The Advocate

Vol. 6, No. 2 A bi-monthly publication of the DPA February, 1984

MAY SEMINAR

The 12th Annual Seminar is scheduled to be held May 6-8, 1984 at the Radisson Hotel in Lexington.

On Sunday, May 6, in addition to registration there will the the Supreme Court Review, a Movie and 7 small group sessions and video presentations.

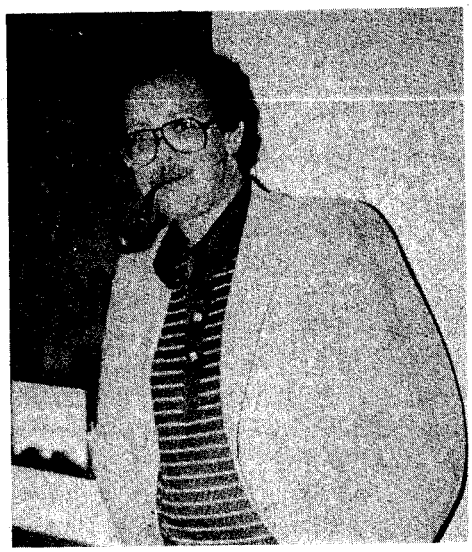
Topics for the Seminar include:

1. Suppression hearings and confessions.
2. Closing Arguments
3. Cross-Examination of Expert Witness
4. Preservation of the Record
5. Parole and the Parole Board
6. Evidence of other crimes and uncharged conduct.

In addition to the lecture on closings there will be Large Group Demonstrations and small groups with individual critiquing.

(Continued, P. 2)

THE ADVOCATE FEATURES



On December 31, 1983, William M. Radigan's nine and one-half year tenure with the Department of Public Advocacy ended. Bill, age 34, resigned from DPA to form a partnership for the practice of law with Patricia G. Walker, a former staff attorney with DPA's Protection and Advocacy Division. The partnership's offices will be in Louisville.

(See Radigan, continued P. 2)

INSIDE

(May Seminar, Continued)
The Faculty for the Seminar include:

William Murphy
Rikki Klieman
Edward J. Imwinkelried
Vince Aprile
Harry Rothgerber, Jr.
Kevin McNally

Brochures on the seminar will be sent. If you need further information please contact Cris Purdom at (502) 564-5245.

* * * * * *

APPELLATE SEMINAR

The Appellate Seminar, a one day seminar, is scheduled to be held at the Capital Plaza Hotel in Frankfort, March 1, 1984 from 9:00 a.m., to 4:15 p.m.

In addition to a luncheon address by Hon. Anthony Wilhoit, Frankfort Public Defenders will be lecturing on Appellate Procedure and Motion Practice, the Art of Brief Writing and Assignments of Error, Discretionary Reviews, Federal Habeas Corpus and Post-Conviction Relief, and Appellate Ethics. Frank Heft, Jr., with the Louisville Public Defender Office will speak on Oral Advocacy.

Registration for the program will be at the desk in the lobby near the lecture hall from 8:00 - 9:00 a.m., on Tuesday, March 1, 1984.

Fees for the seminar are $10.00 for persons in the Public Advocacy System and $25.00 for all other attorneys.

* * * * * *

NEW DEPARTMENTAL OFFICES OPENED IN THE STATE

On January 1, 1984 the Richmond, Madison County office opened. Ernie Lewis as the Directing Attorney will administer public defender services as well as handle all trial work. He now has an office at 507 West Main, Richmond, Kentucky 40475 and his telephone number is (606) 623-8413.

The same date the Department opened a combination post-conviction trial services office at Northpoint Training Center. The directing attorney is McGehee Isaacs. Allison Connelly is the staff attorney and another attorney should join the staff within the next few weeks. The Northpoint office delivers post-conviction services to Center residents, as well as trial cases arising from that facility. Their mailing address is P.O. Box 479, Burgin, Kentucky 40310 and their telephone number is (606) 236-1300, extension 256.

* * * * * *

(Radigan, continued from P. 1)

Bill's association with DPA began during the summer of 1974. Bill, who had just completed his second year at the University of Louisville Law School, worked at the central office in Frankfort as one of a number of law clerks whose summer employment was funded by a grant. At the conclusion of the summer, Bill attempted to secure a work-study clerk job with that office, but was surprised to

(See Radigan, Continued P. 9)

During November and December the Kentucky Supreme Court continued its apparent policy of publishing an increasing number of opinions.

The Court in In Re Radigan, Ky., 30 K.L.S. 13 at 7 (November 2, 1983) held appointed appellate counsel in contempt for failure to file a brief during the time granted by the Court. Appellate counsel had requested three thirty day extensions of time. Upon granting the third extension the Court specified that, if the brief was not filed in the allotted time, counsel "shall appear before this court...in order to show cause why appellant's counsel should not be held in contempt..." No brief was filed. Instead, counsel filed a fourth motion for extension of time requesting ten more days. At a subsequent show cause hearing counsel explained that he did not examine the record until the final day of the third extension at which time he determined that ten days would be required to brief the case. The Court held counsel in contempt and specifically noted that he waited until the last moment to examine the record on appeal.

