



The Advocate

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KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY

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State should fund indigent defense better

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UPHOLDING THE RIGHT TO FAIR TRIAL WORTHWHILE

Clarence Earl Gideon could not afford an attorney, so he represented himself and managed to get himself convicted of a crime he did not commit. Those who follow criminal law know the rest.

Gideon wrote a letter to the Supreme Court from his prison cell, arguing it was not fair that he was denied legal representation simply because he was poor. The court agreed, and in 1963 Justice Hugo L. Black wrote that there could be no fair trial in a serious criminal case without a right to counsel for the defendant.

Anthony Lewis, a *New York Times* columnist who wrote about Gideon's case in *Gideon's Trumpet*, said last year it was time to amend Black's precedent-setting opinion to today's standards: There can be no justice without "competent" counsel "with adequate resources."

That is also the finding of the Blue Ribbon Group, whose appointed members represented the Kentucky justice system and legislature with a goal of providing solutions to improve the state's public defender system. The group discovered some disturbing, yet not surprising, weaknesses in Kentucky's system.

Most of them centered on the lack of money spent on indigent defense.

Among 19 states that were studied, including all those contiguous to Kentucky and others with similarities, Kentucky ranked as one of the worst in indigent defense cost per capita, cost per case and in public defender salaries.

The starting pay for Kentucky public defenders is \$23,388 per year. The average entry level salary for 23 other jurisdictions is \$32,396 and five of Kentucky's seven neighboring states

pay at least \$30,000, including Indiana and chronically poor West Virginia.

What Kentucky is very good at is tacking on fees to court proceedings and then collecting that money to aid public defenders. Each person who is assigned a public defender is assessed a \$52.50 fee, and the DPA also collects \$50 of the \$200 service fee charged to those who are convicted of drunken driving. In fiscal year 1998, Kentucky received 15.2 percent of its revenue for indigent defense from those sources, among the highest of any state.

The notion of "making the criminals pay for their defense" has merit, but at some point, reality says there is a limit to what can be collected. Success in creating alternate revenue does not excuse the legislature from taking seriously its duty to provide adequately a fair trial for each person arrested in Kentucky.

Out of 12 other states that supplied their costs for indigent defense in 1998, Kentucky spent less per case than any. Kentucky spent \$19 million for 101,210 cases, a per-case cost of \$187. Kansas and Wisconsin each spent more than \$500 per case. Tennessee spent \$235 per case but also had 50 percent more cases.

The inherent problem in boosting the amount spent on indigent defense is that many people do not care whether someone accused of a crime is fairly represented — unless it is someone they know. Getting "tough on crime" is worthwhile, but so is upholding the constitutional right to a fair trial.

If that is not one of our most cherished rights — for everyone — what have we become as a society? ♦

Getting "tough on crime" is worthwhile, but so is upholding the constitutional right to a fair trial.

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The miracle, or the power, that elevates the few is to be found in their industry, application, and perseverance under the prompting of a brave, determined spirit.

Mark Twain

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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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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 defender 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.

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From The Editor . . .

WORKLOAD

The DPA FY 99 *Annual Caseload Report* shows defender caseload is on the rise. Public Advocate, Ernie Lewis provides an overview and analysis of that report. If you would like a copy of it, contact Tanya Dickenson, Assistant Director of Law Operations at (502) 564-8006, ext.211.

PAROLE CONTINUES TO DECLINE

Over the last decade and a half, parole of Kentucky inmates has dropped 24%. Serve outs have increased 26%. Inmates sentenced to prison for sex offenses are being paroled less frequently than in the past and as compared to prisoners sentenced for non sex offenses. We present the Kentucky Department of Corrections' parole facts in this issue.

DEFENDER RULES PROPOSALS

Public Advocate, Ernie Lewis has submitted 7 proposed changes to the civil and criminal rules to the Supreme Court's Civil and Criminal Rules Committees. We have reproduced those proposals in this issue.

*When one door of happiness
 closes, another opens; but often
 we look so long at the closed
 door that we do not see the one
 which has been opened for us.*

Helen Keller

DPA ANNUAL CASELOAD REPORT IS RELEASED

Ernie Lewis, Public Advocate

DPA has released its *FY 99 Annual Caseload Report*. This is an increasingly important document. I rely upon this report extensively to determine trends in the criminal justice system, to determine long-range needs, and to establish a budget. DPA directors, managers, and supervisors likewise are encouraged to use this document in a similar fashion, in addition to assisting them in managing their work unit.

The following major trends are noted from this year's report.



Ernie Lewis, Public Advocate

Trial Level Caseload Rises 4%

Public defenders represented 4% more clients at the trial level in FY 99 than they did in FY 98, rising from 93,238 to 97,646. That is one of the most interesting facts to come out of the *FY 99 Annual Caseload Report*, released on November 19, 1999. This continued rise in trial level caseload occurred despite a general downturn

in the violent crime rate. While the causes of this increase are many, the opening of new offices and the covering of more counties with full-time attorneys is certainly one of the primary causes. Another cause for the increase is the increased caseload in Megan's law, prerelease probation, methamphetamine, and several other new cases created by the 1998 General Assembly.

This rise in caseload at the trial level is cause for concern. *The Blue Ribbon Group on Improving Indigent Defense in the 21st Century*, which issued its report in June of 1999, expressed its deep concern for high public defender caseloads even prior to knowing of the 4% increase. Finding #5 was that "The Department of Public Advocacy Per Attorney Caseload Far Exceeds National Caseload Standards." Recommendation #6 is that "Full-time Trial Staff Should Be Increased to Bring Caseloads Per Attorney Closer to the National Standards. The Figure Should Be No More Than 350 in Rural Areas and 450 in Urban Areas."

There are likewise individual areas of concern. The Jefferson County District Public Defender caseload rose from 27,899 in FY 98 to 31,330 in FY 99. This returned Jefferson County's caseload from the historical low of FY 98 back to their level of FY 97, which was 31,146. Unfortunately, this caseload caused caseloads to go back per attorney to 603 per lawyer, far in excess of the national standards.

The Fayette Legal Aid Office continued its puzzling decline. For many years, the Lexington office had a caseload of 10,000+. In FY 97, the caseload was 10,119. This lowered to 8,569 in FY 98, and again to 6813 in FY 99. The caseload per attorney in Fayette County is now at 382, which is actually below the target set by the BRG of 450 per lawyer. We will need to keep a close tab of this caseload.

Caseload averages per attorney in the full-time system have remained about the same, moving down from 480 to 475. Caseload relief is highly dependent upon the 2000 General Assembly. A budget has been presented to the Governor's Office that would implement the *Blue Ribbon Group's* recommended caseload levels of 450/350 for urban/rural defenders.

While the average caseload level remains too high, there are many offices where caseloads are at an alarming level. The Hazard Office had a level of 650 per lawyer. Henderson features 618 per lawyer. And in our new office of Owensboro, 1168 cases were opened per lawyer. Additional lawyers have been added in Hazard and Owensboro to reduce these levels somewhat. However, significant problems remain, particularly in the Owensboro and Henderson Offices.

Juvenile Caseload is Significant

One of the primary initiatives by DPA during the biennium was to improve juvenile representation in the Commonwealth. This was to be accomplished by the opening of new trial offices, the conversion of contract counties, naming juvenile specialists in each office, hiring an assistant training director with juvenile training responsibilities, hiring 2 social workers, hiring 2 juvenile appellate lawyers, and other efforts. This year, the *Gault Initiative* is leading DPA to continue to focus on enhancing the quality of representation provided to our children.

The *FY 99 Annual Caseload Report* shows the number of juveniles represented in Kentucky to be holding steady. In FY 98, 18,772 juveniles were represented. In FY 99, 18,708 were represented. This was 19.16% of DPA's caseload.

With the efforts in the 1998 General Assembly, the plan to complete the full-time effort through the 2000 General Assembly, and the *Gault Initiative*, it is hoped that the emphasis on represented these 18,000+ juveniles will pay big dividends in the future.

1998 General Assembly Funding Increases are Reflected in this Report

The Kentucky public defender system has been mired at the bottom of public defender agencies nationwide in all of the most significant benchmarks for many years. *The Blue Ribbon Group* found that "The Department of Public Advocacy Ranks at, or Near, the Bottom of Public Defender Agencies Nationwide in Indigent Defense Cost-Per-Capita & Cost-Per-Case."

(Continued on page 5)

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The 1998 General Assembly contributed \$2.3 additional General Fund dollars to begin to address the issue of chronic underfunding. The actions of the 1998 General Assembly show up in the 1999 Annual Caseload Report. The funding per case went from \$182 per case to \$210 per case. The funding per capita moved from \$5.09 in FY 98 to \$5.90 in FY 99. The third benchmark, public defender salaries, were not addressed by the 1998 General Assembly.

DPA seeks to continue the progress made by the 1998 General Assembly by proposing to implement the recommendation of the Blue Ribbon Group. DPA is presenting the 2000 General Assembly with a budget that would increase the General Fund contribution by an additional \$11+ million dollars. This request would place the Kentucky public defender system in the middle of the nation in the 3 primary benchmarks, funding-per-case, funding-per-capita, and salaries.

The full-time system continues to grow

When I became Public Advocate, I set as one of my primary goals the delivery of 85% of the cases at the trial level by the full-time method by 2000. We have achieved that goal with this caseload report. In FY 99, 86% of the cases were handled by full-time attorneys. 14% of the caseload, or 13,519, were handled by contract attorneys. We are now in a position to realistically aim for the completion of the full-time system by the end of the next biennium.

The Death Penalty Continues to be very costly to the DPA

One of the most serious problems facing a defender system like Kentucky's is the presence of the death penalty. This penalty continues to cause extraordinary expenses for this poor public defender system.

FY 99 was no exception. This year there were 73 capital cases at the trial level. DPA represents all 39 of the men on Kentucky's death row at the appeal and post-conviction stages. DPA spends over \$700,000 for its Capital Trial Branch, \$439,000 for its Capital Post-Conviction Branch, and \$351,000 for its Capital Appeals Branch. In addition, DPA's trial offices represent many capital clients at the trial level. Louisville and Lexington also represent all of their capital clients.

The DPA provided counsel to over 100,000 Kentuckians in FY 99

An annual caseload report is not just a time to count cases. It is also a time to celebrate the immense amount of progress made during the year delivering justice to poor people. In FY 99, 101,732 people were represented by Kentucky's public defenders. Congratulations to the men and women of DPA for their wonderful good work during this past year delivery justice to Kentucky's poor people. ♦

**Parole Eligibility:
What does it really mean?**
by Dave Norat
Division Director of Law Operations

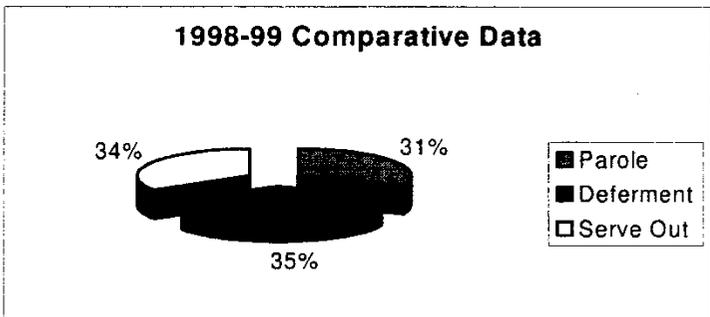
How many times has a client, a victim, a member of the community asked, "How much time really will be served?" Or, "Oh! He got a five year sentence so he will out in a year." Or, "Everybody makes parole the first time they see the parole board."

According to the Kentucky Parole Board Statistical Report for fiscal year 1998 - 1999, only 13% or 626 individuals were recommended for parole out of the 4,852 cases that received initial hearings/reviews in fiscal year 1998-99. Of the remaining 87%, 43% or 2,091 were deferred and 44% or 2,135 were ordered to serve out their sentences. While the Report does not tell us what was the average length of deferment or the average length of time for serve out of sentence, the report does tell us that: a five-year sentence does not mean the individual will be out in a year; only a small percentage of individuals are recommended for parole upon initial review; and, you have about an equal chance of being served out on your sentence as you have of being paroled before serving out.

Comparative Data for FY 84, FY 93, FY 94, FY95, FY 96					
	1983-84	1992-93	1993-94	1994-95	1995-96
Parole	53%	59%	39%	36%	33%
Deferment	37%	37%	34%	32%	33%
Serve Out	8%	24%	27%	32%	34%

Comparative Data for FY 97, FY 98, FY 99			
	1996-97	1997-98	1998-99
Parole	30%	26%	31%
Deferment	37%	41%	35%
Serve Out	33%	33%	34%

A review of parole and serve out percentages indicates that 16 years ago the answers to the foregoing questions would be quite different than the answers today.



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FY 1998-99 STATISTICS

Inmates Interviewed/Reviewed: 10,544

(Includes initial, deferred, back to board, medical, reconsideration, and early parole)

4,852 cases were initial hearings/reviews:

- 626 (13 percent) were recommended for parole
- 2,091 (43 percent) were deferred
- 2,135 (44 percent) were ordered to serve out sentences

4,069 deferred cases were interviewed/reviewed:

- 2,602 (64 percent) were recommended for parole
- 791 (19 percent) received additional deferments
- 676 (17 percent) were ordered to serve out sentences

1,623 revocation cases were interviewed/reviewed:

- 11 (1 percent) were recommended for parole
- 811 (50 percent) received additional deferments
- 801 (49 percent) were ordered to serve out sentences

Other Hearings Conducted:

- 472 Preliminary Parole Revocation Hearings
- 249 Victim Hearings
- 1,669 Final Parole Hearings
 - 21 Other (medical, reconsideration, early, ISP, courtesy)
 - 170 Back to Board Cases
 - 281 Open Hearings
 - 68 Youthful Offender Hearings
- 1,574 Waivers of Final Parole Revocation Hearings
- 1,516 Warrants Issued

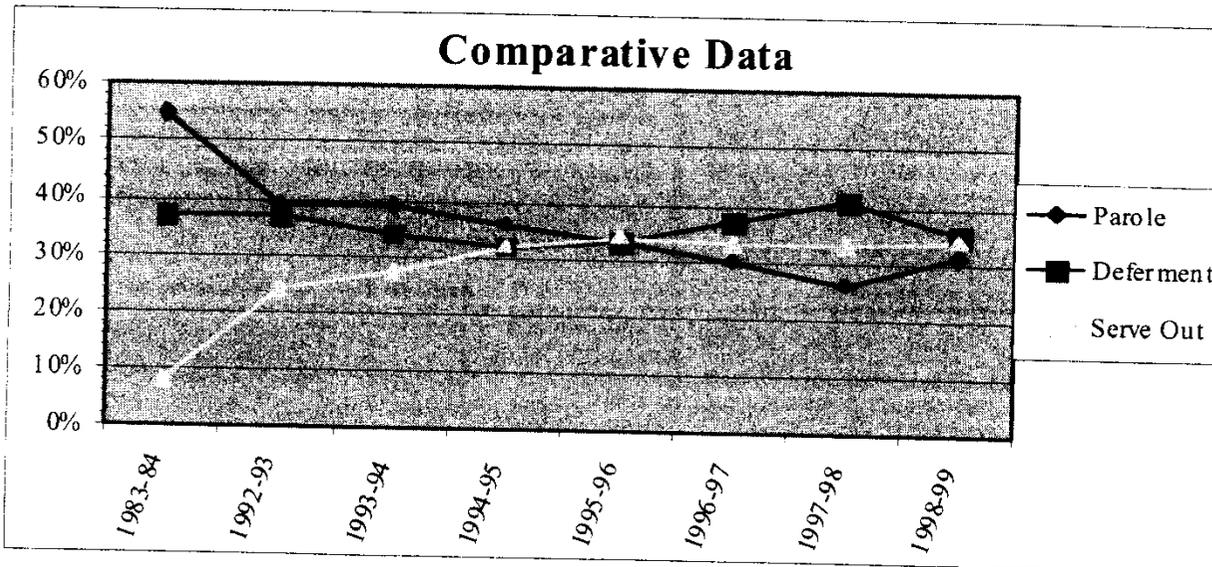
While the available statistics do not provide information as to what type of individual is granted parole upon initial review, we do know what factors the parole board applies in its decisions to grant or deny parole at any stage of an individual's

eligibility. These criteria are found in Section 5 of 501 Kentucky Administrative Regulations, Chapter 1:030. The factors are:

- (a) Current offense - seriousness, violence involved, firearm used;
- (b) Prior record;
- (c) Institutional adjustment and conduct - disciplinary reports, loss of good time, work and program involvement;
- (d) Attitude toward authority - before incarceration, during incarceration;
- (e) History of alcohol or drug involvement;
- (f) History of prior probation, shock probation, or parole violations;
- (g) Education and job skills;
- (h) Employment history;
- (i) Emotional stability;
- (j) Mental capacities;
- (k) Terminal illness;
- (l) History of deviant behavior;
- (m) Official and community attitudes toward accepting inmate back in the county of conviction;
- (n) Victim impact statements and victim impact hearings;
- (o) Review of parole plan - housing, employment, need for community treatment and follow-up resources;
- (p) Any other factors involved that would relate to the inmate's needs and the safety of the public.

