truth.

Dr. Abramsky also noted the defendant had a tendency to say bad things about himself as a punishment.

Id. 654.

The testimony is admissible "as it relates to the weight and credibility of defendant's statements." As held in Crane v. Kentucky, 476 U.S. 683 (1986), questions of credibility are for the jury, and a defendant has a right to challenge a confession's reliability via an expert's testimony.

Improper Comment on Consequences of GBMI

Tyrus Mozee v. Commonwealth
(Ky.App. March 4, 1988)
(unpublished)

The defendant was found guilty but mentally ill on various charges. In his closing, the prosecutor, Mr. Gutman, urged a guilty but mentally ill verdict because, "The difference is treatment."

The Court of Appeals held this comment, even though an admonition was given, reversible error under Payne v. Commonwealth, Ky., 623 S.W.2d 867, 870 (1981) which prohibits comment to the jury on "consideration of future consequences such as treatment, civil commitment, probation, shock probation, and parole..."

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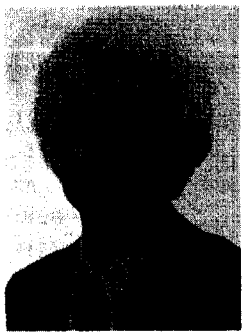
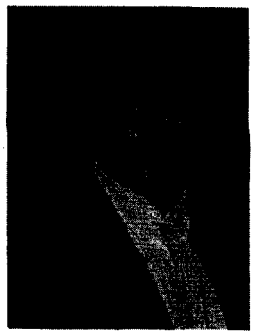


Dave Norat

A JOINT JUDICIAL, PROSECUTORIAL DEFENSE AND PROBATION AND PAROLE CONFERENCE ON ALTERNATIVE SENTENCING



Judge Daughaday

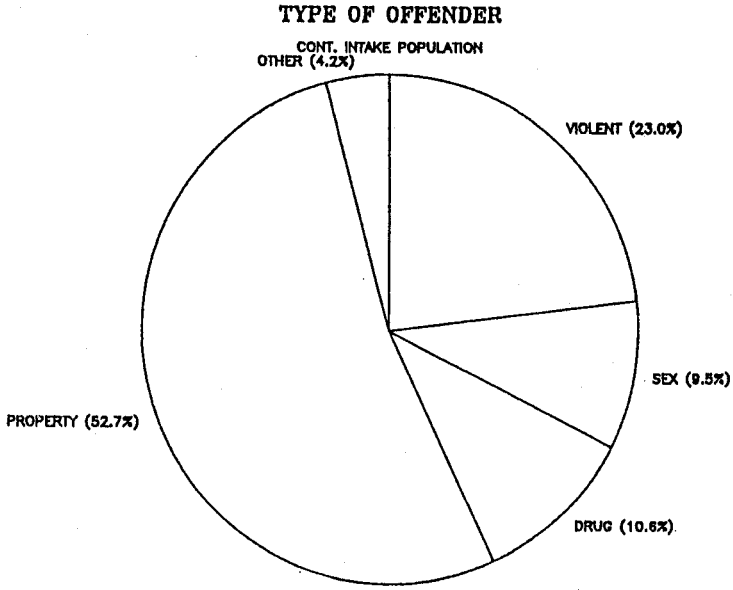
A co-review by David E. Norat, Department of Public Advocacy, and John T. Daughaday, Circuit Judge, 52nd Judicial District.

On January 29, 1988, a unique event occurred for those who work in the Criminal Justice System. Approximately 40 judges, prosecutors, defense attorneys, probation and parole officers and alternative placement workers from four different judicial districts spent the day working together to learn how to develop an Alternative Sentencing Plan (ASP). This was perhaps the first time these components of the Criminal Justice System had met to discuss in a candid fashion their concerns when sentencing a defendant. At the end of the day we learned that an ASP is not about letting someone out of jail, but about a community based approach to criminal behavior.

We learned that in fiscal year 1988 the average daily cost to citizens of the Commonwealth to house an inmate with the Corrections Cabinet is $34.67 per day or $12,654.55 annually. By 1990 the annual cost will be $14,165.65.

