# The Advocate

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## THE ADVOCATE FEATURES

I interviewed Will Kautz at lunch on the day after a client of his received ten years on second degree manslaughter, with the original charge being murder. Will kept wanting to talk about the trial, and not himself. That's vintage Will Kautz.

(See Kautz, P. 2)

INSIDE



## GOVERNOR APPOINTS OPA STUDY TASK FORCE

Governor Brown, at the request of Secretary Welch, has recently signed an Executive Order establishing a "Task Force on the Office for Public Advocacy." This blue ribbon group, consisting of judges, lawyers and members of the General Assembly, is to conduct a "comprehensive study of the problems related to the delivery of legal services to indigent persons by the Office for Public Advocacy" and submit a report to the Governor recommending changes and legislation or funding to correct these problems.

The Task Force also has been called upon to establish "guidelines to determine, on a priority basis, which [legal] services should be provided should funding levels be inadequate to fund a full service system".

Although Governor Brown's Order establishes no deadline for the work of the Task Force, it has been reported that the Chairman, Neil J. Welch, Secretary of Justice, intends for the committee to complete its work on or before the opening of the coming session of the General Assembly on January 5, 1982. The Task Force plans its first meeting in Frankfort the week of December 6, 1981.

Members of the Task Force are: Justice J. Calvin Aker, Joe Barbieri, Judge James S. Chenault, Judge William L. Graham, Professor William H. Fortune, Representative Jim LeMaster, Senator Michael R. Maloney, Senator Edward H. O'Daniel, Representative David H. Thomason, Les Whitmer, Judge Anthony M. Wilhoit, and Neil J. Welch.

(Kautz, Continued from Page 1)

Will has been a full-time public defender in Paducah since December of 1978. Starting off in district court, he soon moved into circuit court. He has tried approximately fifteen felony cases before a jury, with three acquittals and three cases being reduced to a misdemeanor by the jury. Will is now an experienced and valuable trial attorney in the Paducah Office.

Will is a native of northern Kentucky. He grew up in Fort Mitchell, received a BS in business at Northern Kentucky University, and graduated from Chase Law School in 1978. Before joining the Paducah office, he spent six months in the west, backpacking and camping.

After law school, Will attended the training course at the National College for Criminal Defense lawyers. This intensive two week trial advocacy session was called by Will the most valuable training he has ever received.

Will enjoys being a full-time public defender, both because of the courtroom experience it has given him, and because it allows him the flexibility, when a trial term has ended, to explore the lakes of western Kentucky. In addition, Will says that being a public defender allows one to help other people, to divert a kid with no record, or to work a case correctly without taking into account monetary considerations.

Will and I finished our lunch, and began to walk back to the office. We ran into a local attorney, and Will immediately began to talk to him about the trail that had just ended. Will had expected an acquittal, and yes he was disappointed, and didn't understand the jury's verdict, and he was going to have to talk to some of the jurors to understand what had happened, and it really hurt when his client asked him "What do we do now", and...

ERNIE LEWIS

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## MALPRACTICE INSURANCE FOR PUBLIC DEFENDER CASES

We have recently been notified by Complete Equity Markets, Wheeling, Illinois that local public advocate attorneys, who also engage in private practice are eligible to purchase professional liability (malpractice) insurance under the National Legal Aid and Defender Association (NLADA) group plan, provided they are members of NLADA. The insurance plan does offer some benefits over other plans. It should be noted, however, that the policy only covers cases in which the attorney is appointed under the local public advocacy plan and does not cover any cases resulting from private practice.

The basic coverage provides $250,000 coverage per occurance/ $500,000 aggregate. Optional higher limits are available. There is a deductible of $100, but the deductible only applies in the event of a judgment or settlement against you and does not come off the front end as with some other policies.

As you may know there have been recent Supreme Court decisions (Ferri v. Ackerman, 100 S.Ct. 402 and others pending) which indicate that attorneys handling public defender cases, full or part-time, may be sued for malpractice. For that reason this office sought legislative authority in 1980 from the General Assembly to purchase professional liability insurance for its full-time employees. The insurance has already paid for itself as a result of two claims which have been filed.

In order to purchase the insurance you must be a member of NLADA which costs $30 per year. The insurance itself, at current rates, costs $170 per attorney per year. If you have any questions or would like more information contact the LAB attorney for your area.

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# WEST'S REVIEW

A large number of opinions were issued by Kentucky's appellate courts during September and October.

In Trulock v. Commonwealth, Ky. App., 28 K.L.S. 12 at 3 (September 4, 1981), the Court of Appeals reversed the defendant's conviction because of the trial court's failure to comply with RCr 8.30. RCr 8.30 requires the appointment of separate counsel for codefendants unless the trial court explains to the defendants the possibility of a conflict of interest in their joint representation, and enters into the record their statement that although the possibility of a conflict of interest has been explained to them they nevertheless desire to be represented by a joint attorney. Trulock raised the trial court's failure to comply with the rule in his motion for a new trial. The Court of Appeals found that the directive of RCr 8.30 was mandatory and declined to consider the possibility that the error was harmless. The Court also rejected argument by the Commonwealth that the issue was unpreserved because it was not raised until after trial. The Court held that "a defendant cannot be found to have waived the trial court's failure to comply with the rule."