So, parole eligibility: What does it really mean? It means that in fiscal year 1999 an individual had a 1 chance in 3 of making parole the first time they saw the parole board.

It means that over the last 16 years, parole upon initial review decreased by 24% and that the likelihood of getting a serve out has increased by 26% over the last 16 years. Important numbers when talking to client, victim, or community member. ♦



Proposed Changes to the Kentucky Rules of Criminal and Civil Procedure



Kentucky Supreme Court Justices
 Front Row L to R: Janet Stumbo, Chief Justice Joseph Lambert, John W. "Bill" Graves
 Back Row L to R: William S. Cooper, Martin Johnstone, James Keller, Donald Wintersheimer

The Department of Public Advocacy has submitted the following rules proposals to the Kentucky Supreme Court's Criminal and Civil Rules Committees. The Criminal Rules Committee is chaired by Justice William Cooper. The Civil Rules Committee is chaired by Justice Janet Stumbo.

PROPOSED AMENDMENTS TO RCr 3.02 AND RCr 3.05

RCr 3.02 Initial Appearance before the Judge

RCr 3.02(2) – An officer making an arrest under a warrant issued upon a complaint shall take the arrested person without unnecessary delay, *and under no circumstances more than 24 hours in those counties with a judicial district containing 10 or more district judges and under no circumstances more than 48 hours in those counties with a judicial district containing less than 10 district judges*, before a judge as commanded in the warrant. If the arrest is made in a county other than that ... etc.

RCr 3.02(2) – Any person making an arrest without a warrant shall take the arrested person without unnecessary delay, *and under no circumstances more than 24 hours in those counties with a judicial district containing 10 or more district judges and under no circumstances more than 48 hours in those counties with a judicial district containing less than 10 district judges*, before a judge, and shall file...etc.

RCr 3.02(3) – If no judge is available in the county in which the arrest was made the defendant shall be taken to jail, and any documents relating to the arrest shall be given to the jailer. If the defendant is ineligible to post bail under Rule 4.20 or cannot make the bail endorsed on the arrest warrant, the jailer shall take the defendant before the judge without unnecessary delay, *and under no circumstances more than 24 hours in those counties with a judicial district containing 10 or more district judges and under no circumstances more than 48 hours in those counties with a judicial district containing less than 10 district judges*.

RCr 3.05 Cautioning of Accused; Appointment of Counsel

RCr 3.05(1) – At the time of the defendant's appearance the judge shall inform the defendant of the charge against him or

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her and of his or her right to a preliminary hearing or a trial, and shall advise the defendant of his or her right to have counsel. The defendant shall be informed also that he or she is not required to make a statement and that any statement made by him or her may be used against him or her. **The judge shall further decide based upon the facts as stated in the complaint or the post-arrest complaint whether there is probable cause to believe the defendant has committed the crime charged in the complaint or post-arrest complaint. If the judge finds that no probable cause exists, the defendant shall be released from custody. If the judge finds probable cause exists, the judge shall notify the attorney for the Commonwealth, allow the defendant reasonable time and opportunity to consult counsel, and release the defendant on personal recognizance or admit the defendant to bail if the offense is bailable.**

COMMENTARY

These proposals strengthen pretrial procedures in Kentucky's Court of Justice, and further to bring these procedures into compliance with the United States Constitution as declared in United States Supreme Court cases since 1991.

RCr 3.02

In *County of Riverside and Byrd v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 S.Ed.2d 49 (1991), the Court held that an accused could not be held for longer than 48 hours without appearing before a court for a probable cause determination without violating the 4th Amendment. As now written, RCr 3.02 allows for *McLaughlin* to be violated on a daily basis in our district courts.

This principle has been reaffirmed in *Powell V. Nevada*, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994), where the Court stated that *McLaughlin* "made specific the probable cause promptness requirement of *Gerstein*..." *Id.* at 1283. This rule is being broken throughout the Commonwealth, particularly in rural counties and especially during weekends and holidays. Many district judges have not changed their procedures to comply with the holding of this case. In essence, they decline to hold arraignments on weekends or during holidays. Experience in most of our counties reveals that this initial reluctance to change procedures in order to comply with the Constitution has hardened into widespread violations of the 4th amendment. Section Ten of the Kentucky Constitution would likewise be violated.

The proposed amendment to RCr 3.02 would mandate compliance with the clear dictates of *McLaughlin*. It would create 24 hour as the outside limit for one arrested to be taken before a court in counties with 10 or more district judges and 48 hours in other counties. *McLaughlin* states that weekends and holidays are no excuse for the failure of courts to conduct arraignments within the 48 hours. *Id.*, 114 L.Ed.2d at 63.

It has been said in the past that "without unnecessary delay" is

sufficient to satisfy the 4th amendment. However, as *McLaughlin* recognizes, "it is not enough to say that probable cause determinations must be 'prompt.' This vague standard simply has not provided sufficient guidance." *Id.*, 114 L.Ed.2d at 62.

However, the "without unnecessary delay" language of the present rule is continued in the proposed amendment. This would encourage a continuation of local procedures in which arraignments are presently being conducted in considerably less time than 24 or 48 hours, while at the same time bringing those jurisdictions that conduct arraignments outside the boundary of 48 hours into compliance.

The 24-hour time limit for counties with 10 or more district judges is reasonable for Kentucky's judicial system. The Legislature has required judicial review of certain matters in 18 hours or less, and the Kentucky courts have found that timing workable. For example, KRS 202A.041 requires that a person who is arrested and involuntarily hospitalized must be taken without unnecessary delay before a judge, and that it should occur within 18 hours absent exceptional circumstances.

RCr 3.05

An amendment to RCr 3.05 makes clear what is implied in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1974) and clarified in *County of Riverside v. McLaughlin*, *supra*. Within 48 hours, an accused held in detention has a right to have a probable cause determination by the district judge.

The experience across the state is that many law enforcement officers are not detailing probable cause in either complaints or post-arrest complaints. Many pleadings are conclusions with no supporting facts. For example, a post-arrest complaint may read simply "DUI." District judges do not appear to be reviewing such pleadings and releasing those individuals where probable cause is not made out on the face of the pleadings, as required in *Gerstein* and now *McLaughlin*.

Probable cause is determined at the preliminary hearing in felony cases. That, however, is usually beyond the 48-hour requirement. Further, there are no preliminary hearings in misdemeanor cases. Thus, it should be made clear that the district judge is to make such a determination from the face of the pleadings in all misdemeanor cases.

It cannot be disputed that probable cause is to be determined by the district judges at arraignment. It should not be in any way controversial to spell out to all participants in the criminal justice system what the standard is to be held to beyond 24 / 48 hours.

The police, defense attorney, prosecutors, and judges alike will benefit from simply stating that at arraignment, a probable cause determination must be made.

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PROPOSED AMENDMENT TO RCr 3.14(2)

RCr 3.14 Initial Appearance, Probable Cause Determination

RCr 3.14(2) – The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him or her and may introduce evidence in his or her own behalf, *including the introduction of testimony by adverse witnesses.*

COMMENTARY

This proposed amendment would clarify that the defendant can call adverse witnesses at the preliminary hearing. While the rule as it is presently written appears to include adverse witnesses, some judges read the rule to mean that the defendant can only call witnesses who present exculpatory testimony.

This practice has been taken so far as to exclude the testimony of the primary accuser against a defendant. In such cases, a preliminary hearing consists of hearsay testimony presented by a police officer, followed by a rejection of the defendant's efforts to call the primary accuser to the stand. This practice in effect guts the preliminary hearing, and enables citizens to be held for 60 days on the basis of hearsay testimony alone without having confronted the primary accuser. While many judges feel that they have enough information to find probable cause at a certain point in the testimony of the prosecutor's witness, there are instances where the hearsay information from that witness will not be enough after hearing from an adverse witness. The proposed process assures a more reliable set of information for the judge's decision, as it will not be based primarily on hearsay evidence.

This proposed amendment would not limit the discretion of the district court to control the number and nature of witnesses called at a preliminary hearing. See *Tinsley v. Commonwealth*, 495 S.W.2d 776 (Ky. 1973), *cert. den* 414 U.S. 1077, 94 S.Ct. 594, 38 L.Ed.2d 484 (1973) and 414 U.S. 1145, 94 S.Ct. 898, 39 L.Ed.2d 101 (1974). Rather, it would guarantee that the critical nature of the preliminary hearing as contemplated in *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), RCr 3.10 and 3.14 is preserved.

A preliminary hearing in Kentucky is a critical stage of the proceedings. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); see also *Shanks v. Commonwealth*, 575 S.W.2d 163 (Ky. App. 1979). This critical stage preliminary hearing performs a vital role under our criminal rules. The determination of probable cause after a reasonable airing of evidence presented by both prosecutor and defense is the primary purpose of the hearing. Only after such a reasonable hearing should a person be held for as much as 60 days in confinement without an opportunity to prove their innocence. In order for the hearing to function in this manner, however, it

is vital that a district court not have the discretion to prohibit the testimony of the primary accuser. Nor should the district court be encouraged to truncate the probable cause inquiry.

This amendment would clarify and strengthen the role of the preliminary hearing in Kentucky to insure the fair and useful procedure contemplated in our present criminal rules.

PROPOSED AMENDMENT TO RCr 8.01

RCr 8.01 Initial Appearance after Indictment or Information

Within a reasonable time after indictment or information but no later than 15 days after indictment or information, [Upon the appearance of a defendant] the judge shall proceed as provided in Rule 3.05 and shall also proceed with or set a time for arraignment.

COMMENTARY

After indictment, there is no provision to require the timely appearance of a defendant before a judge for the cautioning of the accused and appointment of counsel, if necessary, pursuant to RCr 3.05.

It is in the interests of citizens-accused to have the assistance of counsel as soon as possible. This proposed change advances that assistance.

PROPOSED AMENDMENT TO RCr 9.40(1)

Rule 9.40 Peremptory Challenges

RCr 9.40 – (1) If the offense charged is a felony, the Commonwealth is entitled to ~~six (6) eight (8)~~ peremptory challenges and the defendant or defendants jointly to ~~ten (10) eight (8)~~ peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges.

COMMENTARY

Seeking a Level Playing Field. Prior to 1994, the defense had more peremptory challenges than the prosecution had:

1877 – 1893

Felony: Defense (20)	Misdemeanors: Defense (3)
Prosecution (5)	Prosecution (3)

(Continued on page 10)

*(Continued from page 9)***1893 – 1978**

Felony: Defense (15)	Misdemeanors: Defense (3)
Prosecution (5)	Prosecution (3)

1978 – 1994

Felony: Defense (8)	Misdemeanors: Defense (3)
Prosecution (5)	Prosecution (3)

1994 – PRESENT

Felony: Defense (8)	Misdemeanors: Defense (3)
Prosecution (8)	Prosecution (3)

In 1994 both sides were given the same number. The argument for the October 1994 "equalizing" of the peremptory challenges for the prosecution and defense was presented under the banner of "leveling the playing field." But that argument is based on a misanalysis of the prosecution's position in voir dire as contrasted with the defense situation.

Federal rule. Federal Rule of Criminal Procedure 24(b) provides for 10 peremptories for the defense and 6 for the prosecution in felony cases:

Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

The Institutional Delivery of Prosecutorial Services. Felony cases in each circuit court are normally prosecuted by the local Commonwealth's Attorney's Office. Unlike England, where prosecutors in criminal cases are selected from private lawyers on an assignment basis, the prosecutorial function in Kentucky in felony cases is normally delivered by prosecutors, whether full-time or part-time, who are members of the local Commonwealth's Attorney's staff.

Prosecutors Have an Institutional Advantage in Voir Dire. Consequently, in any given circuit court, attorneys in the local Commonwealth Attorney's Office will normally conduct the voir dire in every criminal case. As a result, prosecutors in each circuit have a distinct advantage with the venire in each

successive jury selection using venirepersons from a particular jury pool.

During the first voir dire conducted in a criminal case during the life of a particular jury pool, the prosecution will learn information relating to venirepersons who are questioned by judge, prosecutor or defense counsel. That information, whether volunteered or elicited, is not on the venireperson's juror qualification form and is not readily accessible to defense lawyers in future jury selections in other cases where venirepersons are still selected from the same jury pool. The memories and notes of that initial jury selection can and will often be used legitimately by the local prosecutors in succeeding jury selections taken from the same jury pool.

Normally, the life of a jury pool is 30 days. KRS 29A.130(1). During that period, individual venirepersons may be questioned on voir dire in a number of criminal cases. Whether an individual venireperson serves on a jury, his or her answers in the course of one or more prior voir dire constitute invaluable background information to each lawyer who has access to that venireperson's responses.

The prosecution's experience with the venirepersons in a particular jury pool grows through repeated questioning of the individuals making up the pool in successive cases. As a jury pool is called upon to provide jurors for more and more criminal cases, the local prosecutors have an extensive amount of non-record data on the individual venire members which enables the prosecution in any given case to exercise peremptory challenges on the basis of information not generated by the voir dire in the case in question and generally not available to the defense lawyers in that particular case. See generally *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992) ("We find no fault with the prosecutor for exercising a peremptory challenge against a juror where the decision to strike is based upon information which the prosecutor has received from a source other than information received from voir dire.... A prosecutor may utilize his own personal knowledge concerning a juror and information supplied from outside sources.")

The Defense Has No Comparable Information Advantage. Conversely, the criminal defense bar has no comparable institutional advantage. A private defense lawyer and even that lawyer's firm may have only one jury trial in a criminal case during a term of a particular jury pool in a circuit court.

Even a public defender office does not have the institutional knowledge of the jury pool that a prosecutor's office has since a significant number of criminal jury trials in the life of any jury pool will be tried by the private bar as retained counsel.