Corrections' inmate population for fiscal year 1988 is 7,155 inmates of which 1,508 inmates are housed in county jails pursuant to Controlled Intake. By fiscal year 1990 Corrections projects a population of 8,403 inmates.

In drastic contrast, the average daily cost of a probationer is $2.39 per day or $872.35 annually. When comparing this to the cost of confining one inmate for FY88 at $12,654.55 (This does not reflect the costs of building new prisons), the cost of incarceration is enormously more. The Criminal Justice System must look at new boundaries when sentencing.

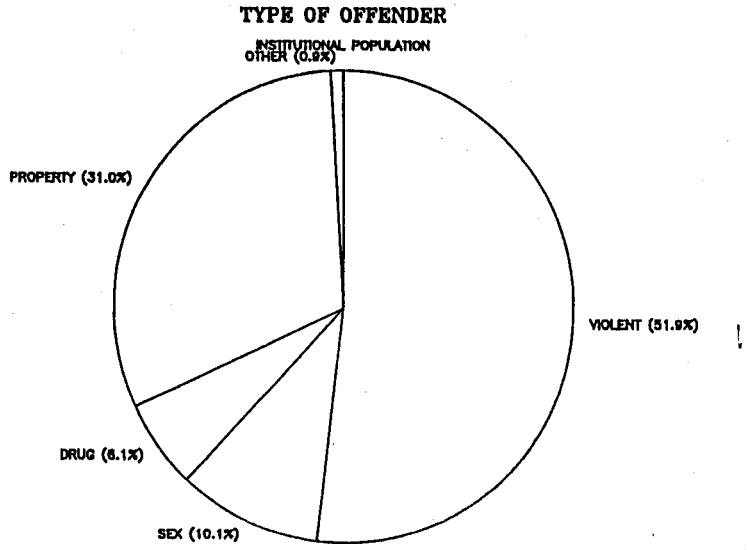


Bart Lubow, Deputy Director for the New York Division of Probation and Correctional Alternatives, one of five presenters that day, made the following observations about the Criminal Justice System and passed on for discussion his recommendations. He said the Criminal Justice System has an addiction to incarceration. We have over the last 150 years continued to rely on incarceration as our primary sanction for criminal activity.

We continue to lock people up for long periods, and then when they are released on parole and later returned as violators we blame parole. Parole has not failed. Incarceration has failed because it does not produce the kind of changes the public expects.

Corrections is about public safety. But as incarceration rates go up people do not feel more secure. Therefore shouldn't we reconsider what it is we are doing and think about other approaches? Mr. Lubow believes non-prison sentences for certain types of offenders can be more effective and better. Why? Because a defendant's specific alternative sentence involves two things:

1) More and different informati provided to the court upon which



sentencing decisions can be made, and 2) an increase in the number of options available to the court. The judge with a more comprehensive report can be more objective when sentencing.

It is Mr. Lubow's position that an objective sentence has four goals: 1) retribution/punishment, 2) deterrence - specific and general, 3) rehabilitation, 4) incapacitation. Mr. Lubow then explained how a defendant's specific alternative sentencing plan (ASP) addresses these four goals.

1) Retribution - The Criminal Justice System now has a singular approach to punishment - **INCARCERATION.** This singular approach does not fit all offenders and all offenses. Victims know incarceration does not make the victim whole again. There are approaches other than prison that can be just as punitive or more punitive to a specific defendant. For instance, community service, restitution, fines, curfew or other deprivations of liberty such as house arrest.

2) Deterrence - The threat of imprisonment has little or no deterrent effect to most defendants. Why? Because most have experienced prison once already; yet they go out and repeat other crimes. Deterrence is based on the middle class model. The people who comprise the middle class have options and are rational. Most of your public defender clients have no options and are not rational. But a specific deterrence for a specific defendant can make a difference.

