

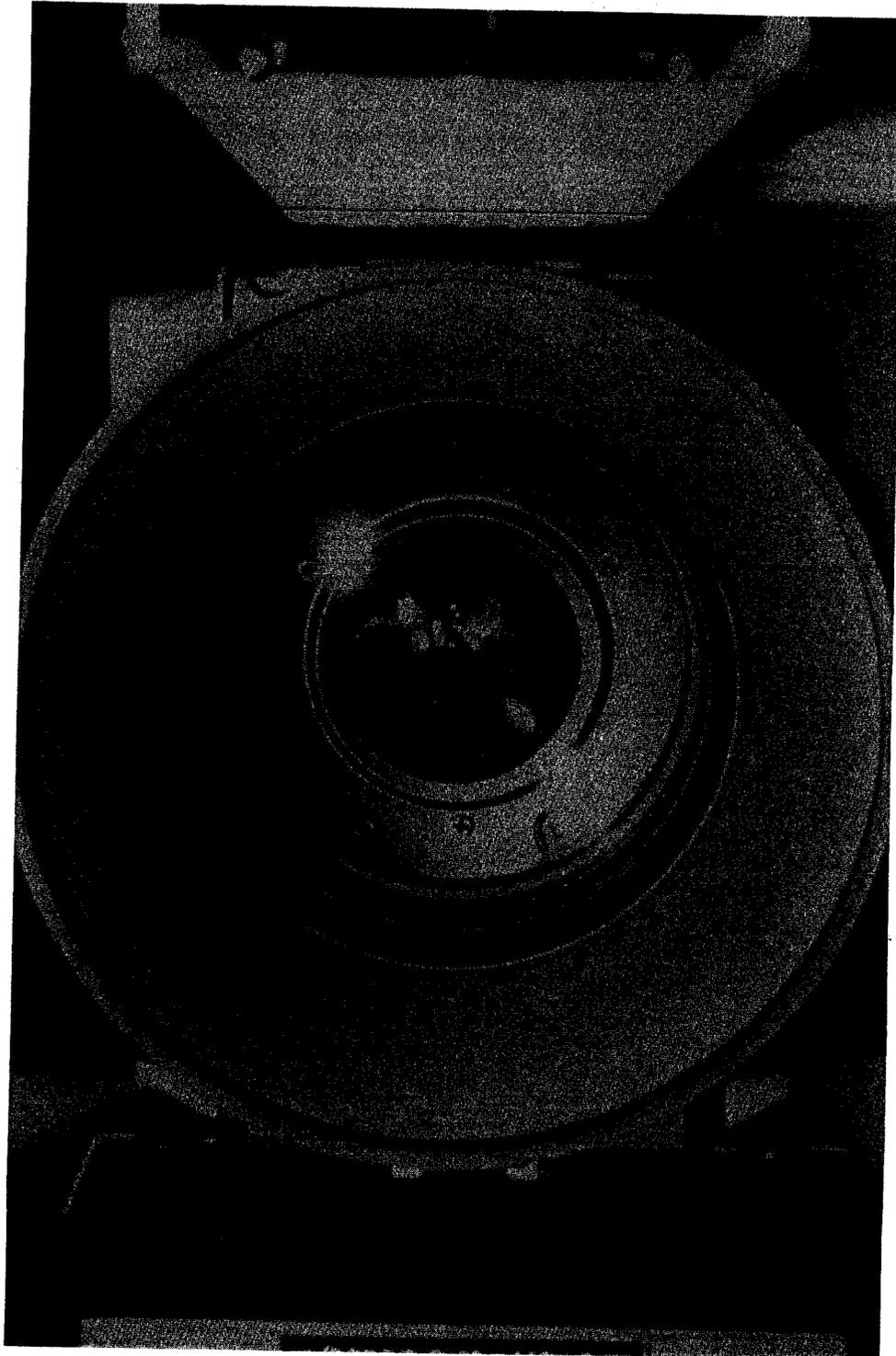


THE ADVOCATE

Vol. 8 No. 5

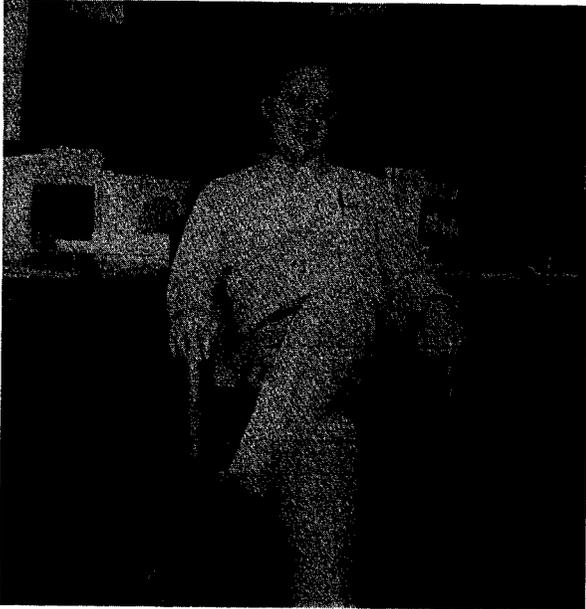
A Bi-Monthly Publication of the DPA

August, 1986



**CIRCUIT JUDGE JAMES E. CHENAULT ON
VIDEOTAPE AS THE RECORD (On Page 24)**

THE ADVOCATE FEATURES



JOE MYERS

Joe Myers, a Jeffersonville, Indiana native, is the Directing Attorney of the Paducah field office effective August 1, 1986. He comes to that office via Mexican Hat, Utah.

Joe has a BA in Economics and Management from Centre College. After graduating in 1980 from the University of Kentucky School of Law, Joe took a job as a law clerk with Legal Services on a Navajo Reservation near the Arizona border. That experience gave him insight into the native American character and plight. He spoke of their attachment to the land as a mother and their kinship with nature giving gender to rivers and streams, their tribal legends like that of Ship Rock that brought the Navajo to the earth, the intrinsic values of animistic religions, the extended family and their dependency on their brother, sheep, for food and clothing, native crafts, such as their exquisite Navajo rugs. Native Americans balance the pressure to survive in the nearly

twenty-first century, against their traditions, and that gives rise to the ravages of those ways and the success stories (or the failures depending on whether you're Navajo or not).

Joe, as ever committed to indigent services, came to Paducah as an attorney to work with Legal Aide. He ended up leaving that job primarily because he felt the disgruntled atmosphere of the national administration as Legal Aid funds were being restricted. He also as a legal aide attorney, did not get to develop his oral advocacy trial skills.

He came to DPA with commitment and welcoming the challenges of the public defender duties. He commented on his gratefulness for the help of the former director, Will Kautz, and said he hopes he can do the same for others in the office as its director.

Joe is a member of Toastmasters International. He attends the twice monthly dinner meetings where prepared and impromptu speeches hone his speaking skills. Joe also professes a love of astronomy and particularly enjoys reading books on Metaphysics. He enjoys traveling in the Western part of the United States and has visited Bermuda twice, needless to say not since he joined the Department three years ago, because his workload is intense. Joe enjoys the outdoors and thinks that the tranquil beauty of the Land Between the Lakes, Kenlake and Lake Barkley region is the best secret of the Western Kentucky area, yet pristine and special.

Joe is an intensely quiet and dedicated worker for the Department. It's good to know you're out there in the Western regions keeping the faith, Joe.



THE ADVOCATE

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Book Review

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

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10-YEAR SERVICE AWARD BANQUET

The Department of Public Advocacy held its First Annual 10 Year Service Award Banquet at the Capital Plaza Hotel at the Annual Public Defender Training Seminar June 8, 1986.

Service Award Plaques were given to qualified employees by Public Advocate, Paul Isaacs, who commented that having 22 employees in one department for that length of service was a point of pride for the Department of Public Advocacy.



(Left to Right) Mike Zaldan, Larry Rapp, Janie Hosley, Gail Robinson, Steve Heffley, Rodney McDaniel, Kevin McNally, H.D. Britt, Mildred Heltzel, Madeline Jones, Dave Norat, Eloise Simpson, Vince Aprille, Patsy Shyrock, Tim Riddell. (Honorees not shown) Joyce Hudspeth, Brenda Hughes, Ed Monahan, John Rogers, Larry Marshall and David Stewart.



M. GAIL ROBINSON

M. GAIL ROBINSON RECEIVES NLADA DEFENDER SERVICES AWARD

At the Annual Public Defender Training Seminar Awards Banquet on June 8, 1986, Paul Isaacs, Public Advocate, presented the National Legal Aid and Defender Association Defender Services Award to M. Gail Robinson, a former assistant public advocate. The Award read: "in recognition of the outstanding contribution made by M. Gail Robinson to the high quality criminal defense services for the indigent accused" and "for outstanding performance and accomplishment as Public Defender for the Department of Public Advocacy, Frankfort, Kentucky for her unceasing and spirited dedication to high quality criminal defense services for the poor. Awarded this 19th day of May, 1986." The Award had inscribed on it a quote by the Honorable Rose Elizabeth Bird, Chief Justice, California Supreme Court: "it is your skill, your diligence, and your intelligence that help breathe life into the Bill of Rights."

West's Review



Linda K. West

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

KENTUCKY COURT OF APPEALS

DUI - PRESCRIPTION MEDICATION
Cruse v. Commonwealth
33 K.L.S. 7 at 2 (May 2, 1986)

When Cruse was arrested for D.U.I., he indicated to the arresting officer that the source of his intoxication was not alcohol but prescription medicine. Cruse's statement was borne out by a breathalyzer test. Cruse contended on appeal that the failure of KRS 189A.010(1) to define "substance" rendered the statute unconstitutionally vague. The Court disagreed that the Legislature was required to specify those substances whose ingestion would support a conviction. The Court adopted the language of the trial court: "The crime is not the consumption of alcohol or any other substance, but rather the continued operation of a motor vehicle after one's ability to operate a motor vehicle has been impaired."

DIRECTED VERDICT/CLOSING ARGUMENT
Smith v. Commonwealth
33 K.L.S. 7 at 7 (May 9, 1986)

In this case, the Court of Appeals held that evidence of Smith's possession of forty-eight cans of beer, five pints of whiskey, and one pint of vodka, and of his attempt to destroy the evidence, was sufficient proof of possession of alcoholic beverages for sale.

The Court also held that closing argument comments by the prosecutor that Smith never stated that the alcoholic beverages were for his personal use was not prejudicial error. The Court noted that KRS

242,230 places on the defendant the burden of proving that the alcoholic beverages in his possession were lawfully acquired and intended for lawful use.

RAPE SHIELD LAW
Bixler v. Commonwealth
Bean v. Commonwealth
33 K.L.S. 7 at 11 (May 16, 1986)

The single issue in this case was whether it was error to exclude evidence of an alleged rape victim's prior sexual relationship with the accused. The rape shield law, KRS 510.145(3), provides that "evidence of the complaining witness' prior sexual conduct or habits with the defendant" is admissible provided that: (a) the defense files a written motion to use such evidence no later than two days prior to trial, and (b) the evidence is relevant. Although the defendants did not comply with the motion requirement of the statute, the Court of Appeals ruled on the substantive issue inasmuch as the trial court had chosen to rule on it.

The Court held that evidence of Bixler's prior sexual relationship with the victim was admissible as relevant to his defense of consent. Interestingly, the Court held that the evidence was also admissible in Bean's defense since "Bean's defense hinged, in part, on the fact that he knew the victim had had a prior sexual relationship with Bixler and, therefore, he

expected to have a similar relationship with her."

**HEARSAY/MARITAL PRIVILEGE/
BIBLICAL REFERENCES IN CLOSING**
Estes v. Commonwealth
33 K.L.S. 7 at 17 (May 16, 1986)

The defendant objected to admission of his wife's out-of-court statement as hearsay and as in violation of the marital privilege. The Court held that the statement was admissible under the "residual exception" to the hearsay rule as set out in Federal Rule of Evidence 804(b)(5). The rule was satisfied for five reasons - the defendant was given notice of the commonwealth's intent to use the statement, the statement was relevant, the wife's testimony was unavailable because of the marital privilege, the statement was essential since the proof of guilt was otherwise insufficient, and the statement was reliable since it was written soon after the charged offense.

The trial court did commit error to the extent that portions of the wife's statement touched on confidential communications between the defendant and her. The Court adopted the definition of confidential communication contained in Lawson, Kentucky Evidence Law Handbook, Section 5.05 (1984) as "all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party."

The Court found no error in the prosecutor's Biblical references in closing argument. The argument did not urge the jury to decide the case on religious grounds. See Ice v. Commonwealth, Ky., 667 S.W.2d 671 (1984).

**CONTEMPT-FIFTH AMENDMENT
PRIVILEGE**

Woods v. Commonwealth
33 K.L.S. 7 at 21 (May 16, 1985)

The Court affirmed Woods' contempt conviction. Woods refused to testify against Daniel Wade, asserting his testimony would be self-incriminating. The trial court heard the testimony in camera and ruled it was not incriminating. When Woods persisted in refusing to testify he was held in contempt.

The trial court did not commit error when it sentenced Woods in disregard of KRS 421.140. The statute provides that, upon final disposition of the case in which a contemnor refuses to testify, he shall be discharged from any imprisonment. The Court of Appeals held the statute unconstitutional as a "material interference with the discharge of judicial functions." The Court noted that Woods' determinate sentence for the contempt could not be ordered to run consecutively to any indeterminate sentence he later received for felony charges pending against him. Finally, the Court held that Woods could not be repeatedly held in contempt for successive refusals to testify in the same case.

PFO - FOREIGN CONVICTIONS

Davis v. Commonwealth
3 K.L.S. 8 at 1 (May 23, 1986)

In this case the issue was whether an Ohio conviction carrying an indeterminate sentence of six months to five years could be used

to support a PFO conviction. The Court held that such a conviction did not qualify as a previous felony conviction under KRS 532.080(3)(a) since the minimum sentence imposed was less than a year. "The fact that appellant actually served more than one year does not change the result...."

**TRANSFER OF PRISONER
UNDER DETAINER/PFO**

Hays v. Commonwealth
33 K.L.S. 8 at 6 June 6, 1986)

In this case the Court held, pursuant to KRS 440.330, that only the Governor may relinquish custody of a prisoner facing charges in Kentucky to another jurisdiction. Thus, when county authorities released custody of Hays to Indiana they forfeited jurisdiction of him.