The Court has certified the law as to the proper standard for judging the sufficiency of the evidence on a motion for directed verdict. Commonwealth v. Sawhill, Ky., 30 K.L.S. 14 at 7 (November 23, 1983). The Court held that the proper standard is stated in Hodges v. Commonwealth, 473 S.W.2d 811 (1971): "With the evidence viewed in the light most favorable to the commonwealth, if the totality of the evidence is such that the trial judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient and the case should be submitted to the jury." The Court distinquished this standard from that set forth in Trowel v. Commonwealth, Ky., 550 S.W.2d 530 (1977). Trowel held that "[i]f under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a vereict of acquittal." The Court noted that this standard was more rigorous than that expressed in Hodges but stated "[w]e interpret the view expressed in Trowel to constitute an appellate standard of review."

In Hayes v. Commonwealth, Ky., 30 K.L.S. 14 at 7 (November 23, 1983), the Court held that KRS 532.080(2), the PFO statute, does not require that an offender be more than twenty-one years old at the time of the principal offense in order to be adjudicated a persistant felony offender. The statute provides that "[a] persistent felony offender in the second degree is a person who is more than twenty-one years of age and who stands convicted of a felony..." The Court conceded that there was merit to the defendant's argument that he could not be convicted as a PFO because, although he was

(Continued, P. 4)

twenty-one years old at the time of trial, he was under twenty-one at the time of the principal offense. However, the Court deferred to the "plain and unambiguous" language of the statute. The Court held that under the terms of the statute a defendant may be convicted as a PFO following a second conviction if the defendant is more than twenty-one years old at the time of the second conviction. Thus, the defendant's age at the time of commission of the second felony was irrelevant. Justice Leibson and Chief Justice Stephens dissented.

In Ford v. Commonwealth, Ky., 30 K.L.S. 15 at 18 (December 22, 1983), the Court addressed various issues arising from the defendant's composition challenges to the grand and petit juries. The Court initially considered the defendant's claim that blacks were underrepresented in the pool from which the grand jury was selected. Ford attempted to make out a prima facie case of underrepresentation through statistical analysis. Ford compared the proportion of blacks found in random samples of jury panels during a two year period to the proportion of blacks shown in U.S. Census data for the county. The Court found this statistical showing deficient in two respects. First, the Court held that random sampling of jury panels over a two year period did not constitute a sufficiently "significant period of time" to support prima facie case of underrepresentation. Secondly, the Court held that comparison of the random samples to the total population of the county was improper. In the Court's view the proper basis for comparison was the voter registration rolls and property tax rolls. The Court's holding in this regard conflicts with the decision of the U.S. Supreme Court in Duren v. Missouri, 439 U.S. 357 (1979), that the proper basis for comparison is the "community."

In considering the defendant's challenge to the petit jury the Court held that underrepresentation of young adults does not present a due process violation because young adults are not "cognizable as a class." The Court also held that KRS 31.110, which provides that indigent defendants receive funds for "necessary services" did not entitle Ford to funds for the services of a statistician so that he could more thoroughly challenge the jury's composition.

The Court in Ford also rejected the defendant's contention that the trial court erred in admitting as expert testimony the testimony of a serologist that a piece of skin matched the size of an injury to the defendant's hand and likely came from the defendant. Justice Leibson dissented, indicating that he would reverse because the serologist's testimony that the skin likely came from the defendant exceeded the scope of his expertise and was directed at an ultimate issue for the jury.

In an important decision for Kentucky search and seizure law the Court, in Estep v. Commonwealth, Ky., 30 K.L.S. 15 at 20 (December 22, 1983) overruled its holding in

(Continued, P. 5)

Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979). The police in Estep stopped the defendant's car on the basis of probable cause to believe that it had been used in a robbery. The officers removed Estep from the vehicle and then searched it, including the glove box which yielded incriminating evidence. The Court held that the evidence thus obtained was properly admitted into evidence. The Court had previously held in Wagner, supra, that Section 10 of the Kentucky Constitution prohibits the warrantless inventory search of a vehicle in the absence of exigent circumstances or the owner or permissive user's consent. Citing United States v. Ross, 456 U.S. 798 (1982), the Estep court stated as its holding that "where probable cause justifies the search of a lawfully stopped vehicle, it also justifies the search of every part of the vehicle and its compartments and contents that may conceal the object of the search."

The Court has held that the defendant in a PFO proceeding is entitled, pursuant to RCr 9.54(3), to an instruction to the jury that the defendant is not compelled to testify and that no inference of guilt should be drawn from his election not to do so. Hibbard v. Commonwealth, Ky., 30 K.L.S. 15 at 21 (December 2, 1983). Hibbard overrules a previous decision to the contrary in Finney v. Comonwealth, Ky.App., 638 S.W.2d 709 (1982). The Court also held in Hibbard that the trial court committed reversible error by permitting the introduction of the facts resulting in a previous felony conviction which was used at the PFO proceeding to obtain an enhanced penalty.

In Commonwealth v. Morrison, Ky., 30 K.L.S. 15 at 21 (December 22, 1983), the Court, certifying the law, held that the trial court properly excluded evidence that the defendant was a parolee at the time of the charged offense and failed to make scheduled appearances before her parole officer. The defendant was on trial on a charge of bail jumping. The commonwealth contended that the defendant's previous failure to make appearances before her parole officer was relevant to show that she also intentionally jumped bail. The Court held that the proper procedure in assessing the admissibility of evidence of doubtful relevance is to "decide whether the probative value of the evidence outweighs its inflammatory nature." In the case before it, the trial court properly found that the proferred evidence was more inflammatory than probative.

