

The Advocate



dpa.ky.gov

June 2015

Summary of 2015 Heroin Bill

By Damon Preston



Damon Preston
Deputy Public Advocate

A heroin bill was identified by both parties, both chambers, and the Governor as “Must Pass” legislation in 2015. Unfortunately, the parties and chambers did not agree on a compromise bill until the last day and, due to the short timeframe and hectic schedule near the session’s end, the language in the final bill was never fully disclosed or debated in a committee meeting prior to its passage.

The bill signed by the

Governor, Senate Bill 192, is a mix of both efforts to address the demand side through treatment and strategies designed to help addicts and also attempts to stop the supply side of heroin through increased prison time for traffickers.

Here are the significant features of the bill and some of the challenges litigators, judges, and law enforcement officers will face.

TABLE OF CONTENTS

SUMMARY OF 2015 HEROIN BILL	1
by Damon Preston	
SUMMARY OF 2015 CRIMINAL LAW LEGISLATION	5
by Damon Preston	
DNA EVIDENCE: AN EXPANSION OF KORA	8
by Krista Dolan	
TWO NEW BATSON CASES!	11
THE NEXT STEP: Six Common Sense Proposals to Save While Holding Offenders Accountable and Protecting the Public	12
CALL TO END PREDATORY COLLECTION PRACTICES	14
Ed Monahan & Dan Goyette	

Expanded Treatment Services

Senate Bill 192 changed many existing laws to open doors for more heroin treatment options. A benefit for “substance use disorder” was added to the Medicaid law, allowing addicts to obtain treatment using Medicaid funding. In addition to improving access, this change should also increase the number of treatment beds available as this new funding mechanism goes into place. Treatment beds should also increase because of three changes to make opening new treatment facilities easier: 1) individuals with a current drug addiction may be treated at a “Residential Care Facility” after the removal of language from the criteria for such places, 2) shorter deadlines were set for the approval or rejection of applications to open substance abuse treatment programs, and 3) small substance abuse treatment programs will no longer be required to go through the Certificate of Need process prior to being approved. Faith-based programs will be specifically authorized to meet any requirements for treatment under a diversion or deferred prosecution plan.

To address the special needs of pregnant women with addictions, priority will be given to them when applying for treatment programs. Also, all treatment programs will be required to provide access to pregnant women, as long as the programs are otherwise appropriate. (This same requirement also passed in Senate Bill 54). A woman who uses non-prescribed controlled substances during her pregnancy will be protected from having her parental rights terminated if she enrolls in and complies with both a treatment program and a regimen of recommended prenatal care throughout the remainder of her pregnancy. Court records of the woman’s use of drugs during pregnancy will be sealed if she completes a treatment or recovery program or maintains compliance for at least six months after giving birth. All these changes have the intent of reducing the number of drug-addicted babies born in the Commonwealth.

Increased funding was provided in the amount of \$10 million to be distributed at the discretion of the Justice and Public Safety Cabinet Secretary to the following groups for the specified purposes:

1. Department of Corrections for the provision of substance abuse treatment in county jails, regional

- jails, or other local detention centers that employ evidence-based practices in behavioral health treatment or medically assisted treatment for non-state inmates with opiate addiction or other substance abuse disorders;
2. Kentucky Agency for Substance Abuse Policy (KY-ASAP) programs operating in county jails or in facilities under the supervision of county jails that employ evidence-based behavioral health treatment or medically assisted treatment for inmates with opiate addiction or other substance abuse disorders;
 3. Kentucky Agency for Substance Abuse Policy (KY-ASAP) to provide supplemental grant funding to community mental health centers for the purpose of offering additional substance abuse treatment resources through programs that employ evidence-based behavioral health treatment or medically assisted treatment;
 4. Kentucky Agency for Substance Abuse Policy (KY-ASAP) to address neonatal abstinence syndrome by providing supplemental grant funding to community substance abuse treatment providers to offer residential treatment services to pregnant women through programs that employ evidence-based behavioral health treatment or medically assisted treatment;
 5. Kentucky Agency for Substance Abuse Policy (KY-ASAP) for supplemental funding for traditional substance abuse programming under KRS Chapter 15A;
 6. Department of Corrections for the purchase of an FDA-approved extended-release treatment for the prevention of relapse to opiate dependence with a minimum of fourteen (14) days effectiveness with an opioid antagonist function for use as a component of evidence-based medically assisted treatment for inmates with opiate addiction or substance abuse disorders participating in a substance abuse treatment program operated or supervised by the department;
 7. Department for Public Advocacy to provide supplemental funding to the Social Worker Program for the purpose of creating additional social worker positions to develop individualized alternative sentencing plans; and
 8. Prosecutors Advisory Council to enhance the use of rocket docket prosecutions in controlled substance cases.

Referrals and Increased Communications

Parts of SB 192 were designed simply to increase the flow of information so problems could be addressed more quickly. Hospital emergency rooms are now required to inform overdose victims of available substance use disorder treatment programs in the area and may obtain permission

from an overdose victim to contact a treatment program on their behalf. Community mental health centers may provide on-call services to emergency rooms to meet with overdose victims. In the event someone calls for medical or law enforcement assistance for a person who is overdosing, the local health department is required to contact the person making the call to offer referrals for treatment. Coroners are now required to notify the Commonwealth Attorney and law enforcement of any death resulting from overdose of a Schedule I controlled substance.

Expanded Naloxone (or Narcan) Availability

Access to the life-saving drug Naloxone (marketed often as Narcan) will be expanded. Health-care providers can now dispense the drug to any person or agency that is deemed capable of administering the drug in an overdose emergency. The Board of Pharmacy is required to create regulations governing the procedures and requirements that will ensure the safety and effectiveness of this expanded access. School boards may develop procedures for keeping Naloxone on school grounds.

Needle Exchange Programs

Many advocates say that needle exchange programs are important to public health, to prevent the spread of disease through shared needles. Under SB 192, communities in Kentucky will be permitted to set up needle exchange programs, but only if local approval is provided by both the Board of Health and the city or county government. Needles exchanged in an approved program will not be deemed drug paraphernalia for purposes of a prosecution.

“Good Samaritan” Immunity Provision

Some parts of the new bill are specifically designed to try to save the lives of addicts and overdose victims, even at the expense of what could be a criminal prosecution under existing law. One such part is often referred to as the “Good Samaritan” law. Without this law, a person who is in the presence of someone who is overdosing (or even who is overdosing himself) may hesitate to call for help because they face prosecution for possession of drugs or drug paraphernalia when police arrive. This new statute seeks to remove this disincentive to call for help for someone who is overdosing.

The new language says, “A person shall not be charged with or prosecuted for a criminal offense prohibiting the possession of a controlled substance or the possession of drug paraphernalia if” the following conditions are met:

1. The request for assistance is made “in good faith,” meaning that it is a legitimate request for assistance and is not being made during a lawful search or arrest.

2. The assistance is sought for a drug overdose and is made to a public safety answering point (i.e. 911), law enforcement officer, or medical services practitioner;
3. The person who would otherwise be charged is the person who made the request, acts in concert with the requestor, or is the overdose victim;
4. The person remains with (or is) the victim until assistance is provided; and
5. The evidence for the potential charge or prosecution is obtained as result of the overdose and the need for assistance.

