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REPORT ON THE
TECHNICAL ASSISTANCE VISIT TO THE
COMMONWEALTH'S ATTORNEY

30TH JUDICIAL DISTRICT OF KENTUCKY
NOVEMBER 19 - 20, 1980

CRIMINAL PROSECUTION TECHNICAL ASSISTANCE PROJECT

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The views expressed in this report are not necessarily those of the Law Enforcement Assistance Administration

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INTRODUCTION

On November 19 and 20, 1980, a Technical Assistance team from the Criminal Prosecution Technical Assistance Project visited the offices of David L. Armstrong, Commonwealth's Attorney for the 30th Judicial District of Kentucky, Louisville, Kentucky. The Technical Assistance team examined the Commonwealth's Attorney's management and operations functions in accordance with the terms of a contract with the Law Enforcement Assistance Administration. Members of the team included:*

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David H. Bludworth, Consultant
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The purpose of the visit was to assist the Commonwealth's Attorney and his staff in the implementation of a screening unit which has just been created in the office. An overall assessment of the entire office was not attempted, nor was it desired. The purpose of a technical assistance visit is to evaluate and analyze specific problem areas and provide recommendations and suggestions for dealing with those areas. It is designed to address a wide range of problems stemming from paperwork and organizational procedures, financial management and budgeting systems, space and equipment requirements and specialized operational programs, projects and procedures unique to the delivery of prosecutorial services.

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*Vitae are attached as Appendix A.

During the visit, interviews are conducted with those members of the office who are most directly involved in the problem area. Their functions and tasks are examined, as well as their perceptions of the problem. The flow of paperwork and the statistical system may also be examined if they are problem areas. Interviews may also be conducted with personnel involved in other component areas of the criminal justice system, such as police, courts and the public defender's office.

The basic approach used by the Technical Assistance team is to examine the office with reference to its functional responsibilities. This means that the process steps of intake, accusation, trials, post-conviction activities, special programs and projects, juveniles and other areas are examined, as required, with respect to their operations, administration and planning features. Taking a functional analysis approach permits observation of the interconnecting activities and operations in a process step and identification of points of breakdown if they exist.

Once the problem and its dimensions have been specified, an in-depth analysis is made which results in an identification of the major elements and components of the problem, and an exposition of needed change, where applicable.

After the problem has been fully examined, its dimensions discussed, and the analysis of the critical component factors undertaken, recommendations that are practical and feasible are made.

The visit to the Commonwealth's Attorney's office for the 30th Judicial District of Kentucky focused on the problem of implementing a screening unit

in the office. This unit was recently created in response to a need for the Commonwealth's Attorney to assume control of the intake function for his office.

The Technical Assistance team would like to thank Mr. Armstrong and his staff for their cooperation and assistance during the visit. Reception of the team was excellent, and the staff's willingness to discuss the strengths and weaknesses of the office was of considerable assistance to the Technical Assistance team in carrying out its tasks.

II. SUMMARY OF RECOMMENDATIONS

1. The Commonwealth Attorney should assume the intake and screening function for felony cases which enter his office.
2. The District Court should be limited to making determinations of bail and counsel in felony cases.
3. The initial determination of probable cause in felony cases should be by means of a sworn affidavit. This should replace the arrest slip currently in use.
4. Law enforcement agencies should be required to present all police reports, statements and other relevant material to the screening unit of the Commonwealth Attorney's office within 14 days of a felony arrest.
5. Within 20 days of arrest, the screening unit should produce a written statement detailing the decision made in the case and reasons supporting the decision.
6. If necessary, legislation should be sought providing for an ex parte determination of probable cause in felony cases, thereby eliminating the necessity for the preliminary hearing to duplicate the efforts of the Grand Jury.
7. A uniform complaint affidavit should be developed in conjuction with the major police agencies in the jurisdiction.
8. Transcripts of the preliminary hearings should routinely be made available to the Commonwealth's Attorney.

9. Initially, all felony cases, including career criminal cases, should be screened by the intake unit in order to firmly establish the concept of review and to make known the criteria for career criminal cases. After that time, career criminal cases may be referred directly to that unit.

10. Regular communication should take place between the Commonwealth's Attorney and the County Attorney, the police agencies and the courts. This should be in the form of a series of meetings with all interested parties involved in felony case processing.

III. SYSTEM OVERVIEW

The Commonwealth Attorney for the 30th Judicial District of Kentucky took office in January of 1976. He oversees a staff of approximately 80 employees, of which approximately 33 are assistant commonwealth's attorneys, who serve at the pleasure of the Commonwealth's Attorney. The office is organized into three Trial Divisions, a Grand Jury Division, a Career Criminal Division, an Economic Crimes Division and the Administrative Division.

There are 70 law enforcement agencies which present cases in the jurisdiction, of which the majority are brought by the Louisville Police Department and the Jefferson County Police Department. These two agencies account for over 45 percent of all cases presented. During the last year approximately 15,000 to 17,000 persons were arrested on felony charges. Of these, 1,750 were presented to the Grand Jury and 1,700 indictments were returned. The major offenses brought were burglary, robbery and receiving stolen goods. There is no uniform police report in use by all law enforcement agencies in the jurisdiction.

Criminal charges are initiated by the police agencies by filing directly with the court. There is no screening performed prior to the preliminary hearing. It is the common practice for preliminary hearings not to occur until up to ninety days after arrest. This is in violation of the holding in Gerstein v. Pugh, 420 U.S. 103 (1975) that a subject be arrested on a sworn affidavit which within a reasonable time thereafter is scrutinized by a judicial authority. Subjects who are arrested in

Jefferson County and are not able to post bail and who are not released on their own recognizance generally are detained without a judicial determination into the reasonableness of their arrest. There are few other time constraints imposed upon prosecution in the county as well. There is no speedy trial rule in effect and no statue of limitations on felonies. The statue of limitations for misdemeanors is one year.

