THE ADVOCATE

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

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Robert F. Stephens
BRG Co-Chair

BLUE RIBBON GROUP

On Kentucky Public Defenders in the 21st Century is Formed with 20 Prominent Members:

Michael Bowling
BRG Co-Chair

- Chief Justice **Joe Lambert**
- Former Congressman **Scotty Baesler**
- Senator **David Williams**
- Representative **Kathy Stein**
- Representative **Harry Moberly**
- Representative **Jeff Hoover**
- Former Representative **Jim Lovell**
- KBA President **Dick Clay**
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- Public Protection and Regulation Cabinet Secretary **Laura Douglas**
- Jeff. Co. District Judge **Denise Clayton**
- Commonwealth's Attorney **Phil Patton**
- Criminal Justice Council Ex. Dir. **Kim Allen**
- U.K. Professor **Robert Lawson**
- Lawyer and Businessman **Richard Dawahare**
- Former Public Advocacy Commission Member **Robert Carran**
- Commission member and Appalachian Research and Defense Fund Director **John Rosenberg**
- Public Advocacy Commission Chair **Robert Ewald**

The Blue Ribbon Group

"Improving Indigent Defense for the 21st Century"

sponsored by the public advocacy commission and kentucky department of public advocacy

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DPA Employment Opportunities:
http://dpa.state.ky.us/career.htm

The Advocate **(since May 1998):**
http://dpa.state.ky.us/advocate

Defender Annual Caseload Report:
http://dpa.state.ky.us/library/caseload.html

We hope that you find this service useful. If you have any suggestions or comments, please send them to DPA Webmaster, 100 Fair Oaks Lane, Frankfort, 40601 or webmaster@mail.pa.state.ky.us

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DPA'S AUTOMATED ATTENDANT

The Frankfort Office of DPA has installed an automated phone attendant to direct calls made to the primary number, (502) 564-8006. To access the employee directory, callers may press "9." During normal business hours callers may press "0" to speak with the receptionist. Listed below are extension numbers and names for the major sections of DPA. Make note of the extension number(s) you frequently call. Should you have questions about this system or experience problems, please call Roy Collins or the Law Operations Division, ext. 136.

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From the Editor

Defender funding is the focus of a 20 member group of professionals who are as diverse as they are prestigious. They have agreed to look at defender funding needs and will receive the benefit of the nation's preeminent expert on indigent defense, **Robert Spangenberg**, as their consultant. We appreciate their willingness to address our defender needs. Public Advocate **Ernie Lewis** fills us in on their work in this issue.

$183 per case and 100,790 cases are critical facts that mark Kentucky's current defender reality. These facts and the advances made towards a statewide full-time defender program are discussed in this issue by Public Advocate Ernie Lewis.

Defender Revenue is falling substantially short of what is needed to continue the current services which are being provided to the courts. A modest increase in assessment and collection of the Public Advocate administrative fees would provide defenders and also clerks with much needed funding.

Prerelease Probation practice is updated. This new sentencing feature of HB 455 is evolving based on the experience of judges, corrections, prosecutors and defenders.

DPA's 27th Annual Conference is June 14-16, 1999 at the Executive Inn Hotel in Louisville, Kentucky. **Phyllis Subin**, public defender for the state of New Mexico will be a featured presenter. Mark it on your calendar and join us for the largest yearly gathering of criminal defense advocates.

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.

BLUE RIBBON GROUP FORMED TO ADDRESS CHRONIC DEFENDER UNDERFUNDING

➢ **Ernie Lewis, Public Advocate**

The Public Advocate and the Public Advocacy Commission have formed a Blue Ribbon Group on Kentucky Public Defenders in the 21st Century (BRG). The BRG will be addressing the chronic underfunding of the Kentucky public defender system, DPA's proposal for solving this problem, and creating a strategy for improvement.

The genesis for the BRG was in the Spangenberg Report of January 1997. The Spangenberg Group, located in Cambridge, Mass., is the nation's foremost expert on indigent defense. This Group has worked with the ABA Bar Information Project, and more specifically on numerous task forces addressing crises in state indigent defense systems, including Missouri, Tennessee, Louisiana, Mississippi, and Florida.

In their January 1998 report, the Spangenberg Group indicated their support for DPA's Plan 2000 which was being presented to the 1998 Kentucky General Assembly. The report noted that the Plan being presented by the Department of Public Advocacy was a sound one, and would address many of the most acute needs facing DPA. However, the report struck a cautionary note: *there existed chronic and systemic problems which Plan 2000 did not address*. Until those problems were addressed, Kentucky would remain at the bottom of the nationwide indigent defense heap. In a nation where underfunding of indigent defense is the norm, this was not a place Kentucky wanted to remain.

Plan 2000 was passed by the General Assembly in most part. This Plan was funded by $2.3 million in General Fund dollars. It is now being implemented. It includes the opening of 5 new full-time offices, the conversion of a number of other contract counties, and the significant enhancement of juvenile representation through an assistant trainer, 6 juvenile attorneys, 2 juvenile appellate attorneys, and 2 juvenile social workers. The implementation of Plan 2000 when completed will improve significantly the quality of representation of indigents throughout the Commonwealth.

Plan 2000 did not address the chronic and systemic problems still present in Kentucky's indigent defense system. Included in those problems are the following:

- High caseloads averaging 480 open cases per lawyer in 97-98.
- Low salaries, starting at approximately $23,000 for entry level public defenders throughout the system.
- An inadequate administrative infrastructure insufficient to support the full-time system.
- An Appellate Branch of only 12 lawyers compared to 32 in the analogous appellate entity in the Attorney General's Office.
- Private lawyers inadequately compensated for public defender work, including conflicts, contract counties, and death penalty work.
- 41 contract counties by July 2000, where the funding per case remained at $125 per case in 97-98.
- Juvenile representation still in need of significant improvement.
- Access to courts for the more than 14,000 Kentucky inmates falls far short of the need, particularly when the incarceration occurs for Class D felons in local jails. This is also the case with juveniles in treatment and detention centers.

The Blue Ribbon Group has been formed to address these chronic problems. It will be chaired by the future Secretary of Justice and former Chief Justice **Robert Stephens** and former Chair of the House Judiciary Committee **Mike Bowling** of Bell County. The BRG consists of persons with the highest integrity and credentials from a broad spectrum of Kentucky. The BRG includes:

- Chief Justice **Joe Lambert**
- Former Congressman **Scotty Baesler**
- Senator **David Williams**
- Representative **Kathy Stein**
- Representative **Harry Moberly**
- Representative **Jeff Hoover**
- Former Representative **Jim Lovell**
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- Lawyer & Businessman **Richard Dawahare**
- Former Public Advocacy Commission Member **Robert Carran**
- Commission member and Appalachian Research and Defense Fund Director **John Rosenberg**
- Public Advocacy Commission Chair **Robert Ewald**

The Blue Ribbon Group will be meeting three times between March and May of 1999. The Spangenberg Group will be consulting for the BRG, providing nationwide comparisons, research, and other services. DPA will also help provide staff support.

This is a vital effort for addressing the chronic problems of the Kentucky Public Advocacy system. I encourage the reader's questions and support.

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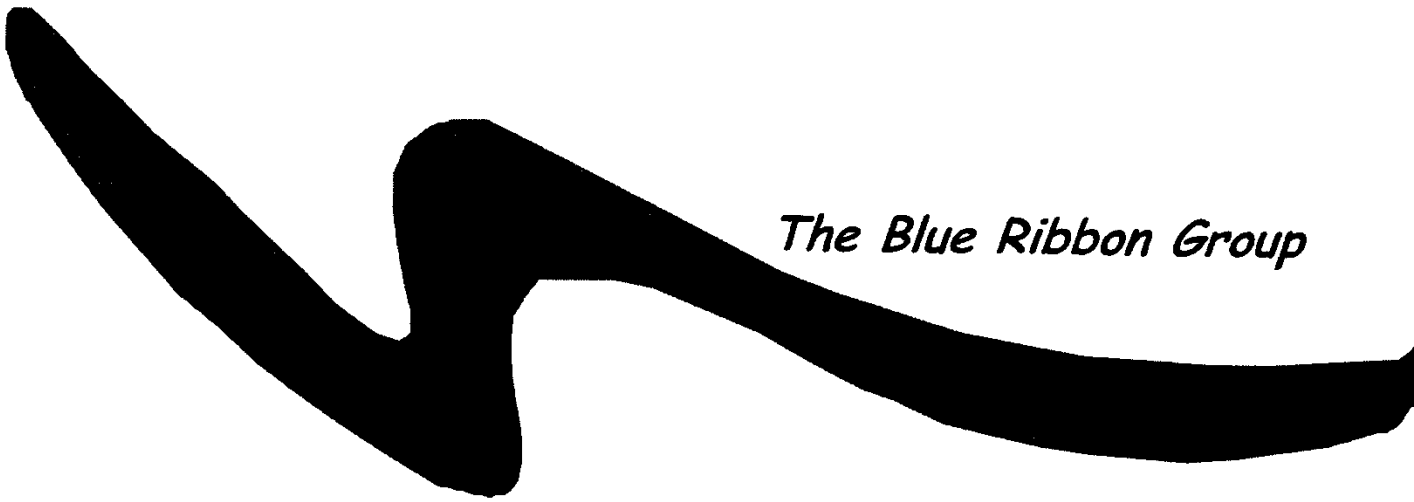


"Improving Indigent Defense for the 21st Century"

sponsored by the public advocacy commission and kentucky department of public advocacy

KENTUCKY MOVES CLOSER TO A STATEWIDE FULL-TIME PUBLIC DEFENDER SYSTEM

➢ **Ernie Lewis, Public Advocate**

1996 vs. 1998

Full-Time Offices: 18 vs. 25

Counties Covered by Full-Time Offices: 47 vs. 73

Cases: 93,839 vs. 100,790

Funding Per Case: $136 vs. $183

When I became Public Advocate in October 1996 I found a system, described then as a "mixed" system, consisting of 18 full-time offices, primarily located in Eastern Kentucky, covering 47 of Kentucky's 120 counties. In 1995-1996, 93,839 cases were opened at a funding level of $136 per case. Included in this was 66,284 cases represented by the full-time offices, and 21,432 cases represented by the part-time contract counties. In 1997-1998, 100,790 cases were opened at a funding level of $183 per case. 70,695 cases were handled by full-time offices. 22,123 were handled by part-time lawyers in contract counties. These figures reflect the growth of the full-time method in Kentucky. Future caseload reports will reflect further the change in how public defender services are delivered in Kentucky.

Henderson and Bell Counties

During 1997-1998, two offices opened in Henderson and Bell Counties. Neither of these had been proposed in the 1996-1998 budget. However, because of the showing of need made, both offices were authorized. Both are now running and are fully staffed.

Numerous Counties Converted to Full-time

One of the benefits of a full-time system is that nearby contract counties can often be served by an existing full-time office. This allows for the stable office to provide services to a county whose system has broken down or is in need of coverage for some other reason, often without an extensive investment of funds in office space, libraries, or support staff.

During 1996-1998, eleven contract counties have converted to full-time status and are now being covered from an existing office. Most of

the counties were included in Plan 2000; some converted based upon a crisis. These counties include:

- Montgomery County - now covered from the Morehead Office.
- Union and Webster Counties - Henderson Office
- Muhlenberg and McLean Counties - Madisonville Office
- Nelson, Hart, and Larue Counties - Elizabethtown Office
- Scott and Anderson Counties - Frankfort Office
- Harlan County - in the process of being covered by Bell County Office

In addition to these Counties, both Jessamine and Livingston Counties will convert to full-time status on July 1, 1999. Jessamine County will be served by the Stanford Office, while Livingston County will be served by the Hopkinsville Office.

Three Offices Open January 4, 1999

On January 4, 1999, three of the five new offices funded by the 1998 General Assembly opened their doors.

Owensboro. The Owensboro Office will initially cover only Daviess County. It is led by Rob Sexton, an 8 year veteran of the Somerset Office. The office is fully staffed other than an investigator. Joining Rob are staff attorneys Jerry Johnson and Stephanie Baisden, Owensboro natives, and Kim Shown, office secretary. Hopefully, an investigator will have been hired by the time of publication. An office opening ceremony was held on January 29, 1999. This office will be in the Western Region.

Paintsville. Kristi Gray, formerly of the Pikeville Office, is the new directing attorney of the Paintsville Office. This office will cover the counties of Johnson, Lawrence, Martin, and Magoffin. Chris Brown, a Johnson County native, has joined Kristi in this office. Recruiting for remaining staff is ongoing. This office will be in the Eastern Region.

Columbia. Teresa Whitaker, formerly of the Somerset Office, is the new directing attorney of the Columbia Office. She has been joined by Jim Maples, formerly of the Elizabethtown Office, and Glenda Edwards. This office, when fully staffed, will cover the largest number of counties of any of our 23 offices. It will cover Adair, Casey, Clinton, Cumberland, Monroe, Washington, Marion, Taylor, and Green Counties. This office will be in the Central Region.

Two Offices Remain

Bowling Green. Two offices remain to be opened under Plan 2000. In July of 1999, the Bowling Green Office will be opened. It will be directed by John Niland, formerly the Contract Branch Manager and now the new Central Regional Manager. Initially, this office will cover only Warren County.

Maysville. An office in Maysville, located in the Northern Region, will be opened on January 1, 2000, and will cover Bracken, Mason, and Fleming Counties.

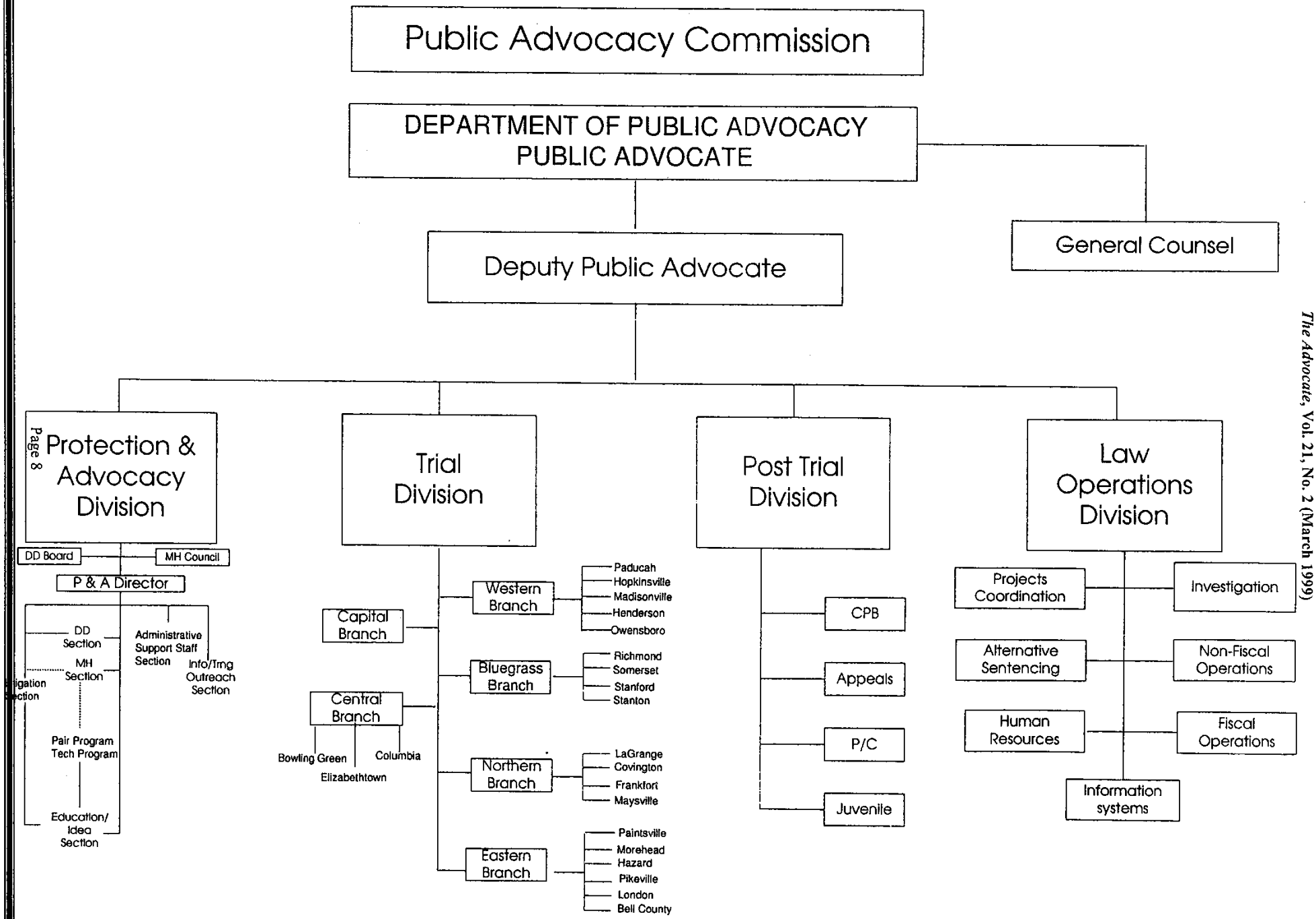
Full-time System within Sight

Kentucky has made great strides toward a full-time system within the last 2 ½ years. By January of 2000, Kentucky will have 25 offices covering 79 Counties. Over 85% of the caseload will be delivered by full-time offices, meeting our primary goal. Many of the remaining 41 contract counties will be easily served from existing full-time offices, with some exceptions. The organizational chart for DPA follows this article and reflects the Department's structure.