The Court also held that a sentence consisting only of a fine was not subject to enhancement under the PFO statute.

**EX PARTE CONTACT WITH JURY
/CLAIM OF PRIVILEGE/AVOWAL
/JUDICIAL NOTICE**

White v. Commonwealth
33 K.L.S. 9 at ___ (June 13, 1986)

In this case the Court found numerous grounds for reversal. Foremost was ex parte contact between the judge and jury during deliberations. RCr 9.74 specifically prohibits communications by the judge to the jury outside the presence of the defendant. The judge's action also denied White his due process right to be present at every stage of the proceedings.

The trial judge also erred when she sustained a claim of Fifth Amendment privilege made in behalf of a defense witness by the prosecutor, and without first examining the testimony to determine whether it was in fact

privileged. The record also indicated that the witness may have previously given the same testimony in federal court, thereby waiving any privilege. Yet the trial court refused to permit the defense to lay a foundation for introducing the prior testimony. The trial court also erred in refusing to permit the defense to question the witness by avowal.

Finally, the trial court erred by taking "judicial notice" that a local judge was unavailable to testify because of his wife's illness. "[A] court may only take judicial notice of facts which are either of common knowledge or capable of immediate verification through indisputable sources. A trial judge may not take judicial notice of facts which lie purely within the realm of his personal knowledge."

ENTRAPMENT

Sanders v. Commonwealth
33 K.L.S. 9 at ___ (June 20, 1986)

Under KRS 505.010 entrapment may be asserted as a defense when the defendant is induced to commit the charged offense by a public servant and when "[a]t the time of the inducement or encouragement he was not otherwise disposed to engage in such conduct." Sanders contended on appeal that he was entitled to a directed verdict of acquittal because the evidence showed that he was not otherwise disposed to commit robbery at the time he was induced to do so by an undercover state police officer. The Court of Appeals agreed. The Court, citing Sebastian v. Commonwealth, Ky.App., 585 S.W.2d 440 (1979), framed the issue before it as "whether the evidence established that the criminal intent to commit first-degree

robbery originated in the mind of the appellant, rather than in the minds of the governmental agents." Sanders, who was himself an undercover state police agent, testified that he bragged about plans to commit a robbery in order to further a drug deal. Specific plans for committing the robbery were then advanced by another undercover agent who drove Sanders to the robbery site and provided him with a gun and mask. Sanders was also intoxicated at the time. The Court concluded that "the evidence established that appellant was not otherwise disposed to engage in first degree-robbery at the time he was induced to do so...."

COMPETENCY

Rowland v. Commonwealth

33 K.L.S. 9 at ___ (June 27, 1986)

In this case, the Court reversed the defendant's conviction of assault entered on his guilty plea. At sentencing, defense counsel moved to withdraw the defendant's guilty plea until the defendant could undergo a psychiatric examination. A family member testified that the defendant needed help. The defendant also offered his personal description of the offense:

Charles Paul Brown aggravated [sic] me by telling me how bad he was and what all could do to me and anybody else, so I was in the kitchen and Charles Paul was sitting at the table and it looked like he was going to take a swing at me. I just reached and got the hammer and swung at him, and hit him on the left hand side of the head.

The Court of Appeals held that "appellant's irrationality coupled with the family member's statement

that appellant needed psychiatric help demonstrated a need for mental evaluation before sentencing." Judge Cooper dissented.

KENTUCKY SUPREME COURT

DELAY IN SENTENCING

Commonwealth v. Tiryung

33 K.L.S. 6 at 27 (May 1, 1986)

This case reverses an en banc decision of the Court of Appeals which held that there was unreasonable delay in sentencing Tiryung where the sentencing court imposed a term of probation without first fixing a sentence, and imposed a term of imprisonment only after Tiryung violated his probation.



The sentence imposed by the trial court was the minimum. The Supreme Court agreed with the Court of Appeals that "[t]he statutory scheme requires imposition of a sentence of imprisonment or fine upon conviction...which must be rendered without unreasonable delay and before sentencing to probation." KRS 532.030. However, the Court held that "whether the delay in fixing a penalty is reversible error, absent objection, depends on whether there are circumstances giving rise to an inference of prejudice." Tiryung made no showing that the delay in sentencing

caused him to receive a stiffer penalty. The Court stated its willingness "to correct an error where such 'manifest injustice' is shown even though no objection has been made."

OTHER CRIMES/SEXUAL ABUSE

ACCOMMODATION SYNDROME

Lantrip v. Commonwealth

33 K.L.S. 7 at 26 (May 22, 1986)

The Court reversed Lantrip's convictions of two counts of rape of his adopted daughter, Amanda. The Court held it was reversible error to admit evidence of sexual advances made by the defendant to other individuals which "was not so similar to those exhibited towards Amanda as to establish a method or pattern of operation which in itself would identify appellant as the perpetrator [of the charged rapes]." Prior acts are not admissible to show "lustful inclination." See Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985),

The Court also found error in the admission of psychiatric evidence that the victim exhibited characteristics of "sexual abuse accommodation syndrome." "There was no evidence that the so-called 'sexual abuse accommodation syndrome' has attained a scientific acceptance or credibility among clinical psychologists or psychiatrists." Justice Wintersheimer dissented.

MULTIPLE COUNTS

Ross v. Commonwealth

33 K.L.S. 7 at 28 (May 22, 1986)

In this case the Court held that the defendant could be convicted of three counts of robbery based on the robbery of three Holiday Inn employees although property belonging only to one owner was taken. The Court reasoned its holding from robbery's status as a

crime against persons, and not against property. The Court specifically overruled Douglas v. Commonwealth, Ky., 586 S.W.2d 16 (1979) which affirmed multiple robbery convictions based on the robbers' theft of personal and company property from a motel clerk.

The Court also held that threatening a child with a gun while robbing his parents did not constitute a robbery of the child. Chief Justice Stephens and Justice Wintersheimer dissented.

MENTAL CONDITION OF WITNESS

Commonwealth v. Huber

33 K.L.S. 8 at 12 (June 12, 1986)

This case reverses a decision of the Court of Appeals, which held that the defendant should have been permitted to cross-examine a witness about her psychiatric history. The Supreme Court held that "[t]he prior mental treatment of a witness is not relevant to the credibility of that witness unless it can be demonstrated that there was a mental deficiency on the part of the witness, either at the time of the testimony or at the time of the matter being testified about." The Court distinguished its holdings in Wagner v. Commonwealth, Ky., 581 S.W.2d 353 (1979) and Mosley v. Commonwealth, Ky., 420 S.W.2d 679 (1977) on the grounds that in those cases expert testimony showed a connection between the witness' mental condition and credibility.

DOUBLE JEOPARDY/COINCIDENTEE'S GUILTY PLEA

Linder v. Commonwealth

33 K.L.S. 8 at 14 (June 12, 1986)

Linder was convicted of theft by unlawful taking for her act of shoplifting, and as an accomplice to theft by unlawful taking for her

conduct in diverting store personnel while others shoplifted. The Court rejected Linder's claim that the second conviction was for a lesser-included offense of the theft by unlawful taking. "The proof for each offense was completely different, and none of the facts proving one offense was necessary to prove the other."

However, the Court reversed Linder's conviction because of error in informing the jury that one of her accomplices had plead guilty. See Parido v. Commonwealth, Ky., 547 S.W.2d 125 (1977).

PRESENCE OF DEFENDANT/ CHILD WITNESS

Stincer v. Commonwealth

33 K.L.S. 8 at 18 (June 12, 1986)

In this case the Court agreed with Stincer's claim that he was denied the right to confrontation when he was excluded from an evidentiary hearing held to determine the competency of a child witness. "Although this court recognizes the problems and pressures encountered when dealing with child witnesses, when a defendant is placed on trial by the state for criminal conduct he is entitled to be present and to assist his counsel at hearings to determine the competency of witnesses against him." Justices Wintersheimer and White dissented.

UNITED STATES SUPREME COURT

CONFRONTATION

Lee v. Illinois

39 CrL 3121 (June 3, 1986)

The Court held in this case that the defendant was denied confrontation at her bench trial when the trial judge considered as evidence the confession of a non-testifying co-defendant that im-

plicated the defendant. The Court noted that this hearsay, as the confession of an accomplice, was "presumptively unreliable." The Court found insufficient "indicia of reliability" to overcome the statement's presumptive unreliability.

The Court also concluded that the codefendant's confession was not admissible as "interlocking" with the defendant's own confession. "If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." Chief Justice Burger and Justices Blackmun, Powell and Rehnquist dissent.

CONFESSION - RIGHT TO PRESENT A DEFENSE

Crane v. Kentucky

39 CrL 3129 (June 9, 1986)

Prior to his trial Crane moved to suppress his confession. The motion was denied following a hearing. Crane then attempted to place before the jury evidence regarding the circumstances under which he confessed, in order to substantiate the defense theory that the confession, although voluntary, was unreliable. The trial court held this evidence inadmissible. Crane's conviction was affirmed by the Kentucky Supreme Court. Crane v. Commonwealth, Ky., 690 S.W.2d 753 (1985).

The U.S. Supreme Court held unanimously that the exclusion of the defense evidence "deprived petitioner of his fundamental constitutional right to a fair

opportunity to present a defense." The Court noted its holdings in Jackson v. Denno 378 U.S. 368 (1964) and Lego v. Twomey, 404 U.S. 477 (1972) that "questions of credibility, whether of a witness or of a confession, are for the jury." "Accordingly, regardless of whether the defendant marshalled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility."

JURY TRIAL - SENTENCING
McMillan v. Pennsylvania
39 CrL 3161 (June 19, 1986)

McMillan asserted that Pennsylvania's Mandatory Minimum Sentencing Act deprived him of trial by jury. The act provides that upon conviction, the sentencing judge must impose a minimum sentence of five years if he finds by a preponderance of the evidence that he defendant "visibly possessed a firearm" during the offense. The act further states that "visible possession of a firearm" is not an element of the underlying offense.

The Court rejected McMillan's claim and held that the state could treat possession of a firearm as a sentencing consideration rather than as an element of the offense, thereby sidestepping the right to jury trial and the necessity of proof beyond a reasonable doubt. The Court found Mullaney v. Wilbur, 421 U.S. 684 (1975) inapplicable. The Court emphasized that finding delegated by the statute to the sentencing court "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available

to it...." The Court's holding raises the spectre of state legislatures redefining offenses so that facts which currently serve as elements of an offense and which distinguish it from lesser degrees become mere "sentencing considerations." Justices Brennan, Marshall, Blackmun, and Stevens dissented.

RIGHT TO COUNSEL
Kuhlman v. Wilson
39 CrL 3207 (June 26, 1986)

In this case the Court held that the defendant was not denied the right to counsel by the admission into evidence of his post-indictment, spontaneous and unsolicited statements to a jail cell informant. The informant was specifically told by the police to not question the defendant. The Court distinguished United States v. Henry, 447 U.S. 264 (1980) which held in keeping with Massiah v. United States, 377 U.S. 201 (1904) that, once the right to counsel has attached, a defendant is denied that right when state agents deliberately elicit incriminating statements from him in the absence of counsel. Justices Marshall, Brennan and Stevens dissented.

HABEAS CORPUS
Kimmelman v. Morrison
39 CrL 3187 (June 26, 1986)

In this case the Court held that Stone v. Powell, 428 U.S. 465 (1976), which barred habeas corpus review of a Fourth Amendment claim if the state provided an opportunity for full and fair litigation of the claim does not apply to claims of ineffective assistance of counsel premised on the failure to raise a Fourth Amendment issue. The Court held that a defense attorney's complete failure to seek pretrial discovery, which resulted in his failure to

challenge an illegal search and seizure, constituted ineffective assistance of counsel. The Court then remanded to the district court for a determination as to whether the defense was prejudiced.

HABEAS CORPUS - "CAUSE"
Murray v. Carrier
39 CrL 3218 (June 26, 1986)

In this case, the Court held that a federal habeas petitioner cannot show "cause" for a procedural default by showing only that competent counsel's failure to preserve a claim of error was inadvertent rather than deliberate. Where it is not claimed that counsel was ineffective, "cause" requires that the petitioner show "that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." The Court stated as an exception that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Justices Brennan and Marshall dissented.

HABEAS CORPUS - "CAUSE"
Smith v. Murray
39 CrL 3231 (June 26, 1986)

In this case, the Court applied its analysis in Murray v. Carrier, *supra*, to hold that a competent attorney's deliberate decision to forego a Fifth Amendment claim on direct appeal, based on a misperception of the claim's merit, was not excused by "cause." The defendant's statement was introduced by the state during the penalty phase of his capital trial. Inasmuch as the context of the Fifth Amendment claim was a sentencing proceeding, the Court,

rather than looking to the "innocence" of the defendant as in Carrier, asked whether enforcement of the "cause" requirement would result in a "manifest miscarriage of justice." Since in the majority's view it did not, habeas relief was barred by the failure to show "cause." Justices Brennan, Marshall, Stevens and Blackmun dissented.

LINDA WEST
Assistant Public Advocate
Appellate Branch

EVANGELIST SAYS HIGH COURT NOT THE LAW

The Rev. Pat Robertson says he does not consider Supreme Court rulings the law and sees no obligation for the President and Congress to follow them, a published report says.

Robertson, in an interview with the Washington Post, said he thinks the high court's decisions are not above those of the other two branches of the government. However, the Supreme Court for decades has asserted power to declare unconstitutional acts of Congress or the President.

Robertson said public officials were bound to support the Constitution as they see it, but that the framers of the Constitution never intended the Supreme Court to be "paramount over the other two branches." I don't think the Congress of the United States is subservient to the courts.... They can ignore a Supreme Court ruling if they so choose," he said.

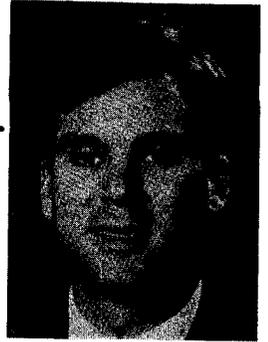


"I STAND IN LOAFERS BEFORE THIS COURT, UNABLE
TO FIND MY WING TIPS."

Drawing by Michael Maslin, Reprinted with Permission.

Post-Conviction

Law and Comment



McGehee Isaacs

A Look at County Jail Standards

This writer, as manager of the Post-Conviction Branch, spends a great deal of time traveling around the state and visiting various county jails. One of the most striking aspects of our county jail system in Kentucky is its unevenness in quality of facilities as well as delivery of services. Our county facilities range from ultra modern ones where well-trained corrections professionals incarcerate individuals in textbook, humane fashion, to jails designed to house civil war prisoners and run by part-time employees with little or no training.

