

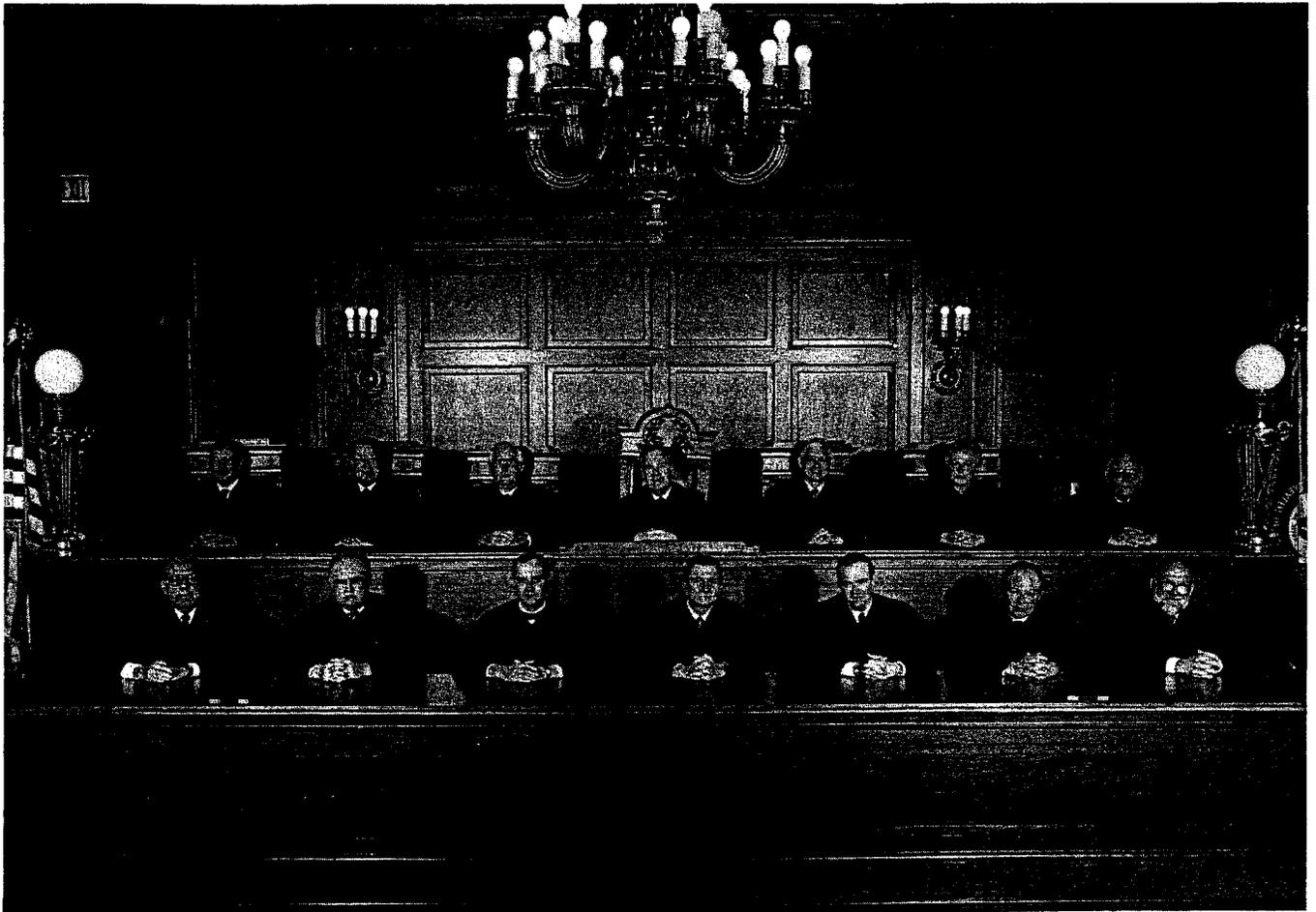


THE ADVOCATE

Vol. 9 No. 4

A Bi-Monthly Publication of the DPA

June, 1987



The 14 Judges of the Kentucky Court of Appeals

Interview with the New Court of Appeals Chief Judge, William Howerton

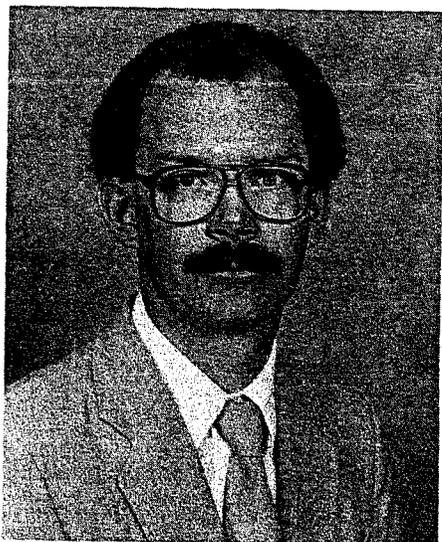
Also in this issue:

William E. Johnson on the Kentucky Criminal Rule Process

Schizophrenia -

Dr. Weitzel's Review of the Comprehensive Textbook of Psychiatry-

The Advocate Features



John Halstead

John's favorite quotation:

"There's too many people who do nothing that's wrong, and not enough people who do right." - Dave Gorden from "Slip of the Hand"

John R. Halstead joined the Department in August of 1982. He graduated from the University of Cincinnati School of Law that same year. Criminal defense work gives him the "ability to help someone get a second chance when they have made a mistake. Many times people are written off as bad when there is still tremendous good in them. Most people are basically good and just need a little push to straighten up. If a client can do good after being given a second chance, that represents a victory."

The DPA Somerset Office handles 5 counties: Pulaski, Rockcastle, Russell, Wayne and McCreary. What makes that practice different than private practice?

Really it's the general nature of public defender work. The private attorneys around here, because we are in a rural area, generally do work in different counties. Plus I generally stay in Pulaski County as

that's my area of concentration.

We have all criminal cases so we're able to gain greater expertise in one area of the law as opposed to an attorney who has to learn many areas. George Sornberger who left our office says private practice is like going back to law school, because someone will come in with an issue that you haven't even thought about for 10 years and you have research it. So I think that any problem that comes in, if we haven't already encountered it once, we at least know where to look fairly quickly for the answer. I think specialization sets us apart a bit from other attorneys.

In an ideal situation what additional resources, support staff does the Somerset Office need in order to provide excellent services to the indigents of those counties?

I think Joe Howard does an extremely good job, but I would like to have another investigator for a 4 attorney office. In any case that you get into, you can find out more about it, so I think the more a case is investigated, the better the result will always be. Also, I'd like to have at our disposal more library resources. The Frankfort librarian can mail us what we want, but what comes first knowing what you want or being able to look for it? (We need) either a paralegal to help us do our research or more investigative resources.

What are your expectations when you go before a judge and does your

practice before them meet that expectation?

The Circuit Judge that I practice before is extremely knowledgeable about the law and my expectation is that when I file a motion he is going to know the area of law or not be stumped by anything I put in there, if he doesn't, he has a law clerk who will research it. So when I go before the judge, I expect that we're going to get the right decision whatever side he comes down on.

As time is limited on a case, what do you feel are the most important aspects to focus on in order to defend that client?

At trial even though you may be limited in time, I don't think there's an opportunity to put some time into the trial or a certain aspect. You've got to find the time for it. If you're going to trial you can lose it at almost any phase and while I think most cases have their points that can make (the time involved) shorter, if you're going into trial you need to be totally prepared no matter how long it takes.

You've been with DPA since August 1982. What do you see as your future with the office? How does it feel looking back?

I really think that I'll probably still be somewhere in a field office. I never really expected

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THE ADVOCATE

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

The Advocate welcomes correspondence on subjects treated in its pages.

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Interview with Judge Howerton

The Court of Appeals Judges elected Judge J. William Howerton as their Chief Judge. His term is from January 1, 1984 until December 31, 1991. Judge Howerton has been a Court of Appeals Judge since 1976. He is from Paducah, and prior to becoming an appellate judge he was in private practice.

Below is a written interview by The Advocate with Chief Judge Howerton.

What is the average caseload of a Court of Appeals Judge, and what do you project that caseload to be in the future?

In 1986, the average caseload per judge was approximately 11 per month, or about 132 per year. We rendered 1,837 opinions in 1986. This total compared to 1,662 opinions rendered in 1985. By July 1985, we had accumulated a backlog of approximately 1,000 cases. We began using the special appeals procedure, and we were able to increase our output and we were able to cut into our backlog. We have now cut our backlog down to about 300 cases, which is a very manageable number. For some unknown reason, we have had fewer filings this past year than in the previous year, but I don't believe that trend will continue. Between the beginning of our Court in 1976 and 1986, we had an increase of approximately 50 percent. In round figures, the number of filings increased from 2,000 per year to 3,000 per year. Hopefully, this trend will not continue through the next decade. The number of cases

making up the difference between filings and opinions get dismissed in various ways. Some are by technicalities and some by settlement, for example.

How does this compare with the case loads of other judges in the criminal justice system?

We have what I would call a rather heavy caseload. If you are comparing our caseload within the Kentucky system, the only place we could make a reasonable comparison would be with our Supreme Court. Our caseload is substantially higher per judge than is their load. Because of the difference in the nature of the work, we are unable to compare our workload with the state trial judges. Furthermore, there is a wide disparity among caseloads among the trial judges in the Commonwealth.

If we compare ourselves to other states which have an intermediate appellate court, of which I believe there are 32, we still have a substantially high caseload. Different states classify different things as a case, such as two appeals which are consolidated or a cross-appeal might be listed as two cases in some jurisdictions but only one in others. It is therefore difficult to really have a true understanding or comparison. In addition to deciding complete cases, we also decide many motions and other actions such as petitions for rehearing or modification and requests for immediate and injunc-



Judge William Howerton

tive-type relief, all of which adds to our total volume of work.

How does the role of Chief Judge of the Court of Appeals differ from that of the other 13 Court of Appeals Judges?

I continue to do the work of a regular judge. I have the same case load as the others. I sometimes can get a little extra help in working on my regular case load, but generally speaking, the role of Chief Judge provides you with some additional duties. These duties are primarily administrative and supervisory. I also handle most of the one-judge motions which require the exercise of discretion and something other than what can be handled administratively. I am also called on for a lot more public functions which do require time and travel, and I am going to have to learn how to say "no" more often than I have been able to do to date.

What, in your view, are the greatest problems facing appellate practice in criminal cases in this state?

We still get a number of criminal appeals that seem to have little or no merit in them. Cases of this type take a lot of unnecessary time. I am glad to say, however, that I have been pleasantly surprised to see a slight increase in the number of Anders briefs and in the requests from the Public Advocate's office to withdraw as counsel and to allow the litigant to proceed pro se because your people have discovered that the appeal is not one which would be taken by anyone who had to spend his own money for costs and attorney fees. I hope that the defenders are not overlooking material and possibly reversible issues, but the fact that they are attempting to give a true evaluation of the merits of the case has been refreshing to me.

How important to the decision-making process are briefs and reply briefs in the Court of Appeals?

Briefs are extremely important. The judges on the panel for that particular appeal read the briefs before oral argument. The presiding judge will have the record, but the associate judges will only have the briefs. The briefs identify the issues and explain to us the essential facts. It is also the primary presentation for the argument concerning each allegation of error. A good appellant's brief is absolutely essential to success on appeal. The reply brief is necessary only if the appellee brings in new material which would require a reply. We do not appreciate having a reply brief merely rehash what was originally brought out in the other brief.

A good brief is very helpful in preparing the opinion. Although we sometimes need to do additional research and will need to verify the brief writer's idea concerning

the holdings in precedential cases, we nevertheless rely on the information in the briefs and use them throughout the decision-making process. I might add, however, that the best brief ever written cannot overcome certain precedents and certainly not those which would be binding on an intermediate appellate court.

How important to the decision-making process is an oral argument in the Court of Appeals?

The brief is clearly the most important item in the decision-making process, but an oral argument is important in close questions and in cases where the issue needs some additional clarification and discussion. As a matter of fact, if we have done our homework properly, we will have an opinion as to how the case should be decided by the time we hear most oral arguments. Unless through the argument and in answers to our various questions the attorneys can cause us to change our thinking, there will be no change in the outcome of what we have already decided from reading the briefs and checking the record. There are definitely some cases, however, where we have no strong opinion as to how we will rule until after we have had the opportunity to hear the arguments and have attorneys answer certain questions. I believe overall that we could decide most cases, including criminal appeals, without taking the time for oral arguments.

Do you feel the appellate process is ever expedited at the cost of quality advocacy and decision making?

I cannot honestly give you an unequivocal "no" for an answer, but I do feel that our appellate process is working very well. In my

own experience, I would say that it was a very rare situation when I felt that we were too rushed. Sometimes I do feel it would be nice, however, to be able to ponder particular questions a little longer. Sometimes the more difficult cases do get into the hands of the Supreme Court where there is greater luxury of time than we have. Most of our cases are adequately treated, even if expedited.

What tips do you have for someone doing criminal appellate work in this state?

I suppose I could make a few suggestions, although I think the public advocates do a good job in practicing their cases. Four or five items which should be kept in mind might be these. (1) Know the appellate rules and study the sequence of events whereby a case is presented to the appellate court. (2) Respect the deadlines imposed by the rules. Requests for extensions should be the exception rather than the rule. (3) Know your case. Know what happened and try to understand why. Be aware of the choices confronting trial counsel and try to understand the strategy he or she employed. Sometimes it seems that the appellate counsel has had no contact with the trial counsel. (4) Respect the other participants in the process. This includes the police, prosecutors and judges. All are striving to make the system work. Disparaging remarks in briefs or at oral argument only undermine the position of the writer or speaker. Finally, I would add that one should carefully evaluate the issues to be presented on appeal. Do not bury the truly worthy issues in other issues where there is no chance for success. On some rare occasions, we have found that the cumulative effect of many small errors could warrant a new trial. Most of the time, however,

one good issue will be the thing that will bring about a reversal or a new trial, and the inclusion of several other inconsequential arguments only helps to lose the real significance of the good issue.

How does the Court assess the performance of public defender attorneys who practice before it?

Personally, I feel that the public advocates are the real professionals in criminal cases. They specialize and become expert in their field. I have noticed also that the new members of the Department of Public Advocacy are accompanied by some of the older, more experienced personnel when they come for oral arguments. It also seems clear that the older advocates oversee the work of the new ones in brief writing. Although I don't always agree with the position taken by the public advocates, I assess their performance as excellent.

Are there any changes in the rules of criminal procedure or the appellate rules that you think would advance the criminal justice system?

Generally no, but we are attempting to work out a system whereby ap-

peals involving RCr 11.42 can be handled in the special appeal process which we now use exclusively in civil practice. If we can work this out satisfactorily, I believe it will be a big help to the Court and to the litigants. It would certainly expedite the appeals and the appellate process, and it would hold down costs to the litigants and the system.

Video appeals have been extremely burdensome to the appellate attorneys because of the enormously greater amount of time they consume in their reviewing, preparation and presentation to the appellate courts. How has the Court of Appeals' experience been with video appeals?

Records on video tape are here to stay. We have some additional problems because of the time it takes in finding the evidence that has been identified for us to review. One thing that would help us would be to have a device that would move the tape in fast-forward at the same speed we can obtain in reverse. It is helpful to us if the advocates for both parties can either agree as to the nature of the testimony or if they will have a partial transcript made of the portion of the video that is in ques-

tion. Except for questions about tone of voice and facial expression we have no real need to actually watch the transcript of a trial on the video. The preparation of appeals from the video can be simplified with more cooperation between the trial and appellate counsel to help identify the time and place an alleged error occurred.

The real benefit from video concerns time and cost. The reporter system can be enormously time-consuming and expensive, especially in lengthy cases. One recent criminal appeal which went directly to the Supreme Court involved a three-week trial which had not been taken by video. A request was made for the entire transcript of the evidence, and even at a reduced, bargain rate, the cost to the Commonwealth for this pauper's appeal was \$18,000. It also took a substantial amount of time to have the transcript typed.

I believe that we will find more courts equipped with permanent video taping devices, and we will also find some portable units which will be taken to certain courtrooms when it is anticipated that there will be a lengthy trial with an appeal and a very expensive transcript.

**JUDGE--CERTIFICATION OF
ADDITIONAL JUDICIAL MANPOWER--
FLORIDA DISTRICT COURTS OF APPEAL**

IN RE: CERTIFICATION OF ADDITIONAL JUDICIAL MANPOWER--DISTRICT COURTS OF APPEAL. Supreme Court of Florida. Case No. 70,423. April 28, 1987. Original Proceeding-- Certificate of Judicial Manpower. (MCDONALD, C.J.)

Prompted by an escalating increase in new case filings that exceeded their projections, some of the



district courts of appeal have requested that this Court certify a need for additional judicial manpower. This Court originally intended to defer any such certification until 1988, but we are satisfied that should we wait the quality of work of the district courts of appeal would likely suffer, resulting in jeopardizing the appropriate appellate review of litigants' claims.

For the vast majority of cases, the decisions of the district court of

appeal are final. Thus, careful analysis and consideration need to be given by the judges to the merits of each case. Moreover, this Court considers for review only written opinions of the district courts of appeal; hence, in cases of statewide importance, statutory construction, and those dealing in issues which conflict with the views of another district court of appeal a well-reasoned and clearly written opinion is important. To assure that quality work can be produced, appropriate manpower and tools must be afforded the district courts. The legislature has recently permitted the purchase and use of word processors, computer-aided research, and case management. It has added to the judicial research staff. These help and assist the judiciary in handling more cases per judge than before. But even with those aids, Florida's growth and the resultant increase in case filings at all levels clearly demonstrate that the time has arrived for additional judicial manpower to be added to the district courts. Adequate reflective and deliberative time must be afforded the individual judges.

Eight years ago the Supreme Court Appellate Review Commission found an appropriate case load for an appellate judge to be 250 case filings per judge. Experience has taught us that a district court of appeal judge can exceed, and consistently has exceeded, this number. In 1986 the district courts had an average rate of 317 cases per judge. The first district had an average of 276 per judge while both the third and fifth districts had average dispositions of 371 per judge. Despite this productivity, case filings in 1986 exceeded dispositions, and 1987 projected filings demonstrate an expected increase deficit of filings over dispositions. The projected filings

are conservative, the 1986 projections were understated, and it is our belief that the filings in the district courts will at least meet, and probably exceed, by a small margin, the 1987 projection.

In our judgment a statewide standard of 325 case filings per judge is a substantial and heavy load. This is probably excessive in some districts such as the first whose specialized appellate jurisdiction seemingly precludes as high a disposition rate as the other districts. Nevertheless, utilizing this figure (325) as a criteria there should currently be, based on 1986 actual filings, an additional judge in the fourth, fifth, and third districts. Based on 1987 projected filings, an additional judge is currently needed for both the second and fourth districts.

The First District Court of Appeal has also suggested to us the need for an additional judge. This may well be, but we cannot document it on a filings per judge basis which, as a matter of expediency, we adopt for the purpose of our conclusion in this case. With the gathering of additional data in all likelihood a certification for 1988 will be made for the first district.

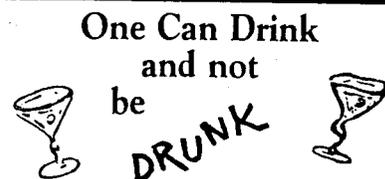
Accordingly, this Court certifies to the legislature an immediate need for one additional district court of appeal judge each for the Fourth, Fifth and Third District Courts of Appeal to begin July 1, 1987. We certify a need for a second additional judge for the Fourth District Court of Appeal and an additional judge for the Second District Court of Appeal to begin January 1, 1988. We respectfully request the legislature to approve and fund these judges with the attendant necessary staff. (OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur.)



When faced with trial, youthful features help

An adult who has a baby face stands a better chance of being acquitted of crimes like robbery and murder than those with more mature features, according to Leslie Zebrowitz McArthur, a psychologist at Southern Methodist University.

Moreover, the advantages of having a youthful face may hold true in diverse cultures, according to a report by McArthur and colleagues in the *Journal of Cross-Cultural Psychology*. In a study, people in the United States and in Korea who looked at pictures of Caucasians agreed on which had baby faces and their personality traits.



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Reader's Survey

At the end of last year we tabulated returns from our reader survey distributed in The Advocate's August, 1986 issue. Fifty-nine of our 1451 readers returned the survey. This was just over a 4% return rate, which is not bad for this kind of survey. Our 1451 readers include all Kentucky public defenders and judges and many criminal defense lawyers and friends of our work.

Of the 59, 6 were circuit and district judges, 22 were full or part-time public defenders. Other responses came from law school professors, a psychiatrist, a psychologist, a consultant to the National Juvenile Law Center and an inmate legal aid.

To our delight, over 50% read 100% of The Advocate with over 80% of those responding reading 50% or more of The Advocate.

When it comes to The Advocate's regular columns, your favorites are: Trial Tips, West's Review, Plain View, Sixth Circuit Review and Cases of Note...in Brief.