It is anticipated that in future General Assemblies, funding will be sought for conversion of many of the additional contract counties, as well as the opening of a couple of remaining new offices. We can all be proud of the progress made in Kentucky in serving indigents accused of crimes.

Ernie Lewis, Public Advocate ■

PUBLIC PROTECTION AND REGULATION CABINET



DPA's Administrative Fee for First Half of FY 99

➢ **Ernie Lewis, Public Advocate**

The Administrative fee paid by public advocate clients to the Department of Public Advocacy for the first half of FY 99 (July 1, 1998 - June 30, 1999) is reported in the attached table by county, along with fees collected in the previous 4 fiscal years.

DPA receives revenue from three sources in addition to the General Fund:

- $52.50 (the clerks receive $2.50 of this) administrative fee for each public defender appointment. KRS 31.051(2) (see insert below).
- $50 from each DUI conviction as 25% of the service fee. KRS 189A.050(4).
- Recoupment moneys ordered by the trial court for persons who are found to be able to afford some of the Chapter 31 services they receive.

Recoupment is returned to the county public advocate fund in those places where there is no full-time office. KRS 31.051(1). The first two fees go to DPA for delivery of services statewide.

DPA is highly dependent upon revenue for delivery of services. Little of it goes toward administration. Rather, most all of the revenue received either goes back to the county public advocate or is spent for the delivery of services. At present, significant revenue goes to support the programs in Jefferson and Fayette Counties, the Covington Office, the Capital Trial Branch, Appellate Branch attorneys, several trial attorneys, the Capital Post-Conviction Branch, and the Henderson, Madisonville, and Elizabethtown

$52.50 Public Advocate Administrative Fee

AN ACT relating to the statewide public advocacy system. *Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

Section 1. KRS 31.051 is amended to read as follows:

(1) With the exception of the administrative fee contained in subsection (2) of this section, all moneys received by the public advocate from indigent defendants pursuant to KRS Chapter 31 or which are collected by the public advocate pursuant to KRS Chapter 431 shall be credited to the public advocate fund of the county in which the trial is held and shall not be credited to any general account maintained by or for the public advocate. Moneys credited to a county public advocate fund may be used only to support the public advocate program of that county.

(2) Any person provided counsel under the provisions of this chapter shall be assessed at the time of appointment, a nonrefundable *fifty*~~{forty}~~ dollar *($50)*~~{($40)}~~ administrative fee, payable, at the court's discretion, in a lump sum or in installments. *The first payment shall be accompanied by a handling fee of two dollars and fifty-cents ($2.50) to be paid directly to the Circuit Clerk and deposited in a trust and agency account to the credit of the Administrative Office of the Courts. The account shall be used to assist the circuit clerks in hiring additional employees and providing salary adjustments for deputy clerks.* **The court *shall*~~{may}~~ reduce or waive the fee if the person~~{ remains in custody or}~~ does not have the financial resources to pay the fee. In any case or legal action a needy person shall be assessed a total administrative fee of no more than *fifty*~~{forty}~~ dollars *($50)*~~{($40)}~~, regardless of the stages of the matter at which the needy person is provided appointed counsel. In the event the defendant fails to pay the fee, the fee shall be deducted from any posted cash bond or shall constitute a lien upon any property which secures the person's bail, regardless of whether the bond is posted by the needy person or another. The failure to pay the fee shall not reduce or in any way affect the rendering of public defender services to the person.**

(3) The administrative fee shall be in addition to any other contribution or recoupment assessed by the court pursuant to KRS 31.120 and shall be collected in accordance with that section.

(4) The administrative fees collected pursuant to this subsection (2) shall be placed in a special trust and agency account for the Department of Public Advocacy, and the funds shall not lapse.

(5) If the administrative fee, or any portion thereof, is not paid by the due date, the court's order is a civil judgment subject to collection under Civil Rule 69.03 and KRS Chapter 426.

Offices. The services funded by these 3 revenue sources amount to approximately $3.5 million of DPA's approximate $20 million public defender budget.

In 1997-1998, the sum of the three revenue sources was approximately $2.8 million. DPA is spending approximately $700,000 more in revenue than it is taking in. While a significant surplus from these funds was present in 1996, at the present rate of spending, this surplus will disappear in July of 2000. This is why the revenue picture for DPA is so significant. Without a change in the revenue picture, DPA will have to cut vital services. The first half of FY 99 indicates DPA has received $1,436,549 in revenue, a 5% increase. However, the additional $58,931 in the first half of this fiscal year is below the $353,000 increase that was needed.

HB 337 Will Make A Difference

The 1998 General Assembly passed HB 337. This bill amended KRS Chapter 31 to change the PA or administrative fee from $40 to $52.50. This $52.50 fee includes a handling fee of $2.50, which goes to the clerks for salary increases.

This change in the PA fee should lead to a 25% increase from those administrative fees assessed and collected in this fiscal year. For the first half of this fiscal year, the increase in administrative fees is but 9%.

Observations and Analysis of the Statewide Data for First Half of FY 99

For the first half of this fiscal year:

- Recoupment has risen by 6%. Many of our county public defender programs are highly dependent upon this revenue source.
- The DUI service fee has increased by 1%.
- The problem remains the PA or administrative fee. In 1997-1998, the PA fee generated $691,650. This was 9% above the $666,894 of 1996-1997. For the first half of this fiscal year, the fee is up but $30,673 or 9%.
- If the $52.50 PA fee were collected in 50% of DPA's 100,000 cases each year, the clerk's salary enhancement fund would receive $125,000 and DPA would receive 2,500,000 annually. Not only would DPA's revenue picture move back into the black, but also $1,800,000 in additional services could be provided.
- Many counties are collecting the PA fee at a high rate. Others are not. (*see data that follows this article*)
- Full-time DPA Offices are not collecting PA fees at a high rate.
- The PA collection rate in Jefferson County remains one of the lowest. In 1997-1998, only $51,521 was collected. That represents 1288 fees out of approximately 27,899 trial cases. While Jefferson County represents about 30% of the trial public defender caseload, and has approximately 28% of the population, it generated only 7.4% of the total revenue from the administrative fee in FY 98. So far this half of FY 99, Jefferson County's PA fee collection is but $21,656. This is *less* than half of what was collected last year.

What Can Be Done by Defender Administrators, Judges, Clerks?

The Commonwealth of Kentucky is responsible for funding an adequate public defender system for poor people accused of or convicted of crimes. At present, 17% of DPA's budget is paid from fees generated primarily from poor people. DPA is going to do everything it can to make the revenue program function effectively, however revenue from poor people can never replace the general obligation that the people of Kentucky have to fund Kentucky's public defender system reasonably and adequately. Having said that, several ideas come to mind:

- Administrators of the public defender systems at the local level must *personally* communicate with their judges and clerks regarding the importance of revenue. This is

an *administrative* job of the head of the office, rather than the job of the individual attorney in the individual case.

- We must *personally* educate clerks:

  1) that for every PA fee collected, $2.50 goes to a non-lapsing fund that is used for their salary increases;
  2) about the importance of the collection of revenue to the delivery of services to poor people in Kentucky; and,
  3) that we need their help.

- Judges are critical to helping the success of this effort. Without their assistance, this effort cannot succeed.

- Judges should assess $52.50 in *every public defender case* permitted under the statutory criteria.

- Judges should utilize the liberal waiver or reduction provision of KRS 31.051. People who are in custody or who are too poor to pay the fee should have the fee waived.

- Judges should not jail persons who do not pay. Rather, HB 337, KRS 31.051(5), changes the failure to pay into a civil judgment.

- Revenue collection is critical to DPA's ability to provide services to clients and the court's as 17% of our clients depend on it for their representation.

Please give me your thoughts on how we can further improve this process, which is vital to DPA's future.

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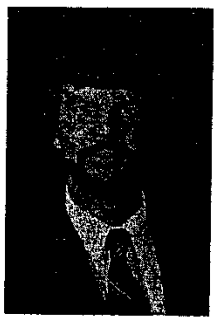
Foster Sentenced to Life



Kevin McNally

"On January 11, 1999, Fay Foster waived parole and was sentenced by Judge Rebecca Overstreet to life in prison without the possibility of release for five intentional murders. This plea quietly ended 13 years of litigation over whether she was to live or die. Knowledgeable onlookers were slack-jawed due to this unlikely exception to the two decade "no plea" policy by the Commonwealth in capital cases in Lexington, Kentucky. When Judge Overstreet asked Fay to state, in her own words, what the plea agreement meant, she simply stated: "It means I'll die in prison." On December 19, 1991, her 1987 sentence of death for five counts of murder was reversed by the Kentucky Supreme Court for failure to separate her case from the co-defendant, Tina Powell. *Foster v. Commonwealth*, 827 S.W.2d 827 (Ky. 1992).

Commenting on the plea, her attorneys, Kevin McNally and Russ Baldani, observed that "the new sentencing option of life without hope of release is sufficiently draconian to make the death penalty almost besides the point. The fact that two hard-nosed, famously aggressive prosecutors, Ray Larson and Mike Malone, would be satisfied with this result suggests that properly informed capital jurors can also be persuaded, even in highly aggravated cases." ■

PUBLIC ADVOCATE ADMINISTRATIVE FEE HISTORY FOR FY 96 through DECEMBER OF FY 99 and Public Defender Caseload by County for FY 1998

(Bolded counties collect a lower % of PA fees than their % of Public Defender cases)

COUNTY	FY 96	FY 97	FY 98	FY 99 (through 12/98)	FY 99 % of PA fee	FY 98 Caseload	FY 98 Caseload %
ADAIR	**$1,225.00**	**$510.00**	**$290.00**	**$300.00**	**0.08%**	**193**	**0.21%**
ALLEN	**$1,600.00**	**$1,300.00**	**$920.00**	**$570.00**	**0.15%**	**144**	**0.16%**
ANDERSON	$1,650.00	$1,490.00	$1,387.00	$630.00	0.17%	123	0.13%
BALLARD	$2,678.00	$4,780.00	$4,030.00	$1,500.00	0.40%	134	0.14%
BARREN	$5,452.50	$4,087.00	$5,630.00	$3,020.00	0.81%	712	0.77%
BATH	$3,682.50	$3,263.00	$2,499.00	$2,075.00	0.55%	28	0.03%
BELL	**$4,919.00**	**$7,345.00**	**$7,578.00**	**$4,840.50**	**1.29%**	**1210**	**1.30%**
BOONE	$11,612.50	$14,162.50	$17,038.50	$10,137.47	2.71%	1030	1.11%
BOURBON	**$1,749.00**	**$3,070.00**	**$1,776.00**	**$1,049.75**	**0.28%**	**291**	**0.31%**
BOYD	**$10,692.50**	**$10,671.50**	**$10,871.17**	**$5,352.33**	**1.43%**	**1474**	**1.59%**
BOYLE	$3,290.68	$2,741.00	$3,395.50	$1,742.50	0.47%	262	0.28%
BRACKEN	$640.00	$1,146.00	$1,004.00	$1,137.00	0.30%	52	0.06%
BREATHITT	**$3,215.00**	**$1,625.00**	**$3,030.00**	**$1,910.00**	**0.51%**	**502**	**0.54%**
BRECKINRIDGE	**$2,350.00**	**$2,118.00**	**$2,135.00**	**$1,400.00**	**0.37%**	**475**	**0.51%**
BULLITT	$5,572.50	$7,571.50	$7,446.50	$4,192.25	1.12%	682	0.73%
BUTLER	$2,090.00	$2,049.50	$1,320.00	$1,200.00	0.32%	159	0.17%
CALDWELL	$2,772.50	$2,688.50	$2,750.50	$1,167.50	0.31%	159	0.17%
CALLOWAY	$3,249.00	$3,220.00	$5,935.00	$4,685.00	1.25%	465	0.50%
CAMPBELL	$13,535.30	$17,625.00	$19,729.00	$7,858.40	2.10%	1466	1.58%
CARLISLE	$2,334.50	$1,730.00	$1,734.50	$890.50	0.24%	58	0.06%
CARROLL	$5,167.00	$5,602.25	$5,059.74	$2,199.00	0.59%	42	0.05%
CARTER	$4,064.00	$5,390.74	$5,728.00	$3,511.00	0.94%	595	0.64%
CASEY	**$935.00**	**$980.00**	**$800.00**	**$290.00**	**0.08%**	**107**	**0.12%**
CHRISTIAN	$17,125.50	$24,076.50	$27,765.50	$15,813.97	4.22%	3156	3.40%
CLARK	**$3,508.89**	**$4,405.00**	**$4,360.00**	**$1,570.00**	**0.42%**	**702**	**0.76%**
CLAY	**$4,868.50**	**$4,545.00**	**$2,654.50**	**$1,400.50**	**0.37%**	**665**	**0.72%**
CLINTON	$620.00	$360.00	$830.00	$596.50	0.16%	118	0.13%
CRITTENDEN	$2,932.50	$3,299.55	$2,702.50	$1,230.60	0.33%	124	0.13%
CUMBERLAND	$720.00	$680.00	$810.00	$280.00	0.07%	63	0.07%
DAVIESS	$19,760.00	$13,800.00	$13,840.00	$8,350.00	2.23%	1942	2.09%
EDMONSON	**$1,640.00**	**$1,080.00**	**$2,755.00**	**$160.00**	**0.04%**	**114**	**0.12%**
ELLIOTT	**$760.00**	**$840.00**	**$1,260.00**	**$530.00**	**0.14%**	**203**	**0.22%**
ESTILL	**$2,340.00**	**$1,175.00**	**$630.00**	**$880.00**	**0.23%**	**307**	**0.33%**
FAYETTE	$99,463.50	$105,260.46	$112,111.07	$59,369.25	15.85%	8596	9.25%
FLEMING	$1,172.00	$2,256.00	$3,150.00	$1,501.00	0.40%	116	0.12%
FLOYD	$14,262.50	$13,885.00	$13,441.00	$7,675.00	2.05%	995	1.07%
FRANKLIN	$2,280.50	$1,908.00	$2,504.00	$2,276.00	0.61%	450	0.48%
FULTON	$7,709.50	$7,632.32	$5,969.00	$3,613.70	0.96%	353	0.38%
GALLATIN	$1,138.00	$955.00	$614.00	$290.00	0.08%	38	0.04%
GARRARD	$975.00	$1,440.00	$1,660.00	$980.00	0.26%	170	0.18%
GRANT	$1,405.00	$1,525.45	$2,692.00	$807.00	0.22%	117	0.13%
GRAVES	$11,615.00	$13,140.00	$14,900.00	$8,320.00	2.22%	1187	1.28%
GRAYSON	**$2,140.00**	**$2,645.00**	**$2,915.00**	**$1,195.00**	**0.32%**	**341**	**0.37%**
GREEN	$1,000.00	$725.00	$480.00	$395.00	0.11%	44	0.05%
GREENUP	$5,427.00	$5,338.00	$4,232.50	$2,777.50	0.74%	84	0.09%
HANCOCK	$1,040.00	$1,000.00	$810.00	$742.50	0.20%	59	0.06%
HARDIN	$18,470.00	$20,634.80	$23,747.00	$15,132.35	4.04%	1084	1.17%

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(Bolded counties collect a lower % of PA fees than their % of Public Defender cases)

