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CRIMINAL JUSTICE PLANNING COMMISSIONS:
Improving The System Through Coordination, Cooperation and Communication

America's adversarial criminal justice system depends on a healthy dose of independence and distance amongst the various players: defense attorneys, prosecutors, law enforcement officers, court personnel, correction officials, probation officers, etc. In this combative climate it is easy to overlook the fact that the criminal justice system is indeed an inter-dependant system, funded with public monies and operating on behalf of the same "customers," the public. As in any relationship, when commun-ication among the various parties (in this case, funding bodies and criminal justice agencies) wanes, the odds for discord increase dramatically. Frequently missing in these situations are rational policies and adequate and balanced funding among the various criminal justice agencies. Without these elements, it is impossible to operate a smooth functioning system. This article explores one forum, the criminal justice planning group, in which criminal justice agencies can work cooperatively, rather than competitively, to plan for a fair and efficient system.

Enhancing System Performance and the Integrity of the Law

Criminal justice planning groups bring together representatives from all of the key criminal justice agencies in a given jurisdiction to conduct planning from a multi-agency, or system-wide, perspective.

The origin of criminal justice planning commissions dates back to the early 1970's when federal funds from the Law Enforcement Assistance Administration (LEAA) were distributed to states and local governments. The planning groups were formed to determine, in a coordinated fashion, how the funds would be allocated among the various criminal justice components. When LEAA funds were terminated in 1980, some jurisdictions opted to maintain the planning commission structure to administer locally funded programs.

The rationale for creating criminal justice commissions was perhaps best stated by Robert C. Cushman in his publication entitled *Criminal Justice Planning for Local Governments* (1980):

> Experience has shown that good planning can result in better understanding of crime and criminal justice problems; greater cooperation among agencies and units of local government; clearer objectives and priorities; more effective resource allocation; and better quality criminal justice programs and personnel. Taken together, these results can increase public

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> confidence in and support for criminal justice processes, thus enhancing system performance and, ultimately, the integrity of the law (p. iii).

Successful criminal justice planning commissions have operated on both short-term and long-term bases. Those with short lives are often formed to address particular problems, such as how to ameliorate severe jail overcrowding, or to develop specific projects, such as introducing a drug court. Long-standing groups are more likely to take on-going, less crisis-oriented projects such as developing an automated criminal justice information system. The commissions are found most often in large counties, such as Dade County, Florida and Los Angeles, California, but they are also appropriate for smaller, rural communities. Some planning groups support state-level criminal justice agencies. Recent planning groups around the country include:

- Arkansas Corrections Resources Commission
- Los Angeles Countywide Criminal Justice Coordinating Committee
- Orange County (California) Criminal Justice Coordinating Council
- Delaware Criminal Justice Council
- District of Columbia Criminal Justice Coordinating Council
- Dade County (Florida) Department of Justice Assistance
- Palm Beach County (Florida) Criminal Justice Commission
- Fulton County (Georgia) Criminal Justice Ad Hoc Committee
- Hawaii Population Management Commission
- Illinois Criminal Justice Coordinating Council
- Iowa Criminal and Juvenile Justice Planning
- Louisville-Jefferson County (Kentucky) Crime Commission
- Anne Arundel (Maryland) County Criminal Justice Coordinating Council
- Russell Committee (Maryland)
- Minnesota Criminal & Juvenile Information Policy Group
- St. Louis, Missouri Ad Hoc Commission on Crime
- Texas Alliance for Judicial Funding
- Washington Access to Justice Board.

How Did These Groups Get Started?

Turbulence in the local criminal justice system spurred the formation of the Ad Hoc Committee of Criminal Justice in Fulton County (Atlanta), Georgia. First, Fulton County was being sharply criticized following release of a 1990 report by The Spangenberg Group showing the public defender program was seriously overworked and underfunded. Then one of the assistant public defenders, carrying 122 active felony cases, requested in court that she not receive more than six additional appointments a week. She filed a motion stating her caseload was so overwhelming that it violated both her clients' right to effective assistance of counsel and the canon of ethics of the State Bar of Georgia. Meanwhile, problems were also mounting at the county jail, which was seriously overcrowded.

The Fulton County Criminal Justice Coordinating Committee was formed at the urging of local bar members to establish a criminal justice plan for Fulton County containing both long-term and short-term goals to respond to demands on the criminal justice system. Commission membership is now broad-based, consisting of representatives from the following organizations:

- Fulton County Public Defender
- Fulton County Sheriff
- Fulton County District Attorney
- Fulton County Superior Court Judges
- Fulton County Superior Court Administrator
- Clerk of Fulton County Superior Court
- Fulton County State Court Judges
- Solicitor General of Fulton County State Court
- Fulton County Marshal
- Fulton County Manager
- Fulton County Board of Commissioners
- Georgia Indigent Defense Council
- Atlanta Bar Association
- Gate City Bar Association

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- City of Atlanta
- North Fulton County Municipalities
- South Fulton County Municipalities.

Thus far the group has achieved success in supporting increased funding for the public defender and in addressing the serious overcrowding problems at the county jail. The Committee is seeking passage of a county resolution that would formalize the group and, among other things, permit it to hire staff. Currently the top priority for the group is development of a fully automated, county-wide criminal case information system.

The Los Angeles Countywide Criminal Justice Coordinating Committee (CCJCC) was established in 1981 by the Los Angeles County Board of Supervisors to bring together all of the key decision makers to promote improvements in the local criminal justice system through greater cooperation and coordination. With 36 members, the Committee relies on numerous sub-committees and task forces to tackle issues such as jail overcrowding, street gangs, criminal aliens, video technology and a variety of special projects. In 1988 it implemented the Same-Day Arraignment Project and in 1990 it developed, implemented and evaluated the Effective Arraignment Program (EAP), designed to achieve early disposition of criminal cases and to reduce the number of court appearances necessary to process criminal cases. More recently, CCJCC collaborated with the Public Defender, Sheriff's Department and Probation Department in a successful bid for $160,000 in grant funding from the Air Quality Management District for a 58-mile video conferencing project linking the Civic Center to county jail facilities.

The Louisville-Jefferson County Crime Commission is one of the oldest planning commissions in operation. Formed in 1967, it continues to achieve notable accomplishments. In 1994 the Commission received $1,014,748 in federal grant monies from the Edward Byrne Memorial State and Local Law Enforcement Assistance Program. In the Fall of 1994, the Commission announced a new plan for implementation of the JUSSIM (Justice System Improvement Model) computer model in Jefferson County. And in June 1995, the Commission published an evaluation of the Progressive Criminal Justice Plan for the Fair, Efficient and Effective Resolution of Criminal Cases ("Rocket Docket") for the Jefferson Fiscal Court.

Theme and Variation: Florida Fills the Gap

A cousin to the traditional "planning group" model formed during the 1995 legislative session in Florida when the State Courts System, the Florida State Attorneys Association, the Florida Public Defenders Association and the Office of the Attorney General joined together in a coalition called "Fill the Gap." The coalition was created to illustrate to the Florida Legislature that additional funding would be needed for the three adjudicatory components (courts, prosecution and public defense) if certain proposed legislative initiatives became law.

In publishing a report in February 1995, this group outlined what they perceived to be the three components of the criminal justice system as follows:

> Front End: An enormous amount of federal dollars has been authorized for the front end of the criminal justice system. The federal crime bill authorizes $30 billion over six years, including 100,000 law enforcement officers. Florida could add as many as 5,400 sworn officers to its ranks over the next five years. Over $100 million (including matching funds) will be committed in Florida in 1995 for front end law enforcement officers and activities.
>
> Back End: The Florida Legislature has committed a tremendous amount of state general revenue dollars for new spending on the back end of the system. New dollars for juvenile justice total $130 million in the current fiscal year. Two hundred sixty-four million dollars has been spent on prison construction, and an additional $210 million will be required for prison operations. Further, the federal crime bill authorizes $7.9 billion for grants to states for corrections.

