THE ADVOCATE

A Bi-monthly Publication of the Kentucky Department of Public Advocacy
Advocacy Rooted in Justice

PUBLIC DEFENDER FUNDING

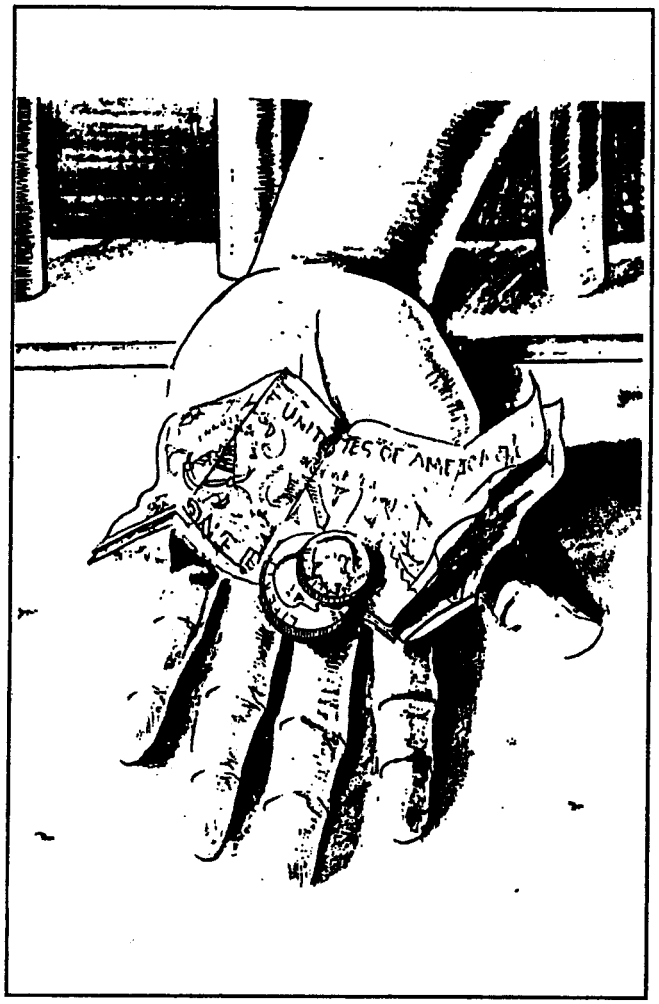
- Kentucky's Rural DPA Offices
- As Compared to Other Wages
- Legislative Actions in 6 States
- In Kentucky Capital Cases
- Shortage of Attorneys
- *Pro Bono* Efforts

KY CORRECTIONS CRISIS

- Skyrocketing Prison Population
- Legislative Views
- Parole Being Eliminated

LEGISLATIVE ACTION

NEW ETHICS RULES



Nation's Courts Rule Attorneys Representing Indigents Entitled to *Fair Compensation* **Page 33**

Volume 12, Number 1 **December, 1989**

FROM THE EDITOR: Do money and resources make a difference in criminal cases? *You bet.* Everyone involved in the criminal justice system knows this. The indigent Ky. citizen who is accused of committing a crime does not have the help of a properly funded public defender program. The results indigents obtain are less than those of a person of means in Ky. To allow this to continue to the degree that it exists in this state diminishes us all. As Martin Luther King observed in a letter he wrote from the Birmingham jail, *"Injustice anywhere is a threat to justice everywhere."*

Again in this issue, we manifest the poor funding of our public defender system with articles from our regional trial managers, a look at Ky. wage data, capital defense underfundings, the shortage of criminal defense attorneys. We contrast this states' recognition of their duty to properly fund indigent criminal services.

Prisons and parole are battling to see which can *out crisis* the other. This is sure to be a duel to the death of common sense and responsible objectives. We seem bent on impoverishing ourselves further by this race to make prisons and parole as regressive as possible. Articles in this issue address this *incarceration insanity.*

Soon our legislature will have the opportunity to change the criminal law. We bring you the views of groups who hope the legislature acts in their interest.

ECM

The Advocate is a bi-monthly publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet for administrative purposes. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the attention of our Editor.

Edward C. Monahan, Editor
Cris Brown, Managing Editor

Contributing Editors

Linda K. West	**Barbara Holthaus**
West's Review	Juvenile Law
Allison Connelly	**Donna Boyce**
Post-Conviction	6th Circuit Highlights
Neal Walker	**Ernie Lewis**
Death Penalty	Plain View
Vince Aprile	**Gary Johnson**
Ethics	In the Trenches
David Niehaus	**Dave Norat**
Evidence	Ask Corrections

Department of Public Advocacy
1264 Louisville Road
Frankfort, Kentucky 40601
(502) 564-8006

Printed with State Funds KRS 57.375

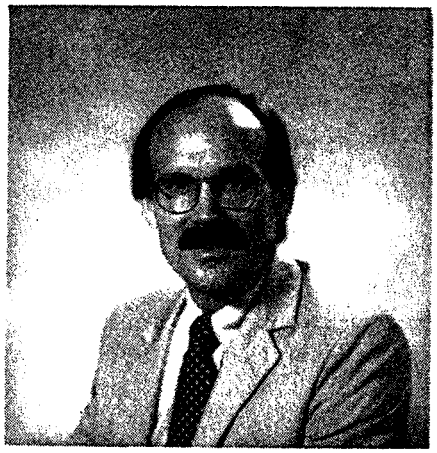
IN THIS ISSUE

THE ADVOCATE FEATURES

DPA Rural Trial Offices

We continue to feature the state of the Department's trial efforts across Kentucky. In this issue we focus on DPA's 13 rural trial offices which cover 44 counties via interviews with DPA's 3 regional trial managers.

CENTRAL KENTUCKY TRIAL OFFICES



Ernie Lewis

How many offices are in your region of responsibility and how many counties do they cover?

I supervise the Richmond office, covering 2 counties, the Somerset Office, covering 5 counties and the London office covering 4 counties.

What are the major problems encountered in your region?

The major problems are recruiting and retaining persons to staff our trial offices, the large percentage of serious felony cases, particularly in London and Somerset, and the high caseloads the attorneys are expected to carry. Morale among the staff is very difficult to keep high, particularly among the attorneys. By and large we have staffs who are bright, hard working, and committed. Yet, too often they are unable to have sufficient time to work the cases like they want to, they are too often treated shabbily by the criminal justice system, and to top it off, they are being paid much less than public defenders in other states, members of their local bar, and other persons in state government whose positions require only a high school degree or less.

What problems are created in your region by capital cases?

When a rural trial office is assigned a capital case, that can literally wreck that office for a period of time. Unlike city offices, we do not have large staffs who can absorb a serious capital case. Nationally, capital cases take from 400 to 800 hours of time. Put another way, one capital case can take up to 1/2 of an attorney's time during a year (based upon a 1600 billable hours figure). We have a policy of requiring 2 attorneys for each capital case. This then becomes exacerbated by the multiple-defendant situation in capital cases. Given these facts, one case can turn an office upside down. Unfortunately, an individual office is staffed by looking at annual caseload figures, without taking into consideration capital cases, whose locations are highly unpredictable. We have no adequate mechanism for getting relief to the small trial offices in that situation. Worse yet, offices can have more than one such case. Last spring, the Somerset office had 3 capital cases; presently, the Richmond office has 4 such cases. Trying to get all the other courts and cases adequately covered while at the same time doing a competent job on the capital case can be a virtual impossibility.

What public defender problems are peculiar to "rural" trial offices in our state-wide system?

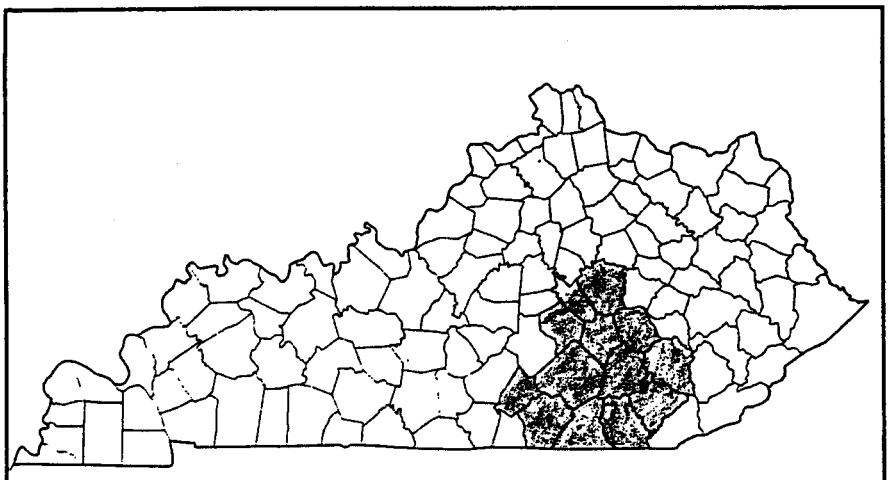
There are numerous problems peculiar to rural trial offices. First, many of our attorneys have to travel long distances to court, time that attorneys in more urban offices do not have to spend. It is more difficult to recruit persons to rural trial offices, particularly when the office is quite remote and the recruiting pool is young and single. Thirdly, a rural trial office must exist in whatever local political situation is extant. Given the high visibility of some of our cases, this can make the job of a rural public defender unpopular and lonely.

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

I believe the entire criminal justice system is starved for resources. One reason for that is the black hole represented by Corrections; all new money goes to incarceration, and little to the other vital parts of the system. I do not feel prosecutors are overfunded. However, public defenders are the most starved portion of the system. Comparatively, prosecutors fare well. We have part-time assistant county and commonwealth attorneys who earn as much as or more than our full-time attorneys. That is discouraging.

Why is it important for the state to have quality public defender services?

There are lots of reasons. I will relate 3. First, public defenders act as a check on the prosecutorial/law enforcement part of the system. When functioning correctly, we keep the police, parole officers, prosecutors hopping, honest and hard working. Secondly, a quality public defender system makes our system of incarceration/probation, etc. work better. A person who has been convicted, and is to serve a lot of time, will be a problem if he perceives that he never has a chance in court, that his "state-paid" lawyer somehow did not represent his interests. He will be a problem in court, on probation, or in prison. The converse is true also, and that is why it makes little sense to starve the public defender system. Finally, I believe you can tell what is in the very soul of a culture or people by the manner in which they treat the most vulnerable among them, such as children, the poor, the homeless, and prisoners. A strong public



The counties covered by DPA trial offices in Central Kentucky are shaded.

defender system would demonstrate that we are a people who believe in justice even for the most vulnerable among us, the poor person accused of a crime.

What has to happen for indigent Kentucky citizens who are accused of committing a crime to receive adequate public defender representation?

We must have true leadership in the legislature. We will never have a constituency. Ours will never be a politically popular cause. Raising taxes to pay for lawyers for indigents charged with crimes will not get any one votes. Yet, Tennessee and West Virginia, to name 2, have recently demonstrated the political leadership necessary to push through unpopular but necessary increased funding for public defender systems. It took political courage to pass KRS 31 back in the early 70's; it is time for that to emerge again.

What are the advantages of our full-time public defender system in rural Kentucky?

I am a believer in a full-time public defender system where possible. There are some places where a contract system remains the only viable choice. However, in many if not most areas of the Commonwealth we should have a full-time office. In many areas of the state, there are not enough private lawyers to do the public defender work such as the area covered by the Stanton office; there, a trial office is an absolute necessity. In other areas, the experienced criminal defense lawyers are not interested in or cannot afford to participate in doing public defender work. In general, public defenders are specialized in criminal law, they are extensively trained, they are managed, all of which are real advantages. I would add, however, that we should strive to include private lawyers who desire to do public defender work, by, for example, having them serve as conflict counsel.

What do you hope our Public Advocacy Commission will do for us during this 1990 General Assembly and over the next 5 years?

I would hope that the Commission could help change the political atmosphere in which DPA operates. Over the years, our Commissions have had persons on it who are listened to by the power structure. The Commission is a sleeping giant. I would hope that it would achieve its potential for advancing DPA's interest in the Legislature.

What substantive criminal law legislative changes should there be?

The last decade has witnessed numerous mostly regressive criminal law changes, changes which have incarcerated many more people for longer periods of time than before, changes which have been irrational, changes which have all but destroyed what was created by the new Penal Code in 1974. I would like to see the following, among others:

a) The Truth-In-Sentencing bill was ill-conceived and poorly drafted. It should be abolished altogether. Prosecutors don't need it to get convictions and long prison terms. At a minimum the irrational parole eligibility statue for violent offenders, KRS 439.3401, should be amended so that the parole eligibility for a life sentence would represent the maximum parole eligibility. Allowing prosecutors to talk about misdemeanor convictions and parole during the penalty hearing is unfair and very confusing. It is particularly unfair given the fact that a defense lawyer is limited in mitigation to merely rebutting the prosecutor's evidence. Further, having a bifurcated procedure for Class C and D trials is a colossal waste of time, sometimes extending trials into an additional day.

b) If we are going to have KRS 439.3401 then we don't need the PFO laws. We should not be locking people up for 10 years in prison at a cost of at least $150,000 for 3 Class D felonies.

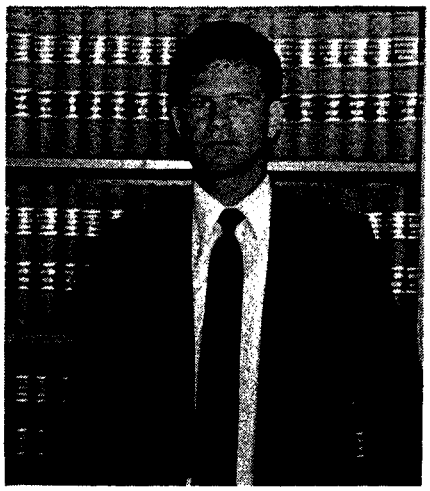
c) We should make more democratic our jury selection practices. Our federal and state constitutions contemplate a randomly selected jury from a pool that is representative of the community. The reality is far different. In many of our counties we have hand-selected jury commissioners choosing prospective jurors. The result is a prosecutorial, blue-ribbon jury. Many segments of our communities, people new to the community, poor people, women, young people, minorities are being under represented on our jury panels. What could be more fair and more democratic than requiring the use of a computer to select prospective jurors from a broadly based jury list, such as driver's license or telephone lists?

d) We must get rid of the death penalty for the mentally retarded and juveniles. I am opposed to the death penalty in all cases for religious reasons. However, killing the mentally retarded and children is perverse and obscene. I frankly would think that proponents of the death penalty would agree, because killing these groups shows how wrong, how vicious the death penalty in this country really is.

ERNIE LEWIS
Director
Richmond Trial Office
201 Water Street
Richmond, KY 40475
(606) 623-8413

Ernie is regional manager in the central region of Kentucky. He has been with DPA for the last twelve years and has served as an appellate attorney, a Trial Services Branch Chief, and Director of the Richmond Office. A Missouri native and graduate of Washington University Law School and Vanderbilt University Divinity School, Ernie lives in Richmond with his wife and two children, ages 7 and 3.

EASTERN KENTUCKY TRIAL OFFICES



Bill Spicer

How many offices are in your region of responsibility and how many counties do they cover?

There are 3 field offices in the Eastern Region (Stanton, Pikeville, and Hazard) covering the total of 14 counties.

What are the major problems encountered in your region?

The most overwhelming and devastating problem encountered in the Eastern Region is the inability to recruit and retain quality attorneys. Vacant positions remain unfilled for months and even years. Staff shortages are particularly acute in our Pikeville and Hazard offices. In Hazard, for example, resignations at the end of 1988 left that office with 4 vacant positions and only one remaining attorney. That attorney, Nancy Bowman Denton, had only been practicing law for 6 months yet she was forced to take responsibility for dozens of felony cases, including murders, and to assume the role of directing attorney. Though Nancy has done an outstanding job, and now has one additional attorney to help ease the caseload burden, it is absurd that she has been asked to shoulder these impossible responsibilities. The Pikeville Office would have 4 attorneys if fully staffed and 5 attorneys would be needed to adequately cover their area. However, as of now the Pikeville office has 2 attorneys, one a new directing attorney and the other recently admitted to the Bar. There are over 700-800 open cases in the Pikeville office. The 2 Pikeville attorneys would each have to handle double the recommended maximum yearly caseload in order to provide representation in all of these cases. This, too, is an absurd situation. The added caseload pressures created by chronic vacancies leads to attorney frustration and burnout. Even attorneys who are dedicated to public defender work often resign due to the overwhelming stress and underwhelming pay.

What problems are created in your region by capital cases?

In light of the chronic staff shortages and low average experience level, requiring offices like Pikeville and Hazard to handle capital cases is akin to kicking a person while they are down. As Eastern Regional Manager, I believe it would be irresponsible and unethical for me to ask any of the attorneys in these two offices to accept even one capital case at the present time. Even under the best of circumstances (full staffing), our resources are stretched to the limit. Each capital case not only requires two attorneys but puts added strain on the investigative and secretarial staff. When several capital cases arise in one office or region, the public defender resources are stretched beyond the breaking point. Our understaffed offices simply cannot meet our capital case responsibilities at the present time. This not only does a gross disservice to the person accused, but damages the relationship between our offices and the local judges and prosecutors.

What public defender problems are peculiar to "rural" trial offices in our state-wide system?

Staff shortages are not peculiar to rural areas, but the number and length of vacancies seem to be more acute in the Eastern Region offices. Finding conflict attorneys in rural areas is often a problem. The Stanton office covers counties in which there are no available attorneys in the county to do conflict cases and it is difficult to find private attorneys outside the county willing to take cases at the low rate of pay offered by the department. Rural areas are generally more impoverished than urban areas and therefore the public defenders are required to handle much higher percentage of criminal cases.

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

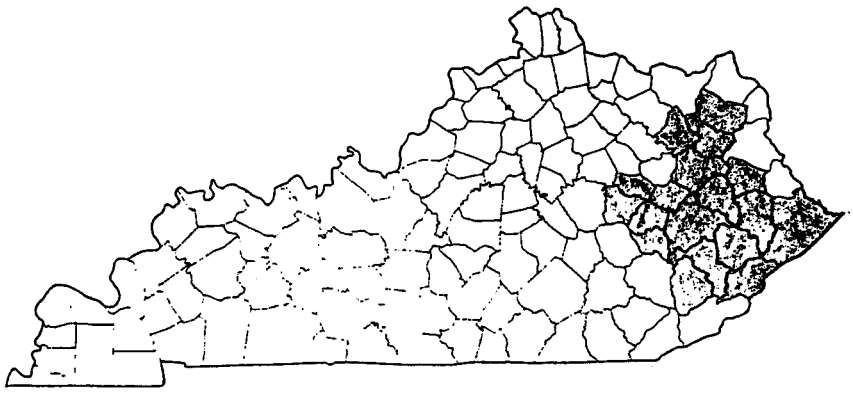
No comment.

Why is it important for the state to have quality public defender services?

Hopefully, most responsible citizens of Kentucky believe in the principles of justice and fairness. I would like to think that an overwhelming majority of the people would condemn a judicial system in which a fair shake can be guaranteed only to those with money to pay for a lawyer. If prosecutions and police actions could be brought up against indigent Kentucky citizens without challenge, a serious erosion of everyone's constitutional liberties would be the inevitable result.

What has to happen for indigent Kentucky citizens who are accused of committing a crime to receive adequate public defender representation?

Adequate funding of the Department for Public Advocacy is a must. The structure we have in place is excellent; the problem is inadequate funding. Increased funding would allow for higher salaries, increasing our ability to recruit and retain quality staff. Increased funding for our contract counties would create competition for the contracts and theoretically lead to an increase in the number and quality of attorneys willing to do contract work for the department. Likewise, finding conflict at-



The counties covered by DPA trial offices in Eastern Kentucky are shaded.

torneys would be easier if the hourly rates of pay were increase.

What are the advantages of our full-time public defender system in rural Kentucky?

The full-time public defender system in rural Kentucky guarantees that the indigent accused in these areas are represented by trained criminal defense specialists. The full-time public defenders are insulated from political pressures and do not have a paying clientele competing for time and attention.

What do you hope our Public Advocacy Commission will do for us during the 1990 General Assembly and over the next 5 years?

I hope the commission helps us urge the lawmakers to increase funding in two major areas. First the extremely low salary structure has to be improved. My office is attempting to recruit a recent graduate who paid for her education by working for the U.S. Postal Service as a letter carrier. She sincerely wants to begin her legal career as a public defender in Kentucky. However, her present salary with the U.S. Postal Service is nearly twice that of a beginning public defender in Kentucky. Understandably, she is hesitant to accept such a drastic cut in her income. I hope the Commission would agree that only an increase in the salary structure can end our frustrations in recruiting and retaining quality personnel. The second major area that the Commission needs to help us address is that of funding for death penalty representation, particularly at the trial level.

What substantive criminal law legislative changes should there be?

The truth-in-sentencing statute needs to be revamped. In many ways, the jurors are more in the dark about the effects of their verdict than they were before the law was passed. The jurors should know the range of punishment before they begin their deliberations in the guilt phase. Jurors should also be given the power to make recommendations concerning probation during the sentencing phase.

Other thoughts?

The structure that exists in the Kentucky public defender system is in many ways a model nationally. However, inadequate funding, particularly in the area of salaries, creates overwhelming stresses on the system. The situation in the Eastern Region is now desperate. It is disheartening to see underpaid young attorneys who are willing to work long hours in order to provide ethical, quality representation to the citizens of Kentucky placed under pressures so severe and constant that they ultimately leave our department for saner employment.

WILLIAM SPICER
Directing Attorney
Stanton Office
P.O. Box 725
Stanton, KY 40380-0725
(606) 663-2844

Bill is a 1977 graduate of West Virginia University and a 1980 graduate of the University of Kentucky College of Law. He is the Managing Attorney for the Eastern Region which consists of field offices in Stanton, Hazard, and Pikeville. He has been with the Department since 1980 serving as a trial attorney and directing attorney in London, KY.

James Brennan Rees formerly an attorney in private practice in Florence, KY became Fayetteville, West Virginia's first public defender. He was co-administrator of public defender programs in Mason and Breckinridge counties in KY before opening his private practice in 1979.

J.B. was offered a position with our London office but chose to go to the position in West Virginia because, "it was exciting to be involved in building an office from scratch and realistically with my years of experience there was an $8,000 pay difference."

He started at a salary of $32,500 in West Virginia.

WESTERN KENTUCKY TRIAL OFFICES

Bette Niemi

How many offices are in your region of responsibility and how many counties do they cover?

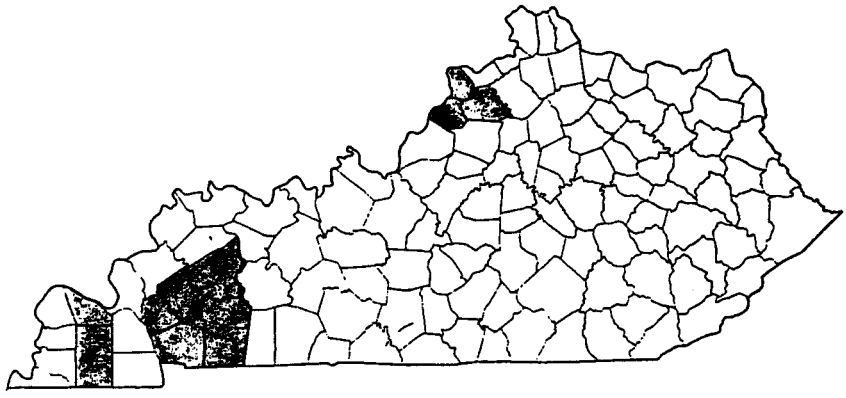
Three offices covering 11 counties.

What are the major problems encountered in your region?

Turnover, keeping staff because we are not competitive in salary.

What problems are created in your region by capital cases?

Capital cases rob offices of manpower - other lawyers must compensate for the "other" caseload of the attorney involved. Emotional stress.



The counties covered by DPA trial offices in Western Kentucky are shaded.

U.S. FEELS SHORTAGE OF CRIMINAL DEFENSE LAWYERS

PROBLEM CREATES BACKLOG OF CASES

PROVIDENCE, R.I. - It isn't tough to find a lawyer in Rhode Island- the state bar association says there is one for every 265 residents. But for people in jail, waiting two years or more for a trial, criminal defense lawyers are almost an endangered species.

Around the country, those involved in the criminal justice system say the story is the same: Lawyers are fleeing criminal defense work for more lucrative business, letting defendants languish in jail while the overworked lawyers who remain in the field are tied up on other matters.

"It's very difficult, when one lawyer has 60 cases, to dispose of those cases when he's on trial for 2 or 3 months" in one of them, said Thomas F. Fay, chief justice of the Rhode Island Supreme Court.

Samuel Dash, former chief counsel to the Senate Watergate committee and now a Georgetown University professor, was chairman of an American Bar Association committee studying problems in the nation's criminal court system.

"The system is entirely snarled. There are not enough defense lawyers, prosecutors, police officers and judges," he said.

And more lawyers might give up their defense work, especially in drug cases, because the U.S. Supreme Court said the government may seize lawyers' fees if the money came from the clients' illegal drug sales, said Neal Sonnett, president of the National Association of Criminal Defense Lawyers.

"A lot of lawyers find themselves not litigating in defense of their client, but in defense of their own fees," Sonnett said. "I've had lawyer after lawyer tell me they just don't want the hassle."

When there are not enough criminal lawyers, it can lead to hasty and poorly conceived plea bargains that let dangerous criminals go free or repeated trial delays that keep people in overcrowded prisons, Dash said.

James Ryan, chief of criminal prosecution in the Rhode Island attorney general's office, said victims also become more reluctant to testify as time passes, leading to more dismissed cases.

The United States has 725,574 actively practicing lawyers, according to the American Bar Association, or about one for every 340 people. Sonnett estimated that fewer than 50,000 of them are defense lawyers, including public defenders.

Associated Press, October 5, 1989

What public defender problems are peculiar to "rural" trial offices in our state-wide system?

A great deal of travel between counties cuts into hours to devote to individual cases. Salaries of P.D.'s are greatly disproportionate to private bar in small counties.

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

We have less of their resources. Attorneys often do their own investigation, their own research and their own leg work: a waste of our talents at cost to our clients.

Why is it important for the state to have quality public defender services?

Quality P.D.'s safeguard the rights of individuals and ensure that proper interpretation and extension of our laws. They do so because of the rights, not the financial fee a client may appear to have.

What has to happen for indigent Kentucky citizens who are accused of committing a crime to receive adequate public defender representation?

Money has to be found - the general public must realize freedom has a price. As much money should be attached to preserve constitutional rights as is to make accusations.

What are the advantages of our full-time public defender system in rural Kentucky?

One, no one else is going to do it. Two, full-time public defenders, if paid an honest and adequate salary, will keep the system honest.

What do you hope our Public Advocacy Commission will do for us during this 1990 General Assembly and over the next 5 years?

Funding for a state-wide full-time public defender system including resources to pay attorneys representing indigents at least as much as those lawyers prosecuting and judging them.

What substantive criminal law legislative changes should there be?

Eliminate capital punishment. Abolish the parole board. Revamp PFO to target "violent" crimes only. Increase dollar limits in theft related cases.

BETTE NIEMI
Assistant Public Advocate
Director, LaGrange Trial Office
300 North First Street
LaGrange, KY 40031
(502) 222-7712

COURT OF APPEALS JUDGE MICHAEL O. MCDONALD

KY Public Defenders are Grossly Underpaid and Grossly Overworked

From your perspective as a former circuit court judge and your present Court of Appeals position, what do you see as the biggest problems in the criminal justice system in Kentucky?

Inconsistency in sentencing for one thing. I think it would be better for the judges to do the sentencing as opposed to the juries. The bifurcated truth-in-sentencing phase is a little bit too cumbersome to handle. I've gone back and tried some cases recently and it's very time consuming.

When you say it's time consuming, you mean the truth-in-sentencing phase is time consuming.

Yes, and of course, if you add judge sentencing you wouldn't have to go into that. I think you could be more consistent and I feel that that the law should be consistent. These sentences of 1000 years and things like that, I think there's just something inherently wrong there. You know in a personal injury case you enter the mortality table, I guess there ought to be some type of mortality table in a criminal case as to how long is that person going to be around. It doesn't seem like you could extend the period beyond any reasonable life expectancy. But I think that would be cured with judge sentencing. I know it's a controversial thing, but I think that ought to be changed. I think the judge sentencing must be in conjunction with the presentencing report and the input by professional people. And I know that some judges are maybe in some circumstances more ridiculous than maybe what a jury might be but I think that has to be, the sentencing has to be in conjunction with the input by professionals, with the presentencing report.

Do you see any other huge problems in Kentucky's criminal justice system?

Everything is drug out beyond what is reasonable. It's gotten to be supertechnical. Things of that nature.

Michael O. McDonald

What criminal law legislation would best serve the people of this state?

Well, I've always urged that there ought to be an expungement of tremendous amount of criminal records that, I'm saying after a 10 year period where no one has had an arrest for any type of violent or sexual crime or anything like that and it's a misdemeanor or any type of probatable felony. I think that there comes a time when that person ought to be able to shed the criminal aspects of whatever that is a connotation of. I think it hurts a good many of the citizens to be tagged for the rest of your life with a criminal record. I know that there's a theory once a sinner always a sinner and maybe you can parlay that into saying once a criminal always a criminal but I see a lot of justification for expungement. Where there is no more police interest in an individual, why should that person be in the computers for the rest of their life. I see a need for legislation to rethink the violent vs. nonviolent crimes as to the incarceration. A lot of our crimes that are on the books statutorily are just there for collection purposes for businesses and I think that ought be excluded. Anybody that takes a bad check for over $300, there ought to be a *caveat emptor* provision that, shame on you. I have no empirical study, but my experience of debt, and recently I've been made aware of, the courts are used as a clearinghouse for collection purposes as opposed to the correction of criminal behavior and I don't think that's the place. I think we have to trim it down, I think we have to have more realistic sentences, more realistic time involved. I think we have to have more incarceration of the violent people and remedial steps taken for those who are nonviolent.

Do you think the Kentucky public would accept that kind of change?

Yes. The Kentucky public sure want it when they're in it. I think there has to be some rational approach to all of this, and I think in many instances we make a particular crime out of something which is really not there.

Any other legislation you would think could solve some of the criminal justice problems?

I think the violent crimes ought to be treated on a non-probatable basis...you can probate somebody that stabbed you to death but you can't probate somebody that uses a weapon, that doesn't make sense to me. I think they all ought to be treated the same. I would be harsher on those in the society that are violent and commit that type of crime.

Kentucky has the lowest compensation for appointed defense attorneys in capital cases of all the states, is it fair to only compensate an attorney representing someone whose life is at stake the maximum of $2,500?

That's, it's an insult, and a degradation of the whole profession, as far as I'm concerned. The Governor, the Executive Branch, Legislative Branch have contract lawyers. I understand that they do quite well. I don't see any difference between the contract lawyer there and the contract lawyer here. I think this would happen to be more important, just from the simple dignity of life itself that you ought to protect it as much as you possibly can and I think that it puts a price tag of $2,500 on a person's life. I'm opposed to that. On the

other hand, I don't believe in opening up the treasury to somebody. I think there has to be reasonable constraints and controls on it, but this is almost, it's repulsive.

From your viewpoint as a judge, why is it in your interest to have the lawyer representing the indigent capital defendant properly compensated?

Well, I think you get a fair fight. I put it just basically, I think we've had an experience in, who was it recently, in Kenton County? You know, that's almost an indictment itself against the whole system. I have tried capital cases myself as a lawyer, I speak with some degree of experience and it's not fun and games, it's very serious business and I just can't imagine a trial judge feels satisfied knowing that you've got someone here working at less than minimum wage. That just doesn't, there's something inherently wrong about that whole system. Yet, I recently sat on the lottery case; I would love to see the hours paid to the lawyers in that. I would think that when you compare the two, it would be rather shocking.

That's a good point.

I tried to figure up and this was just a hearing, time wise, I tried to figure up, the best I could conclude, the time expense in that case just for our purposes, just where we were, not the trial court, not subsequently the Supreme Court, anything else, I tried to calculate, and I figured it would be around $35,000.

That's incredible, what it says of our values.

As I say, I think that's an indictment, and it's not against lawyers. The indictment is against the whole attitude and as long as you have, you can't activate someone unless you develop an attitude. I've always believed that and we have a bad attitude.

Could you explain that a little bit more?

Well, I'm simply saying, you can't do something, I don't think you activate yourself whether it's in defending someone, prosecuting someone or doing anything that's worthwhile until you develop a proper attitude toward what you're doing. You have to follow through and to follow through requires a proper attitude otherwise you're going to fail and I think our whole mentality has to develop a better attitude or we're not going to follow through and we're going to continue to have the $2,500 maximum as long as we have this type of attitude toward the system that we're not going to have anything better than what we've got. You're not going to have better education until you get a better attitude toward education.

Yeah, I'll take somebody with a good attitude any day over somebody that has education or whatever, because you can do a lot with somebody that has a good attitude.

Because otherwise they're just going through the motions.

Sentencing a person convicted of a crime to prison often is not the most effective "solution" to the problem, yet we seem addicted to incarceration. An "alternate sentence" of treatment, restitution, sanction and community service can provide more punishment and a better chance of solving the causes of the criminal behavior long term in many cases with costs being lower. Should the criminal justice system be encouraging this better solution in appropriate cases?

Yes, I draw the line with, you know, that's where I say again, I think we have to have a rethought concerning violent, nonviolent behavior and I think we have to have different types of incarcerations. I don't think all criminals are created equal. I think we have to redevelop a whole new structure and have some remedial measures for those who are nonviolent and that's where I would look toward as far as the alternate sentencing is concerned. As far as the incarceration of the violent people, I think you have a better opportunity to work with them to change their attitudes and their behavior patterns.

Any suggestions on how we could bring that kind of different view on alternate sentencing in appropriate cases about in this state?

Well, number one, I think under any alternate program, the victim has to be compensated for the transgressions committed. And that is the primary responsibility under alternate program of the defendant. I think the defendant in a nonviolent situation should be programed to where that would have to make compensation to the victim and then compensation also to the society and I think that has to be done through very structured programs and not left to the pure political process. I think it has to be done professionally and I think it would relieve the crowding in the prisons, I think it would do a lot toward that goal.

Why is it important from your perspective as a judge to have Kentucky citizens accused of crime represented by good criminal defense attorneys and public defenders?

It's just simply my sense of a fair game or a fair fight or a fair anything. I don't like anything lopsided. I don't enjoy the situations where one person has the advantage over another person therefore I think that you have to have competent counsel for people. This is the spirit of the law and it's not too fancy, but I like a fair fight and surely to goodness you wouldn't throw a person, an indigent, under the knife in surgery by someone who is going there for the first time and doesn't know anything about it. I mean, it just, I can't imagine that.

