The Advocate

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COURT RENDERS FIRST DECISIONS IN DEATH CASES

In Hudson v. Commonwealth, Ky., ____ S.W.2d ____ (April 1, 1980), Joe Hudson had been accused of murder and robbery on February 10, 1975. The present Kentucky death penalty law became effective December 22, 1976. Mr. Hudson was not tried until May, 1978.

The Kentucky Supreme Court held that the Commonwealth could not execute Mr. Hudson because the death sentence had been retroactively applied to him. They relied on KRS 446.080(3) which states, "No statute shall be construed to be retroactive, unless expressly so declared." The Court has decided that a person cannot be convicted and sentenced under a statute that was not in existence when the act was done. Justice Clayton dissented on the basis of Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 334 (1977).

(See SMITH, p. 14)

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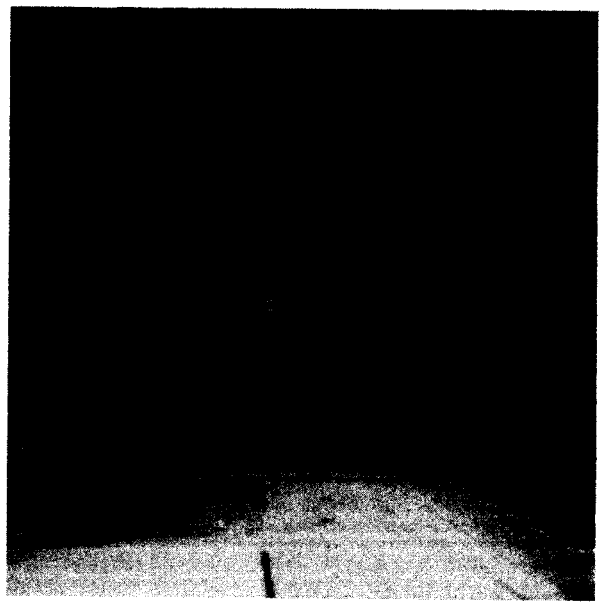

Nora McCormick of the Winchester Regional Office is a Louisville native who attended Bellarmine College and majored in political science. After graduating from college Nora worked at the Bureau of Corrections in planning and research. She enjoyed that job and has found it helpful in her practice of criminal law, particularly with respect to sentencing alternatives.

Nora attended the University of Kentucky and graduated in December of 1976. She worked for Central Kentucky Legal Services from April of 1977 to February of 1979 and then joined the staff of the Winchester Regional Office. Nora prefers working in the criminal law field.

(See McCORMICK, P. 8)

WEST'S REVIEW

A number of interesting, and significant decisions, were handed down by Kentucky's appellate courts and the U.S. Supreme Court during the months of March and April.

In Commonwealth v. Bertram, Ky. App., 27 K.L.S. 4 at 1 (March 14, 1980), the Court dealt with the issue of the continued applicability of the "automatic" standing rule. The automatic standing rule, first enunciated by the U.S. Supreme Court in Jones v. United States, 362 U.S. 257 (1960), provides that where possession of the evidence seized is an essential element of the charged offense that fact automatically confers standing on the defendant to challenge the seizure of the evidence. The purpose of the rule was to immunize the defendant from the necessity of admitting possession in order to establish standing. The Court of Appeals reasoned that this purpose is not served in Kentucky because "it is clear as a matter of state constitutional law that when a defendant testifies in support of a motion to suppress evidence alleged to have been seized illegally, his testimony may not be used against him later at trial over his objection." in lieu of the automatic standing rule, the Court stated the test for standing as follows: "[T]he appropriate inquiry seems to be whether the defendant had an interest in connection with the searched premises that gave rise on his part to a reasonable expectation of freedom from governmental intrusion." It should be noted that the Kentucky Supreme Court utilized the same test to deny the defendant standing in Rawlings v. Commonwealth, Ky., 581 S.W.2d 348 (1979). However, the U.S. Supreme Court has granted certiorari to review the Court's holding in Rawlings. Thus, the opinion of the Court of Appeals in Bertram rests on decidedly unstable ground.

The Kentucky Supreme Court has reached an important decision limiting the reciprocal discovery obligations of criminal defendants. King v. Venters, Ky., 27 K.L.S. 4 at 14 (April 1, 1980). The trial court had issued an order requiring the Commonwealth to disclose the name of prospective witnesses to the defense. The trial court subsequently issued a second order requiring the defense to reciprocate. The Kentucky Supreme Court granted the defendant's petition for writ of prohibition, observing that RCr 7.24, which specifies those matters which a defendant may be required to divulge as a condition of discovery, does not include a list of witnesses. "It is our opinion there is no authority for requiring a defendant to furnish such a list to the Commonwealth . . ."

In Litton v. Commonwealth, Ky., 27 K.L.S. 4 at 12 (April 1, 1980), the Supreme Court was required to define the term "inhabited building" as used in KRS 511.010-040 to distinguish the different degrees of burglary. The defendant was convicted of second degree burglary which requires an intrusion into an "inhabited building" as opposed to a "dwelling" (first degree burglary) or an "uninhabited building" (third degree burglary). The trial court defined inhabited building in its instructions to the jury as a building "routinely or regularly occupied by a person or persons for periods of time." The Supreme Court reversed, holding that "second degree burglary is committed only when a person or persons, other than the burglar or burglars, are present in the building at the time of the burglary." (Emphasis added).

The Court reversed the persistent felony offender conviction of James Heady. Heady v. Commonwealth, Ky., 27 K.L.S. 4 at 13 (April 1, 1980). Heady was convicted of carrying a concealed weapon - usually a misdemeanor. However, because Heady had been previously convicted of "armed robbery" the charge was tried as a felony pursuant to KRS 527.020(5).

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The Commonwealth then used the resultant felony conviction to trigger a further enhanced penalty as provided by the persistent felony offender statute. The Supreme Court disallowed this procedure, stating: "In the absence of language to the contrary, we conclude the legislature did not intend to increase punishment a second time through the use of the persistent felony offender statute."