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> Middle "Gap": What remains is a woefully underfunded middle-courts, prosecution, and defense--through which all cases must flow. (Fill the Gap, 1995 Florida Legislature, February 1995, pg.3)

The report, which contains a vivid hourglass graphic depicting the situation, states:

> The Legislature must "Fill the Gap" in the criminal justice system through increased funding for the State Courts System, prosecution, and defense. This must be a top funding priority for the 1995 Legislature if the public's priority of reducing crime and delinquency is to be realized. A failure by the Legislature to fill the gap will compromise Florida's effort to bring the crime problem under control.

The concerted efforts of the State Courts System, the Florida State Attorneys Association, the Florida Public Defenders Association, and the Office of the Attorney General were highly successful. The budget increases for FY 1996 were roughly double those of FY 1995. This initiative is even more of a success because the courts, public defenders and state attorneys were expecting to be flat-funded for FY 1996 because of tight budget constraints confronting the state.

One of the things that makes Florida's "Fill The Gap" coalition unique is that most of the work was accomplished by prosecutors, courts and public defenders working together, rather than by a larger criminal justice task force or commission which typically involves law enforcement and corrections.

In many jurisdictions, for too long, prosecutors, courts, and public defenders have been unhappy bedfellows fighting for the largest piece of the pie that each could get, sometimes at the expense of the other two. Too often in developing their own internal policy they have given little thought to the effects that policy of one component can have on the other two components. Too often in setting policy they have not had appropriate concern for either citizens who come before the courts, or state and local government, which are primarily responsible for funding the system.

For example, prosecutors who fail to perform the screening process fairly and consistently place unnecessary burdens on the court and public defense. On the other hand, courts which require superfluous hearings in all criminal cases place unnecessary burdens on prosecutors and public defenders. And public defenders who request unnecessary continuances for purpose of delay place unnecessary burdens on prosecutors and the courts.

Adjudication partnerships such as Fill the Gap offer a neutral setting in which to collectively evaluate the adjudication function of a given jurisdiction. Such partnerships are ideal forums in which to:

♦ Examine how the policies of the courts, prosecution and defense affect the resources of

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each other and the quality of justice within the local criminal justice system.

- Attempt to agree on improved policies that could be instituted without additional funds or personnel that would make the system more efficient and improve the quality of justice.
- Agree to improve and share the local criminal justice information system ("CJIS") and case tracking system based upon the needs of all three components. This would include the willingness to share a common definition of a case so that valid comparisons of workload could be established for planning purposes.
- Agree to undertake a positive approach to working together and to creating a new and positive dialogue.
- Agree to explore methods to decrease workload such as de-criminalization, early screening, proper diversion, etc.

Tips for Successful Groups

Mark Cunniff, Executive Director for the National Association of Criminal Justice Planners, has been working with criminal justice system planning groups since the 1970s. He offers several pieces of advice for jurisdictions, particularly counties, interested in developing a planning group.

First, it is best for such groups to target one specific issue at a time. Cunniff recommends that groups deal with a finite issue that has an identifiable outcome, rather than attempting comprehensive planning. Issues and projects explored should affect two or more justice system agencies. Consideration should be given to the various policies of the individual criminal justice system players and to the overall functioning of the system.

Cunniff also recommends that planning groups have clear by-laws outlining: who the members are, what the process is for appointing members who are not representatives of justice system agencies, who chairs the group, when meetings take place, the planning group's goals, etc.

Without question the members of these groups are busy individuals. Just getting the local district attorney, sheriff, public defender, chief judge, chief probation officer, etc. together in one room for a monthly meeting is challenging; expecting them to do a great deal of work outside of the meetings is unrealistic. Therefore, staff for these groups are critical. However, the issue of who pays for staff can be problematic. In a county group, ideally, staff should work under the county executive, but it must be clear that they do not work solely in the interests of the county, but rather on behalf of the criminal justice system.

Finally, don't overlook the critical importance of actively involving those individuals who are responsible for funding the system in the commission's activities. In some cases, this may mean spending some extra time to educate those who do planning and fiscal analysis about the specific roles of each of the criminal justice agencies and how each is integral to the functioning of the system.

In the world of limited resources and increased demands for system accountability, criminal justice planning commissions provide an innovative forum for the key players within the criminal justice system to work together, leaving their traditionally adversarial relationship behind in the courtroom. By working together toward the larger goal of improving service for the public, it is likely that criminal justice system leaders will also improve the functioning of their individual agencies.

For further information on criminal justice system planning commissions, contact The Spangenberg Group. ❖

POST-CONVICTION DEFENDER ORGANIZATIONS FAVORABLY REVIEWED BY FEDERAL AND STATE JUDGES, BUT THEIR EXISTENCE IS THREATENED BY U.S. CONGRESS

This past June, the three member Subcommittee on Death Penalty Representation issued its much anticipated report on the appointment of counsel in federal post-conviction capital cases. The Subcommittee, appointed by Judge Gustave Diamond,

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Chair of the Committee on Defender Services of the United States Judicial Conference in January 1994, was comprised of Judge Emmett Ripley Cox of the Eleventh Circuit Court of Appeals, Judge Arthur L. Alarcon of the Ninth Circuit Court of Appeals and Judge Miriam Goldman Cedarbaum of the Southern District of New York.

Federal courts are required, pursuant to 21 U.S.C sec. 848(q), to appoint and compensate at least one lawyer for any federal habeas corpus capital case. The federal courts provide counsel in one of three ways. They can appoint an attorney from a Criminal Justice Act (CJA) panel, a Post-Conviction Defender Organization (or "PCDO", formerly named Death Penalty Resource Center), or a federal or community defender organization.

The June report evaluates the following characteristics of the current system: 1) its approach to appointing and compensating counsel in these cases; 2) its success at making qualified counsel available for appointment; and 3) the quality of services provided. As charged by Judge Diamond, the Subcommittee report also recommends solutions to the problems identified during the course of the study.

One of the most important of the Subcommittee's findings is that PCDOs "have both facilitated the provision of counsel to death-sentenced inmates and enhanced the quality of representation." The report states: "The promise of expert advice and assistance from PCDO attorneys has encouraged private counsel to provide representation to death-sentenced inmates. Private lawyers who communicated with the Subcommittee almost uniformly expressed the view that they would not willingly represent a death-sentenced inmate without the assistance of a PCDO or similar organization."

The Subcommittee also reported that "PCDOs can also enhance the quality of representation by providing continuity of counsel over the course of a case. Some PCDOs receive both federal and state resources and therefore may work in both state and federal court. When PCDOs recruit attorneys before the first state post-conviction review, PCDOs can extract a commitment from the private attorneys to represent the inmate in both state and federal court."

Significantly, the Subcommittee reported that in addition to enhancing the quality of post-conviction representation, PCDOs also help control the cost of providing representation. The Subcommittee found that in every state, PCDO attorneys cost less per hour than the average hourly rate of appointed counsel who request compensation. PCDO's fostering of continuity of counsel also adds to their cost effectiveness because with continuity of counsel through the various post-conviction steps, the government need pay only once for counsel's review of the record and investigative expenses. Finally, the Subcommittee found, PCDOs in some states have helped to recruit private attorneys to accept these cases on a pro bono basis.

