THE ADVOCATE

The Magazine of the Kentucky Department of Public Advocacy

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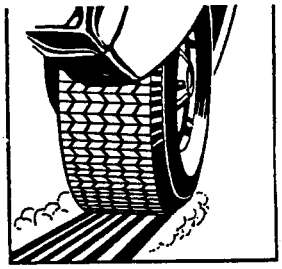
Representing 84,000 Poor Kentucky Citizens *Volume 14, #3 April, 1992*

Is Counsel At Risk for Kentucky's Poor?



Kentucky allocated $10.2 million general fund dollars to fund its indigent defense in 1990 and in 1991. That amount would build 4 miles of two lane road in Kentucky.

20th Anniversary

Department of Public Advocacy

1972-1992

Our Specialty is Criminal Defense Litigation

The Kentucky Department of Public Advocacy (DPA) is a state-wide public defender program that was established at the recommendation of Governor Wendell Ford by the 1972 Kentucky Legislature. There are over 100 full-time public defenders in 16 offices across the state. Another 250 attorneys do part-time public defender work in 80 of Kentucky's 120 counties. DPA is an independent agency located within the state's Protection and Regulation Cabinet for administrative purposes. A Public Advocacy Commission oversees the Department. Yearly, DPA represents 84,000 poor citizens accused of crimes for offenses ranging from DUI to capital murder. Day in and day out our attorneys bring life to the individual liberties guaranteed by our United States and Kentucky Constitutions.

FROM THE EDITOR

WE NEED YOUR HELP

The 5.05% ($545,000) cutback in this fiscal year's state funding (July 1, 1991 - June 30, 1992) which DPA has been required to take has left us with no state funds to publish *The Advocate*. However, we are trying to publish smaller issues through donations.

Special Issues not Published

The October, 1991 special Bill of Rights *Advocate* issue was not published although it was ready to be printed. That issue had articles by Kentucky Historian Tom Clark, Harvard Professor Charles Ogletree, FBI Director William Sessions, Criminal defense attorney William Pangman, and many other distinguished people.

We had hoped to send that issue to each Kentucky school to increase awareness of our individual liberties.

Truncated Issues Published with Donations

Our December, 1991 issue was reduced to 16 pages and *xeroxed*. It cost $781.00 to publish with 16 public defenders, DPA staff and criminal defense attorneys donating their own money to cover those costs.

The 24 page *printed* February, 1992 issue was published at a cost of $1861. Our donations include general gifts from NLADA and friends of DPA.

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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Kentucky's Program to Provide Counsel for the Poor Born in 1972

In 1972, the General Assembly passed HB-461 and created Kentucky's public defender program. HB 461 was sponsored by Representatives Kenton, R. Graves and Swinford. It passed the House by a 60-18 vote and the Senate by a 26-5 vote.

This year we celebrate our 20 years of providing legal help to persons facing a loss of their freedom and too poor to hire counsel. *What a privilege it is for us to be entrusted with that obligation.* If you'd like to share reflections on these 20 years, please contact us.

ED MONAHAN
EDITOR

20th Anniversary

Department of Public Advocacy

1972-1992

IN THIS ISSUE

DEFENSE OF POOR CRISIS NEEDS FUNDING HELP

The Public Advocacy Commission

February, 1992 remarks to the Senate Appropriations and Revenue Committee by Chair of Public Advocacy Commission.

There is a crisis in Kentucky in the delivery of constitutionally mandated defense of poor persons accused of crime.

I want to compliment Public Protection and Regulation Secretary Holmes and his staff for their recognition of this fact. I support his efforts and the budget request for the Department contained in the Cabinet's budget. The Cabinet has, I feel, within the constraints placed upon it by the Executive Branch in preparing a budget request, been very supportive. However, the proposed budget does not address the crisis that has been building over the years as more and more responsibility has been placed on the Public Defender System without a true recognition of the fiscal impact of those added responsibilities.

Attorneys throughout the state, regardless of whether they are private attorneys, attorneys working through a roster system, attorneys working for independent metropolitan offices, or in the Department of Public Advocacy, are underpaid and overworked. Attorneys in the Department and in the metropolitan offices are carrying caseloads that far exceed any reasonable number of cases with the result that the constitutional standards for effective assistance of counsel are being ignored.

This is not just my personal evaluation:

The Public Advocacy Commission has been concerned about the problems for some time. We have struggled with trying to develop a method of evaluation of the Kentucky system. We finally turned to the American Bar Association, Bar Information Program for the purpose of seeking technical assistance and information in preparing a method of evaluation. The ABA approved our request and sent Robert Spangenberg of the Spangenberg Group to look at our system and suggest a method of evaluation.

Mr. Spangenberg has been associated with public defender work for 15 years and his group has evaluated 16 state public defender systems. He has had previous experience with the Kentucky System in developing caseload standards in death penalty cases at the request of Paul Isaacs. He spent several days in Kentucky at that time. Before coming to Kentucky this time at the ABA's request, he reviewed voluminous documentation supplied by DPA staff.

He spent 2 days in Kentucky interviewing a wide range of participants in the system, including judges, full-time attorneys, contract attorneys, managers in the Fayette County and Jefferson County Systems, and staff here in Frankfort, including the Public Advocate, Paul Isaacs. He prepared a written report for the Commission. Some of his observations:

1. The reputation of the Kentucky System as a model is based upon history, not current reality and is based primarily upon the activities of certain long-time dedicated members of the system who have gained national reputations in things such as training and death penalty litigation.
2. There are serious problems in the representation of indigent defendants in many parts of the state. This despite the dedication, hard work and advocacy of committed public defenders and staff.
3. Defendants are sometimes sitting in jail for periods up to nine months without seeing an attorney because of the case overload.
4. Many contract attorneys are inexperienced or simply not interested because the pay is so low.
5. While all of the public defender offices around the state appear to suffer from case overload and lack of adequate funds and resources, my observation is that the Louisville Office is already in a state of crisis.
6. There is a real problem of lack of independence of the Public Advocate.
7. There is a need for a true statewide system.
8. The salaries are, if not the lowest, among the lowest in the country.
9. Your overwhelming problems of case overload and underfunding are substantially exaggerated by the volume of death penalty cases assigned to the Department of Public Advocacy.

Mr. Spangenberg also commented upon the Commission's efforts to draft a comprehensive statute to replace the current Chapter 31. "Not only is it thorough, but it is well documented. I think your program's future is tied in part to a careful and thorough review of your statute."

The Kentucky Court of Appeals has also gotten into the act and in a recent opinion, *Lavit v. Commonwealth*, Ky.App., ___ S.W.2d ___ (Nov. 8, 1991), opined that the present mixed system in Kentucky is probably unconstitutional because of the disparity among levels of defense services available to poor persons accused of crime because of the different ways in which defense services are delivered.

You are aware of the budget cut that has already been implemented in this fiscal year. It was not evenly applied in the Criminal Justice System: The judiciary took a 3.3% reduction, the prosecutors took only a 2% reduction, the Department of Public Advocacy took a 5% reduction.

It occurs to me also that large sums of money have been appropriated to build more prisons-to provide more beds for convicted persons. Consider whether those persons are processed. A substantially high percentage of the increased prison load, caused by increasing numbers of criminal prosecutions, pass through the public defender system.

So, while I commend Secretary Holmes and the Public Protection Cabinet in doing the best that they can to address the problems of the Department's budget, it simply does not address the crisis that has developed over the years in the delivery of public defender services in Kentucky.

I am sure that everyone has the best of intentions. All of you have heard the old expression, however, "the road to hell is paved with good intentions." The course of defense of poor persons accused of crime in Kentucky is the road to hell. We need more than good intentions. We need help.

For that reason, I urge this committee to recommend funding in excess of that proposed in the Executive Budget. At the very least, the Department of Public Advocacy budget should be considered from the Fiscal 1992 Budget base before the 5% reduction was imposed. Given the lower reductions in the budgets of other segments of the criminal justice system, that seems only fair.

WILLIAM R. JONES
Chair
Department of Public Advocacy
Commission
Former DeanChase College of Law

PUBLIC ADVOCATES

1) **Anthony M. Wilhoit**
1972-1974

2) **A. Stephen Reeder**
Dec. 27, 1974

3) **Jack E. Farley**
March, 1975- October 1, 1983

4) **Paul F, Isaacs**
October 1, 1983- December 31, 1991

5) **Judge Ray Corns,**
Acting Public Advocate,
January 1, 1992- present

Paul's Tremendous Strides

"Paul Isaacs made tremendous strides for the Public Advocacy movement. Also his annual seminars for P.D.'s is nationally known. He was highly respected for these efforts by the Court System and the Legislature."

Lambert Hehl, Jr.
District Judge, ret'd
Member of the Public Advocacy Commission

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.

MARTIN LUTHER KING, JR.

PUBLIC ADVOCATE RESIGNS

Paul F. Isaacs becomes General Counsel for Justice Cabinet

At the age of 39, Paul F. Isaacs was appointed Public Advocate by Governor Brown upon the recommendation of the Public Advocacy Commission on October 1, 1983, [see The Advocate, Vol. 6, No. 1, December 1983] replacing Jack Farley who served as Public Advocate for 8 years. As an Assistant Public Defender with DPA from 1973-75, Paul did appellate and postconviction litigation. From 1975-80 he was Deputy General Counsel for Kentucky's Department of Justice, and from 1980-83 Paul was General Counsel for Justice. Paul was reappointed Public Advocate by Governor Collins October 1, 1987 upon the recommendation of the Public Advocacy Commission. Paul declined answering The Advocate's interview questions and instead provided the following thoughts. We wish Paul well in his new, important Justice duties of providing counsel to Corrections, State Police, Criminal Justice Training, Grants Management, Medical Examiner, Crime Commission and the Secretary of Justice.

Because my decision to accept the position of General Counsel of the Justice Cabinet happened very quickly, I did not have an opportunity to express my appreciation to my many colleagues in the Department of Public Advocacy. I enjoyed working with you over the last 8 years and I am very proud of our accomplishments. Even with the cutbacks of this year, the Department's budget has been doubled over the last 8 years, attorney salaries have been raised to a more competitive level, a Capital Resource Center has been developed, and Protection and Advocacy has expanded its role to new clients. These accomplishments occurred because of your hard work and support.

