The Advocate

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LEGISLATURE ENDORSES FULL-TIME CONCEPT

The 1982 General Assembly has endorsed the concept of delivering public defender services through offices staffed by full-time attorneys in population centers or other areas where such an office is economically feasible.

One major result of that endorsement is that OPA's Southeast Public Advocacy Regional offices (SEPAR), which

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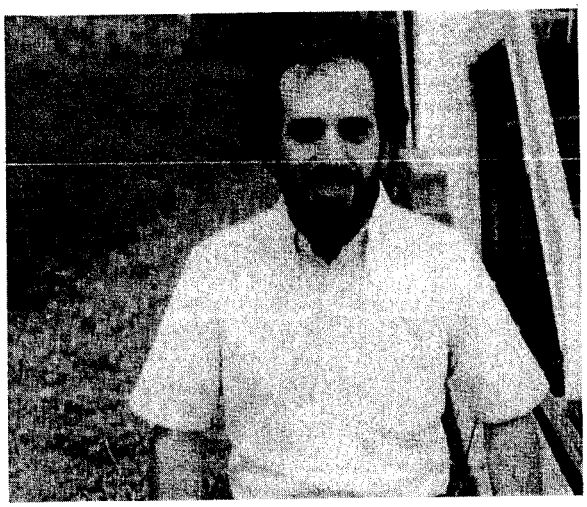

THE ADVOCATE FEATURES

This month The Advocate features Peter Kunen, directing attorney of the Hazard office which covers Perry, Breathitt and Leslie Counties. Peter has the unusual distinction of having worked out of his car for more than a year before an office was actually established in Hazard. Amazingly enough, this extremely difficult work situation did not dampen Peter's enthusiasm or dedication to his work. In fact during the period when he was without an office Peter tried his first felony case, an armed robbery, and won an acquittal for his client.

Raised in Massachusetts, Peter attended Harvard University and graduated in 1974 with a degree in Social Relations, a

(See Kunan, P. 28)

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began several years ago with a federal grant from LEAA, have now become an ongoing part of the public advocacy system. Offices in Hazard, London, Pikeville and Somerset will be funded by the State, and the employees of those offices have been given merit status.

Secondly, OPA has been given the green light for establishing other full-time offices throughout the Commonwealth over the next two years. At the present time, plans are being made to open offices in November in Hopkinsville, Morehead, and the Red River Gorge area. Three additional offices hopefully will be opened before the end of the fiscal year. An undetermined number of offices are on the drawing board for fiscal year 83-84.

OPA has for many years asserted that the most cost-efficient manner of delivering high quality legal services to indigents accused of crime is a system which mixes full-time offices in population centers, with groups of private practioners in the remainder of the Commonwealth. This session of the legislature enabled OPA to implement this concept over the next two years.

The legislature made a couple of other changes in the Public Advocacy system. First, OPA is no longer a part of the Department of Justice. OPA will in the future be under the Public Advocacy Commission, an appointed independent body.

Secondly, the General Assembly abolished the "assigned counsel" method of delivering public advocacy services. The only two methods of delivering services under the new law are the contractual or the full-time office methods. Attorneys who are presently in counties with assigned counsel public defender systems will soon be contacted concerning changing over to a contract system. While there will be a time of transition, of course, we hope in the near future to have eliminated all assigned counsel systems.

Finally, the General Assembly has enabled OPA to contract directly with local attorneys to deliver public defender services, where for some reason a contract with the fiscal court is not feasible. In the past, if a fiscal court refused to contract with a group of attorneys, then the only alternatives were to establish a full-time office or an assigned counsel system. Because assigned counsel systems have been statutorily abolished, the legislature wisely made it easier for the contract method to be established in a county.

These changes have obvious impact on many public defender systems across the Commonwealth. We believe the changes will enhance the delivery of public defender services. If you want more information, or have a question or comment concerning any of the above, contact the attorney from the Local Assistance Branch (LAB) who supervises your area of the state.

ERNIE LEWIS
CHIEF, LOCAL ASSISTANCE BRANCH

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WEST'S REVIEW

A majority of the published opinions issued in Kentucky during the months of March and April came from the Court of Appeals.

In Commonwealth v. Evans, Ky. App., 29 K.L.S. 3 at 5 (March 5, 1982), the Court of Appeals held that the ciruit courts lack authority to transfer the trial of a criminal charge from the county where the offense occurred to the defendant's county of residence pursuant to the doctrine of forum non conveniens. "Kentucky empowers the trial courts to grant changes in venue only if there is statutory authority for doing so." Id. "KRS 452.210 grants the trial court authority to transfer the trial of a criminal proceeding to an adjacent county only if it appears the defendant or the Commonwealth cannot receive a fair trial in the county where the prosecution is pending." Id. The Court concluded that the trial court exceeded its authority in ordering the case transferred.

The Court has issued an opinion which would limit the scope of the Kentucky Supreme Court's holding in Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980). In Ray v. Commonwealth, Ky. App., 29 K.L.S. 4 at 1 (March 12, 1982), the Court of Appeals held that an indigent was not entiled to appointed counsel to mount a challenge under CR 60.02 to a prior conviction used to obtain the indigent's conviction as a persistent felony offender. The Court cited KRS 31.110(1), which provides that before an indigent is entitled to appointment of counsel he must be "detained under a conviction for a serious crime..." The Court then held that "[w]e are satisfied that the 'serious crime' referred to in KRS 31.110(1) is the crime which is causing a present detention of the defendant, not some crime committed years ago, the liability for which has been completely discharged." Id. (Emphasis by the Court). Discretionary review of the Court's opinion is being sought.

The Court has held that "there is no rational difference" between hashish and marijuana, and consequently both are excepted from the penalties provided in KRS 218A.990(2) for possession of a Schedule I controlled substance. Commonwealth v. McGinnis, Ky. App., 29 K.L.S. 4 at 5 (March 26, 1982). The Court based its holding on testimony at the defendant's trial that hashish

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is the "extracted resinous substance" of marijuana. "We do not believe that the Legislature intended hashish to be treated differently from marijuana simply because it is referred to by a different name." Id. "We hold that it does not matter whether there is a difference or not because in reality the definiton of marijuana is so broad as to include it anyway." Id.

The Court was confronted with a novel double jeopardy issue in Nichols v. Commonwealth, Ky. App., 29 K.L.S. 5 at 2 (April 2, 1982). The defendant in Nichols made timely motions for directed verdict at his first trial for murder. The trial ended with a hung jury. At his second trial the defendant moved to dismiss the indictment, arguing that the trial court erred by denying the motions for directed verdict at the first trial and that, consequently, his second trial was barred by double jeopardy principles. The Court of Appeals held that the defendant's motion to dismiss the indictment "preserved the alleged error from the first trial for review following the conviction." Id., at 3. The Court found that there was sufficient evidence at the first trial to take the case to the jury. As a result the Court stated, "we need not decide whether a retrial for the same offense or offenses following a hung jury in a trial wherein there should have been an acquittal places the accused in double jeopardy." Id. The Court, however, pointedly referred prosecutors, defense attorneys and trial judges to Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), which bars retrial after an appellant's conviction has been reversed for insufficient evidence. Clearly, defense counsel should be aware of this issue and preserve it for appeal when applicable.

The Court validated the warrantless seizure of evidence from an impounded vehicle in Cardwell v. Commonwealth, Ky. App., 29 K.L.S. 5 at 3 (April 2, 1982). After the defendant was removed from the scene of an automobile accident in an ambulance police decided to impound the disabled vehicle. The Court found that the warrantless impoundment of the car was permissible under Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979), because the vehicle posed a danger to the public safety. As the police prepared to tow the vehicle, an officer noticed there was no lock on the trunk of the car. The officer decided to check for valuables and in so doing "stumbled" upon evidence of crime. The Court held that the officer acted lawfully and "in good faith in an effort to 'safe keep' appellant's personal property." Id., at 4. The Court additionally held that the circumstances supported a finding of "implied consent" since "an ordinary reasonable person under the same circumstances would consent to the trooper securing his trunk..." Id.