In another decision involving RCr 8.30, the Court of Appeals held that failure to provide separate counsel to codefendants is not error where the record contains a written waiver in compliance with the rule. Brock v. Commonwealth, Ky. App., 28 K.L.S. 14 at 6 (October 30, 1981). The Court of Appeals refused to reverse on the basis of actual conflicts of interest which may have impaired counsel's representation, inasmuch as the defendant had specifically waived his right to separate counsel. However, while affirming Brock's conviction, the Court of Appeals commented that "[d]ue to the scope and magnitude of this problem, trial judges would be well advised to record their colloquys with a defendant regarding the requirements of RCr 8.30 just as their comments, questions, and answers are recorded in accepting a guilty plea."

The Court of Appeals considered the validity of a vehicle search, and search of the vehicle's contents, in Brock v. Commonwealth, Ky.App., 28 K.L.S. 13 at 1 (September 25, 1981). In Brock, the police responded to an informant's tip that a white van, bearing Illinois license plates, would appear at a specified location within an hour to make a drug sale. The police spotted the van and after pulling it over for traffic violations obtained the driver's consent to search it. The officers also conducted a patdown search of the driver after observing what appeared to be a hunting knife inside his shirt. This search yielded a package of pills. During a second consent search of the van the police opened a lunch box which also contained drugs. The Court of Appeals upheld the consent searches, the patdown and the search of the lunch box. The Court upheld the search of the lunch box under New York v. Belton, 29 CrL 3124 (July 1, 1981), which upheld the search of a jacket found in a vehicle as incidental to the defendant's lawful arrest. The Court of Appeals attempted to distinguish its decision from that in Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979). In Wagner the Kentucky Supreme Court held that "legal custody of an automobile by law enforcement officials does not automatically create a right to rummage about its interior." The Court of Appeals reasoned that Wagner did not involve a search contemporaneous with an arrest and therefore was not applicable. Based on Belton and the Court of Appeals' interpretation of Belton in Brock, it appears that a rule that the search of a vehicle and its contents contemporaneous with an arrest is per se "incidental" to the arrest is evolving. A focused challenge to this position may consist of detailed factual inquiry into whether, in an individual case, the

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vehicle and its contents are areas "within the arrestee's immediate control" and thus within the scope of a search incidental to an arrest as defined in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

The Kentucky Supreme Court has announced a surprising reversal of its position on the permissibility of closing argument comment on the consequences of a verdict of not guilty by reason of insanity. In Paul v. Commonwealth, Ky., 28 K.L.S. 11 at 6 (September 1, 1981), the Court reaffirmed its position that the prosecution may argue to the jury that an acquittal may place the defendant at large, while the defense may point out to the jury that, if acquitted, the defendant may be civilly committed. Jewell v. Commonwealth, Ky., 549 S.W.2d 807 (1977); Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980). However, the Court in Paul held that the introduction of proof as to the availability of civil commitment proceedings is reversible error. Subsequently, in Payne v. Commonwealth, 28 K.L.S. 13 at 12 (October 13, 1981), the Court overruled its holdings in Jewell, Gall and Paul, supra, that comment on the consequences of an acquittal based on a finding of insanity is permissible. The Court noted that "[t]he consideration of future consequences such as treatment, civil commitment, probation, shock probation, and parole have no place in the jury's finding of fact and may serve to distort it." The Court then held that "neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict. . ."

The Court in Payne also rejected a vagueness challenge to KRS 531.110, which prohibits the use of a minor in a sexual performance. The defendant challenged the statute as unconstitutionally vague and overbroad in violation of the First Amendment protection of freedom of speech. The Court upheld the statute after holding that it penalized the "conduct" of using a minor in a sexual performance rather than effecting "legitimate expression."

In Riley v. Commonwealth, Ky., 28 K.L.S. 11 at 7 (September 1, 1981), the Supreme Court reversed the defendant's robbery conviction on the grounds that the trial court required the defendant to engage in a prejudicial courtroom demonstration. The complaining witness had been called upon to identify the defendant from photographs, at a showup held the night of the robbery, and at a preliminary hearing. In each instance she failed to identify him. Finally, at trial, the defendant was required to put on a mask allegedly used by the robber, hold a gun, and repeat words used by the robber. At that point the witness identified the defendant as the robber. The Court found that "[t]he dress rehearsal held before the jury, when considered in light of the totality of the circumstances, was so unnecessarily suggestive and conducive to irreparable mistaken identification that movant was denied due process."

The Court in Warner v. Commonwealth, Ky., 28 K.L.S. 12 at 13 (September 22, 1981) reversed the defendant's conviction of three counts of rape and one count of sodomy allegedly committed by the defendant upon female inmates at the Fayette County Detention Center while he was a deputy jailer. At the defendant's trial evidence of three unrelated incidents in which the defendant engaged in inappropriate sexual conduct was introduced by the Commonwealth. The alleged prior acts amounted to acts of third degree sexual abuse. The Commonwealth argued that this evidence of prior sexual acts was admissible as an exception to the rule against the use of prior acts. The Commonwealth analogized to the rule permitting the introduction of evidence of separate but similar sexual acts committed on children to show pattern or disposition in a case involving a sex crime against a child. The Court was unpersuaded by this argument as applied to the facts before it because "the activities alleged . . . clearly fail to have a reasonably close relation in scheme and pattern and in time to the acts alleged in appellant's conviction."