Thank you for your help in making my time with the Department so rewarding.I know that with the current economic situation in Kentucky that the Department faces even greater challenges. However, the Department is blessed with an extremely dedicated staff and part time lawyers who, by working together, can meet these challenges. The strength of the Department of Public Advocacy is not in a small elite group but in the many dedicated individuals who day after day insure that all of the Department's clients are fully represented. The support staff, the investigators, the advocatorial specialists, the many private attorneys and full time staff are the heart of the Department. With the continued and unified support of everyone, the Department can continue to grow and reach new heights.

If the Department lets itself fall victim to the divisive elitism of an oligarchy dedicated to perpetuating their own private vision of "the right way," it will lose its greatest asset. I miss my many friends in the Department and will always cherish my time with you. My fondest wish for each of you and the Department is even greater success.

PAUL F. ISAACS

DPA and Criminal Justice Funding FY 85 to FY 92

When Paul Isaacs became Public Advocate (FY 84), DPA's total funding was $6,675,800. The first budget Paul submitted to the General Assembly (FY 85) provided DPA with total funding of $6,807,100. In FY 92, Paul's last year at DPA, total the funding for DPA was $11,331,800, an increase of $4,656,000 over 8 years.

In the same time period, Prosecutor's total funding increased $12,621,900; Justice's rose $34,109,800; The Judiciary's increased $32,629,300; and Corrections' jumped $113,171,300.

Next to DPA , the least dollar increase over this 8 year period was the $12.6 million increase for prosecutors. Yet, the prosecutors' 8 years *increase* exceeds DPA's current funding.

ED MONAHAN

Dedication and Perseverence of Paul

"During the time I worked with Paul Isaacs, I was impressed by his dedication and perseverance while serving as Public Advocate. He is a fine person and I feel honored to have been associated with him during my term as Secretary of the Public Protection Cabinet. I extend my best wishes to him in any future endeavors."

THEODORE T. COLLEY
Distilled Spirits Administrator

THE RIGHT TO COUNSEL:
AT RISK FOR KENTUCKY'S POOR

In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defence.
Sixth Amendment, U.S. Constitution (1791).

In all criminal prosecutions the accused has the right to be heard by himself and counsel....
Section 11, Kentucky Constitution (1891).

We are rightly proud of our constitutional commitment to the liberties guaranteed us as individuals. Most are embodied in our United States *Bill of Rights*, which was enacted in 1791, and our Kentucky *Bill of Rights* first enacted in 1791. These liberties are what most distinguish us from all other countries in the world.

However, when we look at the balance sheet of how the United States Supreme Court, Kentucky's highest court, Congress, our state legislature, prosecutors and defense attorneys have substantively and financially treated the most important constitutional guarantee, the right to counsel for an accused citizen, too much red ink appears.

For the vast majority of our country's history, the right to counsel under the 6th Amendment and Section 11 has not been freely afforded to the poor. Under the 6th Amendment, *the right to counsel has not been constitutionally guaranteed indigents accused of a felony for 86% of the last 200 years*! (See 6th Amendment Timeline).

While the 6th Amendment guarantee of counsel was interpreted in a gradually expanding manner by the United States Supreme Court from 1932 until the 1970s, it has of late been restricted more often than expanded by that Court. It is further being undermined quite effectively by a society which refuses to fund counsel at a fair level for the poor accused of a crime. Constitutional law aside, society has decided to *structurally* deprive the poor of the full measure of counsel by *choosing* to underfund public defender programs. Over the years, prosecutors who are charged with seeking justice ironically have urged that the poor's access to counsel be diluted.

These trends are hardly befitting the 200th Anniversary of our United States *Bill of Rights* and the 100th Anniversary of our Kentucky *Bill of Rights, which we celebrated in the Fall, 1991. They raise the question of whether we are really committed to* the 6th Amendment and Section 11.

THE SLOW CONSTITUTIONAL EXPANSION

The 6th Amendment right to counsel is clearly stated and guaranteed to citizens by our *Bill of Rights*. However, it was not until 1932, 141 years after our *Bill of Rights* became a part of our *Constitution*, that our U.S. Supreme Court held an accused whose very life was in jeopardy had a right to counsel even if he could not afford one. *Powell v. Alabama*, 287 U.S. 45 (1932).

For most of our statehood, Section 11 clearly stated the people's belief in the fundamental right to counsel. However, our courts did not command much respect for the people's value of counsel, especially if you were a poor defendant accused of a crime. Counsel was not viewed as a sacred or a preeminent right for many years.

In 1886, the Kentucky Court of Appeals saw no need to afford appellate counsel to a person who had been sentenced to life and who was unable to employ counsel. *Turner v. Commonwealth*, 1 S.W. 475 (Ky. 1886).

The Court in *English v. Commonwealth*, 288 S.W. 320 (Ky. 1926) saw no right to counsel for a woman who was "an unfortunate, friendless old woman, addicted to the use of narcotics, and very poor...ignorant of all her rights" since she had not "specially called" the attention of the court to her lack of counsel.

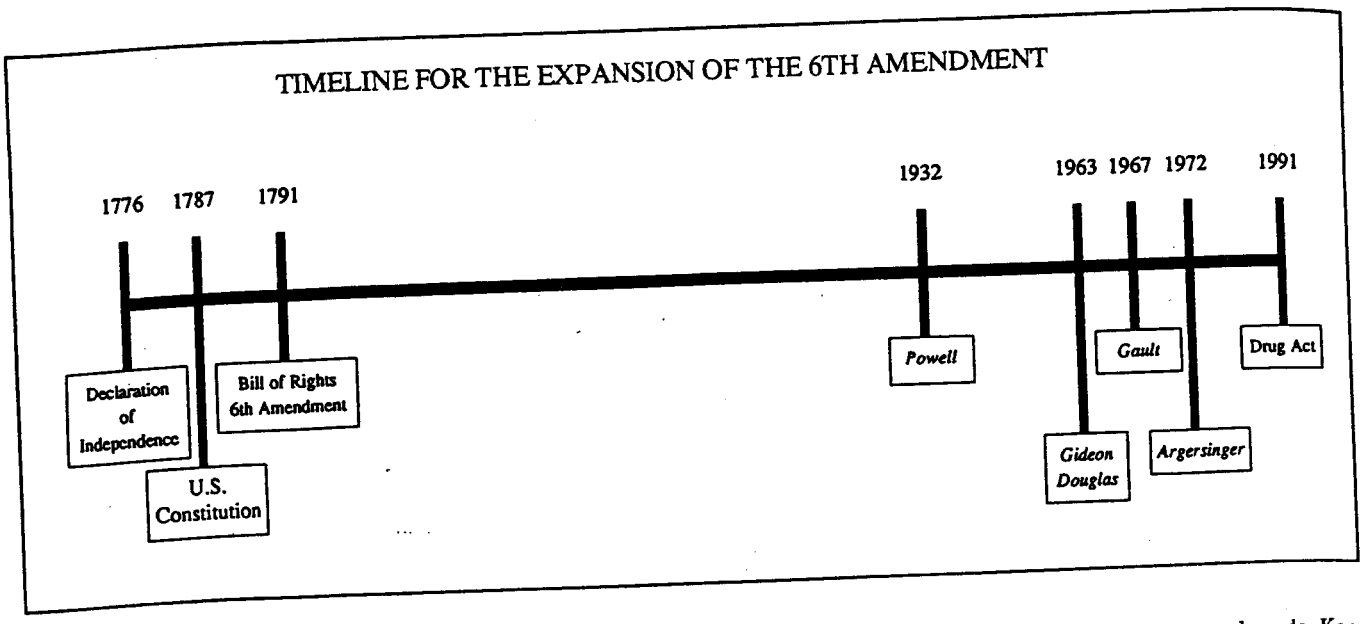
In *Williams v. Commonwealth*, 110 S.W. 339 (Ky. 1908) Kentucky's highest court reversed a robbery conviction of a person "stricken by poverty" who was tried without counsel but the right to counsel required more than just indigency. It required him to be "without education, and has not mind enough to know when he was placed in jeopardy...." *Id.* at 340. When a "court can see that the person charged is a person of at least ordinary intelligence and can fully appreciate the position which he occupies...," then the poor person was not entitled to appointed counsel under Section 11. *Id.*

Counseless poor persons who failed to ask for counsel and who failed to make "the necessary showing in support thereof" went to prison without appellate relief from their uncounseled conviction. *Hamlin v. Commonwealth*, 152 S.W.2d 297 (Ky. 1941).

Being 21 years old, inexperienced in court proceedings and legal matters was not enough to require the court to appoint an attorney for an indigent accused absent a request and sufficient showing by this young neophyte. *Moore v. Commonwealth*, 181 S.W.2d 413 (Ky. 1944).

It was not until 1948, 157 years after Section 11 breathed life, that Kentucky's highest court interpreted Section 11 to require that an attorney be appointed for a poor person charged with a felony unless that person intelligently, competently, understandingly and voluntarily waived counsel. *Gholson v. Commonwealth*, 212 S.W.2d 537 (1948). *Hamlin, supra* and *Moore, supra* were specifically overruled. See also *Hart v. Commonwealth*, 296 S.W.2d 212 (1956).

It was not until 1963, 172 years after passage of our *Bill of Rights*, that the Supreme Court of the U.S. in *Gideon v. Wainwright*, 372 U.S.



335 (1963) decided that due process required that counsel must be given at trial by the state to an indigent accused of committing a felony in a state court. In that same year the 6th Amendment right to an attorney was extended as a result of equal protection to an appeal by indigents convicted of a crime. *Douglas v. California*, 372 U.S. 353 (1963).

It took until 1967, 176 years after ratification of our *Bill of Rights*, for the guarantee under the 6th Amendment of free counsel for an indigent to be applied to juvenile defendants at trial. *In re Gault*, 387 U.S. 1 (1967).

Not until 1972, 181 years after our Bill of Rights became effective, was the 6th Amendment right to have legal counsel at trial required for citizens accused of committing a misdemeanor. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

THE QUICK CONSTITUTIONAL ASSAULT ON THE RIGHT TO COUNSEL

The right to counsel had flourished in the 40 years following *Powell*, but after 1972 the United States Supreme Court began its battle plan against the 6th Amendment. As a result of the Court's assaults, there is no federal constitutional right to counsel on discretionary criminal appeals following an appeal of right. *Ross v. Moffitt*, 417 U.S. 600 (1974); *Wainwright v. Torna*, 455 U.S. 586 (1982). Neither the due process clause of the 14th Amendment nor the equal protection guarantee of "meaningful access" requires the state to appoint counsel for indigent prisoners seeking state post-conviction relief. *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

As a result of an early Rehnquist Scud attack, poor persons convicted of a crime are not constitutionally entitled to an attorney if they are unable to have one when they request the U.S. Supreme Court to grant *certiorari* - even in capital cases. *Ross v. Moffitt*, 417 U.S. 600 (1974).