At this August's annual Conference of Chief (State Court) Justices, the Conference also recognized the importance of competence of counsel in capital cases. The Conference approved Resolution XVII, which urges the judicial leadership of each state in which the death penalty is authorized by law to "[i]nitiate a broad-based, interdisciplinary planning program to establish standards and a process that will assure the timely appointment of competent counsel, with adequate resources, to represent defendants in capital cases at each stage of such proceedings."

Notwithstanding these positive reports from federal and state judges, the U.S. House of Representatives recently voted to eliminate federal funds for all PCDOs effective October 1995. This action, if approved by the U. S. Senate, could cause a crisis for both federal judges and sentenced defendants whose cases are already pending in federal court, or those who intend to file petitions in federal court in the future.

It is estimated that there are over 700 defendants with federal habeas capital cases pending. For a substantial majority of these defendants, PCDOs provide either direct representation or back-up legal assistance to defendants' pro bono counsel or CJA panel attorneys.

Despite Herculean efforts to recruit pro bono counsel by the ABA Postconviction Death Penalty

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Representation Project, PCDOs and bar associations, it will be impossible to find a sufficient number of attorneys to handle the avalanche of cases that will result should the PCDOs not receive FY 1996 federal funds.

A crisis of major proportions looms on the horizon if the funding is in fact eliminated by the Congress. ❖

LEGISLATIVE HIGHLIGHTS FROM AROUND THE COUNTRY

Introduction

By the end of August, most states will have recessed their 1995 legislative sessions. The Spangenberg Group spent several weeks this summer gathering information on 1995 legislative action that will affect indigent defense services. The trend toward lengthening sentences and toughening juvenile law was not surprising; for the past three years, through our association with the American Bar Association's Special Committee on Funding the Justice System, we have observed the "war on crime" and its effect on indigent defense. Expanding anti-crime legislation and imposing mandatory minimum sentences has had costly repercussions not only for prosecutors and public defenders, but also for courts, jails, and prisons. While most legislators recognize the need to augment appropriations to corrections or law enforcement agencies as a result of more stringent crime legislation, often they do not recognize the need for adequate and balanced funding for courts, prosecution and public defenders.

In the 1995 legislative session, however, we noticed a few states taking a more pragmatic approach by addressing the problem of an overworked and under-compensated judicial system, through measures such as the decriminalization of minor misdemeanors and the supplementation of budgets of justice system agencies previously "overlooked."

Decriminalization

Alaska, Minnesota and Vermont legislatures eliminated jail time for certain offenses and "decriminalized" certain offenses by changing the classification of "misdemeanor" to "violation" or "infraction." These offenses will no longer require counsel. Decriminalization measures will relieve caseloads for prosecutors and public defenders, the court system, and the jails. While Alaska's and Minnesota's decriminalization efforts concentrated on juvenile misdemeanors, Vermont's focused on criminal traffic violations.

In Alaska, under prior legislation, minors caught with alcohol were charged with a criminal misdemeanor and adjudicated for the offense. Now the law permits police to cite juveniles for a violation which would not necessarily require any court time.

Minnesota modified juvenile law pertaining to alcohol-related and other minor misdemeanors so that these offenses will not be punishable by out-of-home placement. Further, the classification of "juvenile delinquency" was removed from these offenses. The result of these measures is projected to relieve the public defender of roughly 8,000 cases.

Vermont eliminated mandatory jail time for persons driving with a suspended license, unless their license was suspended in connection with a previous drunk driving conviction.

Death Penalty

Arkansas, Idaho, Louisiana, Montana, New York, Oklahoma and Tennessee made changes to their death penalty laws.

Arkansas passed a measure that will make persons convicted of drive-by shootings eligible for the death penalty.

States such as Idaho and Oklahoma instituted a "unitary" or "consolidated" appeal for capital cases, which combines the direct appeal and post-conviction proceedings. In Oklahoma, no additional funding was appropriated to the post-conviction unit of the Oklahoma Indigent Defense System (OIDS), a state-funded agency. Oklahoma public defenders fear their caseloads may become unmanageable with the increased workload caused by this new legislation.

In Louisiana, new legislation mandates that judges who preside over cases in which the death sentence is applicable must inform the jury that the Governor has the power to stay an execution. According to some

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officials, one motivating factor for this new law is the hope that more death sentences will be handed down if the jury feels that the Governor, not the jury, is ultimately responsible for an execution.

In Montana, fees for capital as well as non-capital post-conviction work done by attorneys handling indigent defense cases will now be reimbursed by the state rather than the counties.

New York reinstated the death penalty and introduced a capital defender office to oversee, among other things, appointment of counsel to indigent defendants facing death sentences. (See "News From Around the Nation" for more on New York.)

The Tennessee General Assembly rescinded support for the Capital Case Resource Center, a state and federally funded agency that provides direct assistance to attorneys handling post-conviction capital cases. At the same time, the General Assembly also created a state post-conviction defender office and significantly modified Tennessee's capital post-conviction law. With the impending termination of federal financial support, the Capital Case Resource Center may have to close. (See "News From Around the Nation" for more on Tennessee).

Sentencing Enhancements: Truth-in-Sentencing

While almost all states increased sentence lengths for violent crimes or imposed more mandatory minimum sentences, sweeping sentence reform was instituted in Arkansas, Connecticut, Florida, Maryland, Mississippi, South Carolina and Virginia with their adoption of so-called "Truth-in-Sentencing" acts, which require inmates to serve a mandated percentage of their original sentence.

Under the new legislation, Connecticut, Florida, Mississippi, South Carolina and Virginia require inmates to serve 85% of their sentence; Arkansas elected to require a 70% minimum, and Maryland designated that inmates must serve at least 50% of their original sentence.

Habitual Offender and "Three Strikes"

Another type of sentencing reform that continued during this legislative session was sentencing enhancements via habitual offender or "Three Strikes and You're Out" legislation. These laws allow prosecutors to seek life without parole sentences for defendants with prior felony convictions. Some states have toughened "three strikes" into "two strikes" for certain serious violent crimes such as murder and rape. The implications of habitual offender laws are escalated trial rates for both public defenders and prosecutors, and increased prison populations.

Arkansas, New Jersey, Ohio and Virginia each adopted a "three strikes" provision that applies to violent felonies such as murder, manslaughter, rape, arson, kidnapping, and aggravated burglary.

The "three strikes" law passed in South Carolina is not reserved solely for violent habitual offenders. It can also be applied to defendants convicted of multiple property felonies (such as burglary) or multiple drug felonies. A provision for imposing a life sentence without parole after a second felony conviction, called "two strikes," was also adopted this legislative session. For "two strikes" to be imposed, a person must be convicted of two serious and violent felonies such as murder, rape, aggravated battery or kidnapping.

Juvenile Law

Over the past few years, many states have transferred jurisdiction of some minors who commit certain serious crimes to the adult court system. The age of transfer has been lowered to 13 in some states. Others have lengthened juvenile sentences and imposed mandatory sentences for violent crimes or crimes committed while armed. One state succeeded in holding parents partially responsible for their child's crimes by imposition of fines. This year, Connecticut, Indiana, Iowa, Maryland, Mississippi, Missouri, New Hampshire, South Dakota, Tennessee and Washington made significant changes in their juvenile justice codes.

