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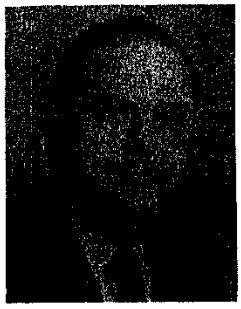

The Future of Public Defending

by James J. Neuhard

With Reflections by:

- **Alma Hall, Ph.D., Georgetown College**
- **Ernie Lewis, Public Advocate**
- **Daniel T. Cherry, Secretary, Dept. Corrections**
- **Valerie Salley, Kentucky Youth Advocates**

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- Requiem by **Jodie English**
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- FY 1998 Defender Caseload Report & Analysis: $183 Per Case

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From the Editor

Role of Defenders: Independence is critical to effective criminal defense advocacy. In the criminal justice system, which is rightly identified by the ABA as an ecosystem, interdependence is essential. We know from the daily practice of cases that defenders are not an island, independent of all others. The many cases negotiated, increasingly in creative ways as the result of defender ingenuity, are a prime area of navigating the independence/ interdependent tightrope. Defenders who master that paradox do so to the benefit of their clients. This issue we tackle this seeming contradiction of independent advocacy in an interdependent criminal justice system by printing the remarks from our 1998 Annual Conference of **Jim Neuhard** and the reflections of **Alma Hall, Ph.D., Ernie Lewis, Secretary Daniel Cherry**, and **Valerie Salley**. This dialogue of perceptive perspectives is fertile ground for our further thought. Please send us your thoughts to publish in future issues.

New Prison Construction: Since the end of the 1998 General Assembly, a great debate has taken place over whether new construction at the Kentucky State Penitentiary is wise. Corrections Commissioner **Doug Sapp** and KCLU director **Everett Hoffman** enlighten us with their very different viewpoints.

Defender Caseloads are reported and analyzed for Fiscal Year 1998 by Public Advocate **Ernie Lewis.** While per case funding of $183 is up, it is still not adequate.

Edward C. Monahan, Editor, ***The Advocate***

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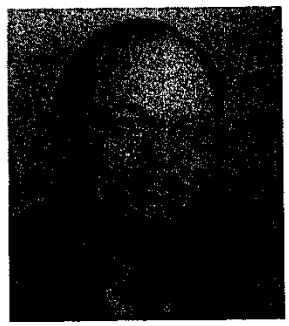
The Advocate

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. It 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.

THE DEFENDERS --- AS I SEE US

➢ **James R. Neuhard**
Detroit, Michigan



Recently I was asked to speak on the future for defenders and on independence and interdependence of defense services. I asked why independence and interdependence was even an issue for defenders? What makes our daily work so different from other government or professional functions? Why does the topic even merit the euphoniously clever "dependence and interdependence" focus? Upon reflection, I broke the topic into three distinct parts. In large part to understand it, but also to focus specifically on the one aspect of the future and the independence/interdependence issue that drives both and makes our job different. The three parts are:

- The Right to Counsel – Shouldering the Burden
- 2020 – The Future Through My Eyes
- Independence – The Litigators Primal Need and Dependence – The Manager's Reality

This left "interdependence" orphaned. However, I came to view it as a descriptive fact and a means to the end of independence, rather than a separate analytical topic.

Why do defenders even talk about our image? Why is it seemingly our lot to feel estranged and apart from most parts of government and to some extent our own neighbors and neighborhood?

Is it us? Is it that we are closet or overt liberals in a conservative time? Is it that we are all a little broken in parts and are the true iconoclast, anti-bureaucrats of our day? Were we the shunned, uncool ones in our youth? Is it that we hire people who inherently root for the underdogs? Did Rod Sterling damn us with karma visible to the average citizen but not to us?

No. We came to defense work for many different reasons - commitment to ideals, orneriness, to get a job, to get experience, and perhaps for all of these. Over time, however, our role does cause us to act and even think like the above persons much the same way the 'job' molds the attitudes and thinking of police, judges and even parents.

The true culprit about how we feel the vibes we do as criminal defense attorneys is larger than any individual – it's not us, it's the "role" of criminal defense attorney – more particularly in our case, it's the role of a criminal defense attorney paid at public expense. But it begins first with the role of "criminal defense attorney."

The Right to Counsel, Shouldering the Burden

"*I represent the defendant in this cause…*" *There* we stand, in court, for all to see – and what do they see?

A little test – picture an organized crime figure – his name ends in an "O"- standing with his lawyer on the court house steps, no – quick – the lawyer standing next to him – Do you think he's "an ordinary" attorney or knowingly part of a crime family? If ***we*** succumb to stereotypes and association judgments, this should give us a glimpse into why attitudes about us are what they are. How others – friends, jurors, judges, politicians, legislators see us, and how we even view ourselves.

Our basic liberties were embedded in the Constitution for a reason. The drafters hoped that by making our basic rights constitutional, no matter how tough the times, it would prove more difficult for our government to deny them. Experience taught the founders that, no matter how enlightened rulers might be rulers change. And, when those in power feel threatened those rights in the Bill of Rights are the most readily denied. The American experience over the past two centuries bears out their concerns and their vision.

However, necessary and noble civics 101 and some novels might make defending the poor and those wrongly charged, the daily truth of the matter remains far different. Understanding how people really feel about what we do is essential to effectively respond to these attitudes in the courtroom, with politicians, and in our personal lives.

There is a truth about attitudes towards criminal defense lawyers – in the long run, we will never be more "popular" than police or prosecutors. The reason is quite simple. Except in times of civil unrest, when the moral worth of government itself is challenged, criminal laws are meant to protect us from whatever society feels threatening. Therefore, people feel that effectively defending those charged with crimes makes it more difficult to protect society, and so is often very naturally resented.

Today, the government's power that most comes in contact with citizens resides in police agencies. As the United States Supreme Court noted, in the area of criminal justice, the right to counsel is the most pivotal right of all. It brings the others alive. And it is counsel that comes into direct contact and confrontation with the police. Us! Time and again the constitutional rights afforded to citizens shaped the style and substance of police methodology.

While on occasion, populist cases and rooting for the underdog might offset this sentiment; there remains a muddled suspicion that criminal defense attorneys support the values of their clients. After all, ACLU, civil rights and other cause attorneys often have the same values as those *they* represent. Is it not the same for criminal defense attorneys? These latent feelings understandably color the feelings of many about the role of defense lawyers.

Often the public subconsciously weighs the comments of defense lawyers as follows - if the prosecutors represent the victims and are against crime, then the corollary must be that, if we represent the criminals, we must be <u>for</u> crime? Along with such subliminal feelings come the expressed feelings of our fathers, mothers, sisters, and brothers of "how can we represent those people." While they might generally accept that everyone is entitled to an attorney, their next question reveals their ambivalence "What if they actually did it?"

The abstract "right to counsel" does not occur in a vacuum. Real lawyers represent <u>real</u> clients in all too *real* courtrooms and police stations across America. In novels, attorneys handle one controversial case and we never hear how the attorneys' practice fared thereafter. The story of Atticus Finch in "To Kill a Mockingbird" captures the pressure an attorney feels from his community and on his practice from handling an extremely unpopular case in a small town. He represented a black man charged with raping a white woman in the South during the Depression. His client was innocent, but what if he wasn't? Was his effort less noble?

What happened and happens to the practice of criminal defense attorneys who handle *extremely* unpopular cases? in a small town? What if the defense attorney regularly represents clients charged as members of organized crime? Remember the test above?

In practice, many aspects of criminal defense and defender work make our practice fundamentally different from other areas of practice. Attorneys reappear in the courts again and again encountering the same judges, police and prosecutors. Those who represent indigent defendants experience the pressure to give their clients their undivided loyalty but are faced with the reality that they will be back in this court again. There is the temptation to trade one client off against another or to sacrifice a hard case for a worthier client.

Assigned counsel face the added reality that their pay comes not from their client but from the very government that funds those trying to convict their clients. In Michigan and most states, this generally means that the Judge they are before will determine their fee. But even if it is a defender agency as here or other government mechanism, there is the constant tension between quality and cost. (The medical profession is experiencing much the same tension today.) There is the reality from the payer point of view that assigned counsel or defenders are young, inexperienced, overzealous or plain bad. However, paying for added

hours, experts or "frivolous" motions is not only a waste, but the payer *must* protect the public purse – moreover, often the payer shares in the same measure the "attitude" about criminal defense the general public shares.

The dissatisfied client did not and cannot chose the attorney who is advocating for them. They cannot, as could those who can afford counsel in a free market system, vote with their feet and chose another more responsive or competent lawyer. It arguably is up to the judge to see that the attorney performs competently. The same judge who perhaps harbors the same latent antagonism towards the client and the attorney as does the general public, the same judge who has to move a crowded docket and the same judge who feels they have seen this case many times before. The same judge who must determine what the assigned counsel is paid or conversely, who must preserve the taxpayer's money.

The purpose of this article is not an apologia for the role of the defense counsel. Rather it is to examine how these very real external sentiments and internal pressures challenge every defense lawyer's ability to remain independent and place extreme pressures on their ability to provide effective assistance of counsel to their clients.

America has built a court and governmental structure on the assumption that the police make mistakes. There are few countries that require the police to justify arrests in open court before a judge or give the defendant the right to challenge the validity of their detention at any time during their custody – through trial and at least one appeal.

The elaborate appellate structure for reviewing arrests through convictions, and the protections built into the State and United States Constitutions, bespeak a fundamental distrust concerning the power of government versus the individual. In fact, our government is one of the few governments created and structured on the premise that its officials will make mistakes or be corrupted by power. Corruption does not always mean bribery or theft. It speaks of a more fundamental loss of perspective – a loss of faith in the democratic process. The very real human instinct to see only your side of the issue – to know you are right and all that disagree are naïve or wrong. Hence the appellate system and the checks and balances of the three branches against each other. Think about it, an entire criminal court system whose principle reason for being is designed to "check" the power of those who make the arrests.

This "check" is also on most citizen's very real need to accept and support the actions of those in power, their elected officials and all police. These seemingly opposing values trust the police but prove guilt fairly and beyond a reasonable doubt - account for why Hollywood can at once make very popular movies such as *Dirty Harry and All the President's Men.*

The conflict between our system's basic distrust of unfettered governmental power and our need to support those who protect us makes all in the system who must challenge the police very uncomfortable. Prosecutors refuse warrant requests, internal affairs investigates its own, defense lawyers imply police are liars, jurors acquit those the police must believe are guilty or they would not have arrested them; and trial or appellate judges suppress confessions or reverse convictions. Taking such steps that are perceived or felt to be against the police or "*for*" the guilty does not come easily to those who must do it. Often others in the system such as judges, funders, and prosecutors resent it – even though they at times may be compelled to do it. Indeed, prosecutors use the natural discomfort jurors or judges feel about challenging the police as a tactic by eliciting that sentiment to win close cases.

While theoretically every citizen recognizes the constitutional duties of the defense attorney, every trial lawyer knows the instinct of virtually everyone is to give the "benefit of the doubt", not to the defendant, but rather, to the police.

This brings me to the second truth – most jurors and judges start out presuming the defendant carries some guilt or they would not be sitting in the courtroom as a defendant. Effectively getting judges or jurors to rise above that initial sentiment is the job of the defense counsel. To do that requires what some mistake as cynicism, that is, assuming the police are wrong, the witnesses are

lying or everyone is grossly mistaken – including our clients. I once had an appellate judge ask me during a defendant's appeal, "Why do you always claim someone made a mistake in the trial below?" My first instinct was to tell him to think about it awhile. But I didn't. But again, this reflects on how even appellate judges view us and how important it is to take nothing for granted.

And there are tactics and appeals made by defendants to counter the "smoke" perception. Directly or indirectly, the defense will try to answer the question of why the defendant happens to be the one before them. Explaining the arrest as a result of mistake, vindictiveness, sloppy police work or as racially or politically motivated are time-honored tactics. Intuitively, the successful trial attorneys deal with this reality. In fact the O.J. Simpson trial at times reflected virtually all of the defense strategies.

The issues of *police* and *punishment* dominate political debate and rhetoric on the campaign trail and in deliberative sessions. A politician's position on police and punishment are the only issues about the entire justice system, civil or criminal, that can actually cause a politician to lose an election. When President Clinton said he supported both 100,000 additional police on the streets and the death penalty, crime was not an issue in either of his elections.

How large a task is it then to change their inbred attitudes on these issues – very! However, it is not impossible or we would not exist or clients would not be acquitted.

When the need and time comes for government to address issues concerning indigent defense, very quickly its lack of political importance, the fact that supporting indigent defense is thought of as being soft on crime and the general, free floating, negative attitude toward criminal defense affects the entire process. There is little constituency among voters for the issue. This lack of constituency alone does not make us unique. However, adding in the very real feelings engendered by whom the defense represents, makes funding this area extremely low priority.

In fact, a legislator once asked me "We spend so much money catching and locking up these criminals, why should we pay you to get them out?" However, it is not just indigent defense that is low priority. While prosecutors and courts fare somewhat better, they too are frequently not funded to keep up with the work generated by increases in sheriff or police power or to handle the complexity of cases caused by punishment policies legislatively adopted such as the death penalty or "three strikes." Again the two "P's" -- police and punishment "rule"! While we might lump courts and prosecution into the police camp, they generally are not part of the "club" and only look through the window at the boys inside.

What are the effects of this perennial distant cousin relationship of defense to the system?

The consequences of underfunding on the defense are patent when assigned counsel fees are so low that they do not even cover the overhead of practicing.

Assigned defense attorneys frequently have no libraries, no subscriptions to criminal justice periodicals, rarely attend in service training events, and lack sufficient funds for investigators or sentencing alternative specialists. And for the staff defenders, their salaries are often below the salaries of the prosecutors they contest daily, and their support falls far short of that available to the prosecutor who has the crime labs, state and federal support and the police as their investigative and trial support arm.

All this makes the work wearying and forces many handling criminal defense work to leave the field. Turnover increases inefficiency in the system, causes many avoidable errors and makes the standard of practice low.

Because of the nature of the work, many argue that the bar has a *pro bono* duty to accept this work for low or no pay. Which naturally leads to the question, what other profession licensed or otherwise, is expected to work for the state at reduced fees? Architects, doctors, plumbers, All receive the going rate for their services, no matter who is the recipient of the services. Moreover, even in the legal profession, the vast majority of

the bar refuses to handle indigent cases and contributes nothing to support the reduced fees for indigent services. Even the prosecutor and the judges, all attorneys taking the same oath as those representing the indigent and who are appearing in the same case in the same courtroom with the indigent, do not take reduced fees when an indigent case is before them. Only those who chose or are ordered to represent indigents must take a reduced fee.

The above means that those who do this work, face very large economic pressures and great social and professional pressures. Because it is economically hard to handle these cases, most criminal defense attorneys practice in solo or small firms. The public and even fellow attorneys assume young attorneys handle these cases for the experience or cannot obtain better paying clients or jobs. This results in a professional bias concerning the quality of the attorney and, for many, a lowering of the esteem they enjoy from their peers. Seldom do criminal defense attorneys rise to leadership positions in the organized bar. In turn, this means that the profession itself exerts little pressure to improve the fees for assigned cases.

Moreover, in an attempt to limit the already very low fees, many small and intermediate counties have resorted to low bid contracts to reduce or contain the fees even further. This is in spite of the fact that the ABA has condemned low bid contracts as inadequate to assure the quality for all clients represented by the contractors. The incentive in low bids to increase the profit is to under serve the client. Unlike virtually all other professionals who bid for contracts with the state, there are no minimum standards that must be met to assure that the bidder will perform according to minimal standards of quality.

In truth, many if not most criminal defense attorneys are forced to quit unless they work in defender offices that are reasonably funded. Those who continue, either work as assigned counsel in counties that pay higher assigned fees than most, are able to attract enough higher paying retained cases, specialize in drunk driving, or reduce their overhead to a point where they can survive but jeopardize the quality of their work.

While structural changes could and would lessen some pressures of assigned work, our founders realized that the right to have an attorney in criminal prosecutions would never be popular. The pressures described will be there in some form, always. That is why our founders placed it in the Constitution in the first place. Likewise we must realize all the overt and covert pressures that come with our role. While everyone must function within the system, defense counsel, whether appointed, retained or volunteering, must remain independent if they are to remain effective. You cannot bend to the pressures faced daily. You cannot turn your efforts away from the best interests of your client. To start down that road makes the right to counsel meaningless. Those handling criminal cases must be aware of these pressures to effectively cope with them, not only in the courtroom, but also in our daily lives.

To not recognize and understand these pressures can quickly lead to burn out, or worse, cynicism and rationalization. If it becomes more comfortable not to push; if life becomes too short to take the grief and challenge the accepted; if you do not challenge the police; if you do not stand up to the judge; if you give less than your best effort for the worst among us - if this becomes acceptable - then the vision of our founders will have been for naught.

2020

However, in our area of law and in particular indigent defense, some things will remain unchanged and some are predictable.

First, criminal defense work will remain troubling to the average citizen and elected officials, so even adequate funding will require constant effort.
In addition, age-old assumptions and cultural attitudes will be under immense strain and continue to undergo profound development. The great issues of this century - race, sex, and labor reveal the immense changes they wrought in our culture and ultimately to our legal system. While these particular issues may be diffused at the end of this century, the great social issues of the next century are around us now and most likely are assembling to drive the next millenium as we

speak. Identifying them may be a fool's game, but fun nonetheless.

Social and Economic Justice: The common issues driving the last century's social issues contained social justice, political equality and broader access of more people to economic prosperity and security. Those issues will still be the driving forces in most any sustained movement. Very probably, the international, borderless version of those issues will become a mainstay of the earlier part of the next century.

Amidst these social and economic justice issues will be the continuing impact physical and social science will continue to have on police work and proof at trial and/or the "production end." Automation will continue its relentless metamorphosis, fair workplace and courtroom.

Technology: For example, the impact of video technology, coupled with little respect for criminal defendants and the pressure to lower costs will continue to create the virtual courtroom and office. Real time transcripts have arrived and will not only make records instantly available, they will solve many of the Americans with Disabilities Act issues in courtrooms.

Transcripts and videos will be centrally filed and offer virtual presence along with the court file itself. This will revolutionize the concept of jurisdiction as files can be accessed simultaneously by trial and appellate courts. Traditionally jurisdiction followed the physical file for very practical reasons. With a file accessible to all courts simultaneously, such may not be necessary. Briefs will be hyper linked to full text of cases, articles and exhibits. Video clips and oral summaries will be embedded in the briefs.

Office automation will eliminate many traditional support roles. Our office has not hired a secretary for 5 years. We hire paralegals that do little typing but offer much needed legal support and field work.

However, as noted, because our clients lack status as litigants, without constant vigilance, the erosion of the dignity and effectiveness of presenting our clients cases will be gravely at risk.

The technology is getting cheaper and more powerful and the quality and speed for the user are now acceptable and are less distracting for judges and attorneys to use naturally.

That "look forward" was easy.

Science: Some of the continuing struggles we face with science will continue

the rapidity of applications;
admissibility standards;
the coming and going of junk science;
and the constant skirmishes and wars on the boundaries between science and religion.

Examples of "junk science" abound. Polygraphs, "profiles," anatomically correct dolls, and "abuse" syndromes. Examples of good scientific tools misused are bad police labs or incompetent or corrupt technicians/pathologists, hypnosis, and DNA matching by under-trained technicians; and misused diagnostic tools such as hypnotic regression and anatomically correct dolls.

These are but some of the *current* issues.

Life – How it Begins and How It Ends: However, as I look forward, there are profound issues that we will confront us long into the future. These issues are pushed by forces at times splitting the country in half – no side having hegemony for long. Others are emerging as long standing policies collapse in the face of anger about crime. Policies forged in expediency, unreflected on as policy and sure to plague us far into the future -- to wit, abortion, the death penalty and elimination of "juvenile justice" as a separate private, area of law for adult crime.

What is life? When does it begin? How can you begin it? Who owns it? Who can choose to end it? How can it be ended and by whom? Can we sell parts of our body? Can we donate parts while we are alive? Can we mine bodies? Can we grow body parts? Can we use the brains of aborted embryos? Can pregnant women deliver illegal drugs to fetuses? Alcohol? Nicotine? Can punishment be enhanced for harm to a fetus? Is it manslaughter?

Role of the Defense Attorney: Not only these forces at work, but there are pressures to change the very role of the defense attorney. What is the role of criminal defense lawyer to be? Attorney General Reno believes we have to stay involved with our clients *after* the sentencing – be a part of and perhaps accountable for the process we may have recommended and we participate in helping our clients successfully complete probation. She also believes in that systemically defenders must be players in the system and sit equally at the table with the courts, prosecution and executive branch agencies in designing a better system. There are those that say "no" – emphasizing either change in our roles would compromise our role, which is to challenge all aspects of the government's case, including the sentence. That our role is to assert innocence and seek the least restrictive treatment or custody and not become too close with those who make policies to fight crime lest we lose our perspective and ability to challenge programs we might have helped design.

But in the future, who better than us to see our clients needs, the best cure, the best to course to help the entire family? Who better than us to have first hand knowledge about whether mandatory drug treatment works and for whom? How can we best use our immense experience and yet maintain our independence in the courtroom? How can we maintain credibility and our cynical distrust of all and everything to properly test and assure truth and that our client's best interests are served?

If we plan a program for our clients that may be good for them but far more restrictive than the government could get otherwise, who checks us? Are we now agents of the government that our clients already think we are part of?

Juvenile Justice- Old Before Their Time: As we tear down traditional protections for juveniles, and try 12 year olds for the death penalty, new and confounding issues arise. How is it we can determine that a child can form the intent required to deserve execution, yet cannot consent to sex until they are 16? How is it a child cannot execute a contract until 18 but can be executed at 12? How is it that a child is deemed incapable of exercising sufficient judgement about drinking until they are 21, but is capable of forming intent sufficient to take their life for the judgement they exercised?

"Adult Time For Adult Crime!" What is so different about today then 50 years ago? Instead of school fights with fist and knives, there are drive-by shootings with assault rifles. Instead of the residuum of the Reform movement of the last two centuries, the belief that all men are created equal and only their environment makes them bad, we are sliding into a time when we "cure those *like us*" and punish horrifically – "*them.*"

Make no mistake, our attitude is almost always limited by our vantage point. If it is our children, if we are paternal, driving a nail with a hammer should be held off until 16 because of the inherent danger and judgement involved.