This provision does not extend to crimes other than possession of drugs or possession of controlled substances. Notably, this includes trafficking, so a person who gave someone drugs leading to an overdose could still be prosecuted, even if they seek assistance.

The success of this statute in accomplishing its goal, saving lives, will be directly tied to each law enforcement agency's willingness to honor it. The clear intent is that individuals who call for help not be charged, not simply that charges eventually be dismissed. Unless officers are willing to offer assistance and then leave the scene without making arrests, many potential calls that might save a life will not be made, out of fear of arrest. The bill provides immunity from liability for officers who make arrests in violation of the statute, but the express intent of the legislature is that arrests not be made in the first place when the above criteria is met.

Once arrests are made and cases are filed in circumstances that could arguably qualify for protection under the Good Samaritan law, there will be many challenges for litigators and courts. Among the questions to be answered are the following:

- By what standard does a court decide if this immunity applies?
- Who has the burden of proof?
- How early can a motion be made?
- Can a district court finding that the statute applies bar a grand jury hearing or circuit court indictment?
- Is a Writ of Mandamus to the Court of Appeals available to challenge denial of a motion to dismiss under this statute, since the purpose is to avoid prosecution altogether?

Immunity Upon Warning of a Needle

A separate immunity provision seeks to protect law enforcement officers, not necessarily drug addicts. Under this new law, a peace officer preparing to search a person or area may ask whether there are any needles or other sharp objects present in the area to be searched and offer not to

charge a person with possession of drug paraphernalia if the person warns the officer of such objects. If a person, in response to the offer, admits to the presence of needles or sharp objects, then the person cannot be charged with drug paraphernalia for the sharp objects or possession of controlled substance for trace amounts of drugs on the sharp objects found. This protection does not apply to other objects or crimes.

As with the Good Samaritan provision, there will be challenges in implementing this immunity protection. All the same questions raised above could also be asked here, as well as the following:

- Because the immunity is triggered by a question that the officer has discretion not to ask, what if the person warns of a needle before the officer asks?
- What if the officer asks about needles, but does not offer immunity? Does the protection still apply?
- If there are needles and also other "non-sharp" items, can the person be prosecuted for those other items? Assuming the answer is yes, can the presence of the needles be used as evidence to prove the baggies or other items were intended for drug use?

Importing Heroin

A new crime of "Importing Heroin" has been created. It is a Class C felony with a provision that a person convicted of the offense cannot be released until he or she has served at least 50% of their sentence. By specific language in the statute, the offense "is intended to be a separate offense from others in this chapter, and shall be punished in addition to" other offenses occurring during the same course of conduct.

The elements of Importing Heroin are:

- Knowingly and unlawfully
- Transporting any quantity of heroin
- Into the Commonwealth
- With the intent to sell or distribute the heroin.

Because this offense is transporting heroin "into the Commonwealth," it could only be prosecuted in border counties. A person selling heroin in an interior Kentucky county would not have come into the Commonwealth within that county. All elements of the offense of Importing Heroin would be complete when the person first stepped foot (or tries) into Kentucky.

While there is clear legislative intent that this be punished in addition to other offenses, such intent would not circumvent the constitutional protections against double jeopardy. Heroin possession or even trafficking (possession with intent to sell) would be lesser included offenses of Importing Heroin

constitutional review. “[D]ouble jeopardy prohibits the Commonwealth from carving out of one act or transaction two or more offenses.” *Clark v. Commonwealth*, 267 S.W.3d 668, 678 (Ky. 2008).

Changes to Existing Drug Laws

Existing drug statutes were amended to raise some penalties for traffickers who are not mere “peddlers” (addicts selling or transferring small amounts). All convictions for First-Degree Trafficking of heroin that are classified as a Class C felony or higher will now require service of at least 50% of the sentence before any form of release is available. While trafficking in heroin in amounts of under 2 grams remains a Class D felony, defendants convicted of that offense may be subject to 50% parole eligibility if the defendant was in possession of more than one item of paraphernalia that indicates, given the totality of circumstances, that the trafficking was a “commercial activity.” A defense to this enhanced parole eligibility is available if the defendant is found by the court to have had a “substance use disorder” at the time of the offense.

Two new levels of offenses were created for high-volume traffickers. A new offense of Aggravated Trafficking in the First Degree will apply in situations where a defendant is charged with trafficking 100 grams or more of heroin. This offense would be a Class B felony with service of at least 50% of a sentence required before any form of release. Similarly, Trafficking in a Controlled Substance in the Third Degree has been amended to have an “aggravated” Class D felony level for a first offense that involves more than 120 dosage units. Previously, only second or subsequent offenses could be felonies.

Other Changes

Beyond these broad changes, there were a few targeted changes that will be significant in applicable cases. Acetylfentanyl, an opioid many times stronger than heroin, has been added to the list of Schedule I controlled substances. Fentanyl, which already exists in Schedule II, has been added to heroin and methamphetamine as the controlled substances to which a “2-gram” threshold exists distinguishing between Class C and Class D trafficking offenses. A person convicted of a Homicide or Fetal Homicide offense relating to an overdose of a Schedule I controlled substance who is not otherwise considered a “violent offender” (under KRS 439.3401) would not be eligible for release until service of at least 50% of his or her sentence.

Going Forward

Finally, Senate Bill 192 lays the groundwork for further study and oversight moving forward. The Cabinet for Health and Family Services and the Office of Drug Control Policy are to initiate a program to study treatment programs and strategies and determine best practices for dealing with substance abuse. A joint report is due to LRC and the Governor no later than December 31, 2016. The Cabinet is further encouraged to study many aspects of the heroin problem and solutions, including Medicaid expansion, medication-assisted treatment options (which are not permitted by many drug courts), and committees and teams that may be formed in the future to address heroin-related issues in Kentucky.

A Senate Bill 192 Implementation Oversight Committee will be appointed by LRC to monitor the implementation of the Act. That committee will consist of three members of the House and three members of the Senate. Notably, this is different from the larger interagency committees that have been used to monitor implementation of recent landmark legislation including 2011’s HB 463 and 2014’s SB 200. No specific meetings or reports are required of the Implementation Oversight Committee.

Summary of 2015 Criminal Law Legislation

By Damon Preston

In 2015, discussions of criminal law legislation was dominated by negotiations over various heroin proposals, but a relatively small number of other bills that will impact criminal defendants and litigators made it through both chambers to be signed by Governor Beshear.

IGNITION INTERLOCK DEVICE

Legislation that would require ignition interlock devices in all or most DUI cases has been proposed for many years. In 2015, it finally passed in Senate Bill 133, although only after substantial negotiation and amendment. While the resulting bill may be reasonable under the circumstances (as compared with the initial proposal, which would have required them in every DUI and permanently suspended the license of anyone who failed to complete six months with a device), the implementation of the bill as written is likely to be bumpy and complicated. It is highly likely that a bill will be needed in 2016 to fix unforeseen consequences of the legislation.