The cumulative knowledge of the prosecution about the jury pool gives more knowledge about some of the venireperson which facilitates more successful challenges for cause and

(Continued on page 11)

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more information than the defense has when exercising peremptory challenges

Inherent Prosecution Advantage Justifies Additional Defense Peremptories. A prosecutor may retain this knowledge of venireperson, culled from prior voir dire, unconsciously or intentionally, by happenstance or systematically. It matters little. Since in either event it is non-record information about the venire obtained solely as a result of the prosecutor's unique institutional role in the criminal justice system.

Even though any given prosecutor or prosecutor's office does not intentionally and systematically take advantage of this accumulating information about the members of the jury pool, a system of institutionalized prosecutors inherently offers this jury selection advantage to the prosecution. Significantly, this advantage may be capitalized on at any time by any prosecutor or prosecutor's office.

Under this amendment, the prosecution's institutional advantage in voir dire would be balanced by the additional peremptory challenges given the defense in felony cases.

The equalization of peremptory challenges in a civil case, three each for the plaintiff and the defendant, reflects the reality that private or government attorneys representing these parties have no institutional advantage in voir dire during any given term of a jury pool. CR 47.03(1). In the life of any given jury pool private firms or government lawyers representing parties in civil cases will seldom have repeated exposure to the jury pool through repeated voir dire in a number of civil cases.

Even when certain retained lawyers or government attorneys do have several cases tried during the life of a particular jury pool, seldom would the voir dire information learned in one type of civil case, e.g., product liability, be useful in another type of civil case, e.g., personal injury litigation.

In most instances, however, the basic type of juror information sought by the prosecution in criminal cases remains the same from case to case, particularly from the prosecution's perspective.

The institutionalization of the prosecution function in certain government lawyers, rather than assigning private bar lawyers on a case-by-case basis to prosecute, creates an inherent potential information advantage for the prosecution in most of the voir dire conducted in criminal cases.

Additional peremptories to the criminal defendant in felony cases is the least onerous remedy for that systemic imbalance.

Conclusion. The former allocation of peremptory strikes between the prosecution and the defense served the criminal justice system well with no evidence, empirical or anecdotal, that the defense's additional peremptory challenges created

any unfairness or disadvantage to the prosecution's ability either to select fair and unbiased juries or to obtain convictions where warranted by the evidence. The prior ratio of defense peremptory challenges to prosecution peremptories recognized the inherent informational advantage the prosecution has in the jury selection portion of a criminal trial and attempted to compensate for the imbalance in an effort to level the playing field.

PROPOSED NEW RCr 9.59

RCr 9.59 Informants

RCr 9.59 – If requested by a party in a trial by jury where an informant testifies, the Court shall instruct as follows, "The testimony of an informant, someone who provides evidence against someone else for money, or to escape punishment for [his] [her] own misdeeds or crimes, or for other personal reason or advantage, must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated.

_____ may be considered to be an informant in this case.

The jury must determine whether the informer's testimony has been affected by self-interest, or by the agreement [he] [she] has with the Commonwealth, or [his own] [her own] interest in the outcome of this case, or by prejudice against the defendant."

COMMENTARY

Informants play an important role for law enforcement. Their use is on the rise. Inherently, the credibility of informants is questionable. See Thomas A. Mauet, *Informant Disclosure and Production: A Second Look at Paid Informants*, 37 Arizona L. Rev. 563 (1995). This proposed instruction is found at O'Malley, Grenig, Lee, *Federal Jury Practice and Instructions* (5th ed., 2000) § 15.02 at 364-365.

Federal courts have required an instruction that informant testimony should be viewed with caution. *United States v. Patterson*, 648 F.2d 625, 630-31 (9th Cir. 1981); *United States v. Garcia*, 528 F.2d 580 (5th Cir. 1976) (holding the failure to give such an instruction to be plain error); *United States v. Griffin*, 382 F.2d 823 (6th Cir. 1967) (holding the failure to give such an instruction concerning the testimony of a narcotic addict/informer to be plain error). To date, Kentucky has not chosen to provide for such an instruction. See *Thurman v. Commonwealth*, 975 S.W. 2d 888, 89L (Ky 1998).

This rule permits jurors to be apprised of the fact, which experienced participants in the criminal justice system know, that informant testimony should be viewed with great caution.

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This instruction advances the truth-finding function of the Court of Justice because it will prevent jurors, who may not be aware of the suspect nature of informant testimony, from unduly relying upon such evidence. The reliability of verdicts will be increased. The public will have more confidence in verdicts.

PROPOSED AMENDMENT TO RCr 12.78 – BAIL ON APPEAL

Rule 12.78 – Bail on Appeal – (1) Bail may be allowed by the trial judge pending appeal notwithstanding that service of the sentence has commenced, except when the defendant has been sentenced to death or life imprisonment.

- (2) When a person has been convicted of an offense and only a fine has been imposed the amount of bail shall not exceed the amount of the fine and costs.
- (3) The applicable provisions governing bail shall apply to bail on appeal.
- (4) The court allowing bail may at any time revoke the order admitting the defendant to bail.
- (5) *If a notice of appeal is filed in a case involving a conviction and sentence, which will be substantially or completely served pending resolution of the appeal, a trial judge shall consider a request for bail pending the appeal within ten days of its request. If the trial judge denies the request for bail pending appeal, the circuit judge or Court of Appeals, whichever applies, shall decide any appeal of the denial of bail, brought pursuant to RCr 12.82 within ten days of its request. In deciding the request for bail pending the appeal of the conviction and sentence, the judge or Court of Appeals shall give due consideration of the length of time it will take to decide the appeal and the considerations of RCr 4.16*

COMMENTARY

The Kentucky Rules of Criminal Procedure have long recognized the need for expedited appeals of pretrial bail rulings to prevent hardships. RCr 4.43.

Justice is not served when a person who prevails on an appeal of a district court conviction or a felony conviction with a short sentence has served most or all of his sentence when he receives his reversal. Bail on appeal, which is in the discretion of the judge, can provide appropriate relief from this result if timely decided.

This change in the rule provides short but reasonable timelines for the decisions on whether bail on appeal will be granted in appeals of district court convictions to the circuit court, and short felony convictions appealed to the Court of Appeals. It also provides clear direction on the factors to consider in making the discretionary decision.

While there is not constitutional right to bail while the appeal is pending before the appellate court, *Braden v. Lady*, 276 S.W.2d 664, 666 (Ky. 1955), a successful appeal for someone who has substantially or completely served his sentence creates relief that has limited meaning.

This amendment encourages timely decisions about whether to provide an appellant with bail on appeal when his sentence is not long to be made in a fair, reliable way.

Department of Public Advocacy's Proposed Amendment of CR 98

CR 98(5) should be amended by adding the following new section:

(c) In forma pauperis appeals where the appellant was sentenced to death, a written transcript of the official videotape recordings shall be prepared by the Administrative Office of the Courts and filed with the clerk and certified by the clerk as part of the official record on appeal. This written transcript shall be an exception to Paragraph three (3) of this rule and shall constitute part of the original record on appeal. Within thirty (30) days after the date of the filing of the notice of appeal the circuit court clerk must forward to the Administrative Office of the Courts the official videotape recordings of the proceedings for transcription. The time for certification of the entire record on appeal by the circuit court clerk, as provided in paragraph (3)(b) of this rule, shall be held in abeyance until the completion of the transcription of the official videotape recordings by the Administrative Office of the Courts. The original record on appeal shall be prepared and certified by the clerk of the circuit court as soon after receipt of the transcription of the official videotape recordings as possible, but in any event within thirty (30) days after receipt of the transcription. In every non-indigent appeal, a notarized transcript of the videotape record may be certified and filed, along with the videotapes, as part of the official record on appeal at the option of any party or by agreement of the parties. In every non-indigent appeal, the parties may, upon their agreement and at the cost of the parties, prepare and submit for certification and filing as part of the original record on appeal the transcription of all or portions of the official videotape recordings.

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REASONS FOR THE PROPOSED AMENDMENT

This rule change will expedite appellate review in capital cases, as public advocates, attorney generals and the Supreme Court will be able to complete its work on these cases significantly quicker.

Paragraph three of CR 98 states that "[u]nless otherwise ordered by the court, no transcript of court proceedings shall be made a part of the record on appeal except as provided in Paragraph 4 [sic] of this rule." CR 98(5)(a) gives the appellate court the authority to "request the Administrative Office of the Courts to transcribe any portion of the videotape recordings it determines is necessary for a decision in the case."

The purpose of this proposed amendment to CR 98 is to require a written transcript be provided in all *in forma pauperis* appeals where the appellant was sentenced to death, and allowed in other appeals when the parties pay for it.

One of the original reasons for the institution of the videotape recording system was to reduce the amount of time it took court reporters to type a transcript of trial proceedings. With the advent of this new technology, the trial transcript in videotape form is ready upon completion of the trial. Although this new technology has reduced the time on the front end of the appeal for certifying the record on appeal, it has now effectively become the duty of the appellate attorney to labor in very time consuming review of the videotape so the appellate briefs can be prepared. It would be more cost effective to pay a trained individual (such as a legal secretary, transcriptionist, court report, and stenographer) for his/her time to transcribe the record than to pay an attorney for his/her time to do the time consuming review.

"Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Griffin v. Illinois*, 76 S.Ct. 585, 591 (1965). Although videotape trial records may be more economical for the Administrative Office of the Courts since they eliminate the necessity of a court report, such transcripts simply shift the cost of reviewing the videotape record to appointed or public defender appellate counsel, who have neither the time nor the resources to do that time intensive review.

In most instances, the appellate attorney representing the indigent criminal defendant did not represent that defendant at trial. The appellate attorney is not familiar with what occurred at the trial level and is not aware first-hand of the possible issues to be raised in the appellate brief. The appellate attorney does not know what portions of the record are relevant until she has viewed the entire videotape. The relevance of an occurrence at the beginning of the trial may not be discovered until the end of the trial. Reviewing of the videotapes in their entirety must then occur.

In cases where the sentence is death, a written transcript should be prepared by qualified AOC transcriptionists rather than requiring appointed appellate counsel to review the videos. The transcript should be made part of the official appellate record and should be available to all parties as well as the appellate court. The parties and the appellate court will then be able to carry out their duties in the most efficient and effective manner.

"[V]iewing a videotape requires much more time than reading a transcript. The task of reviewing the record is one a[n] appellate attorney] cannot delegate, but must waste time watching what [s]he could have read in one-tenth the time." *Pottinger v. Warden*, 716 F.Supp. 1005, 1008 (1989). The Kentucky Supreme Court has recognized "reviewing the entire videotaped record of a lengthy trial...is necessarily cumbersome." *Deemer v. Finger*, Ky., 817 S.W.2d 435, 437 (1991). Citing to the videotape record, as well as checking the opposing party's citations to the videotape, is a cumbersome procedure which consumes valuable time for appellate counsel. Instant access to specific occurrences at trial is, for the most part, impossible.

A videotape transcript of state court proceedings is an unacceptable transcript for *in forma pauperis* cases in the federal court system. Rule 11(f)(3) of the Rules of the United States Court of Appeals for the Sixth Circuit states:

(3) Appendix in Habeas Corpus Cases Where There is no Written State Court Record. The joint appendix in an appeal from the grant or denial of a writ of habeas corpus in a case in which the record of the proceedings in state court is in other than written form shall include a written transcript of all portions of the state court record which any party deems relevant to this court's resolution of the issues raised on appeal. Notwithstanding the provision of subsection (b) of this rule, parts of the record not included in the joint appendix may not be relied upon by the parties in presenting arguments....

Ohio, which is part of the Sixth Circuit, also uses a videotape recording as the official transcript for the record on appeal. However, Ohio has recognized the necessity of written transcripts in death penalty cases and its rules require a written transcript of the trial record in all capital cases. See Ohio Appellate Rule 9.

A transcript in cases in which the sentence is death also expedites any necessary review for post-conviction action. The number of appellate cases each year that have death sentences is not such that it would be cost prohibitive. ♦

PEREMPTORIES

What number of peremptories are available under RCr 9.40 when there is one defendant and alternate jurors are seated?

Springer v Commonwealth, 998 SW 2d 439 (Ky 1999) stated:

- RCr 9.40(1)-- 8 (per side)
- RCr 9.40(3)-- 2 (one per defendant if tried jointly)
- RCr 9.40(2)-- 1 (one "each side" if alternate jurors seated)
- RCr 9.40(2)-- 2 (one "each defendant" if alternate jurors seated)

for a total of 13 peremptories where two co-defendants are tried jointly.

RCr 9.40(2) states: "If one (1) or two (2) additional jurors are called, the number of peremptory challenges allowed *each side* and *each defendant* shall be increased by one (1)".

Under the *Springer* Court's analysis, with two co-defendants, RCr 9.40(2) yields the defense three peremptories one for the "each side" and two for the "each defendant". Even though the Court was not dealing with one defendant where alternate jurors are seated, logically RCr 9.40 should extend to this situation as well. With one defendant the "each side" provision nets the defense one peremptory and the "each defendant" provision nets a second peremptory even though the side and the defendant are one and the same. The defendant is both a defendant and a side. Had the Court meant otherwise, it could have said something like *each side* or *each defendant*, if there is more than one defendant.

Richard Hoffman
Assistant Public Advocate
Appellate Branch

PRACTICE TIPS

from DPA's Appellate Division

Collected by Susan Balliet, Assistant Public Advocate

New rules for designation of record

The Kentucky Supreme Court has a new policy that supplementation of the record will be denied on appeal unless the matter sought to be added is contained within the designation of record. This means the only way to ensure a complete record on appeal is to keep a list of court appearances, and a brief description of what occurred, and include this information in your designation of the record. If you forgot to keep a list, you can refer to the clerk's step sheet that has the date and time of each event, and try to refresh your memory with that. The following is a suggested form for a designation:

The defendant, _____, by counsel, designates for appeal the entire record of these proceedings, mechanically or otherwise recorded, including the arraignment, all pretrial hearings, all evidence presented, voir dire, all opening and closing arguments, all bench conferences, all in-chambers' hearings, all post-trial hearings and/or hearings on motion for new trial, and the final sentencing hearing.

<u>DATE(S)</u>	<u>EVENT</u>
_____	arraignment
_____	status conference(s)
_____	pretrial hearing(s)
_____	trial (includes voir dire and opening and closing arguments)
_____	new trial and/or post-trial hearing(s)
_____	final sentencing
_____	other

Richard Hoffman, Appeals, DPA Frankfort (with thanks to Rob Riley, Northern Regional Trial Manager)

Move to dismiss an indictment when there are gaps in grand jury proceedings.

RCr 5.16(2) provides that failure to have a record made of grand jury proceedings is grounds for dismissal of the indictment, unless the commonwealth can show good cause for the failure. Coincidentally, the Court of Appeals rendered a decision on this issue 11/5/99 in *Garrett v. Commonwealth* (unpublished opinion) ordering a remand for a hearing in which the commonwealth must show good cause for gaps in the grand jury tape. Failure of the commonwealth to make this showing should result in the dismissal of the indictment.

Richard Hoffman, Appeals, DPA Frankfort

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Object when KSP personnel attempt to testify by closed-circuit television

KSP personnel are beginning to testify via closed circuit television, a practice not authorized under *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed. 2d 857 (1988) or *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990), which hold a criminal defendant has the right to confront witnesses face-to-face. Under these cases, a state can abrogate the defendant's right to confrontation only where there is enabling legislation, a hearing is held on a case-by-case basis, and the state can demonstrate a compelling need. Such legislation exists in Kentucky only with respect to child witnesses.