I am always amazed that the gun lobby talks about "only criminals will have guns" as though the criminals are an alien race of beings that come from some place else. If we view the external, frightening world of crime, however, it is not "us" but "them." What they don't get is that the criminals are us. Too many citizens, nothing works for "them," rehabilitation and welfare are a joke to "them," "they" are sub-human, "they" must be evil and "they" respond to nothing but pain. If a little pain does not work, then we must use more, if that doesn't work, then we must use even more.

Suffice it to say that "adult time for adult crime" along with the belief that kids are too young to consent to sex, drink, vote, sign contracts or get married is not a coherent idea nor thought about by the general public. Each one is thought about individually and determined with a feeling driven by whether the public sees "us" or "them."

One insight into there contradictions I can share is illustrated by another *test*, picture in your mind's eye who you see eloping or trying to sign a contract, the answer would be generally young white "kids." If I asked you to picture whom you see robbing you in a dark parking lot late at night, the answer, most likely is an African-American "*man.*" Race continues to shape policy.

Why is it that the talk radio mantra of "personal accountability" so often heard today does not apply when girls consent to sex, boys buy cigarettes or children sign contracts? There is much that needs be done in this area. The issues and legislation are the stuff of much litigation far into the future. Why do we protect children from themselves in this area but condemn them in others.

Sentencing and Treatment- guiding hand or zealous advocate: Aren't judges interested in what works? Wouldn't it help you at sentencing if you could honestly tell a judge that this program works x % of the time for this type defendant? Why doesn't government have effective standards? Why don't they define "what it means to work" and let us know "for whom it works." What programs are effective in treating addiction? What programs give clients a chance to not repeat? What works and what is the measure of what works?

If an armed robber goes seven years without committing a violent crime but shoplifts or gambles, is this a success? If a drug addict only drinks? If a felon doesn't repeat but misses their probation meeting? If a felon, drinks but holds a job, pays support, raises a family stays employed for 3 years, stays dry for five, and yet shoplifts. Is this working? Goes to college? Stops beating or molesting their kids?

Suffice it to say, much needs to be done to create effective treatment programs for our clients. We must also recognize that their needs span the entire gamut of human failings. The well springs of misbehavior reside in all the seven deadly sins and require different treatments for different behaviors and for different people – different measures of success. Without our active involvement, good programs explode when one graduate picks up a gun and holds hostage his family or commits a public crime. They are held to unreasonable standards of success. Would a cancer drug that increases the "cure" rate 25% be removed from the market because some still died? The criminal justice system is still driven by myths and lack of research much like medicine was at the turn of the last century. It is time for a change.

Independence as a Dependent Defender

"Evidently he did not want a public defender as he was heard to say that ' a defender was worse than having no lawyer at all'." People v. Losinger, 50 N.W.2d 137 (Mich. 1951).

Having explored the attitudes held by others about our work, having peered somewhat into the future on how we will practice and the continuing effect of race and the convergence of religious and moral values in criminal law – what does it mean in real terms? After all, one of the biggest hurdles we face is not only our image with the public, but also our image with our clients. Are we really on their side? Are we any good? Unlike the private bar, they did not chose us; they do not pay us and they start off not trusting us. In this light, the staff attorney must communicate to their client their undivided loyalty - day in day out, case in case out, anew with each client. It is hard enough maintaining the reality of independence, let alone effectively communicating it to all our clients. But certainly if we lose our independence, if we sell our soul, if we lose heart, to be sure, our clients will see it in our eyes and hear it in our heart.

As I see it then, the issues remain the same. The independence of the criminal defense lawyer remains the single most important requirement for our system. In Argentina they had words to describe how the criminal defense lawyers were persecuted – "Abogado desperacidos" (disappeared lawyer). Gangs of paramilitary thugs came in the night and took the defense attorneys away. Terror was used to separate the attorney from their clients. They did not want them to represent their clients and if they did, they did not want it done well. While we do not face that level of hostility, the pressure on us to not do our jobs well is real and present. The temptation to tell us that we try too many cases, file too many motions, ask too many questions, file needless appeals, raise too many issues and win too many cases? One county in Michigan wanted to stop assigning our office for many of the above reasons. They wrote a letter to the Chief Justice asking us to leave their County and named 5 frivolous issues. One of the great days in our office was when we won the last of those issues.

I differentiate the independence of the attorney from the program. The conundrum that must be dealt with is the fact that the program must obtain funding from the very government it challenges in court. Moreover, it is performing at best an unpleasant, though necessary function. To fully appreciate the difficulty, before *Gideon* and *Argersinger*, only a handful of jurisdictions provided appointed counsel in all cases. Why, because it made no sense to the funders to do so. Free counsel was viewed as a charity not a right. To this day and into the future, this tension will continue. It is this reality that program leaders will contend with. To gain perspective, one needs to look no farther than the checks and balances of our government itself. The instinct to blot out or control the opposition is engrained and only very large constitutional protections can contain it.

Recognizing this, even understanding it does not make it go away. Each new election, particularly with term limits, rewinds the tape. Much like Sisyphus in Dante's Inferno, we are doomed to the endless, repetitive labor, pushing the boulder near the top, only to lose it and start over again.

Nonetheless, it is the role of leadership to be persistent, to push for improvements, to educate the new, and to testify on substantive crime bills, corrections bills and treatment bills – whatever will advance the process towards a just, rational responsive and effective system.

By the 1970's, two images of the defender or appointed counsel shared equal billing: that of the underpaid, overworked, burned out or too young hack, or that of the young, hard working crusader. In truth, many if not most systems have and had both and everything in between. But this remains true of all areas of practice, not just appointed lawyering. The fact that the State pays both the prosecution and the defense makes and continues to make defender work unique. And places defender "systems" in at best an awkward posture but in competition for funding at a distinct disadvantage.

To be sure, other branches and agencies from time to time experience similar dilemmas such as whenever the Courts issue an unpopular decision that might seriously upset members of the very same legislative body that also funds the Courts. Understanding and negotiating that hazard is the responsibility of the defender managers. It is self indulgent to rail against this reality and explain all failures as "political" or " the climate of the times." The fact remains long term success and even survival of the program demands that this reality be understood and that strategies must be developed that can be effective to assure the health of the program or the well being of their clients.

But there is a danger. Obvious and palpable - should the program sacrifice its independence? Should unpopular strategies be avoided? Should obviously guilty people not be defended to the nth degree? Should defendants be plead that "everyone knows" is guilty? Should hard questions of judges, police, victims or children not be asked to spare the cost and pain? In the abstract, if asked the way I just did, all but the most benighted would answer "*No*!" But if the answer is "*Yes,*" then what's the point?

The staff lawyer chooses a strategy that the older and wiser supervisor feels will not work. Worse the manager knows it will infuriate the, _____*(fill in the blank – governor, county commissioners, chief judge etc.)*. The independence of the staff attorney imperils the dependent funding or good will of the office. A strategic decision to benefit one defendant may or often definitely will negatively affect the other clients of the office – either by creating a negative attitude about the office or jeopardize the funding and thus hurt future clients.

The principle demand for independence remains ethically and practically that of the attorney providing the direct representation to the client. The principle responsibility to cultivate the dependent relationship is that of the system managers. But unpopular strategies are only one of many independence pressures. Too many cases, taking too long for one case at the expense of others, using too many resources for one client, or the ultimate difference between private practice and the assigned council, the dichotomy between who is paying the attorney. Where is the loyalty -- with the client or the paycheck? Again, defenders are not the only attorneys in a third party payer situation. Examples of attorneys provided by and

paid for by another are attorneys provided by insurance companies, pre-paid plans, legal services, etc? Also, if you are an attorney in private practice and the parents of the client are paying, who calls the shots? Again, to understand how our clients feel, - how do *you* feel about the loyalty of an attorney provided by your insurance company. Therefore, we know that the loyalty of the staff lawyer must be to the client and that all decisions made must be made to benefit that client – not the program. This said, what should the managers do if they believe that the attorney is making a bad decision along with it being unpopular and possibly detrimental to the program? It is not that I have an answer or need to answer that question in this article and I certainly lack the time.

What I have described is our world. To be sure, there are other important concerns or examples of what I have described. My point wasn't to decry them, though I am sorely tempted to do so. But like the genius of our founding fathers, they saw that there was no system, philosophy or "ism" that was perfect. Their government assumed that the inherent nature of man would play itself out in the halls of congress, courthouses and our very own houses. My call to you is to do likewise. Understand what we are and design and plan accordingly.

For us to be effective we must jealously guard the independence for the lawyer in the courtroom and work hard in the halls of government to gain recognition as responsible players. At times, we must accept that the positions we take will anger some, disappoint others or not be in our economic self-interest. So it goes.

However, my experience is that we have thought about, argued about and seen much that the legislature needs to know and our duty is to share it – even if it is rejected. Over time, we will be heard.

Defenders are leading the field in automation, electronic filing, data sharing, court funding, new sentencing systems, bench-bar conferences, bench handbooks. They serve on constitutional reform committees, are active in virtually every bar association, are running for office, joining the judiciary and more, much more. In so doing, they honor us all. But more importantly, foot by foot, they gain more ground towards dispelling the myth that we are inconsequential or the "enemy."

In so doing, I believe we will contribute to making the system better for everyone. While we can't always get what we want ... what we may get is something far more important – making the defenders meaningful players in the system.

As I tell my legislators when I testify "I have kids, I am raising them in the same neighborhoods I want the law under consideration to apply to. What I am saying I am saying because it is right, well reasoned and will work. It is not to be dismissed as the idle thoughts of a college sophomore." While I know, that as I get tantalizingly close to full partner, a murder occurs, a child explodes with an assault rifle, or there is an election and new leaders get off that train from the general public and I must roll the boulder up the hill again.

I only hope that these remarks are not those of a college sophomore and that they help some of you be better defenders and leaders of the defense community by understanding why we feel the way we do.

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REFORM REQUIRES ADJUSTMENTS FOR ALL OF US

➢ Secretary Daniel Cherry, Justice Cabinet

I appreciate Mr. Neuhard's effort at a frank assessment of the roles and responsibilities of public defenders. The need for criminal justice reform is manifest, but true reform will require us all to reexamine our purposes and places within the criminal justice system. There is great value in continually reexamining our respective roles, for real reform will undoubtedly require some adjustments for all of the system's components.

The role of the defense attorney and our society's treatment of juveniles are issues ripe for consideration as we reach toward reform. Achieving the ultimate goal of a just, rational, responsive and effective system will require a new commitment from defenders. They must be prepared to act as "counselors-at-law" and to be an integral part of preventing recidivism by helping their clients succeed on probation and parole instead of focusing only on "winning" the case. When a guilty defendant goes free or a juvenile in need of treatment is put back on the street, the crime victim, and in fact society, are denied justice and there are no winners.

Reexamination of roles and purposes in the justice system is a critical part of justice reform and certainly part of what a coordinating group like the new Kentucky Criminal Justice Council can help to facilitate by creating a neutral forum for discussion. While I recognize the need for the public defender to play an independent role in representing the best interests of his or her clients, the development of balanced and systemic approaches to criminal justice issues clearly necessitates that the Public Advocate and defense bar be players at the table. With the belief that many of the issues we face in the criminal justice system represent both conditions to manage and problems to solve, the public defender needs to be part of the management team and the solutions.

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THE IMPORTANCE OF INTERDEPENDENCE

➢ **Alma Hall, Ph.D., Chair, Dept. of Communication Arts**
Georgetown College

I applaud Mr. Neuhard for titling his comments, *The Defenders -- As I See Us*. Perspective is at issue here so we need to be mindful of our vantage point. My interest is in organizational behavior and leadership development, a view removed from Mr. Neuhard's front row but tempered by my observations as a mother and mentor to a young public defender.

The value of this article, as I see it, lies in Mr. Neuhard's ability to raise questions. As a developer of leaders I firmly believe that if we ask the right questions, the answers will find us. Too few of us are willing to question when we do not have ready answers.

I take issue, however, that Mr. Neuhard failed to give the notion of interdependence a fair hearing. Even he admits that the concept became "orphaned." It appears that Mr. Neuhard cast independence at one end of a continuum and lumped interdependence/dependence at the other. It appears that he did so because of his exaggerated concern for the image and role identity of the defender.

Interdependence is a greater concept than the feared "dependence." It implies mutual depen-dence within the system. For example, within the criminal justice system interdependence implies that the judge will rely on the defense who relies on the police who relies on the judge who relies on the prosecutor and so forth. What is it that everyone relies on? They rely on professionalism. Being interdependent does not imply that the defender will "bend to the pressures faced daily" or "turn your efforts away from the best interests of your client."

Mr. Neuhard's argument that the independence of the attorney can be differentiated from the program also causes me pain. There is truth to the notion that the higher you go in an organization, the broader your perspective must be. However, Mr. Neuhard's acceptance that the "program" can be interdependent because it must obtain funding is just simply outdated. Organizational [programs] do not exist "out there" to supply bullets and beans and whatever else is part of the old Army adage. Organizations are us. If the program is interdependent, we are interdependent. If we are independent, the program is independent.

I also hope that Mr. Neuhard will think longer on his characterization that the loyalty of the staff lawyer and the program are at odds. In my opinion, the issue of loyalty is central to the discussion he ahs undertaken here. I think he does need to answer that question because that answer likely reveals the essence - the very self - of the defender.

The reason that I support personal development rather than skills development for leaders has to do with the leader's need to gain an outside perspective. I know, however, that he or she must first discover a "self" - we must know who we are - in order to be able to reflect and to see from a global perspective. Discovery of the self occupied most of the classical philosophers and may not catch on with overworked public defenders. It might represent a worthwhile pursuit!

Overall, Mr. Neuhard does leave on an encouraging note. He heralds defenders' accomplishments: "[They] serve on constitutional reform committees...[are] active in bar association...run for office, join the judiciary...."

In my opinion, these behaviors evidence their interdependent - and serve their clients well.

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INTERDEPENDENCE MINIMIZED

➢ Ernie Lewis, Public Advocate

Jim Neuhard has consistently been one of the defender community's most thoughtful and provocative leaders. He does not disappoint in this article.

I have a few comments in response to the article, mostly in agreement with Jim.

- Jim truly understands how fragile is the right to counsel. He describes the tremendous pressures criminal defense lawyers and particularly public defenders feel as they represent too many unpopular clients in too many cases before the same courts. He understands further how insidious the pressures are, how some of the criticism not only is external and expected, such as criticism from the bench, prosecutors, or the police, but how some of the pressure to avoid zealous advocacy can come from family, other members of the office, other clients, or even within.
- Jim describes the fascinating nature of the checks and balances that is our system of government, and further demonstrates how the system operates in the criminal justice context. We truly are ambivalent as a people: we are suspicious of government while at the same time we want government to make us safe and secure from those who commit crimes. Jim artfully demonstrates how criminal defense lawyers operate as checks and balances worked into the fabric of our government.
- Jim is right on target in describing how important the funding of indigent defense is to the health of the system. If the right to counsel is to continue to operate as a check on the power of government, then it is vital that the system to provide counsel to the poor accused is funded sufficiently. This means that the funding authority must fund public defenders at the same time the police and prosecutors are funded, and at the same time new laws are passed which are going to increase a defender's caseload. This means that low-bid contracts must be minimized and seen for the threat on quality that the ABA, NLADA, and NACDL have described. This means that defender salaries, which are far too low in Kentucky, must be raised to be reasonably equitable with prosecutors. This means that unethical caseloads which threaten the quality of individual representation more than any other pressure must be reduced. And it means that we must enable experienced and zealous defenders to pursue public defense as a career rather than a stopping point to a career. The extent to which we accept the public defender's plight, that of the burned-out, low-paid, young lawyer on his/her way to a private career, is the extent to which we undermine the role of the right to counsel in our system.
- Jim correctly states that the independence of the criminal defense lawyer is the most crucial part of the criminal justice system. That is one hallmark of our system.
- Jim minimizes too much the role of interdependence. Many of the problems of the public defender have occurred because it is easy to isolate the "other," the "alien," the "unknown." As long as we remain on the outside of our communities, our bar associations, criminal justice committees and task forces, it will be easy for decision makers to criticize us, to underfund us, and to ignore us. While Jim certainly recognizes the importance of interdependence, I believe that it stands with independence as a co-equal value. Only if the independent criminal defense bar is at the table when important decisions are made will many of the problems of public defense be minimized or solved.

Ernie Lewis, Public Advocate
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THE ROLE OF DEFENDERS REPRESENTING CHILDREN

➢ **Valerie Salley, Kentucky Youth Advocates**

Jim Neuhard's predictions for changes in the 21st century regarding the role of public defenders in juvenile cases accurately reflect the inconsistency of the public's image of juveniles--they are too immature to enter into contracts, to marry, to vote, but increasingly we hear demands that juveniles do "adult time for adult crime". As Mr. Neuhard points out, the shift from a rehabilitative focus to a punitive one in the area of juvenile justice is in large part influenced by a distinction drawn between those thought of as *bad kids* and those thought of as *our* kids. In contrast to *our* own children, the bad kids are often economically disadvantaged, at-risk youth who have already been introduced to the system via child protective services, and often those in need of intensive services to address a myriad of psychological and educational issues.

The point that Mr. Neuhard makes is that when *our* children want to enter into contracts, marry, consent to sex or drink alcohol, we prohibit this as a form of protection because we believe that they lack the ability to make those judgments. Yet, the public pushes to hold "other people's children" personally responsible for poor judgment to the degree that an adult would be held accountable. I believe that his point is on the mark. The idea that young people in communities or families unlike our own need to be fixed with harsher penalties is pervasive. This mindset can contribute to more punitive decisions made by prosecutors, judges, and juries alike, a fact which poses difficult challenges for juvenile defenders as they present their clients' cases.

As Mr. Neuhard explains, it is important for public defenders to recognize that our public policy is moving toward the elimination of juvenile justice as a separate area of law, to that of viewing juvenile offenses as adult crimes. I think that it is essential for public defenders to incorporate this recognition into their legal defense of juveniles. This trend is fueled by media accounts of sensationalized crimes and politicians' portrayals of teenagers as the enemy of the day. The best defense of juveniles must both debunk popular myths about juveniles as a group, and include information about the individual child's capacity to form criminal intent. The ABA has stated that juvenile defense attorneys need more that strong legal skills. They need to gain expertise in mental health, child development, and special education issues in order to adequately convey the needs of their client to the court.

While it is true that much public perception about the role the public defender plays is negative, in that many think that public defenders are a part of the problem of increasing crime rates and reduced public safety, this perception has been linked historically to the defense of adults. Juveniles were different. There was hope to rehabilitate them, and their defense attorneys played a quasi-social service role in guiding courts toward specific rehabilitative measures. And yes, the juvenile defender was there to ensure that due process and a fair hearing were provided. With the emergence of the "adult time for adult crime" mentality, the public's image of juvenile defense also may be deemed antithetical to the public good. If juvenile defenders are assailed for their representation of youth, it may become more difficult for them to maintain the independence needed to vigorously represent youth. For juvenile defenders to truly maintain independence, they should defend youth with as much diligence as they defend their adult clients. To do so, they should assess what is in the best interest of the client, focus on the applicable

law, listen to the client, and work toward integrating the specific needs of their clients into their defense.

While advocates, including public defenders, must work against the tide of demonizing youth at the cost of their futures, public defenders have a particularly significant role to play. Who better to know how judicial rulings and prosecutorial policies are affecting this group of "other people's children" than their lawyers? Who better than juvenile defenders to inform the public debate on this issue? Juvenile defenders have keen insight into what effect the interplay between juvenile law, criminal law, and constitutional law have on youth in Kentucky. For this reason, juvenile defenders should work for improvements in the juvenile system and substantive criminal law by educating legislators and policy makers. While Mr. Neuhard speaks to the public perception of public defenders as a part of the problem, there are many who recognize that they are a part of the solution. In fact, they are the voice, for both individual young people and youth as a group, that is needed as we face ever changing policies in the juvenile justice arena.

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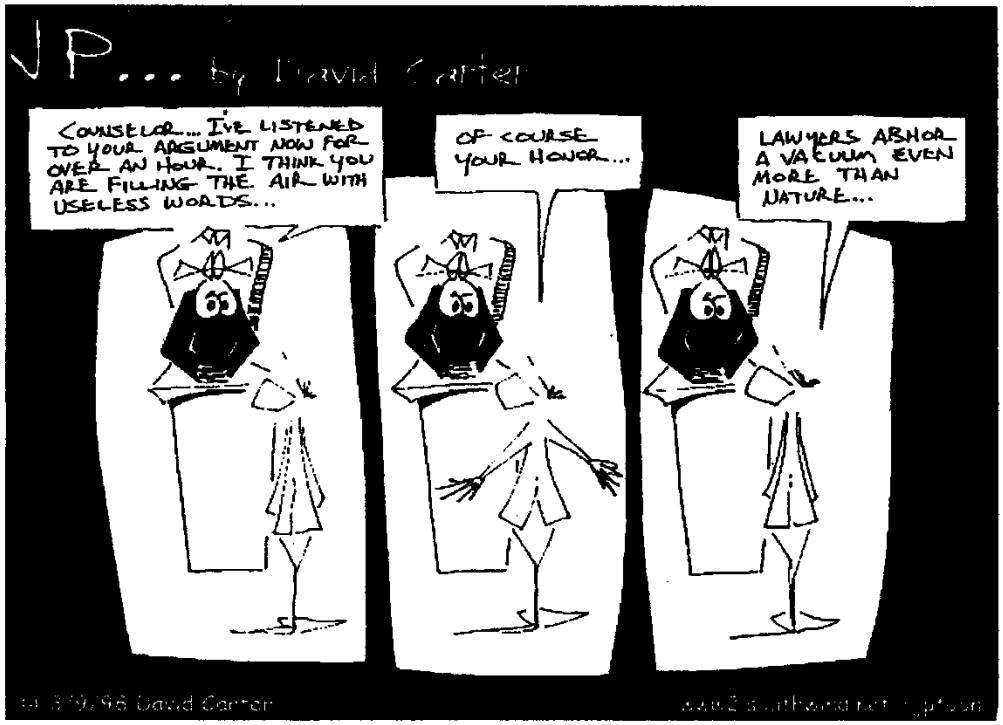


JP...the legal cartoon, by David Carter. This cartoon has been reprinted with permission of the author.