After the bill's effective date (June 24, 2015), installation of ignition interlock devices will be required of all defendants who are convicted of an aggravated first-offense DUI and all second or greater DUIs, in which alcohol is involved. In a DUI that is strictly related to drugs, no ignition interlock will be ordered.

A significant change that will benefit many defendants is that, in most circumstances, ignition interlock licenses (permitting operation of a vehicle with an installed device) will be available immediately after a conviction. A person whose license is suspended because of a DUI on Monday morning could be driving legally on Monday afternoon. The devices would also be available during a suspension related to a refusal.

For persons who cannot or choose not to install an interlock device, SB 133 will significantly lengthen the time they cannot legally drive. The statutory scheme of the ignition interlock requirement is that a person may not operate a vehicle without an installed device for a period of time that is separate from the license suspension period. While the statutory language does not phrase it this way, it could best be understood as if the time periods were sentences. If a person does not install a device, the two time periods run consecutively. If a person installs a device, the periods run concurrently.

Example: A defendant is convicted of DUI, 2nd Offense. His license is suspended for 12 months and he is ordered to have an ignition interlock device for 12 months. If he does not

install a device, he cannot have his license restored for 24 months. If he installs a device immediately and complies with the requirements, he could be restored after 12 months. Once the device is installed, he gets credit towards the device requirement.

The previous example is based on this writer's interpretation of what the sponsor intended, but the statutory language is less than clear that the intention will be the result. For example (and this is only one example), consider the following amendment to KRS 189A.340:

~~(1) In lieu of ordering license plate impoundment under KRS 189A.085 of a person convicted of a second or subsequent violation of KRS 189A.010, the court may order installation of an ignition interlock device as provided in this section as follows:~~

~~(a) Except as provided in **subsection (4) of Section 11 of this Act** [paragraph (d) of this subsection], at the time that the court revokes a person's license under any provision of KRS 189A.070 [other than KRS 189A.070(1)(a)], **for an offense in violation of KRS 189A.010(a),(b),(e), or (f)**, the court shall also order that, at the conclusion of the license revocation, **any license** the person shall be **issued shall restrict the person to** [prohibited from] operating **only** ~~a~~ [any] motor vehicle or motorcycle **equipped with** [without] a functioning ignition interlock device.~~

~~(a) [(b)] **The ignition interlock periods shall be as follows:**~~

1. The first time in a five (5) year period [that a person is penalized under this section], a functioning ignition interlock device shall be installed for a period of six (6) months, **if at the time of offense, any of the aggravating circumstances listed under subsection (1) of KRS 189A.010 were present while the person was operating or in physical control of a motor vehicle.**

KRS 189A.070(1)(a) refers to a suspension for a first offense DUI. By deleting the "other than KRS 189A.070(1)(a)" in the first paragraph, it appears that even first-offense DUI offenders will be limited to ignition interlock devices at the end of their suspension period. While subparagraph 1 limits the application to aggravated DUIs, that paragraph only deals with the duration of the interlock period, not whether a device is ordered.

More unclear, the deletion of the phrase "that a period is penalized under this section" in subparagraph 1 leaves open

the interpretation that the periods are based on the number of times an Ignition Interlock Device is ordered, not the number of DUI convictions a person has. If a defendant is convicted of a third-offense DUI on June 25, 2015, it would appear he could argue that he is subject only to a six-month interlock requirement because it is the first time that an interlock device has been ordered, regardless of the prior convictions. If his third offense is not aggravated, he could argue that the interlock requirement does not apply to him at all.

A concern for public defenders whenever ignition interlock devices are discussed is how they will be made available to indigent defendants if they are ordered. A person seeking to install an ignition interlock device must first pay a fee of up to \$200 to the Department of Transportation. According to testimony at legislative committee meetings, the person must then pay an installation fee of up to \$100 and prepay at least a month's rental fees, which could cost another \$100. Altogether, he or she could have to come up with \$400 just to start the program. This is in addition to the associated costs of having a vehicle of their own in the first place, which many poor people do not have, and of traveling during business hours to an installation location, which could be in another town.

SB 133 does nothing to address the issues of car ownership or travel, but does attempt to address the issue of direct costs by giving courts the ability to waive some or all of the costs, if the defendant is indigent. The Kentucky Supreme Court will develop a sliding scale to assist courts in setting an appropriate reduced amount. If a person ordered to have an ignition interlock device pays the court-ordered reduced fee, the vendor is required to accept it as payment in full.

While this arrangement for indigent defendants will expand access, it is not without foreseeable risks. First, vendors may make a business decision not to operate in a given jurisdiction where defendants are regularly found to be indigent. This will reduce availability for all defendants and lead to pressure on courts not to reduce the fees. Second, if vendors do operate in an area with many indigent defendants, the price of the devices will rise on all other defendants, which could result in more defendants not being able to afford them, creating an unsustainable cycle of higher prices and increased waivers.

Litigation challenges during the first year of the Ignition Interlock requirement are numerous. As mentioned above, the negotiated compromise of the final bill likely has language that, when analyzed by litigators and courts not involved in the legislative process, will be found to be unclear in its meaning. This could lead to varying interpretations around

the state until any ambiguity is corrected by appellate court decision or future legislation.

Even aside from unintended ambiguities, the bill as written raises at least the following questions for litigation:

1. What options do defendants in areas without an Interlock Vendor have? (With an effective date in June, this will likely be over half the state at the start)
2. Successful compliance with the Interlock Program can satisfy a suspension period, but how will unsuccessful attempts be treated? Is one incident of blowing into the device with a BA level of .02 (a legal level, under the law) enough to reset the clock on the suspension period?
3. How will indigency be determined and how will it be treated for renewals of devices after the initial rental? What if an indigent defendant complies with the program, but cannot pay a renewal fee after 30 days? Is that a violation of the program?

“CONNOR’S LAW” SENATE BILL 102

In 2010, two-year old Conner died as a result of injuries caused by abuse. The boyfriend of Conner’s mother was charged with murder, but a jury could not reach a verdict so a mistrial was declared. After the hung jury, the defendant and prosecution agreed to a 10-year sentence on a reduced charge of second-degree manslaughter, which is classified as a non-violent offense. Supporters of Senate Bill 102 argued that this plea agreement was too lenient and that the gap between murder and “non-violent” second-degree manslaughter needed to be bridged.

SB 102 amends the first-degree manslaughter statute (KRS 507.030) to include death caused by abuse: *Through circumstances not otherwise constituting the offense of murder, he or she intentionally abuses another person or knowingly permits another person of whom he or she has actual custody to be abused and thereby causes death to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.*

In practice, the resulting “middle ground” may actually work to reduce as many sentences as it increases. Tragic circumstances like Connor’s often result in murder charges, but juries will now have a specific Class B felony to consider as an alternative to murder. Litigators will have to explain carefully to juries the differences between murder, first-degree manslaughter, and second-degree manslaughter. Likely, many juries will land in the middle when they otherwise may have convicted of murder.

