A Bi-Monthly Publication of the Department of Public Advocacy Volume 11 Number 3

THE ADVOCATE

Advocacy Rooted in Justice April, 1989

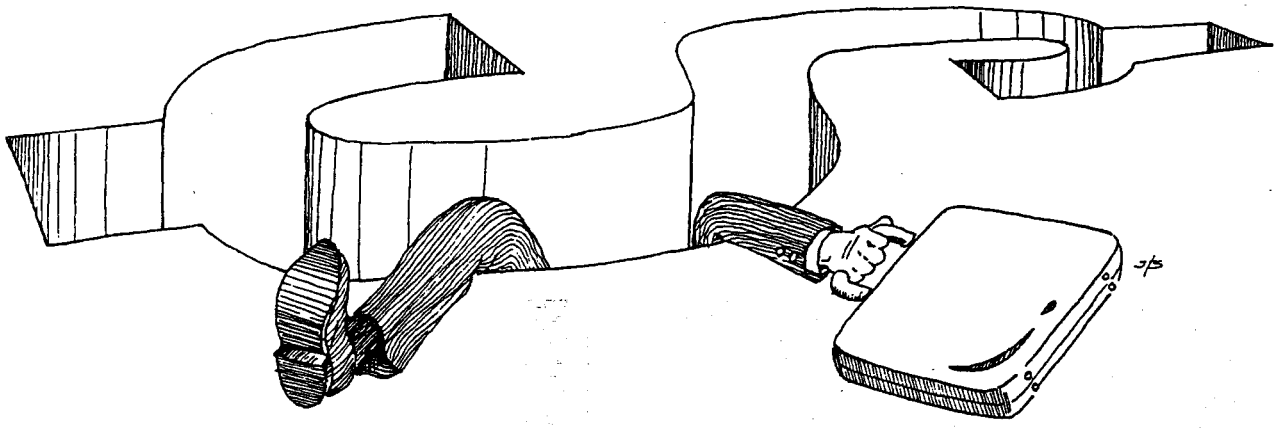

Illustration by James T. Snyder

Public Defenders Work for Minimum Wage in Northern Kentucky

Why Are We Addicted to Ineffective Prison Sentences?
Can We Prosecute Our Way Out of the Drug Problem?
The Kentucky Crime Commission
The Kentucky Association of Criminal Defense Lawyers
17th Annual Public Defender Training Seminar

FROM THE EDITOR:

We begin two important series this issue: a look at Kentucky public defender systems, and interviews with capital trial defense attorneys. The money available for contract public defender programs and the salary levels of full-time Kentucky public defenders lags significantly behind national levels. The toll that capital cases takes on criminal defense attorneys is hard to imagine. We begin a discussion of that unique burden.

We also feature information on the revived Kentucky Crime Commission; Kentucky Association of Criminal Defense Lawyers; the need to step back and reflect on the best way to confront our drug problem, and our self-destructive reliance on prisons.

The Advocate

The Advocate is a bi-monthly publication of the Department of Public Advocacy, an agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects treated in it.

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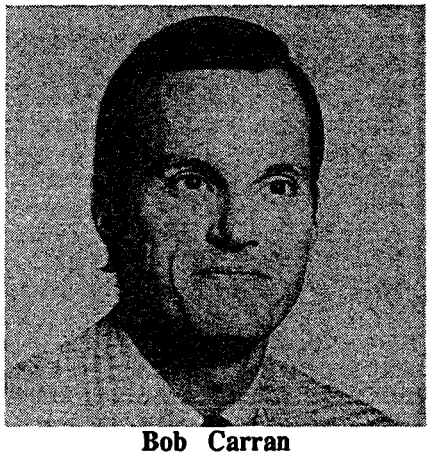
IN THIS ISSUE

THE ADVOCATE FEATURES

Kenton, Gallatin, Boone Public Defender System

Since 1979 each issue of *The Advocate* has featured a criminal defense advocate in Kentucky that we all could look to with admiration, and as an example of a vigorous protector of individual liberties. This issue we begin a 4 part series featuring 4 public defender systems in the state, rather than an individual, in the hope that we can better understand the challenges and difficulties our public defender systems in Kentucky face. We begin with a written interview with Bob Carran, Administrator of Kenton, Gallatin, and Boone County public defender system.



Bob Carran
Public Defender Administrator

How many attorneys are in your Kenton, Gallatin, Boone County system?

Gallatin	1 attorney
Boone	1 attorney
Kenton	26 attorneys

This is the number of attorneys who are presently taking cases on a regular basis. There are another 8-10 attorneys who sometimes will take a case. Five years ago, we had approximately 60 attorneys.

What was your system's caseload for fiscal year 1988 (July 1, 1987 through June 30, 1988)?

In FY '88 we handled a total of 3,395 public defender cases in the 3 counties broken down as follows:

Felony	592
Misdemeanor	860
Involuntary Commitment	120
Juvenile	1820
Other	3
Total	3,395

How many cases did your system's attorneys try during 1988?

Circuit Court Trials	12
District Court Trials	108

How many homicide cases did your system handle in 1988?

We handled 16 homicides. Three of them were capital. Two went to the penalty phase. Our attorneys are currently handling 5 homicides and 1 capital case.

How many indigent felonies/misdemeanors does an attorney in your system on average handle per year?

On average, 120 per attorney per year.

How much are your system's attorneys paid for public defender cases?

We authorize $15.00 per hour out-of-court and $25.00 per hour in-court, however, due to inadequate funding, we routinely prorate down to 75% of the amount billed, or down to $11.25 per hour out-of-court and $18.75 per hour in-court. In the past, we have had to prorate as low as 50% of the amount billed.

Do you feel that all of your clients are fully and fairly represented under the circumstances?

Not every time. I am convinced that, human nature being as it is, an attorney cannot always devote his best effort when the rate of pay is less than minimum wage. If I prorate fees, and a deduction is then made for fixed overhead of $10 to $12 per hour, our roster attorneys are working for minimum wage, or less. I also believe a system which requires Fiscal Courts to pay additional costs puts us in a position where we must seek these funds from a public entity represented by a county attorney - the same attorney who opposes us in the great majority of our cases. This is a totally conflicting and frustrating arrangement.

What was the biggest success of your system in the last year?

A jury verdict of not guilty by reason of insanity.

What are the biggest problems your system faces?

A loss of attorneys due to inadequate funding and an inability to provide well trained, experienced attorneys in a capital case.

How do your resources compare to the Commonwealth's resources?

We have no comparable investigative ability, and we must beg and plead for expert witness fees.

Outrageous Inconsistency

Through December 31, 1988, the University of Kentucky spent $274,681.80 on legal expenses for its internal basketball probe. Due to the importance of the matters involved, the University has hired one of Kentucky's leading attorneys at considerable expense. The University's attorney, James Park, Jr., charged $158 per hour.

What does that expenditure of money say when the State of Kentucky spent only 55% of that amount on the representation of 3395 indigent citizens accused of crimes in Kenton, Boone and Gallatin Counties during the entire FY 88?

How much more money do you need to do the job adequately?

I believe a properly funded system should pay $40.00 per hour out-of-court and $60.00 per hour in-court. Therefore, our system needs approximately 3 times its present funding of $34,664.00 per quarter.

What 3 substantive criminal legislative changes would you like to see made in the 1990 Legislature?

A) Funding of a Capital Penalty Task Force to handle all capital cases in the Commonwealth.

B) Remove the funding burden from the Fiscal Courts and place it completely on the state.

C) A clear statement that attorney fee caps are not allowed in public defender cases and that judges may not be involved in the appointment or fee setting process.

Any other thoughts you have?

Our overall average per case fee is $45.25. That is just not a fair overall average fee. It is one of the lowest in the country. Kentucky does not have an adequate amount of money allocated for public defender cases. The funding from the state just has to increase.

BOB CARRAN
Kenton,Gallatin,Boone
Public Defender Administrator
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(606) 581-3346

Bob Carran practices law in Covington, Kentucky. He has been the Kenton County Public Defender Administrator since 1973, and he has been the administrator of the Kenton, Gallatin, Boone public defender system since 1983.

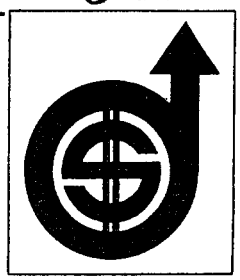
DPA Attorney Vacancies

There are currently 10 attorney vacancies in DPA field offices. The vacancies are in Hazard, Stanton, London, LaGrange, Morehead, Frankfort and Paducah.

Attorneys Leave DPA

Since August 1, 1988, 13 attorneys have left DPA. They had a total of 74 years of service and experience with DPA.

EQUAL JUSTICE?



Underfunded System

Every person knowlegeable about Kentucky's criminal justice system is aware that Kentucky's public defender system is underfunded. The money allocated to the defense of indigents determines the degree of their defense. Our public defender program cannot fully provide the required defense for indigent Kentucky citizens accused of crime due to underfunding.

According to a September, 1988 United States Department of Justice Statistics Report, Kentucky had the 4th greatest increase in public defender cases between 1982 and 1986 of all the states in the country.

According to that Report, Kentucky ranks 47th in average money allocated for a public defender case at $118 per case. The average amount of money allocated for each case in Kenton, Boone and Gallatin counties is $45.25, an incredibly inadequate amount.

Inequitable Distribution of Resources

Even more discouraging is the imbalance of resources between the prosecution and defense in this state.

The resources available to the prosecution and defense in Kenton, Gallatin, and Boone counties is a good example of this inequity. The prosecution in those 3 counties has at its disposal over $400,000. Public defenders have but $153,656. In these 3 counties the prosecution has over 2 and 1/2 times the resources available to the public defender system.

This inequity is even more difficult to understand and accept when the University of Kentucky is paying an attorney $158 per hour in its internal basketball probe. UK's interests are important, but they pale in comparison to the importance of a citizen's threatened loss of life and liberty in a criminal case. Public defenders in Kenton, Boone and Gallatin Counties are being paid $11.25 per hour for out of court work and $18.75 per hour for in court work. After they pay their overhead, the public defenders are working for minimum wage or less.

Unconstitutional Funding

Kentucky ranks at the bottom nationally in its commitment of money to the defense of indigent citizens accused of crime. Kentucky's system is providing an unconstitutional system of public defender funding in many of its counties. See *Smith v. State*, 681 P.2d 1374 (Ariz. 1984).

RESOURCES IN KENTON, GALLATIN, BOONE COUNTIES

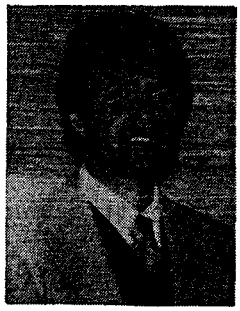
PROSECUTION	$402,971
DEFENSE	$153,656

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

Justice Hugo Black
Griffin v. Illinois, 351 U.S. 12, 19 (1956).

CAPITAL TRIAL DEFENSE

Written Interview with Will Zevely



Will Zevely

You are a prominent Kentucky criminal defense attorney who has defended capital clients. How were you and are you affected by your client being sentenced to death?

When I began doing capital cases, although I realized my clients could be sentenced to death, I really didn't think it would happen. The responsibility is awesome. A death verdict is something that I live with and think about almost every day. There is really no escape from it.

Often victims of serious crimes, especially the family of victims of capital murder, have harsh feelings toward defense lawyers who fight hard for their capital client. What are your reflections about that experience?

Threats on your life from family members are common. During one trial, the victim's father made a comment, which was overheard, to the effect that he had a pistol and would kill me and my client, and would do it before anyone could kill or stop him. I am concerned about security. I am careful where I go, and the surroundings I am in. It makes the job that much more difficult.

What are the hardest aspects of defending capital clients?

I do not know of any easy aspect of defending a capital client. Every decision that is made is a major decision. Even small decisions are major decisions which require too much thought.

Why have you been willing to take on the immense responsibility of defending a capital client?

The older I become, and the more of these cases that I become involved in, the more likely I am to not become involved in others. The majority of the work that I have done on capital cases involved the public defender program. I felt that I had an obligation to the program and to the profession to accept the responsibility.

Having gone through the extraordinary process of a capital trial, do you feel the death penalty serves a useful purpose in our criminal justice system?

I honestly do not know the answer to this question. I feel that becoming emotionally involved in the rightness or wrongness of the death penalty, has a negative affect on my ability to make objective decisions in a capital case.

What kind of money and other resources does it take to fully defend a capital client in Kentucky?

I do not know that you could put a dollar amount on capital cases in general. Each case must be judged on the particular facts. To become privately involved in a true capital case, from my standpoint, would indeed take a great deal of money. This does not include obvious things such as psychologists, psychiatrists, investigators and the likes. The support effort could easily be in the range of $10,000.

The Department of Public Advocacy has been able to pay attorneys handling capital cases only $2,500, the lowest attorney fee in the nation for a capital defense. Is that enough for an appointed lawyer in Kentucky to do an adequate job?

$2,500.00 is a joke! I was involved in a capital case of great magnitude about ten years ago. I tried to calculate, roughly, how much this case cost me in lost time and clients. My figure was somewhere around $20,000.00.

Seven of Kentucky's death row inmates had criminal defense lawyers represent them who are now in prison, disbarred, or disciplined by the Bar, or left the profession before being disbarred. Can the ultimate decision survive that kind of representation?

The defense of these cases requires the absolute best lawyers. You certainly are not going to get these lawyers for $2,500.00. Unfortunately, most death cases involve indigent defendants and, hence, they are represented by the public defender's office. The office is obviously underfunded. The interesting thing is, for appellate purposes, the Commonwealth has just as much of an interest in having competent defense lawyers defending these cases as the defense bar does.

Do you think capital punishment for drug dealers will have any influence on the drug problem in Kentucky?

No. There is obviously tremendous financial gain involved in illegal drugs. I don't think the death penalty is a deterrent at all.

WILL ZEVELY
Busald, Funk & Zevely
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Will Zevely is a 1968 graduate of the University of Cincinnati and a 1972 graduate of Chase Law School. He is a member of the Northern Kentucky Bar Association, the American Trial Lawyers Association and the American Bar Association. He is a board member of the Kentucky Association of criminal defense attorneys. He served as the Boone and Gallatin public defender administrator from 1972-1983. He has represented 10-15 capital clients, including Gene Gall who was sentenced to death in 1978.

IN MEMORIAM

We were saddened to learn of the sudden death, on February 27,1989, of Craig Barnard, known nationally for his tireless defense of inmates on Florida's death row. He successfully argued *Hitchcock v. Dugger* in the U.S. Supreme Court in 1967. Scores of condemned inmates in Florida received new sentencing hearings as a result of this unanimous decision. Along with Vince Aprile, Craig was co-chair of the NLADA Death Penalty Litigation Section.

AVERAGE ATTORNEY MAKES $76,930

Attorney Salaries

Attorneys working in business/industry/not-for-profit organizations have a mean annual income of $76,930. However, 10% have an income of $127,630 or more...with the highest incomes being well over $500,000. At the other end of the spectrum, 10% have an annual income of $35,682 or less. These are some of the findings of a recent survey of 235 organizations conducted by Dr. Steven Langer. Copies of the complete, 3-volume, 1,362-page survey report, entitled **Compensation in Legal & Related Jobs** (non-law firms) are available for $425 from Abbott, Langer & Associates, 548 First St., Crete, IL 60417. Each volume (supervisory & managerial attorneys; non-supervisory attorneys; and legal administrators, paralegal assistants, and legal secretaries) sells for $175.

In aggregate, the cities/states with the highest median incomes were:

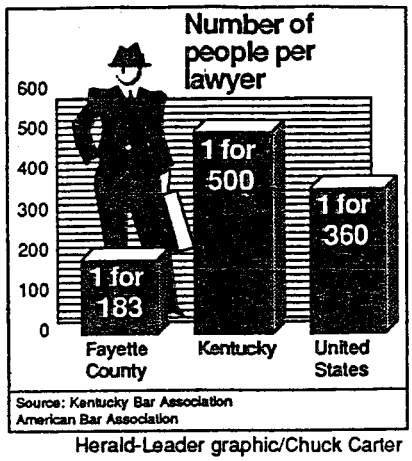
Idaho	($98,281)
Miami	($93,508)
Atlanta	($91,914)
Connecticut	($89,220)
Chicago	($82,885)
Denver/Colo. Spr.	($82,400)
New York	($81,250)
Cleveland	($81,200)
San Fran./Oakland	($81,000)

The lowest were:

North Dakota	($36,420)
Iowa	($40,000)
Kansas	($41,330)
Ft. Lauderdale	($43,451)
Portland, OR	($46,400)
Sacramento	($49,144)
Missouri	($49,250)
Pennsylvania	($49,741)
Kansas City	($49,850)

Naturally, these figures change significantly when consideration is given simultaneously to such demographic variables as job level, supervisory responsibility, type and size of employer, length of experience, functional area, etc.

Attorneys employed by manufacturing/extractive firms make significantly more (a median of $79,500) than those employed by non-manufacturing firms ($56,040). The highest median incomes (hereafter MI) were found among those employed by transportation equipment ($128,500), paper produce/printers/publishers($92,471), stone/clay/glass/concrete product ($90,000), health care organizations ($87,800), and chemical/pharmaceutical/plastic/rubber products ($85,500) and food/beverage/tobacco products($80,525). **The lowest MIs were found in state & local government ($39,387)**, associations-/societies ($45,000),insurance co. ($56,600), and banks & other financial firms ($59,700).



Herald-Leader graphic/Chuck Carter

The MI of attorneys rises regularly with the size of the organization, from $43,873 in organizations with under 1,000 employees to $68,730 in those with 10,000 to 24,999 employees, leveling off thereafter.

Excluding attorneys in banks & other financial institutions, the MI of attorneys increases regularly as sales/revenue/value of policies in force increases. For example, the MI of attorneys increases from $40,254 in non-manufacturing organizations with annual sales of under $50 million to $68,100 in similar firms with annual sales of $5 billion or more.

Overall, attorneys holding an MA/MS /MBA have a MI 7.9% higher than those holding only the LLB/JD. However, the additional degree provides a financial advantage primarily to attorneys in supervisory and managerial positions.

Income increases regularly with length of experience. Attorneys with 30 years of experience or more have a MI of $107,688, versus $28,264 for those with under one year of experience. Much the same pattern was found when income was

JOBS AT DPA UNDER THE KY MERIT SYSTEM

Classification	Grade	Salary	Education	Experience
Asst. Public Adv. Manager	16	29,856	JD	5
Asst. Public Adv. Chief	15	27,072	JD	4
Asst. Public Adv. Sup.	15	27,072	JD	4
Asst. Public Adv. Prin.	14	24,552	JD	2
Investigator Manager	13	22,272	Assoc.	4*
Asst. Public Adv. Sr.	12	20,196	JD	1
Polygraph Examiner	12	20,196	Licensed	2
Personnel Administrator	12	20,196	Bachelor	2
Admin. Specialist Prin.	11	18,324	Bachelor	3
Fiscal Officer	11	18,324	Bachelor	2
Asst. Public Adv.	10	16,608	JD Must be Licensed	
Investigator Sr.	10	16,608	H. S.or Associate	4-2
Paralegal Sr.	9	15,072	Degree Min. 1 yr. as Paralegal	
Legal Sec. Sr.	9	15,072	H S Min. 1 yr. as Legal Sec.	
Secretary Administrator Sr.	9	15,072	High School	4
Law Clerk	8	13,668	24 hours at ABA approved school	
Paralegal	8	13668	Degree (2year)	2
Legal Secretary	8	13,668	High School	4*
Administrative Specialist	7	12,408	Bachelor's Degree*	
Accountant	6	11,244	High School	2*
Data Entry Operator Chief	6	11,244	High School	2
Clerk Chief	6	11,244	High School	3
Data Entry Operator Principal	5	10,200	High School	
Clerk Principal	4	9,264	High School	1
Secretary	4	9,264	High S chool	
Typist Principal	4	9,264	High School	1

*Denotes years of experience and years of education are interchangeable.

An attorney who has been with DPA for 5 years and has been promoted to Manager (not just supervisor or chief) makes $10,000 less than the lowest median income category of state and local government attorneys across the nation.

A Directing Attorney of one of DPA's Trial Offices makes $ 27,072. A Commonwealth Attorney makes $ 54,946.

compared to age of individual and year of LLB/JD.

Of the 9 areas of specialization studied, the highest-paid area is administration/management ($118,000 MI), followed by patent/trade-mark/copyright law ($75,000), and international law ($74,213). The lowest MIs are received by those in insurance/negligence/compensation law ($49,370), probate/trust law ($52,967), and taxation/administrative law ($54, 900). The 3 remaining areas of specialization studies (real property law, labor relations law, and corporation/banking/business law) have MIs between $62,610 and $67,572.

Supervision or management of other attorneys correlates strongly with total compensation. Attorneys who direct the activities of 10 or more attorneys have a MI of $141,730, 111% higher than those who supervise one or two clerical or paralegal employees.

Turning to compensation by specific job function, the median total cash compensation of the chief corporate legal officer is $115,000; the mean compensation is $141,757. However, 10% of this group make under $62,325 and 10% make over $257,895, with a fair number making in excess of $350,000. Naturally, income varies within this job function (and all other job functions studied) on the basis of the numerous demographic variables discussed earlier.

The median incomes of other higher-level legal jobs are:

Dep. Chief Corp.Off.....$90,050
Chief Div./Subsidiary Off.....$90,000
Dep. Chief Div./Sub. Off.....$62,000
Managing Attorney.....$91,000
Supervising Attorney.....$77,000

Non-supervisory attorneys have a MI of $52,536, about 68% as much as supervising attorneys. Within this group, 10% make under $32,016 annually and 10% over $82,397, varying by level of responsibility, geographic location, type of employer, etc. When divided by level of responsibility, the MIs are as follows:

Atty "A" (sr.).....$64,625
Atty "B" (intermediate).. .....$50,000
Atty "C" (jr.) $40,000

Legal Administrators

Legal Administrators have a MI of $32,179, with a total mean income of $36,827. While 10% of this group make under $24, 950, 10% make over $52,178.

Paralegals

Paralegal Assistants have a MI of $26,586, approximately 2/3s as much as Attorneys "C", but 10% make under $19, 714 and 10% over $36,000.

STARTING SALARIES OF KY PROFESSIONALS

ATTORNEYS

ENTRY LEVEL ATTORNEYS

Lexington Public Defender	$14,000
Louisville Public Defender	$15,000
Assistant Public Advocate	$16,608
Assistant Attorney General	$16,608
Ass't Commonwealth Atty.	$17,904
Assistant County Attorney	$23,040

DIRECTING ATTORNEY

Dir. Atty., DPA Field Off.	$27,072
Commonwealth Attorney	$54,946
County Attorney	$54,946

LAW SCHOOL

Law School Faculty/U.K.	$40-42,000
Law School Faculty/U.L.	$40,000
Law School Faculty/Chase	$38,000

LAW CLERKS

DPA Law Clerk	$13,668
Fayette Co. Com. Att. Off	$10,000
Jefferson Co. Com. Att. Off	$10,440
Supreme Court Law Clerk	$21,504
Appellate Court Law Clerk	$19,512

OTHER

JUDGES

Federal District Judge	$89,500
Chief, Ky. Supreme Court	$68,311
Kentucky Supreme Court	$66945
Chief, Ky. Court of Appeals	$64,896
Kentucky Court of Appeals	$64,213
Circuit	$61,480
District	$54,168

CLERKS

Supreme Court Clerk	$54,900
Appellate Court Clerk	$54,900
Supreme Court Clerk Deputy	$15,120
Circuit Court Clerk	$17,483-42,844
Deputy Circuit Court Clerk	$13,680
County Court Clerk	$34,861
Fed. Dis. Ct. Clerk	$27,716-54,907

POLICE

KSP	$18,056
Louisville	$18,000
Jefferson County	$18,373
Lexington	$16,646
Covington	$15,942
Boone County	$18,648
Owensboro	$15,349
Paducah	$18,120
Ashland	$17,310
Richmond	$14,000
FBI Agent	$25,000
Frankfort	$16,880
Bowling Green	$18,296
College Educated	$19,296

CORRECTIONS

Warden, Max.Security	$29,856
Warden, Med.Security	$27,072
Warden, Min. Security	$24,552
Dep. Warden, Max. Security	$24,552
Dep. Warden, Med. Security	$22,272
Dep. Warden, Min. Security	$20,196
Prison Guard	$12,408
Case Worker	$11,244
Probation & Parole Officer	$15,072
County Jailer	$34,861
County Sheriff	$34,861

MENTAL HEALTH

State Social Worker	$13,668
State Psychologist	$24,492
State Psychiatrist (KCPC)	$65,880-89,124

Other

State Investigator	$13,668
State Paralegal	$13,668
State Legal Secr.	$13,668

Starting Salary for Public Defenders 7 Surrounding States and Kentucky

Indiana	$46,956
Ohio	$25,896
Tennessee	$24,300
Missouri	$23,220
Virginia	$23,000
W. Virginia	$18,000-21,000
Average	*$23,131*
Kentucky	***$14,00-16,608***

New Hampshire Public Defender Salary Scale - Attorney

Atty. level 1	To start	$20,624
	1	$23,712
	2	$26,734
Atty. level 2	3	$31,044
	4	$34,157
Atty. level 3	5	$38,556
	6	$41,600
	Deputy Director	Discretion of the Director

Attorney Level # 2

1. 3 years experience with PublicDefender Program or comparable experience; and,
2. Demonstrated ability to provide quality representation in criminal cases.

Attorney Level #3

1.5 years experience withPublic Defender Program or comparable experience; and
2.Demonstrated ability and commitment to provide high quality representation in the most serious criminal cases, and willingness to work with less experienced attorneys as co-counsel.

Increments *

Office Management

1-3	lawyers	$1,093
4-8l	lawyers	$1,639
9-12	lawyers	$2,186
13+	lawyers	$2,732
Homicide Defense		$2,186
Supervision		$2,186

Homicide Defense: Increment paid to those attorneys who are assigned to the Homicide Defense Unit.

Supervision: Increment paid to those attorneys who are assigned specific responsibility for the training, supervision and evaluation of attorney staff in addition to caseload responsibility.

Increments are not annual grants of monies, but salary in addition to the base salary.

Legal Secretaries

The MI of Legal Secretaries is $22,328, but 10% make under $16,912 and 10% over $30,000. Those who use shorthand in their work have a median total income of $24,960, while those who transcribe from dictaphone recordings have a median income of $21,100.

Steve Langer
Abbott, Langer & Associates

Salaries of Fayette Co. school administrators have increased dramatically in the last few years:

Two years ago, only one Fayette Co. Administrator made $60,000. Now 21 administrators make between $60-$70,000.

The number of administrators making between $50 - 60,000 increased from 22 in 1985-86 FY to 37 in 1997-88.

No administrator was paid less than $30,000 this year. Four were in 1985-86.

Lexington Herald Leader, June 28, 1988

Public Defender Cuts Cases Back

Special to The New York Times

SAN FRANCISCO, Sept. 15 — The Public Defender's office here has announced that starting Monday it will stop representing poor people accused of misdemeanors and will cut its felony caseload by 20 percent unless its budget is increased to cover an explosion of drug cases.

The Public Defender, Jeff Brown, said that his office could not handle the growth in drug cases — crack arrests are up 102 percent over last year — because spending has been increased on prosecuting drug cases without a corresponding increase in defense outlays. In the last 14 months, the staff of the Police Department's narcotics division has jumped to 117 officers from 53, and drug-related arrests each month have surged to 1,700 from 750.

