THE ADVOCATE

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Death penalty claims 100th person

EDWARD BYRNE, 28, on June 14 became the 100th person to be executed in the United States since the Supreme Court reinstated the death penalty in 1976. He was electrocuted in Louisiana.

ARTHUR BISHOP, 36, a former Mormon missionary, was executed by lethal injection June 10 in Utah.

Previously put to death:

Questions About The Executions on Page 4

1988: Earl Clanton Jr., VA 4/14; Leslie Lowenfield, LA, 4/13; Willie Jasper Darden, FL, 3/15; Wayne Felde, LA, 3/15; Robert Streetman, TX, 1/7.

1987: Timothy McCorquodale, GA, 9/21; Joseph Starvaggi, TX, 9/10; William Mitchell, GA, 9/1; Wayne Ritter, AL, 8/28; Beauford White, FL, 8/28; Pierre Dale Selby, UT, 8/28; Sterling Rault, LA, 8/24; John Brogdon, LA, 7/30; Willie Watson, LA, 7/24; Willie Celestine, LA, 7/20; Connie Ray Evans, MS, 7/8; John Thompson, TX, 7/8; Richard Whitley, VA, 7/7; Elliott Johnson, TX, 6/24; Jimmy Wingo, LA, 6/16; Jimmy Glass, LA, 6/12; Alvin Moore, LA, 6/9; Benjamin Berry, LA, 6/7; William Boyd Tucker, GA, 5/29; Anthony Williams, TX, 5/28; Richard Tucker, GA, 5/22; Earl Johnson, MS, 5/20; Joseph Mulligan, GA, 5/15; Eliseo Moreno, TX, 3/4; Ramon Hernandez, TX, 1/30.

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

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

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

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

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

1981: Steven Judy, IN, 3/9.

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

1977: Gary Gilmore, UT, 1/17.

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

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Preservation

President of the District Court Judge's Association - Julia Adams

Changing Faces, Common Walls: Kentucky's Prisons

202B Case Investigation

The Advocate Features

Kevin McNally is a product of a family of 10 out of Hollis, Queens, New York City. He is a 1971 political science graduate of the Bronx' Manhattan College.

His 39 years encompass much. During Law School at U of L, he worked for the City Law Department and for Gittleman and Barber, compiling the first codification of Louisville ordinances in many years.

In his 12 years at DPA, Kevin has held a variety of positions - appellate lawyer, trial services regional manager for public defender programs in 25 Eastern Kentucky counties, and most recently as the person in charge of the Major Litigation Section (MLS). In this latter role, he has literally been the DPA pointman for the death penalty efforts in Kentucky. His creative, relentless, dynamic commitment to see that the death penalty is not carried out in Kentucky defines him as a person and defines the best of DPA. As head of MLS, he has amassed an incredible amount of disturbing information on capital cases in Kentucky, demonstrating the repeated, unfair imposition of death.

He is a member of the Kentucky Coalition to Abolish the Death Penalty, and a founding member of the Kentucky Association of Criminal Defense Lawyers.

He has argued before the United States Supreme Court in Carter v. Kentucky, 450 U.S. 288 (1981) and Buchanan v. Kentucky, 107 S.Ct. 2906 (1987). Carter brought the Kentucky criminal justice system out of the dark ages by requiring that jurors be informed in the instructions that citizens accused of crimes who chose not to testify cannot have any adverse inference used against them for that decision. He has argued over 65 cases to the Kentucky appellate courts and over 15 in the Sixth Circuit. He has published a wide variety of articles in NACDL, The Champion, The Advocate, Fellowship, and The Louisville Examiner. In addition to his articles, he is sought after as a capital defense lecturer, presenting over 20 times nationally from California to Florida, and countless times in Kentucky.

Sean Fitz McNally, Jesse Dylan Robinson, and William Douglas Robinson are the proud children of Kevin McNally and Gail Robinson. They love the land of Bald Knob in Frankfort, and live in a magnificent house constructed by themselves.

Kevin has dedicated his professional life to serving those in most need - criminal defendants, especially capital defendants. Kevin manifests the highest legal values in zealously struggling to provide the least in the legal system with a fair and equal opportunity. He has done extraordinary work at extraordinary sacrifice. On all our behalfs, he brings the best traditions of the legal profession to bear on those in most need.

Kevin is leaving DPA to continue his work in other forums.

Upon hearing of Kevin's departure, Tony Amsterdam of New York University Law School, expressed the views of many of us: "For more years than most of us admit remembering, you have been an eloquent and effective voice against the death penalty, on behalf of each of your clients and humanity. Your unsparing commitment to criminal defense work, and to the battle against capital punishment, has been an inspiration to all of us who have been privileged to work with you.

You have taught us a lot. But the most important thing you have taught us is that good lawyering can still make a difference."

Dennis Balske, a nationally prominent capital defense attorney from Alabama, has reflected, "I think the best way to appreciate Kevin's contributions is to look at it in the light of the old Jimmy Stewart movie, It's a Wonderful Life. You may recall in this classic that Jimmy Stewart jumps from a bridge, only to be saved by an angel trying to earn his wings. The angel then shows Jimmy Stewart what the world that he grew up in would have been like had he not been there.

Without Kevin, many people on and off Kentucky's death row, would

Continued on page 52

From the Editor:

The execution of the 100th person is sobering for those defending capital clients. It's important to remember the many injustices in the killing process, so we feature in this issue the continued failures of the system.

Neal Walker begins this issue as the editor for the death penalty column.

Judge Adams shares her good thoughts with us in our continuing series of interviews with important persons in the Kentucky criminal justice system. Enjoy this issue.

ECM

THE ADVOCATE

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The Advocate welcomes correspondence on subjects treated in its pages.

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IN THIS ISSUE

Major justice questions lurk in some executions

Various probable or possible errors haunt death lists

By PATRICIA LEFEVERE
Special Report Writer
Tenafly, N.J.

ON THE OCCASION of the 100th person's execution since the U.S. Supreme Court reinstated the death penalty in 1976, *NCR* reviews a dozen cases that raise major questions of justice concerning the death penalty:

Execution of the mentally retarded

JEROME BOWDEN, a 33-year-old black man, died in Georgia's electric chair June 24, 1986. He was electrocuted for the robbery and murder of Kathryn Stryker, a white woman, in Columbia, Ga. Evidence from the crime was found on and around the property of Jamie Graves, who received a life sentence in return for his testimony against Bowden. Only a confession, which Bowden made to the police after his arrest, tied him to the crime.

Mentally retarded, Bowden's IQ was measured at 59 when he was 14. He attended five schools — all of them racially segregated — and was shifted to one special education class to another. These classes were held apart from the "normal" classes.

Bowden's trial attorney attempted to raise the competency issue, but the trial judge suggested it be withdrawn. Bowden was never evaluated during his trial, and the jury never heard any evidence of his mental capacity. Bowden was illiterate, and evaluation made of him after the trial indicated his actions stemmed primarily from mimicking those around him and from a strong desire to please, particularly those in authority.

March 7, the Georgia House, by a 92-49 vote, became the first state specifically to rule out the death penalty as punishment for those found to be mentally retarded. Besides Bowden, Ivon Stanley of Georgia, Morris Mason of Virginia, James Terry Roach of South Carolina and John Brogdon of Louisiana — all of who had IQs under 70 — were also electrocuted.

The possibility of mistakes

JAMES ADAMS, a black man, was convicted and sentenced to death by an all-white jury in St. Lucie County, Fla., in March 1974 for the felony murder of Edgar Brown, a white man. Adams, 47 at the time of his electrocution, May 10, 1984, steadily maintained his innocence before, during and after his trial.

Although one witness identified Adams as the man seen parked and driving in the vicinity of the victim's home, the only witness who saw a man leave the Brown residence at the approximate time of the homicide, and who spoke with that person, said it was definitely *not* Adams.

The person with whom he had spoken, said the witness, was darker than Adams and had no moustache. He also reported hearing a woman's voice from inside the house before seeing the man exit.

Despite defense attorney requests, the Florida Department of Law Enforcement did not provide Adams' lawyer a report of exculpatory evidence found at the scene of the crime. A hair removed from the palm of the victim's hand was determined not to be Adams', but this evidence was not provided to his counsel until after the trial. Florida's governor declined to grant a stay of execution to allow for evaluation of this new evidence.

Recent investigations by a 21-year veteran of the Philadelphia Police Department's homicide unit argues convincingly that Adams was innocent and posits the identity of the real killer. In their recent book-length study of wrongful convictions, *Miscarriages of Justice*, authors Hugo Bedau and Michael Radelet include Adams as one of 23 innocent persons executed in the United States this century. At least three other men — Timothy Baldwin of Louisiana, Edward Earl Johnson of Mississippi and Willie Jasper Darden of Florida — have been executed with significant claims of innocence.

Racism and the death penalty

FROM THE TIME of his arrest in 1974 until his death in the electric chair March 15, 1988, Willie Jasper Darden never stopped claiming he was innocent of the murder of Harry Turman, a white man who owned a furniture store in Lakeland, Fla., and who was killed during a robbery.

Two witnesses came forward after the trial with evidence of Darden's innocence, although they were never heard together by any court before the 54-year-old black man was executed.

Tried in Inverness, Citrus County, Fla., where blacks and whites have been separated by centuries of racism and oppression and where the differences in wealth, social status and job opportunities are stark, Darden faced an all-white jury and a prosecutor whose opening remarks demonstrated the racial climate:

"The testimony is going to show, I think very shortly when the trial starts, that the victims in this case were white, and of course, Mr. Darden, the defendant, a possibly innocent man to his death.

When victims and prosecutor protest

KENNETH BROCK was executed in Texas June 16, 1986, for the murder of Michael Sedita, a 7-Eleven manager, during the course of a robbery, despite pleas for clemency from the prosecutor and the father of his victim. Although many Texas prosecutors no longer consider robberies-gone-bad as capital crimes, this was not the case at the time of Brock's conviction in the 1970s.

Trying to prevent his execution, Brock's prosecutor testified to his being a good prisoner on death row and said he would not have sought lethal injection for him had his crime occurred later.

"Killing Kenneth Brock is wrong. It will not change what has happened to my son," said the victim's father, J.M. Sedita. "It will not ease my suffering or the suf-

fering of my wife. Two wrongs do not make a right. I could not be at peace if Kenneth Brock dies."

Despite requests for mercy, then-Governor Mark White and the Pardons and Parole Board refused to grant clemency. Two other Texans, Charlie Brooks and Jay Kelly Pinkerton, were executed despite pleas from the families of their victims, as were James Dupree Henry and Willie Rivers in Florida.

Cruel and unusual

JOHN LOUIS EVANS was the first person to be electrocuted in Alabama in 18 years. He was convicted at age 27 and sentenced to die for the robbery of a pawn shop in 1977 during which the owner was killed. After exhausting his appeals, Evans — his head shaved and smeared with conducting gel — was strapped into the electric chair April 22, 1983, with more than 30 witnesses looking on.

After a 30-second surge of 1,900 volts, journalists reported that "a fiery arc shot from beneath the mask that covered Evans' face. Smoke poured from the electrode on his left leg." The strap on Evans' leg burned loose.

After the initial surge, prison physicians found that Evans' heart continued to beat. One witness reported seeing him struggle to take a breath. Then a curtain was dropped in front of the onlookers before the second surge was released.

Officials replaced the strap on Evans' leg, tightened each of the straps and administered a second surge four and a half minutes after the first. Again the examining doctor reported that Evans was not dead.

His attorneys, reportedly frantic, made a final appeal to halt the execution. A call was made to then-Governor George Wallace pleading that the electrocution had become intolerably cruel and unusual — in violation of the Eighth Amendment. Wallace refused, and a third surge of electricity killed Evans.

The forensic lab that conducted an autopsy on Evans showed that his body had two fourth-degree burns on the temple and a second-degree burn on the leg. But the prison commissioner denied that the execution had gone awry.

March 13, 1985, Texas executioners took more than 40 minutes to find a suitable vein in which to inject a lethal dosage to Stephen Morin, a former drug addict.

Execution of the emotionally ill

WAYNE ROBERT FELDE, 39, was executed March 15 in Louisiana's electric chair for the murder of a Shreveport police officer he had killed 10 years earlier. There was no question of Felde's guilt, but significant debate about his culpability has been raised.

Felde, the son of a World War II veteran who committed suicide upon his return to the United States, joined the Army and arrived in Vietnam on his birthday in 1969. He was assigned "tunnel duty" and had to crawl on his belly through enemy tunnels, unable to back up, turn around or move.

He was also recruited to recover bodies of dead GIs. He told of finding a friend so burned by napalm that his arms came off in Felde's hands as he tried to move him to a waiting helicopter.

When Felde returned from the war, he was suffering from nightmares, flashbacks and other bizarre symptoms of a disease now recognized as Post-Traumatic Stress Disorder (PTSD), which has affected a half million Vietnam veterans. Although it is now treatable, when Felde returned it had not yet been recognized, and Felde received no therapy. Instead, he turned to a life of violence.

When his mother died in 1978, Felde decided to take his own life. Shortly after her death, he was arrested for drunkenness and handcuffed in the back of a police car. Felde reached for a gun hidden in his belt and tried to aim it at his head. The policeman in the front turned and tried to grab the weapon as Felde fired, but was himself fatally injured by two shots that went through the seat of the car.

Felde's trial attorney based his argument on his client's symptoms of PTSD — the first such defense of its kind in the nation. But after his conviction, both Felde and his lawyer asked the jury for a death sentence.

The jurors tearfully obliged, adding in a statement, "We feel the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans."

Two weeks after Felde's electrocution, the California supreme court unanimously overturned the death sentence of a California death row inmate, citing PTSD as a mitigating factor in the case. Another PTSD sufferer, David Funchess, was executed in Florida in 1986.

Execution of nontriggermen

ROOSEVELT GREEN, 28, died in the Georgia electric chair Jan. 9, 1985, for the shooting death of Teresa Carol Allen in December 1976, even though he was not with Allen at the time of her death. Late in 1976 Green, an escapee from a Florida jail, traveled to Georgia to visit a friend he had met in jail, Carzell Moore.

Moore talked Green into assisting him in the robbery of a local store owner to whom he owed money; Moore agreed to share the proceeds with him. However, Allen, a store clerk, recognized Moore and so Moore kidnapped her, drove her and Green around and raped her. There was no evidence that Green took part in the rape.

Later, when they ran out of gas, Moore sent Green to get gas for the car. When he returned, he discovered that Moore had shot and killed Allen. Green agreed to help Moore pull her body into the nearby bushes. The two then parted ways, Green leaving with the stolen rifle and car.

Despite evidence that Green had not been present at the murder or even knew of Moore's intentions, he was convicted and sentenced to death. In his report, the trial judge wrote that "the defendant was an accomplice in a murder committed by another person, and his participation in the homicidal act was relatively minor." Five days after Green's electrocution, Doyle Skillern, another nontriggerman was executed in Texas.

Ineffective trial representation

JOHN YOUNG, 28, was executed in the Georgia electric chair March 20, 1985, for the beating deaths of three elderly people during the commission of a robbery.

Young's early history offers clues to his violent behavior as a young adult. When he was four or five, Young's mother was murdered as she lay in bed with him and his brother beside her. John was sent to his grandmother's, but the family quickly decided they did not want responsibility for John and his brothers and sisters.

Over the years, the children were shuffled from relative to relative. Young left school after the fifth grade, got involved with drugs and landed in reform school, from where he was released at age 19.

Young's court-appointed attorney for his capital trial, Charles Marchman had problems of his own. According to an affidavit signed by Marchman later, he

was, at the time of the trial, heavily involved in drugs and having severe family problems.

Marchman separated from his wife in March 1975. In late 1975 his father became ill, and the lawyer traveled frequently to Tennessee to care for him. Marchman admitted to spending little time on Young's case.

He never obtained any family history from Young or his relatives. He limited his trial preparation to the guilt phase and to finding a single psychologist to testify during the sentencing phase. Young's jury never heard any testimony about his childhood.

Three weeks after Young's trial, Marchman was arrested on drug charges. He was sentenced and later disbarred. When released from jail, the lawyer disappeared, and appellate attorneys for Young were unable to find him to discuss the case.

Ten years after the trail, Marchman resurfaced. Admitting his representation had been poor, he pleaded with an appellate judge for a new trial, but Young's appeals had been exhausted, and the court was unable to hear Marchman's new testimony.

Execution by default

ROBERT STREETMAN, 27, was executed Jan. 7, 1988, in Texas for the 1982 shooting death of Christine Baker. Streetman's execution drew national attention because of a freakish Supreme Court ruling that allowed the execution to occur even while the court agreed to consider Streetman's case.

It takes four votes to win full review of a petitioner's case and four votes to hold a petition while the court decides a similar issue the justices have agreed to hear, but five votes are needed to win a stay. Streetman lacked one vote to halt his execution.

Hours before his scheduled death, his attorneys filed an appeal based on the pending Franklin case, and Texas Attorney General Jim Mattox agreed not to pursue any executions while Franklin was pending.

At midnight Jan. 7, Streetman was strapped to the injection gurney, and needles were inserted into his arm while his lawyers struggled to reach the court. The court voted first 4-4 to hear Streetman's case but failed to rally the needed fifth vote to stay his execution.

Prison officials at Huntsville, Texas, baffled at the court's ruling and at Mattox's silence on the matter, delayed administering the lethal injection for two hours until convinced the execution was to take place. Streetman's attorney's were on hold with the court when the poison flowed into his veins.

Execution of juveniles

JAMES TERRY ROACH, 24, was executed in South Carolina's electric chair Jan. 10, 1986, for the deaths of Tommy Taylor, 16, and Carlotta Hartness, 14. The crime was one of the most brutal known to Columbia, S.C., residents.

Roach, 17, Joseph Carl Shaw, 22, a military policeman at Fort Jackson army base in Columbia, and Ronnie Mahaffey, 16, a school dropout, were high on PCP and alcohol when they stumbled upon Taylor and Hartness at a deserted park outside town. Shaw shot Taylor, and the trio kidnapped the girl, drove her to a secluded spot, raped her and shot her several times. It has never been ascertained which of the three killed her.

At the time of their arrests, there was a tremendous clamor for the state's newly reinstated death penalty. Only one attorney was appointed to defend the threesome, even though each maintained different and conflicting defenses. The attorney recommended that the boys waive their right to a jury trial and — despite a warning from the trial judge — indicated to Roach and Shaw they would be likely to get a life sentence from the judge.

Roach was retarded, with an IQ of 64. Later evidence suggested he may have suffered from the early stages of Huntington's Chorea, a debilitating brain disease, which Roach's mother had. None of this evidence was raised at his trial, however.

Mahaffey, who testified against Shaw and Roach, got a life sentence while the latter pair received the death penalty. Shaw was electrocuted in January 1985.

A yearlong effort to win clemency for Roach followed, with pleas sent to the Georgia governor from Mother Teresa, the UN secretary general, Jimmy Carter and hundreds more.

A brief filed with the Organization of American States (OAS) arguing that the execution of juveniles violated the OAS Covenant on Civil and Political Rights produced a ruling in favor of Roach, but it came too late to stop his execution.

Charles Rumbaugh and Jay Pinkerton in Texas were also executed for crimes they committed before age 18.

Ignoring rehabilitation

WILLIAM BOYD TUCKER, 31, died in Georgia's electric chair May 29, 1987, for the kidnapping and murder of Kathleen Perry, whom he killed while high on drugs and alcohol. Tucker, the son of a career soldier and one of seven children, started abusing substances at 13. His stormy relationship with his father led him into trouble, and he spent time in a reform school.

After enrolling in college in 1977, he began to repair his ties with his father. But the day after their reconciliation, the father died and Tucker plunged into a deep depression.

Again, he turned to drink and drugs and not long afterward murdered Perry. Although he had no previous record of violent crime, the jury sentenced him to death.

Once in prison, Tucker underwent a profound rehabilitation, which nearly a decade later prison officials judged as sincere and dramatic. The condemned man took correspondence courses in Japanese and Norwegian, psychology and religion. After a 10-year struggle with his convictions, he was received into the local United Methodist church.

Tucker taught other inmates to read and write and became a model prisoner — so much that, at times, when Georgia's death row was overcrowded, he was permitted to be housed within the general prison population.

In a six-minute statement just before his execution, Tucker said, "I cannot change what I did, but I can and have become a loving, caring and mature person. I am grateful for the chance I had to do so over the last years, and I am now ready to leave this world as somebody I could like."

Manipulation of the death penalty by convicted murderers

"LET'S DO IT," said Gary Gilmore, 36, as he faced a Utah firing squad Jan. 17, 1977, becoming the first person to be executed under the nation's new death penalty laws and a national celebrity at the same time. Gilmore's demand to die became the stuff of a motion picture and a best seller by Norman Mailer, *The Executioner's Song*.

Those who knew Gilmore said he loved every minute of media attention. A street-smart con man with an IQ of 130, Gilmore had spent almost his entire life in

correction facilities. On his release from one such institution in 1976, Gilmore repeatedly told an uncle he would commit suicide rather than go back to prison. His attempts to be executed were just that.

Convicted for the murder of a motel manager during a robbery in July 1976, Gilmore demanded that no appeals be filed on his behalf. He tried to fire his court-appointed representatives when they attempted to file an appeal. Throughout the winter of 1976, Gilmore continued his struggle to die as execution dates were set and then stayed.

In the fact of Gilmore's manipulation of the spotlight around his voluntary suicide, the memory of his victim has all but vanished. Gilmore's voluntary execution led to a series of other volunteer suicides, raising questions of whether the state may rightfully participate in an individual's suicide.

Eleven other condemned prisoners have been volunteer executions, and at least one death-row inmate reportedly committed his crime to obtain the death penalty. ■

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NLADA STANDARDS FOR COUNSEL IN CAPITAL CASES

In December 1987, the National Legal Aid and Defender Association (NLADA) adopted Standards for the Appointment and Performance of Counsel in Death Penalty Cases. The standards are an attempt to improve the quality of representation afforded poor defendants charged with capital offenses. They are being distributed to courts and counsel in states which have death penalty statutes. They are also under consideration by committees of the American Bar Association. The complete Standards, 113 pages with commentary and footnotes, are available from NLADA at a cost of $6 for NLADA members, $12 for non-members. (NLADA, Defender Division, 1625 K Street, N.W., Eighth Floor, Washington, D.C. 20006).