NEW FEES IN CRIMINAL CASES

Two new fees have been added to criminal cases. A \$30 fee will be added to the court costs assessed after convictions for sex crimes or stalking. This fee will provide funding for the Address Confidentiality Program, run by the Secretary of State. In cases where the defendant is indigent, the court may waive all or part of the fee. A separate \$10 fee will be added in all misdemeanor and felony cases to fund the Internet Crimes Against Children Task Force within the Kentucky State Police. This fee does not have language relating to whether it can be waived so it is likely to be treated the same as court costs and other fees. Attorneys for indigent clients should move for waiver.

REMOVAL OF MISTAKE OF AGE DEFENSE IN HUMAN TRAFFICKING

With a clear intent to take all possible actions to eliminate the sex trade for minors, a new provision was added to the Human Trafficking statute to eliminate Mistake of Age as a defense. The new law reads: *In any prosecution [for Human Trafficking or Promoting Human Trafficking] involving commercial sexual activity with a minor, it shall not be a defense that the defendant was unaware of the minor's actual age.* This means that a person charged with those offenses relating to a 17-year-old girl could not argue that he believed she was 18 years old even if every bit of available evidence led him to believe that she was. He will be strictly liable as to the age of the minor.

While this change was intended to address a narrow category of cases (minors being trafficked), one possible collateral effect is that the Class B Felony Human Trafficking statute will now be used in cases beyond trafficking situations. This has happened in the past with the offense of Unlawful Transaction with a Minor, a more serious general crime that is now frequently used to increase the punishment or the leverage against a defendant who would otherwise face only a Class D or Class C felony in Chapter 510. If the Human Trafficking statute is used in this way, it would undermine the efforts to combat the real threat the law is intended to address.

DOMESTIC AND INTERPERSONAL PROTECTIVE ORDERS

One of the highest profile pieces of legislation in 2015 was House Bill 8, which reformed the procedures for obtaining domestic violence orders and expanded protection to dating couples for the first time. While the total scope of the 63-page bill is beyond the purposes of this article, there are some important parts of the bill for criminal law litigators.

To the basic definitions in KRS Chapter 403, "stalking" was added to the list of circumstances or actions that constitute

domestic violence and "grandchild" was added to the list of victims that would be considered a "family member" for purposes of domestic violence.

A potentially significant change was made to KRS 403.725 as to where a petition for an order of protection may be filed. Existing law allowed a petition to be filed in the county of "usual residence" or, if the petitioner has moved to avoid domestic violence, a petition could be filed in the county of the petitioner's current residence. House Bill 8 makes a subtle change to this statute by broadening the language to allow a petition to be filed in "a county where the victim has fled to escape domestic violence and abuse." There is no requirement of a new residence in the county of filing.

While this expanded access to orders will prove beneficial to many legitimate victims who have sought refuge from domestic violence, the broader jurisdiction will also allow for forum shopping in some circumstances. A petitioner seeking an advantage in a marriage dissolution or child custody dispute could "flee" to a nearby county that he or she perceives to be more receptive to their claim. Not only would this lead to the EPO/DVO proceedings being heard in that county, but all future contempt actions could also be heard in that remote county away from the residence of the respondent. Criminal defense attorneys and prosecutors may be litigating contempt cases when all of the actions in question occurred in another county.

In providing protection to dating couples, the General Assembly had to deal with the difficult and thorny question of how to define a dating relationship. The result was the following definition:

"Dating relationship" means a relationship between individuals who have or have had a relationship of a romantic or intimate nature. It does not include a casual acquaintanceship or ordinary fraternization in a business or social context. The following factors may be considered in addition to any other relevant factors in determining whether the relationship is or was of a romantic or intimate nature:

- (a) *Declarations of romantic interest;*
- (b) *The relationship was characterized by the expectation of affection;*
- (c) *Attendance at social outings together as a couple;*
- (d) *The frequency and type of interaction between the persons, including whether the persons have been involved together over time and on a continuous basis during the course of the relationship;*
- (e) *The length and recency of the relationship; and*
- (f) *Other indications of a substantial connection that would lead a reasonable person to understand that a dating relationship existed;*

Whether specific situations meet this definition will be strongly litigated in the years to come. An objective determination of whether the prior standard for an order – marriage, living together, or child in common – was met was usually easy. This new standard may be applied “in the eye of the beholder” until appellate courts have a chance to render decisions outlining the boundaries.

In addition to being more expansive in definition, the new coverage of dating couples is also not limited in coverage based on age. A parent of a teenager could bring a petition on behalf of the minor child. This will result in teenage respondents, perhaps as young as 14 or 15, being haled into court without counsel to answer claims of violence within a dating relationship. The decisions that will be made at those court appearances could result in collateral consequences or future jail sentences that are not understood by the minor respondent.

Similar to the above discussion regarding forum shopping, the availability of Interpersonal Protective Orders (the new name for the orders that apply to dating couples) to teenage victims of violence will provide important protection for some legitimate victims, but the potential for manipulation or abuse of the system is great. What parent would not want to get the local Family Court judge to back him or her up in saying, “Stay away from my daughter!” The District or Family Court could become a regular destination to work out the drama involved in a teenage relationship.

The provisions of House Bill 8 do not take effect until January 1, 2016 to allow for education and preparation. Interpersonal Protective Orders, unlike Domestic Violence Orders, will not implicate the federal firearm prohibition. All rape, sodomy, sexual abuse, or stalking convictions will operate as an application for an Interpersonal Protective Order that may be effective for up to 10 years, with renewals possible. A victim may request that no order be issued.

UNLAWFUL POSSESSION OF DEXTROMETHORPHAN

A new crime was created in KRS Chapter 218A outlawing the possession of 1 gram or more of pure or extracted dextromethorphan. The penalty for a violation will be a \$1,000 fine for the first offense and \$2,500 fine for each subsequent offense. Further, the sale of any products containing dextromethorphan to anyone under 18 years old is prohibited. Fine for merchants who sell to minors and for minors who attempt to purchase products containing dextromethorphan range from \$25 to \$250. No jail time is authorized for any violations of the new offenses.

Dextromethorphan is the “DM” in many commercial cough suppressants, like Robitussin DB and Mucinex DM, and is also in Nyquil and other general cold and cough medicines. In its pure form or when taken in high doses, dextromethorphan can produce a high that includes hallucinations. DM (or DXM) abuse is often called “robo-tripping” and has increased among teens in recent years.

ABUSE OF TEACHER NOW ABUSE OF SCHOOL EMPLOYEE

The criminal statute embedded in KRS Chapter 161 (School Employees) prohibiting Abuse of a Teacher was expanded to include any “classified employee” functioning in his or her capacity as a school employee. While the crime, a Class A misdemeanor, is often referred to as “Abuse”, the definition is very broad to include non-abusive situations: *“direct[ing] speech or conduct toward the teacher, **classified employee**, or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school.”*

This statute has traditionally been used in some jurisdictions as a criminal alternative to filing a status petition for beyond control of school. With Senate Bill 200 changing the landscape of how juveniles are charged, this change may not have the impact that it would have had prior to SB 200. Still, for school systems that charge unruly kids with this crime, the expanded language will likely increase the opportunities to file delinquency petitions against their students.

