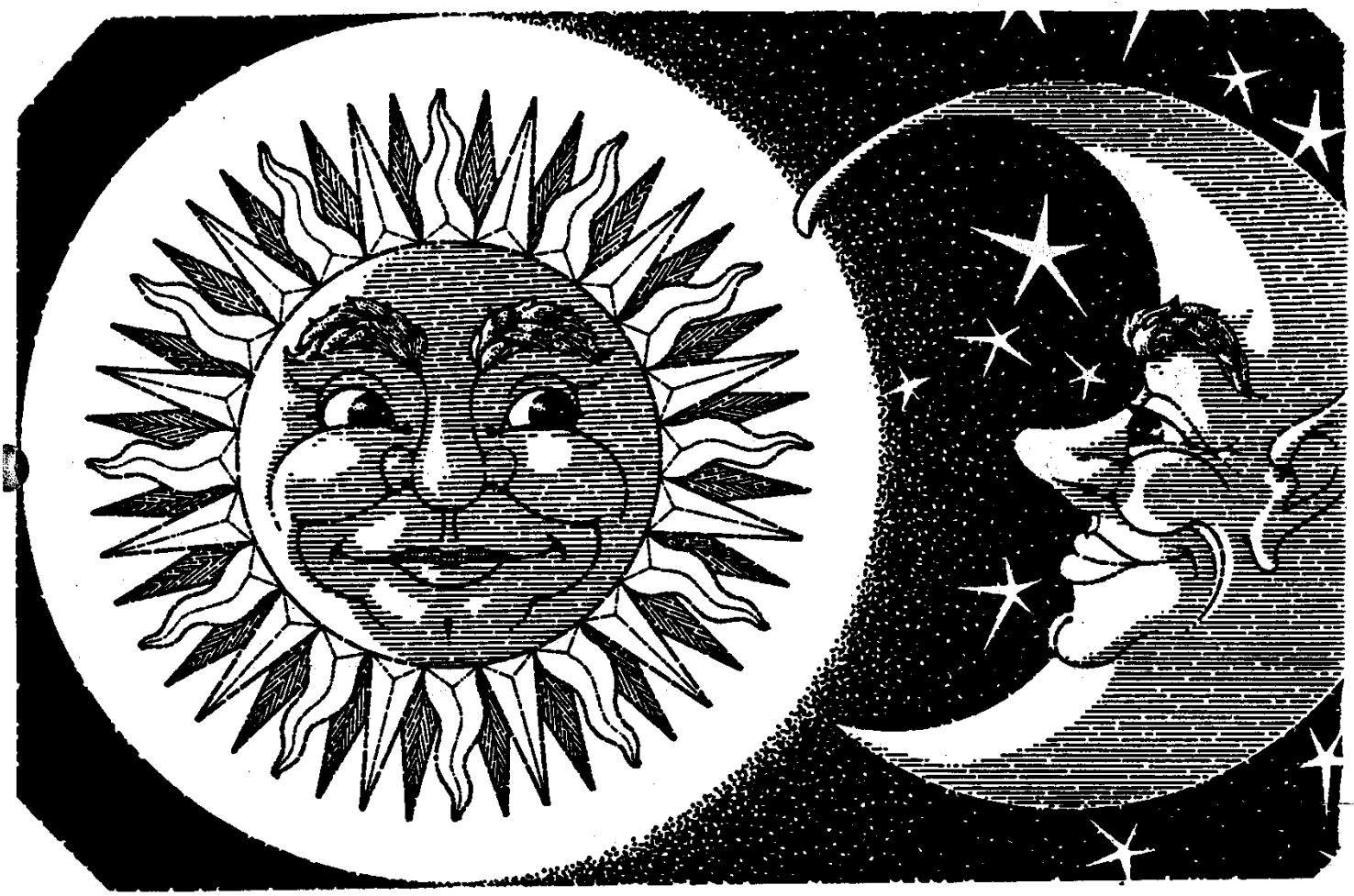
The Kentucky Department of Public Advocacy's Journal of Criminal Justice Education and Research

THE ADVOCATE

The Means of Defense for Those Without

Volume 15, No. 5, November 1993



Change

All people, rich or poor, have an absolute right to justice and equality before the law.

FROM THE EDITOR:

In today's whitewaters, challenges, change, and increasing customer demands are inexorable. An organization which seeks to effectively traverse the white-waters must continuously assess its structures, processes and leadership. The organization must strategically plan for the future journey. This issue of *The Advocate* describes DPA's organizational development and strategic planning efforts.

The work of the Governor's Task Force on the Delivery and Funding of Quality Defender Services through its first three meetings is summarized in this issue. The Task Force affords Kentucky's defender community hope that its longstanding needs will be recognized and met with the infusion of additional funding and a long range, permanent solution to delivering services.

Twenty years ago Wendell H. Ford called us all to work hard to see that the criminal justice system has the credibility to insure the confidence of the people that justice is being done. Defenders have the critical job of seeing "that justice works the same for rich and poor alike... the poorest of those least able to protect themselves must stand on equal legal footing with the corporate executive or the presidential advisor." Then Governor Ford's remarks are reprinted in this issue.

Speaking of change, the mental health community continues to discover the realities of the *cycle of violence* that we defenders know intimately from our experience. We bring you a significant 1992 study sponsored by the National Institution of Justice.

Edward C. Monahan, Editor

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Paid for by State Funds KRS 57.375 & donations.

IN THIS ISSUE

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.

Credibility of the Justice System:
Defenders Insure Justice Works for the Rich & Poor

The following remarks of Governor Ford were made at the May 11, 1973 1st Annual Public Defender Conference with Tony Wilhoit serving as Public Defender.

Too often crime and criminal justice are used as vehicles to gain public office. Politicians playing on fear and images resort to negative sloganeering such as being "soft on crime" or accusing the courts of "coddling the criminal." I have pledged my administration to take a more positive approach to the critical need for action in criminal justice. Crime is a complex problem, and it can only be solved by an integrated strengthening of the entire criminal justice system, from the policeman on the beat to the parole officer.

Let me mention a few of the programs that have given Kentucky a reputation as being one of the most progressive states in the country in criminal justice: a 15 percent salary supplement for local police if standards are met; special units for organized crime and narcotics investigation; modernizing communication and information systems on a statewide basis and tying-in with the FBI in Washington; new crime lab facilities, from mobile units for on-the-scene investigation to sophisticated central labs for detailed work; seven new circuit court justices; a study of the entire court system to see where changes may be made - "justice delayed is justice denied"; a revision of the criminal code; a Prosecutor's Assistance Division in the Attorney General's Office to aid local prosecutors; and an upgraded standard for members of the State Parole Board to professionalize it; and new techniques in rehabilitation rather than simply punishment (smaller facilities like the Blackburn Correctional Complex, work release, shock probation, and the forensic center).

These and other programs are designed to fight a realistic war on crime, a war we think we can win. They are based on the belief that criminal justice is a system, not just a slogan. One of the most important ingredients in any criminal justice system is credibility. If the people don't believe that the system is capable of protecting their well-being, property, and rights, they are going to shrug it off and go their own way. We know the unhappy consequences of the law's failure to meet the just expectations of those governed by it. Law loses its stabilizing influence. At best, the results are alienation and lack of trust in the legal system. At worst, there is unrest and violence.

Charged with the responsibility of defending those who face prosecution, yet cannot afford an attorney, you and your colleagues must see to it that no person is denied his right to equal protection under the law and to due process simply because he is poor. Your job is not, as some mistakenly believe, to free the guilty, but rather it is to see that justice works the same for rich and poor alike. Let no one think that crime is found only among the poor. It can reach into the boardrooms of corporations and even into the White House itself. Still, under our system of law, the poorest and those least able to protect themselves must stand on equal legal footing with the corporate executive or the presidential advisor.

Your job, just as mine, is to serve the people. You must be prepared, and I know you will be, to champion the causes of many whose cases are not popular. You must be prepared to seek the truth wherever it takes you and to devote all of your professional skill and competence to your client. In terms of money, your rewards will not be great, though professionally, your rewards should be. You will know that you have lived up to those high standards long established by the legal profession.

You are all qualified to do a professional job in meeting the commitments of a public defender, but professional ability cannot alone achieve the kind of justice we are seeking. The best public defender system in the world is rendered useless if nobody knows about it. I wonder what the results would be if a poll were taken today, asking people what a public defender is or if they know whether there is one in their state? My question to you then is, "How are you going to make yourself visible to the public you serve?" Without the visibility, all of the good intentions we have will be in vain. We have the potential to show the nation how justice can and should work. The mechanism has been established, the program has been funded. Now it is up to you to see that it becomes a reality.

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RESTRUCTURING FOR EFFECTIVE ADVOCACY

The Reorganization Efforts of the Department of Public Advocacy

Public Advocacy's goal is to implement organizational changes which will more effectively and efficiently maximize available resources, yet respond to the needs of the public defender system through a quality-driven, custom-oriented state government structure.

Allison Connelly
Public Advocate, March 1993

INTRODUCTION

The mission of the Kentucky Department of Public Advocacy (DPA) is to provide legal representation for all indigent criminal defendants at every stage of the criminal justice process and to advocate on behalf of the developmentally disabled, the mentally ill and the mentally retarded.

It was with renewed attention to its mission in early 1991 that the DPA undertook the task of examining the connections between that mission and the organizational structure that delivered services to clients and customers. That reorganization, the first since 1985 and the only major restructuring since 1980, was the result of a conscious, systematic process. The goal of this process, called organizational development, or OD for short, was to increase the department's effectiveness, to institute quality methods and to continuously improve its services. From a strategic perspective, it reflected and anticipated a variety of streamlining initiatives at the national and local levels.

The intent of this narrative is to describe, from a consultant's point of view, the process used by the department to reorganize which led to the final cost saving organizational structure. Charts are provided which illustrate the step-by-step process. However, rather than elaborate on the specific organizational details of the restructuring, this account focuses on three key dimensions that characterize the *process* of the reorganization: that it was deliberate and informed; participatory and committed; and, mission-driven and future-focused. A few concluding comments return to the theme of organizational development and the criteria of successful OD projects.

A DELIBERATE AND INFORMED PROCESS

In the spring of 1991, it was apparent that the department's leadership organizational structure needed attention. Caseloads had grown dramatically, internal processes seemed unresponsive or completely lacking, judges, social workers, and clients complained of lack of service, and staff turnover was high. Serious attention to these problems called for forthright steps.

The first step to address these critical issues occurred in July of 1991. The Defense Services Division initiated a survey of some 150 employees. The intent of the survey was to consider employee perceptions of the organization, its work and its processes. While the response rate of 16% was low, the survey findings confirmed the perceptions that the key problems were widely experienced.

At this juncture the department's leadership went further in its commitment to problem identification and analysis by requesting the assistance of an external consultant to facilitate the process. While somewhat familiar with the work of the Department of Public Advocacy, the consultant, representing Governmental Services Center at Kentucky State University, had considerable experience in organizational development projects leading to reorganization. Together with the leadership, the consultant outlined a process where attention to the problems could be focused and connected with an appropriate reorganization.

In August 1991, the Public Advocate and the managers of the Division of Defense Services convened a strategic planning session. Utilizing the results of the earlier limited survey, the session devoted its attention to the department's key strategic components: mission, structure, key functions and strengths and weaknesses. The group also suggested many ways to improve the system. While there was agreement among the participants on the perceived direction, current organization and key functions, the discussion waxed spirited and divergent on the department's strengths and weaknesses and how systemic and structural improvements might be made. All participants agree that organizational restructuring to address problems was needed. However, there was little agreement as to the form such reorganization should take. Nonetheless, there was one consensus suggestion for improvement: to conduct an administrative review or "quality audit." The audit's purpose was to diagnose particular problem areas, augment the earlier survey findings, and identify key priorities for attention in the restructuring process.

Accordingly, in the fall of 1991, at the suggestion of the consultant, the same group of managers decided to conduct a "quality audit" throughout the department. The intent of the instrument was not only to gauge and diagnose, but to involve as many departmental employees in the process as possible. That decision required all managers to explain the audit's purpose and use to their employees.

The decision to use the quality audit and to make it available throughout the organization was significant for three reasons: first, it allowed for participation by the entire organization; second, it yielded information pertaining to a broad base of employees and managers; and third, it signified a growing organizational ownership of the process of reorganization.

The quality audit instrument is based on the seven categories of the Malcolm Baldridge Quality Award. It was adapted from private sector use for the public sector by Governmental Services Center. It is comprised of 169 statements dealing with the following topical areas:

1) Leadership;
2) Strategic Quality Planning;
3) Human Resource Utilization;
4) Information Analysis,
5) Quality Assurance;
6) Quality Results; and,
7) Customer Satisfaction.

(See Chart One)

Survey participants respond to certain statements on a scale of one to ten which indicates their opinion from

strongly disagree to strongly agree. Taken collectively, the resultant respondent data yields a composite picture of the organization in each topical area. As a consequence, perceived priority problem areas can be identified and evaluated and which allows for the formation of informed strategic decisions.

In December 1991 the audit was extensively discussed by Defense Services and further customized for department use. All employees were informed and invited to participate. With appropriate procedures for ensuring respondent anonymity, and with provision for both electronic and hard copy responses, the audit was administered. Some 45% of the total possible employees responded, a rate that augured well for the generalization of the data.

The results indicated key needs and strengths in each of the seven topical areas. For example, in terms of needs, the results showed the following:

1) Leadership -- increase communication from the Public Advocate to all employees;

2) Strategic Quality Planning -- greater use of internal process information, *e.g.* the status and disposition of cases;

3) Human Resource Utilization -- increase employee satisfaction factors, *e.g.* identification of measures that affect employee morale and well being;

4) Information Analysis -- focus on identifying internal standards for support, *e.g.* the need for establishing benchmarks such as timelines, accuracy and routing of documents for internal support services;

5) Quality Assurance -- track results more carefully, *e.g.* the need to use process control information to update and improve day-to-day operations;

6) Quality Results -- focus on selected effectiveness measures, *e.g.* the need to use trend information for key measures of supplier quality of services; and

7) Customer Satisfaction -- respond to suggestions and recognize front-line accomplishments, *e.g.* the need to consider employee suggestions and celebrate employee service achieve-ments to customers.

The results of the audit indicated a number of departmental strengths as well. In summary they were:

1) a strong sense of organization mission and goals;

2) effective methods to improve and evaluate education and training efforts;

3) the department's capability of gathering levels of information on pertinent regulations;

4) the department's commitment to assuring quality services to its customers;

5) the department's commitment to service reliability; and,

6) the department's accessibility to customers who want to comment on the quality of the organization's services.

Informed by results of the quality audit, the managers then proceeded to the question of reorganization; that is, how best to restructure to address the department's mission, the internal priorities and external expectations. Six alternative structures were vigorously advocated and widely discussed in staff meetings around the state. Much input was offered, shared and evaluated in the managers meetings throughout the winter and spring months of 1992. Eventually, several structures were identified that reflected the mission, incorporated the survey findings and the quality audit priorities and anticipated future developments. Moreover, by flattening of management in the new structure, the department was able to save several thousands of dollars.

A PARTICIPATORY AND COMMITTED PROCESS

While the process of restructuring was systematic and disciplined by work-related information, it also involved all levels of the organization. From the outset it enjoyed the support of the Public Advocate, two of the division directors and the branch and section managers. Moreover, the decision to involve all employees in the department yielded deep and wide participation.

The quality audit -- in both electronic and hard copy forms -- elicited responses from Frankfort and field offices, attorney and non-attorney personnel, managers and non-managers. As a result, a reasonably accurate and broad-based set of perceptions could be inferred. Likewise, it was apparent from the responses that there was remarkable unanimity on the prime problem areas within each of the seven topics which comprise the quality audit.

A significant note on commitment to the process occurred at about the time the quality audit was administered in late 1991. Although the Public Advocate accepted another professional opportunity, the newly-appointed interim Public Advocate forthrightly supported restructuring, and the project went forward with little loss of momentum. That continuity of commitment and support was critical to the success of the reorganization process.

A MISSION-DRIVEN AND FUTURE-FOCUSED PROCESS

With the decision to appoint a new Public Advocate in July 1992, the process moved at a slower speed. Multi-layered discussions of the department's major needs and strengths and their relation to the proposed structure, continued to focus on a variety of topics. Key barriers to department's effectiveness were reassessed, while the organizational structure developed a short-term and long-term component. What evolved was the ground work for a cost saving, management lean structure which instituted total quality leadership values and techniques, quality methods training, team building, benchmarking and customer input.

Above all, the Department of Public Advocacy sought to sharpen its focus on the mission and to bring its structure into appropriate alignment. In doing so, the agency demonstrated a clear intent to be serious about its direction, its strategies, the quality of its services and its commitment to its clients. What began as an internally-initiated act of self-examination by one division, resulted in a two-year

process of complete reorganization for the majority of agency functions.

The consequence of that process is represented in Charts Two, Three, and Four. These charts show, respectively, the progress of reorganization from the 1985 structure, to the present (new structure), to the envisioned structure contingent upon the Governor's Task Force forth-coming review and approval.

