



The Advocate

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FARLEY REAPPOINTED

On August 1, 1979, Jack Emory Farley was formally reappointed to a four-year term as the Public Advocate for the State of Kentucky. As head of the entire state public defender system, Farley oversees the services of the approximately 450 attorneys doing public defender work across the state.

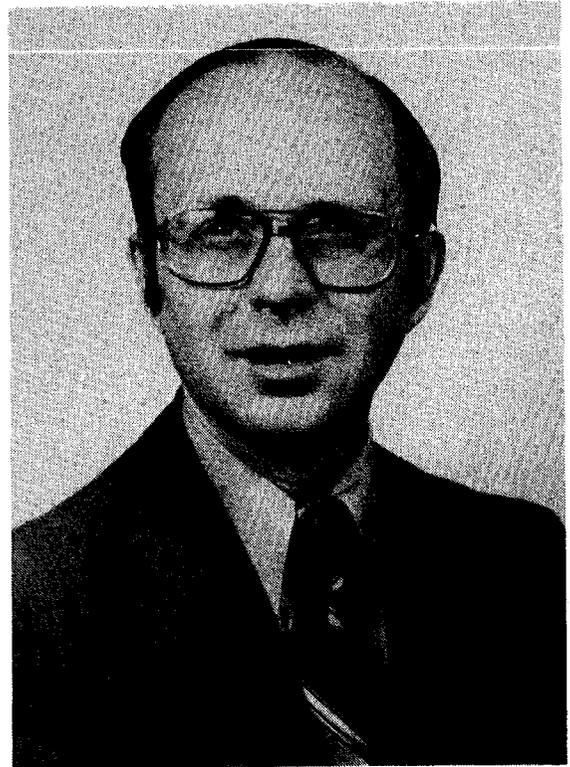
Mr. Farley was originally appointed Public Advocate by Governor Julian Carroll on March 1, 1975. He succeeded Anthony M. Wilhoit, who is now a judge on the Kentucky Court of Appeals. Jack received his B. A. degree from the University of Kentucky in 1962 and his J. D. from the American University, Washington College of Law in 1967. He was formerly a trial attorney for the U. S. Department of Justice in Washington, D. C. Prior to his appointment as Public Advocate, he was engaged in the general practice of law in Pikeville, Kentucky. Jack is married to the former Margaret Rose Saad, has three young daughters, and lives in Frankfort, Kentucky.

The following is an interview with Jack held shortly after his reappointment.

Q. How do you envision your role as the Chief Public Advocate of this Commonwealth? What essentially do you believe are your primary and overriding responsibilities?

(See Farley, Page 14)

PUBLIC DEFENDER OF THE MONTH



Bill Mizell of Boyd County is our public defender of the month. Bill was born in Clarksville, Tennessee in 1942 but grew up in Paris, Kentucky. He graduated from Transylvania University where he majored in political science. After receiving his law degree from the University of Louisville in 1975, he began work as assistant public defender in Boyd County. Since December of 1977 he has been serving as the chief public defender in Boyd County.

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Bill is an imaginative and dedicated public defender. He uses expert testimony whenever it is valuable even in "minor" cases. Bill is always looking for new ways to provide his clients with the best possible representation. He attended the National College for Criminal Defense Lawyers in Houston, Texas this year, enjoying the experience thoroughly.

During the past year Bill has tried three cases where the prosecutor was seeking the death penalty, none of which resulted in a death sentence. In fact the jury was unable to agree on the question of guilt or innocence at the last trial.

Congratulations, Bill, on the outstanding job you are doing as a public defender. You are living proof that a person represented by a public defender can receive as good or better representation than a person who has the money to hire a private lawyer.

WEST'S REVIEW OF RECENT COURT DECISIONS

The most noteworthy appellate decisions during the months of July and August came from the Kentucky Court of Appeals, while the U. S. and Kentucky Supreme Courts took their summer recess. Two of these cases deserve particular attention.

In Sebastian v. Commonwealth, 26 K.L.S.11 (August 10, 1979), the appellant contended that the trial court had improperly refused to instruct the jury on the defense of entrapment. The Court of Appeals agreed. Sebastian, who had no prior history of drug trafficking, was induced to deliver drugs from an informant to an undercover narcotics agent after being told that he could keep the money paid for the drugs in satisfaction of a debt

owed him by the informant. The Commonwealth argued, pursuant to KRS 505.010(2), that the defense of entrapment was unavailable to Sebastian because Sebastian had merely been provided with an "opportunity" to commit the offense. The Court of Appeals, however, found that a jury question concerning entrapment was presented, observing that "the criminality of an act depends on whether the criminal intent originated in the mind of the entrapping person or in the mind of the accused."