As most criminal practitioners are aware, the executive branch of state government has been struggling mightily for years to upgrade and standardize the housing of prisoners in the county jails. Many county jails have been closed and attempts are being made to regionalize the county jail structure. In 1982 the legislature gave sweeping authority to the Corrections Cabinet to regulate and force the upgrading of county jails. Specifically, the Corrections Cabinet was given the authority to adopt minimum standards for jails in the areas of:

- 1) Health and safety conditions;
- 2) Fire safety;
- 3) Jail operations, record keeping, and administration;
- 4) Curriculum of basic and continuing annual training

- for jailers and jail personnel;
- 5) Custody, care and treatment of prisoners;
- 6) Medical care; and
- 7) Jail equipment, renovation and construction. See KRS 441.011.

In line with this, the Corrections Cabinet promulgated an extensive set of regulations defining and refining inmate life in the county jails and was given the authority by the legislature to enforce these minimum standards in the courts. See 501 KAR 3:140 (inmate rights), and KRS 441.014 (violation of regulations prohibited; Cabinet may see court order: Civil Contempt Penalty).

In generating this inmates' rights regulation, for promulgation and adaptation to the county jail setting, the Corrections Cabinet drew from its own experience on inmate life in the prison setting.

501 KAR 3:140 (inmate rights) sets out specific regulations for

- a) Access to courts
- b) Access to attorneys
- c) Mail
- d) Telephone
- e) Grievances
- f) Search and seizures
- g) Disciplinary procedures
- h) Racial segregation
- i) Medical care
- j) Mental health care (if possible)
- k) Religion

This writer will not attempt to deal with every section of the regulation in this article, but

will attempt to handle those areas which generate the greatest amount of prisoner mail concerning problems in the county jails.

The policy concerning access to one's attorney is in line with the U.S. Supreme Court's many pronouncements concerning the Sixth Amendment right to counsel as well as access to the judicial process.

Number (2) of §1 of the regulations states:

The jailer shall not prohibit an inmate's right of access to the judicial process.

Number (3) enhances this. It says:

The jailer shall ensure the right of inmates to have confidential access to their attorney and their authorized representative.

This means a prisoner has a right to a private meeting with his attorney and the jailer should have an appropriate place for this type of meeting to be held.

The regulation sets out an extensive visitation policy which is meant as minimal standards for jail visitation.

4(a) of §1 mandates at least two visiting days each week, with at least one during the weekend.

4(b) mandates at least one visit per week unless a prisoner is under a disciplinary penalty.

Visits under 4(c) shall not be less than 15 minutes and a visit by two or more persons at the same time shall only count as one visit.

(4d) Lastly, children are allowed visits, if accompanied by an adult.

(4e) states: Attorneys, clergy, and medical personnel are not bound by the same rules of visitation as general visitors and number 5 of §1 policy and procedure mandates the jailers written policy on attorney, clergy, and medical personnel visits be reasonable and not counted as an allotted visit under the general visitation rule.

An area of general confusion among the population is that of denial of visitation. Contrary to common belief, jailers may deny access to a prisoner. 501 KAR 3:140 sets out the circumstances under which a visitor may be denied access to a prisoner, and the Corrections Cabinet has attempted to take the arbitrariness of the authority of denial away in most circumstances. Under the regulation, if a visitor violates one or more of the set out conditions, he or she may be excluded from the jail. They are:

- a) The visitor represents a clear and present danger to security.
- b) The visitor has a past history of disruptive conduct at the jail.
- c) The visitor is under the influence of alcohol or drugs.
- d) The visitor refuses to submit to search or show proper identification.
- e) The inmate refuses the visit.

One problem area has been access to mail. The jail mail regulation promulgated by the Corrections Cabinet is in line with its general mail regulation in its prison regulations (see Corrections Policy & Procedure Manual, Chapter 16). Under §2 of the regulation, jailers are charged with devising their own mail regulation with the goal of protecting the personal rights of the prisoner as well as maintaining jail security. Numbers 2 and 3 of the mail regulation sets minimum standards for incoming and outgoing mail. It allows prisoners to correspond with anyone as long as such correspondence does not violate any state or federal laws. Incoming mail may only be inspected for contraband prior to delivery and official mail such as correspondence from attorneys, courts, or public officials may only be opened and inspected in the presence of the prisoner.

Section 3 of the regulation sets out telephone privileges for use in jails. The Cabinet adopted a reasonableness standard in allowing local and collect long distance phone calls to the prisoner's attorney or family member and sets the standard of access to phones to within one hour of receiving the prisoner at the jail. Under telephone usage, the jailor must keep a telephone log of all incoming and outgoing calls and the rule gives the prisoner permission to complete as least one telephone call a week. This call must be at least five minutes in duration and calls are not to be routinely monitored. If such calls are monitored, then the prisoner is to be informed. Lastly, jailors must designate the length of time that telephone privileges are revoked for violation of the jails telephone regulation.

The personal rights area of the regulation guarantees the prisoner

the right to practice his or her religion within institutional security limits and guarantees participation in religious services and the receiving of religious counseling within the jail. Prisoners may not be required or forced to attend any religious activity.

Section 6 of the regulation establishes the framework for prisoner due process regarding his life in the jail. Under this section, all jails are required to have a written grievance procedure for prisoner complaints and this procedure must contain at a minimum the following: a) that a response will be made to the grievance within a reasonable period of time; b) access of the grievance procedure to all prisoners; c) the guarantee that there can be no reprisal for the exercise of the grievance procedure by the prisoner and d) a provision detailing how legitimate complaints will be resolved.

Section 7 of the regulation details the manner and method under which searches will be conducted in the jail setting. First, the privacy interest of prisoners is generally misunderstood by laymen as well as criminal practitioners. The right to privacy in the incarceration setting is limited extensively by the parameters of institutional security. See Hudson v. Palmer, 468 U.S. ___, 104 S.Ct. 3194, 82 L.Ed.2d 393. With this limited privacy right in mind, §7 of the regulation gives the jailor latitude in conducting searches of prisoners with few limitations. These being the search must be done in a private area and in a professional manner to maintain the prisoner's dignity if possible and a jailor shall only strip search those individuals who are of the same sex as the jailor.

Section 9 mandates access to necessary medical care for prisoners. This is in line with KRS 441.045 which sets out when medical care must be given and who should pay for it. It says:

(5) The cost of providing necessary medical, dental or psychological care, beyond routine care and diagnostic services, for prisoners held pursuant to a contractual agreement with the state shall be paid as provided by contract between the state and county. The costs of necessary medical, dental or psychological care, beyond routine care and diagnostic services, of prisoners held in the county jail for which the county receives a per diem payment shall be paid by the state.

(5) When the cost of necessary medical, dental or psychological care for a prisoner exceeds twenty-five hundred dollars (\$2500), as calculated by using the maximum allowable costs to similar persons or facilities for the same or similar services under the Kentucky medical assistance program, the state shall reimburse the county for that portion of the costs that exceed twenty-five hundred dollars (\$2500). The reimbursement shall be subject to the following terms and conditions: (a) The care is necessary as defined in subsection (9) of this section; (b) The prisoner is indigent as defined in subsection (7) of this section, or is uninsured; and (c) No state reimbursement to the county for care provided by physicians, hospitals, laboratories, or other health care providers shall exceed the maximum payments allowed to similar persons or facilities for the same or similar services under the Kentucky medical assistance program.

(7) The determination of whether a prisoner is indigent shall be made pursuant to KRS 31.120. Prisoners who are later determined not to have been indigent, or who at a time following treatment are no longer indigent, shall be required to repay the costs of payments made pursuant to this section to the unit of government which made the payment.

(8) The terms and conditions relating to any determination of nonindigency and demands for repayment shall be under the same terms and conditions as are provided under KRS Chapters 31 and 431 relating to similar circumstances in the program for defense of indigents by the public advocate.

(9) For the purposes of this section, "necessary care" means care of a nonelective nature that cannot be postponed until after the period of confinement without hazard to the life or health of the prisoner. The physician attending the prisoner shall certify, under oath, that the care was necessary.

Many times in the course of conducting a criminal defense, counsel is called upon to do things that do not easily fit into the confines of the law books or the courtroom setting. If jail conditions are such as violate the very specific regulations set out by the Corrections Cabinet then counsel should bring these violations to the attention of corrections so they may rectify the infractions. In promulgating 501 KAR 1:140 (inmate rights) the Department of Corrections is attempting to standardize jail life throughout the individual counties of Kentucky. In light of such cases as Wolff v. McDonald, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 706 (1985) where the Court

stated:

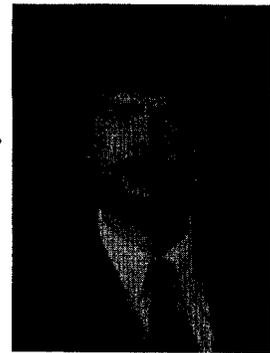
A prisoner is not wholly stripped of constitutional protection when he is in prison from crime. There is no iron curtain drawn between the constitution and the prisoners of this country. See Wolff Id., at 555.

The Cabinet is attempting to take many of the inhuman aspects of day-to-day prisoner existence out of the system. This writer receives many complaints from prisoners as well as attorneys concerning many of the aspects of this regulation. As with many reform type regulations, compliance is uneven throughout the state and when an infraction occurs, Corrections should be notified. I believe it is incumbent upon criminal practitioners throughout the state to determine if the jails having their clients are in compliance with current regulations. It is interesting to note that in an attempt to educate the inmate on what his or her rights are in the jail setting, Corrections as a part of this regulation mandates that a copy of it will be given to each prisoner upon his admission to the jail.

In conclusion, reforms such as those contemplated in the inmates rights regulation are a necessary step in upgrading the county jail system in Kentucky. Although people normally presume that jail reform comes from spending millions of dollars to fund new jail facilities, the due process aspect of day-to-day life in the jails is equally important and this regulation takes care of many past abuses.

McGehee Isaacs
Assistant Public Advocate
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The Death Penalty



Kevin M. McNally

KENTUCKY'S DEATH ROW POPULATION - 29
 PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 83

JURY SELECTION AND
 OTHER IMPLICATIONS OF
RECENT DEATH PENALTY POLLS

a. Favor/Oppose

	Favor %	Oppose %	No Opinion %
1953	68	25	7
1937	65	35	*
1936	61	39	*

b. Alternatives

Gallup reports that when the public is presented with a viable option to the death penalty, support declines dramatically. Often the alternative between execution and life imprisonment with absolutely with no possibility for parole, death penalty support drops to 55%. Gallup at 2. Only 46% of moderate supporters of the death penalty would still vote for death. Forty-one percent (41%) would vote for life imprisonment without parole.

The public's views on deterrence were reported the following day. Gallup, THE GALLUP POLL (March 3, 1986). Sixty-one percent believed that the death penalty is a deterrent. Among death penalty supporters, 77% believe this. Gallup's sample was then asked: "Suppose new evidence shows that the death penalty does not act as a deterrent to murder, that it does not lower the murder rate. Would you favor or oppose the death penalty?" Gallup at 1. Death penalty support then drops to 51%. Interestingly, when presented with contrary information--that the death penalty does deter and does lower the murder rate, support for abolition drops only 7% to 15%--clearly the hard core of moral opposition.

c. Reverse - Witt

Those opposed, thus potentially excluded under Witherspoon and Witt, still tend to be disproportionately young, black and female, although blacks are the only group to oppose the death penalty. Perhaps even more significant for any future "cross-section" challenge to "death-qualification" is the "evidence...of a strong political coloration in the survey findings... Democrats favor capital punishment by a 2-to-1 margin while among Republicans support reaches 7-to-1..." Gallup at 1.

Hard core support for executions is 54% -- those who "very strongly favor" the death penalty. This is roughly consistent with a 1985 Media General - Associated Press Poll which found twice as many (27%) who believed the death penalty was appropriate in all murder cases as (12%) who believed it to be never appropriate. Lexington Herald-Leader, A2 (1/29/85). Gallup found only 13% very strongly oppose the death penalty.

The implications of this are enormous, as argued in THE ADVOCATE, "Witt's Boomerang" at 17-18, Vol. 7, No. 3 (April 1985). "Logical consistency", Adams v. Texas, 448 U.S. 38, 53 (1980) (Rehnquist, J., dissenting), requires exclusion of all veniremen in Kentucky who can not "temporarily set aside their own beliefs in deference to the rule of law...", Lockhart v. McCree, 106 S.Ct. 1758, 1766

The latest Gallup poll shows a drop of 5% in support for the death penalty in the past year. However, it is impossible to ascertain whether the movement downward is a reaction to the rise in executions -- now including women, juveniles and the retarded -- or merely a statistical wave. "The trend of public opinion on capital punishment is among the most volatile in Gallup annals." Gallup, THE GALLUP POLL (March 2, 1986). Still, 7 in 10 adult Americans support the death penalty. Twenty-two (22%) percent oppose capital punishment and 8% have no opinion. Polls by Gallup on this issue span the last 50 years:

DEATH PENALTY FOR MURDER

	Favor %	Oppose %	No Opinion %
1986- 1/10-13	70	22	8
1985- -Nov.	75	17	8
-Jan.	72	20	8
1981	66	25	9
1978	62	27	11
1976	65	28	7
1972	57	32	11
1971	49	40	11
1969	51	40	9
1966	42	47	11
1965	45	43	12
1960	51	36	13

(1986), on all the punishment options: 20 years to death. Since more jurors may have "scruples" which would "prevent or substantially impair the performance of his duties as a juror" regarding minimum, rather than maximum, punishment options "in accordance with his instructions..." Witt v. Wainwright, 105 S.Ct. 844, 850 (1984), quoting Adams, 448 U.S. at 44, one should expect the "penalty qualification" process in Kentucky to be, at least, even-handed. Not so. One searches the Southwest reporter nearly in vain for any discussion of the "reverse-Witt" situation.

The only remark we can find relevant to "minimum-sentence qualification" was recently in Harper v. Commonwealth, Ky., 694 S.W.2d 665, 668 (1985). "For some reason, Harper complains that the trial court should have excused a juror reluctant to impose the minimum sentence. As this juror was excused by the Commonwealth, it is impossible to see how Harper was prejudiced." Other jurisdictions have begun, however, to grapple with "reverse - Witt" issues.