In essence Chart Three, the new structure, represents a major attempt to streamline the organization in the short-term. The key measures are downsizing the middle management, cutting costs, facilitating communication between the Public Advocate and the front line and supporting those front line services. In this interim move, the department reflects other public defender organizations in benchmark states that are seeking to downsize. Furthermore, it anticipated the methods of the current Governor's Commission on Quality and Efficiency.

Chart Four, the envisioned structure, presents a long-term plan for consideration by the Governor's Task Force charged to review the state's indigent criminal defense system. This envisioned structure offers a plan comprised of five divisions which are organized according to the department's major functions:

1) trial;
2) post-trial;
3) capital;
4) protection and advocacy; and,
5) operations which provides management information, training and other key support services.

As with the present interim structure represented in Chart Three, the envisioned structure retains the streamlined organization.

On August 11, 1993, in Frankfort, Kentucky, Public Advocate, Allison Connelly, presented the reorganization to the Kentucky General Assembly Interim Joint committee on State Government for review and approval. There were no demurrals. Rather, the questions and comments by the legislators were directed to the nature of the department's work, the challenges of pursuing its mission, its funding and the quality and prospects for its future efforts. The virtual assumption by the reviewing legislators appeared to be that the department had anticipated the proper structure to pursue those worthy purposes.

CONCLUSION

In summary, the reorganization process undertaken by the Department of Public Advocacy appears to provide a model or, at least, a case study of organizational development. Typically, organizational development projects that are successful aim for three criteria.

First, they address *real needs* experienced by employees.

Second, they *involve* those employees in identifying the needs and in fashioning the means to meet them.

Third, successful OD projects take *appropriate action* to enhance the organization's culture to better realize its mission.

In this case those actions were major structural reorganization, increased employee participation, increased communication and feedback, greater opportunities for employee growth through involvement and training, and increased focus on customers/clients, both internal and external.

The department's efforts reflect those criteria of success. Continuous improvement is now a requirement for the organizational culture to match expectations from within and without. In this sense the dynamic process of restructuring for *effective* advocacy never stops.

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Chart One

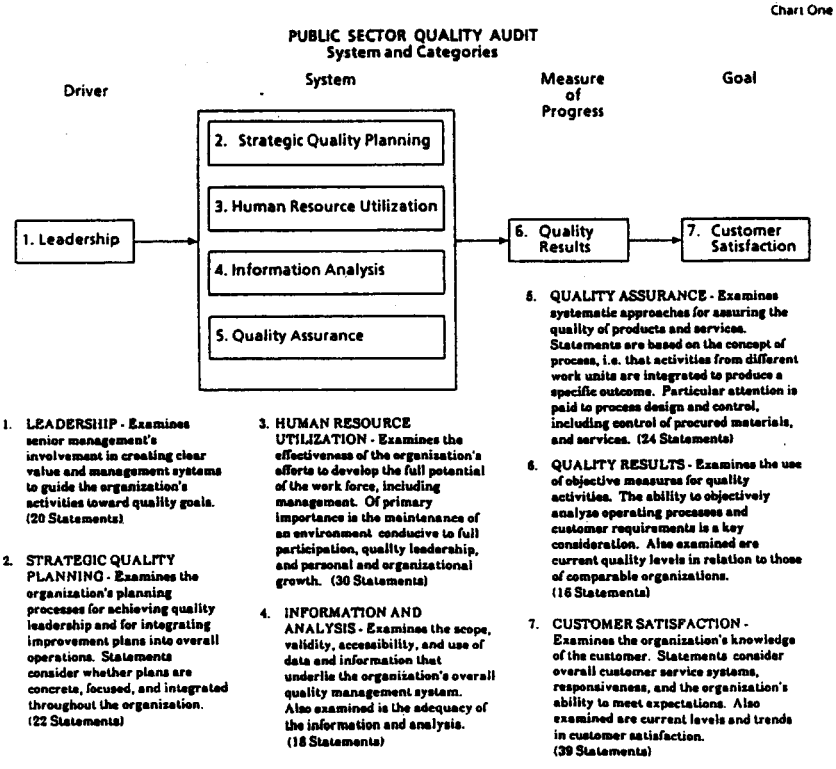


CHART TWO

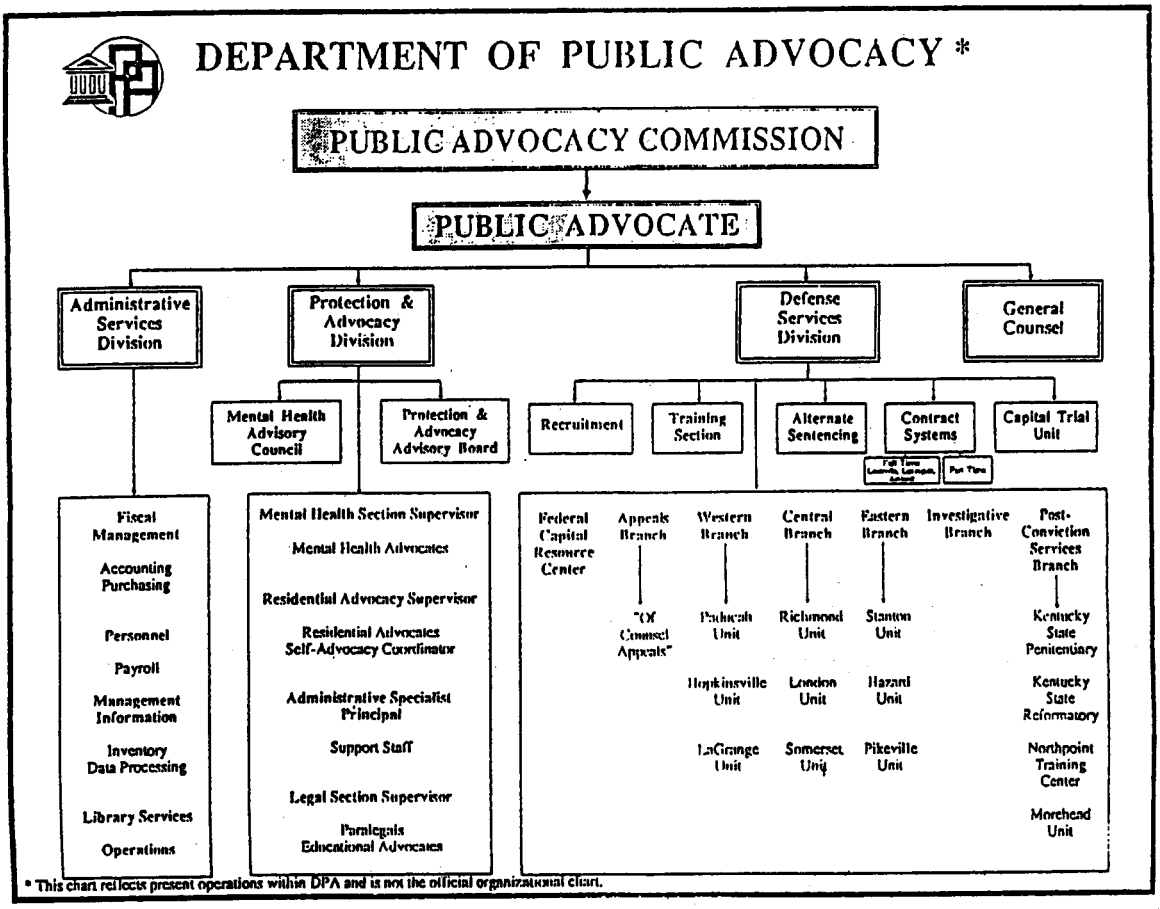
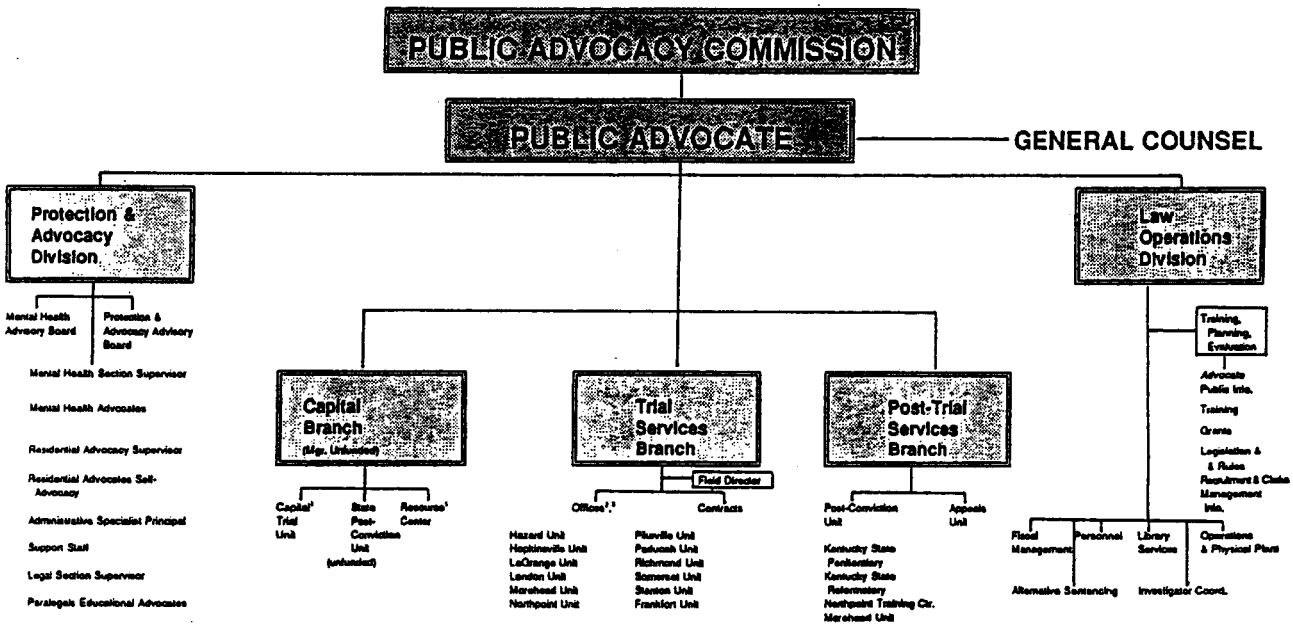


CHART THREE

February 8, 1993 As Implemented

DEPARTMENT OF PUBLIC ADVOCACY



[1] Funded entities with existing staff who will report to the Public Advocate.

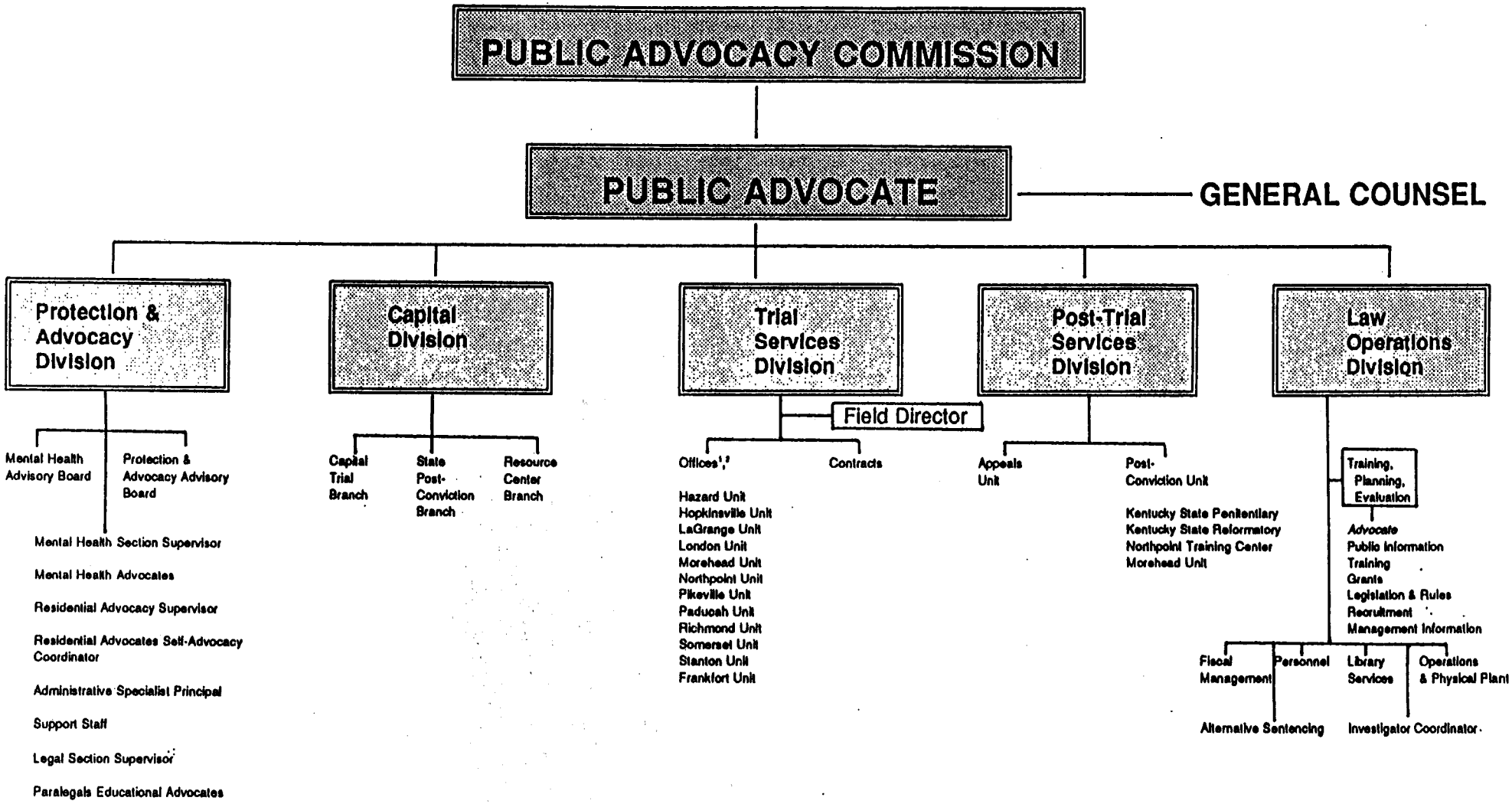
[2] Investigators are under Trial Director & Directing Attorney sole supervision.

[3] Eventually CTU Attorneys will be regionalized in the field.

CHART FOUR

Feb...y 8, 1993 As Envisioned

DEPARTMENT OF PUBLIC ADVOCACY



[1] Investigators are under Trial Director & Directing Attorney sole supervision.

[2] Eventually CTU Attorneys will be regionalized in the field.

Defender Excellence Into the 21st Century

History of Public Advocacy Commission & Defender Services Strategic Planning Process, 1989-1993

Organizations which distinguish themselves develop a plan with long range goals and a strategy for implementing those goals with the appropriate short range goals. The Department of Public Advocacy and its Commission have developed strategic plans through several processes since 1989. Most recently with significant input from all defender staff, DPA's leadership has created a strategic plan until the year 2000. To place the current plan in context, we review the planning process since 1989.

I. 1989 DPA Defender Services Planning Meeting

At the Vest Lindsey House in Frankfort on June 1 & 2, 1989, with the facilitation of Mike King of Governmental Services, the DPA Defense Managers and Public Advocate met for a day and one half and conducted an Executive Retreat.

The past and present of Kentucky's indigent defense were assessed. We worked at discovering the future, with goal development, and personal action planning.

From this meeting, DPA statements of purpose were developed:

- To provide the highest level of professional services to our clients.
- To improve the overall quality of the criminal justice system.
- To efficiently manage our resources without compromising professional services.
- To provide and ensure effective representation and advocacy for all indigents accused and convicted of crimes and mental states.
- To ensure quality legal services to indigents accused of crimes, convicted/mental states with highly committed and trained lawyers through a full-time public defender system throughout the state.

Five-year Long-Term Goals identified at that meeting were:

1. **CAPITAL CASES.** To increase funding to develop a pool of qualified lawyers for capital cases (non-federal).
2. **QUALITY STAFF.** To recruit and retain full, quality staff.
3. **INDEPENDENCE.** To achieve professional and political autonomy including hiring and funding.
4. **FULL-TIME OFFICES.** To expand full-time the public defender trial offices state-wide where caseloads and economics merited this delivery mechanism providing interim full-time management for the contract systems.

II. 1989, 1990 Public Advocacy Commission Goals

At the 31st meeting of the Public Advocacy Commission on November 16, 1989 a subcommittee of the Commission recommended adoption of 6 long-range goals:

1. **BUDGET HELP.** Actively assist the Public Advocate in the budget request process.
2. **EVALUATION OF PUBLIC ADVOCATE.** Develop a process to evaluate the Public Advocate's performance yearly.
3. **FULL-TIME OFFICES.** Make the provision of services by the full-time delivery method a priority, and to create a long-term plan to achieve this.
4. **INDEPENDENCE.** Identify conflicts within the structure of the system which interfere with professional and political independence, and a plan to eliminate the conflicts.
5. **FUNDING.** Develop long-term plan of how to attack continued funding problems.
6. **SALARIES.** Improve salaries.

At the 32nd meeting of the Public Advocacy Commission on January 11, 1990 the Commission unanimously approved these goals.

