

Lack of Prosecution Prevents Felony Cases From Moving Through Harlan County Courts

Hundreds of cases to be expunged after Harlan Commonwealth's Attorney fails to bring them to Grand Jury

BY TINA WHITAKER

Recent court filings by Directing Attorney of the Department of Public Advocacy Clay Beineke on behalf of over 640 of the Department's clients in Harlan County have exposed an apparent persistent problem that may answer the question of just what has been happening with felony criminal cases over the past several years.

Felony cases involve the more serious of crimes including drug trafficking, assault, arson, sexual abuse, rape and murder, and are generally brought by law enforcement officers who make an arrest of a defendant who then is arraigned in District Court, to enter a plea of guilty or not guilty.

For the case to go forward, those charged with a felony are given the opportunity of a preliminary hearing in District Court where it is determined whether or not there is enough evidence for the case to be considered by the grand jury for indictment. Once there is an indictment, the case moves on to the Circuit Court docket.

Approximately 2,600 cases were bound over to the grand jury by the District Court from 2015 through 2020. Of those, approximately 640 cases represented by a public defender were not presented to the grand jury for indictment. It is not known how many defendants with private representation have gone without being presented to the grand jury.

The years between 2012 and 2014 show a total of 80 of the cases that are up for expungement. In the years that follow, there appears to be a steady increase of cases that were not prosecuted by Commonwealth's Attorney including:

- 2015 – 56
- 2016 – 70
- 2017 – 114
- 2018 – 139

The COVID-19 pandemic curtailed court proceedings as well as arrests. The number of felony cases that did not make it to the grand jury during these years totaled 134, 85 in 2019 and 49 in 2020.

Without prosecution, the cases languished and were not dismissed by the grand jury with a no true bill nor ever passed on to the Circuit Court with an indictment where they could finally be tried.

By statute, the Commonwealth Attorney has 60 days in which to present a case to the grand jury for it to consider. If the defendant in a felony case is held in jail and the 60 days expires, they are released. Additionally, any bond that was posted for release must be returned. If the case has not been

presented to the grand jury after six months following the date the District Court bound the case to the grand jury, the case is to be expunged.

On June 8, Mr. Beineke filed individual Petitions for Expungement for all the Harlan felony cases that had not been presented to the grand jury during 2014-2020. Those cases included charges of drug possession and drug trafficking to theft, burglary, robbery, multiple cases of criminal abuse of a minor, manufacturing meth, rape and arson.

Expungement is the legal term meaning that all records of the case have been sealed or destroyed and that for legal purposes it is as if the case never was filed.

According to the statute, the person whose record is expunged will no longer have to disclose the fact that they were arrested or any matter related to the case on an application for employment or credit check.

Commonwealth Has No Objection

Harlan Commonwealth's Attorney Parker Boggs, whose job it is to present the cases to the Grand Jury, stated in his response that he had no objection to the public defender's Petitions for Expungement in filings with the Circuit Clerk dated June 20th, adding that he requested the cases be dismissed without prejudice, meaning they could be prosecuted at a future date.

However, it is unclear how cases that have had their records expunged from any court record, jail record or police record, could ever be brought before a grand jury for indictment, or prosecuted in Circuit Court.

Though Commonwealth's Attorney Boggs claims that the filings such as Mr. Beineke's are not unique to Harlan County, the number of the cases left unprosecuted appears to be.

In neighboring Letcher County, for instance, difference the number of felony cases presented to District Court compared to those that were listed as Circuit Court cases after receiving indictments by the grand jury during the years 2017 through 2021 totals 35. During that time span, some 2,137 felony cases were brought to the Letcher District Court. It is not clear if the 35 cases represent those not being presented to the grand jury, or if they were cases presented and a no true bill was returned, which would mean no Circuit Court case would have been needed.

Letcher Commonwealth's Attorney Edison G. Banks said that he and his staff have made it a



Clay Beineke, Directing Attorney for Department of Public Advocacy in Harlan.



Parker Boggs, Harlan County Commonwealth's Attorney.

point to keep up with felony cases approaching the 60-day mark since taking office in 2001 to prevent the premature release of suspected felons on the community.

"We may have had some cases that got by us, but if the 60-day requirement for grand jury presentation passes, we immediately present them to the grand jury to prevent cases from becoming cold, making them harder to prosecute," Mr. Banks said.

The office of the Letcher County Commonwealth's Attorney included one part-time assistant, during this same time period, though an additional part-time assistant attorney and full-time office staff members have been added recently.

Commonwealth Attorney Relies Upon County District Court Preliminary Hearings For Felony Cases, Police Agencies To Present To Grand Jury

Kristi Skeens, who acts as the Grand Jury Coordinator for the Letcher

Commonwealth's Attorney, explained that felony cases are covered by Assistant Commonwealth's Attorneys during preliminary hearings in Letcher District Court. Those hearings are also attended by a Victim's Advocate and Commonwealth's Detective to get a clear understanding of the case prior to it being presented to the grand jury.

Mr. Boggs, however, relies on the County Attorney's office to handle preliminary hearings in Harlan District court and lays the responsibility of bringing the cases before the grand jury on the arresting officers and police agencies that initially brought them to District Court.