Three published opinions were issued by the Court of Appeals during the period under review.

In Wine v. Commonwealth, Ky.App., 30 K.L.S. 15 at 1 (November 25, 1983), the Court of Appeals held that the defendant, whose direct appeal had been dismissed because of the failure of appellate counsel to timely perfect it, was entitled to an order vacating the judgment and entry of a new judgment. A fresh appeal could then be taken from the new judgment. The Court based it holding on the decision of the

(Continued, P. 6)

Kentucky Supreme Court in Stahl v. Comonwealth, Ky., 613 S.W.2d 617 (1981). The Court opined that "[t]he proper remedy for inexcusable neglect by court-appointed counsel is not the dismissal of the appeal of the client who has not condoned or is ignorant of the neglect. The proper remedy lies with professional disciplinary proceedings and, where appropriate, the contempt powers of the court."

In Godsey v. Commonwealth, Ky.App., 30 K.L.S. 15 at 5 (December 9, 1983), the Court of Appeals reversed the defendant's conviction of second degree burglary. The Court agreed with the defendant that the trial court committed reversible error when it refused to strike for cause a prospective juror who was serving as County Attorney at the time the defendant's case was in district court for preliminary hearings. The trial court refused to strike the juror after he disavowed any familiarity with the case. The Court of Appeals held that, despite the juror's claim of lack of bias, bias was implied by the juror's recent status as a representative of the commonwealth. The Court found prejudice in the fact that the defendant who exhausted his peremptory strikes, was compelled to use a peremptory to remove the challenged juror.

In Commonwealth v. Turner, Ky.App., 30 K.L.S. 15 at 10 (December 16, 1983); the Court, in a case of first impression, interpreted KRS 208.194(2). The statute in question states:

> If a child is sixteen (16) years of age or older, and is adjudicated delinquent in the commission of a felony offense or found guilty of a felony offense and has previously been adjudicated delinquent of a felony offense or found guilty of a felony offense in two (2) or more separate adjudications, the sentencing court in its discretion may commit the child to the cabinet for purposes of institutionalization for an indeterminate period of time of not less than six (6) months.

The Court adopted the appellee's position that the statute is to be read as follows:

> If a child is sixteen (16) years of age or older and is adjudicated delinquent in the commission of a felony offense,
>
> AND (EITHER)
>
> has previously been adjudicated delinquent of a felony offense or found guilty of a felony offense in two or more separate adjudications institutionalization may be directed.

The Court's interpretation concludes that "institutionazation may be directed only when linked to previous felonious assessments."

No opinions were issued by the U.S. Supreme Court during November and December.

LINDA WEST

* * * * * *

A SUCCESS STORY

On December 17, 1977, Dewitt Spurlock was killed in his home in Harlan County, Kentucky. The murder weapon was his own .22 rifle. Pearl Lee Stepp, a fourteen year old boy, had pulled the trigger.

In spite of his youth, on February 7, 1978, the Harlan District Court transferred its jurisdiction to the Harlan Circuit Court so Pearl could be tried as an adult. Just two days later a capital murder indictment was returned against him.

Because conflicts with local counsel added to the severity of the case, the Central Office of the Department of Public Advocacy took over the representation of this fourteen year old boy. A multitude of pretrial motions were filed including a motion to exclude the possibility of the death penalty because of Pearl's age. While the circuit judge, the Hon. Sid Douglass, failed to rule on the motion to exclude the death penalty, he made it clear that he would not impose such a penalty on Pearl. In November of 1978, Pearl decided to enter a plea of guilty to the charge of murder. In exchange for this plea all concerned agreed that it would be best that Pearl be transferred to the Department of Human Resources to see what, if anything, could be done to rehabilitate the already life toughened youth.

On November 20, 1978, Pearl, who was fifteen at that time, entered his guilty plea. Judge Douglass was clearly appalled at the crime committed. Accordingly, the judge, over Pearl's representatives' objections, sentenced Pearl to life imprisonment. He did, however, commit Pearl to the Department for Human Resources until he reached the age of twenty-one and thereafater to the custody of the Bureau of Corrections. At the time that Pearl was sentenced he had spent a year in the old Harlan County Jail.

Pearl was clearly incensed at the life sentence which had been meted out to him. Unfortunately, this attitude affected his initial stay with the Department for Human Resources in the Northern Kentucky Treatment Center. Pearl remained at that juvenile institution until April 15, 1980 when he was transferred to Danville Youth Development Center where he was placed in the Voc-Ed Residential Program. Sometime during his stay at this latter institution something changed.

The hard shell which had encased Pearl since the earliest days of his life and which has been hardened by the trial judge's life sentence softened. Pearl began to realize that he was responsible for taking the life of a citizen of this Commonwealth. He anguished over his action. The energy he had been expending on his anger was soon directed toward improving his lot.

On September 9, 1980, Pearl Stepp received his High School Equivalency Certificate from the State Board of Education.

(Continued, P. 8)

(Continued from P. 7)

In the spring of 1981 he finished his vocational education residency at the Danville Youth and Development Center. He had impressed the people so much at the institution that on August 31, 1981, he was placed in a Boyle County foster home. While there he entered Boyle County High School with two goals in mind -- graduating from high school and playing football.