III. 1991 DPA Defender Services Planning Process

At DPA's March 1991 Management Conference at the Seelbach Hotel in Louisville, each manager in DPA's full-time system, and from the Louisville, Lexington and Ashland systems, met under the facilitation of Larry Landis, executive director of the Indiana Public Defender Council, and envisioned our future in the year 2000 and the goals necessary to achieve that future. This envisioning process was preceded by a survey of the 38 persons in the system across the state who had any management responsibility.

At that 1991 Conference, we identified the following purposes of DPA:

Courts - access for poor
Constitutional Rights of all
Effective representation for poor
Superior representation for poor
Improve overall criminal justice system

From that Conference, the DPA Defense Services Managers developed the following goals for the next budget request:

FY-1992-94 BIENNIAL GOALS AND BUDGET PRIORITIES

GOAL I: FUNDING. To fund adequately the delivery systems in the three major urban areas:
A. Jefferson
B. Fayette
C. Northern Kentucky

To reach this goal through salary parity and adequate staffing.

GOAL II: **STAFFING.** To staff and equip adequately existing full-time DPA programs:
- A. Trial staff increases
- B. Appellate attorneys
- C. Post-conviction staff increases
- D. Contract county administration
- E. Training resources

GOAL III: **SERVICE DELIVERY.** To improve the delivery of public defender services in remaining existing counties:
- A. Additional full-time offices
- B. Funding remaining contract counties

GOAL IV: **STATUTE REVISION.** Revise Chapter 31 to:
- A. Guarantee professional & political independence of the Public Advocacy System.
- B. To ensure the efficient and effective delivery of services and to promote responsiveness and efficient management.

IV. 1993 DPA Defender Services Strategic Planning Process

In the winter of 1993 the Public Advocate and branch managers decided to conduct a long-range strategic planning process. The process was developed and produced by the DPA Law Operations staff with the consultation of Governmental Services.

In May 1993 a DPA Strategic Planning Survey was sent to each staff member in the DPA full-time offices, and Jefferson, Fayette, and Boyd counties.

The survey asked the following questions:

1. Purposes of the branch;
2. Strengths;
3. Weaknesses;
4. Values staff have;
5. Values we want to be seen as possessing;
6. The 3-5 key results which should be accomplished to insure continuous improvement, increased efficiency and quality service;
7. Evaluation of success and continued needs of past organizational goals:
   a. professional & political independence;
   b. recruit and retain full-time, quality staff;
   c. adequate capital case funding and representation;
   d. expansion of full-time offices statewide;
   e. parity of full-time defender salaries statewide;
   f. adequate funding and staffing statewide;
   g. revise KRS Chapter 31;
8. Any other thoughts.

The survey results were anonymous. Of the 219 surveys distributed, 61 or 28% were returned.

In June 1993 DPA Defender Managers met at the Kentucky Leadership Center for a 2-day DPA Strategic Planning Retreat. With the support of Sharon Marcum of Governmental Services and the facilitation of Mike King, generously on loan from the Corrections Cabinet, a mission statement and long and short-range goals were developed. The managers have met several times since the Retreat to complete the tasks, timing and assignment of duties. A copy of the full plan is available from DPA.

The long term goals follow. Achieving these goals remains in the hands of DPA's leaders throughout the Department, its entire staff.

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The DPA Leadership Team

With over 100 years of combined experience with the Kentucky DPA.

Front (l to r): Dave Norat, Director of law Operations; Allison Connelly, Public Advocate; Margaret Case, Director of Post-Trials; Ernie Lewis, Director of Trials
Back (l to r): Ed Monahan, Director of Planning, Recruiting & Training; Vince Aprile, General Counsel; Randy Wheeler, Director of Federal Capital Resource Center; Steve Mirkin, Contract County Adminstrator. {Absent: Rob Riley, Trial Field Director}

DPA LONG-TERM GOALS, 1993-2000

1. ADEQUATE FUNDING. Adequate funding for all components of the state-wide Public Defender system to insure manageable workloads and compensation parity with the other components of the justice system.

2. FULL-TIME OFFICES. Insure effective and efficient representation by creating full-time offices where justified.

3. ADEQUATE CAPITAL RESOURCES. Adequate capital case funding and effective representation.

4. QUALITY NON-CAPITAL POST-CONVICTION RESOURCES. provide quality post-conviction services in non-capital cases to Kentucky's convicted population.

5. PROFESSIONAL WORK ENVIRONMENT TO RECRUIT & RETAIN EMPLOYEES. Create a professional work environment to recruit and retain quality employees to insure the delivery of quality services.

6. CRIMINAL DEFENSE PERSPECTIVE. Provide criminal defense perspectives, particularly the Public Defender viewpoint, on the significant legislative, judicial, and executive issues relating to criminal justice.

West's Review

Hughett v. Housing & Urban Development Commission, Ky.App., 855 S.W.2d 340 (6/11/93)

The City of Louisville obtained an order from the Jefferson Circuit Court allowing city housing inspectors to enter Hughett's apartment to determine if she was in violation of the City's Existing Structure's Code.

The Court of Appeals reversed the order because the city utterly failed to show there was probable cause to search the *inside* of Hughett's residence. The city failed to allege what code provisions it believed Hughett was violating and the only evidence it presented in support of the order was the existence of *exterior* violations.

Although "the standard of probable cause applicable to an administrative search warrant is more relaxed than that applicable to a criminal case, there still must be *some* probable cause to allow intrusion into one's home to inspect for health and safety code violations." Applying this standard, the Court of Appeals held that code violations *inside* the home could not be reasonably inferred solely on the basis of bags of garbage were piled *outside* the home.

Copley v. Commonwealth, Ky., 854 S.W.2d 748 (1993)

The defendant was convicted of manslaughter I and sentenced to twenty years for the murder of his ex-girlfriend's current boyfriend. His defense was self-protection.

Several allegations of error in the selection of the jury were raised on appeal but the Kentucky Supreme Court found none warranted reversal. First, a supplemental panel of jurors was called and merged with the existing panel the day before trial. The Court found no error in this procedure since there is no requirement that the existing jury panel be exhausted before a new panel is called. Second, the Court failed to address the defendant's claim, that an elementary school principal was improperly excused *prior to* voir dire, because the basis for the claim was not made part of the record. Third, the Court held it was not error for the trial court to excuse, during voir dire, another juror who was an elementary school principal. Lastly, the Court held it was not error for the trial court to deny the defendant's motion to exclude for cause all prospective jurors who worked at Fruit of the Loom as did the victim and the defendant's ex-girlfriend. "Such an association of itself is insufficient to excuse a juror."

Two Justices dissented on these issues. They found the trial court failed to follow the proper method for calling additional jurors as set out in RCr 9.30(1). They also found there was no reason for the trial court to excuse the two school principals from jury service, particularly when one stated there was no reason he could not serve. As to those prospective jurors who worked at Fruit of the Loom, they "can hardly be regarded as neutral jurors" since the prosecuting witness would be returning to work there after the trial and they would have to face her on a daily basis. These prospective jurors should have been excused for cause for implied bias despite their affirmative answer to the "magic question." *See Alexander v. Commonwealth*, *infra*, where the Court found reversible error in denying the defendant's challenges for cause for implied bias despite the prospective jurors affirmative answers to the "magic question."

Another issue raised on appeal was the Commonwealth's introduction of only portions of the defendant's taped statement rather than the introduction of the entire statement. The defendant argued this procedure denied him the opportunity to present his defense that the victim was the aggressor. Although the Commonwealth conceded error on appeal, the Court held the error was harmless since the defendant presented five witnesses who testified to the information that was excised from his taped statement. Two Justices dissented, believing the error was not harmless because playing the entire tape would have shown the defendant's claims were not concocted after the fact. Also, the entire tape would have changed the jury's perception of the police interview.

The next issue raised on appeal was the Commonwealth's introduction, in rebuttal, of testimony by the defendant's ex-girlfriend that the defendant had previously shot through the window of a car in which she and the defendant's son were passengers. The defendant argued it was improper to introduce this evidence, but the Court held that the defendant opened the door to this testimony when he testified in his case-in-chief about his love and concern for his son. The Commonwealth also called a police officer in rebuttal to corroborate the ex-girlfriend's testimony, however, the officer recanted a significant part of his testimony in a post-trial affidavit. The Court held the trial court did not abuse its discretion when it denied the defendant's new trial motion based on the officer's recantation.

Three Justices dissented on this issue believing it was reversible error to admit the rebuttal testimony about the shooting incident, that occurred eight months prior to the charged offense, since it was irrelevant evidence of an uncharged crime. The dissenters believed the error in admitting the rebuttal testimony was compounded because the trial court, under an erroneous application of the separation of witnesses rule, precluded the defendant from offering surrebuttal.

Commonwealth v. Monson, Ky., S.W.2d (7/1/93)

The issue in this case was whether KRS 95.740(1) confers county-wide arrest powers upon police officers of fourth-class cities. The Court answered the question in the affirmative reversing the opinion of the Court of Appeals.

The defendant was arrested for DUI and reckless driving in Park Hills, Kentucky by a Fort Wright police officer. Park Hills and Fort Wright are each fourth-class cities. The defendant was convicted of both offenses in the Kenton District Court. The Kenton Circuit Court held the arrest by a Fort Wright police officer in Park Hills was legal and affirmed the DUI conviction.

The Court of Appeals reversed the circuit court, holding a Fort Wright police officer has no jurisdiction to make an arrest in Park Hills.

The Kentucky Supreme Court reversed the Court of Appeals, holding that KRS 95.740(1) confers upon a police officer of a fourth-class city county-wide arrest power in the county where the city is located. Since Park Hills and Fort Wright are in Kenton county, an officer of either fourth-class city may legally arrest a person in the other fourth-class city. The defendant's DUI conviction was reinstated.

Baker v. Commonwealth, Ky., S.W.2d (7/1/93)

The defendant was tried and convicted for first degree burglary. His conviction was affirmed by the Court of Appeals and upon a grant of discretionary review was affirmed by the Kentucky Supreme Court.

The defendant and his accomplice entered the owner's home without his permission. When an individual arrived to clean the home, the men explained they were looking for a lost dog and left posthaste. The men were apprehended within fifteen to twenty minutes, three tenths of a mile from the home by a neighbor and his friend. Within minutes of the apprehension a police officer arrived. The neighbor warned the officer that Baker was trying to reach for his hip pocket in which the officer found a handgun.

On appeal Baker argued the Commonwealth failed to prove the elements of first-degree burlary because there was no evidence he was armed while he was in the home. Baker admitted he possessed the gun before entering the home, but maintained he placed it under a rock before entering the home and retrieved it upon his exit.

The Court found the jury could reasonably infer Baker was armed while he was in the home. Alternatively, even if Baker was not armed while in the home, he was armed while in the course of his *immediate flight* from the home which is sufficient to constitute first degree burglary.

Baker also argued the handgun should have been suppressed because the officer violated KRS 431.025 by not telling him he was being arrested or for what he was being arrested. The Court found this statute inapplicable since the search of Baker was reasonble. Thus, there were no grounds to suppress the gun.

Mack v. Commonwealth, Ky., S.W.2d (7/1/93)

The defendant was tried and convicted of first degree sodomy, first-degree sexual abuse, and being a PFO II. The Kentucky Supreme Court reversed his convictions due to prosecutorial misconduct and denial of his motion to have the victim examined by a defense psychiatrist.

The prosecutorial misconduct occurred in the guilt/innocence phase closing argument. The prosecutor told the jury it had not heard the "full story" because certain incriminating information was excluded by the "rules of evidence" and "legal proceedings."

The Court held the prosecutor's comments denied the defendant due process of law and a fair trial. They were *not* a fair comment on the evidence, but rather "constitute[ed] unfair speculation on anything but the evidence." The Court was "amazed" that the trial court, the prosecutor, and the Commonwealth saw nothing improper in the prosecutor's argument.

The Court also held, based on the particular facts in this case, and *Turner v. Commonwealth*, Ky., 767 S.W.2d 557 (1989), that a psychological or psychiatric examination of the nine year old child victim "would have significant positive potential, and minimal potential for harm or harassment."

At trial the defense sought to introduce the victim's medical records pertaining to treatment for prior sexual abuse by someone other than the defendant and a deposition from the victim's treating psychiatrist showing she was transferring the prior experience to the defendant. The Court held the trial court did not abuse its discretion in excluding this evidence because the defense failed to establish that post-traumatic stress disorder or transferrence were conditions generally recognized in the medical or scientific community, and the opinions in the deposition were based upon a reasonable degree of medical probability.

The defendant objected to the testimony of two prior victims against whom the defendant committed sexual offenses six years prior to the charged offense and the introduction of the defendant's confession to those crimes. The Court found these prior crimes were not too remote and were sufficiently similar to allow their introduction. As to those portions of the evidence that were not sufficiently similar, the Court found their admission was harmless.

The Court noted the testimony of the prior crimes and the defendant's confession to those crimes was introduced *prior to* the presentation of the evidence to support the charged offense. This order of proof "invites prejudicial error" because it prevents the trial court from judging the similarity of the prior acts to the charged offense.

Harrison v. Commonwealth, Ky., S.W.2d (5/27/93)

The defendant was convicted as an accomplice to three burlaries and of being a PFO I. Prior to the defendant's trial, his co-defendant was tried and convicted as a principal for the three burglaries.

When the co-defendant was apprehended, he admitted his involvement in the burglaries to the sheriff and implicated the defendant as his accomplice. Although the sheriff reduced the co-defendant's statement to writing, the co-defendant refused to sign it.

The defendant moved to suppress the co-defendant's statement to the sheriff as it was an unsworn, out of court statement and thus, unreliable. At a pretrial suppression hearing the co-defendant denied making the statement and indicated his refusal to testify at the defendant's trial.

The trial court denied the motion to supress; the co-defendant refused to testify at the defendant's trial; and the sheriff was allowed to testify to the co-defendant's prior out of court statements

to him implicating the defendant.

The Court held the trial court did not err in allowing the sheriff to testify to what the co-defendant told him and in admitting the sheriff's written statement of what the co-defendant told him because the statement was one against the co-defendant's penal interest and was corroborated by testimony and physical evidence. *See* KRE 804(b)(3). By contrast, the dissent refers to the co-defendant's statement as being inherently unreliable since it was made to curry favor with the police.

Although the defendant argued the admission of the co-defandant's statements violated his right to confront the witnesses against him, the Court found the corroborating evidence enhanced the reliability of the co-defendant's statements so as not to violate the defendant's confrontation rights.

The Court's opinion is simply a sequel to its opinion in *Taylor v. Commonwealth*, Ky., 821 S.W.2d 72 (1992), allowing the Commonwealth to get around *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and *Cosby v. Commonwealth*, Ky., 776 S.W.2d 367 (1989).

Johnson v. Commonwealth, Ky., S.W.2d (5/27/93)

The seventeen year old defendant was convicted of first degree rape, first degree sodomy, first degree sexual abuse and second degree wanton endangerment. The charges arose after a night of drinking and partying in a private home. The fifteen year old victim passed out in a bedroom around midnight and several of the boys, including the defendant, either engaged in or attempted to engae in sexual activity with the passed out victim.

The Court of Appeals affirmed the convictions. The Kentucky Supreme Court granted discretionary review and reversed the convictions for the sexual offenses, but affirmed the wanton endangerment conviction.

Since the charged offenses occurred while the victim was in an unconscious state due to alcohol intoxication, she did not have first hand knowledge of the alleged sexual acts. However, the trial court permitted her to testify to what her friend told her had happened and to gossip she heard about the incident at school. Since this testimony, which was rank hearsay, was offered to prove the charged sexual acts occurred and the defendant committed them, the Kentucky Supreme Court found it's admission was reversible error.

Another witness for the Commonwealth was a certified clinical psychologist to whom the victim had gone for counselling. She testified, over objection, what the victim told her about the alleged incident. Since the victim gained this information from a friend and the friend gained the information from someone else, the psychologist's testimony was triple hearsay. The Court held the admission of the psychologist's testimony was reversible error. The Court noted that since the victim's testimony about the charged offenses was inadmissible hearsay, this evidence did not become admissible when it was repeated a psychologist.

The defendant claimed the Commonwealth engaged in selective enforcement by prosecuting him as an adult, while the other youthful offenders were either prosecuted in juvenile court or not at all. The Kentucky Supreme Court disagreed stating "[t]he mere fact that *some* other putative offenders are not prosecuted does not make a case of selective or arbitrary enforcement." In addition, the Court found the putative offenders and offenses are not identical since the boys differed in age from fourteen to seventeen and there was more evidence against the defendant than the other boys.

The Kentucky Supreme Court also found reversible error in the trial court's failure to instruct on any lesser included offenses under the rape and sodomy charges. Although the evidence was sufficient to sustain the convictions for rape and sodomy, the Court found the evidence as a whole demonstrated the jury might reasonably have found the defendant guilty of only first degree sexual abuse, instead of rape, since there was evidence the defendant did not have an erection and thus only *attempted* intercourse. As to the sodomy charge, although there was evidence the defendant put his face between the victim's legs, the only witness to this act testified he did not observe actual oral-genital contact (sounds like a directed verdict motion should have been granted).