In Watkins v. Turner, 26 K.L.S. 11, (August 17, 1979), the Court dealt with KRS 504.040(5)(c), which requires the release of an incompetent defendant for civil commitment proceedings if it appears there is no substantial probability that the defendant will attain competency "in the foreseeable future." Watkins, a "hopeless incompetent", had been alternately held at Central State Hospital and the Breathitt County Jail for two years awaiting his competency to stand trial. The Court of Appeals ordered Watkins' release as provided by the statute, stating "an incompetent may not be held indefinitely without a trial and the opportunity to clear himself."

The Kentucky Supreme Court issued a significant decision during the period under review. In Young v. Commonwealth, ___ S.W.2d ___ (decided May 22, 1979, opinion issued August 21, 1979), the Court held that a county is only obligated to pay expenses incurred by an indigent defendant who retains a private psychiatrist or other private expert when payment for the use of such private resources is authorized by court order. KRS 31.185 provides that an indigent may utilize those state facilities for the evaluation of evidence which are available to the Commonwealth. The statute further provides that: "If he considers their use impractical, the court concerned

(See Decisions, Page 13)

-NOTE-

Protection & Advocacy for the Developmentally Disabled

STAFF NOTES

P & A has several welcome additions to its staff:

Bill Stewart, a psychologist, is working primarily in the area of educational advocacy. Bill received a B.A. in Psychology from Centre College and an M.A. in Humanistic Psychology from West Georgia College. Prior to joining P & A Bill worked as a juvenile services counselor with the Kentucky Department of Child Welfare, as a school social worker with Fayette County Schools, and as school psychologist at Fayette School, a Lexington-based school for behavior-disordered adolescents.

John Henriksen graduated in May from the University of Kentucky Law School and will be staying with P & A as a full-time attorney. John has a B.A. in History from the University of Pennsylvania. His prior work experience includes clerking with the Public Benefits section of Central Kentucky Legal Services and working with the Unemployment Insurance Division of the Department for Human Resources.

Robert Wagner, legal aide, is a second-year law student at the University of Kentucky. Prior to entering law school, Robert received a B.S. from Western Illinois University and served as Assistant Department Chairman and Instructor at Berklee College of Music in Boston, Massachusetts.

Debra Catron, administrative intern, is majoring in History and Political Science at Berea. Debra will be working on several research projects and surveys through December.

Another member of the P & A staff, Marie Allison, has taken a temporary leave to be with her new son, Allen Thornton Riddell, born August 20, 1979. Our congratulations to Tim and Marie.

U.S.SUPREME COURT UPHOLDS
GEORGIA COMMITMENT LAWS FOR
JUVENILES.

J.L. v. Parham, 47 L.W. 4740 (June 20, 1979)

In a 6-to-3 decision written by Chief Justice Burger, the Supreme Court ruled that states may authorize parents to commit children to mental institutions without the protection of judicial or administrative hearings, and that the state itself, acting as guardian, may incarcerate children in such institutions without evidentiary hearings.

The Court accepted the proposition that a child has the same constitutionally-protected interest as an adult in not being confined unnecessarily in a mental institution. In determining what process is due in the commitment of children, the Court considered the following three factors:

(1) The private interest of the child. Recognizing that a parent attempting to institutionalize a child may be acting against the child's best interests, the Court found that a child's interest in not being committed is "inextricably linked" with the parent's interest in the health and welfare of the child. The Court found the child's interest subordinate to the historical concept of

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the family as a unit "with broad parental authority over minor children" and a "high duty" to recognize symptoms of illness and to seek and follow medical advice. Absent a finding of abuse or neglect, parents retain a substantial, if not dominant, role in making decisions affecting their children.

(2) Risk of error. The Court found that the high risk of parental error in a decision to institutionalize a child is balanced where a "neutral fact-finder" investigates the need for commitment, has the authority to refuse to admit the child, and periodically reviews the child's need for commitment. The reviewing authority does not need to be legally trained or conduct a formal or quasi-formal hearing and may be a member of the institutional staff (e.g., a physician).

(3) The state's interest. The Court found that the state's interest in limiting the use of costly mental health facilities to cases of genuine need is met where there is a review of admissions decisions by state personnel. The state also has an interest in not imposing unnecessary procedural obstacles that might discourage parents from seeking needed assistance. Finally, the state has an interest in allocating a high priority to diagnosis and treatment, which might be impeded by time-consuming pre-admission proceedings.

Where a child is a ward of the state, the Court found that there is no justification for requiring different procedures at the time of admission. However, the Court remanded the case to determine whether additional safeguards are required for periodic review of children without parents in light of "the risk of [the child's] being 'lost in the shuffle!'"

In a companion case the same day, the Court adopted the same analysis in

upholding Pennsylvania's juvenile commitment statutes (Institutionalized Juveniles v. Secretary of Public Welfare of Pennsylvania). In dealing with the principal analytic differences between the two cases, the Court drew no distinction between procedures applicable to mentally ill and mentally retarded children and found it unnecessary to decide whether there is state action in commitment to a private facility.