Absent a showing of this nature, the commonwealth should not be allowed to use this procedure. A jury could easily infer that such a witness has heightened importance due to receiving special accommodation and being excused from appearing in court. Such a practice can also be attacked as discriminatory unless defense witnesses are given the same accommodation.

Richard Hoffman, Appeals, DPA Frankfort

Take care to verbalize important jurors' names during voir dire

During voir dire, please be aware that court reporters do not generally list a venire member's name unless someone says it out loud. And trial videos do not reveal which juror is speaking, unless the juror comes to the bench. Even then, counsel need to be sure to get each juror at the bench to say who they are, so that appellate counsel will know who it is you are trying to strike.

Per Curiam, Appeals, DPA Frankfort

Remember to show your charts and diagrams to the video camera

When you use a chart, diagram, or picture while addressing the jury, please be aware that the appellate court will never see it unless 1) you move it into evidence and it's small enough to fit in a manilla envelope, or 2) you place it in a location where a video camera will pick it up. If you do not, the appellate court will have to watch the back of your chart, and speculate as to what important fact your witness is marking with a red pen for the jury.

If it is impossible to place charts in a spot where both the jury and the video camera will "see" it, please get the court's permission to turn the chart around and hold it in front of the

camera long enough to record it in the record. If a witness has marked on it, get the commonwealth to agree and then say something like: "Let the record reflect that witness marked this area with a red pen." You can get the court's permission to do this with the commonwealth's charts and diagrams as well as your own.

Susan Balliet, Appeals, DPA Frankfort

Speak up in bench conferences, and don't wander too far from a microphone

Inaudible videos, especially during bench conferences, are the bane of appellate attorneys. A court reporter can ask attorneys and judges to speak up, but a video camera never complains, even when your words are totally inaudible. Commensurate with shielding your bench conference from the jury, you should always use as audible and clear a voice as possible at bench conferences. If the bench conference will require more than a few words, please request to address the court in chambers, where the odds of a good audible record are much higher.

In the courtroom, be aware, your voice gets fainter the further you wander from a microphone. If you have something to say that you want an appellate court to hear, speak louder whenever you stray from the mike. Or be sure to be "on mike" when you make your most important points.

Susan Balliet, Appeals, DPA Frankfort

Attention: *Practice Tips* needs your tips, too. Whether you are a trial attorney, an appellate attorney, or fit some other category, if you have a practice tip to share with public defenders, please email it to sjballiet@mail.pa.state.ky.us

"Before water turns to ice, it looks just the same as before. Then a few crystals form, and suddenly the whole system undergoes cataclysmic change."

Joanna Rogers Macy

Plain View

Ernie Lewis, Public Advocate

Flippo v. West Virginia
120 S.Ct. 7
10/18/99

Baker v. Commonwealth
1999 WL 1044495
(Ky. 11/18/99)

*Commonwealth v. Fox and
Peterson*
98-CA-082147-MR
(Ky. Ct. App. 11/5/99)
(Not to be published)

United States v. Worley
193 F.3d 390
(6th Cir. 9/29/99)

Ahlens v. Schebl
188 F. 3d 365
(6th Cir. 7/30/99)

U.S. v. Navarro-Camacho
186 F. 3d 701
(6th Cir. 8/6/99)

United States v. Peters
- F.3d -
1999 WL 791664
(6th Cir. 10/6/99)

United States v. Hill
- F.3d -
1999 WL 718116
(6th Cir. 10/4/99)

Flippo v. West Virginia
120 S.Ct. 7
10/18/99

The United States Supreme Court has held that there is no "crime scene exception" to the warrant requirement, reaffirming the previous holding in *Mincey v. Arizona*, 437 U.S. 385 (1978). In this case, the West Virginia Supreme Court had held that the police could enter a state park cabin and "process the scene" after being called by Flippo, finding him wounded, and entering his cabin and finding his wife dead.

In a per curiam decision, the Court rejected the opinion of the West Virginia Supreme Court. "A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement...none of which the trial court invoked here. It simply found that after the homicide crime scene was secured for investigation, a search of 'anything and everything found within the crime scene area' was 'within the law.'...This position squarely conflicts with *Mincey v. Arizona, supra*, where we rejected the contention that there is a 'murder scene exception' to the Warrant Clause the Fourth Amendment. We noted that police may make

warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises...but we rejected any general 'murder scene exception' as 'inconsistent with the Fourth and Fourteenth Amendments...'The case was remanded back for consideration of other issues.

Baker v. Commonwealth
1999 WL 1044495
(Ky. 11/18/99)

Baker was standing on a corner in an area of Lexington "commonly associated with drug and prostitution activity." He was seen by the police standing with a prostitute. The officers told both to leave and they did. Later, Baker was seen again on the same corner with the prostitute. Officer Richmond got out and approached Baker, who had his hands in the pockets. Baker was not threatening in any way. Richmond told Baker to take his hands from his pockets. Baker did not respond, so Richmond told him again to do so. Baker did, and threw a crack pipe and foil packet of cocaine to the ground. He was charged with possession of crack cocaine and drug paraphernalia. He moved to suppress. The trial court found that Baker's refusal to remove his hands from his pockets "created the necessary articulable suspicion that Appellant was about to commit a criminal offense," justifying the order. A conditional plea occurred, and an appeal was taken to the Court of Appeals.

The Court of Appeals found that the first order was not a seizure, but the second order was a seizure. The Court further found that under the totality of the circumstances the seizure was proper. The Supreme Court granted discretionary review.

In an opinion written by Special Justice Andrew Stephens, the Supreme Court affirmed the decision of the Court of Appeals. The Commonwealth contended that under *California v. Hodari D.*, 499 U.S. 621 (1991), no seizure occurred in this case, and thus the Fourth Amendment was not implicated. The Court rejected this position, and held that a seizure had occurred. The Court found that a seizure had occurred when Richmond demanded Baker to remove his hands the second time, utilizing the factors in *United States v. Mendenhall*, 446 U.S. 544 (1980). "Officer Richmond's subsequent direct order for Appellant to remove his hands from his pockets must be interpreted as a show of authority which, we believe, would compel a reasonable person to believe he was not free to leave...There can be no question then, that Officer Richmond 'seized' Appellant at that point in time."

The Court went on to determine that while a seizure occurred, it was legal under the circumstances. The standard they used originated in *Terry v. Ohio*, 392 U.S. 1 (1968). "Whether a seizure is reasonable requires a review of the totality of the circumstances, taking into consideration the level of police intrusion into the private matters of citizens and balancing it against the justification for such action." Under this standard, the Court affirmed both previous courts and held the seizure to be reasonable. The Court relied upon the fact that it was late, that it was a high crime area, that Baker was with a prostitute, that he was wearing clothing "that could conceal a weapon," and that he refused to comply with the initial request. While the Court acknowledged that Baker's conduct was consistent

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with innocence, that did not eliminate Richmond's reasonable suspicion "that criminal activity could have been occurring once Appellant failed to comply with the request to remove his hands from his pockets... When an officer is justified in believing that an individual, who is unquestionably not cooperative, may be armed, it would be clearly unreasonable to deny that officer the authority to take necessary measure to determine whether the individual is, in fact, carrying a weapon, and to alleviate the threat of physical harm." Accordingly, the search was legal.

This decision gives the police a potent weapon in the War on Drugs. Note that there was no allegation the Baker had committed an offense. He was standing on a corner talking to a prostitute. He was not seen committing an offense. No criminal offense had been reported. No anonymous tip had been called in. Baker was standing, talking, with the apparent right to be left alone. Yet, under this opinion, Baker had to obey the police or face a seizure. So much for the freedom to be left alone. See *Florida v. Royer*, 460 U.S. 491 (1983).

Parenthetically, the United States Supreme Court has now heard argument in *Illinois v. Wardlow*, 98-1036, on the issue of whether flight from the police constitutes a reasonable and articulable suspicion. Further, see some of the Sixth Circuit opinions below in which other potent weapons in the War on Drugs are apparent.

Commonwealth v. Fox and Peters
98-CA-002147-MR
(Ky. Ct. App. 11/5/99)
(Not to be published)

The police saw Fox and Peters driving a truck with a child standing in the passenger seat unrestrained. They stopped Fox, and during the stop observed what they viewed to be contraband. They were charged with complicity to receive stolen property. On a motion to suppress, the trial court suppressed the evidence seized from the truck bed and the Commonwealth appealed.

The Court of Appeals in an opinion written by Judge Gudgel and joined by Judges Buckingham and Knox affirmed the decision of the trial court suppressing the evidence. The Court held that KRS 189.125(7) applied to this situation, and thus an officer may not stop a vehicle for a violation of the child safety law unless there is another reason for the stopping. The Court was unpersuaded by the Commonwealth's argument that KRS 189.125(3)(6) and (7), read together, meant that where a child was not restrained, a stopping could occur without another offense being committed in conjunction. "Here, there is no dispute that the law enforcement officers' sole cause for stopping Fox's truck was the alleged failure to properly secure a young child in a child restraint seat... [S]uch a stop was illegal, and it follows that neither the searching of the bags located in the truck's bed nor the resulting seizure of property

was proper."

The Court also rejected the Commonwealth's contention that Peters had no standing to challenge the search. Standing for Peters occurred as a result of the truck being stopped. "Clearly, the stop of the truck was illegal with regard to both passengers. Thus, the evidence seized pursuant to that stop was not admissible against Peters."

United States v. Worley
193 F.3d 380
(6th Cir. 9/29/99)

"You've got the badge, I guess you can." Are these words expressions of consent to search luggage at an airport? Or are these words mere acquiescence to authority and hardly the expression of consent? This was the situation in this case, and the magistrate judge held that these words were consensual. The district judge held both that they were consensual and then that they were nonconsensual. Finally, this was resolved by the Sixth Circuit.

Judge Jones wrote for the majority, joined by Judge Boggs. He noted that the standard of review of the district judge's opinion was whether the opinion on voluntariness, an issue of fact, was clearly erroneous. He further noted that the government had the burden of proof by a preponderance of the evidence. Judge Jones further acknowledged that there was no evidence of duress or coercion that the period of detention was not lengthy, that the officers were in plain clothes and did not display arms, their conversation was amicable, and it occurred in a public place. However, despite these facts, Judge Jones found that the district judge was not clearly in error, based upon: "Harvey's[the officer] misunderstanding about the ticket and his insistence that the ticket was one-way when it was, in fact, round-trip suggested to Worley that any further disagreement was futile; Worley's subjective belief that he had no choice but to comply with Harvey's request to search the bag; Worley saw the officers' badges; Worley did not assist the officers in their search, nor did he make any additional statements which would indicate free and voluntary consent." Jones also noted that while it is not necessary, the officers did not tell Worley of his right not to consent to the search. Based upon all of these facts, the Court held that the district judge had not erred in finding the consent not to be voluntary.

Judge Nelson dissented "I am not persuaded that a reasonable police officer standing in Officer Harvey's shoes would have taken Mr. Worley's words as the 'opposite' of free and voluntary consent. The consent was rueful rather than cheerful, to be sure, but it was uncoerced consent. Mr. Worley—no stranger to police procedure—was not forced to give an affirmative response to the officer's request, and the response clearly was affirmative. 'I guess you can,' as a matter of plain English, does not mean 'I guess you can't.'"

(Continued on page 18)

(Continued from page 17)

Ahlers v. Schebil
188 F. 3d 365
(6th Cir. 7/30/99)

A woman alleged that when she was arrested, a correctional officer forced her to perform oral sex on him in return for food. An investigation ensued. It was found that there was a window of time within which the assault could have taken place. The "victim" was consistent in her allegations over time. She reported the incident immediately to a cellmate. Based upon this and other facts, the officer was arrested and charged with sexual assault. However, the "victim" failed to show up at the preliminary, and later appeared disinterested in pursuing the charges. Eventually charges were dropped. The officer, however, sued imder #1983, alleging an arrest without probable cause. The district judge granted a motion for summary judgment, and the officer appealed to the Sixth Circuit.

The Court, in an opinion written by Judge Keith and joined by Judges Daughtrey and Moore, affirmed the grant of the summary judgment motion. The Court acknowledged that an arrest "warrant is valid only if supported by probable cause." However, the Court further noted that the accusation "standing alone, was sufficient to establish probable cause, especially when bolstered by Sheriff's Department's records which confirm that there was a window of time within which the alleged sexual assault could have occurred." Nor did the Court fault the subsequent investigation. "Once probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused... This, however, does not mean that officers may make hasty, unsubstantiated arrests with impunity." Accordingly, because there was probable cause, the district judge had been correct in the granting of the motion for a summary judgment.

U.S. v. Navarro-Camacho
186 F. 3d 701
(6th Cir. 8/6/99)

The Ohio Highway Patrol received a tip indicating that Navarro would be carrying five kilos of cocaine into Toledo. After some time of watching for the vehicle, the police located him and pulled him over. The officers used a dog to sniff Navarro's vehicle, with the dog alerting near the driver's door. A search revealed 5 kilos of cocaine in a duffel bag. Navarro was arrested and charged with trafficking in cocaine. A motion to suppress was filed. Navarro alleged that he was not speeding, that the dog was not reliable, and that the officers had used "pseudo-cocaine", a substance used in training of narcotics dogs, in order to cause a positive alerting by the dog. A videotape of the encounter somewhat corroborated the allegation. The magistrate judge found that Navarro had been speeding (68 in a 65), that Dingo the dog was reliable, and that the officers' testimony that the gesture picked up on the video was a "low-five" was credible. The district judge adopted the

magistrate judge's findings. Navarro appealed to the Sixth circuit.

The Sixth Circuit, in an opinion written by Judge Boggs and joined by Judges Wellford and Moore, affirmed the lower court. The Court found the initial stop to have been accomplished with probable cause that Navarro was speeding. The Court noted that there was no evidence to support that the officers were using a dog search in order to stop and search the vehicles of Hispanic drivers.

The Court further found that the lower court's determination that Dingo the dog, whose reliability had been determined between 90-97%, was reliable was not clearly erroneous. Thus, there was probable cause to search the car based upon Dingo's alert to the car.

Finally, the Court reviewed the evidence of police misconduct. The Court acknowledged that "the encounter between Stevens and Baranowski, as depicted on the videotape, looks unnatural and may be subject to conflicting interpretations." However, based upon the clearly erroneous standard, the Court was unwilling to find the district judge to have been in error. "[A]n independent review of the videotape does not give us a settled feeling that the fleeting interaction between Stevens and Baranowski was the transfer of any object, yet alone a package of pseudo-cocaine." Based clearly upon the Court's standard of review and limited appellate review, the findings and holding of the district judge were affirmed.

The Court, however, was clearly troubled by the possible pretextual nature of this case. "Navarro's able counsel has constructed a narrative that has at least a possibility of being true. Navarro believes that criminal police officers repeatedly follow a policy in which they deliberately stop Hispanic motorists on trumped-up charges, exchange in full view of a police video camera a substance designed to cause a drug dog to alert, apply the substance to a motorist's car, and then either allow a drug dog to alert to the substance, or simply invade the interior of the car so that the dog can more easily alert to the multi-kilogram quantities of drugs suspected to be therein. However, we must emphasize that the alternative scenario also could be true. Drug runners speed; police stop them for speeding; and a drug dog alerts to large quantities of drugs."

