WASHINGTON STATE

Minority and Justice Commission

Así lo sonó Sandino

Alejandro Canales

Biennial Report 2003 - 2004

Commission Members 2003 - 2004

Justice Charles W. Johnson
Co-Chairperson
Washington State Supreme Court

Judge William W. Baker[1]
Court of Appeals, Division I

Judge Monica J. Benton[1]
United States Magistrate Judge

Ms. Myrna I. Contreras
Attorney at Law
Contreras Law Offices

Judge Ronald E. Cox
Court of Appeals, Division I

Dean Donna Claxton Deming
Associate Dean
Seattle University School of Law

Judge Anne L. Ellington[1]
Court of Appeals, Division I

Judge Deborah D. Fleck
King County Superior Court

Ms. Lourdes Fuentes
Attorney at Law
MacDonald, Hoague and Bayless

Guadalupe Gamboa[1]
Attorney at Law
United Farm Workers of America

Judge Richard A. Jones
King County Superior Court

Judge Kenneth H. Kato
Court of Appeals, Division III

Judge Ron A. Mamiya
Seattle Municipal Court

Justice Charles Z. Smith (retired)
Co-Chairperson
Washington State Supreme Court

Judge Ricardo S. Martinez[2]
United States Magistrate Judge

Judge LeRoy McCullough
King County Superior Court

Ms. Janet L. McLane[3]
Interim Administrator
Administrative Office of the Courts

Ms. Mary Campbell McQueen[2]
Administrator
Administrative Office of the Courts

Judge James M. Murphy (retired)
Spokane County Superior Court

Kenneth E. Payson[3]
Heller Ehrman White and McAuliffe

Jeffrey C. Sullivan
Assistant United States Attorney
Chief of the Criminal Division

Judge Greg D. Sypolt[3]
Spokane County Superior Court

Judge Mary Alice Theiler
United States Magistrate Judge

Brian A. Tsuchida
Federal Public Defender

Judge Mary I. Yu[3]
King County Superior Court

Judge Dennis D. Yule[3]
Superior Court of Franklin and Benton Counties

Ms. Erica S. Chung
Executive Director
Washington State Minority and Justice Commission

[1] Term ended in 2003
[2] Term ended in 2004
[3] Appointed by Supreme Court in 2004

WASHINGTON STATE

MINORITY AND JUSTICE COMMISSION

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Washington State Supreme Court
Temple of Justice
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BIENNIAL REPORT 2003 - 2004

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The Washington State Minority and Justice Commission is mandated to issue an Annual Report. For considerations of time and budget, the annual reports for the years 2003 and 2004 are combined in this Biennial Report 2003-2004.

Acknowledgment

The Washington State Minority and Justice Commission thanks and acknowledges the following persons for their contribution, preparation, and layout of this report: Justice Charles Z. Smith (retired), Judge LeRoy McCullough, Judge James M. Murphy (retired), Brian A. Tsuchida, Judge Kenneth H. Kato, Judge Deborah D. Fleck, Monto S. Morton and Erica S. Chung.

The Commission is grateful to Justice Charles Z. Smith (retired) and Justice Charles W. Johnson, Commission co-chairpersons, for their leadership, inspiration, and support in advancing the Commission and their commitment to eliminating racial, ethnic and cultural bias in our state court system. We are also grateful to all our Commission members for their continued support and assistance in advancing the Commission's mission and goals.

Special appreciation is extended to the justices of the Washington State Supreme Court for their continuing support of the Commission and commitment to diversity by their periodic Orders of Renewal, the Washington State Legislature for its continuing support of important education programs, research activities, and other projects through budget allocations, and Ms. Mary Campbell McQueen, Administrator for the Courts (now the President of the National Center for State Courts), for her participation in and support of the Commission from its inception.

Cover Art

The art work on the cover of this Report is a photograph of a mural which graces the walls of a meeting room at Seattle's El Centro de la Raza. It is the culmination of a work project of noted Nicaraguan artist, Alejandro Canales, who was sent to El Centro by the Nicaraguan government as artist-in-residence prior to his death a few years ago. He had a distinguished career as an artist recognized throughout the world.

In addition to his prolific output as an artist, Mr. Canales taught classes for children and adults at El Centro and encouraged his young students to express themselves through the paint medium. The mural reproduced on our cover was in fact a participatory work product involving young students. After a contest to name the mural, it is now titled "*Así lo sonó Sandino,"* roughly translated as *"This is as Sandino dreamed it."*

Murals have been used for centuries by artists in many cultures to convey ideas, sentiments and messages of a religious, social, political or philosophical nature. *"Así lo sonó Sandino"* perhaps encompasses all of these. Throughout his life and career Alejandro Canales was consumed by a passion for justice and human dignity which intensified during a period of internal political strife in his native Nicaragua. He believed that freedom was the birthright of all persons in every nation and culture. He looked upon the politically controversial historic Nicaraguan personage, Augusto "Cesar" Sandino (1895-1934) as a "messiah of light and truth."

The artist Canales is no longer with us to explain his El Centro mural. However, as amateur "art critics" we can read into this colorful pictorial message the essence of "light and truth" and a strong statement of his belief that children and adults of all cultures and walks of life can represent truth, justice and fairness through peaceful means.

It is for this reason that the Washington State Minority and Justice Commission has chosen Alejandro Canales' mural at El Centro de la Raza, *"Así lo sonó Sandino,"* to reinforce our belief that all persons in our society are entitled to the benefits of truth, justice and freedom as we celebrate our courts in an inclusive society. ■■

El Centro de la Raza

There is a special place in Seattle's Beacon Hill Area where women, men, youth and children of all racial, ethnic, linguistic and cultural backgrounds are welcome to participate in its special programs in order that they may gain a more fulfilling and meaningful existence. It is *El Centro de la Raza* which for more than thirty years has occupied a formerly abandoned public school building at 2524 Sixteenth Avenue South. El Centro de la Raza is indeed the center not only for our cultural ethnic Latino population, but is *el centro de todos los gente del mundo* (the center for all peoples of the world). The initial three-month occupation in 1972 resulted in a two-year lease for the building at $1.00 a year. The property now is owned by El Centro.

The Washington State Minority and Justice Commission in this Report focuses attention on El Centro de la Raza without derogating the contribution of other social service agencies and groups in our State. We cite El Centro as an example of what private citizens can accomplish at the grass roots level when persons of goodwill, determination and serious purpose combine their intelligence, strength and commitment to create a permanent entity which aids our society—in the private and public sectors—in fulfilling its obligation to ensure to all persons their birthright of freedom. This includes freedom from fear, freedom of religion, freedom of speech, and freedom from want. To bring this about, it is necessary that our society provide education, housing, employment and justice.

As its name implies, El Centro de la Raza was established with a strong orientation towards our Latino culture. Many of its clients are Latinos from various geographical and nationality sectors. The dominant language at El Centro, in addition to English, is Spanish. However, this may obscure the fact that El Centro is dedicated to serving a multi-ethnic, multi-cultural, multi-lingual and multi-national community. This becomes immediately apparent when one takes a brief tour of the facility and hears many different languages being spoken and observes persons who quite obviously identify themselves as Asian, African American, Native American, and Latinos of many heritages (such as Mexican, Cuban, Nicaraguan, Ecuadorian, Puerto Rican, Peruvian, Salvadorean and Spanish).

Although the mission of El Centro de la Raza is accomplished by many volunteers and compensated staff, its acknowledged leader is Roberto Maestas, Executive Director and Founder. He, along with a small group of "community activists" on October 11, 1972, during the "turbulence of the Seattle of the early l970s" led a peaceful and creative occupation of the deserted Beacon Hill School "armed only with an abiding faith in people and a deep longing for a sense of community." Thus El Centro de la Raza was born. The "occupiers" then knew it was essential to involve "children, youth, adults and elders of all races and nationalities in a climate of love and understanding through total communication."

The former Beacon Hill School was subsequently deeded to El Centro de la Raza. Present developments in operation include a community kitchen (*La Cocina Popular*) with meal programs for low-income people and catering services; a museum store; office space leases; a printing operation; a senior/multipurpose room; a sports court; Frances Martinez Community Service Center (which offers language translation; advocacy; housing; senior services; food bank and hot meal service; job readiness; and employment service); José Martí Child Development Center; International Relations/Community Outreach Department; and English as a Second Language classes.

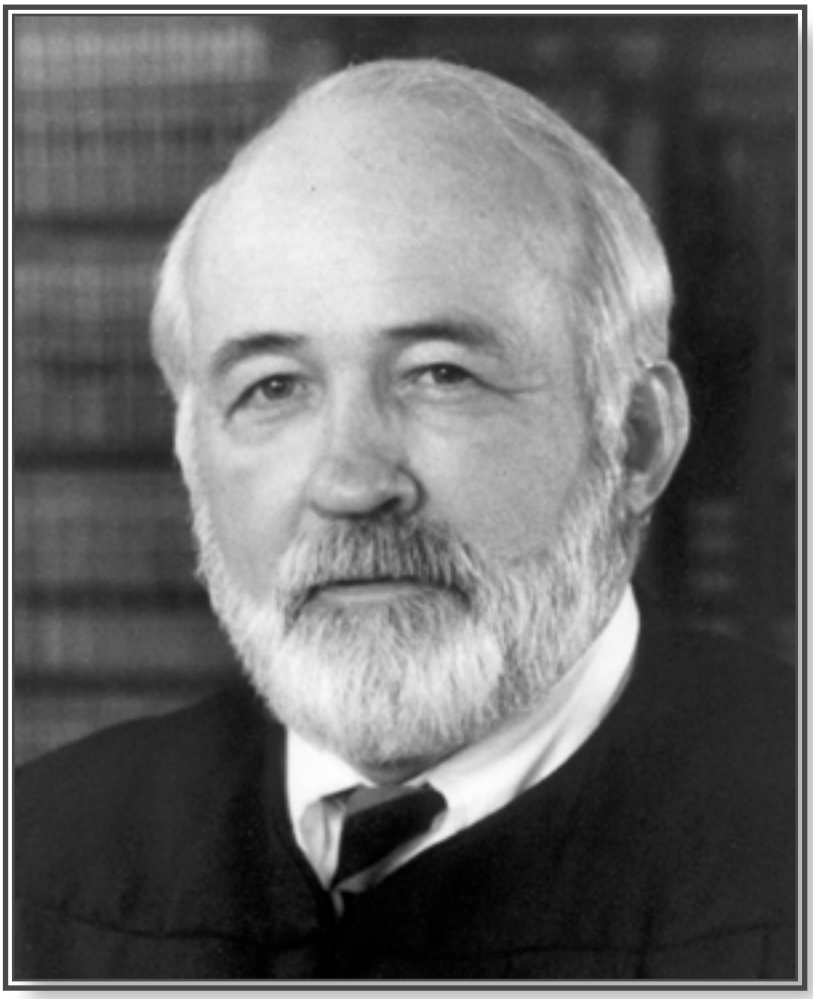
El Centro de la Raza "combines a strong sense of self-esteem and connection to one's family and culture with active participation in community affairs" and has "developed an extensive network—locally, nationally and internationally—to join diverse people with common problems in search of effective solutions." El Centro "squarely confronts problems of racism, sexism and other forms of inequality that have bedeviled the world for centuries." El Centro is dedicated to solving these problems as stated in its announced principles:

> *To share, disburse and distribute our services, resources, knowledge and skills to our participants, community, visitors and broader family with all dignity due their individuality, needs and condition, and to do so creatively with warmth, cultural sensitivity, fairness, enthusiasm, compassion, honesty, optimism, patience and humility in all areas of work.*

The Alejandro Canales mural on the cover of this Report is a colorful symbol of the principles of El Centro de la Raza. And a quote from the great Cuban patriot, José Martí (1853-1895), provides a poetic statement for the future of El Centro: *"Para los niños trabajamos porque los niños son los que saben querer, porque los niños son la esperanza del mundo."* In translation it states "It is for the young that we work, for they are the ones who know how to love, for they are the future of the world." ■■

Celebrating the Courts in an Inclusive Society

In Memoriam



James Morgan Dolliver
(1924-2004)

It is altogether fitting at the close of the year 2004 to give special recognition to retired Supreme Court Justice James Morgan Dolliver who died in Olympia, Washington on November 24, 2004 at the age of 80.

Serving on the Supreme Court from his appointment in 1976 until his retirement in 1999, Justice Dolliver actively served as Co-Chairperson of our Minority and Justice Commission from 1990 until his retirement. He was a source of inspiration to those of us privileged to know and work with him. He possessed in great abundance the qualities of intelligence, judicial temperament, political acumen, scholarliness, religiosity, humanitarianism, integrity and humor. He was passionately devoted to diversity and inclusiveness in all aspects of his personal and professional life. These qualities remained in evidence despite serious health problems following a stroke he suffered in January 1993. After initial rehabilitation, he admirably returned to the court in a wheelchair in 1993 and served the remainder of his six-year term. Throughout that period he maintained a regular workload which he completed with his usual intelligence and dispatch. After his retirement he developed other serious medical problems which severely curtailed his active life. But until the end, he never lost his intellectual functioning nor his many distinguishing qualities.

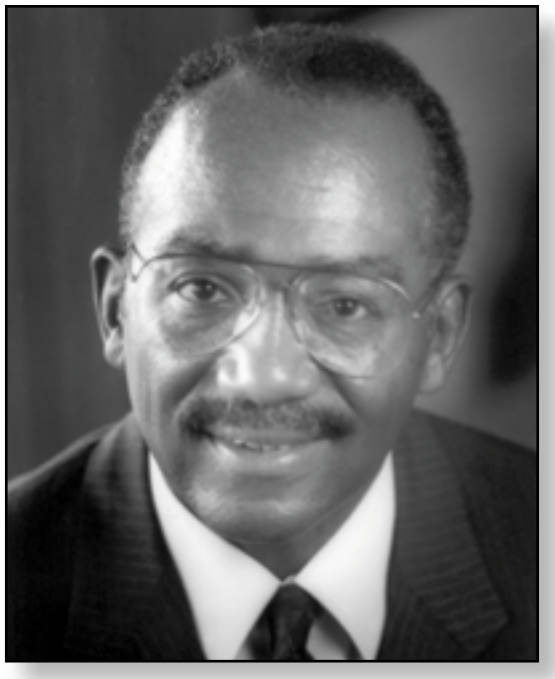
An active outdoorsman during most of his life, Justice Dolliver was devoted to environmental causes. He was commissioned in the Navy in World War II and piloted surveillance aircraft for the Coast Guard. He served on the staff of Washington members of Congress. But his most significant political service was as Chief of Staff for Washington Governor Daniel J. Evans from 1965 to 1976. He served on over 40 boards and commissions at the local, State and national level.

Justice Dolliver graduated from Swarthmore College, where he met and married his wife, Barbara, who survives him. The mother of their six children, she is herself a distinguished published poet. He graduated from the University of Washington School of Law in 1952.

