The Advocate

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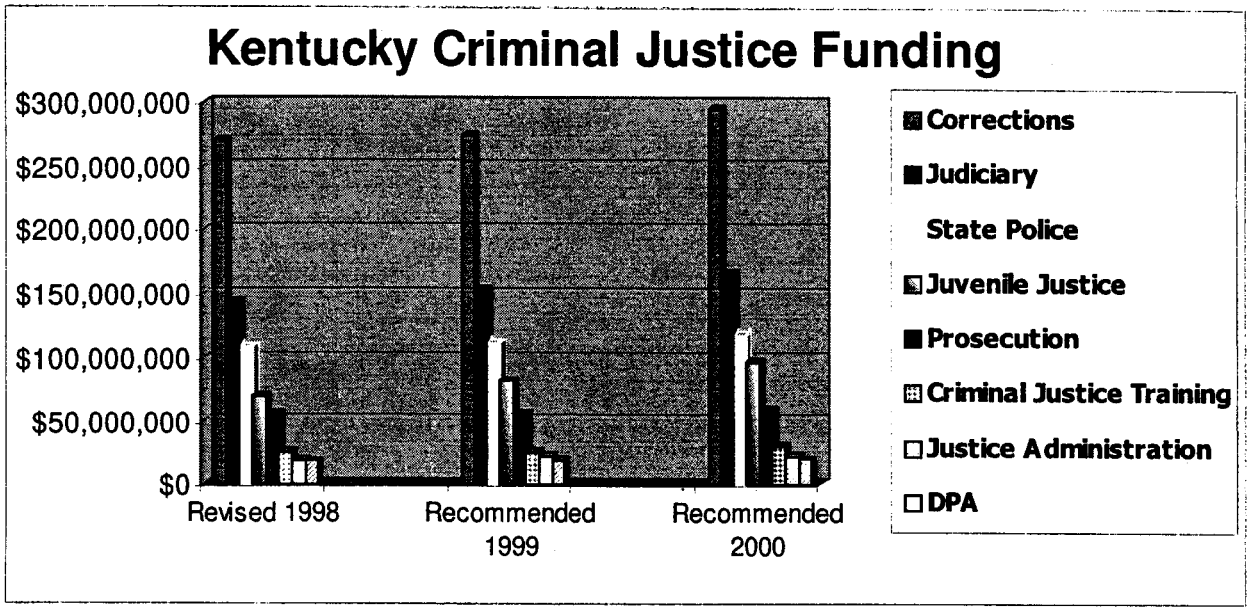
Funds for Kentucky Criminal Justice

Kentucky Defenders Lowest Funded in the Nation



Kentucky Criminal Justice Budgets, Total Funds, FY 1998, 1999, 2000

AGENCY		REVISED FY 98		RECOMMENDED FY 99		RECOMMENDED FY 2000
Corrections	37.9%	$270,252,700	36.9%	$274,888,600	36.5%	$295,016,700
Judiciary	20.2%	143,563,100	20.6%	153,338,000	20.5%	165,672,500
State Police	15.3%	108,698,600	15.0%	111,961,600	14.7%	118,703,400
Juvenile Justice	9.8%	69,811,700	10.9%	81,617,800	12.0%	96,670,900
Prosecution	7.8%	55,840,600	7.6%	56,515,700	7.3%	59,118,800
Criminal Just. Training	3.6%	25,860,000	3.5%	25,932,500	3.7%	30,088,000
Justice Administration	2.7%	19,542,500	2.9%	21,993,100	2.8%	22,326,400
DPA	2.6%	18,595,600	2.6%	19,611,100	2.5%	20,257,100
TOTAL	100%	$712,164,800	100%	$745,858,400	100%	$807,853,800

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From the Editor

A question to ponder: When one adversary has 3 times the resources (see front cover) as their opponent, is the result likely to be fair and reliable across 100,000 cases?

The Juvenile Justice programs in Kentucky have received funding from the May 1997 Special Session. When these funds are added into the total funds for all Kentucky criminal justice agencies, the percentage for defenders drops to 2.67%. Defenders have less than 1/3 of the resources available to prosecutors. *Reliability is at risk.*

Evaluation of DPA: Through the generosity of the ABA Bar Information Program, we carry an important and insightful evaluation of DPA's funding needs from the nation's expert, **Robert Spangenberg**.

A costly recipe: The number of inmates continues to increase. The paroling of inmates is decreasing. The consequences for Kentucky's limited resources are stark.

Correction: In the January 1998 *Advocate* we listed our Public Advocacy Commission members. We listed Donald Kazee as a member when in fact Bill Jones has taken his place effective August 19, 1997. Bill was Chase Law School's Dean from 1980-85 and served on the Commission from July 15, 1982 – June 15, 1993, serving as its Chair from 1986-93. Bill's a long-time leader of defender interests in Kentucky who again graces us with his time and talents. We're sure glad to have him back helping us. I apologize to Bill for this mistake.

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The Advocate

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. *The Advocate* educates criminal justice professionals and the public on its work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) 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.

National Expert Evaluates DPA's Request for Increased Funding

Both the House and Senate Appropriations and Revenue Committees met February 12, 1998 and considered the budget for the Department of Public Advocacy (DPA). DPA's request for increased funding is strongly supported in a report prepared by a national expert's recently review of the Department that provides indigent defense services in Kentucky.

In the fall of 1997, Public Advocate Erwin W. Lewis requested that *The Spangenberg Group*, on behalf of the Bar Information Program (BIP) of the American Bar Association conduct a review of DPA, its funding needs for the coming biennium and its "Plan 1998-2000." The 3 primary goals of the plan are to:

1) improve juvenile representation and reduce unethical caseload levels,
2) fund Jefferson and Fayette County public defender programs to reduce caseloads and provide salary parity, and
3) improve defender representation in capital cases.

Based on its on-site visits to 6 locations, analysis of defender data, and evaluation of the current needs of the statewide defender program, *The Spangenberg Group* supports each of the three primary goals of DPA's "Plan 1998-2000," which has already received the unanimous support of the Public Advocacy Commission, and a strong endorsement of its modest funding request by the Board of Governors of the Kentucky Bar Association, the Children's Law Center, the 1997 Governor's Criminal Justice Response Team, the Department of Juvenile Justice's Advisory Board, and the Kentucky Association of Criminal Defense Lawyers.

The Spangenberg Report found, "In our opinion, if adequate funding is provided to realize these goals, the quality of indigent defense services will be improved throughout the Commonwealth. However, we believe that the magnitude of problems confronting DPA is profound, warranting longer-term, more significant changes...."

"The Spangenberg Report confirms that the right to counsel is seriously at risk in Kentucky," observed Public Advocate Ernie Lewis. "DPA is funded at the trial level at the lowest cost per case in the nation. Caseloads are too high for our urban defenders and many of our rural defenders. Juvenile representation is at the crisis stage. Capital cases put immense pressure on our public defenders. There are too many counties served by private lawyers functioning as public defenders, lawyers who are working virtually pro bono. There are now substantially more counties being served by full-time prosecutors than full-time defenders. This is no time to despair. We have a plan that can solve many of these problems with a modest increase in funding and we are hopeful that it will be received favorably by our General Assembly."

The ABA Bar Information Program was established in 1986 to provide information and technical assistance to state and local jurisdictions interested in improving their indigent defense system. In the past 12 years, BIP has responded to over 150 requests form nearly all 50 states and has provided on-site technical assistance in more than 35 states.

The Spangenberg Group, based in West Newton, Massachusetts, is the nation's leading expert in the delivery of indigent criminal defense services, having conducted more than two dozen studies of statewide indigent defense systems over the past decade. In 1997, *The Spangenberg Group* was selected by the U.S. Department of Justice. Bureau of Justice Statistics, to perform a nationwide survey which for the first time in over a decade will collect caseload. Expenditure and other information about indigent defense systems in all 50 states.▼

"The Spangenberg Report"

THE KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY: A PRELIMINARY REVIEW

January 1998

Prepared for:
THE DEPARTMENT OF PUBLIC ADVOCACY, Commonwealth of Kentucky
Erwin W. Lewis, Public Advocate

Prepared by:
THE SPANGENBERG GROUP, Robert L. Spangenberg, Michael R. Schneider, Catherine L. Schaefer

On behalf of the American Bar Association Bar Information Program

1.0 Introduction

As part of the Kentucky Department of Public Advocacy's (DPA's) efforts to recommend and implement a plan for improving indigent defense services in Kentucky, Public Advocate Erwin W. Lewis requested in the fall of 1997 that The Spangenberg Group, on behalf of the Bar Information Program of the American Bar Association, conduct a review of DPA, its funding needs for the coming biennium and its "Plan 1998-2000." The ABA Bar Information Program (BIP) was established in 1986 to provide information and technical assistance to state and local jurisdictions interested in improving their indigent defense system. In the past 12 years, BIP has responded to over 150 requests from nearly all 50 states and has provided on-site technical assistance in more than 35 states. The Spangenberg Group is currently the ABA's sole provider of technical assistance relating to indigent defense systems.

The Spangenberg Group, based in West Newton, Massachusetts, is the nation's leading expert in the delivery of indigent criminal defense services, having conducted more than two dozen studies of statewide indigent defense systems over the past decade. In 1997, The Spangenberg Group was selected by the U.S. Department of Justice, Bureau of Justice Statistics, to perform a nationwide survey which for the first time in over a decade will collect caseload, expenditure and other information about indigent defense systems in all 50 states.

With over thirty years of experience in the provision of legal services for the poor, Robert L. Spangenberg, the founder and President of The Spangenberg Group, has provided research and technical assistance to defender organizations in every state in the country. Michael R. Schneider recently became "of counsel" to The Spangenberg Group, after practicing for four years as associate to Harvard Law Professor Alan Dershowitz, and after serving ten years as a trial, appellate, and training attorney for public defender offices in Massachusetts and New York. In addition to the research team's rich background in indigent defense systems throughout the nation, Mr. Spangenberg has also been closely involved with the operation of DPA for nearly 20 years, having made numerous site-visits to DPA field offices, having conducted several previous studies of DPA, having provided testimony before the state legislature, and having provided technical assistance to DPA.

Over the course of three days in early December 1997, Mr. Spangenberg and Mr. Schneider conducted a series of site visits at a selected sampling of courts and defender offices throughout the Commonwealth, including Louisville, Lexington, Owensboro, Hazard, Pineville, and London. After reviewing DPA's "Plan 1998-2000" and volumes of supporting data furnished by the Public Advocate, extensive discussions were held in Frankfort with Public Advocate Erwin Lewis, Deputy Public Advocate Edward Monahan, as well as the directors of the Trial Division, the Post Trial Division, the Law Operations Division, and the managers of various trial and post-conviction branches and regional and local offices.

During the site visits, interviews were also conducted with full-time defenders, investigators, and support staff in various DPA district offices, part-time defenders in various contract counties, as well as prosecutors and district and circuit court judges. Caseload, personnel, case tracking, and budgetary data provided by DPA were extremely helpful.[1] This report contains both short-term and long-term recommendations based on our analysis and evaluation of DPA's needs.

2.0 DPA's "Plan 1998-2000"

In September 1997, in an effort to address the profound problems confronting DPA, Kentucky Public Advocate Erwin Lewis issued DPA "Plan 1998-2000" which lays out a series of goals prem

ised on a modest funding increase of $ 6 million, approximately 15%, over the next biennium. The Public Advocate should be commended for his far-sighted effort to lay out a well-thought out plan to meet DPA's needs over the next biennium. In our experience, this is something few public defender offices around the country have even attempted. The Plan's three primary goals are as follows:

2.1 Improvement in juvenile representation and the reduction of caseloads.

This goal would require: a) creating five new full-time DPA field offices in Owensboro, Campbellsville, Paintsville, Maysville, and Bowling Green, staffed by 14 additional full-time defenders trained to handle both juvenile and criminal matters, b) the hiring of seven additional trial attorneys specializing in juvenile representation who would be placed in already-functioning full-time field offices, and two additional full-time appellate lawyers specializing in juvenile appeals who would be placed in Frankfort, c) the hiring of a full-time juvenile justice trainer to be based in Frankfort. The total projected cost for these improvements would be $ 2,338,300 over the next biennium.

2.2 Funding Jefferson and Fayette County Public Defender Offices to Enhance Caseload and Salary Parity.

With respect to Jefferson County, the funding request would allow for the hiring of additional staff to lower caseloads from the current high level of 820 per attorney; the reduction in the disparity in salaries between DPA staff and Jefferson County Public Defenders staff; and for a much needed infusion of $100,000 to cover conflict contracts for capital cases, all at a projected cost of $732,000 over the next biennium. With respect to Fayette County, the funding request would allow for the hiring of two additional attorneys to cover the two new divisions of the circuit court; for a five percent annual salary increase to reduce the disparity between DPA staff and Fayette County Legal Aid staff; for an additional secretary and investigator; for the purchase of computers and printers; and for $50,000 to cover conflict contracts for capital cases, all at a projected cost of $471,000 over the next biennium.

2.3 Improving the Quality and Cost-Effectiveness of DPA's Delivery of Defender Services in Capital Cases.

DPA's funding request would allow for an increase in compensation of private attorneys hired by DPA under contract to litigate capital cases from $12,500 to $20,000 per attorney per case, which is necessary to attract high quality lawyers and to fund the work necessary in such difficult and time-consuming cases; for use of change of venue surveys in high profile capital cases; for the replacement of federal Byrne grant moneys; for the hiring of two mitigation specialists, an assistant public advocate at the chief level, an additional investigator, and other essential experts, all at a projected cost of $983,500 over the next biennium. To make up for the defunding of the Capital Post-Conviction Branch, additional funds are requested to hire attorneys, experts and support staff to represent death row inmates at the post-conviction stage.

