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. 6, December 1993

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

FROM THE EDITOR:

This issue features the Interim Report of the Governor's Task Force on the Delivery and Funding of Quality Public Defender Services with the votes of the Task Force. The Task Force was created in June, 1993 and has met 6 times.

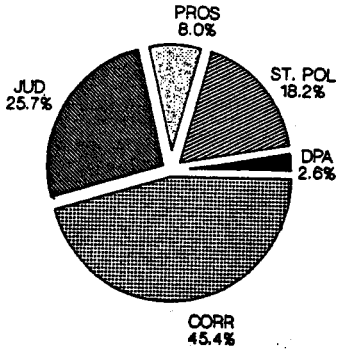
DPA's underfunding is stark compared to funding for other Kentucky efforts. We compare some personal service contract funding with DPA funding.

With this issue, Dave Eucker, Assistant Public Advocate in DPA's Richmond Office, becomes the associate editor for *The Advocate's* District Court Column, *In the Trenches*. Originated by Gary Johnson, *In the Trenches* was authored by Rob Riley for many years. We thank Rob for his education of us all over the years, and we thank Dave for assuming this responsibility.

Julia Pearson, a paralegal with the Kentucky Capital Resource Center, is providing *The Advocate* with a summary of U.S. Supreme Court Capital Caselaw, an area where staying current is essential. Thanks, Julia for your help.

Edward C. Monahan, **Editor**

Criminal Justice Funds FY 93
Agency Appropriations



DPA'S CONSTITUTION

To provide each individual client with quality legal services, efficiently and effectively, through a delivery system which ensures well-compensated, well-trained, well-respected defender staff dedicated to the interests of their clients and the improvement of the criminal justice system.

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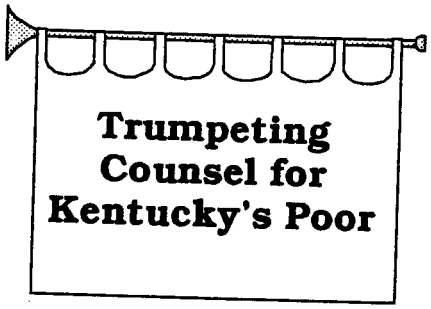
IN THIS ISSUE

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.

Public Advocate Seeks Nominations



KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY'S *GIDEON* AWARD: TRUMPETING COUNSEL FOR KENTUCKY'S POOR

In celebration of the 30th Anniversary of the United States Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Kentucky Department of Public Advocacy established the *Gideon* Award in 1993. It is presented at the Annual DPA Public Defender Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. The first award was presented in 1993 to J. Vincent Aprile, II, General Counsel of DPA, by Allison Connelly, Public Advocate. Written nominations should be sent to the Public Advocate by May 1, 1994 indicating the following:

1) Name of the person nominated;
2) Explanation of how the person has advanced the right to counsel for Kentucky's poor as guaranteed by the Section 11 of the Kentucky Constitution and the 6th Amendment of the United States Constitution; and,
3) A resume of the person or other background information.

Like the Gideon of old who was summoned by an angel of the Lord to lead Israel and overcome the Midiantites, Clarence Earl Gideon of Panama City, Florida, championed the cause of justice for all indigent defendants.... It is intolerable in a nation which proclaims equal justice under law as one of its ideals that anyone should be handicapped in defending himself simply because he happens to be poor.

- *The Washington Post* (1963)

Since Fortas had been appointed to represent Gideon, his personal belief about the rightness or wrongness of *Betts v. Brady* could not affect his duty, but in fact he strongly believed that representation by a lawyer was an absolute essential of fairness at any criminal trial. His own experience had so persuaded him, and he wished there were some way he could convey to the justices first-hand the atmosphere of the criminal courts. "What I'd like to have said," he remarked later, "was, 'Let's not talk, let's go down and watch one of these fellows try to defend himself.'"

- Anthony Lewis, *Gideon's Trumpet* (1964)

***Gideon's* Plea**

The Defendant: Your Honor, I said: I request this Court to appoint counsel to represent me in this trial.
The Court: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a Defendant is when that person is charged with a capital offense, I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.
The Defendant: The United States Supreme Court says I am entitled to be represented by counsel.
The Court: Let the record show that the defendant has asked the court to appoint counsel to represent him in this trial and the court denied the request and informed the defendant that the only time the court could appoint counsel to represent a defendant was in cases where the defendant was charged with a capital offense. The defendant stated to the court that the United States Supreme Court said he was entitled to it.

But the Spirit of the Lord came upon Gideon, and he blew a trumpet....

- Judges 6:34

*The Governor's Task Force on the Delivery and Funding of Quality Public Defender Services Interim Recommendations**

I. SUMMARY

These interim recommendations from the Governor's Task Force on the Delivery and Funding of Quality Public Defender Services address, for the short-term, the immediate problems facing Kentucky's public defender system.

The Task Force advances three basic recommendations. First, there is no question that additional funds are needed to enable the Department of Public Advocacy to meet its state and federal constitutional mandates. However, recognizing the state's current fiscal situation, the recommendations propose a coordinated revenue package to increase funding for indigent defense that is directly related to the operation of the criminal justice system and public defender services.

Second, the report highlights crisis points in Kentucky's mixed delivery system, such as capital and contract case delivery, and recommends viable short-term solutions.

Special emphasis is placed on the problems faced by contract counties.

Whether additional funds, administered through a contract system, will alleviate delivery problems in certain areas, such as Harlan and Bell Counties, remains to be seen.

Third, the Task Force recommends both a tightening of the current eligibility screening system and a more structured system of screening applicants for indigent defense services. It is recommended that those who can afford to pay some portion of the costs of their defense should reimburse the system for the services rendered. In this regard, a stricter eligibility screening process is one method of insuring that only eligible individuals receive public defender representation. This in turn may reduce caseloads and, to some extent, the costs of indigent defense.

In short, the recommendations presented should be viewed in their totality. This is a plan: a short-term plan to improve the quality and funding of public defender services in this state. Many problems, such as the funding responsibilities of the state and the counties, remain to be addressed and are reserved for further Task Force consideration. However, these recommendations begin to address the chronic under-funding that Kentucky's public defender system has faced for many years. Finally, the plan recognizes that although there are many social problems that cannot be solved by simply spending more money, the right to counsel is a place where additional expenditures will make a substantial difference.

II. **SUMMARY OF RECOMMENDATIONS WITH VOTE TALLY** (14/1/1 means 14 yes, 1 no, 1 abstain)

A. **RECOMMENDATIONS RELATING TO DELIVERY OF INDIGENT DEFENSE SERVICES--CURRENT PROGRAMS AND SERVICES**

1. **Afford quality representation to all eligible persons at every level of the criminal justice system. 16/0/0**

2. **At the present time, the most cost-effective means of providing high quality trial, post-trial and capital services in Kentucky is a centrally administrated, statewide, mixed system of delivery, composed of full-time attorneys in regional offices with significant involvement by the private bar. 16/0/0**

3. **A substantial increase in funding for full-time non-profit corporations to achieve salary parity and caseload reductions is required. 15/0/0**

4. **Additional funding is mandated to adequately compensate contract attorneys, ensure quality conflict free representation and needed support services. 16/0/0**

5. **Funding must be increased for the "of counsel" appellate program to insure adequate compensation. 15/0/1**

6. **Maintain at current funding levels of the Department of Public Advocacy's full-time trial, appeal and post-conviction offices. 15/0/1**

   a. **Maintain the Department's 12 full-time trial level regional offices.**

   b. **Maintain the Department's centralized appellate section.**

   c. **Maintain the Department's post-conviction section.**

B. **RECOMMENDATIONS RELATING TO NEW PROGRAMS AND SERVICES**

1. **Increase funding for capital cases. 16/0/0**

2. **The funding for death penalty conflict cases handled by the private bar must be increase substantially. 15/0/1**

3. **Provide funding to extend statutorily required post-conviction services to inmates incarcerated in private prisons and local jails. 14/1/1**

4. **Study the feasibility of regionalization to support**

local public defender contract attorneys and assist in state oversight functions. 14/1/1

5. Insure funding in the new area of civil contempt cases, as mandated by the Kentucky Supreme Court's decision in *Lewis v. Lewis*, Ky., ____ S.W.2d ____ (May 27, 1993). 14/1/1

C. RECOMMENDATIONS TO IMPROVE THE FUNDING OF KENTUCKY'S PUBLIC DEFENDER SYSTEM

1. Public defense is a necessary expense of government that must be adequately funded. 16/0/0

2. Public defenders are essential co-participants in the criminal justice system and the actions and policies of one component almost always affect the fiscal requirements of all other components. 16/0/0

3. The Task Force will continue to study and make a future recommendation on the funding relationship between county and state authorities for public defender programs. 15/0/1

4. The majority funding for public defense must come from the state's general revenue fund that is generated from a variety of sources. 16/0/0

5. Funding sources which are related to the operation of the courts and indigent defense are appropriate potential sources for new revenue. 14/0/2

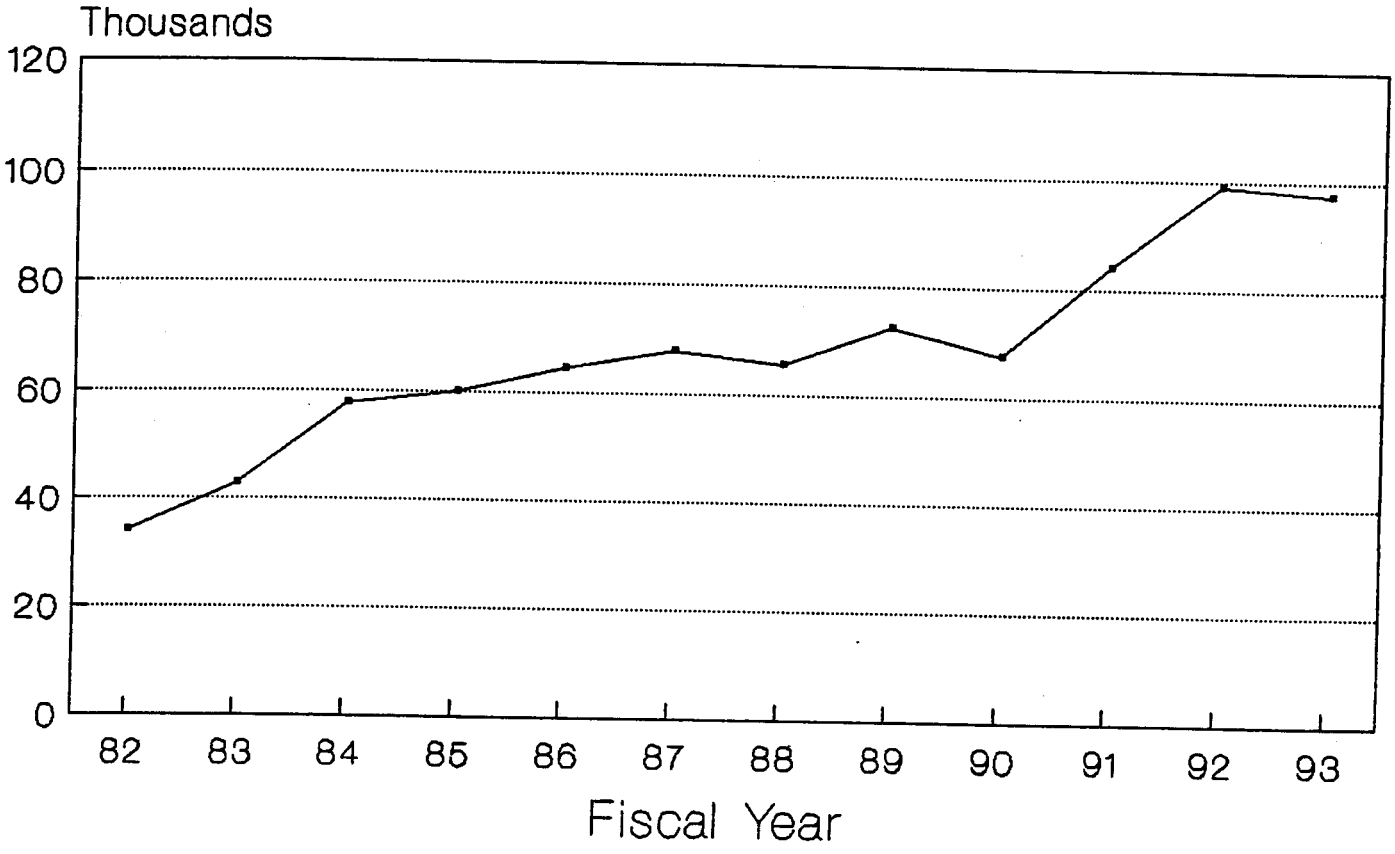
6. As a funding mechanism, the following two pieces of funding legislation should be enacted:

   a. Amend KRS Chapter 31.120 to provide for an up-front $40.00 administrative or "user" fee for public defender services, which can be reduced or waived, at the direction of the court, if the person remains in custody or does not have the financial resources to pay the fee. In the event the defendant has failed to pay the required administrative fee, the fee shall be deducted from any posted cash or property bond. 15/0/0

   b. Amend KRS 189A.050(1) and (3) to increase the current driving under the influence service fee from $150 to $200 and dedicate 25% of that fee to public defense. 13/3/0

7. The two pieces of leg-islation proposed above are to be designated as "re-stricted funds" and are to be deposited into a special, non-lapsing Departmental fund. 14/1/1

DPA CASELOAD - FY 82 through FY 93



8. The Department of Public Advocacy should receive a balanced share of federal grant money, including but not limited to federal drug grant money. In support of this goal, a member of the Department of Public Advocacy should have permanent membership on the Kentucky Crime Commission. 14/1/1

9. Legislation should be enacted which would require preparation of a fiscal impact statement to measure the effect of all pending legislation on the criminal justice system, including indigent defense. 16/0/0

10. The Department of Public Advocacy should be funded with seed money for federal grants to expand the resources available to public defense. 14/1/1

11. Based on average incarceration costs of $13,000 per inmate per year, it is recognized that public defenders and their staff financially benefit the criminal justice system for successful dismissals, acquittals, the reduction of charges and sentences, including reductions from felonies to misdemeanors, probation successes and alternative sentencing plans. 13/2/1

D. RECOMMENDATIONS RELATING TO ELIGIBILITY SCREENING AND CLIENT CONTRIBUTIONS

1. All potentially indigent criminal defendants requesting public defenders should be carefully screened for eligibility in order to insure that only the truly indigent are provided representation at public expense. Careful screening will also identify those partially indigent defendants who are unable to afford a private attorney but who have some ability to contribute to the cost of their defense. 16/0/0

2. Amend the language of KRS 31.120(2) to require the pretrial release officer to obtain and compile the affidavit of indigency. 14/1/1

3. The Task Force should study for possible implementation a fee schedule for those that are partially indigent. 15/1/0

4. All defendants subject to a contribution or recoupment must be afforded minimum constitutional due process safeguards. 16/0/0

5. Propose and work with the Administrative Office of the Courts to review and consider a new arraignment order that includes the order finding that the defendant is or is not qualified for public defender services, and which sets out the initial amount of contribution ordered by the court for the defendant to pay. 13/2/0

E. OTHER RECOMMENDATIONS

1. The training of contract and full-time public defenders is a critical element in providing quality indigent legal defense representation. Consequently, such programs must be adequately funded. 16/0/0

2. The Task Force needs to continue to seek long-term solutions to problems facing Kentucky's public defender system. This can best be achieved by extending the date of the Task Force's final report to July 1, 1994. 13/3/0

3. The funding committee should review, on behalf of the full Task Force, the Kentucky penal code to determine if there are any criminal offenses requiring jail time that might more effectively be handled as violations. 14/2/0

4. To the extent funding is available, salary parity for full-time state defender staff with others in state government is mandated. 10/0/0

III. DELIVERY OF INDIGENT DEFENSE SERVICES

A. PROBLEM AREAS IN THE DELIVERY OF INDIGENT CRIMINAL DEFENSE LEGAL SERVICES

1. The indigent defense caseload in Kentucky has substantially increased over the last few years without a corresponding increase in funding. Since 1989 actual caseload levels have risen over 35%;

2. Gross inequities and great disparities in funding exist between Kentucky counties and render many contracts

♣ The Kentucky State Police Budget Request for the Next Bienium Includes:

- 120 new officers
- $20 million more per year; $102 million in FY 95; $103 million in FY 96
- $2.2 million for time spent in court
- $2,341 raise for each officer's base salary to remain competetive with surrounding states

financially unfeasible for private practitioners. (Summary at I8-28);

3. Certain public defender programs around the state, most prominently Jefferson County, are suffering from overwhelming caseloads that are four to five times the acceptable national standards;

4. Contract counsel compensation, at both the trial, appellate and post-conviction level, are frequently inadequate to attract and retain competent counsel. The routine expenses of part-time contract appellate attorneys are not even reimbursed.

5. Salaries and benefits for attorneys and support staff working in full-time public defender programs are neither equal nor comparable even where the work performed is identical;

6. There is both a general lack of defense resources and a limited use of investigators and other support staff in contract counties to assist defense counsel in representing indigent defendants;

7. Unforeseen circumstances, such as a death penalty or a complicated sexual assault case, have a devastating financial and emotional impact on any office, especially a contractor;

8. The representation of death eligible defendants by private practitioners at current levels of not more than $2,500 per attorney is totally insufficient. There is a lack of training, experience and time necessary to devote to such cases, many of which are handled by contract attorneys;

9. The number and length of videotape appeals continues to increase and are more expensive in time and money for the public defender system to handle than the traditional typed transcripts;

10. Public defender staffing at some of Kentucky's prisons has remained virtually static for over twelve years, despite growing populations at the prisons served by those offices;

11. In fiscal year I994, the Kentucky Corrections Department will open a 500 to I,200 medium bed security facility; and,

12. KRS 532.100(4-7) enacted in I990, has resulted in nearly I,900 class D felons being housed in local jails rather than state prisons with little, if any, access to courts and public defender counsel.

B. DELIVERY RECOMMENDATIONS RELATING TO CURRENT PROGRAMS AND SERVICES

1. Afford quality representation to all eligible persons at every level of the criminal justice system.

COMMENT

In accordance with the fundamental principal that all people, rich or poor, are entitled to equal justice and a fair trial, Governor Jones' mandate creating this Task Force emphasizes "quality public defender services." Because the overriding concern in any defender organization must be quality rather than cost, the Governor has charged this Task Force to "[i]nvestigate and evaluate funding mechanisms which ensure access to **quality** public defender services."

Likewise, recognizing the critical importance of "quality" public defender services, the I993 ABA Standards for Criminal Justice, Chapter 5, Providing Defense Services, Standard 5-I.I, states:

> The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel...

The Commentary to this provision emphasizes that whatever standard is used to "measure the performance of counsel, even the minimum constitutional mandate of 'reasonably effective assistance', [the standard] cannot be met when the defender system is not structurally sound or is deprived of the resources necessary for quality performance by each and every attorney who provides defense services in individual cases." Commentary, ABA Standard 5-1.2, at 3.

Obviously, a definite relationship exists between cost and quality in providing defense services. While cost is an important factor in assessing an indigent defense delivery system, it is not the overriding or most important factor. Rather, the concern must focus on quality. The type of trial a person receives cannot depend on the amount of money he has. The Constitution requires the same level of quality services that a person of wealth receives.

In Kentucky the quality of representation an indigent criminal defendant receives should not vary from county to county. Quality public defender representation is

- University of Kentucky Athletic funding: $19.9 million
- DPA's funding from all sources (state, county, recoupment, federal): $12.5 million

a right available to each and every indigent citizen charged with a crime, regardless of where the crime allegedly occurred.

2. **At the present time, the most cost-effective means of providing high quality trial, post-trial and capital services in Kentucky is a centrally administrated, statewide, mixed system of delivery, composed of full-time attorneys in regional offices with significant involvement by the private bar.**

COMMENT

The mixed method of indigent defense has been recommended by numerous criminal justice authorities, including the American Bar Association.

Each component, the full-time institutional defender and part-time private bar participant, has an important role to play in the delivery of indigent defense services. The Commentary to the 1993 ABA Standards for Criminal Justice, Chapter 5, Providing Defense Services, states, "When adequately funded and staffed, defender organizations employing full-time personnel are capable of providing excellent defense services. By devoting all of their efforts to legal representation, defender programs ordinarily are able to develop unusual expertise in handling various kinds of criminal cases. Moreover, defender offices frequently are in the best position to supply counsel soon after an accused is arrested." Commentary, at 7. This is particularly true in capital cases.

Likewise, the private bar has a major role in the delivery of public defender representation. ABA Standard for Criminal Justice 5-1.2(b) explicitly states that every "system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services."

DPA currently uses the mixed system of delivery. At the trial level, DPA contracts with private part-time attorneys in 74 of Kentucky's 120 counties. DPA also contracts with the private bar to handle conflicts that arise in the full-time offices. The mixed system of delivery is also used at the post-trial level. While the full-time appellate staff handles the cases with lengthier records, including extensive video records and more serious charges, nineteen private attorneys participate in the Department's "of counsel" appellate program through contracts.

3. **A substantial increase in funding for full-time non-profit corporations to achieve salary parity and caseload reductions is required.**

COMMENT

In Kentucky there are two types of full-time institutional defenders: those state employees who are employed by the Department of Public Advocacy and the full-time employees of the non-profit organizations which contract with the Department to provide representation in a given area. Additional funds are needed in at least two of the full-time offices, Jefferson and Fayette Counties, run by nonprofit corporations. Both county governments contribute significantly to the cost of their own public defender system. Jefferson County is in need of significant funding increases to hire additional attorneys and support staff. Present caseload levels in Jefferson County far exceed 850 cases per lawyer. Clearly, additional funding is needed to reduce such heavy caseload levels in Louisville to a manageable number so that those full-time defenders can provide competent, quality representation to their indigent clients.

Secondly, full-time public defenders and staff in Louisville and Lexington are not in salary parity with their state counterparts. For example, beginning public defenders in Louisville and Lexington are paid $18,500 a year while starting salaries for state public defenders are $21,600. Such a disparity is clearly unfair and devastating to employee morale. Equal pay for equal work makes economic sense when all the workers in the equation are full-time institutional defenders.

Lexington public defenders, although full-time employees, do not even have retirement benefits. Some Lexington public defenders have been employed there for over fifteen years with no retirement package available. Additional funding is needed to meet these needs as well.

A commitment to adequately fund these two counties will cost approximately $2 million dollars over the next two years. (See Summary at 87).

4. **Additional funding is mandated to adequately compensate contract attorneys, ensure quality conflict free representation and needed support services.**

5. **Funding must be increased for the "of counsel" appellate program to insure adequate compensation.**

COMMENT

Caseload figures reported to the Department of Public Advocacy reveal great public defender funding disparities between Kentucky counties. (See Summary, at 18-28). For example, the reported funding per public defender case in Larue County is $44.22, while in Green County the cost is $296.44. Likewise, contract public defenders handle a heavy volume of indigent criminal cases without

- Personal Service Contracts Issued for fiscal year 1993-94 as of October, 1993
  Total Amount: $53,422,179.26
- DPA's Funding: $12.5 million

adequate or accessible investigative state support. Current public defender county contracts also require the contractors, even a single contractor/administrator, to handle *every* case that arises in the county, including any death penalty case and all conflict cases. Consequently, regardless of the annual compensation under the contract, the contracting lawyer or lawyers must retain and pay conflict counsel out of the contract funds. As such, there is a financial incentive not to recognize a conflict. Similarly, many private practitioners refuse to consider a public defender contract because of the contractual obligation to defend any and every death penalty prosecution brought against indigent defendants. With knowledge of the extraordinary amount of time an attorney must devote to defending a capital client, private bar attorneys are wisely reluctant to jeopardize their private practice and their personal financial security on the gamble that no indigent will be charged with capital murder in their county or district.

Significantly, contract public defenders are not compensated according to volume of pretrial litigation, trials, or the complexity of their cases. The cumulative result of these many responsibilities and too few support services, is that many attorneys are terribly underpaid and overworked. This greatly contributed to turnovers in 34 of 74 contract counties during fiscal year 1992-1993. Often, high quality is only provided by the dedication and sacrifice of individual lawyers. When this occurs, those lawyers are voluntarily shouldering a personal and private tax to relieve the Commonwealth of its burden to fund adequately competent criminal representation for indigents. Sometimes, contracting lawyers find the volume of work and the meager compensation overwhelming and the indigent clients suffer.

The 1993 ABA Standard for Criminal Justice 5-2.4 states, "Assigned counsel [and, by inference, attorneys on contract] should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses."

At a minimum, the contract price should reflect the effort required to provide adequate representation in each type of case, and generate a reasonable income for the work performed. A by-product of increased compensation would be better case reporting data and the state's ability to include contractually essential performance and training standards to insure quality representation. Increasing the level of compensation paid to contract public defenders should also result in an increase in the number of more experienced criminal practitioners willing to contract with the state.

In summary, additional funding is needed to adequately compensate contract attorneys and to insure reasonable caseload levels, yet keep the important involvement of the private bar. The Department recommends that funding to the contract counties increase by 25% each fiscal year over fiscal year 1993-94 for a biennium cost of $1,118,600.00, excluding Jefferson and Fayette Counties. (See Summary at 87). At this level, Kentucky will pay an average cost per case of $150.00 which would more closely approach fair compensation for contract attorneys.

Likewise, "of counsel" appellate attorneys must be adequately compensated. *See* ABA Standard 5-2.4. At the present time, due to budget constraints, the Department *prorates* all fee claims quarterly and does not even reimburse routine expenses, such as duplicating costs, postage and long-distance phone charges. Rather, the Department contracts at an hourly rate with a limit on the maximum fee. Obviously, "of counsel" appellate attorneys should not have to pay the expenses for doing an appeal and should be adequately and fairly compensated. As such, the Department recommends that compensation for of counsel attorneys should be increased to a maximum of $1,250 instead of $750 and billed at the rate of $25 an hour out-of-court and $35 an hour in-court. It is recommended that funding for this program be increased by $252,900.00 for fiscal years 1994-96. (See Summary at 89).

6. Maintain at current funding levels of the Department of Public Advocacy's full-time trial, appeal and post-conviction offices.

COMMENT

The Department of Public Advocacy's full-time offices, including trial offices, prison offices and the centralized post-trial staff, must be maintained. As previously explained, the ABA supports and recognizes the critical role of full-time institutional defender offices at the trial and post-trial levels. Moreover, under the Department's long-term regionalization plan (see infra), full-time defenders located in field offices would aid private attorneys in discharging their contractual public defender duties, handle all capital cases, provide additional support services including access to a library, motion file and brief bank.

a. Maintain the Department's 12 full-time trial level regional offices.

