



# The Advocate

Vol. 4, No. 2 A bi-monthly publication of the Office for Public Advocacy Feb., 1982

## 10TH ANNUAL PUBLIC DEFENDER TRAINING SEMINAR

The 10th Annual Public Defender Training Seminar has now been scheduled. It is to be held at the Ramada Inn on Hurstborne Lane in Louisville, Kentucky. The dates are May 9, 10 and 11.

We will give more details regarding schedule, speakers, etc., in the next Advocate and in a separate mailing. All local public defenders should plan on attending what has become a traditional event.

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### THE ADVOCATE FEATURES

Frank Jewell is a Frankfort native who graduated from the University of Kentucky in 1974 with a degree in political science and from the University of Louisville Law School in 1977.

Frank began working with the Jefferson District Public Defender's Office when he was a freshman in law school. He worked approximately twenty hours a week at night at the Jefferson County Jail interviewing inmates and filling out indigency applications for them. In his senior year, he began clerking for the office.

After receiving his law degree, Frank became a full time public defender for the office working in the juvenile division. He worked there for a year and then transferred to the adult division in 1978. In 1979, he was promoted to the juvenile division and became Deputy Chief of that division.

(See Jewell, P. 20)

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# WEST'S REVIEW

## WEST'S REVIEW

Kentucky decisional law for the months of November and December came almost exclusively from Kentucky's Supreme Court.

In Hayes v. Commonwealth, Ky., 28 K.L.S. 14 at 13 (November 3, 1981), the Court rejected a double jeopardy challenge to the defendant's conviction of both robbery and possession of controlled substances taken in the robbery. Hayes was arrested while still fleeing from the scene of the robbery. The Court held that Hayes could be convicted of possession of the stolen contraband, reasoning "[i]t cannot sensibly be regarded as a legal possession because the possessor accomplished it through theft." The Court in Hayes also rejected arguments that it was a violation of KRS 439.510 for a parole officer to testify from parole records as to the birthdate and last release date of the defendant. KRS 439.510 provides that information obtained by a parole or probation officer in the discharge of his official duties shall be privileged. The Court held that, although the parole officer obtained the information as part of the discharge of his duties, the information was not privileged because it was "not obtained from a parolee in the form of privileged communication."

The Court reversed the first degree wanton endangerment conviction of Mark Marshall, Hayes' codefendant. Marshall v. Commonwealth, Ky., 28 K.L.S. 14 at 14 (November 3, 1981). Marshall was convicted of both first degree robbery and first degree wanton endangerment based on his act of pointing a pistol at store employees during the robbery. The Court held that the wanton endangerment conviction must be set aside because "[t]he

act of pointing a gun at certain persons prior to the seizure of the loot which gave rise to the wanton endangerment charge was in reality a part of the elements of the robbery act."

In Jones v. Commonwealth, Ky., 28 K.L.S. 14 at 14 (November 3, 1981), the Court held that it was error for the trial court to automatically exclude a defense witness who had violated the rule against separation of witnesses "without considering whether the violation of the separation rule would be prejudicial under the facts and circumstances of this case." The trial court also erred by refusing to permit defense counsel to enter the witness' testimony into the record by avowal in order to demonstrate that it was of such a nature that it could not be tainted by having heard prior testimony. The trial court's refusal to permit the avowal prejudiced the defendant's right to preserve his claim of error for appellate review. The Court also noted that the lack of an avowal made it impossible for it to determine that the exclusion of the witness' testimony was not prejudicial. The case was reversed and remanded for a new trial.

The Court held that the Court of Appeals acted erroneously when it reversed a defendant's assault conviction because an instruction on the defense of insanity charged the jury that "the law presumes every man sane until the contrary is shown by the evidence." Commonwealth v. Southwood, Ky., 28 K.L.S. 15 (November 24, 1981). The inclusion of this language in the instruction was error under Mason v. Commonwealth, Ky., 565 S.W.2d 140 (1978). However, no objection to the instruction was made and, moreover, defense counsel himself tendered the erroneous instruction.

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The Supreme Court observed "[i]t is still the law that an objection must be made in order to preserve an error in the instructions."

In Hayes v. Commonwealth, Ky., 28 K.L.S. 15 (November 24, 1981), the Court reversed the defendant's murder conviction because of the possibility that he was convicted by a jury verdict that was not unanimous. The trial court's instruction to the jury permitted them to convict the defendant of murder if they believed he had acted intentionally or wantonly. The Supreme Court, citing Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980), held that if the evidence was such that the killing could not be wanton then the defendant was denied his right to a unanimous verdict since "it could not be ascertained that the jurors based their decision only on the theory supported by the evidence." The Court went on to find that there was insufficient evidence of a wanton mental state for the issue of wantonness to go to the jury.

The Court has upheld the use of a narrative statement as a substitute for a trial transcript on appeal. Cardine v. Commonwealth, Ky., 28 K.L.S. 15 at 8 (November 24, 1981). The court reporter in Cardine lost her stenographic notes. The trial court subsequently certified a narrative statement prepared pursuant to CR 75.13 and agreed to by the commonwealth and defendant. On appeal the defendant challenged the adequacy of the narrative statement to effectuate his right to appeal. The Court cited the holding of the United States Supreme Court in Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963), that a full narrative statement may be a constitutionally adequate substitute for a transcript but that the prosecution carries the burden of demonstrating that the statement is adequate to afford full and fair appellate review. The Court then held that the statement before it was adequate, noting that it summarized the testimony of all witnesses, contained the jury instructions, and indicated that timely

motions for directed verdict were made. The Court emphasized that defense counsel had agreed to the statement.

Only two published opinions were issued by the Court of Appeals during the period under review. In Patterson v. Commonwealth, Ky.App., 29 K.L.S. 1 at 1 (December 18, 1981), the Court was confronted with the question of whether a defendant may assert a Fourth Amendment privilege to not be arrested at the home of a third party without a search warrant. Of course, in Steagald v. United States, 455 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the Supreme Court held that the third party is protected by the Fourth Amendment from an unreasonable or warrantless entry into his home to effect an arrest. However, the Court of Appeals held that Steagald "in no way extended the right to assert that Fourth Amendment privilege to a suspect upon the premises."