Transfer Age

Connecticut amended its juvenile code to allow 14- and 15- year-olds charged with committing serious crimes to be transferred to adult court. In Indiana, the transfer age has been lowered to 16 for "criminal deviant conduct"; the court is now able to place a 14-

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year-old offender in the Department of Corrections for up to two years if the child has two prior serious felonies. The age of transfer in Iowa has been lowered to 16 for an aggravated misdemeanor or a felony. Maryland has increased the number of crimes for which a juvenile can be transferred to adult court. In Mississippi, 17-year-olds are tried as adults; for crimes involving guns, the age can be lowered. In Missouri, any child charged with a felony will be tried as an adult under the state's new juvenile justice bill. New Hampshire reduced the age of majority from 18 to 17 in light of an increased juvenile felony caseload. South Dakota passed legislation easing the process of transferring juvenile defendants to adult court; once a juvenile has been transferred, any subsequent offenses will be tried in adult court. Tennessee lowered the age of transfer to 16 for violent felonies.

Parental Responsibility

In Washington, the parents or guardian of a juvenile convicted of a crime may be assessed for court costs.

Funding For Indigent Defense

Obtaining adequate funding for public defender programs and other indigent defense delivery systems is traditionally an uphill battle. In recent years, many programs and agencies have made significant strides in securing an adequate budget. With the proliferation of crime legislation and the imposition of more mandatory minimum and life imprisonment sentences, caseloads for public defenders (as well as courts and prosecutors) have risen significantly. Most indigent defense appropriations have not kept pace with the burgeoning workload. Around the country this year, a few states increased appropriations for indigent defense programs, but many reduced the amount of money allocated for the defense of indigent defendants.

Gains

Arkansas' Public Defender Commission was given an additional $187,000 for two new investigators and other expenses of Arkansas' Capital, Conflicts, and Appellate Office, a state funded agency that provides resources and support to attorneys handling indigent defense cases.

Florida's Public Defender Association secured an appropriation greater than what was expected based on the trend of previous years. This success may be attributed in large part to the coalition of public defenders, prosecutors, and courts called "Fill the Gap." (See "Criminal Justice Planning Commissions" for more detailed discussion of Florida's Fill the Gap coalition.) In presenting their collective "under-funding" situation to the Florida Legislature, all three agencies gained through their joint effort.

The Indiana Public Defender Commission, a state agency which disburses state funds to Indiana's counties for indigent defense expenditures, received an additional $600,000 per year from the state to reimburse county expenditures for FY 1995 - FY 1997 non-capital indigent defense costs.

The State Public Defender in Minnesota received a 3.3% overall increase in its budget.

The Missouri Public Defender received a 15% budget increase, designated for salaries.

Losses

The Oklahoma Indigent Defense System reports that it is underfunded by $2.3 million this year (it received reductions in both state and federal funds); the capital post-conviction unit faces an unfunded mandate as "unitary appeal" legislation goes into effect.

The Governor of South Carolina vetoed a supplement of $55,000 to the Office of Indigent Defense, a state-funded oversight agency, for additional staff. He also cut an appropriation to indigent services and public defenders throughout the state by 5%. In the eleventh hour of the 1995 legislative session, legislators hurried to pass a measure relieving counties of their responsibility to pay for indigent defense costs once the allocated county funds were exhausted.

This legislation was enacted "on the floor" and, to this date, there have been no provisions made to transfer responsibility of "overflow" indigent defense

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costs -- expenses exceeding the county indigent defense appropriation -- to the state or another party. Some officials believe that should a challenge to this legislation be raised, under established South Carolina case law, the counties are responsible for all costs of indigent defense. If this proves true, the legislation may be rendered invalid.

In Wisconsin, twelve public defender supervisors in the trial division lost a provision giving them a 50% caseload reduction, originally implemented to allow supervisors adequate time to tend to administrative tasks. The legislature also amended existing legislation pertaining to public defender caseload, restoring the public defender caseload standards to higher, pre-1993 levels.

The Spangenberg Group is always interested in court or legislative actions which affect your agency. Has any legislation or court decision affected your work? Have you gained or lost funding? We would be interested to know about your current situation. If you want to share your experience, please contact us by phone (617) 969-3820 or fax (617) 965-3966. ❖

HOT OFF THE PRESS

Two recently published books are invaluable resources for addressing criminal defense attorneys' ethical and performance standards questions. *Ethical Problems Facing the Criminal Defense Lawyer*, published by the ABA Criminal Justice Section, offers "practical answers to tough ethical questions" facing criminal defense lawyers, with particular emphasis on public defenders and appointed counsel representing the indigent. The volume addresses over 20 common ethical concerns, among them: how to cope with excessive workload, whether it is permissible for one office to represent codefendants and how to handle anticipated client perjury. *Ethical Problems Facing the Criminal Defense Lawyer* costs $49.95 for ABA Criminal Justice Section members, $59.95 for non-members, and can be ordered through the ABA Publications Department by calling (312) 988-5522.

NLADA's recently published *Performance Guidelines for Criminal Defense Representation* provides black letter standards as well as commentary regarding counsel's duties and obligations during the course of representing a criminal defendant. The NLADA publication costs $25.00 for NLADA members, $60.00 for non-members, and can be ordered by calling (202) 452-0620. ❖

NEWS FROM AROUND THE NATION

Nationwide Correctional Population Skyrockets

The nation's correctional population increased by over 250% from 1980 through 1993, according to the April 1995 BJS publication *Correctional Populations in the United States*. During 1993, 4.9 million adults - approximately 2.6% of the U.S. population - were on parole, on probation or in jail or prison. This number reflects an increase of 3 million people since 1980. Over two thirds of the 4.9 million adults who comprised 1993's correctional population were on probation or parole.

State and Federal Prison Population Exceeds One Million

The United States' prison population exceeded one million for the first time in 1994, according to a recently released Bureau of Justice Statistics (BJS) report. Between 1993 and 1994 prison populations increased by 8.6 percent nationwide; in 16 states, prison populations increased by at least 10 percent. The largest increases occurred in Texas (up 28.5 percent) and Georgia (up 20.3 percent).

Eight state prison systems were so crowded that they sent over 10 percent of their inmates to local jails in 1994. Louisiana topped this list, housing 33.5 percent of its prison inmates in local jails.

Annual Survey of Jails and Jail Inmates Shows the Number of Inmates in Local Jails Is Approaching 500,000

According to a recent Bureau of Justice Statistics survey, the number of inmates held in the Nation's local jails reached 490,442 on June 30, 1994.

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The number of jail inmates per 100,000 U.S. residents increased from 96 in 1983 to 188 in 1994. At the same time the total jail staff increased 156%, and the number of correctional offices grew 165%.

The jail population grew by over 30,000 inmates from 1993 to 1994. The twelve month increase was the equivalent of a 6.7% rate of growth. Almost 50% of the jail inmates were awaiting trial.

Finally, excluding capital outlays in 1993, the average cost to keep one jail inmate incarcerated for a year was $14,667, up from $9,360 in 1983.

For further information you can obtain a free copy of the survey from the BJS Clearinghouse, P.O. Box 179, Dept. BJS-236, Annapolis Junction, Maryland 20701-0179.

Corrections Spending Increases At a Higher Rate

The biannual publication, *The Fiscal Survey of the States*, edited by the National Governors' Association and the National Association of State Budget Officers, reports in the April 1995 edition that "most states completed fiscal 1994 on a positive note." According to the document, some states, encouraged by the gradually improving trend in the economy and the "continuation of stable budgets" at the state level, have begun to increase appropriations to certain government agencies and programs. While overall justice system funding may rise as a result of a healthier state budget, statistics cited in "The Fiscal Survey of the States" show that state spending for corrections grew at a higher rate than other public programs.

The average increase in total state spending in FY 1994 was 7.8%; corrections spending increases hovered around 13.4%. The report forecasts that corrections expenditures will continue to rise as the prison population expands and legislation length-ening prison sentences continues: "[c]orrections spending is a volatile part of state budgets because of the frequency of changes in criminal justice policies." Several state legislative oversight committees have been created to address the problem of increasing corrections expenditures.