Justice James Morgan Dolliver will be remembered in future generations for his great intellect, optimism, and compassion. His leadership and spirit provide inspiration for our Minority and Justice Commission to continue its mission of "Celebrating the courts in an inclusive society." ■■

Dedication

Judge Janice B. Niemi



Senator George T. Fleming

In reflecting upon the progress our Washington State Minority and Justice Commission has made since its inception in 1987 (initially as the Minority and Justice Task Force), we pay special tribute to two then members of the Washington State Legislature whose foresight and leadership led to action by our Supreme Court creating this Commission and its related Gender and Justice Commission.

While serving as a State Representative in 1987, it occurred to Judge Janice B. Niemi (later a State Senator), an experienced lawyer in the private and public sectors and a former Superior Court judge, that clearly defined action should be asserted by our judicial system to eliminate gender and racial bias from our courts and to help judges become more consciously aware of problems which manifestly could lead to such bias—however unintentional they may be. About the same time, State Senator George T. Fleming, a highly respected businessman, independently reached the same conclusion—with particular reference to eliminating racial, ethnic and cultural bias in the courts.

Having full regard for the reputation of judges in our State who strive for fair treatment of all persons coming before our courts, Representative Niemi and Senator Fleming were primarily responsible for inclusion in the budget for the Administrator for the Courts an appropriation of $130,000.00 "of the public safety and education account . . . solely for the administrator for the courts to initiate measures [to include] (a) A study

of the status of women and minorities as litigants, attorneys, judges, and court employees; (b) Recommendations for implementing reform; and (c) Providing attitude awareness training for judges and legal professionals."

From this springboard, the Washington State Supreme Court, under the inspired leadership of Chief Justice Vernon R. Pearson, created the Washington State Minority and Justice Task Force and its companion, the Washington State Gender and Justice Task Force. Using a wide cross-section of citizens (judges, lawyers and laypersons), the task forces undertook programs and empirical studies which inspired the Supreme Court to create permanent commissions: the Washington State Minority and Justice Commission; and the Washington State Gender and Justice Commission. Both commissions now operate under five-year renewals enthusiastically established by our Supreme Court.

The Minority and Justice Commission consists of twenty-one members appointed by the Supreme Court and approximately twenty members appointed by the Commission. With the limited staff of an Executive Director and one Program Assistant, the Commission operating through its five sub-committees (Education, Outreach, Research, Workforce Diversity, and Evaluation and Implementation) continues to conduct empirical studies and present educational programs for judges at all levels and court staff to carry out the expressed hopes of Representative Niemi and Senator Fleming.

The Niemi/Fleming influence has been felt throughout the United States because of the influential leadership of the Washington State Minority and Justice Commission, an original incorporator (with its counterparts in New York, New Jersey and Michigan) in 1987 of a national group now known as the National Consortium on Racial and Ethnic Fairness in the Courts. With annual meetings in various host states, the Consortium now consists of more than thirty Commissions created by the highest courts of their states. ■■

Celebrating the Courts in an Inclusive Society

Introduction

The Washington State Minority and Justice Commission was created by the Washington State Supreme Court in 1990 as successor to the Washington State Minority and Justice Task Force created by the court in 1987 at the request of the Washington State Legislature. By order of the Supreme Court on December 2, 1999, the Commission was renewed for an additional period of five years until December 2005. In creating the Commission and subsequent Orders of Renewal, the Supreme Court acknowledges there is a continuing need to identify and to eradicate all racial, ethnic, and cultural bias in our state court system.

The purpose of the Minority and Justice Commission is to determine whether racial and ethnic bias exists in the courts of the State of Washington. To the extent that it exists, the Commission is charged with taking creative steps to overcome it. To the extent that such bias does not exist, the Commission is charged with taking creative steps to prevent it.

The primary functions of the Minority and Justice Commission in pursuit of its mandate are:

first, to improve the administration of justice by developing and presenting educational programs designed to eliminate racial, ethnic and cultural bias in the judicial system;

second, to eliminate racial and ethnic bias from the state court system through identification of problems and through implementation of recommendations ensuring fair and equal treatment for all;

third, to engage in empirical research studies examining whether racial and ethnic disparities exist in the criminal justice system;

fourth, to increase racial and ethnic diversity in the court workforce through development and implementation of recruitment and workforce diversity education programs; and

fifth, to publish and distribute a regular newsletter, *Equal Justice*, and an annual report.

The Washington State Minority and Justice Commission is co-chaired by Supreme Court Justice Charles W. Johnson and Justice Charles Z. Smith (retired). The work of the Commission is carried out through its five sub-committees: Education, chaired by Judge LeRoy McCullough, King County Superior Court; Evaluation and Implementation, chaired by Judge James M. Murphy (retired), Spokane County Superior Court; Outreach, co-chaired by Ms. Myrna I. Contreras, Attorney at Law, Contreras Law Offices, and by Brian A. Tsuchida, Federal Public Defender; Research, chaired by Judge Kenneth H. Kato, Court of Appeals, Division III; and Workforce Diversity, chaired by Judge Deborah D. Fleck, King County Superior Court. The Commission currently consists of twenty-one members appointed by the Supreme Court and twenty "technical support members" appointed by the Commission. ■■

Supreme Court Order Renewing Commission

SUPREME COURT OF WASHINGTON

ORDER RENEWING WASHINGTON STATE MINORITY AND JUSTICE COMMISSION	)	Number 25700 B-374

PREAMBLE

1.0 *Equal Justice Before the Courts* The Washington State Supreme Court recognizes the need for all persons to be treated equally before the courts of this State. The Court recognizes that for any system of justice to be responsible, it must be examined continuously to ensure it is meeting the needs of all persons who constitute the diverse populations we serve, with particular concern for the needs of persons of color who represent various racial, ethnic, cultural and language groups.

2.0 *Establishment of Minority and Justice Commission* The Court on October 4, 1990 established the Washington State Minority and Justice Commission to identify problems and make recommendations to ensure fair and equal treatment in the state courts for all parties, attorneys, court employees and other persons. The Commission was created to examine all levels of the State judicial system to particularly ensure judicial awareness of persons of color to achieve a better quality of justice and to make recommendations for improvement to the extent it is needed.

3.0 *Renewal of Minority and Justice Commission.* The Minority and Justice Commission was established in 1990 for a period of five (5) years, subject to renewal for additional years as may be determined by the Court. It was renewed for an additional period of five (5) years by order of this Court on July 15, 1995. Upon review of the activities of the Commission since its creation, the Court now determines that the Commission should be renewed for an additional period of five (5) years, subject to further renewal as may be determined by this Court.

ORDER

4.0 *Order Renewing Minority and Justice Commission*. By this order the Washington State Supreme Court now renews and continues the Washington State Minority and Justice Commission for an additional period of five (5) years, subject to further renewal for additional years as may be determined by this Court. The Commission shall continue its operation without interruption and shall proceed according to its established organization and program.

5.0 *Membership of Commission.* The Washington State Minority and Justice Commission shall continue with twenty-one (21) members and shall include an appropriate mix of judges at all levels of court, members of the Washington State Bar Association, the Administrator for the Courts, trial court administrators, college or university professors, and private citizens. Appointments to the Commission shall be made to assure racial, ethnic, gender, cultural and geographic diversity from the population of the State of Washington.

6.0 *Terms of Appointment to Commission*. All appointments to the Commission shall be for terms of four (4) years, staggered according to the tenure established under the October 4, 1990 Order, except that the chairperson or co-chairpersons may serve for an unlimited term at the pleasure of the Supreme Court. Vacancies on the Commission shall be filled by the Supreme Court upon recommendation of the Commission.

7.0 *Technical Support Members.* The chairperson or co-chairpersons may augment the Commission by appointing Technical Support members, to serve without vote, when broader representation or specific expertise is needed. The terms of Technical Support members shall be for one (1) year, renewable for additional periods of one (1) year at the pleasure of the chairperson or co-chairpersons.

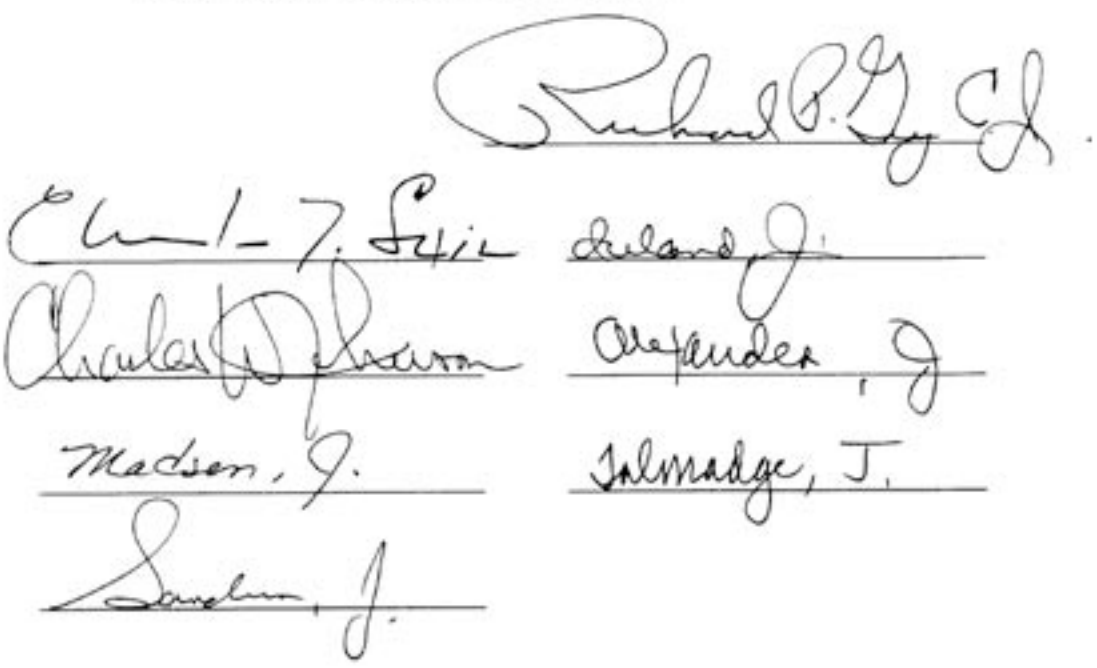
8.0 *Budget of Commission* The budget of the Commission shall be provided in the Budget of the Supreme Court or in the Budget of the Administrator for the Courts.

9.0 *Administrator for the Courts.* The Administrator for the Courts, with the advice of the Commission and subject to budget considerations, shall provide staff and other resources for ongoing activities of the Commission. But the Executive Director of the Commission shall be employed by, and be directly responsible to, the Commission acting through its chairperson or co-chairpersons.

10.0 *Annual Report.* The Commission shall prepare and file an annual report with the Governor, Legislature, Supreme Court and the Administrator for the Courts concerning its activities and shall recommend appropriate action for further promotion of equal justice for racial, ethnic, cultural and language minorities in the state judicial system. This shall include continuing education on cultural diversity for judges and other court personnel.

11.0 *Authorization to Seek Funds.* The Commission is authorized to seek funding from the private and public sectors and is authorized to receive funds in its own name.

Signed at Olympia, Washington on December 2, 1999.



Celebrating the Courts in an Inclusive Society

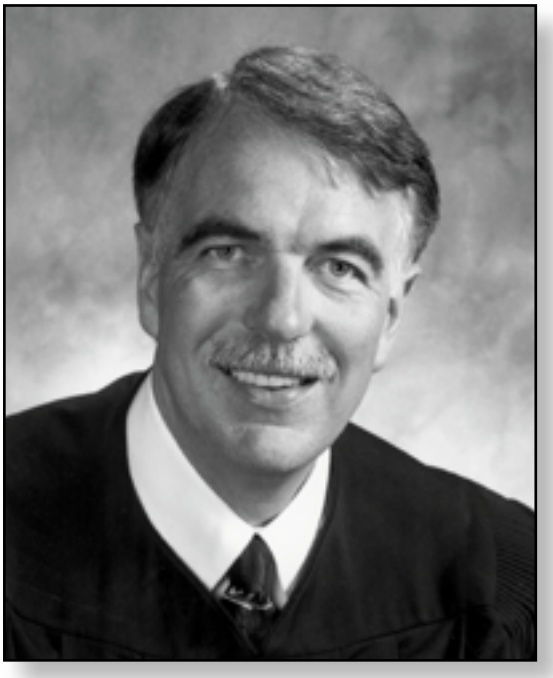
Judges as Commission Members

The Washington State Minority and Justice Commission was initially created and continues to be authorized by judges (justices of the Washington State Supreme Court) to assist *judges* in continually rendering justice and fairness to all persons who come before our courts.

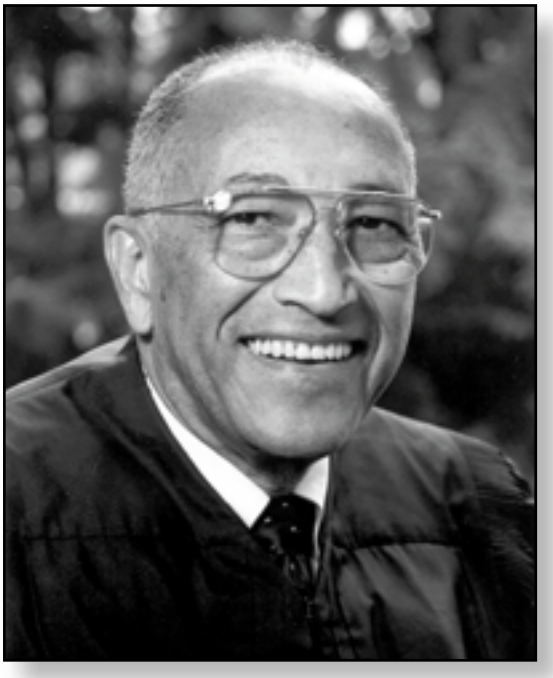
Our Commission has, since its beginning in 1987, earned the respect of judges at all levels. This is perhaps due to the active participation by judges who faithfully serve as members of the Commission, along with lawyers and laypersons who work together to fulfill our mission.

In this 2003-2004 Report, we acknowledge the significant role of judges on our Commission by presenting photographs of active and retired (or former) judges who have served on the Commission during this period.