The prosecution function is bifurcated in Jefferson County, as is the court function. Charges are brought in the District Court, which determines bail and hears the preliminary hearings, which are adversarial in nature. The County Attorney has exclusive jurisdiction in District Court. He does no screening of cases before they are filed in court by police agencies. The District Court tries all misdemeanor cases, the prosecution of which is handled exclusively by the County Attorney.

Once cases are bound over to the Circuit Court after the preliminary hearing, they are presented to the Grand Jury by the Commonwealth's Attorney, who has exclusive jurisdiction in the Circuit Court. If an indictment is returned by the Grand Jury, the Commonwealth's Attorney handles the case in Circuit Court.

At the present time, plea bargaining is handled by the assistant county attorney who is assigned to the preliminary hearings. This assistant has complete discretion to negotiate pleas in these cases. Generally, the most experienced attorneys are assigned the preliminary hearing function, and there are certain articulated standard pleas for certain cases. There is very little communication or coordination between the County Attorney and the Commonwealth's Attorney.

Because the Commonwealth's Attorney does not receive felony cases until they are bound over from the District Court, and because he rarely sees a transcript of the preliminary hearing, the public defender has a decided advantage over the Commonwealth's Attorney in case preparation. The public defender is able to secure extensive discovery at the preliminary hearing because of the adversarial nature of the proceedings. The acquittal rate for felony cases taken to trial by the public defender is 33 to 40 percent. This is due not only to better opportunity for case preparation, but also because inappropriate cases are being filed and inappropriate charges are being brought in those cases. If the District Court finds no probable cause, a police officer can still file the case with the Commonwealth's Attorney and seek an indictment.

In an attempt to alleviate this problem, the Commonwealth's Attorney has recently sought, and obtained, funding to create a Plea Bargaining Reduction Unit in the office. The problem statement contained in the grant application accurately reflects the situation as it currently exists in Jefferson County:

PROBLEM STATEMENT

> "Approximately 1500 criminal cases are indicted annually by the Grand Jury of Jefferson County. Before indictment, there is no analytical review or evaluation of cases by trial attorneys of the Commonwealth Attorney's Office to determine if the charges have been fully investigated and properly documented, if the proper charges are listed, or even if the case has prosecutorial merit. Such an approach shifts the role of prosecutor to police agencies or to a grand jury which historically have not had sufficient staff to perform this task. Valuable time of trial prosecutors is utilized to correct deficiencies in indictments, to complete investigations, in obtaining documentation necessary for trial preparation, and in handling cases which clearly lack prosecutorial merit.

In many instances, trial prosecutors are forced to plea-bargain to a lesser charge or to dismiss a case because of a serious defect which might have been cured if reviewed before the case progressed to indictment. A plea-bargain reduction unit of experienced trial attorneys can eliminate case deficiencies and expedite case handling by the trial attorney and insure the even-handed administration of justice."

The project goals were articulated as follows:

"This project will create a Unit of skilled and experienced attorneys who shall systematically and thoroughly analyze criminal cases prior to their presentation to the Grand Jury. The Unit will work closely with police, victims, and witnesses to insure that cases are properly charged, investigated and documented before indictment."

Unit personnel, under this grant, would be charged with the responsibility to review all cases prior to their presentation to the Grand Jury, except for Career Criminal Bureau and Economic Crime Unit cases. This review will ensure that proper charges, supported by admissible evidence, are charged and that sufficient facts exist to justify the decision to indict. The attorneys in this unit will also ensure that investigations are carried out when needed and that the case file is properly documented, including an analysis of the evidence. This unit was also charged with developing all necessary policies and procedures, including a charging manual. The unit will consist of a Unit Chief and three assistant commonwealth's attorneys, with a secretary as support staff.

IV. ANALYSIS

The analysis of the Commonwealth's Attorney for the 30th Judicial District of Kentucky focused on problems inherent in the current intake procedure and possible solutions utilizing the newly created Plea Bargain Reduction Unit. External, as well as internal factors were examined and recommendations made with respect to the use of the new unit and other possible changes.

A. The Need for the Prosecutor to Control the Charging Function

Systems in which criminal charges are filed with the court by the police always leave the prosecutor in a reactive position. This deficit or liability is compounded in a jurisdiction such as Jefferson County in which the office charged with prosecuting felonies does not have any input into a case until after the police have filed charges and until the County Attorney's office has disposed of the case at the District Court level.

The Commonwealth Attorney, even with the establishment of a Plea Bargain Reduction Unit, will still be compelled to act in a reactive manner and under existing Kentucky-Jefferson County practice, must present all felony matters which have been bound over by the District Court to the Grand Jury. In those cases which should not have been filed, the Commonwealth Attorney must attempt to secure a no true bill from the Grand Jury, which is not always possible.

According to a recent survey undertaken by the Bureau of Social Science Research of over eithty urban prosecutors, 85 percent of all offices

surveyed review felony charges before they are filed with the court.[1] This practice is more efficient than the system in which the judicial process is initiated by the police filing charges with the court.

Although in early England the authority to bring prosecutions was vested in the victim of a crime or his family, in the Colonies, the concept of a public prosecutor quickly replaced the notion of private prosecutions. The Colonial system was derived from the English system of sheriff, constable and watchman. Even in the beginning of the 19th Century, the prosecutor was a minor official. However, the prosecutive duties once perfomed by the sheriffs and police, including the presentation of facts of a case to the court, gradually were transferred to the prosecutor as his power, stature and responsibilities took shape. The idea that the criminal law, unlike other branches of the law such as property and contract law, was designed to vindicate public, rather than private interests became firmly established by the time of the American Revolution.

