The Advocate

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EDITOR'S NOTE

The August Newsletter is the first to go to print since the premeditated killing of John Spenkelink by the State of Florida. It is appropriate then, to lead this issue with the following article by Robert Pittman which appeared in the St. Petersburg Times of July 1, 1979, and is reprinted here with permission.

THE VALUE OF A DOG'S LIFE AND A HUMAN LIFE

This death warrant was signed, not by Gov. Bob Graham, but by the president of Floridians Against Executions (FAE).

"Whereas the state of Florida has embarked on a series of executions; and whereas citizens of the state in order to form valid opinions of executions need to know about them; and whereas the governor has arranged a deliberate program to hide the reality of executions from the citizens in whose name they are performed; now, therefore, is issued this warrant directing the public execution of one Mixed Breed Dog at 8 a.m., Wednesday, July 4, 1979, at Fourth Street and Central Avenue in the city of St. Petersburg, Fla."

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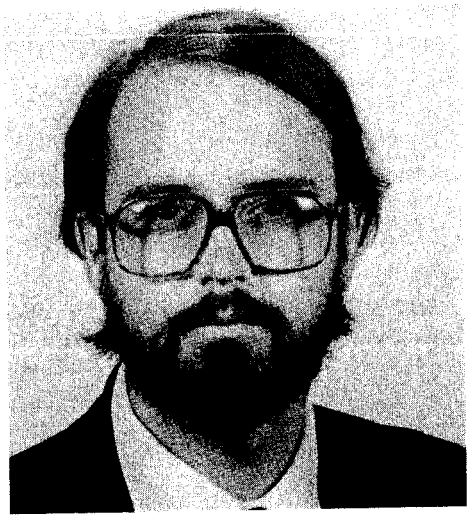
PUBLIC DEFENDER OF THE MONTH



Rick Receveur, the Public Defender of the month, can truly be described as "a legend in his own time." Rick began his amazing public defender career as an intern in the Jefferson County Public Defender's Office for three semesters during law school at the University of Louisville. When he graduated from law school in 1975, he became a full time public defender. He has served with tremendous competency and dedication.

The word in the Hall of Justice in Louisville is that when Rick is appointed to defend someone the prosecutor immediately starts offering

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APPELLATE PROCEDURE

In order to enable the Office For Public Advocacy to properly process an appeal for an indigent defendant from a circuit court to the appropriate appellate court, local public defenders must comply promptly with the regulation and statute governing the processing of appeals. (See 504 KAR 1:030 and KRS 31.115). The regulation and statute were promuglated for the sole purpose of ensuring that an indigent defendant will be timely afforded his constitutional right to appeal if he desires to appeal his conviction.

Once the defendant does express his desire to appeal and once the notice of appeal and the designation of record have been duly filed, the local public defender should immediately notify the Office For Public Advocacy in Frankfort if he wishes the Office to handle that defendant's appeal. Included in that notification must be the following: 1) the defendant's name, his present address, and, if the defendant is not in one of the penal institutions, his telephone number; 2) the name, address and telephone number of the court reporter; 3) a statement indicating whether or not the defendant has been released on bail pending the appeal and, if so, the amount of the bail; and, 4) a brief statement of any suspected errors which occurred during the trial. Certified copies of the final judgment and the notice of appeal should be sent with the notification.

Once this notification is received in the Office For Public Advocacy, the primary responsibility for processing the appeal to the appropriate appellate court falls within the hands of the Office; however, it must be remembered that a local public defender's responsibility for his defendant's case continues until the record on appeal is filed in the appropriate appellate clerk's office (an example of what a local public defender may be called upon to do subsequent to sending our Office the notification is to procure an extension of time in the circuit court to have the record certified as being complete). All notifications made pursuant to the regulation and statute should be sent to the Office For Public Advocacy in care of Tim Riddell. If any questions arise concerning appellate procedure, feel free to contact Tim at 502-564-5214 and he will be glad to answer them.

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good deals. Rick has been a principal participant in the Death Penalty Task Force at the Louisville PD office and has tried a number of capital cases. None of his clients have been sentenced to death. He has also fought hard to prevent the prosecutors from seeking the death penalty in cases where the crime charged was allegedly committed before the new statute was enacted. Rick's anti-death penalty work has been outstanding.

The case of which Rick is the proudest is Charles Erwin Williams. Mr. Williams was sentenced to two life sentences for murder and robbery after a jury trial. Rick then uncovered evidence that the prosecutor had arranged for the chief prosecuting witness to receive very favorable treatment and concealed that fact at trial. Rick won a new trial for Mr. Williams on appeal. Williams v. Commonwealth, Ky., 569 S.W.2d 139 (1979). Williams is now free on bond.

Rick is always willing to take time out from his very busy schedule to talk with a fellow attorney who has a puzzling problem. He also manages to play his banjo with a bluegrass group on the side.

Unfortunately for the public defender system Rick, who has just tried three capital cases in a month, has resigned as of August 1 to begin private practice. We thank him for the incredible job he has done during his long public defender career.