In December of 1981 Pearl obtained his driver's license. He began to work at a local department store in Danville. In August of 1982 he was placed in the foster home where he is currently residing, the Hubert Abbott household in Danville.

On May 20, 1983, Pearl graduated from the Boyle County High School as one of their star football players and as an above-average student. In July of 1983 he was informed that he was accepted at Kentucky Wesleyan College and was given an opportunity to try out for its football team. At that time he received some funding from DHR to continue his education. He enrolled officially in Kentucky Wesleyan College in the fall of 1983 and, as a freshman, he played different roles on the football team. While Pearl's grades in college would not put him on the Dean's list, he is passing.

On December 30, 1983, Judge Douglass, in one of his last official acts as Circuit Judge for Harlan County, held a hearing on Pearl's case to determine whether to modify the commitment order. He was indeed moved by the transformation of Pearl from the tough young punk who had taken Dewitt Spurlock's life to the courteous young man who was presently enrolled at Kentucky Wesleyan College. The judge was both relieved and pleased to be given an opportunity to ensure that all the positive rehabilitative processes that Pearl had gone through would not be undermined by the possibility of Pearl having to go to an adult institution when he turned twenty-one. Accordingly, Judge Douglass signed an order pursuant to the same juvenile statute under which he had sentenced Pearl modifying the commitment order by placing Pearl on probation for five years after he turned the age of twenty-one. Tears of joy welled in the eyes of all who attended the last formal hearing of Judge Douglass' tenure. Pearl walked from the courtroom with the knowledge that as long as he continued to lead the life he had grown proud of he would not have to serve any time in an adult institution for the murder he had committed seven years ago.

Stories like this are indeed rare. The author of this article, who has been one of Pearl's representatives since the beginning, has not run across a more joyful success story in his almost ten years as a practicing attorney. While it is true that the majority of the credit goes to the young boy who wanted to improve himself, not enough can be said for the bravery of Judge Douglass in sending this admitted murderer to be cared for by those specially trained to do so, rather than sending

(Continued, P. 9)

him to an adult institution. If only more circuit judges throughout this Commonwealth would avail themselves of KRS 208.180 when sentencing children who have been transferred to their jurisdiction because of the violent crimes they have committed, perhaps Pearl's story would not be just a refreshing anomaly. The system just might work if we let it.

EPILOGUE

As with most violent juveniles, at the time of the killing Pearl was running with a bunch of other "tough" boys. One of those boys is presently serving a twelve year sentence for a manslaughter conviction. Another one was killed by his brother during a violent argument. Still another one was killed trying to steal a shotgun. Pearl is presently enrolled in Kentucky Wesleyan College seeking a degree which will lead him to a career in the criminal justice system.

TIM RIDDELL

* * * * * *

(Radigan, Continued from P. 2)

learn that, although the University of Kentucky Law School had such an arrangement with DPA, the University of Louisville did not. Undaunted and in a manner which would become his hallmark as a public defender, Bill lobbied and cajoled the University of Louisville until a work-study program was instituted with DPA. Bill, of course, was the first student to be hired under that plan.

Bill was born in Washington, D.C. and raised in Arlington, Virginia. His father was a partner in Adams, Porter & Radigan, an Arlington, Virginia law firm that emphasized real estate law. Bill graduated in 1971 from Washington and Lee University in Lexington, Virginia with a B.S. Degree in Politics.

After clerking for DPA throughout his senior year of law school, Bill elected to seek full-time employment as an assistant public defender in the DPA office in Frankfort, instead of returning to Virginia and his father's law firm. Bill chose Kentucky over Virginia, criminal law over civil practice, and public defender work over private practice.

Upon admission to the Kentucky bar in 1975, Bill became an assistant public advocate and immediately assumed a full caseload as an appellate defense attorney. Although a neophyte lawyer chronologically, Bill's appellate briefs reflected both the careful eye and the resourcefulness of a seasoned appellate attorney.

Throughout his years with DPA as a staff attorney, Bill not only mastered the tasks and roles assigned him, but he constantly sought new areas of professional development and service within the context of his position in the Public Advocacy system.

Bill has tried capital murder cases, presented oral arguments to state and federal appellate courts, and participated on

(See Radigan, P. 15)

NEED QUICK ANSWERS

The attorneys in the Appellate Branch and the Post-Conviction Branch of the Central Office have volunteered to provide quick answers and immediate advice about any of the legal issues found below. Due to time restraints this will not be a research service. It is merely intended to allow you quick access to the wealth of knowledge that some of the Central Office attorneys have acquired over the years. Notwithstanding this new service, you should continue to consult your Trial Services Branch Supervisor as you have in the past.

A.

Access to courts - Mike
Appellate procedure - Mark, Larry, Tim
Arrest, general - Tim
Arrest, probable cause - Linda

B.

Belated appeals - Randy, JoAnne

C.

Caselaw, recent - Linda
Collateral attacks (11.42/60.02) - Randy
Comment on silence (Doyle) - Larry
Confessions, Anti-Sweating Act - Marie
Confessions, general - Larry
Confessions, juveniles - Kathleen
Contempt of Court - Mike
Controlled Substances - Tim
Cotton issues - Larry, JoAnne
Counsel, conflict of interest - Linda, Mark
Counsel, right to - Linda
Criminal Facilitation - Mike
Criminal Syndicate - Linda

D.