What are the advantages of having a full-time public defender system versus an appointed or other type of public defender system?

Well, number one is professionalism, I think you have to develop a dedication and an attitude toward the profession. You're not going to do that if you're on some sort of a part-time paid system where your allegiance is to your practice and it's not to what you're doing professionally. That's my attitude. I think if there's conflict of interest, I think there's, again Ed, I'm talking, not from an empirical standpoint because I don't have any facts, but my perception is that there are more guilty pleas from part-time hourly paid attorneys as opposed to professional full-time, less jury trials. I don't like the attitude of some judges who will not appoint people who make motions. I've heard judges say it. I won't appoint him because he tries to exercise me. I don't like that attitude toward lawyers. I think it has somewhat of a chilling effect on the whole system, so I prefer going for the one who wants to dedicate themselves to it totally. Now, I'm not slamming anybody that is in this, it's just simply that's what I feel, my experience.

Public defenders in this state carry for the most part large caseloads due primarily to the lack of funding for enough staff. What problems, if any, does that cause the court system?

Speaking from the judge's standpoint, if I'm in the Jefferson Circuit Court and I've got a public defender defending somebody who three other judges have put time constraints on them and they have to be in four different courts at the same time and each one of them want a hunk of him or her, you've got to be realistic and give way to let these people function. They're carrying such a caseload that if it was a civil matter, you would tag them immediately with malpractice. Any insurance company would not tolerate that type of handling of their affairs. No one would, and we would

be the first to condemn such a procedure yet we get in the justice system over on the criminal side, that's business as usual. It's almost moveable malpractice. Well you have to take that into consideration. And I say the same thing for the prosecutors, just a horrible workload, a terrible workload and the public is not being protected.

Public defenders in Kentucky are the lowest paid public defenders by a wide margin of any in the region, is it in the interest of the criminal justice system to have adequately paid public defenders?

Well definitely, of course, I'm the wrong person to talk to about that because I was originally one of the 3 incorporators of the local public defender. We hired Col. Tobin. I was on the Board of Directors until such time that the Commonwealth Attorney protested and said I had a conflict of interest being a judge and on the Board of Directors. Public defenders, and I'll say this also for the prosecutors, immediately their entry level ought to be twice what they're making, automatically. And their caseloads have to be at least half of what they are presently carrying for what I would consider adequate and effective representation, whether it be on the prosecution side, or on the defense side, because I think the two offices from my experience, sort of mirror each other in these regards. Both are underpaid, grossly underpaid and both are grossly overworked.

Any other thoughts?

It's a matter of priorities, right now our priorities are not on the high road. I think we could have done much better with the lottery with building more space to house the criminals instead of letting them out and providing the ones who are in charge of the system primarily the public defenders and the prosecutors an adequate salary. That would enhance and would not detract because I think we get very good lawyers in this area. But it would at least pay them a decent salary, commensurate with all other branches of the Government.

Judge McDonald was a Jefferson County Circuit Court Judge for 9 years. He served as the county's first Chief Judge, implementing pretrial release, jury pools, and consolidation of the courts. He was a founder of the Jefferson County full-time public defender system, and has been a criminal defense attorney. He is currently a Court of Appeals judge, serving in that capacity for the last 9 years.

VISION: MYSTICAL AND PRACTICAL

When we think of vision or visionary we may think of something or someone utopian: something that doesn't exit or someone who may be considered a bit (or a lot) out of touch with reality.

A vision is something that doesn't yet exist and is currently seen only in our imagination. It is rooted in values, spirit, ideas, and ideals. In our imagination we see images of people, programs, interactions, and procedures which incorporate these values and ideals. A vision is a desired state for the future. It is more intuition than linear thinking.

People and programs that don't have vision will likely find themselves floundering about flitting from here to there, or getting stuck in a rut. Vision gives us freedom to wander about, experiment, make changes with less fear or threat. We can do this because we test our changes against our vision: Is this change moving us in the direction of our vision? Our visions need to permeate all of our lives and programs.

Vision doesn't start in committee. However, a vision that is not available and open to examination and is not influenced by others is likely to be problematic. "Trust me" is not enough. We must be willing to work at conveying the vision.

Yet it is very difficult to articulate the whole picture because a vision incorporates motivations, spirit and values. Life experiences and/or demonstrations are essential.

Our visual image of our vision changes as we gain new insights and as reality around us changes. Yet some of the core values are not likely to change. Justice and peace are core values in my vision but my visual images changes as I gain new insights through exposure or life experience.

Vision is more than just a dream. It is that image of our desired state of affairs that reaches all the way back to our current action.

One concern I have is that we might think that vision is only for certain people or for certain kinds of programs. Vision is desirable for all individuals and groups. Part of my vision is that all people and groups have a vision that incorporates love, justice, and peace.

One resource that I'd like to quote may seem unlikely to those involved in social action. John Naisbitt and Patricia Aburdene in *Re-inventing the Corporation* (Warner Books, 1985) say "Only a company with a real mission or sense of purpose that comes out of an intuitive or spiritual dimension will capture people's hearts. And you must have people's hearts to inspire the hard work required to realize a vision."

It is vision that both motivates us to do something and guides us along the way.

RON CLAASSEN VORP of Central Valley, California

Network Newsletter. (October, 1989) Reprinted with Permission.

POVERTY LEVELS ON THE RISE IN RURAL KENTUCKY

A University of Louisville Urban Studies Center study done by C. Theodore Koebel shows poverty rates were on the rise in Eastern KY and other rural areas of the state throughout the 1980s, bucking a trend of declining poverty since the late 1960s. The 1970 census showed 42% of Harlan County's residents earned less than the federally defined poverty level, by 1986 that figure had jumped to 31.4%. In 1989, the federal government drew the poverty line for a single person at an annual income of $5,980 or below. The poverty level for a family of 4 was $12,100.

1989 KENTUCKY STATEWIDE WAGE DATA SURVEY

Public Defenders Start at $8.56/hour; An Elevator Installer Starts at $9.87/hour

The 1989 Kentucky Wage Data Survey was conducted as a cooperative and coordinated joint venture by the Dept. for Employment Services, Div. of Administrative and Financial Management, Job Training (JTPA), Job Services and Special Programs; the Office of Administrative Services; and the Ky. Occupational Information Coordinating Committee (KOICC).

The survey was designed to aid businesses, employees, decision makers, students and job seekers in evaluating the labor market, as well as the staff of Economic Development who need such information in seeking potential industries and businesses for relocation to the Commonwealth of Kentucky.

SURVEY METHODOLOGY

The universe of business firms was selected for the survey, rather than use a sampling technique. While the sampling method is much easier to conduct, we felt that all employers should be asked to participate, thus smaller as well as large firms could have input into the survey. State and Federal government agencies were excluded from the survey.

Forms were mailed to approximately 60,000 firms in the survey. Wage information was requested for 631 occupations, using Occupational Employment Statistics occupational codes and titles.

The Standard Industrial Classification (SIC) codes, which identifies firms by their products and/or services, were used to identify the major occupations usually found in each SIC. The major occupations were listed on each survey form, for the specific SIC, thus assisting the firm in identifying the occupations being surveyed. Efforts were made to include occupations pertinent to the specific firm.

For each applicable occupation listed on the survey form, employers were asked to report the entry and maximum hourly wage for Part Time employees, the number of people typically employed Full Time in each occupation, and the entry, average, and maximum wage, by hourly, daily, weekly, monthly, or yearly method, for Full Time employees. All reported wages were standardized to an hourly rate criteria.

TABLE 1

The following are selected occupations with the entry level, average, and maximum wages:

Occupational Title	Entry	Average	Maximum
1. Admin. Services Manager	20.19	21.91	23.65
2. Dentists	18.03	25.52	33.03
3. Pharmacists	15.88	17.85	20.16
4. Physicians/Surgeons	38.63	65.08	87.95
5. Securities Sales	16.62	20.38	35.77
6. Veterinarians	13.12	16.11	20.55

TABLE 2

Kentucky Public Defender Entry Level Hourly Wage:

Assistant Public Advocate	8.56

TABLE 3

The following are selected entry level hourly wages for occupations in Kentucky.

1. Instructors, Non-Voc.Ed	8.54
2. Brick Masons	8.66
3. Hard Title Setters	8.72
4. Graduate Assistants	8.75
5. Captains, Water Vessel	8.87
6. Insurance Adjusters/Investigators	8.98
7. Furnace Operators/Tenders	9.20
8. Grader	9.43
9. Buyers/Purchasing Agents Farm	9.50
10. Blasters/Explosive workers	9.54
11. Dental Hygienists	9.87
12. Elevator Install./Repair	9.87
13. Electricians	10.03
14. Librarian	10.15
15. Broadcast Technicians	10.35
16. Machinery Maintenance Workers	10.53
17. Brattice Builder	10.81
18. Data Processing Repairers	10.91
19. Counselors, Voc./Ed.	11.25
20. Grinding/Polishers	11.39
21. Earth Drillers	11.45
22. Dieticians/Nutritionist	11.46
23. Education Admin.	14.49
24. Gas Appliance Repair	13.30
25. Continuous Mining Operators	13.43

Reprinted by permission from the September, 1989 Your Business Magazine

LEGISLATURES INCREASE PUBLIC DEFENDER FUNDING

In Missouri, Tennessee, New Mexico, California, Georgia, West Virginia

LEGISLATIVE SUCCESSES

The recent round of legislative sessions has significantly expanded public defender services. State Supreme Courts continue to recognize the inevitable—*the unconstitutionally low funding of public defender systems.* This was an exceptionally good year for public defender offices—perhaps the best year since the early 1970's, when the last effects of the *Gideon* decision were still being felt. Three states, Missouri, Tennessee, West Virginia, which adjoin Kentucky, had major increases in public defender resources. Notable developments include:

MISSOURI

A budget increase of $4.5 million (plus a one time start up budget of $1.2 million) for the Office of State Public Defender in Missouri. The new funds will enable the program to restructure itself into three divisions (capital litigation, appeals, and trial), increase the number of staff attorneys and support staff by over 100, open new offices throughout the state, and increase the number of private attorneys under contract to handle conflict and rural cases. The Spangenberg Group, under contract to the Bar Information Program, provided support to the state bar committee which led the effort to increase the funds for the public defender's office.

TENNESSEE

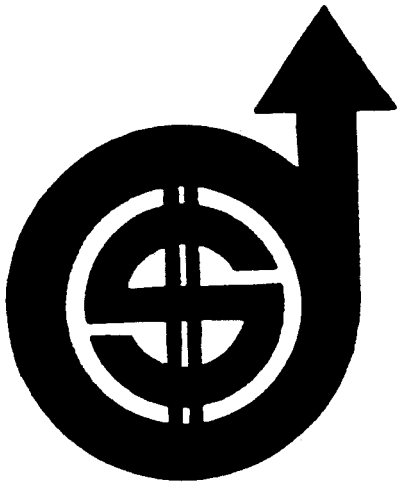
Authorization to establish new public defender offices throughout Tennessee. Once the expansion is completed, every county but one in Tennessee will be served by a public defender. The public defenders will be financed by a $6 filing fee on all civil and criminal cases.

NEW MEXICO

A 39% increase in the budget of the State Public Defender's Office in New Mexico. A major increase last year enabled the Office to pay its staff salaries comparable to attorneys in other government agencies; this year's new money will permit a major increase in the number of public defenders and supporting staff. A report prepared by the Spangenberg Group for the Bar Information Program helped persuade the legislature to grant virtually all of the new funds requested.

CALIFORNIA

A $2.3 million increase for the State Public Defender's office in California. The surprise here was that Gov. Deukmejian, who once tried to dismantle the appellate office, supported the budget increase. The new funds will permit the program to add 20 additional attorneys and 10 support staff during the 1989-90 fiscal year.



Hourly rates for capital cases in California were raised effective June 1, 1989. California compensation rates for appointed counsel increased from $60-75 per allowable hour for cases on review. These same rates apply for associate counsel. In addition the reimbursement rate for paralegals and law clerks is now $25 per allowable hour.

GEORGIA

After many years of effort by the State Bar of Georgia and other advocates, the Georgia legislature has approved its first appropriation for indigent defense services. Given the serious problems in Georgia's county-based indigent defense system, the $1 million appropriation might be considered modest, at best. But seen in the light of the legislature's reluctance to provide any funds for indigent defense— a model state-wide public defender program created LEAA funds in the mid-1970s was disbanded when the legislature refused to pick up the cost— the appropriation is a major step forward.

WEST VIRGINIA

West Virginia Supreme Court found the state's indigent defense system "constitutionally unacceptable" and ordered a new fee schedule and limits on total time attorneys may be required to devote to representation of indigents.

Attorney fees must be no less than $45 for out-of-court and $65 for in-court work by July 1, 1990. The rates were calculated based on the effect of inflation on the rates ($20 out/$25 in-court) set by the legislature in 1977.

The 10% maximum time rule was applied immediately, thereby giving the appointed attorney, Mr. Jewell, the relief he sought. Judges may appoint attorneys from other circuits to relieve the burden on attorneys in smaller counties; such out-of-circuit attorneys may claim reimbursement for travel above the current $500 per case expenses limit.

To compensate for the chronic lack of adequate funding (the state exhausted its entire 1988 budget for indigent defense less than seven months into its fiscal year) and slow payment of claims, the court ordered the legislature to establish, by July 1, 1990, "a mechanism that allows lawyers to receive up to $1500 cash advances for out-of-pocket expenses subject to the approval by the circuit judge."

CAPITAL TRIAL DEFENSE

Written Interview with Ned Pillersdorf

You are a prominent Ky. criminal defense attorney who has defended capital clients. How are you affected by doing death penalty trials?

I have always enjoyed the challenge. The pressure of doing these cases, especially by yourself is enormous. It seems that the weeks prior to trial are more stressful than during the trial. Needless to say, the most stressful time is waiting for the verdict.

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?

I believe the harsh feelings of families of murder victims toward defense attorneys, can be diffused by showing them respect and compassion, both in and out of the courtroom.

What are the hardest aspects of defending capital clients?

Dealing with the families of the defendant.

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

I like the challenge of fighting uphill battles. I also believe the death penalty is misapplied in many respects.

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?

No. The death penalty tends to be sought in cases that receive high publicity. This does not necessarily mean that the person being tried is an appropriate candidate for the death penalty. The death penalty also wastes vast amounts of tax payers money, and is sought almost exclusively against the poor and disadvantaged.

From L to R: Ned, Nancee (2 1/2), Sarah(4), Janet Stumbo

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

It takes tremendous money and resources to defend a capital case. Having tried ten capital cases, I have often found that my law practice experienced severe financial problems during capital trials. A private practitioner can literally go bankrupt if he or she gets involved in a lengthy capital case, without proper compensation.

The Department of Public Advocacy has been able to pay attorneys handling capital cases only $2500, 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?

For many years I accepted capital cases for $2,500. I believe this was a big mistake. I recently tried to make amends by filing a writ of mandamus against Judge F. Byrd Hogg, for making me try a capital case for $2,500.00.

This lack of compensation economically strangles the attorney, and endangers the effective assistance rights of his client. I wish I had sued Judge Hogg years ago over this issue.

Seven of Kentucky's death row inmates had criminal 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?

Unfortunately incompetent, unethical, self-promoting lawyers are attracted to death penalty cases. I believe the press and public should be more critical of these clowns, so as to protect our profession, and the individuals charged with these offenses.

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

No. Drug dealers don't think they are going to get caught. Hence, potential punishments are irrelevant to them.

Any other thoughts?

I believe I had been a lawyer for about six weeks before I was assigned my first capital case in Johnson Circuit Court.

Over the years I have represented about twenty five individuals charged with capital crimes, and have tried ten capital trials. Each trial involved a tremendous emotional and professional commitment.

I do not suggest this kind of work for an attorney who does not have stable emotional conditions. The pressures of capital trials are so intense, that an attorney must ask himself if he is emotionally prepared for such an undertaking.

I owe much of my success in defending capital cases to the unselfish advice and support given to me by Kevin McNally and Gail Robinson. I would be more than happy to return the favor to any criminal defense attorney who calls.

NED PILLERSDORF
#8 South First Avenue
Prestonsburg, KY 41653
(606) 886-6090

Born in the Bronx, New York; son of parents who both served in the military during World War II. His father (Stanley) was captured, and was an American P.O.W. during the war. He attended Vanderbilt University (1973-1977), and McGeorge School of Law, Sacramento, California from 1977 to 1980. He is a member of the California Bar and the Kentucky Bar. He worked for the Department of Public Advocacy from 1981 through 1985. He represented Clyde Douglas Marshall in the Fayette County capital murder prosecution. Marshall was acquitted in March of 1985. He has received acquittals in three other murder cases. He has an active Civil Rights and criminal defense practice in Prestonsburg, Kentucky along with his wife, Janet Stumbo, and Gerald DeRossett. He has been a Little League manager for the last 12 years and founded a local humane society which operates the animal shelter.

I would express that what is about to take place is a murder.

The final statement of Alton Waye before his execution for murdering a 61 year-old woman by stabbing her 42 times.

5th DPA DEATH PENALTY TRAINING COMPLETED

Death is different, like lightening striking, randomly and with no reason, destructive and deadly. In recognition of the incredible effort needed to resist the irrational forces of death, the Department of Public Advocacy presented a seminar focused on defense of capital clients at all stages of the capital process, state trials, state and federal appeals, and state and federal post-conviction. This 5th DPA Death Penalty program assembled distinguished national and state faculty.

70 ATTEND PROGRAM

In attendance were 52 full-time and part-time public defenders, and private criminal defense attorneys in Kentucky. Also there were 18 people in attendance from Arizona, Florida, Ohio, Tennessee, Massachusetts, N. Carolina, Georgia, California, and Missouri.

OUR FACULTY

A faculty of 17 included **Mark Olive** of the Georgia Capital Resource Center; **Millard Farmer**, Team Defense Director in Georgia since 1976; **Bryan Shechmeister**, a 12 year public defender in Santa Clara County, California; **Jim Thomson**, a capital litigator in private practice in Sacramento, California; **John Blume**, Executive Director of the South Carolina Death Penalty Resource Center; **David Bruck**, South Carolina's appellate defender; and **Bill Reddick**, Executive Director of the Tennessee Capital Resource Center. We also were fortunate to have **Ron Dillehay** and **Mike Nietzel**, professors of psychology from the University of Kentucky and **Kevin McNally**, capital litigator in private practice in Frankfort; and the Department's faculty of **Ernie Lewis, Vince Aprile, Ed Monahan, Neal Walker, Bette Niemi** and **Gary Johnson.**

OUR PROGRAM

During the 5 days of training at the Kentucky Leadership Center in Faubush, Kentucky, the participants practiced each major aspect of capital litigation. Each exercise was preceded by a lecture on the topic and followed with a demonstration by a faculty member. Members of the Somerset community assisted us by playing the role of various witnesses. Timothy and Angela Hennis also spoke with us. Tim was charged with capital murder in North Carolina, convicted, and sentenced to death, spending years on death row. At a new trial, he was acquitted. He shared the unique aspects and difficulties of spending time on death row to better help us understand what our clients experience. *See State v. Hennis*, 372 S.E.2d 523 (N.C. 1988).

THE DEATH PENALTY CONTINUES THE CYCLE OF VIOLENCE

David Bruck closed the program with some insightful reflections on the death penalty. He observed that South Africa sentences as many people to death as we do but that country kills many more. He said that it is important for us to ask why that is. He thought that, in part, this reality might be explained by the fact that the public really abhors violence, and there is a clear understanding that the intentional killing of another human being by the state is violence. He reminded us that we are against the death penalty because of the horror of violence, and we should not underestimate that we share this abhorrence with the public. In reality, we have made it past the death penalty as a people but we do not yet know it as a country.

CONCLUSION

Hopefully armed with the best skills, knowledge, and spirit, we will be up to our immense challenge to insure that our clients are not sentenced to death.

Thanks to all of those selfless people who made this training effort beneficial to us in Kentucky.

ED MONAHAN

UPCOMING KENTUCKY CRIMINAL LAW LEGISLATION

A Variety of Groups Share Their Views and Goals

THE KENTUCKY DISTRICT JUDGES ASSOCIATION

Judge Julia Adams
Pres. District Judges Assn.

What do you see as the biggest problem with Kentucky's criminal justice system?

In general, the lack of jail space and prison space is the most identifiable problem in light of mandatory sentencing legislation.

How can this problem be solved or minimized?

We would encourage additional prison development to relieve overcrowding in local jails, as well as a review of statutes which mandate incarceration upon sentencing.

We are very much interested in a "truth in sentencing" proposal for misdemeanor offenses, so that sentencing in District Court would take on more meaning and impact for the participants and the system.

What are your organization's goals for the 1990 Kentucky legislative session?

We are very much interested in a refinement of current DUI provisions.

We have made significant proposals to diminish guardianship theft or misuse of minors' estates.

We are committed to a salary equalization plan for the Court of Justice; along with a uniform benefit package. We intend to support the proposal for increased residential services as reported by the Children's Residential Services Advisory Committee.

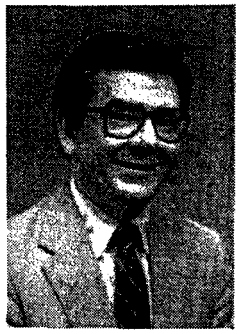
We are currently working with CHR, AOC and other disciplines to better coordinate the efficiency and service intended in the Kentucky Unified Juvenile Code.

Any other thoughts you'd like to share with our readers?

The District Judges Association of Kentucky, in recognition of the invaluable service to the courts by the Department of Public Advocacy, is committed to recoupment for defense services. We sincerely believe that a defendant becomes more of a participant in his or her case if he or she is monetarily responsible. We would request that in each case before the courts, the Public Advocate move for reasonable recoupment, understanding that each defendant presents a different set of financial capabilities. We recognize the various funding problems associated with your Department and we believe that with a cooperative effort, we can be successful in working toward a resolution. Please work with us in our sincere effort to be responsible to your Department and clientele.

Judge Adams has served on the District Court Bench since 1984. She is formerly an Assistant Clark County Attorney from 1978-80. She is a 1977 graduate of the University of Kentucky School of Law.

THE KENTUCKY COUNCIL OF CHURCHES



The Rev. John C. Bush
Executive Director,
KY Council of Churches

What are your organization's goals for the 1990 Kentucky legislative session?

1. Ban the Sale and unauthorized possession of assault weapons. As Christians we are called by our Lord to be Peacemakers, to settle our personal and interpersonal conflicts by non-violent means.

As Christians we are called by our Lord to respect the rights and opinions of others. However, we are concerned about the easy access to and abuse of those guns whose purpose far exceeds a hunting or sporting use (*i.e.*, AK 47 and MC 11).

Assault weapons are being used to commit crimes and to attack police and other citizens. Assault weapons have become instruments by which ordinary people act out their aggressions.

On September 14, 1989, at Standard-Gravure in Louisville, an AK 47, was used to kill 9 people and seriously wound 12 more. We seek to make a healthy and constructive response.

As people of faith we stand with the victims of violence. We seek an end to the senseless suffering and death resulting from the availability of assault weapons. We urge our elected representatives to exert moral leadership by making every effort to protect society from these dangerous weapons.

We seek to challenge the existing situation of easy access to assault weapons in our communities and across state lines.

We recognize that legislation will not solve the underlying moral, social and economic conditions that create a climate where these weapons are used. But such action will promote public safety. Therefore, we call for effective legislation and regulations to ban the production, sale and possession of assault weapons.

The Kentucky Council of Churches urges the Kentucky General Assembly to enact legislation and regulations to ban the sale and unauthorized possession of assault weapons.

The Kentucky Council of Churches urges the United States Congress to adopt legislation which will ban the import, domestic production, sale and possession of such weapons.

The Kentucky Council of Churches urges all church leaders to communicate this resolution in such a way that local churches and governing bodies can more effectively study and address this grave moral issue.

The Kentucky Council of Churches encourages all persons who support this resolution to communicate their views to the media and their elected officials.

2. Eliminate the death penalty for juveniles and the mentally ill.

3. Preserve the integrity of the parole system.

He believes, with all his heart and soul and strength, that there *is* such a thing as truth; he has the soul of as martyr with the intellect of an advocate.
- *Mr. Gladstone*, by Walter Bagehot

COUNTY ATTORNEY'S ASSOCIATION

Michael Conliffe
President-elect,
KY County Attorney's Association

What do you see as the biggest problem with Kentucky' criminal justice system?

We need more prison space and jail space. We are allowing too many people who have been convicted of committing various crimes to go free without serving all or part of their sentences. The public wants these criminals punished and is entitled to that.

How can this problem be solved?

We need to build these facilities. More prison and jail space th house these convicted criminals is needed.

What are your organization's goals for the 1990 Kentucky legislative session?

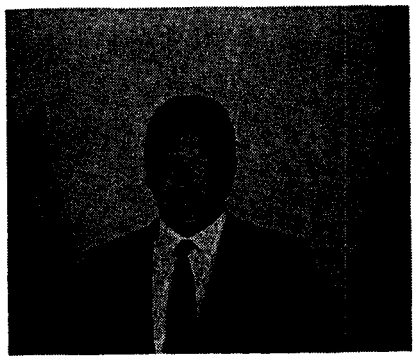
We are meeting in December to discuss our legislative goals.

Any other thoughts you would like to share with our readers?

The cost of more prisons and jails will be considerable. The public needs to be made aware of this and needs to be educated to the fact that accomplishing this objective will mean generating more revenue to get the job done.

Mike has been the Jefferson County Attomery since 1986. He has served with that office since 1970, as a staff attorney (1970-1980 and the First Assistant County Attorney (1980-86). He served as the secretary to the organization from 1986-1988.

KENTUCKY CRIME COMMISSION



Mark A. Bubenzer
Director,
Kentucky Crime Commission

What do you see as the biggest problem with Kentucky's criminal justice system?

The biggest problem is the situation of overcrowding in our prisons and jails. Punishment for crimes is no longer the primary consideration for determining length of incarceration it would seem. There also exists disparity in sentencing throughout the state.

How can this problem be solved?

Even with immediate construction of more prison facilities, the problem will continue. The problem can only be solved by a complete restructuring of the sentencing and incarceration system in Kentucky. We must develop punishments that are an alternative to incarceration.

What are your organization's goals for the 1990 Kentucky legislative session?

The Crime Commission is endorsing and seeking passage of 2 of Governor Wilkinson's pieces of legislation. The first is the DUI *per se* law and the second is the revised asset forfeiture law.

Any other thoughts you would like to share with our readers?

The only way that we can restructure the criminal justice system in Kentucky to be more effective and efficient is for all people and agencies that are involved in this system to cooperate.

KENTUCKIAN'S VOICE FOR JUSTICE

What do you see as the biggest problem with Kentucky's criminal justice system?

Lack of interest of our Judicial System personnel for rights of the victim. All their interest is to see that the perpetrator is given his rights and protection.

Prosecutors are not generally as experienced as the defense attorneys, possibly because of limited salary.

Such as: Victims families can be kept out of the courtroom for the fear they may influence the jurors and the defendant with his/her family can be present at all times.

How can this problem be solved or minimized?

Insure the laws are at least equal to those of the person who commits the crime.

Get more laws which give the victims input in the trials and sentencing.

Better pay for the prosecutors.

What are your organization's goals for the 1990 Kentucky legislative session?

To protect the laws presently on the books; *i.e.*, "Truth in Sentencing" and Victims Bill of Rights.

Attempting to get something changed on the Mental Plea which can allow a murderer to go free.

Enter some changes to the Juvenile Code that can reflect a change where a person convicted will not be released when they become 18.

Any other thoughts you'd like to share with our readers?

It would be very thoughtful of the Judges to acknowledge a concern for the victims and not just for the person on trial.

Only when it happens to them do they realize the trauma the victim is confronted with, neverending, never a chance for parole, never a chance for probation, there is nothing to look forward to as a victim.

Earl E. Pruitt, age 65, resides in Louisville, Kentucky. He was born in Henderson, Kentucky and raised in Louisville where he lived all his life except for a tour in the Army during WWII and the Berlin Recall. He is retired from the Army with 32 years total service. He married, Anna Lee Rhoten from Tompkinsville, Kentucky. They raised 4 children and are now raising a grandson whose father was murdered. He was the original co-founder of a group who worked with changing the laws and work with victims of violent crime. He worked with this group for several years, successful in getting the truth in sentencing law passed. "Unfortunately, some board members forgot that our total goal was to work with victims". He then started up another group over the Commonwealth which all the chapters that were still intact changed over to the new group presented called Kentuckians Voice for Crime Victims (KVCV). They have chapters in Louisville, Covington, Owensboro and Paducah as well as having victims assistance members in other cities where they have a Commonwealth Attorney. He resigned from his position as National Accounts Manager for a large national manufacturing company in order to devote his full time to work with victims of crime.

ATTORNEY GENERAL'S OFFICE

What do you see as the biggest problem with Kentucky's criminal justice system?

A lack of comprehensive planning. Our criminal justice system has been too reactive. We have moved from crisis to crisis, putting out fires with little attempt to oversee, improve, or coordinate the system. This has resulted in inadequate personnel, piecemeal policy development, overcrowded courts, overburdened prosecutors, crowded prisons and jails, and disgruntled victims.

How can the problem be solved or minimized?

The solution requires a unified and comprehensive look at the whole system to identify the problems, caauses, and potential solutions. Criminal justice is a necessary and important system. It is also expensive to operate. We need to try to develop creative, long-term, and unified approaches to solving these problems. It will not be easy, but it could produce real benefits to the Commonwealth and its citizens.

What are your organization's goals for the 1990 Kentucky legislative session?

In the area of criminal justice, our major goal will be passage of legislation based on the recommendations of our Task Force on Drunken Driving. The Task Force has developed recommendations which take a broad-based, long-term approach to the reduction of drunken driving. This includes an integration of prevention, treatment, adjudication, and sanctions. We are also working with the Justice Cabinet on a revised asset forfeiture statute which will benefit agents of the criminal justice system as well as the public. We are also working to expand our drug unit. This unit has as its purpose the investigation of drug cases involving the illegal diversion of pharmaceuticals. These are frequently abused drugs, but have been overlooked in most strategies to address drug abuse.

Any other thoughts?

We are at a critical point in the criminal justice system in Kentucky. We need to begin to take a long-term systems approach to our problems. We need to recognize that our plans and the consequences of our decisions will extend further than 4 years. What we do or do not do will impact the Commonwealth well into the 21st century.

LACK OF VIEWS FROM OTHER GROUPS

The Advocate asked many groups to share their legislative views and goals. We are delighted with those who have done so. The criminal justice system will be better off because of this communication. In spite of our request, the following did not give us any views to share:

Legal Aid Society, Inc.
K Y Association of Criminal Defense Lawyers
KY Coalition Against the Death Penalty
Crime Victim's Compensation Board
Mothers Against Drunk Drivers
KY Catholic Conference
Commonwealth Attorney's Association
County Judge Executive Association
Circuit Judges Association

WEST'S REVIEW

Linda West

KENTUCKY COURT OF APPEALS

RCR 11.42 RELIEF
Commonwealth v. Gilpin
36 K.L.S. 11 at 5
(September 15, 1989)

The trial court granted Gilpin's RCr 11.42 motion without a hearing. The trial court found that Gilpin was rendered ineffective assistance of counsel when his trial attorney failed to cross-examine a prosecution witness regarding possible bias where forgery charges against the witness had been dismissed after he made a pretrial identification of Gilpin. The motion to vacate was granted without a hearing.

The commonwealth appealed and argued that the trial court should have conducted a hearing to determine whether trial counsel's failure to cross-examine had been prejudicial. The Court of Appeals agreed and remanded the case for an evidentiary hearing to determine whether the commonwealth had in fact struck a "deal" with the witness in exchange for his testimony.

VIDEOTAPED PRIOR INCONSISTENT STATEMENT
Muse v. Commonwealth
36 K.L.S. 11 at 6
(September 15, 1989)

At Muse's rape trial, the infant complaining witness recanted her allegations that Muse had raped her on two occasions. The commonwealth was then permitted to introduce a videotape of the witness' prior inconsistent statement made to a social worker. The Court of Appeals held that admission of the prior inconsistent statement was permissible under *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969). The fact that it was videotaped, as opposed to being introduced through the testimony of the social worker, was irrelevant. The Court also noted that the trial court found the infant witness competent to testify prior to the admission of the videotaped statement in accordance with *Gaines v. Commonwealth*, Ky., 728 S.W.2d 525 (1987) and *Ballard v. Commonwealth*, Ky., 743 S.W.2d 21 (1988).

SENTENCING-STATUTORY CONFLICTS
Commonwealth v. Martin
36 K.L.S. 12 at 3
(September 29, 1989)

While he was free on bond pending his trial on various charges, Martin committed an additional offense. He was ultimately tried and convicted of the additional offense and, shortly thereafter, pled guilty to the earlier charges. The commonwealth's motion for consecutive sentencing was denied. The commonwealth appealed.

The commonwealth argued that KRS 533.060(3) prohibited concurrent sentencing of Martin. The statute provides that "[w]hen a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which said person is awaiting trial."

Martin argued that KRS 532.110, which in general terms gives a trial court discretion to impose either concurrent or consecutive sentences, should control. The Court rejected Martin's position based on the rule of statutory construction that a more specific statute controls over a more general statute. The Court did, however, hold that Martin should be permitted to withdraw his guilty plea inasmuch as it was based on a promise by the trial court to impose concurrent sentences.

WIRETAP/EXPERT OPINION/TRAFFICKING IN MARIJUANA-SUFFICIENCY/OTHER CRIMES
Howard v. Commonwealth
36 K.L.S.
(October 20, 1989)

In this case, the Court of Appeals held that no error occurred when the commonwealth introduced as evidence a taped conversation in which Howard offered to sell marijuana to one Drake Jenkins. The tape was obtained as the result of a wiretap operation conducted by the FBI pursuant to a federal court order. The Court of Appeals reaffirmed the rule announced in *Basham v. Commonwealth*, Ky., 675 S.W.2d 376 (1984) that evidence obtained by federal officers through a lawful wiretap operation is admissible in state proceedings "absent collusion between the state and federal authorities to circumvent the state statute prohibiting wiretaps."

The Court found no error in permitting a State Police Detective to identify the voice on the tape as Howard's where the detective testified that he was familiar with Howard's voice and had previously heard a tape recording of it. The Court also found "nothing wrong with the Commonwealth's presenting evidence interpreting drug language as it assisted the jury in understanding the taped conversations."