The Court reversed Brian Douglas Schaefer's conviction of bribing a

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witness because of conduct of the commonwealth attorney in repeatedly eliciting testimony concerning tape recordings which had been ruled inadmissible by the trial court. Schaefer v. Commonwealth, Ky., 28 K.L.S. 13 at 11 (October 13, 1981). The tapes contained conversations during which Schaefer, an attorney, met with a Detective Young and allegedly made a payment of $500 to Young in exchange for Young altering his testimony against a client of Schaefer's. Young testified at Schaefer's trial but the tape recordings were ruled inadmissible. Despite the trial court's ruling the commonwealth attorney repeatedly elicited references to the tapes from witnesses. The Supreme Court held that "this violation of the trial judge's ruling clearly constitutes error." Id. The Court held the error was prejudicial inasmuch as "repeated mention of the tape could have influenced the jury's determination of what transpired at the meeting." Id.

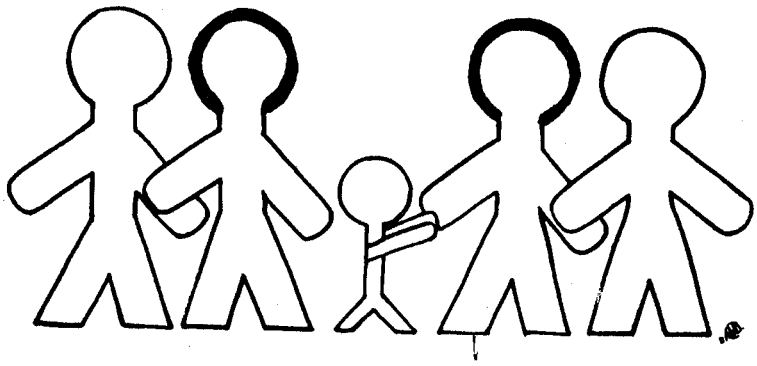
The Court has held that an accused can be convicted of both theft and retaining the goods which he has stolen under KRS 514.110 (1). Sutton v. Commonwealth, Ky., 28 K.L.S. 13 at 12 (October 13, 1981). The Court of Appeals had previously held in Sutton's case that proof of theft by unlawful taking is sufficient to support a conviction of receiving stolen property. Sutton v. Commonwealth, Ky. App., 27 K.L.S. 12 at 12 (September 5, 1980). The Kentucky Supreme Court affirmed the Court of Appeals' decision specifically stating that it agreed with the Court of Appeals' holding. However, the Supreme Court then went on to hold, in dictum, that "[o]ur conclusion is that one who steals property and is later found to be in possession of it may be convicted both of the theft itself (in the county in which it was committed) and the retention (in the county in which he is proved to have been in possession of the stolen goods)." The Court did not address the double jeopardy dilemma occassioned by its decision to simultaneously embrace the proposition that proof of theft by unlawful taking constitutes proof of receiving stolen property, and the proposition that a defendant may be convicted of both based on a single incident. Clearly, trial counsel should strenuously object to any attempt to convict their client of both theft and receiving or retaining the stolen property, citing the Fifth Amendment protection against double jeopardy and KRS 505.020 (1)(a).

In a similar decision the Supreme Court has held in Sebastian v. Commonwealth, Ky., 28 K.L.S. 13 at 15 (October 13, 1981), that a defendant may be convicted of both burglary and receiving property stolen by him during the burglary. Of course, a defendant may be convicted of both burglary and theft of property taken in the burglary since conviction of the two offenses requires proof of distinct elements. On the basis of this principle, and in view of its holding in Sutton, supra, the Court held that "[b]y parity of reasoning it follows that a person can be convicted of both burglary and retaining possession of property stolen by him in the course of the burglary." The Court also held that it was error under RCr 6.18 for the trial court to refuse to grant a severance of unrelated robbery charges.

No United States Supreme Court opinions were issued during the two months under review. However, a Sixth Circuit opinion merits discussion.

In Weir v. Fletcher, 6th Cir. (September 9, 1981), the Sixth Circuit concluded that prosecutorial comment on a defendant's silence after he was arrested, but before he was given Miranda warnings, is grounds for granting habeas corpus relief. It has been held that prearrest silence may be used to impeach a defendant who testifies, while Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), held that use of a defendant's silence after he has been given Miranda warnings is violative of due process. The Sixth Circuit reasoned that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." The Court concluded that the principle announced in Doyle should extend to the protection of postarrest, pre-Miranda warning silence.

LINDA WEST





"A TRIP TOWARD DEATH"
by George F. Will

Who is Phillip Becker that so many have been so mindful of him? I wrote about him here (April 14, 1980) when his parents successfully asserted a right to block life-prolonging surgery to correct his heart defect. Without the surgery he probably will die prematurely, slowly and painfully, possibly drowning from blood in his lungs. Now a California court has given Phillip to the custody of another couple. Surgery may occur if his biological parents do not erect yet another legal impediment. But it now may be too late for surgery.

Phillip, 14, has Down's syndrome, a chromosomal defect involving retardation and physical abnormalities. The Beckers opposed surgery on two grounds: it might fail, and it might not. Doctors testified to a 90 to 97 percent chance of success, but the Beckers said it was too risky. And they said it might succeed and Phillip, surviving them, might receive care so poor his life would not be worth living. But they cited a pediatrician who said Phillip's life now is devoid of "all qualities of human dignity," he is "so innocent" he would be a "natural victim" of people bent on "taking his money" and is unsuited for modern society. And his father said it would be best for everyone, including Phillip, if he were dead.