The Court of Appeals also considered whether KRS 532.050 permits a trial court to consider an adult's juvenile record when imposing a felony sentence. Schooler v. Commonwealth, Ky.App., 29 K.L.S. 1 at 5 (December 30, 1981). KRS 532.050 specifically permits the inclusion of a history of "delinquency" in presentence reports. However, that provision appears to conflict with KRS 208.350, which provides that the "disposition of any child under the provisions of KRS 208.010 to 208.540 . . . shall not be lawful evidence against the child for any purpose." The Court disposed of this conflict in favor of KRS 532.050 by referring to the principle that "[w]here two statutes deal with the same subject matter, the one treating it in a particular manner is preferred over the general."

No published opinions were issued by the United States Supreme Court during the two months under review.

LINDA K. WEST

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RAISING INSUFFICIENCY OF  
EVIDENCE IN A  
FEDERAL HABEAS CORPUS ACTION

Since the Supreme Court decision in Wainwright v. Sykes, 433 U.S. 72 (1977), unpreserved errors have become more difficult to raise in a federal habeas action than ever before. Prior to Wainwright, it was necessary only to show that the procedural default was not a "deliberate bypass" of a lower court by the litigant. The "deliberate bypass" test was established in Fay v. Noia, 83 U.S. 822 (1963).

However, pursuant to Wainwright, a petitioner is barred from raising an issue which is unpreserved unless he can show "cause" and "prejudice". Since the Supreme Court left these terms undefined in Wainwright, lower courts have had to supply meanings to these terms. Thus, it can be a difficult task to show cause and prejudice for a procedural default.

However, in situations involving an allegation of insufficiency of evidence, there is a strong argument that the procedural default analysis of Wainwright does not apply. When a person is convicted and incarcerated on evidence insufficient to support the verdict, the defendant's right to substantive due process is violated. A state should not be allowed to deprive a person of his or her freedom on the basis of a conviction which itself violates due process.

Oftentimes, the respondent in a habeas action where insufficiency of evidence is an issue will argue that the evidence is barred from review by a

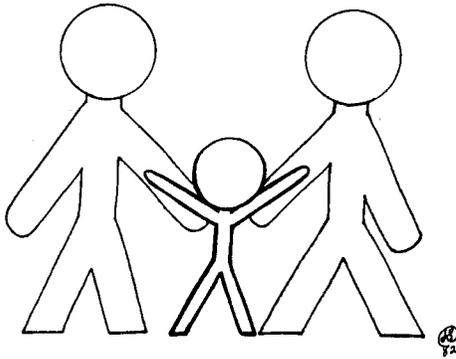
procedural default. Counsel may have failed either to renew a motion for directed verdict or to have objected to the instructions as required in Kimbrough v. Commonwealth, Ky., 550 S.W.2d 525 (1977). But Wainwright discussed only constitutional errors which violated the defendant's right to procedural due process. It did not address violations of substantive due process.

Vachon v. New Hampshire, 414 U.S. 478 (1974) did address the issue of insufficiency of evidence as a substantive due process violation. In that case, the Supreme Court struck down a conviction based on insufficient evidence, over vigorous dissent, despite more than one procedural default by the petitioner. Consequently, Vachon, not Wainwright, should control in habeas actions involving the allegation of insufficient evidence.

While there is a good argument that federal courts should address the merits of a conviction based on insufficient evidence whether or not preserved, it cannot be too strongly emphasized that the battle should be fought first in the state courts. Properly presenting the issues to the trial court in the first instance assures a client more immediate relief than any alternative arguments in federal court where there has been no preservation.

JOANNE YANISH





# Guardianship

## GUARDIANSHIP BILL NEEDS YOUR SUPPORT

In 1980 the General Assembly passed H.B. 974, the "Guardianship Bill," which completely revised Kentucky's statutes on guardianship of mentally disabled persons contained in KRS Chapters 203 and 387. The bill was passed with a two-year delayed effective date, with a recommendation that the bill be studied in the interim by the Joint Interim Committee on Judiciary.

Pursuant to recommendations by committee members and mental health professionals, several revisions were made during the interim. Most of the changes were minor changes in wording or organization.

The revised version of the bill was prefiled on October 14, 1981 by the Interim Committee, with a recommendation for passage by Senators Ed O'Daniel and Tom Easterly. The bill, now Senate Bill 35, is currently before the Senate Judiciary-Civil Committee. If approved by the committee, the bill will be voted on by the Senate and then forwarded to the House of Representatives for passage. If passed by both houses, the bill will become effective July 1, 1982.

The bill was originally drafted by Patricia Walker, formerly of the Protection and Advocacy Division, and Nancy

Barrickman, an attorney with the Office of the Attorney General, with the support and assistance of various attorneys, judges, and professionals in the fields of mental health and mental retardation, in response to a general consensus that our current laws were outdated.

The bill allows flexibility in fashioning guardianship orders commensurate with the needs and abilities of persons with a mental disability, placing all proceedings in district court and requiring an interdisciplinary evaluation report to be completed prior to a hearing in a petition for appointment of a guardian.

S. B. 35 provides for the following:

1. Repeals KRS Chapter 203 and those portions of KRS Chapter 387 dealing with committees of persons of unsound mind.
2. Creates one chapter dealing with the appointment and duties of guardians and conservators.
3. Discards the term "committee." Establishes the term "guardian" for a person who has full care, custody, and control of a ward and the term "conservator" for one who manages the financial resources of a ward.

(Continued, P. 6)

4. Discards the term "incompetent" person, uses the term "disabled" person.

5. Provides for a determination of partial disability as well as total disability. Specifically distinguishes between disability in managing personal affairs and disability in managing financial affairs. A "limited" guardian or conservator may be appointed for a ward who is only partially disabled.

6. Provides functional definition of disability. Respondents are to be placed under legal disability only to the extent necessitated by actual functional disabilities.