The concurring judges were also troubled by the case. Judge Wellford wrote a concurring opinion in which he said that "[I]f one were to ignore this standard in this difficult case, there would be a temptation to arrive at the different result urged upon us by defendant. We, however, must follow the law." Judge Moore stated that "I am troubled by several aspects of this difficult case. First, I find the actions of Troopers Stevens and Baranowski, as recorded on video tape, to be very suspicious... My second concern, and the reason for my separate writing, relates to the allegations of race and ethnicity targeting by the Ohio High Patrol... In a proper case, I believe that a

(Continued on page 19)

defendant in Navarro's position could achieve suppression of the evidence or dismissal of the prosecution by demonstrating that the investigatory practice had a discriminatory purpose and a discriminatory effect."

United States v. Peters

-- F.3d --

1999 WL 791664

(6th Cir. 10/6/99)

Tony Peters was carrying a black attaché case from an Amtrak train. Police observed him get out of the train, make a telephone call, and get onto a bus. Officers asked to talk with him. Peters' ticket was in the name of Tony Morris. Peters had additional identification in other names. Peters denied having any luggage. The attaché case was then placed into the luggage area of the bus, where it was subjected to a dog search. After the dog alerted to the attaché case, it was searched and 400 grams of heroin were discovered. Peters was charged with possession with intent to distribute heroin. His motion to suppress was overruled. At his trial, he again denied that the attaché case was his. Thereafter he was convicted at trial, and sentenced to 120 months in prison. He appealed.

The Sixth Circuit affirmed the conviction, including the decision of the district judge on the motion to suppress. The Court, in an opinion written by Judge Contie and joined by Judges Keith and Norris, held that by disavowing the attaché case, Peters had abandoned any reasonable expectation of privacy that he had. Accordingly, he had no standing to challenge the search. "This and other circuits have recognized that '[o]ne who disclaims any interest in luggage thereby disclaims any concern about whether or not the contents of the luggage remain private.'"

The Court further found that the abandonment of the attaché had not been caused by an improper seizure of his person. Relying upon *Florida v. Bostick*, 501 U.S. 429 (1991), the Court held that no seizure occurred here when Peters was merely asked questions and sought identification "as long as the officers do not convey a message that compliance with their requests is required."

United States v. Hill

-- F.3d --

1999 WL 781810

(6th Cir. 10/4/99)

This is the third case during this reviewing period where there was evidenced a concern that police officers in the Sixth Circuit area are violating the Fourth Amendment for pretextual reasons, and in some circumstances, conducting seizures based upon profiles. Yet, while the Court expresses its concern, the Court also affirms the lower court's decisions based upon the present state of the law.

Here, John and Malcolm Hill were driving a U-Haul in Shelby

County Tennessee. An Officer saw them and pulled in behind them "because it was a U-Haul, and because it had been his experience that U-Hauls carry narcotics." When the U-Haul traveled 62 miles per hour in a 55, it was pulled over. John, the driver, got out. His hands were shaking "uncontrollably." He gave inconsistent and unconvincing answers. He denied a request for a consensual search. Thereafter, 2 dogs alerted to his U-Haul. Eventually, 502 kilos of cocaine was found. After the motion to suppress was denied, a conditional plea was entered, and an appeal taken to the Sixth Circuit.

The Court, in an opinion written by Judge Clay and joined by Judges Krupansky and Boggs, affirmed. The short version of the holding is as follows: "In summary, the district court properly found that Deputy Whitlock had probable cause to stop Defendants for speeding; properly found that Deputy Whitlock had a reasonable suspicion to detain Defendants beyond the purpose of the stop; and properly found that Deputy Whitlock had probable cause to search the U-Haul based upon Spanky's alert. Accordingly, we conclude that the district court did not err in denying Defendants' motion to suppress the 502 kilograms of cocaine found in the U-Haul."

The more interesting part of the opinion is in the text. The Court quotes at length from the dissenting opinion in *United States v. Akram*, 165 F.3d 452 (6th Cir. 1999), including: "It is clear to me from the cases that reach our court--including this one--that the officers are looking for 'profile' or 'target' vehicles and occupants. A rental truck is a profile or target vehicle...The courts have given the police this extraordinary power to make pretextual stops and searches of vehicles..." The court itself states that it shares "in the concern that police officers are using the state of the law in this Circuit as carte blanche permission to stop and search 'target' or 'profile' vehicles for drugs...Although U-Hauls may in fact be used to carry illegal contraband, the potential for police officers to abuse the Whren principle is apparent and when applied to 'target' vehicles, such as U-Hauls—which are typically used by lower income people to move who do not have many personal belongings and cannot afford the expense of a professional moving company, or typically used by young college students making their first move from home—the abuse becomes particularly distasteful." ♦

*Somewhere, something incredible
is waiting to be known.*

Carl Sagan

Short View. . . Ernie Lewis, Public Advocate

1. *Florida v. Johnson*, 119 S.Ct. 1128 (1999). The Florida Supreme Court has held that when a person puts out his car to police inspect and prior to even being aware of the police, that the police may not conduct a full search of the car incident to an arrest under *New York v. Belton*, 453 U.S. 454 (1981). The Court based this upon the common law of *Exton v. Jones*, 525 U.S. 118 (1998), which held that when the officer is not going to arrest a person but is going to issue their warrant that is why not conduct a full search of the car. Using this reasoning, the Court remanded the case in order to determine whether the defendant had been aware of the presence of the police (who were searching his house) when he arrived at his house and left his car.
2. *In re M.D.R.*, 601 N.W.2d 214 (Minn. Ct. App. 10/5/99). A police officer may not use his suspicion that a person who has been stopped for a traffic violation will flee in order to conduct a *Terry* frisk for weapons. Here, a juvenile was stopped for running a stop sign and turning the wrong way down a one-way street while riding his bicycle. Although there was no evidence the juvenile had a gun, the officer conducted a frisk and found a gun. He justified the search based upon his fear that the juvenile was going to flee.
3. *Florida v. J.L.*, 120 S.Ct. 395 (11/1/99). The United States Supreme Court has granted cert. from a Florida opinion found in 727 So. 2d 204 (1998) holding that an anonymous tip regarding the dress of a youth who was carrying a gun was insufficient to provide reasonable suspicion to allow for a *Terry* frisk of the individual.
4. *R.C. v. Pumas Unified School District*, 192 F.3d 1260 (9th Cir. 9/30/99 as amended 10/21/99). A dog sniff of students in a school is a search, where there is no drug problem, dog sniffs are unreasonable and in violation of the Fourth Amendment. The Court distinguished *United States v. Place*, 462 U.S. 696 (1983) which had held that a canine search of luggage is not a search by noting the obvious difference in that which is being sniffed. The 9th Circuit recognized the split in the circuits, and came down with the 5th Circuit, which had held that dog sniffs of people were searches in *Horton v. Goose Creek Independent School District*, 690 F. 2d 476 (5th Cir. 1982). The Court went on to analyze the reasonableness of the search, and found it wanting because there was no drug problem in the school, there was no individualized suspicion, and the search in particular was indiscriminate and invasive.
5. *United States v. Peoples*, - F.Supp.3d -, 1999 WL 950957 (W.D. Mo. 10/5/99). Hosts and their visitors have no reasonable expectation of privacy in their conver-

6. *State v. Mitchell*, - So.2d -, 1999 WL 955500 (La. 10/19/99). In a narrow decision, the Louisiana Supreme Court has held that the existence of security measures at a home, such as burglar bars, will prevent the police from the obligation of knocking and announcing to execute a search warrant. Relying on *Reynolds v. Wisconsin*, 528 U.S. 385 (1997), the Court said the burglar bars constitute a reasonable argument that Mitchell would rather destroy evidence to avoid entry than the officers' safety during entry. The bars prevented the police in order that the presence of the burglar bars were intended so much to slow down the entry of the police as to protect the occupants from intruders. As such, it was reasonable for the police to infer that the delay they would encounter in overcoming the burglar bars at the front door after waiting to knock and announce their presence would only increase the likelihood that defendant would be able to dispose of the drugs he possessed on his person before entry could be successfully accomplished.
7. *State v. Norris*, 1999 WL 1071689 (Ohio Ct. App., 11/5/99) (not yet final). Opening a motel door does not put a defendant into a public place sufficient to permit the police to enter the room and arrest the defendant for whom they had probable cause. Relying upon the fact that he had never crossed the threshold when he opened the door, and upon *Peyton v. New York*, 445 U.S. 753 (1980), the Court held that a warrant was needed to enter the room and arrest the defendant. ♦

There is only one thing more painful than learning from experience and that is not learning from experience.

Archibald McLeish

Gall Capital Case Heard before 6th Circuit

The case of Eugene William Gall, Jr. was orally argued before the United States Court of Appeals for the Sixth Circuit in Cincinnati, Ohio at 3:00 p.m. Wednesday, November 3, 1999. The constitutionality of Gall's murder verdict and death sentence are being challenged. The panel of Chief Judge Boyce F. Martin, Jr., Nathaniel R. Jones and Ralph B. Guy, Jr. heard argument from Public Advocate Ernie Lewis and Assistant Attorney General Rickie Pearson for an hour.

The concluding remarks of the Assistant Attorney General evoked a significant response from the Court. Pearson, citing what he termed an apropos caveat in *Boyd v. California*, 494 U.S. 370, 380 (1990) said, "there is a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is equally strong policy against retrial years after the first trial where the claimed error amounts to no more than speculation." Judge Martin took issue with that characterization, "Now just a minute Mr. Pearson, I'll tell you this, this case has been delayed in large measure by the actions of the Kentucky Attorney General. It could have been pushed. If you are talking about years delay let me tell you one thing it's your burden to get the cases moving." Pearson said, "That's right. Oh no, sir, I didn't mean it that way." "Well that's the way I interpreted it," said Judge Martin. "You shouldn't have interpreted it that way," said Pearson. "I think what I was thinking about is that he was convicted in 1978 and it's just taken a long process." Judge Martin disagreed, "No, the problem is that states will not fund adequate representation. They will not provide the monetary need to move these cases along. We can't do it. We sit here and I am trying to manage 20 of them right now and I can't get the states to do a thing.... The problems are the legislature if they want to move these cases they've got to give the public defender the adequate funds to proceed in the cases, and if they've got one person handling 20 cases there's no way we'll ever get them all heard." Pearson told the Court. "I will take that back to my boss, sir." Judge Martin instructed Pearson, "Oh, he hasn't listened yet and he's not about to and neither is the Governor. I know what is going on. It's happening in Ohio and it's happening in Tennessee. Nobody wants to appropriate the funds to proceed forward, and it's just money." "And everybody wants the death penalty," Judge Jones added. Pearson responded, "Well sir, I think where it's appropriate. I don't think anybody wants to engage in the ultimate punishment where it's not appropriate."

There are many reasons why the ultimate punishment is not appropriate for Eugene Gall, Jr. Eugene is severely mentally ill, emotionally disturbed, and brain-damaged. His illnesses are chronic. He was sexually abused as a child. At his trial, his sentencers did not consider or give effect to the weighty mitigation before sentencing him to death. Their verdict of death lacks minimal trustworthiness and reliability.

The 53-year-old Hillsboro, Ohio man, Eugene Gall, Jr., has been incarcerated at the Kentucky State Penitentiary in Eddyville since his 1978 conviction. Eugene has been brain damaged since his youth. He experienced grand mal seizures before his 20th birthday. He was sexually abused as a child. At age 22, he was declared incompetent to stand trial on Ohio charges. He spent 2 years in an Ohio mental hospital before being found competent to be tried. Thereafter, he spent 5 years in an Ohio prison before being released on parole in 1977.

A year later, Eugene Gall, Jr. was arrested and charged with the murder of 12 year old Lisa Jansen. The evidence at his trial of his severe mental and emotional illnesses was enormous. Gall was diagnosed in 1978 by a psychologist and a psychiatrist as suffering from paranoid schizophrenia, the most severe mental illness. Both mental health experts testified that Mr. Gall was insane when he killed Lisa Jansen. The state has never presented any evidence that Gall was not mentally ill, not emotionally disturbed, not brain damaged. In fact, the Commonwealth's psychiatrist who very briefly examined Gall shortly after the crime, later agreed in 1989 that Mr. Gall was mentally ill. In 1991, a neurologist and a neuropsychologist examined Mr. Gall and found that he was brain damaged at the time he killed Lisa Jansen.

On September 30, 1978, 5 months after the April 1978 murder, a jury found Eugene guilty of Lisa Jansen's murder, and on October 2, 1978 the jurors sentenced him to die.

The brief filed in the Sixth Circuit Court of Appeals on behalf of Eugene raises 15 fundamental constitutional errors. These key errors were considered for the first time by the Sixth Circuit Court of Appeals on November 3, 1999.

Eugene's brain damage, paranoid schizophrenia, and emotional disturbance led to the commission of this tragic crime. Flatly ignoring the overwhelming mental health evidence, neither the jurors nor the trial judge agreed that Mr. Gall suffered from any mental or emotional illness. The jurors' and judge's failure to even consider the role his mental illness played in this crime constitutionally undermines the reliability and trustworthiness of their decision to sentence Eugene to death. The June 1999 *White House Conference on Mental Illness* highlighted the prevalent stigma and discrimination of mental illnesses because of a fundamental lack of understanding of what it is and its effects. Mental illness is one of the most devastating stigmas of the 20th Century. See <http://www.mentalhealth.gov/default.asp>

The trial was held in rural Boone County, Kentucky only 5 months after the crime. Immense publicity in the newspapers and television saturated the jurors called upon to decide the case. Prospective jurors making macabre jokes during jury selection about the death penalty. Jurors were allowed to sit who had been exposed to this massive, prejudicial publicity.

(Continued on page 22)

(Continued from page 21)

The trial itself was fundamentally unfair. Rather than counter the substantial evidence of severe, longstanding mental illness presented by the defense at trial, the prosecutor ridiculed the insanity defense, kept critical mental illness records about Mr. Gall's mental illness from the Commonwealth's psychiatrist, and made improper comments about Mr. Gall's failure to testify at trial.

Gall's attorneys, Ernie Lewis and Ed Monahan, are confident that Eugene's significant mental illness, emotional disturbance and brain damage will be recognized by the Sixth Circuit and that his unfair and unreliable death sentence will be reversed. As cautioned by former Justice Thurgood Marshall, "When we tolerate the possibility of error in capital proceedings . . . we hasten our return to the discriminatory, wanton, and freakish administration of the death penalty that we found intolerable in *Furman*."

CRITICAL FACTS OF GALL CASE

1. Eugene was and is brain damaged but jurors never heard about this injury.
2. He is severely mentally ill. Schizophrenia is the most tragic disease left in Western civilization.
3. Eugene was sexually abused as a child.
4. He grew up in a dysfunctional family.
5. The prosecutor's misconduct at trial prevented fair consideration by the jurors of significant mitigation, Eugene's longstanding mental illness.
6. There are issues that have not been fully reviewed on their merits due to the highly technical federal rules of nonretroactivity and procedural default, e.g., *Caldwell* recommendation issue, *Mills* unanimity issue, and the failure of Eugene to be present at a critical deposition.
7. Eugene was tried in a small, rural county which was saturated with unfair publicity that predisposed jurors to prejudice and towards a sentence of death.
8. Eugene was tried shortly (5-1/2 months) after the crime, the second quickest capital trial in Kentucky since 1976.
9. Eugene was represented by two attorneys doing public defender work who were paid a total of \$14,400 for representing *all* indigent criminal defendants in Boone County for the entire year.
10. He was not evaluated at trial by a neurologist or neuropsychologist, and thus his brain damage was never presented to the sentencers, the jurors and judge.

