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### EDITOR'S NOTE

This is the first issue of what is intended to be a bi-monthly newsletter published by the Office for Public Advocacy. The brain-child of Jack Farley, it is the product of the Public Information Committee.

It is the purpose of this newsletter to keep you informed regularly about what is going on in our office and across the state in the area of public defender work.

Your input is welcome. If you have an opinion which you wish to express, please write us. Other suggestions about the content of this newsletter will also be welcomed.

### SEMINAR SCHEDULED

Tentatively, the 7th Annual Public Defender Training Seminar is scheduled for May 20, 21 & 22, 1979. It will once again be held at the Ramada Inn-Hurstbourne in Louisville. Should you have suggestions as to program content please make those suggestions to Vince Aprile. If you have suggestions as to the physical arrangement for the seminar please contact Bill Ayer.

### WANTED: A NAME

You might notice that this newsletter is styled "?". This is not an indication of uncertainty, but is rather an invitation to you to help us with a name. Let us hear your suggestions.

### NEW PUBLIC DEFENDERS SWORN



From Left: Ed Gafford, Jill Dallas, Randall Wheeler, Patricia Walker, Thomas Hectus.

### SOUTHEAST PROJECT FUNDED

Under the present system of delivery of public defender services there is a critical shortage of public defenders in the Southeastern portion of the Commonwealth. A great many courts in this area are finding that attorneys that formerly handled public defender cases are now refusing to accept such cases either because their private practice has become so lucrative or because the fees available from public defender cases are not sufficient to meet their requirements.

This lack of available defenders is compounded by a drastically increased caseload. With almost a years experience with the District Court system it has become obvious that having judges  
(Continued on Page 7 )

# -NOTE-

## Protection & Advocacy for the Developmentally Disabled

### NEW ROLE FOR PUBLIC DEFENDERS

In 1978 the name of the Office of Public Defender was altered to reflect a new division opened in October, 1977, and a new responsibility of the entire office. KRS 31.010 now requires that the Office for Public Advocacy provide for the "pursuit of legal, administrative, and other appropriate remedies to insure the protection of the rights of the developmentally disabled." The impetus for this expansion of duties came from the Developmentally Disabled Assistance and Bill of Rights Act, P.L. 94-103 (42 U.S.C. Section 6012), which requires that -as a condition of receiving certain federal funds - each state must have a system to protect and advocate the rights of persons with developmental disabilities.

While the Protection & Advocacy Division of the OPA (P & A) was established specifically to deal with the problems of developmentally disabled persons, it is the responsibility of every Public Advocate to represent these clients as well. The P & A staff is planning training programs to acquaint central office and local defenders with disabilities law and is available for consultation and assistance.

### BASIC TOOLS FOR PRACTICING EDUCATION RIGHTS CASES

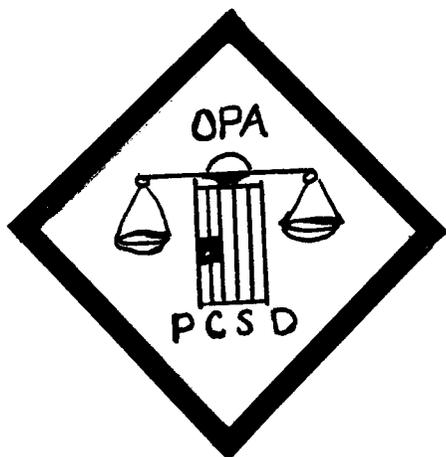
Since studies indicate that as high as 90 percent of the juveniles who are institutionalized as "delinquents" have one or more learning disabilities, there appears to be a definite correlation between learning difficulties and juvenile delinquency. Thus, it is a logical extension for public advocates who have been defending those juveniles in their "criminal" cases to enter into representing them in their "education" cases.