Does the constitutional guarantee of equal protection of the law allow the right to life to vary with intelligence? Mr. Becker has said he would not deny such surgery to one of his normal sons. Would any court have allowed the denial were Phillip not retarded? A court did say the Beckers could exercise absolute discretion regarding medical care for a child who might become a "burden." The sovereignty that the court gave the Beckers over Phillip seems especially grotesque considering testimony about the sort of responsibility they have exercised.

BETTER DEAD? Until Pat and Herb Heath filed their action for guardianship, the Beckers never allowed Phillip, who has been institutionalized since birth, a single night in their home. They claimed to visit him six times a year; other said the visits were even fewer. The Beckers say he would be better off dead than surviving them and being without their vigilance. Vigilance? A court has now asked: "Why was he still in diapers at age 6? Why did all his teeth rot? Why didn't he have pre-school?" Why was it necessary for another adult to call the Beckers' attention to the care deficiency at one place they institutionalized him?

The judge who supported the Beckers emphasized their fear that Phillip would be a "burden" to their other sons, who might have to be their brother's keeper. Apparently the judge was ignorant of the fact that the Heaths were eager to adopt Phillip. They had been visiting Phillip and bringing him to their home (and Cub Scout pack) until the Beckers forbade contact with the Heaths, causing attested injury to his health. Pat Heath told "60 Minutes": "I can handle Phillip being dead, because we believe in heaven and we believe he'll be in a much better place. What I can't handle is for him to spend two years dying an agonizing death while adult people sit around and fight about who has the right. That's killing." The Heaths went to superior court.

The earlier case involved California against the Beckers, who benefited from the presumption in favor of parental rather than state judgment regarding a child. But the Heaths' action in Judge William Fernandez's superior court posed a choice between two sets of parents, the "psychological" and "biological" parents. It turned not on the narrow issue of who should make a particular decision affecting Phillip, not on a parental right to assess medical risk. It turned on who should make decisions affecting the rest of Phillip's life. It turned on the detriment already inflicted by "the great parenting fault of the Beckers," and the detriment that would be inflicted by severing Phillip from his "defacto" parents, the Heaths.

Fernandez said children have rights and courts must seek the "least detrimental alternative" for those like Phillip. He said Phillip's parents felt "he should never be close to anyone." Although "ripe for affection and love," he never received from his parents "nurturing" or "constancy of affection and love." Each is a "sine qua non of parenting." A true parental relationship exists between Phillip and the Heaths. Phillip "suffered harm by the parenting of the Beckers" - physical, medical and severe emotional harm, and "stigmatization." And he can "never receive any benefit from custody with the Beckers because they have no expectations for him and will therefore do nothing to allow him to win a place into our society."

TRAGEDY: It is reprehensible that the Beckers continue to judge their son even though by all accounts, except their own, they barely know Phillip. They say he is an ineducable "low Down's" who cannot talk, communicate, write his name, draw, cook or form loving attachments. But Fernandez says: "Whenever the Becker side claimed he couldn't do something, the witnesses for Phillip Becker proved the counter."

Fernandez says Phillip has been denied his right to "habilitation," which includes training. Phillip is "emancipatable" and should have a right to choose, through the "substitute judgment" of the court, between being "warehoused" or living "bathed in the love and affection" of the Heaths.

Fernandez described Phillip's case as a wonderful and irrational tragedy. Wonderful because so many have worked for Phillip, braving "a storm of parental indignation including scathing cross-examination and a multimillion-dollar lawsuit. "Tragic because "I weep uncontrollably" when reading evidence of Phillip's strangling illness, evidence that he is "beginning on his trip toward death," and knows it. (By years of delay the Beckers may have so raised the risks of surgery that his premature death has begun.) The tragedy is irrational because the case has consumed so much time and money that could have been used "to make the last part of Phillip Becker's life happier than the earlier part."

I conclude by mentioning two things, only the second of which is really relevant. I am being sued by the Beckers, who think that what I have reported injures their reputations, and who mistakenly think they have been libeled. Jonathan Will, 9, trout fisherman and Orioles fan, has Down's syndrome.

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## RCr 11.42 AVAILABLE TO INDIVIDUALS ON PAROLE, PROBATION AND CONDITIONAL DISCHARGE

The Court of Appeals was recently requested to determine whether parolees could maintain an RCr 11.42 motion even though they were no longer incarcerated by the Department of Corrections. In two unpublished opinions the Court held that the rule was intended to cover these situations. Hines v. Commonwealth, No. 81-CA-1020-MR (October 16, 1981); Ivey v. Commonwealth, No. 81-CA-1060-MR (October 16, 1981). Suprisingly, in the nineteen years since RCr 11.42 became effective, the Court had apparently never addressed this issue; at least there are no published opinions on point. The Court had determined, however, that generally a movant must be in "actual physical custody." Sipple v. Commonwealth, Ky., 384 S.W.2d 332 (1964).