The Supreme Court's decision in Parham is a serious setback to efforts to establish adequate procedural safeguards for children facing commitment to state mental hospitals. While noting that the law has long recognized a presumption in favor of parental prerogatives, the Court recognized that not all parents act in their children's best interests when seeking their admission to state mental hospitals. The Court incorrectly concluded, however, that the child is adequately protected against erroneous parental requests for admission by "neutral" medical factfinders who currently make the admission decisions and review the need for continuing confinement. The Court failed to address three essential factors: (a) evidence pointing toward the tendency of mental health professionals to over-institutionalize children, (b) the reality of admissions decisions too often made without knowledge of existing community resources and without adequate exposure to the child, and (c) the strong probability that institutional psychiatrists and other mental health professionals lack the objectivity to serve as "neutral factfinders."

The Court expressed concern that admissions hearings would adversely affect familial relationships by exacerbating existing parent-child tensions, but fails to explain why a hearing in this context would be more damaging to familial relationships than hearings

(See Parham, Page 13)



GUILTY PLEAS AND CONCURRENT SENTENCE RECOMMENDATIONS

An interesting problem has surfaced recently involving a conflict between two statutes pertaining to sentencing, KRS 532.110 and KRS 533.060, and their effect on plea negotiations. The relevant portions of KRS 532.110 read:

- (2) If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve.
- (3) When a defendant is sentenced to imprisonment for a crime committed while on parole in this state such term of imprisonment and any term of reimprisonment that the board of parole may require the defendant to serve upon the revocation of his parole shall run concurrently, unless the court orders them to run consecutively.

KRS 533.060(2) states:

- (2) When a person has been convicted of a felony and is committed to a correctional facility maintained by the bureau of corrections and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony committed while on

parole, probation, shock probation, or conditional discharge, such person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.

The conflict is obvious. While KRS 532.110 leaves the matter of whether a sentence will run concurrently or consecutively within the court's discretion in all cases, KRS 533.060(2) seems to remove that discretion in cases where a person is convicted of a felony while on parole, probation, shock probation or conditional discharge -- demanding that the sentence be run consecutively to any other.

Typically, the problem arises when a defendant has been charged with a felony committed while on parole, probation or shock probation. In plea negotiations related to that charge the prosecutor may state that he will recommend that the sentence on the new charge run concurrently to the sentence on the previous offense for which the defendant has been paroled. This offer may be made due to the prosecutor's lack of awareness of KRS 533.060, intent, or due to his belief that the judge's order pursuant to KRS 532.110 will control the situation. For the same reasons the court will often accept the recommendation and, after a plea of guilty, run the new sentence concurrently either explicitly or by a silent judgment. The defendant then enters the Bureau of Corrections' jurisdiction content that he received a good deal. However, if the Bureau of Corrections discovers this, it will abide by KRS 533.060(2) rather than KRS 532.110 and change the sentence to run consecutively regardless of the court's order. Needless to say, the defendant is understandably upset.

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It must also be noted that a similar problem can arise under KRS 533.060(3) when a defendant is charged with a crime committed while he is awaiting trial on another charge.

Unfortunately, the appellate courts have not determined which statute controls how the sentences will run. However a cursory examination of the problem seems to indicate that KRS 533.060 may control since it became effective on June 19, 1976 whereas the effective date of KRS 532.110 was January 1, 1975. When statutes conflict the last in time usually wins out.

Regardless of which statute may eventually be held as controlling, defendants at present may suffer the consequences of consecutive sentences on guilty pleas induced by such recommendations. We hope that by alerting defense attorneys to this problem that defendants will be better informed when negotiating pleas under these circumstances and will be able to avoid falling into this unfortunate situation. Any questions concerning this problem as it relates to a specific case, should be sent to the Post-Conviction Services Division of the Office for Public Advocacy.

NEW ATTORNEY AT EDDYVILLE

On July 1st Tod Megibow joined the Office for Public Advocacy as a staff attorney at the Kentucky State Penitentiary. Tod hails from New York City being born in Manhattan. He attended Kentucky Wesleyan College and received degrees in Sociology and History in 1973. After receiving his J.D. at the Loyola University School of Law in Louisiana in 1978, Tod returned to Kentucky to begin his practice with the OPA as an Assistant Public Advocate. We welcome Tod to our staff and wish him the best of luck in his endeavors.

ADMINISTRATIVE REGULATIONS CONCERNING WAIVER OF APPEAL BY DEFENDANT

Much has been said in past issues of "The Advocate" about the duties of trial counsel in relation to his client's appeal. These articles have stressed the fact that the trial attorney is obligated, under KRS 31.115, to perfect an appeal if his client requests one, and that to protect against allegations that defense counsel was derelict in not doing so, that a written affidavit should be made if the defendant decides to forego an appeal. In this vein your attention is directed to 504 KAR 1:010(1):

In all felony convictions where the defending attorney is operating under any Public Defender Plan authorized by KRS Chapter 31, a client shall be entitled to have the defending attorney take an appeal on his behalf to the Kentucky Court of Appeals unless the client makes a statement in writing to the court and to the defending attorney that he desires not to have an appeal and that he understands that if he wished to have an appeal he could have one free of charge.