Co-Chairpersons



Charles W. Johnson
Associate Chief Justice
Washington State Supreme Court



Charles Z. Smith
Justice (Retired)
Washington State Supreme Court

William W. Baker
Court of Appeals

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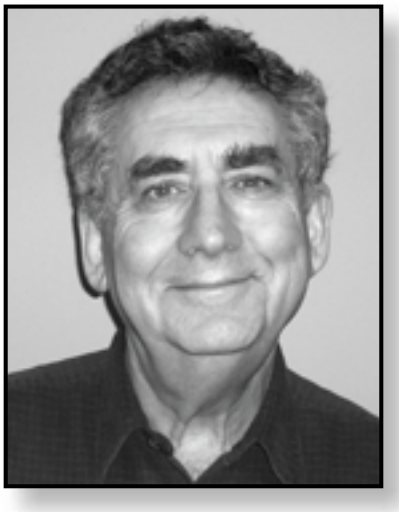
United States Magistrate Judge

Ronald E. Cox
Court of Appeals

Anne L. Ellington
Court of Appeals

Deborah D. Fleck
King County Superior Court



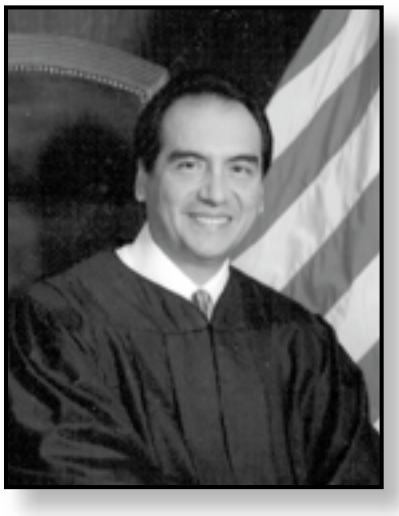
Donald J. Horowitz
King County Superior Court
(Former)

Richard A. Jones
King County Superior Court

Kenneth H. Kato
Court of Appeals

Douglas W. Luna
Tlingit and Haida Indian
Tribes of Alaska

Ron A. Mamiya
Seattle Municipal Court



Ricardo S. Martinez
United States District Court

LeRoy McCullough
King County Superior Court

Richard F. McDermott, Jr.
King County Superior Court

Maryann C. Moreno
Spokane County Superior Court

James M. Murphy
Spokane County Superior Court
(Retired)

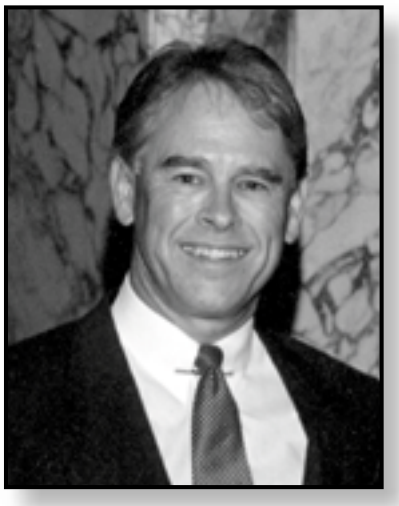
Greg D. Sypolt
Spokane County Superior Court

Mary Alice Theiler
United States Magistrate Judge

Philip J. Thompson
Court of Appeals
(Retired)

Vicki J. Toyohara
Office of Administrative Hearings

Mary I. Yu
King County Superior Court



Dennis D. Yule
Superior Courts of Franklin and Benton Counties

Celebrating the Courts in an Inclusive Society

An Unusual Look at a Historical Injustice

On February 19, 1858 Chief Leschi of the Nisqually Tribe, an Indian (or "Native American"), was hanged following his "conviction" in the Washington Territorial Court upon his indictment for the murder of one A. B. Moses, a white settler and militiaman engaged in a "war" declared by Territorial Governor Isaac I. Stevens.

For years descendants and historical suporters of Chief Leschi—honored for more than 150 years as a brave, noble and humane leader—sought legal exoneration of the great chief because of what they perceived to be a gross miscarriage of justice.

On March 4, 2004 the Washington State Legislature by Senate Resolution 8727 and House of Representatives Resolution 4708 simultaneously issued a significant statement which recited these historical facts:

> . . . Chief Leschi was a prominent Nisqually Indian leader who made a profound impression upon our early history as a Territory; and
>
> . . . Chief Leschi was a benevolent man of great intelligence and character, who acted humanely during times of both war and peace; and
>
> . . . Chief Leschi led the Nisqually Indians at the time the Treaty of Medicine Creek was signed in December 1854; and
>
> . . . By the terms of the Treaty, the Nisqually Indians were assigned to a reservation on lands far removed from the Nisqually River and its fisheries which had sustained them for centuries; and
>
> . . . Chief Leschi met with territorial leaders seeking a reservation with a sufficient land base for the Nisqually people, but was refused; and
>
> . . . War broke out between Indians and territorial forces, and in the course of war, A. Benton Moses, a soldier in the Washington Territorial Militia, was killed during the Battle of Connell Prairie; and
>
> . . . Chief Leschi was charged with murder in the death of Moses and was tried before a territorial court. The trial resulted in a hung jury after the jurors were instructed that killing of a combatant in the time of war was not murder; and
>
> . . . Chief Leschi was tried a second time and was convicted of murder and sentenced to death by hanging after the court refused to give the jury instruction regarding the death of combatants. The judge also refused to admit into evidence a

map of the battleground showing that Chief Leschi could not have traveled the distance required to be in a position to fire at A. Benton Moses; and

. . . The U. S. Army refused to execute Chief Leschi, who was regarded as a prisoner of war, and he was hanged only after the Territorial Legislature enacted a law enabling local authorities, under color of law, to execute Leschi. Accordingly, the Supreme Court rescheduled his execution, which took place on February 19, 1858; and

. . . Chief Leschi was the victim of discrimination and was executed because, as the leader of the Nisqually Indians, he vigorously defended the territorial rights of his people; and

. . . There was at that time, and continues to be, a public outcry over the wrongful conviction and execution of Chief Leschi[.]

Both resolutions continued with declarations by the Senate and the House of Representatives that each House:

. . . recognize the injustice which occurred in 1858 with the trial and execution of Chief Leschi and reaffirm the commitment to a legal system under which a fair trial is the right of everyone regardless of race or creed; and

. . . recognize Chief Leschi as a courageous leader whose sacrifice for his people is worthy of honor and respect and that the residents of the State of Washington solemnly remember Chief Leschi as a great and noble man; and

. . . join with those who hope that the Nisqually Tribe is successful in its efforts to right a gross injustice through a vacation of his conviction by the Washington Supreme Court [.]

A request was made by the Legislature that the Supreme Court act upon these Resolutions. Chief Justice Gerry L. Alexander determined that because the Leschi case occurred when Washington was a Territory and before it became a State, and because the court which heard the case was the Territorial Court and not a Washington State court, our Washington State Supreme Court does not have jurisdiction to review and take action on the Leschi case. However, our Chief Justice did determine it would be appropriate to convene a "historical court" which would, in an adversary proceeding, hear testimony based upon the historical record and reach an appropriate conclusion upon a petition on behalf of Chief Leschi.

The Chief Justice called upon present and retired judges to "hear the case" at the Washington State History Museum in Tacoma on December 10, 2004. In addition to Chief Justice Alexander, the court consisted of Supreme Court Justice Susan Owens; Court of Appeals Chief Judge Ronald E. Cox; Court of Appeals Judge (retired) Karen Seinfeld; Thurston County Superior Court Judge Daniel J. Berschauer; Lummi Tribal Court Judge Theresa Pouley; and retired Pierce County Superior Court Judge Donald H. Thompson.

Appearing as attorneys for Petitioner were Nisqually Tribal Attorneys Bill Tobin and Thor Hoyte; Robert Anderson, Director, University of Washington Native American Law Center; and John W. Ladenburg, Pierce County Executive and former Prosecuting Attorney for Pierce County.

Appearing as attorneys for the Respondent were Senior Pierce County Deputy Prosecuting Attorneys Carl T. Hultman and Mary Robnett.

Called as witnesses in the hearing were Ms. Cecelia Svinth Carpenter, a Nisqually and a noted historian; Professor Charles Wilkinson, University of Colorado at Boulder School of Law, a national expert on treaty rights and Indian natural resource law; Ms. Shanna Stevenson, noted author of several local history publications; Professor Alexandra Harmon, University of Washington Department of Indian Studies; United States Army Judge Advocates Captain Eugene Ham and Captain Paul Robson; Professor Emeritus of History Kent Richards, Central Washington University, a noted scholar and author of a biography of Governor Isaac I. Stevens; Ms. Cynthia Iyall, a Nisqually and descendent of Chief Leschi; Dorian Sanchez, a Nisqually and Chairperson of the Nisqually Tribal Council; Ms. Connie McCloud, a Puyallup, cultural coordinator at the Puyallup Health Center; and Billy Frank, Jr., a Nisqually and chairperson of the Northwest Indian Fisheries Commission.

Both statements were scholarly, sensitive, germane and represented the highest standards of the legal profession.

After hearing the testimony, the court heard closing statements from Carl T. Hultman for Respondent and John W. Ladenburg for Petitioner. Both statements were scholarly, sensitive, germane and represented the highest standards of the legal profession. Because of limited space, this article will only report the statement by Mr. Ladenburg:

"I want to thank the Leschi family and the Nisqually Tribe for allowing me to participate in this important event.

"I have practiced law here in Washington State for 30 years. I had the pleasure of being elected four times as the Prosecutor of this county, something never done before. During my practice I have had the privilege to participate in many trials, criminal and civil. I have been honored to practice before our Supreme Court and in the Federal trial and appeals courts. I am one of a handful of lawyers in this state who have participated as counsel in death penalty cases both for the defense and prosecution.

"Yet I stand before this court today thinking this may be the most important case I have ever been involved in.

"This case is about the future not the past.

"This case is about humanity not history.

"This case is a rare opportunity for the people of Washington, both Indian and non-Indian, to come together to heal old wounds and create the road toward understanding and respect.

"This court has that opportunity. Most judges, most courts will never have such a chance to impact so many lives. We must not squander that opportunity.

"Let us briefly review the facts. If one thing is clear now, it is that what happened that day at Connell's Prairie was shrouded in mystery the day it happened and still is. We have the highly questionable testimony of the single alleged eyewitness, Rabbeson. Rabbeson, who would chair the grand jury that indicted Leschi, in spite of the fact that he was the sole witness against him. Did Rabbeson thereby judge his own credibility? The absurdness of it is shocking even if it did not result in a man's death.

"We have very credible proof from the Army that Leschi could not have been present at the scene based on Rabbeson's own testimony of the distances traveled. This evidence was never given to the jury. We have the fact that Moses was shot in the back with no one really knowing who fired that shot. Even if Leschi is there, mere presence at the scene cannot be used to convict. Remembering that the evidence must establish guilt beyond a reasonable doubt, we can safely say that no reasonable jury, given all the facts, could convict.

"But there exists another compelling reason to exonerate Leschi. These facts are not even disputed.

"First, Leschi was picked by Governor Stevens to be a spokesman or leader for the Nisqually. Leschi was a peaceful man, known to be a friend of the settlers. The historical record indicates that Leschi helped the first settlement survive the winter. Leschi believed that all could share the land, as long as all were treated fairly.

"Leschi did not seek the position, he was thrust into it. What is important is that since Governor Stevens picked Leschi to lead the Nisqually in treaty negotiations, it is clear that Stevens considered the Nisqually a sovereign nation to negotiate with, and that he considered Leschi their leader. Leschi was the recognized leader of a sovereign nation, involved in negotiations with Stevens.

"The record is also clear that when Leschi refused to sign the treaty and fled to his home, he did not declare war. Rather, it was Stevens who declared war by sending troop to capture Leschi, the leader of a sovereign nation. By declaring war on the Nisqually, Stevens made Leschi an enemy combatant. Leschi was proven correct about the treaty as Stevens eventually had

to revise the treaty to give the Nisqually better lands.

"Leschi recognized the laws of nations. He told Owen Bush, a settler, that the tribe would not hurt any of the settlers and advised them to stay on their farms. This shows he knew that civilians should be off limits in the war declared on his nation.

"The record is full of examples of the fact that both sides knew that a state of war existed and that Leschi was a combatant.

"Colonel Wright of the US Army refused to hand over Leschi because the Army, recognizing the laws of warfare, considered him a prisoner of war. Leschi was promised amnesty to surrender because of his status.

"Later Colonel Casey would refuse to allow Leschi to be hanged at Fort Steilacoom because the Army still considered him a combatant who was given amnesty. What more proof that Leschi was a combatant entitled to protection from state murder charges than the position of the very Army that he was fighting?

"It is clear that Leschi himself understood the law by his comments before his hanging that he did not believe it a crime to kill the other side's soldiers in time of war.

"The record shows us that the first Leschi trial ended with a hung jury because Leschi was entitled to status as an enemy combatant. That much is clear from the writings of Ezra Meeker.

"The record is unclear if that defense was allowed Leschi at the second trial, but that fact is unimportant. The court should never have let the case go to the jury, but should have dismissed upon the record.

"The final proof of the fact that Leschi was wrongfully convicted is in the decision of the Supreme Court upholding his conviction.

"I quote:

"'The prisoner has occupied a position of influence, as one of a band of Indians, who, in connection with other tribes, sacrificed the lives of so many of our citizens, in the war so cruelly waged against our people on the waters of Puget Sound.'

"This statement is remarkable. This statement recognizes that Leschi was a leader of his people, his 'position of influence.' This statement recognizes that the tribes banded together and actually recognizes that this was 'in a war.' This statement then goes on to classify that war as 'cruelly waged' and blames Leschi for the 'sacrificed lives of so many of our citizens,' something he was not on trial for.

"There is enough in that statement for this Historical Court to find that Leschi did not get a fair trial or appeal. The court showed its extreme prejudice against the defendant and completely ignored the well settled law that combatants cannot be convicted in civil courts for crimes during war. The court had no jurisdiction to convict and hang Leschi—and that proof exists in that incredible first paragraph. With or without argument, the court had an absolute duty

to dismiss the indictment and free Leschi.

"So, the facts are not really in dispute here. The record is clear. Based upon the highly questionable testimony of only one eyewitness, Leschi was convicted and hanged. Based upon the record of the original mistrial and the written record of the court itself, Leschi is entitled to absolute immunity under the laws of war, recognized by both sides.

"The only fair and just result is that this Historical Court correct the history of this State and declare Chief Leschi exonerated.

"To do anything less, to shirk from the duty before you, will be a terrible blow to our people and to our system of justice. You have the chance to issue a verdict that will heal old wounds.

"Like the eagle from above, we can see the landscape of our heritage in sharp focus."

"After Leschi was killed, a story grew up around the Nisqually area. Bald eagles are a rare species today, but then they were common. The unusual thing about bald eagles is that they mate for life. When one mate is killed, the remaining eagle leads a solitary life until death.

"It is said that after Leschi was killed, a solitary bald eagle was often seen circling Leschi's original home. As it circled, the eagle would scream a single cry, and then disappear into the tall fir.

"It might be that that eagle represented the land itself, searching for Leschi. Maybe that eagle represented the family of Leschi, searching for their kin. Perhaps the eagle was Leschi himself, cruelly separated from his land and family.

"Today, another solitary eagle slowly circles that sacred land. It too cries a lonely, simple cry.

"This cry is not for Leschi, but for us the living.

"This cry is for our heritage and history.

"This cry is for our time and place.

"This cry is for the children who attend Leschi School.

"This cry is for the citizens who live in Leschi neighborhood.

"This cry is for the families walking on the sand of Leschi Beach.

"This cry demands of us only one thing.

"This cry demands to know when we will have the courage to stand up as one people of Washington and admit the wrongs of the past.

"Like the eagle from above, we can see the landscape of our heritage in sharp focus. We can see the injustice done to Leschi and the Nisqually. We can see the pain caused by the multiple trials, the lingering appeals, and the obscene pressure to hang this man.