COMMENT

DPA's twelve regional offices in Paducah, Hopkinsville, LaGrange, Northpoint, Somerset, Frankfort, Richmond, London, Morehead, Stanton, Hazard, and Pikeville should be maintained.

Many of these offices are located in the most impoverished rural counties in Ken-

- Of the 678 Personal Service Contracts Issued by the state for all agencies for Fiscal Year 1993-94 (as of October, 1993) 83 were for Attorneys Totalling $1,889,336.51
- 46 of the 83 Contracts for Attorneys were at a Rate of $75 per hour or more (up to $150 per hour)
- Kentucky's Statutory Public Defender Hourly Maximums: $25.00 in-court, $35.00 out-of-court (See KRS 31.170(4))

tucky. These offices provide stability, expertise, experience, and efficiency to the delivery of legal services to indigent criminal defendants. Unless additional counties are added to these offices to address specific problems that arise in surrounding contract counties, significant additional funding for these full-time offices is not anticipated. However, it must be recognized that funding stability, account-ability and legal expertise are important benefits of a full-time delivery method.

b. Maintain the Department's centralized appellate section.

COMMENT

The Department's Appellate Section also be maintained. KRS 3l.030 requires the Department to "[assist] local counsel on appeals or [take] appeals for local counsel in the same manner as such appeals for the Commonwealth are presently handled by the attorney general." The Attorney General's Office recognizes the need for criminal appellate specialists and maintains a Criminal Appellate Division. A central defender appellate section in Frankfort is particularly necessary in light of this Commonwealth's reliance on videotape appellate records and the increasing use of the death penalty across the Commonwealth. For example, the average record size handled by the Appellate Section is six videotapes or eight volumes of evidence, and such records have gone as high as 17 videotapes. "Of counsel" appellate attorneys simply will not accept lengthy videotape records because they are so time consuming and financially unrewarding. Moreover, the appellate section needs funding for a transcriptionist and technologically advanced video equipment which would begin to address the delays and inefficiencies generated in appellate defense representation by videotape records.

Videotape records were embraced by the judiciary to eliminate, first, the expense of court reporters both in recording the testimony and in typing the record and, second, the lengthy delay between the completion of the criminal trial and the completion of the appellate record. Videotape records achieved both these goals with considerable savings to the judiciary. Unfortunately, to accomplish this result, videotape records substituted a delay in the preparation of the appellant's brief for the delay in the preparation of the record. And, the savings for the judiciary were realized only by adding new costs to the Department's appellate section as experienced appellate litigators' productivity and efficiency decreased when viewing replaced reading and playback replaced rereading.

c. Maintain the Department's post-conviction section.

COMMENT

DPA's Post-Conviction Section has offices in Frankfort, LaGrange, Northpoint, and Eddyville which should be maintained. These offices, welcomed by the Kentucky Department of Corrections, satisfy the constitutional requirement of access to the courts. *Bounds v. Smith*, 430 U.S. 8l7 (l977). Such offices also save the criminal justice system an enormous amount of money and time. In fact, prison post-conviction offices are one of the most cost effective ways to pro-vide public defender services. Since 1990, post-conviction attorneys' efforts have reduced inmate sentences over 900 years. At $13,000 per year per inmate for incarceration, these reductions are a significant economic contribution to the funding of Kentucky's criminal justice system.

Likewise, many Kentucky trial judges and correctional officials have come to appreciate the important role of post-conviction attorneys in screening out meritless claims. In these offices, nine DPA attorneys and four paralegals handle the various legal problems of approximately 8,000 inmates located in Kentucky prisons. While the inmate population continues to grow, DPA's post-conviction services staff complement has remained the same. It is estimated in the year 2000 more than l4,000 inmates will be incarcerated in Kentucky. Based on current numbers and projected increases, the staffing of prisons by DPA post-conviction staff personnel is woefully inadequate.

C. RECOMMENDATIONS RELATING TO NEW PROGRAMS AND SERVICES

1. Increase funding for capital cases.

2. The funding for death penalty conflict cases handled by the private bar must be increased substantially

COMMENT

The l993 ABA Standards for Criminal Justice 5-l.2(d) state, "[w]here capital punishment is permitted...the plan should take into account the unique and time-consuming demands of appointed representation in capital cases." Despite this mandate, Kentucky has failed to address the significant defender problems related to capital cases.

At the present time, capital representation in the Department's full-time offices is adequately provided by full-time defenders, although such cases certainly put a strain on the day-to-day case responsibilities of those offices. However, severe underfunding of capital representation occurs at the contract level. While contractors are required to provide services in capital cases, such a case can bring a private lawyer's practice to a standstill and render the contract a financial disas-

- Personal Service Contract (7/1/93)
  Economic Development Cabinet; McBrayer, McGinnis, Leslie & Kirkland; represent, advise and consult with the Kentucky Economic Development Finance Authority on specific matters at $75 per hour up to $125,000.00

- For capital litigation DPA pays no more than $2,500 for legal representation at $25 per hour in-court and $35 per hour out-of-court

ter. For example, the ABA Commentary to Standard 5-I.2(d) points out that the average preparation and trial of a capital case takes 400-500 hours. Appellate attorneys spend approximately four times as much time on a death appeal than any other case. Commentary, at 11. Because of budget constraints, the low level of capital case funding and the maximum contract fee of $2500 per lawyer in capital cases, does nothing to ameliorate the death penalty problem in contract counties.

DPA's Capital Trial Unit, though funded for three attorneys, currently consists of two lawyers, one secretary, one paralegal, and one investigator. This Unit's mandate is to provide capital trial services in a limited number of capital cases in contract counties. Unfortunately, the Unit's small size does not allow it to become involved in a majority of the capital cases presently pending in contract counties. The Unit's centralized location in Frankfort insures that a considerable amount of staff worktime will be devoted to unproductive travel time.

Additional funding is needed in the area of capital representation so that well trained, highly experienced criminal defense attorneys can handle the most serious death penalty cases. Such a scheme would increase the reliability of the final result.

The problem is equally serious at the post-trial level. DPA's small appellate unit has been representing virtually all death-sentenced individuals since 1976, both on their direct appeals and through all six stages of the post-conviction process. This additional workload has decreased the appellate unit's ability to represent a number of non-capital appellate clients.

While KRS Chapter 31 requires DPA to provide services after the appeal, there is no one on staff to provide services at the state post-conviction level in capital cases. Although the Capital Resource Center is providing representation in a few of these cases, its federal grant restricts the Center's representation to a level equivalent to the federal representation provided by other attorneys in the Department. Those cases which have moved into state post-conviction have featured attorneys from other branches or units representing individual clients. Many of the clients on death row will have their cases move into state post-conviction in the near future, which represents a looming crisis of representation. Increased funding in this area is needed as well.

A state capital post-conviction branch should be established. This branch would provide services to those individuals whose cases were completed at the appellate level prior to their being eligible to be represented by the federally funded Kentucky Capital Resource Center. The State Post-Conviction Capital Branch would complement the representation provided by the Resource Center, and in conjunction with that branch, would provide all capital post-conviction representation, except in conflict cases. This branch would be staffed by two attorneys, one secretary and one paralegal.

In conflict situations, the Depart-ment contracts with experienced members of the private bar. Nevertheless, such attorneys must be fairly compensated given the extraordinary complexity, time and resources required for the defense of capital cases. The Department's current contract amount of $2,500 is wholly inadequate and must be significantly raised. However, this can only occur through additional funding.

Lastly, all congressional versions of the pending 1993 habeas reform bill contain language that requires the states to provide two reasonably compensated attorneys at each stage of state capital litigation. Specific standards for attorney qualification would also be required. Under the Senate's version of the bill, failure to comply with federal attorney qualification standards will result in an open federal courthouse door to relitigate every potential issue, regardless of whether the matter was considered by the state's highest court. Consequently, the proper funding of capital cases will ensure future compliance with federal law and preserve the integrity of Kentucky law and procedure.

3. Provide funding to extend statutorily required post-conviction services to inmates incarcerated in private prisons and local jails.

COMMENT

To meet its obligations under the federal consent decree in *Kendrick v. Bland*, 542 F.Supp. 21 (1981), the Department of Corrections fully supports DPA's funding request for post-conviction attorneys. Currently, DPA's post-conviction staff is unable to provide services to private prisons, local jails, regional jails, the newly opened boot-camp for young first time offenders, or the new 500-1200 bed medium security Muhlenberg County prison which is scheduled to open in 1994. Moreover, recent legislation has resulted in the scattering of nearly 1,900 post-conviction clients among the many local jails. This means that those hundreds of inmates housed in local jails convicted of Class D felonies (legislatively mandated jail placement), inmates awaiting transfer to prison or under controlled intake, and those in community service are totally without access to any legal assistance. The Department recommends the addition of three paralegals, regionally located in existing field offices, would provide this class of felons with post-conviction representation. The biennial cost of meeting these prison population

- Personal Service Contract (10/29/93)
  Transportation Cabinet; John Norfleet; prepare appraisal report for the fair market value of surplus property in Scott County for $5,000.

- DPA pays up to $2,500 to represent a capital defendant at trial.

demands is approximately $187,439.84. (See Summary at 90).

4. Study the feasibility of regionalization to support local public defender contract attorneys and assist in state oversight functions.

COMMENT

It is clear that historically public defender contract counties have been neglected. It was only in December of 1992 that DPA hired a contract administrator to supervise and assist the private bar defenders in DPA's 74 contract counties. Although the establishment of a contract administrator has already enhanced the quality of the administration of these county contract systems, it is equally clear that one administrator cannot raise the quality of services in 74 separate county systems to the level to which citizens are entitled.

However, a regionally placed full-time defender office would provide support services to part-time defenders in the surrounding contract counties. Properly staffed, such offices could handle an extremely high percentage of conflict cases, capital cases, sexual abuse cases, and other complex cases that would arise in surrounding contract counties. Moreover, such regional offices could ensure quality legal representation by monitoring performance and recruiting new attorneys for defender work. Likewise, contract attorneys would also have a nearby resource for other support services such as access to an appropriate library, motion file, and brief bank. Such offices would also increase contractors' knowledge of and access to the Frankfort central office and its resources.

5. Insure funding in the new area of civil contempt cases, as mandated by the Kentucky Supreme Court's decision in *Lewis v. Lewis*, Ky., ___ S.W.2d ___ (May 27, 1993).

COMMENT

On May 27, 1993, the Kentucky Supreme Court rendered a to be published opinion in *Lewis v. Lewis*. In *Lewis*, the court extended the right to counsel under KRS Chapter 31, and held that a person facing incarceration for civil contempt, if found to be indigent, must be appointed a public defender. No civil contempt caseload statistics are kept by the Administrative Office of the Courts and so the financial and logistical impact that this new class of cases and clients is hard to gauge. Nevertheless, the Department must be properly funded, staffed and trained to handle this new and totally different responsibility.

IV. FUNDING: PROPOSED REVENUE SOURCES FOR INCREASED FUNDING

A. FUNDING PROBLEMS FACING THE DEPARTMENT OF PUBLIC ADVOCACY

1. Kentucky's system of indigent defense is near crisis due to chronic underfunding;

2. In fiscal year 1992, each public defender case, from the simplest traffic offense to capital murder, was financed, on average, with only $125 in government funds. Such a funding level is now the lowest in the United States, and $118.00 below the national average of $243.00. (See Summary at 97);

3. At the trial level, a public defender case was government financed, on average, with only $94.00. This makes Kentucky's public defender program the poorest funded trial level program in the nation. (See Summary at 18);

4. In the last five years, the Department of Public Advocacy's operating and capital expenditures have increased 11% and caseloads have increased 35%;

5. With over 88% of the Department's budget devoted to personnel costs, any budgetary cuts or reductions of general fund dollars requires a corresponding reduction in mandated services;

6. All current funding sources are unpredictable;

7. There is a statutory disincentive for counties to contribute to the public defender system. Only 34 counties currently contribute to the cost of local public defender programs; and,

8. Legislation is frequently passed which fails to consider the fiscal impact of such legislation on the criminal justice system, including the indigent defense function.

B. RECOMMENDATIONS TO IMPROVE THE FUNDING OF KENTUCKY'S PUBLIC DEFENDER SYSTEM

1. Public defense is a necessary expense of government that must be adequately funded.

2. Public defenders are essential co-participants in the criminal justice system and

- Personal Service Contract (7/1/93)
  Human Resources; Covington & Burling; representation over the audit of the statewide job training program and the Toyota Motor Manufacturing Corp. plant in Georgetown at $125 per hour up to $135,000.00

- DPA pays attorneys doing felony conflict cases a maximum of $400 per case.

the actions and policies of one component almost always affects the fiscal requirements of all other components.

3. **The Task Force will continue to study and make a future recommendation on the funding relationship between county and state authorities for public defender programs.**

4. **The majority funding for public defense must come from the state's general revenue fund that is generated from a variety of sources.**

5. **Funding sources which are related to the operation of the courts and indigent defense are appropriate potential sources for new revenue.**

6. **As a funding mechanism, the following two pieces of funding legislation should be enacted:**

   a. **Amend KRS Chapter 31.120 to provide for an up-front $40.00 administrative or "user" fee for public defender services, which can be reduced or waived, at the direction of the court, if the person remains in custody or does not have the financial resources to pay the fee. In the event the defendant has failed to pay the required administrative fee, the fee shall be deducted from any posted cash or property bond.**

COMMENT

A user fee is an up-front, fixed charge or fee assessed each needy person at arraignment for public defender services. The system is easy to administer and the $40.00 figure represents an amount that should be affordable by most individuals. As conceived, the fee can be reduced or waived, if the person remains in custody or does not have the financial resources to pay the fee. Moreover, the fee is in addition to any other contribution or recoupment assessed by the court. **Accordingly, the funds generated by the administrative fee would go directly to the Department of Public Advocacy to support the state-wide defender effort while any additional contribution or recoupment made by the defendant would be returned to the county to support the local public defender program.**

Another important feature of such a fee is that it be paid to the circuit court clerk in a lump sum, through installments, or from a posted cash or property bond. Payment of the fee can also be made a condition of probation. In this way, the maximum amount of revenue generated by the fee is returned to the public defender system. The result will be better representation with increased resources. Finally, based on an expected "destitution" rate of 30%, *i.e.*, those individuals who can pay nothing, the Department projects that such a fee would generate approximately $2,653,000.00. (See Summary at 94).

   b. **Amend KRS 189A.050(1) and (3) to increase the current driving under the influence service fee from $150 to $200 and dedicate 25% of that fee to public defense.**

COMMENT

Currently, counties receive 25% of the service fee, CHR 45%, Justice 26%, and the Department of Transportation 4%. The service fee breakdown reflects funding for some parties who faced increased costs to enforce the Chapter. Yet, the Department of Public Advocacy, who represents many of the individuals charged with and convicted of driving under the influence, was not included in the fee split.

Based on fiscal year 1992 figures, by increasing the service fee $50.00 and dedicating 25% of that total to the Department would generate $1,570,300.00. (See Summary at 92).

7. **The two pieces of legislation proposed above are to be designated as "restricted funds" and are to be deposited into a special, nonlapsing Departmental fund.**

COMMENT

Restricting such revenue would insure that the revenue generated would be used only for the defense of indigents. It would also provide some funding stability and predictability.

8. **The Department of Public Advocacy should receive a balanced share of federal grant money, including but not limited to federal drug grant money. In support of this goal, a member of the Department of Public Advocacy should have permanent membership on the Kentucky Crime Commission.**

In 1990 federal legislation clarified and emphasized that federal assistance to

- Personal Service Contract (7/14/93)
  AOC; Grant Hellman; legal representation of court of justice juvenile services court designated worker in *Horn v. Devere*; $75 per hour up to $5,000

- The maximum attorney fee paid by the Department of Public Advocacy for a capital case: $2,500 at $25 per hour in-court and $35 per hour out-of-court

state and local government be used to expand "defender resources" to enhance the overall operational effectiveness of the court process. Section 109 of the Comprehensive Crime Control Act of 1990 amended 42 U.S.C. 3751(b), and enumerated 21 purposes for which grants to states and units of local government may be made by the Bureau of Justice Assistance under the Drug Control and System Improvement Grant Program. This amendment clarified that the goal of "improving the operational effectiveness of the court process" requires a balance of support for all components of the court process, including prosecutorial, public defender, and judicial resources. According to this amendment, this improvement in the effective operation of the court process should be achieved "by expanding prosecutorial, defender and judicial resources, and implementing court delay reduction programs."

The Judiciary Committee Report on this legislation concluded that "this amendment is...needed to ensure that federal funding for indigent defense programs is recognized as no less significant than the other purpose areas specifically enumerated in Section 3751(b)."

In view of public defense's equal partnership role acknowledged in the Crime Control Act, a representative of the Department of Public Advocacy should be a permanent member of the Kentucky Crime Commission, the entity charged with developing the Commonwealth's Drug Control Strategy and evaluating grant proposals for the distribution of federal drug money. The Department's presence would provide both a needed defender perspective and a realistic evaluation of the impact on public defender services of proposals to increase the resources of the other components of the criminal justice system.

9. Legislation should be enacted which would require preparation of a fiscal impact statement to measure the effect of all pending legislation on the criminal justice system, including indigent defense.

COMMENT

In the August 1992 report of the American Bar Association's Special Committee on Funding the Justice System, entitled *Funding the Justice System: A Call to Action*, the Special Committee recommended the concept of "justice system impact statements," which would "examine and analyze the funding and workload impact of proposed legislation and executive branch orders or actions for each and every element of the criminal and civil justice system." *Id.* at pp. 29-30. "Such [justice system impact] statements can be useful to show the relationship between action on one justice system component and the subsequent reaction of the others." *Id.*

A more restrictive version of the justice system impact statement limits the fiscal impact analysis to only the various components of the jurisdiction's criminal justice system, without focusing on the repercussions to civil litigation.

Ideally, a criminal justice system impact statement would identify and quantify the financial costs to all components of the criminal justice system directly or indirectly generated by a proposed law. Legislation designed to create a harsher recidivist enhancement statute may actually contain hidden costs to the criminal justice system. A certain number of addi-

DUI SERVICE FEE DISTRIBUTION
$150 Fee

KRS 189.050 sets $150 service fee as part of the sentence of a person convicted of DUI. The statute requires the fees to be used for enforcement of DUI laws, support of jails, recordkeeping and treatment and education programs for DUI cases.

Allotted to 4 Entities

109 KAR 11:030 allots driving under the influence service fees as follows:

1. Department of Local Government: 25% for the distribution to counties in which drunk driving convictions are adjudged to assist in expense of maintaining jails and which shall be used in addition to other jail costs allowed by the state.
2. Cabinet for Human Resources: 45% for treatment programs for indigent offenders.
3. Justice: 26% for enforcement activities under provisions of KRS 189.010.
4. Transporation Cabinet: 4% for furnishing copies of driver history records to courts for use in DUI cases.

Dollars Allotted FY 91, 92, 93

The Service Fees Collected in FY 1991, 1992, & 1993 were distributed as follows:

	FY 91	FY 92	FY 93
1) 25% Counties	1) $ 849,741	1) $ 844,240.81	1) $ 783,477.14
2) 45% CHR	2) $1,529,534	2) $1,519,633.46	2) $1,410,258.86
3) 26% Justice	3) $ 883,731	3) $ 878,010.45	3) $ 814,816.23
4) 4% DOT	4) $ 135,959	4) $ 135,078.53	4) $ 125,356.34
5) TOTAL	5) $3,398,965	5) $3,376.963.25	5) $3,133,908.57

tional prosecutors, judges, public defenders, prison guards, prison cells, assistant attorney generals and appellate defenders may be necessary to accommodate the additional defendants who, when confronted with this more severe enhancement penalty, would insist upon jury trials and criminal appeals. A criminal justice impact statement analyzing this enhancement bill would delineate the projected resources needed by each component of the criminal justice system once the new law was implemented with anticipated increases in each component's expenditures in dollar terms.

Criminal justice fiscal impact statements would provide the legislators with a more definite picture of the anticipated costs of any act and allow for greater planning by the affected institutions and departments in the criminal justice system.

10. The Department of Public Advocacy should be funded with seed money for federal grants to expand the resources available to public defense.

COMMENT

Many federal grants require an in-kind cash match of state or local funds. Historically, the Department has been unable to take advantage of available federal grant programs and dollars, even though such programs would reduce the costs associated with indigent defense to state and local funding authorities.

11. Based on average incarceration costs of $13,000 per inmate per year, it is recognized that public defenders and their staff financially benefit the criminal justice system for successful dismissals, acquittals, the reduction of charges, and sentences, including reductions from felonies to misdemeanors, probation successes and alternative sentencing plans.

V. ELIGIBILITY SCREENING, CONTRIBUTIONS FROM PARTIAL INDIGENTS AND RECOUPMENT

A. PROBLEMS IN ELIGIBILITY SCREENING AND CLIENT CONTRIBUTIONS

1. Many judges simply do not have the time to properly screen potentially indigent criminal defendants for eligibility to insure that only the truly indigent are provided representation at public expense;

2. Courts fail to identify those partially indigent defendants who are unable to afford a private attorney but who have some ability to contribute to the cost of their defense;

3. Despite varying poverty rates, an unexplained and wide disparity exists between Kentucky counties in the amount of contributions or recoupment received from partial indigents under KRS Chapter 31. Some counties recoup a substantial amount of money from defendants, while other counties recoup very little or no money;

4. There are few established guidelines for courts to use in determining the appropriate contribution level or amount of recoupment to be made by a partially indigent defendant. Consequently, there is a lack of uniformity in assessment and collection of contributions from defendants;

5. When a private lawyer withdraws from a case, especially a capital case, many times the defendant is rendered totally destitute and unable to pay even a small sum toward the cost of his representation; and,

6. Often courts verbally order a contribution from the defendant, but unless that order is in written form, the recouped money may not be properly credited to the county or even collected.

B. RECOMMENDATIONS RELATING TO ELIGIBILITY SCREENING AND CLIENT CONTRIBUTIONS

1. All potentially indigent criminal defendants requesting public defenders should be carefully screened for eligibility in order to insure that only the truly indigent are provided representation at public expense. Careful screening will also identify those partially indigent defendants who are unable to afford a private attorney but who have some ability to contribute to the cost of their defense.

COMMENT

A stricter eligibility screening process is one method of controlling caseloads and therefore, reduces the costs of indigent defense.

2. Amend the language of KRS 31.120(2) to require the

- Personal Service Contract (7/1/93)
  Attorney General Office; Segal, Isenberg, Sales, Stewart, Cutler, & Tillman; hazards of asbestos litigation in state-owned buildings at $75 up to $19,136.43

- The maximum attorney fee paid by the Department of Public Advocacy for a non-capital appeal: $750 at $25 per hour in-court and $35 per hour out-of-court

pretrial release officer to obtain and compile the affidavit of indigency.

COMMENT

Indigency screening would be greatly improved if the pretrial release officer was required to compile the affidavit of indigency for the judge. Currently, the statute only requires that the affidavit of indigency be compiled by the pretrial officer "where practical." Judges could make a more informed eligibility determination in a highly efficient manner if pretrial release officers, who already fill out the bond form, were initially responsible for the affidavit.

3. The Task Force should study for possible implementation a fee schedule for those that are partially indigent.

COMMENT

Many criminal justice experts believe in order to determine a fair, equitable and appropriate amount of contribution prior to trial, it is necessary to establish standards based on the average costs of attorney representation in different types of cases at different court levels. A system of uniform fee rates would avoid the current disparity between jurisdictions and counties. Judges at present have few guidelines to use in determining the appropriate amount of defendant contribution or recoupment. This lack of uniformity could be minimized by a standard schedule of charges based on a specific type of case.

Standardized fee rates would relieve the conscientious trial judge of the difficult task of attempting to ascertain with accuracy the actual cost to the public defender system of representing a particular defendant. Standard fee rates would of necessity allow some defendants to reimburse the state coffers less than the actual cost of their representation, while other indigents would be required to reimburse slightly more than the actual cost of the legal services they received. In the long run the expense of either administratively or judicially determining the actual cost of the defender's representation in each case would consume any additional reimbursement generated by a more accurate calculation of the dollar amount expended.

4. **All defendants subject to a contribution or recoupment must be afforded minimum constitutional due process safeguards.**

5. **Propose and work with the Administrative Office of the Courts to review and consider a new arraignment order that includes the order finding that the defendant is or is not qualified for public defender services, and which sets out the initial amount of contribution ordered by the court for the defendant to pay.**

COMMENT

As an administrative convenience to judges and clerks, and to insure recouped money is properly credited to each county, the arraignment order should reflect the court's indigency determination and the initial amount of recoupment assessed by the court.

VI. OTHER PROBLEMS AND RECOMMENDATIONS

A. OTHER PROBLEMS FACING INDIGENT DEFENSE

1. Extremely limited training funds are available to the public defender staff. Full-time staff have paid a part of their own training costs for the past two years;

2. Statewide data on indigent defense caseload and costs needs improvement; and,

3. The problems facing public defense are complicated and require further indepth study and consideration.

B. RECOMMENDATIONS

1. **The training of contract and full-time public defenders and staff is a critical element in providing quality indigent legal defense representation. Consequently, such programs must be adequately funded.**

COMMENT

The role of a criminal defense lawyer requires extensive knowledge and expertise. Within the specialty of criminal defense are subsumed a multitude of subspecialties, such as juvenile law, capital representation, trial litigation, appellate representation and post-conviction litigation. Public defenders, whether full-time institutional defenders or part-time private bar contract attorneys, are required to master many of these subspecialties. The only effective and efficient method to guarantee public defenders are competent in a variety of criminal law specialties is to provide them with free access to continuing legal education programs specifically tailored to their needs as public defenders. Again, as the ABA Standard 5-I.5 (I993) provides:

The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education pro-

♣ Personal Service Contract (7/1/93)
State Police; Lippert & Association; provide psychological services for employees involved in traumatic situations at $100 per hour up to $7,080.

grams should be available, and public funds should be provided to enable all counsel and staff to attend such programs.

The Department of Public Advocacy has an excellent record of providing, to all public defender counsel and to the private criminal defense bar, a variety of seminars and practice institutes, staffed with credentialed local and national faculty, geared to develop efficient and effective advocates capable of providing quality representation despite a high volume practice.

The Department's commitment to excellence in training results in cost savings not only to the Department, but also to the other components of the criminal justice system, such as law enforcement agents, prosecutors, judges and even corrections officials. Well trained criminal defense specialists do not waste precious time and resources learning their craft by trial and error in the courtroom. Trained defense litigators test the system and insure reliable results for both their clients and the public.