In some states, such as Florida, fiscal impact analysis is conducted on all proposed legislation that could potentially affect programs administered by the Department of Corrections, specifically the lengthening of sentences and the so-called "Truth in Sentencing" measures that require inmates to serve at least 85% of their sentences.

The Florida Estimating Conference, a committee made up of legislative staff designated to compile fiscal impact statements, was successful in lobbying against costly proposals for increased sentence lengths and a "three strikes" measure in 1994. In the 1995 legislative session a cost analysis done on proposed criminal legislation involving lengthening of sentences for burglaries and a habitual offender provision revealed that implementation of the laws would cost a projected $1 billion. Despite this fiscal burden, legislators in Florida passed the bills.

"The Fiscal Survey of the States" reports that between fiscal year 1993 and fiscal year 1994, states have increased their corrections spending from $19.6 billion to $22.2 billion. To shoulder the increase, many states have passed bond measures which will be used to fund prison construction into the future. Legislators seem to be optimistic about the states' continued fiscal health as they commit to several years worth of costly construction expenses for new corrections facilities.

California State Bar Disciplines Former County Public Defender For Failing to Ensure Adequate Representation for Indigent Defendants

In November 1994 the California State Bar followed the California Supreme Court's recommendation and placed the former San Benito County Public Defender on two years' probation for his failure to ensure that indigent defendants in his office received competent representation.

In 1991, the public defender was criticized for his response to the assistant public defender's complaints that he assigned her too many cases and that her clients were suffering as a result. When the assistant public defender, the only other attorney in the office, asked the public defender for help in handling her

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caseload because she believed that she was beginning to make poor decisions, he offered to take all misdemeanor cases as well as serious felony cases. The assistant public defender retained responsibility for all other felony cases.

California State Bar records indicate that during 1990 and most of 1991, the assistant public defender handled approximately 450 Superior Court cases per year. In both 1990 and 1991, the public defender handled approximately 1,000 misdemeanor, felony and juvenile cases annually. As a result of his failure to properly supervise the assistant public defender, the state bar determined that several of the San Benito Public Defender's clients received "incompetent representation," according to the Summer 1995 issue of *Cornerstone*, a NLADA publication. Significantly, the state bar ruled that as public defender, he was ultimately responsible for ensuring that the office's clients received an adequate defense.

Georgia Indigent Defense Council Seeks Director

The Georgia Indigent Defense Council (GIDC) is looking for a new director. GIDC is an independent state agency responsible for the distribution of state funds to local indigent defense programs in Georgia. In addition to the distribution of funds, GIDC focuses its activities in two main areas: Professional Education for lawyers appointed to represent indigent clients in criminal cases, and Program Compliance to ensure that the local programs meet the established state guidelines for local indigent defense programs. GIDC also maintains administrative oversight of the Multi-county Public Defender Office, which is the statewide trial resource center for death penalty cases.

The Director is responsible for the administration and management of the agency and its staff (20) which consists of legal and support personnel. Qualifications: Excellent fiscal and management capabilities; previous supervisory experience of professional and non-professional staff; extensive knowledge of indigent defense delivery systems; prior work experience with either the judicial, legislative or executive levels of government. Strong written and verbal skills; J.D. or comparable degree.

Applicant should direct a letter of interest, a resume, salary requirements, and a list of references to the Hiring Committee, GIDC, Ponce de Leon Avenue, Atlanta, GA 30306. No telephone inquiries.

Louisiana Indigent Defender Board to Fund Statewide Appellate and Capital Litigation Programs

In FY 1996 the Louisiana Indigent Defender Board (IDB) will administer $7.5 million in state funds to run statewide appellate and capital litigation programs and to assist district indigent defender boards with general operations. Now in its second year since being created by Supreme Court Rule, the IDB is hard at work under the guidance of Chief Executive Officer, Jean Faria.

Since June, the certification review sub-committee of the IDB's executive committee has been reviewing applicants seeking to be certified to take capital case appointments. So far, approximately 75 attorneys have been certified as lead capital trial counsel, 60 as associate capital trial counsel, 20 as lead appellate capital counsel and 27 as associate appellate capital counsel. All attorneys representing indigent defendants in capital cases in Louisiana, whether they are public defenders or private court-appointed counsel, must now be certified by the IDB to receive appointments. Certification for trial attorneys consists of nine previous felony trials, including one capital trial through sentencing, or in which all of the necessary mitigation research is completed prior to settlement.

Another priority for the IDB is to develop a uniform case tracking system. Current case tracking methods are inadequate for district indigent defense boards and inconsistent statewide. This situation complicates the IDB's ability to allocate its limited resources. For instance, earlier projections reported to the IDB placed the number of current pending death penalty cases in the Orleans parish at 36, and 100 to 150 statewide. After comparing notes with district attorneys throughout the state, the IDB learned there were 93 pending capital cases in Orleans alone, and approximately 300 statewide. Eventually the IDB will develop capital contract conflict panels to be overseen

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by district indigent defense boards for parishes with high numbers of capital cases.

Hall County Nebraska Public Defender Eliminates Representation Other than that Statutorily Required in Compensation Dispute

In late July, Hall County (Nebraska) Public Defender Jerry Piccolo's labor and salary dispute with the Hall County Board of Supervisors intensified, prompting Piccolo to modify his office's policy of representing juvenile and child support paternity contempt defendants, though Nebraska public defenders are not statutorily required to do so. As of July 25, the public defender will no longer handle these cases.

In a July 19 letter to the Board of Supervisors, Piccolo requested that his office's FY '95-96 budget be increased by $36,546, which would bring the public defender's legal and administrative staff salaries in line with those of the County Attorneys'. When Piccolo's request fell on deaf ears, he made the decision to cease handling the cases of defendants Nebraska public defenders are not statutorily required to represent. We will update you on the Hall County Public Defender's efforts in our next newsletter.

Nebraska Commission on Public Advocacy Created

On June 1, 1995, Governor Nelson of Nebraska signed L.B. 646 into law, creating the Nebraska Commission on Public Advocacy, an agency to oversee the delivery of indigent defense services in Nebraska. Implementation of the Nebraska Commission on Public Advocacy was the result of the efforts of the Nebraska Indigent Defense Task Force, chaired by Harold Rock. Creation of the Commission was recommended in the report entitled, "The Indigent Defense System in Nebraska" (December, 1993) by The Spangenberg Group in conjunction with the Nebraska Indigent Defense Task Force. The report recommended that a statewide commission be formed for the purposes of providing oversight for the state's county-based indigent defense delivery systems, centralizing data collection regarding indigent defense caseload and cost and that the state begin to provide funds for indigent defense services.

Nebraska is one of only six states in the nation that funds indigent defense entirely at the county level.

Nebraska lacks statewide uniform standards and guidelines for attorney qualifications, compensation, and workload. The Nebraska Commission on Public Advocacy will be responsible for centralizing data for all county systems, so that information can readily be collected and analyzed on a statewide level and will administer the new state fund appropriated by the legislature. Another of the Commission's roles will be to provide assistance in the representation of capital cases.

Through assistance provided by a Nebraska State Bar Foundation Grant, Robin Hadfield has been hired from July 1, 1995 to December 31, 1995, as the administrative attorney for the Nebraska Commission on Public Advocacy to facilitate operations until Commission members can be appointed. The Commission members are expected to be named in mid- to late-October. Robin will be supported in part by technical and research assistance through The Spangenberg Group.