2.4 Other Goals

In addition to these three main goals, DPA's plan also seeks to meet a number of other goals, including: improved computer-based research capabilities, case tracking, and information technology; improved post-conviction representation for Class D felons in local jails and inmates in private prisons who are currently unrepresented by the hiring of three additional attorneys and three support staff to service these facilities; improved appellate efficiency to meet the demands imposed by videotaped records by hiring two additional attorneys and two additional support staff; and improved staff recruitment. In an effort to obtain some of the necessary funding from funding sources other than the general fund, the DPA plan also has asked the 1998 General Assembly to authorize an increase in the administrative fee paid by DPA clients from $40 to $50. See KRS 31.051(2).

3.0 Short-Term Recommendations Regarding DPA's "Plan 1998-2000"

Based on its on-site visits, its analysis of defender data, and its evaluation of the current needs of the state-wide defender program, The Spangenberg Group supports each of the three primary goals of DPA's "Plan 1998-2000", which has already received the unanimous support of the Public Advocacy Commission, and a strong endorsement of its modest funding request by the Board of Governors of the Kentucky Bar Association, the Children's Law Center, the 1997 Governor's Criminal Justice Response Team, the Department of Juvenile Justice's Advisory Board, and the Kentucky Association of Criminal Defense Lawyers. In our opinion, if adequate funding is provided to realize these goals, the quality of indigent defense services will be improved throughout the Commonwealth. However, we believe that the magnitude of prob

lems confronting DPA is profound, warranting longer-term, more significant changes which are discussed in Section 4.0 below.

Overshadowing all of the problems facing and the solutions proposed by DPA is that of burgeoning caseloads. Over the past decade DPA's caseloads have increased dramatically, while funding has failed to keep pace. From FY 1996 to FY 1997 alone, DPA's caseload increased by approximately 5% from 93,839 cases to 98,797 cases. While Kentucky's extremely broad KRS Chapter 31 right to counsel accounts, in large part for this trend, a number of attorneys reported that they have been routinely appointed in cases even where there is no right to counsel under KRS Chapter 31, *e.g.*, cases where no incarceration or substantial fines could be imposed.

The caseload information provided to us indicates that in FY 1997, DPA full-time trial defenders handled an average of 604 felony, misdemeanor, juvenile and other cases per attorney, with public defenders in Louisville handling as many as 820 cases. It is clear that, with the exception of just a few rural offices, DPA's Trial Division caseloads are in violation of Standard 5-5.3 of the American Bar Association Standards for Criminal Justice: *Providing Defense Services* (3rd.ed.) (1992), which provides in part:

> Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

The Commentary to Standard 5-5.3 states:

> The standards of the National Advisory Commission [NAC], first developed in 1973, have proved resilient over time, and provide a rough measure of caseloads. They recommend that an attorney handle no more than the following number of cases in each category each year:
>
> 150 felonies per attorney per year; or
> 400 misdemeanors per attorney per year; or
> 200 juvenile cases per attorney per year; or
> 200 mental commitment cases per attorney per year; or
> 25 appeals per attorney per year.

While the NAC standards do not make recommendations for public defenders who, like the DPA's, handle mixed caseloads, it is clear that the DPA numbers far exceed those contemplated by the NAC. Our on-site interviews revealed that virtually all attorneys felt that their caseloads were too heavy, the quality of the representation they provided, adversely affected, and that they simply did not have enough time to interview all clients, investigate cases, prepare for trial, and draft motions, memoranda, and briefs adequately. This is corroborated by our interviews with judges.

The Need For Improved Juvenile Representation and Lower Caseloads.

In our view, Kentucky's juvenile defender system is badly in need of repair. Our site work tended to confirm many of the observations made by the Covington-based Children's Law Center in its 1996 report criticizing DPA for placing inexperienced full-time defenders in juvenile court, for contracting with part-time attorneys to handle juvenile cases without any training or experience in juvenile work, and for permitting many juveniles accused of serious offenses to go unrepresented in blatant violation of their constitutional right to counsel and their statutory rights under KRS Chapter 31. See Kim Brooks, Kim Crone, and James Earl, "Beyond *In Re Gault*: The Status of Juvenile Defense in Kentucky," 5 Ky. Children's Rts. J. 1 (1996).

During the course of our brief site visits, we heard many reports of judges pressing juveniles to "waive" counsel because defense attorneys were not readily available; of juvenile co-defendants being represented by the same attorney, notwithstanding the potential conflicts of interest; and of substandard representation at all stages of the process, including inadequate contact with their attorneys, inadequate investigation of their cases, little or no pretrial motion practice, as well as inadequate preparation for trial and dispositional proceedings. In many rural counties where the distances between the offices of defense attorneys and the nearest detention center or residential treatment center are often large, we were told that many juvenile clients are not interviewed until the very dates they are brought into court. We were repeatedly informed that in many of the contract counties, there is a scarcity of attorneys with an adequate knowledge of and experience in handling the highly specialized and complex area of juvenile defense. Virtually all parties interviewed reported that few if any juveniles receive any appellate representation whatsoever despite their statutory and constitutional right to appeal their adjudications.

While the increase in caseloads has been felt severely throughout the system, it has had par

ticularly harsh results in terms of DPA's representation of juveniles where the pressures of rising caseloads have been exacerbated by recent amendments to Kentucky's juvenile code, which provide for harsher penalties and the transfer of juvenile cases to circuit court in increasing numbers. If the problem is not addressed promptly, it risks systemically denying indigent defendants throughout the state their constitutional right to effective representation. DPA's approach of improving the quality of juvenile defense throughout the state by increasing the number of full-time defenders with expertise in juvenile matters makes good sense in view of reports from many full-time and part-time defenders and judges that the existence of full-time defenders with juvenile expertise tends to improve the general level of juvenile representation in full-time and part-time counties alike.

In light of already excessive caseloads and the looming demographic changes over the coming years, which may well result in increased juvenile crime, as well as the trend in Kentucky and elsewhere toward more punitive sanctions for juvenile offenses, the steps urged by DPA to improve the delivery of juvenile representation constitutes the bare minimum needed in the short run to satisfy the requirements of *In re Gault*, 387 U.S. 1 (1967), KRS Chapter 31, and KRS Chapters 600 *et seq.* This renewed commitment to enhanced juvenile representation has received support from a wide variety of sources, including the Department of Juvenile Justice's Advisory Board and the Governor's Criminal Justice Response Team which issued its final report recommending increased funding for indigent juvenile defense, and from the 1996 Children's Law Center study, which has strongly endorsed DPA's "initiative to increase the level of staffing in trial offices to better accommodate juvenile matters."

3.2 The Need for Increased Funding for Jefferson and Fayette Counties.

In the urban counties of Jefferson and Fayette, DPA contracts with two independent non-profit public defender organizations, the Jefferson County Public Defender (JCDPD -- Louisville) and Fayette County Legal Aid (FCLA -- Lexington), to provide the full range of defender services to residents of the two counties. Caseloads in these two urban counties is extraordinarily high with caseloads in Fayette County topping 600 cases per attorney per year, and 820 cases per attorney in Jefferson County. These caseloads clearly jeopardize the provision of indigent defense services in these counties.

In Fayette County, in light of the Commonwealth attorney's placement of additional attorneys to staff the two new divisions of the circuit court, it is clear that FCLA's has a pressing and immediate need for two additional attorneys to staff these sessions. Indeed, judges we spoke with confirm that they frequently must wait around for defenders to appear in their sessions as the defenders are overworked and the organizations understaffed.

Salary parity is a significant issue in both Jefferson and Fayette county organizations. The problem is that in both counties starting salaries for defenders are considerably less than that of starting DPA defenders and where such attorneys have no prospect of regular step increases as in the DPA state personnel system. Morale in both of these non-profit offices appears to be adversely affected by the substantial salary disparities with DPA attorneys coupled with their enormous caseloads.

In Fayette County, we found that there are currently no working computers in place on the desks of any of the organization's 16 attorneys. The needs of the Jefferson County organization in the computer and information technology area were only slightly less pressing.

For all of these reasons, we believe that the comparatively modest funding increase requested by DPA for Jefferson and Fayette Counties is desperately needed for the coming biennium.

3.3 The Need for Improvements in DPA's Delivery of Defender Services in Capital Cases.

The recent loss of federal monies and inadequate levels of compensation for private attorneys handling capital trial, post-conviction and appellate proceedings under contract from DPA is, in large part, responsible for the difficulties faced by the DPA in its provision of services in the area of capital litigation. For DPA to meet constitutionally adequate levels of representation in this area, it is essential that compensation rates be increased for private attorneys willing to contract for these exceedingly difficult and time-consuming cases. It is also clear that additional funds are, indeed, needed to permit the hiring of qualified experts, investigators, mitigation specialists, and support staff in order to properly support the defenders doing this difficult work.

In the past, federal funds have been obtained to assist in providing state post-conviction capital representation. The federal funds have now been

substantially reduced and must be replaced by adequate state funding in the next biennium.

4.0 Long-Term Recommendations

When the Kentucky legislature enacted KRS Chapter 31 in 1972, it was heralded across the country as a model approach to structuring a statewide public defender system. In fact, shortly thereafter, several states used the legislation to create their own statewide public defender system. In our professional judgement, the once-heralded public defender system in Kentucky can no longer be called either a model or a coherent statewide system. Over the years, the program's caseload has sky rocketed while its budget appropriations have failed to keep pace. We have serious doubts about whether the statewide program is capable today of assuring that defendants who qualify for court-appointed counsel will receive adequate representation throughout the state.

We have reached the opinion not only as a result of our most recent visit to Kentucky, but also because of our previous experience with DPA, dating back to 1979, and our extensive experience reviewing indigent defense systems around the country over the past 20 years.

The problems with the implementation of the statute are well-documented in the numerous studies of DPA conducted by various organizations dating back to 1973. They were most recently set out in great detail in the December 1995 report of the Governor's Task Force on the Delivery and Funding of Quality Public Defender Services. This report includes testimony and substantial documentation of other state systems provided by Robert Spangenberg at the request of the Task Force. Sadly, despite the enormous efforts of the Task Force and DPA leadership, most of the problems remain, while few of the recommendations have been addressed.

The Kentucky Department of Public Advocacy has been "studied to death." The facts are clear and documented. Despite strong efforts of the Public Advocacy Commission and several recent Public Advocates, the program has lurched from biennium to biennium in a "patch-work, finger in the dike" approach, with no clear support for implementing the major findings.

The Department of Public Advocacy "Plan 1998-2000" period is well thought out, well documented, but falls far short of what is needed to bring the system up to minimum professional standards. The Spangenberg Group endorses the priorities established by DPA for the next biennium. However, we strongly believe that the time has come to prepare a comprehensive plan, designed to assure that the Kentucky Department of Public Advocacy can reclaim its heralded stature of 1972 - as a model statewide public defender system - as it enters the 21st century.

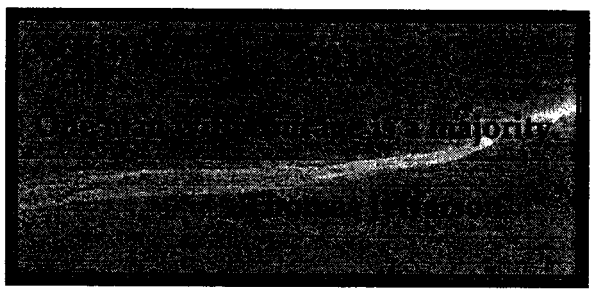
To achieve that goal, DPA must have the cooperation of all three branches of government, as well as the organized bar and the citizens of the Commonwealth. The long-term approach needs a documented budget goal, a comprehensive statewide approach and a group of prestigious leaders of all segments of government, the organized bar and the business community to assure success. The details of such a plan must be developed by leaders in Kentucky. Based upon our work in other states facing similar challenges, we are confident that such an approach would succeed in Kentucky.

5.0 Conclusion

Kentucky's DPA has been fortunate to have had the far-sighted leadership of its current leadership team which has begun to grapple with the deep-seated problems facing the delivery of indigent defense services. While its "Plan 1998-2000" appropriately begins to address DPA's most immediate short-team needs in a balanced and effective way, DPA must set its sights far higher in the long-term. To assist in this regard, we would be happy to provide additional thoughts and information on how other states have successfully achieved these goals.

FOOTNOTES

[1]The Spangenberg Group would like to thank the more than three dozen full-time and part-time defenders, DPA managers, investigators, and support staff, as well as the judges and prosecutors who took time out of their busy schedules to candidly discuss the problems confronting indigent defense in Kentucky. The commitment shown by DPA attorneys, managers and staff in defending their clients in the face of burdensome caseloads and severe underfunding is encouraging.▼



Parole Decreases 6%; Deferments Increases 5%; Serve-Outs Increase 1%

Statistics provided by the Kentucky Parole Board for the last three years indicate substantial trends in parole, deferments and serve-outs.