Problem Is Widespread

Mr. Brown is seeking $462,170 in supplemental city funds to add 10 lawyers to his staff of 66 attorneys. Each of his lawyers now handles nearly 260 cases a year, almost double the number recommended by the American Bar Association for public defenders.

Soaring load of drug cases is at issue.

The problem is not unique to San Franciso, legal aid lawyers say. All over the country, according to legal aid officials, an escalation of cocaine arrests is pushing the criminal justice system to its limits, making it more difficult to try other kinds of cases.

Mr. Brown said that the court would have to appoint private attorneys to handle the misdemeanor and arraignment cases. Lillian K. Sing, presiding judge of the Municipal Court here, said, "We have a court to run and defendants who need competent representation."

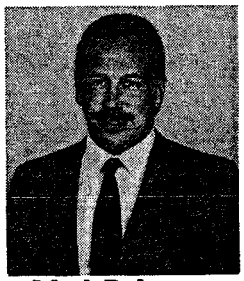
The Prosecutor's office is also caught in the system's bottleneck but without the opening available to the Public Defender, "There doesn't happen to be a neat judicial mechanism for us," said District Attorney Arlo Smith, who supervises 98 attorneys, who each handle nearly 250 cases a year. "By law we have to prosecute."

In New York City, the 560-member criminal defense division of the Legal Aid Society withdrew its attorneys from arraignments in 1987 after an increase in arrests and indictments, much of them drug-related. "We hadn't received funding," said a spokeswoman, Patricia Bath, "and we were concerned about effective counsel."

Mr.. Brown acknowledges that his move is a short-term answer to a complicated problem. The long-term solution, say officials, is more Federal money and drug education programs. The police cannot cut back on their undercover operations to relieve the bottleneck, Mr. Brown said. "It's kind of like Vietnam," he said. "You can increase the troop level but you can't decrease it without looking like you're losing the war."

KENTUCKY CRIME COMMISSION

Written Interview with its Director, Mark Bubenzer



Mark Bubenzer

What is the purpose of the Ky. Crime Commission?

The original purpose of the Ky. Crime Commission was to administer federal justice grants. The current Commission advises the Secretary of the Justice Cabinet, W. Michael Troop, and Governor Wilkinson on criminal justice issues and long range planning.

What is its history and past record?

The Crime Commission was created in the early 70s to administer grants. The Commission also worked on the Judicial Reform Amendment during the 70s. Since that time the Commission has met quarterly to discuss criminal justice issues, but had no full-time staff. Governor Wilkinson and Secretary Troop wanted to provide full-time staff to the Commission. This occurred on September 15, 1988, when I was hired as Director. At that time, the Commssion was reduced from 39 members, who were mostly *ex-officio*, to 12, in order to be more effective.

You were appointed on September 15, 1988 as Director of the revised Commisison. Why did you want the position?

I have a great interest in the legislative process. As a defense attorney and prosecutor, I have seen why laws are or are not effective. That experience, particularly in the courtroom, has given me an opportunity to see laws from a practical as well as theoretical viewpoint.

What is your background?

I was born and raised in Covington. I received a B.A. in Political Science from Northern Ky. University in 1974 and my J.D. from Salmon P. Chase College of Law in 1978. I spent one year during law school as a bail bondsman, before they were abolished. Since 1978, I practiced law in Kenton and Boone Co. I performed part-time public defender work for 5 years and was Assistant Kenton Co. Attorney from 1985 until September 1988.

Why has the Commission been revived?

Governor Wilkinson believes that the executive branch should be looking at the entire criminal justice system. Kentucky needs to be doing long range planning for the entire criminal justice system, rather than addressing each part individually.

How does the Commission fit in with all of the criminal justice agencies in the state?

The Commission is primarily a body to provide planning. The Commission needs input from all other criminal justice agencies and in return can make recommendations that will keep all parts of the criminal justice system operating as smoothly as possible.

Isn't the Commission's work in some or many ways a duplication of the work of other criminal justice agencies?

I am not aware of any other state agency in Kentucky whose role is to study and make recommendations for the entire criminal justice system. Most agencies, such as AOC and Corrections are interested in their own particular problems.

In December, 1988 the Governor appointed 12 members to the reconstituted Commission which is chaired by Justice Secre. Michael Troop and also includes Atty. Gen. Fred Cowan. The members appointed are:

Pike Co. Judge-Exec.Paul Patton; Fayette District Judge Gary Payne; Adair Circuit Judge Paul Barry Jones; Warren Co. Attorney Michael Caudill; Boone Co.Jailer John Schickel; Daviess Co. Sheriff John Bouvier; State Senator Kelsey Friend, D-Pikeville; Jefferson Co. Police Chief Bobby Crouch; Philip Mullins, Hopkinsville; and William Pelfrey, Louisville.

Why does the Commission not have representation from DPA or KACDL?

Although the Commission is comprised primarily of elected officials, representation was based upon Congressional districts, with 2 *ex-officio* members and three at-large members. Many other groups could have been included, such as Commonwealth Attorneys, treatment and corrections personnel, but the intent was to have a small, efficient group. Representatives from Public Advocacy and Criminal Defense Attorneys or any other criminal justice group are welcome to attend and participate in any meeting of the Crime Commission.

What's the Commission's agenda for the next year and several years?

In addition to attempting to ease the burden on the overall justice system, the Crime Commission has identified particular areas of need, including crime prevention, victims' rights, prison overcrowding, prison industries, juvenile facilities, DUI, and asset forfeiture. We will be looking at long range planning, including sources of funding.

What legislative changes do you expect the Commission to propose for the next Legislative session?

The Crime Commission will offer new asset forfeiture legislation and recommendations for criminal sentencing. New DUI legislation has been drafted. Recommendations will probably be made in most areas that we are examining.

> Your honor, years ago I recognized my kinship with all living beings and I made up my mind that I was not one bit better than the meanest of earth.I said then, I say now, if there is a lower class, I am in it; if there is a criminal element, I am of it; if there is a soul in prison, I am not free.
>
> Eugene V. Debs, *Pro Se*

What involvement did you have in the Governor's DUI proposals

As Director of the Crime Commission, I coordinated the efforts of the Governor's DUI Committee. Working with the Justice Cabinet, Kentucky State Police, the Transporation Cabinet, the Cabinet for Human Resources, the ABC, the Governor's Office, and National Highway Traffic Safety Administration, we have drafted proposed legislation and administrative amendments relating to DUI.

In this period of celebrating our Constitution and Bill of Rights and their protections and individual liberties, what are the Commission's plans for furthering individual rights of citizens accused of crime?

In our new DUI legislation we have provided safeguards, such as taking two (2) breath samples for analysis. We also believe that better criminal justice training will result in more knowledgeable law enforcement. We certainly believe that prison overcrowding must be addressed to insure fair treatment of persons convicted of crimes.

With the prison crisis upon us, why does the criminal justice system not promote alternative sentencing more, especially when there exists in Kentucky a model, effective alternative sentencing program?

The Crime Commission is beginning a study on structured sentencing and alternative sentencing so that solutions can be recommended.

Any other thoughts?

Our courts are becoming overloaded. Our prison population is growing at an alarming rate, particularly in numbers of maximum security prisoners. If we truly want to address this problem, we in criminal justice must begin pulling in the same direction rather than each setting our own agenda. I believe that the Kentucky Crime Commission can help in coordinating those efforts.

MARK BUBENZER
Kentucky Crime Commission
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Frankfort, Kentucky 40601
(502) 564-7554

Correction: The February 1989 P&A column on The Retarded (reprint) was incorrectly credited as a *Cincinnati Post* editorial. That editorial appeared in the *Cincinnati Enquirer.*

"JUSTICE?"

Many times it is said that the biggest fool is the man who fools himself. I believe we as a nation fool ourselves on a daily basis.

We Americans generally feel like boasting that our system of justice is the finest in the world and most of us probably believe it. Those with actual experience in the system know better. Guilty or innocent, convicted or acquitted (innocent), they have learned at first hand the cold fear associated with being a defendant in an American Court.

The elements of this fear are many and very real. To begin with, the financial burdens of a first class defense are crippling to all but a favored few. Even when top fees can be paid, a defendant has precious little protection against getting a lawyer of less skill than he paid for. There is no speical license, no badge or certififcation of any kind that marks the true professional defense lawyer. Many a defendant has learned, when it was far too late, that his advocate wasn't equal to the responsibilities he assumed.

Innocent people, in particular, are frequently the unwary victims of a peculiar syndrome that lands them in jail. It goes this way:

An ordinary citizen, with no criminal background, gets indicted for a serious crime. It may be a businessman accused of some financial fraud or "white collar crime." It may be an auto mechanic accused of rape, the victim of a wrongful identification by the victim. Because he knows in his heart of hearts that he is innocent, he is complacent about the risks involved.

He believes that the truth will win out, that justice will prevail, that the courts will protect him. He hires a local layer, perhaps a general practitioner with modest experience in criminal matters, for two reasons. First, he wants to keep the costs down since he has done nothing to deserve them; and second, he is afraid that if he hires a known criminal attorney his friends, and perhaps the jury, will think he is guilty.

His case is not well prepared. The cross examination falters on a few key points. The summation fails to establish a reasonable doubt. The jury convicts. The defendant is stunned. So are his family and friends, some of whom may have been his alibi witnesses. Suddenly the matter is indeed serious.

The appeal many times is unsuccessful for a multitude of reasons. The judge is very bright and one of the best, thus his decisions are rarely reversed; no new evidence, etc. The system has misfired nevertheless and there is no effective remedy.

It happens every day. The only ones who are really aware that it happens are the victims of the system, their heartbroken loved ones, and the lawyers.

Convicting the innocent is a "flaw" that continues year after year, in case after case. It happens because most people don't believe that it does happen, and of those who know better, not enough really care. If this is a sad commentary on American Jurisprudence, it is nonetheless one that is statistically defensible by any of us who can really speak from experience.

Quoted from *"The Defense"* by F. Lee Bailey.

NOT POOR IN SPIRIT

"Our dreams are the same"

Compiled after four months of travel and interviews, "Not Poor in Spirit" contains the stories and photographs of dozens of low-income families in Kentucky. Lack of material goods has not diminished their pride or strength, their dignity or their love for their children. The report also suggests ways we can improve the quality of life for the thousands of children and families in our state who live in poverty. Due to a generous donation by Sallie Bingham, the 200-page report is available for only $3 upon request to Kentucky Youth Advocates, 2024 Woodford Place, Louisville, Kentucky 40205. 502 456-2140

Kentucky Association of Criminal Defense Lawyers

Maria Ransdell

Can it be over 2 years since the first meeting of the Kentucky Association of Criminal Defense Lawyers was held on January 19, 1987 at the Frankfort Holiday Inn? Although conceived many months prior to that meeting, the birth of the "fledgling" KACDL was induced to a great extent by the ill-informed "Truth in Sentencing" legislation. The many problems of the criminal defense bar included individual isolation, lack of a unified voice and the ever increasing momentum of the law enforcement, victim oriented movement which showed complete disregard for the rights of accused individuals. In an exciting rally of criminal defense attorneys across the state, this "fledgling" has now grown to an organization of over 200 members.

Purpose of KACDL

When I was asked to serve KACDL as its Vice-President, I had little inkling of what responsibility and just plain hard work lay ahead. I can probably speak for most board members in describing the tasks of organizing a group such as KACDL as gargantuan. Our established purpose as an organization was to foster, maintain and encourage a high standard of integrity, independence and expertise of the criminal defense lawyer and further, to strive for justice, respect and dignity for criminal defense lawyers, defendants and the entire criminal justice system consistent with the Kentucky and United States Constitutions. These goal are obviously lofty ones and from our inception the group has tackled the tasks head-on.

KACDL Officers

We are fortunate to have chosen as the first President of the body **Hon. Frank E. Haddad, Jr.**, of Louisville, who has been vigilantly dedicated to getting the group on its feet. He has shown great energy as well as generosity in his donation of time and resources in both manpower and such necessities as postage and copying. Without his leadership this organization would not be celebrating a 2 year anniversary. The other officers, President-elect **William E. Johnson** of Frankfort, Secretary **Allen Holbrook** of Owensboro and Treasurer **Edward C. Monahan** of Frankfort, have all worked diligently to achieve the goals of KACDL.

KACDL Committees

Committees of KACDL were formed from the outset and include Organization, Membership, Legislation/Rules and Education. Two successful seminars have been staged by the Education Committee and an upcoming educational event is being planned in the Fall, 1989. **Hon. Tom Hectus** of Louisville has put in many hours of planning in regard to our CLE Programs. Another very important and time consuming task which has been taken on by KACDL is the quarterly newsletter. **Hon. Ernie Lewis** of Richmond is to be commended for his hard work in getting this newsletter out to our members.

1990 Legislation

The leadership of the Legislation/Rules Committee has just been placed in co-chairpersons **Hon. Samuel Manley** of Louisville and **Hon. Kevin McNally of Frankfort.** Of all the committees of the KACDL, the Legislation/Rules Committee may have the greatest impact on the criminal justice system by positively influencing legislation and court rules. The committee is presently working on the preparation of our legislative package for the upcoming 1990 session. Surveys have been done of the membership to pinpoint those legislative issues of the greatest significance and results are presently being tabulated.

Membership

Membership in the KACDL is that all-important ingredient which keeps the wheels of the organization turning in terms of financial support and elbow grease. With **Hon. Bette Niemi** of LaGrange at the helm of the Membership Committee, the group size has continued to increase and existing members have renewed their membership. This financial backing is an absolute necessity to KACDL's survival.

KACDL Staff

KACDL is about to turn a corner in regard to its development. The Board of Directors has authorized the hiring of a part-time staff person and is presently searching to find the most appropriate candidate for this position. With this staff person will come better communication between the officers, board and membership at large resulting in a greater "unified front." Although there has been no preference indicated for the location of this staff person's office, the KACDL post office box will be changed to that location and telephone accessibility will be initiated.

Our weakness at the present time exists in regard to the completion of those day-to-day organizational tasks that can really only be done by one person who has the time to expend. Hopefully our staff person, when hired, will take the responsibility for many of the tasks now performed by Board members, and in turn, those members can become involved in representing and serving the members of the KACDL throughout the state in more aggressive ways.

Strike Force

Of note in this regard is the formation of the KACDL Lawyers Assistance Strike Force headed by **Hon. Bill Summers** of Lexington, who was instrumental in forming the same type of committee for the N ACDL some 10 years ago. This benefit of membership is one which, until actually needed, might be easily overlooked. However, once a lawyer becomes a "target" such a support system is invaluable to that attorney as well as to the criminal defense bar as a whole.

Join KACDL

Celebrate the 2 year anniversary of the KACDL with us! If you are a member, join one of our committees by dropping a line to our P.O. Box 674, Lexington, Kentucky 40586. If you've been remiss in renewing, please do so as soon as possible in order to avoid being purged from our membership list. If you have yet to join, we urge you to do so because our strength lies only in our numbers which must continue to grow. The momentum created by the birth of KACDL has continued to become the energy of a thriving group of dedicated professionals with whom "you owe it to yourself" to be affiliated.

MARIA RANSDELL
KACDL Vice-President

Maria is a 1979 graduate of the Univ. of KY ts Law School. She was a Fayette Co. public defender from 1979-84. From 1984-88 she was in solo practice in Lexington. Since November 1, 1988 she has been practice with Ernesto Scorsone. Scorsone and Ransdell are located at 804 First National Building, 167 W. Main Street, Lexington, Kentucky 40507, (606) 254-5766. Her practice is predominently criminal law.

WEST'S REVIEW

Linda West

KENTUCKY COURT OF APPEALS

COSTS OF DEFENSE OF INDIGENT

Commonwealth v. Lincoln County Fiscal Court

36 K.L.S. 1 at 2

(January 6, 1989)

The issue in this case was whether the county in whichdefendant is charged with a crime, or the Department of Public Advocacy, was responsible for payment of private defense experts when, at the time of prosecution but not at the time of commission of the offense, the defendant is in a state correctional institution. KRS 31.185 authorizes the use of private defense experts to be paid for by the county. However, KRS 31.200(3) provides that expenses of representation of "needy persons confined in a state correctional institution" are to be borne by DPA. The county argued that this statute meant that, although a defendant was not in a state correctional institution when he committed the charged offense, if he was in state custody by the time he was prosecuted (due to parole revocation or by virtue of being convicted of some other crime), then the cost of his defense was shifted to DPA. The Court of Appeals rejected this interpretation of the statute since it would have served no rational legislative purpose. The Court instead interpreted the statute as shifting the costs of defense from the counties to DPA only in those cases in which the charged crime was committed in a state correctional institution. Judge McDonald dissented.

RCr 11.42 RELIEF - PERJURY

Commonwealth v. Basnight

36 K.L.S. 2 at 9

(February 3, 1989)

Basnight was convicted of multiple counts of sodomy based on the testimony of a juvenile victim. At a subsequent civil action brought against Basnight, the victim recanted the testimony regarding sodomy which he gave at the criminal trial. Basnight then alleged perjury at the criminal trial as grounds for RCr 11.42 relief. Basnight also asserted prosecutorial misconduct as grounds for relief. This claim was based on a conflict between the testimony of a prosecution impeachment witness and an assistant prosecutor. The witness stated that the prosecutor discovered, during an accidental encounter with the witness on the day of trial, that the witness could impeach the defendant's testimony that he had never been in an adult bookstore. The assistant prosecutor stated in deposition testimony some five years later that he was aware on the day the trial began that the impeachment witness was available. However, at the 11.42 hearing the assistant prosecutor explained his deposition testimony as being "in error." The circuit court granted 11.42 relief on both grounds.

The Court of Appeals reversed. The Court held that perjury is not a basis for obtaining RCr 11.42 relief, citing *Fields v. Commonwealth*, Ky., 408 S.W.2d 639 (1966). As to the alleged prosecutorial misconduct the Court of Appeals noted that the circuit court granted relief based on the "appearance of impropriety" without actually finding prosecutorial misconduct. Because the circuit court did not find the deprivation of a constitutional right its grant of RCr 11.42 relief was in error. Judge Combs dissented.

LATE NOTICE OF APPEAL

Demoss v. Commonwealth

36 K.L.S. 2 at 12

(February 3, 1989)

In this case, the commonwealth filed a late notice of appeal from a district court's dismissal of charges against Demoss. The commonwealth argued that the ten day limitation of RCr 12.04(3) did not apply since the district clerk failed to give the commonwealth notice of entry of the order dismissing. However, under RCr 12.06(3), the notice of entry requirement does not apply in non-felony cases. The Court also held that, unlike a criminal defendant, the commonwealth is not in a position to obtain a belated appeal in order to protect a constitutional right, such as effective assistance of counsel, since the commonwealth has no personal constitutional rights.

KENTUCKY SUPREME COURT

EVIDENCE OF PRIOR INDICTMENT/MUG SHOTS

Brown v. Commonwealth

36 K.L.S. 1 at 27

(January 19, 1989)

At his trial for robbery and murder, Brown testified that he "never had any reason to want to rob anyone - or to kill anyone..." On cross-examination the commonwealth then inquired into another robbery charge of which Brown had been acquitted. The Kentucky Supreme Court held that the admission of this evidence was error. Brown's testimony did not open the door to admission of the commonwealth's evidence. In addition, evidence that a defendant has been previously acquitted of an offense "is without probative value, but is potentially prejudicial in that the jury may be persuaded that the defendant escaped justice in the earlier case and resolve to see that it does not happen again."

Error was also committed when the commonwealth introduced mug shots of the defendant. The removal of identifying numbers did not render the mug shots admissible.

ENFORCEMENT OF PLEA BARGAIN

Commonwealth v. Reyes

36 K.L.S. 1 at 28

(January 19, 1989)

The Court held in this case that Reyes was entitled to enforcement of a plea bargain agreement. Reyes and an accomplice, Anderson, were charged with the murder and attempted murder of two clerks during the robbery of a liquor store. Reyes confessed to police that he fired shots which resulted in the death of one victim while Anderson fired shots which seriously wounded the other victim. The commonwealth, however, inexplicably construed

This regular *Advocate* column reviews the published criminal law decisions of the United States Supreme Court, the Kentucky Supreme Court, and the Kentucky Court of Appeals, except for death penalty cases, which are reviewed in *The Advocate* Death Penalty column, and except for search and seizure cases which are reviewed in *The Advocate* Plain View column.

Reyes' confession as indicating that Anderson fired the fatal shots. The commonwealth then entered into a written plea bargain with Reyes whereby, in exchange for his guilty plea, and cooperation and testimony against Anderson, the commonwealth would not seek the death penalty against Reyes. Just prior to Anderson's trial and before entry of Reyes' plea, the commonwealth discovered its error. The commonwealth then reneged on the plea agreement.

Holding that Reyes was entitled to enforcement of the plea agreement, the Court noted that Reyes "never claimed that he did not shoot the deceased victim." The Court found no evidence that the plea agreement was the result of duplicity on Reyes' part. Reyes also performed his part of the plea agreement in that he discussed the case with prosecutors on several occasions, sometimes in the absence of counsel, and provided details incriminating of himself as well as Anderson. The Court held that, under these circumstances, "[i]t appears highly unlikely that Reyes can now receive a fair trial if the state's promise is successfully repudiated."

JURY SENTENCING
Wilson v. Commonwealth
36 K.L.S. 2 at 20
(February 9, 1989)

Wilson was sentenced to life without parole for twenty-five years even though the jury at his capital trial failed to find an aggravating factor. On appeal, this sentence was reversed and the case remanded for resentencing. The trial judge subsequently refused to allow resentencing by jury and instead imposed a sentence himself. Wilson again appealed. The Court held that under Kentucky statutes and rules a defendant is entitled as a matter of right to jury sentencing. See KRS 29A.270(1), RCr 9.84. "The trial judge is not vested with the authority to abrogate a criminal defendant's right to jury sentencing by speculating on what sentence the jury would have imposed if properly instructed." Justices Vance and Gant dissented.

UNITED STATES SUPREME COURT

RIGHT TO CONFER WITH COUNSEL DURING TRIAL RECESS
Perry v. Leeke
44 CrL 3053
(January 10, 1989)

Immediately following Perry's direct testimony at his murder trial, the trial judge called a brief recess, but ordered that Perry not speak to anyone, including his attorney. Perry argued that the trial court's directive violated his Sixth Amendment right to counsel citing *Geders v. United States*, 425 U.S. 80, 06 S.Ct. 1330, 47 L.Ed.2d 592 (1976). The Supreme Court disagreed.

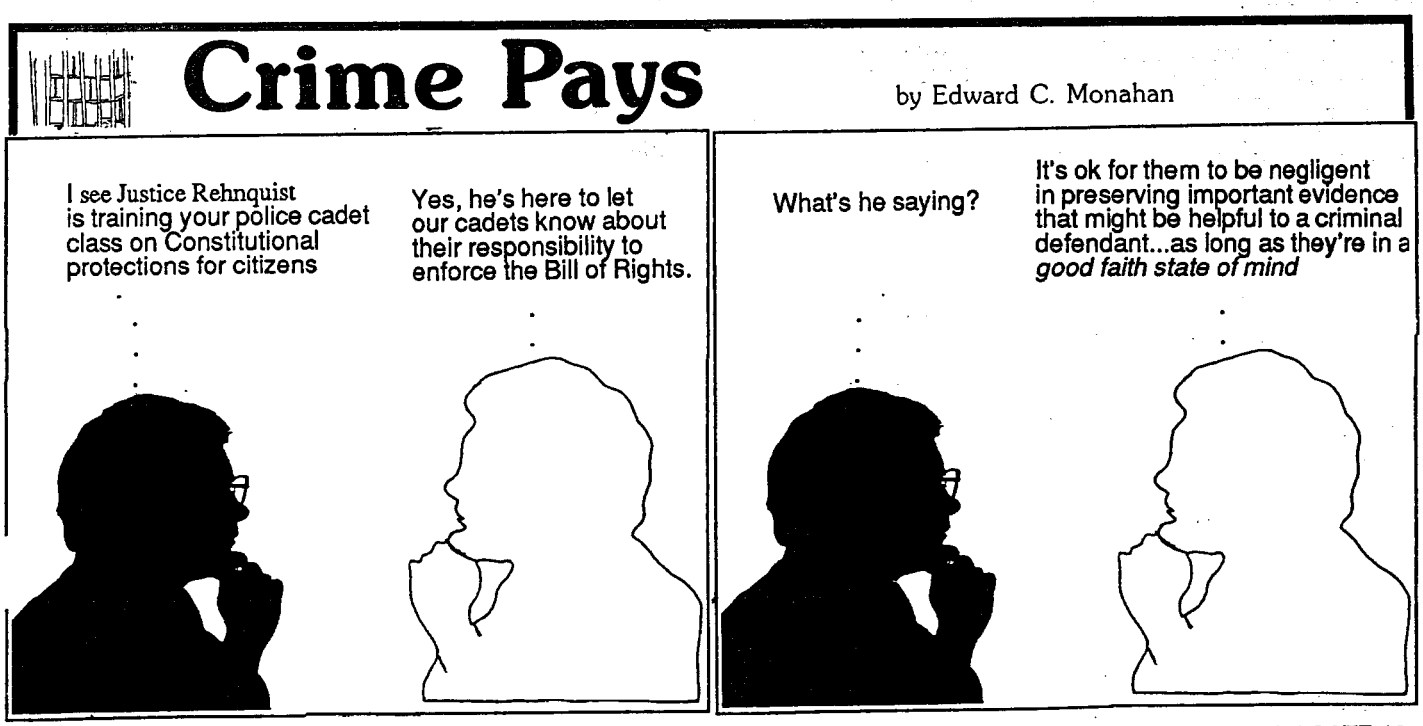
The Court held in *Geders* that a defendant's right to counsel was violated by a trial court ruling that the defendant could not confer with his attorney during an overnight recess called while the defendant was on the stand. The Court distinguished *Geders* from *Perry* on the grounds that attorney-client discussions during the overnight recess in *Geders* would likely have encompassed matters beyond the defendants to-be-continued testimony, such as trial tactics. By contrast, discussions during the brief recess before cross-examination of Perry would almost certainly have been limited to the subject of his testimony. The Court noted that, independent of the possibility of unethical "coaching," "cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney." The Court then weighed this supposed truth-finding value of uncounseled cross-examination against the Sixth Amendment right to counsel. The right to counsel lost. The Court did hold, however, that if a Sixth Amendment violation like that in *Geders* had occurred no showing of prejudice would be required.

Justices Marshall, Brennan, and Blackmun dissented stating: "Central to our Sixth Amendment doctrine is the understanding that legal representation for the defendant at every critical stage of the adversary process enhances the discovery of truth because it better enables the defendant to put the State to its proof" (Emphasis in original).

COLLATERAL ATTACK OF GUILTY PLEA ON DOUBLE JEOPARDY GROUNDS
United States v. Broce
44 CrL 3085
(January 23, 1989)

The defendants in Broce pleaded guilty to two separate conspiracy charges based on their conduct in agreeing to rig bids on two separate highway projects. They subsequently sought to vacate the second conspiracy conviction on the grounds that both bid rigging schemes were parts of a single conspiracy.

The Supreme Court held that the defendants' guilty pleas foreclosed their double jeopardy claim. The Court distinguished *Blackledge v. Perry*, 417 U.S. 21,



94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) and *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) on the grounds that in those cases the defendants asserted a "right not to be haled into court at all." Moreover, the claims asserted in those cases were determinable on the face of the record while disposition of the double jeopardy claims in Broce required an evidentiary hearing. "[T]hey cannot prove their claim without contradicting the indictments, and that opportunity is foreclosed by the admissions inherent in their guilty pleas."

