THE ADVOCATE

The Magazine of the Kentucky Department of Public Advocacy

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Representing 70,000 Poor Kentucky Citizens *Volume 14, #2 February, 1992*

OUR CONSTITUTION REQUIRES:

adequate funding of Kentucky's indigent criminal defense

and

Revision of KRS Chapter 31

Celebrating the 201st anniversary of our U.S. Bill of Rights on December 15, 1992
Celebrating the 101st anniversary of our KY Bill of Rights on September 28, 1992

THE VALUES OF KRS CHAPTER 31 PROPOSED REVISIONS:

Quality Legal Representation

We recognize that the two most important things to us are our *life* and *liberty*. It is important to express clearly the public policy of insuring that the constitutional right of counsel is honored for persons in Kentucky who cannot afford legal counsel and who have their life or liberty at risk because of a law enacted by government.

Quality representation must be provided. "The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel...." ABA Standards for Criminal Justice, *Providing Defense Services*, Standard 5-1.1 (1990).

Just as our judicial needs are met by full-time judges and full-time judicial staff across the state, so too defense services for the indigent should be provided by full-time public advocates and staff dedicated to full-time professional service to poor clients.

STATE OBLIGATED TO PAY: The state is legally obligated to provide for indigent criminal defendants' constitutional right to counsel. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 92 L. Ed. 2d 799 (1963); *State Ex Rel. Stephen v. Smith*, 747 P. 2d 816, 835-36, 850 (Kan. 1987). "Since the providing of counsel for indigent defendants in criminal prosecutions in the state courts is an obligation imposed on the state by the constitutions it would appear that the payment of reasonable compensation to such counsel would be in the category of an *essential governmental expense*." *Jones v. Commonwealth*, 457 S.W. 2d 627, 632 (Ky. 1970).

In Kentucky the issue of whose duty it is to fund counsel was settled in *Bradshaw v. Ball*, 487 S.W. 2d 294, 298 (Ky. 1972). Kentucky attorneys cannot be forced to represent indigent criminal defendants without reasonable compensation since to do so would be "a substantial deprivation of property and constitutionally infirm." *Id.* at 297, 298.

This case holding combined with the fact that Kentucky's criminal justice system is a statewide program with a full-time, state-funded judiciary makes it clearly the state's duty to fund a statewide public advocacy program. As stated in *Bradshaw v. Ball, supra*:

...it is the duty of the legislative department to appropriate sufficient funds to enforce the laws which they have enacted. *Bradshaw, supra*, at 299.

The American Bar Association has addressed the need of government to properly fund legal representation. The funding must be full funding for quality service:

Government has the responsibility to fund the full cost of quality legal representa all eligible persons....

ABA Standards for Criminal Justice, *Providing Defense Services* (1990), Standard 5-1.6, Funding.

At its 1991 Annual Meeting, the ABA passed a resolution recognizing "that the highest priority of the bench and bar must be to promote improvements in the American system of justice by ensuring balanced and adequate funding and timely access to the entire justice system."

EVOLUTION OF REVISIONS: The proposed revisions of KRS Chapter 31 have evolved out of these fundamental values. Ed Monahan

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

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IN THIS ISSUE

JUDGE RAY CORNS, DEPUTY PUBLIC ADVOCATE

Editor's Note: *Public Advocate, Paul F. Isaacs resigned on Dec. 31, 1991 We had planned to publish an interview with Paul F. Isaacs. As it was not received by the time we went to press, we will publish it next issue.*

Welcome to DPA. How do you feel about being here?

I enjoy the challenges confronting the agency and working with the truly dedicated individuals, who give so much for so little in monetary return.

How did you come to be appointed Deputy Public Advocate?

Paul Isaacs called and inquired if I would like to be Deputy Public Advocate.

Leadership

Ultimately a genuine leader is not a searcher of consensus, but a molder of consensus. On some positions, cowardice asks the question, "Is it safe?" Expendiency asks the question, "Is it politic?" And vanity comes along and asks the question, "Is it popular?" But conscience asks the question, "Is it right?" And there comes a time when one must take a position that is neither safe nor politic nor popular, but he must do it because conscience tells him it is right. And this is where, I believe, we must go, as ministers of the gospel.

Martin Luther King, Jr.

Relate your professional background.

-Legal Advisor - Governors Combs and Breathitt

-Assistant Attorney General

-Chief Legal Counsel, Kentucky Department of Education

-Juvenile Judge

-Commonwealth Attorney

-Circuit Judge

What are your goals as you lead DPA through these difficult times?

Full funding, improve morale, establish good communication practices.

How does DPA funding compare to other criminal justice agencies and other state government agencies?

Grossly underfunded.

The DPA Public Advocacy Commission is proposing a revision of KRS Chapter 31 to meet the funding and constitutional problems noted in *Lavit v. Brady*? Your views of the proposed revision.

Support *strongly*.

Do you want to lead DPA long-term?

-I plan to apply for the position of Public Advocate.

What have you identified as problems in the agency that need to be changed?

-Treat *all* staff alike.

-Need to have DPA accepted as a full partner in the criminal justice system.

-Ultimately, make salaries commensurate with the services provided.

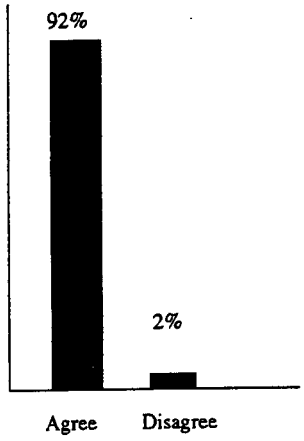
Any other thoughts.

I have been very pleasantly surprised by the devotion and dedication of so many individuals to the mission of DPA. This is really encouraging, especially, when it exists in difficult financial times.

I only wish that this type of assiduous devotion to duty was as prevalent in all agencies of state government.

1989 Poll of Kentuckians

Should Death Penalty Laws Guarantee No Racial Bias in Application of Death Penalty?



COMMONWEALTH OF KENTUCKY

DEPARTMENT OF PUBLIC ADVOCACY

PUBLIC ADVOCACY COMMISSION
1264 Louisville Road
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Frankfort, Kentucky 40601

(502) 564-8006

Dear Friends of Public Advocacy:

For a long time it has been apparent that there are severe problems in Kentucky with the way in which we attempt to deliver defense services to poor people who have been accused of crimes. Aside from the requirements of due process and equal protection under the United States and the Kentucky Constitutions, the Kentucky General Assembly has mandated that certain defense services be provided at government expense. Lack of adequate funding is certainly central to the problems which public defenders in Kentucky experience, and that problem has increased every year the Department of Public Advocacy has been in existence. Real dollars have shrunk, and the legislature continues to increase the responsibilities of the Department without consideration of the fiscal impact of their actions upon the Department.

But there are other problems in the structure of the statutes which provide for the manner of delivery of defense services to the poor defendant. Constant disputes arise as to which entity is responsible for payment of fees above statutory levels (themselves so low as to be absurd), and the other expenses associated with adequate representation. The present statutes provide for different kinds of systems for delivery of defense services, with varying levels of funding occuring. (Recently, in *Lavit v. Brady*, Ky.App., ___ S.W.2d ___ (Nov. 8, 1991), a panel of the Kentucky Court of Appeals stated,".... We do not know how the legislature expects the state to fulfill its obligation to provide indigent defendants with competent, effective representation, especially in capital cases, with the meager limits of compensation it is authorized to pay. Additionally, we have serious doubts concerning the constitutionality of the total defender scheme under KRS Chapter 31 because of its lack of uniformity, lack of adequate state funding, and the special legislation of some of the statutes....")

Because of these problems, the Public Advocacy Commission requested the Public Advocate to appoint a committee to study the various statutes and to make recommendations for a better structure. The result of the intense effort on the part of that committee was a redraft of Chapter 31 of the KRS. Among other things, this proposed statute attempts to give the Public Advocate the necessary independence to be a real advocate for the Department's needs and to eventually provide for the delivery of defense services by full-time defenders on a uniform basis throughout the Commonwealth.

Following is a comprehensive analysis of this proposed Chapter 31 prepared by Ed Monahan, Assistant Public Advocate and Editor of the *Advocate*, who chaired the committee. The Commission has voted to attempt to have it enacted into law. It represents an ideal. We know that there is opposition to the proposal among influential legislators. This should not deter us from attempting to achieve this ideal. I urge each of you to carefully consider this proposal. I hope that you can support it and that you will contact your state Senators and Representatives to urge their support when it is introduced in the legislature.

Sincerely yours,

William R. Jones

William R. Jones
Chair
Public Advocacy Commission

INDIGENT DEFENSE NEEDS REVISING

The Department of Public Advocacy has the duty to represent persons accused of committing a crime but too poor to hire an attorney. Currently, 70,000 persons across the state are being represented each year.

STATEWIDE SYSTEM CREATED

The Kentucky statewide public defender system was created by the 1972 Legislature after significant, repeated legal challenges to the coercion of members of the Kentucky bar to represent indigents charged with a crime. The state has the duty to professionally run and adequately fund a public defender system. *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972). "It is clear that *Bradshaw* mandates two things: the state must furnish indigents competent counsel; and, counsel so furnished must be paid just compensation." *Lavit v. Brady*, Ky. App., __ S.W.2d _ (Nov. 8, 1991).

THE STATUTE NEEDS UPDATING

Since its 1972 enactment, the public advocacy statute, KRS Chapter 31, has been amended in a piecemeal fashion 12 times.

In the two decades since the state public defender system was established by the legislature, many significant changes have occurred nationally and in Kentucky. KRS Chapter 31 needs to be revised as a whole to account for the last 20 years of change and to insure that representation of indigents charged with a crime in Kentucky is fully adequate in the 1990s and beyond.