2. **The Task Force needs to continue to seek long-term solutions to problems facing Kentucky's public defender system. This can best be achieved by extending the date of the Task Force's final report to July 1, 1994.**

3. **The funding committee should review, on behalf of the full Task Force, the Kentucky penal code to determine if there are any criminal offenses requiring jail time that might more effectively be handled as violations.**

COMMENT

Cases in which a jail sentence cannot be imposed have no constitutional requirement for the appointment of counsel. If these cases were diverted from public defender caseloads, there would be a positive effect on all components of the criminal justice system.

4. **To the extent funding is available, salary parity for full-time state defender staff with others in state government is mandated.**

COMMENT

Employees of the Department of Public Advocacy do not have salary parity with others in similar classifications in state government. For example, attorneys for the Department of Public Advocacy are currently earning a smaller annual salary than their counterparts at the Attorney General's Office and others throughout state government. This difference has arisen in the past two years and can be tied directly to the Department's underfunding.

In 1991 the Department of Personnel promulgated salary changes for the Attorney series and the Assistant Attorney General series. These increases applied to the first three classification levels of the series. Providing these increases was at the agency's discretion. Although the Attorney General's Office was able to increase salaries for its attorneys, the Department of Public Advocacy could not participate in the upgrade because of funding problems. As a result, the Department has lost applicants and employees to other state agencies that pay as much as $3,500 more per year for similar work.

CONCLUSION

In the next biennium, Kentucky's public defender system must receive approximately $6,300,000 in new funds. However, this report has identified new sources of revenue to finance this necessary funding increase. Nevertheless, a sound, long-term funding solution must be found. There is no cheap fix, but our adversarial system of justice is at stake. Remember, unless the adversary system is strong--unless it protects the weakest and least powerful members of society as well as the richest--the promise of the Sixth Amendment will be unfulfilled and the vision of equal justice in our courts will remain a mirage.

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- Personal Service Contract (7/1/93)
  Justice/Corrections; John D. Tarrant; dental services at Northpoint prison at $35 per hour up to $83,600.

- Of the 77 counties DPA allots money to for contracted public defender services, only 4 (Fayette, Jefferson, Kenton & Boyd) receive an allotment of $83,600 or more

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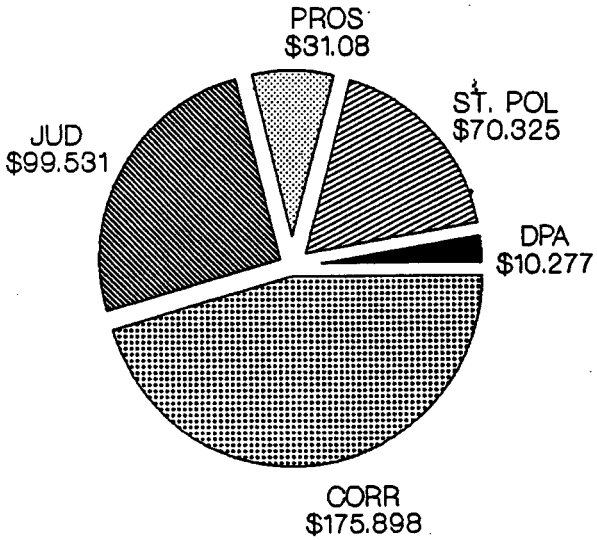
*Senator Michael Moloney resigned from the Task Force effective November 2, 1993.

**The commentary, which interprets and supports each recommendation, was written by the Department of Public Advocacy and accompanied the recommendations that were presented to and approved by the Task Force on November 11, 1993.*

♦ ♦ ♦ ♦

Criminal Justice Funds FY 93

Agency Appropriations



In Millions

♣ **Capital Query**: What is the only state in the country other than Alabama that has a maximum attorney fee cap in capital cases?

Answer: Kentucky.

Task Force on the Delivery and Funding of Quality Public Defender Services

The full Task Force has now had six meetings. What follows is a summary of what occurred at the first two meetings, July 19 and August 12, 1993.

A. July 19, 1993 Meeting

The Task Force's Organizational Meeting was held on July 19. Remarks were made by Ed Holmes, Secretary of the Public Protection and Regulation Cabinet who is chairing the Task Force, and by Allison Connelly. Secretary Holmes told the members that there is a crisis in the state with the public defender system; and that Governor Jones has charged the Task Force with finding long-term solutions to the problem of providing legal representation for indigent defendants.

Allison then gave the group an orientation to DPA's current status. She pointed out that the system has been underfunded since its inception; that the past five years have seen a 42% increase in cases handled, met by only a 20% increase in funding; that 88% of DPA's budget is now spent on personnel costs; that there have been no pay raises or reclassifications for two years; that there are salary inequities between full time defender staff (Jefferson, Fayette and Boyd state defenders) and between defenders and prosecutors; and that attorneys statewide are handling numbers of cases far in excess of maximum caseload standards recommended by the ABA. Kentucky now ranks 50th in the nation in per-case trial level expenditures for indigent defense, and 49th in overall per-case expenditures. The statistics are especially compelling in light of the $2,500 per attorney payment in capital cases.

After the initial meeting, the Task Force formed three subcommittees on Delivery of Services, Client Eligibility, and Funding. The Executive Committee will draft the interim and final report and any necessary legislation. The members of these subcommittees, and DPA staffers assigned to work with them, are listed on the attached sheet. Circuit Judge Ellen Ewing of Jefferson County agreed to serve as vice-chair of the Task Force.

B. August 12, 1993 Meeting

This meeting focused on the delivery of public defender services. First to address the Task Force was Kim Taylor-Thompson, former director of the Washington, D.C. Public Defender System and now a professor at Stanford Law School in California. She is also the outgoing chair of the ABA's Bar Information Program (BIP).

Ms. Taylor-Thompson began by referring to a number of other states which, because of previous budget cuts to their indigent defense systems, had convened similar task forces to address long-term solutions. She noted that in Missouri, such a task force resulted in a 40% increase in state funding, as well as a capital resource center. Moreover, the Ohio Task Force recommended increases in state funding, limits on defender caseloads, and downgrading of minor offenses to eliminate potential jail sentences and reduce caseloads.

Speaking for the ABA-BIP, Ms. Taylor-Thompson recommended that any indigent defense plan: 1) be politically independent; 2) operate pursuant to caseload and workload standards; 3) be provided sufficient resources for library, experts, and litigation costs; 4) develop specifically trained sub-units for unique classes of litigation; 5) have access to effective training; and, 6) be properly supported by other professionals, including investigators, paralegals, social workers, sentencing specialists, and secretaries. The ABA generally recommends the use of full-time public defender offices where the population and caseload warrant them. However, some rural areas may be better served by contracting with local attorneys, provided there is a full-time defender in the area to monitor and assist with the provision of services. Ms. Taylor-Thompson emphasized the need for active involvement by the private bar in any public defender system. For example, in many states the private bar provides services in conflict cases and when the public defender caseload overflows the applicable standards. However, she stated that such involvement would only be effective when the private bar was *adequately compensated.* Problems arising in systems depending wholly on contracts with private attorneys have included: a lack of flexibility to provide for unforseen circumstances, such as a sharp increase in caseload during a contract year; insufficient funds to provide adequate training and support services; and, a lack of quality control.

Questioned at length about the role of client recoupment, Ms. Taylor-Thompson replied that most jurisdictions have found that recoupment can be of some benefit, but that it rarely provides as much revenue as had been anticipated. She said recoupment efforts have been more effective when the payment amount is assessed at the outset of the case rather than as the case progresses. She referred to other alternative funding sources which have been used by some jurisdictions to augment general revenue funding. These include tapping into federal anti-drug abuse grants, and using interest from cash bail accounts.

Probably the most important part of Ms. Taylor-Thompson's presentation was the following:

> When jurisdictions have invested the time and resources into a system that provides quality representation to indigent clients, they find that it tends to save money in the long run. The programs attract committed attorneys who are willing to work the long hours required of them, they train lawyers sufficiently [so that] they develop the individual and institutional experience that enables them to resolve cases more effectively and more efficiently. With caseload controls, attorneys are able to handle cases quicker and with greater reliability of the results. We tend to see the more expensive suits challenging the system and convictions based on ineffective assistance of counsel when a system is overloaded.

Following her presentation, Senator Maloney urged the group to "recognize

reality" in light of recently announced budget cuts. Senator Moloney added, "our goal should be how we're going to meet the needs of the criminally accused indigent Kentuckians with the resources that we have. We may have to reallocate some resources but we've got only a limited amount of resources." In response, Allison pointed out that DPA had escaped any cuts under the new proposed budget, because we are already stretched to the limit.

Ernie Lewis then gave a presentation about the history and development of DPA at the trial level. He described the plan to open 13 full-time offices which was funded in 1982 but never implemented due to budget cuts the next year. He pointed out that had that plan been implemented ten years ago, "we wouldn't be here today trying to solve what seems to be an almost intractable problem with delivery of services. Rather, we would be fine-tuning a mixed system instead of looking systematically at the great difficulties that we are now having."

Currently, the majority of Kentucky Counties (74 of 120) are served by local contract attorneys, making us one of only three states in that position. (It was noted however that these 74 counties include just under 50% of the state's population). Judge Wilhoit engaged Ernie in a discussion, joined by Judge-Executive Tommy Turner of Larue County, of the decrease in county contributions to local defender programs. Fewer than thirty of the state's counties made any substantial contribution in the last fiscal year. It was pointed out by Judge Turner that counties are also feeling the effects of state budget cuts, and are not in a position to make voluntary contributions (only Jefferson County is required by statute to contribute to its public defender system). It was also pointed out by Allison and by Vince Aprile that some county governments have tried to condition their contributions upon the contract going to someone of their choosing, thus compromising the political independence which Kim Taylor-Thompson had listed as the first requirement of an effective delivery system.

Due to the high degree of engagement by the members in questioning both presenters, the meeting ran long. Scheduled presentations on appellate representation (Margaret Case) and capital representation (Bette Niemi) were postponed until the September 9 meeting, and an additional session was scheduled for September 23. The meeting closed with an admonition from Joe Bill Campbell of Bowling Green, past president of the KBA: "[I]t is the function of the legislative and the executive branches of government to see that [the public defender system is]...adequately funded and that it functions the way that it's supposed to function because I'm telling you, that if the legislature and the executive branches don't do it, the judicial branch will."

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Sixth Circuit Highlights

Depositions and Confrontation Clause Rights

In ***Carter v. Sowders***, 5 F.3d 975, 22 SCR 20, 7 (6th Cir. 1993), the Sixth Circuit Court of Appeals found that the Commonwealth's use at trial of a paid police informant's deposition violated Carter's rights under the Confrontation Clause. Carter was indicted for several drug offenses and Charles Elam, a salaried narcotics agent with a Tennessee police department, was a key witness for the prosecution.

Prior to trial, the prosecution moved to take a videotape deposition of Elam, giving no specific ground. A second motion was filed two weeks later claiming that a pretrial deposition was necessary because the prosecution could not secure the attendance of Elam, a Tennessee resident, at Carter's trial in Kentucky. The Court granted the motion but no deposition was taken. The prosecutor issued no subpoena for Elam, and made no other efforts to obtain his attendance at trial. After Carter's trial was continued, the prosecutor filed an *ex parte* petition, pursuant to Tennessee's Uniform Non-Resident Witness Act, to secure Elam's attendance at a deposition. The petition was granted but no deposition was taken.

Shortly thereafter, the prosecution filed another *ex parte* petition, this time pursuant to Oklahoma's Uniform Non-Resident Witness Act, to secure Elam's presence for a deposition set for June 30, 1986. This petition was also granted. On June 5, the prosecutor wrote Carter's counsel notifying him of Elam's deposition and advising that the deposition would be read at trial. Counsel did not receive the notice until June 20, whereupon he wrote a letter to Carter informing him of the deposition and stating "you may wish to be present." Counsel received no response to this letter or several subsequent phone calls. The trial court later found there was no evidence that Carter had notice he was supposed to be at the deposition.

The deposition was held as scheduled. Defense counsel appeared but told the prosecutor he could not effectively represent Carter without his presence. He left the deposition after advising the prosecutor that if Elam could be compelled to come to Kentucky for a deposition, there was no reason why he could not be present for trial in September. The prosecutor then deposed Elam in the absence of Carter and his counsel.

In preparation for trial, the prosecution issued subpoenas for seven witnesses but Elam was not among them. New counsel was appointed for Carter when his original counsel withdrew and the trial was postponed until January 1987. Carter's new counsel moved to quash Elam's deposition or the ground that Carter was denied his constitutional right to confront Elam at the deposition. The motion was not denied until trial.

Three weeks prior to trial, the prosecutor wrote Elam in Oklahoma notifying him of the new trial date and advising Elam that he would like him to come back to Kentucky to testify in person. The prosecutor also wrote the Logan Circuit Clerk asking that a subpoena be issued for Elam. The letter to Elam was returned due to an expired forwarding order and a subpoena was issued but never served. The prosecutor made eleven phone calls to Oklahoma and Tennessee in an effort to locate Elam.

At trial, defense counsel reiterated his objections to the admission of Elam's deposition. The objections were overruled and the deposition was read as the prosecution's first witness.

The Sixth Circuit recognized that the 6th Amendment Confrontation Clause provides two crucial protections to a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. Against this backdrop, the Court found that the absence of Carter's counsel during Elam's deposition demands close scrutiny. Noting that Elam's videotaped testimony was the sole evidence supporting Carter's convictions, the Court held that the deposition was hearsay and improperly admitted under KRE 804's "unavailable witness" exception. The Sixth Circuit did not reach the issue of whether the prosecution's attempts to secure Elam's attendance at trial satisfied the good faith effort test because it held that the deposition, taken in violation of Carter's Confrontation Clause rights, could not satisfy the "other adequate indicia of reliability" standard imposed by the unavailable witness exception to the hearsay rule.

The Sixth Circuit rejected the Commonwealth's argument that Carter waived his 6th Amendment rights through his failure to attend the deposition after his attorney sent him written notice. The Court commented that even if this assertion was true it would not overcome the reliability problem. Nevertheless, the Court pointed out that the trial court found there was no evidence Carter ever received the letter. Furthermore, even if received, the letter did not inform Carter of his constitutional right to attend, urge him to exercise that right or provide him with any notice of the consequences if he failed to appear. The Sixth Circuit also rejected the district court's finding that Carter effected a waiver of his right through the actions of his attorney who appeared for the deposition and then departed. The Court found that even if defense counsel could waive Carter's rights under the Confrontation Clause, the waiver would not bind Carter in the absence of a showing that he consented.

Disqualification of Retained Counsel

The Sixth Circuit found that disqualification of retained counsel on the basis of a potential conflict of interest in representing co-defendants with antagonistic defenses did not violate the petitioner's 6th Amendment right to counsel even though the co-defendant pled guilty prior to trial in ***Serra v. Michigan Dept. of Corrections***, 4 F.3d 1348, 22 SCR 19, 12 (1993).

Co-defendants Serra and Poole retained attorney Holman to represent them. Prior to a scheduled joint preliminary hearing, Holman requested separate hearings alleging that Poole's defense was antagonistic to the position of Serra. The prosecutor then moved to disqualify Holman as Poole's counsel due to the antagonistic defense. The court ruled that both cases would be consolidated for purposes of the preliminary hearing and denied the prosecutor's motion to disqualify Holman.

After both cases were bound over for trial, the prosecutor again moved to disqualify Holman from representing Poole. As an additional reason for seeking disqualification, the prosecutor stated that he had tried to enter into plea negotiations with Poole but was unable to because the same attorney was trying to protect Serra's interests. The court then disqualified Holman from representing either Serra or Poole because their defenses were intrinsically antagonistic (*i.e.*, each would claim the narcotic belonged to the other). Since the defendants were not present at the disqualification hearing, the court was unable to inquire whether they wished to waiver any conflict after being advised of their rights and the potential problems with having the same attorney. Recognizing that Holman presumably had gained the privileged confidence of each defendant and that the confidence from each defendant cannot be used to advance the other defendant's interest, the court disqualified Holman from representing either defendant.

After a motion to reconsider, stating that neither Serra nor Poole opposed joint representation, was filed and denied, counsel was appointed to represent Serra and his case proceeded to trial. Appointed counsel objected to the disqualification of Holman. The trial court refused to reconsider its ruling even when it was made clear that Poole was now Serra's wife and had already pled guilty.

The Sixth Circuit stated that while a criminal defendant who can afford his own attorney has a right to his chosen attorney, that right is a qualified right. The presumption in favor of a defendant's counsel of choice can be overcome by a demonstration of actual conflict or a showing of a serious potential for conflict.

The Sixth Circuit lamented the "whipsaw" nature of claims of waiver of conflict-free representation--that defendants can attempt to claim error no matter which way the trial court rules--but stated that evidence that a defendant was denied his right to counsel of his choice arbitrarily and without adequate reason is sufficient to mandate reversal without a showing of prejudice. However, the Court did not find this to be a case where the trial court arbitrarily disqualified counsel because the court was justifiably concerned with the potential for conflict and the integrity of the trial process that is implicated anytime conflict-free representation is compromised. The Sixth Circuit held that the initial disqualification of Holman was not a 6th Amendment violation and that it could not say that the trial court's refusal to vacate its order disqualifying Holman and to allow a substitution on the second and final day of trial was an abuse of the trial court's discretion.

Inmate's Liberty Interest of Residing in General Population

A Kentucky State Reformatory (KSR) inmate brought a §1983 action against prison officials alleging he was deprived without due process of his liberty interest of residing in the general prison population. The Sixth Circuit, in ***Black v. Parke***, 4 F.3d 442, 22 SCR 18, 2 (6th Cir. 1993), affirmed the district court's denial of qualified immunity to these officials because there was a genuine issue of material fact as to whether Black received all the process due him.

Black alleged that prison officials violated his state-created liberty interest of residing in the general population by placing him in administrative segregation on "hold ticket" status for extended periods of time without due process. Black did not complain about administrative segregation assignments that were made to protect his own safety. Rather, Black's complaint concerned his later segregation assignments when, pending his transfer to an out-of-state institution, he was held as a "hold ticket" inmate in lock-down at KSR off and on for 2 years. The district court found that Black had a liberty interest created by state Corrections Department policies; that prison officials initially had a right to put him in lock-down for his own safety; that after that, he was given some of the process required to be kept in lock-down; but that a trial was necessary to determine the adequacy of the periodic status reviews.

The U.S. Supreme Court, in *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864 (1983), held that although the Due Process Clause does not confer the right to be part of the general prison population, state regulations may create a liberty interest protected by the Due Process Clause. A regulation confers this right when it is more than a simple procedural guideline and uses languages of an unmistakably mandatory character. The Sixth Circuit found that Kentucky's Correction Policy and Procedure (CPP) 10.2 creates a liberty interest in being placed in the general prison population.

Because Black had a liberty interest in remaining in the general population, the Court held that prison officials had to afford him due process in order to deprive him of that right. However, the Court noted that *Hewitt, supra*, makes it clear that the procedural due process required is governed by federal constitutional law and not state law, and that minimal process is required for segregation in the prison context. Thus, Black did not have a liberty interest in the more stringent state-created procedures. The Court stated that there is no constitutional violation when state officials fail to meet their own regulations, so long as the minimal constitutional requirements have been met. Accordingly, under *Hewitt, supra*, Black was entitled to an "informal, nonadversary review" of the information supporting his segregation within a "reasonable time," an opportunity to respond in writing or in person and periodic review of his confinement to assure that the confinement was not being used as a pretext for indefinite confinement.

Jury's Inadvertent Exposure To Inadmissible Evidence and Double or Greater Exposure To Selected Portions of Testimony

In ***U.S. v. Walker***, 1 F.3d 423 (6th Cir. 1993), the Sixth Circuit remanded the case for a new trial due to trial court's failure to conduct an adequate hearing on jurors' bias when transcripts of videotaped depositions, including highlighted portions deemed inadmissible at trial, were inadvertently sent into the jury room along with admitted exhibits.

Prior to trial, videotaped depositions were taken of several unindicted co-conspirators. Major portions of the videotaped depositions were objected to and, prior to trial, the court made rulings as to those portions which would be inadmissible. The inadmissible portions were deleted from a copy of the taped depositions. For convenience, a transcript of the depositions had been prepared with the portions of the testimony which were ruled inadmissible highlighted with a yellow marker. The government was allowed to use the modified videotape copies to present the testimony of the absent witnesses. Neither the original or edited tapes were admitted as exhibits. The transcripts were not admitted into evidence. When it was learned that the transcripts of the depositions, highlights and all, had been given to the jury during deliberations, the defense moved for a mistrial.

While the greatest risk to a fair trial from the jury's exposure to the transcripts would seem to be in the redacted but highlighted portions, the trial court found no prejudicial material therein and a very strong probability that none of the jurors had read the highlighted objections and testimony. Rather, it was the jury's double or even greater exposure to selected portions of the key witnesses' testimony that was the real concern.

The Sixth Circuit acknowledged that the potential for double exposure to selected testimony to improperly influence a jury has long been recognized. The two inherent dangers are that undue emphasis may be accorded such testimony and that the limited testimony that is reviewed may be taken out of context by the jury. The Court found that the unauthorized and uncontrolled "read back" that occurred in this case created a substantial potential for undue emphasis and a special hazard that limited testimony might be taken out of context.

When this unusual, or any other, unauthorized contact with the jury occurs, the trial court must determine the circumstances, the impact thereof upon the jury and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate. The trial court in this case did question jurors individually but did not inquire whether their experience with the transcripts had influenced their ability to be fair jurors, despite a defense request to do so.

The Sixth Circuit emphasized that when a defendant alleges that an unauthorized contact with a juror has tainted a trial, a hearing must be held; the defendant bears the burden of proving that such contact resulted in actual juror bias; prejudice is not to be presumed; and a juror's testimony about his or her own impartiality at such a hearing is not inherently suspect.

In this case, the Sixth Circuit held that by denying a reasonable request to inquire into the jurors' states of mind, the defendants were denied the opportunity to meet this burden of proving actual juror bias, and were thereby denied a fair trial.

DONNA BOYCE
Assistant Public Advocate
DPA Post-Trial Services

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Persistence...

"Nothing in the world can take the place of persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent."

- Calvin Coolidge

Plain View

Clark v. Commonwealth
1993 WL 331792 (Ky.App.)

Every public defender should recognize the factual scenario in this case. And, every public defender should be able to use this case at some point for the benefit of their clients.

It began when Nutter, the driver, was driving 76 in a 55. Nutter had a learner's permit. However, Clark, the passenger, had no identification on him, and his license had been suspended. As a result, the police officer who pulled Nutter over demanded that he get out of the car, handcuffed him, and placed him in his cruiser. Thereafter, the officer searched Clark, the passenger, and then searched the car. In the car was a box with neither Clark's nor Nutter's name on it, as well as "fake" hashish. Items in the back were later found to be stolen. The trial court rejected the motion to suppress.

In an opinion by Judge Stumbo, the Court of Appeals overturned the decision of the lower court. Significantly, the court holds that Section Ten governs the decision. The Fourth Amendment, according to the court, merely establishes the "floor" of privacy rights. This is a welcome decision by this panel of the Court of Appeals, stating explicitly that when the rights of Kentuckians are concerned, that our own Constitution can be used to broaden and extend that provided by the U.S. Constitution.

The court went on to reject a number of exceptions to the warrant requirement advanced by the Commonwealth. The court stated that there was no plain view exception because the objects seen in the car were not incriminating in themselves. Because no inventory purpose was asserted by the officer, and no rules and regulations tendered pursuant to *Florida v. Wells*, 495 U.S. 1 (1990), no inventory exception applied. There was no probable cause to believe the items in the car were contraband, and thus the automobile exception of *Carroll* did not apply.

Most significantly, the court rejected the search incident to a lawful arrest. And here is where the benefit of this case is most apparent. The court holds that a speeding ticket does not turn into a carte blanche search incident to a lawful arrest. This takes away a useful law enforcement device the police have used for years, utilizing traffic stops as the springboard for complete car searches. The court further characterized the search conducted in this case as not a true search incident to a lawful arrest because it went beyond the area of Nutter's control, and because it took place 30-40 minutes after arrest.

Steinbeck v. Commonwealth
1993 WL 394364 (Ky.App.)

Privacy rights of motorists did not fare as well in this case. Here, the Court of Appeals has held that avoiding a roadblock constitutes sufficient grounds to stop a motorist and investigate whether she or he has been drinking. In doing so, this panel of Judges Johnstone and Huddleston, with Judge Stumbo in dissent, has taken what is apparently a minority position nationwide.

The facts are simple. Steinbeck had been in Cairo, Illinois and at 3:00 a.m. was coming across the bridge into Kentucky when he saw, 100 yards from the end of the bridge, a number of police cars with emergency lights. Steinbeck turned on his signal, and turned onto an unpaved road with no housing on it. The police stopped him, gave him two field sobriety tests, and placed him under arrest. During the search incident to arrest, cocaine was found.

At the suppression hearing, the police testified every person who had turned onto that road in order to avoid their roadblock had later been found to have been drinking. When the trial court rejected the suppression motion, Steinbeck entered a conditional guilty plea.

The Court of Appeals acknowledged that there is much authority standing for the proposition that "the fact that a car turns in a manner to avoid a roadblock, standing alone, is insufficient to create a reasonable suspicion to justify a stop." The court also agreed that no Kentucky case existed directly on point. The court relied, instead, on an Indiana Court of Appeals case named *Snyder v. State*, 538 N.E. 2d 961 (Ind. App. 4 Dist., May 23, 1989). There, the Indiana Court held that "while a driver approaching a roadblock is not 'seized' until actually reaching the roadblock, a driver's attempt to avoid the roadblock, by making a turn around, does raise a 'specific and articulable fact' which gives rise to a reasonable suspicion on the part of a police officer that the driver may be committing a crime. Such a suspicion entitles the officer to detain the driver of the vehicle something short of a full arrest to further investigate whether or not probable cause exists for a search or arrest of the driver."

The Court adopted the reasoning in *Snyder*, saying that "appellant's turn away from the sobriety checkpoint, coupled with the deputy sheriff's experience in similar instances, the time of day, and the nature of the roadway onto which the appellant turned, constitute specific, reasonable, and articulable facts which allowed the police officer to draw an inference sufficient to form a reasonable suspicion that the driver might have been engaging in criminal activity."

United States v. Leake
998 F.2d 1359 (6th Cir. 1993)

We now face the brave new world of the good faith exception to the exclusionary rule under *Crayton v. Commonwealth*. Given that fact, counsel should obtain a copy of this textbook application of *United States v. Leon*, 468 U.S. 897 (1984).

Detective Thomas Murphy of the Louisville Police Department received an anonymous phone call from a citizen saying that he had seen at some unnamed time a large amount of marijuana in a basement at 4825 Westport Road in Jefferson County. The tipster indicated that he had worked at the house on a job. Murphy staked out the house for two hours on two nights, and observed nothing. He then presented an affidavit for a search warrant to a Jefferson Circuit judge, who granted the petition for a search warrant. The execution of the warrant revealed 300 pounds of marijuana. Leake was prosecuted in federal district court. His motion to suppress was granted.