Justices Blackmun, Brennan, and Marshall dissented on the grounds that a guilty plea "does not bestow on the government any power to prosecute that it otherwise lacks."

HABEAS CORPUS - PROCEDURAL DEFAULT
Harris v. Reed
44 Crl 3120
(February 22, 1989)

Harris appealed to the proper Illinois appellate court from the denial of his motion for post-conviction relief alleging ineffective assistance of counsel. The Illinois appellate court noted that Harris could have raised the issue on a previous direct appeal but did not. However, the court then went on to review and reject the merits of Harris' claim. Harris' subsequent petition for federal habeas relief was dismissed based on the state appellate courts "suggested" finding that Harris' ineffective assistance claim had been defaulted under Illinois law.

The Supreme Court reversed. The Court held that, in the absence of a "plain statement" of procedural default by the state court, the federal habeas court could not dispose of the habeas petition on the basis of procedural default. "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." Because the state court's decision in Harris was ambiguous in this respect, the habeas court erred in finding a procedural default. Justice Kennedy dissented.

HABEAS CORPUS - EXHAUSTION
Castille v. People
44 Crl 3145
(February 22, 1989)

The Court granted certiorari in this case "to consider whether the presentation of claims to a State's highest court on discretionary review, without more, satisfies the exhaustion requirements of 28 U.S.C. 2254." The Court unanimously held that it did not.

28 U.S.C. 2254(c) provides that a claim shall not be deemed exhausted so long as a petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." The Court has held, however, that this bar is inapplicable where a petitioner has made a "fair presentation" of his claim in state court and has exhausted his direct appeals, so that further presentation of the issue would be useless. In *Castille*, the Supreme Court makes clear that a claim raised solely in a petition for discretionary review to a state appellate court does not "fairly present" the claim for exhaustion purposes.

RETROACTIVITY OF DECISIONS/SCOPE OF HABEAS CORPUS
Teague v. Lane
44 Crl 3129
(February 22, 1989)

In this case, the Court held that habeas petitioner Teague could not benefit from the court's decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) since Teague's conviction had already been affirmed on direct appeal at the time Batson was decided. See *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986).

Teague also submitted in his habeas petition that the Sixth Amendment's fair cross-section requirement applies to the petit jury as well as the jury panel. A plurality of the Court declined to reach the merits of this issue. The plurality held that habeas corpus cannot be used as a vehicle to create a totally new constitutional rule of criminal procedure unless the rule would be applied to all similarly situated individuals, i.e. all individuals whose convictions are under collateral attack. However, new rules of law are not generally given retroactive effect as to cases already affirmed on direct appeal, even though under collateral attack. Exceptions exist where the new rule places previously proscribed conduct beyond the reach of the criminal law-making authority, or where the new rule enforces "procedures that are implicit in the concept of ordered liberty." Teague's claim did not fall within either of these exceptions. Justices Brennan and Marshall stated in dissent: "Out of an exaggerated concern for treating similarly situated habeas petitioners the same, the plurality would for the first time preclude the federal courts from considering on collateral review a vast range of important constitutional challenges...."

LINDA WEST
Assistant Public Advocate
Appellate Section
Frankfort

SPICER APPOINTED DPA REGIONAL MANAGER

Effective March 1, 1989, **Bill Spicer** was appointed by the Public Advocate, Paul **Isaacs, as Eastern Kentucky regional trial**

Bill Spicer

supervisor. He replaces Jay Barrett who resigned January 3, 1989. As a regional trial supervisor, Bill has responsibility for the Pikeville, Stanton and Hazard full-time public defender trial offices. These 3 DPA offices provide public defender representation for 13 Eastern Kentucky counties.

Bill has been a Ky. public defender since 1980, working in the London and Stanton offices. He was the directing attorney of the London office from 1985 to 1987, and is currently the directing attorney of the Stanton office.

DPA has 3 other regional trial supervisors.

Bette Niemi is the Regional Supervisor for the LaGrange, Hopkinsville and Paducah trial offices. Those offices cover 10 counties. **Ernie Lewis** is the Regional Supervisor for the Richmond, Somerset and London trial offices. Those offices cover 13 counties. **Allison Connelly** is the Regional Supervisor for the Morehead, Northpoint, LaGrange Reformatory and Eddyville Penitentiary offices. The regional supervisors manage Kentucky's statewide public defender system at the local level.

NEW ON BOARD

Elizabeth Isaacs, joined our London office as an Assistant Public Advocate on Feb. 1, 1989. She is a 1987 graduate of the UK School of Law. She was formerly with the firm of Tom L. Weatherly in London,Ky.

John Hansen, joined the Hazard office as an Asistant Public Advocate on April 1, 1989. John attended the Cumberland School of Law graduating in 1988

POST-CONVICTION

Parole Eligibility

Hank Eddy

During the sentencing phase of trial or prior to pleading guilty a defendant probably wants to know what the parole ramifications of the sentence are going to be. This is important because gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel. *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988). The purpose of this article is to provide attorneys with information so that they can properly advise their clients regarding their parole eligibility dates.

Statutory Guidelines

Parole eligibility dates are mandated by statutes and Kentucky Administrative Regulations. Pursuant to KRS 439.340(3) the Parole Board recently promulgated 501 KAR 1:030 (Eff. December 3, 1988) which is the general guideline used to determine parole eligibility. The Kentucky General Assembly has also enacted statutes which set parole eligibility for certain types of crimes. These statutes will be discussed further.

Factors Effecting Eligibility

Several factors can effect the eligibility date. These include: length of sentence; type of crime; when the crime was committed; where the crime was committed and age of the victim. Each of these factors will be discussed separately.

Eligibility for Most Crimes

The eligibility date for most crimes committed after December 3, 1988 is determined by 501 KAR 1:030 Section 4(1)(a). For sentences of one year up to but not including two years parole eligibility is four months minus jail credit. For two years up to and including thirty-nine years the eligibility date is twenty percent of sentence minus jail credit. More than thirty-nine years including life the eligibility date is eight years minus jail credit. A table taken from 501 KAR 1:030 Section 4(1)(a) & (b) showing how to compute parole eligibility dates for most crimes committed after December 3, 1980 can be found at the end of this article.

Crimes Committed Prior to Date of Instant Commitment or on Parole

This situation occurs when your client, who is already in prison, is convicted and sentenced for a crime committed prior to his or her present incarceration. Eligibility in this case is determined by 501 KAR 1:030 Section 4(1)(e). This subsection also covers several other situations such as parole violators who are returned to the institution with a new sentence. If your client receives a new sentence while on parole the eligibility date will be determined by the length of the new sentence. This subsection also covers prisoners who have already seen the Parole Board, and then receive a new sentence.

Crimes Committed in an Institution or While on Escape

For crimes committed in an institution or while on escape from an institution 501 KAR 1:030 Section 4(1)(f) controls. An inmate will be eligible for parole when the parole eligibility time of the new sentence is added to the eligibility time of the old sentence.

For instance, if an inmate is serving a five year sentence normal parole eligibility is one year. However, if he or she commits a crime while in the institution or while on escape, and receives a new five year sentence, then parole eligibility will be two years. It will be two years even if the new sentence is ordered to run concurrently.

Crime of Escape

Parole eligibility time is also aggregated for the crime of escape. 501 KAR 1:030 Section 4(1)(g) provides that the Parole Board will require the service of the additional time towards eligibility for the crime of escape. Parole eligibility time for the escape sentence is added to the eligibility time of the original sentence which can be added on to the parole eligibility time of any crime committed in the institution or while on escape. Under this provision it is possible for the parole eligibility time of three or more sentences to be added together. Basically 501 KAR 1:030 Section 4(1)(e)-(m) deals with eligibility time for crimes committed within an institution, crimes committed while on escape, crimes committed while on parole, crimes committed while on shock probation, and the crime of escape. The important thing to remember regarding these crimes is that even if the sentences are ordered to be served concurrently to prior sentences being served, parole eligibility time may increase even though the sentence length may not.

Example, inmate serving five year sentence escapes, and receives a five year sentence for that crime. The new sentence is ordered to run concurrently. Total sentence is five years, however the inmate will not be eligible for parole for two years because the parole eligibility dates of the two sentences are aggregated. Normally an inmate is eligible for parole in one year for a five year sentence.

Violent Offenders

Violent offenders as defined by KRS 439.3401 are not eligible for parole until they have served fifty percent of their sentence. Violent crimes include class A and B felonies involving death of victim, first degree rape, first degree sodomy and crimes involving serious physical injury to the victim. The Parole Board has also defined violent crimes in 501 KAR 1:030 Section 4(1)(a). Arson and kidnapping are included when there is serious physical injury.

If a violent offender receives a life sentence he or she is eligible for parole in twelve years. This creates a dilemma for defense counsel because for violent offenders a sentence of life is better than any sentence in excess of twenty-four years for parole eligibility purposes.

Capital Offenses

KRS 532.030(1) provides the punishments for capital offenses. They include: death; twenty-five years without parole or twenty years to life.

Certain Persons Prohibited From Parole

KRS 532.045 provides a long list of crimes for which there is no probation or parole. These crimes are generally sex offenses against minors. Additionally

some type of aggravating factor such as force, violence, threats of force, use of weapons on injury to victim must usually be involved before this statute applies.

Persistent Felony Offenders

A first degree persistent felony offender is not eligible for parole for ten years. KRS 532.080(7). Such an offender serving a ten to thirteen year sentence may be released from confinement before becoming eligible for parole. This will occur if the offender does not lose any of his statutory good time provided by KRS 197.045.

Currently each inmate is given credit for three months good conduct for each year to be served. This credit does not have to be earned, but it can be taken away if prison disciplinary rules are broken. Thus, an inmate with a ten year persistent felony offender sentence receives thirty months of credit when service of sentence begins. The inmate would be released in seven and one-half years if credit for good conduct was not lost. The inmate would be released before becoming eligible for parole.

Sex Offenders

KRS 439.340(10) provides no eligible sexual offender within the meaning of KRS 197.400 to 197.440 shall be granted parole unless he has successfully completed the sexual offender treatment program. KRS 197.410 defines "sexual offender" and "eligible sexual offender".

A sex offender is a person who has been adjudicated guilty of any felony in Chapter 510 or any other felony committed in conjunction with a misdemeanor described in Chapter 510. An eligible sexual offender is one who has demonstrated evidence of a mental, emotional or behavioral disorder, but not active psychosis or mental retardation; and is likely to benefit from the program. Either the sentencing court or cabinet officials determines who is an eligible sexual offender.

Misdemeanants

KRS 439.177 which authorizes the sentencing judge to parole misdemeanants was held unconstitutional in Commonwealth v. Cornelius, Ky. App. 606 S.W.2d 172 (1980). The Court reasoned that according to our state constitution parole is solely an executive function. Despite this case the legislature continues to enact statutes which effect parole eligibility even though this authority was delegated to the Parole Board in KRS 439.340(3).

Early Parole

The Parole Board can consider an inmate for parole prior to his eligibility date if he qualifies under 501 KAR 1:030 Section 4(2). Generally early parole is only considered in unusual cases such as when medical problems exist or the sentencing Judge or prosecuting attorney of record recommends it.

Conclusion

Knowing parole eligibility dates is important. The prosecutor is allowed to introduce evidence regarding minimum parole eligibility dates during sentencing. KRS 532.055. Actual computation of the date can often be complicated by the various factors effecting the date. Before rendering advice on this subject all relevant statutes and regulations should be reviewed.

HANK EDDY
Director, Eddyville Office
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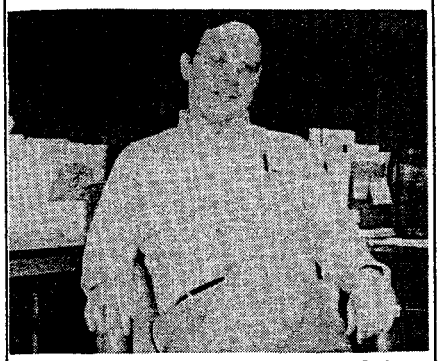
Eddyville, KY 42038
(502) 388-9755

DPA TRANSFERS



Joe Myers, formerly Director of the Paducah office, transferred on Feb. 16, 1989 to the Northpoint Training Center trial/post-conviction office.

Barbara Holthaus, Assistant Public Advocate, transferred on Feb 1, 1989 from our Northpoint trial/post-conviction office to the Frankfort Post-Conviction Branch.

Allison Connelly, formerly the Director of the Northpoint trial/post-conviction office transferred to Chief of the Post-Conviction Branch, Frankfort.

DPA RESIGNATIONS

Phil Chaney, resigned as an Asst. PA with our Somerset office on Jan. 1, 1989 to join the law offices of King, King and Chaney, P.O. Box 249 Pine Knot, KY 42635 (606) 354-2153.

Gary Stewart, resigned as an Asst. PA with our London Office on March 15, 1989 to work with the Jefferson Co. District Public Defenders as an assistant public defender in their Adult section.

THE DEATH PENALTY

Capital Law and Comment

Neal Walker

A. RETRIAL ORDERED FOR MORRIS

Proving that it means business, on February 9, the Kentucky Supreme Court reversed Joseph "Jo-Jo" Morris' convictions for capital murder and robbery. *Morris v. Commonwealth*, ___S.W.2d___(Ky. 1989).

The court has now reversed 5 of the last 6 death penalty cases it has reviewed - all within the last 9 months. The others include *Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky. 1988); *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988); *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988); and *Haight v. Commonwealth*, 760 S.W.2d 84 (Ky. 1988). And the court granted relief in yet another capital case during this time frame, upholding a lower court decision enforcing a plea agreement advantageous to the defendant in *Commonwealth v. Reyes*, ___ S.W.2d ___ (decided January 19, 1988). Only Brian Keith Moore's death sentence was affirmed during this time period, although the Court had reversed his original conviction and death sentence in 1982. *Moore v. Commonwealth*, ___ S.W.2d ___ (decided November 17, 1988); *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982).

Viewed collectively, this spate of reversals appears to herald a new approach to capital cases by the Kentucky Supreme Court, particularly with respect to jury issues and prosecution misconduct.

MORRIS v. COMMONWEALTH

Morris and two accomplices broke into the home of an elderly 5 member Harlan County family. Encountering 2 residents in the living room, the intruders undertook to bind them with duct tape. Within moments, though, another family member armed himself with a rifle and proceeded downstairs where he exchanged gun fire with a co-defendant before Morris shot and killed him.

RIGHT TO INDIVIDUAL SEQUESTERED VOIR DIRE

For the first time, the court finds reversible error in a capital case due to the failure to conduct individual sequestered voir dire. This position had been advanced by Chief Justice Stephens in his concurring and dissenting opinion in *Grooms*, and has since become mandatory under RCr 9.38 (effective Jan. 1, 1989), which requires individual questioning on publicity and the death penalty in all capital cases. Writing for the majority (predictably, Justice Wintersheimer is the lone dissenter) Justice Gant now announces that "[t]he reason for the change in the rule and the reason for this ruling are the same. When there has been extensive pretrial publicity, great care must be exercised on voir dire examination to ascertain just what information a prospective juror has accumulated" (S at 3). Without sequestration, the entire panel could be tainted by a disqualifying item of knowledge. "It is mandatory to permit voir dire questioning which will assure that a jury which is empaneled will base its verdict solely on the evidence in the case and the instructions of the court" (S at 3). The group voir dire also created problems during the process of death qualification, as jurors became preoccupied with extra-legal terms like "cold-blooded" which they overheard from jurors under examination.

PRO-DEATH JUROR BIAS

On examination, 4 jurors declared that they would only consider death as a punishment upon a conviction for capital murder. Failing to excuse them for cause was reversible error, despite the prosecution's attempts at rehabilitation. "Both the Commonwealth and the defendant are entitled to a panel of jurors who will consider the entire range of punishment" (S at 5).

This marks the second time the court has reversed a conviction due to a juror's stated pro-death bias. *Grooms*, 756 S.W.2d at 137 (pro-death juror should have been excused for cause due to his view that "mitigating circumstances or compassion would have nothing to do with it"). Curiously, though, the court cited neither *Grooms* nor any relevant Supreme Court decision, see *Wainwright v. Witt*, 469 U.S. 412, (1985) as authority for its holding.

Apparently frustrated with the form of the questions employed by counsel, the court offers a "simple" question to serve as a model: "If you determine under the instructions of the court beyond a reasonable doubt that the defendant is guilty of intentional murder, could you consider the entire range of penalties provided by statutes of this Commonwealth as outlined to you?" (S at 5). Nothing in the opinion, though, suggests that further questioning is prohibited in the event it is needed to ascertain whether a juror can, in fact, consider, for instance, the minimum sentence of 20 years in a capital case.

DOUBLE STANDARD ON DEATH-QUALIFICATION

Although not a separate ground for reversal, the court expressed concern that the trial court granted all of the prosecutor's cause challenges but none for the defense. "We note with interest that the court sustained motions of the Commonwealth to strike six jurors who answered that they could not give the death penalty under any circumstances, but would not strike these four who answered they could give nothing else" (S at 4).

PRESERVING THE CLAIM BY EXHAUSTING ALL PEREMPTORIES

Even though none of the 4 venire persons sat on the jury which convicted him, Marlowe preserved his claim since he was forced to squander his peremptory chal-

KY DEATH ROW	
As of April 1, 1989	
Death Row Population	29
Women	1
Juveniles	1
Age of Oldest Inmate	78
Black Population	6
Black Victim Cases	0
Inmates whose Trial Lawyers have been Disbarred or Suspended	7

This regular *Advocate* column reviews all death penalty decisions of the United States Supreme Court, the Kentucky Supreme Court, the Kentucky Court of Appeals, and selected death penalty cases from other jurisdictions.

lenges to purge them from the jury. "[T]he court denied the motion to excuse these four jurors for cause, forcing the appellant to exhaust his peremptory strikes when there were other jurors he wished to strike" (S at 4).

Last term, in *Ross v. Oklahoma*, ___ U.S. ___, 108 SCt. 2273 (1988), the Supreme Court ruled that the trial court's failure to remove a juror who, like these four, declared that he would automatically vote for the death penalty, was not reversible error since the juror was removed with a peremptory challenge. However, there was no showing in *Ross* that the lost peremptory impeded the defendant's ability to strike other jurors who were unsuccessfully challenged for cause. Furthermore, Oklahoma specifically requires defendants to use peremptories to cure erroneous refusals to excuse jurors for cause. But the settled law in Kentucky is that "a defendant should not be required to waste his peremptory challenges on jurors who should have been excused for cause" *Grooms*, 756 S.W.2d at 135; *Marsch v. Commonwealth*, 743 S.W.2d 830 (Ky. 1988). However, to preserve the claim, you must identify on the record other jurors whom you would have struck if you had not been forced to waste your peremptories.

VICTIM PHOTOGRAPHS

The court was disturbed by the introduction of 19 photographs of the deceased. "Standing alone this may or may not be reversible error" (S at 6). On retrial, the court should "not overwhelm the jury with repetitive photographs" (Id.).

PROPORTIONALITY

The court ducked "the question of whether the death sentence herein is disproportionate, as we are remanding this case for a new trial" (S at 9). Not counting Justice Liebson's excellent dissent in *Slaughter v. Commonwealth*, 744 S.W.2d 407, 416 (Ky. 1988), the court has yet to find a death sentence disproportionate. Morris would likely prevail on this claim in, say, Florida, where death is routinely held to be disproportionate in single victim felony murder cases, at least where the defendant has no prior convictions. *Proffitt v. State*, 510 So2d 896 (Fla. 1987).

PROSECUTION MISCONDUCT

The prosecutor's misconduct, a separate ground for reversal, was strongly criticized by the court. "[S]eldom have we seen such a flagrant disregard for the rules of evidence" (S at 6). Primarily, the prosecutor was faulted for repeatedly emphasizing the "war record, wounds, community service, etc. of all the Pope family." (Id.). Proof was introduced that one of the victims was a former Commonwealth's Attorney while another had been County Attorney. Acknowledging that *McQueen v. Commonwealth*, 669 S.W.2d 519, 523 (Ky. 1984) permits "some latitude" in establishing the victim's "characteristics", here "the entire tenor of the arguments and questioning...was to point out that the victim was a 'hero', a 'constructive man', in fact, a leader of the community" (S at 8). The court found this conduct to be condemned by *Booth v. Maryland*, 107 S.Ct. 2529 (1987).

THE CONCURRENCE: PROSECUTION MISCONDUCT OR "GUERRILLA WARFARE"?

Chief Justice Stephens, joined by Combs and Liebson, filed a concurring opinion addressing other examples of prosecutorial misconduct. "Overall, the prosecutor's tactics were akin to guerilla warfare" (S at 3). The concurrence condemned the prosecutor for blaming the defendant for "forcing us through this process" by pleading not guilty; for "denigrating defendant's counsel for being a public defender"; for telling the jury that the public defender's office represented another condemned inmate on appeal; for misleading the jury by equating the intoxication defense with a license to kill; for expressing his personal opinion that the defendant deserved to die; for misleading the jury about the defendant's prospects for rehabilitation; for not complying with trial court rulings; and, for making "a perverse comment on appellant's religious faith as a mitigating factor" (S at 1-3).

B.GALL SECURES BROAD DISCOVERY IN FEDERAL COURT

In Re: Warden, Kentucky State Penitentiary, ___F.2d___(No. 88-5521, decided January 18, 1989) While litigating the constitutionality of his death sentence in a federal habeas corpus pro-ceeding, Eugene Gall secured a discovery order from the district court requiring the state to forward the serological evidence introduced at his trial to Gall's forensic expert in Texas. He also sought and obtained an order to depose a juror who had since moved out of state. "Gall represented that [juror] Palmer would testify that the jury did not consider his mental illness as a mitigating factor, but rather considered it as a non-statutory aggravating factor" (S at 2).

From these discovery rulings, the Warden unsuccessfully sought mandamus relief from the 6th Circuit. Mandamus was improper since the Warden "has not demonstrated that the district court's order that petitioner be allowed to remove the evidentiary exhibits to Texas was even an abuse of discretion" (S at 2). The same was true of "the discretionary act of ordering a deposition" (S at 3). Accordingly, the 6th Circuit denied the Warden's petition.

C. FLORIDA SUPREME COURT BUSTS CAPITAL FEE CAP

For the second time, the Florida Supreme Court has ruled that the state's $3,500 statutory limit on attorney's fees is unconstitutional. In *John Thor White v. Board of Pinellas County*, ___ So.2d ___ (#72,170, decided January 26, 1989), the court found "that all capital cases by their very nature can be considered extraordinary and unusual and arguably justify an award of attorney's fees in excess of the current statutory maximum fee cap" (S at 3). Nevertheless, the court declined to declare the statute facially unconstitutional. Rather "[t]he statute is unconstitutional when applied in such a manner that curtails the court's inherent power to secure effective, experienced counsel for the representation of indigent defendants in capital cases" (S at 4). The court relied on its earlier decision of *Makemson v. Martin County*, 491 So.2d 1109, 1111 (1986), which referred to "the dreadful responsibility of trying to save a man from electrocution".

The court expressly acknowledged the financial burdens implicated in its decision. "We are mindful of the potential burden placed on county treasuries as a result of departure from the statutory maximum fee cap. However, since the state of Florida enforces the death penalty, its primary obligation is to ensure that indigents are provided competent, effective counsel in capital cases" (S at 5).

The fee cap in Kentucky for a capital case is $2,500.00.

NEAL WALKER
Assistant Public Advocate
Chief, Major Litigation Section
Frankfort

Gun Curbs Reduce Homicide Study Shows

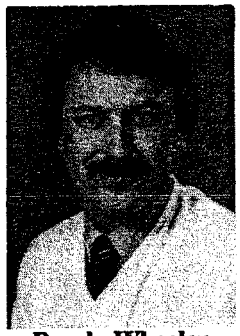
From 1980-86, there were 388 homicides in Seattle versus 204 in Vancouver, a city with stricter gun laws, according to researchers at the Universities of Washington, British Columbia and Tennessee. The study shows that the risk of being killed is almost 5 times higher in Seattle as in Vancouver.

"The difference is highly unlikely to have occurred by chance," the researchers concluded.

Kathleen Kallaher

The Kentucky Capital Resource Center

Assisting Death Row Inmates and their Attorneys in Capital Post-Conviction Litigation



Randy Wheeler

This article provides a detailed account of the funding history of the Kentucky Capital Litigation Resource Center (The Resource Center) and other resource centers nationally and of its organization, goals and activities.

FORMULATION OF THE RESOURCE CENTER CONCEPT

For a decade the ABA has recognized that to provide death row inmates with meaningful access to the courts in post-conviction proceedings a governmentally funded system under which qualified attorneys provide representation is essential. In 1979 the ABA proposed that the Supreme Court adopt a rule for the appointment of counsel in state post-conviction proceedings in death penalty cases. Three years later the ABA passed a resolution to "support the prompt availability of competent counsel for both state and federal court proceedings" and urged that such counsel be specially trained in capital litigation.

In February 1988, the ABA proposed that each federal court adopt a plan to ensure the appointment of competent attorneys to represent death row inmates in federal habeas corpus proceedings. The ABA stressed that these attorneys should be compensated and provided with investigative, expert and other services. Also, the ABA emphasized the need for state or regional resource centers that could advise and assist the appointed attorneys. In June the ABA's Post Conviction Death Penalty Representation Project, in conjunction with the Administrative Office of the United States Courts (AO), held a conference to encourage applications for the funding of such resource centers. In September the Judicial Conference of the United States gave its support to the ABA's proposal.

During this period the Ky. Task Force on Death Penalty Cases had been established to assess the resources necessary to meet the demands of indigent representation in Ky. capital cases in federal court and to recommend solutions. The Task Force, chaired by Hon. Edward H. Johnstone, Chief Judge of the U.S District Court for the W. District of Ky., included then President of the KBA, Charles English and representatives from the Federal District Court for the E.District of Ky., Attorney General's Office, AOC, DPA, Ky. ACLU and NAACP Legal Defense Fund. The Task Force recognizing the difficult problem of guaranteeing competent representation for the indigent condemned in post-conviction proceedings, designated DPA to prepare a plan for solving the problem.

In the Spring of 1988 DPA proposed that Ky. join 12 other states (AL, AZ, CA, FL, GA, LA, MS, NC, OK, SC, TN and TX) in receiving federal funding to establish a capital litigation resource center. The proposal was approved by the AOC and the Judicial Conference and both of Ky.'s federal district courts entered orders amending their Plans for the Implementation of the Criminal Justice Act to establish the Resource Center as a Community Defender Organization pursuant to 18 U.S.C., Section 3006A(g)(B).

In the Fall of 1988 Congress enacted the Anti-Drug Abuse Act which included a provision allowing the funding of the Resource Center. Congress mandated that any indigent state prisoner under a sentence of death "shall be entitled to the appointment of one or more" experienced attorneys and, when reasonably necessary, "investigative, expert or other services" in federal habeas corpus proceedings and any subsequent post-conviction or clemency proceedings.

IS A GOVERNMENT FUNDED RESOURCE CENTER REALLY NECESSARY?