ON THE BRINK AGAIN

The combination of these many factors have placed indigent criminal defense at the point of being inadequate and unconstitutional. The Kentucky Court of Appeals has recently set off the warning siren:

> This is not to say that we do not have serious doubts about the constitutionality of the statutory scheme of fees and, in particular, the caps. We do not know how the legislature expects the state to fulfill its obligation to provide indigent defendants with competent, effective representation, especially in capital cases, with the meager limits of compensation it is authorized to pay.
>
> Additionally, we have serious doubts concerning the constitutionality of the total defender scheme under KRS Chapter 31 because of its lack of uniformity, lack of adequate state funding, and the special legislation of some of the statutes. However, in this regard there were no findings by the trial judge, although a certain amount of the arguments on appeal addressed the constitutionality of these statutes. It is our impression that, if there is going to be a constitutional attack upon the present defender system, the procedure would have to follow the path of the school reform case, *Rose v. Council for Better Education, Inc*, Ky., 790 S.W.2d 186 (1989)
>
> *Lavit, supra.*

NEEDED CHANGES

The Department of Public Advocacy has a proposed revision of KRS Chapter 31 which has the support of the public defender community in Kentucky. It has as its major features:

1. **DELIVERY OF PUBLIC ADVOCACY SERVICES BY FULL-TIME ATTORNEYS ACROSS THE STATE.** This is the recommendation of the American Bar Association. It is the national trend, and is recognized as the best method of providing fully adequate, cost-efficient, cost-controlled services. It is also consistent with the trend in Kentucky, *e.g.*, full-time judges. This change will require new money.

2. **PUBLIC ADVOCACY SERVICES (FUNDS FOR ATTORNEYS AND EXPERTS) FUNDED ENTIRELY BY THE STATE.** Currently, the state provides most of the funding for the public defender system. However, county fiscal courts are responsible for funding the costs of expert witness and for any costs of attorney fees above the state allotment. Under the DPA proposed revision of KRS Chapter 31, counties would have no funding obligations. This is consistent with Kentucky's criminal justice system becoming a state operation, *e.g.*, funding for the judiciary. This will remedy the unfair financial burden currently borne by the counties. This change will require new money.

3. **PROFESSIONAL AND POLITICAL INDEPENDENCE OF PUBLIC ADVOCACY SERVICES.** This is consistent with the direction in Kentucky. Examples are the Department of Education and the Lottery Commission. The American Bar Association Standards view professional and political independence of public defender systems as essential. It is proposed that this be accomplished by a) making the Public Advocate appointed by the Public Advocacy Commission, not the governor, b) making the public advocate a "for good cause" employee instead of non-merit, c) selecting the Public Advocate on the basis of competence and merit; and d) placing some limits on the Governor's discretion on who can be appointed to the Public Advocacy Commission, *e.g.*, requiring some members to be confirmed by the General Assembly. These changes will require nominal new funding, perhaps several thousand dollars.

4. **REASONABLE HOURLY ATTORNEY FEE RATES AND FEE CAPS, ESPECIALLY IN CAPITAL CASES.** When the full-time system must turn to private attorneys to handle cases due to ethical or legal conflicts or other disqualifying reasons, the hourly rates and maximum fees must be equitable with current economic realities. The proposal is that the rates and the caps be raised to a level that accounts for the inflation of the last 20 years. It is also proposed that reasonable fee maximums be created for capital cases, which are not currently provided for in the statute. This is inevitably required by litigation which led the Court of Appeals to rule in November, 1991 that a capital case automatically is a special

circumstance case under KRS Chapter 31 so as to require attorney fee compensation beyond the statutory maximums:

> We have no reluctance in holding that a capital murder case is "*ipso facto*" a special circumstance within the meaning of the statute so as to allow for additional legal defense compensation. Failure to so construe renders the "special circumstances" exception meaningless.
> *Lavit, supra.*

The court also observed in *Lavit, supra*, that: "...it behooves us to comment that the sums are not commensurate with professional services of the kind demanded by the nature of a capital murder case." This will require new money.

5.APPOINTMENT AND RECOUPMENT. It is recommended that the process of appointing public defenders be upgraded to insure that those who can afford counsel are not being represented by the Public Advocacy system with state money, and to require all money recouped from persons represented by a public advocate be returned to the state general fund as are fees and fines generated by the judicial system. These changes will not require any new funding.

NEEDED FUNDING

Yes, some of these requests contemplate increased funding from the General Assembly. However, the funding increases are modest in light of Kentucky's historical underfunding of legal services for the accused. Currently, Kentucky indigent criminal defense efforts receives .1 percent of the total state budget, and 2 percent of the funding for Kentucky criminal justice agencies. Its funding ranks at the bottom nationally.

How much more money is needed to fund the entire proposal? In FY 91 county governments contributed $864,845 to the present full-time contract system. (Boyd, Fayette and Jefferson counties). As these 3 counties are transitioned to state full-time systems the dollars contributed by the counties will have to be allocated by the state.

It is estimated that an additional $1.9 million is needed for the 1992-94 biennium to begin reduction of caseload inequities and to bring the Fayette and Jefferson County offices into salary parity with the full-time state system. Currently, fiscal courts are funding expert witness fees and other ancillary resources at the level of $60,000 per year. Increased funding for capital cases under *Lavit, supra*, is expected to require $280,000 per year. It is estimated that $6.2 million is needed over the 7 year period of implementation to establish 17 field offices and bring the rest of the state into the full-time, state-funded and state-run system. This figure is the cumulative additional cost over the 7 year period compared to what it would have cost to continue running the system with its present non-full-time structure.

At its 1991 Annual Meeting, the ABA passed a resolution that recognized "that the highest priority of the bench and bar must be to promote improvements in the American system of justice by ensuring balanced and adequate funding and timely access to the entire justice system."

FUNDING PERSPECTIVE

The *total* additional state dollars of $7.4 million are the equivalent needed to build but 3 miles of a Kentucky two-lane road, or build and service 74 prison cells in Kentucky. The full amount of this funding would be incrementally reached over the next 7 years.

As a point of reference, in FY 91 the state funding for Commonwealth's Attorneys was $11.3 million, for County Attorneys it was $12 million, and for the Attorney General it was $7.5 million. This totals $30.8 million in state funding for the prosecution. DPA received $10.8 million in FY 91. This 3-1 funding disparity creates constitutional deficiencies.

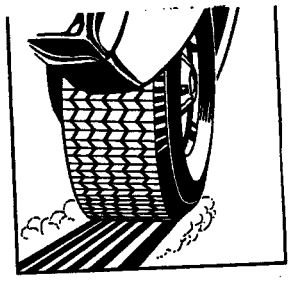
IN OUR COMMON INTERESTS

While funding public defender services and insuring the legal representation is professional are not popular causes, it is "in the public interest that the administration of criminal justice proceed fairly, impartially, expeditiously and efficiently." *Bradshaw, supra*, at 298. We must provide competent representation to fellow citizens who have their life or liberty at risk.

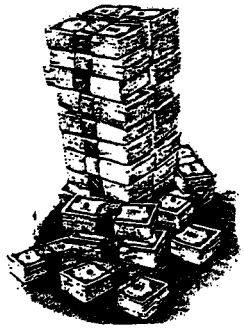
1992 FUNDING PRIORITIES

18.2 MILLION IS THE UK SPORTS BUDGET

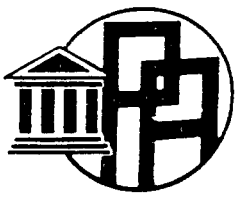
$13.5 MILLION IS THE U OF L SPORTS BUDGET



$11 MILLION BUILDS 4 MILES OF 2 LANE ROAD



$10 MILLION IS NEEDED TO BUILD AND SERVICE 100 PRISON CELLS



$10.2 MILLION IS THE DPA BUDGET

DEVELOPMENT OF DPA'S PROPOSED REVISION OF KRS CHAPTER 31

At the instigation of the Public Advocacy Commission, a committee was formed to develop changes to KRS chapter 31, the public advocacy statutes.

THE COMMITTEE

The committee consisted of:

Robert Carran
Administrator, Kenton County Public Defender System; Member
Public Advocacy Commission

Joe Barbieri
Director, Fayette County Legal Aid

Dan Goyette
Jefferson District Public Defender
Past President, Louisville Bar Association

J. Vincent Aprile, II
DPA General Counsel
Member, NLADA Board of Directors

Edward C. Monahan
Assistant Public Advocate
Chair, Chapter 31 Core Committee

The committee's membership reflects broad representation of the significant interests of Kentucky's defender system, including: (1) the 3 major urban areas; (2) the two major non-DPA full-time offices, which handle the largest volume of cases in the system; (3) DPA full-time offices, which serve 40 of Kentucky's counties; (4) contract counties; and (5) the Commission, itself. Additionally, the Committee includes DPA's General Counsel, who has litigated Chapter 31 and its provisions more frequently than anyone. Persons on this Committee represent systems which currently handle 82% of public defender cases.

THE COMMITTEE'S PROCESS

During the course of its work, the Chapter 31 Core Committee repeatedly solicited suggestions and reactions from interested persons and those affected by the statute in both its present and proposed form. We asked the directors of the Capital Trial Unit, the Post-Conviction Branch, the Appellate Branch, the Capital Resource Center, and those dealing with involuntary commitment issues to "consult with persons in your area and consult with anyone nationally to get the best advice" and provide the committee with ideas and proposals for needed or desired changes in Chapter 31. Suggestions from the Public Advocate and Public Advocacy Commission were also solicited and received.

The Core Committee received literally hundreds of suggestions and proceeded to review and consider every proposal which was submitted. The Committee circulated 9 drafts of proposed statutory changes for reaction and criticism, often reconsidering and revising positions. Debate on the Committee and through the submitted suggestions was open and ongoing.

The Committee scrutinized the public defender statutes in 18 other states and the federal statutes. It reviewed the recently revised ABA Standards for Criminal Justice, (3rd Ed., 1991), Chapter 4, *The Defense Function*, and Chapter 5, *Providing Defense Services*, the April 1990 Federal Court Study recommendations, *LRC v. Brown*, 664 S.W.2d 907 (Ky. 1984), Kentucky's Model Rules of Professional Conduct, and Kentucky's Proposed Rules of Evidence.