"This man whose crime was refusing to

give up his land and possessions. This man whose crime was loving his family and people so much that he could not see them cast away like a forgotten race. This man who died for his nation like so many have died for this new nation.

"Like the soaring eagle, we can now see the truth. We have wiped away the tears of the war, we have wiped away the pain of death, and we have wiped them away with the clear vision of history. We know the truth. Can we not do the simple justice of declaring the truth?

"The eagle demands of this Court that simple justice. The eagle demands that we right the wrong of so many years ago. The eagle now cries for simple justice.

"We cannot bring Leschi back to life. We cannot restore him to his lands. But we can, we must, restore him to his name. It is that simple now after all these years—we must give Leschi back his good name.

"We do this not for Leschi alone. We do this not for Leschi's descendants alone. We do this not for the Nisqually tribe or all the tribes of the Northwest alone.

"The eagle cries for us, all of us.

"Let your verdict vindicate Leschi. Let your verdict clear his good name. Let your verdict be more than a simple verdict.

"Let your verdict surge forth like a raging river from this courtroom. Let it sweep away all memory of the pain and injustice inflicted on Leschi and let it leave the calm waters of reconciliation and brotherhood for all the peoples of Washington.

"Let your verdict pour across the play yard of Leschi School to show the children that justice, however long delayed, is still the cornerstone of this society.

"Let your verdict flow from home to home in the Leschi neighborhood creating a firm assurance that we honor every single soul.

"Let your verdict wash down upon the sands of Leschi Beach like a cleansing tide taking with it all pain and hatred of the past.

"Let your verdict free the spirit of the eagle so that it may rest in peace."

The Historical Court then retired to deliberate upon its decision. After a short period the judges returned to the courtroom. Chief Justice Gerry L. Alexander in open court announced the unanimous decision of the Court.

The Court concluded that at the time of the death of A. B. Moses the Washington Territory was at war with the Indian tribes, including the Nisqually; that any act by Chief Leschi resulting in the death of A. B. Moses was an "act of war" committed by an enemy combatant; that deaths occurring between enemy combants while fighting a war were not subject to the jurisdiction of the civil courts; that the Territorial Court did not have jurisdiction to try, convict and execute Chief Leschi; and that, based upon the historical record, Chief Leschi should be exonerated of the charges which resulted in his execution. ■■

Sub-Committee Reports

The Washington State Minority and Justice Task Force, precursor to the Minority and Justice Commission, in its preliminary work discovered there were significant needs for cultural diversity education and for increasing diversity in the workforce within the court system of Washington State. The Task Force also illuminated the need for continuing objective research in the treatment of people of color who enter the justice system, as well as those in the legal profession, and the need for developing liaisons with mainstream and ethnic bar organizations.

The Task Force, in 1989, recommended creation of the Washington State Minority and Justice Commission with specific mandates. The Washington State Supreme Court issued an Order creating the Commission and two subsequent Orders of Renewal. The Commission established five sub-committees to accomplish its mission:

- The *Education Sub-Committee* focuses on development and implemetation of cultural diversity education seminars, panels, and workshops that imbue judges, court personnel, and persons in the justice system with greater awareness and appreciation of cultural diversity.

- The *Outreach Sub-Committee* disseminates information about Commission activities and reports to state, local and ethnic bar associations, and ethnic community organizations.

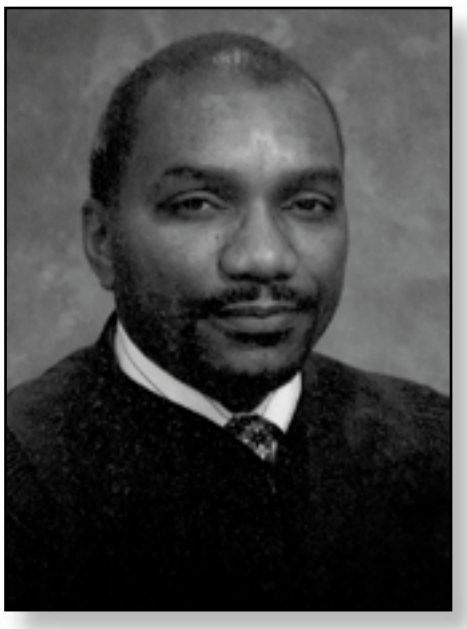
- The *Research Sub-Committee* conducts research projects to examine whether race and ethnicity of participants in the justice system affects their treatment in the courts.

- The *Workforce Diversity Sub-Committee* strives to promote diversity in the workforce and to increase persons of color in non-judicial and quasi-judicial positions within the Washington State court system.

- The *Evaluation and Implementation Sub-Committee*, created in 1998, reviews Commission-sponsored research reports and develops implementation plans based on report findings.

Education Sub-Committee

The mission of the Education Sub-committee is to improve the administration of justice by developing and presenting innovative and educational programs that will identify and eliminate racial, ethnic and cultural bias in the judicial system. In the pursuit of this mission, we continue to promote cultural awareness and mutual respect by judicial officers and by others who deliver court services to the public.



LeRoy McCullough
Chairperson
Education Sub-Committee

Our specific objectives include:

- To provide leadership to all components of the state justice system in order to eliminate racial, cultural, and ethnic bias and disparate treatment;
- To ensure that cultural diversity training becomes a normal and continuous aspect of employment within the state justice system;
- To provide cultural diversity training skills to those within the justice system; and
- To provide the best educational services available to those within the justice system.

Following are brief summaries of recent programs and activities that are consistent with our mission and objectives.

1. Technology-aided Instruction and Guidance Cultivating Cultural Competency (CCC)

The 2003-04 period was an exciting one for the Education Sub-committee. In addition to presenting on-site education programs, we embarked upon the journey to on-line educational success. Prior to 2002, the Administrative Office of the Courts Judicial Education Services (JES) offered an on-site orientation for new employees. Included in the week-long curriculum of this Institute for New Court Employees and Bailiffs was a presentation on cultural diversity. With the termination of the Institute in 2002 the JES decided to replace it with an on-line computer program, the Virtual Institute for New Court Employees (VINCE). We accepted the invitation to provide an on-line cultural diversity component and our first computer course for new employees, Cultivating Cultural Competency (CCC), was born.

The CCC instruction is divided into six units. Unit 1 introduces the course and emphasizes the importance of cultural diversity and its impact on public trust and confidence in the courts. Unit 2 emphasizes self-knowledge and invites learners to examine their own culture and background so that the learner's personal "triggers" can be readily identified. Unit 3 offers listening, observing and reflecting skills and other useful techniques the learner can use to more appropriately respond to the various gestures and cultural patterns of others.

In Unit 4, the student is invited to examine four generations of people currently in the workforce; their differences by generation; and, as well, their amazing similarity in values, skills and other areas. Unit 5 recognizes that workplace misunderstandings are commonplace, but offers specific techniques to minimize the phenomenon and to improve relationships between co-workers. In the final unit of the course, the learner is presented with a review of the course, a brief quiz, and a worksheet that will assist in establishing an individual plan to further advance the learner's cultural competency.

By its very nature, cultural diversity course work is dynamic and subject to a variety of revisions and updates.

This assignment had its challenges. By its very nature, cultural diversity coursework is dynamic and subject to a variety of revisions and updates. While on-site learners have the opportunity to engage in instant personal dialogue and exchange with other students and the instructor, on-line students do not. Nevertheless, we are proud to have successfully completed organization of the course. We expect students to begin accessing the course by January 2005.

We are particularly grateful for the efforts of JES members James Kozick, Janet McLane, Marna Murray, Jennifer Scholes, and Ann Sweeney; AOC User Interface Designers Dexter Mejia and Scotty Jackson; and for the leadership of Minority and Justice Commission Executive Director Erica S. Chung. We also acknowledge the expertise and assistance of the Integral Leadership Group, which initially developed the course content and message.

2. Computer-aided Bibliography Resource

The Education Sub-committee continues its two-year project preparing an on-line annotated bibliography. The purpose of the project is to offer computer-accessible diversity resources to judicial officers and others who desire to enhance their knowledge and continually improve their service to the public. Under the initial direction of Judge Anne L. Ellington, Court of Appeals, Division I, the Sub-committee developed a form for compiling entries and a flow chart to assure website accuracy and functionality. Although Judge Ellington has retired from active Commission membership, she has graciously agreed to see the project through resolution of remaining issues, including formatting, classification, accessibility and programming. We expect to complete the completed bibliography on the Commission website by February 2005.

3. Judicial Education

On Monday, September 20, 2004, at the 47th Annual Washington Judicial Conference, the Education Sub-committee presented a vibrant and energetic education session titled "Foster Care: the Good, the Bad, and the Ugly." With an emphasis on

foster care children and providers of color, the three hour session challenged judicial assumptions about foster care and the traditionally passive role of the judicial officer in foster care placement and related matters.

The session was convened by the Education Sub-committee Chairperson King County Superior Court Judge LeRoy McCullough. King County Juvenile Court Chief Judge Patricia Clark began the substantive presentation with sobering statistics on the disproportionate numbers of children of color in foster care, their length of stay in the system, and their delay in receiving permanent placements. She then presented an overview of the dependency process and its connection to foster care.

The presenters utilized a variety of educational tools throughout the session, including a pre-assessment, a movie clip from the autobiographical movie "Antoine Fisher," hypotheticals, group queries, and panel discussions.

The first of the two panel discussions featured foster care providers and young adults who were formerly in foster care. From these bold and articulate speakers, session attendees received first-hand accounts of system-wide barriers faced by providers, reports of cultural bias, and reports of perceived benign neglect by reviewing judicial officers. The second panel focused on the origin and nature of changes to be implemented as a result of the landmark Braam case. For example, there will be a multidisciplinary oversight panel and the expectation of less frequent moves of foster children. Speakers on the second panel included an attorney who represented the approved Braam class of foster care children and a senior Assistant Attorney General intimately familiar with the settlement and with the role of the Department of Social and Health Services in foster care matters.

After the session was drawn to a close by the moderator's judicial action summary, and by several challenges issued to the judiciary by Judge Clark, the gathering ended with a powerful recitation of the poem "Who Will Cry for the Little Boy (who cries inside of me)?" The presenter was a young male graduate of the foster care system currently enrolled in a four year college and planning for law school studies.

Post session evaluations were extremely positive. On effectiveness of presentation judges rated the program at 4.77, with 5 as the highest rating. Some typical comments included: "By far, one of the best educational presentations in a long time;" "a most outstanding program…a huge wakeup call for the system."

4. Juvenile Justice: Offenders and Disproportionality

At the request of then-Presiding Judge Greg D. Sypolt, Spokane County Superior Court Juvenile Division, the Education Sub-committee sponsored four education programs titled "Addressing Racial Disproportionality in the Juvenile Justice System." The sessions were presented on the

following dates: February 26, May 8, May 14, and May 22, 2003. Dr. Scott Finnie, African American Studies Professor at Eastern Washington University, was the presenter. Initially the Sub-committee committed to sponsoring one education session targeting leaders from the Juvenile Courts, Police Department, Sheriff's Department, Prosecutor's Office, School District, Minority and Social Service Organizations who work within the juvenile justice system. The evaluations indicated it was the "best" training they have ever attended in dealing with racial bias. Dr. Finnie skillfully guided the audience in exploring racial inequities in society and in exploring personal biases, fears, and unconscious judgments. His presentation inspired participants to rethink the issue of racial bias personally and professionally and to commit to addressing racial disproportionality in their respective agencies.

After the success of the initial education training by Dr. Finnie, the Spokane County Juvenile Court requested sponsorship of additional training programs for all participants in the juvenile justice system. Approximately 150 persons, including judicial officers, juvenile court probation/correction officers, prosecutors, public defenders, school and law enforcement staff, and service providers attended.

5. Training for Newly Elected and Appointed Judges

For several years, the Sub-committee has accepted invitations to present cultural diversity education programs for newly-elected or appointed judges and commissioners. This diversity program, "Towards a More Culturally Competent Courtroom," has become a standard of the week-long Washington State Judicial College. As the first education program on the agenda of the College curriculum, our Commission's presentation is able to set the tone for the courses that follow in admonishing participants of the vital and important roles fairness and cultural competency play in the many discretionary and other judicial decisions judges must make.

The Education Sub-committee continues its efforts to improve the quality and relevance of its education programs. For example, in 2004, we enhanced the program by integrating a presentation by Judge Frank Cuthbertson, Pierce County Superior Court, and Judge Kenneth H. Kato, Court of Appeals, Division III: "Impact of Diversity on the Court," with the cultural diversity basic program from Achievement Architects North. The result was a synthesis of practical skills that aided the learners in identifying and properly responding to courtroom bias. While the two judges of color (Judges Cuthbertson and Kato) were able to lend personal credence to the call for correcting overt and covert bias in court processes, the Achievement Architects North consultants, Ms. Benita Horn and Ms. Peggy Nagae, addressed more general subjects such as intent, impact, other communication skills, and practical steps to a bias-free courtroom. The program received high evaluations.

Attendees were also able to see the Mi-

nority and Justice Commission produced film "A Cultural Competency: Rising to the Challenge" which also received positive comments in the evaluations.

6. Outreach: Administrative Law Judges

In 2002, a member of our Commission recommended that we present cultural diversity training for Washington State Administrative Law Judges. The sub-committee agreed that, while a part of the Executive Branch and not the Judicial Branch, administrative law judges review and decide cases in a forum and a manner which impacts the public's perception of the judiciary. In addition, some administrative law decisions may come to the constitutional courts for review. The sub-committee agreed to present a cultural diversity training program to a coalition of administrative law judges from various state agencies, the Adjudicatory Agencies Group.

On August 15, 2003, Judge Ron A. Mamiya, Seattle Municipal Court and a member of our Commission, joined with a California Judge Ken Kawaichi, Alameda County Superior Court, to present the first session on "Cultivating Cultural Competency" to the Adjudicatory Agencies Group. Judge Kawaichi, a member of the National Consortium of Racial and Ethnic Fairness in the Courts, began the dialogue by discussing perceptions, intent, actual impact and methods for minimizing and eliminating perceptions of bias. Judge Mamiya emphasized and focused on the importance of language interpreters. He explained the difference between merely qualified interpreters and court-certified interpreters and gave key suggestions for working with both.

The program evaluations gave the presenters a score of 4.36 out of possible 5.0. Some of the evaluation comments stated: "Excellent presentation!", "Very useful, kept my attention; good planning in presentation. Very good!", "Wonderful - made me do a mental review of my own practices ... which may be the point.", "Very entertaining and informative! Thank you!", and "Great presentation. Great use of video, slides & other visuals to relay information."

Conclusion

The Education Sub-committee is indebted to its membership and to the Minority and Justice Commission leadership for their exemplary service and dedication. Sub-committee members during 2003 and 2004 were Judge Monica J. Benton, Judge Ricardo S. Martinez, Judge William W. Baker, Judge Ronald E. Cox, Judge Anne L. Ellington, Judge Richard A. Jones, Judge LeRoy McCullough, Judge Richard F. McDermott, Jr., Judge Greg D. Sypolt, Judge Ron A. Mamiya, Judge Albert M. Raines, Judge Vicki J. Tohohara, Dr. George S. Bridges, Lonnie Davis, Dean Donna Claxton Deming, Ms. Mary Campbell McQueen, Ms. Janet L. McLane, Ms. P. Diane Schneider, and Ms. Denise C. Marti.