In a *amicus curiae* filed in *Murray v. Giarrantano*, No. 88-411, *cert. granted* (Oct. 31, 1988), the ABA identifies numerous factors which unerringly point to the conclusion that death row inmates must be provided representation by capable counsel for state post-conviction pursuant to an organized state-funded system. First, state post-conviction proceedings are "extremely significant and extraordinary complex." Second, lack of legal training, funds, inability to investigate and obtain experts, inadequate access to legal materials, illiteracy, lack of education and mental impairment, all combine to make it impossible for death row inmates to adequately prepare post-conviction petitions and litigate those claims *pro se*. Third, there is and will continue to be an inadequate supply of *pro bono* volunteer attorneys, unsupported by the state's resources, because of exhaustion brought on by the great quantities of time and energy expended on these legally complex and emotionally draining cases, as well as the huge amounts of money expended.

For instance, a study by the Spangenburg Group for the ABA Standing Committee on Legal Aid and Indigent Defendants (Feb. 1987) showed that the median number of documented hours spent by attorneys doing state post-conviction work in 24 states is 963. An average of $20,000 in documented out of pocket expenses was consumed for state and federal post-conviction proceedings for a capital case.

Needless to say, the same considerations apply to capital habeas representation The same need for legal and factual investigation exists and, if anything, the law and issues at this level are even more complex due to the constant evolution of death penalty law in the federal courts overlaid with the myriad of ever-increasingly draconian procedural roadblocks of which counsel must be aware and able to steer clear. See Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am.U.L. Rev. 513 (1988). The Spangenburg Report states that the median number of documented hours for capital federal post-conviction was 1,037.

However, lack of adequate funding to increase its staff plus the overload already being felt by existing staff who have seen their number of death row clients steadily rise without them receiving corresponding increase in help have begun to spell the end of the days when DPA can represent all death row clients inhouse.

Unquestionably, meaningful access to the courts is critical in a capital case. Meritorious issues obviously exist in post-conviction death cases. While the success rate of ordinary habeas petitioners ranges from 0.25% to 7%, capital habeas litigants prevailed in 60-75% of their cases as of 1982, 70% as of 1983 and 60% as of 1986. See Mello, *supra* at 520-521 [footnotes omitted]. This success in federal court translates directly into lives saved. But these successes depend entirely on adequate investigation, identification and

presentation of issues and strategy at all levels of the capital case.

HOW KY'S RESOURCE CENTER WILL MEET THIS NEED

The Resource Center will initially be staffed by a Director, Randall Wheeler, an Assistant Director, Kathleen Kallaher , a paralegal, an investigator, a secretary and 3 law clerks. Most of those salaries plus a percentage of the Resource Center's operating costs, are paid for with federal money. This has resulted in a rare increase in DPA's staff. However, every state receiving a federal grant for a Resource Center must match a certain portion of those funds with state money. In Kentucky the match required is almost dollar for dollar and will be met primarily by accounting for the money already being spent on state capital post-conviction representation by DPA attorneys and their support staff. Thus, in a very real sense, the Resource Center includes all persons providing capital post-conviction services to death row inmates in Kentucky through the DPA while the federally funded staff of the Resource Center branch are administrators and coordinators of the grant. Therefore, most of our "state matching funds" actually come from the cost of these in-kind services rather than actual additional dollars pulled from DPA's budget.

RESOURCE CENTER RESPONSIBILITIES

The primary goals of the Resource Center are to find competent counsel to represent death row inmates in state and federal post-conviction, and to develop and coordinate all available resources to aid those attorneys.

To accomplish the first mission, the Resource Center attorneys will directly represent some capital clients in post-conviction actions. At the present time the Director and Assistant Director each have 3 capital cases. Additionally, the Resource Center will spend considerable efforts in recruiting private practitioners to be on a panel from which attorneys are chosen to handle capital post-conviction actions. Indeed, on February 20, 1989, representatives of DPA and the Resource Center participated in a LBA conference on implementing *pro bono* programs in Louisville law firms. The meeting was organized by LBA Past President Daniel T. Goyette and *Pro Bono* and Legal Services Committees Chairman James D. Moyer. The conference was attended by members of large and medium sized firms in Louisville. Ron Tabak, a private attorney in a very large New York law firm who has been extensively involved in *pro bono* post conviction capital representation, encouraged the group to get involved.

The Resource Center is also in the process of developing a list of attorneys, with criminal law experience, to contact initially for the panel, and developing criteria for the appointment of panel attorneys to a case.

For the foreseeable future, one DPA attorney with capital litigation experience will be assigned to work with at least one private attorney after the direct appeal is affirmed. Possibly, an entire firm would be assigned to the case. Ideally, the DPA attorney involved will be an attorney that was designated and participated as lead counsel when the direct appeal was first assigned. That team of attorneys would remain on the case through state and federal post-conviction, including any clemency proceedings. A private attorney can expect to receive $2500 plus reasonable expenses *for each stage* of the 11.42 litigation, *i.e.* $2500 for the trial court representation and $2500 for any appeal and motion for discretionary review. If the case proceeds to federal court, the attorney can be appointed under the Criminal Justice Act, 18 U.S.C., 3006(A), where he or she can ask to be reimbursed at the rate of $75 per hour. The maximum amount available for death penalty representation is in the discretion of the chief judge of the circuit who reviews the bills submitted and initially approved by the district court judge. Additionally, vouchers can be submitted for out-of-pocket expenses and, with certain requirements, funds are provided for investigative, expert and other reasonably necessary services. Interim payments may be arranged when necessary and appropriate in an extended and complex case.

The Resource Center staff will be active in assisting the attorneys in identifying federal constitutional issues, formulating strategy and preparing appropriate documents and arguments when necessary. To that end, the Resource Center will expand the present death penalty library and eventually all cases, pleadings, articles, etc. will be indexed so that identification of a topic by an attorney will give ready access to all current information on that issue. The Resource Center will coordinate its resources with other state and national organizations providing assistance to death sentenced clients. The Resource Center, in conjunction with the resource centers in other states, will establish and develop a computerized, indexed pleadings bank . A newsletter and a 6th Circuit habeas corpus manual are also planned. The Resource Center will also develop and coordinate training concerning capital litigation in the post-conviction area, develop and expand existing expert witness lists, assist in organizing investigation efforts (particularly in the area of mitigation) and will monitor all Ky. capital cases.

Through its collection and organization of resources and the performance of the Resource Center staff, we believe we can achieve our goal of being available to provide maximum assistance to both DPA and private attorneys handling capital post-conviction cases.

CAVEAT

The Resource Center will not be a cure-all for the serious difficulties presented by capital cases in securing representation at the trial, appellate and post-conviction levels. This system still depends on state money to fund state post-conviction litigation. Additionally, maintaining an adequate panel of competent attorneys depends on the dedication of the private bar in Ky. to the ideal of ensuring that all poor persons convicted and sentenced to death will receive effective assistance of counsel during state and federal post-conviction proceedings.

However, the representation of death sentenced indigents in post-conviction proceedings provides the opportunity for attorneys to be involved in challenging, significant and extremely important litigation. Ron Tabak has called representation in such cases the "highest possible form of public service" because it literally can make a difference in someone's life.

RANDY WHEELER
KATHLEEN KALLAHER
Resource Center
Frankfort

Kallaher Appointed Assistant Director

On April 1,1989,Kathleen Kallaher transferred to the Kentucky Capital Litigation Resource Center from DPA's Appellate Branch. Kathleen graduated from Vanderbilt Unviversity and UK's College of Law. She has served as a law clerk with DPA's MLS and Post Conviction Branch. Kathleen joined the staff of the Appellate Branch in December, 1983. Her capital litigation experience includes direct appeals, post conviction actions and a capital charge brought against a juvenile .

National Coalition to Abolish the Death Penalty
Midwest Regional Conference
June 2-4, 1989
Bellarmine College
Louisville, Kentucky

Abolitionists from 13 states will convene for this conference which will feature sessions of legislative lobbying, race bias in death penalty sentencing, and outreach to victims. DPA is co-sponsoring the CLE portion. Legal workshops on Saturday morning on jury selection, aggravation, and building a capital defense team with lay volunteers carry 3 hours of CLE credit. Contact Pat Delehanty, President of KCADP for further information at (502)772-2348

VERDICT LIFTS PUBLIC DEFENDER'S BURDEN

Mike Williams had nightmares about the electric chair for a year. The Covington attorney is sleeping better now. A Campbell County jury earlier this week rejected murder charges against his client, Gregory Scott Combs. The jury recommended that Combs be sentenced to 50 years in prison on charges of second-degree manslaughter and third-degree arson. The convictions stemmed from two fires on January 30, 1988. Five people died in one, and curtains were scorched in the other. Judge George Muehlenkamp will sentence Combs, 19, of Dayton, on March 29.

As the public defender for Combs, saving him from the electric chair has been foremost in Williams' mind, sometimes with comic results. One day, Williams walked into a shower at the YMCA still wearing his sweat pants. Another day, he found himself donning two pair of underwear.

"My mind just wasn't working right on anything else except this case," Williams said. "You eat, drink and sleep the case." But the reason for his tunnel vision was far from funny.

"It's your worst nightmare," Williams said. "Because all of a sudden what you do or say (affects whether) somebody may live or die. And I don't consider it significant or a factor that (the electric chair) hasn't been used in Kentucky for several years. It's coming. The appeals (of some cases) are starting to end."

From a defense attorney's point of view, it's hard to imagine a more difficult case than the one facing Combs. The young man was charged with a horrible crime - setting a fire that killed 5 people, including 3 children. One died after his frantic mother tried to throw him to safety from a third-floor window.

In addition, Combs told Dayton police shortly after the fire that he thought he remembered setting it after a night of heavy drinking. "It doesn't get any worse than that," Williams said, "unless somebody was there with a video (camera) and filmed him doing it."

Williams said he felt "outmanned and outgunned" by the commonwealth. "They have state police, city police, cooperative federal agencies. They have investigators, they have police officers who can go out and run witnesses down, take statements. A typing staff." Judge Muehlenkamp ordered the Campbell County Fiscal Court to pay for an arson expert and psychologist for the defense, Williams said. Attorney Mott Plummer assisted Williams at pre-trial hearings and at trial - help Williams said was essential.

But the bulk of the preparation fell to Williams, who estimated he worked 500 hours on the case. Williams, who concedes he is "a workaholic to some extent," says he spent a lot of time researching legal matters. His wife had to call him home from the office on Christmas morning so the children could open their gifts.

Williams did a lot of leg work, too. He walked up and down Sixth Avenue, the scene of the fires. He handed out business cards in bars and on corners, asking people to call him with information about the case. He says he talked to more than 100 people before the trial; he called 29 witnesses.

Williams contended during the trial that Combs was in Huddle's Cafe, also on Sixth Avenue, at the time another witness had testified he saw Combs in the building where the five died. Before the trial, Williams walked - one time briskly, one time slowly - between Huddle's and the site of the fatal fire to see how long it would take.

Williams considered and then discarded the idea of making the trek after "drinking a bunch until I had a stagger. I'm serious," Williams said. "The big complaint people have with me is that I'm too intense, I take things too seriously.

"But when the judge raps that gavel, I feel like I'm only in that courtroom for one reason, and that's to advocate the same way my client would advocate if he had my skills and education."

As for the outcome of the case, "I'm happy because I feel that Greg got the best defense possible, and if you're going to say I'm proud of what Mott and I did, yeah, I'm proud of that.

"Do I think about the victims? Every time I went by that intersection I thought about those people. Mott feels the same way. "But we took an oath to represent this young man and I'm going to live by that oath. When we start getting away from that then we might as well just all start wearing brown shirts like they did back in the '30s and go about and be vigilantes."

Williams said his family life and other cases suffered during the case. He was paid a flat fee of $2,500. He said the state should pay part-time public defenders a minimum of $25,000 for a year's work on a death penalty case so they can afford to spend the time needed to prepare - or place a moratorium on executions.

"If you're not going to give (an adequate defense) to people, then you have a moral duty not to impose (the death penalty)," Williams said. "Anything short of that is a lynch mob."

By JEANNE HOUCK
Kentucky Post staff reporter

Fact #2

Innocent people are Executed

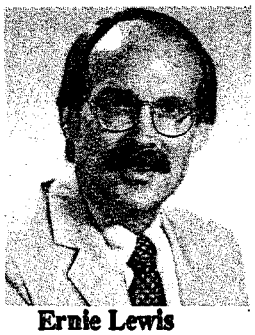
A recent study published by the Stanford Law Review found that at least 350 persons have been mistakenly convicted of potential capital crimes from 1900-1985. Of these innocent people, 139 were sentenced to death and 23 were excuted. Researchers say that there are probably many more cases not yet identified.

For more information: National Coalition to Abolish the Death Penalty, 1419 V St. NW, Washington, DC 20009

It's easy to believe in the death penalty... if you ignore the facts.

PLAIN VIEW

SEARCH AND SEIZURE LAW AND COMMENT



Ernie Lewis

'The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.'

G. Orwell, Nineteen Eighty-Four 4 (1949).

UNITED STATES-SUPREME COURT

Florida v. Riley, 488 U.S. __, 109 S.Ct. 693, 102 L.Ed.2d. 835 (1989).

The battle over what kind of society we will have continued in the United States Supreme Court in January. Last term, the Court approved of the police searching through our garbage without a warrant. *California v. Greenwood*, 486 U.S. __, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). And, in *Florida v. Riley*, at least a plurality of the Court indicates how much of the spectre of Big Brother they can tolerate.

Riley lived in a mobile home on 5acres in rural Florida. He had a greenhouse behind his house, and both were surrounded by a wire fence with a DO NOT ENTER sign posted on it. The greenhouse was covered with corrugated roofing, although a small segment was missing.

The police received an anonymous tip that Riley was growing marijuana. A police officer drove there to look, but could see nothing. He then got in a helicopter and hovered 400 feet over Riley's greenhouse which enabled him to see through the hole in the roof to the marijuana growing there. This observation led to a warrant, search and seizure, and arrest. The trial court suppressed the marijuana, and the Florida Supreme Court agreed.

Justice White was joined only by Rehnquist, Scalia, and Kennedy. He found *California v. Ciraolo*, 476 U.S. 207 (1986) to be dispositive. The Court held that hovering 400 feet above the curtilage was not a search due to the fact "Riley could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter."

Justice White emphasized that the helicopter was within FAA regulations, and was thus within the area available to public aircraft. "We would have a different case if flying at that altitude had been contrary to law or regulation."

Justice O'Connor concurred. Her opinion is interesting. She rejects the plurality's reliance on FAA regulations, saying that the real question is whether members of the public fly in helicopters at 400 feet with sufficient regularity to make Riley's expectation of privacy unreasonable. She placed upon Riley the burden of proving the reasonableness of his expectation of privacy. Because he introduced nothing, Justice O'Connor found his expectation to be unreasonable.

This gives counsel an opening in such cases, however. Now we know who has the burden of proof in these cases. Future persons in Riley's situation need but demonstrate that such flights are rare in order to meet their burden of proof. In such cases, O'Connor would be expected to join the dissent.

Justice Brennan was joined by Marshall and Stevens in dissent. He based his critique of the plurality upon *Katz v. United States*, 389 U.S. 347 (1967), which of course held the 4th Amendment protects people rather than places. Noting that it cannot be seriously questioned that "Riley enjoyed virtually complete privacy in his backyard greenhouse, and that that privacy was invaded solely by police helicopter surveillance," Justice Brennan would have held that Riley's expectation of privacy was quite reasonable.

As he often does, Brennan cut through the legalese to the essence of the plurality's opinion. In what would be condemned as gross cynicism if contained in a public defender's motion, Justice Brennan said that it was "difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the 4th Amendment's protection does not turn on whether the activity disclosed by a search is illegal or innocuous. But we dismiss this as a 'drug case' only at the peril of our own liberties."

Justice Blackmun penned his own dissent, saying that the burden of proof in this case should be upon the prosecution to show that Riley had no reasonable expectation of privacy. He did so because he believed "private helicopters rarely fly over curtilages at 400 feet." Because the prosecution failed to meet its burden of proof, he would have affirmed the decision of the Florida Supreme Court.

"'It was the Police Patrol, snooping into people's windows.' . . . Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours?" *Florida v. Riley, supra* (J. Brennan dissenting).

SIXTH CIRCUIT

The 6th Circuit visited search and seizure issues in 3 cases in January and February. In ***United States v. Garcia***, 18 SCR 3 (6th Circuit, January 10, 1989), one Garcia was met by sheriff's agents who were attracted to Garcia by his dress. A factual dispute arose over the conversation regarding whether Garcia consented to a search of his gym bag. Despite the burden of proof being on the government, and despite the Court's acknowledging that the case was "a swearing contest," the Court found "no justification for disturbing the finding of the trial judge, whose opportunity to observe the witnesses' demeanor renders his judgment as to their credibility superior."

In ***United States v. Berry***, the Court examined the seizure of blood from an unconscious man by a nurse at the direction of a federal officer. The defendant had been driving in a federal park, and had run off the road. Relying on *Schmerber v. California*, 384 U.S. 757 (1965), the Court held the seizure to have been done reasonably, with probable cause, and as an exception to the warrant requirement based upon exigent circumstances.

Finally, the Court looked at the issues of warrant particularity and good faith in ***United States v. Gahagan***, 18 SCR 21 (Sixth Circuit 1/25/89). A warrant did not

This regular *Advocate* column reviews all published search and seizure decisions of the United States Supreme Court, the Kentucky Supreme Court and the Kentucky Court of Appeals and significant cases from other jurisdictions.

authorize the search of a particular cabin, although an unatttached and unincorporated affidavit did refer to that cabin. The Court found that the affidavit sufficiently directed the police to Cabin 3, and that the affidavit could be used to cure any defects in the warrant. "[W]e find that the description of the property to be searched contained in the affidavit, as well as the relevant information known by the executing officers in this case, can be relied upon to validate a warrant if the description contained in the warrant itself is less than complete."

KY COURT OF APPEALS

Neither Kentucky appellate court issued a published search and seizure decision during the past couple of months. There was one interesting unpublished Court of Appeals case, however. In ***Reed v. Commonwealth***, the trial commissioner signed an affidavit, which was then executed by the sheriff. No warrant was ever filed in the Court. The Court of Appeals held as a matter of fact that there was no search warrant, that all that was executed was an affidavit, that this was thus a warrantless search with no exigencies and thus unreasonable. This case reminds us always to check for the return of search warrants as required by RCr 13.10.

WHERE WILL IT END?

The Supreme Court has decided to balance the constitutional rights of persons accused of crimes with the good or bad faith of the nation's police officers. They did so in the case of *Arizona v. Youngblood*, which held that failure to preserve body samples, absent bad faith, is not a violation of due process.

One must question what the Court is up to, particularly in combination with *United States v. Leon*, the good faith search and seizure case. What sense does it make to focus on the bad or good faith of the police, as opposed to limiting the inquiry to whether constitutional rights were violated? How does one prove bad faith? Why should an accused have to prove the absence of good faith when his privacy rights have been violated, or bad faith when his only chance for an acquittal has been obliterated by the careless destruction of evidence?

Where will it end? If a prosecutor makes a blatant comment on the defendant's right not to testify, will the Court place the burden on the accused to prove the prosecution did so in bad faith? If a judge in good faith omits an essential element of the offense in her instructions to the jury, does it matter that she did so benignly?

A recent editorial in the Lexington *Herald Leader* (December 7, 1988), discussed a recent ABA study demonstrating that these rulings by the Court are not about remedying the hundreds of cases being dismissed because of the enforcement of constitutional rights. That study shows that "cases are rarely thrown out of court because suspects weren't read their rights. Similarly, few cases are lost because police failed to collect evidence in accordance with Supreme Court rulings."

What exactly is the Court's agenda? Whose Constitution exactly are they protecting and preserving?

THE SHORT VIEW

State v. Wells, Fla. 44 Cr.L. 2212 (12/21/88). A man was arrested for speeding in Florida. He was taken to the police station for a breath test, during which he asked to go to his car for a coat. On the way, accompanied by a police officer, money was seen in the car. The man agreed to have his trunk opened. A locked suitcase was opened and found to be full of marijuana. The Florida Supreme Court held the search of the suitcase to be an unreasonable search, due to there being no written rules for inventory searches promulgated by the particular police department, as required by *Colorado v. Bertine*, 479 U.S. 367 (1987).

People v. Shields, Calif. Ct. App. 44 Cr.L. 2215 (11/9/88). The owner of a newspaper employed an investigator to inquire into the drug habits of his employees. As a result of the investigation, the employer consented to a search by 20 police officers. The officers went to the newspaper, work stopped, numerous people were arrested and others were questioned. During one encounter, the defendant was questioned, during which he turned over cocaine he had on him. The California Court of Appeals, 2nd District, held that the search was illegal, rejecting a consent theory. "We know of no authority . . . that permits one person to 'consent' to another persons' being detained without even reasonable suspicion that the person is or has been involved in criminal activity."

Jones v. County of DuPage, 44 Cr.L. 2260 (DC ED Ill. 12/17/88). In this 42 USC 1983 case, the Court analyzes the constitutional rights implicated during the hours and days following an arrest. The case involved a man arrested for being intoxicated who, while in an isolation cell, hung himself. The Court refused the defendant's motion to dismiss the civil law suit. The Court said that police officers are liable under the 4th Amendment at arrest, until the accused is delivered to the jail. The jailer is liable then under the 4th Amendment until the accused is presented to a magistrate for a probable cause determination. Once probable cause is found, the 4th Amendments' reasonableness requirements fall aside, and the more relaxed standards of the 14th Amendment come into play.

State v. Dixson, Ore.766 P.2d. 1015 (1988). The Oregon Supreme Court, interpreting its own Constitution, rejected the open fields doctrine of *Oliver v. United States*, 466 U.S. 170 (1984). Not all private land is so protected, however; land outside the curtilage will be protected from governmental intrusion only after the owner exhibits an intention to exclude the public. The constitutional interest being protected is an Oregonian's right to privacy, defined as an interest in freedom from certain forms of governmental scrutiny.

People v. Lewis, Calif. Ct. App. 44 Cr.L. 2290 (12/21/88). A man was arrested for speeding and fleeing a police officer, both offenses for which he could not be incarcerated prior to trial. Thus, a "booking search," which uncovered cocaine on his person, was illegal, according to the 1st District of the California Court of Appeals, despite the fact that a search prior to transporting the accused to the station could have been executed. "'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest,'" citing from *Chambers v. Maroney*, 399 U.S. 42 (1970).

United States v. Johnson, 44 Cr.L. 2326 (12/27/88). In opinion described by the dissent as "subordinating constitutionally guaranteed rights to optimal law enforce-

Aiming at the wrong problem?

And speaking of the fine points of criminal law: A decade of Dirty Harry movies has convinced most of us that our laws are so lax that only a make-my-day police officer has a chance against the criminal hordes.

A recent American Bar Association study, headed by former Watergate prosecutor Samuel Dash, took a close look at the Dirty Harry theory of criminal prosecution. Dash found that the courts were overwhelmed by drug cases. But despite "extraordinary efforts," Dash's panel found, police "have been unsuccessful in making significant impact on the importation, sale and use of illegal drugs . . . ."

What is the problem? Dash and his team don't say. They suggest forming another commission to study the issue. Dash does conclude, however, that the constitutional protections given to those accused of crimes are not hindering the war against drugs.

Dirty Harry loathed the Miranda warning, the recitation of an accused person's rights. Dash's survey found that cases are rarely thrown out of court because suspects weren't read their rights. Similarly, few cases are lost because police failed to collect evidence in accordance with Supreme Court rulings.

Yet the Supreme Court continues to pick away at the rights against illegal search and seizure, all in anticipation, it seems, of helping beleaguered police and prosecutors. If Dash is right, however, the court's rulings will leave us with the drug plague and a weakened Constitution to boot.

Lexington Herald Leader, December 7, 1988

ment efficiency," the 5th Circuit allowed for the warrantless search of luggage in which the police had probable cause to believe there were drugs. The 5th Circuit distinguishes what appears to be the dispositive case, *United States v. Chadwick*, 433 U.S. 1 (1977), by saying that the police could choose the least restrictive alternative, seizing the person and awaiting a warrant, or searching the luggage. *Chadwick* seems to say otherwise.

Green v. State, Md. Ct. Spec. App., 551 A.2d. 127 (1989). *Aguilar/Spinelli* continue to be viable in this Maryland case. Here, an informant called the police to report a man was selling drugs. The police went to the place and saw a man who matched the description given by the informer. The man ran, after which he was arrested. The Court held the arrest to be without probable cause, stressing that there was nothing which established the reliability of the informant or his basis of knowledge. Corroboration by innocent details and flight did not reach the level of probable cause.

Commonwealth v. Sullo, Mass. App. Ct.532 N.E.2d. 1219 (1989). This case condemns what is routine in many jails in Kentucky, the searching of an arrestee's papers. The Court notes the search was not conducted according to routine booking procedures and further saw it as a pretextual search motivated by finding $7500 in cash on the defendant.

City of Seattle v. Altschuler, Wash. Ct. App., 766 P.2d. 518 (1989). The defendant ran a red light, and drove home at 30 miles an hour with the police following him. He was arrested in his garage. The Court reversed the conviction for resisting arrest due to the illegality of the arrest. The arrest was held to be illegal because it was warrantless, the offense involved a minor traffic violation, and "hot pursuit" was not in itself sufficiently exigent to justify the warrantless entry into a home.

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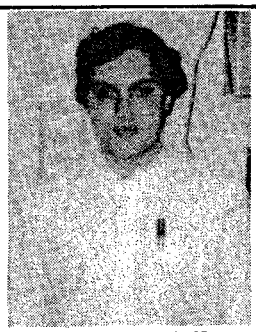
Book Review

Accusations of Child Sex Abuse
Holida Wakefield,M.A.and
Ralph Underwager, M.Div. Ph.D.
Charles C. Thomas Publisher
1988
Cost $68.50



Tom Ransdell

Accusations of Child Sexual Abuse is a critical look at the way accusations of child sexual abuse are currently being investigated in this country. Its purpose is to improve the investigation of allegations of sexual abuse. The authors point out areas which are in need of more thorough research. They suggest that certain research which is currently being relied upon is inadequate. A few of the conclusions reached by the authors are:

1. Statistically, low income families are more likely to have reported cases of sexual abuse than families with incomes of over $25,000.

2. Rural counties are more likely to have reported cases of child sexual abuse than urban counties.

3. The science of psychology has not progressed to the level, where absent physical evidence, it can be said with any medical certainty whether or not a child has been sexually abused.

4. During the investigative interview conducted by the police or a social worker, children are led by verbal and non-verbal cues to elicit a desired response.

5. After a series of interviews, young children are unable to distinguish between what has actually happened to them and what they have been led to believe happened to them as a result of the interview process.

6. Many people are prosecuted as sexual abusers on the basis of nothing more than the accusation of a young child.

7.The prosecution of a false accusation hurts everyone - the child, parents and families, and hurts society in general.

The authors,Wakefield and Underwager, are two well known experts in this subject. Their research is impressive. The bibliography measures 44 pages. However, the book tells the criminal defense lawyer what he or she knows- that the typical investigation of an accusation of child sexual abuse is not designed to determine whether or not the accusation is true or false. The authors deserve a pat on the back for their courageous stand against the wave of media hype and public opinion to crack down on alleged abusers. Nevertheless, *Accusations of Child Sexual Abuse* is not written for lawyers. It is an authoritative thesis written for scholars, teachers, and students of psychology or social work. It could be of interest to the social worker whose conscience drives him or her to know more their profession. However, the amount of new information in this book which is of interest to the defense lawyer does not justify the plodding effort required to read it.

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Instructions Collected, Categorized, Listed

The Department of Public Advocacy has collected many instructions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various instructions in a 7 volume manual. Each instruction is a copy of a defense instruction filed in an actual Kentucky criminal case. They are categorized by offense and statute number. They were updated in February, 1989.