The Death Penalty Costs More Than Life

The fiscal studies continue to show: Executions cost more than life imprisonment. This isn't good news for financially strapped states. Arkansas found out about the cost of executions in 1971 when fiscal-minded public officials commuted 15 death sentences to life imprisonment, saving the state $1.5 million.

The Kansas legislature found out about the cost of the death penalty last spring. Before that, every year for eight years, legislators had passed the death penalty statute only to have the anti-capital punishment governor veto it. Last year, with a new, pro-death governor, the legislature looked at the costs and voted against reintroducing executions. The price tag for Kansas would have been $10 million the first year alone, and $50 million before the first execution in 1990. It wasn't worth it to a state already cutting services 10 percent across the board.

In 1982, a New York State Defender's Association study put the cost of life imprisonment at about $600,000 per person, and execution at 1.8 million. A 1985 University of California study estimated $4.5 million per execution. Capital cases are three times more expensive than noncapital cases because taxpayers foot the bill for prosecutors, the court, and the defense as well, since virtually all prisoners sent to death row are indigent. Capital case require two trials: one for guilt or innocence, and one for sentencing if there is a conviction. With the death of a client at stake, defense attorneys file five times as many pretrial motions and use every appeal step possible. Jury selection takes longer because citizens opposed to capital punishment must be ferreted out. And housing and guarding inmates in maximum security while the legal process goes on is double the $15,000 average yearly cost per inmate. Death row inmates are not allowed to work.

Despite the huge costs, there isn't a shred of evidence that execution deters future murders. In fact, in New Orleans from July to September last year, the murder rate increased 16.9 percent despite Louisiana's spate of eight executions during the same period. "Domestic fights and drugs," the police superintendent said when asked the cause of the increase.

Consider the alternative to executing a few people a year - job programs, drug rehabilitation, improved law enforcement. Or, as South Carolina capital defense lawyer David Bruck puts it, how many laid-off police officers is one execution worth?

For residents of Louisiana, the death penalty costs more than money. In 1987 Amnesty International targeted the United States and Louisiana in particular, for human rights violations based on an 18-month study by an international team. So now, as a result of Amnesty's campaign, the Louisiana Department of Corrections gets mail from Amnesty members and government leaders all over the world, criticizing the state for abusing human rights alongside countries like Iran, the USSR and South Africa.

But the death penalty has a deeper cost. By electrocuting, poisoning, gassing and shooting people who have killed, we do what they have done. We imitate the very violence we seek to eradicate.

Helen Prejean, a member of the Sisters of St. Joseph, is the director of Pilgrimage for Life, an organization against the death penalty.

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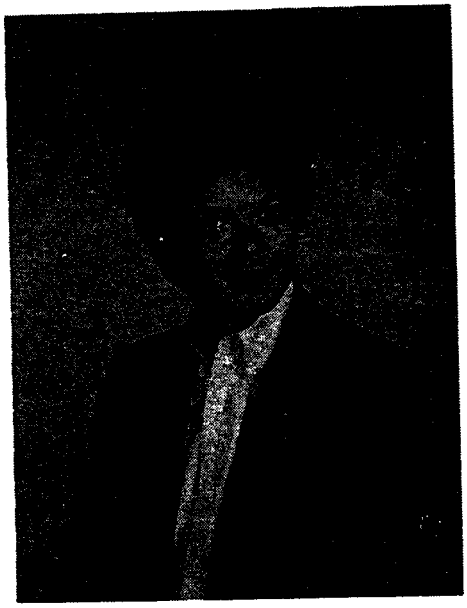
CAPITAL PUNISHMENT "does not effectively deter serious crime," does not "alleviate the fear of violent crime," does not "protect society more effectively than other alternatives," does not "restore the social order" and "is not imposed with scrupulous fairness and in such a way as to insure that innocent people are not unwittingly executed." So wrote the bishops of Illinois' six dioceses in an April 15 statement opposing the death penalty. . .

Interview with President Julia Adams of the District Judge's Association



DISTRICT JUDGE JULIA ADAMS

Why did your Association form? What are its purposes and accomplishments? How many members do you have?

The District Judges Association was formed to promote the interests of the district trial judge and particularly to secure educational standards and to provide a clearinghouse for sharing information and problems among the district bench. We currently have 93 active members. One of our primary purposes is to plan and coordinate the educational programs available to our fellow judges. We also provide limited funding for extraordinary educational opportunities for those judges who qualify.

How are district judges finding the new juvenile code? What changes from the old law are working best, and what problems have been created as compared to the old law? How have recent changes to the law affected juveniles?

Implementation of the new juvenile code has not been as difficult as originally anticipated by those actively involved in the juvenile process. We have provided two judicial colleges with primary focus on the code, as well as a special juvenile update session in the summer of 1987. The changes brought about by the 1988 General Assembly were, on the whole, beneficial changes for the district court. We have been generally, very pleased with the effects of the intake responsibilities of the Court Designated Workers. Detention of serious offenders continues to remain a significant problem, especially in the rural counties. This particular problem continues to be compounded by what appears to be a poor working relationship among fiscal courts, jailers, the Justice Cabinet and Corrections Cabinet. The 24 hour detention hearing requirement presents major problems for those judges who preside in multi-county districts. In the area of dependency, the new code fails to address the chronic, continual low-level abuse and neglect often associated with parental substance abuse that we routinely see and recognize to be the most prevalent type of abuse and certainly among the most damaging. We have been very pleased with the funding provided for legal counsel with regard to dependency cases. It has been our overall experience that juvenile court is most productive when attorneys participate in the process; specifically attorneys who have a regular juvenile practice.

Is there different "justice" based on whether the juvenile defendant is prosecuted and defended in a major metropolitan area versus a rural area?

No. There is no denying that the more urban areas provide a greater variety of home-based alternative treatment programs for juvenile offenders. On the other hand, in our rural areas each child who comes before the court is generally known to the court, or the family is known to the court and these courts can often "tailor-make" an alternative program to fit that particular need.

Do criminal defendants in district court get meaningful, individual justice, or is district court a process that by necessity creates "treadmill justice"?

The quality of justice in any court is directly related to the quality of representation afforded the participants. Also no other judicial level has the unique opportunity to see the broad spectrum of each community as do we. Because of that continuing vital contact, there is an important relationship between the defendants and the system. I must confess that after a number of years on the bench, neither prosecutors, defenders nor myself have formulated a definition for "mean-

ingful justice." There are, no doubt, times that my colleagues and I become frustrated with the sheer weight of the caseload and all-night phone calls, generally however, it is our families who suffer as a result of that frustration and not the citizens before the court.

Do district court criminal defendants obtain different results in their cases if they have legal representation versus not having legal representation?

Generally, no. However, aggressive defenders can usually implement more comprehensive treatment programs that are acceptable to the court. The general rule is that we encourage legal representation because the process flows more smoothly.

In criminal cases in district court what do district judges find the most persuasive for rendering more favorable sentencing decisions?

A prepared alternative to incarceration that addresses not only the needs of the defendant, but recognizes the needs of the community and confirmation by all persons involved that they or their agencies are prepared to commit to the proposed alternative.

What do district judges find most persuasive from the defense in pretrial release requests in criminal cases?

Sufficient family and social history to indicate that the defendant is not a risk in terms of court appearance.

Long-term regular employment is perhaps the single most persuasive element in order to receive a favorable program release.

How do district judges view the practice of public defenders in the district courts?

Necessary. As I have already stated the system seems to flow more smoothly when public defenders are actively involved. Creative dispositions tend to be a direct result of the input of the local public defenders. And, quite frankly, an active public defender "keeps us on our toes."

Can public defenders give adequate representation in district court with their high caseloads?

Yes. I have yet to see a public defender "shelf" a case in district court. Remember, if the defender's caseload is high, so is the caseload of the prosecutor, the court, and support staff. Public defenders incorporate that reality into their trial strategy.

How can public defender representation in district courts across the state best be improved?

I would recommend very broad pretrial conferences, so that the Commonwealth, at an early stage, can identify poor cases and respond accordingly.

What is the average caseload of the district court judge in the state of Kentucky, and what is the caseload trend for district court judges? What percentage of these cases are criminal? How do district judges' caseloads compare with caseloads of other Kentucky judges?

Average caseload per district judge for Fiscal Year 1987 was 4281, 74 percent of which represents criminal filings. The 1987 filings indicate a downward trend. Of the Kentucky trial judges, the average caseload for a circuit judge for Fiscal Year 1987 was 836.

Should county attorneys be full-time or part-time prosecutors?

The status of the county attorney should be related to the caseload.

What is the biggest unfairness occurring in the district court system in criminal cases?

Poor people have less access to securing effective alternative sentencing programs.

From the district court judge's viewpoint, what changes in the criminal justice system would most improve it?

Funding for diversion programs for first offenders. Mediation processes for community squabbles. Judicial access to criminal histories at arraignment.

How do politics and practicalities influence the district court criminal justice system for the better and for the worse?

In terms of practicalities, because of the heavy caseload, the prepared lawyer is more likely to obtain a positive result. The lawyer who fails to do investigative/discovery work prior to hearings, and chooses instead to investigate his case by way of filing form motions and wasting valuable court time, simply will not earn the respect of the court or the prosecutor and should not expect anything other than basic consideration.

An effective advocate should appraise himself with each court's local rules and customs. Aggressive advocacy does not require an adversarial professional posture toward the court or the Commonwealth. Common professional cour-

tesy will not take the edge off of a good defense.

Very clearly, judges are political entities surrounded by other political entities. Police chiefs, county attorneys, commonwealth attorneys, jailers, county judges, circuit judges, sheriffs, newspapers, the local bar all effect the day to day operation of the local system, as well as the productivity of the court. Rarely, in my experience do these political groups agree on appropriate policy or procedure, therefore it has become acceptable to break with former Kentucky tradition and judges are now better able to separate themselves from these influences and develop an independent judiciary. Because of the ever present political climate, the most appropriate response is now "take it to the courtroom and put it on the record."

How are involuntary commitment of the mentally ill and mentally retarded cases viewed by District Judges? Is the advocacy by defense attorneys adequate in these cases?

We are all uncomfortable with these very personal unnatural types of hearings. In general, defense work in these areas is exceptional.

With jails overcrowded and the costs of incarceration vastly increasing, sentencing is often the main issue. Why do district judges not use alternate sentencing more often, especially since alternate sentencing can often better meet traditional sentencing goals and the concerns of the victim and the community?

Alternative sentencing is preferred by the district bench, <u>if the alternate proposal is enforceable.</u> In many counties, probation and parole officers have been advised not to accept or actively supervise a district court probation. Because of the nature of our criminal cases, a large number of our offenders are chronic offenders who have already had access to the limited alternatives available in most of our communities. We cannot overlook the fact that, at this time, public opinion is running strongly in favor of incarceration for certain types of offenses. You might want to be aware that the court clerks are overburdened and cannot possibly monitor alternate compliance, nor is the court able to do so, since a great number of our district judges do not have any secretarial staff.

What do district judges view as the major causes of crime?

Substance abuse and dependency, dysfunctioning family history, ignorance, poor self-image.

Does the criminal justice system properly recognize and deal with those causes?

Probably not. However, it is important to understand that no system could take years of cultural, social, educational and economic failure and remold the offender so that those failures would not significantly effect the quality of his life. Our system of justice does provide for sentencing measures calculated to address those causes, <u>when available.</u>

Of late, we have been seeing a new type of young, middle or upper class offender who believes that he or she will never get caught, is above the law and would not be required to suffer penalties provided by law because he or she is a superior person. The system is sufficient to deal with these elitist offenders.

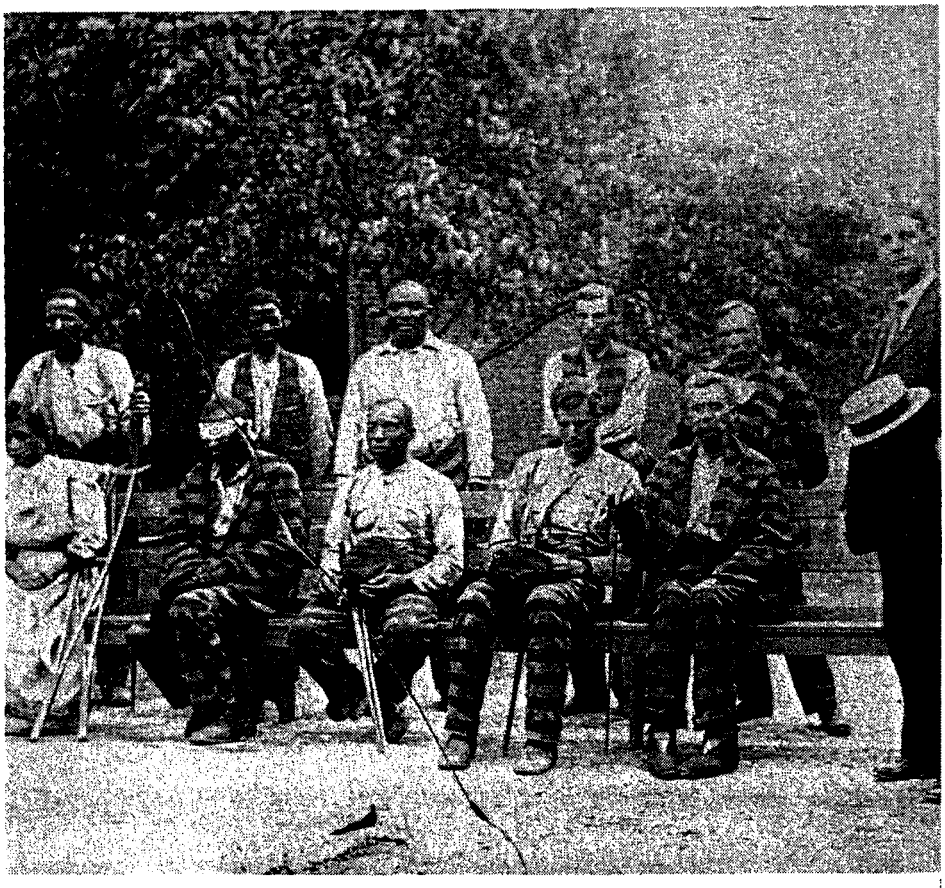
What are the legislative goals of your District Judges' Association for the 1990 session?

We are in the process of developing our legislative program for the 1990 General Assembly. Our legislative committee has been appointed and approved with Judge James Bonderant serving as chairman. The committee will be meeting throughout the summer months and will report to the Association at our September college. At this time it would be premature for me to attempt to answer your question.

The district bench is, by its nature, a flexible judicial unit. In 1984 the legislature passed the DUI-"Slammer Bill" and developed the Domestic Violence law which we were required to implement and enforce. In 1986, the General Assembly ratified the Juvenile Code and we struggled to adapt. In 1988, the Juvenile Code was changed significantly by the legislature, along with increased jurisdiction in Small Claims/Civil, and major changes in Probate and Mental Health. The system did not stand still, in 1987 the district courts processed 646,000 cases. Because we are fortunate enough to have regular and routine contact with the citizens who appear in our courts we are aware that the rule of law protects not the system, but the participants - the flesh and blood of our communities.

District Judge Julia Hylton Adams, 25th Judicial District, was appointed to the bench in January, 1984 by Governor Collins, and was elected in 1985. She received her J.D. from the University of Kentucky College of Law in 1977. She became President of the District Judge's Association in 1988.

Changing Faces, Common Walls: Kentucky Prisons



Convalescent Prisoners - Kentucky State Reformatory, Frankfort, 1912 (Courtesy of the KY Historical Society, Nathan Prichard)

The Changing Faces, Common Walls exhibit is a product of extensive research done from 1982 to 1988 by Kyle Ellison at the Kentucky Corrections Cabinet, Office of Corrections Training, and William Bain, Deputy Warden at Northpoint Training Center. This research project was originally conceived as a useful way to train correction personnel about the problems and demands of working prisons. Favorable response to these efforts prompted the Kentucky Council on Crime and Delinquency to provide funding to expand the collection of historical photographs. In 1987, Kentucky Humanities Council and Eastern Kentucky University Department of Correctional Services funded a grant to prepare this permanent traveling exhibit. Copies of the exhibit will be housed at Kentucky Department of Library and Archives, Kentucky Historical Society, Frankfort, Kentucky, and Eastern Kentucky University Department of Correctional Services. The exhibit is available to the public for display and will be at the Louisville free Public Library at 4th and York Street until the end of August. Much of the factual information for the exhibit was taken from a chronology researched and published by T. Kyle Ellison. **(Ed. Note:** A copy of the chronology will be provided to you if you will write to The Advocate.)

Twenty percent of the state's inmates are backed up in county jails waiting for bed space in a state institution. Private corporations propose to ease the taxpayers' burden by opening prisons for profit and letting the state contract to lease bedspace. Overcrowding, privatization, reform of prisons are all issues which have acted on our prison system throughout its 189 year history. The history of Kentucky's prison system teaches how these issues have been managed in the past and the long-term pitfalls of policies we may choose to implement today.

THE LEASE SYSTEM: 1825 TO 1880

In 1825 Joel Scott, an entrepreneur, suggested that if he ran the penitentiary as a business, the penitentiary would not only pay for itself but also return a profit to the state. The legislature quickly accepted this offer and instituted the "lease system." In return for running the penitentiary and paying the state a percentage of the profits from inmate labor, Scott, as lessee, had control of both the institution and inmate labor. Although the Governor had the power to remove any lessee who failed to meet his obligations, lessees became so politically powerful it was impossible to remove them from office.

THE CONTRACT SYSTEM: 1880 TO 1891

Under the "contract system" instituted in 1880, the state allowed

private contractors to bid for the right to use convict labor on construction projects away from the penitentiary. This not only reduced overcrowding at Frankfort but also made it possible for the state to receive income from inmate labor. In addition to the per diem payment to the state for inmate laborers, contractors were expected to provide housing, food and clothing for the inmates at their work sites. Most contractors did not choose to lower their profits by spending more than absolutely necessary on inmates. Inmates working at sites in remote areas were completely dependent on contractors who were seldom held accountable for their living and working conditions. Although legislative committees held investigative hearings, few of those responsible for inmate deaths were punished.

INMATE ASSEMBLY LINES: 1891 TO 1935

The new state Constitution passed in 1891 included Article 253 which prohibited use of inmate labor outside the walls of the penitentiary. Contractors could still bid for rights to use inmate labor inside the penitentiary and they expanded their operations within the walls to take advantage of the labor supply. Because contractors hired professional photographers to document their operations, we have a record of inmate life during this era. Organized labor's push for a curtailment of the inmate's cheaply produced goods culminated in The Hawes-Cooper Act which excluded private industry from the prisons. After that, prison industries began to decline.

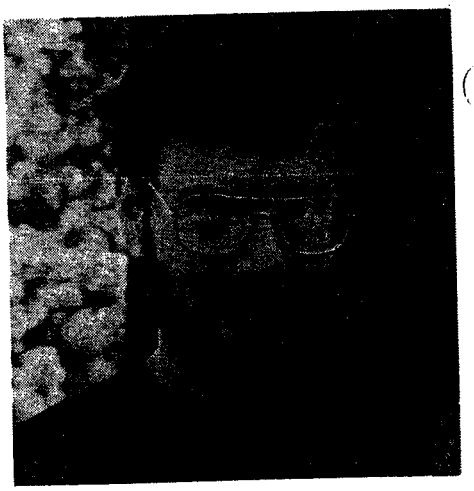
PRISON REFORM: 1860s - 1980s

The politics of overcrowding and exploitation of inmate labor have overshadowed efforts to "rehabilitate" inmates. In 1860 William C. Sneed, the penitentiary physician, was commissioned by the Kentucky legislature to write a history of the penitentiary. In his legislative report, Sneed predicted that the lease system would make the penitentiary into an "engine of political ambition and the pest house of moral corruption."

Overall, the most effective reforms have come from the efforts of inmates themselves. Through several class action suits starting in 1976, inmates persuaded the federal courts to mandate population ceilings and improved living conditions at Kentucky State Reformatory and Kentucky State Penitentiary, and to improve vocational education and inmate housing at Kentucky Correctional Institution for Women.

While creating positive reforms, the dissent decree's population ceilings burdened the other institutions and county jails which were forced to take the excess prisoners. Current efforts to manage the prison population explosion bear a striking resemblance to strategies employed during similar crises in the 1880s and the 1930s.

The return of prisons for profit ranks high on the concerns of many state prison systems. In the 1880s contractors found they could increase profits by hand-picking inmates for their work crews. In the 1980s private prison corporations will be able to increase their profits if they can control which inmates come to their facility. This could be accomplished by transferring those inmates with high medical expenses or behavior problems back to state institutions and getting "problem free" inmates in return.



T. Kyle Ellison

CONCLUSION

A study of prison history provides a means to raise the appropriate issues and to predict the long-term consequences of decisions we make (or fail to make) today. Ultimately our society must build social and economic conditions that will at least reduce the inmate population of the future. The success or failure of these efforts will be reflected by reductions or increases in the price we pay for the prison system over the next century.

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Kyle Ellison was employed by Kentucky Corrections Cabinet from 1972 to 1981 as a Probation and Parole Officer in Louisville and from 1981 to 1988 as a Staff Training Instructor.

A Primer For Jail Litigators. Includes chapters on legal analysis, the use of expert witnesses, class actions, attorneys' fees, enforcement, remedies, and many practical suggestions. $15.

Available from: The National Prison Project, 1616 P Street, NW, Washington, DC 20036.

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

United States Supreme Court

CONTEMPT
Hicks v. Felock
43 Crl 3005
(April 27, 1988)

Felock was adjudged in contempt for failure to make court-ordered child support payments, and sentenced to a jail term. The trial court applied to Felock a state statute which imposed a presumption of ability to comply with the court's orders. The California appellate courts reversed, holding as a matter of state law, that ability to comply was an element of the offense of contempt and thus, as a matter of federal due process, the burden of proof as to this element could not be shifted to Felock. The United States Supreme Court held that this analysis was correct only if the contempt was criminal. Only then would the state be required to prove each element of the contempt beyond a reasonable doubt. The Court explained that a sentence to a definite term of imprisonment in vindication of the court's authority was criminal in nature. However, a sentence of imprisonment until payment is made is civil since it is not a "punishment" but a means to enforce compliance. The case was remanded for state court determination of whether the contempt was criminal or civil. Justices O'Connor, Scalia, and Chief Justice Rehnquist dissented on the grounds that whether the contempt was civil or criminal was itself a federal question.