As the concept of a public prosecutor emerged, two types of case filing procedures came into use. The first type involves review of the case by the prosecutor after the arrest of the defendant and before the case is filed with the court. This could be described as the arrest-review-file model, and is used by approximately 85 percent of the urban prosecutors in the country. It is in the arrest-review-file model that the fullest authority of the prosecutor can be exercised. When the prosecutor has an opportunity to review the case and make the charging decision, his ability to control the intake process is never more powerful. The activity occurring in the intake process generally consists of prosecutorial review

and regulation of the work of the police. The circumstances of police arrests are examined and decisions are made about which cases should enter the formal adjudicative process.

In the second type of intake process, followed by about 15 percent of urban prosecutors, the case is filed by the police in court prior to prosecutorial review. The effect of this arrest-file-review route is to diminish prosecutorial control over the intake gate, reduce the amount of discretionary power the prosecutor can exercise and establish a prosecutorial function that is reactive rather than proactive. Within this limited scope of authority, the charging decision is made first by either the police and/or the courts, and later may be adjusted or dismissed by the prosecutor. Thus, the intake stage, as it has been defined, technically does not exist. This function has been transferred to the police.

Jacoby[2] has developed a theory of prosecution as a process which centers around the prosecutor's ability to make the charging decision. It is part of the criminal justice system's organizational checks and balances that rightfully belongs to the prosecuting attorney. In a later study Jacoby and Mellon[3] validated the significance of the charging decision in establishing the prosecutor's overall policy. They note that the intake phase of the prosecutorial process determines the character of subsequent phases.

The intake and screening phase is the first process in every office and is the point at which the most crucial decisions--if charges are to be brought and the number and level at which each charge will be brought--are made. The intake decision is the key to all subsequent decisions.[4]

It anticipates whether the prosecution, and the defense in many cases, will be willing to negotiate the charges for a plea of guilty, whether the prosecution will seek a conviction on the counts, or whether the defendant will be eligible for alternative programs that may be available, such as deferred prosecution or diversion.

Quality and equity in the discretionary system of justice form the yardstick against which all decisions must eventually be measured. Efficiencies and economies assume only secondary importance, since they measure how these ideals are reached. Equity is the prime issue because it is affected by the discretion exercised by the various parts of the criminal justice system. To control the effects of discretion, the criminal justice system has responded by establishing a system of checks and balances. Ideally, the discretionary decision of the law enforcement agencies to arrest and detain a suspect is checked by the authority of the prosecutor to review the arrest charges, change them if necessary, or even decline to prosecute. If the decision is made to go forward with the case to the point of trial, this action is subject to the decision of the court and/or jury, which acts as a balance and arbiter.

This finely honed system of checks and balances is unique to the United States. It relies on the active participation of all the component parts of the criminal justice system in an equal but independent manner. When one part becomes subservient to another--the system of checks and balances is degraded.

Even though police and prosecutors are at least nominally on the same side in pursuing criminal prosecutions, this theoretically shared interest is belied by a lack of cooperation between the two more often than should be expected under these circumstances. Police are often disappointed

with and wary of the prosecutor's decisions; the prosecutor often distrusts and questions the actions and motives of the police. In many instances, the two work together more in an atmosphere of sullen resignation than one of trust and cooperation.

One reason for the uneasy working relationship that often exists between the police and prosecutor is that they do not share the same interests, responsibilities, or goals in their respective pursuits of law breakers. The police must keep the peace and apprehend the law breaker; the prosecutor must bring the case of the state in a court of law. The police arrest on the basis of probable cause to believe that an individual has broken the law; the prosecutor must produce a higher quantum of evidence to convict the same person in the courtroom, the standard there being proof beyond a reasonable doubt. The police are faced with the responsibility for keeping the streets safe by placing alleged wrong-doers in the judicial system; the prosecutor is faced with the task of representing the community in all actions, of keeping the court process moving, and of eliminating those cases that are inappropriate or insufficient for the attention of the court. As the division of work has separated the two agencies, the goals of each have become more divergent, thereby creating some problems that assume more significance as the criminal justice system becomes more procedure-bound and complex. For this reason, prosecutorial review of charging decisions made by police is crucial. The prosecutor must see to it that the evidence used by the police to make the arrest is sufficient legally to support the allegation that the state will make.

Jacoby and Mellon, speaking of the roles of the police and prosecutor at the intake state, state that:[5]

> Nowhere else in the criminal justice system is there such a highly visable interactive area. The result of this process, produced by a symbiotic relationship between police and prosecutor, reaches into every other processing stage.

They go on to describe the intake process as it should function:[6]

> Optimally, an efficient and effective intake process is one where all relevant information reaches the prosecutor as quickly as possible after an arrest or criminal event so that the facts of the case can be properly reviewed and analyzed prior to a charging decision.

The concept of the prosecutor having control of his own charging decisions has also been endorsed by several professional organizations, as well as the National Advisory Commission on Criminal Justice Standards and Goals, which states in Standard 1.2:[7]

> After a person has been taken into custody, the decision to proceed with formal prosecution should rest with the prosecutor.

The Commission feels strongly that there should be a division of roles between the police and the prosecutor. While the decision to arrest a person is rightly a police decision, the decision to charge, and at what level, should be a function of the prosecutor. They state that the police should have the authority to arrest and book a person suspected of a serious offense without prior approval of the prosecutor, however, the process should go no further than that without the formal involvement of the prosecutor's office.