COPIES AVAILABLE

A copy of the index of available instructions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the actual instructions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Criminal defense advocates can obtain copies of any of the instructions for the cost of copying and postage. Each DPA field office has an entire set of the manuals.

HOW TO OBTAIN COPIES

If you are interested in receiving an index of instructions, or copies of particular instructions, contact:

TEZETA LYNES
DPA Librarian
1264 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601
(502) 564-8006
Extension 119

The Kentucky Department of Public Advocacy

17th Annual Public Defender Training Seminar

June 4,5 & 6, 1989

17 KBA CLE Credits

Holiday Inn, North (1950 Newtown Pike)
Lexington, Kentucky

The Program

The 17th Annual Public Defender Training Seminar for public defenders and criminal defense lawyers will be held June 4-6,1989 at the Holiday Inn North, 1950 Newtown Pike (I-75N exit 115) Lexington, Ky. This is a Holidome with an indoor recreation center with heated pool, sauna, games, wide screen t.v, sundeck and kiddie playground. The program begins on Sunday at 4:00 p.m. and concludes on Tuesday at 3:30 p.m. The program is only open to criminal defense advocates.

This seminar covers a wide variety of criminal law topics with a strong emphasis on trial aspects of criminal defense work. The program is presented by prominent national and Kentucky faculty. This is the largest yearly gathering of criminal defense attorneys in Kentucky, and provides a unique opportunity to meet and mingle with criminal defense advocates from across the state. Program topics are:

Review of United States Supreme Court Cases
Creative Criminal Defense
Using Openended Questions in Jury Selection
Self-Defense: Battered Women Syndrome
Persuasion in the Criminal Defense Process
Defending Child Sexual Abuse Cases
The ABA and the Criminal Defense Attorney
Importance of Criminal Defense Work
Defending Drug Cases
Field Guide to RCR 11.42s
Hot Issues in Juvenile Law
Change of Venue Issues
Handling Aggravated DUI Cases
The New KSP Fingerprint Machine
Expertise of Fingerprinting
Eyewitness Identification Workshop
Managing a Criminal Defense Caseload
Criminal Law and the Kentucky Legislature
Understanding the Victim's Family
Brain Damage & Criminal Behavior

Registration/Meals

The deadline for registration is May 23, 1989. There is a late registration fee of $15. Cancelations must be received by May 30, 1989. There is a $20. cancelation charge. Onsite registration is Sunday, June 4, 1989 from noon until 4 p.m. at the Holiday Inn North. You may check into the hotel after 1 p.m. on Sunday, June 4. Checkout is noon on Tuesday. Breakfast and lunch on Monday and Tuesday, June 5 and 6 are included in your registration.

Attendance Encouraged By Chief Justice

In a memo to all Judges of the Court of Justice, Chief Justice Robert F. Stephens of the Kentucky Supreme Court has encouraged all district and circuit court judges to arrange their schedules to accomodate attendance of public defenders. Consequently, trial judges should be amenable to arranging their trial schedules to allow attendance.

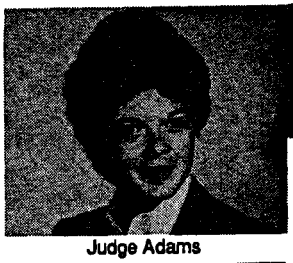
CLE Credits

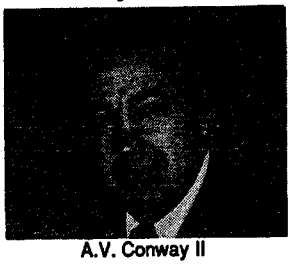
In addition to being approved for 17 hours of CLE credit from the Kentucky Bar Association CLE Commission, this seminar is also approved for CLE credits from the following states for the number of hours indicated: Missouri (17.4), West Virginia (16.9), Florida (17).

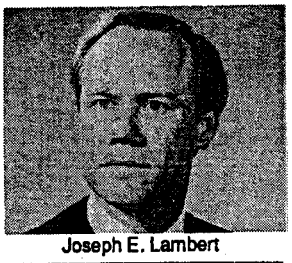
Sunday Evening's Feature: The Causes and Cures of Crime

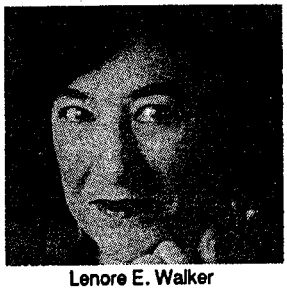
Sunday night's program features a presentation and a panel discussion on the Causes and Cures of Crime. Panel members, representing a wide range of perspectives, will be Doug Magee, author of *Slow Coming Dark (Death Row Interviews) and What Murder Leaves Behind: The Victim's Family*; State Rep. E. Louis Johnson, Chairman of the House Judiciary Committee; Margaret Winstandley, parent of a murdered child; Lane Veltkamp, Clinical Social Worker; Madison District Court Judge Julia Hylton Adams; Thomas Tolliver, Lexington Herald Leader Court Reporter; Ky. Court of Appeals Judge Paul Gudgel; David Vest, 1st Assistant Fayette Co. Attorney, and criminal defense attorney, Bill Summers. The Program will be moderated by Vince Aprile, DPA General Counsel.

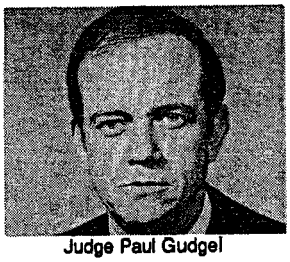
Faculty

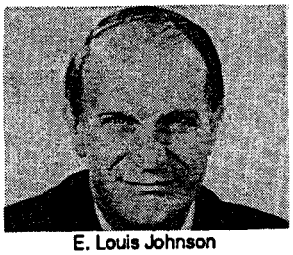

Judge Adams


A.V. Conway II


Joseph E. Lambert


Lenore E. Walker


Judge Paul Gudgel


E. Louis Johnson

Judge Julia Adams, District Judge of the 25th District, is President of the District Judges Association of Ky. Inc., and has served on staff for the District Judges Annual College since 1985.

A.V. Conway II is a 1970 graduate of the U K College of Law. He served as a Ky. Supreme Court Clerk 1970-71 and as Ohio County Attorney, 1974-1981. He represented Charles Chadwick in Ohio County in 1987 with the Battered Elderly Parent defense and obtained an acquittal. He has received 2 acquittals using the battered spouse defense.

Jim Evans recently retired after 25 years of service with the Ky. State Police. For the last 15 years he has worked in fingerprint analysis, and, at retirement, was commander of the KSP Records Section reponsible for criminal histories, accident facts, citation data, uniform crime reporting data, mugshot receipt and fingerprint identification. He's examined tens of thousands of fingerprints. He supervised the KSP Automated Fingerprint Identification System.

Gerald Goldstein is in private practice in San Antonio, Texas. He serves on the NACDL and TACDL Board and ia a NCDC faculty member. He is active in NORML and the Texas Civil Liberties Union. He teaches at the University of Texas Law School and is a criminal defense specialist.

Joe Guastaferro is the former Dean of the School of Drama of DePaul University in Chicago. Since leaving DePaul, he has appeared in many films and t.v. movies. He has been a faculty member at numerous trial institutes, including the Illinois and Federal Defender Projects and Indiana and Ky. trial practice institutes. He presently works as an actor/director.

Judge Paul Gudgel is a Ky. Court of Appeals Judge, appointed in 1979. Born in Brooklyn , NY, he received both his AB and JD degrees from the University of Kentucky. He served as Chief District Judge for the 22nd Judicial District 1978-79.

Rep. E. Louis Johnson is a member of the law firm of Wilson, Johnson and Presser in Owensboro . He was first elected to the House of Representatives in 1978, and has served as Chairman of the Judiciary Committee since 1984.

Justice Joseph E. Lambert became a Kentucky Supreme Court Justice January 5, 1987. Prior to that, he practiced with the firm Lambert & Lambert in Mount Vernon. He attended the University of Louisville School of Law, graduating in 1974.

Doug Magee is a graduate of Amherst College and Union Theological Seminary. He is a screen-writer, photographer and author of *What Murder Leaves Behind:the Victim's Family* (1983) and *Slow Coming Dark:Interviews on Death Row* (1980). Doug has lived for the last 18 years in East Harlem, NY, a neighborhood infested with crime and with glaring criminal justice failures . He brings an insightful perspective on the criminal justice system.

Terence MacCarthy, Executive Director, Federal defender program for Chicago. He is a nationally known speaker on criminal defense topics, and is chair of the ABA Criminal Justice Section.

Dr.John McConnahay,Ph.D is a professor of public policy at Duke Univ. He has been assisting in the selection of jurors and in change of venue issues in civil and criminal cases for the past 14 years. He assisted in the Los Angeles John Delorean case and the Raleigh, NC, Dr. Jeffrey McDonald green beret case on which the movie "Fatal Vision" was based.

Kevin Nelson M.D. is an Assistant Professor of Neurology at the U.K. Dept. of Neurology in Lexington.

Bob Sanders is a 1972 graduate of the Univ. of Cincinnati School of Law. He practices in Covington. He is a member of the KACDL. He represented Heidi Harmeling in a 1986 trial with the battered woman defense . Lenore Walker testified as an expert.

Mark Shelton is a court designated worker for Lincoln and Garrard Counties, and Regional Coordinator for 34 counties, supervising 27 employees. Formerly, he was in charge of the "Sentenced to Read" Juvenile Diversion Program in Lincoln County.

William Summers has practiced criminal defense law for 20 years especially in Ohio and Ky. He was a NACDL Board member for 11 years. He heads up the KACDL lawyer's strike force committee.

Ken Taylor practices in Nicholasville with Daugherty, Thomas & Taylor. He was a Public Defender at Northpoint from 1984 to 1987. He is a KACDL member.

Thomas Tolliver has been a newspaper reporter for 10 years, the last 4 as court reporter for the *Lexington Herald Leader*. He is a West Virginia native born in Logan and a graduate of Marshall University in Huntington. He has covered all the major criminal cases in Lexington.

Lane Veltkamp has been a professor of clinical social work, (child psychiatry division), Dept. of Psychiatry, U.K. College of Medicine since 1982. From 1975-82, he was an associate professor at U.K. Dept. of Psychiatry. His MA in Social Work (Psychiatric Sequence) was received in 1964 from Michigan State University. He is a frequent lecturer and has testified in child sexual abuse cases and capital cases.

David Vest is 1st Assistant Fayette County Attorney, former Deputy Attorney General, former Fayette Co. Trial Commissioner, member of the Chief Justice's Commission on Prosecutorial Ethics, Member of KBA's Ethics Committee.

Dr. Lenore E.A. Walker has worked as a clinical forensic and school psychologist for the past 18 years. She is a Diplomate in Clinical Psychology and a fellow of the American Psychological Association. She practices in Denver, Colo. She frequently testifies as an expert witness in legal actions involving abused persons and is well known in the legal field for her pioneering efforts to have expert testimony admitted in battered women self defense homicide cases. She has published extensively, including *The Battered Woman Syndrome* (1984).

Maragaret Winstandley lost a child to murder in 1986 and became involved with Parents of Murdered Children. As a contact person for this support group in Ky., she helps survivors deal with the aftermath of murder.

DPA Faculty: Tim Riddell, Ernie Lewis, Randy Wheeler, Vince Aprile, Bette Niemi, Tom Kimball, George Sornberger, Rebecca Diloreto, Jim Cox, Barbara Holthaus, Allison Connelly, Neal Walker, Gary Johnson.

Comments from Past Participants:

"The learning opportunities were wide ranging and topnotch."
"The best aspects of this seminar were the comraderie and support received by being around fellow criminal defense attorneys...."
"The Annual seminar was a rare collection of excellent and entertaining speakers and wonderful scheduling."
"I liked the chance to get to know my colleagues from across the state. The inspirational aspect was the 'boost' I came to this seminar hoping for."
"I really liked how the presentations were geared toward practical considerations."
"Excellent training and materials, as usual." Printed with State Funds KRS 57.375

DPA 17th Annual Seminar Registration Form

Deadline for registration is May 23, 1989. Make checks payable to the Kentucky State Treasurer and mail to: Donna Ouellette, 1264 Louisville Road, Frankfort, Kentucky 40601 (502) 564-8006.

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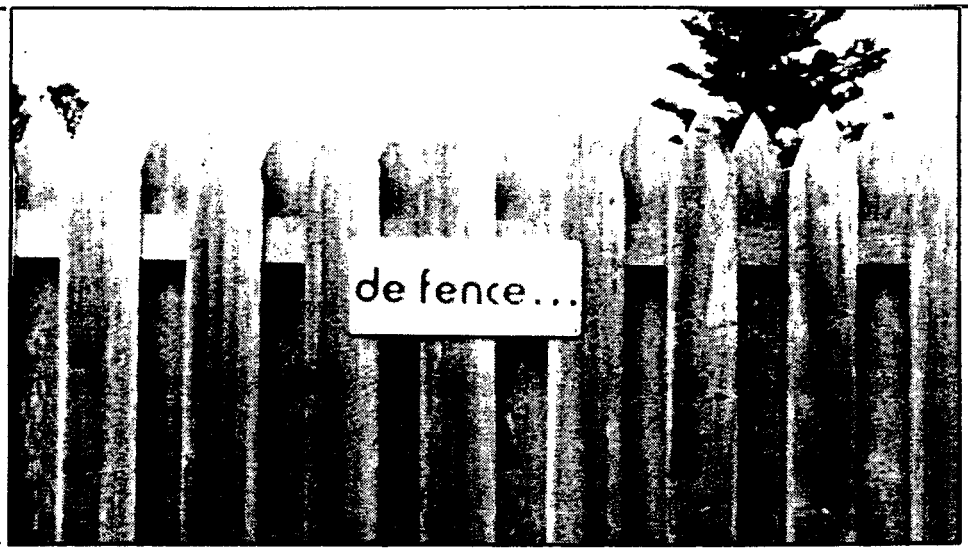


HEAR YE! HEAR YE!

Judge Huddleston

In Warren Circuit Court, as in most courts, the day begins with the bailiff's cry:

Hear ye! Hear ye! Warren Circuit Court, Division I, with the Honorable Joseph R. Huddleston presiding, is now in session. All persons having business before the Court draw near, give attention, and you shall be heard. Order is commanded.

In this brief call to order,.there are 3 references to hearing -- references which generally pass unremarked. Those of us associated with the Court suddenly became aware of the significance of those words when a potential juror returned his jury questionnaire with the notation: "I am deaf, but I would like to serve on the jury."

When the questionnaire was called to my attention by our court administrator, my first reaction was to say "Great! Let's give it a try." Upon reflection, it occurred to me to check the statutes to see if there are any prohibitions against a deaf person serving as a juror in circuit court.

KRS 29A.080(2) provides, in pertinent part, that "a prospective juror is disqualified to serve on a jury if he: . . . (d) is unable to speak and understand the English language; or (e) is incapable, by reason of his physical or mental disability, of rendering effective jury service...." KRS 29A.080(3) provides that "there shall be no waiver of these disqualifications."

Since KRS 29A.090 provides that, "there shall be no automatic exemptions from jury service," it became necessary to determine whether the prospective juror could render effective jury service despite his inability to hear. With the assistance of the Administrative Office of the Courts, 3 women experienced in signing were located.

The interpreters were appointed pursuant to KRS 30A.400(l) which authorizes the judge of any court to appoint an interpreter for any party, witness, or "any other appropriate individual in any manner properly before the court over which he presides."

On the day the jury reported to begin its one-month's service, it was apparent that the other members of the panel were initially curious, but within a short time the presence of a deaf juror and his interpreter was as readily accepted as the presence of the bailiff.

The deaf juror was not singled out in any way as we proceeded through the standard introductions and orientation which mark the opening day of a term. I was pleased to note that he even laughed at one of my feeble attempts at judicial humor -- although, like other jurors, he may have felt obliged to do so, at least on the first day of the term.

The deaf juror was not called in the first two cases tried during the term, but was finally selected. Unfortunately, a directed verdict of acquittal prevented that case from being submitted to the jury for a decision. Given the able assistance of his interpreter, he had no difficulty in following the evidence and indicated that he was looking forward to serving on another case. Late in the term, he was again selected as a juror in a criminal case. Once again he was deprived of an opportunity to deliberate and decide the case when the defendants changed their pleas to guilty after about half the evidence had come in.

"I am deaf, but I would like to serve on the jury."

Although the qualifications which interpreters must meet are set forth in KRS 30A.405, there is no oath prescribed for them. In this instance, each interpreter was admonished to accurately translate the proceedings and not to interject her own comments or opinions. Had a case been submitted to a jury including the deaf juror, it was my intention to swear the interpreter to accurately translate the deliberations, to refrain from expressing her own opinions, and to keep secret the jury's deliberations unless authorized by the court to disclose them.

Our experience with the deaf juror was altogether positive and, according to a story in the Bowling Green *Daily News*, so was the juror's. He was quoted as saying: "I wanted to prove to the hearing community that deaf people can do their duty as well as others. Most hearing people think that most deaf people are not capable of jury duty. I want other deaf people to know that they can be like me."

The courts often receive negative publicity. In this case the publicity was all upbeat. Aside from that, all of us - court personnel, lawyers and jurors alike - benefited from working with a person who was determined not to let a loss of his ability to hear deter him from performing his civic duty.

Did we stretch the law a bit when we determined that one who could communicate by sign language could, as required by KRS 29A.080(2)(d), "speak the English language?" You be the judge. Are we glad we did? You bet!

JUDGE JOSEPH HUDDLESTON
Warren Circuit Court Div. I
The Justice Center
925 Center Street
Bowling Green, KY 42102-3000
(502) 843-5412

Joseph Huddleston is a 1959 graduate of Princeton University where he was class President. In 1962 he graduated from the University of Virginia School of Law. From 1971-80 he was a member of the KBA House of Delegates. He's a past president of the Ky. Academy of Trial Attorneys (1978), and he was a member of the committee that drafted Kentucky's current Penal Code. He and his wife of 30 years, Heidi Lynn, have 3 children.

30A.400 Interpreters; Appointment

1) Any judge of any court may appoint an interpreter for any party, witness, or for any other appropriate individual in any matter properly before the court over which he presides and may authorize payment for such an interpreter out of the state treasury.

Decriminalization: Treating Drug Abuse as a Health, not a Crime Problem

Views of the Mayor of Baltimore, Maryland

Mayor Schmoke

Kurt L. Schmoke is Mayor of Baltimore, Maryland. He is a graduate of Yale and in 1976 received his law degree from Harvard. He has been in private practice in Baltimore, and a member of President Carter's White House Staff for Domestic Policy. In 1978 he became an Assistant United States Attorney in Baltimore, prosecuting narcotics and white collar crime. In 1982 he was elected State's Attorney for Baltimore. As the city's chief prosecutor, he created a full-time narcotics prosecution unit.

Mayor Schmoke gave the keynote address at the January, 1989 National Conference on Sentencing Advocacy in Washington, D.C. His remarks follow.

IS SENTENCING TO PRISON A SOLUTION?

Sentencing and its aftermath is, to borrow a chess term, the end game of the criminal justice system. After what is sometimes years of legal maneuvering, but more likely a quick plea bargain, prosecutors and judges have to determine how to punish still-one-more criminal offender. More often than not, the decision is to incarcerate, resulting in an end game in which the criminal justice system, as much as the criminals, finds itself checkmated. Many cities are now in the Alice-In-Wonderland world of trying to reduce crime (by getting more criminals off the street), while at the same time being under court order to reduce their prison populations. That is what we are confronting in Baltimore, and it is a situation which, at best, might be called a kinder and gentler Catch 22.

We cannot continue to use the criminal justice system to try and solve every one of our social problems. That would be true even if we had the resources and the bad sense to try to incarcerate every criminal offender whose behavior is rooted in poverty, unemployment, illiteracy, adolescent pregnancy or inadequate health care. But it is especially true given our current drug laws.

DECRIMINALIZING SOME DRUGS

Last April I called for a national debate on our current drug strategy. And in September I explained to Congress why I believe that the decriminalization of at least some drugs is preferable to our current policy of trying to end drug abuse by almost exclusive reliance on the sanctions of the criminal law.

Decriminalization represents at least a partial way out of the problem of prison overcrowding. It also offers the hope of greater treatment and education in lieu of punishment. In Baltimore last year, there were 48,110 arrests. Of those arrests, 15,494, or 32%, were for drug related offenses. And in the first 21 days of this year, there have been almost 1100 more drug related arrests. As for sentencing, almost 80% of the population of the Baltimore city jail is serving sentences for drug related offenses.

In spite of the severe strain on our criminal justice resources caused by our singleminded desire to arrest and prosecute every drug offender, a task which of course is impossible, that in itself did not lead me to the conclusion that we should decriminalize drugs.

DRUG ABUSE IS A HEALTH, NOT A CRIME, PROBLEM

On the contrary, I spent 7 1/2 years as a prosecutor, first as an Assistant United States Attorney and last as Baltimore's state's attorney. For most of that time, I looked at the world through a prosecutor's eyes, which means I thought that drug abuse should be handled as a crime problem not a health problem. And although I obviously knew from my earliest days as a prosecutor that our jails were both overcrowded and an ineffective deterrent, I nevertheless performed by responsibilities on the premise that incarceration is, in most cases, the appropriate response to wrongdoing.

But about midway through my term as a state's attorney that view changed, at least with respect to drugs. Drug abuse, I decided, should be treated as a health problem not a crime problem. I came to that conclusion because it was all too apparent to me that our anti-drug abuse strategies were benefiting, and continue to benefit, only the drug traffickers.

Under our current policy, addicts remain addicts; our citizens justifiably feel less and less safe on their streets and in their homes; and billions of dollars are being diverted from education and treatment, not to mention other criminal justice matters, all because we've convinced ourselves that we should have "zero tolerance" of what the American Medical Association recognizes is a disease. And in the meantime, the drug traffickers, like the bootleggers 60 years ago, just get richer and more deadly.

CHANGE THE FAILED DRUG STRATEGY

So I have come to the firm conviction that our strategy for winning the war on drugs must be changed. Some have called my views on decriminalization radical. I don't agree. They actually represent common sense, and what was mainstream thinking 75 years ago. But no matter how you characterize decriminalization, the fact remains that the world in which I functioned as a prosecutor, and now function as a mayor, is struggling under the weight of a national drug policy which amounts to little more than a self-inflicted wound on our society.

When I speak publicly about the war on drugs I usually begin, in the best tradition of Socrates, by asking these 3 questions:

1. Have we won?
2. Are our strategies winning?
3. Will doing more of the same allow to win in the future?

I do not think we can answer "yes" to any of those questions, which is why I have been encouraging people, particularly those in the legal and education communities, to take a second look at the conventional wisdom on this issue.

Lawyers and law enforcement cannot, and will not, solve drug abuse. As for drug related crime, the more law enforcement resources we apply to the problem, and the stiffer we make the sanctions, the worse the problem becomes. In other words, our current drug policy not only is not working, it is making matters worse.

In the war on drugs, the drug criminals have the American public and the law enforcement community exactly where they want us: spending billions of dollars and wasting an untold number of lawyers' hours on revolving door justice, all in pursuit of a losing strategy.

As for the complicated federal drug bill that was passed last year, that law, like so many that have preceded it, are part of the problem, not part of the solution.

WE CANNOT PROSECUTE OUR WAY OUT OF THE DRUG PROBLEM

The fact of the matter is, we are not going to be able to prosecute our way out of drug related crime. On the contrary, the more law enforcement resources we put into the war, the greater the financial incentives become to traffic in drugs and the more willing the traffickers and pushers are to commit heinous crimes. Those crimes, in turn, create still more public outcry for longer, and in many cases, mandatory sentences, which if imposed can send the blackmarket price of drugs even higher, leading to more trafficking and vicious turf battles. As much as we might wish otherwise, our current strategy (and the new federal drug law falls into that strategy) allows for no way out of this painful cycle.

AIDS

I would like to make a couple of more points about why I believe it is time to change our current drug strategy. First, AIDS is this country's most dangerous communicable disease, and it is spreading in part because doctors are not allowed to prescribe and administer drugs to addicts. Half of all new aids cases are attributable to I.V. drug use, and yet national discussion of a needle exchange program, the most minimal decriminalization step we could take, is frowned upon or condemned by many in the legal profession.

It is also important to note that AIDS is a major problem among our prison population, and as long as we continue to incarcerate addicts, the problem is bound to get worse. I hasten to add that it was only after serving on a United States Conference of Mayor's committee studying the relationship between AIDS and drug abuse that I decided to publicly call for a debate on decriminalization.

INCONSISTENT LAWS

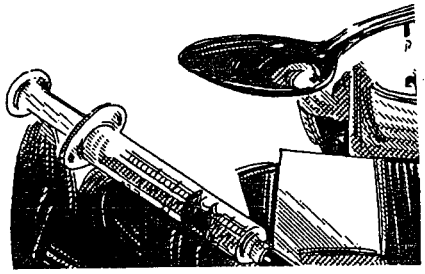
Second, our drug laws are blatantly inconsistent and illogical. For example, over 350,000 people will die this year of cigarette related diseases, or to put it another way, because of the abuse of a substance called nicotine. Yet not only are cigarettes legal, we subsidize tobacco. We also allow cigarettes to be sold in vending machines and we don't even regulate them as a drug.

Nevertheless, without making cigarettes illegal, which would be an open invitation for a huge new criminal enterprise, we have found ways to greatly reduce the number of people who smoke, primarily through public health strategies including education and social pressure.

As for alcohol, during prohibition we tried to achieve an alcohol free America by making alcohol consumption illegal and ended up with millions of Americans still drinking and breaking the law. There was also police and government corruption, terror in the streets, and enormously wealthy and powerful criminal enterprises. Sound familiar? We were right to end prohibition, but we should have also educated our population about the dangers of alcohol use rather than promote drinking as a social good.

ADDICTION WAS TREATED AS A DISEASE

Mention must be made of the Harrison Narcotics Act of 1914. Prior to that Act and several Supreme Court opinions construing it, doctors and other health officials could legally dispense to addicts opium based drugs and cocaine. In other words, addiction was treated as a disease and addicts did not have to resort to crime to pay for their drugs. That, it seems to me, is a far better approach than what we have been doing in the years since 1914.



Interestingly, it was not until late 1919 that the Narcotics Division decided to investigate and close drug maintenance clinics, many of which were run under state and local authority. In his book *The American Disease*, Dr. David Musto says this about the Shreveport Clinic, "Federal District Judge George Jack ... warned he would vigorously oppose any steps towards a discontinuance of the clinic because, from his knowledge, it had lessened crime in the city."

Dr. Musto goes on to say that the chief of police, the sheriff and the United States Marshal in Shreveport all agreed that the clinic reduced crime. That was in 1922. One year later the clinic was closed under pressure from the United States Attorney and 3 Internal Revenue Service Agents.

A BETTER NATION WITH DECRIMINALIZATION

Will decriminalization help bring about a better nation? It will mean more money for education, treatment, and prevention. It will mean that we stop incarcerating people for willfully, or otherwise, falling victim to a disease. It will mean that the spread of AIDS is slowed. It will mean fewer victims of drug related crime. It will mean children will not be enticed into an illegal drug trade. It will mean fewer drug offenders being turned into hardened criminals. It will mean more money spent investigating and prosecuting other serious violent crime. So, yes, I think decriminalization will produce positive rather than negative results for our country.

WHAT IS JUST?

