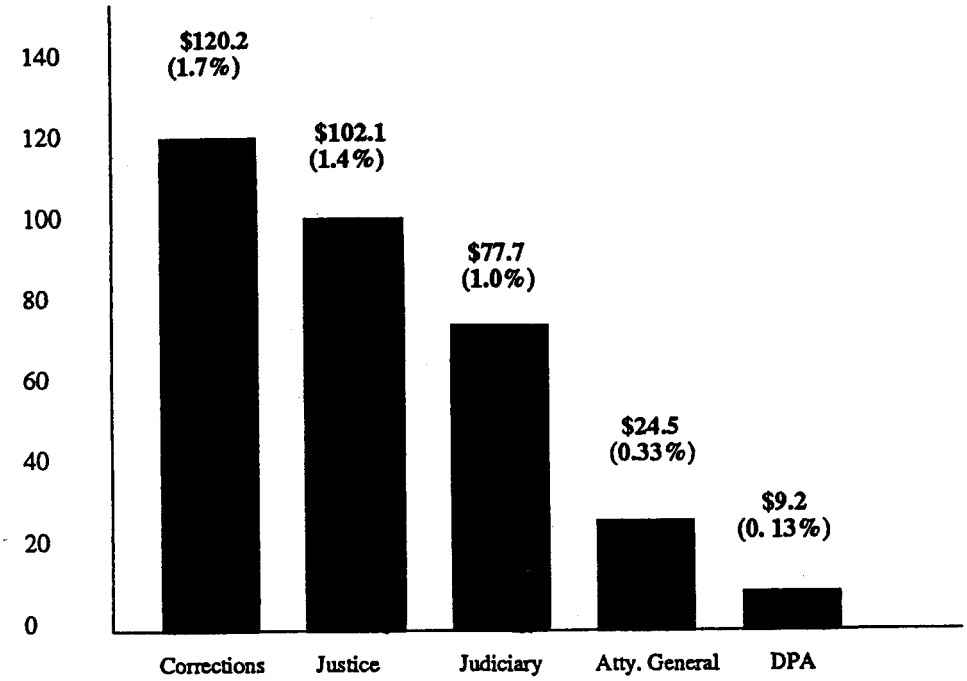
THE ADVOCATE

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

FISCAL YEAR 1989 STATE BUDGET



The numbers at the top of the graph are the dollars allocated to each agency expressed in millions. The percentage in parenthesis at the top of the bar graphs represents the percentage the agency's budget is of the entire state budget. The Justice Cabinet includes the State Police, Training, and Administrative Offices., The Judiciary includes all tiers of the Courts in Kentucky.

INSATIABLE ADDICTION TO INCARCERATION REQUIRES $100 MILLION FIX

IS KENTUCKY'S INCARCERATION PROCESS RACIST?

PROMINENT ATTORNEYS CALL FOR SOLUTION TO PUBLIC DEFENDER FUNDING CRISIS

THE FRANKLIN COUNTY PUBLIC DEFENDER PROGRAM— PITIFULLY FUNDED

Volume 12, Number 2 **February, 1990**

FROM THE EDITOR

This issue is packed with a lot of significant information. However, this is one of our saddest issues. Our desire to incarcerate seems insatiable. Perhaps more of us are addicted to incarcerating the least among us than there are people addicted to drugs.

It is troubling that 32% of those we imprison are black when our state has but 8% who are black. The "justice" system is stacked against people of color. Why is this? Is this a consequence of past racism in the United States so long uncorrected? Is it a product of continued open and subtle racism today in our criminal justice system? We'd better find out and correct the reasons for this racial disparity if we hope to have any moral integrity.

The inadequacy of the state's funding of the public defender system is scandalous. Prominent members of the KBA and KACDL speak to the underfunding. The Franklin County public defender system, existing in our state's capital city, is prime evidence of how bad the public defender crisis is in Kentucky. Some judges in Kenton County are following the law as set out in Chapter 31 by ordering fiscal courts to pay attorney fees in excess of $1,000. Few other judges in our state have been willing to follow the law.

It is a time for leadership in Kentucky, something we see so little of. As Robert James Bidnitto observed, *"Problems loom large when men don't."*

Ed Monahan

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THE ADVOCATE FEATURES

Franklin County Public Defender System: A Full-time Office Would be a Solution

The following oral interview with the Franklin County public defender administrator, Scott Getsinger, was conducted on October 23, 1989 by The Advocate.

What was the Franklin County public defender caseload between July 1, 1988 and July 30, 1989?

We had 554 appointments from the district court and circuit court in Franklin County, 346 appointments from district court and 208 appointments from circuit court.

How many of those 554 Franklin County public defender system cases actually went to trial, whether they be felony or misdemeanor, in that fiscal year?

We did 5 felony trials and 8 misdemeanor trials.

How do you handle your conflict situations here?

We try to get somebody local to handle the conflict case when it comes up, if we can't and we can't give it to somebody who's just willing to take the case on a trade off, then we have to ask the Office of Public Advocacy to find a conflict counsel and they've done that.

And where does the money come from for that?

It comes from our money but the conflict counsel is paid 100% of what he bills for and that comes out of our allotted funds.

In the last fiscal year you received about $30,800 in allotment from the Department of Public Advocacy and about $3700 in recoupment money for about a $35,000 amount of money, is that correct?

I believe that is correct for that time period, yeah.

What hourly rate do you bill at?

Well, this is something that we did to help us out a little bit. If I understand the statute, we're allowed to collect $35.00 an hour for in-court and $25.00 out-of-court from the state funds, we can't exceed that amount. However, the amount of money that the attorneys who have been in our system and that Joe Newburg and I get now is closer to 30% of what we bill out. So since we're not close to recouping the $35/$25 rate from the state funds, we charge $45.00 an hour in-court and $35.00 out-of-court on our vouchers for repayment purposes. We're trying to increase our repayments and that seemed to me a good way to do that since we're not going to be reaching the maximum of what we're allowed to recover from the state funds.

With 554 appointments last fiscal year, about $35,000 that works out to about $64.00 per case. If you take out the $3,000 administrative expense for bookkeeping and the President, it averages out to about $58.00 per case.

That doesn't surprise me.

Are you prorating the bills that are submitted for each case?

We prorate throughout the year, on a yearly basis and then on a quarterly basis too.

You're paying how much on the billed dollar?

Well, it varies, depending on the funding available, but I think it's been in the neighborhood of 35%.

So you're getting $.35 on the dollar?

Roughly, yeah, that's real rough. And that's what caused all the other attorneys that were in our system to get out of the system. It's just that they weren't receiving enough to make it work.

And how much would you estimate that you have in unpaid bills in the last fiscal year, if you had paid everything 100%?

From July 1, 1988 through June 30, 1989, $61,217.84. But we didn't have the funds to pay any of that.

How do you and the other attorneys that have dropped out feel about prorating at about a third of the amount billed?

Well, it's probably not entirely fair, it's the system that was used up until just recently, and since there's just Joe Newburg and me left, we don't know exactly how we're going to handle this, because there's still going to be some other vouchers coming in from other attorneys who have handled cases, but with just the two of us left, I imagine we will still look at the vouchers and figure up a percentage and pay whatever vouchers come in the same rate.

How long has it been just you yourself and Joe Newberg?

I guess it's been, getting close to a year now.

How many attorneys in Frankfort been in the public defender system at one time or another?

Over the last 4 or 5 years, 6 or 7 has been the highest number we had and we fluctuated from that number on down.

And why is it that so many have dropped out and now it's down to the point where yourself and Joe Newburg are the only two that are willing to do it?

Well, the only thing that they've told us is the money situation, which we realize is bad too. We are still trying to find a way to maintain it, but I don't know how much

Resources for Prosecution and Public Defenders

Counties	Prosecution	Defense	Defense % of Prosecution $
1. Franklin Co.	$142,642	$34,964	25%
2. Kenton, Boone, Gallatin	$402,971	$1153,656	38%
3. Harrison, Pendleton, Robertson, Nicholas	$84,650	$28,460	34%
Total for the 8 Counties	**$487,621**	**$182,116**	**32%**

longer we're going to be able to do that, unless we get some additional funding either through the county or through the state or the city, perhaps. But the other attorneys, as far as I know, have dropped out specifically for the money and have indicated that they would be willing to continue to take cases if they were paid, guaranteed to be paid, even the $35/$25 rate. If they were guaranteed that, they'd still do it.

What is the going rate for criminal defense work in the private sector here in Frankfort?

You know, it, it's just hard to say in criminal defense, it's kind of, either you set a rate or your charge an hourly rate and hourly rates can start out at $60/$75 an hour and go on up or you can just get a set fee for whatever type of criminal case you're handling. It's certainly way in excess of whatever is being paid through the public defender fund.

Why have you all been able to be willing to continue with such an unfair rate of reimbursement?

Well, right now, we're just trying to keep the program afloat and we feel we've got to start exploring some avenues to get additional funding. As to why we've continued to do it, I really don't have a good answer for you, other than we've enjoyed it to an extent but it's getting overwhelming and instead of just dropping it altogether, which we know it going to create hassles for the judges and the state office, both, we just try and find a way to hold it together until something better can be done. It may reach that point in the near future, if nothing else is done, we'll just have to dump the whole program.

Both you and Joe Newberg have private criminal defense practices, other than public defender work, and you also have private civil practice?

Yes, and we hope that our private civil practice would be more than our public defender work, but unfortunately it's the other way around right now.

What percentage would you say of your time are you spending on public defender cases?

Probably 75%.

With a caseload of 554 cases last fiscal year, and two attorneys in the system, that leaves you with about 225 per attorney per year, how are you able to adequately handle those cases in the way that an indigent is entitled to with also the need to have a private practice?

That again is directly part of the problem. Those things kind of compound each other. With the number of attorneys dropping out of the system and with us two being the only ones left, we don't always get over to the jail to see people as quickly as they want to be seen, or as quickly as we'd like to see them. We try to prioritize the cases as far as how serious they are, whether they're in custody and to make sure that their rights are protected. And that's why it's taking so much of our time, because we have spent a lot of time doing that and that's what's taking time away from our civil practice. We do have a system through the clerk's office, and we have a pretty good working relationship with the County Attorney and the Commonwealth Attorney as far as getting these cases on the docket when we need to and things like that. But it is kind of overwhelming and it does create some problems of maybe not seeing your people as quickly as they need to be seen.

What would you say as a result of this is the longest that you've been unable to see a public defender client?

Well it depends on the situation, if they're in jail, it depends on when we get notified of the case. Most of the time our only notification of the case is when we get the vouchers through the clerk's office indicating that we've been appointed. Normally there'll be a trial date set or for whenever their next court appearance will be set. We try to contact them before their court date, if they're in jail, we try to go see them in jail before their court date, if they're not in jail, we write them a letter at home or wait until we hear from them to talk to them before the court date. There are some that we don't see until that day that they're in court and most times it works out pretty well, we're able to resolve to everybody's satisfaction at that point on the misdemeanor cases. But as far as time delay, that in Franklin County, which is one a little nicer than some of the other surrounding counties where the judges are on a circuit, we've got 4 judges here in town that are here 5 days a week. So if there's something you need to get in front of the judge, an emergency situation, they're very good about letting you do that.

Can the both of you really do justice to the 554 cases with the inadequate compensation and the pressure of having your own private practice too?

Well, I would say the best way to answer that would indicate the way that we've looked, in order to properly run the public defender program in Franklin County what I would recommend and advise that there be either a state office here or three attorneys employed full-time. I believe 3 full-time attorneys could probably adequately handle the public defender load in this county.

Do you think that a full-time state office here would be one solution to this problem?

Certainly.

Why is that?

It would give 3 people, at least however many they assign here, but I think three would cover it, you could have three people working full-time. I don't know how the office would cover that as far as funding unless they were able to approve some more staff positions so that there could be an office here, that would of course be a money matter with the state office, but certainly that's one answer, that there would have to be proper funding for that office too.

I understand what you're saying then Scott, if there were funding for three attorneys, that would provide all the 500+ clients in this county with the kind of representation that proper funding would allow them to have...

Well, I think it kind of works out like that, at least from the figures too, when I was just kind of glancing at it, I don't know what the state office is paying their starting attorneys or attorneys on their staff but I have to think it's in the neighborhood of $20,000/$25,000 per person.

Actually the starting salary for Assistant Public Advocate is $16,600.

Okay, well when I started with state government it was $11,400, I think, but, if you have three people who are starting, there you are talking minimum of $48,000/$50,000 for those three salaries alone. Then you have your clerical staff you'd have to pay, so I would say when you're talking about running an office for a year, you're talking about office rental and everything else, you're still over $60,000 probably quite a bit over $60,000, and all they're paying out right now, is, I don't know, roughly $35,000 or something in that neighborhood this year. I don't know exactly what the figures are that we get per year now.

You're getting about $31,000 plus several thousand dollars in recoupment.

Okay, but that would be one way to handle it, of course, then if we could have $60,000/$70,000 for our system, we could handle it by contract too.

So how much would you say then again, that it would take for you to run the system through this part-time/private public defender system with fair reimbursement.

For a fair reimbursement, looking at our figures from 88-89, it looked like roughly $97,000 was needed to pay the attorneys 100% on their vouchers. But, so that would probably be somewhat close, however, we could probably get by with even a little less than that guaranteeing attorneys a certain amount. I think if we guaranteed them a certain amount and it wouldn't necessarily have to be a $45 an hour in-court or a $35 an hour out-of-court rate. If you can even guarantee them $35/$25 or something like that, I think we'd get more people in the program who could probably handle it like that. As far as money, I'm guessing still we're looking at minimum $75,000.

And in effect what you're saying then is the difference between $75,000 or the $90,000 will, and the actual reimbursement of thirty some thousand is basically a *pro bono* work then done by Franklin County lawyers?

Yeah, I guess to some extent that is, there is a lot of attorneys in town that do some *pro bono* work on civil matters. We have a Central Kentucky Legal Aid which, has attorneys in their *pro bono* system that do some *pro bono* divorce cases which we do some of those as well.

But in effect you all are basically underwriting as individuals...

Yeah, yeah, obviously we are. Obviously we are, and we'd like to beef up our repayment system too, to help the money coming in from the state, if we can get more in on repayments then that works too. It's tough to get a handle on, on all the figures and what we do, because we just have enough time to take care of the cases we have.

Does the fiscal court here in Franklin County contribute any money to the public defender system?

They haven't for some time, I think it was 2 or 3 years ago, I picked up a check for about $1,500.

Did you know why the fiscal court is not currently contributing any money to the public defender system?

No, I don't, and I'm sure part of that is my fault for not getting on them earlier regarding this and that's something I've tried to take steps to do here recently by meeting with the County judge and the next step would be going in front of the fiscal court to try to get some additional funding from them.

The Kentucky Court of Appeals in the case of *Boyle County Fiscal Court vs. Shewmaker*, 666 S.W.2d 759 (Ky., 1984) has made clear that fiscal courts are responsible for any shortfall in funding from the state public defender program.

Yeah, I'm familiar with that case.

Is it likely that that legal ruling should be applied to Franklin County to make up the $60,000 shortfall?

Public Defender Money Allocated per Case, Kentucky, Nationally

PUBLIC DEFENDER SYSTEM	AMOUNT
1. Franklin Co.	$58.00
2. Kenton, Boone, Gallatin	$45.25
3. Harrison, Nicholas, Pendleton, Robertson	$78.83

STATES	RANK IN NATION	AMOUNT
New Jersey	1	$540
Alaska	2	$468
Wyoming	3	$431
Montana	4	$413
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KENTUCKY	47	$118
Virginia	48	$116
Mississippi	49	$107
Oklahoma	50	$102
Arkansas	51	$63

Starting Salaries for Office Directors

Commonwealth Attorney	$54,964
DPA Directing Attorney	$27,072

Entry Level Salaries

Assistant Commonwealth Attorney (part-time)	$17,904
DPA Assistant Public Advocate	$16,608

Well, we certainly feel that that case is precedent and would be considered such in Franklin County. Other attorneys who have dropped out of our system have, from what I understand, considered filing suit against the county and we've thought about it ourselves and it may come to that but we're hoping it doesn't and we're hoping we can find other ways to get money in the program but if we can't and it looks like that's our only recourse, we'll probably have to use that as well.

How do your public defender resources compare to Commonwealth Attorney and County Attorney resources?

In Franklin County, we have 2 part-time public defenders. In Franklin County we have a full-time County Attorney with 3 part-time assistants and we've got a full-time Commonwealth Attorney with 2 part-time assistants and of course they have their support staff as well. The County Attorney has 2 or 3 clerical people working there as does the Commonwealth Attorney has at least one. So, you know, we're up against, there's 2 of us up against all that and so it's far below the resources that's available to them.

That's not even counting the investigative....

Oh, yeah, that's just looking at the prosecutors themselves and their offices, right.

Do you have any idea what an Assistant Commonwealth Attorney or Assistant County Attorney would make as compared to what the allotment is here for Franklin County?

No I don't. I'm guessing that the Assistant County Attorneys get paid, I'd give a guess between $15,000-$20,000 range, the Assistant Commonwealth Attorneys, I would assume get paid a little higher than that. So, we're still talking about funding, more funding for that than we do for the public defender program just for assisting alone, not even considering the elected prosecutors.

Looking back over this fiscal year what would you term your biggest success is here in the Franklin County public defender system?

The biggest success? That's a tough one, we haven't had many successes. We do feel that we, that the attorneys that have been in our program have done quality work for the people in this county, we do feel that, only with two of us doing the work now, it's certainly more difficult to be able to say that, we'd like to but it's difficult. But I guess we don't have any really big successes right now because the program is pretty much in an all time low.

Due to the pressures of the longstanding inadequate funding in Franklin County are there alot of the people in district court who are entitled to an attorney but aren't getting one because of the inability to appoint the two of you to all of those cases?

Well no, everybody that is appointed an attorney gets an attorney, if we, if there is a conflict Joe and I will get somebody else, we do have some attorneys here locally that have expressed a desire to handle occasional conflict cases so we can do that, this is mostly people that have been with our system before, we can cover that, and if we can't get a conflict attorney and if their defenses do differ where they do need one, we'll ask the state office to get one, but I don't think people not getting counsel has been a problem. I think we need to tighten up with the judges to make sure that everybody who does have a public defender is truly indigent. There have been too many cases where I end up representing somebody who is employed full-time.

In looking at the upcoming General Assembly are there any areas of substantive or other criminal justice law that you would like to see changed to improve the system?

As a defense attorney, there's always ideas that we have to, that we think would improve our system and make our jobs a little bit easier, but I'm sure you're going to find different opinions from the prosecutors as well. No, right off hand, other than going into a lot of detail with a lot of different cases, I don't think there's anything, that we've had the time to consider changing what we'd like to see right now, is like to see, at least with the General Assembly the funding for the Franklin county system get a little better and to be able to allow us to get more people back in the program to represent the indigent defendants.

If a full-time system would be a solution here, would there be support among the current part-time public defenders and the prosecutors and the judiciary and fiscal court, in your opinion?

Oh yeah, for number one, there's only two of us right now in the part-time system and if a state office came down the road, I don't think we'd have any problem with that, we would like the opportunity to continue to handle it the way we've handled it, if that is a possibility, but if it isn't, yeah, I don't think there'd be any problem with the prosecutors or anybody in town working with attorneys doing public defender work. Won't be any problem at all, we've always had a good working relationsip in dealing with prosecutors here.

Any other thoughts that you have Scott, that you'd like to share with people that read *The Advocate*?

I assume, my only advice to other public defenders would be don't let your system get as bad as ours did before you try to do something about it. That's probably been our fault as much as anything else by not trying to get more money from the county.

Scott Getsinger has been in private practice in Frankfort since 1984, prior to that he was Director of the Worker's Compensation Board in Frankfort. He went to Indiana University and went to the University of Louisville Law School. He's been in the Franklin County public defender program for 5 years and its administrator for 3 years, taking over from Jim Benassi.

Nebraska Court-Appointed Attorneys Awarded $33,000

The Nebraska Supreme Court determined in *State v. Ryan*, 444 N.W.2d 656 (Neb. 1989) that the two court appointed attorneys who represented an indigent defendant charged with 2 counts of murder, were entitled to $33,000 for their representation at $50/hour, not the $8,776 approved by the trial judge.

Expressing irritation with the trial judge's insensitivity to this issue, the Court observed:

In horrifying cases such as this case, it is vital that we, as a State and a nation, maintain our degree of civilization and reliance on our Constitution. We must not sink to the level of nations that execute transgressors the morning after alleged offenses occur. Defense attorneys perform an absolutely essential function under our Constitutions and must be treated as honorable persons performing a necessary legal duty.

Id. at 662.

FULL-TIME PUBLIC DEFENDER OFFICE IN FRANKFORT

Interview with Larry Cleveland, Assistant Commonwealth Attorney

In a December, 1989 interview, Larry Cleveland, an Assistant Commonwealth Attorney in Franklin County, expressed his views on the Franklin County Public Defender System from his current prosecution perspective and the perspective of formerly being a part-time public defender in Frankfort.

When were you involved in the Franklin County Public Defender System?

From 1982 to 1986.

You're now an Assistant Commonwealth Attorney in Frankfort?

Yes, I have been since 1986.

Why did you quit being a part-time Franklin County public defender?

I got out of it primarily because I had two public defender defendants who filed complaints with the Bar Association. And that's why many other Frankfort lawyers get out of the system. The Bar Association makes you answer these whether they're meritless or not and you have to go to a lot of trouble. It takes time and you get scared. It is soon not worth it. I determined it to be not worth it when answering the second such complaint, both of which were dismissed as meritless.

Right now we've only got two guys actively doing public defender work, which is a real bad situation because when you have co-defendants, you've got conflict of interest problems because these two guys are partners. And you know, getting somebody else to take one of these cases is awful, real hard.

Why is that?

Because nobody wants to touch one. Nobody wants to deal with the unfairly low funding. It's kind of an expensive hobby. When I did it, I'd be making $2.00 or $3.00 an hour for the work I did.

Literally?

Yes, not even minimum wage. Another thing about it is you can wind up hurting your relationship with the court when you're defending these people. By this I mean to say to do a proper job of representing a defendant in most of the cases in which I was involved as a public defender, it is necessary to be very aggressive. Many of these defendants being repeat offenders and having some history with the Judge and Court personnel, I often felt I became too closely identified with the defendant, and human nature being as it is, sometimes wondered when I lost a close issue in a civil motion or civil bench trial whether something I said or did in an earlier public defender criminal proceeding may not have had something to do with it. That can really put you on the horns of a dilemma.

What would you think it would take financially to run the Franklin County public defender system correctly, total amount of money?

I don't know. What I would love to see them do is hire a full-time public defender or defenders. I don't care if it is somebody just right out of law school that just wants to learn how to try cases. And have it done by full-time public defenders. That's what I would really like to see.

Why do you think that's the best solution?

You know, because a part-time system just cannot provide the time necessary to represent all the many clients fully.

Any other thoughts?

I hope it doesn't sound that I'm being critical because I do not intend to criticize the people now doing public defender work here, but I would really prefer to have a full-time public defender, I really would. That's the way I see it.

What would you guess you are owed if you had been paid 100% rather than having been prorated during the years you were doing public defender work?

It was a substantial amount of money, thousands of dollars.

The Franklin system is only funded at $58.00 a case.

I don't see how they can stay there then. I mean, I couldn't justify it.

ADVICE TO FRANKLIN COUNTY ATTORNEYS: "GET OUT"

Jim Benassi, a Frankfort attorney, handled public defender cases in the Franklin County system between 1978 and 1985. For some of those years he was its administrator. He said that in the beginning the Franklin public defender program was paying 100% of the billed fees but toward the end of his involvement the program started prorating as low as 40% to 50%.

When asked what caused him to quit the Franklin Public Defender program, Benassi said, "Public defender work took too much of my time for the little money I was getting. It was a matter of economy. I had to get out. That is my advice to other attorneys, get out. You thought you were doing the system a favor by doing P.D. work, but I had the judge, client, and prosecutor, everybody was fussing at me for $15.00 an hour, hardly enough to cover overhead. In effect, I was working for free and had my time taken up from doing fee generating cases. It's a money losing proposition."

Jim estimated that he was owed $30,000 in unpaid fees for the 7 years he was working in the Franklin County system.

INTERVIEW WITH WILLIE PEALE

Frankfort Public Defender System: Too Many Cases to Handle Properly

What were the main reasons why you quit doing public defender work in Franklin County?

The overburdened caseload, to be quite honest about it. There were just too many cases to handle properly especially in light of the meager amount we were being paid.

What was the rate that you were paid at during the years you worked there?

In 1980 we were getting 95 to 100% of what we could receive through the state guidelines.

What were you all billing at? $25 and $35 per hour?

Yeah, $25 and $35. In 1985 it was down to 49%. When I got out of the program, really last year, I figured at one time I got paid $3.50 per hour. I could go to McDonald's and get paid that.

That is incredibly low.

It was very meager for what was being done.

In the seven or so years you worked substantially for the public defender system in Frankfort, how much would you say you didn't get paid that was owed you?

I think in 1987 I had figured that if I had been paid a 100% for the time, the actual time with the way the caseload went, I lost something like $14,000 maybe $15,000 dollars on billables.

That is just for one year?

It seemed like the number of cases just proliferated all of a sudden.

What's the solution to make the Franklin County Public Defender System really a viable system that would provide the very best representation for indigents.

Proper funding is at the bedrock of it. The state has to increase its share. More importantly would be for the county government to contribute a fair share. If I am correct I think they have not contributed anything to the program in recent years. I think we used to get $1500 dollars from the city but we got nothing from the county. The available revenue sources that have the legal responsibility of serving its citizenry should bear the brunt of the financial obligation for proper funding.

What do you think it would take to properly fund the system for a year?

$60,000 to $70,000.

Would a full time office in Frankfort ever be a solution to the problem?

That is a possibility, and I see that as a very real prospect with the way things are continuing to deteriorate at this point. A full-time office in Frankfort would assure that the only concern and focus of the practitioners would be their indigent clients. But, I think the costs for staffing a local public defender office would be substantially higher than what I feel would be adequate funding to properly run the present Franklin County program.

Any other thoughts you want to give me?

There is tremendous need for quality legal representation in the public defender program and I think our Franklin County Bar Association has done well in providing quality legal service over the years. The local Bar Association has accepted as its professional responsibility the legal representation of indigent citizens of the county. It's just unfortunate that the funding sources haven't felt the same sense of commitment, and if they would, I think the program as it has been established in Franklin County and has successfully operated for over 20 years could again provide the same quality service it has in the past.

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LOW PAY AND HIGH CASELOAD PREVENTS PROPER REPRESENTATION IN FRANKLIN COUNTY

The two Franklin County attorneys doing the public defender work receive an average of $58.00 per public defender case. They handle in excess of 500 cases yearly in addition to their private practice. The consequences - it is impossible for them to properly handle all of these cases at this low funding.

A CLIENT'S VIEW

One frightening example, is an indigent defendant who was appointed a Franklin County public defender in October, 1989 on a Class A felony charge. The client has not seen or talked to his appointed public defender since October.

The indigent client stated that his appointed attorney said that "he didn't have the time for me. I feel that I need an attorney that will work with me and try to prove my innocence. This is going to take a lot of time and investigation."

Due to inadequate funding and high caseloads, public defender clients in Franklin County are not getting the representation they are entitled to.

WRITTEN INTERVIEW WITH BOB BOWMAN

Relate your past involvement with the Public Defender System as an attorney in it and as its administrator.

During the mid to late 70s and early 80s, I was an active participant in the Franklin County Public Defender Program. For several years I acted as local administrator of the program. During the same time frame, we had between 12 and 15 local attorneys who participated in the program. Initially there were sufficient funds to pay on a reduced basis for the work performed by the participating attorneys. However, with the implementation of the new Court system and an additional District Judge position, the workload increased dramatically and the funding did not. Because of the lack of funding and the increased workload, the attorneys involved in the program received very little and sometimes no compensation for the work which they performed. Currently the Public Defender Program in Franklin County appears to lack sufficient funding to attract attorneys willing to participate even on a reduced fee basis.

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WHAT DO WE VALUE MORE?

A ticket to a Bengals football game can cost $29.00. Two Bengals tickets would cost $58.00. That is all the Franklin County public defender system has to spend on the cases it handles for over 500 Franklin County citizens.

LEGISLATIVE RESEARCH COMMISSION PERSONAL SERVICE CONTRACT REVIEW SUBCOMMITTEE MAXIMUM RATE SCHEDULE

Class	Not to Exceed
Attorney (Individual)	$40 per hour
Attorney (Firm)	Partner/Principle $75/hr.
Attorneys (Title Search)	$125 per surface title; $300 per mineral title; $1,000 per each case completed in Circuit Court; $500 per brief for Court of Appeals
Appraisers	Negotiable fee based on $350 per diem
Auditors (Individual)	$40
Auditors (Firm)	Partners/Principle to $75/hr.
Dentist	$50/hr.
Medical Doctors/Psychiatrists	$50/60 hr.
Musical Entertainer/ Instructor	$15/hr.

FORMER FRANKLIN PUBLIC DEFENDER DEMANDS PAYMENT FROM FISCAL COURT

Recently, William P. Sturm filed a claim with the Franklin Fiscal Court for $10,684.62 due him for his unpaid fees in public defender cases he handled from 1986 through 1988, but for which he was only paid $.48 on the dollar by the Franklin County public defender system. The money he has demanded was calculated at $25.00 per hour for out-of-court work and $35.00 per hour for in-court work, a rate well below the prevailing rate for criminal defense work in Franklin County.

The prorated level of compensation that he received for the three years that he was in the Franklin County public defender system is clearly below a fair level of compensation. Just as clear, the Franklin County Fiscal Court is legally required to pay the unpaid fees under the holding of *Boyle County Fiscal Court vs. Shewmaker*, Ky.App., 666 S.W.2d 759 (1984) and the recently decided Court of Appeals case of *Kenton/Gallatin/Boone Public Defender, Inc., vs. Lape*, Ky.App., (December 1, 1989) (No. 89-CA-630-OA).

When contacted about his unpaid Franklin County public defender fees, Bill Sturm said, "I still expect to be paid for these services. I hate to sue the county or others and make myself look like a bad guy or a greedy person, but I need to be paid at the $25.00 and $35.00 per hour level set by statute. I also want to force this issue, which the Franklin County Fiscal Court has ignored, for the benefit of the attorneys who will work for the Public Defender System in this county in the future. They deserve to be paid at a reasonable level without having to sue to get their fees."

When asked why he no longer does public defender work and why only two local attorneys in Frankfort are willing to do public defender work now, Bill said, "I dropped out of the Public Defender System primarily because of the low pay. When my effective attorney fee rate dropped to $8.00 - $9.00 per hour, I had to get out. This hourly rate would not even cover its pro-rata share of my office overhead expenses. I can only assume that other attorneys have dropped out of the Public Defender Program for the same reason. I firmly believe that if the effective billing rate were $25.00 and $35.00 per hour, as mandated by statute, there would be more attorneys in the Public Defender Program in this county and many attorneys would stay in the program for a longer period of time."

FISCAL COURT'S FUNDING OBLIGATIONS

Kenton, Boone, Gallatin Public Defender System

Bob Carran

KENTON PUBLIC DEFENDER SYSTEM

When the Kenton County Public Defender System first began operating in 1973, our contract with the Kenton County Fiscal Court contained a term wherein the Kenton County Public Defender, Inc. agreed that it would seek no funds from the Fiscal Court other than the funds forwarded to the Fiscal Court by the Commonwealth through the Public Advocate pursuant to the terms of KRS 31.050(2). We functioned from 1973 until approximately 1980 without requesting any funds, however, during that time we were only able to compensate lawyers at the rate of $15.00 an hour for out-of-court work and $25.00 an hour for in-court work. Further, we frequently did not have sufficient funds to satisfy all of our bills, even at that low rate of pay, and we were forced to prorate our payments — sometimes paying only $.50 on the dollar. By 1980, it was quite clear that we must have additional funding. Therefore, we appeared before the Kenton County Fiscal Court to request funding. The Court responded by agreeing to pay $10,000.00 per year to the Public Defender System, once again, extracting a commitment that we would seek no additional funds.

A THREE COUNTY SYSTEM

In 1983, the Public Defender Corporation servicing Kenton County consolidated with the Public Defender Corporation serving Boone County and Gallatin County. At that time, the Public Advocate consolidated the funds provided to the three counties into one lump sum, and began supplying these funds on quarterly allotment to the Kenton County Fiscal Court for forwarding to the Kenton-Gallatin-Boone Public Defender, Inc. The Boone County Fiscal Court voluntarily agreed to contribute $10,000.00 per year to the corporation, thereby matching the Kenton County Fiscal Court contribution. Additionally, all court-ordered recoupments pursuant to KRS 31.120(4) are also forwarded to the corporation, a sum which has always yielded approximately $12,000.00 per year.

REDUCED FUNDING

In 1985, the Kenton County Fiscal Court reduced its contribution to the sum of $5,000.00 per year.

COURT OF APPEALS ORDERS FISCAL COURT TO PAY IN CAPITAL CASE

Approximately 2 years ago, in response to the dramatic decrease in the number of Northern Kentucky attorneys willing to perform Public Defender services, we began working with the Fiscal Courts of Kenton, Gallatin and Boone Counties in an attempt to acquire additional funding. To date, despite all our efforts, no meaningful negotiations have occurred. Therefore, we have been forced to seek court orders requiring the Fiscal Court to supplement our funding on several occasions. In the Greg Wilson case, a capital murder case tried approximately a year ago in Kenton County, the trial judge refused to sign an order prior to trial which would have required the Fiscal Court to provide additional funding so that attorneys could be found to represent Mr. Wilson. However, at the conclusion of the trial the judge ordered $20,500.00 in fees to be paid to the defense attorneys eventually selected by the Court, and ordered that these fees only be paid out of the state allotment to the local Public Defender Corporation.

FISCAL COURTS MUST PAY PUBLIC DEFENDER FEES OVER $1,000 COURT OF APPEALS RULES

In *Kenton/Gallatin/Boone Public Defender, Inc. vs. Lape*, Ky.App., (December 1, 1989) (No. 89-CA-630-OA) the Court of Appeals decided in an original action out of the Kenton Circuit Court that Kentucky statutes limit the Department of Public Advocacy to paying $1,000 per case.

The appellate court ruled that the trial court can order an appointed attorney $1,250 per felony case but DPA can only pay $1,000 of that fee. Assigned counsel can be paid more than $1,250 if the trial court finds special circumstances warrant a higher fee.

The county fiscal court "must pay fees in excess of the state contribution of $1,000 regardless of whether the person is appointed or assigned in the case pursuant to KRS 31.070 or KRS 31.170" if the circuit court orders it. *Id.* at 4.

"Kentucky Revised Statutes, Chapter 31, provides that counties are to 'appropriate enough money to administer the program of representation [they have] elected.'" *Id.* at 6.

The Court further stated, "We believe the statute is clear that the counties must make adequate provisions for the method of representation they have chosen, *Boyle County Fiscal Court*, 666 S.W.2d at 762, and that counties must pay that portion of any fee awarded that exceeds the state contribution." *Id.* at 7.

A copy of the opinion can be obtained by contacting DPA's librarian.

Subsequently, the Court of Appeals, in ruling upon a Motion for Writ of Prohibition filed by the Kenton-Gallatin-Boone Public Defender, Inc., found that the Kenton Circuit Court had failed to follow the requirements of KRS Chapter 31, and, additionally, ruled that any such fees awarded must be paid by the Fiscal Court. The Court of Appeals ruled that if counsel is appointed to represent an indigent defendant, the Public Advocate's Office is authorized to pay that person no more than $1,000.00 in fees for the defense of a single person in any case. The Court further ruled "the statute directs that the county must pay fees in excess of the state contribution of $1,000.00 regardless of whether the person is appointed or assigned to the case pursuant to KRS 31.070 of KRS 31.170."

CIRCUIT COURT ORDERS FISCAL COURT TO PAY

Our attempts to obtain funding for the defense of Greg Wilson, while unsuccessful in the Greg Wilson case, led us into attempts in other serious felony cases. In *Commonwealth v. Newman*, pending in the Fourth Division of the Kenton Circuit Court, we were successful in obtaining a court order which requires the Kenton County Fiscal Court to supplement the funds made available through the Public Advocate's allotment so that any difference between the Public Defender funds and the rate of $50.00 per hour for out-of-court work and $75.00 per hour for in-court work shall be provided, in full, by the Kenton County Fiscal Court. In the matter of *Commonwealth v. Morrison*, a motion has been filed, and a hearing has been held, wherein an order similar to the *Commonwealth v. Newman* order is sought. The result of the orders and opinions rendered in the three cases thus far may cause the Kenton County Fiscal Court to be obligated to pay approximately $40,000.00-$50,000.00 to various defense attorneys in these 3 cases alone. Additionally, there are now similar motions pending before other Boone County and Kenton County judges arising out of two felony murder cases wherein arrests have recently been made.

COUNTY ATTORNEY DESIRES

As you can imagine, our attempts to acquire additional funding have met with resistance from some county attorneys. In Campbell County, the county attorney has drafted a proposed contract between the Public Defender System and the Campbell County Fiscal Court wherein the Fiscal Court would have, in essence, complete and total control over the Public Defender System. This contract, if allowed, would even allow the Fiscal Court to determine who will be doing the Public Defender work and whether they are doing it to the satisfaction of the Fiscal Court. Obviously, all of this would occur under the legal guidance of the county attorney.

Since this appears to be an obvious conflict, an opinion has been sought regarding the ethics involved in a county attorney advising the Fiscal Court on its negotiations with a public defender corporation while that same county attorney is also fulfilling his function as a prosecuting attorney in the criminal courts of the county.

Also, there have been local newspaper articles published wherein a county attorney expressed his opinion that the county could contract with a local attorney or group of attorneys and provide the defense services at a cheaper rate than they are presently being provided by contracting with the Public Defender Corporation. Such actions as these have led to the Campbell County Public Defender Corporation contracting directly with the Public Advocate, rather than the Campbell County Fiscal Court, and are leading the Public Defender Corporation for Kenton, Gallatin and Boone Counties to consider a similar-type arrangement.

$100,000.00 NEEDED

It is our belief that should we be able to acquire the sum of $100,000.00 per year from our respective Fiscal Courts, the corporation servicing Kenton, Gallatin and Boone Counties would then be able to pay roster attorneys the sum of $40.00 for in-court work and $20.00 for out-of-court work, and have no fear of having to prorate these amounts. While this is obviously a very modest fee structure, we believe that attorneys in Northern Kentucky will continue to provide the necessary defense services at this fee rate, due in no small part to their strong *pro bono* sense of responsibility. Additionally, the negative psychological impact of paying a low fee rate and then having to prorate it to an even lower fee rate would be removed.

FISCAL COURTS FUND PUBLIC DEFENDERS ELSEWHERE

It is our strong hope that in the first months of 1990, we will be able to have meaningful negotiations with the representatives of the Fiscal Courts we serve. If not, we are prepared to continue taking all available legal action to insure that ultimately the Fiscal Court will assume the responsibilities given to them by Chapter 31.

A state system wherein a Boyd County supplies its defense system with $107,040.00 per year and a Fayette County supplies its defense system with $114,250.00 per year, but 3 Northern Kentucky counties only supply their system with $15,000.00 per year is unacceptable.

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MASSACHUSETTS INCREASES PUBLIC DEFENDER BUDGET BY $18 MILLION

The December 20, 1989 *Boston Globe* reported that the Massachusetts public defenders have received budget increases over the last 3 years, including an $18 million increase this year for a total of $56 million.

The Massachusetts public defender system handles about 2 1/2 times the cases that the Kentucky public defender system handles. Massachusetts funds its public defender system at 6 times the level of Kentucky's.

Massachusetts starts its full-time public defenders at $26,000. Kentucky's starting public defender salary is $16,608.

Public Defender Leaves Kentucky for $8,000 Raise

Julius Aulisio, an assistant public advocate in DPA's Morehead trial office, resigned December 28, 1989 to take a full-time public defender position in Florida. He will be paid $8,000 more in Florida than he was paid in Kentucky. Not surprisingly, Aulisio said he was leaving for financial considerations. He had been with DPA for 5 and one-half months.

DPA has a turnover rate 3 and one-half times the average of state government, no doubt due in large part to DPA's incredibly low salaries.

SHERYL G. SNYDER, ON INDIGENT DEFENSE

President Kentucky Bar A ssociation

Sheryl G. Snyder

Sheryl received his J.D. from the University of Kentucky in 1971. He was President of the the Louisville Bar Association, 1985. He has held the offices of Vice-President and President-elect of the Kentucky Bar Association. He is a Partner in Wyatt, Tarrant & Combs.

Providing proper legal defense to indigent defendants in capital cases has reached crisis proportions in Kentucky. The work load exceeds the capacity of the few public defenders we have. The level of stress involved in defending only capital punishment cases creates a tremendous burnout factor. The public defenders are paid approximately one-third the salary given to a student straight out of law school who commences work for a major law firm in Louisville or Lexington. Providing only $2,500 to an attorney in private practice to defend a capital case doesn't begin to provide an adequate defense.

The goal of our criminal justice system should be justice, not incarceration or execution. Those punishments should be imposed only after complete due process of law. Those who believe in the deterrent value of retributive justice have to be willing to pay not only for prisons in which to incarcerate the convicted, but also a truly adequate defense for those literally on trial for their life. Any single miscarriage of justice in a capital punishment case carries too high a price for society to accept.

The General Assembly should exert every effort to adequately fund the DPA's full time staff lawyers and contract lawyers who handle capital cases. Simply, justice requires no less.

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INTERVIEW WITH CHARLES R. COY, FORMER KBA PRESIDENT

$2500 Capital Fee is an Insult

Charles R. Coy

A December, 1989 interview with Charles R. Coy presents his views from the unique perspective of a former prosecutor, former President of the KBA (1968) and as a criminal defense attorney.

Kentucky has repeatedly recognized that attorneys cannot be forced to represent indigent citizens accused of crimes without being fairly compensated. Why is this important?

Because persons accused of crime will increasingly go unrepresented or at best, under represented. This will inevitably lead the bench and bar into further public disrepute.

Does the amount of resources available to an attorney in a case, especially the amount of money he or she is paid, make a difference in the way an attorney represents a client? Why?

Yes. Time is money. If one cannot, economically, devote the necessary or even appropriate time to a client because of economic pressures and considerations the quality of representation must suffer.

Is it fair to compensate Ky. public defenders with starting salaries of $15,000-$16,608, and with contract fees that are at a minimum wage rate, and capital case fees that have a maximum of $2,500?

No. Because of my answers to the above and for the further reason that public advocacy can attract only those who do it as a mission and forget the pay and those who can only find employment in public defense work. The capital case fee of $2,500.00 is an insult. What is the value of 6 months to a year of a lawyer's professional life, to say nothing of the emotional trauma?

Ky. ranks 47th in its allocation of money to the defense of indigents accused of crimes. Why should there be an appropriate level of funding for the public defender system in Ky?

To seek "equal justice under law." While this is perhaps only an aspiration, it is, it seems to me, clearly constitutionally mandated.

The ABA's *Criminal Justice in Crisis* (Nov. 1988) calls for increased funding for public defenders and a reduction of their caseloads. Should the KBA and ABA use their influence to alert the public and legislatures to these needs? If so, how?

By adopting the Recommendation of the Special Committee on Criminal Justice in a Free Society and by further adopting a plan for a course of action.