In 1989, Chief Justice Rehnquist and his highly trained fighting majority tomahawked the right to counsel by determining that a state which has sentenced a person to death was not constitutionally required to give that condemned indigent an attorney for his state post-conviction proceeding. *Murray v. Giarrantano*, 492 U.S. 1 (1989).

CONGRESS' LIMITED EXPANSION OF RIGHT TO COUNSEL

It has become so bad that in the Federal Anti-Drug Abuse Act, 21 USC Section 848(q)(4)(B) and (q)(9) (1990), Congress reacted to the U.S. Supreme Court's increasingly narrowing view of the right to counsel, and mandated that any indigent state prisoner under sentence of death "shall be entitled to the appointment of one or more" experienced attorneys and when reasonable necessary with "investigative, expert or other services" for federal habeas proceedings.

Congress has also recently begun to fund federal resource centers to meet the significant capital federal habeas counsel needs. Kentucky has been fortunate to obtain a federal resource center but its focus is only in the federal forum. State legislatures, including Kentucky's, have yet to follow this funding lead for state trial, appeals and post-conviction capital cases.

PROSECUTORS SEEK TO LIMIT RIGHT TO COUNSEL

In each of these cases decided by the United States Supreme Court, a prosecutor argued that the United States *Bill of Rights* did not require counsel for poor people charged with committing a crime who were too poor to hire an attorney.

In contrast, defense attorneys, most often public defenders or appointed counsel, urged the Court in each of these cases to apply the *Bill of Rights* to insure its full meaning by giving counsel to those too poor to hire their own lawyer when their life or liberty were at stake.

COUNSEL MUST BE FULLY FUNDED

Without the proper *resources* available to the attorney for an indigent accused, the 6th Amendment and Section 11 right to counsel is virtually meaningless. Resources and experts are the fingers of the guiding hand of counsel. A hand without fingers is not capable of guidance.

The ultimate resource for the appointed attorney is adequate compensation. For a public de-

fender system it is adequate funding which permits reasonable caseloads. Without fair funding, there is no realized right to counsel for the poor.

Adequately funded counsel is required for competent performance by that counsel. Since an attorney's time is his/her livelihood and since the time devoted to a client depends on the compensation received or the caseload that the funding permits, an appointed attorney who is not fully and fairly paid for his legal services or a public defender who has too large a caseload cannot realistically give a client effective assistance with any regularity. *See* "Attorneys Must be Paid Fairly: Defense Attorneys are Entitled to Fair Market Value," ABA *Criminal Justice*, Vol. 5, No. 2 (Summer 1990). A public defender system lacking in necessary funds cannot provide constitutional counsel.

Well-meaning *pro bono* efforts are not a solution to inadequate funding of attorneys for indigents and, in practice, are unethical because they create and legitimize incompetent representation. *See* "*Pro Bono* Services in Criminal Cases is Neither Mandatory Nor Ethical," ABA *Criminal Justice*, Vol. 5, No. 3 (Fall 1990).

Access to competent defense experts, investigators and other ancillary resources are necessary to insure the effective representation by a public defender or appointed counsel. However, the right to funds for experts has only been afforded in a limited way to this point by the U.S. Supreme Court. *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* has been more narrowly read by lower courts than perhaps any other constitutional right. *See, e.g., Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (*en banc*).

Most Kentucky fiscal courts, the funding source under KRS 31.200 for these resources in Kentucky, have lawlessly refused to meet their clear statutory duty. While the Kentucky Supreme Court has repeatedly recognized that fiscal courts have the duty to pay for these resources, *see, e.g., Simmons v. Commonwealth*, 746 S.W.2d 393 (1988), in the over 10 published cases the court has never once reversed a case when a fiscal court refused to pay or a trial judge refused to order a fiscal court to pay for experts or other resources.

CURRENT FUNDING DOES NOT REFLECT RIGHT TO COUNSEL VALUES

Funding for the 6th Amendment and Section 11 provided by states, counties, cities and the federal government is not sufficient. To illustrate this reality, we look at public defender funding in Kentucky, and how much money we spend on counsel relative to other ways we spend our money.

UNDERFUNDED COUNSEL FOR INDIGENT DEFENSE IN KENTUCKY

The state of Kentucky's 1990-91 budget is $8.922 billion. All of Kentucky's criminal justice agencies received $466 million (5%) of the total state funding.

Kentucky indigent criminal defense efforts received a paltry .1% of the total state budget and an embarrassing 2% of the funding for Kentucky criminal justice agencies. (See state money for agencies graph).

Is the right to counsel furthered by this kind of division of the available money? Not when this means that public defenders and appointed attorneys in Kentucky are underpaid and overworked. Full-time public defenders in Louisville start at $17,500. An appointed attorney handling a Kentucky capital case receives a $2,500 fee. At best, this is minimum wage. It is what we pay people who flip hamburgers. Yet, Kentucky gives its Corrections Cabinet an average of $12,901 to house each state prisoner.

Kentucky has recently built a state prison at a cost of $89,900 per cell. The money spent for one cell is literally more money than the funding 70 of Kentucky's 120 counties receive for all indigent cases in their county for an entire year.

The Kentucky Corrections Cabinet received a 53% increase in its 1990-91 state funding. Their budget jumped $76 million from $147 million to $219 million. Apparently, we stand ready to fund our security but not our liberty.

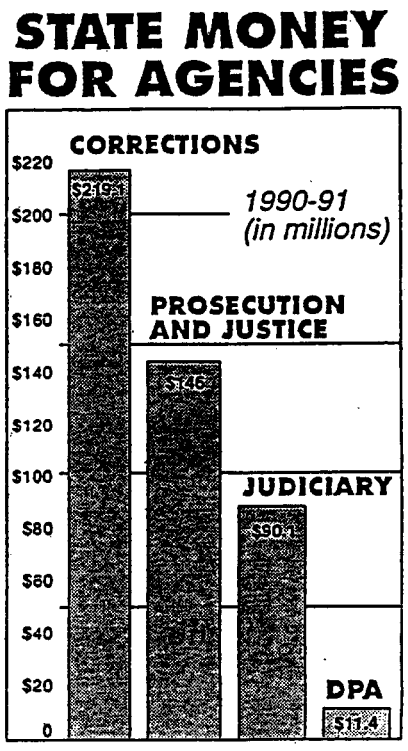
In 1986 the national *average* funding for indigent defense was $223 per case. At that time Kentucky ranked 47th in the nation with funding at $118 per case. In 1990, Kentucky's average funding for the more than 70,000 indigent cases handled is but $162 per case. That includes major felony cases, murder cases, and capital cases.

Nationally, Kentucky ranks at the bottom in its money allocated to counsel for the poor. Kentucky is woefully underfunding its indigent accused responsibilities, especially in contrast to the funding for the prosecutors, police and corrections.

On top of the inadequate and imbalanced funding for Kentucky's public defender system within the criminal justice system funding, the underfunding and imbalance are exacerbated by the one-sided federal drug money grants and federal confiscation and forfeiture proceedings.

In fiscal year 1990, Kentucky police and prosecutors received $4,614,190.64 from civil seizures and forfeitures in drug cases. Kentucky public defenders received none of this money.

In fiscal year 1990, police and prosecutors received $6,080,000 from drug grants under the Federal Comprehensive Crime Control Act. Kentucky public defenders received but $100,000 of this money. When this drug and seized money is added into the state funding, prosecution and police in Kentucky received



$156 million each year compared to the public defenders receiving $11.5 million. Kentucky prosecutors and police receive $14 for every $1 provided public defense. Does that make for a fair fight?

As a result of these vast new resources, drug arrests in Kentucky have skyrocketed since 1987 - a full 114%. Not only have the drug grants and the confiscations increased the funding imbalance, these new funding sources for the police and prosecution have put greater demands on the underfunded Kentucky public defender system.

FUNDING PERSPECTIVE: THE UNDERVALUING OF COUNSEL FOR THE POOR

The right to counsel, which is crucial to our two most fundamental values, our life and liberty, is further affronted when we put indigent criminal funding in context.

Nationally, in 1986 but $1 billion was spent on the defense of indigents in criminal cases. One B-2 Stealth bomber costs $1.1 billion. We spend $36 billion a year on tobacco products, and $3.3 billion each year to attend spectators sports.

Kentucky funded its indigent defense at $11.4 million in 1990. That amount would build but 4 miles of two lane road in Kentucky. The University of Kentucky's athletic budget of $15.9 million is $4 million more than our funding for counsel. The 9 baseball players with the highest 1991 salaries at each position totalled $29,608,333 (see the $29 million lineup) - more than 2-1/2 times the Kentucky funding for indigent defense.

The chief prosecutor in a Kentucky county is paid a salary of $67,378. The chief public defender in the county starts at $35,220.

Kentucky's criminal justice system is funded at $466 million in 1990. At the same time, the federal government spent $557 million just in Kentucky on military contracts.

Across the board, we do not think much of the constitutional right to counsel nationally or in Kentucky relative to other interests and values.

CONCLUSION

Constitutional protections are devoid of meaning without counsel. The right to counsel is the preeminent protection of the United States and Kentucky *Bill of Rights* because all other guarantees depend on legal counsel to effectuate them. Unfunded, underfunded, and imbalanced funding risks the 6th Amendment and Section 11.

Stan Chauvin, the ABA's immediate past-President, recognizes that the "role of the public defender is crucial, critical and essential to insure the fair and effective administration of justice. Without adequate funding, the discharge of this duty is impossible. We must face this reality and act accordingly." Isn't this 201st year of both our *Bill of Rights* the year to do it?

Why do we spend so little on counsel for the poor? It cannot be that society does not have the money. After all, we spend $3.3 billion on dog food annually. Could it be that we are intentionally refusing to fairly fund indigent defense services... because we want the prosecution to have a decided advantage? ...because we want the criminal defendant to have a low paid, overworked, ineffective public defender? ...because we want a bankrupt system defending the poor criminal? ...because we do not understand how important the 6th Amendment and Section 11 are to us? Are we deciding to learn the value of counsel by living out the once popular refrain, "Don't it always seem to go that we don't know what we got 'til it's gone...."?

In 1932 when the United States Supreme Court first put its down payment on the right to counsel in *Powell v. Alabama*, the Justices recognized that denial of counsel was a murderous act:

> Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate, and feeble-minded, unable to employ counsel, with the whole power of the state arrayed against him prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted, and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder....
> *Powell, supra*, 287 U.S. at 72.