SALE OF CONTENTS OF UNCLAIMED TOWED VEHICLES

KRS 376.275 was amended to allow a tow lot to sell the contents of an involuntarily towed vehicle in addition to the vehicle itself after 45 days to recoup the costs of towing and storage. Some exceptions were established, including medical prescriptions and supplies, educational materials, firearms, and personal financial instruments and information. Procedures for notifying the vehicle’s owners and lienholders in advance of a sale were clarified.

NEW CRIME OF DIRECTING A LASER AT AN AIRCRAFT

A new section will be added to KRS Chapter 183 (Aviation) making it a crime to *“knowingly direct at an aircraft, any light emitted from a laser device or any other source which is capable of interfering with the vision of a person operating the aircraft.”* Laser is defined as a device *“designed or used to amplify electromagnetic radiation by stimulated emission that emits a beam.”* Exceptions are established for aircraft research and development and Defense or Homeland Security purposes.

The new crime of directing a laser at an aircraft will be a Class A

misdemeanor, unless the violation “causes a significant change of course or a serious disruption to the safe travel of the aircraft that threatens the physical safety of the passengers and crew of the aircraft,” in which case it will be a Class D Felony.

WHEN MOTORCYCLISTS CAN RUN A RED LIGHT

House Bill 370 amended KRS 189.338 relating to Traffic Control Devices to establish an affirmative defense for motorcyclists who run a red light. The elements of the defense are all of the following:

- (a) The motorcycle was brought to a complete stop;
- (b) The traffic control signal continued to show a steady red light for one hundred twenty (120) seconds or the traffic control signal at the intersection has completed two (2) lighting cycles;
- (c) The traffic control signal was apparently malfunctioning or, if programmed or engineered to change to a green light only after detecting the approach of a motor vehicle, the signal apparently failed to detect the arrival of a motorcycle; and
- (d) No motor vehicle or person was approaching on the street or highway to be crossed or entered, or any approaching person or vehicle was so far away from the intersection that it did not constitute an immediate hazard.

This affirmative defense is only available to the charge of running the red light, not to any other civil or criminal action.

A reasonable question might be why this was limited to just motorcycles? Should not the same defense be available to car or truck operators who sit at malfunctioning lights for more than 2 minutes or two cycles?

FEE IN CASES DIVERTED TO COUNTY ATTORNEY TRAFFIC SAFETY PROGRAMS

In 2012, the General Assembly passed HB 480, which authorized county attorneys to operate traffic safety programs and charge fees for participation that would provide supplemental funding for underfunded prosecutors’ offices. While the programs have been a success and are growing (about 30,000 cases in FY14), a collateral consequence has been that agencies that are funded by court costs have lost important revenue as court costs have not been assessed on most cases that are diverted.

Senate Bill 117 was the product of negotiations between those

who receive funding from court costs and county attorneys who want to maintain the success of the diversion programs. In the future, a \$30 fee will be assessed in all cases diverted to traffic safety programs. That fee will be split among the court cost beneficiaries, which include the Spinal Cord and Head Injury Research Trust Fund, the Traumatic Brain Injury Trust Fund, the Department of Public Advocacy, the Crime Victims’ Compensation Fund, the Justice and Public Safety Cabinet, county sheriffs, fiscal courts, and the Cabinet for Health and Family Services.

STUDY OF UNTESTED SEXUAL ASSAULT EXAMINATION KITS

The State Auditor has been directed, by Senate Joint Resolution 20, to study the number of sexual assault examination kits that are in the possession of law enforcement or prosecutors statewide and that have never been submitted to the Kentucky State Police lab for testing. The Auditor is to file a report with LRC by November 1, 2015.

While the resolution simply calls for a report of the number, the goal is to conduct testing on many of the kits with technology that may not have existed at the time the kit was originally obtained. Testing these kits will undoubtedly result in some “cold cases” being revived and criminal cases being filed years or decades after the initial crime. These cases will be challenging for all involved, defense and prosecution.

WHAT DIDN’T PASS

Overall, the number of criminal law bills that passed in 2015 was less than in prior years. All of the following were introduced in 2015, but did not make it to the finish line. These bills are likely to be proposed again in 2016:

- Restoration of Voting Rights to Convicted Felons
- Class D and Non-Violent Felony Expungement
- Criminal GPS Tracking
- Expansion of DUI Look-Back Window to 10 Years
- Mandatory 12-Hour Hold in Domestic Violence Cases
- Death Penalty Reforms
- Penal Code Reforms

DNA Evidence: An Expansion of Kentucky's Open Records Act

By Krista Dolan

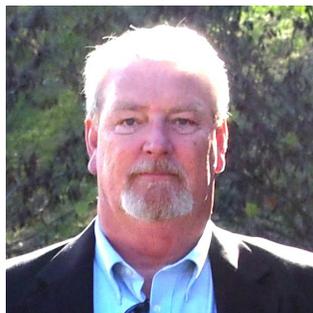
In *Milburn v. Kentucky State Police*, 13-CI-00407, (Franklin Circuit Court, Feb. 18, 2015), the Franklin Circuit Court held that DNA evidence obtained from crime scenes and the lab reports resulting therefrom are not exempt from Kentucky Open Records Act (KORA) requests.



Krista Dolan
Assistant Public Advocate
DPA Post Conviction

On behalf of client Charles Bussell, DPA Investigator Brad Milburn requested a number of items from the Kentucky State Police (KSP) in a KORA Request. KSP denied that request and Milburn appealed to the Kentucky Attorney General. Following a denial by the Attorney General, Milburn appealed to the Franklin Circuit Court.

At issue in the circuit appeal was Milburn's request for "any reports completed in connection with the case, including lab files, reports, bench notes, photos/diagrams, and data," and "[a]ll correspondence, including emails and chain of custody documents," which included police investigative files. KSP maintained that KRS 61.878(1)(h) and 17.175(4) exempted these items from disclosure. Judge Phillip Shepherd ordered additional briefing on the statutory interpretation of the two invoked exemptions.



Brad Milburn
Investigator,
DPA Post Conviction

While the case was pending, the Kentucky Supreme Court issued a unanimous decision in *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), holding that *Skaggs v. Redford*, 844 S.W.2d 389 (Ky. 1992), does not apply to police investigative files. Thus, police records are subject to disclosure under the open records act unless law enforcement agencies make a

significant showing of harm from disclosure of the records. *Skaggs*, a case relied upon by KSP here, held that the files of the Commonwealth Attorney are exempt until the defendant has served his sentence. Since *Skaggs* was decided in 1992, law enforcement agencies have interpreted the case to apply to all law enforcement records. In *Ft. Thomas*, the Kentucky Supreme Court expressly overruled *Skaggs* to the extent that it is understood to apply to anything other than prosecutorial files. *Ft. Thomas*, 406 S.W.3d at 853.