While several court cases established the legal principle that all children, even those who are severely handicapped, have the right to a public education, the principal authority for that right is found in the Education For All Handicapped Children Act of 1975, commonly known as Public Law 94-142, 20 U.S.C. 1401 et seq. That Act mandated that by September of 1978 states must provide all handicapped children with free appropriate educational programs.

Regulations promulgated pursuant to PL 94-142 set out detailed substantive rights which state and local agencies must provide in implementing the statute. These regulations also outline certain procedural rights which must be afforded the children and their parents, such as the right to hearings before placement, right to reasonable notice of hearings, right to representation in hearings and right to appeal to state and/or federal court.

The Commonwealth has established further procedural guidelines in efforts to comply with PL 94-142 which are found in 707 KAR 1:060 and are also published by the Kentucky Department of Education in a booklet called Due Process Policy and Procedure Manual. There are several Attorney General Opinions which have been published interpreting the application of PL 94-142 to Kentucky.

Another Federal law which has affected the right to education of developmentally disabled persons is the Rehabilitation Act of 1973, which prohibits discrimination against any otherwise qualified handicapped individual (19 U.S.C. Section 794). The law applies to Federal agencies and agencies receiving the benefit of federal financial aid. Pursuant to the Act, HEW has published regulations with specific requirements for pre-school, elementary, secondary and post-secondary education programs.



### POST-CONVICTION SERVICES

Since its inception the Post-Conviction Services Division of the Office for Public Advocacy has been occupied with advocating the interests of residents at all of the correctional facilities throughout the Commonwealth. Nevertheless, for obvious reasons, this Division of the OPA is not as visible as those dealing with trial and appellate matters. Therefore, in this first issue of the OPA newsletter we would like to take the opportunity to outline some of the functions that we perform and introduce our staff. It is hoped that by making ourselves known to all involved in the OPA system that our services can be widely and effectively utilized in the future.

After an indigent defendant is convicted and has exhausted his right to an appeal the Post-Conviction Services Division will review the case for further possible action at his request. If the division deems the case to be meritorious it will then make a decision as to what action is warranted.

One avenue of relief is by way of an RCr 11.42 motion to vacate judgment. With such a motion, a defendant challenges the denial of his constitutional rights, including the denial of his right to appeal.

The Post-Conviction Services Division will also assist in the prosecution of motions to set aside a conviction due to newly discovered evidence under RCr 10.06 or if "it is no longer equitable that the judgment should have prospective application" under CR 60.02. Also, if a resident is seeking

his immediate release from custody a habeas corpus action under Chapter 419 of the Kentucky Revised Statutes is available.

This division of the OPA, however, is not limited to taking actions within the state judicial system but can also proceed to federal court on behalf of the defendant once the appropriate state remedies have been exhausted.

In all of the aforementioned actions the Post-Conviction Services Division provides total assistance from the filing of the motion or petition through the representation of the defendant at any resultant hearing. However, this division of the OPA is not restricted to representing defendants in court actions alone. Representation in parole revocation hearings and counseling concerning parole in general is also available. In addition, help can be obtained in getting credit for any jail time which the defendant has served but was neglected at the time credit for other jail days was given in the final judgment.

The only limitation placed on our services is in the civil area. Since Chapter 31 of the Kentucky Revised Statutes does not authorize the OPA to be involved in these matters residents with civil problems are referred to the appropriate legal-aid corporation.

Currently, the Post-Conviction Services Division is staffed by four attorneys with hopes to add one more at the Kentucky State Penitentiary in the near future. David Norat, Assistant Deputy Public Advocate, Director of the Division, operates out of the OPA's central office in Frankfort. Randall Wheeler, Assistant Public Advocate, is also positioned in Frankfort. At the Kentucky State Penitentiary and the Kentucky State Reformatory are Assistant Public Advocates, Robert Fay and Ed Gafford, respectively. Our division would like to urge anyone with questions concerning any post-conviction criminal matter to direct them to the appropriate attorney. Issues raised

(Continued Page 4)

by the inquiries which we feel are of particular interest or importance will be published in this section of the OPA newsletter in the future. More importantly, such a dialogue established between this division of the OPA and associates in the field will ensure that defendants are adequately informed of all the ramifications of a conviction and their means of recourse if they believe they have been unjustly convicted.