SEARCH AND SEIZURE
California v. Greenwood
43 Crl 3029
(May 16, 1987)

Acting without a warrant, police searched garbage bags left on the curb in front of Greenwood's home. The search was performed after the garbage was picked up by the regular trash collector and handed over to police. The Court rejected Greenwood's argument that the search violated a reasonable expectation of privacy. "[H]aving deposited their garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it' [citation omitted] respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded." Justices Brennan and Marshall dissented.

(Ed. Note: See Plain View for a further discussion of California v. Greenwood.)

RIGHT TO COUNSEL - CONFLICT
Wheat v. United States
43 CrL 3037
(May 23, 1988)

In this case, the Court held that Wheat's right to counsel was not violated when the trial court refused to accept Wheat's waiver and substitute counsel who also represented a codefendant with conflicting interests. The Court held that acceptance of the waiver was discretionary. The Court more specifically stated, that, "[t]he District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." In so holding, the Court cautioned trial courts to be wary of conflicts manufactured by the prosecution to prevent a defendant from obtaining particular counsel. Justices Brennan, Marshall, Stevens and Blackmun dissented.

HABEAS CORPUS-PROCEDURAL DEFAULT
Amadeo v. Zant
43 CrL 3043
(May 31, 1988)

On direct appeal and in his habeas petition Amadeo raised a previously unasserted jury composition challenge. The challenge was based on a memorandum from the prosecutor's office to jury commissioners directing them to underrepresent women and blacks on jury lists but not by so much as to constitute a prima facie case of discrimination. The memorandum came to light only during the pendency of the direct appeal. The state court rejected Amadeo's claim as unpreserved. The habeas court, however, found cause for the procedural default since

the discrimination had been concealed by county officials. The Eleventh Circuit reversed. The United States Supreme Court unanimously reinstated the finding of the district court. The Court found adequate factual support for the district courts finding that the basis for the claim was concealed. The Court cited Reed v. Ross, 468 U.S. 1 (1984) and Murray v. Carrier, 477 U.S. 478, 488 (1986) for the principle that "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable, would constitute cause..."

RIGHT TO COUNSEL
Satterwhite v. Texas
43 Crl 3043
(May 31, 1988)

Without serving his motion on defense counsel, the prosecutor requested a psychiatric examination of Satterwhite. The motion was granted, again without notice to the defense. At trial one of the examining psychiatrists testified as to Satterwhite's "future dangerousness," a prerequisite to a sentence of death under Texas' capital sentencing scheme. Satterwhite complained that this procedure violated his right to counsel as set out in Estelle v. Smith, 451 U.S. 454 (1981). The Court agreed that defense counsel was entitled to notice of the requested examination so that Satterwhite's decision whether to submit to the examination could be made with the guidance of counsel. An ex parte order placed in the record did not adequately notify counsel that his client would be examined for future dangerousness.

The Court next addressed the question of whether this Sixth Amendment violation could be harmless. The Court held that a Sixth Amendment violation may be harmless where the deprivation does not "contaminate the entire criminal proceeding." In Satterwhite's case the psychiatric testimony, while it did not contaminate the entire trial, was the only expert evidence in support of a finding of future dangerousness. Thus, the error was not harmless beyond a reasonable doubt. The presence of other evidence sufficient to support a finding of future dangerousness was irrelevant. "The question...is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the state has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

SEARCH AND SEIZURE
Michigan v. Chesternut
43 CrL 3077
(June 13, 1988)

In this case, the Court examined the question of what constitutes a seizure. The Court unanimously held that police did not "seize" Chesternut when they drove alongside him to "see where he was going" and observed him dispose of evidence. The Court enunciated the proper test as whether a reasonable man, viewing the particular police conduct as a whole and within the setting of all of the surrounding circumstances, would have believed he was not free to leave. Because there was no seizure the Fourth Amendment was not implicated.

(Ed. Note: See Plain View for a further discussion of Michigan v. Chesternut.)

INTERROGATION
Arizona v. Roberson
43 CrL 3085
(June 15, 1988)

Roberson was arrested for burglary and, after being given Miranda warnings, invoked his right to counsel. Three days later police again questioned Roberson without counsel but concerning a different, unrelated crime. This time Roberson incriminated himself.

The Court held that the second interrogation was barred under Edwards v. Arizona, 451 U.S. 477 (1981) regardless of the fact that it addressed a different crime. "As a matter of law, the presumption raised by a suspect's request for counsel - that he considers himself unable to deal with the pressure of custodial interrogation without legal assistance - does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." Justice Kennedy and Chief Justice Rehnquist dissented.

RIGHT TO COUNSEL
Patterson v. Illinois
43 Crl 3146
(June 24, 1988)

Following Patterson's indictment, but before appointment of counsel, Patterson responded to police interrogation with a statement. Patterson was first given Miranda warnings but did not request counsel. The Court held that, even though Patterson's right to counsel attached upon indictment he waived that right when he agreed to make a statement following Miranda warnings. The Court noted that Patterson was additionally advised of his indictment. The majority's refusal to attach special significance to the indictment is a departure from previous analysis. See Michigan v. Jackson, 475 U.S. 625 (1986); Edwards v. Arizona, 451 U.S. 477 (1981). Justices Brennan, Marshall, Stevens and Blackmun dissented.

SEARCH AND SEIZURE

Murray v. Carter
43 Crl 3168
(June 27, 1988)

In this case, the Court held that the Fourth Amendment does not require the suppression of evidence initially discovered during an illegal search if that evidence is later seized pursuant to a valid warrant issued on wholly independent grounds. The case represents another application of the "independent source" doctrine. See Segura v. United States, 468 U.S. 796 (1984). Justices Marshall, Stevens, and O'Connor dissented on the grounds that the Court's decision would encourage police who have probable cause to obtain a search warrant to, in some situations, engage in warrantless exploratory searches to verify that a search will be productive before going to the bother of obtaining the warrant. Justices Brennan and Kennedy did not sit.

CONFRONTATION OF CHILD WITNESS

Coy v. Iowa
43 CrL 3226
(June 29, 1988)

The question before the Court in this case was whether a screen blocking the defendant from the view of two thirteen year old complaining witnesses in a sexual assault case violated the defendant's confrontation rights. The Court held that it did. "We have never doubted ...that the confrontation clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." The Court noted that there might be exceptions to the requirement of face-to-face confrontation but stated "[s]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." Justice Blackmun and Chief Justice Rehnquist dissented.

Kentucky Court of Appeals

DUI - PRIOR OFFENSES

Royalty v. Commonwealth
35 K.L.S. 6 at 7
(May 13, 1988)

Royalty was arrested for and convicted of DUI in 1982. Subsequently the following sequence of events took place: arrest II, arrest III, conviction of DUI on arrest III, conviction of DUI on arrest II. Under this sequence Royalty's conviction based on arrest II was for DUI, third offense, since at the time of conviction he had already been convicted of the charges based on arrest III. However, Royalty contended that because the statute, KRS 189A.010, speaks in terms of prior "offenses" the fact of his

Drawing by Michael Maslin. Reprinted with Permission.

conviction was irrelevant, and since at the time of arrest II he had only one prior arrest he could only be convicted of DUI, second offense. The Court rejected this argument to hold that the relevant event for triggering the enhancement provisions of the statute is a prior conviction.

PFO - PRIOR CONVICTION
Hamilton v. Commonwealth
35 K.L.S. 7 at 1
(May 20, 1988)

The question in this case was whether a felony conviction, for which an anomolous sentence of one year or less in a county jail is imposed pursuant to KRS 532.070, is a prior felony for purposes of the PFO statute. The Court held that it was. This is consistent with the Court's previous holding that a sentence to probation or conditional discharge for a felony qualifies as a previous felony conviction under the statute. James v. Commonwealth, Ky., 647 S.W.2d 794 (1983).

PROBATION REVOCATION NOTICE
Messer v. Commonwealth
35 K.L.S. 8 at 5
(June 10, 1987)

The Court held in this case that service of a motion to revoke probation on Messer's attorney, rather than on Messer personally, did not result in a violation of Messer's right to adequate notice. The Court stated: "We do agree that service of the notice of intention to revoke which indicates the grounds therefore is to be served upon the party and not his attorney, especially if the representation by the attorney of record has been in a different concluded litigation...." However, in Messer's case, he and his attorney appeared at the revocation proceeding with knowledge of the alleged grounds, and only complained of inadequate notice after probation was revoked. Under these facts, any error was harmless.

Kentucky Supreme Court

PRESERVATION OF INSTRUCTIONAL ERROR
Duke v. Commonwealth
35 K.L.S. 6 at 10
(May 19, 1988)

In this case the Court held that an instructional error was unpreserved where the defense objected on one theory at trial but offered another theory on appeal. The Court cited the RCr 9.54(2) requirement of a "specific objection... stating specifically the matter to which he objects and the ground or grounds of his objection." The Court's decision reverses a Court of Appeals decision which held the error to be preserved.

DOUBLE JEOPARDY - MISTRIAL
Gray v. Goodenough
35 K.L.S. 6 at 10
(May 19, 1988)

Gray sought a writ of prohibition barring his retrial on double jeopardy grounds. Gray argued that the trial court abused its discretion in declaring a mistrial when the jury indicated it could not reach a verdict. The jury foreman stated twice during four hours of deliberation that the jury was hopelessly deadlocked. No juror disagreed with this assessment. The Court held that these facts justified the declaration of the mistrial.

PROSECUTOR COMMENT ON PAROLE/HEARSAY
Ruppee v. Commonwealth
35 K.L.S. 6 at 13
(May 19, 1988)

Ruppee was convicted as a first degree PFO. In his closing argument in favor of a life sentence, the prosecutor argued to the jury that a life sentence would be no different in effect than a twenty year sentence because Ruppee would in either case serve only ten years less credit for time served. In so arguing, the prosecutor "Misstated the law" since "[t]here is no guarantee that appellant will be paroled at this first eligibility date."

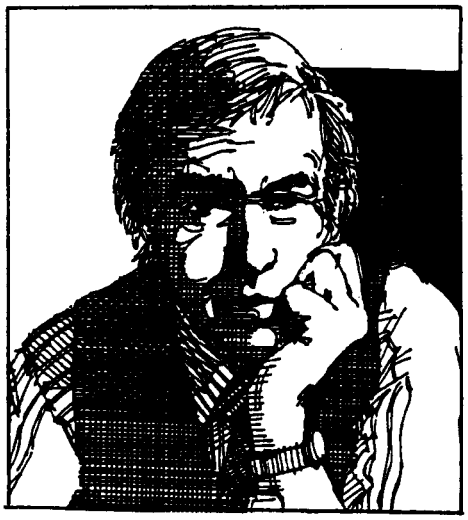
The Court also found reversible error in the trial of the underlying robbery charge. The trial court excluded as hearsay defense evidence that a police officer made comments to a store clerk which were intended to obtain her positive identification of Ruppee. The Supreme Court held that the comments were not hearsay because they were not "offered to prove the truth of a statement but only to show that such a statement was made." Justices Stephenson and Wintersheimer dissented.

REBUTTAL EVIDENCE/HEARSAY/ DOUBLE JEOPARDY/CLOSING ARGUMENT
Wager v. Commonwealth
35 K.L.S. 6 at 14
(May 19, 1988)

The Court reversed Wager's rape conviction based on improper rebuttal by the Commonwealth. The Commonwealth called in rebuttal a witness who testified that the defendant had confessed to him in jail, and had in particular told him that he had injured the victim by biting her finger. The Court noted its previous holding in Gilbert v. Commonwealth, Ky., 633 S.W.2d 69, 71 (1982) that "an admission of guilt ...should not be introduced in rebuttal under the guise of contradicting or impeaching the defendant...."

The Court also found error in the admission of hearsay testimony that the victim, who died before trial of unrelated causes, had named the

defendant as her attacker. The Court reaffirmed its rejection of the "residual hearsay" rule. See Estes v. Commonwealth, Ky., 744 S.W.2d 421 (1988). Hearsay was also admitted when the trial court accepted a non-certified copy of a blood test report introduced through a witness who was not the custodian of the document.



The Court rejected Wagers' claim that his convictions of both second degree assault and first degree rape was double jeopardy. The Court found that each offense included an element not included in the other.

Finally, the Court found error in the action of the commonwealth in performing a demonstration for the jury during closing argument and in displaying to the jury an item not in evidence. Justices Wintersheimer and Gant dissented.

CAPITAL SENTENCING PROCEEDING
Francis v. Commonwealth
35 K.L.S. 7 at 9
(June 9, 1988)

In this case, the Court held that "[i]n the future, in any case in which the death penalty is sought, the capital penalty sentencing phase pursuant to KRS 532.025 should be conducted before the truth-in-sentencing hearing under KRS 532.055(2) and the PFO proceeding per KRS 532.080 are held." However, the Court refused to give Francis the benefit of this rule since in its view he was not prejudiced by the combined PFO and truth-in-sentencing hearing which preceded the capital sentencing phase in his case. Justices Leibson and Lambert dissented on the grounds that evidence not admissible at a capital sentencing proceeding, such as parole eligibility, was thus placed before the jury.

OTHER CRIMES
Anastasi v. Commonwealth
35 K.L.S. 8 at 9
(June 30, 1988)

In this case the Court rejected a argument that a noncomplaining witness should not have been allowed to testify at Anastasi's trial for sexual abuse that the defendant had sodomized him eight years ago. In Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985) the Court held that evidence of sexual acts between the defendant and a third person, if similar to the acts charged and not too remote in time, are admissible to show intent, motive, or a common plan. The Court found that Anastasi's prior acts fell within this rule. Chief Justice Stephens and Justice Stephenson dissented.

OUT-OF-COURT STATEMENT OF NON-TESTIFYING CODEFENDANT
Dodson v. Commonwealth
35 K.L.S. 8 at 9
(June 30, 1988)

The Court reversed Dodson's robbery convictions based on the admission into evidence of a non-testifying codefendant's confession which incriminated Dodson. The Court rejected the commonwealth's argument that the confession was admissible as a statement against interest. Justices Wintersheimer and Stephenson dissented.

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FAYETTE CIRCUIT COURT REJECTS APPEAL OF SODOMY DECISION

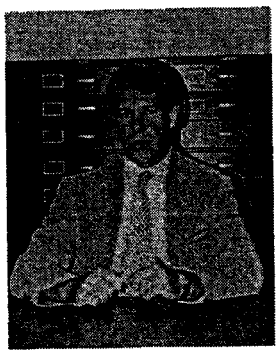
Fayette Circuit Judge Charles M. Tackett has dismissed the county's appeal of a decision holding unconstitutional Kentucky's consensual sodomy law.

Earlier this year, District Judge Lewis Paisley declared the sodomy statute unconstitutional, holding that it violated the right to privacy under the Kentucky Constitution. In so doing, Judge Paisley agreed with arguments submitted by ACLU/KY Cooperating Attorney Ernesto Scorsone that the Kentucky Constitution offers broader privacy protection than the U.S. Constitution. (The U.S. Supreme Court had earlier rejected, by a 5-4 vote, the argument that the right of privacy under the U.S. Constitution rendered unconstitutional Georgia's sodomy statute.)

The circuit court did not reach the merits of Fayette County's appeal. Rather, it held that any appeal had to be brought by the attorney general, not the county attorney. Fayette County has asked Judge Tackett to reconsider his decision. Further appeal is considered likely.

Post-Conviction

Law and Comment



Hank Eddy

RCR 11.42 CASES

Chances are, if you represent indigent people, you are familiar with RCr 11.42. Your competency as a defense attorney may even have been questioned by virtue of a former client filing such a motion. Due to the law regarding appointment of counsel there is a good chance you have been, or will be, appointed to represent a client either at the circuit court level or on appeal of an RCr 11.42 motion.

The purpose of this article is to discuss some ways to approach such an action when appointed. Also discussed will be the procedural requirements of the rule. Some strategic considerations will also be covered. Finally, there will be some discussion regarding appropriate issues.

WHEN APPROPRIATELY FILED

RCr 11.42(1) provides that a prisoner may move the trial court by collateral attack to vacate, set aside or correct the sentence imposed. As stated by the Court in Commonwealth v. Wine, Ky., 694 S.W.2d 689, 694 (1985), "we conclude further that RCr 11.42 is designed to permit a trial court an opportunity after entry of judgment to review its judgment and sentence for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself." The judgment and sentence of the trial court may also be attacked on the basis the court lacked jurisdiction or where the defendant was convicted in violation of a statute such as to make the judgment void. Lay v. Commonwealth, Ky., 506 S.W.2d 507 (1974) and Tipton v. Commonwealth, Ky., 376 S.W.2d 290 (1963).

BURDEN

A heavy burden rests upon the movant to overcome the regularity of a conviction. Wahl v. Commonwealth, Ky., 396 S.W.2d 774 (1965) cert. denied 384 U.S. 976. The movant must show a denial of a constitutional right which causes the proceedings to be fundamentally unfair. Schooley v. Commonwealth, Ky. App., 556 S.W.2d 912 (1977) and Smith v. Commonwealth, Ky., 412 S.W.2d 256 (1967) cert. denied 389 U.S. 873. Obviously, you need a real good issue to win an RCr 11.42 motion. Most trial errors will not afford RCr 11.42 relief. The error must be of such magnitude that the judgment is voided.

RIGHT TO COUNSEL

Most of these proceedings are begun pro se. KRS 31.110 and RCr 11.42 (5) usually require that counsel be appointed. Ivey v. Commonwealth, Ky., 599 S.W.2d 456 (1980). Appointment does not have to be made when the pro se motion does not allege facts which, if true, would entitle the movant to relief. Maggard v. Commonwealth, Ky., 394 S.W.2d 893 (1965). Counsel does not have to be appointed when the record in the case refutes the movant's allegations. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).

REQUEST FOR COUNSEL

The trial court may not appoint counsel in situations where the pro se litigant does not make a proper request. In Allen v. Commonwealth, Ky. App., 668 S.W.2d 557 (1984) the Court ruled Allen was not entitled to counsel because he requested counsel be appointed to represent him at an evidentiary hearing. Since an evidentiary hearing was not necessary, counsel did not have to be appointed. Allen's mistake was in not asking the court to appoint counsel to supplement his motion. Beechum v. Commonwealth, Ky., 657 S.W.2d 234 (1983) is another case regarding the specific nature of the request for counsel. Beechum was denied counsel because his request was not contained in the body of his motion. He made his request on his affidavit of indigency. The Court held this was not a sufficient request. The request for counsel must be in the body of the motion. A pro se litigant should ask that counsel be appointed to supplement the motion and for representation at an evidentiary hearing.

Generally speaking, however, counsel is appointed. Once you have the case you should probably decide whether or not to augment or sup-

plement the issues raised *pro se*. In some instances, you may want to counsel your client to not pursue certain issues or to drop the whole proceeding.

ELIGIBLE FOR RELIEF

The first thing you might want to check is whether or not your client is eligible for relief. RCr 11.42 (1) requires the movant either be in custody, on probation, parole or conditional discharge. Once a sentence is completely served, it cannot be attacked by a RCr 11.42 motion. Wilson v. Commonwealth, Ky., 403 S.W.2d 710 (1966).

VERIFICATION

Another procedural requirement is verification. If this is not done, the motion can be dismissed. RCr 11.42 (2). Any supplemented or augmented motion should also be verified by the movant.

DECISIONS

The requirement of verification raises some strategical questions. For instance, someone may think your client is lying if his or her statements in the motion are contrary to what he or she said at trial. If there is any variance between the record and what is said in the motion, you may want to advise your client to amend or dismiss the motion. Otherwise, the statutory prohibitions against perjury and false swearing may come into play.

Another reason you may want to advise your client to dismiss even a meritorious claim is the fact that the movant may be exposed to greater punishment if successful. In a recent unpublished decision, a movant was successful in having a guilty plea sentence vacated. During the original plea negotiations, a persistent felony offender charge had been dropped. But after successfully attacking his guilty plea, he was retried and convicted of not only the principal offense but also the status offense. Sometimes it is better to forfeit the game.

Another strategic consideration to consider is the fact that the movant is not entitled to invoke the privilege against self incrimination at the RCr 11.42 hearing. Reina v. United States, 364 U.S. 507, 513, 81 S.Ct. 260, 264, 52 L.Ed.2d 249 (1960) and McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986). Movant can be questioned about the crime because he has already been convicted. Also, if movant alleges his counsel was ineffective, the attorney/client privilege is waived. Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1987) cert. denied 106 S.Ct. 3311. Counsel should be cautious about what the client verifies in the motion, and, also, about whether or not he or she should testify at an evidentiary hearing.

HEARING

Regarding the hearing - Are you entitled to one? RCr 11.42 (5) provides for a prompt hearing when a material issue of fact which cannot be determined from the face of the record exists. There is no requirement for a hearing when the allegations can be refuted by the record, and when the petition does not state grounds upon which relief can be granted. Trice v. Commonwealth, Ky.App., 632 S.W.2d 459 (1982). Cases which discuss the expeditious nature of a motion to vacate sentence and the requirement for a prompt hearing include: Moore v. Pound, Ky., 390 S.W.2d 159 (1965); Wahl v. Simpson, Ky., 385 S.W.2d 171 (1964) and Helton v. Stivers, Ky., 385 S.W.2d 172 (1964).

INVESTIGATION

In order to facilitate your investigation and ensure all relevant issues are raised in the RCr 11.42 motion, you must consult with the client, and you may want to consult trial defense counsel, the prosecutor and the appellate counsel. These people may lead you to witnesses you would need for the evidentiary hearing. It is imperative to read the transcript of record and transcript of evidence if there was a trial. During your investigation and research you may find a good issue that has never been raised.

However, issues that could have been, or should have been, raised on appeal cannot be brought in an RCr 11.42 action. This motion is not a substitute for appeal. Bronston v. Commonwealth, Ky., 481 S.W.2d 666 (1972) and Thacker v. Commonwealth, Ky., 476 S.W.2d 838 (1972). You may be moving into troubled waters if you start to raise unpreserved errors. Fortunately, some of the best issues do not require preservation such as double jeopardy, Gunter v. Commonwealth, Ky., 576 S.W.2d 518 (1978) cert. denied, 443 U.S. 905 (1979) and sentencing errors, Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985).