The Sixth Circuit affirmed the district judge's suppression of the marijuana.

Judge Ryan wrote a lengthy, thorough opinion, joined by Judges Surhheinrich and Peck. The Court first reviewed the different standards they were applying. The findings of fact made by the district judge were upheld unless clearly erroreous; the legal decision of the district judge regarding the existence of probable cause was reviewed de novo.

The Court held that the district judge was correct in deciding that there was no probable cause to issue the warrant.

The warrant was not "rich" in relevant detail, failing to give names of the residents, failing to provide the date when the marijuana was observed, failing to provide the "indicia of the caller's reliability", and failing to provide adequate corroboration of the anonymous call.

The Court further held that the district judge was in error in deciding that good faith exception should not apply because the affidavit had been little more than bare bones. The Court held that the affidavit had been more than bare bones, and thus the third exception in *Leon* did not apply.

However, the Court went on to apply the fourth *Leon* exception, which is whether the police had "placed good faith, objectively reasonable reliance on the validity of the warrant." The Court decided that "reasonably well-trained officer 'would have known that the search was illegal despite the magistrate's authorization.'" The reason for this is that the officer had attempted to corroborate the anonymous tip, which was unsuccessful. Despite this lack of corroboration, the officer applied for the warrant anyway, successfully.

This case demonstrates that despite the presence of the good faith exception in state court in Kentucky, the Fourth Amendment and Section Ten are not dead. The Sixth Circuit has instructed us well in their careful examination of the facts, and explanation of the law of good faith in this case.

United States v. Lawson
999 F.2d 985 (6th Cir. 1993)

The accused did not fare as well in this case. Here, a postal inspector became suspicious when he saw a package addressed to Lawson which originiated from a narcotics source area, had a fake return address, was wrapped heavily in tape, and smelled of coffee. A dog alerted to the package, and a search warrant was obtained. The package was found to contain cocaine. A subsequent search warrant was obtained to search Lawson's house after the delivery of the package, which had been resealed. An execution of the warrant revealed the presence of the cocaine. The defendant moved to suppress the cocaine, and having failed, entered a conditional guilty plea.

Judge Wiseman wrote an opinion for the Sixth Circuit, joined by Judges Milburn and Norris in which the anticipatory search warrant was approved. The court carefully notes that where contraband is sent to a particular destination, a warrant may be indicated, that in this case they were approving of the issuance of the warrant upon the "totality of the circumstances." These circumstances included that the cocaine was concealed in an attempt to avoid detection, which "makes it less likely that the defendant was 'set up' by someone and more likely that the cocaine was intended to reach its destination undetected. All of the information contained in the affidavit could reasonably lead a person to conclude that an experienced trafficker in narcotics sent the package in question. Consequently, it was very likely the address on the package was the one at which it was intended to arrive."

United States v. Fountain and McEaddy
2 F.3d 656 (6th Cir. 1993)

Judge Ryan, joined by Judges Milburn and Coffin, also wrote this opinion of the Sixth Circuit. Here, the police executed two search warrants in Fountain's home, finding drugs and weapons. During the second search, they also found one McEaddy, a convicted felon, who confessed to "handling" the weapons.

McEaddy challenged his confession, saying that he was illegally detained during the execution of the search warrant. The Court analyzed the case under *Michigan v. Summers*, 452 U.S. 692 (1981), which had held that the police may detain "occupants" present on the premises during the execution of a search warrant. The Court rejected McEaddy's argument here that *Summers* did not apply to a non-residential "occupant". "Concern for safety of the agents and the need to prevent disposal of any narcotics on the premises, justified the restraint of the occupants, particularly under the circumstances of this case, where the search was part of a narcotics investigation and weapons had been seized from the home just one month earlier. The 'character' of the intrusion on McEaddy and its 'justification' were reasonable and proportional to law enforcement's legitimate interests in preventing flight in the event incriminating evidence is found and in minimizing the risk of harm to officers. Those concerns plainly outweighed the intrusion experienced by McEaddy in being required to be on the living room floor while the search was completed. And those concerns are the same regardless of whether the individuals present in the home being searched are residents or visitors."

After the initial detention, according to the court, the police had authority to continue their holding of McEaddy based upon reasonable suspicion. "Once the search of the premises was completed and resulted in the discovery of drugs and firearms, the agents had reasonable suspicion to focus on any occupant who was present in the home voluntarily or purposefully."

The Short View

1. ***Morris v. State***, Fla. Ct. App., 4th Dist., 53 Cr. L. 1461 (7/21/93). The police cannot turn over to a civilian, such as investigators from a state auditor's office, the responsibilities for executing a search warrant. While this case is based upon a Florida statute, it demonstrates that the manner of executing a warrant can result in the suppression of evidence. "[I]t is of great importance that the police authorized to conduct the search do so. They are especially charged and trained to see that the search is carried out properly, lawfully, and in accord with the provisions of the warrant."

2. ***Willis v. Chicago, Ill.***, 53 Cr. L. 1469 (7th Cir. 1993). A person must be taken before a judge for a probable cause determination within a reasonable time, and in no instance longer than 48 hours, according to *Riverside County, Calif. v. McLaughlin*, 49 Cr. L. 2104 (1991). However, in this civil rights action, the Seventh Circuit held that presenting an accused within 45 hours was unreasonable where the reason for the delay was to place the accused in a lineup. The Court noted that here a person was being "subjected to unreasonably prolonged custody without judicial scrutiny so that the police can undertake further investigatory steps that require the presence of the defendant, a presence that cannot

properly be required without a prior judicial determination of probable cause."

3. ***Commonwealth v. Ramirez***, Mass. Sup. Jud. Ct., 53 Cr. L. 1520 (8/5/93). It is amazing what good lawyering can uncover. Here, a lawyer looked into a police officer's affidavits in support of search warrants, and found that 71 of his warrant applications used the same informer, was buttressed by little corroboration, and resulted in only 60% seizure of contraband. This entitled the defendant to a *Franks* hearing, according to the Massachussets Supreme Judicial Court.

4. ***Bostick v. Peters***, 53 Cr. L. 1527 (8/19/93). Where a defendant is assured that he does not have to testify at his suppression hearing in order to present his issue due to his presenting an affidavit, and thereafter the state appellate court reverses his trial court's suppression order for the trial court's consideration of the defendant's affidavit, the defendant has not received "full and fair litigation" of his Fourth Amendment claim. Thus, despite *Stone v. Powell*, 428 U.S. 465 (1976), the federal court will hear petitioner's Fourth Amendment claim on federal habeas corpus.

5. ***State v. Miller***, Conn. Sup. Ct., 53 Cr. L. 1543 (8/24/93). The Connecticut Supreme Court has used their state constitution to reject *Chambers v. Maroney*, 399 U.S. 42 (1970), which allowed a probable cause search of an automobile without a warrant after the car has been taken to a police lot. While acknowledging that safety concerns may lead the police to impound a car otherwise on the highway, the court rejected the "fiction" that similar safety concerns require a noninventory search of the car once it has been impounded. "We tolerate the warrantless on-the-scene automobile search **only** because obtaining a warrant would be impracticable in light of the inherent mobility of automobiles and the latent exigency that that mobility creates...If the impracticability of obtaining a warrant no longer exists, however, our state constitutional preference for warrants regains its dominant place in that balance, and warrant is required."

6. ***State v. West***, Wisc. Ct. App. Dist. IV, 53 Cr. L. 1544 (9/2/93). A person living with a parolee has no reasonable expectation of privacy in the apartment they share, according to a remarkable decision by the Wisconsin Court of Appeals. Using *Griffin v. Wisconsin*, 483 U.S. 868 (1987), which had held that the parolee/ probationer has no reasonable expectation of privacy when he/she has been freed on conditions of warrantless searches being permissible, the court extended the reasoning to say that a person living with a parolee knows of the warrantless search conditions, and thus her expectation of privacy in her own home is not one society is prepared to accept. This case demonstrates the flimsy basis for *Griffin*; its extension to persons living with parolees is indeed frightening for the hundreds of thousands, and perhaps millions of people whose Fourth Amendment protections would be taken away were other courts to apply similar reasoning.

7. ***United States v. Chan***, 53 Cr. L. 1546 (N.D. Calif., 8/31/93). In another case exploring the Fourth Amendment dimensions of new technology, the U.S. District Court for the Northern District of California has recognized that the person possessing a paging device has a reasonable expectation of privacy in those numbers, similar to an address book. Thus, the police may not, as they did here, "search" the pager without a warrant upon the arrest of the defendant. The court notes that the Sixth Circuit, in *U.S. v. Meriwether*, 917 F. 2d 955 (6th Cir. 1990), had rejected a similar expectation of privacy, although a warrant had given some rationale for the search of the pager. Despite the holding, however, the court gave no relief to Chan, holding that the search was legal as a search incident to a valid arrest.

6. ***Sitz v. Michigan Department of State Police***, Mich. Sup. Ct., 53 Cr. L. 1561 (9/14/93). The Michigan Supreme Court has found unconstitutional as a matter of state law that which the United States Supreme Court found constitutional in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990). The court held that random stops of motorists without suspicion was offensive to the state's history of requiring particularity prior to stopping. "This Court has never recognized the right of the state, without any level of suspicion whatsoever, to detain members of the population at large for criminal investigatory purposes. Nor has Michigan completely acquiesced to the judgment of 'politically accountable officials' when determining reasonableness in such a context."

7. ***U.S. v. Welch***, 54 Cr. L. 1003 (9th Cir. 9/7/93). The consent to search a car by a driver does not give the police the right to search a passenger's purse, according to the Ninth Circuit. A passenger has a reasonable expectation of privacy in her purse; further, the court found that there was no right to search the purse under the facts of this case under an apparent authority doctrine.

8. ***Woolverton v. Multicounty Grand Jury***, Okla. Ct. Crim. App., 54 Cr. L. 1006 (9/13/93). The Oklahoma Court of Criminal Appeals explored the rights of grand juries under the Oklahoma Constitution to obtain physical evidence. The court held that there must be probable cause presented to the presiding judge by way of affidavit for a subpoena to issue for a blood sample, while reasonable suspicion is required for a subpoena to issue for fingerprints and palm prints. The court notes that otherwise "in cases where a District Attorney's Office could not establish probable cause to obtain a search warrant for blood or other intrusive physical evidence, the State could circumvent a suspect's constitutional rights by seeking the evidence through a grand jury subpoena."

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"Law triumphs when the natural impulses aroused by shocking crime yield to the safeguards which our civilization has evolved for an administration of justice."

Watts v. State of Indiana (1949), 338 U.S. 49, 69 S.Ct. 1347. [Felix Frankfurter.]

Erroneous Prior Convictions for Suspended License Due to DUI

Your client stands charged with their third offense of driving while their license is suspended for D.U.I., a class D felony. KRS 189A.090. You review your client's diving history and discover the following:

1/1/92	DUI	1ST CONVICTION
1/15/92	DWS/DUI	1ST ARREST
1/20/92	DWS/DUI	1ST CONVICTION
5/1/92	DWS/DUI	2ND ARREST
5/20/92	DWS/DUI	2ND CONVICTION
9/31/92	DUI	2ND ARREST
11/5/92	DUI	2ND CONVICTION
5/1/93	DWS/DUI	3RD ARREST

Can you help this client? Yes, because your client's DUI 1st suspension expired before his arrest on 5/1/92, and therefore the 5/20/92 conviction for suspended license due to DUI is erroneous. So, what to do? This article will outline three procedures to rectify this situation:

1) a motion to remand the case to district court;
2) a motion in limine to exclude the 5/20/92 conviction; and,
3) a CR 60.02 motion.

First, substance. Your client's 5/20/92 conviction should, at worst, have been for KRS 186.620(2), which prohibits driving a vehicle while one's license is suspended for any reason. Punishment under this statute is not enhanced for subsequent offenses. KRS 189A.090 prohibits driving while one's license is suspended for a specific reason, namely, a prior DUI conviction. Your client's license suspension for the DUI 1st conviction lasted for ninety days, from 1/1/92 to 4/1/92. Your client was arrested on 5/1/92. His license, then, was not suspended at the time of his arrest "for" DUI, as required by KRS 189A.090, and his conviction on 5/20/92 for DWS/DUI is erroneous. This leaves your client with one prior DWS/DUI conviction, not two, and makes your client's current charge a misdemeanor, not a felony.[1]

REMAND

The first procedural attack can be the motion to remand. *Kimbro v. Lassiter*, 648 S.W.2d 860 (Ky. 1983), upholds the discretion of a circuit court to remand to district court an indictment originally charging both a misdemeanor and a felony, where the felony was later dismissed. Thus, *Kimbro* gives you the ability to request that the circuit court remand this case. You may also argue that remand is required, since under KRS 24A.110(2), the district court has exclusive jurisdiction over misdemeanors.

IN LIMINE

Your second option is to move the circuit court in limine to exclude the 5/20/92 conviction on relevancy grounds. Assuming that this prior offense is part of the Commonwealth's case-in-chief, (and if it isn't, the priors shouldn't come into evidence until a sentencing hearing), the prior must be relevant to be admissible. KRE 402. Relevant evidence alters the probability of a fact of consequence. KRE 401. What is the fact of consequence here? Close reading of KRS 189A.090 reveals that the fact of consequence here is the existence of a prior "offense." Does a prior conviction of KRS 189A.090 make the existence of a prior "offense" more likely? Probably, since most who have been convicted previously of KRS 189A.090 have actually committed the offense of which they were convicted. Your client has not, however. This would make the prior conviction substantially more prejudicial (because people tend to give great weight to the proceedings and judgment of a court) than probative, and excludable under KRE 403.[2]

60.02

A third procedural option is a CR 60.02 motion. CR 60.02 applies in criminal cases by virtue of RCr 13.04, which requires application of civil procedure rules where they do not conflict with criminal rules.[3] There exists a time limit of one year from the date of entry of the judgement where mistake, new evidence, or perjury are the grounds alleged. Clients fortunate enough to have met this time limit are few and far between. Fortunately, one may allege fraud, inequity, or other "extraordinary" reasons within a "reasonable" time after entry of the judgment attacked. *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983).

The "fraud" contemplated by CR 60.02(d) is not- testimonial and extraneous. See, *Copley v. Whitaker*, 609 S.W.2d 940, 942 (Ky.App. 1980). CR 60.02 is a substitute for the common law writ of coram nobis, the purpose of which, inter alia, was to bring to a court matters which the party was prevented from presenting to the court by virtue of duress, fear, or other cause. *Gross*, 648 S.W.2d at 856. Thus, CR 60.02(d) fraud exists where your client was prevented from presenting to the court the status of his license suspension. Such would appear to be the case where your client was represented inadequately, if at all, or where the fact of your client's license status was not disclosed to him by either the prosecutor or the court. This is especially true since "[c]ourts should not take a narrow interpretation of fraud affecting the proceedings when the net effect would be to cause an unjust judgement to stand." *Burke v. Sexton*, 814 S.W.2d 290, 292 (Ky.App. 1991). See, also, 7 Bertlesman & Phillips, *Kentucky Practice*, CR 60.02, comment 2 (4th ed. 1984).

Inequity or extraordinary reasons may also lie. The inequity or extraordinary reason must pertain to the trial proceedings, and not to the effect of the judgment. *Wine v. Commonwealth*, 699 S.W.2d 752 (Ky.App. 1985) (60.02 extraordinary reason not shown where defendant alleges adverse effect of incarceration on defendant's family.). Failure to ascertain the status of the defendant's license would appear to be such a defect in the trial proceedings. CR 60.02 inequity lies where prospective application of the judgment would by unjust, due to a change in circumstances subsequent to the entry of judgement. *James v. Hillerich*, 299 S.W.2d 92, 94 (Ky. 1956). Clearly, the new indictment would constitute such a change in circumstances.[4]

CONCLUSION

Thus, in the surprisingly common instance where your client has pled previously to a KRS 189A.090 suspended license charge, and his DUI suspension period has expired, move to exclude the prior on KRE 403 grounds, move to remand to district court if the prior is one of only two priors, and/or file a 60.02 motion in the court where the prior judgment was entered. Counsel has yet to encounter the case where not one of these avenues provided relief.

Footnotes

[1]If an issue is raised in this regard, it can be argued that the rule of lenity, found in *Commonwealth v. Colonial Stores*, 350 S.W.2d 465, 467 (Ky. 1961), mandates your result. This is the position adopted in OAG 90-38. KRS 500.030, which requires a "liberal" construction of penal statutes according to the "fair import" of their terms is specifically limited by its terms to provisions of the penal code, KRS Chapter 500. *et. seq.* It may be argued that the fair import of the language in KRS 189A.090 requiring your client's license by suspended "for a violation of KRS 189A.010" is that your client ceased to be subject to KRS 189A.090 treatment when your client's DUI suspension ceased.

[2]Recall that while the prior may not be excludable on hearsay grounds, since it would be an 801A(b)(3) admission by a party epponent, it is still subject to 403 analysis.

[3]CR 60.02 does not appear to conflict with RCr 11.42, since RCr 11.42 is applicable only to defendants "in custody ... or on probation, parole, or conditional discharge" under the sentence your client seeks to attack. RCr 11.42(1). Pretrial, your client is not in this position. After trial, incidentally, neither RCr 11.42 nor CR 60.02 would appear to be of help. See, *Alvey v. Commonwealth*, 648 S.W.2d 858 (Ky. 1983) (11.42 not available to attack constitutional validity of PFO priors); *Gross vs. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (60.02 unavailable to attack constitutional validity of PFO priors.). A distinction may be made, however, in that we seek to challenge the sufficiency of the evidence of the prior charges, not their constitutional validity.

[4]The only authority ever cited to counsel (unsuccessfully, counsel might add) against this proposition was *Topass v. Commonwealth*, 799 S.W.2d 587 (Ky.App. 1980). Mr. Topass pled guilty to third offense violation of KRS 189A.090, and then, in a separate proceeding, was convicted of a second felony offense under KRS 189A.090. Toppass appealed the second felony conviction, arguing that the prior offenses used to enhance the prior conviction to felony status weren't/shouldn't be KRS 189A.090 offenses. The Court of Appeals held that Topass had judicially admitted to the adequacy of his prior for enhancement purposes by pleading to the first felony. Your client is not faced with a prior felony plea. If your client had pled to a prior felony, one could argue that *Topass* only applies to the offenses leading up to the felony conviction, and not to the adequacy of the felony itself. One could also argue the position taken by the Restatement (Second) of Judg-ments Section 68.1(e), comment i, at 40 (1977), which states, "...relitigation of [an] issue in a subsequent action between the parties is not precluded [where]... (e) there is a clear and convincing need for a new determination of the issue... (ii) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in a subsequent action, or (iii) because the party sought to be precluded did not have adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." One can easily see that a finding of judicial admission is inappropriate where your client is now facing a felony, rather than a misdemeanor, where s/he didn't foresee their latest charge at the time of their earlier plea, or where, because of the pace of district court or the lack of adequate counsel s/he didn't have an adequate opportunity or incentive to obtain a full adjudication of the issue.

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- Personal Service Contract (9/8/93)
  Economic Development Cabinet; Arthur D. Little; provide expertise and coordiation toward the development of the strategic economic development plan for Kentucky at $41,224.50 per month up to $197,600.

- Personal Service Contract (8/5/93)
  Justice/Corrections; Oldham County Veterinary Clinic; professional veterinary services to perform necessary treatment of livestock currently owned by the Department of Corrections at $48 per hour up to $9,984

- Personal Service Contract (7/1/93)
  Justice Cabinet; St. Luke Hospital; serve as regional forensic autopsy facility for Northern Kentucky and perform autopsies in coroners cases up to $150,300.

- Personal Service Contract (7/1/93)
  Human Resources; Billy Ezell; barber services at Western Kentucky Hospital up to $14,640.40

The following chart was taken from the Spangenberg Group's statewide report on Tennessee's indigent defense system, done in 1992, and a report in progress on Nebraska's indigent defense system.

All data is for FY 1992 except Georgia, which is based upon information from FY 1991.

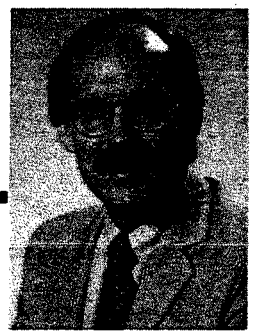
State	Population	Total Expenditure FY 1992	Total Cases FY 1992	Cost/Case FY 1992
Colorado	3,294,394	$19,029,000	52,025	$365.77
Connecticut	3,287,116	$13,801,951	105,866	$138.00
Georgia	6,478,216	$19,725,987	99,121	$199.01
Iowa	2,776,755	$14,411,306	51,300	$281.00
Kentucky	3,685,296	$12,358,000	98,636	$125.29
Mass.	6,016,425	$58,508,604	195,205	$299.73
Minnesota	4,375,099	$21,752,000	67,810	$320.78
Missouri	5,177,073	$13,127,671	56,451	$232.55
Nebraska	1,578,385	$ 7,442,239	39,387	$188.95
New Hamphire	1,109,252	$ 9,800,000	15,838	$618.76
N. Carolina	6,628,637	$29,383,562	103,992	$282.56
Rhode-Island	1,003,464	$ 3,725,881	15,309	$243.38
Tennessee	4,877,185	$17,554,408	124,232	$141.30
Vermont	562,758	$ 4,297,912	13,849	$310.34
Virginia	6,187,358	$28,569,610	167,407	$170.66
Washington	4,866,692	$44,079,861	168,937	$260.92
Wisconsin	4,891,769	$43,535,871	116,302	$374,33
Wyoming	453,588	$ 2,475,684	4,374	$566.00
TOTAL		$363,579,547	1,496,041	$243.03

FUNDING: HOW DOES KENTUCKY COMPARE TO NATIONAL BENCHMARKS?

This is 18 states that we have recent data on, 1992 data, on where the average cost per case for those 18 states is $243. You [Kentucky] are the lowest at $125. A while back you were 49 but you slipped to 50 because the Arkansas Supreme Court in the *Allen* case determined that the court-appointed counsel fees were unconstitutional, both as to the maximum amount and as to the hourly fees....

- Robert Spangenberg
before the Governor's Public
Defender Task Force

16 Year Veteran Resigns as Head of Trial Services



Ernie Lewis

On November 3, 1993 Ernie Lewis resigned as head of trial efforts and returned to head DPA's Madison County trial office which covers Madison and Clark counties. In resigning, Ernie said, "It is with some sadness that I resign my role as Manager of the Trial Services Branch. I will continue my job as directing attorney of the Richmond office. There are a variety of professional and personal reasons that need not be enumerated here that have led me to this decision. I have appreciated the opportunity to have some influence on policy in the DPA over the past eight months, and look forward to the renewed opportunity to represent indigents accused of crimes in this area."

Public Advocate, Allison Connelly said, "It is with great sadness and disappointment that I accepted Ernie's resignation as the head of DPA's Trial Services Branch. Ernie typifies the qualities every successful leader must possess: vision, experience, creativity, excellent communication and organizational skills and a commitment to excellence. In his brief tenure as the trial services leader, Ernie made many changes and improvements in the delivery of trial level legal services to the poor. However, he has returned to his first love, representing the poor and powerless at trial. Although Ernie will be deeply missed in this position, he will be called upon time and time again to tackle significant systemic problems that only a leader of his caliber could handle."

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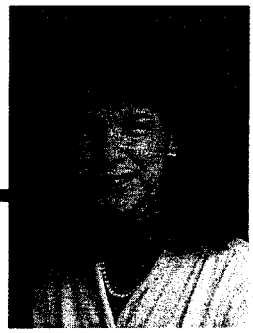
Great ideas, it has been said, come into the world as gently as doves.
Perhaps, then, if we listen attentively,
we shall hear amid the uproar of empires and nations a faint flutter of wings,
a gentle stirring of life and hope.

- Albert Camus

DPA Bids Farewell to Long-Time Employee



Barbara Holthaus

With very mixed feelings, the Department is losing a valued employee to the State of Texas. Barbara Holthaus is moving to her new home in Austin, where she will join her husband-to-be, Rob Owen. And, while everyone is certainly very happy for her, DPA is losing a dedicated career public defender.

While in law school, Barbara clerked for DPA's post-conviction branch. After law school, she worked as a staff attorney in the Jefferson County Public Defender's juvenile division. When she returned to DPA in 1987, she joined the staff of the Northpoint office, handling trial-level cases in Garrard and Lincoln Counties, as well as providing post-conviction services at Northpoint, a medium-security prison. In 1989, Barbara moved to the post-conviction branch's Frankfort office, finally transferring in 1991 to the appellate branch.

Throughout these years, Barbara has maintained her active interest in juvenile defense law. She has served on the KBA's Children's Rights Study Committee, she has written numerous contributions to *The Advocate* on the subject, and she is well known to DPA attorneys as one of the people who trained them in juvenile practice.

Barbara met her fiance, Rob, while he was an attorney with DPA's Capital Trial Unit. Rob is now on the staff of the Death Penalty Resource Center in Texas.

Margaret Case, manager of DPA's Post-Trial Services Branch, said that the appellate section will have a big void to fill as a result of Barbara's departure. "We will all miss Barbara a great deal, both professionally and personally. But, of course, we wish her all the best in this new and exciting part of her life."

"Barbara, the Department's juvenile law expert, will be sorely missed not only by DPA, but by all individuals and groups who care for the rights of children," said Allison Connelly, Public Advocate. "Barbara may be leaving Kentucky, but the lives she changed through her advocacy and the legal precedents she established will continue to prove that public defender's are committed to equal justice and excellence."

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The Minority Rules

This month's column features brief reviews of selected recent cases on juvenile law from around the nation.

Secure Detention for Juvenile Contemnor Overturned

J.Y. v. State,
620 So.2d 804 (Fla. 1993)

J.Y., a child, appealed from an order entered adjudicating him to be in indirect criminal contempt. He raised two issues in his brief: (1) the trial court erred in adjudicating him delinquent on a charge of escape; and (2) the trial court erred in placing J.Y. in secure detention for contempt of court. The delinquency adjudication was not addressed by the contempt order appealed from. The appellant has not challenged his adjudication of guilt for contempt, only the sentence therefor. The juvenile court's sentence imposing secure detention for contempt of court must be reversed and remanded to the juvenile court for imposition of a sanction consistent with *A.A. v. Rolle*, 604 So.2d 813 (Fla., 1990). (See August, 1993 issue of *The Advocate*, pp. 23 - 25).