Death Penalty - Rodney
Defense, right to present - JoAnne
Detainers/IAD - Randy, Dave
Double Jeopardy - Larry, Rodney
Dying Declarations - JoAnne

E.

Evidence, admissibility - Rodney
Evidence, character - Linda
Evidence, co-defendant's guilt - Larry
Evidence, flight/escape - Linda
Evidence, hearsay - Linda
Evidence, prior sexual conduct - Mike, Marie
Evidence, relevancy - Linda, Mark
Evidence, sufficiency - Linda
Ex Post Facto - Linda
Extradition - Randy
Extreme Emotional Disturbance - Rodney, Mike
Eyewitness Identification - Rodney

F.

Firearm offenses - Larry

G.

Guilty pleas, constitutional validity - Richard

H.

Habeas corpus, cause/prejudice - JoAnne
Habeas corpus, federal - Randy, Richard, Rodney
Habeas corpus, state - Randy, Richard

I.

In forma pauperis, denial review - Mark, Tim

J.

Jail credits - Randy
Juror misconduct - Tim
Juror, testimony re verdict - Mike
Juvenile rights and procedure - Mike

K.

Kidnapping exemption - Larry

L.

Lineup/Showup/Photo display - Larry, Linda

N.

Notice of Appeal - Mark, Tim

O.

Offenses, single vs. multiple - Marie

P.

Pardons and commutations - Randy, Dave
Parole - Randy, Dave
Peremptories, improper use of - Tim
PFO proceedings - Rodney, Mike
Possession, what constitutes - Marie
Prisons - Randy, Dave
Privelege, psychiatrist/patient - JoAnne
Prosecutorial misconduct, arguments to jury - Mike
Prosecutorial vindictiveness - Richard

S.

Search and Seizure - Tim, Linda, Rodney
Self-protection - Tim
Sentencing - Randy
Separate trials, co-defendants - Marie
Separate trials, counts - Tim, Linda
Sexual offenses, mistake as to age - Tim
Shock probation - Randy
Speedy trial - Linda, Rodney
Stop and frisk - Tim

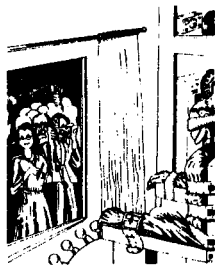
W.

Waiver, counsel - Tim
Waiver, effect of mental retardation - JoAnne
Waiver, jury trial - Tim
Wiretap - Linda
Witness, competency - Larry
Witness, improper intimidation - Mike

Marie Allison	*564-5228
Richard Arvedon	564-2677
Kathleen Kallaher	564-5228
Larry Marshall	564-5231
Rodney McDaniel	564-5231
Dave Norat	564-5223
Mark Posnansky	564-5234
Tim Riddell	564-5212
Linda West	564-5234
Randy Wheeler	564-2677
Mike Wright	564-5219
JoAnne Yanish	564-5219

* All Numbers 502 Area Code.

* * * * * *



THE SUPREME COURT AND PROPORTIONALITY REVIEW

The high court handed down Pulley v. Harris, 34 Cr.L. 3027 (1984) on January 23. Comparative proportionality review is not, the Court said, the "invariable rule in every case" dictated by the 8th and 14th Amendments. 34 Cr.L. at 3029. "As we are presently informed, we cannot say that the California procedures provided Harris inadequate protection against the evil identified in Furman." 34 Cr.L. at 3032 (emphasis added). Harris, however, is irrelevant to Kentucky because comparative proportionality review is already statutorily required. KRS 532.075.

"Proportionality review [is]... an additional safeguard against arbitrarily imposed death sentences..." 34 Cr.L. at 3031. "Once again, proportionality review [is]...an effective, additional safeguard against arbitrary and capricious death sentences." 34 Cr.L. at 3033 (Stevens, J. concurring). Proportionality review "serves to eliminate some, if only a small part, of the irrationality that infects the current imposition of death sentences..." 34 Cr.L. at 3035 (Brennan, Marshall, J.J., dissenting). "[O]ver 30 states now require, either by statute or judicial decision, some form of comparative proportionality review..." 34 Cr.L. at 3036 (dissenting opinion).

The Court repeated "in every case" twice. 34 Cr.L. at 3031. In 1978, Harris shot two teenage boys, then "finished the boys hamburgers" and used their car to commit a bank robbery. Harris had a prior manslaughter conviction in 1975, was found in possession of weapons in prison, sodomized and threatened another prisoner with death. 34 Cr.L. at 3027-28 n.1. Apparently, the Court felt there was no need for proportionality review in Harris's case.

STAY GRANTED TO REVIEW APPLICATION OF GEORGIA STATUTE

In Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983), stay granted, 104 S.Ct. 562 (Dec. 13, 1983), the Court blocked an execution "pending decision of the United States Court of Appeals for the Eleventh Circuit in Spencer v. Zant," 715 F.2d 1562, 1578-1583 (11th Cir. 1983), rehearing en banc granted ___ F.2d ___ (1983). In Spencer and the companion case of Ross v. Hopper, 716 F.2d 1528, 1539 (11th Cir. 1983) a claim of discrimination and arbitrariness was based on a study by Dr. David Baldus "a statistician and social scientist who had previously studied the question of the administration of death penalty statutes, [and] independently conducted a complex scientific study of the administration of

(Continued, P. 13)

Georgia's death penalty..." 715 F.2d at 1579. In their Harris dissent, Justices Brennan and Marshall took note of the growing scientific evidence of racial discrimination and arbitrariness in the administration of the death penalty. "[T]he issue cannot be avoided much longer..." 34 Cr.L. at 3035. The Harris dissenters listed 11 studies as indicative of "a rapidly expanding body of literature." Id. "Although research methods and techniques often differ, the conclusions being reached are relatively clear: factors crucial, yet without doubt impermissibly applied, to the imposition of the death penalty are the race of the defendant and the race of the victim..." Id. (emphasis added). Justice Brennan also pointed towards evidence of other "irrationality... [such as] discrimination by gender... socioeconomic status... geographic location..." Id.