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-NOTE-

Protection & Advocacy for the Developmentally Disabled

UNITED STATES SUPREME COURT RULES ON WHETHER COLLEGE MUST MODIFY CLINICAL NURSING PROGRAM TO ADMIT HEARING IMPAIRED STUDENT

Based in part on "It Isn't the Greatest, But Put Away the Hemlock: The Supreme Court's decision in Southeastern Community College v. Davis or Don't Get Your Legal Analysis From the News Media" by Robert L. Burgdorf, Jr., copies of which are available upon request to Marie Allison 1-800-372-2988.

On July 11, 1979, the Supreme Court of the United States in a unanimous decision ruled for the first time on the merits of a claim under Section 504 of the Rehabilitation Act of 1973. This Act prohibits discrimination against an otherwise qualified handicapped individual in federally funded programs "solely by reason of his handicap." The case, Southeastern Community College v. Davis, _____ U.S. _____ 47 L.W. 4689, involved a woman who suffers from a serious hearing disability and was denied admission to the nursing program of Southeastern Community College because that facility believed that her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients.

The reaction to this decision by the news media was to distort the impact and import of the decision by printing statements similar to the following banner headline which appeared on Page A-1 of the Washington Post on June 12, 1979. "The Supreme Court ruled , unanimously yesterday that education institutions don't have to lower or substantially modify their standards to admit handicapped persons."

Fortunately, the Supreme Court's decision was neither that broad nor that negative. The narrow issue which the Court addressed was stated at the beginning of the opinion as follows:

"This case presents a matter of first impression for this Court: Whether Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an 'otherwise qualified handicapped individual' in federally funded programs 'solely by reason of his handicap,' forbids professional schools from imposing physical qualifications for admission to their clinical training programs."

As can be seen, the scope of the decision was actually so narrow as to only apply to consideration by professional schools in relation to their admissions qualifications to their clinical training programs.

The outcome of the decision reflects the limited precedential value of the case:

"Nothing in the language or history of Section 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case

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that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed." (emphasis added)

It is thus apparent that the Court limited the impact of its decision through its specific statement of the issue and by its reliance upon the "reasonableness" of the qualifications sought to be imposed. Accordingly, whether or not an advocate agrees with the Court's subjective determination of what constituted "reasonable" accommodations in the context of this particular fact situation, the advocate certainly has the opportunity to distinguish this case factually from one in which she or he is seeking reasonable accommodations under Section 504.

Despite the fact that many advocates for handicapped persons view this decision with disappointment, there are some position aspects to the decision:

1) The Court interpreted the meaning of Section 504 as follows:

"It requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program 'solely by reason of his handicap,' indicating only that mere possession of a handicap is not a permissible ground for assuming an inability in a particular context." (emphasis added)

This interpretation is a satisfactory one in the opinion of many advocates for rights of persons with handicaps.

2) The Court generally recognized the validity of HEW regulations under Section 504.

3) The Court acknowledged that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory."

4) While the Court specifically stated that it did not address the issue of whether a private cause of action exists under Section 504, it implicitly ruled that there is such a cause by virtue of its addressing the merits of the case. It could have failed to decide the case on a jurisdictional basis and ruled specifically that there is no private cause of action.

There are obviously also some negative aspects to the case which must be acknowledged:

1) The Court's decision allows colleges to continue to design their clinical programs in a generalized manner, requiring all clinical program students to learn a vast array of skills. Thus, even though a handicapped student may be capable of mastering a limited number of skills which would qualify him or her for a specialized practice or for a particular job, that student may be denied the opportunity to receive that training solely because the handicap prevents the person from participating in the total training program. This holding is particularly disappointing in light of the Court's recognition in a footnote that "there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly [respondent] could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities."

Apparently, the Court was more concerned with preserving the status quo of the training program than ordering modifications which would permit Ms. Davis to receive training appropriate for employment at the positions for which they acknowledge she could become qualified with training. The Court viewed the modifications proposed by Ms. Davis as a "fundamental alteration" of the training program and considered those changes to be beyond what the regulation requires.

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RCr 11.42 MOTION VS. PETITION FOR WRIT OF HABEAS CORPUS: WHICH IS APPROPRIATE?

On January 1, 1963 Kentucky Rule of Criminal Procedure, RCr 11.42, became effective. That rule entitles a prisoner, who claims he has a right to be released from custody under a sentence subject to collateral attack to proceed by motion in the court which imposed the sentence to vacate, set aside or correct it. RCr 11.42(1). The former Kentucky Court of Appeals has stated that the remedy afforded by this rule is comparable to the remedy provided federal prisoners by 28 U.S.C.A. Section 2255, the habeas corpus statute for prisoners in federal custody.

In Ayers v. Davis, Ky., 377 S.W.2d 154 (1964), the Court of Appeals discussed the procedural ramifications of the enactment of RCr 11.42 on the state writ of habeas corpus by comparing it with 28 U.S.C.A. Section 2255. The Court stated that the federal statute expressly suspends the right of a federal prisoner to proceed by a petition for a federal writ of habeas corpus if the applicant fails to apply by motion for relief to the court in which he was sentenced or if that court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective. Even though RCr 11.42 has no such express provision, the Court held that its purpose plainly implied it. Accordingly, in Ayers, the Court upheld a circuit court's dismissal of a state habeas corpus petition since no showing was made that an RCr 11.42 motion would be inadequate.