COUNTY	FY 96	FY 97	FY 98	FY 99 (through 12/98)	FY 99 % of PA fee	FY 98 Caseload	FY 98 Caseload %
HARLAN	**$1,140.00**	**$580.00**	**$1,080.00**	**$525.00**	**0.14%**	**789**	**0.85**
HARRISON	$4,909.50	$5,000.00	$5,648.00	$2,804.50	0.75%	292	0.31
HART	$2,771.50	$3,022.90	$3,862.47	$2,754.50	0.74%	313	0.34
HENDERSON	**$7,446.00**	**$9,560.00**	**$10,375.50**	**$5,167.00**	**1.38%**	**1346**	**1.45**
HENRY	$2,320.00	$1,690.00	$1,383.32	$915.00	0.24%	203	0.22
HICKMAN	$1,657.66	$1,962.50	$2,297.50	$1,085.00	0.29%	124	0.13
HOPKINS	$15,611.20	$20,927.05	$20,832.20	$7,941.20	2.12%	1193	1.28
JACKSON	$2,222.00	$3,087.00	$1,660.00	$1,103.00	0.29%	218	0.23
JEFFERSON	**$45,037.00**	**$48,041.22**	**$51,521.50**	**$21,656.00**	**5.78%**	**27899**	**30.03**
JESSAMINE	$5,970.00	$6,495.00	$6,205.20	$2,927.50	0.78%	256	0.28
JOHNSON	$3,422.50	$2,853.50	$2,649.00	$1,459.50	0.39%	141	0.15
KENTON	**$20,505.50**	**$13,814.50**	**$12,243.00**	**$8,352.90**	**2.23%**	**3386**	**3.64**
KNOTT	**$2,050.00**	**$970.00**	**$430.00**	**$670.00**	**0.18%**	**194**	**0.21**
KNOX	**$1,390.50**	**$2,730.00**	**$2,220.00**	**$1,990.00**	**0.53%**	**738**	**0.79**
LARUE	$3,715.50	$3,255.50	$2,727.00	$1,201.75	0.32%	247	0.27
LAUREL	**$3,657.50**	**$2,942.50**	**$1,902.50**	**$1,476.21**	**0.39%**	**776**	**0.84**
LAWRENCE	$1,971.00	$2,649.50	$2,028.00	$1,346.00	0.36%	58	0.06
LEE	**$1,415.00**	**$830.00**	**$490.00**	**$520.00**	**0.14%**	**296**	**0.32**
LESLIE	**$1,600.00**	**$1,915.00**	**$605.00**	**$490.00**	**0.13%**	**201**	**0.22**
LETCHER	$11,075.00	$10,334.00	$8,670.00	$3,963.75	1.06%	804	0.87
LEWIS	$3,675.00	$2,370.00	$2,543.50	$780.00	0.21%	101	0.11
LINCOLN	$2,312.50	$2,767.51	$2,675.00	$1,597.49	0.43%	214	0.23
LIVINGSTON	$860.00	$1,305.00	$880.00	$690.00	0.18%	113	0.12
LOGAN	$3,353.00	$3,578.00	$3,027.00	$1,860.00	0.50%	346	0.37
LYON	$1,280.00	$960.00	$940.00	$500.69	0.13%	116	0.12
MCCRACKEN	$8,030.00	$17,130.00	$17,880.00	$11,355.00	3.03%	2698	2.90
MCCREARY	$3,897.00	$4,890.00	$5,642.00	$3,302.30	0.88%	474	0.51
MCLEAN	$1,760.00	$1,240.00	$1,880.00	$810.00	0.22%	28	0.03
MADISON	**$6,872.00**	**$8,065.00**	**$7,275.00**	**$4,270.00**	**1.14%**	**1104**	**1.19**
MAGOFFIN	$2,580.00	$1,380.00	$570.00	$582.00	0.16%	110	0.12
MARION	**$1,862.00**	**$1,075.00**	**$1,510.00**	**$1,170.00**	**0.31%**	**385**	**0.41**
MARSHALL	$4,085.00	$4,118.00	$4,510.00	$2,569.00	0.69%	513	0.55
MARTIN	$1,168.00	$1,667.00	$1,806.50	$950.00	0.25%	127	0.14
MASON	$3,883.50	$5,816.50	$6,834.00	$6,463.00	1.72%	510	0.55
MEADE	**$3,242.50**	**$2,760.00**	**$1,660.00**	**$822.00**	**0.22%**	**571**	**0.61**
MENIFEE	$1,820.00	$2,840.00	$3,415.00	$1,335.00	0.36%	135	0.15
MERCER	$1,170.00	$3,280.00	$1,900.00	$1,210.00	0.32%	86	0.09
METCALFE	$1,718.22	$1,155.00	$1,600.00	$720.00	0.19%	120	0.13
MONROE	$1,887.50	$1,910.00	$1,900.00	$690.00	0.18%	20	0.02
MONTGOMERY	$9,013.50	$10,436.50	$11,152.50	$5,942.65	1.59%	890	0.96
MORGAN	$2,758.00	$3,186.00	$3,597.00	$1,746.00	0.47%	228	0.25
MUHLENBURG	$1,580.00	$1,660.00	$2,840.00	$2,075.00	0.55%	173	0.19
NELSON	$4,283.50	$5,241.50	$6,537.50	$3,404.75	0.91%	646	0.70
NICHOLAS	$1,590.00	$1,914.50	$1,031.50	$1,163.00	0.31%	88	0.09
OHIO	$6,305.00	$4,960.00	$6,580.00	$2,602.50	0.69%	320	0.34
OLDHAM	$2,105.00	$1,805.00	$1,800.00	$977.50	0.26%	228	0.25
OWEN	$1,838.00	$1,485.00	$2,428.00	$1,282.00	0.34%	8	0.01

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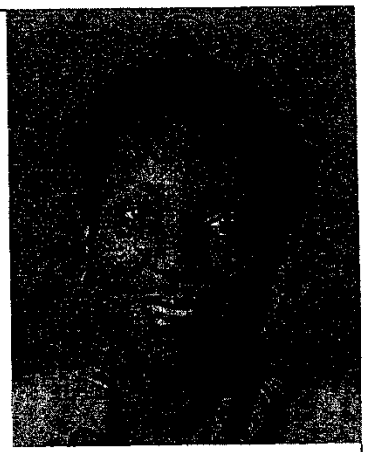
OWSLEY	$2,000.00	$2,500.00	$1,890.00	$1,350.00	0.36%	305	0.33%
PENDLETON	$2,095.00	$1,600.00	$1,439.00	$920.00	0.25%	85	0.09%
PERRY	**$863.50**	**$7,368.50**	**$10,932.50**	**$4,210.50**	**1.12%**	**2063**	**2.22%**
PIKE	**$465.00**	**$1,732.50**	**$1,420.00**	**$430.00**	**0.11%**	**1242**	**1.34%**
POWELL	$2,836.50	$2,728.50	$3,715.00	$2,289.95	0.61%	453	0.49%
PULASKI	**$3,754.50**	**$4,614.00**	**$3,802.50**	**$2,085.50**	**0.56%**	**659**	**0.71%**
ROBERTSON	$740.00	$722.00	$377.00	$200.00	0.05%	20	0.02%
ROCKCASTLE	$1,220.00	$2,488.50	$3,204.00	$1,664.25	0.44%	267	0.29%
ROWAN	$13,791.50	$11,701.50	$11,962.50	$6,825.00	1.82%	830	0.89%
RUSSELL	$2,107.50	$3,452.75	$4,585.00	$2,053.75	0.55%	363	0.39%
SCOTT	$3,447.50	$4,511.00	$3,353.50	$1,986.00	0.53%	476	0.51%
SHELBY	$2,159.00	$2,085.00	$2,510.00	$1,180.00	0.31%	448	0.48%
SIMPSON	**$2,180.00**	**$1,900.00**	**$1,950.00**	**$580.00**	**0.15%**	**327**	**0.35%**
SPENCER	$755.00	$540.00	$200.00	$170.00	0.05%	33	0.04%
TAYLOR	$3,526.50	$3,655.00	$3,875.00	$2,360.00	0.63%	303	0.33%
TODD	$1,323.00	$1,320.00	$800.00	$330.00	0.09%	70	0.08%
TRIGG	$2,127.50	$1,806.50	$1,813.25	$1,064.50	0.28%	134	0.14%
TRIMBLE	**$80.00**	**$185.00**	**$370.00**	**$70.00**	**0.02%**	**78**	**0.08%**
UNION	$4,351.00	$5,248.00	$4,525.50	$2,878.00	0.77%	229	0.25%
WARREN	**$15,545.26**	**$12,716.56**	**$7,924.00**	**$4,041.95**	**1.08%**	**1380**	**1.49%**
WASHINGTON	$1,180.00	$645.00	$405.00	$560.00	0.15%	123	0.13%
WAYNE	**$2,265.00**	**$1,640.00**	**$1,480.00**	**$1,070.25**	**0.29%**	**355**	**0.38%**
WEBSTER	$3,135.00	$4,858.00	$4,388.50	$2,291.50	0.61%	132	0.14%
WHITLEY	$4,657.00	$5,608.00	$9,626.50	$5,103.00	1.36%	841	0.91%
WOLFE	$1,152.00	$395.00	$965.00	$1,445.00	0.39%	290	0.31%
WOODFORD	$2,004.50	$1,360.00	$1,972.00	$757.00	0.20%	175	0.19%
TOTAL	$621,428.21	$666,809.56	$691,650.92	$374,678.91	100.00%	92,898	100.00%

Public Protection & Regulation Cabinet Secretary Laura Douglas Resigns

On February 19, 1999, I attended a press conference at the Capitol where Governor Patton announced that Laura Douglas had resigned as Secretary of the Public Protection and Regulation Cabinet effective March 1, 1999. Laura will become Vice-President and General Counsel of the Louisville Water Company. Laura has been a dear friend of mine, and an effective advocate for DPA, enabling many of our successes over the past 2 1/2 years. We will miss Laura, and hope that a new Cabinet Secretary will be appointed who will understand, as did Laura, the needs of Kentucky's poor and the strategies for meeting those needs. We wish her Godspeed.

- Ernie Lewis, Public Advocate



Laura Douglas

THE EFFECTS OF INDIGENCY ON COSTS, FINES, RESTITUTION, RECOUPMENT

➢ **Ed Monahan, Deputy Public Advocate**
Jeff Sherr, Assistant Director of Education & Development

The 1998 General Assembly's sweeping criminal law legislation substantially increased the financial responsibilities of criminal defendants. This effort has two primary purposes: 1) the need by different criminal justice agencies for increased funding; 2) the philosophical desire to have criminal defendants pay for their crimes. Public defenders especially have increasingly relied on the $50 administrative fee, the $50 DUI fee and recoupment for funding of delivery of services statewide. Over 15,000 or 15% of indigent clients are represented by defenders funded from these fees. The fees and costs created or increased by HB 455 were:

- Crime victim cost - from $10-$20;
- Mandatory restitution;
- Assessment of costs for sex offenders;
- Public Advocacy Administrative fee from $40-$50;
- Diversion costs;
- Probation and parole costs: $500 for a misdemeanor, $2500 for a felony;
- Inmate's medical, food, lodging costs;
- Crime stopper cost of $1.00;
- Court costs from $55-$75;
- Work release costs to jailer.

In this context of these significant financial responsibilities, it is important that the assessment of fees and costs be done without violating constitutional limits, and with an appreciation for the partial or complete indigency of many defendants. The reality is that most defendants will be able to pay some portion of these economic penalties. Many will not be able to pay any penalty. Very few will be able to pay the entire penalty.

A. Indigency

The United States Supreme Court "has long been sensitive to the treatment of indigents in our criminal justice system." *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 2068, 76 L.Ed.2d 221 (1983). Kentucky caselaw and statutes likewise reflect that sensitivity.

B. Costs

Kentucky law prohibits a judge from assessing court costs on a person who is indigent. KRS 31.110(1)(b) states, "The courts in which the defendant is tried shall waive all costs." KRS 453.190(1) states that "A court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs...."

In *Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987) the trial court ordered the defendant who was represented by a public defender to pay $65 court costs upon sentencing for attempted rape and sexual abuse. The Kentucky Supreme Court found it improper under KRS 31.110(1)(b) to impose court costs on a needy person.

C. Fines

KRS Chapter 534 covers fines, methods of imposing fines and response to failure to pay fines. Kentucky statutes prohibit imposing a fine on an indigent.

While there is no constitutional prohibition to imprison a defendant for a willful refusal to pay a fine, it is unconstitutional to incarcerate an

indigent for nonpayment of a fine for any other reason.

Felonies. KRS 534.030 sets out for felonies the limits of fines and specifies factors for determining the amount and method of payment:

1) defendant's ability to pay;
2) hardship on defendant's dependents;
3) impact on ability to pay restitution to victim;
4) any gain from the crime.

In the penalty phase of *Simpson v. Commonwealth*, 889 S.W.2d 781 (Ky. 1994) the judge instructed jurors to set a prison sentence and fine. The Court reversed, holding that any fine is to be imposed by the judge, not a jury. *Simpson* held that KRS 534.030(4) also prohibits imposing a fine on an indigent. *Simpson* concluded that it was inappropriate for a judge to impose a fine on someone represented by an assistant public advocate, since such representation necessarily meant the judge had determined the defendant to be indigent.

Kentucky law did not always recognize that an indigent could not be fined. In *Beane v. Commonwealth*, 736 S.W.2d 317 (Ky. 1987) the Court held 5-2 that the mandatory $150 DUI service fee was a fine or penalty, not a cost, and therefore KRS 453.190's waiver of costs for an indigent did not apply. However, the Court observed that indigency was "a factor which may be considered under KRS 534.060 if it is later shown to be a factor in his *subsequent* nonpayment." *Id.* at 318. Effective July 13, 1990, HB 603 overruled *Beane* by amending KRS 534.030 and 534.040 by adding in a new section which stated, "fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31."

Misdemeanors. KRS 534.040 sets out the limits of fines for misdemeanors. In misdemeanor cases under KRS 534.040, it is the jury, not the judge, which sets the fine. Like the felony fine process, it prohibits imposition of a fine on an indigent. KRS 534.040(4).

Unlike the statute that addresses fines for felonies, this statute does not provide criteria for determining the amount of fines. The statute's Commentary indicates that there is a different Penal Code rationale for fining misdemeanants than there is for fining felons. The Penal Code views fines for misdemeanors as deterrence.

Nonpayment Process. KRS 534.060 outlines a specific and mandatory response to the nonpayment of fines for both felonies and misdemeanors. This statutory procedure was enacted to comply with federal constitutional decisions, and is as follows:

1) The court on its own or on motion of the prosecutor can require a defendant to show cause why he should not be imprisoned for failure to pay.

2) The court can issue a warrant for arrest or a summons for the defendant's appearance.

3) KRS 534.060(2) prohibits imprisonment for nonpayment of a fine as long as the defendant did not intentionally fail to pay and he has made a good faith effort to pay.

4) If the failure to pay is excusable, the court can adjust the time for payment or the amount to be paid, or order the defendant to work for local government at a reasonable rate of pay if the defendant is not otherwise employed and is not disabled and it will not pose an economic hardship on his dependents. A court cannot order more than 40% of gross pay to go towards the fine.

The United States Supreme Court has held "that a state may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done di-

rectly." *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970).

In *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) the statutory penalty only allowed a fine. The Court stated, "although the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like *Williams*, petitioner was subjected to imprisonment *solely* because of his indigency." *Id.* at 397-98.

In *Spurlock v. Noe*, 467 S.W.2d 320 (Ky. 1971) the defendant was imprisoned for 12 months with a $3,000 fine. When the jail term was served, the defendant was not released since the fine was not paid. At the hearing held after the petition for writ of habeas corpus was filed, the defendant demonstrated he was unable to pay the fine. The Court held: "we think that the teaching of Tate v. Short is that a defendant who is in custody solely and only because he cannot make immediate payment of a fine by reason of indigency must be released from custody forthwith. This does not mean, however that the fine is extinguished or that the state is powerless to compel its payment. An indigent person may not be continued in prison for nonpayment of a fine without having been given some reasonable alternative opportunity to satisfy the fine." *Id.* at 321.

D. Restitution

Bearden v. Georgia, *supra* held that revocation of probation and imprisonment of an indigent for failure to fully pay restitution and a fine violated due process absent a willful refusal to pay or absent a funding that an alternative punishment was inadequate.

Danny Bearden pled guilty and was placed on probation with a 3 year sentence deferred. Probation was conditioned on payment of a $500 fine and $250 in restitution over four months. Bearden borrowed $200 from his parents for his first payment. A month after his plea he was laid off from his job. He could not read and had a 9th grade education, was unable to find other work. As he had no other income or assets he was unable to pay the balance, and the trial judge revoked his probation and imprisoned him.

The Court recognized that a "defendant's poverty in no way immunizes him from punishment." *Id.* at 2071. But the Court found that imprisoning a person for failure to pay a fine or restitution could only constitutionally occur if:

- the defendant had the means to pay;
- the defendant willfully refused to pay;
- the defendant failed to make bona fide efforts to seek employment or legally obtain the resources to pay;
- an alternate measure of punishment other than imprisonment are not possible.

Alternatives to Imprisonment. The Court offered common sense alternatives to imprisonment that trial judges should consider:

- extend the time for making the payments;
- reducing the fine;
- direct public service work in place of the fine or restitution.

Revocation of Probation. *Bearden* recognized that fourteenth amendment due process provided "substantive limits on the automatic revocation of probation where an indigent defendant is unable to pay a fine or restitution." *Black v. Romano*, 471 U.S. 606, 611 (1985). While a judge is generally not constitutionally required to consider alternatives to revoking probation, due process guarantees require a judge to consider alternatives to incarceration for a defendant's failure to pay a fine or restitution when a defendant is unable to pay despite reasonable efforts.

E. Recoupment & Partial Payments

Kentucky's public defender's statutes provide for recoupment of money from defendants who were indigent during their criminal proceedings but later have funds to pay for their prior representation. KRS 31.150.

A person who can afford to partially pay for an attorney, can be assessed a partial amount under KRS 31.120(4).

In *James v. Strange*, 407 U.S. 128 (1972) the United States Supreme Court held that the Kansas recoupment scheme violated equal protection guarantees because there was unequal treatment between an indigent criminal defendant's treatment and that of a civil debtor since Kansas afforded the civil debtor many protections and procedures not offered the criminal defendant.

In *Fuller v. Oregon*, 417 U.S. 40 (1974) the defendant was sentenced to 5 years of probation, conditioned on, among other things, repayment of the costs for the attorney and investigator who were appointed for him.