The Committee met 9 times for 45 hours, in addition to the hours of research, drafting, revision in preparation for our meetings and travel to and from meetings. The discussions were lively and focused on presenting the best and most practical recommendations.

COMMISSION'S COMMITMENT

On October 4, 1991 the Public Advocacy Commission approved submission of the Chapter 31 proposal to the 1992 General Assembly. The Commission is dedicated to providing the best possible public advocacy system.

ON TO QUALITY REPRESENTATION

The proposal is a product of the considerable cooperative effort invested in this process by the members of the Committee and those interests they represent. There is a firm agreement among all concerned that the recommendations are critically important to the effectiveness of the statewide public defender system. The document developed can serve as a blueprint for quality legal representation for Kentucky's poor-accused into the 21st century.

For a copy of the proposal, contact Ed Monahan. Specify whether you'd prefer: 1) the bill form of the statute with commentary (78 pages); or 2) the version which sets out the proposal as it would look if enacted and without commentary (20 pages).

POLITICAL AND PROFESSIONAL INDEPENDENCE

The national legal community views political and professional independence as fundamental to a quality public defender system.

The United States Supreme Court has determined, "[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 451, 70 L.Ed.2d 509 (1981).

Professional independence is a recognized ethical requisite for a lawyer. *See, e.g.*, Kentucky Rules of Professional Conduct (1990) Rule 2.1, 5.4.

Political and professional independence of the statewide public defender system is the most important change proposed by the Chapter 31 Core Committee, and is one of the 5 goals and objectives developed by DPA in 1988 and 1991.

The Chapter 31 Core Committee's proposed method of accomplishing political and professional independence includes: 1) changes in the way the Public Advocacy Commission members come to the Commission; 2) making the public advocate appointed by the Commission, not the Governor; 3) making the Public Advocate a "for good cause" employee instead of a non-merit employee; and 4) selection of the Public Advocate on merit. The Governor would continue to appoint Commission members based on recommendations to him.

DPA'S GOALS

One of the five 1988 goals and objectives of the Defense Services Division of DPA was political independence of DPA.

One of the four 1991 goals and objectives of the Defense Services Division of DPA was political independence of DPA.

THE ABA

The ABA Criminal Justice Standards, *Providing Defense Services* (1990) sets out that the public defender organization should have professional independence which is free from political influence, [Standard 5-1.3(a)]; accomplished by putting governing in a board of trustees which does not include judges or prosecutors, [Standard 5-1.3(b)]; by selecting the public defender on the basis of merit who can be removed only for good cause [Standard 5-4.1].

The ABA Standards for Criminal Justice, *Providing Defense Services* (1990), state: "Selection of the chief defender and staff should be made on the basis of merit.... The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited." Standard 5-4.1.

The American Bar Association recognizes that professional independence is necessary for a public defender program to be able to meet its public and ethical duties within the adversary criminal justice system:

> *a) ...The plan and the lawyers serving under it should be free from political influence...*
>
> b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and the manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program...
>
> Standard 5-1.3.

LRC'S VIEWS

The Legislative Research Commission's Program Review and Investigations Committee did a program evaluation of Kentucky's Parole System in November, 1991. It observed that the "perception of politics affects confidence in the nomination process," and it related the following information:

> The 15 members on the Commission on Corrections and Community Services are all appointed by the Governor. Four of these members are *ex-officio* and serve by virtue of their appointment by the Governor to various positions within the Corrections Cabinet or the Parole Board. Commissioners serve during the term of the Governor that appoints them. The most frequent concern expressed about the nominating Commission by former Parole Board members and applicants for positions on the Board was whether or not the Commission can act independently of a governor. The current commissioners interviewed for this study were unaware of any communication between the Governor's office and the Commission during the screening process. The Chairman of the Commission (also the Secretary of Corrections), stated that the only communications with the Governor's Office during the screening process is to get names of possible candidates for the Parole Board. This occurs because applicants often submit resumes to the Governor's Office. However, former Parole Board members and applicants for the Board felt that governors have influenced the process by making their preferences known to Commissioners.
>
> Campaign contributions made by members of the Parole Board may also create the perception that political activity is necessary to get appointed to the Board. At least four of the current Parole Board members or their spouses made campaign contributions to either the 1991 Wilkinson campaign for governor or the political action committee, Kentuckians for a Better Future. One Parole Board member made a contribution a little over two months prior to the expiration of this term. Another member made a contribution approxi-

mately two weeks after his term expired. Both members were later reappointed. One new member made a contribution approximately five weeks after his appointment to the Board. One former Parole Board member, whose term expired June, 1990, and his spouse contributed to the 1991 Jones primary campaign in Fall, 1990. This Board member was replaced in March, 1991.

Some applicants who were not accepted for Parole Board positions also contributed to various candidates. Since resumes are not retained by the Commission on Corrections and Community Services, telephone numbers or street addresses of applicants were not obtainable. However, it appears that three applicants contributed to the Jones and Hopkins campaigns and possibly two others contributed to the Forgy and Baesler campaigns. None of these applicants were appointed.
Id. at 112-113.

The ACA and other national bodies say that parole boards should operate independently of political pressure or other outside influence, and that boards should be appointed in a manner that protects continuity of policy and experience.
Id. at 116.

The Report relates options for eliminating this perception which include creating an independent nominating commission with political autonomy.

LEXINGTON-*HERALD*'S VIEWS

The Lexington *Herald* has expressed editorial views on the necessity of selection of selecting leaders of important efforts on the basis of qualifications, not politics:

KEEP YOUR EYE ON MOREHEAD

University's presidential search is a model - so far, at least

With so much noise coming out of Frankfort lately, a piece of good news has passed un-remarked. Morehead State University is on its way to picking a new president based on qualifications, not politics.

During the last six months, a search committee has been sorting out nominations and applications. The results of the search seem to sweep aside any skepticism about the process. In fact, Morehead's search seems to be a model for other state universities. Five finalists have been selected, and all are qualified. There is not a political ringer in the lot.

So give the school's regents and their search committee high marks to this point. But also keep your eyes on events when the full board meets in January to review the list of final-

MICHIGAN MASTER BLASTS DETROIT TRIAL COURT

A master appointed by the Michigan Supreme Court to examine the operations of the trial court in Detroit has concluded that the Detroit system "is a disincentive to due process."

The master was appointed at the request of plaintiffs who are suing the local court over the fees paid to appointed counsel and the quality of representation being provided to indigent criminal defendants, *Recorder's Court Bar Association, Criminal Defense Attorneys of Michigan, et al. v. Wane County Circuit Court and Recorder's Court and Wayne County*, SC 86099.

Attorneys in the trial court are paid a flat fee based on the maxium sentence for the offense, regardless of the amount of time the attorney spends working on the case, and regardless of whether the case is pled or tried.

In his March 18 report, master Tyrone Gillespie said that system has created a conflict of interest between appointed counsel and the poor clients they are assigned to represent, because it provides a financial incentive for attorneys to encourage their clients to plead guilty and a fincial disincentive for attorneys to file motions and try cases. Attorneys who 'specialize' in guilty pleas, including many who operated 'out of pocket' without offices, secretaries, *etc.*, can make as much as$200/hour for 3 or 4 hours of work, while an attorney who spends many hours preparing and trying a case can make as little as $15/hour. (Attorneys appointed to appear in the U.S. District Court for the Eastern District of Michigan receive $75/hour for the hours they work on each case).

The master also found that the system discourages appropriate plea bargaining by the prosecutor because he/she knows the defense attorney has no financial incentive to go to trial and therefore will, in some instances, accept a plea to a higher charge or a longer sentence.

In his recommendation, the master suggested that the fixed fee schedule based on maximum possible sentence be found unreasonable, and offered several alternatives for changing the system of compensation. He also suggested $60-70/hour as a reasonable hourly rate. He recommended that any study of the assigned counsel system encompass the entire state, and not just Wayne County, because the quality of appointed representation throughout the state varies widely. Finally, he recommended that the state pay for the defense of appeals stemming from felony convictions.

The Supreme Court is expected to decide the case within the next few months.

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ists.

If the board votes to continue with the process, narrowing the field further to two or three finalists, then things are going well. But if the board balks at the finalists and tries to bring some political hack to the forefront, you'll know that Morehead is headed back to the days when it was more a political plaything than a college. And that is something that neither the university nor the state can afford.(Editorial, Lexington *Herald*, Sunday, December 22, 1991)

GOVERNOR'S VIEWS

This furthers the stated desire of Governor Jones and this administration to select Kentucky leaders on the basis of qualifications, not politics.

On February 15, 1991 Governor Jones discussed a plan he had promoted for some time to create a council that would screen candidates for openings on University Boards. He proposed that 3 names be nominated to the Governor to choose from. His public policy rationale was clear, "We must eliminate the influence partisan politics on that process, shifting our focus away from rewarding campaign contributors and toward finding the best person for the job." (*Courier-Journal*, February 15, 1991, p. B4)

The December 31, 1991 *Lexington Herald-Leader* reported on Ernesto Scorsone's bill to take politics out of University governing boards. Scorsone's bill would have the governor select names from the 3 persons nominated by a committee appointed by the governor. However, Governor Jones wants to take that a step further. Governor Jones wants the Legislature to name the nominating committee members. "Brereton wants to take the bull by the horns," said Bill Griffin, Jones' spokesman. "He wants to be even more direct in getting politics out of that process."

COMPETENT, NOT POLITICAL, LEADERSHIP

Independence of the Public Advocate and staff is fundamental to both the fact and appearance of zealous representation of the accused. It is not acceptable for the public advocate to be chosen by judges on the basis of politics, because these methods fail to guarantee that the defender program will remain free of judicial and political "supervision." Even when judges, politicians, and defenders have the best motives, the appearance of justice is tarnished when the public advocate is selected by judges or on the basis of politics.

A Public Advocate, like a university president, must not be selected on the basis of politics, but rather on the basis of merit and competence through open, impartial, competitive selection procedures that seek application from all qualified persons. Merit and competence include the knowledge, skill, and dedication necessary to administer statewide public defense efforts.