Judge Montgomery dissented in this decision for two reasons. See Ayers v. Davis, Ky., 377 S.W.2d 878 (1964). First, he felt that reliance on 28 U.S.C.A. Section 2255 was misplaced since the constitutionality of its suspension of the federal writ of habeas corpus had never been passed on by the United States Supreme Court. Also, unlike 28 U.S.C.A. Section 2255, RCr 11.42 contained no express provision as to the suspension of the state habeas corpus writ.

Second, Judge Montgomery felt that the provisions for habeas corpus traditionally provided prompt and immediate consideration and should not be subservient to the slower RCr 11.42 motion. Despite Judge Montgomery's reasoning and his claim that the suspension of the writ was unconstitutional, his views have never been accepted and the principle enunciated in Ayers continues to be observed today. (A petition for a writ of certiorari in the Supreme Court of the United States by Ayers was denied on June 15, 1964. See 84 S.Ct. 1891).

The Court of Appeals addressed Judge Montgomery's concerns in 1969 in Richardson v. Howard, Ky., 448 S.W.2d 49 (1969) when a habeas corpus petition alleged that due to the length of time needed to pursue a remedy under RCr 11.42 that it was inadequate. The Court disallowed this as a factor of inadequacy stating that time considerations were balanced by the fact that in most situations the prisoner is benefitted under a motion pursuant to RCr 11.42 since it is directed to the sentencing court, not the circuit court of the county in which he is incarcerated, therefore broadening the scope of the remedy by affording the court all pertinent records relevant to the issue.

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The Court has also held that the mere denial of an RCr 11.42 motion does not establish inadequacy and that the proper course of action upon such a denial is an appeal, not the filing of a petition for a writ of habeas corpus. Waddle v. Howard, Ky., 450 S.W.2d 233 (1970). The remedy under RCr 11.42 is also not inadequate where one such motion has been pursued omitting an allegation raised later in the habeas corpus petition. Walker v. Wingo, Ky., 398 S.W.2d 885 (1966). If the issue reasonably could have been raised in the RCr 11.42 motion, RCr 11.42(3) disallowed raising it in a subsequent RCr 11.42 motion. The fact that a habeas corpus petitioner lost his RCr 11.42 remedy on that ground does not mean that the rule does not provide an adequate remedy allowing resort to habeas corpus. The Court has stated that the rule itself makes plain the purpose of placing a reasonable limit on the number of post-conviction proceedings so as to prevent a never ending flood of such motions and petitions.

The bottom line of the cases cited above is that RCr 11.42 has virtually done away with the habeas corpus remedy in the Commonwealth. In all cases where the conviction is subject to collateral attack the motion under RCr 11.42 should be considered as the primary vehicle with which to proceed. However, the habeas corpus petition is not totally useless. For instance, in Herndon v. Wingo, Ky., 399 S.W.2d 486 (1966) the appellant claimed a right to be released based not on the invalidity of his conviction but that Kentucky had effectively forfeited its jurisdiction of him by releasing him to Tennessee without complying with the proper transfer procedures outlined by KRS 440.330. Since the appellant did not claim that his sentence was subject to collateral attack, making no assault on the validity of the original conviction, the Court held the petition for a writ of habeas corpus to be the proper procedure.

It should also be kept in mind, however, that in some situations neither RCr 11.42 nor the writ of habeas corpus will be of any use. In Brown v. Wingo, Ky., 396 S.W.2d 785 (1965), a habeas corpus petitioner alleged that an RCr 11.42 motion would be inadequate because the issue, illegal search and seizure, had been held not to be a ground for relief under RCr 11.42. But even though RCr 11.42 could not be utilized the Court affirmed the circuit court's dismissal of Brown's habeas corpus petition since the issue was one that could have been raised on appeal and "habeas corpus cannot be used to undo an error that could have been corrected by timely appeal."

RECENT U.S. SUPREME COURT CAPITAL CASE LAW

On May 29, 1979 the United States Supreme Court decided Green v. Georgia, ____ U.S. ____, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). Green was coindicted with Moore for capital murder with the aggravating factor of rape. They were tried separately, and both were sentenced to death.

In his sentencing proceeding, Green was prevented from introducing testimony of Thomas Pasby to the effect that Moore told him that he killed the victim, shooting her twice after directing Green to run an errand. The trial court ruled that Pasby's testimony was inadmissible hearsay. The Supreme Court held that the exclusion of the hearsay testimony, which was highly relevant to a critical issue in the punishment phase, denied Green a fair trial on the issue of punishment in violation of fourteenth amendment due process.

Interestingly, the Court noted that the state considered the testimony of Pasby sufficiently reliable to use it against Moore at his trial, and base his death sentence on it.

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More than just being interesting, Justice Rehnquist, in dissent, uttered with unrestrained outcry that the majority was embalming the law of evidence in the due process clause, and that in effect the Court had concluded that "...all capital defendants who are unable to introduce all the evidence which they seek to admit are denied a fair trial."

WEST'S REVIEW OF RECENT COURT DECISIONS

A number of important U.S. Supreme Court decisions dominate the case law for the months of May and June.