Is it fair to expect a small number of the Kentucky Bar, full-time public defenders and part-time contract defenders, to assume the actual as well as financial burden of insuring that indigent criminal defendants are represented by counsel?

Probably not. However, the system was one adopted in wake of *Wainwright* and we are now so deeply involved in it that it would be difficult to come up with any alternative that would do nearly as well. Many lawyers just think that criminal defense is beneath them. To the contrary.

Any other thoughts?

The criminal justice system is not equipped to solve the societal questions facing us. What shall we do?

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Charles was President of the KBA from 1968-69. He is a member of KACDL and the NACDL. He was admitted to practice in Kentucky in 1951. LL.B., 1951 University of Kentucky. He was a Commonwealth Attorney in Richmond 1977-81.

INTERVIEW WITH FRANK E. HADDAD, JR., FORMER KBA PRESIDENT

The State Has the Responsibilty to Properly Fund the Public Defender System

Frank E. Haddad, Jr.

Frank Haddad, Jr. served as President of the Kentucky Bar Association in 1977. He was President of the National Association of Criminal Defense Lawyers from 1973-74, and has just completed 2 years as the first President of the Kentucky Association of Criminal Defense Lawyers.

Kentucky has repeatedly recognized that attorneys cannot be forced to represent indigent citizens accused of crimes without being fairly compensated. Why is this reality important?

It is not the responsibility of individual members of the bar to furnish at their own cost representation to indigent citizens. This is a governmental responsibility. To require an attorney to do so would be taking his money without due process of law.

Does the amount of resources available to an attorney in a case, especially the amount of money he or she is paid, make a difference in the way an attorney represents a client? Why?

The amount of resources available to an attorney is very essential in the representation of a client. If you have no money to provide these resources, you cannot adequately compete with the Commonwealth with its vast resources. The amount of money paid an attorney is also very important because that attorney cannot afford, with his overhead and expenses, to represent an indigent when he could apply his time to people paying him the hourly rate that he is really entitled to.

What is your estimate of the average hourly overhead costs for Kentucky attorneys?

This varies. In a metropolitan area, I would say the very minimum would be $60 per hour. In some rural areas, this could be reduced to between $30 and $40 per hour.

Is it fair to compensate Kentucky public defenders with starting salaries of $15,000-$16,608, and with contract fees that are at a minimum wage rate, and capital case fees that have a maximum of $2,500? Why?

Public Defenders are grossly underpaid. Legal Secretaries in metropolitan areas are making much more than the maximum, $16,608.00 that are paid Kentucky Public Defenders. It is ludicrous to believe that a defendant in a capital case can be represented by an attorney for a fee of $2,500. With the extra amount of time necessary in cases of this type, the attorney would not be earning the minimum wage of $3.25 per hour.

Kentucky ranks 47th in its allocation of money to the defense of indigents accused of crimes. This kind of gross underfunding is analogous to the underfunding of the unconstitutional educational system in Kentucky. Why should there be an appropriate level of funding for the public defender system in Kentucky?

Because our Constitution provides that an indigent defendant should be furnished counsel and it is the responsibility of the Commonwealth of Kentucky to provide adequate funding for representation by counsel and the payment of fees guaranteeing adequate resources for the attorney in the defense of such actions.

The ABA's *Criminal Justice in Crisis* (Nov. 1988) calls for increased funding for public defenders and a reduction of their caseloads. Should the KBA and ABA use their influence to alert the public and legislatures to these needs? If so, how?

Yes, but I think you are going to need more than the KBA. It has never been very effective to have lawyers asking for more money to be paid to attorneys. I think you are going to have to get civic groups who have been made aware of the situation, as well as national groups like the ACLU and its local chapter, KCLU, to persuade the Legislature that funds are needed for this purpose. The state is undertaking to build additional prison facilities by the expenditure of millions of dollars and should be responsible for providing adequate funding for the representation of indigent defendants.

Is it fair to expect a small number of the Kentucky Bar, full-time public defenders and part-time contract defenders, to assume the actual as well as financial burden of insuring that indigent criminal defendants are represented by counsel? Why or why not?

Absolutely not. More so than it would be expected to have the medical profession to provide free of cost all medical needs of indigent people. It is the state's responsibility and must be fulfilled by the state.

Any other thoughts?

It is amazing the excellent job that the Public Defenders have been able to do with the limited funding that they have for salaries and resources. We cannot expect this to continue because it will be impossible for them to do so with the tremendous caseload that they have.

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INTERVIEW WITH KACDL PRESIDENT WILLIAM E. JOHNSON

All Kentucky Attorneys Have a Duty to Insure Citizens Receive Full Measure of Justice

William E. Johnson

Kentucky has repeatedly recognized that attorneys cannot be forced to represent indigent citizens accused of crimes without being fairly compensated. Why is this reality important to Kentucky attorneys and KACDL?

The practice of criminal defense law requires the most dedicated and careful legal service possible if the citizen accused is to receive the kind of defense that he or she is entitled to. In order for any lawyer to devote the time necessary to do the best job possible for the citizen, the lawyer must be fairly compensated. If the lawyer is not fairly compensated he cannot make a decent living and he will have a tendency to refuse to handle cases involving persons accused of crimes. Many capable lawyers have left the criminal defense bar and refused to handle cases involving persons accused of crime. This creates a great shortage of lawyers needed to defend citizens accused. As sorry as I am to say it, inadequate compensation may attract less capable attorneys and cause the citizen accused to receive less than full justice. All Ky. attorneys and members of KACDL have a duty to see that citizens accused receive a measure of full justice.

Does the amount of resources available to an attorney in a case, especially the amount of money he or she is paid, make a difference in the way an attorney represents a client? Why?

Yes. The amount of resources available does make a great difference in the way a client is represented. As a rule, the prosecution has the advantage of professional investigators who devote whatever time is necessary to gather facts for prosecuting the case. The prosecution has access to funds for the employment of outstanding expert witnesses and the preparation of exhibits which help to sell the prosecution's case. If the citizen accused does not have sufficient funds to cover necessary expenses then this may affect the defense. Many lawyers do not have the resources to pay for expert witnesses, fancy exhibits, and all of those things which may be of great assistance in presenting a defense. In some instances, important witnesses are residing out-of-state, or maybe out of the country, and it is impossible for the defense attorney to personally interview them. Unfortunately, attorneys, like everyone else, have to work within the budget available. Criminal defense attorneys have historically spent money out of their own pockets in defending indigent persons accused of crimes.

What is your estimate of the average hourly overhead costs for Kentucky attorneys?

When I first started practicing law I found that for every dollar that I took in approximately 33-1/3% went for overhead. Now I find that my overhead expense runs closer to 50%. I suspect that most Kentucky attorneys will have an average hourly overhead cost of in the neighborhood of $50 per hour.

Is it fair to compensate Kentucky public defenders with starting salaries of $15,000-$16,608, and with contract fees that are at a minimum wage rate, and capital case fees that have a maximum of $2,500? Why?

The starting salaries for Kentucky public defenders are scandalous. The capital fee cases are even more scandalous. Any lawyer that undertakes a capital case for a $2,500 fee realizes that he is going to suffer a great loss. I have great admiration for those lawyers who are willing to undertake defense of capital cases for such a shocking fee. Those who continue to serve as public defenders and those who handle capital cases do so out of the highest sense of duty. However, their continued work leads to burnout and is harmful to themselves, the legal profession, and sometimes to their clients.

Kentucky ranks 47th in its allocation of money to the defense of indigents accused of crimes. This kind of gross underfunding is analogous to the underfunding of the unconstitutional educational system in Kentucky. Why should Kentucky citizens and KACDL want an appropriate level of funding for the public defender system in Kentucky?

In order to continue to attract bright legal minds to the public defender programs we must pay realistic salaries. Kentucky has been fortunate in having many dedicated lawyers agree to work in the public defender program. However, we cannot continue to attract and keep the best with such small compensation. The lack of an adequately compensated public defender corps will lead to the inferior administration of justice in the Commonwealth of Kentucky and a gradual lessening of confidence in our judicial system.

The ABA's *Criminal Justice in Crisis* (Nov. 1988) calls for increased funding for public defenders and a reduction of their caseloads. Should KACDL use its influence to alert the public and legislatures to these needs? If so, how?

Yes. KACDL should do all that it can to alert the public and the General Assembly to the needs of the public defender program. However, we have a great burden to carry in getting the message across that the criminal justice system requires dedicated public defenders, adequately compensated, in order to assure confidence in our public justice system. The citizenry will put the payment of money to lawyers, and particularly to lawyers who defend persons accused of crime, at the bottom of

the scale of needs. We have to go through an education process. Perhaps one way would be to recruit lay persons who have been accused of criminal offenses and ask them to speak to groups of citizens about their experiences and the need for adequate representation in time of trouble.

Is it fair to expect a small number of the Ky.Bar, full-time public defenders and part-time contract defenders, to assume the actual as well as financial burden of insuring that indigent criminal defendants are represented by counsel?

No. It is not fair to expect a small number of the Kentucky Bar to assume the representation of indigent criminal defendants. So long as the program is inadequately funded, there will be justice denied to some citizens simply because of the public defender program being overworked. Private practitioners need to be recruited to devote an amount of *pro bono* work annually to the criminal defense bar. This would be a very worthwhile program for KACDL.

Any other thoughts?

These are dangerous times. Crime has been so publicized that the public has been brainwashed into believing that the only way of dealing with the criminal is by putting him or her in prison and keeping them there. The Federal Sentencing Guidelines are a good example of this philosophy. Longer confinement is supposed to reduce recidivism. However, I doubt that statistics support this premise. We know that capital punishment and even historically torture inflicted with death did not diminish capital crimes. The public has historically been reluctant to spend funds on education whether it be for the purpose of educating your children or in educating society that there is more to life than violence and crime. We, as defenders of the accused, have a continuing duty to try to bring about more humanity in man through all processes available including education.

WILLIAM E. JOHNSON
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Bill received his J.D. from the University of Kentucky College of Law in 1970. He is a partner in the merged law firm of Johnson, Judy, Stoll, Keenon & Park, engaging in all areas of trial practice and administrative law with offices in Frankfort and Lexington. He ia a member KY Criminal Rules Committee; Appellate Handbook Committee; ABA Litigation Trial Practice Committee, KBA Board of Governors 1981-83.

Opinions

Affording justice

Some of our treasured symbols just might need a bit of modern-day revamping.

Take Justice, for example. That timeless image of a blindfolded woman holding the scales has become fiction in Kentucky.

At least for the poor.

If you can afford a lawyer, your day in court is more promising than if you can't. If you can't, you likely will be under-represented by an inexperienced, albeit well-meaning, overworked young attorney. Or, putting the worst face on it, one nobody else is willing to pay for.

A series by Kentucky Post reporters Bill Straub and Jeanne Houck, "Justice: Can We Afford It?," provided insight into a system that too often doesn't work for those unable to pay their own way through the morass.

No one enjoys paying for jails that house the convicted and protect society from them. No one enjoys paying for judges and courtrooms, police officers and FBI agents. But society has deemed them necessary to settle disputes and to keep order.

No one enjoys the prospect of paying more money for the legal defense of poor people accused of crimes against society and individuals — stealing purses, holding up gas stations, robbing homes, selling drugs or killing.

But if we believe in justice, we must pay.

Consider the thoughts of Neal Walker, who represents those on Death Row as an attorney for the state Department of Public Advocacy:

"I really think what keeps me in this work is that I'm attracted to defending unpopular causes because I feel like the Bill of Rights should be applied to unpopular people as well as popular people. Only by fighting to ensure that the oppressed receive the benefit of the Bill of Rights can they have meaning for the rest of us as well."

Indeed. Aristotle once said that democracy can survive only if we are as capable of outrage at injustice to others as we are of outrage at injustice to ourselves. Such healthy outrage has a healthy price tag in modern times.

Yet if we are unwilling to guarantee the most basic rights to others, we can hardly preserve them for ourselves. If we refuse to provide even minimal assurance that the poor have a fair day in court, we can't long deserve such privileges ourselves.

Kentucky's system is broken. The Department of Public Advocacy has a dedicated staff of zealots who believe in justice more than in making money. They work 60-80 hours a week for a salary that begins at $16,600 and may someday climb to $40,000. But the turnover rate is high, and there are always vacancies.

This really is a life or death issue. The people who end up on Death Row in Kentucky are almost always those who can't afford to pay. We must always wonder at the outcome if they had been able to pay for their own defense.

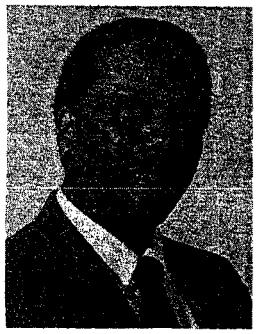
The problem is serious, the solutions are not easy. But those who believe in Justice must stand up and be counted in the fray. The guarantee "with liberty and justice for all" must not disappear for want of money.

Otherwise, the scales of Justice will be forever tipped by a few gold coins.

The Kentucky Post, September 23, 1989

CORRECTIONS' SECRETARY WIGGINGTON

Oral and Written Interview



Secretary John Wiggington

Written Interview

You were appointed Secretary of the Corrections Cabinet in December, 1987. What motivated you to head up this effort?

The operation of the Ky. Corrections Cabinet provided a challenging opportunity to serve in state government. I believe we have an opportunity in this state to build upon a solid, professionally run corrections system to meet the demand which will be placed upon it in the 90's.

What qualifies you to hold that post?

My education and work background are in the related social work field and certainly the four terms which I served on the Lexington-Fayette Urban County Council prepared me well for this post. Corrections is after all big business. In essence, the operation of the Corrections Cabinets is similar to operating a community and, like any community, it is ultimately my responsibility to see that services and resources are made available so that adequate security, programs and other necessary functions can be provided. In my view, perhaps the most important qualification for the Secretary of this agency is that a person have knowledge of how government works and how scarce resources can be apportioned equitably.

To head the Corrections Cabinet a person must have the ability to solve difficult and evasive problems. I derive a great deal of satisfaction of doing just that and feel confident in my ability to deal with what many say is the most difficult job in state government.

What are your goals as Secretary? What is the Corrections' plan for Kentucky?

The public and the legislative body of this commonwealth need to understand that the challenges which face the Ky. corrections system today are very real and very pressing. It is my primary goal to make it known to the public and to elected officials throughout this state that the Ky. Corrections Cabinet is an integral part of this state's criminal justice system. It must be known that our criminal justice system exists on a continuum and if justice is to be fully realized, each link in the chain of law enforcement, including Corrections, must be of equal strength. Therefore, the Corrections plan for Ky. is twofold. In the short term, we need to deal with the immediate needs for additional prison bed space to hold the convicted felons awaiting entry into the state prison system. However, to truly create a system which can be effective in the decade which lies ahead the Corrections plan for Ky. must look toward future prison bed space needs to ensure public safety. However, both the long and short term plans must also provide for community options to incarceration.

What are the 3 biggest problems facing Corrections?

1. Establish a corrections system which can provide sufficient prison bed space and alternatives to incarceration to meet the needs of the criminal justice system for the decade which lies ahead.

2. Resolving the problems which face the local jails.

3. Improving pay, benefits and working conditions for corrections staff.

What has Corrections been unable to do because of the lack of money?

It is quite obvious that the Corrections Cabinet has been underfunded over the past years which has led to the current bed shortage for state prisoners. Additionally, underfunding for both pay and benefits of our line correctional staff has placed Ky. in the unenviable 47th position nationwide when comparing starting salaries for correctional staff.

The benchmark for this administration will be that we have planned for the future.

Since becoming Secretary, what have you done new or differently than the previous Secretary?

I believe the benchmark for this administration will be that we have planned for the future and I would hope that at the conclusion of the upcoming meeting of the General Assembly we will be able to say that the commonwealth has, for the first time in the history of the state correction system, adequately funded a state prison building program while at the same time enhancing our important community programs.

How does Kentucky rate compared to other states in terms of prison escapes?

The national ratio of escapes to agency average daily population for 1988 (source: The Corrections Year Book - 1989) averaged .024, or 24 per 1,000 inmates. Kentucky's average was far below the national average at .014, or 14 per 1,000 inmates.

Were the June, 1988 escapes at Eddyville due to prison failures that were freakish or to a basic inability to house prisoners safely?

The Ky. State Penitentiary has the ability to house prisoners safely. The escapes at the penitentiary were due in large part to the failure of certain staff to follow established security procedures.

Specifically, how is Ky. going to be able to handle the vast increase in the number of prisoners in future years?

In the recently submitted biennial budget request the Corrections Cabinet has requested for funding of 1150 secure male prison beds and 450 secure female prison beds in addition to over 1600 beds in jails, halfway houses and through private ven-

RACISM IN OUR CRIMINAL JUSTICE SYSTEM?

	Population	Percentage
United States		
Total	229,307,000	100%
Whites	196,627,000	86%
Non-Whites	32,680,000	14%
Prisoners in the United States		
Total		100%
Whites		52%
Non-Whites		48%
Kentucky		
Total	3,660,777	100%
Whites	3,379,006	92%
Non-Whites	281,771	8%
Kentucky Prisons		
Total	6,054	100%
Whites	4,107	68%
Non-whites	1,947	32%

dors. In addition to these immediate needs the cabinet is also requesting funding for the design of a 550 bed male medium security prison to begin the process of long term planning for future prison bed needs.

In March, 1988 a newspaper article indicated that you said Ky. would soon run out of prison space and that could incur many contempt of court findings by Ky. courts. Has Kentucky run out of prison space? What contempt of court orders are currently entered against Corrections and from which courts?

In Ky. we consistently average over 1,000 sentenced felons backed up in local jails due to the lack of state prison bed space. Therefore, it is true that Ky. has run out of prison space. We currently have numerous orders from state courts requiring the cabinet to take prisoners from local jails on a timely basis which the cabinet attempts to honor. However, in Fayette, Kenton, Campbell and Jefferson Counties the Corrections Cabinet has been found in contempt of court because of our inability to remove prisoners from those jurisdictions in a timely manner.

In the same news article Senator Ed O'Daniel, D-Springfield, was reported as saying that the Corrections Cabinet is crying wolf about the space problem with the strategy of creating a crisis in order to obtain approval for a new prison. Is this a strategy or a genuine problem?

The Corrections Cabinet has consistently averaged over 1,000 sentenced felons backed up in local jails and currently have over 1300 inmates confined in local facilities awaiting entry into the state prison system. Recent population projections, using a projection method recommended by a consultant from the National Institute of Corrections, indicate a continued growth pattern through the 1990's. If the cabinet's resources were limited to only authorized beds to date, the shortages would be significant. By the end of the next biennium the estimated population will be 9,969 with authorized beds at 8,047 which will leave a shortfall of 1,922 beds. If no additional beds are authorized our projections estimate an inmate population by fiscal year 1996 of 11,470 which will represent a short fall of 3,423 prison beds in Ky. It is plain to see that the Corrections Cabinet is not "crying wolf" about space problems. The crisis is real.

Justice Liebson in his forceful dissent in *Commonwealth v. Reneer*, Ky., 734 S.W.2d 794 (Aug. 6, 1987), the case concerning the "Half-Truth-in-Sentencing" law, stated: "It takes no visionary to foretell that the new sentencing procedure will 1) produce sentences that are, in many cases, unduly harsh and abusive, 2) fatally overload an already overcrowded prison system, and 3) exacerbate the problem of disparate sentencing. The impending calamity to our sentencing system (it will be no less) is not just likely, it is inevitable." Do you agree? What can be done?

I have not had any direct involvement with this case and do not wish to comment in regard to the Supreme Court decision without having had an opportunity to read the entire case.

How does the commissary system in each of the prisons work? What is the markup on the merchandise sold prisoners? Where does the profit from those enterprises go?

The Corrections Cabinet operates a centralized canteen operation in compliance with KRS 196.270. It is required by this statute that the cabinet establish and maintain a centralized canteen operation which shall be incorporated and self-supportive. It is also required that each institution administered by the cabinet shall participate in the centralized canteen operation. The statute also sets out those individuals who shall serve as the Board of Directors for the centralized canteen which includes representatives from each of the major state correctional institutions and a warden from one of the remaining correctional institutions elected at large by the Board of Directors. All profits from the canteen shall be used exclusively for the benefit of the inmates of the Corrections Cabinet. Price markups vary depending on the item. This percentage above cost for items sold in institutional canteens is determined by the Board of Directors.

The chairman of the National Council on Crime and Delinquency, Allen Breed, gave a speech entitled "The State of Corrections Today: A Triumph of Pluralistic Ignorance" in which he says, "We have supported the principles of fairness, justice and humane treatment for those who are wards of the state, yet our daily practices have often been, and often are, at odds with the ideals given voice in oration." Do you agree? How can you change this in Kentucky?

The Ky. Corrections Cabinet supports both in principle and in daily practice fairness. Justice and humane treatment for those men and women who are confined in our state prisons. Over the past years the Ky. Corrections Cabinet has spent many millions of dollars improving prison conditions throughout the state. In response to a 1980 consent decree the state corrections system has renovated almost every area of the Ky. State Penitentiary and the Ky. State Reformatory along with major changes in policy and programs to benefit the inmate population. Although the consent decree revolves around these 2 institutions the entire corrections system was revitalized as the result. This coupled with the system-wide American Correctional Association accreditation of all state institutions ensures that our system is based on policies which are just and fair and which

requires humane treatment in all of our facilities. Certainly, there may be individual instances of abuse of fair treatment, however, the cabinet has in place both formal and informal grievance resolution mechanisms which are designed to bring these instances to light so they may be resolved satisfactory.

Breed also notes that 1) less than 50% of the people think prisons discourage crime, 2) most of the public think prisons are for rehabilitation, 3) 83% favor prisoners working, 4) 95% favor prisoners having a skill or trade before their release, and 5) two-thirds are in favor of alternate sentencing rather than prison terms. How is the Kentucky Corrections Cabinet responding to these public's desires?

The Corrections Cabinet cannot force rehabilitation upon those men and women who are confined in our prison. It is the responsibility of the Corrections Cabinet to make available sufficient numbers of both academic and vocational offerings as well as meaningful work programs for inmates in our system. We certainly encourage those in our institutions to participate in these programs, but the final decision is theirs to make. Alternatives to incarceration are certainly well used in Ky. The Cabinet has a total jurisdictional population including institutional beds and probation and parole and other forms of community supervision totalling approximately 19,150. Of that number only 6,400 men and women are incarcerated in secure correctional facilities. The remaining two-thirds are supervised in the community in some form. Alternatives to incarceration are well used by the state correction system. It is important, however, for the public and elected officials to realize the extent to which alternatives are working well in Ky. and the extent to which they are currently used. It is my belief that this type of education will result in a more accurate perception by both the general public and elected officials concerning the degree to which alternative forms of incarceration are currently being used. At the same time, it is equally as important to make them understand that there is still a significant need for prison bed space to house those individuals who they would not want to reside in their communities and who we cannot place in that type of situation.

DPA, along with others, has implemented an alternate sentencing program in 4 areas of the state. From Corrections' viewpoint, how is this working? Why are alternate sentences not used more by Ky. judges, especially if the public prefers that less costly approach? What part do alternate sentences play in solving Ky.'s prison crisis?

Prior to this administration I understand that the Corrections Cabinet provided partial funding for an alternate sentencing program in 4 areas of Ky. We participate in this program and certainly support these types of initiatives to keep people out of the state prison system and allow them to function in the community when appropriate. Since we do not have oversight responsibility for this program and because I have not been made aware of any data regarding the result of the program, it would be difficult for me to judge how effective the program has been. It would be equally difficult for me to provide a factual answer concerning why judges in Kentucky do or do not use these forms of alternate sentencing. Certainly, this would be an excellent question for the state judiciary to respond to.

From your experience and present vantage point, what are the major causes of crime?

Volumes have been written regarding the causes of crime and further conjecture on my part would probably serve little purpose. It is safe to say, however, that many of the theories are based in poverty and a lack of education both of which are addressed by the programmatic offerings within our state prison system. We offer a full range of academic and vocational offerings as well as a meaningful work program, many of which, especially in the correctional industries, offer marketable skills upon an individuals release from prison.

Do you feel Kentucky's PFO provisions are fairly selecting those who should serve extended terms?

I do not have the necessary information to make a determination regarding whether or not Ky.'s PFO provisions are being fairly implemented.

What legislation does the Corrections Cabinet most hope passes the 1990 General Assembly?

The Corrections Cabinet is in the process of identifying certain issues which we will be asking the General Assembly to consider during the upcoming session. In general terms we will be looking for the passage of legislation which would reduce our current crowding situation in the state prison system. We anticipate that legislation will be submitted that will permit judges to impose sentences and we would support such legislation along with uniform sentencing guidelines.

What do you think of the proposal of a group of legislators to put county jails under state control? Isn't that inevitable?

The takeover of the county jail system by the state Corrections Cabinet is a proposal which is supported by many legislators and fiscal court judges. There are however many political and economic barriers which will make it unlikely that a consensus will be reached in the upcoming General Assembly concerning this issue. Obviously, the local jails are, in some cases, finding that continued operation of these facilities under the standards mandated by statute, is becoming cost prohibitive. I certainly understand their desire to have the state take over the local facilities as in many cases it would result in improved conditions and a more professionally operated jail. However, the economic and political realities make a takeover doubtful. Until such a plan can be implemented it is important that we try to mitigate the current situation as much as possible with a short-term plan to address the problems which plague our county jails.

What role do you see public defenders playing in the Kentucky criminal justice system?

The public defenders play an important role in the total Ky. criminal justice system by representing those who are often times most in need of legal counsel. Post conviction assistance to inmates in the state prison system is another of the many important roles which the public defender's play which directly effects the Ky. Corrections Cabinet in a most positive way. I would agree with Public Advocate, Paul Isaacs, when he says that his office is understaffed and that public advocates are significantly underpaid for the important services which they render.

Oral Interview on December 8, 1989

I believe the local funding for the jails from the Corrections Cabinet is $16.00 per day per inmate, and you're paying $25.00 per day for private prisons, how is that disparity of funding really fair?

It's not fair and it's not the way the situation really is. Very often you hear that we pay a per diem. In the past it's been $10.00, more recently it was increased to

$16.00 and we try to compare that per diem with what is being paid the private sector, and you have to realize that is not an accurate barometer because in fact we fund the jails in several other ways, other than through the per diem. An evaluation of the state's total financial contribution to the local jails reveals that a few counties pay less than 15% of the total cost of operating the local facility. Therefore, the per diem, although it's used many times to distort the issue, is not an accurate explanation of the total financial support provided by the state. It is also worth noting that the per diem has traditionally been established by the Legislature. Unfortunately the per diem fee was not updated on a regular basis to keep pace with the increased cost of jail operation. The Supreme Court ruling requiring the state to assume responsibility for state inmates also established the conditions under which we could utilize local jails to house inmates. That perhaps is the real issue because for all practical purposes the per diem was eliminated as a result of the Supreme Court ruling that said in essence that the state could contract with local jails if three things existed. One, the space existed; two, that it met basic criteria; and three, that we were able to negotiate an acceptable price with the local jail. So it is perhaps through that negotiation that you would come up with what both sides will determine was being fair. One of the key elements in that decision was that the fee would be a negotiated fee which for all practical purposes would seem to make the argument concerning a set per diem established by the Legislature a moot issue. We should direct our energies toward planning for the future and to do that we have to address several significant issues:

1) The role the state is going to play in the operation of the local jail system.

2) The role the jail system as to a whole is going to play toward the effort to meet the total incarceration needs of the state?

3) The ways to facilitate the establishment of a jail system that is accessible to all parts of the state.

What percentage of state inmates come from the major urban areas?

We find that urban areas disproportionately utilize state resources. Approximately 32% of the inmates we have are from Jefferson County, 19% from Fayette County, 4% from Kenton County and 3% from Campbell County. These 3 areas account for 49% of the inmates who are committed to the state. They are residents from those counties who have committed crimes in those areas. Even though they are often referred to as state inmates, there is no county called Commonwealth of Ky. and in fact, the label given them as being state inmates is based more on the type of crime committed. However, this may point up a need for the leadership to develop a strategy to best utilize limited resources. State and local governments need to rationally and consciously decide how we can work together toward this goal. Who do we actually want locked up? That needs to be a rational and cooperative effort and I hope that we'll be able to do that.

In response to the public's demand for a tougher response to crime the legislature has passed numerous statutes which either created new penalties or enhanced existing ones. They have also passed legislation raising parole eligibility to 50% time served for certain violent offenses. The Parole Board has also responded to public opinion by paroling fewer individuals and increasing the length of deferments and serve outs. Have these trends posed any consequences for the Correction's Cabinet?

Obviously all of these factors have been contributors to our population growth. The problem becomes even more difficult to solve. This Cabinet is looked upon as having the answers and solutions to this overcrowding problem. However, we have no control over the number of inmates we receive, the length of time they serve or the numbers that receive parole. Further, we have no control over the funding or location of prisons. These controls rest appropriately with elected legislators.

It is our desire to present our bed needs to them based on projections and acquire the necessary funding to carry out our responsibilities. We also hope to inform them of the conditions in Ky.'s criminal justice policy which contribute to overcrowding. It is my contention that each segment of the criminal justice system should be evaluated to find how each is contributing to overcrowding. Then hopefully the result would be a conscious decision on who our society wants incarcerated and in what type of facility.

We hope to present a list of issues to the legislature responding to requests of how this problem of overcrowding can be addressed. These issues are not new. However, they arise annually when the subject of diversion or alternative programs are discussed. These issues will hopefully initiate discussion and provide the catalyst for change if the legislature so desires.

We are preparing a program that demonstrates the wide array of community-based alternative programs operated by this Cabinet. It must be understood that of the 20,000 offenders placed in our custody over 60% are in such community type programs. The remaining 40% have been programmed in institutional settings varying with the appropriate level of custody in which they should be housed.

Based on our projected needs an additional 3,000 beds are requested through 1994. These beds will be comprised of jail beds, private vendor beds and our own operated facilities at all custody levels. These projections were based on conditions as they presently exist and obviously will change with any additional legislative action. It is hoped that any newly enacted legislation would be accompanied by an impact statement. This would allow the necessary funding to provide the additional beds dictated by their actions. This would allow the flexibility to make the necessary funding adjustments based on newly enacted legislation. It is important when such initiatives as the war on drugs and tougher DUI penalties are enacted that adequate funds are available to keep these offenders incapacitated for proper time frames.

$100 million is needed for more prisons.

What would be your estimate of the cost of these 3,000 new beds?

It would be in a range near $100,000,000.00.

What did the prison in Morgan County cost?

Approximately $72,000,000.00.

How many beds did it provide?

1,050 beds were in the original design however, many of the cells will be double-bunked.

Morgan County prison cells cost $62,000 each.

What was your cost per bed to build that prison?

It was about $62,000. We believe additional prisons can be built at less expense. The Morgan County facility has some security features that would not be neces-

sary in some of requested facilities.

In my discussions with legislators I have sensed consensus emerging in their ranks that tougher penalties and laws must be accompanied by the funding of the necessary beds.

Can the public's seemingly insatiable addiction to more incarceration ever be satisfied?

Perhaps, we can expect that like most things, it will go in a cycle. However with the issue of drug abuse and governmental attempts at all levels to deal with it, the present cycle will continue for some time. Efforts the President and our Governor have initiated will hopefully have positive impacts through enforcement and education. A decline in drug and alcohol consumption will cause a subsequent decrease in crime.

Another possible impact can be realized by certain legislation that upon review and discussion could be rolled back if there is a consensus to do so. Other issues such as sentencing reform and uniformity should be studied in an effort to establish a rational approach to crime and punishment. The punishment for an identical crime should be the same in Lexington as in Paducah or Hazard. Efforts at sentencing reforms have resulted in positive impacts for Minneapolis, Minnesota and Washington in their bed situations.

Is rehabilitation of state prisoners a goal of the Corrections Cabinet?

It's a goal of most Corrections professionals. To achieve rehabilitation in the ideal sense our system is drastically underprogrammed. We recognize the need for programs and the implications they have on both rehabilitation and security. To say we meet that goal would not be entirely accurate. I do believe our system provides any inmate who truly desires to enhance himself the opportunity and programs to do so! However we don't have the resources in funds or programs to achieve the goal that is often expected. Further, I don't sense a commitment by legislators or taxpayers to increase the revenues to shape a system that would rehabilitate a significant percentage of our inmate population.

The disproportionate number of blacks in our prisons needs to be studied.

What about the vastly disproportionate number of black Kentucky citizens in prison (32%) as compared to blacks in Kentucky (8%)?

As far as race, we have a disproportionate number of blacks in our penal system and this is the case throughout the United States. There is no doubt that many sociological factors contribute to this. I think that it's an issue that should be studied as it relates to the criminal justice system. Such issues as to how many minorities are represented by the Public Advocate's Office as opposed to a hired attorney is basic to the issue. Representation is the key to what access is realized in the justice process.

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RACISM IN AMERICAN PRISONS

If white America was called into court and charged with the crime of disproportionately jailing blacks, the prosecution would have a strong case.

- A 1979 government survey revealed that about one out of every 5 black men would go to prison in his lifetime. Imprisonment rates have spiraled since then, and the proportion is now closer to one out of every 4.

- In Michigan, 57% of those imprisoned (in Federal and State institutions) are black, as compared to a total of 12.9% of blacks in the total population. (1986 statistics)

- Nationally, blacks go to prison at a rate of nearly 10 times that of whites. (1984 statistics)

- A recent study of the Wayne County Youth Home found that nearly 90% of those detained were black.

Not many would argue against the belief that those convicted of crimes should be confronted and held accountable. I agree, but I also find myself asking: "Who will confront society about the racist practice of imprisoning blacks at a higher rate than any other country in the world (including South Africa)?

In America, blacks fall below the poverty level at a rate of four times that of whites. In Michigan, we find a 21.2% unemployment rate among blacks as compared to a 6.5% rate among whites. I mention poverty and unemployment because these are the most obvious contributors to crime and subsequent imprisonment. Given the fact that blacks are disproportionately represented in these categories, it is not surprising that we find more of them committing crimes and ending up behind bars.

Even when charged with crimes, it is well documented that the accused who have money are less likely to spend time behind bars. The most obvious reason is that monied people can afford bail. Plus, when they come to trial they often have obtained the best lawyer money can buy. The disproportionate number of blacks caught in the web of poverty do not fare as well when it comes time to post bond or to find legal representation.

Dostoyevsky said that if you want to learn about society, look into its prisons. When we look into American jails and prisons, we see a magnification of America's racism. We see a largely black population, shut out, ignored, and forgotten. We see a people whose suffering does not bring wholeness, only brokenness and resentment. Sound familiar?

The prosecution has presented evidence. Closing arguments are finished. The jury has returned to the courtroom. The judge asks the lead juror: "What say ye?" "Guilty as charged" comes the reply.

The judge responds: "All right then. In the matter of sentencing, I cannot put all of white America in jail. There are just too many of you. Besides, you are already captive to your own racism. So I am sentencing all of you to 3 things: Number one, you must confront your own racist attitudes and realize the ways you scapegoat others. Number 2, you must work toward abolishing prisons. Number 3, until such time as prisons are abolished, you must visit those in prison, and try to narrow this inexcusable gap between the races."

Court adjourned.

CHARLES CARNEY
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INTERVIEW WITH CHAIR OF CORRECTIONS LEGISLATIVE COMMITTTEE, REPRESENTATIVE WILLIAM M. LEAR, JR.

What are the three biggest problems facing Corrections?

(a) **Overcrowding**, which will probably worsen rather than get better in the future.

(b) **Aging facilities** in need of upgrading and/or closure.

(c) **Morale problems and high turnover** among Corrections employees.

What has the Corrections Cabinet been unable to do because it lacks the money?

The Corrections Cabinet has been unable to get ahead on any of its major problems. It has been unable to build and operate new facilities because of budgetary shortfalls. It has been unable to provide adequate pay (including hazardous duty pay), appropriate retirement benefits, and sufficient staff. It has been unable to upgrade its existing facilities on a timely basis. Without a substantial infusion of new dollars, the Corrections Cabinet will face an ever-worsening overcrowding situation in which poorly trained, poorly motivated, poorly paid personnel are asked to control ever greater numbers of more hardened criminals in inadequate facilities. We could well be faced in the years ahead with prisoner turmoil like we have seen in other states, as well as court-ordered release of inmates not otherwise eligible for parole simply to meet court-established prison capacity limits. No responsible Kentuckian wants to see these things happen. For that reason, it is absolutely critical that we insure adequate funding to meet prison operations and construction needs today, and that we take sensible steps which should ease some of the pressure which is currently pushing prison population growth.

Is Corrections in crisis?

Yes, Corrections is in a crisis state, second only to education in its degree of severity and potential negative impact for our state.

William M. Lear, Jr.

What is the Corrections plan for Kentucky?

The Corrections Cabinet plan calls for the construction and leasing of as many as 3,000 additional prison beds over the next biennium. Unfortunately, because of timetables for prison construction, even if new beds were authorized today, we would be lucky to see them on-line before 1991. The Corrections Cabinet has been working with our committee to develop legislation which should help to ease the overcrowding situation somewhat. These include increased emphasis on alternative sentencing, intensive supervision probation, intensive supervision parole, and uniform release dates. Through the work of our committee, I believe the Corrections Cabinet is beginning to formulate a more balanced approach to dealing with the crisis.

How has the Corrections policy changed under the current administration as compared to the past administration?

I believe the policy has changed in that the Corrections Cabinet is now willing to look at the problem on a larger scale and a longer term basis. In the past, the approach has been to look at the issue on a short term prison-by-prison basis. Today, Corrections is looking at the situation from a 10 to 15 year perspective, and is beginning for the first time to develop a construction schedule with reliance on state of the art construction techniques, as well as time and cost saving measures such as prototype design. They also appear to be taking into account both the needs and desires of local communities and the economic development potential for prisons.

How do you feel Kentucky rates compare to other states in terms of its Corrections' problems and plans?

Kentucky has fared favorably in comparison to other states with regard to the severity of its problem. For that reason, Kentucky has not done as much in the area of long-term planning as other states have. We have the opportunity today to plan before our situation gets as critical as it has in other states where courts have literally ordered Corrections officials to begin releasing inmates prematurely. If we act now, Kentucky can avoid that situation.

How is Kentucky going to be able to handle the vast increase in the number of prisoners in future years?

We cannot simply "build" ourselves out of the problem, but building and leasing of new beds must be a part of the solution. Other parts include reliance upon the non-incarceration alternatives mentioned above, provided such reliance is selective. We must continue to incarcerate violent offenders for appropriate sentences. At the same time, we have to begin to recognize that many non-violent offenders have a better chance of rehabilitation if we apply punishments to them other than incarceration.

Justice Leibson in his forceful dissent in *Commonwealth v. Reneer*, Ky., 734 S.W.2d 794, 805 (Aug. 6, 1987), the case concerning the so-called truth-in-sentencing law, stated: "It takes no visionary to foretell that the new sentencing procedure will (1) produce sentences that are, in many

cases, unduly harsh and abusive, (2) fatally overload an already overcrowded prison system, and (3) exacerbate the problem of the disparate sentencing. The impending calamity to our sentencing system (it will be no less) is not likely, it is inevitable." Do you agree? What can be done?

Justice Liebson was entirely correct in his prediction that the truth-in-sentencing law would add to our prison overcrowding problem. Whether the increment attributable to that particular statute is "fatal" will depend upon how the Legislature reacts in the 1990 Session. I also believe that he was correct in predicting that the new law would exacerbate the problem of disparate sentencing, but I do not necessarily agree that it has produced or will produce sentences that are unduly harsh and abusive. Prior to the passage of the truth-in-sentencing law, Kentucky had one of the lowest median lengths of incarceration in the country for adult felony offenders. The problem is not that the truth-in-sentencing law was unjustified, but that the Legislature has yet to take appropriate steps to deal with the prison overcrowding situation the new law helped fuel.

The ways in which the Legislature needs to deal with prison overcrowding have been detailed in my answers to previous questions. In addition to those measures, our committee has recommended adoption of a General Assembly rule change which would prohibit us from voting upon new proposals which would affect prison population, until we have received a "Corrections Impact Statement" which estimates that impact. Such information will not necessarily prevent adoption of new penal legislation, but it should force the General Assembly to take all of the consequences of that legislation into account before rather than after the fact.

The Chairman of the National Counsel on Crime and Delinquency, Allen Breed, gave a speech entitled "The State of Corrections Today: A Triumph of Pluralistic Ignorance" in which he says, "we have supported the principles of fairness, justice and humane treatment for those who are wards of the state, yet our daily practices have often been, and often are, at odds with the ideals given voice in oration." Do you agree? How can this be changed in Kentucky?

In the main, I do not agree with Mr. Breed. When I read statements such as his, I am reminded of my law partner who, after defending a client convicted in the Fayette District Court, remarked, "I went seeking mercy, and I got justice." My experience in the criminal courts some years ago (both as a prosecutor and as a defense attorney) taught me that virtually all of the persons who are convicted of crimes in this state get what they deserve.

There are, however, some notable exceptions. Our state remains one in which minorities appear to get stiffer sentences on average than non-minorities for similar crimes. By the same token, there are in our prison system today hundreds of persons suffering from mental disabilities (including mental retardation) for whom meaningful treatment and rehabilitation is not being given. Our jails and prisons are filled with a disproportionate number of drug and alcohol offenders who, if caught early and required to participate in rehabilitation/treatment programs, could be deterred from future criminal activity.

CORRECTIONS CABINET PRIORITIES

Here are some of the top priorities and mandatory additional appropriations sought by the Corrections Cabinet for the 1990-91 fiscal year:

Most of the requests from Corrections are for mandatory expenses to expand and hire staff for prisons and jails because court orders have capped populations at existing facilities.

Its requests call for $14 million during the biennium to pay overdue inmate medical bills and bills for holding state prisoners in county jails, and $25 million to expand the number of beds in local jails and in privately operated prisons.

The cabinet request also calls for $14 million during the biennium to start paying debt service for a 520-bed medium-security prison for men, a 430-bed medium-security prison for women and a 500-bed minimum-security prison for men.

- Lexington Herald Leader, Nov. 26, 1989

To deal with these populations, we should place (and our committee has proposed to place) additional emphasis on alternative sentencing, intensive supervision probation and parole (which emphasize drug and alcohol testing and treatment) in appropriate cases for non-violent offenders.

Breed also notes that (1) less than 50% of the people think prisons discourage crime, (2) most of the public thinks prisons are for rehabilitation, (3) 83% favor prisoners working, (4) 95% favor prisoners having a skill or trade before they are released, and (5) 2/3's are in favor of alternate sentencing rather than prison terms. How is the Ky. Corrections Cabinet and the Legislature responding to these public desires?

I take issue with the assertion that two-thirds of the people favor alternative sentencing rather than prison terms, at least as applied to violent offenders. In my experience, the vast majority of Kentuckians favor prison terms for such offenders, even if they do not think that prisons rehabilitate the convicted criminals.

Kentucky has a Corrections Industries Program, the purpose of which is to teach prisoners skills which can be used in gainful employment "on the outside." Unfortunately, few prisoners learn such skills. In many cases, this is because of the rather short length of time they spend in prison. The Corrections Cabinet also has a GED program which it promotes in an effort to improve educational levels.

As noted above, our committee has recommended passage of legislation proposed by the Department of Public Advocacy which will give increased emphasis to alternative sentencing as an appropriate disposition in criminal cases. It is my hope that more and more judges will avail themselves of this alternative.