As *Ft. Thomas* largely resolved the interpretation of KRS 61.878(1)(h), at issue in the present case was the interpreta-

tion of KRS 17.175, which exempts "DNA identification records produced from the samples are not public records but shall be confidential and used only for law enforcement purposes. DNA identification records shall be exempt from the provisions of KRS 61.870 to 61.884." Plaintiff argued, and the circuit court agreed, that KRS 17.175(4) was inapplicable to the requested records. In an Opinion and Order entered on February 18, 2015, the Franklin Circuit Court held:

The KSP's interpretation of KRS 17.175(4) misconstrues both the language and the intent of the statute. Based on a plain reading of the statute, it is clear that the exemption only applies to DNA sample from a person that is required to provide a DNA sample (KRS 17.169- Definitions for KRS 17.169, 17.170 & 17.175). The exception does not cover DNA obtained from a crime scene, nor does it cover records such as the ones at issue in this case, which were produced from DNA evidence obtained from the crime scene.

As a result, if there are problems receiving the underlying data and bench notes from lab reports in discovery, the information should be attainable through an open records request.

OPEN RECORDS BASIC

- 1. Records Requests** - Records requests are made pursuant to Chapter 61 of the Kentucky Revised Statutes. Chapter 61 permits anyone to request the records of public agencies, defined in KRS 61.870(1), subject to the limitations in KRS 61.878. Items considered to be public records are defined in KRS 61.870(2). To ensure compliance, it is important to be as specific as possible in requests so that an agency does not use a loophole to circumvent compliance. For example, if you want proficiency test results for a lab technician, make sure you have the names of the lab technician. If you want items such as Coverdell Investigation Documents for a lab, make sure to specify the year.
- 2. Responses to Requests** - Agencies have three days to respond to an Open Records request, calculated from receipt of the request. KRS 61.872(5); KRS 61.880(1). If not in possession of a record, an agency must specifically say so in its response. OAG 90-26, p.4. "It is incumbent on the agency to so state in clear and direct terms," and "a written response that does not clearly so state is deficient." O2-ORD-144, p. 3. Exemptions are set forth in KRS 61.878(1). If an agency is denying any portion of the request "shall include a statement of the

specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1).

- 3. Administrative Appeal** - A requestor can appeal an agency’s decision to the Attorney General. KRS 61.880(2)(a). A copy of both the request and the denial must be enclosed with the appeal. *Id.* If the agency simply refuses to respond, a copy of the request alone is sufficient. *Id.* The appeal should be addressed to the Attorney General, with a copy going to the records custodian. Once the Attorney General has a response from the records custodian, he must issue an opinion within 20 days. *Id.* The Attorney General may extend the time limit, not to exceed 30 days, by sending written notice to the parties explaining the reasons for the extension. A requestor

can bypass the administrative appeal and proceed to circuit court. KRS 61.882(2).

- 4. Court Appeal** - A party has 30 days to appeal the decision of the Attorney General. KRS 61.880(5). An appeal of an open records decision is brought in circuit court as a civil case. KRS 61.882. The plaintiff is the requestor (if an attorney, it would generally be the investigator or paralegal). The defendant is the agency. The action is brought in the circuit of the county where the agency has its principal place of business, or in the county where the record is maintained. KRS 61.882(1). The burden of proof is on the agency. KRS 61.882(3). The parties to be served include: the records custodian and the attorney for the agency. The Attorney General also must be served, but is *not* a party to the action. KRS 61.880(3).

Two New *Batson* Cases!

Just in time for the upcoming thirty year anniversary of *Batson v. Kentucky*, 476 U.S. 79 (1986) – the landmark case[1] which held that the prosecutorial practice of exercising peremptory challenges with a discriminatory intent violated the equal protection clause of the United States Constitution – the Kentucky Supreme Court has issued two new opinions reversing convictions for *Batson* violations.

Gender Discrimination

In *Ross v. Commonwealth*, 455 S.W.3d 899, WL 737573 (Ky. 2015), the Supreme Court reversed a murder and first-degree arson conviction where the prosecutor used peremptory strikes to exclude two women from the jury solely on the basis of their gender. The defense attorney had raised a *Batson* challenge when two jurors, an African American male and an African American female, were struck by the Commonwealth. The prosecutor justified his striking of the male by explaining that the Commonwealth had prosecuted the potential juror’s brother in the past, and that there was another case, then pending, against the brother in which the juror was a victim and potential witness. As for justification for striking the female juror, the prosecutor stated “[i]n all honesty, I was striking women.” The female was then returned to venire. Defense counsel then made another *Batson* motion, but this time challenging the Commonwealth’s use of peremptory challenges to women.

In reversing the case, the court held:

The first step under the *Batson* analysis requires the party invoking *Batson* to make a prima facie showing that the peremptory challenges at issue were exercised on a discriminatory basis. This does not require the movant to prove discrimination by a preponderance or more-likely-than-not standard. “Instead, a defendant satisfies the re-

quirements of *Batson*’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.”

Here, *Ross*’s prima facie showing of gender discrimination was presented to him on a silver platter by the Commonwealth. The Commonwealth’s candid admission that it was striking female jurors is sufficient to satisfy *Batson*’s first step. This admission notwithstanding, the Commonwealth made statements during voir dire, which—when viewed in light of its disproportionate use of peremptory challenges against women—is sufficient to allow an inference of gender discrimination.... *Id.* at 906-07.

This marks the first time in Kentucky that the Supreme Court has recognized *Batson* challenges for considerations other than race. Thus, to gain future benefit from *Ross*, defense attorneys should maintain a watchful eye for more subtle indications of gender discrimination.

Failure to Give a “Race-Neutral” Reason for Striking a Juror

In *Johnson v. Commonwealth*, 450 S.W.3d 696 (Ky. 2014), the Supreme Court gave an example of a “race-neutral” reason for striking an African American juror which did not pass the test. The defense attorney met the burden of going forward with a prima facie case. The defendant was African American and the struck juror was African American. Nothing more was required. The “race neutral” reasons for striking were:

- (1) Age—“well I just felt that based upon her age ... I felt more of the age than anything”;
- (2) Personal Knowledge—“based upon kind of my knowledge of her ... just based upon her friends and associates and things like that I know of ...

based upon my knowledge of her friends, friends and associates years ago”; and (3) Instinct or Gut Feeling—“I just don’t think she would be a good juror ... I just think it’s too much of a wildcard.”

In deciding age could be a race-neutral factor, the Court held:

Age may be a proper race-neutral reason to exercise a peremptory strike against a protected class. **Burkett v. State, 230 Ga.App. 676, 497 S.E.2d 807, 809 (1998)** (“[E]mployment, as well as age, are race-neutral explanations”). However, inherent in the notion that age may be an appropriate race-neutral reason for exercising a peremptory challenge against a member of a protected class, is that something more than the simple word itself, “age,” is required to convert an excuse into a reason. While the distinction may be subtle, excuses are not equal to reasons, and here, all the Commonwealth offered as a race-neutral reason was the word, “age.” What was it about the “age” of Juror Fourteen that concerned the prosecutor? No clue was provided to indicate how old she was and how her age was influencing the prosecutor’s preference to have her removed from the jury. Was she too old or too young? Were other jurors of her age stricken?

In a footnote, the Court also said that “there certainly may be legitimate reasons that a party may seek jurors outside of

this age range; for example in a civil case the plaintiff may be concerned that older jurors, reared in leaner times, are more averse to large verdicts; similarly in a criminal case where the victim is elderly, the Commonwealth may legitimately prefer an older jury more attuned to vulnerability that comes with age. Those situations, however, are easily distinguishable from the situation we address.”