In Kentucky v. Whorton, 25 CrL 82 (May 21, 1979), the Court reviewed the decision of the Kentucky Supreme Court in Whorton v. Commonwealth, Ky., 570 S.W.2d 627 (1978). In that case, a majority of Kentucky's highest court, interpreting Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978), declined to entertain the possibility of harmless error in determining whether the trial court's refusal to instruct the jury on the presumption of innocence constituted reversible error. The U.S. Supreme Court reversed, stating that any holding that the error violated due process must be reached "in light of the totality of the circumstances." It should be noted that this decision has no immediate impact in Kentucky in view of the Kentucky Supreme Court's earlier decision in Watson v. Commonwealth, Ky., 26 K.L.S. 12 (1979), electing as a matter of state law not to apply the harmless error doctrine.

The Court reexamined the legality of custodial interrogation conducted with less than probable cause for arrest in Dunaway v. New York, 25 CrL 27 (June 4, 1979). Dunaway had been involuntarily taken to police headquarters where he made incriminating admissions. The Court rejected the contention that, because Dunaway was not technically under arrest, he could be detained merely on the basis of "reasonable suspicion." The Court observed that "detention for custodial interrogation - regardless of its label - intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." The Court then concluded that, inasmuch as Dunaway had been unlawfully detained, his resultant statements were inadmissible against him.

In Lo-Ji Sales v. New York, 25 CrL 3135 (June 11, 1979), the Court reaffirmed the fundamental requisites of a search warrant. The warrant challenged in Lo-Ji authorized the seizure of certain named obscene films plus "the following items which the Court independently has determined to be possessed in violation of Article 235 of the Penal Law. . . ."A magistrate then accompanied police to the premises to be searched in order to complete the warrant by identifying any obscene matter other than the named films. The Supreme Court found this procedure "reminiscent of the general warrant or writ of assistance of the eighteenth century." The warrant was issued in violation of the Fourth Amendment in that it "did not purport to particularly describe . . . the things to be seized." The fact that a magistrate had completed the warrant did not validate it because the magistrate had not acted in a "neutral and detached manner" but as "a member, if not the leader of the search party." Consequently, all matter other than the named films was illegally seized.

In Arkansas v. Sanders, 25 CrL 3096 (June 20, 1979) the Court was confronted with the warrantless search of luggage removed from a lawfully seized car. The Court held the search unreasonable because, once the car had been stopped and the luggage was secured by police, exigent circumstances ceased to exist. The luggage

was not "attended by any lesser expectation of privacy" merely because it was taken from a car.

The Court opened the doors of federal habeas corpus relief to state prisoners allegedly convicted on insufficient evidence in Jackson v. Virginia, 25 CrL 3229 (June 28, 1979). Federal habeas has previously been available only upon a showing that the petitioner's conviction rests on "no evidence." Thompson v. Louisville, 326 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1959). The new test, as stated by the Court, is whether "any rational trier of fact [could] have found the essential elements of the crime beyond a reasonable doubt." The decision is significant since the test announced is compelled by due process. Thus, it appears that the Sanders test displaces the rule enunciated by the Kentucky Supreme Court in Trowel v. Commonwealth, Ky., 550 S.W.2d 530 (1977), that a conviction will stand if "it would not be clearly unreasonable for a jury to find the defendant guilty."

Two decisions rendered by Kentucky's appellate courts require discussion.

In an important decision the Kentucky Supreme Court has held that, in the absence of consent of the owner or authorized user, a warrant is required to search the interior of an impounded car. Wagner v. Commonwealth, 26 K.L.S. 12 (May 1, 1979). "Mere legal custody of an automobile by law enforcement officials does not automatically create a right to rummage about its interior." The Court's holding is based on Section 10 of the Kentucky Constitution and thus is not at odds with the holding of the U.S. Supreme Court in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L. Ed.2d 1000 (1976), that the inventory search of an impounded automobile is reasonable under the Fourth Amendment. The decision is of major significance because it adopts a more rigorous "reasonableness" standard with respect to automobile searches than the U.S. Supreme Court has been willing to discern in the Fourth Amendment.

And finally, the Court of Appeals in Ivey v. Commonwealth, Ky.App., decided June 29, 1979, has held that an indigent is entitled to appointment of counsel to represent him on a motion pursuant to RCr 11.42. The lower court had refused Ivey's request for counsel on the grounds that Ivey's pro se RCr 11.42 motion could be disposed of without a hearing. The Court of Appeals, reversing, found that "substantial rights" of a movant under RCr 11.42 are at stake regardless of the absence of need for a hearing since the failure to include all available grounds in a first motion may preclude them from being raised later.

* * * * * * *

FEDERAL DISTRICT COURT OVERRULES KENTUCKY SUPREME COURT

In two cases in the past few months, the United States District Court for the Western District of Kentucky has made it clear that comments on post arrest silence will not be tolerated. In Hockenbury v. Commonwealth, Ky., 565 S.W.2d 448 (1978) and Mishler v. Commonwealth, Ky., 556 S.W.2d 676 (1977), the Kentucky Supreme Court held that where a defendant makes a statement at the time of arrest, then a comment by the prosecutor on his post-arrest silence does not constitute a constitutional violation. Not so said the United States District Court. In both cases, a petition for writ of habeas corpus was granted, the Court holding that such comments by the prosecutor were constitutional error and were not harmless. The holdings were all the more remarkable because in both trials defense counsel had failed to object to the prosecutor's comments.