11. Eugene's case was one of the very first death sentences under Kentucky's new 1976 law, and one of the first death cases reviewed under the new law by the Kentucky Supreme Court. Had Eugene's appellate review been conducted by the current Kentucky Supreme Court his conviction would have been reversed on a number of different issues.
 - ◆ Numerous Kentucky cases have been reversed due to the jurors being told that their verdict was only a *recommendation* to the judge, substantially lessening their understanding of their legal responsibility. The jurors in Eugene's case were told their verdict was only a recommendation.
 - ◆ Cases have been reversed for telling jurors their findings on mitigation had to be unanimous because the Constitution guarantees that each juror must be able to consider *individually* whether something is mitigating. Gall's jurors were told that their findings had to be unanimous.
 - ◆ Kentucky cases have been reversed for the failure to define extreme emotional disturbance for the jurors. Eugene's jurors had no definition of this mitigator.
 - ◆ Kentucky cases have been reversed when the accused was not present during the taking of crucial testimony at depositions. In this case, Eugene was not present when the Commonwealth's psychiatrist's, Dr. Chutkow's, testimony was taken by deposition and later used at trial and relied on by the Kentucky Supreme Court in finding no error.
12. Jurors asked about parole eligibility during deliberations, indicating a willingness to sentence Eugene to less than death.
13. This case was tried before the Kentucky General Assembly established the sentence of life imprisonment without the possibility of parole for at least 25 years and life imprisonment without parole and thus jurors did not have those sentence options.
14. Since the trial, jurors have reported that they improperly considered mental illness as an aggravating, not mitigating, factor and that they would have considered a lesser sentence if guaranteed that Eugene would not be paroled.
15. Eugene has functioned peacefully and productively while in the highly structured maximum security Kentucky State Prison in Eddyville, Kentucky for over 21 years. ◆

Juvenile Executions Update

From the Juvenile Justice Center

Below is an editorial by ABA President William G. Paul urging the end to the juvenile death penalty. President Paul has also written letters to Governors Gilmore and Bush urging them to stay three upcoming juvenile executions; you can find the text of these letters on the Internet at <http://www.abanet.org/media/deathpenalty.html>.

AMERICA ON THE THRESHOLD OF SETTING A SHAMEFUL RECORD

U.S. Should Ban Death Penalty for Juvenile Offenders

By William G. Paul

President, American Bar Association

The United States stands at the threshold of a new millennium poised to execute a record number of young men who were juveniles when they committed their crimes. Three youths sentenced to death for crimes they committed when they were juveniles are scheduled for execution in January - two in Virginia and one in Texas. Seventy others reside on death rows in the United States.

These three executions for crimes committed by persons so young will set a record in the United States since the reinstatement of capital punishment in 1976, placing the United States with Iran, Nigeria, Pakistan, Saudi Arabia and Yemen as the only countries who have executed juvenile offenders in the past decade. Most other nations have banned the death penalty altogether for those whose crimes were committed when they were juveniles. International conventions that set the tone for humanity and civility in the world, such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, condemn execution of defendants for crimes committed before age 18.

The United States has been found by the Inter-American Commission on Human Rights to violate international law, because we, alone among the nations of the western world, execute individuals for crimes they committed as juveniles. Even within the U.S., the federal government and 15 of the 38 states that impose capital punishment prohibit the death penalty for crimes committed under the age of 18.

While the American Bar Association believes that young people who commit violent crimes should be appropriately

punished, it has long opposed imposition of the death penalty on any person for an offense committed while they were under the age of 18. Recognizing the paired trends of a growing reliance on capital punishment generally and a willingness to prosecute juveniles as adults, the ABA in 1983 cited a looming specter of juvenile executions, but could find no rational justification for killing juvenile offenders.

Why is it necessary to use the death penalty for those who were juveniles when they committed the crime? We know that adolescents lack a full appreciation of the consequences of their actions, and that juveniles sometimes make rash and terrible decisions because they are young and haven't developed the judgment we expect of adults. For this reason, juveniles cannot vote or serve as jurors. Experts confirm that capital punishment has little or no deterrent value for adolescents. With no deterrent benefit, the only other possible rationale to execute those who killed when they were juveniles is to satisfy our need for vengeance. Many of the young men on death row have crippling mental or behavioral disorders, or have suffered horribly from physical, psychological and sexual abuse. It reflects more upon us as a society than it does on the offender that we would seek legal vengeance through execution for the crimes of a child.

The change of a year is a time of looking both back in time and forward. The change of a century, and indeed of a millennium, is even more emphatically a time of measuring - measuring progress along with time. Governors James Gilmore of Virginia and George W. Bush of Texas have the power to commute these death sentences to life imprisonment. Let us raise our voices and urge them to grant clemency before the executions scheduled for Jan. 10 for Douglas Christopher Thomas of Virginia, Jan. 13 for Steve Roach of Virginia, and Jan. 25 for Glen McGinnis of Texas. Urge them to do that, before it is too late.

If the United States is to grow, to progress, let it not be at the cost of our humanity. Let us reassert our nation's leadership in human rights and abolish the juvenile death penalty. But pending that, let each of us act to save the lives of the three juveniles now slated to die as we march into the millennium. ♦

*The price of greatness is
responsibility.*

Winston Churchill

Cost, Deterrence, Incapacitation, Brutalization and the Death Penalty The Scientific Evidence

Statement Before the Joint Interim Health and Welfare Committee

Gary W. Potter, PhD.
Department of Justice and Police Studies
Eastern Kentucky University

March 20, 1999

Introduction

There is probably no public policy issue related to crime control that has been researched and studied over as long a period of time as the death penalty; in more varied ways than the death penalty; or in greater volume than the death penalty. Put simply, the dilemma is this: there is no crime control issue we know more about than the death penalty and there is no crime control issue where the scientific research has been more ignored by decision-makers and the public than the death penalty. The fact is that the death penalty debate is much more than a matter of conflicting opinions, morals, ethics, and values. There are a plethora of well established, scientifically documented facts at the disposal of both the public and lawmakers. These facts have emanated from research that has been replicated over and over again and subjected to the most rigorous scientific review process available. These facts are well beyond refutation. In sum, it is fair to say to a level of certainty that far exceeds the most rigorous standards of proof in any court in America, that the death penalty, as presently constructed and administered is deplorably bad public policy. In studies using entirely different methodologies, at different times, in different places, constructing research questions in different ways, the facts are immutable and unchanging. The scientifically proven facts of the death penalty are clear. Those facts are:

1. The death penalty has no deterrent value to society. No evidence supporting either a general deterrent or a specific deterrent impact exists and no evidence supporting an incapacitation impact exists. The death penalty performs no crime control function whatsoever.
2. The death penalty, in fact, not only does not deter homicide and other crimes, but through a brutalization effect actually increases both homicide and violent crime markedly, seriously increasing the danger to society in states where it is used with any degree of frequency whatsoever.
3. The death penalty, even as constructed in post-*Furman* statutes, is arbitrary, discriminatory and capricious in its application. The death penalty, in every jurisdiction, discriminates on the basis of race of offender, race of victim, gender, age,

and socio-economic status.

4. The death penalty, as currently structured and administered, results in jury confusion and misinterpretation of the law at every stage of the process. This confusion seriously prejudices the defendant and results in both reversals on appeal and in a large number of wrongful convictions.
5. The death penalty, as currently structured and administered, results in the wrongful conviction and execution of the innocent at a level totally unacceptable in any civilized society.
6. The death penalty is enormously costly, strains the budgets of both state and local governments and diverts funds from more effective crime control strategies and victim assistance programs. This is true in all jurisdictions regardless of state statute. The cost of executions exceeds the cost of life imprisonment by a factor of better than two to one in every jurisdiction studied. And this enormous cost is borne by the taxpayers for a crime control policy that only makes violent crime worse.

The overwhelming body of scientific studies supporting each of these propositions is presented in a written addendum to my testimony, summarizing every important scholarly study on the death penalty since 1980. I believe that if you take the time to read that scientific evidence it will become obvious that the weight of the scientific evidence against the death penalty is not just in preponderance, it is overwhelming and virtually unrefutable.

I have been asked today to specifically discuss in some detail issues of cost, deterrence and brutalization. Allow me to begin with the evidence on cost.

The Cost of the Death Penalty

One of the least obvious, but most important problems with the death penalty is its enormous cost. Research on cost has consistently shown that pursuing a capital case is at least twice as costly as housing a convicted murderer for life in a high security correctional institution. Cost studies in North Carolina, Kansas, Texas, Kentucky, Nebraska and New York all show varying costs but similar ratios with regard to expense of death

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as a sentencing option:

1. In New York each death penalty trial costs \$1.4 million compared with \$602,000 for life imprisonment. The cost of imposing the death penalty in New York State has been estimated to be \$3 million for each case (*NY Daily News*, July, 28, 1998).
 2. In Florida the cost of each execution was estimated to be \$3.2 million, about 6 times the amount needed to incarcerate a convicted murderer for life. From 1973 to 1988 Florida spent \$57 million on the death penalty (*Miami Herald*, July 10, 1988).
 3. In Kentucky the cost of a capital trial varied between \$2 and \$5 million dollars (Blakley, A.F. 1990. Cost of Killing Criminals. *Northern Kentucky Law Review* 18, 1: 61-79).
 4. The most comprehensive study of the costs of the death penalty found that the state of North Carolina spends \$2.16 million more per execution than for a non-capital murder trial resulting in imprisonment for life (Duke University, May 1993; Carter, M. 1995. Cost of the Death Penalty: An Introduction to the Issue. Nebraska Legislature, Legislative Research Division; Cook, P.J. and D.B. Slawson. 1993. Costs of Processing Murder Cases in North Carolina. North Carolina Administrative Office of the Courts.).
 5. In California the death penalty adds \$90 million annually to the costs of the criminal justice system. \$78 million of that cost is incurred at the trial level (*Sacramento Bee*, March 18, 1988).
 6. The Judiciary Committee of the Nebraska legislature reported that any savings from executions are outweighed by the legal costs of a death penalty case. The report concluded that death penalty does not serve the best interests of Nebraskans (*Nebraska Press & Dakotan*, January 27, 1998; Carter, M. 1995. Cost of the Death Penalty: An Introduction to the Issue. Nebraska Legislature, Legislative Research Division.).
- In Texas the cost of capital punishment is estimated to be \$2.3 million per death sentence, three times the cost of imprisoning someone at the highest possible security level, in a single prisoner cell for 40 years (*Dallas Morning News*, March 8, 1992; Dieter, R.C. 1994. *Future of the Death Penalty in the U.S.: A Texas-Sized Crisis*. Death Penalty Information Center. Washington, D.C.).

These high costs strain local and state budgets, divert money from other crime control and victim assistance programs, result

in tax increases, prolong and extend the anguish of victims families over years of appeals and successive execution dates, reduce other governmental services and often results in deferring salary increases for governmental employees

1. In Indiana three recent capital cases cost taxpayers over \$2 million just for defense costs. Prosecution costs usually exceed those of the defense (*Indianapolis Star/News* February 7, 1999).
2. In Washington State, officials are concerned that costs for a single capital case will approach \$1 million. The county in which the trial was held had to let one governmental position go unfilled, postponed employee pay hikes, drained the county's \$300,000 contingency fund and eliminated all capital improvement projects for the fiscal year (*The Spokesman-Review*, January 19, 1999).
3. Thurston County in Washington has budgeted \$346,000 for 1999 alone, to seek Mitchell Rupe's third death sentence. Rupe is dying from liver disease and the state of Washington has had to undertake extreme measures to save Rupe from a natural death so that he may be executed. Since 1997, Thurston County has spent \$700,000 just for the most recent sentencing hearing (*Seattle Times*, March 12, 1999).
4. The state of Ohio spent over \$1.5 million to execute one mentally ill man who was a death penalty volunteer. Some of the costs included \$18,147 in overtime for prison employees and \$2,250 in overtime for State Highway Patrol officers to provide support for the execution. In addition the state had to pay overtime for 25 prison public information officers who worked the night of the execution. The state also spent \$5,320 on a satellite truck so the official announcement of the execution could be beamed to outside media. Ohio's Attorney General had between 5 and 15 prosecutors working on the case, expending 10% of the state's annual budget for its capital crimes section, over a five year period. Keeping the man who was executed in prison for his entire life would have cost less than half as much (*Columbus Dispatch*, February 28, 1999).
5. Because of death penalty trial costs, Okanogan County Washington had to delay pay raises for the county's 350 employees; could not replace two of four public health nurses in the county, and had to stop all non-emergency travel and put on hold on updating county computers and vehicles (*Associated Press*, April 2, 1999).

The death penalty also has a negative impact on the ability of criminal justice agencies to carry out their missions and per-

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form their duties. The immense cost of the death penalty endangers the public in tangible and compelling ways as these examples indicate:

1. New Jersey laid off more than 500 police officers in 1991, at a time when it was putting into place a death penalty statute that would cost \$16 million a year, more than enough to rehire all 500 officers (American Bar Association, 1992; 16).
2. In Florida, budget cuts resulting in a reduction of \$45 million in funding for the Department of Corrections required the early release of 3,000 inmates (American Bar Association, 1992: 21) while spending an estimated \$57.2 million on executions (Von Drehle, 1988: 12A).
3. Professors Richard Moran and Joseph Ellis estimated that the money it would take to implement the death penalty in New York for just five years would be enough to fund 250 additional police officers and build prisons for 6,000 inmates (Moran and Ellis, 1989).
4. Ten other states also reported early release of prisoners because of overcrowding and underfunding (American Bar Association, 1992: 54). In Texas, the early release of prisoners has meant that inmates are serving only 20 percent of their sentences and re-arrests are common. On the other hand, Texas spent an estimated \$183.2 million in just six years on the death penalty (American Bar Association, 1992: 54).
5. Georgia's Department of Corrections lost over 900 positions in the past year while local counties have had to raise taxes to pay for death penalty trials (American Bar Association, 1992: 18).

There are a large number of factors which come together to create the exceptionally high costs associated with the death penalty. First of all, both procedural and substantive constitutional safeguards put in place by the Supreme Court in death penalty cases drive up trial costs and the cost of appeals. As a result there is limited plea bargaining in death penalty cases (a factor which keeps down costs in all other prosecutions); there are lengthy pretrial motions; extensive investigations; increased use of expert witnesses; extensive voir dire; preemptory challenges; and extensive trial and appeal processes. Virtually none of these requirements are subject to reform or state recourse because they were necessitated by Supreme Court guidelines for the death penalty. In addition, almost every capital defendant in America is poor and taxpayers must invariably pay defense costs.

Let me emphasize two issues here:

1. While it is true that some of the costs of death penalty cases result from the appeal process the vast majority of the increased costs are front-end costs. That is, prosecutors spend much more on death penalty cases than on noncapital homicide cases. They reassign prosecutors from other cases, they divert monies for expert witnesses, jury consultants, additional investigation and legal research. This means that not only are enormous sums of money dedicated to death penalty prosecutions, but those moneys are diverted from literally dozens of other criminal cases.
2. The net effect of this front-end cost in capital prosecutions is that victims in many cases seen as less important by prosecutors' offices are not given adequate support or vigorous advocacy by the state. It also means that victim assistance programs, which should provide financial aid to victims, counseling for victims, and vital assistance in reconstituting their own lives are nonexistent and underfunded, all for the sake of a crime control policy which has no measurable social benefit.