The Harlan Commonwealth's Attorney's Office has two part-time assistants, including Karen Davenport and Daniel Farmer.

"It is the responsibility of the police officer to present the arrest evidence to the grand jury for either an indictment or a 'no true bill'," said Mr. Boggs, adding that the grand jury meets regularly twice every month and that police

officers are encouraged to bring in their 'F' (felony) cases during these scheduled meetings.

"The 'F' (felony) cases pending indictment are not a prosecution problem as much as it is a police 'follow-up/follow-through' to begin Circuit level prosecution," Mr. Boggs said, adding, "Law enforcement does the best they can in this regard."

Boggs' reliance on police officers to schedule their own grand jury appearance and present their evidence is in stark contrast to the way most other Commonwealth's Attorneys utilize the grand jury process.

Skeens said that she works to schedule law enforcement officers to the Grand Jury, issuing subpoenas when necessary.

"I contact the officers and schedule them so that the cases from District Court are heard prior to the 60-day dismissal deadline," she explained.

She added that on occasion Kentucky State Police Detectives and others may come before the Grand Jury with the results of investigations that warrant indictment prior to the defendant being arrested.

Unresolved Felony Cases Affect Employment For Those Whose Cases Never Presented To Grand Jury

Speaking on behalf of his clients, Mr. Beineke said, "The very fact of the initial arrest and the charge having been 'bound over' to the grand jury is a public record and shows as an

active and unresolved case on any background check that might be completed," he explained.

"This can result in a loss of employment, the inability to find and keep a job, or any number of negative consequences that arise out of having a record that shows that a person has been arrested, and still seemingly is awaiting trial."

Though there can be many explanations as to why the cases were not pursued by the Commonwealth such as lack of evidence, change in testimony or reluctance of a witness, Mr. Beineke said most often, it is unknown to the defendant why a prosecutor decided not to present the case to the grand jury.

"Nevertheless, there can be real and terrible consequences to a person who has an arrest record which shows that he or she has been arrested, charged, and arraigned in District Court," he said.

"I cannot divine the reasons why the Commonwealth Attorney chooses to indict or not indict individual cases, particularly in such numbers," said Mr. Beineke. "The Commonwealth Attorney is the chief law enforcement officer of the county and it is entirely within his discretion if, when, and how cases are presented to the grand jury."

According to Boggs, there are currently fewer than fifty (50) cases scheduled for Grand Jury presentation in Harlan County.



U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS

Notice of Intent to Prepare a Draft Environmental Impact Statement for the Proposed Federal Correctional Institution and Federal Prison Camp in Letcher County, KY

Pursuant to the National Environmental Policy Act (NEPA) of 1969, as implemented by Council on Environmental Quality and Federal Bureau of Prisons (Bureau) regulations, the Bureau announces its intent to prepare a Draft Environmental Impact Statement (DEIS) for the proposed development of a new Federal Correctional Institution (FCI) and Federal Prison Camp (FPC) in Letcher County, Kentucky.

The Bureau's mission is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, appropriately secure, and provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. A growing challenge to successfully performing that mission is the increasing number of federal correctional facilities and supporting infrastructure that were constructed over 50 years ago (the approximate design life of such facilities), resulting in a continuous need to maintain existing facilities, and when necessary, develop new facilities and infrastructure. To address this need, the Bureau proposes to construct and operate a new medium-security FCI and an adjoining minimum-security FPC in Letcher County, KY. The FCI and FPC would be designed to house approximately 1,152 adult males and 256 adult males, respectively, and serve the need of the Bureau's Mid-Atlantic Region.

Development and operation of a new FCI and FPC is considered to be an action with the potential to significantly affect the quality of the human environment. The DEIS is being prepared to ensure that the potential environmental impacts associated with the proposed action are thoroughly documented and that compliance with NEPA, the Bureau's NEPA implementing regulations, and other environmental statutes, regulations and Executive Orders is achieved. Preparation of environmental documentation, and its consideration by federal, state, and local officials, regulatory agencies, stakeholders, and the public, is being carried out to ensure that the Bureau fully considers the potential environmental impacts associated with the proposed action.

Publication of the DEIS will initiate a public comment period which will last no less than 45 days, during which time the Bureau will host a public meeting. Following the end of the DEIS public comment period, the Bureau will prepare and publish a Final EIS (FEIS) in accordance with NEPA which will incorporate additional data which may come to light into the decision-making process and respond to comments received on the DEIS. The FEIS will be subject to a public review period of not less than 30 days.

No action will be taken to implement any of the proposed alternatives until completion of the FEIS 30-day review period. A decision on whether to proceed with the proposed action would be made thereafter by the Director of the Bureau and taking into account all environmental analyses and public comments and documented by a Record of Decision as stipulated by NEPA regulations.

Publication of this notice initiates a 30-day scoping period. For additional information, or to receive future notifications regarding the proposed project, contact: Kimberly S. Hudson, Site Selection Specialist, Federal Bureau of Prisons, 320 First Street, NW, Room 901-5 West, Washington, DC 20534; email: kshudson@bop.gov or by visiting the project website at: <https://www.proposed-fci-letchercountyky.com>. Thank you for your interest.