7. Provides for evaluation by an interdisciplinary team of at least one physician, one psychologist, and one masters level social worker prior to a hearing on a petition for determination of disability. (current statute: two physicians or one physician and one psychologist).

8. Consolidates the two proceedings under current statutes (adjudication in circuit court; appointment of committee in district court) into one proceeding in district court.

9. Establishes timelines for proceedings. If the petition is accompanied by an interdisciplinary evaluation report, a hearing shall be held within 30 days after the filing of the petition. If no evaluation report accompanies the petition, the hearing shall be held within 60 days.

10. Requires that counsel be appointed for a respondent within one week of the filing of the petition.

11. Requires at least one member of the evaluation team to be present at the hearing.

12. Delineates powers and duties of guardians and conservators. Places

affirmative duty on guardians to provide for appropriate habilitative, vocational, and educational programs for the ward to encourage the development of the ward's maximum potential.

13. Increases reporting requirements to require guardians to account to the court for the personal well-being as well as the financial affairs of the ward.

14. Limits appointment of limited guardians and limited conservators to a period not exceeding five years absent review and reappointment by the court.

15. Provides for appointment of an emergency guardian or conservator during guardianship proceedings.

16. Provides for testamentary appointment of a guardian or conservator by a parent, spouse, or child of a disabled person who is guardian or conservator of same.

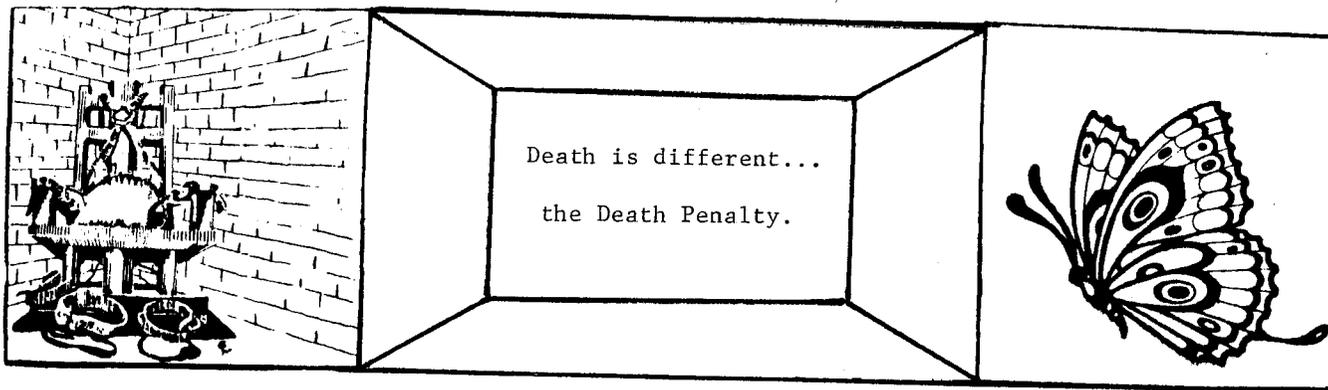
17. Provides for a standby guardian or conservator to be appointed at the time the initial guardian or conservator is appointed. The standby guardian assumes duties upon the resignation, death, or disability of the initial guardian or conservator.

If you support this bill, contact legislators and let them know.

We will be sending legislative alerts to persons who are interested in supporting this bill as it moves through the legislative process. If you want to be included on that mailing list, let us know by writing us at:

PROTECTION AND ADVOCACY DIV.  
OFFICE FOR PUBLIC ADVOCACY  
STATE OFFICE BUILDING ANNEX  
FRANKFORT, KY 40601-9972

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### CAPITAL CASE LAW

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) the plurality (Burger, Stewart, Powell, Stevens) opinion held that the sentence of death was improperly imposed upon Sandra Lockett since the eighth and fourteenth amendments require:

the sentencer, in all but the rarest kind of capital case [perhaps murder by an inmate under a life sentence], not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Id. at 2965.

Lockett has made it perfectly clear that the defendant has the absolute right to place before the sentencer "... factors which may call for a less severe penalty." Id. at 2965. In other words, the sentencer will be permitted "' to dispense mercy on the basis of factors too intangible to write into a statute.'" Id. at 2966-67 n.14. quoting Gregg v. Georgia, 428 U.S. 153, 222, 96 S.Ct. 2909, 2948, 40 L.Ed.2d 859 (1976).

Surely this means that anyone faced with death will be able to force the sentencer to consider such factors as: 1) that the defendant is not beyond rehabilitation; 2) the lack of direct proof that the defendant, himself, intended to cause the victim's death; 3) the minor role of the defendant in the offense; 4) the victim's inducement

or facilitation of the offense; 5) the character of the defendant's mens rea (lack of conscious purpose of cause death); 6) that the defendant had little or no reason to anticipate a killing; 7) cooperation with the authorities; 8) mercy; 9) the defendant's immaturity for his/her age; 10) interest of justice; 11) family history; 12) the probability that this defendant will not commit criminal acts of violence that would constitute a continuing threat to society; 13) the defendant's remorse; 14) the defendant is not dangerous and would not be a danger to his fellow inmates if imprisoned; 15) the defendant does not have the propensity to murder.

Stated otherwise, the defendant now must be allowed to marshal in his behalf every tidbit of any mitigating circumstance even if the circumstance is not set out in the statute.

In dissent, Justice Rehnquist viewed the holding of the Court in Lockett as permitting a defendant to "offer as evidence in the sentencing hearing any fact, however bizarre, which he wishes, even though the most sympathetically disposed trial judge could conceive of no basis upon which the jury might take it into account in imposing a sentence...." According to Rehnquist a mitigating factor can now be "anything under the sun...." Id.

The matter of aggravating and mitigating circumstances is a one way street. The defense must be allowed to introduce any and all mitigating factors whether or not contained in the

(Continued, P. 8)

statute. On the other hand the prosecution cannot go beyond the aggravating factors of the statute lest the decision of the sentencer amount to "unfettered discretion" resulting in the "wanton and freakish" imposition of the sentence of death returning to the days of unconstitutional standardless discretion.