In addition, the Court found the defendant was entitled to instructions on third degree sexual abuse under the rape, sodomy and first degree sexual abuse charges, as well as sexual misconduct as a lesser included offense to the rape and sodomy charges because there was some testimony the victim was not "physically helpless."

The Court reversed the defendant's twelve month sentence on his second degree wanton endangerment conviction (a misdemeanor) because the trial court based its denial of probation or alternative sentencing for this charge on the felony convictions for the sexual offenses that the Court was reversing. The Court did not address the fact that the trial court failed to comply with KRS 532.055 which does *not* apply to misdemeanor convictions.

Rearick v. Commonwealth, Ky., S.W.2d (7/27/93)

The defendant was charged with tweleve different sexual offenses ranging from first degree sodomy to third degree sexual abuse. The charges were brought in three separate indictments, each returned on a separate date, and each involving a different victim. The three different indictments were tried together and the defendant was convicted of six of the twelve charges (the trial court having directed a verdict on five of the charges and the jury returning a not guilty verdict on one charge).

The Kentucky Supreme Court reversed the defendant's convictions due to the improper joinder of the three indictments. Relying on its recent opinions in *Billings v. Commonwealth*, Ky., 843 S.W. 890 (1992), and *Gray v. Commonwealth*, Ky., 843 S.W.2d 895 (1992), the Court concluded that without joinder, evidence of the crimes charged in the indictments, other than the indictment on trial, would not have been admissible as evidence of a common scheme or plan. Thus, there was a "substantial likelihood" that the inadmissible "other crimes" evidence prejudiced the jury as to each crime charged "and that each additional unrelated charge took on a weight by virtue of being joined with the others whereby the whole exceeded the sum of its parts."

Although the defendant must be retried, the Court found it was not error for one

of the victims to testify he saw the defendant anally sodomize a younger brother who did not testify at trial due to his doubtful competence. The Court held this evidence was admissible due to the similarity between the uncharged and charged acts (both victims were the defendant's young sons, each act occurred in the defendant's basement bedroom, and the acts occurred relatively close in time) under its holding in *Anastasi v. Commonwealth*, Ky., 754 S.W.2d 860 (1988).

Alexander v. Commonwealth, Ky., S.W.2d (5/27/93)

The defendant was tried for the rape (one count) and sodomy (two counts) of his seven year old stepdaughter. He was convicted on the rape charge and on one count of sodomy.

The Court recognized it was error for a police officer to testify that she went to get a warrant for the defendant's arrest "because [she] felt, in [her] opinion, that the child was telling the truth," but believed the trial court's admonition to disregard the testimony was sufficient.

The Court reversed the defendant's convictions due to the improper admission of hearsay testimony by an investigative social worker (assigned to the Crimes Against Children Unit of the Louisville Police Department) who told the jury the victim told her the defendant sexually abused her. The trial court admitted the social worker's testimony pursuant to the business records exception to the hearsay rule, but the Court found the social worker's report did not qualify for the exception as it was not made under circumstances of trustworthiness since the victim was not under a business duty to report what happened to the social worker. In other cases where the Court found a social's worker's report did constitute a business record, the report contained "observations" made by the social worker. In the case at bar, the report consisted almost entirely of the out-of-court statements of the victim.

The Court further stated that even if the report qualified as a business record, it would still have been inadmissible. If the social worker had testified from memory, her testimony would have been inadmissible hearsay. Simply putting the same information in a written report did not make it admissible.

The Court also found the opinion testimony, "that the injury [to the victim's hymenal ring] is consistent with the offense charged," of the emergency room doctor who examined the victim was reversible error.

The Court also held the trial court committed reversible error in denying two of the defendant's challenges for cause. The defendant used a peremptory to remove each prospective juror. One prospective juror was challenged for cause after informing the court she was an investigative social worker with the Crimes Against Children Unit of the Louisville Police Department, the very same unit for which two of the Commonwealth's key witnesses worked. Another prospective juror was challenged for cause after telling the court he had "a distaste" for "mixed marriage[s]" and he probably would judge the defendant's wife's credibility a degree differently than he would judge the credibility of other witnesses. The defendant is black and his wife is white and their child is biracial.

The Court found "the probability of bias" on the part of the two prospective jurors was so great that it was an abuse of discretion for the trial court to deny the challenges for cause. That each answered they could decide the case soley upon the evidence presented at trial did not eradicate their bias and prejudice.

Yost v. Smith, Ky., S.W.2d (5/27/93)

The defendant was convicted of first degree burglary and theft over $100 and sentenced to twelve years in the penitentiary. At the time of his conviction he had criminal charges pending in several other states including Louisiana. At the request of the Kentucky Corrections Cabinet, Louisiana prosecuting officials completed and returned an informational request form advising there were charges pending against the defendant and a detainer would be filed. Subsequently, Louisiana issued an arrest warrant for the defendant and it was lodged as a detainer for the defendant.

Several months later Louisiana filed a request for temporary custody of the defendant under Article IV of the IAD. The defendant refused to waive transfer proceedings, and the Boyle district court denied the transfer and dismissed the transfer proceedings. The Commonwealth did not appeal the district court's ruling.

Notwithstanding the district court's ruling, the defendant was transported by Louisiana officials from Kentucky to Louisiana. After the defendant requested the authority for such a transfer, the defendant was returned to Kentucky without further disposition of the Louisiana charges.

The defendant filed a petition for a writ of habeas corpus. His petition was denied by the Oldham Circuit Court and the denial was upheld by the Court of Appeals. The Kentucky Supreme Court granted discretionary review as well as ordering the circuit court to grant the writ.

Since Louisiana is not a signatory to the IAD, said agreement is not applicable to the defendant's situation. Thus, the defendant's transfer from Kentucky to Louisiana did not comply with proper procedure (neither the IAD nor the Uniform Criminal Extradition Act), and Kentucky forfeited its right to require the defendant to serve out the remainder of his twelve year sentence. Since the defendant was transferred to a prison beyond Kentucky's jurisdiction against his will and without lawful authority, Kentucky relinquished its jurisdiction to subject him to further punishment.

The Court based its holding on Section 2 of the Kentucky Constitution which prohibits the exercise of absolute and arbitray power over the citizens of this Commonwealth. That the defendant was transferred to another state *without authority* was the prime evil in this case.

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Thomas Jefferson, in a letter to Thomas Paine in 1789, said, "I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constituiton."

Review of Capital Decisions

Stanford v. Kentucky, 854 S.W.2d 742 (Ky. 1993)

In 1982, Kevin Stanford was convicted of rape, robbery, murder and receiving stolen property over $100. After affirmance on direct appeal, and a trip to the United States Supreme Court, [*Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989); execution of sixteen and seventeen year-olds is not unconstitutional], Stanford filed an RCr 11.42 pleading in the Jefferson Circuit Court. Without holding an evidentiary hearing, the trial court, which had not sat at trial, denied Stanford's request for relief.

EVIDENTIARY HEARINGS NOT AUTOMATIC--In the opinion affirming the trial court, Special Justice Gerald Kirven said that defendants are not automatically entitled to evidentiary hearings, even in capital post-conviction proceedings. If questions raised in the post-conviction pleadings can be answered on the face of the record, then an evidentiary hearing is not mandated. RCr 11.42 (5). However, "trial courts generally should hold such hearings to determine material issues of fact presented." *Stanford*, at p. 744.

ERRONEOUS APPLICATION OF *ENMUND*--Stanford argued that the trial court had erroneously applied *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) to foreclose the eligibility of his non-triggerman co-defendant for the death penalty. The Supreme Court agreed with Stanford's argument, especially in light of *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); however the court said that the misinterpretation of *Enmund* did not work in Stanford's favor. Stanford's argument that the Commonwealth attorney had agreed with the trial court's interpretation was found to be immaterial because the Commonwealth's attorney had the discretion to seek death against Stanford's co-defendant. Furthermore, in light of *Foster v. Commonwealth*, 827 S.W.2d 670, 679-680 (1992), a joint trial in which death is sought against only one defendant is permissible.

TRIAL COURT DISQUALIFICATION--Stanford's argument that the trial judge should have been disqualified because he was a candidate for election to the Kentucky Supreme Court was found to be unsupported by even speculation. The court also felt that post-conviction counsel's contention would mean "that incumbent judges running for reelection would have to stop trying cases until after the election, an intolerable burden on the judicial system." *Stanford*, at p. 745.

COUNSEL'S CONFLICT OF INTEREST-Stanford had argued that trial counsel, who were members of the Louisville-Jefferson Public Defender's Office, had an interest in not correcting the trial court's erroneous interpretation of *Enmund* becuase they had other clients who were non-triggermen who would be able to be tried with the knowledge that they could not be given a death sentence.

The court felt that Stanford had the right to show the prejudice resulting from the jury's ability only to fix his co-defendants punishment at less than death, even though both were tried together, and that an evidentiary hearing may have established that counsel were trying to keep the *Enmund* ruling viable for future clients. However, in light of the strong arguments by trial and appellate counsel that Stanford had been prejudiced by his co-defendant's exemption from the death penalty, and the Supreme Court's examination of that issue on direct appeal, there was no basis for claiming that counsel could have done better without the conflict of desiring to continue the erroneous *Enmund* ruling.

POLICE DETECTIVE'S TESTIMONY--Stanford argued that trial counsel was ineffective for failing to object adequately to a police detective's testimony, to voir dire him outside the jury's presence, to establish that the detective's comment was intentional and to challenge the trial judge's presumption that the remark was inadvertent and unintentional.

After the detective testified that "Calvin Buchanan had been implicated by Kevin Stanford", the trial judge overruled defense counsel's motion to discharge, but did offer to admonish the jury. Defense counsel did not accept the offer, and the court explained that he did not feel the need to discharge the jury because the comment had not reached the point of being so prejudicial as to necessitate discharge of the jury.

The Supreme Court agreed, saying that even had an evidentiary hearing established that the detective deliberately made the statement, "in the course of a guilt phase trial where the record is ten volumes and totals over 1,300 pages", the statement was not so prejudicial that it would have changed the outcome of the case.

INEFFECTIVE VOIR DIRE--The court felt that because the record showed that the jury was voir dired about reasonable doubt and asked about pretrial publicity in individual voir dire, trial counsel were not ineffective because in general voir dire, they had not asked questions about pretrial publicity, reasonable doubt and capital punishment.

APPLICATION OF *MORGAN V. ILLINOIS*--Citing *Hicks v. Commonwealth*, 825 S.W.2d 280, 281 (1992), the court said that Stanford's contention that *Morgan v. Illinois*, --- U.S. ---, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) should apply to his case failed because the question had already been presented and considered on the direct appeal. Stanford's *Buchanan v. Kentucky* 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987) issue failed because he did not meet the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) prejudice prong.

Finally, the Supreme Court extended its opinion to an issue not raised, cautioning that the requirement of verification of a state post-conviction pleading means more than just alleging complaints. The court mentioned specifically the allegations that Stanford was prejudiced because of the trial court's candidacy for higher office and because trial counsel accepted the erroneous *Enmund* interpretation as "grave charges" which should be made in good faith and with a basis in "stated facts". "Without a minimum of factual basis, contained in the verified RCr 11.42 motions, the motion should be summarily overruled. It is inappropriate for a movant to seek a hearing hoping... that 'something would turn up'. *Stanford*, at p. 748.

Smith v. Kentucky, 845 S.W.2d 534 (Ky. 1993)

Robert Allen Smith, was convicted of the murder and Arson in the First Degree in 1990. Two years prior to trial, on February 18, 1988, the Commonwealth filed Notice of Aggravating Circumstances, saying that it would prove that the murder occurred while Smith was engaged in the aggravating factor of Arson in the First Degree. Between the time Notice was filed and the first day of trial, November 6, 1989, the Commonwealth and defense counsel conferred a number of times. Each time, the parties conducted discussions as if the case was not death-eligible. In fact, three weeks before trial, the prosecutor advised defense counsel that he would be filing Notice of Aggravating Circumstances within twenty days prior to trial. At six days prior to trial, the prosecutor believed it was too late to file, but after he looked in his file, he saw "to my utmost delight" that Notice had been filed in 1988.

LACK OF NOTICE OF AGGRAVATING CIRCUMSTANCES--In reversing, the Kentucky Supreme Court noted that many pre-trial discussions had been held as if Smith could not be sentenced to death. By representing that it would not seek the death penalty, the prosecution had made a promise and a bargain, upon which defense counsel had a right to rely without having to search through files to discover the truth. Defense counsel did so, by not preparing for a capital trial.

The Supreme Court analgoized the situation Smith faced with that faced by the in *Lankford v. Idaho*, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991), because in both, there was inadequate notice that the death penalty may be imposed. However, the court flatly stated that "six days' notice is inadequate." *Smith, supra*, at p. 537.

Although the court found that Smith was not prejudiced during the guilt phase of his trial, the lack of time to prepare proper motions, evidence and witnesses for the penalty phase was grossly prejudicial and an egregious error.

NEW PENALTY PHASE NEEDED--At the penalty phase, the trial court did not provide a jury instruction regarding mitigation. Relying on *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2953, 57 L.Ed.2d 973 (1978), *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 105 L.Ed.2d 256 (1989) and KRS 532.025(2), the Kentucky Supreme Court found that because the jury could not consider Smith's personal culpability, he was prejudiced, and thus, must have a new penalty phase.

The court noted that Smith introduced evidence supporting mitigating factors of EED or EMD, and that Smith's capacity to appreciate the criminality of his conduct and conform his actions to the requirements of the law was reduce because of mental illness, mental retardation or intoxication. Through various witnesses, the jury heard that Smith had been married and divorced three times, and that a few months prior to the murder and arson, Smith's third divorce had become final and his son died. The jury also heard that Smith had turned to alcohol and the victim for comfort after it became apparent that his third marriage had failed, but that the victim had "spurned" Smith a number of times before the murder occurred.

Furthermore, Smith's irrational behavior at trial, his inability to maintain relationships, frequent threats to kill people, speech defect and the difficulties he had in formulating thoughts and words and then expressing them and the fact that he was only able to finish the eighth grade supported introduction of a mitigation instruction on mental illness or mental retardation. Other evidence that Smith and the victim drank together and that a number of beer cans were found in the victim's apartment on the night of her death supported an instruction on intoxication. Smith was also entitled to an instruction that the jury could consider any other evidence presented as a mitigating factor.

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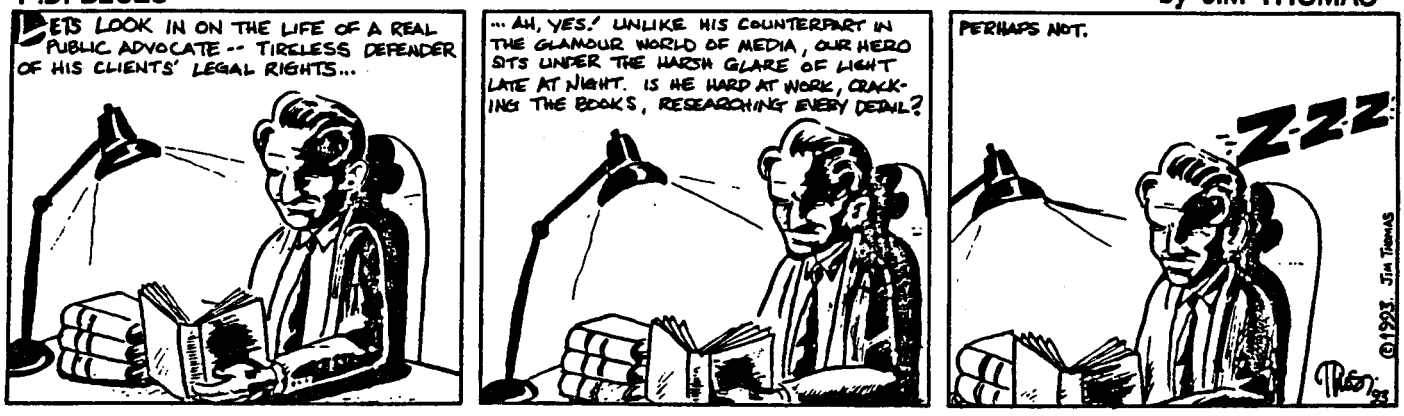
P.D. BLUES by JIM THOMAS



Plain View

Commonwealth v. Monson

The Supreme Court of Kentucky has reversed an opinion of the Court of Appeals which had limited the arrest powers of the police in fourth class cities. In *Monson v. Commonwealth*, the Court of Appeals had held that a Fort Wright police officer had no right to make an arrest for DUI in Park Hills, and thus the breathalyzer results were inadmissible.

The Kentucky Supreme Court reversed, in a 6-1 opinion written by Justice Spain. The Court interpreted KRS 95.740(1), and relied upon the language that fourth class city police officers "shall have the same power of arrest for offenses against the state as a sheriff". Reasoning that sheriffs have county-wide arrest powers, the Court held that fourth class city police officers have similar powers. In so deciding, the Court reviewed case law and noted that first through sixth class city officers also have county-wide arrest powers.