At the time these cases arose RCr 11.42(1) stated simply that the procedure was available to a "prisoner in custody." Therefore, the Court's decision turned on its definition of the term "custody." In both Hines and Ivey the RCr 11.42 motion had been filed while the movants were actually incarcerated but they had been paroled before the proceedings were concluded and the actions were dismissed. Although the Court could have held narrowly that the procedure was still available since the motions were filed while the movants were incarcerated, the Court painted with a roader brush. In making the decisions, the Court relied on a number of authorities. First the Court indicated that the definition of "custody" is very elastic and may mean actual imprisonment, physical detention or the mere power of imprisoning. Black's Law Dictionary 450 (4th. rev.ed. 1968). The Court also emphasized that Kentucky statutes require a parolee to remain subject to the supervision and direction of the Department of Corrections for the duration of parole. KRS 439.346; KRS 439.348.

Case law also supported the decisions. In Mahan v. Buchanan, 310 Ky. 832, 221 S.W.2d 945, 946 (1949), it was stated that a "prisoner is not a free man while out on parole, and he continues to serve time on his sentence until expiration thereof. Parole statutes simply provide for a different manner of serving a sentence than by confinement in prison." On the basis of this reasoning, the Court of Appeals concluded that parole is "legal custody." The United States Supreme Court has ruled similarly in relation to 28 U.S.C. §2254. Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 295 (1963).

Another persuasive case included a determination by the Kentucky Supreme Court that parole is "custody" in a state habeas corpus proceeding. In Walters v. Smith, Ky., 599 S.W. 2d 164, 165 (1980) that Court stated that the Department of Corrections "has the authority to apply constraints on [a parolee's] liberty to go where [he] will, and that is enough to support habeas corpus jurisdiction." The Court also indicated that "'custody' does not require that the petitioner' be confined in a jail or prison. Nor, indeed, is it ever necessary that he be in actual physical custody; it is sufficient merely that he be restrained of his liberty to a significant degree.' 4 Wharton's Criminal Procedure Sec. 650 (C.Torcia, 12th ed. 1976)."

(See 11.42, P. 9)

(11.42, Continued from Page 8)

Apparently in anticipation of the issue involved in Hines and Ivey the Kentucky Supreme Court recently amended RCr 11.42, effective September 1, 1981, to specifically make RCr 11.42 available to a "defendant on probation, parole or conditional discharge." The Court of Appeals gave this clarification of the rule "heavy weight" in interpreting the meaning and intent of the old rule. Presumably, the new rule indicates that "custody" under the old rule would include probation and conditional discharge as well as parole.

Perhaps this amendment explains the decision by the Court of Appeals to forego publication of these decisions. But these opinions coupled with the amended RCr 11.42 indicate that now any individual released on parole, probation or conditional discharge may maintain such a proceeding in spite of the absence of physical incarceration and regardless of whether the motion was filed before or after the release.

RANDY WHEELER

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## OPA PAYS 58¢ ON THE DOLLAR

The Office for Public Advocacy announced earlier this year that for this fiscal year assigned counsel claims would be paid on a pro rata basis. After receiving all claims for the first quarter, and comparing them with available moneys, it was found that only 58.2¢ would be paid for each dollar claimed. This applies to the first quarter only. Second quarter payments will not be known until all claims are in after January 1, 1982. It should be remembered that this applies only to assigned counsel counties, not allotment counties.

## CONGRATULATIONS TO J. VINCENT APRILE II

J. Vincent Aprile II has recently been elected to the Defender Committee of the National Legal Aid and Defender Association.

Founded in 1911, NLADA is a non-profit organization which works toward the goal of equal treatment for the poor in the courts of this country. Its membership includes attorneys who provide both civil and criminal legal assistance for the poor and members of the general bar, the client community and the general public. In 1981 the Association has concentrated its efforts on the survival of the federally funded Legal Services Corporation and on the preservation of legal safeguards which protect the right of the accused.

For the past year, Vince has been chairperson of the Amicus sub-committee of the Defender Committee of NLADA, which has been responsible for submitting amicus briefs in the United States Supreme Court on such cases as Eddings v. Oklahoma, and Roth v. Hunt. Vince will continue to chair this sub-committee.

The Defender Committee itself is a policy making group for public defender and private bar defense attorneys. Policy matters relevant to defense attorneys, and in particular, right to counsel, compensation for public defenders, etc. are initiated and decided in the Defender Committee subject to the approval of the Board of Directors of the NLADA.

The Office for Public Advocacy is proud that Vince has received this honor.

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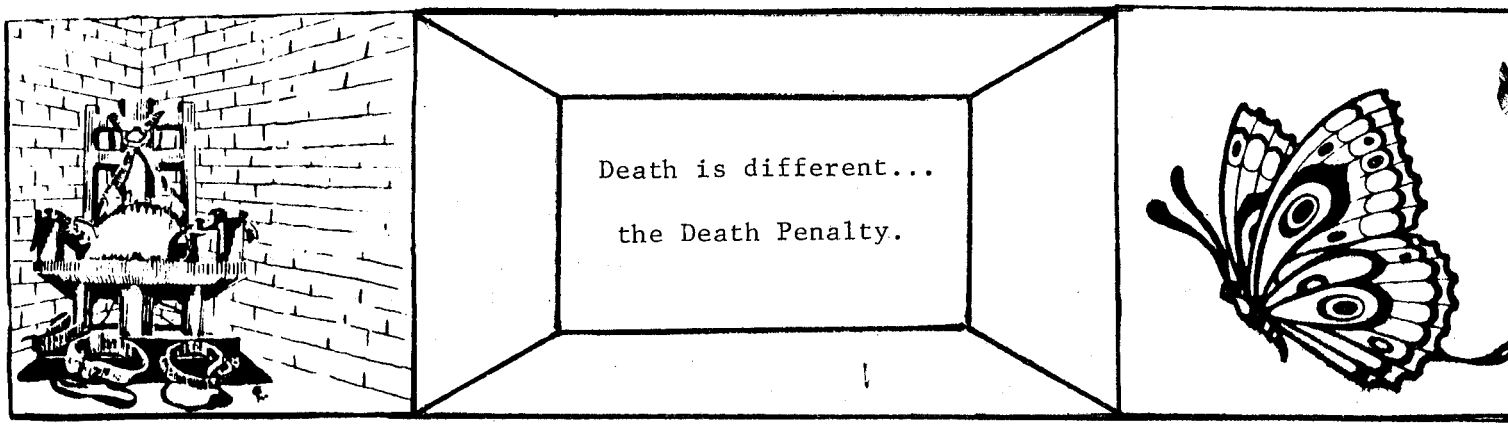