What kind of mitigating circumstances have been instructed on in capital cases? In State v. Rook, 283 S.E.2d 732, 739 n.1 (N.C. 1981) sixteen mitigating factors were submitted to the jury:

(1) That this murder was committed while John William Rook was under the influence of mental or emotional disturbance.

(2) The capacity of John William Rook to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

(3) The age of John William Rook at the time of this murder is a mitigating circumstance.

(4) John William Rook, in his formative years, was subjected to cruelty and physical abuse by his parents.

(5) John William Rook, in his formative years, was subjected to mental abuse by his parents.

(6) John William Rook, in his formative years, was subjected to emotional abuse by his parents.

(7) John William Rook has been a loving and affectionate husband to his wife.

(8) John William Rook has been loving and affectionate to his brothers and sisters and their children.

(9) John William Rook is an alcoholic.

(10) John William Rook is an abuser of drugs and is addicted to drugs.

(11) John William Rook was sexually abused by an older man whom he lived with when he was 10 years old in order to have a more stable home environment.

(12) John William Rook had a deprived and chaotic childhood in which he was schooled in violence and criminality by his parents.

(13) John William Rook now has an IQ of 71 and received very little education in his formative years.

(14) John William Rook, in his formative years, received very little religious and moral training.

(15) John William Rook confessed in detail as to what he did and cooperated with the detectives and investigators of the Raleigh Police Department and Wake County Sheriff's Department as to his involvement.

(16) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value.

In a recent Boone County capital sentencing hearing the following circumstances in mitigation were instructed upon:

a. That when he committed the offense of which you have found him guilty he was acting under the influence of extreme mental or emotional disturbance, even though you might already have

(Continued, P. 9)

found the influence of extreme mental or emotional disturbance insufficient to constitute a defense to the crime itself.

b. That Paul Kordenbrock was a relatively young man at the time of the offense.

c. The circumstances under which Paul Kordenbrock was raised.

d. That Paul Kordenbrock cooperated with the police.

e. That Paul Kordenbrock can be rehabilitated.

f. That Paul Kordenbrock's capacity to commit the offense of murder was lessened by mental difficulties or the intake of drugs, and that his ability to maturely and meaningfully deliberate, reflect and intend the death of Stanley Allen was lessened by mental problems or by the effects of drugs.

g. That Paul's motorcycle accident caused him disorder and problems in his life.

h. That Paul's tour of duty in the service caused him serious difficulties in his life.

i. That Paul Kordenbrock has no history of criminal convictions for violent offenses.

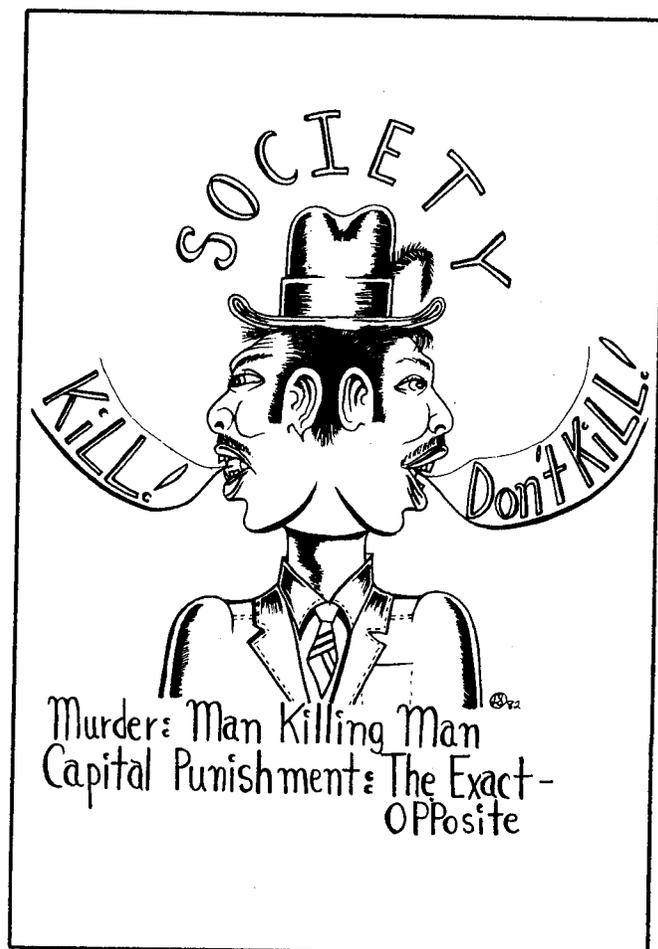
j. That Paul Kordenbrock confessed to the crimes.

k. That Paul Kordenbrock is sorry for killing Stanley Allen.

Lockett has been recently reaffirmed by the United States Supreme Court in Eddings v. Oklahoma, U.S. \_\_\_\_ (January 19, 1982). Eddings was a juvenile who had been brought up with

destructive parental guidance. His parents were divorced when he was five years old. Until age 14, he lived with his mother who provided no supervision and who was probably an alcoholic and prostitute. Being uncontrollable, his mother sent Eddings to live with his father at age 14. His father eventually "reasoned" with his son through physical punishment -- hitting with a strap, for instance. Eddings' mental and emotional development were several years below his age. His personality disorders were treatable and he could

(Continued, P. 10)



be rehabilitated over many years according to a sociologist and a psychiatrist. The psychiatrist testified that Eddings, "did pull the trigger, he did kill someone, but I don't think he knew that he was doing it," and that if treated, he would not pose a serious threat to society.

In weighing aggravating and mitigating evidence, the trial judge concluded that he could not "consider the fact of this young man's violent background." The trial judge only considered mitigating evidence that would support a legal excuse from criminal liability. This "violated the rule of law announced in Lockett: "When the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant" to sentencing.

Eddings' holding instructs us that Lockett does mean what it says.

ED MONAHAN

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DEATH ROW U.S.A.