The Oregon scheme, unlike Kansas' in *James v. Strange* provided criminal defendants some protections. Defendants did not have to repay if not convicted. A defendant had to have the subsequent ability to pay. The financial resources of the defendant had to be considered by the judge. The defendant had the right to petition the court to remit unpaid portions, and a defendant could not be held in contempt if his failure to pay was not intentional refusal.

The Court held this scheme constitutional since it only required payment from those who obtained the ability to pay and since it provided criminal defendants with the protections afforded civil debtors.

F. Practice Tips

1) Explain the Public Advocacy Administrative fee to your client and that is is paid to the clerk not to you.

2) Explain the possibility of an additional recoupment fee and this court policy toward imposing the fee.

3) Speak with you client about his resources to pay these fees.

4) In cases when the client can not pay the fee, be prepared to argue to the court that the fee should be waived.

5) Make sure the judge does not impose *costs* on your indigent client in the final judgment.

6) Make sure the court does not impose a fine on your client unless your client consents pursuant to a plea.

7) If the judge imposes legitimate financial responsibility on your client, insure that it is consistent with the client's ability to pay in the future in light of other financial obligations.

8) Explain to your client that if it appears he will be unable to pay he needs to document his financial situation and be able to show what efforts he has made to obtain the funds. Be ready to help your client with a motion to extend the time to make the payment.

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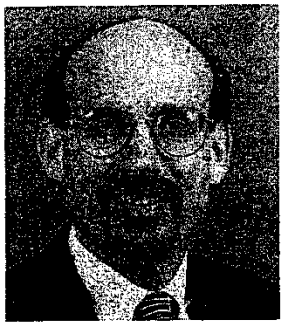
Problems

The mere formulation of a problem is far more essential than its solution, which may be merely a matter of mathematical or experimental skills. To raise new questions, new possibilities, to regard old problems from a new angle requires creative imagination and marks real advances in science.

- Albert Einstein

PLAIN VIEW

➢ **Ernie Lewis, Public Advocate**



Knowles v. Iowa
119 S.Ct. 484 (12/8/98)

Minnesota v. Carter
119 S.Ct. 469 (12/1/98)

Taylor v. Commonwealth
1998 WL 820556
(Ky.S.Ct. 11/19/98)
(Not Yet Final)

Knowles v. Iowa
119 S.Ct. 484 (12/8/98)

A significant Fourth Amendment case has been decided by the United States Supreme Court. The Court was at one of those watershed moments. They could decide that when the police have pulled over a motorist for a traffic violation and issue only a citation, a full search was to be allowed. Or, they could decide that their tilt to the right in recent years had its limits, and that such a search indeed violated even their sensibilities. Fortunately, the Court has recognized the outer limits to their quest for "reasonableness" under the Fourth Amendment.

The case arose as a result of an Iowa statute, unusual in the nation, allowing an arrest or a citation as a result of a traffic violation; the statute also allows a full-blown search following the issuance of a citation. Knowles was driving 43 in a 25 and was pulled over. A citation was issued by the traffic officer, who then discovered a bag of marijuana and a pipe during a full search of Knowles' vehicle. The Iowa Supreme Court affirmed Knowles' conviction, holding that because the officer decided to issue a citation but could have made a custodial arrest, the full-blown search pursuant to the statute did not violate the Fourth Amendment.

The United States Supreme Court, in a unanimous decision written by the Chief Justice, rejected the position taken by the Iowa Supreme Court. The Court considered the statute in light of *United States v. Robinson*, 414 U.S. 218 (1973). In *Robinson*, the Court justified the search-incident-to-arrest exception based upon the "need to disarm the suspect in order to taken him into custody" and upon "the need to preserve evidence." The Court recognized that the need to disarm a suspect diminishes where the

officer is going to issue a citation rather than make a custodial arrest. "[W]hile the concern for officer safety in this context may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search." Thus, the first rationale under *Robinson* was not served in this case.

Nor could a full-blown search be justified under *Robinson's* second rationale. "Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained."

The Court's opinion is interesting in several respects. First, the reader will be disappointed in the brevity of the opinion as well as its reach. Absent is any sweeping language regarding our right to privacy, the limited nature of the Fourth Amendment, or the dangers of the encroachment by government into our homes, vehicles, and persons.

More significant, however, is the actual holding. The Court has rejected the expansion of the exceptions to the Fourth Amendment. Practically speaking, the Court has ended the police practice of being able to stop anyone on our highways and searching them based upon the slightest pretext. While the Court has rejected an analysis into the mind of the police officer, see *Whren v. United States*, the Court has nevertheless put limits on the officer. Of course under the statute the officer could still make a custodial arrest and conduct a full-blown search in this speeding case. However, officers will not be allowed to pull someone over for the slightest reason with no intention of making a custodial arrest, writing a citation, and proceeding with a full-blown search in the hopes of finding incriminating evidence of a greater crime.

Minnesota v. Carter
119 S.Ct. 469 (12/1/98)

Carter and Johns lived in Chicago. They were in the cocaine business. They went to the apartment of Thompson in Minneapolis , where they had never been before. Thompson permitted them to come to her apartment and put powder cocaine into baggies. In return, she received 1/8 gram of cocaine. This was a business arrangement rather than a social event. A person walked by, saw the three bagging what was believed to be cocaine, and called the police. Officer Thielen answered the call, went to the window and looked in, seeing Carter, Johns, and Thompson bagging cocaine. He contacted headquarters, which began to prepare to obtain a search warrant. When two men left the building and got into a car, the police stopped the car, finding Carter, Johns, a gun, and 47 grams of cocaine in baggies.

Carter and Johns were arrested and charged with violating Minnesota's controlled substance laws. They moved to suppress, but the trial court denied their motion, ruling that Carter and Johns were temporary visitors and thus could not claim Fourth Amendment protection in the apartment, unlike the overnight guests in *Minnesota v. Olson*, 495 U.S. 91 (1990). The trial court also ruled that the officer's observations were not a search, and thus not entitled to protection. After conviction, the Minnesota Court of Appeals affirmed, holding that Carter and Johns had no standing to challenge the search. The Minnesota Supreme Court, however, reversed, holding that Carter and Johns had standing, that the officer's observations constituted a search, and that the search was unreasonable.

In a 6-3 opinion written by Justice Rehnquist, the United States Supreme Court reversed. The Court first rejected the lower court's reliance upon the concept of standing. Returning to *Rakas v.Illinois*, 439 U.S. 128 (1978), the Court reminded all that standing is no longer an issue in Fourth Amendment cases. Rather, the proper analysis is to determine whether a person claiming Fourth Amendment protections can "demonstrate that he personally has an expectation of privacy in the placed searched, and that his expectation is reasonable."

The Court returned to *Minnesota v. Olson* to draw the distinction between that case and the facts of this case. The question here was whether Carter and Johns were more like an overnight guest, as in *Olson*, or more like one merely on

the premises with the consent of the leaseholder. The Court restated that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not."

Significant to the Court was the particular circumstances of Carter and Johns' presence. The Court noted that they were not overnight guests, they had never stayed there before, they were there for a brief period of time, and they were there merely to transact business. "But the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights." Based upon this holding, the Court declined to decide whether the officer's observations constituted a search.

The case is interesting in the wide variety of opinions written. Justice Scalia, joined by Justice Thomas, penned a concurring opinion. His opinion is long, interesting, and witty. Justice Scalia returns as he often does to the text of the Fourth Amendment. He views the *Rakas* "reasonable expectation of privacy" test to be a "fuzzy standard," while at the same time criticizing the *Katz* decision. According to his reading of the original text, "each person has the right to be secure against unreasonable searches and seizures in his own person, house, papers, and effects," but not in anyone else's. *Olson* was the outer limit because it was "plausible to regard a person's overnight lodging as at least his 'temporary' residence." On the other hand, "it is entirely impossible to give that characterization to an apartment that he uses to package cocaine."

Justice Kennedy also wrote a concurring opinion. He rejects Justice Scalia's textual argument and restriction of Fourth Amendment protections to one's individual home. Rather, he believes that "almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home." However, he concurs in the majority opinion because "respondents have established nothing more than a fleeting and insubstantial connection with Thompson's home... [r]espondents used Thompson's house simply as a convenient processing station, their purpose involving nothing more than the mechanical act of chopping and packing a substance for distribution."

Justice Breyer also wrote a concurring opinion. He agreed with the dissenters that Carter and Johns had a reasonable expectation of privacy in Thompson's apartment. However, he concurred in the judgment because in his opinion Officer Thielen had not violated the Fourth Amendment by peering into a basement apartment through open blinds.

Justice Ginsburg wrote in dissent, joined by Justice Stevens and Justice Souter. In her view, the decision of the majority "undermines not only the security of short-term guests, but also the security of the home resident herself. In my view, when a homeowner or lessor personally invites a guest into her home to share in a common endeavor, whether it be for conversation, to engage in leisure activities, or for business purposes licit or illicit, that guest should share his host's shelter against unreasonable searches and seizures." The core value of the Fourth Amendment for Justice Ginsburg is the home, where one may include or exclude others. "My concern centers on an individual's choice to share her home and her associations there with persons she selects. Our decisions indicate that people have a reasonable expectation of privacy in their homes in part because they have the prerogative to exclude others." She laments where this case leads. "Human frailty suggests that today's decision will tempt police to pry into private dwellings without warrant, to find evidence incriminating guests who do not rest there through the night."

Taylor v. Commonwealth (Not Yet Final) 1998 WL 820556 (Ky.S.Ct. 1998)

The Kentucky Supreme Court has addressed the issue of confidentiality of informants in the

context of conducting a suppression hearing. Here, Taylor was arrested following an unnamed informant's tip to the police that two black men would be driving a particular car with a particular license plate and that there would be drugs in the car. When the police located the car, they stopped it, saw the defendant take a plastic bag and place it under the seat. A search revealed cocaine in the bag, and Taylor was arrested and convicted. His suppression motion was overruled.

On appeal, Taylor challenged the trial court's decision not to require the Commonwealth to reveal the identity of the informant. Taylor's counsel objected to not being able to view the sealed affidavit of the police, or to not being able to question the police regarding the informant.

The Court rejected all efforts by the defense to pry into the informant's identity or the police reliance upon the information supplied by the police. In an opinion written by Justice Wintersheimer, the Court stated that the trial court was correct in not requiring the Commonwealth to reveal the identity of the informant pursuant to KRE 508. The Court stated that the exceptions to the informant's privilege were not present in this case. The Court relied upon the fact that in this case, the informant was a "mere tipster" rather than a witness to the crime, relying upon *Roviaro v. United States*, 353 U.S. 53 (1957), and *Schooley v. Commonwealth*, Ky., 627 S.W. 2d 576 (1982). "This tip led police to further investigation and to the making of an investigative stop where the officers observed a suspected controlled substance in plain view in the lap of Taylor. The informant was not present in or near the vehicle when the charged crime was committed. Accordingly, the informant could not have provided any testimony about what occurred when the vehicle was stopped by the police."

The Court further found that the issue regarding the effort of counsel to look at the sealed affidavit was not preserved for appellate review.

The Court rejected the appellant's claim that counsel should have been allowed to question the police regarding the informant. "There is a distinction between the confrontation clause protections in a pretrial hearing from those protections at public trial...The defense cannot circumvent the privilege accorded to the informer by claiming to test reliability..."

After rejecting Taylor's arguments on the informant, the Court had little problem finding the search in this case to have been reasonable. With little discussion, the Court found that the tip had been verified and that this verification had established a reasonable suspicion to stop the car, citing *Commonwealth v. Hagan*, Ky., 464 S.W. 2d 261 (1971) and *Alabama v. White*, 496 U.S. 325 (1990).

SHORT VIEW

1. ***J.L. v. State***, 1998 WL 873070 (Fla.Sup. Ct. 12/17/98). There is no firearm exception to the articulable suspicion standard for a stop and frisk, according to the Florida Supreme Court. Thus, where an anonymous tip told the police that someone at a bus stop had a gun, the police could have approached the group of young men and engaged in a conversation, but could not frisk each of them. The Court noted that possessing a firearm was legal in that state, and as a result, a search was illegal under these circumstances.

2. ***State v. Lytle***, 1998 WL 908100, __ N.W. 2d __, 255 Neb. 738 (Neb.Sup.Ct. 12/11/98). A tip through a Crimestoppers Program does not necessarily provide probable cause to issue a search warrant. The Court noted that an anonymous tip requires that reliability be demonstrated in order to issue a search warrant; the "citizens informer" status normally accorded witnesses to crimes who aid police, who are presumed to be reliable, is not available for a tip through Crimestoppers. Significant in this finding is that there is a financial motive to submit a tip in most Crimestoppers programs. Thus, such tips require corroboration before a search warrant may be issued based solely upon them.

Ernie Lewis, Public Advocate ■

KENTUCKY'S *SAWHILL/BENHAM* STANDARD: A NEW APPROACH FOR THE DEFENSE

➢ **Susan Jackson Balliet, Assistant Public Advocate**

We all know the standard boilerplate for setting up a directed verdict argument: "[i]f the court finds, under the evidence as a whole, it was clearly unreasonable for the jury to find the defendant guilty, directed verdict of acquittal should be granted." *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991); *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983); *Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky. 1977). And everyone (especially the Commonwealth) always uses the following quote from *Benham* to set out the standard:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. *Benham*, 187.

But there is a better way for defendants to describe the *Benham* standard, a way that is equally valid based on the language of *Benham*. Defense counsel should be talking about *Benham*'s "scintilla standard" and whether there is - or is not - more than a scintilla of evidence against the client.

The Kentucky Supreme Court established the "scintilla" standard for evaluating sufficiency of evidence in *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky., 1983). The court stated in *Sawhill*, that a trial court is "authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence. Obviously, there must be evidence of substance." (*Id.*) Applying the scintilla standard, in *Commonwealth v. Benham*, 816 S.W.2d 186, 187-188 (Ky., 1991) the Kentucky Supreme Court reversed the Court of Appeals, which had found certain evidence to be *less* than a scintilla. In *Benham* the Supreme Court stated the following evidence was "*considerably more*" than a scintilla:

> Benham was in the area of the barn fire and had an opportunity to commit the crime. An officer and a bystander saw Benham wet and muddy which could have come from the area where the fire started; he had a motive because the mayor had had Benham arrested previously; **Benham admitted setting the fire, and there was a handwritten statement by his cousin which documented Benham's admission of guilt.** Benham's statement to the police was that he noticed smoke, but neither smoke nor fire was visible from the road. Benham also said he saw sparks and juice from electrical wires through which no current flowed. (emphasis added)

Of course, most of us would readily agree there was a whole lot more than a scintilla of evidence against Mr. Benham. And unfortunately –precisely because the case involved so much more than a scintilla of evidence - the *Benham* case really doesn't give much guidance as to what is or is not a scintilla.

But luckily, there is a case that does give us guidance. In *Johnson v. Commonwealth*, 885 S.W.2d 951 (Ky. 1994) the only evidence against the defendant was that the defendant *may*

have run a red light when he crashed into a woman's pick-up truck and killed her. *Johnson*, 885 S.W.2d at 952-953. The Court held this was not enough evidence to sustain Johnson's conviction. The Court held that a mere *possibility* that a defendant may have done wrong is no more than a scintilla of evidence against that defendant. *Johnson* applied the scintilla standard to extremely close facts. Therefore *Johnson* is much better than *Sawhill* or *Benham* as authority that describes the true parameters of the scintilla standard.

As defense counsel we should be arguing the scintilla standard and citing *Johnson* in every case where the evidence arguably presents a "close call." See also *Adkins v. Commonwealth*, 313 Ky. 110, 230 S.W.2d 453 (Ky., 1950) (conviction not to be based on speculation, suspicion, conjecture) and *DeAttley v. Commonwealth*, 310 Ky. 112, 220 S.W.2d 106 (1949) (ditto).

Of course, it will come as no surprise that *Johnson* is something of an isolated case, and in applying the scintilla standard after *Benham*, the Court has usually found evidence to be more than a scintilla. Defense counsel will simply need to be aware of these cases, in order to be able to distinguish them. For instance, in *Brown v, Commonwealth*, 914 S.W.2d 355, 357 (Ky.App. 1996) the court looked to the following facts and found there was "much more than a mere scintilla" of evidence to sustain Brown's and his co-defendant's convictions:

> On October 13, 1993, Terrence Brown and Michael Dewon Ross were apprehended for suspected drug activity near the Westside Plaza in Lexington, Kentucky. At the time of his arrest, Brown had in his possession a loaded semi-automatic handgun, twenty rocks of crack cocaine, $582.00 in cash, a mobile paging unit, rolling papers and false identification. Ross was found with $1,419.00 in cash, a pager and a stolen bicycle.
> *Brown*, 914 S.W.2d 355, at 356-357.

Brown was caught red-handed, and the circumstantial evidence against Ross was very strong. Ross was present at the scene with Brown and holding a very large sum of money and a pager, two common accouterments of a drug dealer. There was apparently no dispute between the commonwealth's witnesses as to the facts in *Brown*. This was evidence "of substance" as required by *Sawhill*.

In finding more than a scintilla of evidence in *Edmonds v. Commonwealth*, 906 S.W.2d 343, 346 (Ky. 1995) the Court noted there was an "unequivocal" in-court identification of the defendant by an informant. There was also an audio tape of the drug buy. Edmonds was arrested with other "First Family" members in a Frankfort apartment, and a witness testified Edmonds was a member of the "First Family" who made trips to New York to purchase large quantities of cocaine.