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The Kentucky Supreme Court reversed the murder conviction and death sentence of Laverne O'Bryan. O'Bryan v. Commonwealth, Ky., 29 K.L.S. 3 at 10 (March 9, 1982). O'Bryan was convicted of murder in the arsenic poisoning death of her husband. The Court held that O'Bryan was deprived of a fair trial when the trial court permitted the introduction of evidence that a previous husband of O'Bryan's had also died of arsenic poisoning. The Court rejected argument by the Commonwealth that similarities between the deaths of O'Bryan's two husbands was evidence of a common scheme or plan. The Commonwealth's argument failed because of a lack of evidence to show that O'Bryan administered the arsenic to her first husband, and because the two deaths occurred twelve years apart. "[I]t would take a quantum leap of fact and logic to say that this evidence was of such a nature as to show a 'scheme' or 'system'." Id., at 11. The Court also held that, under KRS 452.220(3), O'Bryan was entitled to a hearing on her motion for change of venue, and, that the trial court erred by permitting the use of hearsay evidence to show as an aggravating factor that O'Bryan murdered her husband "for monetary gain."

In Commonwealth v. Key, Ky., 29 K.L.S. 4 at 9 (March 30, 1982), the Court held that, in the absence of some proof that the Commonwealth has possession of exculpatory evidence, a motion for disclosure of exculpatory evidence is not a "general discovery tool" entitling the defense to any discovery broader than that provided by the criminal rules. However, the Court emphasized that "[w]hile it may be true that a defendant may obtain relief only upon 'proof' that the government suppressed something, the duty on the state, mandated by the due process clause, to reveal exculpatory evidence is always applicable." Id. (Emphasis by Court). The Court also noted that the Commonwealth's affirmative duty to disclose exculpatory evidence may extend to disclosing evidence in the possession of the county attorney, who is also a "spokesman for the Government."

The United States Supreme Court issued two significant decisions during March and April. In United States v. McDonald, 30 CrL 3111 (March 31, 1982), the Court reversed a holding by the Fourth Circuit that McDonald was denied his right to a speedy trial. McDonald was charged with the murder of his wife and two children under the Uniform Code of Military Justice in May, 1970. Those charges were dropped in October, 1970, but investigation of McDonald's case by the Justice Department continued until 1975 when McDonald was again formally charged and subsequently tried and convicted. The Fourth Circuit, including the period from 1970 to 1975 in its reasoning, held that McDonald was denied a speedy trial. The Supreme Court held that in assessing the claimed speedy trial violation any period during which McDonald was neither under indictment or under arrest was irrelevant.

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"Once charges are dismissed, the speedy trial guarantee is no longer applicable." Id., at 3113. The Court did note that defendants are protected from prejudice occasioned by pre-indictment delay under the due process clause. See United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). Justices Marshall, Brennan, and Blackmun filed a dissenting opinion taking the position that the entire period of delay was relevant to the speedy trial issue.

The Court reversed the holding of the Sixth Circuit in Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980). Engle v. Isaac, 31 CrL 3001 (April 5, 1982). The Sixth Circuit held in Isaac that federal habeas relief should have been granted petitioners whose state convictions were obtained after the jury was erroneously instructed that petitioners carried the burden of proving self-defense by a preponderance of the evidence. The petitioners failed to object to the instruction at trial because giving the instruction was "established practice" so that an objection would have been futile. However, subsequent to the petitioner's convictions, the Ohio Supreme Court held that the instruction was erroneous. The Sixth Circuit held that the instruction violated due process by relieving the prosecution of the burden of proof as to an element of the offense - the absence of self-defense. The Sixth Circuit also found "cause" and "prejudice" in accordance with Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

The Supreme Court, reversing, held that the Ohio rule that the state must dispove self-defense beyond a reasonable doubt after the defendant has come forward with some proof of self-defense, did not elevate the absence of self-defense to an element of the offense. "A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense as an element of the crime." Id., at 3005. Under this reasoning the erroneous instruction did no more than violate state law. The Court also held that the petitioners had made an insufficient showing of "cause" for their failure to object at trial. "[T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." Id., at 3007. The Court sidestepped the issue of whether "cause" inherently flows from a failure to object to an unknown constitutional error since a defendant may not waive constitional objections unknown at the time of trial. The Court evaded this issue by finding that the basis for a claim of constitutional error clearly existed at the time of petitioners' trials in light of In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Justices Brennan and Marshall dissented from the majority opinion.

LINDA WEST

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PROTECTION AND ADVOCACY
DIVISION
OFFICE FOR PUBLIC ADVOCACY

DOWN'S SYNDROME SHOULDN'T BE A CAPITAL OFFENSE

The baby was born in Bloomington, Indiana, the sort of academic community where medical facilities are more apt to be excellent than moral judgments are. Like one of every 700 or so babies, this one had Down's syndrome, a genetic defect involving varying degrees of retardation and, sometimes, serious physical defects.

The baby needed serious but feasible surgery to enable food to reach its stomach. The parents refused the surgery, and presumably refused to yield custody to any of the couples eager to become the baby's guardians. The parents chose to starve their baby to death.

Their lawyer concocted an Orwellian euphemism for this refusal of potentially life-saving treatment - "Treatment to do nothing."

Indiana courts, accommodating the law to the zeitgeist, refused to order surgery, and thus sanctioned the homicide. Common sense and common usage require use of the word "homicide." The law usually encompasses homicides by negligence. The Indiana killing was worse. It was the result of premeditated, aggressive, tenacious action, in the hospital and in courts.

Such homicides can no longer be considered aberrations, or culturally incongruous. They are part of a social program to serve the convenience of adults by authorizing adults to destroy inconvenient young life. The parents' legal arguments, conducted in private, reportedly emphasized - what else? - "freedom of choice." The freedom to choose to kill inconvenient life is being extended, precisely as predicted, beyond fetal life to categories of inconvenient infants, such as Down's syndrome babies.

There is no reason - none - to doubt that if the baby had not had Down's syndrome the operation would have been ordered without hesitation, almost certainly, by the parents or, if not by them, by the courts. Therefore the baby was killed because it was retarded. I defy the parents and their medical and legal accomplices to explain why, by the principles affirmed in this case, parents do not have a right to kill by calculated neglect any Down's-syndrome child - regardless of any medical need - or any other baby that parents decide would be inconvenient.

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Indeed, the parents' lawyer implied as much when, justifying the starvation, he emphasized that even if successful the surgery would not have corrected the retardation. That is, the Down's syndrome was sufficient reason for starving the baby. But the broader message of this case is that being an unwanted baby is a capital offense.

In 1973 the Supreme Court created a virtually unrestrictable right to kill fetuses. Critics of the ruling were alarmed because the court failed to dispatch the burden of saying why the fetus, which unquestionably is alive, is not protectable life. Critics were alarmed also because the court, having incoherently emphasized "viability," offered no intelligible, let alone serious, reason why birth should be the point at which discretionary killing stops. Critics feared what the Indiana homicide demonstrates: The killing will not stop.

The values and passions, as well as the logic of some portions of the "abortion-rights" movement, have always pointed beyond abortion, toward something like the Indiana outcome, which affirms a broader right to kill. Some people have used the silly argument that it is impossible to know when life begins. (The serious argument is about when a "person" protectable by law should be said to exist.) So what could be done about the awkward fact that a newborn, even a retarded newborn, is so incontestably alive?

The trick is to argue that the lives of certain kinds of newborns, like the lives of fetuses, are not sufficiently "meaningful" - a word that figured in the 1973 ruling - to merit any protection that inconveniences an adult's freedom of choice.

The Indiana parents consulted with doctors about the "treatment" they chose. But this was not at any point, in any sense, a medical decision. Such homicides in hospitals are common and will become more so now that a state's courts have given them an imprimatur. There should be interesting litigation now that Indiana courts - whether they understand this or not - are going to decide which categories of new-borns (besides Down's-syndrome children) can be killed by mandatory neglect.