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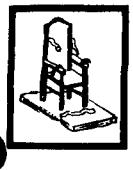

THE DEATH PENALTY

Death is Different

DEATH SENTENCES CHANGE:
RESULT DOES NOT

This is an article by John Filiatreau. It appeared May 22, 1979. Copyright (c) 1979, The Courier-Journal. Reprinted with permission.

A look into history, to help put into perspective last week's signing by Florida Governor Robert Graham of death warrants against John Spenkelink and Willie Darden, whose executions are tentatively scheduled for tomorrow:

On March 2, 1757, in Paris, Damiens of the Regicide is condemned to death.

By royal order, he is "to make the amende honorable before the main door of the Church of Paris," then to be "taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, was and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds."

On April 1, the Gazette d'Amsterdam reported of the public spectacle: "Finally, (Damiens) was quartered. This last operation was very long, because the horses used were not were not accustomed to drawing; consequently, instead of four, six were needed .... The spectators were all edified by the solicitude of the parish priest of St. Paul's who despite his great age did not spare himself in offering consolation to the patient."

This ugly narrative perhaps ought to make us grateful that we've progressed beyond such primitive and public methods of execution.

But capital punishment today, while certainly less spectacular, is just as final and nearly as ugly. We just aren't invited to see the ultimate proof of the state's dreadful power.

French philosopher Michael Foucault calls it one of the greatest changes in the recent history of criminal justice: "The disappearance of torture as a public spectacle."

According to Foucault's analysis, the change means that: "Punishment... will tend to become the most hidden part of the penal process. This has several consequences: it leaves the domain of more or less everyday perception and enters that of abstract consciousness; its effectiveness is seen as resulting from its inevitability, not from its visible intensity; it is the certainty of being punished and not the horrifying spectacle of public punishment that must discourage crime.... As a result, justice no longer takes public responsibility for the violence that is bound up with its practice."

Though our executions take place in secret, and exist in our minds only in the abstract, in the United States we are the government, and we are the executioners. I wonder how much progress we really have made.

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If capital punishment is to be a national policy, my feeling is that we ought to be forced to deal with it on the most visceral level. If we are the executioners (and we are), then we ought also to be witnesses.

Perhaps the jurors who condemn a man to death should be required to witness his execution; or perhaps all our executions should be made public, and should take place on television.

The arguments against capital punishment are compelling. No nation in history has ever managed to apply the death penalty fairly. In our country, disproportionate numbers of blacks and poor people have died on gallows, in electric chairs and in gas chambers.

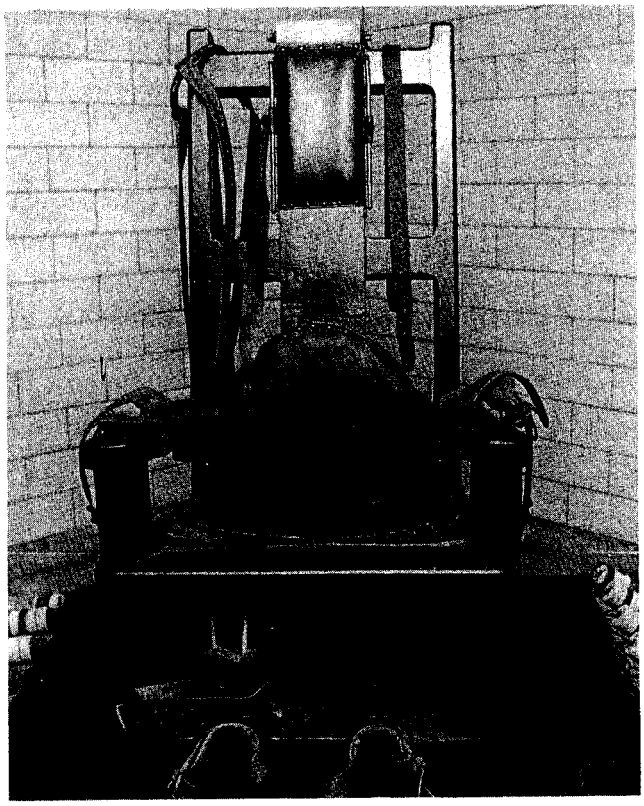
Many experts believe that the death penalty doesn't deter crime. Some others argue that there are extreme cases, assassination of a head of state, for one, in which the death penalty is justifiable, even necessary.

The problem is that the death penalty, when approved for such extreme cases, is almost inevitably extended to apply in cases of heinous but common crimes, such as murder committed in the course of a robbery or rape; and as a consequence, large numbers of criminals are sentenced to death.

What results is a mechanical, pendulum effect, in which the law and public opinion swing back and forth between support for total abolition of the death penalty, and its use for routine crimes.

The tragedy is that the pendulum swings back and forth while most citizens ignore altogether the issue and its philosophical implications.

The situation in Florida has relevance for us. Three prisoners are on Kentucky's Death Row today, sentenced to death for crimes that are horrible, and horribly routine. Will we kill them, or not?



THE KENTUCKY CHAIR

DEATH ROW U.S.A.