In *Baker v. Commonwealth*, 973 SW.2d 54, 55 (Ky., 1998) the issue was whether the defendant subjected the victim to a risk of injury, and the evidence was that the victim's feet were seen dangling out of an open door of the vehicle as it sped away. Understandably, the court held there was more than a scintilla of evidence to sustain the conviction in *Baker*.

Whenever a directed verdict issue arises, in addition to *Sawhill* and *Benham*, defense counsel should argue the scintilla standard and cite *Johnson*. And of course, counsel should also remember to argue that a conviction without sufficient supporting evidence denies a defendant his right to federal due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, as well as Sections 2 and 11 of the Kentucky Constitution. *Perkins v. Commonwealth*, 694 S.W.2d 721, 722 (Ky.App., 1985).

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KENTUCKY SUPREME COURT CHANGES RULES

In the January 1999 *Bench & Bar*, the Kentucky Supreme Court announced changes to their criminal and civil rules which were effective January 1, 1999.

Criminal Rules

1. **RCr 7.24 Discovery & Inspection.** While it may seem odd to many Kentucky practitioners, the practice in many counties did not provide for discovery of police reports. Section 2 of this rule makes a significant change. Previously, pretrial discovery of police was not authorized by this rule. Now this rule authorizes that pretrial discovery. The rule still does not authorize pretrial discovery of police memoranda, which is likely to be the subject of future litigation as to the real difference between a report and a memorandum.

   This change has long been advocated by the Kentucky Association of Criminal Defense Lawyers (KACDL) and the Department of Public Advocacy (DPA) and finally is enacted as a result of a proposal last year by KACDL through its President David R. Steele.

   This pragmatic change will increase efficiency of the litigation, encourage reliable advice to a client on the evaluation of the strength of the case and allow informed decisionmaking by a defendant on whether to plead guilty or not. It is likely to reduce delays during trials. Early disclosure allows for adequate time for the defense to competently prepare for the case.

2. **RCr 8.04 Pretrial Diversion.** As a result of a KACDL proposal, there is now a new rule providing for pretrial diversion that sets out a simple, straightforward process for misdemeanors and felonies. It requires the agreement of the defendant and prosecution and is subject to approval of the court. KACDL proposed this rule to the Court.

   Passage of this rule by the Kentucky Supreme Court follows upon the 1998 General Assembly's enactment of HB 455 that has provisions for a diversion process that in some significant ways is more restrictive than the new RCr 8.04. The new statute is limited to some Class D felonies where persons have not had a felony in 10 years or been on probation or parole in the last 10 years.

   The Supreme Court of Kentucky has been clear in holding that it, not the Legislature, sets the procedures. RCr 8.04 is obviously seen as procedural by the Kentucky Supreme Court otherwise it would not have promulgated it. This is especially true in this situation since the court considered this Rule at the June, 1998 Bar Convention *after* the 1998 General Assembly passed its diversion law.

   Litigators are going to have to pay attention to both of these provisions but since the Kentucky Supreme Court has the last word on such matters, RCr 8.04 is likely to be the provision used while the statutory provisions are likely unconstitutional.

3. **RCr 9.57 Deadlock Jury Instruction**. As a result of a change proposed by the Court, this rule was strengthened by specifically saying that the instructions given by trial judges to a deadlocked jury can contain only the elements outlined in the rule and no other.

   This change is wise since it insures that judges cannot leave out or add to this instruction in a way that prejudices one side or

the other and is consistent with the Kentucky Supreme Court's direction in *Commonwealth v. Mitchell*, 943 S.W.2d 625, 627 (Ky. 1997) advising courts not to "tailor individualized versions" and risk reversible error.

4) **RCr 10.24 Motion for Judgment of Acquittal.** This rule was amended to allow for a motion for acquittal to be made not only after a guilty verdict but also after a jury failed to return a verdict because they were hung.

   It is wise to allow for this motion in the case where no verdict was returned to permit judges the opportunity to make a decision on this matter when the evidence does not support a verdict of guilty upon retrial. This change is consistent with CR 50.02 and FRCP 29 (c).

5) **RCr 12.04 When and How Appeal is Taken.** The court proposed this change to increase the time for filing a notice of appeal in a criminal case from 10 days to 30 days as set in civil cases. It makes sense to have the same deadlines for filing appeals for both civil and criminal cases to reduce confusion and mistakes.

Civil Rules

1) **CR 24.03 Procedure When Constitutionality Challenged.** This rule was amended to require "a copy of the pleading, motion or other paper first raising the challenge" upon the Attorney General. Previously, it was only necessary to serve the notice of the motion.

2) **CR 72.10 Statement of Appeal from District Court.** This rule sets new requirements for the contents and service of the statement of appeal.

3) **CR 75.01(1) Designation of Evidence.** This rule change requires a designation of untranscribed material even in proceedings that were taken exclusively by video. The rule envisions a list of proceedings by date.

4) **CR 75.02(1) and (3). Transcript of Evidence and Proceedings and CR 75.07(1) and (2) Record Prepared by Clerk and 75.13(1) Narrative Statement.** Proceedings that were not videotaped are added to this rule's provisions.

5) **CR 76.12(4)(c)(vi) Form and Content.** The Appendix to a brief must now have an index page followed by the judgment.

6) **CR 76.16(2) Appellate Oral Arguments.** Visual aids are now specifically authorized to be used at oral argument with leave of court.

7) **CR 76.20(2)(b) Motion for Discretionary Review.** The time for filing is changed from 20 to 30 days.

8) **CR 76.30(2) Effective Date of Opinion.** Changes the date of finality of Court of Appeals opinion from 21 days to 31 days. Finality for Supreme Court opinions remains 21 days.

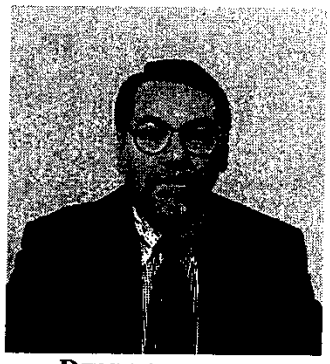
9) **CR 79.06(3) Docketing of Appeals.** Now only allows docketing when the appellate clerk receives copies of the notice of appeal, judgment and receipt of the filing fee from the circuit clerk.

10) **CR 98(2) Videotape Records**. The change makes this rule applicable to cases with videotaped records in addition to the other appellate rules.

Conclusion

The changes in these rules demonstrate that the work of KACDL and DPA to promote rules that are fairer and foster reliable decisionmaking is appreciated by the Kentucky Supreme Court. ■

BALANCING QUALITY JUVENILE SERVICES WITH CONSISTENT SANCTIONS



DENNIS MAHAN

The attached is a rebuttal to the article ***Defending Juveniles Accused of Sex Crimes*** *published in the November 1998 issue of* ***The Advocate.***

Since its inception, the Department of Juvenile Justice has striven to operate in a cooperative, collaborative manner with other agencies and individuals concerned about the youth placed in our care. Part of our responsibility relevant to these efforts has been the development of strong participatory relationships, the dissemination of accurate information to the public and other stakeholders, and, when necessary, the correction of erroneous information or perceptions.

In reference to the article "Defending Juveniles Accused of Sex Crimes " in the November 1998 issue of "The Advocate," it is critical to point out a number of factual efforts within the text. The article discusses The Department of Juvenile Justice (DJJ), sex offenders committed to DJJ, sex offender programming provided by DJJ, and the sex offender classification process internal to DJJ.

Committed sex offenders may be placed in one of four DJJ clinically supervised sex offender programs. Three of these programs are state operated and one is a contracted private child care provider. Each program specializes in treating sex offender groups based on particular variations reference the seriousness of the offense, risk factors to the youth and community, age, size, emotional stability and sophistication. This specialization process prevents "mixing young sex offenders with so called older, experienced sex offenders."

A court cannot commit a sex offender to any specific DJJ or privately operated facility or program. A judge will have the option to commit a sex offender to the Department of Juvenile Justice. An assigned local DJJ Juvenile Services Specialist will "recommend" possible placement considerations to the Centralized Intake/ Classification Branch of DJJ. This Branch will assess for placement each sex offender commitment utilizing a statutory sex offender assessment and the DJJ risk/needs classification instrument in conjunction with an evaluation of all dispositional 'materials and input from the DJJ Mental Health Services Section.

Throughout the short tenure of the Department of Juvenile Justice, the emphasis of balancing quality juvenile services with predictable and consistent sanctions has been the guiding force. A primary philosophy in conveying this message has been through proactive partnering with key publics, human services agencies, youth advocates, and the public at large. The Department of Juvenile Justice is available at a times to assist in informing accurately the citizens of the Commonwealth as well as all interested parties. It is discouraging when inaccurate information is communicated through a professional journal publication, knowing that the facts are easily accessible through the Department of Juvenile Justice. Perhaps more disheartening is the conveyance of descriptions as follows from pages 64 and 65:

a. The court could commit the child to the Department of Juvenile Justice as a sexual offender. 7his commitment will frequently mean that the child will be placed in one of Kentucky's

residential treatment centers. The sexual offender treatment programs at these centers are generally very harsh, Juvenile in such programs frequently report that staff regards them only as offenders: moral reprobates who are unlikely to successfully return to society. Particularly where the offender is very young, placement in such a program with older, experienced sexual offenders is unlikely to benefit the child or the community and may prove not to be sexual offender treatment, but sexual offender training.

Such editorializing based on singular opinion or conjecture and not facts significantly erodes the progress the Department of Juvenile Justice has made in educating all constituents as to its mission, responsibilities, and functions.

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BOOK REVIEW: THE LAW OF SELF-DEFENSE

➢ **Virginia M. Bibb, Paralegal**

The Law of Self-Defense: A Guide for the Armed Citizen
by Andrew F. Branca, *Operon Security, Ltd.*,
P.O. Box 2905, Acton, MA 01720-6905

Andrew F. Branca, a Massachusetts attorney and active firearms enthusiast and supporter has written a no nonsense, but somewhat opinionated guidebook for the generalized application of the legal principals that provide a foundation to the law of self-defense.

The general legal principals examined here by Mr. Branca are illustrated by examining actual statutes, as well as, contemporary court cases from many jurisdictions that have interpreted and applied those statutes. Although not a definitive authoritative resource for the law of self-defense, this book should be utilized as a guide to form a foundation on which the reader can construct a knowledge and understanding of those laws.

The author's goal through this writing is to provide the reader with some fundamental concepts of the law of self-defense. Such as standards and burdens of proof, descriptions of the reasonable and prudent person, knowledge of the attacker's reputation for violence, an explanation of criminal charges which may arise from the act of self-defense and the legal defense of self-defense. In depth explanations accompany each topic with case law, common law and personal commentary interwoven throughout each chapter.

This book certainly has many compelling points and can be viewed as a great educational tool in understanding the law of self-defense. It is recommended for anyone who wants general information about self-defense and/or for those who may encounter situations where self-defense may be necessary. ■

WEST'S REVIEW

➢ **Julie Namkin, Assistant Public Advocate**

***Commonwealth v. Hodges*, Ky., ___ S.W.2d ___ (12/17/98)**
Warren Circuit Court

Hodges was convicted by a jury in the Warren Circuit Court for D.U.I. fourth or subsequent offense within a five year period, a class D felony, and of being a P.F.O. II.

The facts of this case go back to 1991. In that year Hodges entered a guilty plea, with the assistance of counsel, to D.U.I. Subsequently, in 1992 and 1993 Hodges again entered guilty pleas, with the assistance of counsel, to charges of D.U.I. In 1994 Hodges was again arrested and, with the assistance of counsel, pled guilty to D.U.I. fourth. No challenge was raised concerning the validity of the 1991, 1992 and 1993 prior convictions that were used to support the 1994 D.U.I. fourth conviction. Hodges was probated for five years pursuant to the 1994 guilty plea.

In 1995, while on probation, Hodges was again arrested for D.U.I. On the day before his trial, Hodges' counsel, both orally and in writing, moved to suppress his 1992 and 1993 convictions as being uncounseled and in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969), despite Hodges' signature on the guilty plea forms. The trial court overruled the suppression motion.

After a jury trial, Hodges was convicted of his fifth D.U.I. offense in five years. In the second phase of Hodges' trifurcated trial, the jury found Hodges guilty of D.U.I. fourth offense, based upon the proof of the 1991, 1992 and 1993 convictions. In the third phase of the trial, the 1994 conviction was used to prove the P.F.O. II charge.

Hodges appealed his convictions to the Court of Appeals of Kentucky alleging a Boykin violation and double enhancement. The Court of Appeals reversed on the basis that Hodges was not represented by counsel at his second (1992) and third (1993) guilty pleas.

The Commonwealth's motion for discretionary review was granted and the Kentucky Supreme Court reversed the reversal by the Court of Appeals.

The Kentucky Supreme Court held that since Hodges failed to timely challenge the validity of his 1991, 1992 and 1993 convictions when he entered a guilty plea to D.U.I. fourth in 1994, he had waived the right to challenge those convictions at his 1995 trial.

Hodges convictions were reinstated.

***Cavender v. Miller*, Ky., ___ S.W.2d ___ (12/17/98)**
Wolfe Circuit Court.

This case involves a writ of prohibition and/or mandamus by Cavender to compel discovery of the handwritten notes of the police officer that interrogated him.

The question in this case arose from the following facts. Cavender's statement to the police officer was recorded on videotape. During the taping, the officer was taking notes. As part of the discovery process, the Commonwealth turned over the videotape to the defense. The officer can be seen taking notes on the videotape. When counsel first requested the officer's notes, he denied their existence, but later admitted they existed and contained words by Caven-

der as well as his own ideas. The Commonwealth refused to turn over the notes and the trial court ruled the notes were not discoverable under RCr 7.24.

Cavender sought relief in the Kentucky Court of Appeals by filing a petition for a writ of mandamus to compel the Commonwealth to turn over the notes as well as an order requiring the Commonwealth to preserve the notes for appellate purposes. Cavender argued he needed the notes so he could properly question the police officer at the pretrial hearing on his motion to suppress his statements. The Court of Appeals denied the petition for mandamus, characterizing the claim as a discovery issue, because Cavender had an adequate remedy in the form of an appeal. However, the Court of Appeals ordered the police officer, not the trial court, to preserve the notes. The trial court and the Court of Appeals refused to order the officer to place the notes into the record by avowal for preservation purposes. Cavender appealed the Court of Appeals' ruling to the Kentucky Supreme Court.

Cavender argued he was entitled to the officer's notes under RCr 7.26 because the officer had testified at the suppression hearing.

The Kentucky Supreme court dismissed this argument as "unconvincing." The Court pointed out that RCr 7.24(2) specifically exempts the notes of an investigating police officer from production. Thus, the trial court correctly ruled Cavender was not entitled to the officer's notes which contained his mental impressions.

Cavender also argued that if the officer's notes were not properly preserved by placing them into the record by avowal, he would be denied his remedy of an appeal. The Court stated that even though the notes were not placed into the record by avowal, Cavender was not denied his remedy of a direct appeal, citing *Gaston v. Commonwealth*, Ky., 533 S.W.2d 533 (1976).

The three member dissent would have ordered the officer's notes to be sealed and made part of the trial court record because "[w]ithout the notes, it will be difficult, if not impossible, to review this issue further on appeal."

Stephenson v. Commonwealth, Ky., ___ S.W.2d ___ (12/17/98)
Jefferson Circuit Court

Stephenson was convicted in the Jefferson Circuit Court of first degree facilitation of trafficking in a controlled substance and first degree trafficking in a controlled substance. Each offense occurred on a different date.

The sole issue raised on appeal was that the proceedings were conducted pursuant to an invalid indictment because the indictment was not signed by the foreperson of the grand jury in open court. Thus, the trial court lacked subject matter jurisdiction.

The Kentucky Supreme Court cited *Nicholas v. Thomas*, Ky., 382 S.W.2d 871, 872 (1964), which "held that the presence or absence of the signature does not materially affect any substantial rights of the defendant and that it neither assures to him nor prevents him from receiving a fair trial." The Court stated it could not "identify, not does [Stephenson] assert, any prejudice he suffered as a result of the unsigned indictment. Appellant received notice of the charges against him and was able to prepare an adequate defense. . . . Therefore, . . . the indictment . . . is entitled to a presumption of validity."

The Court also pointed out that Stephenson was aware of the fact that the indictment was unsigned, but did not timely object in the trial court when this clerical defect could have been remedied.

Stephenson's convictions were affirmed.

Commonwealth v. Bellew, Ky., ___ S.W.2d ___ (12/17/98)

This case involves a certification of the law. The issue presented to the Kentucky Supreme Court was "whether, under KRS 635.060(5), a juvenile public offender may be committed to a

secure juvenile detention facility for more than 90 days if the offender is charged with multiple incidents of criminal behavior."

The Kentucky Supreme Court answered this question in the negative, "since KRS 635.060(5) limits public offender detention commitments to 90 days per dispositional hearing, regardless of the number of separate offenses charged." Thus, "stacking of dispositional commitments to result in a detention commitment greater than 90 days" is prohibited.