I know that the problems associated with overcrowded prisons, insufficient use of alternative forms of sentencing, and lack of available education and treatment programs, particularly for drug offenders, are not, in themselves, the only reasons that those attending this conference are trying to educate elected officials and the public on the need for sentencing reform. There is also the matter of simple justice and fairness.

President Bush laid out the parameters of a concept of justice when he said in his Inaugural Speech that this should be the age of the "offered hand."

And what should be in that offered hand? Many things I suppose - including greater justice. A kinder and gentler nation is a more just nation. So this is a good time to ask ourselves whether it is just for those with the least money, the least education and the least chance of achieving economic opportunity to be bearing most of the burden of drug addiction, incarceration and drug related crime, which occurs mostly in our inner cities. I don't think it is.

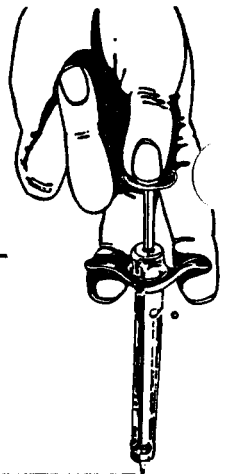
FOCUS ON THE CAUSES

With that in mind, I hope that those of you attending this conference will support drug policy reform. Sentencing, after all, comes toward the end of the criminal justice process. We also need to focus on the beginning of that process. As I told a recent gathering of law school professors in New Orleans: The courts, even with the fairest of procedures (including sentencing procedures) cannot make up for a lifetime of poverty, despair and inequality. Where we start in life still has a significant affect on where we end up in life. Therefore, if we really want a more just society, we are going to have to work for it, not only in the courtroom, but before defendants and victims reach the courtroom. And for this audience, let me add - before sentence is imposed.

KURT L. SCHMOKE
Mayor
Baltimore, Maryland

In the second part of King Henry VI, Cade, a rebel against the King, proclaimed "...and I will make it a felony to drink small beer...when I am king - as king I will be," to which his loyal henchman, Dick the Butcher, responded, "The first thing we do, let's kill all the lawyers."

BREAKING THE ADDICTION TO INCARCERATION



As a state administrator responsible for designing, funding and regulating the activities of alternatives to incarceration programs, I am amazed at how often I hear local criminal justice policy makers and elected officials claim that "Alternative sentencing is a nice idea, but it won't work here. We're a very conservative community." I have heard these comments while visiting remote rural counties, as well as in the Bronx. If a foreign observer heard this argument as frequently as I have, he or she might get the impression that we are very much a homogeneous society with a singular perspective on how the courts should respond to crime. Fortunately, reality remains different than this rhetoric implies.

Resistance to alternatives to incarceration, however, does reflect a basic conservatism, though not the ideological type that we commonly associate with the term. Rather, the conservatism of criminal justice policies is a simpler, somewhat obstinate resistance to change, an unwillingness or inability to reconsider long standing practices regardless of whether or not they have proven effective. When it comes to incarceration practices, this resistance seems so pervasive that it takes on the characteristics of an addiction. Surely, we must be addicted to incarceration. How else can we explain the system's dogged reliance on this practice so long after the "thrill" (i.e., intended impact) has gone?

There should be little doubt that the "thrill" is gone, since the evidence is substantial that incarceration does not accomplish its intended goals. For example, despite the fact that the number of incarcerated offenders in state and federal prisons has increased from approximately 200,000 inmates in the early 1970s to more than one-half million today, no one feels any safer as a result of these harsher sentencing policies. We should not be surprised by this, for criminologists have never been able to demonstrate a meaningful correlation between increased incarceration rates and reduced crime rates.

Perhaps fittingly, during this period of rising incarceration rates, policy makers discarded one of the old rationale for incarceration--rehabilitation--and created new conceptual frameworks ("just deserts" and "retributive justice") to explain society's continued addiction to incarceration. This is also not surprising. Rationalization is common to addiction and so it is perhaps predictable that we have come up with new excuses for the same practices. In effect, what has been done is only to modify how we take the drugs.

Perhaps the most obvious indicator of the addictive nature of our use of incarceration is the "thievery" that accompanies the practice. It has cost billions of dollars to build and operate the facilities that house all these new prisoners. State and local governments alike have gone into hock to finance these new prisons and jails and our children (and their children) will pay the price for years to come. More importantly, increased corrections costs in the present can only be met at the expense of other government programs, be they for health, education, new roads, whatever. Budget makers have had to resort to "stealing" from various pools of public funds in order to feed the incarceration habit. Many of those most addicted say that the cost of incarceration is really not their worry or responsibility. But, indeed, it is. Public funds are finite, just like personal funds. And those in public service have a basic responsibility to utilize the taxpayers' money in the most effective

ALTERNATIVE SENTENCING UPDATE

A survey just completed by The Sentencing Project reveals the expanding role of sentencing advocates in the criminal justice system. The survey indicates that there are now at least 115 defense-based sentencing programs in 27 states, a substantial increase from the 17 programs known to exist prior to 1980 and the 83 programs identified in a similar survey conducted two years ago.

The 115 programs provided sentencing services to 16,000 felony defendants in the past year, and in more than half the cases -- 8,300 -- staff prepared "intensive" sentencing proposals for consideration by sentencing judges. These proposals consisted of elements of community service, restitution, "house arrest," supervision, treatment programs, and counseling.

The defense-based programs surveyed work in conjunction with defense attorneys to prepare sentencing plans in "prison-bound" felony cases, those in which the defendant faces a substantial likelihood of incarceration.

Of the 115 programs, 44 are affiliated with public defender offices, and 71 are privately-based. States with the greatest number of programs are California - 20, North Carolina - 13, New York - 12. Sources of funding for the programs include private foundations, federal "anti-drug" funds, state and local government, and fees for services.

A listing of these programs is included in the 1989 National Directory of Felony Sentencing Services, available from The Sentencing Project, 1156 15th Street, N.W., Suite 520, Washington, D.C., (202) 463-8348; single copies are $9 each.

way and efficient ways possible (including ensuring needed space for those most serious offenders who most merit the cost and protection of imprisonment).

If wholesale reliance on incarceration is not making us safer, if it does not change offender behavior, and if it results in distorted budgets that we can't afford, then the time has come to kick the habit.

Lest the foregoing appear unrealistic, it is only fair to acknowledge that even when free of this addiction, there will continue to be many offenders incarcerated, regardless of the innovativeness of new approaches to sentencing. But, if we look at most prisons and jails, it is easy to find many others who pose no substantial risk to the personal safety of citizens and for whom other approaches can be quite effective. Alternative sentencing plans, such as those now being introduced by the Kentucky Department of Public Advocacy, can meet the traditional goals of sentencing and provide the courts with better and less costly options than those currently at their disposal. Such plans accomplish two essential tasks that can change sentencing decisions. They provide more and better information about defendants and they provide new and different options for the courts to consider. If comprehensive and enforceable, these plans can reduce reliance on incarceration in many cases.

There are four commonly accepted goals of sentencing: retribution, rehabilitation, incapacitation and deterrence. The relevance of the various goals, as they relate to dispositions for individual defendants, varies from case to case. Because alternative sentencing plans have the virtue of being tailored to the specifics of the case at hand, they can emphasize one or more of the goals as the particular case may demand. How do alternative sentencing plans seek to accommodate these goals? Consider the following:

RETRIBUTION

Punishment, as the primary rationale for incarceration, has been given increased importance in recent years as theorists have popularized the "just deserts" model. The basic notion behind these theories is that society has the right and need to punish those who violate its laws. Unfortunately, our theorists have given insufficient thought to what is accomplished as a result of this punishment. Moreover, they have failed to weigh the utility of alternative sanctions, insisting instead to equate punishment largely with the deprivation of liberty. This equation is neither necessary nor common to countries similar to ours. In West Germany, for example, fines tend to be used as the primary punishment for the types of cases that typically result in sentences of less than one year in the United States.

Recent program developments in criminal justice have expanded the variety and scope of alternative sanctions. Many of these new approaches, furthermore, include ancillary benefits that make them very attractive options when compared with incarceration. For example, community service, restitution, fines, intermittent sentences and home confinement are meaningful punishments that deserve more frequent utilization. In each instance, these sanctions not only punish and, therefore, hold the offending party accountable, but also create additional benefits. Community service, for example, results in the cleaning of public parks and the painting of senior citizens' centers, work that might not otherwise be accomplished. Restitution results in direct "payback" to victims, all too often the forgotten party in sentencing decisions involving incarceration. Recently, as a result of technological advances, home confinement has become an enforceable alternative sanction. Not only is such con-

finement genuinely punitive; it also enables an offender to sustain employment. While use of these alternative sanctions has been increasing in recent years, they are too commonly utilized for "soft" (i.e., non-incarceration-bound) cases, a disturbing phenomenon that could ultimately degrade their value as alternative sentencing options. And while none of these sanctions is as punitive as lengthy incarceration, it is quite possible to develop combinations of these various alternatives that have considerable punitive value.

REHABILITATION

Regardless of whether rehabilitation has fallen from grace as a popular goal of corrections, no judge, in making that fundamental "in or out" decision, fails to ask him or herself "Will this person do it again?" At its heart, this is a question about rehabilitation. Given the fact that an overwhelming majority of those who come before the criminal courts are drug or alcohol abusers, suffer from developmental disabilities, are illiterate, unemployed or mentally disturbed, the question is certainly appropriate. The justice system can either address these issues, or it can warehouse offenders for relatively short periods only to release them with the very same problems.

Alternative sentencing plans address the rehabilitative goal of sentencing in two ways. First, they accurately identify the nature and scope of the problem requiring treatment. Second, they provide specific treatment options for the court's consideration. All too frequently, judges are simply told that a particular defendant needs drug treatment. This is inadequate. What a judge really needs, if he or she is to embrace the appropriateness of rehabilitative services, is a detailed treatment plan identifying the service provides, the period of treatment, the frequency of treatment and how treatment participation will be monitored. Experience shows that judges are more inclined to utilize rehabilitative interventions when they know, at sentencing, the specifics of the treatment.

INCAPACITATION

Many incarcerative sentences are justified on the grounds that the offender will be precluded from further criminal acts while in prison. Though this is true, it is also true that most offenders are incarcerated for relatively short terms that do not protect the community for long. ("Selective incapacitation", that strategy that would lock up chronic offenders who commit large numbers of crimes for longer periods, has been shown by research to be neither practical nor accomplishable.) The question that emerges, then, is whether it is possible to develop community-based sentences that are incapacitative in nature. The answer is yes.

Typical community supervision accounts for so little of an offender's daily activity as to have limited incapacitative value. However, innovations like intensive supervision and home confinement greatly enhance the system's ability to restrict behavior in the community. When such supervision strategies are combined with other interventions, such as mandatory treatment and community service, they can "blanket" an offender with a monitorable schedule of daily activities that restricts negative behaviors. While such comprehensive supervision does not totally preclude future criminal acts in the way that incarceration does, it can effectively inhibit most offenders and it can identify whenever others stray into proscribed activities.

DETERRENCE

Continued high crime rates in the face of wholesale incarceration indicate that imprisonment, as a general deterrence strategy, does not work well. It probably never has. Similarly, the relatively high rates of recidivism among those who have served time in prison further indicate that, even on the individual level, the threat of imprisonment has limited deterrent im-

pact. It may, therefore, be unrealistic to expect alternative sentencing to achieve that which incarceration has apparently failed to accomplish.

If the research on deterrence reveals much it is that steady reinforcement (on the individual level) of the consequences of violations is the most effective approach to sustaining positive behavior. Recent experience does seem to indicate that individuals who are subject to rigorous community-based sentences are quickly sensitized to the fact that they are on a "short leash". Implementation of restrictive conditions, meaningfully enforced, appears to deter negative behavior more than the faded headlines about crime and punishment in the tabloids, or even the memory of prior periods behind bars. A good alternative sentencing plan can create the context for such a deterrent sentence. Effective implementation and monitoring of that plan by the community supervision agency is essential, however, to meaningful deterrence.

In the final analysis, alternative sentencing plans are really little more than the application of new approaches to accomplish traditional sentencing goals. Not only can such plans meet these goals; they can combine them in ways that imprisonment rarely can. For example, needed treatment interventions can also serve incapacitative ends (e.g., residential treatment facilities offer comprehensive supervision). Creatively crafted plans provide new opportunities for the courts, for victims, for defendants and for our communities. Today, in individual cases all across the country, the utility of these approaches is being demonstrated on a daily basis. What must be done, however, if we are to change incarceration practices, is to advance from this limited number of "special" cases to a more systematic utilization of this comprehensive approach to sentencing. Defense attorneys, in particular, must incorporate such plans in their advocacy repetoires. Armed with credible options, defense counsel (like a good drug counselor) can realistically address the needs that command the court's attention and allow the criminal justice system to avoid the temptation of yet another shot of incarceration.

BART LUBOW

**The author is a member of the Advisory Board of The Sentencing Project, a Washington DC-based organization that provides technical assistance nationwide to defense-based alternative sentencing programs. He was part of The Sentencing Project's team that provided training when the Department of Public Advocacy implemented its new alternative sentencing program. The following article is a summary of a presentation made at that training session. The views expressed are those of the author.*

KY DPA ALTERNATIVE SENTENCING PROJECT (PAASP) UPDATE

PAASP is a joint private and state funded, multi-agency effort involving the DPA, the Corrections Cabinet, the Developmental Disabilities Council and the Public Welfare Foundation.

PAASP was funded by 2 grants with funds from 4 different funding sources. The initial grantor was the Ky. Developmental Disabilities Planning Council(DDPC). The Council's grant laid the foundation for the Developmentally Disabled Offender Project (DDOP) which identifies the developmentally disabled felony offender and then seeks to achieve a viable Alternative Sentencing Plan (ASP) through a networking of resources.. The Corrections Cabinet contributed to this grant. The Public Welfare Foundation pro-vided the second grant which allowed the DDOP to be expanded to all prison bound clients of the DPA in the project areas. Both grants formed PAASP.

In the first 12 months, the PAASP received 110 referrals. 70 plans were written with 28 clients receiving probation or shock probation to ASPs, thus making available 28 prison beds. These plans contained payments of $31,934.04 in restitution, $3,294.48 in service fees, $3,681.26 in fines and other misc. amounts and 1,275 hours in community service. State and community resources used to address client needs in ASP's were substance abuse centers both in-patient and outpatient, MH/MR facilities, vocational rehabilitation and adult learning centers and sexual abuse counseling.

The Department is now seeking continuation funds to operate the PAASP to June 30, 1990. The DDPC has approved a continuation grant for the DDOP to June 30, 1990. Requests before the Ky. Crime Commission and the Public Welfare Foundation are pending. The Corrections Cabinet has advised that they are unable to contribute to the continuation of the PAASP due to insufficient funds. The Department's goal is to receive an appropriation from the 1990 Session of the Ky. General Assembly to continue and expand the PAASP to serve more counties throughout the Commonwealth. Thereby, increasing the jail and prison beds available to Corrections for more appropriate use. If you have any questions or desire additional information contact David Norat, DPA

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The Sixth Circuit Court of Appeals

Its History and Great Tradition

The Sixth Federal Judicial Circuit is a cross-section of the nation. Extending from the tip of Michigan's Upper Peninsula to the Mississippi border, it spans the heartland of our country. So it is that the United States Court of Appeals for the Sixth Circuit is not a regional court, but in every sense, a national one. Its workload reflects the pluralism and diversity of our national life. [1]

Justice Potter Stewart

In 1988, this diverse workload of the 6th Circuit included approximately 400 criminal appeals. [2] These criminal appeals represented nearly 11.5% of the total cases filed at the 6th Circuit, which has seen 3,797 criminal appeals filed in the decade following 1977. [3]

Given these statistics, the probability is substantial that a Ky. defense attorney who practices criminal law long enough will one day find himself headed for Cincinnati, Ohio, to argue a federal criminal appeal. The probability is not great, however, that this advocate will possess a substantial knowledge of the Court, its history, structure, offices or membership. Such information is simply not taught in law school. Nor does the busy criminal defense practitioner ordinarily have the opportunity to fill in the gaps and extensively familiarize himself with the personnel and policies of the Court.

This Article is intended to fill in these gaps and give the criminal defense bar of Ky. a basic understanding of the 6th Circuit history.

The modern U. S. Court of Appeals for the 6th Circuit is a surprisingly recent institution in the history of American jurisprudence. Not until 1891 did Congress authorize the creation of a true court of appeals. Prior to that time, the federal judicial system endured a hybrid system of quasi-intermediate appellate courts, known as "circuitcourts." [4] These courts, somewhat like Ky.'s circuit courts, had appellate jurisdiction over district court decisions involving minor federal criminal cases, but exercised original jurisdiction in major criminal cases and diversity matters. [5] No full-time judges sat on the original circuit courts. Instead, 2 U.S. Supreme Court Justices and a district judge from the Circuit constituted a 3-judge panel. [6]

From 1789 until 1911, these initial federal circuit courts continued to exist, their geographic boundaries fluctuating as the republic evolved. [7] During this 122 years, Ky. frequently found itself shuffled along the circuits. Under the "Midnight Judges" Act of 1801, Congress first placed Ky. in a 6th Circuit comprised of TN, KY and OH. [8] In 1807, however, these 3 states were grouped together as the 7th Circuit. [9] This organization was changed again in 1837, when Michigan joined the Union, and KY, TN and MO became the 8th Circuit. [10] During the Civil War, Congress radically realigned the circuits, joining KY, TN, LA and TX in a new 6th Circuit. [11] Not until July 23, 1866, did Congress establish the present boundaries of the 6th Circuit.

A quarter of a century later, on June 16, 1891, the modern U.S. Court of Appeals for the 6th Circuit held its first meeting in Cincinnati, Ohio. [12] On that date, the membership of the Court consisted of a mere three judges. [13] As their first official act, the judges adopted 34 rules of procedure, appointed a clerk of the Court and a Marshall. [14] Four months later on October 5, 1891, they appointed a Court Baliff, a Court Cryer and heard their fist case, *Farmers' and Merchants' State Bank v. David Armstrong, Receiver.* By 1892, the caseload of the new court required the addition of a second, full-time Circuit Judge, William Howard Taft, of Cincinnati, the only man ever to sit as Chief Judge of the U.S. Court and President of the United States. [16] A third, full-time judge followed Taft in 1899 as the Court's third Circuit Judge.For the next 30 years, the membership of the Court remained fixed at three judges. However, by 1929, rising caseloads required the appointment of a 4th judge.. A 5th judge followed in 1938, and a 6th in 1940. Congress appointed two more judges in 1966, and another in 1968. [17] By 1988, 15 active circuit judges would sit on thebench of the 6th Circuit, making it the second-argest federal appellate court in the United States. [18]

In the 98 years since that initial meeting in Cincinnati, the 6th Circuit has made a dramatic impact on the development of American jurisprudence. It has produced 1/4 of the Chief Justices and 1/5 of the Associate Justices of the U.S. Supreme Court. [19] In all, 22 past attorneys from the 6th Circuit have served on the lU.S. Supreme Court: 5 of these Justices were Kentuckians, Thomas Todd (1807-1826); [20] Robert Trimbell (1826-1828) [21]; John Marshall Harland (1877-1911) [22]; Stanley F. Reed (1938-1957) [23]; and Fred M. Vinson (1946-1953) [24]. Among these 5 Kentuckians, Justice Vinson served as Chief Justice for 7 years. [25] John Marshall Harland was to be rated one of the 12 greatest justices ever to serve on the Supreme Court. [26]The 6th Circuit also has the distinction of having had the first woman federal circuit judge in the United States, Florence Ellinwood Allen, appointed by President Roosevelt in 1934. [27]

Without a doubt, the U.S. Court of Appeals for the 6th Circuit is a fundamental institution in our judicial system, an appellate court with an important history that Kentuckians have helped to shape. As our Ky. defense attorney heads toward Cincinnati to argue his first appeal, he should be aware of this history and be proud to be a part of this great tradition.

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Jerome graduated from the Univ. of Ky. School of Law in 1983. He worked as a staff attorney for theUnited States Court of Appeals for the 6th Circuit in 1987. He clerked for the Ky. Court of Appeals 1984-86.

Frank is the President of KACDL (1987-89). He is the past president of the KBA (1977-78), and NACDL (1973). He is a 1952 graduate of the University of Louisville School of Law.

FOOTNOTES

[1] *Stewart, J., Preface, The Sixth Circuit Review 1968-69, 1970 U.Tol L.Rev. 49.*

[2] *U.S. Court of Appeals Sixth Circuit, Report to the Advisory Committee (May 14, 1968). Although these statistics compiled in this report include only the decade from 1977 through March 31, 1986, the number of criminal appeals filed during this period has remained surprisingly constant. The figure tends to fluctuate between approximately 350 to 450 criminal appeals filed per year.*

[3] *Report to the Advisory Committee, supra, note 2 at page 7.*

[118]Only the Ninth Circuit, with 25 active judges, has more judges than the Sixth Circuit. See, Table of Judges, 855 Fed.2d vii (1988).
[19]History of the Sixth Circuit, *supra*, note 4 at p. 3-4.
[20]See, O'Rear, *Justice Thomas Todd*, 38 Register of the Kentucky Historical Society 113 (1940); H.H. Levin, *Lawyers and Lawmakers of Kentucky*, 147 (1897).
[21]*Memoir of Judge Trimble, One American Jurist*, 149 (1829); J. Goff, *Mister Justice Trimble of the United States Supreme Court*, 58 Register of the Kentucky Historical Society 6, (1960); H. Levin, *Lawyers and Lawmakers of Kentucky*, 149 (1897).
[22]F.B. Clark, *The Constitutional Doctrines of Justice Harland, Series XXXII*, No. 4 (Baltimore, 1915); Westin, *Justice Marshall Harland and the Constitutional Rights of Negros: The Transformation of a Southerner.*,66 Yale L.J. 637 (1957); Hearts, *John M. Harland in Kentucky, 1855-1877*, 14 Filson Club Historical Quarterly, 17 (1940).

[118]Only the Ninth Circuit, with 25 active judges, has more judges than the Sixth Circuit. See, Table of Judges, 855 Fed.2d vii (1988).
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[21]*Memoir of Judge Trimble, One American Jurist*, 149 (1829); J. Goff, *Mister Justice Trimble of the United States Supreme Court*, 58 Register of the Kentucky Historical Society 6, (1960); H. Levin, *Lawyers and Lawmakers of Kentucky*, 149 (1897).
[22]F.B. Clark, *The Constitutional Doctrines of Justice Harland, Series XXXII*, No. 4 (Baltimore, 1915); Westin, *Justice Marshall Harland and the Constitutional Rights of Negros: The Transformation of a Southerner.*,66 Yale L.J. 637 (1957); Hearts, *John M. Harland in Kentucky, 1855-1877*, 14 Filson Club Historical Quarterly, 17 (1940).
[23]O'Brien, *Justice Reed and the First Amendment*, (Washington 1958).
[24]Pritchett, *Civil Liberties and the Vinson Court* (Chicago, 1954); Frank, *Fred Vinson and the Chief Justice Ship*, 21 U.Chi.L.Rev. 212 (1954); BVolner, *Fred M. Vinson: 1890-1938, The Years of Relative Obscurity*, 63 The Register of the Kentucky Historical Society 3 (1960).
[25]*Id.*
[26]53 ABA 1183 (November 1972).
[27]History of the Sixth Circuit, *supra*, note 4 at p. 13.

To be an effective criminal defense counsel, an attorney must be prepared to be demanding, outrageous, irreverant, blasphemous, a rogue, a renegade, and a hated, isolated and lonely person. Few love a spokesman and active defender for the despised and the damned.

Clarence Darrow

ASK CORRECTIONS

In the February, 1989 issue of The Advocate, the answers to the second and third questions pertaining to lengths of time to serve under parole supervision and conditional discharge were mistakenly reversed in the production process. To prevent any confusion questions 2 and 3 which appeared in the February, 1989 issue of The Advocate are repeated below with the proper answers. The Advocate apologizes for any problems this error has caused.

TO CORRECTIONS:

My client has been convicted of receiving stolen property over $100 and received a one-year sentence. He will be parole eligible next month having served 4 months on his sentence. If paroled will he have 8 months to serve under parole supervision or will he have 12 months under parole supervision as set out in KRS 439.342?

TO READER:

Your client will be issued a Final Discharge from Parole when his adjusted maximum expiration date is reached,

Betty Lou Vaughn

provided a parole violation warrant has not been issued by the parole board or he has not absconded from parole supervision, per KRS 439.354.

TO CORRECTIONS:

My client is on parole and will soon reach his conditional release date as reflected on his Resident Record Card. Will he be issued a Final Discharge from Parole on that date?

TO READER:

No, the conditional release date is the date upon which your client would have been released from prison had the parole board not granted him parole but gave him a serve out. When one is granted parole and accepts same, he is working toward his adjusted maximum expiration date.

The terms used in the previous 2 questions are defined by the Corrections Cabinet as follows:

Adjusted Maximum Expiration Date: Total time to serve plus final sentencing date minus jail time credit.

Conditional Release Date: Adjusted Maximum Expiration Date less statutory good time and meritorious good time.

Final Discharge From Parole: A formal document issued by the Parole Board which terminates all liability under the present sentence.

This regular *Advocate* column responds to questions about calculation of sentences in criminal cases. Betty Lou Vaughn is the Corrections Cabinet's Offender Records Administrator, State Office Building, Frankfort, KY 40601. For sentence questions not yet addressed in this column send to Dave Norat, DPA 1264 Louisville Road, Frankfort, KY 40601.

Involuntary Commitment of People with Mental Retardation

Hank Blandford

RESOURCES, LEAST RESTRICTIVE ENVIRONMENT, DEFENSE EXPERTS

KRS 202B, Mental Retardation Hospitalization, pertains to the involuntary admission of a person with mental retardation to a residential treatment center. Philosophical considerations about institutional care aside, a 202B defense would be aided by a basic knowledge of resources, least restrictive environment and defense experts particular to this issue.

State Institutions

Resources are limited. The typical mental retardation residential treatment center is licensed by the state as an ICF/MR, Intermediate Care Facility for Mental Retardation and related conditions. They are funded by Medicaid and can be state owned and operated, private non-profit or private for-profit by organization. Res/Care, Inc., a for-profit enterprise, operates state owned Outwood ICF/MR in Dawson Springs, Kentucky, through contractual agreement.

The typical admissions process is thorough and usually results in a waiting period of many months before admission to a state facility. It would be helpful to become acquainted with admission or social work personnel at each of the state facilities. They could be valuable witnesses to dtermine that a particular person is inappropriate for ICR/MR care. The facilities are:

1) **Central State ICF/MR**, LaGrange Road, Louisville, KY 40223, (502) 245-4121.
2) **Hazelwood ICF/MR**, 1800 Bluegrass Avenue, Louisville, KY 40214, (502) 361-2301.
3) **Oakwood**, U.S. 27 South, Somerset, KY 42501, (606) 679-4361.
4) **Outwood**, Dawson Springs, KY 42408 (502) 797-3771.

COMMUNITY ALTERNATIVES To ICF/MR Institutions

Medicaid pays for the intermediate care at the ICF/MR but also for the intermediate care in a state-wide growing program known as AIS/MR, Alternative Intermediate Services/Mental Retardation. AIS/MR placement are the chief community alternatives to the large institution for people needing program support. They can be used relative to KRS 202B.040(3) which provides the requirement that involuntary commitment apply only with the determination that "the least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center."

The AIS/MR program is one of 2 Medicaid Waivers which Kentucky selected to implement. Sometimes called a Title XIX Waiver, it can be used for anyone who would otherwise be eligible for ICF/MR services but who would prefer to stay in their locale or some other community setting.