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.

The Court held that the commonwealth was not required to introduce the actual marijuana in order to sustain a conviction of trafficking in marijuana. Howard's conviction was supported by sufficient evidence where he was photographed entering the premises while carrying a bag large enough to contain the alleged marijuana, where Howard identified himself by name on the tape, where Howard then stated that he had marijuana for sale, and where, at the time of his arrest, Howard denied ever having gone to the scene of the wiretap.

Finally, the Court held that it was not error to admit evidence that some 4 months after the wiretapping Howard sold marijuana to an undercover agent in another county. The Court held that this other crime was admissible as showing "a plan, scheme or system."

KENTUCKY SUPREME COURT

INSANITY/LESSER INCLUDED OFFENSES/JOINDER
Cannon v. Commonwealth
36 K.L.S. 10 at 6
(September 7, 1989)

The Court reversed Cannon's convictions on the grounds that Cannon was entitled to a jury instruction on his defense of insanity. A psychiatrist called at Cannon's trial testified that at the time of the offense there was a "50/50 chance" that Cannon was insane. However, during a colloquy with the trial judge, the psychiatrist declined to state that there was "a reasonable degree of medical certainty" that Cannon was insane. The Kentucky Supreme Court held that the psychiatrist's testimony was sufficient to require submission of Cannon's insanity defense to the jury. The Court specifically rejected "medical certainty" as a prerequisite for the giving of an insanity instruction.

The Court additionally held that Cannon was entitled to an instruction on second degree unlawful imprisonment as a lesser included offense to kidnapping. The evidence showed that Cannon picked up two women but, instead of taking them where he had said he would, proceeded to go on a "joy ride." Cannon released one of the women to go to the bathroom and then allegedly attempted to strike her with his vehicle. Following this Cannon raped and sodomized the second woman. Based on these facts a jury could have concluded that Cannon merely intended to "knowingly and unlawfully" restrain the victim. Thus, an instruction on unlawful imprisonment was justified.

Finally, the Court found no error in the joinder of the above offenses for trial with yet another kidnapping and rape allegedly committed by Cannon some 5 days prior, under similar circumstances. Justices Vance and Wintersheimer dissented.

BATSON
Commonwealth v. Hardy
36 K.L.S. 10 at 9
(September 7, 1989)

Of two black jurors called at Hardy's trial one was peremptorily struck by the commonwealth and the other sat on the jury. Hardy challenged the prosecution's use of a peremptory against the one juror as racially motivated. The Court of Appeals reversed, holding that the defense had made out a *prima facie* case of racial discrimination under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), thereby shifting the burden to the commonwealth to provide a racially neutral explanation for striking the juror. The Kentucky Supreme Court granted discretionary review.

The Court held that the striking of the single juror, without other circumstances indicating discrimination, did not make out a *prima facie* case of racial discrimination under *Batson*. "...*Batson* requires more than merely stating that the prosecutor struck a certain number of blacks from the jury panel." Justice Leibson dissented.

PRIVATE PROSECUTOR/ KRS 532.055(4) - JUDGE SENTENCING
Commonwealth v. Hubbard
36 K.L.S. 10 at 10
(September 7, 1989)

In this case, the Court reversed a decision of the Court of Appeals that held that the employment of private prosecutors is violative of federal due process. The Court held that *Young v. United States, ex rel Vuitton et Fils S.A.*, 481 U.S. ____, 95 L.Ed.2d 740, 107 S.Ct. 2124 (1987) which was relied upon by the Court of Appeals in reaching its decision, was an exercise of the Supreme Court's supervisory power over the federal courts and not binding on state courts. The Kentucky Supreme Court did note that "the ethical conduct of any private counsel should be measured by the same standard as applied to the commonwealth attorney."

The Court also held that KRS 532.055(4), the provision of the Truth in Sentencing statute which permits the trial judge to fix a penalty at more than the minimum but less than the maximum when the jury fails to agree on a penalty, does not violate federal due process. Justice Leibson and Chief Justice Stephens dissented.

PFO
Howard v. Commonwealth
36 K.L.S. 10 at 14
(September 7, 1989)

The Court rejected Howard's claim that his first degree PFO conviction was based on a prior conviction obtained pursuant to an invalid guilty plea. The same prior conviction had been previously used to obtain Howard's conviction as a second degree persistent felon. The Court held that under *Alvey v. Commonwealth*, Ky., 648 S.W.2d 858 (1983), once Howard failed to challenge the prior conviction at his previous PFO proceeding, he had waived the issue.

Howard also asserted that it was impermissible for the commonwealth to split up multiple counts of prior convictions resulting from a single indictment so that one conviction (a misdemeanor) could be used to obtain his conviction of trafficking in a controlled substance, subsequent offender, while another (a felony) was used to obtain his PFO conviction. The Court rejected this argument, noting that the misdemeanor conviction never merged with the felony conviction for any purpose. Justices Vance, Lambert, and Leibson dissented.

CONFRONTATION/PAID INFORMANT/ DOUBLE JEOPARDY/PFO
Carter v. Commonwealth
36 K.L.S. 11 at 10
(September 28, 1989)

Prior to trial, the principal witness against Carter was deposed and testified to a drug purchase that he had made from Carter. Although Carter's attorney had made efforts to get Carter to attend the deposition Carter did not. Defense counsel then chose to leave the deposition without conducting cross-examination since Carter was not available for consultation. At the time of trial, the witness was unavailable and the deposition was entered into evidence over defense objection. The Kentucky Supreme Court held that Carter's right to confrontation was waived by Carter and his counsel. The Court also held that testimony in the nature of "investigative hearsay" given by a police officer was harmless error since the same matters were testified to by other witnesses and as

Carter was not directly named.

It was disclosed at trial that the deposition witness had been paid between $200 and $500 as a paid informant in Carter's case, although the commonwealth had stated during discovery that none of its witnesses were paid. The Court held that the trial court did not abuse its discretion when it refused to grant a continuance or declare a mistrial based on the late disclosure of this exculpatory evidence.

The jury erroneously convicted Carter of both the possession of and trafficking in the same LSD. The trial judge then instructed the jury that it could return a verdict of guilty as to one or the other but not both. In so instructing the trial judge advised the jury that the trafficking offense carried the stiffer penalty. Carter argued on appeal that this was an improper reference to sentencing information during the guilt/innocence phase of his bifurcated trial. The Court agreed but held that the error was harmless since "[t]he trial court could have simply set aside the verdict for the lesser offense."

The Court did reverse Carter's PFO conviction due to a lack of proof that Carter was at least 18 years old when he committed his prior crimes. Justice Combs dissented.

TRUTH IN SENTENCING-MITIGATING EVIDENCE
Commonwealth v. Bass
36 K.L.S. 11 at 12
(September 28, 1989)

In this certification of the law, the Court held that at the bifurcated sentencing proceeding authorized by KRS 532.055 the defendant may not introduce evidence regarding the sentence imposed on a coindictee pursuant to a plea bargain or the coindictees reformatory resident card disclosing the coindictee's record of prior convictions. In the Court's view, such evidence is not mitigating as defined in Subsection (2)(b) of the Truth in Sentencing statute. Neither was it offered to negate any evidence introduced by the commonwealth. Justices Leibson and Combs dissented.

PROSECUTORIAL MISCONDUCT-PRESERVATION
West v. Commonwealth
36 K.L.S. 11 at 23
(September 28, 1989)

In this case, the Court held that the defense had failed to preserve for appellate review any issue as to the "barrage of vilification, misleading innuendo, and outright deception" in the commonwealth's closing argument. Defense counsel objected but in every instance limited his request for relief to an admonition, which was given. Defense counsel did not request a mistrial. "[F]ailure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted." The Court also declined to review the error under the manifest injustice standard of RCr 10.26 since counsel's failure to seek a mistrial may have been a tactical choice to have the jury as impaneled decide the case.

GUILTY BUT MENTALLY ILL- COMMENT ON EFFECT OF VERDICT
Mitchell v. Commonwealth
36 K.L.S. 12 at 17
(October 19, 1989)

A jury found Mitchell guilty of murder but mentally ill pursuant to KRS 504.120. Mitchell contended on appeal that her attorney should have been permitted to argue to the jury that such a verdict would not necessarily differ in its consequences from a simple conviction of murder, and that in the absence of such argument the jury may be mislead into believing its verdict will insure psychiatric treatment of the defendant. The Court rejected Mitchell's argument and reaffirmed its holding in *Payne v. Commonwealth*, Ky., 623 S.W.2d 867 (1981) that "future consequences such as treatment, civil commitment, probation, shock probation and parole have no place in the jury's finding of fact...."

PRESERVATION OF ERROR-AVOWAL
Caudill v. Commonwealth
36 K.L.S. 12 at 20
(October 19, 1989)

At Caudill's trial for sodomy the infant victim's mother, Caudill's wife, was called as a witness. Caudill sought to impeach this witness by cross-examining her regarding her affair with another man on the theory that the witness was motivated to get Caudill "out of the way." Prosecution objection to this line of questioning was sustained.

The Kentucky Supreme Court agreed with Caudill that he should have been permitted to so question the witness. However, defense counsel did not offer to prove what the witness would have said by way of avowal. Consequently, the issue was unpreserved. The Court additionally opined that any error would be harmless since the victim also took the stand and testified that Caudill had sodomized her.

DOUBLE JEOPARDY
Commonwealth v. Bass
36 K.L.S. 12 at 21
(October 19, 1989)

Bass was indicted for a violation of KRS 205.850(4), prohibiting Medicaid fraud, for each month during which he submitted false claims under Kentucky's Medical Assistance Program. This approach resulted in a total of 15 counts of fraud.

The Kentucky Supreme Court held that this did not offend the provisions of KRS 505.020. Subsection 1 of that statute provides that "[w]hen a single course of conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense." However, subsection (1)(c) states an exception to this general rule where the "offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses." The Court held that under KRS 205.990(5) the Medicaid fraud statute was a statute providing that "specific periods of such conduct constitute separate offenses," in that the statute refers to individual applications and claims as the basis for liability under the statute. Justices Leibson and Vance dissented.

CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME
Mitchell v. Commonwealth
36 K.L.S. 12 at 22
(October 19, 1989)

In this case, the Court reaffirmed its previous holding in *Bussey v. Commonwealth*, Ky., 697 S.W.2d 139 (1985) and *Lantrip v. Commonwealth*, Ky., 713 S.W.2d 816 (1986) that testimony regarding child sexual abuse accommodation syndrome is not admissible in the absence of 1) "medical testimony that the syndrome is a generally accepted medical concept," and 2) a showing of "substantial

relevance to the issue of ...guilt or innocence." Justices Wintersheimer and Gant dissented.

ORDINANCES-CONFLICT WITH STATE STATUTES
Pierce v. Commonwealth
36 K.L.S. 12 at 24
(October 19, 1989)

The city of Florence enacted an ordinance prohibiting solicitation to commit 4th degree sodomy. The ordinance differed from KRS 510.100 and KRS 506.030 prohibiting the same conduct, in that the ordinance provided for a stiffer penalty for the prohibited conduct and defined solicitation more broadly than the state statute. The Kentucky Supreme Court held that the ordinance was invalid in that it conflicted with the statutes. Under KRS 82.082(1) an exercise of municipal power "is in conflict with a statute if...there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes." Justices Vance, Gant, and Wintersheimer dissented.

RECUSAL OF APPELLATE JUDGE
Poorman v. Commonwealth
36 K.L.S. 12 at 25
(October 19, 1989)

At oral argument of Poorman's case, appellate counsel first became aware that a Court of Appeals judge hearing the case had previously fixed bond in Poorman's case while serving as a district judge. No objection was made by counsel at that time. However, after Poorman's conviction was affirmed, counsel filed a petition for rehearing in which he argued that the appellate judge should have disqualified herself. The Supreme Court granted discretionary review of the issue.

The Court held that prior judicial participation in a case does not per se disqualify a judge absent circumstances indicating that "his impartiality might reasonably be questioned." In Poorman's case, the judge's prior participation had been minor and she was not called upon to review any determination previously made by her. Thus, the judge was not required to recuse herself. Justice Combs dissented.

LINDA WEST
Assistant Public Advocate
Appellate Branch
Frankfort

PIKE ATTORNEY'S "IDEAS" ONE OF A KIND'

PIKEVILLE - It sounds a little like *The Scarlet Letter*, but Commonwealth's Attorney John Paul Runyon of Pikeville thinks it would work. He wants people on welfare and those convicted of drunken driving to be forced to go public about it.In a plan reminiscent of Nathaniel Hawthorne's 19th-century novel in which a woman was publicly labeled as an adultress, Runyon suggests that people on welfare be required to wear badges informing taxpayers, "I am a welfare recipient."

The Pikeville prosecutor also would subject drunken drivers to branding and other measures.Gov. Wallace Wilkinson wants an automatic drunken-driving conviction for motorists who register 0.10 percent or higher on blood-alcohol tests. Runyon would take it a step further. He would make it illegal to drive with any amount of alcohol in the bloodstream. Wilkinson wants to seize the licenses of drunken drivers. Runyon wants to confiscate their cars.

Runyon has no plans to seek legislative office, so the advice is free. If the General Assembly cowers at such proposals, he would suggest bumper stickers saying: "This person has been convicted of drunk driving. Be careful." He would make it a felony to remove them.

At lunch with Runyon last week, Pike County Sheriff Charles "Fuzzy" Keesee was clearly startled by the idea of labeling welfare recipients. "How could you do something that unfair to children?" the sheriff asked Runyon, who shook his head. Keesee, like many Kentuckians, was thinking short-term, he said. Runyon's object is long term - to create a stigma that makes welfare unattractive to future citizens.

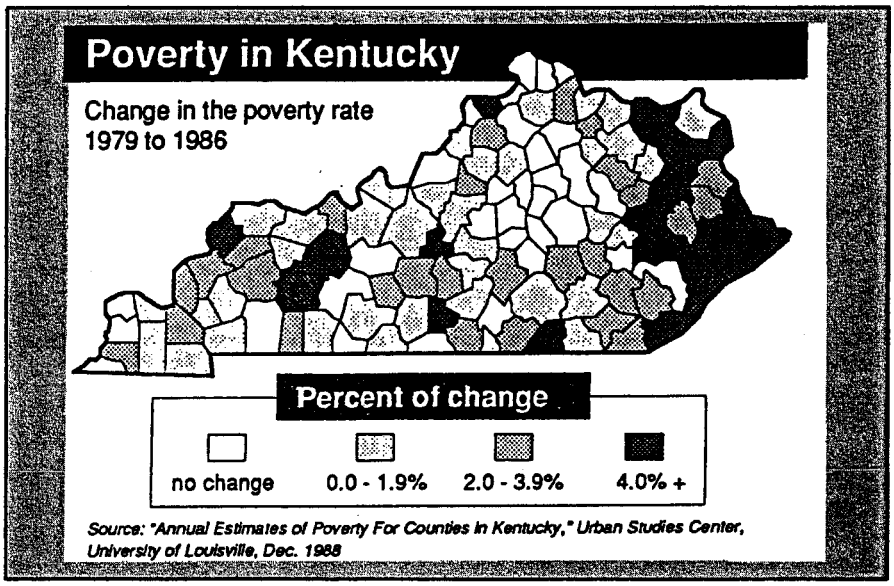
Defense lawyers oppose such measures, but Runyon said that the defense lawyers were part of the problem. They control the state legislative committees that pass criminal law, he said. "If they start substituting themselves for the courts, and saying what legislation will be passed to improve our circumstance, we're in a heap of trouble," he said.

The 6-foot-4 Runyon has been a prosecutor and formidable figure in Pike County for more than two decades. "I don't think 'maverick' is the right word for me," Runyon said, smiling, "but I do consider myself as kind of one of a kind." The son of a prosecutor, Runyon, a Democrat, was Pike County attorney for two terms before losing a race for circuit judge in 1965. He was elected commonwealth's attorney in 1970 and rarely has been opposed in re-election bids.

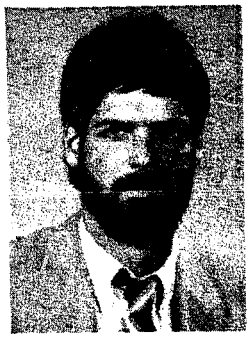
Larry Webster, a Pikeville defense lawyer, once worked for Runyon as an assistant prosecutor. Although he respects Runyon, Webster said he didn't necessarily agree with his views on branding drunken drivers. "We could carry this to its logical extension and test people for self-esteem," Webster said drolly. "Anybody that doubted themselves would have to stand with this big sign around their necks that said, 'I lack self-esteem.'"

Runyon said he was serious about the proposal, but acknowledged, "I don't really think the general public would accept it, because we're not at a point in our history where we're willing to take the big step to cure our problems."

LEE MUELLER Eastern Kentucky Bureau *Lexington Herald-Leader*, Dec. 17, 1988



DEATH PENALTY



Neal Walker

Two Kentucky death penalty opinions have been recently issued by federal and state courts.The bad news is that the 6th Circuit Court of Appeals has affirmed Paul Kordenbrock's death sentence. This is the first death case to be decided by the 6th Circuit. The good news comes once again from our own state Supreme Court, which ordered a new trial for Roy Wayne Dean. The Court has now granted relief in 10 of the last 11 death cases it has decided. These 2 opinions should guide our capital litigation strategies as we move into a new decade. While the 6th Circuit rejected every single claim of federal constitutional error in *Kordenbrock*, our state Court reversed Dean's convictions due to violations of the Kentucky Constitution. The implications of these opinions are explored below.

A. 6TH CIRCUIT UPHOLDS PAUL KORDENBROCK'S DEATH SENTENCE

On November 3, 1989, a 3- judge panel of the 6th Circuit Court of Appeals affirmed Paul Kordenbrock's 1981 Boone County death sentence. *Kordenbrock v. Scroggy*, __F.2d __ (Nos. 88-5467/89-5107; 6th Cir. 11/3/89). Judge Krupansky and Judge Wellford are both Reagan appointees. The most conservative Carter appointee on the Court, Cornelia Kennedy, authored the opinion. This is the first death penalty decision on the merits that the 6th Circuit has issued. As such it represents the genesis of a body of decisional law which will define the federal constitutional parameters of death sentencing practices throughout the entire circuit (KY, TN and OH; [MI has no death penalty]). Other federal circuits have experienced "honeymoon" periods, reversing the first several death cases before becoming hardened as more and more capital cases came under review. If *Kordenbrock* is any indicator, there will be no honeymoons in the 6th Circuit.

Kordenbrock's sentence was affirmed even though he was sentenced to die without any psychological or psychiatric testimony and even though his confession was taken in violation of *Miranda*. In upholding his conviction and sentence, the Court largely relied on the reasoning of the district court, which denied relief last year. *See Kordenbrock v. Scroggy*, 680 F.Supp. 867 (E.D. Ky. 1988).

THE FACTS

Kordenbrock and a co-defendant robbed a Western Auto Store in Florence, KY on January 4, 1980 in order to steal guns which they planned to sell to support their drug habits. Kordenbrock, who was armed, and his co-defendant (who was not sentenced to death) entered the store together. Kordenbrock proceeded to the rear of the store where he forced the owner, Thompson, and his employee to lay face down. In the meantime, co-defendant Kruse, who was in the front of the store, posed as a sales clerk and told a customer they did not do repair work. Minutes later Kruse broke the glass of the gun display case. At the instant he heard the glass shatter, Kordenbrock shot both Thompson, who survived to identify him, and his employee, who died. Hours after the killing the two men attempted to sell the guns. One of the potential purchasers tipped the police and Kordenbrock was arrested near midnight the next day. He was interrogated for 3 hours until 2:30 a.m. and finally confessed.

THE *AKE* CLAIM

The primary claim in Kordenbrock's federal habeas appeal concerned the denial of funding for independent psychiatric assistance. After obtaining the services of a Cincinnati psychiatrist, Dr. Nizny, and receiving an oral report of his evaluation, the psychiatrist was informed that the fiscal court would refuse to pay his bill. At the time "there was an ongoing dispute over whether the county or the state was responsible for paying experts

Kentucky Death Notes

Number of people executed since statehood	438
Number of people executed this century	162
Number of people executed in the electric chair	162
Number of people who applied for the position of executioner in 1984	150
Number of people now on death row	26
Number of Vietnam Veterans on death row	1
Number of women on death row	1
Number of juveniles on death row	1
Number whose trial lawyers have been disbarred or had their license suspended	6
Number of these lawyers who are now incarcerated	1
Number who can afford private counsel on appeal	0
Number sentenced to death for killing a black person	0
Perecentage of death row inmates who are black	20%
Percentage of population that is black	7%
Number of black prisoners who were sentenced by all white juries	1
According to a 1987 *Stanford Law Review* Study, number of persons sentenced to death in Kentucky and later proven innocent	1

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 topics.

appointed to assist criminal defendants" *Kordenbrock*, Slip Opinion, 5, hereinafter *K.*, at 5. The fiscal court refused to pay the psychiatrist even after being ordered to do so. Upon being informed that Boone County would refuse to pay him, Dr. Nizny refused to provide a written report or testify unless payment was guaranteed. Trial counsel reported this to the court. Nizny was not advised of the fiscal court's order that he be paid one half of his fee upon filing the report and one half upon testifying.

The trial court then ordered Kordenbrock to be evaluated at KCPC. Kordenbrock was later seen by Dr. James Bland at that institution. "Because the state restricted such expert to a neutral and objective evaluation concerning only competence to stand trial and sanity, and because he feared that Dr. Bland's opinion might not remain confidential, appellant's counsel advised him not to cooperate." *K., at 6.*

Kordenbrock was thus tried and sentenced with no psychiatric testimony. He contended that this violated *Ake v. Oklahoma*, 470 U.S. 68 (1985), which held that an indigent defendant has a due process right to psychiatric assistance in capital cases. The 6th Circuit rejected his claim for the following reasons.

First, relying heavily on the federal district court's opinion, the Court blamed trial counsel for not taking additional measures to secure payment or Nizny's testimony. "The District Court found that counsel could have urged the Circuit Court to hold county officials in contempt or to levy on county bank accounts or to subpoena Dr. Nizny to testify." *K.*, at 5. The 6th Circuit also credited the district court's finding that trial counsel exploited the funding controversy simply to set up an appellate issue. "The District Court found that counsel's failure to secure payment and to have Dr. Nizny testify was a deliberate attempt to create an appealable issue." *K.*, at 5. The appellate court also credited the district judge's finding that Dr. Nizny's evaluation would not have been helpful, since he reported to counsel that he found no evidence of mental illness and that Kordenbrock told him that he had robbed and killed a gas station attendant the night before the Western Auto robbery/homicide. "The unfavorable nature of Dr. Nizny's report, plus counsel's failure to take any of the obvious steps to obtain Dr. Nizny's assistance, caused the appellate court to conclude that appellant was not "denied" psychiatric assistance, he was merely maneuvering to create an appealable issue." *K.*, at 5.

Indicating its disapproval of Kentucky's failure to pay the psychiatrist, the Court nevertheless declared it could not upset the district court's factual findings since they were not clearly erroneous. "Although we do not condone the state's refusal to pay Dr. Nizny, we find no constitutional violation." *K.*, at 6.

The 6th Circuit rejected Kordenbrock's claim that access to the state funded expert, Dr. Bland, was not sufficient under *Ake* since it was limited to determining competence and sanity. Again, the Court credited the district court's finding, entered after an evidentiary hearing at which Bland testified, that Bland would have answered all the issues counsel wanted Nizny to address. For instance, "Bland was prepared to investigate and testify as to appellant's family history and psychological background." *K.* at 7 n. 4.

The 6th Circuit, again agreeing with the district court, concluded "that Dr. Bland's assistance, had appellant taken advantage of it, would have met *Ake*'s command of guaranteeing appellant 'access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense'" *K.*, at 10 (quoting *Ake*). "We also agree that as a matter of strategy appellant chose not to avail himself of this witness." *Id.*

According to the 6th Circuit, Kordenbrock's concern over confidentiality "could have been met with a court order." *K.*, at 10.

The Court identified several other reasons that Kordenbrock's rights under *Ake* were not violated. Noting that *Ake* is not implicated unless the defendant shows that his sanity will be "a significant factor at trial", the Court observed that Kordenbrock "never attempted to raise insanity as a defense." *K.*, at 10. Instead, Kordenbrock attempted only to show that he had not acted intentionally due to his drug and alcohol use. "*Ake* requires that the defendant, at a minimum, make allegations supported by a factual showing that the defendant's sanity is in fact at issue in the case." *Id.* (citation omitted). "Such a showing is not made merely by positing that appellant was a habitual drug and alcohol abuser." *Id.*

In any event, the Court concluded, any denial of access to Nizny was harmless since Kordenbrock presented the testimony of a pharmacologist who detailed Kordenbrock's history of drug and alcohol abuse and who testified about his mental state at the time of the crime. Kordenbrock "fails to establish how Dr. Nizny's testimony would differ or add to [pharmacologist] Nelson's testimony" *K.*, at 12. "Simply asserting that Dr. Nizny's testimony would have been sufficient is not enough." *Id.*

Finally, the Court squarely rejects Kordenbrock's contention that *Ake* provides a constitutional right to psychiatric assistance for the preparation and presentation of mitigating evidence. "*Ake* only guarantees a defendant the right to a psychiatrist at the sentencing phase to oppose the government's psychiatric testimony." In *Ake*, the state presented psychiatric evidence of *Ake*'s future dangerousness at the sentencing phase. This did not happen in Kordenbrock's trial. Therefore, the Court concluded, there was no right under *Ake* to psychiatric assistance at the sentencing phase. "In addition, the testimony given by Dr. Nelson went to the effects of his drug and alcohol abuse and could be used for purposes of mitigation..." *K.*, at 13.

How to cope with *Kordenbrock*'s holding concerning the *Ake* claim will be the subject of this column in the next issue of *the Advocate*. At this point it should suffice to say that *Kordenbrock* is a fact-bound opinion which should not impair an indigent capital defendant's right to a state funded independent psychiatric evaluation in Ky. Additionally, *Kordenbrock*'s holding that *Ake* does not apply to psychiatric assistance to present mitigating evidence is of questionable constitutionality. Kordenbrock's lawyers will petition for *certiorari* on this issue, if a rehearing is not granted.

THE CONFESSION ISSUE

Kordenbrock contended that the introduction of his confession violated *Miranda v. Arizona*, 384 U.S. 436 (1968) since his request to stop questioning until the next day was not honored. After admitting that "I did it...that's all I can tell you is that I did it," Kordenbrock requested that the questioning cease until the next day. Nevertheless, the police continued to interrogate him and he ultimately detailed the homicide, saying at one point that "I tried to shoot them so they would not get up." *K.*, at 15.

The 6th Circuit held that the introduction of the confession violated both *Miranda* and *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) since Kordenbrock's request to cut off questioning was not "scrupulously honored." Nevertheless, even as it recognized that the "primary evidence" against Kordenbrock was the survivor's identification "and Kordenbrock's confession," the 6th Circuit, again agreeing with the district court, found that introduction

of the unconstitutionally obtained confession was harmless error. *K.*, at 4, 15.

But Kordenbrock also contended that, even if the error was harmless as to guilt, the same could not be said of its effect at the sentencing phase. After all, he pointed out, Kordenbrock had confessed that he shot the victims so they wouldn't get up. The Court disagreed, rejecting Kordenbrock's argument that the confession was prejudicial since it showed no remorse. "However, in appellant's case we have his statement made to the jury for the express purpose of showing remorse." *K.*, at 18. The Court found that the effect of the confession was harmless as to penalty as well as guilt.

Finally, the Court rejected the argument that the trial court's failure to suppress the illegal confession forced Kordenbrock to concede guilt at trial. To reach this conclusion, the Court had to rely on an unpublished opinion which was characterized as being "impossible to distinguish" from the facts under review. In *Burks v. Perini*, No. 853507 (6th Cir. Nov. __, 1986) (unpublished opinion), the Court held that the government's use of an involuntary confession did not induce the defendant to testify that he shot the victims in self defense. "We adopt *Burks*' analysis and find that here, as in *Burks*, the state's use of his illegally obtained confession did not induce appellant to make the statement he did to the jury." *K.k*, at 17. "[W]e agree with the district court that appellant would have adopted this trial strategy even if his confession had been excluded in light of the overwhelming evidence of his guilt." *K.*, at 15-16.

DESTRUCTION OF EVIDENCE

Also, the Court rejected Kordenbrock's argument that the erasure of the tape recording of the confession by the police destroyed his ability to challenge the use of his admissions. Noting that Kentucky law requires police to preserve such tapes upon defense request, see *Hendley v. Commonwealth*, 593 S.W.2d 662, 667 (Ky. 1978), the Court found that Kordenbrock's confession was destroyed before a request was made to preserve it. Further, there was a transcript of the confession. Finally, Kordenbrock failed to show bad faith. *Arizona v. Youngblood*, 109 S.Ct. 333 (1989).

Likewise, the Court rejected Kordenbrock's argument that the loss by the police of a photo display and of a vial of pills seized from him violated due process. The display consisted of 6 photos, all of them mug shots except Kordenbrock's. Kordenbrock had the opportunity to cross examine the eyewitness about the display. Neither the photo display nor the vial of pills were known to be exculpatory when they were lost. "Appellant had and utilized several avenues for showing that he was drugged and intoxicated. The failure to preserve the vial did not deny him this defense." *K.*, at 29.

THE "RECOMMENDATION" ISSUE

The 6th Circuit found no problem with the fact that the prosecution repeatedly described the jury's verdict as a "recommendation" and that it was so identified in the instructions. KRS 532.075(1)(b) itself provides that the jury's verdict is a recommendation. The jury was also told that the judge would give the jury's recommendation "great weight." Since "[t]here were no representations to the jury that their sentence would be reviewed or that the final decision of death would rest elsewhere," there was no violation of *Caldwell v. Mississippi*, 972 U.S. 320 (1985). Acknowledging that a recent decision of

Drawing by Kevin Fitzgerald

the Kentucky Supreme Court prohibits describing the verdict as a recommendation, see *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988), the 6th Circuit refused to hold that Kordenbrock's rights were violated by use of the term. "Failure to apply *Tamme* to appellant's case would at most make out a violation of state law only. Although using 'recommend' may now violate Kentucky state law, it does not offend appellant's constitutional rights." *K.*, at 23.

EXCLUSION OF MITIGATION

The Court found no error in excluding the testimony of Dr. Glenn Stassen, a Christian Ethicist, since his proposed testimony was "primarily a general discussion" of religion, philosophy and the death penalty. He only spoke to Kordenbrock for 45 minutes the morning he was to testify. "Although appellant has a right to place any evidence before the jury for purposes of mitigation, that right is limited by the fact that it be relevant, the determination of which rests with the trial judge." *K.*, at 24. Even if error, it was harmless since cumulative to the testimony of another minister.

VENUE

The Court rejected Kordenbrock's argument that the failure to change venue deprived him of an impartial jury. Acknowledging the existence of "widespread publicity," the Court deferred to the trial judge's findings that there was neither a showing of prejudice nor a likelihood that Kordenbrock could not receive a fair trial in the area. *K.*, at 25-26.

JUDGE RECUSAL

Kordenbrock moved to recuse the trial judge after filing a writ of prohibition against him to prohibit him from trying the case in Boone County. "Because the judge had no personal interest in the prohibition proceeding, there was no justification for his recusal." *K.*, at 26.

THE CONCURRENCE

Judge Wellford filed a concurring opinion to address "the issues most troubling." *K.*, at 31.

Concerning the confession, Judge Wellford disagreed with the majority opinion that the failure to suppress the confession did not alter Kordenbrock's trial strategy. "This action complicates the confession issue for me, but it does not affect my conclusion that only harmless error was involved beyond a reasonable doubt." *K.*, at 32.

The "second difficult question" to the concurring judge was the *Ake* issue. Judge Wellford disagreed with the district court's opinion that Dr. Nizny's report would not be helpful to the defense." I do not believe a fair reading of the evidence supports that view." *K.*, at 34. Nevertheless, he found no error, advancing the same reasons as set forth in the majority opinion.

The concurrence found that the failure to preserve evidence "deserves approbation" but was no constitutional error. *K.*, at 34.

Finally, Judge Wellford observed that "Kentucky law on the question of the jury's role in the death penalty process has created some confusion in this case prior to its resolution." *K.*, at 35. Nevertheless,

he believed that no constitutional error occurred by describing the verdict as a recommendation.

B. KENTUCKY SUPREME COURT REVERSES ROY WAYNE DEAN'S DEATH SENTENCE

In late September the state Supreme Court reversed Roy Wayne Dean's conviction and death sentence imposed by the Todd Circuit Court. ***Dean v. Commonwealth***, __S.W.2d __(Nos. 85-SC-1031-MR; 87-SAC-566-TRG; Rendered 9-28-89). Once again, the Kentucky Supreme Court condemns prosecutorial misconduct in a capital case, as it has had to do frequently in the past year. See *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky. 1989) and *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988). *Dean* is also significant since the reversal is predicated purely on state (as opposed to Federal) constitutional grounds. The *Dean* opinion is most significant, though, for its treatment of the issue of competency to waive an insanity defense. *Dean* is simply one of the most enlightened opinions in the country on this significant mental health issue.

THE FACTS

Dean was convicted of murder, burglary and rape as a result of the death and sexual assault of a Todd County housewife. After his indictment he was committed to KCPC for a period of 156 days where he underwent a comprehensive evaluation of his competency to stand trial and of his criminal responsibility. Dean had previously been diagnosed as schizophrenic and moderately mentally retarded. At that time his schizophrenia required medication.

Dr. Phillip Johnson evaluated Dean during his commitment after the capital indictment. Despite "deficits in a number of psychological and cognitive areas pertinent to his ability to stand trial," Dean was found competent. *Dean*, Slip Opinion at 2, hereinafter *Dean*, at 2. He was also found to be criminally responsible for his conduct. While psychological testing indicated that Dean was mentally retarded (with an IQ of 59), Dr. Johnson suspected that Dean may have been malingering since he had a much higher score, 81, on a similar test administered in 1981 (He scored between 48-51 on a test administered in 1977). Even as he concluded that Dean was competent, Johnson believed that Dean's "understanding of courtroom procedure and appraisal of likely outcome of the case was limited" *Dean*, at 3.

THE CONFRONTATION ISSUE

At the pretrial competency hearing, Dr. Johnson's deposition was received in lieu of his testimony. It was also presented by the prosecution during its case-in-chief. The deposition of Dean's father-in-law was also received into evidence during the state's case-in-chief.