In O'Connell v. State, 480 So.2d 1284, 1287 (Fla. 1986), the Court agreed with trial counsel's motion to strike for cause "three prospective jurors who would automatically recommend a sentence of death in a capital case." This decision follows Thomas v. State, 403 So.2d 371, 375 (Fla. 1981) "in which we held that the trial court erred in denying the challenge for cause to a juror who admitted that he could not 'recommend any mercy'...under any circumstances." 480 So.2d at 1287. "The bias violated the express requirements in the sixth amendment to the United States Constitution..." See also Cuevas v. State, 575 S.W.2d 543 (Tex.Cr.App. 1978); Smith v.

State, 573 S.W.2d 763 (Tex.Cr.App. 1977).

Sixty-five years ago, in a passing reference, the United States Supreme Court stated "it may well be" that a challenge for cause to a venire member who was "in favor of nothing less than capital punishment" should have been sustained. Stroud v. United States, 251 U.S. 15, 20-21 (1919).

The 11th Circuit has stated that the Adams/Witt standard applies to "a venire member in favor of the death penalty..." as well as to those opposed. Hance v. Zant, 696 F.2d 940, 956 (11th Cir. 1983).

In fact, prior to Witherspoon, the en banc 4th Circuit recognized a federal constitutional violation when 1/2 the panel was excused for cause or by peremptory challenge for opposing capital punishment to one degree or another. Crawford v. Bounds, 395 F.2d 297, 301 (4th Cir. 1968).

Each of the jurors in Crawford "professed a belief in capital punishment. Indeed, one...stated he believed...'an eye for an eye', and that it would be his duty" to vote for death. Id. The entire 4th Circuit unanimously found "a double standard of inquiry" because the judge's questions did not focus on pro, as well as anti-death penalty views and held that the jury was selected in an "inherently unfair manner." 395 F.2d at 303.

d. Right to Inquire Regarding Minimum Punishment Views

Recognition of the existence of a potential reverse-Witt challenge for cause is only one step. The right to establish that a juror is biased can only be meaningful if questions are permitted -- preferably by counsel but at least by the

judge. In Patterson v. Commonwealth, 283 So.2d 212 (Va. 1981), the Supreme Court of Virginia held it was reversible error to refuse questions designed to expose cause challenges to ADP jurors. Texas and Florida agree. See Pierce v. State, 604 So.2d 185 (Tex.Cr.App. 1980); Poole v. State, 194 So.2d 903, 905 (Fla. 1967) [voir dire inquiry as to issue of "mercy" required].

e. Can The Juror "Follow The Law"

Gallup also demonstrates that many face the staggering question of how they feel about state-sanctioned killing for the first time during capital voir dire. Over the last 30 years of poll-taking, between 7 and 13% (consistently 8% in the 1980's) simply have "no opinion" on the death penalty. Some continue to change their minds after voir dire. See Warner v. Commonwealth, Ky., 192 S.W.2d 96 (1946) [juror misunderstood the question!]; McQueen v. Commonwealth, Ky., 669 S.W.2d 519, 521 (1984) [juror allegedly expresses reservations about the death penalty in midst of trial]. "The Witherspoon test is pretty straight forward, but sometimes not readily understood by laymen and frequently requires additional questioning." White v. Commonwealth, Ky., 671 S.W.2d 241, 245 (1984). "[V]eniremen may not know how they will react...or may be unable to articulate, or may wish to hide their true feelings." Witt, 105 S.Ct. at 852, n.5. In Pierce, the juror in question was challenged by the prosecutor as an automatic life vote and by the defense as an automatic death vote.

The moment to moment shifting of views (whether out of ignorance, disinterest or confusion) on the death penalty is well known to anyone who has participated in capital jury selection. Nowhere is

it better demonstrated than by Gallup who asks a "follow up" question positing life without any possibility of parole as an alternative to the death penalty. Confusingly, two percent of those who "strongly" oppose the death penalty say they would vote for a death verdict. Gallup at 2.

"Objections to capital punishment may be based on many different stages of belief, and involve subtle nuances of conscience." Crawford, 395 F.2d at 312. In Lockhart v. McCree, Justice Rehnquist emphasized that even citizens who **firmly** believe that the death penalty is unjust may nevertheless serve... so long as... they are **willing to temporarily set aside their own beliefs** in deference to the rule of law. Witherspoon, 391 U.S. at 514-515, n.7, stated that a venire member strongly opposed to capital punishment "could nonetheless **subordinate his personal views** to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State..." And in Boulden v. Holman, 394 U.S. 478, 483-84 (1969), "it is entirely possible that a person who has '**a fixed opinion against**' ...capital punishment might nevertheless be perfectly able as a juror to abide by existing law..."

It is our fault--trial defense counsel's fault--that we let "punishment-qualification" become solely "death-qualification." We should expect judges, at least, and counsel to inquire whether punishment views will be temporarily laid aside as required by law for jury service. Contrast the approach taken by most trial judges on publicity. Patton v. Yount, 104 S.Ct. 2885, 2893 (1984), is an excellent example. The defense challenged three jurors who ad-

mitted to having opinions that the defendant was guilty. It was proper to let the jurors sit who could "**lay aside his...opinion** and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961). For example, juror Pyatt said she could put her opinion aside "[i]f [she] had to...." Yount at 2893. Cf. Aldridge v. Marshall, 765 F.2d 63,67 (6th Cir. 1985)[same]. When have we seen this approach taken on "penalty qualification"?

The Crawford court contrasted the approach of the trial judge on publicity and punishment. Anti-death jurors were "immediately excused... without further inquiry..."; yet, a juror with a "more or less...fixed opinion" the defendant was guilty was questioned further. In a scene familiar to all Kentucky defense counsel, the juror promised the judge he could "erase" the opinion. Crawford found further support for its "double standard" decision here.

Counsel should request an instruction/question based upon Witt/McCree for each juror (or the whole panel-- but better after an individual juror indicates reservations) who expresses "conscientious scruples" regarding the death penalty--along these lines:

THE COURT: Mr. Juror, even if you "**firmly believe the death penalty is unjust,**" you are still qualified for jury service. However, if you happen to be chosen as a juror in this or another case, you must "**conscientiously obey the law**" as given to you in my instructions. Can you "**temporarily set aside (your) own beliefs (on the death penalty)**" because it is the law of Kentucky that the death penalty

must be fairly considered along with the other punishments of 20 years to life imprisonment?

The Supreme Court has often relied upon trial counsel's input, or lack of it, in addressing the propriety of Witherspoon/Witt questions. "Defense counsel did not...**attempt rehabilitation.**" Witt, 105 S.Ct. at 848, 856. "[C]ounsel's failure to speak in a situation later claimed to be so rife with ambiguity..." can be fatal. 105 S.Ct. at 856 n.11. "[C]ounsel chose not to question [the juror] himself..." 105 S.Ct. at 858. "No specific objection was made...nor did the court perceive... any need to question further..." Darden v. Wainwright, 39 Cr.L. 3169, 3172 (1986). Defense participation is essential, preferably by asking questions, but at least by tendering carefully worded inquiries touching on the points raised here.

Contact us for a draft of model capital punishment voir dire inquiries.

KEVIN MCNALLY
Assistant Public Advocate
Chief, Major Litigation Section

* * * *

If anyone had bothered to ask me in January, 1960, if I was going to kill anybody, the question would have been as absurd to me as if they had asked if I were going to fly to the moon. Kill someone? Of course not! I had no desire or intention of ever killing anyone. And if you had asked those who knew me, my family and friends, if they thought I would kill anyone, they would have told you the idea was absurd.

Dennis Whitney, inmate

Sixth Circuit Highlights



Donna Boyce

Media Access To Tapes, Transcripts, Documentary Exhibits

In United States v. Beckham, 789 F.2d 401, (6th Cir., April 29, 1986), the United States Court of Appeals for the Sixth Circuit reviewed the news media's right to copy tape recordings introduced into evidence, transcripts of those recordings used by the jury and documentary exhibits.

The Court stated that the media's right to copy such materials was not equivalent to their First Amendment right to attend trials. Rather, the Court held that the media's right at issue was the common law right to inspect and copy public records and that when this was weighed against the defendant's right to a fair trial and the court's desire for orderly proceedings, the trial court did not abuse its discretion in refusing to permit the media to copy tape recordings that were played in open court and non-evidentiary transcripts of those recordings that were used by the jury.

The Sixth Circuit found that the trial court did abuse its discretion in allowing the media to inspect but not copy documentary exhibits, however. The exhibits were business records, not inflammatory, not open to misinterpretation and of no danger to innocent third parties. There was no articulable reason to deny permission to copy these documents and to have done so was an unwarranted infringement on the common law right to inspect and copy public records.

Confessions

In United States v. Short, ___ F.2d ___, 15 S.C.R. 10, 11 (6th Cir. May 5, 1986), the Sixth Circuit vacated the defendants' convictions because the government failed to meet its burden of proving the voluntariness of the defendant's confessions.

At the outset, the Court noted that both the prosecutor and the trial judge appeared to have been under the mistaken impression that the defendant must prove involuntariness or the lack of a valid Miranda waiver. In Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) it was made clear that the prosecutor must bear the burden of establishing the voluntariness and admissibility of a confession.

In reviewing the particular facts and circumstances of this case, including the background, experience and conduct of the defendant, the Sixth Circuit held that the government failed to meet its burden of proving a valid Miranda waiver with respect to either of two separate confessions made by the defendant.

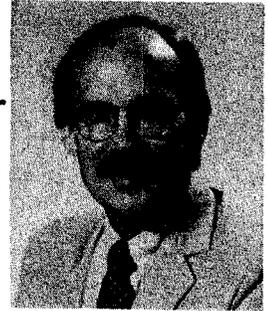
Donna Boyce
Assistant Public Advocate
Major Litigation Section

The great enemy of clear language is insincerity.

- George Orwell

Plain View

Search and Seizure Law and Comment



Ernie Lewis

I. CAR SEARCHES

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Despite these words, practitioners have long been confused by precisely when and how much of the Fourth Amendment applies to car searches and seizures. This has been caused by many things, not the least of which is the importance of the automobile in our society, and the confusion of the Court regarding just how the glowing terms of the Fourth Amendment are to apply to something so mobile and important as the automobile. I have shared the confusion of practitioners for all of my legal career, which is one reason why I have attempted to write this particular article, the purpose of which is to set out some general propositions which hopefully will be of some use to the defense lawyer.

II. WARRANTS

Warrants are required to search cars just like they are required to search all other things. To justify a warrantless search, one must have an exception to the warrant requirement. Just like the hearsay rule, this particular rule is reminiscent of the song "There is a hole in your bucket, Dear Liza, Dear Liza," because the exceptions to the rule appear to be so many that they have practically swallowed the rule."

III. EXCEPTIONS TO WARRANTS

A. PROBABLE CAUSE

One major exception to the warrant requirement occurs when an officer has probable cause to believe that a car contains contraband or evidence of crime.

This exception to the warrant requirement was first established in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This exception, according to Professor LaFave, was unused for many years due to the use of the so-called Harris/Rabinowitz rule, which allowed for the unrestrained search of the defendant's house incident to an arrest. See Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1944); United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950). LaFave observes that once the Harris/Rabinowitz rule was overturned in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the Carroll rule gained prominence.

The Carroll rule was given new life in the case of Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). In that case, the Court reaffirmed Carroll, and extended Carroll, saying that if the police have probable cause to search a car for contraband, not only can they search under the exigent circumstances of the car being on the highway but they also may search without a warrant once the car has been taken to the police station. Even at that, the

rule of Carroll and Chambers was not completely without limits. "Neither Carroll, supra, or other cases in this Court require or suggest that in every conceivable circumstance the search of an automobile even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily moveable. Where this is true, as in Carroll and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search." 26 L.Ed.2d at 428.

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), made it clear that the Carroll /Chambers rules were not unlimited. There, the Court held that where exigencies are not present, such as the car being on the highway, or someone being around to take the car away that a warrantless search cannot be performed despite the presence of probable cause. The Court found it particularly important that the police in this case could have obtained a warrant since no exigencies made seeking such a warrant problematic.

The continued existence of the automobile exception to the warrant

requirement was stressed in United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). In that case, which focuses mainly on the scope of such a search, the Court held that a warrantless search of a car based on probable cause may be as broad as that which a magistrate could have authorized in a warrant.

The Court recently used the automobile exception case to allow for a probable cause search of a mobile home. This occurred in the case of California v. Carney, 471 U.S. ___, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), where probable cause existed and the exigency of mobility also existed.

In United States v. Johns, ___ U.S. ___, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985), the Court held that a car may be searched some three days after its seizure without a warrant. After the Johns case one must question whether the limitations of Coolidge continue to exist. Despite that fact, the opinion does note that "we do not suggest that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search." 83 L.Ed.2d at 898.

It should be noted that even where a vehicle search can be carried out, a search of a person without a warrant does not necessarily follow. United States v. DiRe, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948).

The scope and intensity of the Carroll search must be related to the specific probable cause to believe that the car has stolen property within it such as a shotgun, that would not justify the police in ripping out the floorboard in order to find drugs or stolen jewelry.

One fruitful area of attack in Carroll /Chambers cases occurs when the police obviously know they are going to search a car and have a great deal of advance warning of that, and where they later go to a place, seize the vehicle and search it. Defense counsel should continue to use Coolidge v. New Hampshire to restrict the Carroll /Chambers rule to those situations in which true exigencies exist.

Kentucky has squarely adopted the rules set out in the above cases. In Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1984), the Court explicitly affirmed the use of United States v. Ross, *supra*. They held that "police who have a legitimate reason to stop an automobile and who have probable cause to believe that the objects of the search are concealed somewhere within the vehicle may conduct a warrantless search of the vehicle and all the compartments and containers thereof as well as the contents thereof that are not in plain view.

The decision is in harmony with Section 10 of the Kentucky Constitution which protects people from unreasonable searches because probable cause is still a prerequisite to an automobile search." 663 S.W.2d at 215. But see McHone v. Commonwealth, Ky.App., 576 S.W.2d 242 (1979).

B. INCIDENT TO LAWFUL ARREST

The second major exception to the warrant requirement is that an auto may be searched incident to a lawful arrest.