Status Offenders Not to be Placed in Detention Facilities

In the Interest of Stacey R.,
428 S.E.2d 869
(S.C., 1993)

"Appellant, a fifteen-year-old female, was adjudicated delinquent upon a finding of incorrigibility and sentenced to six months confinement at the Department of Youth Services (DYS). Appellant has served her sentence so the matter would generally be held to be moot. However, we ordered the parties to brief the issue whether appellant was improperly sentenced since the question is capable of repetition yet will frequently evade review. We now vacate the sentence of the family court judge. Incorrigibility is a status offense, which means that if it were committed by an adult, it would not be a crime. A juvenile taken into custody for committing a status offense shall not be placed in a detention facility unless she is first found in contempt of a previous court order and all less restrictive alternatives have failed in the past.

In the present case, the solicitor and appellant's attorney supported DYS' recommendation that appellant be allowed to return to her mother's case at home. Despite the unanimous recommendation and despite the clear language of the statute cited above, appellant was sentenced to confinement at DYS. The family court judge clearly erred in imposing sentence. Therefore, we affirm the finding of incorrigibility but vacate appellant's sentence. We again remind family court judges that mere status offenders are not to be placed in detention facilities.

Youth Court Could Not Commit Child to a Specific Facility for a Specified Time

In re B.L.T.,
853 P.2d 1226
(Mont., 1993)

"The power of the youth court is not diminished through the granting the Department placement power of a delinquent youth. The court has the exclusive power to sentence the youth. If the court chooses to place the youth with the department, it is just one of the possible proper dispositions. Furthermore, the court reserves residual power, pursuant to section 41-5-523(5), which allows it to revoke or modify the disposition of the Department at any time, upon notice to the Department and subsequent hearing. This assures that the youth retains his rights in case the Department exceeds or abuses its authority. Other states with similar statutory schemes have determined that the rehabilitative goals of their juvenile offender acts require that ultimate authority over the child rest with the appropriate human services agency, not the court.

"It is important to keep in mind the broad discretion given to the Department under the Youth Court act. When a youth is committed to the Department, the Department has the statutory power to determine appropriate placement and rehabilitation programs for the youth, subject to various statutory limitations. As a result, a commitment to the Department is not equivalent to a commitment to a specific state correctional facility, such as Pine Hills. If the youth court in the present case had committed B.L.T. to the Department for a specified period of time, we would have approved that determination. However, there is no legislative authority granting the youth court the power to commit B.L.T. to Pine Hills School for Boys, a specific correctional facility, for a specified period of time. We hold that the youth court did not have the authority here to determine the length of time B.L.T. should spend at Pine Hills. Reversed and remanded for further proceedings consistent with this opinion."

Court was Obligated to Expunge Juvenile Records Once Statutory Requirements Met

State v. Webster,
848 P.2d 1300
(Wash., 1993)

In 1987, Webster, a 16-year-old juvenile, was found guilty of second degree rape and sentenced to serve 30 days in detention followed by 12 months of community supervision. In 1991, Webster moved to have his juvenile record sealed. The State did not oppose the motion. Nevertheless, a judge denied Webster's motion, as well as his subsequent motion to reconsider, expressing concern about (1) the serious nature of Webster's offense, and (2) the effect sealing the record might have on the court's ability to obtain information about the rape offense if Webster was charged with a similar offense in the future. Webster appealed.

The pertinent statute provides in part: The court shall grant the motion to seal

records if it finds that: (a) Two years have elapsed from the later of: (i) Final discharge of the person from the supervision of any agency charged with supervising juvenile offenders; or (ii) from the entry of a court order relating to the commission of a juvenile offense or a criminal offense; (b) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense; and (c) No proceeding is pending seeking the formation of a diversion agreement with that person.

It is undisputed that Webster satisfied all statutory of the requirements. That being the case, the court erred in denying his motion.

The meaning of an unambiguous statute is derived from the face of the statute. The word "shall" creates an imperative obligation unless a different legislative intent can be discerned.

There being no contrary interpretation apparent from a plain reading of the statute, the court was obliged to seal the records once the requirements of the statute were met. A court's discretion is limited to deciding whether the requirements of the statute have been satisfied. If those requirements are satisfied, then the court is obligated to grant the motion.

Plea of Guilty (Admission) not the Result of an Informed Choice

In the Matter of Kenyon N., 429 S.E.2d 447 (N.C., 1993)

Juvenile appealed from the District Court's order adjudicating him a delinquent juvenile based on the acceptance of his admission to misdemeanor assault with a deadly weapon.

A juvenile petition was filed in District Court alleging that the appellant, a fifteen-year-old juvenile, was delinquent, based on a charge of assault with a deadly weapon. The juvenile's admission to the charge was accepted by the trial court. The trial judge ordered that a stenographic transcript of the proceedings be prepared, but the tape recording of the proceedings was lost and it was therefore not possible to prepare a transcript.

The juvenile's attorney later moved that the proceedings be dismissed because the adjudication was based on an admission that was not the result of the juvenile's informed choice, and thus was invalid. The dispositive issue is whether the district court which initially adjudged the juvenile to be delinquent erred in accepting the juvenile's admission. The acceptance of an admission by a juvenile is tantamount to the acceptance of a guilty plea by an adult in a criminal case. As with any guilty plea, the trial court must determine that the admission is a product of the juvenile's informed choice before accepting the admission. Accordingly, the statute requires that, prior to acceptance of admissions by juveniles, the trial judge must address the juvenile personally on the following: (1) informing him that he has a right to remain silent and that any statement he makes may be used against him; (2) determining that he understands the nature of the charge; (3) informing him that he has a right to deny the allegations; (4) informing him that by his admissions he waives his right to be confronted by the witnesses against him; (5) determining that the juvenile is satisfied with his representation; and (6) informing him of the most restrictive disposition on the charge. The fact that these inquiries and statements were made must affirmatively appear in the record of the proceeding, and if the record does not so reflect, the adjudication of delinquency based on the admission must be set aside. In the instant case there is no transcript of the hearing at which the admission was accepted.

Thus, the only record evidence as to the inquiries and statements made to the juvenile at the time of the admission was accepted is the juvenile's later testimony. This testimony reveals that the trial court failed to inquire of the juvenile whether he understood the nature of the charge against him and whether he was satisfied with his representation. The trial court also failed to inform the juvenile that he had a right to remain silent, a right to deny the charges against him, and by his admission he waived his right to confront the witnesses against him, and what constituted the most restrictive disposition possible on that charge against him. Thus, it does not affirmatively appear from the record that the statutory provisions were complied with. The order adjudicating delinquency based on the admission was vacated.

Additional Evaluation of Juvenile's Competency to Stand Trial Allowed

In the Matter of Carlos S., 599 N.Y.S.2d 257 (N.Y., 1993)

Family Court entered an order directing that the Family Court Mental Health Service examine juvenile to determine his competency to stand trial. Family court did not abuse its discretion in ordering an additional competency evaluation for appellant. Having found appellant not competent to stand trial only months before, and upon the petition for a new hearing on this issue, family court had before it only the testimony of a state psychologist that was at odds with testimony of the experts at the prior hearing, and which it rejected as motivated by the state's desire to avoid responsibility for the care and treatment of a troublesome case. With no new credible evidence before it, resort to the Family Court Mental Health Service for a further examination was an appropriate exercise of discretion serving the court's fact-finding function under the Family Court to determine appellant's competency.

Adult Sentence was Improperly Enhanced by Prior Unconstitutional Transfer Proceeding

Kelly v. Kaiser, 992 F.2d 1509 (Okla., 1993)

Michael Kelley brought this petition for habeas corpus relief challenging his 1978 conviction in Oklahoma state court for robbery after a former felony conviction, for which he was sentenced to thirty-five years. Kelley, who pled guilty to the above charge, asserted that his sentence was improperly enhanced by a prior 1965 conviction because he was unconstitutionally treated as an adult in the earlier proceeding.

Kelley was seventeen years old when he was tried as an adult and convicted of marijuana possession in 1965. Under the juvenile code provisions in effect at that time, males of sixteen and seven-

teen were prosecuted as adults, while females of the same age were treated under the juvenile code unless certified to stand trial as adults.

In *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972), it was held that this statutorily mandated sex-based discrimination violated the Equal Protection Clause, and in *Radcliff*, it was held that the decision in *Lamb* was to apply retroactively. The conviction need not be set aside if it is established that the juvenile court would have certified the petitioner for treatment as an adult. The ruling in *Bromley* was premised on the holding of an evidentiary hearing, either in state or federal court, to determine whether a particular adult certification would have been made in juvenile court. Of course, the fact that the determinations whether certifications would have been made will, in some of these cases decided today, relate to circumstances a few or quite a number of years back. However, the burden of proof and persuasion will rest on the state. The court can take into account all doubts that arise, and any weakness of proof, because of the passage of time as factors against the state. This will afford substantial protection to the petitioners from the fact that the determinations will concern circumstances in earlier years. In the instant case, Kelley filed a petition in state court for post-conviction relief challenging the validity of his 1965 conviction; he asserted that he would not have been certified as an adult in 1965 because the crime he was charged with, possession of marijuana, was a nonviolent one, and he had never previously been convicted of a crime although admittedly there was a charge then pending against him in Kansas. The state courts nevertheless denied relief without a hearing, ruling that Kelley had failed to present a valid reason for believing that certification would not have occurred. Kelley then sought federal habeas relief, asserting that the state court improperly shifted to him the burden to prove that he would not have been certified to stand trial as an adult.

Whether a petition would have been certified by a juvenile court judge to stand trial as an adult, is, of course, a fact question. Requiring Kelley to make a showing that adult certification would not have occurred denies him the benefit of the statutory presumption, accorded to females his age, that he would be treated as a juvenile. Kelley was seventeen years old at the time of his 1965 conviction. Given the statutory presumption that juveniles would be treated in the juvenile system, this fact alone is sufficient to make a prima facie showing that he would have not been certified as an adult. Having enacted an unconstitutional distinction between the treatment of males and females, the state can not as part of the remedy for the resulting unconstitutional conviction reincorporate a gender distinction making it more onerous for males than females to obtain the benefit of the juvenile court system. Moreover, requiring Mr. Kelley to make an initial showing before he receives the hearing to which he is constitutionally entitled is to ignore the fact that the state has an affirmative obligation to provide that hearing. Having created the juvenile court system, it is the state's decision to seek a threat a juvenile as an adult that, in and of itself, triggers the need for a hearing.

Under these circumstances, the proper procedure is to remand the case to the district court for the purpose of holding an evidentiary hearing in that court. The district court should assess the evidence in determining whether Mr. Kelley would have been certified as an adult in 1965. Reversed and remanded for further proceedings in light of this opinion.

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"Let us put our minds together and see what life we can make for our children."

- Sitting Bull, Lakota Sioux 1877

Youth Violence Preventable, Study Says

Although statistics show that violence is rising among American youth, a panel of psychologists has released a report offering an optimistic view of what might be done to reverse the trend.

"Violence is learned, and we can teach children alternatives," said Ronald G. Slaby, a psychologist at Harvard University who is one of the panel's twelve members. Intervening at an early age, especially from ages four to eight - before children's habits of aggression are fixed - was among the study's main recommendations.

The report described as particularly effective programs in the schools that teach social and emotional skills like managing anger, negotiating, adopting another child's perspective and thinking of alternative solutions to disagreements. Children who are already aggressive can benefit from special tutoring along these lines, the report noted.

Television is a vehicle that should be used to teach children positive alternatives to violence, the study said. It called on the Federal Communications Commission to make license renewal for broadcasters depend in part on their providing programs that counter violence, and it asked that violence be sharply curtailed in the hours that children watch television most.

Another recommendation was that laws be changed to require anyone who purchases a gun to be of voting age and pass a background check and a test on firearm safety. "It should be at least as hard to get a gun as to get a driver's license," Slaby said.

The report concluded that many factors leading to violence in youth were "within our powers to change."

Copies of the report, *Violence and Youth*, may be obtained by writing to: Violence and Youth Report, American Psychological Association, 750 First St. NE, Washington, D.C. 20002.

Double Jeopardy, II

In a former article on Federal and Kentucky Double Jeopardy law, I discussed the changes wrought by the United States Supreme Court's decision in *Grady v. Corbin*, 495 U.S. ___, 110 S.Ct. 362, 109 L.Ed. 2d 548 (1990).[1] In that article I criticized *Grady* for the vagueness of its holding, and the difficulty of applying that holding to new sets of facts. But I expressed the hope that the vagueness of *Grady* would lead to an era of exciting new growth in Double Jeopardy Law, in which the "same conduct" test of *Grady* would be given definition through an expanding body of precedent. My hopes have proven overly sanguine. In the very recent case of *United States v. Dixon*, 509 U.S. ___, 113 S.Ct. ___, 125 L.Ed.2d 556 (1993), the vagueness of *Grady* proved to be its undoing. The bar should now take notice that *Grady v. Corbin* has been overruled.

I. *GRADY* AND ITS DEMISE

a) *GRADY*

In *Grady v. Corbin*, *supra*, an intoxicated motorist caused an automobile accident in which one person was killed. The motorist was charged with DUI, and entered a guilty plea. In a subsequent proceeding, the motorist was charged with negligent homicide. The prosecutor issued a Bill of Particulars stating he would prove negligence by showing the same instance of intoxicated driving for which the motorist had already been successfully prosecuted.

The motorist moved to dismiss the second indictment, arguing it was barred by the Federal Double Jeopardy Clause. The motion was overruled by the trial court. The motorist then sought the Writ of Prohibition from the Supreme Court of New York, Appellate Division. The Writ was denied. The motorist then appealed to the New York Court of Appeals, which reversed the Appellate Division. The state then sought certiorari, which was granted, and the Court affirmed the Court of Appeals.

Grady mandated a two step analysis of issues arising under the Federal Double Jeopardy Clause. The first step was to apply the so-called *Blockburger* rule, which mandates that each offense with which a defendant is charged must require proof of a fact which the other offense does not. When this rule cannot be satisfied, federal law forbids a double prosecution, whether the offenses charged are joined in one proceeding or severed into separate proceedings.

But, in situations where charges were brought in two separate proceedings, *Grady* mandated a second analytical step after *Blockburger* was satisfied. For *Grady* held that a second proceeding could not be had to punish a defendant for the same conduct for which he already had been successfully prosecuted. The necessary vagueness of the "same conduct" standard was heightened by the Court's firm insistence that it was *not* adopting a "same evidence" or a "same transaction" view of double jeopardy. If the confusion created by the "same conduct" test was not a sufficient reason for the Court to overrule such a new precedent, it certainly has furnished a beautiful excuse. *Grady v. Corbin* is no longer the law.

b) THE DEMISE OF *GRADY*

The case of *United States v. Dixon*, *supra*, presented the Court with two fact situations which presented similar issues, and which were combined by the Court for hearing and disposition. In the first case, Alvin Dixon had been released on bond while awaiting trial in the District of Columbia for a charge of second degree murder. As a condition of his bond, Dixon had been ordered to commit no new offense. Before being tried for murder, Dixon was arrested and indicted with possession of cocaine with intent to distribute. He was haled into the court where his murder charge was pending to show cause why he should not be held in contempt.

An elaborate hearing was held, at which the Government produced four witnesses to show that Dixon had indeed possessed cocaine with intent to distribute. The Court found Dixon guilty of contempt beyond a reasonable doubt, and sentenced him to six months in jail. Dixon then moved to have this pending indictment for cocaine possession dismissed on double jeopardy grounds. The motion was granted. The Government appealed and the District of Columbia Court of Appeals affirmed. The Government then sought certiorari.

In the related case, Michael Foster's estranged wife obtained a domestic violence order against him. He was tried for numerous counts of contempt for allegedly violating that order, and was convicted on several counts. He was sentenced to 600 days of imprisonment. The Government, showing no dearth of zeal, then indicted Foster for simple assault, and assault with intent to kill, based on the same conduct for which Foster was even then presumably languishing in the DC jail.. Foster moved to dismiss the indictments on double jeopardy grounds. His motion was denied by the trial court. He appealed to the District of Columbia Court of Appeals, which reversed. The Government then sought certiorari.

Both fact situations presented the same issue, described thusly by the Court: "whether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based on the same conduct for which he has been previously held in criminal contempt of court." The Court answered the question presented in the affirmative, provided the substantive prosecution and the contempt prosecution are the same under *Blockburger*. The Court overruled *Grady*, and held that its same conduct analysis is no longer a necessary supplement to the *Blockburger* rule.

At this point, I should perhaps bewail the threat to liberty presented by *Dixon*. I think, however, I will instead keep my handkerchief dry for those occasions when I *really* need it. For *Dixon* establishes the simple truth which, even after two centuries, has yet fully to permeate the Courts of the Commonwealth: criminal contempt is a crime. In the fact situation presented by the first Respondent, Dixon, the Court therefore held that the Government was barred from prosecuting Dixon for possession of cocaine,

after convicting him for contempt on exactly the same facts. In the second case, the Court held that the charge of simple assault against Foster had to be dismissed, but that the charge of assault with intent to kill would lie, because distinct under *Blockburger* from the previous contempt proceeding.

Dixon also makes short shrift of the Government's breathtakingly silly argument that the Court and the legislature are separate sovereigns for the purposes of double jeopardy analysis; so that contempt, which offends the court, and a substantive crime, which offends the legislature, can form the basis of successive prosecutions even when the *Blockburger* test is not satisfied. Justice Scalia patiently points out in *Dixon* that the Court and the legislature are not separate sovereigns, because they are not sovereigns at all. The *people* of jurisdiction are its sovereign, and an offense against the people, whether directed towards the legislative or judicial branch of government, can only be punished once.

All in all, the only loss inflicted by *Dixon* was *Grady's* "same conduct" analysis. I continue to think there is a need for *something* to supplement the rather wooden, algebra-like *Blockburger* rule, but I cannot argue that *Grady* reached the definitive answer, valid for all time.

c) THE KENTUCKY PROGENY OF *GRADY* LIVE ON

No one practicing in Kentucky can fail to remember that the "same conduct" analysis once mandated by *Grady*, is still mandated by Section Thirteen of the Kentucky Constitution.[2] We, therefore, now enjoy the best of all worlds, at least as long as our Court refrains from overruling the cases which interpret Section Thirteen more expansively than the Fifth Amendment. The Federal Constitution now prohibits substantive prosecutions based on *identical facts* adjudicated in prior contempt prosecutions. Section Thirteen goes one step farther, to prohibit substantive prosecutions based on the *same conduct* adjudicated in prior contempt prosecutions.

CONCLUSIONS

There is much to criticize in *Dixon*. In that opinion, Justice Scalia continues to apply his exaggerated deference to old common law precedents. It is now obvious, if it ever was in doubt, that the Court now places greater weight on ancient precedents than on a case decided three terms ago, with many of the same judges sitting on the Court both then and now. At one point, Justice Scalia even expresses doubt that *Grady* ever was an accurate expression of the law. In short, it appears that the Court is now inclining to the ancient jurisprudence of the English-speaking peoples, which believed that judges could never actually *make* law, but could only perceive, articulate and apply the one, common, and eternal law, valid for all times and places.

We have all been taught in law school to distrust this old jurisprudence, but, like it or not, it is reemerging as the dominant legal philosophy of our times. If we are to remain effective advocates for our clients, we must frame our arguments in terms which will persuade. To do this, we must now be able to root our arguments in the legal and social history of our people. Invitations to make new law will now increasingly continue to fall on deaf ears. To win, we must be prepared to show that the law which always has been will serve to succor our clients. The Kentucky Supreme Court has shown an increasing willingness to interpret our Constitution more broadly than the Federal Constitution, but even here one increasingly feels that arguments well grounded in the unique legal and social history of Kentucky have been the most persuasive.

The task now before us should not be as difficult as we may imagine. Our intellectual forbearers, the barristers of England and the lawyers of the Commonwealth, have been fighting tyranny for centuries, to great effect. Their successes are enshrined in the same ancient precedents our courts now increasingly revere. If our courts' new respect for history is anything but a mask for cynicism, this should not be an era in which our liberties are diminished, but consolidated. We can even hope that the courts will give our liberties incrementally increased protection, provided that we begin to speak the language our courts now find persuasive.

Aside from the rather startling revival of the old jurisprudence in which *Dixon* is grounded, it appears that the Court's opinion there helps us more than hurts us. Now and presumably forever, contempt proceedings have been brought within the aegis of the Double Jeopardy Clause. An insidious invitation to extend the separate sovereigns doctrine has been firmly rejected. The only thing lost was *Grady's* additional "same conduct" analysis, which, in fact, has not been lost at all in Kentucky.

FOOTNOTES

[1]"Double Jeopardy," *The Advocate*, Vol. 15, Number 4, p. 93 (1992).

[2]See *Ingram v. Commonwealth*, Ky., 801 S.W.2d 321 (1990); *Walden v. Commonwealth*, Ky., 805 S.W.2d 102 (1991).

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Foretelling the Future?

"I do not imagine that the white and black races will ever live in any country upon an equal footing. But I believe the difficulty to be still greater in the United States than elsewhere."

- Alexis de Tocqueville (1835)

Use of the State Constitution Revisited

"Contrary to popular belief, the Bill of Rights in the United States Constitution represents neither the primary source nor the maximum guarantee of state constitutional liberty. Our own constitutional guarantees against the intrusive power of the state do not derive from the federal constitution. The adoption of the federal constitution in 1791 was preceded by state constitutions developed over the preceding 15 years, and, while there is, of course, overlap between state and federal constitutional guarantees of individual rights, they are by no means identical. State constitutional law documents and the writings on liberty are more the source of federal law than the child of federal law."[1]

KNOW THE HISTORY OF OUR STATE CONSTITUTION

Over the last several years there has been a growing awareness and reawakening of the benefits which have lain dormant in our state constitution.[2]

"Defense attorneys can't expect our state courts to articulate the rights which exist under our *Constitution* unless we provide them with the opportunity of doing so. The groundwork for a state constitutional law argument must be laid in the trial court."[3]

We must know the history of our state constitution to use it in support of our state constitutional arguments. *Commonwealth v. Wasson*, Ky., 842 S.W.2d 487 (1993), is an excellent example of how our awareness of the history surrounding our state constitution can benefit our clients. A reading of *Wasson, supra*, reveals that we must know the political, legal, moral and social theorists who either wrote our constitution or whose works were turned to as resources by the framers of our constitution. Justice Leibson writing for the majority in *Wasson, supra*, drew from the *Official Report of the Proceedings and Debates in the 1890 Convention*, E. Polk Johnson, Vol. 1. Justice Leibson quotes J. Proctor Knott of Marion County and J.A. Brintz of Clinton County with respect to their discussions of Sections One and Two of the Kentucky Constitution during the 1890 Constitutional Convention. *Wasson, supra* at 494.

Noted Kentucky historian, Dr. Thomas D. Clark, has also written extensively about the framers of the Kentucky Constitution and their respective positions on particular constitutional provisions.[4]

In addition to knowing the individuals who framed our state constitution and the theorists on whom they relied, it is also important for us to be aware of what state constitutions were used as models in the construction of the Kentucky state constitution. Again, in *Wasson, supra*, our Kentucky Supreme Court has pointed to Pennsylvania as the originator or source of our Constitution. In *Wasson, supra* at 492, the Court notes that "the original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution of 1792."[5] Dr. Clark notes that though "there seems to be no documentary proof that any [Kentucky] delegate had in hand a copy of the second Pennsylvania Constitution; ... Evidence is clear that a copy was present."[6]

Thus, in our analysis of the Kentucky Constitution, it is not only fair, but imminently significant, for us to look at Pennsylvania cases interpreting the Pennsylvania Constitution. There we will find support for our analysis of the Kentucky Constitution.

The Court in *Wasson, supra* at 498, offers the example of one such case. *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980), dealt with a homosexual sodomy statute similar to KRS 510.100, challenged by the appellant in *Wasson, supra*. The Pennsylvania Supreme Court provided our Court with "this guidance": "With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct *does not harm others*." *Wasson, supra* at 498.

Justice Leibson noted that the Pennsylvania Supreme Court reached to the same roots in interpreting its state constitution as our Supreme Court did in the case of *Commonwealth v. Campbell*, 133 Ky. 50, 117 S.W. 383 (1909). At issue in *Campbell, supra*, was an ordinance that criminalized possession of intoxicating liquor, even for private use. *Campbell* was written during Prohibition times when the possession, sale and distribution of alcohol was illegal.

Our present Supreme Court in *Wasson, supra*, noted with great respect that the Court in *Campbell* relied on the "great work" on liberty of the 19th century English philosopher and economist, John Stewart Mill: "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute... The principle requires liberty of taste and pursuits; a framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong."[7] Our present Court has peeled away Mill's premise to the bare bones, stating that "criminal sanctions, should not be used as a means to improve the citizen." *Wasson, supra* at 496. Thus has arisen from the sleeping giant of our state constitution a spectacular right to privacy resulting in the overturning of our fourth degree sodomy statute.

KNOW TEXTUAL AND STRUCTURAL DIFFERENCES

The next most obvious reason to distinguish state and federal constitutions lies in the differences in the texts and structure of the provisions.[8] With regard to textual language, our state constitution may provide an explicit right not recognized by the federal constitution.

However, differences in language do not insure a different interpretation in meaning. For example, in *Mace v. Morris*, Ky., 851 S.W.2d 457 (1993), the argument was well-stated by the

defense that Section Eleven of the Kentucky Constitution reads differently than the Fifth Amendment. Yet, the comparison, premised on a legitimate distinction in language, was made to no avail.

Section Eleven of the Kentucky Constitution reads in part that the accused "cannot be compelled to give evidence against himself." Counsel in *Mace*, *supra* at 458, argued that this language "to give evidence" is of "broader scope" than the language of the Fifth Amendment of the United States Constitution "to be a witness." The Court in *Mace*, *supra*, does not explicitly state that these textual differences are meaningless. However, it refuses to read the language of Section Eleven as broadly as is requested by the appellant.

Mace challenged a trial court order authorizing the Commonwealth to collect blood, hair and saliva specimens from him for scientific comparison. In *Holbrook v. Knopf*, Ky., 847 S.W.2d 52 (1993) the Supreme Court dealt with a similar issue. A post-indictment order required the defendant, accused of a sexual offense, to submit to the involuntary taking of physical specimens as part of a criminal investigation. Counsel presented their arguments under Sections One and Ten of the Kentucky Constitution. Holbrook argued that Section Ten authorized search warrants only for places and that it authorized warrants to seize persons but not to search persons in order to look for evidence of crime. The Supreme Court refused to recognize any difference in the textural language of Section Ten of the Kentucky Constitution and the Fourth Amendment to the United States Constitution. The Court in *Holbrook* noted "Appellants' Brief has cited neither case law from elsewhere nor learned commentary supporting their theory that such procedure violates constitutional protection of personal security. While we have decided several recent cases protecting individual rights on state constitutional law grounds (*see, e.g., Rose v. Council for Better Educ., Inc.*, Ky., 790 S.W.2d 186 (1989); *Commonwealth v. Wasson*, Ky., 842 S.W.2d 487 (1992) (*rendered September 24, 1992*) **our stated purpose is to do so only where the dictates of our Kentucky Constitution, tradition, and other relevant precedents call for such action. We have no intention that such cases should encourage law suits espousing novel theories to revise well-established legal practice and principles.**" *Holbrook*, *supra* at 55. (emphasis added).