The National District Attorneys Association considers the decision to charge, and selecting the most appropriate and accurate charges, to be one of the prosecutor's greatest responsibilities. They also feel it to be the sole responsibility of the prosecutor. This is reflected in the

standards promulgated by this organization concerning the charging and screening functions. Standard 9.1 concerns the authority to charge:[8]

> The process of determining and initiating criminal charges is the responsibility of the prosecutor. Within his discretion the prosecutor shall determine what charges should be filed, and how charges should be presented.

Standard 9.2 goes on to state:[9]

> The prosecutor has the responsibility to see that the charge selected adequately describes the offense or offenses committed and provides for an adequate sentence for the offense of offenses.

In order to insure that the proper charge has been made, the prosecutor must have all available data concerning the event before him at the time he makes his charging decision. He should also consider such factors as the nature of the offense, the characteristics of the offender, the interests of the victim, whether the statute has been enforced, with regularity in the past, the possible deterrent value of the prosecution, the probability of conviction, recommendations of the law enforcement agency and the presence of any mitigating circumstances. These are all things which must be weighed by the prosecutor before he makes a decision to charge a certain crime at a certain level. Only the prosecutor has all of the information necessary to make this decision, as some of the information used in coming to a decision involves policy considerations, of which the police are not aware and are not in a position to evaluate.

In addition to these Standards, Standard 8.1 also addresses this area:[10]

> The decision to initiate or pursue criminal charges should be within the discretion of the prosecutor, excepting only the grand jury, and whether the screening takes place before or after formal charging, it should be pursuant to the prosecutor's established guidelines.

Screening is defined as the process by which a person is removed from the criminal justice system prior to trial or plea. The earlier in the process screening takes place, the more savings accrue to the system as a whole. Needless steps in the process are eliminated, thereby conserving resources for cases that should be in the system at further points along in the process.

The American Bar Association has also addressed the issue in Standards Relating to the Administration of Criminal Justice. Standard 3-3.4 deals with the decision to charge:[11]

> (a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.
>
> **********
>
> (c) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be initiated.

In the commentary to this section, the ABA goes on to point out that:[12]

> Whatever may have been feasible in the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official. The need for law-trained judgment to guide the exercise of the power to charge a citizen with a criminal act and to put the citizen under the heavy burden of defending himself or herself is discussed in Standard 3-2.1.

Standard 3-2.1 states:[13]

> The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.

The ABA recognizes that intake is a process which results in placing cases with sufficient evidence to support a conviction before the court. But the ABA Standards go further by directing attention to the charging decision itself as a critical point in the process and then by elaborating factors other than the weight of the evidence in terms of applicable law that have a bearing on the decision to accept or reject a case. Other considerations include: (1) the prosecutor's reasonable doubt that the accused is in fact guilty; (2) the extent of the harm caused by the offense; (3) the disproportion of the authorized punishment in relation to the particular offense or the offender; (4) possible improper motives of a complainant; (5) reluctance of the victim to testify; (6) cooperation of the accused in the apprehension or conviction of others; and (7) availability and likelihood of prosecution by another jurisdiction.[14] The ABA Standards, like others, is an elaboration and substantiation of the belief that, for proper charging, what is needed is a careful and rational review of the information available to the prosecutor. Here the policy of the prosecutor is clearly given weight in this discretionary process, along with a recognition of prevailing community values.

The discretionary charging decisions are made within a policy environment that produces such distinctly different dispositional patterns (both immediately in the form of reject rates and also later in the form of plea, trial and dismissal rates) that its influence cannot be discounted.

When the charging decision is not made by the prosecutor, the function is transferred to another agency, in this case the police department. The effects of this transfer are both predictible and widespread. The effects of transfer on the prosecutor are generally a loss of control, power and influence, and the adoption of a reactive "catch up" style of operation in the next process step. As a result, the accusatory process assumes the added role of charge review as well as accusation. Some cases that never should have entered the system are disposed of at the preliminary hearing or are remanded to the lower court after grand jury presentations. The accusatory process then can be either pro forma or it can be a major dispositional vehicle. The result of the loss of control in the early stage is to let into the system cases of questionable merit, reduce the discretionary authority of the prosecutor to set the charge and concomitantly increase modifications to the original charges, require additional work in other process steps and generally divert some of the prosecutorial effort to correction, modification and disposition rather than trial preparation. The key distinction between having an intake function or not is that without screening, the decision is largely restricted to what charges to bring, not whether to charge.

The loss of control over intake has serious effects on the public defender as well. Instead of representing a defendant in a case that has prosecutorial merit, the public defender must also share the increased workload. Obtaining dismissal of cases that either should not have been allowed in the system or should have been prosecuted at a lower level or on a different charge involves time, work and often unnecessary expense.

The effect of a lack of control over the intake stage was also noted by the ABA when it observed:[15]

> The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions which are not consonant with our traditions of justice.

The expertise and legal knowledge of what is needed to prove the guilt of a defendant in court, which the prosecutor has, cannot be used at the intake stage if that stage has been transferred to another agency. This knowledge should be employed at the police investigation level to strengthen cases while it is still possible to do so. A trained attorney's determination that additional witnesses should have been located, that investigative crime scene work to gather additional real evidence should have been done, or that some other police initiative was indicated will not be timely when made by the assistant prosecutor preparing a case for hearing or trial weeks or months after the criminal event. The opportunity to consult with police immediately after the arrest, which would permit more effective utilization of existing investigatory techniques and evidence gathering is lost if the prosecutor does not review charges before they are filed in court.

In addition, without police cooperation in sharing information, no case can be screened on the basis of features inherent to many prosecutions which invariably lead to case weakness. Elements such as the relationship between the parties, the attitude of the complaint toward prosecution, or the poor quality of witnesses are thus unavailable to the screening assistant prosecutor. Frequently, the incident which led to the arrest is not a situation with which the court system can deal satisfactorily, and conviction and a prison sentence is not an appropriate response by society

to the defendant's conduct. An experienced assistant would recognize that the charges were slated for eventual reduction or dismissal. No attempt to screen out theses cases can possible be made without prosecutorial review of the charges.