The search incident to a lawful arrest rule has as its genesis the case of Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) in the context of a premises search. It is important to recognize that Chimel was written

as a limitation upon the right of the police to search a person after an arrest, since Chimel expressly overruled Harris v. United States, *supra* and United States v. Rabinowitz, *supra*. Chimel held that a search incident to lawful arrest may involve only a search of the person and a search of the area close by where a weapon or evidentiary items may be concealed. In the context of a car, Chimel limits a search incident to an arrest to that area of the car where a person could reach for a weapon. Chimel was very careful in justifying the search incident to a lawful arrest exception based upon the officer's safety. Thus, any item located in a car which cannot be reached by the arrestee reasonably should not be subject to seizure without a warrant.

However, in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) the Court held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may as "contemporaneous incident of that arrest, search the passenger compartment of that automobile." 69 L.Ed.2d 768 at 775. The Court noted that Chimel had been difficult to apply in the context of a car. The problem was in defining the area into which an arrestee may reach. The Court in Belton simply decided that the entire passenger compartment was that area into which a person may reach, and thus an officer may search the entire passenger compartment incident to an arrest.

Unanswered in Belton are many questions, including how long the car may be searched after the arrest has occurred, whether the search includes locked glove compartments, or the interior of door panels, whether it includes hatchbacks and other areas which would be diffi-

cult to reach. Further unanswered is the situation of an arrest where there is absolutely no danger to the police officer. At a suppression hearing, must the prosecution articulate reasonable facts justifying the suspicion?

One thing that is clear is that a custodial arrest must occur under Belton in order for a subsequent search of the car to result. Thus, if a citation is issued with an accompanying summons to bring the person back to court, no search incident to that arrest may occur.

In Kentucky, Commonwealth v. Hagan, Ky., 464 S.W.2d 261 (1971) seems to go beyond the rule in Chimel and perhaps even the rule in Belton. There, the Court held that if an officer "believes that a misdemeanor has been committed in his presence on the basis of what he sees and hears, or if he believes that a felony has been committed and the person or persons who he has stopped have committed it, he may place him or them under arrest and forthwith proceed to search the automobile incident to the arrest." 464 S.W.2d at 264. It is questionable whether this statement from Hagan could survive either Belton or Chimel, as it is much too broadly drawn. It should be noted that the Hagan rule does except traffic violations from the broad search incident to a lawful arrest.

C. PLAIN VIEW EXCEPTION

A third major exception to the warrant requirement is that officers may seize evidence from cars when it is in plain view.

Under Coolidge v. New Hampshire, supra, an officer may seize an item in plain view when his sighting of the evidence occurs when he has a right to be where he sees the evidence, and that sighting is inad-

vertent. Thus, where an officer illegally stops a car and thereupon sees contraband in plain view, the plain view exception cannot be utilized to justify the seizure of the evidence. Likewise, when an officer legally stops a car but has as his purpose the sighting of a piece of evidence in plain view that evidence is not necessarily admissible. "[W]here the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatsoever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.'" 29 L.Ed.2d at 585-586.



The continued validity of this exception is obvious after Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). While the four justice plurality appeared to have some question as to the Coolidge plain view requirements, Texas v. Brown does not overrule Coolidge. Further, the Brown decision observes that plain view is not exactly an exception to the warrant requirement, but is rather "an extension of whatever the prior justification for an officer's

'access to an object' may be." 75 L.Ed.2d at 511.

The Kentucky Supreme Court looked at the plain view exception in Patrick v. Commonwealth, Ky., 535 S.W.2d 88 (1976). There, a police officer followed an individual who he had observed walking away from a store in a shopping center at 2:30 in the morning. The officer pulled him over at which time he saw gloves on the floor. The officer, after the individual was able to produce an auto registration, opened the door of the car and saw a lug wrench and a tire tool in the car floor which resulted in a possession of burglary tools charge and conviction. The Court held that this search could not be validated through the use of the plain view exception. "There was no valid reason for the officer to take the gloves from the car, so his opening the door for that purpose cannot justify the subsequent observing of the tools." 535 S.W.2d at 89-90. Patrick is a good example of the principle that the legality of the plain view exception depends more than anything upon the initial legality, i.e., does the officer have a right to be where he is. In Patrick, the officer did not.

D. INVENTORY TO LAWFULLY IMPOUNDED CAR

Another exception is that a lawfully impounded car may be inventoried without a warrant.

In South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the Court held that where a car is illegally parked that it may be impounded, and thereupon may be searched without a warrant. This search is not unlimited in its scope, however, but rather may only be conducted pursuant to a regularized set of procedures in order to guard against

arbitrary searches by the police. A locked trunk may not necessarily be opened because there is no need to safeguard the contents of that trunk since they are already locked. Documents found in the car may not necessarily be sifted nor may cassette tapes be listened to. Thus, the challenge in an inventory search is to the scope of that search as opposed to the initial right to search a lawfully impounded car.

There is also a question as to the right of an arrested person to ask the police for someone else to be able to take the car so that impoundment and subsequent search is not necessary. The question is whether the police must seek some less intrusive alternative to a full and complete impoundment and search. Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983), in the context of an inventory of a shoulder bag, rejected the less intrusive alternative theory. The question is whether a Court would then use Lafayette and apply it to Opperman in order to allow for impoundment where there are less intrusive alternatives.

Kentucky's law on inventory searches of cars appears to be more restrictive than that set out in Opperman. In Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979), the Court set out situations when a car could be impounded: 1) the owner or permissive user consents to the impoundment; 2) the vehicle, if not removed, constitutes a danger to other persons or property or public safety and the owner or permissive user cannot reasonably arrange for alternative means of removal; 3) the police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent

immediate impoundment the vehicle will be removed by a third party or; 4) the police have probable cause to believe both the vehicle contains evidence of crime and that absent immediate impoundment the evidence will be lawfully destroyed. The Court made it clear after looking at the case of City of Danville v. Dawson, Ky., 528 S.W.2d 687 (1975) and the Opperman case that they were basing their decision on Section 10 of the Kentucky Constitution.

Under Wagner, once an impoundment occurs, the police cannot search the car without consent. Rather, the police are simply to lock up the car and the owner then assumes the risk of damage to the car. "Mere legal custody of an automobile by law enforcement officials does not automatically create a right to rummage about its interior... such an inventory is impermissible unless the owner or permissive user consents or substantial necessity is grounded upon public safety to justify the search." "If the police have probable cause to believe the vehicle contains evidence or constitutes a fruit or instrumentality of a crime they must procure a warrant in order to conduct a search in the absence of the consent of the owner or permissive user. In such a case the police can prevent the removal of a vehicle until a reasonable time has elapsed in which a warrant can be secured." 581 S.W.2d at 357. For Kentucky cases, utilizing impoundment subsequent to Wagner, look at Pack v. Commonwealth, Ky. 610 S.W.2d 594 (1981); and Cardwell v. Commonwealth, Ky.App., 639 S.W.2d 549 (1982).

In Estep v Commonwealth, Ky., 663 S.W.2d 213 (1984), the Court ostensibly overrules Wagner and City of Danville "to the extent inconsistent." However, a reading

of Estep makes it appear that it is a United States v. Ross case as opposed to an inventory following a lawful impoundment case. Counsel should continue to argue that Wagner applies in impoundment and inventory cases.

E. CONTAINERS

Containers may be searched in cars where there is probable cause as to the car itself; where, however, there is probable cause only as to the container and not the entire car then a warrant is required in order to search that container.

Probably the most confusing issue surrounding the search of a car has to do with containers found in the car by a police officer. This issue has to do with basically three cases, United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1981); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); and Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

In the Ross case, as has been previously alluded to, the Court held that where the police have probable cause to believe that contraband is within the car, containers found within the car may also be searched. The scope of that search is no broader and no narrower than "a magistrate could legitimately authorize by a warrant." If "probable cause justified the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."

Interestingly, the Court in Ross does not overrule the Chadwick and Sanders cases. In United States v. Chadwick, *supra*, the Court looked at the situation of the search of a

footlocker taken from the trunk of a car. The Court held that while the seizure of the footlocker was valid, the warrantless search of that footlocker was a violation of the Fourth Amendment. The Court distinguished the expectation of privacy that a person has in his automobile, and the greater expectation of privacy that he has in a footlocker or other personal effects.

Likewise, in Arkansas v. Sanders, supra, the Court held that "as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places... we therefore find no justification for the extension of Carroll and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police." 61 L.Ed.2d at 245-246.

In the Ross case, the Court looked at both Chadwick and Sanders, basically saying that "the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of Carroll applicable: the police had probable cause to seize the suitcase before it was placed in the trunk of the cab and did not have probable cause to search the taxi itself." 72 L.Ed.2d at 586. Thus, the question counsel must look at is whether the containers seized was taken with probable cause as to that container, in which case a warrant is needed, or whether police have probable cause as to the entire vehicle.

Counsel should also be aware of the search of a container incident to a lawful arrest. New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). In that case, the Supreme Court explicitly held

that a police officer may search the passenger compartment of a car and any containers found therein incident to an arrest.

The Court recently had an opportunity to overrule Chadwick and Sanders following United States v. Ross. In Oklahoma v. Castleberry, 471 U.S. ___, 105 S.Ct. 1859, 85 L.Ed.2d 112 (1985) the Court examined a California case where the Court had held that a suitcase taken from a car trunk required a warrant prior to opening. The Court dismissed the certiorari petition as improvidently granted.

For a Kentucky case analyzing the search of a container found in a car in Kentucky, see Cooper v. Commonwealth, Ky.App., 577 S.W.2d 34 (1979) where the Court held that a search of a container was valid due to the existence of exigent circumstances.

Professor LaFave states that there is also a developing rule based upon footnote No. 13 in the Sanders case where some containers may be searched without a warrant with probable cause as to the container where the item itself exhibits no expectation of privacy by its very appearance. The obvious example given is that of a gun case.

F. REASONABLE SUSPICION

A car may be searched based upon a reasonable suspicion. In Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Court held that "the search of a passenger compartment of an automobile limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, rea-

sonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons," citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Court reviewed prior decisions involving Terry frisks in which a car was involved, looking at Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) where the Court held that the police "acting on an informant's tip may reach into the passenger compartment of an automobile to remove a gun from a driver's waistband even when the gun was not apparent to police from outside the car and the police knew of its existence only because of the tip," 463 U.S. at 1219, and Pennsylvania v. Mims, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) where the Court held "that police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous." 77 L.Ed.2d at 1218-1219.

In Kentucky, in DeBerry v. Commonwealth, Ky., 500 S.W.2d 64 (1973), the Court held that a stopping of a truck while not based on probable cause was reasonable when based upon reasonable suspicion under Terry, thereupon validating a plain view seizure of contraband at the time of the stopping.

G. ROAD BLOCKS

Cars may be stopped at road blocks to check licenses, registrations, etc.

In Delaware v. Prowse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) the Court held that "excepting those situations in which there is at least articulable and reasonable suspicion that a mo-

torist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and registration of the automobile are unreasonable under the Fourth Amendment." 59 L.Ed.2d at 673. The Court went on to say that "[q]uestioning of all oncoming traffic at roadblock type stops is one possible alternative" to the discretionary stop for checking licenses condemned in this case.

H. CAR MAY CONTAIN A WEAPON

A car may be searched without a warrant where the police believe that the car contains a weapon.

The Court held in Cady v. Dombrowski, 413 U.S. 1074, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) that the police acted reasonably when they searched a car without a warrant after an accident where the police had cause to believe that the car had a weapon therein.

I. VEHICLE IDENTIFICATION NUMBER

The police may enter a car which has otherwise been lawfully stopped in order to look for the vehicle identification number.

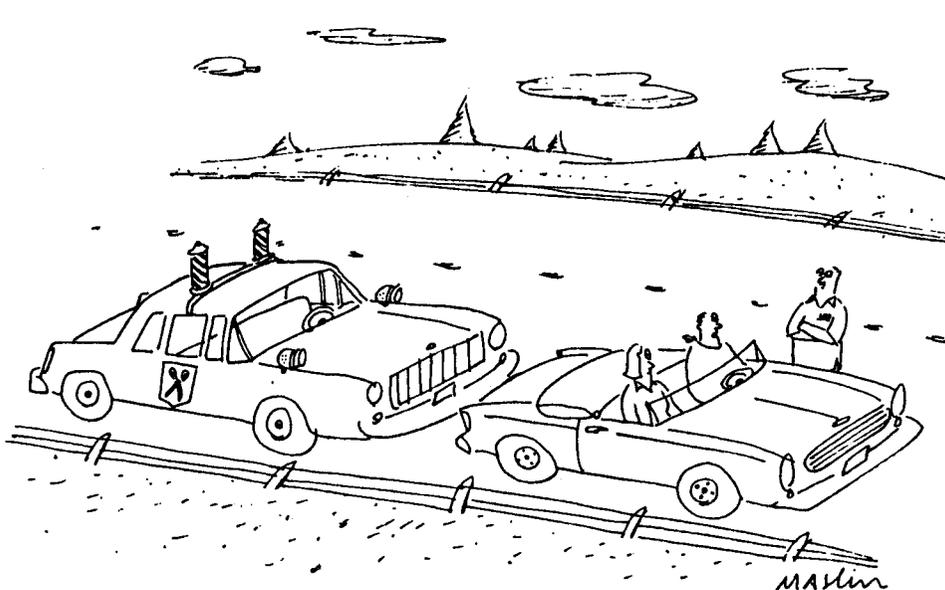
In New York v. Class, 38 Cr.L. 3128 (1986) the car had been stopped on a traffic violation. The vehicle identification number was obscured and the police entered the car in order to see that number. The Court held that this was reasonable. What Class shows us is first of all is that a search incident to a lawful arrest does not apply to traffic violations since otherwise the police would have been allowed to search the interior of the car incident to the arrest. Counsel further should use Class to say that the only reason that the interior of the car may be searched then is due to the vehicle identification number being obscured. If it is not obscured, then the police again would have no cause to search the interior of a car incident to the arrest on a traffic violation.

A car which may be searched without a warrant at the scene may instead be seized and searched later at the police station. Texas v. White, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975). Texas v. White, *supra*, was extended in United States v. Johns, 470 U.S. ___, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) where the Court approved of a vehicle search three days after the initial seizure and the unloading of packages where there was probable cause.

IV. CONCLUSION

I hope that this review has in some way assisted counsel in sorting out the many problems associated with the automobile and the Fourth Amendment.

ERNIE LEWIS
Assistant Public Advocate
Director, Madison County Public
Advocacy Office



Drawing by Michael Maslin. Reprinted with Permission

" I CAN'T AFFORD ANOTHER HAIRCUT, CAN'T YOU
JUST LET ME OFF WITH A TRIM?"