As far as prisoners working, I find that most of the tasks people would have them do outside the prison walls are ones which are not going to improve the prisoners' employability after prison. In my opinion, cutting weeds, picking up trash, and other types of public-works jobs are appropriate tasks for prisoners, but we must not assign them with the mistaken impression they are going to teach employment skills or useable trades.

DPA, along with others, has implemented an alternative sentencing program in four areas of the state. From your perspective, how is this working and why are alternate sentences not used more by Ky. judges, and not encouraged or required more by the Ky. Legislature, especially if the public prefers that less costly approach?

As you can see from my previous answers, the Legislature is moving toward increased emphasis on alternative sentences. In my judgment, these have not been used significantly in the past because the public and the courts either have not accepted or been aware of their availability.

The new legislation which has been recommended by our committee should help change this situation.

From your experience and vantage point, what are the causes and cures of crime?

From my perspective, the principal causes of crime are poverty, lack of education, alcohol, drugs, and lack of parental care and nurturing. Each of these is a deeply rooted societal problem and all of them are intertwined. Unfortunately, no civilization in history has ever been able to eradicate any, let alone all, of these problems. For this reason, our law enforcement agencies (as well as our Corrections agencies) fight a battle they can never really win—because they deal only with the symptoms of these deeper problems and because by the time an individual comes to their attention, it is often far too late to deal with the real causes of the crime.

There is no simple cure for the causes of crime. Probably most important is education. If our Legislature is successful in affecting meaningful education reforms in the months ahead, we will do more to attack the causes of crime than if we doubled our police force and built 20 more prisons. Unfortunately, even if we are able to restructure and adequately fund our educational system, it will take years to see the effects of improved education in our adult population. As a result, we must continue to have an effective law enforcement system and to build enough prisons to house those for whom it is too late to get at the real cause.

How are we in this state really meeting the causes of crime for the person we convict and imprison?

For the reasons mentioned above, it is very difficult to deal with the real causes of crime in hardened adult offenders. We can, however, make substantial efforts to do the following: require drug and alcohol rehabilitation programs for convicted persons for whom drugs or alcohol were a contributing factor in their crime; require the attainment of a GED for non-high school graduates as a condition for probation or parole; require extensive drug and alcohol testing for those placed on probation or parole; increase efforts in correction industries to teach skills in demand in the outside world.

Do you feel Ky.'s PFO provisions are fairly selecting those who should serve extended terms?

For the most part, yes.

New York Judge Bruce Wright has written a book entitled *Black Robes, White Justice*. In it he discusses why the justice system does not work for blacks. In Ky., our nonwhite population is 8%. 32% of Ky. prisoners are nonwhite. Why do you think there is such a large disparity? Do you think racism plays a part in Ky.'s criminal justice system.

I do not know what role racism plays in the disparity you mention, but the numbers cause me grave concern. I do know that there is disparity in sentences as you move from jurisdiction to jurisdiction within Ky. The statistics also indicate such disparity between whites and nonwhites. Unlike some, I do not think judicial sentencing is the answer to this problem. Neither, in my opinion, is determinate sentencing. I believe the factors taken into account pursuant to the truth-in-sentencing law should have a bearing on punishment. Obviously, these will vary from defendant to defendant.

What I would like to see is the promulgation of relatively narrow sentencing guidelines. Whether the judgment within these guidelines is established by a judge or a jury is immaterial to me. As far as the decision whether or not to convict, the only reasonable solution is to insure that jury panels have a fair representation of minorities and that racial prejudice plays no role in the striking of potential jurors. This last matter is particularly difficult and troublesome, but it is essential if we are to have an even-handed justice system.

Finally, I believe the judiciary and the Attorney General's Office have responsibilities to track the records of courts and prosecutors in an effort to identify those jurisdictions in which minorities seem to be receiving disparate treatment. Reports of their findings should be made available to the public and, where appropriate, disciplinary action should be taken.

Any other thoughts?

In many ways, the Corrections system of our state has an impossible task. Having no means to deal with the causes of crime, no real input into the matters which affect prison population (judges, juries, prosecutors, parole boards and the criminals themselves determine that) and too little funding, it is charged with holding and rehabilitating an ever increasing and ever-more-hardened population of criminals. The Legislature, on the other hand, has responsibilities that touch upon all of the things which contribute to prison population growth. I am hopeful we will do a better job of shouldering that responsibility in the future than we have in the past. I believe the recommendations which have come out of our special committee give some indication that the Legislature is beginning to consider all of these elements. If we follow through on this initiative, our approach to corrections in the future will involve more than just increasing sentences and building prisons.

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More Prisons Do Not Mean Less Crime

If more prisons resulted in less crime, the United States might rank as the most crime-free nation of Earth, because we have a staggeringly high incarceration rate - right behind the Soviet Union and South Africa. Today, 244 of every 100,000 Americans are in prison. This is 10 times the imprisonment rate of the Netherlands, 7 times that of Japan and 4 times that of West Germany. Moreover, the U.S. prison population has doubled since the last decade (to more than 627,000) and is increasing 15 times faster than the general population.

However, as the prison population grows, so does the crime rate. In 1987, the prison population grew by 7.2%; in 1988, 7.4 %.

In 1987, the last year for which figures are available, incidents of crime went up 2%, according to the FBI. If those who believe more prisoners mean fewer crimes being committed were right, crime should have declined in something roughly equivalent to the increase in the prison population.-

Lexington Herald-Leader, May 30, 1989.

COST TO IMPRISON

In 1990, the average cost for imprisoning a Kentucky state inmate is $12,581.55. It costs $16,140.35 per year to house a prisoner at Kentucky's maximum security prison. The average cost of supervising a person on probation or parole is $ 1,018 per year.

THE PUNISHMENT ADDICTION

Twenty Years of Compulsive Punishment Lifestyles

Our culture suffers from a *punishment addiction.*

The simple statement sounds outrageous. We are so accustomed to thinking that we need to punish more, not less, that to claim our approach to punishment is compulsive and self-injurious can seem more than odd — it seems incongruous.

There are other problems with use of *addiction* to describe our approach to punishment. Most addictions have a physiological component in which withdrawal causes severe physical reaction. Moreover, addictions occur in organisms, and it certainly stretches systems theory to characterize a culture as an organism. It is equally problematic to equate punishment with a *substance* used by an organism. In addition, the term *addiction* itself is imprecise, and classification systems using addiction as a criterion often suffer from problems of reliability.

Despite these problems, I am using the term addiction advisedly to describe our approach to punishment in this culture for several reasons. First, we have, in recent years, developed a kind of disgust at being addicted. Interestingly, our repulsion at addiction stems both from the damaging effects which occur to systems dependent on substances and from revulsion at the very fact of being dependent. Thus, the term addiction has itself been stretched to apply to the generally self-destructive fulfillment of urges such as for sex or for thrills.

Admittedly, using the term *addiction* to characterize how we punish also has dramatic value. It is so popular these days to despise addiction that use of the term catches the attention. And so I choose the metaphor partly for its shock value, just as those treating addicts find they sometimes need to shock the patient with the absurdity and self-injuriousness of the behavior being exhibited.

The most important reason I choose this way of describing our punishment lifestyle is that the description works. Many if not most of the techniques developed to define and portray addictive behavior among individuals apply to our way of punishment. I use the phrase "punishment lifestyle" instead of the more common "punishment policy" because, in truth, we have no punishment policy in this culture. What we have is an attraction to punitiveness gone haywire, an obsession with giving pain to those who break our laws. The purpose of this paper is to describe that obsession.

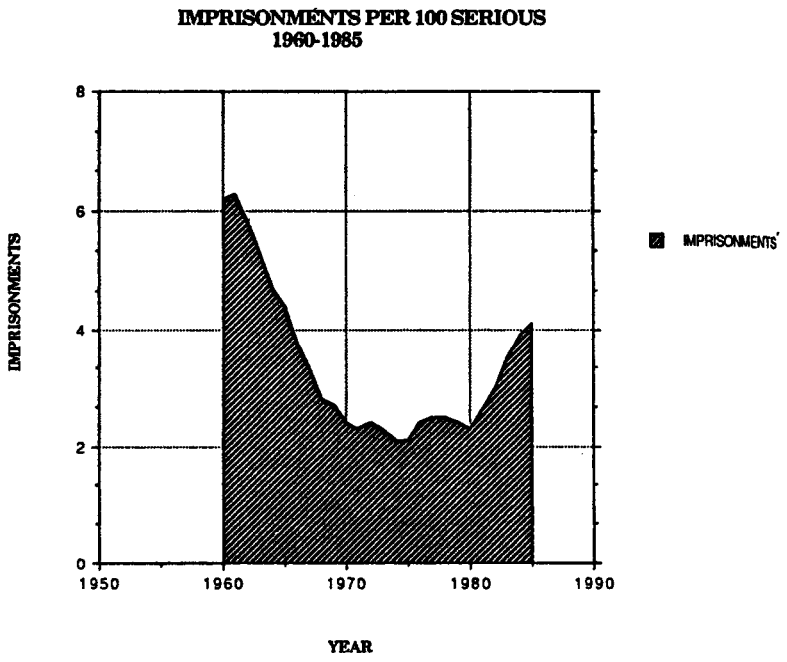
I am organizing the paper around the 12-question inventory that is used by Alcoholics Anonymous to determine the degree of a person's trouble with drinking compulsion. It is a simple checklist, and the AA leaders say that a "yes" answer to more than 3 or 4 of the questions indicates serious reason for concern; a "yes" to 7 or 8 means real trouble. When these questions are revised to ask about how our culture deals with punishment, we get a "perfect" score of 12 "yes" answers.

In using this AA instrument, I am sensitive to the fact that numerous people have begun a remarkable personal recovery by starting with a self assessment of the negative impact of their own drinking. I do not mean to belittle the significance of their experiences; indeed, I hope that a frank self-appraisal of our culture's punitiveness can serve as a similar first step toward recovery of a more realistic way of treating crime.

1) Have you ever decided to stop drinking for a week or so, but only lasted for a couple of days?

One of the most common and pathetic experiences in the construction boom of the 1980s has been the building of an overcrowded prison or jail. The scenario

Figure 1



is pretty standard. Political and justice system leaders alike decry the debilitating effects of a lack of jail or prison space. The situation is called a "crisis". Planners, architects and engineers are brought in on an emergency basis, and drastic plans are established for a significant expansion of facility capacity.

Even though the situation was called *critical*, somehow the system survives the minimum of 2 to 5 years it takes to plan, site, build and equip the new jail or prison. To a chorus of relief (often accompanied by a warning from system insiders that "even this will not be enough") the new facility opens. Within months or even days, it is itself at capacity. In many of the more celebrated instances, before the facility is more than a year or 2 old, it has been subject to litigation establishing a new capacity limit.

2) Do you wish people would mind their own business about your drinking — stop telling you what to do?

When cells fill, the political and system leadership often get busy blaming the judiciary for interfering with correctional practices. While only the hard-liners go public with their criticisms, it is not uncommon to hear the grumbling among the insiders: federal judges are unrealistic and meddlesome, hamstringing the system; prisoners get better treatment than ordinary citizens who obey the laws—on and on. If the courts would mind their own business, corrections could get on with punishment.

In fact, the passing of the "hands-off" doctrine has occasioned direct judicial involvement in the daily affairs of our nation's prisons and jails. Such considerations as food, clothing, heat, religious practice and medical care are the topics of litigation through court suits protesting the violation of the civil rights of prisoners. The courts were forced to become involved in the face of an abdication by correctional and political authorities of their obligation to implement the law.

It is no small irony that the punitive lifestyle of this country has reached the point where we complain when we are held accountable for obeying the law in how we hold others accountable for disobeying them.

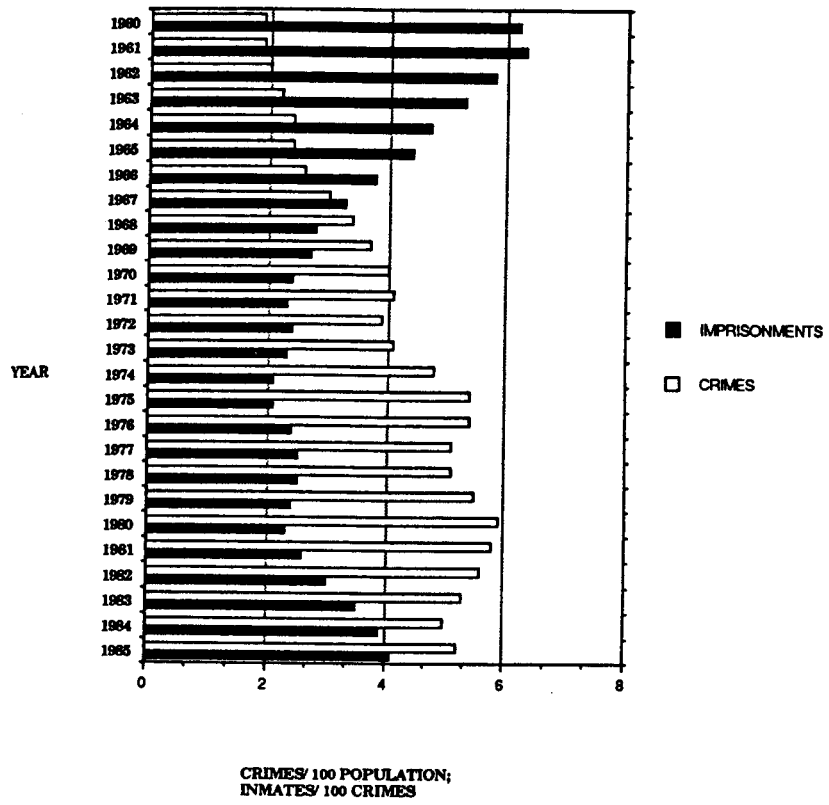
3) Have you ever switched from one drink to another in the hope that this would keep you from getting drunk?

The latter half of the 1980s has been the era of the "new" prison construction approach, and the emphasis has been on making the prison affordable in times when other social programs are not. Technical plans have been widely distributed to support the use of modular and popular jails which cost less per cell to construct. Two other popular approaches are the use of private contracts for incarcerative correctional services and the strategy of contracting for the new facility rental rather than floating a bond to build it. The most creative ideas have included renovating old school houses closed for lack of students, salvaging military battleships bound for the scrap heap and converting them to correctional institutions (reminiscent of the days of the "hulks" in the London harbor) and buying whole islands to remake into correctional colonies (as though Australia then and Rikers today are not enough).

The theme in all these new stratagems is the quick, cheap fix. It is hoped to get more prison capacity at less cost than a true prison and more rapidly than the regular channels provide. If the public consistently votes down prison bonds, contract with a private vendor for building and renting space. If a full scale new prison is fiscally out of the question, get a used one for less. By all means, avoid the fact that the system seems to want more punishment than it can afford.

Figure 2

CRIME RATES AND PRISON RISKS: 1960-1985



CRIMES/ 100 POPULATION;
INMATES/ 100 CRIMES

4) Have you had an eye-opener upon awakening in the past year?

If anything, the punishment rhetoric has accelerated in the most recent months, fueled by the national fervor to overcome another cultural addiction, that to drugs. It is a classic type of knee-jerk reaction to our horrification at the existence of crime, often brought to focus in reaction to specific incidents.

Despite overwhelming evidence as to its futility (and even likely countereffectiveness), Congress has passed a "get tough" law that creates a death penalty for drug "king-pins" and can make life miserable for recreational users, even of marijuana. There is virtually no evidence to support the imposition of these penalties as realistically likely to interrupt drug industry. If anything, the new laws will simply add to the misery resulting from drugs.

Just as the problem drinker thinks first of "a quick one" to help face morning hangover pain, we seem to turn immediately to more punishment as the solution to the pains of our social problems.

5) Do you envy people who can drink without getting into trouble?

When the public debate gets desperate, we always find ourselves comparing our situation to that of other countries. The left points out the familiar fact that we incarcerate at a higher rate than any other Western industrialized democracy. The punishment lifestyle of Scandinavia is pointed to, with admiration, as a model to which we should aspire.

The right, for its own part, has comparisons to make, as well. On the one hand, the destructiveness of our crime rates is starkly presented by the favorite comparison of murder rates in Detroit to homicide rates in Japan. The implication is that we need to be more like Japan, in which criminal deviance (even deviance generally) is little tolerated. The other graphic comparison is to some Middle-Eastern countries, where thieves have their hands removed and nearly everyone is subject to brutal punishment, including death. We should have a country more like them, it is stated, where crime rates seem low and people comply with conventional norms.

Yet what we have is Western culture, with a vast tradition of upset about the amount of crime, despite punitive excess. In England of the 1700s, crime was felt to be "rampant", even though the punishment of choice was death (Hughes, 1987). The pattern of concern that crime is too high and punishment too impotent has been a cultural trademark of America since the invention of the prison, accelerating during times of national stress, such as the height of immigration, but generally always present (Sherman and Hawkins, 1981).

Today, we continue that philosophy. One recent survey found that 1 in every 80 adults in the U.S. is under correctional supervision at any given time—including 1 out of every 45 Texans and better than 1 in 35 citizens in the District of Columbia (Austin and Tillman, undated). Federal statistics are even more stunning, estimating that in 1986, fully one out of every 55 adults was under correctional supervision (BJS, 1988). Everywhere, it is said this is not enough, and more is needed. We need to be like the really tough nations, the ones who take their crime seriously.

6) Have you had problems connected with drinking during the past year?

There is good evidence that, like the alcoholic whose body finally starts to succumb to the continual effects of the onslaught of alcohol, our punishment lifestyle has achieved a different level of significance in recent years. Scholars have argued that a type of homeostasis applies to punishment levels in the U.S., and statistics on imprisonment rates since the early 1900s appeared to bear them out. Recently, there is evidence that we have reached a change in the level of our use of punishment. Since the 1920s, we have had relatively stable levels of both rates and numbers of sentenced prisoners. Starting at the end of the 1970s, however, the trend appears to have destabilized and accelerated upwards under both measures. In the period from 1980-1986, there was a 43% increase in the number of admissions per 100,000 adults in the U.S. In the West, the rate of increase was 74%. This increase was not merely a product of more crime, however, for the rate of admissions per 1,000 selected, serious offenses increased 72%.

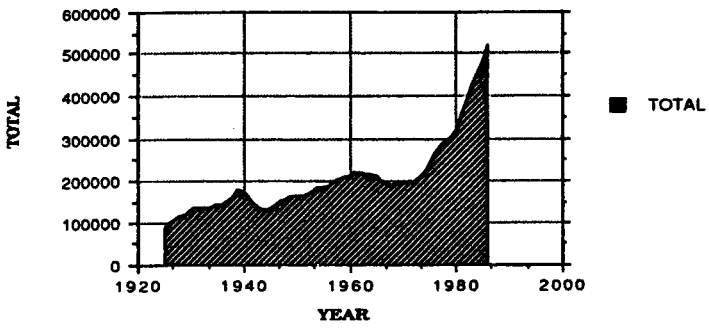
When the total effect of these changes on imprisonment levels is calculated, the result is stunning. The U.S. has always had a growing inmate population, partly because of a growing general population. From 1925 to today, the average annual percentage increase was 2.8%. The figure for the period from 1980-1986 is 8.8%, or over three times the average established over more than half a century.

7) Has your drinking caused trouble at home?

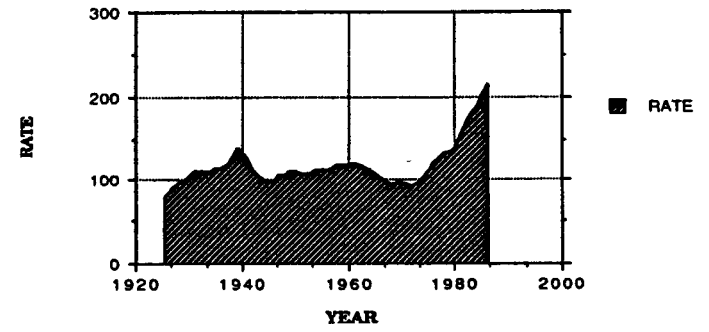
Perhaps the single, most unassailable fact is that our punishment lifestyle has left corrections in a shambles, has made the public disenchantment over the criminal justice process a central theme of our culture.

The complaints of judges, prosecutors and politicians are legion. Judges say they cannot impose the penalties they think are deserved because there is no room in prisons for the convicted who stand before them. Prosecutors complain that their best trial efforts are overcome by a system stuffed to the limits with bodies. The most familiar complaints come from corrections officials, who are frequently forced to release offenders early under "emergency" provisions. States with parole boards are lucky, since they have a

NUMBER OF SENTENCED STATE AND FEDERAL PRISONERS 1925-86



NUMBER OF SENTENCED STATE AND FEDERAL PRISONERS PER 100,000 U.S.POPULATION, YEAREND 1925-86



NOTE: Prior to 1977, prison reports were based on the custody population. Beginning in 1977, focus is on the jurisdiction population.

mechanism established precisely to release offenders — but the boards themselves resent the pressure.

The most creative systems have developed imaginative ways to cut down on prison populations. Work release, furlough and half-way houses are no longer correctional programs designed for offenders, they are corrections management programs established to make the system feasible. In the area of creative release systems, almost anything goes, so long as it gets the inmate out. South Carolina at one time had 13 different ways to be released from prison, including so-called "Christmas parole" in which if the parole date occurred within a set period of weeks after Christmas, parole could be given before December 25. (Presumably, Jews and Muslims were also eligible for this leniency.) In Oregon, a 5-year sentence, when imposed without a set minimum term, at one time amounted to 36 days time served, after all the credited time was calculated (most of the credited time is recent policy designed to empty cells to make room for the next entrant). In several jurisdictions, offenders who at sentencing get prison terms are given future dates at which they must show up in court to start serving them, once the space will be available.

The entire criminal justice system is rocked by the fact that levels of punishment are being promised to offenders when there is no capacity to deliver. Financial deficit in Washington, D.C. is matched by punishment deficit in the states.

Many people get to participate. The most recent inmate survey, conducted in 1982, concluded that 1 in every 450 adults was actually in prison at any given time. For Black males, the figure was 1 in 50! Surely even these amazing rates have increased since that time. The impact on our collective social experience is quite large. In 1979 (the last year for which data are available), 1 in 37 U.S. citizens could expect to experience a prison sentence in a lifetime— about 1 in 19 males and almost 1 in 5 Black males. Again, the age of the study suggests today's figures would be even higher. Our prisons are far from an unusual experience for our citizens.

Prevalence Estimates of the Precent of Population Expected to serve a First Sentence in Lifetime

Population Segment	Prevalence estimate: percent of population expected to serve a first sentence in lifetime, based on number and demographic characteristics of persons admitted to prison for the first time in their lives			
	in 1973		in 1979	
	Inmate Survey	Admissions Census	Inmate Survey	Admissions Census
Total*	1.306%	2.107%	1.713%	2.742%
Male*	2.453	3.954	3.182	5.123
White	1.491	2.404	2.053	3.305
Black	10.226	16.488	11.590	18.658
Female*	.166	.273	.251	.367
White	.110	.181	.138	.201
Black	.610	1.004	1.030	1.509

NOTE: Estimates applicable to all other races are not shown separately because of known inconsistencies between census and survey procedures for designating "other" race. Demographic charateristics (including the ordinal number of sentence admitted for) and, in the case of inmate survey prevalence estimates, number of persons admitted to adult State prisons are from the 1974 (Survey of Inmates of State Correctional Facilities and Census of State Adult correctional Facilities, 1974- ICPSR 7811, U.S. Dept. of Justice, BJS, Ann Arbor, MI: ICPSR, Fall 1983) and 1979 (Survey of Inamtes of State Correctional Facilites , 1979 - ICPSR7856, U.S. Dept. of Justice, BJS, Ann Arbor, MI: ICPSR, Fall 1981) surveys of inmates of State prisons. In the case of admissions census prevalence estimates, number of persons admitted to adult State prisons based on the inmate surveys are pro-rated to admission counts published in Prisoners in State and Federal Institutions on December31, 1971, 1972, and 1973 (National Prisoner Stastistics Bulletin No. SD-NPS-PSF-1, U.S. Dept. of Justice, NCJISS, Washington: USGPO, May 1975), and Prisoners in State and Federal Institutions on December 31, 1979 (National Prisoner Statistics Bulletin No. NPS-PSF-7, NCJ73719, U.S. Dept. of Justice, BJS, Washington: USGPO, February 1981). U.S. population estimates used to calculate prevalence estimates are from U.S. Census Bureau, Current Population Reports, Series P-25, NO. 917, Preliminary Estimates of the Population of the United States, by Age, Sex, and Race: 1970 to 1981, Washington: USPGO, 1982, Table1, pp. 11-12, 18-19. Also, inmate surveys provide under estimates and admissions censuses provide overestimates of the prevalence of imprisonment. In the case of inmate survey estimates for admission year 1979, correction for some of the underestimation can easily be made. Since the 1979 survey was conducted in October 1979, and therefore could not possibly have included all 1979 admissions, 1979 inmate survey prevalence estimates are based on data for 10 out of 12 months in 1979. To pro-rate 1979 inmate survey estimates to the full 12 months, they should be multiplied by 1.2.

*Includes persons of all other races.

8) Do you ever try to get "extra" drinks at a party because you do not get enough?

One of the myths of our punishment lifestyle is that we have to become increasingly more punitive because we are now so lenient. Our level of punitiveness in 1984 for persons convicted of serious offenses (first-time releases only) exposes the myth. The average sentence is over 5 years for all offenses taken together, 5 years for burglary, almost 10 years for rape, 20 years for murder and 9 years for robbery. Actual time served averages over 7 years for murder, over 4 years for rape, 3 years for robbery and 1.5 years for burglary. In virtually every category, males do more time than females and blacks more than whites— and if anything, we are more punitive now than we were in 1984.

For the reader who thinks these time-served amounts are short, I suggest a personal reflection. Think of what you were doing 3 years ago on this date. Then think of all the personal life events that have transpired since that date. These are all losses, events that would be missing from your life due to an average conviction for robbery. The purpose of the test is not to denigrate the act of robbery, but to show that punishment for it is not a slap-on-the-wrist.

When we think about the amount of punishment we give for offenses, we often get in one of 2 traps. We either are unduly influenced by the unusual case that makes the headlines, or we are shocked by the small percentage of the sentence that is actually served. In the former case, the mistake is plain: it is simply bad policy-making to allow unusual cases to establish rules for handling routine cases.

In the latter case, it is a mistake of interpretation. Since 1965, actual time served on first releases has remained relatively stable around 18-20 months. The sentence, however, has increased dramatically, from 33 months in 1965, to 40 months in 1975 to a whopping 65 months in 1985. By simple math, the proportion of time served has plummeted, from 61% in 1965, to 47% in 1975 to 30% in 1985. Although we are imposing about the same amount of pain on offenders sentenced to prison now as we were 20 years ago, our perception is quite different— and that perception exists because what has changed is our desire: we want to punish twice as much as before.

This escalating desire for punitiveness is reflected in the rhetoric and practice of our vaunted new "alternatives" to incarceration. They are very plainly "tough" in intent and by design. With electronic and chemical surveillance, 24-hour coverage and promises of strict enforcement, it is no wonder they often produce high rates of

program failure having little to do with new criminality (Petersilia, 1987).

9) Do you ever tell yourself that you can stop drinking at any time you want to, even though you keep getting drunk when you don't mean to?

Equal to the myth of leniency is the myth of crime rates. We tell ourselves that we have no choice about punishment because our crime rates are so high they require drastic action. In fact, we say, we must upgrade our punitiveness because the number of criminals is increasing and getting an upper hand.

But the relationship between crime and punishment is not directly rational, as shown by experience with crimes reported by victims over the last 20 years. The number of crimes fell by 22% in that time period, violent crimes by 18%, burglaries by nearly a third. Yet this is precisely the time period when our prison populations have skyrocketed.

The illogical nature of this relationship is illustrated by the political rhetoric each year when the new Uniform Crime Reports (UCR) come out. When numbers show an overall decrease, political leaders point with pride to the successfulness of our new policy of heavy use of incarceration, and urge continued escalation to produce continued reductions in crime. When numbers show an increase in crime, political leaders respond in a panic that we must get tougher to stem the obvious tide of crime. If the answer to UCR data is always to increase punitiveness, no matter what the result, why bother to measure crime, anyway?

One of the most outrageous versions of this strategy of linking our punitive needs to crimes was a recent publication by the National Institute of Justice called *The Costs of Decarceration* (Zedlewski, 1984). The document, which got wide coverage in the public media, argued (1) that the new increases in incarceration were due to the need to repair a lapse in our punishment policies from the late 1960s and early 1970s and (2) that these recent increases had been responsible for a drop in crime in recent years. Figure 1 was used to support the first proposition, Figure 2 the second.

Each of these figures is patently misleading. First, Figure 1 runs only from 1960 on, and there is no reason to think that the 1960 rate was the one against which rates must be compared for "normalcy." Unfortunately, the data are not available to test whether 1960-62 is aberrant or the period from 1966 to 1980. Equally troubling is the design of the figure, which bases the Y axis on a scale of 6. The casual observer will miss the fact that this number is really of a base of 100. While the chart as shown seems to indicate extreme drops and rises, the true numerical difference is from about 6 in the 60s to about 3 in the 70s, "recovering" (as Zedlewski would have us believe) to about 4 in the 80s. From an absolute numerical point of view, these are small changes. To show how small the shifts really are, imagine a reconstructed version of Figure 1 for which the Y axis is established as a 50 base — or one-half the 100 crimes — the shifts would seem far less remarkable.

Figure 2 is a similar distortion. It is meant to make the case that even small shifts in incarceration produce huge shifts in crime. Methodologists would point out that the model being proposed is a causal time series, and 25 data points are insufficient to establish a stable measure (McCleary, 1978). This is illustrated by simple logic. It is quite plausible that higher crime rates in the 1960s produced both prisoners and public reaction resulting in higher prison populations in the 1970s and 80s. Whether the alternative explanation that crime influences prison populations is better than the one offered by Zedlewski (that prison populations produce crime rates) is subject to debate. But you would not know of the debatable interpretation from Zedlewski, who is satisfied with claiming that high punishment levels reduce crime.

The claim was in fact remarkable. It was estimated that each offender incarcerated resulted in a new reduction of hundreds of crimes, due to unreported and unapprehended criminality. These estimates were used to conclude that it actually is cheaper to lock a person up than to leave him on the streets, due to the costs of crime and the criminal justice system.

There is something wrong with these estimates. Using them, Zimring and Hawkins (1988) have shown that the large increases in incarceration should have produced a complete elimination of all crime by 1988, if the estimates were accurate. It did not happen.

The point is not merely that the numbers are wrong, but that people in the National Institute of Justice feel such a need to promote such obviously ludicrous numbers, even when they are wrong. The need stems from the drive to justify the escalation in our punitive lifestyle. We need to convince ourselves that we need ever more and more punishment.

The public dissemination of Zedlewski's study must be compared with the refusal to disseminate a much more carefully crafted study showing that prison was, in the long run, no more successful at preventing crime than incarceration (Petersilia, 1986), even though the latter study appears to be much more consistent with our aggregate experience than the former.

10) Have you missed days of work or school because of drinking?

The costs of punitive lifestyle have been well documented, and appear to be increasing. The financial costs are substantial: a new cell costs about $75,000, and amortization may be 3 times that, per cell. Land purchase and preparation add another 25% or so over the building costs. Housing the offender may cost up to $25,000 a year. Even the most imaginative money-savers have trouble reducing these costs by more than 10-20%.

These big numbers are why so many state fiscal officers are worried. Correctional budgets are growing faster than ever before, faster than perhaps any other portion of the budget. Their percentage of the overall fiscal picture, never before a large piece of the pie, is growing rapidly. Money is diverted from schools, roads and health care to pay for our punitive lifestyle, and all signs are it will get worse before getting better.

There are other losses, especially the growing population under correctional control. The nearly .5% of the population that is in our prisons and jails, 1 in every 215 adults, produce no meaningful goods or services, pay no taxes and support no families. Each of the over 3 million citizens under supervision occupies the time and attention of correctional workers whose efforts would otherwise be directed elsewhere.

11) Do you have blackouts?

Sometimes, the punitive froth with which these issues are discussed leads to a kind of excess, the vehemence of which is surprising.

The cry for the death penalty is an example. Recently, 2 policemen in New York were killed during drug enforcement work. The predictable calls came for the death penalty for cop killers, rage serving as a basis for doing "something, because things are out of hand". We are urged to execute, even though the balance of evidence on the question shows that the death penalty is either ineffective or barely marginally so as a deterrent; even though the same deterrence arguments support the idea that the death penalty creates an incentive for criminals to kill cops to escape arrest; and even though

death is a daily hazard of the street criminal.

Is no level of punishment too repulsive to our punishment lifestyle? Why not take serious offenders, rip off their arms, and make them eat them, in an extension of the opening to Foucault's study of punishment (1979)? Have we lost all perspective and reason in our drive to give pain to criminals?

What we do to criminals is just as much a reflection on us as it is on them, and certain acts are repulsive even to us. Deterrence — "doing something" — is not the sole test of punishment, nor should it be. When we find ourselves hungering for punishments that disparage our own humanity, we have reached a limit we must recognize and accept.

12) Have you ever felt that your life would be better if you did not drink?

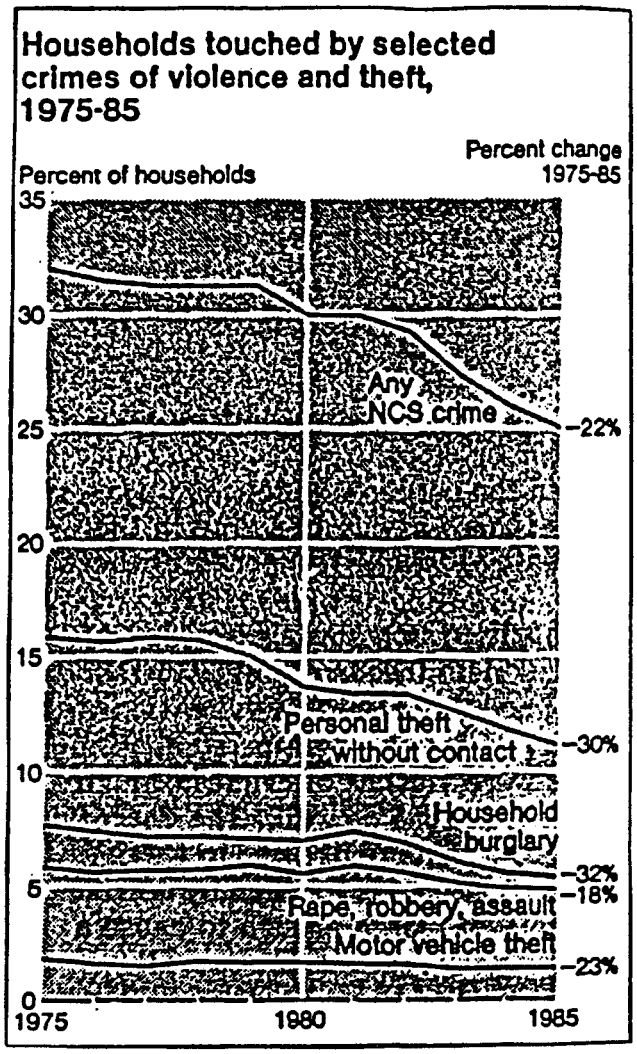
This is the unaskable question: what would happen if we forebore our punitiveness?

A good example of our need to think about alternative paradigms to our punishment lifestyle is the current rhetoric about drugs. There can be no question that the use of drugs in U.S. society is associated with a great deal of pain and suffering. But so is our "drug war." In any urban court, the trial calendar is dominated by drug related cases — not street crime, but drug sale and possession. The number of people in our prisons and jails for drugs is huge. The daily cost in tax dollars to fight this war is astounding. Soon, not only will the sellers be prosecuted, but the buyers and "recreational users" as well. Children are being urged to turn in their parents; families are being evicted from public housing- all in the name of the drug war. In the midst of this war, it has become forgotten that our original reason for getting involved in the war was to reduce human misery and ease drug pain. At some point, we must ask if our punitive agenda creates more misery than it reduces.

Most public officials now recognize that we cannot build our way out of the prison crowding problem. Stated in another way, it is obvious we cannot punish our way out of a crime problem. We need to develop a different punishment lifestyle.

What if we began to emphasize crime prevention instead of crime control? What if we insisted that a punishment had to be the lesser in terms of pain and suffering when compared to the crime itself and to doing nothing? What if we developed a new commitment to working with offenders to develop their potential as citizens rather than eliminating it— not in the naive hope they'll respond, but with the real expectation that we can do better than merely to punish?

What if we changed our punitive lifestyle?



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WEST'S REVIEW

Linda West

KENTUCKY SUPREME COURT

CHARACTER EVIDENCE/JUROR MISCONDUCT/ SEPARATE TRIALS /REFUSAL TO STRIKE JURORS/ PEREMPTORY CHALLENGES

Turpin v. Commonwealth
36 K.L.S. 14 at 3
(November 30, 1989)

In this case, the Court held that there was no error in the admission of a two year old diary and letter, despite their remoteness in time from the charged offense, and the fact that they were written before the defendant met the victim, where the diary and letter reflected on motive and "state of mind."

There was no error in the trial court's refusal to declare a mistrial when a juror was arrested on a felony charge between the guilt and penalty phases of Turpin's trial. The Court rejected Turpin's contention that the juror should have been allowed to continue to sit because he had reason to curry favor with the prosecution "even though the Commonwealth indicated that it would be disqualified and a special prosecutor would be sought."

The trial court did not error in denying Turpin's request for a trial separate from her codefendant. "The decision of the trial judge in such a situation will not be reversed unless the reviewing court is clearly convinced that prejudice occurred...."

No error occurred when the trial court refused to strike three jurors for cause since the jurors were ultimately removed by peremptory strikes and no request for additional peremptories was made at that time. Neither was there any error in the trial court's action in initially limiting Turpin and her codefendant to 12 peremptory challenges jointly.

Justice Leibson dissented on the grounds that the defendants diary entry and letter were evidence not of motive and state of mind, but of reprehensible character, and as such should have been excluded. Justice Leibson would also have reversed based on the denial of separate trials because the joint trial prejudiced Turpin by denying her the opportunity to introduce her codefendant's statement to police which tended to exonerate Turpin. Finally the dissenting opinion would have reversed because of the trial court's refusal to instruct on the offense of hindering prosecution as an alternative offense embodying Turpin's theory of the case and because Turpin was forced to exhaust her peremptory challenges to remove jurors who should have been struck for cause.

CONFESSION/ PRESERVATION OF ERROR/ AGGRAVATING FACTOR-MURDER FOR PROFIT

Brown v. Commonwealth
36 K.L.S. 14 at 4
(November 30, 1989)

In this appeal by Turpin's, *supra*, codefendant the Court held that the trial court acted properly when it refused to suppress statements made by Brown after receiving her Miranda rights but before she requested an attorney.

The Court additionally held that an issue regarding the questioning of witnesses was not properly preserved where objection was made by counsel for the codefendant and Brown's counsel did not join in. "The objection of an attorney for one codefendant will not be deemed to be an objection for the other codefendant unless counsel has made it clear that in making the objection it is made for both defendants."

Finally, the Court held that the jury was properly instructed on the aggravating factor that "the offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value, or for other profit." "The fact that the insurance policy on the victim's life was not directly payable to her does not mean that she did not intend to share in the proceeds."

TRUTH IN SENTENCING-MINIMUM PAROLE ELIGIBILITY

Boone v. Commonwealth
36 K.L.S. 14 at 5
(November 30, 1989)

At issue in this case was whether a defendant is entitled to introduce evidence at the sentencing phase that as a violent offender his minimum parole eligibility, pursuant to KRS 439.3401, is 50% of his sentence.

Boone argued that to place this evidence exclusively within the control of the prosecution denied him due process of law. The Court agreed. "It is our opinion that that portion of KRS 532.055(2)(a) giving the sole power to the commonwealth to introduce evidence of minimum parole eligibility to the Commonwealth is unconstitutional, and the privilege of introducing said evidence shall be extended to the defendant and the Commonwealth." Justice Leibson dissented.

DISCOVERY/ EVIDENCE-RELEVANCY/ VIDEOTAPE OF SCENE/ CONFESSION- VOLUNTARINESS/ COMMENT ON SILENCE

Milburn v. Commonwealth
36 K.L.S. 15 at
(December 21, 1989)

At Milburn's trial, a commonwealth ex-

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.

pert testified as to the likely distance between the defendant's gun at the time it was fired and the victim. Milburn contended that this evidence should have been excluded because it went beyond the scope of the expert's written report as provided to Milburn through pretrial discovery, and because the trial court had previously directed that prior to a scheduled deposition the expert of a summary of his testimony should be given the defense. However, the expert's report did state that lead residues were found on the victim's hair sample, which "serves the commonly recognized purpose of determining the proximity between the gun muzzle and the victim." Consequently, in the Court's view, the defense was on notice of the expert's conclusion.

The Court found no error in the admission of two knives found at the scene which were admittedly not used in the charged assault. "[t]he presence of the knives could have tended to negate appellant's self-defense claim, thus making them relevant evidence."

There was no error in admitting a videotape of the scene as opposed to photographs.

Milburn contended that his statements to the police made while he was receiving medical treatment for chest injuries and facial lacerations, and while he was intoxicated, should have been suppressed. The Court disagreed. "[I]n view of the thorough consideration given by the trial court and the nature of appellant's inculpatory statements basically denying involvement in the shooting, the trial court did not err in denying appellant's motion to suppress the statements."

Testimony by a police officer on cross-examination that, after giving some statements, Milburn invoked his 5th Amendment privilege was "invited" by the defense and was harmless in view of previous testimony that Milburn was willing to talk. Chief Justice Stephens, and Justices Combs and Leibson dissented.

DOUBLE JEOPARDY
O'Hara v. Commonwealth
Pearson v. Commonwealth
36 K.L.S. 15 at
(December 21, 1989)

The defendants contended that they could not be convicted of both assault and first degree robbery where the force used in the assault was also used to elevate the robbery offense to robbery in the first degree. The Commonwealth argued that the defendants could be convicted of both where the proof showed that the defendants were armed with a deadly weapon and that the assault was committed thereafter.

The Court did not address the commonwealth's argument since it found that the defendants could not have been convicted of first degree robbery based on their use of a deadly weapon because the indictment did not so charge. Instead, the indictment charged that the defendants committed first degree robbery when they used physical force and caused an injury. Thus, the assault committed on the victim merged with the robbery offense.