Capital Case Law
State vs. Adams
___S.E.2d___(S.C. 10/6/81)

Appellant was convicted of murder, housebreaking and kidnapping, and sentenced to death. His convictions were reversed for two reasons: (1) a violation of the attorney-client privilege by testimony of appellant's former appointed attorney that appellant's confession was voluntarily given after the attorney had disscussed the matter with him, where that testimony was based in part on observations made during confidential conversations; and (2) the court's refusal to require disclosure of notes that a police officer used to refresh his memory while testifying.

The sentence was also reversed on grounds relating to the death penalty:

1) Appellant testified at the guilt phase of his trial, denied involvement in the crime, and said that his confession had been coerced. On cross-examination the prosecutor pressed him to concede that the person who committed the crime described in the confession didn't deserve to live. Finally he obtained the desired concession:

> "Q. Anybody that would do something like this ought to die, shouldn't they?
>
> "A. I really can't say if that's the truth. The words were made up on the statement.
>
> "Q. I'm not saying that. I'm asking you if this actually happened, whoever did it should die, shouldn't they?
>
> "A. Yeah, whoever done it.
>
> "Q. That's all."

Although trial counsel made no objection to this questioning, in a capital case the Supreme Court reviews the record in favorem vitae, and finds that this cross-examination violated appellant's Fifth Amendment right to remain silent as to his punishment if convicted:

> When a defendant waives his privilege against self-incrimination by electing to take the witness stand in the first phase of the trial, he opens himself to impeachment only as to issues related to his innocence or guilt. Given the structure of the capital proceeding, the defendant who testifies in the first phase may nonethe-less choose to exercise his privilege at the second phase and not testify. Thus, to delve into the punishment area while

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cross-examining a defendant during the guilt-or-innocence phase of the trial is a violation of his constitutional guarantee against coerced self-incrimination.

Beyond the serious Fifth Amendment violation, the questions propounded here were not only irrelevant as to the issue then before the jury, they also were designed to create a response, based on opinion, going to an ultimate issue reserved for the jury's determination. The effect of having the appellant unwittingly state that he deserved the death sentence prior to the jury having even considered the matter created an 'arbitrary factor' intolerable to this Court. Section 16-3-25(c) of the Code.

State vs. Plath
___S.E.2d___(S.C. 10/7/81)

Appellants were convicted of murder and kidnapping and sentenced to death. Convictions affirmed; sentences reversed.

1) The sentences of death must be reversed due to prosecutor's penalty phase argument that

a) He would never seek the death penalty again if the jury did not recommend that appellants be sentenced to death. The same prosecutor made an almost identical reversible error 20 years ago. State v. Davis, 122 S.E.2d 633 (1961); and

b) The trial judge could ignore the jury's sentencing recommendation. See State v. Woomer, 277 S.E.2d 696 (S.C. 1981).

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## CAPITAL COMMENTS

Two Justices of the United States Supreme Court recently clashed during oral arguments over whether it is constitutional to sentence juveniles to death.

Justice William Rehnquist questioned the juvenile's (Monty Eddings) lawyer, Jay Baker: "Why should the taxpayers have to bear the cost" of confining Eddings for the next 15 to 30 years, he asked Baker.

Baker responded by noting that the state had already spent tens of thousands of dollars in prosecuting Eddings.

Rehnquist then bemoaned the cost to taxpayers from endless appeals of death sentences.

At that point, Justice Thurgood Marshall interupted: "It would have been cheaper just to shoot him right after he was arrested, wouldn't it?" Marshall asked sarcastically.

Rehnquist did not respond.

Baker continued his argument: "The current thought in Europe and South America is that to execute juveniles is barbaric. The only purpose I can see in executing a 16-year-old child is retribution -- pure and simply vengeance."

But Oklahoma Assistant Attorney General David W. Lee argued that states should be allowed to execute a juvenile as long as he has no psychological disorders and is not retarded.

"Younger people in this country are becoming more mature at an earlier age," he added.

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On September 18, 1981 the French National Assembly overwhelming approved, 363 to 117, a bill to abolish the death penalty. This makes France the last country in Western Europe to abolish capital punishment. The worldwide abolishment trend continues.

(Continued, P. 12)

Statistics have never supported the deterrence rationale for the death penalty. In West Germany and Austria, where such sentences ended years ago, the homicide rate has consistently been lower than it is in France.