The second most popular set of columns are: No Comment, The Death Penalty, Post-Conviction and The Advocate Features.

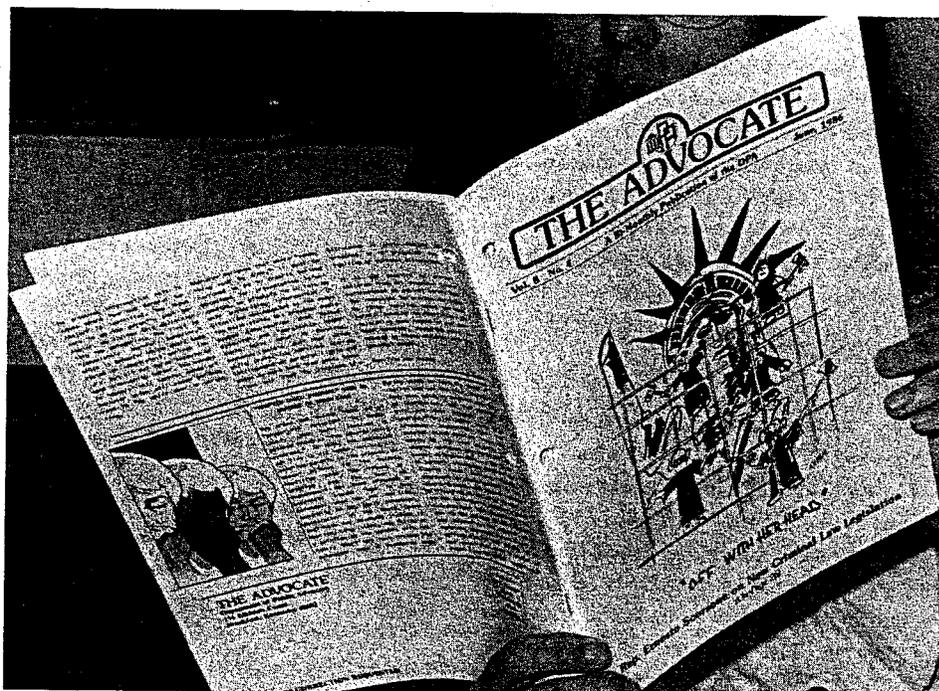
The third most popular cluster of our regular columns are: Juvenile Law, Supreme Court Rule Changes, Legislative Update, Ethics, Book Reviews, Protection & Advocacy, and Administrative News.

Overwhelmingly, you have indicated that you want all these features to continue to be published regularly.

When we asked you what you liked best about The Advocate, you clearly like articles that relate to practical trial information, especially when one area of criminal law is analyzed and reviewed in a comprehensive way. You want us to

do more of this. Some of the specific comments on what's most liked: "It's to the point"; "Practical orientation"; "All of it!"

You are not hesitant to tell us what you find to be the worst aspects of The Advocate. Your primary complaint is that the cases and topics aren't indexed enough.




THE ADVOCATE

You find cumulative indexing essential. You enjoy our humor and cartoons and want more. You also have complained that it's not published often enough, and that each issue should contain more pages. In fact, 40% of those responding felt it should be published monthly. While you think our form has improved greatly, you also want us to continue to upgrade our layout, graphics and readability.

Your comments do reveal some significant differences of opinion about the tone and philosophy of the publication. On the one hand, some of you believe we're over zealous: "Crusading attitude and intellectual bias bordering on contempt to all who do not share your ideology"; "Too liberal"; and "Sometimes give PD's the impression it is helpful to be cute or technical or over zealous." However, more of you applaud our clear advocacy for our clients: "Your dedication to your purpose"; "I like it just like it is"; "It sheds light on 'justice'"; "It is defense oriented"; "It's a linking of PD's across the state"; "Makes me feel good about criminal defense work."

Most of you are thankful that we publish the newsletter: "The Advocate is the best criminal law

periodical a Kentucky attorney can receive"; "Best publication on Kentucky criminal law"; "It is a first class publication."

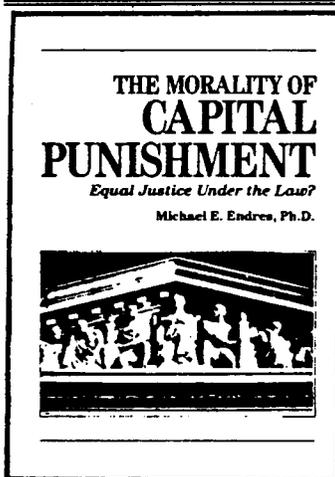
Based on your comments, we've tried to upgrade the newsletter. In "The Advocate Features" we're trying to share the person's substantive views in addition to who the person is. We have increased our reviews or in-depth look at a particular, practical area. For instance, the law of warrants was reviewed; we looked at family dynamics and its influence on behavior. We have provided a variety of viewpoints on the new trend using videotaping as the trial record. Also, we have tried to bring you the thoughts of

important people in the criminal justice system. A new column on sentencing has emerged.

It is obvious that The Advocate is meeting your needs. We're able to do that because the authors of the articles are willing to research and write for you in addition to their regular duties and caseloads. We all owe them much thanks.

Your views have helped us continue to improve The Advocate. We'll do whatever we can with our limited resources to make it better in the future. Continue to share your thoughts with us.

Ed Monahan



Paper, 184 pages, \$5.95.

The Morality of Capital Punishment: *Equal Justice Under the Law?*

Michael E. Endres, Ph.D.

The Morality of Capital Punishment lucidly develops the moral-legal argument against the death penalty. The author demonstrates that capital punishment is immoral because it fails to serve valid purposes of punishment, and that it is no more effective than less severe measures. The author also shows that the death penalty has not been, and cannot be, fairly applied.

Critiquing landmark decisions of the U.S. Supreme Court concerning the death penalty, Dr. Michael Endres, professor of criminal justice at Xavier University of Cincinnati, analyzes the opinions of the Justices. He also offers alternative interpretations of the U.S. Constitution and recommends morally superior, yet equally effective, alternatives to the death penalty.

Dr. Endres reviews the relationship between the death penalty and its stated purpose of incapacitation, deterrence, rehabilitation and the restoration of order, justice and the community's solidarity.

O.J. Keller, retired member of the U.S. Parole Commission's National Appeals Board, commenting on Dr. Endres' approach to the emotionally charged issue of capital punishment as exceptional because it does so "not by quoting statistics or Biblical passages but rather by discussing whether the death penalty can be defended on moral grounds, that is, is it a punishment fitting for man when circumstances require it?" He affirms Professor Endres' view that "Capital Punishment is not a penalty that can be imposed with either dignity or justice."



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West's Review

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



Linda K. West

KENTUCKY COURT OF APPEALS

DUI - BLOOD TEST

Eubanks v. Commonwealth

34 K.L.S. 4 at 14 (March 27, 1987)

In this case, the Court held that the results of Eubank's blood alcohol test was properly admitted into evidence. The Court rejected argument that Eubank's blood sample was taken improperly because the medical technician who took it was not licensed. KRS 189.520(b) provides that "[o]nly a physician, registered nurse or qualified medical technician, duly licensed in Kentucky, ...can withdraw any blood of any person submitting to a test under this section..." The Court concluded that the license requirement in the statute applies "only to physicians and nurses, and not to medical technicians who are qualified by training and experience to draw blood samples." The Court also held that chain of custody of the blood sample was adequately proved. A state chemist's testimony that the blood sample container delivered to him was not sealed properly by the police did not compromise the integrity of the sample where there was no evidence of tampering.

OTHER CRIMES

Bush v. Commonwealth

34 K.L.S. 4 at 14 (March 27, 1987)

Following his robbery of a convenience store, Bush barricaded himself in a house where he offered

armed resistance to arrest for two-and-one-half hours. At his trial on the robbery the circumstances of Bush's arrest were introduced into evidence. Bush contended that this was improper introduction of evidence of other crimes. The Court of Appeals disagreed that this evidence was of "other crimes," choosing instead to characterize it as evidence of flight. As such, the evidence was admissible to show a guilty conscience.

THEFT OVER \$100 - PROOF OF VALUE

Wolfenbarger v. Commonwealth

34 K.L.S. 6 at ___ (April 3, 1987)

Wolfenbarger contended on appeal that the Commonwealth relied solely on hearsay as to the value of stolen property. The Commonwealth relied on price tags attached to the goods as proof of value. The Court rejected Wolfenbarger's position: "The majority rule that price tags are competent evidence of the value of stolen goods is the better rule and the proper one for Kentucky."

APPEAL BY COMMONWEALTH -

LATE NOTICE OF APPEAL

Commonwealth v. Cobb

34 K.L.S. 5 at 10 (April 24, 1987)

The Court dismissed this interlocutory appeal by the Commonwealth for failure to file a timely notice of appeal. On October 14, the trial court entered an order suppressing certain prosecution evidence. The Commonwealth filed a motion to reconsider, which was

denied by an order on October 30. The Commonwealth filed a notice of appeal from the October 30 order.

The Court of Appeals held that the 10 day period for filing a notice of appeal was to be calculated from the date of service of notice of entry of the October 14 order, since this was the order which affected the Commonwealth's interests. The Commonwealth could not stay the time for filing a notice of appeal by filing a motion for reconsideration.

KENTUCKY SUPREME COURT

CREDIBILITY OF CONFESSION

Crane v. Commonwealth

34 K.L.S. 3 at 25,

726 S.W.2d 302

(March 12, 1987)

The trial court excluded defense evidence concerning the circumstances under which Crane's confession was obtained. The evidence was proffered as being relevant to the credibility of the confession. On appeal, the Kentucky Supreme Court affirmed. However, the U.S. Supreme Court granted certiorari and in Crane v. Kentucky, 106 S.Ct. 2142 (1986) held that the excluded evidence was admissible.

On remand to the Kentucky Supreme Court, the Court held that, weighing all the evidence in the case, the error in excluding the evidence was harmless beyond a reasonable doubt.

PRE-SENTENCE INVESTIGATION

Edmonson v. Commonwealth

34 K.L.S. 3 at 28,
725 S.W.2d 595 (March 12, 1987)

In this case the Court vacated Edmonson's sentence based on the failure of the trial court to comply with KRS 532.050 by giving "due consideration to the pre-sentence investigation report" and giving the defendant "a fair opportunity and a reasonable period of time to controvert the contents thereof." At Edmonson's sentencing hearing, the trial judge had ready a completed final judgment which was given to Edmonson immediately at the close of the hearing. The final judgment was clearly prepared prior to the hearing. The Court held that this procedure did not comply with the statute.

VIDEOTAPE OF CHILD WITNESS

Gaines v. Commonwealth

34 K.L.S. 3 at 28
(March 12, 1987)

In this case, the Court reversed Gaines' convictions of sodomy and sexual abuse based on the admission into evidence of a videotape of an unsworn oral statement made by the child victim to social workers. The videotape was introduced pursuant to KRS 421.350(2). The Kentucky Supreme Court held this application of the statute unconstitutional: "we are of the opinion the statute which permits testimony from a child who has not been declared by the trial court competent to testify as a witness is an unconstitutional infringement on the inherent powers of the judiciary..." Justices Vance and Winter-sheimer dissented.

BOYKIN

Jewell v. Commonwealth

34 K.L.S. 3 at 30,
725 S.W.2d 593
(March 12, 1987)

Jewell sought to withdraw his otherwise voluntary guilty plea after a maximum sentence was imposed. Jewell contended that he was not informed of the range of possible sentences. The Kentucky Supreme Court held that the trial court correctly denied the request." Boykin does not require that a defendant be informed of the range of sentences which may be imposed."

ROBBERY - "PHYSICAL FORCE"

Morgan v. Commonwealth

Cochrum v. Commonwealth

34 K.L.S. 5 at 19 (April 30, 1987)

The issue in this case was whether robbery is committed when physical force is used against one person in order to accomplish a theft from another person. During the course of removing property from a burglarized home, appellants pointed a gun at the non-owner occupants and told them to "be quiet." In Ross v. Commonwealth, Ky., 710 S.W.2d 229 (1986) the Court held that where the defendant threatened an

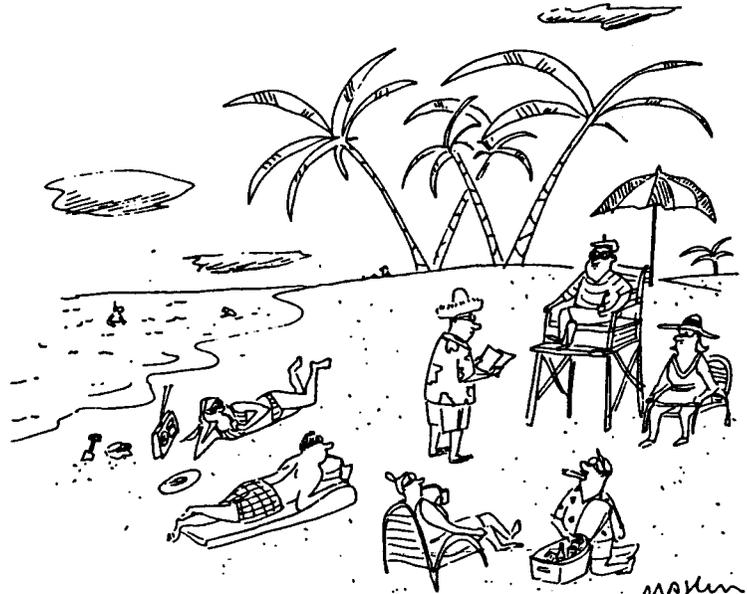
adult victim's infant son in order to accomplish a theft of property from the adult, the defendant was guilty of robbing only the adult, and not the infant son. However, in Morgan and Cochrum, the Court held that robbery is committed "where physical force is used or threatened against any person with intent to accomplish theft, whether or not the intended theft was of the property of the person against whom the threat was directed." The Court overruled Ross to the extent it held to the contrary.

PFO - "FELONY"

Commonwealth v. Davis

34 K.L.S. 5 at 16 (April 30, 1987)

The Court of Appeals reversed Davis' PFO conviction after holding that an Ohio conviction, for which a probated indeterminate sentence of six months to five years was imposed, was not a felony conviction for PFO purposes. The Kentucky Supreme Court reversed the Court of Appeals. The Court stated that "[t]he fact that the Ohio fel-



RESORT COURT

Drawing by Michael Maslin - Reprinted with Permission

any provisions permit punishment for less than one year is not as significant as the fact that the statute authorizes punishment for more than one year. The key is that the maximum sentence imposed which can be served in a foreign jurisdiction controls and permits the crime to be considered as a felony for PFO purposes in Kentucky." Chief Justice Stephens dissented.

HEARSAY

Hughes v. Commonwealth

34 K.L.S. 5 at 17 (April 30, 1987)

In this case the Court reversed Hughes' robbery conviction due to the admission of hearsay evidence. A police officer was allowed to testify that an unknown person called him and said that she had overheard Hughes admit mugging a man. "This is precisely the situation which the confrontation clauses of the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution were designed to prevent."

UNITED STATES SUPREME COURT

HABEAS CORPUS - EXHAUSTION

Granberry v. Greer

41 CrL 3021 (April 21, 1987)

The state failed to assert an available non-exhaustion defense to the petitioner's habeas action. The petition was dismissed on the merits. On appeal to the Seventh Circuit the state belatedly asserted the non-exhaustion defense.

The Supreme Court held that in this situation the exhaustion defense had not been waived by the state's procedural default, but neither was it a complete bar to the state prisoner's habeas action. Rather,

"[t]he court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim."

BRUTON - INTERLOCKING CONFESSIONS

Cruz v. New York

41 CrL 3036 (April 21, 1987)

In this case the Court reexamined the holding of Parker v. Randolph, 442 U.S. 62 (1979), that Bruton does not apply where the defendant's own confession is introduced and "interlocks" with the confession of a non-testifying codefendant. The Court rejected the blanket rule of Parker for a case by case determination of whether the introduction of a defendant's own confession renders a Bruton violation harmless. The Court noted that a codefendant's confession which "interlocks" with a defendant's confession may be enormously damaging if it confirms a confession whose credibility is in question. The Court also reaffirmed its holding in Bruton that an admonition to the jury will not cure a Bruton violation. White, Rehnquist, Powell, and O'Connor dissented.

BRUTON - REDACTED CONFESSION

Richardson v. Marsh

41 CrL 3039 (April 21, 1987)

The confession of a non-testifying codefendant in this case was carefully redacted to eliminate any references to the defendant. However, the confession, which concerned the planning of the offense, nevertheless implicated the defendant since other evidence introduced at trial showed the defendant was present when the planning took place. The Sixth Circuit held that under these facts Bruton applied

and the redaction, plus an admonition to the jury, did not cure the error. The U.S. Supreme Court reversed. The Court reasoned that, where the codefendant's confession does not facially implicate the defendant, a jury may be expected to follow a curative admonition. "[T]here does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton's exception to the general rule." Stevens, Brennan, and Marshall dissented.

Linda West

Assistant Public Advocate
Appellate Branch

Otis is alive and well at the Fayette County Detention Center. Otis, of course, was the harmless drunk on "Mayberry RFD" who insisted upon being arrested so he could spend the night in Andy Griffith's jail.

When the weather turns bad here, any one of 300 Otises may show up at the back door to the downtown detention center and ask to be arrested, say assistant director Ray Sabbatine Jr.

Which they are.

"It's just like 'Mayberry,'" Sabbatine says.

But what about chronic jail overcrowding?

"If we've already got 50 people sleeping on the floor, and it might be a matter of a person freezing to death out on the street, what's the difference if we've got 51?" Sabbatine says.

Lexington Herald Leader
January 29, 1982

Post-Conviction

Law and Comment



Hank Eddy

DEFENDING AGAINST PFO

This article will discuss some tactics used to defend against a persistent felony offender (PFO) charge. KRS 532.080. Some of the following strategies are successful in attacking a PFO conviction in a post conviction action. However, if they are used at trial or during pretrial they have a much better chance of being successful.

Probably the best place to start is with the indictment itself. Anywhere from one to multiple prior felonies may be listed as a basis for the charge. Sometimes prosecutors obtain a PFO indictment just because your client has a prior felony history without insuring he or she is PFO qualified. Thus, it is necessary to make sure every element of the statute can be proven. For example, the Commonwealth may not be able to prove your client was eighteen years of age at the time the prior offense was committed. KRS 532.080(2)(b). Sometimes a prosecutor can not prove a defendant was discharged from probation or parole within five years of the principle offense or other similar elements as required by KRS 532.080(3)(c) 1, 2, 3, 4 and 5.

The next possible area of attack is to challenge the validity of the prior convictions. This method is similar to post conviction law. It requires a pretrial motion. Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984). According to Dunn v. Commonwealth, Ky., 703 S.W.2d 874

(1985) when a defendant files a motion to suppress a prior conviction the burden shifts to the Commonwealth to prove the judgment valid. This burden can be met by introducing the judgments which are presumed to be regular. The burden then shifts back to the defendant to show any infringement of his or her rights or irregularity of procedure. If the defendant can refute the presumption of regularity the burden finally shifts to the Commonwealth to prove the underlying judgment was entered in a manner which did protect the rights of the defendant. Silent records are not sufficient.

Corbett v. Commonwealth, Ky., 717 S.W.2d 831 (1986) has confused when and where prior convictions must be challenged. It may now be necessary to file challenges to priors both in the original court of conviction and the court where the principal offense is being tried in order to avoid an appellate court determination that the challenge was improperly lodged.

Sometimes prior judgments obtained by guilty pleas can be attacked in the above manner, particularly if they are old. Occasionally the records of a prior guilty plea will be silent as to whether the defendant was advised of or waived his rights regarding self incrimination, trial by jury and right of confrontation as required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). If the record is silent the Commonwealth will have to prove the

validity of the conviction by introducing evidence outside the record. Kotas v. Commonwealth, Ky., 565 S.W.2d 445 (1978).

If the PFO charge can not be dismissed before trial then make sure the prosecutor proves his case by competent and relevant evidence. Sometimes a prosecutor will attempt to prove a prior conviction through the testimony of a parole officer or correctional official. Such evidence is not competent. In Johnson v. Commonwealth, Ky., 516 S.W.2d 648 (1974) the Court stated that prior felony convictions are proven by "...reading into evidence the judgments of prior convictions contained in the order book of the trial court." Id. at 649. Prior convictions can also be proven by introducing certified copies of the judgment. Willis v. Commonwealth, Ky., 719 S.W.2d 440 (1986). Records from the Bureau of Corrections can only be used to prove the defendant's age and parole status. Garner v. Commonwealth, Ky., 645 S.W.2d 705 (1983).