MARK. J. STANZIANO ELECTED TO LEAD KACDL ORGANIZATION

Somerset attorney, Mark J. Stanziano, took over the leadership of Kentucky's foremost criminal defense organization at the annual meeting of the Kentucky Association of Criminal Defense Lawyers on November 13, 1998, in Louisville. At the meeting, Stanziano was elected to the presidency of the KACDL and succeeded David R. Steele of Covington who had served as the group's president for the previous year.

The Kentucky Association of Criminal Defense Lawyers is a statewide organization made up of criminal defense attorneys; both from the private bar and the various public defender offices around the state. Its purpose is to foster, maintain and encourage a high standard of integrity, independence and expertise among member criminal defense attorneys, to strive for justice, respect and dignity for criminal defense lawyers, defendants, and the entire criminal justice system consistent with the constitutional rule of law in Kentucky and the United States.

As he took office, Stanziano set forth his goals for the upcoming year in remarks made to the attendees at the annual conference. *(The full text of Stanziano's speech follows)* Stanziano listed as a top priority the unification of the private and public criminal defense bars in Kentucky as a way to bring positive change, and to improve the public's perception of criminal defense attorneys, in particular, and the criminal justice system, in general.

In addition, Stanziano viewed his obligation to appoint KACDL members to the standing committees of the newly-formed Kentucky Criminal Justice Council (CJC), on which Stanziano serves as a voting member, as an important step toward making the voice of the citizen-accused heard in the highest levels of state government. He appointed Deanna Dennison of Covington, Samuel Manly of Louisville, Kathryn Wood of Somerset, and David Steele of Covington to CJC committees on Alternatives to Incarceration, Drug Policy, Juvenile Justice, and Police Issues, respectively. He has two more appointments to make which, he expects, to be made within 30 days.

The inclusion of the criminal defense bar at the table of public debate on the criminal justice issues now facing Kentuckians is a major step toward bringing fairness and sanity into a discussion which has been skewed dangerously to the right in recent years by politicians more concerned with knee-jerk and gut-level appeals to "law and order" than with a balanced approach to improving the criminal justice system for all the citizenry. Stanziano said, "It is incumbent on myself and every KACDL member appointed to serve on the CJC committees that we not be shy or timid in making the voice of the citizen-accused resonate in Frankfort. Though we are terribly outnumbered on the Council itself, and its attendant committees, by persons who rank the continued protection of the rights of the citizen-accused as least among the priorities of the Council, we must be sure that no member of the Council forgets the overarching importance or the timeless wisdom and fairness of the Constitution and the Bill of Rights."

The criminal justice system in Kentucky and America is charged with determining the *legal* guilt of citizens who are accused of having violated one or more of society's criminal prohibitions. In its current form, it is *barely* able to do

that. The system will never be able to accurately assess and deal with actual guilt. Most importantly, there is no possible way under our current governmental structure that the issue of a person's *moral* guilt can be dealt with fairly or effectively. While substantive and system-wide changes do need to be made - there is much room for the improvement of the current system - shredding the Constitution is not the first step on that important journey.

Lastly, Stanziano called for more intra-dependence among the criminal defense bar; extolling the membership to work more closely together on a day-by-day and a case-by-case basis in order to better represent their clients and to tell their clients' stories in such a way as to make them understandable to an already skeptical and fearful public.

Unless and until the criminal defense bar joins together to speak with one voice, strong and unified, it will be difficult for criminal defense lawyers to improve their standing in Kentucky's communities. In order for the KACDL to convince a public that has grown weary of "the rights of criminals," who are "getting off on technicalities," because of "scummy defense lawyers" to understand the vital importance criminal defense attorneys play in the American system of justice, it will be necessary for the KACDL to increase its growing membership and to take our messages of innocence, forgiveness and love to every area of the state in a unified effort to change public opinion for the better and give new meaning to long-standing, but now endangered, constitutional principles such as the presumption of innocence, the right to counsel, and the necessity of proof beyond a reasonable doubt before depriving a citizen of their property, freedom or life.

Stanziano reiterated the remarks that former president Steele made a year earlier, "our association has important work to do if we are to make these goals a reality in our lifetime."

Contact Linda DeBord, Executive Director KACDL, at (502) 243-1418 for KACDL membership information.

KACDL: WHERE ARE WE GOING

➢ Remarks of President Stanziano at the November 11, 1998 KACDL Annual Conference

Who are you? Who are we?

What are you? What are we?

Why do you do this work? Why do we do this work?

We are gunslingers. Shootists. Mercenaries. Soul-less, heartless, God-less fiends who only care about criminals' rights and who would rather see a guilty person placed back on the street (where he's going to "do it again") than to see justice done. We are the Devil, that rotten son-of-a-bitch or, if one is trying to be politically correct, that rotten bitch. We have had the ills of the society ascribed to us as if we were some sort of modem day Pandora who opened up the box and allowed all the evils to be loosed upon the unsuspecting world.

We live with these characterizations and character assassinations, secure in our own minds that we are nobly doing what is right, what is just, and what is necessary. In our hearts, of course, we know that those who would demean the work we do are the ones who would gratuitously trade the freedom of others for the illusion of their own personal security. They are the ones, the modern day "party members," who sacrifice the poor, the illiterate, and the different, upon the altars of uniformity, expediency, and order.

Yet, the dichotomy between "them" and "us" remains. Although we know what we know in

our own minds, so do they. And, like two ships that pass each other in the night, we can see each others lights but cannot make contact because of the depths of the waters between us.

We have lost touch with those classic values which once made us great; which once made us respected within our communities; and which helped us to remain dignified in the face of the adversity that sometimes accompanies our involvement in the most reprehensible of causes. We have forgotten about honor, courage, and truthfulness. We have forgotten to set our sights on the future and to strive for the promise that the future holds. We have stagnated, wallowing in the victories of our brothers and sisters in times long since forgotten, and lamenting our Quixote-like existence; complaining that all there is left to do is joust with windmills.

But what we need is not a Holy Grail. We do not need to drink from the cup of eternal knowledge to understand that it is we who have failed to keep up with the changing world. We, who feel not the least ashamed of standing up and speaking on behalf of an individual accused of the most horrific crime, have shamefully remained silent when it came time to speak-up for ourselves and our rightful and essential place in our system of criminal justice. And, for our silence, we have been rewarded with the contempt of a nation.

Who are we? Why do we do what we do?

The KACDL, has been too quiet, as well. Though individuals in the KACDL have acted with the utmost courage, at times, and on diverse occasions, we have not been a unified force or a united voice for meaningful change within our great Commonwealth. We have sat back and let opportunities slip by like the wind that blows through our hair on a warm summer day. This trend must end. Now. Forever. Unless we slide complacently into the oblivion of insignificance and obscurity, we must begin to take charge of our own destiny. The will to act is at hand and I am issuing a call to arms to all of you, and to all of our brothers and sisters, to help me begin to make the changes that will help restore the public's belief in the necessity and importance of what we do.

Who are we? What are we?

We are sons and daughters. We are mothers and fathers. Grandmothers and grandfathers, some.. We belong to the PTAs. We enjoy smiling, dancing, good food and drink. We are neighbors and friends. We have hobbies and past-times. We root for one sports team or another. We worship at one church or another. We live. We love. We laugh. We cry. We are no one in particular and, yet, we are every man. We are us and, at the same time, we are them.

Still, something sets us apart from those self-centered and compassionless people from whom we hear so much. We care about our fellow man and woman. We strive to tell the stories of our clients - stories of a lifetime of pain, of a moment of casual indifference, of an instant of uncontrollable rage to a generally uncaring and unfeeling world. We, who have no reason to love those who are universally despised, choose to love anyway. We give of ourselves, our time, our talent, in some cases, our treasure to help those who seem to be long past helping. We lend our brains to the scarecrows, our hearts to the tin men, and our courage to the cowardly lions whom we are charged with helping.

We rarely receive remuneration in an amount which fully compensates us for all we have done for these unfortunates. In the case of public defenders, we receive far less than anything which even remotely approaches fair compensation. And, we choose to love nevertheless. Despite the personal, professional and physical costs the giving of this love sometime extracts from us, we continue to choose the narrow, uphill path of light and love over the wide and flat road into the darkness.

The time is now to make our communities aware of who we are, what we do, and why we do it. The KACDL must be a leader in this effort. The KACDL must be a full-time partner with each

and every member and must seek to form partnerships with those criminal defense practitioners who are not yet members. Together, the private criminal defense bar and the public criminal defense bar must ally themselves together to stand as one voice, one unified criminal defense bar with one voice, for positive change.

Over the coming year, I will dedicate myself and my office to making this unification happen, to making our voice heard, to helping our membership tell OUR story to the public.

Along those lines, I have appointed Deanna Dennison, Sam Manly, David Steele, and Kathryn Wood to serve as my surrogates on the various committees of the Kentucky Criminal Justice Council. Together, we will make our collective voice heard in the highest levels of our state government and we will work to make sure that the changes which are inevitable in our criminal justice system remain grounded in the fairness and timeless wisdom of our Constitution and the Bill of Rights.

I have charged our various KACDL committees with reinventing themselves and becoming more pro-active by energetically recruiting new members and making sure that these people are called on regularly to help with the work of the committees. I have appointed two new committee chairpersons, George Sornberger and Rob Sexton both long-time public defenders, to head-up our very important Education and Rules Committees, respectively.

I have asked Linda DeBord, our executive director, to have committee sign-up sheets available to you all day today so that you can volunteer to help us make this vision a reality. Many of you have already signed up for committee work. I have every confidence that your talents will be utilized in the coming months.

In the upcoming year, we will take our message from the mountains of Eastern Kentucky to the banks of the Ohio River in the west. From the light of the cities in the north to the poverty of the lands in the south. And, we will move everywhere in between. We will make more use of press releases and will take the time to recognize our members who are so giving of themselves. We will market ourselves and our cause.

I will make myself available to speak locally across the state whenever I am asked by a KACDL member who is able to find a fortune for our message to be projected upon the minds and into the hearts of our fellow Kentuckians.

The Board of Directors and the Officers of the KACDL will stand ready to assist any KACDL member anywhere in this state who wants to use his or her best efforts to bring our message of fairness, compassion, and equality before the law for the citizen accused to a public willing to listen.

When a KACDL member has success, every member should hear about it. We all need to know that we are not alone in the fight. Therefore, the staff at my office will begin the year-long process of collecting your success stones and cataloging them for quarterly publication in our newsletter.

Lastly, but by no means least, we are going to strive to be of more help to each other in the practice of law on a day-to-day and a case-by-case basis. For too long, each of us has been as the lone wolf in the forest. We have scavenged and foraged on our own; forced to be satisfied with small game, nuts and berries for our subsistence. No more. We are going to begin to hunt as a pack. There is strength in the pack. There is camaraderie. There is support. We are through going hungry when there is plenty. Together, we will enjoy the spoils of a hunt where we can make caribou and elk, instead of canon, the target of our team efforts. Our bellies will be full. Our spirits will soar.

For a year, I get to be the king of the world. Join with me and there *shall be* an abundant feast. Thank-you. ■

1997-1998 KENTUCKY DEFENDER CASELOAD REPORT AND ANALYSIS: $183 PER CASE

➢ **Ernie Lewis, Public Advocate**

The *1997-1998 (July 1, 1997 - June 30, 1998) Final Kentucky Defender Caseload Report (November 1998)* has been completed. DPA management is studying the figures for use in managing our agency, for staffing, and for determining needs. A complete copy of the Report is found at http://dpa.state.ky.us/library/caseload.html. As I look at the *Report*, I have these observations:

- DPA continues to be the lowest funded public defender agency in the nation. DPA represented over 100,000 people at $183 per case, and at $5.09 for every Kentucky citizen. These are astonishing figures. This includes not only all cases in district court, but the complex child sexual abuse trial, the capital trial, the capital appeal and post-conviction case. Viewed from a fiscal posture, the taxpayers of Kentucky are being well-served by the Department of Public Advocacy and its public defenders. However, Kentucky needs to do better. The primary reasons why the cost-per-case figure is so low is that public defenders in Kentucky carry caseloads which are too high, and they are paid salaries which are too low. Most defenders in Kentucky opened more than 400 cases per year, and they were paid at the entry level at $23,000+ per year. While this keeps the cost-per-case down, it threatens the quality of services being delivered, and in too many cases drives dedicated hard-working lawyers away from being public defenders.

- 101,210 poor people charged with or convicted of a crime or a mental state that could have resulted in their confinement were represented by Kentucky public defenders. This is where the rubber meets the road. The promise of *Gideon* was realized over 100,000 times in Kentucky in 1997-1998.

- Kentucky is fortunate to have a statewide controlled and managed public defender system. There are states which spend a great deal more than Kentucky which do not have the ability to provide comprehensive public defender services to their citizens. I am aware of states which cap capital cases at $1000 per case, and others that are unable to provide public defenders for misdemeanants, all of which spend more per case than does the DPA. The figures cited in the *FY 98 Final DPA Caseload Report* include all of the money spent on public defender services, including administration. To be able to provide a public defender to an individual client, and to administer the system at the same time, for $183 per case, is quite an accomplishment.

- Defender caseload has stabilized. This is welcome news after years of rising caseloads which affected previous efforts at lowering individual attorney caseloads. In 1996-1997, DPA represented 103,209 cases. This declined in 1997-1998 to 101,210, a decline of .9%. At the trial level, the caseload dropped from 96,484 to 93,238, again a .9% drop. The primary decline occurred in Louisville and Lexington, which is consistent with the nationwide trend of dropping crime rates in our major urban areas. In Louisville, 31,146 cases in 1996-1997 dropped to 27,899 in 1997-1998. In Lexington, 10,119 cases in 1996-1997 dropped to 8,596 cases in 1997-1998. The cases in the remainder of the state actually went up between 1996-1997 and 1997-1998.

- Total funding-per-case, including at the trial level, is up from the previous year. In 1997-1998, the total funding-per-case for DPA, that is adding trial and post-trial costs to-

gether, went from $161 in the previous year to $183.

- The trial level funding-per-case for full-time delivery and part-time/contract delivery is similar. In 1996-1997, the funding-per-case for full-time offices was $132 per case, compared to $109 per case for part-time lawyers. In 1997-1998, the full-time method cost $152 per case, compared to $139 for the part-time method. Experience has taught us that when a full-time office is established, caseload skyrockets, indicating that one of the hidden costs in the part-time method is the unrepresented indigent. Experience has also taught us that one of the only ways that the part-time method has been able to continue is for private lawyers to contribute considerable pro bono resources to the defense of indigents. Part-time lawyers in Kentucky are simply not being paid even their overhead, much less what they charge their private clients. It has been a goal of mine to eliminate the disparity between the two methods. We are close to that goal.

- DPA is spending $7,470 for every in-house appeal, and $919 for those appeals handled by the of-counsel program. DPA's Appellate Branch represents all Kentucky Supreme Court cases, while distributing most Kentucky Court of Appeals cases to a group of 12 part-time contract appellate public defenders comprising the of-counsel program.

- DPA represented 6,516 cases at the post-conviction level last year at a cost-per-case of $176. The funding for post-conviction services has not kept pace with the burgeoning inmate level. Funding was sought in 1998 for post-conviction services for Class D felons held in county jails, but this was not accomplished.

- DPA is spending a great deal on the death penalty. 86 capital cases were opened in 1997-1998 at the trial level, excluding Jefferson County, for which we had no separate report. DPA spent $10,000+ per year for each of its 26 capital post-conviction clients. DPA spent $834,900 on the Capital Trial and Capital Post-Conviction Branches in 1997-1998. DPA's full-time offices, Lexington, and Louisville all spent untold resources on representing capital clients in 1997-1998 outside the spending of the two specialized capital branches.

- 92% of the caseload handled by DPA was at the trial level.

- 76% of the trial level caseload was handled by full-time attorneys.

- 24% of the appellate caseload was handled by full-time attorneys.

- 18% of the caseload involved juveniles. DPA handled 18,739 juvenile cases.

- The Juvenile Post-Disposition Branch opened 909 cases, including 324 fact cases, 261 duration cases, and 324 conditions cases. This was done at a funding-per-case of $445.

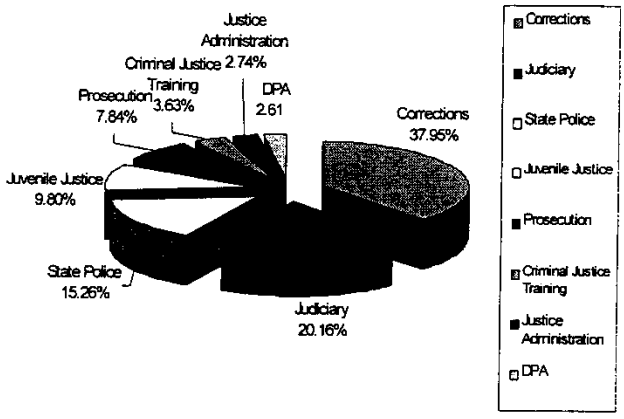
- The funding-per-case at the Post-Trial level was $394.

- 2%, or 2502, of the cases involved involuntary commitments.

- Projected caseloads for individual lawyers for 1998-1999 will be more reasonable than they have been in the past. The open cases per lawyer in the full-time system was 524 in FY 95, 473 in FY 96, and 516 in FY 97. In FY 98, those caseloads were 480 per lawyer. If caseload remains stable, the open cases per lawyer will go down to 449 in 1998-1999. National standards have long established 400 misdemeanors, 150 felonies, and 200 juveniles as a full trial level caseload. Kentucky's caseloads have long exceeded these standards. However, with more resources being available to Kentucky's public defenders, and with caseloads stabilizing, we are moving in the direction of having caseloads more in line with national standards.

- Projected caseloads for individual attorneys in Lexington and Louisville also have become more reasonable. In FY 96, caseloads for individual Louisville lawyers were at 707. This moved up to 724 in FY 97. In 1997-1998, however, caseloads moved back down to 700. In FY 1998-1999, with $300,000 in additional resources budgeted in the 1998 Legislature, caseloads should be at 579 per lawyer in Louisville. This is the first time in my memory that caseloads in Louisville have dropped below 600 per lawyer. Likewise, in Lexington in FY 96, lawyers there opened 573 per lawyer. This moved up to 632 in FY 97. However, in 1997-1998, this moved down to 545. Projected caseloads for 1998-1999 with the $200,000 in additional resources in Lexington are 485, the first time in memory that the caseloads dropped below 500 per lawyer.

- 882 cases were opened by DPA investigators in 1997-1998. This figure does not include Louisville and Lexington investigators. This means that a small minority of cases were investigated by a full-time investigator. I am aware that in our offices, investigators can only be assigned to serious felony cases and to cases with a high possibility of going to trial. This contrasts dramatically with the goal expressed in the NLADA Standards of every case being fully investigated prior to the entry of a plea or other disposition.



- Funding per case in Warren and Daviess Counties remained far too low in 1997-1998, $111 and $70 respectively. In DPA's Plan 2000, both counties will be covered by a full-time office during the biennium, which will feature considerably more resources going into these two high caseload counties.

- DPA continued in FY 98 to receive only 2.61% of the criminal justice budget. This is the real story behind these caseload figures. Only 2.61% goes to indigent defense. 7.8% goes to prosecutors. More money goes to criminal justice training, 3.63%, than to indigent defense. 9.8% goes to juvenile justice—over 4 times that going to indigent defense. 37.9% goes to Corrections.

- The *FY 98 Final DPA Caseload Report* highlights the importance of the collection of thorough, accurate, high quality data. I rely a great deal on data, from making staffing decisions to planning future budgets. The funding authorities in Kentucky deserve to have high quality data from DPA. I encourage all public defenders and their staff to commit to doing their part to ensure that the figures upon which we rely, and which we present to the General Assembly, are of the highest quality.

The real story here is not one of funding per case, nor of lowering caseloads. Rather, the real story is that a great deal of justice is being delivered in a high quality way by Kentucky's public defenders. We do this in a state with an 18% poverty rate. We do this in a state with immense social problems.

Thank you to all of Kentucky's part-time and full-time public defenders and their staffs for making the Constitution work every day of 1997-1998.

Ernie Lewis, Public Advocate ■

KENTUCKY DEPARTMENT OF CORRECTIONS

➢ Doug Sapp, Corrections Commissioner

The Kentucky Department of Corrections will be expanding the segregation unit at the state's only maximum security institution, the Kentucky State Penitentiary in Eddyville. The expansion will allow penitentiary staff to more safely manage the most aggressive, assaultive inmates in the Kentucky corrections system.

Currently, the segregation unit at the penitentiary houses 156 inmates. The unit, originally designed in the 1880's, and renovated in the early 1960's, has proven inadequate to house a certain segment of the inmates located in this unit.

All of the inmates are housed in segregation, following a due process hearing, for violations of institutional rules. However, there are those inmates within this unit who have continued to assault inmates and staff, set fires on the unit, and been disruptive to daily operations. Because of their behavior they have been assigned to a separate set of cells within the unit so staff can more closely monitor their activities.

Unfortunately, these 20 cells, and the unit as a whole, were not designed to house inmates who constitute such a serious threat to other inmates and staff. Last year alone the penitentiary experienced 73 assaults on staff and 44 assaults on other inmates in the unit. Many of the inmate-to-inmate assaults were the result of inmates having to exercise together in areas not specifically designed for that purpose. The design of this 100 year old cell block has necessitated the construction of the new 50-bed expansion to the segregation unit. Its design will enhance safety for both inmates and staff.

The new segregation unit has yet to be designed, however, preliminary plans call for a unit which will be constructed to meet the standards as set forth by the American Correctional Association for segregated housing. It will include improved fire safety features, individualized inmate exercise areas, and smaller living units to allow for improved staff supervision.

One of the frequent misconceptions concerning segregated housing is that the purpose of these units is to eliminate all contact between inmate and staff. To the contrary, this unit will allow for continued inmate and staff interaction. As is current practice, regular rounds will be made by security staff, as well as, frequent visits by medical and program staff. However, the design of the new facility will reduce the potential for physical abuse of these staff.

Although the new unit will have many enhanced security features, the procedures currently in place at all Kentucky correctional institutions, which govern the use of force and restraints when dealing with inmates, will govern the operation of the new unit as well.

The length of an inmate's assignment to this unit will be determined by departmental policy and their behavior. Periodic reviews will be conducted to evaluate each inmate's adjustment with the ultimate goal being to return them to a less structured environment.