AS OF DEC. 20, 1981, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE LEGAL DEFENSE FUND: 924

Race:

Black	383	(41.39%)
White	488	(52.87%)
Hispanic	43	( 4.66%)
Native American	7	( 0.76%)
Asian	2	( 0.21%)
Unknown	1	( 0.11%)

Crime: Homicide

Sex:	Male	914	(98.92%)
	Female	10	( 1.08%)

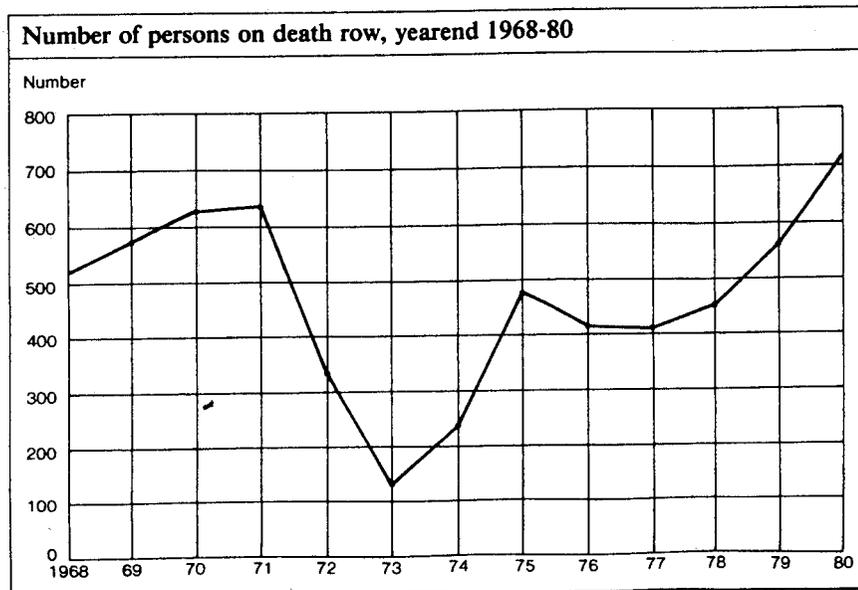
DISPOSITIONS SINCE JULY, 1976 (and since 1972 in FL, GA, and TX):

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

Death Sentences vacated as unconstitutional: 549

Convictions reversed or sentences vacated on other grounds: 363

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## CAPITAL COMMENTS

Most public opinion polls indicate that three-fourths of the American public favor capital punishment. Why such an amazingly high percentage?

In 1976 when the sentence of death was determined to be constitutional by the United States Supreme Court, Justice Thurgood Marshall felt that "the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable." This complete information no doubt includes an awareness that the death sentence is applied disproportionately in cases with white victims; that the sentence of death does not have any significant deterrent effect; and that serious crime has complex causes.

In 1976 and 1979 Psychology Today (Vol. 10, Sept. 1976, pp. 16-17; Vol. 12, Jan. 1979, p. 13) briefly addressed Justice Marshall's hypothesis, and found it to prove out: "Our results confirm Justice Marshall's initial expectation that the opinions of an informed public would differ significantly from a public unaware of the consequences and effects of the death penalty."

"People who say they generally favor the death penalty ... shrink from calling for it when they are confronted with cases of real criminals."

"Why the gap? One possibility ... is that when someone asks, 'Are you in favor of the death penalty?' people think of the worst possible murder case -- far worse than most real-life cases -- and answer with that in mind." This is an important point to remember when conducting a capital voir dire. First answers of prospective jurors may not accurately reflect their true beliefs. See also Sarat and Vidmar, Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis, 1976 Wisc. L.Rev. 171. Further analysis of public attitudes toward capital punishment is contained in Criminal Justice Abstracts, Vol. 13 No. 4, December, 1981, published by the National Council on Crime and Delinquency.

ED MONAHAN

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# TRIAL TIPS

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## INVOLUNTARY COMMITMENT: THE ROLE OF THE DEFENSE ATTORNEY

All too often attorneys appointed to represent indigents facing involuntary commitments feel that because their client is alleged to have mental problems, there is a reason to ignore the client's wishes and to act in a manner that the attorney thinks best. The attorney sheds the coat of the advocate and becomes, in effect, a guardian ad litem -acting in what he considers to be the "best interests" of the client.

There are various subtle (and some not so subtle) factors which may lead the attorney into this guardianship role:

- (1) Tremendous pressures are often placed upon counsel by mental health professionals, family members, and even fellow members of the legal profession to allow the state to "help" the mentally ill person by hospitalization;
- (2) Many attorneys have difficulty in relating to an individual who may be suffering from bizarre, uncontrolled, and sometimes delusional thinking;
- (3) There is a tendency to view the whole commitment process as more of a medical than a legal problem. After all, the court is relying on testimony from experts in a specialty in which few attorneys feel adequately trained;
- (4) The defense attorney, is often appointed to a case without the funds necessary to retain an expert for the defense. Counsel is often faced with the problem of accepting the medical conclusions of the state-appointed psychiatrist.

This attitude of acting in the client's "best interests" is at odds with the basic principles guiding attorneys in carrying out their duties. Counsel normally functions in a manner which advocates their client's goals as their client defines them. This role should not change simply because the client is alleged to be mentally ill.

In attempting to define the role of the attorney in involuntary commitment proceedings, various sources lead to the same conclusion - the attorney must act as an advocate.

### I - the interests of the client

Every civil commitment proceeding involves what has been described by the Supreme Court of the United States as a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). Even though these proceedings do not involve criminal acts, they do result in the deprivation of liberty. Consequently, the procedures utilized in the involuntary hospitalization of an individual must comport with the due process clause.

[When] a proceeding may lead to a loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution. Denton v. Commonwealth, Ky., 383 S.W.2d 681, 682 (1964).

Under these circumstances, the applicability of the Fourteenth Amendment to civil commitment actions cannot be questioned. As Chief Justice Burger recently noted:

Continued, P. 13)

There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. O'Connor v. Donaldson, 422 U.S. 563 (1975).

Commitment to a mental hospital additionally carries with it collateral legal consequences. One who is labeled a mental patient carries that stigma with him after he is discharged from the hospital.