Since it is difficult to predict when the Court will recognize textural and structural differences as meaningful and when it will disregard them as irrelevant, defense counsel is obligated to examine the language of our state constitutional provisions carefully and raise these issues where their recognition will benefit his client.

INDEPENDENT AND ADEQUATE STATE GROUND PRACTICE - THE METHOD OF ANALYSIS

In his recent address to the Kentucky Association of Criminal Defense Lawyers at their annual seminar, NACDL President John Henry Hingson, III, set forth a methodical five step approach to the analysis of issues in state court. He recommended that defense counsel ask herself the following questions:

1) Is there an administrative rule or regulation supportive of your position?;

2) Is there a state statute supportive of your position?;

3) Is there a state constitutional provision supportive of your position?;

4) Is there a federal law, rule, regulation or statute supportive of your position?;

5) Is there a federal constitutional provision supportive of your position.[9]

Hingson urged defense lawyers to use their motion writing at the trial level and their briefs with the appellate courts, to guide the courts to analysize the issues, beginning with state law and only turning if necessary to federal law.

We must continue to remind ourselves and our judges that the greatness of federalism lies in the freedom it gives to each state to carve out its own unique comprehension of its state's constitutional principles as long as those principles do not fall below the floor of individual rights proscribed by our federal constitution.

THE PLAIN STATEMENT RULE

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1981), the United States Supreme Court erected the "plain statement rule." Under the plain statement rule, a state court must: "Make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not themselves compel the result that the Court has reached."

"If the state court decision indicates clearly and expressly that it is alternatively based on bonafide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision. *Michigan v. Long*, *supra*.

If a state court asserts that its decision rests on state and federal grounds, the United States Supreme Court will find jurisdiction by claiming that the state decision was really entirely federal. In *Montana v. Jackson*, 460 U.S. 1029, 103 S.Ct. 1418, 75 L.Ed.2d 782 (1983), the United States Supreme Court claimed that the state decision in interpreting its state constitution was really entirely federal because the state court cited federal authorities in reaching its decision.

We need to be careful that the state cases we are citing to for support in making a state constitutional argument do not all refer only to the federal constitution. If there is no prior case law which explicitly refers to the respective state constitutional provision, then it becomes especially important for defense counsel to look back to the history and origin of our state's constitutional provisions. Again, that history can be found in the works of Thomas Clark and other noted historians.

The United States Supreme Court has recognized that the failure of a state court to use the five step analysis and to abide by the plain statement rule has caused the Supreme Court to decide issues that otherwise would not be in its domain and to burden it unnecessarily.[10]

A CAVEAT TO PLAIN STATEMENT RULE

One important factor to remember as defense counsel attempts to raise

state constitutional issues is the need to preserve both federal and state constitutional arguments for appeal and habeas review. We cannot forget the case of *McCleskey v. Zant*, 111 S.Ct. 1454 (1991). In *McCleskey*, the Supreme Court has in effect ruled that the failure to raise a claim at the state court level can prevent a petitioner from having it considered on habeas review. Thus an argument that one's right to a remedy rests on independent and adequate state grounds could jeopardize later recourse to a federal constitutional provision. If we place to much reliance on the state constitution to the exclusion of a federal constitutional argument, we may be foreclosing an avenue of habeas relief for our client. With this danger awaiting clients in federal court, there continues to be a need to rely on both the state and federal constitution.

THE GIANT CONTINUES TO AWAKEN

Though the Supreme Court's strong-step forward in *Wasson, supra*, has been followed by several steps backward, the awakening of our citizen's state constitutional rights continues. In *Commonwealth v. Grubb*, 40 K.L.S 9 (final 10/21/93), the Supreme Court affirmed a decision of the Court of Appeals reversing the drug convictions of *Grubb* due to a violation of the double jeopardy clause of Section Thirteen of the Kentucky Constitution. At the trial level, Grubb was found guilty of four counts of Trafficking in a Schedule II Controlled Substance.

Two counts dealt with one sale of 12 pills of Schedule II Narcotics, Percodan and Dilaudid. The issue as framed by the Supreme Court and before it the Court of Appeals, was whether multiple sentences for drug trafficking may be imposed under the "compound consequences" prong of the *Ingram* test (arising from *Ingram v. Commonwealth*, Ky., 801 S.W.2d 321 [1990]), when the defendant has trafficked in different named substances but which are criminalized in the same schedule.) *Grubb, supra* 40 K.L.S. 9. The Kentucky Supreme Court affirmed *Ingram* stating that it has adopted a broader view of double jeopardy than the United States Supreme Court. Section Thirteen of the Kentucky Constitution permits the Commonwealth to carve out of a single criminal episode the most serious offense, but not to punish a single episode as a multiple offense. Thus, double jeopardy analysis under Section Thirteen of our Kentucky Constitution requires a trial court to determine if the situation at issue presents a "single impulse act having no compound consequences."

The fact that our Supreme Court has been courageous enough to interpret and give independent meaning to our state constitution should be commended. In the years to come, as the composition of the United States Supreme Court continues to change, our clients may again turn to it for recourse. However, presently the Bill of Rights as articulated in the Kentucky Constitution has more vigor and life than most of us expect to find when we turn to the analogous federal constitutional provisions. Viva the Kentucky Constitution!

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ENDNOTES

[1]*Commonwealth v. Wasson*, Ky., 842 S.W.2d 487, 492 (1993).

[2]See A. Connelly, *A Sleeping Giant, Section Two of the Kentucky Bill of Rights, The Advocate*, Vol. 15, No. 4, p. 115-117 (June, 1992).

[3]F. Heft, *Using Kentucky's Bill of Rights in Criminal Cases, The Advocate*, Vol. 15, No. 4, p. 31 (June, 1992).

[4]See T.D. Clark, *George Nicholas: Father of the Kentucky Constitution, The Advocate*, Vol. 15, No. 4, p. 6-7 (June, 1992); T.D. Clark, *The Kentucky Bill of Rights, The Advocate*, Vol. 15, No. 4, p. 13 (June, 1992); T.D. Clark, *A History of Kentucky* (1960).

[5]See Gormley and Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration, The Kentucky Law Journal*, Vol. 80, No. 1: 1991-1992.

[6]T.D. Clark, *The Kentucky Bill of Rights, supra* note 4, at p. 13.

[7]J. Mill, *On Liberty*, pp. 22, 23, 28.

[8]F. Heft, *Using Kentucky's Bill of Rights in Criminal Cases, supra* note 3, at 32.

[9]See also Carson, *Last Things Last: A Methodological Approach to Legal Arguments in State Courts*, 19 Williamette Law Review 641, 643-645 (1983); *State v. Jewett*, 500 A.2d 233, 238, N. 10 (Vt. 1985); and *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1447, N. 10, 89 L.Ed.2d 674 (1986) (Stevens, J., dissenting).

[10]*Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984) (Stevens, J., concurring).

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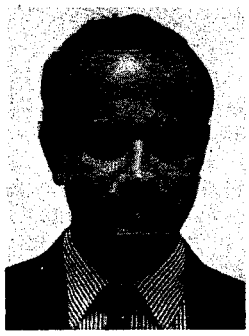
TOP 10 REASONS WHY THE ATTORNEY DIDN'T WALK HIS MURDER DEFENDANT AT TRIAL

by Larry H. Marshall

#10 Trial?...What's a trial?
#9 The attorney was a potted plant.
#8 Why be objectionable?
#7 The attorney was cross with his direct.
#6 The attorney left a wake-up call only for the penalty phase.
#5 Happy hour starts at 4:00 p.m.
#4 The defendant's defense - "Well Excccuuuse Me."
#3 The defendant testified that he want'n to do it.
#2 The attorney got struck by lightning during a brainstorm.

And the #1 reason why the attorney didn't walk his murder defendant at trial:
#1 The attorney's training wheels fell off on his way back from Faubush.

Electronic Malpractice



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

Computers. Seems you either love them or you hate them. Even those of us who love them love to hate them sometimes. We all know computers are a fact of modern life. Just try running a law office without one. It is nearly impossible anymore. Computers, after all, have become quite simple to operate and are priceless management tools.

So why are there pockets of resistance still holding ground out there? Reasons vary. Some say it just takes too long to learn computers. Others tried their hands at computers ten years ago and still carry the battle scars.

But if you haven't looked at computers lately, you don't know what you are missing. Even most attorneys that do use computers are missing the mark. Most personal computers are used simply as word processors by secretaries. But the unit sitting on her desk today can do a lot more than you may realize with the right software.

If you're still not totally convinced of the importance of you and your staff learning as much as possible about computers, then consider the ethical obligations we strive to uphold.

The pendulum has swung -- bringing computers from a matter of mere personal preference or business efficiency, to a matter of professional and legal imperative. At what point should we consider it our DUTY to employ technology which results in better service to our clients? How far should that duty extend? How should it be enforced within the profession?

As the computer invades the law office, these questions begin to raise their ugly heads. Must we learn to use litigation databases, communications programs, legal research databases, and graphic simulation programs for evidence, lest we be held liable for malpractice?

Today, the answer seems to be "No." Tomorrow ..... probably. We're all held to the standard of what a reasonably competent practitioner acting professionally would do.

Six years ago, not a court in the land would expect a lawyer to perform computerized legal research. Only seven percent of all lawyers even had access to a computer six years ago.

But look what's happened. Today, not seven -- but SEVENTY -- percent of all lawyers are doing their legal research on computers. And with portable notebook computers just out, that number is going to shoot through the ceiling this year.

The ethical test is a dynamic one, linked to expectations of reasonable standards in a particular profession AT A PARTICULAR POINT IN TIME. A hundred years ago the Court wouldn't have expected you to be up-to-date with Advance Sheets -- the pony express just wasn't that reliable.

Today you're expected to be fairly current. And in just a couple of years, the standard of a reasonably competent practitioner acting professionally will be determined by the ninety percent of us who are using computers to research and prepare cases. It is my personal opinion that attorneys who let the computer age pass them by, will be opening themselves up to serious ethical and professional attacks in the future.

There are several harbingers coming to us from other parts of the country and from various professions:

A lawyer was found negligent recently after checking an annotated code, but not a 30-year-old textbook which would have led him to a judgment clarifying an ambiguous statute.

A research chemist checked all the recent literature, but failed to look at some 50-year-old books which would have led him to discover that a chemical was hazardous. He was found negligent.

In San Francisco, a lawyer was found negligent for giving erroneous legal advice in an unsettled area. The court said his judgment was not informed by adequate research.

A doctor in Washington State failed to use the latest computerized diagnostic procedures in treating a glaucoma patient. Negligent.

A lawyer in Vancouver lost an appeal because he failed to find an unreported judgment. The Judge suggested the lawyer was negligent.

A client challenged a lawyer's bill, saying he charged too much for research because computerized research would have been more efficient. The court REDUCED THE BILL.

Chief Justice Abbott said 160 years ago, "God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law." With all due respect to Justice Abbott, we're drawing ever closer to the time when every attorney's COMPUTER will be bound to know all the law.

Courts have begun groping -- hesitantly -- toward the articulation of tougher standards for legal research. Several common principles have emerged, many from California courts:

♣ A lawyer must know how to find the law beyond his or her basic knowledge, by using standard research techniques.

♣ Failure to conduct research may lose the lawyer the protection of the informed judgment rule, since without research, judgment is not informed.

♣ Competence is assessed on the basis of reasonable conduct, measured by a standard of care reflecting the skill and knowledge of ordinary lawyers under similar circumstances.

♣ The U.S. Fifth Circuit has proclaimed "Professional knowledge must be kept current."

♣ And the U.S. Third Circuit adds, "Computer-aided research is reasonable in contemporary legal practice."

When lawyers first started using computers, nobody could predict the implications. At most, it seemed they simply altered the way we did what we had always done. A floppy disk of a deposition transcript didn't seem phenomenally different from a printed transcript.

But then WESTLAW and LEXIS jumped into the picture. And now we have evolving CD-ROM technology and instant searches through thousands of cases. It is quickly becoming apparent that technology is subtly and profoundly altering the substance and style of our work.

Relationships, events, and trends are easily discernable on computer -- in a manner never possible by rummaging through a shoebox of client cards.

The field of legal ethics is evolving as rapidly as the new technology itself. We CANNOT sit idly by. Computerized legal research is in its infancy. We've only just begun. It's a challenge to all of us to be imaginative and adventurous. It's a challenge that must be met. The public interest -- not to mention our professional self-interest -- demands it.

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C. Kevin Batts, M.B.A., J.D., is Director of Information Systems and Attorney with the Tennessee District Public Defenders Conference. Batts has authored numerous articles for national publications in the fields of computer science, law and management. He has appeared on network television and radio programs addressing technology issues. For seventeen years, Batts designed computer systems for the federal government. Many of his systems are still in use today by the federal court system, the Department of Defense, the Department of Treasury, the Internal Revenue Service, and the U.S.D.A. Batts resides in Nashville with his wife and two children.

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From the Recruiting Corner:

R.B. DiLoreto, Recruiter

DPA SALARIES CONTINUE TO LAG BEHIND

The Department of Personnel's Classification and Compensation Branch conducted a 1993 salary study, comparing Kentucky state employees' salaries with the salaries of similarly situated employees in all states contiguous to Kentucky and all states in the Southeast. Roy Collins, DPA Personnel Director, compared those salary figures to DPA salaries and made the following comments in his "DPA 1993 Salary Study":

> Average salaries paid by the Department ranked above the Kentucky state average in only two classifications: Fiscal Officer and Administrative Assistant. This finding could be due to the years of service by the individuals in these positions and/or the period of time in the position. The disparity in salaries in other classifications is due, in large part, to the Department's employee turnover rate and the lack of discretionary raises awarded by DPA. The Department has been unable to award raises necessitated by class and/or grade changes.
>
> The lack of sufficient funding to the Department meant there could be no raises awarded to the legal secretaries in 1985 when other secretaries in state government received raises. The same held true when state government initiated pay grade changes in 1990. Again, funding shortfalls prevented the Department from raising attorney salaries in 1991, when the Department of Personnel sanctioned the raises if the agency had the money in its budget. Other discretionary raises such as reclassifications have been put on hold while the Department struggled through a tight fiscal period.
>
> When considering only those employees whose salaries are below the average, the cost of providing raises is significantly higher than when considering all employees (those *above* and below the average) within a given classification. The difference is 11.3% or approximately $50,000. This occurs because employees with a salary greater than the average tend to pull the DPA average up thereby reducing the difference between averages and the overall cost necessary to bring the averages in line. This is most apparent when examining the Legal Secretary Senior classification.
>
> When considering all employees in the Legal Secretary Senior class and determining an average salary, the projected cost of providing raises to meet the state average is $18,972, compared to a projected cost $51,865 to bring the salaries of those employees below the state average up to par.
>
> This is the legacy of DPA, an agency that consistently receives the short end of the funding stick and has allowed that short end to be inherited by its dedicated staff. In order to bring the salaries of DPA employees up to the average salaries of other state employees approximately $485,000 must be obligated in FY 95. This would adequately address the situation as it currently exists. However, to prevent a recurrence in the long run, a systematic change in the approach to funding the Department must be addressed.
>
> Failure to address this problem will result in a continuation of the decline in employee morale at the Department and a potential increase in on-going turnover/retention problem. These problems have a severe effect on the Department's staff and are likely to have a long term impact on productivity.

1993 DPA SALARY STUDY						
Class	**KY State Avg**	**Avg-Other States**	**DPA Average**	**Difference**	**Estimated Cost/mo.**	**Estimated Cost/yr.**
Attorney I	1,933.00	2,397.00	1,860.00	73.00	762.12	9,145.44
Attorney II	2,803.00	2,887.00	2,301.00	502.00	4,076.24	48,914.88
Attorney III	3,387.00	3,522.00	2,875.00	512.00	13,066.24	156,794.88
Attorney Sv	3,658.00	n/a	3,341.00	317.00	3,677.20	44,126.40
Paralegal	1,391.00	1,641.00	n/a	n/a	n/a	n/a
Paralegal Sr	1,595.00	1,802.00	1,513.00	82.00	380.48	4,565.76
DOL Invest Sr	2,356.00	1,931.00	1,905.00	451.00	6,277.92	75,335.04
DOL Invest Sv	2,919.00	2,606.00	2,363.00	556.00	1,934.88	23,218.56
Clerk Ch	1,322.00	n/a	1,277.00	45.00	52.20	626.40
Secretary	997.00	1,107.00	893.00	104.00	120.64	1,447.68
Secretary Pr	1,290.00	1,290.00	n/a	n/a	n/a	n/a
Secretary Ch	1,617.00	1,457.00	1,199.00	418.00	1,454.64	17,455.68
Legal Secy	1,633.00	1,526.00	1,384.00	249.00	866.52	10,398.24
Legal Secy Sr	1,925.00	n/a	1,763.00	162.00	4,322.16	51,865.92
Fiscal Off	2,311.00	n/a	3,063.00	-752.00	n/a	n/a
Personnel Adm	2,872.00	3,102.00	2,346.00	526.00	610.16	7,321.92
Accountant Pr	1,852.00	n/a	1,432.00	420.00	487.20	5,846.40
Accountant Sv	2,105.00	2,002.00	1,759.00	346.00	401.36	4,816.32
Admin Asst	1,517.00	1,578.00	1,545.00	-28.00	n/a	n/a
Admin Sect Sv	2,664.00	2,660.00	2,627.00	37.00	42.92	515.04
Admin Spec Pr	2,278.00	n/a	1,819.00	459.00	1,597.32	19,167.84
Janitor	1,075.00	1,129.00	866.00	209.00	242.44	2,909.28
Computer Anlyst	1,865.00	2,201.00	1,820.00	45.00	52.20	626.40
Systems Anlyst	1,977.00	2,155.00	n/a	n/a	n/a	n/a
Total				4,733.00	40,424.84	485,098.08

DPA salary figures are based on the salary as of 9/1/93

The averages used are average salaries paid by state governments

Included in the total cost is a 16% charge for additional benefits as a result of the higher salary

The total cost is the estimated total annual cost to raise the salaries of DPA employees to the KY state average

Child Sexual Abuse: A Mental Health Issue?

This is a 4-part series....

Child sexual abuse is one of the most pervasive social problems faced by this society. Its impact is profound because of the sheer frequency with which it occurs and because of the trauma brought to the lives of children and adults who have experienced this crime. Historically, however, the sexual abuse of children was dismissed as a "family problem." Within the past decade, it has been addressed by a sometimes reluctant criminal justice system. It is only in more recent years that the profession of mental health has begun to understand child sexual abuse not only as a criminal justice problem, but also as a mental health concern. This realization has been unavoidable as clinicians have repeatedly seen the manifestation of sexual abuse in the lives of their clients.

Research findings related to the incidence of sexual abuse and assault against women report that between 15 to 28 percent of females will be sexually victimized at some point in their lives. Research data related to male victimization is less available, and is undoubtedly underrepresented by the currently reported figure of 8.7 percent. The application of national studies to Kentucky population figures reveals that over 580,000 females will be directly impacted by sexual abuse during their child or adult years, and that over 43,000 male children in this Commonwealth will be sexually abused before the age of eighteen. The research clearly indicates that for far too many women and men, third first experience of sex occurs in the context of violence and manipulation rather than love and trust.

In addition to compelling statistics related to the incidence of sexual abuse and assault, there is mounting evidence that early victimization places persons at risk of subsequent psychological problems. Studies related to the impact of sexual abuse in childhood, for example, indicate an association of the experience with significant mental health problems in adulthood. High incidence rates of child sexual abuse history have been documented among inpatient and outpatient populations, including findings that 70% of females in a psychiatric emergency room sample were abuse survivors, that 43% of inpatients had confirmed histories of physical and sexual abuse, and findings that 51% of state hospital patients were sexually abused during childhood or adolescence. Similarly, studies have found a child molestation rate of 44% among female outpatients and a rate of 33% within a general outpatient caseload. Notably, these incidence figures within mental health populations compare to an incidence rate within the general population of 19 to 28 %.

The specific types of long-term effects of childhood sexual abuse have also been documented in clinical and non-clinical populations. High rates of depression, anxiety, substance abuse, dissociative disorders, interpersonal dysfunction, sexual problems, and suicidality have all been identified to varying degrees among women and men who survive sexual abuse. The severity of psychological and psychosocial problems experienced by adult survivors of childhood victimization has been found to vary based on the age of the victim, the relationship between the victim and the offender, the violent or coercive nature of the crime, the length of time during which the molestation occurred, and other factors. Researchers conservatively report, however, that approximately 20% of sexual abuse victims will suffer significant long-term effects. Extrapolating from the incidence of sexual abuse in the general population, this estimate reveals that approximately 5% of the female population within the United States experiences major mental health problems in their adult lives as a direct result of childhood sexual abuse.

The existence of long-term effects of child sexual abuse may well result because of the influence which this early trauma has on children. The experience of sexual abuse for a child distorts her or his self-concept, orientation to the world, and affective capabilities. The child's sexuality is shaped in a developmentally inappropriate manner as children are placed in an adult relationship for which they are cognitively unprepared, and because sex is associated in the mind of the child with fear, pain, manipulation and secrecy. Children faced with incestuous abuse experience the ultimate sense of betrayal in that they are harmed most by the person upon whom they are most dependent. Sexually abused children may also feel betrayed by non-offending family members who offered no protection or disbelieved or blamed the child when the abuse was first disclosed. The experience of sexual abuse is also a disempowering process for children whose will, desires, decision-making and sense of efficacy or contravened. Children who face sexual trauma most often incorporate into their self image negative connotations of guilt, shame or "badness" which are communicated intentionally by the offender or by cultural and societal attitudes which view victims in such a negative light.

For some children, the path to recovery from sexual abuse is completed with short-term support and intervention. Studies show that other children, however, continue to re-experience the trauma with symptoms of fear, anxiety, nightmares, phobias, clinging behavior, depression, suicidality, alcohol or drug abuse, self-destructive behavior, and in vulnerability to future victimization. The high percentage of sexually abused children within psychiatric hospitals and residential facilities within this Commonwealth, and the significant percentage of children with a serious emotional disturbance who have memories of sexual abuse speaks to the formidable impact which victimization can bear.

While the incidence of sexual victimization nationally and within the Commonwealth is dramatic, the history of sexual abuse frequently goes undetected by therapists. Studies of client records, in fact, reveal that abuse is rarely detected by mental health professionals. In a 1989 study of outpatients in which 68% were found to have experienced prior abuse, almost 3/4 of prior victims had never revealed the abuse experience to therapists. When asked by researchers they the prior victimization had never been disclosed, a significant number responded simply that they were never asked. A lack of detection of abuse history may have significant implications in that the clinician is at risk of treating symptoms without addressing one of the

major causes of mental health or emotional problems for a client.

The significant impact of childhood sexual abuse is unquestionable. This impact, however, speaks not only to the individual child victim of the crime, but also to the mental health community. There is no longer a question of whether child sexual abuse is a criminal justice problem or a social services problem or a mental health problem, for its power pervades the territory of each. The question must now lie in the resolve of all professionals to overcome skepticism with acknowledgement, disbelief with understanding, indifference and indignance, and reluctance to intervene with an unswayable intolerance of the victimization of all children.

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Carol currently serves as Administrator of the Sexual and Domestic Violence Program of the Kentucky Department for Mental Health and Mental Retardation Services. In that capacity, she provides consultation and training to the state's Community Mental Health Centers and Rape Crisis Centers on the delivery of sexual and domestic violence services. She serves on the Attorney General's Task Force on Domestic Violence Crime, the Kentucky Coalition Against Rape and Sexual Assault, and the Attorney General's Task Force on Child Sexual Abuse. She also serves as legislative liaison for the Division of Mental Health. Ms. Jordan received a Master of Science degree in Clinical Psychology in 1983.

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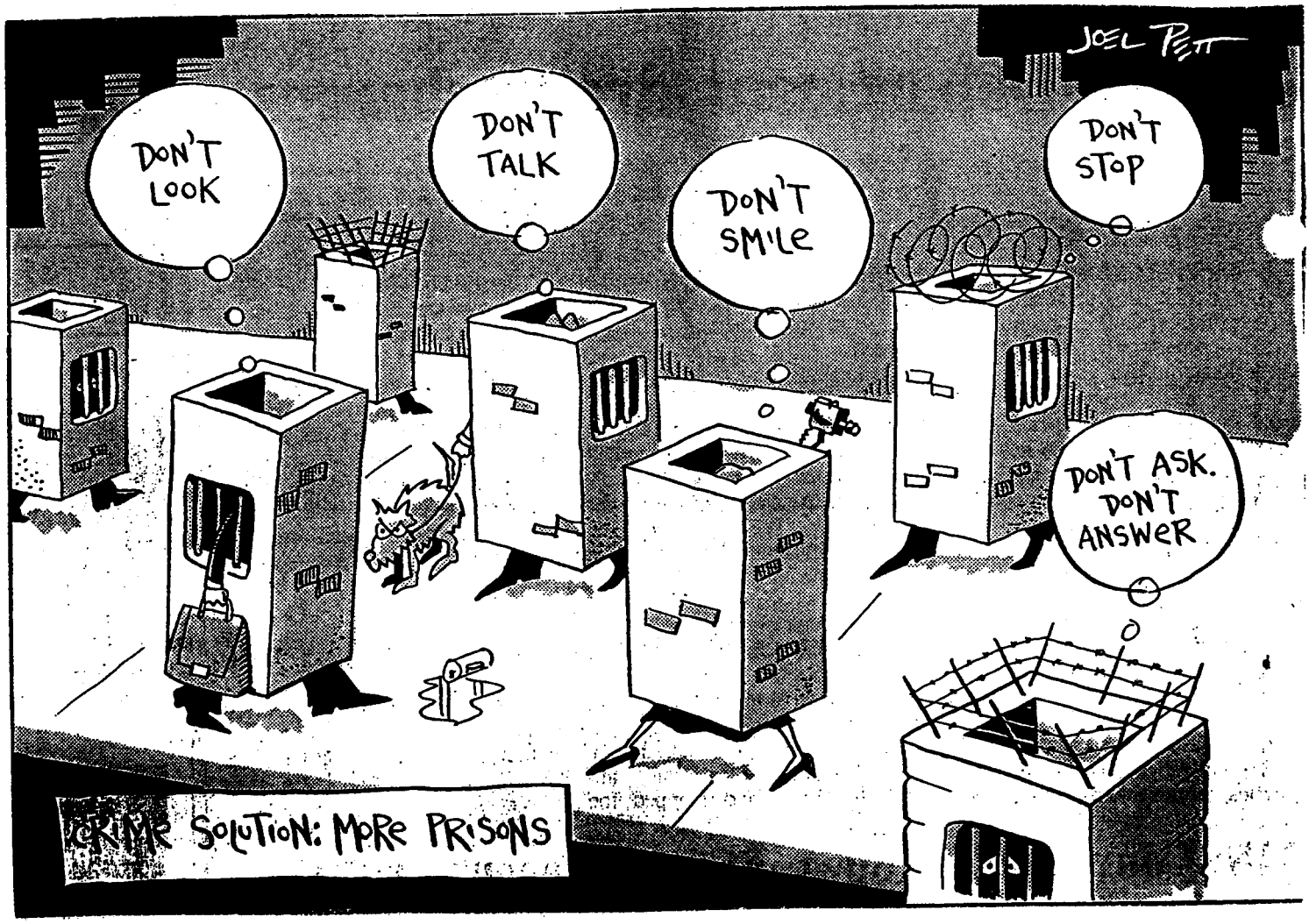

Coordinated Effort Needed to Increase Funding for Contract Counties

Contract Funding Efforts

Elsewhere in this issue is printed the interim report of the Governor's Task Force on the Delivery and Funding of Quality Public Defender Services. Prominent among the recommendations is a substantial increase, over the next biennium, in funding for contract attorneys. Specifically, we have submitted a budget request that includes a 25% increase for FY 94-95 in grants to contract counties (exclusive of Jefferson and Fayette, whose funding needs are addressed separately), and an additional 25% increase for FY 95-96. The Task Force recommends the funding increases to be covered by a $40 administrative or "user" fee for public defender services, to be imposed and paid at the outset of the case, and by increasing the DUI service fee from $150 to $200.