FY 1996-97 STATISTICS:

Inmates Interviewed/Reviewed: 11,490
(includes initial, deferred, back to board, medical, reconsideration and early parole)

6,458 cases were initial hearings/reviews:

907 (14%) were recommended for parole
2,879 (45%) were deferred
2,672 (41%) were ordered to serve out sentences

2,756 deferred cases were interviewed/reviewed:

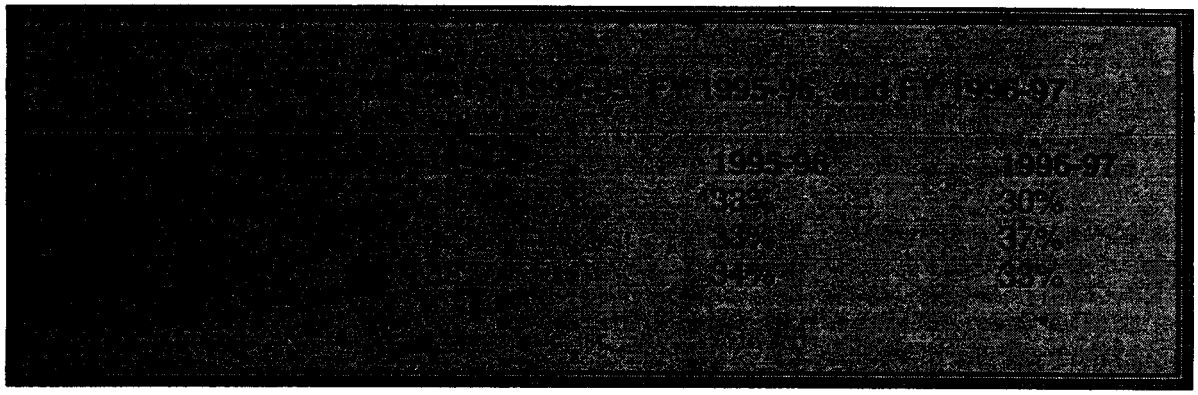
1,826 (66% were recommended for parole
505 (18%) were additional deferments
425 (15%) were ordered to serve out sentences

Combined figures for initial and deferred interviews/reviews with 9,214 inmates:

2,733 (30%) were recommended for parole
3,384 (37%) received deferments
3,097 (33%) were ordered to serve out sentences

Other Hearings Conducted:

445 Preliminary Revocation Hearings
191 Victim Hearings
1,507 Final Parole Revocation Hearings
61 Other (Medical, Reconsideration, Early, I.S.P., Courtesy)
72 Back to Board
204 Open Hearings



THE TRUTH ABOUT JUVENILE CRIME STATISTICS

Three recent publications by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) analyze data and offer perspectives that ought to be considered by those deciding juvenile justice policy in our Commonwealth. The studies reveal that the data is out there to tell us what works and what does not. Sometimes, we at the state level resist input from the federal government. We ignore the following findings from recent OJJDP studies at our peril.

Violent Juvenile Crime is Decreasing. All measures of juvenile violence known to law enforcement are going down and have been descending for the past two years. This decrease is occurring despite growth in the juvenile population. Snyder, Howard N. *Juvenile Justice Bulletin*, OJJDP, November, 1997. This decrease experienced in 1995 and 1996 follows an eight-year increase. Yet, analysts for OJJDP see *hope* in this decline. They see *hope* because the decline in violent crime arrests was led by a decline in the arrests of younger juveniles. Sigmund, Melissa; Synder, Howard; Poe-Yamagata, Eileen, *Juvenile Offenders & Victims: 1997 Update on Violence*, OJJDP, August, 1997. "If the level of delinquency of young juveniles is correlated with the level of similar behavior as they age, the lower violent crime arrest rate of the younger juveniles in 1995 indicates that their levels of violence at ages 15 to 17 are likely to be below those of 15 to 17 year olds in 1995." *Id.*, p. 19.

Access to Guns Has Made Juvenile Crime More Lethal. The August 1997 study clearly indicates that access to guns has made juvenile violence more lethal. Seventy-nine percent of the victims of juvenile homicide offenders were killed with a firearm. Sixty-four percent of those victims were acquaintances or family members. *Id.*, p. 12.

The Myth of Juvenile Super Predators. It is interesting to note that the individual juvenile offender does not commit more acts of violence. Rather, those youth who commit an act of violence today commit the same number of violent acts as his/her predecessor of 15 years ago. This statistical reality exposes the falsehood of the derogatory term "super predator." According to OJJDP statistics, the appellation, used frequently to justify dehumanizing treatment of detained juveniles in one of Kentucky's largest cities – is a myth.

As noted by OJJDP Administrator Shay Bilchik (former Florida prosecutor): "While we heard an awful lot of talk about predators – even of a generation of juvenile super predators – it is simply not true. For starters, only about one-half of 1 percent of juveniles ages 10 to 17 were arrested for a violent crime last year, and of all juvenile offenders, just 6 to 8 percent are serious, violent, or chronic offenders. So to talk of a generation of super predators is not only false but unfair. It fails to recognize the vast majority of youth as good citizens who have never been arrested for any type of crime. Talk of super predators is tabloid journalism that distorts the facts." *Juvenile Justice: Making A Difference on the Front Lines With OJJDP Administrator Shay Bilchik*, Vol. IV, No. 2, OJJDP, Dec., 1997, p. 5.

The OJJDP studies indicate the real predators are the stark realities that *every day in America* 2,600 children are born into poverty, 2,800 drop out of school, 8,500 are reported abused or neglected and 15 children die of gun fire. *Id.*, p. 5. The number of children identified as abused or neglected almost doubled between 1986 and 1993, 1 in 5 violent offenders in state prison reported having victimized a child. Sickmund, Melissa, et. al. *supra*, at 5,6.

For those who are intent on destroying a separate rehabilitative approach to juvenile justice, these OJJDP studies waive the yellow flag of caution. The conclusions drawn are that we need effective prevention, early intervention and graduated sanctions. The answer is not to be found in thrusting more youth into the adult system. Nor is it in converting the juvenile justice system into a mini-adult court with the ever increasing practice of incarcerating children for exceedingly longer durations.

To impact the juvenile crime rate, we must protect and nourish our nation's children. Those involved in our juvenile courts all know that the abused child of yesterday becomes the offender today or tomorrow. More concrete and mortar for the convicted will not divert that train.

The studies mentioned above are available by contacting the Office of Juvenile Justice and Delinquency Prevention, 810 Seventh Street NW, Washington, D.C. 20531.

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Post Trial Division Director▼

Ask Corrections

QUESTION: I have 2 clients who were both convicted of Burglary 3rd Degree. One was sentenced to 1 year in prison. The other was sentenced to 1 year and 6 months. They were co-defendants and sentenced the same date. They both received the exact same amount of jail time. However, their parole eligibility dates are the same. I believe that the longer sentence would require more time to serve for parole eligibility, based the 20 percent of the sentence imposed for parole review.

ANSWER: No. Parole regulations stipulate that a person who receives a sentence of 1 year, up to but not including 2 years are required to serve 4 months for parole review. Both of your clients would be required to serve four (4) months before parole eligibility since they are serving sentences of less than two (2) years. Persons who receive sentences of 2 years, up to and including 39 years, are required to serve 20 percent of the sentence received for parole review, more than 39 years, up to and including LIFE, are required to serve 8 years for parole review.

QUESTION: I have a client who was sentenced out of the Franklin and Woodford Circuit Courts. She was sentenced to 1 year in the Franklin Circuit Court on 11-05-1997. That sentence was ordered to run concurrently with any other sentence to be served. On 11-20-1997, she appeared in the Woodford Circuit Court and was sentenced to 2 years. This sentence was ordered to run consecutively with any other sentence. How does Corrections determine whether the sentences are to be served concurrently or consecutively?

ANSWER: It is the practice of the Department of Corrections that when conflicting judgments are received (*i.e.* one saying concurrent, the other saying consecutive), we rely on the later judgment as the prevailing one. Therefore, your client's sentences would run consecutively, based on the Woodford County judgment, for a total of 3 years.

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HONEST JOHN by JIM THOMAS

FACTS ON THE JUVENILE DEATH PENALTY

House Bill 691 eliminates death for anyone under 18. It is sponsored by Rep. Eleanor Jordon, and co-sponsored by Reps. Barbara White Colter, Porter Hatcher, Jr., Bob Heleringer, and Jim Wayne. It was assigned to the House Judiciary Committee on February 24, 1998.

THE 1997 ABA MORATORIUM CALL IS BASED IN PART ON THE FACT THAT THE STATES CONTINUE TO SENTENCE CHILDREN TO DEATH.

In the 1988 report of the Criminal Justice Section of the ABA, it was stated that "The spectacle of our society seeking legal vengeance through execution of a child should not be countenanced by the ABA."

THE JUVENILE DEATH PENALTY IS RACIST

- 2/3rds of the 288 children executed in the nation's history were black.
- 100% of the 40 children executed in the U.S. for the crimes of rape or attempted rape were black.
- 2/3rds of children now on death row in the United States are black, including the one individual on Kentucky's death row who committed his crime as a juvenile.
- Six of the seven children executed in Kentucky history have been black.

CHILDREN ARE DENIED MANY RIGHTS DUE TO THEIR INABILITY TO EXERCISE MATURE AND SOUND JUDGMENT

- 26th Amendment sets 18 as the age to vote.
- 18 is the age of majority in Kentucky. KRS 2.015.
- 21 is the age to buy and possess alcohol. KRS 244.080, .085, 087, .090.
- children are not allowed to contract until they are 18. KRS 371.010(2)
- children must be 18 before they are allowed to buy cigarettes. KRS 438.300.
- children must be 18 before donating their bodily organs. KRS 311.175
- children must be 18 generally (unless they are parents) before they are allowed to make a will. KRS 394.020-030.
- children must be 18 (unless there is parental or judicial consent) in order to marry. KRS 402.020

THE DEATH PENALTY IS LESS OF A DETERRENT FOR CHILDREN THAN IT IS FOR ADULTS.

- children are often impulsive and reckless.
- children often have little concept of death.

THE DEATH PENALTY IS CONTRARY TO THE FUNDAMENTAL PREMISE OF THE JUVENILE JUSTICE SYSTEM: THAT CHILDREN SHOULD BE TREATED, THAT SOCIETY SHOULD NOT GIVE UP ON CHILDREN.

THE DEATH PENALTY IS SELDOM USED AGAINST CHILDREN

- Only 2% of the total of persons executed in this country were children at the time of the crime.
- In Kentucky, only 2 juveniles were sentenced to death since 1976; only one person remains on death row who was a juvenile at the time of his crime.

THE DEATH PENALTY IS USED IN ONLY HALF THE STATES FOR JUVENILES.

- in 14 states with the death penalty, 18 is the age of accountability.
- in 4 states, 17 year olds are eligible.

in 21 states, 16 year olds are eligible for the death penalty.

THE UNITED STATES IS ISOLATED IN THE KILLING OF JUVENILES.

- since 1990, only 5 countries have executed juveniles - the United States, Iran, Pakistan, Saudi Arabia, and Yemen.
- 3/4ths of the nations of the world (73 of 93 reporting to the ABA in 1986) set 18 as the minimum age for executions.
- In 1966, the General Assembly of the United Nations agreed that the "sentence of death shall not be imposed for crimes committed by persons below 18 years of age..." President Carter signed this covenant for the United States in 1978.

LIFE WITHOUT PAROLE HOLDS JUVENILES RESPONSIBLE FOR THEIR CRIMES.

OTHER FACTS

- 7 children were executed prior to 1800.
- 97 children were executed prior to 1900.
- the youngest child to be executed in this country was 10.
- the Model Penal Code recommends against the death penalty for juveniles.
- of 13,847 legal executions in American history, 288 of them were of children.
- Kentucky has not executed a juvenile in 40 years.▼

THE LONESTAR STATE PREPARES TO EXECUTE ITS SIXTH JUVENILE OFFENDER

The state of Texas has set an April 22, 1998 execution date for Joseph John Cannon. This would be the first execution of juvenile offender by any state in 5 years. Nine of the children sentenced to death in the United States since 1976 have been executed. Texas alone has carried out 5 of these sentences.

Joseph Cannon is the quintessential example of a child who, because he was consistently denied the basic resources he needed to grow up normally, became a danger to himself and others. At the age of 4, Joseph was struck by a truck and suffered a fractured skull, a broken leg and a punctured lung. Instead of being released from the hospital into the arms of his parents, Joseph was sent to an orphanage.

Hyperactivity, among other severe learning disorders, made it virtually impossible for Joseph to function in the classroom. A Texas school expelled him in the first grade, and he received no formal education beyond that point. By the time he was 10, Joseph had sniffed so much gasoline, glue and other solvents that he was diagnosed as suffering from permanent brain damage.