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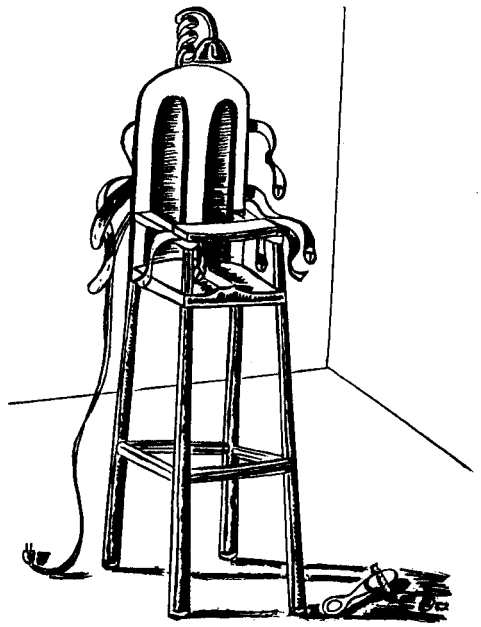

Hours after the baby died, the parents' lawyer was on the CBS Morning News praising his clients' "courage." He said, "The easiest thing would have been to defer, let somebody else make that decision." Oh? Someone had to deliberate about whether or not to starve the baby?

The lawyer said it was a "no-win situation" because "there would have been horrific trauma - trauma to the child who would never have enjoyed a quality of life of any sort, trauma to the family, trauma to society." In this "no-win" situation, the parents won: The county was prevented from ordering surgery; prospective adopters were frustrated; the baby is dead. Furthermore, how is society traumatized whenever a Down's-syndrome baby is not killed?

Someone should counsel the counselor to stop babbling about Down's-syndrome children not having "any sort" of quality of life. The task of persuading communities to provide services and human sympathy for the retarded is difficult enough without incoherent lawyers laying down the law about whose life does and whose does not have "meaning."

"Infant Doe" (the name used in court) was described in news accounts as being "severely retarded," but that is a misjudgment that is both a cause and an effect of cases like the one in Indiana. There is no way of knowing, and no reason to believe, that the baby would have been "severely retarded." A small fraction of Down's syndrome children are severely retarded. The degree of retardation cannot be known at birth. Furthermore, such children are dramatically responsive to infant stimulation and other early interventions. But, like other children, they need to eat.

When a commentator has a direct personal interest in an issue, it behooves him to say so. Some of my best friends are Down's-syndrome citizens. (Citizens is what Down's-syndrome children are if they avoid being homicide victims in hospitals).

Jonathan Will, 10, fourth-grader and Orioles fan (and the best Wiffle-ball hitter in southern Maryland), has Down's syndrome. He does not "suffer from" (as newspapers are wont to say) Down's syndrome. He suffers from nothing, except anxiety about the Orioles' lousy start.

He is doing nicely, thank you. But he is bound to have quite enough problems dealing with society - receiving rights, let alone empathy. He can do without people like Infant Doe's parents, and courts like Indiana's asserting by their actions the principle that people like him are less than fully human. On the evidence, Down's-syndrome citizens have little to learn about being human from the people responsible for the death of Infant Doe.

Commentary by George Will

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1982 POST-CONVICTION LEGISLATION

The 1982 General Assembly enacted a number of bills that will have an affect on various post-conviction matters and incarcerated persons generally. The following is a synopsis of those bills.

Although shock probation under KRS 439.265 has in the past been applied to both felony and misdemeanor convictions, SB 213 has now extended the provisions specifically to any misdemeanant convicted in either district or circuit court. However, some provisions relating to shock probation for both misdemeanors and felonies have been modified. First, the motion for shock probation must be made by a misdemeanant not earlier than thirty days after he has been delivered to the keeper of the institution to which he has been sentenced. Unlike felony shock probation there is no outer time limit for filing the motion. The outer time limit for felony shock probation motions has been changed from sixty to ninety days after the defendant has been delivered to the keeper of the institution to which he has been sentenced. Finally, the provision which previously allowed a court to grant shock probation on its own motion has been deleted.

Misdemeanants may now also be worked at community service related projects in the county of imprisonment under HB 379. That bill, which amends KRS 431.140, indicates that the fiscal court, with the advise of the jailor, will adopt a written policy in relation to this type of work. The county judge executive or his designee must then approve participation before permission for such work will be granted. The physical and mental ability of the prisoner and the security of the jail and general public must be considered and no prisoner can be assigned to unduly hazardous work that will endanger the life or health of the prisoner or others. Additionally, if the prisoner has a valid medical reason to decline such work, he may do so and cannot be punished or otherwise penalized for that refusal.

The legislature has also created a new section of KRS Chapter 346 to establish a "crime victim's compensation fund." Although compensation has been available to victims of crimes since 1976, HB 149 has now specified the sources from which the funding will come. Money may come from appropriations by the General Assembly, the federal government and any public or private source, the act also requires any defendant sentenced to imprisonment or placed on parole, probation or conditional release, to pay $10 into the fund for all offenses for which imprisonment may be imposed. The clerk of the court is

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obligated to collect the defendant's payment and forward it to the state treasurer to be deposited in the compensation fund. However, if the payment or any part thereof is not made, it can be withheld from any disbursement, payment, benefit, compensation, salary, or other transfer of money due the defendant from the state. The act does not indicate whether this must be a condition of the defendant's release and makes no provision for any revocation of the release for failure to pay.

However, HB 450, which amends KRS 533.030, does require restitution to be a conditon of probation or conditional discharge if the victim has suffered monetary damage to property, actual medical expenses, out-of-pocket losses or loss of earnings. The bill requires full restitution unless the damages exceed $100,000 or twice the amount of gain by the defendant from the crime, whichever is greater, in which case the higher of the two amounts will be awarded. The bill does not necessarily require monetary restitution; however, it allows the court to order work for or on behalf of the victim in lieu of restitution. Furthermore the act allows apportionment of the restitution if there is more than one victim or defendant involved. If the defendant fails to make the restitution, the court is obligated to hold a hearing to determine if the defendant is in contempt of court or has violated the terms of his release.

HB 105, another bill relating to payments by a defendant, creates a new setion of KRS Chapter 439 to require a defendant released on probation, parole or other release supervised by the Department of Corrections, to pay a fee to offset supervision expenses in a lump sum or installments. A schedule of fee amounts according to the offense has been established by the bill. The bill requires the releasing authority to determine the ability of the defendant to pay the fee, but allows a petition by the defendant to modify or vacate the fee arrangements if necessary. This payment can be made a condition of the release and nonpayment may result in revocation.

Treatment for mental illness must also be made a condition

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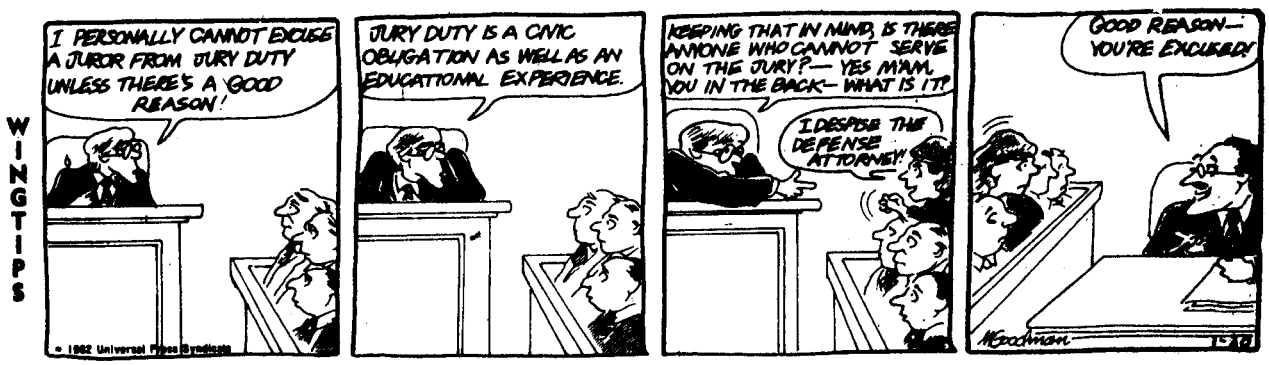

of probation, shock probation, conditional discharge, parole or conditional release for any defendant found guilty but mentally ill if the mental illness continues at the time of release. HB 32 also requires that such a defendant who is not released be treated while incarcerated until he is no longer mentally ill or until the expiration of his sentence. If at the expiration of sentence the defendant is still in need of treatment, however, the act places the responsibility on the Department of Corrections to initiate proceedings for civil commitment.