Selection on the basis of merit for the leader of the statewide public defender system must be made on the basis of demonstrated fitness without regard to political considerations. Likewise, removal of the Public Advocate must only be possible for good cause. Removal cannot be permitted for arbitrary reasons; to do so would make unlikely the necessary proactive, zealous leadership.

PUBLIC CONFIDENCE

The public will have confidence in the government if there is political and professional independence of the Department of Public Advocacy insured by a Commission insulating its work from inappropriate influence.

CRIMINAL JUSTICE CONFIDENCE

Persons in the criminal justice system need to be confident in the belief that the public advocate and the program of representation he administers is independent and not an extension of the prosecution, state police, corrections, or the governor. Such risks are dispelled by the involvement of the independent commission in appointment, selection and retention of the Public Advocate.

CONCLUSION

The KRS Chapter 31 proposal incorporates these recommendations and values in their entirety.

1992 NLADA Training Calendar

NLADA is pleased to announce its 1992 schedule of training events. Announcements including program agendas, registration fees and forms, and travel information will be mailed to programs as they become available.

Event	Date	Place
Life in the Balance IV: Defending Death Penalty Cases	March 6-8	Nashville, TN
Appellant Defender Conference	April 9-11	Nashville, TN
Defender Management Conference	May 13-16	Albuquerque, NM

The Kentucky Department of Public Advocacy's

20th Annual Public Defender Conference.

The Third Century of American Liberty

May 31-June 2, 1992

Lake Cumberland State Park

The largest yearly gathering of Public Defense Attorneys

For more information contact

Ed Monahan
Director of Training
Department of Public Advocacy
1264 Louisville Road
Frankfort, KY 40601
(502) 564-8006
(800) 582-1671
FAX# (502) 564-7890

ATTORNEY FEES & CASE MAXIMUMS

Two decades of inflation have rendered the rates and caps in KRS Chapter 31 unrealistically low. They are completely out of step with current economic realities. The proposed revision of the attorney fees and case maximum statute is as follows:

31.070 ATTORNEY FEES AND EXPENSES; APPOINTED COUNSEL

Reasonable and necessary fees and expenses of counsel appointed by the department shall be paid in accordance with the following procedures and subject to the following limitations:

(1) Amount of Compensation.

(a) The rate for compensation of an attorney shall be fifty dollars ($50) an hour for out-of-court time and seventy dollars ($70) an hour for in-court time;

(b) The maximum attorney fee for non-death penalty cases shall be:

(i) misdemeanor, involuntary commitment, juvenile - $1,500;

(ii) Class A, B, C, or D felony - $3,000;

(iii) appeal to circuit court - $1,500;

(iv) appeal to Court of Appeals or Supreme Court - $3,000;

(v) other non-death penalty cases - $3,000.

(c) The maximum attorney fee for cases in which death is a possible punishment or a sentence of death has been imposed shall be:

(i) trial - $20,000;

(ii) appeal - $10,000;

(iii) post-conviction proceedings - $20,000.

(2)Procedures for Compensation.

(a) Each fee plus expenses incurred in the defense shall be presented by affidavit by the defense attorney to the court which shall review the fee and expenses request and shall approve, deny, or modify the amount of compensation and fee listed therein. After final approval of the fee and expenses the court shall certify the amount and transmit the document to the Public Advocate, who shall review the fee and expense request and shall approve, deny, or modify the request. No representative of the Commonwealth, other than the Department of Public Advocacy, shall have standing to contest the fee or expenses in question. The request as approved or modified shall then be paid.

(b) In determining the amount of the fee, the court shall consider the time and effort required, the responsibility assumed by counsel, the novelty and difficulty of the legal and factual questions involved, the skill requisite to proper representation, the extent to which other employment was precluded, the fee customarily charged in the locality for similar services, the gravity of the charge, and the experience and ability of defense counsel.

(c) The court can exceed these maximum amounts when necessary to compensate quality legal representation.

(3) At the request of counsel appointed by the department, the court can authorize interim payments of the fee and/or expenses incurred.

STATUTORY HOURLY RATES AND FEE CAPS

In 1972, Chapter 31 had the following hourly rates and the following case maximums:

1) $20 per hour for in-court work;

2) $30 per hour for out-of-court work;

3) $500 maximum for any case other than a felony;

4) $1000 maximum for a felony.

In 1978, the 2 hourly rates were increased to $25 and $35. The felony maximum increased to $1250.

There have been no increases in the hourly rates or the case maximums since 1978.

ACCOUNTING FOR INFLATION

The state Office of Financial Management and Economic Analysis of the Finance and Administration Cabinet calculated the inflation increases between 1972 and 1990 to be 213%, and it calculated the values of the 1972 statutory rates in 1990 dollars due to this inflation:

1972	1990
$ 20	$ 62.50
$ 30	$ 93.90
$ 500	$1,565.00
$1000	$3,130.00

The rates as proposed in KRS 31.070 are responsible proposals and very reasonable, as they are all less than the 1990 inflation maximum rates. In effect, the new rates and maximums are nothing more than the current value of the 1972 rates, taking into account inflation, or, to be more accurate, slightly less than today's value of the 1972 rates.

CAPITAL CASE COSTS

How much new funding would the increases for capital case maximums require? The best DPA estimate is that $280,000 in new money would be needed each year. That estimate is based on a projection of about four (4) trials, two (2) petitions for post-conviction relief and two (2) appeals each year with two (2) attorneys per case.

ATTORNEYS APPOINTED BY DPA

This amended statutory language permits payments from DPA funds only to attorneys "appointed by the department." Under this statute, if an attorney is representing a client *pro bono* or if an attorney is representing a client for a fee and the client is no longer able to pay the fee, and the attorney desires to continue to represent the client as an attorney under KRS Chapter 31 (in order to receive appointed attorney fees), that determination is made by DPA, not the court and not the attorney.

While the court does not have the authority to appoint counsel and thereby obligate DPA funds, the court does have the authority to refer the matter to DPA and request that DPA appoint the attorney.

This procedure is necessary to insure the independence of the DPA program and its financial stability. If attorneys or the courts could represent indigents at will or courts could appoint attorneys to represent indigents, the fixed budget of DPA for counsel fees would be at risk. In fact, the judiciary, itself, recognizes that if it were in the business of setting fees for appointed counsel who were not a part of an organized, controlled public defender program, this would create "budgetary problems." *Jones v. Commonwealth*, 457 S.W.2d 627, 632 (Ky. 1970).

PERIODIC PAYMENTS

In fairness to attorneys appointed by DPA and to insure competent representation of the client, there will be times when an attorney deserves an interim payment for fee or expenses. The statute provides for that with court approval. The American Bar Association Guidelines for the Appointment and Performance of Counsel in death penalty cases Guideline 10.1(c) Compensation states "Periodic billing and payment during the course of counsel's representation should be provided for the representation plan" (1989).

The Commentary to that ABA Guideline explains:

> Periodic billing and payment — for example, monthly — should be available to avoid hardship to sole practitioners, small firms and any other appointed counsel. As the commentary to Guideline 1.1 and the Guidelines in section 11 make clear, extensive preparation and long hours characterize capital representation. Office overhead, the need for reimbursement for expenses incurred, and for compensation for time already worked do not stop during a capital case. Financial hardship imposed by a long delay before payment for time worked and expenses incurred may impact adversely upon counsel's ability to provide quality representation.

FEE FACTORS

In subsection (2)(b) the statute details factors to be considered by a court in reviewing and approving the requested fee of an attorney appointed by the Department. These factors are nearly identical to those listed in the ABA Standards for Criminal Justice, *The Defense Function*, Standard 4-3.3 Fees (1991) as appropriate for setting an attorney fee.

FEE STANDARD

In subsection 2(c), the proposed statute sets the standard for counsel compensation: *an amount which is necessary to insure quality legal representation.* This is the compensation standard recommended by the ABA Standards for Criminal Justice, *Providing Defense Services*, Standard 5-2.4 Compensation and expenses (1990).

Integrity

One must be true to the things by which one lives. The safe course is to avoid situations which are disagreeable and dangerous. Such a course might get one by the issue of the moment, but it has bitter and evil consequences.

In the long days and years which stretch beyond that moment of decision, one must live with one's self; and the consequences of living with a decision which one knows has sprung from timidity and cowardice go to the roots of ones life.

It is not merely a question of peace of mind, although it is vital; it is a matter of integrity of character.

Dean Acheson, Secretary of State, 1950

Legislative Information

Senate Judiciary Committee
Kelsey Friend (D), Chair
Charles W. Berger (D), Vice Chair

David K Kerem (D)
Joseph U. Meyer (D)
Michael Moloney (D)

Walter A. Baker (R)
Tim Philpot (R)
David L. Williams(R)

House Judiciary Committee
Louis Johnson (D), Chair
Charles Geneden (D), Vice Chair
Thomas Robert Kerr (D), Vice Chair
Bob Heleringer (R), Vice Chair

Joe Borrows (D)
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Herbie Deskins, Jr. (D)
Richard H. Lewis (D)
Mike Ward (D)

Jon Acherson (R)
Jo Elizabeth Bryant(R)
Lindy Casebier (R)
Stephen Nunn(R)
Raymond Overstreet (R)

Lawson Walker II (R)

Toll-free telephone numbers are available for citizens interested in the work of the Regular Session of the 1992 General Assembly.

A message line—1-800-372-7181—may be used to leave a message for individual legislators.

A meeting information line—1-800-633-9650—may be used to obtain information about meeting and agendas.

A meeting information line in Franklin County—564-5034—may be used to obtain information about meeting and agendas.

A bill status information line—1-800-382-2455—may be used to check the status of a particular bill.

FUNDS FOR RESOURCES

Funds for resources are constitutionally necessary for the effective representation of many indigent defendants, especially in the face of serious or complex charges.