This regulation states explicitly what has been recommended as proper procedure. If the defendant does not wish to appeal, it is mandatory under this regulation that counsel obtain a written statement to that effect being careful to include the fact that he is not foregoing the appeal due to its costs. Abiding by this regulation will prevent the problem of a defendant claiming at a later date that he desired an appeal but his attorney was at fault for not perfecting one for him.

THE ISSUE OF INEFFECTIVE ASSISTANCE

According to Kentucky's Supreme Court Chief Justice John Palmore, "More than half the trial lawyers are incompetent." This somber comment on the competency of the legal profession followed United States Supreme Court Chief Justice Warren Burger's highly publicized opinion that fifty percent of the nation's trial lawyers are incompetent. Such severe criticisms bring the question of ineffective assistance to the foreground. In particular, questions concerning our competency as attorneys in the representation of criminal defendants must be confronted and dealt with seriously. In the ensuing issues of the Advocate, the question of ineffective assistance will be addressed. Due to the gravity and breadth of this issue, discussions ranging from a general statement of the relevant state and federal standards to the personal attitudes of appellate attorneys and the policy of the Office for Public Advocacy regarding ineffective assistance of counsel will be featured.

It is the purpose of this first article to provide an overview of the applicable state and federal standards relating to the issue of ineffective assistance. This discussion must necessarily begin with the Sixth Amendment's provision that the accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of Counsel for his defense." In the landmark decision of Gideon v. Wainwright, 371 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the United States Supreme Court held that the right of an accused to counsel in all felony cases is applicable to the states via the Fourteenth Amendment. A decade later the court extended the right of counsel to those accused of misdemeanors involving the loss of liberty. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). This invaluable constitutional right has

been given added import by the Supreme Court's mandate that the representation rendered by the trial counsel be "effective." Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

Federal courts have adopted various standards to be applied in determining whether trial counsel rendered effective assistance. For a number of years, the Sixth Circuit applied the "farce and mockery" standard. Stidham v. Wingo, 482 F.2d 817 (6th Cir. 1973). In order for ineffectiveness to be found under this approach, the attorney's act or omissions had to "shock the conscience of the court." The Sixth Circuit has recently replaced this strict test with a more liberal standard. In Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), the federal court held that "effective" counsel meant counsel reasonably likely to render, and rendering reasonably effective assistance. After reviewing two recent Supreme Court decisions, McMann v. Richardson, 397 U.S. 759 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) and Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235, (1973), the Sixth Circuit concluded that reasonably effective assistance is indeed a standard mandated by the Constitution. The federal court gave additional support to this new standard by providing objective guidelines for counsel's performance. In order to be reasonably effective, "[d]efense counsel must perform as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests undeflected by conflicting considerations."

In 1963, the Kentucky Supreme Court first enunciated the "farce and mockery" standard as applicable to questions of ineffective assistance. Rice v. Davis, Ky. 366 S.W.2d 153

(1963)(in which a defendant successfully appealed the denial of his writ of habeas corpus on the basis of ineffective assistance). The standard was again applied in 1965 to affirm a circuit court's order denying a motion to vacate judgment. Wahl v. Commonwealth, Ky., 396 S.W.2d 774 (1965). The Court stated in Wahl that to "vacate a judgment because of poor representation of counsel the court must find that the circumstances of the representation were such to shock the conscience of the court and to render the proceedings a farce and mockery of justice."

The state's highest court has continued in its unwavering application of this most strict standard. Additionally, a heavy burden of proof has been placed on the defendant by requiring that more than a doubt be raised concerning the regularity of the proceedings -- the denial of a substantial right must be specifically shown. Commonwealth v. Campbell, Ky., 415 S.W.2d 614 (1967). This burden of proof is compounded by the court's recognized presumption of counsel's competence and diligence. Copeland v. Commonwealth, Ky., 397 S.W.2d 59 (1965). Moreover, the question of ineffective assistance will not be reviewed by the appellate courts on direct appeal unless preserved at the trial level. Davidson v. Commonwealth, Ky., 555 S.W.2d 269 (1977).

The Sixth Circuit has criticized Kentucky's continued adherence to the farce and mockery standard. In Berry v. Cowan, 497 F.2d 1274 (6th Cir. 1974), it was noted that Kentucky continues to apply the standard which the Sixth Circuit has expressly rejected as a measure of ineffectiveness of counsel under the Sixth Amendment. It is important to note that the Kentucky Court of Appeals has cited with approval the new standard now applied by the Sixth Circuit.

In Relford v. Commonwealth, Ky. App., 558 S.W.2d 175, 178 (1977), the Court of Appeals states that "the right to counsel does not mean errorless counsel or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render, and rendering reasonably effective assistance".