The Supreme Court has held that any "substantial deviation" from the procedures for jury selection set out in RCr 9.30 and KRS 29A.060 is reversible error despite the absence of a showing of prejudice. Robertson v. Commonwealth, Ky., 27 K.L.S. 4 at 15 (April 1, 1980). The Court reversed the holding of the Court of Appeals that a showing of prejudice was required. "We agree there is no showing of prejudice here, but the larger question presented is whether we should enforce substantial compliance with our rules." The decision adds the final details to Kentucky's evolving standards for enforcement of its rules governing jury selection. Cf. Allen v. Commonwealth, Ky.App., 26 K.L.S. 13 at 3 (September 21, 1979); Moore v. Commonwealth, Ky.App., 27 K.L.S. 1 at 6 (December 28, 1979).

Finally, in Walters v. Smith, Ky., 27 K.L.S. at 12 (April 22, 1980), the Court addressed the question of whether the parole release of a habeas corpus petitioner moots his case. Again reversing an opinion of the Court of Appeals, the Court held that it does not. The Court found that, as a parolee, Walters was sufficiently subject to "constraints on his liberty to go where he will" to support habeas jurisdiction.

In a landmark decision, the United States Supreme Court has held that a warrant is required to arrest a suspect in his home. Payton v. New York, 27 CrL 3033 (April 15, 1980). The Court's opinion analogizes to search and seizure principles to derive a critical distinction between arrests made in public and arrests effected by an intrusion into the home. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshhold may not reasonably be crossed without a warrant." Payton v. New York, at 3037. The decision brings the law of arrest into conformity with search and seizure law by requiring a warrant unless exigent circumstances dictate immediate action. The decision overrules Shanks v. Commonwealth, Ky., 463 S.W.2d 312 (1971), in which the former Kentucky Court of Appeals sanctioned the warrantless arrest of a suspect at his home.

The Court has rendered a decision in the controversial case of Rummel v. Estelle, 26 CrL 3118 (March 18, 1980). The Court affirmed Rummel's life sentence under Texas' recidivist statute, rejecting Rummel's argument that his sentence constituted cruel and unusual punishment. Over a period of ten years Rummel was convicted of three separate property offenses involving amounts ranging from $28 to $120. Upon conviction of the third offense Rummel was sentenced to a mandatory life sentence. A majority of the Court distinguished Rummel's case from those death penalty cases, cited by Rummel, in which the proportionality of the penalty imposed has been balanced against the severity of the offense. The Court perceived a dispositive distinction in the uniqueness of death as a punishment. The Court further grounded its decision on its conservative "conviction that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts."

In a less publicized decision, but one which should have a more distinct impact on Kentucky practice, the

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Court has held that a misdemeanor conviction, obtained without affording the misdemeanant the right to counsel, cannot be used to enhance the penalty for a subsequent offense. Baldasar v. Illinois, 27 CrL 3073 (April 23, 1980). The Court held last term in Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), that a sentence of imprisonment may not be imposed for a misdemeanor conviction if the indigent accused was not provided counsel. In Baldasar, the Court found that Baldasar's enhanced punishment for a second offense was the "direct consequence" of a prior uncounseled misdemeanor conviction and was thus forbidden under Scott. As one example of the decision's possible application in Kentucky, Baldasar would preclude the imposition of an enhanced penalty of one to five years for a second conviction of possession of marijuana for sale (as provided by KRS 218A.990(4)) in those cases in which an indigent defendant was not provided counsel at the adjudication of the first offense.

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PETTY CRIMES, SEVERE SENTENCE

The following is an article written by Ronald Goetz, and reprinted with permission from the April 16, 1980 issue of THE CHRISTIAN CENTURY, Copyright 1980. Christian Century Foundation.

If someone had told me a few weeks ago that somewhere in the U.S. a poor loser was languishing in prison, serving a life sentence for thefts totaling a mere $229.11, I would probably have concluded that in a mad world such flukes occur, but surely there would be some redress for the unfortunate convict. Such a sentence would obviously be "cruel and unusual punishment."

As it happens, the state of Texas does have a man serving a 1973 life sentence for thefts totaling $229.11. He appealed to the U.S. Supreme Court, which ruled recently on a split decision, 5 to 4, that William James Rummel, 37, is not being punished in an unconstitutional manner, even if he should spend the rest of his life in prison for the $229.11 he misappropriated.

Rummel, a petty thief, was sentenced to life imprisonment for three crimes: he used someone else's credit card to buy tires worth $80.00; he paid a $28.36 hotel bill with a forged check; and he accepted $120.75 to repair an air conditioner but never did the work. Texas law is harsh on recidivists, and the penal code provides that anyone convicted of three noncapital felony crimes must automatically serve a life sentence.

For some time, there has been a deep current of resentment in the country at large over the failure of our legal system to convict criminals speedily and punish them sufficiently. Polls show that there is general national support for the Supreme Court's 1976 reinstatement of the death penalty. Richard Nixon, who named four of the nine sitting Supreme Court justices, ran on a platform that promised to get tough on crime. We have all read of outrageous affronts to justice, as criminals go free or are barely punished because overburdened courts cannot deal with their heavy case loads. "Plea bargaining" is part of the modern vernacular. Some of those who are less than confident about the "scientific" status of psychiatric testimony become embittered as felons are freed on mental ground - "treated" and released. The problem of recidivism is a national scandal - as is the crime rate, as are the prisons, as is the judicial system. A strong case can be made for spending the money necessary to provide enough courts so as to ensure speedy and uniform justice. And a strong case can be made for spending the money necessary to ensure radical prison reform. With these reforms perhaps a rational case could be made for longer sentences, though I have many doubts about that.

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Given the public desire for strict enforcement of criminal statutes, one cannot automatically fault the state of Texas for having a "habitual-offender" law, especially as it does hold out the possibility of parole (something not very generously granted in Texas, however). Nevertheless, when Texas law defines as felony theft the stealing of an amount as small as $28.36, the specter of Victor Hugo's Jean Valjean arises. Life in the galleys for a loaf of bread is no longer unthinkable.

In his dissenting opinion Associated Justice Lewis F. Powell, Jr., writes:

> We are construing a living Constitution. The sentence imposed upon petitioner would be viewed as grossly unjust by virtually every layman and lawyer. In my view, objective criteria clearly establish that mandatory life sentences for defrauding persons of about $230.00 cross any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment.