The defense is entitled to defense experts to act as consultants; to help present evidence of a defense or mitigation of punishment; to contradict state evidence; and to assist in cross-examining state experts. When a transcript is required for the effective assistance of counsel, the defense is entitled to the funds to obtain it. Similarly, the defense is entitled to money to transport witnesses necessary for an evidentiary hearing, or a trial.

Currently, fiscal courts are responsible for funds for resources for indigents in criminal cases. Few fiscal courts honor this obligation.

The major proposed changes in KRS Chapter 31 are necessary to bring the statutes into conformity with constitutional developments, and to insure fair determinations as well as judicial economy.

The United States Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985), recognized the necessity for *ex parte* defense requests for funds. This procedure insures indigents are not required to provide discovery before a non-indigent defendant would have to provide such information.

The Kentucky Supreme Court has long recognized that indigent criminal defendants are entitled to funds for experts. See *Young v. Commonwealth*, 585 S.W.2d 378 (1979).

FUNDS FOR PROSECUTORS

Currently, Kentucky statutes permit prosecutors to obtain money to bring state witnesses to testify at a proceeding but do not provide like funding for defense witnesses. KRS 421-.015 and 421.230-.270. Money is readily provided prosecutors under this statute. Prosecutors also receive funds from the legislature for experts needed when they prosecute criminal defendants.

STATE FACILITIES

State facilities that are a part of the Kentucky State Police or are regularly utilized by prosecutors do not have the capability to provide defense assistance, planning or consultation, either because their resources are inadequate to provide this help or because such a role conflicts with their responsibilities.

PROCEEDINGS APPLICABLE TO

The statute is written so that funds for resources must be provided when the appropriate showing is made in any proceeding in which a defendant's life or liberty is at stake. Therefore, funds can be obtained when appropriate for pretrial proceedings, trial, appeal, post-conviction proceedings, and other proceedings where DPA has responsibility for representing indigents.

FISCAL COURTS

County fiscal courts should not be required to pay the funds for defense resources since the criminal justice system is now a state-funded system. The state should bear financial responsibility for this service, as it currently does for prosecution funds for experts, witnesses, and transcripts.

COSTS

What will this cost the state? In FY 89 the 120 fiscal courts spent $54,609 on funds for expert witnesses. In FY 90, the amount was $59,886.

MATERIALS AVAILABLE

DPA MOTION FILE INSTRUCTIONS MANUAL

The Department of Public Advocacy has collected many motions and instructions filed in actual criminal cases in Kentucky, and has compiled an index of categories of the various motions and instructions. Instructions are categorized by offense and statute number. Many motions include memorandum of law.

CAPITAL CASES

The motion file contains many motions which are applicabe to capital cases, and that includes many motions filed in capital cases on non-capital issues.

In addition to containing tendered capital instructions, the DPA Instructions Manual contains instructions actually given in many Kentucky capital cases for both the guilt/innocence and penalty phases.

COPIES AVAILABLE

A copy of the index of available instructions and the categories and listing of motions is free to any public defender or criminal defense lawyer in Kentucky.

Copies of any of the actual instructions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Each DPA field office has an entire set of the instructions.

Criminal defense advocates can obtain copies of any of the motions for the cost of copying and postage.

HOW TO OBTAIN COPIES

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

BARBARA SUTHERLAND
DPA Librarian
1264 Louisville Road
Frankfort, KY 40601
(502) 564-8006, ext.119

CLINICAL NEUROPSYCHOLOGY

Clinical neuropsychology is a subspecialty within psychology which is concerned with the relationship between brain states and behavior, cognitive abilities or emotional life. These three categories of function will be referred to hereafter as psychological function. It is a discipline that lies at an interface involving the medical specialties of psychiatry and neurology on the one hand, and clinical psychology on the other. From the forensic point of view, clinical neuropsychology has been found to be relevant in both civil and criminal contexts. In the paragraphs to follow, the assumptions and methods used by clinical neuropsychologists will be described as will their training. The potential usefulness of neuropsychological opinion in forensic contexts also will be explored.

Assumptions:

The fundamental assumption which underlies the practice of clinical neuropsychology is that there is a systematic relationship between changes in brain function and alterations in psychological function. It is further assumed that changes in particular parts of the brain are systematically related to particular types of alterations in psychological function. Finally, it is assumed that controlled methods of observation, "tests," will reveal these alterations in psychological function.

These assumptions grow out of a long history of research, clinical observation and treatment of persons with diseases of the brain. They are termed, "assumptions," rather than "facts," because they represent a general way of looking at and thinking about brain and behavior, one with which most experts would agree. These same experts, however, often disagree concerning more specific formulations about, for example, particular brain structures and particular categories of behavior. Furthermore, these assumptions are hierarchical in nature, and the universality of consensus among experts decreases as the assumptions grow more specific. That is, one would be hard pressed to find an expert (or layman, for that matter) who does not agree that changes in brain function lead to changes in behavior. Opinion about the utility of particular tests as indicators of such change, on the other hand, is more controversial.

Methods:

The intellectual methods of clinical neuropsychologists are similar in many respects to those physicians or clinical psychologists. The basic paradigm is one that begins with presentation of a problem or question about a patient, observation of the patient using a variety of tools, inferential reasoning to underlying causes for the patient's problem and recommendation for or execution of remedial intervention. What differentiates the various types of practitioners are thus not their intellectual methods. Rather, they are distinguished, first, by the types of patient questions they are generally asked to address, second, by the methods of observation they employ and third, by the nature of the interventions they are qualified to recommend and/or perform.

Questions:

For clinical neuropsychologists the question posed generally takes the form of, "Is the behavior and mental functioning of the patient different in significant ways from that of other comparable individuals, and, if so, do those differences reflect brain dysfunction?" In the medicolegal context, the specifics of the question posed to the neuropsychologist will vary depending on the nature of the case. For example, a fairly common civil matter is the determination of damages following head injury in a motor vehicle accident. Depending upon the condition of the patient, the question may be one of specifying the magnitude of disability or degree of occupational limitation in cases where the presence of some functional loss consequent to the injury is agreed to by both parties. In other cases, the plaintiff may claim functional loss of a subtle nature, the presence of which defense contests. In both these types of cases, the clinical neuropsychologist will be asked to perform an evaluation and render an opinion as to the patient's behavioral capacities. In the second, however, an additional inference to neurological status may be required.

In criminal matters, the question posed will usually concern competency to stand trial and/or diminished capacity as a defense. As in the civil circumstance, the neuropsychologist will be asked to describe the patient's functional status. Inference to underlying neurological mechanisms may or may not be pertinent, depending on the case.

Observation Methods:

The clinical neuropsychological evaluation consists of several elements including interview of the patient and others, review of psychological and other records, administration of tests and generation of a report which includes interpretation of all these data. The tests used by neuropsychologists fall into three general categories, conventional tests of intelligence and other abilities, tests of personality and neuropsychological tests. The first two categories will be familiar as they are widely used to asses human function for a variety of purposes such as school placement, job screening, career counselling and psychiatric evaluation. Of particular interest in the present context, however, are neuropsychological tests.

These are behavioral measures which are designed and validated for the specific purpose of identifying persons with brain dysfunction and describing the nature of their deficits. A long history of research has demonstrated that

some alterations in psychological function are more frequently seen in patients with brain dysfunction that are others. It is measures of these psychological functions that make up the neuropsychological tests.

There are a variety of approaches pursued by different clinical neuropsychologists which reflect differences in training and theoretical orientation. The general parameters of the evaluation, however, are widely agreed upon by experts. The evaluation must include a broad objective survey of functions including motor skills, perceptual abilities, cognitive abilities and emotional variables. The particular tests chosen will vary. Interpretation must take into account the social and cultural history and present circumstances of the patient. Use of normative comparisons, for example, must be pursued with appropriate consideration given to differences between the patient being tested and the norm group.

Interventions:

Clinical neuropsychologists may provide and/or recommend a variety of psychological, educational and/or rehabilitation interventions to treat the deficits identified in the evaluation. In the medicolegal context, this might involve projections of costs for long term treatment in civil matters, or recommendations for appropriate treatment and disposition for criminal defendants.

Training:

Clinical neuropsychologists are doctorally trained (PhD or PsyD), licensed providers of psychological services. Most frequently, they have completed an internship in clinical psychology at a site approved by the American Psychological Association and will have had additional post-doctoral training specifically in neuropsychology. Diplomate Status in Neuropsychology granted by the American Board of Professional Psychology is somewhat analogous to Board Certification in the medical specialties and is a widely acknowledged criterion of the highest standard of competency. Licensed clinical psychologists, lacking specific training in neuropsychology, would not generally be stipulated as experts in this field, however there is no generally agreed upon standard at this time.

Forensic Applications:

In the foregoing paragraphs, several references have been made to forensic applications of neuropsychology. Civil matters more often than criminal are the context of interface between neuropsychologists and the legal system. Such issues as competency to handle one's affairs in the face of dementing illness, disability determination for purposes of workmen's compensation and determination of damages in personal injury are the major areas of activity.

As regards the criminal justice system, neuropsychologists may be called upon to render an opinion as to the mental status of a defendant with regard to his competency to stand trial. Cognitive deficits identified in the neuropsychological examination may render the defendant incapable of understanding the proceedings or of cooperating in his defense. Competency evaluation will involve primarily an assessment of cognitive ability and emotional state. In most cases, such an evaluation could be performed either by a licensed clinical psychologist or a neuropsychologist. Preference for the latter might occur in cases where the defendant is thought to have a history of neurologic disease, since the neuropsychologist will generally have greater experience in the evaluation of such patients.

A defense based upon diminished capacity is the second circumstance in which neuropsychological evaluation might be appropriate in a criminal matter. As in questions of competency, based upon deficits demonstrated in the neuropsychological examination, the defense might contend that the defendant, at the time of commission, was unable to appreciate the wrongfulness of the act or was unable to conform to the requirements of the law. Here, the nature of the alleged incapacity will determine whether evaluation by a clinical psychologist or a neuropsychologist would be more pertinent. As with the competency question, if there is thought to be a neurological basis for the incapacity, neuropsychological evaluation is to be preferred. If, on the other hand, psychiatric illness is being alleged, clinical psychological evaluation would be more appropriate.