AIS/MR placements are in all 14 of the Community Mental Health/Mental Retardation Comprehensive Care service regions. They are organized as clusters of varying residential settings depending on client need and preferences. Each cluster has a core residence which serves as a center focal point for all placements. The core is usually the first placement location for a new client and can be used as a back-up location for respite or emergency situations. A typical core is a home in a community with three or more bedrooms.

Flexibility is key to a dispersed cluster's success. Placement of 1,2, or, 3 clients are disbursed throughout the community with typical families, supported apartments and other staffed residences available. One cluster supports approximately 45 people and ranges in cost from about $15,000 to $25,000 per year per resident, significantly less than state facility average of $42,164.61 (1986/87 figures).

Regions of Service

Medicaid is the dominant funding source for the Comprehensive Care Centers' MR/DD (mental retardation/developmental disabilities) programs. There are other funding mechanisms, however, and each region does things uniquely with differing emphases. The contact point, utilizing case managers through an MR/DD office, is the same. A good relationship with the regional MR/DD Director and any local Case Managers is important. Any referral could start with the MR/DD Director (see map):

Region I

Ann Beveridge MR/DD Director, Western Kentucky MH/MR Center, 1530 Lone Oak Road, P.O. Box 287, Paducah, KY 42001, (502) 442-7121.
Counties: Ballard, Calloway, Carlisle, Ful-

Medicaid funded AIS/MR services include:

COMPONENT	SERVICES
1.Case Management	Coordination, evaluation, plan of care preparation
2.In-Home Support	Training, home aide services, personnal care services
3.Residential	Residential training, personnal care and respite care in core residences and altemative living units. This includes minor physical adaptation, laundry services,meal planning and preparation,shopping and light housekeeping.
4.Habilitation	Behavior management psychological services, psychometric services, medical services, occupational therapy, physical therapy, speech therapy, expressive therapy, and leisure time services.
5.Adult Day Habilitation	Employment oriented program of work training and basis work skills.
6.Respite	Short term care for the temporary relief of the individual or the family provided in a variety of settings.

ton, Graves, Hickman, Livingston, McCracken, Marshall.

Region II
Bruce Carver MR/DD Director, Pennyroyal MH/MR Center, 735 North Drive, Hopkinsville, KY 42240 (502) 886-5163.
Counties: Caldwell, Christian, Crittenden, Hopkins, Lyon, Muhlenburg, Todd, Trigg.

Region III
Gayle DiCesare, Greenriver MH/MR Center, 233 West Ninth Street, P.O. Box 950, Owensboro, KY 42301, (502) 684-0696.
Counties: Daviess, Hancock, Henderson, McLean, Ohio, Union, Webster.

Region IV
Greg Moore, Barrenriver MH/MR Center, 822 Woodway Drive, P.O. Box 6499, Bowling Green, KY 42101 (502) 843-4382.
Counties: Allen, Barren, Butler, Edmonson, Hart, Logan, Metclafe, Monroe, Simpson, Warren.

Region V
Jewell Jones, MR/DD Director, North Central MH/RR Center, 225 College Street, Elizabethtown, KY 42701, (502) 769-3377.
Counties: Breckinridge, Grayson, Hardin, LaRue, Marion, Meade, Nelson, Washington.

Region VI
Sandi Milnarcik, MR/DD Director, Seven Counties Services, Inc., 101 West Muhammad Ali Boulevard, Louisville, KY 40202 (502) 585-5947
Counties: Bullitt, Henry, Jefferson, Oldham, Shelby, Spencer, Trimble.

Region VII
Ginger Paul, Ed.D. MR/DD Director, Northern Kentucky, MH/MR Center, P.O. Box 2680, Covington, KY 41012, (606) 431-8152.
Counties: Boone, Campbell, Carroll, Gallatin, Grant, Kenton, Owen, Pendleton.

Region VIII
Dewey Applegate, MR/DD Director, Comprehend, Inc., P.O. Box G., Highway E., Maysville, KY 41056, (606) 564-4016.
Counties: Bracken, Fleming, Lewis, Mason, Robertson.

Region IX and X
B. Kent Duke Ed.D. MR/DD Director, Pathways, Inc., P.O. Box 790, Ashland, KY 41101, (606)
Counties: Bath, Boyd, Carter, Elliott, Greenup, Lawrence, Menifee, Montgomery, Morgan, Rowan.

Region XI
Chalmer Howard, MR/DD Director, Mountain MH/MR Center, 18 South Front Avenue, Prestonsburg, KY 41653, (606) 886-8572.
Counties: Floyd, Johnson, Magoffin, Martin, Pike.

Region XII
Glenda Moon, MR/DD Director, Kentucky River Community Care, 200 Medical Center Plaze, 2F, Hazard, KY 41701, (606) 439-0326.
Counties: Breathitt, Knott, Lee, Leslie, Letcher, Owsley, Perry, Wolfe.

Region XIII
Chad Jackson, MR/DD Director, Cumberland River MH/MR Center, P.O. Box 568, Corbin, KY 40701, (606) 528-7010.
Counties: Bell, Clay, Harlan, Jackson, Knox, Laurel, Rockcastle, Whitley.

Region XIV
Karen Gardner, MR/DD Director, Lake Cumberland MH/MR Center, 324 Cundiff Square, Somerset, KY 42501, (606) 679-7304.
Counties: Adair, Casey, Clinton, Cumberland, Green, McCreary, Pulaski, Russell, Taylor, Wayne.

Region XV
Paula Porter, MR/DD Director, ACCESS, 200 West Second, Suite 101, Lexington, KY 40507 (606) 233-0444.
Counties: Anderson, Bourbon, Boyle, Clark, Estill, Fayette, Franklin, Garrard, Harrison, Jessamine, Lincoln, Madison, Mercer, Nichols, Powell, Scott, Woodford.

Experts

KRS 202B.010 defines a QMRP, Qualified Mental Retardation Professional, among other terms. When a petition is filed in District Court and reasonable cause for involuntary hospitalization is determined, QMRP's will assist a physician in an evaluation of a respondent.

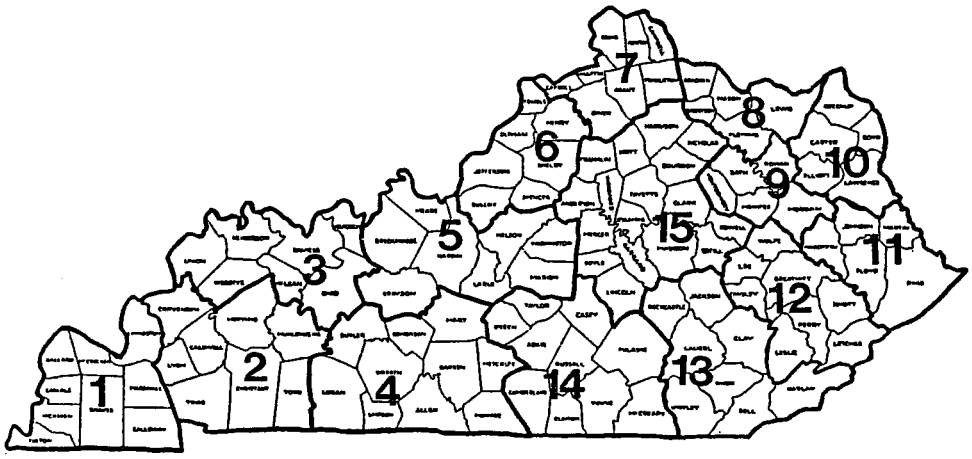
The best "defense" experts will usually come from the same Regional MH/MR Centers previously mentioned. Regional familiarity is essential at this point. Some programs have a strong commitment to their MR/DD programs and/or community services and will be of the upmost assistance. Other regions have a softer commitment and would be damaging to the respondent's interest.

Each Comprehensive Care Center (Regional MH/MR Boards) has a professional staff including psychiatrists, psychologists and social workers. These are the best candidates for expert evaluations to include staff whose specialty is residential coordinator, cluster manager or some analogous title. As a practical matter, the smoothest transitions occur when the regional MR/DD staff provide the expert testimony, have a program opening and make a firm alternative residential program commitment to the respondent. Some respondents have had successful prior placements in "New Neighbors" or "Waiver" programs, an eloquent rationale that the community is the appropriate, least restrictive mode of treatment. Where the defense clearly indicates that involuntary commitment is inappropriate but there are no available openings in the community, the Protection and Advocacy division would be very interested in more direct involvement.

While each of the 14 regions is independent and multi-faceted, mental retardation funds do funnel through to the regions from the Cabinet for Human Resources. Centralized information is available from the Division for Mental Retardation regarding the availability of openings and unallocated funding opportunities. Contact: **Charles E. Bratcher**, Director, 275 East Main Street, Frankfort, KY 40621, (502) 564-7700.

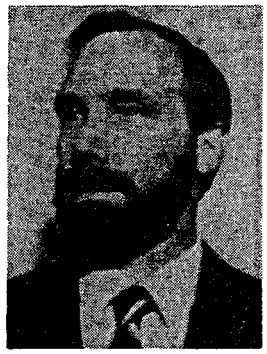
For further information feel welcome to contact any of the attorneys or residential advocates at the Protection and Advocacy Division. The alternative placement workers under Developmental Disabilities funding coordinated through Dave Norat, and working in some of the DPA offices also have invaluable information and a track record in working with the regional centers.

HANK BLANDFORD
Supervisor Residential Advocacy
Protection and Advocacy



THE PAROLE BOARD

Issues and Answers



Dr. John Rhunda

A variety of questions with a common theme are frequently asked of the Parole Board. In order to respond to these questions I have separated them into various categories and will discuss each one in this article.

Juvenile Record

The juvenile record of an inmate in an important factor in parole consideration. Research has demonstrated that the age at which one has first contact with the criminal justice system is a valid and reliable predictor of a person's parole risk. The earlier the age and the more frequent the contact, the poorer the risk the individual is. The parole Board takes into consideration the age of the inmate who is eligible for parole and traces his criminal history to determine how constant his criminal activity has been. If an eligible inmate is twenty years old but has a juvenile and misdemeanor record, there is little basis to conclude that he is a good parole risk. If, however, the eligible inmate is thirty-five years old at his first felony conviction and has had no contact with the criminal justice system since his juvenile days, the Board is less likely to attach as much significance to his juvenile record.

The best predictor of future behavior is past behavior. The best way to reduce the significance of a juvenile record is to place as many years as possible between it and future contacts with the criminal justice system.

Sex Offenders

KRS 439.340(10) specifies that no eligible sex offender shall be granted parole unless he has successfully completed the sex offender program. KRS 197.400 to 197.440 indicates that a "sexual offender" must be adjudicated guilty of a felony described in KRS Chapter 510. He becomes an "eligible sexual offender" when the sentencing court or Corrections Cabinet officials determine that the offender has demonstrated evidence of a mental, emotional or behavioral disorder, but no active psychosis or mental retardation; and is likely to benefit from the program.

These statutes only apply to these persons who crimes were committed on or after July 15, 1986. Many people who have committed sex offenses prior to the effective date of the statute have maintained that the provisions of this statute have been illegally applied to their cases. This is simply not the case.

In Kentucky where parole is a privilege and not a right, it is incumbent upon the inmate to demonstrate to the Board that he is a good parole risk. He must be able to indicate how he has dealt with the problem which led to his conviction. When a sex offender appears before the Board and has not sought any counseling, it is very difficult to conclude that he is a good risk. Given the high recidivism rate for sex offenders it is extremely important for them to develop a self-awareness, an understanding of the impact the crime had on the victim and coping mechanisms to deal with stress, anger and other emotions in an acceptable way. The sex offender program is the primary mechanism provided by the institution to deal with these issues.

Many sex offenders appear before the Board and declare their innocence of the crime. Their statement has little relevance since the Board and they must focus on the fact that they have been convicted of a sex offense. The proper arena for the discussion of guilt or innocence is the court, not the parole hearing. Given the fact of the conviction, the Board is most interested in discussing the issues previously mentioned.

The sex offender program has established certain criteria for admission. One criterion is the admission of guilt. If an individual does not admit guilt he cannot enter the program. The United States District Court has upheld the constitutionality of this requirement. Therefore, the non-admitter is in the precarious position of not being admitted to the sex offender program yet trying to argue that he has sufficient insight into his offense to assure the Board that he is a good parole risk and unlikely to re-offend.

Because sex offenses appear to be the most frequently denied offense it is reasonable to conclude that sex offenders, especially the deniers, are frequently denied parole.

Serve-Outs

Many questions are posed asking if those individuals who have been ordered to serve out their sentences in prison are eligible for intensive supervision. The answer is no. Those individuals given serve-outs by the Parole Board are released at their conditional release date and have consequently satisfied the requirements of their sentence. Upon discharge by conditional release, the individual is free to enter society with no restrictions.

Intensive Supervision is a level of supervision for parolees (and probationers). The Board has no statutory authority to require intensive supervision for someone discharged at their conditional release date. When a serve-out is ordered, the Parole Board is saying that the individual is a poor parole risk and will continue to be so for the various reasons indicated on the sheet given to the inmate. Therefore, earlier release into intensive supervision would be totally contradictory to the decision of the Board.

Short Sentences

While the length of sentence is a good indicator of the court's assessment of the severity of the offense, it does not make the probability of parole more or less likely. Of particular interest is the Board's response to short sentences (1-2 years). Each case is reviewed based upon its own merits. If, however, an individual has a prior juvenile or misdemeanor record, prior incarcerations or has violated probation, it is reasonable to assume he is a poor risk and might benefit from serving his entire sentence. A one or two year sentence does not, in itself, preclude the individual from being seriously considered for parole.

Pardons

KRS 439.450 indicates that upon the request of the Governor, the Board shall investigate and report to him with respect to any case of pardon, commutation of sentence, reprieve or remission of fine or forfeiture. The Governor is not required to consult the Board concerning these issues nor is the Board authorized to initiate

these investigations. The Board simply stands ready to respond to the Governor. Several governors in the past have requested input from the Board concerning death penalty cases and the commutation of sentences of life without parole to straight life sentences.

Truth in Sentencing

Various defense attorneys have petitioned the Parole Board to produce the annual statistics for their use in the truth-in-sentencing phase of the court proceedings. As of this date the circuit judges presiding over the specific cases in point have accepted an affidavit sworn to and submitted by the Chairman of the Parole Board attesting to the accuracy and authenticity of the included statistics. It is unclear as to the effect the introduction of these statistics has had on the final recommended sentence.

Misdemeanor Convictions While on Parole

The conviction of a misdemeanor committed while on parole establishes probable cause to believe the parolee has violated his parole. When a parolee is convicted of a misdemeanor and is required to serve time in jail, the Parole Board does take into consideration the amount of time served. This does not mean, however, that the Board will not require an additional period of incarceration on the felony sentence on which he was paroled.

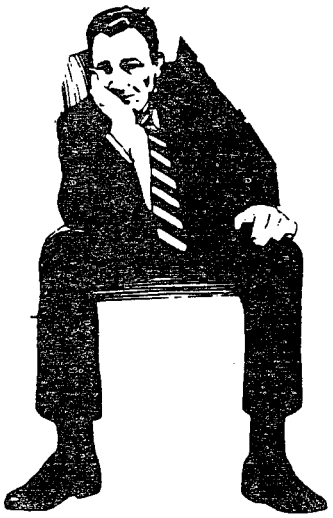
For instance, if an inmate was paroled on a Manslaughter conviction and he was under the influence of alcohol or drugs when the felony was committed, and subsequently was convicted of Alcohol Intoxication while on parole, the Parole Board would see this as a very serious violation of parole, regardless of the time served for the new misdemeanor convictions. There are occasions, on the other hand, where the Parole Board receives a special request from the parole officer to rescind a parole violation warrant due to the amount of time the parolee has served in jail and involvement in treatment programs upon release.

Again, the Board reviews each case individually and makes its decisions based upon the factors specific to that case.

Pre-Sentence Investigation Report

The PSI provides the official version of the crime for the Parole Board. From that document the Board also determines the prior criminal record, the social and family history as well as the educational and employment history of the inmate. In addition the Board becomes aware of the probation and parole officer's assessment of the individual's personal strengths and weaknesses as well as his recommendation for or against probation. Of particular interest to the Board is the response to the "official attitude" section. The Board seriously considers the input of the sentencing judge and prosecuting attorney concerning the possible parole of the person in question. The Board is making a concerted effort to encourage these officials to take advantage of this opportunity to communicate with the Board.

Of course, the PSI presents the inmate's version of the crime. Many times this serves as a useful point of departure in discussing the crime itself. Another version of the crime which the Board considers is



the version presented by the victim through the victim impact statement. The Board understands that this version is just as subjective as that presented by the inmate. It is possible for the Board to request additional court documents if it so sees fit. Since anyone is free to submit written documents to the Board prior to the parole hearing, much information in support of and in opposition to parole for the inmate is received and considered. Again, the official version of the crime found in the PSI is the one upon which the conviction is based and therefore is the most important source concerning the facts of the crime itself.

Victim Hearings

KRS 439.340(5), (6) and (7) require the Parole Board to notify the Commonwealth Attorney at least 30 days prior to the initial parole eligibility hearing for persons convicted of Class A, B and C felonies. Depending upon the date of incarceration either the Commonwealth Attorney or the Board must notify the victims of the crime. When notified, the victims are sent a Victim Impact Statement to be completed and returned to the Board where it is made a part of the permanent file of the inmate. Among the items continued in the VIS are questions asking whether or not the victim wishes to appear in person for a victim hearing prior to the parole hearing, and if the victim wishes to be notified of the Board's decision concerning the parole of the inmate.

If a victim wishes to appear for a victim hearing one is scheduled. At this hearing the victim is able to describe the crime, and any short term or long term effect the crime had had on him/her or their family. In addition the victim can express their overall feelings about the inmate, the crime and possible parole. The Board answers any questions the victim may have and explains the various options that are available to it. The Board also explains the benefit and shortcomings of parole, a deferment or a serve-out.

Most victims are very responsive and indicate that their experience with the victim hearing is usually their most satisfying experience throughout the entire criminal justice process. It offers them the opportunity to express themselves and be heard. For the Parole Board the victim hearing personalizes the crime.

The Board is aware that there are no restraints upon the victims' statements. Undoubtedly, exaggerations and falsehoods have been presented to the Board from time to time. This, however, only parallels the parole hearing where the inmate is free to say whatever he wants and most of what he says is not verified. Undoubtedly, exaggerations, minimalizations and falsehoods have also been presented to the Board. It is the Board's responsibility to consider the facts and the input received from a variety of sources, and to apply the factors which determine the inmate's parole risk and finally to make a decision regarding parole.

Legal Representation

The parole hearing is closed. Only the inmate and the Parole Board are present. There is no legal representation at the hearing because parole is a privilege and not a right which needs defending. The Board welcomes input from defense attorneys on behalf of an inmate. The most appropriate means of communication with the Board is through the submission of written documents which can be included in the inmate's file and thus, will be available to all Board Members prior to the parole hearing. While written input from attorneys is appropriate it is not necessary in order for an inmate to be recommended for parole.

Parolees have the right to be represented by an attorney at the preliminary parole revocation hearing. The final parole revocation hearing conducted by the Parole Board is closed unless the parolee specifically requests a Special Hearing at the beginning of his Final Parole Revocation Hearing. If this occurs, the Board grants a two month deferment in order to schedule the Special Hearing at a time which is convenient for the Board and the parolee's attorney. The purpose of the Special Hearing is to be represented by legal counsel and to present witnesses on behalf of the parolee.

Overcrowding

Prison overcrowding does not make parole more likely. The Parole Board statistics which cover the past five years clearly indicate that a lower percentage of paroles are being granted and more serve-outs are being ordered. Without a doubt, the actions of the Parole Board do impact the population of the prison.

The Parole Board considers each case on its own merits and the fact that prisons are overcrowded does not make any particular individual a good parole risk. The statute which governs the actions of the Board states that parole shall be ordered only for the best interest of society and when the Board believes the individual is able and willing to fulfill the obligations of a law abiding citizen.

This does not mean that the Board is unaware of or insensitive to the overcrowding problem. On the contrary, the Board is seeking ways to increase community resources and support systems so that certain individuals, who are currently incarcerated due to the lack of appropriate and available resources which would increase their chances for a successful parole, could possibly be paroled. Without the resources they remain poor parole risks, with resources they become better risks.

The Parole Board is also very supportive of the establishment of a highly structured in-patient substance abuse treatment facility within the prison system. Currently, a majority of parole violators violate their parole due to substance abuse problems. Rather than revoke their parole and keep them incarcerated for an additional twelve to eighteen months, the Board is supportive of placing these people into a facility described above for approximately six months and review their progress at the end of that time. This intense treatment might prevent future parole revocations and could reduce the total time a parole violator might have to serve in prison, thus helping to reduce the over-crowding problem.

Though the responses to the various issues have been brief it is hoped that they have clarified the Parole Board's position. As future issues emerge, they too will be addressed in this publication.

JOHN C. RHUNDA
Chairman, Parole Board
5th Floor State Office Building
Frankfort, KY 40601

John was appointed to the Board by Governor Collins in 1986 and became Chairman in 1987. He received his Ph.D. from Ohio State University in 1980.

MOTIONS COLLECTED, CATEGORIZED, LISTED

The Department of Public Advocacy has collected many motions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various motions, and a listing of each motion. Each motion is a copy of a defense motion filed in an actual Kentucky criminal case. They were updated in February, 1989.

COPIES AVAILABLE

A copy of the categories and listing of motions is free to any pub lic defender or criminal defense lawyer in Kentucky. Copies of any of the motions are free to public defenders in Kentucky, whether full-time, part-time, contract, or conflict. Criminal defense advocates can obtain copies of any of the motions for the cost of copying and postage. Each DPA field office has an entire set of the motions.

HOW TO OBTAIN COPIES

If you are interested in receiving an index of the categories of motions, a listing of the available motions, or copies of particular motions, contact:

TEZETA LYNES
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LEXINGTON HERALD-LEADER

CITY/STATE Section B

Tuesday, February 28, 1989

Woman's early parole upsets prosecutor, judge

Message is that selling cocaine 'worth the risk,' Larson says

By Thomas Tolliver
Herald-Leader staff writer

A Lexington woman sentenced to 10 years in prison for trafficking in cocaine has been paroled after serving just five months.

Her release has outraged the judge and the prosecutor in the case, both of whom say the early parole sends a bad message to the community.

"The jury said selling cocaine in Fayette County is not worth the risk," said Fayette Commonwealth's Attorney Ray Larson. "The parole board, by releasing this woman to serve only a few months, has given the opposite message, that it is worth the risk."

Sharona Moore, 23, who lived at 409 Bainbridge Court when she was convicted, was paroled Feb. 13 from the Kentucky Correctional Institution for Women at Pewee Valley. She had reported to the prison Oct. 6. In addition to the four months at Pewee Valley, Ms. Moore was given credit for 41 days that she had spent in the Fayette County Detention Center, for a total of five months behind bars.

The chairman of the state parole board said Ms. Moore's lack of a prior criminal record and a stable background made her a good parole risk.

Former Fayette Circuit Judge Don Paris, who presided over Ms. Moore's trial, said the parole board's decision would not deter others who might be tempted to sell drugs.

"I was concerned that a more substantial part of the sentence wasn't served," Paris said. "It looks like the parole board was circumventing the jury that heard the case."

Ms. Moore, along with a male companion, Myron Thomas, 25, also of Lexington, was arrested May 22 at the Knight's Inn on Elkhorn Drive after police went there looking for Thomas.

In the room where Ms. Moore and Thomas were staying, officers found a large amount of cash lying on a table, along with a white substance suspected of being cocaine. A search of the room turned up more cocaine, some of it hidden behind the commode. Larson said the drug turned out to be crack, a more potent form of cocaine. Police also found a knife in Ms. Moore's purse.

Ms. Moore and Thomas stood trial Aug. 23, and both were convicted of trafficking in cocaine. Ms. Moore also was convicted of carrying a concealed deadly weapon. The jury imposed the maximum 10-year sentence and a $5,000 fine on each defendant on the cocaine charge. Ms. Moore was fined $100 on the weapon charge.

On two occasions after her sentencing, Ms. Moore sought shock probation, which releases prisoners soon after they have been through the shock of going to jail. She was turned down both times, once by Paris and later by his successor, Judge Rebecca Overstreet.

(Turn to PAROLE, back page)

THREE PAROLE MYTHS

The first myth is that prison is a revolving door. Prosecutors would have us believe that persons convicted of crimes are sent to prison and are immediately released. The facts are, however, that during the 1987-88 fiscal year, of those inmates appearing for the first time before the Parole Board, parole was recommended in only 32% of their cases. Put another way, 68% of the people appearing for the first time before the Parole Board did not get paroled. So there is little truth in the revolving door myth.

Myth number two is that no one in Kentucky serves the time that he or she receives. Everyone, including juries, believe that if a person gets five years he automatically gets out in one or two. The reality is that of all those who appeared before the Parole Board in 1987-88, including persons appearing for the first time, 17% received what is known as a serve-out. In other words, 17% served the time given by the jury or the judge.

Myth number three is that the Parole Board has not been responsive to the sentiment expressed by the truth in sentencing bill and other public expressions of outrage. Again, the facts are much different than the myth. In fiscal year 1983-1984, only 10% of the people were given a serve-out. That figure increased to 22% by 1987-88. When looking at all hearings, and not just the first appearance by an inmate, in 1983-84 55% of those appearing before the Parole Board were granted parole. That figure dropped to 45% by 1987-88. Again, myth number three is just that, a myth.

The criminal justice system is extraordinarily complex. Parole, administered by the Parole Board, plays an important but often misunderstood role in the justice system. It is easy to condemn, and even easier to distort.

ERNIE LEWIS
Board Member
KACDL

KY HOMICIDE RATES

Bill Curtis

Homicide Rates

A homicide rate is a standard number which is derived by dividing the number of homicides in a given population by that population and multiplying by a constant, usually 100,000. It then becomes possible to make valid comparisons of rates among cities or counties.

It is not extremely meaningful to say that in 1987 there were 58 murders committed in Jefferson Co. and only 4 in Fulton Co.. After calculating the homicide rates per 100,000 population for these two counties, it is found that the 1987 homicide rate for Jefferson was 8.5 while Fulton was 61.7. (See Table 1).

Rates for 1976-85

From 1976 through 1985 Kentucky experienced a gradual downward trend in its homicide rate from 10.5 to 6.8. During this ten year period the rate decreased 54%. The 1987 homicide rate of 7.2 represents a six percent increase over the 1986 rate of 6.8. 1988 data are not yet available, and it is not known whether another upward trend in the homicide rate is commencing. (See Table 2).