Not only is the life penalty, in this case, a violation of the Eighth Amendment's provision against "grossly excessive punishments," but "it is difficult to imagine felonies that pose less danger to the peace and good order of a civilized society than the three crimes committed by the petitioner."

On what grounds, one might ask, could such undeniable logic be dodged? With a rationale that ends in an incredible evasion of the Bill of Rights, Associate Justice William H. Rehnquist, writing for the majority, begins reasonably enough. He argues that a state has a "valid interest" in imposing long sentences on "those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society...."

And thus Rehnquist's opinion is that the issue is fundamentally one of state's rights. The Constitution does not demand uniformity in sentences because such uniformity would be "inimical to traditional notions of federalism." Therefore "some state will always bear the distinction of treating particular offenders more severely than any other state."

Merely to quote Rehnquist's opinion is to be left incredulous. Could he and the other four Supreme Court justices actually have sworn to uphold the Constitution and the Bill of Rights and then argue that a state's power should prevail over those guarantees specifically granted by the Constitution to the individual? The whole function of the Constitution is to define and limit the powers of governing bodies, both state and federal. When a state exercises excessive zeal in the punishment of crime, it overshoots its constitutional prerogatives. Some states are more strict than others - and this is consistent with "federalism" - but when a state's laws create a situation that is a stench in the nostrils of the majority of rational people, we have state tyranny and "cruel and unusual" punishment.

Rummel is being sacrificed at the altar of a conservative dogma of state's rights. He is facing life imprisonment for a political principle. How else can we see this situation, except to say that he is a political prisoner? The tragedy is that he has no further recourse. He has faced the highest court in the land, and it has been found wanting.

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LEGISLATION

1980 LEGISLATIVE ACTION

The following is a cursory review of new legislation which should be of interest to criminal defense lawyers:

HB-424

In a striking manner, KRS 31.120 has been amended to establish certain criteria for eligibility for public defender representation. House Bill 424 makes the following prima facie evidence that a person is not indigent: 1) if he owns real property; 2) is not receiving or is not eligible to receive public assistance payments; 3) has paid money for bail, whether deposited by himself or another; 4) or owns more than one motor vehicle.

The inequity of the Bill abounds. There is no consideration in the prima facie factors of the amount, if any, of equity in the real property or the car. The Bill ignores the Supreme Court of Kentucky's holding that a person is indigent even if another person, who has no responsibility to care for the person, has money available. Tolson v. Lane, Ky., 569 S.W.2d 159 (1978). The ineligibility for public assistance payments has little to do with a person's lack of ability to afford an attorney.

The Bill also amends KRS Chapter 405 to allow judges to require parents or guardians of minor defendants to repay for public defender services.

SB 309

This Bill creates a far reaching, comprehensive juvenile code. Chapters include 208A definitions and general provisions, 208B abuse, neglect, or dependency actions, 208C termination of parental rights, 208D status offenders, 208E children committing public offenses, 208F youthful offenders, 208G mentally ill children. Most significantly, it guts the present juvenile justice system and replaces it with a comprehensive youthful offender system. It allows children as young as 14 to be treated as adults. The Bill fails to provide any meaningful standards for determining which children will be tried as adults.

The Bill has an effective date of July 1, 1982 with a study commission in the interim.

SB 59

Amends KRS 208.200 to allow a child to remain subject to juvenile jurisdiction until 21 instead of 18 in order to take advantage of educational programs.

SB 227

Creates a new section of Chapter 17 to require law enforcement agencies to segregate from the records of guilty persons the records of persons found innocent or when charges are dismissed or withdrawn, and to notify the defendant of his right to this procedure.

SB 277

Amends KRS 514.010 to include aircraft, boats, construction machinery and trailers as propelled vehicles. Amends KRS 514.100 (unauthorized use of vehices) to make the second and subsequent offenses Class D felonies. Makes first offense a Class D felony if person was previously convicted of auto theft.

Amends the obscuring statute, KRS 514.120, to include parts of property, to include removing VIN's, etc. with intent to render other property unidentifiable, deletes the reference to holding property "for the purpose of sale in the course of business."

Makes obscuring a machine worth less than $100 a Class A misdemeanor and $100 and over a Class D felony. Creates a new section of KRS Chapter 514 to permit police to confiscate property used in facilitating thefts,

(Continued, P. 7)

transportation of stolen property, the stolen property itself, and vehicles with a list of stolen parts thereon.

SB 278

Amends KRS 24A.175 to increase district court criminal costs from $15 to $20 and gives the extra $5 to county for operating county jail.

HB 53

Creates new section of KRS Chapter 217 making glue sniffing (sniffing of volatile substances) a Class B misdemeanor (90 day treatment program similar to marijuana first, however) and selling, etc. volatile substances a Class D felony. Makes repackaging of volatile substances rebuttable presumption of evidence of intent to sell.

HB 66

Amends KRS 431.005 to define when peace officer may make arrests with and without warrant. Amends KRS 431.015 to permit issuance of citations for violations and prohibit arrests for violations unless the officer believes the person to be arrested will not appear in answer to the citation or the violation is one of those specified in 431.005.

HB 85

Amends KRS 509.040, kidnapping, to make it a Class B felony if victim is released alive and in safe place prior to trial; a Class A felony if victim is released but suffered serious physical injury, released in an unsafe place, or released under circumstances which may lead to serious physical injury; and a capital offense if the victim is not released alive or if released alive subsequently dies as a result of the kidnapping.

HB 86

Amends KRS 431.005 to permit full-time city, county, city-county, and state police and sheriffs and full-time paid deputy sheriffs to make arrests without a warrant when he has reasonable grounds to believe that the person, if not arrested, poses a danger or threat of danger to others and the person has injured a spouse, child, parent, grandparent, or stepchild. Within 12 hours of the apprehension and booking of such person, the officer shall return to the abused person, if an adult, and request that a signed written statement be made by that person stating that an abuse occurred and naming the person that committed it. If the person refuses to sign the statement, the charges are to be summarily dismissed and the defendant released from custody.

HB 316

Amends KRS 514.060 (theft of services) to state that evidence of tampering with meter, bypassing of meter, or reconnection after disconnection of a utility without the consent of the utility supplier is prima facie evidence of theft of services.