Another mistake prosecutors sometimes make is to over prove their case by introducing irrelevant evidence. For instance the prosecutor might try to delve into the facts of the prior felonies which is generally not allowed. In Berning v. Commonwealth, Ky., 550 S.W.2d 561 (1977) the Court held it was prejudicial error to allow the clerk to testify regarding the nature of the prior felonies. It was also improper to allow the sheriff to describe his investiga-

tion and findings surrounding the prior felony. The Court in Berning v. Commonwealth, Ky., 565 S.W.2d 443, 444 (1978) clarified Berning I by stating that alluding to the nature of the prior felony is not prohibited, but is condemned when the cumulative effect "...is calculated to, or likely to prejudice the jury," Another example of irrelevant evidence is Burton v. Commonwealth, Ky., 715 S.W.2d 897 (1986) where a PFO conviction was reversed and remanded because the prosecution introduced evidence regarding the beginning date of defendant's parole. Make sure the prosecutor does not prove too much.

Also, many prosecutors over prove their case by introducing proof of more convictions than required. In Callison v. Commonwealth, Ky. App., 706 S.W.2d 434 (1986) the Court stated that proof of a second felony conviction in a second degree PFO proceeding was irrelevant, but was admissible at the

discretion of the trial judge. However, in an unpublished decision the Court in Smiddy v. Commonwealth (rendered December 13, 1985) the Court of Appeals stated that it might violate the unanimous verdict rule RCr 9.82(1) to allow proof of more than two felony convictions in a first degree PFO proceeding.

As you keep the Commonwealth from proving too much make sure it does not prove too little. Check to see that evidence is offered on every element of the statute. For example, insure proof is offered that your client was eighteen at the time the prior offense was committed. It is not sufficient to prove age at the date of conviction. Hon v. Commonwealth, Ky., 670 S.W.2d 851 (1984). Be prepared to move for a directed verdict if the proof is insufficient.

If prior to trial you appear to be in a no win situation you might try to obtain a plea agreement for a

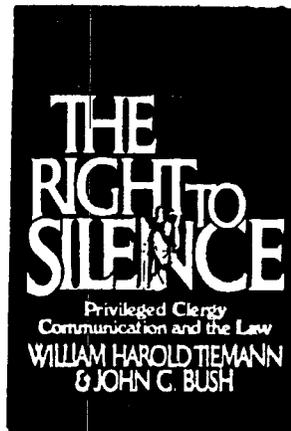
ten year sentence on a first degree charge. This will allow your client to get out of prison in seven and one-half years if he does not lose any KRS 197.045 statutory good time.

These methods are some of the ways to defend your PFO case. There are other imaginative and innovative ways yet undiscovered or tested. Finally, of particular interest to your client and post conviction attorneys is that generally the validity of prior convictions can not be contested unless challenged at the PFO proceeding. Alvey v. Commonwealth, Ky., 648 S.W.2d 858 (1983); but see Corbett, supra. Failure to properly investigate your case will probably preclude your client from later attacking prior felonies.

Hank Eddy
Assistant Public Advocate
Kentucky State Penitentiary



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The Death Penalty



Kevin McNally

KENTUCKY'S DEATH ROW POPULATION - 30
PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 77

THE YEAR IN REVIEW: PART I

I. OKIE BEVINS' DEATH SENTENCE AFFIRMED

The sentence of the oldest (presently 74) death row inmate in the United States has been affirmed, Justice Leibson writing. William O. Bevins, shot eight men in an auto-parts store in Allen, Kentucky. Five died. Venue was changed from Floyd to Greenup County. At trial, after the jury was selected, sworn and the first witness testified, Bevins' lawyer decided to plead his client guilty and ask for judge sentencing. The lawyer, Lester H. Burns, was then running for governor in the Republican primary. He has since resigned from the bar and been convicted and sentenced to eight years on various federal charges.

Burns explained that he advised his client to throw himself on the mercy of the judge (who himself was in an unsuccessful fight for re-election) because the insanity defense he began the trial with "was no longer a viable issue... 'Your Honor, we have learned in the interim that our medical evidence is contrary to our position...'" Bevins v. Commonwealth, Ky., 712 S.W.2d 932, 933 (1986). So much for pretrial preparation.

a) Judge Sentencing

Rejecting a per se challenge to this waiver, the Court speculated that "the testimony of the first witness" was of "such a devastating

nature as to make it likely that the jury would have recommended death..." Although no member of the Court has defended a capital case under our bifurcated procedure, all agreed that Burns' "tactic" (i.e., to get rid of the jury) was in his client's best interest. "[T]he sordid circumstances of the... sexual relationship with [a young woman]..." which was to be in issue "during the penalty phase in an attempt to prove that he was emotionally disturbed" was "probably...a poor" approach for a jury. (Bevins was sexually involved with, and allegedly manipulated for money by, a young woman who was married to one of the deceased.)

While the Court may be right that there can not be a per se bar against waiving a jury in a capital case, it is difficult in general and impossible in particular to see how this waiver makes any sense at all. This writer happened to be a spectator sitting next to an actual juror in the audience during Bevins' penalty phase -- after the jury had been dismissed. The juror volunteered that the young woman in question "should be on trial not that old man."

Personal experiences aside, what evidence suggests that judges (especially in an election year) are, tactically speaking, more merciful or compassionate audiences than ordinary folk to present mitigation before? There is none. The deadly track record of Florida's elected trial judges speaks volumes. By the time of Spaziano v.

Florida, 104 S.Ct. 3154, 3167 (1984) (Stevens, J. dissenting), they had rejected 83 merciful jury verdicts in order to impose death on a single vote - their own. Juries are simply much more likely to show mercy than judges. See H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment 37-50 (1966). Let's be honest about it, "the fact that more persons identify with victims of crime than with capital defendants inevitably encourages judges who must face election to reject a recommendation of leniency." Spaziano, 104 S.Ct. at 3171 n.14 (dissent). With all due respect, Bevins is bad advice for trial lawyers and capital defendants alike. "I cannot so easily change my appraisal of human nature. Judges in Alabama, as in many states, are elected... They are not insulated from community pressure..." Baldwin v. Alabama, 105 S.Ct. 2727, 2741 (1985) (Stevens, J. dissenting). In Kentucky, defense lawyers have requested judge sentencing as a "tactic" in three death penalty cases: Alexander Bowling, Okie Bevins and Robert Askew. All three were quickly dispatched to death row...where Bowling eventually killed himself.

b) Parole Eligibility

The trial judge called the parole board before final sentencing and then announced he was imposing five death sentences because Bevins would be eligible for parole in only 8 years. Of course, the bogus issue of parole for a 70 year old

man sentenced to life imprisonment (with a prior murder) appears absurd except in the context of an election contest. On appeal this ex parte communication is held proper because the trial judge claimed "he had already determined that the death penalty was appropriate" before he called. 712 S.W.2d at 935. The Court accepts this claim at face value and then, based on an analogy to non-capital jury sentencing, constructs an entirely original statutory interpretation of Kentucky capital sentencing within which this scenario fits:

Sentencing in Kentucky contemplates a two-stage procedure in which first a sentence is selected which is appropriate for the crime, and then information is utilized to decide whether that sentence should be mitigated. Id.

Of course, the death penalty statute makes no mention of such mental gymnastics. More disturbing, however, new non-statutory aggravating factors are grafted onto Kentucky law...while at the same time confusingly described as part of the consideration of mitigation.

The sentencing procedure utilized by the judge contemplates considerations of future dangerousness and possibility of parole in deciding whether to mitigate the sentence previously arrived at. Id.

Constitutionally speaking, it seems highly suspect to create a new category of aggravation - future dangerousness - when the Kentucky legislature declined to do so. Second, it seems that the initial focus is solely on the crime (was it bad enough to call for a death sentence?) before any attention is paid to the other, equally important, prong of capital sentencing:

"the history, character and condition of the defendant..." This approach isn't constitutional because it reduces mitigation evidence to an after-thought.

In those cases where the jury is waived, the judge wears two hats. He both sets the sentence appropriate for the crime and then decides whether the history, character and condition of the defendant would make it appropriate to mitigate that sentence. It is appropriate that he obtain information regarding potential parole eligibility in order to perform the second function. Id.

The approach of the Bevins Court is not atypical. Indeed, it is exactly how, absent appropriate guidance, lay people/jurors view capital cases. The primary, sometimes exclusive, focus is on the crime and the life-history of the defendant is only marginally relevant...if at all. Yet this was not the self-described vision of the United States Supreme Court in resurrecting the death penalty in Gregg v. Georgia, 428 U.S. 153 (1976) and shaping it in Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 106 S.Ct. 1669 (1986) and, most recently, Hitchcock v. Wainwright, ___ S.Ct. ___ (1987).

Bevins also seems to shift the burden of proof to the capital defendant on the ultimate issue by making the crime the sole criterion of the initial determination of appropriateness. This methodology is exactly the stunted approach the Court takes toward proportionality review. It is simply too easy to define "appropriate" as the presence of an aggravating factor - obviously a fait accompli in any real penalty phase. See The Advocate

(Vol. 8, No. 2) at 20 (Feb. 1986). The United States Supreme Court has yet to decide whether, as argued by Justices Stevens, Brennan and Marshall, the State must prove "beyond a reasonable doubt[,] that...death is appropriate..." Smith v. North Carolina, 103 S.Ct. 474 (1982). But whatever standard of proof is required, surely the government must bear the burden and not, as Bevins suggests, the other way around. It is people we sentenced to death and the primary, or at least equal, focus should be on who the person is and whether he should be among the handful we kill.

c) Prior Capital Offense

Bevins was convicted of murder in 1930. There is considerable doubt about what exactly constitutes a "prior record of conviction for a capital offense..." KRS 532.025(2) (a). There is even more doubt about whether this aggravating circumstance could, by itself, support a death sentence. The death penalty was an option for murder in Kentucky in 1930, therefore, KRS 532.025(2)(a) is said to apply. Since Bevins was already "death eligible", having killed five, "we need not decide what we would do if this were the only circumstance..." The remoteness of the prior murder doesn't mean it "counts for nothing". 712 S.W.2d at 936. Clearly, the Court is hedging its bets on this one, as evidenced by its alternative holding that any error was "harmless" under Barclay v. Florida, 463 U.S. 939 (1983) and Zant v. Stephens, 456 U.S. 410 (1982).

d) Findings

Although it is not clear what is meant, the Court refuses to insist that the trial judge "specify in advance what aggravating and mitigating circumstances he would con-

sider." Id. (Emphasis added.) No findings are required by the trial judge on mitigation after he has heard the evidence. "There is no more reason to require the judge to enumerate the 'non-existence' of mitigating circumstances, than there is to require a jury to do so." 712 S.W.2d at 937. Nevertheless, the trial judge did refuse to find the existence of extreme emotional disturbance [EED] in mitigation. The Supreme Court agreed, holding EED "difficult to define... this case is not that... [Bevins] did not suddenly go berserk, triggered suddenly into irresistible, uncontrolled behavior...." 712 S.W.2d at 938.

e) Advanced Age and Poor Health as Mitigation

"At the time of trial [Bevins] was seventy years old and had some health problems. But he appeared to be neither enfeebled nor debilitated in such a way that would make the death penalty shocking or grotesque." This implies a possible 8th Amendment problem with the execution of the helpless...old, infirm, retarded...just as there is with the insane, Ford v. Wainwright, 106 S.Ct. 2595 (1986) and may well be in killing children. See Thompson v. Oklahoma, 107 S.Ct. 1284 (1987) (cert. granted). However, as with other non-statutory mitigating circumstances, the "decision whether or not these factors should be considered relevant was [the] responsibility [of the sentencer] to make." 712 S.W.2d at 936. As we shall discuss in a future column, leaving it up to the jury or judge to define mitigation for itself can be a serious constitutional problem.

11. HUGH MARLOWE APPEAL REJECTED

On the same day as the Bevins decision, March 20, 1986, another

Eastern Kentucky death sentence was affirmed. Hugh Marlowe was convicted of murder and robbery of an elderly man who was target shooting with some boys in the early morning hours along the railroad tracks in Harlan County. When Marlowe was arrested in the Fall of 1981 he first implicated one Larry Wilkerson as the triggerman, saying only that he and a juvenile friend, George Owens, were present. Marlowe, accompanied by his lawyer (who had just been elected to the district court bench but had not yet been seated), confessed to the prosecutor that Wilkerson was innocent and that his initial statement was false. Represented by a second public defender, Marlowe appeared and entered a guilty plea to the shooting but vehemently denied beating the victim and any robbery. Unfortunately, no prose-



cution lawyer was present in court to confirm or deny the assertion that a plea bargain involving a life sentence had been struck between counsel. Despite the absence of the prosecutor, the judge accepted the plea and interrogated Marlowe at length about his involvement. Marlowe explained that the deceased gave him the gun to shoot a battle but for reasons he didn't understand he turned and shot Henry Hamblin.

At the next court hearing the prosecutor disputed the existence of any "firm" plea bargain, especially without an admission to robbery, and Marlowe was permitted to withdraw his plea -- with the promise that his statements to the judge would not be used against him. At trial, the proof showed the cause of death was due to a beating with the gunshot wound an "additional significant injury." Owens, who Marlowe said must have beat the deceased and stole his ring and money (if anyone did) after Marlowe left, was called to the stand and refused to testify. The jury convicted Marlowe of murder and, after the brief penalty phase testimony of his mother, sentenced him to death.

After trial the judge ordered a psychological examination on his own motion to determine Marlowe's "personality type and potential for rehabilitation." Marlowe v. Commonwealth, Ky., 709 S.W.2d 424, 427 (1986). Marlowe had been told by the trial judge he didn't necessarily have to discuss the crime with the doctor. Yet, "[t]he psychologist testified that the appellant denied committing the crime and showed no remorse" and he was cross-examined by the prosecutor about Marlowe's admissions during the withdrawn guilty plea. The trial judge sentenced Marlowe to death. 709 S.W.2d at 427.

a) Recusal

The Court refuses to read KRS 26A.015(2)(a) and (e) to require sua sponte recusal here. "We adopt the Ninth Circuit's view as expressed in United States v. Winston, 613 F.2d 221, 223 (1980): '...[R]ecusal is appropriate only when the information is derived from an extra-judicial source...'" 709 S.W.2d at 428. However, a second due process prong of this

claim - violation of the judge's promise - was only implicitly rejected as Marlowe alleged "the judge relied on [the withdrawn plea colloquy] when sentencing him to death." 709 S.W.2d at 427.

b) Proof of Robbery

Marlowe was only 20 and had no prior record. The only aggravator was robbery and the only proof was the testimony of the widow that her husband always wore his gold watch, Masonic rings and carried his wallet containing \$100.00. None of these items were ever recovered. Marlowe's first statement blamed Wilkerson for the robbery. A witness placed George Owens with two \$50 bills - soon after the crime, requesting a car be purchased for Owens and Marlowe (despite confrontation problems). This proof is said to be enough to make this a death case. 709 S.W.2d at 428.

c) Co-Defendant's Refusal to Testify

The co-defendant's trial was scheduled separately. No deals had been made. Owens was called to the stand by the prosecutor and predictably refused to testify on advice of counsel. This was held to be an acceptable prosecution tactic because "there is no showing...that the trial court or the prosecutor knew the witness would claim the privilege..." Any way, "any error ...was harmless." 709 S.W.2d at 429.

d) Enmund

As in other Kentucky capital cases an "aider and abettor" theory was given to the jury permitting a conviction of murder and/or robbery if Marlowe "intentionally, willfully and knowingly endorses, counsels, aids, assists and encourages the performance of... [an] illegal act...of which you have received

evidence..." (i.e., murder or robbery). This instruction is "constitutionally sound" and Enmund v. Florida, 458 U.S. 782, 789 (1982) "is distinguishable." 709 S.W.2d at 430.

e) Prosecutor's Misconduct

Calling Marlowe "demonic and satanic", invoking religion, wishing the jury had more graphic evidence than the bloody pictures in front of them "such as the smell of blood and the ability to watch Mrs. Hamlin search for her husband," the prosecutor wept and implored the jury to represent "the victims of crime" just as he did. These and other "strong words" are acceptable in a Kentucky capital case if the defendant, by his crime, is guilty of "outrageous conduct." Second, "any error...is harmless" because "[w]e believe...the jury would have returned the same verdict of guilty ..." 709 S.W.2d at 431. Of course, the real prejudice was, and usually is, in sentencing but the court continues in its attitude that the death penalty is a foregone conclusion in any capital case, however marginal, like this one. In reality, only 6% of potential capital cases result in death and even two-thirds of penalty trials result in mercy - many involving far more heinous crimes than this.

The court dealt separately with the penalty phase closing argument, finding it proper to express the prosecutor's personal view, to refer to "religious matters" and to urge a death sentence as necessary to stop "decent people being pushed around too long." 709 S.W.2d at 432.

f) Post-Trial Psychological

A post-trial, court-initiated psychological exam is "undoubtedly" helpful and "within the sound dis-

cretion of the trial judge." KRS 532.050(3). No 5th or 6th Amendment claims arise because "appellant was warned that any statement he made to the psychologist could be used against him..." The court recognizes, but again ignores, Marlowe's claim he was "misled" by the trial judge that his guilty plea statements wouldn't be used against him and also "misled" when the judge told him he needn't admit his guilt to the psychologist. Marlowe had argued that his alleged lack of remorse was only a reflection of his invocation of the privilege - in fact he was remorseful. Unfortunately, the Court didn't see it that way.

g) Life Option

Marlowe insisted that he had a right to an instruction specifically informing the jury that a life sentence could be imposed even though the aggravating circumstance of robbery existed. This instruction, known as the "life-option" has found some support in the federal circuit courts of appeal. The Court believes that the present "Palmore" instructions adequately cover this option.

h) Proportionality Review

The Court finds that the murder/robbery "exceeds the standard for imposing death," whatever that is. 709 S.W.2d at 433. After 21 death penalty appeals in ten years, the court has yet to find a case that does not exceed "the standard for imposing death."

III. HAROLD MCQUEEN'S IAC CLAIM REJECTED

It appears that Harold McQueen will be the third Kentucky condemned to enter federal court. On September 25, 1986, the Court, Justice Wintersheimer writing, denied Mc-

Queen's appeal from a two day evidentiary hearing and "an extensive 27-page order overruling the [RCr 11.42] motion" McQueen v. Commonwealth, 721 S.W.2d 694 (1987). Much of the order was devoted to assailing the character and professionalism of the public advocates representing McQueen and other condemned. The order was apparently circulated to some other circuit judges in the Commonwealth. The allegation which provoked this attack was, predictably, ineffective assistance of counsel. Unlike the trial judge, the Court limited its discussion to the issues: "This case is controlled by...Strickland v. Washington, 466 U.S. 668 (1984) ...[and] Gaff v. Commonwealth, Ky., 702 S.W.2d 37 (1985)."

The twin standard for such review is the proper measure of attorney performance or simple reasonableness under prevailing professional norms and whether the alleged errors of the attorney resulted in prejudice to the accused. The defendant must demonstrate that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the trial would have been different. 721 S.W.2d at 697.

McQueen alleged that his lawyer failed to adequately advise him of his right to testify at the penalty phase, although possible testimony was discussed as to the guilt phase. Apparently because the lawyer "was never asked such a specific question" at the 11.42 hearing (presumably by present counsel for McQueen), the Court rejected the claim -- even though McQueen's testimony on the point was uncontradicted. "Under these circumstances, the failure to specifically advise McQueen of his right to testify at the penalty phase did not constitute ineffective assis-

tance of counsel." Moreover, the "proposed testimony [i.e. his "history of drug abuse... (and) host of social and psychological maladies ...as a result"] sheds no light on the facts...and the defense of intoxication was established through other witnesses". 721 S.W.2d at 698. Therefore, insufficient prejudice exists in the Court's mind. Justice Wintersheimer doesn't explain why, to be crucial, penalty phase testimony must shed light "on the facts" of the crime or on "defenses". Again the Court views mitigation as only marginally relevant to capital sentencing.



McQueen finds it entirely proper for one attorney to rely on the pretrial motion practice of the co-defendant's lawyer, despite some conflict in positions, absent undue deference to the other's judgment. However, the Court doesn't comment on McQueen's similar allegation that his lawyer relied on the co-defendant's lawyer for witness interviews as well.

McQueen's trial lawyer was not ineffective in failing to seek a severance since it is "a matter of judicial discretion" and the trial judge rejected a similar request by the less culpable co-defendant and

said at the 11.42 hearing, he would have done the same for McQueen.

Noting that McQueen "does not allege that [his lawyer] failed to produce [any] penalty phase witnesses [such as] a psychological expert and a clergyman" (both of whom testified), the Court upholds the alleged "tactic" of refusing to call as witnesses McQueen's "family, mother, aunt and stepfather..." 721 S.W.2d at 699-700.

Nor was the defense counsel ineffective in deciding not to seek a change of venue for various tactical reasons. Among them, counsel allegedly felt Judge Chenault "more competent" to hear a death case than neighboring trial judges..." Id. The Court also sloughed off the question of counsel's work, or lack of it, on a jury pool challenge - having previously criticized the evidentiary support for this motion on direct appeal. McQueen v. Commonwealth, Ky., 669 S.W.2d 519, 521 (1984). Additionally, no prejudice is seen even if women were underrepresented as half the jury turned out to be female any way. (This is constitutionally irrelevant. See Castaneda v. Partida, 430 U.S. 482, 488 n.9 (1977), where 7 of 12 jurors and the judge were Mexican-Americans, yet a discrimination claim was upheld.)