In dealing with questions of competency or capacity, some neuropsychologists will prefer that an initial evaluation by a physician, usually a psychiatrist, be performed before the neuropsychologist is consulted. If the question of the presence of a medical illness has not been resolved, medical evaluation is essential. In cases where the client's medical status is already well established, physician consultation may be unnecessary. In evaluation, the formulation of the competency or capacity issue is handled with the physician as the organizer of the data. The situation is seen as analogous to a conventional medical evaluation in which the psychologist or other professional plays a consulting role. They thus provide data upon which they may be asked to amplify in deposition or at trial as needed, while the physician acts as the final common pathway.

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WHAT EVERY STATE DEFENSE ATTORNEY MUST KNOW ABOUT THE FEDERAL GUIDELINES

Can It Really Get Any Worse?

I. INTRODUCTION

The Federal Sentencing Guidelines are important to the state criminal practitioner. It would be malpractice for a defender to work out a plea to a drug offense without advising his or her client that a second offense imposes a greater mandatory sentence. That same concept applies to the advice that should be given to a state defendant before a plea so that an informed decision can be made as to *all* of the consequences and ramifications of that plea. A slight change of a state sentence from sixty (60) to fifty-nine (59) days may save your client much more than that one (1) day if a federal charge is ever filed in the future. Many clients do not know that they are on a non-reporting probation for a traffic offense at the time a federal offense is committed. That probation then costs dearly on the new federal sentence.

Gone are the days of what we in Ohio affectionately referred to as a Kentucky Demurrer *i.e.* - get out of town and pay the costs with one year's non-reporting probation. As you read on, you'll see several reasons why this type of sentence can come back to haunt your client.

II. THE PURPOSES OF THE GUIDELINES: JUSTICE, HONESTY, UNIFORMITY

> The United States Sentencing Commission states that in drafting the guidelines its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentence for offenders convicted of federal crimes. U.S. Sentencing Commission Guidelines Manual at 1.1. The bottom line is that a series of calculations are made by a probation officer and given to the sentencing judge setting out a range of approved sentences for each crime of conviction or for the relevant conduct of the offender. The judge merely selects where, within the range, the sentence should be.

The Commission further states that the Guidelines are to establish honesty in sentencing by eliminating the uncertainty of the parole system, so that an offender serves the sentence that he receives. Guidelines Manual at 1.2. Secondly, Congress wanted uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. *Id.* The criminal record of a defendant is what the Court must use to determine similar offenses. This article will concentrate on Chapter Four of the Guidelines Criminal History and Criminal Livelihood. It is that chapter which has consequences for the client based on his or her past record.

III. HOW THE GUIDELINES ARE CALCULATED

To begin calculating a federal sentence, one must look at the United States Code section for the offense of conviction and then find the corresponding guideline section in the Guidelines Sentencing Index (Appendix A). The relevant guidelines will provide the Base Offense Level from which an adjusted offense level is calculated. Then, certain crime characteristics (*i.e.* amount of drugs and/or money, or risk of harm to the victim from the crime) are added to that base. That base level is then further adjusted either up or down depending on a list of adjustments such as victim adjustments, role in the offense and obstruction. The final number is the Offense Level.

If multiple offenses are committed there is a multiple count calculation that gives you the total offense level. A grid is provided which lists the offense level vertically and corresponds to a range of sentences in months. Horizontally, the criminal history is calculated in points and six (6) columns are provided for the final calculation.(see sentencing table page 17)

IV. CALCULATING CRIMINAL HISTORY

A defendant's criminal history is based on the length of sentence received on his past record, and/or whether the defendant is currently on probation. The calculation is as follows:

A. Criminal History Category

The total points from items (a) through (e) listed below determine the criminal history category in the Sentencing Table in Chapter Five, Part A of the Guidelines.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not included in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less then two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item(d), add only 1 point for this item. Guidelines 4A1.1.

Look at the record sheet of a typical client, calculate his points and just gaze across the

offense level chart to see in months what that record does to his federal sentence.

As an example, assume that your client is convicted in federal court of possession of a kilogram of cocaine. After checking the Guidelines' Drug Quantity Table, which assigns Base Offense Levels to specific drug quantities, you find that the base offense level is 26. Your client's criminal record is not bad. While he has no prior drug offenses, he does have two convictions for driving under the influence. On the first offense, three years ago, he was sentenced to a three-day drug intervention program.

For the second offense, six months ago, he received a typical sentence of one hundred eighty (180) days in the county jail, with one hundred seventy (170) days suspended, court costs, and one year's probation.

In checking the criminal history score we assign two (2) points for the prior offenses (4A1.1(c).) However, since the current drug offense was committed while on probation, your client receives two (2) additional points (4A1.1(d).) His total point score is now four (4). This places him in Criminal History Category III.

The guideline sentence range is seventy-eight (78) to ninety-seven (97) months. If your client were not on probation but had the *same* record, his sentence would have been seventy (70) to eighty-seven (87) months.

Another example would be a client who was convicted in state court for burglary in 1987. He received a five-year sentence. Because of his good behavior and obvious rehabilitation, he served three (3) years and was on two (2) years parole. He is now convicted of altering motor vehicle identification numbers on a 1990 Cadillac. The Base Offense Level is 8, but because the auto had a value of more than $10,000, but less than $20,000, we add 3 additional points for a total Offense Level of 11.

If your client had no record he would be looking at a range of 8 to 14 months. Unfortunately, this is not the case. We must now determine the criminal history level.

First, add 3 points for a prior sentence of more than one (1) year and one (1) month; 2 points

SENTENCING TABLE [in months of imprisonment]
Criminal History Category (Criminal History Points)

Offense Level	I (0-1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	1-7	2-8	4-10	8-14	12-18	15-21
8	2-8	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

for being on parole; 1 point for the instant offense being committed less than two (2) years after the release from prison.

Our total Criminal History Level is 6, all for the single burglary. With our Offense Level of 11, our client must be sentenced to a range from 12 months to 18 months.

B. Sentences Counted And Excluded

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

1. Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

a. Careless or reckless driving
b. Contempt of court
c. Disorderly conduct or disturbing the peace
d. Driving without a license or with a revoked or suspended license
e. False information to a police officer
f. Fish and game violations
g. Gambling
h. Hindering or failure to obey a police officer
i. Insufficient funds check
j. Leaving the scene of an accident
k. Local ordinance violations (excluding local ordinance violations that are also criminal offenses under state law)
l. Non-support
m. Prostitution
n. Resisting arrest
o. Trespassing.

2. Certain prior sentences are excluded by the Guidelines for purposes of calculating criminal history; but most non-petty offenses are not. Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

a. Hitchhiking
b. Juvenile status offenses and truancy
c. Loitering
d. Minor traffic infractions (*e.g.*, speeding)
e. Public intoxication
f. Vagrancy.
Guidelines 4A1.2(c)-(d).

State judges love to place people on probation, even if it is non-reporting. It makes them look good. It will make you look good and make your client feel good if you get the shortest period of probation possible. As in the example described above, probation will cost your client a longer term of federal sentence if he is on probation at the time of his new federal criminal conduct, or if the prior offense is petty but probation is one year or more.

As if all of this were not bad enough, the federal sentence gets worse if your client is classified as either a Federal Career Offender, Criminal Livelihood Offender, or an Armed Career Criminal. A Career Offender is at least eighteen (18) years old at the time of the commission of a felony drug or controlled substance offense and has at least two (2) prior convictions of felony drug or violent offenses. If those requisites are met, then the criminal history category in every case is category VI. Guidelines 4B1.1. If a defendant committed an offense as part of a pattern of criminal conduct engaged in as a criminal livelihood, the Guidelines impose a minimum offense level of 13, unless the defendant is entitled to a two-point reduction in offense level for Acceptance of Responsibility. Guidelines 4B1.3. Armed Career Criminal is a special category of enhanced sentence for firearms where the offender has at least three (3) prior convictions of violence or serious drug offenses. Guidelines 4B1.4.

Revocation Table
(in months of Imprisonment)

Criminal History Category*

Grade of Violation	I	II	III	IV	V	VI
Grade C	3-9	4-10	5-11	6-12	7-13	8-14
Grade B	4-10	6-12	8-14	12-18	18-24	21-27
Grade A	12-18[1]	15-21	18-24	24-30	30-37	33-41
	24-30[2]	27-33	30-37	37-46	46-57	51-63

* The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.

[1]Except as provided in subdivion (2) below.

[2]Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony.

V. SUPERVISED RELEASE

Another provision of the sentencing guidelines that the state criminal practitioner must be aware of is supervised release. Whenever a federal offender is sentenced to imprisonment of more than one year, the court *shall* order a term of supervised release to follow imprisonment. Guidelines 5D1.1.

The term of supervised release shall be at least one year for a Class E felony or Class A misdemeanor and up to five years for a Class A or B felony. Guidelines 5D1.2. A provision of Supervised Release is that the court shall impose a condition that the defendant not commit another federal, state or local crime, 18 USC 3583(d), and not possess illegal controlled substances, 18 USC 3563(a)(3).

The Guidelines establish a classification of violations by Grades A through C and then provides for a term of imprisonment for the revocation of supervised release. Guidelines 7B1.4. (see revocation table)

VI. WHEN IN DOUBT, ASK

When the state practitioner has reason to believe that his or her client may face future federal charges or is currently on some type of federal supervision, it makes good sense to check into any federal ramifications. The best place to seek that advice is your nearest federal defender's office. I have always found federal

defenders ready and able to give of their time and talents. If no federal defender is available, a federal probation officer is a second choice. The only dumb questions is the one you don't ask.

VII. CONCLUSION

Every client I have ever had has always told me the same thing: I've learned my lesson. I will never be in trouble again. Unfortunately, this is not always true. By keeping the Federal Sentencing Guidelines in mind when molding a state sentence, the defense attorney may not stop recidivism, but he can temper its consequences.

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LETTER TO THE EDITOR

September 24, 1991

RE: N.F. No. 102814

Suicide or Death Penalty?