HB 389

Amends KRS Chapter 218A to make phencyclidine (angel dust) a schedule I controlled substance and set penalties for sale, etc., of phencyclidine and LSD at 5-10 years or $5,000-$10,000 fine, or both--1st offense; and 10-20 years or $10,000-$20,000 fine, or both--subsequent offenses.

HB 392

Creates a new section of KRS Chapter 514 to prohibit possession, use, or transfer of device for theft of telephone service. Does not apply to cable television or to devices authorized or approved or otherwise permitted by state or federal agencies.

HB 396

Amends KRS 69.110 to give commonwealth's detectives power of arrest within judicial circuit and right to execute process statewide.

(Continued, P. 8)

HB 415

Amends KRS 431.200 to require restitution of property or reparation for damages from misdemeanants as well as felons unless such restitution has been made a condition of probation.

HB 416

Creates new sections of KRS Chapter 15, popularly known as police bill of rights. Requires that complaints against police be in writing and sworn to by complainant. Prohibits threats against officers as well as coercion. Prohibits officer from being interrogated in departmental matters for 48 hours after written request for interrogation of the officer. Written reports of alleged incident may be required of officer no later than end of tour of duty on which incident occurred. If police officer is arrested or likely to be, he is to be accorded the same rights as any other person under Constitution. Charges against officers are to be in writing (for violation of local rules or regulations) and with specificity. Prohibits making statements about charges until disposition of the matter. Prohibits requiring police officer to testify before non-governmental bodies about misconduct. Requires 72 hour notice of hearings; 24 hour delivery of statements or affidavits, complainant required to attend hearing (unless good cause shown for nonattendance and non-attendance is beyond control of complainant). Requires dismissal of charges with prejudice if complainant does not show for hearing. Gives officer right to counsel, right to present evidence and cross examine. If hearings are not held within 60 days, charges are to be dismissed with prejudice. Appeals are to circuit court and then to Court of Appeals. Applies only to police receiving salary supplement.

HB 668

Creates new sections of KRS Chapters 67, 82, and 16 to require appointment of property custodians. Counties must name the sheriff or chief of county police. Cities may name a property custodian. State Police must deposit property at their respective posts. Local officers must deposit property with the city or county custodian as indicated. Property must be accounted for and unclaimed or forfeited property may be sold in accordance with the statute.

HB 823

Amends KRS Chapter 511 to eliminate distinction between day and night burglary. Class B felony if with weapon or person injured--1st degree; Class C felony if dwelling--2nd degree; Class D felony if other building--3rd degree.

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(McCORMICK, Continued from P. 1)

Nora believes that the most rewarding case in which she has been involved is that of Kathy Phillips, a Prestonsburg woman who was charged with murdering her husband and was acquitted by the jury. Three lawyers and a psychologist worked together with support from a local spouse abuse center. Nora felt this approach was effective in presenting a case of self-defense based on past abuse by Kathy's husband. (See article on page 18)

Nora works all over southeastern Kentucky and enjoys her job. However, she feels hampered by the lack of training. Keep up the good work, Nora.

1980 POST-CONVICTION LEGISLATION

Although many bills were introduced which could have affected parole, probation, shock probation and other post-conviction matters, very few passed the 1980 General Assembly. The following is a synopsis of those that were passed.

By enacting Senate Bill No. 227 the legislature created a new section of KRS Chapter 17. This new section provides for the segregation of records relating to an arrestee upon written request if he is found innocent or the charges are dismissed or withdrawn. Upon receipt of the arrestee's application the trial court must issue an order to all law enforcement agencies with records on the arrestee to segregate them regardless of their nature (including fingerprints, photographs, and all documentary or electronic data). It is interesting to note that the act does not provide for expungement but only for the separate filing of these records from those of convicted persons.

The General Assembly also enacted various amendments to Chapter 439 (Probation and Parole) in House Bill No. 791. Although the legislature retained conditional release as a mechanism for early release from incarceration, the provisions of KRS 439.430 were amended to disallow the reincarceration of one so released for a violation of the conditions of his release. Accordingly, one who leaves the institution on conditional release due to accumulated good time credits will now have in effect served the entirety of his sentence. (It should be noted that this bill did not alter the Parole Board's authority to fix conditions for the releasee. KRS 439.330. However, without any means of enforcement this provision is practically meaningless).

House Bill No. 791 also amended KRS 439.341 to require preliminary probation revocation hearings to be conducted by a hearing officer. Until now this duty has been performed by the sentencing court with only parole revocations being handled by hearing officers.

One further change brought about by HB 791 is the repeal of KRS 439.400. Accordingly, a prisoner released on parole or conditional release will no longer be entitled to a maximum of $10, suitable civilian clothing or transportation. Nor will he be allowed an advance for temporary maintenance of up to $25.

In House Bill No. 415, the legislature amended KRS 431.200 to require restoration or reparation for taking, injuring or destroying property in misdemeanor as well as felony cases. The amendment also indicates that restoration or reparation can be made a condition of probation in both situations.

Finally, another bill which may have an indirect affect on parole revocations in the future is Senate Bill No. 214 (the bill will become effective July 1, 1982). This act removes criminal penalties for public alcohol intoxication (public intoxication by controlled substances is a Class B misdemeanor). Currently, alcohol consumption can be the basis for a parole revocation; however, this act seems to recognize that alcoholism should not be considered a crime and may therefore be a basis for challenging the reincarceration of a parolee on this basis. SB 214 provides for treatment and rehabilitation for this problem. Therefore a similar remedy may be appropriate for parolees who break this condition of parole. See United States v. Proctor, No. 79-5011, 26 CrL. 2237 (4th Cir. 10/23/79).

-NOTE-

Protection & Advocacy for the Developmentally Disabled

P & A LEGISLATION

The 1980 Kentucky General Assembly passed a number of bills which affect developmentally disabled persons. Protection and Advocacy drafted or assisted with the following:

New guardianship chapter enacted

House Bill 974, which has a delayed effective date of July 1, 1982, repeals KRS Chapter 203, pertaining to adjudications of incompetency, and those portions of KRS Chapter 387 pertaining to the appointment of committees for incompetent persons. It establishes a new section of KRS Chapter 387 which deals with both incompetency determinations and appointment of committees.