Tennessee Legislature Eliminates State Funding for Federal Resource Center; Funds Instead State Post Conviction Defender

As of September 1, both Tennessee's capital post-conviction law and the way counsel is provided to indigent defendants at the post-conviction stage of a capital case will change dramatically, as the legislature passed both the Post-Conviction Procedure Act and the Post-Conviction Defender Commission Act.

The Post-Conviction Procedure Act, which was drafted without any input from Tennessee's year-old Indigent Defense Commission or other defense organizations, is designed to expedite the appeals process for capital cases. To reach this end, the Act requires that petitions for post-conviction relief be filed within one year of the final action of the highest state appellate court to which an appeal is taken, and specifies that this statute of limitations shall not be tolled for any reason. Once the petition has been filed,

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the petitioner has the burden of proving the allegations of fact by clear and convincing evidence. The legislation also provides that there is a rebuttable presumption that a ground for relief not previously raised before a court of competent jurisdiction is waived. Finally, the legislation provides that final disposition of a capital case must be made within one year of the filing of the petition.

Tennessee's indigent defense attorneys' compliance with the Post-Conviction Procedures Act's expedited scheduling and heightened burden of proof will be further complicated by the imminent replacement of the Capital Case Resource Center of Tennessee by the new "state resource center" created by the Post-Conviction Defender Commission Act. Until July 1, the state provided one third of the Resource Center's funding. As of July 1, the state stopped providing this funding. As documented above, nationwide, federal resource centers are also likely to lose all federal funding. The result may be the disappearance of Tennessee's Federal Resource Center, which has been in operation since 1988.

The Resource Center in FY 1995 received approximately $960,000 in combined state and federal funds to represent death row petitioners in both state and federal court. Tennessee's legislature approved a budget of $650,000 for the new Post-Conviction Defender office in FY 1996, a reduction of over 30%. While the Post-Conviction Defender office will only handle state post-conviction appeals (the Federal Public Defender in Tennessee is expected to increase its staff to handle the influx of federal habeas capital appeals filed by death row inmates), lawyers in Tennessee are concerned not only because of the reduction in available funds, but also because of the increased inefficiency that most certainly will accompany bifurcating appellate representation in capital cases.

The Post-Conviction Defender Commission Act, which was also drafted and passed without any input from either the Tennessee Indigent Defense Commission or other state defense organizations, provides for the creation of a nine member commission to oversee the state Post-Conviction Defender office. As of mid-August, the Commission had not yet been appointed, despite its September 1 start date.

New York Court of Appeals and Capital Defender Organization Prepare for Re-Institution of Death Penalty

New York's Court of Appeals, the state's highest court, recently issued two proposed rules for the appeal of death penalty cases. New York's death penalty law, signed March 7 by Governor George Pataki, goes into effect on September 1. The law permits imposition of the death penalty in murder cases involving the following circumstances: intentional murders, murders committed during the course of a violent felony, serial murders, contract murders, murders involving torture of the victim before death, murders by either escaped or imprisoned inmates or murders of on- duty judges, police officers or prison guards. Mentally retarded or incompetent individuals are exempted from the law.

Under the proposed rules, when a death sentence is entered, the defendant's trial attorney must file a notice of appeal in the trial court. A capital defendant in New York may not waive an appeal of a death sentence. The proposed rule also gives defendant's trial counsel 10 days to move for appointment of appellate counsel. Finally, the proposed rule directs the appellate courts to give preference in hearing an appeal to defendants whose appeals involves claims that they are mentally retarded.

The New York Court of Appeals is seeking comments on these proposed rules by September 30.

At the same time, the Capital Defender Office (CDO) is currently in the process of contracting with attorneys and other indigent defense organizations. The CDO, created by statute earlier this year with the goal of assuring high quality and integrity in the provision of defense services to indigent defendants facing the death penalty in New York state courts, is headed by Kevin Doyle, formerly an attorney with the Alabama Capital Representation Resource Center.

Proposed Statewide Appellate Defender Office and Commission Fail to Become a Reality in Utah

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In this past legislative session of the Utah General Assembly, Utah's Task Force on Appellate Representation of Indigent Defendants made recommendations for the improvement of the state's appellate indigent defense system, primarily through the creation of a statewide appellate defender office and an appellate defender commission. These recommendations were initially met by enthusiastic responses from the Utah Legislature and drafted into bills by the Office of Legislative Counsel. However, due to their low priority in the allocation of judicial funds, both bills died in committee.

The proposed legislation did, however, incur a few favorable comments and may be reintroduced next year. For now, the Utah Supreme Court Advisory Committee on Criminal Procedure will review the need for formal eligibility standards and guidelines for attorneys handling indigent appeals. If the Advisory Committee decides to promulgate qualification standards by court rule, the quality of statewide indigent defense appellate services stands a chance of improving.

Vermont Legislature Passes "Public Defender Relief Act," But What About U.S. V. Nichols?

This past session, the Vermont legislature passed what some have labelled the "Public Defender Relief Act," which eliminates mandatory jail time for driving with a suspended license (except when the license was suspended after a DUI conviction), decriminalizes a number of misdemeanors and provides that a prior uncounseled conviction of these decriminalized offenses cannot be used for enhancement purposes.

While this legislation may indeed provide some relief to Vermont's public defenders, in light of the U.S. Supreme Court's 1994 U.S. v. Nichols decision, it also raises important questions about whether a state can legislatively prohibit prior uncounseled misdemeanor convictions to be used for sentencing enhancement. Under Nichols, 55 CrL 2136, the Supreme Court held that an uncounseled misdemeanor conviction that was constitutionally valid when entered, because no prison term was imposed, may be considered for purposes of sentencing enhancement on a subsequent conviction without violating the Sixth Amendment's guarantee of assistance of counsel. ❖

CASE NOTES

California Courts of Appeal Narrowly Interpret State's "Three Strikes" Law

In three related decisions, California's Courts of Appeal have narrowly interpreted California's "three strikes" law. In People v. McGrath, 57 CrL 1406, the California Court of Appeal, Fourth District, held that a defendant who is charged but has not been convicted under California's recidivist sentencing law is still eligible for pretrial diversion. Penal Code Section 667(c)(4), the "three strikes" provision which was enacted by the state legislature on an emergency basis and later became law by voter initiative (at Penal Code Section 1170.12(a)(4)), provides in part that "if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions...[d]iversion shall not be granted..." In reaching its conclusion, the court refused to contradict the plain language of the statutes, which requires "that a defendant be convicted of a felony and the prior strike allegations be proved before a defendant is ineligible."

In July, The Second District Court of Appeal held that the state's "three strikes" scheme does not strip trial courts of their discretionary authority to treat "wobblers" as either misdemeanors or felonies. "Wobblers" are defined in Section 17(b) of the California Penal Code as those cases in which the district attorney has the discretion to charge as either a misdemeanor or a felony, and the judge has the discretion to reduce from a felony to a misdemeanor. According to the Second District Court of Appeal, once a trial court decides to treat a wobbler as a misdemeanor, the conviction cannot be treated as a "strike" for sentencing enhancement purposes. People v. Trausch, 57 CrL 1406. The Second District's holding is in line with that of a June panel decision of the Second District in People v. Vessel, 57 CrL 1385.

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Under New Mexico Constitution, Apparent Authority Not An Exception to Consent to Warrantless Search; Overnight Status Not Required for Reasonable Expectation of Privacy in Another's Home

On March 31, 1995, the New Mexico Court of Appeals held that Article II, Section 10 of the New Mexico Constitution does not recognize the good faith exception, as articulated in U.S. v. Leon, 468 U.S. 897 (1984), to an individual's right to be free from unreasonable searches and seizures. State v. Wright, No. 15,472 (NM Ct.App. 2/14/95). That is, a warrantless search is not valid even though the police, at the time of the entry, reasonably believe that a third party has authority to consent to the entry.