The Court of Appeals in *Lavit v. Brady*, S.W.2d (Nov. 8, 1991) has sounded the warning siren on the unconstitutionality of Kentucky's inadequately funded public defender program.

The Bar has special reasons to be interested in promoting fully funded public defense. *Jones v. Commonwealth*, 457 S.W.2d 627, 632 (Ky. 1970).

Only by acting now can we keep the right to counsel from the shackles of debtor's prison.

EDWARD C. MONAHAN
Assistant Public Advocate
Director of Training
Frankfort

Staff Changes

Resignations

10/16/91 **Debbie Bailey**- A/P Adv.- Hazard; DOE 10/16/90; joined private firm in Hazard.

10/25/91 **John Grant**- A/P Adv. Sr. DOE 7/1/91- returned to clerk with Judge Forrester.

1/16/92 **Jane Osborne**- A/P Adv. Sr.- Paducah DOE 11/1/90 joined County Atty. office- Graves Co.

1/16/92 **Charlotte Scott**- A/P Adv. Pr.- Paducah DOE 7/16/85 joined Comm. Atty. office- McCracken County.

Transfers

10/1 **John West**- APA Sr.- from Somerset to Northpoint.

2/16 **Donna Boyce**- APA CH- from Capital Trial Unit to Appeals.

Appointments

10/16 **Mike Ruschell**- APA Pr- Hopkinsville office- [Case Western Reserve '73]

11/16 **Bill Burkhead**- APA Sr.- Eddyville [UL Law '76.]

11/16 **Kelly Gleason**- APA- Capital Trial Unit [UK Law '91].

11/16 **Suzanne McCollough**- APA- Northpoint [UK Law '91.]

11/16 **Austin Price**- APA- Hazard- [Chase Law '91.]

1/16 **Jim Havey**- APA- Pikeville- [UK Law '91.]

1/16 **Dana Collier**- APA-Sumerset- [UT Law '91.]

DOE= Date of Entry

A/P= Assistant Public Advocate

"I WILL NOT ACCEPT ANY MORE CASES"

Overwhelmed after handling hundreds of cases a year, Lynne Borsuk rebelled. This is the story of her personal trial as a public defender

One day each week, buses pull up in front of the Fulton County Courthouse in downtown Atlanta, disgorging a routine cargo of accused felons. They are herded upstairs to the courtroom of Superior Court Judge Joel J. Fryer to formally hear the accusations being made against them and go through a question-and-answer session as to whether they understand their rights.

Lynne Borsuk stood in Fryer's courtroom through dozens of these weekly cattle calls. By the fall of 1990, after nearly 4 years as an assistant public defender, Borsuk had worked her way up to one of the top jobs in the PD's office - trial attorney in the criminal division. As the only public defender assigned to Fryer's courtroom, she was appointed to represent virtually all of the indigent defendants making their way through this branch of the judicial system.

But these were not easy times in the Fulton County courts, particularly for those charged with defending the poor. Resources were stretched beyond their limits by an exploding caseload. Trial-level attorneys had been grousing for months about a workload so overwhelming that it was turning courtrooms into "plea mills," where justice and fairness took a back seat to keeping the system afloat.

Borsuk, 30, says she became increasingly uncomfortable about her role as a cog in this judicial machine, uneasy about what her participation in a process collapsing under its own weight was doing to her clients. While the problem had been festering for months, they came to a climax during one exceptionally chaotic arraignment session in September 1990.

"I was assigned 45 cases for one arraignment calendar," she says. "When I figured it out, it wound up being 10 minutes per defendant. I had 10 minutes to devote to each one.

"I guess sometimes in life, that's how you realize things - when they just get so bad that you think 'I just can't do it anymore.' And that's what happened."

Borsuk began talking to her fellow defenders, as well as outside experts in the criminal defense field, to try to come up with some way, any way, to spark reform.

"I recognized that I was no longer doing my clients a service by keeping quiet. It was a sham. We were pretending that we were providing adequate representation. We weren't. You can't provide adequate representation for somebody charged with a felony when you devote 10 minutes to their case. That's a lie. It's not honest and it's not ethical.

"The judge would ask the defendant, 'Do you have a lawyer?' The defendant would say 'no.' Then it would come out during the conversation, 'No, but I've got a public defender.' If I were ever, God forbid, charged with a felony, and my attorney presumed to spend 10 minutes on my case, I wouldn't think I had a real lawyer either."

By October 2, Borsuk had settled on a risky plan of action. Assisted by 2 attorneys from the Georgia Association of Criminal Defense Lawyers, she marched into Fryer's courtroom prepared to use the legal system itself - and it's constitutional guarantees - to turn the spotlight on the deficiencies in Fulton's system of public defense.

After receiving her sixth court appointment of the day, Borsuk turned and faced the judge.

"I would ask your honor not to appoint me to any more cases at this time," she said. Then she handed the clerk a written motion which stated that her caseload was so overwhelming

that it violated her clients' rights to effective assistance of counsel, due process, and a speedy trial. She also pointed out that the canons of ethics of the State Bar of Georgia prohibit her from taking on more cases than she can handle.

"Filing the motion seemed to be a sound, legal way of achieving change," she says. At the time she filed it, Borsuk had 121 active cases pending. While the National Advisory Commission on Criminal Justice Standards recommends that a public defender close no more than 150 cases a year, she had already closed 476 in the first 10 months of 1990. She asked Fryer to giver her no more than 6 new cases a week.

"I didn't know what was going to happen. I just knew that it couldn't go on," Borsuk says.

"With that many cases, at some point you've got to start choosing who's more important, who's got more to lose, whatever. So that while I'm devoting hours and hours to a particular person charged with murder or rape or

a series of armed robberies or something, there's somebody over here who is not getting the attention that they deserve. That's a conflict of interest. No client should be sacrificed."

"Even a little case in superior court is a significant case. You're talking about a year in jail for that person. You've got to pity the person whose case is the little one because you figure they're going to get smushed through the most quickly."

Borsuk's motion made an immediate splash, and the size of the waves it created surprises her even now. News of her action spread from the legal community into the mainstream press, throwing the spotlight on the problems with the indigent defense system in Atlanta and making Borsuk something of a local celebrity. The problems were an open secret among practitioners in Atlanta's criminal courts, but the politicians and the public had little idea of what was going on. The publicity her motion generated changed all that.

It was also the beginning of the end of her career as an assistant public defender in Fulton County.

While Borsuk met with Fryer prior to the arraignment session to tell him what she was about to do, she did not inform her boss, Chief Public Defender Vernon Pitts. He found out about Borsuk's motion when questioned by a reporter, and his response was that he was considering firing her.

At the next arraignment session, Pitts told Fryer that he didn't support her motion. Two weeks later, he transferred Borsuk, one of the most experienced lawyers in the public defender's office, to juvenile court, which is normally the domain of green, newly hired attorneys - the place Borsuk herself started out in 1987.

"I didn't enjoy being punished, and I don't think it was proper to punish me for what I was ethically bound to do because the punishment for not doing what the ethical rules tell you is disbarment," says Borsuk, who vowed after her transfer to juvenile court that she would not resign - or shut up.

"I thought I owed a duty to my clients to try and see that they receive adequate representation. And resigning would have shirked that responsibility."

For Lynne Borsuk, life as a public defender wasn't always so contentious. After graduating from the University of Florida College of Law, she was hired by Fulton County just a week after passing the Georgia bar. It was not a career path she intended - Borsuk says she went to law school solely to learn legal theory and never intended to become a practicing attorney.

"In so many ways, it's really a great job. You have a tremendous opportunity to help people. You learn so much and have the ability to have hands-on experience. You actually get to try cases for people."

After she was hired, Borsuk was thrown into juvenile court with virtually no training. She would have to sink or swim on her own.

"I actually was neurotic about it. I would stay up until 11 o'clock every night thinking, 'Oh my God, what am I going to do?' My boyfriend was a lawyer, and I would ask him 'How do I do this, how do I do that?' at night so that I could figure out how to do things during the day."

As her career progressed, Borsuk became a fervent believer in the importance of public defense and her role in it.

"Part of the problem with this is that indigent defense is not popular. It's never going to be politically popular. People charged with crimes are not viewed fondly by the voters. But the rights that accrue to those charged accrue to all of us, including the voters. And if want to protect those rights for all of us, we need to ensure that we're protecting them for the poor."

When she was promoted to handling felony cases in superior court, the number of people indicted on felony charges in Fulton County had begun an astronomical rise, doubling in just 5 years. An increased emphasis on drug arrests was the main reason. Prosecutors also stepped up the pace of indictments to help relieve severe jail overcrowding, cutting down the time indigent defendants would sit in a cell between arrest and indictment.

The 25 attorneys in the public defender's office shared one computer. They had no paralegals and only 3 investigators. In addition to handling their courtroom work, defenders would at times have to play Matlock or Rosie O'Neill, investigating their own cases and even serving subpoenas.

Grand juries were churning out an indictment as often as once every 3 minutes. On one day that his courtroom calendar contained 98 arraignments, Fryer quipped to Borsuk, "We're going to get drowned."

"We're already drowning," she replied.

"We're drowning, and we're going to get drowner," he answered.

Yet Fryer's reaction to Borsuk's motion was not sympathetic. During the next arraignment session after the October 2 episode, he repeatedly asked her why her caseload moved more slowly than that of other defenders. "We're here together," he said. "If you're busy, so am I."

He began assigning cases to the public defender's office, rather than to Borsuk personally, so that her caseload never technically reached the 6-cases-a-week maximum she requested. Then she departed for juvenile court, and the judge never formally ruled on her motion.

Today, Lynne Borsuk is no longer doing penance in juvenile court. She resigned in frustration from the public defender's office in February 1991 - 4 months after vowing that she would not leave.

"In all honesty, I just have to say it was common sense at that point. I left. I tried very hard to effectuate some change and worked as hard as I could the whole time I was there. I did what I could."

She still practices criminal law, albeit in a different setting from the drab confines of the downtown courthouse. She has launched her own defense practice from a sunny office in the heart of Atlanta's fashionable Buckhead neighborhood, although she does continue to occasionally accept appointments to represent indigent defendants.

She says she's frustrated by the lack of change in the public defender's office, despite her very public protest. Yet there is some encouraging evidence that Borsuk's actions weren't for naught.

Even though funding for indigent defense is not politically popular, media reports of deficiencies in Fulton County's system led the county commission to appropriate an addi-

tional $470,000 for new lawyers, investigators, and clerical help. To investigate indigent defense, the Atlanta Bar Association appointed a blue-ribbon panel, made up of some of the most high-powered lawyers in the city. That panel is considering recommending fundamental changes in the organizational structure of the office.