SUCCESSIVE MOTIONS

It is important to raise all meritorious issues in the motion because successive actions are usually barred. Kinnon v. Commonwealth, Ky., 396 S.W.2d 331 (1965). To get a second shot in an RCr 11.42 proceeding, the movant would have to show why he could not have raised the issue in the first motion. Other cases discussing successive motion are Crick v. Commonwealth, Ky., 550

S.W.2d 534 (1977) and Case v. Commonwealth, Ky., 467 S.W.2d 367 (1971).

WITHDRAWAL

What happens if you are appointed and cannot find any good issues, or, after you review the issues in the pro se motion, you determine they are without merit? Then a motion filed pursuant to KRS 31.115 and KRS 31.110(2)(c) to withdraw as counsel would be appropriate. KRS 31.110(2)(c) provides that if counsel and the court involved determine this is not a proceeding a reasonable person with means would bring, then there is no further right to representation.

In Pennsylvania v. Finley, ____ U.S. ____, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) appointed counsel moved to withdraw after reviewing the trial record and consulting with his client. The Court held the United States Constitution does not require Anders procedures be applied to post-conviction proceedings; therefore, Finley was not denied counsel by her attorney's motion to withdraw.

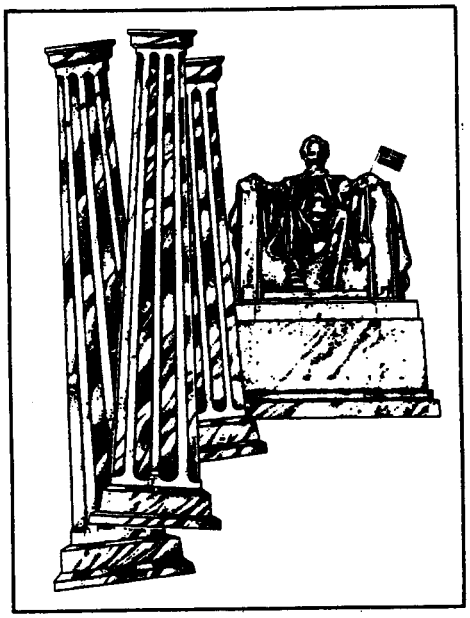
If you file a motion to withdraw, you may feel more comfortable if you strictly follow the procedures set out in Anders. Another alternative is to move the court to make its ruling based solely on the issues raised in the pro se motion. Every approach requires that you thoroughly search for issues which have merit.

RELIEF

If you do proceed with the case, and your client is entitled to relief, the court, pursuant to RCr 11.42 (6), may discharge, resentence, order a new trial or correct the sentence. Either side may appeal. RCr 11.42 (7).

GOOD ISSUES

(1) **Ineffective assistance of counsel**, for test see Strictland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1980) and Gall v. Commonwealth, Ky., 720 S.W.2d 37 (1985), cert. denied 106 S.Ct. 3311. For test regarding guilty pleas see Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). (2) **Sentencing issues**, see KRS 532.110(1)(c), See v. Commonwealth, Ky., ____ S.W.2d ____ (rendered March 3, 1988) and Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985). (3) **Issues regarding guilty pleas**, see Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986) and Quarles v. Commonwealth, Ky., 456 S.W.2d 693 (1970). (4) **Perjured testimony**, see Williams v. Commonwealth, 569 S.W.2d 139 (1978). (5) **False and incompetent evidence**, see Jennings v. Commonwealth, Ky., 380 S.W.2d 284 (1964). (6) **Lack of jurisdiction**, see McMurray v. Commonwealth, Ky. App., 682 S.W.2d 794 (1985).



BAD ISSUES

There are certain issues that currently are not good in this type of post-conviction action such as: errors in instructions, Boles v. Commonwealth, Ky., 406 S.W.2d 853 (1966); defects in the indictment, Warner v. Commonwealth, Ky., 385 S.W.2d 77 (1964); insufficiency of the evidence of illegal arrest, Johnson v. Commonwealth, Ky., 473 S.W.2d 823 (1971) and unlawful searches and seizures, Dupin v. Commonwealth, Ky., 404 S.W.2d 280 (1966). Also persistent felons who fail to attack prior convictions before their status proceeding are precluded from attacking the prior convictions in a subsequent post-conviction action. Alvey v. Commonwealth, Ky., 648 S.W.2d 858 (1983). Some issues that are not presently proper for relief may have to be raised to exhaust for federal purposes. Also, even though these issues have not been good in the past, it does not mean they should automatically be discarded. Given some good facts and a miscarriage of justice, you may find a court that will change the law.

CONCLUSION

RCr 11.42 is used extensively to attack sentences. Procedural rules and decisions limiting the availability of post conviction relief make it difficult to win an RCr 11.42 proceeding. However, the rule does supply a state remedy to cure a miscarriage of justice.

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"...To no one will we refuse or delay right or justice"

Magna Carta CH.40(1215)

The Death Penalty

Neal Walker

The summer of 1988 has ushered in a number of momentous developments in the administration of the death penalty on the national and local fronts. The summer's drought may be killing the crops in the field, but the gnarley old oak of capital punishment stubbornly grows on. Its branches continue to support the hangman's noose; on June 14, Edward Byrne in Louisiana became the 100th person to be executed in the United States since the restoration of capital punishment in 1976.

The United States Supreme Court has again devoted much attention to the death penalty, unloading a number of decisions[1] in June. While several decisions are favorable, it has been the Kentucky Supreme Court which has been most active this summer in pruning the excesses of the hanging tree.

RETRIALS ORDERED FOR TWO CONDEMNED PRISONERS

> And what is so rare as a day in June?
> Then, if ever, come perfect days.
> **James Russell Lowell** (1884)

And so it was on June 8, 1988 for two prisoners on Kentucky's death row, Parramore Sanborn and Fred Grooms, beneficiaries of stunning decisions by the Kentucky Supreme Court ordering retrials in both cases. Read together, the cases stand as a warning to prosecutors and a reminder to trial judges: regardless of how formidable the evidence of guilt and regardless of how revolting the murder, even the most unpopular capital defendant is entitled to a fair trial conducted in an atmosphere free from the corrosive pressures of an outraged community, by an unbiased jury instead of one predisposed to vote for the death penalty.

I. SANBORN V. COMMONWEALTH "DRAWING THE LINE BETWEEN LAW AND LYNCHING"

Sanborn's death sentence stemmed from his conviction in the Henry County Circuit Court for murder, rape, sodomy and kidnapping. A five member majority reverses (with Justices Vance and Gant concurring in result only). Predictably, Justices Wintersheimer and Stephenson dissent.

The victim's car was found at the end of the family's driveway "surrounded by evidence of a vicious attack." Sanborn v. Commonwealth, ___ S.W.2d ___ (Ky. 1988) [S at 3]. Some time later and several miles away, her body, partially nude, was discovered. The cause of death was multiple stab wounds (several were diagnosed as post-mortem). There was medical evidence of vaginal penetration and oral sodomy. Sanborn, a disgruntled farm hand formerly employed by the victim and her husband, was arrested at his home after he invited the police inside as they canvassed the neighborhood. Blood and fiber evidence connected him to the victim.

Recognizing the evidence proved a "particularly vicious and shocking premeditated murder," the Court believed that "the death penalty was justified" [S at 1]. Nevertheless, an accused "has certain minimum guarantees to a fair trial and due process, constitutionally mandated, drawing the line between law and lynching, which apply regardless of the revolting circumstances of the offense." Id.

A. CONTINUANCE/CHANGE OF VENUE

Preliminarily, the Court summarily addresses two issues "which are unlikely to recur" at a retrial [S at 2]. The trial court was criticized because "the case was tried less than 3-1/2 months from the date of the occurrence, despite its complexity" Id. And, "because the trial court refused a change of venue, trial was held precipitately in a small community where the hideous details were still vivid in the minds of the veniremen" Id.

B. PROSECUTORIAL MISCONDUCT

Sanborn's conviction was reversed "for trial error willfully engaged in by the prosecutor, and inexcusably tolerated by the trial judge" [S at 2].

1. INTENTIONAL DESTRUCTION OF TAPED WITNESS STATEMENTS

After the defense moved for production of tape recorded statements of 4 prosecution witnesses, the prose-

cutor, who was aware of the court's policy to order disclosure of such evidence two weeks before trial, stated on the record that he had erased the tapes "in anticipation of the court's ruling" [S at 6]. On appeal, he claimed a right to destroy the tapes. The Court rejected it. "The claim is specious, and his tactics unforgivable"[2] [S at 6].

The tapes were discoverable under RCr 7.26(1), and it was a violation of due process to destroy them. Importantly, the court expands the Brady v. Maryland, 373 US 83 (1963) definition of exculpatory evidence to include not only evidence which would be exculpatory, but that which might be. Moreover, "prejudice is presumed where the prosecutor destroys evidence" [S at 7].

Since the witnesses were not essential to the state's case, and since the relief requested was not dismissal or exclusion, the Court reversed with directions to give the missing evidence instruction as requested by the defense.

2. USE OF PROSECUTION TRANSCRIPT OF DEFENDANT'S TAPED STATEMENT

After his arrest, the police taped Sanborn's statement. At trial, over objection, the prosecutor furnished his transcription of this statement to the jury. There were at least 25 instances where the defense disagreed with the transcript. For instance, at one point the prosecutor's transcript quotes the defendant as saying he was "wrong" while the official court reporter's transcript, made while listening to the tape as it was played in the courtroom, quotes the defendant as saying he was "drunk."

To complicate things, the trial court highlighted the prosecutor's version of the questionable remarks with a yellow marker. "It was prejudicial error to enhance the inaudible or unintelligible portions of the defendant's statement with the Commonwealth's written version, and the error was exacerbated by being highlighted with a yellow marker" [S at 9].

At oral argument the prosecutor tried to pass it off as an official transcript, mightily upsetting the Court. "The Commonwealth Attorney was in violation of his duties as an officer of this Court when he represented to us at oral argument that this was a transcript prepared by the trial court" [S at 10].

C. THE DEATH OF INVESTIGATIVE HEARSAY

The final error which would independently support reversal concerned "the extensive use of testimony from 3 different police officers repeating what was told them by persons whom they interviewed during the course of their investigation" [S at 10]. Finally, the Court has buried the archaic "investigative" exception to the hearsay rule.[3] "Perhaps it would help to state forcefully at the outset that hearsay is no less hearsay because a police officer supplies the evidence" [S at 10]. Sanborn's trial was infested with this sort of hearsay. For example, in an attempt to rebut Sanborn's statement to the authorities that two unnamed brothers were responsible for the victim's death, a police officer "was permitted to summarize information from interviews with some 40 or 50 persons" that the two brothers did not exist [S at 12].

The Court issued a strong warning against the admission of such unreliable evidence: "[p]rosecutors should, once and for all, abandon the term 'investigative hearsay' as a misnomer, an oxymoron" [S at 11]. The Court did, however, distinguish the nonhearsay use of "verbal act" evidence.

D. CUMULATIVE ERRORS

The Court identified dozens of errors which, while insufficient to support reversal independently (either because not sufficiently serious or not preserved), collectively mandate a new trial.

While acknowledging KRS 532.075(a) mandates that the Court consider "any errors enumerated by way of appeal" in death cases, the Court continues to invoke the limited contemporaneous objection rule used in Ice v. Commonwealth, Ky., 667 S.W.2d 671, 674 (1984), under which it will refuse to address an assignment of error where "it may reasonably be inferred" that the failure to object was a deliberate trial tactic. Admitting that divining from a cold record why no objection was made often presents an "imponderable problem," the Court declared that the collective effect of the errors supported reversal "eliminating the need to quibble over individual questions of preservation" [S at 13].

1. "A LAUNDRY LIST OF MISCONDUCT"

The Court identified 3 categories of prosecution misconduct (in addition to the primary errors already addressed) which, as a "laundry list of misconduct", supports reversal [S at 13].

a. EMPHASIS ON VICTIM'S POPULARITY AND GOOD CHARACTER

Much of the prosecution's case consisted of "a parade of family members utilized as witnesses primarily to elicit sympathy for the victim" [S at 14]. The victim was portrayed as a "mother, wife and homemaker" who was an "energetic, attractive and beautiful former Miss

Henry County" [S at 15]. Grieving family members introduced articles of the victim's clothing and photographs of her decorating a wedding cake. All of this was followed by a closing argument where the prosecutor recited "Barbara's favorite poem" and called attention to the devastating impact on the family.

The Court's current unwillingness to permit the determination of punishment in capital cases to turn on the victim's character or popularity is complicated by the hole it dug for itself in McQueen v. Commonwealth, Ky., 669 S.W.2d 519, 523 (1984), where it described a similar challenge to the admission of such evidence as "totally offensive to the Court". Nevertheless, the Court boldly embraces the "principle that conviction and punishment are not contingent on who was the victim" [S at 15]. This concept, "difficult...to explain to the public in the present climate of victim's advocacy" is nevertheless "fundamental to our American system of justice and cannot be ignored in individual cases" [S at 15].

The Court has no hesitancy in holding that the rule was violated in this case, although it can't quite bring itself to overrule McQueen, and continues to believe that "a certain amount of background evidence regarding the victim is relevant to understanding the nature of the crime" [S at 14]. Recognizing the tension between competing interests, the Court retreats to the comfort of a probative/prejudicial balancing test.

Conspicuously absent from the court's analysis is any reference to the Supreme Court's watershed decision in Booth v. Maryland, 107 S.Ct. 2529 (1987), which held that the 8th Amendment forbids the introduction of character evidence of the victim or the impact of the crime on the victim's family.

b. ATTACKS ON DEFENSE COUNSEL, DEFENSE WITNESSES, AND DEFENDANT

Although many comments were outside the jury's presence, the Court condemned the prosecutor's effort to ridicule and intimidate defense counsel. These attacks, including a threat to "ram it down your damn throat", extended to the defendant and his witnesses [S at 17]. Questioning a defense expert about his fee, the prosecutor asked, "And that's what you want the court to direct Henry County to pay you?" [S at 18]. Later, the prosecutor referred to the "trick they pulled with that psychiatrist", and accused the defendant of hiding behind fendant of hiding behind "secret defenses" [S at 18, 19].

The defendant himself was characterized as a "monster", a "wolf", a "black dog of a night." This was highly improper since "[t]here is no place in argument for scurrilous and degrading terminology" [S at 20].

C. MISSTATEMENTS OF LAW

In argument, the prosecutor improperly defined reasonable doubt, but the "most serious misstatement" concerned the prosecutor's penalty summation, where he argued that the jury had a "duty" to pronounce death if an aggravating circumstance was found [S at 20].

2. RESTRICTIONS ON CROSS-EXAM TO EXPOSE BIAS

a. The defense sought to impeach a key prosecution witness, who didn't come forward until after the trial started, "by proving his motive was because he thought [Sanborn] guilty and wanted to assist in proving it" [S at 21]. The trial court halted a line of cross-examination designed to expose this bias. This was error since "[t]he credibility of a witness' relevant testimony is always at issue, and the trial court may not exclude evidence that impeaches credibility even though such testimony would be inadmissible to prove a substantive issue in the case" [S at 21].

b. The trial court also refused to allow the defense to develop on cross-examination that a prosecution witness was on misdemeanor probation. The trial court apparently confused impeachment by revealing bias with impeachment by exposing a criminal conviction, and refused to allow cross-examination since the conviction was not for a felony. This was error under Davis v. Alaska, 415 U.S. 308 (1974).

3. JURY ISSUES

a. FAILURE TO RECORD REASONS FOR HARDSHIP EXCUSALS OF PROSPECTIVE JURORS

The trial court was faulted for failing to comply with KRS 29A.080, and 29A.100(2) which mandate recording the reasons for hardship excusals on the jury qualification forms. Even though the court later gave reasons as to why the jurors were excused, "this subsequent ex-

planation is no substitute for contemporaneous compliance with the statutory rules" [S at 29].

b. ALLOWING PROSPECTIVE JURORS TO STUDY LIST OF VOIR DIRE QUESTIONS

Before commencing individual voir dire, the trial judge read to the entire panel the questions to be asked during individual voir dire, and then provided the venirepersons with a list of the questions. This procedure violated the defendant's right to be present at every stage of the trial, including jury selection. RCr 8.28.

Furthermore, the procedure devalued "the critical importance of visually observing prospective jurors while they are formulating answers to voir dire questions "[S at 23].

c. CALDWELL ERROR: EMPHASIS ON VERDICT AS RECOMMENDATION

The Court was presented with the chronic problem of prosecutorial suggestions that the jury's verdict would only be a recommendation. Acknowledging the holding in Caldwell v. Mississippi, 472 U.S. 320 (1985) that the 8th Amendment forbids minimizing the responsibility of the jury in assessing the death penalty, the Court nevertheless finds that Caldwell's mandate "is not ironclad, and use of the word 'recommend' is not per se reversible error" [S at 24].[4]

Ducking the issue since a retrial was being ordered, the prosecutor's comments were described as borderline, especially when considered with the Court's voir dire questions and instructions.

d. THE SHERIFF: KEY WITNESS, FIRST COUSIN TO THE VICTIM AND JUROR SNIDER, CUSTODIAN OF THE JURY

1. The Sheriff & Juror Snider

Juror Snider's wife was the first cousin of the Sheriff, a crucial prosecution witness. During voir dire, Snider stated that he would "have to lean towards what the Sheriff might say" [S at 25]. He "should have been excused for cause, but was not" [Id.].[5]

While it is ordinarily a matter of discretion as to whether to excuse a first cousin by affinity, here there were "further answers showing a probability of bias toward the testimony" [S at 25].

Finally, Snider should not have remained on the jury after being informed, during penalty deliberation, of his father's unexpected death.

ii. The Sheriff as Jury Custodian: a "psychologically intimidating force"

"As is often the case with a mistake of this nature, subsequent events compounded the problem" [S at 26]. Here the sheriff, an important witness, was put in charge of the jury when it was sequestered.

This was a violation of the principle of separation of witnesses. Turner v. Louisiana, 379 U.S. 466 (1965). Under these facts, the sheriff was a "psychologically intimidating force" on the jury [S at 14].

4. PENALTY PHASE REBUTTAL

On the "pretext" of rebutting a "casual comment by a defense witness" suggesting that Sanborn was a "peace lover", the prosecution called his wife and step-daughter, presenting inflammatory evidence of uncharged crimes including rape and assault [S at 28]. This was highly improper rebuttal. The defense witness made a brief and unresponsive comment which "did not open the door to the storm of evidence which followed" [S at 28].

5. EX PARTE CONTACTS BETWEEN JUDGE AND PROSECUTOR

A "gross breach of the appearance of justice" occurred where, during the penalty phase, the trial court granted an ex parte order for an order compelling the attendance of defendant's wife as a witness. Once the trial commences, **"every order requested of the court** is a matter to be addressed in the **presence of opposing counsel"** [S at 30] [emphasis in original].

C. THEORY OF DEFENSE INSTRUCTIONS

The Court addressed several claims concerning instructions about the defendant's theory of defense to avoid error on retrial.

The primary theory of defense was that the rape occurred post-mortem. If believed, this theory would have negated convictions for the offenses being used as aggravating circumstances.

The trial judge refused to charge on the crime of abuse of a corpse. On retrial, the instruction should be given if supported by the evidence. While the defense theory diverged from the defendant's pretrial denial of participation in the killing, the trial court must submit instructions on the various

alternatives when a jury could come to any of several conclusions. Pace v. Commonwealth, Ky., 561 S.W.2d 664, 667 (1978).

LIGHTNING STRIKES TWICE

1972 - Opinion of Justice Stewart, striking down the death sentences of prisoners in Florida, Georgia, Texas, etc. in Furman v. Georgia, 409 U.S. 238, 309 (1972): "These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual."

1986 - After a decade of experience with the "new" death penalty, Florida ranks first among the states in both the number of prisoners executed by electrocution and the number of people killed by lightening.

II. GROOMS V. COMMONWEALTH COMPASSION IS THE LAW

Grooms, a "somewhat mentally retarded" black inmate, was sentenced to death for the murder of Patricia Ross, a penitentiary employee. KRS 532.025(2)(a)(5). He was also convicted of attempted murder of fellow inmate Larry Lehner. Grooms' evidence established that he and the deceased worked together in harmony, that fellow convicts mercilessly teased him that Ross, whom he was infatuated with, was having a relationship with another man, and that Grooms was taunted into an uncontrollable rage resulting in Ross' death and Lehner's assault. The prosecution theory suggested that Grooms lured the victim into a stockroom with the intent to have sex but, upon being rebuffed, deliberately killed the victim and attempted to kill an inmate who happened upon the scene.

A five member plurality (Gant, Stephens, Vance, Leibson, Lambert) orders a retrial on the murder charge but leaves the attempted murder conviction standing. Concurring and dissenting in part, Stephens, Lambert and Leibson would reverse both convictions. Once again, Stephenson and Wintersheimer dissent and would have Grooms executed.

A. CHANGE OF VENUE

The controlling opinion finds no abuse of discretion, even though the case was "tried in the county where the prison is located, where many of the prospective jurors had some knowledge of the case, and when a substantial number of them worked at the penitentiary or had relatives or friends who worked there" Grooms v. Commonwealth, Ky., ___ S.W. ___ (1988) [G at 13]. The Court also acknowledged that a public opinion poll showed 98% of the respondents as having some knowledge of the case. All but 4 of the 28 prospective jurors indicated some knowledge of the case during selection. Furthermore, "the record here substantiates that there was a great deal of pretrial publicity concerning this case" [G at 4]. This issue failed to persuade the Court, but relief was forthcoming on a related matter.

B. JURY ISSUES

1. RIGHT TO ASK JURORS WHAT THEY KNOW ABOUT HIGH PUBLICITY CASE

"The exclusion of any questions as to the extent of the knowledge about the case possessed by the prospective jurors and the inability to learn what they had heard about it and from whom they had heard it, kept from the trial judge information important to the determination of whether a challenge for cause to a particular juror should have been sustained and kept from counsel information important to the determination of which jurors should be peremptorily challenged" [G at 4]. While not going so far as to hold that counsel had "an absolute right" to direct questioning, the Court squarely held that, upon request, "inquiry should be made into the extent of knowledge possessed by prospective jurors about the case and the source of that knowledge" [S at 5].

2. RIGHT TO INDIVIDUAL SEQUESTERED VOIR DIRE ON PUBLICITY

Acknowledging that inquiry in the presence of other jurors as to what a venireperson knows about the case poses the danger of polluting the panel, the Court ruled that the "better procedure" is to question jurors independently in a sequestered fashion.