In view of the fact, as we shall in the next portion of my testimony, that scientific research can establish no incapacitative or deterrent benefit from the death penalty, this cost is entirely wasted.

General Deterrence

The most commonly advanced argument in support of capital punishment has been that no offender wants to die, therefore the threat of execution will deter homicide in society at large. While this may seem a common sense fact, it is anything but sensible. The scientific facts are very simple. No credible study of capital punishment in the United States has ever found a deterrent effect.

In studies of contiguous states, at least one with the death penalty and at least one without, research has shown that there is no deterrent impact from capital punishment (Sellin, T. 1980. *The Penalty of Death*. Beverly Hills, CA: Sage Publications).

In studies of states where the death penalty was adopted or reinstated after having been abolished, research has once again failed to show any deterrent effect. (Sellin, T. 1980. *The Penalty of Death*. Beverly Hills, CA: Sage Publications; Zeisel, H. 1977. The deterrent effect of the death penalty: Facts v. Faith. In *The Supreme Court Review 1976*. P. Kurland (ed.). Chicago: IL: University of Chicago Press).

Comparative data also fails to demonstrate any deterrent value to the death penalty. The United States is the only Western

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democracy that retains the death penalty. The United States also has, far and away, the highest homicide rate in the industrialized world (Kappeler, V., M. Blumberg, and G. Potter. 1996. *The Mythology of Crime and Criminal Justice* (2nd ed.). Prospect Heights, IL: Waveland Press: 310).

Comparative data compiled by region within the United States shows the same pattern. According to data from the Bureau of Justice Statistics, Southern states have consistently had the highest homicide rates in the country. In 1997, the South was the only region with a homicide rate above the national average, despite the fact that it accounts for 80% of all executions. The Northeast, which accounts for less than 1% of all executions in the U.S., has the lowest homicide rate. Similarly, when states with the death penalty are compared to those without the death penalty, the data show that a majority of death penalty states have homicide rates higher than non-death penalty states. In 1997 the average homicide rate for death penalty states was 6.6, while the average homicide rate for non-death penalty states was only 3.5.

The alleged deterrent value of the death penalty is refuted by all the data we have on violent crime. The death penalty, if it is to deter, must be a conscious part of a cost-benefit equation in the perpetrator's mind. There are very few murders that involve that level of rationality or consciousness of the outcomes. Most murders are (1) committed under the influence of drugs or alcohol; (2) committed by people with severe personality disorders; (3) committed during periods of extreme rage and anger; or (4) committed as a result of intense fear. None of these states of mind lend itself to the calm reflection required for a deterrent effect.

Specific Deterrence

Some proponents of the death penalty argue that capital punishment provides a specific deterrent which controls individuals who have already been identified as dangerous criminal actors. According to this argument, the presence of the death penalty ought to reduce a wide variety of criminal acts. The weight of scientific evidence tells us that it does not.

If the death penalty deters homicide then it should prevent incarcerated people from killing again and reduce the number of homicides among prisoners. The fact of the matter is that over 90% of all prisoner homicides, killings of other prisoners or correctional officers, occur in states with capital punishment (Sellin, T. 1980. *The Penalty of Death*. Beverly Hills, CA: Sage Publications).

An extensive death penalty study, using multiple means of measurement that measured the impact of capital punishment in three distinct and different ways could find no evidence that the death penalty had any effect on felony crime rates, "this pattern holds for the traditional targeted offense of murder, the

personal crimes of negligent manslaughter, rape, assault and robbery, as well as the property crimes of burglary, grand larceny, and vehicle theft. In other words, there is no evidence ... that residents of death penalty jurisdictions are afforded an added measure of protection against serious crimes by executions" (Bailey, W. 1991. The general prevention effect of capital punishment for non-capital felonies. In R. Bohm (ed.) *The Death Penalty in America: Current Research*. Cincinnati, OH: Anderson and the Academy of Criminal Justice Sciences).

Finally, it has been argued that capital punishment specifically protects law enforcement officers by deterring assaults on and killings of police. There have been five major studies addressing the question of whether capital punishment protects police officers. In no case did the death penalty provide any deterrent to killing law enforcement officers, nor did it reduce the rate of assaults on police (Bailey, W. and R. Peterson. 1987. Police killings and capital punishment: The post-Furman period. *Criminology* 25, 1: 1-25; Bailey, W. 1992. Capital punishment and lethal assaults against police. *Criminology* 19: 608-625; Sellin, T. 1980. *The Penalty of Death*. Beverly Hills, CA: Sage Publications; Cardarelli, A. 1968. An analysis of police killed in criminal action: 1961-1963. *Journal of Criminal Law, Criminology, and Police Science*. 59: 447-453; Hunter, R. and R. Wood. 1994. Impact of felony sanctions: An analysis of weaponless assaults upon police. *American Journal of Police* 13, 1: 65-89).

Once again the scientific evidence is clear, **the death penalty does not provide specific deterrence from other crimes**. It has no deterrent impact on other felonies, it has no deterrent impact on crimes against law enforcement officers, it has no deterrent impact on drug crimes, and it has no deterrent impact on violent crimes. In fact, the death penalty is more likely to endanger the lives of police who investigate crime and pursue fugitives, and endanger the lives of witnesses who may provide evidence necessary for conviction. The reason is obvious, preventing capture and conviction becomes far more pressing a matter in death penalty states.

Incapacitation

Another frequently advanced argument is that the death penalty protects society by incapacitating violent criminals and thereby preventing further offenses. The evidence for this proposition is also weak. Obviously, an executed murderer is unlikely to recidivate, but so is a murderer in prison for life without parole. The facts, however, indicate that even if not executed and even if not incarcerated for life, it is unlikely that a person convicted of homicide will kill again, or even commit an additional serious offense.

A massive study which tracked the post-release behavior of 6,835 male prisoners serving sentences for homicide offenses, who were paroled from state institutions, found that only 4.5%

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of them were subsequently convicted of another violent crime and only 0.31% committed another homicide (Sellin, T. 1980. *The Penalty of Death*. Beverly Hills, CA: Sage Publications). This means that for every 323 executions we **might** prevent one additional murder. Other studies find essentially the same results. For example, a study of prisoners whose sentences were commuted as a result of the *Furman* decision (Marquart, J. and J. Sorensen. 1988. Institutional and post-release behavior of *Furman*-commuted inmates in Texas. *Criminology* 26: 677-693), found that 75 percent of these inmates committed no serious infractions of prison rules, and none of these inmates were involved in a prison homicide. Some of the *Furman*-commuted inmates were paroled back into the community. Only 14 percent of them committed a new crime, and only one committed an additional homicide.

Vito, Koester and Wilson (1991) also analyzed the behavior of inmates removed from death row as a result of the *Furman* decision. Their study found that of those inmates eventually paroled only 4.5% committed another violent crime and only 1.6 percent committed another homicide. The authors conclude "that societal protection from convicted capital murderers is not greatly enhanced by the death penalty" (Vito, G., P. Koester, and D. Wilson. 1991. Return of the dead: An update on the state of *Furman*-commuted death row inmates. In R. Bohm (ed.) *The Death Penalty in America: Current Research*. Cincinnati, OH: Anderson and the Academy of Criminal Justice Sciences).

Even in states with capital punishment the overwhelming majority of people convicted of homicide receive a prison sentence, and many of them will eventually be released on parole. A review of the data on these released murderers clearly reveal that they have the lowest recidivism rates of any felons. In addition, paroled murderers in states without the death penalty had a much lower rate of recidivism than parolees released in states with the death penalty (Bedau, H. (ed.) 1982. *The Death Penalty in America*. 3rd ed. Oxford: Oxford University Press).

The death penalty does not protect society from further crimes of violence in any way. Eleven additional studies from the National Criminal Justice Reference Service database for the period 1980-1998 all fail to find any general or specific deterrent or any incapacitative impact from the use of the death penalty (Bailey, W.C. and R.D. Peterson. 1994. Murder, Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings. *Journal of Social Issues* 50, 2: 53-74; Cheatwood, D. 1993. Capital Punishment and the Deterrence of Violent Crime in Comparable Counties. *Criminal Justice Review* 18, 2: 165-181; Grogger, J. 1990. Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts. *Journal of the American Statistical Association* 85, 410: 295-303; Decker, S. H. and C. W. Kohfeld. 1990. Deterrent Effect of Capital Punishment in the Five Most Active Execution States: A Time Series Analysis. *Criminal Justice Review* 15, 2: 173-191; Decker, S.H. and C.W. Kohfeld. 1987.

Empirical Analysis of the Effect of the Death Penalty in Missouri. *Journal of Crime and Justice* 10, 1: 23-46; Decker, S.H. and C. W. Kohfeld. 1986. Deterrent Effect of Capital Punishment in Florida: A Time Series Analysis. *Criminal Justice Policy Review* 1, 4: 422-437; Decker, S.H. and S.W. Kohfeld. 1984. Deterrence Study of the Death Penalty in Illinois, 1933-1980. *Journal of Criminal Justice* 12, 4: 367-377; Archer, D., R. Gartner and M. Beittel. 1983. Homicide and the Death Penalty -A Cross-National Test of a Deterrence Hypothesis. *Journal of Criminal Law and Criminology* 74, 3: 991-1013; Forst, B. 1983. Capital Punishment and Deterrence -Conflicting Evidence? *Journal of Criminal Law and Criminology* 74, 3: 927-942).

The Brutalization Effect of the Death Penalty

Neither incapacitation nor deterrence theories are supported by the scientific research on capital punishment. In most public policy debates the burden of proof is on those advocating a measure to demonstrate its effectiveness. If that were the case in the death penalty debate adherents would fail miserably. But the fact is that the death penalty not only doesn't deter murder, it encourages people to kill.

Studies of capital punishment have consistently shown that homicide actually **increases** in the time period surrounding an execution. Social scientists refer to this as the "**brutalization effect.**" Execution stimulates homicides in three ways: (1) executions desensitize the public to the immorality of killing, increasing the probability that some people will be motivated to kill; (2) the state legitimizes the notion that vengeance for past misdeeds is acceptable; and (3) executions also have an imitation effect, where people actually follow the example set by the state, after all, people feel if the government can kill its enemies, so can they (Bowers and Pierce, 1980; King, 1978, Forst. 1983).

Let me clear here. The scientific evidence on the brutalization effect is compelling. We are not talking about one or two speculative studies. We are talking about a body of research that has found over and over again, in state after state, that the use of the death penalty increases, and often sharply increases, the number of homicides. Let me be specific:

1. **OKLAHOMA:** Oklahoma's return to capital punishment in 1990 was followed by a significant increase in killings that involved strangers, with an increase one stranger homicide per month for the year following an execution. In addition, the analysis also showed a brutalization effect for total homicides as well as a variety of different types of killings that involved both strangers and nonstrangers (Bailey, W.C. 1998. Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment. *Criminology* 36, 4: 717- 733; Cochran,

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- J.K., M.B. Chamlin, and M. Seth. 1994. Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment. *Criminology* 32, 1: 107-134).
2. **ARIZONA:** Studies in Arizona found an increase in specific types of homicides following an execution in that state. In particular the Arizona study found large increases in spur-of-the-moment homicides that involve strangers and/or arguments and a large increase in gun-related homicides (Thomson, E. 1997. Deterrence Versus Brutalization: The Case of Arizona. *Homicide Studies* 1, 2: 110-128).
 3. **GEORGIA:** A study in Georgia found that a publicized execution is associated with an increase of 26 homicides, or 6.8 percent increase, in the month of the execution. Overall, publicized executions were associated with an increase of 55 homicides during the time period analyzed (Stack, S. 1993. Execution Publicity and Homicide in Georgia. *American Journal Of Criminal Justice* 18, 1: 25-39).
 2. **ILLINOIS:** A study of capital punishment in Illinois found that the net effect of executions was to increase rather than decrease Chicago first degree murders and total criminal homicides (Bailey, W.C. 1983. Disaggregation in Deterrence and Death Penalty Research - The Case of Murder in Chicago. *Journal of Criminal Law and Criminology* 74,3: 827-859).
 3. **CALIFORNIA:** In California studies have found that the number of murders actually increased in the days prior to an execution and on the day of the execution itself. In addition homicides rates were even higher in the weeks after executions (Bowers, W., G. Pierce, and J. McDevitt. 1984. *Legal Homicide: Death as Punishment in America, 1864-1982*. Boston, Northeastern University Press)
 4. **PENNSYLVANIA:** A study looking at data for both California and Pennsylvania found that each execution studied was followed by a two- to threefold increase in the number of homicides the next month (Bowers, W, and G. Pierce. 1980. Deterrence or brutalization: What is the effect of executions? *Crime and Delinquency* 26: 453-484). And in the earliest study demonstrating a brutalization effect, Robert Dann found an average increase of 4.4 homicides for each execution (Dann, Robert. 1935. The deterrent effect of capital punishment. *Friends Social Service Series* 29).

Once again the scientific research provides compelling evidence against the death penalty as public policy. **The death penalty does, invariably and without exception increase the**

number of homicides in jurisdictions where it is applied. This has been proven in Pennsylvania, California, Oklahoma, Arizona, Illinois and other jurisdictions. The brutalization thesis is not mere speculation. It has been verified in study after study. If a legislature were looking at the impact of a pharmaceutical drug and only one study suggested that the drug killed more than it cured, legislators would no doubt ban the drug. The evidence with regard to the brutalization theory is far stronger, with at least eleven unrefuted, replicated and valid studies clearly showing a brutalization impact. In the case of the death penalty the cure is clearly worse than the disease, and like a dangerous drug, this cure should be banned.

Conclusion

Criminologists and criminal justice scholars are constrained to make their judgments on facts and scientifically valid and reliable scholarly research. It is the judgment of the overwhelming majority of criminologists and criminal justice scholars that the death penalty is bad policy and is in fact criminogenic in its social impact. The American Society of Criminology, an organization made up of the best researchers and scholars in the country, has strongly condemned the death penalty:

Be it resolved that because social science research has demonstrated the death penalty to be racist in application and social science research has found no consistent evidence of crime deterrence through execution, the ASC publicly condemns this form of punishment and urges its members to use their professional skills in legislatures and the courts to seek a speedy abolition of this form of punishment (ASC Annual Meeting, Montreal, 1987).

The scientific evidence on the death penalty is clear and unequivocal. The use of the death penalty in American society is the rough equivalent of a person hitting himself or herself repeatedly on the head with a hammer in order to treat a headache resulting from a brain tumor. It can only make a very bad situation much worse. This judgment is not based upon vague conceptions of morality or popular formulations of common sense or the vagaries of political opinion, it is based on rigorous evaluation of the state's two primary responsibilities: (1) to protect the public health and safety; and (2) to provide equity, fairness and justice to its citizens. The death penalty is anathema to both goals. It is the worst kind of crime-control policy. ♦

INCARCERATION AND PAROLE OF SEX OFFENDERS IN KENTUCKY

Incarceration. Kentucky has been incarcerating more sex offenders over the years. In a four year period there has been a net increase of 226 persons in prison for sex offenses. As of January 1999, 1660 inmates are being imprisoned for sex convictions.

Recidivism. The recidivism rates indicate that fewer sex offenders recidivate than do other offenders. While other offender recidivism rates are increasing, the recidivism rates for sex offenders is decreasing.