LINDA WEST
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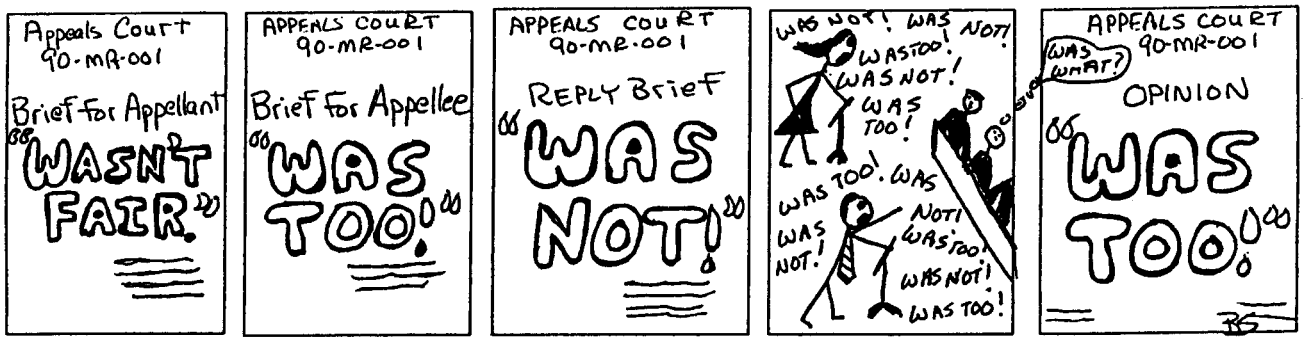
SUPREME COURT RULING COULD INCREASE LITIGATION AT PRISONS, OFFICIAL SAYS

FRANKFORT - The U.S. Supreme Court declined to hear the state's appeal of the ruling that women at the prison must receive an attorney's help with their appeals. One of the issues the state had appealed was whether courts, without finding past intentional sex bias, can order prison systems to offer female inmates the same court access that male inmates receive.

Inmates at the women's prison in Pewee Valley sued over conditions there in 1980. The suit alleged, among other things, that inmates lacked adequate access to courts because the law library was inferior to those available to male inmates at the Ky. State Penitentiary at Eddyville and the Ky. State Reformatory at LaGrange.

After a 4-week trial in 1982, U.S. District Judge Edward H. Johnstone ruled that the state had violated female inmates' equal-protection rights by not providing them the same court access as male inmates. He ordered state authorities to provide a library identical to those at the 2 prisons for men, to increase the hours women could use their prison library and to provide free legal help with the equivalent of at least a part-time attorney.

Jones said that actually would give female inmates more access to legal assistance than men had. Only that part of Johnstone's order calling for legal help was appealed. It was upheld by the 6th U.S. Circuit Court of Appeals on April 10. In the appeal a attorneys for the prison officials argued that the hiring of a part-time attorney should not be required. "There is no justification," the appeal said. "There is no formula...(to) measure the success of this part-time attorney. There are no limits to the assistance provided by counsel." The appeal was supported in a "friend-of-the-court" brief submitted by 13 states. Associated Press



NOT TO BE PUBLISHED
By Bill Spicer

KENTUCKIANS OPPOSE CAPITAL PUNISHMENT

A statewide poll of Kentucky citizens was conducted under the direction of Linda Burgess of the University of Louisville's Urban Research Institute. The results and conclusions reveal that Kentucky citizens do not embrace killing its fellow citizens when presented with real circumstances.

The survey was funded by Amnesty International, U.S.A. The design of the questions and the analysis of the results was conducted entirely under the direction and supervision of the authors. A summary of the results and our conclusions follow.

46% OPPOSE DEATH PENALTY; 36% FAVOR IT

46% of Kentucky citizens oppose the death penalty as a punishment option if life without parole is an available penalty. Only 36% of Kentuckians want a death penalty even if there is a sentence of life without parole. 18% remain unsure.

ONLY 69% FAVOR DEATH IN THE ABSTRACT

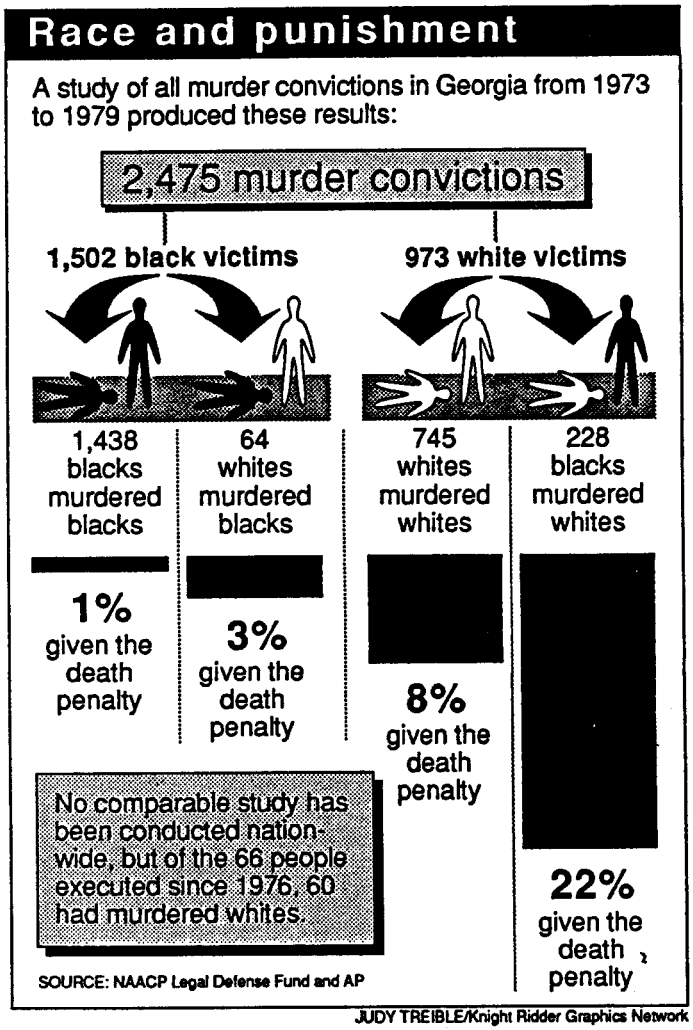
Even when Kentuckians are presented with the unreal issue of whether they favor capital punishment in the abstract (without life imprisonment as an option) only 69% favor the death penalty.

KENTUCKY LOW COMPARED TO OTHER STATES

Compared to 6 other statewide death penalty surveys conducted under the sponsorship of Amnesty International, the 69% support for capital punishment in the abstract in Kentucky is lower than 5 of the 6 states, and 15% lower than in Florida:

ABSTRACT SUPPORT FOR DEATH PENALTY

Florida	84%
Oklahoma	80%
Georgia	75%
South Carolina	72%
New York	72%
Kentucky	69%
Nebraska	68%



When presented with concrete situations and real alternatives, support for the death penalty in Kentucky falls significantly.

MENTALLY RETARDED SHOULD NOT BE KILLED

Only a small minority of Kentuckians favor the death penalty in cases where the offender is mentally retarded (15.3%) or has a history of mental illness (28%).

PHYSICALLY OR SEXUALLY ABUSED SHOULD NOT BE KILLED

Most Kentuckians do not support capital punishment where the offender has a history of severe physical or sexual child abuse (33% in favor).

KIDS SHOULD NOT BE KILLED

Only a minority of Kentucky citizens, 42%, favor killing kids.

DRUGGED KILLERS

If the offender is under the influence of either alcohol or drugs at the time of the offense, a majority of Kentuckians (approximately 66%) favor capital punishment.

RACISM CANNOT BE PART OF DEATH PROCESS

Over 92% of Kentucky citizens feel that death penalty laws should guarantee that there is no racial bias in the application of the death penalty.

GENERAL VIEWS ON THE DEATH PENALTY

Items and Frequency Distributions

1. In general, would you say you are strongly against, somewhat against, strongly in favor of, somewhat in favor of the use of the death penalty for persons convicted of murder, or are you not sure?

Strongly Against	9.7%
Somewhat Against	6.5
Not Sure	14.7
Somewhat in Favor	26.4
Strongly in Favor	42.7

2. If it were possible to sentence a person convicted of murder to life in prison with no possibility of parole rather than sentencing the person to death, which of these two penalties would you favor, or are you not sure?

Life Without Parole	46.0%
Not Sure	18.1
Death Penalty	35.9

3. What if the convicted person was a youth under 18 years of age?

Strongly Against	19.7%
Somewhat Against	16.4
Not Sure	21.9
Somewhat in Favor	20.9
Strongly in Favor	21.1

4. What if the convicted person was mentally retarded?

Strongly Against	32.8%
Somewhat Against	24.4
Not Sure	27.5
Somewhat in Favor	9.0
Strongly in Favor	6.3

5. Death penalty laws should guarantee that there is no racial bias in the application of the death penalty.

Strongly Disagree	0.9%
Somewhat Disagree	1.0
Not Sure	5.9
Somewhat Agree	6.4
Strongly Agree	85.8

6. Some people feel that it is unfair for minorities to be tried and sentenced to death by an all-white jury.

Strongly Disagree	16.7%
Somewhat Disagree	19.4
Not Sure	19.1
Somewhat Agree	24.3
Strongly Agree	20.6

7. Court appointed lawyers should meet professional guidelines (related to training and experience) to ensure they can provide an adequate defense for poor people facing the death penalty.

Strongly Disagree	1.9%
Somewhat Disagree	1.5
Not Sure	8.5
Somewhat Agree	17.6
Strongly Agree	70.5

8. Prosecutors are not required to seek the death penalty in every possible case. Would you favor or oppose the idea of requiring a review of the prosecutor's decision to seek or not seek the death penalty for any eligible case?

Favor	62.6%
Don't Know	21.1
Oppose	16.3

9. Many people are willing to serve on juries in murder cases but are unwilling to impose the death penalty. Do you think these people should or should not be prohibited from sitting on juries where the death penalty is being considered?

Yes, should be prohibited	52.7%
Not Sure	13.1
No, should not be prohibited	34.2

10. What if the murder was committed by two people and one offender received a lighter sentence in exchange for testifying against the person you are now sentencing? Would you be... (concerning a death sentence)

Strongly Against	38.9%
Somewhat Against	17.6
Not Sure	17.3
Somewhat in Favor	13.1
Strongly in Favor	13.1

11. Now, I know it is hard in a survey like this, but just for a moment, I'd like you to imagine that you are a member of a jury. The jury has found the defendant guilty of murder beyond a reasonable doubt and now needs to decide about sentencing. You are the last juror to decide and your decision will determine whether or not the offender will receive the death penalty.

How would you feel about imposing the death penalty if the case involved more than one victim?

Strongly Against	9.4%
Somewhat Against	3.6
Not Sure	12.7
Somewhat in Favor	12.1
Strongly in Favor	62.1

12. What if the murder was premeditated and deliberate?

Strongly Against	6.4%
Somewhat Against	4.8
Not Sure	7.6
Somewhat in Favor	8.0
Strongly in Favor	73.2

13. How would you feel about imposing the death penalty if the convicted person was a woman?

Strongly Against	11.0%
Somewhat Against	5.0
Not Sure	21.4
Somewhat in Favor	17.7
Strongly in Favor	44.9

14. What if the convicted person had a history of mental illness?

Strongly Against	21.1%
Somewhat Against	21.6
Not Sure	29.4
Somewhat in Favor	17.3
Strongly in Favor	10.5

15. What if the convicted person had been severely physically or sexually abused as a child?

Strongly Against	13.0%
Somewhat Against	21.2
Not Sure	26.5
Somewhat in Favor	20.4
Strongly in Favor	18.9

16. What if the murder was committed while the convicted person was under the influence of alcohol?

Strongly Against	11.1%
Somewhat Against	9.2
Not Sure	13.6
Somewhat in Favor	19.9
Strongly in Favor	46.2

17. What if the murder was committed while the convicted person was under the influence of drugs?

Strongly Against	10.6%
Somewhat Against	10.1
Not Sure	13.3
Somewhat in Favor	17.0
Strongly in Favor	49.0

Only 36% of Kentuckians believe that it is fair for minorities to be tried and sentenced to death by all white juries.

ADEQUATE LEGAL HELP ESSENTIAL IN CAPITAL CASES

Approximately 88% of Kentuckians believes guidelines should be established to ensure that court appointed attorneys can provide an adequate defense for poor people facing the death penalty.

UNLIMITED PROSECUTOR DISCRETION QUESTIONED

About 63% of Kentucky citizens want the prosecutorial decision to seek the death penalty subjected to review.

PROSECUTOR DEALS WITH CO-DEFENDANT

Only about 27% of Kentuckians were in favor of capital punishment when one of two offenders has avoided the death penalty by testifying against the other (when both are equally responsible for the homicide).

JURY SELECTION

About 53% of those sampled believed that the jury selection ("death qualification") process in capital cases in Kentucky was fair.

RACE AND CONGRESSIONAL DISTRICT

The poll reveals that support for the death penalty also varies by race and congressional district in Kentucky. Among nonwhites, opinion concerning the death penalty in the abstract was evenly split (50% in favor) while a majority of whites (over 70%) support capital punishment in the abstract. Within congressional districts, support for the death penalty in the abstract ranges from a low of about 59% (District 5) to a high of approximately 79% (District 1).

PREMEDITATED AND MULTIPLE KILLINGS

Regarding the circumstances surrounding the offense, a clear majority of Kentuckians support the use of the death penalty in cases where the homicide was "premeditated and deliberate" (81.2%) and when the case had multiple victims (74.2%).

CONCLUSION

Kentucky citizens do not wholeheartedly embrace capital punishment. Only when presented with an unreal, abstract situation (the death sentence without a punishment of life without parole) or with the very most severe killings (a drugged offender or a multiple killer) do they want death as a sentence option.

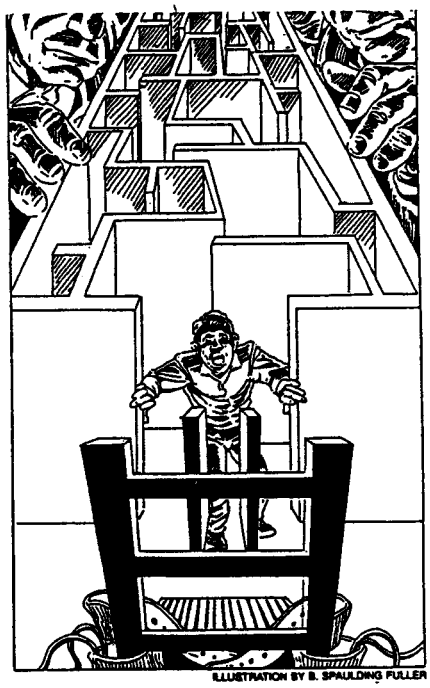


ILLUSTRATION BY B. SPAULDING FULLER

Dramatically few Kentuckians want to kill kids, the mentally ill, or the sexually or physically abused capital client. Only 36% of Kentuckians want death as a possible penalty for a fellow citizen when life without parole is a sentencing option.

How a sentence is imposed is critical to the people of this state. Kentuckians refuse to favor death when race plays a part in the process. The citizens of Kentucky want capital clients to have adequate counsel, and they do not want prosecutors to have unbridled discretion to seek death. When a prosecutor cuts a deal with one capital offender, Kentuckians do not think it fair to sentence a co-defendant to death.

Interestingly, a slight majority of the people of this state believe that current Kentucky jury selection procedure are fair. This may be due, in part, to the individualized, sequestered lengthy voir dire conducted by most all judges in capital cases in Kentucky.

Of course, these findings do not reflect how attitudes shift concerning the use of capital punishment, in other words, how and under what circumstances do opponents (or supporters) of capital punishment change their views. This question will be considered at a later date.

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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 of inmates who have committed suicide	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
Percentage of death row inmates who are black	20%
Percentage of Kentucky population that is black	7%
Number of black prisoners who were sentenced by all white juries	1
Number of persons sentenced to death in Kentucky and later proven innocent	1

6TH CIRCUIT HIGHLIGHTS

Donna Boyce

BRUTON AND *BENCH* TRIALS

The *Bruton* rule that a non-testifying co-defendant's confession implicating another defendant must be excluded at a joint trial does not apply in bench trials according to the Sixth Circuit in ***Rogers v. McMackin***, 884 F.2d 252 (6th Cir. 1989). The Court found *Bruton* [391 U.S. 123 (1968)] to be concerned with jury trials, and not bench trials, and to rest on the proposition that juries cannot be trusted to consider a non-testifying co-defendant's confession solely in relation to that defendants' case. Unlike the District Court, which had granted Rogers habeas relief, the Sixth Circuit did not believe that *Lee v. Illinois*, 476 U.S. 530 (1986) made *Bruton* applicable to bench trials. In *Lee*, the Supreme Court reversed because the trial judge expressly relied on portions of the co-defendants' confession as substantive evidence against the defendant, and the co-defendants' confession did not bear sufficient independent indicia of reliability to rebut the presumption of inherent unreliability.

DRUG TESTING OF PRISON INMATES

In ***Higgs v. Bland***, 888 F.2d 443 (6th Cir. 1989), the Court held that a positive result of a urinalysis drug detection test (EMIT) may be used as the sole basis for disciplining a prison inmate for drug use. Under *Superintendent v. Hill*, 472 U.S. 445 (1985), the standard for evaluating whether a prison disciplinary proceeding has denied a prisoner due process is whether "some evidence" supports the disciplinary action. The Court found the EMIT test to be sufficiently reliable so as to constitute "some evidence" from which the prison adjustment board could conclude that a tested inmate was guilty of drug use. The Court noted that a test which produced frequent false positive results could fail to constitute "some evidence" under the *Hill standard.*

JUDICIAL MODIFICATION OF PRISON CONSENT DECREE

The Sixth Circuit considered the appropriate standard for modifying a consent decree entered in the context of prison reform litigation in ***Heath v. DeCourcy***, 888 F.2d. 1105 (6th Cir. 1989). The Court agreed with the inmate - appellants that a more relaxed standard should apply than the "grievious wrong evoked by new and unforeseen conditions" standard used in "commercial" consent decrees regulating business practices. The Court noted that prison consent decrees affect more than the rights of the immediate litigants; they impact on the public's right to the sound and efficient operation of its prisons. Accordingly, the Sixth Circuit held that in order to modify a prison consent decree a court need only identify a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree. The Court stated that a modification will be upheld if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties.

NO MANIFEST NECESSITY FOR MISTRIAL

In ***Taylor v. Dawson***, 888 F.2d 1124 (6th Cir. 1989), the Sixth Circuit found no manifest necessity for a mistrial declared on the prosecution's motion and, thus, held Taylor's retrial to have been barred by the Double Jeopardy Clause. Taylor has been tried 3 times for killing her abusive boyfriend. At the first trial, the jury aquitted her of murder but found her guilty of first degree manslaughter. That conviction was reversed by the Kentucky Court of Appeals because Taylor's credibility had been improperly impeached with a misdemeanor conviction. The second trial ended in a mistrial at the prosecution's request due to the introduction of the decedent's prior bad acts directed towards others but known to the defendant. The third trial ended in Taylor's conviction.

In an in-chambers hearing conducted before the jury was impanelled in the second trial, the prosecution moved *in limine* to bar any mention of the decedent's prior bad acts. The court did not grant the prosecutor's motion *in limine* and, in the course of a discussion of the decedent's drug use, the court cut the prosecutor off by saying he could make his objections when defense counsel introduces such evidence. In the context of a discussion of the decedent's prison record and parole status, the court reiterated that it would rule when the issue arose during trial.

During trial, the court permitted references to decedent's violent acts towards others during defense opening the testimony of another girlfriend of the decedent and the testimony of the defendant. When the defendant made an unsolicited, incomplete reference to the defendant's escape, the court sustained the prosecutor's objection and declared a mistrial, citing counsel's repeated violation of its order not to mention prior criminal acts.

The Sixth Circuit viewed this precipitous declaration of a mistrial as erratic and noted that the court's actions could be described as irresponsible if not irrational. The Sixth Circuit pointed out that the court had not warned defense counsel that further testimony about the decedent's bad acts might result in a mistrial and expressed amazement that a mistrial was declared over testimony that is ordinarily admissible. The Court held that the record in this case did not demonstrate a manifest necessity for the mistrial.

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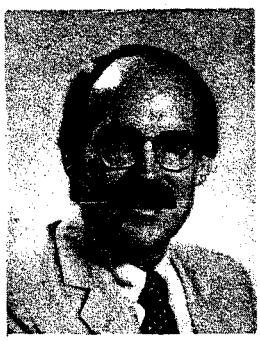
PLAIN VIEW

Search and Seizure Law



Ernie Lewis

A police officer hears that a known bootlegger was on his way from a wet area to a dry area in a car sitting "low." Is there enough to warrant the stopping of the car by the officer? He did stop the car, and found what he was looking for. However, in a two to one opinion, the Court of Appeals reversed, saying that the evidence seized should have been suppressed by the trial court. ***Berry v. Commonwealth***, Ky. App., __S.W.2d.__(Nov. 17, 1989).

In a decision by Judge Miller, the Court rejected the Commonwealth's position that the police officer had articulable suspicion under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (19968) to stop the car and investigate these suspicious circumstances. *Graham v. Commonwealth*, Ky. App. 667 S.W.2d 796 (1983) was distinguished by noting *Graham* involved a tip that a crime was occurring, "a far cry from the mere suspicion that low-riding car may in fact be stocked with alcohol even by a known bootlegger." Notably, the Court relied upon the increasingly important Section 10 of the Kentucky Constitution.

From the Kentucky Court's analysis of bootlegging law, we appropriately move to two Sixth Circuit drug cases. In ***United States v. Baxter***, 18 SCR 24 (Nov. 20, 1989), a police officer wrote an affidavit in which he misstated the nature of the informant. The reality was the officer himself was the source of the information. When the officers executed the search warrant at defendant Baxter's home, an altercation broke out. Eventually cocaine and valium were found. The 6th Circuit affirmed the district court's finding that there was insufficient evidence to constitute probable cause under *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). However, the Court rejected the good faith exception in this case due to the fact that the officer made a "knowing misstatement" about where he had obtained his information, an exception to *Leon v. United States*, 468 U.S. 897 (1984). The case was remanded to the district court for a determination of exigency due to the altercation that broke out during the execution of the warrant.

United States v. Silverman, 18 SCR 24 (Nov. 21, 1989), featured an airport encounter between the DEA and a man completing a flight from Miami to Detroit. (Under these facts, O. J. Simpson would have been stopped every time.) He went down the stairs "rapidly," made "hurried" phone calls, walked "rapidly" through the terminal. Based upon these facts , the DEA agents approached Mr. Silverman as he drove from the airport. The Court disregarded his testimony that agents blocked his car as he drove away. He got out of his car, talked to the agents, and consented to a search of his duffel bag. The search contradicted his earlier statements, and also contained narcotic transaction records. They then patted Silverman down, and found a package on his waist containing cocaine.

The Court seemed to have little problem affirming this search, which is troubling in itself. First, the Court holds the 4th Amendment was not implicated in the initial encounter, that under *Michigan v. Chesternut*, 108 S.Ct. 1975 (1988) a reasonable person would have felt free to leave. The Court further found the search of the duffel bag to be consensual. The Court then strained to find that the narcotics transaction records gave the officers probable cause to pat Silverman down. Relying upon *United States v. Moore*, 675 F.2d 802 (6th Cir. 1982), the court held that there is probable cause "to conduct pat-down searches of suspected drug carriers when documents suggesting a drug transaction are found in the suspect's possession and evidence discovered by the agents contradicts statements made by the suspect."

Finally, *cert.* has been granted by the United States Supreme Court in *Illinois v. Rodriguez*, 46 Cr.L. 3057 (Nov. 1, 1989), that may become an important case. The Court will be looking partially at the question of whether good-faith reliance upon a girl friend's authority to consent to enter should be an exception to the warrant requirement when consent was invalid under state law. Readers will recall that *Leon* has yet to be extended in federal court to warrantless searches. One wonders whether this will be the vehicle chosen for such a move. Makes one appreciate Section 10 all the more.

SHORT VIEW

State v. Jacumin, Ten., 46 Cr.L. 1122 (10/9/89). In an important decision, the Tennessee Supreme Court has joined Washington, Massachusetts, New York, and Alaska, among others, in rejecting the *Illinois v. Gates*, 462 U.S. 213 (1983) totality of the circumstances standard for gauging the existence of probable cause to issue a warrant. Tennessee will continue to follow the veracity/basis of knowledge requirements of *Aguilar/Spinelli*. *Gates* was viewed as nebulous, permissive and impermissibly shapeless. Unfortunately, Kentucky was quick to adopt the *Gates* standard. *See Beemer v. Commonwealth*, Ky., 665 S.W.2d 912 (1984).

Tillman v. Coley, 46 CR.L. 1126 (11th Cir. 10/18/89). A police officer with probable cause against someone may not arrest a person to resolve a question of identity, according to the 11th Circuit. Thus, the officer in such a case could not rely upon qualified immunity to defend against a 42 USC 1983 action brought by the person illegally arrested. "[No] reasonable law enforcement officer may conclude that an

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.

arrest warrant may be obtained and an arrest made for the sole purpose of identifying a suspect."

Higbie v. State, Texas Ct. Crim. App., 46 Cr.L. 1145 (10/11/89). A roadblock set up near 3 bars at closing time in order to check for drunk drivers violated the 4th Amendment, according to the Texas Court of Criminal Appeals, which also cast doubt upon the constitutionality of all DUI roadblocks. "A DWI roadblock is in direct conflict with *Terry*'s requirement of specificity — individualized suspicion consisting of articulable and objective facts that criminal activity is afoot . . . *Terry* and its progeny, however, do not permit 'hunches' to be the basis for stopping everyone at a particular point so as to subject each individual citizen to an open ended investigation." The opinion is based in strong measure on the rights to privacy, to travel, and most fundamentally the right to be left alone.

Reynolds v. State, Texas Ct. App. 1st Dist., 46 CR.L. 1152 (10/19/89). A mother had told her children to stay away from her bedroom when she was out of the house. The children later discovered drugs in the bathroom. Upon urging by her ex-husband and their father, the children called the police and allowed the police into the house to search the bathroom where drugs were found. The Court held under the circumstances that mother had a reasonable expectation of privacy in her bathroom, and that her 12 year old son was incapable of waiving those rights for her;

State v. Scheer, Ore. Ct. App., 46 Cr.L. 1152 (10/25/89). When a person in Oregon fails to produce a driver's license upon request, a completed crime occurs. Thus, a police officer has no right to conduct a search for the license. Nor was the search justified under the incident to a lawful arrest exception, because the search was unrelated to the crime. Thus, a weapon and marijuana found during the search should have been suppressed;

People v. Jackson, 446 N.W.2d 891 (Mich.Ct. App. 1989). A warrant authorizing the search of any person at a certain address fails the particularity requirement; thus, a person arriving at the house during the execution of the search warrant was illegally searched under the rule established in *Ybarra v. Illinois*, 444 U.S. 85 (1979);

State v. Hammett, Mo. Ct. App., 46 Cr.L. 1197 (11/7/89). Multiple hearsay which is uncorroborated is insufficient even under *Gates* and *Leon*, according to the Missouri Court of Appeals. Here, an affidavit alleged that the defendant's mother told "another lady" who told the informer's wife who told the informer who told the police officer. Nothing in the affidavit spelled out either the credibility of the informer or the basis of his or her knowledge. Further, even under *Gates*' totality of the circumstances standard, the warrant failed. Finally, the Court concluded that the warrant was so lacking in indicia of probable cause that the good faith exception did not apply;

State v. Bigelow, 447 N.W.2d 899 (Minn. Ct.App. 1989). A car was pulled over for speeding. When the officer illuminated the front seat, a marijuana pipe was observed. Bigelow, a passenger in the back seat, was asked to get out of the car. A search of his duffel bag in the back seat revealed a bag of marijuana. That search was illegal. *United States v. Ross*, 456 U.S. 798 (1982) did not apply because there was simply no probable cause as to Bigelow or his luggage.

State v. Leach, 782 P.2d 1035 (Wash. 1989). The Washington Supreme Court held that "[w]here the police have obtained consent to search from an individual possessing, at best, equal control over the premises, that consent remains valid against a cohabitant, who also possesses equal control, only while a cohabitant is absent." *United States v. Matlock*, 415 U.S. 164 (1974), which had established that a cohabitant can consent to a search of the premises shared with a nonconsenting but absent person, was distinguished in this case, where Mr. Leach was present at the time the search was conducted;

State v. Mische, N.D. Sup. Ct., 46 Cr.L. 1245 (11/20/89). We sometimes forget that when there is probable cause to believe that an individual is selling drugs, that does not necessarily mean that there is probable cause to search his house. Here, when a search of a particular place for which there was probable cause, turned up nothing, a warrant was issued to search the defendant's house, for which there was no probable cause. That was merely a fishing expedition, according to the Court, and thus drugs found during the search should have been suppressed;

State v. Harms, Neb., 46 CR.L. 1246 (12/1/89). Evidence seized unlawfully by federal authorities is not admissible in state court in Nebraska. The Court considered and rejected the so-called "reverse silver platter" doctrine. It should be remembered that in Kentucky that evidence seized by federal authorities lawfully under federal standards but unlawfully under state standards is admissible in state court. *Basham v. Com.*, Ky., 675 S.W.2d 375 (1984), *cert. den.*, 470 U.S. 1050 (1985).

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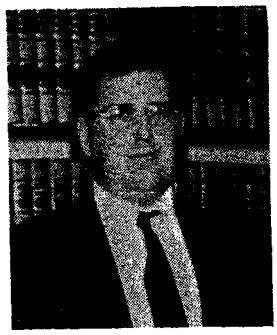
EVIDENCE IN CRIMINAL CASES

Dealing with DNA Testing



David Niehaus

The idea behind DNA testing is that the DNA sequence of a particular sample of human matter can be determined through a technique called "Southern" blotting and that this sequence can be compared with other samples to determine common origin. DNA "fingerprinting" involves techniques that are well established in biochemistry, which no doubt accounts for the attractiveness of the method. While the techniques are generally accepted, their application in criminal cases may not be because of the questionable statistical calculations that are the premises of the researcher's conclusions. The "bases" that comprise DNA repeat in patterns which, statistically, are unique. In DNA fingerprinting the DNA fragments are transferred onto a nitrocellulose or nylon sheet after undergoing electrophoresis. After radioactive markers are placed on the strip, a technician simply looks at the strip and compares the location of the DNA bases. If the bases from both samples are composed of the same material they should be in the same location on the strips and the technician calls it a match. If not, the technician says that the substances are not the same or that the test is inconclusive. Where a criminal case turns on identification of a semen sample or blood stain the importance of this scientific evidence is clear.

I intend in this article to look more at the underpinnings and techniques of DNA testing than at the cases that have been decided. Several courts have accepted DNA testing, and a significant few have not. In the final section of this article I will list some of the important cases that have been decided recently, but because scientific techniques are accepted one state at a time, and because it is a bad idea to get scientific information from court opinions I think it is more important at this point to provide a basic understanding of what goes on in a DNA test and why the scientists believe that it is valid.

DNA testing will have to be established by showing that it is reliable enough to be a basis for a jury decision. The first step under both *Frye v. U.S.*, 293 F. 1013 (D.C. Cir., 1923) or FRE 702 (or proposed KRE 702, submitted to the Supreme Court of Kentucky in November, 1989) is to determine if the scientific basis of DNA identification is sufficient to guarantee reliable conclusions. It is safe to say at this point that the theories and lab techniques of DNA manipulation are so well established in the scientific community that attacks on them probably would be useless. However, successful attacks can be made, at least in the near term, on the transferability of techniques used on clean laboratory samples to forensic samples recovered at a crime scene. Also, the statistical assumptions underlying the conclusions of uniqueness are subject to attack. But before discussing these points, it is necessary to learn a little bit about biochemistry and genetics. This information is outside a lawyer's general realm of competency, it certainly is outside of mind. However, it is possible to understand why scientists believe that they can pinpoint the identify of the donor of certain blood or semen stains.

I. BIOCHEMISTRY AND GENETICS FOR LAWYERS

(A) The Scientific Basis For DNA Testing

The scientific basis for DNA testing has existed only since the mid-1940s. Before that time scientists did not know if DNA had any active role in body chemistry. [Stryer, *Biochemistry* 3 Ed. (Freeman, 1988), p. 73]. In the 1950s scientific studies showed for the first time that each protein identified in the body had a precisely defined chemical (amino acid) sequence. These studies revealed that each protein is unique and that the amino acid sequences of each is determined genetically by the sequence of nucleotides (a particular type of molecule) of DNA (deoxyribonucleic acid), which orders a complementary sequence of nucleotides of RNA, which specifies the amino acid sequence of the particular protein. [Stryer, p. 23]. The varying sequences of the 20 amino acids known to exist define the particular protein molecule.

A similar construction was found in the 1960s by two English scientists who deduced the structure of DNA, a particular form of nucleic acid, which is the basic molecule from which human tissue is formed. [Metzler, *Biochemistry; The Chemical Reactions of Living Cells* (Academic Press, 1977), p. 90]. There are three parts to this molecule, a "base", a sugar and a phosphoric acid. [Metzler, p. 90]. The sugar and the phosphate provide the structure of the molecule, the "double helix" about which you have probably heard, while the "base" carries the genetic information. DNA is a long threadlike molecule which can be visualized best as a twisted ladder in which the bases are the rungs which hold the two uprights together. For our purpose, there are four important things to know about DNA molecule structure: (1) that there are only 4 possible bases in a DNA molecule, adenine (A), guanine (G), thymine (T), and cytosine (C); (2) that adenine is always paired with thymine and guanine is always paired with cytosine, [Stryer, p. 76; Metzler, p. 96], (3) that the sequence of these invariable pairs is completely unrestricted; and (4) that the precise sequence of the bases carries genetic information. [Stryer, p. 76; Metzler, p. 96].

The structure of the DNA molecule led scientists to significant conclusions about genetics and the techniques that make DNA fingerprinting possible. They are (1) that each DNA strand complements the other, (that is, the presence of adenine will always tell the observer that thymine is opposite, and that guanine will always tell an observer that cytosine is opposite), (2) that a cell replicates DNA by separating the strands and synthesizing new complementary bases for the separate strands, (3) that the genetic information is conveyed in three nucleotide pairs called "codons", (4) that the average gene contains about 900 nucleotide pairs together with about 100 "spacer" or "pseudogenic" regions. [Metzler, p. 5-6; Stryer, p. 99-100; 842], and (5) that there are more than three billion base pairs in the human genome that do not contain a code for synthesis of protein or RNA. These

spacers, stutters, pseudogenes, or nonsense DNA are important parts of DNA fingerprinting.

The key to DNA sequence identification is the complementary nature of DNA strands. Biochemists generally agree that complementary nucleic acids recognize each other with "great precision". [Fincham, *Genetics* (James and Bartlett, 1983), p. 386]. A single strand of radioactively labeled DNA of known composition can be used as a probe for another strand which has a complementary sequence. [Fincham, p. 386; Stryer, p. 130]. Thus the presence of a particular sequence in a particular sample can be determined simply by introduction of radioactive DNA probes that will bind with strands in the sample bearing the complementary DNA acids. Chemical probes, called "restriction enzymes" also recognize specific base sequences in an undivided DNA chain and will cut these sequences out of the chain at specific places. More than 90 such enzymes have been purified and identified. [Stryer, p. 118]. Once the sequence has been cut out, it may be visualized by two well-established laboratory techniques, gel electrophoresis and Southern blotting. This is how the DNA fingerprint is established in a laboratory.

(B) Laboratory Techniques

(1) Gel Electrophoresis

The underlying premise of electrophoresis is that biological molecules contain a certain electrical charge. When placed in an electrical field these charged particles will migrate to one pole or the other of the field, depending on the net charge. [Gaal, *Electrophoresis in the Separation of Biological Molecules* (Wiley: 1980), p. 15]. This phenomenon is called electrophoresis. [Gaal, p. 15; Stryer, p. 44]. Separation is usually carried out in a chemically pure gel (usually agarose gel for DNA) because it minimizes interference from outside factors such as temperature. The substance to be tested is put in the top of a container containing gel and then an electrical current is applied to the gel for various lengths of time. The small proteins move more rapidly toward the bottom of the mixture than the larger ones which move very little and stay near the top. After the procedure is completed, the proteins in the gel can be visualized either by staining them with a dye placed into the gel or by autoradiography. In autoradiography, the proteins are washed with a radioactive substance which "labels" them for detection. Once the proteins are labeled, they are detected in the gel by putting a sheet of x-ray film over it. After a while, the x-ray film reveals the location of the proteins. [Stryer, p. 44]. This process has been adapted successfully in DNA mapping by a variation called "Southern blotting". This technique is well-established and the textbooks on the subject speak of it as a normal technique that apparently can be learned by competent lab technicians.

(2) Southern Blotting

The "restriction fragments" that are cut out of the DNA chain by "restriction enzymes" can be visualized by a particular type of gel electrophoresis named for Edward Southern who developed it. In this technique the DNA fragments are separated by electrophoresis conducted in agarose or polyacrylamide gel and, when separated, are transferred to a sheet of either nitrocellulose or nylon by simply placing these membranes on the gel. Then, the specific locations of the fragments are marked with radioactive probes, usually single strands of complementary DNA which, of course, bind with the sought after DNA sequence. X-ray film is laid over the nitrocellulose sheet. The resulting autoradiogram reveals the location of the sequence. [Stryer, p. 119-120]. According to Stryer this is a powerful technique in which "[a] particular fragment in the midst of a million others can be readily identified . . ., like finding a needle in a haystack." [Stryer, p. 120].

In DNA tests, it is possible to break the chain either by chemical or other means. When the DNA chain is broken, the substances are separated by electrophoresis. Then, radioactive fragments produce an autoradiogram that displays a pattern of bands from which the technician can read the sequence directly. [Stryer, p. 120-121]. The various fragments resolve in "lanes" which allow the reader to determine the sequence by simply comparing the lanes. The shortest fragments move most so they appear toward the bottom. The development of the ability to "read" sequences from autoradiograms allowed the development of the idea of DNA fingerprinting for forensic use. Again, Southern blotting is a well-established laboratory technique which is discussed in college level biochemistry books. The only caution is that the technician must use care in the execution of each step. About 5 million DNA base sequences have been determined but very little sequencing of the estimated 3 billion base pairs in human genomes has been accomplished. [Stryer, p. 122-123].

II. DEVELOPMENT OF FORENSIC DNA FINGERPRINTING

Currently there are three commercial DNA testing services, Lifecodes Corp. in Valhalla, New York, Cellmark Diagnostics Corp., Germantown, Maryland, and Forensic Science Association, Richmond, California. Each is described in an important article in the Virginia Law Review by William Thompson and Simon Ford. [Thompson and Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Virginia Law Review 45 (February, 1989)]. Lifecodes and Cellmark use a test called restricted fragment length polymorphism analysis which according to the article is based on the standard techniques used in laboratories for identifying DNA fragments with probes. [Thompson and Ford, p. 64, fn. 85]. They are based on the "DNA paradigm" which provides (1) that no two individuals except for identical twins have identical DNA, (2) that a person's DNA does not vary from cell to cell, and (3) that the DNA molecule can be broken up in several different ways. [Thompson and Ford, p. 60-62]. According to the article Lifecodes uses four probes which produce one or two bands each. The prints of the two specimens are then compared by an analyst. The validity of the comparison is premised on the belief that "the likelihood of a coincidental match on all bands is low." [Thompson and Ford, p. 48]. Cellmark also uses what is called a "single-locus" probe, although it formerly used a more complex procedure. Using this technique, Cellmark claims that from a blood or semen stain the size of the head of a pin or from a single hair root it can make an identification. From a decent sized sample, a single-locus probe, according to Cellmark, "... can differentiate individuals to the degree of excluding the world's population." [Informational Bulletin, Cellmark Diagnostics, DNA Fingerprinting and DNA profiling, p. 8-9]. The third company uses a different procedure called "DNA amplification." This method requires less material to test but only determines whether particular types of DNA are present. [Thompson and Ford, p. 76]. This test is still new and does not have much of a track record. [Thompson and Ford, p. 77]. Because there is little information on the technique, I will not deal with it here.

In restriction fragment length polymorphism analysis (RFLP) the method described in Part I is followed pretty faithfully. The desired sequences of DNA are cut out of a "cocktail" by restriction enzymes and subjected to gel electrophoresis. In these commercial ap-

plications, standard DNA "markers" of known size are run along with the unknown sample for calibration. Also, the membrane onto which the fragments are transferred is made of nylon. [Thompson and Ford, p. 70-71]. According to Cellmark, the nylon membrane forms the permanent record of the test and is always kept by the laboratory.

The procedures used either by Lifecodes or Cellmark are really nothing too unusual. It is only after the laboratory result has been obtained that the process goes from high to low tech. The interpretation of the results is made by one or more laboratory analysts. "In most cases, the DNA prints are simply eyeballed to see whether they match." [Thompson and Ford, p. 74]. Although this is an accepted biological technique, it brings into a fairly straightforward scientific procedure an element of subjectivity that raises doubts about the validity of the conclusions that are reached. [Thompson and Ford, p. 75]. The possibility of an erroneous "call" by a laboratory analyst is one of the three main questions that have been raised concerning DNA testing. Thompson and Ford pose three questions in determining the validity of DNA typing evidence. The first is a question of the probability of a coincidental match between unrelated individuals. The second is an erroneous "call" by the laboratory, and the third is the possibility of laboratory error or contamination of the sample.

Because forensic DNA identification has not been around for more than two or three years in the United States, there is a very small base of identifications on which to rely. Therefore, both RFLP companies rely on statistical probabilities. The basic premise is that the likelihood of a coincidental match decreases as the number of matching bands and the rarity of those bands increases. [Thompson and Ford, p. 81]. However, there are no national standards or generally accepted scientific standards saying how many matches are necessary to call the samples a match. As for the percentages calculated by Lifecodes and Cellmark it is important to keep in mind that the calculations are premised on the belief that the incidence of the particular bands is "independent". An occurrence is "independent" when the probability of a match for that band is unaffected by the occurrence of a match on any other band. Current genetic knowledge shows that certain alleles (alternative forms of the same gene that can occupy a specific site) are more likely to occur when other alleles are present. Thus, use of the "produce rule" which requires independence for calculating the possibility of coincidental match may not be correct. [VNR Concise Encyclopedia of Mathematics, (VNR, 1977), p. 581]. However, the calculations are based on this product rule. According to Thompson and Ford, this is the way in which the developer of the Cellmark technology calculated originally that with a fifteen band autoradiogram that there would be a one in thirty billion chance of coincidental matching. However, as Thompson and Ford point out, this study was based on only twenty samples. Therefore, the use of the produce rule may not be valid in these circumstances. And, until there is a reasonable assurance by means of generally accepted methods that matches will not be coincident, there is a strong argument against using DNA identification techniques in court.

The second danger, the erroneous analysis by a lab technician can arise from a number of problems. Thompson and Ford identify the problem of "slop" which is apparently a generic term to describe variations in result caused by minor variations in procedures or samples. [Thompson and Ford, p. 87-88]. And of course, the determination of a "match" is a matter of opinion, the opinion of the person analyzing the test results.

The third problem is described as "artifactual" results. These are results caused by faulty lab procedures and contamination of the sample recovered from the crime scene. It is important to keep in mind that all of the DNA technology described in Part I of this article occurs under laboratory conditions. The samples are clean and the procedure is, presumably, followed correctly. However, blood spots taken from carpeting or furniture or other surfaces may well contain other sources of DNA or chemicals that may modify the DNA contained in the sample. Again, there are no nationwide standards for dealing with these problems. This is why Thompson and Ford in their article call for a series of validation studies by persons other than scientists employed by Lifecodes or Cellmark. [Thompson and Ford, p. 73].