***Justice v. Commonwealth*, Ky., ___ S.W.2d. ___ (12/17/98)**
Knox Circuit Court

Justice was convicted of first degree assault and D.U.I. The charges arose out of a car crash. The main issue at trial was whether Justice was the driver of the car at the time of the crash.

Justice admitted he drove the car away from his apartment in an intoxicated state. However, he maintained he pulled off the road prior to the crash and one of the passengers took over the driving. Justice's wife, who was not in the car, testified she saw the car pull over and watched the occupants get out of the car, but no driver switch occurred. Other witnesses testified they saw Justice speed away from his apartment.

Justice raised the following issues as a result of his one day trial.

1. Justice argued he was entitled to a directed verdict of acquittal because the Commonwealth failed to prove he was driving the car at the time of the crash. Based on the evidence [the only facts in the opinion are set out above], the Kentucky Supreme Court held "it was not unreasonable for the jury to find that [Justice] was driving the Duster at the time of the collision."

2. Justice was arrested on the night of the car crash. The following day he pled guilty to alcohol intoxication and leaving the scene of an accident. He was subsequently indicted and tried for first degree assault and D.U.I. based on the same incident. Justice argued his convictions for first degree assault and D.U.I. violated principles of double jeopardy because he had already pled guilty to alcohol intoxication and leaving the scene of an accident. Justice argued that *Burge v. Commonwealth*, Ky., 947 S.W.2d 805 (1996), was not controlling because the crash occurred prior to the rendition of *Burge*.

   The Kentucky Supreme court disagreed. It held that since all of the offenses of which Justice was convicted, both by plea and a jury, were in effect at the time of the crash, the retrospective application of *Burge* was proper and does not violate due process.

3. The trial court excluded testimony from Justice's wife that one of the occupants in the car stated "he had to leave [Appellant] behind because he was wanted in other states and he [Leonard] was not going to be charged with this accident." The testimony was placed into the record by avowal. Defense counsel argued the testimony was an exception to the hearsay rule and was admissible as a statement against penal interest The trial court ruled the statement did not come under any exception to the hearsay rule and was "self serving" The Kentucky Supreme Court pointed out the statement against penal interest exception to the hearsay rule only applies if the declarant of the statement is unavailable as a witness. KRE 804(b) The Court found Leonard was not unavailable because Justice made no effort to produce Leonard as a witness, such as by issuing a subpoena for him or by any other reasonable means. KRE 804(a)(5).

   The Court further held that the trial court's exclusion of Justice's wife testimony of Leonard's out of court statement did not deny Justice due process of law. The Court reasoned that Justice had the constitutional right of compulsory process for producing Leonard to testify on his behalf, but for

whatever reason, he chose not to take advantage of that right.

4. The victim of the car crash testified he had incurred medical expenses in excess of $200,000 in response to a question by the prosecutor, and then added that Justice had no insurance. The lack of insurance testimony was unsolicited. Justice objected and the trial court ruled it was irrelevant and immediately admonished the jury to disregard it and not consider it for any purpose. The Kentucky Supreme Court held the nature of the evidence was not so prejudicial that the jury could not follow the court's admonition.

   Justice also objected, on relevancy grounds, and moved for a mistrial based on the victim's testimony as to the amount of medical expenses he had incurred. The trial court ruled the evidence was probative on the issue of the severity of the victim's physical injuries and overruled the objection. The Kentucky Supreme Court pointed out the Commonwealth had to prove "serious physical injury" as an element of first degree assault, and the magnitude of the victim's medical expenses tended to make the fact that the victim suffered serious physical injury more probable and, thus, was relevant evidence. The Court also pointed out that Justice never challenged the seriousness of the victim's injuries. Justice's defense was that he was not driving the car.

5. During the trial, Justice moved to separate the lead investigator for the Commonwealth and the victim. The trial court denied the motion. The basis for this motion is not clear from the record. However, on appeal Justice argued the failure to separate the witnesses allowed the investigator and the victim to tailor their testimony to contradict the testimony of Justice's wife. The Kentucky Supreme Court acknowledged it was error for the trial court to fail to separate the victim since there was no applicable exception in KRE 615. However, the Court found the error to be harmless because the motion was made after Justice's wife had already testified Thus, the motion came too late to prevent the prejudice alleged on appeal.

6. During opening statement, the prosecutor told the jury that Justice had told a neighbor that the accident "wasn't that bad." The defense objected without stating any grounds. The trial court overruled the objection and said the statement was admissible because it was an admission by the defendant. During his case in chief, the prosecutor put on a witness who testified Justice said the accident "wasn't that bad." The defense made no objection. On appeal, Justice argued the statement should have been excluded on relevancy grounds. The Kentucky Supreme Court stated the issue was not properly preserved for review.

7. The Commonwealth's lead investigator testified briefly as to the extent of the injuries suffered by a passenger in Justice's vehicle. Justice's objection on relevancy grounds was overruled. The Kentucky Supreme Court agreed the testimony was not relevant, but since the description was brief and did not conflict with Justice's defense, that he was not the driver of the car, it was harmless error.

8. Justice challenged numerous instances of "prosecutorial misconduct" that were not objected to at trial. The Kentucky Supreme Court stated "[a]bsent contemporaneous objections, 'prosecutorial misconduct' is not grounds for reversal."

Accordingly, Justice's convictions were affirmed.

Benton v. Crittenden and *Commonwealth v. Benton*, Ky., ___ S.W.2d ___ (12/17/98)
Franklin Circuit Court

This opinion consolidates two separate appeals based on the same set of facts. An unidentified

black man armed with a gun accosted a family as they were getting into their car in the Wal-Mart parking lot. The man got into the back seat of the car with one of the family members and ordered another family member to drive away. After driving around for over an hour, the man had the driver pull over to the side of a rural road. The man ordered the family to get out of the car and then shot the eldest family member in the head, killing him. The man then fled in the family's car.

Benton was eventually arrested and tried in federal court for carjacking. The victims were unable to identify Benton as their assailant and the jury found Benton not guilty.

Immediately after Benton's federal trial, he was arrested for murder by the Kentucky authorities. Subsequently he was indicted for murder, kidnapping (three counts) and first degree robbery.

Benton moved to dismiss the Kentucky charges on double jeopardy grounds. He also moved for funds to obtain a transcript of the federal trial. The Franklin Circuit Court granted Benton's motion to dismiss the murder charge, but refused to dismiss the kidnapping and robbery charges.

The Commonwealth appealed the portion of the trial court's ruling that dismissed the murder charge. The trial court then approved the request for funds to obtain a transcript of the federal trial. The Court of Appeals reversed the trial court's dismissal of the murder charge and remanded the case so the trial court could review the "now available" transcript "to determine whether a rational jury could have grounded its verdict of acquittal for car jacking upon an issue other than a belief that Benton did not murder Mr. Bonner." The Commonwealth sought discretionary review of the Court of Appeals decision because it did not order the trial court to reinstate the murder charge. The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review.

Meanwhile, Benton filed a petition for a writ of prohibition in the Court of Appeals seeking to prohibit the trial court from trying him on the kidnapping and robbery charges. The Court of Appeals summarily denied the petition for a writ of prohibition, and Benton appealed the denial to the Kentucky Supreme Court.

The two cases are consolidated in the Court's opinion. The Kentucky Supreme Court, in a four to three opinion, relying on KRS 505.050(2) and *Smith v. Lowe*, Ky., 792 S.W.2d 371 (1990), held the trial court correctly dismissed the murder charge and thus reversed the decision of the Court of Appeals. The Court also reversed the Court of Appeals order denying Benton's petition for a writ of prohibition and granted the writ prohibiting the trial court from proceeding on the charges of kidnaping and robbery.

The dissent argued *Smith v. Lowe, supra*, should be overruled.

All charges against Benton were dismissed.

***Commonwealth v. Day*, Ky., ___ S.W.2d ___ (1/21/99)**
Pulaski Circuit Court

Day was indicted on two charges of first degree trafficking in a controlled substance. One offense occurred on March 21, 1993, and the second offense occurred on March 25, 1993. After a jury trial, Day was acquitted of the March 21st offense, but found guilty of the March 25th offense.

On appeal, the Court of Appeals reversed and remanded for a new trial because the trial court failed to instruct the jury on the defense of entrapment and the lesser included offenses of possession of a controlled substance and criminal facilitation.

The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review and reversed the decision of the Court of Appeals.

Entrapment. The facts showed the trial court instructed the jury on the defense of entrapment as to the March 21st offense, and the jury returned a not guilty verdict. However, the trial court refused to give an entrapment instruction on the March 25th offense because Day "must have been predisposed to commit the second offense, because 'the second time he had done it before, because he did it the first time.'"

The Kentucky Supreme Court affirmed the Court of Appeals' reversal on this issue. The Court held that "[w]hile [Day's] acquittal of the first charge did not require an acquittal of the second, neither does his admission that he was entrapped to commit the first offense require a conclusion that as a matter of law he was predisposed to commit the second." "[T]he question of whose mind initiated the criminal intent is a question of fact to be submitted to the jury." The Court overruled Fuston v. Commonwealth, Ky.App., 721 S.W.2d 734 (1984) to the extent it holds otherwise."

Lesser Included Offenses. The Kentucky Supreme Court held Day was not entitled to an instruction on possession of a controlled substance because he admitted transferring the cocaine to the confidential informant, "thus, he could not have been convicted of possession of a controlled substance. Any possession which may have occurred prior to the transfer may have been a separate uncharged offenses, but was not a fact necessary to prove the charged offense." Although the Court acknowledged possession of a controlled substance could be a lesser included offense of trafficking under a different set of facts, it could not be under the facts in the case at bar. The Court also held Day was not entitled to an instruction of criminal facilitation because Day could not have been convicted of criminal facilitation, "which is committed when a defendant, with no intent to promote or commit the crime himself, provides the means or opportunity for another to do so."

Day's case was remanded to the circuit court for a new trial at which, if the evidence is the same, the jury should be instructed on the defense of entrapment, but not on the offenses of possession of a controlled substance or criminal facilitation.

Brown v. Commonwealth, Ky., ___ S.W.2d ___ (1/21/99)
Jefferson Circuit Court

Brown was convicted of the intentional murder of his former wife and of the attempted murder of her fiancée (Barker). The incident occurred in a car outside Brown's house.

The Commonwealth's theory of the case was that Brown intentionally murdered his former wife to prevent her from testifying at his upcoming trial for flagrant non-support. Brown's defense was self defense. The crucial issue in the case was whether Brown's ex-wife and her fiancée were each armed with handguns. Brown testified they were armed, while Barker testified that neither he nor Brown's ex-wife were armed.

Over Brown's objection, Barker was permitted to testify while holding a Bible. The Kentucky Supreme Court recognized that credibility of the witnesses was key, because for the jury to believe Brown's defense, it would have to disbelieve Barker. The Court stated "the effect of Mr. Barker's testimony while holding a Bible likely served to bolster his credibility with the jury and it did so prior to any attempt by [Brown's] trial counsel to impeach Mr. Barker." Thus, the Court held the trial court's ruling permitting Barker to testify while holding a Bible was reversible error requiring a new trial.

A second issue raised at trial and on appeal concerned the introduction of the indictment charging Brown with flagrant non-support and the amount of evidence introduced to support the indictment.

Prior to trial, the Commonwealth moved, pursuant to KRE 404(b), to introduce the indictment charging Brown with flagrant non-support and evidence to support the indictment. Brown's objection to the motion was overruled. During trial, not only did the Commonwealth introduce

the indictment for flagrant non-support, but it was permitted to call witnesses who testified to "the methods used to calculate the alleged arrearage, the amount of the alleged arrearage, that no payments had been made according to the county attorney's documents and that there was only one 'live' witness in the non-support case," Brown's former wife.

The Kentucky Supreme Court held it was within the trial court's discretion to allow the Commonwealth to admit evidence of Brown's indictment for flagrant non-support. However, the Court held the trial court abused its discretion when it allowed the Commonwealth to present evidence to prove that Brown was guilty of the offense of flagrant non-support. The Court concluded the amount of evidence introduced was excessive and "unduly prejudicial and trial error."

Brown's convictions were reversed and remanded for a new trial.

***Commonwealth v. Ray*, Ky.App., ___ S.W.2d ___ (11/25/98)**
Jefferson Circuit Court

This case involves a double jeopardy question of first impression in Kentucky.

Ray and Robbins were jointly indicted and tried on one count of first degree assault. The indictment charged the two men with intentionally or wantonly shooting the victim while acting alone or in complicity with each other. Ray testified he shot the victim in self-defense.

The trial court instructed the jury on first degree assault, second degree assault (wanton belief in self-protection), fourth degree assault (reckless belief in self-protection), second degree assault (wanton), and assault under extreme emotional disturbance. During deliberations, the jury sent a note to the court stating it could not reach a verdict as to Ray. When the jury was called to the courtroom, the foreman stated the jury was hopelessly deadlocked as to Ray, but it had found Robbins not guilty. The trial court declared a mistrial as to Ray and the jury was released.

The trial court then reviewed the verdict forms and noticed the jury had signed and dated the verdict form stating it did not believe Ray was guilty of first degree assault. The verdict forms on the lesser offenses were left blank. The court called the jurors back into the courtroom and polled them on their verdict. The polling revealed the not guilty verdict on the first degree assault instruction was unanimous. The court again declared a mistrial and the jury was released.

Ray then moved to dismiss the indictment on double jeopardy grounds. Ray argued the jury's acquittal on the greater offense of first degree assault and its failure to reach a verdict on the lesser offenses constituted an implied acquittal of all the charges. The Commonwealth argued the jury's verdict of acquittal on the first degree assault charge did not bar retrial on the remaining lesser included offenses submitted to the jury. The trial court agreed with Ray and dismissed the indictment. The Commonwealth appealed.

The Kentucky Court of Appeals, relying on *United States v. Gooday*, 714 F.2d 80, 83 (9th Cir. 1983), held "that an acquittal on a greater offense does not bar a retrial on lesser included offenses for which the jury was unable to reach a verdict." The Kentucky Court of Appeals pointed out that in *Gooday. supra*, the court stated "that double jeopardy did not bar retrial on the lesser offenses because the mistrial on those offenses was due to a deadlocked jury and the lesser offenses should be treated as if they had been specified in separate counts of the indictment"

The order of the Jefferson Circuit Court was reversed and Ray's case was remanded for retrial on the lesser included offenses.

***Hancock v. Commonwealth*, Ky.App., ___ S.W.2d ___ (12/18/98)**
Fayette Circuit Court

This case involves a question of first impression in Kentucky.

Hancock was indicted for first degree wanton endangerment based on his repeatedly engaging in sexual intercourse with another person for over a period of two years knowing he had been diagnosed with H.I.V. The alleged victim claimed Hancock never told her he was H.I.V. positive, while Hancock claimed that she knew.

Hancock moved to dismiss the indictment, arguing his conduct did not constitute wanton endangerment and the statute was unconstitutional as applied to his case. After a hearing on the motion, the trial court held the indictment was valid and the statute was not unconstitutional as to his case. The court denied the motion to dismiss the indictment.

Hancock entered a conditional guilty plea to the amended charge of second degree wanton endangerment and reserved the right to appeal the order denying his motion to dismiss.

The Court of Appeals held the indictment was valid and the wanton endangerment statute is not unconstitutional as applied to the facts of Hancock's case. Thus, the circuit court properly denied Hancock's motion to dismiss the indictment against him.

***Clark v. Commonwealth*, Ky.App., --- S.W.2d — (12/18/98)**
Franklin Circuit Court

Clark was indicted on four counts of bribery of a public servant (KRS 521.020) based on her receiving cash in exchange for using her influence as a public servant to intercept and "fix" traffic citations. The jury found Clark guilty on only one of the four counts. Clark raised two issues on appeal.

First, Clark argued the trial court erred when it overruled her objection and allowed Franklin Circuit Court Judge William Graham (who did not preside over her trial) to testify in rebuttal at her trial, in violation of RCr 9.48 (the separation of witnesses rule), since he had heard some of Clark's trial testimony on a closed circuit television in his chambers.

The Court of Appeals held the trial court did not abuse its discretion when it allowed Judge Graham to testify. The record evidence showed the prosecutor cross-examined Clark about whether she had had any disciplinary problems during her tenure as a deputy clerk. Clark responded that she had not. The sole purpose in calling Judge Graham was to impeach Clark by showing that when Judge Graham was a district court judge he had placed Clark on probation

Clark also argued the trial court erred when it overruled her motion for a directed verdict of acquittal. The Court of Appeals held "the Commonwealth presented sufficient evidence to support a reasonable inference that [Clark] was guilty of bribery of a public servant."

Clark's conviction was affirmed.

***Grady v. Commonwealth*, Ky.App., ___ S.W.2d ___ (12/18/98)**
Jefferson Circuit Court

Grady was in jail awaiting trial on robbery charges. During this time he was held in contempt for violating a "no contact" order. The trial court sentenced him to six months on the contempt charge and ordered that he could not receive jail time credit for any other sentence while he was serving this sentence. Grady then pled guilty to the robbery charges and objected to the court's order that ran the contempt sentence consecutively with the robbery sentence.