One frequently expressed criticism of segregation units is that they house disruptive but mentally ill inmates. Kentucky has addressed this issue by opening, on September 1, 1998, of this year, a newly constructed mental health housing unit at the Kentucky State Reformatory. This unit is supplemented by an extensive mental health program already in place at that facility. What the new mental health unit has allowed the

department to accomplish is somewhat unique when compared to other correctional systems in this country. This unit houses inmates who may have previously been classified to segregation units because of their violent nature. Despite their sometimes disruptive behavior we are providing intensive mental health treatment for these individuals without housing them in a segregation unit.

The Kentucky Department of Corrections was progressive in requesting funding to build this Mental Health Unit. Also at the Kentucky State Reformatory we operate a modern nursing care facility which handles the long term medical needs of our aging inmate population. Now, our department, with the assistance of a $4.6 million dollar grant from the federal government, will be able to provide a much needed expansion of the segregation unit at the Kentucky State Penitentiary. This unit will allow us to us to provide safer places for inmates to live and for staff to work. Hopefully, this highly structure unit will provide an incentive for our system's most assaultive and disruptive inmates to change their violent behavior.

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BACKGROUND ON SUPER MAXIMUM SECURITY (SUPER MAX) ISOLATION UNITS

➢ **Everett Hoffman, Executive Director,**
American Civil Liberties Union of Kentucky

The Super Max concept represents a radical extension of the traditional concept of solitary confinement. Modern technology is used to isolate, regulate and survey the life of the inmate without permitting any human contact or social stimulation. Inmates are often kept in these conditions for years on end.

Typically, inmates are confined in 8 x 10 foot cells for 23 hours a day in enforced idleness. The cells are windowless and have solid doors, so that the inmate cannot see or hear anything going on outside the cell. Inmates are "cell fed" -- their meals are delivered through slots in the cell doors, with no verbal or visual contact with the guards delivering the meals. No furniture or other amenities are allowed beyond the concrete and steel furniture in the cell -- no television, no radio, no tobacco. Inmates in Super Max units are allowed one hour a day of solitary "recreation" in a concrete enclosure, their movements monitored by video cameras.

Inmates are within close proximity of staff only when they are being visually searched as they stand naked before a control booth window before their one hour of "recreation." Typically, they remain shackled in front of their families during non-contact visits conducted behind clear partitions. There is always a physical barrier between the inmate and other human beings. They are deprived of human contact or touch for years on end.

Corrections officials say that these conditions are necessary to protect prison personnel and other prisoners from those inmates who engage in repeated acts of violence. Super Max critics disagree -- they say that the extreme conditions in Super Max units go far beyond what is necessary for prison security. They charge that the extremes of isolation and sensory deprivation are more properly viewed as psychological torture.

One of the harshest critics has been Human Rights Watch, an international human rights organization that is well-respected for its work documenting the use of torture by governments around the world. In October, 1997, Human Rights Watch issued a comprehensive report condemning two Super Max units operated by the Indiana Department of Corrections.

Criticisms of Super Max units fall into five general areas.

1. **Potential for physical abuse**. Human Rights Watch found that the total isolation of inmates in Indiana's Super Max units resulted in a high incidence of physical abuse by prison guards, including beatings, macings, excessive use of restraints and excessive use of cell extractions carried out by five-member teams of guards.

2. **Excessive confinement periods**. Human Rights Watch also found the conditions at Super Max facilities are so extraordinarily harsh and potentially harmful to inmates that they should be used, if at all, only as punishments of last resort for brief periods of time. But in Indiana, as in other states, inmates are kept in Super Max units for years at a time. If Warden Parker was quoted correctly in recent news stories, that is the plan here in Kentucky as well.

3. **Assignment criteria**. Human Rights Watch has found that there is a natural tendency, once Super Max facilities are built, to fill them to capacity -- even if that means relaxing the initial criteria for incarceration in the unit. The result is that many inmates in Super Max units do not represent serious enough security risks to warrant isolation and that others are kept in the Super Max unit much longer than necessary.

4. **Treatment of Mentally Ill Inmates**. One of the most widely expressed criticisms of Super Max units is that they are used to house inmates who are disruptive because they are mentally ill. Studies report that mentally ill inmates get in trouble in disproportionate numbers and end up spending more time in lockdown and solitary confinement. Predictably, the sensory deprivation and social isolation which are the very purposes of the Super Max unit serve to aggravate inmates' mental illness and increase their suffering. In a tragic vicious circle, their worsened mental condition leads to more rule infractions, such as self-mutilation, for which they receive more time in isolation.

5. **Effect Upon Release**. The last major criticism of Super Max units is the total lack of preparation that they give to inmates who complete their sentences and are released back into society. As one inmate is quoted in a recent article, "*If you have an animal in a cage, and you're constantly provoking him and hurting him and one day you let him out, you'll have a dangerous animal*"

Indeed, the most insidious effect of long-term isolation is that it destroys the inmate's ties to society. Inmates in isolation retreat further and further into themselves. They start to discourage the few visitors they have because they become increasingly uncomfortable around people. Men in long-term isolation are more likely to see their marriages break up and their relationships with their children wither. By the time they are released, they have little prospect for adjusting to society and nobody left to help them.

All of this is not to say that corrections officials do not need new tools to deal with inmates who are repeatedly violent and disruptive. But it is critically important for the full General Assembly to consider the policy and financial issues carefully -- and to consider the alternatives.

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NATIONAL INMATE POPULATION OF TWO MILLION PROJECTED BY 2000

➢ The Sentencing Project

An analysis of 1997 prison population figures just released by the Bureau of Justice Statistics indicates that the nation's prison and jail population will reach a total of two million inmates by the year 2000 if current trends continue. Based on an average growth rate of 6.5% since 1990, the inmate population will surpass 2 million by the beginning of the new millennium. As seen below, the number of inmates by mid-year 1997 had more than tripled from the level of 501,886 in 1980.

Year	National Prison & Jail Population
1980	501,886
1985	742,579
1990	1,148,702
1995	1,585,586
Mid-1997	1,725,842
1997	*1,781,932
1998	*1,897,758
1999	*2,021,112
2000	*2,152,484

* estimated year-end

The current level of incarceration represents the continuation of a 25-year escalation of the nation's prison and jail population beginning in 1973. The U.S. rate of incarceration of 645 per 100,000 is second only to Russia, and represents a level of incarceration that is 6-10 times that of most industrialized nations.

The rise in the prison population in recent years is particularly remarkable given that crime rates have been falling nationally since 1992. With less crime, one might assume that fewer people would be sentenced to prison. This trend, though, has been overridden by the increasing impact of lengthy mandatory sentencing policies. These include:

- *Mandatory Minimums - The* mandatory minimum sentencing policies that now exist in every state have been used disproportionately for drug offenders, who now constitute one of every four inmates nationally. Research by the Department of Justice, the U.S. Sentencing Commission, and other agencies has documented that many of these offenders are low-level offenders whose continued incarceration is extremely costly and wasteful of prison space. [1]

- *"Three Strikes " Policies - The* federal government and nearly half the states have some type of "three strikes and you're out" law that requires sentences of life without parole or significant increases over past sentencing patterns. California's law is by far the broadest such statute, with more than 30,000 offenders having been sentenced under its provisions since its enactment in 1994.

- *"Truth in Sentencing" - Spurred* on by financial incentives in the 1994 federal crime bill, half the states have qualified for federal prison funding as a result of having changed their sentencing laws to require that certain offenders serve 85% of their prison sentence. In most cases, these changes will result in significant increases in time served in prison for these offenders, many of whom would have received lengthy prison terms under past practices. The consequent increased cost of incarceration, though, was

cited as the main factor for not adopting such policies in 16 states, according to an analysis by the General Accounting Office.[2]

Continued expansion of the prison system has also been demonstrated to be a far less cost-effective means of addressing crime than other measures. Research by Rand, for example, has documented that spending an additional $1 million on treatment for drug offenders would reduce serious crime 15 times more than expanding the use of mandatory prison terms. [3]

The growth in incarceration has had its greatest impact on minorities, particularly African Americans. In the ten-year period 1985-95, the number of African Americans in state prisons increased by 132%, compared to an increase of 109% for white prisoners. For drug offenses, there was a 707% rise in the number of imprisoned blacks, compared to 306% for whites.

The proliferation of harsh mandatory sentencing policies has also inhibited the ability of courts to sentence offenders in a way that permits a more "problemsolving" approach to crime, as is being demonstrated in the community policing and drug court movements today. By eliminating any consideration of the factors contributing to crime and a range of responses, such sentencing policies fail to provide justice for either victims or offenders. Finally, given cutbacks in prison programming and rates of recidivism of 60% or more for released prisoners, the increased use of incarceration in many respects represents a national commitment to policies that are both ineffective and inhumane.

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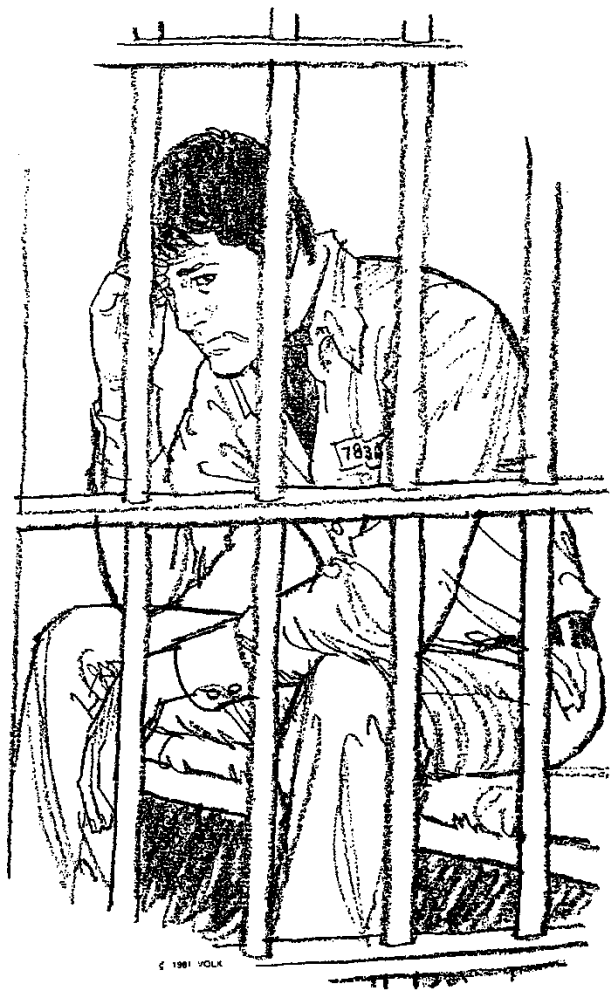
Footnotes

[1] U.S. Department of Justice, "An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories," February 4, 1994, and United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, August 1991.

[2] General Accounting Office, "Truth in Sentencing: Availability of Federal Grants Influenced Laws in Some States," February 1998.

[3] Jonathan P. Caulkins, et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money*?, RAND, 1997. ■



MITIGATION STRATEGIES IN DEATH PENALTY CASES

➢ **Diana McCoy, Ph.D.**

All too often the fact that every death penalty case is really two trials, a guilt/innocence trial and a sentencing trial, is ignored. Many times the defendant wants to focus exclusively on the fact that he did not do it and is in denial about the very real possibility that he may be found guilty. Because the awesome responsibility of the attorney who has assumed a death penalty case is so overwhelming, it is sometimes tempting to share the defendant's "head in the sand" mentality and go into denial along with him. This is especially tempting since typically the defense attorney is focusing the lion's share of his/her efforts on the guilt/innocence phase. Defendants can often foil even those attorneys who know the importance of carefully preparing for the sentencing phase by "stonewalling" about important background information, apparently in an effort to stress their normalcy and the extreme unlikelihood that they would ever engage in such culpable behavior. This can make it very difficult to proceed with mitigation.

To wait until the day before or the morning of the sentencing trial based on a misplaced sense of complacency, for example, that jurors will not sentence a woman or a teenager to death and to then make a last ditch effort to save your client's life is bound to be viewed as a half-hearted measure at best, illustrating to the jury that even you do not think your client's life is worth the effort to adequately prepare for trial. The jury assumes that you, as the defendant's supposed confidante, know "the real truth" and thus to be so poorly prepared sends them an important corroborating message regarding the defendant's guilt and your sense of his worth that they will not fail to appreciate.

Employing a Mitigation Team

Because of the intense, time consuming work necessary to uncover evidence helpful in mitigation, it is recommended that the attorneys have a mitigation expert/investigator team to help orchestrate the sentencing phase of the trial. Funds for mitigation experts, investigators, and trial and jury consultants are available in capital cases. In the event that the trial judge is loathe to approve funds for services, this may well be an appealable issue. Within the past few years the Tennessee Supreme Court and Sixth Circuit Court of Appeals have ruled on the importance of all available mitigation material being put before the jury in sentencing. *State v. Odom*, 928 S.W.2d 18 (TN 1996) held that at a sentencing hearing it was not harmless error that the mental health expert was not permitted to testify about the defendant's background but instead constituted reversible error. *Goad v. State*, 938 S.W.2d 363 (TN 1996) held that "...defense counsel was ineffective in failing to present the available expert mitigating evidence of mental illness which would have substantially strengthened the mitigation case of the defense." In *Austin v. Belt*, 126 F.3d 843 (6th Cir. 1997) the Sixth Circuit he d that trial counsel's performance during the sentencing phase was deficient and prejudiced his defense because he presented no evidence. Similarly, a federal judge ruled in *James Jones v. Bell*, in which this author served as mitigation expert, that the defense at the original trial had not presented existing evidence that might have proven helpful in the penalty phase of his trial, granting Jones a new sentencing trial.

Comprehensive Social History Necessary

A carefully researched, factual social history lends an air of thoroughness and credibility to the defense presentation in the penalty phase and at the very least is a good visual exhibit when complete with all available records. The mitigation expert, with the help of the investigator, collects all data pertinent to the defendant's background, including, but not limited to, edu-

cational, medical, employment, legal, and military records as well as those pertaining to marriage(s) and divorce actions, social service agencies, etc. In short, any scrap of paper that may be out there could potentially shed light on the defendant's character and situation, offer factual information, as well as suggest additional leads and thus is doggedly pursued. For example, the military records of one defendant's deceased father, which could only be obtained via court order, made reference to a marriage prior to that with the defendant's mother of which none of the offspring were aware. This small detail, seemingly inconsequential, contributed to the overall picture of a highly secretive family which the judge ultimately described as not just dysfunctional but bizarre. This minor point helped develop the image of an emotionally and behaviorally disturbed young man who was not in total control of his faculties at the time of the homicide.

Mitigation Themes are Persuasive

The mitigation expert develops "themes" pertinent to the mitigation strategy. For example, a primary theme may be that the defendant has had a terrible childhood, where all of his siblings have likewise had difficulty with life and with no one emerging from such a family having much of a chance of success but that despite this the defendant has attributes worthy of allowing him to live. Or, it may be that she is a passive person as a result of childhood sexual abuse who is easily led and who would otherwise not have found herself in such a predicament had she not been under the domination of a stronger personality. While perhaps not enough to acquit her, such a theme may be crucial in avoiding the death penalty. Themes of this nature are best asserted via testimony supported by police reports, third parties, medical records, and the like as opposed to only expert testimony which relies, for example, on the defendant's word and psychological test results. Numerous interviews with family, friends, co-workers, neighbors, and so forth are essential in obtaining sufficient detail and multiple perspectives to persuasively weave this theme throughout the sentencing hearing in a believable manner.

Mitigation Witnesses

The mitigation expert should provide the trial lawyer with a "cast of characters" to take the stage during mitigation, along with an analysis of their strengths and weaknesses as well as suggestions for examination. Parading a number of witnesses to the stand during sentencing, even if they are only on the witness stand for a few minutes, not only shows that you went to some trouble to identify and interview witnesses but also indicates that there are a number of other people, in addition to you, who think the defendant's life has sufficient value to miss work, risk the embarrassment of cross-examination, be away from loved ones if having to travel any distance, and so forth in order to come to trial.

The more these witnesses talk about your client, the more the jury is helped to "know" different aspects of your client and the more human he becomes. It is a well known truism that it is much more difficult to sentence someone you know to death, even with death-qualified jurors. The other benefit to having more rather than fewer witnesses is that one or the other of your witnesses is bound to appeal to every member of the jury on at least an unconscious level, whether this is an authority figure, a representative of middle-management, someone from the working class, and so forth.

Consider obtaining the affidavits, or even videotaping the testimony, of any witness you consider absolutely critical to your case, especially since appeals may go on for many years. Witnesses sometimes have the unnerving tendency of dying just when you need them the most. For example, in one case the affidavit from the only reasonably coherent sibling able to attest to the extreme brutality of the defendant's father toward the defendant was helpful, but not as helpful as his live testimony or even videotaped deposition would have been had he not chosen to commit suicide.

Judges, as well as jurors, vary greatly in their attitudes toward expert witnesses, with some being more receptive and less threatened than others by experts. In addition, the jury may not find the expert credible, for one reason or an-

other, especially in the case of a mental health expert who has previously testified in the guilt/innocence phase of the trial and is now "tainted." For this reason, it may be advantageous, if psychological/psychiatric opinions are to be rendered in the sentencing phase of the trial, to have another mental health expert address pertinent issues in the guilt/innocence phase. A mental health expert may help with an overview or a summation in the sentencing phase, with lay witnesses developing key issues subsequent to this.

If the prosecution intends to call an expert to testify regarding the future dangerousness of the defendant and you do not feel you have strong evidence to prove otherwise, the mitigation expert can utilize well-documented research to attest to the inability of mental health experts to accurately predict future dangerousness, or, if his/her training does not qualify him/her for this, can locate a qualified expert to do so. When expert witnesses are prevented from discussing future dangerousness, defense attorneys can still defuse the dangerousness issue through the testimony of relatives and friends of the defendant who can describe instances of the defendant solving problems non-violently. They may also discuss their personal relationship with the defendant as to how they do not fear him or feel threatened by him (White, 1987).

Learning from Social Science Research

Your mitigation expert should be conversant with law and case law as well as social science research. Much may be learned from reading the current literature and applying this to mitigation work. For example, White (1987) studied the factors believed to influence jurors' penalty decisions in capital trials, the nature of the crime committed, and the defense's portrayal of the convicted offender's character. Based on his results, he determined that certain defenses were most or least effective depending upon the specific nature of the homicide, such as when, in a felony-murder the defendant panicked and shot a hysterical clerk, when the defendant coolly shot a tied-up clerk in a felony-murder, and thirdly, when there was the brutal and senseless killing of several victims. He broke this down further by gender, suggesting that it might be possible, in jury selection, after the defense strategy has been ascertained for both the guilt/innocence and mitigation part of the trial, to decide which jurors might be more receptive to what particular kind of defense. That is, if the mitigation is to be based on a poor social history, male jurors may be preferable to female jurors. However, female jurors may be preferred if the defense has decided to present an argument against the propriety of the death penalty. In his research suggestions, White also discusses the possibility that jurors who vote for life and death may differ from each other in terms of personality variables in that jurors who vote for death may possess characteristics of the "authoritarian personality," such as being conventional in their values, more likely to identify with power figures, and more likely to punish people who violate society's rules.

Hans (1988) discusses the importance of setting the stage for the penalty phase by illustrating positive features of the defendant throughout the guilt/innocence phase, since jurors often make up their minds prior to the penalty phase even beginning. She discusses models of jury decision making, saying that it is less a matter of weighing and summing aggravating versus mitigating factors and more a matter of comparing the defendant to a prototype of someone they believe definitely should get the death penalty, such as Richard Speck or Charles Manson.

Logan (1982; 1986) recommends against closing arguments by defense counsel which stress that the death penalty itself is equivalent to murder and that vengeance is a base motive since this directly attacks the values of these death-qualified jurors. Instead, making the defendant's behavior understandable as well as stressing the severity of life in prison without parole may be a more viable option because this takes into account the values and perspectives of the jurors, who can punish the defendant and protect society at the same time without imposing the death penalty. Barnett (98 5) analyzed jury verdicts and found that the more certain jurors are that the killing was intentional, the more willing they are to render a death sentence. Geimer and Amsterdam (1988) cited the most frequent reason

for death verdicts was the gruesome or cruel nature of the murder. Life verdicts were returned most often when there was lingering doubt about the defendant's guilt.

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REQUIEM

➢ **Jodie English**

> "For these are all our children. We will all profit by, or pay for, whatever they become."
> - James Baldwin

Two clients. Two lawyers. Two impending executions.

A little over a year later, both men are off death row. One executed. The other serving a sentence of sixty years. One, his ashes spread on the grounds of the Bloomington, Indiana Friends Meeting. The other, eking out his existence in the thin hard soil of a maximum security prison. But alive.

INTRODUCTION:

We drove the five hours to Indiana's death row wrapped in the web of friendship. Gray skies over the hollow hulls of the cornfields. As the walls and razor wire loomed large, we steeled ourselves. I could feel the air between us go dry. Jan Dowling, one of several lawyers representing Gary Burris; myself, lead counsel for Bill Spranger. Both of us hoping that neither would suffer the agony of execution, condemnation to that hell where lawyers wake in the night to revisit what might have been done differently.

Bill Spranger's Crime:

Bill Spranger was eighteen when he and a man ten years his senior set in motion the events that

would place Bill on death row. It was an evening fueled by alcohol, an evening that accelerated so unintentionally from a simple prank to deadly violence. They'd been out drinking almost until morning when, less than a mile from home, they saw a car parked beside the road.

The older man wanted to break in. Bill was too drunk to disagree. When the town marshal pulled up, Bill just stood there, waiting to be taken away to spend his first night ever in jail. But the man Bill was with felt differently.

Unbeknownst to Bill, this man had been convicted of robbery, and faced serious prison time if he was caught. The man started to fight with the marshal, a fight that very quickly turned ugly. As Bill watched in a drunken stupor, the two men rolled over and over each other all the way across the highway. Finally, the officer got the best of his assailant. But the marshal didn't just put on the handcuffs and finish the arrest. The marshal started beating the man who had fought him. The man lost consciousness, but the beating continued. Days later, his body bore nightstick shaped bruises.