Although not relating directly to post-conviction matters, the legislature enacted three bills that will have an effect on new crimes committed by defendants in custody. SB 190 creates a new section of KRS Chapter 520 to establish the offense of attempted escape from a penitentiary. A number of instances can be considered attempted escape such as concealing oneself in the walls of the penitentiary, attempting to scale the penitentiary walls or escaping from any area to which the inmate has been assigned or confined. The act also requires that any sentence imposed for escape or attempted escape, must run consecutively with any other sentence the defendant must serve.

HB 489 has expanded the types of prior crimes that qualify for use in persistent felony offender proceedings. If the defendant was on conditional discharge, conditional release, furlough, appeal bond, probation, parole, or any other form of legal release from any of the previous felony convictions at the time of the commission of the principal offense, or was discharged from any of these types of release on any of the prior felony convictions within five years of the commission of the principal offense, then any prior felony conviction will be available for use in the PFO proceeding. Prior to this amendment of KRS 532.080, only probation and parole were included. The amendment also includes as qualifying prior felony convictions, any for which the defendant was in custody or had escaped from custody at the time of commission of the principal.

Finally, in an apparent response to Commonwealth v. Cooper, Ky. App., 29 K.L.S. 2 (February 5, 1982), in which the Court of Appeals held that marijuana was "contraband" rather than "dangerous contraband" under KRS 520.010 due to a lack of specific legislative guidance, the legislature amended that statute by SB 340 to include as "dangerous contraband," dangerous instruments as defined in KRS 500.080, any controlled substance and marijuana.

RANDY WHEELER

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CAPITAL COMMENTS
Has Kentucky Left The Death Belt?

Those familiar with the history of the application of capital punishment in this country know the "Old South" as the "Death Belt." Historically, with 103 executions between the years 1930 and 1965, Kentucky ranked high among the states in executions as compared to population. Indeed, Kentucky, home of the last public execution in the United States, had proportionately more executions than such prominent "death penalty" states such as Texas and Florida.

However, as the following chart indicates, Kentucky has moved to last place among the traditional "Death Belt" states. The figures listed below indicate the number of persons presently on death row per 1 million citizens of each state.

STATE	DEATH ROW
Georgia	20.6
Florida	17.9
Alabama	14.3
Mississippi	11.5
Arkansas	10.5
Texas	10.1
Louisiana	8.3
South Carolina	6.4
Tennessee	5.8
North Carolina	3.7
Virginia	3.1
Kentucky	2.7

What is to account for this good news? Is it the compassion and sensitivity of our citizens? What type of role does our judiciary play? Certainly, the fact that large numbers of death verdicts have not been handed down in Kentucky is not from want of trying by the prosecution. Whatever the reasons for any limited success in convincing juries that death is not the answer, at least some of the credit must be given to those attorneys who have sacrificed much in order to handle the defense of capital cases. Thanks.

HELP!

Lest we forget, the reason that the death penalty was originally thrown out was that it was, historically, "wantonly" and "freakishly" applied. Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring). Although we are imposing it less often in Kentucky, the question remains whether we are doing it any more "intelligently", assuming such is possible. A definitive answer to that question will have to await rigorous scientific research. In the wake of Ex Parte Farley, Ky., 570 S.W.2d 617 (1978), we have been attempting to gather

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relevant data on potential and acutal capital cases in the Commonwealth. This process of trying to make sense out of who does and who does not receive the death penalty is a difficult one. You can help us in this mammoth undertaking by letting us know of any capital cases in your area in which you are involved or that you hear about. We are interested in all cases involving crimes which occurred after the effective date of the present death penalty statute--December 22, 1976. Initially, the only information we need is the name of the defendant, the county and the name of the trial attorney, if possible. Please send any and all information to Kevin McNally or Karen Carney at the OPA in Frankfort or call (502) 564-5255 or 1-800-372-2988 (toll free). HELP!

Wanton and Freakish; Killing Kids

We hate to keep harping on Eddings v. Oklahoma, 102 S.Ct. 869 (1982), but Chief Justice Burger's dissent deserves some additional comment. A majority of the court has twice sidestepped the question of the constitutionality of the death penalty in the case of a juvenile. Not so the four dissenters in Eddings. They felt that the time had come "when the court must 'bite the bullet.'" 102 S.Ct. at 883. To borrow a phrase from Henry Schwarzschild (ACLU, Capital Punishment Project), "biting the bullet is a charming term for...execut[ing] children." How can we, in good conscience, state that executing juveniles comports with basic concepts of human dignity when others, with long criminal records, escape capital punishment for equally or more heinous offenses?

Although we haven't got our scientific evidence together yet, even a glance at Kentucky's death row population must raise eyebrows. Todd Ice was barely fifteen at the time of the offense for which he resides on death row. Moreover, Todd isn't the only death row inmate with no prior criminal record. Have we returned, as Justice White feared in Lockett v. Ohio, 438 U.S. 586, 622-623 (1978), to a restoration of the state of affairs at the time Furman was decided, where the death penalty [was] imposed so erratically . . . ." Are

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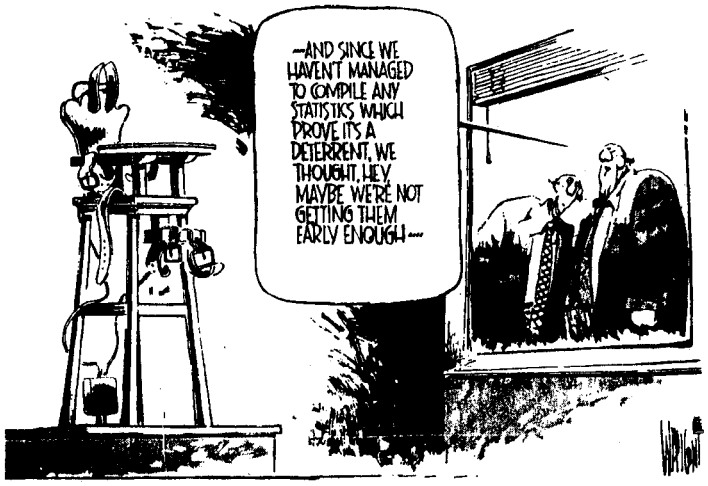


Don Wright, The Miami News

Kentucky's death row inmates an "intelligently" selected few who deserve, above all others, the ultimate punishment? Or is their plight similar to being "struck by lightning" and are they a "capriciously selected random handful" the same as the litigants before the Supreme Court in Furman, 408 U.S. at 309-10 (Stewart, J., concurring). Think about it.

Walter Berns, author of For Capital Punishment, is one of the leading pro-death penalty advocates. But even Berns questions whether government has the capacity to pick the "appropriate" subjects to execute. "Whether the United States...should be permitted to carry out executions is a question that is not answered simply by what I have written here. The answer depends on our ability to restrict its use to the worst of our criminals and to impose it in a nondiscriminatory fashion. We do not yet know whether that can be done."

Second Thoughts In Washington? Zant v. Stephens

Could it be that the United States Supreme Court is having second thoughts regarding the underlying premise of Gregg v. Georgia, 428 U.S. 153 (1976)? In Zant v. Stephens, 31 Cr.L. 3035 (May 3, 1982), the question before the Court was "whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." 31 Cr.L. at 3036. Instead of deciding the issue, the Court ordered the Georgia Supreme Court to explain the conclusion that a death sentence is not impaired by the invalidity of one of the statutory aggravating circumstances found by a jury. Justices Marshall, Brennan and Powell dissented expressing the view that the rationale for Georgia's rule was irrelevant since a death sentence received under these circumstances was unconstitutional in any event.