If she had it to do all over again, Borsuk says she would still blow the whistle on the deficiencies within Fulton County's system of public defense, despite what it did to her career. In fact, she firmly believes that what she did will be good experience as she moves out into her own practice.

"I love criminal defense. And as a criminal defense lawyer, your aim is to advocate for your clients. And that's what I've done."

RICHARD SHUMATE

Richard Shumate is a writer in Atlanta.

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In Memoriam

Jack M. Smith, Jr. a contract public defender for Boyle Co. died on Oct. 4, 1991 of an apparent heart attack. He was 44. He had done criminal defense work for 19 years.

In a February, 1987 *Advocate* written interview (9/2/2), Jack wrote about his commitment to criminal defense work, Judges in his county, the pressure of being a defense attorney and the country's addiction to punishment.

Jack's law firm partner, J. Thomas Hensley, continues to do the work.

Mr. Hensley said of Jack Smith, "Jack and I were partners and friends for over 20 years. He was a big man, with an even bigger heart. He was committed, as I am, to providing quality criminal defense work to people who couldn't afford to pay."

We will miss his two decades of service.

KENTUCKY GUILTY OF INCONSISTENCY: State must live up to the obligation it has set for itself.

Strange, isn't it, how state government works itself into righteous wrath over the way the federal government burdens it with unwanted costs and then has no qualms about doing the same thing to its own counties.

The best recent example of Frankfort's grievance against Washington has to do with the Medicaid program, which grows more expensive by the year because of federal requirements. The common refrain heard in the capitals of this state and others is that Congress mandates programs and leaves it to the states to pay for them.

Well, McCracken County might say the same thing about the state of Kentucky. The Office of Public Advocacy was established to see to the criminal defense of defendants too poor to pay for their own. The agency and its mission are creatures of the state. Yet, when the office does its empty pockets routine, part of the bill is foisted off on the counties.

McCracken County currently is under circuit court order to pay some defense costs in two homicide cases, generally labelled Chumbler and Stout. Four defendants in all are charged and three of them are considered indigent. They come from distant states, a fact that is sure to add to the expense of investigation and trial.

The state Office of Public Advocacy has a $2,500 limit on its fee for any private attorney, which is not much to defend a client ina complicated murder case. Furthermore, that doesn't take into account all the extra costs expert witness fees, investigations, examinations, travel expense.

The orders by Circuit Judge Bill Graves cover a defense attorney in the Chumbler case plus some unspecified expenses, and costs to talling more than $4,000 in the Stout case. The orders are under appeal.

The legal dispute between McCracken County and Judges Graves will prompt no comment here, as it involves conflicting interpretations of the statute establishing the public advocacy office.

What is important, in our view, is that the state live up to the obligation it has set for itself. That can not be done with unrealistically low caps on attorneys fees and by failing to recognize the extra expenses that go with a legal defense.

There is no quarrel with the defense having access to investigate resources, tests and expert witnesses. When an individual is on trial, possibly for his life, our system demands that he be given a decent chance to defend himself.

But there is concern that these items might tend to become openended and subject to abuse. That's always a possibility when someone else, in this case the tax payers, are paying the bill.And we share County Attorney Fred Grimes' worry that the two cases in question could be precedents to raid the county treasury every time an indigent is accused of a serious crime.

The General Assembly needs to take hold of the issue. If poor criminal suspects are to be defended at public expense and there really is no choice in the matter the legislature must appropriate the necessary money. Legal disputes over who is going to pay what, with the delays and uncertainty inherent in that process, should not occur every time a major criminal case comes up.

Editorial, *The PaducahSun*, Oct.1,1991
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PROFESSIONAL STANDARDS AND LEGAL AND ETHICAL COMMANDS PREVENT A PUBLIC DEFENDER FROM TAKING UNLIMITED CASES

Compliance with the Kentucky Supreme Court's ethical rules, the American Bar Association's (ABA) Criminal Justice Standards, and caselaw limits the number of cases one attorney can handle.

KENTUCKY SUPREME COURT ETHICAL RULES: *NO WORK PERMITTED BEYOND WHAT ATTORNEY CAN COMPETENTLY DO*

The Kentucky Supreme Court through its *Rules of Professional Conduct*, SCR 3.130, has instructed Kentucky lawyers about their ethical duties. In order to practice in an ethical manner, an attorney in Kentucky must provide representation which is *competent*:

> A lawyer shall provide competent representation to a client.
> Rule 1.1.

The Court has detailed requirements of competent representation:

> Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
> Rule 1.1.

A Kentucky lawyer is not permitted to represent a client if the attorney is not qualified to handle the type or level of case involved, or the attorney does not have the time due to other work to provide the necessary representation.

The Supreme Court has determined by its rules that a Kentucky attorney is ethically prohibited from representing a client if "representing the client is likely to result in violation of the Rules of Professional Conduct or other law." Rule 6.2(a). As the Commentary to Rule 6.2 states, "For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel... Good cause exists if the lawyer could not handle the matter competently...."

AMERICAN BAR ASSOCIATION NATIONAL STANDARDS: *PUBLIC DEFENDERS SHOULD NOT ACCEPT WORKLOADS THAT PREVENT QUALITY REPRESENTATION*

The American Bar Association, the largest voluntary professional organization, has national professional standards which set out what the legal profession requires: "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." ABA Standards for Criminal Justice, *The Defense Function* (1991), Standard 4-1.2(b).

The ABA Standards specify a lawyer's duty to insure that the amount of work is not permitted to rise to a level that prevents effective, quality representation: "Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations." ABA Standards, *supra*, *The Defense Function*. Standard 4-1.2(c).

"Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations." ABA Standards, *Providing Defense Services* (1990) Standard 5-5.3(a). "Special consideration should be given to the workload created by representation in capital cases." *Id.*

See generally Fortune & Underwood, *Trial Ethics* (1988) §14.2 Competency at 382.

FORMAL ETHICS OPINIONS

In the Wisconsin State Bar Committee on Professional *Ethics Opinion E-84-11* (Sept. 1984) determined that a staff lawyer in the state public defender office must decline new cases assigned by the attorney's supervisor if the workload makes it impossible to prepare cases adequately and represent clients competently. The public defender should continue representation in pending cases only if competent representation can be provided. The attorney's supervisor may not assign lawyers new cases to a public defender employee whom the supervisor is aware that increased workload would be unmanageable.

A digest of that opinion is as follows: "Full-time staff lawyers in a state public defender office have no direct control of their caseloads, but instead must accept cases assigned by supervisors. Because of various political pressures, supervisors may be forced to attempt to reduce costs and/or increase productivity, which results in increased caseload pressures for staff lawyers."

"When faced with a workload that makes it impossible for a lawyer to prepare adequately for cases and to represent clients competently, the staff lawyer should, except in extreme or urgent cases, decline new legal matters and should continue representation in pending matters only to the extent that the duty of competent, nonneglectful representation can be fulfilled. See Wisconsin Supreme Court Rule 20.32; cf. ABA Formal Opinion 347 (12/1/81) (legal services office lawyers should retain only those matters that can be handled in a competent, nonneglectful manner). In addition to declining new legal matters, a lawyer should withdraw from a sufficient number of matters to permit proper handling of the remaining matters. A lawyer who attempts to continue responsibility for substantially more matters than the lawyer can competently han-

dle violates SCR 20.32(2) and (3). See ABA Formal Opinion 347."

"Supervisors in a state public defender office may not ethically increase the workloads of subordinate lawyers to the point where the lawyer cannot, even at personal sacrifice, handle each of his or her clients' matters competently and in a nonneglectful manner. SCR 20.32; see ABA Informal Opinion 1359 (6/4/79). Although supervisors are not required to institute a system of priorities or waiting lists, such may be necessary to avoid a violation of SCR 20.32. See ABA Informal Opinion 1359.

"As to a staff lawyer's responsibilities to current clients in the event that the lawyer is terminated or resigns from his or her position with a state public defender office, the committee recommends reading Formal Opinion E-80-18, *Wis. Bar Bull.*, June 1984, at 69. It should be noted that "impossible" and "unmanageable" are subjective stands that may vary depending upon the individual circumstances involved. ABA/BNA *Lawyers Manual on Professional Conduct* at 511-512.

Arizona Ethics Opinion 90-10 (September 1990) addressed the ethics of public defender workloads, and their determination, after reviewing Rules 1.1, 1.3, 1.16(a)(c), 3.2, 5.1, 5.2, 5.4 and 8.4, was that a public defender office must reduce its caseload when the office has cases in excess of the number that would allow competent and timely representation. The individual public defender's evaluation of their workload must be given great weight as individual workload decisions are made.

SOME COURT DECISIONS

Courts take seriously a lawyer's duty to competently represent their criminal client, including public defender or appointed counsel cases.

An attorney who is not competent to handle a criminal case at the felony level cannot ethically represent the client who is constitutionally entitled to an adequate defense. *See Easley v. State*, 334 So.2d 630 (Fla.App. 1976).

A lawyer cannot be required by a judge to represent an indigent criminal defendant when the lawyer cannot competently perform because of inadequate preparation time. "Failure of an attorney to *decline* to perform such representation may result in disciplinary measures being taken against him." *Id.* at 507.

In *Easley*, the judge appointed a public defender to represent felony defendants at a preliminary hearing when the public defender who had the case and the file did not appear. Upon refusing the appointment due to lack of preparation and violation of Rules of Professional Conduct and effective assistance of counsel guarantees the trial court held the attorney in contempt and had the attorney incarcerated. The appellate court reviewed the contempt holding that the trial judge erred in "refusing to recognize [the attorney's] responsibilities under the Code of Professional Responsibility...." *Id.* at 508.