However, as for the other cited race neutral reasons – personal knowledge and “gut feeling” – the Court had this to say:

Whatever the prosecutor knew about Juror Fourteen (and her friends and associates) that may have provided a race-neutral rationale for excluding her from the jury, remained known only to him. He never “articulate[d] the reason to the trial court[.]” He failed to give a single, specific example of how his knowledge of the juror translated into a reason other than race to disfavor her participation as a juror.... [and]

Least impressive among the prosecutor’s explanations for striking Juror Fourteen is his instinct, or gut feeling, which he expressed by saying, “I just don’t think she would be a good juror.... I just think it’s too much of a wildcard.” Those statements, true as they may be, suffer from the same deficiency as his other efforts to circumvent the *Batson* challenge. The proffered statements are really no reason or explanation at all.

**The Next Step:
Six Common Sense Proposals to Save Money
While Holding Offenders Accountable and Protecting the Public
Summary of Legislation Introduced by Rep. Brent Yonts**

Reduce low level non-violent misdemeanors to pre-payable violations

- Reduction of minor non-violent offenses would save:
 - ▶ County jail expenses by eliminating incarceration;
 - ▶ County and State prosecution expenses by removing cases from court;
 - ▶ State judicial branch expenses by reducing court dockets; and
 - ▶ State public defender expenses, by eliminating the right to appointed counsel for these offenses.



Representative Brent Yonts
D - Greenville

- Offenders would still be held accountable with fines and convictions.
- Offenses include Possession of Marijuana, Possession of Drugs in Improper Container, Possession of Drug Paraphernalia, Criminal Trespass in the Second and Third Degrees, Criminal Littering, Unlawful Assembly, and Disorderly Conduct in the Second Degree.
- Filed in 2015 as House Bill 305

Create a Gross Misdemeanor classification for some serious non-violent offenses

- Gross Misdemeanors would carry sentences up to 24 months with presumptive probation. Sentences, if served, would for all purposes be treated as state sentences.
- Offenders would be held accountable through penalties, supervision, and conviction, but would not face the

lifelong consequences of a felony conviction.

- Flagrant Non-support would be deemed a Gross misdemeanor. Delinquent parents could work on probation to support children without the employment limitations of being a convicted felon.
- Gross Misdemeanors would save State Correctional costs by reducing some Class D sentences and presumptively requiring probation instead of incarceration.
- Filed in 2015 as House Bill 286

Require parole for eligible non-violent Class D offenders

- After serving prison time to reach their eligibility date, parole would be granted without a hearing to all Class D inmates unless they are:
 - A violent offender,
 - A sex offender, or
 - Found to have committed a violent disciplinary violation while incarcerated.
- Mandatory parole would save the State Correctional costs currently being spent on non-violent offenders who are denied parole by the Parole Board.
- Filed in 2015 as House Bill 285

Create a mechanism for early release of non-violent misdemeanants

- Good behavior, educational, and service credits now available only to felons would be extended to jail inmates.
- Conditional discharge of the remaining sentence of some non-violent misdemeanants would be required after service of 30 to 60 days.
- Conditional release of non-violent misdemeanants would save county jail expenses.
- Filed in 2015 as House Bill 285

Adjust pretrial release standard to ensure House Bill 463 requirement for release of low-risk defendants is consistently applied

- HB 463 required pretrial release without bond for low and moderate risk defendants unless specific conditions are present (risk of flight or danger to others). In some courts, the exceptions have become more common than the rule;
- A court decision denying pretrial release to a low-risk defendant would have to be supported by clear and convincing evidence that the defendant is a risk of flight or a danger to others. Appellate review would result in consistent practices statewide;
- Consistent pretrial release, as intended by HB 463, would save county expenses currently being spent housing low-risk defendants who are not a danger to the public.

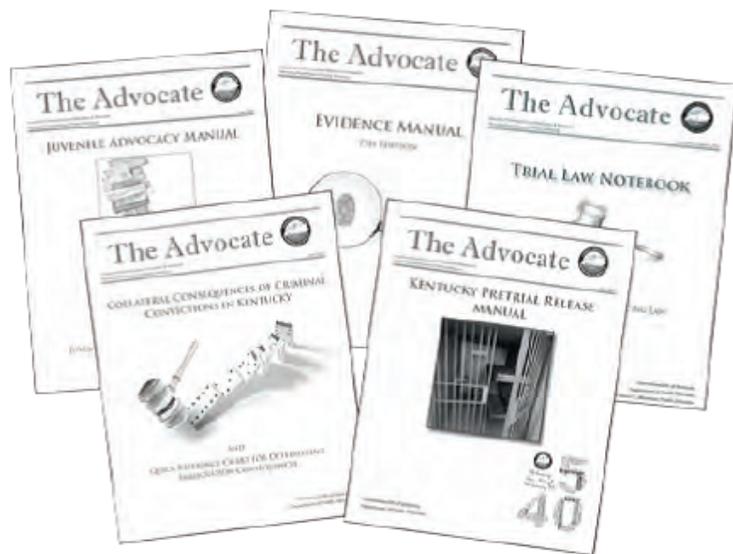
- Filed in 2015 as House Bill 284

Modify the persistent felony offender statute to reserve the highest sentences for violent offenders and career criminals

- PFO sentencing would be available if the offender:
 - Has twice previously been convicted of felony offenses or has a prior conviction for a crime against a minor (same as current requirements for PFO, 1st Degree); and
 - Is convicted of a violent offense.
- The jury, considering the facts of an individual case and defendant, could elect not to use PFO to raise the defendant’s sentence.
- Prior felonies would be limited to those for which a sentence was completed within the past 15 years.
- Filed in 2015 as House Bill 304

In FY14, the Commonwealth spent \$65,388,822 to incarcerate 2,967 individuals serving PFO-enhanced sentences for non-violent offenses. The average sentence of these individuals is more than 20 years. By the end of their sentence, the total cost will be more than \$1.3 billion to house these non-violent offenders.

THE DPA COURTROOM MANUAL SERIES



The Trial Law Notebook covers Kentucky trial law and sentencing law. The 4th edition was published June, 2014. The Evidence Manual includes the text of every Kentucky rule of evidence accompanied by relevant discussion points and caselaw. The 7th edition was published June, 2013. The Collateral Consequences Manual covers some of the basic questions to ask clients regarding possible collateral consequences. The Kentucky Pretrial Release Manual contains form motions, briefs, and writs relating to bail issues at all levels. The Juvenile Advocacy Manual serves as an overview of the most relevant law in the various areas of juvenile practice and procedure.

Manuals available online at dpa.ky.gov

Kentucky's Public Advocate and Louisville Metro's Chief Public Defender Join National Organization's Call for an End to Courts' Predatory Collection Practices

On May 13, 2015, the National Association for Public Defense (NAPD) issued a "Policy Statement on the Predatory Collection of Costs, Fines, and Fees in America's Criminal Courts," calling for an end to the assessment of excessive fines and fees to fund government operations. NAPD called upon the judiciary to embrace their responsibility to protect the poor from being jailed when they have an inability to pay the overwhelming and continuously expanding fines and fees and oppressive monetary bonds routinely set in criminal cases.