Trial Tips

For the Criminal Defense Attorney

VIDEO--NEW KID ON THE COURT'S BLOCK

Since the advent of videotape technology several efforts have been made to utilize it in the making of the record of trial court proceedings. Efforts during the early 70's in Columbus, Ohio, and Chattanooga, Tennessee, proved unsatisfactory largely because of vigorous court reporter resistance, tentative commitment on the part of the trial judges, and near rejection on the part of the appellate courts.

Improved technology and lower costs led the Kentucky Administrative Office of Courts, with the approval of then Chief Justice John S. Palmore, to approve a request that videotape be given a try in the Madison Circuit Court. After nearly a year of designing a system, ordering equipment and putting it in place, the system became operational in March of 1982. Since that date all jury trials in Division One, and since January, 1984, in both divisions, have been recorded by videotape.

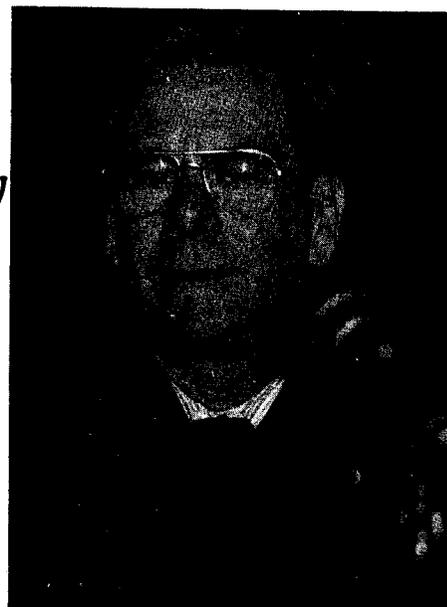
The Madison system has two cameras, each with pan and zoom capacity, with split screen capability, and in full color with regular room lighting. During the four-year plus period of use, there has never been any breakdown delaying or affecting a trial. The videotape recording is of such quality that the Lexington television stations often take a feed directly off the court's equipment for playing on their news reports (with Channel 27 being kind enough to note that the tape was "courtesy of the Madison Circuit Court"). The recorder automatically

generates a date/time recording (month - day - year -- hour - minute - second) on the lower part of the screen, thus making the recording both extremely easy to access as a particular witness/question/answer and extremely difficult, if not impossible, to successfully alter or otherwise tamper with.

The success of the Madison experience has led to the conversion to videotape of eight courtrooms in Louisville (with three additional courtrooms in the process of acquiring the system), and of three courtrooms in Lexington. The new installations have four cameras and are voice-actuated, needing no operator.

Chief Justice Robert Stephens appointed a task force, headed up by Justice Charles Leibson, to draft for recommendation to the Supreme Court, rules and procedures for the use of videotape equipment to record court proceedings. These rules addressed the unique problems that arise in videotaping, were adopted and have been updated on June 26, 1986. They provide that the judge using videotape "shall give a copy of" the special rules "to each attorney who practices a case in the judge's court." In summary, the rules require the simultaneous recording of duplicate tapes, with an adequate log of the proceedings, and detail how exhibits may be handled and how depositions may be utilized. They further provide how the record on appeal is to be perfected, including the preparation of a written transcript when necessary.

The cost-factor in comparing video-



JUDGE JAMES S. CHENAULT

tape to court reporter-produced transcripts has seen a dramatic change in the past decade. While court reporters necessarily had to adjust their fees with inflation, the cost of video equipment and videotape has declined substantially. It is now possible to put a full day's proceedings on one videotape cartridge, many of which now sell commercially for as little as \$5.00. As observed in The National Law Journal, June 23, 1986, (V. 8, n. 41), in an article titled "The Video Verdict," and dealing mainly with videotape depositions, "The video pioneers are feeling rather vindicated these days," further noting that "the idea of recorded testimony was revolutionary enough to run up against a wall of skeptical lawyers and judges. Bit by bit, though, resistance to emerging technology crumbled." The article closes quoting Jeffery Nash, a New York public defender, who says "Video is bringing us into the 20th century. Lawyers will keep finding new uses because it brings a case to life."

One of the bugaboos against videotaping often voiced is that the cameras would be distracting and that the participants would ham it up. Where this notion comes from is

unknown, but it is widespread. For example, Virginia judges were asked about the effect of television cameras in their courtrooms and 93% felt witnesses would be distracted, 84% said lawyers would be distracted, and 72% opined that even judges would be distracted by the presence of cameras -- yet 97.8% of these answering judges admittedly had never practiced in a courtroom where television cameras were used! (Virginia Bar News, Sept. '85, Vol. 34, No. 3).

Experience has shown this not to be the case. Twenty minutes after a trial begins, no one seems to be aware of the presence of the video cameras. The only change noted by the author is that lawyers do tend to dress better for a videotaped trial than for non-videotaped hearings--and perhaps the judge is somewhat more guarded against bobbling off in a dull trial.

There can be no dispute but that a videotape recording is a quantum leap ahead of the former traditional court reporter transcript--in accuracy, in efficacy, in reality. It is instantly available for replay. The difference in replaying testimony by videotape, as opposed to a court reporter reading shorthand notes, is comparable to personally experiencing an event as opposed to reading about it in the newspaper. Similarly, a videotape deposition is far more effective than the old method of droning through the courtroom reading of a deposition.

Strangely, with from 36 to 40 exceptions (depending on which authority you consult), hearsay testimony is considered unreliable and its use is prohibited, yet we have traditionally paid great obeisance to a court-reporter-generated-transcript, which, by any measure, is pure hearsay!

The use of videotape is neutral. It favors neither side. It does assure a readily accessible and accurate record to both sides. The technology continues to improve. Video cassettes the size of audio cassettes are now being produced. The price of components continues to drop.

Within a few years it is likely that hook-ups between the jails and courtrooms will permit bail to be speedily set without having to physically transport the defendant to court. Possibly lab technicians will be able to testify without leaving their labs through two-way microwave and cable hook-ups. It is a possibility that doctors may testify live from either their office complex or from a hospital setting. The day is not far away when all in-custody police interrogation will be done before video cameras. It is foreseeable that even field arrests, field sobriety tests, and the like, will be videotaped. Again, "The Video Verdict," supra, quotes a lawyer-user: "The possibilities are limited only by lawyers' imaginations. The only issues in using video are truth, accuracy and probative value."

Presently Kentucky is testing its new videotape statute on child abuse (KRS 421.350). A virtual national outcry against courtroom abuse of children who have allegedly been physically or sexually abused has precipitated the adoption of this statute. The statute attempts to strike a balance between the child-victim's right not to be further abused by an emotionally devastating appearance in the frightening setting of a courtroom and the defendant's right to a fair trial. A portion of this statute has been tested and approved by the Supreme Court in a recent case.

As has been said, lawyers are 100% for progress, and 1000% against change. The video revolution is upon us and many changes from traditional methods are inevitable. We can anticipate a wave of support of each change, and a tidal wave of resistance to it. Our courts await some fascinating fights that will result from attempts to accommodate the courts to late 20th century technology.

It's an exciting time to be practicing law!

James S. Chenault

Judge Chenault is the chief circuit judge for the 25th Judicial Circuit comprising Madison and Clark counties. He is the chief regional circuit judge for the Bluegrass Region.

* * * *

CHIEF JUSTICE OPPOSES TELEVISIONING COURT PROCEEDINGS

Chief Justice Warren E. Burger said that he thought allowing televised news coverage of the Supreme Court's public sessions would be "bad for the country, bad for the court and bad for the administration of justice."

But Burger told the American Society of Newspaper Editors in Washington that he might favor allowing one source, such as the C-SPAN cable network, to air an argument session in its entirety if all other broadcasters were barred from airing "snippets" on news shows.

Kentucky Post

VIDEOTAPE RECORDS

Recent talk of experimenting with the use of videotapes for recording court proceedings raises some doubts, but makes one realize the implications of the electronic information age in which we live.

But does the advantage over court reporters and paper transcripts make videotaping worth the trouble it may cause in the courtroom?

Who would be in charge of turning the videotape machine on and off, the judge? Some judges say they have enough work to carry, without having to be movie directors.

What if the tape stops in the middle of testimony or during a

defense attorney's critical closing statements? What if the tape is accidentally erased or decays over time?

These questions may seem frivolous, but they are serious considerations we have to make when applying technology to anything as critical as the justice system. As observers of Murphy's Law would assert, it's just one more thing that could go wrong--and go wrong at the worst possible time.

Transcripts are recorded for the purpose of reviewing the court's procedures in the event the case is appealed to a higher court. We doubt that the defendant's nervous twitch, the prosecutor's incessant pencil tapping or the judge's

wandering gaze would be grounds for a retrial.

But on the other hand, a malfunction with the videotape machine might be, and there we have a whole new realm of procedural technicalities.

As court dockets bulge and prisons overflow, it's apparent the court needs to find ways to be more efficient. But we should use cautious skepticism when trying to fix components of the system that aren't broken.

Kentucky Post Editorial
May 27, 1986
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JUDGE WANTS TRIALS ON VIDEOTAPE

Kenton Circuit Court Judge Douglas Stephens is interested in participating in the pilot program to use video taping equipment instead of a court reporter during trials.

"I think it's a good idea," Stephens said. "My only reservation is I've never actually seen it work. I've talked to other judges who have used the system, and everything I hear is positive."

State officials say a pilot program elsewhere indicates that taping can reduce costs for courts, but some judges question whether the video taping of court proceedings, instead of using court reporters, is appropriate.

Judges in Jefferson and Fayette counties have used video taping for a year. Madison County judges were the first to test the system in 1979. "It's a very accurate

system," Stephens said. "It's instantaneous, and much, much cheaper."

The equipment costs about \$40,000. For comparison, salaries for court reporters average about \$20,000 a year, said Donald Cetrulo, director of the Administrative Office of the Courts in Frankfort. Cetrulo said the state has been able to install equipment that brings savings in salaries whenever court reporters quit or retire.

Components usually include four or five cameras and eight to 12 microphones, all controlled by computer. Cetrulo said the savings are significant. For example, a 12-hour trial costs about \$30 for videotape, but between \$100 and \$1,000 for a stenographer's transcription.

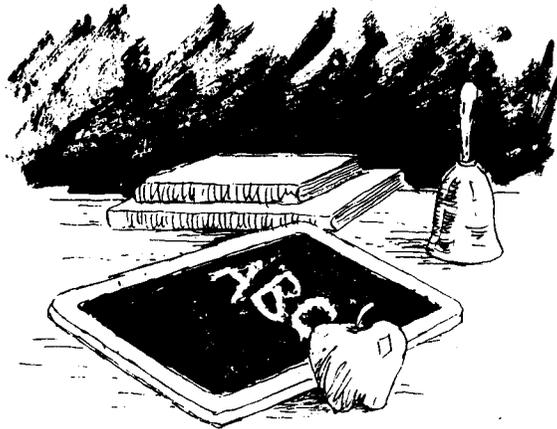
The pilot program could include Kenton County by next year, Cetrulo said. Some judges are opposed to the idea of replacing court reporters with machinery. "I don't

machinery. "I don't want it," said Kenton County Circuit Judge Raymond Lape. "I'd rather have the court reporter. The court reporter is your right arm out in the courtroom." Lape said the system will mean more work for the judges--starting the video equipment and marking exhibits. "I have enough work to do," he said. "And what if the tape breaks down and no one knows about it?"

Cetrulo said some problems, such as the marking of exhibits, remain, but can be worked out. "The main thing is this is a lot different from the court reporter system," Cetrulo said. "You have to make some changes."

Kentucky Post
May 13, 1986
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JUVENILE LAW



JUVENILE COURT PRACTICE- AN OUTLINE OF KRS CHAPTER 208

The following is a reprint of an outline presented at the Annual Public Defender Training Seminar of existing juvenile statutory law. If the reader has a specific question about Chapter 208 or if caselaw support is needed regarding the interpretation of any particular section of Chapter 208, the reader is encouraged to contact Michael Wright at (502) 564-5219 or at our mailing address.

1. JURISDICTION

Children under 18 at time of offense; living or found within the county. 208.020 (1).

Public Offenses (Delinquency Actions). 208.020 (1)(a), 208.010(7).

Status Offenses. 208.020 (1)(b) and (c), 208.010(8).

Dependency Actions. 208.020 (1)(d), 208.010(9).

Traffic offenders under 16. 208.020(1)(a).

2. "TAKING INTO CUSTODY"

Not an "arrest." 208.110 (1).

No right to bail. 208.110 (1).

Immediate notification to parent/custodian. 208.110 (3).

Either release to parent or secure custody. 208.110 (3).

Possible to release to diversionary center. 208.110(4).

Written report to the court necessary if detained. 208.192(1).

No one under 16 to be detained in police station, lockup, jail, or prison unless hearing held--and then, must be separated from adults. 208.120

3. ARRAIGNMENT

Must be read rights under 208.060(3)(a)-(e) to: counsel, to privilege against self-incrimination, to confront and cross-examine, to appeal; rights belong solely to child.

4. INFORMAL ADJUSTMENT

Unique to juvenile court.

Court must consider it. 208.060(3).

May be ordered at any time in proceedings. 208.060(3).

Information given during discussion not to be used against child later. 208.060(3).

Presumption that disposition will be informal adjustment. 208.060(2)(d).

Statutory language: petition dismissed and child's case informally adjusted among parties. 208.060(3).

(Also mentioned in 208.070 (1).)

5. DETENTION HEARING

Right to counsel and public defender appointment. 208.065.

Hearing must be held within 72 hours of commencement of detention, not counting Sundays and holidays. 208.192(2).

Right to confront and cross-examine. 208.192(3).

Two stage hearing: A) probable cause that offense was committed by child. Burden on Commonwealth by preponderance of evidence. If not established at hearing, case dismissed. 208.192(4)(a); B) whether safety of child, protection of community and appearance of child in court must be assured. 208.192(4)(b).

Court must consider: seriousness of offense; danger of child to community; prior record; pending charges elsewhere. 208.192(4)(c).

Secure detention for status offenders limited. 208.192(4)(d).

Court must list reasons in writing. 208.192(5).

Child to be released if hearing not held. Remedy is habeas. 208.192(6).

6. PRE-ADJUDICATION MATTERS

Physical evidence obtained in same manner as adults. 208.196(1).