3. REVERSE WITHERSPOON: THE RIGHT TO PURGE THE JURY OF KILLERS

For the first time in its history, the Court held that the trial court erred in failing to grant a causal challenge to a juror who would automatically vote for the death penalty upon a conviction for intentional murder, regardless of how compelling the case for mitigation.

In so doing, the Court restates the standard for death (or life) qualification in Kentucky, drawing not from Wainwright v. Witt, 469 U.S. 810 (1985), but rather from Witherspoon v. Illinois, 391 U.S. 510 (1968): "the Commonwealth is entitled to have excused for cause a person who has such conscientious objection to the death penalty that he would never, in any case, no matter how aggravated the circumstance, vote to impose the death penalty. Conversely, a juror should be excused for cause if he would be unable in any case, no matter how extenuating the circumstances may be, to consider the imposition of the minimum penalty" [G at 11].

Here, Juror Veech made it "abundantly clear" that he favored the death penalty to the exclusion of all other penalties as punishment for intentional murder. In Veech's view "[m]itigating circumstances or **compassion** would have nothing to do with it" [G at 11-12] [emphasis added]. The court's reference to compassion should not go unnoticed. Regardless of how aggravated the killing, a juror must be able to consider granting mercy if he or she has compassion, or feels sorry for the defendant.

The trial court denied Grooms' challenge for cause, and he was forced to use a peremptory challenge on Veech, thereby preventing him from using a peremptory challenge on other jurors whom he desired to excuse for cause. Citing Rigsby v. Commonwealth, Ky., 495 S.W.2d 795 (1973), the Court holds that it is reversible error "In a case where the defendant has elected to use a peremptory challenge to excuse that juror and it later develops that the defendant is prevented thereby from exercising a peremptory challenge to another juror whom he desires to challenge" [G at 5]. "This is true because a defendant should not be required to waste his peremptory challenges on jurors who should have been excused for cause" Id. Here it was apparent that Grooms would have exercised a peremptory on at least one of the other jurors he unsuccessfully challenged for cause, and who sat on the jury.[6]

C. DESTRUCTION OF EVIDENCE

The Court finds no error in the "routine destruction" of blood samples by the state laboratory 10 days after the trial court ordered the preservation of all serological evidence. There was "no indication it was done in a calculated effort to circumvent disclosure requirements" [G at 15]. Plus, Grooms had confessed, so the prosecution "had no reason to suspect that the blood samples would in any way exculpate him" [G at 15].

D. CONFESSION ISSUES

The Court rejected a host of challenges to the admission of Grooms' confession. His claim that his waiver was not voluntary due to his low I.Q. was summarily rejected. It was of no import that the first confession was not preceded by Miranda warnings since it was not used. Further, the Court held that Grooms was not a suspect. A subsequent Mirandized confession was not "fruit of the poisonous tree". Oregon v. Elstad, 470 U.S. 298 (1988).

Finally, Grooms' confession was not rendered involuntary even though he was advised incorrectly by the investigating officer that the death penalty was not a possibility unless Lehner died from his injuries.

E. INSTRUCTIONS

1. NO INFERENCE INSTRUCTION

The mere tendering of a "no inference" instruction is not sufficient to preserve the issue. There must be a specific objection on the record to the failure to give the instruction. RCr 9.54(2).

2. VERDICT AS RECOMMENDATION

In an important ruling, the Court held that, at least in cases where capital offenses (where the jury "recommends" the penalty) are joined with non-capital offenses (where the jury "fixes" the punishment), "the instructions on the penalty phase should require the jury to fix the punishment" [G at 21] [emphasis added].

F. JUROR'S USE OF BIBLE

On retrial, the court is instructed not to allow jurors to take Bibles into the jury room, as happened at the first trial.

G. THE ATTEMPTED MURDER CONVICTION

Although the murder conviction was reversed, the Court refused to disturb Grooms' conviction for attempted murder of inmate Lehner.

H. THE CHIEF JUSTICE'S CONCURRENCE: "FRED GROOMS DID NOT GET A FAIR TRIAL"

In a powerful concurring opinion joined by Justices Leibson and Lambert, Chief Justice Stephens concurs with the reversal of the murder conviction but dissents from the portion of the majority opinion which upholds the attempted murder conviction.

1. VENUE

The Chief Justice would reverse on this issue and direct that retrial be conducted in "a venue where a fair trial can occur." (Stephens, C. J., concurring and dissenting) [CJ at 3]. Referring to the public opinion poll, the Chief Justice notes that only 54% of the citizens believed that Grooms could get a fair trial. "To permit a trial in such a location is similar to playing Russian roulette with 46% of the gun's chamber being loaded. Is that a fair trial? Is that due process of law? [CJ at 3].

2. RIGHT TO INDIVIDUAL SEQUESTERED VOIR DIRE

The Chief Justice believes that the trial court should be directed to permit individual voir dire on the issue of publicity at the retrial. "It would only have taken a little more time, and when an accused's

life is at stake,, that time is a small price to pay" [CJ at 4].

3. JURY QUALIFICATION

The Chief Justice criticized the majority for reversing due to the improper ruling on only 1 juror. In fact, the trial court also should have excused "8 persons who had a close relationship with the victim's family or with Kentucky State Prison employees". Indeed, "the trial court seemed almost oblivious of his duty to see that a fair and impartial jury should be selected in this case" [CJ at 5].

Also, the trial court should not have summarily excused 41 jurors, without notice. Even the trial judge's own notes showed 11% of the jurors were excused without good cause. KRS 29A.070.

4. JUROR'S USE OF BIBLE

Another ground for reversal was the juror's use of the Bible during the penalty phase deliberations. Grooms was convicted of bludgeoning the victim to death with an industrial can opener. At a post-trial hearing, an affidavit was filed indicating that the jury had consulted Chapter 35, Verse 16 of the Book of Numbers while deliberating on Grooms' fate. The scripture reads: "And if he smites him with an instrument of iron, so that he dies, he is a murderer: the murderer shall surely be put to death" [CJ at 8]. This was obvious jury misconduct. NeCamp v. Commonwealth, Ky., 225 S.W.2d 109 (1949).

I. WINTERSHEIMER'S DISSENT

Recognizing that the case is to be reversed, Justice Wintersheimer, joined by Justice Stephenson, flies a handwringing opinion dissenting from the reversal, arguing that "the infinitely better practice would be to permit unlimited peremptory challenges to avoid the situation that has arisen in this case" Grooms (Wintersheimer, J. dissenting and concurring, p. 3).

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[1]These decisions, none of which will have a systemic impact in Kentucky, will be assayed in the next edition of The Advocate.

[2]The prosecutor, Bruce Hamilton, appeared unrepentant in an interview the next day in the Louisville Courier Journal when he stated that "four of the seven [Justices] weren't too upset," an apparent reference to the fact that Gant and Vance concurred only in the result.

[3]The federal courts condemned the Kentucky hearsay exception over a decade ago. Stewart v. Cowan, 528 F.2d 79 (1976).

[4]This is a questionable interpretation of Caldwell, which allows for no harmless error analysis.

[5]The Court found it questionable whether this issue was preserved since it was first raised in a new trial motion.

[6]Recently, in Ross v. Oklahoma, ___ U.S. ___ (decided June 22, 1988), the Supreme Court ruled that the trial court's failure to remove a juror who, like Veech, declared that he would automatically vote for the death penalty, was not reversible error since the juror was removed with a peremptory challenge. However, there was no showing in Ross that the lost peremptory impeded the defendant's ability to strike other jurors who were unsuccessfully challenged for cause. Furthermore, Oklahoma specifically requires defendants to use peremptories to cure erroneous refusals to excuse jurors for cause. But in Kentucky "a defendant should not be required to waste his peremptory challenges on jurors who should have been excused for cause" [G at 5]. The interplay of Grooms and Ross will be addressed in greater depth in the next Advocate.

6th Circuit Highlights

Donna Boyce

Double Jeopardy

The prosecutor's failure to request, and the judge's failure to give, instructions on the only theory of liability supported by the evidence bars a retrial on that theory. Saylor v. Cornelius, ___ F.2d ___, 17 SCR 10, 21, 43 Cr.L. 2186 (6th Cir. 1988). Saylor was indicted for murder as a principal and accomplice, and murder by conspiracy. Despite the lack of evidence of a conspiracy, the judge instructed on the murder count only on the theory of Saylor's liability as a conspirator. The prosecutor did not object or request instructions on any other theory of liability. The Sixth Circuit found that due to the prosecutor's acquiescence in the instructions given, the prosecutor should bear the burden of the aborted outcome. The Court saw no reason why the prosecutor should be allowed to try Saylor again merely because it did not realize during trial that the only theory of liability established by the evidence had not been charged to the jury. The Court rejected the position of the Kentucky Supreme Court that Saylor could be retried because this was merely an instructional error.

Lineup Photograph

In United States v. McCoy, ___ F.2d ___, 17 SCR 12, 4 (6th Cir. 1988), the Sixth Circuit found erroneous the admission of a photograph of a lineup including McCoy where the men were dressed in identical, institutional uniforms and standing in front of sign that said "Cincinnati Police Department." The Court stated that the men looked as if they had answered a casting call for the role of a thug in a television police drama except that their unhappy faces indicated their presence in the lineup was not voluntary. Because the photos suggest McCoy is a "bad guy" who belongs in jail, a juror could be influenced irrationally to conclude he is guilty of the charged offense. The court found that in contrast to its prejudicial nature, the photographic evidence had no probative value in that it was offered to show that lineup was not unduly suggestive even though McCoy had not challenged the fairness of the lineup. The Court found the error to be harmless because McCoy was acquitted of the charge that the photograph related to.

Jury Composition Challenges

In Ford v. Seabold, ___ F.2d ___, 17 SCR 6, 8 (6th Cir. 1988), a Sixth Circuit panel addressed its first major jury composition challenge case. Ford first raised a fair-cross section challenge to the jury pool from which his petit jury was selected in Scott County. The Court found that young adults and college students were not cognizable groups and declined to decide if the large absolute disparity of women in the jury pools and population was unreasonable because there was no evidence that jury commissioners used a particular system or procedure in order to exclude women. The Court agreed with Ford that in conducting a jury analysis it is proper to compare the percentage of a particular group in the jury pools to the percentage in the population rather than that in the voter's registration lists. The Court also rejected the state's argument that jury samples over a two year period do not cover a significant enough portion of time.

Ford also raised due process and equal protection challenges to the underrepresentation of women and young adults from the Scott County jury commissions. With respect to the due process claim, the Court found young adults were not a cognizable group and that there was no testimony from the judge or evidence that he had systematically excluded women from jury commissions. The Court concluded Ford had no standing to raise an equal protection claim because he was neither a women nor a young adult.

Additionally, Ford made due process and equal protection challenges to the exclusion of women, young adults, students and nonwhites from the Franklin County jury commissions and the jury pools from which the grand jurors who indicted him were selected. Despite acknowledging considerable authority to the contrary, the Court held that a due process claim cannot be raised in a challenge to the composition of the

grand juries or jury commissions. With respect to his equal protection challenge to the composition of grand juries jury commissions, the Court held that Ford had standing only as to nonwhites. While underrepresentation of nonwhites on grand juries was insignificant, the Court expressed alarm at the absence of blacks on jury commissions for twenty years. Despite its alarm, the Court found that total exclusion without further evidence of discrimination is insufficient to establish a prima facie case. Even if total exclusion is sufficient to prove an equal protection violation, the Court ruled that reversal would not be required. The Court said such discrimination would not undermine the integrity of the indictment and conviction due to the clerical, technical nature of jury commissioner's responsibilities.

Petition for certiorari is pending in Ford.

Involuntary Commitment of Mentally Retarded

The Sixth Circuit's recent opinion in **Doe v. Austin**, ___ F.2d ___, 17 SCR 13 (6th Cir. 1988), retains for mentally retarded adults the right to have judicial determinations of whether or not they meet the criteria for involuntary civil commitments.

However, this right exists, according to the Sixth Circuit, due to the equal protection right of mentally retarded persons to be provided the same protection as is provided to mentally ill persons vis-a-vis civil commitment. Therefore, since KRS 202A provides for judicial hearings prior to commitment of mentally ill individuals, there must be such hearings afforded to mentally retarded adults.

The Sixth Circuit specifically reversed that part of the district court's judgment which found that mentally retarded adults were entitled to judicial hearings based on the due process clause. The Sixth Circuit found the currently utilized administrative commitment procedure to be violative of due process. This conclusion was reached after comparison with the due process afforded to prisoners who are the subject of transfer to mental facilities under Vitek v. Jones, 445 U.S. 480 (1980).

The district court's opinion was affirmed in two other areas. The Court found that the guardianship procedures are not a sufficient replacement for a hearing prior to institutional placement. The Court also found that parents or guardians cannot place their adult children in an institution under the auspices of a voluntary commitment. Such placements are involuntary commitments.

The court further mandated that the Commonwealth must make a periodic judicial review procedure available to mentally retarded persons during their confinements. The timing of such review was not established by the Sixth Circuit. The case was remanded for further action consistent with these findings.

A petition for rehearing filed by the Cabinet for Human Resources is pending in this case.

Revocation Hearings

In an unpublished opinion, **Summers v. Scroggy**, 6th Cir. No. 87-5064, cert. denied, 108 S.Ct. 1122 (1988), the Court found KRS 439.352 to be unconstitutional because it violates a paroiee's due process right to a hearing. This statute automatically terminates parole when the paroiee is convicted of a new crime and is sentenced to prison. The Court, noting that a paroiee must be given the opportunity to present evidence in mitigation, remanded the case for a revocation hearing.

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Judge says remark not meant to offend

Associated Press

MINNEAPOLIS — A judge said he did not intend to offend anyone when he asked a black defendant represented by a black attorney if he would like to consult with a white attorney before pleading guilty to sexual assault.

Hennepin County District Judge Chester Durda said Monday that "some people get rubbed funny" about things he says.

"You can't hang on every word," he said.

According to a transcript of the hearing, Durda asked the defendant in open court June 3 if he would "feel more comfortable if the judge provided a white attorney or another minority of some kind" to explain the court process, because the defendant could not read.

Defense attorney William McGee said Monday he wanted to speak with the judge before publicly commenting.

Lexington Herald-Leader, 6/17/87

Plain View

Search and Seizure Law and Comment

Ernie Lewis

The Supreme Court of the United States during the past two months has considered two major search and seizure cases, both of which went against the rights of the person accused of the crime.

In the first, California v. Greenwood, 468 U.S. ___, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the Court considered a question that had been brewing before the lower courts for some time. The question as posed by the Court was whether a defendant manifests "a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." Id. at 3030.

The case began when one officer Stracner received information that the defendant Greenwood might be involved in narcotics trafficking. Officer Stracner also knew that a DEA agent had heard from a criminal suspect in a case that a truck containing drugs was headed for Greenwood's house. Officer Stracner had also heard that a neighbor had been complaining of heavy vehicular traffic in the area near Greenwood's house. However, a surveillance of Greenwood's house failed to reveal further substantial evidence of drug trafficking. In order to further investigate the case, Officer Stracner asked the trash collector to save the trash from Greenwood's house. The trash collector did so; Officer Stracner rummaged through trash which had been in a sealed garbage bag. There, Stracner found "items indicative of narcotics use." Officer Stracner then secured a warrant for the house, the execution of which revealed hashish and cocaine. Stracner then went through the entire process a second time once Greenwood was released on bail. Greenwood was convicted but the state courts reversed, holding that the warrantless trash search had been violative of the Fourth Amendment.

Justice White wrote for a six person majority, absent Justice Kennedy. The Court held that while defendant Greenwood might have had a subjective expectation of privacy in his garbage as witnessed by the fact that it was concealed inside a garbage bag, this expectation of privacy was not one society was prepared to view as reasonable. The Court noted that garbage placed at the curb in garbage bags was exposed to the public where "animals, children, scavengers, snoops" had access to the garbage. Citing Katz v. United States, 389 U.S. 347 (1967) the Court stated that "'what a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection.'" Id. at 3030.

Justice Brennan wrote the dissent for himself and Justice Marshall. In stinging language, he stated that "scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior. I suspect, therefore, that members of

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our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trashbag will not become public." Id. at 3032.

Brennan analyzed the search from the perspective of a container as opposed to garbage. It is interesting here that the nomenclature seems to be determinative of the way the opinion goes. Justice White, viewing the object of the search as mere garbage, said that society was not prepared to view as reasonable privacy expectations in a garbage bag. Justice Brennan, on the other hand, instructed the Court to look at this as a container search. When viewed from this perspective, he could rely upon a long line of cases finding the expectation of privacy reasonable in a container. See United States v. Jacobsen, 466 U.S. 109, (1984); Robbins v. California, 453 U.S. 420 (1981); and United States v. Chadwick, 433 U.S. 1 (1977). Brennan ended his dissent by saying that "the Court paints a grim picture of our society. It depicts a society in which local authorities may command their citizens to dispose of their personal affects in the manner least protective of 'the sanctity of the home and the privacies of life' ... and then monitor them arbitrarily and without judicial oversight -- a society that is not prepared to recognize as reasonable an individual's expectation of privacy and the most private of personal affects sealed in an opaque container and disposed of in a manner designed to co-mingle it imminently and inextricably with the trash of others ... the American society with which I am familiar 'chooses to dwell in reasonable security and freedom from surveillance,' ... and is more dedicated to individual liberty and more sensitive to intrusions on the sanctity of the home than the Court is willing to acknowledge." Id. at 3034-3035.

The Court also looked at the common street encounter where upon seeing the police the object of the encounter flees. Michigan v. Chesternut, ___ U.S. ___, 108 S.Ct. 1975, ___ L.Ed.2d ___ (1988). This was a decision which had been long awaited by the law enforcement community who hoped that the Chesternut case would decide that evidence of flight upon seeing police allowed for at a minimum a Terry stop. In that sense, the Chesternut case had to be something of a disappointment.

In an opinion by Justice Blackmun, in which Justice Kennedy, joined by Justice Scalia wrote a concurrence, the Court took a minimalist approach to the problem. The facts were simple. Four police officers were driving in Detroit when they saw a car stop, a man get out and go up to one Michael Chesternut, who then saw the police and began to run. The police drove alongside Chesternut. They did not arrest him, blue lights were not turned on, guns were not drawn. During flight, Chesternut threw packets out of his pocket which were then recovered. Shortly after throwing the packets out of his pocket, Chesternut stopped. An officer looked at the packets and in his opinion thought that they were narcotics and arrested Chesternut. After arrest, Chesternut was taken to the police station where more pills, heroin, and a needle were found on his person.

The state of Michigan contended that until Chesternut was apprehended, the Fourth Amendment was not involved in any way. Chesternut, on the other hand, contended that any police chase, including the one involved in this case implicated his privacy rights. The Court rejected both positions. Rather, they held that under the particular circumstances of this search the Fourth Amendment was not involved. They used the test first used in United States v. Mendenhall, 446 U.S. 544 (1980), which states that "the police can be said to have seized an individual 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" Id. at 3079. Under the Mendenhall test, the Court concluded that Chesternut was not seized before he had tossed the packets. "[T]he police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement."

The Court was careful to note that the police here did not have their siren or flashers on, they did not command Chesternut to stop, they did not display their weapons, nor did they control Chesternut's direction or speed. This emphasis, in combination with the Court's holding, actually makes the Chesternut case a good one for the defense. Where a siren is turned on, where the police draw weapons, control the defendant's direction or speed or use any other kind of intrusive device, it can be said that under the Mendenhall test, an arrest or a stop has occurred implicating the Fourth Amendment.

The opinion is interesting in another way. Justice Kennedy wrote a concurrence which was joined in by Justice Scalia. It is our first indication, other than his circuit court opinions, of how exactly he will approach Fourth Amendment questions. Given that, his concurrence does not bode well for persons

interested in preserving Fourth Amendment rights. Justice Kennedy viewed this case as presenting "an opportunity to consider whether even an unmistakable show of authority can result in the seizure of a person who attempts to elude apprehension and who discloses contraband or other incriminating evidence before he is ultimately detained. It is at least plausible to say, that whether or not the officers conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect." It appeared that Justice Kennedy was disappointed that the Court did not take the opportunity in the Chesternut case to expand Terry v. Ohio, 392 U.S. 1 (1968) to extend to one of the most common street encounters. One cannot read too much into the failure of Justice Kennedy to achieve a majority for his position, however. The Court was able to find a majority which simply viewed the specific circumstances of this case, affirmed the Mendenhall test, and said little more. The greater question will simply wait for a later time.

The Court of Appeals of Kentucky in an unpublished decision wrote an interesting opinion in **Commonwealth v. George Martin**, (unpublished, June 3, 1988). They viewed a situation where one George Martin had a car wreck and was taken to the hospital. While there, the deputy sheriff requested that a blood sample be drawn for chemical testing, that testing later revealing a .16. Three days after the accident, but before the sample's results came back, Martin was charged with driving under the influence. He was convicted but this conviction was later reversed by the Casey Circuit Court. The Circuit Court's opinion was affirmed by the Court of Appeals on discretionary review who held that the blood test was inadmissible because it was taken without a warrant prior to arrest in violation of the Fourth Amendment and KRS 186.565 (1) and (2).

The Sixth Circuit also spoke in the Fourth Amendment area twice in the last two months. In **United States v. Markham**, S.C.R. 17 (6th Cir. 4/18/88), the defendant had parked an unattended motor home in a private driveway. It was conceded that police had probable cause to believe that the motor home, a Winnebago contained marijuana. The defendant contended before the Court that the automobile exception did not apply because there was no mobility inherent in the vehicle. The Winnebago was unoccupied, was under surveillance and thus there were no exigent circumstances allowing for a warrantless search of the Winnebago.

The Sixth Circuit disagreed, however, relying upon California v. Carney, 471 U.S. 386 (1985). The Sixth Circuit held that the search here was valid saying that Carney and the automobile exception required no exigencies to justify a warrantless search. Rather, the Sixth Circuit viewed Carney as setting up a bright line rule under the automobile exception, rejecting implicitly, although not stated, the exigency analysis contained in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

In **United States v. Jones**, 17 S.C.R. 10 (6th Cir. May 4, 1988), the Court held that an illiterate defendant who was not advised of his Miranda rights nor advised of his right to refuse a search did not voluntarily consent to a search where he had been picked up; believed that he was under arrest; and taken to his house. The Court under the totality of the circumstances viewed his consent as involuntary.