III. ACCEPTANCE BY COURTS

According to a presentation made at the KACDL seminar in Florence, Kentucky in December, 1989 Cellmark's DNA determinations have been accepted in 21 states. Four states are considering legislation concerning the acceptance of DNA testing. (Maryland, Minnesota, Louisiana, and Nevada). Apparently, DNA tests have been accepted in 36 states. [Address of Lisa Richardson, KACDL Seminar, December 2, 1989, Florence, Kentucky]. According to the *National Law Journal* of December 18, 1989 three appellate courts have accepted DNA testing. (Florida, Maryland and Virginia). The cases are *Andrews v. State*, 533 So.2d 841 (Fla. App., 1988), *Cobey v. State*, 559 A.2d 391 (Md. App., 1989) and *Spencer v. Commonwealth*, 384 S.E.2d 775 (Va., 1989); 384 S.E.2d 785 (Va., 1989). However, Minnesota in *State v. Schwartz*, 447 N.W.2d 422 (Minn., 1989) has rejected DNA evidence. And in a very important trial level case a New York Supreme Court judge in *People v. Castro*, 545 NYS2d 985 (NY Sup., 1989), ruled that the tests presented in that case were "so flawed as to be inadmissible." [Sherman, *DNA Tests Unravel*, National Law Journal, December 18, 1989, p. 24]. I think it is safe to say that DNA identification analysis is open to legitimate challenge and probably will be so over the next several years.

In Kentucky, when such tests are presented I don't believe it will be profitable to attack the genetic theory underlying DNA testing. From what I have read in textbooks and other sources the "DNA paradigm" is so well accepted by the scientific community that it might be difficult to find an expert to argue with it. Of course, in an area that is continuing to develop and which has really only been in existence for 20 or 25 years, things can change. However, scientific thinking about the structure and operation of DNA molecules probably is fairly well settled.

I don't know that there would be much percentage in challenging gel electrophoresis or Southern blotting as legitimate scientific techniques. Carried out in research laboratories, there appears to be general satisfaction with the efficacy of these techniques. However, I think that the transfer from research laboratory conditions to conditions in state forensic laboratories raise a lot of questions about safeguards to avoid false readings.

Probably the best line of attack will be the statistical calculations that have been put forward so far. It appears that no one really knows whether the product rule can be used in calculation of the probability of coincidental matches in DNA. If a statistically significant possibility of error exists I think that this should be enough to foreclose the use of DNA testing, at least until the techniques are refined enough or the statistical base is large enough to assure courts that there won't be coincidental matches.

Sooner or later a criminal case in Kentucky will present this issue. I am sure,

given the number of articles written on the subject that there will be further developments in DNA testing technology with which each lawyer will have to remain familiar. There is an excellent file of information in the DPA Library in Frankfort and any attorney facing a DNA case should get to that library immediately to review the articles, scientific papers and court memoranda and briefs concerning DNA testing. For more information about DNA testing I suggest reading the following: Thompson and Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Virginia Law Review 45 (1989); Long, *The DNA Fingerprint: A Guide to Admissibility*, 1988 Army Lawyer 36 (October, 1988); *DNA Identification Tests and the Courts*, 63 Wash. L. Rev. 903 (October, 1988); Shines, *Blood Grouping and Genetic Marker Evidence: The Use of Electrophoretic Testimony*, 24 Crim. L. Bulletin 475 (Nov/Dec, 1988); *DNA Fingerprinting: Possibilities and Pitfalls of a New Technique*, 28 Jurimetrics Journal 455 (Summer, 1988); Sherman, *DNA Tests Unravel?*, National Law Journal, December 18, 1989.

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Penal chief doesn't advocate more prisons to ease crowding

By Robert White
Post Ohio Bureau

COLUMBUS -- For a man who's in charge of a penal system that's at 151 percent of capacity and getting worse, George Wilson has some curious views about prison construction.

He doesn't want any more.

At least not before Ohio starts keeping more of its "minor" felons in their home communities. Not before Ohio starts trying harder to solve the social problems that lead to crime in the first place. And not before the state takes steps to end what he sees as a disproportionate number of black men going to jail.

"We are talking about a readjustment of public policy," said Wilson, who came to Ohio in 1988 after spending seven years as head of Kentucky's corrections system.

Much of the prison overcrowding that Wilson is grappling with now is the result of a public policy that's gone in quite the opposite direction of what he's advocating. The General Assembly, apparently with strong public support, has over the last decade enacted repeated revisions of criminal laws to force judges to hand out longer, tougher sentences.

While much of the move toward mandatory sentences, limitations on parole eligibility and longer prison terms has been aimed at violent crimes, lawmakers have also toughened laws in areas like drunk driving and drugs.


George Wilson

Within the next two months, the General Assembly is expected to hammer out an agreement on a tough new drug bill, as well as a revision of Ohio's drunk driving statutes, that could add tens of thousands of inmates to the state's already swollen system. The bills also call for construction of six more state prisons, as well as $50 million to help local communities cope with jail overcrowding.

The legislature's deliberations come as Ohio is finishing one of the largest prison construction programs in the U.S. When finished in 1992, Ohio will have spent $640 million to add about 10,000 beds at 14 new prisons, bringing its total rated capacity to 21,547.

Yet Ohio's frenetic building program hasn't kept pace with the influx of incoming prisoners.

The rising rate of admissions, coupled with longer average sentences, has taken Ohio's total prison population from 7,432 in 1979 to above 30,000 this year.

The issue of how many people will come into Ohio's prison system — and who they are — is crucial to the debate now underway in Columbus.

Under existing criminal codes, the Ohio Department of Rehabilitation and Correction expects inmate population to rise steadily until 1994, when it will level off at about 33,500. But if legislators toughen drug penalties substantially, Ohio's inmate population would go even higher.

Wilson's staff is already taking a hard look at alternatives aimed at siphoning at least some third- and fourth-degree felons out of the state system to make room for those sentenced for more serious crimes.

Last month the Senate passed a bill that calls for construction of six 500-bed minimum security prisons at a cost of about $85 million.

But rather than build more prisons, Wilson wants to keep as many third- and fourth-degree felons as he can from coming into the state system in the first place.

He advocates alternatives such as intensive probation, half-way houses and even at-home incarceration enforced by electronic bracelets.

Prison facts

- **Ohio's prison** population, for the first time ever, has topped the 30,000 mark. By 1990, state officials estimate, it will climb to at least 35,700.el,2
- **The state** in 1992 will complete a decade-long, $640 million prison construction program. It will have added 14 new prisons, with about 10,000 new beds. The rated, or ideal, capacity of the 24-prison state system will then be 21,547.
- **The rate** of admissions into Ohio's prisons has risen dramatically over the last 10 years. In 1978, 5,993 men and 558 women were admitted. In 1988, prison intake was 11,170 men and 1,296 women.
- **About 50 percent** of entering inmates are black. The 1980 census reported that about 10 percent of Ohio's population was black.
- **About 61 percent** of new inmates were entering prison for the first time, 19 percent the second, 10 percent the third.
- **A recent study** based on 1985 data found that about half of all entering inmates were convicted of property crimes. Another 11 percent were sentenced for violating drug laws.

The Cincinnati Post, December 11, 1989

OBTAINING FUNDS FOR EXPERTS IN CRIMINAL DEFENSE CASES

Making the Threshold Showing

Ed Monahan

This is the second of a 3 part series. Last issue we addressed fees for attorneys. This article looks at the showing necessary to obtain funds for experts. Next issue we review cases that have granted funds for experts. A version of parts 2 &3 of this series appeared in NACDL's The Champion. Vol. XIII No. 7 (August, 1989).

A. THE NEED FOR EXPERTS

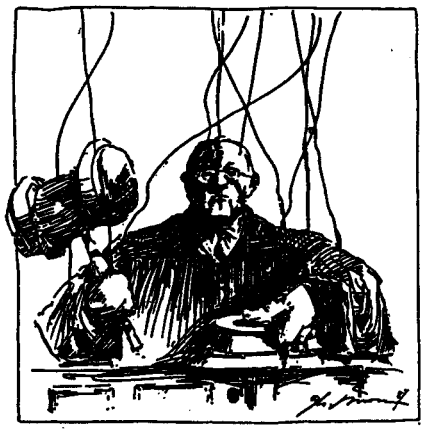
In the 20th century, as in the 13th, justice cannot be had for nothing....
W. McKechnie
Magna Carta: A Commentary (1914)

No major undertaking in life can be done well without the proper resources and expertise, whether it be building a house, healing our bodies, or defending a citizen accused of crime. Criminal defense work requires resources to investigate; select jurors; to test, consult and present testimony on such things as psychological aspects of the client, forensic evidence presented by the prosecution, and suppression of evidence; and to cross-examine prosecution experts.

Obtaining the money to be able to employ the necessary experts and obtain needed resources is often a high priority since so many possibilities are created when we have the means to fully defend the case. In many ways, experts and resources are as important as the right to counsel. They are the *fingers of the guiding hand of counsel.*

The needed money can be obtained from the client or his family and friends. But when the client does not have or cannot procure the money, criminal defense lawyers in most states must turn to the courts for the funds.

As with most things that make a real difference in the results of a criminal case, defense attorneys have to fight hard to persuade a judge to authorize funds for experts. The process of persuading must be done in a way that will convince the judge, and, if we lose, create a solid record for success on further review. This article will discuss ways to make a threshold showing in order to obtain funds from the court.



GEOFFREY MOSS
(c) 1987, Washington Post Writers Group, reprinted with permission.

B. EX PARTE HEARING

Almost always, you will want to obtain the right to present to the judge the request for funds *ex parte*. An *ex parte* hearing before the judge allows you to present your information without the prosecutor, public or media present and without revealing your strategy of defense to the prosecution.

Counsel representing a criminal defendant who has or who can obtain expert money would not be required to reveal to the prosecution the employment of an expert except as required by the rules of discovery. Equal protection guarantees of the 14th amendment to the United States Constitution require that appointed counsel not be forced to reveal their thoughts, reasoning and strategy as to expert assistance to the prosecution during the hearing requesting funds.

You will want to insure that the *ex parte* hearing is recorded for future transcription, sealed, preserved and made a part of the record for appeal purposes. The making and preserving of the record insures the court's ruling can be reviewed on appeal and protects against any arbitrary action. Sealing the record insures continued confidentiality of the information revealed in the hearing.

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) presumed that a defendant is entitled to make his request for necessary funds in a hearing that is *ex parte* when it stated:

> When the defendant is able to make an *ex parte* threshold showing to the trial court....
> *Id.* at 1096.

In *McGregor v. State*, 733 P.2d 416 (Okla.Ct.Crim.App. 1987) the court addressed head-on whether an *ex parte* hearing was constitutionally essential when there was a request for funds for experts by an indigent defendant: "The intention of the majority of the *Ake* Court that [the threshold showing] hearings be held *ex parte* is manifest...." *Id.*

McGregor noted the reason why *ex parte* hearings were so critical: "...we are compelled to agree with the petitioner's assertion that there is no need for an adversarial proceeding, that to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendant's, as nearly as possible, on a level of equality with nonindigent defendants." *Id.*

"[T]he use of *ex parte* hearings... is a well recognized technique available to any party" who is faced with the dilemma of being "forced to reveal secrets to the trial court and prosecution" in order to "support" a motion. *State v. Smart*, 299 S.E.2d 686, 688 (S.C. 1982).

Some jurisdictions have the guarantee of an *ex parte* showing in the statute or rule that sets out the procedure for requesting funds. For instance, "under 18 U.S.C. 3006A(e), hearings for the purpose of considering motions for the allowance of in-

What's Good for the Goose is Good for the Gander.... Or Is It?

Funds Allocated for Prosecution, but not Defense

Many Kentucky judges believe and have ruled that Kentucky's state psychiatric facilities are adequate under *Ake* in a criminal defense case when an indigent citizen needs mental health assistance. As defense attorneys, we know the reality is otherwise — *and prosecutors do too!*

When KCPC renders an opinion favorable to the defense (a rarity to say the least), prosecutors do not accept this "neutral opinion" as "adequate assistance." Instead, they use money given to them by the Legislature ($20,000 per year) to employ a private psychiatrist to obtain the opinion they want. It has happened in the following cases:

CASE	EXPERT	$PAID TO PROSECUTION EXPERT
Comm. v. Ulysses Davis,III	Psychiatrist	$5000 at $200/hour
Comm. v. Donald Harvey	Psychiatrist	$4500 at $200/hour
Comm. V. Clawvern Jacobs	Psychiatrist	$3450 at $150/hour
Comm. v. Wm Bennett	Psychiatrist	$3000 at $200/hour
Comm. v. Chaney	Psychiatrist	?
Comm. v. Smith	Psychiatrist	?
Comm. v. Bevins	Psychiatrist	?

Prosecutors know experts make a difference in results in criminal cases. They make sure they have the opinion they need. When they cannot obtain that opinion from KCPC, they have money to obtain it from the private sector.

Why is it that the Legislature allocates money to prosecutors for experts if state facilities are really adequate? Why is it that indigent Kentucky citizens do not have money allocated by the Legislature for experts if state facilities are really adequate?

vestigative funds under the Criminal Justice Act of 1964 are conducted *ex parte*." *Mason v. State of Arizona*, 504 F.2d 1345, 1352 n.7 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975). "Where counsel for defendant objects to the presence of Government counsel at such a hearing, the failure to hold an *ex parte* hearing is prejudicial error." *Id.* See also *United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972); *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970) "The manifest purpose of requiring that the inquiry be *ex parte* is to insure that the defendant will not have to make a premature disclosure of his case." *Id.*

Federal Rule of Criminal Procedure 17(b) provides that application for subpoenas by defendants unable to pay for them be made to the court *ex parte*.

Recently, the Georgia Supreme Court in *Brooks v. State*, 385 S.E.2d 81 (Nov. 2, 1989) held that an indigent criminal defendant was entitled to ask for funds for experts assistance *ex parte* to avoid prejudicing the indigent defendant by "forcing him to reveal his theory of the case in the presence of the district attorney." *Id.* at 84.

The counsel for the county funding source for expert funds is not entitled to be present at the *ex parte* hearing. Such a "procedure would create unnecessary conflicts of interest; in any event, county counsel's presence cannot be permitted because such petitions are entitled to be confidential." *Corenevsky v. Superior Court*, 204 Cal.Rptr. 165, 172 (Cal. 1984) (In Bank).

C. CRITICAL NATURE OF A THRESHOLD SHOWING

Since the 1985 decision in *Ake*, contrary to what we would hope and expect, many courts across the country continue to deny indigent defendants funds for experts. This is no doubt due to the ultra conservative nature of judges but it is also often, much too often, due to a grossly inadequate threshold showing by the defendant's lawyer. We can win more of these cases on appeal, and get more relief at the trial level if we do a good, thorough job of making a threshold showing that convinces a trial judge or appellate court that an expert is reasonably necessary.

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), a capital case, presented an issue of whether an indigent defendant was entitled to have money for ballistics and fingerprint experts. During oral argument, which took place one day before the issuance of *Ake*, there were many exchanges concerning the funds for expert issue on the inadequacy of the showing at trial that the experts were really needed. In *Caldwell*, the Court, in an opinion written by Justice Marshall, held that money for experts was not constitutionally required in that case. Justice Marshall instructed criminal defense lawyers on the critical nature of a proper showing:

> But petitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than "the general statement that the requested expert 'would be of great necessarius witness.'" 443 So.2d 806, 812 (1983). Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision. Cf. *Ake v. Oklahoma*, ... (discussing showing that would entitle defendant to psychiatric assistance as matter of federal constitutional law). We therefore have no need to determine as a matter of federal constitutional law if any showing would have entitled a defendant to assistance of the type here sought.
> *Caldwell, 105 S.Ct. 2633, 2637 n.1.*

D. HOW TO MAKE A THRESHOLD SHOWING

Appellate courts have found many reasons to deny funds for experts. The threshold showing, which is in our control, should remove these reasons. At a minimum, the threshold showing should include the following in the *ex parte* hearing:

1. TYPE OF EXPERT. State to the judge the specific types of experts being requested, *e.g.*, expert in hair, blood analysis, psychiatrist, pharmacologist, social worker.

2. TYPE OF ASSISTANCE. With

specificity, tell the judge the types of assistance needed from the experts:

1) investigating, testing, consulting and testifying for the defense on *pretrial issues*;

b) investigating testing, consulting and testifying for the defense on *guilt/innocence phase issues*;

c) investigating, testing, consulting and testifying for the defense on *sentencing phase issues;*

d)assisting in effective *cross examination of prosecution experts* pretrial, trial, sentencing.

3. NAME, QUALIFICATIONS, FEES. Relate the specific names, credentials, fees of the requested experts, *e.g.*, "Dr. Smith is a practicing clinical forensic psychologist, here is his vitae, he charges $70 per hour for out-of-court work and $100 per hour for in-court work and he estimates his total fee to be between $1,500-$2,000 for his testing, interview, report, testimony, and assisting us in cross."

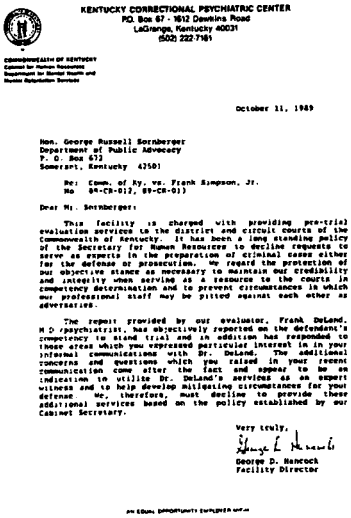
Defendants are entitled to experts at least as qualified as those used by the prosecution. In *Thornton v. State*, 339 S.E.2d 240 (Ga. 1986) the court required appointment of a forensic dental expert who was at least as qualified as the state's expert: "[t]he trial court shall appoint an appropriate professional, whose experience, at minimum, is substantially equivalent to that of the state's expert witness...." *Id.* at 241.

4. REASONABLENESS OF COSTS. Demonstrate to the judge the reasonableness of the hourly fees and of the total expected amount for the work. If necessary, this can be demonstrated with affidavits of other similar experts in the community.

In *Matter of Machuca*, 451 N.Y.S.2d 338 (1982) the court determined that expert medical testimony is very costly, and that the following rates in 1982 were reasonable for a psychiatrist:

Examination per 45 minutes - $95.00
Psychiatric report per hour - $125.00
Court attendance per hour - $175.00

5. FACTUAL BASIS IN THIS CASE. It is critical to demonstrate to the judge the specific factual reasons why these experts are necessary for this case. For example, "my client needs the assistance of a psychiatrist and psychologist in this murder case because he had a serious car accident in 1984 with a head injury; he was unconsciousness; he is a frequent drug user; he has had seizures and has a history of high fevers; he is adopted; his father died in 1983; there was a significant change in his personality in 1983; his sister is in a psychiatric hospital; the facts of the case indicate it was committed by a person who has severe mental and emotional difficulties. I have talked to the above-named psychiatrist and psychologist and they have told me that these facts indicate a person with significant mental difficulties. There is the question of whether this person was insane, whether he acted with intention, whether he acted under extreme emotional disturbance, whether his waiver of his *Miranda* rights was voluntary and knowing and whether his confession was voluntary and knowing."



KENTUCKY CORRECTIONAL PSYCHIATRIC CENTER
P.O. Box 87 - 1612 Dawkins Road
LaGrange, Kentucky 40031
(502) 222-7161

October 11, 1989

Hon. George Russell Sornberger
Department of Public Advocacy
P. O. Box 673
Somerset, Kentucky 42501

Re: Comm. of Ky. vs. Frank Simpson, Jr.
No 89-CR-012, 89-CR-013

Dear Mr. Sornberger:

This facility is charged with providing pre-trial evaluation services to the district and circuit courts of the Commonwealth of Kentucky. It has been a long standing policy of the Secretary for Human Resources to decline requests to serve as experts in the preparation of criminal cases either for the defense or prosecution. We regard the protection of our objective stance as necessary to maintain our credibility and integrity when serving as a resource to the courts in competency determination and to prevent circumstances in which our professional staff may be pitted against each other as adversaries.

The report provided by our evaluator, Frank DeLand, M.D./psychiatrist, has objectively reported on the defendant's competency to stand trial and in addition has responded to those areas which you expressed particular interest in in your informal communications with Dr. DeLand. The additional concerns and questions which you raised in your recent communication come after the fact and appear to be an indication to utilize Dr. DeLand's services as an expert witness and to help develop mitigating circumstances for your defense. We, therefore, must decline to provide these additional services based on the policy established by our Cabinet Secretary.

Very truly,
George D. Hancock
Facility Director

Some courts have held that an expert must be appointed to conduct a "threshold examination" to determine whether the defense is entitled to the full assistance of an expert under *Ake. See Harris v. State*, 352 S.E.2d 226 (Ga.Ct.App. 1987).

6.COUNSEL'S OBSERVATIONS. Relate, to the extent appropriate, your own observations in dealing with your client. For instance, "my client has exhibited delusional thinking and bizarre behavior to me in the following ways...." As attorneys, we have a lot of contact and a significant relationship with our clients so that the weight of our observations and conclusions is important to relate to the court.

7. LEGAL NECESSITY. It is essential to inform the judge precisely of the legal reasons why these experts are necessary for the particular phase of the case. For instance, "we need a psychiatrist for the guilt and penalty phases of this case since there is a duty to explore all possible defenses; in this case the defense of insanity, intoxication, extreme emotional disturbance must be explored; whether the mental state of the client was intentional or wanton must be explored; we must have ability to investigate and present statutory and nonstatutory mitigating factors including whether he is emotionally or mentally disturbed, whether he has mental difficulties less than insanity, his personality type, his possibilities for rehabilitation, the influence of his family and others on who he is and his actions, why he is involved with drugs, what effect drugs had on him, who the client is and why he acts as he does; the influence of his being adopted, his father's death."

8. ENTITLEMENT TO *DEFENSE* EXPERTS. While all courts do not agree, *Ake* necessarily implies when it says we are entitled to help in cross-examining state experts that we are entitled to independent or defense experts who work confidentially and at our direction, just as a person with means would be able to obtain. See, *e.g., Curry v. Zant*, 371 S.E.2d 647 (Ga. 1988); *Commonwealth v. Plank*, 478 A.2d 872, 874 n.3 (Pa.Super. 1984).

9. INADEQUACY OF AVAILABLE STATE EXPERTS. Relate the specific reasons why state facilities are inadequate for our defense needs.

a) KCPC

For the state mental health experts this may be able to be done by relating that they will only examine in limited areas, like insanity and incompetency, and not on all suppression issues or all defenses and not for mitigating factors or on sentencing issues; that they are not defense experts; that they report to the court; that confidentiality is not assured and has been broken in the past; that they will not affirmatively explore all matters favorable to the defense; that they will not work at the direction of the defense attorney; that they will not help cross-examine prosecution experts.

A recent letter from the Director of KCPC to a public defender illustrates the inadequacy of the state facility:

October 11,1989

Re: *Commonwealth v. Frank Simpson, Jr.*
Dear Mr. Sornberger :

> This facility is charged with providing pretrial evaluation services to the district and circuit courts of the Commonwealth of Kentucky. It has been a long standing policy of the Secretary for Human Resources to decline requests to serve as experts in the prosecution of criminal cases either for the defense or the prosecution. We

regard the protection of our objective stance as necessary to maintain our credibility and integrity when serving as a resource to the courts in competency determination and to prevent circumstances in which our professional staff may be pitted against each other as adversaries.

The report provided by our evaluator, Frank DeLand, M.D./ Psychiatrist has objectively reported on the defendant's competency to stand trial and in addition has responded to those areas which you expressed particular interest in your informal communications with Dr. DeLand. The additional concerns and questions which you raised in your recent communication come after the fact and appear to be an indication to utilize Dr. DeLand's services as an expert witness and to help develop mitigating circumstances for your defense. We, therefore, must decline to provide these additional services based on the policy established by our Cabinet Secretary.
Very Truly,
/s/George D. Hancock
Facility Director

b) KSP Lab/Information Services

For the Kentucky State Police Crime Lab, this may mean demonstrating that the Lab is a law enforcement agency headed by a captain in the state police; they are not defense experts; that confidentiality is not assured; there is a conflict since they have already tested evidence in this case at the request of the police and they now have a vested interest and the integrity of their employee is at stake; they are clearly prosecution experts since they contact the prosecution or police with results and contact the prosecution when a defense lawyer talks to them and since they do not talk to the defense alone if the prosecution prohibits them from doing so; they are clearly part of the prosecution team since they operate at the direction of the police.

A January 12, 1989 affidavit of KSP Major Bob Stallins reveals the inability of the Kentucky Stae Police Information Services Branch to examine on behalf of the defense:

AFFIDAVIT

Comes now the affiant, Bob Stallins, and after being dully sworn, hereby states as follows:

1) Bob Stallins, Major, Commander, Information Services Branch, Kentucky State Police.

2) I am the Commander of the Information Services Branch of the Kentucky State Police.

3)The Identification Unit is part of the Information Services Branch of the Kentucky State Police.

4) There are three Latent Fingerprint Examiners working in the Unit. The volume of daily incoming work to be examined already exceeds the capabilities of these three Examiners. Therefore, it would be very difficult to handle an increase in the workload of this unit.

5) Among the duties of the State Police Latent Fingerprint Examiners are: crime scene analysis and processing of latent fingerprints and evidence submitted by any other law enforcement agency in the Commonwealth.

6) In the Identification Unit, the results of each examination are double checked by another person in that Unit.

7) The professionals in the Identification Unit are trained in and employ the same methodology in examining fingerprints.

8) If members of the Identification Unit were required to testify at trial for the defense when another Latent Fingerprint Examiner of the Identification Unit is called for the prosecution, then, their testimony would be identical. This is due to the double verification that is done within this Unit.

9) It is the position of the State Police that it is not practical to appoint Identification Unit personnel to be forced to act as independent defense experts in retesting evidence already examined by the police.

c) Evidentiary Hearing

To demonstrate the inadequacy of the state facilities, an evidentiary hearing is likely to be required with testimony from the heads of the state facilities and perhaps the particular expert(s).

In *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970) the defendant requested money for defense investigative assistance. The trial court appointed the FBI. The 10th Circuit determined it was plain error to do this:

> Just as an indigent defendant has a right to appointed counsel to serve him as a loyal advocate he has a similar right under properly proven circumstances to investigative aid that will serve him unfettered by an inescapable conflict of interest. The Bureau, following leads furnished by an accused, is obviously faced with both a duty to the accused and a duty to the public interest. The dilemma, and danger, is glaringly apparent in the events that occurred in the case at bar.
> *Id.* at 1319.

10. SUPPORTING INFORMATION. Make the showing to the judge with

specific supporting documents and necessary testimony. You can present affidavits from your proposed experts on the nature of the expertise, the opinion that their assistance is necessary for the particular reasons of this case, their qualifications, fees, what they can do in this case for the defense, and their detailing that there are aspects of the expertise or opinion of the prosecution's expert that need clarifying or retesting. Affidavits can be obtained from lawyers about the necessity of funds for experts in capital cases and in this case. Letters, affidavits, testimony can be obtained from state facilities setting out their limitations.

11. QUESTION THE STATE EXPERT ON VOIR DIRE. To make or bolster your threshold showing for the trial judge and appellate court, you will want to consider questioning the prosecution expert prior to his or her testifying out of presence of the jury. This can occur at your *ex parte* hearing, a pretrial hearing or prior to the expert's testifying at trial. This may allow you to prove some things otherwise difficult or impossible to show. It can also give your issue more persuasive clout since you are proving or corroborating through the prosecution's witnesses. The prosecution expert is likely to testify favorably in this area since it is in the expert's self-interest to support the profession's purpose and necessity, and the expert's own worth. Questions like the following are possible areas of inquiry:

IT IS AN EXPERTISE

a. The area you are testifying on is an area of expertise ?

b. It's not an area that is within a layperson's knowledge ?

c. You've studied a long time and have a lot of experience ?

d. What is all the education and training you've had?

e. Who has trained you?

f. What is all the experience you've had?

g. Your expertise has a lot of tests not within layperson's knowledge ?

h. You've conducted those tests in this case ?

i. Your opinion is an expert's and is based on training, experience and testing, not within competence of laypersons ?

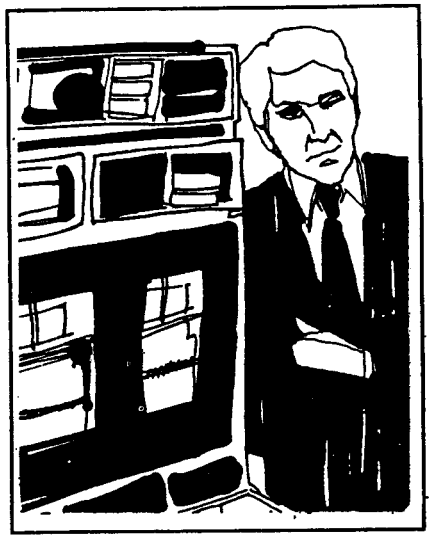
j. I'm not qualified as an attorney to render an expert opinion in this area, am I?

TIME / REASONABLE FEE/AVAILABILITY OF DEFENSE EXPERTS

a. How long have you spent analyzing evidence in this case?

b. It took a long time ?

c. What is the going rate for an expert in private practice to do this kind of testing and analysis and testifying?



d. Are there any experts in this state, region or country that can do this kind of testing in criminal cases that do not work for law enforcement agencies?

e. Are there other people as experienced and as capable to do the analysis testing and to render an opinion?

f. Are there experts more experienced than you?

STATE EXPERT NOT NEUTRAL

a. You work for the Kentucky State Police Lab ?

b. Your ultimate boss is the Commissioner of State Police ?

c. The person in charge of the state Lab system in Kentucky is a captain in the state police ?

d. You refused to talk to me without first notifying the prosecutor and without the prosecutor being present ?

e. You do not work at my direction ?

f. You test based on police requests ?

g. You returned test results back to the police in this case ?

h. You are not a defense expert ?

i. You would not help me cross examine one of your co-workers ?

j. How many times have you testified at the request of the prosecution, and how many times at the request of the defense?

POSSIBILITIES OF DIFFERENT RESULTS/OPINION; MORE TESTING POSSIBLE

a. Your expertise involves standard tests ?

b. What are they?

c. Which did you do?

d. What other tests could be done but were not?

e. Other experts can do the tests you did not do ?

f. In doing your tests, you don't always get exactly identical results each time you do the test on the same sample?

g. The opinion you rendered involves doing tests, observing what is there and what isn't there, analyzing the results and employing your judgment to reach your conclusion ?

h. The art of rendering an opinion, reaching a conclusion involves your professional judgment based on your training, experience, analysis and test results ?

i. That's one reason why two experts can disagree ?

j. Because their judgments, based on the same data, can be different ?

k. It is possible that a different examiner could come to a different conclusion than you ?

> ... upon trial of certain issues, such as insanity or forgery, experts are often necessary both for the prosecution and for the defense.... [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.
>
> Chief Judge Benjamin Cardozo
> *Reilly v. Barry*, 166 N.E. 165,167 (N.Y. 1929)

12. QUESTIONS OF JUDGE. If you are denied any or all funds, you may want to ask the judge some questions to make your record for further review better. For example, you could ask: a) do you agree that we have the right to experts if "reasonably necessary"; b) do you agree that we have right to introduce expert evidence on pretrial matters, our defense and on mitigating evidence; c) do you agree we have the right to cross-examine the state's expert with the assistance of our expert; d) how can we do that fully and completely without our own experts; e) what additionally do we have to show you in this case to obtain funds for experts; f) have you ever granted funds for experts before; g) if you could order the state treasury to pay the bills instead of your local elected county fiscal court, would you do that in this case?

13. EXPERT HELP IS REASONABLY NECESSARY. Most courts, statutes, and rules have followed the lead of the federal statute's standard of *reasonably necessary*. That is Kentucky's statutory, KRS 31.200, and caselaw standard. *Young v. Commonwealth*, 585 SW2d 378 (Ky. 1979). *Ake*'s standard for when a defendant is entitled to the help of a psychiatrist is: *when the mental state of the defendant is seriously in question.*

Use all the above information to convince the judge that the standard has been met.

Some states have a standard that is much less than "reasonably necessary" or the *Ake* standard. In *State v. Hamilton*, 448 So.2d 1007 (Fla. 1984) the court determined that the Florida rule of criminal procedure is "unequivocal that, when counsel for an indigent defendant has 'reason to believe' that his client 'may have been insane at the time of the offense,' the defendant is entitled to have the court appoint one expert to assist in the preparation of his defense." *Id.* at 1008.

In explaining what the *reasonably necessary* standard is and is not, the Massachusetts Supreme Court in *Commonwealth v. Lockley*, 408 N.E.2d 834 (Mass. 1980) has stated:

> This standard is essentially one of reasonableness, and looks to whether a defendant who was able to pay and was paying the expenses himself, would consider the "document, service or object" sufficiently important that he would choose to obtain it in preparation for his trial. The test is not whether a particular item or service would be acquired by a defendant who had unlimited resources, nor is it whether the item might conceivably contribute some assistance to the defense or prosecution by the indigent person. On the other hand, it need not be shown that the addition of the particular item to the defense or prosecution would necessarily change the final outcome of the case. The test is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires.
>
> In making this determination under that statute, the judge may look at such factors as the cost of the item requested, the uses to which it may be put at trial, and the potential value of the item to the litigant.
> *Id.* at 838.

14. CONSTITUTIONALIZE THE REQUEST. Make sure you ask for this relief under every conceivable constitutional guarantee. A listing follows:

A. United States Constitution, 14th Amendment Due Process.

1. Due Process fairness.
2. Due Process right to present a defense.
3. Due Process right to disclosure of favorable evidence.
4. Due Process right to fair administration of state created right.

B. Kentucky Constitution, Section 2 Due Process.

C. United States Constitution, 14th Amendment Equal Protection.

D. United States Constitution, 14th and 6th Amendment Right to Effective Assistance of Counsel.

E. Kentucky Constitution, Section 11 Right to Effective Assistance of Counsel.

F. United States Constitution, 14th and 6th Amendment Right to Confrontation.

G. Kentucky Constitution, Section 11 Right to Confrontation.

H. United States Constitution, 14th and 6th Amendment Right to Compulsory Process.

I. Kentucky Constitution, Section 11 Right to Compulsory Process.

J. United States Constitution, 14th and 8th Amendment Reliable Sentencing, Produce Mitigating Evidence; Rebut aggravating evidence.

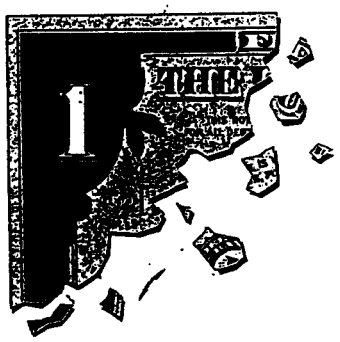
If all the necessary money is not obtained, you will want to insure that you have made the proper showing to have reversible error on appeal or in federal habeas. You need the relief.

CONCLUSION

We know that *"[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (Justice Hugo Black). Many or most criminal cases now are pled or go to trial without the assistance of experts because the defendant cannot afford them. We have to do better at educating ourselves and judges of the critical nature of expert assistance in criminal defense work, and we have to more effectively advocate and obtain funds for experts for our clients. Otherwise, *"...justice is denied the poor - and represents but an upper-bracket privilege." United States v. Johnson*, 238 F.2d 565, 572 (2nd Cir. 1956) (Judge Jerome Frank, dissenting).

ED MONAHAN
Assistant Public Advocate
Director of Training
Frankfort

Funds Resources Available from DPA



A compendium of authorities supporting an indigent defendant's right to funds for experts, counsel, transcripts and witnesses is available for $10.00. Send a check payable to the KY State Treasurer to:

Ed Monahan
DPA
1264 Louisville Road
Frankfort, KY 40601
(502) 564- 8006

BASIC BOOKS FOR THE KENTUCKY CRIMINAL DEFENSE PRACTITIONER

A few good books will go a long way for the beginning criminal defense practitioner in Kentucky. This article is intended to assist you in building a basic working collection of criminal law and practice texts. Note that many treatises devoted to special topics, such as drunk driving or forensic medicine, are available but are not discussed herein because most beginning practitioners are assumed to be operating on a limited budget, and thus must be selective in their purchases.

Before turning to the titles that you should consider acquiring, and how to do that, a few words about access to law books in general are in order. If an adequate county law library is unavailable to you, you can take advantage of contacts you have probably developed with established individual attorneys or firms in your community. Find out who has U.S. Reports, Kentucky Decisions, Kentucky Digest, other major sets, LEXIS or WESTLAW, and what you can do to assure your ability to use them. You might trade the use of your collection, or offer to share the cost of subscriptions or equipment.

Also, keep the telephone numbers of institutional and public law libraries on file so that you can call ahead to be certain the library will be open when you plan to use it. The reference staff at university libraries can be very helpful to you, especially if you make requests in advance. Inquire about photocopy services by which you can order copies of cases and articles for a fee. Don't forget the D.P.A. library!

If you plan to purchase major sets for your office library, watch the notices in the *Kentucky Bench and Bar* or local bar publications for used law books, or contact a reputable used book dealer. [1] Remember that the cost of some books, supplements and subscriptions may be deducted as a business expense from your taxable income if their useful lives are short, generally one year or less. The cost of major sets of lasting value would be considered a capital expenditure, recoverable through annual depreciation deductions. [2]

I. CRIMINAL LAW COMPENDIUMS AND TREATISES

CRIMINAL LAW OF KENTUCKY
(Banks-Baldwin [3] 1988)
$73.50.

Revised biannually since 1982, this is the one reference every criminal defense practitioner must have. Complete to November 1, 1988, it contains selected provisions of the U.S. and Kentucky Constitutions, the Kentucky Penal Code (K.R.S. ch. 500-534), the Unified Juvenile Code (K.R.S. ch. 600-645), other criminal statutes ranging from D.U.I. and "Coroners, Inquests and Medical Examinations" to "Crimes and Punishments." Also find Kentucky Rules of Criminal Procedure with forms and the Uniform Schedule of Bail, and a quick reference guide called "Elements of Crimes, Statutory Charges and Indictments."

Indexing is adequately thorough, and the arrangement is logical, making this volume easy to use. Note these special features: notes to decisions are included in the Penal Code and Crimes and Punishments sections; commentary from the 1974 Kentucky Crime Commission follows the Penal Code Provisions.

***KENTUCKY JURISPRUDENCE*, v.2**
William S. Haynes
(Lawyers Co-op, 1986, supp. 1989).

Claiming to address "substantive criminal law as it is applicable to Kentucky practice," this volume subtitled "Criminal Law" is a reference tool that recites the law on various topics as found in the U.S. and Kentucky Constitutions, statutes, caselaw and rules of court. Each chapter concludes with research references to Am.Jur.2d, Am.Jur. forms, and ALR articles.

The topics begin with Jurisdiction and Venue and conclude with Postconviction Remedies. This book clearly overlaps with some others reviewed herein but if you are considering purchasing the 11-volume set of *Kentucky Jurisprudence*, the "Criminal Law" volume will be a useful bonus. The set sells for $990 and volumes are not currently sold separately. Yearly supplements cost $75 for the set. See also *Kentucky Jurisprudence*, v. 3 ("Criminal Procedure"), *infra*.

II. RULES OF COURT

KENTUCKY RULES OF COURT
(West, 1990)
$24.00

Revised yearly, this essential book is a *must buy* for all practitioners. It contains Kentucky Rules of Civil Procedure and Criminal Procedure, followed by official forms and the Uniform Schedule of Bail. The Rules of the Supreme Court, Kentucky Bar Association By Laws, and Jefferson Circuit and District Court rules are also included. Note that the (new) Kentucky Rules of Professional Conduct are found in SCR 3.130. Federal rules include those for the Supreme Court, Appellate Procedure, the Sixth Circuit, the Eastern and Western Districts of Kentucky, Evidence and Civil Procedure.

Indexing is alternately right on target and remarkably obtuse. For another approach, try Kentucky Rules Annotated (Michie $35), revised bi-annually and supplemented ($5 - $10) in odd years. This volume accompanies Michie's Kentucky Revised Statutes. Note that unlike West's Kentucky Rules, the annotated version contains notes to decisions, and the Federal Rules of Criminal Procedure. See also *Kentucky Jurisprudence*, v.3, *infra*.

III. CRIMINAL PRACTICE AND PROCEDURE

KENTUCKY CRIMINAL PRACTICE
(Banks-Baldwin, 1990)
$60.00-$70.00.

The 3rd edition of this widely used treatise is expected in 1990, authored by J. Vincent Aprile II, General Counsel, D.P.A. Like its predecessors, the Murrell and Milward editions, this volume can be expected to provide a guide to the procedural steps of a criminal case from arrest to probation and parole. The treatise emphasizes federal and Kentucky constitutional caselaw, but treats the law affecting more garden variety questions of criminal practice as well. Based on the title's reputation, and knowledgeable author of the 3rd edition, this volume is highly recommended.

KENTUCKY PRACTICE, v. 8 & 9
Leslie W. Abramson
(West, 2nd ed. 1987) $140
(1989 supp. $12.504).

These two volumes on "Criminal Practice and Procedure" are written to meld the various official and unofficial rules of Kentucky criminal practice in one comprehensive treatise. For example, in Chapter 11: Pretrial Motions in General, one finds a very practical, point-by-point guide to drafting motions, supplementing them with affidavits and memoranda, filing motions and responses and the consequences of failing to file. A sample form is provided, as well as references to rules, cases and statutes. Whether you are practicing on your own, or you occasionally find that you exhaust your supply of free advice from a trusted and experienced colleague, you should have these two volumes handy.

Volume 9 is yet another source of the Kentucky Rules of Criminal Procedure, and selected provisions of the Administrative Procedures of the Court of Justice and the Kentucky Rules of Civil Procedure (all unannotated). Tables of statutes, rules and regulations precede an adequate subject index.

A third volume on substantive criminal law is due out in 1990.

KENTUCKY JURISPRUDENCE, v.3
William S. Haynes
(Lawyers Co-op 1985, supp. 1989).

Volume 3 of Kentucky Jurisprudence is subtitled "Criminal Procedure," and is the companion volume to Volume 2 on "Criminal Law." Organized according to the Kentucky Rules of Criminal Procedure, each section of the book begins with the text of the rule and continues with commentary and analysis. Research references conclude each rule section. The Appendix of Official Forms precedes an extensive subject index to the volume.

KENTUCKY CRIMINAL TRIAL PRACTICE
William R. Jones
(Harrison 1986) $77.95
(1989 supp. $21.95).

Professor Jones' treatise is divided into 5 major parts: 1) Arrest and Criminal Investigative Procedures, 2) Client-Counsel Relationship and Proceedings Prior to Preliminary Hearing, 3) Pretrial Judicial Proceedings, 4) The Trial, and 5) Post-trial Remedies and Revocation of Probation or Parole. Covering much of the material found in Abramson's *Kentucky Practice* volumes, this book takes a somewhat different approach and emphasizes strategy. The table of contents and index provide sufficient access to the material.

Its companion volume, *Kentucky Criminal Trial Practice Forms* ($54.95) begins with the elements of drafting and service, then is structured according to the topics in the main volume.

MOTION FILE INDEX
Department of Public Advocacy.
Current through February, 1989.

This index to motions compiled by the D.P.A. provides a complete subject access to many motions filed in actual Kentucky criminal cases. The index is free to Kentucky's criminal defense bar. Copies of the motions are available at the cost of photocopying and postage upon request from Tezeta Lynes, D.P.A. Librarian (502) 564-8006 ext. 119.

IV. EVIDENCE

KENTUCKY EVIDENCE LAW HANDBOOK
Robert G. Lawson
(Michie, 2nd ed. 1984) $65
(1989 supp. $25).