The sole issue on appeal was whether the trial court committed reversible error when it ordered the six month sentence for contempt to run consecutively with any other felony sentence.

Grady relied on KRS 532.120(3) and KRS 532.110(1) to support his argument that the trial court should have run his sentences concurrently.

The Court of Appeals relied on KRS 533.060(3) and *Handley v. Commonwealth*, Ky.App., 653 S.W.2d 165 (1983), to conclude the trial court's order was correct. The Court of Appeals stated that since KRS 533.060(3) was the latter-enacted statute it was controlling.

The order of the Jefferson Circuit Court was affirmed.

***Taylor v. Commonwealth*, Ky.App., ___ S.W.2d ___ (12/23/98)**
Calloway Circuit Court

Taylor was tried and convicted of trafficking in marijuana greater than eight ounces and less than five pounds. At his trial, a chemist from the Kentucky State Police Lab testified that based upon microscopic and chemical analysis, he determined the substance sent to him (.5 grams of marijuana) contained delta-9-tetrahydrocannabinol, which he concluded to be marijuana. The chemist never specifically stated the substance he tested was of the cannabis species. Rather, he testified the substance was confirmed to be marijuana because it contained the chemical delta-9-tetrahydrocannabinal.

On appeal Taylor argued there was insufficient evidence to prove the offense of trafficking beyond a reasonable doubt because there was no evidence the samples tested by the officials were of the species cannabis which is required by the statutory definition of marijuana. KRS 218A.010(12).

The Court of Appeals held the chemist's failure to specifically testify the substance he tested was of the cannabis species was not fatal to the Commonwealth's case. The chemist testified "he tested the substance and found it to be marijuana." This testimony was sufficient to convict Taylor under KRS 218A.1421.

Taylor also argued there was insufficient evidence of trafficking in marijuana because only six of the 98 plants used to compose the total amount were tested at the state police lab. Taylor claimed that since weight was an element of the trafficking charge, each plant used to determine the total weight must be tested.

The Court of Appeals noted that Taylor's argument was one of first impression in Kentucky. However, other jurisdictions that have addressed the issue have reached a conclusion contrary to Taylor's position. The Court of Appeals pointed out that all 98 plants were seized at the same time and from the same location, and the officials randomly took samples from six plants. The samples were tested and were found to be positive for marijuana. There was no evidence, and Taylor did not allege any, that the remaining 92 plants not tested were different from the six plants tested. Thus, the Court of Appeals concluded there was sufficient evidence to find Taylor guilty of trafficking in all 98 plants seized.

Taylor's conviction was affirmed.

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Good Lawyering

Mere commitment and compassion, without competence, are a fraud upon the profession and the public to be served. At the same time, competence, without commitment to justice or compassion for those we serve, results in a sterile and incomplete lawyer.

- Bernard Dobranski
Dean & Professor of Law
The Catholic University of America

PRERELEASE PROBATION: SOME PERSPECTIVES ON HOW THE KENTUCKY CRIMINAL JUSTICE SYSTEM IS DEALING WITH THE PROGRAM

➢ **Joe Myers, Assistant Public Advocate**

22 (or 6%) of 365 Persons Granted Prerelease Probation.

This is the third in a series of Articles on Prerelease Probation (PRP), a program enacted into law by the 1998 Kentucky General Assembly as part of HB 455, the Governor's Crime Bill. See Vertner Taylor, *HB 455 Demands Cooperation*, *The Advocate*, Vol. 20, No. 5 (Sept. 1998) at 47; Joe Myers, Tina Scott, *Prerelease Probation - What Trial Attorneys and Their Client's Need to Know*, *The Advocate*, Vol. 20, No. 6 (Nov. 1998) at 6. Since this program involves many participants across the state, with individual case situations, this article hopes to address some general perspectives and concerns. Additional information, questions and concerns that readers may want to see presented or addressed in future articles on this program may be forwarded to the author.

Introduction

When the General Assembly and the Governor addressed the issue of crime in the Commonwealth, the resulting legislation produced some significant changes not only for those citizens convicted of crimes, but also for many persons who administer different components of the criminal justice system. Perhaps none of these changes has brought about more widespread and immediate questions, concerns, hopes and feelings than the Prerelease Probation (PRP) Program found in KRS 439.575 and administered through the Kentucky Department of Corrections (DOC). Unlike other programs in the crime bill, Prerelease Probation quickly got the attention of much of Kentucky's incarcerated felon population and their families. The inmate response in turn was thrust upon the court system, Corrections, the Bar and in some cases victims. The Kentucky Department of Corrections' Office of General Counsel has likened the present situation to the time period shortly after the enactment of shock probation in 1972. Below are some general perspectives on the PRP program.

Kentucky Department of Corrections

The General Assembly delegated a significant amount of the administrative work for PRP to the Kentucky Department of Corrections. In response to this mandate, the DOC has worked with its staff and the courts to facilitate processing information about the inmate and getting it to the requesting court within a 90 day turnaround. The DOC Community Services and Local Facilities Branch, which includes the Division of Probation and Parole, reports that court orders seeking DOC's recommendation for PRP, are coming "on a daily basis" to their office. In turn, they are being processed to the proper individual "as quickly as possible." From this administrative perspective, the PRP program seems to be working well within the statutory guidance presented by House Bill 455.

Aside from dealing with the logistics of complying with court requests for a DOC recommendation on the PRP applicant, the agency also finds itself in a position to observe or receive reactions from the inmate population about PRP. According to Hazel Combs, Assistant Director of the Division of Probation and Parole, the most common misperception is that a judge must grant or act upon the inmate's request for prerelease probation. Some inmates expect more than a summary denial without a hearing or a chance for DOC to give its recommendation as to PRP.

In response to the mandate to administer the PRP program, Corrections promulgated Corrections Policy and Procedure (CPP) 27-11-02 on August 1, 1998 in conjunction with a uniform risk assessment scale to score the inmate risk level. This assessment instrument was prepared for a previous parole board by the National Institute of Corrections. Approximately two months after promulgating the above CPP, DOC recognized that two problems were created by the language in the new policy. In response, DOC modified the language where "an inmate with a major violation" was excluded from PRP consideration and issued a new regulation on December 17, 1998. (*Copy follows this article.*) It was replaced with a less onerous requirement, where inmates would be excluded for PRP consideration, if they had committed a major violation within the last twelve months or had any outstanding good time loss. Additionally, language in the original CPP could have lead one to believe that the deputy warden and the district supervisor could review the risk assessment score and give an unfavorable recommendation, even if the inmate received a score in the low risk category. This was replaced with language that in those cases of a low risk score, the deputy warden or district supervisor are to review the assessment and presentence report for accuracy. In essence, the score, not the reviewer, would now dictate a favorable or unfavorable recommendation. The New Risk Assessment Form follows this article.

In formulating DOC policy regarding how to determine which inmate gets a favorable recommendation, DOC Office of General Counsel had to meet several internal objectives. First, the Department's Code of Ethics which prohibits a policy of favoritism toward any of its inmates must be strictly followed. Secondly, the administration of the program must be handled helpfully but cautiously. Thirdly, uniformity in the process, avoiding unfairness, was sought. In the end DOC wanted to present to the courts for a favorable recommendation, those inmates who posed no more than a reasonable risk.

This cautiousness was recently the subject of a January 6, 1999 front page article in the Louisville *Courier-Journal*. In response to complaints that the PRP statute has done little to ease overcrowding, DOC points out that this legislation was not designed to eliminate the overcrowding of Kentucky's prisons and jails. DOC Office of General Counsel notes, as did the Courier, that the Bill's sponsor did not intend such a result either. Rather, other components of the Crime Bill, including greater use of alternatives to prison, such as mandating probation or probation with alternatives for more criminal defendants, pre-trial diversion, home incarceration for certain felons, use of electronic monitoring devices for parolees overall would lessen the prison overcrowding situation more significantly than PRP.

As of February 1, 1999, DOC had processed 365 requests for PRP. Twenty-two persons at that time had been probated to prerelease probation. This is 6%.

The Courts

Not surprisingly, according to DOC General Counsel's Office, and other observers, the response by the Judiciary has been varied. The number of persons granted PRP clearly shows there has not been a widespread embracement by the courts. Some judges obviously are using it to grant qualifying inmates a second chance. One example cited involved a judge, when he sentenced a defendant, envisioned he would be paroled at his initial parole review. When the inmate was denied parole, the judge considered his request for PRP and granted it. Other examples illustrate a strong feeling among Judges for the need for closure in criminal cases. Prosecutors and victims in large part could be expected to share this view even more strongly. Naturally, inmate requests for PRP add work to courts with already overcrowded dockets. Since this program was perceived by many inmates as a new chance for freedom, the swift application to the sentencing courts from individuals in an inmate population totaling roughly 15,000 (according to figures in the *Courier* article) confronted some courts with old cases and a lot of them. Some courts have chosen to deny PRP requests summarily without asking for a recommendation from DOC. At least one court, on the other hand, has taken an active hand in reviewing the unfa-

vorable recommendation score given an inmate by DOC's risk assessment scale. Still another court has held the statute to be unconstitutional on grounds that it vests in the trial court the executive function of parole. This, according to the court, is a clear violation of separation of powers under Sections 27, 28, 69 and 109 of the Kentucky Constitution.

It is clear the prospect for inmates seeking PRP , even with a favorable recommendation from DOC, in many cases will depend on convincing the judge to use his/her discretion to grant the privilege of PRP. Perhaps in some cases, the judge will have to be convinced that PRP itself, is a realistic and appropriate alternative to imprisonment in general, before addressing the individual inmate's plea for relief.

The Inmates

For the 22 inmates who have received PRP, the program and opportunity given them undoubtedly has been a major benefit. It will be interesting to monitor these individuals' success rate and compare them with parolees, probationers and shock probationers.

In the meantime, those denied PRP understandably are less than happy. As noted, those inmates whose cases are summarily denied without a hearing or any review of their institutional record, who might have received a low risk score, never got their day in court to show the judge the change in their lives. Such inmates will naturally be frustrated.

Others, already skeptical of DOC, view the risk assessment scale, especially when it disqualifies them with an unfavorable recommendation, as a tool by DOC to keep most prisoners behind bars. Still others are critical about ambiguities they perceive in the risk assessment scale criteria. This they feel in turn leaves a certain amount of interpretation in the hands of the caseworker who reviews the inmate information and assign points where indicated on the risk assessment scale.

To illustrate some potential problems, what constitutes a record of mental health concerns or record of alcohol abuse? Does having two categories that cover the age of one's first arrest doubly enhance one's score? What constitutes record of substance abuse as a juvenile? Clearly, in some cases, there is an element of subjectivity that can creep into the process. Presently there is no grievance opportunity under CPP 27-11-02 to challenge a risk assessment scale score. Will the court become the final arbiter? What about the inmate with subnormal intelligence or an undiagnosed learning disability that precludes his/her from attaining a GED? If one has a record of alcohol abuse as a juvenile, does that constitute a record of substance abuse also (*i.e.* alcohol is a drug)? When one is denied a favorable recommendation by a close margin, these issues can be devastating to the inmate's plight.

It is clear that some inmates have been led to believe that this program was intended to alleviate present prison and county jail overcrowding. Their view that this risk assessment scale is designed to keep them locked up, unfairly, only adds further to their frustration.

Kentucky Department of Public Advocacy

Understandably, the DPA is both affected by and interested on behalf of its past, present, and future clients in terms of PRP eligibility. At the trial level, PRP, like probation and shock probation, is another variable to factor into the plea bargaining equation. Seeking amended charges and favorable court fact findings, where feasible, can open an otherwise closed door to PRP eligibility. And PRP now provides an opportunity to respond effectively to a prosecutor who, in offering a plea bargain, is extremely confident that your client will only do a year or two before being paroled- and then gets a serve-out or lengthy deferment.

As noted previously, some courts have chosen not to grant hearings on PRP requests. While neither HB 455 generally, nor KRS 439.575 specifically establishes the right to a hearing or counsel in PRP cases, it is the Department of Public Advocacy's policy that appointing counsel in these cases is appropriate in some circumstances, as is the holding of a hearing. If the sentencing court wishes to conduct a PRP hear-

ing and hear argument, DPA supports the appointment of counsel in such scenarios.

From a post- trial perspective, the Department's post-conviction branch has prepared a self-help packet for inmates on PRP. It provides information so the inmate usually can determine initially whether he or she is excluded automatically by law or regulation from receiving PRP. Materials to prepare a pro-se motion for PRP consideration are also included in the packet to assist the inmate. These packets are also made available to attorneys in DPA's trial level offices as well.

Additionally, DPA is in litigation, advocating upholding the constitutionality of the PRP statute. Aside from recognizing the fact that Kentucky statutes enjoy a presumption of constitutionality, DPA strongly believes the PRP is a constitutional extension of the trial court's sentencing power. The legislature unquestionably has the authority to deal with matters involving crime and punishment. Parole and probation eligibility are in fact part of the punishment/sentence. The legislature can dictate the method and conditions for probation. The constitutionality of the felony shock probation statute, KRS 439.265, has been upheld. The sentencing courts in this Commonwealth have been permitted to grant probation both at the time of sentencing and after final sentencing. PRP is merely a second type of post sentencing probation that allows a court to regain jurisdiction for a limited purpose and under limited circumstances.

Like DOC, DPA is closely monitoring the evolution and treatment of the PRP program in Kentucky's criminal justice system. Public Advocate, Erwin Lewis was quoted in the January 6, 1999 article expressing disappointment that so few people have been released. Having actively been involved with the 1998 General Assembly's work on criminal justice legislation, Lewis noted in the article that prerelease probation "fits logically" into provisions in the 1998 crime bill as one of its cornerstones - to use the limited number of prison cells for violent offenders. Lewis, who was appointed to the newly created Kentucky Criminal Justice Council, chairs the Council's "Corrections Alternatives to Incarceration " Committee. Undoubtedly, PRP will be a focal point in that organization's work.

Conclusion

Like shock probation, PRP has come onto the Kentucky Criminal Justice System offering hope to some and disappointment to others. It already has raised legal questions as to its own validity. Some judges have granted it while others have not. There is dissatisfaction from some on how DOC is administering the program and disappointment that the judiciary has not embraced the program to a greater degree. Statistics quoted in the Courier-Journal article attributed to the DOC showed about an 80% rejection rate for the then 224 applicants for whom review had been completed at that time. For those who obtained a favorable recommendation, 10 out of 46 had been granted PRP by the courts at the time of the article. PRP is experiencing some growing pains and rejection while at the same time being fine-tuned. Naturally, as with most new programs, there will be bumps in the road. Nevertheless, since the *Courier-Journal* article, in about a month's time the number of inmates being granted PRP slightly more than doubled. Undoubtedly, PRP has gotten the attention from various sectors of the criminal justice system. How these sectors treat and deal with PRP will almost certainly be a topic of study for next century's Kentucky General Assembly.

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I would like to recognize and thank Marcus Jones for his work in researching the constitutional challenge issue. ■

NOTICE: The responsibility for representing clients in prerelease probation hearings is the responsibility of the attorneys in DPA's Trial Division. When the Court appoints counsel on these cases, the local DPA trial attorney (contract & full-time) will provide representation.

KENTUCKY CORRECTIONS Policies and Procedures	Policy Number NEW 27-11-02	Total Pages 3
	Date Issued December 11, 1998	Effective Date December 17, 1998
References KRS 439.470, 439.575	Subject **PRERELEASE PROBATION**	

I. AUTHORITY

This policy is issued in accordance with: KRS 439.575 which institutes a program of prerelease probation; and KRS 439.470 which authorizes the Commissioner of the Department of Corrections (Corrections) to make rules regarding probationers and parolees.

II. PURPOSE

To set forth procedures to govern the administration of prerelease probation.

III. APPLICABILITY

To all employees of Corrections and all offenders.

IV. DEFINITIONS

None

V. POLICY

It is the policy of Corrections that inmates who receive a low score on the risk assessment scale shall be given a favorable recommendation for prerelease probation to the sentencing court.

VI. PROCEDURES

A. Criteria

1. The following individuals shall be excluded from consideration. An inmate:

a. who has committed a crime in which a life was taken or the victim suffered serious physical injury;

b. with an outstanding felony detainer; or

c. who has committed a major violation within the last twelve (12) months or has any outstanding good time loss.

2. To receive a favorable recommendation to the sentencing court, the inmate:

a. shall be eligible for probation or shock probation;

b. shall have a home placement within the Commonwealth of Kentucky; and

c. shall receive a score in the low category on the risk assessment;

B. Responsibilities of Caseworkers and Probation and Parole Officers (Officer)

1. A file shall not be reviewed prior to the passing of the one hundred eighty (180) day shock probation period.

2. The caseworker shall complete the risk assessment within sixty (60) days of receiving a written request for consideration from the court.

3. The Officer responsible for the Class D program shall complete the risk assessment within sixty (60) days of receiving a written request for consideration from the court.

4. The caseworker or Officer shall forward the completed risk assessment to the Deputy Warden or District Supervisor for review.

5. The inmate shall be informed of his risk assessment score. The score shall not be appealable or grievable.

C. Responsibilities of Deputy Warden or District Supervisor

If the inmate receives a score in the low category, the Deputy Warden or District Supervisor shall review the assessment and the presentence investigation report for accuracy. A decision and recommendation shall be made within thirty (30) days of receipt of the risk assessment to forward to the sentencing court.