In *Matter of Beck*, 902 F.2d 5 (7th Cir. 1990) the court appointed an attorney under the federal Criminal Justice Act as appellate counsel for an indigent convicted defendant. The client's attorney, Beck, filed an appellate brief of less than 2 pages. The appellate court entered a show cause order asking Beck to explain his incompetent work. His response that he was a sole practitioner and this was his first appeal was found by the 7th Circuit to be an unappealing excuse. Suspending Beck for at least a year, and requiring him, among other things, to take an appellate advocacy course, the court reasoned:

> Members of the bar of the Seventh Circuit have an obligation to render competent services. Although the cumbersome mechanisms of professional discipline usually are reserved for lawyers who steal from clients, otherwise violate ethical rules, or frivolously vex adversaries, they are not so limited. It is an important part of the judicial office to ensure the competence and dedication of the bar, as well as its adherence to ethical standards. *United States v. Williams*, 894 F.2d 215 (7th Cir. 1990); *SEC v. Suter*, 832 F.2d 988 (7th Cir. 1987); *United States v. Gerrity*, 804 F.2d 1330 (7th Cir. 1986); *United States v. Bush*, 797 F.2d 536 (7th Cir. 1986); *El-Gharabli v. INS*, 796 F.2d 935, 938-40 (7th Cir. 1986). Defendants in criminal cases especially need the courts' aid. Indigent criminal defendants do not select their own lawyers. If counsel offer feeble assistance, meritorious defenses may go unclaimed, or defendants may languish in prison (as [appellant] is) while the court obtains a second lawyer to put up a stiffer defense. *Id.* at 7.

CONCLUSION

Under these standards, Kentucky public advocates, whether full-time or part-time, and DPA cannot ethically, professionally, or legally accept cases which create a workload that interferes with competent, quality representation.

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AN INTRODUCTION TO DUI REFERENCE MATERIAL

With the onset, July 1, 1991 of the "new" DUI law, even more citizens will be pulled, admittedly by their own actions, into the criminal justice system. The difference in these clients is that a large percentage of them will have no criminal record. They will be full-time employed. The average DUI offender can be the bank president coming home from his daughter's wedding, the local high school teacher having had a couple of beers at the ballgame, or you. With the *per se* violation, the average person has no clear clue as to when he/she crosses the line. As such, these people will be showing up by the hundreds at law offices all over this Commonwealth with their virtual livelihood on the line. As such, DUI court is no longer the place to "cut a good deal" or to let "the younger lawyers cut their teeth." As practitioners in DUI court, we owe it to these clients to be well-prepared and armed with sufficient legal/technical information to challenge the prosecution's case.

With those thoughts in mind, the following is a brief introduction to available DUI reference materials. No attempt was made to "rate" the resources nor was price considered. All of the material provided insight into the situation, and the differences were noted in an attempt to aid selection. There are most assuredly other resources and references available not included in this sample, and their exclusion was due to lack of immediate availability, not quality.

TITLE: DEFENSE OF DRUNK DRIVING CASES

AUTHOR: Erwin, Richard C.

PUBLISHER: Matthew Bender

TYPE OF RESOURCE: 4 Volume, Loose Leaf, Updated 3 Times Per Year

ADVANTAGES: Erwin is a comprehensive treatise on virtually all aspects of drunk driving practice. Access to the information is provided through 3 sources: (1) a comprehensive index; (2) a detailed section by section table of contents; and (3) a table of cases that are cited in the resource. The various breath alcohol measuring devices (Intoxilyzer, Breathalyzer) receive in depth treatment including the history, the scientific principle involved, problems with and attacks to the method or the machine, and sample direct and cross-examinations. In addition to a step by step outline to the practice of DUI cases, Erwin includes a chapter specifically devoted to the special problems and defenses to a *per se* prosecution. The reference is replete with sample motions, sample examinations, published studies, and sample instructions on almost any conceivable issue encountered in a DUI case.

DISADVANTAGES: Erwin is definitely a desk set. The table of contents is in Volume 1, the index is in Volume 4, and the material is spread out between. Each volume is cumbersome and therefore ready reference in the courtroom is hampered. As a comprehensive set, Erwin, by definition, contains a lot of material not directly relevant to Kentucky practice. As is true in many legal treatises, the update at times changes the text by page, paragraph and line. Where the original text, if found in other than Volume 1, this necessitates flipping back and forth between volumes. A lot can change between updates.

COMMENTS: Erwin is readable and well-annotated. For those just starting a DUI practice or those who, although not generally engaged in criminal work, from time to time find themselves in DUI court, Erwin is an excellent cornerstone for the library. For those with more experience and as reliance on the *per se* statute increases, some of Erwin will lose its day to day usefulness; however, the technical sections will continue to make Erwin a valuable resource.

TITLE: DEFENDING DRUNK DRIVERS

AUTHOR: Frajola, Walter J. and Tarantino, John

PUBLISHER: James Publishing Company

TYPE OF RESOURCE: Single Volume Loose Leaf Notebook

ADVANTAGES: Frajola points out the significant issues and problems encountered in the typical DUI case. Since Frajola is a biochemist, the book leans to scientific principles, explaining them in common sense terms. Specific sections are devoted to the various breath testing devices, with sample question and answer challenges to the Intoxilyzer and Breathalyzers provided in the appendix. Various helpful forms are incorporated throughout the text as well as specific examples of direct and cross-examinations in key areas. When updated, the new material replaces the old in the text.

DISADVANTAGES: Access to the information is through table of contents only. Case citations are representative, not exhaustive. My copy, although recently updated, failed to incorporate the effect of recent Supreme Court decisions that greatly effected the text presented.

COMMENTS: Frajola is a resource best suited for those who regularly practice criminal law but need extra insight into the specific issues involved in DUI litigation. The single volume is readily accessible, although the lack of index limits its effectiveness. The information presented seems pointed at the technical aspects of the case, although limited practical information is also included.

TITLE: DRINKING/DRIVING LAW LETTER

AUTHOR: Nichols, John

PUBLISHER: Callaghan & Company

TYPE OF RESOURCE: Biweekly Periodical, Cumulative Index Published

ADVANTAGES: Up to the minute reporting of significant developments in DUI case law and scholarly publications. The author directs the reader to related articles in past issues.

DISADVANTAGES: The digest format itself, particularly of the case decisions. Frequently, decisions are reported with insufficient citation to allow the ready retrieval of the case itself or with cites to trial court rulings. The eventual bulk produced by attempting to keep each issue in a retrievable system is a problem.

COMMENTS: A service of this type is crucial to the practitioner who concentrates on DUI law and/or one who needs to keep abreast of the latest trends. It will not adequately replace the treatises for the beginner or occasional practitioner. The editor is a nationally recognized expert in the field whose insight, through his commentary, is extremely helpful.

TITLE: HANDLING DRUNK DRIVING CASES

AUTHOR: Brent, Stephen and Stiller, Sharon

PUBLISHER: Lawyer's Cooperative Publishing Co.

TYPE OF RESOURCE: Single Volume Desk Book, Updated Annually By Pocket Part

ADVANTAGES: Each section of this resource contains annotations to relevant Am.Jur. and A.L.R. articles. Resource divided into broad chapters (ex. Initial Encounter to Arrest; Police Questioning) that are easily recognized by even the least experienced practitioners. Appendix of common forms. Information retrievable through table of contents, index, and table of cases. Detailed technical information, including deficiencies in and challenges to the various breath testing techniques.

DISADVANTAGES: To a small degree contains information helpful to an overall understanding of the field of study but not directly helpful, such as a history of enforcement techniques. Pocket part requires flipping back and forth through text.

COMMENTS: This resource is aimed at both the defense and prosecution of DUI. As such, it contains text, forms, and samples geared at the prosecution as well. In addition to the technical/legal aspects of DUI work, attention is given in this resource to being a DUI lawyer. Text is presented on setting of fees and forms are provided for sample retainer agreements.

TITLE: DRINKING AND DRIVING LITIGATION

AUTHOR: Nichols, Donald

PUBLISHER: Callaghan & Company

TYPE OF RESOURCE: Multivolume Loose Leaf, Updated, Notebook Form

ADVANTAGES: Nichols expands beyond DUI litigation and covers the related areas such as dram shop litigation, third party civil liability, postmortem evidence, *etc.* Like Erwin, it is comprehensive in scope. Multiple citations to relevant authorities are provided. Nichols contains both technical information and how-to advice. Of great advantage is the separate volume "trial notebook" containing checklists and forms and practical advice to guide the practitioner through a DUI case from initial contact through post trial action. There is a glossary of relevant terms used in the resource, as well as a bibliography of relevant published materials available. The information is adequately retrievable due to an index, table of contents, and table of cases. Detailed sections of the various testing techniques is provided, as well as common sense grouping of topics.

DISADVANTAGES: Multiple volumes require this resource to remain a library resource. The update refers to changes in text by page, paragraph, and line thus requiring flipping back and forth. The length of time between updates hampers reliance on this resource for up to the minute information.

COMMENTS: Nichols, the author, may well be the preeminent authority in this field. All of the other resources credit Nichols for contributions to the finished product. Nichols allows the practitioner to look to one resource for information on the DUI and the related civil liability issues. The "trial notebook" is an exceptional plus to using the resource. Like the Brent/Stiller resource, Nichols gives practical information into billing, retainers, and the aspects of law office management that a DUI practice involves. It is the most comprehensive resource reviewed due to its scope.

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TWO PUBLIC DEFENDERS SWITCHING SIDES WITH NEW JOBS

The scales of justice will tip toward the prosecution's side Thursday when 2 attorneys in the Paducah Office of Public Advocacy change jobs.Charlotte Scott, after 6 1/2 years as a public defender, will become an assistant to McCracken County Commonwealth Attorney Tom Osborne.Jane Osborne, a sister to Tom Osborne, will become an assistant attorney to Graves County Attorney Gayle Robbins."I couldn't be happier, "Tom Osborne said of Scott's employment to fill the position vacated 6 months ago when Donna Dixon returned to private practice. "She's got great experience and will be a big addition to the staff in this office and a big plus for law enforcement in the county." Osborne said he discussed Scott's employment with various police officers, "and they all said they supported it." Osborne said he and assistant commonwealth attorney Tim Kaltenbach handled all of the office's cases for the past 6 months and called the 3 1/2-week Chumbler-Kariakis trial "just one little bit" of the total workload. "You don't get to have many people like (Scott)," he said. "And, we're talking major support out of that position." "It's like having Christmas come around a second time," he said. Scott worked for 2 years with a private law firm in Louisville before becoming a public defender. Her cases have included practically every type of crime including capital murder. She said the office has been a great place to gain experience. "I loved being a public defender," she said. "I look forward to representing the citizens of the commonwealth now instead of just one citizen at a time." Don Muir, managing attorney, said the Paducah Office of Public Advocacy would have only 4 other attorneys to cover both McCracken and Graves counties - Patricia Bym, Susan Burrall, Bob Little and Carolyn Keeley.Muir said Jane Osborne had been in the office 2 years.The caseload in the Paducah office "is probably as heavy as anybody's in the state," he said.Although the normal staff includes 7 attorneys, Muir said he'd been told state funding had been frozen. Competing with private law offices is another obstacle."The beginning salary is roughly the same as the state police and you're talking about people who have three years of law school and a bar exam under their belt."