AS OF JUNE 20, 1979, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE NAACP LEGAL DEFENSE FUND: 512

Race:

Black	215	(41.99%)
Spanish Surname	18	(%)
White	274	(53.52%)
Native American	4	(0.78%)
Unknown	1	(0.19%)

Crime: Homicide

Sex:	Male	507	(99.02%)
	Female	5	(0.98%)

DISPOSITIONS SINCE JULY, 1976

Executions: 2
Suicides: 4
Death Sentences vacated as unconstitutional: 504
Convictions or sentences reversed: 171

LEGAL PUBLICATIONS

The office has updated its Death Penalty Manual (May, 1979). It is available to local defenders for the asking. Otherwise, it is available for $5.00 in order to cover printing costs. Contact Edward C. Monahan.

Also available is: Motion File: Criminal Law Motions and Memorandums (May, 1979). This publication contains over 900 pages of sample motions and memorandums. Because of enormous printing costs, it is necessary to charge $25.00 for this publication. Contact Bill Ayer.

DID YOU KNOW?

Did you know that a capital murder in Kentucky does not necessarily carry the possibility of a death sentence?

The legislature has denominated every murder a capital offense. See KRS 507.020(2). However, this designation is a misnomer since only certain capital murders carry the possibility of a sentence of death. According to KRS 532.025(3), the death penalty is a possible punishment only if one of the seven statutory aggravatory factors listed in KRS 532.025 (2)(a)(1)(7) exists. Without the presence of one of the statutory aggravatory factors, a capital murder carries a maximum possible punishment of life imprisonment.

DEATH PENALTY ASSISTANCE

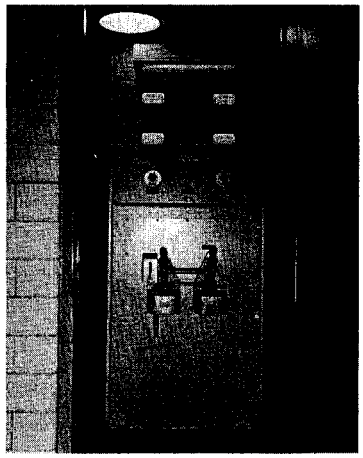
A number of attorneys in the office have formed a group in order to provide assistance to trial attorneys handling capital cases.

If you are interested in our assistance, contact Edward C. Monahan, Chairman, Death Penalty Task Force.

CAPITAL TRIAL EMPHASIS ON THE PUNISHMENT STAGE OF A CASE

This is the third of a four part article. It is authored by Millard Farmer, attorney, and Courtney Mullin, psychologist, of Atlanta Team Defense. The article appeared in HOW TO TRY A CAPITAL CASE (1977) and is reprinted with permission of the North Carolina Academy of Trial Lawyers, P.O. Box 767, Raleigh, N.C. 27602:

The family background, the psychologist, the theologians, the people who can mend and help in that area. Often lawyers question how this is



admissible. They call up and say, "I have a man who witnessed 187 executions in Texas and I understand you have used him in many trials but my judge isn't going to let him testify. It isn't permissible." The D.A. says I can't get it in." You see that's because you've made it a regular trial. You tried the case in a sterile atmosphere and you haven't done what is necessary, you haven't let them know that it is a trial really about this individual's life. There are going to be very few judges anywhere in this country, regardless of their views, that are going to keep out any of your efforts on the penalty segment. They are going to say, "Look, let's let the jury see it all." And that's your argument to the prosecutor. What are you afraid to let these people know? Why are you afraid for them to find it out?

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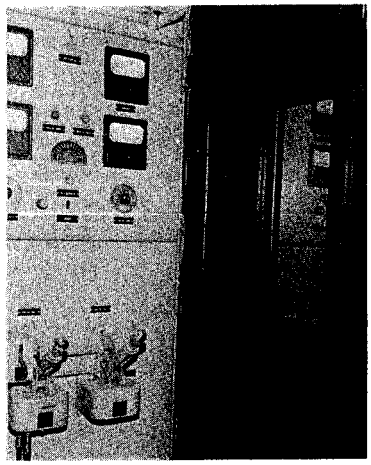
But you've got to have a theme for that and you've got to understand a way to get it in. Get in the members of the family by merely saying this is information the psychologist or the psychiatrist needs to testify later on. You don't have to say the man is insane to have a psychologist or psychiatrist there. You don't have to say those things about him. You don't have to reduce him down to being an animal. And it's a mistake. The old "insanity" defenses when you don't have any other defenses are the dumbest defenses going. They are of no value. You want to develop an explanation for what could happen to the individual from here out and what might have happened up until this point. You've got to carry it out with every little thread and every little witness that has testified and all the voir dire examination.

I can't tell you all of the different kinds of people who have been used throughout the country in these penalty phase trials. Some of them include many executioners in this country. In fact, most executioners will now come and tell you it's wrong. It shouldn't be done. It shouldn't have been done. And they want to have their little part in stopping it. I know very few executioners out of the last era who are now living who wouldn't come and testify for you.