Dear Editor:

I just lost a client, to suicide in prison: a man I first interviewed December 3, 1990, and classified as a "case" to determine whether it met our priorities. As a DPA attorney for Post-Conviction Relief, I am horrified by my inability to have acted in the interest of this human being, instead of classifying his "issues" — until I closed the case after he had been transferred to a more secure "facility" for an institutional offense. I did not even learn of his hanging himself in his cell until today, although it occurred two weeks ago. It must not have been relevant to his "issues" or his "case".

In 1971, I lost a fifteen year old boy fives hours after he arrived at an unauthorized holding facility for children. He hanged himself, also. Then, as now, I question a system we are sworn to improve, and my lack of capacity to prevent tragedy at its hands.

I responded to the "Paducah" death penalty survey, and emphasize now, that any sentence with deprivation of parole (almost the only "priorities" I have time for, except detainers with immediate serve-out or parole dates and transferees with immediate court dates pending), is potentially death. In absurdly long sentences, we have allowed ourselves to adopt an illogical distinction between "death penalties" and "penalties which result in death" — the slow, grinding death of the spirit and the mind, or the quicker answer of suicide. Obviously for No. 102814, his 15-year sentence enhanced by a first degree PFO is in the same category. Because the "issue" was not our "priority," we waited until too late. Some of our prison clients have had trials and some have had appeals, and Post-Conviction Relief is seen by much of the public as a "gift".

But the despair, the isolation and alienation, and now death, cry out for more than this. We need lawyers who are not moved from Post-Conviction to try misdemeanor cases. We need trained intake clerks, investigators and paraprofessionals sufficient in number and devotion to meet the needs of the 5,000 men and women who will be in prison in 1992. I have been trained in the technical aspects of handling caseloads, monitoring and computerized tracking. I have been "trained" to treat my clients as people, not cases.

However, none of this training has prepared me to work *without* the technical devices used for substantive reasons. None educated me to accept an answer that we "make do" with one lawyer for 1,000 men, one paralegal for all non-litigation cases, or 25% of the time of an over-extended investigator for PFO challenges, lawyer ineffectiveness and fact research all over the Commonwealth.

I, as a *lawyer* working in the Post-Conviction Relief section of the DPA, lost this man and I have to find a way to avoid another death. But as a Department, we must *now* try to assemble resources to serve adequately the 5,000 prisoners whose lives we will touch next year. Training in the substantive law is not enough. Can we try some systems of case monitoring to avoid transfer problems? Can we improve our staffing and merit salary structure? Can we learn to manage large, transient caseloads more adequately? Can we seek outside funding for pro-active alternative parole projects?

It is no longer sufficient to say the Legislature or the Department of Corrections is to blame for Post-Conviction budgeting problems. We — all of us as Public Advocates — must be trained to demand adequate financial, legislative and political support for this important function.

Before another number dies.

Anthea M. Boarman
Attorney for Post-Conviction Relief

IMBALANCED BUDGET CUTBACKS: PROSECUTION CUT 1.84%; DPA CUT 5.05%

The December 9, 1991 Order of the Secretary of Finance and Administration Cabinet directing reduction of appropriations for state government agencies hit DPA hard, and put DPA at a further disadvantage with prosecutors.

The prosecution (Attorney General, Commonwealth Attorneys and County Attorneys) had their $30,886,600 state funding cut by 1.84% ($569,400). On the other hand DPA's $10,793,200 was cut 5.05% ($545,000). The funding now stands at $30,317,200 for the prosecution and $10,248,200 for DPA.

Not only is DPA substantially underfunded and not only is DPA's funding at a 3-1 disparity with the prosecution's but DPA has now been forced to take a percentage reduction that is nearly 3 times more than the prosecution. Kentucky's criminal justice system cannot fairly function with DPA suffering these series of disadvantages.

MANY AGENCIES TOOK NO CUT

It should not pass unnoticed that while the *essential* DPA services were being cut 5.05%, other state agencies took *no* cut. Agencies taking no reductions include:

1. Secretary of State
2. County Costs
3. Local Government Economic Fund
4. Miscellaneous Appropriations
5. Flood Advisory Commission
6. Local Jails Support
7. Department of Existing Business and Industry
8. Kentucky Development Finance Authority
9. Oral History Commission
10. Heritage Council
11. Department of Workplace Standards
12. National Resources General Administration and Support
13. Board of Tax Appeals
14. Revenue Cabinet
15. Transportation Cabinet General Administration and Support

AGENCIES TOOK LESS THAN 5.05% CUT

Other state agencies were cut at rates substantially less than DPA's 5.05%. These agencies and their percentage cut include:

1. Judicial Branch - 3.33%
2. Justice Cabinet - 4.98%
3. Public Protection & Regulation, Office of the Secretary - 3.3%
4. State Fair Board - .45%

GENERAL FUND REDUCED 3.33%; DPA REDUCED 5.05%

The entire state general fund budget reduction was 3.33%. The road fund budget reduction was 3.58%. Yet, DPA suffered a 5.05% cut.

CONSEQUENCES OF FURTHER FUNDING CUTS FOR DPA: NO LAWYERS FOR THE POOR

Further funding cuts this fiscal year will cause further cuts in direct legal services to indigent criminal defendants.

If DPA receives 15% ($1,537,230) less next fiscal year, many clients in many of Kentucky's 120 counties will not have an attorney and will not be able to be prosecuted. Jail populations will increase. Indicted and convicted persons will have to be released. Prosecutors will not have the ability to constitutionally convict and imprison indigent defendants.

January 24, 1992

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Edward Monahan
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Dear Ed:

I was disturbed to hear about the financial problems that are threatening The Advocate, since it's one of the most valuable publications we receive in the Defender Division.

Your work in examining relative funding and salaries for defender programs in Kentucky and other states has not only helped us, but many defender programs in states and counties around the country.

Similarly, your focus on the important substantive issues like sentencing, search and seizure, competency, mental retardation provides invaluable assistance to trial and appellate attorneys.

It's a shame that more states don't have publications like The Advocate, and it would be criminal if it were forced to cease publication.

I've enclosed a check from NLADA for $250.00 toward costs of publishing future issues.

Thanks again for the great work that you and the DPA staff do. Good luck.

Sincerely,

Mary Broderick
Director
Defender Division

JUDICIAL SENTENCING: ABANDONING CITIZEN WISDOM

Criminal Law Legislation in the 1992 General Assembly

Summary of House Bill 125

This Bill was prepared by the Task Force on Sentences and Sentencing Practices. The Task Force vote for this Bill was less than overwhelming.

It has been filed by Representative Bill Lear on January 7, 1992. Its major features include:

1.Establishes judicial sentencing in Kentucky in all criminal cases, including after jury trials.

2.Establishes a Sentencing Commission attached to the Justice Cabinet whose purpose is to write sentencing guidelines to shape sentencing decisions by judges.

3.Allows for victims and their families to testify regarding the impact of the crime on them in the trials of death penalty cases.

4.Apparently abolishes the role of the jury in deciding whether someone is guilty of being a persistent felony offender.

5.Abolishes court modification of jury sentences and the ability of a circuit judge to change a Class D verdict into a Class A misdemeanor.

6.Makes various changes in KRS Chapter 45, the statute governing budget and administration.

7.Makes small changes in KRS Chapter 321, the statute governing veterinarians.

1.Changing a Century of Practice: Judicial Sentencing

House Bill 125 makes a radical change in the manner in which citizens in Kentucky are sentenced following a jury verdict. Historically, Kentucky citizens have had their sentences *fixed* following a jury trial by the jury that decided their guilt. Judges thereafter could only lower the sentence in light of information provided by a presentence investigation report.

In 1986, the General Assembly complemented jury sentencing by passing the Truth in Sentencing Bill, which provided the jury in felony cases additional information upon which the jury could base its sentencing decision. Thereafter, the jury learned of this information in a second hearing, following the return of a guilty verdict, after which they fixed the defendant's penalty. Sentencing by the judge followed.

A century or more of history is changed by this Bill. The bill takes the jury out of the sentencing decision. The Bill makes irrelevant the jury's opinions regarding how much time in prison a particular factual scenario should merit, taking this decision out of the hands of common citizens who have heard the facts freshly, and puts the decision into the hands of an elected judge who may have heard cases for many years.

Utilizing the Wisdom of Citizens

Juries have not functioned improperly, or unwisely, over the years, nor have they been particularly "soft" on citizens who have committed crimes. Indeed, our prisons are already full, and more prisons are being called for.

What juries have done is brought the wisdom and experience of twelve common people to the sentencing decision. The jury system has worked well in Kentucky. We should abandon such an experience only upon a significant and pressing need, which is not apparent at this time.

Not only are juries' roles being reduced by this Bill, but the judges' role is being enhanced.

The Politics of Judge Sentencing

One significant problem with judicial sentencing in Kentucky that is not present in many states who have judicial sentencing, and in the federal system, is that we are one of few states whose judges are elected. By politicizing the selection of judges, we also enable opponents to campaign based upon political decisions by

The Wisdom of Citizens

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trused to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing around.

G.K. Chesterton
"The Twelve Men,"
Tremendous
Trifles 86 (1920)

the incumbent. One serious and negative effect of this Bill is that judges will sentence with one eye upon the next election; his or her opponents will be equally aware of an incumbent's sentencing decisions. Longer sentences will result.

Sentencing Inconsistency Unsolved

This Bill will not eliminate inconsistency in sentencing, its ostensible purpose. The great majority of sentencing is already being done by judges, that is pursuant to plea negotiation. There is little evidence that juries sentence any more inconsistently than do judges. Judges vary widely in their sentencing philosophy, and the sentencing guidelines do not promise to eliminate this source of inconsistency. Nor does the Bill eliminate other causes of inconsistency, such as prosecutorial discretion in charging and negotiation. Inconsistency in sentencing will not be solved by attacking only a small source of the inconsistency.