In 1995 the recidivism rate in Kentucky for all offenders was 33.1%

Kentucky sex offenders do not recidivate as much as other Kentucky offenders. In 1995, 14.6% of sex offenders were returned to prison.

In comparison, the recidivism rates for the following offense types were significantly higher:

- Drug34.5%
- Property....33.3%
- Violent.....38.3%
- Weapons....31.8%
- Other.....24.7%.

A comparison of recidivism rates from 1989 to 1995 for all inmates rose from 30.8% to 33.1%. During that period, fewer sex offenders recidivated while other classes of offenders have increased rates of reoffending:

- Drug.....20.4% v. 34.5%
- Other.....19.1% v. 24.7%
- Property...33.8% v. 33.3%
- Sex.....16.9% v. 14.6%
- Violent.....34.9% v. 38.3%.

Parole statistics. According to parole statistics provided by the Kentucky Corrections Cabinet July 12, 1999, very few sex offenders are paroled and that number has been decreasing.

**Kentucky Department of Corrections
Sex Offenders
Number of Inmates by Type of Exit
Median Sentence for New Commitments**

FYE	Parole	Serve Out	Shock Probated	Median Sentence for New Commitments (years)
1993	44 (23%)	135	14	8
1994	41	136	20	8
1995	51	243	30	8
1996	98 (41%)	159	42	8
1997	67	247	18	7
1998	68	243	27	8
1999	68	297	23	6
2000	39	295	24	7
2001	25 (7%)	295	27	6

Recruitment Efforts and Defender Employment Opportunities

by Doug Howard

DPA finished a great on-campus recruiting season for the Fall. We interviewed at 10 of the area law schools including UK, UofL, Chase, Cincinnati, Tennessee, Dayton, IU Indianapolis, IU Bloomington, Southern Illinois University, and Vanderbilt. The students interviewed at each school were excellent and very interested in criminal law. Spring recruitment is rapidly approaching, so if you have any suggestions, please drop me a line.

DPA looks forward to the opening of the Maysville office in March of 2000 and will have several positions for attorneys in the office. DPA will also be looking forward to the future when further expansion will open several more offices while we continue to strive for a full-time public defender system across Kentucky.

Currently, we have the following openings still available: Stanton, Stanford, Bowling Green (Directing Attorney position available January 1, 2000); Columbia, Bell County, Hazard, Pikeville, Maysville (Entry and Directing Attorney), Frankfort – Capital Trial Branch attorney, General Counsel and Capital Post Conviction (2 Chief slots). If you are interested in any of these positions, or know of someone that may be interested in them, please inform me.

Check out DPA's most current openings on the webpage at:

<http://dpa.state.ky.us/dpa.htm>

If you have any comments or questions, please drop me a line.

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THE RIGHT TO PRESENT THE DEFENSE

BY ED MONAHAN, DEPUTY PUBLIC ADVOCATE

Defendants are constitutionally entitled to an opportunity to be heard, to effectively present evidence central to their defense, to call witnesses to testify in their behalf, to rebut evidence presented by the prosecution pursuant to Sections 2 and 11 of the Kentucky Constitution and the 6th and 14th Amendments of the United States Constitution.

The reliability of the jurors' verdict on guilt or innocence and on the degree of guilt and on the extent of punishment requires that a defendant be permitted to fully be heard, to fully present his defense. After a long history of development, the common law in England "recognized that the accused has a right to present a defense at trial." Imwinkelried, *Exculpatory Evidence* (1996) at 1. The United States Supreme Court has found the right to effectively present a defense to be constitutionally required. Evidentiary rules cannot prevent a defendant from presenting his defense. *Chambers v. Mississippi*, 410 U.S. 284 (1972). In *Chambers* the defendant was prevented by Mississippi evidence rule from putting on a confession from a third party that another person said he was the murderer because it was hearsay which was a denial of his right to show another person did the crime. The Court said, "The right of an accused in a criminal trial due process is, in essence, the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* at 294.

The United States Supreme Court has held that 14th Amendment due process provides defendants the right to *rebut* the prosecution's evidence. See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) ("defendant's compelling interest in fair adjudication at the sentencing phase of a capital case."); *Gardner v. Florida*, 430 U.S. 349 (1997) (capital case; due process requires opportunity to deny or explain persistence report); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (capital case;

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defendant entitled as matter of due process to rebut evidence of future dangerousness). In Kentucky, the right to rebut is often termed the right to respond when the opponent has opened the door. In *Commonwealth v. Alexander*, 5 S.W.3d 104 (Ky.1999) this Court recognized the manifest fairness of allowing a party to respond to what the other party has opened up. "We agree with the Commonwealth that the defense did, in fact, 'open the door' by asking Sergeant Simms his opinion about who was at fault for the collision. In *Dunaway v. Commonwealth*, Ky., 39 S.W.2d 242, 243 (1931), our predecessor Court held: It is an established and recognized rule of practice that a party to litigation, who first introduces into the trial of the case either irrelevant or incompetent evidence cannot complain of the subsequent admission by the court of like evidence from the adverse party, relating to the same matter."

In *Crane v. Kentucky*, 476 U.S. 683 (1986) the Court held that it was error to prevent jurors from hearing testimony about the environment in which the defendant's confession was taken by the police since the manner in which it was taken were relevant to the reliability and credibility of the confession. The Court stated that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Id.* at 690. In explaining what that meant, the Court said: "That opportunity would be an empty one if the State were permitted to exclude competent reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 690-91.

In *Olden v. Kentucky*, 488 U.S. 227 (1988) the trial judge refused to allow a black defendant in his kidnapping, rape, and sodomy trial to cross-examine the white complaining witness regarding her cohabitation with a black boyfriend. The Court held this prohibition violated the 6th amendment right to confrontation of a witness to show the falsity of the witness' testimony. The excluded evidence was relevant to the defense that the black defendant and the white complainant were engaged in a consensual sexual relationship and that the complainant lied in saying the black defendant raped her out of fear of jeopardizing her relationship with her boyfriend. The Court explained its ruling by emphasizing that "'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Id.* at 231. It is clear that "'a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors... could appropriately draw inferences relating to the reliability of the witness.'" *Id.*

"The credibility of a witness' relevant testimony is always at issue, and the trial court may not exclude evidence that impeaches credibility even though such testimony would be inadmissible to prove a substantive issue in the case." *Sanborn v. Commonwealth*, 754 S.W.2d 534, 545 (Ky. 1988).

Even if a court finds evidence not admissible in the guilt/innocence phase of a case, at a minimum, evidence, which lessens culpability, is clearly admissible in the sentencing phase before the jurors. Under the change in KRS 532.055(2)(b), which became effective July 15, 1998, "The defendant may introduce evidence in mitigation or in support of leniency...." There is constitutional support for this statutory provision. See *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (capital case; improper to exclude relevant evidence in mitigation of punishment).

The state has no legitimate reason to keep evidence from the jurors, which helps them assess the defense presented by the defendant. Fourteenth Amendment due process requires any state evidentiary bar to admission must fall since it was "highly relevant to a critical issue.... and substantial reasons existed to assume its reliability." *Green v. Georgia*, 442 U.S. 95, 97 (1979). In *Green*, the defendant was prevented from calling in the penalty phase a witness who would have said a codefendant said he killed the victim while the defendant was not present. The trial judge excluded the testimony, which was hearsay. In reversing, the Court citing *Chambers* said, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 97. See also *Gilmore v. Henderson*, 825 F.2d 663, 665-667 (2d Cir. 1987) (constitutional error to exclude the testimony of witnesses that provided exculpatory testimony and testimony that would have contradicted another's testimony). In *United States v. Foster*, 128 F.3d 949 (6th Cir. 1997) the defense attorney failed to timely subpoena a grand jury witness who would have testified to exculpatory evidence. The trial judge refused to allow the introduction of the grand jury transcript due to the defense's failure to preserve its request for the testimony meant the witness was not unavailable under Federal Rule of Evidence 804(b)(1). Despite the failure of the defense to fully preserve the error, the Sixth Circuit reversed the conviction. The judge's failure to allow the defense to introduce exculpatory grand jury evidence "could have had a significant impact on the jury's verdict." *Id.* at 956.

Our Constitutions insure that a defendant is allowed to present his defense, which exculpates him from guilt or exonerates him from a greater degree of guilt or punishment or rebuts harmful prosecution evidence. Defendants deserve to have jurors understand their defense before they render their verdict so their decision is reliable and one the public has confidence in relying on. ♦

THE PUBLIC VALUE OF KENTUCKY PUBLIC DEFENDERS

Public defenders provide significant value to the people of Kentucky. Anthony Lewis, New York Times Pulitzer Prize winning columnist, has observed that "The lawyers who make Kentucky's indigent defense system work are in a great tradition. They prove what Justice Holmes said long ago: 'It is possible to live greatly in the law.'" The values that public defenders provide to the citizens of the Commonwealth add to Kentucky's wealth in uncommon ways.

1. Fair process that brings results we can rely on in criminal cases is the service defenders provide Kentuckians.
2. Defenders help over 100,000 poor Kentuckians with their legal problems when those citizens are accused of or convicted of a crime.
3. In the district and circuit courts in all 120 counties and in the Kentucky Supreme Court and Court of Appeals, defenders serve the Courts' need to fully understand both sides of the dispute before the decision is made.
4. Defenders serve the public's need for results in which they can have high confidence.
5. Defenders serve the citizens we represent by insuring their side of the dispute is fully heard and considered before their life or liberty is taken from them.
6. Defenders help children in juvenile court, addressing many of their family, educational, and social problems in order to help them become productive and law-abiding adults.
7. Defenders help the criminal justice system insure that fairness and reliability is not only what we say but what we do every day in the Courts of the Commonwealth.

PUBLIC ADVOCACY SEEKS NOMINATIONS

We need your nominations for the Department of Public Advocacy Awards which will be presented at this year's 28th Annual Conference in June.

An Awards Search Committee recommends two recipients to the Public Advocate for each of the following awards. The Public Advocate makes the selection.

Contact Patti Heying at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006 ext. 236; Fax: (502) 564-7890; or Email: pheyng@mail.pa.state.ky.us for a nomination form.

All nominations are required to be submitted on this form by March 1, 2000..

The Awards Search Committee is made up of both contract and non-contract defense attorneys from different regions of Kentucky.

KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY'S AWARDS AND PREVIOUS RECIPIENTS

GIDEON AWARD:

TRUMPETING COUNSEL FOR KENTUCKY'S POOR

In celebration of the 30th Anniversary of the United States Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the *Gideon* Award was established in 1993. It is presented at the Annual DPA Public Defender Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky.

- 1993 - **J. VINCENT APRILE, II**, General Counsel of DPA
- 1994 - **DAN GOYETTE**, Executive Director of the Jefferson County District Public Defender's Office and the JEFFERSON DISTRICT PUBLIC DEFENDER'S OFFICE
- 1995 - **LARRY H. MARSHALL**, Assistant Public Advocate in DPA's Appellate Branch
- 1996 - **JIM COX**, Directing Attorney in DPA's Somerset Trial Office
- 1997 - **ALLISON CONNELLY**, Assistant Clinical Professor of Law, University of Kentucky, former Public Advocate former Public Advocate
- 1998 - **EDWARD C. MONAHAN**, Deputy Public Advocate, Frankfort, KY
- 1999 - **GEORGE SORNBERGER**, Department of Public Advocacy Trial Division Director, Frankfort, KY

ROSA PARKS AWARD

FOR ADVOCACY FOR THE POOR

Established in 1995, the *Rosa Parks* Award is presented at the Annual DPA Public Defender 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."

- 1995: **CRIS BROWN**, Paralegal, DPA's Capital Trial Branch
- 1996: **TINA MEADOWS**, Executive Secretary to Deputy, DPA's Education & Development
- 1997: **BILL CURTIS**, Research Analyst, DPA's Law Operations Division
- 1998 - **PATRICK D. DELAHANTY**, Chair, Kentucky Coalition Against the Death Penalty
- 1999 - **DAVE STEWART**, Department of Public Advocacy Chief Investigator, Frankfort, KY

NELSON MANDELA LIFETIME ACHIEVEMENT AWARD

Established in 1997 to honor an attorney for a lifetime 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. The attorney should have at least two decades of efforts in this regard. The Award is presented at the Annual Public Defender Conference. 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."

1997 - **ROBERT W. CARRAN**, Attorney at Law, Covington, KY, former Kenton County Public Defender Administrator

1998 - **COL. PAUL G. TOBIN**, former Executive Director of Jefferson District Public Defender's Office

1999 - **ROBERT EWALD**, Chair of the Public Advocacy Commission, Louisville, KY

IN RE GAULT AWARD FOR JUVENILE ADVOCACY

This Award honors the person who has advanced the quality of representation for juvenile defenders in the Commonwealth. It was established this year by Public Advocate, Ernie Lewis and carries the name of the 1967 United States Supreme Court case that held a juvenile has the right to notice of changes, counsel, confrontation and cross-examination of witnesses and to the privilege against self-incrimination.

1998 - **KIM BROOKS**, Director, Northern Kentucky Children's Law Center, Inc.

1999 - **PETE SCHULER**, Chief Juvenile Defender, Jefferson District Public Defender Office, Louisville, KY

No duty is more urgent than that of
returning thanks.

St. Ambrose

PROFESSIONALISM & EXCELLENCE AWARD

A new *Professionalism & Excellence Award* began at last year's 27th Annual Conference. The President-Elect of the KBA selected 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.*

1999 - **LEO SMITH**, Deputy, Jefferson County Public Defender Office

ANTHONY LEWIS MEDIA AWARD

Established in 1999, this Award recognizes in the name of the *New York Times* Pulitzer Prize columnist and author of *Gideon's Trumpet* (1964), the media's informing or editorializing on the crucial role public defenders play in providing counsel to insure there is fair process which provides reliable results that the public can have confidence in. This year, **Anthony Lewis**, himself, has selected two nominees to receive the Award named in his honor:

1999 - **JACK BRAMMER**, *Lexington Herald Leader*, March 5, 1999 article, "The Case of Skimpy Salaries: Lawyers for poor make little in Ky."

AND

DAVID HAWPE, Editorial Director, and *The Courier Journal* for their history of coverage of counsel for indigent accused and convicted issues from funding to the death penalty.

Affection is responsible for nine-tenths of whatever solid and durable happiness there is in our lives.

C.S. Lewis

The Advocate

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THE ADVOCATE

Upcoming DPA, NCDC, NLADA & KACDL Education

** DPA **

- 28th Annual DPA Education Conference; Covington, KY; June 12-14, 2000.
- 2000 Death Penalty LPI, Kentucky Leadership Center, Faubush, KY; October 15 - 20, 2000

NOTE: DPA Education is open only to criminal defense advocates.

For more information:
<http://dpa.state.ky.us/train/htm>

** KACDL **

- KACDL Annual Conference
Fall, 2000

For more information regarding KACDL programs call or write:
Linda DeBord, 3300 Maple Leaf Drive, LaGrange, Kentucky 40031 or (502) 243-1418 or George Sornberger at (502) 564-8006, ext. 230.

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>

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.

** NLADA **

- NLADA 78th Annual Conference, Washington, DC, November 29 - December 2, 2000

** NCDC **

- NCDC Trial Practice Institutes, Macon, Georgia - June 11-14, 2000 and July 16-29, 2000

The application deadline has been moved to March 15, 2000. Please notify NCDC if your address has recently changed.