3) Rehabilitation - Rehabilitation is out of favor with the criminal justice system. If that is the case then what does a judge consider when sentencing? A judge considers what factors caused the defendant to commit the crime the first time. He then considers if these factors can be removed or their influence lessened. A defendant's specific ASP can deal with these problems on an individual basis thereby removing or lessening the influence they have on the defendant. Dealing with these factors is essential if the ultimate goal is not to recycle defendants in the criminal justice system.

4) Incapacitation - Incapacitation is usually the primary goal. For the most part the types of cases that ASPs address are defendants involved in crimes with a sentence range of one to five years. In these cases incapacitation is limited - 20 percent of the sentence. A comprehensive and monitorable ASP incapacitates. An ASP keeps track of the defendant for large amounts of time. Traditional probation does not incapacitate. It does not keep track of the defendant for large amounts of time.

In conclusion Mr. Lubow stated that even with a good ASP there is no guarantee of success. The same risks exist as if the defendant were placed on parole or released by expiration of sentence from Corrections. The criminal justice system model requires that certain types of risks be taken. But risks can be reduced with an ASP that is accountable and reasonable.

Mr. Lubow then addressed the question of duplication of services when you have probation officers and pre-sentence investigations. Yes, there will be a certain amount of conflict but we must have alternative placement workers and ASPs. The criminal justice system is based on the adversarial model. Defense lawyers must be the advocate at sentencing. Probation has a different role and prosecutors likewise. This adherence to the model enables judges to make better decisions.

With this background, Paul F. Isaacs, Public Advocate, explained the Department of Public Advocacy's Alternative Sentencing Program (PAASP). (See Sentencing Alternatives in Kentucky, The Advocate, December, 1987).

Chief Judge Martin E. Johnstone, Jeferson Circuit Bench, spoke to the group about the pressures and concerns facing judges when sentencing defendants. He reminded us that Kentucky has a presumption for probation, KRS Chapter 533.010. In

listing what a judge considers when sentencing, we learned that the victim's input, what is the community attitude toward the crime, and will probation work for this defendant, are some of the concerns addressed in an Alternative Sentencing Plan.

Dennis Schrantz, Regional Director for the North Carolina Community Penalties Program, a Division of the North Carolina Department of Crime Control, then directed our efforts in three hypothetical cases. The exercises required each component of the criminal justice system to present the case setting out their sentencing concerns. A general discussion on each case followed to develop an acceptable ASP. The accepted ASPs addressed the concerns of all parties involved and provided the court with an option which met all of the sentencing goals without imprisonment in the Corrections Cabinet.

At the end of the day, Dennis Schrantz noted four concerns the Kentucky program and other programs nationwide must address. **First,** the defendants chosen for the PAASP must be truly prison bound. A good evaluation of any program must first start with the assumption that candidates chosen for alternative sentences were prison bound. Only then can the program be evaluated on whether or not the plans kept the defendants out of prison. Then, if they were kept out of prison, did they stay out of prison? An alternative sentencing program does not deal with high risk probationers. A **second** concern is the need for a cooperative relationship with probation and parole. **Third,** there must be quality control. The plans must be reviewed continually. The credibility of the program is tied to the quality of the plans. **Fourth,** does the plan truly reflect the community view?

The need to be selective was again emphasized by Bart Lubow. Alternative placement workers must not only choose prison bound offenders but submit a quality plan if the program is to maintain its credibility. An ASP should offer judges several options for each component of the plan.

Mr. Lubow then restated an earlier discussion point that the victim's input should be solicited but that victims do not control the sentencing process.

Malcolm Young, Executive Director of The Sentencing Project, Washington, D.C. whose organization has provided extensive technical support to the PAASP reminded all participants that change is slow, especially change in the criminal justice system. Why? Because of the criminal justice system's responsibility for public safety. But change can occur and it is necessary - necessary because of prison overcrowding, rising incarceration costs, and high recidivist rates.

The conference concluded on this note: there will always be setbacks in any program. With that said there was a resolve to give the Public Advocacy Alternative Sentencing Program (PAASP) with its limited 12 month funding an opportunity to bring about needed change in the criminal justice system.