Inhalants offered Joseph some escape from the sexual abuse he had been suffering at the hands of his third stepfather since he was 7 years old. Men in his family sexually assaulted Joseph right up until the time he was arrested for murder at the age of 17.▼

SEXUAL ABUSE AS MITIGATION

Recently I had the opportunity to attend a seminar on sexual abuse in Lexington, presented by Carondelet Management Institute. This seminar was directed toward helping professionals in various disciplines who may encounter situations of sexual abuse or sexual abuse survivors. My intent in attending the seminar was to gain a deeper understanding of the signs and symptoms presented by survivors, to better identify individuals and/or families in which sexual abuse is present. This subtopic was thoroughly covered, as well as the dysfunctional dynamics that emerge in families with sexual abuse, unhealthy coping mechanisms of survivors, and treatment techniques with the highest success rates. For the purposes of a professional who is attempting to identify areas of mitigation, identification of the abuse survivor and perpetrator is the most important information to share. The following is a compilation of characteristics of the sexual abuse survivor:

1. Fear of the dark and/or sleeping alone
2. Nightmares
3. Lack of physical self-care
4. Eating disorders and related symptoms of such; distorted body image
5. Alcoholism and drug abuse, or total abstinence
6. Various phobias, such as agoraphobia or claustrophobia
7. Striving for perfection that seems obsessive in nature
8. Self-mutilation and self-destructiveness
9. Depression
10. Hysterical physical symptoms of illness
11. Compulsive behaviors
12. Blocking out memories of early years
13. Mistrust of others
14. "Victim" patterns in lifestyle/relationship choices
15. Rigidity in thought processes
16. Anger issues(rage disorders or total inability to express anger)
17. Discrimination against race/gender of perpetrator
18. Sexual issues in adult relationships
19. Gynecological problems; physical/psychosomatic symptoms such as gastrointestinal concerns, headaches, or arthritis
20. Minimization of childhood problems or complete denial of such problems
21. Dissociative (formerly multiple personality) disorders

The characteristics identifying sexual abuse perpetrators are, unfortunately, much less specific. In fact, it was stressed throughout the seminar to be constantly aware that many unlikely individuals are revealed as perpetrators. With that in mind, the following is a descriptive profile of the sexual abuse perpetrator:

1. Male or female
2. Likely to be a sexual abuse survivor
3. Substance abuser
4. Charming demeanor
5. Possibly a pillar of the community
6. Likely from a sexually dysfunctional family system
7. May be a pedophile
8. May be a sex addict
9. Denial
10. Dissociation
11. Rage issues
12. Shame/guilt issues
13. Exhibits antisocial personality traits/ disorder

Besides identifying characteristics of the survivor and perpetrator, a person actively searching for signs of sexual abuse should carefully seek signs of sexual abuse family dynamics when observing interactions amongst family members. This requires an understanding of **trauma bonds**, attachments and acquired roles of family members which are not present in a healthy family. An example of a traumatic bond that often develops in a sexually abusive household is a "surrogate spouse" bond between the perpetrator and victim; this dynamic presents as an unusually close relationship between the perpetrator and victim, with the child victim practically replacing the role of the other parent or adult in the household.

An individual investigating a possibly sexually abusive situation should look for this type of unhealthy dynamic, as well as other unusual child roles, such as a child with decision-making power or control on a level with that of an adult parent.

The power of sexual abuse mitigation is obvious and apparent. It is one area in which no blame typically is placed upon the victim/survivor for the situation. Sexual abuse most often emerges as

an issue in childhood, and most people would agree that children are not able to defend themselves against this type of abuse and manipulation. The variety and severity of problems sexual abuse creates for the adult survivor(and possible future perpetrator) can go a long way in explaining inappropriate, dysfunctional and destructive behavior that our clients often exhibit.

If any readers have a particular interest in this area and would like more information about sexual abuse and successful treatment, I would be happy to share the literature I received at the seminar.

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Problems & Decisions

Recently, I attended a 2-day workshop conducted by the Governmental Services Center on *Problems & Decisions*. As the facilitator emphasized repeatedly, the purpose of the workshop was not to teach us -- state employees from various agencies -- how to come up with the correct solution to a problem or the right decision, but how to come up with a well-thought solution or decision.

We learned about 4 different problem-solving/decision-making processes: problem cause analysis, decisionmaking, plan implementation, and creative thinking skills. Various techniques were employed by the facilitator, *e.g.*, a film of a Sherlock Holmes mystery and a video clip demonstrating the difference between low risk takers and high risk takers when making a decision. The participants often broke up into various small groups to collaborate on and practice these 4 problem-solving and decision-making processes - which can be utilized not only in our work environment, but in our personal lives as well.

With regard to making a well-thought decision, we learned the following 3 steps:

1) Set a reasonable time frame.

2) Make a tentative instinctive decision (TID).

3) Use time frame to gather information, test assumptions, and modify your TID.

Although I was familiar with at least some aspects of the 4 problem-solving/decisionmaking processes prior to attending the workshop, I found the workshop as a whole to be intellectually stimulating and an excellent source of reference materials for solving problems and making decisions in a well-thought manner. I also enjoyed interacting with state employees from different state agencies, particularly in the various small groups.

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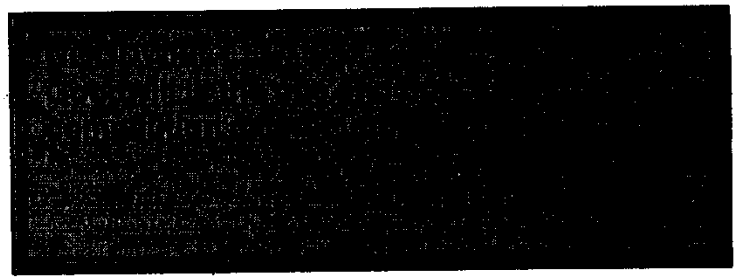

PLAIN VIEW

Kalina v. Fletcher
118 S.Ct. 502, 139 L.Ed.2d 471 (12/10/97)

The Supreme Court's first Fourth Amendment case of the 97-98 term is one only tangentially related to the interests normally protected by the Fourth Amendment. Here, the Court reviewed the question of whether a prosecutor is entitled under §1983 to absolute vs. qualified immunity when engaged in certain acts related to the obtaining of an arrest warrant.

In Washington, cases are initiated by filing an information and a motion for an arrest warrant. Because there is no grand jury, the law also requires that an arrest warrant be based upon an affidavit or sworn testimony which establishes probable cause.

In this case, the prosecutor filed all three documents. Fletcher was arrested on a burglary charge based upon the documents, spent a day in jail, and one month later, had charges dismissed against him. He filed suit under 42 U.S.C. §1983 alleging a violation of his Fourth Amendment rights.

The prosecutor defended the action by saying that her pleadings were all protected by absolute immunity. However, the Court disagreed, in a unanimous opinion written by Justice Stevens. The Court held that while the acts which were clearly prosecutorial, the filing of the information and the motion for the arrest warrant, were protected by absolute immunity, the third act, that of preparing a sworn affidavit supportive of probable cause, was protected only by qualified immunity.

The distinction relied upon by the Court was that of the prosecutor as advocate versus the prosecutor as complaining witness. "Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness." As a result, the Court affirmed the lower courts in holding that §1983 may provide a remedy for the person aggrieved by the alleged illegal search against the prosecutor for her act of filling out a sworn affidavit in support of an arrest warrant.

Short View

1.. ***U.S. v. Ward***, 131 F.3d 335 (3rd Cir. 11/13/97). Mandating the testing of persons accused or convicted of sexual assault crimes does not violate the Fourth Amendment, according to the Third Circuit. The Court reviewed a judge's order pursuant to the Violence Against Women Act, which, according to the Court, provides protections beyond that mandated by the Fourth Amendment. The Court also found that the seizure of blood, while a search, was justified under the special needs doctrine. "The special needs in this case are insuring that the victims of sexual assaults are notified promptly, whether or not their attackers carry HIV, and preventing a sexual assault victim from unwittingly transmitting the virus to others."

2. ***United States v. Castro***, 129 F.3d 752 (5th Cir. 11/19/97). The seizure of a vehicle in order to conduct an inventory search of it following the arrest of the occupants is violative of the Fourth Amendment when the object of the search is investigative. Here, the police followed the defendants for 115 miles without discovering a reason for a stopping; they then asked a local sheriff to make an arrest and come up with his own probable cause. An arrest was made for speeding, followed by the seizure of the vehicle in order to search it. The Court acknowledged the holding in *Whren v. U.S.*, 116 S.Ct. 1769 (1996), which held that a search is justifiable if there is probable cause to make an arrest, even where subjectively the search was pretextual. Here, the 5th Circuit emphasized that an inventory search has as its object to protect the property that has been lawfully seized, to protect the police against claims of lost or stolen property, and to protect the police from potential danger." Such a search is only legal "if conducted according to standardized procedures...and lawful only if conducted for purposes of an inventory and not as an investigatory tool to produce or discover

incriminating evidence...An inventory search may not be used by police as a 'ruse for a general rummaging.'" Because these rules were violated in this case, suppression was mandated.

3. ***State v. Stevens***, 62 Cr. L. 1199 (Wis. Ct. App. 10/28/97). Relying solely on officers' belief that drug dealers are likely to destroy evidence and carry weapons is not sufficient to overcome the requirements of knock and announce. This holding reiterated that holding of the Court in *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997). "If the police do not have a reasonable suspicion that announcing their presence may impede the investigation or endanger the officers, they may not enter a home without announcing their presence...We therefore conclude that *Richards* represents a categorical rejection of the view that generalized knowledge alone is sufficient to create the necessary reasonable suspicion required to justify an unannounced entry."

4. In a law review article reprinted in the *Search and Seizure Law Report* of November 1997, Professor James Fleissner of Mercer Law School argues against the "growing support" for expanding the good faith exception to warrantless searches and seizure. Professor Fleissner notes that expanding the exception is good politics, as well as being supported by one federal case, U.S. *v. Williams,* 622 F. 2d 830 (5th Cir. 1980) (en banc), cert. den., 449 U.S. 1127 (1981), a pre-*Leon case.* However, he observes that the exclusionary rule is the most effective means for enforcing the Fourth Amendment, that it is particularly vital for enforcing the Fourth Amendment in the context of a warrantless seizure, and that if applied to warrantless seizures, the good faith exception would be very difficult to administer. He concludes: "The good faith exception should not be extended to cases involving warrantless searches and seizures...The price of police error in such cases should be exclusion. That will promote police training and remove any reward for a violation. This is especially critical in warrantless searches and seizures, where the training of the police is the only way to prevent violations. Adopting the good faith exception in such cases will dramatically reduce the beneficial effects of the Exclusionary Rule and will prove difficult to administer. We should chart a path that protects not only the integrity of the Fourth Amendment, but ensures that expansion of the good faith exception will not undermine the integrity of the guarantees of the Fifth and Sixth Amendments as well.

State v. Robinette, 685 N.E.2d 762 (OH.Sup.Ct. 11/12/97). The Ohio Supreme Court seemed to have the final say. Here, the Court had initially stated that a Fourth Amendment violation occurred when, during a routine traffic stop, the police asked for consent to search without telling the driver that he or she is free to go. The United States Supreme Court disagreed in *Ohio v. Robinette*, 117 S.Ct. (1996), which held that the Fourth Amendment required no such bright line rule for determining the voluntariness of a confession. The Ohio Supreme Court first determined that after the traffic stop for speeding was over, the officer could further detain the driver briefly to ask him whether he had contraband in his car, without reasonable suspicion. This was justifiable under *Florida v. Royer*, 460 U.S. 491 (1983), and *Whren v. U.S.*, 116 S.Ct. 1769 (1996). However, the Court held that further detaining the driver and asking him for consent to search without reasonable suspicion violates the Fourth Amendment. The Court focused on the suspicionless detention, which followed the dissipation of the reason for the stopping. Finally, the Court looked at the fact that no free-to-go warning was given, that there was no reasonable suspicion, and held that the State had not demonstrated voluntariness of the consent to search.

5. ***State v. Branham***, 62 Cr. L. 1330 (Ariz. Ct. App. 1/21/98). The failure to show proof of registration does not establish probable cause to believe that the car is stolen, according to the Arizona Court of Appeals. Thus, evidence of drugs found during the search had to be suppressed. "The failure to produce registration is not a criminal offense...As a result, the failure to produce registration is equally consistent with innocent behavior. Therefore, such failure, by itself, does not provide probable cause to believe that a car is stolen and does not permit the limited search conducted here."

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BRAVERY
Bravery is the capacity to perform properly even when scared half to death.
- General Omar Bradley

West's Review

***Slaven v. Commonwealth*, Ky. ___ S.W.2d ___ (12/18/97)**

Slaven was convicted of murder and first degree robbery in the Perry Circuit Court and sentenced to life imprisonment without the benefit of parole for twenty-five years. The charges arose out of a robbery and a shooting at a gas station. The Commonwealth's case was based on circumstantial evidence. Slaven relied on an alibi defense that he was at home with his wife.

At trial Slaven and his wife Becky invoked the marital privilege set out in KRE 504. However, the trial court ruled she was an unavailable witness and admitted her out of court statements under KRE 804(a)(1). On appeal, Slaven argued the trial court erred when it allowed the prosecutor to introduce his wife's out of court statements through the testimony of other witnesses.

The Kentucky Supreme Court stated that an out-of-court statement of a witness who is precluded from testifying because of invocation of the spousal privilege is admissible if that statement falls within a recognized exception to the hearsay rule and if it does not divulge a confidential marital communication. Applying this test to the facts of the case at bar, the Court examined each of Becky's fourteen out of court statements to determine if it was hearsay; whether it fell within an exception to the hearsay rule; whether it was excluded by the marital privilege, and whether its admission at trial was prejudicial. Out of a total of fourteen statements, the Court held that admission of seven constituted prejudicial error requiring reversal of Slaven's convictions. The Court found the admission of two other statements was harmless error, and held those statements should be excluded upon retrial.

The evidence presented at trial from numerous witnesses showed that Slaven had consumed large quantities of beer, whiskey, xanax and marijuana on the day of the charged offenses. Based on this evidence, the trial court instructed the jury, in a separate instruction, on the defense of intoxication. However, the trial court refused to give Slaven's requested instruction on second degree manslaughter.

The Kentucky Supreme Court held it was reversible error for the trial court to fail to instruct the jury on the lesser-included offense of second degree manslaughter. The Court stated that "while voluntary intoxication is a defense to intentional murder, it is not a defense to second degree manslaughter." A jury's belief that a defendant was so voluntarily intoxicated that he did not form the requisite intent to commit murder does not require an acquittal, but could reduce the offense from intentional homicide to wanton homicide, *i.e.*, second degree manslaughter. As part of its instructions, the trial court included a definition of intoxication and voluntary intoxication. During its deliberations the jury sent a note to the trial court asking for a clarification of the difference between the two terms and does the fact that the intoxication is voluntary have any bearing on the intoxication defense instruction. The trial court did not answer the jury's questions.