Baker v. Commonwealth

The Kentucky Supreme Court affirmed the decision of the Court of Appeals, and adopted the opinion written by Judge Johnson. The defendant had been arrested by the police after having been seen in a house by the cleaning person. After fleeing from the house, he was stopped by the owner of the house. Shortly thereafter the police arrived. After being warned by the owner that the defendant was armed, Baker was searched. A .38 was found on him. Baker challenged the search, saying the police had violated KRS 431.025 in arresting him.

The Court gave little attention to the claim, saying that the officer "was abundantly justified in believing that appellant had just committed a felony and that he might have had a weapon on his person. The search being reasonable, there is no reason to suppress the evidence that was obtained by it."

United States v. Finch

In January of 1992, five members of the Memphis Tennessee Police Department executed a search warrant at the home of Ronald Finch and his mother. The warrant was based upon an affiant's statement that he had been in the house and had seen cocaine. The police knocked on the door and yelled "police". When there was no answer within five to ten seconds, the officers broke down the front door and entered into the house. The police also broke down Finch's bedroom door, where Finch was discovered with his girlfriend. All three occupants denied that there was any cocaine in the house, at which point the police told them that all three would be arrested unless one person admitted to the cocaine if any was found. Finch told the officers that there was cocaine in the garage. Finch was then arrested. After losing a motion to suppress, he entered a conditional guilty plea.

Judge Churchill wrote the opinion for the Sixth Circuit, joined by Judge Keith and in part by Judge Batchelder. The court sustained the district court on most of the Fourth Amendment issues raised by the defendant. The court held that there was probable cause to issue the warrant under the totality of the circumstances. The court held that there was no error in the failure to put into the affidavit that the previous day an officer had searched Finch and no drugs had been found. The court rejected the defendant's position that the police should have announced that they had a warrant prior to breaking down the door.

However, the court reversed the district court due to the involuntariness of the defendant's statement when he revealed the presence and location of cocaine in his garage. The court emphasized that the officers had threatened to arrest his girlfriend and his mother if cocaine was found during the execution of the warrant. Five officers were involved in the raid, and both the front door and the bedroom door were broken down. Under these circumstances, the court held that the totality of the circumstances indicated that Finch's statement was the involuntary result of "inherently coercive police tactics." His statement was the "functional equivalent of a confession", and its seizure "resulted directly from the confession". Accordingly, the court held that the district court erred when it failed to suppress the confession and the cocaine obtained as a result of the involuntary confession.

Judge Batchelder concurred in most of the court's opinion. However, she would have remanded the case in order to determine whether the discovery of the cocaine was admissible under the inevitable discovery exception. See *Nix v. Williams*, 467 U.S. 431 (1984).

United States v. Ayen

The Sixth Circuit also had occasion on June 23, 1993 to visit the meaning of *Franks v. Delaware*, 438 U.S. 154 (1978). A Michigan sheriff received information from an informant that he had seen a large marijuana growing operation on the property of "Ole Ayen." The defendant was Milo Ayen; his brother Ole had been dead for some time. Other information signifying an indoor operation was included in the affidavit the Sheriff signed to obtain a warrant to search the property. He stated in the affidavit that an additional informant had reported Ayen for hauling marijuana in a 4-wheeler. The Michigan State police also reported that 3 informants had given similar information. The Sheriff verified the information obtained from the informants prior to obtaining the warrant. A prosecutor helped him prepare his affidavit.

During the preparation of the affidavit, the sheriff flew over the defendant's property to see whether heat was coming from the house. No high level of heat was detected. Other errors were present in

the affidavit, such as that Ole Ayen, the person named, was in fact dead, that the defendant did not own a K-Car as named in the affidavit (his mother owned such a car), and that the defendant's electrical usage was not "running high".

The Sixth Circuit affirmed the district court's decision rejecting the defendant's suppression motion. While agreeing that under *Franks* statements in an affidavit "intentionally false or made with reckless disregard for the truth must be stricken," the court did not find that present here. Rather, the court held the mistakes made in the affidavit by the sheriff were "unintentional" and "inadvertent." The court praised the effort by the sheriff and the prosecutor to corroborate the informants' information. Finally, the court held that even setting aside the inaccurate statements, there was still probable cause. "The material fact in the affidavit was that a substantial indoor marijuana growing operation was observed at the location by two anonymous informants...Defendant cannot succeed in his challenge to the search warrant by demonstrating non-material negligence, carelessness, and innocent mistakes."

Judge Ryan concurred probable cause existed despite the inaccuracies and omissions. However, he asserted that the omissions by the Sheriff exhibited a "reckless disregard for the truth".

United States v. Patterson

The defendant was stopped by the Columbus, Ohio, police after having committed a number of traffic violations. A records check revealed he was driving on a suspended license, and he was arrested. During a search of his car, crack cocaine was found. At the trial level, he moved to suppress the cocaine. This motion was overruled, based upon the court's decision that this constituted a valid inventory search.

On appeal, the Sixth Circuit affirmed the district court in a per curiam decision on May 12, 1993. However, the court did not reach the inventory issue. Rather, relying upon *New York v. Belton*, 453 U.S. 454 (1981), the court held the search was legal because it was incident to a lawful arrest. The court relied upon *United States v. White*, 871 F. 2d 41 (6th Cir. 1989) to state that the search incident to arrest was legal "even after the arrestee was handcuffed and placed in the backseat of a police cruiser." The court notes that there is a split in the circuits on this point. See, *United States v. Vasey*, 834 F. 2d 782 (9th Cir. 1987).

United States v. Perkins

The FBI was contacted in August of 1991 by Billie Jean Berry and told that the defendant and James Hibbard were trafficking in marijuana. The FBI contacted the Kentucky State Police, and they began to work with Berry. In September, a trip to North Carolina was planned. Hibbard was stopped on the way, and 41 pounds of marijuana was recovered. Additional marijuana was recovered in a bar where the defendant was located stripping marijuana with others. The district court overruled Perkins' motion to suppress, and the defendant was tried and convicted in federal court.

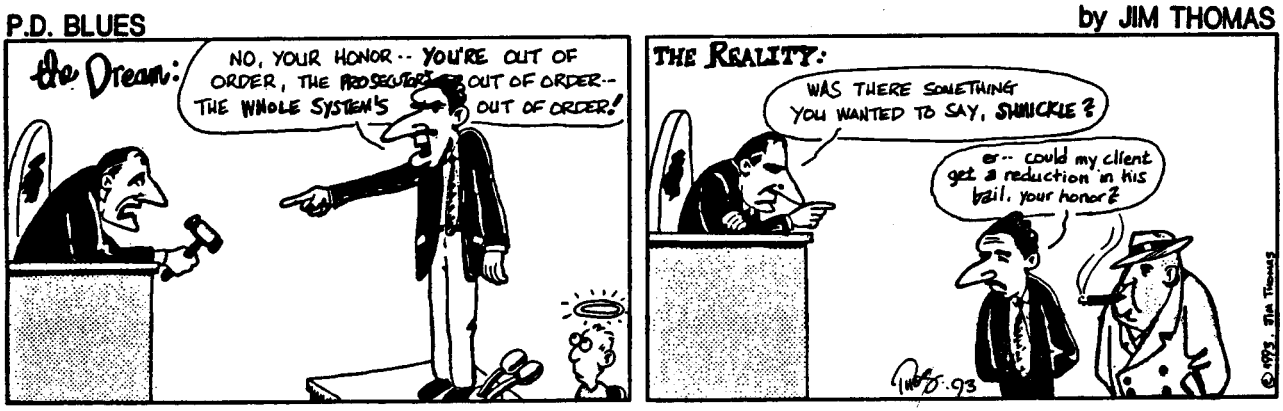
The Sixth Circuit affirmed the decision by the district judge. The Court rejected the defendant's attack upon Berry's credibility based upon their corroboration of Berry's information. "From these corroborations of Berry's information, law enforcement officials had good reason to believe that she was well placed inside a drug trafficking organization, that she was informed of its plans, and that she was truthfully relaying these to the authorities."

The defendant asserted that a warrant should have been obtained for the search of the truck. The court rejected this assertion, saying that there were exigent circumstances to justify not obtaining a warrant. "[T]here was insufficient time within which to obtain a search warrant", and thus no warrant was required.

The Short View

1. ***United States v. Barton***, 53 Cr. L. 1296 (9th Cir. 6/15/93). In a case described as one of first impression, the Ninth Circuit has held that *Brady* applies to challenges to search warrant affidavits. An officer stated in an affidavit that he smelled marijuana while in the defendant's home. The defendant asserted that the marijuana was of a kind that did not smell. The police permitted the marijuana to rot, failing to put holes in the bags for ventilation. The defendant challenged the destruction of the evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), saying that the negligence of the police led to his being unable to challenge the truth of the affidavit for the search warrant at his suppression hearing. The Court rejected the defendant's argument. However, by doing so, they extended the procedural rights of defendants challenging the issuance of a search warrant under *Franks v. Delaware*, 438 U.S. 154 (1978). "By deliberately destroying impeaching evidence, an officer could feel secure that false allegations in his or her affidavit for a search warrant could not be challenged. Such a result would effectively deprive a criminal defendant of his Fourth Amendment right to challenge the validity of a search warrant. To protect the right of privacy, we hold that the due process principles announced in *Brady* and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant."

2. ***Commonwealth v. Martin***, Pa. Sup. Ct., 53 Cr. L. 1317 (6/8/93). The Pennsylvania Supreme Court has held



previously that under the state constitution, a canine sniff is a search that requires at least a reasonable suspicion. This was contrary to *U.S. v. Place*, 462 U.S. 696 (1983), in which the Court held that a canine search was not a search for constitutional purposes. Here, a briefcase was being sniffed, which was viewed by the court as a search of the person, leading the court to hold that probable cause is required prior to permitting the dog to sniff. "[A] free society cannot remain free if police may use drug detection dogs or any other crime detection device without restraint."

3. ***United States v. Richard***, 53 Cr. L. 1374 (5th Cir. 6/22/93). The police cannot go to a house without a warrant, knock and announce their presence, and then knock down the door upon hearing movement and soft talking, despite the officers' fears for their safety. This was viewed by the court as manufactured exigent circumstances which do not qualify as an exception to the warrant requirement.

4. ***In re E.D.J.***, Minn. Sup. Ct., 53 Cr. L. 1377 (8/4/93). In *California v. Hodari D.*, 49 Cr. L. 2050 (1991), the Court held that the police had not seized a person until they had physically restrained him or he had submitted to their authority. The Minnesota Supreme Court has rejected that for purposes of their state constitution. The Court in Minnesota will continue to look at whether a reasonable person would have felt free to leave in order to determine whether a seizure has occurred or not.

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Sixth Circuit Highlights

Parole Revocation

In *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir. 1993), the Sixth Circuit recently resolved the question of whether due process is violated by the automatic revocation of a parolee's parole status without a final hearing pursuant to KRS 439.352 upon the parolee's incarceration for conviction of a crime committed on parole. The Court previously had rendered conflicting unreported decisions on this issue. The Court found that *Morrissey v. Brewer*, 408 U.S. 471 (1972), "does not require that a parole authority be given discretion regarding when to revoke a parolee's parole status; rather, it simply requires that where such discretion is given, a revocation hearing is required." Thus a parolee is not entitled to a final revocation hearing where the parole board lacks discretion in determining whether to revoke his parole status. Under KRS 439.352, the parole board was mandated to revoke a parolee's parole upon incarceration for a crime committed on parole. In the Court's view, a revocation hearing would serve no purpose under these circumstances.

Batson, Powers & Teague

Batson v. Kentucky, 476 U.S. 79 (1986) held that a black defendant could challenge the race-based exclusion of a black juror. More recently, in *Powers v. Ohio*, 111 S.Ct. 1364 (1991), the U.S. Supreme Court extended the *Batson* rule to hold that a prosecution may not use peremptory challenges to exclude a black prospective juror from a white criminal defendant's jury on account of their race. Unfortunately for white habeas petitioners whose convictions became final after *Batson* but before *Powers*, the Sixth Circuit has held that the *Power's* extension of *Batson* was a new rule not dictated by *Batson* and, *thus*, under *Teague v. Lane*, 489 U.S. 288 (1989) may not be applied retroactively in federal habeas corpus cases. *Echlin v. Lecureaux*, 995 F.2d 1344 (6th Cir. 1993).

Use of Depositions At Trial

In *Stoner v. Sowders*, ___ F.2d ___, 1993 WL 239400 (6th Cir. 1993), the Sixth Circuit held that the trial court denied Stoner's Sixth Amendment right to confront the witnesses against him by admitting videotaped depositions of two witnesses without a sufficient showing of their unavailability to give live testimony.

Stoner was charged with the burglary of the home of the Kaelins, an elderly couple. The prosecution obtained a court order allowing the deposition of the Kaelins. The day before trial, the couple traveled to the police station where, in the presence of Stoner and his counsel, a deposition was taken. The next day at trial, the depositions were introduced over defense objection after the prosecutor produced a doctor's affidavit stating that the Kaelins were in extremely poor physical health and that their health could be impaired if they were subjected to the rigors of a jury trial.

The Sixth Circuit stated that Stoner was "denied the usual right to confront and examine crucial witnesses before the jury in open court...because of a short, conclusory doctor's affidavit...[which] itself was hearsay." The Court further noted that to say the Kaelins were unavailable was "a legal fiction.... They were 'unavailable' only in the sense that they preferred not to testify and were in poor health according to the doctor's affidavit."

The Court held that when the prosecution claims a witness is unavailable due to illness, there must be a case specific finding of necessity before confrontation in open court can be dispensed with. In Stoner's case, the requisite finding of necessity "was not even addressed, much less found."

The Sixth Circuit concluded that "the deposition is a weak substitute for live testimony, a substitute that the Sixth Amendment does not countenance on a routine basis."

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PRO BONO LEGAL SERVICES/ FROM A CONFINING PERSPECTIVE

Access to the courts, consent decrees and pro bono legal services are all terms familiar to the post-conviction criminal law practitioner.

In 1981, in the case of *Kendrick v. Bland*, 541 F.Supp. 21 (W.D.Ky. 1981) the United States District Court handed down a major court decision addressing many issues concerning prisoner's conditions of confinement at the Kentucky State Reformatory (KSR). One of these was to provide formal legal education and training for KSR inmates. Also included was the establishment of regular continuing legal education training for those already working as legal aides. Undoubtedly, this part of the consent decree grew out of the landmark U.S. Supreme Court case of *Bounds v. Smith*, 430 U.S. 817 (1977). *Bounds* arose when North Carolina inmates claimed that the correctional facilities in that state denied them access to the courts in violation of their Fourteenth Amendment rights. The state was accused of failing to provide legal research facilities to the inmate population. It was from this controversy that the fundamental constitutional right of prisoner's access to the courts was mandated and began to take its effect upon other state prison authorities.

As an outgrowth of *Bounds* and *Kendrick*, the Department of Public Advocacy became involved in formulating, planning, organizing and presenting both basic and continuing inmate legal aide training.

In 1992 it was quite apparent to DPA that the inmate legal aides were seeking assistance in the area of civil practice and procedure, especially handling federal civil jury trials. In an attempt to meet this need, DPA contemplated what resources would be needed to present this training. Unlike many other trainings, which focused primarily on criminal law or related areas, this would be different. DPA's own full-time criminal law practitioners, by the nature of their work, do not venture into federal civil jury trials. Thus, it was necessary to seek resources outside of the Department. The KSR DPA Office turned for assistance to **William Radigan**, of the Louisville firm of Walker and Radigan. Bill's background as a former DPA attorney, as a trainer in litigation skills, and as an established general practitioner with experience in dealing with legal problems and issues against the Department of Corrections made him an ideal candidate. DPA was most fortunate when Bill said yes to this request for help.

In July of 1993 this idea, thanks to the efforts of Bill Radigan, became a reality. He totally undertook the responsibility of recruiting other civil practitioners and an investigator to address various aspects of jury trial work from case investigation to closing argument. Bill designed the entire program with the individual presenters being responsible for presenting their subject matter. Twenty-two inmate legal aides from Roederer Correctional Complex, Kentucky Correctional Institute for Women, Luther Luckett Correctional Complex and the Kentucky State Reformatory participated in the training.

The first day of training began with the subject of investigation of cases, offered by **Mike Zaidan**, investigator for the Department of Public Advocacy. Inmates often face an uphill battle in conducting investigation from behind prison walls. Mike's wealth of experience and practical tips provided some food for thought and useful ideas to consider. **Ann Benfield**, a 1981 graduate of the University of Kentucky College of Law and Clerk to Judge Charles Allen of the U.S. District Court at Louisville, presented discovery practices in federal court. She was followed by **Louis Waterman** from the Louisville firm of Morris, Garlove, Waterman and Johnson. Louis offered the inmate legal aides a "how to" approach in conducting a voir dire. Opening statements and their role at trial was covered by Bill's law partner, **Patricia Walker-Fitzgerald**. The first day's session concluded with a presentation on motion practice and objections by former DPA attorney **Bette Niemi** of Louisville.

The presenters offered such helpful information and stimulated inmate inquiries to such a degree that in most cases there was simply not enough time to cover the subject matter as thoroughly as all parties would have liked.