Policy Number	Issue Date	Effective Date	Page
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D. Violations of Prerelease Probation

Any violation of court imposed conditions shall be governed by KRS 439.575.

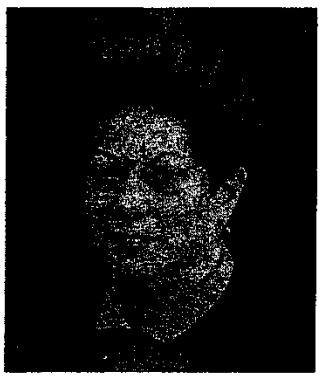
E. The period of supervision shall be governed by KRS 439.575.

* * * * * * * * * * * *

MARK YOUR CALENDAR!

27th Annual Public Defender Conference
June 14-16, 1999
Executive Inn Hotel, Louisville, KY

KENTUCKY PUBLIC DEFENDING IN THE 21ST CENTURY



Featured Speaker:

Phyllis H. Subin is the Chief Public Defender of the New Mexico Public Defender Department. Prior to beginning her work in New Mexico, Phyllis spent thirteen years with the Defender Organization of Philadelphia as Director of Training and Recruitment. She has taught for the University of New Mexico School of Law, University of Pennsylvanian School of Law, National Institute for Trial Advocacy, National Legal Aid and Defender Association and advocacy institutes in Philadelphia, New York and Kentucky. Considered one of the nation's leaders in public defender education, Phyllis recently presented at the Train the Trainers Conference in Lexington, Kentucky.

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, Bowling Green, Columbia, Hazard, Paintsville, Pikeville, Somerset, and Stanford. We are also seeking a Conflict Attorney for the Central Kentucky Region, a Juvenile Specialist Staff Attorney for the Elizabethtown Office, a Capital Trial Branch Manager who will direct the trial level death penalty defense effort statewide, and a Capital Post-Conviction Branch Manager who will direct the post-conviction death penalty defense effort statewide. We are also seeking staff attorneys for the Appellate Branch, Capital Trial Branch, and the Capital Post-Conviction Branch. In addition, we have openings for investigators in Bowling Green, Columbia, the Capital Post-Conviction Branch, Henderson, and Paintsville. We are seeking secretaries for Bell County, Bowling Green, Columbia, Covington, the Appellate Branch, and Paintsville.

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.

KENTUCKY DRUG COURTS:

COURT SUPERVISION OF A DRUG TREATMENT PROGRAM

➢ **Hon. Mary C. Noble & Connie Reed, MSW**

Since the mid-1980's, court dockets across the nation have become overloaded with drug cases or drug-involved offenders, leaving fewer resources available for more serious, violent offenders. In the ensuing years it has become clear that 1)incarceration does very little to break the cycle of illegal drug use followed by crime; 2) incarcerated offenders exhibit a high rate of recidivism; and 3) drug abuse treatment is very effective in reducing both drug addiction and drug-related crime. In an attempt to find more productive strategies, the Miami, Florida courts, let by Janet Reno, then a local prosecutor, and Timothy Murray developed a program where defendants who had a history of drug abuse were provided treatment, frequent contact with their judge, and drug testing. This program was so successful that it became a prototype for the nation, known as Drug Courts.

- A Drug Court program is essentially court supervision of a drug treatment program which adds to the element of treatment enforceability, and to the element of law enforcement, treatment as an effective tool for rehabilitation. While all parts of a Drug Court program have long existed separately in the criminal justice system, this program is the first method of bringing all the elements together so that the proverbial right hand knows what the left is doing. Interdisciplinary cooperation is essential to the success of the program, and involves several agencies including the judiciary, the Administrative Office of the Courts, Probation and Parole, treatment providers and the police. Any successful program must also have the support of the local community. For this reason, while there are key components which all Drug Court programs must have, the programs must be designed on a local option basis in order to adjust to the resources and attitude of a particular community.

The guiding component of Drug Courts is the recognition that incarceration of individuals for their drug-abusing lifestyles will only remove them from their environments for certain periods of time. Without providing treatment, education, and life skills training, they return to the same destructive cycle, for themselves and the victims of their crimes. In 1997, Kentucky's institutions housed 12,705 inmates at an average cost of $14,433 per person. Drug Courts provide alternative services for about 10% of that cost, stop drug abuse and related criminal activity, and break the cycle of addiction that runs through families.

Drug Courts include other key components:

- mandatory alcohol and drug treatment (including evenings and weekends)
- a team approach with prosecutors and defense attorneys working to protect the participants rights and promote public safety in a non-adversarial manner
- participants assessed and screened earlier so treatment can begin sooner
- continuum of alcohol, drug and other treatment/rehabilitation services
- frequent and random drug and alcohol testing
- a phasic program with at least three phases or levels of treatment and supervision
- sanctions for noncompliance, possible incentives for compliance
- participants reviewed by the judge weekly in Phase I, bi-weekly in Phase II and once every three weeks in Phase III
- on-going program evaluations and collection of monthly/quarterly statistics
- continuous local, state and national training for the Drug court team

- partnerships with other public agencies to generate local support and enhance effectiveness

Participants enter the program through probation referrals or diversion recommendations. Eligible defendants are identified early in the process based on the nature of current charges. The program is explained to the defendant and the criminal defense attorney. If the defendant is interested, a criminal history is obtained to ensure that there are no prior crimes of violence. A clinical assessment is conducted and a urine screen is done. If a defendant assesses as program qualified, he or she is assigned to a Drug Court judge, who will have continued jurisdiction over the case. If the defendant successfully completes the program, the diverted charges will be dismissed, and the probated charge will be conditionally discharged. These outcomes provide a powerful incentive for a defendant to complete the program.

The program is rigorous. All participants are given a weekly calendar when they go to Drug Court. This calendar sets forth events and activities the participant is required to complete during that week, such as scheduled treatment meetings, daily journal topics, court appearances, and reporting instructions. Participants must call every day to see if they are to be drug screened that day, write in their journal every day, and attend NA or AA a set number of times per week. Case specialists individualize the calendars. All participants MUST have employment or be enrolled in a full time educational program, unless medically excused; periods of unemployment require a minimum of 20 hours community service. As they progress through the program, more activities are added and supervision is decreased in order to allow the participant to blend into a permanent life style.

To most addicted persons, the demands of the program are extremely difficult, but they are in fact no more than what is required of daily drug-free, crime-free living. Nonetheless, a relatively high percentage of participants will not be able to complete the program. This is not perceived as a program failure, but is rather recognized as evidence that drug-addicted defendants fall into three categories: those who have minor drug use problems and can successfully complete ordinary probation requirements; those who are too addicted to function successfully in an outpatient program such as Drug Court and must be incarcerated for their own and the public's safety; and those who have serious addiction problems and are amenable to outpatient treatment. Participants are exited from the program only when it is apparent that they can not perform as an outpatient. The stringent program requirements will usually identify these defendants within a few months. The fact that must be recognized here is that while these defendants clearly need help, they are not appropriate for this particular program, and resources must be preserved for those who can benefit.

The program takes approximately two years to complete. Participants are making a significant time investment, often longer than a serve out of their sentences. However, the program offers many things to the participant that a prison term would not. Those who complete the program obviously consider those benefits to be greater than the mere passage of time. Services are provided by in-house staff workers as well as through contracted services with local mental health facilities, health departments, vocational rehab and other state and local agencies. The program is performance-based with measurable expectations and accountability through a sanction system ranging from community service to jail detention for several days.

PROGRAM DEVELOPMENT

On July 1, 1996, the Administrative Office of the Courts received funding from the General Assembly for Fayette Drug Court. Other Drug Court sites have been added and are administered through AOC in conjunction with local Drug Court committees and judges. The state appropriation is used as a 25% cash match to apply for grant monies. The Kentucky Justice Cabinet approved $690,166 for FY 98-99 (third-year application) under the provisions of the Narcotics Control Assistance

Program to fund the Regional Drug Court for five sites:

- Jefferson (1993): District Judge Henry Webber
- Fayette (1996): Circuit Judges Mary Noble, Sheila Isaac, and James Keller; District Judge Maria Ransdell
- Warren (1997): Circuit Judges John Minton and Tom Lewis
- Kenton (1998): Circuit Judge William Wehr
- Campbell (1998): Circuit Judge Greg Bartlett

Grants through the Office of Justice Programs, Drug Courts Program Office, totaling $232,500 have funded the following additional planning sites:

- Fulton/Hickman
- Clark/Madison
- Daviess
- Hardin
- Bourbon
- Shelby
- Campbell/Boone/Gallatin (juvenile)

Several other jurisdictions across Kentucky have expressed an interest in applying for planning grants for the upcoming year.

PROGRAM STATISTICS

In FY 96-97, only three programs were in operation: Jefferson, Fayette and Warren Counties. Jefferson County accepted 185 participants, terminated 40 and graduated 42. In their start-up year, Fayette and Warren Counties had no graduates, but Fayette accepted 105, terminated 46; Warren accepted 42, terminated 2. In FY 97-98, Jefferson accepted 218, terminated 43, graduated 45; Fayette accepted 203, terminated 37, graduated 42; Warren accepted 75, terminated 30, graduated 14. Fulton and Kenton Counties started programs, and Fulton accepted 16, terminated 8; Kenton accepted 9, terminated 1.

FAYETTE DRUG COURT

The Fayette Drug Court held its first session on August 16, 1996. Since that time, 278 participants have been treated. On January 5, 1999, Fayette held its 6th graduation, bringing the total number of graduates in the program to 73. Of those 73, only one has been arrested for a subsequent felony offense; two others have been arrested for misdemeanor offenses. One hundred and twenty participants have been exited from the program for reasons other than successful completion.

During 1998, Fayette Drug Court treated **197 active** participants, among whom **146** were employed full-time; **14** part-time; and **17** were in some type of educational program, either high school, college or vocational school. Prior to entering the program **only 46** had full-time employment and **only 5** were in educational pursuit. During this year, **7** drug-free babies were born and **9** participants regained custody of minor children that had been removed by the Cabinet for Families and Children.

Frequent and random urine testing indicated at the end of 1998 that out of 6,228 urine screens, only **.06%** tested positive.

STRENGTHENING FAMILIES

Literature indicates that family is one factor related to being at risk for substance abuse. Children with unstable living environments, either because of parental substance abuse and/or criminal justice involvement are at high risk of engaging in these behaviors themselves. The children of Drug Court participants are doubly at risk due to their parents' being drug abusers and having convictions. Fayette, Jefferson and Warren Drug Courts have received prevention grants through the Kentucky Incentive Project to establish a Strengthening Families Program.

This program will use a family prevention program with proven success in a variety of different populations in order to target 9-14 year old children of Drug Court participants. This prevention intervention will 1) prevent initiation of alcohol, tobacco and marijuana use for those who have not begun to use; 2) reduce use among users; 3) reduce positive attitudes toward substance abuse; and reduce significant family risk factors, thereby

stopping the cycle of addiction and related criminal activity.

MENTOR COURTS

During the National Association of Drug Court Professionals (NADCP) annual conference in May, 1998, Kentucky Drug Courts received national recognition. The NADCP has named the Fayette Drug Court a NADCP/COPS mentor training site. COPS stands for Community Oriented Policing Services. The mentor program recognizes the importance of a unified system involving drug courts and local law enforcement. The Lexington-Fayette County Urban Government police force has been recognized as an outstanding force on national ratings, and has been fully supportive of Fayette Drug Court by assigning a liaison officer, making home visits with case specialists, hosting mentor trainees from various states, aiding with alcohol testing and many other functions. This strong law enforcement support of the drug court program has been a major factor in its success in Fayette County.

The Jefferson Drug Court Program was named a Mentor Drug Court for a second term at the annual conference. The Mentor Drug Court Network is based on the premise that local drug courts are the most logical place to educate and train court practitioners. Both Fayette and Jefferson drug courts will be hosting training sessions for the grantees of the Office of Justice Program's planning and implementation grants.

The benefits to society from Drug Court programs are numerous and far-reaching. Personal, financial and societal areas are impacted, since these participants are paying restitution, child support, taxes and are not taking up prison beds needed for violent offenders. By offering these participants a chance to make positive, life-long changes in their life-styles, Drug Courts are affecting change in the population which has been most frequently involved with the criminal justice system. This can only be a positive use of public resources and the court's enforcement powers.

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Judge Mary C. Noble *obtained a bachelor's degree in English from Austin Peay State University in 1971 and a master's degree in psychology in 1975. She attended law school at the University of Kentucky in Lexington, and received her J.D. in December 1981. Judge Noble has been a speaker on a wide array of topics, and has served as Chair of the statewide Gender Fairness in the Courts Committee; on the state Civil Rules Committee, the Attorney General's Task Force on Prescription Drug Abuse, the Executive Branch Committee for a Collaborative Approach to Substance Abuse, and the Juvenile Justice Advisory Board, a statutory committee charged with overseeing juvenile justice reform. As a practitioner, Judge Noble was a litigation attorney, practicing the areas of school law, personal injury and criminal law. She has done both defense and plaintiff representation. Prior to her election as circuit judge in 1992, she served as Domestic Relations Commissioner for Third Division, Fayette Circuit Court.*

Connie Reed *is the Treatment Coordinator for the Fayette Drug Court. She is responsible for completing assessments on potential clients, maintaining contact with judges, prosecutors, and defense attorneys, and conducting group, family, and individual counseling. Connie has been with the Fayette Drug Court since it's inception. Prior to working with Drug Court, she worked ten years in the Social Work field with court committed juveniles, adult and child sexual abuse victims, and the dually diagnosed chronically mentally ill. She earned her BSW from Morehead State University and her Masters Degree from the University of Kentucky.*■

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 15, 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.* ■

PRACTICE TIPS

➢ DPA's Appellate Branch

Collected by Susan Balliet, Assistant Public Advocate

• **Ask for 12 peremptories in co-defendant cases involving alternate jurors.** An issue currently before the Kentucky Supreme Court concerns the correct number of peremptory challenges where alternate jurors are seated and there are co-defendants. Where there are two co-defendants and an alternate juror, RCr 9.40 entitles each defendant to 12 peremptories as opposed to the 11 that many courts appear to be giving. The Supreme Court appears to be taking this issue very seriously, so you might want to ask for 12 in all pending.

Richard Hoffman, Assistant Public Advocate
rhoffman@mail.pa.state.ky.us

• **Object when the prosecutor asks your witness to call another witness a liar.** Under *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997) the commonwealth is precluded from forcing a witness to characterize another witness as a liar. Example: Mr. X, are you saying that ... is true? Then Ms. Y must be a liar.

Richard Hoffman, Assistant Public Advocate
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• **In stalking cases – stipulate prior bad acts or ask for bifurcated proceeding.** In defending under the new stalking statute, KRS 508.140, defense counsel should be asking for bifurcated trials, or –when prior offenses are not contested-- offering to stipulate to prior offenses. Under KRS 508.140(b) one of the elements of stalking can be the fact of a prior emergency protective order, prior criminal complaint, or prior conviction arising from against the same victim. In *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) the Court ruled that when there is a "status element" which requires proof of a prior conviction and the defendant offers to stipulate to the prior conviction, then neither the name of the offense nor the prior record of the offense may come in during the trial because its prejudicial effect outweighs its probative value. *Old Chief*, 117 S.Ct. at 646.

A stipulation, of course, would only be correct in a case where the defendant does not contest the validity or applicability of the prior conviction. By implication, under *Old Chief*, where a defendant contests the validity of prior convictions or other bad acts, at a minimum there should be a bifurcated proceeding. It is unclear whether the Court intended a *per se* rule to apply, or whether a harmless error analysis should be applied. *Old Chief*, 519 U.S. 172, at n. 11. To be safe, defense counsel should be sure to argue the introduction of prior convictions, etc. will materially affect the jury's verdict. Counsel should also preserve the underlying federal question by arguing that allowing bad acts evidence and refusing to exclude evidence of a prior EPO or other convictions, violates the right to due process under the 5th and 14th Amendments and Sections 2 and 11 of the Kentucky Constitution.

Susan Balliet, Assistant Public Advocate
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• **New Designation of Record Rule**
In your designation of record, please include a calendar of all dates and times of all pretrial hearings, and a brief description of what occurred at those hearings. When dates are omitted, you can be sure that the record on appeal will be incomplete.

Julie Namkin, Assistant Public Advocate
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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 **

- **KACDL Annual Conference** - October 29, 1999 - Louisville, Kentucky

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
- **NLADA Defender Advocacy Institute,** Dayton, Ohio - May 21-25, 1999
- **NLADA Juvenile Defender/Team Child** - Seattle, Washington - June 17-19, 1999
- **NLADA Appellate Defender Conference** (TBA) - October 1999
- **NLADA 77th Annual Conference,** Weston Long Beach Hotel, California, November 10-13, 1999

For more information regarding NLADA programs call 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

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- **NCDC Theories & Themes** - Atlanta, Georgia - March 25-28, 1999
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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.

The quickest way to kill the human spirit is to ask someone to do mediocre work.

- Ayn Rand

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