On appeal, Slaven argued that the definition of voluntary intoxication was prejudicial surplusage. The Kentucky Supreme Court held the error was not in the instruction on the definition of voluntary intoxication, but in failing to instruct on second degree manslaughter and the definition of wantonly.

A third issue raised by Slaven was that the introduction of a prior consistent statement of prosecution witness Joey Gadberry amounted to improper bolstering. Gadberry and Slaven had spent the afternoon and early evening of the day of the robbery together. Gadberry gave two written statements to the police: one on January 15th and a more detailed statement on January 24th. During his direct testimony, Gadberry told the jury about Slaven's activities on the day of the robbery. On cross-examination, defense counsel pointed out that most of the significant details of Gadberry's testimony were not included in his January 15th statement to the police. On redirect, the prosecutor attempted to rehabilitate Gadberry by having him read to the jury, in its entirety, his January 25th statement.

The Supreme Court pointed out it was Slaven who initially introduced portions of the January 28th statement. The Court held that [o]nce a portion of a statement is introduced by one party, the rule of completeness allows the adverse party to require the introduction of the remainder of the statement. KRE 106. Thus, no error occurred.

Slaven raised the following additional issues on appeal.

First, Slaven argued it was error to prevent him from impeaching a defense witness, Jeff Jones, a third cousin of the victim, by showing that at another time and place Jones had fired a pistol into a car occupied by another of his cousins, for which he was convicted of second degree wanton endangerment. The Supreme Court held this evidence was properly excluded because it was impeachment on a collateral matter; it was really an effort to get inadmissible evidence before the jury under the guise of impeachment; it was not relevant because it did not prove Jones killed Noble; and second degree wanton endangerment is a misdemeanor and only felony convictions may be used for impeachment.

Second, Slaven argued the prosecutor engaged in misconduct by repeatedly asking improper questions and then rephrasing or withdrawing them after the damage was done. The Supreme Court held the record did not reveal a pattern of improper questioning and thus there was no ground for reversal.

Third, the Court held it was not error for the prosecutor to elicit from the chief investigating officer that the two men had consulted on the case prior to seeking a warrant for Slaven's arrest.

Fourth, the Court held it was not error for the prosecutor to elicit from Slaven's mother-in-law that it was only after Slaven changed attorneys that he came up with the theory that either Joey Gadberry or Jeff Jones had stolen his pistol and used it to commit the robbery and murder. The evidence was relevant to support the Commonwealth's theory that Slaven's alibi was a recent fabrication.

Fifth, the Court held the prosecutor's comment in closing argument, AI think he's a cold-blooded murderer from the evidence that we've shown you, was within the bounds granted to both parties in closing argument.

Sixth, the Court held it was error to allow Sgt. Allen to testify that police dispatcher Wayne Delph called him to report an anonymous tip that Slaven had been seen in the vicinity of the crime with a 9-mm pistol, taking drugs and trying to borrow money.

Seventh, Slaven argued it was error for the trial court to use the capital penalty verdict forms at Section 12.10 in Cooper, *Kentucky Instructions to Juries (Criminal)*, (4th ed., *Anderson*, 1993), instead of the form at Section 12.10A. The Supreme Court held that even though it preferred the form in the latter section, it was not reversible error to use the form in Section 12.10.
Slavens' convictions were reversed for a new trial.

***Meredith v. Commonwealth*, Ky. ___ S.W.2d ___ (12/18/97)**

Meredith was indicted in the Franklin Circuit Court for capital kidnapping, capital murder and first degree rape. At the close of the Commonwealth's case, the trial court granted Meredith's motion to dismiss the rape charge due to the Commonwealth's failure of proof. At the close of all the evidence, the jury was unable to reach a verdict on the remaining kidnapping and murder charges. On retrial, Meredith was convicted of capital kidnapping and capital murder and sentenced to life imprisonment without the possibility of parole for twenty-five years and life respectively.

On appeal, the Kentucky Supreme Court addressed five issues raised by Meredith.

The first issue concerned the sufficiency of the evidence to support the capital kidnapping conviction. Meredith argued he was entitled to a directed verdict of acquittal because there was absolutely no evidence he unlawfully restrained Teresa Larsen with the intent to rape her. The Kentucky Supreme Court disagreed. The Court stated the evidence showed that Larsen's body was found rolled up in a carpet, unclothed from the waist down, with a coaxial cable wrapped around her neck and right wrist. Other evidence showed the cable came from Meredith's CB radio. There was also evidence that the duct tape, which was found around Larsen's neck, was **possibly** used as a gag around her mouth and had slipped down around her neck due to decomposition of her body. Accordingly, it would not have been unreasonable for the jury to conclude that Meredith restrained Larsen with the intent to rape her.

The second issue concerned the introduction of improper, prejudicial hearsay testimony. Det. Ball testified the prosecutor had given him a letter written by Paul Childers, a concerned inmate, that said another inmate, Pearl Smith, had information about Meredith's case. Childers' letter alleged that Smith had told Childers that Meredith had told Smith certain details about the crime. As a result of the letter, Det. Ball went to interview Pearl Smith.

Smith testified and denied knowing Childers. The prosecutor asked Smith a series of questions as to what Smith told Det. Ball that Meredith had told Smith. Smith denied making most of the statements to Det. Ball. The prosecutor then asked Smith if Ball had read him a portion of the Childers' letter which said: "Yeah, I [Meredith] really fucked up when I left that cable where the police could find it." Smith admitted that Ball had read the sentence to him, but testified that Meredith did not say that. The prosecutor then asked Smith if Ball had read a portion of the letter to him that said "Hank had strangled someone with a cord to a radio antenna," and asked Smith if Smith had said that. Smith denied making the statement.

Det. Ball was recalled later in the trial and the prosecutor elicited from him that Smith had told him that the information in the Childers' letter was accurate. Defense counsel specifically objected to Det. Ball repeating the contents of the letter, since Childers was not a witness at trial, but the trial court made no ruling and the prosecutor had Det. Ball read portions of the letter to the jury.

Citing *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969), the Kentucky Supreme Court held Det. Ball's testimony as to the contents of the Childers' letter was inadmissible hearsay and reversible error. Unlike in *Jett*, where both the wife, who made the out-of-court statement, and the sheriff, to whom she allegedly made the statement, testified, in the case at bar Paul Childers never testified. Thus, Meredith was denied his right to confront the witnesses against him.

The Court pointed out that if the prosecutor's true intent was to impeach Pearl Smith, he could have done so with the testimony of Det. Ball. Childers had no personal knowledge of the charged offenses and the letter was not necessary to prove what Smith told Det. Ball.

The Court also stated it was improper to place the contents of the Childers' letter before the jury because it contained an opinion of a witness as to Meredith's guilt.

The Court reversed and remanded for a new trial because of the improper introduction of the Childers' letter.

A third issue concerned the introduction of testimony about an out-of-court experiment the prosecutor conducted which was offered to show that the duct tape found around Larsen's neck was consistent with having been placed over her mouth. The prosecutor had a trace analyst from the KSP lab testify as to the length of each piece of duct tape that was found around Larsen's neck. The pieces ranged in length from four to nineteen inches. The prosecutor then had his paralegal testify that as part of an experiment with the trace analyst and the prosecutor it was determined that the circumference of her head at the point of her mouth was nineteen and one half inches. Based upon this out of court experiment, the prosecutor told the jury in closing argument that "I think it's clear that was a gag that was on there at one time and due to the decomposition of the body and the hair and everything coming down, it got below her neck."

The Supreme Court held that the paralegal's testimony and the prosecutor's comments upon it during closing argument were improper because they were based on facts outside the record. Since no evidence was introduced as to the circumference of Larsen's head, the evidence of the out of court experiment was irrelevant. The Court reversed on this issue.

The fourth issue concerned the prosecutor's comments during closing argument that DNA extracted from two cigarettes found in Larsen's apartment matched Meredith's DNA. Evidence was introduced that several cigarette butts found in Larsen's apartment were the same brand as the brand Meredith was smoking at the time of his arrest. Because there was only a very small amount of saliva on the cigarette butts, they could not be tested at the KSP crime lab, but had to be sent to an out of state lab that was able to do PCR type testing. The lab report stated that "[t]he HLA DQ alpha type 1.2, 1.3 obtained from the cigarette butt is consistent with the HLA DQ alpha type obtained from Hank W. Meredith and occurs with a frequency of 2.6% in the North American Caucasian population."

Based on this evidence, the prosecutor told the jury in closing argument that of that 2.6% of the population, .8% smokes; and "what percentage of them smoke Doral full flavor filter kings? I submit to you . . . that we're getting that percentage of who that could have possibly been way back."

The Court held the prosecutor's "comments lacked an adequate foundation in statistical theory and seem to have come about by virtue of the brand of cigarettes [Meredith] allegedly smoked...The calculations were completely unfounded and in error." Because the Commonwealth had a weak, circumstantial case, the Court held the error was not harmless and reversed for a new trial on this issue.

A fifth issue was that the trial court's capital kidnapping instruction was improper because it violated principles of double jeopardy. The court instructed the jury that it could find Meredith guilty of kidnapping if it believed beyond a reasonable doubt that he restrained Larsen with the intent "to accomplish the commission of attempted rape..." However, the first degree rape charge had been dismissed at Meredith's first trial due to the insufficiency of the evidence.

The Court, citing *Davis v. Commonwealth*, Ky., 561 S.W.2d 91, 95 (1978), stated "it is improper to use a crime, for which one had been acquitted, to satisfy an element of another crime. In the case at bar, [Meredith] cannot be convicted of kidnapping if the rape, for which he had previously been acquitted, is an essential element of that charge." Thus, the use of the attempted rape to satisfy the "felony" element of the kidnapping statute violated double jeopardy principles and was reversible error.

Meredith's convictions were reversed for a new trial.

***Commonwealth v. Stallard and Adams*, Ky.**
___ S.W.2d ___ (12/18/97)

Stallard and Adams were separately indicted for first degree perjury based on testimony each had given before a Special Letcher County Grand Jury. The Grand Jury was conducting an investigation into the activities of Letcher County Commonwealth's Attorney James Wiley Craft and possible public corruption. Stallard was a permanent part-time secretary in the Commonwealth Attorney's office and Adams was a detective employed by the Commonwealth Attorney. The Letcher Circuit Court dismissed the charges against Stallard and Adams. The Court of Appeals affirmed the circuit court's dismissal. The Commonwealth sought discretionary review which was granted by the Kentucky Supreme Court.

To obtain a conviction for first degree perjury, the Commonwealth must prove beyond a reasonable doubt that the accused, under oath, in an official proceeding, knowingly made a "material false statement." KRS 523.010(1) defines a "material false statement" as "any false statement, regardless of its admissibility under the rules of evidence, which could have affected the outcome of the proceeding." The circuit court's dismissal of the indictments against Stallard and Adams specifically found that, under KRS 523.010(1), no "material false statement" which could "affect the outcome of the grand jury proceeding was made by Stallard and Adams."

The circuit court's ruling was based on the fact that the amount of time spent by Stallard on [her] job could not be used as a proper basis for a criminal indictment since no published guidelines or definition existed as to the minimum number of hours of work required for said position.
The Kentucky Supreme Court pointed out that "[w]hether a false statement is 'material' in a given factual situation is a question of law . . . This Court is not inclined to establish a rigid or inflexible standard that trial courts must follow in deciding whether a 'material false statement' has been made. Instead, that determination should be left to the sound judgment of Kentucky's trial court judges on a case by case basis. The Court held "that, under the facts of this particular case, the elements of first degree perjury have not been fulfilled. We do not pass on whether the elements of any other crime relating to false testimony have been fulfilled, because that issue is not before the Court."

The Court affirmed the opinion of the Court of Appeals.

***McGinnis v. Wine*, Ky.**
___ S.W.2d ___ (1/22/98)

This case involves an original action in the Court of Appeals in which McGinnis sought a writ of prohibition to prevent his retrial on double jeopardy grounds. The Court of Appeals denied the writ. McGinnis appealed the denial to the Kentucky Supreme Court. The action was the result of the following facts.

McGinnis was tried in the Jefferson Circuit Court for murder and was convicted of wanton murder. Not only did the jury sign the verdict form of guilty under wanton murder, it also signed the not guilty verdict forms for the lesser-included homicide offenses of first degree manslaughter, second degree manslaughter and reckless homicide. The prosecutor did not move to set aside these not guilty verdicts, nor did the trial court set them aside *sua sponte*. The Kentucky Supreme Court reversed McGinnis' conviction. Upon remand to the circuit court for a new trial, McGinnis moved to dismiss the indictment, or for a judgment of acquittal, on the ground that a retrial would violate double jeopardy principles. The Commonwealth did not intend to retry McGinnis for intentional murder; rather it sought retrial on the lesser-included homicide offenses.

In support of his writ of prohibition, McGinnis argued that the jury's signature on the not guilty verdict forms for the lesser-included homicide

offenses prevented his retrial on those offenses. The circuit court and the Court of Appeals rejected McGinnis' argument, holding the not guilty verdicts were unnecessary and unauthorized surplusage.

On appeal from the Court of Appeals' denial of his writ of prohibition, the Kentucky Supreme Court framed the issue as "whether the jury's conduct in completing the not guilty portions of the verdict forms of the lesser-included offenses, despite the admonition in the wanton murder instruction to 'say no more,' bars retrial." The Court stated that "an action by a jury which exceeds the scope of its authority is mere surplusage, which is not binding on the trial court." "When the jury found McGinnis guilty of wanton murder, it necessarily concluded that all of the elements of the lesser-included offenses were present.... By proceeding beyond its instructions and authority, the additional verdicts amounted to no more than mere surplusage." The Court held "the unauthorized recommendations of the jury on the lesser-included offenses to be nonbinding surplusage, which may be ignored."