The major changes effected by the new legislation involve the evaluation of an alleged incompetent person and the scope of the legal order of incompetency. This new legislation provides that a respondent shall be evaluated by an interdisciplinary team of at least one physician, one social worker, and one psychologist, one of which shall be knowledgable in the area of the alleged disability of the respondent. The respondent is given a comprehensive evaluation to determine his functional inabilities, if any, to manage both his personal and financial affairs. Guardianship is then ordered only to the extent necessitated by the individual's actual mental, physical, and adaptive limitations.

The term "incompetent" is discarded and replaced by the terms "disabled" and "partially disabled." "Committee" is replaced by four terms which denote different types and degrees of authority:

(a) "Guardian" is applied to a person who has full care, custody and control of the ward, as does the committee under the current statutes.

(b) A "limited guardian" is granted limited authority over the person of a partially disabled ward and has powers and duties specifically enumerated by the court.

(c) A "conservator" may be appointed to manage the financial affairs of a disabled person.

(d) A "limited conservator" has limited specifically delineated authority to manage certain of his ward's financial affairs.

Limited guardianship or limited conservatorship shall at all times be the preferred form of intervention in a disability proceeding. The determination of disability and the appointment of a guardian or conservator are conducted as a single proceeding in district court. Upon a determination of disability, a guardian or conservator must be appointed or the determination has no legal effect.

(Continued, P. 11)

Due process procedures are clarified and strengthened by H.B. 974. For the first time, guardians are required to report to the court as to the ward's personal well-being, to take affirmative steps to provide for the education and habilitation of the ward, and to account for placement of the ward in a residential facility for developmentally disabled persons. Finally, the statute provides for the appointment of emergency, standby, and testamentary guardians and for the establishment of the state-wide central registry for filing copies of all determinations of disability and appointments of guardians and conservators.

Statute regulating driver's licensing of persons with epilepsy liberalized

Senate Bill 329 amends KRS 186.411, which governs the circumstances under which a person who has epilepsy can obtain a driver's license.

The major thrust of the amendment is to change the period of time during which a person must certify that he has been seizure-free prior to application for a driver's license from a period of one year to that of ninety days. Additionally, the amended law clarifies that an individual who cannot certify the prerequisite seizure-free period of time has the right to have a hearing on the matter of whether his seizure condition causes him to be an unsafe driver. Unlike the old law, the new law provides that an individual has the right to have an individual review and the opportunity to prove that the condition does not affect his ability to drive safely. The law sets forth the requirement for the Department of Transportation to give notice by first class mail of the hearing rights, and provides for an automatic waiver if the hearing is not requested within 20 days after notice.

Removable parking permits provided for persons utilizing designated handicapped parking places

House Bill 38 creates a new section of KRS Chapter 189 which provides that any person who has lost the use of one or both legs or one or both arms, or any person who is blind, or any person with a severe respiratory ailment shall, upon application to the county clerk in the county of his residence, be issued a special parking permit. The special permit entitles the operator of the motor vehicle in which it is displayed to park in a designated handicapped parking place. In addition, when parked where a parking limit is imposed, the vehicle may be parked for a period of two (2) hours in excess of the legal parking period, with some exceptions

Requirements for accessibility in safety for handicapped persons in buildings and accommodations amended

House Bill 659 expands KRS Chapter 198B, the state building code, to establish an architectural barrier advisory committee attached to the Department of Housing, Buildings, and Construction.

The committee shall meet at least quarterly and issue advisory opinions on matters relating to the accessibility and safety of buildings for physically-handicapped persons.

Another new section of KRS 198B requires the Department of Housing, Buildings, and Construction to issue regulations establishing the requirements necessary for making buildings accessible for persons with physical handicaps. No building permit or other official authorization for construction or remodeling of any covered building shall be valid unless the plans and specifications are in compliance with the accessibility requirements contained in the Kentucky building code.

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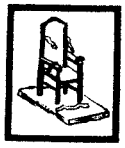

THE DEATH PENALTY

Death is Different

CAPITAL CASE LAW

Experts must be appointed for indigents in capital cases. In People v. Frierson, 599 P.2d 587 (Calif. 1979), the defendant's sole possible defense was diminished capacity due to the effect of drugs. There was lay testimony that the defendant took drugs the day of the murder, and that he appeared "spaced out." Defense counsel did not request any exam to explore the defendant's mental state, nor did he consult any expert to determine if the defendant's ingestion of drugs, due to their quantity or nature, caused him to lack the essential mental elements to deliberate or form an intent. Defense counsel also put on no evidence in the penalty phase.

Defense counsel's representation in both phases was defective since he did not conduct the substantial factual inquiry necessary to make informed tactical decisions regarding the most effective presentation of the defense.

The Fourth Circuit held in Williams v. Martin, ____ F.2d ____ (4th Cir., March 6, 1980), that expert assistance necessary to the adequate presentation of the defense is essential to the operation of a just judicial system. The defendant wanted a forensic pathologist to assist in his defense that the victim's death 8 months after the gunshot wound was not caused by the gunshot. The trial judge told defense counsel he would allow the use of the expert if defense counsel could find some way to have the expert paid.

An indigent has an equal protection-based right to an expert wherever a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional help.

A defendant has the right to obtain judicial immunity for a witness capable of providing clearly exculpatory evidence on behalf of a defendant according to the Third Circuit. Virgin Islands v. Smith, ____ F.2d ____ (3d Cir., February 5, 1980).

Before the judicial grant of immunity, it must be shown that 1) an application has been made to the district court naming the witness; 2) his testimony must be particularized; 3) the witness must be available; 4) the testimony must be clearly exculpatory and essential to the defense.

The Third Circuit relied on Chambers v. Mississippi, 410 U.S. 284 (1973), for its determination that the defendant cannot be denied access to exculpatory evidence necessary for his defense even if such access is normally precluded for other reasons. In other words, the prosecution cannot urge a conviction while denying to the defendant the use of information necessary for his defense.