Bill just wanted the beating to stop. He looked around and saw that the marshal's gun had come unholstered during the rolling tussle across the highway. Bill had never held a gun before, but he picked it up and yelled for the marshal to stop the beating. The marshal ignored him. Then Bill cocked the gun, to show the marshal that he really meant for the beating to stop. A split second later, the gun exploded in Bill's hand. The two fled - Bill to the arms of the girl he was engaged to marry, the girl whom he told, within an hour of the shooting, his voice shaking, "I shot him, but I didn't shoot him - the gun just went off."

In 1983, when Bill was sentenced to die for the murder of the officer, the jury never heard what he had told his girlfriend. They never heard that there was something profoundly wrong with the officer's gun - that ballistics testing of the gun confirmed the explosive, hair trigger condition of the firearm. They sentenced him to die based on the testimony of his codefendant, who received a sentence of four years.

Bill's Childhood:

Part of representing someone in a capital case is to unearth their past, for the past always bears witness to the reasons the murder took place. As death row inmate Michael Lee Lockhart said on the eve of his own execution, "One thing is certain: God did not create a murderer."[1]

For months, Bill refused to open up. Both his parents had died while he was on death row. What was the point of maligning their memory? It wasn't until I told him something of my own past that I got him to understand that it wasn't a question of blame, it was just a question of telling the jury the truth of who we are.

I told him of one of my parents' drunken arguments when I was nine. At three in the morning, I woke to the alarm of their anger. I huddled close to the heat grate on the floor of my room through which I could see into the room below where they fought. I watched as my father mangled my mother in his strong hands, ripping a clump of hair from her head as she screamed, the ball of her hair moving along the floor in the air from the heat run. The bald spot. How she would comb her hair so carefully to try and hide what had happened.

My past was redeemed by the trust that came to exist between Bill and me. The horrible memories that used to haunt me whenever someone cracked their knuckles or I saw hair cleaned from a brush have less of a hold on me, for without them, I could never have told Bill's story so fully.

Bill was the tenth child, born in as many years. With his father either absent working two jobs or drunk, and his mother gone for months at a time caring for one of Bill's brothers who spent most of his childhood in hospitals due to kidney failure, Bill got very little. There was grinding poverty. There were times they ate popcorn for dinner. Times the family of twelve drove to

[1] Indianapolis Star, "Indiana Girl's Killer is Set to Die Today in a Texas Prison," December 9, 1997, pp.1, 12.

church at the rescue mission all packed into a rusting VW bug. The only thing there seemed to be enough of was alcohol. Bill's father thought nothing of letting Bill have sips of his liquor as a child, openly shared his booze with Bill as a teenager. In the Spranger household, intoxication was manly. And intoxication was the catalyst for violence. Sometimes as a teenager, Bill would try to intervene - try to stop the beatings with whatever was at hand. It was a pattern that was repeated the night of the marshal's death.

Gary Burris

Gary was tall, rail thin, black; with musing, caring, questioning eyes. Abandoned as a baby in a trash dumpster, Gary would never know the identity of his parents. He was raised by the pimp who rescued him from the refuse, by prostitutes and thieves. At six he brought clean wash cloths to the girls to wipe themselves for the next trick. At seven he helped sell liquor to the clientele of the whorehouse that was his home. Even though there were several police raids at the brothel, the law never cared that a nameless little black boy was living in squalor.

When the state finally placed him in foster care, Gary was described as quiet and good. Always appreciative. His only request for Christmas each year was for a birth certificate. He wanted to find out who he was, to have a birth date, some day of his own to celebrate.

For a man denied the knowledge of the date he was born, Gary came to know several dates by which he was to die for his crime of killing a cab driver. In the decade and a half over which these appointments were set, scrubbed and rescheduled, he became something of a philosopher, reading constantly. His gentle manner disarmed those who guarded him. He was made a trustee on the row. When others lost their self control, his was a voice of reason. Around him, some peace was possible.

Two years ago, when he came very close to being executed, some guards came to Jan, and with tears in their eyes, asked her to tell him goodbye for them. Faced with the possibility of imminent execution, Gary thought mostly of other's feelings - telling Jan that perhaps he should take his last words from the old Mr. Wizard, Tutor Turtle cartoon. Tutor would find himself in some awful jam and yell for help to his wise friend Mr. Wizard, who, waving his magic wand, would quietly intone: "Drizzle, drazzle, dradle, drone. Time for this one to come home." Then Tutor would be spirited back to safety. Gary hoped to bring some sanity to the prison's superintendent, who though a strong supporter of the death penalty, did not believe Gary deserved to die.

Bill's Trial:

The prosecution chartered a bus to ensure that the courtroom would be packed with law enforcement officers. By closing arguments, the courtroom was bursting with police. Standing room only. Wall to wall, an ocean of uniforms in navy blue and brown.

I hadn't foreseen this. A modern day Roman coliseum, the roar of the crowd, thumbs down. I hadn't anticipated that I would be able to count the friendly faces in the courtroom on less than the fingers of one hand. But my fear dissipated in the face of the overriding need to tell Bill's story. Against their weapons, their anger, and the popular public hue and cry for vengeance, I armed myself with Bill's story. The story of the accidental shooting, the defective weapon. The story of how his father had started Bill drinking at age eight, and helped to make Bill a full blown alcoholic by age sixteen. The story of his efforts to make the best of himself on death row - including testimony from his GED tutor, who though her daughter was married to our chief of police, nevertheless described Bill's determination and hard work as greater than any other prisoner she had tutored. I felt the unmistakable sense of calling that comes when the Spirit moves me to speak in Meeting, but I didn't know if Bill's story would be enough.

Pictures At An Execution

The witnesses are confined to the chapel. The wait is interminable, much longer than officials had represented. Instead of it being thirty minutes before the end of his world, it has been over an hour. Schedules adjust, but only as to the

moment of his ending, not the fact of his extermination. Death - that much, is certain.

The witnesses are ushered to their seats. The curtains open. The body strapped, almost strait jacketed. The long fingers that decades ago caressed a woman's cheek, that once grasped a gun as a man was left to die, now lift slowly and flutter his goodbye. The head turns. These are the last minutes of the world for him. And for the witnesses, who will never be as innocent and free again, who will order the events of their lives by the bookmark of his execution. No one speaks. No one moves. It is so absolutely quiet that each witness can hear the heartbeat of the person beside.

Then he vomits. Over and over. Purging himself of their last supper. The witnesses, forewarned that they will be banished if they speak out, barred from honoring his last wish for their presence, struggle to silence themselves, struggle not to gag. Tears fall, knuckles tighten, some fight to not throw themselves like birds against the plate glass of the execution chamber. In his mind's eye, one witness sees himself grabbing a weapon, freeing the man bound to the gurney, the poison poised on the brink of coursing through his veins, ripping out the IV lines, running... free.

With the vomit cleaned from his face, the ship of death rights itself. This is the final act. The final curtain. All is as clinical and sanitary as the showers at Auschwitz. His eyelashes, so long they brush his ashen cheeks, flutter, then still. The moth's wings shudder from the camphor. The specimen is pinned. That of God that existed in him is dead.
The ashes are spread by a tree. Those who knew him, who fought with the simple hope of knowing him still, stand beneath the branches. Some feel his presence, some are even sure he is there. For a decade and a half he'd longed to see a tree. None ever grew in the yard on death row. By spring, he will be part of the greening.

Not all of the lawyers who knew him were able to go on. One left the practice of law, left the state that murdered him. When the idea of writing this article was first raised, her reaction brought back the words of the Russian poet, Anna Akhmatova, who like so many thousands of others had lost her loved ones to executioners:

> "I spent seventeen months in prison queues in Leningrad.... Beside me, in the queue, there was a woman with blue lips....she suddenly came out of that trance so common to us all and whispered in my ear (everybody spoke in whispers there): 'Can you describe this?' And I said: 'Yes, I can'. And then something like the shadow of a smile crossed what had once been her face."[2]

But even she has begun to move on. She hears his voice some times while walking in the mountains. After years of stooping to pick up the five smooth stones to slay Goliath, she bends to no one. She wakes early, follows the sun rise, and at times, carries him with her. And through her, freedom and love call in answer to the shrouded heart.

I'm Alive:

When the judge uttered the words the words that meant he would live, the man just broke down and cried. His face was lit from deep within, he looked as innocent as a child, aglow with joy and he became new. The man who had struggled to breathe in the iron lung of a death sentence year after brutal, lonely year, was reborn. There is a childlike awe in his gaze as he whispers, over and over, the tears falling, "I'm alive. Oh my God, I'm alive."

His lawyer knew then, for the first time, what he had endured. How he had held his breath all those years in the Valley of the Shadow of Death. And she knew what she had lived under, not knowing all that past year whether she had been working on a cadaver, dictating an autopsy report, or whether her patient would survive.

"To have saved one life, it is as though you have saved the entire world." The Talmud.

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[2] Akhmatova Anna Selected Poems, "Requiem," Penguin Books, p.87, (1976).

DEFENDERS AND THE DEATH PENALTY

I wrote this article without telling you which of our clients lived and which was executed because I wanted it clear that we are all diminished by an execution, whether the client is ours or not. We all suffer, we all bleed. So ask not for whom the bell has tolled - it tolls for thee, and thee. Clearly, none of us alone can solve the problems inherent in the death penalty's profoundly arbitrary calculus of determining who should live or die. We must not let the devastation of these deaths divide us. Our solidarity is and will be our and our clients' only salvation.

The Killing Fields:

Over three thousand men and women await execution in America. "I should like to call you all by name...."[3] Some have no lawyers, and their fate is assured. Others are represented by hard fighting, but soul weary teams of lawyers and investigators, some of whom I know and care for deeply. Everywhere around me, eyes I love are closing on this final horror.

I don't know how to stop the bloodbath, the killing of our, not God's, mistakes. Those of us with any sense know we can't hunt murderers to extinction when every day society's indifference breeds murderers anew.

But this essay is meant to be more than a voyeur's glimpse at the profanity of the death penalty. It is a call to community and a call to action. Death penalty proponents would like nothing better than that we attack each other rather than fight the executioners. I implore you, make a united stand for life. As Benjamin Franklin stated, "We must all hang together, or assuredly we shall all hang separately."[4] Hanging together means that the trial lawyers admit their humanity and tell post-conviction lawyers the whole unvarnished truth about both all that might have been done but wasn't, and all that wasn't done well at trial. Hanging together means being forthright about our fallibility and the honest absence of a strategy basis for the inevitable errors we make in these high pressure cases. Hanging together means rather than blaming each other we point the finger of accusation at the system that denies us the time and resources to litigate these cases zealously.

Silence is complicity. I implore you, make a strong stand for life. These cases are being tried by defenders you know or should know in your cities and towns. Your county prosecutors are pursuing these death sentences, sentences that are the vote of your neighbors. The death penalty is the greatest act of domestic violence, the ultimate example of our society modeling violence as a solution to violence. As defenders, is it not our sacred calling to see this societally sanctioned slaughter abolished?

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"The problem with communication is the illusion it has been accomplished."

- George Bernard Shaw

[3] *Id.*, at p.95.

[4] Benjamin Franklin, on the signing of the Declaration of Independence, 1776.

MORE THAN MEETS THE EYE:

RETHINKING ASSESSMENT, COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE

➢ Dr. Marty Beyer, Dr. Thomas Grisso, Mr. Malcolm Young

Elements of A Juvenile Defendant's Dispositional Plan

The possible elements advocates may consider in fashioning a dispositional plan for juvenile defendants are many and varied, with the special needs, assets, limitations and history of each child and his or her family suggesting more permutations. The Sentencing Project urges advocates to consider as full a range of support services, reliance upon positive family and community connections, constructive controls and alternative sanctions as is possible for each child. A partial list of options to consider includes the following:

1. **Living Arrangements and Residential Options.** Where and with whom the child lives, and any necessary special consideration throughout the duration of the period of court supervision. Options include the family home, residences of collateral family members or adult friends, group homes, half-way houses and secure residential treatment centers. A serious proposal to place a child in a family member or friend's home requires a visit to that home and a visit with the responsible adults in advance.

2. **Geographic Relocation**. Removing a juvenile offender from a particular area or family setting may be an acceptable solution to several problems, including regular interaction with the victim. Question children about family members or adult mentors or friends who may live elsewhere.

3. **Psychological Assessment or Treatment.** To assist the child with problems which give rise to criminal behavior or to further rehabilitation, appropriate assessment or treatment may be arranged for alcohol and drug dependency and for emotional and psychological disorders, including unacceptable sexual conduct. Plans must document a juvenile offender's acceptance into a program, the location of treatment, the treatment facility personnel and the extent of the period of treatment. In some jurisdictions, juvenile probation may assist in finding and obtaining appropriate services; in other jurisdictions the advocate's initiative will determine whether a child actually obtains needed assessments or services.

4. **Counseling.** Some juvenile offenders are very receptive to counseling in areas such as substance abuse, anger management, parenting skills, family relationships and the like. We too often neglect the difficulties juvenile offenders have coping with the basics of their lives.

5. **Community Service**. Many juveniles are too young to work for payment, but unpaid work or volunteer assistance to a community agency, church, school or law enforcement may constitute a genuine "pay back" for an injury or damage and offer the juvenile a positive experience while assuring supervision for the time that is involved. As for

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adults, activity arranged for a child should be more than "busy work."

6. **Public Acknowledgment of an Offense or a Characteristic.** In its negative forms, this kind of sanction is sometimes called "public humiliation" sentencing when imposed in criminal court. To ensure that criminal defendants publicly acknowledge their offense or responsibility, courts have required them to obtain paid newspaper advertisements, wear marked clothing or post signs or bumper stickers. Juvenile court confidentiality may bar public acknowledgment, but in limited circumstances advocates might wish to consider whether some public acceptance of responsibility might be appropriate. Community service concepts are generally more constructive than the "humiliation" a few judges seem to desire.
7. **Contributions to Law Enforcement.** Some juvenile offenders might gain from working with, or being around, law enforcement officers; some police units are set up to provide mentoring or sponsoring support to juveniles through Big Brother/Big Sister or community policing programs.

8. **Public Information Services.** Some juvenile offenders are well positioned to inform the public about the seriousness or the means of preventing certain types of offenses, such as drug abuse, gang participation and vandalism including graffiti. The means of providing information might include speaking to schoolmates, groups of offenders or adult groups, and even assisting reporters and other media professionals in preparing articles on delinquency issues.

9. **Victim Restitution.** Payment of the victim's monetary loss in order to compensate for damages or financial loss suffered as a result of the juvenile offender's criminal activity; limited by a juvenile's ability to legally obtain an income.

10. **Symbolic Restitution.** When monetary restitution is not possible, there is often an option of providing partial, symbolic restitution, which punishes the juvenile offender as it partially offsets a victim's loss. Symbolic restitution may be paid to any individual or group who may have suffered an indirect financial expense due to the juvenile offender's behavior, or to a charitable organization.

11. **Special Consideration for the Victim.** There is no reason why a sentencing order should not take into account the reasonable needs or desires of the victim. A juvenile offender's offer to "stay away from" an individual or a neighborhood, or to in some way assist a victim, his or her friends, family or a person in whom the victim has an interest, may be appropriate in some cases.

12. **Education.** For most juveniles, a plan to continue education is important whenever realistic. The plan might include continuation in public or private schools, GED preparation courses, remedial or special education programs or specialized training; usually considered to serve a rehabilitating function. For many juveniles with legal problems, learning or other disabilities are factors which often have never been addressed. Under the Individuals With Disabilities Education Act (IDEA), juveniles have a right to appropriate educational and remedial services. Access to these services usually requires specialized advocacy skills.

13. **Employment.** If not in school, and of legal age to work, the juvenile offender should be employed whenever possible. The advocate should specify who should supervise the juvenile offender, the hours of employment, the salary and the duties of the position.

14. **Vocational Training.** When employment is impossible or inappropriate, vocational training should be considered, as it may leading to gainful employment in the future. In addition to state vocational rehabilitation, manpower, Job Corps and corporate on-the-job training, advocates might consider variations on the apprenticeship and mentoring models even for youths too young to work for salary.

15. **Community Advocate/Third Party Monitor.** A highly recommended, if not essential, component for most children, this element provides individuals in the community to monitor a juvenile offender's compliance and behavior. Properly arranged, a third party monitor can extend supervision beyond that normally provided by probation or parole officials. There may be more than one advocate or third party monitor. This function may be linked to employment, counseling, vocational training and the like. Community organizations such as churches and civic organizations may contribute to this function.

16. **Relinquishing a Right/Sacrificing Freedom.** The most common form involves "house arrest," which need not be linked to electronic monitoring. However, "house arrest" is over-played as a probation option that requires increased supervision. Other provisions may involve limits upon use of a car or travel, rigid structuring of a juvenile offender's time, restrictions on privacy and voluntary submission to searches, breathalyzer tests and the like at the behest of law enforcement, including probation. Punishment for some juvenile offenders may be having to give up treasured activities, including fishing or hunting, sports, television and the like.

17. **Part-Time Incarceration.** A sanction rarely applicable for juveniles, even those in criminal court, this involves work release or periodic (*e.g.*, weekends) imprisonment, usually in a local (jail) facility.

18. **Short-Term Incarceration.** Many jurisdictions permit short-term incarceration as "punishment" for juveniles, although it has limited utility or positive benefit.

19. **Day Reporting/Treatment Programs.** There are an increasing number of juvenile day reporting centers or programs. Day reporting offers daily accountability and observation, including optional drug testing, schooling, counseling and activities.

20. **Special Considerations.** Juvenile offenders often require dispositional arrangements that involve unique elements tailored to their special needs or circumstances. Examples include steps to solve medical needs, transportation problems, transferring probation elsewhere (interstate compact), obtaining financial assistance including public assistance and Medicare benefits, help with immigration problems, or, as previously noted, a program to address developmental disabilities.

21. **Letters of Support and Recommendation.** A sentencing plan needs to provide indications of the support available to the juvenile offender in the community and from family, friends, employers, public officials, clergy and the like. Care must be taken that letters are consistent with the sentencing strategy, including acceptance of responsibility, presented to the court.

*Modified from the Sentencing Project's Briefing Sheet, *Elements of a Defense Sentencing Plan.* The elements listed here also may be considered in preparing a motion for release from detention, or in preparing for bail motions or sentencing for children prosecuted in criminal court.

Endnotes

[1] Less than one-half of 1% of all persons ages 10 through 17 in the U.S. were arrested for a violent crime in 1995 (OJJDP Juvenile Justice Bulletin, February 1997). The arrest rate for juveniles dropped between 1991 and 1993; 16,036 per 100,000 were arrested in 1989, 16,893 per 100,000 were arrested in 1991, and 16,681 per 100,000 were arrested in 1993. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, SELECTED NATIONAL STATISTICS ON JUVENILE ARRESTS AND DETENTION (1995). In 1995 murder, rape, robbery and aggravated assault arrests of juveniles dropped 3%. Based on 1992 data before the juvenile arrest rate dropped, the Department *of* Justice acknowledged that Juveniles are not responsible for most *of* the increase in

violent crime. "if juvenile violence bad not increased between 1988 and 1992, the *U.S.* violent crime rate would have increased 16% instead of 23%." OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND *VICTIMS iv* (1995).

[2]The Specialty Guidelines for Forensic Psychologists are a clear statement of the special responsibilities of forensic evaluators to know the law relevant to an individual child's case. Experts do not give legal conclusions, but go much further than non-forensic evaluators in presenting clinical material in ways that can be used effectively in court. Forensic psychologists come within the medical exception to hearsay restrictions and may present information obtained during the evaluation and used in forming an opinion. Since the Specialty Guidelines for Forensic Psychologists call for forensic evaluators to have "cur-rent knowledge about legal developments," evaluators should ask attorneys for statutes regarding the offense and be able to provide clinical opinions about the juvenile's thought process in the context *of* how the law defines the particular offense. *specialty Guidelines for Forensic Psychologists,* 15 *L.* AND HUMAN BEHAVIOR, 655 (199 *1).*

[3]R. Dana, *Impact of the Use of Standard Psychological Assessment on the Diagnosis and Treatment of Ethnic Minorities, in* PSYCHOLOGICAL INTERVENTIONS AND CULTURAL DIVERSITY (J.F. Aponte et al. eds., 1995); *see also M.* Lindsey, *Ethical Issues in Interviewing, Counseling and the Use of Psychological Data with Child and Adolescent Clients,* 64 Fordham L. Review 2035 (1996).

[4]*T.* Grisso, *The Competence of Adolescents as Trial Defendants,* PSYCHOL., PUB. POL'Y AND L. 291 (1992).

[5]The names and Identifying information *of* the adolescents in these case studies have been changed, but the description *of* their offenses and needs and quotations from interviews with them are true.

[6]L. Steinberg & E. Cauffman, *Maturity of Judgment in Adolescence: Psychological Factors in Adolescent Decision Making,* 20 *L.* AND HUMAN BEHAVIOR 249 (1996).

[7]"Recent figures showing a drop in juvenile crime across America have some 'experts' who warned of a new generation of 'super-predators' seeking forgiveness for being so far *off* in their predictions. The effect would be comical - except that the pundits' pronouncements are still being used to justify ever more draconian policies directed against younger and younger kids." *V.* Schiraldi *& M.* Kappelhoff, *Where are the Teen 'Super Predators",* HandsNet (May 5, 1997).

[8]L. KOHLBERG, MORAL STAGES AND MORALIZATION: THE COGNITIVE-DEVELOPMENTAL APPROACH; *T.* LICKONA, MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES (1976); *C.* GILLIGAN, IN A DIFFERENT VOICE (1982).

[9]*M.* Beyer, *One Child and Family at a Time: Strengths/Needs-Based service Crafting,* 12 CARING 3 (1996).

[10]*A.* Browne& D. Finkelhor, *Impact of Child Sexual Abuse,* 99 PSYCHOLOGICAL BULLETIN 66-77 (1986); *see also* J.R. Conte *& L.* Berliner, *The Impact of Sexual Abuse on Children, in* HANDBOOK ON SEXUAL ABUSE OF CHILDREN (L.E.A. Walker ed., 1987); *A* SOURCEBOOK ON CHILD SEXUAL ABUSE (D. Finkelhor ed., 1986); D. Kolko, *Treatment* of *Child Sexual Abuse,* 2 JOURNAL OF FAMILY VIOLENCE 303-31 (1987).

[11]P. Steinhauer, THE LEAST DETRIMENTAL ALTERNATIVE (1991).