The Court of Appeals' opinion was affirmed.

***Jarvis v. Commonwealth*, Ky. ___ S.W.2d ___ (1/22/98)**

Jarvis was angry at his wife and threw a knife at her during an argument. The knife blade entered her throat killing her. Jarvis was indicted for murder and possession of cocaine. The cocaine charge was dismissed, and the jury convicted Jarvis of wanton murder and sentenced him to thirty years in the penitentiary. On appeal, Jarvis raised the following issues.

First, Jarvis argued the trial court erred when it found the couple's three and one half year old daughter, who witnessed the stabbing, competent to testify. The Kentucky Supreme Court held the trial court did not abuse its discretion in finding the child competent to testify after holding a competency hearing.

Second, Jarvis argued his daughter's testimony was improperly bolstered by the testimony of several other prosecution witnesses. Some witnesses repeated what the child had told them, and other witnesses testified to what they had overheard the child tell someone else. The repetition of the child's out-of court statements was hearsay. The Commonwealth argued the child's out-of - court statements were admissible as exceptions to the hearsay rule because they were either present sense impressions or excited utterances.

The Kentucky Supreme Court held the hearsay statements were not admissible under the present sense impression exception to the hearsay rule (KRE 803(1)) because there was no evidence in the record as to the amount of time between the mother's death and the child's statements. Also, the child was not questioned regarding the circumstances surrounding the making of her statements, and the witnesses who testified to the statements were only questioned generally as to the circumstances surrounding the statements.

The Court also held the out-of-court statements were not admissible under the excited utterance exception to the hearsay rule. In *Souder v. Commonweaith*, Ky., 719 S.W.2d 730 (1986), the Court set out eight criteria that should be met for an out-of-court statement to be admissible under the excited utterance exception to the hearsay rule. In the case at bar, the Commonwealth failed to meet these criteria since it did not present evidence of the child's emotional state at the time the statements were made; it did not establish the time period between the child's statements and her mother's death; and it did not establish whether the statements were made spontaneously or in response to questioning.

A third issue raised by Jarvis concerned the improper admission of character evidence through three different witnesses. One witness testified she saw bruises on Jarvis' wife days prior to her death. However, since there was no evidence connecting this abuse to Jarvis, the Supreme Court held the evidence was irrelevant and should have been excluded under KRE 403 as being more prejudicial than probative.

Another witness testified that just prior to Jarvis' wife's death, she [the witness] and Jarvis were going out to buy a controlled substance. Since this evidence was not introduced to show motive, intent or malice, and was only used to paint Jarvis in a bad light, it should have been excluded under KRE 404.

A third witness testified Jarvis had made threats to cut his wife's throat, within three to four weeks prior to her death, if she did not leave him alone. The Court held this testimony was admissible to establish malice or intent to kill. [Yet it should be noted that Jarvis was convicted of wanton, not intentional, murder].

However, the Court concluded the erroneous admission of the hearsay evidence was harmless error because when Jarvis testified he confirmed his daughter's testimony as well as the evidence of

prior abuse testified to by the two above-mentioned witnesses. As to the evidence that Jarvis was about to go purchase a controlled substance before he killed his wife, the Court held there was not a reasonable probability that said testimony contributed to Jarvis' wanton murder conviction.

Lastly, Jarvis argued the trial court erred when it read Count Two of the Indictment to the jury during voir dire even though there was a motion pending to dismiss Count Two. When Count Two was dismissed, the trial court, at defense counsel's request, informed the jury that the charges in Count Two had been dismissed. The Kentucky Supreme Court held the trial court's actions were not an abuse of discretion and no error occurred.

Jarvis' wanton murder conviction was affirmed.

***Walker v. Commonwealth*, Ky.App. ___ S.W.2d ___ (12/24/97)**

Walker, a juvenile, was indicted in the Fayette Circuit Court for first degree robbery. Walker's case was transferred to circuit court pursuant to KRS 635.020.

Walker entered a guilty plea to an amended charge of criminal facilitation to commit first degree robbery, a class D. felony. Walker was sentenced to five years. The trial court then probated Walker's sentence. One of the conditions of Walker's probation was that he serve an additional six months in the Fayette County Juvenile Detention Center. Walker requested credit for the 215 days he had already served in the juvenile facility, but the trial court denied the request, holding that the six months additional incarceration was a "'tool for the court to use as a condition of probation.'"

The only issue on appeal was whether the trial court could impose the additional six month jail sentence as a condition of probation since Walker had already served more than six months awaiting sentencing.
The Court of Appeals held that Walker was entitled to credit for the time he had already served awaiting sentencing based on the interplay of KRS 533.030(6) and KRS 532.120(3).

The Court of Appeals vacated that portion of the judgment requiring Walker to serve an additional six months in the juvenile detention center as a condition of probation, without receiving credit for the time he previously served awaiting sentencing.

***Logston v. Commonwealth*, Ky.App. ___ S.W.2d ___ (1/23/98)**

Logston entered a conditional guilty plea, in the Fayette Circuit Court, to one count of use of a minor under the age of sixteen in a sexual performance in violation of KRS 531.310. He was sentenced to ten years imprisonment. The charge arose from the following facts.

Logston persuaded a twelve year old girl to try on and model two bathing suits in his home. Logston secretly hid a video camera in his bedroom and taped the young girl while she was trying on the bathing suits. The videotape showed the young girl's exposed breasts, buttocks and pubic area. The videotape was found in Logston's home dubbed onto a commercially available sexually explicit adult videotape. Approximately one hundred bathing suits and negligees were found in Logston's home and he admitted having a fetish for this type of clothing.

Logston raised two issues on appeal.

First, Logston argued that "mere nudity of the minor was not 'obscene' sexual conduct." The Court of Appeals stated the issue as being "whether the videotape depicting the twelve-year old girl exposing her breasts, buttocks and pubic area while she is in the process of changing her clothes, has as its predominate appeal, when taken as a whole, a prurient interest in sexual conduct involving a minor." The Court of Appeals concluded that it did because of Logston's carefully planned manipulation of the young girl dressing and undressing in sexually appealing clothing, his surreptitiously videotaping the girl in the nude while her breasts, buttocks and pubic are were exposed and his dubbing that videotape onto a sexually explicit adult videotape.

Second, Logston argued his conduct was not prohibited by the statute. The Court of Appeals disagreed. It held the videotape depicts the victim in a manner that "the predominate appeal of the matter taken as a whole is to a prurient interest in sexual conduct involving a minor." KRS 531.310.

Logston's conviction was affirmed.

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DISTRICT COURT PRACTICE:
Dear Diary: What a day it's been.

This month, apologies for our title go out to *The Moody Blues*. No citations, no legal analysis, no 'war stories', what kind of article is this? The following has been taken from the personal diary of a new staff employee of the Department of Public Advocacy. The names have been changed to protect the guilty.

Dear Diary:

It has been a while since I started the new job with the Department of Public Advocacy. WOW! I have worked for a lot of legal offices but have never seen such skilled attorneys. They are very intelligent and really know their work inside and out. They get constant training so they can be the best and there is no question that they are the best. The dedication to their clients is amazing.

I only wish they would let me really help them. I am also real good at my job but feel that I could help them a lot more if they would only let me. Last week, I finally talked to Shawn about his phone calls. We get so many calls, sometimes I feel like that handset is cemented to my ear. Half of them seem to be his calls and they are mostly repeats. I tried to explain that every time he ducks a call or forgets to call a person back it means I eventually have to spend time taking another message. That cuts into the time I have available to do my other work. I wish he would just spend the 2 or 3 minutes it would take to talk to the person. It would save me hours of repeatedly taking messages and promising that I would see to it that he returns the call.

Joan has again promised to try to not rely on me to be her personal baby sitter. She runs into the office late, grabs her things and runs to Court. Sure enough, 30 minutes later, she calls asking me to bring her the file she left sitting on her desk. I know she is busy and I do not even mind doing some of the less critical paper work but it is always last minute: "I don't have time to fill out my time sheet, will you do it for me"; "I was supposed to file this yesterday, will you run it to the clerk's office"; "I forgot to get those blank subpoena forms I need, will you pick some up before you go to lunch". Some days I feel like pinning notes to her blouse so she will remember all of the things she needs.

Telephones seem to be a curse. Even when I call another office for a question or to get some help it seems like they never return the call and I just keep having to call and call again.

Sometimes I need to help serve subpoenas. Mick will lay out a trial in detail, knowing exactly what questions he will ask and even the expected answers. He has it all put together weeks in advance of trial. Even then however, it is like all the other cases from all of the other attorneys. The night before trial, out come the stack of subpoenas and we all end up running all over the county serving them for the trial in the morning.

Procrastination must be a class in law school. If I had the work in hand when it was first developed, it would not be an emergency and everything would run much smoother.

Worse than the telephone calls and emergencies that would not be a problem under normal conditions is the paper work. We have a lot of forms that need to be filled out for various things. Time sheets, travel reports and case tracking forms are the main ones. You would think that someone with all of that college could understand how to fill out a simple form but inevitably, I end up running around trying to find an answer to fill in one or two blank spaces.

It may sound pretty awful from all of my complaints but really, I love the job and the people I work with. I just wish they would consider how much help I could really give them if I were given half a chance.

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Confidential Request for Funds: Lack of Money Does Not Mean Less Protection

Funds for experts and other resources lose much of their meaning if obtained at the expense of confidentiality. Fortunately, our Constitution, caselaw, and statutes increasingly recognize the need for requests for funds by indigents to be confidential without the prosecutor, public or media present. Without this confidential process, indigents are penalized by their poverty into prematurely revealing their defense strategies. With this confidential process, the attorney/client privilege is insured.

Non-Confidential Requests Create Constitutional Problems

A request for funds for experts or other resources must contain enough information to meet the *threshold showing* which is necessary to justify the fourteenth amendment right to the defense resources. ***Ake v. Oklahoma***, 470 U.S. 68, 105 S.Ct. 1087, 1091, 1096, 84 L.Ed.2d 53 (1985). Almost necessarily, that *threshold showing* will contain privileged information about the defense which the prosecutor is either never entitled to discover or not entitled to discover at this early juncture of the proceedings.

A non-indigent criminal defendant selects and hires experts, investigators, etc. without knowledge of the prosecutor or court. In the civil arena, information about the retention of an expert by a party is not discoverable. *See, e.g.*, ***Newsome v. Lowe***, 699 S.W.2d 748 (Ky.App. 1985). In order to obtain public funds for resources, indigents rightly have to present information to a neutral judge who decides whether the requested assistance is reasonably necessary. But revealing that confidential information to the prosecution in a way that a nonindigent criminal defendant does not have to reveal it violates equal protection.

Ex parte proceedings increase the information available to the judge and increase the reliability of his decision. In assessing the request for public funds, the judge is entitled to the thoughts, reasoning and strategy of the defense, including matters within the attorney/client privilege, but the prosecutor is not entitled to that privileged information. Therefore, an *ex parte* proceeding has the pragmatic effect of allowing judges to obtain more information from the defense for the judge to make a decision since the proceeding is confidential. When a judge has more information, his decision is likely to be more reliable.

Kentucky's Authority

With rare exception, criminal defendants are not required to reveal their defense prior to trial. While KRS Chapter 31 provisions do not explicitly recognize the right to make requests for funds for resources *ex parte*, KRS 500.070(2) implicitly recognizes such proceedings as it states, "No court can require notice of a defense prior to trial time."

The necessary implication of this statutory provision is that a defendant cannot be required to reveal his defense by having to make his threshold showing in front of the prosecutor, public or media.

RCr 1.08, which addresses the service of motions, recognizes the *ex parte* nature of some motions by stating, "...every written motion other than one that may be heard *ex parte*...must be served upon each party."

Ake Requires Requests Be *Ex Parte*

Ake, *supra*, makes the statement, "when the defendant is able to make an *ex parte* threshold showing to the trial court...." "The intention of the majority of the *Ake* Court that [the threshold showing] hearings be held *ex parte* is manifest...." ***McGregor v. State***, 733 P.2d 416 (Okla.Ct.Crim. App. 1987).

Ake has been relied on by other courts to find that proceeding *ex parte* is constitutionally required. An "indigent defendant who requests that evidence supporting his motion for expert psychiatric assistance be presented in an *ex parte* hearing is constitutionally entitled to have such a hearing...." *State v. Ballard*, 428 S.E.2d 178, 179 (N.C. 1993). Preventing a defendant from proceeding *ex parte* improperly forces him to "jeopardize his privilege against self-incrimination and his right to the effective assistance of counsel, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." *Id.*

"Only in the relative freedom of a non-adversarial atmosphere can the defense drop inhibitions regarding its strategies and put before the trial court all available evidence of a need for psychiatric assistance. Only in such an atmosphere can the defendant's privilege against self-incrimination and his right to the effective assistance of counsel not be subject to potential violation by the presence of the State." *Id.* at 183.

Kentucky Caselaw: *Ex Parte* Process and the 5th & 6th Amendments

While no published Kentucky appellate level decision has held it reversible error to fail to allow an indigent criminal defendant to make his request for funds *ex parte*, the Kentucky Supreme Court has held in an unpublished opinion that the *ex parte* process is required in a highly analogous situation.

In the extraordinary writ case of ***Jacobs v. Caudill***, 94-SC-677-OA (Ky., Sept. 2, 1994) (unpublished) the Kentucky Supreme Court unanimously held that the hearing to "determine petitioner's competency to voluntarily and intelligently waive any defenses or otherwise direct his defense...." had to be conducted in accord with the 5th and 6th amendments. "To avoid any possible violation of the petitioner's constitutionally protected rights, it is mandated that when issues arise in said hearing involving petitioner's attorney-client privilege, right against self-incrimination or his right to prepare and present a defense, said proceedings shall be conducted by the trial court *in camera* and *ex parte*, but on the record."