Dean himself was not present during the taking of these depositions. The Kentucky Supreme Court found this to be a violation of Section 11 of the Kentucky Constitution, which guarantees "the right...to meet the witnesses face to face." RCr 7.12 (right to personal confrontation at deposition) and RCr 8.28 (right to be present at "every critical stage of the trial") were also violated. Counsel's waiver of Dean's presence was ineffectual. "We hold that because the right to be present and to confront is personal to the accused...only the defendant can waive this right." *Dean* at 7-8. "Counsel's waiver being ineffective, there was no waiver." *Id.*

Dean was prejudiced by his absence at the depositions. Dr. Johnson's deposed testimony was particularly damaging, as he believed that Dean was legally sane at the time of the crime and that Dean may have produced low IQ scores by malingering.

The *Dean* Court's express reliance on the state constitution as basis for reversal cannot be over-emphasized. The Court went out of its way to state that its holding was *not* predicated on the federal constitution (thereby insulating the issue from review by the U.S. Supreme Court). Counsel *should always* rely on the state as well as federal constitution when making objections or motions in a capital case.

COMPETENCY TO WAIVE THE INSANITY DEFENSE

On appeal, Dean claimed that his right to control his defense was violated when his lawyer presented an insanity defense after Dean testified as to his innocence. The court declined to reverse on this basis, finding that counsel did not concede Dean's guilt.

The Court, however, recognized counsel's dilemma "in balancing the wisdom of appellant's decision to waive the defense of insanity in view of the considerable documentation of his below average intelligence and mental disorders against a defendant's right to make decisions central to his defense'" *Dean*, at 20, citing *Frendak v. United States*, 408 A.2d 364 (D.C. 1979).

The Court then announced "guidelines" for resolving such conflicts in the future. First, counsel should seek to resolve the conflict by fully advising the defendant of the consequences of asserting or not asserting the defense of insanity. If, following this, "the defendant insists on an ill-advised course of action, counsel should bring the conflict to the attention of the trial court by seeking a determination of whether the accused is capable of voluntarily and intelligently waiving the defense." *Dean*, at 21-22.

The Court expressly rejects the notion that a determination of competence to stand trial resolves the issue. "Even if a defendant is found competent to stand trial, he may not be capable of making an intelligent decision about his defense." *Dean* at 22. "It is possible that a defendant found competent to stand trial might be unable to comprehend the consequences of choosing not to use the insanity defense, thus rendering the defendant incapable of intelligently waiving the defense. The accused might also suffer a mental disability which would make it difficult or impossible "to recognize his or her present condition." *Id.* citing *Frendak.*

If a defendant is found competent to waive the defense, his wishes must be respected. If a defendant is found not competent to waive the defense "counsel must proceed as the evidence and counsel's professional judgment warrant. The inquiry and findings of the court will be on the record, should review later be necessary." *Dean*, at 22.

PROSECUTION MISCONDUCT

Again relying on the state constitution, the Court held that the prosecutor's misconduct "undermined appellant's right to a fair trial guaranteed implicitly by Section 2 and Section 11 of the Kentucky Constitution." *Dean*, at 10.

The misconduct included cross examining *Dean* during the guilt phase about the appropriateness of the death penalty for whoever committed the crime; telling the jury that they had an obligation to impose the death penalty if they found an aggravating factor but no mitigating factors; and arguing "if there ever was a case where the death penalty was deserved this is it." *Dean*, at 10.

The prosecutor was guilty of "sensationalizing the victim's suffering." *Dean*, at 11. And by emphasizing her social activities, religious commitment and family ties, the case presented "Yet another instance of impermissible glorification of the victim." *Dean*, at 11.

Additionally, the Court was critical of the prosecutor's handling of Mrs. Dean's assertion of the testimonial privilege as recognized in KRS 421.210(1). After assuring her she would not be asked about confidential communications (a separate rule), he persuaded her to testify in front of the grand jury in full. She did the same at trial. "Whether the prosecutor obtained Mrs. Dean's waiver through his own misunderstanding of the distinctions between the two privileges, which misunderstanding he has a duty to eliminate, or through a deliberate attempt to wear down a lay witness without benefit of counsel, the Commonwealth's Attorney came notably close to violating the Rules of Criminal Procedure." *Dean*, at 15.

USE OF "RECOMMENDATION" AS DESCRIPTION OF JURY'S SENTENCING FUNCTION

Even as the 6th Circuit ruled that Paul Kordenbrock's jury was not affected by the prosecutor's extensive use of the word recommend, the Kentucky Supreme Court held that similar conduct warranted a new trial for Dean. "We agree that the pattern established by the drumbeat of 'recommend' did indisputable denigrate the jury's responsibility for determining an appropriate sentence." *Dean* at 16.

INSTRUCTIONS

The Court agreed with Dean that the trial court erred in not defining the terms "extreme emotional disturbance" or "mental illness" in the instruction.

CONCURRENCE AND DISSENT

Concurring, Justice Liebson would reverse Dean's conviction since his lawyer asserted an insanity defense against his will. Liebson would not reverse on the confrontation issue, since he believed counsel's waiver to be valid. Finally, Justice Liebson registers his protest at the current definition of extreme emotional disturbance as announced in *McClellan v. Commonwealth*, Ky., 715 S.W.2d 464 (Ky. 1986). Inasmuch as that definition mandates that the defendant acted "uncontrollably," it requires the absence of criminality. It should instead be equated with diminished responsibility.

Wintersheimer and Gant dissented, and would see Dean executed on this record.

NEAL WALKER
Assistant Public Advocate
Chief, Major Litigation Section
Frankfort

M. Kerry Kennedy

Dear Friend:

As the daughter of a murder victim, I take special interest in the debate about capital punishment.

Speaking both as a victim, and as an average citizen fearful of crime, I know two things: Murder is a terrible act and needs to be punished severely. But the death penalty is not the answer.

The Supreme Court had good reasons for striking down the death penalty in 1972. It was biased against blacks. It was biased against the poor. And it was capricious -- in the words of Justice Potter Stewart, "cruel and unusual."

Today's death penalty is little different. It remains racially biased. It remains random. And as we know from the recent releases of two wrongly convicted men (in Texas and Florida) it remains unworthy of our trust.

Perhaps most important of all: The death penalty does nothing to deter crime.

I was eight years old when my father was murdered, and I remember praying, "Please God, please don't let them kill the man who killed my father." I didn't want another person -- any person -- to die. And I didn't want another family -- any family -- to experience the grief that my family was experiencing.

I now work in the field of international human rights, so I know I'm not alone: No other Western democracy likes the death penalty either. All but the United States have abandoned it.

I'm also pleased to know that my opposition to the death penalty was shared by someone I hold in great esteem: my father, Robert Kennedy.

"Whenever any American's life is taken by another American unnecessarily," he wrote, "whether it is done in the name of the law or in defiance of law...the whole nation is degraded."

The religious leaders who call us to fight capital punishment are lighting a great torch of conscience. I am grateful for the chance to add my own little light.

Add yours too.

Kerry Kennedy

Kerry Kennedy

PLAIN VIEW

Search and Seizure Law

Ernie Lewis

In this time following the end of the Supreme Court term, and prior to new 4th Amendment decisions being written, there are a few items of interest to persons for whom privacy rights are a concern that I want to touch on.

In an August 14, 1989 front page *Kentucky Post* article, it was reported that Jefferson Co. Commonwealth's Attorney, Ernest Jasmin was pushing a state wire tap bill in the 1990 General Assembly. Jasmin expressed concern that it took too long to get a federal wiretap, and wanted a bill paralelling the federal law which would allow state court judges to authorize wiretapping. Wiretapping, called eavesdropping, is presently a Class D felony in Ky. KRS 526.020. A federal officer, however, executing a federal wire-tap warrant, does not act in violation of the eavesdropping law. *Basham v. Commonwealth*, Ky., 675 S.W.2d 376 (1984), *cert den.*, 470 U.S. 1050 (1985). *Basham* also held that evidence procured by the wiretap was admissible in state court.

Basham was recently followed in a Court of Appeals opinion, ***Howard v. Commonwealth***, Ky.App., _S.W.2d__, (10/29/89). Ronnie Howard was convicted of trafficking in marijuana, despite the government's inability to produce any marijuana that had been sold. The evidence consisted of an eavesdropping device placed in a pool hall as a result of a 18 U.S.C. 2516 warrant. The Court of Appeals followed *Basham*, saying that "evidence obtained in a wiretap operation conducted by federal law enforcement officers in accordance with federal law and pursuant to a federal court order is admissible in state court proceedings absent collusion between the state and federal authorities to circumvent the state statute on wiretaps."

Law enforcement officers demonstrated this fall an equally effective, although much less sophisticated, device. In a July 20, 1989 article in *The Kentucky Post*, I-75 police agencies revealed that they had been trained to spot drug couriers using the interstate. A similar report was made the previous day regarding I-95. In that article, a Florida Highway Patrolman admitted that his police force was also targeting interstate travelers. "'They're using motor vehicle violations as probable cause for stopping cars and then conducting a search,' he said." Trooper Joey Barnes of Richmond admitted that " . . . you stop a guy for speeding. All of a sudden as a policeman you are looking for different characteristics which might make you think that this person might be carrying drugs." Are we sure we want these guys to have access to wiretaps too?

One 6th Circuit 4th Amendment case has come down of late. In ***United States v. Campbell***, __F.2d__, 18 SCR 14 (6th Cir. 1989), the Court examined the question "whether deliberate false statements in an affidavit supporting an application for a search warrant compel the voiding of the warrant even if the false statements are unnecessary to a finding of probable cause." The question arose from a case in which FBI agents had hidden the identity of their informants by creating fictitious people in the affidavit. Under *United States v. Luna*, 525 F.2d 4 (6th Cir. 1975), *cert. den*, 424 U.S. 965 (1976), the 6th Circuit would have voided the warrant.

Franks v. Delaware, 438 U.S. 154 (1978), however, effectively overruled *Luna*, according to the Court, and thus the Court upheld the warrant despite the deception by the F.B.I. The Court in this drug case also significantly noted "we cannot muster much enthusiasm for returning a man like Mr. Campbell to the streets. . ." The Court went on to examine the untainted portion of the affidavit, finding it sufficient to support a finding of probable cause. The Court has placed the 6th Circuit in the great majority of the circuits on requiring materiality of *Franks* material prior to the voiding of a warrant.

PENDING CASES

Counsel should be aware that a number of 4th Amendment cases are presently pending before the United States Supreme Court:

1. ***New York v. Harris.*** This could be an important case. The state obtained *certoriari* following the New York Court of Appeals' decision finding that a confession after full *Miranda* warnings was tainted by an illegal arrest some one hour earlier (the arrest was a violation of *Payton v. New York*, 445 U.S. 573 (1980)).

2. ***United States v. Verdugo—Urqiudez*** will look at the rights of foreign nationals whose homes are searched in a foreign country by American police officers without a warrant.

3. ***Maryland v. Blue*** When police are armed with an arrest warrant, may they make a "protective sweep" after the arrest for the accomplice for whom there is no probable cause?

4. ***Florida v. Wells*** revisits *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) and *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987) by examining an inventory search pursuant to written regulations which do not authorize the object searched here, a closed container.

5. ***James v. Illinois*** has similar ramifications to *New York v. Harris*, both of which examine the continued reach of the exclusionary rule. Here, the Court looks at the question of whether a defendant's statement taken after an illegal arrest may nevertheless be used to rebut testimony of

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.

one of the defendant's witnesses.

6. ***Michigan Department of State Police v. Sitz*** will look at the constitutionality of sobriety checkpoints.

7. ***Minnesota v. Olson*** The Court granted *cert.* on a decision favorable to a Minnesota defendant. The Court will look at the issue of the defendant's expectation of privacy in another person's apartment, and further at exigent circumstances justifying a warrantless search.

8. ***Horton v. California*** will examine the question of whether a plain view discovery must be truly inadverent in order to come within that exception to the warrant requirement.

There are a lot of substantive issues on the Supreme Court's plate, making this spring a time for watching.

THE SHORT VIEW

United States v. Karagozian, 45 Cr.L. 2297 (D.C. Conn. 6/21/89). *Payton v. New York*, 745 U.S. 573 (1980), requiring an arrest warrant prior to entry into someone's home to effect an arrest, applies as well to a deck located in the rear of the defendant's home. The Court focused on the reasonable expectation of privacy the defendant had in the deck, and the fact that it was not as readily accessible to the public as was a driveway.

Pimental v. Rhode Island Department of Transportation, R.I., 45 Cr.L. 2301 (7/7/89). Based upon the Rhode Island Constitution, the Court found unconstitutional all sobriety checkpoint roadblocks. "It is illegal to permit law enforcement officers to stop 50 or 100 vehicles on the speculative chance that one or two may be driven by a person who has violated the law ...[I]t would shock and offend the framers of the RI Constitution if we were to hold that the guarantees against unreasonable and warrantless searches and seizures should be subordinated to the interest of efficient law enforcement. Once this barrier is breached in the interest of apprehending drivers who violate sobriety laws, the tide of law enforcement interests could overwhelm the right to privacy."

People v. Torres, NY Ct.App., 45 Cr.L. 2302 (7/11/89). The police may not search a persons' car after a reasonable suspicion stop unless the officer is actually under some kind of threat. The Court, rejecting *Michigan v. Long*, 463 U.S. 1032 (1983) and *New York v. Belton*, 453 U.S. 454 (1981), based its holding on the New York Constitution. New York, having previously rejected the good faith exception in *People v. Bigelow*, 488 N.E.2d 451 (N.Y. 1985), has a tradition of utilizing its state constitution. The Court sees through *Michigan v. Long* and *New York v. Belton* for what they are, opportunities to expand a traffic search into a complete car search, and confines the search to the basic rationale. Unless the officer can point to factors threatening to him can he expand a *Terry* stop into a complete car search.

People v. Harold, Calif. Ct. App., 45 Cr.L. 2408 (8/15/89). When the defendant fit the description of an earlier burglary, he was stopped and asked for identification. He showed the police a social security card and a prison identification card, but the police insisted on seeing his wallet, upon whose production evidence of the burglary was discovered. The act of demanding the wallet after identification had already been established violated the 4th Amendment, according to the California Court of Appeals. Citing *Florida v. Royer*, 460 U.S. 491 (1983), the Court stated that during an investigative detention, the police should use "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."

State v. Rothman, Hawaii Sup. Ct., 45 Cr.L. 2409 (8/10/89). The Hawaii Constitution protects the right of privacy in the numbers dialed to and from the home, and thus a warrant will be required prior to installation of a pen register. You will recall that in *Smith v. Maryland*, 442 U.S. 735 (1979), the Court had held that this was not a search. Because the Hawaii Constitution has a right to privacy provision, the Court was willing to go beyond *Smith*, and hold that Hawaiians have a reasonable expectation of privacy in the phone numbers they are dialing.

State v. Graham, Hawaii Sup. Ct., 46 Cr.L. 1034 (9/19/89). In the *Brave New World* category is this case. Social Services heard that an 8 year old child's father was using cocaine, so they interviewed the child at school without her parent's consent. When she said she saw her father use cocaine, they took her into protective custody and contacted the police, who interviewed the child, and based upon the information given by the child obtained a search warrant. The Hawaii Supreme Court held that no federal or state right to privacy had been violated by this chain of events, all the while acknowledging that "family relations may be damaged when information secured from a child serves as the basis for an invasion of the privacy of a parent."

Seelig v. Koehler, New York Sup. Ct., App. Div. 1st Dept., 46 Cr.L. 1074 (10/12/89). The New York Court upheld random drug testing for New York City correctional officers. The Court extended *National Treasury Employees Union v. Von Raab*, 489 U.S. __, 109 S.Ct.__, 103 L.Ed.2d 685 (1989) and *Skinner v. Railway Labor Executives' Associations et. al.*, 489 U.S. __, 109 S.Ct.__, 103 L.Ed.2d 639 (1989) to include random, periodic drug testing, without reasonable suspicion or any other measure of suspicion.

United States v. Malone, 46 Cr.L. 1076 (9th Cir. 9/28/89). AKA Son of *U.S. v. Sokolow*. The Court found no problem with stopping a young man in an airport based upon the fact that he was young, black, had on a jacket (red? blue?) that is associated with a gang, he "looked hard" at an agent, came from a "known drug-source city" (Are there any cities that are not? Keokuk? Waddy?), looked furtively around, and had no luggage.

Livingston v. State, Md. Ct. App., 46 Cr.L. 1081 (10/11/89). The police, upon stopping a speeding car, and seeing marijuana seeds in the front seat, could not arrest a rear-seat passenger for possession. Thus, the search incident to the arrest which uncovered other drugs was illegal.

In a Law Review article by Michael R. Beeman, he explores the fascinating possible application of the 4th Amendment in child abuse cases. *Notes: Investigating Child Abuse: The Fourth Amendment and Investigating Home Visits*, 89 Col.L. Rev. 1034 (1989). He ultimately urges the requirement of a warrant based upon reasonable cause prior to an investigatory entry by a caseworker into a home during a child abuse investigation. He explores *Wyman v. James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971), which had said that a home visit in an AFDC benefits situation did not implicate the 4th Amendment. *Wyman*, the Hawaii case above, and this law review article tell me that we have neglected using Sec. 10 and the 4th Amendment in our child sex abuse cases. Can a caseworker take a child out of school without the parents' permission and question the child? Does that not implicate the privacy rights of the family? Does Sec. 10 protect our family's privacy beyond what the 4th Amendment covers? This area is totally undeveloped in Kentucky as far as I know. Let's at least begin to explore our cases with our client's privacy rights in mind.

ERWIN W. LEWIS
Director
DPA/Madison/Jackson Co. Office
Richmond, Kentucky 40475
(606)623-8413

JUVENILE LAW

Harry Rothgerber, Jr. Speaks Out for Kentucky's Children

Harry Rothgerber

In a recent interview, Harry Rothgerber, Jr., Deputy Chief Juvenile Defender for the Jefferson County Public Defender's Office and a Commissioner of the Ky. Juvenile Justice Commission shared some thoughts on the challenges facing the juvenile justice system in the 1990's. Basically, he sees 4 major problems at this time: Kentucky's lack of compliance with the Juvenile Justice Delinquency Prevention Act of 1974 [JJDPA], a lack of appropriate treatment alternatives for committed children, judicial abuse of the system and the misinformation of the public concerning juvenile crime.

Kentucky and the JJDPA

Ky.'s juvenile code permits secure detention of children in certain situations [1] The JJDPA, a federal grant act, sets certain standards regarding jailing and incarcerating children. If the state does not meet the federal standards set forth in the act, the state will lose grant money that is distributed to the Ky. Juvenile Justice Committee for establishing alternatives to jailing and secure incarceration of children, especially in the pre-adjudicatory stage.

The April 1988 Amendments to the Kentucky Unified Juvenile Code (UJC) [KRS Chapter 600 *et. seq.*] were a tremendous step backwards from the original intent of the code with regard to jailing and secure confinement of children accused of and adjudicated of committing status and public offenses. "Our unified code is currently not in compliance with [the JJDPA]," says Rothgerber. "We're in danger of losing our funding for alternatives to secure detention. If this occurs our counties will be looking at more jail time for kids, more suicides and assaults."

Kentucky has not been in compliance with the Act for the last 3 fiscal periods. Under the Act, a state can apply for a waiver and still receive funds despite non-compliance. Ky. is now on its 3rd waiver, and although Ky. will probably, receive its 1989 money, with the number of incarcerated status offenders and jailed kids on the rise, the state won't meet the requirements for 1990. Wisconsin has already been excluded from funding for repeated non-compliance.

The only hope to save the funding and preserve the alternatives to detention that have been set up through the Juvenile Justice Commission is to amend the code to bring it back into compliance with the JJDPA. A public education campaign is in the works for the commission regarding the JJDPA. Hopefully it will have some impact on the legislature as well as the public.

Lack of Proper Treatment Facilities

The second major problem is a lack of CHR treatment alternatives, both non-secure/secure facilities, for committed children. "Not only does this lead to long detention waiting lists," he says, Due to a lack of appropriate, immediately accessible treatment facilities, "CHR is forced to place kids based on what's available, which might not be best for the child based on his or her particular needs." He sees a need for increased funding for CHR and the need for better choices with how to allocate the funds once CHR receives them.

The Judiciary

Third, our judiciary is often not attuned, not educated and trained to the purposes of the UJC. Some judges still persist in the punitive approach to children, says Rothgerber. They insist on citing kids for contempt when they display the very behavior they have come into the system to be treated for or they adjudicate escape charges in runaways from future homes and bootstrapping status offender in delinquency category.

Rothgerber feels that the public has to solve this problem by electing more "educated" judges and making kids a priority in our communities. He also feels that child advocates should use the system to advance the rights of children and to educate the judiciary. "Our office has never lost an appeal or writ [concerning any particularly punitive judge]. We need to go to Circuit Court more and to the Court of Appeals." If the Court of Appeals can be pressured to accept more cases on juvenile law, Rothgerber feels we can produce more published opinions on kids and a better educated judiciary.

Misconceptions on Kids and Crime

Finally, he sees a public misconception that the juvenile crime rate is on the rise and something to be feared. This is actually not the case. This fear of youth crime comes from 2 main sources: Media hype from irresponsible journalists looking for sensational stories to sell papers and irresponsible politicians who put forth a "get tough on crime stance" as a means of winning re-elections.

The juvenile crime rate has actually been declining based on JJDPA statistics. Yet there is a public perception that youthful crime is on the rise. For example, while there is an extreme amount of media attention to children and drugs and child drug dealers, the state statistics of kids charged with controlled substance offenses is shockingly low. While he certainly does not discount that drugs are a major problem in other areas, he feels that other problems with kids are more deserving the public's attention in Ky.

Final Thoughts

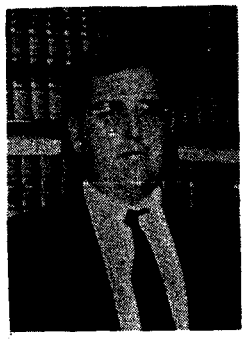
"If there's one thing that bothers me, it's the perception of a lack of aggressive advocacy on behalf of children in some parts of the state." Rothgerber is distressed by stories of judges who say that every child in his court waives their right to counsel." Attorneys need to aggressively litigate children's rights both at the trial level and the appellate level."

BARBARA HOLHAUS
Assistant Public Advocate

Footnote: [1] See the August 1989 *Advocate* column on Juvenile Law for a more detailed explanation of the interaction between KRS 600 and the JJDPA and the secure incarceration of juveniles.

EVIDENCE IN CRIMINAL CASES

The Fate of *Frye*



David Niehaus

One of the hotter controversies in academic discussions of evidence these days is the fate of the *Frye* doctrine. The doctrine was announced in *Frye v. U.S.*, 293 F. 1013 (D.C. Cir., 1923) in a case dealing with the forerunner of the polygraph machine. Surprisingly, the opinion is very short, and the rule is set out in one paragraph:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. [293 F. at 1014].

Frye has been the guiding principle concerning the admissibility of testimony or other evidence based on novel scientific theories. However, in 1975, Congress enacted as part of the Federal Rules of Evidence (FRE) Rule 702 which reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

The question that is raised now is whether the failure to include any mention of *Frye* in either the text or commentary to FRE 702 meant that *Frye*, a common law evidentiary doctrine, was superseded by the rule. This question is of interest to practitioners for two reasons. First, it appears that the Supreme Court of Kentucky has informally adopted Rule 702 as the standard governing the admissibility of expert testimony in Kentucky criminal cases. Therefore, it is important to know whether *Frye* has any use in Kentucky, or if, as in other jurisdictions it has been done away with. The second reason for discussion of this topic now is that in the next issue I am going to write about DNA testing and it is important to know the standard on which its admissibility turns. DNA testing is being received well in courts all around the country. Typical of its reception is an opinion from a New York trial-level court styled *People v. Wesley*, 533 N.Y.S.2d 643 (Co. Ct., 1988). The judge in that case wrote

> . . . if DNA Fingerprinting proves acceptable in criminal courts, [it] will revolutionize the administration of criminal justice. Where applicable, it would reduce to insignificance the standard alibi defense. In the area of eyewitness testimony, which has been claimed to be responsible for more miscarriages of justice than any other type of evidence, again, where applicable, DNA Fingerprinting would tend to reduce the importance of eyewitness testimony. And in the area of clogged calendars and the conservation of judicial resources, DNA Fingerprinting, if accepted, will revolutionize the disposition of criminal cases. In short, if DNA Fingerprinting works and receives evidentiary acceptance, it can constitute the single greatest advance in the "search for truth", and the goal of convicting the guilty and acquitting the innocent, since the advent of cross-examination. [533 N.Y.S.2d at 644].

I have been told that two technicians at the Kentucky State Police Laboratory at Frankfort have received training in DNA Fingerprinting technique, and therefore, in the near future, defense lawyers will have to learn how to deal with this new procedure. This article, then, is a prelude to the next issue concerning DNA Fingerprinting and its probable effect on criminal practice in Kentucky. [1]

Courts consistently hold that jurors are sufficiently sophisticated to deal with all types of evidence and to follow instructions on proper use of that evidence. We are told that the system of jury trial is based on this principle. [*Richardson v. Marsh*, 481 U.S. 205, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176 (1987)]. But where novel scientific principles are involved, courts become justifiably doubtful of the validity of this general principle. Expert testimony has, at least until recently, been justified only on the ground that a jury of ordinary citizens is unlikely to know enough to make a valid judgment about matters like skid marks, blood alcohol levels, ballistics, or psychological condition. Experts were allowed to give opinion evidence because it was necessary. But in 1975, the adoption of FRE 702 changed the basis for admissibility from necessity to "assistance." Because the federal or uniform version of this rule has been adopted by over 35 states, there has been a wide variety of opinion as to whether *Frye* survived the enactment of the federal rules.

It appears that the U.S. Supreme Court is not in a hurry to resolve the conflict created by this question. In 1986 the Supreme Court turned down an opportunity to address the issue in *Mustafa v. U.S.*, 479 U.S. 953, 107 S.Ct. 444, 93 L.Ed.2d 392 (1986). In a dissent from the denial of *cert.* on that case, White and Brennan noted that in *Mustafa*, the Court of Military Appeals had ruled that Rule 702 superseded *Frye* and that Rule 702 created a "more flexible standard." The Justices noted the conflict among the federal circuits and for that reason desired to resolve the issue by grant of *cert.* in *Mustafa*. A more recent case, *Rock v. Arkansas* touched on this question but did not provide an answer. [483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)]. In *Rock* the Justices held that a criminal defendant has a 5th, 6th and 14th Amendment right to testify, even if her testimony was hypnotically refreshed. The Arkansas *per se* exclusionary rule was rejected by the court. In *Rock* the court noted that hypnosis by physicians and psychologists had been recognized as a valid therapeutic technique for a number of years. But the court also noted and cited an article in the

Journal of the American Medical Association which reported that there was "no data to support a [conclusion] that hypnosis increases remembering of only accurate information." Instead, the court found, the most common response to hypnosis shown by the data was "an increase in both correct and incorrect recollections." [483 U.S. at 59; 93 L.Ed.2d at 51]. Despite the lack of scientific certainty about the value of hypnosis, and the lack of consensus as to its validity as a tool in criminal investigations, the court concluded that because the adverse party could point out inconsistencies with other evidence known in the case and could reveal more inconsistencies by cross-examination, a *per se* exclusionary rule unduly impinged on the defendant's right to testify at trial. The court left further development up to the states however by saying that they could develop guidelines for the proper use of hypnotically affected testimony.

Neither *Frye* nor FRE 702 was considered in *Rock*. The court did at several points use the terms "reliable" and "untrustworthy,", but these seem inconclusive indications as to how the court views the conflict. For now, anyway, there will be no guidance from the U.S. Supreme Court on the proper interpretation of FRE 702.

Until the Supreme Court rules, the states are going to have to deal with the conflict between *Frye* and the interpretation of FRE 702 to set out in *U.S. v. Downing*, 753 S.W.2d 1224 (3rd Cir., 1985). *Frye* excludes scientific tests still in the experimental stages by limiting admissibility to those ideas "sufficiently established to have gained general acceptance in the particular field in which it belongs." [*Kofford v. Flora*, 744 P.2d 1343, 1346-1347 (Utah, 1987)]. The main complaint about *Frye* is that it creates a "cultural lag" during the development of a new idea which can result in exclusion of evidence that might be completely reliable. [*Andrews v. State*, 533 So.2d 841, 844, fn. 1 (Fla. App., 1988)]. In addition, critics say that the standard is rather vague because it is difficult to pin down what has to be established by which group before the evidence can be admitted. [2] Defenders of *Frye* however say that a little delay is not so bad [115 FRD at 118] particularly in criminal cases where the defendant's life or liberty are at stake. There have been a lot of scientific theories that just weren't borne out in practice. [*e.g.*, 115 FRD at 100; 119]. To Kentucky attorneys who have been exposed to scientific marvels like Neutron Activation Analysis (NAA) *Frye* does not seem like that bad of an idea. To the extent that *Frye* is useful in preventing convictions on faulty "scientific" evidence, delay in admissibility of new scientific techniques seems like a reasonable trade off.

Critics of *Frye* say that this justification is based on the flawed premise that juries attribute "mystic infallibility" to scientific testimony. [115 FRD at 92, citing *U.S. v. Addison*, 498 F.2d 741, 744 (D.C. Cir., 1974)]. Empirical studies have raised doubts that jurors do this. [115 FRD at 92, citing *Imwinkelreid*, 28 Vill. L. Rev. 554 (1982-1983)]. But, as Professor Starrs of Georgetown University has argued "most experienced trial attorneys use experts on the expectation that such testimony will carry the day before an untutored jury." [115 FRD at 93]. It is this difference in outlook that has sparked the controversy about which standard to follow.

The Federal Rules of Evidence credit the jury with the ability to avoid being unduly influenced by any type of evidence. This is certainly shown by the relaxed rules on hearsay. Therefore, it is not surprising to find in FRE 702 a fairly low threshold for admissibility. The Federal Rules do not create blanket rules to exclude evidence that might be used improperly. Rather, the scheme of the Federal Rules appears to be one in which most evidence is admissible subject to the relevancy requirement of FRE 401 and the checkrein provisions of FRE 403 that allow the trial judge to exclude evidence on the grounds of unfair prejudice, confusion of issues, or misleading of the jury. This is the approach advocated by the Third Circuit in *U.S. v. Downing*. As noted in *Downing*, under FRE 702 ". . . an expert can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult [though] not beyond ordinary understanding." [753 F.2d at 1229]. Where the technique or theory sought to be used by the expert is well-established there is no real problem. But what FRE 702 does not address is the foundation requirement for reliance on new procedures or theories. The court in *Downing* noted that some authorities found in this silence an abandonment of *Frye*, while others found implicit incorporation of that doctrine. [743 F.2d at 1234]. However, the Third Circuit saw no barrier to interpreting the rules without reference to *Frye*, and therefore set out the following foundation procedure for novel scientific evidence.

> (1) The evidence must be considered at an *in limine* conference held before presentation of the evidence to the jury.
>
> (2) The threshold inquiry must consist of a balancing test centered on two factors of (a) the reliability of the scientific principles on which the testimony is based, and (b) the likelihood that introduction of the testimony may in some way overwhelm or mislead the jury.
>
> (3) If the principle is sufficiently reliable, the party must make a specific showing of how, precisely, the expert's testimony is relevant to the case. [*Downing*, at 1238-1242; *Bloodsworth v. State*, 512 A.2d 1056, 1064 (Md., 1986)].

Even if these tests are met, according to *Downing*, the trial judge may still exclude on FRE 403 grounds. Therefore, under this rule, a scientific or technical expert's testimony is admissible if shown to involve relevant scientific or technical evidence which assists the trier of the facts to understand a relevant factual issue, even if the scientific or technical principles underlying the testimony are not yet generally accepted in the particular scientific or technical field. [*Reager v. Anderson*, 371 S.E.2d 619, 628, fn. 4 (W.Va., 1988)]. The distinction between *Frye* and *Downing* is apparent. Under *Downing*, general acceptance is a component of reliability but it is not, as in the case of *Frye*, the *sine qua non*. [Lawson, *Kentucky Evidence Law Handbook*, 2d Ed., 1989 PP., Section 6.10, p. 49]. Under *Downing*, the expert's testimony does not have to be supported by citation to other cases, journal articles, or testimony of other experts which say that a particular scientific idea is sufficiently established. Rather, the scientific evidence is admissible because the proponent convinces the judge that the idea will produce reliable conclusions.

Obviously, a theory that is rejected by most persons in a particular field will generally be found unreliable. The *Downing* rule therefore is designed primarily for a theory that appears reliable or promising, but which just has not been around long enough to develop a "track record". [*Downing*, 753 F.2d at 1238]. *Downing* gets a new idea past the *Frye* bar but still requires a determination that it will produce reliable results.

Lawson notes in his *Handbook* that in Kentucky the appellate courts have not settled on a standard of admissibility. [Lawson, 1989 PP., p. 47-48]. The cases that he cites show this to be true. In *Brown v. Commonwealth*, Ky., 639 S.W.2d 758, 760 (1982) bloodstain evidence was admitted on the strength of the expert's testimony about the development of the method and his professional opinion that the method was reliable. In *Bussey v. Commonwealth*, Ky., 697 S.W.2d 139, 141 (1985), however, evidence of sexual

abuse accommodation syndrome was deemed inadmissible in part because the proponent had failed to show that it was a "generally accepted medical concept." This same conclusion was reached in a recent decision, *Mitchell v. Commonwealth*, Ky., ____ S.W.2d ____ (1989), 36 KLS 12, p. 22 (Oct. 25, 1989). In *Mitchell*, the court ruled that sexual abuse accommodation syndrome evidence was admitted erroneously because there was (1) no medical testimony that the syndrome is a generally accepted medical concept, and (2) there was no evidence linking it to the case. However, reliability was the basis of decision in *See v. Commonwealth*, Ky., 746 S.W.2d 401, 403 (1988) in which the HLA genetic marker test was held admissible.

In *Commonwealth v. Rose*, Ky., 725 S.W.2d 588, 590 (1987) the Supreme Court appeared to adopt FRE 702 by citing the rule and quoting portions of it to the effect that ". . . inherent in the trial court's decision . . . was a finding that this syndrome (battered spouse) represents . . . specialized knowledge that would assist the trier of fact to understand the evidence or determine a fact in the case." The same type of language reappears in *Carpenter v. Commonwealth*, Ky., 771 S.W.2d 822, 825 (1989). In response to a claim that medical testimony that injuries were intentional invaded the province of the jury the court stated that ". . . opinion testimony is admissible where it appears that the trier of fact would be assisted in the solution of the ultimate problem."