VERNE BROOKS
Sun Staff Writer

"Reprinted from the *Paducah Sun*."

CHANGING THE SYSTEM: RACISM AND CRIMINAL JUSTICE

THE CRIMINAL JUSTICE SYSTEM IS RACIST

I have been wearing a bow-tie for the past few months and the reaction has been interesting. At first I thought I would be accused of being a rocket scientist or perhaps a law school Dean or maybe even confused with Senator Paul Simon. But, that wasn't the case; instead many people inquired whether I was doing an imitation of Minister Louis Farrakham. Was that racism? Maybe.

A few years ago, I appeared in a suburban Cook County courtroom. My client was late and when the case was called, I stepped up to the bench. The judge looked up from his papers and asked me where was my lawyer; he assumed that I was the defendant. Was that racism? Probably.

I wrote, as Public Defender, articles in the *Chicago Defender*, a local newspaper serving the African-American community. In response to my articles, readers wrote in with questions. I received a letter from a mother of a defendant who had been charged with a felony. When she appeared in court she noted that the judge was white, the clerk, the court reporter, the sheriffs were white. Her question: whether the criminal justice system was racist, since the only black people in the courtroom were either defendants or victims. The answer to that question is yes, there is no doubt about it: *the criminal justice system is racist.*

In fact, the criminal justice system of the United States looks more and more like that of South Africa's every day. As the Sentencing Project has pointed out in its latest report, here in the land of the free and the home of the brave, black men are incarcerated at a rate of four times the rate of black men in South Africa, a tragic and revealing statistic.

LEGAL SYSTEM'S FAILURES

Unfortunately, the legal profession has not responded to the racism and crisis in the criminal justice system. Although there are approximately 800,000 lawyers in this country, fewer than 1% are in any way involved in defending the indigent and perhaps only 4% or 5% are concerned with criminal law or criminal justice.

Law school admission requirements and costs excluded many minorities who may be interested or inclined to deal with the criminal justice system. Our major law schools are turning out those content to write memos but unprepared or uninterested in defending liberty. More and more lawyers are representing a smaller percentage of monied clients, while those persons most in need of legal services are going unrepresented.

Legal education is not immune from racism. The complexion of most law school facilities remain devoid of color. It's only been in the fairly recent past that the ABA and the New York Bar, admitted African-Americans into their ranks.

CRIME'S DEBT

But the crime problem, as Earl Warren pointed out years ago, is largely the result of an overdue debt that our society has been unwilling to pay. It is clear, however, that our society is willing to pay some debts. For example: the billion dollar bail-out to the savings and loan industry and the six hundred dollars an hour the FDIC is paying private law firms to work on the saving and loan crisis; the massive resources the government was willing to devote to the Persian gulf war. Most commentators suggest that we will never know the total cost involved in that effort. So we choose to pay some debts and ignore others.

We have ignored the conditions that have created the problems of crime in this society. Those conditions which breed crime include the lack of meaningful employment opportunities, a failing public education system in our urban areas, poverty with all its ramifications and racism.

Today we have one million people locked up in jails and in prisons in this country. Over 50% are African-American males. We have more black men in our jails and prisons than in our colleges and professional schools. 45% of African-American children live in poverty. The number one cause of death for black men between the ages of 15 and 30 is murder.

Despite the fact that the average drug abuser, according to our former drug czar William Bennett, is a white male suburbanite, the "war on drugs" is concentrated in the African-American community, not for prevention and treatment but for enforcement and incarceration. Our failed policies are dramatically illustrated by the AIDS epidemic: 52% of the women with AIDS in the United States are African-American; AIDS is now creeping up to be the fourth and fifth leading cause of death for African-American women of child-bearing age; 53% of children in this country with AIDS are African-American.

THE NEW SLAVE CATCHERS

Back to the legal profession: I attended a recent conference discussing the American Bar Association's proposals for new sentencing standards and someone pointed out the need to reexamine the philosophy of the standards in light of information that the United States now leads the entire world in its rate of incarceration, in light of the fact that prison construction is becoming the number one domestic growth industry, that we are spending more money on constructing more prisons than new homes, that we have one correctional officer for every three inmates versus one teacher for every thirty students in our urban public schools, that the costs of our crime control/in-

carceration binge is now at about 16 billion dollars a year. And the response was"well, so what? The United States also leads the world in violent crimes." Although not often articulated, the sentiment among many is that African-Americans commit a disproportionate share of the crime and therefore deserve to be locked-up and incarcerated disproportionately.

I'm often asked why there is this disproportionate impact on and in the African-American community? The answer to me is obvious, particularly when you look at the historical, systematic and continuing oppression of entire generations and communities. In fact, I often wonder why more African-American, particularly in our urban areas, are not"criminals." Remember, it used to be a crime for an African-American to learn to read or write, a crime to marry, a crime to move or relocate from one community to another, a crime to speak the native language or to keep families intact.

The badges of slavery are not easily disposed of without lingering effects, especially in light of persistent and continuing racism as evidenced by police brutality, segregated housing, inadequate education and lack of meaningful employment opportunities. Today, it seems as though equal employment opportunity for African-American men exists only in the military and in jails and prisons. Don't forget inadequate medical care in our urban areas, lack of treatment and pre-natal care, hospitals failing all over inner city communities, an infant mortality rate for some African-American communities exceeding that of most third world countries. Given the historical perspectives and the odds, sometimes I marvel at the success rate of many African-American families and individuals.

Although one out of four young black men is under the control of the criminal justice system, either on parole, in jail or prison, or on probation, that means that somehow three out of four are managing to escape the dragnet, the new slave catchers. But it's not easy.

About a year ago, two young boys in a middle-class community in Chicago were on their way to the barber shop one Saturday morning. Suddenly a police car pulled up, called them over, slammed them against the car, verbally abused them, searched them, went through their clothes and wallets and, finding nothing, drove off. One of the young boys happened to be my son. I was stunned but he was not outwardly affected because he says he sees instances like this frequently.

Last fall two teenagers were waiting for a bus after a baseball game outside Comisky Park. A police car pulled up, ordered them into the car, drove them into one of the more racially hostile areas of the city, dropped them off where they were attacked, beaten and chased out of the community. I have just learned that the two police officers alleged to have committed this act were tried and acquitted at a bench trial.

WHAT DO WE DO?

So what must we do as lawyers and advocates in the criminal justice system, recognizing that at the sentencing stage it's almost too late? Clearly we must devote some efforts outside the courtroom to educate the public, change priorities and challenge the status quo. Inside the courtroom we must do the same and get creative; educate the judges, change priorities and, once again, challenge the status quo.

STRETCH THE LAW TO ACHIEVE JUSTICE

A few years ago I had a death penalty case where two black men were charged with murder of two white businessmen. The case was tried twice and both times the jury was hung. At the third trial the prosecutors excused all the blacks from the jury venire. This was pre-*Batson* and when I argued to the judge that this was unfair, he relied on the state of the law as it existed at that time. I argued that the law is living, breathing and subject to change; that generations ago it would have been illegal for me to even be in the courtroom arguing the case. He didn't buy my argument but eventually the case was reversed.

The point is we must stretch the limits of the law and make it change to provide justice for our people.

A good example is the Minnesota judge who declared the narcotics law in Minnesota unconstitutional for the disparate effect they had on African-American in that the penalties for those dealing crack were far more harsh than those dealing powder cocaine. She recognized in a courageous decision that "crack" was a drug largely confined to the African-American community because it was cheaper, while powder cocaine is used more often in the white community.

VICTIMIZATION OF THE DEFENDANT

I think we must point out that often there are two victims in the courtroom; not always, but often the defendant is also a victim and we must discover, point, and portray the environmental conditions that contribute to an individual's behavior. We must educate the judges about the defendant's community, the lack of resources, drop out rate in the high schools, lack of employment opportunities, *etc.*

PERSONAL WORRIES

For me, these issues are personal as well as professional. I have a sixteen-year-old son and I'm concerned that statistically he may have a better chance of being murdered or incarcerated than being educated and becoming a productive member of our society. I know that my eighteen-year-old daughter's life may be threatened by the AIDS epidemic and that her quality of life may be impacted by the generations of young black men incarcerated and on death row.

ADVOCATING FOR THE MARGINALIZED

We have the privilege and the responsibility of speaking for the voiceless, the restrained, the confined and the deprived. We must be clear and forceful.

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Randolph N. Stone, former Cook County Public Defender, now Clinical Professor of Law and Director of the Edwin F. Mandel Aid Clinic at the University of Chicago. Originally presented at the National Conference on Sentencing Advocacy in Washington, D.C., April 19, 1991. He will present at the KBA Annual Convention in Lexington on June 6, 1992 on Racism and sexism, and funding in the criminal justice system.

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WHAT DOES A FAIR CRIMINAL JUSTICE SYSTEM REQUIRE OF US?

On April 14, 1991, Steve Durham and Ernie Lewis spoke to the Sentencing Task Force established by the 1990 General Assembly. On behalf of the Kentucky Association of Criminal Defense Lawyers.

We talked to the Task Force as public defenders who had been practicing in the trial courts for many years. We did not present reams of statistics, nor did we speak from the perspective of criminologists. Rather, we spoke as criminal defense lawyers.

It is important in discussing sentencing to recall what sentencing laws should be. Sentencing laws in a state should be simple so that those required to apply those laws, probation and parole officers, judges, lawyers, can understand and apply those laws. It is important for the laws to be consistent, so that litigants before court believe that they have been treated equitably. And flexibility is important, because laws cannot be written in such a way that every situation and scenario can be addressed.

The common law in Kentucky did anything other than meet these goals. Rather, that law was "a product of historical accidents, emotions, and the comforting political habit of adding a punishment to every legislative proposition." "The Kentucky Penal Code", by Hon. Frank Haddad, Jr., *The Advocate*, April, 1991, quoting Prof. Kathleen Brickey. Mr. Haddad has done the entire bar a wonderful service by this well researched and written historical perspective. (We handed the article out to members of the Task Force).