4 MORE EXECUTIONS PROVOKE HARSH WORDS

Since our last issue, Robert Sullivan (Fla., 11/30/83); Robert Wayne Williams (La., 12/04/83); John Smith (Ga., 12/15/83); and Anthony Antone (Fla., 01/24/84) were executed. Sullivan's last words were "I hold malice to none. May God bless us all." Louisville Courier Journal (Dec. 1, 1983). Apparently not sharing this sentiment, Chief Justice Burger, concurring in a final denial of a stay, condemned Sullivan's lawyers for inflicting "the cruelty of 10 years on death row...upon this guilty defendant [while] seeking to turn the administration of justice into [a] sporting contest..." Sullivan v. Wainwright, 104 S.Ct. 450, 452 (1983). Pope John Paul II had tried to save Sullivan from execution.

The growing number of executions has provoked strong language from other members of the Court. Dissenting from an order vacating a stay of execution, Justice Brennan stated the majority was "surely insensitive, if not ghoulish." Hutchins v. Garrison, 34 Cr.L. 4156, 4157 (1984). Justice Marshall, also dissenting, was of like mind. "I find the Court's haste outrageous...incredible... Ironically, the Court's jealous efforts to authorize Hutchins's execution at the last minute may be futile." 34 Cr.L. at 4158. They were. The North Carolina Supreme Court granted a stay.

The real explanation for the Harris decision may lay in words used by the California Attorney General to close his Harris brief at 53-54. "The present case presents this Court with an opportunity to... prevent the waste of increasingly precious public resources which would be occasioned by prolonging the indecision over capital punishment. The time has come... to get on with it." (emphasis added).

So much for safeguards.

KEVIN McNALLY

* * * * * *

NO COMMENT

Our version of Chuck Sevilla's "Great Moments in Courtroom History" continues. Send your contributions to The Advocate, c/o Department of Public Advocacy, Frankfort. All dialogue guaranteed verbatim from Kentucky courtroom records or newspapers.

****

PUBLIC DEFENDER VACATIONS

JUDGE: Where is [P.D. 1]?

PROSECUTOR: Europe.

JUDGE: Europe. [P.D. 2] they tell me one of the lawyers here is in Europe on vacation, maybe in Jerusalem, you might call over there and tell him he can stay...

[P.D. 2]: He's probably in Russia, Judge.

Epilogue -- He was.

****

THE BOY DOWN AT FRANKFORT

JUDGE: Can you give me a date that we will have other counsel here to represent these other people...

[P.D. 1]: Your honor, I don't know, [P.D. 2] is taking care of that with [P.D. 3] in Frankfort...

PROSECUTOR: [The Court should] enter an order for the Office of Public Advocacy to have attorneys for these people...

JUDGE: Prepare the order and direct the boy down at Frankfort, the chief, whatever his name is.

****

CAN WE GET EXPENSES LIKE THIS FOR DEFENSE WITNESS?

JUDGE: The trial...having been assigned...and [Mr. Smith] and his wife having been subpoenaed as witnesses for the Commonwealth...and it therefore being necessary to put their dogs in a kennel for the time they would be coming from Florida to Kentucky to appear as witnesses in said case, and the Court being sufficiently advised,

It is now ORDERED by the Court that the State of Kentucky shall reimburse said witnesses in the amount of $47.50 for the kennel bill on said dogs, and in any further amount that may accrue during their presence as witnesses in the aforestyled action.

Epilogue -- Fat chance.

****

"JUDGE, CAN WE HAVE FIVE MORE MINUTES"

JURORS TO JUDGE: All jurors condemn the use or growing of marijuana but based on the evidence and testimony we don't feel there was enough evidence

(Continued, P. 15)

(No Comment, Continued)

the marijuana was being grown by the defendant. [We find the defendant not guilty.]

JUDGE TO JURORS: I'll tell you this. You will never see a stronger case, in this or any other county.

****

Thanks and a tip o' the hat to Ed Monahan, Debbie Hunt and Jay Barrett.

KEVIN MCNALLY

* * * * * *

(Radigan, Continued from P. 9)

committees and task forces to improve the law as it relates to the clients of DPA. In all of these undertakings, Bill has performed with exceptional professional knowledge and an unflagging sense of duty.

Sensing a dangerous void in the public advocacy program, Bill elected to become DPA's resident expert in the area of involuntary commitment/mental health law. With no incentive other than broadening his own professional development and providing DPA with a needed type of unavailable expertise, Bill through self-education became one of the leading experts in Kentucky on mental health law. His grasp of both the theory and practice in this area of law made him an often requested lecturer at continuing legal education programs for both practitioners and judges.