The removal of capital punishment will not necessarily reduce the number of murders. However, such statistics do support the position that homicides are the consequence of various, complicated factors for which death sentences are not the simple answer.

Minister of Justice, Robert Badinter, arguing for the abolition of capital punishment before the legislature in September, read the guillotine's own condemnation when he said, "The death penalty has, for 2000 years, been contrary to what humanity has considered to be its most noble dreams." Badinter's crusade began in 1972 when, as the lawyer of a condemned murdered, he watched his client's execution by guillotine, a moment so traumatic that he later wrote, "crime physically changed sides" when the blade fell.

ED MONAHAN

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DEATH ROW U.S.A.

TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE NAACP LEGAL DEFENSE FUND: 891

Race:

| | | |
|---|---|---|
| Black | 367 | (41.19%) |
| Hispanic | 40 | ( 4.49%) |
| White | 474 | (53.20%) |
| Native American | 5 | ( 0.56%) |
| Unknown | 3 | ( 0.34%) |
| Asian | 2 | ( 0.22%) |

Crime: Homicide

| | | | |
|---|---|---|---|
| Sex: | Male | 882 | (98.99%) |
| | Female | 9 | ( 1.01%) |

DISPOSITIONS SINCE JULY, 1976

Executions: 4
Suicides: 7
Commutations: 18
Died of natural causes or killed while under death sentence: 4

INVESTIGATIVE BRANCH

The Office for Public Advocacy trains and oversees a staff of investigators, including a full-time polygraphist. Although prior experience may not be necessary, some investigators have experience and training in criminal, developmental disability, involuntary commitment, and post-conviction relief cases. Some hold advanced degrees, others have law enforcement experience, and a few hold office in the National Defender Investigators Association.

Their main function is obtaining relevant information for an indigent client's attorney, information which may establish the innocence of a defendant, assist defense counsel in plea negotiations, or protect the rights of developmentally disabled persons. Investigators conduct interviews of defendants and witnesses, obtain releases and records, serve subpoenas, conduct polygraphs, make record checks, testify at trials and hearings, and help public advocates in other ways.

Each investigator has access to the National Criminal Information Center (NCIC) and Kentucky Criminal Information Center (KCIC) arrest reports, the Kentucky State Police crime laboratories, and other sources of information. Staff investigators are located across the Commonwealth so they may serve the local attorneys of an investigative district of several counties. Interested persons should contact the Recruitment and Examination Section, Department of Personnel (502-564-8030) to sit in on the Public Advocacy Investigator examination.

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# TRIAL TIPS

## ETHICS: QUANDARIES & QUAGMIRES

By: Vince Aprile

Query: Which decisions relating to the conduct of the case are ultimately for the defendant and which are ultimately for the defense counsel?

"Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel." 1 ABA Standards for Criminal Justice (2nd Ed. 1980), The Defense Function, § 4-5.2 (a). "As established by the history of the criminal justice process and the rights vested in an accused under the Constitution, certain basic decisions have come to belong to the client while others fall within the province of the lawyer." ABA Standards, The Defense Function, supra, Commentary, § 4-5.2.

There can be no dispute that the following three decisions "are to be made by the accused after full consultation with counsel":

(i) what plea to enter;

(ii) whether to waive jury trial; and

(iii) whether to testify in his own or her own behalf.[1]

"In making each of these decisions -- whether to plead guilty, whether to waive jury trial, and whether to testify -- the accused should have the full and careful advice of counsel." ABA Standards, Defense Function, supra, Commentary, § 4-5.2. "[C]ounsel is free to engage in fair persuasion and to urge the client to follow the proffered professional advice." Id. Nevertheless, "because of the fundamental nature of these three decisions, so crucial to the accused's fate, the accused must make the decisions." Id.

The right of self-representation - to make one's own defense personally without the assistance of counsel - is also a decision to be made by the accused. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

In Kentucky, an accused may even make a limited waiver of counsel, specifying the extent of services he desires, and he then is entitled to counsel whose duty is confined to rendering the specified kind of services within the normal scope of counsel services. Wake v. Barker, Ky., 514 S.W.2d 692, 696 (1974).

"It is also important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury." ABA Standards, The Defense Functions, supra, Commentary, § 4-5.2. "[B]ecause this decision is so important as well as similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses." Id. "For instance, in a murder prosecution, the defendant, rather than the defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughter." Id.

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[1] ABA Standards, The Defense Function, supra, Section 4-5.2(a); see Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930); Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972).

Similarly, "[t]he decision whether to appeal must be the defendant's own choice." ABA Standards, The Defense Function, supra, § 4-8.2(a). "After conviction, the lawyer should explain to the defendant the meaning and consequences of the court's judgment and defendant's right to appeal." Id. "The lawyer should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal." Id. "The lawyer should also explain to the defendant the advantages and the disadvantages of an appeal." Id.

Conversely, "[t]he decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client." ABA Standards, The Defense Function, supra, § 4-5.2(b). "Because these decisions require the skill, training, and experience of the advocate, the power of decision on them must rest with the lawyer, but that does not mean that the lawyer should completely ignore the client in making them." Id., Commentary, § 4-5.2.

By appreciating that certain decisions are the preogative of the defendant and others are within the province of the attorney, the defense counsel can avoid improper and unethical trial strategies. For example, "an attorney may not [in closing argument] admit his client's guilt which is contrary to his client's earlier entered plea of 'not guilty' unless the defendant unequivocally understands the consequences of the admission." Wiley v. Sowders, 647 F.2d 642, 649 (6th Cir. 1981); emphasis added.