We also acknowledge with special gratitude the extraordinary and effective leadership of this sub-committee's immediate

past Chairperson, United States Magistrate Judge Monica J. Benton. We could not produce or maintain our programs without the enthusiastic and capable support and participation of our Executive Director, Ms. Erica S. Chung, and her assistant, Monto S. Morton.

As the Education Sub-committee celebrates its past accomplishments and prepares for the future, we will maintain the high standards expected of us by Commission Co-Chairpersons Justice Charles Z. Smith (retired) and Justice Charles W. Johnson, by our fellow Commission members, by the judiciary and by the public we are privileged to serve. ■■

Celebrating the Courts in an Inclusive Society

Evaluation and Implementation Sub-Committee

In September 1998, in response to suggestions that the Minority and Justice Commission should become more active in implementing recommendations made by authors of research reports sponsored and published by the Commission, the Evaluation and Implementation Sub-committee was created by the Commission. At the time of its creation, studies had been completed by Dr. George Bridges of the University of Washington. His conclusions have been the basis for projects undertaken by the sub-committee.

JAMES M. MURPHY
Chairperson
Evaluation and Implementation
Sub-Committee

James M. Murphy, a retired superior court judge from Spokane County, chairs the sub-committee. Other members of the sub-committee include Judge Deborah D. Fleck, King County Superior Court, Robert C. Boruchowitz, Director of the King County Defenders' Association and Jeffrey C. Sullivan, Chief of the Criminal Division, United States Attorney's Office, Western District of Washington.

A conclusion reached by Dr. Bridges' research dealt with the evidence of apparent disproportionality in the rate of incarceration of minorities in pre-trial circumstances. The sub-committee undertook a method of addressing this disproportionality by re-writing Washington State Criminal Rule CrR 3.2 and Criminal Rule for Courts of Limited Jurisdiction CrRLJ 3.2.

The rules project included gathering input from affected parties, attorneys, judges and legal scholars across the state, submitting a proposal to the Supreme Court Rules Committee which published the proposal for official comment and final adoption by the Court in September 2002. Since that time, the sub-committee has undertaken a system of education in the use of the revised rules in an attempt to obviate the disproportionate incarceration of racial and ethnic minorities who are subject to pre-trial release.

The sub-committee presented an education program regarding changes to CrR 3.2 and CrLJ 3.2 at the Spring 2004 Superior Court Judges Conference on April 26, 2004. The presenters shared with the judges key changes before and after adoption of the criminal court rules in September 2002, intended result of changes, impact of implementation consistent with public safety, and utilized hypotheticals to enhance application of the new rules.

The sub-committee prepared an Order re Release of Accused for Non-capital Offense for use by judges when addressing release on felonies, as well as adaptation for use in misdemeanor courts. The form directs attention to a series of priorities embodied in the rules. A model form was presented to the Pattern Form Committee of the judicial associations for consideration and possible adoption to assist in implementation of the spirit of the rewrite of the rule. It has also asked the Administrative Office for the Court, which prepares the Criminal Benchbook, a

resource manual for judges, for inclusion of a script in the benchbook of "Decision on Pretrial Release" regarding application of criminal court rule 3.2 prepared by the sub-committee.

During 2004, an additional project was completed by the sub-committee to re-write the language of CrR 2.2. Research has shown that the disproportionate incarceration of racial and ethnic minorities may be minimized by the use of summons as an initial means of providing notice of a defendant's obligation to appear in court to answer charges. The common procedure presently in use is issuance of a warrant of arrest with a bond amount set which may not be attainable by the defendant. The re-write would primarily be applicable to non-violent felonies, drug possession and first-offenders. The sub-committee submitted proposed changes to the Supreme Court Rules Committee in March 2004. The proposed changes were published by the Court for comments in July 2004. The comment period will expire on April 30, 2005.

The re-write of CrR 2.2 would primarily be applicable to non-violent felonies, drug possession and first-offenders.

A successful program undertaken by several courts is being considered as a project of the sub-committee. It includes telephoning persons who have been summoned to court in order to increase the percentage of responses by defendants to summons. Those courts have shown a significant increase in the percentage of responses to summons and reduced the need for issuance of arrest warrants. In light of the current number of warrants, presently estimated to be 350,000, such an effort may be very fruitful. ■■

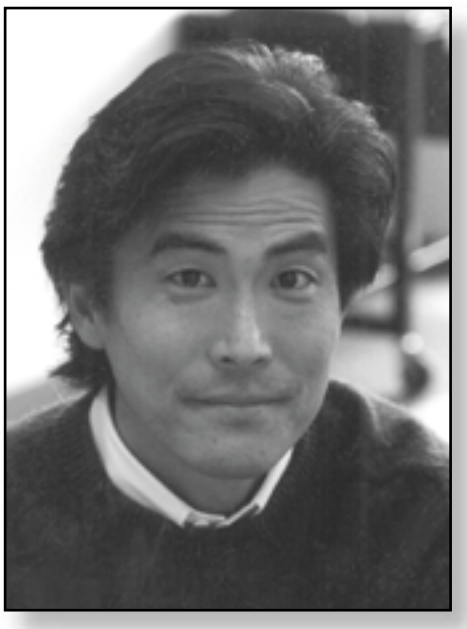
Celebrating the Courts in an Inclusive Society

Outreach Sub-Committee

The Outreach Sub-committee is co-chaired by Myrna I. Contreras, attorney at law, Contreras Law Offices, and Brian A. Tsuchida, Assistant Federal Public Defender, Federal Public Defender's Office for the Western District of Washington. The members of the sub-committee are Judge Douglas W. Luna, Associate Judge, Central Council Tlingit and Haida Indian Tribes of Alaska; Judge Richard F. McDermott Jr., King County Superior Court; Ms. Rosa Melendez, Regional Director, Community Relations Service, United States Department of Justice; Magistrate Judge Mary Alice Theiler, United States District Court for the Western District of Washington; Judge Philip J. Thompson (retired), Court of Appeals, Division III; and Judge Dennis D. Yule, Superior Court of Franklin and Benton Counties.

MYRNA I. CONTRERAS
Co-Chairperson
Outreach Sub-committee

Over the last several years, the primary mission of the Outreach Sub-committee has been production, publication and distribution of the Washington State Minority and Justice Commission's newsletter, *Equal Justice*. Each year, the sub-committee sought to publish newsletters to share information, create awareness, and to develop a greater understanding of issues related to diversity and the elimination of bias in our state's court system. The sub-committee believes that the *Equal Justice* newsletter assists our Commission in advancing its mission: to determine whether racial, ethnic and cultural bias exists in our state court system and, when it does exit, to recommend appropriate action to overcome it. Since the publication of the 2002 Annual Report, the sub-committee has published four issues of the newsletter:



BRIAN A. TSUCHIDA
Co-Chairperson
Outreach Sub-committee

- Volume 7, number 1: Legal Education for a Diverse Society, Part I
- Volume 7, number 2: Legal Education for a Diverse Society, Part II
- Volume 8, number 1: Observations
- Volume 8, number 2: 50 Years after *Brown vs. Board of Education*

For the year 2003, the sub-committee decided to publish a newsletter on the theme "Legal Education for a Diverse Society" in view of the 2000 United States Census which revealed that people of color constitute approximately twenty (20) percent of Washington State's population and that this percentage is expected to grow with time. Given these demographic projections, it is reasonable to assume that the number of students of color who will apply for and be accepted at higher education institutions in Washington State will in-

crease. Alternatively, even if the number of students of color enrolled in institutions of higher education does not increase, the total number of people of color in Washington State is increasing. Given the changing demographic profile of Washington State, the sub-committee posed the following questions: what are our educational institutions doing to prepare our students for life in an increasingly diverse world? Currently, are there any programs which address this question? Are there additional programs which are needed?

What are our educational institutions doing to prepare our students for life in an increasingly diverse world?

The sub-committee learned that many of the higher education institutions have developed academic programs that address issues of bias and diversity and the value and importance of diversity. All three law schools in Washington State mandate specific hours of public service which may include an externship devoted to pro-bono legal work or service at a non-profit organization. These educational opportunities often involve service to minority communities or indigent persons who are financially unable to access legal assistance or the court system. The two newsletters devoted to this topic also featured undergraduate institutions which have developed academic programs that address diversity issues and access to the legal system.

The first issue of 2004 provided a series of anecdotal articles regarding the actual experiences of people of color with the court system in Washington State. The Outreach Sub-committee solicited articles from attorneys who provided legal services for indigent and people of color and asked those attorneys to share their observations of problems and experiences actually encountered in the court system. The sub-committee asked for "hands on" information that would provide insight into what is actually taking place.

In the second issue of 2004, the sub-committee initially decided to focus on the activities and history of the National Consortium on Racial and Ethnic Fairness in the Courts. The focus expanded once it was informed the theme of the Consortium's conference was "50 Years after *Brown*: A National Dialogue on Racial and Ethnic Fairness in the Courts". The sub-committee consequently decided that, the newsletter should include activities commemorating 50 years after *Brown v. Board of Education*. The newsletter thus incorporates some of the educational sessions featured at the 2004 annual meeting of the National Consortium in Washington, D.C. and highlights articles related to the historic Supreme Court decision in *Brown vs. Board of Education*.

While the publication of *Equal Justice* is important, the sub-committee believes that direct and regular contact with organizations and individuals in the community is also crucial to heighten awareness of diversity and bias issues to exchange of

ideas, to gain firsthand knowledge of the experiences and concerns of the community and to coordinate the efforts of the many groups and organizations interested in diversity and bias in the court system. Therefore, the sub-committee made the difficult decision in 2003 to reduce the number of newsletters published each year in an effort to involve itself in more hands on outreach activities.

In 2004 the sub-committee assisted Ms. Erica S. Chung, the Commission's Executive Director, in organizing a Community Forum in Seattle; and assisted Judge Greg D. Sypolt and Judge James M. Murphy (retired) in organizing a Reception and a Community Forum in Spokane at the Gonzaga University School of Law following our Commission meeting. The purpose of the Community Forums was to allow members of the community to voice directly to the Commission their concerns about bias and diversity issues in the Washington State justice system.

Both Forums were very successful. Many community and legal representatives attended the Forums and made excellent presentations about their experiences and concerns regarding bias and diversity issues in the Washington State Courts. Attendees consistently expressed the need for more discussion and urged the Commission to conduct additional Forums. Each of the Forums were reported and transcripts were distributed to Commission members and others to assist in their future work endeavors.

The purposes of the Reception in Spokane were to announce to the local community the creation of the Diversity Section in the Spokane County Bar Association and to develop relationships with local minority attorneys and organizations serving the minority community. Judge Sypolt presented background information about the development of the Diversity Section, its purpose, and thanked the key persons instrumental in creating the Section.

The sub-committee specially recognizes Judge Greg D. Sypolt and Judge James M. Murphy for their extraordinary amount of time and energy they put into the reception. Also, the sub-committee extends thanks to Acting Dean George Critchlow, Gonzaga University School of Law, for the school's hospitality in hosting the Commission on July 30, 2004. ■■

Research Sub-Committee

The mission of the Research Sub-committee is to design, fund and conduct research projects pertaining to problems of racial and ethnic minorities in our justice system. After Dr. George S. Bridges' "A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trail Detention Practices in Washington," the next several years saw the evaluation and implementation of changes to Washington Criminal Court Rules (CrR) 3.2, "Release of Accused," prompted by the conclusions of that study.

KENNETH H. KATO
Chairperson
Research Sub-committee

For 2004, it was the hope of the sub-committee that it would proceed with a project in conjunction with the Juvenile Detention Alternative Initiatives (JDAI) in Spokane County. The sub-committee was invited by the Spokane County Juvenile Court to sponsor a potential research project in relation to the JDAI. The Annie E. Casey Foundation developed the JDAI to show that jurisdictions can establish more effective and efficient systems to accomplish the purposes of juvenile detention. JDAI's objectives are (1) to eliminate the inappropriate or unnecessary use of secure detention, (2) to minimize failures to appear and the incidence of delinquent behavior, (3) to redirect public finances to responsible alternative strategies, and (4) to improve conditions in secure detention facilities. For more information about the JDAI, visit the Annie E. Casey Foundation website: www.aecf.org.

The chairperson (Judge Kenneth H. Kato) and Ms. Erica S. Chung, Executive Director of the Minority and Justice Commission, attended the JDAI stakeholder meeting on Friday, March 19, 2004, in Seattle. The meeting was attended by representatives of five counties that are, or are interested in, implementing the JDAI. The purpose of attending the meeting was to determine how the sub-committee may collaborate on a statewide research project instead of just Spokane County. It was determined that JDAI may not be an appropriate project for the Research Sub-committee at this time.

For 2005, the sub-committee will explore a new research topic submitted by the Education Sub-committee: "The Impact of Collateral Consequences of Conviction on People of Color." According to the American Bar Association's Standards for Criminal Justice (Third Edition), "'collateral consequences of conviction' include relatively traditional penalties such as disenfranchisement, loss of professional licenses, and deportation in the case of aliens, as well as newer penalties such as felon registration and ineligibility for certain public welfare benefits. They may apply for a definite period of time, or indefinitely for the convicted person's lifetime…[and t]he imposition of collateral penalties has serious implications, both in terms of fairness to the individuals affected, and in terms of the burdens placed on the community. If promulgated and administered indiscriminately, a regime of collateral consequences may frustrate the chances of successful re-entry into the community, and thereby encourage recidivism."

The issue of collateral consequence is of particular interest to the Minority and Justice Commission because of racial disproportionality in incarceration of persons of color. As noted in Judge Deborah D. Fleck's article in "Justice Imbalanced: Strategies to Address Racial Disproportionalities," about 23% of all offenders in confinement in Washington are African American (compared to their representation of three percent of the State population). One third of all drug offenders in confinement in Washington are African American—and drug offenders make up about 21% of our prison population. Nationally, the percentage of African American and Latino drug offenders is 79%.

Given these startling statistics on racial disproportionality, the Commission is interested in engaging in empirical research which would produce a professional report that would document the impact of collateral consequences on persons of color and methods for moderating that impact.

Celebrating the Courts in an Inclusive Society

Workforce Diversity Sub-Committee

The mission of the Workforce Diversity Sub-committee is to promote equal employment opportunity and to increase racial and ethnic minority representation at all levels of the courts.

DEBORAH D. FLECK
Chairperson
Workforce Diversity
Sub-committee

The primary goals formulated to advance the mission are: *first*, provide workforce diversity education for existing court personnel; *second*, promote recruitment and retention of minority court personnel; *third*, develop resource materials to educate and to promote diverse recruitment and retention for each county court system; and *fourth*, obtain adequate funding to continue these tasks.