A major complaint was directed at the trial lawyer's failure to object to the receipt of extrajudicial information about a juror's mid-trial conversation revealing doubts about the death penalty. Nor did counsel seek to ascertain the degree of contamination of the other jurors when that juror was excused "based on the appearance of impropriety" and because she "permitted persons [a police officer/relative] to discuss the case with her." Id. Ironically, the Court now holds that McQueen

failed to establish prejudice white, at the same time, upholding the trial judge's "discretion" to refuse to permit juror interviews or testimony - even though the subject matter had nothing to do with deliberations.

It was proper to reject McQueen's proposed expert on defending capital cases. "There is no basis for McQueen's argument that death pen-

alty cases are so different as to represent an entirely different area of expertise." 721 S.W.2d at 701. As in *Gaff*, McQueen was denied his right to out-of-state witnesses under KRS 421.250 which is said to be "not applicable to an RCr 11.42 proceeding." In this case, McQueen sought the testimony of the psychiatrist who testified at trial, ostensibly in mitigation, but called McQueen a sociopath. 721

S.W.2d at 702.

Ruling that the trial court did not "abuse its discretion" (for the seventh time in the opinion), the Court refused McQueen expert assistance in three areas: 1) pretrial publicity, 2) jury composition, and 3) defending capital cases. *Id.* The Court also upheld various evidentiary rulings by the trial judge.

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Ministering love

Father of murdered girl offers faith to prisoners

The Associated Press

DAWSON SPRINGS — "You can't go around with hate in your heart," Paul J. Stevens believes. He has every reason to hate.

The retired Buckhorn Industries employee began a prison ministry at the Kentucky State Penitentiary at Eddyville three months ago.

Sitting at the dining room table at his small farm near Dawson Springs, Stevens reflected, "I think it's much easier to forget by working in a place like this.

"After I retired, I told Father Roof that I wanted to become more active in church ministries."

Rev. Frank Roof is pastor of St. Paul's Catholic Church in Princeton, Resurrection Catholic Church in Dawson Springs and chaplain at the prison.

"Father needed help at the prison," Stevens said. "In a way, it made sense that I should help. It's something that I seem to be suited for," he said.

Paul Stevens and his family have endured the pain of the ultimate crime first hand.

In July of 1969, when Stevens, his wife and seven children lived in Evansville, Ind., their 20-year-old daughter, Cindy, was murdered.

"Her killer was convicted of first-degree murder," he said. "However, because of a bad transcript, the conviction became second-degree murder. He was released in seven years."

Stevens and his family were angry at the situ-

ation.

"We asked for the death penalty," he said. "We really hated the person who killed our daughter, and we wanted him to die, too."

When Stevens left his job in Evansville and came to work for Buckhorn, "I still hated the man who killed my daughter," he said. "I still believed in capital punishment. There was no way I could ever forgive that man."

However, nine years later, Stevens did forgive his daughter's killer.

At the prison, Stevens and Roof talk and counsel with the inmates that "want to come in and talk to us." They also visit the cell blocks and talk to prisoners, sometimes bringing cards and envelopes.

After lunch with the prisoners, Stevens visits death row.

"I had pictured a dirty little hole in the wall with obscene mean men in rags down there," he said. "Out of 32 or 33 prisoners on death row, only one fitted that description, and he's been there 27 years."

Mass is held on death row every Thursday with eight or nine inmates attending, Stevens said.

Stevens said he's no longer a proponent of capital punishment and calls it "a waste." He also plans to stay with the ministry as long as possible.

"It can get quite emotional," he said. "Frankly, I don't know how long I can take it."

The Kentucky Post, Monday, May 11, 1987

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Plain View



Ernie Lewis

There has been a lot of activity in the Courts since we last reviewed 4th Amendment law. As has been the case over the past few years, most of the activity continues to narrow 4th Amendment protections.

On January, 14, 1987, Chief Justice Rehnquist wrote the majority opinion for the Court in an important decision touching both the automobile and containers. Colorado v. Bertine, ___ U.S. ___, 40 Cr.L. 3175. In a 7-2 decision, the Court held the search of a backpack seized from a van which had been seized after a DUI arrest was legal. Controlled substances found in the pack were admissible, according to the Court, where the search was conducted pursuant to standard procedures. Rejected was the reasoning of the Colorado Supreme Court, which had invalidated the search because the defendant could have made alternative arrangements for his van, and because the police procedures allowed for discretion to be used in deciding whether to impound or simply park and lock the van in a public place.

Justices Blackman, Powell, and O'Connor concurred, stressing that "it is permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle."

In dissent, Justices Marshall and Brennan distinguished prior inven-

tory cases, showing that too much discretion was being left in the hands of the individual officer. They raised the fear that the inventory search was becoming a "talisman' much like the automobile" in whose presence the 4th Amendment fades away and disappears.

On February 24, 1987, the Court decided Maryland v. Garrison, ___ U.S. ___, 40 Cr.L. 3288. The Court, with Justice Stevens up, examined a search of Garrison's third floor apartment pursuant to a warrant authorizing a search of the person and third floor apartment of Mr. McWebb. The Court, in a 6-3 decision, held that the warrant was valid at its inception as sufficiently particular in its description and valid in execution because "the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable." The Court thus tatched a "reasonable mistake" exception onto the good faith doctrine of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Blackmun's dissent was joined by Brennan and Marshall. They questioned whether there should be a reasonable mistake doctrine and further doubted whether the particular officers in this case were reasonable in their mistake.

Two weeks later, two decisions came down from the high court. The first, United States v. Dunn, ___ U.S. ___, 40 Cr.L. 3313 (3/3/87), revisited Oliver v. United States, 466 U.S. 170 (1984). In a 7-2 de-

cision by Justice White, the Court approved a search warrant obtained following a warrantless entry by the police onto the defendant's ranch and by their peering into a barn located 50 yards from a fence encircling the ranch's residence. The Court held that the officers had not invaded the curtilage. In the future, whether a particular area is within the curtilage and thus entitled to a reasonable expectation of privacy will be decided by analyzing four factors, "the proximity of the area claimed to be curtilage to the home, whether the area is included with an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." The Court also held that the defendant had no reasonable expectation of privacy in the area adjacent to the barn.

In dissent, Brennan joined by Marshall argued that "the barnyard invaded by the agents lay within the protected curtilage of Dunn's farmhouse" and "the agents infringed upon Dunn's reasonable expectation of privacy in the barn and its contents." They pointed out an irony of the decision: henceforth a warrant authorizing a search of a particular place including curtilage will not authorize a search of a barn under the circumstances here.

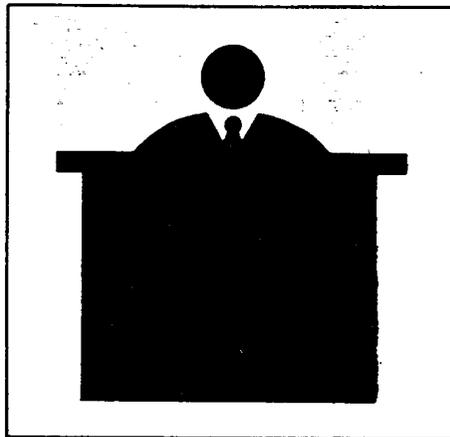
That same day, in a surprising decision by Scalia, the Court considered the question left open in

Coolidge v. New Hampshire, 403 U.S. 443 (1971), which was whether the "plain view" doctrine allowing for the warrantless seizure of an item "that comes with a plain view during their lawful search of a private area" could be "invoked when the police have less than probable cause to believe that the item in question is evidence of a crime or is contraband." Arizona v. Hicks, ___ U.S. ___, 40 Cr.L. 3320 (3/3/87).

In this case, the police responded to reports of a shooting by entering Hick's apartment and seizing some weapons and other items. While there, they recorded serial numbers from stereo components, some of which were taken only after moving some of the equipment. It was the latter move which made the police action a search. Further, because the officer had no probable cause to believe that the stereo component was contraband, the 4th Amendment was violated. A plain view search and seizure, thus, under Coolidge, will normally require probable cause. In encouraging language, Scalia rejected the dissent's law enforcement rationale for the police action taken here. "There is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."

Powell, Rehnquist, and O'Connor dissented with both Powell and O'Connor writing dissents. The dissent advanced a position that "if police officers have a reasonable, articulable suspicion that an object they come across during the course of a lawful search is evidence of crime, in my view they may make a cursory examination of the object to verify their suspicions. If the officers wish to go beyond such a cursory examination of the object, however, they must have probable cause."

In Illinois v. Krull, ___ U.S. ___, 40 Cr.L. 3327 (3/9/87), the Court extended the good faith exception of Leon, supra, to the exclusionary rule "when officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment." As the Court did in Leon, there are exceptions to Krull. It does not apply where "the legislature wholly abandoned its responsibility to enact constitutional laws," nor where the law's "provisions are such that a reasonable officer should have known that the statute was unconstitutional."



Justice O'Connor in a dissenting opinion joined by Brennan, Marshall, and Stevens stated that "the inevitable result of the Court's decision to deny the realistic possibility of an effective remedy to a party challenging statutes not yet declared unconstitutional is that a chill will fall upon enforcement and development of Fourth Amendment principles governing legislatively authorized searches."

The final opinion of the Court during this period was O'Connor v. Ortega, ___ U.S. ___, 41 Cr.L. 3009 (3/31/87), a 1983 action brought by a dismissed state psychiatrist

whose office had been searched during his employer's investigation of him prior to his being terminated. O'Connor, writing for the plurality, held that a state employee has a reasonable expectation of privacy in her workplace. Despite that, the Court further rejected a warrant requirement and a probable cause standard. Using New Jersey v. T.L.O., 469 U.S. 325 (1985), the Court held "that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as investigations of work-related misconduct, and should be judged by the standard of reasonableness under all the circumstances." Scalia concurred in the result, but would have held that government searches "to retrieve work-related materials or to investigate violations of work-place rules" were not 4th Amendment violations.

Blackmun dissented, joined by Brennan, Marshall, and Stevens. The dissent criticized the plurality's abandonment of both the warrant and probable cause requirements in public employee searches, and further criticized the "advisory-opinion" nature of the decision.

Three opinions of the KY Supreme Court were written during this period. In Todd v. Commonwealth, Ky., ___ S.W.2d ___ (9/4/86), the Court would not review what appears to be a substantial 4th Amendment claim where the issue raised on appeal differed from the way the issue was raised in the motion to suppress.

In Hargrove v. Commonwealth, Ky., ___ S.W.2d ___ (11/26/86), the Court demonstrates the difficulty of making a search and seizure challenge when an informer is involved. Here, a confidential infor-

mant told the police that she had seen marijuana at Hargrove's house. The Commonwealth would not reveal the name of the informant. Susan Murphy testified that she told the police about the marijuana, but denied having been to the house within 48 hours of the time of the affidavit sworn to by the police, which contradicted the statement of the police. The defendant made a Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) challenge. The Court rejected it, stating that Ms. Murphy's saying that she was the informant does not mean that she was. Curiously, the Court did not require the Commonwealth in these circumstances to state that she was or was not the informant, creating a tidy judicial catch-22. One must wonder how to make a Franks challenge that the affidavit is based upon a false statement when the Commonwealth can hide the identity of the informant and hide behind what the police say the informant said at the same time. That this case demonstrates a certain disrespect for the Franks challenge is an understatement.

The third case during this period was Walker v. Commonwealth, Ky., ___ S.W.2d ___ (4/2/87). Here, the Court reversed a decision of the Court of Appeals. The case involved a search warrant for the house where Walker lived. It was based upon an agent's observation of Creech who stood near Walker's house, and who then was stopped after he drove away. Upon finding cocaine in Creech's car, the police obtained a warrant based upon the police officer's affidavit stating that he saw Creech go into Walker's house, a clear and obvious exaggeration meant to buttress the affidavit in order to obtain the warrant.

The Court of Appeals saw the affi-

davit for what it was, and reversed based upon the false and misleading affidavit.

The Supreme Court reversed the Court of Appeals. The Court states that the affidavit saying that Creech was observed going into the house is a "reasonable conclusion, based upon what the agent observed." The Court further criticized the Court of Appeals for having "failed to give any deference to the findings of the trial court at the suppression hearing and did not give proper deference to the decision of the district judge to issue a search warrant." The Court characterized what occurred here as "nothing more than an innocent mistake" rather than a knowing disregard for the truth.

One Court of Appeals opinion during this period of time pertained to search issues. The police arrested Jerry Ramsey on a DUI. Ramsey v. Commonwealth, Ky. App., ___ S.W.2d ___ (3/13/87). During the arrest, the police "shone a flashlight on the back seat of the car and noticed a chain saw partially covered by a jacket." The officer removed the chain saw, wrote down the identification number, and placed it back in the car. Later, the police discovered the chain saw was stolen, and charged the defendant. The Court reversed, saying that the police had authority only to search for evidence of intoxicants, since that was what the arrest was based upon. "[We] cannot approve of police conducting themselves as if a citizen's detained automobile and its contents amount to the captured grab bag into which they can search, and from which they can seize, any item they imagine to be evidence of a crime."

The 6th Circuit has also discussed a number of important 4th Amendment issues over the past few months.

In Jennings v. Rees, 15 SCR 18 (8/27/86), the Court held that a handgun seized during the execution of a search warrant was not a violation of the 4th Amendment. The search was justified under the "public safety" exception of New York v. Quarles, 467 U.S. 649 (1984), and under the "plain view" doctrine. The Court also stated that because under Stone v. Powell, 428 U.S. 465 (1976), a full and fair hearing had been given to the defendant in the state court that they did not have to review the issue at all.

The 6th Circuit also revisited Tennessee v. Garner, 471 U.S. ___, 105 S.Ct. 1694, 85 L.Ed.2d (1985), which had held the Tennessee statute allowing for the use of deadly force against fleeing felons to be a violation of the 4th Amendment. In this 1983 action, the 6th Circuit, as it had done in Garner, held the Tennessee statute to be unconstitutional, and further held that Garner should have been applied retroactively at the trial. Carter v. City of Chattanooga, 15 SCR 20 (10/6/86).

In United States v. Harnett, 15 SCR 22 (11/6/86), the Court held that despite blocking his car and approaching him with guns drawn, the police had not "arrested" him, and thus probable cause was not necessary to justify the seizure. "[T]he mere use or display of force in making a stop will not necessarily convert a stop into an arrest. . . . Where the display or use of arms is viewed as 'reasonably necessary for the protection of the officers' the courts have generally upheld investigative stops made at gunpoint. . ."

In Affinder v. Ohio, 16 SCR 2 (1/8/87), the Court declared an Ohio statute unconstitutional which allowed for warrantless searches of apiaries (beehives). The Court

rejected the State's open field argument, saying that structures in fields are entitled to protection.

Finally, in U.S. v. Beal, 16 SCR 4 (2/5/87) the Court held that the seizure of pen guns from the defendant's house was not legal under the plain view exception where there was no probable cause to connect the pen guns with criminality. "Plain view", the Court reminds us, requires that there must be a nexus between the item viewed and criminality and that nexus must be both "immediate" and "apparent."

In Autoworld v. United States, 16 SCR 8 (3/31/87), the 6th Circuit approved the warrantless seizure of five cars which were on display in the showroom of a dealership. The Court held that examining the cars was not a search because they were publicly displayed, citing Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985). The Court further held that once the examination revealed probable cause to believe the dealer had violated the law, the cars could be seized without a warrant, under the automobile exception to the warrant requirement.

The 6th Circuit reviewed a common street confrontation in United States v. Hatfield, 16 S.C.R. 8 (4/3/87). Hatfield was stopped in his van whereupon the police saw illegal police scanners inside. The police then searched the van and discovered burglary tools during the search. The Court rejected the defendant's suppression motion, saying that the search was incident to a lawful arrest, citing New York v. Belton, 453 U.S. 454 (1981).

The Short View

1) Chapa v. State, Tex. Ct. Crim.

App., 41 Cr.L. 2067 (4/8/87). Here, the Texas Court held that a passenger in a cab has a legitimate expectation of privacy in that cab, and thus evidence seized from under the front seat after the police stopped the cab could be suppressed without facing standing problems.



2) State v. Gawron, Idaho Sup. Ct., 41 Cr.L. 2069 (3/31/87). Evidence seized from a probationer's house by a probation officer without a warrant was admissible according to the Idaho Supreme Court. Waivers of 4th Amendment rights as a condition of probation are legal since probationers have reduced expectations of privacy;

3) Duncan v. State, Ark. Sup. Ct., 41 Cr.L. 2070 (3/23/87). A defendant's confession to the murder of a police officer had to be suppressed when the police, instead of taking him before a magistrate following his arrest, held the defendant for three and a half days until he gave a statement. The Arkansas rule involved is quite similar to RCr 3.02. Counsel should be alert to any improprieties in the seizure of evidence obtained during the period of time between the arrest and the first appearance before a magistrate;

4) People v. Stith, New York Ct. App., 41 Cr.L. 2048 (3/26/87). The New York Court in this case confined the inevitable discovery exception to so-called secondary evidence, or fruits obtained from the initial illegal search. Where a gun was seized illegally in a criminal possession of a weapon prosecution, inevitable discovery could not be used to save the search.

5) United States v. Ceballos, 40 Cr.L. 2434 (2nd Cir. 2/13/87). This case demonstrates the importance of determining exactly when an arrest has occurred. An officer told a suspect he was not under arrest, but also told him he could not drive to the police station by himself. As a result, the arrest was illegal, and all evidence obtained thereafter had to be suppressed;

6) Commonwealth v. Douglas, Mass. Sup. Jud. Ct., 40 Cr.L. 2436 (1/26/87). A warrant describing the place to be searched as "premises to be identified by [a state trooper] prior to the execution of the warrant" was particular, and thus the evidence seized had to be suppressed. The Court further held that "a police officer can never validate a general warrant through objectively reasonable reliance on the warrant."

7) People v. Lucente, III, Sup. Ct. 40 Cr.L. 2456 (2/20/87). In a very reasonable opinion, the Court faced the problem of an unnamed informant in a Frank v. Delaware, 438 U.S. 154 (1978) situation. The problem is that where the state does not reveal the name of the informant, the defendant has great difficulties in showing the "substantial" need for a hearing on his allegation that the affiant has shown a reckless disregard for the

Continued on page 38

Trial Tips

For the Criminal Defense Attorney

CRIMINAL RULES AMENDMENT PROCESS IN KENTUCKY

Rule 13.08 of the Rules of Criminal Procedure (RCr) reads as follows:

(1) Suggestions for amendment of these Rules may be submitted directly to the Supreme Court for its consideration.

(2) Unless otherwise directed by the Supreme Court all substantial amendments will be published in an official publication of the Kentucky Bar Association or mailed to the members of the Kentucky Bar Association at least 60 days before they become effective.

Chief Justice Stephens appointed Justice Roy Vance as Chairman of the Criminal Rules Committee. Lawyers and judges familiar with the criminal law process in Kentucky are appointed as members of the Committee. The present members of the Committee are:

Honorable William Graham
Circuit Judge
Franklin County;

Penny Warren, Esq.,
Assistant Attorney General
Frankfort, Kentucky

Mark P. Bryant, Esq.,
Commonwealth Attorney
McCracken County;

Frank E. Haddad, Jr., Esq.,
Louisville, Kentucky;

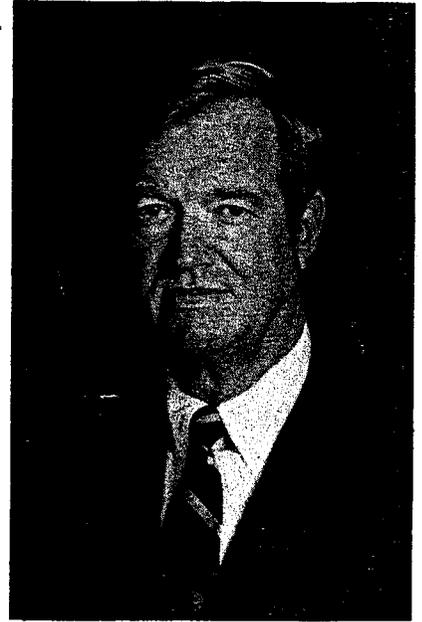
William E. Johnson, Esq.,
Frankfort, Kentucky; and

Frank W. Heft, Jr., Esq.,
Office of the Public Defender
Louisville, Kentucky.

Amendments to the Criminal Rules are generally initiated by recommendation from some member of the Bar. These recommendations or "suggestions for amendment" as referred to in subsection (1) of Rule 13.08, are most often sent to the Supreme Court of Kentucky. However, in some instances the suggestions are made directly to the members of the Committee. Also, in some instances, the Supreme Court initiates discussion about a proposed amendment.