Physical evidence to be surrendered to court upon child's elimination as suspect in case. 208.196(2).

Referrals by court of child suspected to be mentally ill. 208.150.

Physical exams. 208.160.

Pretrial conferences (in certain counties).

Motion practice: should be similar to adult cases.

Information obtained by probation officers confidential; numerous exceptions. 208.340.

[If no transfer motion made, Nos. 7, 8, 9, and 10 apply below. If transfer motion made, Nos. 11, 12 and 13 apply below.]

7. ADJUDICATION (TRIAL)

Right to speedy hearing; no trial by jury; may be informal. 208.060(1).

Rules of Criminal Procedure apply on motion of child. 208.060(2)(b).

Reasonable doubt standard applies. 208.060(2)(b).

General public excluded; only person with direct interest may be present; witnesses present only for duration of testimony. 208.060(1).

Plea of guilty called "an admission." 208.060(a).

An adjudication not deemed a "conviction." 208.200(8).

Special criteria for post-adjudicatory detention: danger to child or community. 208.060(2)(c).

8. DISPOSITION

Predisposition investigation necessary. 208.140.

Right to a separate dispositional hearing on separate day. 208.060(2).

Disposition recommendations/report may be made by anyone. 208.060(4)

Dispositional alternatives:

- A. Probation-until age 18. 208.200(1)(a)
- B. Commitment: "Ordinary" until age 18. 208.200(1)(b); "Bridge": not less than six months if child has: Capital, A or B felony. 208.194

(1); Two or more (prior) separate adjudications. 208.194(2).

- C. Restitution. 208.240.
- D. Community Service Work (120, 80, or 40 hours). 208.200(4)(a)
- E. Fines (150, 75 or 50 dollars). 208.200(4)(b)(c)
- F. Detention (Maximum 30 days). 208.200(7)
Jury trial in these cases is ambiguous and confusing. 208.200(7).

Parents may be ordered to support probated or committed child. 208.280.

Court to make order of commitment to CHR. 208.270.

Status offenders and delinquents not to be mixed in "Institutions." 208.430(1)(c).

CHR may place committed child in clinical setting for 30 days without hearing before Chapter 202 begins. 208.460.

Law enforcement agencies to be notified of commitments and releases. 208.198

Treatment rationale. 208.140.

9. APPEALS

Rules of Criminal Procedure apply. 208.380(1).

To be heard as soon as reasonably possible by circuit court. 208.380(1).

Right to a release hearing within three days after filing of the appeal. 208.380(2).

Further appeals to Court of Appeals governed by RCr 208.380(3).

Dependency appeals taken under Rules of Civil Procedure, 208.380

10. POST-DISPOSITIONAL PROCEDURES

Shock probation of bridge commitments possible, after 30 days, with consent of CHR, 208.194(5).

Child who fails to do work or pay fine may be held in contempt (5, 3, or 2 days in detention). 208.200(5) (6).

Commitment order may be modified or terminated by court at any time. 208.205.

Duties of CHR regarding care, treatment, and rehabilitation. 208.400, 208.410.

Committing court may object to discharge. 208.430(1) (a).

208.470 (committed child who is incapable of benefiting from CHR treatment) appears unconstitutional.

Administrative procedures to revoke supervised placement after release from residential setting (preliminary and final hearings). 208.510.

Expungement of record available two years after release from jurisdiction. Waiver of two year period upon extraordinary circumstances. 208.275(1).

11. PROBABLE CAUSE HEARING

Is there probable cause to believe an offense was committed and child did it? 208.170(2).

Eligible children: Over 16 years old; any felony; Any age: Class A felony or Capital Offense. 208.170 (1).



12. TRANSFER HEARING

"Waiver" is misnomer.

Cannot transfer a child after an adjudication of same charge.

Statutory criteria for transfer:

- A. Seriousness of offense;
- B. Person vs. property offense;
- C. Maturity of child as determined by environment;
- D. Prior record;
- E. Prospects for adequate protection of public;
- F. Likelihood of rehabilitation in current ju-

venile justice system. 208.170(3).

Age not mentioned as factor.

Reasons for transfer in writing. 208.170(4).

Develop and use own experts (community and institutional social workers, psychologists) and call witnesses (parents, minister, friends, employers).

13. POST-TRANSFER PROCEDURES

Bail available after transfer. 208.170(5)(d).

Grand Jury must be told it can send case back to juvenile court. 208.170(5) (a).

After indictment, circuit court can transfer case back to juvenile court. 208.170(5)(b).

Child tried as any adult, if case kept in circuit court. 208.170 (5)(c).

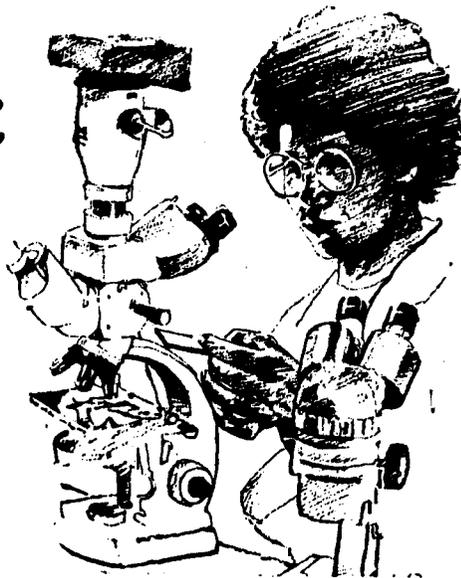
If convicted in circuit court of felony, child under 18 at time of sentencing may be committed to CHR for indeterminate time until age 21. 208.180(1).

If convicted of misdemeanor in circuit court, child to serve time in county jail, but child under 18 at time of sentencing may be committed to CHR for indeterminate time not to exceed age 21. 208.180(2).

Harry Rothgerber, Jefferson County District Public Defender Office, Louisville, Kentucky.

Michael Wright, Assistant Public Advocate, Department of Public Advocacy, Frankfort, Kentucky

Forensic Science



ACID PHOSPHATASE

The presence of semen in a rape case has for many years been confirmed by using the acid phosphatase test. The principle forming the basis of this test is that the prostate produces high levels of acid phosphatase in men.

Somewhat recently it was discovered that women also produce acid phosphatase, albeit in substantially lesser quantities. This discovery has, as a practical matter, been more or less discounted as significant by forensic laboratories and lawyers, both the prosecution and defense.

Now, however, it is becoming an accepted practice for some laboratories to distinguish between seminal acid phosphatase and vaginal acid phosphatase. In Ablett, "The Identification of the Precise Conditions for Seminal Acid Phosphatase (SAP) and Vaginal Acid Phosphatase (VAP) Separation by Isoelectric Focusing Patterns," Journal Forensic Science Society 23:255 (1983) the author discusses the utilization of an isoelectric focusing method to improve resolution of bands from the two different acid phosphatase and thereby quantitatively distinguish them.

Therefore, if one is defending a rape prosecution and the State is relying upon the acid phosphatase test it would be appropriate to review this article. It is likely that the forensic laboratory that made the test did not distinguish between the two types of acid phosphatase.

FORENSIC ASSOCIATES

Providing complete support to attorneys in all aspects of scientific and investigative matters in criminal and civil litigation. Areas include private crime lab, investigations, testimony, firearms, fire cause, accident reconstruction, DWI defense, drug analysis, case review and consultation.

Jack Benton and Pat Donley
Forensic Associates
1220 Broadway, Suite 505
Lubbock, Texas 79401
(806) 763-5108

BLOOD AND URINE EVIDENCE

The identification and subsequent quantitation of ethyl alcohol in

blood and urine samples is most commonly accomplished by virtue of gas chromatography. The columns used in these gas chromatographs separate components, and by virtue of their resolution yields a chart indicating the position or retention time of the component of interest. This retention time, given specific column and parameter conditions, indicates the identity of the component of interest when compared to standard components analyzed under the same parameters. The height or area of the peak produced on the resultant graph is indicative of the amount of component present.

Unfortunately, a single column run is not specific, as other substances may mimic the component of interest and yield a false positive or contribute to an erroneously high result in terms of the amount of component present.

The single column method of blood alcohol analysis is a common practice which should be vigorously explored by the attorney faced with these test results. Only by employing two or more column runs utilizing different parameters or column material would this test procedure be considered specific. Additionally, in order to absolutely rule out the possibility of false positives, a series of standard volatiles should be analyzed under the same set of parameters to establish the ability of the run parameters to discriminate between the ethyl alcohol and other volatiles. Many laboratories utilize the single column identification method comparing the unknown components in evidence blood or urine samples to ethyl alcohol only, ignoring the possibility of other volatile contamination.

Jack Benton & Pat Donley

CASES OF NOTE IN BRIEF

I find it helpful at times to refresh my memory on past Kentucky case law. I hope you find it helpful, too.

INSTRUCTION ON DEFENSE Christian v. Commonwealth 235 S.W.2d 774 (Ky. 1951)

The defendant was convicted of operating a car without the owner's consent. His defense was that another person was driving the car; that he was just a passenger, and that he did not know the car was stolen.

The appellate court held it error for the trial court to not give "a specific instruction covering this defense."

TIME TO PREPARE CASE Fugate v. Commonwealth 72 S.W.2d 47 (Ky. 1934)

The defendant was indicted on August 16 for an August 2 killing and tried on August 29 with a hung jury resulting. His attorneys withdrew, and the court appointed two new attorneys on September 4 and required them to proceed to trial on September 5. The appellate court reversed:

By section 11 of our Constitution, one charged with crime is given the right to be heard by himself and counsel. By custom that has come to mean, it is the duty of the court to appoint counsel for an accused who is unable to employ counsel... and it is the duty of such appointed counsel to

put forth his best efforts... and of the court to give to counsel reasonable time and opportunity to acquaint himself with the facts, to confer with the accused, to learn what is his defense, and to prepare and present it.... This is of special importance where the accused is represented by appointed counsel.

id. at 48.

CONSENT TO SEARCH AFTER ARREST Johns v. Commonwealth 394 S.W.2d 890 (Ky. 1965)

The defendant was stopped for reckless driving. He showed the trooper his license and was arrested. The officer asked to look in the trunk. The defendant said the lock on the trunk didn't work. Finally, with a screwdriver, the defendant agreed to open the trunk where the officer spotted a large quantity of beer. The defendant was convicted of illegally transporting alcoholic beverages.

In deciding whether the defendant's consent made the search legal, the appellate court said:

Neither do we regard the instant search as having been accomplished with the voluntary consent of the appellant. It will be recalled that the trooper had placed appellant under "physical arrest" prior to requesting permission to search. In our view, the appellant had no recourse except to submit to the authority of the officer in

this situation, so that his reluctantly given "consent" was nothing more than yielding to the inevitable.

Id. at 892-93.

IMPLIED BIAS

Taylor v. Commonwealth 335 S.W.2d 556 (Ky. 1960)

The defendant was a general manager of a mine that was involved with a labor dispute that evoked extreme violence. The defendant was convicted of holding and flourishing a deadly weapon and pointing the gun at a picket line.

The defendant unsuccessfully objected to any member of the labor organization involved in the strike serving as a juror due to their implied bias. The jury that tried the defendant consisted of two jurors whose husbands were on a strike picket line, another whose son-in-law was on duty at the place where the incident occurred, and two or three jurors whose husbands were members of the labor organization on strike. Each juror disclaimed prejudice and bias.

The appellate court reversed the conviction because of the implied bias that was present due to the connection between the labor union and the defendant and the violence between them. The "conditions were such that [the jurors'] connections would probably subconsciously affect their decision of the case adversely to the defendant's." Id. at 557.

Ed Monahan
Assistant Public Advocate
Director of Training

The impossible is often the untried. - Jim Goodwin

No Comment

THANK GOD FOR QUINCY

PROBE BEGINS ON 'SUICIDE' OF MAN
STRUCK 32 TIMES

State police detectives have begun a review of the evidence in the brutal April 6 death of James A. Cooley...whose skull was broken by 32 hammer blows, bypassing local police who rule the man had committed suicide, officials said

A public feud erupted in June between Coroner Dr. Daniel D. Thomas after police Chief Lawrence E. Juzwicki called the death a suicide and closed the case. Thomas, however, ruled the death a homicide and began a campaign to re-open the investigation.

Associated Press, 10/24/85

ONE QUESTION TOO MANY

A 67-year-old laundromat employee who had taken the witness stand...suffered a heart attack before she could identify her assailant, and died despite the prosecutor's attempts to save her with mouth-to-mouth resuscitation.

"I asked her how she felt when the guy pointed the gun at her, and the expression on her face kind of changed. Her arms dropped to her side...." said [the] prosecutor who was trying his first case since graduating from law school two days earlier.

[The two prosecutors] rushed to the witness..and attempted to get her breathing again, but in vain.

Lexington Herald-Leader at B2,
5/16/84.

GOOD THING WOMEN WERE ON THE JURY

PROSECUTOR (LATER U.S. ATTORNEY):
The bank's on the alert for smooth talking thieves on Christmas, aren't they?

A. Yes.

DEFENDANT: Your Honor, I object.

JUDGE: Yes, we'll sustain the objection.

PROSECUTOR: It's the truth.

* * * *

PROSECUTOR: I don't believe a word you say, Mr. Defendant.

JUDGE: Mr. Prosecutor.

PROSECUTOR: I can believe what I want to believe, Judge.

* * * *

PROSECUTOR: If the women weren't here, I'd like to literally knock the living hell out of him. That's just what I've got to say to you, you dirty, sneaking, lousy crook.

JUDGE: Alright.

PROSECUTOR: Go on and get up and do something about it, you son-of-a-bitch.

DEFENDANT: You hear how it is, sometimes the truth hurts.

PROSECUTOR: You god damn, son-of-a-bitch.

DEFENDANT: Remember the story--put that in there, what he called me.

PROSECUTOR: Yes, put it in there, because that's what you are you louse.

Epilogue - Conviction affirmed on appeal. Loy Lovett

"GOING A LITTLE FAR"...OR... GOOD THING MEN WERE ON THE JURY

PROSECUTOR (SUCCEEDS PROSECUTOR ABOVE):

What...I have done based upon the proof in this case is proved that that's the filthiest man you all will ever lay your eyes on sitting right there at that table. He is a degenerate of the worst kind -

DEFENSE COUNSEL: Judge, I object..

PROSECUTOR: Based upon the evidence...that's what the man is...What are we going to do with him, ladies and gentlemen? You know, if we were all sitting around in the living room and we read about this in the newspaper, do you know what one of you guys would say? You'd say, 'I think we should cut his testicles off.'