Worthy of note is language in the per curiam opinion making it clear that Gregg was decided on the assumption that the new death penalty statutes "promised to alleviate to a significant degree the concern of Furman...that the death penalty not be imposed capriciously or in a freakish manner. We recognize that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing capital sentences consistently with this concern." 31 Cr.L. at 3036. (Emphasis added.) The Court indicated that it was "premature" to decide whether Georgia's rule "might undermine the confidence we expressed in Gregg... that the Georgia capital sentencing system, as we understood it then, would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster." Id. (Emphasis added.) Is the Court's confidence in Gregg beginning to erode?

(Continued, P. 16)

Innocent and Executed

Stories continue to emerge about citizens who have been either executed or incarcerated on death row and later are found to be innocent. Recently the Associated Press carried an article about an 83 year old man who came forward to state that Leo Frank, who was sentenced to death in 1913 for killing a 14 year old girl, was innocent. Alonzo Mann, an eye-witness to the murder, stated that he could no longer live with his silence. Mann passed two lie detector tests sponsored by the newspaper which printed the story.

Random Notes

Congratulations to Bart Adams, Ben Hardy and Paula Bierley for the Kentucky Supreme Court's reversal of LaVerne O'Bryan's death sentence and murder conviction. Worthy of note was the court's holding that hearsay evidence cannot be used to establish an aggravating factor.

Unfortunately, Kentucky's death row population may remain at a constant ten or may increase by one. A Louisville jury has recommended a death sentence for Ray McClellan. Judge Ryan has sentenced McClellan consistently with the jury's recommendation. In Harlan, a jury has recommended a death sentence for Hugh Marlowe. He awaits sentencing before Judge Douglass.

The Eleventh Circuit recently entered a stay of execution for Ernest Dobbert. Dobbert v. Strickland, 670 F.2d 938 (11th Cir. February 25, 1982). Ernest Dobbert's crimes (Dobbert v. Florida, 432 U.S. 282 (1977)) occurred over ten years ago. What does nearly a decade on death row do to a man? Is he the same person?

Meanwhile, also down in Florida, Judge Thomas M. Coker, Jr., has sentenced eight murderers to the electric chair in the seventeen months since he was assigned to hear capital cases. Judge Coker first attracted national attention when he posed for pictures waving a gun in his courtroom after a defendant had become unruly. It's no wonder he is known as the "Hanging Judge." National Law Journal (Feb. 1, 1982).

KEVIN McNALLY

* * * *

DEATH ROW U.S.A.

April 20, 1982

TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE LEGAL DEFENSE FUND: 1009

Race:		
Black	422	(41.82%)
White	528	(52.33%)
Hispanic	47	(4.66%)
Native American	8	(.80%)
Asian	3	(.30%)
Unknown	0	
Crime: Homicide		
Sex: Male	997	(98.81%)
Female	12	(1.19%)

DISPOSITIONS SINCE JANUARY 1, 1973

Executions:	4
Suicides:	8
Commutations:	20
Died of natural causes, or killed while under death sentence:	5

* * * *

SURVEY

We are interested in getting the opinions and suggestions of our readers so that we can improve The Advocate! We would greatly appreciate your taking a few minutes to answer the following questions and returning this survey to:

Karen Carney
Office for Public Advocacy
State Office Building Annex
Third Floor
Frankfort, Kentucky 40601

Personal Information

Name (Optional): _____

Position:

_____ Full-time P.D. _____ Part-time P.D.

_____ Private Attorney _____ District Judge

_____ Circuit Judge _____ Other (Specify _____)

Number of years in practice: _____

Age: _____ Sex: _____

General Evaluation of The Advocate

	Good	Fair	Poor
Overall content	____	____	____
Layout	____	____	____
Regular Features	____	____	____
The Advocate Features	____	____	____
Protection & Advocacy Articles	____	____	____
Post-Conviction Serv. Div. Articles	____	____	____
The Death Penalty Notes	____	____	____
West's Review of Recent Court Dec.	____	____	____
Trial Tips	____	____	____

Amount of Space Devoted to Particular Subjects

	Right Amount	Too Much	Too Little
Administrative News	_____	_____	_____
Protection & Advocacy	_____	_____	_____
Post-Conviction Services Division	_____	_____	_____
Death Penalty	_____	_____	_____
Current Legal Information	_____	_____	_____
Practical Trial Tips	_____	_____	_____

Death Penalty Section

	Do Want	Do Not Want
We need to know whether you do or do not want this section and if so what should be in it. _____	_____	_____
Editorial opinions about the death penalty.	_____	_____
Review of appellate decisions in capital cases throughout the country.	_____	_____
Review of cases being handled at trial level in Kentucky.	_____	_____
Articles by columnists	_____	_____

Suggestions for future issues: _____

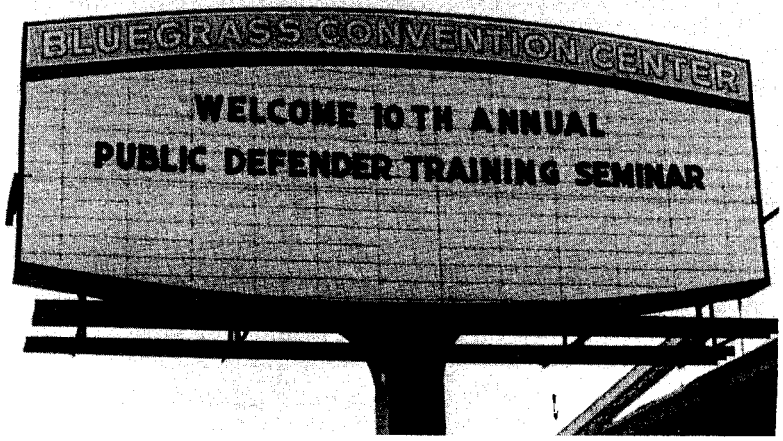
General

Areas/topics you would like to see covered in The Advocate: _____

Comments on past issues: _____

If you have any illustrations, articles or cartoons that you think would be appropriate to publish in The Advocate, please send them to us!

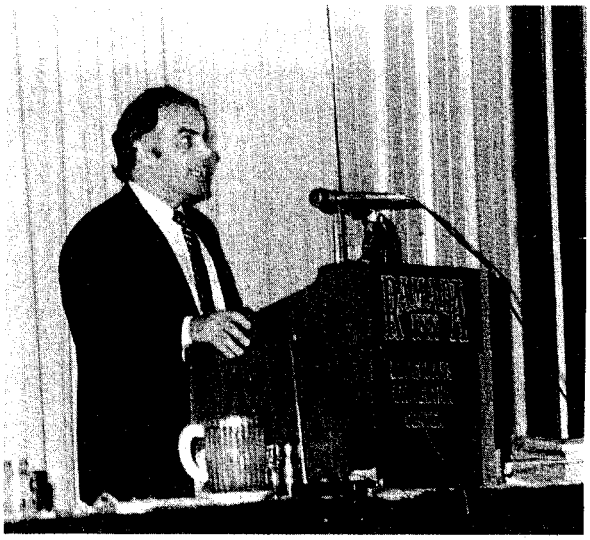
THANK YOU!