The following day was no exception, beginning with Richmond, Kentucky practitioner and former DPA trial counsel, **William M. Nixon**, who presented a lecture on direct examination. He was followed by general counsel of the ACLU of Kentucky and noted litigator **David Friedman** who presented some basic rules and techniques illustrating the purpose, value and role of cross-examination in the civil trial. **Stephanie Cox** of Louisville followed up this presentation addressing the federal evidentiary rules and exhibits. She offered the legal aides some of the evidentiary nuts and bolts needed to present a case at trial. Next, Bill Radigan presented information and advice on dealing with jury instructions. The afternoon's legal aide training was rounded out by a spirited presentation on closing arguments by Louisville lawyer **Fred Radolovich**.

Of the participant comments that the author heard following this training, all were favorable.

Often when the term *pro bono* is used in the delivery of legal services several images of attorneys may come to mind. First, the dedicated yet unfortunate attorney who is called upon by the court to represent an indigent individual in a highly controversial case. There is little reward except that of self-satisfaction for a job well done, as illustrated in the character of Atticus Finch portrayed by Gregory Peck in *To Kill a Mockingbird*.

Another less visible image is that of the practitioner, who, upon learning more about a meritorious case and recognizing the financial limitations of a client, generously provides valuable advice, a phone call or a letter, helping to resolve

the client's difficulty at no charge. Perhaps the most cynical illustration of *pro bono* work is the practitioner who takes a case only to find out later that his client cannot cover the costs, leaving the attorney holding the bill.

Hopefully, Bill Radigan and the fine folks mentioned previously who gave of their time have added another dimension to the concept of *pro bono* legal services. Their time and effort have sown seeds that not only fulfill the obligation of the consent decree, but also provide greater access to the courts for those incarcerated individuals unable on their own to lay claim to what the law entitles them.

DPA is extremely grateful to Mr. Radigan and these presenters for their time, effort and expense in making this two-day presentation a reality.

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DPA and its incarcerated clients are deeply indebted to the following individuals for their generous contribution of time and expertise: Hon. William Radigan, Attorney at Law, Louisville, KY; Mike Zaiden, DPA Investigator, Northern Kentucky; Hon. Ann Benfield, Federal Court Law Clerk, Louisville, KY; Hon. Louis Waterman, Attorney at Law, Louisville, KY; Hon. Patricia Walker-Fitzgerald, Attorney at Law, Louisville, KY; Hon. Bette Niemi, Attorney at Law, Louisville, KY; Hon. William M. Nixon, Attorney at Law, Richmond, KY; Hon. David Friedman, Kentucky ACLU General Counsel, Louisville, KY; Stephanie Cox, Louisville, KY; Hon. Fred Radolovich, Attorney at Law, Louisville, KY.

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CASE DEFINITION & CASE REPORTING

In order for DPA to properly provide defense services to our clients, it is absolutely vital that we have accurate, meaningful data reflecting the actual number of cases handled by public defenders in each county across the state. In the past this effort has been hampered by haphazard (or non-existent) reporting from large numbers of counties, and by a vague and imprecise definition of "case" which was subject to wide variations in interpretation for counting purposes.

The first problem has been largely taken care of by withholding quarterly checks from county defender systems until they provide their caseload reports. In FY 1993 only one contractor failed to provide any caseload reports, and he has now been replaced.

To address the second problem a committee was formed, consisting of persons who represent the various defender interests in the state, including the leaders of the Jefferson and Fayette County programs, to determine how best to count cases so as to come up with figures that

(a) are internally consistent, and
(b) bear some rational relationship to the work actually performed.

As a result of the work of this committee, the following set of definitions has been adopted for use in the current fiscal year. All contractors have been provided with this document as part of their contracts, and have acknowledged the vital importance of using it to fully and accurately report their caseloads.

A number of people have proposed simply adopting AOC's caseload numbers. This was not workable, first because AOC does not currently provide data in all 120 counties as to whether a case involved appointed counsel, retained counsel, or no counsel; second, because AOC's method of counting each indictment as one case does not provide for the reality of single indictments which allege multiple charges against multiple defendants; and third, because AOC's system does not provide for new proceedings in previously opened cases, such as motions to revoke probation, RCr 11.42 motions, or parole revocation hearings.

DPA staff is currently working on a modernized, hopefully streamlined reporting form which will meet the needs of our reporting system, as well as make it easier for attorneys in the field to provide caseload numbers to the Frankfort office. This form will replace the old AOC 77 form, and will hopefully bring our caseload reporting system into the computer age.

Stay tuned and please provide us with your ideas on improving our case counting and reporting procedures.

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CASE DEFINITIONS & COUNTING PROCEDURES

CASE DEFINITION

A Case - in district or circuit court, a single accused having, either under the same or different case number, one or more charges, allegations, or proceedings arising out of one event or group of related contemporaneous events, brought contemporaneously against the defendant, stemming from the same course of conduct and involving proof of the same facts.

It is understood that not all cases which trial attorneys handle take place in the trial courts, *e.g.*, parole revocation hearings, KRS 31.110 -- lineups, interrogations, other pre-charge events, witness representations.

Generally, a case should be counted, even if there is no formal entry of appearance by counsel, if it involves a special trip to court or a substantial investment of attorney time and expertise. A case should not be counted if there is no for-

mal appointment by the court and the activity involves only a few minutes and is strictly routine, *e.g.*, standing in for arraignment purposes at a regularly scheduled motion hour, or other brief and routine functions performed as a courtesy to the court.

APPLYING THE CASE DEFINITION CIRCUIT COURT CASES

The following scenarios are given to show how this case definition is applied in common situations.

1. One defendant, one count. An individual indicted and charged with a felony offense is counted as a felony case. Felonies are defined and classified by KRS and the UOR codes.

2. One defendant, multiple counts. An individual who is indicted on multiple counts *arising from the same incident* will be counted as one case.

3. When an individual is charged with multiple counts of theft by deception involving checks, such charges will be counted as one case; provided that, if the charges are tried and/or disposed of separately, they each should be counted separately.

4. When there are several charges in a case, the major charge will be entered in the "charges" box on the case opening form and the number of other charges will be indicated. For example, when rape and robbery are charged, the box should be labeled "Rape + 1". When three assaults are charged, the charge box should be labelled "Assault + 2". When 50 counts of Theft by Deception are charged, the charge box should be labeled "TBD + 49".

5. Multiple accused with separate attorneys. Multiple accused listed on the same indictment with separate public defenders assigned each accused will be counted as a separate case regardless of whether the court severs the case.

6. Multiple accused with one attorney. In the event that multiple accused listed on the same indictment choose to waive any potential conflict of interests and be represented by the same public defender, and such defender, after carefully weighing the ethical issues involved undertakes such multiple representation, each accused will be counted as a separate case regardless of severance.

7. If the public defender or agency in question did not handle the original case, an appointment to provide representation for purposes of sentencing, shock probation or show cause in the matter will be counted as a new and separate case. Otherwise, sentencings, shock probation hearings and show cause hearings for payment of fines and/or restitution will *not* be counted as separate cases, but as a part of the original case.

However, if representation is interrupted for 90 days or more because of the non-appearance of a client, and subsequent events lead to reopening of the case, it shall be treated as a new case.

8. Recoupment. Representation required due to an order of recoupment will be counted as a separate case *only* when the hearing or proceeding does not involve any other issues in the case, other than those related to the recoupment issue.

9. A resentencing after a remand by an appellate court shall be counted as a separate case.

10. Probation Revocation Hearings will be counted as separate cases.

11. An appeal to circuit court from a conviction in district court will be counted as a separate case. A petition to circuit court for a Writ of Mandamus, Prohibition, Habeas Corpus, or other extraordinary relief will be counted as a separate case.

12. Interstate fugitive charges will be counted as separate cases.

CASE COUNTING SCENARIOS

1. A client is charged with possession of cocaine, DUI, NOL, expired registration, failure to stop at a stop sign. The case will be counted as *one felony case* with the cocaine charge as the major charge, *e.g.*, cocaine +4.

2. A client is charged with 26 counts of TBD O/$300, 17 counts of TBD U/$300 over a three week period. The case will be counted as one felony case, *e.g.*, TBD +25F+17M, unless the counts are tried or disposed of separately, in which case each will be counted separately.

3. A client is charged with 5 burglaries on five separate occasions over a three week period. There are 5 different sets of witnesses and 5 sets of factual issues. This will be counted as 5 separate cases.

4. A drug sweep takes place. 10 defendants are charged on one indictment in a variety of combinations for several different transactions. Separate cases will be counted for each separate event and for each defendant.

CLASSIFICATION OF CIRCUIT COURT CASES

CAPITAL FELONY: Murder or kidnapping where statutory aggravating factors exist (KRS 532.025 (2) (a)).

MURDER: KRS 507.020 where no aggravator is alleged.

A FELONY - Defined by UOR codes & KRS

B FELONY - Defined by UOR codes & KRS

C FELONY - Defined by UOR codes & KRS

D FELONY - Defined by UOR codes & KRS

PROBATION REVOCATIONS

APPEAL - An appeal from a misdemeanor conviction, juvenile proceeding, or from a final order of a District Judge. The appeal is filed and decided in the Circuit Court.

YOUTHFUL OFFENDER TRANSFERS: Defined by KRS. Not covered by UOR codes.

EXTRADITION HEARINGS: Defined by KRS and UOR codes.

OTHER CASES: FAMILY COURT CONTEMPT HEARINGS.

The DPA case record and reporting forms and data base for circuit court cases will be modified to include all of the circuit court cases listed above.

DISTRICT COURT CASES

1. All cases opened in district court will be closed in district court. Felonies bound to the Grand Jury will be closed in district court AFTER the grand jury has acted.

2. The same procedures used in circuit court for counting multiple defendants and multiple charges apply in district court cases.

3. If the Grand Jury remands the case to district court as a misdemeanor, the original case should be maintained. A new case file should not be opened nor should a new case be counted.

4. If the Grand Jury returns an indictment, the district court case will be closed. A new case will be opened in circuit court. If, subsequently, the case is reduced to a misdemeanor and remanded to district court, it shall be closed in circuit court and reopened in district court as a new case.

CLASSIFICATION OF DISTRICT COURT CASES

FELONY - An individual charged by criminal citation with a felony offense is counted as a felony case. All of the different types and classes of felonies, Capital, A, B, C, and D are defined by UOR codes and KRS numbers.

MISDEMEANOR - An individual charged by a criminal citation or complaint with a misdemeanor offense is counted as a misdemeanor case. All of the different types and classes of misdemeanors, A, B, and violations are defined by UOR codes and KRS numbers.

A criminal case which is punishable by a fine in excess of $500 or sentence to a county jail for no more than one year.

INVOLUNTARY COMMITMENT: A mental health case defined by UOR code and KRS numbers. Each petition shall be counted as a separate case.

PROBATION REVOCATION.

JUVENILE COURT CASES

1. A child less than 18 years of age who is charged with any or all of the felony and misdemeanors defined for the circuit and district courts above or is charged with committing an act which is unlawful only because s/he is a child; or a person regardless of age, with charges or contempt proceedings pending in the juvenile court.

2. The same procedures used for counting multiple defendants and/or charges in the circuit and district courts listed above apply to juvenile courts cases.

3. A juvenile transfer hearing under the youthful offender statute, KRS 635.020 and 640.010, shall be counted as a separate case.

4. A juvenile case in which an indictment is returned will be closed in district juvenile court. A new case will be opened in the circuit court.

5. In juvenile matters, all charges occurring at approximately the same time in the same criminal transaction can be defined as one case. Generally, one case will consist of charges set forth in a juvenile petition, although it is possible to have more than one case alleged in a single petition. Representation in connection with the handling of one case will normally consist of arraignment, detention hearing, the filing of all appropriate motions pertaining to matters currently before the juvenile court, adjudication, and disposition.

There are several types of proceedings in the juvenile court which are separate and distinct from the original offense with which a client may have been originally charged. These are:

a. contempt citations;
b. motions to revoke probation;
c. administrative hearings for the revocations of CHR supervised placement;
d. hearings with respect to continuation or termination of CHR commitment;
e. Writs;
f. juvenile appeal;
g. motions to change custody;
h. motions to challenge conditions of confinement
i. hearings on whether the juvenile court can force medical treatment upon a child;
j. **other** proceedings to decide numerous issues involved in determining the best interest of a child.

CLASSIFICATION OF JUVENILE CASES

PUBLIC OFFENSES: Capital, A, B, C, D, Felonies A, B Misdemeanors and violations are defined by UOR codes and KRS numbers.

STATUS OFFENSES: Truancy, Runaway, Beyond Control as defined by UOR codes and KRS numbers.

TRANSFER HEARING: Hearing for potential transfer of jurisdiction to the Grand Jury and to circuit court.

PROBATION REVOCATION:

VIOLATION OF CONDITIONS OF SUPERVISED PLACEMENT: KRS 635.100

REVIEW, CONTINUATION OR TERMINATION OF DISPOSITIONAL ORDERS: KRS 610.120

CHILDREN ALLEGED VICTIMS OF ABUSE, DEPENDENCY AND NEGLECT: DPA policy is that each jurisdiction shall contract or make other arrangements to handle these cases. Such cases should not be reported as defender cases for purposes of these counting procedures.

PARENTS CHARGED WITH ABUSE, DEPENDENCY AND NEGLECT: DPA policy is that public defenders will not handle these cases, unless there is a contempt citation pending. The authority of DPA under KRS Chapter 31 is limited to providing representation to indigents accused of crimes or mental states.

PAROLE REVOCATION: Parole revocations will be counted as separate cases.

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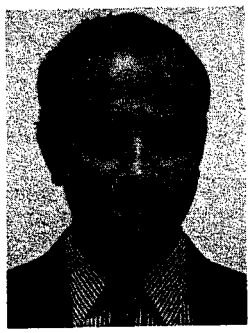
'Are we not the same people who worked, prayed, planned and dreamed of a country where the idea of freedom was in the national conscience, and dignity was a part of the national framework?'

-Maya Angelou

THE INFORMATION EXPLOSION



This is the first in a series of 3 articles by Mr. Batts.

In the last six years, the number of attorneys with computers on or near their desks rose from 7 to 70 percent, according to a national survey by the *ABA Journal*. If that trend continues, a computer will be as commonplace as a telephone on the desk of every attorney in this country within the next two to three years.

The type of computer used by lawyers has also changed dramatically since 1985. In that year, nearly every attorney workstation was a simple computer terminal tied into a large mainframe. Most attorneys had no direct control over software or storage of data.

Today, nearly all attorney desktop computers are PC's. These personal computers, also called microcomputers, allow full-powered independent computing with full control over software. They also allow the attorney to directly manage the storage and retrieval of his or her own data.

The vast majority of personal computers used by lawyers are desktop systems. The trend, though, is toward smaller, more powerful machines. Laptop computers cut a big slice out of the market a few years ago, but most were still quite bulky, and at 25 to 30 pounds, were still not accepted by the legal community for use in the courtroom, or attorneys on the go.

Notebook computers exploded on the scene last year, and are quickly making inroads. A substantial share of the personal computer market is expected to go to notebook computers this year. At four to five pounds and no larger than a standard three-ring notebook, lawyers have discovered a tool that can conveniently accompany them wherever they go.

As notebook computers become more affordable through the competition process, you'll begin to see more and more of them in the courtroom. In another two or three years, your notebook computer will be as indispensable as a legal pad is today.

In a national survey conducted last year, 75 percent of all lawyers performed computer-assisted research tasks at their desks. WESTLAW and LEXIS were the primary tools in use. However another explosion was hitting the computer scene last year. In 1991, CD ROMS were virtually non-existent in law firms. Last year -- just one year later -- nearly half of all lawyers were using CD-ROM research.

It's estimated that 80 to 90 percent of all lawyers will at least have access to CD-ROM research technology by the end of this year. And most of those will have a CD-ROM reader on their desktop or in their briefcase.

More than half of all litigators across the country are now experimenting with graphics in the courtroom. Using graphic software programs, these lawyers are preparing presentations, demonstrative evidence, simulations, and statistics for trial use. Graphics software is being used for trials, hearings, depositions, and other litigation activities.

Lawyers are clearly in the path of the information explosion. Do your best to be prepared. There are a number of good computer magazines on the market for both the novice and the advanced "techy." I suggest you read all you can to stay on top of the latest advances. There are two computer magazines that I consider great for showing you the future.

And as a representative of any government entity, you are eligible for a free subscription. Write to: *Government Computer News*, 44 Cook Street, Denver, CO 80206-5800; and *Government Technology*, P.O. Box 469024, Escondido, CA 92046-9941.