Mr. Chief Justice Burger has recognized that involuntary commitment to a mental hospital "can engender adverse social consequences to the individual." Addington v. Texas, 441 U.S. 418 (1979). Similarly, Mr. Justice Brennan has noted that "persons confined in mental institutions are stigmatized as sick and abnormal . . ." even after release. Parham v. J.R., 442 U.S. 584 (1979).

## 2 - ABA Code of Professional Responsibility

The Canons of Ethics support the position that the attorney has a duty to advocate the client's interests as defined by the client. The Code of Professional Responsibility requires that the attorney "represent his client zealously," protect the client's legal rights, and present every legally possible defense. EC 7-1. This means that the attorney representing a client facing commitment must exercise all his professional knowledge and skill to advocate the client's position. The Code further provides:

EC 5-1. The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.

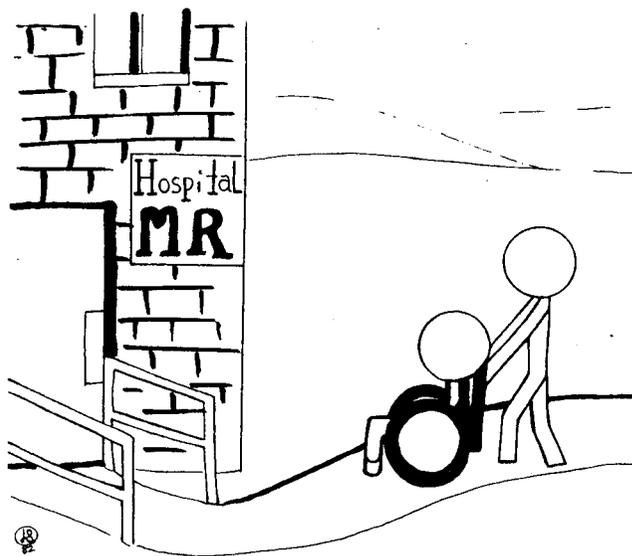
Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client (emphasis added).

It is the client's interests that must be advocated; not what the attorney feels are in the client's best interests.

## 3 - ineffective assistance of counsel

The role of counsel in civil commitment cases has also been the subject of discussion in appellate courts dealing with ineffective assistance of counsel claims. A number of federal courts have clearly indicated that the attorney at a commitment proceeding must act as an advocate for his client's interests. Lessard v. Schmidt, 344 F.Supp. 1078 (E.D.Wisc. 1972); Suzuki v. Quisenberry, 411 F.Supp. 1113 (D.Ha. 1976); Lynch v. Baxley, 386 F.Supp. 378 (M.D.Ala. 1974); Bell v. Wayne County General Hospital, 384 F.Supp. 1085 (E.D. Mich. 1974).

(Continued, P. 14)



According to the Lessard court, the appointment of an attorney as a guardian ad litem does not meet the requirement of the appointment of counsel because "he sees his role not as an advocate for the prospective patient but as a traditional guardian whose function is to evaluate for himself what is in the best interests of his client-ward and then proceed, almost independent of the will of the client-ward to accomplish this." Id., 349 F.Supp. at 1099. Utilizing a similar analysis, the courts in Suzuki and Bell have held that the right to effective assistance of counsel cannot be satisfied by appointment of a guardian ad litem.

As an advocate, the attorney in a commitment proceeding has certain inherent duties. These include:

- (1) full representation of his client at both the preliminary and final hearings;
- (2) examination of all reports on the client (psychiatric, psychological, and others) in an attempt to understand the relevant facts of the case;
- (3) interviews with the client, family, and friends as a portion of the investigation;
- (4) any further investigation necessary for an understanding of the factual events leading to the filing of the petition;
- (5) an investigation of possible alternatives to hospitalization of the client; and
- (6) consultation with and advising the client concerning the nature of the proceedings, possible alternatives, and statutory and constitutional rights.

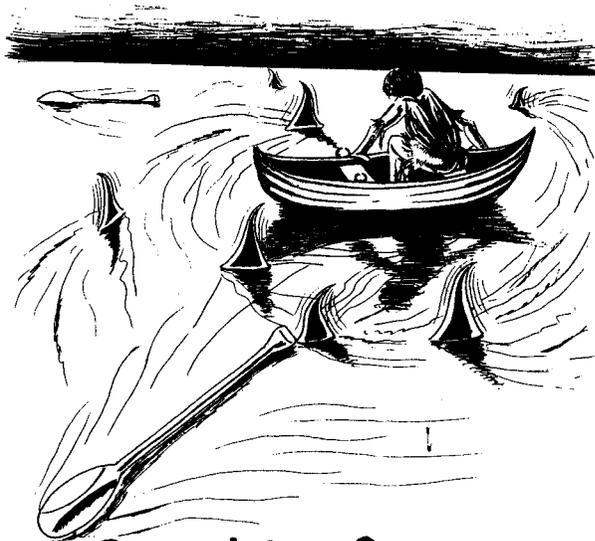
Additionally, the advocate must guarantee that the patient's constitutional rights to procedural due process are enforced. These rights include:

- (1) adequate written notice of the proceedings (both preliminary and final);
- (2) preliminary hearing;
- (3) presence of the client at both the preliminary and final hearing;
- (4) cross-examination of adverse witnesses;
- (5) presentation of evidence in the client's behalf;
- (6) application of the same rules of evidence as applicable to criminal cases;
- (7) proof beyond a reasonable doubt;
- (8) record of proceedings; and
- (9) appellate review.

When the implications of commitment proceedings are considered in conjunction with the Code of Professional Responsibility and case law, the result is unquestionable. The effective assistance of counsel can only be provided in commitment proceedings if the attorney adopts the adversarial role. The attorney must consult with his client and fully investigate the facts of the case. As in any criminal case, the attorney must take whatever steps necessary to protect his client's constitutional rights. Only through an adversarial process can there be any guarantee that inappropriate hospitalization will not take place.