The Workforce Diversity Sub-committee has the following to report since our last report, thanks to the dedication, commitment, and work of sub-committee members. In 2002, the sub-committee produced a book titled *Building a Diverse Court: A Guide to Recruitment and Retention*, providing court managers and judges a roadmap for building and maintaining a culturally rich and diverse workforce. To educate judges and court mangers in the use of the guide, the Sub-committee secured Ms. Sheryl Willert, one of the co-authors of the guide, to present an education session titled "A Smart Court is a Diverse Court" using the book at the Spring 2003 Joint Management Conference at the Tacoma Sheraton on May 19, 2003. The session evaluations rated Ms. Willert with a total score of 4.9 out of 5.0 for effectiveness, 4.8 out of 5.0 for communication, and she received the following comments: "Made me think about something that I assumed our office was doing, and really wasn't. Made me aware of the benefits of diversity to work and life;" "Suggestions on where to find individuals needed by your court. Reinforced my belief that the court should reflect the community it serves;" "Diversity is coming, wherever you are in this state. Helpful in recognizing the need to be up on it;" "Realize some of the resources that are available—alternatives to the way we do things;" "I gained very specific tools to take back to my court and employ in recruitment and retention of a diverse workforce;" "I thoroughly enjoyed her presentation and will take home valuable information;" "Thank you for the terrific manual;" and "Speaker excellent – good content."

In our continuous effort to provide workforce diversity education and to promote recruitment and retention of minority court personnel, the Sub-committee again presented the program "A Smart Court is a Diverse Court" in 2004 at the Spring Presiding Judges' Conference in Kelso, Washington and at the Access to Justice—Bar Leaders' Conference in Yakima, Washington. The education program was provided to Presiding Judges because, although they may not be intimately involved in the hiring practices of their courts, Presiding Judges do play a critical role in the administration and management of the judicial system. For the Spring 2004 Presiding Judges' Conference, the Sub-committee secured Chief Judge Patricia Clark, King County Juvenile Court, and Ms. Katherine Cooper Franklin, Littler Mendelson, to present an education session

in association with the guide to approximately 130 judges and court managers. Anecdotal comments indicated that it was very well received by the attendees. For the Bar Leaders' Conference, the Sub-committee secured the assistance of Judge Judith Hightower, Seattle Municipal Court, and Judge LeRoy McCullough, chairperson of our Education Sub-committee, as well as Washington State Bar Association President David Savage, and Judge Deborah D. Fleck, chairperson of this Sub-committee, to reinforce to the bar leadership the importance of diversity and using the guide to increase diversity in the courts and law firms.

The sub-committee sponsored four youth events in the course of two years.

The Sub-committee has set as one of its goals inviting a speaker of national stature to provide an inspirational speech to Fall Conferences in even-numbered years as it has done for 2000 and 2002. For the Fall 2004 Judicial Conference, the Sub-committee sponsored Dennis W. Archer, immediate past President of the American Bar Association, as the Keynote Speaker. Mr. Archer enlightened the audience with various diversity initiatives the American Bar Association advanced during his tenure as president and his views on access to justice for indigent persons and persons of color in the United States today.

Judges LeRoy McCullough and Richard A. Jones, members of the Sub-committee, are dedicated to sharing the possibilities of an interesting career in the justice system with young people, especially from communities underrepresented in the legal profession.

Under their leadership the sub-committee sponsored four youth events in the course of two years. On March 7, 2003 and on March 5, 2004 the Sub-committee, in partnership with the Washington State Bar Association's Young Lawyers Division and Educational Service District 123, sponsored a "Youth and Justice Forum" in Pasco, Washington. On April 26, 2003 and April 24, 2004, the Sub-committee in partnership with the First A.M.E. Church Social Action Commission sponsored a "Youth and Law Forum" in Seattle, Washington. The purposes of these events included exposing students traditionally underrepresented as participants in the justice system to employment opportunities, enhancing students' legal education, building trust between students and those working in the justice system, and detailing other positive aspects of the justice system. In Pasco, approximately 200 students in grades eight through twelve attended and in Seattle, over 100 students in grades eight through twelve attended. Many volunteer professionals, including judges, prosecutors, defense attorneys, police officers, probation officers, interpreters, court reporters, bailiffs and corrections officers participated in these events. Some of the evaluation comments received were: "It was interesting to learn about different career options;" "Because it was fun

and educational;""It was very helpful and I learned a lot;""It was like what would happen in real life;" and "I thought this was fun and gave a lot of information."

After the success of the four programs, Sub-committee members and local partners committed to hosting additional events. In collaboration with local partners, the Sub-committee will host a Forum in Pasco, Washington on March 4, 2005 and in Seattle, Washington on April 22, 2005.

The goal of this ongoing project is to reach out to youth still contemplating their career choices and to make them aware of employment opportunities in the courts and the judicial system. Providing an interactive learning experience fosters that interest and can be a catalyst to a young person's plans for a future in a law-related field. Even if students are not interested in a legal career or any career in the justice system, it nevertheless enriches students' education about the law and enhances their networking opportunities with the leadership in their communities. It also strengthens the public's trust in our justice system by connecting a real person to a career choice. ■■

Treatises

Quantity and Sentencing: An Analysis of Drug Dealing Cases in King County

Ed Vukich, Human Services Policy Analyst

This project was undertaken at the behest of the Joint Select Committee on the Drug Offense Sentencing Grid (established under Chapter 290, Laws of 2002)

Introduction

The purpose of this study is to gather, analyze and present empirical data regarding often-heard anecdotal offerings that "most" convicted drug dealers are dealing only small quantities of drugs. Many of these "dealers" are believed to be arranging sales of or actually dealing small quantities of drugs in order to support their own drug use. The anecdotal offerings are particularly true of cocaine dealing in urban King County, Washington. If the anecdotal offerings are supported by empirical research, then the implication would be that criminal justice policy changes brought about by the so-called War on Drugs have, in effect, resulted in a casting of a net over "small-time" dealers. This net would result in a burden on the police, courts and state prisons with what some would consider relatively minor offenders.[1]

This study is exploratory in nature and should not be considered an absolute confirmation or refutation of the anecdotal offerings. Rather, this study is meant to stimulate debate on the subject by providing methodologically sound empirical data. Additionally, as this study only drew upon cases where there was a conviction for a drug dealing offense in King County, the results cannot be generalized to all drug-related offenses, nor can they be generalized to the rest of the state of Washington.

Methodology

This study was designed to gather quantity of substance information on drug dealing cases in King County. While the Washington State Sentencing Guidelines Commission (SGC) has detailed data on all adult felony sentences handed down in the state, and the Washington State Administrative Office of the Courts has, among other information, records of all criminal filings and convictions in the state, there is no central source of data that contains the facts of the underlying criminal offenses. Therefore, a survey was needed to gather data on drug quantities.

Utilizing SGC Fiscal Year 2002 data, a list of all adult felony drug dealing cases that resulted in a sentence was compiled.[2] Due to practical concerns (time involved, the number of cases necessary for a reasonable sample, case file availability and volunteer availability for data collection, etc.) the list was narrowed down to only cases from King County in which the cause number for the case began with 01 or 02. From this list, a 10% random sample was developed, along with procedures for selecting substitutes for unavailable case files.

A group of student volunteers from the Seattle University School of Law was instructed on data collection by SGC staff and staff from the King County Prosecuting Attorney's Office. They used the ran-

dom sample for case selection and a survey form, developed by staff from the Washington State Senate and the SGC, for recording the data.

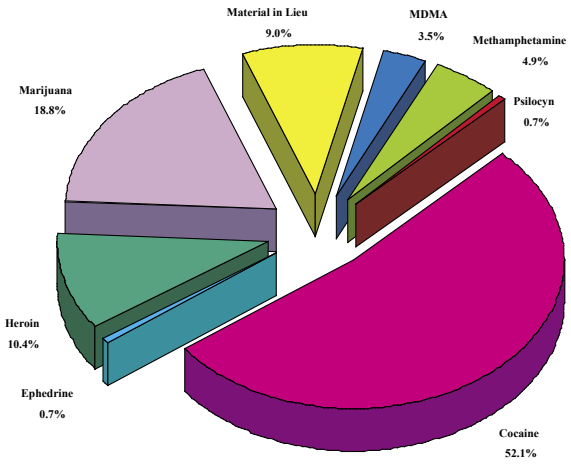
Since the data to be collected were contained in prosecutorial case files, data collection was guided by staff from the King County Prosecuting Attorney's Office. Once collected, the data were entered into a spreadsheet, which was forwarded to SGC staff.[3]

Case Characteristics

Based on the random sample and the substitute procedures, data was collected from a total of 152 case files from the King County Prosecuting Attorney's Office. Of these 152 cases, eight were dropped from the sample due to various anomalies, resulting in 144 useable cases. The following charts graphically demonstrate the basic characteristics of the 144 cases.

Figure 1 shows the composition of the cases by the type of substance involved in the underlying criminal offense – the substance being dealt by the offender.[4]

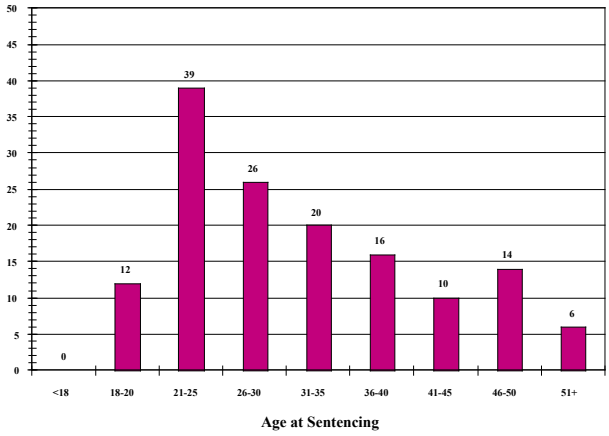
Figure 1
Total Cases by Type of Substance



It is apparent that cocaine-related offenses dominate dealing offense convictions in King County. Because of this fact, and given the study's sample size, only cocaine related cases were chosen for quantity-based analysis, as described in the next section.

A distribution of offender ages, based on age at sentencing, is represented in Figure 2 (one is unknown).

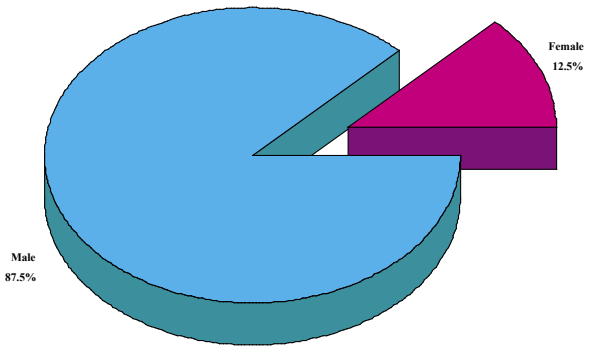
Figure 2
Total Cases by Age at Sentencing



As would be expected, the majority of offenders in the case sample are younger in age (67.4% are under 36).

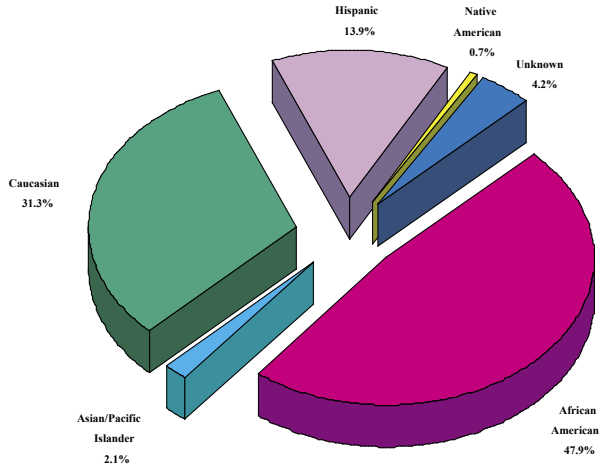
The gender breakdown of the cases in Figure 3 shows that, of those convicted in King County of drug dealing offenses, males outnumber females seven to one.

Figure 3
Total Cases by Gender



The next chart describing characteristics of the cases, Figure 4, gives the number of cases by race/ethnicity.

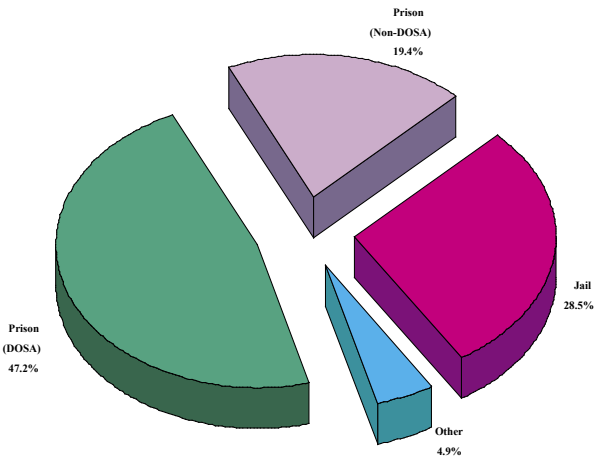
Figure 4
Total Cases by Race/Ethnicity



This chart clearly demonstrates extreme racial/ethnic disproportionality among drug dealing convictions in King County.[5] This criminal justice system trend has been repeatedly demonstrated throughout the nation.[6]

The final chart concerns the sentences in the cases. Figure 5 is a display of the cases by sentence type.

Figure 5
Total Cases by Type of Sentence



According to the analysis, the overwhelming majority of convicted drug dealers in King County are sentenced to prison, with most of them sentenced under the Drug Offender Sentencing Alternative (DOSA).[7]

Drawing from the analyses discussed above, a composite of the average drug dealer convicted in King County yields an African American male, under the age of 35, who was convicted of dealing cocaine and sentenced to prison under DOSA. The data also show that 97.2% of the cases were resolved via a plea bargain. Only four of the 144 cases were taken to trial.

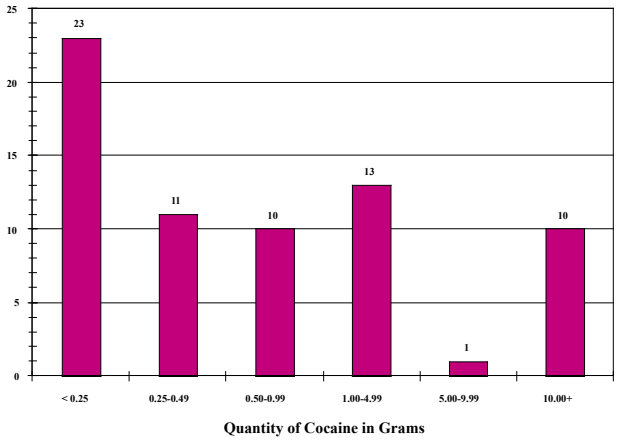
Characteristics of Cocaine Dealing Cases

Since cocaine cases comprise the majority of drug dealing cases in King County (and, therefore, the sample of those cases), the analysis of the quantity of substance involved in the underlying dealing offenses is restricted to cases of convictions for dealing cocaine.[8]

Of the 144 cases used in the preceding analyses, 75 were convictions for dealing cocaine. Of these 75 cases, the quantity of substance was unknown in seven. Therefore, the following analyses utilize only those 68 cases in which the quantity of substance was known.