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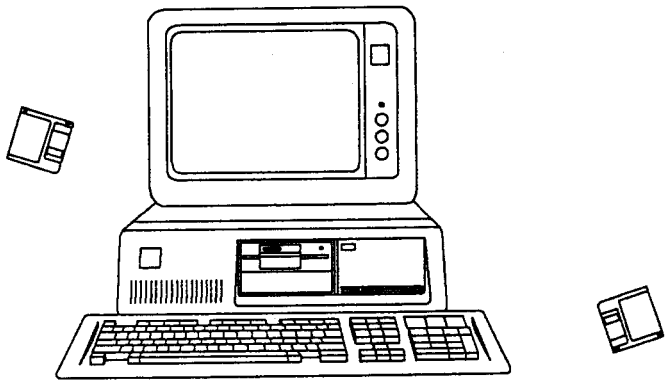

MENTAL HEALTH AND CRIMINAL JUSTICE: The Common Ground

During the middle portion of this century, two concurrent developments led to the discharge or deinstitutionalization of thousands of patients from mental hospitals. The first was a series of breakthroughs in the pharmacotherapy of mental illness. These drugs, which were able to control certain symptoms of mental illness, made it possible for the first time for many patients to live outside of the state hospital setting.

The second development was the birth of the community mental health movement which resulted in the passage of the Community Mental Health Centers Act in 1963. This Act was based on the belief that all citizens should be provided mental health care in their own communities and that persons with mental illness should be treated in the least restrictive environment possible. It also created a system of community mental health centers (CMHCs).

As the CMHCs initiated mental health services to people in need they did so without giving consideration to the other needs of this population that the hospitals had been meeting (housing, companionship, medical care, inc). Failure to meet these needs added stress and threatened patients' physical and emotional survival. It became evident that the CMHCs did not have the capacity nor were they designed to provide all the needed support services previously offered in an institutional setting.

In the years following the passage of the Community Mental Health Centers Act, it had become obvious that substantial numbers of individuals were being harmed by the implementation of deinstitutionalization. While some returned successfully to the community, others became homeless or were left in squalid living arrangements. Still others, due to behaviors born out of their inadequately treated illness, were locked up in jails and prisons.

It is now decades later and, due to new programs and initiatives, some of the perils of deinstitutionalization have been lessened in their severity. Some, such as the imprisoning of people with mental illness, have not.

In fiscal year 1992, Kentucky incarcerated 1,593 individuals in its county and regional jails solely because they had or were suspected of having a mental illness. These people had committed no crime but their behavior, a manifestation of their mental illness, seemed to indicate they might be a danger to themselves or others and, thus, they were jailed.

The Department for Mental Health and Mental Retardation Services (DMHMRS) several years ago took the position that this practice should be abolished and has subsequently taken steps to advance the achievement of that goal. In the next session of Kentucky's General Assembly, DMHMRS hopes to introduce its revision of KRS 202A, Kentucky's involuntary hospitalization law, which should effectively decriminalize mental illness. Instead of jailing a person suspected of having a mental illness, the revised statute proposes to have the person taken immediately to a hospital or a psychiatric facility for an evaluation to determine a course for treatment, if warranted. At no time may a person be placed in jail under this revision of KRS 202A.

The proposed changes to the involuntary hospitalization law, if passed by the General Assembly and signed by the Governor, will affect a significant number of Kentuckians with mental illness in a positive way. However, a related question needs to be addressed: What about all the other people in our state's prison system who have been convicted of criminal activity clearly attributable to their mental illness? This extremely important issue demands a much more in-depth response than can be developed inside the

limitations of this article. A viable stance has been taken by those who assert that people whose behavior is controlled by their mental illness should be treated for that illness and not punished for actions resulting from it. It is hoped that movement toward resolution of this complex issue will be tempered by wisdom and compassion, and attention will be paid to the civility of a society that seeks to treat its members with a degree of humanity that increases with each passing day.

The remainder of this article will be devoted to describing some of the current services available to adults with severe mental illness through the 14 CMHCs in this state. These services, and others not described herein, may be accessed through an intake and treatment planning process at the CMHC. Professionals in the Public Advocacy Alternative Sentencing Program, Probation/Parole Officers and the mental health consumers whom they both serve may find resources in these described programs that will assist the consumer in reintegrating into society with a sense of self-determination and self-worth.

Outpatient Services
(Individual, Group, Psychiatric)

These services are provided to individuals for the following purposes:

1. Diagnostic: Services such as psychosocial, psychological and/or psychiatric evaluations provided to a client to formulate a treatment plan

2. Treatment: Therapeutic interventions provided by a qualified mental health professional or mental health associate to a client for the purpose of reducing or eliminating the presenting problem of the client

Therapeutic Rehabilitation

This is a therapeutic program for persons with mental illness who require less than twenty-four hours a day care but more than simply outpatient counseling. The purpose of a therapeutic rehabilitation program is to assure that a person with a psychiatric disability develops those physical, emotional and intellectual skills to live, learn and work in his/her own particular environment. Services are designed for the development, acquisition, enhancement and maintenance of social, personal adjustment and daily living skills. The focus of all services is on helping participants view themselves in healthy roles rather than in the role of a patient.

Case Management

Case management services are defined as those which will assist the targeted population (adults with severe mental illness) in gaining needed medical, educational, social and other support services. These services are performed by qualified case managers and shall include:

1. A written comprehensive strengths/needs assessment

2. Assistance in the development of the client's treatment plan

3. Coordination of and arranging for needed services

4. Assisting the client in accessing all needed services

5. Monitoring the client's progress through the full array of services

6. Performing advocacy activities on behalf of the client

7. Establishing and maintaining current client records

8. Providing case consultations as required

9. Providing crisis assistance

Supported Employment

Supported Employment means paid work in a variety of integrated work settings. These work settings are matched to the individual to assist on-the-job functioning for those whom competitive employment is unlikely, and for those whom, because of their disability, need ongoing post-employment support to perform in a work setting. Persons eligible for this program must have adequate documentation to substantiate their mental illness, mental retardation or developmental disability with severe handicapping conditions. This program encompasses the following types of activities designed to assist eligible individuals in accessing and maintaining employment:

1. Individualized assessment

2. Individualized job development and placement services.

3. On-site training in work and work-related skills

4. Ongoing supervision and monitoring of the individual's performance

5. Ongoing support services necessary to assure job retention

6. Training in interpersonal and related skills and the use of the community's natural supports that are essential to obtaining and retaining employment

7. Transportation between the individual's residence and the workplace when other forms of transportation are unavailable or inaccessible

Supported Housing

The goal of this program is to enable eligible individuals to live in a location of their choosing. The main components of this service are:

1. Development of housing resources in the community by specialized staff

2. Assistance in identifying and procuring residential placement according to the individual's choice

3. Provision of in-home services to assure retention of residential placement and to allow further development of individual's independent living skills

Once the individual has achieved adequate independent living skills, she/he may receive case management services if ongoing support is desired.

Work/Adult Habilitation Services

These services are designed to provide an employment-oriented program of meaningful work training to adults with mental illness, mental retardation and/or developmental disabilities. The goal is to enable individuals served to move either into competitive employment or other work training programs. Components of this service include:

1. Assessment of the individual's work interest, work skills and related behaviors

2. Identification of potential employment options and needed environmental modifications to facilitate use of such options

3. Supervised work/training experience that will promote physical capacities, psychomotor skills, interpersonal and communication skills, work habits, appropriate dress and grooming, job-seeking and work-related skills and employment opportunities

Some individuals may be involved in work services on a full-time basis while others may be involved in work services for only a few hours a week, spending most of their day in adult habilitation services, a goal-oriented program of developmental and therapeutic services designed to develop, maintain, increase or maximize an individual's independent functioning.

Outpatient Competency/Criminal Responsibility Evaluations

The Division of Mental Health, through the CMHCs, administers competency and criminal responsibility evaluations ordered by District and Circuit Courts. These evaluations are conducted by qualified CMHC staff (psychiatrists or licensed clinical psychologists) either in the jail in which the defendant is being held or a nearby CMHC office. This program is coordinated by the Kentucky Correctional Psychiatric Center, DMHMRS' forensic hospital in LaGrange.

For further information regarding these or other mental health programs for adults or for information about the Sexual and Domestic Violence Program, contact the Adult Branch of the Division of Mental Health at (502) 564-4448. To inquire about programs funded through the Division's Children and Youth Services Branch, call (502) 564-7610.

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LETTERS TO THE EDITOR:

Dear Editor,

The June, 1993 issue of *The Advocate* arrived recently, and I thought I should pass along a correction for staring PD salaries in Tennessee. The table on page 5 indicates a starting salary of $38,500 in Knoxville, which is part of our state system. This is most likely our median salary statewide. Starting salary for Assistants with less than one year experience is $23,400, still higher than Kentucky but significantly less than the reported $38,500. Assistants' salaries are directly tied to a percentage of the District Public Defenders' salary, currently $58,630. Starting salary with less than one year experience is 40% of the D.P.D., after one but less than two years is 45%, and so on up to 85% of the D.P.D.'s salary at the nine year level. After 9 years experience, an Assistant is entitled to $49,836 under our pay scale. These amounts do not include a 2% across the board pay increase given all state employees effective July 1, 1993. I do not know whether the starting salary shown for Nashville is accurate since they are not part of the state P.D. system, but I suspect it too is on the high side.

I thought it best if this discrepancy was pointed out since the enabling public defender legislation contains our compensation structure. Irregardless, I think you make a strong case for increased funding in Kentucky's system. If I can assist you in any way, please do not hesitate to contact me.

ANDY HARDIN
Executive Secretary
District Public Defenders Conference
Nashville, Tennessee

Dear Editor,

In the June, 1993 issue *The Advocate* there was an unsigned article entitled **From the Recruiting Corner.** In this article, the author lamented that the realtively low starting salaries offered by the DPA preclude the DPA from hiring the best. The article also seems to imply that, but for the training the DPA offers, our attorneys would find few offers in the private marketplace.

I'm sorry, but I do not share the author's vision of the DPA as a sort of hospital for the rehabilitation of defective new attorneys. I am of the opinion that the DPA has been consistently able to recruit the best, and that, if it were otherwise, the stateside public defender system would be in a **real** crisis.

I do not know, nor do I care, how any of my colleagues did in law school. The public defenders I admire most are those with the moral courage to face the daily grind, and take real joy in the opportunity to make a difference in the lives of poor people. Those who took up this challenge knowing and not despairing about low salaries and public indifference are, in my opinion, the best the law schools have to offer.

Our new attorneys have all made great financial sacrifices to do this work, and, in all offices I am aware of, are immediately placed in a frontline position. They deserve our admiration. I shall expect all attacks on them in *The Advocate* to cease.

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U.S. Department of Justice
Office of Justice Programs
National Institute of Justice

NATIONAL INSTITUTE OF JUSTICE
Research in Brief

Charles B. DeWitt, Director

October 1992

The Cycle of Violence

by Cathy Spatz Widom

Does childhood abuse lead to adult criminal behavior?

How likely is it that today's abused and neglected children will become tomorrow's violent offenders?

In one of the most detailed studies of the issue to date, research sponsored by the National Institute of Justice (NIJ) found that childhood abuse increased the odds of future delinquency and adult criminality overall by 40 percent. The study followed 1,575 cases from childhood through young adulthood, comparing the arrest records of two groups:

- A study group of 908 substantiated cases of childhood abuse or neglect processed by the courts between 1967 and 1971 and tracked through official records over the next 15 to 20 years.
- A comparison group of 667 children, not officially recorded as abused or neglected, matched to the study group according to sex, age, race, and approximate family socioeconomic status.

While most members of both groups had no juvenile or adult criminal record, *being abused or neglected as a child increased the likelihood of arrest as a juvenile by 53 percent, as an adult by 38 percent, and for a violent crime by 38 percent.*

The "cycle of violence" hypothesis suggests that a childhood history of physical abuse predisposes the survivor to violence in later years. This study reveals that victims of neglect are also more likely to develop later criminal violent behavior as well. This finding gives powerful support to the need for expanding common conceptions of physical abuse. If it is not only violence that begets violence, but also neglect, far more attention needs to be devoted to the families of children whose "beatings" are forms of abandonment and severe malnutrition. An example of intervention for the prevention of neglect is described later in this *Research in Brief.*

The first phase of this study relied on arrest records to measure delinquency and criminality. A second phase calls for locating and interviewing a large sample of the previously abused and neglected children to draw a more complete picture of the consequences of childhood victimization. The remainder of this report presents Phase I results in greater detail and introduces preliminary findings from Phase II.

Study design

Several important design features distinguish this research from prior efforts to study the intergenerational transmission of violence.[1] First, by following a large number (1,575) of cases from childhood through adolescence into young adulthood, this "prospective" study was able to examine the long-term consequences of abuse and neglect. The sample, drawn from a metropolitan area in the Midwest, was restricted to children who were 11 years or younger at the time of the incident of abuse or neglect. At the time that juvenile and criminal records were checked, subjects ranged in age from 16 to 33; most were

From the Director

Family violence—particularly violence against children—is a critical priority for criminal justice officials, political leaders, and the public we serve. The statistics are alarming. Almost a million children are victims of child abuse and neglect, according to the 1990 Annual Fifty State Survey conducted by the National Committee for Prevention of Child Abuse.

Family violence can be considered from a variety of different perspectives: criminal justice, psychology, sociology, and economics. Studies have produced varying estimates of the magnitude of family violence; various methods have been considered for estimating its extent. None has examined its effect on the later behavior of children as does the NIJ study reported in this *Research in Brief.* Some of the findings are startling. For example, *being abused or neglected as a child increased the likelihood of arrest as a juvenile by 53 percent, as an adult by 38 percent, and for a violent crime by 38 percent.*

I have made child abuse a priority at NIJ, and this is the first in a series of five *Research in Brief* reports NIJ will publish dealing with the consequences of child abuse. In addition, NIJ is supporting a multisite study of child abuse prosecution and a study of ways the justice system has addressed this critical problem.

Charles B. DeWitt
Director
National Institute of Justice

between ages 20 and 30, with a mean age of 25.

Matching members of the study group to others whose official records showed no childhood abuse or neglect was an equally important feature of the research. This design allowed the study to separate the effects of known correlates of delinquency and criminality (age, sex, race, and socioeconomic status) from the experience of abuse and neglect. Both groups were approximately two-thirds white and one-third black and were about evenly divided between males and females. Most were between 6 and 11 years old at the time the abuse was documented (see exhibit 1).

The study design also featured clear operational definitions of abuse and neglect. Combined with large sample sizes, this permitted the separate examination of physical abuse, sexual abuse, and neglect, defined as follows:

- Physical abuse cases included injuries such as bruises, welts, burns, abrasions, lacerations, wounds, cuts, bone and skull fractures, and other evidence of physical injury.
- Sexual abuse involved such charges as "assault and battery with intent to gratify sexual desires," "fondling or touching in an obscene manner," rape, sodomy, and incest.
- Neglect cases represented extreme failure to provide adequate food, clothing, shelter, and medical attention to children.

Family members (often parents) were the primary perpetrators of the abuse and neglect. The most frequent type of perpetrator varied, however, by type of maltreatment (see exhibit 2).

Juvenile court and probation records were the source of information on the abuse and neglect, as well as the characteristics of the family. Arrest data were obtained from Federal, State, and local law enforcement records. Recognizing that much child abuse (as well as later delinquent and criminal behavior) never comes to the attention of any official authority, Phase II will supplement these official records with interview results.

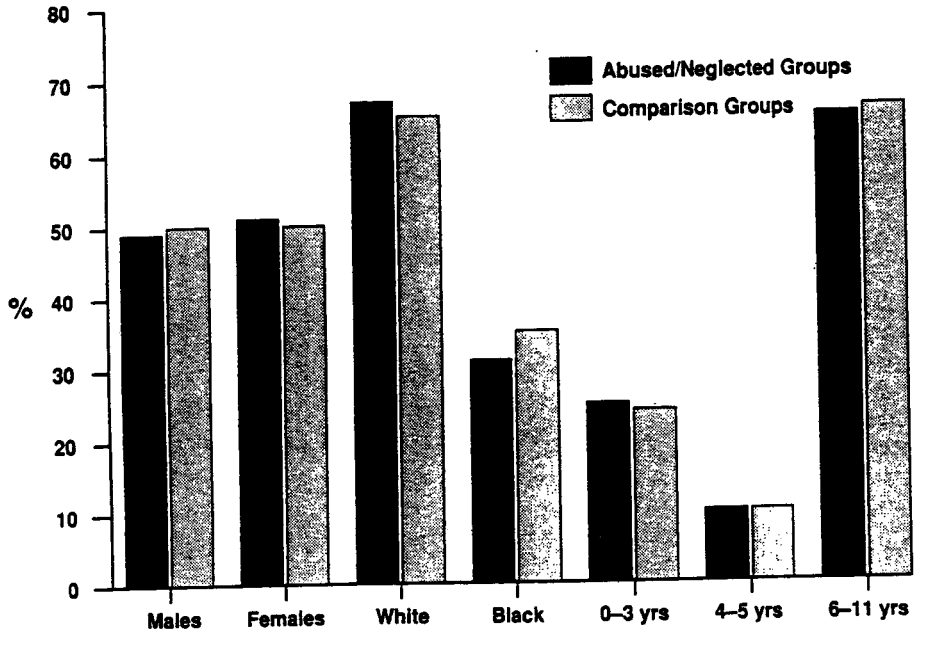
Study findings

Of primary interest was the question, "Would the behavior of those who had been abused or neglected be worse than those with no reported abuse?" The answer, shown in exhibit 3, was evident: those who had been abused or neglected as children were more likely to be arrested as juveniles (26 percent versus 17 percent), as adults (29 percent versus 21 percent), and for a violent crime (11 percent versus 8 percent). The abused and neglected cases were also more likely to average nearly 1 year younger at first arrest (16.5 years versus 17.3 years), to commit nearly twice as many offenses (2.4 percent versus 1.4 percent), and to be arrested more frequently (17 percent of abused and neglected cases versus 9 percent of comparison cases had more than five arrests).