The suggestion for amendment is circulated to all members of the Committee for comment. The members of the Committee most often express their opinions in writing to Justice Vance, with copies to other members of the Committee. The Committee holds at least one annual meeting where the suggested amendments are discussed and voted upon by the Committee. Most suggested amendments are placed on the agenda for consideration by the members of the Kentucky Bar Association at the Annual Kentucky Bar Association meeting.

Justice Vance presides at the public hearing. All members of the Bar in attendance, and any member of the public, will be given an opportunity to express himself as to the proposed amendment. The



William E. Johnson

comments of the members of the Committee and the comments made at the public hearing are made known to the Supreme Court prior to the adoption of any amendment of the Rules.

Most of the suggested amendments during the past several years have come from Commonwealth Attorneys and the Attorney General's Office. It is obvious that attorneys in these offices believe that the present Criminal Rules are too advantageous to the citizen accused. Lawyers engaging in the practice of criminal defense law need to be vigilant in paying attention to the suggested amendments submitted from the prosecutorial side of the Bar so that appropriate responses may be made to the Committee and the Supreme Court of Kentucky. An effort has been made by the Supreme Court to have representatives of both the prosecution and the defense on the Committee. This appears to be working well at the present time.

Any member of the defense bar having a suggested amendment should

submit same to the Supreme Court of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

WILLIAM E. JOHNSON

Bill Johnson has practiced law

since 1957. He has been a member of the Kentucky Bar's Board of Governors, Chairman of its House of Delegates, member of the Association of Trial Lawyers of America Board of Governors and President of the KY Academy of Trial Attorneys.

Presently, Bill practices as a partner in the merged law firm of Johnson, Judy, Stoll, Keenon and Park. He is a board member of the recently formed Kentucky Association of Criminal Defense Attorneys.

Prison ministry supports, shelters visiting families

By SUSAN HANSEN
Staff Writer
Jefferson City, Mo.

THE PRISON families come to Missouri's state capital from St. Louis, from Kansas City, from Joplin to the south and sometimes from much farther afield. They might drive, or ride in by bus or by train, and stay a day or perhaps longer.

For a long time their presence — these mothers, wives and children of the inmates who crowd the handful of nearby state prisons — was scarcely noticed, their special hardship rarely told.

Occasionally, there were stories — about the woman who, unable to afford a \$26 hotel room, spent the night beneath a bridge locked in her car, or about the mother and child who arrived at the Jefferson City bus station at 3 a.m. and slipped into the restroom of a nearby hotel to pass the hours before daylight.

In her ministry at the state prisons, Benedictine Sister Ruth Heaney, co-founder of the Agape House, one of perhaps a dozen hospitality houses around the country for prison families, had heard the stories and had seen the need up close. Often, she would bring prison visitors with little money and no place else to go back to the big, empty house she shared with two other nuns. But conversations with others involved in prison ministry persuaded her that piecemeal sheltering was not enough and that a larger vision was required.

With strong encouragement from Heaney and Janice Webb, a Southern Baptist active in the Prison Fellowship movement, an ecumenical task force on criminal justice soon took up the cause. And in November 1980, after a successful search for funding and a suitable locale, the newly rehabilitated, 100-year-old house at 810 E. High St. opened its doors.

Since then, Agape House, whose name was inspired by the Greek word meaning God's unconditional love, has provided more than 35,000 nights of room and often board to prison families. Like most of the 5,000 men and women locked away in the four area prisons, the women and occasionally the men the Agape ministry serves tend to come from financially depressed backgrounds — and the \$3 nightly room charge has been set accordingly. On



Jean Heard, a guest from St. Louis, sits in the Agape House kitchen.

most weekends and holidays, the warmly decorated 10-bedroom house, which sleeps 35 persons, including a live-in, nonsalaried manager, is filled to capacity.

But the shelter ultimately provides much more than an inexpensive place to stay. By reducing the cost and hardship of a weekend trip to Jefferson City, it has also helped to encourage more regular prison visits and thus enabled many prisoners to maintain contact with their families.

These visits, said Heaney, who has been active in prison ministry for the past 15 years, give inmates hope. "Prison is a lonely place," she said, "but the prison experience is not nearly as destructive if they (the prisoners) are getting support from their families."

Heaney also cited studies that show that an inmate who receives regular family visits is much more likely to win an early release. "They don't get so isolated and institutionalized," she said. "They know their families haven't forgotten them, and that gives them a lifeline."

If Agape House has helped to keep families together, it has also helped to make the time spent in Jefferson City less lonely and stressful for many prisoners' families. On most weekend



Sister Ruth Heaney

nights, the house's cozy kitchen and adjacent living room are filled with the conversation and clatter of women back from a long and often draining day at the prisons. It is an atmosphere that many guests here seem to find consoling.

Christine Noel, one of several prison wives seated around the shelter's kitchen table on a recent Saturday evening, said she is often too embarrassed to discuss her situation with her coworkers at a St. Louis purse factory. "I never really talked to people about it until I started coming here," said Noel, whose husband is serving a life sentence at the Missouri State Penitentiary. "But everybody's in the same situation here. People understand."

In their seven-year effort to offer Noel and thousands of others like her the chance for some small comfort, Heaney and the ecumenical corps behind Agape House have faced more than a few financial crises. Operating costs average \$50,000 annually, and upkeep of the old house is also expensive. Both the roof and the house's siding are badly in need of repairs.

To meet these costs, the shelter, which was founded under the auspices of the Missouri Council of Churches, relies on donations from both churches and individuals. Two years ago Agape House was officially designated a United Way agency and is now the beneficiary of a \$10,000 annual grant from that organization. In addition, the shelter receives many "in-kind" contributions from a network of Catholic, Southern Baptist, Methodist and Presbyterian volunteers who have helped by decorating, painting, mopping and staffing the shelter. The First Church of God in southern Missouri has also joined the effort and, on the third weekend of every month, provides free shuttle bus service for prisoners' families along the way from Joplin to Jefferson City.

Mark Saucier, who heads the shelter's board of directors, said it was this cooperative spirit and a shared commitment to Christian values that had enabled Agape House to carry out its work — and to serve as a model for similar prison hospitality houses in Texas and Missouri. "What we're trying to do," he said, "is offer a welcome and some warmth to people who have been through bad times."

Cofounder Heaney described the house's mission in still simpler terms. "The people who come here are brokenhearted," she said. "They need to be supported." ■

Self-Defense



Kathleen Kallaher

INTRODUCTION

In the past few years, the Kentucky Supreme Court has radically altered the law concerning when a defendant is entitled to a lesser included offense instruction on second degree manslaughter and reckless homicide in a case in which he claims self-defense. These changes have resulted from the Court's shifting interpretation of KRS 503.120. The result is both an advantage and a disadvantage to criminal defendants depending on whether the accused wants a lesser included offense instruction or not.

I. BLAKE

Darrell Blake shot David Grissom because he saw Grissom pulling a gun and thought Grissom was going to shoot. However, no gun was found in the building. Additionally, Grissom had beaten Blake and threatened to kill him weeks earlier. At trial, Blake requested instructions on second degree manslaughter and reckless homicide which he did not receive. On appeal, Blake claimed that he was entitled to these instructions based on KRS 503.120(1). That statute states:

(1) When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to KRS 503.110 but the defendant is

wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable and a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

KRS 503.050 provides that the use of deadly physical force by a defendant is justified if the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat. The 1974 Commentary to that section makes it clear that this is a subjective standard to be judged in the view of that defendant in that particular situation. Therefore, defendant does not have to show that his belief in his need to use deadly physical force or what amount of force to use is reasonable.

However, the Commentary to KRS 503.050 [goes on to] states:

In eliminating the requirement that a defendant's belief and action be reasonable for the defense of self-protection, this chapter does not necessarily relieve him of all criminal liability for action

based on unreasonable belief. If the defendant is mistaken in his belief as to the necessity of using force, KRS 503.050 provides him with defense to all offenses having "intentional" as the culpable mental state, no matter how unreasonable his belief. At the same time, if he is "wanton" or "reckless" in having such a belief, it is possible because of KRS 503.120 to convict him of an offense having "wantonness" or "recklessness" as the culpable mental state...As a consequence of the relationship between KRS 503.050 and 503.120, a person who kills another under a mistaken belief that his action is necessary for his own protection cannot be convicted of intentional murder but can be convicted of manslaughter in the second degree or reckless homicide if his mistaken conduct is sufficient to constitute "wantonness" or "recklessness."

The 1974 Commentary to KRS 503.120 similarly states:

If the belief upon which a defendant's use of force [or the degree of force used] is based is so unreasonable as to constitute "wantonness" or "recklessness," justification is not available for offenses having either of these culpable mental states as the essential element of culpability. For instance, if a defendant, in killing another, believes him-

self in danger of death but is wanton in having such a belief, he cannot be convicted of murder. But since manslaughter in the second degree is committed through "wantonness" and since this subsection denies a defendant justification for such an offense, he can be convicted of this lesser degree of homicide.

This viewpoint makes sense if it was the legislature's intention that, on one hand, it is too harsh to punish someone for murder or first degree manslaughter when he killed in an honest belief in the need to defend himself but it turns out that under all the circumstances he was mistaken or unreasonable in that belief, but, on the other hand, it is not advisable to allow someone to kill another "by mistake," even if an honest one, with no legal culpability. By allowing for a conviction for wanton manslaughter or reckless homicide in that situation, the Penal Code is encouraging persons to be careful in making the decision to use deadly physical force and if one should reasonably be or is actually aware of, and consciously disregards facts which would show them that they do not need to defend themselves, they will be liable.

Consequently, since an unreasonable belief in the need to use physical force or as to what amount of force is necessary may be wanton or reckless, the defendant or the Commonwealth would naturally be entitled to lesser included offense instructions on second degree manslaughter and reckless homicide in a case where there is a question as to the reasonableness of the defendant's belief.

This is what the Kentucky Supreme Court held in Blake v. Common-

wealth, Ky., 607 S.W.2d 422 (1980), in reversing Blake's conviction.

In light of the Commentary to KRS 503.050 and 503.120, the Court's decision in Blake seems to correctly reflect the intent of the legislature.

II. BAKER AND GRAY

However, four years later, the Kentucky Supreme Court decided Baker v. Commonwealth, Ky., 677 S.W.2d 876 (1984). Baker was predicated on the stormy relationship between Bobby Baker and his ex-wife, Vivian. He confronted Vivian one night and she began running to the bar where her purse, in which she usually kept a gun, was located. Bobby shot Vivian six times in the back, continuing to shoot until she was laying on the ground. Baker asked for and did not receive a reckless homicide instruction. He relied on self defense. Overruling Blake, the Court held that it could not "escape the fact that an act claimed to be done in self-defense is an intentional act." Id. at 879. The Court analyzed the definitions of the different mental states and found that recklessness under KRS 501.020 refers to a failure to perceive a substantial and unjustifiable risk that a conduct will cause a particular result. Id. But Baker never said he failed to perceive the risk that shooting Vivian six times in the back would cause her death. Since Baker claimed his actions were done in self-defense, he was necessarily saying that he shot intentionally but was justified in doing so. Therefore, it would have been inconsistent to say that the same conduct would support the finding of an offense based on a reckless mental state as defined by KRS 501.020.

The Court does seem to recognize that the drafters of the Commentary to KRS 503.120 and KRS 503.050 intended that a person with a mistaken or unreasonable belief in his need to use force to protect himself could be subject to prosecution for second degree manslaughter and reckless homicide. The Court attempts to get around the Commentary by pointing out that the legislature enacted the definitions for intent and recklessness, and conduct that is intentional cannot fit within an offense which relies on recklessness as the mental state.

Justice Leibson concurred only in the result, countering the majority's reasoning by saying that there was no need to enact KRS 503.120 if the legislature did not specifically intend a defendant to be prosecuted for reckless homicide if his subjective unreasonable belief in the need to defend himself was reckless. Justice Leibson argued that recklessness as defined in KRS 501.020 goes to failure to perceive the result of an act while reckless used in KRS 507.050 addresses the recklessness of the conduct rather than the result. This interpretation has a certain attractiveness for reconciling the statutes. For example, in a reckless homicide case not involving self-defense, a person may be convicted if it is shown that he failed to perceive the risk that his actual conduct would cause the prohibited result. In a self-defense case, a person may be convicted of reckless homicide if he failed to perceive the risk that his belief was unreasonable and would therefore cause him to kill in self-defense when he did not need to.

In Gray v. Commonwealth, Ky., 695 S.W.2d 860 (1985), the defendant, who admitted he shot at the victim

when, after a drinking party at his house, he thought his life was in danger when the victim began to draw a gun on him, objected to a self protection instruction that included a qualification which allowed the jury to find the defendant guilty of second degree manslaughter if the jury found that it was not in fact necessary for the defendant to use physical force, and his belief to the contrary constituted wanton conduct. The Supreme Court reversed Gray's conviction, holding that to be convicted of second degree manslaughter a person must necessarily be guilty of wanton conduct, therefore acting without the intention to kill but being aware of and consciously disregarding a substantial and unjustifiable risk that his conduct will cause death. The Court said that because there was no question that Gray intended to shoot and kill the victim but did so in self defense, he could not be convicted of an offense based on his conduct being wanton. Justice Leibson again dissented, calling for a return to Blake.

III. APPLYING BAKER AND GRAY

Baker and Gray had several immediate practical results. First, as the Court made clear in Baker, the Court's analysis falls with equal weight upon a defendant he does not want a lesser included homicide instruction as it does on a defendant who requests one even if he claims self defense.

From cases decided after Baker and Gray, several trends become clear. A defendant who claims that she acted in "pure" self-protection, i.e. she intended to shoot and kill the victim but did so to save her own life, cannot have a self-defense instruction with an unreasonable belief qualification allowing for a manslaughter or reck-

less homicide conviction foisted upon her over her objection.

This was the situation in Ford v. Commonwealth, Ky.App., 720 S.W.2d 735 (1986). Margaret Ford shot her husband Jerry five times at close range after Jerry had armed himself, made threats to her life and had started coming toward her with his hand resting on the gun in his pocket. A sixth shot missed by a matter of inches. After pulling the trigger the first time, Ford did not remember the shooting. Ford was convicted of second degree manslaughter. Margaret testified at trial that she knew Jerry was going to kill her if she did not shoot. Relying on Gray, the Court of Appeals found that the self-protection instruction was erroneous.

Under the rationale of Baker and Gray, if a self-protection instruction contains an erroneous or unreasonable belief qualification allowing for a second degree manslaughter or reckless homicide conviction, and the defendant is convicted of one of those crimes where the evidence points unerringly to the fact that the defendant intended to kill the victim, the

The Court of Appeals reached the identical decision in Russell v. Commonwealth, Ky.App., 720 S.W.2d 347 (1986). Russell shot the victim twice during a fight and the trial court gave a self-defense instruction containing an erroneous belief qualification to which Russell objected. Finding that the instruction actually allowed the jury to "take back" the self-defense justification if his belief was unreasonable and that there was no evidence that the shooting was anything but intentional, the Court reversed Russell's second degree assault conviction.

Although Ford and Russell were based on an instructional error, the Court of Appeals found that based on Ford's defense, and the lack of any evidence in either case showing that their conduct was anything but intentional, there was insufficient evidence to convict them of a wanton or reckless crime. Id. at 736. Therefore, since Ford had already been acquitted of murder and first degree manslaughter and because there was no evidence to support the finding of guilt on second degree manslaughter or reckless homicide because of her intentional act, the Court said



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was acquitted of all the charges against her. Id.

The question presents itself as to whether Ford could have been retried based on second degree manslaughter or reckless homicide with a clean self-protection instruction if there had been facts supporting a finding that a reasonable jury could believe her actions were wanton or reckless, rejecting altogether her claim that her actions were done intentionally in self-defense? A related question is what happens when a defendant wants lesser included offense instructions but still claims self-defense alone or in conjunction with another defense? If there is any evidence that the accused's conduct was wanton or reckless, the trial court would be entitled to give those instructions on the theory that the jury is free to disregard evidence of a defense and convict on any offense supported by sufficient evidence. It seems that under Baker, a defendant who claims self-defense is forever excluded from lesser included homicide instructions based on wantonness or recklessness since an act claimed to be done in self-defense is intentional. Furthermore, if a defendant claiming self-defense could get lessers, what is sufficient evidence to show only intentional, justifiable homicide as opposed to an act of killing done recklessly or wantonly?

With a single exception, the Kentucky Supreme Court seemed to adopt the view that once self-defense is claimed, a second degree manslaughter or reckless homicide instruction could not be given. In Randolph v. Commonwealth, Ky., 716 S.W.2d 253 (1986), Randolph claimed that the victim was chasing him so he fired a pistol he pulled from his pocket. A scuffle ensued and

the defendant said both he and the victim were reaching for the pistol when a third person shot the victim with a shotgun. Both had been drinking. In another confession, Randolph said he fired a shotgun at the victim when the victim was chasing him. Randolph claimed self defense. In holding that it was not error to refuse to give Randolph requested instructions on second degree manslaughter and reckless homicide, the Supreme Court reiterated that an act claimed to be in self defense is intentional and cited Baker and Gray in support. The Court said that there was no question that Randolph's act of shooting was intentional although the Court recited no specific evidence explaining that.

In James Benton Kilmon v. Commonwealth, Ky., Master Slip Opinion (rendered November 26, 1986) (not to be published), the victim was stuck with a knife that Kilmon opened when the victim was choking Kilmon during a struggle. Kilmon said he did not know how the victim was stabbed. He was just trying to get the victim off of him. On appeal, Kilmon specifically argued that in this kind of "quasi"-self-defense case where a struggle or fight ensues out of a motive to defend oneself against an attack and one of the participants is fatally wounded but the defendant did not necessarily intend to kill by his acts, there is room to give a reckless homicide instruction requested by the defendant even if the defendant claims self-defense. The Court specifically held that Baker rules out a reckless homicide instruction if the defendant claims self-defense.

Kilmon, although not a published case, seemed to signal an almost mechanical approach whereby a defendant who claims self-defense will never be entitled to a second

degree manslaughter or reckless homicide instruction regardless of evidence which would ordinarily have supported one of those lesser included homicides if self defense had not been asserted. In other words, fighting with someone while holding an open knife may be wanton or reckless in a non-self-defense case since it shows disregard for the risk that someone will get stabbed.

This is a harsh result for a defendant who is struggling with an attacker to defend himself and is not aware of inflicting a fatal wound until after the struggle ends and did not intend to kill the attacker but simply to make them stop. His conscious objective was to defend himself but not to cause death. This will almost always insure a conviction unless the self defense argument is quite strong since the jury will be left with the alternative of convicting of murder or first degree manslaughter or acquitting the defendant.

One exception to this rule seems to be Rasmussen v. Commonwealth, Ky., 705 S.W.2d 914 (1986). Rasmussen claimed the victim grabbed him in the groin area and attempted to sodomize him. Rasmussen strangled the victim so violently that a bone was fractured in his throat. He choked the victim while locking his forearm around the victim's neck "so he would leave me alone." The Supreme Court held that Rasmussen was entitled to instructions on second degree manslaughter and reckless homicide. Without further explanation, the Court held that Baker was clearly distinguishable.

The import of Rasmussen is that it indicates that a situation exists where a defendant can claim self-defense and yet evidence can be adduced which would justify the same defendant also being granted

his request for instructions on wanton and reckless homicide. The problem is the Court neither lists the specific facts it relies on in justifying the giving of those instructions nor does it explain why Baker can be distinguished. It is certainly hard to distinguish Rasmussen from Kilmon. A significant difference may be that Rasmussen did not use a deadly weapon.

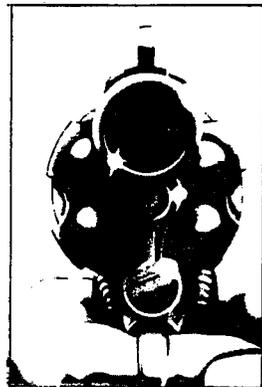
Rasmussen may be a very important case to use in arguing for lesser included offense instructions where self defense is employed but it is not a pure "I meant to kill him but I was justified" situation.

Thus, the state of the law after Rasmussen is that there seem to be cases to support either the giving of no lesser included offenses in any self-defense case or that lesser included instructions may be given if there is evidence that the conduct was wanton. Of course the key question is what evidence does it take to show that an act is purely intentional or could also be wanton?

For instance, in Joyce Marie Duke v. Commonwealth, Ky., App., Master Slip Opinion (rendered November 26, 1986) (not to be published), Joyce Duke, who was holding a razor sharp butcher knife grabbed Karen. Russell raised a hammer over Joyce's head as if to hit her. They fell to the ground and Karen was fatally stabbed. Duke said that she was trying to defend herself against blows from Karen's hammer. The Court of Appeals reversed Duke's second degree manslaughter conviction since the self-protection instruction contained an unreasonable belief qualification and thus was erroneously given.