↓
Kentucky's continued application of the "farce and mockery standard" is evidence of the appellate court's refusal to face the problem of ineffective assistance of defense counsel. Illustrative of this attitude, is the fact that no criminal case has ever been reversed on direct appeal in Kentucky on the basis of ineffective assistance. The status quo will necessarily continue as long as the courts interpret the "farce and mockery" standard as requiring overwhelming proof of incompetency before the possibility of reversal arises.

In light of the Sixth Circuit's adoption of the reasonably effective counsel standard, a reevaluation of Kentucky's stance on this issue should be made. Until then, we, as appellate attorneys, must continue to deal with the problems of ineffective assistance and the ineffectual application of the farce and mockery standard. In making the following statement, Judge Bazelon best described the problems inherent with the "farce and mockery test". "The mockery test requires such a minimal level of performance from counsel that it is itself a mockery of the Sixth Amendment." Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 17 (1973).

Sarah Collins



THE DEATH PENALTY



Death is Different

OBSERVATIONS

During the last several months, death has been avoided in a number of capital trials throughout the state. Jefferson County public defenders, Ray Clooney and Rick Receveur, (recognized in August as our public defender of the month!) defended David Poynter. Poynter's codefendant, Wesley Pullen, was represented by Tom Thomas, Donna Proctor and Mark Posnansky. Only Poynter's case went to the sentencing phase, as Pullen was convicted of reckless homicide. A professor of the New Testament from the Presbyterian Seminary testified that Poynter was sincere about religion, was serious about being a newborn Christian, and had worthwhile characteristics which could benefit society. He stated that killing does not teach others not to kill. A guard at the Jefferson County Jail testified that Poynter was a good prisoner, and that he had positive feelings about him.... Chris Combs and Philip Owens represented James Warner and a sentence other than death was imposed.... Kermit Couch was defended by James Boyd in a Scott county capital case in which the jury sentenced Couch to a term of imprisonment.... In Christian County, Ron Lee Johnson was sentenced to a term of years and was defended by Richard Cameron.... The Boyd County public defender, Bill Mizell (our public defender of this month!) represented Martin Grace in a murder-1st degree rape capital case. After the jury hung in the guilt-innocence phase, Martin pled guilty to 20 and 10 years on the manslaughter and rape In two other capital trials, Shiela Collins and Rick Receveur defended Lyle Johnson and James Coleman. Both were not sentenced to death. In fact, in the Coleman case a directed verdict was entered on the aggravating

factor, first degree robbery, and Coleman was sentenced to 10 years on a manslaughter conviction!

Allow me to observe.... Those that relish death as a punishment must recognize it as revenge--satisfaction through retaliation in kind. Is it not insane that we detest killing so much that we employ the detestable as our penal response? Why are we humans so inhuman? Why do we proclaim with such perverted pride that killing is so horrendous that we will kill to eradicate it? ...When the death penalty is invoked, we announce with distinct clarity that killing can, indeed, be a useful undertaking. In so doing, have we not undermined our purpose? Doesn't part of each of us die when anyone is killed? By: Ed Monahan

DEATH ROW U.S.A.

AS OF AUGUST 20, 1979, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE NAACP LEGAL DEFENSE FUND: 535

Race:

Black	216	(40.37%)
Spanish Surname	20	(4.47%)
White	290	(54.21%)
Native American	5	(0.93%)
Oriental	1	(0.19%)
Unknown	3	(0.56%)

Crime: Homicide

Sex: Male	530	(99.06%)
Female	5	(0.94%)

DISPOSITIONS SINCE JULY, 1976

Executions:	2
Suicides:	4
Death Sentences vacated as unconstitutional:	504
Convictions or sentences reversed:	179

CAPITAL TRIAL EMPHASIS
ON THE PUNISHMENT
STAGE OF A CASE

This is the last of a four part article. It is authored by Millard Farmer, attorney, and Courtney Mullin, psychologist, of Atlanta Team Defense. The article appeared in HOW TO TRY A CAPITAL CASE (1977) and is reprinted with permission of the North Carolina Academy of Trial Lawyers, P.O. Box 767, Raleigh, North Carolina 27602:

You might consider bringing in some research specifically about North Carolina that compares people who have gotten life in prison as opposed to people who got death in years past. We have been able to obtain from the court that information in Georgia. It was compiled by the Supreme Court of Georgia from public records and I would suspect that somewhere in North Carolina that information has been compiled as well. It takes finding out who may have compiled the data which would be very interesting to present and very positive for the defense. Start subpoenaing the person with these records for your trial saying they are in some position of knowledge about the death penalty... It is an absolute gold mine to show that there is tremendous racial prejudice going on against the people who get the death penalty. It is essentially legalized lynching, with the same areas that used to lynch the most now giving the death penalty the most. They give it to the poor people, they give it to people whose victims are white. All of that information came from the Supreme Court of Georgia.