Another effect of the transfer of the charging function is the inability of the prosecutor to assess the facts of the case for accuracy. The conclusions stated by the police in court papers as established facts often turn out to be unsupported, this legal insufficiency, when it is identified, causes the case to be dismissed. There is no way that an assistant prosecutor, without dialogue with the arresting officer, can isolate such a situation. By the time this takes place in Jefferson County, the case has already been in the system for some time, and valuable time has been lost.

It is impossible, based only on a reading of the police report, for an assistant prosecutor to recognize the existence of constitutional problems relating to searches, confessions, or identification procedures which may either lessen chances for successful prosecution or destroy them completely. It is manifest that where such an impediment to conviction exists it would be a waste to assign a high priority to a case so flawed, even though the crime may be quite serious. It would take a conversation with the arresting officer to highlight these matters, and it should be done as early in the prosecution as possible.

In addition to these problems, the transfer of the charging function to the police denies the prosecutor the opportunity to identify those cases which require special attention or handling for successful prosecution. It is important that the bail recommendation made by the prosecutor at

arraignment be tailored, within constitutional limits, to the individual defendant and his case. Without complete information from the police involved, there is always the danger that inappropriate bail could be recommended.

The net effect of transfer of the intake function is to debilitate agency control over the subsequent process steps. When control over intake is missing, the prosecutor is less capable of assuming a proactive stance. If early penetration of the system is prohibited, then both prosecution and defense are more dependent on the results of the activities of the police and courts.

Were the eventual outcome of an arrest entirely dependent upon the seriousness of the crime label initially affixed to the case by the police, the 30th Judicial District of Kentucky would be blessed with the highest level of case disposition in the entire criminal justice system. The Commonwealth's Attorney in Jefferson County's existing legal system has no opportunity to review a police charging decision prior to the case being filed with the court, and rather than ensure successful prosecution, police practices often serve only to further burden a system whose resources are already overextended.

B. External Changes Necessary

It is the current practice in Jefferson County for the law enforcement agencies to file all charges, misdemeanors and felonies, directly in the District Court. The County Attorney then receives the case and determines the next course of action, either a plea offer or a determination of probable cause at a preliminary hearing. In the case of felonies, if the case survives the preliminary hearing and is bound over to the Circuit

Court, the Commonwealth's Attorney will then receive the case for the first time. By this time, the public defender has been able to secure extensive discovery, due to the adversarial nature of the preliminary hearings.

This system is clearly unacceptable if the Commonwealth's Attorney is to have the capacity to control not only the intake of cases in his own office, but the screening of cases which never should have reached his office in the first place.

In order to facilitate effective case intake in the office of the Commonwealth's Attorney, several external changes will be necessary. The effectiveness of the new Plea Bargain Reduction Unit will be severely curtailed if the Commonwealth's Attorney is not able to review cases at an earlier stage.

In felony cases, there is currently a duplication of the determination of probable cause. It is determined once at the preliminary hearing, then after the case is bound over from the District Court, probable cause is determined again by the Grand Jury. This duplication does not appear to be mandated by statute and is not required by Federal Constitutional decisions It is therefore the recommendation of the Technical Assistance team that in the case of felonies only, the District Court determine the questions of release and provision of counsel. At this point, the case should be presented to the Commonwealth's Attorney for a determination as to the next course of action. At this time, the Plea Bargain Reduction Unit of the Commonwealth's Attorney's Office would either accept the case for presentation to the Grand Jury as a felony, recommend that the case be reduced to a misdemeanor and handled by the County Attorney in District Court, or refuse to accept the case and file a motion to dismiss. An

agreement should be made with the County Attorney allowing the intake unit 20 days in which to make a recommendation as to the disposition of a felony arrest. In order to effectuate this new procedure, the law enforcement agencies should be required to make an appointment with the intake unit within 14 days of a felony arrest. The officer at that time should be required to bring with him all police reports, statements, and other relevant material in order for his arrest to be considered by the intake unit. The decision made by this unit should then be documented in writing with reasons.

In order to implement this recommendation, it may be necessary to seek legislation to formalize the ex parte probable cause determination. The following legislation has been proposed in the state of Indiana and the wording may be useful should the Commonwealth's Attorney be required to seek similar legislation in the state of Kentucky:

> Sec. 2. (a) At any time prior to an or at the time of the initial hearing of a person arrested without a warrant for a felony, the facts upon which the arrest was made shall be submitted to the judicial officer, ex parte, in a probable cause affidavit. In lieu of the affidavit or in addition to it, the facts may be submitted orally under oath to the judicial officer. If facts upon which the arrest was made are submitted orally, the proceeding shall be recorded by a court reporter, and, upon request of any party in the case or upon order of the court, the record of the proceeding shall be transcribed.
>
> (b) If the judicial officer determines there is probable cause to believe that any felony was committed and that the arrested person committed it, the judicial officer shall order that the arrested person be held to answer in the proper court of the county with jurisdiction over the offense charged. However, if the facts submitted do not establish probable cause or if the prosecuting attorney informs the judicial officer on the record that no charge will be filed against the arrested person, the judicial officer shall order that the arrested person be discharged immediately.

This legislation is premised upon a judicial determination of probable cause based upon sworn affidavits at the time of arrest. At the present time, this is not possible in Jefferson County because of the use of arrest slips to hold persons in custody until the preliminary hearing, which in most cases does not take place for up to ninety days after arrest. This does not satisfy the mandate of Gerstein v. Pugh, 420 U.S. 103 (1975) which requires a judicial determination into the reasonableness of the arrest. The minimal requirements of Gerstein, that a subject be arrested on a sworn affidavit which within a reasonable time thereafter is scrutinized by a judicial authority, are not honored in Jefferson County.