### SHERLOCK WANTED

The Office for Public Advocacy has a western Kentucky vacancy in its investigations branch. Investigators Serve local public defenders and Office for Public Advocacy attorneys in four areas: initial criminal actions against indigents, protection of the rights of developmentally disabled persons, appellate investigations, and post-conviction relief actions. Investigators receive a salary and expense account for serving a 14-county region roughly approximating an area development district.

Entry level qualifications vary according to the position applied for (there are five investigator job classifications), but previous investigations or law enforcement experience may not be required.

The Personnel Department of state government supervises the test for public defender investigator positions. Anyone interested in the western Kentucky vacancy should contact the Personnel Department (Examination Program, Capitol Annex, Frankfort 40601) and arrange to take the Public Defender Investigator examination.

### LEGISLATIVE IDEAS?

The Office for Public Advocacy now has a Legal Research and Development Committee. That Committee is presently developing legislative proposals

for the 1980 session of the General Assembly in the following areas:

1. Criminal;
2. Post-conviction;
3. Mental Health;
4. Protection & Advocacy/developmentally disabled
5. Public Defender Administration.

Ideas for legislation in any of these areas are now being sought and should be forwarded no later than January 1, 1979 to:

Edward C. Monahan  
Chairman, Legal Research  
& Development Committee  
Office for Public Advocacy  
State Office Building Annex  
Frankfort, Kentucky 40601

### TRUCK DRIVER ACQUITTED IN BEATTYVILLE DISASTER

After four days of trial, a Jackson county jury deliberated thirty minutes in acquitting William Wilson of seven counts of second degree manslaughter. As he descended the Beattyville hill, Wilson lost control of the gasoline tanker truck he was driving. The resulting crash destroyed a good part of the town; seven died, and four were injured. The prosecution contended that Wilson was traveling at an excessive rate of speed. Wilson made the defendant in the case both the treacherous nature of the hill and the truck.

The venue of the case was changed from Lee to Jackson County. A special judge presided. Wilson was defended by Jim Early, Winchester Regional Public Defender, and Ed Monahan, Assistant Public Advocate. Three Assistant Attorney Generals of the Prosecutorial Assistance Division of the Attorney General's Office presented for the Commonwealth.



# THE DEATH PENALTY



## Death is Different

### THE DEATH PENALTY TASK FORCE

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

If you are interested in our assistance, please contact the chairman of the Death Penalty Task Force. The office's number is (502) 564-3754. The office's toll free number is 1-800-372-2988.

The Task Force has prepared a Death Penalty Manual (May, 1978). That manual covers the following areas: jury (grand and petit) composition challenges, change of venue in a capital case, voir dire in death penalty cases, the penalty phase of a death penalty proceeding, suggested instructions for the sentencing phase, executive clemency, recent Kentucky and United States Supreme Court capital cases, retroactive application of the death penalty statute, and list of sample motions for capital cases. A copy of the manual can be obtained by contacting the chairman of the Death Penalty Task Force, or any attorney in the Frankfort office.

Other death penalty materials available from the office are: Witherspoon Trial Manual: Selecting A Jury in a Capital Case; Psychological Methods of Jury Selection in the Typical Criminal Case (Cathy Bennett, Southern Poverty Law Center); The Case Against the Death Penalty (Hugo Bedau).

"Justice of this kind [the infliction of capital punishment] is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first." A. Camus, Reflections on the Guillotine 5-6 (1960).

### DEATH IS AVOIDED BY PUBLIC DEFENDERS

From October 30, 1978 until November 10, 1978 a capital murder trial was held in Catlettsburg, Boyd County, Kentucky. The defendant, Claude Edward Plummer, was accused of three counts of murder in the first degree. Plummer, a 27 year old white man, was convicted on all three counts and a sentence of 99 years and one day was recommended by the jury.