[12]. E. Deblinger, S.V. McLeer, & D. Henry, *Cognitive Behavior Treatment for Sexually Abused Children Suffering Post-Traumatic Stress,* 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, 747 (1990); *see also* J.D. Osofsky, *The Effects of Exposure to Violence on Young Children, in* AMERICAN PSYCHOLOGIST (1995).

[13]Simon points out that 4 out *of* every *10* Americans are exposed to a major trauma by age 30, and PTSD develops in about a quarter *of* them.

He emphasizes that often clinicians do not verify the specific criteria required for a diagnosis *of* PTSD met by the individual being evaluated. "Repeated re-experiencing *of* the traumatic event, either through recurrent nightmares, distressing, intrusive recollections, or flashback experiences, is the hallmark feature *of* PTSD." Simon also emphasizes the importance *of* assessing the specific impairment in functioning, another required criterion *of* the PTSD diagnosis. R. Simon, *Toward the Development of Guidelines in the Forensic Psychiatric Examination of Post-Traumatic Stress Disorder Claimants, in* PTSD IN LITIGATION (Robert Simon ed., 1995).

[14]POST-TRAUMATIC THERAPY AND VICTIMS OF VIOLENCE (Frank Ochberg ed., 1988).

[15]David Elkind, *ALL GROWN* UP AND *NO* PLACE *TO GO* (1984).

[16]In putting together a rehabilitative proposal, counsel for children facing transfer or waiver hearings or sentencing should request that more than one program (preferably public and private delinquency agencies) interview the young person and describe in writing specifically the services they would offer him/her to meet the needs identified by the expert. *If* the expert can become familiar with the services offered and the security *of* these programs, their recommendations regarding the programs' capacity to meet the young person's needs can be valuable.

[17]*T.* Grisso, *Society's Retributive Response to Juvenile Violence,* 20 LAW AND HUMAN BEHAVIOR 229 (1996). Grisso also presents a number *of* studies indicating that juveniles who commit homicides rarely kill a second time and, in fact, have low re-arrest rates for other offenses.

[18]*S.* Henggeler, G. Melton, and L. Smith, *Multisystemic Treatment of Serious Juvenile Offenders,* 60 J. OF COUNSELING AND CLINICAL PSYCHOL. 953 (1992). Nevertheless, as Grisso points out .even *if* rehabilitative programs are found to be relatively successful with many adolescents found guilty *of* violent offenses, one can expect that the), will fail with a sizable minority *of* them. Under those conditions, the public is likely to support a rehabilitative response to juveniles with violent offenses only *if* we can identify which adolescents are unlikely to respond to such interventions. This is a formidable challenge, in light *of* the primitive status *of* our abilities to assess which adolescents present greater risk *of* life-course-persistent antisocial behavior."

[19]Eisikovits & Baizerman, *Doin' Time,* J. OFFENDER COUNSELING, SERVICES & REHABILITATION, *Vol.* 6 (1983). See also complaints filed by the Youth Law Center (San Francisco, California) in the *Robbins, Horn* and *Armstrong* cases: 15-, 14-, and 17-year-olds who killed themselves in adult facilities in California, Kentucky and Indiana.

[20]COMMUNITY RESEARCH FORUM, AN ASSESSMENT OF THE NATIONAL INCIDENCE OF JUVENILE SUICIDE IN ADULT JAILS, LOCKUPS AND JUVENILE DETENTION CENTERS (1980).

[21]Rowan & Hayes, NATIONAL INSTITUTE OF CORRECTIONS, TRAINING CURRICULUM ON SUICIDE DETECTION AND PREVENTION *IN* JAILS AND LOCKUPS (1988).

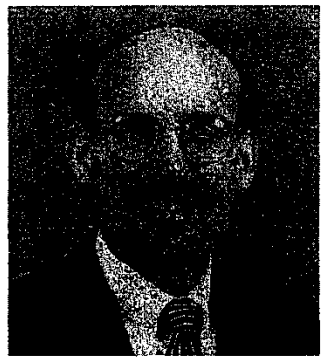
[22]Williams, *When A Private Act of Desperation Becomes a Public Issue,* CORRECTIONS COMPENDIUM, *Vol.* 14 (1989); *see also* STANDARDS FOR HEALTH SERVICES IN JAILS (Nat'l Comm. on Correctional Health Care 1996).

[23]*M.* Forst, *J.* Fagan *& T. S.* Vivona, *Youth in Prisons and Training Schools,* JUV. AND FAM. COURT J., Vol. 40 (1989); *see* also Thomas et al., *The Impact of Confinement on Juveniles,* L. AND SOCIETY REV., *Vol.* 14 (1983).

[24]National Prison Project Fact Sheet (1996). ■

PLAIN VIEW

➢ Ernie Lewis



***Banks v. Commonwealth*,**
1998 WL 741546 (Oct. 23, 1998)
(Ky. Ct. App. - not yet final)

This case from the Court of Appeals looks at the question of how much time officers must wait to execute a search warrant after knocking and announcing their purpose. The Louisville Police Department went to Banks' house armed with a search warrant after midnight. They knocked on the door, announced their purpose, and when no one answered within 40 seconds to a minute, they broke into the house. They found cocaine and arrested Banks. He challenged the search, saying that the police had unreasonably executed the search warrant by entering too quickly after having knocked and announced.

The Court of Appeals affirmed the denial of the motion to suppress. In a unanimous decision written by Judge Buckingham, the Court held that under *Wilson v. Arkansas*, 514 U.S. 927 (1995) and *Adcock v. Commonwealth*, Ky., 967 S.W. 2d 6 (1998), there is no requirement that officers wait beyond 40 seconds. The Court notes that some courts have allowed for 10 second waiting periods. "We believe the rule to be that '[t]he length of time an officer must wait before breaking in after an announcement must be reasonable in light of the circumstances of the particular case.' The wait of forty seconds to one minute was sufficient in this case, especially given the fact that the officers were searching for drugs which could easily have been destroyed."

EDITOR'S NOTE: *Minnesota v. Carter*, (97-1147) (Dec. 1, 1998) Web-accessible at: http://supct.la.cornell.edu/supct/html/97-1147.ZS.html was decided by the U.S. Supreme Court on December 2, 1998, in a 5-4 vote in which the privacy rights of Americans were diminished further. It will be reviewed in the next *Advocate*. The Court, in an opinion by Chief Justice Rehnquist, wrote that short-term guests have no reasonable expectation of privacy under the circumstances of the case.

***United States v. Spikes*,**
158 F.3d 913 (6th Cir. Sept. 2, 1998)

On August 11, 1995, an FBI Agent asked a federal judge to issue a search warrant to search Spikes' house. In the affidavit, the Agent related a history of Spikes' drug activities. He detailed that by May of 1995, Spikes had become the "primary source of crack cocaine in town." The Agent noted that in July of 1995, drug trafficking at Spikes' house was verified. He also described finding instrumentalities of crack production in the trash near Spikes' house on August 1, 1995. Based upon this information, the judge issued a warrant. A SWAT team went to Spikes' house, and 15-20 seconds after using a bullhorn to announce their presence, but only 4 seconds after knocking, went into the house where cocaine was found in the front-room. Spikes and his codefendant challenged the search, saying that the information in the warrant was stale, and saying that a violation of knock and announce had occurred.

The Court, in an opinion written by Judge Gilman, rejected both assertions. First, on the staleness issue, the Court relied upon *Sgro v. United States*, 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260 (1932). *Sgro* held that "whether information contained in an affidavit is stale 'must be determined by the circumstances of each case...' In judging the 'circumstances of each case,' the

length of time between the events listed in the affidavit and the application for the warrant, while clearly salient, is not controlling." Because the affidavit described an ongoing drug enterprise, the Court rejected Spikes' staleness argument. "Because the affidavit contained information demonstrating that the drug activity at 505 North State Street was of an ongoing and continuous nature, and that the premises served as the operational base for drug traffickers," the lower court was affirmed.

The Court also rejected Spikes' second argument. The Court noted that *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995) had incorporated the common law knock and announce rule. That rule is that "'[Before the police execute a warrant] they must identify themselves as police and indicate that they are present for the purpose of executing a search warrant....Once having given the required notice, the officer must wait a reasonable period of time before he may break and enter into the premises to be searched.'"

EDITOR'S NOTE: ***Knowles v. Iowa***, (97-7597). Web accessible at: http://supct.law.cornell.edu/supct/html/97-7597.ZS.html

The United States Supreme Court reversed the Supreme Court of Iowa and unanimously held (opinion by Rehnquist) that Iowa police violated Knowles' Fourth Amendment rights when, after issuing him a citation for speeding, they conducted a full search of Knowles' vehicle absent probable cause or a custodial arrest. The search was authorized under Iowa law. When the officer conducted the search, he found a bag of marijuana under the seat. The Supreme Court reasoned that a concern for officer safety and avoiding destruction or loss of evidence does not justify the greater police intrusion of a full search when the concern for safety was minimal and all the evidence necessary to prosecute the speeding citation was obtained.

This case will be reviewed in the next *Advocate*.

The defendants argued that the police had entered only 4 seconds after knocking, which they asserted was clearly a violation of *Wilson*. The Court, however, focused on "when those inside should have been alerted that the police wanted entry to execute a warrant." Thus, the Court examined whether 15-30 seconds was reasonable for the officers to wait after the bullhorn announcement prior to entering. Based upon a flexible evaluation, the Court decided that the time period in this case was reasonable. "First, the officers were searching for drugs. Prior to executing the warrant, the officers were made aware that there were persons inside the residence that might destroy such evidence before it could be seized...Second, immediately prior to executing the warrant, the officers were warned that 505 North State Street was the residence of drug traffickers who had taken measures to defend themselves and their drugs...Third, the police executed the warrant during the middle of the morning when most people are awake and engaged in everyday activities...Finally, the method used by the police to alert those inside of their presence - the bullhorn - was so effective that neighbors had already exited their homes to observe the execution of the warrant before the police made their entry into the residence." Based upon all of these factors, the Court decided that 15-30 seconds was sufficient time to wait prior to entering Spikes' house.

Gibson v. McMurray, 159 F.2d 230 (6th Cir. Oct. 20, 1998)

In this civil rights case dismissed by the Sixth Circuit, the Court held that the presigning of a warrant application by a prosecutor in violation of a state statute was not fatal to the warrant itself. The Court, with Judge Merritt writing the opinion, stated that the Fourth Amendment did not require prosecutorial review of warrant applications.

The Court noted that there is no requirement under the Fourth Amendment for a prosecutor to review a warrant application. "The Michigan law that requires the prosecuting attorney to review the warrant request form before it is presented to the judicial officer is simply an additional safeguard to the arrest process under Michigan law. The warrant request form must still be evaluated by a 'neutral judicial officer' to determine if there is probable cause to issue a warrant."

The Court would not assume that the magistrate reviewed the application with less scrutiny due to the fact that the he or she assumed that the prosecutor had reviewed the application before

signing. "We reject the district court's reasoning that the evaluation by the judicial officer would be different—the implication is that the judicial officer would simply rubber stamp the application—if he or she knew that the warrant had been reviewed by a prosecuting attorney. The review undertaken by the judicial officer should be an independent review that is not influenced by the fact that a prosecuting attorney also signed the request form."

United States v. Erwin, 155 F.3d 818 (6th Cir. Sept. 17, 1998)

The Sixth Circuit, in an *en banc* opinion written by Judge Ryan, has reversed a panel decision upholding the Fourth Amendment rights of Mr. Erwin. The primary question considered by the Court was "whether, once two law enforcement officers' suspicion that defendant James Erwin, Jr. was driving while intoxicated proved to be unwarranted, they were required to permit him to depart without further questioning, even if they then had a reasonable and articulable suspicion of other criminal conduct."

On July 31, 1992, two officers in Livingston County, Michigan, received a tip that there was a drunk or reckless driver. The police located him at a truck stop standing between his car and phone booths. When approached, he appeared nervous and attempted to get into his car. The police learned that he had a cell phone on the front seat, and a loose cushion in his back seat. He was wearing lots of jewelry and a jogging suit. He had a driver's license, and indicated that he had borrowed the car from a friend who had rented it. The police further learned from a dispatcher that he had prior convictions for drug and weapons offenses. An officer patted Erwin down, noticing that he was "sweating profusely, that his eyes were darting around, that he kept taking off his hat and running his hand through his hair, and that he kept reaching into his pocket." The pat-down revealed a pager, $846 in cash, and $135 in food stamps. The police noticed a mirror and what erroneously was assumed to be a cocaine spoon (in reality a blackhead remover). By this point, the police both no longer suspected that Erwin was driving drunk, but also suspected that he "might be a drug distributor." After denying knowledge of weapons or drugs in the car, Erwin consented to a search. The search revealed one kilogram of powder cocaine. Erwin later entered a conditional guilty plea following the denial of his motion to suppress.

The Court affirmed the district judge's decision to deny the motion to suppress. In so doing, they held that "the warrantless search of the defendant's vehicle was not unconstitutional under the Fourth Amendment because (1) the Constitution does not mandate that a driver, after being lawfully detained, must be released and sent on his way without further questioning once the law enforcement officer determines that the driver has not, in fact, engaged in the particular criminal conduct for which he was temporarily detained; and (2) the district court's determination—that the defendant's consent to search his vehicle was voluntary—is not clearly erroneous."

The first holding is the most significant for the practitioner. The Court based its decision upon the following: "he (1) was nervous, (2) seemed to try to avoid being questioned by attempting to leave, (3) seemed to have used or was preparing to use a pay telephone to make a call when a cellular telephone was available, (4) seemed to have drug paraphernalia in his vehicle, (5) had a large amount of cash, (6) had no registration or proof of insurance, (7) had a criminal record of drug violations, and (8) had an out-of-place backseat cushion."

United States v. Lumpkin, __ F.3d __ 1998 WL 770194 (6th Cir. Nov. 6, 1998)

On May 10, 1995, a confidential informant told the police that Lumpkin would be driving on I-440 toward I-65 in a turquoise Mercury Tracer with a Tennessee license number 862-BXX in possession of large amounts of methamphetamine, and that he would be traveling with a white female passenger. The police located a car matching the description, stopped it, and began to question Lumpkin and Thompson, Lumpkin's female companion. Eventually, a search of the trunk revealed $20,000, and a search of the engine produced a pound of methamphetamine.

Thompson told the police that they had traveled to Nashville in a truck which was parked at Opryland, and she did not understand why they had rented a car. The police then seized the truck, the search of which produced another pound of methamphetamine. Lumpkin's motion to suppress was denied, and he entered a conditional plea of guilty.

The Court, in an opinion by Judge Hood, affirmed the district judge. First, the Court upheld the search of the car under the automobile exception to the warrant requirement. The Court discounted the fact that probable cause came from a confidential informer's tip, saying the tip "was corroborated by the officers' own observations, thus providing probable cause for the search of the automobile."

The more difficult question for the Court involved the search of the truck. Here, the Court found that the truck could be searched under the inventory exception to the warrant requirement. The Court held that under the inventory exception, the police could lawfully search the engine compartment.

SHORT VIEW

1. ***United States v. Young***, 153 F.3d 1079 (9th Cir. 9/4/98). The policy of FedEx to examine packages they believe contain illegal drugs does not cause those examinations to be considered as Fourth Amendment searches. There was no evidence the corporation was an instrument or agent of the government as that term of art is used in *Walter v. U.S.*, 447 U.S. 649 (1980). This question is decided by evaluating whether the government knew of the policy and whether the search was intended to assist law enforcement or had a legitimate business purpose.

2. ***Knowles v. Iowa***. The U.S. Supreme Court has heard oral arguments in an exceptionally important search and seizure case. Iowa has a statute allowing for the searching of anyone pulled over for a traffic offense after the citation has been written. This statute, if upheld, would eliminate the need to have an arrest prior to a search incident to the arrest. It would further eliminate the need to have probable cause or reasonable suspicion. Rather, anyone pulled over for a traffic violation could be searched and have their passenger compartment searched. Defenders need to be watching for this case to come down this summer.

3. ***People v. Reyes***, 961 P.2d 984 (Calif. 9/21/98). California has reversed its previous law and decided that no suspicion is required for the search of an adult parolee who had signed an agreement to permit warrantless searches, overruling *Burgener v. People*, 714 P. 2d 1251 (Calif. Sup.Ct. 1986). "Because society has an interest in both assuring that the parolee corrects his behavior and in protecting its citizens against dangerous criminals, a search pursuant to a parole condition, without reasonable suspicion, does not 'intrude on a reasonable expectation of privacy, that is, an expectation that society is willing to recognize as legitimate.'" This appears to be increasingly the national position. Given the number of people on parole, and particularly the number of African American males on parole and probation, it is apparent that a large class of people, particularly people of color and poor people, are being carved out of the protections of the Fourth Amendment.

4. ***United States v. Anderson***, 154 F.3d 1225 (10th Cir. 9/15/98). The Tenth Circuit has explored the extent to which an employee may challenge a search in the context of a private business. The Court, in their finding that the defendant had standing to challenge the FBI's warrantless seizure of child pornography tapes from him, looked primarily at whether the employee had a "nexus" to the area searched. The Court also considered whether the employee owned the item searched, whether the employee controlled the item at the time of the search, and whether the employee had taken steps to maintain privacy in the items searched.

5. ***Connecticut v. Gabbert***, 118 S.Ct. 39 (10/5/98). The United States Supreme Court has granted *cert.* to decide the question of whether a prosecutor violates an attorney's rights under the Fourteenth Amendment by "causing attorney to be searched at time his client is testifying before grand jury?

6. ***Wyoming v. Houghton***, 119 S.Ct. 31 (9/29/98). The United States Supreme Court has also granted *cert.* to decide whether the "'automobile exception' to Fourth Amendment's warrant requirement allow police to conduct warrantless search of passenger's personal belongings, such as purse, that are located inside passenger compartment of vehicle that has been lawfully stopped for traffic violations, in case in which police have developed probable cause to search vehicle generally for controlled substances but have no probable cause specific to purse or passenger."

7. ***Brown v. State***, 504 S.E.2d 443 (Ga. Sup. Ct. 9/21/98). A driver who has been the subject of a traffic stop does not provide probable cause to the police by attempting to hide a piece of paper which fell between his legs during an attempt to provide documentation. The Court reasoned that while the paper was in plain view, its incriminating nature was not apparent, nor did the defendant's furtive movement provide probable cause. Crucial to the holding was that the officer had testified that he had no idea what was in the paper.

8. ***State* v. *Dearman***, 962 P.2d 850 (Wash. Ct. App. 9/14/98). The police may not subject the exterior of a garage to a dog sniff without a warrant, according to the Washington Court of Appeals. This decision is based upon the Washington Constitution. "An infrared thermal detection device, using a narcotics dog, goes beyond merely enhancing natural human senses and, in effect, allows officers to 'see through the walls of the home."

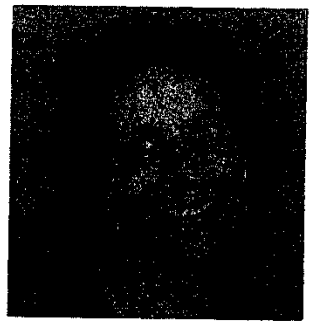
9. ***In re Bernard G.***, 679 N.Y.S.2d 104 (NY Sup. Ct. App.Div., 1st Dept. 10/1/98). A runaway may not be subject to a complete search incident to arrest in New York.

10. ***United States v. Acosta-Colon***, 157 F.3d 9 (1st Cir. 10/5/98). The First Circuit has found that the detention of an airport traveler exceeded the scope of *Terry*, necessitating probable cause which was not present. Here the Court looked at the scope of the detention, the use of handcuffs, and the duration of the detention.

11. ***State v. Ward***, 1998 WL 697203 (Wisc. Ct. App., 10/8/98). A judge considering a warrant application may not make inferences based upon his/her personal experiences the facts for which are not contained in the warrant application. Here, a warrant affidavit had nothing in it demonstrating that the target had drugs in his house. The judge, however, had inferred that drug dealers store drugs in their houses, saying "I have had numerous cases that deal with this kind of thing, and I can't remember a time when somebody was dealing drugs when they weren't being dealt out of the person's house." The Wisconsin Court of Appeals held that this inference, based on the judge's experience rather than facts averred in the application, violated the Fourth Amendment. Allowing such inferences would "relieve law enforcement of any responsibility to place before a magistrate the 'underlying circumstances' which establish a 'substantial basis' that evidence of drug dealing will likely be found in the dealer's residence."

12. ***United States v. Sakyi***, __ F.3d __, 1998 WL 759077 (4th Cir. 10/30/98). We learned in *Maryland v. Wilson*, 519 U.S. 408 (1997) that the Fourth Amendment allows for the police to require all passengers in a lawfully stopped vehicle to get out of the vehicle, even without a particularized suspicion. The Fourth Circuit also recognized in this case that without a particularized suspicion, those passengers could not be subjected to a *Terry* frisk. However, where there is an articulable suspicion of the presence of illegal drugs, a *Terry* frisk may be conducted. "In the absence of ameliorating factors, the risk of danger to an officer from any occupant of a vehicle he has stopped, when the presence of drugs is reasonably suspected but probable cause for arrest does not exist, is readily apparent....The indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger to the officer." It should be noted that the Supreme Court has declined to make a similar association between drugs and guns in the knock-and-announce context. *Richards v. Wisconsin*, 520 U.S. 385 (1997).

Ernie Lewis
Public Advocate■



WEST'S REVIEW

➢ **Julie Namkin, Assistant Public Advocate**

Barnett v. Commonwealth, Ky., ___ S.W.2d ___ (10/15/98)
Taylor Circuit Court, Judge Hall

Barnett was convicted of first degree complicity to commit robbery, first degree complicity to commit burglary and second degree complicity to commit burglary. The robbery victim was an eighty year old man.

Barnett was prosecuted by the Taylor County Commonwealth's Attorney who was assisted by Craig Cox, the Taylor County Attorney. Barnett made numerous objections, both during and after trial, to the county attorney's participation at trial due to (1) a lack of a written agreement, pursuant to KRS 15.725(3), authorizing the sharing of prosecutorial duties between the County Attorney and the Commonwealth's Attorney, and (2) the failure to obtain an appointment as a special prosecutor from the Attorney General. Each objection was overruled. On the direct appeal of his convictions Barnett raised this issue.