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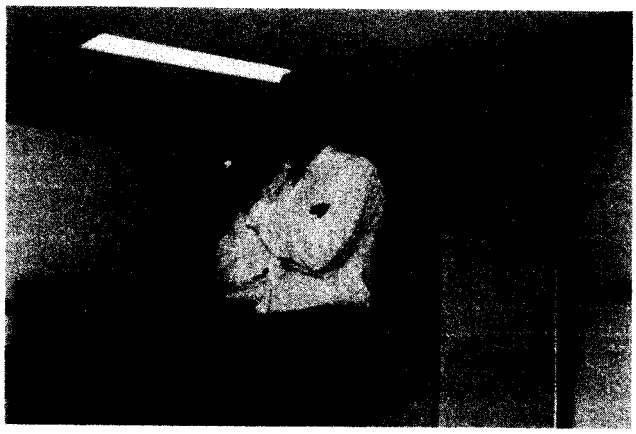
DEATH PENALTY SEMINAR HELD

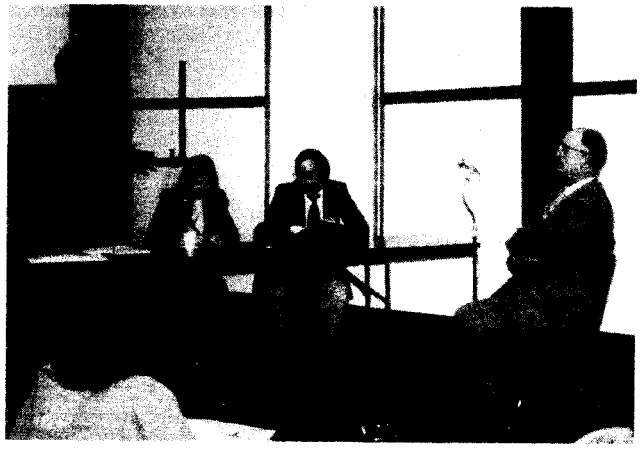
Sixty-five attorneys from around the Commonwealth met in Shakertown on March 29-30, 1980 for a seminar on the trial of capital cases. They heard Rev. Tom Feamster speak on the last days of John Spenkelink, Legal Defense Fund lawyer Jim Liebman on post-conviction remedies in capital cases, Kathy Bennett on psychological aspects of jury selection, and John Carroll and Morris Dees on various aspects of the trial of capital cases. The quality of expertise of these speakers was matched only by the enthusiasm of the attending attorneys and, of course, the food at Shakertown.



REV. FEAMSTER

MORRIS DEES, JOHN CARROLL

KATHY BENNETT



CARROLL, DEES, BENNETT QUESTION VENIREMAN

JIM LIEBMAN

ED MONAHAN TALKS TO ERNIE LEWIS

(SMITH, Continued from P. 1)

In Smith v. Commonwealth, Ky., ____S.W.2d____ (April 22, 1980), Johnny Smith was allegedly hired by Ricky Simms and his lover, Carolyn Jarvis, to kill Carolyn's husband, Ronnie Jarvis. In return, Smith was to receive Jarvis' collection of guns. After Jarvis was shot and killed, Smith and Simms allegedly removed the victim's wallet. Simms turned state's evidence and received 21 years. Johnny Smith was sentenced to death.

The Supreme Court (Palmore, Aker, Lukowsky and Sternberg) reversed Smith's conviction and death sentence since the trial court refused to instruct on accomplice testimony. The majority chose to reach only a few of the death penalty issues. Smith had complained that he received inadequate notice, pursuant to KRS 532.025(1)(a) which permits introduction of evidence in aggravation only that which the state makes known to the defendant prior to his trial. Smith complained that he was given no notice of intention to use his prior felony convictions during the sentencing portion of the trial. However, this evidence was presented to the jury during the guilt phase. The Court stated that there was no need to repeat evidence at the sentencing stage which has been admitted at the guilt portion of the trial.

The final sentence, according to the Court, must be justified by the "who, what, when, where, and why of the defendant as developed in both phases of the bifurcated proceeding." Any evidence that would tend to excuse or alleviate a defendant's responsibility is competent in the penalty stage. The Court observed that "the same jury that tried the guilt or innocence phase of the trial was the jury that tried the sentencing phase." The Court also noted that there is no need for repetition of evidence except "in the event the sentencing phase of a trial is required to be before a new and different jury...." This is an implicit recognition that in some cases it is appropriate to have a different jury for the sentencing phase.

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U. S. SUPREME COURT ADOPTS NEW RULES EFFECTIVE JUNE 30, 1980

On April 14, 1980, the United States Supreme Court promulgated new Rules, including some dramatically different revisions. The new Rules are effective June 30, 1980.

Criminal defense attorneys should note that the time for filing a petition for a writ of certiorari in a state criminal case has been shortened from ninety (90) days to sixty (60) days and increased to sixty (60) days in federal criminal cases. U.S. Sup.Ct. Rule 20.1.

The new Rules now specify that the time for filing a petition for a writ of certiorari runs from the date of the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice)." U.S. Sup.Ct. Rule 20.4. Of course, "if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties ... runs from the date of the denial of the rehearing or of the entry of a subsequent judgment entered on the rehearing." Id.

For the first time, the United States Supreme Court has imposed page limitations on the pleadings and briefs filed in that forum. For example, a petition for writ of certiorari "shall be as short as possible, but may not exceed 30 pages" if "produced by standard typographic printing or its equivalent." U.S. Sup.Ct. Rule 21.4. However, "Where documents are produced by photostatic or similar process," a page limit of 65 pages is imposed for a petition for certiorari. U.S. Sup.Ct. Rule 33.3.

ETHICS: QUANDARIES & QUAGMIRES

By J. Vincent Aprile II Assistant Deputy Public Advocate Director for Professional Development

QUERY: Is it ethically proper for a prosecutor or criminal defense attorney to discourage or obstruct communication between prospective witnesses and opposing counsel?

"A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel." ABA Standards, The Prosecution Function, Supplement, Standard 3.1(c), (Approved Draft 1971). "It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which he has the right to give." Id.

The rationale behind this standard is discussed in the Commentary to Standard 3.1(c):

> Prospective witnesses are not partisans; they should be regarded as impartial spokesmen for the facts as they see them. Because witnesses do not 'belong' to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that he not submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a defendant represented by counsel). In the event a witness asks the prosecutor or defense whether it is proper for the witness to submit to an interview by opposing counsel or whether he is under a duty to do so, the witness should be informed that although he is not under a legal duty to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interest of justice that the witness make himself available for interview by counsel.
>
> Counsel may properly request an opportunity to be present at opposing counsel's interview of a witness, but he may not make his presence a condition of the interview. ABA Standards, The Prosecution Function, supra, Commentary, p. 78.