The NAPD Statement stressed the need to end the current criminal justice monetary policy, which involves the collection of costs, fines, and fees in criminal courts across the United States that are predatory in nature and an economic failure. These predatory practices impact poor people in catastrophic and life-altering ways, and they are disproportionately levied against people of color.

In Ferguson MO, **Thomas Harvey**, Executive Director of the ArchCity Defenders and an NAPD member, referenced the distrust that develops when a community has the impression that police and courts in the region "engage in low level harassment that isn't about public safety but instead about money and race. At the time of Mike Brown's killing, there were over 600,000 warrants for arrest in the St. Louis region, which has roughly 1.2 million people. Most of these warrants are from unpaid fines for non-violent poverty offenses. These warrants, and jailings on the failure to pay fines, act as a barrier to employment and housing. What we are seeing is the connection between the cycle of poverty and the justice system in America."



Ed Monahan
Public Advocate
Department of Public Advocacy

Joining in the statement, **Janene McCabe**, a public defender in Colorado and a member of NAPD stated, "Colorado struggles with the same problem, where municipal courts jail citizens when they do not pay their court ordered fees and fines. The cost to the taxpayers is great and the loss of liberty to citizens means the loss of jobs, housing, and stability. The legislature recognized the courts were spending far more time and money incarcerating people for unpaid fees than they would have collected and acted to change the law. Despite the change, requiring ability to pay hearings, the problem persists in some courts today."

Calling for change now, **Tim Young**, Ohio Public Defender and Chair of NAPD said, "We depend on courts to be justice courts, not revenue courts. The presumption of innocence pretrial should not be reserved for people with money while the poor stay in jail, disproportionately impacting people of color; especially when there is no evidence that money bail has any correlation with the risk of reoffending or showing up in court. A fair and balanced system of pretrial release ought to be based on public safety, not on the person's status as rich or poor. In Ohio and everywhere, jails are extremely expensive and should be used only to protect public safety, not to extort money from society's most vulnerable."

The NAPD Statement calls for an elimination of monetary bond. The Supreme Court has ruled, incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment.¹ It wholly fails to consider the ability of the defendant to pay fines and undermines the constitutional protections against incarceration for costs and fees which are a civil debt. It is a system that favors the wealthy who can make bail over the poor person who cannot."



Daniel T. Goyette
Chief Public Defender
Louisville Metro Public
Defender's Office

Daniel T. Goyette, Chief Public Defender in Louisville and Jefferson County, said "While our state has been characterized as a 'front-runner' in progressive bail policy, having abolished bail bondsmen nearly 40 years ago and replaced them with a statewide

¹ See *Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

pretrial services system, our jails are still over-populated by poor people of color, and the reasons have more to do with their socio-economic status than with public safety. That is a continuing concern in Louisville and elsewhere, one which has been exacerbated here by the recent suspension of the 24-hour judicial review process in Jefferson District Court.”

On the other hand, Goyette noted that Louisville Metro Corrections has implemented several innovative programs and taken a number of steps designed to reduce overall jail population. Additionally, as examples of what he termed “a more enlightened approach to corrections in Jefferson County,” he pointed to a recent decision by the Metro Corrections Director not to take people into custody over failure to pay fees, nor to hire a collection agency to recover them. “It makes no sense to incarcerate someone at a cost of \$65 per day in order to recoup a lesser amount, particularly when there is no reasonable expectation that the person can afford to pay it in the first place,” Goyette said. “Fortunately, leadership in our jurisdiction recognizes the folly in that.”

Unfortunately, the leadership in other parts of the state often does not necessarily share that recognition or follow the logic of that approach. **Ed Monahan**, Kentucky Public Advocate, said “the judicial practices on fines and fees and pretrial release across our state are all over the place. Many judges routinely waive fines and costs for indigents and do not impose monetary bail. However, there are other judges, too many, who not only refuse to waive fines and costs, but impose money bail that poor people cannot pay. Fines should never be assessed against an indigent. Costs should not be assessed absent an ability to pay, and no poor person can be constitutionally jailed if unable to pay. A \$200 cash bond is an unattainable amount of money for a poor person. Stuck in jail, too many lose their jobs, see their families go hungry, watch spouses leave them, or lose the homes in which they live. Meanwhile, a similarly charged but financially well-off person suffers none of these consequences. A fair and balanced system of pretrial release ought to be color-blind, especially when that color is green.”

Troubling practices in Kentucky include:

- A poor elderly man whose assault 4th was diverted but whose court costs were not waived by the court, and so he was left to ask churches for help in putting food on his table;
- A DUI defendant unable to pay \$1,008 costs and fees, and was required to serve 20 days in jail in lieu of paying;
- Defendants not released from jail until payment of a \$40 arrest fee assessed by the Sheriff;
- Poor people given “pay or stay” warrants and then jailed for failure to pay a \$500 fine;
- Defendants who fail to ask for more time to pay fines/fees and are jailed for 180 days or until the money is paid;
- Defendants who are unable to pay for their \$35/day home-incarceration bracelets, and are returned to jail;
- Defendants revoked because they are unable to get transportation to their drug tests or are unable to pay for them;
- Diversion programs which carry fees of \$400;
- Courts refusing to waive costs for clients with long prison sentences;
- Courts setting cash bonds so high that defendants can never post them (often with the *intention* of ensuring continued incarceration) and then continuing their arraignment for days until the defendant is willing to plead to anything, often foregoing legitimate defenses in order to get out of jail.

Criminal justice costs – including resources required to fund court operations, prisons, prosecutor offices and the right to counsel – are an essential government obligation. Assessing exorbitant fines and fees to people whose contact with the criminal justice system might be as minor as a parking ticket without consideration of the ability to pay is predatory and unconscionable. Further, threatening their liberty for failure to pay is illegal, yet it is an endemic practice in courts across the country. We join with NAPD in calling for an immediate end to these practices in Kentucky and in other states.



Department of Public Advocacy

200 Fair Oaks Lane, Suite 500 • Frankfort, Kentucky 40601 • 502-564-8006, Fax: 502-564-7890

The Advocate



Sign up for **The Advocate** online for more useful information including:

- Legislative news and updates
- Summaries of Supreme Court and Court of Appeals criminal opinions
 - And much more!

Please sign up for **email, Twitter or Facebook** updates by going to:

www.dpa.ky.gov

IN THIS MONTH'S ADVOCATE

SUMMARY OF 2015 HEROIN BILL

SUMMARY OF 2015 CRIMINAL LAW LEGISLATION

DNA EVIDENCE: AN EXPANSION OF KENTUCKY OPEN RECORDS ACT

TWO NEW BATSON CASES!

THE NEXT STEP: SIX COMMON SENSE PROPOSALS TO SAVE WHILE HOLDING OFFENDERS ACCOUNTABLE AND PROTECTING THE PUBLIC

CALL TO END PREDATORY COLLECTION PRACTICES