TABLE 1
HOMICIDE RATES BY COUNTY FOR KENTUCKY
1987 PER 100,000 POPULATION

County	Per 100,000	County	Per 100,000
Adair	6.3	Knox	9.9
Allen	.0	Larue	.0
Anderson	7.4	Laurel	2.4
Ballard	24.2	Lawrence	.0
Barren	2.9	Lee	25.0
Bath	9.8	Leslie	32.6
Bell	5.8	Letcher	19.9
Boone	2.0	Lewis	.0
Bourbon	.0	Lincoln	10.4
Boyd	.0	Livingston	11.1
Boyle	15.8	Logan	8.2
Bracken	.0	Lyon	15.5
Breathitt	6.1	McCracken	11.5
Breckinridge	5.9	McCreary	24.2
Bullitt	4.4	McLean	.0
Butler	17.8	Madison	16.5
Caldwell	.0	Magoffin	28.0
Calloway	.0	Marion	.0
Campbell	4.9	Marshall	.0
Carlisle	.0	Martin	.0
Carroll	.0	Mason	.0
Carter	11.6	Meade	12.9
Casey	.0	Menifee	19.0
Christian	7.8	Mercer	5.2
Clark	6.9	Metcalfe	.0
Clay	25.4	Monroe	.0
Clinton	10.2	Montgomery	9.7
Crittenden	.0	Morgan	.0
Cumberland	13.3	Muhlenburg	3.1
Daviess	8.0	Nelson	.0
Edmonson	8.8	Nicholas	.0
Elliott	14.9	Ohio	.0
Fayette	5.7	Owen	.0
Fleming	24.1	Owsley	18.0
Floyd	15.7	Pendleton	.0
Franklin	2.3	Perry	11.5
Fulton	61.7	Pike	7.2
Gallatin	.0	Powell	8.4
Garrard	.0	Pulaski	.0
Grant	7.1	Robertson	.0
Graves	9.1	Rockcastle	20.5
Grayson	4.6	Rowan	5.2
Green	.0	Russell	.0
Greenup	.0	Scott	9.1
Hancock	12.4	Shelby	4.2
Hardin	3.3	Simpson	6.6
Harlan	11.8	Spencer	16.2
Harrison	12.8	Taylor	.0
Hart	.0	Todd	.0
Henderson	4.7	Trigg	10.3
Henry	7.5	Trimble	.0
Hickman	17.4	Union	5.6
Hopkins	4.3	Warren	2.4
Jackson	16.0	Washington	39.0
Jefferson	8.5	Wayne	.0
Jessamine	10.5	Webster	13.5
Johnson	.0	Whitley	11.3
Kenton	4.4	Wolfe	56.5
Knott	10.9	Woodford	5.3

TABLE 2

HOMICIDES AND RATE PER 100,000 POPULATION IN KENTUCKY FROM 1973 THROUGH 1987

YEAR	HOMICIDES	PER100,000
1987	270	7.2
1986	253	6.8
1985	253	6.8
1984	240	6.4
1983	275	7.2
1982	294	8.0
1981	301	8.2
1980	321	8.8
1979	335	9.6
1978	318	9.1
1977	348	10.1
1976	362	10.5
1975	351	10.3
1974	345	10.3
1973	320	9.6

1987 Rates

Table 1 lists 1987 homicide rates per 100,000 population for each county in Kentucky. Most of the counties do not contain 100,000 population, but the rates are calculated as if there were 100,000 population. The rate can very easily be standardized on 10,000 or 1,000 population by simply moving the decimal point one or two places.

Highest Rates in Appalachia

The homicide rates in 1987 for Kentucky's 120 counties reveal some interesting facts. The highest rates did not occur in the counties with the largest populations - Jefferson 8.5, Fayette 5.7, Kenton 4.4, Warren 2.4, and Pike 7.2. The homicide rates in Kentucky's population centers do not begin to approach the counties with the 10 highest homicide rates. (See table 3).

In 1987 Fulton Co. had the highest homicide rate at 61.7. This is not an anomaly. Fulton County has a history of very high homicide rates. Perhaps, the most noteworthy observation about table 3 is that seven of the ten counties with the state's highest homicide rates are Appalachian Counties. The Kentucky Commerce Cabinet lists 49 Kentucky Counties as part of Appalachia. These are: Adair, Bath, Bell, Boyd, Breathitt, Carter, Casey, Clark, Clay, Clinton, Cumberland, Elliott, Estill, Fleming, Floyd, Garrard, Green, Greenup, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Menifee, Monroe, Montgomery, Morgan, Owsley, Perry, Pike, Powell, Pulaski, Rockcastle, Rowan, Russell, Wayne, Whitley, and Wolfe.

After looking at Table 3, the state's counties were divided into 2 sections, Appalachian and Non-Appalachian. It was hypothesized that analysis would show that homicide rates would be consistently higher in the Appalachian Counties. The analysis clearly supports the hypothesis. (See Table 4).

Dramatically Different Rates

Not only are the homicide rates for the Appalachian Counties consistently higher than those in the Non-Appalachian Counties, the differences are stunning. The difference in rates ranges from 20% higher in 1986 to 101% higher in 1981. These wide disparities are far too great to have occurred simply by chance. In 1981 a person was two times as likely to be murdered in the Appalachian Counties.

Mountain Violence Syndrome

Is there a mountain violence syndrome at work in Appalachia? Horace Kephart in his book, *Our Southern Highlanders*, alluded to this idea.

TABLE 3

TEN COUNTIES WITH HIGHEST HOMICIDE RATE PER 100,000 POPULATION* IN KENTUCKY 1987

Fulton	61.7
Wolfe	56.5
Washington	39.0
Leslie	32.6
Magoffin	28.0
Clay	25.4
Lee	25.0
McCreary	24.2
Ballard	24.2
Fleming	24.1

*** These counties do not contain 100,000 population, but for comparative purposes the rates are calculated as if they had 100,000 population.**

Kephart's contended that mountain people place a low value on human life. He claimed that nothing surprises outsiders more than the fact that Appalachian men, for what seem trifling matters of disagreement, proceed to kill one another. Life is viewed as something to put at risk in the pursuit of manly ideals. Kephart maintained that in Appalachia the private war is sanctioned in the minds of many people. "When society, as represented by the state, cannot protect a person or secure him his dues, then he is not only justified, but obligated to defend himself and seize what is his own. And, the Mountain Society with the big S is often powerless against the Clan with a bigger C."

Kephart made note of the fact that mountain people foster a profound distrust of the courts. He argued that outsiders would be amazed at how well versed mountain people are in the petty nuances of legal practice. This understanding of legal subtleties is derived from experience. The Mountain person who has not served as a juror, witness, or principal in a lawsuit is a rare person indeed. Personal experiences with the Courts have taught (rightly or wrongly) mountain people that when a serious issue is at stake sinister influences prevent fair and impartial decisions. The strongest of these influences are perceived to be Clan money and Clan votes. When mountain people go to court, they rarely expect impartial treatment. It is believed that one must fight cunning with cunning and local influence with local influence.

TABLE 4

COMPARISON OF HOMICIDE RATES IN KENTUCKY'S APPALACHIAN AND NON-APPALACHIAN COUNTIES 1974 - 1987

	Appl.	Non Appl.	% Diff.
1987	9.6	6.3	52%
1986	7.7	6.4	20%
1985	10.2	5.4	89%
1984	8.6	4.9	76%
1983	10.2	7.0	46%
1982	9.2	7.0	31%
1981	12.5	6.2	101%
1980	10.4	7.9	32%
1979	11.8	8.3	42%
1978	12.5	7.4	69%
1977	13.2	8.4	57%
1976	12.0	9.4	28%
1975	12.0	8.9	35%
1974	10.7	8.3	29%

Culture of Poverty

Kephart's views on mountain violence are interesting. In sum, he discusses attitudes, values, and beliefs which are derived from Appalachian Culture. But, what are the characteristics of this culture which generate the values, beliefs, and attitudes discussed by Kephart? It is likely that the very high homicide rates result not from a mountain violence syndrome but from a culture of poverty.

The people of Appalachian Counties in Kentucky have long experienced oppression, defeatism, and ostracism which results from low incomes, high unemployment, sub-standard housing, poor medical and dental care, and low levels of education, etc.

BILL CURTIS
Research Analyst
Frankfort

1*Kentucky Economic Statistics, 1987.*

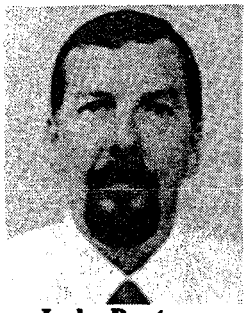
[2] Kephart,Horace. *Our Southern Highlanders: A Narrative of Adventure in the Southern Appalachians ands a Study of Life Among the Mountaineers.* The University of Tennessee Press, Knoxville, 1976.

There are hundreds and hundreds of examples of guns used to kill shortly after they were purchased. Today, it is easier to buy a lethal weapon than it is to cash a check.

Sen. Howard Metzenbaum, urging a federal requirement for a waiting period before buying guns

FORENSIC SCIENCE NEWS

Advantages Over the Dubowski Method and Possible Sources of Error



Jack Benton

This is the final part of a 4 part series.

As a working methodology, this procedure provides an acceptable and rapid method of alcohol measurement, if done correctly. This procedure's advantages over the Dubowski procedure include less opportunity for operator error involving the manipulation of measuring devices, length of analysis time, and cleanup.

Additionally, calibration curves are not required as the gas chromatographic technique is assumed to be linear, i.e., to produce ratios of N-propanol/ethyl alcohol response factors which are correlatable to the standard, regardless of the amount measured. This linearity does not, however, strictly hold and the relative response of these components may change as does their concentrations. It is these response changes which may produce erroneous results. Another error inherent in this method is the actual measurements of the blood to be tested, the standard sample, and the N-propanol internal standard, which is added to each unknown blood specimen. Each of these measurements is critical to the precision of this procedure. Viscosity of the blood to be examined should also be considered as a possible source of error, as its accurate measurement is related to its viscosity. This factor may also contribute to differences in the vapor phase concentrations of volatile components when compared to standard alcohol solutions which do not contain blood.

Aside from typical error sources encountered in any physical measurement, the gas chromatographic blood alcohol procedures, as used in most crime labs, employs only a single column identification. Current scientific opinion agrees that such a single column run is not specific and should be considered presumptive at best. To produce a positive and complete identification of any substance utilizing gas chromatographic procedure it is necessary to employ a dual column procedure. Although this procedure is capable of isolating specific volatile components in a given mixture, correct analysis parameters have to be established in order to do so. Further, in a single column procedure there is the distinct possibility that volatile contaminants or other substances can produce falsely high readings or false positives.

CONCLUSION

Any attempt to precisely measure alcohol in blood demands rigid attention to detail on the part of the analyst and specific quality control guidelines in the laboratory system. Without adherence to these guidelines, there can be no assurance as to the reliability of any result.

In light of this need for quality control in the analysis of blood alcohol specimens and other analytical procedures, it has become, or at least it should be, a major consideration for all laboratories conducting forensic examinations. Both internal and external monitoring or results should be employed. Indeed, the legislature should establish certification of testing apparatus, procedure and personnel as it has in breath testing. Some laboratories conduct multiple analyses and report any deviations that occur if they exceed ± 10%. Quality assurance in the laboratory should be explored in detail by the court, the prosecutor and by the defense attorney. Otherwise, they have no guarantee as to the validity of results that may ultimately decide the citizen accused's guilt or innocence.

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[1] Consideration should be given to several specific area when inspecting or establishing a quality assurance program. The following outline details the general areas of consideration.

I. Laboratory Staff
- A. Basic Qualifications
- B. Additional Training
- C. Proficiency Continuance for Individual Analyst
  1. Continuing education
  2. Minimum caseload to maintain proficiency in analytical procedures
  3. Documentation of training and analytical proficiency

II. Procedures
- A. Environmental Conditions
  1. Radio frequency interference
  2. Temperature, humidity and ventilation control
  3. Noise levels
  4. Adequate electrical current for instrumentation to insure proper line voltage
  5. Proper storage for required reagents
  6. Proper documentation of the above conditions
- B. Laboratory Integrity and Security
  1. Evidence storage
  2. Chemical standards
  3. Access to lab
  4. Chain of custody
  5. Proper documentation of above items

III. Methods
- A. Analysis Procedure
  1. .General guidelines
  2. Individual method guidelines
  3. Documentation of analysis procedures
- B. Evaluation and Consideration by Outside Party

IV. Report Writing
- A. Format
- B. Opinions
- C. Review

V. Proficiency Evaluation: Sample Checks
- A. In house
- B. External sources
- C. Evaluation and documentation of these results.

CASES OF NOTE

Ed Monahan

Access to Victim's Psychiatric Records
People v. Rivera
530 N.Y.S.2d 801 (1988)

The defendant was convicted of first degree manslaughter. The Court reversed since the defendant was denied the psychiatric records of the victim. The victim had a history of mental illness and drug addiction, and had been found to be a danger to others. The victim also had a history of assaults, and had 17 convictions. "The denial of access to these records deprived the defendant of an opportunity to fully prepare its case and present a defense...." *Id.* at 806. The denial of access also "...constituted the withholding of *Brady* material." *Id.* The court viewed the records as vital to the issues of who was the initial aggressor and whether the defendant could retreat from the situation without harm to himself or others.

Alternate Sentencing Cannot be Denied Due to Indigency
Commonwealth v. Melnyk
548 A.2d 266 (Pa.Super. 1988)

It is a violation of 14th amendment due process fundamental fairness to preclude an indigent defendant from a pretrial disposition of her criminal welfare fraud charge that would have provided a non criminal disposition simply due to the person's inability to pay restitution.

Cross of Multi-Disciplinary Team
Ward v. State
547 A.2d 1111 (Md.Ct.Sp.App. 1988)

Walter Ward, a Vietnam Veteran, killed his girlfriend. He pled insanity due to Post-Tramatic Stress Disorder (PTSD). The jury did not agree, and it found him guilty of first degree murder. He was sentenced to life.

The state called a psychiatrist, who was a member of the multi-disciplinary team that examined the defendant, to rebut the defense's testimony that the defendant was insane. The psychiatrist testified that the psychiatrists and psychologists on the team unanimously diagnosed the defendant as having an "adjustment disorder with mixed disturbance of mood and con duct." The obvious inference was that all the team thought the defendant did not suffer from PTSD.

The Court determined that the testimony of this psychiatrist that the diagnosis was the unanimous one of others including himself was hearsay but that the hearsay was admissible since it was made from hospital records and came within the business record exception. However, the testimony did deny the defendant his constitutional right to confront and cross-examine the witnesses against him on this critical matter. Absent defense ability to cross all members of the team, the testimony of one member as to the team's opinions was unconstitutionally admitted.

DUI - Failure to Video Accused
Logan v. State
757 S.W.2d 160 (Tx.Ct.App. 1988)

The Court determined that a defendant is permitted to argue to the jury that the state failed to make a video tape of him after being arrested for DUI. "A defendant may use the absence of a video tape in an attempt to create a reasonable doubt in the jurors' minds." *Id.* at 162. Likewise, a defendant is permitted to produce evidence that video equipment was available, operational, and in close proximity.

Suppression of Blood Sample Results
Commonwealth v. Culp
548 A.2d 578 (Pa.Super. 1988)

The defendant was found by the police in a pickup truck stuck in a snow bank. Detecting a strong odor of alcohol, the police had a blood sample taken at a hospital with the consent of the defendant. His blood alcohol level was .195% by weight. The defense moved to suppress since the blood sample was not taken timely, and since the equipment was not calibrated and tested correctly, and since the testing was not done by an approved person or by approved methods. The prosecution did not produce any proof of the licensing or authorization of the lab or technicians, and no evidence about the lab's testing procedures or qualifications of its technicians. Rather, the Commonwealth asked the court to take judicial notice that the lab was an approved facility.

The court held that the Commonwealth had not met its burden to prevent suppression of the results of the blood test:

> The requirement for admissibility of evidence obtained by chemical testing can be compared to the requirements for admitting evidence obtained by search warrant. In determining whether the Commonwealth has gone forward with the evidence this court has stated:
>
> The burden is on the Commonwealth to establish the validity of the search warrant and the burden is not carried by merely introducing the search warrant and affidavit with no supporting testimony because then the only way for the defendant to challenge the veracity of the information is to call witnesses himself and this effectively shifts onto him the burden of disproving the veracity of the information, an almost impossible burden... [If this was allowed] then policemen could recite in an affidavit as probable cause for the issuance of the warrant any and all statements which they felt were of help in obtaining the warrant, irrespective of the truth ... realizing that such statements would be insulated from defendant's cross examination ... *Id.* at 581-82.

State Lab Expert Can't Testify Contrary to Report
State v. Wilson
507 N.E.2d 1109 (Ohio 1987)

The results of the neutron activation analysis test run on the sample taken from the defendant's hand indicated insufficient amounts of barium and antimony to conclude that he fired a gun or was near one that was fired. The report given to the defense prior to trial through discovery concluded that the results were inconclusive. The report also indicated that the absence of a finding of antimony could be explained by the fact that residues may not have been expelled when the firearm was discharged or that any residues deposited on the hands of the defendant were removed prior to obtaining the sample.

Oral communication between the prosecutor and forensic expert before trial revealed that the test was inconclusive since *only* an excessive amount of barium was found on the hands of the defendant;

This regular *Advocate* column reviews selected unpublished opinions of the Kentucky Supreme Court and Kentucky Court of Appeals, and selected cases of interest from across the country.

and since the ammunition used in this crime contained only barium, the excessive amount of barium on the hands of the defendant was "consistent with" his having fired a gun loaded with ammunition of the type that killed the victim. The defense was not told of this oral explanation of the written report prior to trial. The expert testified at trial to this oral explanation of his report.

The court held that the defendant was denied due process by the failure of the trial judge to strike the expert's opinion, and this was compounded by the failure of the trial judge to permit the defense to admit the written report. A continuance would not have been a sufficient remedy since that precluded the defense from objecting to its admission prior to it being presented to the jury. It also precluded the defense from conducting a different trial strategy due to this different opinion of the expert.

Homosexuality and Anatomically Correct Dolls
United States v. Gillespie
852 F.2d 475 (9th Cir. 1988)

The Court held evidence that the defendant had a homosexual relationship was inadmissible in this child molestation case since it was irrelevant and extremely prejudicial to the defendant.

In part, the defense was that the abuse of the victim was caused by a female, not the male defendant. The child's therapist testified that the child's behavior with anatomically correct dolls showed she had been abused by a man using his penis and not by a woman.

The Court determined that the *Frye* test was applicable to expert opinions on play therapy with anatomically correct dolls because the "trier of fact would tend to ascribe a high degree of certainty to the technique." *Id.* at 481. Since the therapist's opinion was admitted without any showing that it was scientifically accepted and reliable, the conviction was reversed.

Brady Material from Probation File of Informant
United States v. Strifler
851 F.2d 1197 (9th Cir. 1988)

Defendants were convicted of attempting to manufacture and conspiracy to manufacture and distribute methamphetamine.

The defense impeached the government's informants with information obtained from the informant Maxwell's probation file and given to them from that file by the judge after the judge reviewed the file *in camera*. The Court held that the trial judge erred in not turning over enough *Brady* material to the defense:

> We adopt the rule that we will reverse for denial of *Brady* material from a probation file if, on review of the file, we find that the district court committed clear error in failing to release probative, relevant, material information. Frank Maxwell's criminal record was in the file. It was, as another district judge had earlier observed, "a horrible record." Normally, the criminal record of a witness is available to the prosecutor and, as it bears on the witness's credibility, must be turned over to the defendant. The criminal record cannot be made unavailable by being made part of the probation file. Consequently, it was clearly erroneous for the trial court not to make available to the defense Frank Maxwell's entire criminal record. In addition, the probation file contained material which would have permitted the defendants to cross-examine Frank Maxwell further on his and his wife's motives for informing against the Striflers, particularly with regard to the alleged June 12 "cook." The file contains, among other things, probation reports showing a tendency in Maxwell to "overcompensate" for actual or perceived problems; reports of the long-standing financial needs of the Maxwells; and reports of repeated instances of Frank Maxwell's lying to authorities. This information would have provided a basis for impeaching Maxwell especially on the issue of whether he invented the existence of suspicious activities at the Fitzsimmons' ranch on June 12, 1986. *Id.* at 1202.

Violence of Victim Admissible
Chapman v. State
367 S.E.2d 541 (Ga. 1988)

Robin Chapman was sentenced to life for the murder of her husband. The defendant was prevented from introducing evidence of the victim's reputation for violence. The trial judge refused to admit the testimony of a person who knew the defendant for 20 years and refused to allow an employee of the Sheriff's Department to testify. Both would have testified as to the victim's reputation for violence.

The Court recognized that the character of a victim is not admissible. However, there is an exception to that rule. A defendant can show a victim's propensity for violence to support a defense that the victim was the aggressor and the defendant was defending herself.

Shoeprint ID Inadmissible
People v. Ferguson
526 N.E.2d 525 (Ill.App. 1988)

A physical anthropologist testified as a shoeprint expert that the anthropological structure of every human being is unique and each person has a unique foot impression.

The Court held it was error to allow her to testify as an expert on shoeprint identification through wear pattern comparisons and her conclusion that the defendant wore shoes that made the shoeprints at the scene of the crime. The court recognized that there may arguably be a scientific basis for this theory but there was no general acceptance in the scientific commentary for it. There were no studies other than the expert's own on this expertise. Although there were 4 persons in other countries doing this type of analysis, no other person has rendered such an opinion for shoe wear patterns alone.

The rationale of this case obviously leads one to think that the colposcope analysis and opinions used in sex abuse cases are likewise not sufficiently acceptable to allow into a criminal trial.

Excusal for Cause due to Alcohol Beliefs
Ex Parte Beam
512 So.2d 723 (Ala. 1987)

The defendant was convicted of murder arising out of the use of a car while he was under the influence of alcohol. On voir dire the defense asked prospective jurors if any of them had a strong religious or moral belief against the use of alcohol. One juror said she had such a belief but wasn't sure if it would affect her ability to make a fair decision. The trial judge refused to excuse the juror for cause. The Alabama Supreme Court held that it was error to refuse to excuse this juror for cause.

Ineffective to Fail to Obtain Defense Expert After Testing by State Doctor
Curry v. Zant
371 S.E.2d 647 (Ga. 1988)

The trial judge had assured the appointed counsel that a psychiatrist would be appointed upon any reasonable request for one. On its own motion, the trial court had the defendant tested at the state hospital for competency. The state doctor found the defendant to be organically brain damaged and to have a borderline personality disorder. He also found that he may be malingering or manipulating. Defense counsel did not ask for a defense expert. On a plea of guilty, the defendant was sentenced to death for murder.

On his state habeas challenge to his death sentence, the defendant produced a mental health expert who testified that the defendant had an IQ of 69; had the intelligence of a 12 year old with an IQ of 100; that he was seriously mentally ill, and that he could not waive his constitutional rights. Also, at the habeas hearing, the defendant's trial counsel said he did not ask for independent expert because he felt it would be futile based on the state doctor's report. The court held that the defendant was denied effective assistance of counsel:

> We find that although trial counsel met with Curry on many occasions, consulted with Curry and Curry's family on the decision to enter a guilty plea, and conscientiously prepared for the sentencing phase of the trial, his failure to take a crucial step of obtaining an independent psychiatric

evaluation of Curry deprived his client of the protection of counsel. Conscientious counsel is not necessarily effective counsel. The failure to obtain a second opinion, which might have been the basis for a successful defense of not guilty by reason of insanity and would certainly have provided crucial evidence in mitigation, so prejudiced the defense that the guilty plea and the sentence of death must be set aside. *Id.* at 649.

No Standing Required to Prevail on *Batson*
State v. Superior Court
760 P.2d 541 (Ariz. 1988) ***(En Banc)***

Caucasian criminal defendant had standing to challenge prosecutor's racially motivated use of peremptory challenges to remove all blacks and any substantial and identifiable class of citizens from the jury panel since such discriminatory exclusion violated the defendant's constitutional right to a fair cross section of the community under the 6th and 14th amendments. See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

ED MONAHAN

BOOK REVIEW

Not Poor in Spirit
Ky Youth Advocates
2024 Woodford Place
Louisville, KY 40205
Available for $3

Becky Diloreto

Nancy Gall-Clayton of Kentucky Youth Advocates has written a book of relevance to all involved in government, to all those who work with the poor and perhaps most importantly to all those who choose to disassociate themselves from that "segment of society" that relies on federal and state aid to feed, cloth, house and educate themselves and their children.

The stories of the 91 low-income families Nancy Gall-Clayton interviewed for her Kentucky Youth Advocates report, *Not Poor in Spirit: Hope for Kentucky's Low-income Families and Children* might just as well be excerpts from the pages of our client's lives. As public advocates we know of women who go to work for measly wages and therefore become ineligible for medical cards. Subsequently, they cannot obtain the counseling they need or their children's health problems go unanswered. We know of married couples who live apart (or pretend to) in order to collect AFDC. Still their homes are rickety, cold in winter and sultry in summer. We know of many examples where the government is trying to prosecute people for welfare fraud who are nothing but victims themselves.

There are many similarities between the 91 families Ms. Gall-Clayton interviewed and our thousands of clients. However, most of our clients have come to learn through bitter experience that you almost never beat the system. Recognizing the need for systemic change, Nancy Gall-Clayton offers many solutions for what Kentucky can do to better help those among us who though not poor in spirit are the unpropertied - the poor in income. Ms. Gall-Clayton's central theme is that most poor people want to become independent, but because of their economic disadvantage their dreams can only be realized when they are provided with opportunities.

The Kentucky Youth Advocates make thirty very specific recommendations. Some of those include:

Kentucky should expand Medicaid coverage to recipients of Aid to Families with Dependent Children (AFDC) who become employed. Without Medicaid coverage, such employees may be forced to quit their jobs and return to the AFDC rolls when needed health care for themselves or their children is beyond their means.

Even before federal legislation, effective in October of 1990, requires the state to include two-parent households in the AFDC program, Kentucky should offerAFDC benefits to two parent families.

Kentucky should encourage more physicians, particularly in rural areas, to accept Medicaid cards for prenatal care by the use of both incentives and disincentives. The lack of ready access to prenatal care is the beginning of a chain of events that sometimes ends with low-weight, high-risk babies who may require intensive, costly hospital care.

Kentucky should pay for semi-annual teeth-cleaning through the Medicaid program because preventive dental care is less costly than corrective treatment.

Kentucky should provide incentives to encourage counties to enact housing codes which require the provision of basic services such as heat, water, and electricity to tenants. However, the incentive program must be designed so that it does not decrease the supply of affordable homes.

Kentucky should restore housing as a funding category under the Small Cities Community Development Block Grant Program. The recent elimination of housing as a funding category will divert thousands of federal dollars which would have been spent on housing for low-income Kentuckians.

Kentucky should prohibit public schools from 'charging tuition fees,' 'laboratory fees,' or fees of any type for attending classes of one's choosing. Inability to pay causes students to take only free classes or to drop out of school altogether.

The Kentucky Department of Education and the Cabinet for Human Resources should work jointly to develop a method of supplying low-income students with feminine hygiene supplies and lice shampoo. Parents' inability to purchase these items sometimes prevents children from attending school.

Kentucky should provide incentives to encourage the establishment of quality child care centers in areas where few exist. In such areas, the state should reimburse caretakers, including relatives in the home, while parents attend educational programs. Without liberal child care policies, particularly in rural areas, many AFDC recipients will be unable to take advantage of educational opportunities.

Nancy Gall-Clayton gathered her "data" for this report by traveling 4,600 miles across Kentucky, meeting and talking with the families she wanted to write about. She often interviewed with one of her three year old twin sons in tow. Ms. Gall-Clayton could have relied on cold data instead of real people for her report and perhaps have come up with many of the same recommendations. However, it is this combination of thorough analysis and the in-depth person to person encounter that make Ms. Gall-Clayton's work extraordinarily moving and effective. Her report is a breath of fresh air in an age where so many of our best and brightest put on blinders to go after their individual pursuits.

Ms. Nancy Gall-Clayton and the Kentucky Youth Advocates are asking all of us to remember our common humanity. I encourage you to read her report.

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FUTURE CRIMINAL DEFENSE SEMINARS

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