One main point in the penalty phase is to approach the problems of why people believe in the death penalty or say they believe in the death penalty. In North Carolina, particularly around the more urban areas, people are going to say it deters crime. The law itself is a symbolic response of our society to peoples' fear about being robbed, etc. They think that somehow by passing this to be able to execute people, they are going to stop crime. We have a long history of passing poor, symbolic laws which this one is. We need to approach and confront people with evidence to show them death as punishment does not accomplish the goals they want it to accomplish. There is a book called Executions in America written by William Bowers at Northwestern University, an exhaustive study that shows not only does death as punishment not deter crime but he also found, to his surprise, that the homicide rate rises significantly in the



month following an execution. The executions by the State cause more homicides to occur in the community. He explains it like the phenomenon when a famous person commits suicide and there is a rash of suicides. Other people who have problems say that person had so many problems they couldn't deal with them so they killed themself and got rid of their problems. People see the State as a symbolic authority figure to look up to. It can't solve its social problems so it simply wipes away a life that causes its problems. The State kills that person in a barbaric manner and they think, "Well, I've got these people who are problems to me and I'll go out and I'll kill them and I'll get rid of them, too." Not only does the death penalty not deter murder but it causes a rise in the rate of homicides.

There have been a number of studies that completely repudiate a poorly done study that showed the death penalty does deter in terms of economic theory. There are people who you

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could get to talk to the jury from the basis of economic theory of predictability that the death penalty does not deter homicides. There are people who have been on death row and who are now living socially acceptable lives in this society. This is to tell the jury people on death row, people who have killed change and can be rehabilitated, can change and become good citizens of our society. We can get chaplains on death row to talk about the quality of people, what it's like to be a chaplain on death row, and the privation suffered by many inmates on death row. Explain the differences between the people on death row as opposed to the people with life in prison. You can get theologians to talk about what I think is the whole problem, what is underlying peoples' belief in the death penalty that is retribution. We believe in an eye for an eye. If you are going to kill, we are going to kill you. In our experience in rural areas even a great number of ministers and religious people are telling their congregations, "Yes, we believe in capital punishment, we believe that it's a good thing". So you need, particularly in a state like North Carolina in the rural areas, to come at that directly. There is a Baptist preacher in Georgia but it would be much better to get one in North Carolina to say, "No, we believe in life. We don't believe in an eye for an eye, and that's not the way that should be interpreted." Refute that whole argument.

It is important to realize what untapped resources you have. In all of the states now there are coalitions of individuals and groups who conscientiously oppose death as punishment. The polls now report it is probably 70-30. Only 30 percent of the people believe that we should not have death as punishment and it's going to have to be turned around in the street before it's turned around in the court. In other words, we are going to have to find that more people in the public don't want death as punishment before we find the rule of law that says that it is cruel and unusual, or whatever we are going to say it is. There are groups composed of various segments of society from the far left to the far right. Whichever of those groups you can work with, you can tap them to help you. Don't forget the power of having the pastor or preacher of the victim testify. Go talk to the victim and say retribution isn't what you ought to be concerned about. "Suppose you go with me to the District Attorney and let's talk about this individual being punished, yes, but not inhumanely dealt with through death as punishment." We probably have turned around two cases and had one trial stopped in the middle because the family of the victim told the D.A. to stop it. They did not want the death penalty against that individual. It was going to be a real scene in the courtroom if he didn't stop the trial. The D.A. stopped the trial, the client took life. The victim's wife went up and hugged the black mother and cried and said, "Listen, I hate your son. But I couldn't sit here and see you as a mother week after week fighting for your son's life. I could imagine it was me there sitting if my son had done something wrong, fighting for his life. I don't care what it is, that D.A. is not going to do this to you". The judge saw this as a very reasonable solution to the case to stop the trial. You can tap the resources by having them come to the courtroom, have support for you in the courtroom. It's important for the fight for that one client; it's important in the overall fight that you won't be trying death cases back to back, day in and day out in that county just because the D.A. has found that he has a green light to the death penalty. So tap that resource.

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2) The Court seemed to base its decision partially on the financial burden which would be placed upon the college. In a footnote the Court referred to a section of the Rehabilitation Act of 1978 which authorizes grants to state units for such purposes as providing interpreters and stated:

"Whatever effect the availability of these funds might have on ascertaining the existence of discrimination in some future case, no such funds were available to Southeastern at the time respondent sought admission to its nursing program."

This footnote leaves the impression that perhaps the decision would have been different had financial aid been available to the college to accomplish the proposed modifications.

3) Although the Court was cognizant of the regulation, 45CFR Section 84.44 which requires recipients of federal funding to provide auxiliary aids to handicapped persons, it construed the term auxiliary aid to exclude the type of accommodation which Ms. Davis sought. Ms. Davis proposed that under the definition, "close, individual by a nursing instructor" there could be protection of the safety of any patients whom she attended during the training program. Since the applicable regulation specifically lists interpreters for the deaf as an example of the type of auxiliary aid which would be required to be provided, the Court could have analogized the close, individual services, since indeed the purpose of the attention would be to serve as the ears for Ms. Davis. However, the court adopted a different approach and compared the proposed accommodation to the category of activities which are not required by recipients of federal money -- services of a personal nature. Thus, advocates need to be cautious in the manner in which they prevent their accommodations so that it is clear to the courts that their proposals fall into the category of required accommodations and not into the exceptions.

4) Finally, it is evident from the entire decision that the safety of patients whose welfare would be affected by Ms. Davis during the clinical program, as well as the safety of potential patients of Ms. Davis, was of considerable concern to the Court. This extra factor may have resulted in the Court's leaning toward a narrow interpretation of Section 504. Since this patient safety factor will lie in only a limited number of factual situations, there may be more favorable decisions in other cases brought before the Supreme Court.