JUDGE DENNIS CHALLEEN

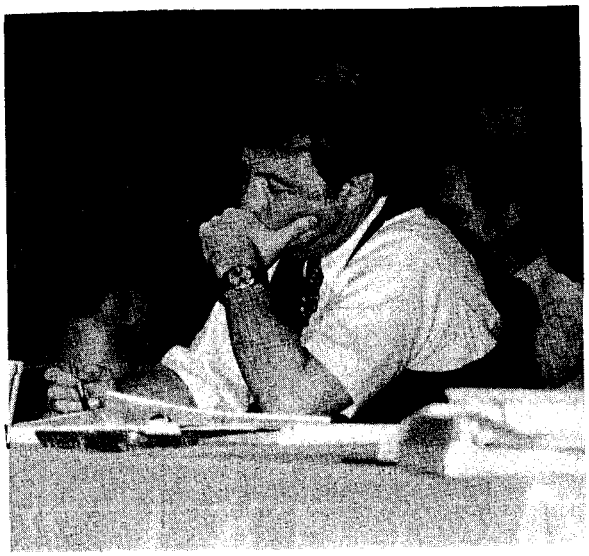
BRIAN WRAXALL

JOE BARROWS

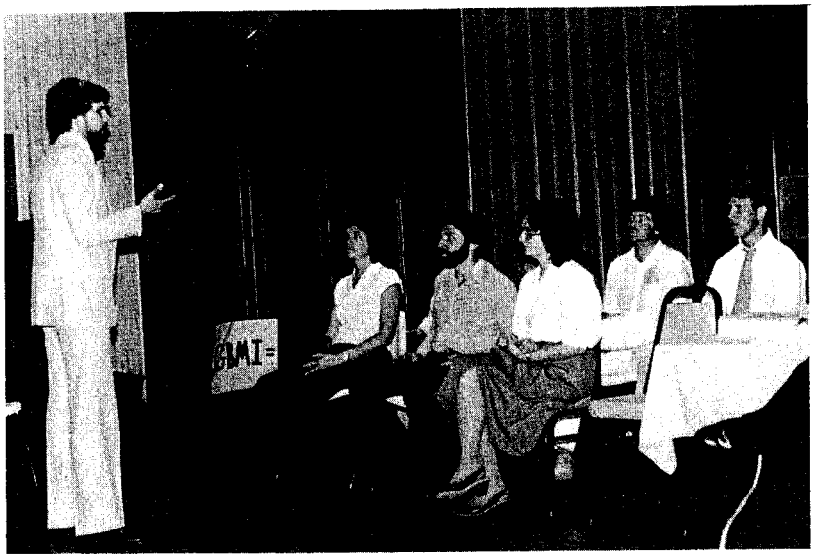


JOE GUASTAFERRO

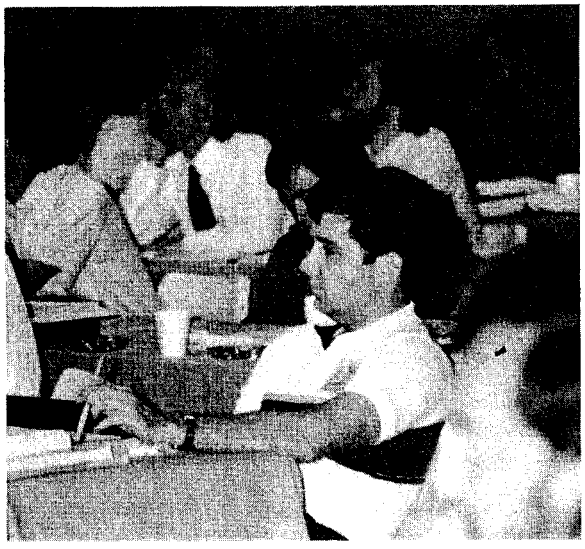
RICK WILSON AND JACK FARLEY



RICHARD LEWIS



KEVIN McNALLY



KENT AKERS

ERNESTO SCORSONE AND THOMAS CHIMERA

TRIAL TIPS

THE OUT OF STATE WITNESS

A defendant will often have as his only witness in his defense a person who is out of the Commonwealth of Kentucky. That potential witness may either be reluctant to come to trial to testify on behalf of the defendant, or he may be too poor to be able to afford the trip. In either case, the defense attorney must be aware of how to get that witness into the courtroom.

The Sixth Amendment establishes the right of an accused "to have compulsory process for obtaining witnesses in his favor." This right is applicable to the States through the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The Kentucky Constitution provides similarly in Section Eleven.

The method of procuring witnesses who are located out of state is set out in KRS 421.230 through 421.270 in the "Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings." To procure a witness who is out of state, the defense attorney must do the following:

1. Check to make sure that the state in which his witness resides is party to the Uniform Act. Since the great majority of states are, this will likely not be a problem. (Call your LAB Attorney for information).

2. Make a motion for compulsory attendance and payment of expenses of out of state witnesses.

3. In your motion, you must show that there is a prosecution pending, and that the witness is material to that case. It is the burden of the defendant to show why the witness is material to his case. State v. Mance, Ariz., 438 P.2d 338 (1968).

This does present a dilemma. Often, the defense attorney will not wish to reveal the content of his witness' prospective testimony to the prosecution. Yet, he must show materiality or risk losing his motion, his witness, and any appellate issue. In such a situation, the defense should seek to show materiality in an ex parte hearing, without the prosecution being present.

One other note: the defense must show exactly where the witness is located. Lancaster v. Green, 175 Ohio St. 203, 192 N.E.2d 776.

4. If the Court decides the witness is material, then he issues a certificate, with a seal, specifying the number of days the witness will be needed. KRS 421.250. This certificate is sent to the judge in the county where the witness is. The certificate may recommend that the witness should be taken into custody, if the witness can be expected to disobey the summons.

(Continued, P. 20)

5. The judge in the county where the witness resides receives the certificate, and holds a hearing to decide if there is a prosecution pending where the witness is material and necessary, if the witness will suffer undue hardship as a result of a summons, and if the witness will be protected from process or arrest in answering the summons. If these issues are answered in the affirmative then the judge must issue a summons directing the witness to attend.

6. If the witness is tendered ten cents a mile from his residence to the site of the trial, then his failure to obey the summons can be punished with contempt or other sanction provided in that state. KRS 421.240(4).

This is admittedly a clumsy procedure. It is the only way, however, to bring into the courtroom a material witness who otherwise would not be there, due either to hostility or penury.

There are some other issues related to the Uniform Act of which the defense attorney should be aware. First of all, if the witness is a prisoner in another state, use the provisions of KRS 421.600-421.690. The procedure is similar. If, however, the witness is in a federal penitentiary, the matter becomes clouded. The prosecution can obtain a federal prisoner through an agreement with the federal authorities. KRS 455.150. Fitzgerald recommends the defense ask the Commonwealth's Attorney to use this statute to bring back a federal prisoner for the benefit of the defense. See Fitzgerald's Kentucky Practice, Vol. 8, Section 719, n.8 (1978). If he refuses, however, then the only recourse seems to be a writ of habeas corpus ad testificandum under 28 U.S.C.A. Section 2241. If neither method brings the witness to court, the defendant probably has good reversible error for himself.

A related problem is that of the subpoena duces tecum. Often, papers or other things a witness has in his possession are of more importance than the witness himself. Whether KRS 421.250 allows for a subpoena duces tecum has not yet been decided in Kentucky. The defense thus should assume that a subpoena duces tecum is provided for in the statute, citing Re Saperstein, 30 N.J. Supr. 373, 104 A.2d 842 (1954).

The most severe problem in this area is that of expenses. As indicated above, the summons is unenforceable unless it is accompanied by a check for expenses. KRS 421.240(4). These expenses are paid by the State Department of Finance with no questions asked for prosecution witnesses.

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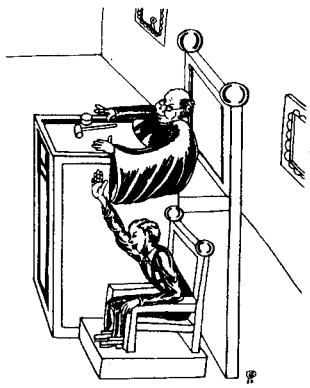

The attitude of Finance changes, however, if the witness is a defense witness. Finance has paid expenses for defense witnesses, notably in a northern Kentucky capital case. Usually, however, they refuse payment. Their authority is OAG 75-682, which states that the Uniform Act allows for payment of expenses of prosecution witnesses only, despite the explicit language of KRS 421.240, which indicates that expenses are for "witnesses", and not "prosecution witnesses."