The Short View

Washington v. Belleu, 751 P.2d 321 (Wash. App. 1988). Here the police heard that an individual was casing a house. Upon investigation, they found the defendant with another man, walking by the house. He met the description given by the informant. The two men ran toward the car and shortly thereafter the car drove off with its headlights off. Police stopped the car, drew their guns, and ordered the persons out of the car. Upon searching the car, they found a rifle in the backseat, and two other guns in the car. They also found a stolen ring as a result of a patdown of one of the persons. The Washington Court of Appeals held that what had occurred was a full felony stop requiring probable cause. They rejected the state's contention that this was only a Terry stop, because once the car was stopped, guns were drawn and all occupants were ordered out of the car. They were not free to leave and probable cause was required.

Williams v. Ward, 43 Cr.L. 2081 (2nd Cir. 4/19/88). In this particular case, a class action suit

suit had been filed challenging the New York practice of providing an arraignment and a probable cause determination within 72 hours after the initial arrest. The plaintiff class had successfully persuaded a federal district judge to rule that a 72 hour arraignment violated Gerstein v. Pugh, 420 U.S. 103 (1975), which had held that a much longer detention without a probable cause determination in Florida had violated the Fourth Amendment. The Second Circuit reversed the district court holding that a 72 hour detention followed by an arraignment and combined with a probable cause determination satisfied the Fourth Amendment's requirements. The Court noted that New York's procedure allowed "the accused [to be] present at the arraignment and [to have] the benefit of counsel in attacking the sufficiency of the charging instrument." The Court further noted that the ALI Model Code of Prearraignment Procedure had approved the 72 hour detention.

What is important about this particular case for Kentucky practitioners is not that a lesser time of 72 hours was not required by the Second Circuit. Rather, what is important is the Court's emphasis upon nothing more than 72 hours prior to the holding of the arraignment and probable cause determination. What is further important is the emphasis on a probable cause determination. One will review district court procedures in vain largely to find a significant probable cause determination being conducted by district judges. In specific cases, the failure of the Court either to provide a 72 hour appearance before a magistrate or more specifically a probable cause determination can have a significant impact on later admissibility of evidence such as confessions taken in derogation of those rights.

United States v. Thomas, 844 F.2d 678 (1988). Here, the Ninth Circuit reminds us that the stop and frisk elements of Terry v. Ohio, 392 U.S. 1 (1968) involved two separate acts with their own justifications. Here the police received word that two men were passing counterfeit bills. Upon arrival at the place specified, the defendant's car was pulled over by the police, he was ordered out of the car, and he was frisked whereupon a weapon was discovered. The gun was correctly suppressed according to the Ninth Circuit, due to the fact that while the initial stop was justified by an articulable suspicion, the frisk was not based upon evidence that the defendant was armed and dangerous, citing Adams v. Williams, 407 U.S. 143 (1972). In every Terry stop, counsel should specifically look at whether there was articulable suspicion not only that the defendant was involved in criminal activity which justifies the stop but also whether there is an articulable suspicion that the defendant is armed and dangerous justifying a frisk.

People v. Griminger, N.Y.Ct.App., 43 Cr.L. 2103 (4/28/88). Here, New York rejects the Illinois v. Gates, 462 U.S. 213 (1983) test for judging the adequacy of informer hearsay offered to prove probable cause prior to the issuance of a search warrant. New York will continue to use the tried and true Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969) test.

Carney v. State, 525 So.2d 776 (Miss. Sup. Ct. 1988). The police obtained a warrant allowing for a search for a stolen radio and television set at the defendant's house. The police started at the patio where they found the radio and also found some marijuana under a wooden spool. Once inside the house, they found the television set. Their search then proceeded to the attic where a significant amount of marijuana was found in aluminum foil. The Mississippi Court reversed the defendant's conviction for trafficking in marijuana saying that the evidence should have been suppressed. The police had no authority to look under the spool because the spool could contain neither the radio nor the television set. Further, once the radio and television were found, authority for the search ended and thus, going up into the attic and looking in the aluminum foil where obviously no radio or television set could be contained was a violation of the Fourth Amendment.

State v. Smith, 540 A.2d 679 (Conn. Syst., 1988). The defendant, convicted of armed robbery to feed a drug habit, was released from prison after eighteen months and placed on probation. He showed up for an appointment with his probation officer four hours late under the influence of some stimulant. Upon questioning, he admitted to the officer that he had smoked marijuana and brazenly stated that he would continue to do so. The trial judge allowed for a change in the conditions of probation upon presentation of this information. One of the conditions was that of the requiring of the defendant to submit to urine testing. The defendant appealed citing Griffin v. Wisconsin, 97 L.Ed.2d 709 (1987). The Connecticut Supreme Court upheld the change in conditions stating that there was a reasonable suspicion for the urine test.

State v. Fales, 540 A.2d 1120 (Mn. Sup., 1988). The Court rejected in this case what has to be described as a creative approach to a justification for a search by the State of Maine. Here, the defendant

had been arrested for DUI and was released on bail. His car was impounded and the police asked him if he wanted a ride home. He stated that prior to going home he wanted to retrieve a gym bag which had a large amount of money in it. While on the way the police noticed mild "moodswings." Once at the impoundment facility, the defendant asked the officer to get the gym bag for him. The officer noticed a great deal of money sticking out of the gym bag and decided to search the gym bag where he found a significant amount of marijuana. The defendant was taken back to the police station at that point and charged with additional offenses. The Court rejected the state's contention that they had a right to search the gym bag due to the defendant's "mild moodswings" stating that that did not give them a reasonable or articulable suspicion justifying a search of the gym bag. Further they rejected the state's contention that the police officers had a right to search the gym bag in order to protect themselves, noting that there was no suspicion that the defendant was armed and dangerous.

Commonwealth v. Derosia, Mass. Sup. Jud. Ct. 43 Cr.L. 2174 (5/4/88). The police in this case had a warrant to arrest the defendant. They found that he was in a third person's home and without a warrant for entering that home, they went in and arrested the defendant. The Court held that the arrest of the defendant was illegal citing Steagald v. United States, 451 U.S. 204 (1981). This case represents an extension of Steagald, however, due to the fact that Steagald addressed the privacy rights of the third party whose house was entered without a warrant. Derosia goes further saying that the entry of the third party's house was illegal and the person named in the arrest warrant had standing to challenge the illegal entry of that house.

United States v. Whitehead, 43 Cr.L. 2177 (4th Cir. 5/24/88). Here the Fourth Circuit found that a sleeping compartment in an Amtrak train was more like a car than a motel room and thus a person had a limited expectation of privacy in that sleeping compartment. Further, because of the limited intrusiveness of a canine search, probable cause was not required to expose luggage in the compartment to a sniff from a dog. The Court allowed for a dog sniff based upon reasonable suspicion rather than probable cause relying upon California v. Carney, 471 U.S. 386 (1985) and United States v. Place, 462 U.S. 696 (1983) (which held that public exposure of luggage to a dog sniff is not a search).

State v. Reddick, Conn. Sup. Ct. 43 Cr.L. 2178 (5/10/88). The police in this case had a warrant to search the upper floor of a building. There was a basement where there was a laundry area shared with another apartment unit. The police entered the upper floors and executed their search warrant but they did not find a shotgun which they believed was involved in a robbery. They entered the basement laundry area where they found the shotgun hidden in a washing machine by the defendant. The Court held that the defendant who was the adult son of the person renting the apartment had a reasonable expectation of privacy in his parent's home, and in the basement area shared with the other apartment. Thus, the police had no authority to violate the defendant's reasonable expectation of privacy by conducting the search of the basement area outside the bounds of the warrant.

State v. Sierra, Utah Ct. App. 43 Cr.L. 2193 (5/18/88). Here, a police officer saw a suspicious motorist pass two cars thereupon failing to return to the right lane on a four lane highway. The police officer wanted to pull the car over and used the actions of the motorist to pull the car over and to search the car, whereupon he found cocaine. The Court held this to be an obvious pretextual arrest and ordered a suppression of the cocaine found during the search.

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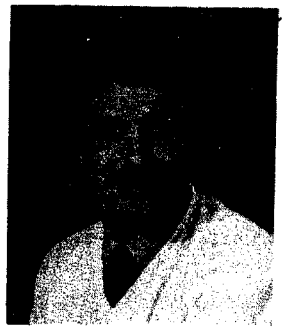
Preservation



Randy Wheeler

As every attorney who has handled an appeal should know CR 76.12(4)(c)(iv) requires that each argument in an appellant's original brief be introduced by "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Obviously, this requirement is easily met if, indeed, the issue being raised has been adequately preserved. But what does one assert if an arguably meritorious issue has not been preserved or if an assertion of preservation pursuant to this rule is met with opposition? RCr 10.26 (and its parallel civil rule, CR 61.02) contains at least a basis for the answer to this question. The rule provides: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

Although this rule does provide appellate counsel with a toehold for review, experience has taught that an assertion that the appellate court should review an unpreserved error under this rule without elaboration is, in essence, the equivalent of arguing the substance of an error simply by stating that the issue is meritorious. Overlooking the importance of the need to sufficiently argue why an unpreserved error should be reviewed either initially or in reply may prove fatal since it is clear that appellate courts will often look to the lack of preservation to avoid reviewing, much less reversing on the merits. Any problems with preservation should, therefore, be addressed with as much care and concern as the merits of the issue involved.

PRESENTING OBJECTIONS TO TRIAL COURT

The requirement that a litigant "fairly and adequately" present his position to the trial court in relation to any issue which arises during trial is primarily to allow the trial court the first opportunity to correct the problem. Long v. Commonwealth, Ky., 559 S.W.2d 482, 485 (1977); see also Damron v. Commonwealth, Ky., 687 S.W.2d 138, 140 (1985). But if the trial court is not given the first opportunity to alleviate the error the appellate court will generally determine that it is inappropriate for it to rule on the issue since as far as it is concerned no issue has actually arisen and, more importantly, the litigant claiming the grievance on appeal actually may not have wanted to raise it at the time of trial. The Court of Appeals, at least, has said that it will not adopt a rule requiring a trial court to stop the proceedings if it recognizes the possibility of an issue in order to determine if a waiver is intended. Salisbury v. Commonwealth, Ky.App., 556 S.W.2d 922, 927 (1977). Another reason given for declining to review unpreserved or insufficiently preserved errors is that the failure to raise an issue may have prevented the record from being fully developed. See Simmons v. Commonwealth, Ky., 746 S.W.2d 393, 398 (1988); Relford v. Commonwealth, Ky.App., 558 S.W.2d 175, 177 (1977).

PRESERVATION

Emphasizing the importance of preservation (but not without implying the need for exceptions to the requirement) the Supreme Court of Kentucky has stated:

> Substantive rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive. There is a simple and easy procedural avenue for the enforcement and protection of every right and principle of substantive law at an appropriate time and point during the course of any litigation, civil or criminal. That is not to say that form may be exalted over substance, because procedural requirements generally do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or

denigrated. Without them every trial would end in a shipwreck. Brown v. Commonwealth, Ky., 551 S.W.2d 557, 559 (1977).

In most situations, the appellate courts have been quite strict in requiring preservation. For example, an objection on one ground will not allow an appeal of the issue on the basis of another. See Gunter v. Commonwealth, Ky., 576 S.W.2d 518, 522 (1978). Additionally, an objection by a codefendant in a joint trial, even if fairly and adequately presented, may not be sufficient to allow the appellate court to review the error. See Ross v. Commonwealth, Ky.App., 577 S.W.2d 6 (1977); Price v. Commonwealth, 474 S.W.2d 348 (1971); Arnold v. Commonwealth, Ky, 433 S.W.2d 355 (1968). However, the trial court, by addressing an issue in a particular way, may preserve an issue for appeal even if the objection voiced was not on point. See Bixler v. Commonwealth, Ky.App., 712 S.W.2d 366, 368 (1986); Sebastian v. Commonwealth, Ky.App., 585 S.W.2d 440, 441 (1979).

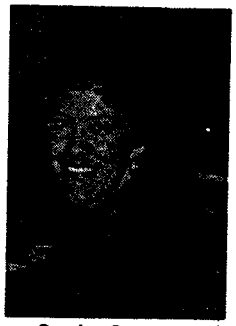
These preservation rules have been applied to collateral as well as direct appeals, Parker v. Commonwealth, Ky., 465 S.W.2d 280, 281 (1971), although it has been indicated that in a nontrial context a judge may have a greater responsibility to ensure that a waiver is intended. See Salisbury, supra, at 927. Additionally, preservation rules apply to the prosecution at least to the extent of preventing it from challenging an action by the trial court related to an issue raised by the appellant on appeal when it voiced no concern below. See Fair v. Commonwealth, Ky., 652 S.W.2d 864, 867 (1983).

FAILURE TO PRESERVE

The appellate courts have addressed the ramifications of the failure to preserve issues in different ways depending on the circumstances. Generally, the courts will simply indicate that the lack of preservation prevents a review of the issue (even though raising the issue may at least cause the court to review the entire record to make this determination). See Russell v. Commonwealth, Ky., 482 S.W.2d 584, 589 (1972); Futrell v. Commonwealth, Ky., 437 S.W.2d 487, 488 (1969); Cutrer v. Commonwealth, Ky.App., 697 S.W.2d 156, 159 (1985). Sometimes the courts will say an issue can't be reviewed but if so it would have no merit. See Payne v. Commonwealth, Ky., 623 S.W.2d 867, 878 (1981); Hunter v. Commonwealth, Ky., 560 S.W.2d 808, 809 (1977); Summit v. Commonwealth, Ky., 550 S.W.2d 548 (1977). On occasion the courts have gone even farther saying that an issue not preserved in the trial court cannot even be raised in the appellate court much less reviewed. See Corbett v. Commonwealth, Ky., 717 S.W.2d 831, 834 (1986) (in which the court did go on to review the issue to find no merit); Taylor v. Commonwealth, Ky, 461 S.W.2d 920, 923 (1970). When the courts do review an unpreserved error in an attempt to find a manifest injustice usually they will do so only to find a lack thereof. See Byrd v. Commonwealth, Ky.App., 709

DPA Staff Changes

RESIGNATIONS



Sandra Simmons

Sandra Simmons, formerly an Assistant Public Advocate with our Stanton Office, resigned on May 31, 1988. She is now working with the law office of Alec G. Stone, 138 Broadway, Brandenburg, Kentucky 40108, (502) 422-3900.

Morris Eaton

Warren A. Taylor, formerly director of the Hazard Office, resigned on June 30, 1988, and has gone into private practice in Hazard. His new address is P.O. Box 1588, Hazard, Kentucky 41701, (606) 436-6066.

Morris Eaton, formerly an Assistant Public Advocate with our Paducah Office, resigned on August 4, 1988. He is now an Illinois public defender.

Gail Robinson

NEW STAFF

Nancy Bowman Denton, Assistant Public Adovcate, joined the Hazard Office on July 16, 1988. She is a 1987 graduate of the University of Louisville School of Law.

Gail Robinson, Assistant Public Advocate, rejoined the Frankfort Office's Major Litigation Section on August 1, 1988, after a two year "absence." Thanks to Gail for her numerous pro bono efforts during the course of that absence.

S.W.2d 844, 845 (1986); Roston v. Commonwealth, Ky.App., 724 S.W.2d 221, 222 (1987). So how does one argue for review and, more importantly, reversal on the basis of unpreserved errors?

SUBSTANTIAL ERROR

The "substantial error" rule, RCr 10.26 (and CR 61.02) appears to require that two criteria be met before a review can be undertaken. The error must be palpable and must affect the substantial rights of the party raising the issue. If the issue can be considered then relief may be granted only if it is determined that a manifest injustice has resulted from the error. (Sometimes the appellate courts will hold that an issue can't be reviewed unless it amounts to a manifest injustice. See Knox v. Commonwealth, Ky., 735 S.W.2d 711, 712 (1987)), The substantial error rule which existed prior to RCr 10.26, the former RCr 9.26, indicated that a judgment could be reversed only if the court was satisfied that the "substantial rights of the defendant had been prejudiced." This rule, unlike RCr 10.26, was not a preservation rule and was applied many times to issues that were unpreserved. See, e.g., York v. Commonwealth, Ky., 395 S.W.2d 781 (1965). Although on at least one occasion an appellate court has analyzed an unpreserved error under RCr 10.26 using the standards expressed for the former RCr 9.26, it appears from other decisions that the standards to be met under RCr 10.26 are more stringent. See Jackson v. Commonwealth, Ky.App., 717 S.W.2d 511 (1986).

PALPABLE ERROR

A palpable error is, by definition, one which is obvious. But this is somewhat misleading as will be seen. Perhaps the quintessential palpable error case is Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970). In that case a witness testified that the defendant cashed a stolen check at 9:00 p.m. on a certain date. The defendant denied that he was in the area that night. On appeal the court noticed that the check was stamped by the bank in which it was deposited on that date. Therefore, the court concluded on its own that the defendant could not have cashed the check on the day the witness said. Accordingly, since that witness was the only one who could place the defendant in possession of the check the court reversed the defendant's conviction despite the failure of the defendant to bring this discrepancy to the trial court's attention.

Certainly the problem in Stone was obvious, but Stone and other cases dealing with palpable errors make it clear that the test for whether an error is palpable is more than just whether it appears that an error has been made. Actually the courts on many occasions have been primarily concerned with the question of whether a waiver of the issue was intended by the appellant. If so, even an otherwise obvious error might not be considered palpable since the appellant did not originally intend the problem to be considered an error. See Sallsbury, supra, at 927-28. In other words, in Stone, supra, the error may have been glaring but there was also no reason why the appellant would have waived the error. The problem with such an analysis of palpable error, however, is that the reason why an issue was not raised at trial is often "imponderable." Sanborn v. Commonwealth, Ky., __ S.W.2d __, 35 KLS 7, 17 (rendered June 9, 1988).

Ultimately, if there is an indication in the record that the failure to raise an issue was a tactical decision the court will decline to review it. See Commonwealth v. Goforth, Ky., 692 S.W.2d 803 (1985). If, however, the error is of such a nature or is so prejudicial that there can be no reasonable explanation for a failure to preserve, the court may address the issue without the requirement of further proceedings. See Thomas v. Commonwealth, Ky.App., 574 S.W.2d 903, 907 (1979) (in which the Court of Appeals indicated that an error might be "so prejudicial" as to constitute a palpable error). But, if there is any question concerning why there was a lack of preservation it may be that the appellant will have to resolve the issue through a post conviction proceeding alleging ineffective assistance of counsel. See Sallsbury, supra, at 928.

Sallsbury, supra, clearly indicates that whether there is palpable error and whether that error affects the defendant's substantial rights are separate questions, both of which must be answered affirmatively before review can be afforded. It should be noted, however, that it has long been held that reversal is required only when a defendant's substantial rights have been affected regardless of preservation. See former RCr 9.26; Maupin v. Commonwealth, 267 Ky. 212, 101 S.W.2d 914 (1937). Accordingly, it appears that an appellant will always have

to show that his substantial rights were affected if he hopes to obtain relief. This then does not appear to present a requirement peculiar to unpreserved errors although it should be kept in mind that RCr 10.26 requires that the substantial rights affected be shown in order to obtain a review of the issue before the question of relief is even addressed.

MANIFEST INJUSTICE

Although an error is palpable and involves a defendant's substantial rights relief cannot be granted unless there has been a manifest injustice, even if the issue involves the defendant's constitutional rights. See Smith v. Commonwealth, Ky., 722 S.W.2d 892 (1987); Commonwealth v. Tiryung, Ky., 709 S.W.2d 454 (1986); Sanders v. Commonwealth, Ky., 609 S.W.2d 690, 691-92 (1980); Roston v. Commonwealth, Ky.App., 724 S.W.2d 221 (1987). Furthermore, whether a manifest injustice has occurred must be judged in the context of the entire record. Anderson v. Commonwealth, Ky.App., 554 S.W.2d 882, 884 (1977). Manifest injustice is certainly synonymous with some level of prejudice. However, it is not clear whether an unpreserved error must be more prejudicial than a preserved one in order to warrant relief. A manifest injustice has been equated simply with the denial of a fair trial. Thomas, supra. But the courts have also indicated that finding a manifest injustice may require "clear prejudice," Byrd v. Commonwealth, Ky.App., 709 S.W.2d 844, 845 (1986) or prejudice which is "apparent" and "great." Taylor v. Commonwealth, Ky.App, 551 S.W.2d 813, 814 (1977). See also Ferguson v. Commonwealth, Ky., 512 S.W.2d 501, 504 (1974). It is also important to emphasize once again that even if an extreme amount of prejudice can be shown passing this test alone might not mandate reversal. See e.g. Newell v. Commonwealth, Ky., 549 S.W.2d 89, 91 (1977); Warren v. Commonwealth, Ky., 256 S.W.2d 368, 379 (1953).

There are some areas of the law in which exceptions to the preservation rules have been provided. Perhaps the most important of these exceptions applies to capital cases in which the Supreme Court has indicated that it will consider any error claimed to be prejudicial to ensure a "fair and impartial trial." Smith v. Commonwealth, Ky., 366 S.W.2d 902, 906 (1962). The Court has stated that it will address any error discussed in the appellant's brief unless the error has been affirmatively waived or the lack of preservation was an intentional trial tactic. Sanborn, supra; Ice v. Commonwealth, Ky., 667 S.W.2d 671, 674 (1984); Jaggers v. Overstreet, Ky., 412 S.W.2d 238 (1967). Graves v. Commonwealth, 256 Ky., 777, 77 S.W.2d 45, 46 (1935). The Court has also, on at least one occasion, said that it will search for errors in death penalty cases even if they were not preserved at trial or raised on the appeal. Caine v. Commonwealth, Ky., 491 S.W.2d 824, 826 (1973). The Court has taken this approach because "[t]he duty of maintaining the constitutional rights of a person on trial for his life and the importance to society and constitutional government that such person be accorded a fair and impartial trial require that the court take notice of any prejudicial error in the record, whether objected to or or not, and direct a reversal of the judgement in order that such a trial may be had. When the accused's life is at stake, technical rules of procedure must give way in order that justice may prevail." Bowman v. Commonwealth, Ky., 290 S.W.2d 814, 817 (1956); see also Edwards v. Commonwealth, 298 Ky. 366, 182 S.W.2d 948, 952 (1944).