Barnett also moved for a new trial, pursuant to CR 60.02, on the ground that Cox should have been disqualified, under KRS 15.733, due to a conflict of interest based on his relationship with the victim. At sentencing, both Cox and the victim denied that the victim had granted Cox a power of attorney and denied that the victim had named Cox a beneficiary under his will.

After sentencing and a search of the Taylor County courthouse records, it was discovered that Cox had been appointed as a limited guardian for the victim several days after the crime due to the victim's incapacitation from the charged offenses. The documents revealed Cox had been the victim's friend for over twenty years and his attorney for at least fifteen years and was executor of the victim's will.

Notwithstanding the aforementioned information, the trial court denied Barnett's CR 60.02 motion. Barnett appealed the denial of the court's motion.

The two appeals were consolidated and the Kentucky Supreme Court addressed both issues in a single opinion.

The Kentucky Supreme Court analyzed KRS 15.725 (3) and concluded that the language of the statute that states that Commonwealth and county attorneys "**shall** assist each other in prosecution within their respective courts" is mandatory and requires the attorneys to provide mutual assistance. However, the language of the statute that states that Commonwealth and county attorneys "**may** enter into agreements to share or redistribute prosecutorial duties in the Circuit and District Courts" is permissive, and when such an agreement is entered into it should be formalized in a written agreement.

The Kentucky Supreme Court concluded the two provisions are separate and independent. Since the county attorney **assisted** the Commonwealth's Attorney in the prosecution of Barnett's case rather than shared the Commonwealth Attorney's duties, no written agreement was required.

As to whether the county attorney had a conflict of interest because he had been appointed a limited guardian for the robbery victim, the Kentucky Supreme Court found no violation of KRS 15.733(2). The Court stated the county attorney's appointment was only temporary while the victim was incapacitated, and a limited guardian did not meet the statutory definition of fiduciary. The Court concluded that since the county attorney did

not have any interest, financial or otherwise, that could have been substantially affected by the trial's outcome and the absence of a showing of actual prejudice, there was no conflict of interest sufficient to require the county attorney's disqualification. Thus, the trial court did not abuse its discretion when it overruled Barnett's CR 60.02 motion.

Two justices dissented because they found the trial court erred in overruling Barnett's CR 60.02 motion based on the totality of the relationship between the victim and the county attorney. A reasonable person would perceive the appearance of impropriety in the assistance by the county attorney and such appearance undermines confidence in the integrity of the Barnett's trial.

Barnett's convictions were affirmed.

Gray v. Commonwealth, Ky., ___ S.W.2d ___ (19/15/98)
Christian Circuit Court, Judge White

Gray was charged with and convicted of three counts of trafficking in cocaine, second offense, and being a second degree persistent felony offender. The jury fixed his punishment at the maximum of twenty years on each trafficking count, enhanced to seventy years on the PFO II conviction.

The trafficking charges occurred on two dates, August 1 and 23, 1996. Both sales were made to the same confidential informant. On August 1st, at the informant's request for $600.00 worth of cocaine, Gray went to her home. He had only $200.00 worth of cocaine with him because he thought the informant was lying about having $600.00. When he saw the informant actually had the money, he left and returned in fifteen minutes with the requested quantity of cocaine. A single sale for $600.00 was made. Gray was indicted for one count of trafficking in cocaine based on this transaction.

On August 23rd, Gray again went to the informant's home pursuant to her request to purchase $600.00 worth of cocaine. Again, Gray had only $200.00 worth of cocaine. After selling the informant the $200.00 worth of cocaine he had with him, Gray left and returned in seventeen minutes with $400.00 worth of cocaine which he sold to the informant. Gray was indicted for two counts of trafficking in cocaine based on this transaction.

On appeal, Gray argued it violated principles of double jeopardy for him to be convicted of two counts of trafficking based on the August 23rd incident because it was a continuing course of conduct and not two separate and distinct transactions.

The Kentucky Supreme Court disagreed. The Court acknowledged the two sales on August 23rd occurred on the same date and involved the same substance. However, the Court held that because the second incident occurred at a different time and resulted in a transfer of a separate quantity of cocaine, it was a separate and distinct transaction and did not result in a violation of double jeopardy principles.

Gray also argued on appeal that the Commonwealth improperly split a single prior felony conviction so as to prosecute and convict him as a second offender under the drug statute (KRS 218A.1412(2)(b)) and as a persistent felony offender under the PFO statute.

The record evidence showed that Gray had previously been indicted, in two different indictments, for trafficking in cocaine on two different dates some four months apart. Gray plead guilty to both charges on the same date, was sentenced on the same date, and a consolidated judgment imposing concurrent five year sentences was entered.

Gray argued these two prior felony convictions merged into a single felony conviction under KRS 532.080(4), and they could not be split into two single felonies for purposes of double enhancement.

The Kentucky Supreme Court agreed. The Court stated "once felony convictions are merged for purposes of the PFO statute, then the convictions must remain merged. Once the PFO statute is

applied, the statute and all its provisions must remain in force." *Howard v. Commonwealth*, Ky., 777S.W.2d 888 (1989). Thus, Gray's conviction was subjected to improper double enhancement in violation of KRS 532.080(4).

Gray's convictions were affirmed, but his case was remanded to the trial court for resentencing.

Commonwealth v. Bird and Nicholson, Ky. ___ S.W.2d ___ (11/19/98)
Fayette Circuit Court, Judge Keller

Bird and Nicholson were arrested for trafficking in a controlled substance (cocaine). The police filed a notice of seizure with the Revenue Cabinet, pursuant to KRS 138.880, which then assessed Bird and Nicholson for nonpayment of drug taxes and penalties. The two men paid the required taxes and were then indicted for trafficking in a controlled substance.

The Fayette Circuit Court dismissed the trafficking charges as violating principles of double jeopardy relying the United States Supreme Court's decision in *Department of Rev. of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994).

The Kentucky Court of Appeals affirmed the dismissal by the circuit court and the Kentucky Supreme Court granted the Commonwealth's motion for discretionary review.

The Kentucky Supreme Court distinguished Kentucky's Controlled Substances Excise Tax from Montana's Dangerous Drug Tax Act on the following grounds. First, Montana's tax rate was excessive, up to eight times the market value of the drugs seized, while Kentucky's tax is only two times the estimated market value of the controlled substance and thus is not excessive. Second, the Montana tax was payable only **after** the taxpayer was arrested for a drug-related crime; there was no opportunity for the taxpayer to pay the tax beforehand. The Kentucky tax provision provides for anonymous tax payment, which is due "immediately upon the occurrence of taxable activity," and precludes the use of the tax information in criminal prosecutions. The tax is not contingent on the commission of a crime. Third, Montana law enforcement officers seized and destroyed the drugs before the tax was levied, so at the time the tax was assessed the taxpayer no longer possessed or owned the goods. The Kentucky tax is not levied on confiscated property. It is an excise tax levied on a taxable activity: dealing in illegal drugs. Thus, the Court concluded there was no double jeopardy violation.

Additionally, the Court held there was no double jeopardy violation because there is no identity of offenses (the trafficking statute has a scienter requirement while the drug tax statute has no such requirement) as required by *Commonwealth v. Burge*, Ky., 947 S.W.2d 805 (1996) and *Blockburger v. United States*, 52 S.Ct. 180 (1932).

The Court held that "assessment and payment of the Kentucky Controlled Substances Tax does not bar subsequent criminal prosecution on federal and Kentucky double jeopardy grounds." The order of the Court of Appeals was reversed.

Taylor v. Commonwealth, Ky., ___ S.W.2d ___ (11/19/98)
Jefferson Circuit Court, Judge Morris

This case involved an investigatory stop. The police received information from an unnamed tipster that two black men in a blue Oldsmobile convertible with a certain license plate would be in the area of a certain street corner and there would be drugs in the car. The police went to the described location and observed two black men in a blue Oldsmobile convertible with the same license plate. The police stopped the car and walked up to the passenger side where Taylor was sitting. The police saw Taylor take a clear plastic bag, later determined to contain cocaine, from his lap and place it under the seat. When the officers searched the car, they found the cocaine. Taylor was arrested and charged.

Prior to trial, Taylor moved to have the prosecution reveal the identity of the tipster and to suppress the cocaine. A suppression hearing was held. The trial court relied on a sealed affidavit by the police and ruled the identity of the informant

did not have to be disclosed. When defense counsel asked one of the officers on cross-examination if he had ever used this particular informant before, the trial court sustained the Commonwealth's objection made on relevancy grounds. The court also prohibited the defense from asking any other questions about the informant. The trial court denied the motion to suppress.

At trial, Taylor testified the cocaine belonged to his cousin who was the driver of the car. Taylor was convicted of possession of cocaine and tampering with physical evidence. He was sentenced to nine years.

On appeal, Taylor argued the trial court erred in not ordering the Commonwealth to reveal the identity of the informant; in not allowing defense counsel to view the sealed affidavit and in not allowing defense counsel to question the police officer about the informant at the suppression hearing.

First, the Kentucky Supreme Court, relying on the privilege to refuse to disclose the identity of an informant in KRE 508, held the trial court did not err when it refused to make the Commonwealth disclose the identity of the informant. The Court pointed out the informant was not a material witness to the crimes charged and provided only a tip. This tip led the police to further investigation and to make an investigative stop after which the officers observed a suspected controlled substance in Taylor's lap. The informant was not present in or near the car when the charged offenses occurred. Thus, the informant could not have testified about what occurred when the vehicle was stopped by the police. The Court stated "that where the evidence shows that an informant was merely a tipster who leads to subsequent independent police investigation which uncovers evidence of the crime, disclosure of the identity of the informant is not required."

Second, the Kentucky Supreme Court held the trial court did not err when it refused to allow the defense to see the sealed affidavit about the confidential informant. The Court pointed out this issue was not properly preserved for review because the defense never objected to the sealed affidavit or requested an opportunity to review it.

Third, the Kentucky Supreme Court held the trial court did not err when it limited defense counsel's cross-examination of the officer about the confidential informant. Without citation to any authority, the Court stated "[t]here is a distinction between the confrontation clause protections in a pretrial hearing from those protections at [a] public trial."

Fourth, the Kentucky Supreme Court held the trial court did not err when it ruled the stop of the car was justified based on the totality of the circumstances.

Fifth, the Kentucky Supreme Court held the trial court did not err when it overruled the defense motion for a directed verdict of acquittal on the tampering with physical evidence charge because Taylor did not actually "conceal" the cocaine since the police saw him place the cocaine under the seat.

Sixth, the Kentucky Supreme Court held it was not reversible error when, during the penalty phase, the court clerk testified Taylor had previously been convicted of trafficking in cocaine. The clerk immediately corrected himself and stated the prior conviction was for illegal possession of a controlled substance. The Court pointed out the misstatement by the clerk was brief and immediately corrected and Taylor did not receive the maximum sentence on either offense.

Taylor's convictions were affirmed.

Commonwealth v. Allen & Cook, Ky., ___ S.W.2d ___ (11/19/98)
Bullitt Circuit Court

This case involves the interpretation of KRS 620.030(1), Kentucky's Child Abuse Reporting Statute.

The case arose from the following facts. Two students reported to Allen (a teacher) and Cook (a counselor) that another teacher had engaged in

sexual contact with them. Allen and Cook, following school protocol, told the school principal what the students had told them. Allen and Cook were subsequently indicted for failing to report the alleged abuse to a local law enforcement agency, the Kentucky State Police, the Cabinet for Human Resources or its designated representative, the Commonwealth's Attorney or the County Attorney as required by KRS 620.030(1). The statutory violation of failure to report is a misdemeanor.

Allen and Cook argued they discharged their reporting duties by informing the school principal of the suspected abuse pursuant to school protocol. They further argued that since they had informed the school principal, they were entitled to immunity from prosecution under KRS 620.050.

The charges were twice dismissed by the district court prior to any trial and wound their way through the court system until they reached the Kentucky Supreme Court.

The Kentucky Supreme Court held the language of the reporting statute is clear and unambiguous. "All individuals with firsthand knowledge or reasonable cause to believe that a child is abused have a mandatory duty to report the abuse. Supervisors [such as school principals] have a dual responsibility. They must not only report in their individual capacity, they must also relay to authorities any reports they receive from their subordinates." Thus, Allen and Cook violated the provisions of the statute by only reporting to the school principal.

The Court next addressed whether Allen and Cook were entitled to immunity from prosecution because they had made a report to the school principal. The Court held "[a] report to a supervisor based upon school protocol is not a report within the meaning of KRS 620.030 ... and therefore [Allen and Cook] do not meet the threshold requirement for the protection of this immunity statute...."

Accordingly, the case was remanded to the district court for further proceedings consistent with the Court's opinion.

Commonwealth v. Beeler, Ky.App., ___S.W.2d ___ (10/2/98)
Fayette Circuit Court, Judge Paisley

Beeler was indicted for welfare fraud and being a second degree persistent felony offender. In exchange for her guilty plea, the Commonwealth recommended a one year sentence on the first count, enhanced to five years on the PFO II count, and restitution. The trial court accepted Beeler's guilty plea. At sentencing, Beeler asked the court to probate her sentence. The Commonwealth objected, arguing Beeler was ineligible for probation under KRS 532.080(5). The trial court recognized it could only grant Beeler probation if it found the PFO statute unconstitutional.

The trial court held the statute unconstitutional because a similarly situated PFO I defendant would be eligible for probation under KRS 532.080(7) and there was no rational basis for probation to be available to Class D PFO I defendants but not Class D PFO II defendants. The court sentenced Beeler to one year, enhanced to five years, probated the five year sentence and ordered restitution.

The Commonwealth appealed and argued the rational basis for making Class D PFO I defendants eligible for probation but not Class D PFO II defendants is rationally related to the state's interest in eliminating prison overcrowding.

The Court of Appeals agreed. It stated that although the effect of the statutory provision [the 1994 amendment] "may seem inequitable to those defendants in Beeler's position, it withstands rational basis review."

Accordingly, the Court of Appeals held the trial court erred when it found the statute unconstitutional and probated Beeler's five year sentence because probation was not a legal option. The Court of Appeals vacated the circuit court's order and remanded Beeler's case for resentencing consistent with its opinion.

Colbert v. Commonwealth, Ky.App., ___ S.W.2d ___ (10/2/98)
Jefferson Circuit Court, Judge Conliffe

The police went to the house where nineteen year old Colbert, his mother and his younger brother lived in response to a domestic disturbance call from Colbert's mother. After a chase, Colbert was arrested for assault and resisting arrest. After his arrest Colbert asked a police officer to retrieve a specific pair of shoes and a coat from his bedroom in the basement. The officer asked Colbert's mother for permission to search her son's room for weapons. Mrs. Colbert told the officer he could search anywhere in the house he wanted and "do whatever you gotta do." No consent form was signed and no warrant was obtained.

Upon entering Colbert's bedroom, the police discovered several plastic cases resembling handgun cases and an unlocked safe which contained a large quantity of cocaine, marijuana, money, an ammunition clip and several photographs.

Colbert was subsequently charged with trafficking in cocaine and trafficking in marijuana.

Colbert moved to suppress the cocaine, marijuana and money as being the result of an illegal search arguing his mother's consent to search his room was invalid. After a suppression hearing, the trial court overruled the motion to suppress. Colbert then entered a conditional guilty plea to trafficking in cocaine, trafficking in marijuana, resisting arrest and second degree assault.

On appeal, the Court of Appeals phrased the issue as being "[w]hether parents have sufficient common authority over a child's bedroom within their home to render valid their consent to a search."

Although Colbert's room was in the basement, separate from the rest of his mother's house, the door to his bedroom was left unlocked, allowing his mother to enter his room at will. Colbert paid no rent to his mother for his room in her house. It appeared from the evidence Mrs. Colbert had joint access to or control over her son's room for all practical purposes.

The Court of Appeals concluded that Mrs. Colbert's consent to search her son's room in her house was valid. The Court of Appeals further held her consent to search the room included the closed plastic handgun cases and the unlocked safe. Her consent to search was without reservation or limitation, although she could have placed parameters on the scope of the search. Since she did not, the police were permitted to search the gun cases and the safe.

Because the trial court did not err in refusing to suppress the evidence found as a result of the search, Colbert's convictions were affirmed.

Skimmerhorn v. Commonwealth, Ky.App., ___ S.W.2d ___ (11/9/98)
Davies Circuit Court, Judge Howard

Two brothers, John and Mark Skimmerhorn, were tried for and convicted of second degree burglary. John was also convicted of being a second degree persistent felony offender and Mark was convicted of being a first degree persistent felony offender. They were sentenced to ten years and fifteen years, respectively.

On appeal, both men argued the trial court erred when it overruled their motions for a directed verdict of acquittal. Their argument was premised on discrepancies and contradictions in the testimony of the prosecution's witnesses.

The Court of Appeals stated witness credibility is a question for the jury. The Court of Appeals also pointed out there was physical evidence connecting John to the crime since insulation from the stolen safe and a hammer with traces of insulation on it were found in John's home. Thus, it was clearly not unreasonable for the jury to find John and Mark guilty of second degree burglary.

Mark also challenged his first degree PFO conviction which was based on a prior felony conviction from Hopkins Circuit Court and a prior felony conviction from Oldham Circuit Court. The Daviess county deputy clerk testified to these certified out-of-county judgments. Mark argued the clerk's testimony was improper because the

Daviess county deputy clerk was not the custodian of the records for Hopkins and Oldham counties.

The Court of Appeals found no error because the Commonwealth presented a certified copy of the Hopkins Circuit Court judgment of conviction. The Court of Appeals relied on KRE 1005 which states a certified copy is self-authenticating and does not require testimonial declarations of its verity. Since the judgment was certified, there was no requirement for the deputy clerk or any other person to testify from personal knowledge. The Court of Appeals concluded the trial court did not err in allowing the deputy clerk to testify about the out-of-county judgment because the judgment was self-authenticating, relevant and an exception to the hearsay rule.

Mark also argued the Hopkins County judgment of conviction should not have been admitted because it did not identify Mark by birthdate and social security number and thus there was no proof Mark was the same person named in the judgment.

Again the Court of Appeals found no error. It pointed out that Kentucky courts have long held that identity of name is *prima facie* evidence of identity of person. Thus, the burden was on Mark to show that he was not the same person named in the Hopkins County judgment. Mark offered no proof that he was not the individual named in the judgment.

John and Mark's convictions were affirmed.

Osborne v. Commonwealth, Ky.App.,
___ S.W.2d ___ (11/13/98)
McCracken Circuit Court, Judge Daniels

Osborne was tried for and convicted of driving under the influence, fourth offense, driving with a revoked license and being a first degree persistent felony offender. He was sentenced to a total of twenty years. His convictions were affirmed on direct appeal. Osborne then filed an RCr 11.42 motion and asked for an evidentiary hearing. The trial court denied the motion without an evidentiary hearing and Osborne appealed.

Osborne claimed in his RCr 11.42 motion that his trial counsel rendered ineffective assistance, not based on his performance at trial, but based on his failure to comply with his desire to accept two different plea offers made by the Commonwealth prior to trial and his failure to advise him of the benefits of those plea offers and the dangers posed by a jury trial.

Osborne's claims were based on the following facts. Osborne was originally charged with DUI, fourth offense, and driving with a revoked license. His appointed attorney moved to suppress one of Osborne's prior DUI convictions, but the motion was denied. Prior to trial, the Commonwealth offered Osborne five years on the DUI charge and twelve months on the revoked license charge in exchange for his guilty plea. Osborne alleged in his RCr 11.42 motion that he told his counsel he wanted to accept the Commonwealth's offer, but no such acceptance was communicated.

Subsequently, a new indictment was returned charging Osborne with being a PFO I in addition to the two original charges. Four days after the above-mentioned offer, the Commonwealth offered to dismiss the PFO I charge if Osborne would proceed to trial within a week. Osborne alleged in his RCr 11.42 motion he was willing to accept this offer, but his trial counsel refused, insisting the matter would be remanded to district court when the motion to suppress one of Osborne's prior convictions was granted. (The record revealed the motion to suppress had been denied two months earlier.).

The new trial date was four months hence. One week before trial, the Commonwealth offered Osborne a total of seven years in exchange for his guilty plea. Osborne alleged in his RCr 11.42 motion that he was willing to accept this offer, but his attorney would not permit him to do so.

The Court of Appeals held that Osborne may have suffered prejudice by his counsel's failure to render effective assistance in the pretrial proceedings.

The Court of Appeals also found the record reflected evidence that Osborne communicated to counsel his willingness to accept the Commonwealth's offers. The evidence to support this claim was contained in a letter in the record from an attorney representing Osborne on another matter in another county. The record also contained letters from Osborne to his trial counsel in this case stating his willingness to accept the offers.

The Court of Appeals stated "it remains questionable why a plea agreement, such as those offered by the Commonwealth, would be rejected." "Unless trial counsel can proffer a plausible reason for advising Osborne to reject same, it would appear the record does not refute Osborne's claim and there is adequate objective evidence supporting an allegation of ineffective assistance of counsel."

The Court of Appeals reversed the ruling of the trial court and remanded the matter for an evidentiary hearing. The Court of Appeals further stated that if the trial court determined trial counsel was ineffective and Osborne was prejudiced by that ineffectiveness, then Osborne should be allowed to serve a sentence harmonious with that offered by the Commonwealth. The Commonwealth would be permitted to withdraw its prior offer only if it could rebut the presumption that the withdrawal is the product of prosecutorial vindictiveness.

Prince v. Commonwealth, Ky.App.,
___ S.W.2d ___ (10/17/98)
Jefferson Circuit Court, Judge Ewing

A police officer attempted to arrest Prince on two outstanding bench warrants. Prince resisted the arrest and a wrestling match occurred. According to the police officer, Prince pulled the pistol from the officer's holster, pointed it in the officer's face and fired it. The officer received a gunshot wound to his ear that required stitches. According to Prince, the officer wrestled him to the ground, got on top of him, put the gun in his face, and Prince pushed the gun away and it went off and hit the officer in the ear.

Prince was tried for attempted murdered. The trial court instructed the jury it could find Prince guilty of attempted murder, second degree assault, third degree assault and self protection. The jury found Prince guilty of attempted murder and fixed his punishment at sixteen years in the penitentiary.

Prince raised four issues on appeal all relating to the trial court's instructions.

First, Prince argued the trial court should have instructed on the lesser included offense of attempt to commit first degree manslaughter.