Sex. Experiencing early child abuse or neglect had a substantial impact, even on individuals with little likelihood of engaging in officially recorded adult criminal behavior. Thus, although males generally have higher rates of criminal behavior than females, being abused or neglected in childhood increased the likelihood of arrest for females—by 77 percent over comparison group females. As adults, abused and neglected females were more likely to be arrested for property, drug, and misdemeanor offenses such as disorderly conduct, curfew violations, or loitering, but not for violent offenses. Females in general are less likely to be arrested for street violence and more likely to appear in statistics on violence in the home. Through interviews, Phase II will examine the incidence of unreported violence to learn more about the possible existence of hidden cycles of family violence.

Race. Both black and white abused and neglected children were more likely to be arrested than comparison children. However, as shown in exhibit 4, the difference between whites was not as great as that between blacks. In fact, white abused and neglected children do *not* show increased likelihood of arrest for violent crimes over comparison children. This contrasts dramatically with the findings for black children in this sample who show significantly increased rates of violent arrests, compared with black children who were not abused or neglected. This is a surprising finding and one that may reflect differences in an array of environmental factors. Phase II will investigate a number of explanations for these results, including differences in poverty levels, family factors, characteristics of the abuse or neglect incident, access to counseling or support services, and treatment by juvenile authorities.

Exhibit 1. **Demographic Characteristics**



Juvenile record. Previously abused or neglected persons were at higher risk of beginning a life of crime, at a younger age, with more significant and repeated criminal involvement. Notably, however, among those arrested as juveniles, abused or neglected persons were no more likely to continue a life of crime than other children:

- In both groups, roughly the same proportion of children with juvenile arrests also had arrests as adults (53 percent versus 50 percent).
- Similarly, in both groups, about the same proportion of those with violent juvenile arrests also had violent arrests as adults (34.2 percent versus 36.8 percent).

In short, childhood abuse and neglect had no apparent effect on the movement of juvenile offenders toward adult criminal activity. Distinguishing the factors that promote the onset of criminal behavior from those that affect persistence in a criminal career is clearly an important topic for future research.

Does only violence beget violence?

To test the notion that childhood victims of violence resort to violence themselves in later years, violent criminal behavior was examined as a function of the type of maltreatment experienced as a child. The results are presented in simplified form below.

Abuse Group	Number	Percent Arrested for Violent Offense
Physical abuse only	76	15.8%
Neglect only	609	12.5
Physical abuse and neglect	70	7.1
Sexual abuse and other abuse or neglect	28	7.1
Sexual abuse only	125	5.6
Comparison group	667	7.9

The physically abused (as opposed to neglected or sexually abused) were the most likely to be arrested later for a violent crime. Notably, however, the physically abused group was followed closely by the neglected group.

Exhibit 2. **Perpetrators of Abuse and Neglect**

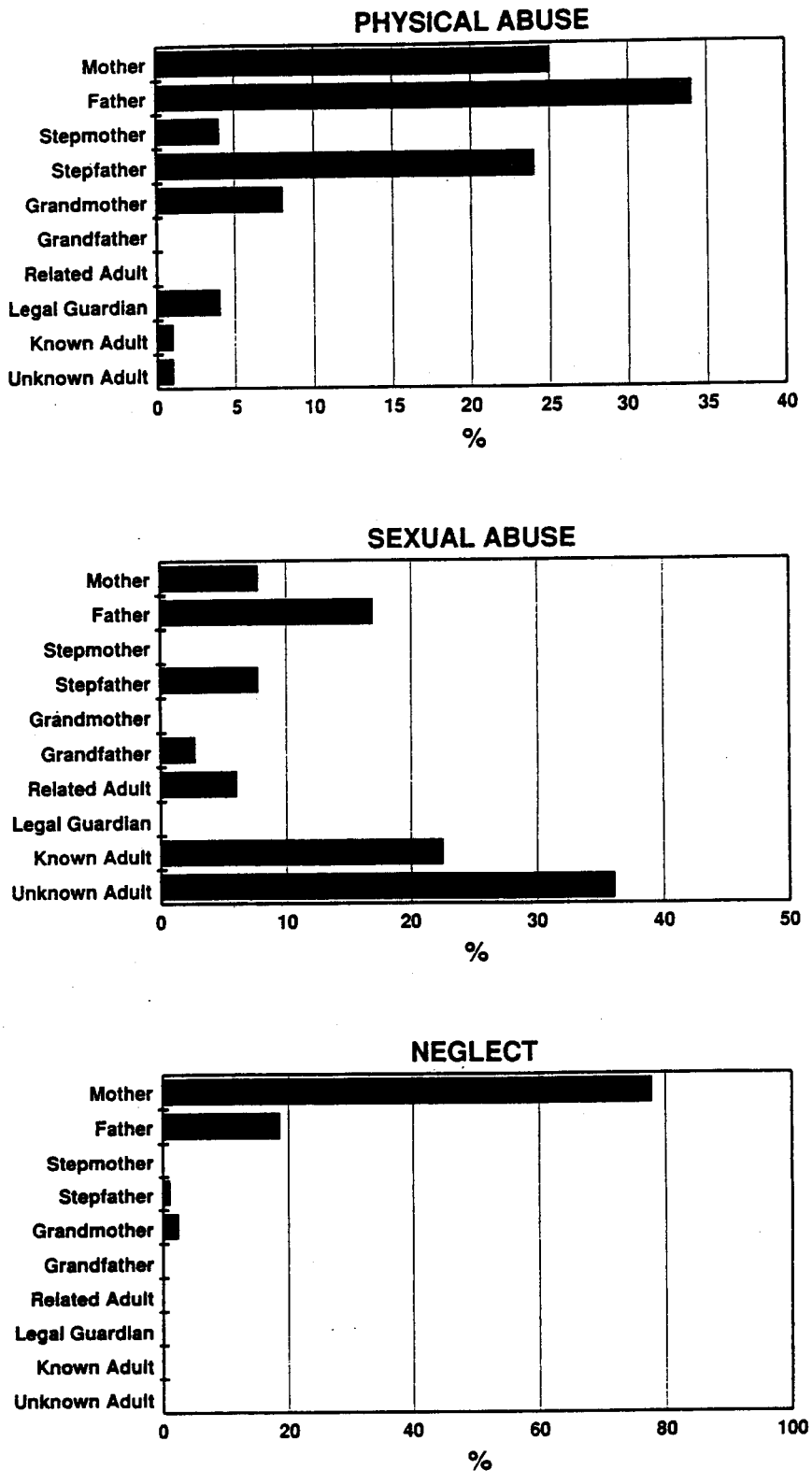


Exhibit 3. **Extent of Involvement in Delinquency, Adult Criminality, and Violent Criminal Behavior**

	Abused and Neglected (n = 908)	Comparison Group (n = 667)
Type of arrest	(%)	(%)
Juvenile	26.0	16.8
Adult	28.6	21.1
Violent crime	11.2	7.9

Note: All differences significant.

Exhibit 4. **Involvement in Criminality by Race**

	Abused and Neglected (n = 908)	Comparison Group (n = 667)	Significance
Any arrest	(%)	(%)	
Juvenile			
Black	37.9	19.3	<.001
White	21.1	15.4	<.05
Adult			
Black	39.0	26.2	<.01
White	24.4	18.4	<.05
Violent			
Black	22.0	12.9	<.01
White	6.5	5.3	NS

Because different types of abuse and neglect are not distributed evenly by age, race, and sex, these frequencies present an oversimplified picture. Even after controlling for age, race, and sex, however, a relationship between childhood neglect and subsequent violence remained evident.

This finding offers persuasive evidence for the need to take concerted preventive action. Nationwide, the incidence of neglect is almost three times that of physical abuse (15.9 per 1,000 children in 1986, compared to 5.7 per 1,000 for physical abuse, and 2.5 per 1,000 for sexual abuse).[2] Neglect also is potentially more damaging to the development of a child than abuse (provided the abuse involves no neurological impairment). In one study of the influence of early malnutrition on subsequent behavior, previously malnourished children had attention deficits, reduced social skills, and poorer emotional stability than a comparison group.[3] Other researchers have found an array of developmental differences associated with childhood neglect.[4] This study now suggests that those differences include a greater risk of later criminal violence.

Research findings show how imperative are improved procedures for the identification of child abuse and neglect. Referring to the connection between child maltreatment and adult criminality, New York City instituted new procedures for police response and followup in cases involving suspected child abuse and neglect.[5]

Out-of-home placement and criminal consequences

Not all abused and neglected children grow up to become delinquents, adult criminals, or violent criminal offenders. What are some of the possible mediating variables that act to buffer or protect abused and neglected children? Placement outside the home is one possible buffer that was investigated with Phase I data. Scholars and practitioners have often criticized out-of-home placements (foster care, in particular). Children placed outside the home are considered a particularly vulnerable group, since they have experienced both a disturbed family situation and separation from their natural parents. Accordingly, child welfare policies today often seek to avoid removing the child from home and instead to mitigate negative family situations through counseling and related support.

In contrast to today's practices, the vast majority of a sample of the children abused and neglected roughly 20 years ago were placed outside the home during some portion of their childhood or early adolescence. Year-by-year information was available from juvenile court and probation records on 772 cases. For these children, out-of-home placements included foster care, guardian's home, and schools for the retarded or physically handicapped. Only 14 percent of these abuse and neglect cases had no record of having been placed up through age 18. The average amount of time in placement was about 5 years, and sometimes lasted through childhood and adolescence.

As exhibit 5 shows, there was remarkably little difference between the arrest records of those who remained at home and those who were placed outside the home due to abuse and neglect. (Predictably, both of these groups were strikingly different from those placed outside the home due to delinquency as well as abuse and neglect.) At least for this sample, then, an out-of-home placement did not lead to negative effects on the arrest measure for those who were removed from their homes due only to abuse and neglect.

The study also showed that stability may be an important factor in out-of-home placements. Children who moved three or more times had significantly higher arrest rates (almost twice as high) for all types of criminal behaviors—juvenile, adult, and violent—than children who moved less than three times. In turn, children with multiple placements typically had behavior problems noted in their files. These notations covered a wide spectrum of problem behavior, including chronic fighting, fire setting, destructiveness, uncontrollable anger, sadistic tendencies (for example, aggressiveness toward weaker children), and extreme defiance of authority. Whether the behavior problems caused the moves, or the moves contributed to the behavior problems, is unclear. In either case, children with numerous placements obviously need special services.

These findings challenge the assumption that it is necessarily unwise to remove children from negative family situations. While stability of placement appears to be important, the potential damage of removing an abused and neglected child from the home did not include a higher likelihood of arrest or violent criminal behavior.

Exhibit 5. **Juvenile and Adult Arrests as a Function of Placement Experiences for Juvenile Court Cases Only (n = 772)**

Type of Placement	N	Arrest (in percent) Any Juvenile (n=209)	Any Adult (n=217)	Both Juv. & Adult (n=115)	Any Violent (n=93)
No placement	106	15.1	29.2	6.6	10.4
Abuse/neglect placement only	489	17.8	23.3	8.6	8.4
Delinquency placement plus abuse/neglect	96	92.7***	60.4***	55.2***	34.4***

Note: Adult arrest rates restricted to subjects age 21 and older in March 1988.
*** $p<.001$

Phase II: Followup and in-person interviews

While the findings from Phase I demonstrate convincingly that early child abuse and neglect place one at increased risk for officially recorded delinquency, adult criminality, and violent criminal behavior, a large portion of abused and neglected children did not have official arrest records. Indeed, the linkage is far from inevitable, since the majority of abused and neglected children did not become delinquents, adult criminals, or violent offenders. However, because the findings from Phase I were based on official arrest records, these rates may be underestimates of the true extent of delinquency and criminality. Phase I findings also do not tell us about general violent behavior, especially unrecorded or unreported family violence.

Phase II was designed to address many of the unanswered questions from the first phase by finding and interviewing a large number of these people 20 years after the childhood victimization. Most are now young adults in their early 20's and 30's; some are beginning to have their own children. The followup study aims to examine the full consequences of maltreatment as a child and to determine why some victims of childhood abuse and neglect fare well, while others have negative outcomes. The interviews will explore recollections of early childhood experiences, schooling, adolescence, undetected alcohol and drug problems, undetected delinquency and criminality, and important life experiences.

Preliminary Phase II findings, based on 2-hour followup interviews with 500 study and comparison group subjects, indicate that other negative outcomes may be as common as delinquency and violent criminal behavior. These interviews suggest that the long-term consequences of childhood victimization also may include:

- Mental health concerns (depression and suicide attempts).
- Educational problems (inadequate cognitive functioning, extremely low IQ, and poor reading ability).
- Health and safety issues (alcohol and drug problems).
- Occupational difficulties (lack of work, employment in low-level service jobs).

In addition to documenting the broader consequences of childhood victimization, Phase II is geared to identify "protective" factors that may act to buffer the negative results of abuse and neglect. The ultimate goal is to provide a base of knowledge on which to build appropriate prevention and treatment programs.

Conclusion and implications

Childhood victimization represents a wide spread, serious social problem that increases the likelihood of delinquency, adul criminality, and violent criminal behavior. Poor educational performance, health problems, and generally low levels of achievement also characterize the victims of early childhood abuse and neglect.

This study offers at least three messages to juvenile authorities and child welfare professionals:

- *Intervene early.* The findings of Phase I issue a call to police, teachers, and health workers for increased recognition of the signs of abuse and neglect, and serious efforts to intervene as early as possible. The later the intervention, the more difficult the change process becomes. Specialized attention needs to be paid to abused and neglected children with early behavior problems. These children show the highest risk of later juvenile and adult arrest, as well as violent criminal behavior.
- *Develop policies that recognize the high risks of neglect as well as abuse.* Also important in its implications for juvenile court and child welfare action is the fact

that neglect alone (not necessarily physical abuse) was significantly related to violent criminal behavior. A picture emerges where physical abuse is only one point on a continuum of family situations that contribute to violence. Whether those situations result in active physical abuse, or more passive neglect, it is now quite clear that both forms of child maltreatment are serious threats. Neglect cases represent the majority of cases taxing the child protection system. Research shows that today's victim of neglect may well be a defendant in tomorrow's violent criminal case.

● *Reexamine out-of-home placement policies.* This NIJ study focused on cases during the period 1967–1971, when out-of-home placements were a common intervention. Detailed information available for 772 cases revealed that the vast majority (86 percent) were placed outside their homes for an average of 5 years. This contrasts sharply with today's efforts to avoid out-of-home placement on the assumption that separation may aggravate, rather than ameliorate, a child's problems. Yet, there was no evidence that those who were separated from their families fared any worse on the arrest measures than those who remained at home. Though these results are far from definitive, they do suggest that child protective policies in this area deserve close scrutiny. The assumption that removal from the home offers additional risk could not be confirmed by this study. Any policy founded on this assumption ought to be tested through careful local studies of the full consequences of out-of-home placement.

Notes

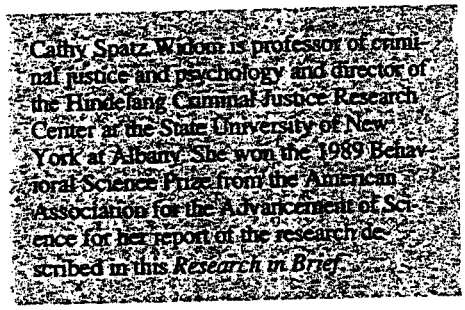
1. For further information on the design and sampling procedures, see Widom, C.S., "Child abuse, neglect, and adult behavior: Research design and findings on criminality, violence, and child abuse," *American Journal of Orthopsychiatry*, 59(1989):355–367.

2. Westat, Inc. *Study Findings: Study of National Incidence and Prevalence of Child Abuse and Neglect: 1988*, Washington, D.C., U.S. Department of Health and Human Services.

3. J.R. Galler, F. Ramsey, G. Solimano, and W.E. Lowell, "The influence of early malnutrition on subsequent behavioral development: II. Classroom behavior," *Journal of the American Academy of Child Psychiatry*, 24(1983):16–24.

4. See, for instance, R.E. Allen and J.M. Oliver, "The effects of child maltreatment on language development," *Child Abuse and Neglect*, 6(1982):299–305; B. Egeland, A. Sroufe, and M. Erickson, "The developmental consequences of different patterns of maltreatment," *Child Abuse and Neglect*, 7(1983):459–469; A. Frodi and J. Smetana, "Abused, neglected, and nonmaltreated preschoolers' ability to discriminate emotions in others: The effects of IQ," *Child Abuse and Neglect*, 8(1984):459–465.

5. Benjamin Ward, Commissioner, New York City Police Department, press release No. 17, May 22, 1989.



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Findings and conclusions of the research reported here are those of the researcher and do not necessarily reflect the official position or policies of the U.S. Department of Justice.

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