Other exceptions appear to be based generally on the fundamental nature of the right involved (which could be a recognition that these errors inherently involve substantial rights, result in a manifest injustice and are palpable since the failure to preserve can not be explained as a tactic or otherwise excused). Although constitutional rights are not necessarily exempt from the need to preserve, see Futrell, supra; Payne, supra; Commonwealth v. Tiryung, supra; Randolph v. Commonwealth, Ky., 564 S.W.2d 1, 4 (1978); Shockley v. Commonwealth, Ky., 415 S.W.2d 866 (1967); Salisbury, supra, the Kentucky Supreme Court has indicated that double jeopardy issues need not be preserved to be raised on appeal. Sherley v. Commonwealth, Ky, 558 S.W.2d 615, 618 (1977); Jackson v. Commonwealth, Ky., 670 S.W.2d 828, 832 (1984).

REVIEWABLE ISSUES REGARDLESS OF PRESERVATION

On occasion the courts have indicated that some other rights must be afforded the defendant regardless of the criminal rules. For instance, preservation has not been required for issues dealing with the right to trial by jury, Tackett v. Commonwealth, Ky., 320 S.W.2d 299 (1959), the right to a probation revocation hearing with adequate notice, Murphy v. Commonwealth, Ky.App., 551 S.W.2d 838 (1977), and a codefendant's right to separate counsel and conflicts in general, White v. Commonwealth, Ky., 671 S.W.2d 241 (1983); Trulock v. Commonwealth, Ky.App., 620 S.W.2d 329 (1981).

In addition, defects in jurisdiction may be raised at any time. Anderson v. Commonwealth, Ky., 465

S.W.2d 70, 74 (1971). This principle has been applied to the improper calculation of sentences in violation of statutory authority, Wellman v. Commonwealth, Ky., 694 S.W.2d 696, 698 (1985), but not to invalid juvenile waivers. Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 144 (1985); but see Edwards v. Commonwealth, 264 Ky. 4, 94 S.W.2d 25 (1936). Also, the Supreme Court recently indicated that a jurisdictional issue dealing with a defective indictment could not be raised on appeal. (Although the court did address the issue to find against the appellant.) Corbett, supra; but see Couch v. Commonwealth, 281 Ky. 543, 136 S.W.2d 781 (1940); Strunk v. Commonwealth, 302 Ky. 284, 194 S.W.2d 504 (1946).

Questions concerning the insufficiency of evidence have met with mixed results. The Court of Appeals has held that when the Commonwealth fails to prove an essential element the conviction is a violation of due process and therefore constitutes a palpable error affecting the substantial rights of the party. Perkins v. Commonwealth, Ky.App., 694 S.W.2d 721, 722 (1985). On the other hand, the Supreme Court has declined to reverse in many cases due to the lack of preservation even though there may have been a "plain failure to prove a case." Newell, supra, at 91. Perhaps in no other area is the conflict between the preservation requirement and a fundamental right so pronounced. Certainly, the failure to prove every element of a crime beyond a reasonable doubt is is prejudicial to the accused, and a conviction so based should constitute a manifest injustice. See Maupin v. Smith, 785 F.2d 135, 140 (1986) The error, which clearly involves a substantial right, should, therefore, be palpable, thus requiring review.

CONCLUSION

The most obvious conclusion that can be reached by evaluating all the aforementioned cases and others not cited herein is that the appellate courts have not been consistent in determining how or whether to review unpreserved errors and if so, whether to grant relief. Few cases discuss this area of procedure in depth and many seem to confuse and apply in inconsistent ways the standards to be met for such review. But from these cases it appears that counsel urging the appellate court to review and reverse on an unpreserved error pursuant to RCr 10.26 should assert an exception or 1) show that an error has occurred; 2) convince the court that the failure to preserve could not have been an intentional waiver or a trial tactic and that there is no need for any factual determinations through further proceedings concerning why there is a lack of preservation; 3) show that important rights of the defendant have been infringed upon by the error (primarily by denying him his constitutional right to a fair trial); and 4) illustrate that the defendant has been severely prejudiced in the context of the entire trial. Hopefully showing the fundamental nature of the right involved and/or an extremely egregious level of prejudice will also help illustrate that the failure to preserve could not have been an intentional choice and that further proceedings dealing with the effectiveness of counsel could lead to no other result than reversal. Such a showing might also achieve the establishment of another exception to the general requirement of preservation.

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Spouse abuse group's founder faces fight to clear reputation

Associated Press

TRAVERSE CITY, Mich. — Michael G. French no longer faces a first-degree rape charge. But French, the founder of a support program for spouse abusers, says he still faces the trial of restoring his reputation.

"There always will be people out there scratching their heads, saying, 'He got off only because there was not enough proof,'" French said after the Grand Traverse County prosecutor's office dropped the charge last week.

French, 43, was arrested in November 1986 and charged with first-degree criminal sexual conduct. He had allegedly assaulting a 39-year-old Traverse City woman the previous month.

Assistant Prosecutor Arnie White said he dropped the charge because the woman refused to cooperate with prosecutors. She refused to comply with a court order requesting medical and psychological records, said she would not testify and finally indicated she wanted to "drop the whole thing," White said.

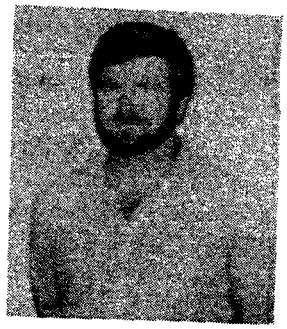
Richard Zerafa, the woman's attorney, said she was not willing to disclose personal information.

French said the accusation cost him not only thousands of dollars in legal fees but also an estimated $50,000 in revenue for the Time Out support program.

Lexington Herald-Leader, April 24, 1988

Trial Tips

For the Criminal Defense Attorney



Warren Taylor

Half-Truth In Sentencing

Lets face it! The separate sentencing hearing in Kentucky is here to stay - at least for now! As a result, Kentucky stands alone amongst the 50 states in having a bifurcated felony system. Since this is still a new process in Kentucky, the system remains in the initial stages of development, both in terms of the final form for sentencing procedure, what is allowed as evidence, and what will become the normal standards of practice at the sentencing hearing. In the recently published case of RUPPEE v. COMMONWEALTH, No. 87-SC-281-MR, the Kentucky Supreme Court showed that they meant it when they said that they would correct problems as they arose by ruling that it is improper for a prosecutor to argue that a defendant will be released when he is first eligible for parole. This should be the first of many rulings yet to come which will establish proper sentencing procedure. It is the trial defense lawyer's responsibility to establish a standard of practice which will assure that those future rulings will continue to protect our client's substantial rights.

Even though we in Kentucky stand alone amongst the states, we are not the only, and are far from being the first, judicial system to adopt a bifurcated trial procedure. A system very similar to ours has been in place for many years in military Courts-Martial, and that system has a well-developed standard of practice for defense counsel during sentencing hearings. We in Kentucky would be most lax in our responsibilities as defense lawyers if we simply ignored this large body of law and experience and simply reinvented the wheel. The purpose of this article is to familiarize you with the military system, and to make some suggestions as to how to apply the military standards to Kentucky practice.

Because some of the words used by the military differ from those in civilian practice, and because most civilian lawyers are not familiar with the military courts and publication, the following list of definitions is provided in order to avoid confusion:

Accused: "The defendant."
Defense Counsel: "The defense counsel."
Presentencing Hearing: "The sentencing hearing."
Trial Counsel: "The prosecutor."
Court of Military Appeals: (CMA or COMA) "The final Appellate Court for Courts-Martial. On rare occasions the United States Supreme Court will review their decisions.
Court of Military Review: (CMR) "The intermediate appellate courts. Each branch of the military has it's own Court of Military Review. The initial for a Court of Military Review is CMR preceded by the initial of the branch it serves.
Manual for Courts-Martial, United States 1984: (MCM) "Contains both the regulatory substantive and procedural law for Courts-Martial."
West's Military Justice Reporter: (M.J.) "Contains the published decisions of both the Court of Military Appeals and the various Courts of Military Review.
Court-Martial Reports: (C.M.R.) "The older version of West's Military Justice Reporter.

SENTENCING PROCEDURE AT COURTS-MARTIAL

Rule 1001 of the MCM establishes the procedure for the presentencing hearing at Courts-Martial and read as follows:

(1) **Procedures.** After findings of guilty have been announced, the prosecution and defense may present matters pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matter shall ordinarily be presented in the following sequence:
(A) Presentation by trial counsel of:
(i) service data relating to the accused taken from the charge sheet;
(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;
(iii) evidence of prior convictions, military or civilian;
(iv) evidence of aggravation; and
(v) evidence of rehabilitative potential.
(B) Presentation by the defense of evidence in extenuation or mitigation or both.

(C) Rebuttal.
(D) Argument by the trial counsel on sentence.
(E) Argument by the defense counsel on sentence.
(F) Rebuttal arguments in the discretion of the military judge.

(2) **Adjudging sentence.** A sentence shall be adjudged in all cases without unreasonable delay.

(3) **Advice and inquiry.** The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

You will note that there are both similarities and differences in regard to what the prosecutor can present. Since this article is pointed toward the defense perspective, I will briefly touch on those here, and they will not be mentioned again.

First, both in Courts-Martial and in Kentucky, the prosecutor is allowed to present evidence of prior convictions, and evidence in aggravation. The items relating to service data and personal data are peculiar to military service and do not really have civilian counterparts. Of interest, however, is that under certain circumstances in the Courts-Martial, the prosecutor may be required to present evidence which shows rehabilitative potential as well as evidence which shows lack of rehabilitative potential. However, those circumstances are beyond the scope of this article.

Of most interest to Kentucky practitioners is the absence of evidence of parole from the matter which the prosecutor is allowed to show. The military courts have strictly and universally adhered to the principal that parole is a result of future considerations, many of which are beyond the control of the accused, and that considering parole as a factor in sentencing is nothing more than engaging in speculation. As a result, they have strictly forbidden any use of evidence related to parole eligibility.

Evidence in Extenuation and Mitigation is covered in greater detail in the MCM at Rule 1001(c) as follows:

(c) **Matter to be presented by the defense.**
(1) **In general.** The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.
(A) **Matter in extenuation.** Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.
(B) **Matter in mitigation.** Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes ... particular acts of good conduct or bravery, and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a service member

(2) **Statement by the accused.**

(3) **Rules of evidence relaxed.** The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

It should be pointed out here that some courts have interpreted KRS 532.055 as limiting the defense to evidence that the defendant does not have a criminal record and evidence in rebuttal of any evidence presented by the prosecution. While a full discussion of this point is beyond the scope of this article, it is vital that this interpretation not be allowed to stand, or if it does that it be challenged constitutionally. It would certainly appear to be a violation of due process in that it would establish a one-sided sentencing procedure whereby the prosecution is allowed to present several matters in aggravation of a sentence, but would not allow the defense to present several matters in aggravation of a sentence, but would not allow the defense to present any evidence except evidence in negation. Evidence that the defendant has no prior criminal record is essentially negation evidence in that it shows the absence of an undesirable trait rather than allowing the showing of desirable traits.

It is axiomatic that in order to arrive at a fair sentence, the jury must know as much as possible about the defendant. In order to know about the defendant they must be allowed to hear a wide range of character evidence if such is offered in mitigation. A jury which does not hear anything about the defendant is going to sentence the defendant based strictly on the crime itself, and as a rule, those sentences will tend toward the maximum. Sentencing is not just a function of "the sentence should

fit the crime" but is equally a function of "the sentence should fit the individual defendant." By applying a possible range of sentences for the different crimes, the General Assembly has already dealt with the application of the sentence to the crime. If there was no intent to tailor sentences to the individual defendants, then there would be no need for a range of possible sentences.

This is the primary theme which prevails throughout decisions relating to sentencing issues in military courts. In 1976, the Court of Military Appeals reconfirmed the relevance of character evidence to sentencing when they stated that "character evidence is relevant both to determination of guilt and adjudgment of an appropriate sentence." United States v. Carpenter, 1 M.J. 384 (CMA 1976). More recently, the Army Court of Military Review stated that the "proper application of sentencing concept that punishment should fit the offender and not merely the crime necessarily depends upon the Courts knowledge about the offender as a whole person ...." United States v. Wright, 20 M.J. 518 (ACMR 1985).

Again, this is a vitally important issue. If we're going to have separate sentencing hearings, then the defense must be allowed to present positive evidence of the defendant's good character. Anything less would deny the defendant any opportunity to receive a fair sentence.

A couple of other points of Courts-Martial procedure which the defense counsel should consider are the facts that the rules of evidence are relaxed in regard to the presentation of evidence in mitigation and extenuation (not as to matters in aggravation or rebuttal thereof), and that the defense counsel instead of the trial counsel gets the last argument on sentencing.

As to the first, it has generally been the practice across Kentucky that the Judge would receive and read letters or petitions from family, friends or neighbors prior to final sentencing. There is no reason why this potential evidence of character should be denied to the sentencing jury. Second, the prosecutor receives the last argument during the guilt phase because he has the burden of proof. He has no such burden during sentencing. In addition, he has the advantage of only having to convince the jury that this convicted felon must be punished severely. The defense, on the other hand, must be able to convince the jury that the convicted felon should be given a break. The last word can frequently be a powerful weapon, and in a situation of sentencing where the prosecution already holds a decided advantage, he should not also be given the extra advantage of the last word.

PRACTICE AT COURTS-MARTIAL SENTENCING HEARINGS

Probably the most significant change we in Kentucky need to make in our criminal practice is in the area of trial preparation. Where we know that there is a reasonable likelihood of a sentencing hearing by the jury we must commence the gathering of sentencing evidence at the outset of our investigation of the case. This is the general practice by military defense counsel. A general question which is asked of all defendants during the initial interviews is to provide the military defense counsel with a list of those persons who might be willing to provide character evidence for him. Those persons are then routinely interviewed with an eye in mind as to their utilization during the sentencing hearing.

The form that character evidence may take in a sentencing hearing is far more varied than the limited evidence one may offer during the guilt phase. Since one of the major objectives of arriving at an appropriate sentence is for the jury to know as much as possible about the defendant, the military allows a wide latitude in regard to character evidence during sentencing. This should also be the case in Kentucky, just as it has normally been in the past during the final sentencing by the Judge. Since the purpose of such evidence is to allow the jury to get a solid "feel" for the defendant, the need for strict rules as to form are greatly diminished.

One word of warning in that any evidence offered opens the door for rebuttal. However, rebuttal character evidence which is based strictly on opinion or *reputation* resulting from the crime itself should not be allowed.

In the Military Courts, almost any evidence which is offered by the defense which would assist the jury in knowing the individual offender has been admitted during the presentencing hearings. This evidence is primarily limited only by rele-

vance and by rules limiting the presentation of cumulative evidence. The most common form it has taken has been in the form of testimony by the Accused's superiors, peers, family, and friends. Generally it would consist of general "good guy" opinions. It can relate to how he gets along with his family and friends, open ended opinions as to what kind of person he is, whether he's a hard worker, whether he is courteous, kind, obedient, brave, or generous, etc. Such evidence can, and frequently does include specific incidents which help to illustrate favorable traits in the accused. I have listed below a partial list of some specific types of evidence which have been ruled admissible in extenuation or mitigation:

-Acquittal of Accomplice
-Commander's desire to have accused returned to his command
-Commander's recommendation as to whether accused should be retained in service
-Economic situation of Accused's family
-Favorable aspects of Accused's Prior Military Service
-Guilty Plea as a mitigating factor (and also a reject offer by the accused to plead guilty)
-Health of the Accused
-Mental Condition of the Accused
-Diminished Capacity
-Non-violent nature of the Accused
-Pre-trial restraint of the Accused
-Psychiatric Condition of the Accused (at the time of the trial)
-Recommendations as to Accused's supervisors in regard to his potential for Rehabilitation
-Restitution (also instructions to the accused not to make restitution)
-Satisfactory Performance of Duty
-Service Awards
-Unsworn Statement of the Accused (not subject to cross-examination)
-Willingness of others to serve in combat with the accused

Note that this list is a partial list, and does not begin to cover the entire spectrum of evidence which has been received during presentencing hearings. Also, you might note that many of the items which appear to be peculiar to the military would also have civilian counterparts. It can correctly be said that the possibilities are only limited by your imagination.

INSTRUCTIONS

This is not an article about instructions, however, it should be evident that there are some instructions which are essential if you want the jury to give your sentencing evidence a fair consideration. If you want them to consider the evidence in mitigation and extenuation as well as the crime itself in setting the sentence, then they must be told that they are required to consider evidence presented by the defense in extenuation and mitigation as well as any evidence in aggravation presented by the prosecution. To protect against them sentencing based on parole eligibility they must be told that they must adjudge a sentence which will be fair if served in its entirety and must not adjudge a harsh sentence based on considerations of possible future sentence mitigation. And certainly, they need to be told by the judge that the law considers the appropriate sentence to be the smallest sentence which will adequately serve both the needs of society and of the defendant.

CONCLUSION

I hope that this article has been helpful to you in stimulating new ideas about presenting a sentencing hearing. Obviously, in many cases, the application of the ideas is going to depend upon favorable rulings by the Courts. I anticipate that overall, we will receive fair rulings and will be allowed to present all the evidence which we have which is relevant to sentencing. It can be effective when presented properly. In Nurnberg, Germany, about six years ago, I saw another defense lawyer present a sentencing case where the defendant was convicted of murder, but for his punishment he was reduced two grades in rank and fined five hundred dollars. Not only that, but the Court-Martial panel felt good about their decision when they left the Courtroom. I have both seen and participated in numerous other Courts-Martial which resulted in sentences which would have seemed unusually small based upon a "sentence should fit the crime only" theory.

It is important to show the jury that the defendant isn't just some scumball criminal, but that under normal circumstances he is a pretty good fellow. The jury will listen to evidence of this type, and when the crime is not the type to drive all possibility of sympathy for the defendant from their hearts, they will respond to it. With that in mind, let's begin the task of directing the Kentucky law in regard to sentencing in the direction of protecting defendant's rights and receiving truly fair sentences. Hopefully, we will succeed so well that a few years from now it will be the prosecutors who are wondering if it's possible to return to the old rules.

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202B Investigation

Rita Ward

The courtroom scene looks like this: the prosecutor representing the Commonwealth at one table, the respondent's attorney with her client at the other, the judge, and a jury. Sounds like a typical courtroom scene, right? The difference is that the client who will be called "Mary" is a person who is mentally retarded. Mary has an IQ of 35, placing her in the severe range of mental retardation. She is 40 years old, but has the adaptive skills of a 4 year old. She can feed herself finger foods, can hold a cup, can dress herself with assistance and is toilet trained. She has no communication skills and makes little or no eye contact. No relative or friend has stepped forward to assume her care in their home since the recent death of her mother with whom she had lived her entire life. No money was available for a community placement such as an adult foster home, supervised apartment, or group home. A petition has been filed in district court seeking to place the client in a hospital or mental retardation treatment facility for 1 year.

As a result of Judge Allen's decision in the case of Doe v. Austin, 668 F.Supp., 597 (W.D. Ky., 1986) which was recently affirmed in part, reversed in part by the Sixth Circuit, all mentally retarded individuals over the age of 18 years have a right to a hearing prior to commitment to an institution for the mentally retarded operated by the state. A person such as Mary has a right to a jury trial with the Commonwealth being required to prove each element of the need for hospitalization beyond a reasonable doubt. KRS 202A.076(2). In order to commit a person to the hospital, the Commonwealth must prove that: 1) she is mentally retarded; 2) she presents a danger or threat of danger to self or others; 3) the least restrictive mode of treatment requires placement in a hospital or mental retardation treatment center; and, 4) treatment that can reasonably benefit the individual is available in the hospital or mental retardation treatment center. KRS 202B.040. As in any criminal trial, placing doubt upon 1 of these criteria is the key to winning a 202B hearing.

In a 202B hearing, there is very seldom reasonable doubt that the client is mentally retarded. Mentally retarded individuals who are profoundly and severely retarded will always be dangerous to themselves because they will always need 24 hour supervision. The need for 24 hour supervision, however, does not prove a need for institutionalization. Most mentally retarded individuals in institutions do not need institutionalization, they need a home.

The starting point of an investigation for a 202B hearing is to visit the client. As with any client, visiting even a profoundly retarded client can help develop rapport that may be useful in keeping the client cooperative during a long court hearing. These visits also allow the attorney to witness for herself any abilities or disabilities the client may have. Mental retardation professionals acknowledge that even the most profoundly handicapped person can be served in the community. Knowledge of a client's needs will help the attorney question the professional witness regarding out-patient programs needed for the client. Many of the programs available in a hospital are also available on an out-patient basis.

The attorney should attempt to see as much of the facility as feasible during the visit to the client including the client's room and work area. Having another person on the tour would allow the attorney to call this person as a witness at trial to describe the facility objectively. The jury needs to know that the facility to which they are being asked to commit the person is a hospital, an institution, and not a home.

The law requires more of a facility than merely providing a place for the mentally retarded individual to live. The facility must give the mentally retarded individual "a realistic opportunity to improve his level of functioning consistent with accepted professional practice . . ." KRS 202A.011(7). Thus, the client must improve while at the facility in order for benefit to be shown. The facilities are required

to develop an I.P.P. or Individual Program Plan for each resident in the facility. The I.P.P. outlines problem areas observed in the client (such as a need for toilet training) and how the facility intends to treat the problem. Old school records, if available through the hospital or school, can be utilized to compare what the facility wishes to accomplish with the client and what has been attempted in the past. Psychological evaluations should give an indication of what realistically can be expected for the client to accomplish based upon his intellectual level. Any mental retardation professional will testify that there is no cure for retardation and that any progress a particular client will make will be minimal. All of this information should provide fuel for argument that placement in a facility will not be a benefit as defined under the law but merely provide her with a place to live.

A psychosocial history is developed on each resident at the facility. This is composed by the social worker and contains background information on the client such as prior hospitalizations and family background. In Mary's case, the psychosocial would provide the information about her living at home for 40 years until the death of her mother. It should also state whether Mary has a source of income such as Social Security and whether other family members are involved with Mary. Evidence that a person lived at home for 40 years certainly buttresses the argument that hospitalization is not the least restrictive form of treatment and that Mary needs a home, not institutionalization.