BILL RADIGAN

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## Quandries & Quagmires

### ETHICS QUANDRIES AND QUAGMIRE

QUERY: To what extent are the ethical obligations of a defense attorney altered when his client's ability to make decisions is impaired because of minority, mental disability or some other comparable reason?

"The normal attorney-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters." ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Standards (Proposed Final Draft 1981), § 1.14, Comment, p. 94. "When a client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects." Id.

For example, a criminal defense attorney may reasonably believe that his client is presently incompetent to stand trial due to the client's particular mental problems. However, the trial judge, after holding a competency hearing, rules that the defendant is competent to stand trial. Now the defense counsel is in a difficult situation. Although the defense counsel

doubts that his client can make adequately considered decisions relating to legal representation, the attorney has already been overruled on this issue by the trial judge.

Obviously, "[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer." ABA Code of Professional Responsibility (1969), EC 7-12. "If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of his client." Id., EC 7-12. If the defendant is "capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid." Id., EC 7-12.

If such a defendant was ruled competent to stand trial and was convicted of the charged offense, defense counsel would have to "explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal." ABA Standards for Criminal Justice (2nd

(Continued, P. 16)

Ed. 1980), The Defense Function, § 4-8.2(a). Defense counsel would "give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal, ... the probable results of an appeal," and "explain to the defendant the advantages and disadvantages of an appeal." Id., § 4-8.2(a).

Normally, "[t]he decision whether to appeal must be the defendant's own choice." Id., § 4-8.2(a). However, if the defendant's disability and the lack of a designated legal representative "compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client." Id., EC 7-12.

In this situation, even though the defendant asserts his desire not to appeal his conviction, defense counsel should file a timely notice of appeal "to safeguard ... the interests" of his client. "The lawyer should take whatever steps are necessary to protect the defendant's right of appeal." ABA Standards, The Defense Function, supra, § 4-8.2(b).

Conversely, if the defendant insisted on an appeal, the defense attorney could not on the basis of the client's mental disability disregard the expressed request and refuse to file the notice of appeal. "[O]bviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent." Id., EC 7-12.

It is clear that a client under a severe mental disability that precludes rational decision making is not bound by the decisions of his attorney on matters which are normally solely the province of the defendant. To illustrate, the jury trial and conviction of a deaf

mute who was never taught to read or write or use sign language and who was unable to communicate with anyone in any language was unconstitutional, despite his attorney's attempt to waive on the defendant's behalf the issue of incompetency to stand trial. People v. Lang, Ill.App., 325 N.Ed.2d 305 (1975). "Although defendant's attorney chose the risk of trial for him rather than ... confinement as an incompetent," the defendant should not be bound by this choice. Id. at 309. The decision "was made by his attorney but, because of [the defendant's] lack of communication, ... the defendant could not have participated in the decision." Id.

In the proposed final draft of the ABA Model Rules of Professional Conduct, supra, Rule 1.14 provides two extremely helpful ethical principles to guide an attorney whose client is under a disability that impairs his decision making faculties.

First, "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." ABA Model Rules, supra, § 1.14(a).

Even though an incapacitated person may have no authority to make legally binding decisions, "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." ABA Model Rules, supra, § 1.14, Comment, p. 94. "The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect." Id.

(Continued, P. 17)

When the client has no guardian or legal representative, the attorney often must function as de facto guardian.

Even when the disabled person has a legal representative, the attorney should as far as possible accord the person the status of client, particularly in maintaining communication. Id. If a legal representative has already been appointed for the client, the lawyer should look to the representative for decisions on behalf of the disabled client.

Second, "[a] lawyer shall secure the appointment of a guardian or other legal representative, or seek a protective order with respect to a client, only when the lawyer reasonably believes that the client cannot adequately communicate or exercise judgment in the client-lawyer relationship." ABA Model Rules, supra, § 1.14(b); emphasis added.

In some instances, disclosure of a client's disability may result in adverse consequences for the client. For example, "raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment." Id., Model Rules, supra, § 1.14, Comment.

The lawyer's position in this situation is an unavoidably difficult one. Consequently, the defense attorney should remember that he must ethically seek the appointment for his client only when he "reasonably believes" that the defendant cannot adequately maintain the attorney-client relationship because of his disability.

J. VINCENT APRILE II

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## THE DEFENSE OF RENUNCIATION

Renunciation is a statutory defense to the offense of criminal attempt to commit a crime. KRS 506.020 sets out the criteria for the statutory defense. "The question that is answered by this section is what to do about an offender who proceeds far enough in his criminal endeavor to commit criminal attempt but abandons his course of conduct prior to completion of the offense." Commentary (1974) to KRS 506.020 (emphasis added).

### Criteria

Before the statutory defense can be made out the following must exist: 1) The defendant must abandon his effort to commit the crime; 2) The abandonment must take place under circumstances showing that it is voluntary and complete; and 3) affirmative action to prevent commission of the crime must be undertaken by the defendant if mere renunciation would not prevent commission of the offense.

### Evidence Necessary to Require Instruction

An instruction is proper only when the evidence is sufficient to justify it. It is justified when there is "evidence warranting an inference" of a finding of the defense. See Martin v. Commonwealth, Ky., 571 S.W.2d 613, 615 (1978) (quantity of evidence necessary to obtain instruction).

The evidence must be viewed in the light most favorable to the defendant, see Cooper v. Commonwealth, Ky., 569 S.W.2d 668, 671 (1978), in determining if the instruction is required.

In order to obtain an instruction on the theory of the defense, the defendant need not testify or offer evidence or witnesses. The evidence can come from any source, even the prosecution's evidence.

(Continued, P. 18)

In People v. Johnson, 585 P.Ed. 306 (Col. Ct.App. 1978), the evidence amounted to the following:

The People's principal witness testified that on the night of June 7, 1976, she saw someone on a light colored bicycle ride up the sidewalk and driveway of the house across the street. During a brief period when the bicycle rider was out of the witness' sight, the witness heard what sounded to her like breaking glass. A few seconds later, she saw the cyclist ride back down the sidewalk and leave. At this point, the witness called the police. The police officer who responded to the call testified that, after obtaining a description of the cyclist from the witness, he located defendant some two blocks north of the scene, heading south. Other officers at the scene discovered a broken window on the southwest corner of the house. Id. at 307.