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Circuit Court Judge
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Mayfield, KY 42066

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One in 55 U.S. adults doing time

Associated Press

WASHINGTON — A record 3.2 million American adults — one of every 55 people age 18 or older — were on probation, past role or behind bars in 1986, a 7 percent increase from the previous year, the government says.

The number of criminals under community supervision is rising more rapidly than the number of people serving time in local jails and prisons, concluded a new study by the Bureau of Justice Statistics.

From 1983 through 1986, there was a 32 percent increase, to 2.1 million, in the number of probationers 18 years and older, the bureau said. The number of parolees rose 38 percent to 327,000 million.

The number of inmates in prison as of a year ago was 547,000, up 28 percent from 1983, and there were 273,000 people in local jails, up 23 percent.

Texas had the highest rate of people on probation, 2,468 per 100,000 adults. Regionally, the South had 1,377 probationers per 100,000; the Northeast 1,040; the West 1,034 and the Midwest 1,003.

In the past decade, the percentage of offenders who left prison as a result of a parole board's discretionary decision fell from almost 72 percent of those released to just 43 percent.

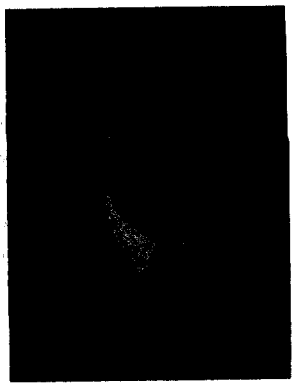
The change results from increasing reliance on determinate sentencing, with a prisoner serving the full sentence the court hands down minus a reduction for good behavior.

States suffering from overcrowded prisons but facing public demands for tougher treatment of criminals are beginning to turn to intensive supervision probation and other programs as alternatives to incarceration.

Intensive probation benefits tried in at least one county in each of 35 states involve close supervision with small caseloads, paying restitution to crime victims and performing community service.

The Cincinnati Post
December 14, 1987

Book Review



William Weitzel

14 JUVENILES CONDEMNED TO DEATH

Dorothy Otnow Lewis, M.D. holds the titles of Professor of Psychiatry at New York University School of Medicine and Clinical Professor of Psychiatry at the Yale University Child Study Center in New Haven, Connecticut. This author enjoys a well deserved reputation for her publications that highlight her interest in adolescents and criminal behavior. Her perspective involves a hands-on evaluation approach combining the skills of a neurologist and a psychiatrist. This combination is not frequently found and her publications about the neuropsychiatric assessments of adolescents and adults involved in violent behavior usually attract interest. In 1986, Dr. Lewis published an article in the American Journal of Psychiatry about the psychiatric, neurological, and psychoeducational characteristics of fifteen Death Row inmates in the United States. In October, 1987, Dr. Lewis, et. al., presented a paper entitled "Neuropsychiatric, Psychoeducational, and Family Characteristics of Fourteen Juveniles Condemned to Death in the United States" at the 34th Meeting of the American Academy of Child Adolescent Psychiatry.

The following review is meant to highlight the findings:

Dr. Lewis reports that execution of juveniles in America dates back to 1642 when a child was executed for bestiality. If you include individuals condemned as juveniles and executed as young adults, there have been 272 American juveniles executed. United States law permitting execution of juveniles is based on English common law although such executions were halted in Britain in 1908. The tradition in this country is to hold juveniles responsible for acts and to punish children as if they were adults. This study involved evaluations of fourteen boys sentenced to death in four different states where statutes permit execution of minors. Diagnostic evaluation consisted of psychiatric, neurological, psychological, neuropsychological, educational, and electroencephalographic examinations.

Findings:

1) all 14 subjects suffered head injuries during childhood, 9 of which were severe enough to require hospitalization.

2) in 9 cases, serious neurological abnormalities were documented.

3) seven of the 14 subjects were psychotic at the time of evaluations and/or had been so diagnosed earlier in childhood.

4) only 2 subjects had IQ scores above 90.

5) only 3 juveniles were reading at grade level and 9 were reading at 4 or more years below their expected grade for their age.

6) twelve of the subjects had been brutally, physically abused, often by more than one family member.