The first analysis of cocaine dealing cases, Figure 6, is a distribution of cases by the quantity of cocaine involved in the underlying offense.

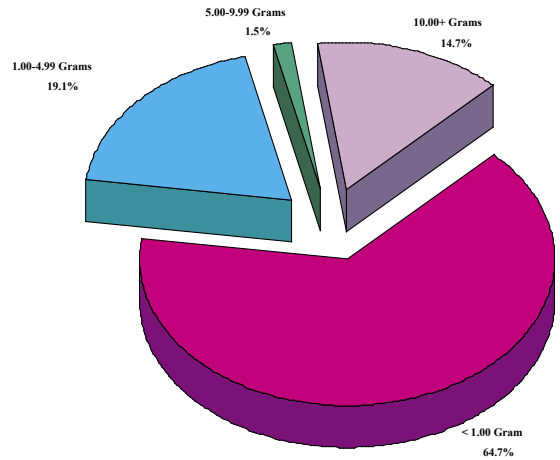
Figure 6
Cocaine Cases by Quantity of Substance



From this chart, it is clear that the vast majority of convictions for dealing cocaine in King County are of offenders dealing less than one gram. To place this amount in context, the small packets of sugar and sugar substitutes found in restaurants contain one gram per packet. Compared to these packets of sweetener, 64.7% of the offenders convicted of dealing cocaine had an amount less than what is in an individual packet, and 33.8% – a full one-third – had less than one-quarter of that amount (less than 0.25 grams).

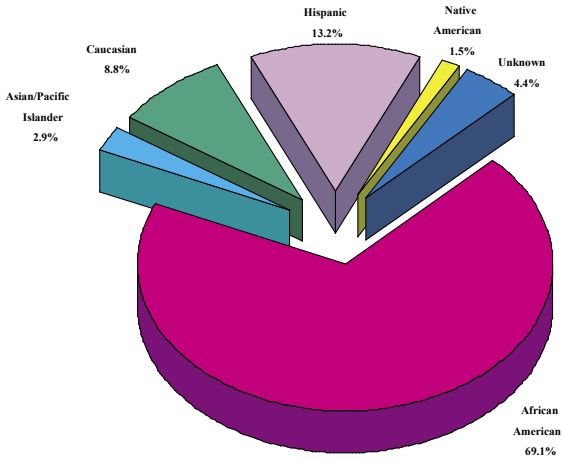
Figure 7 demonstrates this data in a slightly different method.

Figure 7
Cocaine Cases by Quantity of Substance



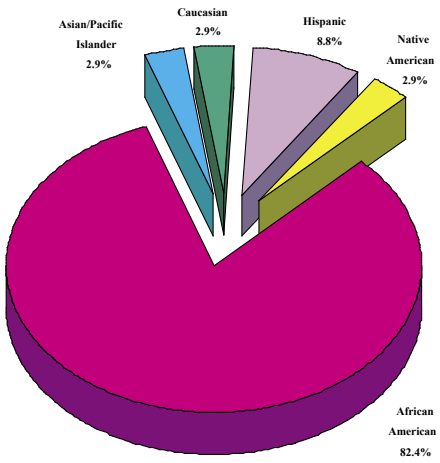
When analyzing only cocaine cases where the quantity is known, the issue of racial/ethnic disproportionality appears as it does in the analysis of all cases. Figure 8 shows that there is greater disproportionality among those convicted of dealing cocaine than there is for dealing convictions as a whole (compare to Figure 4).

Figure 8
Cocaine Cases by Race/Ethnicity



This disproportionality is even further exaggerated when only those cases where the quantity of cocaine was less than 0.5 grams are analyzed (Figure 9).

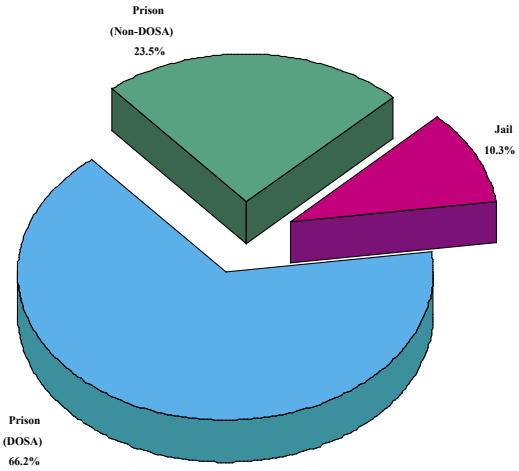
Figure 9
Cocaine Cases (<0.50 Grams) by Race/Ethnicity



There were 34 cocaine dealing cases that fell into this category (quantity was less than 0.5 grams). Nearly all of the offenders in this category are African American.

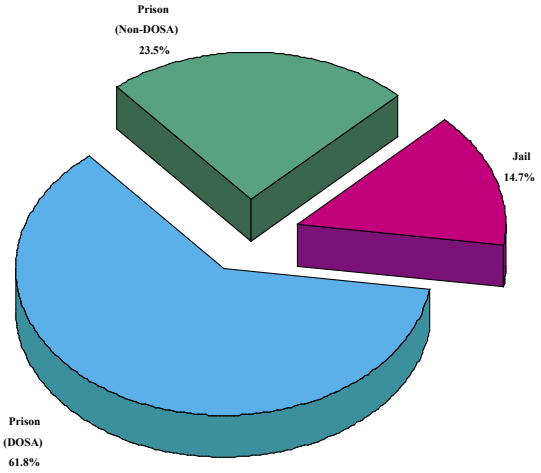
The next analysis of cocaine dealing cases involved the type of sentence. (To be consistent throughout this section, only those cases in which the quantity of cocaine involved in the underlying offense was known were analyzed.) Since the standard range sentences under the state's sentencing guidelines for dealing cocaine[9] are presumptive prison, it would be expected that the majority of the sentences in the sample would be to prison.[10] Figure 10 is consistent with this.

Figure 10
Cocaine Cases by Type of Sentence



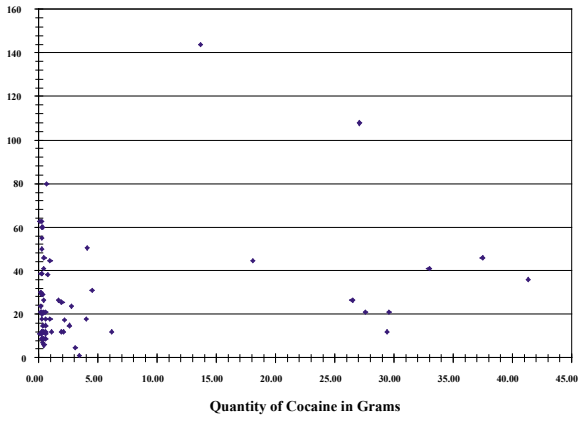
When analyzing only those cases in which the quantity of cocaine was less than 0.5 grams, the results remain relatively constant (Figure 11).

Figure 11
Cocaine Cases (<0.50 Grams) by Type of Sentence



The last analysis of cocaine dealing cases is a simple scatter plot that shows where cases are distributed in terms of the length of the sentence and the quantity of substance involved in the underlying offense.

Figure 12
Cocaine Cases – Sentence Length and Quantity



Clearly, there is no relationship between sentence length and the quantity of drug involved in the underlying offense. This is to be expected since adult felony sentencing in Washington State is based on sentencing guidelines,[11] where the current offense and the offender's criminal history determine the standard range.[12]

While sentences may fall outside the standard range, as discussed in the footnotes, the relative narrowness of most standard ranges limits judicial discretion in sentencing. It leaves very little room for taking into account extra-legal factors such as quantity of substance involved in a drug offense. However, limiting extra-legal factors in sentencing decisions is one of the main purposes of Washington State's sentencing guidelines.

Discussion

Historical SGC data and a survey of prosecutorial case files for convictions on drug dealing offenses in King County produced the data for this study. From this data, a picture of the average drug dealer convicted in King County emerged. This offender is likely to be an African American male, under the age of 35, who was convicted of dealing cocaine and sentenced to prison, most likely under DOSA, via a guilty plea. Consistent with other studies of the criminal justice system, racial/ethnic disproportionality is very evident.

Because of the large number of cocaine dealing cases, further analysis of these cases was possible. The additional analyses demonstrate two key findings.

The first key finding is that most cocaine dealers convicted in King County are sentenced (to prison) for relatively small amounts of the substance. Nearly two-thirds of the cases involved less than one gram of cocaine (64.7%), and just over one-third (33.8%) involved less than 0.25 grams. For all of the cocaine dealing cases, 89.7% were sentenced to prison, while 85.3% of those with less than 0.5 grams were sentenced to prison.[13]

The second key finding is that there is even greater racial/ethnic disproportionality among cocaine dealing cases, as compared to all of the dealing cases. The percentage of African Americans for all of the dealing cases is 47.9%, while it climbs to 69.1% for only cocaine cases and 82.4% for only cocaine cases involving less than 0.5 grams.

As was previously stated, the purpose of this study is to gather, analyze and present empirical data regarding often-heard anecdotal offerings that "most" convicted drug dealers are dealing only small quantities of drugs. Due to practical limitations on the study, the findings contained herein should not be considered an absolute confirmation or refutation of the anecdotal offerings, nor can the results be generalized to all drug-related offenses or to the rest of the state.

Further investigation into the subject of sentencing and drug quantity is recommended. This study is limited in the fact that it cannot fully account for the plea bargaining process (e.g., other possible charges were ignored or dropped for a plea to dealing, resulting in a prison sentence for dealing a small quantity of drugs, thereby skewing the results). A study in which the plea bargaining process can be taken into full account would be of great benefit. ■■

[1] Historical data from the Washington State Sentencing Guidelines Commission indicates that the percentage of adult felony sentences for drug offenses (as defined by the Caseload Forecast Council crime category of drug) has increased from 9.7% in Fiscal Year 1986, to 33.0% in Fiscal Year 2002. Additionally, historical data from the Washington State Department of Corrections indicates that the percentage of the state prison population comprised by drug offenders has risen from 3.0% at the end of Fiscal Year 1984, to 21.1% at the end of Fiscal Year 2001, resulting in a corresponding increase in operating costs from $3.2 million in Fiscal Year 1984, to $76.6 million in Fiscal Year 2001.

[2] Drug dealing cases are those involving drug-related offenses defined as drug offenses under RCW 9.94A.030(30) – what are known as statutory drug offenses.

[3] The SGC staff member involved with this project departed the Commission shortly after the data were collected. However, the responsibility for the analysis remained with that person.

[4] Percentages in the charts may not add to 100% due to rounding.

[5] According to Census 2000 data, the composition of the adult population in King County is as follows: 5.0% African American, 11.5% Asian/Pacific Islander, 77.9% Caucasian, 4.9% Hispanic and 0.8% Native American.

[6] As an example – for an analysis of disproportionality in sentencing in Washington State, see Lee, Nella, and Edward M. Vukich. Representation and Equity in Washington State: An Assessment of Disproportionality and Disparity in Adult Felony Sentencing – Fiscal Year 2000. Olympia, WA: State of Washington, Sentencing Guidelines Commission, 2001.

[7] See RCW 9.94A.660.

[8] Additionally, a basic statistical principle, the central limit theorem, states that a sample must be of sufficient size in order to approach normality (a normal distribution) – a sample size of at least 30 is required to be sure that the sampling distribution is approximately normal. [See Agresti, Alan, and Barbara Finley. Statistical Methods for the Social Sciences. 2nd ed. San Francisco: Dellen, 1986 (pp. 79-82).] Of the sample for this study, only cocaine dealing cases numbered 30 or more.

[9] Manufacture, deliver, or possess with intent to deliver heroin or cocaine – RCW 69.50.401(a)(1)(i).

[10] At the time of this survey (prior to the implementation of the Drug Offense Sentencing Grid – RCW 9.94A.517 and 518 – and the level and scoring changes under Chapter 290, Laws of 2002), the standard range sentence for dealing cocaine was between 21-27 months and 108-144 months in prison, depending on the offender's prior history. However, sentences may fall outside the standard range, resulting in a sentence either below or above the standard range. In addition to exceptional sentences, a solicitation to commit the offense reduces the standard range by 25%, while it becomes unranked (0-12 months in jail) for an attempt or conspiracy, which explains the jail sentences in Figure 10 and Figure 11.

[11] See Chapter 9.94A RCW.

[12] At the time of this survey, all cocaine dealing cases were sentenced at the same seriousness level – the offense was not in any way based on quantity. While law changes, for a time, split cocaine dealing into two seriousness levels, this split was based solely on the offender's prior history. Again, it was not based in any way on quantity.

[13] In both cases, the majority of those sentenced to prison were sentenced under DOSA; 66.2% and 61.8% of the, respectively.

Justice Imbalanced: Strategies to Address Racial Disproportionalities

Deborah D. Fleck, Judge of the King County Superior Court

This article is based upon a speech she made at the Annual Meeting of the National Legal Aid and Defender Association in November 2003.

Racial Disproportionality and the Crisis of Confidence.

All of us who serve as judges, jurors, and attorneys here and in courtrooms around the country see the racial disproportionality that exists in the criminal justice system. This disproportionality is particularly evident both in the "tough on crime" approach in the past fifteen years to drug offenses and also in the application of our drug laws. Is confidence in the justice system hanging in the balance? I think it is at risk.

There is something wrong with the criminal justice policy when those charged with a strike offense, such as robbery in the second degree, only face three to nine months in prison on their second conviction for such an offense, when a first time offender who delivers one rock of cocaine, typically weighing two tenths of a gram (an easy reference is that a packet of sweetener weighing one gram), within range of a bus shelter faces a standard range of thirty-six to forty-four months.

In Washington, one of the promises of the mandatory sentencing guidelines enacted in 1984 was that they would overcome the racial disproportionality in sentencing that existed twenty years ago. In fact, that disproportionality has increased, particularly in the area of drug cases.

Statistics in Washington include:

About 23% of all offenders in confinement in Washington are African American compared to their state population of 3%.

One third of all drug offenders in confinement in Washington are African American and drug offenders make up about 21% of our prison population. Nationally, the percentage of African American and Latino drug offenders is 79%.

In King County, African American males are sentenced for drug offenses at a ratio that is twenty-five times greater than for Caucasian males in a county where African Americans comprise only 5 to 6% of the population. Disproportionality also exists in other counties around the state. In Spokane County the ratio is thirteen times greater, in Snohomish County it is approximately six times greater and in Pierce County it is approximately four times greater.

These are stunning figures. They are not explained by the rock versus powder cocaine dichotomy in the federal system.

Nationally there has been a 261% increase in correctional supervision population from 1990 to 2002 and a 297% increase in the national incarcerated population; the vast majority of which are in the state not the federal system.

The number of persons incarcerated for drug offenses at all levels has increased by more than 1,000% from 40,000 in 1980 to 453,000 by 1999. At that point, the number of drug offenders in state prisons was 251,200 at a cost of about $5 billion. [1]

The Negative Returns of the Incarceration Policy.

This policy of incarceration is extremely costly. There has been a 600% increase in corrections spending at all levels of government between 1980 and 1999.