Plummer was represented by Hon. William Mizell of the Boyd County Public Defender's office. One of the most important factors at the trial, Mizell feels, is the fact that the judge permitted individual jury voir dire to be conducted.

After the defendant was found guilty of the three counts of murder, the sentencing phase was held in order to hear evidence of aggravating and mitigating circumstances. The defense introduced, in mitigation, evidence of insanity and evidence that Plummer was acting under the influence of extreme emotional disturbance. Mizell also argued the lack of a criminal record and the fact that Plummer may have had a moral justification for his actions.

### Martin

Robert E. Martin was tried for his life in September of 1978, for the offense of murder and first degree burglary. He was represented by Assistant Public Advocate Ernie Lewis and Hopkins County Public Defender Marc Wells. On September 14, 1978, the jury found him guilty of murder and first degree burglary. The maximum of twenty years for the burglary, and some other indications, convinced counsel that the jury was tending toward the imposition of the death penalty on Martin.

The following day, the presentence hearing was conducted to determine the appropriate sentence for Martin. The Commonwealth presented no evidence. Evidence for the defense included: a professor of ethics, who testified to the factors of age, race, and poverty; a psychologist, who revealed to the jury his analysis of the defendant; the defendant's mother; and a chaplain at Kentucky State Penitentiary, who testified to the rehabilitative possibilities in the prison system. After hearing all the evidence, the same jury who had returned the twenty year maximum on the burglary charge gave Martin thirty years for murder.

The presentence hearing made all the difference.

#### Bendingfield

Larry Bendingfield, represented by retained counsel, was convicted of 9 charges, including murder and 3 kidnappings, in August of 1977. The jury recommended 2 death sentences, a life sentence and 120 years in prison. His retained attorney withdrew, and he was appointed public defenders. In February of 1978 the trial judge granted Mr. Bendingfield a new trial because of improper death-qualification of the jury, misconduct by the prosecutor and ineffective assistance by the defense counsel. Mr. Bendingfield was tried again in October of 1978 on the same 9 charges. The judge directed a verdict on 2 of the charges and omitted to instruct on another. Mr. Bendingfield was convicted of the other 6 and received the minimum sentence on each, a total of 75 years.

Why did the 2 trials end so differently? Mr. Bendingfield's public defenders, Kevin McNally and Gail Robinson of the state office, think the voir dire made the difference. The trial judge permitted individual voir dire on the issues of exposure to publicity and opinions about the death

penalty. He also gave the defense 12 peremptories and the prosecutor 8. Before questioning each prospective juror, the judge instructed him that it was his duty under the law to put aside any personal feelings about the death penalty and to follow the court's instructions and consider it as a possible punishment. If a juror indicated total opposition to the death penalty in response to the judge's questions, the judge permitted defense counsel to question him. Counsel emphasized the defendant's right to a jury that's a cross-section of the community, the juror's duty to follow the law even if he doesn't agree with it and extreme examples, such as Hitler, where a juror might consider the death penalty appropriate. The jury finally selected included 5 people who had some opposition to the death penalty and 2 who had strong feelings against it.

#### Lewis, Nolan, Sullivan

Each defendant was black charged with a capital murder and first degree robbery, two counts of first degree burglary, two counts of first degree robbery, two counts of third degree assault and first degree assault. The defense were demanded capacity due to intoxication and drugs, alibi and "present but not involved," respectively. The sentencing phase included testimony from relatives, psychologists, psychiatrists, social worker and neighbors.

Initially, the court prohibited any defense evidence on the death penalty's lack of deterrence. This ruling was reversed when the defense made a motion in limine to prevent any prosecution comment on the need to impose death as a deterrence for future crimes. Terry Holloway, Nolan's court-appointed attorney, read a graphic description of a electrocution causing a juror to faint. Bill Grimes and Dave Johnstone, Louisville Public Defenders, represented Lewis, and Steve King-solver, court-appointed attorney,

represented Sullivan. Lewis and Nolan were sentenced to a total of 60 years; Sullivan to 80 years.