No competent criminal defense attorney who practices his cases ethically would ever reveal any defense information prematurely, absent some strategic advantage.

In ***McCracken County Fiscal Court v. Graves***, 885 S.W.2d 307 (Ky. 1994) the Kentucky Supreme Court set out a very helpful principle: *Indigents are entitled to be represented to the same extent as monied defendants.*
The Court said, "We also take this opportunity to offer a bit of guidance to trial courts for the purpose of future determinations of what constitutes a reasonable and necessary indigent expense. In KRS 31.110(1)(a), it is stated that a needy defendant is entitled: To be represented by an attorney to the same extent as a person having his own counsel is so entitled. While this certainly cannot mean that an indigent defendant is entitled to have any and all defense-related services, scientific techniques, etc., that a defendant with unlimited resources could employ, we think it is a useful standard as a starting point. At a minimum, a service or facility the use of which is provided for by statute should be considered by a trial court, as a matter of law, to be 'reasonable and necessary.'" *Id.* at 313.

There "is no need for an adversarial proceeding, that to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants." *McGregor, supra*, at 416.

In other contexts, the Kentucky Supreme Court has recognized the necessity for courts to function *ex parte*. In *West v. Commonwealth*, 887 S.W.2d 338 (Ky. 1994) the Court held that a trial judge has jurisdiction to enter an order pursuant to RCr 2.14(2) after an *ex parte* hearing appointing public defender to an indigent being questioned by police and ordering that the questioning be stopped so the defendant could consult with the attorney. "By virtue of its general jurisdiction, the circuit court frequently acts *ex parte* in criminal matters. A clear example of such an act is in the issuance of search warrants. RCr 13.10." *Id.* at 341 n.1.

It is not reversible error for a trial court to conduct an *ex parte* hearing on the issue of funds for experts. In *Baze v. Commonwealth*, 953 S.W.2d 914, 923 (Ky. 1997) the Court stated, "On cross-appeal, the Commonwealth argues that the trial judge committed error in allowing the defense counsel to proceed *ex parte* in requesting funds for experts. Although we believe it is prudent to discourage *ex parte* proceedings in a trial of this importance, we do not find reversible error in this case."

Ex Parte Used in Other Contexts

Proceeding *ex parte* is commonly recognized as appropriate in other settings. Eleven examples of Kentucky statutes, rules, and caselaw which permit proceeding *ex parte* follow:

1) **CR 65.07(6) Interlocutory relief:** allows *ex parte* grant of emergency relief when a movant will suffer irreparable injury before a motion can be heard by a panel;
2) **CR 5.01 & RCr 1.08 Service:** exempts serving pleadings which may be heard *ex parte*;

3) **CR 6.04 Time for Motions:** serving written motions which may be heard *ex parte*;
4) **CR 53.05 Domestic Relations, Commissioners, Meetings:** allows proceeding to be conducted *ex parte* if a party fails to appear at the time and place appointed;
5) **CR 65.08(7)**: Interlocutory relief pending appeal from final judgment;
6) **CR 76.38**: Reconsideration of appellate orders;
7) **CR 77.02(1)**: Hearings outside judicial district;
8) **KRS 209.130(1)**: *Ex parte* order for protection when "it appears probable that an adult will suffer immediate and irreparable physical injury or death if protective services are not immediately provided...."
9) **KRS 620.060(1)**: *Ex parte* emergency custody order "when it appears to the court that there are reasonable grounds to believe, as supported by affidavit or by recorded sworn testimony, that the child is in danger of imminent death or serious physical injury or is being sexually abused and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child."
10) **KRS 645.120(3)**: Emergency involuntary hospitalization of a child that as a result of mental illness needs immediate hospitalization for observation, diagnosis or treatment. This can occur by telephone.
11) ***West v. Commonwealth*, 887 S.W.2d 338, 341 (Ky. 1994).** Circuit court can consider *ex parte* request for appointment of counsel under RCr 2.14. "By nature of its general jurisdiction, the circuit court frequently acts *ex parte* in criminal matters." *Id.* at 341 n.1.

The Federal Statute & Rule

Since 1964, the Criminal Justice Act, 18 U.S.C. 3006A(e)(1), has provided that requests by indigents for funds for resources be done *ex parte* if the defendant wants that confidential process.

That statute states, "Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application."

The federal Anti-Drug Abuse Act's provisions involving federal capital prosecutions provide for an ex parte hearing for funding of resources when there is a showing of a need for confidentiality: "No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made part of the record available for appellate review." 21 U.S.C. §848(q)(9).

Federal Rule of Criminal Procedure 17(b) allows applications for subpoenas by defendants unable to pay for their service be done *ex parte* to the court." See ***Holden v. United States***, 393 F.2d 276 (1st Cir. 1968). That rule states, "**Defendants Unable to Pay**. The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense."

Other Caselaw

An indigent defendant is entitled to ask for funds for expert help *ex parte* to avoid prejudicing the defendant by "forcing him to reveal his theory of the case in the presence of the district attorney." ***Brooks v. State***, 385 S.E.2d 81 (Ga. 1989).

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

"Where counsel for defendant objects to the presence of Government counsel at such a hearing, the failure to hold an *ex parte* hearing is prejudicial error." ***Mason v. Arizona***, 504 F.2d 1345, 1352 n.7 (9th Cir. 1974). "The manifest purpose of requiring that the inquiry be *ex parte* is to insure that the defendant will not have to make a premature disclosure of his case." ***Marshall v. United States***, 423 F.2d 1315 (10th Cir. 1970). See also ***United States v. Sutton***, 464 F.2d 552 (5th Cir. 1972).

Standing of the Funding Authority

Under KRS 31.185 fiscal courts, except for Jefferson County, now pay a fixed sum into a statewide indigent resources fund with the state paying anything above this fixed amount.

When the county fiscal courts had sole responsibility for these funds, the county clearly

had standing to challenge the court's determination. After July 15, 1994, the effective date of the amendment to KRS 31.185, the only entity likely to have standing to challenge the authorization of funds or their amount is the Finance and Administration Cabinet since county fiscal courts must pay a fixed amount of money into the statewide special fund, and only the state has an open financial obligation if the fund is exhausted.

Presence of Attorney for Funding Authority

The ultimate funding authority, now the Commonwealth of Kentucky through the Finance and Administration Cabinet, is not legally entitled to be present at any *ex parte* hearing. *See* ***Boyle County Fiscal Court v. Shewmaker***, 666 S.W.2d 759, 762-63 (Ky.App. 1984).

The presence of counsel for the funding authority "would create unnecessary conflicts of interest; in any event, county counsel's presence cannot be permitted because such petitions are entitled to be confidential." ***Corenevsky v. Superior Court***, 204 Cal.Rptr. 165, 172 (Cal. 1984) (In Bank). The funding authority's right to challenge the awarding or amount of funds is available after entry of the order.

Local Rules

For some time, the Fayette County local rule, Rule 8B, requires *ex parte* hearings when indigents requested funds for an expert or other resource.

Conclusion: Lack of Money Does Not Mean Less Protection

Nationally, the trend is to permit funds requests to be made *ex parte*. "Six states allow for the procedure via legislation, these states being California, Kansas, Minnesota, Nevada, New York, and Tennessee. Nine other states have judicially allowed for *ex parte* hearings on these requests: Arkansas, Florida, Georgia, Hawaii, Indiana, Michigan, North Carolina, Oklahoma, and Washington." *State v. Touchet*, 642 So.2d 1213, 1218 (La. 1994). Requesting funds for resources to insure a competent defense must be *ex parte* to make sure that obtaining appropriate funds is done without sacrificing confidential information. Indigents are entitled to the same confidential aid that monied defendants do not even have to seek. *Poverty should not be a penalty.*

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TABLE OF AUTHORITIES

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 1091, 1096, 84 L.Ed.2d 53 (1985)

Newsome v. Lowe, 699 S.W.2d 748 (Ky.App. 1985)

McGregor v. State, 733 P.2d 416 (Okla.Ct. Crim.App. 1987)

State v. Ballard, 428 S.E.2d 178, 179 (N.C. 1993)

Jacobs v. Caudill, 94-SC-677-OA (Ky., Sept. 2, 1994)

McCracken County Fiscal Court v. Graves, 885 S.W.2d 307 (Ky. 1994)

West v. Commonwealth, 887 S.W.2d 338 (Ky. 1994)

Baze v. Commonwealth, 953 S.W.2d 914 (Ky. 1997)

Holden v. United States, 393 F.2d 276 (1st Cir. 1968)

Brooks v. State, 385 S.E.2d 81 (Ga. 1989)

State v. Smart, 299 S.E.2d 686, 688 (S.C. 1982)

Mason v. Arizona, 504 F.2d 1345, 1352 n.7 (9th Cir. 1974)

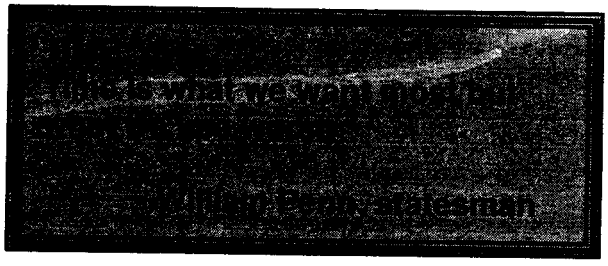
Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970)

United States v. Sutton, 464 F.2d 552 (5th Cir. 1972)

Boyle County Fiscal Court v. Shewmaker, 666 S.W.2d 759, 762-63 (Ky.App. 1984)

Corenevsky v. Superior Court, 204 Cal.Rptr. 165, 172 (Cal. 1984)

State v. Touchet, 642 So.2d 1213, 1218 (La. 1994)▼



National Clearinghouse for the Defense of Battered Women
125 S. 9th Street, Suite 302, Philadelphia, PA 19107
Tel: (215) 351-0010; Fax: (215) 351-0779

If in the course of your work, you come in contact with a battered woman charged with a crime (who may be facing trial or considering a plea, going through a trial, waiting to be sentenced, or if her case is on appeal) or a battered woman who is in jail or prison, please contact the national Clearinghouse for the Defense of Battered Women. The staff of the National Clearinghouse, comprised of two full-time staff people and part-time consultants, will work with you to assess the situation and determine how they can be of assistance. For example, we work with battered women charged with killing their abusers, women who are coerced into criminal activity, and women who are charged with a crime a result of "failing to protect" their children from their batterers violence and/or abuse.

Examples of when to call the National Clearinghouse:

If the woman is charged with a crime. Staff works with members of the defense teams -- defense attorneys, expert witnesses, battered women's advocates, investigators and the woman herself -- in identifying defense strategies, providing relevant case law and examples of litigation materials, identifying expert witnesses when needed/requested, and helping to identify support networks for the woman who is facing trial or whose case is on appeal.

If the woman is in prison. If there are any legal options available, or if the woman is pursuing a clemency or parole application, we work with her local counsel and/or advocates. We also correspond with hundreds of incarcerated women nationally. Membership to our Supporting Members' Network is free for women in prison and incarcerated women who join receive our newsletter, *Double-Time*, free of charge.

If your state is working on a clemency campaign/clemency petitions. We have an extensive resource library of information about clemency generally and battered women's clemency actions specifically. Staff can help think through some of the ups and downs of clemency campaigns and provide information about other people who have worked on clemency issues in the past.

If your program/organization is currently running or planning to run a support group for women in prison. Staff will provide you with information about other support groups around the country. We can connect you with other group facilitators and give you information about curricula used by some of the groups. We published a set of Working Papers about prison and jail support groups in 1991.

If your state is thinking about introducing or has introduced legislation that directly impacts on battered women charged with crimes. Staff will help assess the current situation in your state, help analyze the proposed legislation, and provide information about similar legislation in other states.

If you are doing research on battered women who kill (exploring legal, social or psychological issues), incarcerated women, or the legal or psycho/social effects of battering on women (sometimes referred to as battered woman syndrome). The National Clearinghouse has an extensive Resource Library and a companion Annotated Bibliography that lists the 4,000 cases, articles and litigation materials that are in our Library. If you have written something that you believe should be included in our Resource Library, please send us a copy and we will gladly review it for possible inclusion.

If you have information about battered women charged with crimes please contact the National Clearinghouse. We count on people like you in the field to keep us up to date about what is going on in your state that affects battered women defendants and incarcerated battered women so we can pass this information along to others. Please send us newspaper articles, legislative proposals, information/feedback about expert witnesses and defense attorneys, prison support groups for battered women, etc.▼

Kentucky Department of Public Advocacy

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- ***The Domestic Violence Perpetrator***
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The Kentucky Justice Cabinet's Department of Criminal Justice Training

The more things change... the more things change! So it is with the Department of Criminal Justice Training! Since July 1996, when the new administration arrived, change has been the operative word! And, those who have realized these changes will certainly say that change is good! From a new organizational structure to a new look in attire, the Department is just different.

The DOCJT is divided into two branches, In-Service and Basic Training. Within the In-Service Branch, Breath Testing and Tele-Communications Training are also included. Currently, the Department of Criminal Justice Training employs thirty-one law enforcement training instructors who are supported by an administrative staff of thirty. The executive management staff includes eighteen men and women. The average instructor has eight years with the department. Eighty-six percent of the certified personnel have a bachelor's degree and thirty-four percent have advanced degrees. The thirty-one instructors have an average of thirteen years of law enforcement experience.