Under this interpretation, the Uniform Act becomes virtually useless for the indigent accused. However, the OAG opinion might temporarily thwart the defense; in the long run it has serious constitutional problems. A defendant who cannot produce a material witness at trial has clearly been deprived of his rights to compulsory process, to present a defense, to a fair trial, and to equal protection of the law. Such naked discrimiation cannot be expected to be ignored in the right case, particularly in federal court.

An astute prosecutor will argue, however, that no constitutional violation has occurred due to the provisions of RCr 9.04. Under this rule, a defendant may read to the jury an affidavit of a missing witness, including a witness who is out of state. This provision, the argument goes, renders harmless any absence of a material out of state witness.

Any defense attorney knows, however, that the reading of an affidavit to the jury is worthless. He probably has to use RCr 9.04 if the witness is not at trial. However, he should argue on the record that his use of RCr 9.04 does not waive his objection to the witnesses not being produced due to the failure to tender expenses.

Preston v. Blackledge, 332 F.Supp. 681 (E.D.N.C. 1971) provides excellent support for this argument. In that case, the defendants had been to trial four times, all of them resulting in hung juries. In each of those trials, two alibi witnesses testified pursuant to the Uniform Act, and their travel and expenses had been paid for at public expense. In the fifth trial, however, the trial court refused to order their attendance, requiring instead that their prior testimony be read. They, of course, were then convicted. The Court granted the writ, stating that the trial court abused its discretion by failing to require the witnesses' attendance at public expense.

The Court rejected the argument that the Uniform Act does not provide payment for defense witnesses at public expense, and that the county had no funds for such an expenditure. The Court noted that the Supreme Court would not "accept an excuse of lack of funds or statute authorizing the payment of funds for the failure to provide an accused with an attorney." Id., at 684.

(Continued, P. 22)

Similarly, the same argument cannot stand against the rights to compulsory process and to present a defense. See also Hancock v. Parker, 100 Ky. 143, 37 S.W. 594 (1896).

If prior testimony, subject to cross-examination, was not an adequate substitute for live testimony under Preston, then obviously the reading of an affidavit is grossly inadequate. Neither RCr 9.04 nor the OAG should stand in the way of procuring the presence of a witness who is material and necessary in defending a person charged with a crime.

ERNIE LEWIS

* * * *

DEFENDANT'S RIGHT TO INSTRUCTIONS ON SECOND DEGREE MANSLAUGHTER AND RECKLESS HOMICIDE WHERE HE CLAIMS THE HOMICIDE WAS COMMITTED INTENTIONALLY IN SELF-DEFENSE

KRS 503.050(1) gives a defendant the right to use physical force to defend himself against the use or imminent use of unlawful physical force by another person. Deadly physical force can be used if the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat. KRS 503.050(2). The availability of this defense is no longer dependent upon a showing that a defendant's belief in the necessity of his action was reasonable. "The fact that unlawful force is not actually being threatened, that the amount of force used is actually excessive, or that the individual's beliefs are unreasonable does not strip him of the defense provided by this subsection." KRS 503.050, Commentary (1974).

"If a defendant is mistaken in his belief as to the necessity of using force, KRS 503.050 provides him with a defense to all offenses having 'intentional' as the culpable mental state, no matter how unreasonable his belief." Id.

The elimination of the requirement that a defendant's belief and action be reasonable for the defense of self-protection does not necessarily relieve him of all criminal liability for action based on unreasonable belief. This is where the right to a second degree manslaughter and reckless homicide instruction comes in for a defendant who claims that he committed the homicide in self-defense. The Commentary (1974) to KRS 503.050 states that if a defendant is "wanton" or "reckless" in believing that the use of force was necessary, it is possible because of KRS 503.120 to convict him of an offense having "wantonness" or "recklessness" as the cuplable mental state. KRS 503.120 provides:

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

(Continued, P. 23)

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

The Commentary (1974) to KRS 503.120 provides in pertinent part as follows:

> If the belief upon which a defendant's use of force is based is so unreasonable as to constitute "wantonness" or "recklessness," justification is not available for offenses having either of these culpable mental states as the essential element of culpability. For example, if a defendant, in killing another, believes himself in danger but is wanton in having such a belief, he cannot be convicted of murder. But since manslaughter in the second degree is committed through "wantonness" and since this subsection denies a defendant justification for such an offense, he can be convicted of this lesser degree of homicide.

Additonally, Chief Justice Palmore's model instructions require instructions on second degree manslaughter and reckless homicide in the situation where the defendant wantonly or recklessly uses deadly physical force in self-protection. Palmore, Kentucky Instructions to Juries, Section 10.26, Self-Defense -- Deadly Force Under Erroneous Belief of Necessity by Defendant (KRS 503.120) (1975). The Comments to this section state, in part:

> This instruction is to be used when a defendant has used deadly force under circumstances which he claims to have justified self-defense and the evidence would support a finding that if he had the necessary beliefs for this defense he was wanton or reckless in so believing and acting.

The Supreme Court recently considered this question in Blake v. Commonwealth, Ky., 607 S.W.2d 422 (1980). The

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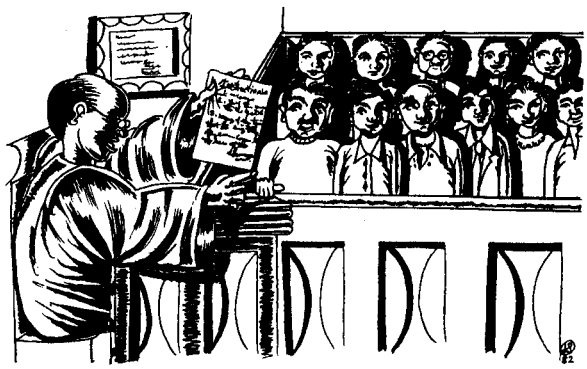

defendant in the cited case defended a homicide charge on the basis of self-defense. He also requested instructions on second degree manslaughter and reckless homicide on the grounds that he was wanton or reckless in believing deadly force was necessary. The trial court refused to give these instructions and the Supreme Court held that this was reversible error, explaining:

> Since no weapon was found at the scene it would not have been unreasonable for the jury to believe that no gun actually existed but yet also believe that Blake thought he saw a gun and thus may have been wanton or reckless in his belief that Grissom was about to shoot him. Under the facts of this case it certainly presented a jury question as to whether or not Blake was wanton or reckless in his belief. The jury may not have believed Blake's claim of self-defense but still could have believed that he was wanton or reckless. Id., p. 423.

If instructions on second degree manslaughter and reckless homicide are desired in the type of case discussed in this article, the defense must either tender such an instruction or orally request that it be given. RCr 9.54(2). If this is not done, the trial court is under no duty to give such instructions.

RODNEY MCDANIEL

* * * *

ETHICS: QUANDARIES & QUAGMIRES

By: Vince Aprile

Query: Does the attorney-client privilege extend to third persons who assist the attorney, such as law clerks, secretaries, paralegals, investigators, polygraphists, and expert consultants?

The attorney-client privilege is given on the grounds of public policy in the belief that the benefits of the privilege justify the risk that otherwise relevant information may be suppressed. Adequate legal representation carries as a prerequisite the full disclosure of the facts by the client to his attorney. Unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks may be unfavorable facts. Given the privilege, a client may make such a disclosure without fear that his attorney may be forced to reveal the information confided to him. "[T]he absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent." 8 Wigmore, Evidence Section 2300a (McNaughton rev. 1961).

The classical definition of the attorney-client privilege is:

> (1) Where legal advise of any kind is sought

(Continued, P. 25)

(2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. 8 Wigmore, Evidence, supra, Section 2292, p. 554.

Traditionally, this privilege would extend only to direct confidential communications between the attorney and the client - the presence of a third party would serve to defeat the privilege. See, e.g., Hyden v. Grissom, 306 Ky. 216, 206 S.W.2d 960 (1947). Similarly, communication to a third party was regarded as defeating the confidentiality of the privilege.