The hard part, of course, will be getting these measures through the legislature. This is where we need your help. As the legislative session approaches, we need to contact and line up support among as many legislators as possible. No measure for increased funding will be popular in the current fiscal climate, but we are confident we can make the case for adoption of the Task Force's recommendations to anyone who will listen.

We need you to contact your legislators. Ask your Judges, your Judge-Executives, your bar associations, your colleagues, local editors, even your prosecutors if you think it will help, to support these funding proposals. Make sure they know that Kentucky currently funds its public defenders at the lowest per-case level in the country; even enactment of this funding request in full will not bring us up to the median level of per-case funding nationally. The cost of such an increase over the next biennium would be about $1.1 million, all of it to be raised from the proposed fees mentioned above. The Public Advocate, Allison Connelly, and I will be actively seeking your direction regarding lobbying efforts in the legislature to secure enactment of these provisions. This is our best chance in a long while to bring Kentucky's system of public defender funding into what's left of the 20th century. Let's not let it go by.

Funding Tied to Workloads

The second point has to do with how we spend this new money if we get it. Rather than simply increasing everyone's grant by 25%, which would perpetuate inequities in the current funding formula, our intention is to refine the formula, so as to reallocate the funds among the contract counties as fairly as possible. Of course the single most important factor of such a formula will be caseload data. This brings us back to an old subject, which I promised not to nag you about for a while.

New Case Counting Methods

By the time this is printed, all contractors should have received the new case-counting software developed by Stan Cope, along with instructions on how to use it. Those who do not have computers will have received a new paper form containing the same information. All contractors have also been provided with a document defining case-counting methods to be used uniformly around the state. Once these are in place and being used, our caseload data will be the most accurate it has ever been. Once we begin to proceed on that assumption, counties from which we are not receiving complete caseload data will not be funded at the level to which they should otherwise be.

AOC's Sustain

It should be noted that we are also making progress in obtaining access to AOC's caseload data through the "Sustain" system. But certain characteristics of AOC's case counting methods render their figures less than perfect in terms of assessing our own caseloads; thus, these numbers will be effective for comparison purposes but no more.

Conclusion

In other words, you now have a direct financial incentive to report your cases promptly and completely. We're trying to make it less time-consuming to do. If you have questions about the counting definitions, call me. If you have questions about the mechanics of the software or forms, call Stan Cope.

In the meantime, call your legislators.

STEVE MIRKIN
Contract Administrator

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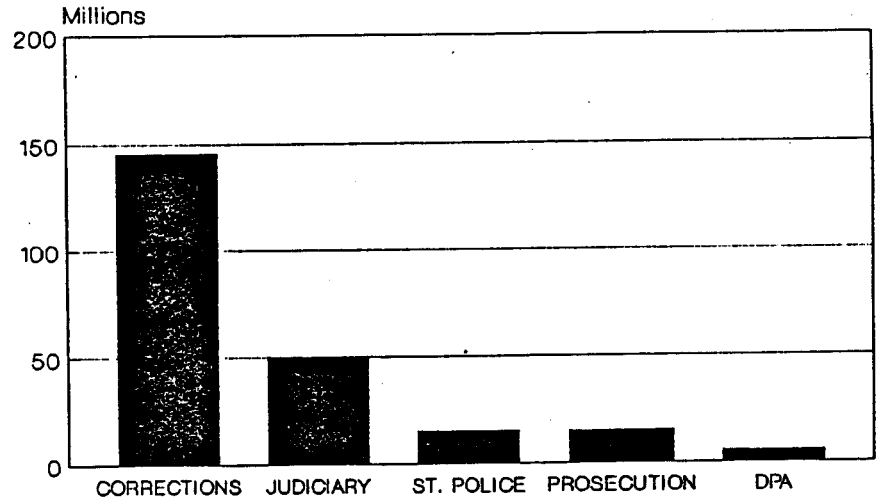
KY CRIM JUSTICE AGENCIES
EXPENDITURE INCREASES FY82 - FY94



JUXTAPOSING REVEALS VALUES & INEQUITIES

Fees for Personal Service Contracts vs. Fees for Public Defender Services

Information about Kentucky personal service contracts appears throughout this *Advocate* often juxtaposed against a DPA financial reality. The hope is to communicate how little funding DPA has to perform its critical constitutional responsibilities. In this short article we relate summary personal service contract information to provide a context for the entries spread throughout the issue.

$53.4 Million

As of the end of October, 1993 personal service contracts issued by the state for fiscal year 1993-94 amount to $53.4 million.

83 Legal Contracts

There are 678 Personal Service Contracts issued this year. Of the 678, 83 or 12% are contracts for legal services. The 83 legal contracts amount to $1.8 million.

The Categories of Contracts

The Department of Finance report provides a summary of the types; number and amounts of the contracts:

TYPE CONTRACT	CONTRACTS	TOTAL AMOUNT
Attorneys	83	1,889,336.51
Auditors	18	927,825.00
Architect-Eng.	61	551,759.00
Medical	179	7,035,855.09
Computer Services	9	4,024,709.40
Consultants	46	8,903,902.10
Advertising	6	2,016,112.48
Artistic	5	76,447.44
Appraisals	10	1,130,950.00
Miscellaneous	261	26,865.282.24
TOTAL	678	53,422,179.26

Gifts-in-Kind or Money Donations

Anyone wishing to donate non-financial gifts to the Department of Public Advocacy should contact the Department at (502) 564-8006 for current "Gift-in-Kind" needs. Gifts-in-Kind help the Department meet needs without affecting the operating budget. Current needs are:

Training:

- ✓ A camcorder for videotaping trainees during practice institutes
- ✓ Dual-Deck VCR (for duplicating videotapes) - $695
- ✓ Big screen (35") TV & stand for showing videos to trainees - $2,700
- ✓ Portable flipchart easel - $265
- ✓ Overhead projector cart - $271
- ✓ TV/Video cassette recorder for trainees to review video performances - $800
- ✓ Therm-A-Bind system to bind training materials - $199
- ✓ Additional Library resources

If you can help with any of these items or have something else to donate to the Department please contact the Department today!

ASK CORRECTIONS

Question #1:

If the Department of Corrections receives a final judgment in which the sentence imposed does not appear to be in compliance with the sentencing guidelines set by statute, does the Corrections Department follow the final judgment?

Response to #1:

The Department of Corrections is bound by the orders of the court.

Therefore, the sentences imposed by the court would be followed and calculated pursuant to the orders of the court.

As the Department of Corrections is not involved in the criminal prosecution of the prisoner, we would not normally contact the court on these issues. The Commonwealth's Attorney, defendant's attorney and the court would be involved in this matter, and the sentences imposed may be a result of a plea agreement to which the Department is not a party.

Question #2:

If a defendant feels that his sentences are incorrect or not consistent with applicable sentencing guidelines, how can he have that corrected? Can he get this taken care of without going through the court?

Response to #2:

The defendant, or his attorney, should file the proper motions in the respective Circuit Court Clerk's Office for modification or correction of sentence. The prisoner may also contact the Department of Public Advocacy at the institution confined for assistance.

However, if the defendant feels that a clerical error was made, these concerns should be directed to the records office at the institution to which he is assigned, or to the central office offender records, so that his case can be reviewed to determine what action, if any, needs to be taken: Problems regarding clerical errors may be resolved without further court action.

Question #3:

Has the Corrections Department recalculated all violent offenders sentences under the 50% where the sentence was in excess of 12 years?

Response to #3:

Yes. To our knowledge all cases which fall under the provisions of KRS 439.3401 have been reviewed and any necessary recalculations have been made on their parole eligibility dates, pursuant to the Opinion of the Supreme Court of Kentucky rendered in *Sanders v. Commonwealth.*

Question #4:

What system does the Department of Corrections have to alert another state which has detainers lodged against a prisoner?

Response to #4:

When a detainer is lodged against a prisoner, the detainer/ warrant is placed in his institutional and central office inmate file and recorded on his records as a detainer. This information is then entered in the ORION computer system. The detainer remains active unless notification is received by the detaining agency that the detainer should be released.

Notification of a prisoners pending release is usually sent to the detaining agencies 30 to 60 dates prior to his release date so that necessary steps can be taken by the detaining authorities to assume custody of the prisoner upon release from our system.

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♦ ♦ ♦ ♦

The following 10 principles are from Bell & Howell's Quality First Policy Card:

- ✓ Require that all employees participate fully in the process and lead by example.
- ✓ Build a spirit of working together toward common goals.
- ✓ Promote a climate of open communication and feedback.
- ✓ Encourage and recognize innovation and teamwork.
- ✓ Provide honest, fair, and equitable treatment of all and develop an atmosphere of trust and mutual respect.
- ✓ Recognize the right of every employee to understand the requirements of his or her assignments and to be heard when offering suggestions for improvement.
- ✓ Take prompt action on opportunities, problems, and conflict.
- ✓ Encourage every person to strive continually to understand the requirements of customers and suppliers and to reach agreement on what those requirements are.
- ✓ Require that products not be shipped and services not be performed if they do not meet customer requirements.
- ✓ Actively and continually evaluate competitor performance.

Capital Case Review

RICHMOND v. LEWIS

Richmond v. Lewis, 113 S.Ct. 529 (1992)

After Willie Lee Richmond was resentenced to death using the Arizona "heinous, cruel and depraved" aggravating circumstance, he argued to the Arizona Supreme Court that the aggravator was unconstitutionally vague.

Two justices of that court wrote that Richmond's offense was "heinous" and "depraved", but not cruel, and that the aggravator was not unconstitutionally vague. They based their reasoning on the factors stated in *State v. Gretzler*, 659 P.2d 1 (Ariz. 1983), which state that heinousness or depravity is found in the infliction of gratuitous violence on or the needless mutilation of the victim. In Richmond's case, the Arizona justices found, because the victim was already bleeding and unconscious when he was run over by a car from two different directions, heinousness and depravity were shown.

Two other justices wrote that neither "gratuitous violence" nor "needless mutilation" were found, but agreed that death was the appropriate penalty for Richmond because of the existence of other aggravators. Yet another justice agreed that the heinous, cruel or depraved factor was not found, but argued that the mitigating evidence of Richmond's rehabilitation in prison precluded the death sentence.

In its opinion affirming the denial of Richmond's habeas petition, a panel of the Ninth Circuit held that a valid narrowing of the aggravator had been imposed and alternatively, that Richmond's sentence could stand without the HCD aggravator, notwithstanding the decision in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) because while the Mississippi statute at question in *Clemons* rendered mitigation relatively "weightier" if an aggravator were found to be invalid, the same could not be said of the Arizona statute.

NO REWEIGHING TOOK PLACE

In an 8-1 opinion written by Justice O'Connor, the Supreme Court found that the concurring justices in *Richmond II* had not reweighed his sentence using the remaining aggravating factors and the mitigation presented. O'Connor said that although the state of Arizona asked the court to assume a reweighing had taken place, "any presumption of reweighing is overcome by the language of the concurrence itself." *Richmond*, at 535.

Lastly, the court said that although two justices of the Arizona court had properly reweighed the aggravators and mitigators, one more vote was needed for Richmond's sentence to stand muster. The other concurring justices had not done so, therefore, Richmond's sentence was found invalid.

Justice Thomas used his concurrence to promote his argument that the court's decision in *Stringer v. Black* that any reasonable jurist should have known that "automatic affirmance" in a weighing state violates the Eighth Amendment was wrong.

SCALIA'S DISSENT

Justice Scalia, the lone dissenter, said that because two valid aggravating circumstances were found, and that is all that is required by the narrowing provisions of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the sentence should stand.

LOCKHART v. FRETWELL

Lockhart v. Fretwell, 113 S.Ct. 838 (1993)

Defense counsel's failure to make an objection based upon caselaw which was later overruled does not meet the *Strickland* prejudice prong because the resulting sentence was neither unreliable nor fundamentally unfair. "To hold otherwise would grant criminal defendants a windfall to which they are not entitled." *Lockhart*, at 841.

Bobby Ray Fretwell argued on direct appeal that because the aggravator of pecuniary gain duplicated an element of the underlying felony--robbery--under Eighth Circuit caselaw at that time, his death sentence could not stand. *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.) *overruled, Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989). The Arkansas Supreme Court refused to reverse because counsel had failed to object to the use of the aggravator at sentencing.

On habeas, Fretwell argued that counsel was ineffective for failing to object. The district court held that because counsel had a duty to be aware of caselaw relevant to the death penalty, and counsel failed to object, that failure satisfied the prejudice prong. The Eighth Circuit affirmed, because it felt that under the Supremacy Clause the Arkansas trial court was bound to follow Eighth Amendment jurisprudence. The court held that even though *Collins, supra*, had been overruled two years earlier, Fretwell would have been entitled to its benefits at the time of his sentencing. Thus, the court granted his habeas and remanded with orders to sentence Fretwell to life without possibility of parole.

IAC PREJUDICE INVOLVES THE RELIABILITY AND FAIRNESS OF THE SENTENCE

The dissenting judge argued that prejudice means more than a different outcome, it also involves the reliability and fairness of the sentence. Justice Rehnquist, joined by Justices White, O'Connor, Scalia, Kennedy, Souter and Thomas, picked up on this reasoning and reversed the Eighth Circuit. Citing *Strickland* (the right to counsel exists "in order to protect the fundamental right to a fair trial"), *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 998, 89 L.Ed.2d 123 (1986), (under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"), *United States v. Cronic*, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043, 80 L.Ed.2d 657 (1984), and *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981), the majority felt that an analysis which focuses on the "mere outcome" without discovering if the result of the proceeding was fundamentally unfair or unreliable "is defective." *Lockhart, supra*, at 842.

Responding to Fretwell's argument that *Strickland* prejudice should be determined under the laws existing at the time of a defendant's trial, Rehnquist said that contemporary assessment was adopted because a more rigid standard "could dampen the ardor and impair the independence of trial counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Strickland*, at 2064, but that the prejudice prong focuses only on the

question of whether counsel's deficient performance renders the result unreliable or the trial fundamentally unfair. "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart, supra*, at 844.

LOCKHART NOT INCONSISTENT WITH *TEAGUE*

Rehnquist said *Lockhart* is not inconsistent with *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 1074, 103 L.Ed.2d 334 (1989) (new rules will not be applied or announced in collateral proceedings because of the state's interest in finality and because the state should not be penalized for relying on standards prevailing at the time of the original proceedings), because a federal habeas petitioner by the very nature of his action does not wish for the state's judgment to be final. He also does not have a claim of reliance of past judicial precedent which corresponds to the state's "reasonable good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990). "The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not. Rehnquist saw it not as a "windfall" for the state, but "a perfectly logical limitation of *Teague* to the circumstances which gave rise to it." *Lockhart, supra*, at 844.

In concurrence, Justice O'Connor pointed out that in her view, in the vast majority of cases, the new view of the prejudice prong would have no effect because this case is based on the circumstance where a defendant attempts to demonstrate prejudice "based on considerations that, as a matter of law, ought not inform the inquiry." *Lockhart, supra*, at 845.

DISSENT

In dissent, Justice Stevens and Blackmun wrote that the court reached "the astonishing conclusion" that deficient performance by trial counsel does not prejudice a defendant even though he is sentenced to death erroneously, because that is a "windfall" for the defendant. "The Court's aversion to windfalls seems to disappear when the State is the favored recipient." *Lockhart, supra* at 846.

Both felt that Fretwell had met the *Strickland* standard because the state did not contest the deficiencies in counsel's actions and because there was no "serious dispute[]" that but for counsel's error in failing to make the objection, the decision would "reasonably likely have been different". "In Sixth Amendment terms, it is as though respondent had shown an actual conflict of interest, or the complete absence of counsel during some part of the sentencing proceeding: the adversary process has malfunctioned, and the resulting verdict is therefore, and without more, constitutionally unacceptable." *Lockhart, supra*, at 848.

In Stevens' view, the majority has now demanded that additional indicators of unreliability be presented--"precisely the kind of harmless error inquiry that the Court has rejected time and again, in the Sixth Amendment context." *Id.* Furthermore, the error is compounded because the majority insists upon hindsight, unlike *Strickland*, which makes it clear that ineffective assistance of counsel "must be 'viewed as of the time of counsel's conduct.'" *Strickland, supra* at 2066.

Stevens felt that the majority's reliance on *Nix v. Whiteside, supra*, could not be compared to *Lockhart*. *Nix* dealt with an attorney's refusal to present a defense based on perjured testimony; while this case deals with reliance on current Court of Appeals case law.

Furthermore, the dissent felt that Fretwell might be entitled to relief even if he could not meet the prejudice prong because trial counsel failed to address the most important legal question in his client's trial.. "In other words, there may be exceptional cases in which counsel's performance falls so grievously far below acceptable standards under *Strickland's* first prong that it functions as the equivalent of an actual conflict of interest, generating a presumption of prejudice and automatic reversal." *Lockhart*, at 851.

In this case, however both prongs were met, and only with the court's "dramatic change" in and a retroactive application of the standard does Fretwell not obtain relief.

> Since 1985, changes in the law often afford less protections to individual defendants. Even-handed retroactivity seems to point to examining claims under the law as it was at the time of the defendant's trial. "If, under *Teague*, a defendant may not take advantage of subsequent changes in the law when they are favorable to him, then there is no self-evident reason why a State should be able to take advantage of subsequent changes in the law when they are adverse to his interests....A rule that generally precludes defendants from taking advantage of post-conviction changes in the law, but allows the State to do so, cannot be reconciled with this Court's duty to administer justice impartially.
>
> *Lockhart, supra*, at 853.

HERRERA v. COLLINS

Herrera v. Collins, 133 S.Ct. 853 (1993)

"Actual innocence" does not entitle a petitioner to habeas relief. Leonel Torres Herrera was sentenced to death for the murder of a Texas policeman. Herrera presented the affidavits of attorney who had represented the actual killer, Herrera's now deceased brother Raul, and a former cellmate of Raul Herrera, his nephew, Raul Herrera, Jr. and a schoolmate of the elder Herrera brothers. Raul Jr. said that he had witnessed his father kill the two policemen and that Leonel Herrera was not present. Leonel Herrera alleged that law enforcement officials had violated his *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) rights to any exculpatory evidence. The affidavits of Raul Herrera's attorney and his cellmate had been presented in the Texas state courts on second state habeas, but to no avail.

The district court dismissed most of Herrera's habeas petition on abuse of the writ grounds, but, "out of a sense of fairness and due process" and to ensure that Herrera could assert his constitutional claims, the district court granted a stay of execution so that Herrera could present the new affidavits to the state courts. An evidentiary hearing on the *Brady* allegation was also granted, after first being denied. The Fifth Circuit vacated the stay of execution and said that Herrera's actual innocence allegation without an accompanying constitutional violation was not cognizable under *Townsend v. Sain*, 372 U.s. 293, 317, 83 S.Ct. 745, 759, 9 L.Ed.2d 770 (1963) because the existence of newly discovered evidence relevant to guilt is not a ground for relief on federal habeas corpus.

ACTUAL INNOCENCE WITHOUT AN UNDERLYING CONSTITUTIONAL VIOLATION NOT COGNIZABLE ON FEDERAL HABEAS

In a 6-3 opinion, Chief Justice Rehnquist wrote that because in criminal cases, the trial is the principal forum to determine guilt or innocence, Herrera's claim must be evaluated in light of the previous ten years of proceeding and that because of his convictions, Herrera was not entitled to a presumption of innocence. Federal habeas courts do not sit to correct errors of fact, but to ensure that persons are not in prison because the United States Constitution was violated. Thus, claims of actual innocence without an underlying constitutional violation have never been held to state a ground for habeas relief. "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence." *Herrera*, at 861.

Rehnquist found differences in the *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) authorization for federal review of a claim that evidence introduced at trial was not sufficient to convict a criminal defendant beyond a reasonable doubt because in *Jackson* inquiries, federal courts perform their historical duties: assuring that a habeas petitioner is not being held in violation of his federal constitutional rights. Second, *Jackson* inquiries are limited to what is in the record. Finally, *Jackson* focuses on whether the jury made a rational decision, not on whether the decision was correct.

Furthermore, the *Sawyer v. Whitley*, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) rule that a habeas petitioner whose claims may be subject to abuse of the writ or successive writ defenses may have his claims considered if he makes a proper showing of actual innocence, makes it clear that actual innocence is not in itself a constitutional claim, but "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, at 862. The fundamental miscarriage of justice exception also does not apply, once again because there is no showing of a constitutional violation to go with Herrera's claim of innocence.

Ford v Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 l.Ed.2d 335 (1986) and *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) also do not support Herrera's contention. Both these cases dealt with punishment. Texas' rule limiting consideration of newly discovered evidence motions to those submitted 30 days after the trial does not violate the Fourteenth Amendment's guarantee of due process. Furthermore, Herrera still has a forum in which to present his claim: an executive clemency request - the "'fail safe' in our criminal justice system." *Herrera*, at 868.

HERRERA'S PROOF DOES NOT REACH THRESHOLD SHOWING

For the sake of argument, Rehnquist said the Court could assume that "a truly persuasive demonstration of 'actual innocence'" would render the execution of a defendant unconstitutional and warrant federal relief if there were no open state avenue. However, the threshold showing "would necessarily be extraordinarily high." Leonel Herrera's proof did not reach the threshold because Herrera's evidence was in the form of affidavits.

"Petitioner's affidavits are particularly suspect...because, with the exception of Raul Herrera Jr.'s affidavit, they consist of hearsay....No satisfactory explanation has been given as to why the affiants waited until the 11th hour–and, indeed, until after the alleged perpetrator of the murders himself was dead–to make their statements." No explanation was offered as to why Herrera, "by hypothesis, an innocent man, pleaded guilty" to one of the murders. Further, the affidavits contain inconsistencies and "fail to provide a convincing account of what took place on the night Officers Rucker and Carrisalez were killed." *Herrera*, at 869. Lastly, examining the affidavits in light of the proof presented at trial--two eyewitness identifications, other circumstantial evidence and a handwritten letter in which Herrera apologized for the killings and offered to turn himself in if certain conditions were met--"points strongly to petitioner's guilt." *Herrera*, at 870. If the testimony had been presented at trial, the jury could have weighed it. However, ten years after the fact, "this showing of innocence falls far short" of that which would trigger a constitutional claim. *Id.*

In concurrence, Justice O'Connor, joined by Justice Kennedy, felt that two things were clear in the majority's opinion: 1) the Supreme Court had not stated that the execution of an actually innocent person was constitutional; and 2) Leonel Herrera did not make a persuasive showing of actual proof. *Herrera*, at 874. "Th[e] difficult question [of whether federal courts may entertain convincing claims of actual innocence] remains open. If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all." *Id.*

Justice Scalia, joined by Justice Thomas, wrote a separate concurrence, saying he understood, or at least was accustomed to "the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate." *Herrera*, at 875. Scalia felt the Court would avoid facing the question again because it was improbable that evidence of innocence as convincing as that Leonel Herrera presented would fail to produce "an executive pardon." *Id.*

DISSENT

In the dissent, Justice Blackmun wrote that the real question the Court had been asked to decide was "whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence." *Herrera*, at 876.

The Eighth Amendment prohibits cruel and unusual punishment and bases its prohibition on evolving standards of decency. "[I]t is crystal clear that the execution of an innocent person is 'at odds with contemporary standards of fairness and decency...Indeed, it is at odds with any standard of decency that I can imagine." *Id.* The Constitution prohibits the execution of persons guilty of rape and participating in a robbery during which a killing takes place. "If it is violative of the Eighth Amendment to execute someone who is guilty of those crimes, then it plainly is violative of the Eighth Amendment to execute a person who is actually innocent." *Herrera*, at 877.

The majority is wrong that *Ford* and *Johnson* do not apply. Both cases stand for the proposition that capital defendants may be entitled to proceedings even after conviction and sentencing because of "an intervening development." Furthermore, the Court's reasoning contradicts the holding in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) and misconceives Herrera's argument. Whether Herrera is challenging his death sentence or his continued imprisonment, he is really challenging the state's right to punish him. "What respondent and the United States fail to recognize is that the legitimacy of punishment

is inextricably intertwined with guilt." *Beck* points out that at least in the capital context, the Eighth Amendment requires that not only must the sentencing but also the determination of guilt must be reliable. *Herrera*, at 878.

The majority's suggestion that societal interests would not be served by a new trial which would be less accurate than the first also misses the point because the question is whether, in light of the new evidence, the result of the first trial is sufficiently reliable for the state to carry out a death sentence. It is also "far from clear" that a state would choose to retry a person who wins with a claim of actual innocence. Blackmun would use the standard that a prisoner must show reasonable doubt of guilt *and* probable actual innocence. "I find it difficult to believe that any State would chose to retry a person who meets this standard." *Id.*

DUE PROCESS

The majority misinterpreted Herrera's Fourteenth Amendment raising procedural, rather than substantive due process notions. If substantive due process guarantees "freedom from all substantial arbitrary impositions and purposeless restraints", execution of an innocent person is the ultimate "arbitrary imposition. It is an imposition from which one never recovers and for which one can never be compensated." *Herrera*, at 879, quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. —, 112 S.Ct. 2791, 2805, 120 L.Ed.2d 674 (1992) and *Poe v. Ullman*, 367 U.s. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961).