"As to interviewing a prospective prosecution witness, ...federal constitutional notions of fair play and due process dictate that defense counsel be free from obstruction whether it come from the prosecutor in the case or from another state official ... acting under color of law." Coppolino v. Helpern, 266 F.Supp. 930, 935 (S.D.N.Y. 1967).

It should be noted that Standard 3.1(c), The Prosecution Function, recognizes that there may be occasions when it will be the duty of the prosecutor to advise a person that he should not give information to the defense, e.g., when the person is a government investigator or dissemination of the information is restricted by law.

The right of an accused to interview prosectution witnesses is recognized by the federal courts. United States v. Long, 449 F.2d 288, 295 (8th Cir. 1971); United States v. Miller, 381 F.2d 529, 538 fn.7 (2nd Cir. 1967);

(Continued, P. 16)

Callahan v. United States, 371 F.2d 658 (9th Cir. 1967); Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966).

"Witnesses belong neither to the prosecution nor to the defense. Both sides have an equal right, and should have an equal opportunity to interview them." United States v. Murray, 492 F.2d 178, 194 (9th Cir. 1973); United States v. Matlock, 491 F.2d 504, 506 (6th Cir. 1974). "However, while it is true that a witness is not to be prevented from speaking to the defense by the prosecution, it is equally true that a witness cannot be required to speak to an investigator or an attorney." United States ex rel. Trantino v. Hatrak, 408 F.Supp. 476 (D.N.J. 1976).

Trial defense counsel must function under comparable ethical and legal restraints. "A lawyer should not discourage or obstruct communications between prospective witnesses and the prosecutor." ABA Standards, The Defense Function, Supplement, Standard 4.3(c), (Approved Draft 1971). "It is unprofessional conduct to advise any person, other than a client, or cause such a person to be advised to decline to give to the prosecutor or counsel for co-defendants information which he has a right to give." Id.

"Prospective witnesses are not partisans, and they should be regarded as spokesmen for the facts as they see them." Gammon v. State, Tenn., 506 S.W.2d 188, 190 (1973). "Because they do not 'belong' to either party, a prosecutor, defense counsel or anyone acting for either should not suggest to a witness that he not submit to an interview by opposing counsel." Id. at 190.

If a trial defense counsel has reason to believe that the prosecution has obstructed communication between prospective witnesses and the defense, counsel should move the trial court (1) to order the prosecutor and any of his agents to cease any and all conduct calculated to obstruct counsel or defense investigators, (2) to admonish all prospective prosecution witnesses that the prosecutor's advice that they should not communicate with the defense is improper and should be disregarded by them, (3) to instruct all prospective prosecution witnesses that the decision to communicate with representatives of the defense is solely their own, and (4) to order a continuance to allow the defense ample opportunity to interview all prospective prosecution witnesses who are willing to communicate with the defense after proper judicial instruction on their rights and obligations as witnesses.

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PRETRIAL ADVICE TO DEFENSE WITNESSES

Do you take the time to explain the dynamics of the courtroom to prospective defense witnesses? This expenditure of time and consideration can help defense witnesses avoid the pitfalls that often befall witnesses in their first appearance before a jury.

In Jefferson County, Kentucky the Office of the Commonwealth's Attorney provides a brochure entitled "So You Are Going To Testify..." to each potential prosecution witness "so that the witness might testify more clearly and accurately, and ... feel more comfortable in the courtroom."

The following text, excerpted from the Jefferson County pamphlet, provides at least a minimal checklist of information you should consider discussing with prospective defense witnesses.

(Continued, P. 17)

RECEIVING A SUBPOENA

A subpoena is a court order directing you to be present at the time and place stated. Once you have been subpoenaed, you are obligated to appear. Failure to appear may be understood as contempt of court by the judge, so it is very important that you inform defense counsel if you cannot appear as directed.

COURTROOM PROCEEDINGS

One of the fundamental rules in a criminal case is that both the prosecution and the defense have the opportunity to question witnesses. The attorney who calls on you to testify will question you as to the specific facts of the case. After that questioning is completed, the attorneys for the other side will have the opportunity to ask you questions relating to the same set of facts.

Questions asked by both sides are directed toward achieving the truth. You may be excluded from the courtroom when other witnesses are testifying. This is to insure that the testimony of one witness does not influence the testimony of another.

WHEN TESTIFYING...

Here are some suggestions to keep in mind as you prepare for your court appearance:

1. Dress conservatively and be courteous. The way you dress and present yourself is a direct reflection on you. You want to be sure that your appearance and manner do not distract the judge or jury from careful consideration of your testimony.

2. Be attentive. You should remain alert at all times so that you can hear, understand, and give a proper response to each question. If the judge or jury get the impression that you are bored or indifferent, they may tend to disregard your testimony.

3. Always tell the truth. Don't guess or make up an answer. If you are asked about little details which you don't remember, it is best to say "I don't remember."

4. Speak clearly and loudly. The juror farthest from you should be able to hear distinctly what you have to say.

5. Answer all questions directly. Answer only questions asked. If you can answer a question with a simple yes or no, do so. If you don't understand a question, ask that it be explained.

6. Be serious in the courtroom. Avoid laughing and talking about the case in the presence of the jury or anywhere in the courthouse where you may be observed.

7. Do not lose your temper. Remember that some attorneys on cross examination may try to wear you out so you will lose your temper and say things that are not correct. Hold your temper and your testimony will be much more valuable.

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SPOUSE ABUSE AS DEFENSE TO MURDER CHARGE

On April 8, 1980, Kathy Phillips was acquitted on a murder charge. Kathy was indicted for the alleged murder of her husband, Eugene Phillips. Two aspects of the defense are particularly noteworthy: a "team defense" approach was utilized and the acquittal was based upon a self-protection instruction.