This situation could be rectified by the use of a uniform complaint affidavit, sworn to and stating the material elements of the crime. This uniform complaint affidavit should be filed in the District Court, with a copy to the County Attorney and to the screening unit of the Commonwealth's Attorney. This should be required within 24 hours of arrest. The police investigation report could then be incorporated by reference into the affidavit of probable cause and could also be used by the defense bar as a form of discovery.

It is the recommendation of the Technical Assistance team that such a uniform complaint affidavit be developed for use by all law enforcement agencies in the jurisdiction. This could be done in conjunction with the court and the chiefs of the major law enforcement agencies in the jurisdiction. The police agencies visited by the Technical Assistance team expressed a willingness to cooperate with the Commonwealth's Attorney in working out a satisfactory

procedure for more direct referrals to the Grand Jury in felony cases. This spirit of cooperation should be utilized by the Commonwealth's Attorney for bringing about these changes, from the development of the uniform complaint form to the change in procedure in felony cases.

While these recommendations are being implemented, the Commonwealth's Attorney will need to offset the extensive discovery being accomplished by the public defender at the preliminary hearing. The current practice does not even call for the Commonwealth's Attorney to routinely receive a copy of the transcript of the preliminary hearing. This leaves his office at a decided disadvantage concerning case strategy and other valuable information which could be obtained from the record. It is the recommendation of the Technical Assistance team that, in the interim before the Commonwealth's Attorney achieves complete control of the intake function for his office, he routinely receive the transcript of the preliminary hearing. The fact that the cost of producing a transcript for each preliminary hearing will probably be prohibitively high serves to highlight the necessity for a speedy assumption of the intake and screening function by the Commonwealth's Attorney.

C. Internal Changes Necessary

The Commonwealth's Attorney has taken a major step by acquiring funding for the Plea Bargain Reduction Unit. The creation of this unit has resulted in a mechanism whereby the Commonwealth's Attorney can assume control of the intake for his office. The work of this new unit should continue to be developed. The assignment of experienced attorneys to this intake unit is to be commended and should be continued.

It is recommended by the Technical Assistance team that all felony cases be initially reviewed by this unit after arrest, including those to be designated as career criminal cases. This will firmly establish the concept of case review and entry for accountability in the office of the Commonwealth's Attorney. Later, as the criteria for acceptance of cases by the career criminal unit become universally known and accepted by the law enforcement agencies, those cases could bypass the initial review by the intake unit and be presented directly to the career criminal unit. The articulated criteria for acceptance by the career criminal unit are set forth in Appendix B.

It is also recommended that this new unit be responsible for preparing indictment forms and also be responsible for scheduling the cases for the Grand Jury. The Grand Jury Section could be under the operational control of this intake unit.

Overcoming the initial problems in implementing these recommended changes will require cooperation and coordination. This can best be achieved through regular communication between the Commonwealth's Attorney, the County Attorney, the law enforcement agencies and the courts. The Commonwealth's Attorney should initiate this cooperation through a series of meetings with all interested parties. In this way, their input will be ensured at each stage as the Commonwealth's Attorney acquires control of the intake function in his office.

V. CONCLUSIONS

At the present time, the public defender is achieving an acquittal rate of 33-40 percent in felony cases. This is unacceptable and is due primarily to the fact that the Commonwealth's Attorney must assume a reactive, rather than a proactive posture with respect to the intake of cases into his own office. Unlike 85 percent of the prosecutors in the United States, the Commonwealth's Attorney in Jefferson County does not have the opportunity to review felony cases before they are filed in court. He does not receive the cases until 90 days or more after the arrest and charge has been filed by the law enforcement agency.

In order to effectuate some measure of control over the flow of cases into his office, the Commonwealth's Attorney has received funding for a Plea Bargain Reduction Unit to perform a limited intake function with respect to felony cases. However, with charges being filed directly with the court by police officers, this unit cannot achieve that measure of control over the caseload which it should have.

This situation can be remedied by giving the intake function to the Commonwealth's Attorney at the earliest possible time. It is the recommendation of the Technical Assistance team that a change in procedure concerning felony charging be produced, through legislation if necessary. Under this new procedure, instead of using the present arrest slip to hold suspects in custody until the preliminary hearing, a practice which violates the requirements of Gerstein v. Pugh, 420 U.S. 103 (1975), a uniform complaint affidavit should be developed and used to effectuate a judicial inquiry into the reasonableness of the arrest. This sworn affidavit,

along with the police investigation report, could also be used by the defense bar as a discovery tool.

After the District Court has made a determination concerning bail and the provision of counsel, it is recommended that the police present all felony cases to the Commonwealth's Attorney within 14 days for a determination of the next course of action concerning the case. A decision should be forthcoming within 20 days as to whether to present the case to the Grand Jury, reduce the case to a misdemeanor and bring it in District Court or to dismiss the case. This decision should be documented, with reasons given.

It is also the recommendation of the Technical Assistance team that all felony cases, including those which will be designated as career criminal cases, be reviewed initially by the new intake unit. In this way, the concept of review will be firmly established and the criteria for acceptance of cases by the career criminal unit will become universally known and accepted. After the criteria are firmly established, those cases may be presented directly to the career criminal unit.

The team would like to recommend that the indictment be prepared by the new intake unit and Grand Jury cases be scheduled by the unit as well. It may be more practical for the Grand Jury Section to be under the operational control of this unit.

A series of meetings should be instituted by the Commonwealth's Attorney with the County Attorney, the various police departments and the courts for the purpose of smoothly implementing these changes in procedure.