Daily progress notes are kept by the nursing staff indicating the client's behavior on the ward and progress in attaining the goals outlined on the I.P.P. The client who is functioning at a 4 year old level may be displaying behavior typical for a 4 year old. The lawyer should note how the hospital disciplines transgressions by the client. Is the hospital's response the response a parent would have for her 2 year old child? Is the client disciplined or given a shot of medication such as a tranquilizer? Juries are usually interested in these arguments as they pertain to the facility being the least restrictive mode.

Facilities may use medications such as antipsychotic medications and tranquilizers to control the behavior of their mentally retarded patients. The Physician's Desk Reference will provide needed information regarding the use of these medications and the adverse side effects they may have.

The psychologicals, social histories and progress notes are kept in the chart that the hospital keeps on each resident. The attorney has a right to access to these charts and any past records from prior hospitalizations on her client and the attorney should review these prior to court.

Before any person may be permanently placed in an intermediate care facility for the mentally retarded run by the state, her application must be processed and approved by the Comprehensive Care Center servicing her home county and then approved by the Division of Institutional Care of the Cabinet for Human Resources in Frankfort. Before approving a person for institutional care, the local comp care must be able to certify that no less restrictive form of treatment exists. In preparing for a 202B hearing, an attorney would do well to review the records of the comp care center servicing her client and find out what efforts have been made to secure a less restrictive placement.

The trend in the field of mental retardation is away from institutionalization and toward community placement. Qualified mental retardation professions will verify that almost any person, regardless of handicap, can be served in the community. (The exception would be the extremely violent.) They will say further that they could provide services for person in the community that are presently being provided in institutions if the funding was available. Funding for noninstitutional care for the mentally retarded is primarily done through the Alternative to Institutional Services for the Mentally Retarded or AIS/MR program. This program allows medicaid benefits to be used for mentally retarded persons outside of institutions. Unfortunately, the assessability to these funds is limited. There are 14 comp care centers serving separate areas of Kentucky. (Seven County Services is the comp care center for Jefferson and surrounding counties.) Each comp care center has been allotted a certain number of AIS/MR "slots" to be utilized in its particular region. The slots are allotted in clusters of 45 of which 25 may be used for residential care. Each residential slot allows for $25,000 per year of medicaid funds to be used for outpatient treatment for the person filling that slot. A residential slot allows the service provider to secure the client a home outside of an institution. While $25,000 may seem like a large expenditure, it is far below the annual cost of institutional care. Each comp care center handles its own slots independently of others in the state and uses them for the people within their service area. Slots generally may not be transferred between

comp care centers but nothing indicates that clients cannot be serviced outside their home area. (Hopefully, in the future, slots may be transferred from 1 area to another.) For example, Seven County Services has 90 AIS/MR slots, all of which are presently in use. Both the Pikeville and Hazard areas have been allotted 45 slots each, all of which are not presently in use. A fruitful area for questioning by an attorney when statements are made at trial that not less restrictive treatment exists is whether all 14 comp care centers in the state were notified concerning possible AIS/MR openings. No law says that a mentally retarded individual from Louisville must live in Louisville. If a local comp care refuses to service a client because of her handicap, the attorney should attempt to discover why and whether the center's refusal to serve complies with medicaid requirements for the AIS/MR program.

The local comp care workers have information regarding the types of programs and living arrangements that can be developed with AIS/MR funds. Protection and Advocacy with the Department of Public Advocacy can provide answers to many questions regarding what services are available both in a particular community and statewide.

The disability of a client requires advocacy skills different than may be required for the criminal defendant. Those disabilities do not lessen an attorney's responsibility to advocate zealously for her client. Few of these cases are actually "won" on behalf of the mentally retarded client but the client does win through judicial review and by making all parties accountable for their treatment of the mentally retarded. Mary may not go home or to an AIS/MR slot today but, hopefully, by the time her case comes up for review again, more money will be available so that she can be served in the community where she has lived for so many years.

Rita Ward
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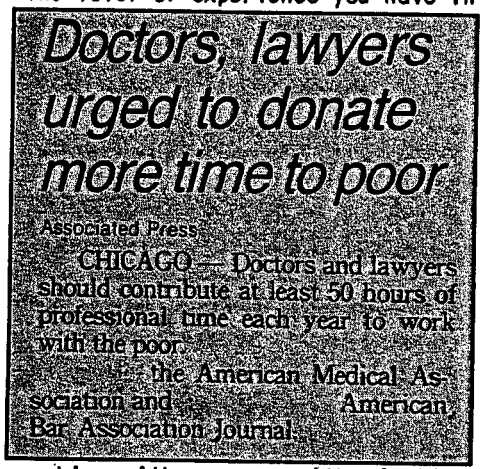
Protection and Advocacy Updating Referral Service Listing

The Kentucky Protection and Advocacy Division (P & A) is an independent agency located in the Department of Public Advocacy. The agency provides legal assistance to Kentucky citizens with developmental disabilities and/or diagnoses of mental impairments. The office frequently receives requests for legal assistance with cases that range from routine matters such as divorce and property questions to discrimination or other civil rights claims against public and private entities Many of these cases involve fee-shifting statutes.

P & A is updating its list of attorneys who are interested in accepting referrals from P & A. If you wish to be placed on a referral list or need further information, please contact Ava Crow, Protection and Advocacy, 1264 Louisville Road, Perimeter Park West, Frankfort, Kentucky 40601. Please indicate the level of experience you have in working with persons with disabilities and/or mental health diagnoses, the types of cases you handle, and whether you are willing to accept cases under fee-shifting status.


Doctors, lawyers urged to donate more time to poor

Associated Press

CHICAGO — Doctors and lawyers should contribute at least 50 hours of professional time each year to work with the poor, the American Medical Association and the American Bar Association Journal ...

Also, please indicate whether you want P & A to simply give the client your name, or whether you prefer to have P & A call you to discuss the facts of the case prior to the referral.

Attorneys who wish to be considered for this referral service must show evidence of having professional liability insurance coverage.

Ava Crow
Attorney
Protection and Advocacy Division
1264 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601
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Don't Read This . . . And If You Do, Don't Consider It

By Thomas Hayner, Staff Attorney

A recent American Bar Foundation (ABF) study has confirmed what many trial lawyers have known, or suspected for a long time; cautioning a jury to disregard incriminating evidence is like telling them to ignore the pink elephant that just walked into the back of the courtroom.

The ABF did the test of the effectiveness of a judge's admonition in the context of a mock Fourth Amendment damage action against law enforcement officials for unreasonable searches and seizures. See Bivens v. Six Unknown Named Agents of the F.B.I. (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619.

To measure the effectiveness of instructions to "disregard what you have just heard," Foundation researchers took 535 potential Cook County jurors and/or student volunteers, and separated them into three groups. They were again divided into juries and heard the same case, with certain important differences.

One-third of the juries were exposed to testimony that the illegal search, which was the basis of the civil rights action, had turned up heroin or other drugs, or murder evidence. A third of the juries heard testimony that nothing was found. The remaining third were not told the outcome of the search.

Where the juries heard that damaging evidence was found, the juries were admonished by the Court to ignore that evidence, according to the New York Times report on the study. [Whether drugs were found is irrelevant to the merits of the claim that civil rights were violated, of course.]

Despite the admonition, where jurors heard, for example, that heroin was found, they awarded damages only 38% of the time. In contrast, where there was testimony that nothing was found, plaintiffs were awarded damages in 61% of the cases, and where the results of the search were not revealed, the plaintiffs won 62% of the cases. Frequency of punitive damage awards was also dependent on whether the jury heard damaging evidence.

The bottom line for criminal defense lawyers is that a judge's admonition will not undo the damage done by "incompetent" evidence the jury hears. And if juries are influenced by such evidence in civil damage cases, it's undeniable they will be so influenced where criminal culpability is at stake.

The ABF study confirms the common belief in the benefits of resolving evidentiary and suppression issues by *pretrial* motions. Pretrial motions to suppress and motions *in limine* not only may prevent the jury from hearing the evidence, but also tend to avoid inferences and speculation as to what the excluded evidence might be. Pretrial resolution of these issues also tend to reduce the need for inessential objections in front of the jury. Objections feed the negative image of defense lawyers as obstructionist. Note, however, that orders *in limine* are not final, and that you still must object at trial. Davidson v. State (1982), Ind., 442 N.E.2d 1076.

Of course, while many of the better opportunities for criminal defense counsel to make inroads into the prosecution's case are in the areas of Fourth, Fifth and Sixth Amendment-based motions to suppress, garden variety objections (privilege, etc.) are also grounds for motions *in limine*.

The study is to be published in the May issue of the American Bar Foundation publication, Law and Social Inquiry.

Indiana Defender, May 1988.
Reprinted with Permission.

Ask Corrections

Betty Lou Vaughn

TO CORRECTIONS:

My client was recently sentenced on the charge of Kidnapping for a crime committed after July 15, 1986, how long will he have to serve before becoming eligible for parole consideration?

TO READER:

If the crime of Kidnapping involved serious physical injury or death and he received a LIFE sentence it would fall under the provisions of KRS 439.3401 (Violent Offender Statute) and your client would have to serve 12 years minus jail time before becoming eligible for parole consideration. If your client received a sentence of a definite number of years and it fell under the provisions of KRS 439.3410 he would have to serve 50% of his sentence minus jail time before becoming eligible for parole consideration. If the crime did not involve serious physical injury or death then your client's parole eligibility would be calculated under parole regulations 501 KAR 1:011, which use the 20% of time served criteria.

TO CORRECTIONS:

How does Offender Records know if there was serious physical injury or death involved in the crime?

TO READER:

If the judgment of conviction did not contain such information, then Offender Records would obtain such information from the Presentence Investigation Report.

TO CORRECTIONS:

My client was sentenced to 10 years on the charge of criminal attempt to commit murder, if the crime did not involve any serious physical injury or death, when would my client be eligible for parole consideration?

TO READER:

Your client would have to serve 2 years minus jail time before becoming eligible for parole consideration, as the crime would not fall under the provisions of KRS 439.3401 as there was no serious physical injury or death involved in the crime.

All questions for this column should be sent to David E. Norat, Director, Defense Services Division, Department of Public Advocacy, 1264 Louisville Road, Frankfort, Kentucky 40601. If you have questions not yet addressed in this column, feel free to call either Betty Lou Vaughn at (502) 564-2433 or David E. Norat at (502) 564-8006.

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

State workers fight for performance pay

The Associated Press

FRANKFORT — Twenty-six state employees are challenging the Wilkinson administration decision to suspend a "pay-for-performance" program.

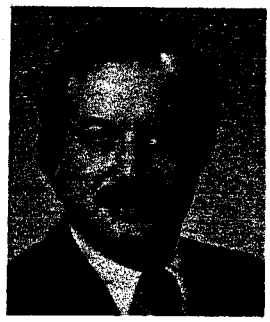
The employees have taken their case before the state Personnel Board.

Ken C. Grant, one of the 26 employees, said the state implied that a contract existed with employees by announcing the program, holding public meetings with employees to discuss it and publishing a handbook about it.

Daniel F. Egbers, an attorney representing the Human Resources Cabinet, said the employees have no grounds for a complaint because there was no contract. The cabinet, along with the Personnel Department, was named in at least 17 of the Personnel Board appeals.

Under the program, 12,416 state merit employees qualified for bonus pay. The program was suspended as part of a wide-ranging budget cutback announced in January. The cuts were designed to offset a projected state deficit of about $53 million this fiscal year.

Cases of Note...In Brief



Ed Monahan

RIGHT TO COUNSEL/POLICE EAVESDROPPING

State v. Mattatall,
525 A.2d 49 (RI 1987)

The United States Supreme Court remanded this case to the Rhode Island Supreme Court to reconsider in light of Kuhlmann v. Wilson, 106 S.Ct. 2616 (1986) on the issue of whether the defendant's 6th amendment right to counsel was violated by the police in listening to telephone conversations between the defendant and John Carney relating to the death of the victim.

Carney complained to the police that he received threatening calls from the defendant. The police went to Carney's house and with his consent listened in on phone conversations between Carney and the defendant. Carney initiated the conversation about the victim during which the defendant made inculpatory statements. The eavesdropping occurred after the defendant was arraigned and represented by counsel.

The Rhode Island Supreme Court ruled the incriminating phone statements of the defendant were inadmissible since the 6th amendment right to counsel was violated due to the fact that Carney was more than a "mere passive listener."

DIMINISHED CAPACITY

State v. Hill,
744 P.2d 1228 (Kan. 1987)

Expert testimony that the defendant, who was charged with second degree murder, suffered from a diminished capacity was admissible to negate intent.

DUI/DOUBLE JEOPARDY

Ray v. Commonwealth
Ky.App. (Feb. 12, 1988)
unpublished

The trial court in this DUI, second offense, case declared a mistrial when in opening statement the defense attorney stated that the defendant would testify that he has to have his drivers license in his work. On discretionary review, the Court of Appeals held it improper for the trial judge to declare a mistrial based on this remark, even assuming the remark was improper, and that the defendant's second trial violated double jeopardy.

DUI/TEST WITHOUT WARRANT PRIOR TO ARREST

Commonwealth v. George S. Martin
Ky.App. (June 3, 1988)
unpublished

This case came to the Court of Appeals on a Motion for Discretionary Review by the Commonwealth. The Court held the admission of results of a blood alcohol test in a criminal prosecution under KRS 189A.010 administered without a warrant prior to arrest was a violation of the 4th amendment and Kentucky's Section 10.

DISQUALIFICATION OF PROSECUTION OFFICE

John W. Potter v. Commonwealth
Ky., (April 28, 1988)
unpublished

At his 1985 capital trial, the defendant, White, was represented by Ray Clooney, a Jefferson County Public Defender who later became an Assistant Commonwealth Attorney. The Kentucky Supreme Court reversed White's conviction and sentence of death. On retrial, White's public defender moved to disqualify the entire Jefferson County Commonwealth Attorney Office due to Clooney's employment with them.

The trial judge in this case conducted an extensive hearing and made findings on the disqualification request and ordered the exclusion of the entire prosecution office. In so deciding, the trial judge found that Clooney had not divulged any confidential information to any prosecutor.

The Commonwealth petitioned the Court of Appeals for a writ of prohibition. That Court granted the writ, and White appealed to the Kentucky Supreme Court. The Court reversed the Court of Appeals and affirmed the trial judge's order of disqualification.

Edward C. Monahan
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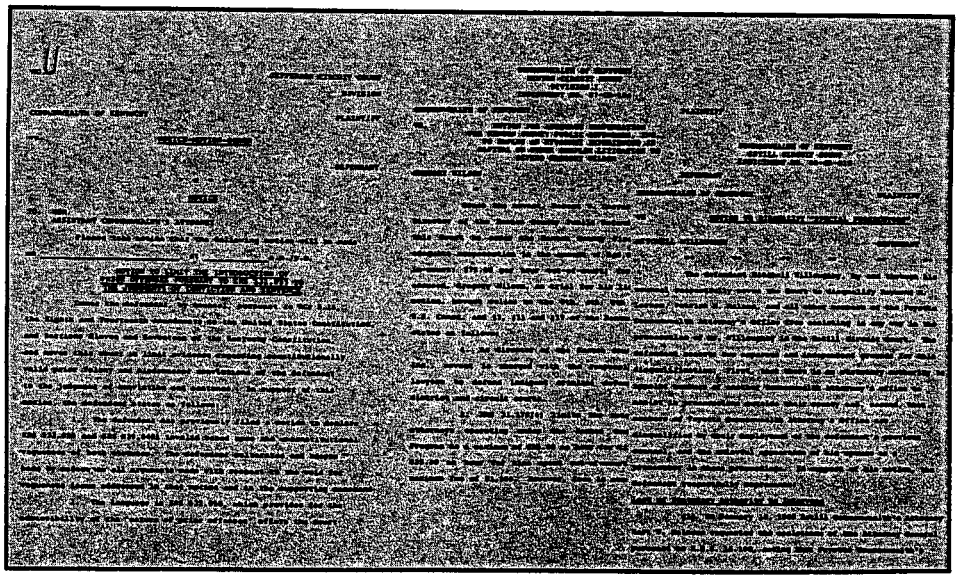
DPA Motion File



MOTIONS COLLECTED, CATEGORIZED, LISTED

The Department of Public Advocacy has collected many motions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various motions, and a listing of each motion. Each motion is a copy of a defense motion filed in an actual criminal case in Kentucky.

COPIES AVAILABLE

A copy of the categories and listing of motions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the motions are free to public defenders in Kentucky, whether full-time, part-time, contract, or conflict. Criminal defense advocates can obtain copies of any of the motions for the cost of xeroxing and postage.

HOW TO OBTAIN COPIES

If you are interested in receiving an index of the categories of motions, a listing of the available motions, or copies of particular motions, contact:

Tezeta Lynes
DPA Librarian
1264 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601
(502) 564-8006
Extension 119

FILE IN FIELD OFFICES

We have a complete set of all motions in each of DPA's field offices, including Lexington, Louisville, Boyd County and Covington. Call the director of those offices for access to their copy of the file.

USE OF THE MOTION FILE

In using the index of categories and listing of motions, make sure you look under multiple categories when searching for sample motions since many of the motions could have been categorized in more than one way. We have attempted to categorize them in only one way. For instance, challenging the admissibility of a prior offense in a truth-in-sentencing proceeding could be categorized under the category of "truth-in-sentencing" or under the category of "prior offenses." We have categorized it only under prior offenses.

ONLY SAMPLES: UPDATE AND INDIVIDUALIZE

Of course, the motions are meant only as samples of motions filed by other attorneys in other individual cases. Each motion must be completely reviewed, and updated and individualized for your particular client.

SEND US YOUR MOTIONS

The motion file is only as good as the motions we receive from attorneys practicing criminal defense work throughout the state of Kentucky. Please send us any motions that you think should be included in the file in the future. This concept of collecting and disseminating good motions only works well if each of you give us your motions to share with others.

OTHER SOURCES

Do not forget the many good articles on motion practice in The Advocate, as listed in The Advocate cumulative subject index.

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Book Review

TELLING LIES
by Dr. Paul Ekman
W.W. Norton Co., 1985
500 Fifth Avenue
New York, New York 10110
$3.95 (paperback)

Gerald Anderson was accused of the rape and murder of his next door neighbor. The day following the homicide Anderson did not go to work but drank heavily at a local bar while talking about the crime. Once home, he was overheard by someone telling his wife in tears, "I didn't want to do it, but I had to." He became the prime suspect of the police.

A spot of blood was found in Anderson's car. He claimed that it had been there when he purchased it; however, he later admitted that during an argument he had slapped his wife and caused her nose to bleed. Anderson also admitted to the police that at age twelve he had committed a minor sex offense but it later came out that he was actually fifteen at the time.

Anderson submitted to a polygraph examination. The examination showed deception concerning questions of guilt. The polygraph reinforced the belief of the police that Anderson was the culprit. Anderson was interrogated for six days and ultimately confessed. He actually became convinced that he had committed the crime and had simply lost his memory of the incident. Seven months later the true killer charged with a similar offense confessed to the crime and Anderson was absolved of any guilt.

Anderson was innocent but the police believed he had committed the crime and had made it clear to him that they did. Accordingly, Anderson's fear of being disbelieved led to his failure of the polygraph examination (which does not actually detect lies but only emotional arousal) and his interrogators used the weight of their own convictions about his guilt to force him to give up his claim of innocence. Anderson also confided after he was exonerated that he had felt guilty and ashamed because when he had entered his neighbor's home immediately after the homicide with her husband he had admired her nude body.

In Telling Lies, Dr. Paul Ekman, a professor of psychology at the University of California, concludes that Anderson's interrogators made what he calls an "Othello error." As you probably know, Othello interprets Desdemona's panic at Cassio's demise as confirmation of her infidelity rather than that she might be innocent and is panicked by the loss of her last hope of proof of her innocence. Othello is already convinced that Desdemona has been unfaithful.

One of Dr. Ekman's primary points in Telling Lies is that in attempting to determine whether someone is trying to deceive, the evaluator must never forget to consider his own preconceptions about the suspected liar and about the situation.

In Telling Lies Dr. Ekman does not simply relate interesting anecdotes about deception. Ultimately, the book is a very thorough and scientific exploration of how and why people lie and how those lies can be detected by observing the choice of words, tone of voice, movements of the body, and particularly the face. He even provides an appendix which includes a check list to assist in determining whether a lie is being told and provides suggestions on how an interrogator can more easily detect lies by the formulation of his questions and prefatory remarks. Ekman also discusses the use of the polygraph in criminal cases and the marketplace condensing and contrasting a number of interesting studies which have been done on the subject.

In the legal world the question of whether a person is prevaricating is always of prime importance. Telling Lies, although not providing a foolproof method for determining deception, allows anyone seeking the truth in any situation to come at least a little closer to that goal. Telling Lies is not only instructive but also entertaining since Dr. Eckman has done an excellent job providing real and familiar examples for many of his points. (An account and analysis of how President Kennedy handled meetings with Soviet representatives during the Cuban Missle Crisis knowing beforehand that he had been deceived is particularly amusing.) Telling Lies is truly well worth reading. Trust me.

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McNally continued from page 2

have been without the benefit of the reassurance and caring of Kevin's guiding hand. Judges would be less sensitive to valid legal issues. Even the families of victims would have suffered more without Kevin's devotion to the sacredness of all life. Certainly, the lives of those of you who work with Kevin would be different, too. Perhaps your lives would be a bit more calm and routine, but that special spark and drive that Kevin supplies would be missing."

Suzy Post of the Kentucky Civil Liberties Union expressed the contradictory feelings many have about Kevin's leaving, "It is with mixed emotions that I confront your resignation. I'm happy for you and sad for us."

As Kevin leaves DPA, it is appropriate to reflect on the comments of Justice Thurgood Marshall about the extreme importance of people like Kevin who have selflessly committed so much to the least in society:

> The attorneys who currently are shouldering our collective burden deserve our gratitude, not our scorn and not simply our tolerance. They are making enormous sacrifices -- emotional as well as financial. Prosecution of a single appeal on behalf of a person on death row frequently involves months of exhausting, seemingly futile effort. One lawyer has described the process as a 'self-lacerating investment of time and energy.' To the attorneys willing to make such investments, again and again, I wish to express my admiration and thanks.

Our thanks, too, Kevin!

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"A person with a dream...holds out to others better alternatives, real alternatives, hopeful alternatives, so complete in their number that one can expend a lifetime in their pursuit and in the hope of their accomplishment."

Anthony Padovano, in *Dawn Without Darkness*

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