In October of 1976 Bill filed on behalf of a 52-year-old Hazard woman a civil rights action in federal district court challenging the constitutionality of Kentucky's involuntary commitment statutes, KRS Chapters 202A and 202B. Two years later, while that federal suit was still pending, Bill was appointed by the Kentucky Supreme Court to serve on a special advisory committee to research and make recommendations on mental health commitment procedures in Kentucky. Many people credit Bill's civil rights litigation with prompting both the creation of the Mental Health Advisory Committee and the enactment by the 1982 General Assembly of a comprehensive revamping of Kentucky's involuntary commitment laws.

In 1981 when the state decided to close the Grauman forensic unit at Central State Hospital and transfer its pre-trial evaluation program to the Kentucky Correctional Psychiatric Center (KCPC) at the Luther Luckett Correctional Complex on the grounds of the Kentucky State Reformatory, Bill on behalf of several clients filed a federal civil rights action to preclude the Commonwealth from being able to house and evaluate pre-trial detainees in a maximum security facility with convicted state prisoners. That federal suit is still in litigation.

In 1982 Bill was designated as DPA's appointee to Kentucky's Inter-Agency Council on Mental Illness/Mental Retardation which was initially composed of representatives from state departments such as Corrections, Human Resources, and

(See Radigan, Continued P. 19)

1983 DEATH PENALTY SEMINAR

Over 70 attorneys participated in The Third D.P.A. Death Penalty Seminar held December 1-4, 1983 at Barren River State Park.

The three days of intensive lecturing, small group sessions and open panel discussions about tactical approaches to defending capital cases were very valuable. The social hours were sensational.

The faculty included Dennis Balske, Cathy Bennett, Millard Farmer, Andrea Lyon, Jeff Blum, David Stebbins and Ron Dillehay. The Seminar ended on Sunday morning with a moving talk by Dick Burr about losing the struggle to stop Robert Sullivan's execution in Florida.

THE SENTENCING HEARING PANEL

"THE FACULTY"
RON, CAT, MILLARD, ANDREA, DENNIS

VOIR DIRE EXERCISES

VOIR DIRE DEMO

"BREAKFAST" SUNDAY MORNING

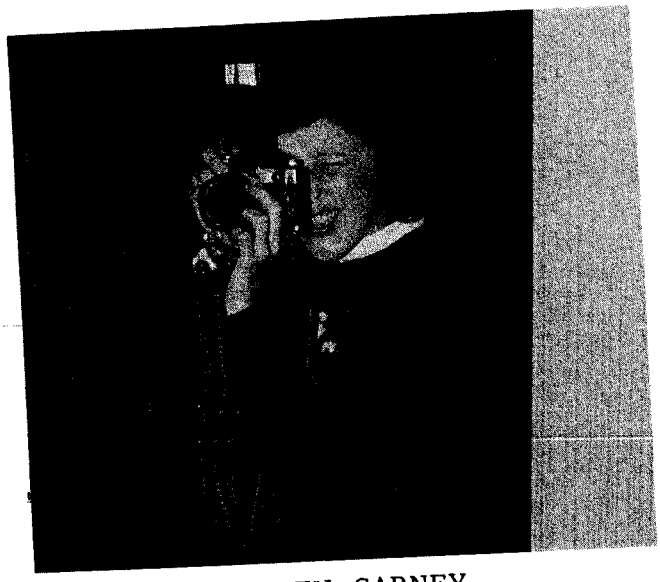
LOUISVILLE P.D.'S PSYCHING THEMSELVES UP FOR TRIAL

This is an update on BR 286 (now known as H.B. 33) which, as you might remember from the last issue of The Advocate, is known as the Bill of Rights for persons with developmental disabilities. The legislation has picked up new cosponsors and, on November 16, 1983, was voted out of the Interim Joint Committee on Health and Welfare with a recommendation for passage.

H.B. 33 requires that services and residential alternatives for persons with developmental disabilities be tailored to meet the individual's needs rather than requiring the person to tailor his/her needs to the services offered. The Act requires joint implementation by the Education and Humanities Cabinet and the Cabinet for Human Resources to accomplish the purposes of the legislation and to provide for an impartial grievance procedure to resolve disputes related to services and residential alternatives.

The Legislative Research Commission is completing a fiscal impact statement for consideration by the legislature. The fiscal implications of the Act will be considered by the Appropriations and Revenue (A & R) Subcommittee on Human Resources on January 18 and should be submitted for review by the full A & R Committee within a week or two of that date. As the bill goes through the legislative process, your support will be important. If you need additional information regarding the bill or would like a copy, please leave a message on the toll-free message center, 1-800-372-2988, and your call will be returned. Please phone or write your legislators to let them know that you support the bill. The toll-free number in Frankfort for your legislator is 1-800-372-7181 and 1-800-372-2985. You can leave a message at this number indicating your support for H.B. 33.

* * * * * *



KAREN CARNEY

The public advocacy system in Kentucky has lost a friend. You are probably unaware of her, unless you worked in Frankfort or in one of DPA's regional offices. But while you might not have known her, you were not unaffected by her.

Karen Carney, paralegal for the Trial Services Branch, made an impact on people and things everywhere she went. She was with us for only two years, but the vacuum she has created is immense.