The statements in *Rose* and *Carpenter* are strong indication that the Supreme Court of Kentucky intends to follow, even if it has not formally adopted, FRE 702. Lawson certainly is correct when he says that it is not clear that the "general acceptance" of *Frye* test has been done away with. This is a question that attorneys will have to deal with when novel scientific evidence, such as DNA Fingerprinting, comes up. It certainly is a question that should be dealt with by the drafting committee of the proposed Rules of Evidence and by the Supreme Court of Kentucky before those rules are promulgated for use in Kentucky courts. In this instance, the late adoption of the Federal Rules of Evidence may prove to be an advantage to Kentucky because the court can modify FRE 702 or include a statement in the commentary to answer the question of whether *Frye* should be followed. In the meantime, practitioners will have to prepare to deal with novel scientific evidence under both rules.

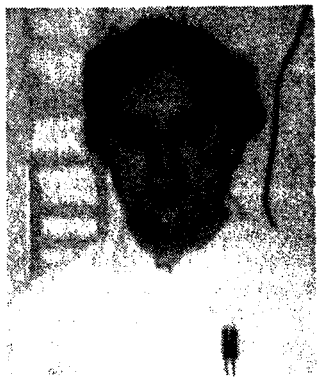
When presenting an argument to the court for or against admission of scientific evidence probably the best short list of things to argue is found in Weinstein's *Evidence*, Sec. 702(03) in which the authors say that the judge should consider (1) the expert's qualification and stature in his field, (2) the use which has been made of the technique before this case, (3) the potential rate of error, (4) the existence of specialized literature that would allow independent confirmation of the expert's testimony, (5) the novelty of the technique or procedure, and (6) the degree of acceptance within the scientific or technical community. Until the Supreme Court of Kentucky rules on the continued viability of *Frye*, this is about the best that a trial lawyer can do.

[1] For those who may need to learn more about DNA Testing before the next issue of *the Advocate*, I recommend reading *People v. Wesley*, which gives a basic outline of what DNA Fingerprinting is and how it works. The standard treatise on DNA Testing, according to McCormick's Hornbook is Maniatis, Frisch and Sambrook, *Molecular Cloning: A Laboratory Manual* (1982). The key numbers on this topic are Criminal Law 388 and Criminal Law 470. Also, any standard scientific evidence text that has been updated since 1982 should provide some information about this method of testing.

[2] There is a tremendous amount of information about this controversy in 115 FRD 79 (1987). This is a report of symposia and proposals for amendment of FRE 702 undertaken by the Section of Science and Technology of the ABA. This is probably the best source for picking up examples of new scientific ideas or techniques that were accepted by courts and later rejected by scientific authorities.

DAVID NIEHAUS
Assistant Public Defender
Jefferson District Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800

TRANSFERRED



Tom Ransdell, an Assistant Public Advocate formerly with the Pikeville office transferred on November 16, 1989 to the LaGrange Post-Conviction office.

FEES FOR ATTORNEYS REPRESENTING INDIGENT CRIMINAL DEFENDANTS

Attorneys entitled to fair market value for services

Ed Monahan

> Nobody is poor unless he stands in need of justice.
>
> Lactantius, 240-320 A.D.

The Constitution's guarantee of the right to counsel in criminal trials and direct appeals is now well understood in this country. But that right only has full meaning if there are monies sufficient to insure good defense counsel. Unfortunately, many jurisdictions have not allocated even a minimum amount of money necessary to provide adequate counsel for all indigents accused of crimes. [1] However, the trend in the case law is towards insuring that a fair amount of money is paid to criminal defense attorneys who represent indigents. This article will selectively survey that favorable development in the law, as well as ethical considerations and financial information, and its expected impact in Kentucky.

MONEY ALLOCATED FOR REPRESENTATION/WORKLOADS

In September, 1988 the United States Department of Justice's Bureau of Justice Statistics compared resources available to the criminal defense of indigents between 1982 and 1986. In *Criminal Defense for the Poor, 1986* it reported that in 1986 there were 4.4 million indigent criminal cases, a 40% increase from the 3.2 million cases in 1982. Three states and the District of Columbia more than doubled their indigent criminal caseloads between 1982 and 1986. Another 4 states had caseload increases between 80 and 100%. Kentucky's increase was 111%, the 4th largest increase in the country. About $1 billion was spent in 1986 by state, county and other local sources on the defense of indigents in criminal cases. The national average amount of money allocated for a defense case was $223 in 1986, ranging from a low of $63 in Arkansas to a high of $540 in New Jersey. An average of $223 per case is a far cry from adequate funding. Six of the 10 states with the lowest average costs per case in 1986 were in the South. Kentucky ranked 47th with a $118 average cost per case.

The ABA Standing Committee on Legal Aid and Indigent Defendants Bar Information Program in 1986 published *An Introduction to Indigent Defense Systems*, an overview of public defender systems in this country. It found that indigent defense compensation was inadequate and often caused "attorneys to ask that their names be removed from the list of lawyers willing to represent indigent defendants":

> Regardless of the means used to set rates and pay attorneys, the fees paid by virtually all assigned counsel programs are too low. A survey of hourly fees and maximums conducted by The Spangenberg Group in March, 1986 showed that hourly fees for out-of-court work ranged from $10 to $50 per hour; averaging all state's out-of-court fees yields a figure in the low thirties. In-court fees were typically $10 per hour higher....
>
> While hourly fees of $10-25 per hour can best be described as wholly inadequate, the worst effects are caused not by low hourly rates but by limits on the maximum fee per case.
>
> *Id.* at 6.

In 1986, at the request of the ABA Criminal Justice Section, the ABA created a Special Committee on Criminal Justice in a Free Society which was chaired by Samuel Dash and included judges, prosectors, defense lawyers, police and law professors. It issued a 1988 Report, *Criminal Justice in Crisis*. Among other things, it addressed funding problems in the cirminal justice system, and concluded that "indigent defense systems nationwide are underfunded." *Id.* at 41. This creates underpaid and overworked public defenders and results in inferrior representation for indigents. It supported the following maximum allowable defense attorney caseloads:

> a. 150 felonies per attorney per year; b. 300 misdemeanors per attorney per year; or
> c. 200 juvenile cases per attorney per year; or
> d. 200 mental commitment cases per attorney per year; or
> e. 25 appeals per attorney per year.
> *Id.* at 43.

It also urged Legislatures to devote far more money to public defender services and all of criminal justice. *Id.* at 39, 44.

ETHICAL CONSIDERATIONS

The ABA Model Code of Professional Responsibility was adopted by the ABA in 1969. Canon 2 states, "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." The aspirational, not mandatory, Ethical Considerations [EC] state: "The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer...." EC 2-25. According to EC 2-29, a lawyer who is appointed by a court to represent a client unable to obtain counsel "should not seek to be excused from undertaking the representation except for compelling reasons." EC 2-30 indicates that a lawyer should not represent a person if competent service cannot be rendered or if the "intensity of his personal feeling... may impair his effective representation...."

In August, 1983 the ABA replaced its 1969 Model Code with the Model Rules of Professional Conduct. About 32 states use the new ABA Model Rules or a variation. Many of the other states continue to use the older ABA Model Code.

The new ABA Model Rules have a specific rule on public service:

> RULE 6.1 *Pro Bono Publico* Service
>
> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Rule 6.2 instructs us that a "lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause...." Good cause includes:
1) "...an unreasonable financial burden on the lawyer,"
2) "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client", and

3) if the "...lawyer could not handle the matter competently...." Rule 6.2 and its Comment.

Effective January 1, 1990, the Kentucky Supreme Court adopted a modified version of the ABA Model Rules of Professional Conduct titling them the Kentucky Rules of Professional Conduct. SCR 3.130.

ABA Model Rules 6.1 and 6.2 were both changed by Kentucky. Instead of saying that a lawyer should render public interest legal service and shall not seek to avoid appointment, Kentucky Rules say that a lawyer is encouraged to render such service and should not seek to avoid an appointment.

In December, 1987 the Editor and Publisher of the *ABA Journal* called for a minimum of 50 hours per year *pro bono* work by each lawyer. [2] Mandatory *pro bono* has been adopted by several federal courts; has been proposed in 2 state legislatures, and imposed by 7 local bar associations.

In August, 1988 at its Toronto meeting the ABA passed a resolution expressing its official policy on *pro bono* representation. The resolution:

> (1) Urges all attorneys to devote a reasonable amount of time, but in no event less than 50 hours per year, to *pro bono* and other public service activities that serve those in need or improve the law, the legal system, or the legal profession;
>
> (2) Urges all law firms and corporate employers to promote and support the involvement of associates and partners in *pro bono* and other public service activities by counting all or a reasonable portion of their time spent on these activities, but in no event less than 50 hours, toward their billable hour requirements, or by otherwise giving actual work credit for these activities; and
>
> (3) Urges all law schools to adopt a policy under which the law firm wishing to recruit on campus to provide a written statement of its policy concerning the involvement of its attorneys in public service and *pro bono* activities.

At its January, 1989 meeting, the Kentucky Bar Association's Board of Governors approved this ABA resolution. [3]

The ABA in its *Standards for Criminal Justice, Providing Defense Services* (1986) rejects the view that attorneys can be required to defend indigents in criminal cases without compensation:

> Assigned counsel should be compensated for time and service performed. The objective should be to provide reasonable compensation in accordance with prevailing standards. Compensation for assigned counsel should be approved by administrators of assigned-counsel programs.
>
> Standard 5-2.4 Compensation.

With this financial and ethical backdrop, we turn to the caselaw developments over the years and recently.

THE DEVELOPING LAW

Of the 35 or so jurisdictions that have addressed the issue of whether an attorney must represent an indigent criminal defendant *pro bono*, a slight majority now hold that a lawyer cannot be forced to represent an indigent criminal defendant absent compensation. [4]

Recognizing that the "defence of the poor" is a "duty" that is "essential to the accused, to the Court, and to the public," the Indiana Supreme Court held in 1854 that it was a "discriminating and unconstitutional tax" to require a lawyer to represent an indigent accused of a crime without any fee. *Webb v. Baird*, 6 Ind. 13, 18 (Ind. 1854).

"The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class - clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens." *Id.* at 17.

Most other state courts have taken much longer to come to the understanding that it was not the duty of lawyers to personally fund the state's obligation to provide a lawyer's services for citizens unable to hire a lawyer when they are charged with a crime.

In 1966, the Illinois Supreme Court held that the statutory limit of $500, $250 for attorney fees and $250 for expert fees, was inadequate for the appointed attorney in a murder case. The Court ordered the attorney awarded $31,000 out of the state treasury even though this amount was well above the statutory maximum. *People v. Randolph*, 219 N.E.2d 337 (Ill. 1966).

Until 1972, lawyers in Kentucky were required to accept court appointments in criminal cases without pay or be subject to sanction for declining. In *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972) the Court finally recognized that "the burden of such service [is] a substantial deprivation of property and constitutionally infirm." *Id.* at 298. The "constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose service does not unconstitutionally deprive him of his property without just compensation." *Id.* As a result of Bradshaw, the Kentucky legislature created and funded the state-wide Kentucky public defender system in 1972. However, Kentucky is not adequately funding its public defender program.

In another context the Kentucky Court of Appeals showed no sympathy for inadequate attorney fees. In *DHR v. Paulson*, Ky.App., 622 S.W.2d 508 (1981) attorneys who represented indigent parents in an action terminating their parental rights were awarded $750 in attorney fees by the circuit judge even though the statutory maximum was $300. The Court of Appeals held that the legislature's statutory fee cap was not an unconstitutional deprivation of property or time if the attorney voluntarily accepts the appointment and has statutory notice of the limited fee.

This holding is disturbing in that it forces *pro bono* work on any attorney accepting an appointment and has the long range effect of insuring that few lawyers will take the appointments and those attorneys that do will unfairly bear the costs of the representation. It no doubt also dries up the pool of competent attorneys available to the courts to handle the cases.

THE ADVANCES OF THE 1980'S: THE FAIR MARKET VALUE OF THE SERVICE

The 1980's have seen, especially recently, a marked increase in state Supreme Courts realistically dealing with the wholesale inadequacy of the money available for attorney fees in criminal cases. Often though, the courts are reluctant to make a clean break with the concept that the lawyer has a duty to be counsel without *full* pay.

For instance, in *State v. Robinson*, 465 A.2d 1214 (N.H. 1983) the appointed attorney in a misdemeanor theft case submitted a bill for $1,265 for legal fees ($20/hour out-of-court and $30/hour in-court) and $429.38 for expenses. The trial court only allowed the appointed attorney $200 of the expenses and the maximum misdemeanor fee of $500.

On appeal, the New Hampshire Supreme Court held that the $500 maximum misdemeanor fee could be exceeded for "good cause," and that all "reasonably incurred" expenses had to be paid:

> A fee for the defense of an indigent criminal defendant need not be equal to that which an attorney would expect to receive from a paying client, but should strike a balance between conflicting interests which include the ethical obligation of a lawyer to make legal representation available, and the increasing burden on the legal profession to provide counsel to indigents. *Id.* at 1216

In *Hulse v. Wifvat*, 306 N.W.2d 707 (Iowa 1981) the court interpreted an Iowa statute on appointed attorney compensation which had a standard of "...reasonable compensation which shall be the ordinary and customary changes for like services in the community...," *Id.* at 708, to mean full compensation. *Id.* at 711. "No discount is now required based on an attorney's duty to represent the poor." *Id.*

States that have had a variety of methods of providing counsel for indigents accused of crimes have presented more complex problems for courts but the trend is to realistically confront those more difficult range of inadequacies.

The bidding system for public defender cases in Mohave County, Arizona was determined to be inadequate by the Supreme Court of Arizona in *State v. Smith*, 681 P.2d 1374 (Ariz. 1984)(*En Banc*) since it 1) did not take into account the time an attorney is expected to spend in representing a client; 2) did not provide for support costs (investigation, paralegals, law clerks); 3) did not account for the competency of the attorney to adequately represent all of his clients assigned him; and 4) did not take into account the complexity of each case. *Id.* at 1381.

Smith held that such a contract system violates state and federal constitutional guarantees of due process and effective assistance of counsel since "an attorney so overburdened cannot adequately represent all of his clients properly and be reasonably effective." *Id.*

Significantly, the Arizona Court reminded public defenders and appointed counsel of their ethical responsibilities as set out in the ABA *Standards for Criminal Justice* and the ABA Code of Professional Responsibility:

> Therefore, an attorney may be forced to allot his limited amount of time and resources between paying clients and indigent clients or even between different indigent clients. This can result in a breach of the attorney's professional responsibility under DR 5-101, 6-101, 7-101 or 5-105.
>
> We remind counsel that accepting more cases than can be properly handled may result not only in reversals for failing to adequately rerresent clients, but in disciplinary action for violation of the Code of Professional Responsibility. *See* DR 1-102(A) (6)....
> *Id.* at 1382.

In the last 3 years the highest courts of Florida, Alaska and Kansas have recognized that the law of economics are directly related to the Constitution's guarantee of counsel who is effective.

In *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986) the indigent defendant's attorney was appointed by the court to represent him on his capital murder, kidnapping and armed robbery charges. The case was changed to a venue 150 miles away and spanned a 9-month period. The in-court time by defense counsel amounted to 64 hours. The appointed attorney asked for compensation for 248.3 hours in the amount of $9,500, even though expert testimony valued his services at $25,000. The Florida statute allowed for a maximum of only $3,500 for attorney compensation in indigent criminal cases.

The court held the statute's cap on attorney fees in capital cases facially valid but "unconstitutional when applied in a manner to curtail the court's inherent power to ensure adequate representation of the criminally accused." *Id.* at 1112. The court specifically found the 6th amendment right to effective representation violated, but the holding was limited to "extraordinary and unusual" capital cases. To safeguard a person's rights, the court decided "it is [the court's] duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter." *Id.* at 1113.

In 1989 the Florida court again addressed the attorney fee issue. In *White v. Board of County Commissioners*, 537 So.2d 1376 (Fla. 1989) the court-appointed lawyer, White, spent 134 hours on a first degree murder case with 63 of those hours in court. All this was over a 31/2 month period. The Florida statute's $3,500 maximum fee meant that White would receive a fee at the rate of $26.12 per hour. An expert testified that an appropriate fee for the 134 hours would be $12,135. White asked for a $50 per hour fee for a total of $6,700. In *White* the Florida court extended its 1986 holding in *Makemson*'s that found the fee cap unconstitutional as applied to "extraordinary and unusual" cases by finding that "virtually every capital case fits within this standard and justifies the court's exercise of its inherent power to award attorney's fees in excess of the current statutory fee cap." *Id.* at 1380. There was no hesitation by the court to find that a $3,500 cap was "unrealistic." *Id.* at 1379. The determining factor in deciding whether the fee cap should be exceeded, according to the Florida Supreme Court, is not whether the case is complex; but rather it is "the time expended by counsel and the impact on the attorney's availability to serve other clients...." *Id.* at 1380.

In 1987 The Criminal Justice Act was amended to increase compensation rates and maximums for attorneys appointed in federal court. Under 18 U.S.C. 3006A(d)(1) the compensation is set at $60 per hour for in-court work and $40 per hour for out-of-court work. Those rates were increased to $75 per hour by a September 8, 1988 order of Judge Eugene E. Siler, Jr. for federal habeas corpus death penalty cases. Further increases are possible under the Act's provisions.

The maximum amounts for attorney fees has been increased to $3,500 for each attorney in a felony case and $1,000 for each attorney in a misdemeanor case. 18 U.S.C. 3006A(d)(2).

The maximum amounts can be exceeded for "extended or complex representation whenever the court...certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit." 18 U.S.C. 3006A(d)(3).

In 1987 the Alaska Supreme Court applied 20th Century reality and economics to indigent criminal representation when in *DeLisio v. Alaska Supreme Court*, 740 P.2d 437 (Alaska 1987) it decided that a private attorney cannot be compelled to represent an indigent criminal defendant without just compensation since to do so would be an unconstitutional taking of property.

The measure of the mandated attorney compensation in indigent criminal cases, according to *DeLisio*, is the "fair market value of the property appropriated, or the 'price in money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy with a reasonable time allowed to find a purchaser.'" *Id.* at 443.

Like many states including Kentucky, Kansas has a mixed system of full time public defenders and appointed counsel.

Kansas' statutes and regulations set compensation at the rate of $30 per hour for attorneys fees in appointed cases. There

is a maximum of $400 for cases that are pled; $1000 for cases tried, and $5000 for exceptional cases. Expenses up to $100 are also allowed. Due to a shortage of state funds, there had been a 12% cut imposed on the billed fees and expenses in appointed attorney criminal cases.

In *State Ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987) a Kansas trial judge entered a general order that no attorney would be required to serve as counsel for an indigent accused absent reasonable compensation, which the judge defined as $68 per hour, considering overhead expenses that ranged from $27-$35 per hour. *Id.* at 822, 837. The judge further ordered that an indigent defendant's charges would be dismissed without prejudice if such compensation was not available within 30 days of a determination of indigency. *Id.* at 822. The state challenged this order by way of mandamus.

The Court in *Smith* observed, "attorneys generally have an *ethical* obligation to provide *pro bono* services for indigents. Such services may only be provided by attorneys. The individual attorney has a right to make a living. Indigent defendants, on the other hand, have the right to the effective assistance of counsel. The obligation to provide counsel for indigent defendants is that of the State, not of the individual attorney.... The burden must be shared equally by those similarly situated. In the final analysis, it is a matter of reasonableness." *Id.* at 835-36.

The Court found that the 5th amendment's prohibition against unfairly taking property and the 14th amendment's equal protection clause were violated. *Id.* at 842, 846. "The State also has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses. The basis of the amount to be paid for services must not vary with each judge, but there must be a statewide basis or scale. No one attorney must be saddled with appointments which unreasonably interfere with the attorney's right to make a living. Out-of-pocket expenses must be fully reimbursed." *Id.* at 849.

On November 16, 1988 the National Legal Aid and Defender Association issued its *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*. Standard 10.1 addressed compensation:

> (a) Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.
>
> (b) Periodic billing and payment during the course of counsel's representation should be provided for in the representation plan.

Id. at 50.

The Commentary to that Standard explained the unfairness of anything less:

> Unreasonably low fees not only deny the defendant the right to effective representation, however. They also place an unfair burden on skilled criminal defense lawyers, especially those skilled in the highly specialized capital area. These attorneys are forced to work for next to nothing after assuming the responsibility of representing someone who faces a possible sentence of death. Failure to provide appropriate compensation discourages experienced criminal defense practitioners from accepting assignments in capital cases (which require counsel to expend substantial amounts of time and effort).
> *Id.* at 51.

Very recently, the West Virginia Supreme Court in *Jewell v. Maynard*, 383 S.E.2d 536 (April 25, 1989) addressed the constitutionality of its state's system for providing counsel to indigents in criminal cases that provided for hourly rates of $20 for out of court work and $25 for in court work with a maximum of $1,000 per case.

The Court conluded that "...the current system does not consistently ensure experienced, competent, capable counsel to all indigent defendants and others entitled to appointed counsel." *Id.* at 542. The Court recognized that inadequate rates and artifical fee caps have unacceptable consequences:

> We have a high opinion of the dedication, generosity, and selflessness of this States' lawyers. But, at the same time, we conclude that it is unrealistic to expect all appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work. It is counter-intuitive to expect that appointed counsel will be unaffected by the fact that after expending 50 hours on a case they are working for free. Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted.
> *Id.* at 544.

With adequate service to the client being the highest value, the Court determined that the legislature had to fund the public defender/appointed counsel systems with "substantially more money than is currently appropriated to meet constitutional standards." *Id.* at 546. The constitutional right to effective assistance of counsel requires that no lawyer can be "involuntarily appointed to a case unless the hourly rate of pay is at least $45 per hour for out of court work and $65 per hour for in court work." *Id.* at 547.

In analogous civil litigation, the United States Supreme Court has held that reasonable attorney's fees due a prevailing party under 42 U.S.C. 1988 are to be calculated at "...the prevailing market rates in the relevant community...." *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984) (rates billed by the New York Legal Aid Society in a Medicaid class action suit approved at $95-$105 per hour).

The 8th circuit approved a fee of $276,000 for a death row class action suit with the attorneys billing at $150 per hour since this was the "market rate". *McDonald v. Armontrout*, 860 F.2d 1456 (8th Cir. 1988).

While the caselaw trend of the 1980's toward fair compensation is not without significant contrary authority, [6] the trend is definite and inexorable.

CONCLUSION

These cases detail the obvious. Appointed counsel and local and state public defender systems cannot competently function without adequate funding. Most programs are currently grossly underfunded. Attorneys can demand fair compensation and even the fair market value of their services when representing indigents in criminal cases.

For a long time these obvious inadequacies of funding have not been fully litigated in many states. The trend in case holdings and the recent commitment of some state Supreme Courts to realistically face the lack of proper compensation should inspire long overdue challenges to inadequate allocations of money for the defense of the poor.

It is common knowledge that Kentucky ranks among the lowest states in the country in many critical education categories. It is not very well known that Kentucky ranks at the bottom in its commitment of money to the defense of indigent citizens accused of crimes. Kentucky is providing an unconstitutional system of funding in many of its counties. Kentucky is ripe for a challenge to its inadequate funding.

ED MONAHAN
Assistant Public Advocate
Director of Training
Frankfort

FOOTNOTES

[1] The United States Supreme Court in the 5-4 decision of *Mallard v. U.S. District Court for the Southern District of Iowa*, 109 S.Ct. 1814 (1989) decided that 28 U.S.C. Sec. 1915(d) ("The court may request an attorney to represent any such person unable to employ counsel....") "does not authorize the federal courts to make coercive appointments of counsel." *Id.* at 1823. The Court did not address whether the federal courts have inherent authority to require lawyers to serve in civil or criminal cases. The Court did not address whether other statutes that talk in terms of assignment or appointment without any or without full pay allow for a court to make counsel represent a person against counsel's will. The court did recognize that "...in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest." *Id.* The opinion was written by Justice Brennan. Justices Marshall, Stevens, Blackman and O'Connor dissented. The National Association of Criminal Defense Lawyers filed an *amicus* urging that lawyers' services, their property, not be taken from them without compensation.

[2] *ABA Journal* (December 1, 1987) at 55.

[3] *Kentucky Bench and Bar*, Vol. 53, No. 2 (Spring 1989) at 35.

[4] See Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.Univ. L. Rev. 735, 756 (1980). In 1980, a slight majority held *pro bono* representation in criminal cases could be required of attorneys. Since 1980, several states have overruled prior cases. Thus the majority is now against uncompensated service. Shapiro's conclusion is, "At least absent adequate compensation, a lawyer should be able to decline an appointment for financial reasons whether or not it would cause 'unreasonable' hardship." *Id.* at 792.

[5] At its February, 1985 meeting, the ABA's House of Delegates passed a resolution stating, "the American Bar Association opposes the awarding of government contracts for criminal defense services on the basis of cost alone, or through competitive bidding without reference to quality of representation."

[6] See *e.g.*, *State Ex Rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (*En Banc*). In *Ruddy*, the Court held that all Missouri lawyers had to accept appointments to represent indigents in criminal cases without compensation when the state money appropriated ran out. Refusal to do so subjected the lawyer to disciplinary action. The only exceptions were if a lawyer could show undue hardship, or if a lawyer served for 120 days without compensation he would be excused from further appointments.

KENTUCKY RULE CHANGES

The following is a summary of the important changes in the rules announced by the Supreme Court of Kentucky in 1989 which relate to the practice of criminal cases. The rules changes were effective August 28, 1989.

RULES OF CRIMINAL PROCEDURE

RCr 4.43(3) Appellate Review of Bail; Habeas Corpus

Adds a new paragraph (3) that limits appellate review of bail to conditions that exist prior to entry of a judgment of conviction. It details that appellate review of bail on appeal is via an intermediate motion under RCr 12.82.

RCr 8.10 Withdrawal of Plea

Drastically changes the longstanding rule in Kentucky on withdrawal of a guilty plea. Now a defendant is absolutely allowed to withdraw a guilty plea if the judge refuses to sentence in accordance with the prosecutor's recommendation.

This brings Kentucky in line with the practice of 41 other jurisdictions. It eliminates the rank unfairness of Kentucky's previous practice of having a defendant bargain for nothing more than the right to play Russian roulette on his sentence.

RCr 9.04 Continuance of Trial

Adds to this rule the following, "If the Commonwealth does not consent to the reading of the affidavit, the granting of a continuance is in the sound discretion of the trial judge."

This rule continues to blatantly violate a criminal defendant's constitutional right to compulsory process.

RCr 12.82 Application for Relief Pending Review

Adds the following, "The decision of the trial court regarding bail will not be disturbed by an appellate court unless it is demonstrated that the trial judge failed to exercise sound discretion."

CR 11 Sanctions

Adds the following, "The Court shall postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment."

CR 73.02(2)(c) Failure to Comply with Appellate Rules

Formerly, a money sanction had to between $250 and $500. Now is can be $500 or any lesser amount. $250 is no longer the minimum. This may actually increase the number of attorneys being fined albeit for a lesser amount.

CR 73.08 Certification of Record on Appeal

Eliminates the requirement that a motion for extension to certify the record on appeal be filed before the expiration of the period as originally prescribed or as extended by a previous order.

CR 76.43

Creates a new rule that sets out the number of copies of pleadings required to be filed in the appellate courts .

CR 98

Creates a new rule for procedure for video records.

ED MONAHAN

METHODS FOR INCREASING *PRO BONO* PARTICIPATION AND THE FEASIBILITY OF HANDLING POST-CONVICTION CAPITAL CASES

A. How To Increase Greatly The Number Of Lawyers Handling *Pro Bono* Cases

My experience in coordinating *pro bono* work in a law firm with offices ranging from a few dozen to several hundred lawyers convinces me that a law firm of at least moderate size can substantially increase the amount of *pro bono* work it does by improving the administration of its *pro bono* program. This can be done quite painlessly at even a very busy firm, as my experience at Skadden, Arps, Slate, Meagher & Flom shows.

The most crucial prerequisite for a successful *pro bono* program is to have a credible coordination mechanism— either one attorney or a committee. In order to be credible, the coordinator(s) must have the visible support of the firm's top management and must be well respected by the firm's attorneys.

The visible support can be easily provided. For example, memoranda urging attorneys to attend meetings about *pro bono* work can be sent out under the name of the firm's managing partner, who can then make introductory remarks at such meetings. Further visibility can be provided by highlighting *pro bono* work at departmental lunches or in the firm newsletter— whose organizers should welcome stimulating *pro bono* "war stories." An additional function for the firm's management is to intervene on behalf of associates in those (hopefully few) instances in which partners violate the firm's *pro bono* policies, such as by insisting that an associate leave a *pro bono* client "in the lurch" in order to handle a paying client matter.

However, visible support from top management will not mean much if the coordination of *pro bono* is relegated to someone — be it partner or associate — who is not well regarded in the firm. In that event, *pro bono* could be perceived as something to be done only, or primarily, by attorneys so poorly thought of that they

Ron Tabak

do not get many regular assignments and thus have time to do *pro bono* work.

The *pro bono* coordinator should have several important tasks. The most basic one is to become familiar with the various sources of *pro bono* work and with the training and support resources they provide to volunteer lawyers, and to inform those organizations about the firm's interest in learning about particular *pro bono* opportunities as they arise. This can be very useful, in two ways. It can enable the *pro bono* coordinator to inform attorneys at the firm about the wide variety of *pro bono* opportunities that are available— including many types of simple and more complex litigation and various non-litigation matters, such as the representation of not-for-profit groups. It can also cause organizations which represent poor people or non-profit organizations to develop suitable *pro bono* projects (if they have not already done so).

The next function of the *pro bono* coordinator is to disseminate information about the general range of *pro bono* matters to attorneys at the firm and to determine which lawyers wish to handle which types of *pro bono* work. The dissemination of information can be done through a memorandum sent to each attorney, followed by a meeting hosted by a member of the firm's management at which the *pro bono* coordinator and representatives of two or three sources of *pro bono* work are the speakers. Following that meeting, every attorney at the firm — whether or not an attendee of the meeting — should be required to complete a *pro bono* questionnaire, which should ask whether or not the attorney wishes to handle a *pro bono* matter sometime during the year and, if yes, to check off which of the indicated types of *pro bono* work the attorney is interested in handling. While it should not be required that everyone say that they do wish to do *pro bono* work, it should be required that everyone be on record by filling out the questionnaire. This process should be repeated each year as new attorneys arrive.

With information from the questionnaires in hand, the coordinator is in position to perform the most critical task — matching interested attorneys with available cases. Being aware of which kinds of *pro bono* matters are of interest to particular attorneys, the coordinator can come up with suitable cases and personally contact an attorney about a case in one of his indicated areas of interest. Through this method, the firm can avoid the inefficiency of having each individual lawyer separately investigate what kinds of *pro bono* cases are available. In placing cases, personal contact is the key, since it is far easier for a busy attorney to overlook or discard a written memorandum than to ignore a request made by phone or face-to-face.

Obviously, most attorneys will be too busy to take on any new *pro bono* case in any given week. But *some* attorneys will likely be available to take on *some* new *pro bono* matter in a given week and most if not all attorneys who truly wish to do *pro bono* work will be available to do sometime during the year. Accordingly, the *pro bono* coordinator, when told that a particular attorney is currently too busy to take on a *pro bono* project, should ask when it would be appropriate to call again. Most attorneys appreciate this, because such inquiries make it easier for them to

effectuate their genuine desire to do *pro bono* work.

The indicated interests of the firm's attorneys in particular types of *pro bono* work may not have a skew which matches the most urgent legal needs of the indigents in the state. Such a situation can be alleviated in several ways. The *pro bono* coordinator can encourage those lawyers who have not expressed a strong preference to take on the most pressing type of case. Moreover, the firm can provide paralegal, typing or other non-lawyer support to the legal services or other public interest offices handling such cases. A further step, described at the end of this article, would be for the firm, either by itself or with other firms, to fund lawyer positions at offices providing the most urgently needed representation.

Once the *pro bono* coordinator has a match of an attorney and a case, several additional steps must be taken. First, the coordinator should determine whether the available attorney is capable of handling the matter properly alone. If not, sufficient additional attorneys should be found to work on the case or it should not be taken on. It is far preferable to handle a large number of relatively small *pro bono* cases properly than to mishandle a few complex cases. When the firm considers a particular complex case to be so significant that it does not wish to turn it down, department leaders can be asked by the firm's management to make suitable attorneys available.

Another important step is to make sure that the partner in charge of overseeing a particular lawyer's overall work load "signs off" on that lawyer's taking on a new *pro bono* matter. Such approval should mean that the *pro bono* work will be considered as part of the lawyer's overall workload, a workload which should not become substantially greater than an average attorney's workload by virtue of the *pro bono* work. Also, any attorney who does a significant amount of *pro bono* work should have that work evaluated by a senior associate or partner, as part of the firm's regular evaluation process — and preferably before the attorney's work product leaves the office. Otherwise, *pro bono* work, even if "counted" in terms of hours, will not count in the way most crucial to an associate's advancement: consideration of the quality of the work and constructive criticism. This is in the firm's interest as much as the attorney's, particularly because attorneys frequently do something for the first time in the context of *pro bono* work. Bad habits developed and uncorrected in doing *pro bono* work may well carry over into paying client work.

The *pro bono* coordinator can help a volunteer attorney to do high quality work by assembling manuals, form banks, brief banks and videotapes on the particular type of case, and by informing the attorney of their existence and of the identities of others at the firm who have handled similar cases. The coordinator should also assist volunteers in getting paralegal and other support from within the firm and in getting substantive guidance from the organization from which the attorney's project came. As discussed below, supportive resources are particularly well developed for those handling capital punishment post-conviction cases.

The final function of the *pro bono* coordinator is to monitor each *pro bono* project regularly. This can be accomplished through the use of (a) time records showing how much time each attorney has spent on each *pro bono* project in a given period of time and (b) questionnaires asking each *pro bono* attorney to indicate the current status of the case and whether the attorney needs assistance or has run into any snags. Through this type of regular update process, the coordinator can identify or be informed of problems before they become crises and can take corrective action. Where necessary, the coordinator can find additional attorneys to work on a case or can replace the attorney handling the case — something which must, in any event, be done when a lawyer leaves the firm without taking a *pro bono* case to the lawyer's new firm.

Once attorneys have successfully completed work on *pro bono* cases, their accomplishments should be publicized through the firm newsletter and at departmental meetings. This not only improves the *pro bono* program's credibility; it also makes attorneys and staff feel better about working at a firm which has helped poor people and non-profit groups which serve the poor. Work product from such cases should be kept in forms banks and briefs banks.