In addition, the court held that as a matter of law, an individual need not have overnight status in another's home in order to have standing to challenge a warrantless search. The issue is whether the individual has a subjective expectation of privacy in the place entered that society recognizes as reasonable, not whether the individual stays overnight.

In concluding that the warrantless search was invalid, the court relied on State v. Gutierrez, 116 N.M. 431, 863 P.2d 1052, 54 CrL 1203 (1993), which held that an apparent authority exception violates the state constitution. In holding that the defendant had standing, the court concluded that status as an overnight guest is sufficient, but not necessary, to meet an individual's expectation of privacy.

Apparent Authority Doctrine No Exception to Hawaii Constitution's Search and Seizure Provision

In a May 16, 1995 decision, the Hawaii Supreme Court held that in order for a consent to search to be valid under article I, section 7 of the Hawaii Constitution, the consenting individual must possess the actual authority to consent.

In State v. Lopez, 57 CrL 1223, three armed men broke into Daniel and Kelly Hauanio's home and stole both money and cocaine. Kelly Hauanio telephoned her mother, who in turn notified the police. Out of fear for their safety, the Hauanio's left their home and spent that night in a hotel. Early the next morning, at 5:45 a.m., one of the detectives assigned to the case telephoned Kelly's mother and told her that he wanted to go to the Hauanio's house. Kelly's mother told the detective that the couple was staying at a hotel. Instead of telephoning the couple himself, the detective went to Kelly's mother's house and asked her to call the Hauanios. Kelly's mother complied, but there was no evidence that the Hauanios gave her permission to let the detective into their house. After the telephone conversation, the detective and Kelly's mother went to the Hauanio's house, where the detective discovered a container of cocaine. The Hauanios were later charged with conspiracy to promote a dangerous drug and other related offenses.

At trial, the court granted the Hauanio's motion to suppress the evidence seized during the course of the detective's warrantless early morning trip to the house with Kelly's mother, because the state did not prove that she had the authority to consent to the entry. On appeal, the Hawaii Supreme Court affirmed, stating that the Hawaii exclusionary rule is broader than the federal rule; in addition to having the federal exclusionary rule's purpose of deterring police misconduct, the Hawaii exclusionary rule also serves to protect the privacy rights of Hawaii's citizens. So, in order for a consent to search to be valid under article I, section 7 of the Hawaii Constitution, the individual consenting must actually possess the authority to do so.

The Hawaii Supreme Court also addressed the state's second argument on appeal: that the inevitable discovery exception to the exclusionary rule should operate to make the evidence admissible. While the Court recognized the validity of the exception, created by the U.S. Supreme Court in Nix v. Williams, 467 U.S. 431 (1983), it also set the higher standard of proof suggested by Justice Brennan in his dissent in Nix: clear and convincing evidence that information ultimately or inevitably would have been discovered by lawful means. The Hawaii Supreme Court found that the state had failed to meet this standard of proof in its appeal.

Uncounseled Prior Drunk Driving Diversions May Be Used For Sentencing Enhancements in Kansas

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The fallout from the U.S. Supreme Court's 1994 decision of U.S. v. Nichols continues. Under Nichols, 55 CrL 2136, the Supreme Court held that an uncounseled misdemeanor conviction that was constitutionally valid when entered, because no prison term was imposed, may be considered for purposes of sentencing enhancement on a subsequent conviction without violating the Sixth Amendment's guarantee of assistance of counsel. In Paletta v. Topeka, Kansas (Kansas Court of Appeals No. 71,881, 4/7/95), the defendant, charged with drunk driving, successfully completed a diversion program without assistance of counsel. When defendant was later caught driving drunk a second time, he challenged prosecutors' use of the prior uncounseled diversion to enhance his sentence. The Kansas Court of Appeals held that "based on Nichols an uncounseled diversion may be used as a prior conviction to enhance sentencing in a subsequent conviction so long as no imprisonment was actually imposed on the uncounseled diversion."

Tenth Circuit Clarifies Preference For Collateral Review Of Ineffectiveness Claims

A convicted federal defendant must raise ineffectiveness claims during post-conviction proceedings rather than on direct appeal according to a May 1995 opinion by the 10th Circuit Court of Appeals. In U.S. v Galloway, 57 CrL 1247, the en banc court reviewed the procedures for assertions of ineffective assistance of counsel and concluded that ineffective assistance claims should be brought in collateral proceedings, not on direct appeal. The court went on to state that ineffective assistance of counsel claims raised on direct appeal are presumptively dismissible.

In reaching this conclusion, the court reasoned that a record must first be developed in and addressed by the district court for effective review. It is only when a detailed factual record is before it that the appellate court can adequately review an ineffectiveness claim.

The Court of Appeals also acknowledged, as it had in Beaulieu v. U.S., 930 F.2d 805 (CA 10 1991), that in rare instances ineffectiveness of counsel claims may not need further development before review on direct appeal. However, the court overruled the part of Beaulieu that required certain ineffectiveness claims to be brought on direct appeal. The court also overruled Beaulieu to the extent that it required the defendant to have different counsel in order to question ineffectiveness of trial counsel on appeal, stating that although the new standard may appear to create the opportunity for awkward situations (trial counsel claiming, on appeal, that they were ineffective), the fewer administrative requirements the better.

Second Circuit Holds Indigent Defendant Not Entitled to Post-Appeal Appointed Counsel to Reduce Sentence on Basis of Guidelines Change

In April, 1995, the Second Circuit Court of Appeals affirmed that 18 USC 3006A(c) of the Criminal Justice Act requires appointed counsel to represent an indigent defendant "from initial appearance through appeal, including ancillary matters appropriate to the proceedings." U.S. v. Reddick, CA 2, No. 94-1245 (4/13/95). The court held, however, that the Criminal Justice Act does not entitle an indigent defendant to appointed counsel in a post-appeal motion for reduction of sentence deriving from subsequent changes in the sentencing guidelines.

In Reddick, the defendant did not appeal his 92-month sentence (the bottom of the applicable guideline range). Within 15 months of the sentencing, the U.S. Sentencing Commission passed two amendments (only one of which was retroactive and only at the discretion of the court) reducing the guidelines calculation. Without requesting counsel, the defendant filed a motion to modify his sentence, and it was denied. For the first time, on appeal, the defendant claimed that the court was required to provide him with assistance of counsel on his motion for sentence reduction, reasoning that his motion was an "ancillary matter appropriate to the proceeding."

In denying the claim, the court relied on Miranda v. U.S., 455 F.2d 402, 404 (1972), which held that ancillary matters refer to the defense of the criminal charge, not to post-conviction proceedings. It also relied on Burrell v. U.S., 332 A.2d 344 (D.C. App.

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1975), cert. denied, 423 U.S. 826, where the court held that 18 USC 3006(A) does not require appointed counsel to assist in preparing a post-appeal motion for sentence reduction. The court reasoned that if appointments extended to post-appeal resentencing motions based on subsequent sentencing guidelines changes, appointed counsel "would remain responsible in perpetuity for all former clients," an outcome that the Act did not intend.

Right to Counsel Attaches Once Defendant Charged With DUI Offense in Idaho

The Idaho Supreme Court ruled on May 18, 1995 that when a driver is detained for driving under the influence, the right to counsel attaches once the driver has been arrested and charged.