As judges and as other actors in the criminal justice system, we must speak up. The racial disproportionality figures in Washington paint a picture of a system that is not just and where people of color are subjected to a different form of justice than whites.

The reasons for the racial disproportionality statistics, especially in drug cases, are complex but, nonetheless, they must be addressed. They start with economic conditions that are not as favorable for citizens of color as for whites. In addition, citizen complaints, particularly in the downtown business core of our cities, among other factors, lead police interdiction policies to target drug use and transactions in public places rather than users and dealers in the downtown towers where attorneys, accountants and other professionals work, or in the restrooms of the nice restaurants in our cities, or simply in private homes in the suburbs. There are also questions about prosecution policies and judicial sentences.

In 2003, while I served as president of the Superior Court Judges' Association, we launched the Race and Justice Initiative to help educate the Legislature and the public and to begin work to end the racial disproportionality that exists in the application of our drug laws in particular. I have no question in my mind that if the children and family members of people who look like me are faced with years in prison for delivering a small amount of a controlled substance because they were addicted to drugs the laws would radically and quickly change. In fact, for the eleven years I have served as a superior court judge, the public, as reflected in our jurors, has almost uniformly responded to voir dire questions regarding the war on drugs as follows: it doesn't work and we should focus our resources on education and treatment.

In 2001, 70% of the population supported mandatory treatment for drug sellers and 75% supported mandatory treatment for drug possessors according to Peter D. Hart Research Associates.

This attitudinal change is consistent with what research shows regarding the effectiveness of treatment versus incarceration.

According to The Sentencing Project Report, the California Department of Alcohol and Drug Programs concluded that in Cali-

fornia, every dollar spent on treatment for substance abuse saves the state seven dollars via reduced crime and health costs.

Rand analysts found that the expenditure of $1 million to expand mandatory minimum sentencing for drug offenders would reduce national drug consumption by 13 kilograms. However, using that same money to expand drug treatment to heavy users would diminish consumption nationally by 100 kilograms.

The Sentencing Project explains that those sentenced to prison have higher recidivism rates and reoffend more quickly than those sentenced to probation and that these outcomes are the result of a number of dynamics.

The war on drugs has devoted 2/3 of the funding to law enforcement and incarceration and 1/3 to prevention and treatment.

The war on drugs has devoted two-thirds of its funding to law enforcement and incarceration and one-third to prevention and treatment. This approach creates a two tiered war where those with money can address their drug problems privately as a health issue while people without access to funds are relegated to the criminal justice system.

Treatment as a Significant Response.

The good news is that there are changes underway here in Washington and in other states.

What is the driver? Perhaps, unfortunately, the driver appears to be the budget crisis in almost every state, rather than an altruistic desire to improve the administration of justice. Regardless of the driver, the budget crisis in many states has brought about needed change.

Does it really make sense to use the most expensive tool—incarceration for extended periods of time—to address the problem of drug abuse, where the majority of such offenders are non-violent? Is it a better policy to invest in prevention and treatment because it is simply a more humane policy and because it yields better results in terms of reduced crime and reduced cost? In 2002, the Legislature's Institute for Public Policy reported that "the return for new beds for drug offenders probably turned negative in the 1990s. Some drug treatment programs provide better returns to taxpayers today."

The Sentencing Project Report states that 58% of those incarcerated in state prisons for drug offenses are non-violent and not engaged in high level drug activity, representing a pool of "appropriate candidates for diversion to treatment programs or some other type of community-based sanctions."

I was asked, along with ten other individuals from around the country, to attend a focus group hosted by the Vera Institute and financed by the Department of Justice in Washington, D.C. in August to discuss the question, "Is Treatment Moving from the Margins?" And the answer seems to be "yes".

The majority of the approximately 130

officials interviewed by the Vera Institute described how fiscal problems have created opportunities for policy changes—to advance treatment alternatives over incarceration.

A number of states have already enacted statutory changes in the area of drug policy. These changes can be divided into two categories: those at the front end, including treatment as a component of diversion, and those at the back end, such as treatment-centered transition and diversion mechanisms.[2] Statutory changes are increasing around the country which divert offenders from incarceration and into community based treatment programs. Also, states are noticing necessary prison savings by diverting technical parole violators from reincarceration to enhanced community based supervision and treatment.

A number of states have already enacted statutory changes in the area of drug policy.

What is being cut in most states is facility-based treatment because it only promises savings in fund later through recidivism reduction. Notably, Ohio has resisted such cuts because of a belief that "in-facility treatment is an essential and ultimately cost-effective element of corrections policy, given that as many as 80% of the nation's prisoners have substance abuse problems."[3]

Nationally, front-end programs are taking two forms: allowing or mandating judges to sentence offenders to treatment alternatives and expansion of drug courts. Some states included funding for treatment; others did not with changes in policy.

In Colorado, Kansas and Texas, the legislatures passed laws that divert prison bound drug possession defendants to treatment with funding for that treatment. In 2002, Hawaii enacted legislation that diverted a targeted group of offenders to community-based treatment, mandated diversion for a broad group of possession offenses (including up to one ounce of methamphetamine) and excluded only offenders with prior drug felonies and recent violent offenses. Unfortunately, no funding was provided for treatment.

In Indiana, Missouri and Wyoming, legislators authorized judges to divert a broad group of offenders, including drug sellers and property offenders, from incarceration to community supervision and treatment. "By including drug sellers and property offenders in their statutes, they intend to deal with all for whom substance abuse or other mental illness is 'a contributing factor or material element of the offense.'"[4] However, it is not clear if judges will exercise their new judicial authority in Indiana because of implementation concerns and lack of dedicated funding for treatment.

The Legislature in Wyoming mandated treatment following assessment of drug and alcohol treatment needs as a sentence requirement, except for drug dealers and vi-

olent felons. In addition, judges have further discretion to use this option for drug sellers where evidence shows the offense was the product of the offender's dependency and for violent offenders where a judge finds clear and convincing evidence that the defendant will participate in treatment without posing a safety risk. The Wyoming Legislature provided $18.2 million from the state's tobacco settlement trust fund to the Department of Health and $1.8 million to the Department of Corrections for the biennium to implement the plan.

The State of Missouri enacted legislation authorizing suspended sentences, excluding only offenders who have been convicted of a dangerous offense or previously sentenced to prison. Missouri law expands the use of a delayed diversion method where offenders spend 120 days in shock incarceration and are then diverted to community supervision and treatment program rather than being incarcerated for the remainder of their prison terms. The Legislature did not, however, provide dedicated funding for the additional treatment.

The second form of front end sentencing change is the expansion of drug courts. About one third of the states, examined by the Vera Institute, increased funding for drug courts in 2003 and some have done so by creating dedicated funding streams.

In Michigan, these funds can only be used for drug court programs that divert offenders from incarceration. California has committed an additional $2 million in funding for drug courts from its Department of Corrections budget for otherwise prison bound prisoners, in addition to the Proposition 36 mandatory funding of $120 million annually.

Transition services and back end diversion programs are additional approaches to reducing the number of inmates incarcerated as a result of drug offenses in the criminal justice system. Transitional services combined with early release create an opportunity for near-term cost avoidance: Arizona, Idaho, Delaware and Wisconsin looked to pre- or post-release treatment and to partial confinement. Arizona's treatment-centered transition program includes a self-funding mechanism. Recent legislation enacted creates a pre-release facility-based treatment program and grants early release to inmates who complete the treatment program. The legislation also automatically reallocates the corrections savings fund resulting from early release to treatment programs. In addition, the federal government's Serious and Violent Offender Reentry Initiative has $2 million available for transition programs for each state.

The Washington legislature attempted but failed in 2003 to dedicate $3 million for pre-release treatment in prison, which wasn't tied to early release. Idaho allocated $735,000 from the general fund to enhance its post-release treatment program and other support services so that offenders can be released at their earliest eligibility.

Other states have combined early release programs with enhanced pre- or post-release treatment services. However, additional

funds for the treatment component are not appropriated by the legislature. In Wisconsin, after intensive facility-based treatment, non-violent offenders are set to be released to community-based supervision, regardless of how much time remains of their sentence. Delaware reduced sentences for non-violent offenses. A reclassification provision allows inmates to serve the last six months of their sentences in residential treatment centers, halfway houses or other community settings where they may receive treatment. The state refused to cut the length of treatment time because they recognize that length is directly tied to success. Instead, the state reduced the number of prison beds that can access treatment.

A recent concept is that "we need to move from being tough on crime to being smart on crime."

Many states are in the process of also implementing back end diversion programs, including technical violation centers, enhanced community treatment centers, limits on the length of reincarceration and preventative technical violator programming by coordinating treatment programs with housing services. Nationally, one third of prison admissions are parole violators—technical violators who are substance abusers. To reduce the number of incarcerated and to reduce the costs associated with incarceration, a number of states have implemented alternative sanctions for technical violators that incorporate expanded community treatment, increased oversight and use of intermediate sanctions. In Arkansas, the Legislature appropriated funding for a technical violator center. In Colorado, the Legislature limited the length of reincarceration to eighteen months. In New Jersey, the Legislature provided funding for enhanced community treatment services for parole violators and for inmates who are eligible for release with enhanced community treatment services. In Hawaii, the Legislature allocated additional funds for an initiative that would coordinate treatment with housing services to those deemed likely to reoffend as a form of preventive technical violator programming.

The Impact of the Fiscal Crisis – Treatment as a Solution

The focus of these legislative changes highlighted is to reduce the most expensive form of sanction—incarceration—in favor of treatment, which in some cases may be self supporting.

At a sentencing policy conference, I heard a reference regarding a Chinese character for "crisis" which translates as "danger plus opportunity." That translation is where we are right now and we need to capitalize on it. Another concept that is becoming popular as states experience budget shortfalls is "we need to move from being tough on crime to being smart on crime." Drug offenses, unlike violent crimes and some property crimes, are distinguishable because there is a "market" for them and without treatment incarceration becomes an expensive revolving door that doesn't provide for public safety "incapacitation effect" in the same way as locking up violent criminals because there are always more drug abusers and small

time dealers in the community to take the place of those incarcerated.

The Superior Court Judges' Association in 2003 suggested two proposals regarding partial confinement for consideration by the policymakers:

A "back end" approach would expand the ability of the Secretary of the Department of Corrections to release defendants to partial confinement beyond the current statutory provision of six months to twelve or eighteen months. The definition of partial confinement would be expanded beyond electronic monitoring, work crew and work release to include Day Programming Centers where defendants spend time in treatment. The use of this approach may allow elimination of costly supervision.

A "front end" approach would model a sentencing option for those whose drug addiction contributed to the offense after the state's sex offender sentencing option. This model would include a suspended sentence with sentencing options including short term shock incarceration, treatment in day programming centers, quarterly reports of progress to judges and immediate reports of violations.

Some of these changes already in place in several jurisdictions and under consideration in Washington will not in and of themselves result in the reduction of people of color in the justice system. However, it is a step towards the path of reduction—they will be effective both in reducing the numbers of and in reducing the length of stay for people of color who are incarcerated. The focus on treatment and length of incarceration will also benefit white defendants. A more effective and frugal use of public funds focused on treatment will result in reduced crime and may turn many of those addicted to drugs into productive citizens.

[1] Two sources of data that spell out the increase in the use of incarceration as a response to crime in general and as a response to drug crime are *Distorted Priorities: Drug Offenders in State Prisons* by Marc Mauer and Ryan King of The Sentencing Project and *Can Sentencing Be Tough When Times are Tough? An Overview of State Responses* by Dan Wilhelm of the Vera Institute of Justice.

[2] "Many fiscal conservatives have become strong new allies of treatment providers and community corrections officials in advocating shifts in state funding priorities away from custody and toward treatment in the community." Moving Treatment From the Margins? The Impact of the 2003 Fiscal Crises on States' Funding for Offender Drug Treatment Programs by Jon Wool and Nicholas Turner, Vera Institute of Justice, July 2003, p.3.

[3] Id. at p.5

[4] Id. at p. 6

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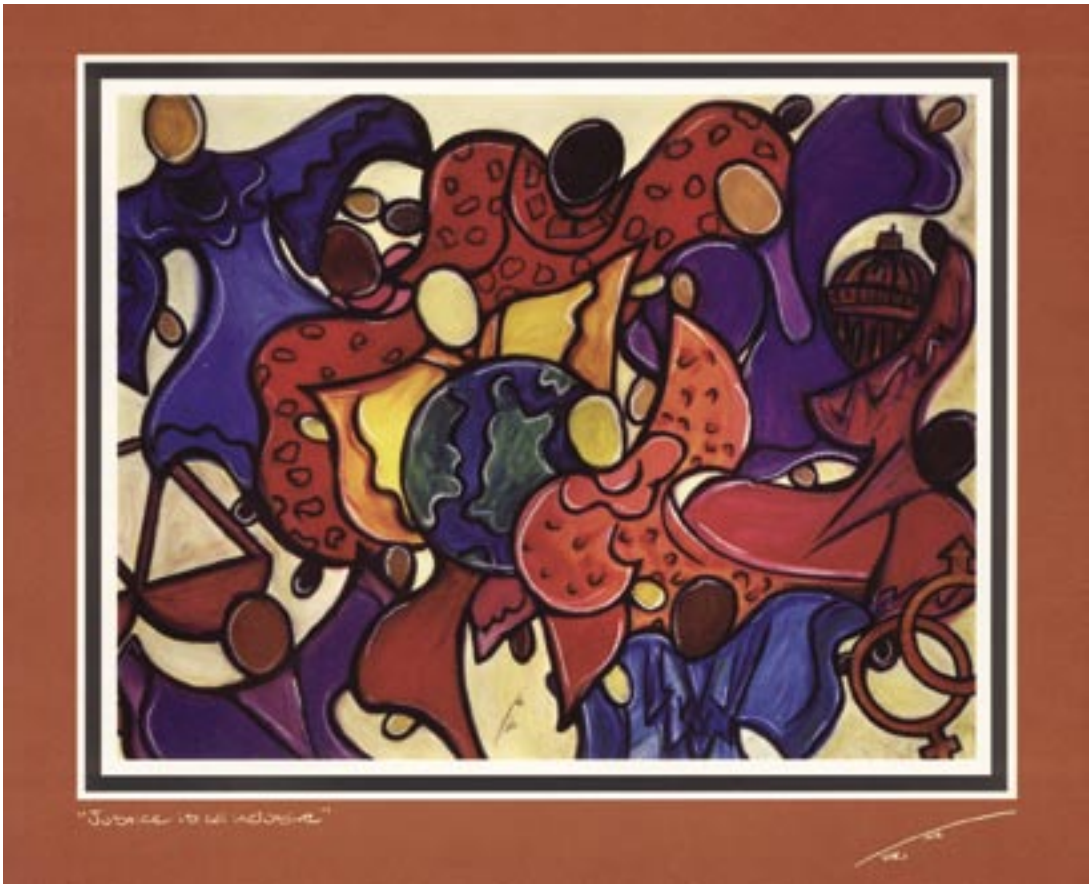

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