Think about the experts, too. You need to spend a lot of time with the people who are going to testify so they will feel prepared. People from academia particularly are interested in cases and in testifying. People in

sociology, people in psychology, political science, are very interested in helping you out in these trials. One of the problems has been in the past a lack of understanding between those social scientists and the lawyers about the problems of their testimony. It is very difficult for people from academia to understand the requirements of the court that they make absolute statements. In academia all you do is put an equivocal statement with everything you say, "Well on the basis of the data it seems that sometimes this may occur". The expert gets up there and does that and you think how could you do this! It is a difficult problem because the social scientist is trained to do this because social scientists know there are no absolutes and they work that way. Their minds work almost opposite from the way lawyers' minds work. You have to explain carefully what the requirements of the law are and try to develop with them the kind of testimony they should give.

Another problem is lawyers are expected to be expert in everything. You are supposed to know all about medicine, bodies, bullets, everything. About all of these specialties that come up. You are supposed to know about those things and of course you don't. It's very difficult then to get an expert and say, "Doctor, I don't know the first thing about what you do and why you do it." But it is important you can explain to them that you don't know and develop their testimony with them, get them involved in the process. You give them a chance to become emotionally committed to the efforts that you are making so that they will eventually be able to get up there on the stand and make statements that the court can accept. One of the most important things about any expert is getting the expert committed to the cause. If the cause is, no we won't have death as punishment, or

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whether you are going to get \$100,000 in a damage suit for some person who is going to live the rest of their lives. Get the client sold as to the truth of it.

There is a defense in every case. There is some reason that individual ought not to be killed. In one case we are sending packets about the whole case to the experts who have nothing to do with that part of the case. We send them all excerpts from preliminary hearings, excerpts about what's going on in that county, excerpts about the publicity. When they arrive, there will be somebody who talks with them even before we start into their area of expertise to sell them on the case. Once that part of the hurdle is accomplished the other part comes easy. To say you don't have to role play and to say you don't have to go through the testimony just like you would with your client or anybody else you were going to put on just because he is an expert is wrong. You need to go through complete examination and show the pitfalls of the cross-examination. They are intelligent people so you have to explain to them the theory of defense. You realize if you're not selling those people early you're not going to be able to sell it to the jury either. The experts are going to add to this individual's life, and in effect that's all they are doing. They are say, "Look, give this individual his life". How you structure those experts is important. If you have a jury with five Catholics on the jury, have an individual somewhere in there, maybe the testimony would be very small, but have it of the same religious faith. Make some small tie in with the evidence.

Mitigating Circumstances

It takes very little imagination to produce mitigating circumstances. If you ever try any of these cases without putting on a large mitigating

circumstance trial it's incompetency per se. If you ever try one of these cases by yourself, one lawyer, it's incompetence per se. You need to look at how you are going to structure who you are going to try the case with. We like a black-white combination, a male-female combination, or a social science-lawyer combination. But for sure don't get someone out of your law firm that thinks exactly like you think to try the case with you because more than likely you're going to be pooling your ignorance.

Emotional Arguments

We go over the rational arguments to the jury and then you get down to the emotional arguments to the jury. Part of our effort from the beginning of any case is to establish a relationship with a client's family and have them become part of our team. A client is central to our team and makes all ultimate decisions. If the client says he will not accept a plea that we think is right, we go to trial. If a client says he or she does not want a juror, we do not take that juror. We say that straight out from the start. "It is your life. It is not my life. We are your agents, and we will tell you what we recommend from our experience, but it is your life and the things that you decide are the decisions that have to be made". That is a tremendously important point because that structure, that interpersonal structure, is portrayed to all of the people there. The value we place on that person, his life is translated to the other people in the courtroom. It takes a lot of time to get to know the families of your clients but you will find it is a tremendously rewarding experience to find out about people's lives, to be at home in their homes, and to understand them in a way that you would never be able to under any other circumstances.

So many of our clients had traumatic early childhoods. One client of ours had a stepfather who would get drunk and beat him with a wire when he was sleeping. When he was a little boy, he would lock him out of the house and he would lie underneath the house to sleep at night. Those are important things. This same child would raid garbage cans for food and bring the best food to his mother. This is what his mother testified to at our trial. This is not uncommon. But it takes time and effort to find out. These things affect people in ways we can never measure or imagine.

You need to get members of the family to attend the trial every day. To work with you in involving the community, to get their friends or relatives to come to the trial, to come to every hearing and sit there in support of you. The law teaches you that you are all-powerful, that you are strong, that you can stand up and fight for what is right. But that is to deny your human self. We all do much better when there are people to support us, when there are people on our side. In any difficult case it is important to get the people there in the courtroom and it changes the quality of justice. If your client is black and there are a great number of black people in that courtroom, the judge acts differently. They know it, he knows it, and it comes down better for everybody. We act better because we feel them back there. You all know the aloneness of a situation where you feel hostility all around you from everybody else in that courtroom. It happens and you are less effective because of that. You need to have some human statement about your client. Just tell about his life. Tell who he is, have the client talk about his life. In one case we had the client's child testify. All we asked was, "Who is that?" He said, "That's the jury". We said, "Who is that over there?" He said, "That's my father."