This compendium of Kentucky law is the unofficial, but highly regarded and widely used code of evidence. It provides a succinct but generally complete treatment to broad topics such as objections and relevancy, as well as the finer points of principles and hearsay rule exceptions by beginning with blackletter law, followed by commentary based upon statutes and caselaw. Most subjects contain a section on the corresponding Federal Rule of Evidence, which includes references to major federal cases construing the rule. You will have no trouble finding the topics you seek through either the table of contents or the index.

As you should know, the Kentucky Bar Association Evidence Rules Committee has recommended a consolidated code be enacted and promulgated. Professor Lawson reports that he is revising his handbook in preparation for hoped-for legislative and judicial action which could result in the Kentucky Rules of Evidence going into effect in 1992. However, whatever happens during the 1990 General Assembly, practitioners must have ready access to the current volume.

ADMISSIBILITY OF EVIDENCE
Cliff Travis
(Harrison 1989)
$49.95.

This quick reference handbook is so new, it is relatively untested. No substitute for Lawson's, the volume's dictionary arrangement gives it a unique approach which could be useful to the practitioner. *Examples*: (1) "Business Records" includes an eleven-step procedure for laying the foundation for admission of business records. (2) "Sexual Abuse Accommodation Syndrome" is cross-referenced from "Child Sexual Abuse," and cites *Lantrip*. But be careful about relying on this or any single volume too heavily on the "frontier" issues.

A Quick Index of topical cross-references and Tables to K.R.S. and the Rules precede the text, which is sprinkled with references to other treatises.

Treated as an aid in an area in which most practitioners can use some extra help, this manual would be a useful addition to Lawson's *Handbook*.

V. JURY INSTRUCTIONS

INSTRUCTIONS TO JURIES IN KENTUCKY, v. 1.
John S. Palmore and Robert G. Lawson
(Anderson, 1975, supp. 1979)
Out of print - revision in progress,

Though this volume has not been comprehensively updated for many years, it is still the most widely relied upon source of sample jury instructions. While some trial courts tend to prefer rigid adherence to the exact language of the instructions, the Preface warns, "It must be kept in

mind that their purpose is entirely illustrative, and that the instructions in any given case must be adapted to the facts of that particular case." Introductory material on the general principles governing criminal jury instructions and commentary and casenotes accompanying individual instructions allow for more in-depth understanding.

You may also want to consult volume 3 of an earlier edition known as Stanley's *Instructions to Juries in Kentucky* (1948).

PALMORE KENTUCKY JURY INSTRUCTIONS, Volume One Revision, William S. Cooper (Anderson, Jan. 1990) $60.

This interim revision of criminal instructions does not include commentary, but is reported to expand upon the AOC computer-generated text made available to circuit judges and others. It has been made available by the publisher because the final revision is two years from completion. Although this volume was unpreviewed by deadline of this article, access to both this volume and the 1975 edition is highly recommended.

INSTRUCTION FILE INDEX, Department of Public Advocacy. Current through February, 1989.

Providing subject access to the multivolume instructions manual, the index also allows access by offense and statute number. The index is available at no cost to the criminal defense bar. Copies of instructions may be obtained at the cost of photocopying and postage by contacting Tezeta Lynes, D.P.A. Librarian (502) 564-8006 ext. 119.

VI. GENERAL PRACTICE AIDS

TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES, Anthony G. Amsterdam (ALI/ABA 1988) $170.

The two hardbound volumes of the latest edition of a highly regarded criminal practice guide emphasize the attorney-client relationship and the constitutional dimension of each stage in the proceeding. Directed at both novices and experienced practitioners, it provides the basis for strategic defense decision-making, as well as legal arguments and authorities for use in motion practice and briefing.

Table of cases and authorities and subject indexes supplement the table of contents for each volume. Checklists, cross-references and citations to law journal commentary supplement the extensive case authority provided. This may not be an essential work, but it is highly recommended to the defense attorney who is serious about honing the craft of advocacy.

FUNDAMENTALS OF TRIAL TECHNIQUES, 2nd ed., Thomas A. Mauet (Little, Brown 1988) $22.50.

An instructional text for beginning litigators, this book aims to tell you what to do, how to do it, and why. It begins with case organization, proceeds through the major phases of the trial, and concludes with a chapter on objections, based partly on the Federal Rules of Evidence. The nuts-and-bolts approach includes many examples, and answers quite literally questions like how to handle exhibits. This stress-reducer is well worth the investment for young attorneys.

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (ABA 1989) Free.

If you have not already discovered, you will soon learn that many clients who enter the criminal justice system are mentally retarded, or suffer from other mental or emotional disorders which affect an individual's ability to waive constitutional rights, as well as one's competency to stand trial and be convicted of committing an offense. Civil commitment is another means by which one's liberty may be curtailed. The ABA *Standards* (Chapter 7 of the *ABA Standards for Criminal Justice*) were developed for both lawyers and clinicians.

Topics covered include: professional obligations to the mentally ill or retarded, the role of the police, pretrial evaluations, competence to stand trial, non-responsibility for crime, civil commitment, sentencing, and the treatment of mentally ill and retarded prisoners. Each section begins with the standard, for example, "Hearing on Competence," followed by extensive commentary. References to other ABA *Standards* are provided. This educational volume is highly recommended.

REVERSIBLE ERROR IN KENTUCKY CRIMINAL CASES, Burton Millward, Jr. (Harrison 1987) $54.95 (1989 supp. $12.95).

Written for the trial and appellate bench, prosecutors and defense counsel, this unusual reference is arranged alphabetically by topics and key words ranging from the obscure to the predictable. For example, four pertinent case summaries appear under an entry for "Bloodhounds." The entry for "Prosecutorial Misconduct" spans 10 pages and is divided into subtopics.

While this volume will probably not tell you everything you need to know on any one topic, it could provide an easy point of entry to research into *Brady* evidence, detainers, or any other subject on which you may suffer a temporary mental block.

VII. PUBLISHERS' SALES REPRESENTATIVES

1) American Bar Association- (312) 988-555.

2) American Law Institute - (215) 243-1600.

3) Anderson - Scott McEwen (502) 366-6915

4) Banks-Baldwin- Michael Davis (502) 429-0904.

5) Harrison - Cormelia McEwen (800) 848-6004.

6) Lawyers Co-op - Martin J. Falle (606) 272-6770 covers eastern and the bluegrass part of central Kentucky; Scott Mendel (502) 228-5511 covers Louisville, central Kentucky and Bowling Green west; Kent McClain (502) 554-8651 covers Paducah.

7) Little, Brown - (617) 227-0730.

8) Michie - Scott McEwen (502) 366-6915.

9) Shepard's - Bill Craft (502) 825-0781.

10) West - L. Jim Hankins (502) 245-2806 covers most of Kentucky west of I-75, except Lexington and Northern Kentucky, Thomas Zachman (513) 683-2020 covers eastern and northern Kentucky and Lexington.

FOOTNOTES

[1] Claitor's Law Books (800) 535-8141 (504) 344-0476; National Law Resource (800) 826-9374 are two of a number of dealers. The major pitfall of buying some used sets

lies in how recently the set was updated. If a digest or encyclopedia, for example, is more than two or three years out-of-date, it could be costly to purchase needed replacement volumes. Check with the purchase needed replacement volumes. Check with the publisher's sales representative to determine how much it will cost to update the set before purchasing a used set.

[2] Treas. Reg. Sec. 1.162-6 (1960); 3 Fed. Taxes (P-H) par. 11,520 (1989). *Example:* Purchase of *Kentucky Digest 2d* (West) at $1363.50 would be a capital expense; the $60 you pay for yearly supplements would be a deductible business expense.

[3] Publisher's sales representatives are listed at the end of this article.

[4] Supplements are included, at no additional cost, for the original purchase price on these and other regularly supplemented volumes.

[5] But see the following entry.

JOELLEN S. MCCOMB
Judicial Clerk
to Justice Joseph E. Lambert
Kentucky Supreme Court
Frankfort, KY 40601
(502) 564- 4162

JoEllen served as Chief Justice Stephens' clerk August, 1988- August, 1989 prior to assuming her current position. She was DPA's law librarian from 1980 to 1983, and reference librarian at U.K.'s College of Law Library from 1983 to 1986. She received her Master of Library Science in 1979 fro the University of Kentucky. She is a 1988 graduate of the University of Kentucky College of Law. JoEllen will clerk for United States District Judge William Wilhoit in Lexington , KY beginning August 1, 1990. Her new telephone number will be (606) 223-2503.

Police Say Man Killed Self After Shooting Wrong Woman

A man shot a woman he apparently mistook for his wife, offered to take her to a hospital, then killed himself with a shot to the head, authorities in Gunterville, Ala. said.

"We're going on the assumption that it was a case of mistaken identity," Marshall County sheriff's Captain Randy Amos said after the shooting. *Lexington Herald-Leader*, May 27, 1988.

BOYD DUI PROSECUTOR SAYS BREATHALYZER UNRELIABLE

A July 16, 1989 Associated Press article in the *Courier-Journal* reported:

ASHLAND, Ky. - Boyd County attorney Jerry Vincent has said he would have been proven innocent if he had thought to have a blood test after he was arrested early Wednesday morning and charged with driving while intoxicated. Vincent, 42, said he refused to take a Breathalyzer test when stopped by Patrolman Tim Wallin because the machines are not reliable and he feared the test would not be accurate. "I didn't even think about it (the blood test)," Vincent said. "I was pretty angry at the time."

A Breathalyzer expert at the state police laboratory in Frankfort said Friday that the older model Breathalyzers - Models 900 and 900A - "can be misread or adjusted improperly and that the accuracy of those machines is dependent on the integrity of the police officer involved." City police confirmed Friday that the Breathalyzer that Wallin was carrying early Wednesday was a Model 900A.

Vincent contends that the arrest stems from a feud between the two men over two dogs that Wallin used to own. Wallin lives near Vincent. The report filed by Wallin said that Vincent's vehicle was traveling between 45 mph and 50 mph in a 35-mph zone and that it crossed the highway's center line several times. Vincent also was cited for speeding.

The report also says that there was a strong odor of alcoholic beverages around Vincent, that the prosecutor was unsteady on his feet, that he failed several field sobriety tests and that he was uncooperative with police officers. Vincent has said that he had been drinking before his arrest, but he has not said how much. Vincent was scheduled to appear in Boyd District Court July 28.

A July 29, 1989 article in the *Lexington-Herald* reported that Vincent's trial was delayed until a special prosecutor was appointed to try the case. Additionally, the article reported that both district judges removed themselves from the case due to their relationship to the prosecutor. A special district court judge has been requested. Vincent has responsibility for prosecuting DUI cases.

DEATH THREAT REPORTED IN DUI CASE

Ashland, Ky. (AP) - An Ashland police officer's wife said a caller threatened to kill her if her husband did not drop a drunk driving case against Boyd County Attorney Jerry Vincent.

Beth Wallin, wife of Ashland Police officer Tim Wallin, said the call came at about 10:15 p.m. He told me, 'You better tell your husband to drop the Vincent case or you're going to be dead,'" Mrs. Wallin said. "It scared me to death." Mrs. Wallin has filed a complaint with the Ashland Police Department. *Kentucky Post*, August 12, 1989.

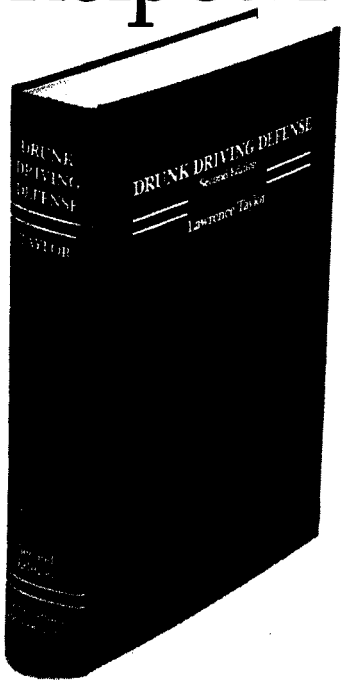
COWAN LOOKS FOR WAY TO REVERSE ACQUITTAL

CATLETTSBURG - State Attorney General Fred Cowan says his office is looking for ways to reverse a judge's acquittal in the drunken driving trial of Boyd County Attorney Jerry Vincent.

"We believe the decision was erroneous and want to take whatever steps we can to rectify it," Cowan said yesterday.

The charges were dismissed on a rare technicality. The special prosecuting attorney, Jeff Mackin, failed to inform jurors about the charges and the evidence against Vincent during opening arguments. *Lexington Herald Leader*, December 2, 1989.

How **Drunk Driving Defense** helped Peter L. Sissman:



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PETER L. SISSMAN
ATTORNEY AT LAW
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(703) 522-2220

December 4, 1987

Lawrence Taylor
(Author: Drunk Driving Defense)
C/O Little, Brown & Company
34 Beacon Street
Boston, Massachusetts 02108

Dear Mr. Taylor:

The arrival of the 1987 supplement to Drunk Driving Defense prompts me to write a fan letter.

I usually carry your book to D.W.I. trials. Recently, while waiting for a case to be called, I heard a D.W.I. case tried where a state trooper, without objection, testified about his administration of the gaze nystagmus test. While I had read generally about the test, in your book among other places, I had not heard of it being administered before in Virginia. I reached into the dark reaches of my brain and went looking for the Frye case, which I remember as the grandaddy of scientific evidence cases. After locating it, I came to my senses and decided to review what your book had to say on the subject. Your treatment of the subject was very well-handled, and I became an instant almost-expert on the subject. Frankly, taking on the prosecution and the trooper on voir dire was as much fun as I've had in court in some time. The evidence did not come in. Further, the trooper was a whole lot easier to control on cross than would have otherwise been the case.

Your book does a good job, and I wanted to let you know how much I appreciate having it in my library.

Sincerely,

Peter L. Sissman

PLS/cr

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PAROLE (OR LACK THEREOF) IN KENTUCKY

In the last issue of *The Advocate* we discussed Parole Board statistics which demonstrate that parole is evaporating in Kentucky. On December 1, 1989 the Parole Board issued its 1989 Annual Report covering its activity from July 1, 1988 to June 30, 1989. We reviewed many aspects of this Report. This issue we will review the Report further. A copy of the Report can be obtained from the Parole Board or DPA's Librarian.

CONTENTS OF THE REPORT

The contents of that 40 page report are:

The Chairman's Letter
The Board and Its Members
The Structure and Function of Parole in Kentucky
1989 Parole Board Statistics
*Combined Statistics by Institution
*Results of Initial Hearings Only by Security Level
*Results of Initial and Deferred Hearings by Security Level
*Average Length of Deferment by Security Level
*Parole Violators
*Other Board Activity
*Victim Hearings
*Total 1989 Parole Board Hearings 1989 A Comparative View
*All Institutions - Combined Statistics
*Type of Release by Fiscal Year End
*Number and Percent Paroled by Crime Group
*Time Served by Parolees by Class of Crime
*Time Served by Sentence Length
*Time to Serve and Time Served Conclusions and Recommendations

VICTIM HEARINGS

One of the most important activities of the The Board's commentary and statistics on victim hearings:

Parole Board is the reception of input from the victims of crimes. Even though the Kentucky Revised Statutes require notification of parole hearings for inmates convicted of Class A, B or C felonies, the Parole Board has extended itself to the victims of Class D felonies when the felonies are of a violent or sexual nature. Not only does the Board avail itself to victims prior to the initial parole hearing, any victim may provide input or request a personal hearing prior to any subsequent parole hearing. The Board has never denied a request by any victim to provide input or to appear before it.

TABLE 7 OTHER BOARD ACTIVITY

Actvity	Interviews	Parole	Defer	S.O.T.	No Action
Early Parole	28	24	2	1	1
%	86%	7%	3.5%	3.5%	
Early Parole to I.S.P. (Minimum Security	34	30	2	0	2
%	88%	6%	0%	6%	
Early Parole to I.S.P. (Medium Security)	6	3	0	0	3
%	50%	0%	0%	50%	
Youthful Offenders	2	0	2	0	0
%	0%	100%	0%	0%	
Back-To-Board	55	27	14	14	0
%	50%	25%	25%	0%	

The response of victims has been very positive. Many have indicated that for the first time throughout the criminal justice process they have been provided the opportunity to state their feelings about the crime, the effect the crime had on them and their family, and their feelings about the possible parole of the inmate. The victim hearing also provides the victim with the opportunity to ask the Board questions about the parole process, the factors considered, the effects of a parole, deferment or serve-out. On several occasions victims have recommended parole for the inmate so that he could be required to continue treatment, be restricted from entering their home county or simply to be supervised.

The notification of Commonwealth's Attorneys and victims requires a full-time staff person. As the Board is required to directly notify more and more victims, the workload is increasing rapidly.

Table 8 gives an overview of victim notification. The victims who request victim hearings tend to be the victims of violent and sexual crimes. Most oppose parole, fear the inmate, are angry about their victimization and fear for future victims if the inmate is released. Most appreciate the opportunity to express their thoughts and feelings to the Board as well. Even though it is difficult to generalize, many victims still seek to understand why they were victimized and many want the inmate to express remorse. While the Board cannot answer these questions, it is important for the victims to ask the questions.

Over 3,000 notifications were made in 1989, over 700 victims mailed in victim impact statements and nearly 100 victim hearings were held. In looking at the Parole Board decisions made immediately after the victim hearing, it is very clear that very few inmates were paroled. The victim input personalizes the crime for the Board and provides additional information. It must be remembered that even though victim input does affect Parole Board decisions, most of these same inmates would probably not have been paroled in any case given the very violent and serious nature of most of their crimes. In no way does this diminish the value of

the input received from victims.

Finally, the back-to-board cases reflect that about half of the parole recommendations were rescinded at the new hearing and this would probably be due to poor institutional conduct after the initial parole recommendations. The 50% of the cases in which the parole recommendation was allowed to stand reflects primarily those situations where one parole plan was disapproved but the Board approved the subsequent plan.

NUMBER AND PERCENT OF PEOPLE PAROLED BY CRIME GROUP

The Board's commentary and statistics on action by type of crime:

In analyzing the decisions of the Board it is instructive to understand the types of crimes which parolees committed and to determine whether release decisions have changed over time relative to these crime groups.

Table 12 indicates the number and percent of inmates paroled by crime group over the decade of the 80s. The total number of inmates paroled has fluctuated over the years but it is significant to note that 2534 paroles were granted in 1989 as compared to 2975 in 1980. The corresponding number of intakes to the prison system for these two years was 4482 and 2716 respectively. Simple subtraction indicates that in 1980 approximately 250 more inmates were paroled than entered prison. In 1989, however, almost 2,000 more inmates came into prison than were paroled.

Except for 1981, the total number of paroles was less in 1989 than in any other year of this decade. In looking at the crime groups from which parolees came, it is possible to note some significant trends. The number and percent of violent offenders paroled have dropped dramatically during the past 10 years. After 1986 the decrease is most apparent. This has occurred without the influence of the violent offender statute. As mentioned previously, this statute will not affect the Parole Board for several more years. Given the increase in the inmate population, it becomes clear that there is a higher concentration of violent inmates currently in prison.

The number of sex offenders paroled dropped significantly in 1989. While the percent of paroles for sex offenders has remained between 4 and 6% during the decade, the total number of sex offenders paroled dropped in 1989. This was due in large part to the existence of the sex offender program and the insistence of the Board that sex offenders participate in it. The Board changed its regulations in 1989 to prohibit eligible sexual offenders who had not successfully completed the program, from appearing before the Board. This regulation is consistent with and based upon the statute which prohibits the Board from paroling eligible sexual offenders who have not successfully completed the program.

The number and percent of drug offenders paroled has increased rather steadily over the past 10 years. In 1989, 14% of all paroles were granted to drug offenders. Most of those paroled were required to attend substance abuse treatment programs as a special condition of parole. The treatment programs generally offer random drug testing in order to monitor the parolees' progress.

Roughly one half of all paroles during this decade were granted to property offenders. Many of these offenses were committed in order to support or in response to substance abuse.

Finally, there is a residual category of offenses which includes all other crimes not listed above. These crimes could include driving on a suspended or revoked license, third offense; flagrant non-support; bribery; perjury, etc. This group constitutes the smallest number and percent who were paroled. It is presented in order to provide a complete accounting of the Board's decisions.

In summary, not only has the total number of paroles decreased during the past ten years, the number and percent of parolees granted to violent offenders has decreased significantly. The percent of paroles granted to other crime groups has remained somewhat constant, with a slightly greater percentage being granted to drug offenders. These decisions by the Parole Board are consistent with its public protection function being met through the incapacitation of most violent offenders and the support for rehabilitation and treatment of drug offenders.

TABLE 8 VICTIM HEARINGS

Number of Notifications to Commonwealth's Attorneys of Scheduled Parole Hearings	2988
Number of Notifications to Victims of Scheduled Parole Hearings	449
Number of Victim Impact Statements Received	710
Number of Victim Hearings Conducted	87

Results of Parole Hearings Immediately Following Victim Hearings

Parole After First Victim Hearing	10
Parole After Initial Denial of Parole (Defendant)	8
Number Deferred	38
Number Served-Out	31

CONCLUSIONS AND RECOMMENDATIONS

The Parole Board makes some noteworthy conclusions and recommendations:

From the foregoing discussion it is clear that the Kentucky Parole Board is very active. As the Board conducts an increasing number of hearings it is constantly aware that its primary function is public protection.

In reviewing the annual statistics and comparing them with previous years the following conclusions are reached:

*The % of inmates paroled at their initial parole hearing is decreasing.

*The % of inmates receiving a serve-out at their initial hearing is increasing.

*The number and % of inmates being paroled each year is decreasing.

*The number and % of inmates being served-out is increasing.

TABLE 11 TYPE OF RELEASE BY FISCAL YEAR END

TYPE OF RELEASE	1981 #	1981 %	1982 #	1982 %	1983 #	1983 %	1984 #	1984 %	1985 #	1985 %	1986 #	1986 %	1987 #	1987 %	1988 #	1988 %	1989 #	1989 %
PAROLE	2358	72.7	2162	71.5	2555	77.0	2015	72.6	2203	74.0	1853	62.7	1496	53.8	1449	45.9	1497	43.
PAROLE TO I.S.P.	0	0	0	0	0	0	2		58	2.0	207	7.0	314	11.3	445	14.1	449	13.1
CONDITIONAL RELEASE (SERVE OUT)	317	9.8	276	9.1	313	7.4	323	11.6	355	11.9	524	17.7	600	21.6	739	23.4	850	24.9
MINIMUM EXPIRATION (SERVE OUT)	29	.9	15	.5	7	.2	11	.4	5	.2	11	.4	6	.2	6	.2	7	.2
MAXIMUM EXPIRATION (SERVE OUT WITH ALL GOOD TIME LOST)	12	.4	3	.1	9	.3	13	.5	20	.7	22	.7	23	.8	22	.7	19	.6
SHOCK PROBATION FROM PRISON	336	10.4	394	13.0	273	8.2	251	9.1	191	6.4	178	6.0	146	5.3	170	5.4	178	5.2
SHOCK PROBATION FROM JAIL (CI)	0	0	0	0	0	0	0	0	0	0	0	0	42	1.5	171	5.4	217	6.4
SHOCK PROBATION TO I.S.P.	0	0	0	0	0	0	0	0	0	0	0	0	2	.1	2	.1	1	
COURT ORDER	46	1.4	39	1.3	35	1.1	36	1.3	49	1.7	59	2.0	55	2.0	58	1.8	62	1.8
ESCAPE	137	4.2	121	4.0	110	3.3	107	3.9	92	3.1	84	2.8	84	3.0	76	2.4	110	3.2
DEATH	7	.2	14	.5	11	.3	16	.6	4	.1	14	.5	6	.2	15	.5	14	.4
PARDON	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
OUT OF STATE TRANSFER	2	.1	1		4	.1	1		1		2	.1	6	.2	7	.2	13	.4
TOTAL RELEASES	3244	100	3025	100	3317	100	2775	100	2978	100	2954	100	2780	100	3160	100	3417	100
TOTAL INMATES	3194		3648		3083		3409		3095		3263		3378		4036		4482	

TABLE 12 NUMBER OF PEOPLE PAROLED BY CRIME GROUP BY YEAR (FYE)
NEW COMMITMENTS ONLY

CRIME GROUP	1980 #	1980 %	1981 #	1981 %	1982 #	1982 %	1983 #	1983 %	1984 #	1984 %	1985 #	1985 %	1986 #	1986 %	1987 #	1987 %	1988 #	1988 %	1989 #	1989 %
VIOLENCE	1108	37	1042	35	997	33	926	32	838	30	910	32	944	34	796	29	887	27	667	26
SEX	130	4	121	4	104	4	110	4	132	5	165	6	162	6	157	6	164	5	126	5
DRUG	224	8	229	8	250	8	269	9	320	12	277	10	296	11	317	11	444	14	353	14
PROPERTY	1463	49	1543	52	1575	53	1481	52	1408	51	1430	50	1321	47	1417	51	1637	51	1307	52
OTHER	50	2	55	1	67	2	74	3	60	2	65	2	66	2	97	4	103	3	79	3
TOTAL	2975		2290		2993		2860		2758		2847		2789		2784		3235		2534	
TOTAL INTAKES	2716		3194		3648		3083		3409		3095		3263		3378		4036		4482	

*The average length of deferment is increasing.

*The % paroled is inversely related to the security level of the institution where the inmate is incarcerated.

*The length of deferment is directly related to the security level of the institution where the inmate incarcerated.

*The recidivism rate in Ky. is very similar to the recidivism rate of other states.

*The Ky. Parole Board revokes the parole of technical violators more quickly than most other states.

*Recidivism due to new felony convictions is lower in Ky. than in most surrounding states.

*The parole system is protecting the public by returning to prison technical parole violators prior to the commission of new felonies.

*Victim hearings have had a positive and direct influence on the decision-making of the Parole Board.

*Parole Board decisions (Parole and Serve-Out) account for more than 80% of all releases from prison.

*The total number of prison intakes is surpassing the total number paroled each year at an accelerating rate.

*The number of violent offenders paroled in 1989 is less than in any of the previous nine years.

*The number of sex offenders paroled in 1989 is less than in any of the previous 5 years.

*Property offenders receive approximately one-half of all paroles.

*The average time served prior to parole for capital offenders was greater for those paroled in 1989 than in any previous year.

*The average time served prior to parole for persons convicted of Class A felonies has increased steadily since 1989.

*The % of sentence served has increased over the past nine years for persons sentenced to 10, 15 and 20 years and Life.

*The time to serve and the time served by inmates released during the past decade by all out actions has remained fairly constant because those figures do not include those currently incarcerated.

*Final Discharge from parole is a measure of parole decision-making success.

*More than 1,000 Final Discharges were issued in 1989 representing a savings of more than 1,000,000 inmate days.

*Parole Board successes saved the Commonwealth more than $34,000,000 in 1989 in incarceration costs.

These conclusions indicate that the Parole Board has accepted and met its statutory obligations to protect the public by determining which inmates con continue to serve their sentences in their communities while on parole and incapacitating those inmates who pose an imminent risk. In the process, the Board has helped reduce incarceration costs.

An inevitable point of discussion concerning the Parole Board is the affect of overcrowding on Board decisions and the affect of Board decisions on overcrowding. Based upon its primary public protection function, the overcrowding problem does not directly affect Board decisions. Simply because the prisons are overcrowded does not make an individual inmate a good parole risk. There is no doubt that the decisions of the Parole Board have had an effect on prison population. This is an unintended, yet very real consequence of the Board performing its public protection function.

PAROLE BOARD INCREASES KENTUCKY PRISON CRISIS

Recently released Parole Board statistics reveal 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;
- 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 first 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.

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.

As the Parole Board conducts its business around the state at the various institutions, it has made several observations which are presented here as recommendations for future planning and action:

*There is an immediate and increasing need for programming for the needs of the long term incarcerated population. This population is growing rapidly due to the actions of both the Parole Board and the Courts.

*There is a need to provide for the needs of the increasing number of geriatric inmates. The long term health care needs of this population need to be addressed.

*Mental health resources need to be expanded within the institutions and the community. There is a significant population of inmates who could be paroled if adequate long term mental health facilities and treatment institutions were available.

*If substance abuse treatment resources were expanded and available more inmates could be paroled.

*If intermediate sanctions were available for technical parole violators, many would not have to be reincarcerated. These sanctions need to include intensive substance abuse treatment centers.

*There is a need to provide pre-release programming for inmates ordered to serve-out their sentence and discharged at their conditional release date. This could involve permitting all of this class of inmates to experience minimum security institutions.

*There is a need for post incarceration supervision of inmates discharged by conditional release.

*There is a need for the Parole Board to communicate to all inmates the need to improve their education prior to parole.

The Parole Board realizes that many of these recommendations carry a high price tag. This fact alone does not diminish the validity of the recommendations. The Board stands ready to explore alternative solutions to the common problems faced by all of the components of the criminal justice system.

REPRESENTING INSTITUTIONALIZED MENTALLY RETARDED PERSONS

The following article explores the need for increased legal advocacy for mentally retarded persons. Contrasting the services available to the mentally ill with the limited resources for the mentally retarded, the authors highlight the unique problems of this underrepresented population, and examine alternative forums for advocacy. In a practical, straightforward analysis, the article identifies barriers to effective representation, including the fundamental problem of lawyers' and advocates' reactions to institutionalized retarded persons' appearance and behavior, and the effect of these reactions on advocacy efforts.

The article is followed by a client interview form and guide that focus on the special problems of the mentally retarded. Although the guide is only one approach to improving the effectiveness of representation, it contains valuable information for both lawyers and advocates, and can also serve as an educational tool for institutional personnel.

THE NEED FOR REPRESENTATION

Successful efforts to provide legal services to mentally retarded clients are a relatively recent development. [1] Even institutionalized mentally ill people found legal advocates at an earlier date. [2] Where progress has been made in securing rights for retarded persons- whether through litigation or legislation- it has often been an afterthought in efforts on behalf of the mentally ill. [3] While the advent of developmental disability protection and advocacy agencies in each state has greatly expanded the legal resources available to retarded citizens, these agencies differ in the extent to which they provide legal advocacy. [4] The cutbacks in agencies funded by the Legal Services Corporation have brought a halt to expansion of legal assistance to retarded persons and may jeopardize those programs now in existence.

The relative novelty of providing legal representation to mentally retarded people, when combined with the increased competition for finite advocacy resources, may lead some to conclude that these clients should not be a high priority for legal advocates. Retarded clients who live in institutions may be particularly easy to ignore; it is not a novelty to observe that those who are out of sight may forfeit a prominent position in the mind. The probability of this result is made more certain by the omission of mandatory provisions for counsel at civil commitments and periodic reviews for the mentally retarded in the statutory structure of many states, provisions that often are in place for the mentally ill. [5] Finally, the number of attorneys who receive any introduction in law school to the legal problems of mentally retarded persons is very small. [6]

Abandonment of these clients in the 1980s would be catastrophic. Reduced state budgets are likely to lead to a decline in the quality of life in institutions, and we have abundant experience to suggest that such a decline will produce abuses of appalling magnitude. [7] Even in more prosperous times we have seen that deinstitutionalization may mean movement into settings which are less notable for their "lesser restriction" than for their "lesser cost." [8] There is reason to believe that these problems are on the rise. The successes of litigation for institutional reform and community placement have not been sufficiently widespread or entrenched to permit complacency or even a period of benign neglect.

THE SETTING FOR REPRESENTATION

Ironically, available forums for legal representation are on the rise. Although the United States Supreme Court declined to order states to provide hearings for mentally retarded minors whose institutionalization was sought by their parents, [9] other opportunities for advocacy are increasing. Slowly but surely, state legislatures are beginning to insert due process language in statutes providing for residential placement. [10] Where the legislatures have not acted, courts are beginning to scrutinize the procedures afforded by the state. [11] An increasing number of states have enacted statutes specifying the rights of institutionalized mental patients, [12] and some of these statutes encompass mentally retarded persons as well. [13] Statutes providing for limited purpose guardianships on issues of treatment and habilitation may also provide a useful forum. [14]

The U.S. Supreme Court's recent decision in *Youngberg v. Romeo* [15] carries important new opportunities for advocacy on behalf of institutional residents. While declining to decide whether there might be a broader and more generalized right to habilitation, the Court found that specific liberty interests of institutional residents could give rise to a constitutional right to training. Mr. Romeo was entitled to that training that was linked to his liberty interests in free bodily movement within the institution and in physical safety.

In other cases, a similar linkage could be shown between needed habilitation and the ability to leave the institution for a less restrictive placement. [16] A concurring opinion holds open the hope of a right to freedom from the institution-induced regression. [17] In all such cases, the teaching of *Romeo* seems to point toward individualized determinations of habilitation rights; to come within the holding of the case, the asserted right must be linked to a liberty interest of the individual resident. Whether this individualized approach will act as an impediment to class action litigation [18] remains to be seen, but it certainly holds open the opportunity for litigation tailored to the needs of a particular client.

We have not attempted an exhaustive list of the forums available for individual legal advocacy for mentally retarded residents of institutions. Other federal [19] and state [20] opportunities present themselves to the lawyer seeking the release of a client who is wrongfully institutionalized or whose needs are not being met by the facility in which he resides.

INTERVIEWING THE CLIENT AND ASSESSING HIS NEEDS

Perhaps the most significant barrier to effective representation of institutionalized retarded persons is their lawyer's visceral reaction to them. Typically, the residents of our public institutions are severely and profoundly retarded, and a disproportionate number have some form of physical handicap as well. [21] Few attorneys will have had prior experience in dealing with such people. If the client experiences seizures, wears diapers (adults), or is self-abusive, the lawyer may find that his or her emotional reaction hinders the provision of legal services which would be performed as a matter of course if the client were mentally (and physically) typical. [22] Even if the lawyer is not put off by the client's appearance or behavior, he or she may be unclear as to the appropriate procedure when the client lacks the ability to speak, or when the speaking ability is rudimentary.

These difficulties may contribute to confusion about the lawyer's role. [23] The attorney may see no point in seeking direction for a client who is mentally retarded. The temptation to be paternalistic is strong. Yet, where the client is able to express some preference about where he will live and under what conditions, the lawyer is ethically obligated to bring those wishes to the attention of the decision-maker.

Canon 7 of the ABA's Model Code of Professional Responsibility states, "A lawyer should represent a client zealously within the bounds of the law." Ethical Considerations 7 and 8, interpreting this canon, make it clear that the authority to make decisions regarding the merits of a case belong exclusively to the client. The lawyer should exert best efforts to ensure that the client has been informed of all relevant considerations, but the lawyer's power to usurp the client's preferences is expressly limited.

Ascertaining the client's preferences is not as simple a task with mentally retarded clients as it is in cases involving mentally typical people. In some cases, technological advances such as language boards may assist clients who lack the ability to speak. [24] But whether or not such aids are available or appropriate, the attorney must adapt his own communications to his client's ability to understand. Questions must be phrased simply and in words and concepts that the client understands. [25] For example, a client may be unable to discuss features of the proposed habilitation plan per se, but may be able to tell his lawyer what kinds of things he likes to do. Similarly, a client's expressed preference about his future residence ("I want to live with my brother," or "I want to live in [a particular city]") may give the lawyer important information about the services the client should receive while still in the institution, *i.e.*, habilitation designed to impart skills that will make the client's preference possible.

The lawyer may face a similar problem in ascertaining the client's current situation. The same disability that impairs the client's ability to tell his lawyer what he wants may also limit his ability to tell him what is happening to him in the institution. The findings of fact in cases like *Youngberg v. Romeo*, [26] *Pennhurst State School & Hospital v. Halderman*, [27] and *Wyatt v. Aderholt* [28] alert the lawyer to the kinds of hazards a client may face while residing in an institution. For example, with regard to abuse and neglect, the previously discussed problem of a client's language disability may be compounded by fear of retribution. The vulnerability of these clients makes it incumbent upon the attorney to be alert to possible problems in the client's life.

A final caveat is in order regarding information provided to the lawyer by members of the institutional staff. Staff members are typically the source of much valuable information. But even when the staff members are perceived as compassionate and competent professionals, the lawyer should bring a degree of skepticism to their information about the client. A staff member, especially above the direct care level, may be basing conclusions upon unreliable hearsay. Diagnostic testing of institutional residents is particularly suspect; there may be incentives for institutions to claim that the bulk of their residents are severely or profoundly retarded; a higher functioning individual who has not been placed in the community may be a source of institutional embarrassment. [29] It is relatively commonplace in our experience to be told by a staff member that a particular client lacks a certain skill (*e.g.*, receptive language skills) when a casual observation by a layperson proves conclusively that this is untrue. It should also be noted that the professional skills of diagnosticians on the staffs of institutions are not uniformly high. [30]

We have outlined a few of the characteristics of these clients that may call for the lawyer to perform differently than in the case of a mentally typical client. Having discussed these exceptions, we must now belatedly emphasize the general rule: *Mentally disabled clients are more like mentally typical clients than they are dissimilar from them.* [31] As with many mentally typical clients, they may be unversed in the legal aspects of their problem, and nervous about discussing their situation with a lawyer. They may find it difficult to understand the role of the lawyer and distinguish it from the role that other professionals play in their daily activities. In addition, like mentally typical clients, they may have difficulty, whether because of shyness, confusion, inarticulateness or a communication disability, in expressing themselves to their lawyer.

The lawyer can safely and profitably start from the rebuttable presumption that things that he or she would find disagreeable or unpleasant will have the same effect on the client. Starting from this premise may also assist the lawyer in dealing with the initial visceral reaction that he or she may experience in dealing with a mentally disabled client. It may be relatively novel for some clients to be treated as if their opinions and condition mattered to someone else, and introducing the client to this kind of treatment is not the smallest service a lawyer can perform. [32]

A CLIENT INTERVIEW AND ASSESSMENT FORM

New Mexico's Protection and Advocacy agency represents institutionalized mentally retarded clients in a number of settings. More prominently, it is counsel for a substantial number of these clients in the mandatory periodic review hearings under the Mental Health and Developmental Disabilities Code. [33] Its lawyers also appear in hearings on petitions for plenary and limited guardianships. At these hearings, the issue is not only whether the client meets the statutory criteria for commitment, but also the adequacy of the individualized habilitation plan [34] and the availability and suitability of less restrictive alternative placements, as well as hearings on educational and other matters.

Early in the representation efforts, it became clear that a standardized method for collecting and organizing information gathered during client interviews was needed. In order to assist lawyers, paralegals and social workers in interviewing clients, an interview form and interviewer's guide were devised by the managing attorney. The agency's objectives were to hone the observation skills of the staff and to achieve consistency among interviewers. Consistency was required in order to ensure that any member of the staff could evaluate a file quickly, make comparisons of a client's response to different members of the staff, detect regression or improvement in a client's abilities and promote continuity if a new lawyer

was assigned to the case.

The form and guide have been revised a number of times as the agency has grown and continuing legal representation has revealed weaknesses in information collection. These tools are proving helpful in eliciting relevant information for use in a variety of legal proceedings and also in standardizing the information on various clients within the agency. Advocates may find that they can adapt the approach to assist them in other advocacy settings. A copy of the form and guide follow this article.

The authors wish to express their appreciation to Professor Lee Teitelbaum, whose support and insights have been vital to our work on legal representation of mentally retarded persons.

FOOTNOTES

[1] *See*, Herr, "The New Clients: Legal Services for Mentally Retarded Persons," 31 *Stanford Law Review* 553 (1979).

[2] *See, e.g.*, Litwack, "The Role of Counsel in Civil Commitment Proceedings: Emerging Problems," 62 *California Law Review* 816 (1974); B. Ennis, *Prisoners of Psychiatry: Mental Patients, Psychiatrists, and the Law* (1972).

[3] *E.g., Wyatt v. Stickney*, 344 F. Supp. 373, 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971); N.M. Stat. Ann. Sections 43-1-2 through 43-1-25 (Repl. 1979). Sometimes even defeats for the mentally retarded follow in the wake of defeats of the mentally ill. *Compare, Parham v. J.L.*, 442 U.S. 584 (1979), with *Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979).

[4] The agencies also differ in the extent to which they actively serve a substantial number of clients who live in institutions.

[5] *B. Sales et al., Disabled Persons and the Law: State Legislative Issues* 416-21 (1982); J. Ellis, R. Luckasson, K. Watson & E. Church, *Commitment of the Mentally Retarded: State Laws and the Need for Reform* (American Bar Foundation, In press 1983). In the past, such hearings as were conducted often became "rubberstamp" procedures. *See*, Kay, Farnham *et al.*, "Legal Planning for the Mentally Retarded: The California Experience," 60 *California Law Review* 438 (1972).

[6] The major law school casebooks on mental health law provide almost no discussion of separate issues confronting mentally retarded persons. The only casebook which devotes major attention to this group is R. Burgdorf, *The Legal Rights of Handicapped Persons: Cases, Materials, and Text* (Paul H. Brookes, Publ. 1980).

[7] *See, e.g.*, B. Blatt & F. Kaplan, *Christmas in Purgatory: A Photographic Essay on Mental Retardation* (1974).

[8] Of particular concern is the trend toward moving residents of institutions for the retarded into nursing homes. *See*, Scheerenberger, "Public Residential Services, 1981: Status and Trends," 20 *Mental Retardation* 210, 214 (1982).

[9] *Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979). For a suggestion that another result might have been preferable, *see, Teitelbaum & Ellis, "The Liberty Interest of Children: Due Process Rights and Their Application,"* 12 *Family Law Quarterly* 153, reprinted in 2 *Mental Disability Law Reporter* 459 (1978).

[10] J. Ellis *et al., supra* note 5. For a draft of the American Bar Association model statute for admission and consent to services, *see* B. Sales *et al., supra* note 5, at 409-52.

[11] *E.g., In re Hop*, 29 Cal.3d 82, 171 Cal.Rptr. 721, 623 P.2d 282 (1981); *People v. Reliford*, 382 N.E.2d 72 (Ill. App. 1978).

[12] Lyon, Levine & Zusman, "Patients' Bill of Rights: A Survey of State Statutes," 6 *Mental Disability Law Reporter* 178 (1982).

[13] B. Sales, *et al., supra* note 5, at 849-64.

[14] *E.g.*, N.M. Stat. Ann. Section 43-1-15 (Repl. 1979). Seeking the client's consent to his individualized habilitation plan may provide an opportunity to scrutinize the adequacy of the services he is receiving. See, Bennett, "Reviewing an Individual Habilitation Plan: A Lawyer's Guide," 4 *University of Arkansas at Little Rock Law Journal* 467 (1981).

[15] 457 U.S. 307, 102 S.Ct. 2452 (1982) see, 6 *Mental Disability Law Reporter* 223 (1982).

[16] Ellis, "The Supreme Court and Institutions: A Comment on *Youngberg v. Romeo*," 20 *Mental Retardation* 197 (1982). *See generally*, American Association on Mental Deficiency, *The Least Restrictive Alternative: Principles and Practices* (H.R. Turnbull ed. 1981); President's Committee on Mental Retardation, *The Mentally Retarded Citizen and the Law* 485-527 (M. Kindred et al., eds. 1976).

[17] 457 U.S. 307, 102 S.Ct. at 2463 (Blackmun, Brennan & O'Connor, J.J. concurring).

[18] Limitations on the ability of agencies funded by the Legal Services Corporation to bring class action lawsuits may also lead to a greater emphasis on individual cases.

[19] While *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), closed some opportunities for litigation under federal statutes, others remain. *See generally*, Turnbull, "Rights for Developmentally Disabled Citizens: A Perspective for the 80s," 4 *University of Arkansas at Little Rock Law Journal* 400 (1981).