BIBBS

Henry Bibbs - Black - charged in Louisville with capital murder of his ex-wife. He was sentenced to life. Bibbs' 9 year old daughter testified in the sentencing phase that she loved her daddy and did not want him to die.

DEATH ROW U.S.A.  
TOTAL NUMBER OF DEATH ROW  
INMATES KNOWN TO LDF: 453

Race:

Black	192	(42.48%)
Spanish Surname	15	( 3.32%)
White	237	(52.21%)
Native American	4	( .88%)
Unknown	5	( 1...%)

Crime: Homicide

Sex: Male	448	(98.89%)
Female	5	( 1.11%)

DISPOSITIONS SINCE JULY, 1976

Executions:	1
Suicides	4
Death Sentences vacated as unconstitutional:	492
Convictions or sentences reversed:	125

"Make justice your aim: redress the wronged, hear the orphan's plea, defend the widow."

Isaiah 1:17

UPDATE ON APPEALS  
BY LOCAL COUNSEL

As you are aware, appeals from convictions which impose an aggregate sentence of less than ten years are to be handled by local counsel under a federal grant. This is to notify you that the original limit placed on the

maximum amount of money that could be received for doing one of these appeals has been doubled. This means that any local public defender who handles his own client's appeal or who handles an appeal for an indigent client from the same geographical area can now receive up to \$1000 (\$25 per hour) plus expenses per case. Those of you who are interested in handling appeals in cases where the aggregate sentence is less than ten years should contact Tim Riddell at 1-800-372-2988. Also, if a local defender has a special interest in appealing a case where the conviction imposes more than ten years, contact Tim Riddell and he will try to make the appropriate arrangements.

SOUTHEAST PROJECT  
(Continued from Page 1)

Given these circumstances the Office For Public Advocacy submitted a grant application to the Kentucky Crime Commission in July, 1978. The application was approved by the Crime Commission at its September, 1978 meeting. The funding for this project includes \$239,634 in federal funds, \$26,626 in Department of Justice matching contribution, and \$186,000 from the Office For Public Advocacy's budget. The total budget will be \$452,260.

The project funded by this grant proposes to establish four fulltime public defender offices to serve a total of 26 Southeastern Kentucky counties. The offices will be located at London, Stanton, Hazard and Prestonsburg. The counties to be served include Laurel, Rockcastle, Jackson, Clay, Knox, Bell, Whitley, McCreary, and Pulaski (London Office); Powell, Estill, Wolfe, Lee and Owsley (Stanton office); Breathitt, Perry, Knott, Leslie, Harlan and Letcher (Hazard office); and Floyd, Magoffin, Johnson, Martin, Lawrence, and Pike (Prestonsburg office). It is hoped that the London and Stanton offices can be operational by December, 1978 and that

the Hazard and Prestonsburg offices can be opened in March or April of 1979. A total of 17 attorneys will be employed to staff these offices.

The attorneys employed under this project will devote their full energy to representation at the trial level. Any appeals arising from this 26 county area will be handled by the appellate staff of the central office.

Given the limited amount of funds available and the limited number of attorneys that can be employed, the project will in no way remove the need for those attorneys in the area who are currently serving as public defenders. In fact, the projected case-load figures made available by the Administrative Office of the Court would indicate that over 70 attorneys are needed to adequately serve the 26 counties that will comprise the grant area. Consequently, the success of this project will to a large degree be dependant upon the assistance of those attorneys who are currently handling public defender cases.

#### NEED HELP?

The appellate attorneys at the Office for Public Advocacy have each been assigned to monitor one of the Kentucky Area Development Districts. Local public defenders who have any legal questions or special problems, or who just want a second opinion on some issue are encouraged to contact the central office at 1-800-372-2988 and ask for the attorney responsible for monitoring his or her particular area of the state.