DEFENSE COUNSEL: Judge, objection.

JUDGE: I think that's a little strong, Mr. Prosecutor.

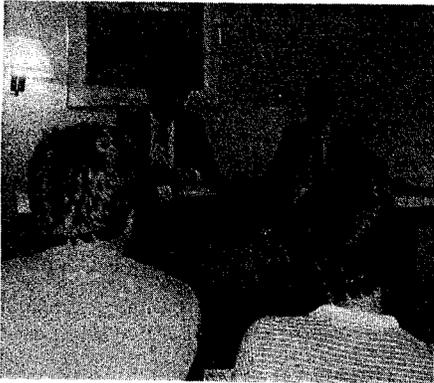
PROSECUTOR: All right, so what would we say in our living room? We would say, "I think we ought to hang the guy." The law won't allow us to do that...(to this) creep...(this) dirty old man...

* * * *

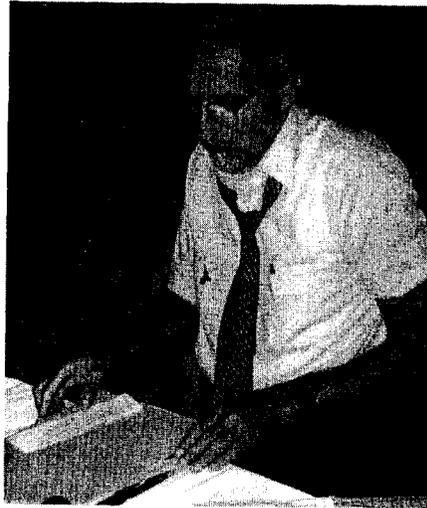
Thanks and a tip o' the hat to Jim Wood and Marie Allison.

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

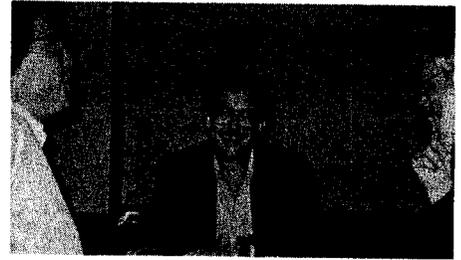
Kevin McNally
Assistant Public Advocate
Chief, Major Litigation Section



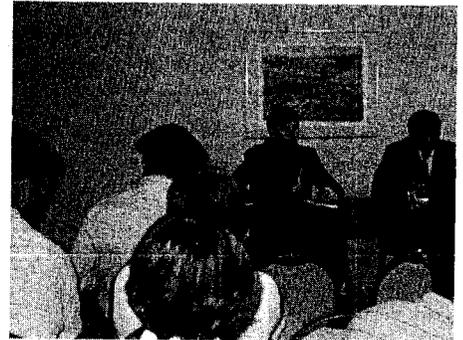
Mike Wright, Ed Dance



James Jenner



Rob Riley, Bill Radigan, Jim Woods



McGehee Isaacs, Ron Simmons



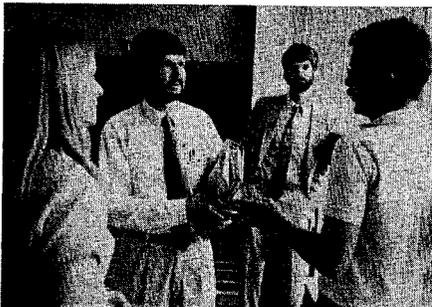
Judge McDonald, Judge Ewing
Patricia Van Houten

ANNUAL SEMINAR COMPLETED

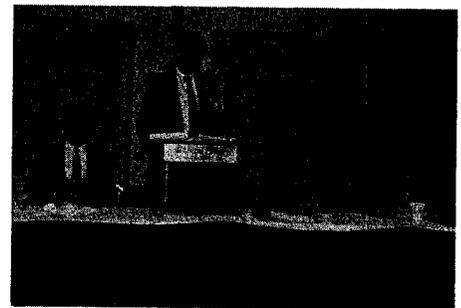
Over 200 persons attended the 2 1/2 day Annual Public Defender Training Seminar. National faculty were John Delgado of South Carolina and James Jenner of California. Other faculty included Bill Radigan, Frank Heft, Dr. John Hunsaker, Ron Simmons, Harry Rothgerber, Frank Jewell, Judge Ellen Ewing, Judge Peter McDonald, and Edward L. Dance. Meanwhile Ed Monahan and Bette Niemi were snowed under in Fitzgerald. Thanks to all those that made the seminar a success. Don't miss next year's seminar to be held June 7-9, 1987 at the Ramada Hurstbourne in Louisville.



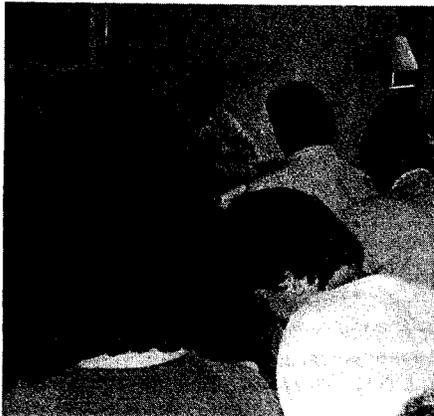
John Delgado



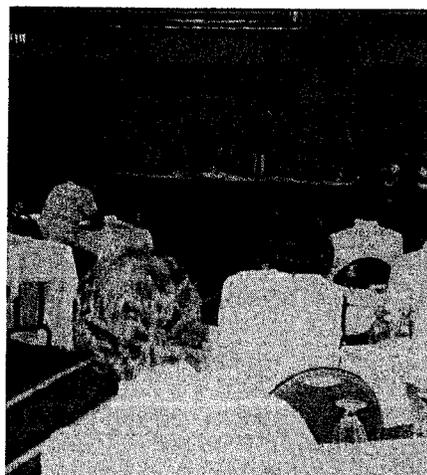
Donna Boyce, Kevin McNally, Neal Walker
Danny Dees



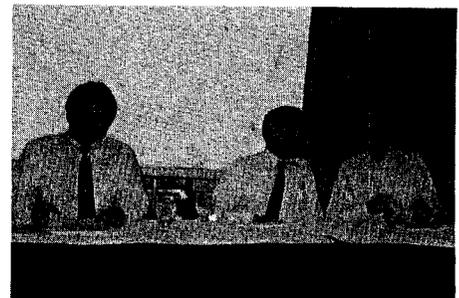
Kevin, Paul, Frank Heft



Jim Cox



McGehee Isaacs, Mark Posnansky
Donna Boyce, Paul Isaacs



Vince Aprile, Dan Taylor
Bill Radigan

Book Review



Patricia Van Houten

THE FIRST YEAR REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN COURTS June 1984

"There's no room for gender bias in our system....There's no room for the funny joke and the not-so-funny joke, there's no room for conscious, inadvertent, sophisticated, clumsy, or any other kind of gender bias, and certainly no room for gender bias that affects substantive rights.

There's no room because it hurts and it insults. It hurts female lawyers psychologically and economically, litigants psychologically and economically, and witnesses, jurors, law clerks and judges who are women. It will not be tolerated in any form whatsoever."

So said New Jersey Chief Justice Robert N. Wilentz on November 23, 1983 to the New Jersey Judicial College in 1982, a thirty-three member task force was appointed by the Chief Justice, a historical first, to determine whether gender bias exists in the New Jersey Courts, and assuming it did, to develop educational programs to address such bias. The initial results of the task force are contained in this report. Through a questionnaire to 900 attorneys; meetings with local bar associations, and an analysis of both case law and existing research on this subject, the Task Force concluded there was "evidence of

some gender bias in the treatment of women lawyers, litigants, judges, witnesses, and court personnel, reflecting a national social problem confronting public and private institutions."

Although the above initially sounds vague, the report gets right down to the nitty gritty by defining gender bias as those stereotypical notions concerning men and women that define so-called appropriate behavior and/or roles. It recognizes that this bias is reflected in all American social institutions. It can be blatant and it can be subtle. Although gender bias affects men, it "(m)ost often and most severely it impacts on women." Pretty amazing stuff for a judicially created and sponsored task force. But it gets better.

After completing the survey and compiling this report, presentations were made before the 1984 New Jersey Judicial College, bar associations, professional organizations, and other interested groups. Videotapes were made and circulated demonstrating how gender bias works.

Some examples of gender bias identified by the report are: 1) a judge complimenting a woman attorney on her appearance in courtroom setting, thus distracting from her credibility; 2) a judge, in chambers, sharing camaraderie with male attorneys and ignoring female counsel; 3) a judge paying careful attention to male experts, while ignoring female experts; and 4) judges impatient with victims of

domestic violence due to lack of knowledge about the psychological and economic problems of battered women.

The survey results are illuminating. Although women only make up 13% of the bar in that state, a third of the responses were received from women. The reason for this interest, although seemingly apparent, is reflected in the responses in the questions as well. Generally the perceptions and the experience of the women attorneys are very different from the male attorneys. This, the report patiently explains, is due to the fact that the bias more directly affects women.

For example 71% of the women, but only 30% of the men responding reported situations where judges treated litigants or witnesses disadvantageously because they were women. Women also reported more examples of other counsel treating litigants or witnesses disadvantageously because they were women: 83% women compared to 47% men.

Seventy-six percent of the women attorneys reported that they had seen a situation where a woman attorney was disadvantageously treated because she was a woman compared to only 33% of the men reporting such an incident.

Specific questions were asked concerning credibility, forms of address, comments on personal appearance, sexual harassment, hostile remarks and sexist jokes, case outcome, intervention by

judges and counsel to correct discriminatory behavior, bar associations and the "Old Boys Network," perception as to counsel fees and fee generating appointments, and attorney performance, problem areas of substantive law, and employment opportunities for women. The results of individual subcommittees on substantive laws and judicial decision making in the areas of Damages, Domestic Violence, Juvenile Justice, Matrimonial Law, and Sentencing are summarized.

The statistical results of the survey and conclusions of the subcommittees are discussed in narrative form. Graphs concerning economic status of women re: matrimonial issues are also included. Adding much to the report are quotes from the respondents. Some of the more interesting quotes addressed the question of the sex of the attorney and the outcome of the case. In this area, unlike most of the others, there was agreement between male and female attorneys that it did not affect the outcome. But that did not come without a price.

"I always try to maintain a professional demeanor, but many judges...treat us like "girls" and expect us to behave accor-

dingly. (I suspect they would accuse me and my colleagues of being oversensitive and not being able to handle some good-natured ribbing. Unfortunately [sic], we can handle it. It's the fact that we have to handle it that distresses me.)"

-Thirty-seven-year-old female.

"A woman attorney must walk the fine line between being feminine and being assertive. She is held to a different standard than a man. If she is too feminine she is accused of trying to use it to her advantage and is therefore resented, but if she is equally assertive to her male counterpart, she is accused of being too aggressive. To their credit, most of the women attorneys with whom I have had dealings have been able to walk that fine line, but it is usually with much more pressure than is experienced by a man."

-Forty-seven-year-old male.

The Task Force correctly focuses on the need for judges to demonstrate leadership on this question. Not only must the judges police their own behavior, but they must intervene actively in all matters of gender bias coming to their attention and demanding action. For its

second year, the Task Force asked New Jersey judges to observe and record instances of gender bias coming to their attention in court, in chambers, or at professional gatherings.

Clearly the New Jersey Supreme Court has taken historical steps to identify the problem of sexism in the context of the judicial system and is further demonstrating leadership by taking steps to eradicate gender bias.

Shortly following the establishment of the New Jersey Task Force, a 23-member task force in New York was also established reporting to the Chief Justice of the New York Supreme Court with similar results painting a picture of "climate of condescension, indifference, and hostility" facing women in all facets of the judicial process. Hopefully other states will follow with their own task forces and plan for action.

Patricia Van Houten.

Patricia is a public defender with the Louisville District Public Defender Office. She was formerly the Director of the Department of Public Advocacy's Morehead Office.

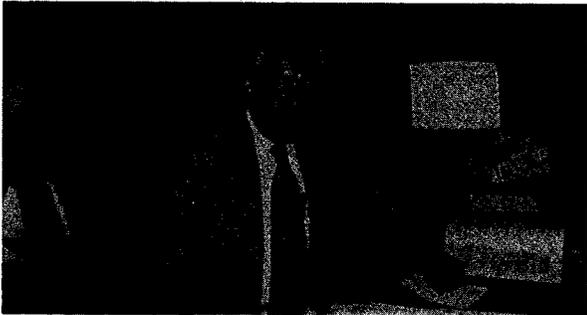
HEAL THYSELF?: In a recent study conducted for the American Bar Association Journal, 63 percent of 600 attorneys said they would object if asked by a partner to do something unethical. Only 59 percent of the respondents stated they would be willing to report misconduct by members of their own firms. Not surprisingly, the vast majority of complaints against lawyers are filed by clients or initiated by bar counsel. When asked who should have the responsibility to police the legal profession, two-thirds of the surveyed respondents felt that the profession should police itself. With regard to reporting judicial misconduct, only 4 in 10 respondents said that they had reported judicial misconduct that they had witnessed. The reasons given for not acting on judicial misconduct included "it's no use" (29 percent); "not their responsibility" (19 percent); and "reluctance to ruin a career" (5 percent). (New York Law Journal, 12/9/85, p. 6).

DPA STAFF CHANGES

Paducah

Will Kautz, former Assistant Public Advocate and Director of the Paducah Office tendered his resignation on February 28, 1986.

Norman Bennett, who had been Acting Director since Will Kautz's resignation of 2/28/86, has resigned effective 5/31/86. Joe Myers is now the Directing Attorney.



DONALD S. MUIR

Assistant Public Advocate Donald S. Muir joined the Paducah Office July 1, 1986.

Hazard

Gary Johnson, formerly the Director of the Pikeville Office has joined the Hazard Office. Steve Owens replaces Gary as the Directing Attorney. Steve came on board May 1, 1986.

Protection & Advocacy

Paul Phillips, Clinical Psychologist has joined the Protection and Advocacy staff as an Advocational Specialist effective June 30, 1986.

Morehead

Patricia Van Houten former Director of the Morehead Office tendered her resignation effective August 1, 1986. She has joined the Louisville-Jefferson Co. District Public Defender's Office. Keith McCormick is now the Acting Director of the Morehead office.

THE ADVOCATE

**Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601**

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