This state of evidence required an instruction on renunciation. Id.

It is reversible error for a trial court to fail to adequately present a criminal defendant's theory of defense. United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976). "Even when the supporting evidence is weak or of doubtful credibility its presence requires an instruction on the theory of defense." Id., United States v. Hillsman, 522 F.2d 454, 459 (7th Cir. 1975).

"The judge must, therefore, be cautious and unparsimonious in presenting to the jury all of the possible defenses which the jury may choose to believe." Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967). "This is true even if the defense is fragile. A defendant cannot be shortchanged nor

this jury trial truncated by a failure to charge." Id. Ultimately, the issue is for the jury to decide. Whether a defendant "abandoned his efforts under circumstances manifesting a complete renunciation, is a matter for the trier of fact to decide after being properly instructed." People v. Johnson, supra, at 308; see also Palmore, Kentucky Instructions To Juries Sections 9.01, 9.02 (1975).

#### Policy for the Defense

There are strong policy reasons for this defense since it

(i) tends to indicate that the actor is not a dangerous person; and (ii) the existence of such a defense might encourage some actors to terminate their criminal designs short of fruition. KRS 506.020, Commentary.

Since the legislature has specifically stated that the rationale for the existence of the defense is to encourage people to not follow through with their criminal purpose, it is likely that the legislature would want the defense to be instructed upon if there is any evidence to support it. To do less would not seem to be in line with the legislature's announced purpose in recognizing the defense.

#### Is Renunciation a Defense to a Completed Offense of Criminal Attempt?

To take an example, if a defendant commits the offense of attempted rape by touching (in effect sexual abuse) but discontinues any further attempt at penetration, is this termination a defense to criminal attempt to rape since the attempt is a completed act? Yes.

(Continued, P. 19)

The statute, its commentary, prior case law, and present case law make it clear that renunciation is a defense to a completed criminal attempt.

For the defense as established by statute to make any sense, it must be applicable to completed criminal attempts. This is a necessary conclusion due to the nature of criminal attempt. The offense of criminal attempt is practically completed when begun. See KRS 506.020 and Commentary. At worst, it is virtually impossible to determine when conduct crosses the line from criminal attempt to completed criminal attempt. The defense only has meaning if it applied to completed attempts.

Importantly, the Commentary to KRS 506.020 indicates that, prior to enactment of the penal code, the Court did not view renunciation as a defense to a completed criminal attempt and that this statute has changed that law:

#### Relationship to Pre-existing Law:

The treatment of "voluntary renunciation" under the pre-existing law of criminal attempt is not clear. Although no case can be found to expressly deny the defense, several opinions seemed to indicate its unavailability. See Wagner v. Commonwealth, 355 S.W.2d 151 (1962); Lockhart v. Commonwealth, 244 S.W.2d 164 (1951). The one that was strongest in its indications was Payne v. Commonwealth, 110 S.W. 311 (1908), a case in which the defendant exposed himself to some young girls, chased them a short distance, and then abandoned his effort. In sustaining a conviction of attempted rape, the Court of Appeals cited with approval, and quoted from, an Alabama case holding that once an attempt to commit a crime is completed, an abandonment by

the defendant of his criminal purpose does not purge the crime. If the Payne case reflects pre-existing law, as it seems to do, then KRS 506.020 can be said to provide a substantial change in the law.

Unless the Commentary and the statute are to be ignored, renunciation is a defense to completed attempt.

This very question was addressed in People v. Johnson, supra:

Nor do we accept the People's argument that abandonment is no defense since defendant had already committed the crime of attempted burglary before his abandonment. The People misconceive the nature of the affirmative defense of abandonment.

By specific terms of the statute, Section 18-2-101(3), C.R.S. 1973, abandonment is an affirmative defense to an attempt crime. Consequently, even though, in a strict analytical sense, the crime of attempt is complete once the actor intentionally takes a substantial step towards the commission of the crime, nevertheless, the defense of abandonment is present if he thereafter voluntarily renounces his criminal intent. Id. at 308.

#### Voluntary and Complete

The statute sets out that a renunciation is not voluntary and complete if motivated by 1) a desire to avoid detection of himself or another, or 2) a desire to postpone the crime to another time. KRS 506.020(2).

ED MONAHAN

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(JEWELL, Continued from P. 1)

Frank especially likes working with juveniles. In 1979, he filed a motion to declare it illegal to house status offenders with delinquents in the Jefferson County Diagnostic and Detention Center. The motion was also concerned with, among other issues, inadequate facilities and inadequate training of staff. The hearing lasted two solid months and at end, the Court responded with a forty-five page opinion. As a result of Frank's efforts, the county properly trained all staff personnel, and a new detention center was built. Status offenders are now frequently placed in alternative programs.

Recently, Frank received another promotion. On January 4, 1982, he became the Chief Adult Defender. He supervises, counsels, and assists staff attorneys assigned to represent adult clients in all courts and all clients in the circuit court.

Frank is a very devoted and conscientious public defender. This is obvious by his outstanding accomplishments while working in the Jefferson District Public Defender's Office. He has just received his fifth Ace Award. (An Ace Award is the equivalent of five separate juvenile court felony acquittals.) In addition, he has acquired two Walker Awards. (This award is given for a Circuit Court felony jury trial acquittal.)

Frank very much enjoys being a public defender and working with the professional staff of the Louisville office. He thinks the most satisfying part of being a public defender occurs when the jury believes you and believes that your client is innocent. Frank thinks it is very important and satisfying to "be a voice for somebody who would not otherwise have a voice."

In his free time Frank enjoys softball and basketball. He is a University of Kentucky fanatic and tries to attend the games as often as possible. He lives in Louisville with his wife Ann, and their son Brandon, who is 3½ years old.

We appreciate Frank's efforts and contributions to the Public Defender System, and wish him success in the future.

KAREN CARNEY

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