THE FEASIBILITY OF CIVIL PRACTITIONERS REPRESENTING DEATH ROW INMATES IN POST-CONVICTION PROCEEDINGS

As someone who had never represented anyone at a criminal trial and had only worked on one criminal appeal, which was not a homicide case, when I was asked to represent my first death row inmate, I an living proof of the fact that with sufficient guidance and support a civil practitioner can provide effective representation to death row inmates in post-conviction proceedings. In less than two years after beginning work on my first case, I had argued three cases in federal courts of appeals, one case in the Georgia Supreme Court, and once, successfully, in the United States Supreme Court. While I did not prevail each time, I was heartened by the fact that leading practitioners in this area of litigation felt that I had represented these clients effectively.

It is true that I have been at a very large law firm when representing death row inmates. But in none of my cases have I used, on an ongoing basis, more than three or four other attorneys — although I have gotten occasional help from others at the firm. The key to effective representation in these cases is the firm's willingness (a) to have several attorneys, including at least one senior associate or partner, devote very substantial amounts of time over an extended period, (b) to support those attorneys with paralegals and the firm's normal litigation support, including computerized research, (c) to pay for the attorneys' and paralegals' travel in investigating and litigating the case,* and (d) to have its attorneys take advantage of the ongoing oversight and guidance available from those with more experience in this area of the law.

The need for law firms to come forward to take on these cases is critical and growing, as more and more death row inmates complete their direct appeals and find themselves without any representation in preparing *certiorari* petitions and in state post-conviction proceedings. Representation is crucial in these stages of litigation, because (a) *certiorari* is granted in death penalty cases far more often than in other litigation and (b) claims not presented in state post-conviction proceedings that have not previously been raised cannot then be presented in federal habeas corpus proceedings, in which state death row inmates are now entitled (under the 1988 federal drug law) to compensated counsel. The need for counsel would obviously not be so critical if the available claims were all frivolous. But they are not. Between 1/3 and 1/2 of death row inmates whose cases have proceeded into federal habeas corpus have secured relief there, as have numerous others in state post-conviction proceedings. While I have not won all of my cases for death row inmates, I have yet to have one in which — through factual or legal research — I was unable to present a very substantial claim.

Fortunately, the support available to lawyers representing death row inmates is now substantially greater than ever a few years ago. Through the American Bar Association's Capital Punishment Post-conviction Project, a manual and videotapes covering various pertinent subjects are available to guide attorneys repre-

senting death row inmates. There is also a relatively new treatise by Professor James Leibman describing the procedural ins-and-outs of capital punishment post-conviction proceedings. There is also for the first time the clear prospect that lawyers who effectively represent death row inmates in state post-conviction proceedings will be appointed to represent them in federal habeas corpus and will receive compensation under the Criminal Justice Act for doing so. Such attorneys may also be provided with aid from compensated expert consultants.

But the most important improvement has been the creation of over a dozen resource centers to provide oversight, guidance and support to lawyers for death row inmates. One of these is the Kentucky Capital Litigation Resource Center, which has been created by the Department of Public Advocacy (DPA).

For the foreseeable future, one DPA attorney with capital litigation experience will be assigned to work with each firm taking on a death row inmate's representation after the conviction and death sentence are affirmed on direct appeal. The DPA attorney may be the lawyer who was lead counsel on the direct appeal. The DPA attorney and the firm would be expected to remain on the case through state and federal post-conviction and any clemency proceedings.

The Resource Center's staff will actively assist the attorneys representing a death row inmate in identifying federal constitutional issues, formulating strategy, and (where necessary) preparing appropriate documents and arguments. In this connection, the Resource Center will expand its death penalty library and eventually will index cases, pleadings, articles, briefs, etc. so that an attorney can readily locate all current information on specific issues. The Resource Center will coordinate its resources with other state and national organizations, and with the other state resource centers, will create and develop a computerized, indexed pleadings bank. There will also be a newsletter and a Sixth Circuit habeas corpus manual. Beyond all this, the resource center will help to plan training programs, develop and expand expert witness lists, assist in organizing investigation efforts and monitor all Kentucky capital cases.

I should also note that it may be feasible in some instances for litigators with substantial trial experience in complex criminal felony cases to represent defendants at capital trials. This should not be undertaken by someone whose background is principally in civil litigation and should not be undertaken by anyone who does not take advantage of the host of valuable services provided by DPA's Major Litigation Section. That section's staff lawyers are available to consult with trial lawyers about their cases. Moreover, the section's Mitigation Project's paralegal Cris Brown is available to conduct intensive day-long client interviews, at which comprehensive information about the client's life will be gathered as the starting point for a complete psycho-social history. Afterwards, Ms. Brown will prepare a memorandum condensing the information she has gathered and will suggest further areas of investigation pertinent to mitigation — which is often the most crucial type of evidence to develop in seeking to avert imposition of the death penalty.

How Firms Can Directly Expand The Number of Full-Time Attorneys Representing The Poor

The first year's experience with the Skadden Fellowship Program demonstrates that if more jobs were available even at relatively modest salaries, but with some mechanism for defraying law school debts, a substantial number of highly qualified law school graduates would be willing to work for legal services programs and other public interest law offices. This is evident from the fact that over 606 third-year law students and judicial law clerks who had gone to 149 law schools applied for the Skadden fellowships in the first year, even though the program was announced only four months before application deadline. Fully 200 of the applicants were so good that they could have been awarded fellowships with impunity.

The first year's Skadden Fellows are now working at such organizations as the Juvenile Law Center in Philadelphia, the Appalachian Research and Defense Fund, the Legal Aid Societies in New York, San Francisco, and Alameda County, California Rural Legal Assistance, the NAACP Legal Defense Fund, the Native American Rights Fund, the Disability Rights Education and Defense Fund, the Southern Prisoners Defense Committee, the Western Center on Law and Poverty, the Disability Law Center, the Mexican-American Legal Defense Fund, the Lawyers Committee for Human Rights, the National Center for Immigrants Rights and the Lawyers' Committee for Civil Rights. They are being paid by the fellowship program $32,500 per year, plus the fringe benefits which their organizations would normally provide, and the fellowship program will pay any law school loan amounts which they would otherwise have had to pay during their one or two years as Skadden Fellows.

This program can definitely been emulated on a smaller scale, as it has already been. For example, several very small Denver law firms have pooled their resources to fund fellowships, as have law students at New York University Law School. Skadden Arps would be pleased to share information with Kentucky law firms about its program, including information about Kentucky applicants who, although being well qualified, are not chosen to receive one of the limited number of Skadden fellowships.

FOOTNOTES

*This should be far less expensive for Kentucky attorneys representing Kentucky death row inmates than for New York attorneys representing Georgia, Florida, Alabama, Texas, Arkansas, Louisiana, Virginia, North Carolina, or Oklahoma death row inmates.

RONALD J. TABAK
Skadden, Arps, Slate, Meagher & Flom
919 Third Ave.
New York, NY 10022-9931
(212) 735-3000

Mr. Tabak spends 40% of his time on pro bono matters and the other 60% on commercial litigation. He has handled numerous habeas corpus death penalty cases on a pro bono basis, including two United States Supreme Court arguments. He authored the ABA resolution (No. 109 in 1988) opposing racial discrimination in capital sentencing and the ABA's amicus curiae brief concerning the right to counsel in state post-conviction proceedings in death penalty cases in Murray v. Giarratano.

Ron has been Special Counsel to Skadden, Arps, Slate, Meagher & Flom since 1985, the co-ordinator of its pro bono program and a member of the advisory committee on the Skadden Public Interest Law Fellowship Program. A member of the New York and Alaska bars, Mr. Tabak received a B.A. from Yale in 1971 (magna cum laude, Phi Beta Kappa), J.D. from Harvard Law School in 1974, and was law clerk to the Hon. John F. Dooling, Jr., United States District Judge (E.D.N.Y.) in 1974-75. He was an associate at Hughes Hubbard & Reed from 1975-83 and was special counsel to Hughes Hubbard from 1983-85.

He recently testified on behalf of the American Bar Association before the Senate Judiciary Committee in support of the proposed Racial Justice Act, which would endeavor to eliminate racial discrimination in capital sentencing. He has organized and moderated numerous training programs for the New York lawyers representing death row inmates and has been on the faculty of training programs in TX, CO, PA and GA.

GRAND JURY TESTIMONY

Presenting Evidence and Obtaining a Transcript

George Sornberger

As all competent practitioners know, obtaining a copy of the testimony from the Grand Jury proceeding that resulted in your client's indictment is an important step in defense counsel's pretrial investigation. This transcript shows unequivocally what testimony was given that resulted in the indictment. It provides a framework for discussion with your client concerning the realities of the case. Also, the transcript may contain the testimony of, or reference to, other purported witnesses. It may suggest areas to be further investigated by defense counsel.

Additionally, you can develop grounds for a Motion to Dismiss by your request for a transcript, if it turns out that no recording has been made, and therefore no transcript is available. (See RCr 5.16(2)) Unless the prosecutor can demonstrate a legitimate unforeseeable, unintentional failure of the recording equipment, you should prevail. In our office where scores of felony cases are defended each year, a transcript of the Grand Jury testimony is obtained in every case as soon as possible.

OBTAINING A COPY OF THE GRAND JURY PROCEEDINGS.

RCr 5.16(3) provides in part "...any person indicted by the Grand Jury shall have a right to procure a transcript of any stenographic report or a duplicate of any mechanical recording relating to his indictment or any part thereof..." If your client is indigent, this must be provided at no cost. (See K.R.S. 31.110(1)(b)) In a Judicial District where the Commonwealth Attorney provides a transcript upon request, we send a letter with a carbon copy to our client, who is thereby aware of our efforts to obtain this testimony. In a Judicial District where a duplicate recording is provided, we send a letter to the prosecutor along with a blank tape. A carbon copy of this letter is sent to our client. In a Judicial District where immediate access to the recording is provided in exchange for us furnishing the Commonwealth Attorney with a copy of the transcript we make, the procedure is as follows: Upon contacting the Commonwealth Attorney's office to arrange a convenient time, our secretary goes to the Commonwealth Attorney's office and copies the Grand Jury tape onto our blank tape. She later transcribes the tape and mails the Commonwealth Attorney's office a copy of our transcript. Once the transcript is obtained and reviewed, arrangements are made to discuss this testimony with our client. In appropriate circumstances, a copy, copiously stamped "CLIENT'S COPY" on each page, is provided to our client.

PRESENTING EVIDENCE TO THE GRAND JURY ON BEHALF OF THE DEFENDANT

RCr 5.08 provides..."If the defendant notifies the Attorney for the Commonwealth in writing of his desire to present evidence before the Grand Jury, the Attorney for the Commonwealth shall so inform the Grand Jury. The Grand Jurors may hear evidence for the defendant but are not required to do so." In cases where we desire to present evidence to the Grand Jury, we prepare a written notice to the Commonwealth Attorney, filing the original with the Circuit Clerk and mail a copy to the prosecutor and the Circuit Judge. A copy of this notice is also mailed to our client. This way there is a permanent record of your request, even if the Grand Jury elects not to receive your evidence. Four cases are set forth below that illustrate many of the ways your client can benefit from creative use of this Rule of Criminal Procedure. (Copies of any of these notices or pleadings referred to in the cases below may be obtained by request from the author.) In some cases, you efforts may result in an indictment returned on lesser charges. Many times, even if the Grand Jury chooses to indict your client, your presentation of additional relevant evidence may educate the prosecutor as to the weaknesses in his case resulting in a reduction or dismissal of the charges after indictment. Also the timing of your request and its affect on the scheduling of Grand Jury matters can be advantageous to your client's case.

CASE NO. 1

On April 27th, 1988, a confidential informant notified the County Sheriff that he had observed over 25 marijuana plants growing on property thought to be the residence of a certain individual. The Sheriff sought and obtained a search warrant and later that same day located and seized 123 suspected marijuana plants. (These seedlings were found growing in an old tire on the back porch of a log residence on the property in a rural location.)

On July 1st, 1988, a criminal complaint was sworn to by the Sheriff and an arrest was made for Cultivation of Marijuana for the Purpose of Sale (KRS 218A.990-(6)(a)), a Class D felony. A Preliminary Hearing was held in the District Court, during which defense counsel learned through the testimony of the Sheriff that the property in question was not owned by the defendant, and that the Sheriff did not yet have strong evidence establishing this defendant's residence at this property.

In mid-August, 1988, defense counsel requested assistance from his investigator to determine: (a) during March and April, 1988, who owned the log house on the property; (b) who resided in it during that time; and (c) what access, if any would a non-owner or non-resident have to the location where the marijuana plants were found?

It was this defendant's contention that he did not own the property, did not live there and did not know about the marijuana plants. The property in question had been and continued to be owned by various members of his family. The Sheriff was scheduled to present this case to the Grand Jury on August 26th, 1988. Defense counsel needed more time for his investigation to be completed. Defense counsel wanted to present to the Grand Jury, through his investigator, evidence that this defendant did not own the property in question and did not reside there during the spring of 1988. A NOTICE TO COMMONWEALTH ATTORNEY, PURSUANT

TO RCr 5.08, OF DEFENDANT'S REQUEST TO PRESENT EVIDENCE BEFORE THE GRAND JURY was prepared and filed on August 24th, 1988, informing the Commonwealth Attorney of this defendant's desire to have evidence presented before the Grand Jury through our investigator. The NOTICE further informed the prosecutor that our investigator would be present not at the August 26th meeting of the Grand Jury, but rather at the September 23rd session. A letter to the prosecutor that accompanied his copy of the NOTICE explained that our investigation was not yet complete and that we would not be ready to present evidence on August 26th, 1988, and set forth our request that the Sheriff wait until the September 23rd session in order to present his evidence. The prosecutor, although angered at what he saw as defense counsel's attempt to control the Grand Jury schedule, nevertheless, agreed to our request. The NOTICE and accompanying letter were read to the Grand Jury and the matter was rescheduled for September 23rd, 1988. On November 11th, 1988, this defendant was indicted on that same charge. However, our evidence had substantial impact upon the prosecutor even though the Grand Jury chose to indict. Defense counsel had sufficiently educated the prosecutor about the weaknesses in his case through the presentation of our evidence; and ultimately the prosecutor agreed to a misdemeanor plea and a conditional discharge.

CASE NO. 2

On December 13th, 1987, a 43- year old man, married and the father of 3 children, died in his bed in his home at about 1:00 p.m. from a gunshot wound to his right temple. Both his hands were under the covers and no weapon was found in that room. The Kentucky State Police and other local law enforcement officers began an investigation that eventually resulted in subpoenas being issued for the deceased's wife, his 3 children and his mother to appear before the Grand Jury of that county. These subpoenas were served in some fashion on February 4th, 1988, for a scheduled Grand Jury session on February 16th, 1988. No arrest had yet been made in a case that was now labeled a homicide. These family members sought assistance and representation from defense counsel. On February 11th, 1988, defense counsel filed an APPEARANCE OF COUNSEL notifying the Commonwealth Attorney that he was counsel of record for the wife, the mother and the 3 children of the deceased. On February 11th, 1988, defense counsel sought and obtained an Order from the District Court appointing defense counsel, pursuant to RCr 5.18, as guardian for these minor children for the limited purpose of representing each in connection with their requested appearance to testify in front of the Grand Jury. This concerned their knowledge of facts and circumstances surrounding the homicide. On February 12th, 1988, defense counsel filed a MOTION TO QUASH SUBPOENA and scheduled this motion for hearing on March 21st, 1988. A letter was sent to the prosecutor that same date, along with copies of the APPEARANCE OF COUNSEL, ORDER APPOINTING GUARDIAN PURSUANT TO RCr 5.18 and the MOTION TO QUASH SUBPOENA. Defense counsel explained to the prosecutor that because of the time factor this motion could not be resolved before February 16th, 1988, the date the prosecutor wanted the Grand Jury to hear their testimony. The letter further informed the prosecutor that defense counsel did not want any of his five clients questioned or contacted at any time concerning this investigation and a carbon copy was sent to the Kentucky State Police Detective working the case. The Grand Jury was informed by the Commonwealth Attorney about these filings. The Grand Jury took no further action on this matter at that time. However, in May of 1989, a new Grand Jury chose to re-investigate this particular homicide. An attempt was once again made to serve a subpoena upon the deceased's wife, his older son, now no longer a minor, and his younger son. The prosecutor informed defense counsel that the deceased's wife and his older son were suspects in this homicide investigation. Defense counsel agreed to have these three individuals appear at the Grand Jury on May 15th, 1989. On May 11th, 1989, defense counsel wrote the prosecutor advising him of this and informing the prosecutor that each of these individuals would have with them a written statement setting forth their refusal to appear before the Grand Jury and the specific reasons for it. These letters were tendered as a formal refusal for each of these individuals to testify, having established from the prosecutor that in view of this, these statements would be read to the Grand Jury and none of these people would be subjected to any questioning at all. No further action by the Grand Jury was taken at that time and the matter appears to be finally at rest.

CASE NO. 3

An individual from Rockwood, Tennessee, on August 19th, 1988, sought and obtained a criminal complaint against a Kentucky citizen for the felony offense of Knowingly Receiving Stolen Property Over $100 (a certain 1981 Harley Davidson motorcycle frame). The defendant then sought our representation. On August 22nd, 1988, defense counsel phoned the Commonwealth Attorney, who was then in session with the Grand Jury, and gave the prosecutor oral notice of defendant's request to present evidence before the Grand Jury. The prosecutor, at that time, agreed to receive that evidence on September 19th, 1988. On August 26th, 1988, defense counsel filed a written NOTICE TO COMMONWEALTH ATTORNEY, PURSUANT TO RCr 5.08 OF DEFENDANT'S REQUEST TO PRESENT EVIDENCE BEFORE THE GRAND JURY, setting forth a September 19th date for presentation of this evidence. Nevertheless, an indictment was returned against this defendant on August 29th, 1988, indicting him for that same offense. On September 19th, 1988, defense counsel filed a MOTION TO DISMISS INDICTMENT. On September 20th, 1988, the Circuit Judge quashed the indictment and defense counsel was directed to file an amended NOTICE. On September 20th, 1988, defense counsel filed his AMENDED NOTICE TO COMMONWEALTH ATTORNEY, PURSUANT TO RCr 5.08, OF DEFENDANT'S REQUEST TO PRESENT EVIDENCE BEFORE THE GRAND JURY, setting forth an October 17th, 1988, date for presentation of this evidence. On October 17th, 1988, defense counsel's investigator appeared before the Grand Jury and testified on several matters, such as the complaining witness's extensive criminal record, that included an outstanding bench warrant issued by a Tennessee Trial Court ordering him to begin serving his Tennessee prison sentence after his convictions had been affirmed on appeal. In addition, defense counsel's investigator informed the Grand Jury about other irregularities in the complaining witness's previous Grand Jury testimony and produced records and receipts from this defendant's restoration of a Harley Davidson motorcycle. This investigator also produced a theft report and a criminal complaint made in Tennessee after the complaining witness's motorcycle was allegedly stolen there. These reports disputed some of the testimony from the complaining witness at his first Grand Jury appearance in Kentucky.

In spite of the evidence presented by defense counsel's investigator, the Grand Jury returned an indictment against this defendant on October 24th, 1988, virtually identical to the indictment previously quashed. However, the Commonwealth Attorney agreed to an Order of Pretrial Diversion because defense counsel had convinced him through his presentation of

evidence on behalf of the defendant that his complaining witness was not a credible person and the prosecutor was unwilling to vigorously pursue this prosecution in view of that.

CASE NO. 4

On August 14th, 1988, a certain individual bled to death from a stab wound to the neck inflicted by his long-time girlfriend and mother of his child during a struggle that had been preceded by the deceased's beating this woman as he had many times in the past. She was arrested on a criminal complaint charging Capital Murder and was lodged in the County Jail. Counsel was appointed the following day at her Arraignment in District Court. Defense counsel made a record at that proceeding concerning the physical condition of his client as she then appeared in Court, noting her fresh cuts, scratches and bruises. Counsel successfully argued for and obtained an Order from the Court directing the local hospital to receive and examine this defendant and appropriately treat her injuries. Defense counsel had his investigator photograph the defendant. While awaiting the Preliminary Hearing, defense counsel continued his investigation and documented the extensive criminal record of the deceased that showed several assaults and other alcohol related convictions. He obtained records of her treatment at the local hospital and various injuries she received of a suspicious nature (*i.e.* where she claimed to have fallen down stairs to account for bruises to the head). In short, defense counsel proceeded to develop a variation on self-defense, specifically battered-woman syndrome. Shortly before the Grand Jury convened, defense counsel filed his NOTICE TO COMMONWEALTH ATTORNEY, PURSUANT TO RCr 5.08, OF DEFENDANT'S REQUEST TO PRESENT EVIDENCE BEFORE THE GRAND JURY. Defense counsel's investigator was allowed to give testimony before the Grand Jury. He gave details of her most recent injuries, presented the Court records and hospital records that suggested a pattern of abuse by the deceased against this defendant and highlighted relative portions of her statement that she had given to the police prior to counsel's entry into the case. That Grand Jury did not indict.

When a new Grand Jury was convened some weeks later, defense counsel again gave NOTICE of the defendant's desire to present evidence before this new Grand Jury. Once again, defense counsel's investigator testified. In addition to that information given to the first Grand Jury, the investigator told the new Grand Jury about her experience in living at a spouse abuse center for several weeks (defense counsel had arranged for her release from jail for her placement in a facility in another county after the first Grand Jury failed to indict her). He also testified about her reunion with her young daughter and the counseling both were receiving at the center. Although the Grand Jury did indict this defendant, they chose to indict her for Reckless Homicide. We had also educated the prosecutor about the strength of our defense by presenting much of our favorable evidence twice. Ultimately, the prosecutor did not object to a probated sentence for this young woman.

CONCLUSION

Defense counsel should carefully consider in every case whether or not an attempt should be made to present evidence to the Grand Jury on behalf of the defendant under RCr 5.08. When properly utilized, it can be a tremendous benefit to your client.

GEORGE SORNBERGER
Assistant Public Advocate
Somerset Trial Office
P.O. Box 672
Somerset, KY 42501
(606) 679-8323

CORRECTIONS:

POPULATIONS AND TRENDS 1989

William D. Clark

CORRECTION'S PURPOSES

The responsibilities of the Corrections Cabinet are public safety, the humane and just treatment of convicted felons and their rehabilitation. To that end the Cabinet has a great interest in projections of population growth, the type of inmate entering our institutions and the cost of holding that inmate.

Using a sophisticated computerized projection technique, the Corrections Cabinet has projected the felon population at the end of FY 90 will be 8,735 and will grow to 12,360 by the end of fiscal year 1999. Using only currently authorized beds, the Cabinet will have 1343 more inmates than beds by the end of this fiscal year and approximately 4,219 by the end of 1999 (Figures 1 and 2).

FIGURE 1

LONG-TERM PROJECTIONS OF INMATE POPULATION/CAPACITY

Year Ending	Total Felon Pop.	Total Institution Capacity	Total Community Bed Capacity	Total	Balance in Controlled Intake
FY 89	7,816	6,258	438	6,696	1,120
FY 90	8,735	6,938	454	7,392	1,343
FY 91	9,425	7,107	454	7,561	1,864
FY 92	9,969	7,687		8,141	1,828
FY 93	10,416			8,141	2,275
FY 94	10,812			8,141	2,671
FY 95	11,154				3,013
FY 96	11,470				3,329
FY 97	11,772				3,631
FY 98	12,068				3,927
FY 99	12,360				4,219

NEW CELLS

Included in the authorized beds are the expansion of the Eastern Kentucky Correctional Complex, located at West Liberty, to 1000 beds, the recent conversion of some minimum security beds to medium security and the addition of more community service beds.

POPULATION CATEGORIES

In January of this year there were 6,227 inmates in state and private institutions, 906 in controlled intake, 1147 in Intensive Supervision Program (ISP), 947 in Advanced Supervision Program (ASP) and 2,212 on active parole (Figure 3).

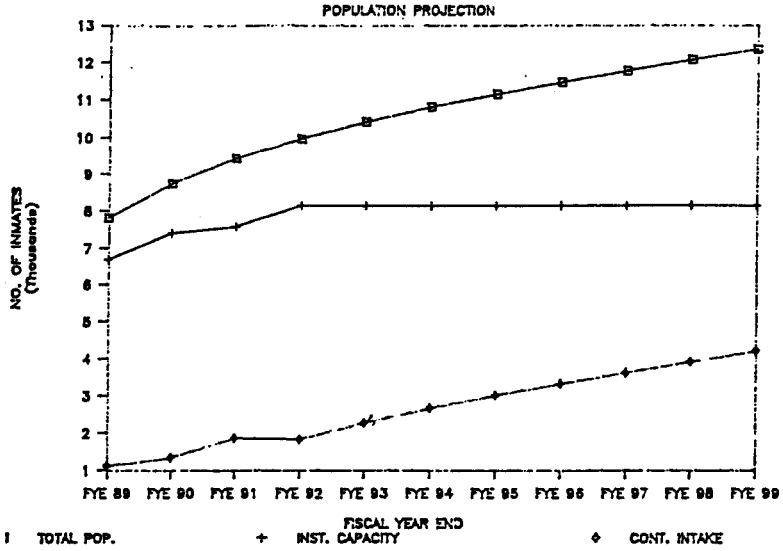
INCREASE IN ISP AND ASP

The number of inmates in the ISP and ASP programs continue to grow at a rapid rate (36% increase in ISP, 6% increase in ASP). The expansion of 250 beds in the private sector produced a temporary decrease in Controlled Intake. That number has recently increased to over 1,100.

FIGURE 2

KY. CORRECTIONS CABINET

POPULATION PROJECTION



FEMALE INMATES

The number of female inmates has remained stable until this last year. This is primarily due to the limited availability of female beds rather than the number of convicted felons. A recent expansion of the Kentucky Correctional Institution for Women has increased its population to 280 but there are still nearly 100 inmates backed-up in jails.

TYPES OF CRIMES - ALL INMATES

In January 1989 over one half of the inmates incarcerated had committed violent crimes and 31% had committed property crimes (Figure 4). Property crimes include such crimes as theft, arson, burglary, bribery, etc. A total of only 262 inmates were incarcerated for property crimes only. There are 4,107 whites and 1,947

FIGURE 3

KENTUCKY CORRECTIONS CABINET
POPULATION HISTORY

Date	Male Institutions	Female Institution	Comm/Res Centers	Jails	ISP	ASP	Regular Parole	Regular Probation
Jan 85	4444	169	237	650	71	---	3567	5160
Jan 86	4523	162	277	791	300	---	3471	5213
Jan 87	4587	169	520	1040	775	581	3113	5310
Jan 88	4768	181	587	1289	852	891	2324	5288
Jan 89	5569	221	437	906	1147	947	2212	5365

blacks incarcerated in the State of Ky.

TYPES OF CRIMES - FEMALE VS. MALE

It is interesting to note that the percentage of male sex offenders is nearly 3 times that of female sex offenders while at the same time the percentage of female drug offenders is twice that of male drug offenders (Figure 5).

COST OF INCARCERATING

The cost for housing inmates in FY 1989 was $34.01 per day, or $12,410 per year (Figure 6). The state currently pays the privately run Marion Adjustment Center $26.11 a day for keeping minimum security felons. The state's average cost in FY 89 was $24.21 for minimum security institutions. The average cost for inmates in community centers ranges from $16.00 to $24.59 per diem. The state currently pays $16.00 per day for state inmates backed up in county jails. In FY1988, the average cost to supervise a person on probation or parole was $2.79 per day, or $1,018 per year.

RECIDIVISM

A 3 year study done by the Corrections Cabinet of those inmates released in 1982 shows an overall recidivism rate of 36.16% with 18.5% of those being new crimes and 17.6% as technical violations. The recidivism rate for violent offenders differs little from the population as a whole (Figure 7).

Of the 1,036 returned for violations in the three year period, almost 50% were for technical violations and 33% for property crime violations. Almost 1/3 of those released in 1982 were violent offenders. Of the 144 who returned, 65 % of them were for technical violations.

PFO'S RISE DRAMATICALLY

Since the current Persistent Felony Offender (PFO) statutes were passed, the number of inmates serving as PFOs has grown dramatically (Figures 8 and 9). In September 1981 there were a total of 561 PFOs in Ky. prisons. In September 1989 that number was 1,965, an increase of 250 %. This amounts to approximately 32% of the population of our institutions. Approximately 44% of those PFOs are from Jefferson Co. and 14 % from Fayette Co.

A 1988 study by Statistical Analysis Center (SAC) at the University of Louisville revealed the average PFO is white, male, 25-34 years old, and serving as a PFO II. The rank ordering of the most serious charge for which the person received a PFO conviction was burglary, robbery, TBUT, other property crimes, other violent crimes, sex offenses, other offenses.

LIFE WITHOUT FOR 25 YEARS

Another recent law which will have a great impact on our long term population is the sentence of Life Without Parole for 25 Years. Since this law was passed in 1986, there have been a total of 33 individuals sentenced under this law. The earliest any of these individuals is eligible to meet the Parole Board is the year 2008. If the Cabinet receives an average of 8 of these inmates annually there will be a total of 176 of these individuals incarcerated before the first one is eligible for parole.

TRUTH-IN-SENTENCING

House Bill 76 passed by the 1986 legislature has also had a long term effect on the population of Kentucky correctional institutions. This law states that certain violent offenders must serve 1/2 of their sentence before being eligible for parole and those sentenced to life for a violent crime must serve 12 years instead of the normal 8 years. Since July 1986 there have been 278 inmates incarcerated under this law. Due to HB 76, the average time an inmate must serve before they are eligible for parole has increased an average of 8.45 years per person.

MENTALLY ILL CONVICTS

The Corrections Cabinet, in cooperation with the Cabinet for Human Resources, operates the Ky. Correctional Psychiatric Center (KCPC). Inmates needing psychological testing or suffering from mental illness often reside there during part of their incarceration.

FIGURE 4

TYPE OF OFFENDER

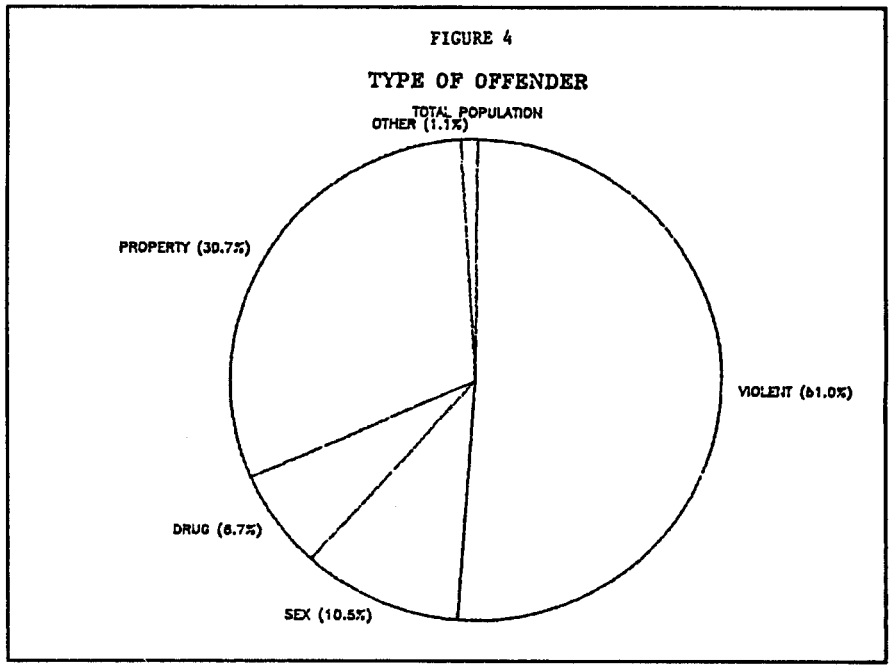


FIGURE 5

TYPE OF OFFENDER

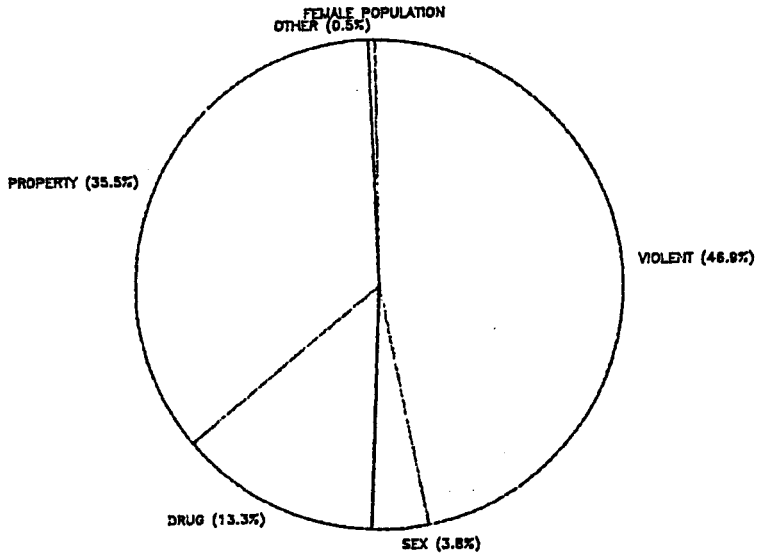


FIGURE 6

COST TO INCARCERATE
PER DIEM

	1985	1986	1987	1988	1989	1990*
Kentucky State Reformatory	32.01	33.14	33.34	36.05	36.05	39.73
Kentucky State Penitentiary	35.92	37.34	39.03	40.39	44.38	45.59
Luther Luckett Correctional Complex	30.59	33.03	34.40	36.14	35.19	35.05
Northpoint Training Center	29.35	30.16	31.99	31.34	29.55	28.43
Kentucky Correctional Institution for Women	37.29	40.24	39.55	42.09	43.37	41.54
Blackburn Correctional Complex	24.07	26.61	27.15	22.08	26.28	27.16
Bell County Forestry Camp	16.39	18.23	21.60	21.49	19.83	22.92
Frankfort Career Development Center	27.01	31.01	40.53	28.31	24.81	27.07
Western Kentucky Farm Center	19.16	21.47	20.96	21.99	23.64	22.29
Roederer Farm Center	15.93	18.67	18.83	25.64	34.64	21.93
Average	30.54	31.46	32.37	33.81	34.01	34.47

*PROJECTED

Figure 7
Kentucky Corrections Cabinet
Persons Released in 1982
3 Year study

Of the 893 violent offenders released in 1982, 144 were returned (31.17% of the total). Their new offenses were:

Violent	20
Sex	2
Drug	1
Property	23
Other	4
Technical	94
Total	144

Recidivism rate for violent offenders = 36.73%, 18.5% new crime; 65.28% Technical Violations.