To discuss what she meant to the Trial Services Branch is to talk about the activities of that Branch. She has edited The Advocate since her arrival here from Indiana. She cajoled people to write articles (she was very difficult to turn down), took pictures, put it together, proofed it, and took it to the printer. She was the detail person for DPA's many training activities. No matter was too unimportant for her. As a result, training activities run by DPA recently have run without a hitch. Karen was actively involved in the Death Penalty Task Force and in DPA's many publications, in addition to handling numerous research projects.

That is what Karen did. And she did them well. More important, however, was who she was. She was, and is, a person who becomes everybody's friend. She makes herself vulnerable to others, thereby allowing people to be themselves around her. She never demanded praise for projects, despite the fact that her involvement resulted in other people's successes. Her ego was strong enough to be a friend, to be vulnerable, and to give others the credit. In a business like we all are in, such a person is rare.

She left the DPA in November, moving back to her home in Indiana. When she left, she did so to strengthen a relationship there, while hurting the development of her career. Her priorities were straight; people always came first. That's why the people in DPA will miss her very, very much.

ERNIE LEWIS

* * * * * *

THE JUVENILE LAW SEMINAR

The Juvenile Law Seminar, a one day session, is set for March 9, 1984. It is to be held at the Radisson Hotel in Lexington from 9:00 a.m., to 4:00 p.m. The program will include:

-- Judge W. E. McAnulty
Juvenile Rights: Statutes and Case Law
-- Tom Hectus; Juvenile Transfer Proceedings

(Continued, P. 19)

(Juvenile Seminar, Continued)

-- Allen Button: The Use of Experts in Juvenile Proceedings
-- David W. Richart: Dispositional Alternatives in Juvenile Cases.

Following the lectures there will be an open panel discussion moderated by DPA Attorney Michael Wright.

Registration for the program will be in the lobby near the lecture hall from 8:30-9:00 a.m., on Friday, March 9, 1984. The fee is $10.00 for persons in Public Advocacy and for other attorneys it is $25.00. The fee includes lunch and handouts, and does not include lodging. Checks are to be made payable to the Kentucky State Treasurer. The registration deadline is March 1, 1984.

* * * * * *

SEARCH AND SEIZURE SEMINAR

On Friday, March 23, 1984, the Louisville Bar Association in conjunction with the Criminal Law Section of the Kentucky Bar Association will present a daylong seminar at the Galt House in Louisville on "Search and Seizure Law: Three Perspectives"

The registration fee for members of either the Louisville Bar Association or the Criminal Law Section of the KBA is $55.00; the registration fee for non-members is $75.,00

Full-time public defenders employed by DPA who are interested in attending this seminar should contact Ed Monahan at (502) 564-5258. Others who wish either to obtain additional information on the seminar or to register should contact the CLE Department, Louisville Bar Center, Suite 200, 717 West Main Street, Louisville, Kentucky 40202, (502) 583-5314.

* * * * * *

(Radigan, Continued from P. 15)

Education as well as a number of attorneys, both public and private, with expertise in mental health law. The Council was created to develop a coordinated, unified approach to problems generated by the state's delivery of services to persons with mental illness or mental retardation. Bill has been an active member of the Council.

In his role as mental health advocate for DPA, Bill directly participated in the establishment of mental health representation by public defenders in both Jefferson and Fayette counties.

At DPA Bill has been a hard working member of the volunteer Death Penalty Task Force. He has not only made contributions to the Death Penalty Manual and the death penalty training seminars, but has also represented numerous indigent clients in capital cases at the trial and appellate levels.

Bill's commitment to continuing legal education has been a constant during his years with DPA. He frequently lectured at DPA training programs, such as the annual public defender

(See Radigan, Continued P. 20)

(Radigan, Continued from P. 19)

seminar, as well as CLE programs sponsored by Kentucky law schools and bar associations. Bill also served as a presenter at numerous judicial training events in Kentucky.

In the summer of 1981, Bill joined the faculty of the University of Kentucky College of Law's Annual Nine-Day Intensive Course in Trial Advocacy for lawyers as an assistant team leader. Bill repeated that role in 1983 and is scheduled to be an assistant team leader at this year's session in May.

Bill is presently the chairperson of the Kentucky Bar Association's Criminal Law Section and is also a member of the National Association of Criminal Defense Lawyers (NACDL).

Bill's legal ability and professional character were acknowledged in 1980 when he was one of three nominees recommended by the judicial nominating commission for the gubernatorial appointment to the district judge vacancy then existing in the 30th Judicial District.

On the occasion of the DPA's "farewell" luncheon for Bill, Chief Justice Robert F. Stephens of the Kentucky Supreme Court, by letter, commented that "Bill Radigan has well served the citizens of Kentucky during his tenure as an Assistant Public Advocate." Chief Justice Stephens described Bill as "a bright, talented and dedicated attorney whose practice has made an indelible mark on the system of justice in the Commonwealth."

Perhaps Chief Justice Stephens' final comment in his letter serves as a fitting epitaph for Bill's years of service at DPA and a touchstone for his future career as a private practitioner: "The Office for Public Advocacy will be losing a fine lawyer, but I am sure the citizens of Kentucky will continue to benefit from Bill's expertise and dedication."

VINCE APRILE

* * * * * *

THE ADVOCATE
Office for Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

BULK RATE
U.S. Postage Paid
Frankfort, KY 40601
Permit No. 1

Printed with State Funds
KRS 57.375

ADDRESS CORRECTION REQUESTED