Citing Baker and Gray, the Court noted that the Commonwealth had argued that the stabbing was inten-

tional and that Duke herself claimed she acted intentionally but in self defense. The Court specifically stated that the evidence that Duke testified that she was unaware that Karen had actually been stabbed until after the struggle ended was not evidence of wanton conduct. The Court said: "An awareness of one's action, or lack of awareness, does not go to the question of intent. It is obvious that the appellant could have intended to stab the victim without being aware of the fact that she had done so."



In other words, if the evidence shows only that the defendant intended to use deadly physical force, whether he actually knew that the use of force had been successful is irrelevant. Of course the problem is what evidence can be used to say that the defendant acted only intentionally? If the defendant intended to protect herself but never even intended to stab or shoot but that occurred during a fight without anyone really knowing how it happened, is that still intentional conduct?

The testimony of the defendant is important. A defendant who actually testifies that she meant to inflict deadly physical force and intended the result of death but did so in order to save her own life is going to have much less chance at having lesser homicide instructions given than one who says there was an attack or a strug-

gle and somehow the victim got killed. However, even in that situation, several older cases exist which hold that when a person who uses a deadly weapon and says that he was trying to defend himself with that weapon during a mutual affray, has no room to argue that he did not intend the natural results of his action and therefore a conviction based on a wanton or reckless mental state cannot stand. See Vinson v. Commonwealth, Ky., 412 S.W.2d 565 (1965) (the defendant fired down at a larger man who was stabbing him, testifying that he did not know where the shots went and which one hit the man); Martin v. Commonwealth, Ky., 406 S.W.2d 843 (1966) (the defendant testified that he shot the victim, a much larger man who was beating him with his fist, "to get him off me"); Shanks v. Commonwealth, Ky., 390 S.W.2d 888 (1965) (defendant who was fighting on the floor with the victim after the victim hit him first reached into his pocket for a knife and, after the victim was stabbed, testified that he did not remember stabbing the victim but he was defending himself and trying to protect his life).

IV. ROSE AND ROSTON

Just when you thought it was safe to practice under the new rules of Baker and Gray, the Supreme Court decided Commonwealth v. Rose, Ky., 725 S.W.2d 588 (1987), and the Court of Appeals decided Roston v. Commonwealth, Ky.App., 724 S.W.2d 221 (1987).

Mary Jane Keffer Rose was convicted of second degree manslaughter after shooting and killing her husband. She claimed that her husband, who had severely abused before, had kicked her and threatened to kill her. She retrieved a loaded gun from the bathroom and fired one

shot at her unarmed husband, striking him between the eyes, killing him instantly. Rose testified that she did not intend to shoot or kill him, that it was not planned, and she did not really remember shooting him. A jury was given a self-defense instruction containing the erroneous belief qualification.

On appeal, Rose claimed that it was error to instruct on second degree manslaughter because she intentionally shot her husband in the belief that she needed to defend herself, relying on Gray. The Court of Appeals held that there was no error.

On discretionary review, the Kentucky Supreme Court held:

Notwithstanding the language in Gray, there may be, as there is in this case, evidence supporting either view, self-defense or wantonness, depending on how the jury should view the evidence. Here it was reasonable for the jury to conclude that the accused shot the victim in a perceived need for self-protection but a wanton stage of mind. . . .

Very often, as in the case, the fact of killing is unambiguous but the accused's mental state at the time of the killing presents a mixed picture. Id. at 592.

In analyzing the same set of statutes discussed in Blake and Baker, the Court found that act of killing in self-defense might be intentional "but it is not planned or premeditated." Id. Consequently, when viewed "objectively," when an act perceived to be necessary in order to defend oneself involves an excessive use of force which is grossly unreasonable, the perception or belief is a gross deviation

from the standard of conduct that a reasonable person would observe in the situation and is thus wanton. Therefore, "the same act should be classified as both intentional and wanton in that situation." Id.

The Court specifically limited Gray to its facts, saying that while it was perhaps very appropriate for the situation in Gray, it would be inappropriate to apply it to the Rose situation.

Justice Vance concurred, explaining that the evidence was clear that Rose either shot her husband intending to kill him, or was wanton in shooting because even if she did not intend to kill him she had to have been aware and consciously disregarded the substantial risk that the shooting might result in death. Justice Vance distinguishes Gray because Gray never testified that the death of a victim was not intended.

Rose leaves this area of the law in a somewhat confused posture. Justice Leibson wrote the majority opinion in Rose, and his reasoning signals that he has convinced the Court that the rule in Blake, and his concurrence in Baker are the correct interpretations of KRS 503.120. The crux of the analysis seems to be that in order to determine whether second degree manslaughter and reckless homicide instructions will be given in a self-defense case, one looks not to the act itself to see if it is wanton or reckless, but to the belief in the need to use self-defense which motivated the intentional act. If the defendant was aware of and consciously disregarded the substantial risk that his belief was mistaken and would result in the unnecessary killing of another, a wanton manslaughter instruction should be given. While

some of the language in Rose is a bit confusing, i.e., saying the act is both intentional and wanton, it seems that this separation of the conduct and the belief leading to the death is what Rose is all about. However, there are still cases which have not been overruled that are hard to square with Rose. By restricting Gray to its facts and not mentioning Baker, the Court leaves the door open for certain defendants claiming self-defense to be denied instructions which would result in a conviction for wanton manslaughter or reckless homicide. The problem is to decipher which factual situations fall within Rose and which fall within Gray. Emphasis seems to be placed on the testimony of the defendant in deciding whether her belief is reasonable or wanton. However, it seems problematic to say that testimony to the effect that Rose did not intend to shoot or kill would be equal to saying she was unreasonable in her belief that she needed to defend herself. That testimony still focuses more on the conduct of Rose and what she intended to be the result of that conduct than the reasonableness of her belief, and it seems hard to believe that that testimony would result in a lesser included instruction when no reasonable person could believe that Rose could have shot right at her husband without intending to shoot and kill him.

Rose certainly seems inconsistent with Ford, especially considering that Ford herself testified that after she pulled the trigger on the gun once she could not remember anything else until she was standing over the body of her husband and the empty gun was clicking.

The Court of Appeals had handed down a similar decision in Roston. Josephine McCray pulled a knife and began swinging it at Roston. Ros-

ton pulled a pistol and shot her three times. Two bullets struck her, one in the chest, and the first shot was a misfire. Instructions for second degree manslaughter and reckless homicide were given. On appeal, Roston claimed that it was error to give those instructions because there was no evidence that his actions were wanton. The Court of Appeals held that the instructions were justified under the evidence because appellant intentionally shot McCray but the evidence did not show that his conscious objective was to kill her. Roston never testified specifically that he intended to kill McCray. Since a person acts intentionally when his conscious objective is to cause a result or engage in a conduct described in the statute defining an offense, appellant may not have intentionally tried to kill McCray.

It seems incredible to believe that a jury can find that someone can shoot someone else three times at close range and not intend to kill the person merely because he did not specifically state that he intended to kill him. The facts seem almost as clear as those in Rose that the conduct of pulling a gun and shooting someone was nothing but intentional and, employing such deadly force towards a specific individual, it could not possibly be said that Roston did not intend the natural result of that action which was death or serious physical injury. However, Roston is one step beyond Rose since, instead of testimony that there was no intent to kill, there was simply no testimony that he intended to kill. In other words, can a defendant who simply remains silent get wanton manslaughter or reckless homicide instructions even if his conduct appears totally intentional?

It seems that in both Rose and Roston, the Courts, by relying so heavily on what the defendant testifies his or her intent was in regard to the act, are still blurring the line between whether the conduct itself is viewed in order to determine whether a wanton or reckless finding can be supported or whether it is the belief or perception in the need to use self-defense that should be focused upon. Justice Vance's concurrence in Rose is a good example of this blurring.

There is still a variety of self-defense in which it is unclear how the Court will rule. These are the Kilmon and Duke situations in which the defendants' belief in the need to use force may be entirely reasonable under the circumstances but their actual conduct may give rise to not only the inference of intent but also wantonness or pure accident.

Stated differently, if the defendant is being attacked by a victim wielding a deadly weapon and that defendant reasonably believes he needs to use deadly physical force to repel the attack and save his life, and he struggles with the attacker, if during the attack the defendant's gun goes off or his knife gets stuck in the victim and and he does not really know how it happened and did not really intend for that specific act to happen but it was just a consequence of the struggle, is a wanton or reckless instruction justified?

Obviously, this Court affirmed Kilmon's conviction, saying that he was not entitled to lesser included offense instructions based on similar facts. Additionally, the Supreme Court has granted discretionary review in the Duke case. It is likely that the Court will answer this question in that case.

CONCLUSION

The different interpretations of KRS 503.120 have both helped and hurt criminal defendants, depending on whether that defendant wanted a second degree manslaughter or reckless homicide instruction. It does seem that the Court's position in Rose will probably be of more benefit to defendants at trial. There are very few self-defense cases where the facts are so strong that the defendant can be so confident that if he forces the jury to choose between murder, first degree manslaughter and acquittal based on self-defense that the jury will choose acquittal. More often than not, a defendant may well want the backup possibility of being convicted of a lesser homicide and receiving a lower sentence.

However, it is probable that the Court has not yet finished fleshing out the law in this area. Therefore, there seems to be at least one case to support any fact situation and argument a defendant wants to make concerning whether second degree manslaughter or reckless homicide instructions should be given in a case where he claims self-defense. Additionally, Rose and Roston may prove useful in obtaining wanton and reckless homicide instructions in other cases since it can be argued that they apply to cases even where the defendant does not claim self-defense. If the Court is really looking at the conduct of the defendant in order to determine whether he or she can be convicted of a wanton crime, then these cases should be useful in non-self-defense cases.

Kathleen Kallaher
Assistant Public Advocate
Appellate Branch

Schizophrenia

This is the second of a two part series.

RPTR.: More than 2 million people in this country suffer from schizophrenia, a disease that usually strikes young adults. Schizophrenics occupy 1/4 of all hospital beds. The cost of medical care and loss of productivity is enormous. More than 30 billion dollars each year. The statistics are staggering, but cannot begin to convey the human cost of this tragic disease.

ANNOUNCER: Yesterday, on All Things Considered, Michelle Trudo presented the story of what it is like to live with a schizophrenic. This evening Trudo introduces some victims of schizophrenia and describes research that is being done to understand its cause.

RPTR.: Greg is a young schizophrenic patient. Confined to this mental hospital in California. He has lived on this locked ward now for several weeks. As he talked with his psychiatrist, Joe Hullett, he occasionally stares across the room at the television set, which is not on.

JOE: Perhaps you could tell us what brought you to the hospital?

GREG: It started with Dinah Shore, on the Dinah Shore Show.

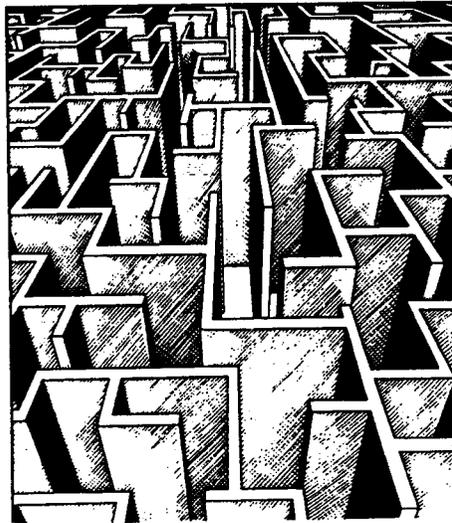
JOE: Could you elaborate on that a little bit?

GREG: I was watching T.V. on channel 5 and all of a sudden Dinah Shore started talking to me while she was doing her show.

JOE: Talking right to you?

GREG: Yes, while she was on the television.

JOE: Do you remember the kinds of things she said?



GREG: I would ask her if she could hear my thoughts and she said yes, while she continued the conversation with the guest.

JOE: And you have no idea why any of this occurred?

GREG: Its just political, you have to ask the government that one. It just came up politically, the evolution of man and electricity doesn't give us too much room. Ronald Reagan, President Reagan is aware of this, he talks to me on the television too.

RPTR.: Before Greg's symptoms appeared three years ago, he was a bright, ambitious college student

majoring in psychology and journalism. Then, during his senior year, Greg began to experience frightening sensations. He was certain that his mind was being controlled by unknown, outside forces. Now he sits for hours on the ward, barely moving, convinced that his brain waves are being broadcast throughout the world.

JOE: Prior to this happening, the day that this happened with Dinah Shore and the Charlie's Angels show, had you been feeling very upset or stressed or were you having some emotional kinds of problems?

GREG: Yeah, I was being followed around by somebody.

JOE: So you were being followed around even before that.

GREG: And that put me under pressure.

JOE: And more pressure?

GREG: Somehow evolved into communicating with my thoughts.

ANNOUNCER: In another part of the mental hospital, in an empty day room, David sits hunched over the table, tugging incessantly at a tuft of his hair. Four years ago, David was an honor student in philosophy at Harvard University. Then during his sophomore year he became convinced that his classmates were trying to kill him. He too ended up in a psychiatric hospital.

RPTR.: Tell me about voices.

DAVID: Okay, voices are like hearing people talk to you who are not in the room.

RPTR.: So the voices are in your own head or are you perceiving them from somewhere else, how does it work?

DAVID: Say that again. Oh, are they environmental stimuli or are they from within me? They are definitely environmental stimuli, they come from other beings from outside of my inner environment.

RPTR.: Okay, why are you giggling?

DAVID: Because it's funny that you even ask that question after I told you, differentiated them from me they are not parts of my mind. I'm not a schizophrenic that hears my own voices.

RPTR.: Do they have names or....

DAVID: They have all sorts of names, there's Boff and Groff, and Toff, and Moff, and Foff and all the others. They are all people, but they will all be gone soon.

RPTR.: Why?

DAVID: Because I don't love them. But, I don't know why, this is getting too complex to understand. It sounds like I'm a crazy man, but I don't want to discuss my voices if it sounds like I'm a crazy man, because its very difficult for in 20 minutes or even 20 hours to display a rational, logical approach to discussing the voices. It's hard to do that because they are so, they are the ones that keep me down. And I'm the one who wants to fly away to heaven.

ANNOUNCER: These schizophrenic patients are typical. They experi-

ence the world in distorted ways. They hear voices that aren't there, see colors and shapes as changing and unreal, family and friends are sometimes unrecognizable and menacing

Schizophrenics may behave irrationally, have hallucinations, say bizarre things. The illness shatters normal thoughts, feelings and perceptions. These symptoms are distinctive and obvious and they often evolve suddenly and unexpectedly in late adolescence or young adulthood. Within weeks or a few months the characteristic symptoms unfold. In the way that most of us think about it, schizophrenia is madness.

David describes what it is like.

DAVID: The mind leaves the body, it says, "This body is hurting, people around me are hating me, the environment is hating me, I will not take responsibility for my actions any longer because I don't know what they are going to do to me. I've got to get out of this place and find a new place." So you break and your mind busts out of your body and flies away as far as it can to escape. That's what schizophrenia is.

ANNOUNCER: Its not difficult to understand why schizophrenics have been ostracized over the centuries. Their behaviors are mystifying and can be terrifying. Schizophrenics were thought to be possessed. They were burned at the stake as witches, locked in prisons, left to die in dark asylums. But by the turn of the century, Sigmund Freud and other psychiatrists determined that schizophrenia was not a religious or social phenomenon, but a disorder where something had gone wrong with the brain itself. They concluded that schizophrenia's cause was biological. They used

the term schizophrenia to mean a shattered brain. To describe the total disruption in thinking and emotions. The complex delusions that characterize schizophrenia, but researchers a hundred years ago didn't have the sophisticated scientific tools to investigate what was wrong with the brains of schizophrenics.

In the 1940's some psycho-analysts took a different tact. Instead of looking at biology, they postulated that bad mothering caused the disease. That the mother's personality and how she raised her child directly caused schizophrenia.

DR. SEYMORE KETTY: Now that was simply a hypothesis.

RPTR.: Psychiatric research, Dr. Seamore Ketty.

DR. KETTY: The evidence for that hypothesis was not compelling and yet it was very widely promulgated So that many psychiatrist and social workers and psychologist believed it and conveyed that to the parents of schizophrenics, giving them a serious guilt feeling that they had done something to cause a schizophrenic child. And there is certainly no reason to think that schizophrenia is caused by how parents rear their children period.

RPTR.: Even now, researchers don't know what causes schizophrenia. They do have some clues. They've found that schizophrenia is similar throughout the world, from tribes in West Africa to communes in China, to Urban American Cities in any culture, in any language, schizophrenics look and sound just about the same. And the incidents of the disease is also similar world-wide. About 1 out of every 100 people become schizophrenic. This kind of evidence that schizophrenia is not directly caused by

our social environment prompted researchers to take a close look at that which is inherited. The genetic background of schizophrenics. They studied children born to schizophrenics. Children who were adopted at birth and raised by non-schizophrenic parents. The findings were striking. The children of schizophrenics were much more likely to become schizophrenic than children of normal parents. The research points to some factor that is inherited in schizophrenia. Again, Seamore Ketty.

DR. KETTY: In modern medicine we recognize that there is no disease which isn't a combination of genetic pre-disposition and environmental variable that operate on the genetic pre-disposition. The question is not nature versus nurture, the question is in any particular disease or in any particular trait, to what extent what genetic factors operating to one extent or environmental factors operating and what is the form of genetic transmission and what is specifically the type of environmental factor which is operating?

RPTR.: For schizophrenia is probably caused by several interactive forces, genes, biology, family, environment. The key is to identify the critical disturbance in the normal balance of these factors. Lots of theories and observations exist. For example, birth complications have been implicated. In prolonged labor oxygen is cut off from the babies developing brain. It may be that the centers of the brain involved in thinking and emotions may be disabled. Some researchers have suggested that a virus contracted in utero or in early years may lead to schizophrenia. This, however, is a speculative hypothesis at this point and awaits further support of evi-

Psychiatrists link brain damage, violent behavior

Chicago Tribune

PHILADELPHIA — New discoveries that link brain damage to violent behavior could increase significantly the numbers of murderers eligible to use the insanity defense, psychiatrists

The new research could also lead to early diagnosis and treatment of people prone to violent behavior, defusing the aggression before they killed someone, researchers said.

Although psychiatrists have long debated the role of brain damage in behavior of people who are habitually violent, there has been no way to diagnose such damage accurately until recently.

Now sophisticated new equipment, including computerized electroencephalography that can map electrical activity in the brain, is allowing doctors to discover brain damage that previously was invisible to them. Dr. Shahrar Khoshbin, a Harvard neurologist, told the annual meeting of the American Association for the Advancement of Science in Philadelphia.

Khoshbin and a panel of four psychiatrists reported on neurobiological aspects of violent action, a motivation for criminal behavior that has been mostly overlooked in the past.

Although understanding of how brain damage leads to violence is still in its infancy, researchers agreed that most people with brain damage, such as people with epilepsy, are not unusually aggressive or violent.

It is only when something in their environment such as being victims of abuse as children is combined with brain damage that their response is violent.

Dr. Anneliese Penilus, a Harvard psychiatrist, said that the environmental component could be much more subtle than physical abuse. Something such as verbal criticism could stimu-

late future violent behavior if it was repeated enough to build up within a person and if that person didn't have some emotional outlet other than violence.

Dr. Dorothy Lewis, a New York University psychiatrist, reported that she had studied 15 prisoners awaiting execution, and that among them, six apparently fell into the brain-damaged category.

"Yet none of these men considered themselves sick and none had attempted to use the insanity defense for his crimes," she said.

Lewis also said that even though all the men had been examined by prison psychiatrists, none of those doctors had diagnosed any abnormality linked to the violent actions of the men.

"This is a much subtler disorder than anything a psychiatrist would look for normally," she said.

Dr. Daniel Pollock, a University of Toronto psychiatrist, said there was a basis for understanding the link between brain damage and aggressive behavior through animal experiments.

Pollock described how a cat named Rambo, who was an aggressive and efficient rat-killer, lost his killer instinct but otherwise retained his personality when his brain was treated with a series of minute electrical charges.

Each individual electrical stimulation had no apparent effect, but their cumulative effect, called "kinding," did. Kinding also may be achieved by use of drugs, Pollock said.

There have been reports of a similar kindling effect achieved inadvertently in humans under treatment for schizophrenia, he said.

It may be possible in the future to use drugs or mild electrical stimulation to kindle the brains of people with brain damage to prevent violent outbursts that can result in murder, Pollock suggested.

Lexington Herald Leader, May 28, 1986
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dence. One promising line of research has been to look at the brains of living schizophrenics. Dr. Daniel Winberger at the National Institute of Mental Health has found that there is a physical shrinkage in some parts of schizophrenic's brains.

DR. WINBERGER: There is clear evidence that something has happened to their brain at some time in their life, probably before the diagnosis was made, that is not seen in normal individuals the same age, with nearly the same frequency.