For the entire 1982 group of 1036 inmates the new offenses were:

Violent	104
Sex	17
Drug	37
Property	341
Other	32
Technical	505
Total	1036

Recidivism Rate for all offenders for 3 year period = 36.16%; 18.5%= new Crime; 48.7% = Technical Violation

There are currently 56 inmates in our institutions who were found guilty but mentally ill. Eight of these inmates are currently at KCPC while the others are in various institutions throughout the state.

CONCLUSION

As one can see, different actions by different agents (courts, legislature, public demand) effect the population, both numerically and type, of those individuals entrusted to the care of the Corrections Cabinet. The Cabinet will continue to fulfill its mission of public safety, just treatment of inmates, and the rehabilitation of those inmates within the fiscal and physical constraints afforded by legislative appropriations.

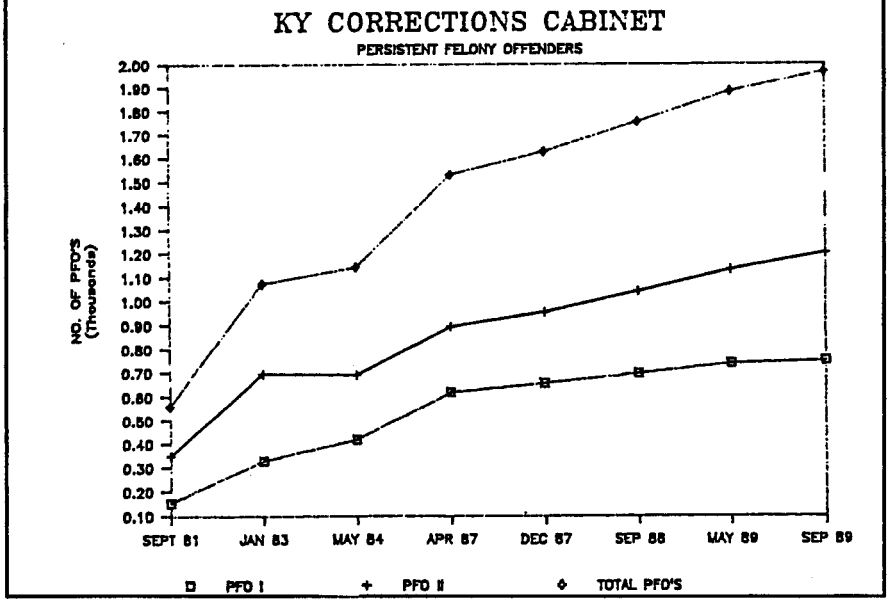
WILLIAM D. CLARK
Corrections Cabinet
State Office Building
Frankfort, KY 40601
(502) 564- 4360

Mr. Clark has a BS in Microcomputers from Ky. State University. He's worked for state government for 15 years and Corrections for 7 years as programmer/analyst or working with computers. His current position is Computer Operations Analyst Senior with Corrections.

FIGURE 8
KY CORRECTIONS CABINET
PFO 1981-1989

	PFO 1	PFO 2	PFO	HC	TOTAL
Sept. 1981	154	353	37	17	561
Jan. 1983	333	698	26	18	1075
May 1984	421	692	21	8	1142
April 1987	620	893	11	6	1530
Dec. 1987	656	953	13	5	1627
Sept. 1988	697	1040	11	4	1752
Sept. 1989	749	1201	9	6	1965

FIGURE 9



TOUR SPARKS IDEAS FOR CAMPBELL COUNTY JAIL

Campbell County officials toured the Jefferson County Jail and learned firsthand that prison overcrowding is a statewide problem. Jefferson County, the state's largest metropolitan area, has a jail that holds 1,300 inmates and is building another structure that will hold 550, said Campbell County Commissioner Dave Otto.

Campbell County is under a district court order to continue incarcerating misdemeanor offenders, but also faces a federal court order to limit the jail population. The county is building a new 130-bed jail, but that facility won't be available until next year. The present Campbell jail holds 45 inmates. Campbell officials toured the Jefferson jail because that county is also under a court order to control overcrowding. Commissioners Rose Berting, Roland Yones and Otto, County Coordinator Ed Pendery and Director of Administration Missy Williams went on the trip to learn how Jefferson County has dealt with its problems.

Otto said Jefferson County officials rely on home incarceration, a program that allows jail officials to electronically monitor a prisoner at home using an arm or leg band. Jefferson County also uses an alternative misdemeanor program that allows inmates to bypass jail but remain in contact with probation officers. He said Otto has pushed the idea of home incarceration before. Jefferson County officials lease their equipment instead of buying it, a move that allows them to keep up with the latest technology, Otto said. Otto also was impressed with a crime commission that advises Jefferson County jail officials. The panel, made up of law enforcement officials and lay people, could be a model for a similar panel in Northern Kentucky, Otto said. Otto wants inmates to become more productive and pay for their keep. He said the fiscal court will fly to Connecticut in the next few weeks to tour a jail factory program there.

KENTUCKY POST, September 1, 1989
By John C. K. Fisher, Kentucky Post staff reporter

PAROLE IS EVAPORATING AS A REALITY IN KENTUCKY

Kentucky's Prison Crisis is Primed to Flourish

A combination of forces is quickly leading Ky. down a path of total elimination of even the *possibility* of parole. The half-truth-in-sentencing craze has handed a lot of Ky. juries the ability to sentence criminal defendants to life without parole. The Parole Board, as evidenced by their recently released statistics and the views of their Chairman as expressed to Ky. judges, is deliberately reducing parole drastically. The Ky. Crime Commission, revived at the Governor's request, is recommending that the law reflect the ever-nearing reality by eliminating parole. In this article, we will look at the Parole Board statistics, the Parole Board Chairperson's views, and the recent Crime Commission action.

I. PAROLE BOARD STATISTICS

The Ky. Parole Board has released statistics for the recently completed fiscal year, July 1, 1988 - June 30, 1989 (FY 89). The Parole Board is requiring inmates who make their initial appearance before the Board and those that have been before the Board previously to spend a lot more time in prison.

What follows is a look at parole statistics for the last year and the last 6 years for the following categories:

1. initial parole hearing
2. all parole hearings
3. security levels
4. deferment lengths

A. INITIAL PAROLE HEARINGS

1) FISCAL YEAR 89

These Parole Board statistics demonstrate that when inmates first are eligible for parole, the Board continues to parole fewer inmates and to order more inmates to serve out their prison sentences.

In FY89, there were 2,561 inmates who came before the Parole Board for the first time. Only 27% received parole, while 27% were required to serve out their sentence.

2) LAST 6 YEARS

Over the last 6 years, the Board has chosen to drastically reduce the number of inmates who are paroled when first eligible for parole, and likewise have chosen to dramatically increase the number of inmates who serve out their sentences.

In FY 84, 2,475 inmates came before the Parole Board for the first time. Of these, 43.6% were paroled while only 10% were required to serve out their sentence.

In the last 6 years, the percentage of inmates paroled when first eligible has declined 16%, and over the same time period those inmates being required to serve out their sentences rose 17%. Table 1 indicates the breakdown of these statistics over the last 6 years.

B. ALL PAROLE HEARINGS

1) FISCAL YEAR 89

The results of all parole hearings (regular, deferred, and others, excluding parole violation hearings and early parole hearings) indicates that of the 4,214 inmates considered for parole, parole was recommended for 43%. However, 20% received serve outs.

2) LAST 6 YEARS

Looking at all parole hearings over the last 6 years, the Parole Board has dramatically reduced the number of inmates who receive parole, and have nearly tripled the number who serve out their sentence.

In FY 84, 55% of the 3,845 inmates who had parole hearings were granted parole, and 7.6% received a serve out.

TABLE 1
ALL INSTITUTIONS - COMBINED STATISTICS
(Excluding Parole Violation Hearings and Early Parole Hearings)
1983-1989

I.Results of Initial Hearings Only

YEAR	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
1983-1984	2,475	1,079	1,148	248
%		43.6%	46.4%	10%
1984-1985	2,157	953	955	249
%		44.2%	44.3%	11.5%
1985-1986	2,108	805	954	349
%		38.2	45.3%	16.5%
1986-1987	2,211	684	1,060	467
%		30.9%	47.9%	21.1%
1987-1988	2,479	785	1,143	551
%		32%	46%	22%
1988-1989	2,561	689	1,172	700
%		27%	46%	27%

In the last 6 years, the percentage of inmates paroled declined 12% from 55% to 43%. During the same time, the percentage of inmates receiving a serve out jumped nearly 13% from 7.6% to 20%.Table 2 details these 6 years of actions by the Parole Board.

C. PAROLE BY SECURITY LEVEL - INITIAL HEARING

Table 3 details the paroling, deferring, and the serve out statistics on initial hearings by security levels- minimum, medium, maximum and controlled intake. Incredibly, 64% of minimum security inmates are deferred or receive serve outs. Only 36% receive parole when first eligible. A bare 9% of the maximum security inmates receive parole the first time up with 91% being deferred or receiving a serve out. Indeed, parole is evaporating as a reality in this state.

D. PAROLE BY SECURITY LEVEL - ALL HEARINGS

Table 4 sets out the Parole Board's statistics by security level for the combination of initial and deferred hearings. Astonishingly, a full 45% of the minimum security inmates who go before the Board get a deferment or a serve out.

E. DEFERMENT LENGTHS BY SECURITY LEVEL

Table 5 reveals the average length of a deferment that the Parole Board chooses to give inmates. The figures are categorized by security level and for initial hearings and all hearings. A minimum security inmate going before the Board for the first time who receives a deferment has to spend an average 17 more months in prison before he has another chance at parole. It is clear that the term minimum security has become a gross misnomer or perhaps a fraudulent representation of how these inmates are really viewed.

The Parole Board has effectively extended initial parole eligibility for maximum security inmates by 3 years. 80% of the maximum security inmates going before the Board for the first time receive a deferment that averages 34 months, nearly 3 years.

F.CONSEQUENCES OF NO PAROLE

As criminal defense attorneys advising clients, we best take heed of these endlessly incredible statistics when advising clients what is in store for them parole wise if sentenced. We also must communicate to them the clear, inexorable trend. Regressive parole news springs eternal in Kentucky. It won't be without adverse consequences.

TABLE 2
II.Results of All Hearings
(Regular, Deferred and Others, Excluding Parole Violation Hearings and Early Parole Hearings)

YEAR	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
1983-1984	3,845	2,113	1,439	293
%		55%	37.4%	7.6%
1984-1985	3,724	2,156	1,261	308
%		57.9%	33.9%	8.2%
1985-1986	3,573	1,933	1,209	431
%		54.1%	33.8%	12.1%
1986-1987	3,517	1,599	1,361	557
%		45.5%	38.7%	15.8%
1987-1988	3,811	1,709	1,455	647
%		45%	38%	17%
1988-1989	4,214	1,827	1,547	840
%		43%	37%	20%

II. PAROLE CHAIRMAN WRITES JUDGES

In October, 1989, the Chairman of Kentucky's Parole Board, DR. JOHN C. RUNDA, Ph.D., communicated with Kentucky judges about parole matters. Part of his letter to them follows:

Enclosed please find a copy of the Parole Board's regulation for "Determining Parole Eligibility" and a copy of the Board's summary statistics which cover the previous six years.

I would like to highlight some of the significant changes found in the new regulation. The Parole Board has increased its maximum deferment (the time between the denial of parole and the next scheduled parole hearing) to twelve years. This coincides with the minimum parole eligibility for someone sentenced to Life, if the crime was committed after July 15, 1986. The Board may now order an inmate to serve the remainder of any sentence, regardless of length, including a Life sentence. This decision can be made at the initial parole hearing.

The Parole Board has significantly reduced the possibilities for an early parole. Currently, there are only four conditions under which an individual may be seen early. These include:
1.Eligibility for the Intensive Supervision Program;
2.Medical factors documented by a Corrections Cabinet physician;
3.Written request of the sentencing judge;
4.Written request of the prosecuting attorney.

Let me explain this further. If the Parole Board receives a written request from the sentencing judge, the file of the inmates is circulated to each board member who votes whether or not to schedule an early hearing. If the majority of the Board votes negatively, the process is ended and the inmate is seen at his regularly scheduled date. The sentencing judge is so notified. If the Board votes affirmatively, a hearing date is scheduled and the early parole hearing is conducted. The full range of outcomes are available to the Board at that time. The judge is also notified of the results of the hearing.

There is one other area of communication with the Parole Board which I would urge you to consider seriously. At the time the pre-sentence investigation report (PSI) is written, the Parole Board would appreciate any comments you may have concerning the possible parole of the individual in question. If you choose not to make any comment, we certainly respect that choice. We do, however, consider the comments seriously, when they are made, even though the Board may not always act consistently with them.

Finally, I refer you to the sheet of statistics. Even though these are of a very general nature, I do believe they show a consistent

TABLE 3

Results of Initial Hearings Only by Security Level, 1988-1989

I. Minimum Security

INSTITUTION	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
Bell Co.	77	29	34	14
Blackburn	174	54	86	34
CommSer.Cntr.	231	122	98	11
FCDC	70	27	33	10
Marion	146	46	77	23
Roederer	77	16	40	21
W. Ky. Farm	157	47	76	34
TOTALS	932	341	444	147
%		36%	48%	16%

II. Medium Security

INSTITUTION	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
KCIW	100	31	49	20
KSR	348	62	181	105
Luther Luckett	206	26	101	79
Northpoint	168	15	122	31
Roederer	66	16	27	23
TOTALS	888	150	480	258
%		17%	54%	29%

III. Maximum Security

INSTITUTION	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
KSP	124	11	99	14
%		9%	80%	11%

IV. Controlled Intake

INSTITUTION	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
Controlled Intake	617	187	149	281
%		30%	24%	46%

GRAND TOTALS

ALL INSTITUTIONS	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
	2561	689	1172	700
%		27%	46%	27%

trend. It is quite clear that at the initial parole hearing, the number of parolees are dropping consistently and the number of serve-outs are rising consistently. The average length of deferment is increasing. I believe these numbers indicate several things. The first is that the type of inmate the Board is seeing tends to have committed more serious and violent crimes. The inmate tends to be a repeat offender with multiple felony convictions and incarcerations. He is also likely to have violated his probation or parole. It would appear that the courts are diverting from prison all those for whom this can reasonably be done. Consequently, most who are sentenced are in need of extended incarceration. Secondly, the make-up of the Board has changed. In general, the decision-making is more conservative and, I believe, more reflective of current societal values.

III.KENTUCKY CRIME COMMISSION STAFF RECOMMENDS ELIMINATION OF PAROLE

The Kentucky Post ran the following article on October 18, 1989:

PAROLE REPORT UNDER FIRE

WILKINSON COMMITTEE TO REVIEW CRIME STUDY

FRANKFORT - A commission that advises Gov. Wilkinson on criminal justice is reviewing a report that recommends abandoning the state parole system in favor of fixed sentencing. The 18-page report by the Ky. Crime Commission staff already has drawn the fire of Parole Board Chairman John Runda, who says the report "totally misunderstands the function of parole in Kentucky."

Acting Ky. State Police Commissioner Mike Troop, chairman of the commission, called the report preliminary and said none of the recommendations contained in it have been officially adopted. Action likely will be taken at the commission meeting next month, Troop said. Any recommendations will be sent to Wilkinson, who revived the defunct commission in 1988 to advise him on criminal justice policy. Wilkinson has said he'll present the 1990 General Assembly with a tough anti-crime package, but it's not clear whether the recommendations in the commission report might be included. Some of the report's proposals - like sentencing by judges rather than juries - have been rejected by past legislatures. Most of the report deals with the state's sentencing system, which the report says should be designed to control crime and punish offenders with little consideration for rehabilitation.

Mark Bubenzer, the commission's executive director and a former assistant prosecutor in Kenton County Attorney John Elfer's office, is the prime architect of

the report. "We think the public wants to be more aware of what occurs when a person is sentenced," Bubenzer said. "If a person is sentenced to 3 years in prison, why shouldn't they serve 3 years?" Bubenzer cited a recent murder case in Kenton County where the defendant received two life sentences, which pleased the victims' families. "Then they found out the defendant would be eligible for parole in 12 years and everyone became very upset," he said.

Bubenzer's report notes that the average felony sentence in Kentucky is 16 years; the average time in prison is 19 months. "Rehabilitation has been the goal of Kentucky's justice system, but it has failed to prove itself successful," the report said.

To "eliminate this disparity," the report recommends that a sentencing commission establish sentencing guidelines, taking into consideration the type of crime and prior criminal history of the defendant. Once convicted, a person would be required to serve the full sentence. Judges could deviate from the guidelines, but they would be required to state their reasons in the final sentencing reports. Either the defendant or the prosecution could appeal the sentence.

The plan has the added benefit of being able to control state prison population, the report said. The sentencing commission can establish sentences "in accordance with available prison resources." In criticizing the report, Runda said a priority of the criminal justice system should be public safety - a priority provided by the parole board. "To omit this function is unthinkable in my opinion," Runda said. "The parole board provides for public safety through the incapacitation of convicted felons." The parole system permits some convicts to re-enter society under close supervision, Runda said. The report's recommendations would allow everyone released from prison to re-enter society without supervision, regardless of whether or not they are prepared to do so.

Troop, who also serves as Wilkinson's justice secretary, hasn't decided whether to support the report's recommendations. "The general direction has been to do a survey of the nation and see what works in other states," Troop said. "We're not re-inventing the wheel, but we want to determine what will work and what won't work in Kentucky. We're going to continue to look at the system we've got."

CONCLUSION

The above reveals an increasingly dark reality:

- 1/4 of all inmates receive a serve out at their 1st parole hearing;

- only 1/4 of all inmates are paroled when first eligible;

TABLE 4

Results of Initial and Deferred Hearings by Security Level, 1988-1989

I. Minimum Security

INSTITUTION	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
Bell Co.	137	72	45	20
Blackburn	285	140	100	45
Community S.	410	283	108	19
FCDC	102	55	36	11
Marion	256	135	90	31
Roederer	126	53	49	24
Western Ky.	237	115	83	39
TOTALS	1553	853	511	189
%		55%	33%	12%

II. Medium Security

INSTITUTION	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
KCIW	180	88	64	28
KSR	656	228	293	135
Luther Luckett	343	103	137	103
Northpoint	407	161	192	54
Roederer	89	31	33	25
TOTALS	1675	611	719	345
%		36%	43%	21%

III. Maximum Security

INSTITUTION	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
KSP	305	113	164	28
%		37%	54%	9%

IV. Controlled Intake

INSTITUTION	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
Controlled Intake	681	250	153	278
%		37%	22%	41%

GRAND TOTALS

ALL INSTITUTIONS	TOTAL INTERVIEWS	PAROLE RECOMMENDED	DEFERRED	SERVE-OUT TIME
	4214	1827	1547	840
%		43%	37%	20%

TABLE 5

Average Deferments by Security Level

I.Minimum Security

INSTITUTION	INITIAL HEARINGS	ALL HEARINGS
Bell Co. Forestry Camp	20 months	17 months
Blackburn	17 months	16 months
Community Service Centers	14 months	14 months
FCDC	14 months	13 months
Marion Adjustment Center	16 months	15 months
Roederer Farm Center	19 months	17 months
Western Ky. Farm Center	20 months	18 months
Average All Minimum Security Combined	17 months	16 months

II.Medium Security

INSTITUTION	INITIAL HEARINGS	ALL HEARINGS
Bell Co. Forestry Camp	12 months	11 months
Ky. State Reformatory	26 months	19 months
Luther Luckett	20 months	20 months
Northpoint Training Center	28 months	21 months
Roederer Farm Center	14 months	12 months
Average All Medium Security Combined	23 months	19 months

III.Maximum Security

INSTITUTION	INITIAL HEARINGS	ALL HEARINGS
Ky. State Penitentiary	34 months	26 months
Average All Maximum Security	34 months	26 months

IV.Controlled Intake

INSTITUTION	INITIAL HEARINGS	ALL HEARINGS
	12 months	12 months

- only 1/3 of minimum security inmates are paroled when 1st eligible;

- 91% of maximum security inmates are deferred or receive a serve out at their initial parole hearing;

- a minimum security inmate who receives a deferment at his 1st parole hearing is given on average a 17 month set back;

- 80% of the maximum security inmates receive a 3 year set back when 1st appearing before the Board; and,

- serve outs have tripled in last 6 years.

With these trends, Kentucky's prison crisis is primed to flourish into the 1990's without pause. It is additionally fueled by the Legislature's enacting long prison terms and the newly concocted half-truth-in-sentencing scheme. Effectively, parole is being eliminated in Kentucky as a reality.

Eventually, the lack of parole and the increasing likelihood of a serve out will have consequences beyond just unmanageable explosion of inmates to house. It will no doubt mean that more persons deciding whether to plead guilty or go to trial will take the latter course. Kentucky's criminal justice system is encouraging another prolonged crisis that will cause results opposite those the public really desires.

ED MONAHAN

PRISON POPULATION SETS RECORD

The nation's prison population increased by 46,004 inmates in the first 6 months of this year to a total of 673,565 inmates according to a Bureau of Justice Statistics Study. This rise not only broke the record for 1/2 year increases, but was higher than any increase in 64 years.

Atty. Gen. Dick Thornburgh said the increase was "an indication that more criminals, many of drug offenders are being caught and punished."

The previous largest annual increase was in 1981-82, when the prison population grew by 41,000 inmates.

MORE PRISONS COMING

Governor Vows To Build Them

WEST LIBERTY - Gov. Wallace Wilkinson helped break ground on the second phase of the $73 million Eastern Kentucky Correctional Complex by proclaiming the state needs to build more prisons.

While lamenting the fact that Kentuckians are "sentenced to spending their tax dollars" to house lawbreakers, the governor nonetheless said more prisons are critical to the state's security and justice needs.

"If we are going to be effective in keeping our homes and communities safe for our families, we must make sure that punishment for criminals is swift and meaningful," the governor said. "There's no teeth in that without a way to effectively deal with an ever-growing prison population."

Wilkinson told those gathered on a breezy Morgan County hill- the site of what will eventually become a 1,100-prisoner facility- that he plans to introduce a criminal justice package to the 1990 General Assembly that will provide for additional prison space.

The proposal, which also is expected to include additional efforts to fight trafficking in illicit drugs, could result in the construction of as many as 1,500 beds - and that won't be the end of it.

Additional bed space likely will have to be provided for several years. Corrections Secretary John Wigginton said the state faces the need to build additional prison space for 600 inmates "year after year" to meet the demand.

"Kentucky is not unique," Wilkinson said. "Other states are facing ever-increasing burdens on their prison system.

"So be it," he said. "If it takes more beds to get criminals off the streets, more beds we'll have."

Wilkinson said he doesn't want to leave future administrations with the crisis he inherited when he became governor in December 1987. The state was under federal court order limiting the number of prisoners at its two primary facilities - LaGrange State Reformatory and Eddyville State Penitentiary.

The situation was further exacerbated when several counties- including Kenton County- challenged the state's practice of keeping prisoners in local jails until prison space became available.

The problem continues. Kentucky expects to have 8,200 convicted felons facing some form of punishment by July 1, 1990. Even with the 550 beds provided by the first phase of the Eastern Kentucky Correctional Complex construction, the state will have space for 5,100 of them.

The second phase, which will result in another 550 medium-security beds, won't be completed until June 1991.

Kentucky lawmakers have to share at least a portion of the blame, Wilkinson said. The legislature rejected his proposal to add 350 medium-security beds at an existing facility during the 1988 session.

That project was referred to as "the mystery prison" by legislators because the Corrections Cabinet refused to tell them where it was to be located. It eventually was determined that the old Dr. School's site in Falmouth was under active consideration.

Even if lawmakers objected to the site, Wilkinson insisted, they should have approved the funding for new beds to remove some of the pressure off the system.

Wigginton said about 1,200 state prisoners are in county jails. That means when the first phase and its 550 beds opens in December, the state still will have to find space for about 700 prisoners.

During the first six months of 1989, Wigginton said, the number of prisoners committed to prison increased 41%. For the most part, Wigginton said, judges are dealing with public demand to get tough on crime by doling out more and longer prison sentences.

"The whole thing has accelerated," Wigginton said.

"We will build them," the governor vowed. "We will build them where the people want them and where they will have some economic impact."

The governor said he will consider alternative forms of punishment as well. He is intrigued by a New York experiment that places drug offenders in a "boot camp" environment- putting inmates through a rigorous physical training schedule that would lead to a reduction in their time behind walls.

Kentucky isn't the only southern state facing a crisis. According to a report from the Southern Legislative Conference, inmate population increased by 76.8 percent during a period form 1977 to 1988.

In 1977, the report said, the adult inmate population in the South was 118,824. In 1988, it was 210,068.

State budgets have increased accordingly - up 323.36 percent over a 10-year period beginning July 1, 1978. Most of that has gone into what was termed "massive prison construction."

The first phase of the Eastern Kentucky complex was to open early this year. It now appears that the first inmates won't arrive until December.

Wilkinson criticized the contractor on Tuesday for delays in the project. He said the state should institute strict levies against builders who fail to meet deadlines.

Once it opens, the facility will provide a boom to economically disadvantaged Morgan County. It will provide 335 new jobs and an annual operating budget of $10.2 million.

"The primary thing it means is an increase in employment opportunities," Morgan County Judge-Executive Sid Stewart said. "They're good jobs -jobs that last."

Like many Eastern Kentucky counties Morgan County's largest employer is the school system. The prison once it is fully operational, will be second.

BILL STRAUB *Kentucky Post* Frankfort Bureau August 30, 1989

PUBLIC ADVOCACY ALTERNATIVE SENTENCING PROJECT*

Part of the Solution to Jail and Prison Overcrowding

Dave Norat

The Interim Legislative Subcommittee on Corrections Operations endorses the Public Advocacy Alternative Sentencing Project (PAASP).

In endorsing the PAASP, the subcommittee in a report of their findings stated that:

"The Project has demonstrated that in appropriate cases closely supervised alternatives to incarceration can provide better results at lower costs. Statutory amendments which make the availability of this program more widely known and which encourages judges to consider alternative sentencing in appropriate cases should be adopted."

In a presentation to the subcommittee by Paul F. Isaacs, Public Advocate and Marc Mauer, Assistant Director, The Sentencing Project** committee members heard that defense based sentencing similar to Ky.'s PAASP dates back over 20 years, but growth in the field has been most significant in the past decade. Ten years ago, there were fewer than 20 defense-based programs around the country. Today, there are more than 115. Collectively, these programs worked with over 16,000 felony defendants during the past year. Their value to the court system has been documented in several ways:

Case Acceptance — Informal surveys show that sentencing proposals developed by the programs are accepted by sentencing judges in more than two-thirds of the cases presented.

Diversion from Incarceration — Studies in several states, including N.C., OH, NM and WI, have demonstrated that these programs have successfully diverted felony offenders who would otherwise have received a prison term.

Cost Savings — The value of prison space freed up by defense-based sentencing programs on an annual basis has been calculated at $1.4 million in NM, $800,000 in OH and $600,000 in WI.

Based on national experience Marc Mauer recommended that an alternative worker (APW) handle no more than 60 "intensive" felony cases per year. These should be cases in which the defendant is very likely to receive a prison term unless a viable alternative punishment proposal is developed.

Data presented to the subcommittee on Ky.'s experience indicates that 64% of the defendants referred to the PAASP had alternative punishment plans presented to the courts. Of the plans presented to the courts, 42% were accepted by the courts. This means that an alternative sentencing worker carrying 60 cases annually will present 38 (64%) alternative punishment plans to the courts with 16 of the plans presented accepted by the courts.

DPA in its 1990-92 biennial budget request has requested 7 APWs and appropriate staff for FY91. Three of the 7 workers now operate under grant funding. In FY92 the Department requests 3 additional APWs for a total of 10.

Using the nationally recommended caseload of 60 cases per worker and the Ky. experience of a 64% plan presentation rate and a 42% plan acceptance rate, the PAASP in FY91 can expect 420 cases (60 cases x 7 APW's) to be referred of which 269 cases (64%) will have alternative

Department of Public Advocacy
Public Advocacy Alternative Sentencing Project (PAASP)
Selected Cumulative Statistics Concerning Closed Cases

Cases Referred to PAASP*	168
Punishment Plans Presented in Court	105
Punishment Plans Accepted in Whole or in Part	47
Jail and Prison Beds Made Available to Corrections	47

DEFENDANT RESTITUTION

	Total in Plans Presented to Courts	Total in Plans Granted by Courts
Dollars to Victim	$50,539.20	$28,165.13
Service Fees	$4,451.98	$ 3,834.48
Court Costs	$3,009.76	$ 2,084.76
Fines	$3,388.50	$2,423.00
Miscellaneous Dollars	$1,680.00	$1,170.00
Miscellaneous Hours	100	-0-
Community Service Hours	1,295	895

RESOURCES TO BE UTILIZED BY THE DEFENDANT **

Substance Abuse- In-Patient	26	15
Substance Abuse- Out-Patient	42	27
Mental Health/Retardation	34	13
Vocational Rehabilitation	10	5
Adult Learning Centers	50	22
Vocational Schools	15	7
Family Counseling	16	3
Sexual Abuse Counseling	5	1
Other	50	17

* Some cases involve the same client due to charges in different jurisdictions or ASP modifications.

** A defendant can utilize more than one resource.

punishment plans presented to the court with 113 cases (269 cases x 42%) receiving a punishment other than incarceration. In FY92, 600 (60 cases x 10 APW's) can be referred to the PAASP with 384 punishment plans (64%) presented to the court and 161 punishments (384 punishment plans x 42%) levied other than incarceration. For the biennium 274 punishments other than incarceration can be potentially levied by the courts.

PAASP's results become significant in terms of jail and prison overcrowding when you look at the fact that Ky. annually averages more than 1,100 convicted felons in county jails awaiting space in the state's prison system through a program called Controlled Intake.

Controlled Intake costs Corrections $16.00 per day per inmate or $5,840 annually. For each convicted felon sentenced to an alternative punishment plan, the Commonwealth saves $4,967.65 in controlled intake costs. ($5,840 annual jail costs less $872.35 annual probation costs, prison costs would be greater). The cost for an APW unit which covers the APW support staff and operating expenses is $57,945.55. With each APW unit placing 16 defendants in a punishment other than prison, the Commonwealth realizes a savings of $21,536.85 ($4,967.- 16 x 16 defendants = $79,472 less $57,945.55 APW unit expenses) per APW unit. Additionally, Corrections has gained 16 jail or prison beds. Over the course of the 1990-92 biennium with only 10 APW's the Commonwealth gains 274 jail or prison beds. The need for new prison construction decreases as the PAASP expands statewide; thus, additional savings.

The above figures assume a 42% acceptance rate of alternative punishment plans. In states where similar programs exist, the acceptance rate has reached 60%.

Punishments other than incarceration through alternative sentencing plans are a more appropriate use of the state's finite resources in terms of dollars and prison beds. Especially when 37% of the Commonwealth's institutional population are property or drug offenders who may be more appropriate for community sanctions which punish and rehabilitate more effectively than incarceration.

In closing Mark Mauer commented on the uniqueness of Ky.'s Alternative Sentencing Program, which utilizes a structured Public Advocacy system and places a special emphasis on the identification and development of alternative punishments for the developmentally disabled felony offenders by saying that:

If the Public Advocate's program continues to develop successfully, you have the opportunity to demonstrate the impact of a creative model of sentencing reform. Ky. is not a wealthy state, nor one rich in resources. It does not have the range of social service resources which may be found in some other jurisdictions. Therefore, for a program such as this to be successful here requires that it take advantage of the resources which you possess, along with creatively developing new sentencing options and coordinating the efforts of all those in the criminal justice system. If this can be done well, then policy-makers around the country will want to observe your programs and your accomplishments.

DAVE NORAT
Director of Defense Services
Frankfort

*PAASP is a joint private and state funded, multi-agency effort involving the DPA, the Developmental Disabilities Council and the Public Welfare Foundation. The initial grantor was the Kentucky Developmental Disabilities Planning Council (DDPC). If you want to know more about alternative sentencing in Kentucky or the Department's efforts to expand the project to your area call Dave Norat at (502) 564-8006.

**The Sentencing Project, Inc., was established in Washington, D.C. in July, 1986, to improve the quality of legal representation at sentencing, to promote greater use of alternatives to incarceration, and to increase the public's understanding of the sentencing process.

THE SENTENCING PROJECT MOVED

Their new address is:

The Sentencing Project
918 F Street NW
Suite 501
Washington, D.C. 20004
(202)628-0871
FAX (202) 628-1091

The nonviolent approach does not immediately change the heart of the oppressor. It first does something to the hearts and souls of those committed to it. It gives them new self-respect; it calls up resources of strength and courage that they did not know they had. Finally it reaches the opponent and so stirs his conscience that reconcilation becomes a reality.

- Martin Luther King, Jr.

PLAUDITS FOR PRETRIAL SERVICES PROGRAM

Hundreds of counties around the U.S. have "pretrial service" programs to assist defendants, but the Pima Co., Arizona program is getting special attention from the US Dept. of Justice which selected the program as one of 7 "model" pretrial service depts.- they will receive $25,000 to play host to state and county officials who want to learn how to cut the costs of confining defendants awaiting trial in already overcrowded jails.

The basic mission of such programs is to oil the gears of the criminal justice system, by making recommendations as to whether to recommend a defendant's release based on the nature and circumstances of the offense, the defendant's family ties, employment and financial resources, and record of arrests and convictions.

Linda McKay of the Justice Department describes these programs as a "crucial link between law enforcement efforts and the correctional efforts." Each time the pretrial service dept. gains release for a defendant awaiting trial, Pima Co.'s program saves the $70-a-day cost of keeping a suspect in jail. While most similar programs handle only defendants charged with felonies, the operation here handles those charged with misdemeanors, too, and has the power to release them without a judge's approval.

Of the 6,700 people arrested on felony charges in Pima County last year, half were released within 24 hours. Most of these were released into the custody of the pretrial services department, an arm of the state Superior Court. Others were released on their own recognizance. The rate for the 20,000 defendants charged with misdemeanors was even higher 1/2 of those arrested were released before ever being put into a cell. Of the other half, about 90% were released the next day at a Superior Court hearing. The program has consistently won high marks from local officials as 94% of defendants released under a recommendation showed up in court, compared with 84% released on bond.

The program is not significant only for its efficiency, says Ms. Holloway. The most important goal of the department, she believes, is to "assure that release while awaiting trial is not reserved for the wealthy." Louis Rhodes, executive director of the Arizona branch of the ACLU, has high praise for the Pima County pretrial program."I only wish we could get it into the rest of Arizona and the rest of the country. It does a great job of keeping the jails from getting clogged up, especially with those arrested for misdemeanors, which are relatively less important crimes."