[20] *E.g.*, dependency and neglect proceedings for the clients who are minors, and, of course, *habeas corpus*.

[21] *See*, Scheerenberger, *supra* note 8. Scheerenberger's data should be read with some degree of skepticism because they are based upon reports by administrators of the institutions. Such data tend to overestimate the degree of handicap of some residents. A comparison of those residents said to be profoundly retarded with those said to possess some ability to speak suggests this disparity.

[22] An illustration form a civil commitment proceeding observed by one of the authors: the judge expressed doubt that the client required institutionalization, whereupon the *defense* attorney interjected, "but your honor, my client wears a hockey helmet!" *Compare*, Wexler, Scoville, *et al.*, "The Administration of Psychiatric Justice: Theory and Practice in Arizona," 13 *Arizona Law Review* 1, 53 (1971).

[23] See, Mickenberg, "The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals," 31 *Standard Law Review* 625 (1979); see generally, IJA-ABA Juvenile Justice *Standards Project, Standards Relating to Counsel for Private Parties* (L. Teitelbaum rptr. 1980); Costello, "Ethical Issues in Representing Juvenile Clients: A Review of the IJA-ABA Standards on Representing Private Parties," 10 *New Mexico Law Review* 255 (1980); "Point/Counterpoint: Legal Advocacy for Persons Confined in Mental Hospitals," 5 *Mental Disability Law Reporter* 274 (1981).

[24] *See*, Bennett, *supra* note 14, at 469-71, for an excellent brief discussion of the client interview.

[25] With some clients it will be necessary for the lawyer to do some rudimentary teaching before the client will understand what this interview is about. Care must also be taken to ensure that the client's answers are truly responses to the lawyer's questions, rather than mere acquiescence intended to "please" the interviewer. Sigelman *et al.*, "When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons," 19 *Mental Retardation* 53 (1981).

[26] 457 U.S. 307, 102 S.Ct. 2452 (1982), see, 6 *Mental Disability Law Reporter* 223 (1982).

[27] 451 U.S. 1 (1981).

[28] 503 F.2d 1305 (5th Cir. 1974).

[29] *See*, Scheerenberger *supra* note 8.

[30] Even in some cases in which staff information is perfectly credible, it may be appropriate to ignore it. For a substantial number of profoundly retarded clients, the staff's conclusion that the client can understand nothing may be consistent with the lawyer's personal observation. However, none of us can be certain what such a client understands or does not understand. It is both prudent and compassionate in such cases to explain the nature of the interview to the client in the simplest, clearest terms possible. The lawyer's investment of a little time is a small cost for the possibility that a few clients may actually understand what is happening. *See*, Bennett, *supra* note 14, at 469-71. It is within our experience that seeing the lawyer patiently talking to such a client has a favorable impact on the way staff members perceive and treat that client.

[31] *See*, B. Blatt, *In and Out of Mental Retardation: Essays on Educability, Disability, and Human Policy* (1981); *see generally*, W. Shakespeare, *Merchant of Venice* III, i. 62.

[32] *See generally*, W. Wolfensberger, *The Principle of Normalization in Human Services* (1972); M. Howell & P. Ford, *The True History of the Elephant Man* (1980).

[33] N.M. Stat. Ann. Sections 43-1-13 (Repl. 1979).

[34] N.M. Stat. Ann. Sections 43-1-9 (Repl. 1979); *see*, Bennett, *supra* note 14.

CLIENT INTERVIEW FORM

Client _____
Date _____
Case Number _____
Time _____
Facility _____ Day of Week _____ Place of Interview _____
Interviewer _____

1) Physical Appearance:

2) Approximate Height: _____
Approximate Weight: _____

3) Clothing/Diapers:

4) Age:

5) Health (*e.g.* injuries, sores, sunburn, coughing):

6) Teeth:

7) Medication:

8) Wheelchair/Eyeglasses/Hearing Aid/Helmet/Bed:

9) Ambulation:

10) Eye Contact:

11) Expressive Speech/Language

12) Receptive Speech/Language Ability (What is client able to understand?):

13) Client's Response to Interviewer:

14) Activity in which client was involved when interviewer arrived:

15) Activity in which other near-by residents are involved:

16) Activity of staff:

17) Expressed desires of client re:

a) Substitute decisionmaking

Recognizes money:

Understands uses of money: ____small amount ____large amount

Connects illness or injury with seeing doctor or nurse:

Understands medical questions:

Consent: ___capacity
___information
___voluntariness

Has personal goals: ___short range
__long range

Reaction to mention of proposed guardian: __positive __negative

Expressed desires of client re:
b) Residence
c) Activities/Likes/Dislikes

18) Staff comments re:

a) Health:
b) Needs/Programming:
c) Visitors:
d) Activities/Likes/Dislikes:
e) Abilities:
f) Regression:
g) Potential Placement/Change:

19) Recommendations of Interviewer
__Oppose Guardianship
___Consent to Full Guardianship
___Consent to Limited Guardianship
__Consent to Treatment Guardianship
___Oppose Extended Commitment
__Consent to Extended Commitment

20) Services which client appears to need, or which should be investigated more thoroughly: _____

INTERVIEW GUIDE

This interview guide is intended to help lawyers and advocates in their efforts to represent mentally retarded institutionalized patients. The guide is not intended to be all inclusive; it should be used in conjunction with general interviewing techniques.

As in the case of an interview with any legal client, there are two primary purposes to an interview with our clients, that is (1) to establish a comfortable attorney-client relationship and (b) to gather information. Additionally, in these situations we will often be in the position of setting an example of the kind of respectful attitude which we expect other persons who deal with this client to exhibit.

The initial contact with the client will generally occur in the cottage or ward. It is important that you introduce yourself to the client and explain the purpose of your visit and your relationship to him. For example, with extended hand you might say, "Hello, Mr. Rand." I am happy to see you. My name is _____. I'm your lawyer: I'd like to talk with you for a little while."

Meanwhile, a staff person will probably have assisted you in locating the client and finding a quiet place to conduct the interview. You should explain that you are Mr. Rand's lawyer and you need to discuss his case with him. You will also want to discuss some things with the staff person after you have completed your client interview. Creating as comfortable and quiet an environment as possible is important. However, try to avoid disrupting an activity or upsetting the client by taking him into a forbidden area (the staff office) or physically endangering him (by rolling his crib into another room, for example.) Do not set yourself up for disruptions from other clients. It's probably a good idea to sit so that you can see as other residents walk toward you.

The information you will need to collect from this interview is extensive and of several varieties. The collection of the information will often require a great deal of creativity on your part as well as intense observation. We are dealing with clients who may never have had a lawyer before and in fact may only rarely have been asked to express an opinion or a desire. In addition to trying to get direction for the legal representation, we should attempt to determine if our client is healthy, physically comfortable, in need of anything (perhaps his eyeglasses need repairing or he has run out of writing paper or he needs to make a phone call), or if he wants to tell an "outsider" something he feels uncomfortable telling to a staff person.

The form should be used only as a guide. Individual clients will present individual concerns and the record of your interview should reflect these. This form is not the form we use to analyze data from the client's medical file or habilitation file.

Therefore, all the data collected is observational data. (For example, a client may be described as toilet trained in his habilitation plan, but be wearing a diaper during your interview. There may be no record of prescribed medications, but you may see a staff member administer a pill or you may be told that "Mr. Rand can't be interviewed this afternoon. He just took his medication and won't wake up until 6:00 this evening.")

The client identification section includes the client's name, case number, facility, place of interview (did it occur in Cottage 3?), name of person conducting the interview, date, time of day (it may be important that a client is eating supper at 3:30), and the day of the week (Saturday activities may be justifiably different from Tuesday school activities).

The first nine items on the form concentrate on the condition of our client. Is he clean, disheveled, shaved, sunburned, injured? Is our client undersized for his age or of normal height? Some of our clients are overweight or underweight and we may need to investigate dietary changes. Is our client wearing clean, well-fitting clothing appropriate to the time of day, his gender, and the season? What is the approximate age of our client (this is a good question to ask of the person himself during the course of the interview). We need to observe the state of our client's health. Is he coughing, does he have swollen areas on the side of his head, an eye infection? Does he have teeth missing, or swollen gums or terribly bad breath, which might indicate an infection? Does he seem drowsy or is he shaking, both of which may be attributable to overmedication. Is he wearing a sound amplifier or a helmet or a baseball cap (which might be a functional substitute for a helmet)? Is our client walking or sitting in a wheelchair or restrained on a bed? In many cases, direct questioning of our client is appropriate in the above items. For example, "Do you hurt?", "Do you brush your teeth?", "Why do you have this hat on?", "Can you walk?".

Items 10 through 13 concentrate on communication ability. Does our client look at you when you're speaking with him or does he keep his eyes closed or averted? Is he blind? Does he have oral language in English or Spanish? Does he use sign language (either his own version or the official American Sign Language)? Does he have a language board with a pointer or a head-directed light? Receptive communication ability is less easily determined than expressive ability. Since we cannot be sure of what many of our clients are hearing and/or understanding, rather than underestimate their abilities and chance not talking with them enough, we should overestimate and give them information even when we can't be sure that they are understanding us.

Item 13 is the place to record the client's response to you. Did he smile when you talked with him? Did he converse with you in an appropriate way? Did he reject all attempts to communicate with him? Was it impossible to break through the stereotypical behavior? Did he grab at you?

The activity occurring in the ward should be reflected in items 15 through 16. Was our client sitting in the corner doing nothing when you arrived? Were the other residents engaged in various forms of self-stimulation? Were the aides watching General Hospital? It may be significant that although our client wasn't doing anything, the other residents were putting puzzles together. After all, the staff may have directed him to sit quietly and wait for his lawyer as a matter of courtesy in order to save you time. (A quick glance at the other activities occurring in the ward will help determine the likelihood that that was indeed the case.)

Item 17 reflects the heart of the interview as it concerns the question of guardianship. Does the client know what money is? Can he recognize a dime when you show it to him? Some clients understand the use of small amounts of money but do not yet appreciate the value of large amounts. For example, Mr. Rand may understand that he can save $89 over a period of a few months and then buy a black and white television set, but he may not yet understand that when he inherits $20,000 from his grandmother he could make a down payment on a duplex.

Does our client express an understanding of the relationship between illness or injury and medical care providers? Does he like the doctor who has been treating him? Do the elements of legally adequate consent exist in this situation at this time?

Is our client able to express some desires concerning goals in his life? Is he enthusiastic about a short-term goal such as getting a Coke, but unresponsive when asked about his desires for his life when he graduates from high school?

Even when a client may not have been able to communicate his desires on any other dimension of the guardianship, he may be able to give us a clue when he hears the name of the proposed guardian. When asked whether he wants his mother to decide things for him, does he blurt out, "It's none of her damn business?" Does the mention of his brother cause him to make a punching motion? Perhaps a loving smile will be his response to discussion of his father. Although the response may not provide the entire basis for a litigation decision, any indication of his desires should be taken into account in some way.

Additionally, we will want to talk with our client about where he likes to live or where he'd like to move. (You should probably check the validity of this information with a question such as "Where do you live right now?"). It's also helpful to find out what our client likes to do so that we can later determine whether his habilitation plan addresses this preference. Does he say that he likes to swim or that he likes to visit his brother in another city or that he likes to go to dances? Is he being allowed by the institution to do the one thing which gives him pleasure?

Generally a staff person is nearby who may be able to give you some useful information. He or she should be able to tell you about any recent medical crises or a particular program which might be beneficial but is not available. A staff person should also be able to tell you whether or not the proposed guardian visits our client or corresponds with him. Since he or she is involved on a daily basis with the resident, the staff person will often describe the likes and dislikes or our client. In addition, you can get otherwise undocumented information on the abilities of our client; for example, "Eddy walks anywhere he wants to on campus" or "he makes a lot of money shining shoes for the staff" or "he runs away every chance he gets." A staff person who has worked at the facility for a long time may be able to describe our client when he or she first arrived. Of interest in that area would be indications of regression in our client's abilities. Some staff may also have thought about possible future placements, and may be willing to discuss these with you.

The interviewer is not being asked in question 19 to make the determination regarding legal action. However, the feeling of the person who participated in the face-to-face interview is valuable as the primary attorney analyzes the case. Any explanatory comments regarding your recommendation are also gladly received. Likewise, question 20 should flag some areas that warrant further thought or investigation.

Remember, this person is our legal client. Therefore, when you are trying to resolve a dilemma concerning the way in which the interview should be conducted, ask yourself the question "How would I handle this with a mentally typical client?" It probably won't solve your dilemma, but it should at least point you in the right direction.

*While the use of Mr., Miss, or Ms. is preferable in addressing legal clients, some of our more disabled clients may only recognize their first names. In such cases, it is acceptable to refer to them in this less formal manner.

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THE VOICES FOR GUN CONTROL

In 1985, the latest year for which figures are available, handguns were used to murder 46 people in Japan, 8 in Great Britain, 31 in Switzerland, 5 in Canada, 18 in Israel, 5 in Australia, and 8,092 in the United States. More than 10,000 others lost their lives in handgun suicides and accidental handgun deaths.

We cannot afford to let this carnage continue. The time has come for America to join other nations of the world and enact a sensible federal gun policy.

Strong gun laws have proven effective nationwide in keeping weapons out of the hands of criminals and in reducing crime and violence. The California Attorney General's office said their 15-day waiting period stopped 1,515 criminals trying to buy handguns over the counter in one year.

State police in Maryland report the state's seven-day waiting period caught 732 prohibited handgun buyers in 1986. The chief of police in Columbus, Ga., says that his city's 3-day waiting period catches two felons a week attempting to buy handguns.

State laws help, but they begin and end at the state lines. Criminals can easily go from states with strong laws into those with weak laws, and walk out with deadly arsenals. That's why every major law enforcement organization in the country backs the Brady Bill - requiring a national seven-day waiting period before the purchase of a handgun, to allow for a criminal records check.

Police know that such a system may not stop every single criminal intent on obtaining a weapon. But they believe, as I do, that a waiting period will go a long way toward reducing senseless handgun violence. As one officer put it, "If it saves one life - it's worth it."

America's law enforcement community is also leading the fight for legislation to stop the sale of paramilitary assault weapons; weapons designed for use in war - with the sole purpose of killing human beings. Every day, police are finding themselves outgunned on our streets - facing drug lords and gang members armed with these weapons of war.

A recent study of Bureau of Alcohol, Tobacco and Firearms data compiled by the *Atlanta Journal-Constitution* attests to the escalating use of assault weapons in crime. According to the study, crimes committed with assault weapons have jumped 78% from 1987 to 1988 and are continuing to rise. Also, an assault gun is 20 times more likely to be used in a crime than a conventional firearm.

President Bush has already taken action against these weapons by directing the BATF to stop their importation. However, since 75% of assault guns are manufactured in America, there is a clear and immediate need to halt the domestic manufacture of these killing machines.

Cities from Los Angeles to Boston have passed legislation to take assault guns off their streets. Virginia and Maryland now require background checks on buyers of these weapons, and California has outlawed the sale and manufacture of assault weapons altogether. Legislators in many other states are working with law enforcement leaders to pass similar public safety measures.

Legislation is now pending in the U.S. House and Senate that was crafted to take into consideration the concerns of hunters and sportsmen as well as those of the nation's law enforcement officers. Known as the "Assault Weapon Control Act," the bill outlaws the sale, importation and domestic manufacture of these guns. It will not prevent hunters from purchasing legitimate sporting weapons - but will go a long way toward protecting the public from criminals and drug dealers armed with combat weapons.

There is little debate about the need to stop the proliferation of combat weapons in our communities. Only the National Rifle Association has been unwilling to come to the table to help find a solution to the problem of assault weapons violence. Instead, they are mounting a campaign of hysteria, claiming that assault weapon bills will ban legitimate sporting weapons. Law enforcement and the American public know better.

Americans believe that stronger gun laws will help fight crime. Public support for tougher laws is at an all-time high. A Gallup Poll released late last year found that 91% of the public - including 87% of gun owners - favor a 7-day waiting period for handgun purchases to allow for a criminal records check. Polls also show strong support for a ban on assault weapons.

Last year, Maryland legislators took a major step toward reducing crime and violence in their state by passing a bill outlawing the sale of Saturday Night Specials - the easily concealable handguns favored by the criminal. Passage of this historic bill was especially heartening to me because nine years ago it was a Saturday Night Special that John Hinckley used to shoot President Reagan and my husband, Jim.

Americans are fed up with gun violence. They are fed up with losing over 20,000 lives every year. But there are solutions. Passage of a national gun policy, including a ban on Saturday Night Specials and assault weapons of war, and a national waiting period to allow for a criminal records check of handgun buyers will save lives. A national gun policy can and will make a difference.

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HABEAS REFORM

SENATE COMMITTEE CONSIDERS TWO BILLS LIMITING DEATH APPEALS

The federal courts' power to undo what state courts have done in criminal cases has been under attack almost as long as the power has existed. Now, Congress is poised to restructure the power of habeas-corpus review in the most sensitive cases of all - in which the penalty is death.

The Senate Judiciary Committee is expected to approve sweeping procedural reforms in these after-the-fact attacks on states' decisions to execute. The reforms would require that competent attorneys handle most of every death case and its appeals, and would guarantee every defendant a limited time for one - but only one - chance at reversal in federal court. If enacted, backers believe, the reforms should make habeas-corpus review both faster and fairer.

The cases certainly aren't fast and sometimes aren't fair now. "Too often today this process is marked by frustrating delays, unnecessary litigation over collateral matters, and an inability of capital prisoners to present substantial constitutional claims for a fair determination of the merits," the ABA's Litigation Section said in a resolution.

TWO COMMITTEES, TWO BILLS

Those concerns led U.S. Chief Justice William Rehnquist and the ABA each to set up special committees last year to propose solutions. In its 1988 omnibus drug bill, Congress had set itself a deadline to consider reform legislation, and the 2 special committees' recommendations are at the heart of two bills now before it.

Retired Supreme Court Justice Lewis Powell headed the 5-judge committee named by Rehnquist. That committee's legislative proposal was introduced in October by Sen. Strom Thurmond, R-S.C., as S. 1760. The same month, Senate Judiciary Committee Chairman Joseph Biden, D-Del., introduced S. 1757, a bill based on the Powell commission report but in some key ways similar to the proposal from the special ABA task force.

The Biden and Thurmond bills and the ABA proposal agree on a number of points. All 3 try to give defendants competent attorneys, and all three would automatically delay executions for a limited time so that federal habeas-corpus relief could be sought. And, albeit in different ways, each proposal would bar most attempts to have federal courts review death cases more than once. Despite the similarities, some differences remain. Death-penalty litigation incites "a controversy where both sides feel passionately," noted Albert M. Pearson, the University of Georgia law professor who was the Powell commissions's reporter. The ABA report drew 5 separate dissenting or elaborating opinions from within the task force itself. Its future before the ABA House of Delegates is far from certain.

The Judicial Conference of the United States, the body of chief judges to which the Powell committee reported, thought the report so important and difficult it put off consideration until March. Rehnquist sparked a small furor when he submitted the report to the Senate anyway, citing the deadlines imposed by the 1988 drug bill.

ABA President L. Stanley Chauvin Jr. also has written to the Senate warning of risk in the Powell committee proposal. The most obvious difference among the bills may be the easiest ground for congressional compromise. The Powell-Thurmond bill proposes a 6-month "statute of limitations" in which to file federal habeas petitions, running from the time a state court appoints a lawyer to handle state habeas proceedings. (The period would be tolled during state litigation.) The Biden and ABA bills would allow a year.

The Thurmond and Biden bills propose to coax states into paying for good lawyers by offering them streamlined federal review provisions in trade. States that won't pay for indigents' attorneys would continue to watch their capital cases drag through courts for the 8 to 15 years. But the Thurmond bill would require competent counsel only once habeas review begins in the state court. It would leave it up to the states to define who competent counsel are, and it would leave it up to the U.S. Constitution to require counsel for trials and direct appeals. The Biden bill states specifically how much experience death-penalty lawyers must have, borrowing language from the 1988 drug bill, and it would impose that standard from the trial forward.

The ABA plan goes even further. It uses a more demanding competency standard adopted by the House of Delegates last February. And instead of drawing states under the standard with a carrot, it would drive them in with a stick. Those that did not adopt competency standards would lose even the barriers to federal review of their death cases that comity and federal law provide now.

TRACKS OF TIERS

Chief Judge Donald P. Lay of the 8th U.S. Circuit Court of Appeals in St. Paul told the Judiciary Committee that allowing states an option would add confusion to an already confused area of law. "It could create one tier of cases going one way because [the states] did opt in, and another tier of cases going another way because they didn't opt in," he said in a later interview.

But U.S. District Judge Barefoot Sanders of Dallas, who was a member of both the Powell and the ABA committees, said the ABA standards for counsel are too high. "I personally doubt you can find sufficient counsel in many jurisdictions who satisfy" the requirements, he said. "Therefore, I think it makes the legislation unattainable." Other criticisms of the Biden and ABA proposals concern the kinds of issues capital defendants could raise under the bills, and when they could raise them. Both would allow federal courts to review some issues not raised at the state level or that have come up because of certain changes in the law while the case was pending. The Thurmond bill, however, would continue the ban on such issues in current law.

Finally, the Thurmond bill would allow a second, successive run through the federal courts only if the defendant could assert on new grounds that he was innocent. The Biden-ABA approach would allow a new habeas petition based on a previously undiscovered "miscarriage of justice." Critics say these provisions mean that Biden and ABA bills would undermine habeas-corpus reform efforts. "Changes in the mechanism for finality could well produce more repetition and last minute appeals, not less," Powell told the Judiciary Committee in prepared testimony. Further, he said, states might choose not to join the system if Biden's bill passes. "I fear that the states would have little incentive to opt for a system that does not recognize the states' legitimate interest in finality," Powell said. Pearson and Sanders also argued that the Biden-ABA approach might not be politically practical.

Thomas Smith, an ABA Criminal Justice Section staff official who is watching the habeas-corpus issue in Washington, predicted the Senate probably would reach a compromise between the Biden and Thurmond bills. But, he said, House members facing election in the fall might use the bill to show they are tough on crime.

Pearson warned those who want the greater protections for defendants in the Biden bill or ABA proposal should consider practicalities and alternatives. If Congress doesn't pass reform legislation soon, he said, the increasingly conservative U.S. Supreme Court will restrict habeas-corpus itself. "I certainly think a few of the justices up there are inclined to cut back on the writ," Pearson added. "That's something I worry about." DON J. DEBENEDICTIS

Reprinted from the January 1990, *ABA Journal* with Permission.

MINORITY REPORT OF STEPHEN B. BRIGHT

We Must Have A Principled Process

Whether a person is put to death for a crime should turn on a principled determination that the ultimate punishment should be inflicted, not on whether a lawyer filed a piece of paper on time. Execution is an extraordinary and irremediable penalty. Its use should be strictly limited to punishing offenders for their own conduct, not that of their lawyers.

Because I believe that we should strive to minimize the impact of lawyer error on the process, not add to it, I strongly disagree with the Task Force's recommendation of a statute of limitations. Judicial review of capital cases should protect the integrity of the process — sanctioning punishment imposed in compliance with our Constitution, and vindicating constitutional rights when they are violated. This purpose is not served by allowing an execution to take place despite a constitutional violation because the lawyer blundered. Instead, it makes a process that did not meet constitutional standards all the more arbitrary and inequitable.

I also believe that the Task Force's recommendations regarding counsel and procedural default do not go nearly far enough to ensure compliance with the Bill of Rights in capital cases. I write separately to express my views on these matters. I will first set out some principles which are integral to consideration of each of these issues and then address, in turn, a statute of limitations, procedural default, and the provision of counsel.

I. The constitutional process for imposing death.

The judicial process for selecting "the few cases in which [the death penalty is imposed] from the many cases in which it is not" [1] is supposed to be a principled one, in which those most deserving of death are identified based upon the circumstances of the crime and the background of the offender. [2] Under our 8th Amendment jurisprudence, death is reserved for those who have committed the most heinous murders and are so far beyond redemption that they should be eliminated from the human community. Arbitrariness is to be avoided as much as humanly possible in this process. [3]

One would reasonably expect, therefore, that before a state in this Union executes one of its citizens, it should be able to establish that the process by which the conviction and death sentence were obtained satisfies constitutional standards. The State should be willing and able to defend on the merits of any argument that the process was infected by a violation of any one of the precious guarantees of the Bill of Rights. Where a life is at stake, the state should not attempt to dodge this inquiry; it should meet it head on and establish that justice was done.

In practice, however, states successfully avoid the inquiry in one capital case after another. Death sentences may be and are carried out despite fundamental violations of the Constitution because inadequately compensated, inexperienced, and often incompetent court-appointed lawyers fail to recognize or properly preserve the issues. [4]

Remarkably, a number of jurisdictions which employ capital punishment readily concede that their judges, prosecutors and defense attorneys cannot provide a capital trial that comports with the Constitution. We were told that they cannot afford to provide competent defense counsel or that none is available. We were also told that they cannot carry out executions without the strict enforcement of procedural bars to prevent review by the federal courts of constitutional errors. [5] Now a statute of limitations is needed to speed up this process.

If it is too expensive or impractical for Alabama, Florida. Georgia, Mississippi, Texas and other states to provide competent counsel and the fairness and reliability that should accompany a judicial decision to take a human life, the solution is not to depreciate human life and the Bill of Rights, but to bring the process into compliance with the Constitution. The way to bring the system into compliance is for courts to determine whether constitutional violations are taking place. If a local trial court cannot comply with the basic safeguards of the Constitution, its power should be limited. It should not be authorized to extinguish life.

It may well be appropriate in other types of litigation for litigants to suffer the consequences of mistakes made by their chosen counsel. However, in my view, this is not acceptable in a process of deciding life and death for poor people who usually have no voice in selecting their counsel and are represented by attorneys who often lack the skill, knowledge, resources, financial incentive and willingness to protect their rights adequately. The result is simply too harsh, too inequitable and altogether inconsistent with the notion of a principled process of selecting those deserving of death based on their crime and background.

This point is illustrated by the cases of Smith and Machetti, two codefendants who were sentenced to death by unconstitutionally composed juries within a few weeks of each other in the same county in Georgia. [6] Machetti's lawyers challenged the jury composition in state court; Smith's lawyers did not. [7] A new trial was ordered for Machetti by the federal court of appeals, [8] and, at that trial, a jury which fairly represented the community imposed a sentence of life imprisonment. The federal courts refused to consider the identical issue in Smith's case because his lawyers did not preserve it. [9] He was executed.

Had Machetti been represented by Smith's lawyers and vice versa in state court, Machetti would have been executed and Smith would have obtained federal habeas corpus relief. This is not how a principled selection process should work. Unlike a state's lottery, the system for imposing capital punishment should not

be a game of chance in which there are some lucky winners and some unfortunate losers, distinguished only by the luck of which lawyers they draw.

For the selection process to work properly, the accused must be provided competent counsel and the process must be held to constitutional standards. Federal habeas corpus review of capital cases is essential to protect the integrity of a process, which too often deviates from constitutional standards because of the passions and pressures of the moment. A statute of limitations is yet another impediment to the federal courts fulfilling their responsibility to interpret and enforce the provisions of the Bill of Rights. We should be removing those impediments, not constructing new ones.

II. Statute of Limitations.

The Task Force recommends a statute of limitations as "a great inducement to counsel and the petitioner to litigate properly and litigate well the first time through."[10] However, dismissal, the sanction for lack of compliance with a statute of limitations — like other sanctions for defense attorney error in the capital process — is imposed not on the lawyer who is in control of the litigation, [11] but on the client.

The client may well have had absolutely no involvement in the selection of the lawyer or in the lawyer's failure to discharge his or her responsibilities. [12] Vindication of constitutional rights would be precluded and the client executed because of what could be gross negligence and malpractice on the part of counsel. However, unlike the situation with most other litigants, there is no chance that one on the way to the executioner would be able to bring a successful malpractice action against the attorney who denied him his day in court.

There will be, as there have been in the past, meritorious claims that for whatever reason do not come to light until after the deadline has expired. As things now stand, courts are presented with gut wrenching decisions about whether an imminent execution should be allowed to take place. A statute of limitations would relieve judges and lawyers of this awful burden by barring the door to the meritorious claims as well as the frivolous.

However, so long as the judicial system exacts life as a punishment, courts should continue to sort out claims that are meritorious from claims that are not. These claims may have nothing to do with "factual innocence" or "eligibility for the death penalty," but they may have everything to do with the integrity and reliability of the selection process. [13] These claims will be barred, allowing in some instances the execution of one who would not have been sentenced to death were it not for the constitutional error.

Such a draconian remedy is particularly offensive because it is not needed to get habeas corpus petitions filed or to promote public confidence in the system. Most of the chaos in the review of capital cases has been created primarily by the lack of counsel for the condemned, as the Task Force Report thoroughly documents. Execution dates have been set for inmates who have no counsel. Other inmates have been represented by counsel who were unqualified to handle capital habeas corpus cases. The obvious solution to this problem is to provide capable lawyers to initiate the litigation.

However, it is unnecessary to couple the provision of counsel with a statute of limitations. There are less drastic ways to make lawyers file habeas corpus petitions than extinguishing the lives of their clients if they do not. Courts may impose sanctions *on the lawyer*. Contempt, disbarment, or replacement of the lawyer who does not file on time is preferable to barring the client from the courthouse. [14]

These measures will seldom be required if counsel is provided. We heard testimony that in many jurisdictions, including Georgia, Alabama, and Kentucky, post-conviction litigation is commenced within a time agreed to by lawyers for the condemned inmate and the state. An execution date is set only if no petition is filed within that time. The same result is achieved by the rules adopted by the federal district courts in California. This approach is sensible, flexible, and serves the interest of justice.

This practice is not followed in jurisdictions where officials can promote their careers by setting execution dates which cannot possibly be carried out and then bashing the courts when stays are granted. For example, in Florida and Arkansas the governors set execution dates. The Attorney General of Arkansas candidly told this Task Force that the governor often sets execution dates to show that he is "tough on crime," even though he knows there is no possibility they can be carried out.

In this way, a governor may advance his senatorial or presidential aspirations while diverting attention from his failures on other issues. [15] This process serves to help local officials promote their careers while undermining public confidence in the judicial system. A recommendation that execution dates be set by the courts, not the governors, would do more to solve this problem than a statute of limitations. [16]

As Judge Irving L. Goldberg has eloquently pointed out, we are trading away the most precious legacy of Lord Coke, the power to discharge from custody even one imprisoned by order of the King, for one mess of pottage after another. [17] On this issue, it is recommended that interests of expediency and finality take precedence over our most cherished and most fundamental notions of justice and fairness. A statute of limitations would allow a state to carry out an unjust and unconstitutional execution in order to teach the condemned person's lawyer a lesson.

I cannot agree that this trade is a good one or that it will make judicial review of capital cases more rational and just.

III. Procedural Default

For the reasons I have already discussed, I believe that procedural bars have no place in the review of cases involving the taking of life. If the process does not meet constitutional standards, an execution should not be carried out. Moreover, litigation over threshold questions of whether a procedural bar is applicable often degenerates into what have been aptly characterized as "unseemly efforts" to "pull the rug out from under" poor people because of mistakes by their court-appointed lawyers. [18] Spending time in this manner does not advance the cause of speedy adjudication, enhance public confidence in the process, or serve the interests of justice. Therefore, federal courts should decide the merits of constitutional claims in all but the most exceptional cases, where it is clearly established by the state that there was actual withholding of a claim. [19]

The Bill of Rights is not a collection of technicalities, but our most fundamental guarantees of fairness and justice. For almost 200 years we have revered these rights, protected them against enemies both domestic and foreign. Our nation is respected and emulated throughout the world because we provide these safeguards of liberty and justice to even the least among us, even those who have

offended us most grievously.

On the other hand, the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny enjoys no such pedigree. It is a collection of technicalities. It is not the work of Jefferson, Madison, and Henry, but a 12-year old, judicially created rule. It frustrates vindication of the principles upon which the Republic was founded. While appearing to operate equally upon all who come before the bar of justice, it falls most heavily upon the poor, who are usually defended by the inexperienced and the incompetent.

The procedural bar doctrine of *Sykes* rests upon the fiction that when a default occurs, counsel knew the applicable law and facts and made an intelligent, tactical decision with a full understanding of the consequences to the case and the client. Unfortunately, as described in detail in Chapter 2 of the Task Force Report, this fiction has no relation to reality.

Sykes is also based upon the Court's undocumented fear of "sandbagging" — the withholding of meritorious claims by lawyers who somehow know that an appellate court will surely sustain them on appeal. However, the dismal record summarized in Chapter 2 of the Report establishes that most of the court-appointed attorneys representing indigents accused in capital cases lack the sophistication required to "sandbag."[20] An attorney whose total knowledge of criminal law is "*Miranda* and *Dred Scott*"[21] is hardly in a position to recognize and hide many constitutional issues.

But beyond these obvious limitations upon those who defend the poor in capital trials for $1,000 to $2,500 in many states, almost any lawyer is going to try to prevail in the forum when the case is, not "save" an issue for an uncertain later day in a court whose composition and receptiveness to the issue cannot possible by calculated at the time of trial.

Finally, and most importantly, the *Sykes* rule does not encourage the states to provide competent counsel; it rewards them for providing inadequate counsel.[22] By providing inadequate counsel,[23] the state obtains two benefits from the poor representation the defendant receives: the likelihood of obtaining the death sentence is increased and any constitutional deficiencies that occur in the process may be insulated from review.[24]

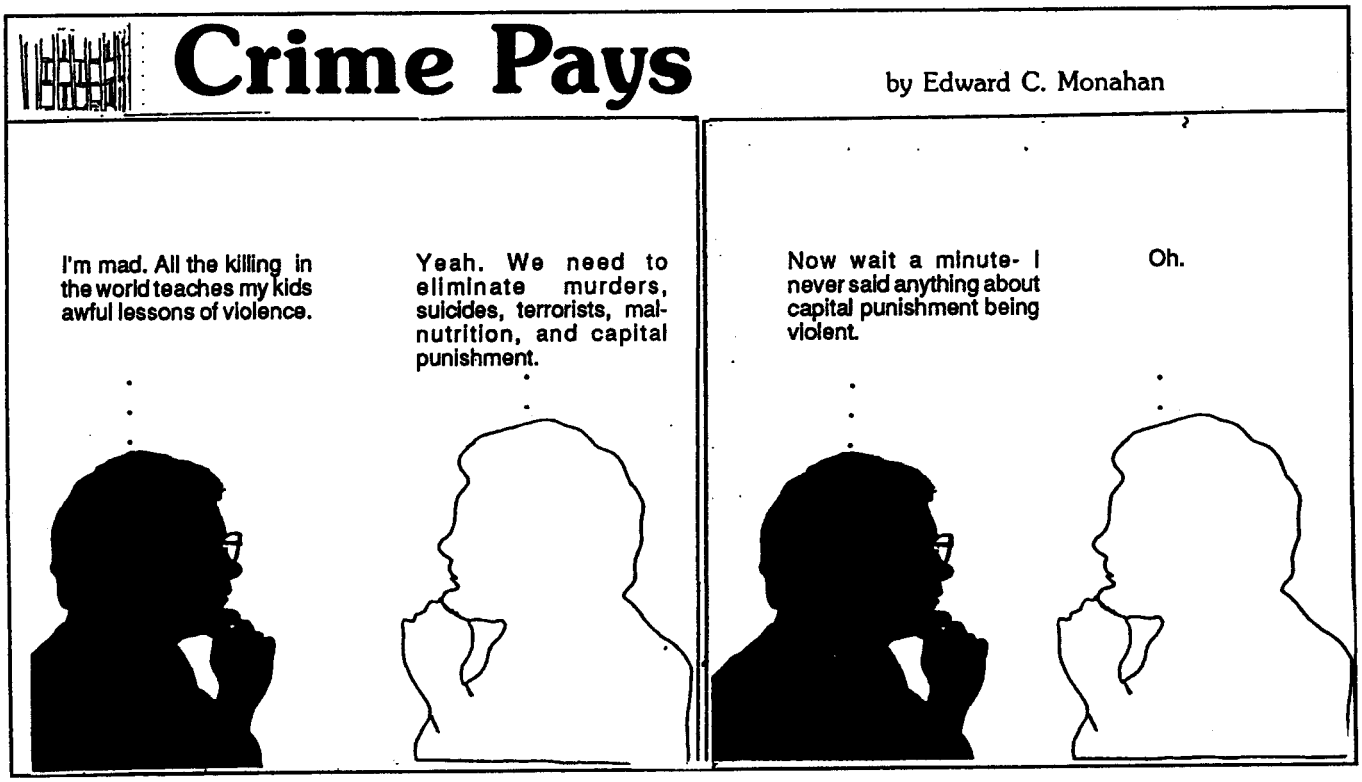
For all of these reasons, federal courts should decide the merits of constitutional issues in capital cases.

IV. Counsel

The Task Force Report thoroughly documents the exceptionally poor quality of counsel for indigent persons accused of capital crimes and makes a number of excellent recommendations for improving the situation. I do not believe, however, that the recommendations are sufficient to deal with the immense problems of inadequate representation in these cases.

The states have been required to provide counsel at capital trials since the Supreme Court's decision in *Powell v. Alabama*, 287 U.S. 32 (1932). Yet just last year in Alabama, a woman was sentenced to death in a trial in which her defense lawyer was sent to jail for one night during the 7-day trial because the judge found him drunk and held him in contempt.[25] This year Alabama executed one person whose lawyer filed no appellate brief with the Alabama Court of Criminal Appeals after the death sentence was imposed,[26] and another whose trial lawyer failed to present any evidence of his mental retardation to the court that sentenced him to die.[27]

The proposed legislation included in our recommendations will not change this situation. As John M. Greacen points out in his concurring statement, the standards are not sufficiently stringent, they do not require replacement of the judge as the appointing authority, and they do not require the establishment of an organization with the responsibility of recruiting, training and assigning competent counsel to capital cases. In my view, these 3 elements are indispensable to making any meaningful improvement in the quality of legal representation which poor people receive in capital cases.



Standards for qualification to do a capital case should not be defined in terms of years at the bar, but with regard to counsel's actual ability to discharge the responsibilities of defending a capital case. For example, a competent attorney must be completely conversant with federal constitutional decisions of the state and federal courts in the nation. He or she also must keep abreast of developments in all of the federal circuits, the state appellate courts [28] and the writings of commentators so as to be aware of all issues that are "percolating" in those courts. This is necessary so that counsel will be aware of the "tools to construct [the] constitutional claim" [29] and will raise and present all issues long before they achieve general acceptance in the courts as required by *Sykes*, *Engle v. Isaacs* and their progeny. [30] So long as *Sykes* and *Engle* apply procedural bars based on the assumption that this is the type of counsel the defendant has, then this is how competent representation must be defined.

Standards should also require skills in managing complex litigation and negotiations, demonstrated ability in the directions of investigations of guilt and mitigation, knowledge and experience in dealing with mental health issues, [31] writing and analytical skills as evidenced in previously written briefs and memoranda, [32] and trial advocacy skills. [33]

Standards, no matter how stringent, will make very little difference without an organization to implement them. Defender programs must be established in the states that do not have them to employ specialists which meet the standards, assign them to capital cases, support local lawyers, and monitor the performance of counsel defending capital cases. Courts are not equipped to do this. [34]

The Task Force Report documents the extraordinary complexity of capital cases, and I will not reiterate that here. This complexity requires specialization. Serious tax or patent matters are appropriately handled by lawyers specializing in those areas. Persons accused of capital crimes will not receive adequate legal assistance so long as they are represented by lawyers whose practice consists mostly of wills, divorces and title searches.

We are told that some states just do not have the money to attract qualified lawyers and that in some places, particularly rural areas, there is simply no one qualified available. These considerations should not excuse lack of adequate legal representation in capital cases. There are many small communities that do not have surgeons. But this does not mean we allow chiropractors to do brain surgery in those communities.

The answer is for states to have available qualified lawyers who can try capital cases throughout the state. There are numerous instances where assistant attorneys general have come from the state capital or special prosecutors have been hired to assist in the local prosecution of a complex case. The experience of a number of states demonstrates that this approach works equally well with regard to the defense of a capital case. [35]

We should not accept the notion that states can pay to prosecute a capital case, but not to defend one. If one of these rural communities needs a pathologist, a hair and fiber expert, or some other expert to assist in the prosecution, [36] it will bring one in and pay what it costs to do so. [37]

It is equally if not more important that states take the same approach to ensure adequate representation and fair trials for the accused. There was a time when states did not have fingerprint experts, serologists or ballistics experts. They remedied the problem. They appropriated money for crime laboratories, sent people to the FBI Academy for training, and developed a pool of experts that could go throughout the state to investigate crime scenes and testify in local prosecutions. They can also establish defender organizations and build up a group of lawyers who can competently try capital cases.

What is lacking is not money, but the political will to provide adequate counsel in capital cases. Attorney General Robert F. Kennedy once said that the poor person accused of a crime has no lobby. Georgia State Senator Gary Parker told us that the Georgia legislature would never adequately fund indigent defense unless ordered to do so by the federal courts. [38] Many states have resisted even the most minimal efforts to establish programs to improve the quality of legal representation in death cases. [39] The reality is that many states, unlike California, are not going to do anything unless they are required to do so and, even then, they are going to do as little as possible. Thus, any federal statute regarding counsel will not result in any substantial improvement unless it contains specific requirements along the lines I discussed above.

No one seriously disputes that the quality of legal representation in capital cases in many states is a scandal. However, few in our society pay much attention to it because almost no one cares about those who face the death penalty. This does not eliminate our duty to correct the situation. As Justice Brennan said in another context:

> It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. . . . [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.
> *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

I hope that the American Bar Association will set as its highest priority the establishment and staffing of outstanding capital defender programs in every state that does not have one and that it will relentlessly pursue this end until these programs are actually operating and providing competent representation in all jurisdictions that have capital punishment.

CONCLUSION

No provision of the Bill of Rights has been amended or repealed since ratification almost two hundred years ago. Ineptness on the part of a lawyer should not operate to strip away the protections of the Bill of Right from the most important and unalterable decision made in our legal system. The system is not in balance. It is imperative that it be brought into proper balance by providing competent counsel and enforcing constitutional standards in any case where the government seeks to extinguish life.

ATLANTA, November 2, 1989.

[1] *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980), quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) and *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

[2] *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[T]he fundamental respect for humanity underlying the 8th Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); *accord Gregg v. Georgia*, 428 U.S. 153, 197 (1976); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

[3] *See, e.g., Beck v. Alabama*, 447 U.S. 625,

640 (1980); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

[4] A number of examples are collected in the Task Force Report. *See, e.g.*, Report at 54 n. 50, 180 n. 346.

[5] For example, the Attorney General of Mississippi asked the state supreme court to begin invoking procedural bars as a means to prevent federal review after constitutional violations were found in seven of the first eight Mississippi capital cases reviewed by the federal courts. *See Evans v. State*, 441 So.2d 520, 531 (Miss. 1983) (Robertson, J., dissenting), *cert. denied*, 467 U.S. 1264 (1984). Vindication of constitutional rights in the federal courts was described by the Attorney General has a "crash upon the rocky shores of the federal judiciary." *Wheat v. Thigpen*, 793 F.2d 621, 626 n. 5 (5th Cir. 1986) (quoting from the State's brief to the Mississippi Supreme Court in another case), *cert. denied*, 480 U.S. 930 (1987).