Discourages Jury Trials

Another serious effect of this Bill is that it discourages jury trials. Historically, a citizen accused of a crime could depend upon the good sense of citizens chosen among his or her peers to judge the case for what it was worth. Thus, often a citizen would place his or her fate in the hands of the community, as represented in the jury, rather than in the hands of an elected prosecutor and judge. This Bill however eliminates the *conscience of the community* from the sentencing decision, and discourages the use of jury trials. In a time when our rights are being constricted daily, we in Kentucky should not be discouraging the use of the jury in making decisions in criminal cases.

Eliminates Citizens and Elevates Victims

Another effect of this Bill is that it encourages judges to take into account the sentencing recommendation of the victims of a particular crime. What is ironic about this is that the Bill eliminates the conscience of the community, the opinion of the twelve jurors, while at the same time encouraging the recommendations of the victims, whose opinions will obviously support the harshest of sentences. At a time of prison overcrowding, writing a statute which will have longer prison terms as an obvious result is highly unwise. Certainly victims should not be shut out of the sentencing decision; however, they should not be heard at the same time the jury opinion of an appropriate sentence is being foreclosed.

Unconstitutional

Lastly, this Bill is clearly unconstitutional. Sentencing is procedural. Only the Kentucky Supreme Court is to make rules regarding procedures in our courts. Only recently, the Court amended Rule of Criminal Procedure 9.84, which retains jury sentencing. The General Assembly will be violating their role under the Kentucky Constitution by passing a bill that attempts to regulate the procedures used in sentencing in Kentucky. Further, the Bill violates Section 7 of the Kentucky Constitution, which reads that the "ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."

2. Sentencing Guidelines: Ignoring the Federal Experience.

The Federal Courts Study Commission in April of 1990 states that the federal sentencing guidelines were causing "serious problems." Federal judges have been particularly critical of the use of sentencing guidelines, some of whom have been heard to quit over their use. Practitioners have been vociferous in their opposition to guidelines. So what do we do in Kentucky? We propose writing sentencing guidelines.

Creating Substantial Costs

Sentencing guidelines would have a serious and negative impact on sentencing procedures in Kentucky. It is expected that our experience will track the federal experience, which has been quite negative. Guidelines will be overly rigid, and will not allow the flexibility needed for any fair sentencing procedure. Guidelines will also be costly, as can been seen by the creation of a new bureaucracy in this bill, the Sentencing Commission. While the procedures are not yet apparent, it is expected that sentencing hearings will become protracted and complex, as issues contained in the guidelines are litigated.

No Appeal of Sentence

One serious problem with the bill as written is the fact that an accused cannot appeal from a sentence under the guidelines. One of the few positive features of the federal system is that an appeal of the sentencing decision is possible. The Bill presently being proposed leaves us with the worst of all worlds, *sentencing by elected judges using guidelines with no right of appeal.*

The makeup of the Sentencing Commission is also problematic. Of the thirteen members, only two are associated with the defense of criminal cases. Four members are associated with law enforcement, four are to be circuit judges, and three are to be victims of crimes, or persons who have worked with victims. Sentencing policy should not be shaped by a group so stacked in favor of longer sentences. It is staggering that more victims of crime will be on the Sentencing Commission than defense lawyers. It is also highly unreasonable not to have a member of the Kentucky Association of Criminal Defense Lawyers named to the group. Parenthetically, no KACDL member was named to the Sentencing Task Force that wrote this bill, and that had a significant effect on the negative portions of this Bill.

3. Victim Impact in Death Penalty Cases.

This Bill contemplates evidence of the "impact of the crime on the victim, the victim's family or survivors" in death penalty cases presented to a jury. This is an extraordinarily unfair and even cruel proposal.

At present in Kentucky, so-called victim's evidence cannot be presented at the penalty phase of a capital case. That is as it should be. The jury is called upon then to decide whether the defendant lives or dies based upon the aggravating and mitigating circumstances that are available, including the facts of the crime.

The Bill would change that, and would produce an even more arbitrary Kentucky death penalty. The penalty phase of capital cases would turn into a proceeding in which the death of the defendant would be urged due to the relative worth of the victim. The deaths of bankers and lawyers and judges would be worth more in such a proceeding than the

death of a cab driver or factory worker or homeless person. Prosecutors would build a shrine to the victim during penalty hearings. Defenders on the other hand would investigate and present any seamy fact or circumstance about the victims' lives in order to save the life of the defendant. Do victims want to go through this? An already racist death penalty would turn even more racist, as juries would be urged to kill based upon the moral value of the victim.

One other impact of the bill is that it seems to allow for a jury to hear the presentence investigation report prepared by the probation and parole officer, a change that would be logistically difficult for the author of the report, and would create numerous evidentiary problems at the hearing.

4. Persistent Felony Offender.

The bill makes a significant and negative change in the law of persistent felony offenders. At present, juries decide whether someone is to be found to be a persistent felony offender or not, and thus whether they will be faced with enhanced penalties. The bill seems to take that authority away from juries, and places them in the hands of judges.

There are factual decisions to be made at a PFO proceeding, and factual issues are better made by juries. The bill changes that.

More importantly, however, the PFO statute can have an immensely draconian effect upon an accused. A person can commit a bad check offense and as a result have to spend ten years in prison without the possibility of parole. Such a decision should not be made by a judge, who will tend to approach the PFO decision mechanically rather than humanly. Juries have been known to find a person not guilty of being a PFO simply because the prior offenses or the present offense do not merit such a result. That discretion should not be taken away.

No statute more crowds prisons than the PFO statute. Apparently the problem for the Sentencing Task Force is that PFO is not being used anywhere much outside of Lexington and Louisville. This is seen somehow as unfair. The solution apparently is to sentence more rural Kentuckians to prison for longer periods so that our urban inmates feel better. Rural prosecutors wisely see that this statute results in too much time being given for criminal offenses. This Bill, rather than limiting the use of or abolishing PFO, would ensure that many more persons in Kentucky would be receiving PFO sentences. Prisons will swell immeasurably with the passage of this portion of the Bill.

5. Fiscal Impact: Sizeable Costs

The fiscal impact of judicial sentencing is difficult to measure. The abolition of the second phase of felony trials may reduce the amount of money paid to juries for the last days of trials, thereby reducing costs. It also may be that the discouraging of jury trials may result in fewer such trials, with resulting lower costs. On the other hand, more jury trials may result where juries are removed from the calculus. Defendants may perceive that they have little to lose from a trial where a judge known for harsh sentencing is presiding.

The fiscal impact of the creation of sentencing guidelines is significant. First, a Sentencing Commission can be expected to be quite costly. A sizeable bureaucracy will grow out of this Commission, and costs will swell. This Commission is to be created out of whole cloth, and thus all new employees, travel, phones, overhead, salaries, etc. will be new dollars coming out of the budget. Further, if sentencing guidelines have their expected effect, an even more serious fiscal impact will occur. At present, many crimes are mitigated, particularly in rural areas, due to the fact that the community knows the particular defendant, and brings that knowledge into the sentencing decision. Guidelines, with their unfeeling consistency, will eliminate that. Persons who should not go to prison will go to prison, while persons who should receive the minimum sentence, or a lesser included offense, will instead receive a midrange sentence for the greater offense. Consistency of sentencing will only be reached by more persons going to prison for greater sentences. Who will pay for this consistency?

The fiscal impact of the victim impact testimony in death penalty cases will be significant because it will result in more persons receiving a penalty of death. Thereafter, numerous persons in the criminal justice system will spend our declining resources on the battle over whether the person should be executed or not.

The fiscal impact of the PFO portion of the Bill promises to be staggering. In many rural areas, PFO's are not pursued against persons who have felony records, for many reasons. Often it is because the person is simply not a persistent offender, and the enhanced penalties are inappropriate. Often it occurs because the enhanced penalties may be inappropriate for the prior offenses or the present offense involved. The mechanical approach taken by the Bill will increase the use of PFOs, and will result in more persons from rural Kentucky being given enhanced sentences for minor felonies. Prison overcrowding will definitely increase, and the black hole of our prison system will have to be fed with more general fund dollars.

Overall Impact to DPA: More Staff Required

DPA will need increased staff as a result of a number of the proposals in this bill. Staff increases will be necessitated by more jury trials caused by judicial sentencing, longer and more complex sentencing proceedings caused by the sentencing guidelines, more death penalties as a result of victim impact evidence being admitted at death penalty trials, more training needed to educate in the area of the sentencing guidelines, and more increased persistent felony cases.

Historically, such as in the recent DUI changes, statutory changes have been made which result in the need but no funding for increased DPA staff. This Bill promises to repeat this unfortunate occurrence.

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SPECIAL FUND IS BEING SOUGHT TO PAY FOR DEFENSE IN SLAYING

Bowling Green attorney Kelly Thompson Jr. has asked that Warren County Fiscal Court be ordered to increase its appropriation to his public advocate office because there's not enough money budgeted to pay for the defense of three men charged in a capital murder case.

"This is an extraordinary case wherein the commonwealth seeks the death penalty and for that reason, an extraordinary amount of expenses above and beyond the normal operating budget of the program will be required to provide an appropriate level of defense for the three individual defendants in this action," Thompson said in a motion made in Division II of Warren Circuit Court.

Thompson, public advocate for the 8th Judicial District, is asking that a fund in the amount of $25,000 be established with the authorization for him to request more money if needed.

Judge J. David Francis will consider the motion in an Oct. 14 hearing.

Thompson's office is defending David Bridges Jr., 18, Antonio Marcus Howard, 18, and Eddie Moore, 17. The three are charged in the July 20 beating and robbery of a handicapped, retired Bowling Green probation and parole officer.

Albert Lamb, 55, of 246 College St. was beaten and robbed of food stamps and left for dead by the three men, who returned twice and again beat the man, Commonwealth Attorney Steve Wilson said.

Lamb was found dead in his truck in downtown Bowling Green. He had been beaten with a 2-by-4, Wilson said.

Thompson has assigned three attorneys to the case, one to represent each person charged. He has estimated that the case could cost more than $100,000.

STAN REAGAN

Daily News Staff Writer

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