7) only 5 subjects had pre-trial psychiatric or psychological examinations of any kind performed. These were judged to be perfunctory.

The authors conclude that these representative group members, chosen only on basis of age, are multiply handicapped. This is presented as an important finding because diffuse (rather than focal) central nervous system injury makes emotional lability more likely with associated impulsivity and difficulty with control of aggressive behavior. Drugs and alcohol destabilize these individuals even further. Episodic paranoid ideation was the most prevalent psychotic symptom and helps to explain how robberies come to involve murders.

Dr. Lewis writes that this history of physical and sexual abuse, which is part of this study group's life experiences, set up future violence because:

1) abuse involves multiple batterings to the head of the child with consequent brain injury.

2) parental violence functions as a model for behavior.

3) being the recipient of brutality engenders rage which is often displaced onto other individuals in the child's environment.

These subjects did not appreciate the existence of the vulnerabilities the authors discovered. They would prefer to be "bad" rather than "sick" or "retarded." Subjects' lawyers seldom discovered this evidence and families often didn't share what they knew about subjects' impairment to prevent any family embarrassment - i.e., information about brain injury, paranoid ideation, physical and sexual abuse was withheld.

Dr. Lewis, et. al., concluded their presentation by asking whether such a group of adolescents should be considered as responsible as adults and sentenced to death for their acts.

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If Dr. Lewis' ideas and perspective interest you, a representative list of some of her recent publications is on page 54.

SURVIVING SCHIZOPHRENIA: A FAMILY MANUAL
E. Fuller Torrey, M.D.
Harper & Row, Publishers, Inc.
New York; $19.50

This is a book for lay readers on schizophrenia, the most widespread of all mental illnesses. This brain disease will strike 1 out of every 100 Americans sometime during their lifetime. Thus, 2 million Americans have or will have schizophrenia. On any given day, there are 600,000 people under active treatment for schizophrenia and each year another 100,000 Americans are diagnosed with it for the first time.

In this book, Dr. Torrey separates myths from facts and provides information on the nature of the disease, what symptoms do and do not characterize it, how it is diagnosed, what the prognosis is for different ages of onset and frequency of recurrence, when hospitalization is indicated, how to care for a schizophrenic patient at home, whether the patient should live at home, what the effects are on family stability, state laws on voluntary/involuntary commitment, and facts on compensation and medical benefits. The book contains appendices delineating commitment laws by state, the comparative cost of antipsychiatric drugs used to treat the disease, family support groups by state, and an annotated bibliography.

Dr. Torrey describes schizophrenics as the lepers of the 20th century. Our society still believes that the best way to deal with this disease is to hide it. There is much ignorance and confusion about schizophrenia. It is a brain disease with probably more than one cause. It is not the same as a split personality, but rather a splitting within a single personality of thought content and his/her accompanying emotion. The category "psychosis" includes persons suffering from a manic-depressive illness as well as schizophrenia. Nor is schizophrenia just an idiosyncratic way of thinking and behaving. It is in fact a disease.

There is no one symptom found exclusively in all schizophrenic patients. Auditory hallucinations are very characteristic of the disease. A schizophrenic may hear voices just as clearly as, or even more clearly than, voices of real people talking to him/her. The brain is malfunctioning and simply makes up what it hears (sees, feels, smells or tastes). A person with true auditory hallucinations should be assumed to have schizophrenia until proven otherwise.

Schizophrenics commonly experience alterations of the senses. Particularly in the early stages, sensations are enhanced. For example, background voices will become as loud as, and sometimes louder than, main voices, making concentration difficult. Visual sensations can also increase. Ordinary colors and light appear to be much too bright and intense, making ordinary reading impossible. Not only are the senses more sharply attuned but they see and hear everything, as the brain does not perform its normal function of screening out most incoming sights and sounds to allow a person to concentrate on whatever he or she chooses. This flooding of the senses makes it very difficult for a schizophrenic to concentrate or think clearly. Concentrating on even as simple a task as walking from one building to another may become impossible often in later stages of schizophrenia sensations are blunted. For example, a schizophrenic will have no feeling of pain. Among other possible symptoms is an inability to sort and synthesize stimuli and to select out appropriate responses. For example, schizophrenics may watch the visual

motion on TV, but few can tell you what is going on.