However, the more modern view has extended the privilege to cover those third persons who, of necessity, assist the attorney in his practice of law. For years, the privilege has been applicable to the attorney's clerk and secretary. Taylor v. Taylor, Ga., 117 S.E. 582 (1934). "Under modern practice of law the business of an attorney cannot be conducted without [the] assistance" of legal clerks and secretaries. Id. at 583. A lawyer's "clerk or secretary, by reason of his or her position, must frequently have almost as much information as to the confidential business of the client as the attorney himself; and it would be clearly against the rule to allow such an assistant to be subpoenaed and required to testify as to matters where the knowledge acquired was through the employement as such confidential clerk or secretary." Id.

Under the canopy of a similar analysis, the attorney-client privilege has been extended to an accountant who was sued by an attorney as a consultant on the client's legal situation. United States v. Kovel, 296 F.2d 918 (2nd Cir. 1961). "The complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts." Id. at 921.

More recently, the attorney-client privilege has been applied to a psychiatrist retained by the defense attorney to assist in the preparation of an insanity defense. State v. Pratt, Md., 398 A.2d 421 (1979). "[G]iven the complexities of modern existence, few if any lawyers could, as a practical matter, represent the interests of their clients without a variety of nonlegal assistance." Id. at 432. "Recognizing this limitation, it is now almost universally accepted in this country that the scope of the attorney-client privilege, at least in criminal cases, embraces those agents whose services are required by the attorney in order that he may properly prepare his client's case." Id.

"It has never been questioned that the [attorney-client]

 (Continued, P. 26)

privilege protects communications to the attorney's clerks and his other agents (including stenographers) for rendering his services." Wigmore, supra, Section 2301. "The assistance of these agents being indispensible to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents." Id.

Additionally cases have extend the attorney-client privilege to those agents of the attorney who necessarily received communications from the client. Wartell v. Novograd, R.I., 137 A. 776 (1927), (law student); People v. Knippenberg, 66 Ill.2d 276, 362 N.E.2d 681 (1977), (defense investigator); United States v. Jacobs, 322 F.Supp. 1299 (C.D. Cal. 1971), (accountant); City and County of San Francisco v. Superior Court, Cal., 231 P.2d 26 (1951), (consulting physician); People v. Hilliker, 29 Mich. App. 543, 185 N.W.2d 831 (1971), (defense psychiatrist); Houston v. State, Alaska, 602 P.2d 784 (1979), (defense psychiatrist); United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979), (defense investigator); People v. Marcy, Mich. App., 283 N.W.2d 754 (1979), (defense polygrapher); and State v. Mingo, N.J., 392 A.2d 590 (1978), (handwriting expert).

In Asbury v. Beerbower, Ky., 589 S.W.2d 216 (1979), an automobile accident case, the plaintiff sought to discover, by deposition, the contents of a statement given by the defendant to her insurance carrier. This statement, given by the defendant before the filing of the lawsuit and before counsel had been retained for her, was required by the terms of the defendant's contract with the insurance contract. Id. at 216-217. In concluding that the communication by the defendant to her insurance company "fell within the scope of the attorney-client privilege," the Asbury court stated:

> "The insured is ordinarily not represented by counsel of his own choosing either at the time of making the communication or during the course of litigation. Under such circumstances we believe that the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." People v. Ryan, 30 Ill.2d 456, 197 N.E.2d 15, 17 (1964). We think that this conclusion makes

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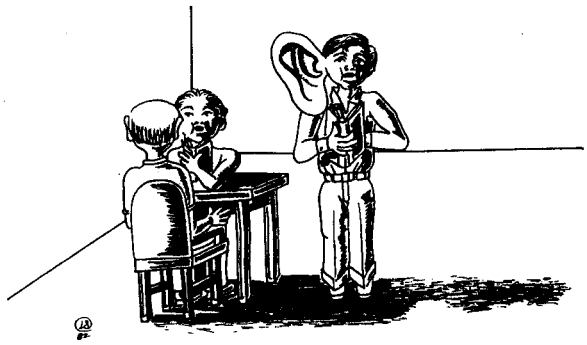

> sense. When a person has had an automobile accident that may result in litigation he would normally confide in counsel. If, however, he is insured, he has paid an insurance company to exercise that choice for him. He should not be penalized for his prudence in that respect. Id. at 217; emphasis added.

In a number of instances, a potential client may be under the mistaken impression that his communciations to an agent would fall within the attorney-client privilege. In such instances, the courts evaluate the subjective feeling of the client. For example, in People v. Barker, 60 Mich. 277, 27 N.W. 539 (1886), a private detective, and in State v. Russell, 83 Wisc. 330, 53 N.W. 411 (1893), a district attorney, each represented himself to the accused as the accused's attorney and each obtained statements from each defendant. In both of the cited cases, the appellate courts concluded that the impression of the "client" as to confidentiality brought the statement within the ambit of the privilege.

In State v. Tapia, 113 N.J. Super. 322, 273 A.2d 769 (1971), a public defender investigator interviewed the wrong client - the statements were taken from Jose Rodriguez Hernandez instead of the client, Jorge Hernandez. Nevertheless, the attorney-client privilege required the suppression of the interview. There is "no valid distinction between a deliberately false representation of attorney status and one mistakenly made, upon the basis of which in either instance the purported client relies, simply because the one misrepresentation is more grevious than the other." Id., 273 A.2d at 793. "The confidence exists even where there was no deliberate intent to deceive." Id.

"[T]he rationale behind the [attorney-client] privilege equally supports the theory that the privilege should be extended to those who make confidential communications to an individual in the genuine, but mistaken, belief that he is an attorney." United States v. Boffa, 513 F.Supp. 517 (D.C. Del. 1981).

Recently, in People v. George, 104 Misc.2d 630, 428 N.Y.S.2d 825 (1980), a New York court extended the attorney-client privilege to the polygraphist. The prosecutor was aware that the defendant was to undergo a polygraph examination by a retained examiner. During the course of the polygraph exam, the defendant confessed. The prosecutor subpoenaed the examiner who refused to testify concerning the substance of the defendant's statements, asserting the communications were privileged.

The George court held that confidential statements made to persons who act as agents for the lawyer -- such as the polygraphist -- are within the scope of the privilege which was correctly asserted by the polygraph examiner. Id.

(Continued, P. 28)

WHEN THE ATTORNEY-CLIENT PRIVILEGE APPLIES

THE ATTORNEY-CLIENT PRIVILEGE APPLIES ONLY IF
(1) THE ASSERTED HOLDER OF THE PRIVILEGE IS OR SOUGHT TO BECOME A CLIENT:
(2) THE PERSON TO WHOM THE COMMUNICATION WAS MADE
- (a) is A MEMBER OF THE BAR OR HIS SUBORDINATE: AND
- (b) in connection with this communication is ACTING AS A LAWYER:

(3) THE COMMUNICATION RELATES TO A FACT of which THE ATTORNEY WAS INFORMED
- (a) by his CLIENT
- (b) without the presence of strangers
- (c) for the purpose of securing primarily either
  - (i) an opinion on law OR
  - (ii) legal services OR
  - (iii) assistance in some legal proceeding, AND NOT
- (d) for the purpose of committing a crime or tort; AND

(4) The privilege has been
- (a) claimed AND
- (b) not waived by the client.

* * * *

(Kunen, Continued from P. 1)

combination of Pyschology and Sociology. After working for approximately two years, he attended Northeastern University Law School in Boston. The Northeastern program is an unusual one where grades are pass-fail and almost a year of each law student's education is spent gaining practical experience by "co-oping". A three month co-oping experience with the Appalachian Research and Defense Fund in Prestonsburg introduced Peter to Kentucky. He returned to become a full-time public defender in September of 1979 and has been directing attorney of the Hazard office since October of 1981.

Peter is a hard working attorney whose hallmark is extremely thorough preparation and attention to detail. His last three felony trials have resulted in hung juries. In the little spare time he enjoys backpacking and cross country skiing. Peter, we appreciate your outstanding work as a public defender and your perseverance through very trying circumstances.

GAIL ROBINSON

THE ADVOCATE
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