Townsend v. Sain, *supra*, does not bar habeas relief because newly discovered innocence does bear on the constitutionality of a defendant's punishment. The discussion is even more perverse in light of the recent cases which shift the focus of habeas review of procedural problems from preservation of constitutional rights to a fact-based inquiry into the defendant's guilt or innocence. The Court had been trying to balance the state's interest in finality with the prisoner's access to a forum to test the basic justice of his sentence, but said that an exception to the state's interest applies when the habeas petitioner makes a colorable claim of actual innocence.

The only principle which reconciles the majority's positions "is the principle that habeas relief should be denied whenever possible." *Herrera*, at 881.

The majority's disposition leaves the states uncertain as to their obligations, but one thing is clear: "[t]he possibility of executive clemency is *not* sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments" because a pardon is an act of discretion.

DISSENT WOULD REQUIRE PROBABLE INNOCENCE

Lastly, Blackmun would require a showing that the habeas petitioner with an actual innocence claim "probably is innocent." *Herrera*, at 882. Because it may be difficult for the state to retry a defendant who obtains relief based on actual innocence, such decisions should not be made lightly. Furthermore, the actual innocence inquiry must shift its focus from the presumption of innocence to "whether the government has met its constitutional burden of proving the defendant's guilt beyond a reasonable doubt...[i]t is fair to place on [the petitioner] the burden of proving his innocence, not just raising doubt about his guilt." *Herrera*, at 883.

Therefore, a court faced with such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances. The court should weigh the evidence of innocence and the evidence of guilt. If discovery would aid in the decision, the district court should order discovery. This standard would not convert federal courts into forums in which state proceedings are retried.

No matter what the majority thinks of the strength of the evidence or the strength of the evidence at trial, the affidavit of Raul Herrera's attorney is sufficient to raise questions about Leonel Herrera's innocence which cannot be answered merely on the face of the affidavits and the petition.

> I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please...I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all...Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder.
>
> *Herrera*, at 884.

GRAHAM v. COLLINS

Graham v. Collins, 113 S.Ct. 892 (1993)

Gary Graham's request for special jury instructions concerning his mitigating evidence of youth, family background and positive character traits announces a new rule as defined in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (a new rule is one which was not *dictated* by precedent existing at the time the defendant's conviction became final"); thus Graham is not entitled to habeas corpus relief.

Since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) was announced, the Supreme Court has been trying to harmonize the two requirements for constitutional capital sentencing: 1) limiting and channeling the discretion of judges and juries to ensure that the death penalty is not given "wantonly" or "freakishly"; and 2) giving the sentencer sufficient discretion so that he may take into account the character and record of the offender and the circumstances of the offense to ensure that death is the appropriate punishment in that specific case.

Four years after *Furman*, *supra*, the Supreme Court decided in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 l.Ed.2d 929 (1976) that the Texas death penalty statute which asked the jury to consider three special issues and answer questions relating to them was constitutional. That statute was in effect at the time Gary Graham was sentenced to death. Thirteen years later, in *Penry*, *supra*, the Court decided that the Texas death statute did not allow a jury to consider Penry's mitigating evidence of mental retardation and his abusive childhood.

TEXAS STATUTE COVERS NEED FOR SENTENCER TO CONSIDER MITIGATION

Justice White, writing for the majority, said that *Penry* did not make a great change in the Texas statute and "does *not* broadly suggest the invalidity of the special issues framework." *Graham*, at 901. To White, any reading otherwise would be inconsistent with the Court's conclusion that *Penry* was not a new rule.

In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct 2954, 57 L.Ed.2d 973 (1978), *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (19820, and their progeny, relevant mitigating evidence was placed beyond the reach of the sentencers. Graham's jury was fully able to consider all the mitigating evidence he presented. In other words, the jury could accept Graham's contention that his violence in May, 1981 was, in light of his youth, his background and his character, an "aberration that was not likely to be repeated." *Graham*, at 901. Even if Graham's mitigation was relevant beyond the first question of the special issues, unlike in *Penry*, the jury could consider the evidence as it related to his future dangerousness.

Furthermore, the majority felt that if it did agree with Graham, it could not do so "without a wholesale abandonment of *Jurek*, *supra*...Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's..." *Id.* If the Court were to read *Penry* as Graham urged, it would require a fourth special issue: "'Does any mitigating evidence before you, whether or not relevant to the above [three] questions, lead you to believe that the death penalty should not be imposed?'" *Id.*

TEAGUE v. LANE APPLIES

Thus, the Court could not say that reasonable jurists in 1984 would have been prohibited from accepting Graham's mitigation; nor could the Court say that reasonable jurists would be of one mind in ruling on Graham's claim in 1993. Thus, the ruling Graham sought is *Teagued*.

Neither *Teague* exception fits; Graham's rule does not "decriminalize a class of conduct or prohibit the imposition of capital punishment on a particular class of person; nor is it a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding...implicit in the concept of ordered liberty." *Teague*, at 1075-1076.

CONCURRENCE

In his concurrence, Justice Thomas wrote that although he agreed with the Court's decision, he felt that *Penry* was wrongly decided because it exacerbated the tension between *Lockett/Eddings* (juries must be able to consider all the mitigation a defendant presents) and *Furman* (states should not be given unguided discretion in imposing the death penalty.

Thomas felt that "it [was] important to recall" why *Furman* was decided: there was great concern about racial bias in the imposition of the death penalty, especially in the south and particularly in rape cases. In *Furman*, Justice Douglas had stressed the potential harm racial bias and other prejudices played in systems where sentencing juries had complete discretion. Justice Marshall and Justice Stewart had echoed those concerns.

The importance of race was reflected in the actions of the NAACP Legal Defense and Educational Fund (LDF), which had represented three of the four original petitioners in *Furman*. Thomas called LDF "part of a larger movement carried on in the 1960s by 'abolitionist lawyers' whose agenda for social and legal change depended on an activist judiciary", who had focused their efforts at abolishing the death penalty to showing that the unguided discretion given to judges and juries led to racial bias in sentencing defendants to death. "It cannot be doubted that behind the Court's condemnation of unguided discretion lay the specter of racial prejudice--the paradigmatic capricious and irrational sentencing factor." *Graham*, at 905-6.

In *Gregg v. Georgia*, 428 U.s. 153, 96 S.Ct. 2909, 2928, 49 L.Ed.2d 859 (1976), the Supreme Court made it clear that a constitutional capital sentencing procedure would direct and limit the sentencer's discretion to avoid "wholly arbitrary and capricious action" and that the discretion must be "informed"; in other words, the jury must focus on the particular crime and defendant. Thomas felt that "by eliminating explicit jury discretion and treating all defendants equally, a mandatory death penalty scheme was a perfectly reasonable legislative response to the concerns expressed in *Furman*". *Graham*, at 908.

However, by discovering the requirements of standards for jury discretion and that the sentencer be given information about the defendant, "the Court has put itself in the seemingly permanent business of supervising capital punishment procedures....While the better view is that the Cruel and Unusual Punishment Clause was intended to place only substantive limitations on punishment...*stare decisis* requires that we make efforts to adhere to the Court's Eighth Amendment precedents." *Id.*, at 909.

Thomas sees *Lockett* and *Eddings* as "doing little more than safeguarding the adversary process in sentencing proceedings by conferring on the defendant an affirmative right to place his relevant evidence before the sentencer." *Graham* at 910. However, such a reading is impossible after *Penry* because "[w]hatever contribution to rationality and consistency we made in *Furman*, we have taken back in *Penry*." In other words, any rational standards by which a state may guide and channel the jury's discretion are after *Penry*, non-existent. *Graham*, at 911. *Penry* reintroduces the very risks that we had sought to eliminate through the simple directive that States in all events provide rational standards for capital sentencing." *Graham*, at 913.

"A permanent truce" between *Eddings* and *Furman* should be implemented in that the Court should conclude that Eighth Amendment jurisprudence allows states to channel the sentencer's consideration of the defendant's "arguably mitigating evidence so as to limit the relevance of that evidence in any reasonable manner" as long as the defendant is not deprived of a full and fair opportunity to relate to the sentencer "all constitutionally relevant circumstances." Furthermore, he feels that the Court should review only for "*reasonableness*" a state's determination of which circumstances are relevant in capital punishment. *Graham*, at 914-915.

> Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigating relevance 'beyond the scope' of the State's sentencing criteria...We cannot carry on such a business, which makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman*.
>
> *Graham*, at 915.

DISSENT

Although Justice Stevens joined in the dissent written by Justice Souter, he wrote separately that he did not agree with Justice Thomas's contention that the Court had not made progress in eliminating racial discrimination and other arbitrary considerations from capital sentencing and cited four reasons: 1) *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death penalty inappropriate for unintentional homicide); *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (death penalty inappropriate for rape); 2) states must significantly narrow

the class of those persons eligible for capital punishment through statutory definition of capital murder or statutory specification of aggravating factors; 3) *Maynard v. Cartwright*, 486 U.s. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) ("especially heinous, atrocious or cruel" aggravator invalid); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) ("outrageously or wantonly vile, horrible or inhuman aggravator invalid); and 4) *Lockett\ Eddings*, *supra*.

Stevens remains "committed to our 'mitigating' line of precedent, as a critical protection against arbitrary and discriminatory capital sentencing that is fully consonant with the principles of *Furman*." Further, Justice Thomas did not explain why the requirement that sentencing decision be based on relevant mitigators increases the risk that the sentencers decision will be based on the irrelevant factor of the defendant's race. *Graham*, at 917. Specifically, Stevens did not see how allowing the jury to fully consider a defendant's mental retardation and abusive childhood increased the risk of a racially biased or otherwise arbitrary sentencing decision.

JUSTICE SOUTER

Justice Souter, joined by Justices Blackmun, O'Connor and Stevens, wrote that the only distinctions he saw between *Penry* and *Graham* were the type of mitigating evidence and the distance to which the Texas statute fell short of allowing the sentencer to give full effect to some of the evidence presented. Therefore, he did not see that Graham's claim could not be considered.

Souter said in the line of cases after *Teague*, the Court made it clear that application of existing precedent to a new fact pattern is not announcing a new rule. *Wright v. West*, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992). Although the question of whether a holding is a new setting for an old rule or clearly a new rule may be difficult, such is not true for Gary Graham because the circumstances in *Graham* "are virtually indistinguishable" from those in *Penry*. Neither Penry nor Graham challenged the facial validity of the Texas capital statute; both argued that the rules of *Jurek*, *Lockett* and *Eddings* had not been applied to the facts of his respective case. *Graham*, at 919.

One distinguishing factor is the type of mitigating evidence involved. *Penry* claimed that the jury could not consider mental retardation and his abused childhood; *Graham* involved youth, unfortunate background and good character traits. An assertion that the type of mitigation should make a difference "flies in the face" of *Wright* that "'a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts [will only infrequently] yiel[d] a result so novel that it forges a new rule, one not dictated by precedent.'" *Graham*, at 920.

The majority's second distinction, that the jury could have given some effect to Graham's evidence is also immaterial. "The point under *Lockett*, *Eddings* and *Penry* is that sentencing schemes must allow the sentencer to give full mitigating effect to evidence"; Gary Graham's assertion that his evidence could receive partial consideration is as much a claim for application of the rule as is Penry's that his mental retardation could not be considered at all under the second of the three Texas special issues.

The Texas scheme looks backward to the defendant's moral culpability for the crime and forward to his possible behavior if his life is spared. When *Jurek* was decided, the Supreme Court "had a reasonable expectation [from the Texas Court of Criminal Appeals] that the sentencer would have authority to give comprehensive effect to each defendant's mitigating evidence." However, *Penry* revealed, and Graham confirms, that Texas sentencers cannot give full effect to the mitigating evidence they hear.

Additional instructions on Graham's youth were needed. A juror could have concluded that his responses to the special issues required death even though the juror felt that Graham, because of his youth, lacked moral culpability for his actions. Further, Graham's youth could have been treated as an aggravator--a sign of his future dangerousness. Youth is irrelevant to any issue of reasonableness of provocation because there was no evidence that the victim had provocated the incident.

Graham's difficult upbringing, his mother's mental illness and moves from one relation to another also needed further clarification. "[T]here is no assurance that the first issue [intention] allows the full scope of its mitigating effect to be considered"; upbringing could be considered a forbearer of future dangerousness and thus, become an aggravator; there is no potential for mitigation under the third special issue.

The redeeming character traits Graham presented, on the other hand, could have been considered under the future dangerousness issue. Souter did not address the issue of whether the evidence Graham presented revealed an element of value unrelated to the circumstances of the crime.

ARAVE v. CREECH

Arave v. Creech, 113 S.Ct. 1534 (1993)

For the usual 7-2 majority, the Idaho "utter disregard for human life" aggravator passes Eighth Amendment muster. Furthermore, Thomas Eugene Creech, by any definition, is not someone who should be free. He admitted to killing or participating in the murders of at least 26 people; the bodies of eleven victims have been found in seven states. Creech has also stated that, unless he is isolated from the rest of the world, he will continue to kill. In 1981, Creech beat and kicked a fellow inmate to death. He was sentenced to death, based in part on the Idaho aggravator that "by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life". *State v. Osborn*, 631 P.2d 187, 200-201 (1981), had defined that aggravator to mean that the murder "is reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, *i.e.*, the cold-blooded, pitiless slayer."

Justice O'Connor, writing for majority, and using the standards of inquiry set forth in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct 3047, 111 L.Ed.2d 511 (1990), found that the aggravator was constitutional: the statutory language itself is not so vague to have provided no guidance to the sentencer (who in Idaho is the judge).

Furthermore, the Idaho Supreme Court had adopted a limiting construction, but the Ninth Circuit had found that the limit was inadequate, not because of its definition, but because it required the sentencer to make a subjective determination. O'Connor and crew disagreed, saying that because the words described the defendant's state of mind-"his attitude toward his conduct and his victim" and that "the law has long recognized that a defendant's state of mind is not a 'subjective' matter, but a *fact* to be inferred from the surrounding circumstances", the aggravator is valid. *Arave*, at 1541. The language at issue in *Arave* was "no less 'clear and objective' than the language contained in *Walton*" because both "de-

fine[] a state of mind that is ascertainable from surrounding facts". *Id.*, at 1542.

O'Connor felt that the aggravator also genuinely narrowed the class of those persons eligible for the death penalty, even though Idaho law defines the class to include all first-degree murders, a class which, in itself, is broad. Some second-degree murders (those committed without "considerable provocation" and under circumstances "exhibiting an abandoned and malignant heart") can also be considered first-degree murders.

The Court acknowledged that some sentencing judges might conclude that every first-degree murder was "pitiless", but "believe[d] that a sentencing judge reasonably could find that not all Idaho capital defendants are 'cold-blooded' because "some..first-degree murderers *do* exhibit feeling. O'Connor used the example of those murders committed with "anger, jealousy, revenge, or a variety of other emotions." *Id.* at 1543. Idaho "narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed" because it identified the class of defendants who kill without feeling or sympathy as more deserving of the death penalty than the norm. *Id.*

Creech had argued that the "utter disregard" aggravator had not been applied consistently. The Court said "[u]nder our precedents, a federal court may consider state court *formulations* of a limiting construction to ensure that they are not consistent. But our decisions do not authorize review of state court cases to determine whether a limiting construction has been *applied* consistently." *Id.*, at 1544. Moreover, none of the cases Creech used in his argument influenced either the trial or the appellate judges who examined Creech's case because they were all considered *after* Creech had been sentenced to death.

Finally, Creech argued that the trial judge's findings that Creech was provoked and that he exhibited an excessive violent rage were irreconcilable with the "utter disregard" circumstance, and that the other murders Creech committed (along with the self-defense explanations for some) may have had a bearing on the "utter disregard" finding. The Court did not reach this argument because Creech was already entitled to resentencing based on two separate Ninth Circuit findings.

DISSENT

In an angry dissent, Justice Blackmun, joined by Justice Stevens, wrote that "like nonsense on stilts" the majority's formation of its own limiting construction "only highlights the deficient character of the nebulous formulation that it seeks to advance." *Id.*, at 1545.

Although Blackmun agreed with the majority about the standards needed to examine a case of this type, he said that a facial challenge to an aggravator cannot be defeated merely by demonstrating that the language contained within could be applied in a narrow fashion. "The entire point of the challenge is that the language's susceptibility to a *variety* of interpretations is what makes it (facially) unconstitutional." *Id.*, at 1546.

In order to save the statute, the state must apply a construction that on its face, "reasonably can be expected to be applied in a consistent and meaningful way so as to provide the sentencer with adequate guidance." *Id.*

Citing a number of recent media articles which called many types of murder "cold-blooded", Blackmun said that the majority was incorrect in its reliance on the term cold-blooded. Furthermore, legal usage of the term cold-blooded refers to willful, deliberate and premeditated murder. Blackmun cited a case in which Justice O'Connor herself had said that intentional murder is murder in the first degree if it committed in cold blood, but that murder in the second degree is a murder committed on impulse or under in the sudden heat of passion. *See United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.E.2d 816 (1982).

An aggravator construed so broadly that it covers every intentional or first-degree murder is clearly unconstitutional under *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980) (sentencer's discretion must be channeled by "clear and objective standards that provide specific and detailed guidance").

Finally, Justice Blackmun felt that the majority missed the point in its conclusion that the Idaho courts had been consistent in their application of the aggravator. "Idaho's application of the *Osborn* formulation is relevant not because that formulation has been inconsistently invoked, but because the construction has never meant what the majority says it does." *Id.* at 1548. If a state declared "jabberwocky" as an aggravating circumstance and then used it in every capital case it examined, the Supreme Court could not decide that "jabberwocky" meant killing a police officer and then fail to inquire into whether a state court had ever understood "jabberwocky" to mean the killing of a police officer simply because it had consistently affirmed the "jabberwocky" aggravator.

"An examination of the Idaho cases reveals that the *Osborn* formulation is not much better than 'jabberwocky'. The Idaho courts had never articulated anything remotely approaching the majority's novel 'those who kill without feeling or sympathy interpretation." *Id.* Idaho cases had applied the "utter disregard" aggravator in different circumstances. In the first, *State v. Aragon*, 690 P.2d 293 (1984), a killer refused to render aid to his victim and was only concerned with covering up his own participation in the killing. In the second, the defendant approached his victim, made him drop his pants and crawl into a cabin, where he bludgeoned both victims and left one of them convulsing. See *State v. Pizzuto*, 810 P.2d 680 (1991). The trial judge's determination in Creech's case seemed to have been based primarily on the fact that Creech killed another human being when that person was completely helpless.

Blackmun found each situation "frightfully deplorable", but failed to see what either had to do with a lack of emotion--or with each other. "Without some rationalizing principle to connect them, the findings of 'cold-bloodedness' stand as nothing more than fact-specific, 'gut-reaction' conclusions that are unconstitutional under *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). "[T]he latest statement from the Idaho Supreme Court on the issue says nothing about emotionless crimes, but instead, sweepingly includes every murder committed that is without 'conscientious scruples against killing'". See *State v. Fain*, 774 P.2d 252 (1988). Blackmun could imagine no crime which would not meet that definition.

It is not necessary to look beyond the record of the case to determine that the majority's construction is inadequate, and that there was insufficient evidence to support the "utter disregard" aggravator. The trial judge explicitly found that Creech was provoked and that he killed in an excessive violent rage". In order to save the statute, the majority would have to show that on its face, the limiting construction "refers *clearly and exclusively* to crimes that occur 'without feeling or sympathy', that is, to those that

occur without 'anger, jealousy, revenge, or a variety of other emotions." The majority did not prove its point. *Arave*, at 1550.

> There is, of course, something distasteful and absurd in the very project of parsing this lexicon of death. But as long as we are in the death business, we shall be in the parsing business as well. Today's majority stretches the bounds of permissible construction beyond the breaking point... The *Osborn* formulation is worthless, and neither common usage, nor legal terminology, not the Idaho cases support the majority's attempt to salvage it. The statute is simply unconstitutional and Idaho should be busy repairing it.
> *Id.*

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What'$ A Dollar Worth?

The answer depends: are you a prosecutor or defender?

Public Defender Rates & Caps: The Non-Elastic Dollar

In 1972 when Kentucky's statewide public defender system was created by the General Assembly the statutory rates and fee caps for legal representation of indigents under KRS Chapter 31 were:

$20 per hour for out-of-court work;
$30 per hour for in-court work;
$500 maximum for a misdemeanor case;
$1,000 maximum for a felony case.

Today the rates and fee caps are:

$25 per hour for out-of-court work;
$35 per hour for in-court work;
$500 maximum for a misdemeanor case;
$1,250 maximum for a felony case.

If just inflation were accounted for what would the 1972 rate and fee caps equivalents be in 1992? The Kentucky Office of Financial Management & Economic Analysis of the Finance and Administration Cabinet answered that question as follows:

1972	1992
$ 20	$ 62.27
$ 30	$ 100.90
$ 500	$1,681.80
$1,000	$3,363.59

This reflects a 20 year inflation of 236%.

Prosecutors' Salaries: THE RUBBER DOLLAR

While public defenders have not been afforded increased rates and fee caps to keep pace with the 236% inflation of the last two decades, others, including prosecutors, in the Commonwealth have enjoyed the benefits of what has become known as the rubber dollar.

In the February 25, 1993 Attorney General Opinion 93-21 the maximum compensation payable to state, county & city constitutional officers under *Matthews v. Allen*, 360 S.W.2d 135 (Ky. 1962) and *Commonwealth v. Hesch*, 395 S.W.2d 362 (Ky. 1965) were calculated with adjustments to reflect the current purchasing power of the dollar in relation to salary maximums of Section 246 of the Kentucky Constitution. Using the consumer price index, annual compensation rates were:

1. $71,462 for Attorney General, Clerk of the Supreme Court of Kentucky
2. $71,462 for County Attorney
3. $71,462 for Commonwealth Attorney
4. $42,877 for part-time Commonwealth's Attorney

Conclusion

Equality before the law seems to be ephemeral in Kentucky. The dollar keeps pace for some, not for all.

In Practice

The Truth Shall Set You Free: The Byrd Case Revisited

On November 4, 1988, Zachary Byrd's nightmare began -- he was arrested on charges that he had raped his own children.[1]

Over four years later, on November 9, 1992, an order was entered during the expungement of all public record of Zach Byrd's criminal prosecution. The charges had been dismissed and Mr. Byrd's nightmare was now over.

Zach Byrd presented an issue of first impression for Tennessee courts. The presentment that charged him with these devastating allegations did not allege when they were supposed to have occurred. The only information available to Mr. Byrd from the presentment was that he was supposed to have committed these crimes sometime during a 25-month period.

The Judge (now District Attorney) Randall E. Nichols dismissed the charges against Zachary Byrd and his former wife because he found that the presentment did not provide constitutionally sufficient notice in order to enable Mr. Byrd to prepare his defense. Judge Nichols made this finding after the Assistant District Attorneys handling the case represented to the Court that they could provide no further specifics as to when the alleged offenses occurred.

The State appealed Judge Nichols's decision and was successful in overturning it in the Court of Criminal Appeals. Mr. Byrd then successfully petitioned the Tennessee Supreme Court to hear the case. However, the Tennessee Supreme Court affirmed the Court of Criminal Appeals' decision and remanded the case for trial. 820 S.W.2d 739 (1991).

The Tennessee Supreme Court's opinion in *Byrd* did not squarely address the constitutional question presented because it assumed that further information would become available both before and during trial as to when Mr. Byrd committed the charged offenses even though the prosecution had made clear no such information was available.[2] Based on this assumption, the Supreme Court held that the presentments were not deficient because the date of the offense is not a requisite allegation of a criminal offense. Of course, no further information became available as to when the alleged offenses occurred. This is because the alleged offenses did not occur.

In the intervening time period between the presentment and the pendency of the appeals of Zach Byrd's case, his children grew up.

Mr. Byrd's children were five and seven at the time he was charged. His children had been questioned repeatedly by various adults concerning whether they had been sexually abused by their parents. Each time they were questioned, the children denied any sexual abuse. It was only after the children were taken from the custody of their mother, separated form their grandparents, placed in unfamiliar surroundings, and questioned in a suggestive fashion by officials from the state who had already concluded that abuse had taken place that the Byrds' youngest child, the five-year-old daughter, agreed that she had been sexually abused. A day or two later, the older son made a similar statement after being told repeatedly that his younger sister had "told the truth."

It was these coerced statements by frightened young children that formed the basis of Zach Byrd's criminal prosecution -- his nightmare.

As time went on, the children went to live with their grandparents in Montana, and the appeals ran their course. While in Montana, the children tried to tell their grandparents that nothing had happened and that they had been coerced into saying something that was not true. The grandparents were under a court order not to talk about the allegations and did not engage in that kind of conversation with them. The children, however, were in counselling in Montana and told the counselors that nothing had happened.

As counsel prepared to finally try the case, four years later, they learned of the recantation and prepared to prove it. The State brought the children back for trial, and they told the prosecutor the truth - that nothing had happened. They then met with defense counsel and told defense counsel the truth -- that nothing had happened. The next day the children finally went to court for the first time and told the judge the truth -- that nothing had happened. The prosecutor then moved to dismiss the charges because nothing had happened. The nightmare was over.

The scary thing about *State v. Zachary Byrd*: This nightmare can be repeated.

Footnotes

[1]Zachary Byrd's former wife, Jean Byrd Hitchcock, was also charged. Ms. Hitchcock was represented by Brenda Lea Lindsay of Knoxville. Mr. Byrd was represented by Charles W.B. Fels and the author, David M. Eldridge, both with the law firm of Ritchie, Fels & Dillard, P.C.

[2]The Tennessee Supreme Court went on to say that if further specifics were disclosed during trial that were known but not disclosed to the defense prior to trial, grounds for reversal might exist. The positive aspect of *Byrd* is that the Court of Criminal Appeals is apparently reading *Byrd* to require *per se* reversal of a conviction (no prejudice required) if it becomes clear that the State had in its possession, either actually or constructively, additional information which could have pinpointed the nature, time, or place of offense, and withheld that information from defendant. See *State v. Jordan*, 17 TAM 45-14 (Tenn. Ct. Crim. App. (Knoxville) October 20, 1992).

*DAVID ELDRIDGE

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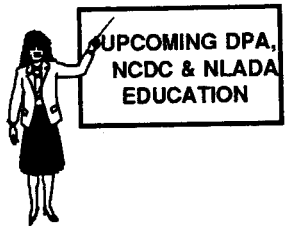
"Form ever follows function."

-Louis Henri Sullivan (1896)



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