Dr. Torrey describes in detail the course of schizophrenia, the causes of the disease and its treatment. He points out that drugs do not cause schizophrenia per se. On the contrary, a schizophrenic may resort to drugs to cope with some of the symptoms of the disease. The onset of the disease typically occurs between the ages of 16 and 25. It is uncommon for the disease to begin after age of 30 and rare after the age of 40. Approximately one third of patients recovers within 10 years, another third shows improvement with medication, and the remainder shows no improvement. There is no longer any doubt that the brains of schizophrenics are structurally different and function differently. The disease sometimes runs in families. On the other hand, schizophrenia does not result from faulty child-rearing practices. Schizophrenia is usually a very treatable disease with the use of drugs, inasmuch as symptoms are controlled. It is not curable at the present time, as the causes are not understood. Drugs are not only the most important treatment for schizophrenia, but they work most of the time for most of the people with the disease if they are used correctly. On the other hand, insight-oriented psychotherapy is not only useless, but probably detrimental. Schizophrenics are overwhelmed by external and internal stimuli and trying to impose some order on the chaos. Asking them to probe their unconscious motivations is analogous to directing a flood into a town already ravaged by a tornado.

Dr. Torrey severely criticizes the mass deinstitutionalization of mentally ill patients in recent decades. Many of the discharged schizophrenics responded poorly (if at all) to drugs, had become highly dependent on the state hospital, had no family and/or had nowhere to go. Many have ended up in abysmal foster homes or hotels or on the streets. There has been a general failure in the United States in providing adequate (or any) after-care psychiatric services for released schizophrenics. These persons have severe difficulties in finding sources of income for food and housing and in obtaining medical care and vocational rehabilitation. Because of their symptoms and the stigma attached to the disease, schizophrenics living in the community have difficulty in obtaining companionship and tend to be very isolated. One study reports that almost half have no recreational activity aside from watching television.

It is possible to devise a comprehensive program to meet the needs of schizophrenics released from the hospital. Dr. Torrey describes in detail two such comprehensive programs (in Washington, D.C., and Miami, Florida) to "illustrate that good programs **can** be created for persons with schizophrenia and that there **can** be something after the hospital besides loneliness and cockroaches." Dr. Torrey also devotes an entire chapter to "what the family can do." He discusses violence, suicide, and homicide among schizophrenics. As a group, schizophrenics are nonviolent. They are more likely to be victims, rather than assailants. They do have a higher arrest rate, due to recurring schizophrenic symptoms--often resulting from poor psychiatric follow-up. Schizophrenics may do things or behave in such ways which bring them to the attention of the police, who then arrest them to return them to the hospital. For example, one man smashed a store window because he saw a dinosaur jumping out at him. For various reasons usually associated with their symptoms, schizophrenics have a relatively high mortality rate from suicide, accidental death, and medical conditions. Homicide among schizophrenics is rare. Usually it is a product of paranoid delusions - an attempt to get "them" before "they" get him/her.

Dr. Torrey discusses in some detail the legal and ethical dilemmas in schizophrenia. The most common is deciding whether to hospitalize a schizophrenic against his/her will. While Dr. Torrey delineates the arguments both for and against involuntary hospitalization, he does believe that in many states it has become too difficult to involuntarily hospitalize schizophrenics who cannot take care of themselves and/or pose a danger to others. He suggests that schizophrenics judged by psychiatrists to be incapable of caring for themselves should be involuntarily hospitalized for a limited period of time - no longer than twelve weeks - during which treatment could be tried. After this period of time, the patient would have to be released unless he/she agreed to stay or was found by a judge and/or jury to be genuinely dangerous to others.

Overall, Dr. Torrey's book is an informative, comprehensible, and practical work on the causes, nature, and treatment of schizophrenia as well as the problems faced by individuals, their families and society in general in dealing with this widespread mental disease.

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DR. LEWIS' PUBLICATIONS

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