In State v. Madden, 57 CrL 1226, defendant Madden was pulled over for driving erratically. Madden failed the field sobriety tests and was placed under arrest for driving under the influence and transported to the sheriff's office. At the sheriff's office, she agreed to take a breath test, but refused to take any further tests. Having failed the breath test, an officer wrote up a citation and brought her to another officer for booking. Before or during booking, Madden requested both an independent blood test and permission to speak with her attorney. She was informed that, according to jail policy, she could not make any telephone calls until after booking was completed. Approximately three and one-half hours after she was stopped and one-half hour after she was booked, Madden was able to call her attorney. After speaking with her attorney, Madden again requested an independent blood test. She was told that she would have to wait until she had posted bond.

On appeal, defendant successfully argued that the state unconstitutionally infringed upon her Sixth Amendment right to counsel. Relying on State v. Wuthrich, 732 P.2d 329 (Idaho CtApp 1986), which held that the right to counsel embraces all critical stages of the criminal justice process after commencement of adversarial criminal proceedings against the accused, the Idaho Supreme Court held that when a driver is detained for driving under the influence, the right to counsel attaches once the driver is arrested and charged, because this point marks the commencement of "adversarial criminal proceedings" and constitutes a "critical stage" of the criminal justice process.

Ninth Circuit Holds Investigative Services Compensable Under Federal Habeas Corpus Representation Legislation

Under the statute that provides federal funding for the representation of habeas corpus petitioners, "reasonably necessary services" include investigative services "for the pursuit of material evidence relating to [cognizable] colorable claims," according to the Ninth Circuit Court of Appeals in Daniels v. U.S. District Court for the Central District of California, 57 CrL 1399.

The defendant in Daniels was convicted in California state court of the murder of two police officers. Prior to his trial, Daniels was denied state funding for experts he claimed would prove his innocence. On direct appeal, Daniels' conviction was affirmed.

Daniels later filed a federal habeas corpus petition pursuant to 28 U.S.C. sec. 2254. During this proceeding, Daniels requested expert services pursuant to 28 U.S.C. sec. 848(q)(9), which states: "Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant..., the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore..." The district court denied Daniels' request for funding for expert services, reasoning that the statute limits funding to that needed to develop evidence for an evidentiary hearing, based on the pleadings and evidence before the court.

In overruling the district court's decision, the Court of Appeals relied on the U.S. Supreme Court's decision in McFarland v. Scott, 114 S.Ct. 2568 (1994), in which the Supreme Court stated: "services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding,

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when possible claims and their factual bases are researched and identified." (emphasis added) 114 S.Ct. 2568, 2572. The Court of Appeals reasoned that as the U.S. Supreme Court had recognized the importance of obtaining expert witness funding as early as the pre-application phase of habeas corpus proceedings, the statute should be interpreted "to direct that in death penalty cases an indigent defendant shall be entitled to funding for the pursuit of material evidence relating to colorable claims which are cognizable pursuant to 28 U.S.C. sec. 2254 and which, if proven, would entitle the petitioner to habeas relief."

Texas Court of Criminal Appeals Holds Indigent Murder Defendant Has Due Process Right to Appointment of Forensic Pathologist

In March 1995, the Texas Court of Criminal Appeals held that an indigent defendant in a murder case has a due process right to the appointment of a forensic pathologist to assist him in the preparation of his defense. Rey v. State, No. 71,459 (Tx Ct.Crim.App. 3/15/95). In its decision, the court expanded the ruling under Ake v. Oklahoma, 470 U.S. 68 (1985), which involved an indigent defendant's request for a psychiatric expert, and held that "Ake requires the appointment of an expert regardless of his field of expertise if necessary for a fair trial." Rey v. State.

In Rey, the defendant, charged with capital murder committed during the course of a burglary, demonstrated that the cause of the victim's death would be a significant issue at trial and that the expertise of a pathologist would be helpful in preparing and presenting his defense. Stating that every criminal defendant, indigent or otherwise, has a right to the basic tools of an adequate defense, the court held that the defendant was entitled, at state expense, to the assistance of a forensic pathologist.

Georgia Supreme Court Holds Indigent Murder Defendant's Refusal to First Be Examined By State's Expert Is No Bar to His Due Process Right to Expert Assistance at Trial

In March 1995, the Georgia Supreme Court held that an indigent defendant who has made a threshold showing that entitles him to state-funded expert assistance under Ake, need not submit to an evaluation by the state's psychiatrist pursuant to OCGA Section 17.7.130.1 unless he intends to present the expert testimony at his trial. Bright v. State, 57 CrL 1002. Under Ake v. Oklahoma, 470 U.S. 68, 83 (1985), when a defendant demonstrates that sanity "will be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense."

In Bright, the defendant was convicted of murdering his two grandparents. He had a history of depression, impulsive behavior, and drug and alcohol abuse. On the night of the murders, he consumed an excessive amount of alcohol and drugs and alleged that the murder of two people with whom he had a good relationship was an impulsive act. The trial court required him to submit to an examination by the state's psychiatrist before it would consider his request for publicly funded expert assistance at sentencing. The defendant refused to submit to the examination and was sentenced to death without expert testimony presented on his behalf.

In reversing the death sentence, the Georgia Supreme Court concluded that the defendant's due process right to present his motion for funds in camera and to initially prepare his insanity defense confidentially was violated under Ake. By demonstrating that his capacity to understand the cruelty of the murder of his grandparents would be a significant issue at sentencing and that experts (a toxicologist and a psychiatrist) would be helpful to him in preparing mitigating evidence, the defendant was entitled, at state expense, to the same expert assistance available to a non-indigent defendant. Only if he decided to introduce his expert testimony at trial, would the defendant be required to submit to a court examination for the state's use in preparing its rebuttal evidence.

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Indigent Defendants Are Entitled to DNA Expert Funds in Alabama and Florida

In two related cases which also address indigent defendants' rights to expert funds, both the Alabama Supreme Court and the Florida Court of Appeal, Fifth District, held that defendants were entitled to DNA experts.

On March 24, 1995, in Dubose v. State (No. 1930827), the Alabama Supreme Court held that under Ake (in which the U.S. Supreme Court held that an indigent defendant is entitled to funds for expert psychiatric assistance), an indigent defendant is entitled to funds to retain a DNA expert, provided he can show that "there is a reasonable probability that an expert would aid in his defense and that the denial of an expert to assist at trial would result in a fundamentally unfair trial."

In State v. Cade (Florida Court of Appeal, Fifth District, No. 92-142, 6/2/95), defendant was convicted of robbery, kidnapping and sexual battery. For the latter charge, the state employed a DNA expert to identify defendant as the perpetrator. The trial court refused to appoint a DNA expert for the defendant, stating that the defense counsel failed to make an adequate showing of need.

Florida Statutes, Section 914.06 provides: "In a criminal case when the state or an indigent defendant requires the services of an expert witness whose opinion is relevant to the issues of the case, the court shall award reasonable compensation to the expert witness ..." While Florida's statutes do not explicitly create a procedure for court authorization prior to hiring an expert, in Martin v. State, 455 S.2d 370, 372 (1984), the Florida Supreme Court held that the standard of review for appointment of experts is "abuse of discretion."

The Court of Appeals stated that an indigent defendant is entitled to the "basic tools" of an adequate defense, and that when such tools are not provided, the court has abused its discretion. In this case, the fact that the DNA evidence was the state's primary piece of evidence connecting the defendant to the crime made the defense's need for its own DNA expert all the more compelling. The court recognized, as had the U.S. Supreme Court in Ake, that scientific testimonial evidence by an expert impresses a jury, particularly when the evidence involves DNA evidence to prove identity. Finally, the fact that defense counsel had specifically requested a DNA expert in a timely fashion helped to persuade the Court of Appeals that the trial court abused its discretion in denying defendant's counsel the requested expert witness. ❖

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