As a minimum, effective immediately, the Commonwealth's Attorney should receive transcripts of all preliminary hearings for felony cases. Regular communication should be initiated between the Commonwealth's Attorney and the County Attorney concerning felony cases and their disposition.

The intake phase is the first process in the office and it is the point at which the crucial decisions are made. It is the key to all subsequent decisions, and sets the tone of operation for the office. If this function is missing from an office, the stance of the prosecutor becomes reactive rather than proactive, and he must play "catch up" in all process steps after intake.

The net effect of the transfer of the intake function from the prosecutor to the police is to debilitate prosecutorial control over subsequent process steps. As a result, the prosecutor is less capable of assuming a proactive stance. If early penetration of the system by the prosecutor is prohibited, then both prosecution and defense are dependent on the results of the activities of the police and the courts.

If the intake function is assumed by the Commonwealth's Attorney for his office, there will accrue not only a substantial savings to the criminal justice system in terms of time and resources, but also an enhancement of the quality of justice in Jefferson County.

FOOTNOTES

1. Joan E. Jacoby and Leonard R. Mellon, "Policy Analysis for Prosecution" (Washington, D.C.: Bureau of Social Science Research, Inc., 1979).

2. Joan E. Jacoby "The Prosecutor's Charging Decision: A Policy Perspective" (Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, 1977).

3. Jacoby and Mellon, "Policy Analysis for Prosecution."

4. Joan E. Jacoby, The American Prosecutor: A Search for Identity (Lexington, Mass.: Lexington Books, 1980), p.109.

5. Jacoby and Mellon, "Policy Analysis for Prosecution", p. 198.

6. Ibid., p. 199.

7. National Advisory Commission on Criminal Justice Standards and Goals, Courts (Washington, D.C.: Government Printing Office, 1975), p. 24.

8. National District Attorneys Association, National Prosecution Standards (Chicago, Illinois: National District Attorneys Association, 1977), p. 131.

9. Ibid.

10. Ibid., p. 125.

11. American Bar Association Standing Committee on Association Standards for Criminal Justice, American Bar Association Standards Relating to the Administration of Criminal Justice, 2nd Edition (Washington, D.C.: American Bar Association, 1978), p. 8.

12. Ibid., p. 9.

13. Ibid., p. 3.

14. Ibid., p. 11.

15. American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (New York: Office of Criminal Justice Project, Institute of Judicial Administration, 1971), p. 49.

APPENDIX A

LEONARD R. MELLON

Research Associate, Bureau of Social Science Research, since January 1978. Formerly, Project Director, National District Attorneys Association, 1975-1977; special counsel, National Center for Prosecution Management, 1974-1975; chief assistant state attorney, 12th Judicial Circuit of Florida, Sarasota, 1974; assistant state attorney, 11th Judicial Circuit of Florida, Dade County, Miami, 1971-1974; Counsel, Transcommunications Corporation, 1969-1971; sole practitioner, Miami, 1965-1969; assistant attorney general, Florida, 1958-1965.

Instructor, Florida State University, 1958-1960; Florida Sheriff's Bureau of Law Enforcement Academy, 1960-1964; Florida Bar Association's Continuing Legal Education Program, 1966; Criminal Justice Institute, Miami Dade Community College, 1972-1973; University of Oklahoma, 1974; Northwestern University School of Law, Summers of 1976 and 1977.

Education: B.S. (political science), Florida State University; B.S.F.S. and Lib. Georgetown University.

Current Research:

Project Director, Criminal Prosecution Technical Assistance Project--a facility to provide national level technical assistance in the prosecution area and participate in the development and improvement of criminal prosecution projects and programs supported by LEAA (Law Enforcement Assistance Administration).

Deputy Project Director, Phase II, Research on Prosecutorial Decisionmaking--a continuation of the Phase I program to conduct research on prosecution nationwide and to test techniques and procedures to measure uniformity and consistency in decisionmaking (Law Enforcement Assistance Administration).

Recently Completed Research:

Research Associate, White Collar Crime Study--a systematic review and analysis of major data sources relevant to white collar crime, supported by a grant from the Law Enforcement Assistance Administration.

Deputy Project Director, Phase I, Research on Prosecutorial Decisionmaking--a nationwide research program to develop techniques and procedures for increasing uniformity and consistency in decisionmaking, supported by the Law Enforcement Assistance Administration.

Past Experience:

As Project Director, National District Attorneys Association, directed a large-scale DHEW-supported study which assisted and encouraged prosecutors and others nationally to participate in the

Federal Child Support Enforcement Act (Title IV-D of the Social Security Act). In connection with the study, conducted regional orientation and training conferences nationwide, developed a reference source for prosecutors on child support enforcement, and a clearinghouse on current child support data; directed and participated in technical visits by child support enforcement consultants to prosecutors offices nationwide.

As special counsel to the National Center for Prosecution Management, prepared under an LEAA grant, standards and goals for homogeneous groups of prosecutors in the U.S., organized the groups, supervised the meetings and assisted in preparation of documentation on standards and goals.

As assistant state attorney, 11th Judicial Circuit of Florida, Dade County, Miami, created special trial division for speedy processing and trial of defendants, assisted in the development of pretrial intervention (diversion) program (under an LEAA grant) and established a Magistrate's Division in the State Attorney's Office. After undertaking a survey of case intake and screening, recommended the establishment of a new system and was appointed head of the new Intake and Pre-Trial Division in the State Attorney's Office.

Selected Publications:

Transmitting Prosecutorial Policy: A Case Study in Brooklyn, New York (with Joan E. Jacoby, et al.). Research Report No. 2, Project 556, November 1979.

A Quantitative Analysis of the Factors Affecting Prosecutorial Decisionmaking (with Joan E. Jacoby, et al.). Research Report No. 1, Project 556. October 1979.