RPTR.: In addition to a change in the structure of the brain, researchers think that there is also a chemical change. An important natural substance that carries messages between nerve cells has in some way gone awry. That chemical, says Dr. Phillip Burger at Stanford University, is dopamine

DR. BURGER: Probably our best current hypothesis is that there are a group of cells deep in the brain that control emotions and behavior and perception that use dopamine as their chemical messenger to communicate from one neuron to another by a release of this chemical dopamine which goes to the second neuron. That there are some neurons that use dopamine as their neuro-transmitter that are hyperactive in patients with schizophrenia.

RPTR.: Drugs that increase dopamine in the brain, like amphetamines, makes schizophrenics worse and drugs that decrease the dopamine activity tend to make schizophrenics better. It's compelling evidence of dopamine's role in schizophrenia, but it's far from conclusive, because the drugs, says Dr. Burger, don't help all schizophrenics.

DR. BURGER: For about 20 percent of people with schizophrenia the symptoms of the disease are completely suppressed. They just don't have any more symptoms and as long as they are taking the neuroleptic anti-psychotic medication they can function normally in society. For another 20 percent these medications have almost no affect at all. For the majority of schizophrenic patients, and that's 60 percent, the medication improved the illness. They allow more normal functioning but they don't bring the people back to normal.

RPTR.: And the drugs must be taken regularly. Despite some frequent unpleasant side effects, because schizophrenia is often a life-long persistent disease. Without medication, a schizophrenic may again experience psychotic disturbances, delusions and hallucinations. Psychiatrists estimate that there are tens of thousands of homeless street people who are schizophrenic. No longer getting treatment. As one psychiatrist describes it, they are this country's lepers. Ranting on street corners, collecting scraps of paper, talking to unheard voices and yet, with the appropriate medicines and supportive of therapy, life can sometimes resume. It may for Jody. He, too, was young, just seventeen when he first started experiencing symptoms, hallucinations and voices. Now, after ten years, he is no longer psychotic, he has trouble sitting still, his speech is a bit slurred, side affects of his medication.

DR.: You sort of resent that you've had this period in your life that you don't feel is...

JODY: Absolutely, I wasted ten years and I'm still wasting time, I feel.

DR.: What do you still have to take care of before you can get out of here, what do you have to take care of in your own head?

JODY: A lot of things.

DR.: Really?

JODY: Getting a job, dealing with the outside world, dealing with reality, dealing with people, dealing with my parents in the proper way, dealing with my sister, dealing with my nephew, my brother-in-law, my relatives. Dealing with my therapist, my landlord. It's all a big number, you know.

RPTR.: Jody has daily psychotherapy sessions now to help make the transition out of the mental institution and into the community.

DR.: It appears from what you said that you're right in the transition kind of.

JODY: Right

DR.: You're leaving one world and you're entering into another, so to speak.

JODY: I'm entering with the world in reality with grownups and everything.

DR.: Yeah and you've got to get used to it again, right.

JODY: Right, its scary.

DR.: It's a little scary. So you have to...

JODY: Reality is much easier than schizophrenia.

DR.: I'm really glad to hear that.

JODY: It is.

DR.: I'm really delighted to hear that.

JODY: It's much easier. It's much simpler. Schizophrenia, boy, it's a bitch.

DR.: So, reality is not as frightening as schizophrenia?

JODY: Reality, no, reality is beautiful, if you can handle it, if you can get up in the morning and take and shower and everything, and shave, which I can't do yet.

DR.: Can I suggest something to you?

JODY: What?

DR.: A little bit at a time.

JODY: Really.

DR.: And you'll get there.

JODY: I want to.

DR.: I believe in you.

JODY: Why?

DR.: Because I think you have the courage.

RPTR.: Courage can help. As can a supportive therapist. But psychiatrist Fuller Torey says the way other people treat a schizophrenic and interact with him may make a bigger difference.

TOREY: Take a schizophrenic and put him back in a family where the family doesn't understand the disease, is blaming him for the disease, is yelling at them, where there is a lot of emotional turmoil, the schizophrenic cannot process that emotional turmoil as well and they won't do as well.

RPTR.: Family interactions don't

cause the illness, but if a family can learn how to cope with its schizophrenic relative and communicate sympathetically then the schizophrenic will have fewer relapses back into a psychotic state, fewer times in the hospital. Even so, for most schizophrenics sanity is a fragile achievement.

Sam is thirty-two, he has been hospitalized 13 times and is now in a half-way house for the mentally ill. For the last year he's felt better, no longer psychotic, but he says he's still afraid.

SAM: The worst part is coming back and I really want to make it this time. I don't want any more episodes, I mean, I don't want any more back, I want to be just the way I am now and, you know, I just want to stay just where I am.

RPTR.: While the symptoms of schizophrenia can sometimes be treated, the disease is currently incurable. It's a mysterious, complex disease and, in spite of decades of research and dozens of theories, schizophrenia is still poorly understood. But some progress has

been made to clarify the relative importance of genes, environment and biochemistry. And researchers are optimistic about further significant advances. In genetics, where competent DNA research will make it possible to identify the gene or genes that may be inherited by some schizophrenics. Improved coping strategies will help the patient and his family ease the burden of schizophrenia and help prevent relapses. And research into the biology of schizophrenia will move quickly now because of new technological tools. Very sophisticated cameras that make it possible to see the brain's structure to analyze its activity, to actually watch the brain think. And as the delicate workings of the mind are unraveled, the roots of madness will be found.

"By Michelle Trudeau. This report on Schizophrenia aired on January 6, 1986 on National Public Radio's series All Things Considered. It was made possible in part by funds from the John D. and Catherine T. McArthur Foundation. Copyright 1986 National Public Radio. Reprinted with permission."

Experimental drug offers hope for victims of schizophrenia

Chicago Tribune

CHICAGO — An experimental drug may provide hope for many of the estimated 300,000 people in this country who suffer from severe schizophrenia and have not responded to any other therapy, according to a nationwide study.

The study, which involved 250 patients at 18 medical centers, showed that the drug, clozapine, significantly improved the condition of one-third of the patients, said Dr. Herbert Meltzer of Case

Western Reserve University School of Medicine, who headed the study.

"Many people thought that these patients had brain damage and that they never would respond to medication, but these results show that there are chemical changes in their brains that can be reversed," he reported at the 140th annual meeting of the American Psychiatric Association.

Schizophrenia, which affects 1.5 million Americans, is marked by hallucinations, delusions, disor-

dered thinking, withdrawal, and a lack of motivation and pleasure.

For most patients, the symptoms can be controlled with such neuroleptic drugs as chlorpromazine and haloperidol. But about 20 percent of the patients fail to respond to any medication.

Most of the patients in the study were institutionalized and had not responded to any treatment for the last five years, Meltzer said.

Lexington Herald Leader, May 15, 1987
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Ask Corrections



All questions for this column should be sent to David E. Norat, Director, Defense Services Division, Department of Public Advocacy, 151 Elkhorn Court, Frankfort, Kentucky 40601. If you have questions not yet addressed in this column, feel free to call either Betty Lou Vaughn at (502) 564-2433 or Dave Norat at (502) 564-5223.

TO CORRECTIONS:

My client received a federal sentence along with her state sentence with the state judge agreeing to run the state sentence concurrent with the federal sentence pursuant to KRS 532.115. My client will be going to the federal correctional system first. Her federal sentence is shorter than her state sentence and therefore will be returned to the Kentucky Correctional system. My question is: What happens to her upon her return as to parole eligibility and sentence calculation?

TO READER:

Upon your client's return to our institution, the United States Bureau of Prisons will be contacted and asked to furnish us documentation in writing, as to when your client commenced serving her sentence with the federal service (including jail time). Your client will be credited with the appropriate amount of time on both her sentence calculation and parole eligibility.

TO CORRECTIONS:

Due to certain facts in my client's case my circuit judge ran my client's Kentucky sentence concurrent with the sentence he received in another state which he has just completed serving. Will my client receive credit for the time he spent in the other state?

TO READER:

When your client is admitted to our institution upon a state judgment which designates that his Kentucky sentence run concurrently with a sentence already served in another state, then the records personnel in the other state is contacted to ascertain when your client's sentence commenced in their system (including jail time). As stated in the answer to the question on concurrent federal and state sentences, Corrections must have this information in writing from the other state. Your client will then be credited with the time served in the other state, both on his sentence calculation and on his parole eligibility. There is no statutory provision for this, but it is the policy of the Corrections Cabinet to honor court orders from circuit judges.

TO CORRECTIONS:

My client was on parole when he received a new felony conviction. Does he have to serve the remaining time on the sentence on which he received parole before he begins

counting time toward parole eligibility on the new sentence.

TO READER:

The answer to your question is **NO**. Your client, when returned as a parole violator with a new felony sentence, will be seen by the parole board when he is eligible on the new sentence. Parole eligibility is calculated from the date returned on the new sentence minus any jail time on the new sentence (501-KAR 1:011 (1)). Under KRS 439.352, return to the institution for a crime committed while on parole automatically revokes parole. Of course, at the time the parole board sees your client on the new sentence it will also take into consideration the propriety of his release by parole again on his original sentence or sentences.

Betty Lou Vaughn
Offender Records Supervisor
Department of Corrections
(502) 564-2433

**When
single efforts join together,
then there is
hope.**



Forensic Science News

The Gaze Nystagmus Test

by Raymond A. Grimsbo, Ph.D.
(candidate)

Nystagmus is defined as "an involuntary rapid jerking movement of the eyeballs in a lateral, vertical or rotary direction... may occur in a normal person as a manifestation of ocular fatigue or poor vision Pathologically it is seen with various diseases of the nervous system...." (Hopkins, 1965). The test we know as the horizontal gaze nystagmus is part of 3 tests that constitute the standardized field sobriety battery taught by the Oregon Board on Police Standards and Training (BPST).

Horizontal gaze refers to the rapid jerking motion of the eyeballs as they gaze to the side. Three factors are generally evident when the test is given to a person under the influence of alcohol: 1) The eyeballs cannot follow a slowly moving object from left to right without a distinct jerking motion being noted. 2) Very pronounced jerking of the eyeballs will be evident when the eyes are held to the right or left at maximum deviation. However, many people exhibit slight jerking even when sober. 3) Usually when the BAC reaches the mystical 0.10%, the jerking will begin before the eyeball has reached maximum deviation. BPST states that seizure medication, phencyclidine (PCP), barbiturates and other depressants may cause nystagmus. As there was limited laboratory and field testing performed on this test (BPST, 1984), there are undoubtedly many

other substances which we are not aware of that will cause nystagmus.

The test should not be given to a person wearing hard contacts. Upon removing any eye glasses, the officer will instruct the person as to the HGN test. Moving a pen or similar object to the person's left from the nose, the officer will determine if there is smooth pursuit. This motion should take two seconds. BPST says "make 2 or more 'passes' in front of the eye to be absolutely sure...." On the same eye the object should now be moved to the side until no white is showing (max. deviation), held for two or three seconds and any jerkiness should be noted. With the person looking straight ahead, the officer now checks for the angle of onset. The object is moved from in front of the nose to a 45 degree angle over a four second period. If any back and forth jerking is noted, the object is held steady and if the jerking continues, then that is the angle of onset. If the jerking stops, then movement is initiated until 45 degrees is met. The officer must note if the onset is prior to 45 degrees. If it is, then the officer must check to see that some white is still showing at the outer edge of the eye. BPST says "use the criterion of onset before 45 degrees only if you can see some white at the outside of the eye." The right eye should be checked in the same manner.

In scoring the test the officer looks for the three "signs" and grades each positive sign with a one (1). The total value is six.

If the person scores four or more then the BAC classification is .10% or above. According to BPST the officer using this method of testing will be able to classify about 77% of the people as drunk or sober. Naturally they do have a disclaimer to the effect that the probability is only approximate.

The basic procedure suggests the officer hold the object above eye level, about 12-15 inches in front of the eyes "for ease of focus." The Administrative Procedures are: 1) eyeglasses/hard contacts, 2) verbal instructions, 3) position object (12-15 inches), test first eye, 4) check pursuit "high speed" pass, 5) check max. deviation, 6) check onset "low speed" pass, test second eye, 7) total the score.

Horizontal gaze nystagmus has its place in the battery of field sobriety tests used for probable cause. However, like any other test, the normal for that person at the time of the test must be taken into account when evaluating the results.

Hopkins, H.U. (1965), Leupold's Principles and Methods of Physical Diagnosis, 3rd ed. W.B. Saunders Co., Philadelphia, page 77. Improved Sobriety Testing Trainee's Instructional Manual, Nov., 1984, Oregon Board on Police Standards and Training.

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Cases of Note...In Brief



Ed Monahan

CLOSING IN INSANITY CASES/IMPROPER INFERENCE

State v. Percy
507 A.2d 955 (Va. 1986)

The defendant pled insanity to a charge of sexual assault. In closing, the prosecutor argued:

Why was Robert Percy going to these doctors, was it because he was sick, was it because he had a pain, or was it because he was trying to find a defense, trying to find something that flies in the face of [the] evidence....

....

Think back to what Dr. Payson himself said in his desperate search for somebody that could find something to hang a defense handle on....

....

The defense in this case is like amoxicillin. If you can swallow it, find him not guilty. Let him go. Find him not guilty by reason of insanity. Because that's what you have been sworn to do, but I suggest to you there [sic] not a shred of credible, reasonable evidence in this, there's a smoke screen, there's a lot of psycho-babble from five psychiatrists, not two, but five, most of which is unintelligible;
Id. at 956-57 n1.

The Court held these comments error since they disclosed "...a studied purpose to arouse the prejudices of the jury by establishing a pattern

that raising a legitimate defense of insanity was a mere attempt to escape justice. Such a line of argument cannot be characterized 'as merely commenting on the evidence.'" Id. at 958.

Also, the prosecutor in this case elicited evidence from three psychiatrists that rapists they interviewed typically claim either consent or amnesia to create the obvious inference that the defendant who made these arguments was not to be believed.

The Court held that this testimony was unfairly prejudicial and not relevant to what this particular defendant said in response to his charge. The prosecutor cannot introduce evidence that a defendant's "story" is like all others and therefore not credible. Id. at 960.

ALIBI INSTRUCTION/SELF-SERVING STATEMENTS

Young v. State
451 So.2d 208 (Miss. 1984)

In this case, defense counsel requested an alibi instruction that advised the jury of the standard to apply in weighing the alibi evidence, including the phrase "... [if] you have any reason to believe that the evidence presented by the defendant to the effect that he did not commit the crime charged is true or that it is probably true, you must find the defendant not guilty." Id. at 210. The court held that the defendant was entitled to this instruction.

Also, the court held it was error to allow the victim to testify that he told other persons out of court of his being assaulted since that testimony was improper hearsay that was self-serving.

DUI: INSUFFICIENT EVIDENCE State v. Johnson

338 N.W.2d 769 (Neb. 1983)

The court held that the following testimony from the police officer was insufficient to indicate the defendant was under the influence of alcohol to the point of being impaired:

- 1) he smelled alcohol on defendant's breath;
- 2) defendant had watery eyes;
- 3) defendant walked to police car in slow, deliberate manner.
Id. at 772.

DUI: UNCOUNSELED PRIORS State v. Dowd

478 A.2d 671 (Me. 1984)

The court held it impermissible to use a prior adjudication for DUI to enhance the penalty on the present DUI conviction when the prior conviction was one where the defendant was not represented by counsel.

Ed Monahan
Assistant Public Advocate
(502) 564-5258

'Code' overhauls juvenile laws

Fifth in a series

By Michele Day
Kentucky Post Staff Writer

Kentucky's new juvenile code aims at keeping children out of jails and putting hard-core delinquents into locked facilities longer.

The one-inch thick procedural manual — six years in the making — shifts the emphasis in juvenile services in the commonwealth from incarceration to home care.

Runaways and truants no longer will languish in county jails, where the risk of suicide is greatest. Youths charged with minor crimes will face family counselors instead of



THE YEAR OF THE CHILD
KIDS ON TRIAL

Juvenile judges.

Hard-core criminals no longer will get off light because of age. Felons and repeat offenders will face longer confinement in treatment centers.

The 1986 General Assembly set aside \$10.7 million for juvenile justice, residential programs and child protective services. Some of that increase will enable the state to implement provisions of the code, which revises juvenile laws and prescribes court procedure.

The changes, which will go into effect July 1, 1987, will reduce the number of kids in jail, lighten the caseloads for judges, create juvenile court staffs for each judicial district and toughen the penalties for serious crimes, authors of the code say.

"It's a radical departure from the treatment most juve-

niles are getting from judges now," said David Richart, executive director of Kentucky Youth Advocates and one of the authors.

"There's a large sentiment now to lock juveniles up."

The lawyers, legislators and youth advocates who put together the code believe the best way to help children is to keep them out of the juvenile justice system.

"We want to get them in programs before they get in the court system and realize how ineffective it can be in dealing with children," said state Sen. Mike Moloney, a

Please see CODE, 2K

Code

2K The Kentucky Post, Thursday, August 14, 1986

Continued from Page 1K

Lexington Democrat who pushed the package through the legislature.

"The goal of the code is to try to emphasize that we should use the least restrictive alternative. The bottom line is to stay out of the juvenile's life as much as possible as far as court proceedings."

The state's juvenile courts handled 42,659 cases last year. Moloney believes the code will cut the caseload in half and empty county jails and detention centers of juveniles.

Juvenile authorities put 606 children charged with minor offenses in jails and juvenile detention centers in 1985. Under the new code, status offenders — such as runaways and kids who skip school — can only be held in a secure detention center separate from the county jail.

"Those children don't need the long arm of the law; they need support and help," Richart said.

The state Cabinet for Human Resources will send social workers into the home to work with the child and his family. The state also may send the child to day-treatment schools or private treatment facilities such as Maplewood in Boone County, Holly Hill in Campbell County and Covington Protestant Children's Home in Covington.

The primary tool of juvenile authorities will be diversion, a form of probation that enables a child to erase charges by following prescribed guidelines.

The diversion or "informal adjustment" may include a cur-

Funds for juvenile services

The 1986 General Assembly set aside about \$10.7 million for juvenile justice, residential programs and child protective services. Here is a breakdown of where that money will go:

- \$3,400,000 — For juvenile court staff who will assist district courts in every judicial district. These staff will handle nearly 42,659 cases that are referred to Kentucky's juvenile courts.
- \$750,000 — For costs of attorneys to represent children in juvenile court proceedings, beginning in FY 1987-88.
- \$411,400 — For 12 youth diversion homes to serve 36 children in FY 1987-88.
- \$1,667,400 — For five new

group homes for juveniles to serve 222 children over a two-year period.

- \$1,057,000 — To provide in-patient emergency psychiatric evaluations for 60 children with emotional problems, beginning January 1, 1988.

- \$2,027,400 — For a 32-bed secure treatment facility to serve 107 public or youthful offenders over the plennium.

- \$350,000 — For crisis assistance to 700 families whose children would otherwise be removed from their homes and placed in foster care.

- \$1,109,600 — To subsidize the adoption of 150 special needs children.

SOURCE: Kentucky Youth Advocates

few, enrollment in an alcohol or drug treatment program or counseling at a social service agency.

Juvenile authorities in Kenton, Boone and Campbell counties already use diversion under agreement with juvenile judges.

The code calls for juvenile court staffs in each judicial district. The employees — called "designated court workers" — will operate under the state Administrative Office of the Courts and handle cases that don't need to go before a judge.

"One of the criticisms of juvenile court systems throughout the country is that judges are overwhelmed by the number of cases they must hear," Richart said. "This allows judges to become involved in the most complicated cases only."

Rudi Lee, who heads the ju-

venile department in Kenton County, said the new system will be similar to the current setup in Northern Kentucky. But the court designated workers will replace juvenile officials in 14 counties, including Boone, Campbell and Kenton.

Many of the displaced juvenile authorities probably will apply for the designated worker positions, Richart said.

The General Assembly authorized \$2 million for 12 youth diversion homes and five group homes, and \$2 million for a 32-bed treatment facility near Louisville for 107 serious offenders.

Additional space will be needed because judges will be able to keep hard-core criminals off the street longer. Kids categorized as serious youthful

offenders currently average six to nine months in treatment.

Hard-core delinquents will undergo treatment in a state-run residential facility until they turn 18. The state then will be allowed to parole them, send them to adult prisons or extend treatment for six more months.

About 224 kids could be convicted as serious youthful offenders each year, according to Anna Grace Day, the cabinet's social services commissioner.

Juveniles must be convicted of felonies such as murder and armed robbery and be a certain age with prior convictions to be committed as a serious youthful offender. Most serious youthful offenders will go to the new treatment facility or Central Kentucky Treatment Center in Louisville where boys convicted of serious offenses are sent now.

Critics of the code fear the longer commitments for serious offenders will crowd kids convicted of less serious crimes out of treatment facilities. The state currently is struggling to reduce a waiting list for treatment.

The code also provides money for attorneys to represent children in juvenile court and outlines the rights of youngsters who are mentally ill, abused and neglected.

"The code is not a panacea," Richart said.