The Christian Science Monitor, September 21, 1989.

ASK CORRECTIONS

Shirley Sharpe

TO: Corrections

Is there a provision wherein a convicted felon in Kentucky who has a detainer for pending charges or untried indictment in another state can go to that jurisdiction for trial at the prisoner's request?

TO: Reader

The Inter-State Compact Agreement on detainers was enacted into law by the Commonwealth of Kentucky with all other jurisdictions legally joining therein, KRS 440.450. Rules and Regulations were designed to implement speedy disposition of indictments, complaints, or information filed against prisoners of one state by officials of another state.

When an inmate desires that his detainer be disposed of by the provision of the Inter-State Agreement on Detainers, (IAD), Form II is completed- Inmates Notice of Place of Imprisonment, and Request for Disposition of Indictments, Information or Complaints. This form is sent to the Prosecutor, and the name of the Prosecutor, and the jurisdictions are listed on the form. The inmate states the name and location of the prison in which he is residing, and lists all charges, indictments, etc. pending against the inmate in that state.

When the prisoner completes the Form II, he is agreeing that this request will operate as a request for final disposition of all untried indictments or complaints on the basis of which detainers have been lodged against him in that state. The prisoner also agrees that this request be deemed as a Waiver of Extradition with respect to any charges or proceedings and a Waiver of Extradition to the state to serve any sentence imposed on the prisoner, after completing any term of imprisonment in this state. The request also operates as a consent of the prisoner to the production of his body in any court where the prisoner's presence may be requested to effectuate the purpose of the IAD and also a further consent to voluntarily return to the institution where the prisoner is confined at the time.

The prisoner also lists on the form whether he has counsel or requests the court to appoint counsel. The prisoner signs the request.

Form III, Certificate of Inmate Status is completed by the Institutional Offender Records Office where the prisoner is incarcerated showing name, number, institution, term of sentence, and lists detainers from the state where the request is being made. This form is signed by the Warden.

Form IV, Offer of Temporary Custody is completed and sent to the Prosecutor and states that an offer of Temporary Custody is made pursuant to the provisions of Article V of the IAD between this state and that state. The form advises that Form III is enclosed, and lists all detainers from that state. The form is signed by the Warden, and the prisoner.

The above documents are sent by certified mail, and the receipt is maintained showing the date the Prosecutor received the document. Article III states that the prisoner" ...shall be brought to trial within 180 days after the prisoner has caused to be delivered to the Prosecuting Officer notice..." that he is imprisoned, place of imprisonment and request for final disposition of the information or complaint provided that for good cause in open court, the prisoner or his counsel being present, the court having jurisdictions of the matter may grant necessary or reasonable continuance. If the trial is not held prior to prisoners return to the institution, the court shall issue an Order dismissing the same with prejudice.

Form VI, Evidence of Agent's Authority to Act for Receiving State must be completed and signed by that state's Inter-State Compact Administrator before prisoner can be released to the other state.

Form VII, is Prosecutor's acceptance of Prisoner offered in Prisoners Request for Dismissal of a Detainer. The prosecutor agrees to accept temporary custody, within the same time frame of Article III of the agreement and agrees to return prisoner after the trial. This form is also signed by the Judge, of that jurisdiction.

If more than one jurisdiction of that state has outstanding detainers, indictments, etc., Form VIII is completed, Prosecutor's Acceptance of Temporary Custody of offender in Connection with another Prosecutor's Request for Dismissal of Detainer.

Form IX is completed after the trial or disposition of charges has been completed. This is completed by the prosecutor, and is forwarded to the institution.

TO: Corrections

If I have a detainer in another state, and I don't request a trial in the other state, can that state request my appearance there, and what can I do about it?

TO: Reader

Yes, the detaining state can request temporary custody of you by sending Form V, Request for Temporary Custody. This form is completed by the Prosecutor of that jurisdiction and signed by the Judge indicating the offense, and advising if they plan to have the trial within the time frame of Article IV of the agreement. (The time frame is that the trial must be held within 120 days after the arrival of the prisoner in that state's court but for good cause shown in open court with the prisoner or his counsel being present. The jurisdiction court may grant reasonable continuance.) If the trial is not held before the prisoner's return to the custody of the sending state then the complaint shall be of no further force or effect, and the court shall enter an Order dismissing the detainer with prejudice.

When Form V is received the inmate is advised he is wanted by another state jurisdiction for trial, per the terms of the IAD. If the prisoner desires to go to the

state there is no problem, he completes Form II, Inmate's Notice of Place of Imprisonment and Request for Disposition of indictments, Information or Complaints, signs his name and advises if he desires the court to appoint counsel, or is he has counsel, and provide the name and address of such counsel.

Form III, Certification of Inmate Status and Form IV, Offer to Deliver Temporary Custody is completed by the Offender Records Office and signed by the Warden, and the prisoner signs Form IV.

The procedure from that point is essentially the same except the time limit is 120 days when the Prosecutor initiates the request, and 180 days when the prisoner initiates it.

If the Prisoner upon being advised that a Prosecutor in another state jurisdiction has requested his presence for trial in another state per the provisions of the IAD states that he does not desire to be released to their custody for trial, a hearing is scheduled in the District Court (County where prisoner is incarcerated). The Judge explains to the prisoner (with a Public Advocate present) what the charges are, his rights and that the Prosecutor has requested his appearance. There is then a 30 day waiting period within which period the Governor of the sending state may disapprove the request for temporary custody, either upon his own motion or motion of the prisoner. If the Governor does not disapprove the request the prisoner goes to the state for the trial or the prisoner may request his procedural protections under the Extradition Act.

Pursuant to *Cuyler v. Adams*, 101 S.Ct. 703 (1981) at p.704, "...a prisoner incarcerated in a jurisdiction that has adopted the Extradiction Act [Kentucky adopted June 16, 1960, KRS 440.150 to 440.420] is entitled to the procedural protections of that Act,...before being transferred to another jurisdictions pursuant to Art. IV of the Detainer Agreement."

If transferred, the prisoner for all purposes other than for which temporary custody is provided for in the agreement, is deemed to remain in the custody of and subject to the sending state. If the prisoner escapes from temporary custody he may be dealt with in the same manner as an escapee from the place of imprisonment in the sending state.

From the time the receiving state receives temporary custody of the prisoner until return to this state, the receiving state is responsible for all costs of transporting, care, keeping and returning the prisoner to this state.

During the temporary custody of the receiving state, the prisoner's time being served on this state's sentence continues to run.

The Interstate Agreement on Detainers shall be liberally construed so as to effectuate its purpose, but "...prisoners transferred pursuant to the provisions of the Agreement are not required to forfeit any pre-existing rights they may have under state or federal law to challenge their transfer to the receiving state." *Culyer v. Adams, supra* at p. 712.

TO: Corrections

How may my client obtain copies of the forms necessary to proceed under the Interstate Agreement on Detainers?

TO: Reader

Your client may secure copies of the IAD forms from either the institutional legal aide office where he is confined or the offender records office of the institution where he is confined.

SHIRLEY SHARPE
Offender Records Administrator
Corrections Cabinet
Frankfort, KY 40601
(502) 564- 2433

All questions in this column should be sent to Dave Norat, Director of Defense Services Division, DPA, 1264 Louisville Road, Frankfort, KY. 40601. Feel free to contact him at (502) 564-8006.

A CODE OF LEGAL ETHICS

Chief Justice Appoints Task Force for the Prosecution / Defense Code

On June 24, 1988, **Chief Justice Robert F. Stephens** wrote **Fred Cowan**, Attorney General, and **Paul Isaacs**, Public Advocate, expressing his recognition of the need for a committee to develop a special code of legal ethics that deals with the prosecution and defense of criminal cases.

Both Fred Cowan and Paul Isaacs accepted the Chief Justice's invitation to co-chair such a committee and each selected 4 other individuals, representing prosecutors and defense attorneys respectively, to serve on the committee to draft such a document and to present it to the Supreme Court for possible adoption.

Since the committee's initial meeting on October 11, 1988, members have reviewed the American Bar Association Standards for the Defense Function and the Prosecution Function and have met in subcommittees to consider ethical obligations arising at various phases of the criminal process.

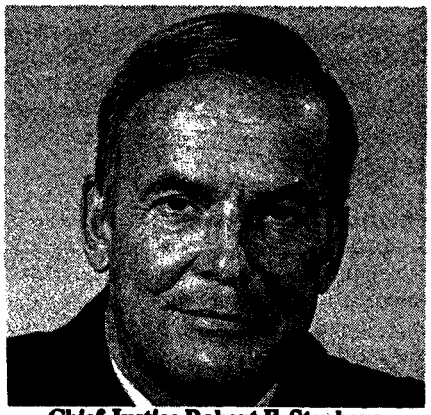
As subcommittee reports and suggestions are developed they are presented and discussed at full task force meetings for possible inclusion in the final committee report.

Upon completion of the task force's work, their draft report will be presented to the members of the bar for comment at the annual meeting of the Kentucky Bar Association.

Comments and questions by the bar relating to the work of the task force are encouraged and may be addressed to the committee members listed below.

TASK FORCE MEMBERS

1. Honorable Robert F. Stephens
ex officio



Chief Justice Robert F. Stephens

Chief Justice Supreme Court of Kentucky
State Capitol
Frankfort, KY 40601
502/564-6753

2. Honorable J. Vincent Aprile, II.
General Counsel
Department of Public Advocacy
1264 Louisville Road
Frankfort, KY 40601
502/564-5224

3. Honorable David A. Barber
Floyd County Attorney
Floyd County Courthouse
Prestonsburg, KY 41653
606/886-6876

4. Honorable Mike Conliffe
Jefferson County Attorney
5. Honorable Richard H. Schulten
Assistant Jefferson County Attorney
621 W. Main Street
Louisville, KY 40202
502/587-7711

6. Honorable Frank E. Haddad, Jr.
Criminal Defense Attorney
Kentucky Home Life Building 5th Floor
Louisville, KY 40202
502/583-4881

7. Honorable Paul Isaacs
Public Advocate
1264 Louisville Road
Frankfort, KY 40601
502/564-5210

8. Honorable Raymond Larson
Fayette Commonwealth Attorney
116 North Upper Street
Lexington, KY 40507
606/252-3571

9. Honorable Robert Lotz
Criminal Defense Attorney
East Third & Court Street
Covington, KY 41011
606/491-2206

10. Honorable William Mizell
Boyd County Public Defender
P.O. Box 171
Catlettsburg, KY 41129
606/739-4161

11. Honorable Carroll M. Redford, Jr.
Commonwealth Attorney
202 E. Washington Street
P.O. Box 357
Glasgow, KY 42141-0357
606/651-8346

12. Honorable Fred Cowan
Attorney General
13. Honorable John Gillig
Assistant Attorney
General Capital Building
Frankfort, KY 40601
502/564-7600

14. Honorable Susan Stokley Clary
ex officio
Supreme Court Administrator
Room 235, Capitol Building
Frankfort, KY 40601
502/564-5444

ETHICS IN KENTUCKY

The ABA Model Code of Professional Responsibility was adopted by the ABA in 1969.

In August, 1983 the ABA replaced its 1969 Model Code with the Model Rules of Professional Conduct. Over 30 states use the new ABA Model Rules or a variation.

Effective January 1, 1990 the Kentucky Supreme Court has withdrawn the Code of Professional Responsibility and adopted the ABA Model Rules with several changes. They are found at SCR 3.130 and are titled *The Kentucky Rules of Professional Conduct.*

KENTUCKY'S VERSION OF THE ABA RULES

The changes in the ABA Rules made by Kentucky which relate to the practice of criminal law briefly are:

1) Conflicts of interest- Rule 1.8 (f)

The ABA Model Rules prevent a lawyer from accepting fees from non clients. The new Kentucky Rules permit a lawyer to accept compensation for representation of a client from a third party if certain protections are adhered to.

2) Safekeeping Property- Rule 1.15 (d)

Kentucky adds the following " A lawyer may deposit funds in an account for the limited purpose of minimizing bank charges. A lawyer may also participate in an IOLTA program authorized by law or court rule."

3) Conduct Toward Tribunal- Rule 3.3

The Model Rule's language prohibits the assistance of the client in a criminal or fraudulent act. Kentucky's Rule prevents " a fraud being perpetrated upon the tribunal." Kentucky also omits the Model Rule's requirement to disclose to the tribunal any directly adverse authority in the controlling jurisdiction.

4) Fairness to the Other Side: Rule 3.4

Kentucky dropped the Model Rule's provision that permits an attorney to ask a client's employees and relatives to not give information to another party. Instead, Kentucky prohibits in 3.4 (f) presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a case.

5) Special Responsibilities of a Prosecutor- Rule 3.8

Curiously, Kentucky omits 2 ABA provisions: a) the rule that prohibits prosecutors from seeking a waiver of pretrial rights (*e.g.* right to a preliminary hearing); and b) the rule that prosecutors must use reasonable care to prevent their assistants from making extra judicial statements that the prosecutor could not make.

6) *Pro Bono Publico*- Rules 6.1 & 6.2

The ABA Rule says that a lawyer *should* render *pro bono* service. Kentucky says only that a lawyer is *encouraged* to do so. ABA Rules say that a lawyer *shall not seek to avoid appointment* except for good cause. Kentucky's version only says a lawyer *should not* seek to avoid appointment.

7) Specialization- Rule 7.4

Kentucky, contrary to the ABA Rules, prohibits any implication by an attorney that he or she is a specialist in an area of legal service except for patent and admiralty law.

8) Misconduct- Rule 8.3

Kentucky omits the ABA demand that a lawyer report misconduct of another attorney or of a judge.

The Kentucky definition of misconduct deletes conduct that is prejudicial to the administration of justice.

KENTUCKY'S RULES ON CONFIDENTIALITY

9) Confidentiality- Rule 1.6

The Kentucky Rule adds to the ABA's Model Rules another exception that permits an attorney discretion to reveal information necessary *to comply with other law or a court order.* Kentucky's Rule reads:

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client; or (3) to comply with other law or a court order.

ED MONAHAN
Assistant Public Advocate
Director of Training
Frankfort

THE NEW ATTORNEY/CLIENT PRIVILEGE

An Interpretation of the New ABA Rule on Confidentiality

The new American Bar Association Model Rules of Professional Conduct significantly enlarged and changed the attorney/client privilege, yet it is a change that appears to have gone essentially unnoticed except by a few publications of but limited circulation. Many of the states have adopted the language in the Model Rule 1.6, but you should review the specific language contained in your state's version of Rule 1.6.

Traditionally, the attorney/client privilege, as set forth in DR 4-101, used the bright line of "confidences" and "secrets." In fact, DR 4-101 was entitled "Confidences and Secrets." The confidences and secrets had to be given in the professional relationship for the privilege to obtain. With some exceptions, information such as the name of the client and the financial arrangement was not included within the privilege.

The Model Rules of Professional Conduct now locate the privilege under Rule 1.6, entitled "Confidentiality of Information." The new rule encompasses far more than confidences and secrets: "A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation...." Rule 1.6(a).

The model rule has established an attorney/client privilege that goes far beyond confidential information or secrets. *Anything* pertaining to the representation cannot be revealed without the client's permission. (Of course, there are exceptions to Rule 1.6) The broader rule creates an entirely different analytical process. Indeed, you can be in violation of the Rules if you resolve an issue using the old DR "confidences" and "secrets" analysis. For instance, assume you are aware from representing a client on a prior matter that the client had an earlier conviction. Further assume that you are representing the client in a new matter and that the district attorney, unaware of the prior conviction, is attempting to negotiate a very reasonable plea. Under these circumstances, you can not reveal the prior representation and conviction- *even though it is a matter of public record* - because it "relates to the representation." Note, however, that this hypothetical does not include any element of your being directly asked (either by the district attorney's office or the court) whether or not there is a prior conviction. If asked, you would still assert the privilege, regardless of the fact that to do so would tip off everyone to a potential problem.

The issue can also arise in the context of collateral proceedings. Suppose you are consulted by a individual who wants to file a very bizzare *pro se* pleading. You review the pleading, recognize that the matter is meritless, and do not take the case. Presumably the case is dismissed in due course. Years later there is a very bizzare murder involving circumstances similar to items contained in the pleading you had reviewed. Issue: Can you reveal this information to the authorities if you choose to? Under the DRs the answer was "yes"; it was a matter of public record and not a confidence or secret. Under the Model Rules the answer would be "no," since it was something you learned "relating to" representation.

And what is your ethical obligation now to turn over physical evidence of a crime that you find or that is given you or placed in your possession? Interpreting the DRs, many courts have taken the position that the item must be turned over, although the fact of turning it over cannot be used against the defendant. An interesting argument could be made, however, that the physical evidence does not have to be turned over, due to the broader interpretation of the privilege as set forth in Rule 1.6.

In evaluating any situation in a state which has adopted language similar to the Model Rules, you must no longer begin your inquiry using the question of confidentiality. Confidentiality as defined by the Model Code is not the distinguishing feature of whether or not a matter falls within the attorney/client privilege. The privilege is no longer one purely of *communication*; instead, the essential issue is *information* - from whatever source - relating to the representation. This includes matters that are public and matters that might have been known to others but not known to all.

You and your office staff have to be especially sensitive to this broadened privilege. Until further case law develops to define the boundaries of the privilege, one could arguably state that even identity and financial arrangements - matters not traditionally within the privilege - cannot be disclosed absent client consent.

Certainly the war stories we all love to tell are still permissible, but you have to think twice before you regale an audience concerning a prior client. Even the attorney who ultimately decides to write a book or an article concerning a famous trial is well advised to get the consent of the client, to eliminate any issue of whether there is a breach.

Generally we should applaud the broadening of the attorney/client privilege, because it obviously has the purpose of assisting and gaining the client's full cooperation. Yet there is still a concern that the broadness could cause future problems, particularly by a sophisticated client. The bottom line is: if you intend to reveal *anything* about a client or a trial, no matter how "public" you think the information might be, you should *get the consent of the client.*

SAMUEL C. STRETTON
301 S. High Street
P.O. Box 3231
West Chester, PA 19381-3231
(215)696-4243

The New Attorney/Client Privilege appeared in the August, 1989 issue of *The Champion*, the National Association of Criminal Defense Lawyers monthly magazine, and is reprinted by permission of the author and *The Champion.*

DPA'S NEW ATTORNEY TRAINING

NEW ATTORNEYS: (L to R) John Nelson, Monica Townsend, Jean Arena (Morehead office), Leslie Brown, Bill Burt, Scott Hayworth (Fayette Legal Aid), Not shown: Margaret Foley and Sharon Hilborn (Fayette Legal Aid)

DPA completed a 4-week training program for 8 new law school graduates who will be employed in the Lexington, Pikeville, Stanton, Morehead, Richmond, London and Northpoint offices.

Training was done by DPA attorneys, Judge Rosenblum, Steve Durham and Debbie Garrison. Their education focused on district court practice from interviewing to district court appeals.

There was a strong emphasis on the practical aspects of advocacy. The new attorneys were given many opportunities to practice skills and receive feedback from experienced lawyers.

This good learning was only possible because of the selfless efforts of the presenters who taught these attorneys on top of a workload already too large. By training these new attorneys, we continue to meet our duty to serve the needs of indigents. DPA is committed to insuring our new attorneys have the best possible legal knowledge and litigation skills as they begin to advocate on behalf of indigent citizens accused of crimes.

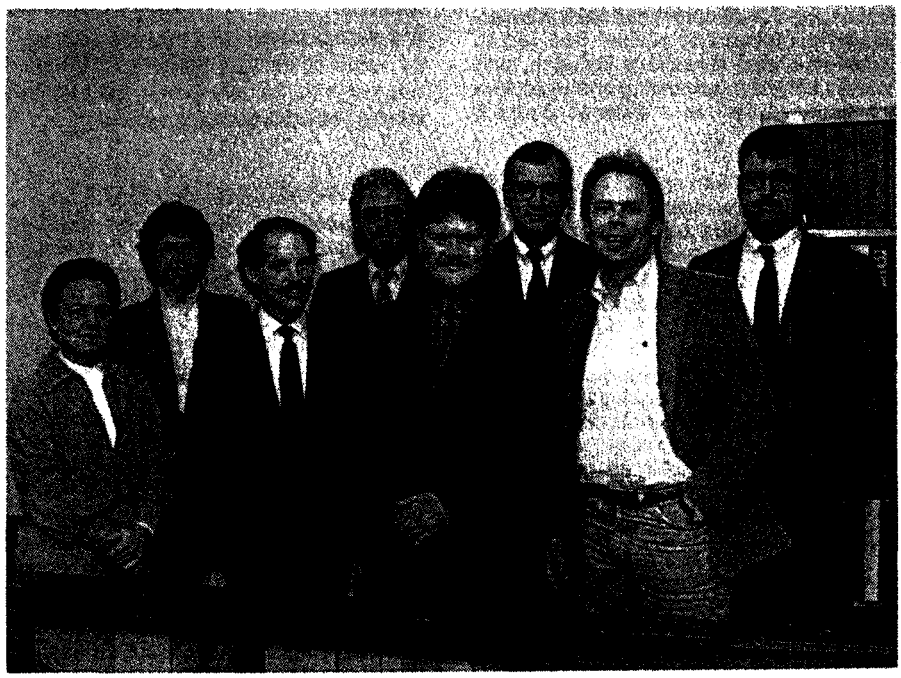
The photos on this page were taken the day the new attorneys did their mock DUI trials and received feedback from attorneys experienced in DUI litigation.

Unfortunately, even with the hiring of these new attorneys, DPA continues to have 15 vacancies in its trial field offices in Paducah (1), Hopkinsville (2), La-Grange Trials (1), London (1), Somerset (2), Hazard (3), Pikeville (2), Stanton (1)and Morehead (2).

Monica Townsend is a May 1989 graduate of the University of Kentucky Law School. Her B.A. received in 1986 is also from UK. She is from Montgomery County. She will join the Richmond trial office.

Leslie Brown is a May 1989 graduate of the University of Kentucky Law School. Her B.A. is also from UK. She is from McCreary County. She will join the London trial office.

John Nelson is a 1989 graduate of the University of Kentucky School of Law. His B.S. is from Penn State. He is from Clark County. He will join the Pikeville office.



FACULTY for the DUI Mock Trial: (L to R) Bette Niemi, Virginia Meagher, Steve Durham, George Sornberger, Henley McIntosh, Mike Williams, Rob Riley, Steve Geurin.

FEDERAL HABEAS CORPUS

What Future for the Great Writ?

TRADE-OFF PROFFERED

A special judicial proposal designed to put death row inmates on a faster track to execution is "abstract, fact-free and bloodless," says leading capital litigators who are girding for the next frontier in the death penalty debate.

Retired Justice Lewis F. Powell Jr., chairman of an *ad hoc* committee of the Judicial Conference of the United States, on Sept. 21 released a report recommending federal legislation to change a system that, he contended, "neither provides sufficient protections for prisoners nor adequately recognizes the public's interest in enforcement of the law."

At the heart of the proposal is the Great Writ, a procedure by which prisoners can attack their convictions and sentences in state and federal courts by claiming constitutional violations. In death penalty cases, the Powell committee said, this multilayered system of review has led to piecemeal and repetitious litigation, and delays between sentencing and execution of sentence that now average about 8 years.

But even as he was announcing dramatic changes that basically would give condemned prisoners one trip through the state and federal review systems, Justice Powell said he would vote against enacting capital punishment laws today if he were a legislator. "My opinion is capital punishment will be abolished in the United States because it is not being enforced," he said. "It brings discredit to our legal system to have statutes not being enforced." "Capital punishment has not deterred murder; we have the highest murder rate in the world. I personally do not think the answer is capital punishment," he added.

> If capital punishment cannot be enforced even where innocence is not an issue, and the fairness of the trial is not seriously questioned, perhaps Congress and the state legislatures should take a serious look at whether the retention of a punishment that is being enforced only haphazardly is in the public interest. Powell, Capital Punishment, 102 Harv. L. Rev. 1035, 1046 (1989)

The proposal offers states a tradeoff. If they provide for the appointment, compensation and reasonable litigation expenses of counsel in state post-conviction pro-ceedings for indigent death row inmates, states can have the advantages of new federal habeas review procedures that :

*Require the filing of federal habeas petitions within a 6-month statute of limitations, triggered by the appointment or refusal of counsel.

*Prohibit as a ground for relief the ineffectiveness or incompetency of counsel during state or federal habeas proceedings.

*Bar subsequent and successive federal habeas petitions as a basis for a stay of execution or a grant of relief absent extraordinary circumstances and a colorable showing or factual innocence.

*Prohibit federal review of new or "unexhausted" claims not presented to the state courts unless such claims fit one of 3 exceptions.

If a state chooses not to provide counsel, its death-sentenced prisoners will continue to proceed under the present federal habeas process, according to Powell.

NO MONETARY ESTIMATES

The Powell committee - composed of federal judges appointed by Chief Justice William H. Rehnquist made no calculations as to the cost to states of participating in the proposed system or the amount of time that would be saved by the new procedures, admitted Justice Powell.

"The key trade-off is a heightened degree of finality. States that have complained about the lack of finality now have an alternative," said Prof. Albert M. Pearson of the University of Georgia School of Law, the committee's reporter.

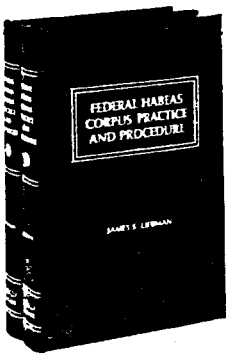
But this "alternative" would sacrifice fairness and justice for efficiency and speed, charged death penalty litigators and civil liberties groups. The 6-month statute of limitations ignores the realities of death penalty litigation and puts a "time-clock on justice," said Leslie Harris, legislative counsel to the ACLU. The counsel provision pays lip service to critical problem by never addressing what constitutes competent counsel, said Scott Wallace of the NACDL.

J. Vincent Aprile II, General Counsel, DPA, and Ronald Tabak, special counsel to New York's Skadden, Arps, Slate, Meagher & Flom, strongly attacked the restrictions on successive habeas petitions, saying they cut off virtually all challenges to the sentencing phase of a capital case and reward police and prosecutorial misconduct. "That is not fair on its face," said Mr. Aprile. "There must be another condition that says if you make a showing of fraud, official misconduct or mistake, you have the right to relitigate a claim related to the fairness of the sentence."

The Judicial Conference delayed formal action on the Powell proposal until March after a number of chief judges said they had not had the opportunity to discuss the recommendations with their courts. If the proposal is transmitted to Congress, a new federal law commits the Senate to expedited consideration of habeas reform, with specific time limits triggered by transmittal of the proposal. A special ABA task force also is studying death habeas review procedures; its report is expected in late October.

MARCIA COYLE Staff Reporter.

> In *Gregg*, among the justifications for capital punishment relied upon by the Court were retribution and deterrence. Although some may argue that retribution is an unworthy motive, as the Court noted in *Gregg*, it is a traditional rationale for punishments commensurate to the crime itself. This is sometimes referred to as the doctrine of proportionality. The second justification was deterrence. According to FBI reports, there were 20,510 murders committed in this country in 1975, the year before *Gregg* was decided. In 1986, the FBI reported a total of 20,613, and in 1987, 20,096. The actual rate of deterrence is intense scholarly debate. Nonetheless, it cannot be said that murder has been effectively deterred." Powell, Capital Punishment, 102 *Harv. L. Rev.* 1035, 1041 (1989).



BOOK REVIEW

Federal Habeas Corpus Practice and Procedure
1988
The Michie Company
$130.00

Kathleen Kallaher

14 JUDGES AT ODDS WITH REHNQUIST

WASHINGTON - Fourteen of the country's most senior federal judges, in a highly unusual move, have written a letter that challenges Chief Justice William H. Rehnquist's authority as a spokesman for the federal judiciary on the death penalty. The letter, sent yesterday to the Senate and House judiciary committees, seeks to assure that dissenting judicial voices are heard when Congress considers new limits on appeals by death row inmates.

The 14 judges are a majority of the 27-member Judicial Conference of the United States, the federal court system's top policy-making group, which met last month to consider a proposal to speed judicial review of death sentences. Rehnquist, the chairman of the conference, sought immediate approval of the proposal. But by a 17-7 vote Sept. 21, the conference rebuffed the chief justice and voted to defer consideration until its next scheduled meeting in March. The judges were "dumbfounded," as one put it off the record, to learn a few days later that Rehnquist, the day after the vote to defer action, formally sent the proposal to the Senate Judiciary Committee.

His action set the clock running on an unusual legislative procedure by which the Senate bound itself, in an amendment to drug legislation in 1988, to consider the recommendations on an accelerated schedule. Late yesterday, as word of the judges' letter began to circulate, Rehnquist issued a statement explaining why he had sent the proposals to the Senate committee. He said the 1988 drug law does not mention the Judicial Conference, referring only to "the date the chief justice of the United States forwards" the report. "If I were the final authority on what the statute meant," the chief justice said, "I would say my obligation to transmit the report was not dependent on approval of the Judicial Conference. "But I also felt this question was properly to be decided ultimately by the Senate and not by me. I therefore viewed my transmittal as giving the Senate the opportunity to decide itself, which it would not have had, if I had simply done nothing." He noted that his letter to the Judiciary Committee reported the Judicial Conference's vote to defer action.

Among the judges who signed the letter was Gilbert S. Merritt, 6th Circuit Court of Appeals in Cincinnati, which covers Kentucky.
Lexington Herald-Leader, October 6, 1989

While it is a cliche to call a treatise "the Bible" on a specific subject, nowhere is that phrase more appropriate than in discussing James Liebman's work, *Federal Habeas Corpus Practice and Procedure*. If you are presently practicing in federal court on habeas corpus cases or anticipate your practice extending to that area in the future, I strongly urge you to purchase these volumes and refer to them often during your work. James Liebman began his research and analysis of the federal habeas corpus process in 1980 after joining the staff of the NAACP Legal Defense and Educational Fund, Inc. Liebman began teaching at Columbia University School of Law in 1986, where he continued his work on federal habeas corpus. The result of this lengthy project is surely the most complete yet practical guide to handling federal habeas corpus petitions ever published.

Probably the most valuable aspect of this book is the sheer number of topics discussed and the organization of the of those subjects. This book is extremely user friendly. There are 8 major subjects covered from timing of the habeas to past judgment proceedings and appeals. Each major part is then broken down into chapters which are in turn broken down into sections and subsections, becoming more and more specific and narrow. This format plus the common sense descriptive phrases used for each particular topic make it very easy for the practitioner to use this book as a reference to pinpoint and research a very narrow issue with a minimum amount of time spent trying to put their hands on a source of information.

The book is also quite useful in giving litigants an explanation of how certain provisions and rules concerning habeas corpus practice came about from a historical perspective. This is helpful not only in tailoring your issues or strategy to fit the underpinnings of the modern view of the Great Writ and of the rules and procedures that Congress and the courts have adopted to administer it, but this historical understanding also gives interested parties a basis for reacting to the shifts or outright overhauls that have been threatened in the last several years by some members of the judiciary and Congress.

Another feature of the book which makes it a godsend for litigants in federal court is its analysis of rules, procedures and case law dealing with habeas corpus petitions and its synthesis of that analysis into suggestions for different strategies either to overcome impediments to the review of issues on their merits or in choosing and litigating issues in the most advantageous manner. Liebman's ability to offer ways to avoid the pitfalls of habeas corpus litigation comes not from a purely academic study of habeas corpus but rather from his own practice in handling complex habeas corpus cases. In fact, Liebman has represented numerous death row inmates in federal post-conviction litigation.

Not surprisingly, an added benefit of this book for attorneys handling capital cases in post-conviction is the specific subsections of many topics devoted specifically to capital cases and clients. Liebman is still interested in capital work and lectured at the NAACP Legal Defense and Eductional Fund's Annual Death Penalty Conference at Airlie House this year. Happily, Liebman plans periodic supplements to his book. This will provide habeas corpus practitioners with the up-to-date assistance that Liebman's brilliant work in this area provides.

KATHLEEN KALLAHER,
Assistant Director,
Kentucky Capital Resource Center
Frankfort

FUTURE SEMINARS

NCDC ADVANCED CROSS-EXAMINATION SEMINAR
Atlanta, Ga.
Spring, 1990

NLADA APPELLATE SEMINAR
April 5-7, 1990
Indianapolis, Indiana

NLADA DEFENDER MANAGEMENT SEMINAR
May 31- June 2, 1990
Philadelphia, PA

DPA 18TH ANNUAL PUBLIC DEFENDER SEMINAR
June 3-5, 1990
Lake Cumberland State Park

DPA TRIAL PRACTICE INSTITUTE
October 28-Nov. 2, 1990
KY Leadership Center

PUBLIC ADVOCACY COMMISSION MEMBER REAPPOINTED

On October 10, 1989 Governor Wilkinson reappointed **Denise M. Keene** Certified Public Accountant, 200 South Broadway, Georgetown, Kentucky 40324 (502) 863-9359 to the Public Advocacy Commission. Ms. Keene was originally appointed in May, 1989 to fill the vacancy left by Helen Cleavinger. A brief interview with her follows:

Will you tell us a bit about who you are and your background?

I am a certified public accountant working as a sole practitioner in Georgetown, Kentucky. I graduated from Ball State University with a B.S. in accounting. I am married to Teddy L. Keene and have two sons, Don and Darrell. I am the President of the Association of Retarded Citizens/Kentucky. I consider myself an active advocate for individuals with disabilities. This interest is especially strong because my younger son, Darrell, is multi-handicapped.

Why are you willing to serve on the Public Advocacy Commission?

I was asked to serve on the Commission as the representative from the Protection and Advocacy Advisory Council. I am willing to serve because of my commitment as an advocate for persons with disabilities.

What do you see as the Department of Public Advocacy's major strengths and weaknesses?

I do not consider myself an authority on the strengths and weaknesses of the Department of Public Advocacy. But, based on my limited information, I think the greatest weakness is the inability to keep all of the staff positions filled. Without adequate staff it is impossible to respond to all the request made on the Department. The greatest strength is the impeccable character and commitment of the staff of the Department.

What do you hope to accomplish as a Public Advocacy Commission member?

My major goal as a commission member is to inform the commission of concerns for people with disabilities and to contribute to the commission in any other way I can.

DEPARTMENT OF PUBLIC ADVOCACY
Perimeter Park West
1264 Louisville Road
Frankfort, KY 40601

BULK RATE
U.S. POSTAGE PAID
FRANKFORT, KY 40601
PERMIT # 1

Address Correction Requested