Similarly, "[c]ounsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof," but "an attorney may not stipulate to facts which amount to the 'functional equivalent' of a guilty plea." Id., citing United States v. Brown, 428 F.2d 1100 (D.C. Cir. 1970), and Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979).

"In those rare situations where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in a manner consistent with Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)." Wiley v. Sowders, supra at 650.

"If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, the lawyer's advice and reasons, and the conclusion reached." ABA Standards, The Defense Function, supra, § 4-5.2(c). "The record should be made in a manner which protects the confidentiality of the lawyer-client relationship." Id.

## ARE OFFENSES INVOLVING POSSESSION OF UNCONCEALED HANDGUNS AND FIREARMS UNCONSTITUTIONAL IN KENTUCKY?

In cases where the defendant is charged with either possession of a handgun by a convicted felon or possession of a defaced firearm - violations of KRS 527.040 and 527.050, trial defense counsel should challenge the constitutionality of these statutes on the basis of the express language of the Kentucky Constitution.

Section 1(7) of the Kentucky Constitution recognizes that "[a]ll men ... have certain inherent and inalienable rights," including "[t]he right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons."

Section 1(7) "is an exemplification of the broadest expression of the right to bear arms." Holland v. Commonwealth, Ky., 294 S.W.2d 83, 85 (1956). This section is in striking contrast to other state constitutions which "give the legislature the right to regulate the carrying of firearms" or "prohibit even the possession of firearms." Id.

In Kentucky, "the legislature is empowered only to deny to citizens the right to carry concealed weapons." Holland v. Commonwealth, supra at 85. "The constitutional provision is an affirmation of the faith that all men have the inherent right to arm themselves for the defense of themselves and of the state." Id. "The only limitation concerns the mode of carrying such instruments." Id.; emphasis added.

As the Holland court acknowledged in 1956, "the meaning of the constitutional provision [§ 1(7)] is plain and the legislature has exercised the power granted it by enacting KRS 435.230," which prohibited the carrying of a concealed deadly weapon. Id. at 85. When the Kentucky Penal Code was enacted, KRS 527.020 replaced KRS 435.230 as the statutory prohibition against carrying a concealed weapon.

On the basis of § 1(7) of the Kentucky Constitution and the Holland precedent, the Attorney General has concluded that a city would have "no authority to adopt an ordinance prohibiting the carrying of unconcealed weapons." OAG 74-73. See also OAG 78-25.

However, with the advent of the Kentucky Penal Code in 1975, two new statutes affecting "the right to bear arms" went into effect. KRS 527.040 prohibits the "possession of a handgun by a convicted felon," while KRS 527.050 prohibits the "possession of a defaced firearm." Neither of these statutes had a comparable provision in prior Kentucky law. KRS 527.040 and 527.050, Commentary (1974).

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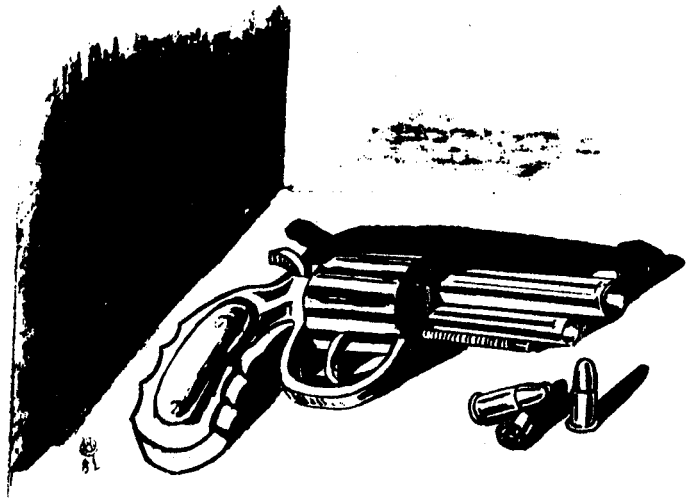

It would appear that these two legislative restrictions on "the right to bear arms" exceed the limited right of the General Assembly under § 1(7) of the Kentucky Constitution "to enact laws to prevent persons from carrying concealed weapons." Under the plain statutory language of KRS 527.040 and KRS 527.050, these crimes do not require that the convicted felon's possession or transportation of a handgun was concealed or that the defaced firearm was possessed in a concealed manner. Consequently, these offenses appear to be unconstitutional legislative infringements on "the right to bear arms" delineated in § 1(7) of the Kentucky Constitution.

The Kentucky Constitution specifically provides that upon conviction of a felony a person shall lose his right to vote and to hold public office. Kentucky Constitution, §§ 145, 150.

However, no provision of the Kentucky Constitution excludes a convicted felon from "the right to bear arms" contained in § 1(7) of the Constitution. Obviously, insofar as KRS 527.040 prohibits a convicted felon from "possessing" or "transporting," as compared to "manufacturing," a handgun, the statute must be deemed unconstitutional.

Trial defense counsel in prosecutions under KRS 527.040 and 527.050 should move, preferably prior to trial, to have these statutes declared unconstitutional under the express language of § 1(7) of the Kentucky Constitution and the charges dismissed with prejudice.

VINCE APRILE

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