"All it is, is a major improvement. It provides an individual response to each child."

Tomorrow: Community-based solutions

The Power to Vote Not Guilty

by Richard M. Bowers

Since 1670 in England, and ever since, here and now in all fifty states and in every US federal court, every juror in every criminal case has the power to refuse to convict a defendant, regardless of what facts are proven beyond any reasonable doubt (even admitted). They may also disregard the law as given to them by the presiding trial judge.

People who are not familiar with this aspect of US criminal law may not believe that this is so. For more than twenty years after I graduated from Columbia University law school, I was unaware that this power exists. But everyone who has looked into the matter, agrees that it does. Not a single judge or other person minimally acquainted with US criminal laws disagrees or dissents. Every juror has this individual right—I contend it is more than a mere power and is a full legal right—which she or he can exercise at any time, alone. If all the other jurors agree, then the jury brings in a “not guilty” verdict and the defendant is set free.

The power of jurors to vote not guilty regardless of the facts or the judge's charge dates back in Anglo-Saxon common law to 1670, when William Penn and another Quaker, William Mead, were tried in England for preaching in the street, after the Crown's representatives locked the doors of the Gracechurch Street Meeting House. After hearing the evidence, the jury refused, over and over, to bring in any verdict other than that Penn and Mead had preached in the street. Finally, after being locked up for hours and otherwise

Richard Bowers is an attorney who practices in Delhi, New York. Formerly with the US Army Judge Advocate General Corps, he has been arrested four times for anti-nuclear actions. He welcomes letters to his home on Burke Road, Delancey, NY 13752 or calls to his law office (607) 746-7349.

pressured (it is reported that no food or toilet facilities were provided) to bring in a proper verdict, they finally voted not guilty.

The trial judge was furious. He fined each juror for “misconduct” in finding the defendants not guilty. Four jurors who refused to pay were imprisoned. They sued for illegal imprisonment and won, in a case that was heard by twelve judges headed by the English Lord Chief Justice.

Ever since, jurors have had the power (right?) to vote not guilty regardless. We should all be grateful to William Penn and the four courageous jurors whose dangerous defiance of the Crown gave us this power.

Law professors and other scholars may debate whether this universally acknowledged power is technically also a “right.” Exercise of this power can be, and has been, used immorally. For example, white bigots in the Old South have voted not guilty in cases where whites have murdered fellow blacks. But jurors cannot be punished for voting not guilty.

In the US, it is the law that jurors may not even be questioned officially and be required to answer about why they voted not guilty. Jurors can, and often do, voluntarily answer questions from reporters and others about their reasons for doing so. That is OK, probably even when some mean judge orders them not to discuss such matters.

This power to refuse to convict is an important public safeguard against abuses of power by persons who are supposed to enforce the laws equally, but often do not. It is a veto given to residents of a community when they do not approve a particular defendant being punished as a common criminal. Persons who break minor laws in acts of

nonviolent protest, or to follow their conscience, for example, may be found not guilty by any jury. This power gives members of the community the right to curb abuses of power by those in high public office.

But please note this important distinction. Jurors *must* abide by the law and facts proven beyond all reasonable doubt before they can find a defendant guilty in a criminal case.

Although I have not found one judge who, in a written court decision, has said this power does not exist, some judges do not want jurors to be told about it. Some poor quality judges have refused to instruct jurors that they have this power, even when requested to do so, in writing by defendants or their counsel. It is interesting to speculate why judges feel they must suppress this truth. I suggest they may fear people in their own community.

In 1895, our highest federal court, in the case of *Shraf v US* (found at 156 US 51), affirmed that this power existed. As recently as in 1972, an opinion by the then Chief Judge of the federal appellate court for the District of Columbia discussed in detail this power, which is sometimes referred to by lawyers as jury nullification. That judge, David Brazelon, is probably the most widely respected federal judge alive today in the US. The case is *US v Dougherty* (found at 473 F 2d 1113). In his long, excellent discussion of jurors acting as the conscience of the community and voting not guilty regardless, Judge Brazelon states clearly that the trial judge should instruct jurors that this power exists. Beyond that, he says that defendants and their counselors should be permitted to argue extensively to the jury why jurors, as representatives of the conscience of the community, should exercise this power by voting not guilty.

Too often jurors in criminal cases of nonviolent civil disobedience against nuclear weapons have been “forced” by trial judges to vote guilty when they wanted to vote not guilty. After some civil disobedience trials, jurors have stated that they wanted to vote not guilty, but they had never been told that this absolute power to ignore what the judge told them was their right, and that they ought to vote their conscience.

I submit that this power to refuse to convict is important, and perhaps essential, for all peace-loving persons to know about and to use. □

Book Review



William D. Weitzel

COMPREHENSIVE TEXTBOOK OF PSYCHIATRY

Kaplan, HI and Sadock, BJ - Editors
Baltimore: Williams & Wilkins Co.,
Inc., Fourth Edition, 1985

This 2,054 page text weighs 7 pounds and commands a prominent place in my library. One hundred and eighty-six contributors have provided expertise for the stated task of compiling a current and erudite introduction to clinical psychiatry. An eclectic perspective allows for a well balanced presentation that contributes to the acquisition and maintenance of general professional competence. As one of the two leading compendia of what is known in American psychiatry, this book enjoys wide circulation. This text is a frequently used resource by practicing psychiatrists in helping to arrive at a list of differential diagnoses, the development of a dynamic formulation, and the delineation of a treatment plan for the individual patient.

This is not a DSM-III-R. In the spring of 1987, the American Psychiatric Association published Diagnostic and Statistical Manual of Mental Disorders - Revised (DSM-III-R). Most lawyers who interface with psychiatrists are familiar with this latter collection of descriptive diagnoses developed by academic nosologists. DSM-III-R attempts to classify the specific manifestations of various psychiatric disorders and, in the

process, develop a common language for psychiatry.

The Comprehensive Textbook of Psychiatry is much more.

Fifty-four chapters and 201 sections illustrate the encyclopedic breadth of topics covered. Modern psychiatry embraces a bio-psychosocial model with a foundation in medicine. Psychiatrists, as physicians, must have a thorough grounding in general medicine with an emphasis in neurology. Biological psychiatry receives stress because that is where the excitement associated with new discoveries is happening. The different schools of psychology receive thorough discussion because a mechanistic, reductionist view is incomplete in our quest to understand human behavior. Each of us searches for increasing self awareness and attempts to make sense of why we live the way we do. A therapist also needs a theoretical frame of reference which colors how events are interpreted when clinical work with patients takes place. The role of environment and community, as the setting in which we make choices, has received increasing emphasis in the last forty years. The chapters outlining current knowledge about the social determinants and reinforcers of behavior merit the attention given. Finally, an attempt is made to integrate consensus data about the ages and stages of life from infancy to geriatric placement in a nursing center. Law and psychiatry

issues get their due with forty-seven pages.

This text is considered authoritative by practicing psychiatrists. Residents-in-training and medical students use it as a source book for learning basic psychiatry. Psychiatrists are encouraged to read professional journals to keep up with new developments that build on what this resource text has described. If you were to do a scientific literature search on a specific subject and ask what has been written in mainstream (not trendy) psychiatric journals through 1984, the core ideas would be found in the relevant chapter of this book. Each author ends a section with up to fifteen of the most germane references for inquisitive readers to pursue.

My colleagues and I use this text for quick reference to reacquaint ourselves with what we have learned about a clinical problem and to make sure that we are being complete in our assessment and treatment of a particular patient's psychiatric disorder. Use of this material helps us maintain our professional competence and allows us to keep our practice behaviors in line with nationally accepted standards. Although a qualified psychiatrist uses many different resources materials, in addition to his training and experience, this book contains the material necessary for a competent practitioner to include in his professional data base.

Some attorneys act befuddled and look at the confrontation of psychiatric issues with glazed eyes. No need to stay uninformed. Although this text does not make for easy reading to the uninitiated, the authors' terse and concise style does try to build on few assumptions. Most important terms are defined somewhere in the text; however, a good companion piece would be a psychiatric glossary or a medical dictionary. Before talking with a psychiatric expert, an attorney can acquaint himself with the psychiatric issues in a case and begin to formulate the right questions. Let your expert elaborate and clarify psychiatric matters for you and direct you to even more particular references. You educate him about the legal question. Usually psychiatric disorders can be understood from different theoretical perspectives. The school of psychiatry your expert owes allegiance to will determine his approach and color his usefulness for you. Your review in this textbook of the subject germane to a case should acquaint you with your choices of explanations and help determine the kind of expert you seek. There has been much heuristic value in this very diversity of approaches and many innovative clinical treatment programs have followed from a blending of a variety of perspectives when applied to a particular case.

No one point of view holds all the answers - ever.

To whet your appetite, let me highlight some matters relevant to criminal law. Do you agree that aggression can be defined as any form of behavior directed toward another living being who is motivated to avoid such treatment? So, aggression is neither an emotion, need, nor motive. Intentions are private, hidden phenomena and must be inferred from events. Psychiatrists can explain aggression in terms of instinctive behavior or elicited drives or as learned social behavior. Does it matter that some psychiatrists associate sexual arousal with aggression or that pain elicits an aggressive response? Experts differ on how to prevent/control aggression. Choices include punishment, catharsis, and empathy.

What if your client claims that he can't remember? Confabulation may be used to cover up either anterograde or retrograde amnesia. Some of the legitimate explanations of memory loss include vitamin deficiency, history of alcoholism, head trauma, cerebral anoxia, tumors, and even the phenomena of multiple personalities.

Drug abuse in this country has reached pandemic proportions.

Cocaine traffic is described as one of the major corrupting forces in our society. Is the craving associated with cocaine dependence so strong that it can be acquainted with the concept of irresistible impulse? Case reports describe marijuana intoxication as causing paranoid psychosis and the results have been lethal. How often does this explanation fit? The professional literature describes an individual with a phencyclidine (PCP) psychosis as likely to be violent, engage in public masturbation, and to laugh inappropriately. Is such a client safe in a jail? Some hospitals attempt to screen away such patients because of their extreme difficulty to treat safely.

The list of germane topics can be a long one and include the effects of post traumatic stress disorder, paranoid disorders, and partial complex seizures. Suffice it to say that this text merits your consideration as an excellent resource and a current compilation of what is known about psychiatry and what can be expected of a psychiatrist.

Dr. William D. Weitzel is a Diplomate of the American Board of Forensic Psychiatry, and Psychiatry and Neurology. He is the Director of Adult Psychiatry Services at Charter Ridge Hospital, and he is in private practice in Lexington.



Patricia Van Houten

Jury Woman by Mary Timothy, 1974
Glide/Emty Press
San Francisco
\$4.95 paperback

While I was looking for a law review article on products liability, I discovered this book at the University of Louisville Law Library. Like many other trial lawyers, I am fascinated by jurors -- what they think; how they reach

a verdict; what can be done to convince them; will they be offended by this tactic, that theory, this approach, etc.

The author was the foreperson of the jury that acquitted Angela Davis of kidnapping, murder and conspiracy in the early 70's.

Six weeks into the trial Ms. Timothy showed up with an anti-war

button. The defense team must have been quite pleased at this show of independence and individuality.

In addition to being a fascinating historical glimpse at the political issues surrounding the Davis trial, this book gives some helpful insight into the reactions and feelings of a juror, a very honest and special juror.

Ms. Timothy described how ill prepared she felt to be a juror. During the trial but before the deliberations began, she went to the library to check out a book to give her guidance. It was entitled, "What You Need to Know for Jury Duty," by Godfrey Lehman. (One wonders if this rises to the level of juror misconduct requiring a new trial as in the Beverly Hills case where the Sixth Circuit remanded for new trial due to experiments conducted by a juror.)

When the deliberations began, Ms. Timothy knew that she wanted to be the foreperson; she had become very involved in the whole judicial process, in the facts of the case, and in the personalities of those involved. She was careful not to push the other jurors too fast and she came up with a procedure to ensure the sharing of ideas and opinions prior to vote taking.

The book describes her exhilaration through the process of deliberations, her understanding of group process, and individual personalities. Also interesting was her reaction to the judge, prosecutor, defense attorneys, and the defendant. She felt that after voir dire was finished the jury was basically ignored by the judge and attorneys.

In a Bill of Rights for Jurors she sets forth the following: (1) the right to adequate remuneration;

(2) the rules of the game should be fully described re: taking notes, asking questions, and getting clarification of issues; (3) the right to make individual, independent judgments and to ignore any prejudicial statements, rulings, or attitudes of the judge; (4) the right to serve on juries which include people from varied socioeconomic groups; (5) the right to have minorities included on the jury; (6) the right not to be stereotyped by allowing extended voir dire by the attorneys to fully explore biases (she also advocates participation by the defendant at this stage); (7) the right to privacy through closed individual voir dire; (8) the right to be free from threats, both direct and indirect, including sequestering of the jury; (9) the right to be free from investigation mainly to avoid the development of governmental files.

She ends: "Power to the jury."

[Aside: Several months ago I reviewed a study of sexism in the courtroom. The 1987 Kentucky Bar Association Convention will conduct a session entitled "The Gender Bias Problem in the Legal Community" on Thursday, June 11, 1987, at 2:35 p.m. to 4:45 p.m. The Honorable Robert Stephens, Chief Justice, will introduce the session.

Panelists include the Honorable Sol Wachtler, Chief Justice of the New York Court of Appeals, and Honorable Marilyn Loftus, Judge of the New Jersey Superior Court.]

Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has.

Margaret Mead

Continued from Page 2

I'd be here that long when I started because I saw problems and thought I might leave within 2 or 3 years. I think it had a lot to do with the adversarial process.

I think it takes a certain type of personality to be a public defender, one that's more aggressive and it took me a little while to develop that. Before I came down here I wasn't used to this type of system. At first, it seems like every time you went to court no matter how small the problem and no matter how it could have been worked out it was battle for battle sake. George Sornberger (then Somerset directing attorney) is the reason I stayed. His enthusiasm for the job rubs off on everybody, you can't help but get excited about it.

Now that I've been here and worked my way through the system and most of the problems that can come up as a public defender, I feel more at ease in the system. Now that I've been here for a while it's not like that completely, plus I've changed so that if it has to be like that so be it.

You're understaffed in the Somerset Office. What problems is that creating?

I think Phil Chaney is tremendous in our office, he's doing the bulk of what George did. He has McCreary County under control and that helps quite a bit. Then the rest of us help out in Wayne County to the extent we can. But it is creating an awful lot of problems and it doesn't look like the position will be filled until the end of 1987.

Cris Brown
Paralegal

5TH DPA TRIAL PRACTICE INSTITUTE

The Department of Public Advocacy will conduct its fifth Trial Practice Institute at Eastern Kentucky University in Richmond from November 4 - 7, 1987.

There will be presentations and demonstrations on courtroom communication, preparation and theory of the case, voir dire, opening state-

ments, direct examination, cross-examination, cross-examination of experts, and closing arguments. Every participant will perform each of these aspects of the trial in a small group with critiques from two faculty members. Each participant will be video taped for their own review.

This is a working seminar with preparation and active participation

essential. Registration will be limited. Mark your calendars now.

National faculty will be presenters at the Institute. This kind of intensive training is the most beneficial for the practicing criminal defense lawyer.

Further information concerning this seminar is available from Ed Monahan (502) 564-5258.

Man wrongly convicted of murder is freed

If people have run out of convincing arguments against the death penalty, they should take a look at Bobby McLaughlin.

The New York Civil Liberties Union began representing McLaughlin, a young man from Brooklyn, in July, 1985. McLaughlin had been convicted in 1980 with a co-defendant of felony-murder and received a life sentence.

The sole evidence linking McLaughlin to the crime was the eyewitness identification of one 15-year-old youth. Over the past several years, however, evidence surfaced which called into serious question the reliability of the witness's testimony. Most disturbing, a tragic mistake had occurred when the teenager was looking at photographs in order to identify the killers. After the boy identified McLaughlin's co-defendant from a police com-

puter, investigating officers noticed that the man had a prior crime partner named "Robert McLaughlin." The detectives then chose from a file drawer the picture of someone named "Robert McLaughlin," but not the co-defendant's prior crime partner.

This led to a series of suggestive remarks that improperly influenced the witness, who overheard the chief investigating officer tell a fellow officer that "McLaughlin and [the co-defendant] had been previously arrested together on another case." Their erroneous statement served as a reaffirmation of McLaughlin's guilt in the boy's mind. McLaughlin had in fact never been convicted of any serious offense. The police and the prosecutor discovered the mistaken identity before the trial, but never brought it to the boy's attention.

A ten-month investigation into the case by Brooklyn District Attorney Elizabeth Holtzman brought to light these facts, including the discovery that the eyewitness had been "quivery" about his identification. The study concluded that the boy had been "susceptible to suggestion from the statement made at the precinct prior to his corporeal identification of McLaughlin." Armed with the results of Holtzman's investigation, the NYCLU filed a motion in Brooklyn Supreme Court to vacate the McLaughlin conviction. On Liberty Weekend in 1986, when New York City threw a party for millions of guests in celebration of this country's freedom, Robert McLaughlin became a free man.

CIVIL LIBERTIES, Winter 1987

Killers May Share Childhood Traits

GANNETT NEWS SERVICE

DALLAS—Children who grow up to later commit murder suffer a constellation of similar traits that may help experts predict which troubled youngsters will go on to kill.

As children, the murderers suffered severe head injuries, were extraordinarily violent and had close relatives with major psychiatric problems, an unusual survey of violent juveniles shows.

The study is the first of its kind because it looked at the children before they killed and followed them for six years. In the years since the study was started, 11 boys have gone on to murder, reports Dr. Dorothy Otnow Lewis, professor of psychiatry at New York University School of Medicine.

Lewis' work, and that of a handful of other mental health professionals, provides a rare glimpse into the world of the violent child.

In another study of 51 youngsters admitted to a psychiatric hospital, Lewis and her colleagues have found that mentally disturbed girls are becoming more violent.

Psychiatrically disturbed females traditionally have been far less violent than their male counterparts, but this new study suggests they are now equally likely to display violent behavior. Aggression, once considered largely a male trait, apparently is becoming equalized among the sexes, say the researchers who conducted the study.

Both studies were presented here Wednesday at the annual meeting of the American Psychiatric Association.

Lewis' study of children who eventually murder portrays a common childhood of bizarre and extraordinarily violent events. One boy choked a bird at the age of 2, and threw his dog out the window at age 4. At 18, he raped and stabbed a woman 13 times.

This same boy had fallen off a roof and injured his head at age 8, suffered seizures in infancy and had a severely mentally ill father who beat him repeatedly, according to Lewis.

"You see this picture over and over and over again," said Lewis.

Cincinnati Enquirer, May 23, 1985

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truth. The Court lowered the showing the accused must make in order to have a hearing in situations where the state wants the informant to remain anonymous.

8) Commonwealth v. Werks, Pa. Super. Ct. 40 Cr.L. 2459 (2/10/87). Police entered the defendant's property lawfully to tell him to extinguish a fire. While there they saw illegal slot machines in a shed. They entered the shed and seized the machines without a warrant. The Court held that despite seeing the machines in plain view, a warrant was required prior to seizure. The Court differentiated this case, where the intrusion occurred after the plain view, and a case where the item is seen inadvertently after the initial intrusion, where no warrant is required;

9) Commonwealth v. Anderson, Pa. Super Ct. 40 Cr.L. 2429 (2/2/87). The police received a description of the burglar, and picked up a man who matched the description. The Court held that by transporting him two blocks without his consent so

the witness could look at him the police had arrested him. Because they had no probable cause, the arrest was illegal;

10) State v. Novembrino, N.J. Sup. Ct. 40 Cr.L. 2317 (1/7/87). Yet another state supreme court has rejected the good faith exception to the exclusionary rule, rejecting Leon, supra, as a matter of state law. The Court referred to records which demonstrated that "the grant of motions to suppress evidence obtained pursuant to defective search warrants is relatively uncommon and apparently poses no significant obstacle to law-enforcement efforts." The Court further rejected the good faith exception because it will "inevitably and inexorably diminish the quality of evidence presented in search warrant applications. By eliminating any cost for non-compliance with the constitutional requirement of probable cause, the good-faith exception assures us that the constitutional standard will be diluted."

11) State v. Tarantino, N.C. Ct. App., 40 Cr.L. 2323 (12/16/86). A

police officer's shining a flashlight to look inside a padlocked building following a tip that marijuana was growing inside violated the owner's reasonable expectation of privacy, and was thus a 4th Amendment violation;

12) Dees v. State, Tex. Ct. App. 13th Jud. Dist. 40 Cr.L. 2271 (12/11/86). Texas statutes do not allow the use of any evidence obtained in violation of the law or the constitution. Thus, the Court says, the "good faith," "independent source" and "inevitable discovery" exceptions would not be applicable in Texas. Whoever complained about federalism?

13) People v. Sundling, Mich. Ct. App., 40 Cr.L. 2176 (7/8/86). Michigan, too, refuses as a matter of state law to go along with Leon's good faith exception.

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