The Kentucky Penal Code, passed in the early 1970's, did much to correct these problems, and to achieve the goals of simplicity, consistency, and flexibility. It was simple, with its four levels of felonies. Class C felonies were constructed as the norm. Class B felonies generally were defined as aggravated Class C felonies. Class A felonies were reserved for the most serious of crimes. All persons convicted of crimes, however, were eligible for probation. The jury fixed penalties based only upon the crime itself rather than extraneous facts selected from a person's background. The judge sentenced as an expert, taking the jury's decision regarding the crime, and adding to it the information from the PSI and his/her experience in order to make a decision on probation, concurrency, or modification. The Penal Code was also consistent, an integrated whole. By and large, all persons were to be treated equally within the guidelines established in the statute. Flexibility was the greatest strength of the Penal Code. The Code did not try to set out in advance those cases in which probation would be inappropriate. Rather, it established a flexible system so that a sentencing court could decide based upon all the factors before him what a fair and appropriate sentence should be.

Since that time, much has been done to dilute the Code, and to return it to the pre-Code hodge-podge days. It is no longer as simple as it was. For example, one need only try to make consistent KRS 533.030, 532.045, and 533.060 to realize that simplicity is disappearing. It is no longer consistent. The philosophy of sentencing is no longer that all are eligible for probation. Rather, the legislature has been carving out egregious situations in which they believe the power to place a defendant from eligibility for probation should be removed from the sentencing judge's discretion. Some statutes are contradictory (see 533.060 and 532.110, or the parole eligibility of PFO 1st vs. a violent offender, to cite two examples). Flexibility in sentencing has now been reduced, with the judge having no choice in many cases to deny probation. The result is that politics have been served, but in many cases injustices have occurred because sentencing judges have had no discretion to do what they otherwise might have done.

More specifically, six post-penal code changes have occurred that have wreaked considerable damage to our sentencing laws:

1. **The passage of KRS 533.060**. The use of a gun as written into the Code had already resulted in numerous Class C felonies being treated as Class B felonies. 533.060 added an additional hammer to the use of a gun. One could conjure numerous situations in which a gun is used, perhaps by a co-defendant and probation would still be appropriate under the circumstances. Section two of the statute made mandatory denial of probation and consecutive sentences for numerous individuals, irrespective of the circumstances, for those persons committing crimes while on probation or parole. Section three took away from the judge the decision regarding whether to sentence concurrently or consecutively for those persons committing crimes while on bail. In all of these instances, the legislature tried to imagine situations where they believed that probation was inappropriate, selectively taking away power from the sentencing court. Courts have been complicitors in this. See *Martin v. Commonwealth*, Ky. App. 777 S.W. 2d 236 (1989), *Riley v. Parke*, Ky., 740 S.W. 2d 934 (1983), and *Devore v. Commonwealth*, Ky., 662 S.W. 2d 829 (1984).

2. **KRS 532.045**. Here the legislature excepted out of the statutory scheme virtually all sex offenses, irrespective of the facts and circumstances, irrespective of treatment the perpetrator may be getting, irrespective of the family situation and the harm that will be done by removal of dad from the family. The legislature made a decision that the touching of a child by a now treated dad is more harmful than beating that same child to the point of death.

3. **The presumption of probation** is not being followed in many places. The Penal Code set up a presumption of proba-

tion. The reality is that the restrictive statutes were not necessary because the presumption is not being followed anyway. There are places where judges never probate anyone; there are other places where probation is only granted for first time, young, Class D felons where the victim is a scumbag.

4. **Truth-in-Sentencing.** This is the best example of political, anecdotal law making, a law passed in response to George Wade not receiving the death penalty. This statute, in addition to all its other mischief, allows the jury to sentence based upon a confusing and sometimes irrelevant misdemeanor record, and restricts the defendant from putting in anything other than that which would rebut what the Commonwealth has proven. The one day trial is virtually a thing of the past. Many trial judges and both prosecutors and defense lawyers hate it. And most seriously, this statute, and specifically KRS 439.3401 allows for the equivalent of life without parole in cases where death has not occurred, much less non-aggravated murder.

5. **The exponential use of PFO.** While there was an arguable need for PFO prior to truth-in-sentencing, that need no longer exists. People who commit violent crimes are now serving longer time in prison under the truth-in-sentencing statutes. The Parole Board is making parole virtually non-existent. And yet, as if law enforcement did not have enough tools, they can take a nonviolent offender with two prior nonviolent offenses and force him to spend ten years in prison with no chance of parole. This law can create immense injustice and inequity between persons in different jurisdictions. Another problem with PFO is that some prosecutors use it as a plea hammer. Many persons with substantial defenses, or perhaps who are innocent, end up pleading to one or two years in order to avoid the parole eligibility of PFO I. Now that misdemeanors are being enhanced in numerous situations, including traffic offenses, one can imagine the potential for injustice. PFO is an unnecessary, nefarious law that needs to be abolished.

6. **The disappearance of parole.** Many persons with short prison terms of one and two years are being denied parole and having to serve out their sentences, often without ever leaving the county jail. People who pled guilty 6-8 years ago under a different parole board, with the expectation of parole, are now being informed that they were seriously in error at the time of their plea. As the word spreads, more and more cases should and will be tried. I now tell all of my clients that if they plead guilty they need to be prepared to do all of the time to which they are pleading, because that is the new reality.

The effects of these changes are obvious. There is serious overcrowding in our nation's and state's prisons. Costs are becoming intolerable, as corrections becomes the taxpayers' black hole. I believe that there is an increasing sense of inmates' doing time who are being treated unfairly. This will be a harvest in the years to come that we will not want to reap.

And yet, at the same time, persons in politics continue to deny the reality of all of this, preferring instead to use the criminal justice system as one of the last solid ways of getting votes. What can be better to talk about than Willie Horton? One can take a strong position on crime and criminals and never have to face the hard issues facing our state and country.

What did we recommend?

1. Eliminate or rewrite PFO so that it applies only to those who are indeed persistent and incorrigible, and against whom the violent offender statute does not apply. We also suggested examining the elimination of Class D felonies altogether from the definitions of underlying felony and felonies for which enhancement is possible.

2. Rewrite 532.060 and 532.045 so that both statutes would establish factors the judge should consider when looking at the probation question, rather than creating absolute probation prohibitions as they do now.

3. Abolish or rewrite substantially the entire Truth in Sentencing Statute, including the Violent Offender Statute. We recommended that in doing so, take time, include thoughtful prosecutors and defense lawyers and judges, and only act based upon reason rather than passion.

4. Restore the cap written into 532.110 and destroyed in *Devore*.

5. Eliminate the possibility of double enhancement.

6. Quit reacting anecdotally. Every time there is a new variation or situation, that does not mean we need a new criminal law. Recognize that the crime rate has a lot more to do with family dysfunction and poverty than it has to do with the deterrent effect of penal laws passed by the legislature.

7. Involve the criminal defense bar more in the writing of new criminal law legislation.

In closing, a decade ago we in this nation incarcerated 230 people per every 100,000. In the past decade, our crime rate increased by 1.8% Yet, we now incarcerate 407 out of every 100,000, more than any other country in the world. We must reverse this trend in order to return a sense of fairness and balance to our criminal justice system

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The *Advocate* has been focusing on racism in the criminal justice system in a continuing series of articles, interviews and tables.

This series has been compiled in a 58 page booklet and is available from The Department of Public Advocacy for $4.00 the cost of xeroxing and mailing. Make your check out to Kentucky State Treasurer and mail to:

Racism Reports
The *Advocate*
Department of Public Advocacy
1264 Louisville Road
Frankfort, KY 40601

JUSTICE CABINET RECEIVES 54 TIMES THE DOLLAR INCREASE OF PUBLIC DEFENSE OF POOR

The Administration's proposed budget for FY 93 and FY 94 shows DPA a continued step- child.

Judiciary Increased 8.8%; DPA Increased 3.3%

The percentage increase for the 92-94 biennium in state funding for the following agencies and for the entire state budget is:

1) Judiciary 8.796%
2) Total State Budget 8.706%
3) Justice 7.512%
4) Public Advocacy 3.289%
5) Prosecutors 3.173%

Justice Receives $18.3 Million; DPA Receives $337,100

The proposed dollar increases for FY 94 over the actual state funding in FY 92 for the following agencies is:

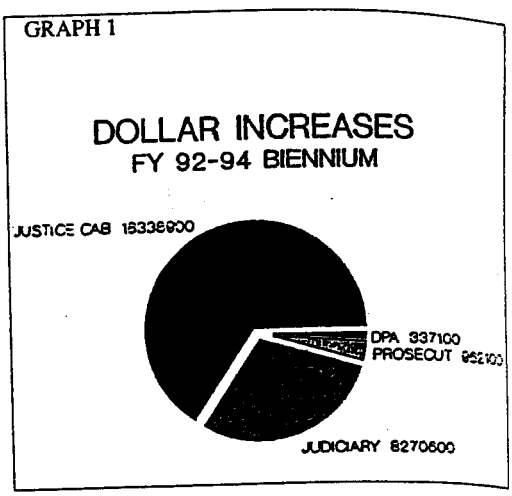
1) Justice $18,338,900
2) Judiciary $8,270,600
3) Prosecution $962,100
4) DPA $337,100
(See Graph 1)

Under the proposed funding, the Justice budget jumps from actual FY 92 funding of $244,129,600 to FY 94 funding of $262,468,500. The Judiciary jumps from $94,029,300 to $102,299,900. Prosecutors increase from $30,317,200 to $31,279,300. DPA increases from $10,248,200 to $10,585,300. The total state budget jumps from $4,505,787,300 to $4,898,052,900.

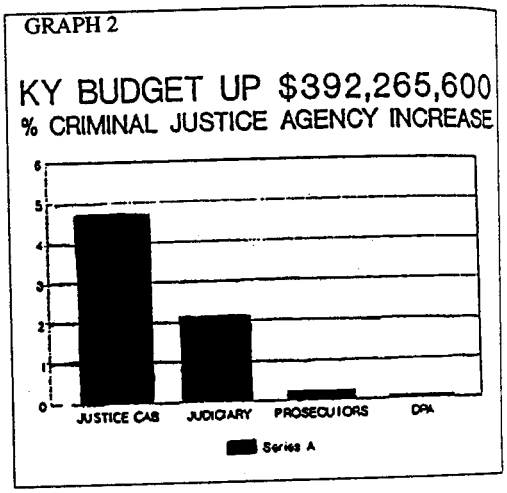
Step- Child Status of DPA

In the proposed budget for FY 94, Justice receives 54 times the increase in dollars as does DPA. The Judiciary receives 24 times the increase in dollars as does DPA.Over the biennium, the state budget increases $392,265,600 (8.7%). Of the $392.2 million increase, the Justice Cabinet receives 4.675%, the Judiciary receives 2.108%, Prosecutors receive .245%, and DPA receives .086%. (See Graph 2).

GRAPH 1



GRAPH 2



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