His voice would go up when he said, "That's my father." "What's the jury going to decide?" "Whether he lives or whether he dies." That was all he said. It was a very strong statement. This man had a family and he had this beautiful little boy. Maybe he did all these awful things but do you really want to kill someone who has such a beautiful little boy?

You also need a psychologist or psychiatrist to explain the client's problems. I think all of us have some sort of problems in our lives. You need to explain how all of these things came about and the psycho history of his human being. You simply have the job of making a human life become understandable to other human beings so that they will give life to that human being.

Understand that trying a death case is not for everybody. You must decide if you are the person who is going to try a death case; the responsibility rests in your hands. And this is a responsibility that probably will not end for many years to come because these cases don't come to trial quickly. They don't topple out easily. You're more than likely going to be hung with appeals and habeas corpus throughout a good portion of your life. It's the question of how much of your career do you want to commit to this type of case. Do you have to be the good old boy in the courthouse? If you do, you probably are not going to find, if you have to try these cases, that that role can continue. It's an era that we are going through, it's going to bring back to the courtroom some things that have long since left. The techniques Darrow knew by instinct have been bred out of us by our society, bred out of us by our law schools. We don't possess them as lawyers. We've got to think of a way to plant those skills back into us. The way the Team Defense project has chosen is through a psychologist going through

an every day process of tapping onto some of the sensitivity of some of the things that normal humans are sensitive to on an ongoing basis.

Let's project ahead in time to the year 8000 A.D. An archaeologist finds an electric chair. "It's hard to understand this. In some ways this society was so advanced. This doesn't fit in, this electric chair. Let's do a more intense project around this. Look at the people that have sat in this chair, look at the people that worked around this chair. It's unclear why they spent so few funds, so little money correcting such a project and look on the scope of what else was going on in that society, in that day and time. It is not understandable. But some of the people there seemed to understand what was happening. Why was it that some did and so many would not follow or didn't understand?"

(Parham, Continued from Page 4)

required before children are adjudicated status offenders at the request of their parents. Most importantly, the Court never satisfactorily balances the perceived harms of the hearing against the well-documented tragic consequences to the child which often flow from an erroneous commitment decision.

Perhaps the most disturbing aspect of the decision is the treatment accorded wards of the state. With current staffing patterns of our public guardianship system, it is difficult to accept the idea that even a modicum of protection against unwarranted commitment is offered to these children.

While Parham is a broad and unfortunate ruling, there are some positive aspects: The Court suggests that there may be other remedies for dealing with the inappropriate commitment of children, remedies such as habeas corpus relief or an action under child abuse and neglect laws. The Court,

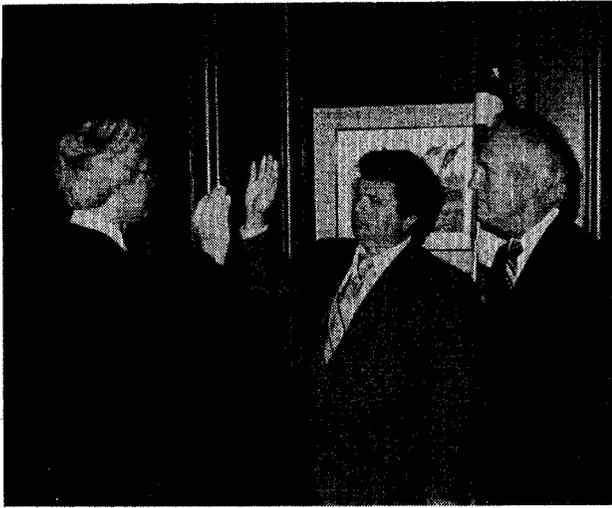
in relying heavily on "medical standards," leaves open the possibility of challenging inappropriate diagnoses and commitments. For the first time, periodic reviews are required to determine a child's need for continuing hospitalization. Finally, the Court did not address the substantive criteria for admissions or the standards of adequate treatment within institutions, so that right-to-treatment and/or least-restrictive alternative issues are not directly affected by the Parham decision.

(Decisions, Continued from Page 2)

may authorize the use of private facilities to be paid for on court order by the county." According to the decision in Young, only such authorization will obligate a county to pay for private experts.

And, lastly, a U. S. Supreme Court decision requires mention. In Rose v. Mitchell, 25 CrL 3271 (July 2, 1979), the Court reaffirmed some basic principles of law governing grand jury composition challenges. The Court held that discrimination in the selection of a grand jury cannot be considered harmless because the defendant is subsequently convicted by a properly constituted petit jury. "Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process."

The court also declined to foreclose federal habeas corpus relief to state petitioners alleging discriminatory grand jury selection as it previously did to claimed Fourth Amendment violations in Stone v. Powell, 428 U. S. 465, 96 S.Ct.3037, 49 L.Ed.2d 1067 (1976). The Court concluded that "claims such as [these] concern allegations that the trial court itself violated the Fourteenth Amendment in the operation of the grand jury system" and consequently require independent Federal review.