[6] *See Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983). Women were systematically excluded from the jury pools from which Machetti's and Smith's juries were selected.

[7] Smith's trial lawyers stated in their application for clemency that they did not challenge the jury because they were unaware of the U.S. Supreme Court decision on point, *Taylor v. Louisiana*, 419 U.S. 522 (1975), decided only 5 days before Smith's trial began. *Application of Smith*, Ga. Board of Pardons and Paroles, at 33 (Dec. 6, 1983).

[8] *Machetti v. Linahan, supra* note 6.

[9] *Smith v. Kemp*, 715 F.2d 1459, 1476 (11th Cir.) (Hatchett, J., dissenting), *application denied*, 463 U.S. 1344, *cert. denied*, 464 U.S. 1003 (1983).

[10] Report at 335.

[11] There is no recommendation that the attorney be permanently disbarred for forfeiting all federal review and possibly the client's life for failing to comply with the statute.

[12] Most of those condemned to die are "people of marginal intelligence, doubtful sanity, and debilitating poverty" who are unable to assert any control over the litigation process. Teepen, "Killing in the name of the law," *Atlanta Journal & Constitution*, Sept. 5, 1987, page 17A.

[13] The integrity of the process is important. No one would condone a lynching, no matter how guilty or how deserving of death the person who was lynched. We should not condone a trial that falls below constitutional standards just because we believe it reached the right result. More-over, our judgment that the result was correct may be impaired because of the very deficiencies in the process that we want to overlook.

[14] Most states that take this approach with regard to appeals of capital cases. All but a few of the states that have capital punishment statutes provide for an automatic appeal of any death sentence, regardless of whether notice of appeal is filed. If the lawyer fails to file the brief on time, he or she is disciplined or replaced. The appeal is not, and cannot, be dismissed.

[15] For example, the current governor of Florida, Robert Martinez, increased the number of death warrants he signed a month from four to eight after his popularity dipped once the repercussions of his tax on services was realized by the electorate.

[16] The recommendation that a stay of execution remain in force throughout the process of post-conviction review (Recommendation No. 11) will also help solve this problem and I agree with that recommendation. However, there is no need that it be tied to a statute of limitations.

[17] *Gaitlen v. Wainwright*, 582 F.2d 348, 375 (5th Cir. 1978) (Goldberg, J., dissenting). *See also Bass v. Estelle*, 696 F.2d 1154, 1160-62 (5th Cir.) (Goldberg, J., concurring), *reh. denied*, 705 F.2d 121, *cert. denied*, 464 U.S. 865 (1983).

[18] *Evans v. State*, 441 So.2d 520, 531 (Miss. 1983) (Robertson, J., dissenting), *cert. denied*, 480 U.S. 930 (1984).

[19] This approach would render moot the debate between the majority of the Task Force and Chief Justice Lucas regarding whether more time would be expended litigating "cause and prejudice" or "ignorance and neglect." If the court decided the case on the merits, no time would be spent on either of these threshold questions.

[20] Twelve years after *Sykes*, we have yet to receive any evidence that attorneys engage in such a practice. The Task Force quite appropriately concludes that sandbagging seldom occurs.

21 Task Force Report at 55-56.

[22] *Sykes* overlooks which side controls the selection of counsel in cases of indigent defendants. Its rationale may well apply in the case of knowledgeable, sophisticated defendants who can afford to hire their own lawyers to protect their rights. However, a local community, outraged over the murder of one of its members, usually does not have the same incentive to protect all of the constitutional rights of the one accused of that killing. This may explain why a defendant in a capital trial in Mississippi was defended by a third-year law student who requested a moment to compose herself during trial because she had never been in court before, *State v. Leatherwood*, Forrest County Circuit Court No. 11831 (1986), or a defendant in a Georgia capital trial was represented by an attorney who had been admitted to the bar just a few months before trial. *Tyler v. Kemp*, 755 F.2d 741, 743 (11th Cir. 1985), *cert. denied*, 474 U.S. 832 (1985).

[23] There is a vast gulf between what is expected of defense counsel under *Sykes* and its progeny and what passes for effective assistance of counsel under the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). For example, O.L. Collins, the Georgia defense lawyer whose entire knowledge of "criminal law" is "*Miranda*" and "*Dred Scott*" has been held to satisfy the *Strickland* standard. *Williams v. State*, 258 Ga. 281, ___, 368 S.E.2d 742, 747-750 (1988), *cert. denied*, 109 S.Ct. 3261 (1989); *Birt v. Montgomery*, 725 F.2d 587, 596-601 (11th Cir. 1984) (*en banc*); *id.*, 725 F.2d at 603-605 (Hatchett, J., dissenting) (the dissent would have found Collins ineffective for failing to investigate and challenge jury pools that were unconstitutionally composed). *See also Remarks of Justice Thurgood Marshall to the Second Circuit Judicial Conference*, Sept. 1988, at 1-6 ("all manner of negligence, ineptitude, and even callous disregard for the client" passes muster under the *Strickland* standard).

[24] In states which do not provide adequate counsel, it is not unusual for the state to argue that most, if not all, issues are precluded because defense counsel did not preserve them. *See, e.g., Richardson v. Johnson*, 864 F.2d 1536 (11th Cir. 1989), (3 of 5 issues in Alabama capital case barred from consideration) *cert. denied*, 460 U.S. 1017 (1983); *Whitley v. Bair*, 802 F.2d 1487, 1496-1504 (4th Cir. 1986) (all 15 issues in Virginia capital case barred from consideration), *cert. denied*, 480 U.S. 951 (1987); *Cabello v. State*, 524 So.2d 313, 320-323 (Miss. 1988) (10 issues in Mississippi capital case barred from consideration).

[25] *See* Anderson, "Defense attorney jailed for contempt of court," *Daily Home*, Talladega, Al., Oct. 21, 1988, at 1; Anderson, "Judy Haney sentencing set for today," *Daily Home*, Nov. 18, 1988.

[26] Herbert Lee Richardson, executed August 18, 1989. Richardson's lawyer was later disbarred. *See Richardson v. State*, Ala. Ct. Crim. App. No. 4 Div. 624 (docket entries) (1978).

[27] Horace F. Dunkins, executed July 14, 1989. Although it would not bar imposition of the death penalty, mental retardation is a particularly compelling mitigating factor which could have been a basis for a sentence less than death. *Penry v. Lynaugh*, 492 U.S.___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). At least one of Dunkins' jurors, upon learning of his retardation from new accounts, came forward and said that she would not have voted for death if she had known of it. *See* Applebome, "Two Electric Jolts in Alabama Execution," *The New*

York Times, July 15, 1989.

[28] *See, e.g.*, now Chief Justice Rehnquist's dissent in *Reed v. Ross*, 468 U.S. 1, 25 (1984). The Chief Justice would have denied Ross relief for not raising an issue at his North Carolina trial in March, 1969, based on "the reasoning employed" by a lower Connecticut court and the 8th Circuit in two cases decided in June and November of 1968. *See also Engle v. Isaacs*, 456 U.S. 107, 132 n. 40 (1982) (refusing to excuse counsel's failure to raise new claim because it had been litigated in some state and federal courts).

[29] *Engle v. Isaacs*, 456 U.S. 107, 133 (1982). The Court in *Engle* stated that "[e]ven those decisions rejecting the defendant's claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at that time." *Id.*, at 133 n. 41. Thus, defense counsel must be aware of the *losing issues* being litigated in other jurisdictions in order to protect their clients' rights.

[30] Moreover, the lawyer must be aware of the necessity of raising every one of the these "percolating" issues as a federal constitutional issue even though it may be foreclosed by existing case law of the state and federal courts that have jurisdiction over the case. Otherwise, the defendant will be denied the benefit of any change in the law resulting from a new Supreme Court decision. *See Smith v. Murray*, 477 U.S. 527 (1986). The unmistakable lesson of *Smith* is that there is no longer any such thing as a frivolous issue — every issue *must* be raised, no matter how hopeless at the time, unless it has been finally resolved by the United States Supreme Court.

[31] The vast majority of capital cases involve questions of the mental health of the defendant. Many of those accused of capital crimes suffer from mental impairments which may have some relationship to their antisocial behavior. Future dangerousness is a statutory aggravating circumstance in some jurisdictions and a factor that is considered in many others. Mental limitations of various sorts constitute mitigating circumstances in every jurisdiction. Therefore, counsel should have some working knowledge of the *Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association* and be conversant with other works on the subject; know the psychological/neurological/psychiatric techniques for determining and documenting brain dysfunction, psychoses, limited intellectual functioning, personality disorders, and other mental disabilities; be particularly familiar with various types of impairments resulting from trauma to the head; be knowledgeable about the various schools of thought in the psychiatric and neurological communities on controversial matters such as brain chemistry and epileptic disorders; and have experience in investigating and documenting mental health histories and working with a variety of mental health experts.

[32] Michael Millman of the California Appellate Project discussed in his testimony before the Task Force how that office utilizes written works of attorneys in assessing their qualifications for handling capital cases. In my view, a lawyer should not be appointed to capital cases unless he or she has filed briefs to state supreme courts in which all available issues were raised, fully supported by proper analysis of the governing law and applicable facts, and all contentions that could properly be supported by both state and federal authority were so supported.

[33] I would suggest the following as fundamental requirements in trial advocacy:

a. training in trial advocacy such as completion of one of the 2-week sessions offered by the National College of Criminal Defense or the National Institute of Trial Advocacy;

b. after completion of such a training program, 6 to 12 hours of continuing legal education each year in areas related to trial advocacy and the defense of criminal cases;

c. at least 5 years of providing *competent* representation in civil or criminal cases; that is, representation in which the attorney filed case-specific motions and memoranda supported by the applicable law, not "boilerplates," conducted full investigations, litigated pretrial motions, examined witnesses, gave opening statements and closing arguments, submitted proposed jury instructions, and submitted letters or memoranda to the court regarding sentencing.

[34] Moreover, the Task Force heard a great deal of disturbing testimony about the extent to which political or other considerations may come into play in appointing counsel. *See, e.g.*, testimony of Senator Gary Parker ("In this state, some judges and district attorneys simply do not want vigorous and effective advocacy in capital cases. In case after case, we have seen courts appoint unqualified counsel, even where competent counsel was available.") *See also Amadeo v. State*, ___ Ga. __, ___ S.E.2d_ (No. 46844, Oct. 5, 1989) (reversing trial court which appointed two lawyers with no experience in capital punishment litigation to case instead of experienced counsel who had won a new trial for the defendant in the U.S. Supreme Court.)

[35] The Task Force heard testimony from George Peach, the district attorney in St. Louis, about how public defenders who specialize in capital defense came from St. Louis and Kansas City to rural parts of Missouri to try death penalty cases. We heard about a similar program in Kentucky. Almost everyone saw the need for it where it does not exist. For example, Robert Walt, an assistant attorney general in Texas, and Caprice Cosper, an assistant district attorney in Houston, both testified about the need for such specialists for trial and direct appeal in Texas. Stephen O. Kinnard of Jones, Day, Reavis & Pogue, who chaired a special committee of the Georgia Bar which studied the problem, testified: "The best way to address the problem of trial counsel in these cases is to create a state wide public defender office that is independent, adequately staffed and funded, and that has as its sole function the representation of all indigents accused of capital crimes."

[36] *See, e.g., Commonwealth v. O'Dell*, Circuit Court of Virginia Beach, Va, No. D-11,413 (1985) (prosecution presented six experts on electrophoresis, including one from New York and one from Connecticut). Virginia always ranks at or near the bottom of funding for indigent defense.

[37] For example, Georgia recently paid a statistician $65.00 per hour to analyze a prosecutor's use of his peremptory jury strikes over a number of years to resist a claim that the prosecutor had discriminated in striking black persons. *State v. Horton*, U.S. District Court, M.D. Ga. Civil No. 88-46-1-MAC (WDO). Georgia has never paid an attorney $65.00 per hour to defend a capital case. It was discovered recently in one county in Georgia that the person who fixed the air condition at the courthouse was paid more per hour than any lawyer has ever been paid to defend an indigent person in that county.

[38] Senator Parker testified: "[A]lthough many of my colleagues in the legislature realize what is needed — a centralized, truly independent capital defense office staffed by experienced capital trial counsel — they are unquestionably unwilling, as they have demonstrated year after year, to appropriate the funds. There is simply no constituency advocating funding for indigent defense. Quite to the contrary, support for indigent defense is viewed by many in this state as being soft on crime." The Georgia legislature funded indigent defense for the first time this year. Senator Parker testified that although 15 to 20 million dollars is required for an adequate indigent defense system, the legislature appropriated only one million dollars for the entire state.

[39] For example, the Alabama Attorney General has successfully prevented any state funding of a resource center to assist lawyers handling capital cases in post-conviction review by asserting that if the resource center is funded it should be coupled with a major increase in funding for the Attorney General's office. The Alabama Attorney General has been particularly aggressive in exploiting inadequate representation to prevent review of constitutional errors in capital cases in that state. Mississippi and Texas have also not provided any state funds to the resource centers in their states.

HOW BEST TO SOLVE THE DRUG PROBLEM: LEGALIZE

New York Federal Judge Robert W. Sweet's Dec. 12 plea for the legalization of drugs added further fuel to the debate about how to cope with the drug crisis.

The present hysteria over controlled substances, such as cocaine and marijuana, has clouded our thinking and caused us to support policies based more on emotion than reason. This trend, if not curtailed by calm reflection and subsequent action to implement a more sane strategy, could result in the waste of billions of dollars and the persecution of some of our community's most ambitious and intelligent young people.

The legalization of the use of cocaine and marijuana is the first step toward developing a more humane drug policy. All other attempts to curtail drug use will fail.

It should be made clear at the outset: In no way do I condone drug abuse. I support all efforts that educate persons about the dangers of drug abuse and that encourage them to refrain from using drugs. What I am against is the arrest, prosecution and incarceration of drug users.

Attempts to stop the flow of drugs into this country will not solve the problem of drug abuse. Research by Mark A.R. Kleiman of the John F. Kennedy School of Government highlights the futility of trying to suppress drug use. Kleiman found that imports of marijuana, thanks to an intensive policy of border interdictions, were reduced from approximately 4,200 tons in 1982 to 3,900 tons in 1986.

The impact of the "crackdown" was twofold: The price of marijuana went up as the risk factor for suppliers increased, and domestic production increased 10 % within the same period. The result is that, today, one quarter of the marijuana sold in the United States is homegrown. As supply decreased, profits increased. Time and again, the increased profits have proved to be powerful incentives for dealers. For this reason, production of drugs is never eliminated; it merely moves to another state or country.

Media hype about drug busts creates a dangerous illusion. Every time we read about a major drug bust we can be sure of one thing, the profits for the dealers will go up. Major drug busts cut supply, which in turn increases demand. While the media, state and citizenry engage in victory dances in front of the television set, drug dealers are calculating their increased earnings.

Legalization of cocaine and marijuana, although the idea mortifies some, would immediately give the government more control over these substances, thus allowing it to regulate both the potency and purity of these drugs.

Those now involved in the distribution of these drugs must work outside the law. Grievances between buyers and sellers can only be settled by violence because there is no mediating body to whom either can go for assistance. If a dealer is selling less than the quantity he actually promised to deliver, he cannot be dragged into court or reported to the Better Business Bureau. Violence is the only way to settle the matter.

Legalization would open the door to a more civilized way to resolve conflicts. The issuing of licenses to sell these products would attract merchants without prior arrest records. Their primary interest would be the management of a legitimate business.

Clearly, the most unjust proposal for dealing with the drug problem is the incarceration of the "user." Currently, U.S. prisons house about one million people, many of them held or convicted of drug-related charges. Each cell built costs the taxpayers about $50,000. Alleviating current overcrowding would cost the state $80 billion.

The fact is, we could never afford to arrest, prosecute and incarcerate the 23 million Americans who use drugs. New York City, for example, has six judges assigned to hear 20,000 narcotics cases a year. That translates into 19,400 plea bargains and an average jail term of 7 days.

In Connecticut, prisoners are being released in order to make room for incoming inmates. Those released are chosen from among the least violent. The least violent often turn out to be those imprisoned on drug charges. This pattern is repeated across the nation.

Even if state legislatures did decide to raise revenues for more prisons, such as a plan could never be justified when so many of our communities are being faced with the problems of unemployment, underemployment, infant mortality, malnutrition, illiteracy and homelessness — problems that many social scientists tell us lead to drug abuse. Capital is in too short supply to be squandered on a formula we know does not work: Drug user + arrest + prosecution + prison term = productive citizen.

Drugs are not the cause, but a symptom, of a more profound and complex set of problems we don't want to face, simply because we haven't learned to solve them: unjust economic conditions and our own addiction to consumption masquerading as "the good life."

Developments of a healthy and reasonable attitude toward the drug problem begins with the acceptance of the drug user as a human being — not as a "fiend," "junkie" or "enemy." In reality, drug users are our sons and daughters, our friends and neighbors.

Politicians such as Mayor Ed Koch, who want pushers shot on the spot, and bureaucrats such as William Bennett, who have no moral problem with beheading drug dealers, appeal to our society's sense of frustration rather than offering solutions that create a sense of hope. This kind of grandstanding is the scenario for war, and wars are the result of injustice. The drug war is no exception.

Although 75% of the users of drugs are white, a majority of those incarcerated for drug use are either black or Hispanic.

The stereotypical drug pusher is black or Hispanic. Little is mentioned about the white bankers and investors who supply the capital for major drug deals. Between 1970 and 1976, the currency surplus (the amount of money received minus the amount lent) reported by the Federal Reserve in the state of Florida almost tripled from $576 million to $1.5 billion, according to Jefferson Morely in an article published in the Oct. 2, 1989, issue of *The Nation*. But when was the last time you heard President Bush call for the immediate execution of bankers who take drug money or William Bennett call for the beheading of venture capitalists who fund major drug deals?

In fact, the typical drug pusher is not a strung-out gang member who lights his cigars with one-hundred dollar bills. A successful drug dealer, like any entrepreneur, is often a hard worker who likely abstains from drug use.

The explanation for this phenomenon is simple. As industry abandoned the inner city and urban areas in general, many blue-collar entry level jobs that had been available to minorities and poor whites were lost. They were replaced by white-collar jobs that require higher levels of education. Inner-city school systems simply could not deliver students prepared to compete for these jobs.

With the advent of crack, a new product that could be sold for as little as five dollars, intelligent, ambitious and aggressive young people who had bought into the culture of consumerism went to work in the only service industry that didn't make them wear funny hats, and it paid 20 times more.

The rise in drug use among our nation's poor and economically disadvantaged is a direct result of our unwillingness as a community to deal with the problems of inadequate school systems, lack of good jobs and the gap that currently exists between our addiction to having it all and our ability to actually pay for it all.

It is simply not fair to incarcerate those who want to live out the dream of consumption when it is our economic system that has both whetted their appetite for such a life-style and simultaneously failed to deliver the opportunities needed to live out that dream. Besides jail terms and prison sentences, we are giving these young people prison records that will follow them for the rest of their lives. These criminal records will hinder them in their future endeavors to live as productive and fully participating members of our society. How many future attorneys, doctors, teachers and such are being cut off at an early age from ever realizing their full potential?

There is a drug problem. But it will not be solved by incarcerating young, poor blacks, Hispanics and whites. It will be brought under control only when the product they are selling is legalized and regulated just like other drugs people use today without a second thought: alcohol, caffeine, nicotine.

Next time we pick up a 6-pack at the grocery store, raise our glass of champagne for a toast or fix ourselves a drink to help us relax after a trying day, we should remember that, only a few years ago, in our own nation, it was chic for politicians and bureaucrats to call for the immediate execution of users of alcohol. (Indeed, in the 17th century, the prince of the petty state of Waldeck was paying 10 thalers to anyone who turned in the drug abusers in his kingdom: coffee drinkers. During the same century, Czar Michael Federovitch executed anyone caught in possession of tobacco.)

Drugs have always been a part of human culture. Their use, within the context of a healthy and sane community, has never hurt the culture. It is only when the social system begins to break down because of economic and social factors that drugs become a point of focus for the projection of our social ills.

But a reasoned and calm analysis can forge a path through the hysteria and lead us to a sane policy for the control and distribution of cocaine and marijuana.

RAUL TOVARES

Raul Tovares has an MA in psychology and worked as a therapist with alcohol and drug abusers. He is now program director for Catholic Television of San Antonio.

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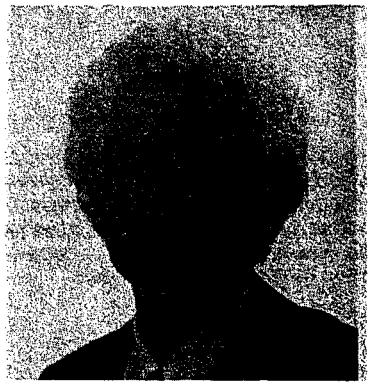
PUBLIC ADVOCACY ALTERNATIVE SENTENCING PROJECT *(PAASP)

Part of the Solution to Jail Prison Overcrowding



Dave Norat

Governor supports alternative sentencing and incorporates continuation of the program in his criminal justice project.

Recognition of the role that alternatives to incarceration can play in addressing the jail and prison overcrowding crisis in Kentucky is a step towards lessening that crisis.

With the Governor laying the groundwork for the continuation of the PAASP, the General Assembly now has the opportunity to build on this foundation. It has the opportunity to take advantage of a structured Public Advocacy System with a sentencing program that is unique in the nation because it also targets the developmentally disabled offender.

The proposal for the PAASP is to expand the project each year of the bienium for a total of ten workers operating by the end of the bienium. Alternative sentencing in other states has been part of the solution to the prison and jail overcrowding crisis. It can also be a part of the Kentucky solution as well.

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

ASK CORRECTIONS

Shirley Sharpe

Over the last several months we have received a number of inquiries covering questions asked in previous issues. In response to these inquiries this column will again answer the questions in hopes of meeting the needs of our readers.

TO: CORRECTIONS

My client is housed in jail after being convicted of a felony. When can he obtain a copy of his Resident Record Card?

TO: READER

He can obtain a copy of his Resident Record Card from the Institution Offender Records Officer within a few days from admission to the AC (Admissions and Classification) Center

If your client remains in jail until after his Parole Board Hearing, he can obtain a copy of the Resident Record Card from Offender Records Office, State Office Building, Frankfort, Kentucky 40601. He should request this in writing.

TO: CORRECTIONS

What is the difference between "Release from Supervision" and "Final Discharge from Parole."

TO: READER

RELEASE FROM SUPERVISION - A parolee has been released from active supervision and does not have to report to a Parole Officer, however, the parolee is still on parole.

FINAL DISCHARGE FROM PAROLE - A formal document issued by the Parole Board which terminates all liability under that sentence.

TO: CORRECTIONS:

My client is lodged in the County Jail having received a prison sentence. How can we be assured that the prisoner will be given credit for all jail time and good time, and also will my client be released the same date, as if he were housed in a Corrections Cabinet Institution?

TO: READER

Certified copies of judgments of conviction are sent to the AC Center and to the Offender Records Section, Frankfort, Kentucky. The sentences are calculated and parole eligibility is figured just the same as if he were incarcerated in the Kentucky Corrections Cabinet facilities. He will be brought to the AC Center for admission and release according to the release dates. If subject has been in the jail enough time to meet the Parole Board, provisions are made to have the inmate fingerprinted and photographed at the time he has his Parole Board Hearing. He can then be released from jail through coordination between the Corrections Cabinet, Probation and Parole and the Jail Personnel. If a prisoner meets the Parole Board, has his fingerprints and photos taken, and receives a serve-out from the Parole Board, the release can be effected from the jail by coordination between the Corrections Cabinet and Jail Personnel.

TO: CORRECTIONS

My client is being held in a local jail on a Parole Violation Warrant. He has been afforded a preliminary hearing which was conducted by an Administrative Law Judge. Has my client's parole been revoked?

TO READER:

Your client's parole will not be revoked until he has been afforded his FINAL REVOCATION HEARING, by the Parole Board. Until his parole has been revoked, he is still on parole and working towards his maximum expiration date. At the time he is given his final parole revocation hearing, and if his parole is revoked, his sentence will be recalculated to determine his new Conditional Release and Maximum Expiration Dates.

TO CORRECTIONS:

How can I explain terms of Normal Maximum Expiration Date; Adjusted Maximum Expiration Date and Conditional Release Date? How does the Corrections Cabinet arrive at these dates:

TO READER:

NORMAL MAXIMUM EXPIRATION DATE - The date the person is received into the system (Corrections) and add to this date the length of sentence to be served.

ADJUSTED MAXIMUM EXPIRATION DATE - Subtract the jail custody credit from the Normal Maximum Expiration Date. This gives you the Adjusted Maximum Expiration Date.

CONDITIONAL RELEASE DATE - Subtract the good time allowance from the Adjusted Maximum Expiration Date and you will have the Conditional Release Date. This date is subject to change, as when an inmate forfeits good time, the amount of good time loss is added on. If the inmate earns meritorious good time, this is subtracted from the date. This is pursuant to KRS Chapter 197.045(3).

SHIRLEY SHARPE
Offender Records Administrator
Corrections Cabinet
State Office Building, 5th Floor
Frankfort, KY 40601
(502) 564-2433

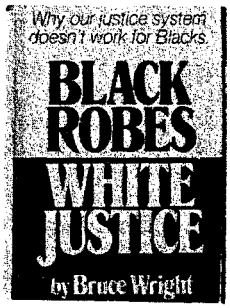
THE RACIST NATURE OF AMERICA'S JUSTICE SYSTEM

The Lady Should Take Off Her Blindfold

In his recent book, ***Black Robes, White Justice,*** Bruce Wright, a New York State Supreme Court Justice, and one of the few black jurists in the United States, characterizes the racist nature of the United States justice system this way: ***Most of the judges in America are male, white, middle class, aloof and conservative. Before them is brought a parade of dark-skinned defendants, all alien to the concept these judges have of the way life ought to be.*** Bruce Wright's chief concern is the judiciary, but the point extends throughout the justice system as a whole. African-Americans in New York, as well as other groups ironically understood to be the "minority" in this city, daily face treatment by white law enforcement officers who don't have an inkling of what their lives are like; who see before them offenses to "law and order" without recognizing within our system of law and order the violence of racism, which cripples a whole people and spoils the notion of justice altogether.

The plain truth of Bruce Wright's charge is constantly before our eyes in this city, and has taken on a visceral reality for us and for anyone who has encountered racism on the streets, in the police precinct, in the prisons, or in the courts, in even a superficial way. Yet is doubtful that we can ever listen closely enough to the voices which tell us that the history of the African-American community in the US is unlike that of any other - these voices are many, and yet normally out of earshot of most whites, even those of us who would like to consider ourselves "socially conscious." Do we wince in shame at the reminder that the experience of black Americans has been, and continues to be, one of "bondage and war?" (Those are the words of Father Lawrence Lucas, pastor of Resurrection Church in Harlem, and one of the handful of black priests in the New York archdiocese.) Do we take to heart the cry of African-Americans that, as the brother of a black man slain by whites said just the other day, "blacks cannot get justice through the courts"?

Statistics cannot hand us the truth of the



Available from Lyle Stuart for $15.95 Carol Publishing Group, 120 Enterprise Ave., Secaucus, NJ 07094 (201) 866-0490.

myriad human tragedies which lie behind them, but some figures speak too loudly to be ignored. One such fact is that the rate of incarceration among poor blacks far exceeds their proportion in the population. It is not that crime is less frequent among whites, and the middle and upper classes, but rather that sensibilities all along the line are altered markedly by the races of the defendant and the victim. To take but one example, we reported 3 months ago the finding that when it comes to capital sentencing, the race of the victim and the defendant is far and away the chief factor governing the decision to apply the death penalty. Thanks be to God, New York State has been spared the death penalty, which used against any person is a blatant violation of the requirements of justice. But doubly so is its use as an instrument of racism and hatred, and so the facts bear restating. Since executions were resumed in 1977:

-Someone who kills a white is 10 times more likely to be executed than someone who kills a black.

-A black who kills a white is about 5 times more likely to be executed than a white who kills a white.

-A black who kills a white is about 60 times more likely to be executed than a black who kills a black.

-And the most telling fact of all: Though there have been well over 2,500 white on black homicides nationally since 1977, not a single state has yet put to death a white who killed a black.

The point of all of this is not to suggest that the poor, of whatever color or background, do not ever commit crimes, or that, even questioning the integrity of the criminal justice system as a whole, there are not many deemed guilty by the system who are in fact guilty of wrong-doing. Rather, the point is that in all these cases one factor is a constant: the racial (and perforce once again, the class) discrepancy between those who mete out the justice and those who receive it. It pays to keep in view the great degree to which enforcement of the law is a discretionary practice, with choices being made at every turn. There is the initial predisposition to see certain people as criminals, and to recognize certain acts as crimes; there is the decision as to whether arrest and prosecution are worthwhile; there are broad assumptions made about what sort of punishment will "work" for what sorts of "criminals."

WHAT WE HAVE WITNESSED

The different standard of justice to which blacks are subject has been observed frequently on the street by many of us living at the *Catholic Worker*. We see it enacted by police officers (who at least in our precinct are usually white) as they encounter the homeless people (the great majority of whom are black) with whom we try to share our lives. We see repeatedly that these people are often treated with a violent use of force which far exceeds the nature of whatever offense they are accused of committing.

In the summer of 1986, Carl witnessed an incident in which a white policeman tried to break up an argument between 2 black homeless men on 2nd Ave., near 6th St. One of the men made a feeble attempt to reach for the policeman's stick. Then the

policeman, with the help of a bouncer from a nearby club, threw both men to the ground, and kept them pinned there until more policemen arrived. In the meantime, a young white man who had been eating in a nearby cafe came over and repeatedly kicked one of the black men in the head, shouting racist insults, with no attempt by the police officer to step in. When more police arrived, the 2 black men were arrested and taken away. The white man who had done the kicking went back into the cafe. Carl, describing what he had seen, told the policeman in charge that 2 crimes had been committed, but only one had been attended to. He was ignored. He complained to a few more policemen, to no avail. He then went into the cafe and asked the man what made him think he had the right to be kicking people in the head. The man shouted that he was a hero, and had been "giving scum what they deserve."

On another occasion, in June of 1987, Carl was walking by a small park on the corner of Greenwich and 8th Avenues. Just then some policemen were closing the park, and ordering several homeless men to leave. One large white policeman was going from bench to bench, knocking over people's bottles with his club and rudely ordering them to leave. One black man protested this treatment. The policeman grabbed him by the neck and threw him into the gutter in the street, spraining his wrist, and giving him a bleeding wound on the head. Carl went up to the policeman, and told him that what he had done was a crime, regardless of the badge he wore. The officer cursed at Carl, and shouted that he had better not interfere. Carl judged that the color of his skin earned him a warning instead of an assault. Both the victim and Carl later filed complaints with the Civilian Complaint Review Board, and Carl followed up the applications with numerous telephone calls to the CCRB, informing them of the incident. Over a year later, he received a letter from the CCRB telling him that because of his and the victim's failure to cooperate (!), the case against the officer had been dropped.

These cases, along with many others to which we have been witness over the years, point to that amalgamation of poverty and race in our society which has caused the creation of a class of virtual nonpersons, who may be abused with impunity. Though Police Commissioner Benjamin Ward is himself an African-American, this entrenched attitude of racism persists in the ranks of an overwhelmingly white police force. These instances also reveal the degree of anger and resentment which simmers just below the surface in many members of the NYC Police Department, who feel maligned and unsupported in their communities, and in a city known for its violence, extremely fearful on the job. This complex of grievances offers many officers a justification for leveling their hostility directly against anyone who broaches resistance to their authority. (More than one woman at the *Catholic Worker* has encountered a mixture of racism and sexism when she has objected to police treatment of a black man on the street - here, the stock response has been to demand whether she would make the same objection if the suspect were guilty of raping her, her sister, her mother, etc.)

As disturbing as these incidents are, they read only as indicators of a practice of violence which has culminated over the past decade in greater New York in a series of well known incidents in which white policemen have actually killed black people without cause. Locally, nothing is more responsible for the crisis of confidence of African-Americans in the justice system than the needles, and unpunished, use of deadly force against them by the NYC police force.

The killing of Michael Stewart, a 25-year-old photographer and model who was beaten to death by transit police, galvanized the despair of many blacks with the justice system. Mr. Stewart, a Brooklyn resident, was arrested on September 15, 1983, on charges of writing graffiti in a Manhattan subway station. An eyewitness stated that after 6 white transit police had handcuffed Mr. Stewart, they proceeded to bludgeon him, mortally wounding him. He was unconscious when he arrived at Bellevue Hospital. Two nurses on duty later testified that on arrival, every part of Mr. Stewart's body had been traumatized. He had lapsed into a coma.

Summoned to the hospital, Mr. Stewart's parents brought in a doctor to see their son, but their physician was prevented from conducting an independent clinical evaluation on Mr. Stewart for 17 hours, while officials insisted that he produce his medical diplomas and license. In the meantime, the administration of Bellevue Hospital told Michael Stewart's parents that he was doing well, when in fact he was in a coma. Michael Stewart never regained consciousness, and after 13 days, he died.

MISCARRIAGES OF JUSTICE

The ensuing investigation and trial proved a disgrace. One of the attorneys who conducted the investigation for the Stewart family reported that his work was frustrated by every branch of the official apparatus involved. Cooperation was not forthcoming from the hospital administration of the transit police. The Medical Examiner's office mishandled the forensic report. The eyewitness was pressured by the assistant District Attorney not to testify against the police. In the end, the police officers were found innocent and allowed to walk free.

Michael Stewart's death was followed the next year by the killing of Eleanor Bumpurs, a 66-year-old grandmother who was shot to death in her Bronx apartment. On October 29, 1988, the police emergency service unit was called to help evict Mrs. Bumpurs, who owed 4 months back rent. (Her rent was $98.85 a month.) The police say that during the dispute, Mrs. Bumpurs threatened them with a knife. A white officer, one of the 6 officers present, then shot her twice, killing her. Mrs. Bumpurs' family maintains that she was too ill and infirm to have posed any serious threat to the police officers. In the storm of protest which followed this needless shooting of an elderly, ill, and confused woman, several officers were demoted, but no one faced imprisonment.

Other black New Yorkers killed by white officers in recent years include Randolph Evans, Yvonne Smallwood, Clifford Glover, Nicholas Bartlett. Only in light of this history can the case of Tawana Brawley be understood. Tawana Brawley is a 16-year-old girl who was missing for several days last year before she was found in dazed condition; she said that she had been the victim of a vicious racial attack. Early on, the Brawley family and their advisors announced they would refuse to cooperate with the grand jury in the case, because they believed that given the blatantly racist nature of the justice system, justice would not be done.

The grand jury finally prepared its report without the testimony of the Brawley family, concluding (over the protests of at least one of the 2 black jurors) that Tawana Brawley fabricated the attack on herself, and her account of what happened to her. In spite of a plethora of unanswered questions, the underpinning of this much sensationalized case is the experience and conviction of African-Americans - which the white legal officials involved have been signally unable to comprehend - that, when they are victims of hate violence from whites, justice is utterly beyond their reach.

Any discussion of the legal administration of justice in this country must acknowledge the question of whether there ever

could be a system of justice in any authentic sense of the word, in a nation as large as ours, as urban, as industrialized, and as powerful. Any mention of the failings of the police force or the courts is bound, now, to bring the rejoinder that the agencies of law enforcement are up against an unprecedented crime rate, and a wave of violence aimed at law officers themselves. This may be true, but it overlooks the connection between such crime (especially related to drugs) and a culture which exalts money, and identifies one's worth with one's ability to spend and to consume. We are aware on the one hand, of the harsh actuality of the lives of the poor; and we speak insistently, on the other hand, against the burgeoning growth of power placed in the impersonal hands of the State - its bureaucracies civil and criminal - while the lives of the excluded ones become yet more desperate. But at the same time it is constantly necessary to exact an accounting from those who, for better or worse, are in the positions of authority, which is to say, rightfully, not first of power, but of responsibility.

We witness in this city an outpouring of shock and concern whenever a police officer is killed in the line of duty, particularly where the death has been drug-related. These deaths are tragic, but our shame is that they are not matched by any outcry against deaths for which the police themselves are responsible or where victims of white violence go undefended. The Church shares in this shame when its leaders neglect to speak out in the knowledge that so many who have perpetrated acts of violence of willful disregard against people of color are Catholics, who look to the teaching and example of the Church for the formation of their consciences.

We have been offered an ideal of justice as a blindfolded lady holding the balanced scales of impartiality. In *Look Out Whitey! Black Power's Gon' Get Your Momma!*, Julius Lester makes the call: "It might help things a helluva lot if Justice would take off that blindfold. Seeing a few things might help her out, 'cause it's obvious that her hearing ain't none too good."

Carl Siciliano Meg Hyre

Reprinted from the December 1988 *Catholic Worker* with permission.

BLACK ROBES/WHITE JUSTICE is available from the DPA Library.

DRUG CRISIS BURDENS PRISON SYSTEM

POLITICAL sage Horace Busby makes a sobering observation about trends in the United States: "In the 1950s and '60s," he says, "everybody was busy building public schools. But the biggest boom area of public contracting in the '90s will be prisons." Mr. Busby's forecast has come true with a jolt in Georgia. This state has launched a frantic building program as its criminal population soars. The Georgia Department of Corrections is known humorously here as the "Department of Construction." But Georgia's desperate need for more prison space is no joke. In an interview, Gov. Joe Frank Harris (D) concedes, "It's enormously expensive. We can't keep up with it." The reason: illegal narcotics pouring across the nation's borders. A number of other states, such as Florida, face equally serious crises. The Sunshine State's prison population is expected to zoom from 33,681 in 1988 to 77,352 in 1991.

The federal government also is struggling with overcrowded prisons. In space designed for 29,606 inmates, the federal system now has squeezed 45,924 - 55% over capacity. Although the focus of attention in America's drug war is on front-line states, like Florida and California, the situation is equally desperate behind the lines in states like Georgia. Four out of every 5 crimes in Georgia today are drug-related. The state's criminal system is so overloaded with drug crimes, and its prisons so overcrowded, that thousands of Georgia felons get off scot-free - with no jail time at all. Others serve only a small fraction of their sentences.

Michael J. Bowers, Georgia's attorney general, complains, "We are literally running that revolving door that George Bush showed in his campaign ads." Mr. Bowers asserts: "Our criminal justice system is broken - due to drugs." Georgia's Organized Crime Council estimates that with criminals going unchecked, illegal drugs have grown into a $7.5 billion-per-year business in this state. The crisis has left Georgia officials with agonizing choices. The state's prison system will hold 19,900 convicts. But 15,000 new inmates will arrive this year. That means thousands will have to be released to make room for them. These are the state's most hardened criminals. More than 90 percent were convicted of either murder, rape, serious bodily assault, multiple burglaries, armed robbery, or drug dealing. "So you tell me who to turn loose," Bowers complains.

Because of overcrowding, many criminals sentenced for as much as 5 years will serve only 4 months. The average drug dealer does one year and 15 days. DuPont Cheney, state district attorney in Hinesville, says "everybody in the legal system feels he is spinning his wheels." Mr. Cheney offers this example. After an extensive investigation, police cracked a motel-theft ring - a father and three sons - who had stolen millions of dollars worth of goods from tourists in southeast Georgia. The father and sons got eight-year sentences. Because of overcrowding, they were back on the street within 4 months, before the district attorney's office could even process all the paperwork.

Cheney says about half the prisoners released early because of overcrowding are back in trouble immediately. Yet most convicted felons don't go to prison until they are found guilty several times. John Siler, of the Department of Corrections, says the only way someone would serve time after one conviction for grand larceny would be to "burglarize the governor's house." Throughout the state, 135,000 felons currently are on probation, walking free even though "a great number of them should be in prison" if there were space, Bowers says. Mr. Siler says new prisons are going up as fast as the state General Assembly can appropriate the money. Another construction project called "Fast Track" will add 1,600 beds at existing prisons, such as the one here at Forsyth. All this will help push Georgia's capacity to 33,000 inmates by 1993 - but the state won't be able to rest on its laurels. By the year 2000, officials estimate they must have spaces for at least 51,000 inmates to keep the very worst offenders off the streets. Even then capacity won't be adequate. Attorney General Bowers says if the state wanted to imprison "serious felons" for at least one-third of their sentences, the cost would be "in the billions." Bowers says: "No one understands the incredible nature of this drug problem we face."

The attorney general says prisons are supposed to serve 4 functions: punish wrongful acts, deter crime, protect the community, and rehabilitate criminals. "We are doing none of those," Bowers says. "All we do is just process people. It's just ridiculous, and it has come home to roost. It's easy for politicians to say, 'Get tough,' but that is hogwash ... for the key is space in the prisons." He adds: "We've never faced the problem we have today." Without more prison space, the work that "judges, the GBI [Georgia Bureau of Investigation], and the police are doing is a waste of time."

Siler says that "no one is more aware of the situation than the [criminals]." Bowers says felons consider the justice system "as a joke." Is there an answer? Short of solving the drug problem, experts say it will be necessary to build more prisons, and find alternatives to prisons for those who aren't locked up. The "National Drug Control Strategy" guidebook issued by the White House this fall concludes: "A large police force may be able to double the number of drug-related arrests it makes, but unless there is a significant number of jails, prosecutors, judges, courtrooms, prisons, and administrative staff, a point of diminishing returns is soon reached: More arrests mean less thorough and effective punishment." Beyond that, the report calls for alternative punishments, such as denial of federal benefits, halfway houses, and house arrests. But the urgent need seems to be more prison cells. As Mr. Busby says, it's a sad commentary on the '90s. One in a series of articles about US border problems.

John Dillin Staff writer of *The Christian Science Monitor* P.O. Box 10116 Des Moines, Iowa 50340-0116. Reprinted with Permission. November 6, 1989.

FUTURE SEMINARS

NCDC ADVANCED CROSS-EXAMINATION SEMINAR
Atlanta, Ga.
April 27-29, 1990

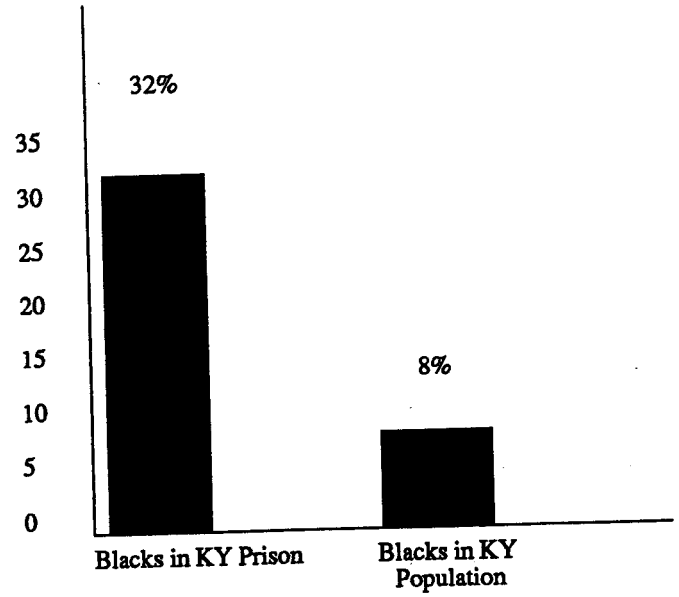
NLADA APPELLATE SEMINAR
April 5-7, 1990
Indianapolis, Indiana

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

RACISM ?



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