The Court of Appeals disagreed. The Court of Appeals stated that to attempt to commit first degree manslaughter "a person would have to, intending only to cause serious physical injury, take an intentional, substantial step toward causing an unintentional, unanticipated death, yet not actually cause death. Such would require an intention to commit an unintentional act." And "[t]here is no such criminal offense as an attempt to achieve an unintended result." *People v. Viser*, 343 N.E.2d 903, 910 (Ill. 1975).

Second, Prince argued the trial court should have instructed the jury that the erroneous belief in the need for self-protection could result in a conviction for third or fourth degree assault rather than attempted murder. Prince argued the officer was using more force than was necessary to effectuate the arrest.

The Court of Appeals disagreed. It held the facts of the case were not sufficient to indicate that the officer used more force than reasonably necessary to effect the arrest so as to entitle Prince to an "imperfect self-defense instruction.

Third, Prince argued the trial court erred when it substituted the word "intended" for "planned" in the attempted murder instruction.

The Court of Appeals disagreed. KRS 506.010(1)(b) uses the word "planned" not "intended." The Court of Appeals held that although it would have been better to follow the language of the statute

exactly, the instruction given sufficiently "embraced and conveyed the meaning" of the statute.

Fourth, Prince argued the trial court should have instructed the jury it could find him guilty of first or second degree wanton endangerment as alternative instructions to attempted murder, not as lesser included offenses.

The Court of Appeals disagreed. The Court of Appeals held that since "it [wa]s absolutely clear that [the officer] suffered physical injury, Prince was not entitled to alternate instructions for first and second degree wanton endangerment."

Prince's conviction was affirmed.

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DISTRICT COURT COLUMN:

DUI TRENDS IN RECENT CASES

➢ Jeff Sherr, Assistant Public Advocate

Your client is pulled over by a police officer for running a red light. The officer after smelling alcohol administers several field sobriety tests. Your client consents to taking a preliminary breath test, however the machine malfunctions. The officer then arrests your client takes him and to the local jail. After hearing the officer read him his informed consent warning, your client, thinking that he should not trust this machine since the other one was broken, refuses to take the breath test. He tells the officer he wants to take a blood test and that he will pay for it. The officer tired of dealing with your client refuses this request and turns him over to the jail.

Your client is charged with DUI 3rd, operating a motor vehicle (OMV) while driving license is revoked or suspended for driving under the influence – third offense, and PFO 2nd. Your learn that the Commonwealth is basing the OMV charge on prior convictions in 1991 and 1992. You also learn that the PFO charge is based on a 1994 felony OMV charge which used the 1991 and 1992 charges to earn felony enhancement.

Was you client entitled to his own blood test? If so, should the other evidence of intoxication be suppressed?

Can the Commonwealth indict for PFO 2nd based on a charge that was enhanced by the same convictions that are enhancing the underlying charge?

Later you learn that your client suspension was supposed to have ended one month prior to the present offense, but he did not attend alcohol abuse education.

Can your client be charged with operating a motor vehicle while driving license is revoked or suspended for driving under the influence if the suspension period is over, but he fails to obtain his license?

Suppose that instead of requesting a blood test, your client refuses. The officer responds by obtaining a search warrant for his blood.

Can the officer use a search warrant in a case not involving death or a physical injury?

These questions are answered in several, *yet to be published*, opinions from the Kentucky Supreme Court and the Court of Appeals.

Commonwealth v. Minix,
___ S.W.2d ___ (Ky.App. 1998)

After being pulled over for running a stop sign, *Minix* was asked to perform several field sobriety tests and a preliminary breath test. The preliminary breath test machine malfunctioned in two attempts. The officer arrested *Minix*, took him to jail, and read the informed consent warning pursuant to KRS 189A.103 and KRS 189A.105. *Minix* then refused, three times, to submit to a breath test on an Intoxilyzer 5000 Breath Instrument. *Minix* requested to be taken to a local hospital for a blood test. This request was denied.

The district court granted a motion to suppress evidence of *Minix*'s intoxication and dismissed the DUI charge because the officer improperly refused the request for a blood test. The Circuit Court affirmed the decision.

The Commonwealth first argued to the Court of Appeals that an individual arrested for DUI is entitled to an independent test only after submitting to the test requested by the officer. The Commonwealth maintained that the fact *Minix* consented to the preliminary breath test was irrelevant because he refused to submit to the breath test the officer requested after his arrest.

The Court of Appeals stated that malfunction of the preliminary breath test does not translate into a refusal by *Minix* and that by consenting to these tests *Minix* had satisfied the consent requirement of KRS 189A.103. The Court also dismissed the argument that these tests were administered before and not after arrest, citing *Speers v, Commonwealth*, 828 S.W.2d 638 (Ky. 1992). The Court held that *Minix* was "entitled to an alternative test of his choice at his expense."

The Court next addressed whether suppression of all other evidence of intoxication is the appropriate consequence for this violation of the implied consent statute. Relying on *Beach v. Commonwealth*, 927 S.W.2d 826 (Ky. 1996), the Court held that the evidence of other intoxication could still be submitted to the jury and the jury could conceivably find Minix guilty of DUI based on the observations of the officer.

Newcomb v. Commonwealth
___ S.W.2d ___ (Ky. 1998)

Newcomb was arrested in 1996 and charged with operating a motor vehicle while driving license is revoked or suspended for driving under the influence. Newcomb had prior convictions for the same offense in 1991, 1992, and 1994 (as a Class D felony). Newcomb was indicted for OMV while license is revoked or suspended third offense, based on the 1991 and 1992 prior offenses. Newcomb was also charged with first-degree PFO, based on the 1994 OMV conviction and a 1974 felony conviction.

The primary issue addressed by the Court was whether the PFO charge should have been dismissed on the basis of double enhancement. The appellant argued that the 1991 and 1992 misdemeanor OMV convictions were used to enhance the 1994 felony OMV conviction which was then impermissibly used to support the PFO charge.

The Supreme Court reviewed several Kentucky cases regarding enhanced offenses and the use of a PFO charge. Relying primarily on *Jackson v. Commonwealth*, 650 S.W.2d 250 (Ky. 1983) and *Eary v. Commonwealth*, 659 S.W.2d 198 (Ky. 1983), the Court held that it is permissible for some offenses to be used to enhance the charged offense to a felony while a different prior is used for PFO enhancement. Therefore, the 1991 and 1992 OMV offenses may enhance the present charge to a felony and the 1994 OMV conviction stands on its own and can be used to support the PFO charge.

Dixon v. Commonwealth
___ S.W.2d ___ (Ky.App. 1998)

Dixon was charged with operating a motor vehicle while driving license is revoked or suspended for driving under the influence, third offense. The indictment alleged that the offense was committed on November 18, 1996. Dixon's license was suspended as a result of a DUI 2nd conviction in 1994. That 12 month suspension, pursuant to KRS 189.070 (1), expired October 31, 1995, however Dixon failed to enroll in an alcohol abuse program and was not eligible for reinstatement of his driver's license at the time of the present offense.

The Commonwealth argued even though he was eligible for reinstatement his failure to obtain reinstatement left him still under a suspension for a DUI conviction.

The Court of Appeal disagreed with that argument. The Court held that Dixon was only liable for a violation of KRS 186.620 (2) for operating a motor vehicle on a suspended license. Once the period of suspension for the DUI ended, Dixon was conditionally eligible for reinstatement once he complied with KRS 189A.070 (3) by attending an alcohol abuse program. The Court reasoned that the failure to attend the alcohol abuse program was why his license was suspended at the time of the offense rather than due to the DUI conviction.

Combs v. Commonwealth
___ S.W.2d ___ (Ky. 1998)

Combs was pulled over by a police officer for weaving and making a wide turn. The officer later testified that Combs smelled of alcohol and that there were two empty beer bottles and four full beer bottles on the front seat of the car. Combs admitted to drinking earlier and complied with a request to perform several field sobriety test which indicated some degree of intoxication. After being taken to jail, Combs refused a blood test. The officer took steps to obtain a search warrant and blood was taken a short time following.

The issue addressed by the Court was whether a search warrant may be used to obtain a suspected drunk driver's blood after a refusal in a case not involving death or a physical injury.

KRS 189A.105(1) states that "[n]o person shall be compelled to submit to any test of tests specified in KRS 189A.103. KRS 189A.105(2)(b) creates an exception to this rule that allows a judge to issue a search warrant "when a person is killed or suffers physical injury."

The Court of Appeals upheld the admission of the blood test holding that the statute violated separation of powers provisions by infringing on the judiciary's power to issue a search warrant.

The Supreme Court in a unanimous decision disagreed with the Court of Appeals holding regarding the constitutionality of the statute. "The ordinarily legitimate action of obtaining a search warrant when a suspect refuses cannot be used to avoid the standard set by the General Assembly which established the requirement of death or physical injury for a blood alcohol test." Despite finding error in the admission of the results of the blood test, the Court affirmed the decision due to other overwhelming evidence of Comb's intoxication.

NOTE: *THESE OPINIONS ARE NOT FINAL AT THE TIME OF THIS WRITING.*

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SHIFTING PARADIGMS AT FAUBUSH:
PERSUASIVELY TELLING THE CLIENT'S STORY

From October 4-9, 1998 25 coaches and 105 participants came to the Kentucky Leadership Center in Faubush, Kentucky for a week of creative thinking on how to persuasively tell the story of their clients and learning how to make persuasive critical judgments for their clients. The Department of Public Advocacy is working hard to provide not only education but also professional development.

Steve Rench of Denver, Colorado, told us that we had to think like a juror, not like a lawyer. Everything we think about and do has to be powerful persuasion. Rench observed that winning litigators understand that people make a decision emotionally and then they rationalize it. The 25 coaches taught us how to rid ourselves of legalese, abstractions, conclusions and generalities and replace them with sensory language, vivid word pictures that are specific, simple and short.

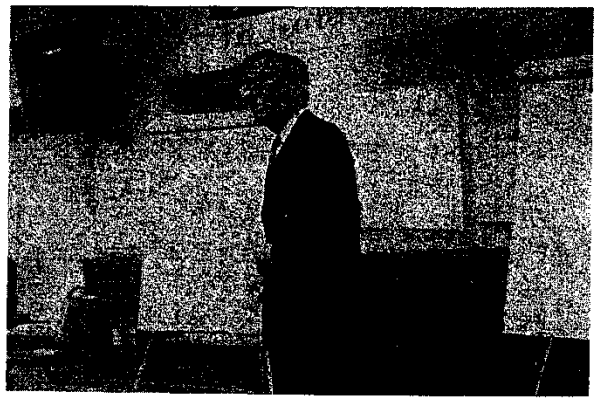
The fundamental skills of creative brainstorming and compelling theory of the case were the foundation of the program. **Rebecca DiLoreto** and **Vince Aprile** presented the principles of these critical litigation skills.

Increasing the national and Kentucky coaches are understanding that the week-long Institute was one of helping litigators learn how to make critical judgments. Those making high quality judgments look at the complex problems they face through multiple perspectives, such as the perspective of other litigators, the jurors, judge, public.

The two most significant advances at this year's Institute were every participant brought their own case and was the addition of appellate and post-conviction tracks. Being a trial attorney is different from being an appellate attorney which is different from being a post-conviction attorney. Some of the differences are very significant. However, the core skills of litigating apply across these three areas. The Institute honored the differences and maximized the commonalities. The bottom line is that winning litigators, whatever the stage of their client's case, excel at creative brainstorming, compelling theory of the case, persuasive presentation to the fact-finders.

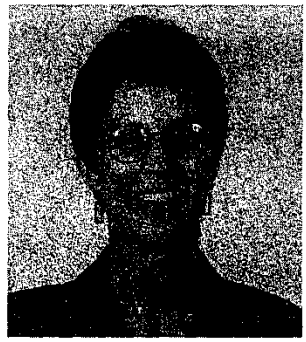
The helpfulness of the Institute was characterized by one of the participants, "This is powerful education. I now know why the things I was doing well are working and I learned a ton of ways to be better for the lawyer coaches, the non-lawyers coaches and from those in my small group."

The attorneys present, participants and coaches alike, continued on their journey to be paradigm pioneers, moving from the esoteric, rational, legal to the effective, emotional, persuasive, telling their client's story every more effectively. Clients were heard to shout for joy.■



PROTECTION AND ADVOCACY

GETTING THE MOST BANG FOR YOUR BUCK!



Maureen Fitzgerald
P & A Director

Protection and Advocacy (P & A) is the agency in Kentucky designated by the Governor to provide legally based advocacy to persons with disabilities. P & A operates four federally mandated and funded programs:

1. Protection & Advocacy for Persons with Developmental Disabilities;
2. Protection & Advocacy for Individuals with Mental Illness;
3. Protection & Advocacy for Individuals Rights;
4. Protection & Advocacy for Assistive Technology.

Each program has their own eligibility criteria and case acceptance priorities.

Because the demand for advocacy services far exceeds its resources, P & A is charged by its enabling statutes to establish priorities and case acceptance criteria on an annual basis. The P & A does this with the active, informed participation of its consumer advisory bodies after receiving public input from a variety of sources.

During its first years of existence, the national protection and advocacy systems responded to every customer's need. Over the years, P & As discovered that providing representation to every individual, who contacted the P & A, while frequently of significant impact to the individual, did not result in long-lasting systemic change. With this realization came the move toward more systemic advocacy and priority setting. Systems change efforts result in laws, regulations, policies, practices or organizational structures that promote access to services on a permanent basis. Systems change advocacy is designed to enable individuals with disabilities to achieve greater independence, productivity and integration within the community and work force. Systems change activities include impacting policy makers, legislative advocacy, and class action litigation.

Congress in concert with the Executive branch agencies with oversight and rulemaking authority over P & As have clearly communicated that it is incumbent upon the P & As to attempt to maximize resources. The most efficient way to maximize resources is to bring about systemic change that will benefit greater numbers of individuals with disabilities than can be accomplished through individual representation.

As P & As have moved to systemic priorities, the perception often has been that individual clients will no longer be represented. P & A does continue to represent individual clients. The number of individual clients and which individual clients P & A can represent are determined by the annual priorities set by staff and the consumer advisory bodies. Most systemic change is advanced through representation of individual clients.

The P & A priorities for fiscal year 1999 (October 1 – September 30) are available upon request. If you would like to offer comments concerning our proposed FY 99 priorities, please contact Ms. Debbie Foy at (502) 564-2967; E-mail: dfoy@mail.pa.state.ky.us.

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Protection & Advocacy
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PUTTING A FACE ON JUSTICE

Defender Employment Opportunities

Are you interested in **Putting A Face On Justice?** If so, the Kentucky Department of Public Advocacy may be the place for you. This is a very exciting time for the Department. We are expanding many of our current offices and will be adding five new offices by the year 2000.

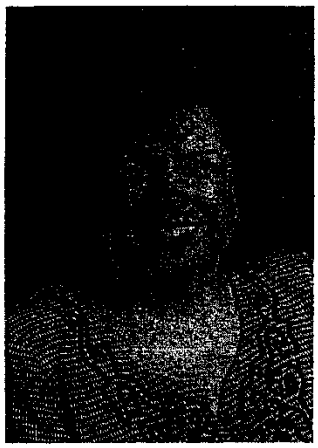
Current Opportunities. DPA is currently seeking attorneys for the following trial offices: Bell County, Lincoln County, Perry County, Pulaski County, and McCracken County. We are also hiring investigators for the Henderson Office and Pikeville Office. We are seeking a Capital Trial Branch Manager who will direct the trial level death penalty defense effort statewide, as well as a Capital Trial Branch attorney. We are also seeking a Capital Post-Conviction Branch Manager who will direct the post-conviction death penalty defense effort statewide. We are seeking a legal secretary in Bell County.

Opportunities in the Next 2 Years. Our expansion will continue into the next two years. In 1999, we will open offices in Daviess County, Adair County and Johnson County. Positions for entry level and experienced attorney are available in Adair and Johnson Counties. In July 1999, we will open our Warren County office and in January 2000 our current expansion will be complete with the opening of our Mason County Office. We are seeking both entry level and experienced attorneys for these vacancies. We will also be hiring secretaries and investigators for each of those offices.

Contact the DPA Recruiter. If you would like to **Put A Face On Justice**, contact **Sarah Davis Madden**, Recruiter, at the Department of Public Advocacy, Division of Law Operations, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, phone: 502-564-8006, extension 136, fax: 502-564-7890, email: smadden@mail.pa.state.ky.us.

Louisville & Lexington. For defender employment information in Louisville, contact Daniel T. Goyette, Jefferson District Public Defender, 200 Civic Plaza, Louisville, Kentucky 40202; Tel: (502) 574-3720; Fax: (502) 574-4052. In Lexington, contact Joseph Barbieri, Fayette County Legal Aid, 111 Church Street, Lexington, Kentucky 40507; Tel: (606) 253-0593; Fax: (606) 259-9805.

Access our Web Page. To remain updated on our job listings or to learn more about the Department check out our web page at http://dpa.state.ky.us.career.htm. ■



Sarah Davis Madden, DPA's Recruiter

Sarah Davis Madden received her Juris Doctorate from Salmon P. Chase College of Law in 1985. She joined DPA as the Recruiter in March 1998. Sarah began her legal career with Cumberland Trace Legal Services. Leaving there, she did a short stint with the Kentucky Court of Appeals before spending several years in private practice. Immediately prior to coming to DPA, she was employed by Salmon P. Chase College of Law.

Public Advocacy Seeks Nominations

An Awards Search Committee recommends two recipients to the Public Advocate for each of the following awards. The Public Advocate makes the selection. The Awards are presented at the Annual DPA Conference in June. Contact Tina Meadows at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006, #236; Fax: (502) 564-7890 for a nomination form. E-mail: tmeadows@mail.pa.state.ky.us. All nominations are required to be submitted on this form by March 1, 1999. Members of the Awards Search Committee are: John Niland, DPA Contract Administrator, Elizabethtown; Dan Goyette, Director, Jefferson District Public Defender's Office, Louisville; Christy Wade, Legal Secretary, Hopkinsville Office, Hopkinsville; Tina Scott, Paralegal, Post-Conviction Unit, Frankfort; Ed Monahan, Deputy Public Advocate, Frankfort, Ky., Chair of the Awards Committee

Gideon Award
Trumpeting Counsel for Kentucky's Poor

In celebration of the 30th Anniversary of ***Gideon v. Wainwright***, 372 U.S. 335 (1963), DPA established the *Gideon* Award in 1993. The award is presented to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. Recipients have been:

1993 ♦ **Vince Aprile**, DPA General Counsel
1994 ♦ **Daniel T. Goyette** and
the **Jefferson District Public Defender's Office**
1995 ♦ **Larry H. Marshall**, DPA Appeals Branch
1996 ♦ **Jim Cox**, DPA's Somerset Office Director
1997 ♦ **Allison Connelly**, U.K. Clinical Professor
1998 ♦ **Ed Monahan**, Deputy Public Advocate

Rosa Parks Award
Advocacy for the Poor: Non-Attorney

Established in 1995, the *Rosa Parks* Award is presented at the Annual DPA Conference to the non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice... And we are not wrong.... If we are wrong justice is a lie. And we are determined...to work and fight until justice runs down like water and righteousness like a mighty stream." Recipients have been:

1995 ♦ **Cris Brown**, Paralegal, Capital Trial Unit
1995 ♦ **Tina Meadows**, Executive Secretary
for Deputy Public Advocate
1997 ♦ **Bill Curtis**, Research Analyst, Law Operations
1998 ♦ **Father Patrick Delahanty**

Nelson Mandela Lifetime Defense Counsel Achievement Award: Systemwide Leadership

Established in 1997 to honor an attorney for a lifetime (at least 2 decades) of dedicated services and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants. Nelson Mandela was the recipient of the 1993 Nobel Peace Prize, President of the African National Congress and head of the Anti-Apartheid movement. His life is an epic of struggle, setback, renewal hope and triumph with a quarter century of it behind bars. His autobiography ended, "I have walked the long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb... I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended." Recipients have been:

1997 ♦ **Robert W. Carran**, Attorney, Covington, Ky.
1998 ♦ **Col. Paul G. Tobin**, Louisville, Kentucky

In Re Gault Award

In Re Gault Award recognizes the person who has specially advanced the quality of representation of juveniles in Kentucky. It honors and is named after the landmark United States Supreme Court case, ***In re Gault***, 387 U.S. 1 (1967) where the Court stated, "...the condition of being a boy does not justify a Kangaroo Court." Recipients have been:

1998 ♦ **Kim Brooks**, Northern Ky. Children's Law Center

Professionalism & Excellence Award

A new ***Professionalism & Excellence Award*** begins at the 1999 Annual Conference. The President-Elect of the KBA selects the recipient from nominations. The criteria is the person who best emulates Professionalism & Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism & Excellence: *Professionalism and Excellence are achieved when every member of the organization is prepared and knowledgeable, respectful and trustworthy, and supportive and collaborative, in an environment that celebrates individual talents and skills, and which provides the time, the physical space and the human, technological and educational resources that insure high quality representation of clients, and where each member takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence.* ■

UPCOMING DPA, NCDC, NLADA & KACDL EDUCATION

**** DPA ****

- **27th Annual Public Defender Conference;** ***Executive Inn Hotel,*** **Louisville, KY; June 14-16, 1999**
- **13th Litigation Practice Institute;** ***Kentucky Leadership Center,*** **Faubush, KY; October 3-8, 1999**
  with 3 litigation tracks: trial, appeal, and post-conviction

NOTE: DPA Education is open only to criminal defense advocates. For more information: http://dpa.state.ky.us/rain/htm

**** 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, ext. 279.**

**** NLADA ****

- **NLADA Substantive Juvenile & Skills**, Washington, D.C. - February 6-7, 1999
- **NLADA Life in the Balance XI**, Atlanta, Georgia - March 13-17, 1999
- **NLADA Leadership & Management Defender Conference**, San Diego, California - April 18-20, 1999

For more information regarding NLADA programs call Paula Bernstein at Tel: (202) 452-0620; Fax: (202) 872-1031 or write to NLADA, 1625 K Street, N.W., Suite 800, Washington, D.C. 20006; Web: http://www.nlada.org

**** NCDC ****

- **NCDC Trial Practice Institutes**, Macon, Georgia - June 13-26, 1999 and July 18-31, 1999

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.

"Sectionalism has often generated a shortsightedness which has kept many Kentucky institutions in a state of mediocrity, or has involved a wasteful use of limited resources."

- Thomas D. Clark

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