L-R JUDGE WILHOIT, JACK FARLEY
GOVERNOR CARROLL

(Farley, Continued from Page 1)

A. The duties and responsibilities of the Public Advocate, are laid out, of course, in the statutes, Chapter 31, but that is kind of cold and lifeless. Essentially, the role is one of a manager of the public advocacy system. The mandate of Argersinger v. Hamlin is to see that everyone who is accused of a crime punishable by loss of liberty is provided with counsel. This is what I see as the major reason for the existence of the public advocacy system in Kentucky and, as manager of the public advocacy system, I see my role as one of trying to provide the most effective and efficient mechanism for providing quality legal representation to all those persons who are eligible and who want this representation.

Q. How would you describe your general theory regarding the running of the public defender system?

A. We must have a quality sytem both at the appellate level and at the trial level, but the major focus of resources should be at the trial level.

Q. What would you say are the major changes that have occurred during the past four years both within the central office and within the entire system?

A. One change that has occurred has been the renewed emphasis and concentration of resources on providing services at the trial level with an idea of sharing our light, so to speak, taking it out from under a bushel and sharing the expertise of our fine central office attorneys with local public defenders throughout the Commonwealth. We have changed the emphasis to provide more and better services, we have allowed appellate counsel to provide trial services, and we have encouraged the development of our Frankfort office as a central support office for the entire public advocacy system. An extension of this concern for the development of trial level services is apparent in the establishment of the Model Local Public Defender System in twenty-six southeastern Kentucky counties where we have attempted to establish four regional offices staffed with full time public defenders who are assisted by panels of local attorneys. That's been a major change or rather a major accomplishment. We've laid the groundwork for future expansion and the future emphasis on trial level services.

Also, within the last four years we have established and had assigned to our responsibility the protection and advocacy system for the developmentally disabled. I see that as a major development; it gives us a whole new kind of client to work for, to advocate for, and this, of course, was the major reason behind the change of office name from Office of Public Defender to Office for Public Advocacy.

We are going to have to attempt to encompass an advocacy role in a much broader sphere.

Q. What do you envision as the general direction of the public defender system over the next four years? Specifically, what are your main objectives and what do you most want to accomplish?

A. Well, I think the major thing that we must accomplish, based upon my experience of the last four years, and my experience before that as a local public defender both in the federal system and in the state system, is to establish a network of fulltime public defenders throughout the state where the caseload will warrant it. This does not mean to say that the local trial counsel will not have anything to do with it. Quite the contrary, because we are going to have to continue to have panels of local attorneys. We're going to have to have a mixed system, with fulltime salaried staff and local practitioners. I believe a mixed system will provide better management, better responsibility, and a better sense of where we're going in the system.

Q. What do you consider your greatest achievement as Public Advocate over the last four years? What do you regard as your biggest disappointment?

A. I don't regard any achievement or any disappointment as being solely mine. Any achievement that has been made has been the result of a great team effort. One of the major accomplishments we have made over the last four years is the recruitment, development and the maintenance of the

high quality staff that we have in the central office. Another, of course, is the establishment of the southeastern region -- the nucleus, the beginning, of what I see we must go to, the full time public defender system is another achievement of this system. This is really an achievement of the entire criminal justice system. We received a lot of support from the courts, from Chief Justice Palmore, from Bill Davis who was the chief of the Administrative Office of the Courts, and from the Crime Commission. Another achievement, I think, too, is the expansion of services. The funding that has been provided has allowed us to provide more and better services commensurate with the tremendous expansion that has been represented by the development of the new and modern court system in Kentucky. We have been able to expand a great deal and to provide more and better services. To the extent, however, that we are not doing it I suspect I would regard that as my biggest disappointment. Particularly, the 1976 General Assembly was a tremendous disappointment. We asked for the flexibility to allocate monies for local public defender systems on the basis of need. The General Assembly responded and gave us that flexibility and that authority and yet provided no more money for local public defender services. I guess that was the greatest disappointment. Really, coupled with that is the disappointment that we have not nearly met the mandate of Argersinger yet. I had hopes that we would be much closer to it in this period of time.

Q. Is there anything else you would like to add that hasn't been covered?

A. One of the essential factors that must be recognized by the public, and the General Assembly, and other folks who may have an interest is that the public advocate or the defender system should be viewed as an equal part of the criminal justice system -- the judiciary, the prosecution, and the defense. These three functions are inextricably intertwined. I think we need more recognition by the public, the General Assembly, and various administrations that the defense role is required if we are going to preserve the American democracy as we now know it in this

country. We simply must preserve, maintain and strengthen the defense function. We must keep working toward the goal of having the defense function considered in the same breath, if you will, with the judiciary and with the prosecution, in funding, in staffing, in all other concerns and regards.

All responses to the Advocate are welcomed. The Advocate is the responsibility of the Public Information Committee and is written by the staff of the Office for Public Advocacy.

IN MEMORIAM

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