"The Prosecutor Constrained by His Environment--A New Look at Discretionary Justice in the United States," Project 450, July 1979.

Policy Analysis for Prosecution (with Joan E. Jacoby) Final report for Phase I of Project 550, Bureau of Social Science Research, April 1979.

Policy Analysis for Prosecution: Executive Summary (with Joan E. Jacoby) Final report for Phase I of Project 550, Bureau of Social Science Research, April 1979.

"Probable Cause Determination," (Commentary) National Prosecution Standards, National District Attorneys Association, Chicago, 1977.

"The Child Support Enforcement Act." Prosecutors' Deskbook, Washington, D.C.: National District Attorneys Association, 1976.

Handbook on the Law of Search, Seizure and Arrest, distributed by the Florida Attorney General's Office, 1960; revised, 1962.

"Can Effective Restrictive Legislation Be Written" Paper delivered to the Southeastern Association of Boards of Pharmacy in 1962 and published in The Journal of the American Pharmaceutical Association.

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Present Position (since July 1, 1975)

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Executive Secretary, Indiana Prosecuting Attorneys Association

Education

Graduate of Kokomo High School - 1950
B.S. in Business, Indiana University School of Business - 1954
J.D., Indiana University School of Law, Bloomington - 1959
Short course at Harvard University in Criminal Law and Procedure - 1976

Legal Experience

General Practice of Law from 1959 until July 1975
Chief Deputy Prosecuting Attorney, Howard County - 1964-1967
Assistant City Attorney and Police Legal Advisor - 1969-1971

Teaching Experience

Associate faculty, Indiana University Purdue University at Indianapolis in department of Criminal Justice, teaching Criminal Law, Criminal Procedure, Criminal Evidence, Juvenile Law and Corrections Law
Associate faculty, Indiana Central University, Indianapolis, in department of Criminal Justice
Lecturer at Indiana Law Enforcement Academy

Legislative Experience

Member of House of Representatives, Indiana General Assembly - 1963-1964
Liason to Indiana General Assembly for Prosecuting Attorneys - 1975- date

Publications

Survey of Criminal Law and Procedure, Vol. 12 No. 1, Indiana Law Review (1979)
Author with Professor Jim Peva of Text Book on Criminal Law and Procedure (West Publishing Co. - 1979)

Organizations Concerned With Law Enforcement

Criminal Law Study Commission
Lawyers Commission of the Indiana State Bar Association
National District Attorneys Association
National Prosecuting Attorneys Coordinators Association
Criminal Justice Section of the American and Indiana Bar Associations
Judicial Task Force of the Indiana Criminal Justice Planning Agency
Organized Crime Prevention Council
Corrections Law Study Commission
Juvenile Division of Judicial Study Commission
Juvenile Standards and Goals Task Force
Criminal Procedural Law Study Commission

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Three children - Jessica, Melanie and Brent

EDUCATION: B.A.E. Degree, University of Florida 1962 (History, Political Science);
J.D. Degree in Law, University of Florida, 1964.

CHURCH: Member, Haverhill Baptist Church

WORK EXPERIENCE: Assistant State Attorney General for Florida.
Assistant County Solicitor for Palm Beach County.
Appointed State Attorney for Monroe County, Florida, by the Governor of Florida.
Has been appointed a Special Prosecutor in several Florida circuits.
Assistant State Attorney, Palm Beach County, Florida.
Municipal Judge, Jupiter, Florida.
Elected State Attorney, Fifteenth Judicial Circuit of Florida in 1972.

TEACHING EXPERIENCE: Business Law and Constitutional Law, University of Maryland, Overseas Division.
Criminal Law and Evidence, Palm Beach Jr. College and Florida Atlantic University.
Palm Beach Atlantic College, Business Law, Constitutional Law & Political Science.

ORGANIZATIONS: Member of American Bar Association, Florida Bar Association, Palm Beach County Bar Association, Young Lawyers Section of the American, Florida and Palm Beach County Bar Associations.
National District Attorneys Association.
Florida Prosecuting Attorneys Association, Rotary Club, VFW, American Legion, Jaycees, Lake Worth Valley Scottish Rite, York Rite Commandery, Amara Shrine Temple.

PUBLICATIONS AND LECTURE EXPERIENCE:

Amicus Curiae Brief for Florida Prosecuting Attorneys Association on the new death penalty in Florida.
Author, Bill of Rights for Mobile Home Owners.
NDAA - Delinquency Programs for the Prosecutor's Office.

MILITARY: Sixteen years commission service, two years active duty, one year overseas in Korea.
Presently lieutenant colonel in U. S. Army Reserve.

APPENDIX B

CAREER CRIMINAL

The Commonwealth's Attorney's Office has implemented a program which will bypass preliminary hearings and unnecessary delays. In order for this program to be successful it is necessary that the police department personnel aid the Commonwealth's Attorney's office in the screening and classification of those persons who meet the following guidelines.

He must be arrested for the following:

1. Burglary I, II, III
2. Robbery I
3. Murder
4. Kidnapping
5. Rape
6. Sale of Narcotics
7. Assault I

And the individual must have five (5) prior felony arrests or two (2) prior felony convictions. If a defendant is on probation, parole, or bond and commits one of the above charges, he fits within this category. If the defendant is charged with a capital offense and has shown a propensity to commit crimes of violence, he may be considered a career criminal.

In order to implement this program and to be of service and assistance to the patrolman, detective or command officer, the Commonwealth's Attorney has a 24 hour answering service. The telephone number is 581-6483. It is the hope of the Commonwealth's Attorney that you will use this number in order to start the special prosecution of career criminals.

A member of the Commonwealth's Attorney's Office will be talking to you at roll call within the next two weeks.

END