Almost every law enforcement officer in the state receives initial training through the DOCJT. Improving standards of entry level officers and encouraging better service to local communities are two forces behind much of the training provided. In the Basic Training Branch, the officers receive instruction in courses including, but not limited to the following: Firearms, Physical Fitness, Mechanics of Arrest Restraint and Control, Criminal Law, Defensive Driving, Investigation and Patrol Techniques, and Domestic Violence. This comprehensive 400-hour/ten week curriculum is expected to expand within the very near future.

The In-Service Branch provides continuing education and training to experienced officers in Kentucky. After an officer completes the required 400 hours of basic training, he/she is given an incentive of $2,500 to complete an additional forty hours of in-service each year. The curriculum selected for these courses is relative to current issues and demands on police officers. In one effort to address such topics, the Department recently conducted a statewide survey of prosecutors and defense attorneys regarding those areas in which they believed police officers needed more training. The results of this survey will be available in late January.

The current administration has established several key priorities that will be of primary concern over the next several months. Some of these initiatives include:

Licensing of Law Enforcement Officers - In March 1997, a committee was developed to study and make recommendations concerning licensing standards in Kentucky. The purpose of this effort is to establish uniform minimum hiring requirements, thus improve the overall quality of entry level police officers. This initiative is the result of a 1996 statewide survey of police executives that revealed that 94% were in favor of developing licensing standards for the state.

Law Enforcement Training Complex - Plans are being made for a new residence hall that will house all functions of the Basic Training Section. This facility will allow the trainees to live in and attend classes in one building. In addition, all Basic Training instructors will have office space in the building which will make the staff accessible to the trainees at all times. Construction has been approved by Eastern Kentucky University and the Governor plans to address the issue at either a special legislative session or in regular session in January 1998. This initiative is directly related to the anticipated extension of the training from ten to sixteen weeks and the potential of an even larger training population with the addition of sheriffs and university police as required participants.

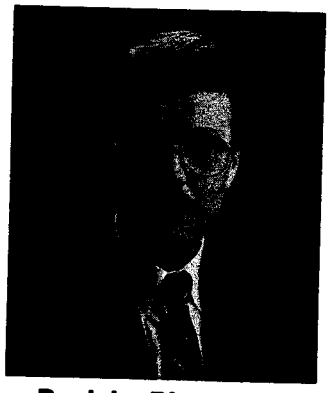
Criminal Justice Executive Development Program - This effort will target smaller police agencies in this region of the country for the purpose of providing management and leadership training. This eight-week/320 hour program will address a variety of issues including a systems orientation to the Criminal Justice System, personnel management, organizational theory and behavior, innovations in technology effective communications and basic leadership strategies. The primary objective will be to enhance the

knowledge and administrative skills of commanding officers such that they will become more effective managers in law enforcement.

Academy Accreditation - The DOCJT will soon pursue becoming only the second accredited law enforcement training facility in the US. This will enhance our existing quality reputation, assist in becoming a leader in police training, help when applying for Federal grants, and promote the hiring of quality instructors in the future. This initiative represents the administration's understanding the need for and promoting current, relevant, and quality instruction for Kentucky police officers.

New Instructional Strategies - The Department has investigated the possibility of initiating a facilitator led/problemsolving approach to instruction. As a result of a visit to the Royal Canadian Mounted Police Training Academy in Canada, efforts have begun to begin gradual implementation of this model.

Job Task Analysis - The Staff Services and Planning is currently working on a new Job Task Analysis. This is a comprehensive evaluation of the job of a non-ranking patrol level officer in Kentucky. The focus will be in determining just where the emphasis should be as we increase the requirements for entry level officers. This revision will replace the existing Job Task Analysis which was written in 1986. It is anticipated that significant modifications will occur in the Basic Training courses as a result of this initiative.



Dr. John Bizzack

It can be expected that good things will continue to happen at the Department of Criminal Justice Training. We are committed to progressive improvements in all areas of law enforcement and hope to be a leader in our field! For continuing information, visit our web site at: docjt.jus.state.ky.us or you may reach one of us at (606) 622-1328.

Dr. John Bizzack, Commissioner
Department of Criminal Justice Training

Mr. Greg Howard, Supervisor/Basic Training
Department of Criminal Justice Training

Both Dr. Bizzack and Mr. Howard are retired Police Captains with over forty years of combined experience in the law enforcement field.▼

University of Cincinnati Institute for Psychiatry & Law

The University Institute for Psychiatry & Law, a division of Psychiatric Professional Services, Inc., a not-for-profit corporation, formally came into existence in April, 1997 with the hiring of Paul A. Nidich as its Executive Director. The idea for the Institute developed from the interest of a number of psychiatrists in the Department of Psychiatry at the University of Cincinnati College of Medicine to get involved with "forensic psychiatry," a growing field of aca-demic, research, and practice interests.

Headed by James R. Hillard, M.D., chair of the Department of Psychiatry and CEO of UC Medical Associates, the University's multispecialty practice group, a number of psychiatrists set about hiring an Executive Director to help bring this concept to fruition. Soon after the arrival of Mr. Nidich, an attorney for 23 years, admitted to practice in both Kentucky and Ohio, the Institute developed a statement of Mission, Vision, and Values, focusing on teaching, research, and practice and dedicating the Institute to the highest standards of ethics and professionalism in all aspects of its work.

The faculty includes six psychiatrists, a neuro-psychologist, and an attorney. The psychiatrists are: Dr. Hillard; Dr. David L. Corwin, director of the Childhood Trust and former chair of the group that founded the American Professional Society on the Abuse of Children; Drs. Paul E. Keck, Jr. and Susan L. McElroy, known nation-wide for their expertise in research psychopharmacology, impulse control disorders, product liability, and other fields of psychiatry; Dr. Daniel R. Wilson, an expert in anthropological psychiatry, informed consent, and family law matters; and Dr. Rodgers M. Wilson, an expert on criminal restoration to competency and insanity matters. Rodgers Wilson also serves as the Medical Director of the Institute. The neuropsychologist is Robert Krikorian, Ph.D., Director of the Psychology Division and the Cognitive Disorders Center, and the attorney, Mr. Nidich, focuses on teaching legal aspects of psychiatry to faculty, fellows, and residents in the Department.

Shortly thereafter, the Institute became associated with Earl G. Siegel, Pharm.D., Asso-ciate Director of the Drug & Poison Information Center, and E. Don Nelson, Pharm.D., Professor of Pharmacology. This association has allowed the institute to expand its services to a whole range of toxicological issues involved in forensic sciences. The Institute is also able to acquire the services of other qualified medical professionals when required by its experts or its clients.

Faculty members of the Institute provide consultation to attorneys, businesses, and organizations. Faculty members of the Institute are involved in research studies involving the development of forensic assessment tools for sex offenders and psychiatric patients involved in the legal system. The Institute is also involved in areas of child and domestic trauma surveys, judicial surveys, NGRI studies, psychiatric practice boundary violation studies, malpractice, and restoration to competency assessment tools studies. An Institute goal is to perform investigations and studies which will lessen or prevent psychological injury to individuals, improve security and safety, and provide for better treatments and outcomes.

The Institute is located at the Department of Psychiatry of the University of Cincinnati Col-lege of Medicine in Cincinnati, Ohio, but faculty have been involved in forensic matters from New Hampshire to California. For more infor-mation about the Institute or to seek the services of a forensic expert, contact Paul Nidich, J.D., Executive Director, *University Institute for Psychiatry & Law*, 231 Bethesda Avenue, P.O. Box 0559, Cincinnati, Ohio 45267-0559; Tel: (513) 558-3990; e-mail: nidichpa@email.us.edu.▼

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June 15-17, 1998

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Professor Lawrence A. Dubin received his B.A. from the University Michigan and his J.D. from the University of Michigan Law School. He is currently a professor at the University of Detroit Mercy School of Law and has been the legal analyst for WJBK-TV (Fox affiliate) in Southfield, Michigan. Professor Dubin has authored numerous articles and books and since 1990 has written a regular ethics column for the *National Law Journal*. He is a member of the State Bar of Michigan, the American Bar Association and the American Arbitration Association. Professor Dubin recently received the President's Award for Teaching Excellence at the University of Detroit, and he has been a pioneer in the production and use of videotapes in law schools across the country as well as law-related education programs on public television.

Dr. James Eisenberg earned his Masters and Ph.D. from the New School for Social Research in New York City. He completed his clinical training at the Veteran's Medical Center in Pittsburgh prior to taking a position at Lake Erie College, just East of Cleveland. Dr. Eisenberg is a Board Certified Forensic Psychologist and a Dipomate of the American Board of Professional Psychology and licensed as a clinical psychologist. He as lectured throughout the country on the role of the psychologist in death penalty litigation. Dr. Eisenberg is Professor of Psychology at Lake Erie College and Director of their Criminal Justice Program. He is the Associate Director of the Lake County Forensic Psychiatric Clinic which serves the Court of Common Pleas. He has evaluated well over 5000 adult criminal defendants including approximately 175 capitally charged defendants. He has testified for both the prosecution and defense.

Ira Mickenberg has been a public defender, appellate defense lawyer, attorney trainer and law professor for twenty-two years. He is chairperson of the Appellate Defender Section of the National Legal Aid and Defender Association, and has designed and taught training programs for appellate defenders in more than a dozen states. When not banging his head against appellate issues, Ira spends as much time as possible at racetracks and ballparks.

James Neuhard of Detroit, Michigan has directed the Michigan State Appellate Defender Office since 1972. Neuhard chaired the ABA's Special Committee on Funding the Justice System which was charged with the highest priority of the ABA to investigate and attack the system wide crisis in funding of the Justice system, past president of the National Legal Aid and Defender Association (1987-89). He served as the ABA Bar Information Program (BIP) chair from 1985-92 and again in 1985. BIP provides technical assistance to local bar associations, courts, legislatures and public defender program seeking ways to improve the funding and delivery of indigent criminal defense representation. Jim was a member of the ABA Special Committee, The Constitution in a Free Society, which published *Criminal Justice in Crisis*. Neuhard is one of the nation's leading public defender/criminal justice system thinkers and leaders, whose leadership spans a quarter of a century.

Rodney J. Uphoff is a Professor and Director of Clinical Legal Education at the University of Oklahoma College of Law. He has a B.A. and J.D. from the University of Wisconsin and a Masters Degree from the London School of Economics. In addition to doing criminal defense work as a public defender and a private practitioner, he served as Chief Staff Attorney for the Milwaukee Office of the Wisconsin State Public Defender. He directed a criminal defense clinic program at the University of Wisconsin Law School and now directs a similar program at Oklahoma. He is vice-chair of the ABA Defense Service Committee and the OBA Public Defender Committee. He was appointed to the Oklahoma Indigent Defense System Board by Oklahoma Governor Frank Keating. He has written and lectured frequently on ethical issues, criminal defense practice and the delivery of indigent defense services. He is the editor of a book published by the ABA entitled *Ethical Problems Facing the Criminal Defense Lawyer* (1995) and also the author of *The Criminal Defense Lawyer As Effective Negotiator: A Systematic Approach*, New York University Clinical Law Review, Vol. 2 (1995) at 73.

Capital Voir Dire Review

Capital voir dire involves skills we are not able to frequently practice. Those co-counsel who are heading to a capital trial are encouraged to spend 1/2 day in Frankfort practicing the individual voir dire in their upcoming case with mock jurors on challenges for cause, rehabilitation, reverse *Witt*, mitigation, aggravation, publicity, race, strategy, using a juror rating sheet. A minimum of one week notice is necessary to set up this review. It must be conducted no later than 1 month before the trial so what is learned can be implemented. Before the review, there must be a written voir dire plan, a one page summary of your case and a juror rating form for your case. A binder of voir dire resources can be obtained from the Director of Education and Development. To set up this review, contact:

Tina Meadows
Dept. of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
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12th Practice Institute
Kentucky Leadership Center
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NOTE: DPA Education is open only to criminal defense advocates.

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**** KACDL ****

For more information regarding KACDL programs call or write: Linda DeBord, 3300 Maple Leaf Drive, LaGrange, Kentucky 40031 or (502) 243-1418 or Rebecca DiLoreto at (502) 564-8006.

KACDL Annual Conference
November 13, 1998
Location not yet determined

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**** NLADA ****

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Philadelphia, Pennsylvania
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Web: http:\\www.nlada.org

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**** NCDC ****

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July 12-25, 1998

For more information regarding NCDC programs call Rosie Flanagan at Tel: (912) 746-4151; Fax: (912) 743-0160 or write NCDC, c/o Mercer Law School, Macon, Georgia 31207.

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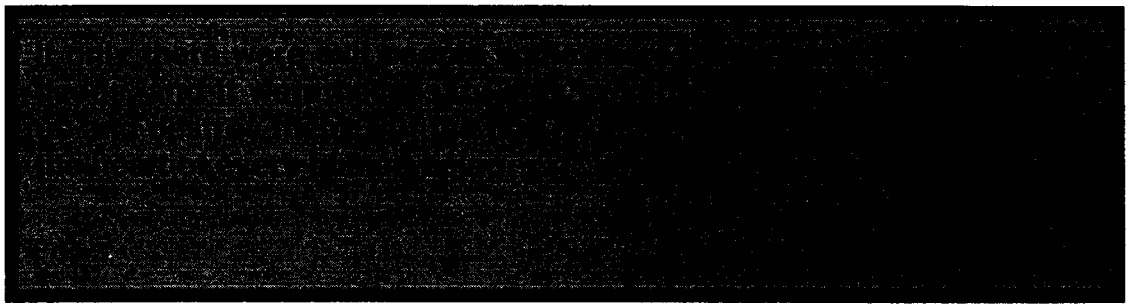

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