Shortly after Kathy was indicted, Gary Johnson was appointed to represent her. Subsequent to his appointment, Gary entered private practice but retained this case. Gary contacted Neal Walker, a public advocate in the Prestonsburg office, and Nora McCormick, a public advocate in the Winchester office. It was decided that a "team defense" approach should be used in the case because of the unique factual and legal issues presented in the matter. Thus, the team was initially composed of Kathy, Gary, Neal and Nora.

Kathy is a twenty-year old mother of two young children. Throughout the course of her marriage to Eugene, she, as well as her children, suffered physical abuse from her husband. The defense team decided, upon Kathy's request, to use the pattern of repeated and serious physical injury as a defense to the murder charge.

The team allocated responsibilities among themselves. Gary was the chief trial attorney; Neal and Nora coordinated legal research and resources.

The team first decided that for Kathy to endure the ordeal of a trial, she needed some support from whatever community resources, however limited, to assist her in coping not only with the rigors of a trial but also in her understanding of the problem of spouse abuse. Kathy, having experienced the terror of her husband's abuse, remained firm in her position that the issue of spouse abuse had to be illuminated and that, hopefully, other women in similar situations would be helped by Kathy's example.

Fortunately, a community organization called Domestic Abuse Support and Housing (DASH) was operative in Floyd County. An initial contact with DASH was made by the team in the hopes of getting emotional and medical support for Kathy. The DASH members very enthusiastically involved themselves not only by providing that support but also by their community-education efforts, actions in which they have long been involved.

Through the DASH contact, Edna Richie became a member of the defense team. Edna is a paralegal employed by the Appalachian Research and Defense Fund (Appalred) in Pikeville. Having been a victim of spouse abuse, Edna became personally and professionally involved with Kathy and assisted in the trial preparation and trial in a myriad of ways.

The team continued its efforts to educate themselves about the nature of the spouse abuse problem. Numerous contacts were made with the Eastern Kentucky Chapter of the National Lawyers' Guild, the Battered Women's Support and Shelter, Inc. (a group which established a shelter house in Barbourville), the Women's Employment Information Service in Hazard, Lansdowne Mental Health Clinic in Ashland, Battered Spouse Shelter in Lexington, Women, Inc. in Lexington, numerous legal services attorneys, and law students. Invaluable legal research was provided by the Guild members, legal services attorneys, and law students. The other community-based programs provided insight, understanding, and support. The result was a tremendous marshalling of knowledge and resources.

(Continued, P. 19)

As the April 7 trial date approached, the services of Paula M. Raines, an attorney and psychotherapist, were engaged to assist in the voir dire, preparation of expert testimony, and overall defense strategy. Her presence and keen insights were pivotal throughout the course of the trial.

The trial began on April 7 and through the Commonwealth's witnesses, the defense team was able to establish the history of repeated and serious physical abuse to which Kathy and her children were subjected. There was no contest that Kathy had a gun, that she had shot the gun, and that the shot killed Eugene Phillips. Rather, the defense team was able to present the circumstances surrounding the shooting in such a way as to warrant an instruction on self-protection.

The facts showed that three days before the shooting Kathy had been subjected to another round of abuse by her husband during which she sustained a concussion. She left her marital residence and stayed with her parents. On the day of the shooting, Kathy and her sister walked over to her marital residence in order to obtain the children's clothing and other necessaries. Kathy had taken a gun to shoot off a padlock placed on the door by Eugene to keep her from obtaining those items. However, as Kathy and her sister approached the house, they heard music and walked to a nearby house. After a short time, Kathy and her sister left but were then confronted with several of Eugene's friends milling about the house. Thus confronted, Kathy removed the gun from her purse and pointed it at herself; her brother, a friend of Eugene's, tried to persuade her to put the gun away. As he approached, the gun was discharged into the ground. She then pointed the gun at herself again and continued to back away from the situation. As another friend of Eugene's tried to approach, the gun was again discharged in the direction of the house.

At some point Eugene came out onto the porch of the house. He taunted her and danced about. The gun went off a third time and struck Eugene.

The facts, thus, did not present a clearcut self-protection defense. However, those facts, coupled with an understanding of the nature of the spouse abouse problem and Kathy's personality configuration, led the team to tender an instruction entitled "Self-protection and use of a deadly force under fear, based upon a history of past repeated and serious physical injury, of present or future abuse". The instruction was accepted by the Court and set out below:

1. If at the time the defendant shot and killed Eugene Phillips (if she did so), she believed that Eugene Phillips was about to use such physical force upon her, she was privileged to use such physical force against Eugene Phillips as she reasonably believed, based upon a prior history of repeated and serious physical abuse to be necessary in order to protect herself from death or serious physical injury.

2. "Physical force" means force used upon or directed toward the body of another person.

3. "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

The jury, having been educated throughout the duration of the trial, from voir dire through closing arguments, about the nature of spouse abuse, returned a not guilty verdict. It is difficult to assess the impact of the various approaches used in the defense of Kathy Phillips. However, certain aspects are clearly worthy of comment.

(Continued, P. 20)

First, the team defense concept can and does work. Given the appropriate circumstances and personnel, a team approach is clearly the preferable method of presenting a complex defense. It is essential that an outline of responsibilities and roles be established early on and that it is maintained throughout. It provides for cohesiveness, efficiency, and effectivenss.

Second, the marshalling of community resources is a tremendous asset to the effectiveness of a defense. By their presence throughout the trial and their pre-trial efforts, all of the above-listed organizations demonstrated their dedication to assisting the defense in any way possible. Their efforts created a courtroom atmosphere that was not only supportive of Kathy and the rest of the team but which visibly demonstrated to the jury and the Court the significance of the defense.

Finally, the use of a consistent and cohesive defense theme, from voir dire through closing arguments, informs the jury, from the outset, of the direction of the defense and ultimately prepares them to accept that defense. Paula Raines was of tremendous assistance in developing certain "buzz words" that helped mold the jurors' attitudes and acceptance of the defense. Thus, the team approach made the difference in the presentation of the defense of Kathy Phillips. A team composed of lawyers, psychologists, other helping professionals and lay persons is a useful and effective tool in presenting unique defenses.

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MAILING LIST

Do you know any defense attorneys or friends who would appreciate receiving The Advocate? If so, please send their names and addresses to Ernie Lewis, Editor, The Advocate, Office for Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601.

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