In conclusion, the first decision interpreting Section 504 of the Rehabilitation Act of 1973 had positive and negative aspects. Since the scope of the decision was of a limited nature, advocates can fairly easily distinguish future cases from this case of first impression. Advocates must, however, learn to select their cases for appeal to the Supreme Court in a careful manner to avoid establishing precedents that are indeed damaging to the rights of persons with handicaps. Finally, there should be a down play of the negative aspects of the case and emphasis upon the positive aspects of the case so as not to discourage persons who have handicaps from seeking their rights under Section 504 and so that institutions covered by the Act will be cognizant of their continued obligation to comply with it.

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AT FIRST it seemed a kooky idea. The group of dedicated opponents of executions planned to stage an electrocution of an unclaimed dog already sentenced to death by the SPCA. The news media and the public would be invited in the hope that the vivid descriptions of the pain and disfigurement caused by the electricity would rally public opposition.

Few people paid much attention to the first announcement. The second press release said FAE has commissioned a carpenter in Pinellas Park for $150 to build the electric chair for the dog. It was to be a 4foothigh oak chair with four strong leather straps for the front and rear paws. The announcement mentioned in the final paragraph that a Tampa television station had agreed to film the execution for broadcast on its evening news.

The next day an indignant officer of the SPCA said no dog would be released from the pound for such a cruel and senseless spectacle. Mayor Corinne Freeman told a press conference that no executions of dogs would be permitted on public property.

The president of FAE replied that his organization has made arrangements to obtain a dog that had killed another dog in a fight staged in Dade County. He said it was strange that human beings could be electrocuted on state property but dogs could not be electrocuted on city property, but that he would move the execution to a vacant lot on Fourth Street N owned by a member of FAE.

ON SUNDAY before the event The Times printed a full page of letters decrying the execution. The newspaper said it had received 452 letters against it and none in favor of it. One woman in Seminole wrote that "this bizarre killing of an innocent dumb animal by a bunch of frustrated zealots has kept me awake for two nights."

"Who elected these people to decide whether man's best friend should live or die?" asked a St. Petersburg resident. Another writer called FAE members "weird pinko commies who think they are God."

Early Monday the carpenter began assembling the small electric chair. Within hours protesters arrived with picket signs. By midday about 50 persons were marching around the site chanting, "This dog must live. This dog must live."

ON TUESDAY the execution site was so crowded that St. Petersburg police were called out to keep traffic moving on Fourth Street N. The Times printed still another page of protesting letters. Only one letter supported the execution. It was unsigned.

Governor Bob Graham was asked about the execution as he walked to a Cabinet meeting. "The execution of this dumb animal is making a spectacle of Florida in a senseless attempt to draw a parallel between my own efforts to carry out the law as it is written and supported by the vast majority of Floridians and this gruesome sideshow," he said. "I have full confidence in the ability of the good citizens of this state to draw a clear line of demarcation between the lawful acts of the governor's office and the extralegal events that are taking place in St. Petersburg."

Tuesday afternoon was busy. Mayor Freeman appealed to the citizens of St. Petersburg to condemn the execution. The Pinellas County Health Department issued an order prohibiting the execution as a threat to public health. FAE went to Circuit Court, where a judge declared the health order invalid.

The SPCA announced that it planned to seek prosecution of FAE under Chapter 828 of the Florida statutes, which prevents cruelty to animals. That sent FAE lawyers back to court. The judge gave them an injunction when they pointed out that the statute prohibits only the killing of an animal "in a cruel and inhuman manner."

Walter Cronkite broadcast the story that night. He shook his head in disbelief as he read it, ending, "And that's the way it is, Tuesday, July 3, 1979."

That night the protesters kept a vigil at the execution site.

THE MORNING of the execution was hot and muggy. About 1,500 persons were crowded into the lot, including 14 newspaper reporters, five photographers, two radio broadcasters and three TV camera teams. The crowd shouted and chanted constantly, "Stop the killing."

A mobile home had been set up for death row. At 7 a.m. six members of FAE dressed in black brought out the dog. The animal was placed upright in the chair, its legs strapped securely. Body straps were not to be used so the public could see the dog's body surge from the powerful charge of electricity. The fur had been shaved on the top of the dog's head and on its lower right leg.

A small cap-like device made of bands of copper was fitted over the dog's head. A sponge soaked with salt water rested on its skull, a large screw in it connected to a black wire that ran down the back of the chair, and then inside the mobile home. Another wire was connected to an electrode strapped on the dog's right leg.

TENSION GREW between the angry, agitated crowd and the businesslike members of FAE. At 7:45 a pushing incident broke out. At 7:50 several people left in disgust, saying they could not watch such well-planned, cold-blooded cruelty.

At 7:55 the president of FAE shouted for quiet. "It's off," he said. "We have made our point. We never intended to do it. We just wanted to make Floridians think about the value of life - a dog's life and a human life."

In the confusion, two FAE members quickly unbuckled the straps holding the dog. They lifted it to the ground and patted its shaved head. The dog wagged its tail and sauntered back inside the trailer where its breakfast waited.

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